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California Forms of Jury Instruction

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Publication Information

1 California Forms of Jury Instruction Drafters of Judicial Council of California Civil Jury Instructions (CACI)

Drafters of Judicial Council of California Civil Jury Instructions (CACI)

The Judicial Council of California Civil Jury Instructions (CACI) reproduced in this publication were written by the Civil Subcommittee of the Task Force on Jury Instructions, and are updated by the Judicial Council's Advisory Committee on Civil Jury Instructions.

Judicial Council Advisory Committee on Civil Jury Instructions Appointed by the Honorable Chief Justice Ronald M. George

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Publication Information

1 California Forms of Jury Instruction About the Contributors

About the Contributors

ORIGINAL AUTHORS FOR CALIFORNIA FORMS OF JURY INSTRUCTION (Matthew Bender)

Former Chapters 1-5, 7 and 8 (now Chapters 1A, 3A-3D, 3F, and 3G) were originally authored by **John F. Wells** and **Lise A. Pearlman** in 1985, who at the time were both partners in the Oakland law firm of Stark, Stewart, Wells & Robinson. He received a B.S. degree from Jamestown College in 1949 and L.L.B. (Order of the Coif) from Stanford University in 1952; Ms. Pearlman received a B.A. (magna cum laude) from Yale University in 1971 and a J.D. (Order of the Coif) from Boalt Hall School of Law, University of California at Berkeley in 1974. Mr. Wells has since retired and lives in Sonoma, California. In 1989, Ms. Pearlman became the first Presiding Judge of the State Bar Court, serving until 1995. Since then, she returned to Oakland and serves as an arbitrator and mediator in civil cases for Alternative Resolution Centers and as an expert witness in attorney ethics.

The current revised edition of former Chapters 1-5, 7 and 8 of this volume (now Chapters 1A, 3A-3D, 3F, and 3G) updates the authors' work to reflect changes in the law, additional case citations and practice pointers by other lawyers as well as revisions including cross-references to the official CACI instructions.

CONSULTANTS FOR CALIFORNIA FORMS OF JURY INSTRUCTION (Matthew Bender)

Since 1971, the Honorable **Rex Heeseman** was a commercial litigator in California federal and state courts, with significant experience with respect to agency, class action, contract, employment, insurance, and real estate issues, as well as related tort theories. He has first-chaired 20 trials to resolution, and personally settled over 500 lawsuits and other disputes. He is often retained as an expert witness, a consultant, an arbitrator and a mediator.

1 California Forms of Jury Instruction About the Contributors

A graduate of Stanford Law School, Mr. Heeseman is currently a Superior Court Judge in Los Angeles. Prior to this appointment, he was a partner in the Los Angeles office of Luce, Forward, Hamilton & Scripps, LLP. A former Assistant and Special Assistant U.S. Attorney, he has taught as an Adjunct Professor ("Insurance Law" and "California Business Torts") at Loyola Law School and as a Lecturer at UCLA Law School.

Judge Heeseman co-authors TRG's *California Practice Guide "Insurance Litigation"* (1995 and updates). He has written "Good Faith Duties and Tort Remedies in Lender Liability Litigation," 15 *W.St.U.L.Rev.* 617, and "The Special Relationship Requirement for Bad Faith Liability," *Los Angeles Lawyer*, as well as a columnist for the *Los Angeles Daily Journal* on "Commercial Torts" and "Insurance Topics." And, he has been a panelist on many subjects for various groups (e.g., California CEB's "Business Practices Litigation" and "Evaluating and Proving Damages in Business Litigation" and the ABA Litigation Section's "Trial of Lending Practices Case" and "Appellate Analysis of Emerging Business Torts").

Ronald Oster is a Partner in the Litigation Department of Paul, Hastings, Janofsky & Walker LLP. He received his A.B. degree in 1970, with honors, from Stanford University. He received his J.D. degree in 1973 from Stanford Law School, where he co-chaired the Moot Court Board. He has served as the Chair of the Firm's National Litigation Department as well as the head of the Los Angeles Litigation Department.

Mr. Oster has extensive trial experience in complex commercial cases. He was the lead trial counsel in cases resulting in multi-million jury verdicts for clients Amoco Corporation (\$425 million), Childcraft Corp. (\$18.6 million), Chemstar, Inc. (\$16.8 million), American Medical International (\$12 million), and Baxter Healthcare (\$6.1 million). He has successfully defended many other clients including General Electric Capital Corporation, McGraw-Hill, Inc. and Harnischfeger Corporation. In 1999, Mr. Oster was part of the litigation team that successfully defended Standard & Poor's in the massive Orange County Bankruptcy proceedings, which resulted in a victory for Standard & Poor's and the establishment of significant First Amendment protections for commercial rating entities.

Mr. Oster has also taken a leading role in the settlement of some of the nation's largest and most complex commercial disputes. Between 1989 and 1991, he advised Phillips Petroleum in successfully recovering more than \$1 billion for property damage and business interruption claims arising from the fire and explosion at the Houston Chemical Complex. In 1988 and 1989, he represented First Interstate Bank in connection with the highrise fire at First Interstate's Los Angeles headquarters. Between 1987 and 1992, he represented UNR Industries, Inc. in Chicago regarding insurance coverage for tens of thousands of asbestos claims. Between 1979 and 1983, he represented GAF Corporation with respect to asbestos liabilities.

Mr. Oster has spoken on litigation subjects for the American Bar Association, the Los Angeles County Bar Association, the California Continuing Education of the Bar (CEB), the Stanford Law School and the University of Southern California Law School. He has served as a faculty member for The Rutter Group and the California Judges Association. For 20 years he has taught the CEB course on "Recent Developments in Civil Litigation." He is a contributing editor to the *Environmental Insurance Handbook* and a co-author of *The Greening of American Business*. He wrote the 1994 revisions to the chapter on pleadings in the Matthew Bender publication *Insurance Bad Faith Litigation*, and he has provided comments and revisions to the 1999 *California Practice Guide on Insurance Litigation* by The Rutter Group. He has also written for *The National Law Journal* and other legal publications.

Joseph M. Devine is a member of the San Francisco insurance defense firm Kern, Noda, Devine and Segal. He has extensive experience in the defense of automobile accident cases, including a substantial number of jury trials. He is a member of the Defense Council Association of Northern California as well as the Northern California Fraud Investigators Association. Mr. Devine is a Graduate of San Francisco Law School and previously worked in the Consumer Fraud Unit of the San Francisco District Attorney's Office. He has received numerous appointments from the Superior Courts of San Francisco and Marin Counties to conduct settlement conferences and arbitrations.

Dona E. Cohn-Payne received her B.A. from the University of South Florida and her J.D. from Nova Southeastern University. She was admitted to the Florida Bar in 1983 and the California Bar in 1989.

Ms. Cohn-Payne has been a managing attorney at a major personal injury firm in San Francisco and a partner in her previous firm. She is currently the founder of the Cohn Law Firm in the San Francisco Bay area. She has extensive experience in all aspects of civil trial practice and has handled thousands of personal injury cases. Ms. Cohn-Payne's litigation experience includes winning verdicts for automobile accident victims and obtaining multi-million dollar settlements for her clients.

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What's New

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Scope

HIGHLIGHTS

Release 54 October 2010

Fiduciary Duty Practice Tips

Ch. 41 has been revised and updated with expert practice tips by Susan Azad of Latham & Watkins, Los Angeles.

Recent Cases

Recent cases have been added throughout the publication.

New and Revised CACI

June 2010 CACI changes are incorporated, including six new instructions, 23 revised instructions, two revoked instructions, and 27 instructions with revised sources and authority.

Fraud. Ch. 19A, *Matthew Bender Fraud and Deceit Instructions*, has been edited and improved with practice tips, expanded discussion, and recent cases.

Construction Contracts. Recovery authorized by *Bus. & Prof. Code* § 7031(b) may not be reduced by an unlicensed contractor's claim of offset for materials and services provided in connection with the unlicensed work or for work performed during a period that it held a license [*Alatraste v. Cesar's Exterior Designs Inc. (2010) 183 Cal.App.4th 656*] . See Ch. 3I, *Matthew Bender Construction Contract Instructions*, MB 300I.59[3][e].

Conversion. In a change from the past, recent cases allow a conversion cause of action for certain types of intangible personal property [*Hernandez v. Lopez (2009) 180 Cal.App.4th 932* ; see, e.g., *CRS Recovery, Inc. v. Laxton (9th Cir. 2010) 600 F.3d 1138* . See Ch. 21A, *Matthew Bender Conversion Instructions*, MB 2100A.05[3][a].

Employment Law. A California appellate court has held that the public policy in favor of an employer's duty to

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pay overtime wages protects an employee from termination in retaliation for making a good-faith but mistaken claim to overtime pay. See *Barbosa v. IMPCO Techs., Inc.* (2009) 179 Cal.App.4th 1116, discussed in Ch. 24A, *Matthew Bender Employment Contract Instructions*, MB 2400A.11[3][e].

Insurance. Self-insurance retentions are somewhat equivalent to primary liability insurance, and policies that are subject to SIRs are "excess policies" that have no duty to indemnify until the SIR is exhausted [see *Forecast Homes, Inc. v. Steadfast Ins. Co.* (2010) 181 Cal.App.4th 1466]. The analogy between "primary" and "excess" insurance should not be carried too far; an SIR is not the same as primary insurance for all purposes [*Forecast Homes, Inc. v. Steadfast Ins. Co.* (2010) 181 Cal.App.4th 1466]. See Ch. 23A, *Matthew Bender Insurance Contract Instructions*, MB 2300A.06[3].

Fiduciary Duties. Ch. 41, *California Judicial Council Breach of Fiduciary Duty Instructions*, has been revised and updated with expert practice tips by Susan Azad, a litigation partner in the Los Angeles office of Latham & Watkins, LLP.

Cases Citing CACI. The table of cases citing CACI has updated in this release.

New and Revised CACI. Release 54 of California Forms of Jury Instruction includes the following CACI changes, approved at the June 24, 2010, Judicial Council of California meeting:

- 6 new instructions
- 23 revised instructions
- 2 revoked instructions
- 27 instructions with sources and authority

A complete list of all instructions included in this release can be found below.

PRETRIAL

CACI No. 101. Overview of Trial (*Revised*)

CACI No. 113. Bias (*New*)

EVIDENCE

CACI No. 204. Willful Suppression of Evidence (*Sources and Authority*)

NEGLIGENCE

CACI No. 450. Good Samaritan (*Revoked*)

CACI No. 456. Defendant Estopped From Asserting Statute of Limitations Defense (*Sources and Authority*)

MEDICAL NEGLIGENCE

CACI No. 504. Standard of Care for Nurses (*Revised*)

PROFESSIONAL NEGLIGENCE

CACI No. 606. Legal Malpractice Causing Criminal Conviction -- Actual Innocence (*Sources and Authority*)

CACI No. 610. Affirmative Defense -- Statute of Limitations -- Attorney Malpractice -- One-Year Limit (*Code Civ. Proc.*, § 340.6) (*Sources and Authority*)

CACI No. 611. Affirmative Defense -- Statute of Limitations -- Attorney Malpractice -- Four-Year Limit (*Code Civ. Proc.*, § 340.6) (*Sources and Authority*)

PREMISES LIABILITY

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CACI No. 1001. Basic Duty of Care (*Revised*)

CACI No. 1006. Landlord's Duty (*Revised*)

DANGEROUS CONDITION OF PUBLIC PROPERTY

CACI No. 1102. Definition of "Dangerous Condition" (*Gov. Code, § 830(a)*) (*Revised*)

CACI No. 1123. Loss of Design Immunity (*Cornette*) (*Revised*)

CACI No. VF-1101. Dangerous Condition of Public Property -- Affirmative Defense -- Reasonable Act or Omission (*Gov. Code, § 835.4(a)*) (*Revised*)

PRODUCTS LIABILITY

CACI No. 1205. Strict Liability -- Failure to Warn -- Essential Factual Elements (*Sources and Authority*)

CACI No. 1222. Negligence -- Manufacturer or Supplier -- Duty to Warn -- Essential Factual Elements (*Sources and Authority*)

CACI No. 1240. Affirmative Defense to Express Warranty -- Not "Basis of Bargain" (*Revoked*)

CACI No. 1244. Affirmative Defense -- Sophisticated User (*Sources and Authority*)

CACI No. 1246. Affirmative Defense -- Design Defect -- Governmental Contractor (*New*)

MALICIOUS PROSECUTION

CACI No. 1501. Wrongful Use of Civil Proceedings (*Sources and Authority*)

EMOTIONAL DISTRESS

CACI No. 1621. Negligent Infliction of Emotional Distress -- Bystander -- Essential Factual Elements (*Sources and Authority*)

RIGHT OF PRIVACY

CACI No. 1800. Intrusion Into Private Affairs (*Revised*)

CACI No. 1801. Public Disclosure of Private Facts (*Sources and Authority*)

CACI No. 1805. Affirmative Defense to Use or Appropriation of Name or Likeness -- First Amendment (*Comedy III*) (*Sources and Authority*)

CACI No. 1807. Affirmative Defense -- Invasion of Privacy Justified (*Revised*)

FRAUD OR DECEIT

CACI No. 1901. Concealment (*Sources and Authority*)

CACI No. VF-1903. Negligent Misrepresentation (*Revised*)

TRESPASS

CACI No. 2003. Treble Damages -- Timber (*Sources and Authority*)

CACI No. 2020. Public Nuisance -- Essential Factual Elements (*Sources and Authority*)

CACI No. 2030. Affirmative Defense -- Statute of Limitations -- Trespass or Private Nuisance (*Sources and Authority*)

INSURANCE LITIGATION

CACI No. 2336. Bad Faith (Third Party) -- Unreasonable Failure to Defend -- Essential Factual Elements (*Sources and Authority*)

FAIR EMPLOYMENT AND HOUSING ACT

CACI No. 2505. Retaliation (*Gov. Code, § 12940(h)*) (*Revised*)

CACI No. 2508. Failure to File Timely Administrative Complaint (*Gov. Code, § 12960(d)*) -- Plaintiff Alleges Continuing Violation (*New*)

CACI No. 2523. "Harassing Conduct" Explained (*Sources and Authority*)

CACI No. 2540. Disability Discrimination -- Disparate Treatment -- Essential Factual Element (*Revised*)

CACI No. 2541. Disability Discrimination -- Reasonable Accommodation -- Essential Factual Element (*Gov. Code, § 12960(m)*) (*Revised*)

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CACI No. 2546. Disability Discrimination -- Reasonable Accommodation -- Failure to Engage in Interactive Process (*Gov. Code, § 12960(n)*) (*Sources and Authority*)

CACI No. VF-2508. Disability Discrimination -- Disparate Treatment (*Revised*)

CACI No. VF-2514. Failure to Prevent Harassment, Discrimination, or Retaliation (*New*)

CIVIL RIGHTS

CACI No. 3000. Violation of Federal Civil Rights -- In General -- Essential Factual Elements (*42 U.S.C. § 1983*) (*Sources and Authority*)

CACI No. 3010. Violation of Prisoner's Federal Civil Rights -- *Eighth Amendment* -- Excessive Force (*42 U.S.C. § 1983*) (*Revised*)

CACI No. 3016. Retaliation -- Essential Factual Elements (*42 U.S.C., § 1983*) (*New*)

ELDER ABUSE AND DEPENDENT ADULT CIVIL PROTECTION ACT

CACI No. 3100. Financial Abuse -- Essential Factual Elements (*Welf. & Inst. Code, § 15610.30*) (*Revised*)

SONG-BEVERLY CONSUMER WARRANTY ACT

CACI No. 3201. Failure to Promptly Purchase or Replace New Motor Vehicle After Reasonable Number of Repair Opportunities -- Essential Factual Elements (*Civ. Code, § 1793.2(d)*) (*Sources and Authority*)

CACI No. 3212. Duration of Implied Warranty (*Sources and Authority*)

CACI No. 3213. Affirmative Defense -- Statute of Limitations (*U. Com. Code, § 2725*) (*New*)

CACI No. 3221. Affirmative Defense -- Disclaimer of Implied Warranties (*Revised*)

CACI No. 3241. Restitution From Manufacturer -- New Motor Vehicle (*Sources and Authority*)

CACI No. 3244. Civil Penalty -- Willful Violation (*Civ. Code, § 1794(c)*) (*Sources and Authority*)

VICARIOUS LIABILITY

CACI No. 3713. Nondelegable Duty (*Revised*)

CACI No. 3721. Scope of Employment -- Peace Officer's Misuse of Authority (*Sources and Authority*)

DAMAGES

CACI No. 3903F. Damage to Real Property (Economic Damage) (*Sources and Authority*)

CACI No. 3930. Mitigation of Damages (Personal Injury) (*Sources and Authority*)

BREACH OF FIDUCIARY DUTY

CACI No. 4102. Duty of Undivided Loyalty -- Essential Factual Elements (*Revised*)

UNLAWFUL DETAINER

CACI No. 4304. Termination for Violation of Terms of Lease/Agreement -- Essential Factual Elements (*Revised*)

CACI No. 4320. Affirmative Defense -- Implied Warranty of Habitability (*Revised*)

CACI No. 4321. Affirmative Defense -- Retaliatory Eviction -- Tenant's Complaint (*Civ. Code, § 1942.5*) (*Revised*)

CACI No. 4324. Affirmative Defense -- Waiver by Acceptance of Rent (*Revised*)



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Table of New, Revised, and Revoked Judicial Council of California Civil Jury Instructions (CACI)

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§ Synopsis to Appendix : Table of New, Revised, and Revoked Judicial Council of California Civil Jury Instructions (CACI)

June 2010 Scope



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Table of New, Revised, and Revoked Judicial Council of California Civil Jury Instructions (CACI)

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June 2010

This supplement to the 2010 Edition of CACI includes all of the new, revised, and revoked California Civil Jury Instructions approved by the Judicial Council of California at its meeting of June 25, 2010.

PRETRIAL

CACI No. 101. Overview of Trial (Revised)

CACI No. 113. Bias (New)

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CACI No. 204. Willful Suppression of Evidence (Sources and Authority)

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CACI No. 504. Standard of Care for Nurses (Revised)

PROFESSIONAL NEGLIGENCE

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CACI No. 1006. Landlord's Duty (Revised)

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CACI No. 1102. Definition of "Dangerous Condition" (Gov. Code, § 830(a)) (Revised)

CACI No. 1123. Loss of Design Immunity (Cornette) (Revised)

CACI No. VF-1101. Dangerous Condition of Public Property--Affirmative Defense--Reasonable Act or Omission (Gov. Code, § 835.4(a)) (Revised)

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CACI No. 1222. Negligence--Manufacturer or Supplier--Duty to Warn--Essential Factual Elements (Sources and Authority)

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CACI No. 2508. Failure to File Timely Administrative Complaint (Gov. Code, § 12960(d))--Plaintiff Alleges Continuing Violation (New)

CACI No. 2523. "Harassing Conduct" Explained (Sources and Authority)

CACI No. 2540. Disability Discrimination--Disparate Treatment--Essential Factual Element (Revised)

CACI No. 2541. Disability Discrimination--Reasonable Accommodation--Essential Factual Element (Gov. Code, § 12960(m)) (Revised)

CACI No. 2546. Disability Discrimination--Reasonable Accommodation--Failure to Engage in Interactive Process (Gov. Code, § 12960(n)) (Sources and Authority)

CACI No. VF-2508. Disability Discrimination--Disparate Treatment (Revised)

CACI No. VF-2514. Failure to Prevent Harassment, Discrimination, or Retaliation (New)

CIVIL RIGHTS

CACI No. 3000. Violation of Federal Civil Rights--In General--Essential Factual Elements (42 U.S.C. § 1983) (Sources and Authority)

CACI No. 3010. Violation of Prisoner's Federal Civil Rights--Eighth Amendment--Excessive Force (42 U.S.C. § 1983) (

Revised)

CACI No. 3016. Retaliation--Essential Factual Elements (42 U.S.C., § 1983) (*New*)

ELDER ABUSE AND DEPENDENT ADULT CIVIL PROTECTION ACT

CACI No. 3100. Financial Abuse--Essential Factual Elements (*Welf. & Inst. Code, § 15610.30*) (*Revised*)

SONG-BEVERLY CONSUMER WARRANTY ACT

CACI No. 3201. Failure to Promptly Purchase or Replace New Motor Vehicle After Reasonable Number of Repair Opportunities--Essential Factual Elements (*Civ. Code, § 1793.2(d)*) (*Sources and Authority*)

CACI No. 3212. Duration of Implied Warranty (*Sources and Authority*)

CACI No. 3213. Affirmative Defense--Statute of Limitations (U. Com. Code, § 2725) (*New*)

CACI No. 3221. Affirmative Defense--Disclaimer of Implied Warranties (*Revised*)

CACI No. 3241. Restitution From Manufacturer--New Motor Vehicle (*Sources and Authority*)

CACI No. 3244. Civil Penalty--Willful Violation (*Civ. Code, § 1794(c)*) (*Sources and Authority*)

VICARIOUS LIABILITY

CACI No. 3713. Nondelegable Duty (*Revised*)

CACI No. 3721. Scope of Employment--Peace Officer's Misuse of Authority (*Sources and Authority*)

DAMAGES

CACI No. 3903F. Damage to Real Property (Economic Damage) (*Sources and Authority*)

CACI No. 3930. Mitigation of Damages (Personal Injury) (*Sources and Authority*)

BREACH OF FIDUCIARY DUTY

CACI No. 4102. Duty of Undivided Loyalty--Essential Factual Elements (*Revised*)

UNLAWFUL DETAINER

CACI No. 4304. Termination for Violation of Terms of Lease/Agreement--Essential Factual Elements (*Revised*)

CACI No. 4320. Affirmative Defense--Implied Warranty of Habitability (*Revised*)

CACI No. 4321. Affirmative Defense--Retaliatory Eviction--Tenant's Complaint (*Civ. Code, § 1942.5*) (*Revised*)

CACI No. 4324. Affirmative Defense--Waiver by Acceptance of Rent (*Revised*)

Table of Related Instructions for New and Revoked CACI (June 25, 2010)

1 California Forms of Jury Instruction June 2010

CACI No.		BAJI No.
113		None
1246		9.30
2508		12.12.7
VF-2514		None
3016		12.10
3213		9.55, 9.86
BAJI No.		CACI No.
4.45		None
9.30		1246
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CHAPTER 1 California Judicial Council Pretrial Instructions

1-1 California Forms of Jury Instruction 1.syn

§ 1.syn Synopsis to Chapter 1: California Judicial Council Pretrial Instructions

CACI 100 Preliminary Admonitions

CACI 101 Overview of Trial

CACI 102 Taking Notes During the Trial

CACI 103 Multiple Parties

CACI 104 Nonperson Party

CACI 105 Insurance

CACI 106 Evidence

CACI 107 Witnesses

CACI 108 Duty to Abide by Translation Provided in Court

CACI 109 Removal of Claims or Parties

CACI 110 Service Provider for Juror With Disability

CACI 111 Instruction to Alternate Jurors

CACI 112 Questions From Jurors

CACI 113 Bias

CACI 114-CACI 199 Reserved for Future Use



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CHAPTER 1 California Judicial Council Pretrial Instructions

1-1 California Forms of Jury Instruction Scope

Scope

SCOPE

This chapter contains the California Judicial Council's "Pretrial Series" of jury instructions [*CACI No. 100 et seq.*]. The Judicial Council of California Civil Jury Instructions (CACI) included in this publication are the product of the Judicial Council of California Task Force on Jury Instructions, which are updated by the Judicial Council of California Advisory Committee on Civil Jury Instructions.

This chapter includes instructions on the following topics:

- Preliminary admonitions [*CACI No. 100*].
- Overview of trial [*CACI No. 101*].
- Taking notes during trial [*CACI No. 102*].
- Multiple parties [*CACI No. 103*] and nonperson party [*CACI No. 104*].
- Insurance [*CACI No. 105*].
- Evidence [*CACI No. 106*] and witnesses [*CACI No. 107*].
- Duty to abide by translation provided in court [*CACI No. 108*].
- Removal of claims or parties [*CACI No. 109*].
- Service provider for juror with disability [*CACI No. 110*].
- Instruction to alternate jurors [*CACI No. 111*].

1-1 California Forms of Jury Instruction Scope

- Questions from jurors [*CACI No. 112*].
- Bias [*CACI No. 113*].

For an introduction to the drafting and use of jury instructions in California, see Ch. 1A, *Matthew Bender Introduction to California Jury Instructions*. Ch. 1A includes a "how to" guide for using the Judicial Council and Matthew Bender specific instructions in this publication, as well as methods for making instructions more understandable to juries and suggestions for drafting jury instructions. That chapter further explains the use of the HotDocs(R) document assembly program to prepare and submit instructions to the court.

LexisNexis Matthew Bender Expert Practice Tip--Scope of Pre-Instructions: The CACI pre-instructions are an improvement. The number of preliminary instructions that should be given have been reduced. For the most part, they do not require significant filling in of blanks or alteration. They cover the required topics that should be given and they get the jury off to a good start.

Some of the preliminary instructions may not be necessary in every case. *CACI Nos. 103, 104, 108, 109, and 110* need not be given if they do not apply. These instructions are fairly straight forward and should be easy to use for the court and the attorneys. *By Joseph Devine*



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CHAPTER 1 California Judicial Council Pretrial Instructions

1-1 California Forms of Jury Instruction CACI 100

CACI 100 Preliminary Admonitions

You have now been sworn as jurors in this case. I want to impress on you the seriousness and importance of serving on a jury. Trial by jury is a fundamental right in California. The parties have a right to a jury that is selected fairly, that comes to the case without bias, and that will attempt to reach a verdict based on the evidence presented. Before we begin, I need to explain how you must conduct yourselves during the trial.

Do not allow anything that happens outside this courtroom to affect your decision. During the trial do not talk about this case or the people involved in it with anyone, including family and persons living in your household, friends and co-workers, spiritual leaders, advisors, or therapists.

This prohibition is not limited to face-to-face conversations. It also extends to all forms of electronic communications. Do not use any electronic device or media, such as a cell phone or smart phone, PDA, computer, the Internet, any Internet service, any text or instant-messaging service, any Internet chat room, blog, or Web site, including social networking websites or online diaries, to send or receive any information to or from anyone about this case or your experience as a juror until after you have been discharged from your jury duty.

You may say you are on a jury and how long the trial may take, but that is all. You must not even talk about the case with the other jurors until after I tell you that it is time for you to decide the case.

During the trial you must not listen to anyone else talk about the case or the people involved in the case. You must avoid any contact with the parties, the lawyers, the witnesses, and anyone else who may have a connection to the case. If anyone tries to talk to you about this case, tell that person that you cannot discuss it because you are a juror. If he or she keeps talking to you, simply walk away and report the incident to the court [attendant/bailiff] as soon as you can.

After the trial is over and I have released you from jury duty, you may discuss the case with anyone, but you are

not required to do so.

During the trial, do not read, listen to, or watch any news reports about this case. [I have no information that there will be news reports concerning this case.] This prohibition extends to the use of the Internet in any way, including reading any blog about the case or about anyone involved with it or using Internet maps or mapping programs or any other program or device to search for or to view any place discussed in the testimony.

You must decide this case based only on the evidence presented in this trial and the instructions of law that I will provide. Nothing that you see, hear, or learn outside this courtroom is evidence unless I specifically tell you it is. If you receive any information about this case from any source outside of the courtroom, promptly report it to the court [attendant/bailiff]. It is important that all jurors see and hear the same evidence at the same time.

Do not do any research on your own or as a group. Do not use dictionaries, the Internet, or other reference materials. Do not investigate the case or conduct any experiments. Do not contact anyone to assist you, such as a family accountant, doctor, or lawyer. Do not visit or view the scene of any event involved in this case. If you happen to pass by the scene, do not stop or investigate. If you do need to view the scene during the trial, you will be taken there as a group under proper supervision.

It is important that you keep an open mind throughout this trial. Evidence can only be presented a piece at a time. Do not form or express an opinion about this case while the trial is going on. You must not decide on a verdict until after you have heard all the evidence and have discussed it thoroughly with your fellow jurors in your deliberations.

Do not concern yourselves with the reasons for the rulings I will make during the course of the trial. Do not guess what I may think your verdict should be from anything I might say or do.

When you begin your deliberations, you may discuss the case only in the jury room and only when all the jurors are present.

You must decide what the facts are in this case. And, I repeat, your verdict must be based only on the evidence that you hear or see in this courtroom. Do not let bias, sympathy, prejudice, or public opinion influence your verdict.

At the end of the trial, I will explain the law that you must follow to reach your verdict. You must follow the law as I explain it to you, even if you do not agree with the law.

New September 2003; Revised April 2004, October 2004, February 2005, June 2005, December 2007, December 2009

Directions for Use

This instruction should be given at the outset of every case, even as early as when the jury panel enters the courtroom (without the first sentence).

If the jury is allowed to separate, *Code of Civil Procedure section 611* requires the judge to admonish the jury that "it is their duty not to converse with, or suffer themselves to be addressed by any other person, on any subject of the trial, and that it is their duty not to form or express an opinion thereon until the case is finally submitted to them."

Sources and Authority

■ *Article I, section 16 of the California Constitution* provides that "trial by jury is an inviolate right and shall be secured to all."

■ *Code of Civil Procedure section 608* provides, in part: "In charging the jury the court may state to them all matters of law which it thinks necessary for their information in giving their verdict; and, if it state the testimony of the case, it must inform the jury that they are the exclusive judges of all questions of fact." (See also *Evid. Code*, § 312; *Code Civ. Proc.*, § 592.)

■ Under *Code of Civil Procedure section 611*, jurors may not "form or express an opinion" prior to deliberations. (See also *City of Pleasant Hill v. First Baptist Church of Pleasant Hill* (1969) 1 Cal.App.3d 384, 429 [82 Cal.Rptr. 1] . It is misconduct for a juror to prejudge the case. (*Deward v. Clough* (1966) 245 Cal.App.2d 439, 443-444 [54 Cal.Rptr. 68] .)

■ Jurors must not undertake independent investigations of the facts in a case. (*Kritzer v. Citron* (1950) 101 Cal.App.2d 33, 36 [224 P.2d 808] ; *Walter v. Ayvazian* (1933) 134 Cal.App. 360, 365 [25 P.2d 526] .)

■ Jurors are required to avoid discussions with parties, counsel, or witnesses. (*Wright v. Eastlick* (1899) 125 Cal. 517, 520-521 [58 P. 87] ; *Garden Grove School Dist. v. Hendler* (1965) 63 Cal.2d 141, 144 [45 Cal.Rptr. 313, 403 P.2d 721] .)

■ It is misconduct for jurors to engage in experiments that produce new evidence. (*Smoketree-Lake Murray, Ltd. v. Mills Concrete Construction Co.* (1991) 234 Cal.App.3d 1724, 1746 [286 Cal.Rptr. 435] .)

■ Unauthorized visits to the scene of matters involved in the case are improper. (*Anderson v. Pacific Gas & Electric Co.* (1963) 218 Cal.App.2d 276, 280 [32 Cal.Rptr. 328] .)

■ It is improper for jurors to receive information from the news media about the case. (*Province v. Center for Women's Health & Family Birth* (1993) 20 Cal.App.4th 1673, 1679 [25 Cal.Rptr.2d 667] , disapproved on other grounds in *Heller v. Norcal Mutual Ins. Co.* (1994) 8 Cal.4th 30, 41 [32 Cal.Rptr.2d 200, 876 P.2d 999] ; *Hilliard v. A. H. Robins Co.* (1983) 148 Cal.App.3d 374, 408 [196 Cal.Rptr. 117] .)

■ Jurors must avoid bias: " 'The right to unbiased and unprejudiced jurors is an inseparable and inalienable part of the right to trial by jury guaranteed by the Constitution.' " (*Weathers v. Kaiser Foundation Hospitals* (1971) 5 Cal.3d 98, 110 [95 Cal.Rptr. 516, 485 P.2d 1132] , internal citations omitted.) Evidence of racial prejudice and bias on the part of jurors amounts to misconduct and may constitute grounds for ordering a new trial. (*Ibid.*)

■ An instruction to disregard any appearance of bias on the part of the judge is proper and may cure any error in a judge's comments. (*Gist v. French* (1955) 136 Cal.App.2d 247, 257-259 [288 P.2d 1003] , disapproved on other grounds in *Deshotel v. Atchinson, Topeka & Santa Fe Ry. Co.* (1958) 50 Cal.2d 664, 667 [328 P.2d 449] and *West v. City of San Diego* (1960) 54 Cal.2d 469, 478 [6 Cal.Rptr. 289, 353 P.2d 929] .) "It is well understood by most trial judges that it is of the utmost importance that the trial judge not communicate in any manner to the jury the judge's opinions on the case submitted to the jury, because juries tend to attach inflated importance to any such communication, even when the judge has no

intention whatever of influencing a jury's determination." (*Dorshkind v. Harry N. Koff Agency, Inc.* (1976) 64 Cal.App.3d 302, 307 [134 Cal.Rptr. 344] .)

Secondary Sources

27 *California Forms of Pleading and Practice*, Ch. 322, *Juries and Jury Selection*, § 322.50 (Matthew Bender)

1 *Matthew Bender Practice Guide: California Trial and Post-Trial Civil Procedure*, Ch. 17, *Dealing With the Jury*, 17.05

Publisher's Notes

This instruction covers issues presented in BAJI Nos. 0.50, 1.00, 1.00.5, and 15.35.

LexisNexis Matthew Bender Expert Practice Tip--When to Give CACI No. 100: This instruction should be given just before the plaintiff's opening statement. *By Rex Heeseman*

LexisNexis Matthew Bender Expert Practice Tip--CACI No. 100 Improves Upon BAJI No. 1.00: CACI No. 100 includes the admonition "Do not let bias, sympathy, prejudice, or public opinion influence your verdict." This replaces BAJI No. 1.00, which provides that "You must not be influenced by sympathy, prejudice or passion." "Public opinion" is probably much better understood by the average juror than "passion." Although they are not the same, the jury is less likely to be confused by their duty to be fair and impartial. *By Joseph Devine*

LexisNexis Matthew Bender Expert Practice Tip--CACI No. 100 Is Important: Most attorneys do not even listen to the preliminary admonitions given by the judge, but CACI No. 100 provides the trial attorney with some important wording that she or he can use during voir dire and opening statement. Stressing to the jury that it is their duty to wait until all the evidence is presented before reaching a verdict or waiting to form their opinion before the end of the presentation of evidence is a very important part of this instruction. This is especially true if you are the defense and must present your case after the plaintiff. Remind the jury of this portion of the instruction when giving your opening statement.

It is important to note that a juror who conducts her or his own research or investigation outside of the courtroom constitutes juror misconduct. Should you find that to be the case during or after the trial, CACI No. 100 is the basis for making your motion for a new trial.

Judges have become strict regarding the portion of the instruction that prohibits contact with the parties, the lawyers, the witnesses, and anyone else who may have a connection to the case. You should determine from the judge from the outset of trial if even courteous "hellos" are prohibited and if so request that the judge inform the jury of this so that it does not appear that you are being discourteous. Avoid the appearance of impropriety by not taking the same elevators as jurors and eating at restaurants that are not frequented by your jury. *By Dona Cohn-Payne*

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jurors General Overview Civil Procedure Trials Jury Trials Jury Deliberations Civil Procedure Trials Jury Trials Jury Instructions General Overview Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions



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CHAPTER 1 California Judicial Council Pretrial Instructions

1-1 California Forms of Jury Instruction CACI 101

CACI 101 Overview of Trial

To assist you in your tasks as jurors, I will now explain how the trial will proceed. I will begin by identifying the parties to the case. [Name of plaintiff] filed this lawsuit. [He/She/It] is called a plaintiff. [He/She/It] seeks damages [or other relief] from [name of defendant], who is called a defendant.

[[Name of plaintiff] claims [insert description of the plaintiff's claim(s)]. [Name of defendant] denies those claims. [[Name of defendant] also contends that [insert description of the defendant's affirmative defense(s)].]]

[[Name of cross-complainant] has also filed what is called a cross complaint against [name of cross-defendant]. [Name of cross-complainant] is the defendant, but also is called the cross-complainant. [Name of cross-defendant] is called a cross-defendant.]

[In [his/her/its] cross-complaint, [name of cross-complainant] claims [insert description of the cross-complainant's claim(s)]. [Name of cross-defendant] denies those claims. [[Name of cross-defendant] also contends that [insert description of the cross-defendant's affirmative defense(s) to the cross-complaint].]]

First, each side may make an opening statement, but neither side is required to do so. An opening statement is not evidence. It is simply an outline to help you understand what that party expects the evidence will show. Also, because it is often difficult to give you the evidence in the order we would prefer, the opening statement allows you to keep an overview of the case in mind during the presentation of the evidence.

Next, the jury will hear the evidence. [Name of plaintiff] will present evidence first. When [name of plaintiff] is finished, [name of defendant] will have an opportunity to present evidence. [Then [name of cross-complainant] will present evidence. Finally, [name of cross-defendant] will present evidence.]

Each witness will first be questioned by the side that asked the witness to testify. This is called direct

examination. Then the other side is permitted to question the witness. This is called cross-examination.

Documents or objects referred to during the trial are called exhibits. Exhibits are given a [number/letter] so that they may be clearly identified. Exhibits are not evidence until I admit them into evidence. During your deliberations, you will be able to look at all exhibits admitted into evidence.

There are many rules that govern whether something will be admitted into evidence. As one side presents evidence, the other side has the right to object and to ask me to decide if the evidence is permitted by the rules. Usually, I will decide immediately, but sometimes I may have to hear arguments outside of your presence.

After the evidence has been presented, I will instruct you on the law that applies to the case and the attorneys will make closing arguments. What the parties say in closing argument is not evidence. The arguments are offered to help you understand the evidence and how the law applies to it.

New September 2003; Revised February 2007, June 2010

Directions for Use

This instruction is intended to provide a "road map" for the jurors. This instruction should be read in conjunction with *CACI No. 100, Preliminary Admonitions*.

The bracketed second, third, and fourth paragraphs are optional. The court may wish to use these paragraphs to provide the jurors with an explanation of the claims and defenses that are at issue in the case. Include the third and fourth paragraphs if a cross-complaint is also being tried. Include the last sentence in the second and fourth paragraphs if affirmative defenses are asserted on the complaint or cross-complaint.

The sixth paragraph presents the order of proof. If there is a cross-complaint, include the last two sentences. Alternatively, the parties may stipulate to a different order of proof--for example, by agreeing that some evidence will apply to both the complaint and the cross-complaint. In this case, customize this paragraph to correspond to the stipulation.

Sources and Authority

■ *Rule 2.1035 of the California Rules of Court* provides: "Immediately after the jury is sworn, the trial judge may, in his or her discretion, preinstruct the jury concerning the elements of the charges or claims, its duties, its conduct, the order of proceedings, the procedure for submitting written questions for witnesses as set forth in rule 2.1033 if questions are allowed, and the legal principles that will govern the proceeding."

■ "[W]e can understand that it might not have *seemed* like [cross-complainants] were producing much evidence on their cross-complaint at trial. Most of the relevant (and undisputed) facts bearing on the legal question of whether [cross-defendants] had a fiduciary duty and, if so, violated it, had been brought out in plaintiffs' case-in-chief. But just because the undisputed evidence favoring the cross-complaint also happened to come out on *plaintiffs'* case-in-chief does not mean it was not available to support the cross-complaint." (*Le v. Pham* (2010) 180 Cal.App.4th 1201, 1207 [103 Cal.Rptr.3d 606] , original italics.)

■ *Code of Civil Procedure section 607* provides:

When the jury has been sworn, the trial must proceed in the following order, unless the court, for special reasons otherwise directs:

1. The plaintiff may state the issue and his case;
2. The defendant may then state his defense, if he so wishes, or wait until after plaintiff has produced his evidence;
3. The plaintiff must then produce the evidence on his part;
4. The defendant may then open his defense, if he has not done so previously;
5. The defendant may then produce the evidence on his part;
6. The parties may then respectively offer rebutting evidence only, unless the court, for good reason, in furtherance of justice, permit them to offer evidence upon their original case;
7. When the evidence is concluded, unless the case is submitted to the jury on either side or on both sides without argument, the plaintiff must commence and may conclude the argument;
8. If several defendants having separate defenses, appear by different counsel, the court must determine their relative order in the evidence and argument;
9. The court may then charge the jury.

Secondary Sources

7 Witkin, *California Procedure* (5th ed. 2008) Trial, § 147

Wagner et al., *Cal. Practice Guide: Civil Trials and Evidence* (The Rutter Group) PP 1:427-1:432; 4:460-4:463

48 *California Forms of Pleading and Practice*, Ch. 551, Trial, § 551.50 (Matthew Bender)

Publisher's Notes

This instruction covers issues presented in BAJI Nos. 0.50, 1.00, 1.00.5, 1.21, 1.20, and 1.23.

LexisNexis Matthew Bender Expert Practice Tip--When to Charge the Jury: Due to the increasing flexibility in trying cases, some judges may opt to charge the jury before the end of the case (*e.g.*, just before the final arguments). *By Rex Heeseman*

LexisNexis Matthew Bender Expert Practice Tip--Points for the Defense: This instruction provides the jury with an overview of the trial, including the fact that plaintiff will present its evidence first. From a defense standpoint, it may be worthwhile to emphasize to the jury in opening statement that the defense case will not be presented until later in the trial, and to emphasize the need to keep an open mind as instructed by the court. *By Ronald Oster*

LexisNexis Matthew Bender Expert Practice Tip--Identifying the Parties: CACI No. 101 requires the names of the parties to be inserted. It is clearly appropriate at the beginning of the trial to identify by name the plaintiff, defendants, cross complainants, etc. After appropriate insertion of the names of the parties, CACI No. 101 will make it easy for the jury to comprehend each party's identity and relationship to the case. The Directions for Use for this instruction includes the following statement: "Throughout these instructions, the names of the parties should be inserted as indicated." Many of the instructions that follow these preliminary admonitions do indicate that the names of the parties should be inserted.

A good argument can be made that repeatedly identifying the name and relationship of the parties becomes tedious and may be more confusing to the jury than simply identifying them once at the outset of the case. It is tedious and time consuming for the attorneys to prepare. The instructions become repetitive for the judge to read and for the jury to hear. There is also a danger in requiring the judge to repeatedly name and identify the parties. Inadvertently, undue emphasis may be placed on one party, or another. A difficult name has more opportunity to be mispronounced with each reading.

The Task Force was undoubtedly attempting to personalize the instructions to the parties in a particular case. The court should always appear to be impartial. The jury should consider the case on its merits without regard to any appearance of undue emphasis on any party. The impartial presentation of jury instructions would be best accomplished by identifying the parties in CACI No. 101, and not repeatedly.

Thus, consider asking the court to identify the parties only once at the beginning of the case in CACI No. 101 and refer to the parties as "plaintiff," "defendant," etc. in the remaining instructions. This will make it easier for the attorneys and the court. It will impress on the jury their obligation to remain impartial, and will make it less likely that they will perceive the court to have any leanings on the case. *By Joseph Devine*

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsGeneral OverviewCivil ProcedureTrialsJury TrialsGeneral OverviewCivil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewCivil ProcedureTrialsJury TrialsJury InstructionsStandard Instructions



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CHAPTER 1 California Judicial Council Pretrial Instructions

1-1 California Forms of Jury Instruction CACI 102

CACI 102 Taking Notes During the Trial

You have been given notebooks and may take notes during the trial. Do not take the notebooks out of the courtroom or jury room at any time during the trial. You may take your notes into the jury room during deliberations.

You should use your notes only to remind yourself of what happened during the trial. Do not let your note-taking interfere with your ability to listen carefully to all the testimony and to watch the witnesses as they testify. Nor should you allow your impression of a witness or other evidence to be influenced by whether or not other jurors are taking notes. Your independent recollection of the evidence should govern your verdict, and you should not allow yourself to be influenced by the notes of other jurors if those notes differ from what you remember.

[The court reporter is making a record of everything that is said. If during deliberations you have a question about what the witness said, you should ask that the court reporter's records be read to you. You must accept the court reporter's record as accurate.]

At the end of the trial, your notes will be [collected and destroyed/collected and retained by the court but not as a part of the case record/[*specify other disposition*]].

New September 2003; Revised April 2007, December 2007

Directions for Use

This instruction may be given as an introductory instruction or as a concluding instruction after trial.
(See CACI No. 5010, *Taking Notes During the Trial*).

The bracketed paragraph should not be read if a court reporter is not being used to record the trial proceedings.

In the last paragraph, specify the court's disposition of the notes after trial. No statute or rule of court requires any particular disposition.

Sources and Authority

■ *Rule 2.1031 of the California Rules of Court* provides: "Jurors must be permitted to take written notes in all civil and criminal trials. At the beginning of a trial, a trial judge must inform jurors that they may take written notes during the trial. The court must provide materials suitable for this purpose."

■ "Because of [the risks of note-taking], a number of courts have held that a cautionary instruction is required. For example, [one court] held that the instruction should include 'an explanation ... that [jurors] should not permit their note-taking to distract them from the ongoing proceedings; that their notes are only an aid to their memory and should not take precedence over their independent recollection; that those jurors who do not take notes should rely on their independent recollection of the evidence and not be influenced by the fact that another juror has taken notes; and that the notes are for the note taker's own personal use in refreshing his recollection of the evidence. The jury must be reminded that should any discrepancy exist between their recollection of the evidence and their notes, they should request that the record of the proceedings be read back and that it is the transcript that must prevail over their notes.' " (*People v. Whitt* (1984) 36 Cal.3d 724, 747 [205 Cal.Rptr. 810, 685 P.2d 1161] , internal citations and footnote omitted.)

■ "In *People v. Whitt*, we recognized the risks inherent in juror note-taking and observed that it is 'the better practice' for courts to give, sua sponte, a cautionary instruction on note-taking. Although the ideal instruction would advert specifically to all the dangers of note-taking, we found the less complete instruction given in *Whitt* to be adequate: 'Be careful as to the amount of notes that you take. I'd rather that you observe the witness, observe the demeanor of that witness, listen to how that person testifies rather than taking copious notes [I]f you do not recall exactly as to what a witness might have said or you disagree, for instance, during the deliberation [sic] as to what a witness may have said, we can reread that transcript back' " (*People v. Silbertson* (1985) 41 Cal.3d 296, 303 [221 Cal.Rptr. 152, 709 P.2d 1321] , internal citations and footnote omitted.)

Secondary Sources

Deskbook on the Management of Complex Civil Litigation, Ch. 2, *Case Management*, § 2.81[5] (Matthew Bender)

28 California Forms of Pleading and Practice, Ch. 326, *Jury Instructions*, § 326.32 (Matthew Bender)

Publisher's Notes

This instruction covers issues presented in BAJI No. 0.50.

Note that the trial judge should encourage counsel in complex civil cases to create juror notebooks containing key documents, exhibits, and other appropriate materials [*Cal. Rules of Ct.*, Rule 2.1032].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsGeneral OverviewCivil ProcedureTrialsJury TrialsJury InstructionsGeneral
OverviewCivil ProcedureTrialsJury TrialsJury InstructionsStandard InstructionsCivil ProcedureTrialsJury TrialsNotes



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California Forms of Jury Instruction

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CHAPTER 1 California Judicial Council Pretrial Instructions

1-1 California Forms of Jury Instruction CACI 103

CACI 103 Multiple Parties

[There are [*number*] plaintiffs in this trial. You should decide the case of each plaintiff separately as if it were a separate lawsuit. Each plaintiff is entitled to separate consideration of his or her own claim(s).]

[There are [*number*] defendants in this trial. You should decide the case against each defendant separately as if it were a separate lawsuit. Each defendant is entitled to separate consideration of his or her own defenses.]

[Different aspects of this case involve different parties (plaintiffs and defendants). Each instruction will identify the parties to whom it applies. Pay particular attention to the parties named in each instruction.]

[or]

[Unless I tell you otherwise, all instructions apply to each plaintiff and defendant.]

New September 2003; Revised April 2009

Directions for Use

The CACI instructions require the use of party names rather than party-status words like "plaintiff" and "defendant." In multiparty cases, it is important to name only the parties in each instruction to whom the instruction applies. For example, an instruction on loss of consortium (see *CACI No. 3920*) will not apply to all plaintiffs. Instructions on vicarious liability (see *CACI No. 3700 et seq.*) will not apply to all defendants. Unless all or nearly all of the instructions will apply to all of the parties, give the first option for the last paragraph.

Sources and Authority

■ "We realize, of course, that multiple defendants are involved and that each defendant is entitled to instructions on, and separate consideration of, every defense available and applicable to it. The purpose of this rule is to insure that the jury will distinguish and evaluate the separate facts relevant to each defendant." (*Campbell v. Southern Pacific Co.* (1978) 22 Cal.3d 51, 58 [148 Cal.Rptr. 596, 583 P.2d 121] , internal citations omitted.)

Secondary Sources

4 Witkin, *California Procedure* (4th ed. 1997) Pleading, § 67 et seq.

27 *California Forms of Pleading and Practice*, Ch. 318, *Judgments*, § 318.15 (Matthew Bender)

1 *Matthew Bender Practice Guide: California Pretrial Civil Procedure*, Ch. 5, *Parties*, 5.30 et seq.

Publisher's Notes

This instruction replaces BAJI Nos. 15.00 and 15.02, and covers issues presented in BAJI No. 1.22.

LexisNexis Matthew Bender Expert Practice Tip--Multiple Parties: This instruction may be helpful if, for instance, you are counsel for a defendant who is not a "main target" of the plaintiff. *By Rex Heeseman*



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CHAPTER 1 California Judicial Council Pretrial Instructions

1-1 California Forms of Jury Instruction CACI 104

CACI 104 Nonperson Party

A [corporation/partnership/city/county/[other entity]], [name of entity], is a party in this lawsuit. [Name of entity] is entitled to the same fair and impartial treatment that you would give to an individual. You must decide this case with the same fairness that you would use if you were deciding the case between individuals.

When I use words like "person" or "he" or "she" in these instructions to refer to a party, those instructions also apply to [name of entity].

New September 2003

This instruction should be given as an introductory instruction if one of the parties is an entity. Select the type of entity and insert the name of the entity where indicated in the instruction.

- *Corporations Code section 207* provides that a corporation "shall have all of the powers of a natural person in carrying out its business activities." *Civil Code section 14* defines the word "person," for purposes of that code, to include corporations as well as natural persons.

- As a general rule, a corporation is considered to be a legal entity that has an existence separate from that of its shareholders. (*Erkenbrecher v. Grant* (1921) 187 Cal. 7, 9 [200 P. 641] .)

- "In general, any person or entity has capacity to sue or defend a civil action in the California courts. This includes artificial 'persons' such as corporations, partnerships and associations." (*American Alternative Energy Partners II, 1985 v. Windridge, Inc.* (1996) 42 Cal.App.4th 551, 559 [49 Cal.Rptr.2d 686] , internal citations omitted.)

Secondary Sources

9 Witkin, Summary of California Law (10th ed. 2005) Corporations, § 1, p. 775

1 *Matthew Bender Practice Guide: California Pretrial Civil Procedure, Ch. 5, Parties, 5.13 -5.17*

Publisher's Notes

This instruction replaces BAJI Nos. 1.03 and 1.10, and covers issues presented in BAJI No. 11.50.

LexisNexis Matthew Bender Expert Practice Tip--Business Entity Defendants: This instruction seems desirable for attorneys representing business entities, at least as an attempt to reduce some jurors' sympathetic feelings for an individual suing such a business entity. *By Rex Heeseman*

LexisNexis Matthew Bender Expert Practice Tip--Humanizing Business Entities: Getting the jurors to "see" a corporation or business as an individual person with the same rights is difficult. Although the instruction addresses this issue, it is something that you may want to discuss in your closing argument. Further, having a representative from the business sit at counsel table during the entire length of the trial will help humanize the business entity. *By Dona Cohn-Payne*

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedurePartiesGeneral OverviewCivil ProcedurePartiesCapacity of PartiesGeneral OverviewCivil ProcedureTrialsJury TrialsGeneral OverviewCivil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewCivil ProcedureTrialsJury TrialsJury InstructionsStandard Instructions



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CHAPTER 1 California Judicial Council Pretrial Instructions

1-1 California Forms of Jury Instruction CACI 105

CACI 105 Insurance

You must not consider whether any of the parties in this case has insurance. The presence or absence of insurance is totally irrelevant. You must decide this case based only on the law and the evidence.

New September 2003

- *Evidence Code section 1155* provides: "Evidence that a person was, at the time a harm was suffered by another, insured wholly or partially against loss arising from liability for that harm is inadmissible to prove negligence or other wrongdoing."
- As a rule, evidence that the defendant has insurance is both irrelevant and prejudicial to the defendant. (*Neumann v. Bishop* (1976) 59 Cal.App.3d 451, 469 [130 Cal.Rptr. 786] .)
- Generally, evidence that the plaintiff was insured is not admissible under the "collateral source rule." (*Helfend v. Southern California Rapid Transit Dist.* (1970) 2 Cal.3d 1, 16-18 [84 Cal.Rptr. 173, 465 P.2d 61] ; *Acosta v. Southern California Rapid Transit Dist.* (1970) 2 Cal.3d 19, 25-26 [84 Cal.Rptr. 184, 465 P.2d 72] .)
- Evidence of insurance coverage may be admissible where it is coupled with other relevant evidence, provided that the probative value of the other evidence outweighs the prejudicial effect of the mention of insurance. (*Blake v. E. Thompson Petroleum Repair Co., Inc.* (1985) 170 Cal.App.3d 823, 831 [216 Cal.Rptr. 568] .)
- An instruction to disregard whether a party has insurance may, in some cases, cure the effect of

counsel's improper reference to insurance. (*Sally v. Pacific Gas & Electric Co.* (1972) 23 Cal.App.3d 806, 814 [100 Cal.Rptr. 501] .)

Secondary Sources

7 Witkin, California Procedure (4th ed. 1997) Trial, §§ 230-233

Jefferson, California Evidence Benchbook (3rd ed. 1997) §§ 34.32-34.36

California Practice Guide: Civil Trials and Evidence, § 5 :371

3 *California Trial Guide, Unit 50, Extrinsic Policies Affecting or Excluding Evidence*, §§ 50.20, 50.32 (Matthew Bender)

48 *California Forms of Pleading and Practice, Ch. 551, Trial*, § 551.68 (Matthew Bender)

Publisher's Notes

This instruction replaces BAJI No. 1.04.

LexisNexis Matthew Bender Expert Practice Tip--Corporate Defendants: This instruction could be helpful to some defendants, especially some corporations. *By Rex Heeseman*

LexisNexis Matthew Bender Expert Practice Tip--Mentioning Insurance During Trial May Be Grounds for Mistrial: Do not mention insurance during the trial. To do so may cause an automatic mistrial, so beware. *By Dona Cohn-Payne*



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CHAPTER 1 California Judicial Council Pretrial Instructions

1-1 California Forms of Jury Instruction CACI 106

CACI 106 Evidence

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

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

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

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

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

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

New September 2003; Revised February 2005

This instruction should be given as an introductory instruction.

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

■ *Evidence Code section 312* provides:

Except as otherwise provided by law, where the trial is by jury:

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

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

■ *Evidence Code section 353* provides:

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

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

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

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

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

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

Secondary Sources

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

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

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

Bender)

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

Publisher's Notes

This instruction covers issues presented in BAJI Nos. 1.02 and 2.09.

LexisNexis Matthew Bender Expert Practice Tip--Dealing With Objectionable Evidence: Despite *CACI No. 106*, jurors will be affected by statements made by counsel and things they see and hear outside of the courtroom that is not admissible evidence. Making motions in limine to prevent objectionable evidence and thereby avoiding objections in front of the jury is a useful tool that should always be used by counsel. Further, counsel should not object to evidence solely because it is objectionable. Sometimes a jury will see objections as bothersome and obstructionist. Try to limit your objections to evidence that really matters in the case. *By Dona Cohn-Payne*

In *Joyce v. Simi Valley Unified School Dist.* (2003) 110 Cal.App.4th 292, 305-306 [1 Cal.Rptr.3d 712], the plaintiff's attorney at trial remarked about an off-site incident in final argument. The trial court sustained an objection and directed the jury to ignore the remarks. The trial court instructed the jury that the counsel's statements were not evidence and to decide all questions of fact from the evidence received at trial and not from any other source. The admonishment cured any prejudice and a motion for a new trial was denied.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsGeneral OverviewCivil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewCivil ProcedureTrialsJury TrialsJury InstructionsStandard InstructionsCivil ProcedureTrialsJury TrialsProvince of Court & JuryEvidenceProcedural ConsiderationsJudicial Intervention in TrialsComments by JudgesGeneral OverviewEvidenceProcedural ConsiderationsObjections & Offers of ProofGeneral OverviewEvidenceProcedural ConsiderationsObjections & Offers of ProofObjections



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CHAPTER 1 California Judicial Council Pretrial Instructions

1-1 California Forms of Jury Instruction CACI 107

CACI 107 Witnesses

A witness is a person who has knowledge related to this case. You will have to decide whether you believe each witness and how important each witness's testimony is to the case. You may believe all, part, or none of a witness's testimony.

In deciding whether to believe a witness's testimony, you may consider, among other factors, the following:

- (a) How well did the witness see, hear, or otherwise sense what he or she described in court?**
- (b) How well did the witness remember and describe what happened?**
- (c) How did the witness look, act, and speak while testifying?**
- (d) Did the witness have any reason to say something that was not true? Did the witness show any bias or prejudice? Did the witness have a personal relationship with any of the parties involved in the case? Does the witness have a personal stake in how this case is decided?**
- (e) What was the witness's attitude toward this case or about giving testimony?**

Sometimes a witness may say something that is not consistent with something else he or she said. Sometimes different witnesses will give different versions of what happened. People often forget things or make mistakes in what they remember. Also, two people may see the same event but remember it differently. You may consider these differences, but do not decide that testimony is untrue just because it differs from other testimony.

However, if you decide that a witness has deliberately testified untruthfully about something important, you may choose not to believe anything that witness said. On the other hand, if you think the witness testified

untruthfully about some things but told the truth about others, you may accept the part you think is true and ignore the rest.

Do not make any decision simply because there were more witnesses on one side than on the other. If you believe it is true, the testimony of a single witness is enough to prove a fact.

You must not be biased in favor of or against any witness because of his or her disability, gender, race, religion, ethnicity, sexual orientation, age, national origin, [or] socioeconomic status[, or [*insert any other impermissible form of bias*]].

New September 2003; Revised April 2004, June 2005, April 2007

This instruction may be given as an introductory instruction or as a concluding instruction after trial.
(See CACI No. 5003, *Witnesses*.)

In the last paragraph, the court may delete inapplicable categories of potential jury bias.

■ *Evidence Code section 312 provides:*

Except as otherwise provided by law, where the trial is by jury:

- (a) All questions of fact are to be decided by the jury.
- (b) Subject to the control of the court, the jury is to determine the effect and value of the evidence addressed to it, including the credibility of witnesses and hearsay declarants.

■ *Considerations for evaluating the credibility of witnesses are contained in Evidence Code section 780:*

Except as otherwise provided by statute, the court or jury may consider in determining the credibility of a witness any matter that has any tendency in reason to prove or disprove the truthfulness of his testimony at the hearing, including but not limited to any of the following:

- (a) His demeanor while testifying and the manner in which he testifies.
- (b) The character of his testimony.
- (c) The extent of his capacity to perceive, to recollect, or to communicate any matter about which he testifies.
- (d) The extent of his opportunity to perceive any matter about which he testifies.
- (e) His character for honesty or veracity or their opposites.
- (f) The existence or nonexistence of a bias, interest, or other motive.
- (g) A statement previously made by him that is consistent with his testimony at the hearing.
- (h) A statement made by him that is inconsistent with any part of his testimony at the

hearing.

(i) The existence or nonexistence of any fact testified to by him.

(j) His attitude toward the action in which he testifies or toward the giving of testimony.

(k) His admission of untruthfulness.

■ *Evidence Code section 411* provides that "[e]xcept where additional evidence is required by statute, the direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact." According to former *Code of Civil Procedure section 2061*, the jury should be instructed that "they are not bound to decide in conformity with the declarations of any number of witnesses, which do not produce conviction in their minds, against a less number or against a presumption or other evidence satisfying their minds."

■ The willfully false witness instruction was formerly codified at *Code of Civil Procedure section 2061*. This statute was repealed in 1965 to avoid giving undue emphasis to this rule compared to other common-law rules. Refusal to give an instruction on this point is not error: "It should certainly not be of importance to tell the ordinary man of the world that he should distrust the statements of a witness whom he believes to be a liar." (*Wallace v. Pacific Electric Ry. Co.* (1930) 105 Cal.App. 664, 671 [288 P. 834] .)

■ Standard 10.20(a)(2) of the California Standards for Judicial Administration provides: "In all courtroom proceedings, refrain from engaging in conduct and prohibit others from engaging in conduct that exhibits bias, including but not limited to bias based on disability, gender, race, religion, ethnicity, and sexual orientation, whether that bias is directed toward counsel, court personnel, witnesses, parties, jurors, or any other participants."

■ Canon 3(b)(5) of the California Code of Judicial Ethics provides: "A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, engage in speech, gestures, or other conduct that would reasonably be perceived as (1) bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status, or (2) sexual harassment." Canon 3(b)(6) requires the judge to impose these standards on attorneys.

Secondary Sources

1A *California Trial Guide, Unit 22, Rules Affecting Admissibility of Evidence*, § 22.30 (Matthew Bender)

48 *California Forms of Pleading and Practice, Ch. 551, Trial*, § 551.122 (Matthew Bender)

Publisher's Notes

This instruction covers issues presented in BAJI Nos. 2.01, 2.20, 2.21, and 2.22.

LexisNexis Matthew Bender Expert Practice Tip--Single Witness Is Enough to Prove a Fact: The instruction that "a single witness is enough to prove a fact" can be especially important in cases when there is a disparity between the two sides in terms of witnesses and resources. This instruction can be argued effectively in closing argument to the jury. *By Ronald Oster*

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsGeneral OverviewCivil ProcedureTrialsJury TrialsJury InstructionsGeneral

OverviewCivil ProcedureTrialsJury TrialsJury InstructionsStandard InstructionsEvidenceTestimonyCredibilityGeneral
Overview



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CHAPTER 1 California Judicial Council Pretrial Instructions

1-1 California Forms of Jury Instruction CACI 108

CACI 108 Duty to Abide by Translation Provided in Court

Some testimony will be given in [insert language other than English]. An interpreter will provide a translation for you at the time that the testimony is given. You must rely solely on the translation provided by the interpreter, even if you understand the language spoken by the witness. Do not retranslate any testimony for other jurors. If you believe the court interpreter translated testimony incorrectly, let me know immediately by writing a note and giving it to the [clerk/bailiff].

New September 2003; Revised April 2004

- It is misconduct for a juror to retranslate for other jurors testimony that has been translated by the court-appointed interpreter. (*People v. Cabrera* (1991) 230 Cal.App.3d 300, 303 [281 Cal.Rptr. 238] .)

- "It is well-settled a juror may not conduct an independent investigation into the facts of the case or gather evidence from outside sources and bring it into the jury room. It is also misconduct for a juror to inject his or her own expertise into the jury's deliberation." (*People v. Cabrera, supra*, 230 Cal.App.3d at p. 303 .)

- "If [the juror] believed the court interpreter was translating incorrectly, the proper action would have been to call the matter to the trial court's attention, not take it upon herself to provide her fellow jurors with the 'correct' translation." (*People v. Cabrera, supra*, 230 Cal.App.3d at p. 304 .)

Secondary Sources

1 *California Trial Guide, Unit 3, Other Non-Evidentiary Motions*, § 3.32 (Matthew Bender)

1A *California Trial Guide, Unit 20, Procedural Rules for Presentation of Evidence, § 20.13* (Matthew Bender)

4 *California Trial Guide, Unit 91, Jury Deliberations and Rendition of Verdict, §§ 91.10, 91.12* (Matthew Bender)

Publisher's Notes

There is no BAJI instruction on this subject.

LexisNexis Matthew Bender Expert Practice Tip--Testimony Through an Interpreter;

Translations: If your client, or an important witness, will testify through an interpreter, this is an important instruction. You may also wish to explore in jury *voir dire* whether any juror will have a problem with translations and will be willing to give such testimony the same weight as other testimony.
By Ronald Oster

LexisNexis Matthew Bender Expert Practice Tip--Choosing a Translator: With our unique diversity in the state an attorney will invariably need to rely on a translator at trial. Make sure you choose a certified translator for the language and you and your witness should meet with the translator before trial. You are gauging the appearance of the translator; remember that the jury will possibly attribute the character of the translator to your witness so you want to make sure the translator makes a favorable appearance. Further, your witness must meet with the translator to make sure there are no problems with communication between the two of them. *By Dona Cohn-Payne*

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsGeneral OverviewCivil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewCivil ProcedureTrialsJury TrialsJury InstructionsStandard InstructionsEvidenceCompetencyInterpretersEvidenceDocumentary EvidenceWritingsTranscripts & TranslationsTranslations



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CHAPTER 1 California Judicial Council Pretrial Instructions

1-1 California Forms of Jury Instruction CACI 109

CACI 109 Removal of Claims or Parties

[[*Name of plaintiff*]'s claim for [*insert claim*] is no longer an issue in this case.]

[[*Name of party*] is no longer a party to this case.]

Do not speculate as to why this [claim/person] is no longer involved in this case. You should not consider this during your deliberations.

New September 2003

This instruction may be read during trial as appropriate.

Publisher's Notes

This instruction replaces BAJI No. 1.24.

LexisNexis Matthew Bender Expert Practice Tip--Importance of CACI No. 109: This instruction could be important in those cases containing several legal theories (either by the plaintiff or by the defendant). Some jurors might be concerned if some theories are dropped, and the instruction should address that concern. *By Rex Heeseman*

LexisNexis Matthew Bender Expert Practice Tip--When Defendant Settles During Trial: In situations where one or more defendants settle during trial, any remaining defendant should request this instruction. *By Ronald Oster*



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CHAPTER 1 California Judicial Council Pretrial Instructions

1-1 California Forms of Jury Instruction CACI 110

CACI 110 Service Provider for Juror With Disability

During trial, [name of juror] will be assisted by a [insert service provider]. The [insert service provider] is not a member of the jury and is not to participate in the deliberations in any way other than as necessary to provide the service to [name of juror].

New September 2003

This instruction should be read along with other introductory instructions at the beginning of the trial if appropriate.

- *Code of Civil Procedure section 203(a)(6)* provides: "All persons are eligible and qualified to be prospective trial jurors, except the following: ... Persons who are not possessed of sufficient knowledge of the English language, provided that no person shall be deemed incompetent solely because of the loss of sight or hearing in any degree or other disability which impedes the person's ability to communicate or which impairs or interferes with the person's mobility."

- *Code of Civil Procedure section 224* provides:

- (a) If a party does not cause the removal by challenge of an individual juror who is deaf, hearing impaired, blind, visually impaired, or speech impaired and who requires auxiliary services to facilitate communication, the party shall (1) stipulate to the presence of a service provider in the jury room during jury deliberations, and (2) prepare and deliver to the court proposed jury instructions to the service provider.

(b) As used in this section, "service provider" includes, but is not limited to, a person who is a sign language interpreter, oral interpreter, deaf-blind interpreter, reader, or speech interpreter. If auxiliary services are required during the course of jury deliberations, the court shall instruct the jury and the service provider that the service provider for the juror with a disability is not to participate in the jury's deliberations in any manner except to facilitate communication between the juror with a disability and other jurors.

(c) The court shall appoint a service provider whose services are needed by a juror with a disability to facilitate communication or participation. A sign language interpreter, oral interpreter, or deaf-blind interpreter appointed pursuant to this section shall be a qualified interpreter, as defined in *subdivision (f) of Section 754 of the Evidence Code*. Service providers appointed by the court under this subdivision shall be compensated in the same manner as provided in *subdivision (i) of Section 754 of the Evidence Code*.

Secondary Sources

7 Witkin, California Procedure (4th ed. 1997) Trial, §§ 331, 340

Publisher's Notes

This instruction covers issues presented in BAJI No. 1.25.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsGeneral OverviewCivil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewCivil ProcedureTrialsJury TrialsJury InstructionsStandard Instructions



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California Forms of Jury Instruction

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CHAPTER 1 California Judicial Council Pretrial Instructions

1-1 California Forms of Jury Instruction CACI 111

CACI 111 Instruction to Alternate Jurors

As [an] alternate juror[s], you are bound by the same rules that govern the conduct of the jurors who are sitting on the panel. You will observe the same trial and should pay attention to all of my instructions just as if you were sitting on the panel. Sometimes a juror needs to be excused during a trial for illness or some other reason. If that happens, an alternate will be selected to take that juror's place.

New October 2004

If an alternate juror is substituted, see *CACI No. 5014, Substitution of Alternate Juror*.

- "Alternate jurors are members of the jury panel which tries the case. They are selected at the same time as the regular jurors. They take the same oath and are subject to the same qualifications as the regular jurors. Alternate jurors hear the same evidence and are subject to the same admonitions as the regular jurors and, unless excused by the court, are available to participate as regular jurors." (*Rivera v. Sassoon* (1995) 39 Cal.App.4th 1045, 1048 [46 Cal.Rptr.2d 144] , internal citations omitted.)

- *Code of Civil Procedure* section 234 provides:

Whenever, in the opinion of a judge of a superior court about to try a civil or criminal action or proceeding, the trial is likely to be a protracted one, or upon stipulation of the parties, the court may cause an entry to that effect to be made in the minutes of the court and thereupon, immediately after the jury is impaneled and sworn, the court may direct the calling of one or more additional jurors, in its discretion, to be known as "alternate jurors."

These alternate jurors shall be drawn from the same source, and in the same manner, and have the same qualifications, as the jurors already sworn, and shall be subject to the same examination and challenges. However, each side, or each defendant, as provided in Section 231, shall be entitled to as many peremptory challenges to the alternate jurors as there are alternate jurors called.

The alternate jurors shall be seated so as to have equal power and facilities for seeing and hearing the proceedings in the case, and shall take the same oath as the jurors already selected, and shall, unless excused by the court, attend at all times upon the trial of the cause in company with the other jurors, but shall not participate in deliberation unless ordered by the court, and for a failure to do so are liable to be punished for contempt.

They shall obey the orders of and be bound by the admonition of the court, upon each adjournment of the court; but if the regular jurors are ordered to be kept in the custody of the sheriff or marshal during the trial of the cause, the alternate jurors shall also be kept in confinement with the other jurors; and upon final submission of the case to the jury, the alternate jurors shall be kept in the custody of the sheriff or marshal who shall not suffer any communication to be made to them except by order of the court, and shall not be discharged until the original jurors are discharged, except as provided in this section.

If at any time, whether before or after the final submission of the case to the jury, a juror dies or becomes ill, or upon other good cause shown to the court is found to be unable to perform his or her duty, or if a juror requests a discharge and good cause appears therefor, the court may order the juror to be discharged and draw the name of an alternate, who shall then take his or her place in the jury box, and be subject to the same rules and regulations as though he or she has been selected as one of the original jurors.

All laws relative to fees, expenses, and mileage or transportation of jurors shall be applicable to alternate jurors, except that in civil cases the sums for fees and mileage or transportation need not be deposited until the judge directs alternate jurors to be impaneled.

Secondary Sources

27 *California Forms of Pleading and Practice*, Ch. 322, *Juries and Jury Selection*, §§ 322.44, 322.52, 322.101 (Matthew Bender)

1 *California Trial Guide*, Unit 10, *Voir Dire Examination* (Matthew Bender)

Publisher's Notes

This instruction covers issues presented in BAJI No. 0.50.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsGeneral OverviewCivil ProcedureTrialsJury TrialsJurorsGeneral OverviewCivil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewCivil ProcedureTrialsJury TrialsJury InstructionsStandard Instructions



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California Forms of Jury Instruction

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CHAPTER 1 California Judicial Council Pretrial Instructions

1-1 California Forms of Jury Instruction CACI 112

CACI 112 Questions From Jurors

If, during the trial, you have a question that you believe should be asked of a witness, you may write out the question and send it to me through my courtroom staff. I will share your question with the attorneys and decide whether it may be asked.

Do not feel disappointed if your question is not asked. Your question may not be asked for a variety of reasons. For example, the question may call for an answer that is not allowed for legal reasons. Also, you should not try to guess the reason why a question is not asked or speculate about what the answer might have been. Because the decision whether to allow the question is mine alone, do not hold it against any of the attorneys or their clients if your question is not asked.

Remember that you are not an advocate for one side or the other. Each of you is an impartial judge of the facts. Your questions should be posed in as neutral a fashion as possible. Do not discuss any question asked by any juror with any other juror until after deliberations begin.

New February 2005; Revised April 2007, April 2009

Directions for Use

The instruction may need to be modified to account for an individual judge's practice.

Sources and Authority

- *Rule 2.1033 of the California Rules of Court* provides: "A trial judge should allow jurors to submit written questions directed to witnesses. An opportunity must be given to counsel to object to such

questions out of the presence of the jury."

■ "In a proper case there may be a real benefit from allowing jurors to submit questions under proper control by the court. However, in order to permit the court to exercise its discretion and maintain control of the trial, the correct procedure is to have the juror write the questions for consideration by the court and counsel prior to their submission to the witness." (*People v. McAlister* (1985) 167 Cal.App.3d 633, 644 [213 Cal.Rptr. 271] .)

■ "[T]he judge has discretion to ask questions submitted by jurors or to pass those questions on and leave to the discretion of counsel whether to ask the questions." (*People v. Cummings* (1993) 4 Cal.4th 1233, 1305 [18 Cal.Rptr.2d 796, 850 P.2d 1] .)

■ "The appellant urges that when jurymen ask improper questions the defendant is placed in the delicate dilemma of either allowing such question to go in without objection or of offending the jurors by making the objection and the appellant insists that the court of its own motion should check the putting of such improper questions by the jurymen, and thus relieve the party injuriously affected thereby from the odium which might result from making that objection thereto. There is no force in this contention. Objections to questions, whether asked by a juror or by opposing counsel, are presented to the court, and its ruling thereon could not reasonably affect the rights or standing of the party making the objection before the jury in the one case more than in the other." (*Maris v. H. Crummey, Inc.* (1921) 55 Cal.App. 573, 578-579 [204 P. 259] .)

Secondary Sources

3 Witkin, California Evidence (4th ed. 2000) Presentation at Trial, § 85

4 *California Trial Guide, Unit 91, Jury Deliberations and Rendition of Verdict*, §§ 91.01 -91.03 (Matthew Bender)

Publisher's Notes

This instruction covers issues presented in BAJI No. 15.53.1.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsGeneral OverviewCivil ProcedureTrialsJury TrialsJurorsGeneral OverviewCivil ProcedureTrialsJury TrialsJury DeliberationsCivil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewCivil ProcedureTrialsJury TrialsJury InstructionsStandard Instructions



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California Forms of Jury Instruction

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CHAPTER 1 California Judicial Council Pretrial Instructions

1-1 California Forms of Jury Instruction CACI 113

CACI 113 Bias

Each one of us has biases about or certain perceptions or stereotypes of other people. We may be aware of some of our biases, though we may not share them with others. We may not be fully aware of some of our other biases.

Our biases often affect how we act, favorably or unfavorably, toward someone. Bias can affect our thoughts, how we remember, what we see and hear, whom we believe or disbelieve, and how we make important decisions.

As jurors you are being asked to make very important decisions in this case. You must not let bias, prejudice, or public opinion influence your decision.

Your verdict must be based solely on the evidence presented. You must carefully evaluate the evidence and resist any urge to reach a verdict that is influenced by bias for or against any party or witness.

New June 2010

The committee wishes to express its thanks to Judge Mark W. Bennett of the United States District Court for the Northern District of Iowa, for his assistance in the drafting of this instruction.

Sources and Authority

- Standard 10.20(a)(2) of the California Standards of Judicial Administration provides: "In all courtroom proceedings, refrain from engaging in conduct and prohibit others from engaging in conduct that exhibits bias, including but not limited to bias based on disability, gender, race, religion, ethnicity, and sexual orientation, whether that bias is directed toward counsel, court personnel, witnesses, parties, jurors, or any other participants."

■ Canon 3(b)(5) of the California Code of Judicial Ethics provides: "A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, engage in speech, gestures, or other conduct that would reasonably be perceived as (1) bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status, or (2) sexual harassment." Canon 3(b)(6) requires the judge to impose these standards on attorneys.

Secondary Sources

Witkin, California Procedure (5th ed. 2008) Trial, § 132

1 *California Trial Guide, Unit 10, Voir Dire Examination*, §§ 10.03[1], 10.21[2], 10.50, 10.80, 10.100 (Matthew Bender)

1 *Matthew Bender Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 6, Jury Selection*, § 6.21

Publisher's Notes

There is no BAJI instruction on this subject.



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CHAPTER 1 California Judicial Council Pretrial Instructions

1-1 California Forms of Jury Instruction CACI 114-CACI 199

Reserved for Future Use

CACI 114Reserved for Future Use



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CHAPTER 1A Matthew Bender Introduction to California Jury Instructions

1-1A California Forms of Jury Instruction 1A.syn

§ 1A.syn Synopsis to Chapter 1A: Matthew Bender Introduction to California Jury Instructions

MB 100A.01 How to Use California Forms of Jury Instruction (Matthew Bender)

- [1] Introduction
- [2] Organization of Set
- [3] Identifying Issues
- [4] Citing to Judicial Council and Matthew Bender Specific Instructions

MB 100A.02 Judicial Council of California Civil Jury Instructions--CACI

- [1] Background
- [2] Source and Coverage of Judicial Council Civil Jury Instructions
- [3] Use of Judicial Council Instructions Is Strongly Encouraged
- [4] Use of Other Forms in Lieu of Judicial Council Instructions
- [5] Guide for Using Judicial Council of California Civil Jury Instructions

MB 100A.03 Making Instructions Comprehensible

MB 100A.04 Drafting Suggestions

- [1] Clarity of Language

1-1A California Forms of Jury Instruction 1A.syn

[a] Use Plain English

[b] Legalese

[c] Nominalizations

[d] Double Negatives

[e] Passives

[f] Word Lists

[g] Organization

[2] Gender-Neutral Language

[3] Length and Detail

[4] Statutory Language

[5] Language From Judicial Decisions

[6] Using Other Sources

[7] When Instructions Should Be Read to Jury

[a] Instruction Before Evidence

[b] Instruction During Trial

[c] Instruction Before Argument

[8] Special Verdicts and Interrogatories

[9] Process Instructions

[a] Relationship to Special Verdicts and Interrogatories

[b] Court's Duty to Instruct on Law

[c] Jury's Duty to Find Ultimate Facts

MB 100A.05 Preparation of Jury Instructions

[1] Requirements of Statute and Rules of Court

[2] Form of Jury Instructions Cover Page

[3] Use of Document Assembly Program

MB 100A.06 Submission of Proposed Instructions

[1] Before Trial

[2] Before Argument

MB 100A.07 Giving Jurors Copy of Instructions

MB 100A.08 Need to Request Complete Instructions

MB 100A.09 Right to Proper Instructions

MB 100A.10 Formula Instructions

MB 100A.11 Court's Disposition of Proposed Instructions

[1] Power to Refuse Instructions Generally

[2] Demand for Clarification

MB 100A.12 Automatic Objection to Instructions

MB 100A.13 When Giving or Failing to Give Instructions Is Appealable

[1] Requirement of Prejudicial Effect

[2] Instructions Considered in Their Totality

[3] Determination of Prejudice

[4] Need for Objection or Request



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CHAPTER 1A Matthew Bender Introduction to California Jury Instructions

1-1A California Forms of Jury Instruction Scope

Scope

SCOPE

This chapter presents an introduction to the drafting and use of jury instructions in California. The chapter covers the following topics:

- A "how to" guide for using California Forms of Jury Instruction (Matthew Bender) [*see MB 100A.01*].
- Use of the Judicial Council of California Civil Jury Instructions (CACI) [*see MB 100A.02*].
- Methods for making instructions more understandable to juries [*see MB 100A.03*] and suggestions for drafting jury instructions [*see MB 100A.04*].
- The procedures for (1) preparing jury instructions [*see MB 100A.05*], including the use of the HotDocs(R) document assembly program [*see MB 100A.05[3]*]; (2) submitting instructions to the court and presenting them to the jury [*see MB 100A.06*]; and (3) the actual providing to jurors of a copy of the instructions [*see MB 100A.07*].
- The need to request complete instructions [*see MB 100A.08*] and the right of each party to have the jury instructed on all applicable theories of the case [*see MB 100A.09*].
- The use of "formula instructions" [*see MB 100A.10*].
- The court's disposition of proposed jury instructions, including discussion of its power to refuse instructions and a party's right to request further clarification [*see MB 100A.11*].
- Objecting to instructions [*see MB 100A.12*] and when the giving or failure to give instructions is appealable [*see MB 100A.13*].

For the California Judicial Council pretrial jury instructions, see Chapter 1. Judicial Council evidence instructions are in Chapter 2, and concluding instructions are in Chapter 50.



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CHAPTER 1A Matthew Bender Introduction to California Jury Instructions

1-1A California Forms of Jury Instruction MB 100A.01

MB 100A.01 How to Use California Forms of Jury Instruction (Matthew Bender)

[1] Introduction

The purpose of California Forms of Jury Instruction (Matthew Bender), including the Judicial Council of California Civil Jury Instructions ("CACI"), is to provide the most comprehensive jury instructions for use in California litigation. In 2003, the California Judicial Council released a comprehensive set of civil jury instructions--CACI (pronounced "Casey"). These instructions cover many areas of law and are approved by the Judicial Council as the "official instructions for use" in California [*Cal. Rules of Ct., Rule 2.1050(a)*; see *MB 100A.02[2]*]. Their use is "strongly encouraged" [*Cal. Rules of Ct., Rule 2.1050(e)*; see *MB 100A.02[3]*]. The CACI instructions are set out throughout this publication. The Matthew Bender ("MB") specific instructions in this publication are intended to supplement CACI by covering additional fact situations as well as additional topics.

The procedure by which jury instructions are drafted, submitted, modified or rejected, and finally given, is a joint effort among the lawyers and the judge, with the judge having the last word. Each of the litigants wants instructions that frame the issues most favorably to his or her side without, of course, creating reversible error. In the heat of battle, the lawyer, particularly the plaintiff's lawyer, may concentrate so heavily on winning the jury verdict that the prospect of losing on appeal goes unattended. The parties often request instructions that are quite one-sided, with the result that the lawyers and the judge spend hours in conference settling their differences. The instructions in California Forms of Jury Instruction (Matthew Bender) are intended to cut through that process. The aim, for both the Matthew Bender instructions as well as the California Judicial Council instructions, has been to create neutral instructions that simply and correctly state the applicable issues of fact and principles of law.

For legal background on using and drafting jury instructions, the court's role in providing and approving instructions, and other issues affecting the preparation and review of jury instructions, see *California Forms of Pleading and Practice*, Ch. 326, *Jury Instructions* (Matthew Bender).

LexisNexis Matthew Bender Expert Practice Tip--Keep Jury Instructions Basic: Judges are extremely knowledgeable about jury instructions and unless you have a unique case, the jury instructions should be basic. In addition, the judge will not allow instructions to favor one side over the other. An

attorney's time is better spent getting the verdict form that best helps her or his case. *By Dona Cohn-Payne*

[2] Organization of Set

The California Judicial Council has drafted over 40 "series" of jury instructions. These instructions--CACI--cover a wide range of topics. Many of the series include their own verdict forms. The chapters in this publication are organized so that the CACI instructions appear first and are followed by additional Matthew Bender ("MB") instructions that enhance CACI or cover areas of law that are not addressed by CACI. The organization is based on the legal topic. Thus, for example, the CACI instructions on general contracts law [*see* Ch. 3, *California Judicial Council Contracts Instructions*, CACI Nos. 300- 374 (e.g., formation, interpretation, defenses, damages, and common counts)] are followed by the Matthew Bender specific contract instructions [*see* Chs. 3A- 3I]. The Matthew Bender instructions that do not have corresponding Judicial Council instructions are set forth last [*see* Chs. 70A et seq.]. These include instructions on such topics as trade libel, debt collection torts, unlawful detainer, and real property sales.

As the Judicial Council and Matthew Bender draft new jury instructions over the years, these instructions will be slotted into this general organization.

The Matthew Bender specific instructions include general instructions that can be used in any case regardless of the subject matter, and several chapters devoted to instructions on the substantive law of contracts [*see* Chs. 3A- 3G]. Matthew Bender substantive law instructions on specialized fields of contract law are also included [*see, e.g.,* Chs. 3H (commercial code sales contracts), 3I (construction contracts)]. Because general contract principles may apply in many of these situations, counsel searching for an instruction on a particular kind of contract should also consult the Judicial Council's general contracts series in Ch. 3 as well as the general contract instructions in Chs. 3A-3G when drafting instructions covering issues peculiar to specific types of contracts.

All Judicial Council and Matthew Bender instructions are followed by authorities and a discussion of how the instruction should be used or modified, as well as an analysis of the legal basis for the instruction.

LexisNexis Matthew Bender Expert Practice Tip--Organization of Jury Instructions in This Publication: It is extremely helpful to follow the CACI chapters, which set forth the California Judicial Council's jury instructions, with chapters immediately following that propose additional special instructions. *By Joseph Devine*

[3] Identifying Issues

It is a truism that the jury should be instructed only on subjects that are actually at issue in the case. "The task of a jury of laymen to comprehend and apply pertinent instructions is onerous enough at best; it should not be unnecessarily aggravated by loading on them a congeries of wholly inapplicable legal propositions. ... [I]t is the duty of the trial judge to scrupulously delete them from the charge finally given" [*Mantonya v. Bratlie* (1948) 33 Cal.2d 120, 124-125, 199 P.2d 677]. Accordingly, the key instructions in any case are the ones that identify the issues that the jury must decide. In the CACI and MB chapters in this publication, these instructions are often identified as the "Essential Factual Elements" or as the "Burden of Proof" instructions. They will be different in every case. Separate instructions defining the standard of proof generally (e.g., "more likely true than not true") are in the CACI evidence instructions [*see* Ch. 2, *California Judicial Council Evidence Instructions*].

LexisNexis Matthew Bender Expert Practice Tip--Identifying Issues: It is always beneficial to identify the issues in your opening and closing statements. Using the same language as the jury instruction when delivering your arguments allows the jury to hear the issues several times before they actually go in to deliberate. Identification of issues combined with the evidence presented that you believe support your case should be part of the jury instructions. *By Dona Cohn-Payne*

[4] Citing to Judicial Council and Matthew Bender Specific Instructions

Cite to the Judicial Council of California Civil Jury Instructions as follows: "CACI No. _____."
(Pronounced "Casey")

Cite to the CACI verdict forms as follows: "CACI No. VF-_____."

Cite to the Matthew Bender jury instructions as follows: "(Matthew Bender) Cal. Forms Jury Inst. MB
_____."

If an instruction is modified or relied on in part, "with modifications" should appear following the citation to the instruction.

LexisNexis Matthew Bender Expert Practice Tip--Providing Legal Authority for Instructions:

You must cite to any appropriate law (e.g., cases or statutes) if you use the Matthew Bender jury instructions or if you modify the CACI instructions. No citation is required for CACI instructions that are not modified [*Cal. Rules of Ct., Rule 2.1055(d)*]. You should always provide legal authority for a jury instruction that was self-crafted. *By Dona Cohn-Payne*

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsGeneral OverviewCivil ProcedureTrialsJury TrialsJury InstructionsGeneral
OverviewCivil ProcedureTrialsJury TrialsJury InstructionsStandard InstructionsCivil ProcedureTrialsJury TrialsJury
InstructionsSupplemental Instructions



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CHAPTER 1A Matthew Bender Introduction to California Jury Instructions

1-1A California Forms of Jury Instruction MB 100A.02

MB 100A.02 Judicial Council of California Civil Jury Instructions--CACI

[1] Background

In 1995, the California Judicial Council established a Blue Ribbon Commission on Jury System Improvement. The Commission was to "conduct a comprehensive evaluation of the jury system and [make] timely recommendations for improvement" [Final Report of the Blue Ribbon Commission on Jury System Improvement (Judicial Council of California, Administrative Office of the Courts 5/6/1996) p.1]. The Commission subsequently recommended to the Chief Justice and the Judicial Council to create a Task Force on Jury Instructions for the purpose of drafting more understandable instructions. The Judicial Council acted on this recommendation and created the Task Force on Jury Instructions Civil Subcommittee (a criminal subcommittee was also formed regarding preparation of criminal instructions). The Chief Justice spoke of the following two principal goals underlying the creation of more intelligible jury instructions [Final Report of the Blue Ribbon Commission on Jury System Improvement (Judicial Council of California, Administrative Office of the Courts 5/6/1996) p.1, n. 1]:

- "[M]aking juror's experiences more meaningful and rewarding"; and
- "[P]roviding clear instructions that will improve the quality of justice by insuring that jurors understand and apply the law correctly in their deliberations."

[2] Source and Coverage of Judicial Council Civil Jury Instructions

In 2003, the Judicial Council released its set of civil jury instructions, the Judicial Council of California Civil Jury Instructions ("CACI"--pronounced "Casey"). The instructions cover many areas of law, such as negligence, intentional torts, damages, insurance, employment relations, civil rights, unfair practices, and eminent domain. In 2005, the Judicial Council also released its set of criminal jury instructions, the Judicial Council of California Criminal Jury Instructions--"CALCRIM." *Cal. Rules of Ct., Rule 2.1050(a)*, provides that "[t]he California jury instructions approved by the Judicial Council are the official instructions for use in the State of California. The goal of these instructions is to improve the quality of jury decision making by providing standardized instructions that accurately state the law in a way that is understandable to the average juror." LexisNexis Matthew Bender is the official publisher of the Judicial Council

of California civil and criminal jury instructions.

LexisNexis Matthew Bender Expert Practice Tip--Purpose of JC Instructions: Under *Cal. Rules of Ct., Rule 2.1050(a)*, the Judicial Council of California Civil Jury Instructions are the "official instructions for use" in California. The purpose of these jury instructions is to improve the quality of jury decision-making by stating the instructions so that an average juror can easily understand them. To obtain this goal, there are common characteristics of the jury instructions. For instance, the names of the parties are used rather than "plaintiff" or "defendant" and technical legal terms are replaced by common definitions. These are just two of the common characteristics. Others will be noted in the individual jury instructions in the appropriate chapter. *By Dona Cohn-Payne*

[3] Use of Judicial Council Instructions Is Strongly Encouraged

Cal. Rules of Ct., Rule 2.1050(e), provides as follows:

Use of the Judicial Council instructions is strongly encouraged. If the latest edition of the jury instructions approved by the Judicial Council contains an instruction applicable to a case and the trial judge determines that the jury should be instructed on the subject, it is recommended that the judge use the Judicial Council instruction unless he or she finds that a different instruction would more accurately state the law and be understood by jurors. Whenever the latest edition of the Judicial Council jury instructions does not contain an instruction on a subject on which the trial judge determines that the jury should be instructed, or when a Judicial Council instruction cannot be modified to submit the issue properly, the instruction given on that subject should be accurate, brief, understandable, impartial, and free from argument.

Thus, on the adoption of former *Cal. Rules of Ct., Rule 855* on September 1, 2003, now *Cal. Rules of Ct., Rule 2.1050*, the prior rule governing the use of "California Jury Instructions--Civil (BAJI)" was revised to delete references to BAJI [see former *Cal. Rules of Ct., Appendix, Div. 1, § 5*].

LexisNexis Matthew Bender Expert Practice Tip--Using CACI: Experienced trial lawyers and judges have become very familiar with BAJI over many years. It will take some time before they will have the experience to be comfortable using CACI. There are more blanks to fill in and brackets to remove in the CACI instructions. Perhaps over time CACI will become easier for the lawyers and judges to use, if they can customize the instructions so that less alterations will be required for each case [see *MB 100A.05[3]* regarding use of the LexisNexis automated document assembly program]. *By Joseph Devine*

[4] Use of Other Forms in Lieu of Judicial Council Instructions

Generally, the Matthew Bender specific jury instructions in this publication cover subjects that are not covered by the California Judicial Council's civil jury instructions. Many of the Matthew Bender instructions enhance the Judicial Council instructions by including additional language on related issues. If instructions properly state the law and are "accurate, brief, understandable, impartial, and free from argument," the courts should not hesitate to use them [see *Cal. Rules of Ct., Rule 2.1050(e)*].

[5] Guide for Using Judicial Council of California Civil Jury Instructions n*

Ease of understanding by jurors, without sacrificing accuracy, is the primary goal of these Judicial Council instructions. A secondary goal is ease of use by lawyers. This guide provides an introduction to the instructions, explaining conventions and features that will assist in the use of both the loose-leaf and electronic editions.

Jury Instructions as a Statement of the Law: While jury instructions are not a primary source of the law, they are a statement or compendium of the law, a secondary source. That the instructions are in plain English does not change

their status as an accurate statement of the law.

Instructions Approved by Rule of Court: Rule 2.1050 of the California Rules of Court provides: "The California jury instructions approved by the Judicial Council are the official instructions for use in the state of California ... The Judicial Council endorses these instructions for use and makes every effort to ensure that they accurately state existing law ... Use of the Judicial Council instructions is strongly encouraged."

Using the Instructions

Directions for Use: The instructions contain directions for use. The directions alert the user to special circumstances involving the instruction and may include references to other instructions that should or should not be used. In some cases the directions include suggestions for modifications or for additional instructions that may be required. Prior to using any instruction, reference should be made to the directions for use.

Sources and Authorities: Each instruction has an analysis of applicable law. References are given to a variety of legal publishers.

Instructions for the Common Case: These instructions were drafted for the common type of case and can be used as drafted in most cases. When unique or complex circumstances prevail, users will have to adapt the instructions to the particular case.

Multiple Parties: Because jurors more easily understand instructions that refer to parties by name rather than by legal terms such as "plaintiff" and "defendant," the instructions provide for insertion of names. For simplicity of presentation, the instructions use single party plaintiffs and defendants as examples. If a case involves multiple parties or cross-complaints and counterclaims, the user will want to modify the instructions. Rather than naming a number of parties in each place calling for names, the user may consider putting the names of all applicable parties in the beginning and thereafter identifying them as "plaintiffs," "defendants," "cross-complaints," etc.

Related California Jury Instructions, Civil, Book of Approved Jury Instructions (BAJI): This publication includes, at the end of the instructions, tables of related BAJI instructions. However, the Judicial Council instructions include topics not covered by BAJI, such as antitrust, federal civil rights, lemon law, trespass and conversion and the California Family Rights Act.

Reference to "Harm" in Place of "Damage" or "Injury": In many of the instructions, the word harm is used in place of damage, injury or other similar words. The drafters of the instructions felt that this word was clearer to jurors.

Substantial Factor: The instructions frequently use the term "substantial factor" to state the element of causation, rather than referring to "cause" and then defining that term in a separate instruction as a "substantial factor." An instruction that defines "substantial factor" is located in the Negligence series. The use of the instruction is not intended to be limited to cases involving negligence.

Listing of Elements and Factors: For ease of understanding, elements of causes of action or affirmative defenses are listed by numbers (*e.g.*, 1, 2, 3) and factors to be considered by jurors in their deliberations are listed by letters (*e.g.*, a, b, c).

Burdens of Proof: The applicable burden of proof is included within each instruction explaining a cause of action or affirmative defense. The drafters felt that placing the burden of proof in that position provided a clearer explanation for the jurors.

Affirmative Defenses: For ease of understanding by users, all instructions explaining affirmative defenses use the term

"affirmative defense" in the title.

Titles and Definitions

Titles of Instructions: Titles to instructions are directed to lawyers and sometimes use words and phrases not used in the instructions themselves. Since the title is not a part of the instruction, the titles may be removed prior to presentation to the jury.

Definitions of Legal Terms: The instructions avoid separate definitions of legal terms whenever possible. Instead, definitions have been incorporated into the language of the instructions. In some instances (*e.g.*, specific statutory definitions) it was not possible to avoid providing a separate definition.

Evidence

Circumstantial Evidence: The words "indirect evidence" have been substituted for the expression "circumstantial evidence." In response to public comment on the subject, however, the drafters added a sentence indicating that indirect evidence is sometimes known as circumstantial evidence.

Preponderance of the Evidence: To simplify the instructions' language, the drafters avoided the phrase preponderance of the evidence and the verb preponderate. The instructions substitute in place of that phrase reference to evidence that is "more likely to be true than not true."

Using Verdict Forms

Verdict Forms are Models: A large selection of special verdict forms accompany the instructions. Users of the forms must bear in mind that these are models only. Rarely can they be used without modifications to fit the circumstances of a particular case.

Purpose of Verdict Forms: The special verdict forms generally track the elements of the applicable cause of action. Their purpose is to obtain the jury's finding on the elements defined in the instructions. "The special verdict must present the conclusions of fact as established by the evidence, and not the evidence to prove them; and those conclusions of fact must be so presented as that nothing shall remain to the court but to draw from them conclusions of law." (*Code of Civil Procedure* section 624; see *Saxena v. Goffney* (2008) 159 Cal.App.4th 316, 325-326, 71 Cal.Rptr.3d 469] .) Modifications made to the instructions in particular cases ordinarily will necessitate corresponding modifications to the special verdict form.

Multiple Parties: The verdict forms have been written to address one plaintiff against one defendant. In nearly all cases involving multiple parties, the issues and the evidence will be such that the jury could reach different results for different parties. The liability of each defendant should always be evaluated individually, and the damages to be awarded to each plaintiff must usually be determined separately. Therefore, separate special verdicts should usually be prepared for each plaintiff with regard to each defendant. In some cases, the facts may be sufficiently simple to include multiple parties in the same verdict form, but if this is done, the transitional language from one question to another must be modified to account for all the different possibilities of yes and no answers for the various parties.

Multiple Causes of Action: The verdict forms are self-contained for a particular cause of action. When multiple causes of action are being submitted to the jury, it may be better to combine the verdict forms and eliminate duplication.

Modifications as Required by Circumstances: The verdict forms must be modified as required by the circumstances. It is necessary to determine whether any lesser or greater specificity is appropriate. The question in special verdict forms for plaintiff's damages provides an illustration. Consistent with the jury instructions, the question asks the jury to

determine separately the amounts of past and future economic loss, and of past and future non-economic loss. These four choices are included in brackets. In some cases it may be unnecessary to distinguish between past and future losses. In others there may be no claim for either economic or non-economic damages. In some cases the court may wish to eliminate the terms "economic loss" and "non-economic loss" from both the instructions and the verdict form. Without defining those terms, the court may prefer simply to ask the jury to determine the appropriate amounts for the various components of such losses without categorizing those losses for the jury as economic or non-economic. The court can fix liability as joint or several under *Civil Code* sections 1431 and 1431.2, based on the verdicts. A more itemized breakdown of damages may be appropriate if the court is concerned about the sufficiency of the evidence supporting a particular component of damages. Appropriate special verdicts are preferred when periodic payment schedules may be required by *Code of Civil Procedure* section 667.7. (*Gorman v. Leftwich* (1990) 218 Cal.App.3d 141, 148-150, 266 Cal.Rptr. 671 .)

LexisNexis Matthew Bender Expert Practice Tip--Using Verdict Forms: A draft of your verdict form should be prepared well in advance of trial and should be modified during the course of the trial. Many times opposing counsel is so caught up in the trial that they do not timely prepare a verdict form and the attorney who has one ready for the judge has a good chance of his or her verdict form being used by the jury. *By Dona Cohn-Payne*

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsGeneral OverviewCivil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewCivil ProcedureTrialsJury TrialsJury InstructionsStandard Instructions

FOOTNOTES:

(n1)Footnote *. * By: Hon. Barton C. Gaut, Associate Justice

Hon. Stuart R. Pollak, Associate Justice

Hon. James D. Ward, Associate Justice Chair, Civil Subcommittee of the Judicial Council Task Force on Jury Instructions



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California Forms of Jury Instruction

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CHAPTER 1A Matthew Bender Introduction to California Jury Instructions

1-1A California Forms of Jury Instruction MB 100A.03

MB 100A.03 Making Instructions Comprehensible

The conventional approach to instructing juries has come under increasing criticism. Traditionally, the jury was not instructed until the very end of the case, when the judge would read instructions "... at such length and with such a superfluity of legal words and phrases as to make it impossible for them to separate the wheat from the chaff" [Mr. Justice Schinn, concurring in *Werkman v. Howard Zink Corp.* (1950) 97 Cal.App.2d 418, 428, 218 P.2d 43]. The main function of that exercise was to make a record for appeal.

Several general principles should be reviewed:

- There is general agreement that the traditional method can and should be improved [see Charrow & Charrow, *Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions*, 79 Colum. L. Rev. 1306 (1979); Tiersma, *The Rocky Road to Legal Reform: Improving the Language of Jury Instructions*, 66 Brook. L. Rev. 1081 (2001); Elwork, Sales & Alfini, *Making Jury Instructions Understandable*, Contemporary Litigation Series, Charlottesville, Va. (The Michie Company, 1983); McBride, *The Art of Instructing the Jury*, Cincinnati (The W. H. Anderson Co., 1969); Schwarzer, *Communicating With Juries: Problems and Remedies*, 69 Calif. L. Rev. 731 (1981); Forston, *Sense and Non-Sense: Jury Trial Communication*, B.Y.U. Law Rev. 601 (1975); Farrell, *Communication in the Courtroom: Jury Instructions*, 85 W. Va. L. Rev. 5 (1982); Avakian, *Let's Learn to Instruct the Jury*, The Judge's Journal, The American Bar Association (1979); Goebel, *Defects in Jury Instructions: Can They Be Eliminated?* 54 Calif. State B.J. 290 (1979); *Memory, Magic, and Myth: The Timing of Jury Instructions*, 59 Ore. L. Rev. 451 (1981); Cunningham, *Instructing Juries*, 32 Calif. State B.J. 127 (1957); Cunningham, *Should Instructions Go Into the Jury Room?* 33 Calif. State B.J. 278 (1958)].
- It is possible to make legal principles understandable to lay juries by employing known linguistic techniques--or at least greatly to improve comprehension levels [Charrow & Charrow, *Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions*, 79 Colum. L. Rev. 1306 (1979); Elwork, Sales and Alfini, *Making Jury Instructions Understandable*, Contemporary Litigation Series, Charlottesville, Va. (The Michie Company, 1983); McBride, *The Art of Instructing the Jury*,

Cincinnati (The W. H. Anderson Co., 1969); Forston, *Sense and Non-Sense: Jury Trial Communication*, B.Y.U. Law Rev. 601 (1975)]. Both the California Judicial Council and Matthew Bender jury instructions in this set are designed to be understood by lay juries.

- Juror comprehension is significantly improved if certain instructions are given at the beginning, and others at intervals during the trial rather than all at one time at the end [Elwork, Sales and Alfini, *Making Jury Instructions Understandable*, Contemporary Litigation Series, pp. 21-24, Charlottesville, Va. (The Michie Company, 1983); Forston, *Sense and Non-Sense: Jury Trial Communication*, B.Y.U. Law Rev. 601, 620-623 (1975); Schwarzer, *Communicating With Juries: Problems and Remedies*, 69 *Calif. L. Rev.* 731, 755 (1981); Avakian, *Let's Learn to Instruct the Jury*, The Judge's Journal, The American Bar Association (1979); Cunningham, *Should Instructions Go Into the Jury Room?* 33 *State B.J.* 278, 286 (1958); Goebel, *Defects in Jury Instructions: Can They Be Eliminated?* 54 *Cal. State B.J.* 290 (1979)].

- Juror comprehension is also improved when, in addition to being read aloud, the instructions are given to the jurors in written form for their use during deliberation [Forston, *Sense and Non-Sense: Jury Trial Communication*, B.Y.U. Law Rev. 601, 619-620 (1975); Elwork, Sales and Alfini, *Making Jury Instructions Understandable*, Contemporary Litigation Series, p. 18, Charlottesville, Va. (The Michie Company, 1983); Schwarzer, *Communicating With Juries: Problems and Remedies*, 69 *Cal. L. Rev.* 731, 756 (1981); Cunningham, *Should Instructions Go Into the Jury Room?* 33 *State B.J.* 278 (1958); *The Jury Instruction Process--Apathy or Aggressive Reform?* 49 *Marq. L. Rev.* 137, 144 (1965)]. A 1986 amendment to *Code Civ. Proc.* § 612.5 requires the judge to (1) advise the jury that a copy of written instructions is available for its use during deliberations; and (2) supply a copy of these instructions to the jury on its request. A written copy of oral instructions is still available only in the court's discretion [*Code Civ. Proc.* § 612.5; see *CACI No. 5000*, "Duties of the Judge and Jury"]].

- The use of special verdicts, interrogatories, and so-called "process" instructions [see *MB 100A.04[9]*] may also be desirable in particular cases [Schwarzer, *Communicating With Juries: Problems and Remedies*, 69 *Calif. L. Rev.* 731, 757 (1981); Thornburg, *The Power and the Process: Instructions and the Civil Jury*, 66 *Fordham L. Rev.* 1837 (1998); Farrell, *Communication in the Courtroom: Jury Instructions*, 85 *W. Va. L. Rev.* 5, 13-14, 17-20 (1981)]. Most of the Judicial Council's CACI series of instructions include special verdict forms.

Each of the above suggested areas of improvement and their roles in using this set are discussed in the remaining sections of this chapter.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsGeneral OverviewCivil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewCivil ProcedureTrialsJury TrialsJury InstructionsRequests for InstructionsCivil ProcedureTrialsJury TrialsJury InstructionsStandard Instructions



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California Forms of Jury Instruction

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CHAPTER 1A Matthew Bender Introduction to California Jury Instructions

1-1A California Forms of Jury Instruction MB 100A.04

MB 100A.04 Drafting Suggestions

LexisNexis Matthew Bender Expert Practice Tip--Importance of Jury Instructions: The importance of jury instructions that accurately state the law cannot be underestimated. Any instruction to a jury that misstates the law, or is not understood, can result in a miscarriage of justice. Improper instructions have caused defense verdicts when liability and damages have been proven. They have also caused excessive damage awards. *By Joseph Devine*

[1] Clarity of Language

[a] Use Plain English

Obviously, if jury instructions are to be understood by most jurors they should be written in plain English [*see Hildebrand v. Los Angeles Junction Ry. Co. (1960) 53 Cal.2d 826, 831, 3 Cal.Rptr. 313, 350 P.2d 65*, which states that "Instructions should be clear and simply stated ... to avoid misleading the jury"; *see also* Judicial Council of California Civil Jury Instructions CACI, "Preface" and MB 100A.02[5], "Guide for Using Judicial Council of California Civil Jury Instructions"]. Lawyers and judges are notorious for using a language foreign to almost everyone else. We say "prior to" and "subsequent to" instead of "before" and "after"; we "proffer" evidence and "execute" documents; we write about the "hereinabove" and the "hereinafter," not to mention the "said" and the "aforesaid." It is bad enough that this language exists in our statutes, rules, and legal documents, but it is unpardonable that we use this language in attempting to communicate with jurors.

It has been demonstrated in psycholinguistic studies that the comprehensibility of standard jury instructions can be significantly improved by rewriting to simplify and clarify them in ways that do not detract from their legal correctness. Several such studies have been described in the literature [*see MB 100A.03*]. These empirical studies uniformly show that the jurors' level of understanding of the standard instructions in use in most jurisdictions is shockingly low. This includes those instructions found in California Jury Instructions--Civil--Book of Approved Jury Instructions (referred to below as "BAJI"), which seems to have been the model for many others. Performance scores of below 50 percent were common. When the instructions were rewritten to "plain English," the scores improved [*see Charrow & Charrow, Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions, 79 Colum. L. Rev. 1306 (1979)*]. Note: The article refers to BAJI (6th ed. 1977), which has since been replaced by subsequent editions].

According to the psycholinguists, there is no set of drafting rules that will guarantee success. One must write, test the results empirically, rewrite, and test the results again. Thus, extensive additional empirical studies will be needed to achieve maximum comprehensibility of jury instructions, experimentation that is beyond the resources of any one jurisdiction or drafting committee [see Elwork, Sales, and Alfini, *Making Jury Instructions Understandable*, Contemporary Litigation Series, pp. 75-78, Charlottesville, Va. (The Michie Company, 1983)].

In drafting CACI, the California Judicial Council followed a set of general drafting principles and guidelines in an attempt to make the instructions as clear and as comprehensible as possible. It applied the following specific techniques, which the Judicial Council outlined in its "Drafting Policies of Task Force on Jury Instructions Civil Subcommittee":

- Avoiding the use of nominalizations [see MB 100A.04[1][c]].
- Using "modal" verbs (must, should, may) to clarify the jury's task.
- Avoiding redundancy or unnecessary words.
- Using short sentences.
- Keeping the subject close to the verb and moving interrupting phrases to the beginning or end of the sentence.
- Avoiding the omission of relative pronouns and auxiliary verbs.
- Avoiding the use of double negatives [see MB 100A.04[1][d]].
- Being concrete rather than abstract.
- Avoiding instructions to the jurors about things they do not need to know.
- Adopting a structure that is logical and easy to follow.

LexisNexis Matthew Bender Expert Practice Tip--Task Force on Jury Instructions: There have been numerous revisions to BAJI since they were first published in 1938. The California Judicial Council's Task Force on Jury Instructions was commissioned to entirely rewrite the civil instructions to make them more intelligible to a jury. It was long overdue, and, overall, the Task Force has done an excellent and commendable job. The comprehensive project was a noble effort. Certainly it involved discussion, debate, disagreement, and compromise. No doubt, there was a political element to the process. The advocate attorney proposing instructions to the court obviously prefers instructions most beneficial to his or her client's position. Although the Task Force has done an admirable job, the element of politics remains evident.

Of course, no studies are yet available to determine the comprehension by juries of the CACI instructions. Undoubtably, there will be revisions to some of these instructions. However, a great effort has been made and, hopefully, the revisions will be few. Once the lawyers and courts become comfortable and find the instructions easy to use, the jurors will find them easy to understand. *By Joseph Devine*

[b] Legalese

Technical words and legal terms should be avoided whenever possible. Examples are "credibility," "deem," "stipulate," and "proximate." If some of these words must be used, they should be clearly defined for the jury.

LexisNexis Matthew Bender Expert Practice Tip--CACI Improves Upon BAJI: The language in the CACI instructions is a vast improvement over the much criticized "legalese" contained in BAJI. The burden to prove something "more likely to be true than not true" [CACI No. 200] is less confusing than "preponderance of the evidence" [BAJI No. 2.60]. The Task Force should be commended for replacing the phrase "Failure of recollection is common. Innocent misrecollection is not uncommon" [BAJI No. 2.21]. The concept is certainly easier to understand when stated as follows: "People often forget things or make mistakes in what they remember" [CACI No. 107; *see also* MB 100A.04[1][d]]. By Joseph Devine

[c] Nominalizations

Nouns constructed from verbs (*e.g.*, "the doing of" and "the making of the stipulation") create an abstraction and should be used as little as possible.

[d] Double Negatives

Multiple negatives impede comprehension. For example, "[i]nnocent misrecollection is not uncommon" (BAJI No. 2.21) is difficult to follow and could be translated to "people often forget" without sacrificing its meaning [*see CACI No. 107* (Witnesses)].

[e] Passives

The passive voice, which is very common in legal writing, including jury instructions--*e.g.*, "the evidence offered should be viewed with distrust" (BAJI No. 2.02)--is sometimes necessary, but should be avoided if possible.

[f] Word Lists

Lists of words of similar meaning should be limited to the essential ones. For example, "knowledge, skill, experience, training or education" [*see* BAJI No. 2.40] is a list containing words of similar meaning that a study has shown do not enhance juror comprehension and may in fact detract from it [*see* Charrow & Charrow, *Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions*, 79 *Colum. L. Rev.* 1306, 1326 (1979)].

[g] Organization

Experts have identified a number of other specific problems as having an important bearing on the comprehensibility of instructions. Like any other spoken or written discourse, instructions need to be logically organized, with separate ideas separately identified, and in many instances numbered as such. Care should be taken to avoid misplacing phrases within sentences. For example, "a proximate cause ... is a cause which in natural and continuous sequence, produces the injury ..." (BAJI (7th ed. 1986) No. 3.75) would be more comprehensible if it read "a proximate cause ... is a cause that produces the injury in a natural and continuous sequence" [*see Mitchell v. Gonzales* (1991) 54 *Cal.3d* 1041, 1 *Cal.Rptr.2d* 913, 819 *P.2d* 872 ; in 1992, the Committee on Standard Jury Instructions of the Superior Court of Los Angeles County withdrew its approval of BAJI No. 3.75, citing *Mitchell*; *see also, for example, CACI No. 350* (setting forth causation requirement for recovering contract damages)]. The vague and sometimes misleading "as to" is another example of a phrase that could be replaced by words of more definite meaning if some thought is given to organizing the instruction.

[2] Gender-Neutral Language

All instructions submitted to the jury must be written in gender-neutral language [*Cal. Rules of Ct., Rule 2.1058*]. Both the Judicial Council instructions and Matthew Bender specific instructions comply with this rule. If additions or

modifications are necessary, these must also be couched in gender-neutral language.

LexisNexis Matthew Bender Expert Practice Tip--Gender-Neutrality: Gender-neutral language should be used. CACI instructions provide for that requirement by bracketing "he/she" which requires the attorneys to go through the instructions to make sure they are gender correct. Once properly corrected, they would certainly be clear to the jury. The instructions would be easier to use, if so much effort was not required to make "politically correct" alterations. Maybe some day a gender neutral word or phrase, that is politically acceptable to all, will become common in the English language and the instructions will be easier to use as less alterations will be necessary. *By Joseph Devine*

[3] Length and Detail

Jury instructions should be as brief as possible, avoiding repetition and redundancy. The shorter the overall length of the instructions, the more the jurors are likely to understand. Repetition may also result in over emphasis of a particular point. Furthermore, when the same point is expressed twice in different ways jurors may become confused and think that different things are intended.

[4] Statutory Language

Jury instructions that track statutory language should only be given when the jury will have no difficulty in understanding the statute without further guidance from the court [*Lourence v. West Side Irrigation Dist.* (1965) 233 Cal.App.2d 532, 538, 43 Cal.Rptr. 889 ; see *Conservatorship of Gregory* (2000) 80 Cal.App.4th 514, 520, 95 Cal.Rptr.2d 336 (proper to instruct jury in applicable statute's language)]. If the applicability of a statute is not supported by the evidence in the case, it would of course be error to instruct the jury on it [*Shamblin v. Polich* (1973) 32 Cal.App.3d 756, 762, 108 Cal.Rptr. 410].

LexisNexis Matthew Bender Expert Practice Tip--Use Caution If Proposing Statutory Language to Instruct Jury: *Statutory language should only be given when the jury will have no difficulty in understanding the statute.* Every person with common sense is in complete agreement with this statement. The California Judicial Council should convene a Legislative Task Force charged with rewriting every single statute so that it could be clearly understood. That probably won't happen in California anytime soon. How about a law requiring all future rules, regulations, and statutes be written so that they are more "understandable?" *By Joseph Devine*

[5] Language From Judicial Decisions

Although there is great temptation to use language taken directly from judicial opinions, counsel must be certain that the facts in the reported opinion and the case being tried are analogous, and that the same principles of law apply. It is sometimes not proper to give instructions on a principle of law in language taken from an opinion [*Schance v. H.O. Adams Tile Co.* (1955) 131 Cal.App.2d 549, 555-556, 280 P.2d 851]. As in the case of an instruction based on a statute, it may be possible to improve on the clarity of the language used in an opinion without distorting the principle of law it expresses.

[6] Using Other Sources

There are a wide variety of sources from which parties may draw instructions, so long as the instructions are correct statements of law. These include, in addition to statutes [see MB 100A.04[4]] and judicial opinions [see MB 100A.04[5]], treatises, hornbooks, legal encyclopedias, digests, and form books. Thus, for example, in a proper case, instructions may be based on state or federal regulations [*Conservatorship of Gregory* (2000) 80 Cal.App.4th 514, 523, 95 Cal.Rptr.2d 336].

[7] When Instructions Should Be Read to Jury

[a] Instruction Before Evidence

Many judges now follow the practice of instructing in installments. For instance, certain instructions may be given during the voir dire selection phase. Some writers and judges recommend that the substantive law instructions also be given at the outset, before the jury begins to hear the evidence [Elwork, Sales & Alfini, *Making Jury Instructions Understandable*, Contemporary Litigation Series, p. 24, Charlottesville, Va. (The Michie Company, 1983); Schwarzer, *Communicating With Juries: Problems and Remedies*, 69 *Calif. L. Rev.* 731, 755 (1981); Avakian, *Let's Learn to Instruct the Jury*, The Judge's Journal, The American Bar Association (1979); Forston, *Sense and Non-Sense: Jury Trial Communication*, B.Y.U. Law Rev. 601, 620 (1975)]. The jurors should be told at least in a general way what they will be called on to decide. This may be especially important in protracted trials involving multiple issues. In some cases the trial should probably be bifurcated and tried in stages [Schwarzer, *Communicating With Juries: Problems and Remedies*, 69 *Calif. L. Rev.* 731, 757 (1981)].

[b] Instruction During Trial

Many believe that, during the course of the trial, the jury should be instructed from time to time as the subjects arise on such matters as expert witnesses, the use of depositions, answers to interrogatories, and the effect of rulings on objections. It would then not be necessary to repeat all these procedural instructions at the conclusion of the trial. Rather, the jury's attention would then be concentrated on the instructions that cover the substantive law applicable to the issues. The complete instructions, those given throughout the trial as well as those given at the end, should then be furnished in written form to be taken to the jury room [see *Code Civ. Proc.* § 612.5 (court has discretion to permit jury to retire with written copy of instructions); see also *CACI No. 5000*, "Duties of the Judge and Jury"].

This approach to jury instructions will require that the issues be defined and the instructions written before the trial begins. *Code Civ. Proc.* § 607a requires this, but it is more often honored in the breach than in the observance. This approach will also call for a pretrial conference on jury instruction that should probably be held even before the voir dire process begins. Although all of this will demand greater initial effort by the lawyers and the judge, it should save time in the long run. Many federal judges follow a similar practice.

[c] Instruction Before Argument

Another suggestion regularly followed by some courts is to instruct before rather than after argument. The standard procedure in California courts is to instruct after argument, and *Code Civ. Proc.* § 607 places instructing the jury last in the order of proceedings, after argument [see Avakian, "Let's Learn to Instruct the Jury," The Judge's Journal, The American Bar Association (1979); Schwarzer, *Communicating With Juries: Problems and Remedies*, 69 *Calif. L. Rev.* 731, 755-766, n. 1 (1981)]. However, the language of *Code Civ. Proc.* § 607 is permissive and the trial court has discretion to vary that practice [see *Penal Code* § 1093; *People v. Pena* (1972) 25 *Cal.App.3d* 414, 427-429, 101 *Cal.Rptr.* 804 ; *People v. Valenzuela* (1977) 76 *Cal.App.3d* 218, 222, 142 *Cal.Rptr.* 655], just as it has discretion to determine the sequence in which instructions are given to the jury [*People v. Smith* (2009) 168 *Cal. App. 4th* 7, 14-15, 85 *Cal. Rptr. 3d* 180]. Probably more trial lawyers favor instructing before argument, thereby giving them the last word. If the other reforms recommended above are adopted, it probably does not matter a great deal whether argument precedes or follows the instructions. By the time that stage of the trial is reached, the jury will have heard most of the instructions already and will understand the issues. There will, in any event, be certain concluding instructions relating to the jury's deliberations, and verdict forms that ought to be given after argument.

LexisNexis Matthew Bender Expert Practice Tip--Instruct Before or After Closing Argument?:

Should the jury be instructed before or after closing argument? Apparently, the court has discretion in this regard [*Code Civ. Proc.* § 607]. Instruction before closing argument would appear to give the plaintiff the advantage of having the last word before the jury retires to deliberate. Instruction after argument appears more neutral as the court would have the last word to the jury before deliberations. Thus:

- If you represent the defendant, request that the court instruct the jury after argument, which has been traditionally the standard practice. It will leave the last words to the jury before deliberations in the hands of the court. To do otherwise, would unfairly advantage the plaintiff with the last word.

- If you represent the plaintiff, request that the court instruct before argument. It will impress on the jury that argument is not evidence. Furthermore, the court has discretion and the traditional order of argument/instruction is not mandated. *By Joseph Devine*

[8] Special Verdicts and Interrogatories

Some judges and writers feel that too little use is made of special verdicts and interrogatories [*McCloud v. Roy Riegels Chemicals* (1971) 20 Cal.App.3d 928, 936-937, 97 Cal.Rptr. 910 ; *Murrell v. California ex rel. Dep't of Public Works* (1975) 47 Cal.App.3d 264, 271, 120 Cal.Rptr. 812]. Special interrogatories are used with a general verdict as a means of testing the general verdict [Code Civ. Proc. § 625; *Cembrook v. Sterling Drug, Inc.* (1964) 231 Cal.App.2d 52, 64, 41 Cal.Rptr. 492 ; see CACI No. VF-5000, CACI No. VF-5001]. Special verdicts, on the other hand, constitute a set of special findings on the basis of which the judge enters an appropriate judgment [see CACI No. 5012]. The jury's conclusions of fact must be framed so that nothing remains to the court but to draw from them the conclusions of law [Code Civ. Proc. § 624; see *Burlingame Motor Co. v. Peninsula Activities, Inc.* (1971) 15 Cal.App.3d 656, 661, 93 Cal.Rptr. 376]. Special verdicts perform much the same function as findings of fact in a nonjury trial [cf. *Murrell v. California ex rel. Dep't of Public Works* (1975) 47 Cal.App.3d 264, 120 Cal.Rptr. 812 ; see Witkin, California Procedure, vol. 7, Ch. VIII, Trial, § 352 (4th ed. 1997)]. Note that Code Civ. Proc. § 632 provides for a Statement of Decision in lieu of Written Findings and Conclusions. Special verdicts are required in punitive damage cases, although requiring the jury to separately state punitive damages on a verdict form will suffice [Code Civ. Proc. § 625; see, e.g., CACI No. VF-3900- CACI No. VF-3904]. Otherwise, the use of interrogatories and special verdicts is discretionary.

The California Judicial Council appears to endorse the use of special verdicts in its official CACI jury instructions [see MB 100A.02]. Most of the CACI series of instructions have accompanying verdict forms.

[9] Process Instructions

[a] Relationship to Special Verdicts and Interrogatories

Both special verdicts and special interrogatories serve to focus the jury's attention on the fact-finding process and result in a special finding on each issue submitted. The use of special verdicts or interrogatories, particularly in complex cases, may also be beneficial in clarifying the fact-finding process. It can also simplify the instructions by relating legal propositions to specific fact issues.

This technique of instructing juries, or something very similar to it, is sometimes referred to as giving "process instructions" [Farrell, *Communication in the Courtroom: Jury Instructions*, 85 W. Va. L. Rev. 5, 17, n. 1 (1982)].

[b] Court's Duty to Instruct on Law

It is doubtful whether such an extreme, even if it were desirable, is within the discretion accorded the trial judge under Code Civ. Proc. §§ 607 and 607a. Although in some contexts those sections use the permissive "may" when referring to the judge's giving of instructions, it is often said that the court has a duty to instruct the jury [see *Thomas v. Buttress & McClellan* (1956) 141 Cal.App.2d 812, 819, 297 P.2d 768 ; *Jackson v. City of San Diego* (1981) 121 Cal.App.3d 579, 589-590 n. 7, 175 Cal.Rptr. 395 ; see also Witkin, California Procedure, vol. 7, Ch. VIII, Trial, §§ 268, 270, 273 (4th ed. 1997)]. The jury's duty is to apply the law as given by the judge to determine the facts [see CACI No. 100]. It can be argued that the application of the law to the facts is the essence of the right to a jury trial.

[c] Jury's Duty to Find Ultimate Facts

In any event, it is clear that a special verdict must present the conclusions of fact as established by the evidence, and not the evidence to prove them [*Code Civ. Proc.* § 624]. In other words, the questions submitted in special verdicts must call for ultimate facts, not for evidentiary facts [*Wyller v. Feuer* (1978) 85 Cal.App.3d 392, 404, 149 Cal.Rptr. 626]. Although there may be considerable doubt in a particular case what will be held to constitute "ultimate" as distinguished from "evidentiary" facts, it seems clear that the determination of ultimate facts such as negligence, undue influence, mental capacity, or mistake require the application of legal principles. The jury will have to be instructed as to the meaning of those principles that have a legal as well as a factual content.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureJudicial OfficersJudgesDiscretionCivil ProcedureTrialsJury TrialsGeneral OverviewCivil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewCivil ProcedureTrialsJury TrialsJury InstructionsStandard Instructions



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California Forms of Jury Instruction

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CHAPTER 1A Matthew Bender Introduction to California Jury Instructions

1-1A California Forms of Jury Instruction MB 100A.05

MB 100A.05 Preparation of Jury Instructions

[1] Requirements of Statute and Rules of Court

Code Civ. Proc. § 607a requires that each proposed instruction be typed on a separate sheet of paper. For each special instruction, a citation of authorities that support the instruction must be included at the bottom of the page. No citation is required for approved instructions (that is, CACI instructions approved by the California Judicial Council) [*Cal. Rules of Ct.*, Rule 2.1055(d); see *Cal. Rules of Ct.*, Rule 2.1055(a)(1)(A) ("approved jury instructions" defined)].

All instructions submitted to the jury must be written in gender-neutral language [*Cal. Rules of Ct.*, Rule 2.1058].

All proposed instructions must be submitted to the court in the form and format prescribed for papers in *Cal. Rules of Ct.*, Rules 2.100-2.150 (requirements surrounding papers and forms to be filed) [*Cal. Rules of Ct.*, Rule 2.1055(b)(1); see *Cal. Rules of Ct.*, Rule 2.111 (format of first page)]. Each set of instructions must be bound loosely [*Cal. Rules of Ct.*, Rule 2.1055(b)(4)].

Under *Cal. Rules of Ct.*, Rule 2.110(a), each paper filed with the court must contain a footer in the bottom margin of each page, placed below the page number and divided from the rest of the document page by a printed line. The footer must contain the title of the paper in at least 10-point type or a clear and concise abbreviation [*Cal. Rules of Ct.*, Rule 2.110(b), (c)]. However, the Rules of Court surrounding papers filed [*Cal. Rules of Ct.*, Rules 2.100-2.119] do not apply to Judicial Council and local court forms [*Cal. Rules of Ct.*, Rule 2.119]. Therefore, county superior courts may adopt local forms and procedures for the submission of jury instructions. In Los Angeles county, a form on perforated paper is often used [see Los Angeles County Local Forms 176, 177].

Rule 2.1055 applies to proposed jury instructions that a party submits to the court. These include both of the following [*Cal. Rules of Ct.*, Rule 2.1055(a)(1)]:

- "Approved jury instructions," which are civil and criminal instructions approved by the Judicial Council of California (CACI and CALCRIM); and

- "Special jury instructions," which are instructions from other sources (such as the Matthew Bender specific instructions in this publication), instructions specially prepared by the party, or approved jury instructions that have been substantially modified by the party.

Rule 2.1055, however, does not apply to the form or format of the instructions presented to the jury, which is a matter left to the court's discretion [*Cal. Rules of Ct., Rule 2.1055(a)(2)*].

As noted above, all proposed jury instructions must be submitted to the court in the form and format prescribed for papers in *Cal. Rules of Ct., Rules 2.100-2.119* [*Cal. Rules of Ct., Rule 2.1055(b)(1)*]. In addition, each set of proposed jury instructions must have a cover page, containing the caption of the case and stating the name of the party proposing the instructions, and an index listing all the proposed instructions [*Cal. Rules of Ct., Rule 2.1055(b)(2)*]. In the index, approved jury instructions must be identified by their reference numbers (that is, "CACI No. ____" for civil instructions and "CALCRIM No. ____" for criminal instructions) and special jury instructions must be numbered consecutively [*Cal. Rules of Ct., Rule 2.1055(b)(3)*]. The index must contain a checklist that the court may use to indicate whether the instruction was [*Cal. Rules of Ct., Rule 2.1055(b)(3)*; see, e.g., sample "Disposition Table" in MB 100A.11[1]]:

- Given as proposed;
- Given as modified;
- Refused; or
- Withdrawn.

Rule 2.1055 also prescribes the format of each proposed instruction by specifying that each proposed instruction must [*Cal. Rules of Ct., Rule 2.1055(c)*]:

- Be on a separate page or pages;
- Include the instruction number and title of the instruction at the top of the first page of the instruction; and
- Be prepared without any blank lines or unused bracketed portions, so that it can be read directly to the jury.

No local court form or rule for the filing or submission of proposed jury instructions may require that the instructions be submitted in any manner other than as prescribed by Rule 2.1055 [*Cal. Rules of Ct., Rule 2.1055(e)*]. Note, however, that Rule 2.1055 does not preclude a judge from requiring the parties in an individual case to transmit the jury instructions to the court electronically [*Cal. Rules of Ct., Rule 2.1055, Advisory Committee Comment*].

[2] Form of Jury Instructions Cover Page

SUPERIOR COURT OF CALIFORNIA
COUNTY OF _____

 _____ [name],)
) **CASE NO. _____**

Plaintiff,	)	REQUEST FOR JURY
vs.	)	INSTRUCTIONS
_____ [name],	)	[Code Civ. Proc. § 607a]
Defendant.	)	
	)	

_____ [Plaintiff or Defendant] _____ [name] respectfully requests this court to give the following jury instructions and any further or additional instructions that may be subsequently requested.

Dated: _____.

Law Offices of _____

By _____ [signature]

_____ [name]

Attorney for _____ [name]

[Plaintiff or Defendant]

[3] Use of Document Assembly Program

Preparation of jury instructions using computer document assembly software can save time and increase accuracy. For a software program to prepare the Judicial Council civil jury instructions using HotDocs(R) document assembly automation, see LexisNexis Automated Judicial Council of California Civil Jury Instructions.

Although the attorney must still exercise careful attention to detail, the LexisNexis Automated Judicial Council of California Civil Jury Instructions program walks the user through questions and decisions that surface, and leads to the creation of better jury instructions. The attorney must review all instructions to make sure that they apply correctly to the particular facts and circumstances of the case for which they are submitted.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsGeneral OverviewCivil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewCivil ProcedureTrialsJury TrialsJury InstructionsStandard InstructionsGovernmentsCourtsRule Application & Interpretation



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California Forms of Jury Instruction

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CHAPTER 1A Matthew Bender Introduction to California Jury Instructions

1-1A California Forms of Jury Instruction MB 100A.06

MB 100A.06 Submission of Proposed Instructions

[1] Before Trial

Code Civ. Proc. § 607a requires that all proposed instructions covering the law as disclosed by the pleadings be delivered to the judge and served on opposing counsel before the first witness is sworn. Failure to submit instructions before trial is technically grounds for the court's refusing them. However, the requirement that jury instructions be submitted before trial is not consistently enforced.

The court may properly refuse to give an instruction that is not submitted in a timely manner [*see Webber v. Inland Empire Investments, Inc. (1999) 74 Cal.App.4th 884, 909, 88 Cal.Rptr.2d 594* (submitted after initial instructions had been given; late instruction would have unduly emphasized its contents)].

[2] Before Argument

Code Civ. Proc. § 607a also provides that before argument, counsel may deliver to the judge and serve on opposing counsel additional proposed instructions on questions of law developed by the evidence at trial.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsGeneral OverviewCivil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewCivil ProcedureTrialsJury TrialsJury InstructionsObjections to InstructionsCivil ProcedureTrialsJury TrialsJury InstructionsRequests for InstructionsCivil ProcedureTrialsJury TrialsJury InstructionsStandard Instructions



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CHAPTER 1A Matthew Bender Introduction to California Jury Instructions

1-1A California Forms of Jury Instruction MB 100A.07

MB 100A.07 Giving Jurors Copy of Instructions

Jurors must be advised by the court at the time they retire to deliberate that written jury instructions are available [*Code Civ. Proc.* § 612.5; *see, e.g.*, first paragraph in *CACI No. 5000*, which provides, in part, that jurors "will have a copy of [the] instructions" with them when they go to the jury room to deliberate]. The court may, at its discretion, provide the jury with a written copy of the instructions that have been given orally. However, if the jury requests a copy of the instructions, then the court must supply it [*Code Civ. Proc.* § 612.5].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsGeneral OverviewCivil ProcedureTrialsJury TrialsJurorsGeneral OverviewCivil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewCivil ProcedureTrialsJury TrialsJury InstructionsStandard Instructions



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CHAPTER 1A Matthew Bender Introduction to California Jury Instructions

1-1A California Forms of Jury Instruction MB 100A.08

MB 100A.08 Need to Request Complete Instructions

Each party must propose complete jury instructions according to the theory of the case as disclosed by the pleadings. If complete instructions are not submitted by the parties, the court is under no duty to give the missing instructions to the jury [*Agarwal v. Johnson* (1979) 25 Cal.3d 932, 951, 160 Cal.Rptr. 141, 603 P.2d 58 ; *Switzer v. State of California* (1969) 269 Cal.App.2d 627, 635, 75 Cal.Rptr. 371]. On the other hand, the court is entitled to give instructions *sua sponte* [Code Civ. Proc. § 608; see *Jennings v. Arata* (1948) 83 Cal.App.2d 143, 146, 188 P.2d 298], and it would probably be an abuse of discretion to fail entirely to instruct the jury [*Thomas v. Buttress & McClellan* (1956) 141 Cal.App.2d 812, 819, 297 P.2d 768]. This is particularly true when the jury asks for guidance. For example, in one case it was held to be error not to give more particular instructions after the jury asked questions indicating that it was confused, even though neither party offered further jury instructions on the point at issue [*Bartosh v. Banning* (1967) 251 Cal.App.2d 378, 387-388, 59 Cal.Rptr. 382].



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CHAPTER 1A Matthew Bender Introduction to California Jury Instructions

1-1A California Forms of Jury Instruction MB 100A.09

MB 100A.09 Right to Proper Instructions

It is clear that each party has a right to have the jury instructed on all theories of the case that are within the issues and supported by the pleadings and by the evidence [*Hasson v. Ford Motor Co.* (1977) 19 Cal.3d 530, 543, 138 Cal.Rptr. 705, 564 P.2d 857 ; *Sesler v. Ghumman* (1990) 219 Cal.App.3d 218, 223, 268 Cal.Rptr. 70 ; *Bozanich v. Jo Ann Fisheries, Inc.* (1969) 270 Cal.App.2d 178, 183, 75 Cal.Rptr. 463], regardless of whether the issues are framed in the pleadings, in a pretrial order, or by the evidence adduced at trial [*Alvarez v. Felker Mfg. Co.* (1964) 230 Cal.App.2d 987, 998, 41 Cal.Rptr. 514], and regardless of whether the court considers the evidence to be persuasive [*Maxwell v. Powers* (1994) 22 Cal.App.4th 1596, 1607, 28 Cal.Rptr.2d 62 , citing *Fish v. Los Angeles Dodgers Baseball Club* (1976) 56 Cal.App.3d 620, 633, 128 Cal.Rptr. 807]. This right is intended to insure that the jury has a full and complete understanding of the law that applies to the disputed facts of the case before it [*Sesler v. Ghumman* (1990) 219 Cal.App.3d 218, 223, 268 Cal.Rptr. 70].

When a correct but general instruction is given, a party is entitled to a more specific instruction that applies the law to the particular facts of the case or to that party's theory of the case [*Menchaca v. Helms Bakeries, Inc.* (1968) 68 Cal.2d 535, 542, 67 Cal.Rptr. 775, 439 P.2d 903 ; *Borenkraut v. Whitten* (1961) 56 Cal.2d 538, 545-546, 15 Cal.Rptr. 635, 364 P.2d 467 ; *Sesler v. Ghumman* (1990) 219 Cal.App.3d 218, 225, 268 Cal.Rptr. 70]. The evidence necessary to justify an instruction need not be overwhelming but may be slight, inconclusive, or even opposed to the preponderance of other evidence [*Byrne v. City & County of San Francisco* (1980) 113 Cal.App.3d 731, 737, 170 Cal.Rptr. 302]. Of course, the court is not required to give every instruction offered by a party [see, e.g., *Morey v. Vannucci* (1998) 64 Cal.App.4th 904, 914-915, 75 Cal.Rptr.2d 573 (trial court did not err in refusing to give plaintiff's proposed instructions defining contract term, without evidence that parties had considered technical definitions in those instructions)] and may modify the instructions it does accept [*Byrum v. Brand* (1990) 219 Cal.App.3d 926, 939, 268 Cal.Rptr. 609 ; *Ray v. Jackson* (1963) 219 Cal.App.2d 445, 455, 33 Cal.Rptr. 339]. This is true even though the requested instructions may state the applicable legal principles more clearly and directly than the instructions the court chooses to give [*Eagar v. McDonnell Douglas Corp.* (1973) 32 Cal.App.3d 116, 121, 107 Cal.Rptr. 819]. Furthermore, if proffered instructions require major modification to make them proper, the trial court is not required to make the changes as long as other instructions cover the principles of law applicable to the factual issues involved [*Wank v. Richman & Garrett* (1985) 165 Cal.App.3d 1103, 1113-1114, 211 Cal.Rptr. 919].

LexisNexis Matthew Bender Expert Practice Tip--Right to Proper Instructions: The parties to a civil action are entitled to appropriate and fair instructions that clearly define the law. This insures that the jury's decision on disputed facts will result in a fair verdict. Proper use of the instructions should be clear to the attorneys who request that they be given. The judge who will decide what instructions will be given should be able to instruct with the confidence that the jury has been properly advised. Improper jury instructions have been one of the most common reasons given by appellate courts for overturning jury decisions. *By Joseph Devine*

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedurePretrial MattersConferencesPretrial OrdersCivil ProcedureTrialsJury TrialsGeneral OverviewCivil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewCivil ProcedureTrialsJury TrialsJury InstructionsStandard Instructions



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CHAPTER 1A Matthew Bender Introduction to California Jury Instructions

1-1A California Forms of Jury Instruction MB 100A.10

MB 100A.10 Formula Instructions

Formula instructions are those that direct the jury to find for a party if it finds certain facts to be true [*see Dodge v. San Diego Elec. Ry. Co. (1949) 92 Cal.App.2d 759, 764, 208 P.2d 37*]. Formula instructions can be defective unless they state all the legal prerequisites to a verdict for a party [*Murrell v. California ex rel. Dep't of Public Works (1975) 47 Cal.App.3d 264, 269, 120 Cal.Rptr. 812*]. Formula instructions have also been criticized as argumentative because they may be selective of certain facts and may emphasize that the jury must find in favor of a party [*see Dodge v. San Diego Elec. Ry. Co. (1949) 92 Cal.App.2d 759, 764, 208 P.2d 37*]. As a general rule, omission of one of the elements necessary for a formula instruction cannot be cured by other instructions that cover the omitted element [*see Mazzotta v. Los Angeles Ry. Corp. (1944) 25 Cal.2d 165, 170, 153 P.2d 338*]. On the other hand, this rule is not strictly enforced when the instructions fully and fairly charge the jury, and the jury is instructed to consider all instructions given together [*Amidon v. Hebert (1949) 93 Cal.App.2d 225, 227, 208 P.2d 733*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsGeneral OverviewCivil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewCivil ProcedureTrialsJury TrialsJury InstructionsPeremptory InstructionsCivil ProcedureTrialsJury TrialsJury InstructionsStandard InstructionsCivil ProcedureTrialsJury TrialsJury InstructionsSupplemental Instructions



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CHAPTER 1A Matthew Bender Introduction to California Jury Instructions

1-1A California Forms of Jury Instruction MB 100A.11

MB 100A.11 Court's Disposition of Proposed Instructions

[1] Power to Refuse Instructions Generally

Before argument, and at the request of counsel, the court must do all of the following [*Code Civ. Proc.* § 607a]:

- Decide whether to give, refuse, or modify the proposed instructions.
- Decide which instructions, if any, are to be given in addition to those proposed.
- Advise counsel of all instructions that will be given.

In deciding whether to give instructions, the court will consider whether the offered instructions, though legally sound, cover subjects adequately dealt with by other instructions [*Mezerkor v. Texaco, Inc.* (1968) 266 Cal.App.2d 76, 100, 72 Cal.Rptr. 1 ; *Crooks v. Pirrone* (1964) 228 Cal.App.2d 549, 554, 39 Cal.Rptr. 622]. The court's power to refuse repetitive instructions underscores the importance of drafting instructions as to the matters at issue, couched in neutral language. A court properly refuses instructions (or is in error if it gives them) that unduly emphasize issues, theories, or defenses by using repetitive language, giving prominence to certain testimony, or stressing one party's duties [*Slayton v. Wright* (1969) 271 Cal.App.2d 219, 238, 76 Cal.Rptr. 494 ; *Clark v. State of California* (1950) 99 Cal.App.2d 616, 624, 222 P.2d 300 ; *Dodge v. San Diego Elec. Ry. Co.* (1949) 92 Cal.App.2d 759, 764, 208 P.2d 37].

Similarly, an instruction can be refused because it is argumentative. It should state the rules of law rather than elaborate on matters of evidence. On the other hand, it is not objectionable to merely state the claims of a party without intimating that the claims are proved or that certain facts exist that are either not in evidence or concerning which the evidence is in conflict [*Slayton v. Wright* (1969) 271 Cal.App.2d 219, 238-239, 76 Cal.Rptr. 494]. With regard to instructions on facts that are not in evidence, they have been consistently held irrelevant and either error to give or proper to refuse [*see, e.g., Walbrook Ins. Co. v. Liberty Mutual Ins. Co.* (1992) 5 Cal.App.4th 1445, 1463, 7 Cal.Rptr.2d 513 ; *Klemme v. Hoag Memorial Hospital Presbyterian* (1980) 103 Cal.App.3d 640, 644-645, 163 Cal.Rptr. 109 (error nonprejudicial); *Foster v. Gillette Co.* (1979) 100 Cal.App.3d 569, 575, 161 Cal.Rptr. 134].

A "Disposition Table" is set forth below:

[Click here to view image.](#)

[2] Demand for Clarification

It is incumbent on a party who feels an instruction is too general, incomplete, or unclear to request additional or substitute instructions [see *Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1162, 74 Cal.Rptr.2d 510 ; *Switzer v. State of California* (1969) 269 Cal.App.2d 627, 636, 75 Cal.Rptr. 371] . If counsel has some doubt about the clarity of an instruction to be given by the court, then he or she should ask the court to explain, or provide an instruction that does [*O'Connor v. United Railroads* (1914) 168 Cal. 43, 52, 141 P. 809]. The court may refuse the clarifying instruction on the ground that it is repetitive, argumentative, or would otherwise be error to give; however, by offering the alternative instruction, counsel may at least have the instruction given reviewed on appeal [*Switzer v. State of California* (1969) 269 Cal.App.2d 627, 636, 75 Cal.Rptr. 371].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewCivil ProcedureTrialsJury TrialsJury InstructionsObjections to InstructionsCivil ProcedureTrialsJury TrialsJury InstructionsPeremptory InstructionsCivil ProcedureTrialsJury TrialsJury InstructionsStandard InstructionsCivil ProcedureTrialsJury TrialsJury InstructionsSupplemental Instructions



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CHAPTER 1A Matthew Bender Introduction to California Jury Instructions

1-1A California Forms of Jury Instruction MB 100A.12

MB 100A.12 Automatic Objection to Instructions

Ordinarily, an objection to a court ruling must be made at the time of the ruling [*Code Civ. Proc.* § 646]. However, this rule is subject to a number of exceptions, among them the one for jury instructions that are given, refused, or modified [*Code Civ. Proc.* § 647]. This means that erroneous instructions that are offered by an opponent or given on the court's own motion are objected to automatically. "When a trial court gives a jury instruction which is prejudicially *erroneous as given*, i.e., which is an incorrect statement of law, the party harmed by that instruction need not have objected to the instruction or proposed a correct instruction of his own in order to preserve the right to complain of the erroneous instruction on appeal" [*Suman v. BMW of North America, Inc.* (1994) 23 Cal.App.4th 1, 9, 28 Cal.Rptr.2d 133 (emphasis in original)].

Although the automatic objection is of no avail if an instruction correctly states the law but is deficient by reason of its generality, when prejudice results from an erroneous instruction it is a matter that can be raised on appeal without exception having been taken in the trial court [*Agarwal v. Johnson* (1979) 25 Cal.3d 932, 948-949, 160 Cal.Rptr. 141, 603 P.2d 58 ; *Rivera v. Parma* (1960) 54 Cal.2d 313, 316, 5 Cal.Rptr. 665, 353 P.2d 273 ; *People ex rel. Dept. of Transportation v. Salami* (1991) 2 Cal.App.4th 37, 42 n.2, 2 Cal.Rptr.2d 833 ; *U.S. Roofing, Inc. v. Credit Alliance Corp.* (1991) 228 Cal.App.3d 1431, 1446-1447, 279 Cal.Rptr. 533]. The automatic objection rule does not apply when a party has failed to request an instruction that would have been proper, or has failed to request a clarifying instruction [*Bisno v. Douglas Emmett Realty Fund* 1988 (2009) 174 Cal.App.4th 1534, 1555 n.7, 95 Cal.Rptr.3d 492; *Hilts v. County of Solano* (1968) 265 Cal.App.2d 161, 171, 71 Cal.Rptr. 275].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewCivil ProcedureTrialsJury TrialsJury InstructionsObjections to InstructionsCivil ProcedureTrialsJury TrialsJury InstructionsStandard InstructionsCivil ProcedureAppealsReviewabilityPreservation for Review



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CHAPTER 1A Matthew Bender Introduction to California Jury Instructions

1-1A California Forms of Jury Instruction MB 100A.13

MB 100A.13 When Giving or Failing to Give Instructions Is Appealable

[1] Requirement of Prejudicial Effect

Article VI, § 13 of the California Constitution provides that an error in instructing the jury is grounds for reversal only if the reviewing court, "after an examination of the entire cause, including the evidence," concludes that "the error complained of has resulted in a miscarriage of justice." The court must determine whether it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of error [*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 580, 34 Cal.Rptr.2d 607, 882 P.2d 298 (error held harmless); *Mitchell v. Gonzales* (1991) 54 Cal.3d 1041, 1054, 1 Cal.Rptr.2d 913, 819 P.2d 872 (error held prejudicial); *Weiner v. Fleischman* (1991) 54 Cal.3d 476, 490, 286 Cal.Rptr. 40, 816 P.2d 892 (error held prejudicial)]. *Code Civ. Proc.* § 475 more specifically provides that a judgment cannot be reversed or affected by any error, improper ruling, instruction, or defect unless the record shows all of the following:

- The effect of the error is prejudicial;
- The appealing party sustained substantial injury as a result; and
- A different result would have been probable if the error, improper ruling, instruction, or defect had not occurred.

Merely showing that error occurred creates no presumption of prejudice or injury to the complaining party [*Code Civ. Proc.* § 475].

[2] Instructions Considered in Their Totality

When it is claimed that the trial court has erred in giving or refusing to give an instruction, the appellate court will consider instructions in their entirety to determine whether or not the effect of the claimed error was prejudicial. If when considered together the instructions state the law fairly and clearly, they are unobjectionable even though isolated passages of single instructions may be justly criticized [*Eagar v. McDonnell Douglas Corp.* (1973) 32 Cal.App.3d 116,

120, 107 Cal.Rptr. 819]. This means that reversal will not be granted on grounds of verbal inaccuracies in an instruction or because a single instruction falls short of including all elements when these can be gathered from the instructions as a whole [*Mangrum v. Union P. R. Co.* (1964) 230 Cal.App.2d 960, 967, 41 Cal.Rptr. 536] . This also explains the significance of the court's standard admonition to the jury that it consider all instructions together and not give more weight to individual instructions.

[3] Determination of Prejudice

If it appears that giving or refusing to give an instruction was likely to mislead the jury and become a factor in its verdict, then the instructional error is prejudicial and a court should not speculate on what may have been the basis for the jury's verdict [*Henderson v. Harnischfeger Corp.* (1974) 12 Cal.3d 663, 670, 117 Cal.Rptr. 1, 527 P.2d 353 ; *Carney v. Santa Cruz Women Against Rape* (1990) 221 Cal.App.3d 1009, 1018, 271 Cal.Rptr. 30]. Although there is no exact formula for measuring the degree of error that will be found prejudicial, a number of factors can be considered [*LeMons v. Regents of Univ. of Cal.* (1978) 21 Cal.3d 869, 876, 148 Cal.Rptr. 355, 582 P.2d 946 ; see *Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 580, 34 Cal.Rptr.2d 607, 882 P.2d 298 (citing *LeMons* and indicating that multifactor test applies in cases of instructional omission as well as when instruction is erroneously given); *Mitchell v. Gonzales* (1991) 54 Cal.3d 1041, 1054-1056, 1 Cal.Rptr.2d 913, 819 P.2d 872 (citing *LeMons* to find prejudicial error when closing argument contributed to instruction's misleading effect and other instructions did not cure error); *Weiner v. Fleischman* (1991) 54 Cal.3d 476, 490, 286 Cal.Rptr. 40, 816 P.2d 892 (applying *LeMons* factors to find prejudicial error); *Logacz v. Limansky* (1999) 71 Cal.App.4th 1149, 1156-1166, 84 Cal.Rptr.2d 257 (citing *Soule* and analyzing various factors to find prejudicial error); *Gargir v. B'nei Akiva* (1998) 66 Cal.App.4th 1269, 1275, 78 Cal.Rptr.2d 557 (no prejudicial error in court's refusal to give instruction that was common sense principle for evaluating witness credibility)]:

- The extent to which there is conflict in the evidence on critical issues.
- Whether the respondent's argument to the jury may have contributed to the instruction's misleading effect.
- Whether the jury requested a rereading of the erroneous instruction or of related evidence.
- The closeness of the jury's verdict.
- The effect of other instructions in curing the error.

[4] Need for Objection or Request

Although there may be no need for an objection to an erroneous instruction because of the automatic objection provided by *Code Civ. Proc.* § 647 [see MB 100A.12], a party may not raise the issue on appeal of the court's failure to instruct on a particular issue unless the party requested the specific proper instruction [*Bisno v. Douglas Emmett Realty Fund* 1988 (2009) 174 Cal. App. 4th 1534, 1555 n.7, 95 Cal. Rptr. 3d 492 ; *Orient Handel v. United States Fid. & Guar. Co.* (1987) 192 Cal.App.3d 684, 699, 237 Cal.Rptr. 667 ; *Spahn v. Guild Industries Corp.* (1979) 94 Cal.App.3d 143, 160, 156 Cal.Rptr. 375 ; *Switzer v. State of California* (1969) 269 Cal.App.2d 627, 636, 75 Cal.Rptr. 371]. In addition, when a party feels that a given instruction states the law correctly, but is too general, incomplete, or unclear, the party should request a clarifying instruction to preserve the objection to the instruction for review on appeal [*White v. Inbound Aviation* (1999) 69 Cal.App.4th 910, 925, 82 Cal.Rptr.2d 71 ; *Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1162, 74 Cal.Rptr.2d 510 ; *Switzer v. State of California* (1969) 269 Cal.App.2d 627, 636, 75 Cal.Rptr. 371 ; see MB 100A.11[2]].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewCivil ProcedureTrialsJury TrialsJury
InstructionsObjections to InstructionsCivil ProcedureTrialsJury TrialsJury InstructionsStandard InstructionsCivil
ProcedureAppealsReviewabilityPreservation for ReviewCivil ProcedureAppealsStandards of ReviewHarmless &
Invited ErrorsPrejudicial Errors



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California Forms of Jury Instruction

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CHAPTER 2 California Judicial Council Evidence Instructions

1-2 California Forms of Jury Instruction 2.syn

§ 2.syn Synopsis to Chapter 2: California Judicial Council Evidence Instructions

CACI 200 Obligation to Prove--More Likely True Than Not True

CACI 201 More Likely True--Clear and Convincing Proof

CACI 202 Direct and Indirect Evidence

CACI 203 Party Having Power to Produce Better Evidence

CACI 204 Willful Suppression of Evidence

CACI 205 Failure to Explain or Deny Evidence

CACI 206 Evidence Admitted for Limited Purpose

CACI 207 Evidence Applicable to One Party

CACI 208 Deposition as Substantive Evidence

CACI 209 Use of Interrogatories of a Party

CACI 210 Requests for Admissions

CACI 211 Prior Conviction of a Felony

CACI 212 Statements of a Party Opponent

CACI 213 Adoptive Admissions

CACI 214 Admissions by Silence

CACI 215 Exercise of a Communication Privilege

CACI 216 Exercise of Witness' Right Not to Testify

CACI 217 Evidence of Settlement

CACI 218 Statements Made to Physician (Previously Existing Condition)

CACI 219 Expert Witness Testimony

CACI 220 Experts--Questions Containing Assumed Facts

CACI 221 Conflicting Expert Testimony

CACI 222 Evidence of Sliding-Scale Settlement

CACI 223 Opinion Testimony of Lay Witness

CACI 224 Testimony of Child

CACI 225-CACI 299 Reserved for Future Use



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CHAPTER 2 California Judicial Council Evidence Instructions

1-2 California Forms of Jury Instruction Scope

Scope

SCOPE

This chapter contains the California Judicial Council's "Evidence Series" of jury instructions [*CACI No. 200 et seq.*]. The Judicial Council of California Civil Jury Instructions (CACI) included in this publication are the product of the Judicial Council of California Task Force on Jury Instructions, which are updated by the Judicial Council of California Advisory Committee on Civil Jury Instructions.

This chapter includes instructions on the following topics:

- The general burden of proof in a civil action ("more likely true than not true") [*CACI No. 200*].
- Clear and convincing proof ("more likely true") [*CACI No. 201*].
- Direct and indirect (i.e. "circumstantial") evidence [*CACI No. 202*].
- Party having power to produce better evidence [*CACI No. 203*].
- Willful suppression of evidence [*CACI No. 204*].
- Failure to explain or deny evidence [*CACI No. 205*].
- Evidence admitted for a limited purpose [*CACI No. 206*] and evidence applicable to just one party [*CACI No. 207*].
- Discovery related instructions, including the use of deposition testimony [*CACI No. 208*], party interrogatories [*CACI No. 209*], and requests for admissions [*CACI No. 210*].
- Admissibility of evidence issues, including instructions on the prior conviction of a felony [*CACI No. 211*], statements of a party opponent [*CACI No. 212*], adoptive admissions [*CACI No. 213*] and

1-2 California Forms of Jury Instruction Scope

admissions by silence [*CACI No. 214*], and the witness' right not to testify [*CACI No. 215*] and privilege against self-incrimination [*CACI No. 216*].

- Evidence of settlement [*CACI No. 217*].
- Statements made to a doctor (previously existing condition) [*CACI No. 218*].
- Expert witness testimony [*CACI Nos. 219-221*].
- Evidence of sliding-scale settlement [*CACI No. 222*].
- Lay witness opinion testimony [*CACI No. 223*].
- Child testimony [*CACI No. 224*].



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CHAPTER 2 California Judicial Council Evidence Instructions

1-2 California Forms of Jury Instruction CACI 200

CACI 200 Obligation to Prove--More Likely True Than Not True

A party must persuade you, by the evidence presented in court, that what he or she is required to prove is more likely to be true than not true. This is referred to as "the burden of proof."

After weighing all of the evidence, if you cannot decide that something is more likely to be true than not true, you must conclude that the party did not prove it. You should consider all the evidence, no matter which party produced the evidence.

In criminal trials, the prosecution must prove that the defendant is guilty beyond a reasonable doubt. But in civil trials, such as this one, the party who is required to prove something need prove only that it is more likely to be true than not true.

New September 2003; Revised February 2005

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

For an instruction on clear and convincing evidence, see *CACI No. 201, More Likely True--Clear and Convincing Proof*.

■ *Evidence Code section 115* provides: " 'Burden of proof' means the obligation of a party to establish by evidence a requisite degree of belief concerning a fact in the mind of the trier of fact or the court. The burden of proof may require a party to raise a reasonable doubt concerning the existence or nonexistence of a fact or that he establish the existence or nonexistence of a fact by a preponderance of the evidence,

by clear and convincing proof, or by proof beyond a reasonable doubt. Except as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence."

■ *Evidence Code section 500* provides: "Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting."

■ Each party is entitled to the benefit of all the evidence, including the evidence produced by an adversary. (*Williams v. Barnett* (1955) 135 Cal.App.2d 607, 612 [287 P.2d 789] ; 7 Witkin, California Procedure (4th ed. 1997) Trial, § 305, p. 352.)

■ The general rule in California is that " '[i]ssues of fact in civil cases are determined by a preponderance of testimony.' " (*Weiner v. Fleischman* (1991) 54 Cal.3d 476, 483 [286 Cal.Rptr. 40, 816 P.2d 892] , citation omitted.)

■ The preponderance-of-the-evidence standard "simply requires the trier of fact 'to believe that the existence of a fact is more probable than its nonexistence.' " (*In re Angelia P.* (1981) 28 Cal.3d 908, 918 [171 Cal.Rptr. 637, 623 P.2d 198] , citation omitted.)

■ "Preponderance of the evidence" " 'means what it says, viz., that the evidence on one side outweighs, preponderates over, is more than, the evidence on the other side, not necessarily in number of witnesses or quantity, but in its effect on those to whom it is addressed.' " (*Glage v. Hawes Firearms Co.* (1990) 226 Cal.App.3d 314, 325 [276 Cal.Rptr. 430] (quoting *People v. Miller* (1916) 171 Cal. 649, 652 [154 P. 468] and holding that it was prejudicial misconduct for jurors to refer to the dictionary for definition of the word "preponderance").)

Secondary Sources

1 Witkin, California Evidence (4th ed. 2000) Burden of Proof and Presumptions, § 35

Jefferson, California Evidence Benchbook (3d ed. 1997) Ch. 45, Burdens of Proof and of Producing Evidence; Presumptions

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

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

Publisher's Notes

This instruction replaces BAJI No. 2.60.

LexisNexis Matthew Bender Expert Practice Tip--Change in Language: In light of change in language as to proof, attorneys may need to alter their closing arguments (i.e., work the "new" language into your argument). *By Rex Heeseman*

LexisNexis Matthew Bender Expert Practice Tip--CACI No. 200 Improves on BAJI: *CACI No. 200* is a clear improvement over the "Burden of Proof" in BAJI No. 2.60. "More likely to be true than not true" is a great improvement over "by a preponderance of the evidence." Also, this important instruction requires no alterations. Unlike BAJI No. 2.60, *CACI No. 200* explains the difference between the burden of proof in a criminal case and a civil case. This distinction was commonly given in civil cases before CACI, and it is an important instruction which, rightfully, will now be given in every civil case. *By*

Joseph Devine

LexisNexis Matthew Bender Expert Practice Tip--Using CACI No. 200: Most tort actions will utilize CACI No. 200's more likely true than not true standard. This instruction makes it very clear for a juror to understand what it means to have the responsibility of proving a fact and to what degree that fact must be proved in order for it to be true. Most attorneys explain to the jury during voir dire and at closing argument the difference between the standard of "beyond a reasonable doubt" used in criminal trials and the standard used in civil trials. *By Dona Cohn-Payne*

The burden of proof does not shift during trial--it remains with the party who originally bears it. Unlike the burden of proof, the burden of producing evidence may shift between plaintiff and defendant during the trial. Once a party produces evidence sufficient to make its prima facie case, the burden of producing evidence to refute the prima facie case shifts to the other party. (*Sargent Fletcher, Inc. v. Able Corp.* (2003) 110 Cal.App.4th 1658, 1667-1668 [3 Cal.Rptr.3d 279] , internal citations omitted.)

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewCivil ProcedureTrialsJury TrialsJury InstructionsStandard InstructionsEvidenceProcedural ConsiderationsBurdens of ProofGeneral OverviewEvidenceProcedural ConsiderationsBurdens of ProofClear & Convincing Proof



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CHAPTER 2 California Judicial Council Evidence Instructions

1-2 California Forms of Jury Instruction CACI 201

CACI 201 More Likely True--Clear and Convincing Proof

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

New September 2003; Revised October 2004

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

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

■ *Evidence Code section 115* provides: "Burden of proof" means the obligation of a party to establish by evidence a requisite degree of belief concerning a fact in the mind of the trier of fact or the court. The burden of proof may require a party to raise a reasonable doubt concerning the existence or nonexistence of a fact or that he establish the existence or nonexistence of a fact by preponderance of the evidence, by clear and convincing proof, or by proof beyond a reasonable doubt. [P] Except as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence."

■ *Evidence Code section 500* provides: "Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting."

■ Each party is entitled to the benefit of all the evidence, including the evidence produced by an adversary. (*Williams v. Barnett* (1955) 135 Cal.App.2d 607, 612 [287 P.2d 789] ; 7 Witkin, California Procedure (4th ed. 1997) Trial, § 305, p. 352.)

■ "Proof by clear and convincing evidence is required 'where particularly important individual interests or rights are at stake,' such as the termination of parental rights, involuntary commitment, and deportation. However, 'imposition of even severe civil sanctions that do not implicate such interests has been permitted after proof by a preponderance of the evidence.' " (*Weiner v. Fleischman* (1991) 54 Cal.3d 476, 487 [286 Cal.Rptr. 40, 816 P.2d 892] (quoting *Herman & MacLean v. Huddleston* (1983) 459 U.S. 375, 389-390).)

■ " 'Clear and convincing' evidence requires a finding of high probability." (*In re Angelia P.* (1981) 28 Cal.3d 908, 919 [171 Cal.Rptr. 637, 623 P.2d 198] .)

Secondary Sources

1 Witkin, California Evidence (4th ed. 2000) Burden of Proof and Presumptions, §§ 38, 39

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

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

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

Publisher's Notes

This instruction replaces BAJI No. 2.62.

LexisNexis Matthew Bender Expert Practice Tip--Closely Consider How to Phrase Your

Argument: This language, it seems, is more difficult for a juror to understand than the prior instruction. Thus, if you have a trial with a "clear and convincing" standard, closely consider how to phrase your argument. *By Rex Heeseman*

LexisNexis Matthew Bender Expert Practice Tip--"Clear and Convincing Evidence" Is Not Proof

"Beyond a Reasonable Doubt": You may also want to remind the jury that proof by "clear and convincing evidence" is still not proof "beyond a reasonable doubt" that only applies in criminal cases. *By Ronald Oster*

LexisNexis Matthew Bender Expert Practice Tip--Use of CACI No. 201 in Tort Actions Is

Unlikely: It would be uncommon for this instruction to be used in a tort action as it is not the appropriate degree of proof. *By Dona Cohn-Payne*

LexisNexis Matthew Bender Expert Practice Tip--"Clear and Convincing" Standard: CACI No.

201 instructs the jury that certain facts must be proven by "clear and convincing" evidence. Unfortunately, the instruction does not set forth which facts need to be proved by the higher standard. The instruction would be improved if it required alteration by inserting those facts which must be proved by "clear and convincing" evidence. *By Joseph Devine*

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewCivil ProcedureTrialsJury TrialsJury
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CHAPTER 2 California Judicial Council Evidence Instructions

1-2 California Forms of Jury Instruction CACI 202

CACI 202 Direct and Indirect Evidence

Evidence can come in many forms. It can be testimony about what someone saw or heard or smelled. It can be an exhibit admitted into evidence. It can be someone's opinion.

Some evidence proves a fact directly, such as testimony of a witness who saw a jet plane flying across the sky. Some evidence proves a fact indirectly, such as testimony of a witness who saw only the white trail that jet planes often leave. This indirect evidence is sometimes referred to as "circumstantial evidence." In either instance, the witness's testimony is evidence that a jet plane flew across the sky.

As far as the law is concerned, it makes no difference whether evidence is direct or indirect. You may choose to believe or disbelieve either kind. Whether it is direct or indirect, you should give every piece of evidence whatever weight you think it deserves.

New September 2003

Directions for Use

An instruction concerning the effect of circumstantial evidence must be given on request when it is called for by the evidence. (*Shepherd v. Walley* (1972) 28 Cal.App.3d 1079, 1084 [105 Cal.Rptr. 387] ; *Calandri v. Ione Unified School Dist.* (1963) 219 Cal.App.2d 542, 551 [33 Cal.Rptr. 333] ; *Trapani v. Holzer* (1958) 158 Cal.App.2d 1, 6 [321 P.2d 803] .)

Sources and Authority

- *Evidence Code* section 410 provides: "As used in this chapter, 'direct evidence' means evidence that

directly proves a fact, without an inference or presumption, and which in itself, if true, conclusively establishes that fact."

■ *Evidence Code section 600(b)* provides: "An inference is a deduction of fact that may logically and reasonably be drawn from another fact or group of facts found or otherwise established in the action."

■ The Assembly Committee on Judiciary Comment to section 600 observes: "Under the Evidence Code, an inference is not itself evidence; it is the result of reasoning from evidence."

■ "[T]he fact that evidence is 'circumstantial' does not mean that it cannot be 'substantial.' Relevant circumstantial evidence is admissible in California. Moreover, the jury is entitled to accept persuasive circumstantial evidence even where contradicted by direct testimony." (*Hasson v. Ford Motor Co.* (1977) 19 Cal.3d 530, 548 [138 Cal.Rptr. 705, 564 P.2d 857] , overruled on other grounds in *Soule v. GM Corp.* (1994) 8 Cal.4th 548 [34 Cal.Rptr.2d 607, 882 P.2d 298] .)

■ "The terms 'indirect evidence' and 'circumstantial evidence' are interchangeable and synonymous." (*People v. Yokum* (1956) 145 Cal.App.2d 245, 250 [302 P.2d 406] , disapproved on other grounds, *People v. Cook* (1983) 33 Cal.3d 400, 413 [189 Cal.Rptr. 159, 658 P.2d 86] ; *People v. Goldstein* (1956) 139 Cal.App.2d 146, 152 [293 P.2d 495] .)

Secondary Sources

1 Witkin, California Evidence (4th ed. 2000) Circumstantial Evidence, §§ 1, 2

3 Witkin, California Evidence (4th ed. 2000) Presentation at Trial, §§ 138-141

Jefferson, California Evidence Benchbook (3d ed. 1997) §§ 19.12-19.18

48 *California Forms of Pleading and Practice*, Ch. 551, Trial, § 551.62 (Matthew Bender)

Publisher's Notes

This instruction replaces BAJI No. 2.00.

LexisNexis Matthew Bender Expert Practice Tip--Structure Your Closing Argument Carefully:

This instruction is one that may be difficult for some jurors to understand and to apply. Hence, structure the closing argument carefully. *By Rex Heeseman*

LexisNexis Matthew Bender Expert Practice Tip--Proving Intent: This can be a very important instruction in cases where proving intent is an element of your case. Except in unusual circumstances, intent can only be proved through indirect evidence. Accordingly, this instruction that the law makes no difference between direct and indirect evidence should be emphasized in closing argument. *By Ronald Oster*

LexisNexis Matthew Bender Expert Practice Tip--Point Out Direct Evidence: Pointing out direct evidence of a fact in issue in a closing argument when the other side only has indirect evidence of a contrary fact on the same issue is a good idea. Even though this instruction indicates no difference on whether the evidence is direct or indirect, jurors tend to favor direct evidence so it is important to point it out when you get the chance. *By Dona Cohn-Payne*

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewEvidenceProcedural ConsiderationsCircumstantial &
Direct EvidenceEvidenceRelevanceCircumstantial & Direct EvidenceEvidenceTestimonyLay WitnessesOpinion
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CHAPTER 2 California Judicial Council Evidence Instructions

1-2 California Forms of Jury Instruction CACI 203

CACI 203 Party Having Power to Produce Better Evidence

You may consider the ability of each party to provide evidence. If a party provided weaker evidence when it could have provided stronger evidence, you may distrust the weaker evidence.

New September 2003

Directions for Use

An instruction on failure to produce evidence should not be given if there is no evidence that the party producing inferior evidence had the power to produce superior evidence. (*Thomas v. Gates* (1899) 126 Cal. 1, 6 [58 P. 315] ; *Hansen v. Warco Steel Corp.* (1965) 237 Cal.App.2d 870, 876 [47 Cal.Rptr. 428] ; *Holland v. Kerr* (1953) 116 Cal.App.2d 31, 37 [253 P.2d 88] .)

The reference to "stronger evidence" applies to evidence that is admissible. This instruction should not be construed to apply to evidence that the court has ruled inadmissible. (*Hansen, supra*, 237 Cal.App.2d at p. 877 .)

For willful suppression of evidence, see *CACI No. 204, Willful Suppression of Evidence*.

Secondary Sources

7 Witkin, *California Procedure* (4th ed. 1997) Trial, § 313, p. 358

48 *California Forms of Pleading and Practice*, Ch. 551, Trial, § 551.93 (Matthew Bender)

Publisher's Notes

This instruction replaces BAJI No. 2.02.

LexisNexis Matthew Bender Expert Practice Tip--Missing Witnesses at Trial: This instruction can be useful in cases when one side has decided not to call an important witness because the witness did not do well in a deposition. A closing argument structured around "the empty chair" (e.g., the missing witness) can be strengthened by emphasizing this instruction. *By Ronald Oster*

LexisNexis Matthew Bender Expert Practice Tip--Use CACI No. 203, 204, and 205 Only When Evidence Exists to Support Finding on Issues: The "Directions for Use" for CACI Nos. 203, 204, and 205 make clear that these instructions should not be given unless there is evidence to support a finding on these issues by the jury. Although attorneys would commonly dispute whether these instructions should be given, BAJI use notes did not make it clear that such instructions should only be given if there was evidence to support them. *By Joseph Devine*

LexisNexis Matthew Bender Expert Practice Tip--If Appropriate, Explain Why Strongest Evidence Was Not Presented: Always provide your strongest evidence and if you cannot then explain to the jury why it was not possible. For example, if a witness cannot testify live and you must rely on deposition testimony, explain to the jury why that witness was not there personally. This instruction should only be used if appropriate to the facts in the case. *By Dona Cohn-Payne*

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewCivil ProcedureTrialsJury TrialsJury InstructionsStandard InstructionsEvidenceProcedural ConsiderationsCircumstantial & Direct EvidenceEvidenceProcedural ConsiderationsPreliminary QuestionsWeight & Credibility of Evidence



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CHAPTER 2 California Judicial Council Evidence Instructions

1-2 California Forms of Jury Instruction CACI 204

CACI 204 Willful Suppression of Evidence

You may consider whether one party intentionally concealed or destroyed evidence. If you decide that a party did so, you may decide that the evidence would have been unfavorable to that party.

New September 2003; Revised October 2004

Directions for Use

This instruction should be given only if there is evidence of suppression. (*In re Estate of Moore* (1919) 180 Cal. 570, 585 [182 P. 285] ; *Sprague v. Equifax, Inc.* (1985) 166 Cal.App.3d 1012, 1051 [213 Cal.Rptr. 69] ; *County of Contra Costa v. Nulty* (1965) 237 Cal.App.2d 593, 598 [47 Cal.Rptr. 109] .)

If there is evidence that a party improperly altered evidence (as opposed to concealing or destroying it), users should consider modifying this instruction to account for that circumstance.

In *Cedars-Sinai Medical Center v. Superior Court* (1998) 18 Cal.4th 1, 12 [74 Cal.Rptr.2d 248, 954 P.2d 511] , a case concerning the tort of intentional spoliation of evidence, the Supreme Court observed that trial courts are free to adapt standard jury instructions on willful suppression to fit the circumstances of the case, "including the egregiousness of the spoliation and the strength and nature of the inference arising from the spoliation."

Sources and Authority

- *Evidence Code* section 413 provides: "In determining what inferences to draw from the evidence or facts in the case against a party, the trier of fact may consider, among other things, the party's failure to

explain or to deny by his testimony such evidence or facts in the case against him, or his willful suppression of evidence relating thereto, if such be the case."

■ Former *Code of Civil Procedure* section 1963(5) permitted the jury to infer "[t]hat the evidence willfully suppressed would be adverse if produced." Including this inference in a jury instruction on willful suppression is proper because "*Evidence Code* section 413 was not intended as a change in the law." (*Bihun v. AT&T Information Systems, Inc.* (1993) 13 Cal.App.4th 976, 994 [16 Cal.Rptr.2d 787] , disapproved of on other grounds in *Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 664 [25 Cal.Rptr.2d 109, 863 P.2d 179] .)

■ "The rule of [present *Evidence Code* section 413] ... is predicated on common sense, and public policy. The purpose of a trial is to arrive at the true facts. A trial is not a game where one counsel safely may sit back and refuse to produce evidence where in the nature of things his client is the only source from which that evidence may be secured. *A defendant is not under a duty to produce testimony adverse to himself, but if he fails to produce evidence that would naturally have been produced he must take the risk that the trier of fact will infer, and properly so, that the evidence, had it been produced, would have been adverse.*" (*Williamson v. Superior Court of Los Angeles County* (1978) 21 Cal.3d 829, 836 fn. 2 [148 Cal.Rptr. 39, 582 P.2d 126] , original italics.)

Secondary Sources

7 Witkin, *California Procedure* (4th ed. 1997) Trial, § 313, p. 358

3 Witkin, *California Evidence* (4th ed. 2000) Presentation at Trial, § 115

48 *California Forms of Pleading and Practice*, Ch. 551, Trial, § 551.93 (Matthew Bender)

Publisher's Notes

This instruction replaces BAJI No. 2.03.

LexisNexis Matthew Bender Expert Practice Tip--Emphasize CACI No. 204, If Applicable: Willful suppression of evidence presents a dramatic part of your case, if applicable. Thus, structure your closing argument with emphasis on this instruction. *By Rex Heeseman and Ronald Oster*

LexisNexis Matthew Bender Expert Practice Tip--Use of CACI No. 204: CACI No. 204 is a particularly powerful instruction to the jury. Review case law on negligent and intentional spoliation of evidence. Plaintiffs counsel in tort cases should immediately notify in writing the defendant and their insurance company and later on counsel that a preservation of evidence (i.e. automobile, product, etc.) is demanded. This should be done as soon as you sign up your client. In the event the item is later destroyed or lost, your chances of obtaining this instruction have increased. *By Dona Cohn-Payne*

See also "LexisNexis Matthew Bender Expert Practice Tip--Use CACI No. 203, 204, and 205 Only When Evidence Exists to Support Finding on Issues" in CACI No. 203.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Evidence Inferences & Presumptions General Overview



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CHAPTER 2 California Judicial Council Evidence Instructions

1-2 California Forms of Jury Instruction CACI 205

CACI 205 Failure to Explain or Deny Evidence

You may consider whether a party failed to explain or deny some unfavorable evidence. Failure to explain or to deny unfavorable evidence may suggest that the evidence is true.

New September 2003

Directions for Use

This instruction should be given only if there is a failure to deny or explain a fact that is material to the case.

Sources and Authority

- *Evidence Code section 413* provides: "In determining what inferences to draw from the evidence or facts in the case against a party, the trier of fact may consider, among other things, the party's failure to explain or to deny by his testimony such evidence or facts in the case against him, or his willful suppression of evidence relating thereto, if such be the case."

Secondary Sources

3 Witkin, *California Evidence* (4th ed. 2000) Presentation at Trial, § 116

4 Johnson, *California Trial Guide, Ch. 90, Closing Argument, § 90.30[2]* (Matthew Bender)

Publisher's Notes

This instruction replaces BAJI No. 2.04.

LexisNexis Matthew Bender Expert Practice Tip--Highlight Evidence Not Explained or Denied: In almost every case, there is some evidence that one side fails to explain or deny. *CACI No. 205* provides an opportunity to highlight the significance of such a failure. *By Ronald Oster*

LexisNexis Matthew Bender Expert Practice Tip--Evidence Must be Material: Make sure if your opposing counsel is proposing this instruction, the evidence that was not denied or explained is actually material. *By Dona Cohn-Payne*

See also "LexisNexis Matthew Bender Expert Practice Tip--Use *CACI No. 203*, 204, and 205 Only When Evidence Exists to Support Finding on Issues" in *CACI No. 203*.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewCivil ProcedureTrialsJury TrialsJury InstructionsStandard InstructionsEvidenceInferences & PresumptionsGeneral Overview



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CHAPTER 2 California Judicial Council Evidence Instructions

1-2 California Forms of Jury Instruction CACI 206

CACI 206 Evidence Admitted for Limited Purpose

During the trial, I explained to you that certain evidence was admitted for a limited purpose. You may consider that evidence only for the limited purpose that I described, and not for any other purpose.

New September 2003

Where appropriate, an instruction limiting the purpose for which evidence is to be considered must be given upon request. (*Evid. Code*, § 355; *Daggett v. Atchison, Topeka & Santa Fe Ry. Co.* (1957) 48 Cal.2d 655, 665-666 [313 P.2d 557] ; *Continental Airlines, Inc. v. McDonnell Douglas Corp.* (1989) 216 Cal.App.3d 388, 412 [264 Cal.Rptr. 779] .) It is recommended that the judge call attention to the purpose to which the evidence applies.

For an instruction on evidence applicable to one party or a limited number of parties, see *CACI No. 207, Evidence Applicable to One Party*.

- *Evidence Code* section 355 provides: "When evidence is admissible as to one party or for one purpose and is inadmissible as to another party or for another purpose, the court upon request shall restrict the evidence to its proper scope and instruct the jury accordingly."
- Refusal to give a requested instruction limiting the purpose for which evidence is to be considered may constitute error. (*Adkins v. Brett* (1920) 184 Cal. 252, 261-262 [193 P. 251] .)
- Courts have observed that "[w]here the information is admitted for a purpose other than showing the truth of the matter asserted ... , prejudice is likely to be minimal and a limiting instruction under section

355 may be requested to control the jury's use of the information." (*Korsak v. Atlas Hotels, Inc.* (1992) 2 Cal.App.4th 1516, 1525 [3 Cal.Rptr.2d 833] .)

■ An adverse party may be excused from the requirement of requesting a limiting instruction and may be permitted to assert error if the trial court unequivocally rejects the argument upon which a limiting instruction would be based. (*Warner Construction Corp. v. City of Los Angeles* (1970) 2 Cal.3d 285, 298-299 [85 Cal.Rptr. 444, 466 P.2d 996] .)

Secondary Sources

1 Witkin, California Evidence (4th ed. 2000) Circumstantial Evidence, §§ 30-34

Jefferson, California Evidence Benchbook (3d ed. 1997) §§ 20.11-20.13

1A *California Trial Guide, Unit 21, Procedures for Determining Admissibility of Evidence*, § 21.21 (Matthew Bender)

48 *California Forms of Pleading and Practice, Ch. 551, Trial*, §§ 551.66, 551.77 (Matthew Bender)

Publisher's Notes

This instruction covers issues presented in BAJI No. 2.05.

LexisNexis Matthew Bender Expert Practice Tip--Considering Evidence for Limited Purpose: "It is hard to unring the bell." Similarly, some jurors will have some difficulties in considering evidence for a limited purpose. *By Rex Heeseman*

LexisNexis Matthew Bender Expert Practice Tip--Consider Keeping Evidence for Limited Purpose Out: CACI No. 206 is a very difficult instruction for a juror to follow since evidence for one purpose will undoubtedly be used for other purposes. If you are opposing the introduction of evidence, it is better to keep the evidence completely out than have to deal with this instruction due to the prejudicial effect. *By Dona Cohn-Payne*

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewCivil ProcedureTrialsJury TrialsJury InstructionsStandard InstructionsEvidenceInferences & PresumptionsGeneral OverviewEvidenceProcedural ConsiderationsCurative AdmissibilityEvidenceProcedural ConsiderationsLimited Admissibility



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CHAPTER 2 California Judicial Council Evidence Instructions

1-2 California Forms of Jury Instruction CACI 207

CACI 207 Evidence Applicable to One Party

[During the trial, I explained that certain evidence could be considered as to only one party. You may not consider that evidence as to any other party.]

[During the trial, I explained that certain evidence could be considered as to one or more parties but not to every party. You may not consider that evidence as to any other party.]

New September 2003

If appropriate, an instruction limiting the parties to whom evidence applies must be given on request. (*Evid. Code*, § 355.) It is recommended that the judge call attention to the party or parties to which the evidence applies.

For an instruction on evidence admissible for a limited purpose, see *CACI No. 206, Evidence Admitted for Limited Purpose*.

■ *Evidence Code* section 355 provides: "When evidence is admissible as to one party or for one purpose and is inadmissible as to another party or for another purpose, the court upon request shall restrict the evidence to its proper scope and instruct the jury accordingly."

Secondary Sources

1 Witkin, *California Evidence* (4th ed. 2000) Circumstantial Evidence, §§ 30-34

Jefferson, *California Evidence Benchbook* (3d ed. 1997) §§ 20.11-20.13

1A *California Trial Guide, Unit 21, Procedures for Determining Admissibility of Evidence*, § 21.21 (Matthew Bender)

48 *California Forms of Pleading and Practice, Ch. 551, Trial*, §§ 551.66, 551.77 (Matthew Bender)

Publisher's Notes

This instruction covers issues presented in BAJI No. 2.05.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewCivil ProcedureTrialsJury TrialsJury
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CHAPTER 2 California Judicial Council Evidence Instructions

1-2 California Forms of Jury Instruction CACI 208

CACI 208 Deposition as Substantive Evidence

During the trial, you heard testimony read from a deposition. A deposition is the testimony of a person taken before trial. At a deposition the person is sworn to tell the truth and is questioned by the attorneys. You must consider the deposition testimony that was read to you in the same way as you consider testimony given in court.

New September 2003

- *Code of Civil Procedure section 2002* provides:

The testimony of witnesses is taken in three modes:

1. By affidavit;
2. By deposition;
3. By oral examination.

- *Code of Civil Procedure section 2025.620* provides, in part: "At the trial ... any part or all of a deposition may be used against any party who was present or represented at the taking of the deposition ... so far as admissible under the rules of evidence applied as though the deponent were then present and testifying as a witness, in accordance with the following [rules set forth in this subdivision]."

- "Admissions contained in depositions and interrogatories are admissible in evidence to establish any material fact." (*Leasman v. Beech Aircraft Corp.* (1975) 48 Cal.App.3d 376, 380 [121 Cal.Rptr. 768] .)

- *Evidence Code section 1291(a)* provides:

Evidence of former testimony is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and:

- (1) The former testimony is offered against a person who offered it in evidence in his own behalf on the former occasion or against the successor in interest of such person; or
- (2) The party against whom the former testimony is offered was a party to the action or proceeding in which the testimony was given and had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which he has at the hearing.

■ *Evidence Code section 1292(a)* provides:

Evidence of former testimony is not made inadmissible by the hearsay rule if:

- (1) The declarant is unavailable as a witness;
- (2) The former testimony is offered in a civil action; and
- (3) The issue is such that the party to the action or proceeding in which the former testimony was given had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which the party against whom the testimony is offered has at the hearing.

■ *Evidence Code section 1290(c)* defines "former testimony" as "[a] deposition taken in compliance with law in another action."

■ "The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds the witness unavailable as a witness within the meaning of *section 240 of the Evidence Code*." (*Chavez v. Zapata Ocean Resources, Inc.* (1984) 155 Cal.App.3d 115, 118 [201 Cal.Rptr. 887] , citation omitted.)

Secondary Sources

3 Witkin, California Evidence (4th ed. 2000) Presentation at Trial, §§ 153-163

7 Witkin, California Procedure (4th ed. 1997) Trial, § 304, p. 351

1A *California Trial Guide, Unit 20, Procedural Rules for Presentation of Evidence*, §§ 20.30 -20.38, Unit 40, Hearsay, §§ 40.60 -40.61 (Matthew Bender)

5 Levy et al., California Torts, Ch. 72, *Discovery*, § 72.41 (Matthew Bender)

16 *California Forms of Pleading and Practice, Ch. 193, Discovery: Depositions*, §§ 193.90 -193.96 (Matthew Bender)

Matthew Bender Practice Guide: California Civil Discovery, Ch. 6, *Oral Depositions in California*

Publisher's Notes

This instruction replaces BAJI No. 2.06.

LexisNexis Matthew Bender Expert Practice Tip--Explain Discovery Devices to Jurors: Most jurors will be unfamiliar with depositions. Therefore, explain this procedural device carefully in your closing argument. This same comment applies to other discovery devices as well, *e.g.*, *CACI No. 209* (Interrogatories) and *CACI No. 210* (Requests for Admissions). *By Rex Heeseman*

LexisNexis Matthew Bender Expert Practice Tip--Impeaching Witness with Deposition Testimony: If you impeach a witness on the stand with a deposition, be sure to have the court read *CACI No. 208* when the deposition is used during trial. *By Ronald Oster*

LexisNexis Matthew Bender Expert Practice Tip--Reading Deposition Testimony During Trial: If you read a deposition at trial, have someone with a powerful presence as the witness reading the transcript from the witness chair, while you read the attorney portion of the transcript. The jury can relate more to this presentation and will be able to follow the evidence easier if read by two people in a questions and answer format. Before reading the deposition make sure that the judge has already ruled on any objections to the testimony and if there are any exhibits to the deposition that you want admitted, prior rulings on any objections make the reading flow better. *By Dona Cohn-Payne*

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewCivil ProcedureTrialsJury TrialsJury InstructionsStandard InstructionsEvidenceDocumentary EvidenceWritingsTranscripts & TranslationsDeposition Transcripts



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CHAPTER 2 California Judicial Council Evidence Instructions

1-2 California Forms of Jury Instruction CACI 209

CACI 209 Use of Interrogatories of a Party

Before trial, each party has the right to ask the other parties to answer written questions. These questions are called interrogatories. The answers are also in writing and are given under oath. You must consider the questions and answers that were read to you the same as if the questions and answers had been given in court.

New September 2003

- *Code of Civil Procedure section 2030.410* provides: "At the trial or any other hearing in the action, so far as admissible under the rules of evidence, the propounding party or any party other than the responding party may use any answer or part of an answer to an interrogatory only against the responding party. It is not ground for objection to the use of an answer to an interrogatory that the responding party is available to testify, has testified, or will testify at the trial or other hearing."

- "Admissions contained in depositions and interrogatories are admissible in evidence to establish any material fact." (*Leasman v. Beech Aircraft Corp.* (1975) 48 Cal.App.3d 376, 380 [121 Cal.Rptr. 768] .)

Secondary Sources

3 Witkin, California Evidence (4th ed. 2000) Presentation at Trial, § 163

7 Witkin, California Procedure (4th ed. 1997) Trial, § 304, p. 351

1A *California Trial Guide, Unit 20, Procedural Rules for Presentation of Evidence*, § 20.50 (Matthew Bender)

16 *California Forms of Pleading and Practice, Ch. 194, Discovery: Interrogatories*, § 194.26 (Matthew Bender)

Matthew Bender Practice Guide: California Civil Discovery, Ch. 9, Interrogatories, 9.29

Publisher's Notes

This instruction replaces BAJI No. 2.07.

LexisNexis Matthew Bender Expert Practice Tip--Using Responses to Interrogatories as Exhibit:

Interrogatories are usually used to impeach a party's testimony with his or her previous responses to interrogatories. Consider having the actual interrogatory along with the verification put into evidence as an exhibit for the jury to consider during deliberation. *By Dona Cohn-Payne*

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryMethodsInterrogatoriesUseCivil ProcedureTrialsJury TrialsJury InstructionsGeneral
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CHAPTER 2 California Judicial Council Evidence Instructions

1-2 California Forms of Jury Instruction CACI 210

CACI 210 Requests for Admissions

Before trial, each party has the right to ask another party to admit in writing that certain matters are true. If the other party admits those matters, you must accept them as true. No further evidence is required to prove them.

[However, these matters must be considered true only as they apply to the party who admitted they were true.]

New September 2003

The bracketed phrase should be given if there are multiple parties.

- Requests for admission are authorized by *Code of Civil Procedure* section 2033.010. *Code of Civil Procedure* section 2033.410 provides, in part: "Any matter admitted in response to a request for admission is conclusively established against the party making the admission in the pending action. ... [A]ny admission made by a party under this section is binding only on that party and is made for the purpose of the pending action only. It is not an admission by that party for any other purpose, and it shall not be used in any manner against that party in any other proceeding."

- "As Professor Hogan points out, '[t]he request for admission differs fundamentally from the other five discovery tools (depositions, interrogatories, inspection demands, medical examinations, and expert witness exchanges). These other devices have as their main thrust the uncovering of factual data that may be used in proving things at trial. The request for admission looks in the opposite direction. It is a device that seeks to eliminate the need for proof in certain areas of the case.' " (*Brigante v. Huang* (1993) 20 Cal.App.4th 1569, 1577 [25 Cal.Rptr.2d 354] (quoting 1 Hogan, *Modern California Discovery* (4th ed.

1988) § 9.1, p. 533).)

■ All parties to the action may rely on admissions. (See *Swedberg v. Christiana Community Builders* (1985) 175 Cal.App.3d 138, 143 [220 Cal.Rptr. 544] .)

Secondary Sources

2 Witkin, California Evidence (4th ed. 2000) Discovery, §§ 157-167, 177

1A *California Trial Guide, Unit 20, Procedural Rules for Presentation of Evidence*, § 20.51 (Matthew Bender)

16 *California Forms of Pleading and Practice, Ch. 196, Discovery: Requests for Admissions*, § 196.19 (Matthew Bender)

Matthew Bender Practice Guide: California Civil Discovery, Ch. 12, *Requests for Admissions*

Publisher's Notes

This instruction covers issues presented in BAJI No. 2.08.

LexisNexis Matthew Bender Expert Practice Tip--Acceptance of True Matters: It is rare that a party will contradict something they admitted as true in a request for admission. However, *CACI No. 210* is important to home in on the fact that the jury must accept a matter as true even if they believe otherwise. *By Dona Cohn-Payne*

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryMethodsAdmissionsEffectCivil ProcedureDiscoveryMethodsAdmissionsResponsesCivil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewCivil ProcedureTrialsJury TrialsJury InstructionsStandard InstructionsEvidenceDocumentary EvidenceWritingsGeneral Overview



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CHAPTER 2 California Judicial Council Evidence Instructions

1-2 California Forms of Jury Instruction CACI 211

CACI 211 Prior Conviction of a Felony

You have heard that a witness in this trial has been convicted of a felony. You were told about the conviction only to help you decide whether you should believe the witness. You must not consider it for any other purpose.

New September 2003

- *Evidence Code section 788* provides for the circumstances under which evidence of a prior felony conviction may be used to attack a witness's credibility. This section is most often invoked in criminal cases, but it may be used in civil cases as well.

- The standards governing admissibility of prior convictions in civil cases are different from those in criminal proceedings. In *Robbins v. Wong* (1994) 27 Cal.App.4th 261, 273 [32 Cal.Rptr.2d 337], the court observed: "Given the significant distinctions between the rights enjoyed by criminal defendants and civil litigants, and the diminished level of prejudice attendant to felony impeachment in civil proceedings, it is not unreasonable to require different standards of admissibility in civil and criminal cases." (*Id.* at p. 273.)

In *Robbins*, the court concluded that *article I, section 28(f) of the California Constitution*, as well as any Supreme Court cases on this topic in the criminal arena, does not apply to civil cases. (*Robbins, supra*, 27 Cal.App.4th at p. 274.) However, the court did hold that the trial court "may utilize such decisions to formulate guidelines for the judicial weighing of probative value against prejudicial effect under section 352." (*Ibid.*)

Secondary Sources

3 Witkin, California Evidence (4th ed. 2000) Presentation at Trial, §§ 292, 294, 295, 308

48 *California Forms of Pleading and Practice*, Ch. 551, Trial, § 551.123 (Matthew Bender)

1 *Matthew Bender Practice Guide: California Trial and Post-Trial Civil Procedure*, Ch. 11, Questioning Witnesses and Objections, 11.64

Publisher's Notes

This instruction replaces BAJI No. 2.24.

LexisNexis Matthew Bender Expert Practice Tip--Considering Evidence for Limited Purpose:

Again, it is difficult for some jurors to consider an item of evidence for a limited purpose (*see also CACI No. 206*). By *Rex Heeseman*

LexisNexis Matthew Bender Expert Practice Tip--Argue Against Introduction of Prior Felony

Conviction: Needless to say strenuous argument against the introduction of a prior felony conviction is required. Choose your jury members carefully if there is a possibility that the prior felony conviction is coming in as evidence and be prepared to address the issue of why the conviction does or does not affect the credibility of the witness during your closing argument. By *Dona Cohn-Payne*

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewCivil ProcedureTrialsJury TrialsJury InstructionsStandard InstructionsEvidenceHearsayExceptionsJudgmentsPrior Felony ConvictionsEvidenceRelevancePrior Acts, Crimes & WrongsEvidenceTestimonyCredibilityImpeachmentConvictionsGeneral Overview



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CHAPTER 2 California Judicial Council Evidence Instructions

1-2 California Forms of Jury Instruction CACI 212

CACI 212 Statements of a Party Opponent

A party may offer into evidence any oral or written statement made by an opposing party outside the courtroom.

When you evaluate evidence of such a statement, you must consider these questions:

- 1. Do you believe that the party actually made the statement? If you do not believe that the party made the statement, you may not consider the statement at all.**
- 2. If you believe that the statement was made, do you believe it was reported accurately?**

You should view testimony about an oral statement made by a party outside the courtroom with caution.

New September 2003

Under *Evidence Code section 403(c)*, the court must instruct the jury to disregard a statement offered as evidence if it finds that the preliminary facts do not exist. For adoptive admissions, see *CACI No. 213, Adoptive Admissions*.

■ *Evidence Code section 1220* provides: "Evidence of a statement is not made inadmissible by the hearsay rule when offered against the declarant in an action to which he is a party in either his individual or representative capacity, regardless of whether the statement was made in his individual or representative capacity."

The Law Revision Commission comment to this section observes that "[t]he rationale underlying this exception is that the party cannot object to the lack of the right to cross-examine the declarant since the party himself made the statement."

- There is no requirement that the prior statement of a party must have been against his or her interests when made in order to be admissible. Any prior statement of a party may be offered against him or her in trial. (1 Witkin, California Evidence (4th ed. 2000) Hearsay § 93.)

- *Evidence Code section 403(a)(4)* provides: "The proponent of the proffered evidence has the burden of producing evidence as to the existence of the preliminary fact, and the proffered evidence is inadmissible unless the court finds that there is evidence sufficient to sustain a finding of the existence of the preliminary fact when [t]he proffered evidence is of a statement or other conduct of a particular person and the preliminary fact is whether that person made the statement or so conducted himself."

- The cautionary instruction regarding admissions is derived from common law, formerly codified at *Code of Civil Procedure section 2061*. The repeal of this section did not affect decisional law concerning the giving of the cautionary instruction. (*People v. Beagle* (1972) 6 Cal.3d 441, 455, fn. 4 [99 Cal.Rptr. 313, 492 P.2d 1] .)

- The purpose of the cautionary instruction has been stated as follows: "Ordinarily there is strong reasoning behind the principle that a party's extrajudicial admissions or declarations against interest should be viewed with caution. ... No class of evidence is more subject to error or abuse inasmuch as witnesses having the best of motives are generally unable to state the exact language of an admission and are liable, by the omission or the changing of words, to convey a false impression of the language used." (*Pittman v. Boiven* (1967) 249 Cal.App.2d 207, 214 [57 Cal.Rptr. 319] .)

- The need to give the cautionary instruction appears to apply to both civil and criminal cases. (See *People v. Livaditis* (1992) 2 Cal.4th 759, 789 [9 Cal.Rptr.2d 72, 831 P.2d 297] (conc. opn. of Mosk, J.).)

Secondary Sources

1 Witkin, California Evidence (4th ed. 2000) Hearsay, §§ 90-93, 125

3 Witkin, California Evidence (4th ed. 2000) Presentation at Trial, § 113

Jefferson, California Evidence Benchbook (3d ed. 1997) §§ 3.7-3.22

2 *California Trial Guide, Unit 40, Hearsay*, § 40.30 (Matthew Bender)

48 *California Forms of Pleading and Practice, Ch. 551, Trial*, § 551.76 (Matthew Bender)

Publisher's Notes

This instruction covers issues presented in BAJI No. 2.25.

LexisNexis Matthew Bender Expert Practice Tip--Emphasizing Inconsistencies: "Catching the other side" in an inconsistency can spell victory instead of defeat. Consequently, the closing argument on this point must be carefully drafted to emphasize the significance of the inconsistency. *By Rex Heeseman and Ronald Oster*

LexisNexis Matthew Bender Expert Practice Tip--Examples of Believable Statements: Examples of

common out-of-court statements in a personal injury action that have a high degree of believability are statements made to police officers and statements contained in medical records. *By Dona Cohn-Payne*

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewCivil ProcedureTrialsJury TrialsJury InstructionsStandard InstructionsEvidenceHearsayExemptionsStatements by Party OpponentsGeneral OverviewEvidenceHearsayExemptionsStatements by Party OpponentsAuthorized StatementsEvidenceHearsayExemptionsStatements by Party OpponentsVicarious Statements



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California Forms of Jury Instruction

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CHAPTER 2 California Judicial Council Evidence Instructions

1-2 California Forms of Jury Instruction CACI 213

CACI 213 Adoptive Admissions

You have heard evidence that [*insert name of declarant*] made the following statement: [*insert description of statement*]. You may consider that statement as evidence against [*insert name of party against whom statement was offered*] only if you find that both of the following conditions are true:

- 1. That [*name of party against whom statement was offered*] was aware of and understood the statement; and**
- 2. That [*name of party against whom statement was offered*], by words or conduct, either**
 - (a) expressed [his/her] belief that the statement was true; or**
 - (b) implied that the statement was true.**

If you do not decide that these conditions are true, you must not consider the statement at all.

New September 2003

Under *Evidence Code* section 403(c), the court must instruct the jury to disregard the evidence of an adoptive admission if it finds that the preliminary facts do not exist.

For statements of a party opponent, see *CACI No. 212, Statements of a Party Opponent*. For admissions by silence, see *CACI No. 214, Admissions by Silence*. Evasive conduct falls under this instruction rather than *CACI No. 212* or *214*.

■ *Evidence Code section 1221* provides: "Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if the statement is one of which the party, with knowledge of the content thereof, has by words or other conduct manifested his adoption or his belief in its truth."

■ *Evidence Code section 403(a)(4)* provides: "The proponent of the proffered evidence has the burden of producing evidence as to the existence of the preliminary fact, and the proffered evidence is inadmissible unless the court finds that there is evidence sufficient to sustain a finding of the existence of the preliminary fact when [t]he proffered evidence is of a statement or other conduct of a particular person and the preliminary fact is whether that person made the statement or so conducted himself."

■ The basis for the doctrine of adoptive admissions has been stated as follows: "When a person makes a statement in the presence of a party to an action under circumstances that would normally call for a response if the statement were untrue, the statement is admissible for the limited purpose of showing the party's reaction to it. His silence, evasion, or equivocation may be considered as a tacit admission of the statements made in his presence." (*In re Estate of Neilson* (1962) 57 Cal.2d 733, 746 [22 Cal.Rptr. 1, 371 P.2d 745] .)

■ In order for the hearsay evidence to be admissible, "it must have been shown clearly that [the party] heard and understood the statement." (*Fisch v. Los Angeles Metropolitan Transit Authority* (1963) 219 Cal.App.2d 537, 540 [33 Cal.Rptr. 298] .) There must also be evidence of some type of reaction to the statement. (*Ibid.*) It is clear that the doctrine "does not apply if the party is in such physical or mental condition that a reply could not reasonably be expected from him." (*Southers v. Savage* (1961) 191 Cal.App.2d 100, 104 [12 Cal.Rptr. 470] .)

Secondary Sources

1 Witkin, California Evidence (4th ed. 2000) Hearsay, §§ 102-105

Jefferson, California Evidence Benchbook (3d ed. 1997) §§ 3.23-3.30

Publisher's Notes

This instruction covers issues presented in BAJI Nos. 2.04 and 2.26.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Evidence Hearsay Exemptions Statements by Party Opponents Adopted Statements



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California Forms of Jury Instruction

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CHAPTER 2 California Judicial Council Evidence Instructions

1-2 California Forms of Jury Instruction CACI 214

CACI 214 Admissions by Silence

You have heard evidence that [insert name of declarant] made a statement in the presence of [insert name of party who remained silent] that [insert description of statement]. You have also heard that [insert name of party who remained silent] did not deny the statement.

You may treat the silence of [insert name of party who remained silent] as an admission that the statement was true only if you believe all of the following conditions are true:

- 1. That [insert name of party who remained silent] was aware of and understood the statement;**
- 2. That [he/she], by either words or actions, could have denied the statement but [he/she] did not; and**
- 3. That [he/she] would have denied the statement if [he/she] thought it was false. In determining this, you may consider whether, under the circumstances, a reasonable person would have denied the statement if he or she thought it was false.**

If you do not decide that all three of these conditions are true, you must not consider [insert name of party who remained silent]'s silence as an admission.

New September 2003

The jury should be instructed on the doctrine of adoptive admission by silence if the evidence giving rise to the doctrine is conflicting. (See *Southers v. Savage* (1961) 191 Cal.App.2d 100, 104-105 [12 Cal.Rptr. 470] .)

Under *Evidence Code* section 403(c), the court must instruct the jury to disregard the evidence if it finds that the preliminary facts do not exist.

For statements of a party opponent, see *CACI* No. 212, *Statements of a Party Opponent*. For admissions by words or evasive conduct, see *CACI* No. 213, *Adoptive Admissions*.

- *Evidence Code* section 1221 provides: "Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if the statement is one of which the party, with knowledge of the content thereof, has by words or other conduct manifested his adoption or his belief in its truth."

- *Evidence Code* section 403(a)(4) provides: "The proponent of the proffered evidence has the burden of producing evidence as to the existence of the preliminary fact, and the proffered evidence is inadmissible unless the court finds that there is evidence sufficient to sustain a finding of the existence of the preliminary fact when [t]he proffered evidence is of a statement or other conduct of a particular person and the preliminary fact is whether that person made the statement or so conducted himself."

- The basis for the doctrine of adoptive admissions has been stated as follows: "When a person makes a statement in the presence of a party to an action under circumstances that would normally call for a response if the statement were untrue, the statement is admissible for the limited purpose of showing the party's reaction to it. His silence, evasion, or equivocation may be considered as a tacit admission of the statements made in his presence." (*In re Estate of Neilson* (1962) 57 Cal.2d 733, 746 [22 Cal.Rptr. 1, 371 P.2d 745] .)

- This instruction addresses adoption of an admission by silence. Adoption occurs "where declarations of third persons made in the presence of a party give rise to admissions, the conduct of the party in the face of the declaration constituting the adoption of the statement to form an admission." (*In re Estate of Gaines* (1940) 15 Cal.2d 255, 262 [100 P.2d 1055] .)

- "The basis of the rule on admissions made in response to accusations is the fact that human experience has shown that generally it is natural to deny an accusation if a party considers himself innocent of negligence or wrongdoing." (*Keller v. Key System Transit Lines* (1954) 129 Cal.App.2d 593, 596 [277 P.2d 869] .) If the statement is not accusatory, then the failure to respond is not an admission. (*Neilson, supra*, 57 Cal.2d at p. 747 ; *Gilbert v. City of Los Angeles* (1967) 249 Cal.App.2d 1006, 1008 [58 Cal.Rptr. 56] .)

- Admissibility of this evidence depends upon whether (1) the statement was made under circumstances that call for a reply, (2) whether the party understood the statement, and (3) whether it could be inferred from his conduct that he adopted the statement as an admission. (*Gilbert, supra*, 249 Cal.App.2d at p. 1009 .)

- In order for the hearsay evidence to be admissible, "it must have been shown clearly that [the party] heard and understood the statement." (*Fisch v. Los Angeles Metropolitan Transit Authority* (1963) 219 Cal.App.2d 537, 540 [33 Cal.Rptr. 298] .) There must also be evidence of some type of reaction to the statement. (*Ibid.*) It is clear that the doctrine "does not apply if the party is in such physical or mental condition that a reply could not reasonably be expected from him." (*Southers, supra*, 191 Cal.App.2d at p. 104 .)

Secondary Sources

1 Witkin, California Evidence (4th ed. 2000) Hearsay §§ 102-105

Jefferson, California Evidence Benchbook (3d ed. 1997) §§ 3.23-3.30

2 *California Trial Guide, Unit 40, Hearsay, § 40.31* (Matthew Bender)

Publisher's Notes

This instruction covers issues presented in BAJI Nos. 2.04 and 2.26.

LexisNexis Matthew Bender Expert Practice Tip--Admissions by Silence Can Be Telling: A closing argument such as "silence is consent" can be telling if you have the appropriate evidence. *By Rex Heeseman*

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewCivil ProcedureTrialsJury TrialsJury InstructionsStandard InstructionsEvidenceHearsayExemptionsStatements by Party OpponentsGeneral OverviewEvidenceHearsayRule ComponentsNonverbal Conduct



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California Forms of Jury Instruction

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CHAPTER 2 California Judicial Council Evidence Instructions

1-2 California Forms of Jury Instruction CACI 215

CACI 215 Exercise of a Communication Privilege

People have a legal right not to disclose what they told their [doctor/attorney, etc.] in confidence because the law considers this information privileged. People may exercise this privilege freely and without fear of penalty.

You must not use the fact that a witness exercised this privilege to decide whether he or she should be believed. Indeed, you must not let it affect any of your decisions in this case.

New September 2003

This instruction must be given upon request, where appropriate. (*Evid. Code*, § 913(b).)

■ *Evidence Code section 913(b)*, provides: "The court, at the request of a party who may be adversely affected because an unfavorable inference may be drawn by the jury because a privilege has been exercised, shall instruct the jury that no presumption arises because of the exercise of the privilege and that the jury may not draw any inference therefrom as to the credibility of the witness or as to any matter at issue in the proceeding."

■ The comment to *Evidence Code section 913* notes that this statute "may modify existing California law as it applies in civil cases." Specifically, the comment notes that section 913 in effect overrules two Supreme Court cases: *Nelson v. Southern Pacific Co.* (1937) 8 Cal.2d 648 [67 P.2d 682] and *Fross v. Wotton* (1935) 3 Cal.2d 384 [44 P.2d 350]. The *Nelson* court had held that evidence of a person's exercise of the privilege against self-incrimination in a prior proceeding may be shown for impeachment purposes if he or she testifies in a self-exculpatory manner in a subsequent proceeding. Language in *Fross* indicated that unfavorable inferences may be drawn in a civil case from a party's claim of the

privilege against self-incrimination during the case itself.

Secondary Sources

2 Witkin, California Evidence (4th ed. 2000) Witnesses, §§ 95-97

Jefferson, California Evidence Benchbook (3d ed. 1997) §§ 35.26-35.27

3 *California Trial Guide, Unit 51, Privileges*, §§ 51.01 -51.32 (Matthew Bender)

Matthew Bender Practice Guide: California Civil Discovery, Ch. 2, Scope of Discovery, 2.09 -2.24

Publisher's Notes

This instruction covers issues presented in BAJI No. 2.27.

LexisNexis Matthew Bender Expert Practice Tip--Use Care With Evidence of Privilege: The topic of privilege is not well known by those who are employed outside of the law. Thus, care must be taken with this type of evidence. *By Rex Heeseman*

LexisNexis Matthew Bender Expert Practice Tip--Use/Non-Use of CACI No. 215: This instruction does not apply to communications of a plaintiff and the plaintiff's doctor in a personal injury case. You should remind your client before getting on the stand of the attorney-client privilege so that this instruction does not have to be used and it does not look like the client has something to hide. *By Dona Cohn-Payne*

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Evidence Privileges General Overview Evidence Privileges Attorney-Client Privilege Elements Evidence Privileges Marital Privileges General Overview Evidence Privileges Self-Incrimination Privilege General Overview



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CHAPTER 2 California Judicial Council Evidence Instructions

1-2 California Forms of Jury Instruction CACI 216

CACI 216 Exercise of Witness' Right Not to Testify

[Name of party/witness] has exercised [his/her] legal right not to testify concerning certain matters. Do not draw any conclusions from the exercise of this right or let it affect any of your decisions in this case. A [party/witness] may exercise this right freely and without fear of penalty.

New September 2003

Citing *Fross v. Wotton* (1935) 3 Cal.2d 384 [44 P.2d 350] , courts have stated the following: "When a claim of privilege made on this ground in a civil proceeding logically gives rise to an inference which is relevant to the issues involved, the trier of fact may properly draw that inference." (*Shepherd v. Superior Court* (1976) 17 Cal.3d 107, 117 [130 Cal.Rptr. 257, 550 P.2d 161] , internal citation omitted.)

However, Assembly Committee on the Judiciary's comment to *Evidence Code section 913* states: "There is some language in *Fross v. Wotton* ... that indicates that unfavorable inferences may be drawn in a civil case from a party's claim of the privilege against self-incrimination during the case itself. Such language was unnecessary to that decision; but, if it does indicate California law, that law is changed by *Evidence Code Sections 413 and 913*. Under these sections, it is clear that, in civil cases as well as criminal cases, inferences may be drawn only from the evidence in the case, not from the claim of privilege."

- *Evidence Code section 913* provides:

- (a) If in the instant proceeding or on a prior occasion a privilege is or was exercised not to testify with respect to any matter, or to refuse to disclose or to prevent another from disclosing any matter, neither the presiding officer nor counsel may comment thereon, no presumption shall arise because of the exercise of the privilege, and the trier of fact may

not draw any inference therefrom as to the credibility of the witness or as to any matter at issue in the proceeding.

(b) The court, at the request of a party who may be adversely affected because an unfavorable inference may be drawn by the jury because a privilege has been exercised, shall instruct the jury that no presumption arises because of the exercise of the privilege and that the jury may not draw any inference therefrom as to the credibility of the witness or as to any matter at issue in the proceeding.

■ *Evidence Code section 940* provides: "To the extent that such privilege exists under the Constitution of the United States or the State of California, a person has a privilege to refuse to disclose any matter that may tend to incriminate him."

■ *Evidence Code section 930* provides: "To the extent that such privilege exists under the Constitution of the United States or the State of California, a defendant in a criminal case has a privilege not to be called as a witness and not to testify."

■ *Evidence Code section 413* provides: "In determining what inferences to draw from the evidence or facts in the case against a party, the trier of fact may consider, among other things, the party's failure to explain or to deny by his testimony such evidence or facts in the case against him, or his willful suppression of evidence relating thereto, if such be the case."

■ "[I]n any proceeding, civil or criminal, a witness has the right to decline to answer questions which may tend to incriminate him in criminal activity." (*Cramer v. Tyars* (1979) 23 Cal.3d 131, 137 [151 Cal.Rptr. 653, 588 P.2d 793] , internal citation omitted.)

■ "[T]he privilege may not be asserted by merely declaring that an answer will incriminate; it must be 'evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result.' " (*Troy v. Superior Court* (1986) 186 Cal.App.3d 1006, 1010-1011 [231 Cal.Rptr. 108] , internal citations omitted.)

■ "The *Fifth Amendment of the United States Constitution* includes a provision that '[no] person ... shall be compelled in any criminal case to be a witness against himself, ...' Although the specific reference is to criminal cases, the *Fifth Amendment* protection 'has been broadly extended to a point where now it is available even to a person appearing only as a witness in any kind of proceeding where testimony can be compelled.' " (*Brown v. Superior Court* (1986) 180 Cal.App.3d 701, 708 [226 Cal.Rptr. 10] , citation and footnote omitted.)

■ "There is no question that the privilege against self-incrimination may be asserted by civil defendants who face possible criminal prosecution based on the same facts as the civil action. 'All matters which are privileged against disclosure upon the trial under the law of this state are privileged against disclosure through any discovery procedure.' " (*Brown, supra*, 180 Cal.App.3d at p. 708 , internal citations omitted.)

■ "It is well settled that the privilege against self-incrimination may be invoked not only by a criminal defendant, but also by parties or witnesses in a civil action. However, while the privilege of a criminal defendant is absolute, in a civil case a witness or party may be required either to waive the privilege or accept the civil consequences of silence if he or she does exercise it." (*Alvarez v. Sanchez* (1984) 158 Cal.App.3d 709, 712 [204 Cal.Rptr. 864] , internal citations omitted.)

■ "The privilege against self-incrimination is guaranteed by both the federal and state Constitutions. As pointed out by the California Supreme Court, 'two separate and distinct testimonial privileges' exist under this guarantee. First, a

defendant in a criminal case 'has an absolute right not to be called as a witness and not to testify.' Second, 'in any proceeding, civil or criminal, a witness has the right to decline to answer questions which may tend to incriminate him [or her] in criminal activity.' " (*People v. Merfeld* (1997) 57 Cal.App.4th 1440, 1443 [67 Cal.Rptr.2d 759] , internal citations omitted.)

Secondary Sources

2 Witkin, California Evidence (4th ed. 2000) Witnesses, § 96, p. 347

5 Levy et al., California Torts, Ch. 72, *Discovery*, §§ 72.20, 72.30 (Matthew Bender)

3 *California Trial Guide, Unit 51, Privileges*, § 51.32 (Matthew Bender)

16 *California Forms of Pleading and Practice, Ch. 191, Discovery: Privileges and Other Discovery Limitations*, § 191.30 *et seq.* (Matthew Bender)

1 *California Deposition and Discovery Practice, Ch. 21, Privileged Matters in General*, § 21.20, Ch. 22, *Privilege Against Self-Incrimination* (Matthew Bender)

Publisher's Notes

This instruction covers issues presented in BAJI No. 2.27.

LexisNexis Matthew Bender Expert Practice Tip--Right Not to Testify: Many jurors will associate this instruction with a criminal case. *By Rex Heeseman*

LexisNexis Matthew Bender Expert Practice Tip--Use of CACI No. 216: This instruction is mainly used in a civil case when a witness exercises the right not to testify in a criminal proceeding and then later there is a civil proceeding--for example, a murder trial whereby a witness exercises the right not to incriminate himself/herself and then there is later a civil suit for wrongful death. *By Dona Cohn-Payne*

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewCivil ProcedureTrialsJury TrialsJury InstructionsStandard InstructionsConstitutional LawBill of RightsFundamental RightsProcedural Due ProcessSelf-Incrimination PrivilegeEvidenceInferences & PresumptionsInferencesEvidencePrivilegesSelf-Incrimination PrivilegeGeneral Overview



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CHAPTER 2 California Judicial Council Evidence Instructions

1-2 California Forms of Jury Instruction CACI 217

CACI 217 Evidence of Settlement

You have heard evidence that there was a settlement between [*insert names of settling parties*]. You must not consider this settlement to determine responsibility for any harm. You may consider this evidence only to decide whether [*insert name of witness who settled*] is biased or prejudiced and whether [his/her] testimony is believable.

New September 2003

Evidence of prior settlement is not automatically admissible: "Even if it appears that a witness could have been influenced in his testimony by the payment of money or the obtaining of a dismissal, the party resisting the admission of such evidence may still appeal to the court's discretion to exclude it under section 352 of the code." (*Granville v. Parsons* (1968) 259 Cal.App.2d 298, 305 [66 Cal.Rptr. 149] .)

- *Evidence Code section 1152(a)* provides: "Evidence that a person has, in compromise or from humanitarian motives, furnished or offered or promised to furnish money or any other thing, act, or service to another who has sustained or will sustain or claims that he or she has sustained or will sustain loss or damage, as well as any conduct or statements made in negotiation thereof, is inadmissible to prove his or her liability for the loss or damage or any part of it."

- "While evidence of a settlement agreement is inadmissible to prove liability, it is admissible to show bias or prejudice of an adverse party. Relevant evidence includes evidence relevant to the credibility of a witness." (*Moreno v. Sayre* (1984) 162 Cal.App.3d 116, 126 [208 Cal.Rptr. 444] , internal citations omitted.)

Secondary Sources

1 Witkin, California Evidence (4th ed. 2000) *Circumstantial Evidence*, §§ 140-148

Jefferson, California Evidence Benchbook (3d ed. 1997) §§ 34.15-34.24

3 *California Trial Guide, Unit 50, Extrinsic Policies Affecting or Excluding Evidence*, § 50.20 (Matthew Bender)

48 *California Forms of Pleading and Practice, Ch. 551, Trial*, § 551.68 (Matthew Bender)

Publisher's Notes

This instruction replaces BAJI No. 2.28 and also covers issues presented in BAJI No. 15.03.1.

LexisNexis Matthew Bender Expert Practice Tip--Evidence of Settlement Generally Not Well Understood By Most Jurors: This instruction is on a topic that is not well understood by laypersons (see also, *e.g.*, CACI No. 215 regarding privilege). *By Rex Heeseman*

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureSettlementsGeneral OverviewCivil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewCivil ProcedureTrialsJury TrialsJury InstructionsStandard InstructionsEvidenceInferences & PresumptionsGeneral Overview



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CHAPTER 2 California Judicial Council Evidence Instructions

1-2 California Forms of Jury Instruction CACI 218

CACI 218 Statements Made to Physician (Previously Existing Condition)

[Insert name of health-care provider] has testified that [insert name of patient] made statements to [him/her] about [name of patient]'s medical history. These statements helped [name of health-care provider] diagnose the patient's condition. You can use these statements to help you examine the basis of [name of health-care provider]'s opinion. You cannot use them for any other purpose.

[However, a statement by [name of patient] to [name of health-care provider] about [his/her] current medical condition may be considered as evidence of that medical condition.]

New September 2003; Revised June 2006

Directions for Use

This instruction does not apply to, and should not be used for, a statement of the patient's then-existing physical sensation, mental feeling, pain, or bodily health. Such statements are admissible as an exception to the hearsay rule under *Evidence Code section 1250*. This instruction also does not apply to statements of a patient regarding a prior mental or physical state if he or she is unavailable as a witness. (*Evid. Code*, § 1251.)

This instruction also does not apply to, and should not be used for, statements of a party that are offered into evidence by an opposing party. Such statements are admissible as an exception to the hearsay rule under *Evidence Code section 1220*. See *CACI No. 212, Statements of a Party Opponent*.

Sources and Authority

■ Statements pointing to the cause of a physical condition may be admissible if they are made by a patient to a physician. The statement must be required for proper diagnosis and treatment and is admissible only to show the basis of the physician's medical opinion. (*People v. Wilson* (1944) 25 Cal.2d 341, 348 [153 P.2d 720] ; *Johnson v. Aetna Life Insurance Co.* (1963) 221 Cal.App.2d 247, 252 [34 Cal.Rptr. 484] ; *Willoughby v. Zylstra* (1935) 5 Cal.App.2d 297, 300-301 [42 P.2d 685] .)

■ *Evidence Code* section 1220 provides: "Evidence of a statement is not made inadmissible by the hearsay rule when offered against the declarant in an action to which he is a party in either his individual or representative capacity, regardless of whether the statement was made in his individual or representative capacity."

■ *Evidence Code* section 1250(a) provides, in part:

[E]vidence of a statement of the declarant's then existing state of mind, emotion, or physical sensation ... is not made inadmissible by the hearsay rule when:

(1) The evidence is offered to prove the declarant's state of mind, emotion, or physical sensation at that time or at any other time when it is itself an issue in the action; or

(2) The evidence is offered to prove or explain acts or conduct of the declarant.

■ *Evidence Code* section 1251 provides, in part:

[E]vidence of a statement of the declarant's state of mind, emotion, or physical sensation ... at a time prior to the statement is not made inadmissible by the hearsay rule if:

(a) The declarant is unavailable as a witness; and

(b) The evidence is offered to prove such prior state of mind, emotion, or physical sensation when it is itself an issue in the action and the evidence is not offered to prove any fact other than such state of mind, emotion, or physical sensation.

Secondary Sources

1 Witkin, California Evidence (4th ed. 2000) Hearsay, § 196

2 *California Trial Guide*, Unit 40, Hearsay, § 40.42 (Matthew Bender)

Publisher's Notes

This instruction replaces BAJI No. 2.43.

LexisNexis Matthew Bender Expert Practice Tip--Use of Evidence for Limited Purpose: CACI No. 218 is an instruction that asks jurors to use the evidence in only a certain respect (*see also* CACI No. 206, CACI No. 211). By Rex Heeseman

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewCivil ProcedureTrialsJury TrialsJury InstructionsStandard InstructionsEvidenceHearsayExceptionsMedical Diagnosis &

TreatmentEvidenceHearsayExceptionsState of MindGeneral OverviewEvidencePrivilegesDoctor-Patient
PrivilegeExceptionsEvidencePrivilegesDoctor-Patient PrivilegeWaiver



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CHAPTER 2 California Judicial Council Evidence Instructions

1-2 California Forms of Jury Instruction CACI 219

CACI 219 Expert Witness Testimony

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

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

- a. The expert's training and experience;**
- b. The facts the expert relied on; and**
- c. The reasons for the expert's opinion.**

New September 2003

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

For an instruction on hypothetical questions, see CACI No. 220, *Experts--Questions Containing Assumed*

Facts. For an instruction on conflicting expert testimony, see *CACI No. 221, Conflicting Expert Testimony*.

Do not use this instruction in eminent domain and inverse condemnation cases.

- The "credibility of expert witnesses is a matter for the jury after proper instructions from the court." (*Williams v. Volkswagenwerk Aktiengesellschaft* (1986) 180 Cal.App.3d 1244, 1265 [226 Cal.Rptr. 306] .)

- Under *Evidence Code* section 801(a), expert witness testimony "must relate to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact." (*New v. Consolidated Rock Products Co.* (1985) 171 Cal.App.3d 681, 692 [217 Cal.Rptr. 522] .)

- *Evidence Code* section 720(a) provides, in part: "A person is qualified to testify as an expert if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates."

- Expert witnesses are qualified by special knowledge to form opinions on facts that they have not personally witnessed. (*Manney v. Housing Authority of The City of Richmond* (1947) 79 Cal.App.2d 453, 460 [180 P.2d 69] .)

- "Although a jury may not arbitrarily or unreasonably disregard the testimony of an expert, it is not bound by the expert's opinion. Instead, it must give to each opinion the weight which it finds the opinion deserves. So long as it does not do so arbitrarily, a jury may entirely reject the testimony of a plaintiff's expert, even where the defendant does not call any opposing expert and the expert testimony is not contradicted." (*Howard, supra*, 72 Cal.App.4th at p. 633 , citations omitted.)

Secondary Sources

1 Witkin, California Evidence (4th ed. 2000) Opinion Evidence, §§ 26-44

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

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

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

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

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

Publisher's Notes

This instruction covers issues presented in BAJI No. 2.40.

LexisNexis Matthew Bender Expert Practice Tip--Explaining Expert Witness Instructions to Jurors: Experts can sometimes be critical, especially with regard to complicated or esoteric subjects. Therefore, explaining *CACI No. 219*, as well as *CACI No. 220* (hypothetical questions) and *CACI No. 221* (conflicting expert testimony), may be important. *By Rex Heeseman*

LexisNexis Matthew Bender Expert Practice Tip--CACI No. 219 vs. BAJI No. 2.40: *CACI No. 219* omits the provision in BAJI No. 2.40 that "... you may not arbitrarily or unreasonably disregard the (expert) opinion testimony in this case." This former provision was frequently used by both plaintiffs and defendants. For instance, when the plaintiff would call an expert to render opinion testimony that was not countered by expert testimony on the other side, the party with the expert would argue that the jury could not (unreasonably) disregard the opinions. In a case of contested experts, defense counsel might argue that he had no choice but to bring in an expert, otherwise the jury might think they were bound by the plaintiff's expert witness's opinions. As a practical matter, this is a significant change in the instructions. The change is probably helpful to the jury. They are still instructed "you may believe all, part, or none of an expert's testimony." The jury is less likely to be confused by lawyer arguments regarding whether or not a jury "may not arbitrarily disregard" opinion testimony. *By Joseph Devine*

LexisNexis Matthew Bender Expert Practice Tip--Using CACI No. 219: Any time you have an expert witness in a personal injury trial, this instruction will be used. Make sure that you have the expert testify about the three considerations listed in the instruction during the expert's testimony. *By Dona Cohn-Payne*

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewCivil ProcedureTrialsJury TrialsJury InstructionsStandard InstructionsEvidenceTestimonyExpertsGeneral OverviewEvidenceTestimonyExpertsCredibilityGeneral OverviewEvidenceTestimonyExpertsHelpfulness



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California Forms of Jury Instruction

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CHAPTER 2 California Judicial Council Evidence Instructions

1-2 California Forms of Jury Instruction CACI 220

CACI 220 Experts--Questions Containing Assumed Facts

The law allows expert witnesses to be asked questions that are based on assumed facts. These are sometimes called "hypothetical questions."

In determining the weight to give to the expert's opinion that is based on the assumed facts, you should consider whether the assumed facts are true.

New September 2003

Juries may be instructed that they should weigh an expert witness's response to a hypothetical question based on their assessment of the accuracy of the assumed facts in the hypothetical question. (*Treadwell v. Nickel* (1924) 194 Cal. 243, 263-264 [228 P. 25] .)

For an instruction on expert witnesses generally, see *CACI No. 219, Expert Witness Testimony*. For an instruction on conflicting expert testimony, see *CACI No. 221, Conflicting Expert Testimony*.

- The value of an expert's opinion depends on the truth of the facts assumed. (*Richard v. Scott* (1978) 79 Cal.App.3d 57, 63 [144 Cal.Rptr. 672] .)

- Hypothetical questions must be based on facts that are supported by the evidence: "It was decided early in this state that a hypothetical question to an expert must be based upon facts shown by the evidence and that the appellate court will place great reliance in the trial court's exercise of its discretion in passing upon a sufficiency of the facts as narrated." (*Hyatt v. Sierra Boat Co.* (1978) 79 Cal.App.3d 325, 339 [145 Cal.Rptr. 47] .)

■ Hypothetical questions should not omit essential material facts. (*Coe v. State Farm Mutual Automobile Insurance Co.* (1977) 66 Cal.App.3d 981, 995 [136 Cal.Rptr. 331] .)

■ The jury should not be instructed that they are entitled to reject the entirety of an expert's opinion if a hypothetical assumption has not been proven. Rather, the jury should be instructed "to determine the effect of that failure of proof on the value and weight of the expert opinion based on that assumption." (*Lysick v. Walcom* (1968) 258 Cal.App.2d 136, 156 [65 Cal.Rptr. 406] .)

Secondary Sources

3 Witkin, California Evidence (4th ed. 2000) Presentation at Trial, §§ 194-201

Jefferson, California Evidence Benchbook (3d ed. 1997) § 29.43, pp. 609-610

3A California Trial Guide, Unit 60, Opinion Testimony, §§ 60.05, 60.50 -60.51 (Matthew Bender)

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

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

Publisher's Notes

This instruction replaces BAJI No. 2.42.

LexisNexis Matthew Bender Expert Practice Tip--Discrediting Expert's Opinion: Attacking an expert witness's underlying assumptions is one of the most common methods of discrediting an expert's opinion. *CACI No. 220* addresses the importance of assumptions used in hypothetical questions. If the assumptions are wrong, the testimony should be disregarded. *By Ronald Oster*

LexisNexis Matthew Bender Expert Practice Tip--Use of CACI No. 220: *CACI No. 220* is an often used instruction since experts are usually presented with hypothetical questions. This is especially true for experts in the field of accident reconstruction in a personal injury case. *By Dona Cohn-Payne*

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewCivil ProcedureTrialsJury TrialsJury InstructionsStandard InstructionsEvidenceTestimonyExpertsGeneral OverviewEvidenceTestimonyExpertsCredibilityGeneral OverviewEvidenceTestimonyExpertsCredibilityImpeachment



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CHAPTER 2 California Judicial Council Evidence Instructions

1-2 California Forms of Jury Instruction CACI 221

CACI 221 Conflicting Expert Testimony

If the expert witnesses disagreed with one another, you should weigh each opinion against the others. You should examine the reasons given for each opinion and the facts or other matters that each witness relied on. You may also compare the experts' qualifications.

New September 2003

Unless the issue is one that can be resolved only with expert testimony, the jury should not be instructed that they must accept the entire testimony of the expert whose testimony appears to be entitled to greater weight. (*Santa Clara County Flood Control and Water Conservation Dist. v. Freitas* (1960) 177 Cal.App.2d 264, 268-269 [2 Cal.Rptr. 129] .)

For an instruction on expert witnesses generally, see *CACI No. 219, Expert Witness Testimony*. For an instruction on hypothetical questions, see *CACI No. 220, Experts--Questions Containing Assumed Facts*.

■ *Santa Clara County Flood Control and Water Conservation Dist., supra*, 177 Cal.App.2d at p. 268 .

■ The "credibility of expert witnesses is a matter for the jury after proper instructions from the court." (*Williams v. Volkswagenwerk Aktiengesellschaft* (1986) 180 Cal.App.3d 1244, 1265 [226 Cal.Rptr. 306] .)

Secondary Sources

7 Witkin, California Procedure (4th ed. 1997) Trial, § 303, pp. 350-351

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

Publisher's Notes

This instruction replaces BAJI No. 2.41.

LexisNexis Matthew Bender Expert Practice Tip--Choosing Expert Witnesses: Choosing your expert is of paramount importance, not only for the opinions the expert will render but also for the qualifications and presence of the expert. *CACI No. 221* speaks directly to the things you should consider when choosing an expert witness. *By Dona Cohn-Payne*

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewEvidenceTestimonyExpertsGeneral
OverviewEvidenceTestimonyExpertsCredibilityGeneral OverviewEvidenceTestimonyExpertsQualifications



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CHAPTER 2 California Judicial Council Evidence Instructions

1-2 California Forms of Jury Instruction CACI 222

CACI 222 Evidence of Sliding-Scale Settlement

You have heard evidence that there was a settlement agreement between [name of settling defendant] and [name of plaintiff].

Under this agreement, the amount of money that [name of settling defendant] will have to pay to [name of plaintiff] will depend on the amount of money that [name of plaintiff] receives from [name of nonsettling defendant] at trial. The more money that [name of plaintiff] might receive from [name of nonsettling defendant], the less that [name of settling defendant] will have to pay under the agreement.

You may consider evidence of the settlement only to decide whether [name of settling defendant/name of witness] [, who testified on behalf of [name of settling defendant],] is biased or prejudiced and whether [his/her] testimony is believable.

New April 2007

Use this instruction for cases involving sliding scale or "Mary Carter" settlement agreements if a party who settled appears at trial as a witness. If the settling defendant is an entity, insert the name of the witness who testified on behalf of the entity and include the bracketed language in the third paragraph.

The court must give this instruction on the motion of any party unless it finds that disclosure will create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury. (*Code Civ. Proc.*, § 877.5(a)(2).)

See *CACI No. 217, Evidence of Settlement*.

See also *CACI No. 3926, Settlement Deduction*.

■ *Code of Civil Procedure section 877.5(a)(2)* provides:

If the action is tried before a jury, and a defendant party to the agreement is called as a witness at trial, the court shall, upon motion of a party, disclose to the jury the existence and content of the agreement or covenant, unless the court finds that this disclosure will create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.

The jury disclosure herein required shall be no more than necessary to inform the jury of the possibility that the agreement may bias the testimony of the witness.

■ Evidence of a settlement agreement is admissible to show bias or prejudice of an adverse party. Relevant evidence includes evidence relevant to the credibility of a witness. (*Moreno v. Sayre* (1984) 162 Cal.App.3d 116, 126 [208 Cal.Rptr. 444] .)

■ Evidence of a prior settlement is not automatically admissible. "Even if it appears that a witness could have been influenced in his testimony by the payment of money or the obtaining of a dismissal, the party resisting the admission of such evidence may still appeal to the court's discretion to exclude it under section 352 of the code." (*Granville v. Parsons* (1968) 259 Cal.App.2d 298, 305 [66 Cal.Rptr. 149] .)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, § 101

5 Levy et al., California Torts, Ch. 74, *Resolving Multiparty Tort Litigation*, § 74.27 (Matthew Bender)

3 *Matthew Bender Practice Guide: California Pretrial Civil Procedure*, Ch. 37, *Settlement and Release*, 37.25

25 *California Forms of Pleading and Practice*, Ch. 300, *Indemnity and Contribution*, § 300.73[10] (Matthew Bender)

46 *California Forms of Pleading and Practice*, Ch. 520, *Settlement and Release*, § 520.16[3] (Matthew Bender)

Publisher's Notes

This instruction covers issues presented in BAJI No. 15.03.1.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Settlements General Overview Civil Procedure Trials Jury Instructions General Overview Civil Procedure Trials Jury Instructions Standard Instructions



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CHAPTER 2 California Judicial Council Evidence Instructions

1-2 California Forms of Jury Instruction CACI 223

CACI 223 Opinion Testimony of Lay Witness

A witness [who was not testifying as an expert] gave an opinion during the trial. You may, but are not required to, accept that opinion. You may give the opinion whatever weight you think is appropriate.

Consider the extent of the witness's opportunity to perceive the matters on which the opinion is based, the reasons the witness gave for the opinion, and the facts or information on which the witness relied in forming that opinion. You must decide whether information on which the witness relied was true and accurate. You may disregard all or any part of an opinion that you find unbelievable, unreasonable, or unsupported by the evidence.

New April 2008

Directions for Use

Give the bracketed phrase in the first sentence regarding the witness not testifying as an expert if an expert witness also testified in the case.

Sources and Authority

- *Evidence Code section 800* provides:

If a witness is not testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is permitted by law, including but not limited to an opinion that is:

- (a) Rationally based on the perception of the witness; and

(b) Helpful to a clear understanding of his testimony.

■ *Evidence Code section 802* provides: "A witness testifying in the form of an opinion may state on direct examination the reasons for his opinion and the matter (including, in the case of an expert, his special knowledge, skill, experience, training, and education) upon which it is based, unless he is precluded by law from using such reasons or matter as a basis for his opinion. The court in its discretion may require that a witness before testifying in the form of an opinion be first examined concerning the matter upon which his opinion is based."

■ *Evidence Code section 1100* provides: "Except as otherwise provided by statute, any otherwise admissible evidence (including evidence in the form of an opinion, evidence of reputation, and evidence of specific instances of such person's conduct) is admissible to prove a person's character or a trait of his character."

Secondary Sources

1 Witkin, *California Evidence* (4th ed. 2000) *Opinion Evidence*, §§ 3-25

Wegner et al., *California Practice Guide: Civil Trial and Evidence* (The Rutter Group) PP 8:643-8:681

Jefferson's *California Evidence Benchbook* (Cont.Ed.Bar 3d ed.) §§ 29.1-29.17

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

1 Cotchett, *California Courtroom Evidence*, Ch. 17, *Nonexpert and Expert Opinion*, § 17.01 (Matthew Bender)

Publisher's Notes

There is no BAJI instruction on this subject.



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CHAPTER 2 California Judicial Council Evidence Instructions

1-2 California Forms of Jury Instruction CACI 224

CACI 224 Testimony of Child

You have heard testimony from a witness who is [_____] years old. As with any other witness, you must decide whether the child gave truthful and accurate testimony.

In evaluating a child's testimony, you should consider all of the factors surrounding that testimony, including the child's age and ability to perceive, understand, remember, and communicate.

You should not discount or distrust testimony just because a witness is a child.

New April 2008

Sources and Authority

• *Evidence Code section 700* provides: "Except as otherwise provided by statute, every person, irrespective of age, is qualified to be a witness and no person is disqualified to testify to any matter."

• *Penal Code section 1127f* provides:

In any criminal trial or proceeding in which a child 10 years of age or younger testifies as a witness, upon the request of a party, the court shall instruct the jury, as follows:

In evaluating the testimony of a child you should consider all of the factors surrounding the child's testimony, including the age of the child and any evidence regarding the child's level of cognitive development. Although, because of age and level

of cognitive development, a child may perform differently as a witness from an adult, that does not mean that a child is any more or less credible a witness than an adult. You should not discount or distrust the testimony of a child solely because he or she is a child.

Secondary Sources

3 Witkin, *California Evidence* (4th ed. 2000) Presentation, § 88(3)

Wegner et al., *California Practice Guide: Civil Trial and Evidence* (The Rutter Group) PP 8:228-8:230

Jefferson's *California Evidence Benchbook* (Cont.Ed.Bar 3d ed.) § 26.2

48 *California Forms of Pleading and Practice*, Ch. 551, Trial, §§ 551.111, 551.113, 551.122 (Matthew Bender)

1 Cotchett, *California Courtroom Evidence*, Ch. 16, Competency, Oath, Confrontation, Experts, Interpreters, Credibility, and Hypnosis, § 16.01 (Matthew Bender)

Publisher's Notes

There is no BAJI instruction on this subject.



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CHAPTER 2 California Judicial Council Evidence Instructions

1-2 California Forms of Jury Instruction CACI 225-CACI 299

Reserved for Future Use

CACI 225Reserved for Future Use



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CHAPTER 3 California Judicial Council Contracts Instructions

1-3 California Forms of Jury Instruction 3.syn

§ 3.syn Synopsis to Chapter 3: California Judicial Council Contracts Instructions

CACI 300 Breach of Contract--Introduction

CACI 301 Third-Party Beneficiary

CACI 302 Contract Formation--Essential Factual Elements

CACI 303 Breach of Contract--Essential Factual Elements

CACI 304 Oral or Written Contract Terms

CACI 305 Implied-in-Fact Contract

CACI 306 Unformalized Agreement

CACI 307 Contract Formation--Offer

CACI 308 Contract Formation--Revocation of Offer

CACI 309 Contract Formation--Acceptance

CACI 310 Contract Formation--Acceptance by Silence

CACI 311 Contract Formation--Rejection of Offer

CACI 312 Substantial Performance

CACI 313 Modification

CACI 314 Interpretation--Disputed Term

CACI 315 Interpretation--Meaning of Ordinary Words

CACI 316 Interpretation--Meaning of Technical Words

CACI 317 Interpretation--Construction of Contract as a Whole

CACI 318 Interpretation--Construction by Conduct

CACI 319 Interpretation--Reasonable Time

CACI 320 Interpretation--Construction Against Drafter

CACI 321 Existence of Condition Precedent Disputed

CACI 322 Occurrence of Agreed Condition Precedent

CACI 323 Waiver of Condition Precedent

CACI 324 Anticipatory Breach

CACI 325 Breach of Covenant of Good Faith and Fair Dealing--Essential Factual Elements

CACI 326 Assignment Contested

CACI 327 Assignment Not Contested

CACI 328-CACI 329 Reserved for Future Use

CACI 330 Affirmative Defense--Unilateral Mistake of Fact

CACI 331 Affirmative Defense--Bilateral Mistake

CACI 332 Affirmative Defense--Duress

CACI 333 Affirmative Defense--Economic Duress

CACI 334 Affirmative Defense--Undue Influence

CACI 335 Affirmative Defense--Fraud

CACI 336 Affirmative Defense--Waiver

CACI 337 Affirmative Defense--Novation

CACI 338 Affirmative Defense--Statute of Limitations

CACI 339-CACI 349 Reserved for Future Use

CACI 350 Introduction to Contract Damages

CACI 351 Special Damages

CACI 352 Loss of Profits--No Profits Earned

CACI 353 Loss of Profits--Some Profits Earned

CACI 354 Owner's/Lessee's Damages for Breach of Contract to Construct Improvements on Real Property

CACI 355 Obligation to Pay Money Only

CACI 356 Buyer's Damages for Breach of Contract for Sale of Real Property

CACI 357 Seller's Damages for Breach of Contract to Purchase Real Property

CACI 358 Mitigation of Damages

CACI 359 Present Cash Value of Future Damages

CACI 360 Nominal Damages

CACI 361 Plaintiff May Not Recover Duplicate Contract and Tort Damages

CACI 362-CACI 369 Reserved for Future Use

CACI 370 Common Count: Money Had and Received

CACI 371 Common Count: Goods and Services Rendered

CACI 372 Common Count: Open Book Account

CACI 373 Common Count: Account Stated

CACI 374 Common Count: Mistaken Receipt

CACI 375-CACI 399 Reserved for Future Use

CACI VF-300 Breach of Contract

CACI VF-301 Breach of Contract--Affirmative Defense--Unilateral Mistake of Fact

CACI VF-302 Breach of Contract--Affirmative Defense--Duress

CACI VF-303 Breach of Contract--Contract Formation at Issue

CACI VF-304-CACI VF-399 Reserved for Future Use



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CHAPTER 3 California Judicial Council Contracts Instructions

1-3 California Forms of Jury Instruction Scope

Scope

SCOPE

This chapter contains the California Judicial Council's "Contracts Series" of civil jury instructions [*CACI No. 300 et seq.*]. The Judicial Council of California Civil Jury Instructions (CACI) included in this publication are the product of the Judicial Council of California Task Force on Jury Instructions, which are updated by the Judicial Council of California Advisory Committee on Civil Jury Instructions.

This chapter includes instructions on the following topics:

- Essential factual elements generally for a cause of action for breach of contract [*CACI No. 300*].
- A party's status as a third-party beneficiary [*CACI No. 301*].
- Essential factual elements involved in contract formation [*CACI No. 302*] and breach of contract cases [*CACI No. 303*].
- Oral or written contract terms [*CACI No. 304*].
- Implied-in-fact contracts [*CACI No. 305*].
- Unformalized agreements [*CACI No. 306*].
- Contract formation (i.e., offer, revocation of offer, acceptance, and rejection of offer) [*CACI No. 307- CACI No. 311*].
- Substantial performance [*CACI No. 312*] and modification [*CACI No. 313*].
- Interpretation of contracts [*CACI No. 314- CACI No. 320*], including interpretation of disputed terms and the meaning of ordinary and technical words.

1-3 California Forms of Jury Instruction Scope

- Condition precedents [*CACI No. 321- CACI No. 323*].
- Anticipatory breach [*CACI No. 324*].
- Essential factual elements for a cause of action for breach of the covenant of good faith and fair dealing [*CACI No. 325*].
- Assignments, including contested assignments [*CACI No. 326*] and non-contested assignments [*CACI No. 327*].
- Affirmative defenses applicable in contract actions [*CACI No. 330- CACI No. 338*], such as mistake, duress, undue influence, fraud, waiver, and novation.
- Damages available in contract actions [*CACI No. 350- CACI No. 361*], such as lost profits and nominal damages.
- Common counts, including money had and received [*CACI No. 370*], goods and services rendered [*CACI No. 371*], open book accounts [*CACI No. 372*], accounts stated [*CACI No. 373*], and mistaken receipts [*CACI No. 374*].

The contracts series also includes special verdict forms for use in breach of contract actions [*CACI No. VF-300- CACI No. VF-303*].

For additional and alternative jury instructions on contracts generally, see Chs. 3A- 3G.

For jury instructions on sales contracts, see Ch. 3H, *Matthew Bender Commercial Code Sales Contract Instructions*.

For jury instructions on construction contracts, see Ch. 3I, *Matthew Bender Construction Contract Instructions*.

For jury instructions on insurance contracts, see Ch. 23A, *Matthew Bender Insurance Contract Instructions*.

For jury instructions on employment contracts, see Ch. 24A, *Matthew Bender Employment Contract Instructions*.



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CHAPTER 3 California Judicial Council Contracts Instructions

*1-3 California Forms of Jury Instruction CACI 300***CACI 300 Breach of Contract--Introduction**

[Name of plaintiff] **claims that [he/she/it] and [name of defendant] entered into a contract for [insert brief summary of alleged contract].**

[Name of plaintiff] **claims that [name of defendant] breached this contract by [briefly state the alleged breach].**

[Name of plaintiff] **also claims that [name of defendant]'s breach of this contract caused harm to [name of plaintiff] for which [name of defendant] should pay.**

[Name of defendant] **denies [insert denial of any of the above claims]. [Name of defendant] also claims [insert affirmative defense].**

New September 2003; Revised December 2007

Directions for Use

This instruction is designed to introduce the jury to the issues involved in the case. It should be read before the instructions on the substantive law.

Sources and Authority

■ The Supreme Court has observed that "[c]ontract and tort are different branches of law. Contract law exists to enforce legally binding agreements between parties; tort law is designed to vindicate social policy." (*Applied Equipment Corp. v. Litton Saudi Arabia, Ltd.* (1994) 7 Cal.4th 503, 514 [28 Cal.Rptr.2d 475, 869 P.2d 454] .)

■ "The differences between contract and tort give rise to distinctions in assessing damages and in evaluating underlying motives for particular courses of conduct. Contract damages seek to approximate the agreed-upon performance ... and are generally limited to those within the contemplation of the parties when the contract was entered into or at least reasonably foreseeable by them at that time; consequential damages beyond the expectations of the parties are not recoverable." (*Applied Equipment Corp.*, *supra*, 7 Cal.4th at p. 515 , internal citations omitted.)

■ Certain defenses are decided as questions of law, not as questions of fact. These defenses include frustration of purpose, impossibility, and impracticability. (*Oosten v. Hay Haulers Dairy Employees and Helpers Union* (1955) 45 Cal.2d 784, 788 [291 P.2d 17] ; *Mitchell v. Ceazan Tires, Ltd.* (1944) 25 Cal.2d 45, 48 [153 P.2d 53] ; *Autry v. Republic Productions, Inc.* (1947) 30 Cal.2d 144, 157 [180 P.2d 888] ; *Glen Falls Indemnity Co. v. Perscallo* (1950) 96 Cal.App.2d 799, 802 [216 P.2d 567] .)

■ "Defendant contends that frustration is a question of fact resolved in its favor by the trial court. The excuse of frustration, however, *like that of impossibility*, is a conclusion of law drawn by the court from the facts of a given case" (*Mitchell, supra*, 25 Cal.2d at p. 48 , italics added.)

■ Estoppel is a "nonjury fact question to be determined by the trial court in accordance with applicable law." (*DRG/Beverly Hills, Ltd. v. Chopstix Dim Sum Cafe and Takeout III, Ltd.* (1994) 30 Cal.App.4th 54, 61 [35 Cal.Rptr.2d 515] .)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, §§ 847-867

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

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

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

Publisher's Notes

This instruction covers issues presented in BAJI Nos. 10.55 and 10.85.

LexisNexis Matthew Bender Expert Practice Tip--Setting a "Tone": Most jurors will be more likely familiar with negligence and some other tort theories as compared to a contract. Hence, *CACI No. 300* may set a "tone." *By Rex Heeseman*

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewCivil ProcedureTrialsJury TrialsJury InstructionsStandard InstructionsContracts LawBreachGeneral OverviewContracts LawBreachCauses of ActionGeneral Overview



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California Forms of Jury Instruction

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CHAPTER 3 California Judicial Council Contracts Instructions

1-3 California Forms of Jury Instruction CACI 301

CACI 301 Third-Party Beneficiary

[Name of plaintiff] is not a party to the contract. However, [name of plaintiff] may be entitled to damages for breach of contract if [he/she/it] proves that [insert names of the contracting parties] intended for [name of plaintiff] to benefit from their contract.

It is not necessary for [name of plaintiff] to have been named in the contract. In deciding what [insert names of the contracting parties] intended, you should consider the entire contract and the circumstances under which it was made.

New September 2003

This topic may or may not be a question for the jury to decide. Third-party beneficiary status may be determined as a question of law if there is no conflicting extrinsic evidence. (*Kalmanovitz v. Bitting* (1996) 43 Cal.App.4th 311, 315 [50 Cal.Rptr.2d 332] .)

These pattern jury instructions may need to be modified in cases brought by plaintiffs who are third-party beneficiaries.

- *Civil Code* section 1559 provides: "A contract, made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it."

- A third party may qualify as a beneficiary under a contract where the contracting parties must have intended to benefit that individual and such intent appears from the terms of the agreement. (*Brinton v. Bankers Pension Services, Inc.* (1999) 76 Cal.App.4th 550, 558 [90 Cal.Rptr.2d 469] .) However,

"[i]nsofar as intent to benefit a third person is important in determining his right to bring an action under a contract, it is sufficient that the promisor must have understood that the promisee had such intent. No specific manifestation by the promisor of an intent to benefit the third person is required." (*Lucas v. Hamm* (1961) 56 Cal.2d 583, 591 [15 Cal.Rptr. 821, 364 P.2d 685] .)

- "Traditional third party beneficiary principles do not require that the person to be benefited be named in the contract." (*Harper v. Wausau Insurance Corp.* (1997) 56 Cal.App.4th 1079, 1086 [66 Cal.Rptr.2d 64] .)

- *Civil Code* section 1559 excludes enforcement of a contract by persons who are only incidentally or remotely benefited by the agreement. (*Lucas, supra*, 56 Cal.2d at p. 590 .)

- "Whether a third party is an intended beneficiary or merely an incidental beneficiary to the contract involves construction of the parties' intent, gleaned from reading the contract as a whole in light of the circumstances under which it was entered. [Citation.]" (*Jones v. Aetna Casualty & Surety Co.* (1994) 26 Cal.App.4th 1717, 1725 [33 Cal.Rptr.2d 291] .)

- *Restatement Second of Contracts*, section 302, provides:

(1) Unless otherwise agreed between promisor and promisee, a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and either

(a) the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary; or

(b) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.

(2) An incidental beneficiary is a beneficiary who is not an intended beneficiary.

This section has been cited by California courts. (See, e.g., *Outdoor Services v. Pabagold* (1986) 185 Cal.App.3d 676, 684 [230 Cal.Rptr. 73] .)

- The burden is on the third party "to prove that the performance [it] seeks was actually promised." (*Garcia v. Truck Insurance Exchange* (1984) 36 Cal.3d 426, 436 [204 Cal.Rptr. 435, 682 P.2d 1100] ; *Neverkovec v. Fredericks* (1999) 74 Cal.App.4th 337, 348-349 [87 Cal.Rptr.2d 856] .)

Secondary Sources

1 Witkin, *Summary of California Law* (10th ed. 2005) Contracts, §§ 685-706

13 *California Forms of Pleading and Practice*, Ch. 140, Contracts, §§ 140.83, 140.103, 140.131 (Matthew Bender)

5 *California Points and Authorities*, Ch. 50, Contracts, § 50.132 (Matthew Bender)

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

2 *Matthew Bender Practice Guide: California Contract Litigation*, Ch. 19, *Seeking or Opposing Recovery As Third Party Beneficiary of Contract*, 19.03 -19.06

Publisher's Notes

This instruction replaces BAJI No. 10.59.

A third party beneficiary is one of the class of persons for whose benefit the contract was expressly made. (*Diamond Woodworks, Inc. v. Argonaut Ins. Co. (2003) 109 Cal.App.4th 1020, 1042 [135 Cal.Rptr.2d 736]* .)

LexisNexis Matthew Bender Expert Practice Tip--Use Care When Explaining Third-Party Beneficiary: Some attorneys would struggle in understanding the meaning of "third-party beneficiary." Thus, consider the plight of almost all jurors. Care should therefore be taken in explaining *CACI No. 301* in one's closing argument. *By Rex Heeseman*

LexisNexis Matthew Bender Expert Practice Tip--Facts Relating to Third-Party Beneficiary May Not be in Dispute: Many defense counsel will want to attack plaintiff's standing as a "third-party beneficiary" by way of motion on the ground that the facts relating to this issue are not in dispute and the matter is one for the court to resolve. Additionally, even if the facts are in dispute, but the evidence to support third-party beneficiary status is weak, the damages to this third party may not be reasonably foreseeable. *By Ronald Oster*

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewCivil ProcedureTrialsJury TrialsJury InstructionsStandard InstructionsContracts LawBreachCauses of ActionGeneral OverviewContracts LawThird PartiesBeneficiariesClaims & EnforcementContracts LawThird PartiesBeneficiariesDefensesContracts LawThird PartiesBeneficiariesTypesIntended Beneficiaries



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California Forms of Jury Instruction

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CHAPTER 3 California Judicial Council Contracts Instructions

1-3 California Forms of Jury Instruction CACI 302

CACI 302 Contract Formation--Essential Factual Elements

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

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

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

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

New September 2003; Revised October 2004

This instruction should only be given where the existence of a contract is contested. If both parties agree that they had a contract, then the instructions relating to whether or not a contract was actually formed would not need to be given. At other times, the parties may be contesting only a limited number of contract formation issues. Also, some of these issues may be decided by the judge as a matter of law. Users should omit elements in this instruction that are not contested so that the jury can focus on the

contested issues. Read the bracketed paragraph only if element #3 is read.

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

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

■ *Civil Code section 1550* provides:

It is essential to the existence of a contract that there should be:

1. Parties capable of contracting;
2. Their consent;
3. A lawful object; and
4. A sufficient cause or consideration.

■ *Civil Code section 1556* provides: "All persons are capable of contracting, except minors, persons of unsound mind, and persons deprived of civil rights."

■ The issue of whether a contract is illegal or contrary to public policy is a question of law. (*Jackson v. Rogers & Wells* (1989) 210 Cal.App.3d 336, 350 [258 Cal.Rptr. 454] .)

■ "In order for acceptance of a proposal to result in the formation of a contract, the proposal 'must be sufficiently definite, or must call for such definite terms in the acceptance, that the performance promised is reasonably certain.' [Citation.]" (*Weddington Productions, Inc. v. Flick* (1998) 60 Cal.App.4th 793, 811 [71 Cal.Rptr.2d 265] .)

■ *Section 33(1) of the Restatement Second of Contracts* provides: "Even though a manifestation of intention is intended to be understood as an offer, it cannot be accepted so as to form a contract unless the terms of the contract are reasonably certain." *Section 33(2)* provides: "The terms of a contract are reasonably certain if they provide a basis for determining the existence of a breach and for giving an appropriate remedy."

■ Courts have stated that the issue of whether a contract is sufficiently definite is a question of law for the court. (*Ladas v. California State Automobile Assn.* (1993) 19 Cal.App.4th 761, 770, fn. 2 [23 Cal.Rptr.2d 810] ; *Ersa Grae Corp. v. Fluor Corp.* (1991) 1 Cal.App.4th 613, 623 [2 Cal.Rptr.2d 288] .)

■ *Civil Code section 1605* defines "good consideration" as follows: "Any benefit conferred, or agreed to be conferred, upon the promisor, by any other person, to which the promisor is not lawfully entitled, or any prejudice suffered, or agreed to be suffered, by such person, other than such as he is at the time of consent lawfully bound to suffer, as an inducement to the promisor is a good consideration for a promise."

■ *Civil Code section 1614* provides: "A written instrument is presumptive evidence of consideration." *Civil Code section 1615* provides: "The burden of showing a want of consideration sufficient to support an instrument lies with the

party seeking to invalidate or avoid it."

- In *Rancho Santa Fe Pharmacy, Inc. v. Seyfert* (1990) 219 Cal.App.3d 875, 884 [268 Cal.Rptr. 505], the court concluded that the presumption of consideration in section 1614 goes to the burden of producing evidence, not the burden of proof.

- Lack of consideration is an affirmative defense and must be alleged in answer to the complaint. (*National Farm Workers Service Center, Inc. v. M. Caratan, Inc.* (1983) 146 Cal.App.3d 796, 808 [194 Cal.Rptr. 617] .)

- "Consideration consists not only of benefit received by the promisor, but of detriment to the promisee. ... 'It matters not from whom the consideration moves or to whom it goes. If it is bargained for and given in exchange for the promise, the promise is not gratuitous.' " (*Flojo Internat., Inc. v. Lassleben* (1992) 4 Cal.App.4th 713, 719 [6 Cal.Rptr.2d 99], internal citation omitted.)

- "Consideration may be an act, forbearance, change in legal relations, or a promise." (1 Witkin, Summary of California Law (10th ed. 2005) Contracts, § 202.)

- Mutual consent is an essential contract element. (Civ. Code, § 1550.) Under Civil Code section 1565, "[t]he consent of the parties to a contract must be: 1. Free; 2. Mutual; and 3. Communicated by each to the other." Civil Code section 1580 provides, in part: "Consent is not mutual, unless the parties all agree upon the same thing in the same sense."

- California courts use the objective standard to determine mutual consent: "[A plaintiff's] uncommunicated subjective intent is not relevant. The existence of mutual assent is determined by objective criteria. The test is whether a reasonable person would, from the conduct of the parties, conclude that there was mutual agreement." (*Hilleary v. Garvin* (1987) 193 Cal.App.3d 322, 327 [238 Cal.Rptr. 247], internal citations omitted; see also *Roth v. Malson* (1998) 67 Cal.App.4th 552, 557 [79 Cal.Rptr.2d 226] .)

- Actions as well as words are relevant: "The manifestation of assent to a contractual provision may be 'wholly or partly by written or spoken words or by other acts or by failure to act.' " (*Merced County Sheriff's Employees' Assn. v. County of Merced* (1987) 188 Cal.App.3d 662, 670 [233 Cal.Rptr. 519] (quoting *Rest. 2d Contracts*, § 19).)

- The surrounding circumstances can also be relevant in determining whether a binding contract has been formed. (*California Food Service Corp., Inc. v. Great American Insurance Co.* (1982) 130 Cal.App.3d 892, 897 [182 Cal.Rptr. 67] .) "If words are spoken under circumstances where it is obvious that neither party would be entitled to believe that the other intended a contract to result, there is no contract." (*Fowler v. Security-First National Bank* (1956) 146 Cal.App.2d 37, 47 [303 P.2d 565] .)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, §§ 26, 50, 58, 116-255, 419, 420

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

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

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

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

Publisher's Notes

This instruction covers issues presented in BAJI Nos. 10.55 and 10.61.

LexisNexis Matthew Bender Expert Practice Tip--"Hidden Intentions" Not Relevant: If the other party is contesting the existence of a contract on the ground of lack of agreement, then the bracketed portion of the above instruction is worth emphasizing. That is, a party's "hidden intentions" are not relevant and should be disregarded by the jury. *By Ronald Oster*

LexisNexis Matthew Bender Expert Practice Tip--Use Care During Oral Argument: Many contractual principles are not familiar to some jurors. That is especially the case with principles such as "capacity" and "legal purpose." Consequently, the related oral argument should be carefully thought out. *By Rex Heeseman 302)_and_footnotes(n1);vk n**

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewCivil ProcedureTrialsJury TrialsJury InstructionsStandard InstructionsContracts LawBreachCauses of ActionGeneral OverviewContracts LawFormationAcceptanceGeneral OverviewContracts LawFormationDefinite TermsContracts LawFormationMeeting of MindsContracts LawFormationOffersGeneral Overview

FOOTNOTES:

(n1)Footnote *. *Editor's Note:* The principles of "legal capacity" and "legal purpose" were removed from *CACI No. 302* in the Judicial Council's October 2004 revisions. As noted in the Directions for Use: "The elements regarding legal capacity and legal purpose are omitted from this instruction because these issues are not likely to be before the jury." The Directions for Use continues by providing sample language if these elements are factually disputed.



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California Forms of Jury Instruction

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CHAPTER 3 California Judicial Council Contracts Instructions

1-3 California Forms of Jury Instruction CACI 303

CACI 303 Breach of Contract--Essential Factual Elements

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

- 1. That [name of plaintiff] and [name of defendant] entered into a contract;**
- 2. That [name of plaintiff] did all, or substantially all, of the significant things that the contract required [him/her/it] to do [or that [he/she/it] was excused from doing those things];**
- 3. [That all conditions required by the contract for [name of defendant]'s performance had occurred;]**
- 4. That [name of defendant] failed to do something that the contract required [him/her/it] to do; and**
- 5. That [name of plaintiff] was harmed by that failure.**

New September 2003; Revised April 2004, June 2006

Directions for Use

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

Element 3 is intended for cases in which conditions for performance are at issue. Not every contract has

conditions for performance.

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

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

Sources and Authority

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

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

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

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

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

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

Secondary Sources

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

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

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

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

Publisher's Notes

This instruction covers issues presented in BAJI Nos. 10.85 and 10.86.

LexisNexis Matthew Bender Expert Practice Tip--Provide Demonstrative Support and Use Care in Closing: This is a key instruction as it addresses the essential elements of a breach of contract action. Hence, consider having demonstrative support (e.g., a written checklist) to show the jury how your client has satisfied (or your opposition has not satisfied) these elements. Plaintiff's counsel must also be careful to demonstrate in closing that *all* elements of *CACI No. 303* have been met. *By Rex Heeseman and Ronald Oster*

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewContracts LawBreachCauses of ActionGeneral OverviewContracts LawBreachCauses of ActionElements of ClaimsContracts LawBreachMaterial BreachContracts LawBreachNonperformance



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CHAPTER 3 California Judicial Council Contracts Instructions

1-3 California Forms of Jury Instruction CACI 304

CACI 304 Oral or Written Contract Terms

[Contracts may be written or oral.]

[Contracts may be partly written and partly oral.]

Oral contracts are just as valid as written contracts.

New September 2003

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

If the agreement is fully integrated, this instruction should not be given. Parol evidence is inadmissible if the judge finds that the written agreement is fully integrated: "The parol evidence rule generally prohibits the introduction of extrinsic evidence--oral or written--to vary or contradict the terms of an integrated written instrument." (*EPA Real Estate Partnership v. Kang* (1992) 12 Cal.App.4th 171, 175 [15 Cal.Rptr.2d 209] .)

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

■ In *Lande v. Southern California Freight Lines* (1948) 85 Cal.App.2d 416, 420 [193 P.2d 144] , the court answered the question "May a contract be partly written and partly oral?" as follows: "This question posed by defendant must be answered in the affirmative in this sense: that a contract or agreement in legal contemplation is neither written nor oral, but oral or written evidence may be received

to establish the terms of the contract or agreement between the parties. ... A so-called partly written and partly oral contract is in legal effect a contract, the terms of which may be proven by both written and oral evidence."

■ Evidence of a contract that is partly oral may be admitted if only part of the contract is fully integrated: "When the parties to a written contract have agreed to it as an 'integration'--a complete and final embodiment of the terms of an agreement--parol evidence cannot be used to add to or vary its terms ... [However,] '[w]hen only part of the agreement is integrated, the same rule applies to that part, but parol evidence may be used to prove elements of the agreement not reduced to writing.' " (*Masterson v. Sine* (1968) 68 Cal.2d 222, 225 [65 Cal.Rptr. 545, 436 P.2d 561] .)

Secondary Sources

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

Publisher's Notes

This instruction replaces BAJI No. 10.57.

LexisNexis Matthew Bender Expert Practice Tip--Using Parol Evidence: Although parol evidence may not be admissible to vary the terms of an integrated written contract, it can be admitted when the contract is partly oral and partly written. Parol evidence may also be used to establish the existence of an ambiguity in a written contract. Finally, if the contract is entirely oral, then the last sentence of *CACI No. 304* is critical--oral contracts are just as valid as written contracts. In other words, "handshake deals" are binding. *By Ronald Oster*

LexisNexis Matthew Bender Expert Practice Tip--Oral vs. Written Contracts: Many jurors might believe that a contract should naturally be written. Thus, if your case deals with an oral contract, be ready to explain away (or seize upon) that common belief. *By Rex Heeseman*

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewContracts LawBreachCauses of ActionGeneral OverviewContracts LawBreachCauses of ActionElements of ClaimsContracts LawContract InterpretationParol EvidenceGeneral OverviewContracts LawTypes of ContractsOral AgreementsEvidenceDocumentary EvidenceParol Evidence



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California Forms of Jury Instruction

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CHAPTER 3 California Judicial Council Contracts Instructions

1-3 California Forms of Jury Instruction CACI 305

CACI 305 Implied-in-Fact Contract

In deciding whether a contract was created, you should consider the conduct and relationship of the parties as well as all the circumstances of the case.

Contracts can be created by the conduct of the parties, without spoken or written words. Contracts created by conduct are just as valid as contracts formed with words.

Conduct will create a contract if the conduct of both parties is intentional and each knows, or has reason to know, that the other party will interpret the conduct as an agreement to enter into a contract.

New September 2003

- *Civil Code sections 1619-1621* together provide as follows: "A contract is either express or implied. An express contract is one, the terms of which are stated in words. An implied contract is one, the existence and terms of which are manifested by conduct."

- *Section 19(2) of the Restatement Second of Contracts* provides: "The conduct of a party is not effective as a manifestation of his assent unless he intends to engage in the conduct and knows or has reason to know that the other party may infer from his conduct that he assents."

- "Unlike the 'quasi-contractual' quantum meruit theory which operates without an actual agreement of the parties, an implied-in-fact contract entails an actual contract, but one manifested in conduct rather than expressed in words." (*Maglica v. Maglica* (1998) 66 Cal.App.4th 442, 455 [78 Cal.Rptr.2d 101] .)

■ Express and implied-in-fact contracts have the same legal effect, but differ in how they are proved at trial: " 'Contracts may be express or implied. These terms, however, do not denote different kinds of contracts, but have reference to the evidence by which the agreement between the parties is shown. If the agreement is shown by the direct words of the parties, spoken or written, the contract is said to be an express one. But if such agreement can only be shown by the acts and conduct of the parties, interpreted in the light of the subject-matter and of the surrounding circumstances, then the contract is an implied one.' " (*Marvin v. Marvin* (1976) 18 Cal.3d 660, 678, fn. 16 [134 Cal.Rptr. 815, 557 P.2d 106] , internal citation omitted.)

■ "As to the basic elements [of a contract cause of action], there is no difference between an express and implied contract. ... While an implied in fact contract may be inferred from the conduct, situation or mutual relation of the parties, the very heart of this kind of agreement is an intent to promise." (*Division of Labor Law Enforcement v. Transpacific Transportation Co.* (1977) 69 Cal.App.3d 268, 275 [137 Cal.Rptr. 855] ; see also *Friedman v. Friedman* (1993) 20 Cal.App.4th 876, 888 [24 Cal.Rptr.2d 892] .)

■ The formation of an implied contract can become an issue for the jury to decide: "Whether or not an implied contract has been created is determined by the acts and conduct of the parties and all the surrounding circumstances involved and is a question of fact." (*Del E. Webb Corp. v. Structural Materials Co.* (1981) 123 Cal.App.3d 593, 611 [176 Cal.Rptr. 824] , internal citation omitted.)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, § 102

13 California Forms of Pleading and Practice, Ch. 140, Contracts, §§ 140.10, 140.110 (Matthew Bender)

1 Matthew Bender Practice Guide: California Contract Litigation, Ch. 13, Attacking or Defending Existence of Contract--Absence of Essential Element, 13.07

Publisher's Notes

This instruction covers issues presented in BAJI No. 10.56.

LexisNexis Matthew Bender Expert Practice Tip--Implied-in-Fact Contracts Are Challenging for Jurors: The idea of an "implied-in-fact" contract will be particularly challenging for many jurors. Hence, be ready to confront this challenge. *By Rex Heeseman*

LexisNexis Matthew Bender Expert Practice Tip--Use Examples and Experts: Contracts that are "implied-in-fact" will be difficult for most jurors to comprehend. This issue should be addressed early on by use of examples (e.g., a bidder who raises a hand at an auction is agreeing to buy an item at a given price). The use of expert testimony to explain the custom and practice in a particular industry or commercial activity may also be necessary. *By Ronald Oster*

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Contracts Law Breach Causes of Action General Overview Contracts Law Types of Contracts Implied-in-Fact Contracts



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California Forms of Jury Instruction

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CHAPTER 3 California Judicial Council Contracts Instructions

1-3 California Forms of Jury Instruction CACI 306

CACI 306 Unformalized Agreement

[Name of defendant] contends that the parties did not enter into a contract because the agreement was never written and signed. To overcome this contention, [name of plaintiff] must prove both of the following:

- 1. That the parties understood and agreed to the terms of the agreement; and**
- 2. That the parties agreed to be bound without a written agreement [or before a written agreement was prepared].**

New September 2003

Do not give this instruction unless the defendant has testified or offered other evidence in support of his or her contention.

■ "Where the writing at issue shows 'no more than an intent to further reduce the informal writing to a more formal one' the failure to follow it with a more formal writing does not negate the existence of the prior contract. However, where the writing shows it was not intended to be binding until a formal written contract is executed, there is no contract." (*Harris v. Rudin, Richman & Appel* (1999) 74 Cal.App.4th 299, 307 [87 Cal.Rptr.2d 822] , internal citations omitted.)

■ The execution of a formalized written agreement is not necessarily essential to the formation of a contract that is made orally: "[I]f the respective parties orally agreed upon all of the terms and conditions of a proposed written agreement with the mutual intention that the oral agreement should thereupon become binding, the mere fact that a formal written agreement to the same effect has not yet been signed

does not alter the binding validity of the oral agreement. [Citation.]" (*Banner Entertainment, Inc. v. Superior Court* (1998) 62 Cal.App.4th 348, 358 [72 Cal.Rptr.2d 598] .)

■ If the parties have agreed not to be bound until the agreement is reduced to writing and signed by the parties, then the contract will not be effective until the formal agreement is signed. (*Beck v. American Health Group International, Inc.* (1989) 211 Cal.App.3d 1555, 1562 [260 Cal.Rptr. 237] .)

■ "Whether it was the parties' mutual intention that their oral agreement to the terms contained in a proposed written agreement should be binding immediately is to be determined from the surrounding facts and circumstances of a particular case and is a question of fact for the trial court." (*Banner Entertainment, Inc.*, *supra*, 62 Cal.App.4th at p. 358 .)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, §§ 133, 134

13 *California Forms of Pleading and Practice*, Ch. 140, Contracts, § 140.22 (Matthew Bender)

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

1 *Matthew Bender Practice Guide: California Contract Litigation*, Ch. 13, *Attacking or Defending Existence of Contract--Absence of Essential Element*, 13.07[3]

Publisher's Notes

This instruction replaces BAJI No. 10.58.

LexisNexis Matthew Bender Expert Practice Tip--Use Care in Putting Together Argument: Even more so than several of the prior instructions, great care must be utilized in putting together this argument. And, do not let the term "unformalized" be used in any respect. *By Rex Heeseman*

LexisNexis Matthew Bender Expert Practice Tip--Establishing Plaintiff's Case: Cases in which there is a time lag between the verbal agreement of the parties and the execution of a written document can be troublesome. In general, the plaintiff will want to establish that performance actually began with the verbal agreement of the parties (even though no written contract was yet prepared) thereby indicating that the parties intended to be bound at the time of the agreement without waiting for a written document. Performance can take the form of ordering supplies, hiring personnel, or otherwise acting to fulfill the terms of the contract in advance of the written documentation. Plaintiff's counsel will also want to use *CACI No. 304* ("[o]ral contracts are just as valid as written contracts") to demonstrate that a final written document was not required. *By Ronald Oster*

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Contracts Law Breach Causes of Action General Overview Contracts Law Formation Execution Contracts Law Types of Contracts Oral Agreements



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California Forms of Jury Instruction

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CHAPTER 3 California Judicial Council Contracts Instructions

1-3 California Forms of Jury Instruction CACI 307

CACI 307 Contract Formation--Offer

Both an offer and an acceptance are required to create a contract. [*Name of defendant*] contends that a contract was not created because there was never any offer. To overcome this contention, [*name of plaintiff*] must prove all of the following:

- 1. That [*name of plaintiff*] communicated to [*name of defendant*] that [he/she/it] was willing to enter into a contract with [*name of defendant*];**
- 2. That the communication contained specific terms; and**
- 3. That, based on the communication, [*name of defendant*] could have reasonably concluded that a contract with these terms would result if [he/she/it] accepted the offer.**

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

New September 2003

Do not give this instruction unless the defendant has testified or offered other evidence in support of his or her contention.

This instruction assumes that the defendant is claiming the plaintiff never made an offer. Change the identities of the parties in the indented paragraphs if, under the facts of the case, the roles of the parties are switched (e.g., if defendant was the alleged offeror). If the existence of an offer is not contested, then this instruction is unnecessary.

■ Courts have adopted the definition of "offer" found at *Restatement Second of Contracts*, section 24: "An offer is the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it." (*City of Moorpark v. Moorpark Unified School Dist.* (1991) 54 Cal.3d 921, 930 [1 Cal.Rptr.2d 896, 819 P.2d 854] .)

■ Under basic contract law " '[a]n offer must be sufficiently definite, or must call for such definite terms in the acceptance that the performance promised is reasonably certain.' " (*Ladas v. California State Automobile Assn.* (1993) 19 Cal.App.4th 761, 770 [23 Cal.Rptr.2d 810] .)

■ "The trier of fact must determine 'whether a reasonable person would necessarily assume ... a willingness to enter into contract.' [Citation.]" (*In re First Capital Life Insurance Co.* (1995) 34 Cal.App.4th 1283, 1287 [40 Cal.Rptr.2d 816] .)

■ Offers should be contrasted with preliminary negotiations: "Preliminary negotiations or an agreement for future negotiations are not the functional equivalent of a valid, subsisting agreement." (*Kruse v. Bank of America* (1988) 202 Cal.App.3d 38, 59 [248 Cal.Rptr. 217] .)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, §§ 116, 117, 125-137

13 *California Forms of Pleading and Practice*, Ch. 140, Contracts, § 140.22 (Matthew Bender)

27 *California Legal Forms*, Ch. 75, Formation of Contracts and Standard Contractual Provisions, § 75.210 (Matthew Bender)

1 *Matthew Bender Practice Guide: California Contract Litigation*, Ch. 13, Attacking or Defending Existence of Contract--Absence of Essential Element, 13.18 -13.24

Publisher's Notes

This instruction replaces BAJI No. 10.65.

LexisNexis Matthew Bender Expert Practice Tip--Jurors May be Uncertain With Legal Term:

Attorneys readily understand the concept of an "offer" but many jurors will be uncertain about this legal term. *By Rex Heeseman*

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewContracts LawBreachCauses of ActionGeneral OverviewContracts LawFormationAcceptanceGeneral OverviewContracts LawFormationOffersGeneral Overview



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California Forms of Jury Instruction

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CHAPTER 3 California Judicial Council Contracts Instructions

1-3 California Forms of Jury Instruction CACI 308

CACI 308 Contract Formation--Revocation of Offer

Both an offer and an acceptance are required to create a contract. [*Name of defendant*] contends that the offer was withdrawn before it was accepted. To overcome this contention, [*name of plaintiff*] must prove one of the following:

- 1. That [*name of defendant*] did not withdraw the offer; or**
- 2. That [*name of plaintiff*] accepted the offer before [*name of defendant*] withdrew it; or**
- 3. That [*name of defendant*]'s withdrawal of the offer was never communicated to [*name of plaintiff*].**

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

New September 2003

Do not give this instruction unless the defendant has testified or offered other evidence in support of his or her contention.

This instruction assumes that the defendant is claiming to have revoked his or her offer. Change the identities of the parties in the indented paragraphs if, under the facts of the case, the roles of the parties are switched (e.g., if defendant was the alleged offeree).

■ *Civil Code section 1586* provides: "A proposal may be revoked at any time before its acceptance is

communicated to the proposer, but not afterwards."

- The methods for revocation are listed in *Civil Code section 1587*, and include:

- 1) Communication of revocation,
- 2) Lapse of time for acceptance,
- 3) Failure to fulfill condition precedent to acceptance, and
- 4) By death or insanity of proposer.

This instruction addresses the first method.

- "It is a well-established principle of contract law that an offer may be revoked by the offeror any time prior to acceptance." (*T. M. Cobb Co., Inc. v. Superior Court* (1984) 36 Cal.3d 273, 278 [204 Cal.Rptr. 143, 682 P.2d 338] .)

- " 'Under familiar contract law, a revocation of an offer must be directed to the offeree.' [Citation.]" (*Moffett v. Barclay* (1995) 32 Cal.App.4th 980, 983 [38 Cal.Rptr.2d 546] .)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, §§ 159-165

13 *California Forms of Pleading and Practice*, Ch. 140, Contracts, §§ 140.22, 140.61 (Matthew Bender)

5 *California Points and Authorities*, Ch. 50, Contracts, § 50.351 (Matthew Bender)

27 *California Legal Forms*, Ch. 75, Formation of Contracts and Standard Contractual Provisions, § 75.211 (Matthew Bender)

1 *Matthew Bender Practice Guide: California Contract Litigation*, Ch. 13, Attacking or Defending Existence of Contract--Absence of Essential Element, 13.23 -13.24

Publisher's Notes

This instruction replaces BAJI No. 10.67.

LexisNexis Matthew Bender Expert Practice Tip--Try to Streamline CACI No. 308: This instruction could be confusing because it contains several double negatives. If possible, counsel should try to streamline *CACI No. 308* by (1) eliminating unnecessary clauses that do not apply to the case at hand; and (2) carefully explaining the clauses that do apply. *By Ronald Oster*

LexisNexis Matthew Bender Expert Practice Tip--Revocation Argument Requires Care: "Revocation" is not a simple concept for many jurors. Thus, the related argument must carefully go over the elements and the connecting evidence. *By Rex Heeseman*

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Contracts Law Breach Causes of Action General

OverviewContracts LawFormationOffersGeneral OverviewContracts LawFormationOffersRejectionsContracts
LawFormationOffersRevocable Offers



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CHAPTER 3 California Judicial Council Contracts Instructions

1-3 California Forms of Jury Instruction CACI 309

CACI 309 Contract Formation--Acceptance

Both an offer and an acceptance are required to create a contract. [*Name of defendant*] contends that a contract was not created because the offer was never accepted. To overcome this contention, [*name of plaintiff*] must prove both of the following:

- 1. That [*name of defendant*] agreed to be bound by the terms of the offer. [If [*name of defendant*] agreed to be bound only on certain conditions, or if [he/she/it] introduced a new term into the bargain, then there was no acceptance]; and**
- 2. That [*name of defendant*] communicated [his/her/its] agreement to [*name of plaintiff*].**

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

New September 2003

Do not give this instruction unless the defendant has testified or offered other evidence in support of his or her contention.

This instruction assumes that the defendant is claiming to have not accepted plaintiff's offer. Change the identities of the parties in the indented paragraphs if, under the facts of the case, the roles of the parties are switched (e.g., if defendant was the alleged offeror).

● *Civil Code section 1585* provides: "An acceptance must be absolute and unqualified, or must include in itself an acceptance of that character which the proposer can separate from the rest, and which will

conclude the person accepting. A qualified acceptance is a new proposal."

■ "[T]erms proposed in an offer must be met exactly, precisely and unequivocally for its acceptance to result in the formation of a binding contract; and a qualified acceptance amounts to a new proposal or counteroffer putting an end to the original offer." (*Panagotacos v. Bank of America* (1998) 60 Cal.App.4th 851, 855-856 [70 Cal.Rptr.2d 595] .)

■ "[I]t is not necessarily true that any communication other than an unequivocal acceptance is a rejection. Thus, an acceptance is not invalidated by the fact that it is 'grumbling,' or that the offeree makes some simultaneous 'request.' Nevertheless, it must appear that the 'grumble' does not go so far as to make it doubtful that the expression is really one of assent. Similarly, the 'request' must not add additional or different terms from those offered. Otherwise, the 'acceptance' becomes a counteroffer." (*Guzman v. Visalia Community Bank* (1999) 71 Cal.App.4th 1370, 1376 [84 Cal.Rptr.2d 581] .)

■ "The interpretation of the purported acceptance or rejection of an offer is a question of fact. Further, based on the general rule that manifested mutual assent rather than actual mental assent is the essential element in the formation of contracts, the test of the true meaning of an acceptance or rejection is not what the party making it thought it meant or intended it to mean. Rather, the test is what a reasonable person in the position of the parties would have thought it meant." (*Guzman, supra*, 71 Cal.App.4th at pp. 1376-1377 .)

■ "Acceptance of an offer, which may be manifested by conduct as well as by words, must be expressed or communicated by the offeree to the offeror." (*Russell v. Union Oil Co.* (1970) 7 Cal.App.3d 110, 114 [86 Cal.Rptr. 424] .)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, §§ 180-192

13 *California Forms of Pleading and Practice*, Ch. 140, Contracts, § 140.22 (Matthew Bender)

5 *California Points and Authorities*, Ch. 50, Contracts, § 50.352 (Matthew Bender)

27 *California Legal Forms*, Ch. 75, Formation of Contracts and Standard Contractual Provisions, § 75.214 (Matthew Bender)

1 *Matthew Bender Practice Guide: California Contract Litigation*, Ch. 13, Attacking or Defending Existence of Contract--Absence of Essential Element, 13.25 -13.31

Publisher's Notes

This instruction covers issues presented in BAJI No. 10.68.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Contracts Law Breach Causes of Action General Overview Contracts Law Formation Acceptance General Overview Contracts Law Formation Acceptance Methods of Acceptance Overt Acts Contracts Law Formation Acceptance Reasonable Time



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California Forms of Jury Instruction

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CHAPTER 3 California Judicial Council Contracts Instructions

1-3 California Forms of Jury Instruction CACI 310

CACI 310 Contract Formation--Acceptance by Silence

Ordinarily, if a party does not say or do anything in response to another party's offer, then he or she has not accepted the offer. However, if [name of plaintiff] proves that both [he/she/it] and [name of defendant] understood silence or inaction to mean that [name of defendant] had accepted [name of plaintiff]'s offer, then there was an acceptance.

New September 2003

This instruction assumes that the defendant is claiming to have not accepted plaintiff's offer. Change the identities of the parties in the last two sets of brackets if, under the facts of the case, the roles of the parties are switched (e.g., if defendant was the alleged offeror).

This instruction should be read in conjunction with and immediately after *CACI No. 309, Contract Formation--Acceptance*, if acceptance by silence is an issue.

- Because acceptance must be communicated, "[s]ilence in the face of an offer is not an acceptance, unless there is a relationship between the parties or a previous course of dealing pursuant to which silence would be understood as acceptance." (*Southern California Acoustics Co., Inc. v. C. V. Holder, Inc.* (1969) 71 Cal.2d 719, 722 [79 Cal.Rptr. 319, 456 P.2d 975] .)

- Acceptance may also be inferred from inaction where one has a duty to act, and from retention of the offered benefit. (*Golden Eagle Insurance Co. v. Foremost Insurance Co.* (1993) 20 Cal.App.4th 1372, 1386 [25 Cal.Rptr.2d 242] .)

■ *Civil Code section 1589* provides: "A voluntary acceptance of the benefit of a transaction is equivalent to a consent to all the obligations arising from it, so far as the facts are known, or ought to be known, to the person accepting."

■ *Section 69(1) of the Restatement Second of Contracts* provides:

(1) Where an offeree fails to reply to an offer, his silence and inaction operate as an acceptance in the following cases only:

(a) Where an offeree takes the benefit of offered services with reasonable opportunity to reject them and reason to know that they were offered with the expectation of compensation.

(b) Where the offeror has stated or given the offeree reason to understand the assent may be manifested by silence or inaction, and the offeree in remaining silent and inactive intends to accept the offer.

(c) Where because of previous dealings or otherwise, it is reasonable that the offeree should notify the offeror if he does not intend to accept.

Secondary Sources

1 Witkin, *Summary of California Law* (10th ed. 2005) Contracts, §§ 193-197

13 *California Forms of Pleading and Practice*, Ch. 140, Contracts, § 140.22 (Matthew Bender)

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

1 *Matthew Bender Practice Guide: California Contract Litigation*, Ch. 13, *Attacking or Defending Existence of Contract--Absence of Essential Element*, 13.31

Publisher's Notes

This instruction covers issues presented in BAJI No. 10.68.

LexisNexis Matthew Bender Expert Practice Tip--Use Caution When Explaining Impact of "Silence": Most jurors will think that a "positive" step must be taken in a contract. So, explaining (from either perspective) the impact of "silence" should be undertaken cautiously. *By Rex Heeseman*

LexisNexis Matthew Bender Expert Practice Tip--Establishing That Silence Means Acceptance: The Sources and Authority following *CACI No. 310* identify several ways to establish that silence means acceptance of the contract. Of these possibilities, proof that the "silent" party received, or expected to receive, the benefits of the contract will go a long way toward persuading the jury that a contract was formed. *By Ronald Oster*

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Contracts Law Breach Causes of Action General Overview Contracts Law Formation Acceptance General Overview Contracts Law Formation Acceptance Methods of

AcceptanceSilenceContracts LawFormationAcceptanceReasonable Time



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CHAPTER 3 California Judicial Council Contracts Instructions

1-3 California Forms of Jury Instruction CACI 311

CACI 311 Contract Formation--Rejection of Offer

[*Name of defendant*] contends that the offer to enter into a contract terminated because [*name of plaintiff*] rejected it. To overcome this contention, [*name of plaintiff*] must prove both of the following:

- 1. That [*name of plaintiff*] did not reject [*name of defendant*]'s offer; and**
- 2. That [*name of plaintiff*] did not make any additions or changes to the terms of [*name of defendant*]'s offer.**

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

New September 2003

Do not give this instruction unless the defendant has testified or offered other evidence in support of his or her contention.

Note that rejections of a contract offer, or proposed alterations to an offer, are effective only if they are communicated to the other party. (See *Beverly Way Associates v. Barham* (1990) 226 Cal.App.3d 49, 55 [276 Cal.Rptr. 240] .) If it is necessary for the jury to make a finding regarding the issue of communication then this instruction may need to be modified.

This instruction assumes that the defendant is claiming plaintiff rejected defendant's offer. Change the identities of the parties in the indented paragraphs if, under the facts of the case, the roles of the parties are switched (e.g., if defendant was the alleged offeree).

Conceptually, this instruction dovetails with *CACI No. 309, Contract Formation--Acceptance*. This instruction is designed for the situation where a party has rejected an offer by not accepting it on its terms.

■ *Civil Code section 1585* provides: "An acceptance must be absolute and unqualified, or must include in itself an acceptance of that character which the proposer can separate from the rest, and which will conclude the person accepting. A qualified acceptance is a new proposal."

■ *Section 39(2) of the Restatement Second of Contracts* provides that "[a]n offeree's power of acceptance is terminated by his making of a counter-offer, unless the offeror has manifested a contrary intention or unless the counteroffer manifests a contrary intention of the offeree."

■ Cases provide that "a qualified acceptance amounts to a new proposal or counter-offer putting an end to the original offer. ... A counter-offer containing a condition different from that in the original offer is a new proposal and, if not accepted by the original offeror, amounts to nothing." (*Apablaza v. Merritt and Co. (1959) 176 Cal.App.2d 719, 726 [1 Cal.Rptr. 500]* , internal citations omitted.) More succinctly: "The rejection of an offer kills the offer." (*Stanley v. Robert S. Odell and Co. (1950) 97 Cal.App.2d 521, 534 [218 P.2d 162]* .)

■ "[T]erms proposed in an offer must be met exactly, precisely and unequivocally for its acceptance to result in the formation of a binding contract; and a qualified acceptance amounts to a new proposal or counteroffer putting an end to the original offer." (*Panagotacos v. Bank of America (1998) 60 Cal.App.4th 851, 855-856 [70 Cal.Rptr.2d 595]* .)

■ The original offer terminates as soon as the rejection is communicated to the offeror: "It is hornbook law that an unequivocal rejection by an offeree, communicated to the offeror, terminates the offer; even if the offeror does no further act, the offeree cannot later purport to accept the offer and thereby create enforceable contractual rights against the offeror." (*Beverly Way Associates, supra*, 226 Cal.App.3d at p. 55 .)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, § 163

13 *California Forms of Pleading and Practice*, Ch. 140, Contracts, § 140.22 (Matthew Bender)

5 *California Points and Authorities*, Ch. 50, Contracts, § 50.352 (Matthew Bender)

27 *California Legal Forms*, Ch. 75, Formation of Contracts and Standard Contractual Provisions, §§ 75.212 -75.214 (Matthew Bender)

1 *Matthew Bender Practice Guide: California Contract Litigation*, Ch. 13, Attacking or Defending Existence of Contract--Absence of Essential Element, 13.23 -13.24

Publisher's Notes

This instruction covers issues presented in BAJI No. 10.68.

LexisNexis Matthew Bender Expert Practice Tip--Counter Offers: *CACI No. 311* parallels *CACI No. 309* regarding acceptance of an offer. The second clause of this instruction is important in cases

where there has been a counter offer, because a counter offer operates as a rejection of the original offer.
By Ronald Oster

LexisNexis Matthew Bender Expert Practice Tip--Using CACI No. 311: As compared to most of the other instructions in this chapter, the idea of a contract "rejection" should be more easily understood by most jurors. *By Rex Heeseman*

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewContracts LawBreachCauses of ActionGeneral OverviewContracts LawFormationOffersRejections



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CHAPTER 3 California Judicial Council Contracts Instructions

*1-3 California Forms of Jury Instruction CACI 312***CACI 312 Substantial Performance**

[Name of defendant] contends that [name of plaintiff] did not perform all of the things that [he/she/it] was required to do under the contract, and therefore [name of defendant] did not have to perform [his/her/its] obligations under the contract. To overcome this contention, [name of plaintiff] must prove both of the following:

- 1. That [name of plaintiff] made a good faith effort to comply with the contract; and**
- 2. That [name of defendant] received essentially what the contract called for because [name of plaintiff]'s failures, if any, were so trivial or unimportant that they could have been easily fixed or paid for.**

New September 2003

Do not give this instruction unless the defendant has testified or offered other evidence in support of his or her contention.

■ " 'Substantial performance means that there has been no willful departure from the terms of the contract, and no omission of any of its essential parts, and that the contractor has in good faith performed all of its substantive terms. If so, he will not be held to have forfeited his right to a recovery by reason of trivial defects or imperfections in the work performed.' " (*Connell v. Higgins* (1915) 170 Cal. 541, 556 [150 P. 769] , citation omitted.)

■ The Supreme Court has cited the following passage from Witkin with approval: "At common law,

recovery under a contract for work done was dependent upon a complete performance, although hardship might be avoided by permitting recovery in quantum meruit. The prevailing doctrine today, which finds its application chiefly in building contracts, is that substantial performance is sufficient, and justifies an action on the contract, although the other party is entitled to a reduction in the amount called for by the contract, to compensate for the defects. What constitutes substantial performance is a question of fact, but it is essential that there be no wilful departure from the terms of the contract, and that the defects be such as may be easily remedied or compensated, so that the promisee may get practically what the contract calls for." (*Posner v. Grunwald-Marx, Inc.* (1961) 56 Cal.2d 169, 186-187 [14 Cal.Rptr. 297, 363 P.2d 313] ; see also *Kossler v. Palm Springs Developments, Ltd.* (1980) 101 Cal.App.3d 88, 101 [161 Cal.Rptr. 423] .)

■ "Whether, in any case, such defects or omissions are substantial, or merely unimportant mistakes that have been or may be corrected, is generally a question of fact." (*Connell, supra*, 170 Cal. at pp. 556-557, internal citation omitted.)

■ "The doctrine of substantial performance has been recognized in California since at least 1921, when the California Supreme Court decided the landmark case of *Thomas Haverty Co. v. Jones* [citation], in which the court stated: "The general rule on the subject of [contractual] performance is that "Where a person agrees to do a thing for another for a specified sum of money to be paid on full performance, he is not entitled to any part of the sum until he has himself done the thing he agreed to do, unless full performance has been excused, prevented, or delayed by the act of the other party, or by operation of law, or by the act of God or the public enemy." [Citation.] [P] ... [I]t is settled, especially in the case of building contracts, where the owner has taken possession of the building and is enjoying the fruits of the contractor's work in the performance of the contract, that if there has been a substantial performance thereof by the contractor in good faith, where the failure to make full performance can be compensated in damages, to be deducted from the price or allowed as a counterclaim, and the omissions and deviations were not willful or fraudulent, and do not substantially affect the usefulness of the building for the purposes for which it was intended, the contractor may, in an action upon the contract, recover the amount unpaid of his contract price less the amount allowed as damages for the failure in strict performance. [Citations.]" (*Murray's Iron Works, Inc. v. Boyce* (2008) 158 Cal.App.4th 1279, 1291-1292 [71 Cal.Rptr.3d 317] .)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, §§ 818-819

13 *California Forms of Pleading and Practice*, Ch. 140, Contracts, § 140.23 (Matthew Bender)

5 *California Points and Authorities*, Ch. 50, Contracts, §§ 50.30, 50.31 (Matthew Bender)

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

2 *Matthew Bender Practice Guide: California Contract Litigation*, Ch. 22, Suing or Defending Action for Breach of Contract, 22.08[2], 22.16[2], 22.37, 22.69

Publisher's Notes

This instruction covers issues presented in BAJI Nos. 10.71, 10.82, 10.83, and 10.84.

LexisNexis Matthew Bender Expert Practice Tip--Use Care With Substantial Performance:

"Substantial performance" is not a simple idea for attorneys, let alone jurors. *By Rex Heeseman*

LexisNexis Matthew Bender Expert Practice Tip--Required Proof: *CACI No. 312* requires proof that the non-performance was not important (or could be easily fixed) and that plaintiff made a "good faith" effort to comply with the terms of the contract. A willful departure from the contract's terms may fall short of the second element. *By Ronald Oster*

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewContracts LawBreachCauses of ActionGeneral OverviewContracts LawPerformanceSubstantial Performance



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California Forms of Jury Instruction

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CHAPTER 3 California Judicial Council Contracts Instructions

1-3 California Forms of Jury Instruction CACI 313

CACI 313 Modification

[*Name of party claiming modification*] claims that the original contract was modified or changed. [*Name of party claiming modification*] must prove that the parties agreed to the modification. [*Name of other party*] denies that the contract was modified.

The parties to a contract may agree to modify its terms. You must decide whether a reasonable person would conclude from the words and conduct of the parties that they agreed to modify the contract. You cannot consider the parties' hidden intentions.

[A contract in writing may be modified by a contract in writing.]

[A contract in writing may be modified by an oral agreement to the extent the oral agreement is carried out by the parties.]

[A contract in writing may be modified by an oral agreement if the parties agree to give each other something of value.]

[An oral contract may be modified by consent of the parties, in writing, without an agreement to give each other something of value.]

New September 2003; Revised December 2009

Sources and Authority

- "It is axiomatic that the parties to an agreement may modify it." (*Vella v. Hudgins* (1984) 151

Cal.App.3d 515, 519 [198 Cal.Rptr. 725] .)

■ *Civil Code section 1698* provides:

(a) A contract in writing may be modified by a contract in writing.

(b) A contract in writing may be modified by an oral agreement to the extent that the oral agreement is executed by the parties.

(c) Unless the contract otherwise expressly provides, a contract in writing may be modified by an oral agreement supported by new consideration. The statute of frauds (Section 1624) is required to be satisfied if the contract as modified is within its provisions.

(d) Nothing in this section precludes in an appropriate case the application of rules of law concerning estoppel, oral novation and substitution of a new agreement, rescission of a written contract by an oral agreement, waiver of a provision of a written contract, or oral independent collateral contracts.

The Law Revision Commission comment to this section observes: "The rules provided by subdivisions (b) and (c) merely describe cases where proof of an oral modification is permitted; these rules do not, however, affect in any way the burden of the party claiming that there was an oral modification to produce sufficient evidence to persuade the trier of fact that the parties actually did make an oral modification of the contract."

■ *Civil Code section 1697* provides: "A contract not in writing may be modified in any respect by consent of the parties, in writing, without a new consideration, and is extinguished thereby to the extent of the modification."

■ "Another issue of fact appearing in the evidence is whether the written contract was modified by executed oral agreements. This can be a question of fact. An agreement to modify a written contract will be implied if the conduct of the parties is inconsistent with the written contract so as to warrant the conclusion that the parties intended to modify it." (*Daugherty Co. v. Kimberly-Clark Corp.* (1971) 14 *Cal.App.3d* 151, 158 [92 *Cal.Rptr.* 120] , internal citation omitted.)

■ "Modification is a change in the obligation by a modifying agreement which requires mutual assent." (*Wade v. Diamond A Cattle Co.* (1975) 44 *Cal.App.3d* 453, 457 [118 *Cal.Rptr.* 695] .)

■ "A contract can, of course, be subsequently modified with the assent of the parties thereto, provided the same elements essential to the validity of the original contract are present." (*Carlson, Collins, Gordon & Bold v. Banducci* (1967) 257 *Cal.App.2d* 212, 223 [64 *Cal.Rptr.* 915] , internal citations omitted.)

■ Consideration is unnecessary if the modification is to correct errors and omissions. (*Texas Co. v. Todd* (1937) 19 *Cal.App.2d* 174, 185-186 [64 *P.2d* 1180] .)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, §§ 964-971

13 *California Forms of Pleading and Practice*, Ch. 140, Contracts, §§ 140.112, 140.149 -140.152 (Matthew Bender)

5 *California Points and Authorities*, Ch. 50, Contracts, §§ 50.520 -50.523 (Matthew Bender)

27 *California Legal Forms*, Ch. 77, Discharge of Obligations, §§ 77.21, 77.121, 77.320 -77.323 (Matthew Bender)

2 Matthew Bender Practice Guide: California Contract Litigation, Ch. 21, *Asserting a Particular Construction of Contract*, 21.58

Publisher's Notes

This instruction covers issues presented in BAJI No. 10.69.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewContracts LawBreachCauses of ActionGeneral
OverviewContracts LawContract ModificationsGeneral OverviewContracts LawContract ModificationsOral
ModificationsContracts LawContract ModificationsPreexisting Duties



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CHAPTER 3 California Judicial Council Contracts Instructions

1-3 California Forms of Jury Instruction CACI 314

CACI 314 Interpretation--Disputed Term

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

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

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

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

New September 2003

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

- *Section 200 of the Restatement Second of Contracts* provides: "Interpretation of a promise or agreement or a term thereof is the ascertainment of its meaning."
- *Civil Code section 1636* provides: "A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and

lawful."

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

- "Juries are not prohibited from interpreting contracts. Interpretation of a written instrument becomes solely a judicial function only when it is based on the words of the instrument alone, when there is no conflict in the extrinsic evidence, or a determination was made based on incompetent evidence. But when, as here, ascertaining the intent of the parties at the time the contract was executed depends on the credibility of extrinsic evidence, that credibility determination and the interpretation of the contract are questions of fact that may properly be resolved by the jury." (*City of Hope National Medical Center v. Genentech, Inc.* (2008) 43 Cal.4th 375, 395 [75 Cal.Rptr.3d 333, 181 P.3d 142] , footnote and internal citations omitted.)

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

Secondary Sources

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

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

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

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

Publisher's Notes

This instruction covers issues presented in BAJI No. 10.75.

LexisNexis Matthew Bender Expert Practice Tip--Issues for Court and Jury: Interpretation of a contract is normally within the province of the court. However, conflicting extrinsic evidence can create a jury issue. Remember that unexpressed beliefs as to the meaning of the contract are not relevant (*see, e.g., CACI No. 302* for instruction that the jury "may not consider the parties' hidden intentions"). By *Ronald Oster*

LexisNexis Matthew Bender Expert Practice Tip--Interpreting Contracts: Some jurors will be skeptical of an instruction that the jury should interpret the contract, especially by what was meant at the contract's inception. Therefore, be careful how the closing is presented. By *Rex Heeseman*

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Contracts Law Breach Causes of Action General Overview Contracts Law Contract Interpretation General Overview Contracts Law Contract Interpretation Good Faith &

Fair DealingEvidenceDocumentary EvidenceParol Evidence



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CHAPTER 3 California Judicial Council Contracts Instructions

1-3 California Forms of Jury Instruction CACI 315

CACI 315 Interpretation--Meaning of Ordinary Words

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

New September 2003

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

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

- "Generally speaking, words in a contract are to be construed according to their plain, ordinary, popular or legal meaning, as the case may be. However, particular expressions may, by trade usage, acquire a different meaning in reference to the subject matter of a contract. If both parties are engaged in that trade, the parties to the contract are deemed to have used them according to their different and peculiar sense as shown by such trade usage and parol evidence is admissible to establish the trade usage

even though the words in their ordinary or legal meaning are entirely unambiguous. [Citation.]" (*Hayter Trucking Inc. v. Shell Western E & P, Inc.* (1993) 18 Cal.App.4th 1, 15 [22 Cal.Rptr.2d 229] .)

Secondary Sources

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

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

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

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

Publisher's Notes

This instruction covers issues presented in BAJI No. 10.75.

LexisNexis Matthew Bender Expert Practice Tip--Interpreting Contracts: Some jurors will be uncertain of the role of interpreting a contract's meaning [*see also* Practice Tip in CACI No. 314]. However, the idea of applying the "usual and ordinary meaning" will be an easier task. *By Rex Heeseman*

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Contracts Law Breach Causes of Action General Overview Contracts Law Contract Interpretation General Overview



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CHAPTER 3 California Judicial Council Contracts Instructions

1-3 California Forms of Jury Instruction CACI 316

CACI 316 Interpretation--Meaning of Technical Words

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

New September 2003

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

- A court will look beyond the terms of the writing where it appears that the parties intended to ascribe a technical meaning to the terms used. (*Cooper Companies, Inc. v. Transcontinental Insurance Co.* (1995) 31 Cal.App.4th 1094, 1101 [37 Cal.Rptr.2d 508] .)

Secondary Sources

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

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

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

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

Publisher's Notes

This instruction covers issues presented in BAJI No. 10.75.

LexisNexis Matthew Bender Expert Practice Tip--Use Expert Testimony: Most jurors will be bothered by "technical words," especially jurors who are not that educated or experienced. Depending on the importance of the term being interpreted, it may be necessary to use expert testimony to establish the meaning of technical terms. This expert testimony can be supplied by the party's own personnel if they have the requisite background and experience. *By Rex Heeseman and Ronald Oster*

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewContracts LawBreachCauses of ActionGeneral OverviewContracts LawContract InterpretationGeneral Overview



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CHAPTER 3 California Judicial Council Contracts Instructions

1-3 California Forms of Jury Instruction CACI 317

CACI 317 Interpretation--Construction of Contract as a Whole

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

New September 2003

- *Civil Code section 1641* provides: "The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other."
- "[T]he contract must be construed as a whole and the intention of the parties must be ascertained from the consideration of the entire contract, not some isolated portion." (*County of Marin v. Assessment Appeals Bd. of Marin County* (1976) 64 Cal.App.3d 319, 324-325 [134 Cal.Rptr. 349] .)
- Contracts should be construed as a whole, with each clause lending meaning to the others. Contractual language should be interpreted in a manner that gives force and effect to every clause rather than to one that renders clauses nugatory, inoperative, or meaningless. (*City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith* (1998) 68 Cal.App.4th 445, 473 [80 Cal.Rptr.2d 329]; *Titan Corp. v. Aetna Casualty and Surety Co.* (1994) 22 Cal.App.4th 457, 473-474 [27 Cal.Rptr.2d 476] .)

Secondary Sources

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

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

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

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

Publisher's Notes

This instruction covers issues presented in BAJI No. 10.75.

LexisNexis Matthew Bender Expert Practice Tip--Using CACI No. 317: This instruction uses general language that may not be very helpful to a jury (e.g., all the parts of a contract have to "make sense" when taken together). If you can show that your opponent's interpretation will defeat the very purpose of the contract, you can show that the interpretation does not "make sense." However, if your opponent's interpretation merely makes performance more difficult, or reduces the benefits to be received, this instruction is less useful. *By Ronald Oster*

LexisNexis Matthew Bender Expert Practice Tip--Use Care with Argument: Sometimes, it will help most jurors in evaluating a contract in its whole. But, other times, that approach will be daunting to some jurors. Hence, in most lawsuits this argument should be carefully detailed. *By Rex Heeseman*

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Contracts Law Breach Causes of Action General Overview Contracts Law Contract Interpretation General Overview Contracts Law Formation Meeting of Minds



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CHAPTER 3 California Judicial Council Contracts Instructions

1-3 California Forms of Jury Instruction CACI 318

CACI 318 Interpretation--Construction by Conduct

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

New September 2003

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

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

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

- "[T]his rule is not limited to the joint conduct of the parties in the course of performance of the contract. As stated in Corbin on Contracts, 'The practical interpretation of the contract by one party, evidenced by his words or acts, can be used against him on behalf of the other party, even though that

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

Secondary Sources

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

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

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

Publisher's Notes

This instruction covers issues presented in BAJI No. 10.75.

LexisNexis Matthew Bender Expert Practice Tip--Argument Should Be Straightforward:

"Conduct" is a term that will be familiar to most jurors. Thus, the related oral argument should be relatively straightforward. *By Rex Heeseman*

LexisNexis Matthew Bender Expert Practice Tip--Using CACI No. 318: This instruction can be very helpful in cases where a party has changed positions with an eye toward litigation. Many jurors are instinctively skeptical of legal positions that are taken "after the lawyers got involved." Conversely, evidence of how the parties acted beforehand can be especially persuasive and should be emphasized. *By Ronald Oster*

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Contracts Law Breach Causes of Action General Overview Contracts Law Contract Interpretation General Overview Contracts Law Contract Interpretation Parol Evidence Course of Dealing Contracts Law Contract Interpretation Parol Evidence Custom & Usage



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CHAPTER 3 California Judicial Council Contracts Instructions

1-3 California Forms of Jury Instruction CACI 319

CACI 319 Interpretation--Reasonable Time

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

New September 2003

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

- This rule of construction applies where the contract is silent as to the time of performance. (See *Palmquist v. Palmquist* (1963) 212 Cal.App.2d 322, 331 [27 Cal.Rptr. 744] .)

- The reasonableness of time for performance is a question of fact that depends on the circumstances of the particular case. (*Lyon v. Goss* (1942) 19 Cal.2d 659, 673 [123 P.2d 11] ; *Consolidated World Investments, Inc. v. Lido Preferred Ltd.* (1992) 9 Cal.App.4th 373, 381 [11 Cal.Rptr.2d 524] .) These circumstances include the situation of the parties, the nature of the transaction, and the facts of the particular case. (*Sawday v. Vista Irrigation Dist.* (1966) 64 Cal.2d 833, 836 [52 Cal.Rptr. 1, 415 P.2d 816] .)

Secondary Sources

1-3 California Forms of Jury Instruction CACI 319

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

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

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

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

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

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

Publisher's Notes

This instruction covers issues presented in BAJI No. 10.75.

LexisNexis Matthew Bender Expert Practice Tip--Use Analogies: "Reasonable time" is a term with which most attorneys are comfortable--but that is probably not the situation with a majority of jurors. So, think about a jury argument that uses analogies to explain this term. *By Rex Heeseman*



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CHAPTER 3 California Judicial Council Contracts Instructions

1-3 California Forms of Jury Instruction CACI 320

CACI 320 Interpretation--Construction Against Drafter

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

New September 2003

This instruction should be given only to a deadlocked jury, so as to avoid giving them this tool to resolve the case before they have truly exhausted the other avenues of approach.

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

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

- "The trial court's instruction ... embodies a general rule of contract interpretation that was applicable to the negotiated agreement between [the parties]. It may well be that in a particular situation the discussions and exchanges between the parties in the negotiation process may make it difficult or even

impossible for the jury to determine which party caused a particular contractual ambiguity to exist, but this added complexity does not make the underlying rule irrelevant or inappropriate for a jury instruction. We conclude, accordingly, that the trial court here did not err in instructing the jury on *Civil Code* section 1654's general rule of contract interpretation." (*City of Hope National Medical Center v. Genentech, Inc.* (2008) 43 Cal.4th 375, 398 [75 Cal.Rptr.3d 333, 181 P.3d 142] .)

■ This rule is applied more strongly in the case of adhesion contracts. (*Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 801 [79 Cal.Rptr.2d 273] .) It also applies with greater force when the person who prepared the writing is a lawyer. (*Mayhew v. Benninghoff* (1997) 53 Cal.App.4th 1365, 1370 [62 Cal.Rptr.2d 27] .)

Secondary Sources

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

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

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

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

Publisher's Notes

This instruction covers issues presented in BAJI No. 10.75.

LexisNexis Matthew Bender Expert Practice Tip--Using CACI No. 320: If the case involves a form contract that was clearly drafted by one side (e.g., an insurance policy), this instruction can be very helpful. However, in many commercial contexts, the parties negotiate the terms of the contract with both sides participating to some extent in the drafting. These situations make it more difficult to apply the instruction. *By Ronald Oster*

LexisNexis Matthew Bender Expert Practice Tip--Using CACI No. 320: If you are representing the party that did not draft the term in question, this instruction should be emphasized as it often provides the jury with a relatively painless way to decide. *By Rex Heeseman*

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Contracts Law Breach Causes of Action General Overview Contracts Law Contract Interpretation General Overview



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California Forms of Jury Instruction

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CHAPTER 3 California Judicial Council Contracts Instructions

1-3 California Forms of Jury Instruction CACI 321

CACI 321 Existence of Condition Precedent Disputed

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

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

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

New September 2003

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

- *Civil Code section 1434* provides: "An obligation is conditional, when the rights or duties of any party thereto depend upon the occurrence of an uncertain event."

- *Civil Code section 1436* provides: "A condition precedent is one which is to be performed before some right dependent thereon accrues, or some act dependent thereon is performed."

- "Under the law of contracts, parties may expressly agree that a right or duty is conditional upon the occurrence or nonoccurrence of an act or event." (*Platt Pacific, Inc. v. Andelson* (1993) 6 Cal.4th 307,

313 [24 Cal.Rptr.2d 597, 862 P.2d 158] .)

■ "A condition is a fact, the happening or nonhappening of which creates (condition precedent) or extinguishes (condition subsequent) a duty on the part of the promisor. If the promisor makes an absolute or unconditional promise, he is bound to perform when the time arrives; but if he makes a conditional promise, he binds himself to perform only if the condition precedent occurs, or is relieved from the duty if the condition subsequent occurs. The condition may be the happening of an event, or an act of a party." (1 Witkin, Summary of California Law (10th ed. 2005) Contracts, § 776.)

■ "[W]here defendant's duty to perform under the contract is conditioned on the happening of some event, the plaintiff must prove the event transpired." (*Consolidated World Investments, Inc. v. Lido Preferred Ltd.* (1992) 9 Cal.App.4th 373, 380 [11 Cal.Rptr.2d 524] .)

■ "When a contract establishes the satisfaction of one of the parties as a condition precedent, two tests are recognized: (1) The party is bound to make his decision according to the judicially discerned, objective standard of a reasonable person; (2) the party may make a subjective decision regardless of reasonableness, controlled only by the need for good faith. Which test applies in a given transaction is a matter of actual or judicially inferred intent. Absent an explicit contractual direction or one implied from the subject matter, the law prefers the objective, i.e., reasonable person, test." (*Guntert v. City of Stockton* (1974) 43 Cal.App.3d 203, 209 [117 Cal.Rptr. 601] , internal citations omitted.)

Secondary Sources

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

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

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

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

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

Publisher's Notes

This instruction covers issues presented in BAJI No. 10.80.

LexisNexis Matthew Bender Expert Practice Tip--Using CACI No. 321: This is a difficult instruction for most jurors and some judges. Thus, exercise care in the way you approach it. *By Rex Heeseman*

LexisNexis Matthew Bender Expert Practice Tip--Avoid Using Legal Terms: The concepts of "conditions precedent" and "conditions subsequent" can be very confusing. Avoid these legal terms at all costs, and try to explain the deal in the simplest possible terms. Consider the use of graphics in your case-in-chief and closing argument to describe deals that involve several options. *By Ronald Oster*

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Contracts Law Breach Causes of Action General

OverviewContracts LawContract Conditions & ProvisionsConditions PrecedentContracts LawContract Conditions & ProvisionsConditions SubsequentContracts LawContract InterpretationGeneral Overview



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CHAPTER 3 California Judicial Council Contracts Instructions

1-3 California Forms of Jury Instruction CACI 322

CACI 322 Occurrence of Agreed Condition Precedent

The parties agreed in their contract that [name of defendant] would not have to [insert duty] unless [insert condition precedent]. [Name of defendant] contends that this condition did not occur and that [he/she/it] did not have to [insert duty]. To overcome this contention, [name of plaintiff] must prove that [insert condition precedent].

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

New September 2003

Do not give this instruction unless the defendant has testified or offered other evidence in support of his or her contention.

If both the existence and the occurrence of a condition precedent are contested, use *CACI No. 321, Existence of Condition Precedent Disputed*.

- *Civil Code section 1434* provides: "An obligation is conditional, when the rights or duties of any party thereto depend upon the occurrence of an uncertain event."

- *Civil Code section 1436* provides: "A condition precedent is one which is to be performed before some right dependent thereon accrues, or some act dependent thereon is performed."

- "Under the law of contracts, parties may expressly agree that a right or duty is conditional upon the

occurrence or nonoccurrence of an act or event." (*Platt Pacific, Inc. v. Andelson* (1993) 6 Cal.4th 307, 313 [24 Cal.Rptr.2d 597, 862 P.2d 158] .)

■ "A condition is a fact, the happening or nonhappening of which creates (condition precedent) or extinguishes (condition subsequent) a duty on the part of the promisor. If the promisor makes an absolute or unconditional promise, he is bound to perform when the time arrives; but if he makes a conditional promise, he binds himself to perform only if the condition precedent occurs, or is relieved from the duty if the condition subsequent occurs. The condition may be the happening of an event, or an act of a party." (1 Witkin, Summary of California Law (10th ed. 2005) Contracts, § 776.)

■ *Section 224 of the Restatement Second of Contracts* provides: "A condition is an event, not certain to occur, which must occur, unless its non-occurrence is excused, before performance under a contract becomes due."

■ *Section 225 of the Restatement Second of Contracts* provides:

(1) Performance of a duty subject to a condition cannot become due unless the condition occurs or its non-occurrence is excused.

(2) Unless it has been excused, the non-occurrence of a condition discharges the duty when the condition can no longer occur.

(3) Non-occurrence of a condition is not a breach by a party unless he is under a duty that the condition occur.

■ "[W]here defendant's duty to perform under the contract is conditioned on the happening of some event, the plaintiff must prove the event transpired." (*Consolidated World Investments, Inc. v. Lido Preferred Ltd.* (1992) 9 Cal.App.4th 373, 380 [11 Cal.Rptr.2d 524] .)

■ "When a contract establishes the satisfaction of one of the parties as a condition precedent, two tests are recognized: (1) The party is bound to make his decision according to the judicially discerned, objective standard of a reasonable person; (2) the party may make a subjective decision regardless of reasonableness, controlled only by the need for good faith. Which test applies in a given transaction is a matter of actual or judicially inferred intent. Absent an explicit contractual direction or one implied from the subject matter, the law prefers the objective, i.e., reasonable person, test." (*Gunter v. City of Stockton* (1974) 43 Cal.App.3d 203, 209 [117 Cal.Rptr. 601] , internal citations omitted.)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, §§ 776-791

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

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

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

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

Publisher's Notes

This instruction covers issues presented in BAJI No. 10.80.

LexisNexis Matthew Bender Expert Practice Tip-- CACI No. 322 Presents Challenges: *CACI No. 322 presents a challenging argument to make the jurors understand what they should decide. Consider using graphics to describe deals that involve several options that depend on underlying facts. By Rex Heeseman and Ronald Oster*

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewContracts LawBreachCauses of ActionGeneral OverviewContracts LawContract Conditions & ProvisionsConditions PrecedentContracts LawContract InterpretationGeneral Overview



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CHAPTER 3 California Judicial Council Contracts Instructions

1-3 California Forms of Jury Instruction CACI 323

CACI 323 Waiver of Condition Precedent

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

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

New September 2003

Do not give this instruction unless the defendant has testified or offered other evidence in support of his or her contention.

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

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

- Waiver of a condition is a question of fact and not of law. (*Moss v. Minor Properties, Inc.* (1968) 262 Cal.App.2d 847, 857 [69 Cal.Rptr. 341] .)

■ *Section 84 of the Restatement Second of Contracts* provides:

(1) Except as stated in Subsection (2), a promise to perform all or part of a conditional duty under an antecedent contract in spite of the non-occurrence of the condition is binding, whether the promise is made before or after the time for the condition to occur, unless

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

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

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

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

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

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

Secondary Sources

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

Publisher's Notes

This instruction covers issues presented in BAJI No. 10.81.

LexisNexis Matthew Bender Expert Practice Tip--Explain CACI No. 323 Carefully: This is an instruction that will generally need to be explained carefully. *By Rex Heeseman*

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewContracts LawBreachCauses of ActionGeneral OverviewContracts LawContract Conditions & ProvisionsConditions PrecedentContracts LawContract Conditions & ProvisionsWaiversGeneral OverviewContracts LawContract InterpretationGeneral Overview



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CHAPTER 3 California Judicial Council Contracts Instructions

1-3 California Forms of Jury Instruction CACI 324

CACI 324 Anticipatory Breach

A party can breach, or break, a contract before performance is required by clearly and positively indicating, by words or conduct, that he or she will not or can not meet the requirements of the contract.

If [*name of plaintiff*] proves that [he/she/it] would have been able to fulfill the terms of the contract and that [*name of defendant*] clearly and positively indicated, by words or conduct, that [he/she/it] would not or could not meet the contract requirements, then [*name of defendant*] breached the contract.

New September 2003

- *Civil Code section 1440* provides: "If a party to an obligation gives notice to another, before the latter is in default, that he will not perform the same upon his part, and does not retract such notice before the time at which performance upon his part is due, such other party is entitled to enforce the obligation without previously performing or offering to perform any conditions upon his part in favor of the former party."

- Courts have defined anticipatory breach as follows: "An anticipatory breach of contract occurs on the part of one of the parties to the instrument when he positively repudiates the contract by acts or statements indicating that he will not or cannot substantially perform essential terms thereof, or by voluntarily transferring to a third person the property rights which are essential to a substantial performance of the previous agreement, or by a voluntary act which renders substantial performance of the contract impossible or apparently impossible." (*C. A. Crane v. East Side Canal & Irrigation Co.* (1935) 6 Cal.App.2d 361, 367 [44 P.2d 455] .)

■ Anticipatory breach can be express or implied: "An express repudiation is a clear, positive, unequivocal refusal to perform; an implied repudiation results from conduct where the promisor puts it out of his power to perform so as to make substantial performance of his promise impossible." (*Taylor v. Johnston* (1975) 15 Cal.3d 130, 137 [123 Cal.Rptr. 641, 539 P.2d 425] .)

■ "In the event the promisor repudiates the contract before the time for his or her performance has arrived, the plaintiff has an election of remedies--he or she may 'treat the repudiation as an anticipatory breach and immediately seek damages for breach of contract, thereby terminating the contractual relation between the parties, or he [or she] can treat the repudiation as an empty threat, wait until the time for performance arrives and exercise his [or her] remedies for actual breach if a breach does in fact occur at such time.' " (*Romano v. Rockwell Internat., Inc.* (1996) 14 Cal.4th 479, 489 [59 Cal.Rptr.2d 20, 926 P.2d 1114] .)

■ Anticipatory breach can be used as an excuse for plaintiff's failure to substantially perform. (*Gold Mining & Water Co. v. Swinerton* (1943) 23 Cal.2d 19, 29 [142 P.2d 22] .)

■ "Although it is true that an anticipatory breach or repudiation of a contract by one party permits the other party to sue for damages without performing or offering to perform its own obligations, this does not mean damages can be recovered without evidence that, but for the defendant's breach, the plaintiff would have had the ability to perform." (*Ersa Grae Corp. v. Fluor Corp.* (1991) 1 Cal.App.4th 613, 625 [2 Cal.Rptr.2d 288] , internal citations omitted.)

■ Section 253 of the Restatement Second of Contracts provides:

(1) Where an obligor repudiates a duty before he has committed a breach by non-performance and before he has received all of the agreed exchange for it, his repudiation alone gives rise to a claim for damages for total breach.

(2) Where performances are to be exchanged under an exchange of promises, one party's repudiation of a duty to render performance discharges the other party's remaining duties to render performance.

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, §§ 861-868

13 California Forms of Pleading and Practice, Ch. 140, Contracts, §§ 140.54, 140.105 (Matthew Bender)

5 California Points and Authorities, Ch. 50, Contracts, § 50.23 (Matthew Bender)

27 California Legal Forms, Ch. 77, Discharge of Obligations, §§ 77.15, 77.361 (Matthew Bender)

2 Matthew Bender Practice Guide: California Contract Litigation, Ch. 22, Suing or Defending Action for Breach of Contract, 22.23

Publisher's Notes

This instruction covers issues presented in BAJI No. 10.87.

LexisNexis Matthew Bender Expert Practice Tip--Explain Concept to Jurors: The concept of

"anticipatory repudiation" can be difficult for some jurors because a party can be held liable for breach of contract even before the time when performance has taken place. It is therefore necessary to explain to the jury that when one party in essence "tears up the contract," the law allows recovery immediately. *By Ronald Oster*

LexisNexis Matthew Bender Expert Practice Tip--Use Care When Arguing: Many attorneys and some judges will struggle with the legal principle of "anticipatory breach." Thus, the argument to the jury must be thought out clearly and carefully. *By Rex Heeseman*

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewContracts LawBreachAnticipatory
RepudiationGeneral OverviewContracts LawBreachCauses of ActionGeneral OverviewContracts LawContract
Conditions & ProvisionsGeneral Overview



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CHAPTER 3 California Judicial Council Contracts Instructions

1-3 California Forms of Jury Instruction CACI 325

CACI 325 Breach of Covenant of Good Faith and Fair Dealing--Essential Factual Elements

In every contract or agreement there is an implied promise of good faith and fair dealing. This means that each party will not do anything to unfairly interfere with the right of any other party to receive the benefits of the contract; however, the implied promise of good faith and fair dealing cannot create obligations that are inconsistent with the terms of the contract. [*Name of plaintiff*] claims that [*name of defendant*] violated the duty to act fairly and in good faith. To establish this claim, [*name of plaintiff*] must prove all of the following:

- 1. That [*name of plaintiff*] and [*name of defendant*] entered into a contract;**
- 2. That [*name of plaintiff*] did all, or substantially all of the significant things that the contract required [him/her/it] to do [or that [he/she/it] was excused from having to do those things];**
- 3. That all conditions required for [*name of defendant*]'s performance had occurred;**
- 4. That [*name of defendant*] unfairly interfered with [*name of plaintiff*]'s right to receive the benefits of the contract; and**
- 5. That [*name of plaintiff*] was harmed by [*name of defendant*]'s conduct.**

New April 2004

This instruction should be given only when the plaintiff has brought a separate cause of action for breach of the covenant of good faith and fair dealing. In many cases, some of the above elements may not be contested. In those cases, users should delete the elements that are not contested so that the jury can focus on the contested issues.

■ *Section 205 of the Restatement Second of Contracts* provides: "Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement."

■ "There is an implied covenant of good faith and fair dealing in every contract that neither party will do anything which will injure the right of the other to receive the benefits of the agreement." (*Comunale v. Traders & General Ins. Co.* (1958) 50 Cal.2d 654, 658 [328 P.2d 198] , internal citation omitted.)

■ " "Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement." " [] The covenant of good faith finds particular application in situations where one party is invested with a discretionary power affecting the rights of another. Such power must be exercised in good faith." (*Carma Developers (Cal.), Inc. v. Marathon Development California, Inc.* (1992) 2 Cal.4th 342, 371-372 [6 Cal.Rptr.2d 467, 826 P.2d 710] , internal citations omitted.)

■ "The covenant of good faith and fair dealing, implied by law in every contract, exists merely to prevent one contracting party from unfairly frustrating the other party's right to receive the *benefits of the agreement actually made*. The covenant thus cannot ' 'be endowed with an existence independent of its contractual underpinnings.' " ' It cannot impose substantive duties or limits on the contracting parties beyond those incorporated in the specific terms of their agreement." (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 349-350 [100 Cal.Rptr.2d 352, 8 P.3d 1089] , internal citations omitted, original italics.)

■ "The implied covenant of good faith and fair dealing rests upon the existence of some specific contractual obligation. The covenant of good faith is read into contracts in order to protect the express covenants or promises of the contract, not to protect some general public policy interest not directly tied to the contract's purpose.' ... 'In essence, the covenant is implied as a supplement to the express contractual covenants, to prevent a contracting party from engaging in conduct which (while not technically transgressing the express covenants) frustrates the other party's rights to the benefits of the contract.' " (*Racine & Laramie, Ltd. v. Department of Parks & Recreation* (1992) 11 Cal.App.4th 1026, 1031-1032 [14 Cal.Rptr.2d 335] , internal citations omitted.)

■ "There is no obligation to deal fairly or in good faith absent an existing contract. If there exists a contractual relationship between the parties ... the implied covenant is limited to assuring compliance with the express terms of the contract, and cannot be extended to create obligations not contemplated in the contract." (*Racine & Laramie, Ltd., supra*, 11 Cal.App.4th at p. 1032 , internal citations omitted.)

■ "The issue of whether the implied covenant of good faith and fair dealing has been breached is ordinarily 'a question of fact unless only one inference [can] be drawn from the evidence.' " (*Hicks v. E.T. Legg & Associates* (2001) 89 Cal.App.4th 496, 509 [108 Cal.Rptr.2d 10] , internal citation omitted.)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, §§ 798, 800-802

13 *California Forms of Pleading and Practice*, Ch. 140, Contracts, §§ 140.12, 140.50 et seq. (Matthew Bender)

2 *Matthew Bender Practice Guide: California Contract Litigation*, Ch. 23, *Suing or Defending Action for Breach of Duty of Good Faith and Fair Dealing*, 23.05

Publisher's Notes

For related BAJI instructions in the context of an employment contract, see BAJI Nos. 10.05, 10.35, 10.37, and 10.38.

LexisNexis Matthew Bender Expert Practice Tip--Use Care When Arguing: CACI No. 325 is an instruction dealing with a legal concept that will be difficult for almost all jurors to understand and apply. Needless to say then, the related argument should be constructed thoughtfully. *By Rex Heeseman*

LexisNexis Matthew Bender Expert Practice Tip--Using CACI No. 325: This instruction can be very helpful in situations where one party is relying on the fine print, strained interpretations, or other technicalities to evade obligations under a contract. Since the language of CACI No. 325 is very general (e.g., a party cannot do anything to "unfairly" interfere with the right of the other party to receive the contract's benefits), this instruction can be applied to many different fact situations. Moreover, CACI No. 325 allows plaintiff's counsel to argue that the "morals of the market place" must yield to the law's higher requirements of "good faith and fair dealings." *By Ronald Oster*

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Contracts Law Breach Causes of Action General Overview Contracts Law Contract Interpretation Good Faith & Fair Dealing



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CHAPTER 3 California Judicial Council Contracts Instructions

1-3 California Forms of Jury Instruction CACI 326

CACI 326 Assignment Contested

[Name of plaintiff] was not a party to the original contract. However, [name of plaintiff] may bring a claim for breach of the contract if [he/she/it] proves that [name of assignor] transferred [his/her/its] rights under the contract to [name of plaintiff]. This transfer is referred to as an "assignment."

[Name of plaintiff] must prove that [name of assignor] intended to transfer [his/her/its] contract rights to [name of plaintiff]. In deciding [name of assignor]'s intent, you should consider the entire transaction and the conduct of the parties to the assignment.

[A transfer of contract rights does not necessarily have to be made in writing. It may be oral or implied by the conduct of the parties to the assignment.]

New February 2005

The bracketed third paragraph should be used only in cases involving a transfer that may be made without a writing.

- *Civil Code section 1052* provides: "A transfer may be made without writing, in every case in which a writing is not expressly required by statute."

- *Restatement Second of Contracts, section 324*, provides: "It is essential to an assignment of a right that the obligee manifest an intention to transfer the right to another person without further action or manifestation of intention by the obligee. The manifestation may be made to the other or to a third person on his behalf and, except as provided by statute or by contract, may be made either orally or by a

writing."

■ "While no particular form of assignment is required, it is essential to the assignment of a right that the assignor manifest an intention to transfer the right." (*Sunburst Bank v. Executive Life Insurance Co.* (1994) 24 Cal.App.4th 1156, 1164 [29 Cal.Rptr.2d 734] , internal citations omitted.)

■ "The burden of proving an assignment falls upon the party asserting rights thereunder. In an action by an assignee to enforce an assigned right, the evidence must not only be sufficient to establish the fact of assignment when that fact is in issue, but the measure of sufficiency requires that the evidence of assignment be clear and positive to protect an obligor from any further claim by the primary obligee." (*Cockerell v. Title Insurance & Trust Co.* (1954) 42 Cal.2d 284, 292 [267 P.2d 16] , internal citations omitted.)

■ "The accrued right to collect the proceeds of the fire insurance policy is a chose in action, and an effective assignment thereof may be expressed orally as well as in writing; may be the product of inference; and where the parties to a transaction involving such a policy by their conduct indicate an intention to transfer such proceeds, the courts will imply an assignment thereof. In making such a determination, substance and not form controls." (*Greco v. Oregon Mutual Fire Insurance Co.* (1961) 191 Cal.App.2d 674, 683 [12 Cal.Rptr. 802] , internal citations omitted.)

■ "An assignor may not maintain an action upon a claim after making an absolute assignment of it to another; his right to demand performance is extinguished, the assignee acquiring such right. To 'assign' ordinarily means to transfer title or ownership of property, but an assignment, to be effective, must include manifestation to another person by the owner of his intention to transfer the right, without further action, to such other person or to a third person. It is the substance and not the form of a transaction which determines whether an assignment was intended. If from the entire transaction and the conduct of the parties it clearly appears that the intent of the parties was to pass title to the chose in action, then an assignment will be held to have taken place." (*McCown v. Spencer* (1970) 8 Cal.App.3d 216, 225 [87 Cal.Rptr. 213] , internal citations omitted.)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, §§ 707-719

6 California Forms of Pleading and Practice, Ch. 60, Assignments, § 60.20 (Matthew Bender)

27 California Legal Forms, Ch. 76, Assignments of Rights and Obligations, § 76.201 (Matthew Bender)

2 Matthew Bender Practice Guide: California Contract Litigation, Ch. 22, Suing or Defending Action for Breach of Contract, 22.51 -22.56, 22.58, 22.59

Publisher's Notes

For a related BAJI instruction, see BAJI No. 10.96.

LexisNexis Matthew Bender Expert Practice Tip--Closing Should be Focused: "Assignment" is a term that should be somewhat familiar to most jurors. However, applying it in a lawsuit may sometimes be difficult. Hence, the closing argument should be focused. *By Rex Heeseman*

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewContracts LawBreachCauses of ActionGeneral
OverviewContracts LawPerformanceAssignmentGeneral OverviewContracts
LawPerformanceAssignmentConsentContracts LawPerformanceAssignmentNonassignability Clauses



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CHAPTER 3 California Judicial Council Contracts Instructions

1-3 California Forms of Jury Instruction CACI 327

CACI 327 Assignment Not Contested

[Name of plaintiff] was not a party to the original contract. However, [he/she/it] may bring a claim for breach of contract because [name of assignor] transferred the rights under the contract to [name of plaintiff]. This transfer is referred to as an "assignment."

New February 2005

This instruction is intended to explain to the jury why a party not named in the original contract is nevertheless a party to the case.

- *Civil Code section 1052* provides: "A transfer may be made without writing, in every case in which a writing is not expressly required by statute."

- *Restatement Second of Contracts, section 324*, provides: "It is essential to an assignment of a right that the obligee manifest an intention to transfer the right to another person without further action or manifestation of intention by the obligee. The manifestation may be made to the other or to a third person on his behalf and, except as provided by statute or by contract, may be made either orally or by a writing."

- "To 'assign' ordinarily means to transfer title or ownership of property, but an assignment, to be effective, must include manifestation to another person by the owner of his intention to transfer the right, without further action, to such other person or to a third person. It is the substance and not the form of a transaction which determines whether an assignment was intended. If from the entire transaction and the conduct of the parties it clearly appears that the intent of the parties was to pass title to the chose in

action, then an assignment will be held to have taken place." (*McCown v. Spencer* (1970) 8 Cal.App.3d 216, 225 [87 Cal.Rptr. 213] , internal citations omitted.)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, §§ 707-719

6 *California Forms of Pleading and Practice*, Ch. 60, Assignments, § 60.20 (Matthew Bender)

27 *California Legal Forms*, Ch. 76, Assignments of Rights and Obligations, § 76.201 (Matthew Bender)

2 *Matthew Bender Practice Guide: California Contract Litigation*, Ch. 22, Suing or Defending Action for Breach of Contract, 22.51 -22.56, 22.58, 22.59

Publisher's Notes

For a related BAJI instruction, see BAJI No. 10.96.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewContracts LawBreachCauses of ActionGeneral OverviewContracts LawPerformanceAssignmentGeneral OverviewContracts LawPerformanceAssignmentConsentContracts LawPerformanceAssignmentNonassignability Clauses



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CHAPTER 3 California Judicial Council Contracts Instructions

1-3 California Forms of Jury Instruction CACI 328-CACI 329

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CHAPTER 3 California Judicial Council Contracts Instructions

1-3 California Forms of Jury Instruction CACI 330

CACI 330 Affirmative Defense--Unilateral Mistake of Fact

[*Name of defendant*] **claims that there was no contract because [he/she/it] was mistaken about [insert description of mistake]. To succeed, [name of defendant] must prove all of the following:**

- 1. That [name of defendant] was mistaken about [insert description of mistake];**
- 2. That [name of plaintiff] knew [name of defendant] was mistaken and used that mistake to take advantage of [him/her/it];**
- 3. That [name of defendant]'s mistake was not caused by [his/her/its] excessive carelessness; and**
- 4. That [name of defendant] would not have agreed to enter into the contract if [he/she/it] had known about the mistake.**

If you decide that [name of defendant] has proved all of the above, then no contract was created.

New September 2003; Revised April 2004

If the mistake is one of law, this may not be a jury issue.

This instruction does not contain the requirement that the mistake be material to the contract because the materiality of a representation is a question of law. (*Merced County Mutual Fire Insurance Co. v. State of California* (1991) 233 Cal.App.3d 765, 772 [284 Cal.Rptr. 680] .) Accordingly, the judge would decide whether an alleged mistake was material, and that mistake would be inserted into this instruction.

■ The Civil Code provides that consent is not free when obtained through duress, menace, fraud, undue influence, or mistake, and is deemed to have been so obtained when it would not have been given but for such fraud or mistake. (*Civ. Code*, §§ 1567, 1568.)

■ *Civil Code* section 1576 provides: "Mistake may be either of fact or law."

■ *Civil Code* section 1577 provides the following definition of mistake of fact:

Mistake of fact is a mistake, not caused by the neglect of a legal duty on the part of the person making the mistake, and consisting in:

1. An unconscious ignorance or forgetfulness of a fact past or present, material to the contract; or,

2. Belief in the present existence of a thing material to the contract, which does not exist, or in the past existence of such a thing, which has not existed.

■ *Civil Code* section 1578 defines mistake of law:

Mistake of law constitutes a mistake, within the meaning of this Article, only when it arises from:

1. A misapprehension of the law by all parties, all supposing that they knew and understood it, and all making substantially the same mistake as to the law; or,

2. A misapprehension of the law by one party, of which the others are aware at the time of contracting, but which they do not rectify.

■ "It is settled that to warrant a unilateral rescission of a contract because of mutual mistake, the mistake must relate to basic or material fact, not a collateral matter." (*Wood v. Kalbaugh* (1974) 39 *Cal.App.3d* 926, 932 [114 *Cal.Rptr.* 673] .)

■ The following quotation explains how unilateral mistakes can be used as a defense: "A mistake need not be mutual. Unilateral mistake is ground for relief where the mistake is due to the fault of the other party or the other party knows or has reason to know of the mistake. ... To rely on a unilateral mistake of fact, [the party] must demonstrate his mistake was not caused by his 'neglect of a legal duty.' Ordinary negligence does not constitute the neglect of a legal duty as that term is used in section 1577." (*Architects & Contractors Estimating Service, Inc. v. Smith* (1985) 164 *Cal.App.3d* 1001, 1007-1008 [211 *Cal.Rptr.* 45] , internal citations omitted.)

■ To prevail on a unilateral mistake claim, the defendant must prove that the plaintiff knew that the defendant was mistaken and that plaintiff used that mistake to take advantage of the defendant: "Defendants contend that a material mistake of fact--namely, the defendants' belief that they would not be obligated to install a new roof upon the residence--prevented contract formation. A unilateral mistake of fact may be the basis of relief. However, such a unilateral mistake may not invalidate a contract without a showing that the other party to the contract was aware of the mistaken belief and unfairly utilized that mistaken belief in a manner enabling him to take advantage of the other party." (*Meyer v. Benko* (1976) 55 *Cal.App.3d* 937, 944 [127 *Cal.Rptr.* 846] , internal citations omitted.)

■ "Failure to make reasonable inquiry to ascertain or effort to understand the meaning and content of the contract upon which one relies constitutes neglect of a legal duty such as will preclude recovery for unilateral mistake of fact." (*Wal-Noon Corporation v. Hill* (1975) 45 *Cal.App.3d* 605, 615 [119 *Cal.Rptr.* 646] .) However, "[o]rdinary negligence

does not constitute the neglect of a legal duty as that term is used in section 1577." (*Architects & Contractors Estimating Service, Inc. v. Smith*, *supra*, 164 Cal.App.3d at p. 1008 .)

■ Neglect of legal duty has been equated with "gross negligence," which is defined as "the want of even scant care or an extreme departure from the ordinary standard of conduct." (*Van Meter v. Bent Construction Co.* (1956) 46 Cal.2d 588, 594 [297 P.2d 644] .)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, §§ 256-275

17 *California Forms of Pleading and Practice*, Ch. 215, Duress, Menace, Fraud, Undue Influence, and Mistake, §§ 215.50 -215.57, 215.141 (Matthew Bender)

9 *California Points and Authorities*, Ch. 92, Duress, Menace, Fraud, Undue Influence, and Mistake, § 92.90 et seq. (Matthew Bender)

27 *California Legal Forms*, Ch. 77, Discharge of Obligations, § 77.350 (Matthew Bender)

1 *Matthew Bender Practice Guide: California Contract Litigation*, Ch. 8, Seeking or Opposing Equitable Remedies in Contract Actions, 8.24

1 *Matthew Bender Practice Guide: California Contract Litigation*, Ch. 16, Attacking or Defending Existence of Contract--Mistake, 16.08[2], 16.13 -16.16, 16.18

Publisher's Notes

This instruction covers issues presented in BAJI No. 10.60.

LexisNexis Matthew Bender Expert Practice Tip--Explaining Mistake's Legal Effect Can Be Challenging: Almost all jurors are familiar with the impact of a "mistake" and how that affects many situations. Still, explaining a mistake's legal effect will sometimes be challenging. *By Rex Heeseman*

LexisNexis Matthew Bender Expert Practice Tip--Proving Mistake: One of the requirements of this affirmative defense is that plaintiff knew that defendant was operating under a mistake. Absent an admission by plaintiff, this may be difficult to prove because it turns on plaintiff's state of mind. *By Ronald Oster*

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Contracts Law Breach Causes of Action General Overview Contracts Law Defenses Ambiguity & Mistake Unilateral Mistake Contracts Law Formation Ambiguity & Mistake Unilateral Mistake



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CHAPTER 3 California Judicial Council Contracts Instructions

1-3 California Forms of Jury Instruction CACI 331

CACI 331 Affirmative Defense--Bilateral Mistake

[*Name of defendant*] **claims that there was no contract because both parties were mistaken about [*insert description of mistake*]. To succeed, [*name of defendant*] must prove both of the following:**

- 1. That both parties were mistaken about [*insert description of mistake*]; and**
- 2. That [*name of defendant*] would not have agreed to enter into this contract if [he/she/it] had known about the mistake.**

If you decide that [*name of defendant*] has proved both of the above, then no contract was created.

New September 2003

This instruction does not contain the requirement that the mistake be material to the contract because the materiality of a representation is a question of law. (*Merced County Mutual Fire Insurance Co. v. State of California* (1991) 233 Cal.App.3d 765, 772 [284 Cal.Rptr. 680] .) Accordingly, the judge would decide whether an alleged mistake was material, and that mistake would be inserted into this instruction.

If the mistake is one of law, this may not be a jury issue.

■ The Civil Code provides that consent is not free when obtained through duress, menace, fraud, undue influence, or mistake, and is deemed to have been so obtained when it would not have been given but for such fraud or mistake. (Civ. Code, §§ 1567, 1568.)

■ *Civil Code section 1576* provides: "Mistake may be either of fact or law."

■ *Civil Code section 1577* provides the following definition of mistake of fact:

Mistake of fact is a mistake, not caused by the neglect of a legal duty on the part of the person making the mistake, and consisting in:

1. An unconscious ignorance or forgetfulness of a fact past or present, material to the contract; or,
2. Belief in the present existence of a thing material to the contract, which does not exist, or in the past existence of such a thing, which has not existed.

■ *Civil Code section 1578* defines mistake of law:

Mistake of law constitutes a mistake, within the meaning of this Article, only when it arises from:

1. A misapprehension of the law by all parties, all supposing that they knew and understood it, and all making substantially the same mistake as to the law; or,
2. A misapprehension of the law by one party, of which the others are aware at the time of contracting, but which they do not rectify.

■ *Section 20(1) of the Restatement Second of Contracts* provides:

- (1) There is no manifestation of mutual assent to an exchange if the parties attach materially different meanings to their manifestations and
 - (a) neither party knows or has reason to know the meaning attached by the other; or
 - (b) each party knows or each party has reason to know the meaning attached by the other.

■ A mistake of fact may be urged as a defense to an action upon a contract only if the mistake is material to the contract. (*Edwards v. Lang* (1961) 198 Cal.App.2d 5, 12 [18 Cal.Rptr. 60] .)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, §§ 256-275

17 *California Forms of Pleading and Practice*, Ch. 215, *Duress, Menace, Fraud, Undue Influence, and Mistake*, §§ 215.50 -215.57, 215.140 (Matthew Bender)

9 *California Points and Authorities*, Ch. 92, *Duress, Menace, Fraud, Undue Influence, and Mistake*, § 92.90 et seq. (Matthew Bender)

27 *California Legal Forms*, Ch. 77, *Discharge of Obligations*, § 77.350 (Matthew Bender)

1 *Matthew Bender Practice Guide: California Contract Litigation*, Ch. 8, *Seeking or Opposing Equitable Remedies in Contract Actions*, 8.24

1 *Matthew Bender Practice Guide: California Contract Litigation, Ch. 16, Attacking or Defending Existence of Contract--Mistake, 16.08[1], 16.09, 16.11, 16.18*

Publisher's Notes

This instruction covers issues presented in BAJI No. 10.60.

LexisNexis Matthew Bender Expert Practice Tip--Bilateral Mistakes Are Rare: The idea that both parties were mistaken will not occur often. Therefore, many jurors will be skeptical of its existence. *By Rex Heeseman*

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewContracts LawBreachCauses of ActionGeneral OverviewContracts LawDefensesAmbiguity & MistakeMutual MistakeContracts LawDefensesAmbiguity & MistakeUnilateral MistakeContracts LawFormationAmbiguity & MistakeUnilateral MistakeContracts LawTypes of ContractsBilateral Contracts



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CHAPTER 3 California Judicial Council Contracts Instructions

1-3 California Forms of Jury Instruction CACI 332

CACI 332 Affirmative Defense--Duress

[*Name of defendant*] **claims that there was no contract because [his/her] consent was given under duress. To succeed, [*name of defendant*] must prove all of the following:**

- 1. That [*name of plaintiff*] used a wrongful act or wrongful threat to pressure [*name of defendant*] into consenting to the contract;**
- 2. That [*name of defendant*] was so afraid or intimidated by the wrongful act or wrongful threat that [he/she] did not have the free will to refuse to consent to the contract; and**
- 3. That [*name of defendant*] would not have consented to the contract without the wrongful act or wrongful threat.**

An act or a threat is wrongful if [*insert relevant rule--e.g., "a criminal act is threatened"*].

If you decide that [*name of defendant*] has proved all of the above, then no contract was created.

New September 2003; Revised December 2005

Use CACI No. 333, *Affirmative Defense--Economic Duress*, in cases involving economic duress.

■ The Civil Code provides that consent is not free when it is obtained through duress, menace, fraud, undue influence, or mistake and is deemed to have been so obtained when it would not have been given but for such fraud or mistake. (*Civ. Code*, §§ 1567, 1568.)

- *Civil Code section 1569* provides that the following acts constitute duress:

1. Unlawful confinement of the person of the party, or of the husband or wife of such party, or of an ancestor, descendant, or adopted child of such party, husband, or wife;
2. Unlawful detention of the property of any such person; or,
3. Confinement of such person, lawful in form, but fraudulently obtained, or fraudulently made unjustly harassing or oppressive.

- *Civil Code section 1570* provides:

Menace consists in a threat:

1. Of such duress as is specified in Subdivisions 1 and 3 of the last section;
2. Of unlawful and violent injury to the person or property of any such person as is specified in the last section; or,
3. Of injury to the character of any such person.

■ "Menace" is considered to be duress: "Under the modern rule, ' "[d]uress, which includes whatever destroys one's free agency and constrains [her] to do what is against [her] will, may be exercised by threats, importunity or any species of mental coercion. It is shown where a party 'intentionally used threats or pressure to induce action or nonaction to the other party's detriment.' " ' The coercion must induce the assent of the coerced party, who has no reasonable alternative to succumbing." (*In re Marriage of Baltins* (1989) 212 Cal.App.3d 66, 84 [260 Cal.Rptr. 403] , internal citations omitted.)

■ "Duress envisions some unlawful action by a party by which one's consent is obtained through fear or threats." (*Keithley v. Civil Service Bd. of The City of Oakland* (1970) 11 Cal.App.3d 443, 450 [89 Cal.Rptr. 809] , internal citations omitted.)

■ Duress is found only where fear is intentionally used as a means of procuring consent: "[A]n action for duress and menace cannot be sustained when the voluntary action of the apprehensive party is induced by his speculation upon or anticipation of a future event suggested to him by the defendant but not threatened to induce his conduct. The issue in each instance is whether the defendant intentionally exerted an unlawful pressure on the injured party to deprive him of contractual volition and induce him to act to his own detriment." (*Goldstein v. Enoch* (1967) 248 Cal.App.2d 891, 894-895 [57 Cal.Rptr. 19] .)

■ It is wrongful to use the threat of criminal prosecution to obtain a consent: "California law is clear that an agreement obtained by threat of criminal prosecution constitutes menace and is unenforceable as against public policy." (*Bayscene Resident Negotiators v. Bayscene Mobilehome Park* (1993) 15 Cal.App.4th 119, 127 [18 Cal.Rptr.2d 626] .) However, a threat of legitimate civil action is not considered wrongful: "[T]he action or threat in duress or menace must be unlawful, and a threat to take legal action is not unlawful unless the party making the threat knows the falsity of his claim." (*Odorizzi v. Bloomfield School Dist.* (1966) 246 Cal.App.2d 123, 128 [54 Cal.Rptr. 533] .)

■ Standard duress is evaluated under a subjective standard: "The question in each case [is], Was the person so acted upon by threats of the person claiming the benefit of the contract, for the purpose of obtaining such contract, as to be

bereft of the quality of mind essential to the making of a contract, and was the contract thereby obtained? Hence, under this theory duress is to be tested, not by the nature of the threats, but rather by the state of mind induced thereby in the victim." (*In re Marriage of Gonzalez* (1976) 57 Cal.App.3d 736, 744 [129 Cal.Rptr. 566] .)

■ The wrongful acts of a third party may constitute duress sufficient to allow rescission of a contract with a party, who, although not participating in those wrongful acts, had knowledge of the innocent party's position. (*Leeper v. Beltrami* (1959) 53 Cal.2d 195, 205-206 [1 Cal.Rptr. 12, 347 P.2d 12] .)

■ "[Defendant has] the burden of proving by a preponderance of the evidence the affirmative of the issues of duress and plaintiff's default." (*Fio Rito v. Fio Rito* (1961) 194 Cal.App.2d 311, 322 [14 Cal.Rptr. 845] ; cf. *Stevenson v. Stevenson* (1940) 36 Cal.App.2d 494, 500 [97 P.2d 982] .)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, §§ 309-315

17 *California Forms of Pleading and Practice*, Ch. 215, *Duress, Menace, Fraud, Undue Influence, and Mistake*, §§ 215.20 -215.21, 215.23 -215.28, 215.120 -215.121 (Matthew Bender)

9 *California Points and Authorities*, Ch. 92, *Duress, Menace, Fraud, Undue Influence, and Mistake*, § 92.20 et seq. (Matthew Bender)

27 *California Legal Forms*, Ch. 77, *Discharge of Obligations*, § 77.351 (Matthew Bender)

1 *Matthew Bender Practice Guide: California Contract Litigation*, Ch. 8, *Seeking or Opposing Equitable Remedies in Contract Actions*, 8.07

1 *Matthew Bender Practice Guide: California Contract Litigation*, Ch. 17, *Attacking or Defending Existence of Contract--Fraud, Duress, Menace, and Undue Influence*, 17.03 -17.06, 17.20 -17.24[1]

Publisher's Notes

This instruction covers issues presented in BAJI No. 10.60.

LexisNexis Matthew Bender Expert Practice Tip--Defense of Duress Is Limited: This is a limited defense as indicated by the commentary. Many counsel will want to challenge this defense by way of a motion before trial. *By Ronald Oster*

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewContracts LawBreachCauses of ActionGeneral OverviewContracts LawDefensesDuress & Undue InfluenceEconomic DuressContracts LawDefensesDuress & Undue InfluenceThreats of Arrest & Imprisonment



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CHAPTER 3 California Judicial Council Contracts Instructions

1-3 California Forms of Jury Instruction CACI 333

CACI 333 Affirmative Defense--Economic Duress

[*Name of defendant*] **claims that there was no contract because [his/her/its] consent was given under duress. To succeed, [*name of defendant*] must prove all of the following:**

- 1. That [*name of plaintiff*] used a wrongful act or wrongful threat to pressure [*name of defendant*] into consenting to the contract;**
- 2. That a reasonable person in [*name of defendant*]'s position would have felt that he or she had no reasonable alternative except to consent to the contract; and**
- 3. That [*name of defendant*] would not have consented to the contract without the wrongful act or wrongful threat.**

An act or a threat is wrongful if [*insert relevant rule, e.g., "a bad-faith breach of contract is threatened"*].

If you decide that [*name of defendant*] has proved all of the above, then no contract was created.

New September 2003; Revised December 2005

■ The Civil Code provides that consent is not free when obtained through duress, menace, fraud, undue influence, or mistake, and is deemed to have been so obtained when it would not have been given but for such fraud or mistake. (*Civ. Code*, §§ 1567, 1568.)

■ The doctrine of economic duress has been described recently as follows: " 'As it has evolved to the

present day, the economic duress doctrine is not limited by early statutory and judicial expressions requiring an unlawful act in the nature of a tort or a crime. Instead, the doctrine now may come into play upon the doing of a wrongful act which is sufficiently coercive to cause a reasonably prudent person faced with no reasonable alternative to succumb to the perpetrator's pressure. The assertion of a claim known to be false or a bad faith threat to breach a contract or to withhold a payment may constitute a wrongful act for purposes of the economic duress doctrine.' " (*Philippine Export and Foreign Loan Guarantee Corp. v. Chuidian* (1990) 218 Cal.App.3d 1058, 1077-1078 [267 Cal.Rptr. 457] , internal citations omitted.)

■ Economic duress is evaluated under an objective standard: "The doctrine of 'economic duress' can apply when one party has done a wrongful act which is sufficiently coercive to cause a reasonably prudent person, faced with no reasonable alternative, to agree to an unfavorable contract. The party subjected to the coercive act, and having no reasonable alternative, can then plead 'economic duress' to avoid the contract." (*CrossTalk Productions, Inc. v. Jacobson* (1998) 65 Cal.App.4th 631, 644 [76 Cal.Rptr.2d 615] , internal citation omitted.)

■ The nonexistence of a "reasonable alternative" is a question of fact. (*CrossTalk Productions, Inc.*, *supra*, 65 Cal.App.4th at p. 644 .)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, §§ 313-315

17 California Forms of Pleading and Practice, Ch. 215, Duress, Menace, Fraud, Undue Influence, and Mistake, §§ 215.22, 215.122 (Matthew Bender)

9 California Points and Authorities, Ch. 92, Duress, Menace, Fraud, Undue Influence, and Mistake, § 92.24 (Matthew Bender)

1 Matthew Bender Practice Guide: California Contract Litigation, Ch. 8, Seeking or Opposing Equitable Remedies in Contract Actions, 8.07

1 Matthew Bender Practice Guide: California Contract Litigation, Ch. 17, Attacking or Defending Existence of Contract--Fraud, Duress, Menace, and Undue Influence, 17.03 -17.06, 17.20 -17.24[2]

Publisher's Notes

This instruction covers issues presented in BAJI No. 10.60.

LexisNexis Matthew Bender Expert Practice Tip--Defendant's Lack of Alternatives: The key limitation on this defense is the requirement that defendant "had no reasonable alternative except to consent to the contract." This is a question of fact, and plaintiff's counsel should present as many alternatives as possible. *By Ronald Oster*

LexisNexis Matthew Bender Expert Practice Tip--Rely on Everyday Experiences: "Duress" is a concept alien to most jurors. So, often rely upon everyday experiences to draw a connection between them and the "duress" in question. *By Rex Heeseman*

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewContracts LawBreachCauses of ActionGeneral
OverviewContracts LawDefensesDuress & Undue InfluenceEconomic DuressContracts LawDefensesDuress & Undue
InfluenceThreats of Arrest & Imprisonment



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CHAPTER 3 California Judicial Council Contracts Instructions

1-3 California Forms of Jury Instruction CACI 334

CACI 334 Affirmative Defense--Undue Influence

[*Name of defendant*] **claims that no contract was created because [he/she] was unfairly pressured by [*name of plaintiff*] into consenting to the contract.**

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

1. That [*name of plaintiff*] used

[a relationship of trust and confidence] [or]

[[*name of defendant*]'s weakness of mind] [or]

[[*name of defendant*]'s needs or distress]

to induce or pressure [*name of defendant*] into consenting to the contract; and

2. That [*name of defendant*] would not otherwise have consented to the contract.

If you decide that [*name of defendant*] has proved both of the above, then no contract was created.

New September 2003

● The Civil Code provides that consent is not free when obtained through duress, menace, fraud, undue influence, or mistake, and is deemed to have been so obtained when it would not have been given but for

such fraud or mistake. (*Civ. Code*, §§ 1567, 1568.)

■ *Civil Code* section 1575 provides three circumstances that support a finding of undue influence:

1. In the use, by one in whom a confidence is reposed by another, or who holds a real or apparent authority over him, of such confidence or authority for the purpose of obtaining an unfair advantage over him;
2. In taking an unfair advantage of another's weakness of mind; or,
3. In taking a grossly oppressive and unfair advantage of another's necessities or distress.

■ The question of undue influence is decided as a question of fact: "[D]irect evidence of undue influence is rarely obtainable and, thus the court is normally relegated to determination by inference from the totality of facts and circumstances. Indeed, there are no fixed definitions or inflexible formulas. Rather, we are concerned with whether from the entire context it appears that one's will was overborne and he was induced to do or forbear to do an act which he would not do, or would do, if left to act freely." (*Keithley v. Civil Service Bd. of the City of Oakland* (1970) 11 Cal.App.3d 443, 451 [89 Cal.Rptr. 809] , internal citations omitted.)

■ "In essence, undue influence consists of the use of excessive pressure by a dominant person over a servient person resulting in the apparent will of the servient person being in fact the will of the dominant person. The undue susceptibility to such overpersuasive influence may be the product of physical or emotional exhaustion or anguish which results in one's inability to act with unencumbered volition." (*Keithley, supra*, 11 Cal.App.3d at p. 451 .)

■ Whether or not the parties have a confidential relationship is a question of fact: "It is, of course, well settled that while the mere fact that a relationship is friendly and intimate does not necessarily amount to a confidential relationship, such relationship may be said to exist whenever trust and confidence is reposed by one person in the integrity and fidelity of another. It is likewise frequently emphasized that the existence of a confidential relationship presents a question of fact which, of necessity, may be determined only on a case by case basis." (*O'Neil v. Spillane* (1975) 45 Cal.App.3d 147, 153 [119 Cal.Rptr. 245] , internal citations omitted.)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, §§ 316-321

17 *California Forms of Pleading and Practice*, Ch. 215, *Duress, Menace, Fraud, Undue Influence, and Mistake*, §§ 215.40 -215.42, 215.130 -215.132 (Matthew Bender)

9 *California Points and Authorities*, Ch. 92, *Duress, Menace, Fraud, Undue Influence, and Mistake*, § 92.70 et seq. (Matthew Bender)

27 *California Legal Forms*, Ch. 77, *Discharge of Obligations*, § 77.352 (Matthew Bender)

1 *Matthew Bender Practice Guide: California Contract Litigation*, Ch. 8, *Seeking or Opposing Equitable Remedies in Contract Actions*, 8.07

1 *Matthew Bender Practice Guide: California Contract Litigation*, Ch. 17, *Attacking or Defending Existence of Contract--Fraud, Duress, Menace, and Undue Influence*, 17.03 -17.06, 17.25 -17.28

Publisher's Notes

This instruction covers issues presented in BAJI No. 10.60.

LexisNexis Matthew Bender Expert Practice Tip--Explain Your Argument Carefully: In some lawsuits, many jurors may look upon the argument of undue influence as avoiding responsibility. Thus, care should be utilized in explaining how this argument should be accepted (or, as the case may be, rejected) by the jury. *By Rex Heeseman*

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewCivil ProcedureTrialsJury TrialsProvince of Court & JuryContracts LawBreachCauses of ActionGeneral OverviewContracts LawDefensesDuress & Undue InfluenceGeneral Overview



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California Forms of Jury Instruction

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CHAPTER 3 California Judicial Council Contracts Instructions

1-3 California Forms of Jury Instruction CACI 335

CACI 335 Affirmative Defense--Fraud

[*Name of defendant*] **claims that no contract was created because [his/her/its] consent was obtained by fraud. To succeed, [*name of defendant*] must prove all of the following:**

- 1. That [*name of plaintiff*] represented that [*insert alleged fraudulent statement*];**
- 2. That [*name of plaintiff*] knew that the representation was not true;**
- 3. That [*name of plaintiff*] made the representation to persuade [*name of defendant*] to agree to the contract;**
- 4. That [*name of defendant*] reasonably relied on this representation; and**
- 5. That [*name of defendant*] would not have entered into the contract if [he/she/it] had known that the representation was not true.**

If you decide that [*name of defendant*] has proved all of the above, then no contract was created.

New September 2003

This instruction covers intentional misrepresentation under the first alternative presented in *Civil Code section 1572*. The other types of fraud that are set forth in section 1572 are negligent misrepresentation, concealment of a material fact, and false promise.

If the case involves an alleged negligent misrepresentation, substitute the following for element 2: "That

[*name of plaintiff*] had no reasonable grounds for believing the representation was true."

If the case involves concealment, the following may be substituted for element 1: "That [*name of plaintiff*] intentionally concealed an important fact from [*name of defendant*], creating a false representation." See *CACI No. 1901, Concealment*, for alternative ways of proving this element.

If the case involves a false promise, substitute the following for element 1: "That [*name of plaintiff*] made a promise that [he/she/it] did not intend to perform" and insert the word "promise" in place of the word "representation" throughout the remainder of the instruction.

- The Civil Code provides that consent is not free when obtained through duress, menace, fraud, undue influence, or mistake, and is deemed to have been so obtained when it would not have been given but for such fraud or mistake. (*Civ. Code*, §§ 1567, 1568.)

- *Civil Code* section 1572 provides:

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

1. The suggestion, as a fact, of that which is not true, by one who does not believe it to be true;
2. The positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true;
3. The suppression of that which is true, by one having knowledge or belief of the fact;
4. A promise made without any intention of performing it; or,
5. Any other act fitted to deceive.

- Fraud can be found in making a misstatement of fact, as well as in the concealment of a fact: "Actual fraud involves conscious misrepresentation, or concealment, or non-disclosure of a material fact which induces the innocent party to enter the contract." (*Odorizzi v. Bloomfield School Dist.* (1966) 246 *Cal.App.2d* 123, 128 [54 *Cal.Rptr.* 533] .)

- Fraud may be asserted as an affirmative defense: "One who has been induced to enter into a contract by false and fraudulent representations may rescind the contract; or he may affirm it, keeping what he has received under it, and maintain an action to recover damages he has sustained by reason of the fraud; or he may set up such damages as a complete or partial defense if sued on the contract by the other party." (*Grady v. Easley* (1941) 45 *Cal.App.2d* 632, 642 [114 *P.2d* 635] .)

- "It is well established that a defrauded defendant may set up the fraud as a defense and, in fact, may even recoup his damages by counterclaim in an action brought by the guilty party to the contract. The right to avoid for fraud, however, is lost if the injured party, after acquiring knowledge of the fraud, manifests an intention to affirm the contract." (*Bowmer v. H. C. Louis, Inc.* (1966) 243 *Cal.App.2d* 501, 503 [52 *Cal.Rptr.* 436] , internal citations omitted.)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, §§ 285-308

17 *California Forms of Pleading and Practice*, Ch. 215, *Duress, Menace, Fraud, Undue Influence, and Mistake*, §§ 215.70 -215.72, 215.144 (Matthew Bender)

9 *California Points and Authorities*, Ch. 92, *Duress, Menace, Fraud, Undue Influence, and Mistake*, § 92.40 et seq. (Matthew Bender)

27 *California Legal Forms*, Ch. 77, *Discharge of Obligations*, § 77.353 (Matthew Bender)

1 *Matthew Bender Practice Guide: California Contract Litigation*, Ch. 8, *Seeking or Opposing Equitable Remedies in Contract Actions*, 8.24

1 *Matthew Bender Practice Guide: California Contract Litigation*, Ch. 17, *Attacking or Defending Existence of Contract--Fraud, Duress, Menace, and Undue Influence*, 17.03 -17.09, 17.12 -17.18

Publisher's Notes

This instruction covers issues presented in BAJI No. 10.60.

LexisNexis Matthew Bender Expert Practice Tip--When Claiming Fraud, Proof and Argument Should be Compelling: Fraud is a common claim. However, to some jurors fraud is a serious matter. Therefore, the proof and related argument should be especially compelling. *By Rex Heeseman*

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewContracts LawBreachCauses of ActionGeneral OverviewContracts LawDefensesFraud & MisrepresentationConstructive FraudContracts LawDefensesFraud & MisrepresentationIntentional FraudContracts LawDefensesFraud & MisrepresentationMaterial Misrepresentation



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California Forms of Jury Instruction

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CHAPTER 3 California Judicial Council Contracts Instructions

1-3 California Forms of Jury Instruction CACI 336

CACI 336 Affirmative Defense--Waiver

[*Name of defendant*] **claims that [he/she/it] did not have to [insert description of performance] because [name of plaintiff] gave up [his/her/its] right to have [name of defendant] perform [this/these] obligation[s]. This is called a "waiver."**

To succeed, [name of defendant] must prove both of the following by clear and convincing evidence:

- 1. That [name of plaintiff] knew [name of defendant] was required to [insert description of performance]; and**
- 2. That [name of plaintiff] freely and knowingly gave up [his/her/its] right to have [name of defendant] perform [this/these] obligation[s].**

A waiver may be oral or written or may arise from conduct that shows that [name of plaintiff] gave up that right.

If [name of defendant] proves that [name of plaintiff] gave up [his/her/its] right to [name of defendant]'s performance of [insert description of performance], then [name of defendant] was not required to perform [this/these] obligation[s].

New September 2003

This issue is decided under the "clear and convincing" standard of proof. See *CACI No. 201, More Likely True--Clear and Convincing Proof*.

■ "Waiver is the intentional relinquishment of a known right after knowledge of the facts." (*Roesch v. De Mota* (1944) 24 Cal.2d 563, 572 [150 P.2d 422] .)

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

■ When the injured party with knowledge of the breach continues to accept performance from the guilty party, such conduct may constitute a waiver of the breach. (*Kern Sunset Oil Co. v. Good Roads Oil Co.* (1931) 214 Cal. 435, 440-441 [6 P.2d 71] .)

■ There can be no waiver where the one against whom it is asserted has acted without full knowledge of the facts. It cannot be presumed, in the absence of such knowledge, that there was an intention to waive an existing right. (*Craig v. White* (1921) 187 Cal. 489, 498 [202 P. 648] .)

■ " 'Waiver always rests upon intent. Waiver is the intentional relinquishment of a known right after knowledge of the facts.' The burden, moreover, is on the party claiming a waiver of a right to prove it by clear and convincing evidence that does not leave the matter to speculation, and 'doubtful cases will be decided against a waiver'." (*City of Ukiah v. Fones* (1966) 64 Cal.2d 104, 107-108 [48 Cal.Rptr. 865, 410 P.2d 369] ; *Florence Western Medical Clinic v. Bonta* (2000) 77 Cal.App.4th 493, 504 [91 Cal.Rptr.2d 609] .)

■ The "clear and convincing" standard applies "particularly" to rights favored in the law; however, it does not apply exclusively to such favored rights. It is proper to instruct a jury that waiver must be proved by this higher standard of proof. (*DRG/Beverly Hills, Ltd. v. Chopstix Dim Sum Cafe and Takeout III, Ltd.* (1994) 30 Cal.App.4th 54, 61 [35 Cal.Rptr.2d 515] .)

Secondary Sources

13 *California Forms of Pleading and Practice*, Ch. 140, Contracts, §§ 140.57, 140.113, 140.136 (Matthew Bender)

5 *California Points and Authorities*, Ch. 50, Contracts, §§ 50.40, 50.41, 50.110 (Matthew Bender)

2 *Matthew Bender Practice Guide: California Contract Litigation*, Ch. 22, *Suing or Defending Action for Breach of Contract*, 22.08, 22.65, 22.68

Publisher's Notes

This instruction covers issues presented in BAJI No. 10.88.

LexisNexis Matthew Bender Expert Practice Tip--Defeating Claim of Waiver: It is often relatively easy to defeat a waiver claim as it needs "clear and convincing evidence" that a party has "freely and knowingly" given up that right. Exploit those standards. *By Rex Heeseman*

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Contracts Law Breach Causes of Action General Overview Contracts Law Contract Conditions & Provisions Waivers Continued Performance Contracts Law Defenses General Overview



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CHAPTER 3 California Judicial Council Contracts Instructions

1-3 California Forms of Jury Instruction CACI 337

CACI 337 Affirmative Defense--Novation

[*Name of defendant*] claims that the original contract with [*name of plaintiff*] cannot be enforced because the parties substituted a new and different contract for the original.

To succeed, [*name of defendant*] must prove that all parties agreed, by words or conduct, to cancel the original contract and to substitute a new contract in its place.

If you decide that [*name of defendant*] has proved this, then the original contract is not enforceable.

New September 2003; Revised October 2004

If the contract in question is not the original contract, specify which contract it is instead of "original."

Although there is language in *Alexander v. Angel* (1951) 37 Cal.2d 856, 860-861 [236 P.2d 561] that could be read to suggest that a novation must be proved by the higher standard of clear and convincing proof, an examination of the history of that language and the cases upon which the language in *Alexander* depends (*Columbia Casualty Co. v. Lewis* (1936) 14 Cal.App.2d 64, 72 [57 P.2d 1010] and *Houghton v. Lawton* (1923) 63 Cal.App. 218, 223 [218 P. 475]) demonstrates that the original use of the term "clear and convincing," carried forward thereafter without analysis, was intended only to convey the concept that a novation must clearly be shown and may not be presumed. The history of the language does not support a requirement that a party alleging a novation must prove there is a high probability (i.e., clear and convincing proof) that the parties agreed to a novation. See also, *sections 279 and 280 of the Restatement Second of Contracts*. A party alleging a novation must prove that the facts supporting the novation are more likely to be true than not true.

■ *Civil Code section 1530* provides: "Novation is the substitution of a new obligation for an existing one."

■ *Civil Code section 1531* provides:

Novation is made:

1. By the substitution of a new obligation between the same parties, with intent to extinguish the old obligation;
2. By the substitution of a new debtor in place of the old one, with intent to release the latter; or,
3. By the substitution of a new creditor in place of the old one, with intent to transfer the rights of the latter to the former.

■ "A novation is a substitution, by agreement, of a new obligation for an existing one, with intent to extinguish the latter. A novation is subject to the general rules governing contracts and requires an intent to discharge the old contract, a mutual assent, and a consideration." (*Klepper v. Hoover* (1971) 21 Cal.App.3d 460, 463 [98 Cal.Rptr. 482] .)

■ Conduct may form the basis for a novation although there is no express writing or agreement. (*Silva v. Providence Hospital of Oakland* (1939) 14 Cal.2d 762, 773 [97 P.2d 798] .)

■ Novation is a question of fact, and the burden of proving it is upon the party asserting it. (*Alexander v. Angel* (1951) 37 Cal.2d 856, 860 [236 P.2d 561] .)

■ "When there is conflicting evidence the question whether the parties to an agreement entered into a modification or a novation is a question of fact." (*Howard v. County of Amador* (1990) 220 Cal.App.3d 962, 980 [269 Cal.Rptr. 807] .)

■ "The 'question whether a novation has taken place is always one of intention,' with the controlling factor being the intent of the obligee to effect a release of the original obligor on his obligation under the original agreement." (*Alexander, supra*, 37 Cal.2d at p. 860 , internal citations omitted.)

■ "[I]n order for there to be a valid novation, it is necessary that the parties intend that the rights and obligations of the new contract be substituted for the terms and conditions of the old contract." (*Wade v. Diamond A Cattle Co.* (1975) 44 Cal.App.3d 453, 457 [118 Cal.Rptr. 695] .)

■ "While the evidence in support of a novation must be 'clear and convincing,' the 'whole question is one of fact and depends upon all the facts and circumstances of the particular case,' with the weight and sufficiency of the proof being matters for the determination of the trier of the facts under the general rules applicable to civil actions." (*Alexander, supra*, 37 Cal.2d at pp. 860-861 , internal citations omitted.)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, §§ 961-963

13 California Forms of Pleading and Practice, Ch. 140, Contracts, § 140.141 (Matthew Bender)

5 California Points and Authorities, Ch. 50, Contracts, §§ 50.450 -50.464 (Matthew Bender)

27 California Legal Forms, Ch. 77, Discharge of Obligations, §§ 77.20, 77.280 -77.282 (Matthew Bender)

2 *Matthew Bender Practice Guide: California Contract Litigation, Ch. 21, Asserting a Particular Construction of Contract*, 21.58[3]

Publisher's Notes

There is no BAJI instruction on this subject.

LexisNexis Matthew Bender Expert Practice Tip--Use Care With Novation: Novation is not a typical argument. However, if present, be careful in making the related rejoinder. *By Rex Heeseman*

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewContracts LawBreachCauses of ActionGeneral OverviewContracts LawDefensesGeneral OverviewContracts LawPerformanceNovation



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CHAPTER 3 California Judicial Council Contracts Instructions

1-3 California Forms of Jury Instruction CACI 338

CACI 338 Affirmative Defense--Statute of Limitations

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

New December 2007

Directions for Use

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

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

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

Sources and Authority

- *Code of Civil Procedure* section 337(1) provides: "Within four years: 1. An action upon any contract, obligation or liability founded upon an instrument in writing, except as provided in Section 336a of this code; provided, that the time within which any action for a money judgment for the balance

due upon an obligation for the payment of which a deed of trust or mortgage with power of sale upon real property or any interest therein was given as security, following the exercise of the power of sale in such deed of trust or mortgage, may be brought shall not extend beyond three months after the time of sale under such deed of trust or mortgage."

■ *Code of Civil Procedure section 339(1)* provides: "Within two years: 1. An action upon a contract, obligation or liability not founded upon an instrument of writing, except as provided in *Section 2725 of the Commercial Code* or subdivision 2 of *Section 337* of this code; or an action founded upon a contract, obligation or liability, evidenced by a certificate, or abstract or guaranty of title of real property, or by a policy of title insurance; provided, that the cause of action upon a contract, obligation or liability evidenced by a certificate, or abstract or guaranty of title of real property or policy of title insurance shall not be deemed to have accrued until the discovery of the loss or damage suffered by the aggrieved party thereunder."

■ "In general, California courts have permitted contracting parties to modify the length of the otherwise applicable California statute of limitations, whether the contract has extended or shortened the limitations period." (*Hambrecht & Quist Venture Partners v. Am. Medical Internat.* (1995) 38 Cal.App.4th 1532, 1547 [46 Cal.Rptr.2d 33] .)

■ "A contract cause of action does not accrue until the contract has been breached." (*Spear v. Cal. State Automobile Ass'n* (1992) 2 Cal.4th 1035, 1042 [9 Cal.Rptr.2d 381, 831 P.2d 821] .)

■ "The claim accrues when the plaintiff discovers, or could have discovered through reasonable diligence, the injury and its cause." (*Angeles Chem. Co. v. Spencer & Jones* (1996) 44 Cal.App.4th 112, 119 [51 Cal.Rptr.2d 594] .)

■ "[T]he discovery rule may be applied to breaches [of contract] which can be, and are, committed in secret and, moreover, where the harm flowing from those breaches will not be reasonably discoverable by plaintiffs until a future time." (*Gryczman v. 4550 Pico Partners, Ltd.* (2003) 107 Cal.App.4th 1, 4-5 [131 Cal.Rptr.2d 680] .)

Secondary Sources

3 Witkin, California Procedure (4th ed. 1996) Actions, §§ 474-509

5 Witkin, California Procedure (4th ed. 1996) Pleadings, § 999

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

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

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

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

Publisher's Notes

There is no BAJI instruction on this subject.



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CHAPTER 3 California Judicial Council Contracts Instructions

1-3 California Forms of Jury Instruction CACI 339-CACI 349

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CHAPTER 3 California Judicial Council Contracts Instructions

1-3 California Forms of Jury Instruction CACI 350

CACI 350 Introduction to Contract Damages

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

To recover damages for any harm, [name of plaintiff] must prove:

- 1. That the harm was likely to arise in the ordinary course of events from the breach of the contract; or**
- 2. That when the contract was made, both parties could have reasonably foreseen the harm as the probable result of the breach.**

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

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

New September 2003; Revised October 2004

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

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

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

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

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

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

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

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

■ *Restatement Second of Contracts, section 351*, provides:

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

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

(a) in the ordinary course of events, or

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

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

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

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

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

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

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

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

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

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

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

■ "Under contract principles, the nonbreaching party is entitled to recover only those damages, including lost future profits, which are 'proximately caused' by the specific breach. Or, to put it another way, the breaching party is only liable to place the nonbreaching party in the same position as if the specific breach had not occurred. Or, to phrase it still a third way, the breaching party is only responsible to give the nonbreaching party the benefit of the bargain to the

extent the specific breach deprived that party of its bargain." (*Postal Instant Press v. Sealy* (1996) 43 Cal.App.4th 1704, 1709 [51 Cal.Rptr.2d 365], internal citations omitted.)

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

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

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

Secondary Sources

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

California Breach of Contract Remedies (Cont.Ed.Bar) Recovery of Money Damages, §§ 4.1-4.9

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

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

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

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

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

Publisher's Notes

This instruction replaces BAJI No. 10.90.

LexisNexis Matthew Bender Expert Practice Tip--Using CACI No. 350: Obviously, CACI No. 350 is an important instruction, especially for the plaintiff. Thus, the factual argument must be sound. From the defense perspective, it is interesting to note that the original version of CACI No. 350 required the plaintiff to prove the amount of his/her/its damages to a "reasonable certainty." That phrase often could have been exploited. However, the phrase was subsequently revised in the Judicial Council's October 2004 revisions to delete the "reasonable certainty" language and to provide that the plaintiff must prove the amount of his/her/its damages "according to the following instructions." *By Rex Heeseman*

LexisNexis Matthew Bender Expert Practice Tip--Plaintiff Need Not Prove "Exact Amount" of Damages: Plaintiff's counsel will want to emphasize that plaintiff does not have to prove the "exact amount" of damages. This is especially important when defendant's breach of the contract has made it impossible to prove damages with mathematical precision. *By Ronald Oster*

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewContracts LawBreachCauses of ActionGeneral
OverviewContracts LawRemediesGeneral OverviewContracts LawRemediesCompensatory DamagesGeneral
OverviewContracts LawRemediesForeseeable DamagesGeneral OverviewContracts LawRemediesForeseeable
DamagesBenefit of the Bargain



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California Forms of Jury Instruction

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CHAPTER 3 California Judicial Council Contracts Instructions

*1-3 California Forms of Jury Instruction CACI 351***CACI 351 Special Damages**

[*Name of plaintiff*] **[also] claims damages for [identify special damages].**

To recover for this harm, [*name of plaintiff*] must prove that when the parties made the contract, [*name of defendant*] knew or reasonably should have known of the special circumstances leading to such harm.

New September 2003

Before giving this instruction, the judge should determine whether a particular item of damage qualifies as "special."

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

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

■ *Restatement Second of Contracts, section 351*, provides:

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

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

(a) in the ordinary course of events, or

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

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

■ "Special damages must fall within the rule of *Hadley v. Baxendale*, ... that is, they must reasonably be supposed to have been contemplated or foreseeable by the parties when making the contract as the probable result of a breach. If special circumstances cause an unusual injury, special damages cannot be recovered unless the circumstances were known or should have been known to the party at fault at the time the contract was made." (*Sabraw v. Kaplan* (1962) 211 Cal.App.2d 224, 227 [27 Cal.Rptr. 81] , internal citations omitted.)

■ "When reference is made to the terms of the contract alone, there is ordinarily little difficulty in determining what damages arise from its breach in the usual course of things, and the parties will be presumed to have contemplated such damages only. But where it is claimed the circumstances show that a special purpose was intended to be accomplished by one of the parties (a failure to accomplish which by means of the contract would cause him greater damage than would ordinarily follow from a breach by the other party), and such purpose was known to the other party, the facts showing the special purpose and the knowledge of the other party must be averred. This rule has frequently been applied to the breach of a contract for the sale of goods to be delivered at a certain time. In such cases the general rule of damages is fixed by reference to the market value of the goods at the time they were to have been delivered, because in the usual course of events the purchaser could have supplied himself with like commodities at the market price. And if special circumstances existed entitling the purchaser to greater damages for the defeat of a special purpose known to the contracting parties (as, for example, if the purchaser had already contracted to furnish the goods at a profit, and they could not be obtained in the market), such circumstances must be stated in the declaration with the facts which, under the circumstances, enhanced the injury." (*Mitchell v. Clarke* (1886) 71 Cal. 163, 164-165 [11 P. 882] , internal citation omitted.)

■ "The requirement of knowledge or notice as a prerequisite to the recovery of special damages is based on the theory that a party does not and cannot assume limitless responsibility for all consequences of a breach, and that at the time of contracting he must be advised of the facts concerning special harm which might result therefrom, in order that he may determine whether or not to accept the risk of contracting." (*Martin v. U-Haul Co. of Fresno* (1988) 204 Cal.App.3d 396, 409 [251 Cal.Rptr. 17] , internal citation omitted.)

■ "[I]f special circumstances caused some unusual injury, special damages are not recoverable therefor unless the circumstances were known or should have been known to the breaching party at the time he entered into the contract. The requirement of knowledge or notice as a prerequisite to the recovery of special damages is based on the theory that a party does not and cannot assume limitless responsibility for all consequences of a breach, and that at the time of contracting he must be advised of the facts concerning special harm which might result therefrom, in order that he may determine whether or not to accept the risk of contracting." (*Brandon & Tibbs v. George Kevorkian Accountancy Corp.* (1990) 226 Cal.App.3d 442, 455 [277 Cal.Rptr. 40] , internal citations omitted.)

■ "Contract damages must be clearly ascertainable in both nature and origin. A contracting party cannot be required to assume limitless responsibility for all consequences of a breach and must be advised of any special harm that might

result in order to determine whether or not to accept the risk of contracting." (*Erllich v. Menezes* (1999) 21 Cal.4th 543, 560 [87 Cal.Rptr.2d 886, 981 P.2d 978] , internal citations omitted.)

■ "When the facts show that a special purpose is intended to be accomplished by one of the parties (a failure to accomplish which by means of the contract would cause him greater damage than would ordinarily flow from a breach by the other party), and this special circumstance is brought to the attention of the other party, damages normally flowing from a breach of the contract in view of such special circumstances are said to be within the contemplation of the parties." (*Christensen v. Slawter* (1959) 173 Cal.App.2d 325, 334 [343 P.2d 341] , internal citations omitted.)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, § 871

15 *California Forms of Pleading and Practice*, Ch. 177, Damages, § 177.13 (Matthew Bender)

1 *Matthew Bender Practice Guide: California Contract Litigation*, Ch. 7, Seeking or Opposing Damages in Contract Actions, 7.04[6], 7.08[3]

Publisher's Notes

This instruction replaces BAJI No. 10.92.

LexisNexis Matthew Bender Expert Practice Tip--Contract vs. Tort Damages: One of the major differences between recovery in tort and recovery for breach of contract is the measure of damages. Tort damages need only be "proximately caused" by defendant's conduct while contract damages must also be "reasonably foreseeable." *CACI No. 351* emphasizes the element of foreseeability. By *Ronald Oster*

LexisNexis Matthew Bender Expert Practice Tip--Clearly Articulate Foreseeability Rule: *CACI No. 351* is related to the foreseeability rule, which needs to be articulated clearly to most jurors (and even some judges and opposing counsel). In some lawsuits, this could be the key instruction. By *Rex Heeseman*

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Civil Procedure Remedies Damages Special Damages Contracts Law Breach Causes of Action General Overview Contracts Law Remedies General Overview



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CHAPTER 3 California Judicial Council Contracts Instructions

1-3 California Forms of Jury Instruction CACI 352

CACI 352 Loss of Profits--No Profits Earned

To recover damages for lost profits, [*name of plaintiff*] must prove that it is reasonably certain [he/she/it] would have earned profits but for [*name of defendant*]'s breach of the contract.

To decide the amount of damages for lost profits, you must determine the gross, or total, amount [*name of plaintiff*] would have received if the contract had been performed and then subtract from that amount the costs [including the value of the [labor/materials/rents/expenses/interest on loans invested in the business]] [*name of plaintiff*] would have had if the contract had been performed.

You do not have to calculate the amount of the lost profits with mathematical precision, but there must be a reasonable basis for computing the loss.

New September 2003

This instruction applies to both past and future lost profit claims. Read this instruction in conjunction with CACI No. 350, *Introduction to Contract Damages*, or CACI No. 351, *Special Damages*.

Insertion of specified types of costs to be deducted from gross earnings is optional, depending on the facts of the case. Other types of costs may be inserted as appropriate.

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

- *Restatement Second of Contracts, section 351(3)*, provides: "A court may limit damages for

foreseeable loss by excluding recovery for loss of profits, by allowing recovery only for loss incurred in reliance, or otherwise if it concludes that in the circumstances justice so requires in order to avoid disproportionate compensation."

- "Where the *fact* of damages is certain, the amount of damages need not be calculated with absolute certainty. The law requires only that some reasonable basis of computation of damages be used, and the damages may be computed even if the result reached is an approximation. This is especially true where, as here, it is the wrongful acts of the defendant that have created the difficulty in proving the amount of loss of profits or where it is the wrongful acts of the defendant that have caused the other party to not realize a profit to which that party is entitled." (*GHK Associates v. Mayer Group* (1990) 224 Cal.App.3d 856, 873-874 [274 Cal.Rptr. 168] , internal citations omitted.)

- "The extent of such damages may be measured by 'the past volume of business and other provable data relevant to the probable future sales.' " (*Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.* (2000) 78 Cal.App.4th 847, 890 [93 Cal.Rptr.2d 364] , internal citation omitted.)

- " 'Lost profits to an established business may be recovered if their extent and occurrence can be ascertained with reasonable certainty; once their existence has been so established, recovery will not be denied because the amount cannot be shown with mathematical precision.' However, '[i]t has been frequently stated that if a business is new, it is improper to award damages for loss of profits because absence of income and expense experience renders anticipated profits too speculative to meet the legal standard of reasonable certainty necessary to support an award of such damage. However, the rule is not a hard and fast one and loss of prospective profits may nevertheless be recovered if the evidence shows with reasonable certainty both their occurrence and the extent thereof. In the present case the question is whether the evidence of loss of prospective profits meets that standard.' Unestablished businesses have been permitted to claim lost profit damages in situations where owners have experience in the business they are seeking to establish, and where the business is in an established market." (*Resort Video, Ltd. v. Laser Video, Inc.* (1995) 35 Cal.App.4th 1679, 1698-1699 [42 Cal.Rptr.2d 136] , internal citations omitted.)

- "Even if [plaintiff] was able to provide credible evidence of lost profits, it must be remembered that '[w]hen loss of anticipated profits is an element of damages, it means net and not gross profits. Net profits are the gains made from sales 'after deducting the value of the labor, materials, rents, and all expenses, together with the interest of the capital employed.' " (*Resort Video, Ltd., supra*, 35 Cal.App.4th at p. 1700 , internal citations omitted.)

- "Under general contract principles, when one party breaches a contract the other party ordinarily is entitled to damages sufficient to make that party 'whole,' that is, enough to place the nonbreaching party in the same position as if the breach had not occurred. This includes future profits the breach prevented the nonbreaching party from earning at least to the extent those future profits can be estimated with reasonable certainty." (*Postal Instant Press v. Sealy* (1996) 43 Cal.App.4th 1704, 1708-1709 [51 Cal.Rptr.2d 365] , internal citations omitted.)

- "It is the generally accepted rule, in order to recover damages projected into the future, that a plaintiff must show with reasonable certainty that detriment from the breach of contract will accrue to him in the future. Damages which are remote, contingent, or merely possible cannot serve as a legal basis for recovery." (*California Shoppers, Inc. v. Royal Globe Insurance Co.* (1985) 175 Cal.App.3d 1, 62 [221 Cal.Rptr. 171] , internal citations omitted.)

- "Where the injured party shows that, as a reasonable probability, profits would have been earned on

the contract except for its breach, the loss of the anticipated profits is compensable. Where business activity has been interrupted by a breach of contract, damages for the loss of prospective profits that otherwise might have been made from its operation are generally recoverable where such damages are shown to have been foreseeable and reasonably certain." (*Brandon & Tibbs v. George Kevorkian Accountancy Corp.* (1990) 226 Cal.App.3d 442, 468 [277 Cal.Rptr. 40] , internal citations omitted.)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, §§ 879-882

California Breach of Contract Remedies (Cont.Ed.Bar) Recovery of Money Damages, §§ 4.11-4.17

15 *California Forms of Pleading and Practice*, Ch. 177, *Damages*, § 177.79 (Matthew Bender)

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

1 *Matthew Bender Practice Guide: California Contract Litigation*, Ch. 7, *Seeking or Opposing Damages in Contract Actions*, 7.12

Publisher's Notes

This instruction covers issues presented in BAJI No. 10.91.

LexisNexis Matthew Bender Expert Practice Tip--Use Care When Determining Profits:

Determination of "profits" can be a difficult and intimidating idea for some jurors. Hence, your related argument should be crafted accordingly. *By Rex Heeseman*

LexisNexis Matthew Bender Expert Practice Tip--Use of Experts: This is an area that will frequently require expert testimony. *By Ronald Oster*

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Contracts Law Breach Causes of Action General Overview Contracts Law Remedies General Overview Contracts Law Remedies Foreseeable Damages Lost Profits



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CHAPTER 3 California Judicial Council Contracts Instructions

1-3 California Forms of Jury Instruction CACI 353

CACI 353 Loss of Profits--Some Profits Earned

To recover damages for lost profits, [*name of plaintiff*] must prove that it is reasonably certain [he/she/it] would have earned more profits but for [*name of defendant*]'s breach of the contract.

To decide the amount of damages for lost profits, you must:

- 1. First, calculate [*name of plaintiff*]'s estimated total profit by determining the gross amount [he/she/it] would have received if the contract had been performed, and then subtracting from that amount the costs [including the value of the [labor/materials/rents/expenses/interest on loans invested in the business]] [*name of plaintiff*] would have had if the contract had been performed;**
- 2. Next, calculate [*name of plaintiff*]'s actual profit by determining the gross amount [he/she/it] actually received, and then subtracting from that amount [*name of plaintiff*]'s actual costs [including the value of the [labor/materials/rents/expenses/interest on loans invested in the business]]; and**
- 3. Then, subtract [*name of plaintiff*]'s actual profit, which you determined in the second step, from [his/her/its] estimated total profit, which you determined in the first step. The resulting amount is [*name of plaintiff*]'s lost profit.**

You do not have to calculate the amount of the lost profits with mathematical precision, but there must be a reasonable basis for computing the loss.

Read this instruction in conjunction with *CACI No. 350, Introduction to Contract Damages*, or *CACI No. 351, Special Damages*.

Insertion of specified types of costs to be deducted from gross earnings is optional, depending on the facts of the case. Other types of costs may be inserted as appropriate.

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

■ *Restatement Second of Contracts, section 351(3)*, provides: "A court may limit damages for foreseeable loss by excluding recovery for loss of profits, by allowing recovery only for loss incurred in reliance, or otherwise if it concludes that in the circumstances justice so requires in order to avoid disproportionate compensation."

■ "Where the *fact* of damages is certain, the amount of damages need not be calculated with absolute certainty. The law requires only that some reasonable basis of computation of damages be used, and the damages may be computed even if the result reached is an approximation. This is especially true where, as here, it is the wrongful acts of the defendant that have created the difficulty in proving the amount of loss of profits or where it is the wrongful acts of the defendant that have caused the other party to not realize a profit to which that party is entitled." (*GHK Associates v. Mayer Group* (1990) 224 Cal.App.3d 856, 873-874 [274 Cal.Rptr. 168] , internal citations omitted.)

■ "The extent of such damages may be measured by 'the past volume of business and other provable data relevant to the probable future sales.' " (*Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.* (2000) 78 Cal.App.4th 847, 890 [93 Cal.Rptr.2d 364] , internal citation omitted.)

■ " 'Lost profits to an established business may be recovered if their extent and occurrence can be ascertained with reasonable certainty; once their existence has been so established, recovery will not be denied because the amount cannot be shown with mathematical precision.' However, '[i]t has been frequently stated that if a business is new, it is improper to award damages for loss of profits because absence of income and expense experience renders anticipated profits too speculative to meet the legal standard of reasonable certainty necessary to support an award of such damage. However, the rule is not a hard and fast one and loss of prospective profits may nevertheless be recovered if the evidence shows with reasonable certainty both their occurrence and the extent thereof. In the present case the question is whether the evidence of loss of prospective profits meets that standard.' Unestablished businesses have been permitted to claim lost profit damages in situations where owners have experience in the business they are seeking to establish, and where the business is in an established market." (*Resort Video, Ltd. v. Laser Video, Inc.* (1995) 35 Cal.App.4th 1679, 1698-1699 [42 Cal.Rptr.2d 136] , internal citations omitted.)

■ "Even if [plaintiff] was able to provide credible evidence of lost profits, it must be remembered that '[w]hen loss of anticipated profits is an element of damages, it means net and not gross profits.' Net profits are the gains made from sales 'after deducting the value of the labor, materials, rents, and all expenses, together with the interest of the capital employed.' " (*Resort Video, Ltd., supra*, 35 Cal.App.4th at p. 1700 , internal citations omitted.)

■ "Under general contract principles, when one party breaches a contract the other party ordinarily is entitled to damages sufficient to make that party 'whole,' that is, enough to place the nonbreaching party in the same position as if the breach had not occurred. This includes future profits the breach prevented

the nonbreaching party from earning at least to the extent those future profits can be estimated with reasonable certainty." (*Postal Instant Press v. Sealy* (1996) 43 Cal.App.4th 1704, 1708-1709 [51 Cal.Rptr.2d 365] , internal citations omitted.)

■ "It is the generally accepted rule, in order to recover damages projected into the future, that a plaintiff must show with reasonable certainty that detriment from the breach of contract will accrue to him in the future. Damages which are remote, contingent, or merely possible cannot serve as a legal basis for recovery." (*California Shoppers, Inc. v. Royal Globe Insurance Co.* (1985) 175 Cal.App.3d 1, 62 [221 Cal.Rptr. 171] , internal citations omitted.)

■ "Where the injured party shows that, as a reasonable probability, profits would have been earned on the contract except for its breach, the loss of the anticipated profits is compensable. Where business activity has been interrupted by a breach of contract, damages for the loss of prospective profits that otherwise might have been made from its operation are generally recoverable where such damages are shown to have been foreseeable and reasonably certain." (*Brandon & Tibbs v. George Kevorkian Accountancy Corp.* (1990) 226 Cal.App.3d 442, 468 [277 Cal.Rptr. 40] , internal citations omitted.)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, §§ 879-882

California Breach of Contract Remedies (Cont.Ed.Bar) Recovery of Money Damages, §§ 4.11-4.17

15 *California Forms of Pleading and Practice*, Ch. 177, Damages, § 177.79 (Matthew Bender)

1 *Matthew Bender Practice Guide: California Contract Litigation*, Ch. 7, Seeking or Opposing Damages in Contract Actions, 7.12

Publisher's Notes

This instruction covers issues presented in BAJI No. 10.91.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Contracts Law Breach Causes of Action General Overview Contracts Law Remedies General Overview Contracts Law Remedies Foreseeable Damages Lost Profits



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CHAPTER 3 California Judicial Council Contracts Instructions

1-3 California Forms of Jury Instruction CACI 354

CACI 354 Owner's/Lessee's Damages for Breach of Contract to Construct Improvements on Real Property

To recover damages for breach of a contract to construct improvements on real property, [*name of plaintiff*] must prove:

[[The reasonable cost to [*name of plaintiff*] of completing the work;]

[And the value of loss of use of the property;]

[And the reasonable cost of alternative housing from the date the work was to have been completed until the date the work was completed;]

[Less any amounts unpaid under the contract with [*name of defendant*];]

[or]

[The difference between the fair market value of the [lessee's interest in the] property and its fair market value had the improvements been constructed.]

New September 2003

Read this instruction in conjunction with *CACI No. 350, Introduction to Contract Damages*. The bracketed options state alternative measures of damage. Choose the option appropriate to the facts of the case. For a definition of "fair market value," see *CACI No. 3501, "Fair Market Value" Explained*.

■ "The proper measure of damages for breach of a contract to construct improvements on real property where the work is to be done on plaintiff's property is ordinarily the reasonable cost to the plaintiff of completing the work and not the difference between the value of the property and its value had the improvements been constructed. A different rule applies, however, where improvements are to be made on property not owned by the injured party. 'In that event the injured party is unable to complete the work himself and, subject to the restrictions of *sections 3300 and 3359 of the Civil Code*, the proper measure of damages is the difference in value of the property with and without the promised performance, since that is the contractual benefit of which the injured party is deprived.' " (*Glendale Fed. Sav. & Loan Assn. v. Marina View Heights Dev. Co.* (1977) 66 Cal.App.3d 101, 123-124 [135 Cal.Rptr. 802], internal citations omitted.)

■ "If the work were to be done on plaintiffs' property the proper measure of damages would ordinarily be the reasonable cost to plaintiffs of completing the work. A different rule applies, however, when the improvements are to be made on property that is not owned by the injured party." (*Coughlin v. Blair* (1953) 41 Cal.2d 587, 600 [262 P.2d 305] , internal citations omitted.)

■ "It is settled ... that the measure of damages for the breach of a building construction contract is ordinarily such sum as is required to make the building conform to the contract. In such situations, the diminution of value rule cannot be invoked and the measure of damages is not the difference between the actual value of the property and its value had it been constructed in accordance with the plans and specifications." (*Kitchel v. Acree* (1963) 216 Cal.App.2d 119, 123 [30 Cal.Rptr. 714] , internal citations omitted.)

■ "The available damages for defective construction are limited to the cost of repairing the home, including lost use or relocation expenses, or the diminution in value." (*Erlich v. Menezes* (1999) 21 Cal.4th 543, 561 [87 Cal.Rptr.2d 886, 981 P.2d 978] , internal citations omitted.)

■ "Where the measure of damages turns on the value of property, whether liability sounds in tort or breach of contract, the normal standard is market value. The definition of market value and the principles governing its ascertainment are the same as those applicable to the valuation of property in eminent domain proceedings and in ad valorem taxation of property. In *Sacramento etc. R. R. Co. v. Heilbron*, market value was defined as 'the highest price estimated in terms of money which the land would bring if exposed for sale in the open market, with reasonable time allowed in which to find a purchaser, buying with knowledge of all of the uses and purposes to which it was adapted and for which it was capable.' That classic exposition with subsequent refinements has always been the accepted definition of market value in California." (*Glendale Federal Savings & Loan Assn.*, *supra*, 66 Cal.App.3d at pp. 141-142 , internal citations and footnote omitted.)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, §§ 909-910

10 *California Forms of Pleading and Practice*, Ch. 104, Building Contracts, § 104.10 et seq. (Matthew Bender)

6 *California Points and Authorities*, Ch. 65, Damages: Contract, § 65.100 (Matthew Bender)

15 *California Legal Forms*, Ch. 30D, Construction Contracts And Subcontracts, § 30D.223 (Matthew Bender)

1 *Matthew Bender Practice Guide: California Contract Litigation*, Ch. 10, Seeking or Opposing Statutory Remedies in Contract Actions, 10.05

Publisher's Notes

There is no BAJI instruction on this subject.

LexisNexis Matthew Bender Expert Practice Tip--Argument Must Be Clear: Improvements to real property is not a common experience for some jurors. Thus, the related argument must explain things clearly. *By Rex Heeseman*

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewContracts LawBreachCauses of ActionGeneral OverviewContracts LawRemediesGeneral OverviewContracts LawRemediesCompensatory DamagesGeneral OverviewContracts LawTypes of ContractsConstruction Contracts



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CHAPTER 3 California Judicial Council Contracts Instructions

1-3 California Forms of Jury Instruction CACI 355

CACI 355 Obligation to Pay Money Only

To recover damages for the breach of a contract to pay money, [*name of plaintiff*] must prove the amount due under the contract.

New September 2003

Read this instruction in conjunction with *CACI No. 350, Introduction to Contract Damages*. If there is a dispute as to the appropriate rate of interest, the jury should be instructed to determine the rate. Otherwise, the judge should calculate the interest and add the appropriate amount of interest to the verdict.

■ *Civil Code section 3302* provides: "The detriment caused by the breach of an obligation to pay money only, is deemed to be the amount due by the terms of the obligation, with interest thereon."

■ *Civil Code section 3289* provides:

(a) Any legal rate of interest stipulated by a contract remains chargeable after a breach thereof, as before, until the contract is superseded by a verdict or other new obligation.

(b) If a contract entered into after January 1, 1986, does not stipulate a legal rate of interest, the obligation shall bear interest at a rate of 10 percent per annum after a breach.

For the purposes of this subdivision, the term contract shall not include a note secured by a deed of trust on real property.

■ "The section is part of the original Civil Code and was intended to codify a common-law rule of damages for breach of a contract to pay a liquidated sum. In *Siminoff v. Jas. H. Goodman & Co. Bank*, the court after careful and extensive analysis concluded that section 3302 was not intended to abolish the common-law measure of damages for dishonor of a check. *Hartford*, in reaching the opposite conclusion, failed even to note the common-law rule or the California cases which had followed it, and did not discuss the strong arguments in its favor advanced in the *Siminoff* opinion. The *Hartford* holding on section 3302 no longer applies to the instant problem since section 3320 clearly constitutes 'a legislative recognition that a depositor whose check is wrongfully dishonored may thereby sustain "actual damage" beyond the amount of the check' and thus supersedes the *Hartford* holding on the measure of damages." (*Weaver v. Bank of America National Trust & Savings Assn.* (1963) 59 Cal.2d 428, 436, fn. 11 [30 Cal.Rptr. 4, 380 P.2d 644] , internal citations omitted.)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, § 908

1 *Matthew Bender Practice Guide: California Contract Litigation, Ch. 7, Seeking or Opposing Damages in Contract Actions*, 7.04[7][a]

Publisher's Notes

This instruction replaces BAJI No. 10.93.

LexisNexis Matthew Bender Expert Practice Tip--Use Care in Explaining Lawsuit: The obligation to owe something is well-known to a vast majority of jurors. However, if your lawsuit presents a different scenario, consider the use of a more everyday experience to explain this lawsuit. *By Rex Heeseman*

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewCivil ProcedureRemediesDamagesGeneral OverviewContracts LawBreachCauses of ActionGeneral OverviewContracts LawRemediesGeneral Overview



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California Forms of Jury Instruction

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CHAPTER 3 California Judicial Council Contracts Instructions

1-3 California Forms of Jury Instruction CACI 356

CACI 356 Buyer's Damages for Breach of Contract for Sale of Real Property

To recover damages for the breach of a contract to sell real property, [*name of plaintiff*] must prove:

- 1. The difference between the fair market value of the property on the date of the breach and the contract price;**
- 2. The amount of any payment made by [*name of plaintiff*] toward the purchase;**
- 3. The amount of any reasonable expenses for examining title and preparing documents for the sale;**
- 4. The amount of any reasonable expenses in preparing to occupy the property; and**
- 5. [*Insert item(s) of claimed consequential damages*].**

New September 2003

Read this instruction in conjunction with *CACI No. 350, Introduction to Contract Damages*. If the appropriate rate of interest is in dispute, the jury should be instructed to determine the rate. Otherwise, the judge should calculate the interest and add the appropriate amount of interest to the verdict.

For a definition of "fair market value," see *CACI No. 3501, "Fair Market Value" Explained*.

■ *Civil Code section 3306* provides: "The detriment caused by the breach of an agreement to convey an

estate in real property, is deemed to be the price paid, and the expenses properly incurred in examining the title and preparing the necessary papers, the difference between the price agreed to be paid and the value of the estate agreed to be conveyed at the time of the breach, the expenses properly incurred in preparing to enter upon the land, consequential damages according to proof, and interest."

■ "Said *Civil Code Section 3306*, 'relating to detriment caused by breach of agreement to convey an estate in real property being a special provision, prevails over general statutes on damages.' " (*Gorges v. Johnson* (1959) 167 *Cal.App.2d* 349, 353 [334 P.2d 621] , internal citations omitted.)

■ *Civil Code section 3289* provides:

(a) Any legal rate of interest stipulated by a contract remains chargeable after a breach thereof, as before, until the contract is superseded by a verdict or other new obligation.

(b) If a contract entered into after January 1, 1986, does not stipulate a legal rate of interest, the obligation shall bear interest at a rate of 10 percent per annum after a breach.

For the purposes of this subdivision, the term contract shall not include a note secured by a deed of trust on real property.

■ "A simple reading of the statute discloses that by its explicit terms it is adaptable only to a failure to convey, and not to a delay in conveying." (*Christensen v. Slawter* (1959) 173 *Cal.App.2d* 325, 330 [343 P.2d 341] .)

■ "This court itself has recently described section 3306 as providing for 'loss-of-bargain damages' measured by the difference between the contract price and the fair market value on the date of the breach." (*Reese v. Wong* (2001) 93 *Cal.App.4th* 51, 56 [112 *Cal.Rptr.2d* 669] , internal citation omitted.)

■ "It is settled that when a seller of real property fails or refuses to convey, a buyer who has made advance payments toward the purchase price may recover interest on those payments as damages for breach of contract. This rule is not limited to sales of real property; it applies to sales in general." (*Al-Husry v. Nilsen Farms Mini-Market, Inc.* (1994) 25 *Cal.App.4th* 641, 648 [31 *Cal.Rptr.2d* 28] , internal citations omitted.)

■ Section 3306 does not ordinarily apply to breach of an unexercised option to buy property. (*Schmidt v. Beckelman* (1960) 187 *Cal.App.2d* 462, 470-471 [9 *Cal.Rptr.* 736] .)

■ "'Generally, [consequential] damages are those which, in view of all facts known by the parties at the time of the making of the contract, may reasonably be supposed to have been considered as a likely consequence of a breach in the ordinary course of events. This provision would conform the measure of damages in real property conveyance breaches to the general contract measure of damages which is specified in *Civil Code* 3300: "... all the detriment proximately caused (by the breach), or which, in the ordinary course of things, would be likely to result therefrom." ' " (*Stevens Group Fund IV v. Sobrato Development Co.* (1991) 1 *Cal.App.4th* 886, 892 [2 *Cal.Rptr.2d* 460] , quoting the Assembly Committee on Judiciary.)

■ "Rents received from the lease of the property in this case are not properly an item of consequential damages. Here, plaintiff introduced evidence as to the fair market value of the property which included these profits. To allow these as consequential damages under these circumstances would have permitted a double recovery for plaintiff." (*Stevens Group Fund IV*, *supra*, 1 *Cal.App.4th* at p. 892 .)

■ "The phrase 'to enter upon the land' refers to the taking of possession rather than to things done to put the land to general use." (*Crag Lumber Co. v. Crofoot* (1956) 144 *Cal.App.2d* 755, 779 [301 P.2d 952] .)

■ "We think the phrase 'and interest' should continue to be read as referring to the generally applicable provisions of [Civil Code] section 3287 regarding prejudgment interest. As amended in 1967, subdivision (a) of section 3287 establishes a right to recover prejudgment interest on damages 'capable of being made certain by calculation' and subdivision (b) gives the court general discretionary authority to award prejudgment interest where damages are 'based upon a cause of action in contract' The discretionary authority conferred by subdivision (b) will ordinarily apply to loss-of-bargain damages measured by the contract price/market value differential." (*Rifkin v. Achermann* (1996) 43 Cal.App.4th 391, 397 [50 Cal.Rptr.2d 661].)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, §§ 898-900

California Real Property Remedies Practice (Cont.Ed.Bar) Breach of Seller-Buyer Agreements, §§ 4.11-4.14

50 *California Forms of Pleading and Practice*, Ch. 569, *Vendor and Purchaser*, § 569.22 (Matthew Bender)

9 *California Legal Forms*, Ch. 23, *Real Property Sales Agreements*, § 23.12 *et seq.* (Matthew Bender)

1 *Matthew Bender Practice Guide: California Contract Litigation*, Ch. 7, *Seeking or Opposing Damages in Contract Actions*, 7.04[7][f]

1 *Matthew Bender Practice Guide: California Contract Litigation*, Ch. 8, *Seeking or Opposing Equitable Remedies in Contract Actions*, 8.37, 8.58

Publisher's Notes

This instruction replaces BAJI No. 10.94.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Contracts Law Breach Causes of Action General Overview Contracts Law Remedies General Overview Contracts Law Remedies Compensatory Damages General Overview Real Property Law Purchase & Sale General Overview



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CHAPTER 3 California Judicial Council Contracts Instructions

*1-3 California Forms of Jury Instruction CACI 357***CACI 357 Seller's Damages for Breach of Contract to Purchase Real Property**

To recover damages for the breach of a contract to buy real property, [*name of plaintiff*] must prove:

- 1. The difference between the amount that was due to [*name of plaintiff*] under the contract and the fair market value of the property at the time of the breach; [and]**
- 2. [*Insert item(s) of claimed consequential damages, e.g., resale expenses*].**

New September 2003

Read this instruction in conjunction with *CACI No. 350, Introduction to Contract Damages*. If there is a dispute regarding the appropriate rate of interest, the jury should be instructed to determine the rate. Otherwise, the judge should calculate the interest and add the appropriate amount of interest to the verdict.

For a definition of "fair market value," see *CACI No. 3501, "Fair Market Value" Explained*.

- *Civil Code section 3307* provides: "The detriment caused by the breach of an agreement to purchase an estate in real property is deemed to be the excess, if any, of the amount which would have been due to the seller under the contract over the value of the property to him or her, consequential damages according to proof, and interest."

- "It is generally accepted that the equivalent of value to the seller is fair market value. Fair market value is reckoned 'in terms of money.' " (*Abrams v. Motter* (1970) 3 Cal.App.3d 828, 840-841 [83])

Cal.Rptr. 855] , internal citations omitted.)

- "The "value of the property" to [plaintiff] is to be determined as of the date of the breach of the agreement by [defendant]." (*Allen v. Enomoto* (1964) 228 *Cal.App.2d* 798, 803 [39 *Cal.Rptr. 815]* , internal citation omitted.)

- There can be no damages where the value to the owner equals or exceeds the contract price. (*Newhart v. Pierce* (1967) 254 *Cal.App.2d* 783, 792 [62 *Cal.Rptr. 553]* , internal citation omitted.)

- "[T]he view that this section is exclusive, and precludes other consequential damages occasioned by the breach, was rejected in *Royer v. Carter*. Under *Civil Code*, section 3300, other damages are recoverable, usually embracing the out-of-pocket expenses lost by failure of the transaction." (*Wade v. Lake County Title Co.* (1970) 6 *Cal.App.3d* 824, 830 [86 *Cal.Rptr. 182]* , internal citation omitted.)

- "[C]ourts have permitted consequential damages, only where the seller has diligently attempted resale after the buyer has breached the contract." (*Askari v. R & R Land Co.* (1986) 179 *Cal.App.3d* 1101, 1107 [225 *Cal.Rptr. 285]* , internal citation omitted.)

- "[I]f the property increases in value before trial and the vendor resells the property at a price higher than the value of the contract, there are no longer any loss of bargain damages." (*Spurgeon v. Drumheller* (1985) 174 *Cal.App.3d* 659, 664 [220 *Cal.Rptr. 195]* .)

- "The same rule of no loss of bargain damages to the vendor applies where the resale is for the same price as the contract price." (*Spurgeon, supra*, 174 *Cal.App.3d* at p. 664 , internal citations omitted.)

- "For the reason that no loss of bargain damages are available to a seller if there is a resale at the same or a higher price than the contract price, the law imposes on the seller of the property the duty to exercise diligence and to make a resale within the shortest time possible. In discussing the duty to mitigate where the vendee seeks return of a deposit, the *Sutter* court states the requirement that resales be made with reasonable diligence 'states a policy applicable to resales of real property. Whether the resale is made one, two or three months later, or whether it be a year or more, it should be made with reasonable diligence to qualify the vendor to an allowance of an off-set against the vendee's claim for restitution of money paid.' " (*Spurgeon, supra*, 174 *Cal.App.3d* at p. 665 , internal citations omitted.)

- "Although it is well settled in the foregoing authorities that damages under *Civil Code* section 3307 for the difference between the contract price and property value may be insufficient to give the vendor the benefit of his bargain and he is entitled also to resale expenses and some costs of continued ownership, he should not be permitted to receive a windfall at the purchaser's expense." (*Smith v. Mady* (1983) 146 *Cal.App.3d* 129, 133 [194 *Cal.Rptr. 42]* .)

- "Inasmuch as under *Abrams* and *Sutter* the vendor has an obligation to resell promptly in order to obtain consequential damages and the resale price may fix the property value as a basis for *Civil Code* section 3307 damages, we are impelled to conclude that there is no inherent separateness in the original sale and subsequent resale transactions. The increased resale price should not be disregarded in considering an offset to consequential damages awarded to a vendor against a defaulting purchaser of real property." (*Smith, supra*, 146 *Cal.App.3d* at p. 133 .)

- "The owner of real or personal property may competently testify to its value." (*Newhart, supra*, 254 *Cal.App.2d* at p. 789 , internal citations omitted.)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, §§ 901-906

California Real Property Remedies Practice (Cont.Ed.Bar), Breach of Seller-Buyer Agreements, §§ 4.37-4.43

California Practice Guide: Real Property Transactions (Rutter Group), 11-C, § C., Seller's Remedies Upon Buyer's Breach--Damages and Specific Performance

50 *California Forms of Pleading and Practice*, Ch. 569, *Vendor and Purchaser*, § 569.22 (Matthew Bender)

9 *California Legal Forms*, Ch. 23, *Real Property Sales Agreements*, § 23.12 *et seq.* (Matthew Bender)

1 *Matthew Bender Practice Guide: California Contract Litigation*, Ch. 7, *Seeking or Opposing Damages in Contract Actions*, 7.04[7][f]

1 *Matthew Bender Practice Guide: California Contract Litigation*, Ch. 8, *Seeking or Opposing Equitable Remedies in Contract Actions*, 8.37, 8.58

Publisher's Notes

This instruction replaces BAJI No. 10.95.

LexisNexis Matthew Bender Expert Practice Tip--Use Care with Argument: As noted in the Practice Tip to *CACI No. 354*, some jurors are not that familiar with the sale of real property. Thus, be careful with the argument. *By Rex Heeseman*

LexisNexis Matthew Bender Expert Practice Tip--Damages Measured as of Time of Breach: Under *CACI No. 357*, damages are to be measured as of the time of the breach. It is important to keep this requirement in mind since real property values will almost always vary over time. *By Ronald Oster*

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewContracts LawBreachCauses of ActionGeneral OverviewContracts LawRemediesGeneral OverviewReal Property LawPurchase & SaleGeneral OverviewReal Property LawPurchase & SaleContracts of SaleGeneral OverviewReal Property LawPurchase & SaleRemediesDamagesGeneral Overview



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CHAPTER 3 California Judicial Council Contracts Instructions

1-3 California Forms of Jury Instruction CACI 358

CACI 358 Mitigation of Damages

If [*name of defendant*] breached the contract and the breach caused harm, [*name of plaintiff*] is not entitled to recover damages for harm that [*name of defendant*] proves [*name of plaintiff*] could have avoided with reasonable efforts or expenditures. You should consider the reasonableness of [*name of plaintiff*]'s efforts in light of the circumstances facing [him/her/it] at the time, including [his/her/its] ability to make the efforts or expenditures without undue risk or hardship.

If [*name of plaintiff*] made reasonable efforts to avoid harm, then your award should include reasonable amounts that [he/she/it] spent for this purpose.

New September 2003

- "The doctrine of mitigation of damages holds that '[a] plaintiff who suffers damage as a result of either a breach of contract or a tort has a duty to take reasonable steps to mitigate those damages and will not be able to recover for any losses which could have been thus avoided.' A plaintiff may not recover for damages avoidable through ordinary care and reasonable exertion. The duty to mitigate damages does not require an injured party to do what is unreasonable or impracticable. 'The rule of mitigation of damages has no application where its effect would be to require the innocent party to sacrifice and surrender important and valuable rights.'" (*Valle de Oro Bank v. Gamboa* (1994) 26 Cal.App.4th 1686, 1691 [32 Cal.Rptr.2d 329] , internal citations omitted.)

- "A plaintiff who suffers damage as a result of either a breach of contract or a tort has a duty to take reasonable steps to mitigate those damages and will not be able to recover for any losses which could have been thus avoided." (*Shaffer v. Debbas* (1993) 17 Cal.App.4th 33, 41 [21 Cal.Rptr.2d 110] ,

internal citation omitted.)

■ "A party injured by a breach of contract is required to do everything reasonably possible to negate his own loss and thus reduce the damages for which the other party has become liable. The plaintiff cannot recover for harm he could have foreseen and avoided by such reasonable efforts and without undue expense. However, the injured party is not precluded from recovery to the extent that he has made reasonable but unsuccessful efforts to avoid loss." (*Brandon & Tibbs v. George Kevorkian Accountancy Corp.* (1990) 226 Cal.App.3d 442, 460 [277 Cal.Rptr. 40] , internal citations omitted.)

■ "The burden of proving that losses could have been avoided by reasonable effort and expense must always be borne by the party who has broken the contract. Inasmuch as the law denies recovery for losses that can be avoided by reasonable effort and expense, justice requires that the risks incident to such effort should be carried by the party whose wrongful conduct makes them necessary. Therefore, special losses that a party incurs in a reasonable effort to avoid losses resulting from a breach are recoverable as damages." (*Brandon & Tibbs, supra*, 226 Cal.App.3d at pp. 460-461 , internal citations omitted.)

Secondary Sources

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

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

6 *California Points and Authorities*, Ch. 65, *Damages: Contract*, §§ 65.103, 65.121 (Matthew Bender)

1 *Matthew Bender Practice Guide: California Contract Litigation*, Ch. 7, *Seeking or Opposing Damages in Contract Actions*, 7.12[6][b], 7.15[4]

Publisher's Notes

This instruction covers issues presented in BAJI No. 10.90.

LexisNexis Matthew Bender Expert Practice Tip--Arguing Mitigation: Mitigation is usually considered a concept that applies to the defense. However, the second part of *CACI No. 358* provides a basis for plaintiff to recover amounts reasonably spent to mitigate damages. Moreover, the duty to mitigate can be used by a plaintiff to explain why the plaintiff did not continue to spend money to perform a contract that defendant had repudiated (i.e., an anticipatory breach [*see CACI No. 324*]). By *Ronald Oster*

LexisNexis Matthew Bender Expert Practice Tip--Use Everyday Experiences to Explain Mitigation: Mitigation is a typical defense. However, many jurors will have difficulties in thinking about mitigation. Thus, often use everyday experiences to explain this concept. By *Rex Heeseman*

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Contracts Law Breach Causes of Action General Overview Contracts Law Remedies General Overview Contracts Law Remedies Avoidable Consequences



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CHAPTER 3 California Judicial Council Contracts Instructions

1-3 California Forms of Jury Instruction CACI 359

CACI 359 Present Cash Value of Future Damages

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

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

[You may consider expert testimony in determining the present cash value of future damages.]

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

New September 2003

Present cash value tables have limited application. In order to use the tables, the discount rate to be used must be established by stipulation or by the evidence. Care must be taken that the table selected fits the circumstances of the case. Expert testimony will usually be required to accurately establish present values for future economic losses. However, tables may be helpful in many cases.

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

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

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

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

Secondary Sources

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

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

Publisher's Notes

There is no BAJI instruction on this subject.

LexisNexis Matthew Bender Expert Practice Tip--Explaining Present Cash Value: Almost all jurors (and many attorneys and judges) will struggle with the concept of "present cash value." Often expert testimony will be helpful, but such testimony will occasionally make matters even more complicated. Spend a lot of time on this concept. *By Rex Heeseman*

LexisNexis Matthew Bender Expert Practice Tip--Calculating Present Cash Value: The plaintiff will usually rely on expert testimony in commercial cases to provide a damage analysis, including present value calculations. Providing the jury with a table to calculate present cash value is taking a big risk. *By Ronald Oster*

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewContracts LawBreachCauses of ActionGeneral OverviewContracts LawRemediesGeneral OverviewContracts LawRemediesCompensatory DamagesGeneral Overview



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CHAPTER 3 California Judicial Council Contracts Instructions

1-3 California Forms of Jury Instruction CACI 360

CACI 360 Nominal Damages

If you decide that [name of defendant] breached the contract but also that [name of plaintiff] was not harmed by the breach, you may still award [him/her/it] nominal damages such as one dollar.

New September 2003

- *Civil Code section 3360 provides: "When a breach of duty has caused no appreciable detriment to the party affected, he may yet recover nominal damages."*

- *"A plaintiff is entitled to recover nominal damages for the breach of a contract, despite inability to show that actual damage was inflicted upon him, since the defendant's failure to perform a contractual duty is, in itself, a legal wrong that is fully distinct from the actual damages. The maxim that the law will not be concerned with trifles does not, ordinarily, apply to violation of a contractual right. Accordingly, nominal damages, which are presumed as a matter of law to stem merely from the breach of a contract may properly be awarded for the violation of such a right. And, by statute, such is also the rule in California." (Sweet v. Johnson (1959) 169 Cal.App.2d 630, 632-633 [337 P.2d 499] , internal citations omitted.)*

- *"With one exception ... an unbroken line of cases holds that nominal damages are limited to an amount of a few cents or a dollar." (Avina v. Spurlock (1972) 28 Cal.App.3d 1086, 1089 [105 Cal.Rptr. 198] , internal citations omitted.)*

Secondary Sources

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

15 *California Forms of Pleading and Practice*, Ch. 177, *Damages*, §§ 177.14, 177.71 (Matthew Bender)

1 *Matthew Bender Practice Guide: California Contract Litigation*, Ch. 7, *Seeking or Opposing Damages in Contract Actions*, 7.04[11]

Publisher's Notes

There is no BAJI instruction on this subject.

LexisNexis Matthew Bender Expert Practice Tip--Seeking Nominal Damages: Nominal damages seem like a strange concept to many jurors. However, in some cases, such damages can lead to other damages. *By Rex Heeseman*

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewContracts LawBreachCauses of ActionGeneral OverviewContracts LawRemediesGeneral OverviewContracts LawRemediesNominal Damages



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CHAPTER 3 California Judicial Council Contracts Instructions

1-3 California Forms of Jury Instruction CACI 361

CACI 361 Plaintiff May Not Recover Duplicate Contract and Tort Damages

[Name of plaintiff] has made claims against [name of defendant] for breach of contract and [insert tort action]. If you decide that [name of plaintiff] has proved both claims, the same damages that resulted from both claims can be awarded only once.

New September 2003

If the issue of punitive damages is not bifurcated, read the following instruction: "You may consider awarding punitive damages only if [name of plaintiff] proves [his/her/its] claim for [insert tort action]."

- "Here the jury was properly instructed that it could not award damages under both contract and tort theories, but must select which theory, if either, was substantiated by the evidence, and that punitive damages could be assessed if defendant committed a tort with malice or intent to oppress plaintiffs, but that such damages could not be allowed in an action based on breach of contract, even though the breach was wilful." (*Acadia, California, Ltd. v. Herbert* (1960) 54 Cal.2d 328, 336-337 [5 Cal.Rptr. 686, 353 P.2d 294] .)

- "Ordinarily, a plaintiff asserting both a contract and tort theory arising from the same factual setting cannot recover damages under both theories, and the jury should be so instructed. Here, the court did not specifically instruct that damages could be awarded on only one theory, but did direct that punitive damages could be awarded only if the jury first determined that appellant had proved his tort action." (*Pugh v. See's Candies, Inc.* (1988) 203 Cal.App.3d 743, 761, fn. 13 [250 Cal.Rptr. 195] , internal citation omitted.)

■ "The trial court would have been better advised to make an explicit instruction that duplicate damages could not be awarded. Indeed, it had a duty to do so." (*Dubarry International, Inc. v. Southwest Forest Industries, Inc.* (1991) 231 Cal.App.3d 552, 565, fn. 16 [282 Cal.Rptr. 181] , internal citation omitted.)

Secondary Sources

15 *California Forms of Pleading and Practice*, Ch. 177, *Damages*, § 177.50 (Matthew Bender)

1 *Matthew Bender Practice Guide: California Contract Litigation*, Ch. 7, *Seeking or Opposing Damages in Contract Actions*, 7.06

Publisher's Notes

There is no BAJI instruction on this subject.

LexisNexis Matthew Bender Expert Practice Tip--Dividing Damages Among Several Claims:

CACI No. 361 is an important topic for closing argument, especially in cases with multiple defendants. Because some claims may apply to some defendants but not others, plaintiff's counsel must make sure that the jury understands how to divide the damages among several claims to provide the maximum (and collectible) judgment. *By Ronald Oster*

LexisNexis Matthew Bender Expert Practice Tip--Contract vs. Tort Damages: Hopefully, the judge will pare the case down to the point where these too legal principles do not collide. Yet, if not, a careful argument may make the difference in the jury's appreciation of this tension. *By Rex Heeseman*

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewContracts LawBreachCauses of ActionGeneral OverviewContracts LawRemediesGeneral OverviewContracts LawRemediesCompensatory DamagesGeneral OverviewTortsDamagesGeneral Overview



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California Forms of Jury Instruction

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CHAPTER 3 California Judicial Council Contracts Instructions

1-3 California Forms of Jury Instruction CACI 362-CACI 369

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CACI 362Reserved for Future Use



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California Forms of Jury Instruction

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CHAPTER 3 California Judicial Council Contracts Instructions

*1-3 California Forms of Jury Instruction CACI 370***CACI 370 Common Count: Money Had and Received**

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

- 1. That [*name of defendant*] received money that was intended to be used for the benefit of [*name of plaintiff*];**
- 2. That the money was not used for the benefit of [*name of plaintiff*]; and**
- 3. That [*name of defendant*] has not given the money to [*name of plaintiff*].**

New June 2005

The instructions in this series are not intended to cover all available common counts. Users may need to draft their own instructions or modify the CACI instructions to fit the circumstances of their case.

■ " 'The common count is a general pleading which seeks recovery of money without specifying the nature of the claim Because of the uninformative character of the complaint, it has been held that the typical answer, a *general denial*, is sufficient to raise almost any kind of defense, including some which ordinarily require special pleading.' However, even where the plaintiff has pleaded in the form of a common count, the defendant must raise in the answer any new matter, that is, anything he or she relies on that is not put in issue by the plaintiff." (*Title Ins. Co. v. State Bd. of Equalization* (1992) 4 Cal.4th 715, 731 [14 Cal.Rptr.2d 822, 842 P.2d 121] , internal citations and footnote omitted.)

1-3 California Forms of Jury Instruction CACI 370

■ "Although such an action is one at law, it is governed by principles of equity. It may be brought 'wherever one person has received money which belongs to another, and which "in equity and good conscience," or in other words, in justice and right, should be returned. ... The plaintiff's right to recover is governed by principles of equity, although the action is one at law.' " (*Mains v. City Title Ins. Co.* (1949) 34 Cal.2d 580, 586 [212 P.2d 873] , internal citations omitted.)

■ " 'The action for money had and received is based upon an implied promise which the law creates to restore money which the defendant in equity and good conscience should not retain. The law implies the promise from the receipt of the money to prevent unjust enrichment. The measure of the liability is the amount received.' Recovery is denied in such cases unless the defendant himself has actually received the money." (*Rotea v. Izuel* (1939) 14 Cal.2d 605, 611 [95 P.2d 927] , internal citations omitted.)

■ "[S]ince the basic premise for pleading a common count ... is that the person is thereby 'waiving the tort and suing in assumpsit,' any tort damages are out. Likewise excluded are damages for a breach of an express contract. The relief is something in the nature of a constructive trust and ... 'one cannot be held to be a constructive trustee of something he had not acquired.' One must have acquired some money which in equity and good conscience belongs to the plaintiff or the defendant must be under a contract obligation with nothing remaining to be performed except the payment of a sum certain in money." (*Zumbrun v. University of Southern California* (1972) 25 Cal.App.3d 1, 14-15 [101 Cal.Rptr. 499] , internal citations omitted.)

■ " 'This kind of action to recover back money which ought not in justice to be kept is very beneficial, and, therefore, much encouraged. It lies for money paid by mistake, or upon a consideration which happens to fail, or extortion, or oppression, or an undue advantage of the plaintiff's situation contrary to the laws made for the protection of persons under those circumstances.' " (*Minor v. Baldrige* (1898) 123 Cal. 187, 191 [55 P. 783] , internal citation omitted.)

■ " 'As Witkin states in his text, "[a] common count is proper whenever the plaintiff claims a sum of money due, either as an indebtedness in a sum certain, or for the reasonable value of services, goods, etc., furnished. It makes no difference in such a case that the proof shows the original transaction to be an express contract, a contract implied in fact, or a quasi-contract.' " A claim for money had and received can be based upon money paid by mistake, money paid pursuant to a void contract, or a performance by one party of an express contract." (*Utility Audit Co., Inc. v. City of Los Angeles* (2003) 112 Cal.App.4th 950, 958 [5 Cal.Rptr.3d 520], internal citations omitted.)

■ "In the common law action of general assumpsit, it is customary to plead an indebtedness using 'common counts.' In California, it has long been settled the allegation of claims using common counts is good against special or general demurrers. The only essential allegations of a common count are '(1) the statement of indebtedness in a certain sum, (2) the consideration, i.e., goods sold, work done, etc., and (3) nonpayment.' A cause of action for money had and received is stated if it is alleged the defendant 'is indebted to the plaintiff in a certain sum "for money had and received by the defendant for the use of the plaintiff." ' " (*Farmers Ins. Exchange v. Zerlin* (1997) 53 Cal.App.4th 445, 460 [61 Cal.Rptr.2d 707] , internal citations omitted.)

■ "A common count is not a specific cause of action, ... rather, it is a simplified form of pleading normally used to aver the existence of various forms of monetary indebtedness, including that arising from an alleged duty to make restitution under an assumpsit theory. When a common count is used as an alternative way of seeking the same recovery demanded in a specific cause of action, and is based on the same facts, the common count is demurrable if the cause of action is demurrable." (*McBride v. Boughton* (2004) 123 Cal.App.4th 379, 394 [20 Cal.Rptr.3d 115] , internal citations omitted.)

■ "A cause of action is stated for money had and received if the defendant is indebted to the plaintiff in a certain sum 'for money had and received by the defendant for the use of the plaintiff.' The cause of action is available where, as here, the plaintiff has paid money to the defendant pursuant to a contract which is void for illegality." (*Schultz v. Harney* (1994) 27 Cal.App.4th 1611, 1623 [33 Cal.Rptr.2d 276] , internal citations omitted.)

■ " 'It is well established in our practice that an action for money had and received will lie to recover money paid by mistake, under duress, oppression or where an undue advantage was taken of plaintiffs' situation whereby money was exacted to which the defendant had no legal right.' " (*J.C. Peacock, Inc. v. Hasko* (1961) 196 Cal.App.2d 353, 361 [16 Cal.Rptr. 518] , internal citations omitted.)

Secondary Sources

4 Witkin, California Procedure 4th (4th ed. 1997) Pleading, § 522

12 *California Forms of Pleading and Practice*, Ch. 121, *Common Counts*, §§ 121.24[1], 121.51 (Matthew Bender)

4 California Points and Authorities, Ch. 43, *Common Counts and Bills of Particulars* (Matthew Bender)

1 *Matthew Bender Practice Guide: California Contract Litigation*, Ch. 9, *Seeking or Opposing Quantum Meruit or Quantum Valebant Recovery in Contract Actions*, 9.02, 9.15, 9.32

Publisher's Notes

This instruction covers issues presented in BAJI No. 10.70.

LexisNexis Matthew Bender Expert Practice Tip--Using Common Count for Money Had and Received: A common count for money had and received can be useful when an underlying contract is unenforceable or otherwise unavailable. *By Ronald Oster and Rex Heeseman*

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Contracts Law Breach Causes of Action General Overview Contracts Law Remedies General Overview



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California Forms of Jury Instruction

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CHAPTER 3 California Judicial Council Contracts Instructions

*1-3 California Forms of Jury Instruction CACI 371***CACI 371 Common Count: Goods and Services Rendered**

[Name of plaintiff] claims that [name of defendant] owes [him/her/it] money for [goods delivered/services rendered]. To establish this claim, [name of plaintiff] must prove all of the following:

- 1. That [name of defendant] requested, by words or conduct, that [name of plaintiff] [perform services/deliver goods] for the benefit of [name of defendant];**
- 2. That [name of plaintiff] [performed the services/delivered the goods] as requested;**
- 3. That [name of defendant] has not paid [name of plaintiff] for the [services/goods]; and**
- 4. The reasonable value of the [goods/services] that were provided.**

New June 2005

■ " 'The common count is a general pleading which seeks recovery of money without specifying the nature of the claim Because of the uninformative character of the complaint, it has been held that the typical answer, a *general denial*, is sufficient to raise almost any kind of defense, including some which ordinarily require special pleading.' However, even where the plaintiff has pleaded in the form of a common count, the defendant must raise in the answer any new matter, that is, anything he or she relies on that is not put in issue by the plaintiff." (*Title Ins. Co. v. State Bd. of Equalization* (1992) 4 Cal.4th 715, 731 [14 Cal.Rptr.2d 822, 842 P.2d 121] , internal citations and footnote omitted.)

■ "To recover on a claim for the reasonable value of services under a quantum meruit theory, a

plaintiff must establish both that he or she was acting pursuant to either an express or implied request for services from the defendant and that the services rendered were intended to and did benefit the defendant." (*Ochs v. PacificCare of California* (2004) 115 Cal.App.4th 782, 794 [9 Cal.Rptr.3d 734] , internal citation omitted.)

■ "[W]here services have been rendered under a contract which is unenforceable because not in writing, an action generally will lie upon a common count for quantum meruit." (*Iverson, Yoakum, Papiano & Hatch v. Berwald* (1999) 76 Cal.App.4th 990, 996 [90 Cal.Rptr.2d 665] .)

■ "Although such an action is one at law, it is governed by principles of equity. It may be brought 'wherever one person has received money which belongs to another, and which "in equity and good conscience," or in other words, in justice and right, should be returned. ... The plaintiff's right to recover is governed by principles of equity, although the action is one at law.' " (*Mains v. City Title Ins. Co.* (1949) 34 Cal.2d 580, 586 [212 P.2d 873] , internal citations omitted.)

■ " 'As Witkin states in his text, "[a] common count is proper whenever the plaintiff claims a sum of money due, either as an indebtedness in a sum certain, or for the reasonable value of services, goods, etc., furnished. It makes no difference in such a case that the proof shows the original transaction to be an express contract, a contract implied in fact, or a quasi-contract.' " A claim for money had and received can be based upon money paid by mistake, money paid pursuant to a void contract, or a performance by one party of an express contract." (*Utility Audit Co., Inc. v. City of Los Angeles* (2003) 112 Cal.App.4th 950, 958 [5 Cal.Rptr.3d 520], internal citations omitted.)

■ "In the common law action of general assumpsit, it is customary to plead an indebtedness using 'common counts.' In California, it has long been settled the allegation of claims using common counts is good against special or general demurrers. The only essential allegations of a common count are '(1) the statement of indebtedness in a certain sum, (2) the consideration, i.e., goods sold, work done, etc., and (3) nonpayment.' " (*Farmers Ins. Exchange v. Zerin* (1997) 53 Cal.App.4th 445, 460 [61 Cal.Rptr.2d 707] , internal citations omitted.)

■ "A common count is not a specific cause of action, ... rather, it is a simplified form of pleading normally used to aver the existence of various forms of monetary indebtedness, including that arising from an alleged duty to make restitution under an assumpsit theory. When a common count is used as an alternative way of seeking the same recovery demanded in a specific cause of action, and is based on the same facts, the common count is demurrable if the cause of action is demurrable." (*McBride v. Boughton* (2004) 123 Cal.App.4th 379, 394 [20 Cal.Rptr.3d 115] , internal citations omitted.)

Secondary Sources

4 Witkin, California Procedure 4th (4th ed. 1997) Pleading, § 515

12 California Forms of Pleading and Practice, Ch. 121, Common Counts, §§ 121.25, 121.55 -121.58 (Matthew Bender)

4 California Points and Authorities, Ch. 43, Common Counts and Bills of Particulars (Matthew Bender)

1 Matthew Bender Practice Guide: California Contract Litigation, Ch. 9, Seeking or Opposing Quantum Meruit or Quantum Valebant Recovery in Contract Actions, 9.02, 9.15, 9.32

Publisher's Notes

This instruction covers issues presented in BAJI No. 10.71.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewContracts LawBreachCauses of ActionGeneral
OverviewContracts LawRemediesGeneral OverviewContracts LawSales of GoodsDamages & RemediesGeneral
Overview



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California Forms of Jury Instruction

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CHAPTER 3 California Judicial Council Contracts Instructions

*1-3 California Forms of Jury Instruction CACI 372***CACI 372 Common Count: Open Book Account**

[*Name of plaintiff*] claims that [*name of defendant*] owes [him/her/it] money on an open book account. To establish this claim, [*name of plaintiff*] must prove all of the following:

- 1. That [*name of plaintiff*] and [*name of defendant*] had (a) financial transaction(s);**
- 2. That [*name of plaintiff*] kept an account of the debits and credits involved in the transaction(s);**
- 3. That [*name of defendant*] owes [*name of plaintiff*] money on the account; and**
- 4. The amount of money that [*name of defendant*] owes [*name of plaintiff*].**

New December 2005

The instructions in this series are not intended to cover all available common counts. Users may need to draft their own instructions or modify the CACI instructions to fit the circumstances of the case.

■ " 'A book account may be deemed to furnish the foundation for a suit in assumpsit ... only when it contains a statement of the debits and credits of the transactions involved completely enough to supply evidence from which it can be reasonably determined what amount is due to the claimant.' ... 'The term "account," ... clearly requires the recording of sufficient information regarding the transaction involved in the suit, from which the debits and credits of the respective parties may be determined, so as to permit the striking of a balance to ascertain what sum, if any, is due to the claimant.' " (*Robin v. Smith* (1955) 132 Cal.App.2d 288, 291 [282 P.2d 135] , internal citations omitted.)

■ "A book account is defined ... as 'a detailed statement, kept in a book, in the nature of debit and credit, arising out of contract or some fiduciary relation.' It is, of course, necessary for the book to show against whom the charges are made. It must also be made to appear in whose favor the charges run. This may be shown by the production of the book from the possession of the plaintiff and his identification of it as the book in which he kept the account between him and the debtor. An open book account may consist of a single entry reflecting the establishment of an account between the parties, and may contain charges alone if there are no credits to enter. Money loaned is the proper subject of an open book account. Of course a mere private memorandum does not constitute a book account." (*Joslin v. Gertz* (1957) 155 Cal.App.2d 62, 65-66 [317 P.2d 155] , internal citations omitted.)

■ "A book account may furnish the basis for an action on a common count ' "... when it contains a statement of the debits and credits of the transactions involved completely enough to supply evidence from which it can be reasonably determined what amount is due to the claimant." ' A book account is described as 'open' when the debtor has made some payment on the account, leaving a balance due." (*Interstate Group Administrators, Inc. v. Cravens, Dargan & Co.* (1985) 174 Cal.App.3d 700, 708 [220 Cal.Rptr. 250] , internal citations and footnote omitted.)

■ "[T]he most important characteristic of a suit brought to recover a sum owing on a book account is that the amount owed is determined by computing *all* of the credits and debits entered in the book account." (*Interstate Group Administrators, Inc., supra*, 174 Cal.App.3d at p. 708 .)

■ "It is apparent that the mere entry of dates and payments of certain sums in the credit column of a ledger or cash book under the name of a particular individual, without further explanation regarding the transaction to which they apply, may not be deemed to constitute a 'book account' upon which an action in *assumpsit* may be founded." (*Tillson v. Peters* (1940) 41 Cal.App.2d 671, 679 [107 P.2d 434] .)

■ "The law does not prescribe any standard of bookkeeping practice which all must follow, regardless of the nature of the business of which the record is kept. We think it makes no difference whether the account is kept in one book or several so long as they are permanent records, and constitute a system of bookkeeping as distinguished from mere private memoranda." (*Egan v. Bishop* (1935) 8 Cal.App.2d 119, 122 [47 P.2d 500] .)

■ " 'The common count is a general pleading which seeks recovery of money without specifying the nature of the claim. ... Because of the uninformative character of the complaint, it has been held that the typical answer, a *general denial*, is sufficient to raise almost any kind of defense, including some which ordinarily require special pleading.' However, even where the plaintiff has pleaded in the form of a common count, the defendant must raise in the answer any new matter, that is, anything he or she relies on that is not put in issue by the plaintiff." (*Title Ins. Co. v. State Bd. of Equalization* (1992) 4 Cal.4th 715, 731 [14 Cal.Rptr.2d 822, 842 P.2d 121] , internal citations and footnote omitted.)

■ "Although such an action is one at law, it is governed by principles of equity. It may be brought 'wherever one person has received money which belongs to another, and which "in equity and good conscience," or in other words, in justice and right, should be returned. ... The plaintiff's right to recover is governed by principles of equity, although the action is one at law.' " (*Mains v. City Title Ins. Co.* (1949) 34 Cal.2d 580, 586 [212 P.2d 873] , internal citations omitted.)

■ "[S]ince the basic premise for pleading a common count ... is that the person is thereby 'waiving the tort and suing in assumpsit,' any tort damages are out. Likewise excluded are damages for a breach of an express contract. The relief is something in the nature of a constructive trust and ... 'one cannot be held to

be a constructive trustee of something he had not acquired.' One must have acquired some money which in equity and good conscience belongs to the plaintiff or the defendant must be under a contract obligation with nothing remaining to be performed except the payment of a sum certain in money." (*Zumbrun v. University of Southern California* (1972) 25 Cal.App.3d 1, 14-15 [101 Cal.Rptr. 499] , internal citations omitted.)

■ " 'As Witkin states in his text, "[a] common count is proper whenever the plaintiff claims a sum of money due, either as an indebtedness in a sum certain, or for the reasonable value of services, goods, etc., furnished. It makes no difference in such a case that the proof shows the original transaction to be an express contract, a contract implied in fact, or a quasi-contract." ' A claim for money had and received can be based upon money paid by mistake, money paid pursuant to a void contract, or a performance by one party of an express contract." (*Utility Audit Co., Inc. v. City of Los Angeles* (2003) 112 Cal.App.4th 950, 958 [5 Cal.Rptr.3d 520] , internal citations omitted.)

■ "In the common law action of general assumpsit, it is customary to plead an indebtedness using 'common counts.' In California, it has long been settled the allegation of claims using common counts is good against special or general demurrers. The only essential allegations of a common count are '(1) the statement of indebtedness in a certain sum, (2) the consideration, i.e., goods sold, work done, etc., and (3) nonpayment.' " (*Farmers Ins. Exchange v. Zerin* (1997) 53 Cal.App.4th 445, 460 [61 Cal.Rptr.2d 707] , internal citations omitted.)

■ "A common count is not a specific cause of action, ... rather, it is a simplified form of pleading normally used to aver the existence of various forms of monetary indebtedness, including that arising from an alleged duty to make restitution under an assumpsit theory. When a common count is used as an alternative way of seeking the same recovery demanded in a specific cause of action, and is based on the same facts, the common count is demurrable if the cause of action is demurrable." (*McBride v. Boughton* (2004) 123 Cal.App.4th 379, 394 [20 Cal.Rptr.3d 115] , internal citations omitted.)

Secondary Sources

4 Witkin, California Procedure (4th ed. 1997) Pleading, § 522

1 *California Forms of Pleading and Practice, Ch. 8, Accounts Stated and Open Accounts*, §§ 8.20, 8.47 (Matthew Bender)

12 *California Forms of Pleading and Practice, Ch. 121, Common Counts* (Matthew Bender)

4 *California Points and Authorities, Ch. 43, Common Counts and Bills of Particulars* (Matthew Bender)

1 *Matthew Bender Practice Guide: California Contract Litigation, Ch. 9, Seeking or Opposing Quantum Meruit or Quantum Valebant Recovery in Contract Actions*, 9.02, 9.15, 9.32

Publisher's Notes

There is no BAJI instruction on this subject.

LexisNexis Matthew Bender Expert Practice Tip--Defeating Claim Based on Open Book Account:

To defeat a claim based on an open book account, the defendant will have to prove that plaintiff's statement of account is inaccurate or incomplete. This could involve an attack on the manner in which the statement was prepared and maintained, or an attack on the underlying transaction itself (e.g., the statement is based on a shipment of goods that were not delivered or were defective). This seems like a

straightforward concept but "open book account" can be difficult to prove and, sometimes, to defeat. *By Ronald Oster and Rex Heeseman*

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewContracts LawBreachCauses of ActionGeneral OverviewContracts LawRemediesGeneral OverviewContracts LawSales of GoodsDamages & RemediesGeneral Overview



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California Forms of Jury Instruction

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CHAPTER 3 California Judicial Council Contracts Instructions

1-3 California Forms of Jury Instruction CACI 373

CACI 373 Common Count: Account Stated

[Name of plaintiff] claims that [name of defendant] owes [him/her/it] money on an account stated. To establish this claim, [name of plaintiff] must prove all of the following:

- 1. That [name of defendant] owed [name of plaintiff] money from previous financial transactions;**
- 2. That [name of plaintiff] and [name of defendant], by words or conduct, agreed that the amount stated in the account was the correct amount owed to [name of plaintiff];**
- 3. That [name of defendant], by words or conduct, promised to pay the stated amount to [name of plaintiff];**
- 4. That [name of defendant] has not paid [name of plaintiff] [any/all] of the amount owed under this account; and**
- 5. The amount of money [name of defendant] owes [name of plaintiff].**

New December 2005

■ "The essential elements of an account stated are: (1) previous transactions between the parties establishing the relationship of debtor and creditor; (2) an agreement between the parties, express or implied, on the amount due from the debtor to the creditor; (3) a promise by the debtor, express or implied, to pay the amount due." (*Zinn v. Fred R. Bright Co.* (1969) 271 Cal.App.2d 597, 600 [76 Cal.Rptr. 663] , internal citations omitted.)

■ "The agreement of the parties necessary to establish an account stated need not be express and frequently is implied from the circumstances. In the usual situation, it comes about by the creditor rendering a statement of the account to the debtor. If the debtor fails to object to the statement within a reasonable time, the law implies his agreement that the account is correct as rendered." (*Zinn, supra*, 271 Cal.App.2d at p. 600 , internal citations omitted.)

■ "An account stated is an agreement, based on the prior transactions between the parties, that the items of the account are true and that the balance struck is due and owing from one party to another. When the account is assented to, 'it becomes a new contract. An action on it is not founded upon the original items, but upon the balance agreed to by the parties. ...' Inquiry may not be had into those matters at all. It is upon the new contract by and under which the parties have adjusted their differences and reached an agreement.' " (*Gleason v. Klamer* (1980) 103 Cal.App.3d 782, 786-787 [163 Cal.Rptr. 483] , internal citations omitted.)

■ "To be an account stated, 'it must appear that at the time of the statement an indebtedness from one party to the other existed, that a balance was then struck and agreed to be the correct sum owing from the debtor to the creditor, and that the debtor expressly or impliedly promised to pay to the creditor the amount thus determined to be owing.' The agreement necessary to establish an account stated need not be express and is frequently implied from the circumstances. When a statement is rendered to a debtor and no reply is made in a reasonable time, the law implies an agreement that the account is correct as rendered. Actions on accounts stated frequently arise from a series of transactions which also constitute an open book account. However, an account stated may be found in a variety of commercial situations. The acknowledgement of a debt consisting of a single item may form the basis of a stated account. The key element in every context is agreement on the final balance due." (*Maggio, Inc. v. Neal* (1987) 196 Cal.App.3d 745, 752-753 [241 Cal.Rptr. 883] , internal citations omitted.)

■ "An account stated need not be submitted by the creditor to the debtor. A statement expressing the debtor's assent and acknowledging the agreed amount of the debt to the creditor equally establishes an account stated." (*Truestone, Inc. v. Simi West Industrial Park II* (1984) 163 Cal.App.3d 715, 726 [209 Cal.Rptr. 757] , internal citations omitted.)

■ " 'The common count is a general pleading which seeks recovery of money without specifying the nature of the claim Because of the uninformative character of the complaint, it has been held that the typical answer, a *general denial*, is sufficient to raise almost any kind of defense, including some which ordinarily require special pleading.' However, even where the plaintiff has pleaded in the form of a common count, the defendant must raise in the answer any new matter, that is, anything he or she relies on that is not put in issue by the plaintiff." (*Title Ins. Co. v. State Bd. of Equalization* (1992) 4 Cal.4th 715, 731 [14 Cal.Rptr.2d 822, 842 P.2d 121] , internal citations and footnote omitted.)

■ "The account stated may be attacked only by proof of 'fraud, duress, mistake, or other grounds cognizable in equity for the avoidance of an instrument.' The defendant 'will not be heard to answer when action is brought upon the account stated that the claim or demand was unjust, or invalid.' " (*Gleason, supra*, 103 Cal.App.3d at p. 787 , internal citations omitted.)

■ "An account stated need not cover all the dealings or claims between the parties. There may be a partial settlement and account stated as to some of the transactions." (*Gleason, supra*, 103 Cal.App.3d at p. 790 , internal citation omitted.)

■ "In the common law action of general assumpsit, it is customary to plead an indebtedness using

'common counts.' In California, it has long been settled the allegation of claims using common counts is good against special or general demurrers. The only essential allegations of a common count are '(1) the statement of indebtedness in a certain sum, (2) the consideration, i.e., goods sold, work done, etc., and (3) nonpayment.' " (*Farmers Ins. Exchange v. Zerin* (1997) 53 Cal.App.4th 445, 460 [61 Cal.Rptr.2d 707] , internal citations omitted.)

■ "A common count is not a specific cause of action, ... rather, it is a simplified form of pleading normally used to aver the existence of various forms of monetary indebtedness, including that arising from an alleged duty to make restitution under an assumpsit theory. When a common count is used as an alternative way of seeking the same recovery demanded in a specific cause of action, and is based on the same facts, the common count is demurrable if the cause of action is demurrable." (*McBride v. Boughton* (2004) 123 Cal.App.4th 379, 394 [20 Cal.Rptr.3d 115] , internal citations omitted.)

Secondary Sources

4 Witkin, California Procedure (4th ed. 1997) Pleading, § 515

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, §§ 972-973

1 *California Forms of Pleading and Practice, Ch. 8, Accounts Stated and Open Accounts*, §§ 8.10, 8.40 -8.46 (Matthew Bender)

1 *Matthew Bender Practice Guide: California Contract Litigation, Ch. 9, Seeking or Opposing Quantum Meruit or Quantum Valebant Recovery in Contract Actions*, 9.02, 9.15, 9.32

Publisher's Notes

There is no BAJI instruction on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewContracts LawBreachCauses of ActionGeneral OverviewContracts LawRemediesGeneral OverviewContracts LawRemediesCompensatory DamagesGeneral OverviewContracts LawSales of GoodsDamages & RemediesGeneral Overview



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California Forms of Jury Instruction

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CHAPTER 3 California Judicial Council Contracts Instructions

*1-3 California Forms of Jury Instruction CACI 374***CACI 374 Common Count: Mistaken Receipt**

[*Name of plaintiff*] **claims that** [*name of defendant*] **owes** [him/her/it] **money** [that was paid/for goods that were received] **by mistake. To establish this claim, [*name of plaintiff*] must prove all of the following:**

- 1. That [*name of plaintiff*] [paid [*name of defendant*] money/sent goods to [*name of defendant*]] by mistake;**
- 2. That [*name of defendant*] did not have a right to [that money/the goods];**
- 3. That [*name of plaintiff*] has asked [*name of defendant*] to return the [money/goods];**
- 4. That [*name of defendant*] has not returned the [money/goods] to [*name of plaintiff*]; and**
- 5. The amount of money that [*name of defendant*] owes [*name of plaintiff*].**

New December 2005

■ " 'As Witkin states in his text, "[a] common count is proper whenever the plaintiff claims a sum of money due, either as an indebtedness in a sum certain, or for the reasonable value of services, goods, etc., furnished. It makes no difference in such a case that the proof shows the original transaction to be an express contract, a contract implied in fact, or a quasi-contract." ' A claim for money had and received can be based upon money paid by mistake, money paid pursuant to a void contract, or a performance by one party of an express contract." (*Utility Audit Co., Inc. v. City of Los Angeles* (2003) 112 Cal.App.4th 950, 958 [5 Cal.Rptr.3d 520] , internal citations omitted.)

■ "It is well settled that no contract is necessary to support an action for money had and received other than the implied contract which results by operation of law where one person receives the money of another which he has no right, conscientiously, to retain. Under such circumstances the law will imply a promise to return the money. The action is in the nature of an equitable one and is based on the fact that the defendant has money which, in equity and good conscience, he ought to pay to the plaintiffs. Such an action will lie where the money is paid under a void agreement, where it is obtained by fraud or where it was paid by a mistake of fact." (*Stratton v. Hanning* (1956) 139 Cal.App.2d 723, 727 [294 P.2d 66] , internal citations omitted.)

■ *Restatement First of Restitution, section 28*, provides:

A person who has paid money to another because of a mistake of fact and who does not obtain what he expected in return is entitled to restitution from the other if the mistake was induced:

(a) by the fraud of the payee, or

(b) by his innocent and material misrepresentation, or

(c) by the fraud or material misrepresentation of a person purporting to act as the payee's agent, or

(d) by the fraud or material misrepresentation of a third person, provided that the payee has notice of the fraud or representation before he has given or promised something of value.

■ "Money paid upon a mistake of fact may be recovered under the common count of money had and received. The plaintiff, however negligent he may have been, may recover if his conduct has not altered the position of the defendant to his detriment." (*Thresher v. Lopez* (1921) 52 Cal.App. 219, 220 [198 P. 419] , internal citations omitted.)

■ "The common count is a general pleading which seeks recovery of money without specifying the nature of the claim Because of the uninformative character of the complaint, it has been held that the typical answer, a *general denial*, is sufficient to raise almost any kind of defense, including some which ordinarily require special pleading.' However, even where the plaintiff has pleaded in the form of a common count, the defendant must raise in the answer any new matter, that is, anything he or she relies on that is not put in issue by the plaintiff." (*Title Ins. Co. v. State Bd. of Equalization* (1992) 4 Cal.4th 715, 731 [14 Cal.Rptr.2d 822, 842 P.2d 121] , internal citations and footnote omitted.)

■ "Although such an action is one at law, it is governed by principles of equity. It may be brought 'wherever one person has received money which belongs to another, and which "in equity and good conscience," or in other words, in justice and right, should be returned. ... The plaintiff's right to recover is governed by principles of equity, although the action is one at law.' " (*Mains v. City Title Ins. Co.* (1949) 34 Cal.2d 580, 586 [212 P.2d 873] , internal citations omitted.)

■ "In the common law action of general assumpsit, it is customary to plead an indebtedness using 'common counts.' In California, it has long been settled the allegation of claims using common counts is good against special or general demurrers. The only essential allegations of a common count are '(1) the statement of indebtedness in a certain sum, (2) the consideration, i.e., goods sold, work done, etc., and (3) nonpayment.' " (*Farmers Ins. Exchange v. Zerlin* (1997) 53 Cal.App.4th 445, 460 [61 Cal.Rptr.2d 707] , internal citations omitted.)

■ "A common count is not a specific cause of action, ... rather, it is a simplified form of pleading normally used to

over the existence of various forms of monetary indebtedness, including that arising from an alleged duty to make restitution under an assumpsit theory. When a common count is used as an alternative way of seeking the same recovery demanded in a specific cause of action, and is based on the same facts, the common count is demurrable if the cause of action is demurrable." (*McBride v. Boughton* (2004) 123 Cal.App.4th 379, 394 [20 Cal.Rptr.3d 115] , internal citations omitted.)

Secondary Sources

4 Witkin, California Procedure (4th ed. 1997) Pleading, § 515

12 California Forms of Pleading and Practice, Ch. 121, *Common Counts* (Matthew Bender)

1 *Matthew Bender Practice Guide: California Contract Litigation*, Ch. 9, *Seeking or Opposing Quantum Meruit or Quantum Valebant Recovery in Contract Actions*, 9.02, 9.15, 9.32

Publisher's Notes

There is no BAJI instruction on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Contracts Law Breach Causes of Action General Overview Contracts Law Defenses Ambiguity & Mistake General Overview Contracts Law Remedies General Overview Contracts Law Remedies Compensatory Damages General Overview



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CHAPTER 3 California Judicial Council Contracts Instructions

1-3 California Forms of Jury Instruction CACI 375-CACI 399

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CACI 375Reserved for Future Use



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CHAPTER 3 California Judicial Council Contracts Instructions

*1-3 California Forms of Jury Instruction CACI VF-300***CACI VF-300 Breach of Contract**

We answer the questions submitted to us as follows:

1. Did [name of plaintiff] and [name of defendant] enter into a contract?

_____ Yes _____ No

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

2. Did [name of plaintiff] do all, or substantially all, of the significant things that the contract required [him/her/it] to do?

_____ Yes _____ No

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

3. Was [name of plaintiff] excused from having to do all, or substantially all, of the significant things that the contract required [him/her/it] to do?

_____ Yes _____ No

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

4. Did all the conditions occur that were required for [name of defendant]'s performance?

_____ Yes _____ No

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

5. Did [name of defendant] fail to do something that the contract required [him/her/it] to do?

_____ Yes _____ No

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

6. Was [name of plaintiff] harmed by that failure?

_____ Yes _____ No

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

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

**[a. Past [economic] loss [including [insert
descriptions of claimed damages]]:..... \$_____]**

**[b. Future [economic] loss [including [insert
descriptions of claimed damages]]:..... \$_____]**

..... **TOTAL \$_____**

Signed: _____

Presiding Juror

Dated: _____

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

New April 2004

If the verdict form used combines other causes of action involving both economic and non-economic damages, use "economic" in question 7.

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

This verdict form is based on *CACI No. 303, Breach of Contract--Essential Factual Elements*. This form is intended for use in most contract disputes. If more specificity is desired, see verdict forms that follow.

If the allegation is that the defendant breached the contract by doing something that the contract prohibited, then change question 5 to the following: "Did [*name of defendant*] do something that the contract prohibited [him/her/it] from doing?"

If specificity is not required, users do not have to itemize the damages listed in question 7. The breakdown is optional depending on the circumstances. If there are multiple causes of action, users may wish to combine the individual forms into one form.

Publisher's Notes

There is no BAJI verdict form on this subject.

LexisNexis Matthew Bender Expert Practice Tip--Using CACI VF-300: Obviously, this is a key instruction. However, first consider whether you want the jury to be so specific. Sometimes that is not beneficial (e.g., may adversely impact insurance coverage), but other times a detailed instruction can aid the jurors. Thus, if using *CACI VF-300*, consider an argument using a demonstrative prop to aid the jury when making the related argument. *By Rex Heeseman*

LexisNexis Matthew Bender Expert Practice Tip--Go Over Each Question in Closing: In cases where a special verdict is used, counsel should go over each question in closing argument, preferably with the use of enlargements or other graphic aids. *By Ronald Oster*

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJurorsGeneral OverviewCivil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewCivil ProcedureTrialsJury TrialsVerdictsSpecial VerdictsContracts LawBreachCauses of ActionGeneral Overview



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CHAPTER 3 California Judicial Council Contracts Instructions

1-3 California Forms of Jury Instruction CACI VF-301

CACI VF-301 Breach of Contract--Affirmative Defense--Unilateral Mistake of Fact

We answer the questions submitted to us as follows:

1. Was [name of defendant] mistaken about [insert description of mistake]?

_____ Yes _____ No

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

2. Did [name of plaintiff] know that [name of defendant] was mistaken and use that mistake to take advantage of [him/her/it]?

_____ Yes _____ No

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

3. Was [name of defendant]'s mistake caused by [his/her/its] excessive carelessness?

_____ Yes _____ No

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

4. Would [name of defendant] have agreed to enter into the contract if [he/she/it] had known about

the mistake?

_____ Yes _____ No

Signed: _____

Presiding Juror

Dated: _____

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

New April 2004

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case. This form is not a stand-alone verdict form. It may be incorporated into VF-300, *Breach of Contract*, if the elements of the affirmative defense are at issue.

This verdict form is based on *CACI No. 330, Affirmative Defense--Unilateral Mistake of Fact*. The verdict forms do not address all available affirmative defenses. The parties may need to create their own verdict forms to fit the issues involved in the case.

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

Publisher's Notes

There is no BAJI verdict form on this subject.

LexisNexis Matthew Bender Expert Practice Tip--Use Care When Arguing Unilateral Mistake: A "unilateral mistake" is normally beyond the experiences of many jurors. Thus, be careful how you explain or attack this legal principle. *By Rex Heeseman*

LexisNexis Matthew Bender Expert Practice Tip--Go Over Each Question in Closing: In cases where a special verdict is used, counsel should go over each question in closing argument, preferably with the use of enlargements or other graphic aids. *By Ronald Oster*

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewContracts LawBreachCauses of ActionGeneral OverviewContracts LawDefensesAmbiguity & MistakeUnilateral MistakeContracts LawFormationAmbiguity & MistakeUnilateral Mistake



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CHAPTER 3 California Judicial Council Contracts Instructions

*1-3 California Forms of Jury Instruction CACI VF-302***CACI VF-302 Breach of Contract--Affirmative Defense--Duress**

We answer the questions submitted to us as follows:

1. Did [*name of plaintiff*] use a wrongful act or wrongful threat to pressure [*name of defendant*] into consenting to the contract?

_____ Yes _____ No

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

2. Was [*name of defendant*] so afraid or intimidated by the wrongful act or wrongful threat that [he/she] did not have the free will to refuse to consent to the contract?

_____ Yes _____ No

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

3. Would [*name of defendant*] have consented to the contract without the wrongful act or wrongful threat?

_____ Yes _____ No

Signed: _____

Presiding Juror

Dated: _____

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

New April 2004

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case. This form is not a stand-alone verdict form. It may be incorporated into VF-300, *Breach of Contract*, if the elements of the affirmative defense are at issue.

This verdict form is based on *CACI No. 332, Affirmative Defense--Duress*. The verdict forms do not address all available affirmative defenses. The parties may need to create their own verdict forms to fit the issues involved in the case.

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

Publisher's Notes

There is no BAJI verdict form on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewCivil ProcedureTrialsJury TrialsVerdictsSpecial VerdictsContracts LawBreachCauses of ActionGeneral OverviewContracts LawDefensesDuress & Undue InfluenceGeneral Overview



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CHAPTER 3 California Judicial Council Contracts Instructions

1-3 California Forms of Jury Instruction CACI VF-303

CACI VF-303 Breach of Contract--Contract Formation at Issue

We answer the questions submitted to us as follows:

1. Were the contract terms clear enough so that the parties could understand what each was required to do?

_____ Yes _____ No

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

2. Did the parties agree to give each other something of value?

_____ Yes _____ No

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

3. Did the parties agree to the terms of the contract?

_____ Yes _____ No

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

4. Did [*name of plaintiff*] do all, or substantially all, of the significant things that the contract

required [him/her/it] to do?

_____ Yes _____ No

If your answer to question 4 is yes, then skip question 5 and answer question 6. If you answered no, answer question 5.

5. Was [*name of plaintiff*] excused from having to do all, or substantially all, of the significant things that the contract required [him/her/it] to do?

_____ Yes _____ No

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

6. Did all the conditions occur that were required for [*name of defendant*]'s performance?

_____ Yes _____ No

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

7. Did [*name of defendant*] fail to do something that the contract required [him/her/it] to do?

_____ Yes _____ No

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

8. Was [*name of plaintiff*] harmed by that failure?

_____ Yes _____ No

If your answer to question 8 is yes, then answer question 9. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

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

[a. Past economic loss:..... \$_____]

[b. Future economic loss:..... \$_____]

..... TOTAL \$_____

Signed: _____
Presiding Juror

Dated: _____

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

New October 2004

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

This verdict form is based on *CACI No. 302, Contract Formation--Essential Factual Elements*, and *CACI No. 303, Breach of Contract--Essential Factual Elements*. The elements concerning the parties' legal capacity and legal purpose will likely not be issues for the jury. If the jury is needed to make a factual determination regarding these issues, appropriate questions may be added to this verdict form.

If specificity is not required, users do not have to itemize all the damages listed in question 9. The breakdown is optional depending on the circumstances.

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

Publisher's Notes

There is no BAJI verdict form on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewCivil ProcedureTrialsJury TrialsVerdictsSpecial VerdictsContracts LawBreachCauses of ActionGeneral OverviewContracts LawFormationGeneral Overview



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CHAPTER 3 California Judicial Council Contracts Instructions

1-3 California Forms of Jury Instruction CACI VF-304-CACI VF-399

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CACI VF-304Reserved for Future Use



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CHAPTER 3A Matthew Bender Formation of Contract Instructions

1-3A California Forms of Jury Instruction 3A.syn

§ 3A.syn Synopsis to Chapter 3A: Matthew Bender Formation of Contract Instructions

MB 300A.01 Definition of Contract

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Definition of a Contract

[b] Elements of a Contract

[c] Oral Contracts

[d] Related Judicial Council Jury Instructions

MB 300A.02 Use of Nontechnical Language

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Liberal Construction

[b] Related Judicial Council Jury Instructions

MB 300A.03 Objective Test of Agreement

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300A.04 Agreement Not to Be Bound

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300A.05 Contract--Express or Implied

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Implied Contract

[b] Related Judicial Council Jury Instructions

MB 300A.06 Implied Contracts (Literary Property)

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Implied Agreement for Payment

[b] Related Judicial Council Jury Instructions

MB 300A.07 Account Stated by Creditor

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300A.08 Contracts Implied by Law--Goods Supplied or Services Rendered

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Quasi-contract

[b] Related Judicial Council Jury Instructions

MB 300A.09 Recovery in Quantum Meruit When Contract Is Illegal

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300A.10 Seller--Recovery of Price of Goods Sold

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300A.11-MB 300A.19 [Reserved for Future Use]

MB 300A.20 Offer Defined

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Definition of Offer

[b] Related Judicial Council Jury Instructions

MB 300A.21 Revocation

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Revocation

[b] Related Judicial Council Jury Instructions

1-3A California Forms of Jury Instruction 3A.syn

MB 300A.22 Acceptance by Words or Conduct

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Acceptance

[b] Related Judicial Council Jury Instructions

MB 300A.23 Offer Accepted by Mailing of Acceptance

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Acceptance by Mail

[b] Related Judicial Council Jury Instructions

MB 300A.24 Method of Acceptance Specified by Offer

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Prescribed Manner of Acceptance

[b] Related Judicial Council Jury Instructions

MB 300A.25 Acceptance

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Acceptance Must Be Absolute

[b] Related Judicial Council Jury Instructions

MB 300A.26 Acceptance of Benefits Assumes Duties

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Acceptance of Benefits Assumes Duties

[b] Related Judicial Council Jury Instructions

MB 300A.27 Acceptance of Same Thing Offered

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Acceptance of Same Thing

[b] Related Judicial Council Jury Instructions

MB 300A.28 Silence as Acceptance

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Communication of Acceptance

[b] Related Judicial Council Jury Instructions

MB 300A.29-MB 300A.39 [Reserved for Future Use]

MB 300A.40 Consideration--Thing of Value

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300A.41 Agreed-Upon Exchange

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300A.42 Existing Obligation and Compromise of Existing Claim

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300A.43 Past Performance Insufficient

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300A.44 Consideration for Written Agreements

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300A.45 Consideration for Modification of Contract Not in Writing

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Means of Modification

[b] Related Judicial Council Jury Instructions

MB 300A.46 Consideration Required for Modification of Written Contract by Oral Agreement

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Modification by Subsequent Oral Agreement

[b] Related Judicial Council Jury Instructions

MB 300A.47 Oral Modification of Written Contract Dependent on Waiver or Estoppel

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Effect of Waiver and Estoppel

[b] Related Judicial Council Jury Instructions

MB 300A.48-MB 300A.59 Reserved for Future Use

MB 300A.60 Promissory Estoppel

[1] Instruction

[2] Use of Instruction

[3] Comment



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CHAPTER 3A Matthew Bender Formation of Contract Instructions

1-3A California Forms of Jury Instruction Scope

Scope

SCOPE

This chapter covers the basic issues of contract formation that are likely to be presented to a jury. For the Judicial Council instructions on formation, performance, modification, interpretation, and breach of contract, see Ch. 3, *California Judicial Council Contracts Instructions*. Ch. 3 also includes Judicial Council instructions on contract defenses and damages. The instructions in this chapter are intended to supplement the Judicial Council instructions [see *Cal. Rules of Ct., Rule 2.1050*].

This chapter covers the following topics:

- Part A includes instructions on the different ways in which contracts may be formed, that is, expressly or implicitly, orally or in writing [see *MB 300A.01 -MB 300A.10*]. The determination of whether an oral or implied contract has been formed requires the jury to interpret the parties' conduct. Therefore, it may be necessary to include instructions on legal principles applicable to interpretation issues, which are discussed in Ch. 3B, *Matthew Bender Interpretation of Contract Instructions*.
- Part B includes instructions on various consent issues [see *MB 300A.20-MB 300A.28*].
- Part C includes instructions for cases in which an issue involving consideration may present a question of fact, such as implied contracts or the modification of written contracts [see *MB 300.40 -MB 300A.47*].
- Part D includes an instruction on promissory estoppel [see *MB 300A.60*].

Ch. 3C, *Matthew Bender Contract Party Instructions*, contains instructions on the persons who may sue or be sued on a contract, including the capacity of minors. Ch. 3F, *Matthew Bender Contract Defenses Instructions*, includes instructions on fact issues arising out of the alleged incapacity of an adult to enter into a contract.



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CHAPTER 3A Matthew Bender Formation of Contract Instructions
PART A TYPES OF CONTRACT

1-3A California Forms of Jury Instruction MB 300A.01

MB 300A.01 Definition of Contract

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

A contract is an agreement to do a certain thing.

[*OPTIONAL (See Use of Instruction)*]

It can also be an agreement not to do a certain thing.

Authority: *Civ. Code § 1549.*

[2] Use of Instruction

This instruction should be used in combination with the instructions applicable to the particular type of contract involved, that is, written or oral, express or implied. For example, if one of the issues is whether an oral agreement was formed, the instructions might be put together in the following way: "The first question is whether there was a contract between the parties for defendant to pay plaintiff a finder's fee. A contract is an agreement to do a certain thing." This would be followed by further applicable instructions on the issue of formation of a contract.

This instruction might also be used in a case when there is no issue of formation of contract as such, as an introduction to an understanding of other contract issues about which the jury will be instructed.

The optional paragraph is for use in cases when the agreement is to refrain from doing something. It is unnecessary and potentially confusing to include the negative when it has no application in the case.

For related Judicial Council instructions, see [3][d], *below*.

[3] Comment

[a] Definition of a Contract

A contract is an agreement to do or not to do a certain thing [*Civ. Code* § 1549]. The plaintiff has the burden of proving the existence of the contract because it is an essential element of the plaintiff's claim [*Evid. Code* § 500; *Reichert v. General Ins. Co.* (1968) 68 Cal.2d 822, 830, 69 Cal.Rptr. 321, 442 P.2d 377].

LexisNexis Matthew Bender Expert Practice Tip--Use Care If Using Statutory Definition of "Contract": Most jurors have a basic understanding of a contract. However, many may be confused by the legal explanation of that term in this instruction [*see Civ. Code* § 1549]. Thus, be careful how you address that situation. *By Rex Heeseman*

[b] Elements of a Contract

For there to be a contract, all of the following must exist [*Civ. Code* § 1550]:

- The parties must be capable of contracting;
- The parties must give their consent;
- The contract must have a lawful object; and
- The contract must have a sufficient cause or consideration.

The plaintiff has the burden of proving the existence of the contract because it is an essential element of the plaintiff's claim [*Evid. Code* § 500; *Reichert v. General Ins. Co.* (1968) 68 Cal.2d 822, 830, 69 Cal.Rptr. 321, 442 P.2d 377].

[c] Oral Contracts

By statute, contracts can be oral unless the statute of frauds is applicable [*Civ. Code* § 1622; *see, e.g., Cable & Computer Technology, Inc. v. Lockheed Sanders, Inc.* (9th Cir. 2000) 214 F.3d 1030, 1035 (evidence of exchange of promises supported by consideration, to team that would submit subcontract bid to defense contractor, would establish oral contract under California law; issue of fact precluded summary judgment)]. The principal statute of frauds is *Civ. Code* § 1624, instructions for which are included in Ch. 3F, *Matthew Bender Contract Defenses Instructions* . The Uniform Commercial Code contains its own statute of frauds governing the sale of goods [*see* Ch. 3H, *Matthew Bender Commercial Code Sales Contract Instructions*].

The fact that there are only certain categories of contracts that must be in writing does not affect the parties' right to choose to express their agreement exclusively in writing. A dispute over whether a writing expresses all of the parties' agreement presents a parol evidence question [*see* Ch. 3B, *Matthew Bender Interpretation of Contract Instructions*]. When only part of an agreement is in writing, parol evidence is admissible to prove the elements of the agreement that were not reduced to writing [*Code Civ. Proc.* § 1856(b); *Masterson v. Sine* (1968) 68 Cal.2d 222, 225, 65 Cal.Rptr. 545, 436 P.2d 561 ; *Hulse v. Juillard Fancy Foods Co.* (1964) 61 Cal.2d 571, 573, 39 Cal.Rptr. 529, 394 P.2d 65]. However, if the trial judge determines that the entire agreement has been reduced to an integrated writing, parol evidence of additional or contradictory terms is inadmissible [*Code Civ. Proc.* § 1856(b), (d); *Masterson v. Sine* (1968) 68 Cal.2d 222, 225, 65 Cal.Rptr. 545, 436 P.2d 561 ; *EPA Real Estate Partnership v. Kang* (1992) 12 Cal.App.4th 171, 175, 177, 15 Cal.Rptr.2d 209 ; *Banco Do Brasil, S.A. v. Latian, Inc.* (1991) 234 Cal.App.3d 973, 1000-1001, 1008-1009, 285 Cal.Rptr. 870 ; *see* Ch. 3B, *Matthew Bender Interpretation of Contract Instructions*].

[d] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 3, *California Judicial Council Contracts Instructions*]:

CACI No. 302 Contract Formation--Essential Factual Elements

CACI No. 303 Breach of Contract--Essential Factual Elements

CACI No. 304 Oral or Written Contract Terms

CACI No. 305 Implied-in-Fact Contract

CACI No. 306 Unformalized Agreement

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewContracts LawBreachCauses of ActionGeneral OverviewContracts LawFormationGeneral OverviewContracts LawTypes of ContractsOral Agreements

John F. Wells and Lise A. Pearlman were the original authors of this chapter. It has since been updated to reflect changes in the law, additional case citations and practice pointers by other lawyers as well as revisions including cross-references to the official CACI instructions.



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CHAPTER 3A Matthew Bender Formation of Contract Instructions
PART A TYPES OF CONTRACT

1-3A California Forms of Jury Instruction MB 300A.02

MB 300A.02 Use of Nontechnical Language

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

In considering expressions of agreement, you must not hold the parties to some ideal standard of precision and clarity in their choice of words. You must take language as it is and people as they are.

Authorities: *Masterson v. Sine* (1968) 68 Cal.2d 222, 224, 65 Cal.Rptr. 545, 436 P.2d 561 ; *Rivers v. Beadle* (1960) 183 Cal.App.2d 691, 695, 7 Cal.Rptr. 170 .

[2] Use of Instruction

This instruction should be used when there is an issue with regard to the formation of an oral or implied contract or a contract that is partly oral or implied and partly in writing. When an integrated writing is involved, the court will determine the existence and terms of the contract as a matter of law. The purpose of this instruction is to negate any impression that the requirement of certainty [see MB 300A.01] can only be met by formality. It is also useful when either or both of the parties used terms or expressions that may have been understood perfectly by the other party but might seem imprecise or inapt to others.

For related Judicial Council instructions, see [3][b], *below*.

[3] Comment

[a] Liberal Construction

Liberal construction of nontechnical language is favored to carry out the intent of the parties [*Masterson v. Sine* (1968)

68 Cal.2d 222, 224, 65 Cal.Rptr. 545, 436 P.2d 561 ; *Rivers v. Beadle* (1960) 183 Cal.App.2d 691, 695, 7 Cal.Rptr. 170].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 3, *California Judicial Council Contracts Instructions*]:

CACI No. 314 Interpretation--Disputed Term

CACI No. 315 Interpretation--Meaning of Ordinary Words

CACI No. 316 Interpretation--Meaning of Technical Words

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewContracts LawBreachCauses of ActionGeneral OverviewContracts LawContract InterpretationGeneral OverviewContracts LawFormationGeneral Overview

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CHAPTER 3A Matthew Bender Formation of Contract Instructions PART A TYPES OF CONTRACT

1-3A California Forms of Jury Instruction MB 300A.03

MB 300A.03 Objective Test of Agreement

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

To determine what it was the parties agreed to, you must ignore any undisclosed intention of either party and consider only the parties' outward expressions by words and acts.

Authorities: *Brant v. California Dairies, Inc.* (1935) 4 Cal.2d 128, 133, 48 P.2d 13 ; *Blumenfeld v. R. H. Macy & Co.* (1979) 92 Cal.App.3d 38, 46, 154 Cal.Rptr. 652 .

[2] Use of Instruction

This instruction should be used when there is an issue as to the parties' agreement on some term of the contract and there is some evidence before them that the contract as expressed does not comport with one of the party's subjective understanding of intent when the agreement was made. For purposes of determining the agreement, the jury will have to ignore evidence of undisclosed intention that may have been admitted on some other issue such as a defense of grounds for rescission or a tort claim by plaintiff for promissory fraud.

LexisNexis Matthew Bender Expert Practice Tip--Keep Argument Simple: This instruction should be understandable to most jurors. Hence, usually keep your related argument simple. *By Rex Heeseman*

LexisNexis Matthew Bender Expert Practice Tip --Using MB 300A .03: This is an important instruction because a party's "hidden intentions" are not relevant to interpreting a contract. This issue will usually surface during the course of the trial in determining what evidence is admissible. If some evidence of undisclosed intentions gets into evidence (because it is relevant to some other issue in the case), this instruction is important to limit the impact of such evidence. *By Ronald Oster*

[3] Comment

This instruction is based on the modern contract rule requiring objective manifestation of agreement [*Brant v. California Dairies, Inc.* (1935) 4 Cal.2d 128, 133, 48 P.2d 13 ; *Blumenfeld v. R. H. Macy & Co.* (1979) 92 Cal.App.3d 38, 46, 154 Cal.Rptr. 652]. In drafting jury instructions, counsel must take pains not to use expressions such as "meeting of the minds," or "intent of the parties," which may suggest that subjective intent is relevant. A party is bound even if he or she misunderstood what he or she was agreeing to do [*Blumenfeld v. R. H. Macy & Co.* (1979) 92 Cal.App.3d 38, 46, 154 Cal.Rptr. 652]. On the issue of mistake as to the subject matter of the contract, see MB 300A.27[3] (law school problem of the two ships "Peerless"). The objective intent requirement does not affect the relevancy of evidence of subjective intent on the question of whether fraud, mistake, or other grounds for rescission might be present. These instructions are included in Ch. 3G, *Matthew Bender Rescission of Contract Instructions*.

In a sale-of-goods case in which the plaintiff contended that the parties' contract comprised only the defendant's written proposal to furnish goods and the plaintiff's check in full payment, while the defendant contended that additional documents (an invoice, a confirmation, certain receipts) together with the proposal and check evidenced the contract, there was substantial evidence to support the jury's finding in favor of the plaintiff's contention. The court of appeal noted: "And the parties do not dispute that the trial court correctly instructed the jury as follows: ... In determining the terms of the contract ... may consider all of the circumstances surrounding the contract, including the negotiations and statements of the parties prior to the contract; the object, nature, and subject matter of the contract; and the subsequent acts and conduct of the parties" [*Brittalia Ventures v. Stuke Nursery Co.* (2007) 153 Cal. App. 4th 17, 23, 62 Cal. Rptr. 3d 467] . This instruction was submitted by the defendant.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Contracts Law Breach Causes of Action General Overview Contracts Law Contract Interpretation General Overview Contracts Law Formation General Overview

John F. Wells and Lise A. Pearlman were the original authors of this chapter. It has since been updated to reflect changes in the law, additional case citations and practice pointers by other lawyers as well as revisions including cross-references to the official CACI instructions.



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CHAPTER 3A Matthew Bender Formation of Contract Instructions PART A TYPES OF CONTRACT

1-3A California Forms of Jury Instruction MB 300A.04

MB 300A.04 Agreement Not to Be Bound

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

If there appears to be a contract between two parties but the parties have in fact agreed between themselves that it will not be binding, then no contract exists.

Authorities: *P. A. Smith Co. v. Muller* (1927) 201 Cal. 219, 222, 256 P. 411 ; *Smith v. MacDonald* (1918) 37 Cal.App. 503, 505-506, 174 P. 80 .

[2] Use of Instruction

This instruction should be used when one party asserts that the parties agreed not to be bound by what otherwise appears to be a binding contract.

[3] Comment

Parties may agree that an instrument that they have executed is not legally enforceable [*Smith v. MacDonald* (1918) 37 Cal.App. 503, 505, 174 P. 80]. Evidence may always be introduced to show that a contract was a sham [*P.A. Smith Co. v. Muller* (1927) 201 Cal. 219, 224, 256 P. 411]. It makes no difference if the alleged contract is in writing because the parol evidence rule has no application to an offer of proof that a writing is not intended to have effect [*P. A. Smith Co. v. Muller* (1927) 201 Cal. 219, 222, 256 P. 411]. It is thereby possible to disprove the validity of what might otherwise appear to be an integrated written agreement and prove the existence of a contrary oral agreement without running afoul of the parol evidence rule [*P. A. Smith Co. v. Muller* (1927) 201 Cal. 219, 222, 256 P. 411]. Either party may still be liable to third parties based on their apparent contractual relationship or liable to each other in quasi contract.

LexisNexis Matthew Bender Expert Practice Tip--Be Specific in Argument: This is a challenging

concept--that a contract seems present but the parties agreed nothing will be binding. If you are making that argument, try to be specific. *By Rex Heeseman*

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewContracts LawBreachCauses of ActionGeneral OverviewContracts LawContract InterpretationGeneral OverviewContracts LawFormationGeneral Overview

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CHAPTER 3A Matthew Bender Formation of Contract Instructions
PART A TYPES OF CONTRACT

1-3A California Forms of Jury Instruction MB 300A.05

MB 300A.05 Contract--Express or Implied

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INST. NO.** _____

The terms of a contract may be express or implied. The express terms of a contract are stated in words. The implied terms of a contract are shown by conduct.

[*OPTIONAL (See Use of Instruction)*]

Implied terms can also be shown by custom or usage.

Authorities: *Civ. Code* §§ 1619-1621; *Code Civ. Proc.* § 1856(c); *Penn. Sec. Life Ins. Co. v. Rising* (1976) 62 *Cal.App.3d* 302, 307, 133 *Cal.Rptr.* 59 .

[2] Use of Instruction

This instruction should be used when one party is claiming that there are implied terms to a contract. This instruction should be followed by instructions on the objective standard [see *MB 300A.03*] and consideration [see *MB 300A.40*]. These instructions should be sufficient in most situations involving an issue with regard to the formation of an implied contract. However, practitioners should be aware that case law on the particular subject with which they are dealing may require further refinements. An example is the unsolicited submission of a manuscript [see *MB 300A.06*].

This instruction should not be given when the court has ruled that parol evidence of the contents of an integrated written contract is not admissible or when the statute of frauds is allegedly applicable.

For related Judicial Council instructions, see [3][b], *below*.

LexisNexis Matthew Bender Expert Practice Tip--Remember That Actions Speak Louder Than Words: Express terms are usually easy to deal with, but implied terms are not. Recall, though, that "actions speak louder than words." That familiar refrain may simplify your argument. *By Rex Heeseman*

LexisNexis Matthew Bender Expert Practice Tip--Important Terms Should Be Expressed: The more important a contract term is to the parties, the more the jury will expect the term to be expressed orally or in writing. If an important term is not expressed, this will require some explanation, such as prior course of conduct between the parties, industry custom and usage, and so on. *By Ronald Oster*

[3] Comment

[a] Implied Contract

An implied contract is sometimes called an "implied-in-fact" contract to distinguish it from a contract implied by law. An "implied-at-law contract," or "quasi-contract," is in reality not a contract at all, but rather an obligation imposed by law when one party has received unjust enrichment [see *In re De Laurentiis Entertainment Group Inc.* (9th Cir. 1992) 963 F.2d 1269, 1272 ; *County of Santa Clara v. Robbiano* (1960) 180 Cal.App.2d 845, 848, 5 Cal.Rptr. 19]. Both types of obligation are often alleged in the same case [see, e.g., *Mann v. Columbia Pictures, Inc.* (1982) 128 Cal.App.3d 628, 631, 180 Cal.Rptr. 522]. For an implied-in-fact contract to be created, there must exist both mutual assent and consideration to the same extent required of an express contract [*Desny v. Wilder* (1956) 46 Cal.2d 715, 735, 299 P.2d 257 ; *Division of Labor Law Enforcement v. Transpacific Transportation Co.* (1977) 69 Cal.App.3d 268, 275, 137 Cal.Rptr. 855]. The only difference between a contract implied-in-fact and an express contract is in the manner of proof of assent: assent to an implied-in-fact contract is determined by evidence of conduct rather than verbal expressions [*Marvin v. Marvin* (1976) 18 Cal.3d 660, 678 n.16, 134 Cal.Rptr. 815, 557 P.2d 106 ; *Desny v. Wilder* (1956) 46 Cal.2d 715, 735-736, 299 P.2d 257]. The burden of proof is on the party seeking to enforce the contract [*Mann v. Columbia Pictures, Inc.* (1982) 128 Cal.App.3d 628, 646-647, 180 Cal.Rptr. 522].

In *Maglica v. Maglica* [*Maglica v. Maglica* (1998) 66 Cal.App.4th 442, 78 Cal.Rptr.2d 101], an unmarried woman claimed breach of an agreement to share in the equity of her cohabitant's lucrative business. The court of appeal held that the trial court erred in giving instructions that may have misled the jury into concluding that evidence that *can* support a finding of an implied-in-fact contract could not [*Maglica v. Maglica* (1998) 66 Cal.App.4th 442, 454-457, 78 Cal.Rptr.2d 101 (instructions affirmatively suggested that facts of parties (1) living together, (2) holding themselves out as spouses, and (3) providing services such as companionship could not as a matter of law support finding of implied contract)]. The court stated that the jury instead should have been instructed that although the facts at issue did not by themselves show an implied agreement to share property, they could, when taken together and in conjunction with other facts bearing more directly on the alleged arrangement, show an implied agreement [*Maglica v. Maglica* (1998) 66 Cal.App.4th 442, 455-457, 78 Cal.Rptr.2d 101].

The same contract may be partly express and partly implied, e.g., an agreement reached by express oral statements and by conduct [*Penn. Sec. Life Ins. Co. v. Rising* (1976) 62 Cal.App.3d 302, 308, 133 Cal.Rptr. 59] or a written agreement supplemented by implied terms such as those derived from custom and usage [*Code Civ. Proc. § 1856(c)*; *Hind v. Oriental Products Co., Inc.* (1925) 195 Cal. 655, 667, 235 P. 438 ; *Pastorino v. Greene Brothers* (1949) 90 Cal.App.2d 841, 845-846, 204 P.2d 368]. However, even if the evidence could support a finding of an implied-in-fact agreement that a newly-hired employee could not be terminated except for good cause, that evidence would be irrelevant when a written contract of employment provides that the employee can be terminated "upon two weeks notice." There cannot be both a valid express contract and also an implied contract, each embracing the same subject but requiring different results [*Halvorsen v. Aramark Uniform Services, Inc.* (1998) 65 Cal.App.4th 1383, 1388, 77 Cal.Rptr.2d 383].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 3, *California Judicial Council Contracts Instructions*]:

CACI No. 305 Implied-in-Fact Contract

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewContracts LawBreachCauses of ActionGeneral OverviewContracts LawFormationGeneral OverviewContracts LawTypes of ContractsExpress ContractsContracts LawTypes of ContractsImplied-in-Fact Contracts

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CHAPTER 3A Matthew Bender Formation of Contract Instructions
PART A TYPES OF CONTRACT

1-3A California Forms of Jury Instruction MB 300A.06

MB 300A.06 Implied Contracts (Literary Property)

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

For Plaintiff to recover for the use of [his/her/its] ideas, Plaintiff has the burden of proving all of the following facts:

- 1. That Plaintiff submitted [his/her/its] ideas for _____ [describe ideas] to Defendant, who received the ideas;**
- 2. That either before or at the time Plaintiff submitted [his/her/its] ideas to Defendant, [he/she/it] clearly conditioned the submission of the ideas on Defendant's agreement to pay for them if Defendant used them;**
- 3. That Defendant knew, or should have known, about the condition of payment _____ [before or at the time] Plaintiff's ideas were submitted by Defendant and Defendant proceeded voluntarily to accept the submission of Plaintiff's ideas; and**
- 4. That in _____ [writing or preparing] _____ [describe literary work or portion of literary work that defendant allegedly wrote or prepared from plaintiff's ideas], Defendant actually used Plaintiff's ideas, and not Defendant's own ideas or ideas from another source.**

In making your decision as to whether Defendant received and actually used Plaintiff's ideas, you may compare Plaintiff's ideas with Defendant's work. If an ordinary person would consider Defendant's work and Plaintiff's ideas basically similar, this is circumstantial evidence that Defendant did receive and use Plaintiff's ideas. You must weigh this evidence against any other evidence that Defendant did not receive and did not use Plaintiff's

ideas.

Authorities: *Desny v. Wilder* (1956) 46 Cal.2d 715, 299 P.2d 257 ; *Mann v. Columbia Pictures, Inc.* (1982) 128 Cal.App.3d 628, 180 Cal.Rptr. 522 ; *Kovacs v. Mutual Broadcasting System* (1950) 99 Cal.App.2d 56, 65, 221 P.2d 108 ; see *Gunther-Wahl Prods., Inc. v. Mattel, Inc.* (2002) 104 Cal.App.4th 27, 42-43, 128 Cal.Rptr.2d 50 .

[2] Use of Instruction

This instruction should be used when plaintiff claims the existence of an implied contract for payment for the use of literary ideas. It is an example of how the type of conduct giving rise to a contract may be circumscribed by case law on a particular subject. On the issue of compensation for the use of literary ideas, it was industry concern over the handling of unsolicited manuscripts that led the courts to specify precisely what conduct would give rise to an implied agreement under such circumstances. The final paragraph instructs the jury that they can compare the ideas and the work to ascertain whether the ideas were received and used. A preponderance of the evidence instruction should be used with this instruction [see Ch. 2, *California Judicial Council Evidence Instructions*, CACI No. 200 ("Obligation to Prove--More Likely True Than Not True")].

For related Judicial Council instructions, see [3][b], *below*.

LexisNexis Matthew Bender Expert Practice Tip--Remember That Actions Speak Louder Than

Words: As noted in the Practice Tip in MB 300A.05[2], express terms are usually easy to deal with, but implied terms are not. Recall, though, that "actions speak louder than words." That familiar refrain may simplify your argument. *By Rex Heeseman*

[3] Comment

[a] Implied Agreement for Payment

This instruction is a modification of the one given in *Mann v. Columbia Pictures, Inc.* [*Mann v. Columbia Pictures, Inc.* (1982) 128 Cal.App.3d 628, 632, 180 Cal.Rptr. 522]. A person who submits literary ideas to another person, who receives them, on the condition that payment will be made if the ideas are used, is entitled to recover on an implied contract if the ideas are used [*Desny v. Wilder* (1956) 46 Cal.2d 715, 734, 299 P.2d 257]. An inference that the material was received and used can be drawn from similarity of the material submitted and the defendant's work, but the inference can be rebutted by direct evidence to the contrary [*Mann v. Columbia Pictures, Inc.* (1982) 128 Cal.App.3d 628, 648, 180 Cal.Rptr. 522 ; *Kovacs v. Mutual Broadcasting System* (1950) 99 Cal.App.2d 56, 65, 221 P.2d 108].

Unlike the instruction given in *Mann*, the instruction in [1], *above*, does not include a requirement that the jury find that the ideas that were used had value. In *Desny v. Wilder* [*Desny v. Wilder* (1956) 46 Cal.2d 715, 734, 299 P.2d 257], the court held that the fact that the ideas were of some value could automatically be inferred from proof of use [*Desny v. Wilder* (1956) 46 Cal.2d 715, 743, 299 P.2d 257]. Moreover, since the entire action is predicated on the absence of an agreed price, any recovery will be limited to the reasonable value of plaintiff's ideas [*Desny v. Wilder* (1956) 46 Cal.2d 715, 734, 299 P.2d 257 ; *Mann v. Columbia Pictures, Inc.* (1982) 128 Cal.App.3d 628, 632, 180 Cal.Rptr. 522]. Therefore, a separate instruction on reasonable value as the measure of damages should be given [see Ch. 3E, *Matthew Bender Contract Damages Instructions*].

With regard to the "clearly conditioned" language set forth in the instruction, one court of appeal has held that the trial court prejudicially erred by instructing the jury that plaintiffs had to "clearly condition" the disclosure of their idea on defendant's agreement to pay for it if used. In that case, plaintiffs were invited to submit their ideas to a toy maker, whom plaintiffs claimed subsequently used the ideas without paying for them. The court of appeal held that the instruction as given incorrectly forced the jury to find against plaintiffs unless they "*clearly conditioned* their disclosure on Mattel's agreement to pay ... if it used the ... concept or any portion of it." The court of appeal found that the jury

could easily interpret that language to require an express oral or written representation of compensation, which the law does not require for an implied contract [*Gunther-Wahl Prods., Inc. v. Mattel, Inc.* (2002) 104 Cal.App.4th 27, 42-43, 128 Cal.Rptr.2d 50].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 3, *California Judicial Council Contracts Instructions*]:

CACI No. 305, Implied-in-Fact Contract

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewContracts LawBreachCauses of ActionGeneral OverviewContracts LawFormationGeneral OverviewContracts LawTypes of ContractsImplied-in-Fact ContractsContracts LawTypes of ContractsImplied-in-Law Contracts

John F. Wells and Lise A. Pearlman were the original authors of this chapter. It has since been updated to reflect changes in the law, additional case citations and practice pointers by other lawyers as well as revisions including cross-references to the official CACI instructions.



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CHAPTER 3A Matthew Bender Formation of Contract Instructions
PART A TYPES OF CONTRACT

1-3A California Forms of Jury Instruction MB 300A.07

MB 300A.07 Account Stated by Creditor**[1] Instruction**[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

For you to find that Defendant is liable to Plaintiff for the balance stated on Plaintiff's bill, Plaintiff has the burden of proving both of the following facts:

- 1. That Defendant received from Plaintiff _____ [describe bill or statement] showing the balance owed by Defendant to Plaintiff; and**
- 2. That Defendant indicated agreement with Plaintiff's statement of the balance due.**

If Defendant received the bill and failed to object to it within a reasonable time, that is circumstantial evidence that Defendant agreed the bill was owed. The weight you give this evidence is up to you to decide in light of other evidence explaining Defendant's conduct.

Authority: *Zinn v. Fred R. Bright Co.* (1969) 271 Cal.App.2d 597, 601, 76 Cal.Rptr. 663 .

[2] Use of Instruction

This instruction should be used when the plaintiff is relying on an account stated resulting from a bill or statement sent to defendant to which defendant did not object. A preponderance of the evidence instruction must be used with this instruction [see Ch. 2, *California Judicial Council Evidence Instructions*, CACI No. 200 ("Obligation to Prove--More Likely True Than Not True")].

LexisNexis Matthew Bender Expert Practice Tip--Argument Should Be Thorough But Simple:

"Account stated" is a relatively common legal claim. However, that term is alien to many jurors. Thus,

the related argument should normally be thorough but simple. *By Rex Heeseman*

LexisNexis Matthew Bender Expert Practice Tip--Overcoming Concept That "Silence Implies Consent": The concept that "silence implies consent" is reflected in this instruction. This concept can be overcome by showing that the defendant was not aware of the basis for an objection until later. *By Ronald Oster*

[3] Comment

An account stated is in effect a type of novation with its own special method of proof. If prior transactions existed for which a balance due was sent to defendant, the plaintiff does not have to sue on the original contract, but may show that defendant failed to object to the balance within a reasonable time. Whether the debtor acquiesced or agreed to the amount due from defendant is a question of fact [*Zinn v. Fred R. Bright Co. (1969) 271 Cal.App.2d 597, 601, 76 Cal.Rptr. 663*].

An account stated may exist for only some of the parties' transactions [*California Milling Corp. v. White (1964) 229 Cal.App.2d 469, 477, 40 Cal.Rptr. 301*]. In that situation, the instruction should be modified to indicate which claims on the bill are at issue.

The defendant's failure to object to a statement will support an inference of assent to the balance stated, but the trier of fact may also consider other facts in deciding whether defendant agreed to the bill [*Zinn v. Fred R. Bright Co. (1969) 271 Cal.App.2d 597, 601-602, 76 Cal.Rptr. 663*].

Ordinarily an account stated will be relied on by the creditor in seeking payment from the debtor, but an account stated may also be a defense against a creditor's claim for a larger amount [see Ch. 3F, *Matthew Bender Contract Defenses Instructions*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Contracts Law Breach Causes of Action General Overview Contracts Law Formation General Overview

John F. Wells and Lise A. Pearlman were the original authors of this chapter. It has since been updated to reflect changes in the law, additional case citations and practice pointers by other lawyers as well as revisions including cross-references to the official CACI instructions.



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California Forms of Jury Instruction

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CHAPTER 3A Matthew Bender Formation of Contract Instructions
PART A TYPES OF CONTRACT

1-3A California Forms of Jury Instruction MB 300A.08

MB 300A.08 Contracts Implied by Law--Goods Supplied or Services Rendered**[1] Instruction**[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

To hold Defendant liable to Plaintiff for the reasonable value of _____ [describe the goods or services], Plaintiff has the burden of proving all of the following facts:

1. That Plaintiff in fact _____ [supplied or furnished] _____ [describe goods or services] to Defendant;

2. That Defendant benefited from receiving _____ [describe goods or services]; and

[EITHER (See Use of Instruction)]

3. That under the circumstances, both parties should have expected that the goods were going to be paid for.

[OR]

3. That under the circumstances, both parties should have expected that Plaintiff's services were going to be compensated.

Authorities: *Philpott v. Superior Court* (1934) 1 Cal.2d 512, 517-518, 36 P.2d 635 ; *Culver Adjustment Bureau v. Hawkins Constr. Co.* (1963) 217 Cal.App.2d 143, 146, 31 Cal.Rptr. 569 ; *Caminetti v. Prudence Etc. Ins. Assn.* (1944)

62 Cal.App.2d 945, 951, 146 P.2d 15 .

[2] Use of Instruction

This instruction should be used when the plaintiff is relying on a quasi-contract for reasonable compensation for goods furnished or services rendered. That cause of action is often combined with a cause of action for breach of contract. It generally permits recovery when an express contract is unenforceable, such as when the statute of frauds prevents recovery on the contract. The first alternative Paragraph 3 is for use when the cause of action is for goods supplied. The second alternative Paragraph 3 is for use when the cause of action is for services rendered. A preponderance of the evidence instruction should be used with this instruction [see Ch. 2, *California Judicial Council Evidence Instructions*, CACI No. 200 ("Obligation to Prove--More Likely True than Not True")].

For related Judicial Council instructions, see [3][b], *below*.

LexisNexis Matthew Bender Expert Practice Tip--Don't Talk About "Quasi-Contract": This instruction brings to mind the saying "you get what you pay for." Thus, if you receive something, you should expect to pay for it. Taking this or a similar approach is better than talking about a quasi-contract.
By Rex Heeseman

[3] Comment

[a] Quasi-contract

Unlike a true contract, a quasi-contract does not depend on a showing of assent or consideration; instead, it is founded on a relationship from which an obligation is imposed by law, regardless of intent, because good conscience dictates that the person benefited should make reimbursement [*In re De Laurentiis Entertainment Group Inc.* (9th Cir. 1992) 963 F.2d 1269, 1272 ; *County of Santa Clara v. Robbiano* (1960) 180 Cal.App.2d 845, 848, 5 Cal.Rptr. 19]. Notwithstanding any equitable aspects of the remedy, the action is one at law for which a jury may be demanded [see *Philpott v. Superior Court* (1934) 1 Cal.2d 512, 523, 36 P.2d 635].

The most common quasi-contract actions are for goods furnished or for services rendered [see, e.g., *Chodos v. West Publishing Co., Inc.* (9th Cir. 2002) 292 F.3d 992, 1001-1002 (in case in which legal publisher breached author agreement by rejecting completed manuscript solely for commercial reasons and not because of any defect, author was entitled to sue for restitution for time and effort he reasonably invested in writing manuscript; full performance does not make restitution unavailable if any part of consideration due from defendant is something other than liquidated debt); *Day v. Alta Bates* (2002) 98 Cal.App.4th 243, 248-249, 119 Cal.Rptr.2d 606 (plaintiff's attorney in unsuccessful medical malpractice action brought quantum meruit action against hospital that filed lien in malpractice action; summary judgment for hospital affirmed as attorney failed to show that his services were either performed at request of hospital or were of benefit to it)]. However, the gravamen of the action--that the defendant has obtained a benefit that may not be justly retained--is not limited to these situations [see Witkin, Summary of California Law, vol. 1, *Contracts*, §§ 1013-1042 (10th ed. 2005)].

Fact issues properly submitted to the jury include a determination whether the plaintiff rendered the services and whether defendant derived a benefit therefrom [see *Culver Adjustment Bureau v. Hawkins Constr. Co.* (1963) 217 Cal.App.2d 143, 146, 31 Cal.Rptr. 569 ; *Meredith v. Marks* (1963) 212 Cal.App.2d 265, 272, 27 Cal.Rptr. 737]. The jury is also entitled to consider whether the services were rendered under circumstances warranting the inference that it was the expectation of both parties that payment should be made [*Caminetti v. Prudence Etc. Ins. Assn.* (1944) 62 Cal.App.2d 945, 951, 146 P.2d 15 ; see Witkin, Summary of California Law, vol. 1, *Contracts*, § 1038 (10th ed. 2005)], and the amount of compensation that is reasonable [*Meredith v. Marks* (1963) 212 Cal.App.2d 265, 272-273, 27 Cal.Rptr. 737 ; see Ch. 3E, *Matthew Bender Contract Damages Instructions*]. For example, in *Maglica v. Maglica* [*Maglica v. Maglica* (1998) 66 Cal.App.4th 442, 78 Cal.Rptr.2d 101], the jury considered the value of services rendered

by an unmarried woman to the flashlight business owned by her cohabitant, and awarded \$84 million on her quantum meruit claim. The court of appeal held that instructing the jury that it could value the measure of plaintiff's services "by [t]he value by which defendant has benefited as a result of [her] services" was error [*Maglica v. Maglica* (1998) 66 Cal.App.4th 442, 450-452, 78 Cal.Rptr.2d 101 (jury instruction stated that reasonable value of services could be either (1) reasonable value of what it would have cost defendant to obtain those services from another, or (2) value by which defendant benefited as result of services rendered by plaintiff)]. The court noted that the threshold requirement of a benefit from the services rendered can lead to confusion; that benefit is not necessarily related to the reasonable value of the services [*Maglica v. Maglica* (1998) 66 Cal.App.4th 442, 450-451, 78 Cal.Rptr.2d 101].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 3, *California Judicial Council Contracts Instructions*]:

CACI No. 305 Implied-in-Fact Contract

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Contracts Law Breach Causes of Action General Overview Contracts Law Formation General Overview Contracts Law Sales of Goods Damages & Remedies General Overview Contracts Law Types of Contracts Implied-in-Law Contracts

John F. Wells and Lise A. Pearlman were the original authors of this chapter. It has since been updated to reflect changes in the law, additional case citations and practice pointers by other lawyers as well as revisions including cross-references to the official CACI instructions.



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CHAPTER 3A Matthew Bender Formation of Contract Instructions
PART A TYPES OF CONTRACT

1-3A California Forms of Jury Instruction MB 300A.09

MB 300A.09 Recovery in Quantum Meruit When Contract Is Illegal

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

The contract between Plaintiff and Defendant was not enforceable because _____ [describe illegality]. However, this does not necessarily mean that Plaintiff should not get paid anything for the work done. Plaintiff may still recover what [his/her/its] services were reasonably worth if [he/she/it] can prove all of the following three things:

- 1. That Defendant knew that the contract was illegal;**
- 2. That Plaintiff did not know that the contract was illegal; and**
- 3. That Plaintiff's ignorance of the illegality was reasonable under the circumstances.**

Authority: *Louis v. Wainscott* (1954) 124 Cal.App.2d 345, 351, 268 P.2d 835 .

[2] Use of Instruction

This instruction should be used in cases that involve illegal contracts when the plaintiff claims to have acted in justifiable ignorance. For a general instruction governing recovery in quantum meruit, see *MB 300A.08*.

[3] Comment

Even if a contract is void, there may be a valid claim for quantum meruit as long as the illegality does not violate strong public policy, that is, if the contract is *malum prohibitum* and not *malum in se* [see *McGillycuddy v. Los Verjels Land*

etc. Co. (1931) 213 Cal. 145, 146-147, 2 P.2d 19 (services in exchange for stock that could not be issued); *Trumbo v. Bank of Berkeley (1947) 77 Cal.App.2d 704, 710, 176 P.2d 376* (invalid agreement by promoters to have directors employ plaintiff as permanent officer); *see also Lawn v. Camino Heights, Inc. (1971) 15 Cal.App.3d 973, 980-983, 93 Cal.Rptr. 621*]. Thus, when a contract is illegal because of facts of which the defendant is aware but the plaintiff is justifiably ignorant, recovery of the value of the performance is permitted [*Holland v. Morgan & Peacock Properties (1959) 168 Cal.App.2d 206, 210-211, 335 P.2d 769* ; *Louis v. Wainscott (1954) 124 Cal.App.2d 345, 351, 268 P.2d 835* ; *see* Restatement (Second) of Contracts §§ 180, 198(a)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Contracts Law Breach Causes of Action General Overview Contracts Law Formation General Overview Contracts Law Remedies Equitable Relief Quantum Meruit

John F. Wells and Lise A. Pearlman were the original authors of this chapter. It has since been updated to reflect changes in the law, additional case citations and practice pointers by other lawyers as well as revisions including cross-references to the official CACI instructions.



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CHAPTER 3A Matthew Bender Formation of Contract Instructions
PART A TYPES OF CONTRACT

1-3A California Forms of Jury Instruction MB 300A.10

MB 300A.10 Seller--Recovery of Price of Goods Sold**[1] Instruction**[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Defendant claims that Plaintiff sold the goods to Defendant knowing that [he/she/it] bought them for an illegal purpose. If you find that this is true, Plaintiff is not entitled to be paid for the goods unless [he/she/it] can prove both of the following two things:

- 1. That it was not made part of the contract that the goods would be used for the illegal purpose; and**
- 2. That Plaintiff did nothing else to help Defendant accomplish the illegal purpose.**

Authority: *Gallick v. Castiglione* (1934) 2 Cal.App.2d 716, 717-718, 38 P.2d 858 .

[2] Use of Instruction

This instruction should be used when the defendant raises the defense of illegality in an action for payment under a contract. For a general instruction governing recovery in quantum meruit, see *MB 300A.08*.

LexisNexis Matthew Bender Expert Practice Tip --Use Care If Proposing MB 300A .10: It will be difficult for many jurors to follow this instruction, especially with its three references to "illegal purpose." Further, this will be a difficult instruction to apply. If the contract is illegal because of a technical deficiency that was unknown to plaintiff (e.g., a failure to register stock properly), the plaintiff has a chance. However, the more obvious the illegality, the bigger the burden on plaintiff to explain ignorance of the illegality. *By Rex Heeseman and Ronald Oster*

[3] Comment

A seller may recover the price of goods sold in spite of his or her knowledge that they were bought for an illegal purpose if (1) it was not made a part of the contract that the goods should be so used, and (2) the seller did nothing to further the unlawful design [*Gallick v. Castiglione* (1934) 2 Cal.App.2d 716, 717-718, 38 P.2d 858].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewContracts LawBreachCauses of ActionGeneral OverviewContracts LawFormationGeneral OverviewContracts LawSales of GoodsBreach, Repudiation & ExcuseGeneral Overview

John F. Wells and Lise A. Pearlman were the original authors of this chapter. It has since been updated to reflect changes in the law, additional case citations and practice pointers by other lawyers as well as revisions including cross-references to the official CACI instructions.



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CHAPTER 3A Matthew Bender Formation of Contract Instructions
PART A TYPES OF CONTRACT

1-3A California Forms of Jury Instruction MB 300A.11-MB 300A.19

[Reserved for Future Use]

MB 300A.11[Reserved for Future Use]



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CHAPTER 3A Matthew Bender Formation of Contract Instructions
PART B. CONSENT

1-3A California Forms of Jury Instruction MB 300A.20

MB 300A.20 Offer Defined**[1] Instruction**

[PLAINTIFF'S/DEFENDANT'S] PROPOSED INSTR. NO. _____

An offer is a definite proposal to enter into a specific contract on acceptance by the person receiving the offer. It is not necessary that any particular words be used. However, an offer does not result every time a person suggests to another person the terms of a possible contract. A person who merely suggests the terms of a possible contract may be inviting an offer from the other person.

Authorities: *Donovan v. RRL Corp.* (2001) 26 Cal.4th 261, 271, 109 Cal.Rptr.2d 807, 27 P.3d 702 ; *City of Moorpark v. Moorpark Unified School Dist.* (1991) 54 Cal.3d 921, 930, 1 Cal.Rptr.2d 896, 819 P.2d 854 ; *Ladas v. California State Auto. Ass'n* (1993) 19 Cal.App.4th 761, 770, 23 Cal.Rptr.2d 810 ; *Winnaman v. Cambria Community Services Dist.* (1989) 208 Cal.App.3d 49, 52, 57-58, 256 Cal.Rptr. 40 ; *Richards v. Flower* (1961) 193 Cal.App.2d 233, 236, 14 Cal.Rptr. 228 ; *Lonergan v. Scolnick* (1954) 129 Cal.App.2d 179, 182, 276 P.2d 8 .

[2] Use of Instruction

This instruction should be used when there is an issue as to whether an offer was made.

For related Judicial Council instructions, see [3][b], *below*.

LexisNexis Matthew Bender Expert Practice Tip--Consider Not Using Second Part of Instruction:

The difference between an "offer" and a solicitation to "invite an offer" from the other party may be confusing for the jury. Unless there is some issue in the case that requires the second half of this instruction to be given, it may be better to delete it. *By Ronald Oster*

LexisNexis Matthew Bender Expert Practice Tip--Use Terms Carefully: "Consent" (or acceptance)

is a familiar concept to attorneys, but may in some lawsuits be challenging to a jury. *By Rex Heeseman*

[3] Comment

[a] Definition of Offer

An offer has been defined as "the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it" [*Donovan v. RRL Corp.* (2001) 26 Cal.4th 261, 271, 276, 109 Cal.Rptr.2d 807, 27 P.3d 702 (auto dealer's newspaper advertisement for sale of particular vehicle at specified price constituted offer that was accepted by customer's tender of advertised price); *City of Moorpark v. Moorpark Unified School Dist.* (1991) 54 Cal.3d 921, 930, 1 Cal.Rptr.2d 896, 819 P.2d 854 ; see Restatement (Second) of Contracts § 24; see also *Winnaman v. Cambria Community Services Dist.* (1989) 208 Cal.App.3d 49, 57, 256 Cal.Rptr. 40]. An offer must be distinguished from a statement of terms of a possible contract or the solicitation of proposals from others [*City of Moorpark v. Moorpark Unified School Dist.* (1991) 54 Cal.3d 921, 930, 1 Cal.Rptr.2d 896, 819 P.2d 854 ; *Winnaman v. Cambria Community Services Dist.* (1989) 208 Cal.App.3d 49, 52, 57-58, 256 Cal.Rptr. 40 ; *Richards v. Flower* (1961) 193 Cal.App.2d 233, 236, 14 Cal.Rptr. 228 ; *Loneragan v. Scolnick* (1954) 129 Cal.App.2d 179, 182, 276 P.2d 8]. The use of the word "quotation" or "estimate" is not dispositive. A quotation by itself is merely a statement of terms [*Leo F. Piazza Paving Co. v. Bebek & Brkich* (1956) 141 Cal.App.2d 226, 230, 296 P.2d 368], but taken in context it may be specific enough to constitute an offer [*Gibson v. De La Salle Institute* (1944) 66 Cal.App.2d 609, 624, 152 P.2d 774 ; see Witkin, Summary of California Law, vol. 1, *Contracts*, § 132 (10th ed. 2005)]. The same is true of an estimate [*Parker v. Meneley* (1951) 106 Cal.App.2d 391, 398, 235 P.2d 101].

An offer must be sufficiently definite, or must call for such definite terms in the acceptance, that the performance promised is reasonably certain. A contract is void if it is so uncertain and indefinite that the intention of the parties in material regards cannot be determined [*Ladas v. California State Auto. Ass'n* (1993) 19 Cal.App.4th 761, 770, 23 Cal.Rptr.2d 810].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 3, *California Judicial Council Contracts Instructions*]:

CACI No. 307 Contract Formation--Offer

CACI No. 308 Contract Formation--Revocation of Offer

CACI No. 309 Contract Formation--Acceptance

CACI No. 310 Contract Formation--Acceptance by Silence

CACI No. 311 Contract Formation--Rejection of Offer

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Contracts Law Breach Causes of Action General Overview Contracts Law Formation General Overview Contracts Law Formation Offers General Overview

John F. Wells and Lise A. Pearlman were the original authors of this chapter. It has since been updated to reflect changes in the law, additional case citations and practice pointers by other lawyers as well as revisions including cross-references to the official CACI instructions.



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CHAPTER 3A Matthew Bender Formation of Contract Instructions PART B. CONSENT

1-3A California Forms of Jury Instruction MB 300A.21

MB 300A.21 Revocation

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

An offer may be withdrawn by notice to the party to whom the offer was made. Notice of the withdrawal is only effective if it is received before the offer has been accepted.

Authorities: *Civ. Code §§ 1586, 1587; Grieve v. Mullaly (1930) 211 Cal. 77, 79, 293 P. 619 ; CPI Builders, Inc. v. Impco Technologies, Inc. (2002) 94 Cal.App.4th 1167, 1173-1174, 114 Cal.Rptr.2d 851 ; Bellasi v. Shackelford (1962) 201 Cal.App.2d 265, 267-268, 19 Cal.Rptr. 925 .*

[2] Use of Instruction

This instruction should be used when there is an issue as to whether an offer was revoked before its acceptance.

For related Judicial Council instructions, see [3][b], *below*.

LexisNexis Matthew Bender Expert Practice Tip--Keep Argument Simple: This is a straightforward instruction. Thus, keep your related argument simple as well. *By Rex Heeseman*

LexisNexis Matthew Bender Expert Practice Tip--Effect of Counter-Offer: Remember that a counter-offer operates as a rejection of the original offer. Thus, a withdrawal may not be necessary if the other side has made a counter-offer. *By Ronald Oster*

[3] Comment

[a] Revocation

An offer may be revoked before the acceptance is communicated to the offeree [*Civ. Code* § 1586], even if the offer states that it is irrevocable [*Grieve v. Mullaly* (1930) 211 Cal. 77, 79, 293 P. 619]. However, an offer for which consideration has been paid is an option, which may not be revoked contrary to its terms [*San Diego v. Miller* (1975) 119 Cal.Rptr. 491, 532 P.2d 139]. The notice of revocation may be oral and may be communicated in the same manner as an acceptance [*Civ. Code* § 1587; see *CPI Builders, Inc. v. Impco Technologies, Inc.* (2002) 94 Cal.App.4th 1167, 1173-1174, 114 Cal.Rptr.2d 851 (offeror's communication of revocation to offeror's attorney did not revoke offer when offeror's attorney did not notify offeree's attorney of revocation before offeree accepted); *Bellasi v. Shackelford* (1962) 201 Cal.App.2d 265, 267-268, 19 Cal.Rptr. 925 ; see also MB 300A.22, MB 300A.23].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 3, *California Judicial Council Contracts Instructions*]:

CACI No. 307 Contract Formation--Offer

CACI No. 308 Contract Formation--Revocation of Offer

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewContracts LawBreachCauses of ActionGeneral OverviewContracts LawFormationGeneral OverviewContracts LawFormationOffersGeneral OverviewContracts LawFormationOffersIrrevocable OffersContracts LawFormationOffersRevocable Offers

John F. Wells and Lise A. Pearlman were the original authors of this chapter. It has since been updated to reflect changes in the law, additional case citations and practice pointers by other lawyers as well as revisions including cross-references to the official CACI instructions.



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CHAPTER 3A Matthew Bender Formation of Contract Instructions
PART B. CONSENT

1-3A California Forms of Jury Instruction MB 300A.22

MB 300A.22 Acceptance by Words or Conduct

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

A person may accept an offer by words or by conduct or by a combination of the two that show agreement to the terms of the offer.

Authority: Beatty v. Oakland Sheet Metal etc. Co. (1952) 111 Cal.App.2d 53, 62, 244 P.2d 25 .

[2] Use of Instruction

This instruction should be used when there is an issue as to whether an offer was accepted. If there is evidence that the acceptance was qualified or a counter offer was made, this instruction should be followed by the instruction in MB 300A.25.

For related Judicial Council instructions, see [3][b], *below*.

[3] Comment

[a] Acceptance

An offer expressed in words may be accepted by either words or conduct or a combination of words and conduct that indicates to the offeror that the offer has been accepted [*Beatty v. Oakland Sheet Metal etc. Co. (1952) 111 Cal.App.2d 53, 62, 244 P.2d 25*].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 3, *California Judicial Council Contracts Instructions*]:

CACI No. 309 Contract Formation--Acceptance

CACI No. 310 Contract Formation--Acceptance by Silence

CACI No. 311 Contract Formation--Rejection of Offer

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewContracts LawBreachCauses of ActionGeneral OverviewContracts LawFormationGeneral OverviewContracts LawFormationAcceptanceMethods of AcceptanceGeneral OverviewContracts LawFormationAcceptanceMethods of AcceptanceOvert ActsContracts LawFormationAcceptanceMethods of AcceptanceSilence

John F. Wells and Lise A. Pearlman were the original authors of this chapter. It has since been updated to reflect changes in the law, additional case citations and practice pointers by other lawyers as well as revisions including cross-references to the official CACI instructions.



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CHAPTER 3A Matthew Bender Formation of Contract Instructions
PART B. CONSENT

1-3A California Forms of Jury Instruction MB 300A.23

MB 300A.23 Offer Accepted by Mailing of Acceptance

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

A contract is formed on mailing of the acceptance regardless of _____ [when or whether] the acceptance is received.

[*OPTIONAL (See Use of Instruction)*]

The date of the contract is the date of the letter.

Authorities: *Civ. Code* §§ 1582, 1583; *Evid. Code* §§ 640, 641; *Palo Alto Town & Country Village, Inc. v. BBTC Company* (1974) 11 Cal.3d 494, 499-502, 113 Cal.Rptr. 705, 521 P.2d 1097 .

[2] Use of Instruction

This instruction should be used only when the offer does not provide otherwise [see *MB 300A.24*]. It informs the jury that delayed receipt or no receipt is irrelevant. The optional paragraph should be used if the letter of acceptance was mailed on the date it bears. If there is evidence that the letter may have been incorrectly dated or not mailed on the date it was dated, then the optional paragraph should not be given.

For related Judicial Council instructions, see [3][b], *below*.

LexisNexis Matthew Bender Expert Practice Tip--Delayed Delivery vs. No Delivery: There is a big difference between a delayed delivery and no delivery. If the letter never arrives, some explanation will be required beyond this instruction. Further, keep in mind that most jurors will be suspicious (at least a

little) of the mails. *By Ronald Oster and Rex Heeseman*

[3] Comment

[a] Acceptance by Mail

When the contract does not provide a means for acceptance, any reasonable method of acceptance may be used [*Civ. Code* § 1582]. The acceptance is effective when the acceptance is put in the course of transmission to the offeror [*Civ. Code* § 1583]. Thus, the contract is formed when the acceptance is mailed [*Palo Alto Town & Country Village, Inc. v. BBTC Company* (1974) 11 Cal.3d 494, 499-502, 113 Cal.Rptr. 705, 521 P.2d 1097], even if the acceptance is lost and never reaches the offeror [Witkin, Summary of California Law, vol. 1, *Contracts*, § 187 (10th ed., 2005)]. The acceptance is considered to have been mailed when it is placed in the custody of the postal service and when there has been sufficient compliance with applicable postal regulations that the postal service will accept it and assume responsibility for its delivery [*Palo Alto Town & Country Village, Inc. v. BBTC Company* (1974) 11 Cal.3d 494, 499-502, 113 Cal.Rptr. 705, 521 P.2d 1097 ; *Jenkins v. Tuneup Masters* (1987) 190 Cal.App.3d 1, 8-9, 235 Cal.Rptr. 214].

The optional paragraph in the instruction is based on the statutory presumption that a writing is truly dated [*Evid. Code* § 640]. This presumption is a presumption affecting the burden of producing evidence [*Evid. Code* § 640]. As such, once the letter is put in evidence, the trier of fact is required to assume the existence of the presumed fact unless and until evidence is introduced that would support a finding of its nonexistence, in which case the trier of fact must determine the issue from the evidence and without regard to the presumption [*Evid. Code* § 640]. The way in which presumptions affecting the burden of providing evidence should be handled in jury instructions is that the jury should never be told it is dealing with a presumption. If there is no contrary evidence, the jury should be instructed that the fact is established. If there is contrary evidence that the jury is entitled to consider, then no presumption applies [see Jefferson, California Evidence Benchbook (3d ed., 1997), vol. 2, § 46.13].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 3, *California Judicial Council Contracts Instructions*]:

CACI No. 309 Contract Formation--Acceptance

CACI No. 310 Contract Formation--Acceptance by Silence

CACI No. 311 Contract Formation--Rejection of Offer

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewContracts LawBreachCauses of ActionGeneral OverviewContracts LawFormationGeneral OverviewContracts LawFormationAcceptanceMailbox RuleContracts LawFormationAcceptanceMethods of AcceptanceGeneral Overview

John F. Wells and Lise A. Pearlman were the original authors of this chapter. It has since been updated to reflect changes in the law, additional case citations and practice pointers by other lawyers as well as revisions including cross-references to the official CACI instructions.



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CHAPTER 3A Matthew Bender Formation of Contract Instructions
PART B. CONSENT

1-3A California Forms of Jury Instruction MB 300A.24

MB 300A.24 Method of Acceptance Specified by Offer

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

If a particular method of acceptance is required by the terms of the offer, then no contract occurs unless that method is satisfied. Therefore, you must first decide whether Plaintiff's offer required a particular method of acceptance, and, if it did, you must then decide whether that method of acceptance was satisfied.

Authorities: *Civ. Code § 1582; Estate of Crossman (1964) 231 Cal.App.2d 370, 372, 41 Cal.Rptr. 800 .*

[2] Use of Instruction

This instruction should be used when there is a question of fact as to whether a particular method of acceptance was required by the offer and whether that method was satisfied. Generally, an offer is accepted on mailing [see *MB 300A.23*]. These issues might go to the jury in the case of an ambiguous written offer or an oral offer. If only one of these issues is involved, the instruction should be modified accordingly. The second issue could also go to the jury if there is an unambiguous written offer specifying a particular method of acceptance, and there is a dispute over whether that method was satisfied. For example, this could occur when receipt of the acceptance is required and receipt is denied.

For related Judicial Council instructions, see [3][b], *below*.

LexisNexis Matthew Bender Expert Practice Tip--Use Care When Preparing Argument:

Depending on the facts in question, this could be a key instruction and, if so, will need a careful argument in explaining what is (and what is not) important for the jury. *By Rex Heeseman*

[3] Comment

[a] Prescribed Manner of Acceptance

If an offer prescribes how the acceptance must be communicated, there is no contract unless that method is used [*Civ. Code* § 1582]. An offer that merely suggests a permitted manner of acceptance does not prevent the other party from using another reasonable method of acceptance [*Estate of Crossman* (1964) 231 Cal.App.2d 370, 372, 41 Cal.Rptr. 800] . Moreover, even if the offer contains a specific required method of acceptance, that provision may be waived [*Artukovich v. Pacific State's etc. Pipe Co.* (1947) 78 Cal.App.2d 1, 3, 176 P.2d 962]. For an instruction on waiver, see Ch. 3F, *Matthew Bender Contract Defenses Instructions*.

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 3, *California Judicial Council Contracts Instructions*]:

CACI No. 309 Contract Formation--Acceptance

CACI No. 310 Contract Formation--Acceptance by Silence

CACI No. 311 Contract Formation--Rejection of Offer

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewContracts LawBreachCauses of ActionGeneral OverviewContracts LawFormationGeneral OverviewContracts LawFormationAcceptanceMethods of AcceptanceGeneral OverviewContracts LawFormationAcceptanceMethods of AcceptanceSilence

John F. Wells and Lise A. Pearlman were the original authors of this chapter. It has since been updated to reflect changes in the law, additional case citations and practice pointers by other lawyers as well as revisions including cross-references to the official CACI instructions.



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CHAPTER 3A Matthew Bender Formation of Contract Instructions
PART B. CONSENT

1-3A California Forms of Jury Instruction MB 300A.25

MB 300A.25 Acceptance**[1] Instruction**[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

An acceptance results in a contract only if it accepts all the terms of the offer and does not propose any new terms. Therefore, you must decide whether a contract was formed because _____ [accepting party] agreed to all of the terms of _____ [offering party]'s offer or whether a contract did not result because _____ [accepting party] added one or more new terms or rejected one or more of the offered terms.

[*OPTIONAL (See Use of Instruction)*]

A grumbling acceptance is still an acceptance as long as no qualifications are added to the terms of the offer.

Authorities: Civ. Code §§ 1500, 1585; *Panagotacos v. Bank of America* (1998) 60 Cal.App.4th 851, 855-856, 70 Cal.Rptr.2d 595 ; *Chicago Bridge etc. Co. v. Ind. Acc. Com.* (1964) 226 Cal.App.2d 309, 316, 38 Cal.Rptr. 57 ; *Angus v. London* (1949) 92 Cal.App.2d 282, 285, 206 P.2d 869 .

[2] Use of Instruction

This instruction should be used when there is an issue as to whether an acceptance was unconditional. It is intended for use in cases in which oral evidence is admissible. When the alleged offer and acceptance are contained in an integrated writing, the court will determine the effect of the acceptance as a matter of law [see Ch. 3B, *Matthew Bender Interpretation of Contract Instructions*]. The optional paragraph can be used when there is an issue as to whether comments made in the acceptance were additional terms or mere complaints about the terms of the contract.

For related Judicial Council instructions, see [3][b], *below*.

LexisNexis Matthew Bender Expert Practice Tip--Explain "Acceptance" Carefully: "Acceptance" (like consent) is a common legal principle. However, sometimes it needs to be explained carefully to a jury. *By Rex Heeseman*

LexisNexis Matthew Bender Expert Practice Tip--Explain "Grumbling" Acceptance: The optional portion of this instruction (i.e., a "grumbling" acceptance) could be confusing and provides little guidance to the jury. Thus, if appropriate to your case, the term should be explained to the jury. *By Ronald Oster*

[3] Comment

[a] Acceptance Must Be Absolute

To result in a contract, an acceptance must be absolute and unqualified. A qualified acceptance that adds new terms or conditions is a new proposal [*Civ. Code* §§ 1580, 1585; *Roth v. Malson* (1998) 67 Cal.App.4th 552, 557-559, 79 Cal.Rptr.2d 226 (prospective buyer's signature in "counter to counter offer" section of real estate form with additional terms proposed did not constitute acceptance of prospective seller's counteroffer); *Angus v. London* (1949) 92 Cal.App.2d 282, 285, 206 P.2d 869]. A grumbling acceptance is sufficient so long as it is unqualified [*Panagotacos v. Bank of America* (1998) 60 Cal.App.4th 851, 856 n.2, 70 Cal.Rptr.2d 595 ; *Chicago Bridge etc. Co. v. Ind. Acc. Com.* (1964) 226 Cal.App.2d 309, 316, 38 Cal.Rptr. 57]. Countering a counteroffer by proposing the same terms as the counteroffer is not an acceptance because the counter proposal calls for a response (acceptance) before a contract can be formed [*Roth v. Malson* (1998) 67 Cal.App.4th 552, 559, 79 Cal.Rptr.2d 226].

Since an unqualified acceptance is essential to the formation of a contract [*see Civ. Code* §§ 1550, 1585], the burden of proof is on the party who is seeking to enforce the contract [*Reichert v. General Ins. Co.* (1968) 68 Cal.2d 822, 830, 69 Cal.Rptr. 321, 442 P.2d 377 ; *Evid. Code* § 500].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [*see Ch. 3, California Judicial Council Contracts Instructions*]:

CACI No. 309 Contract Formation--Acceptance

CACI No. 310 Contract Formation--Acceptance by Silence

CACI No. 311 Contract Formation--Rejection of Offer

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Contracts Law Formation General Overview Contracts Law Formation Acceptance Methods of Acceptance General Overview Contracts Law Formation Acceptance Methods of Acceptance Silence

John F. Wells and Lise A. Pearlman were the original authors of this chapter. It has since been updated to reflect changes in the law, additional case citations and practice pointers by other lawyers as well as revisions including cross-references to the official CACI instructions.



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CHAPTER 3A Matthew Bender Formation of Contract Instructions PART B. CONSENT

1-3A California Forms of Jury Instruction MB 300A.26

MB 300A.26 Acceptance of Benefits Assumes Duties

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

A person who voluntarily accepts the benefit of a transaction automatically agrees to all of the duties arising from the transaction that the person knows about or ought to know about.

Authorities: Civ. Code §§ 1589, 3521; *Melchior v. New Line Productions, Inc.* (2003) 106 Cal.App.4th 779, 788-790, 131 Cal.Rptr.2d 347 ; *Heppler v. J.M. Peters Co.* (1999) 73 Cal.App.4th 1265, 1288-1292, 87 Cal.Rptr.2d 497 ; *Veterans of Foreign Wars v. City of El Paso de Robles* (1998) 62 Cal.App.4th 1077, 1080-1082, 73 Cal.Rptr.2d 171 ; *Recorded Picture Co. v. Nelson Entertainment, Inc.* (1997) 53 Cal.App.4th 350, 361-368, 61 Cal.Rptr.2d 742 ; *Enterprise Leasing Corp. v. Shugart Corp.* (1991) 231 Cal.App.3d 737, 745-747, 282 Cal.Rptr. 620 .

[2] Use of Instruction

This instruction should be used in an implied or quasi-contract case in which one party contends that the other party has taken the benefits of the contract and is therefore liable for the resulting obligation.

For related Judicial Council instructions, see [3][b], *below*.

LexisNexis Matthew Bender Expert Practice Tip--Triggering Duties: This can be a useful instruction because it states that a party "automatically" takes on the duties when that party accepts the benefits of a contract. In other words, nothing further is required of either party to trigger the duties (i.e., no further consents). *By Ronald Oster*

[3] Comment

[a] Acceptance of Benefits Assumes Duties

By statute, a voluntary acceptance of the benefit of a transaction is equivalent to a consent to all the obligations arising from it, so far as the facts are known, or ought to be known, to the person accepting [*Civ. Code* §§ 1589, 3521; see *Melchior v. New Line Productions, Inc.* (2003) 106 Cal.App.4th 779, 788-790, 131 Cal.Rptr.2d 347 (assignee of film production company, which accepted benefits of company's original agreement with author, also accepted obligations of original agreement despite different terms in assignment agreement; summary judgment on breach of contract reversed)]. Under the rule, "[a]ssumption of obligations may be implied from acceptance of benefits under the contract" [*Enterprise Leasing Corp. v. Shugart Corp.* (1991) 231 Cal.App.3d 737, 745, 282 Cal.Rptr. 620]. This rule applies both in cases of implied contract and quasi-contract [*Desny v. Wilder* (1956) 46 Cal.2d 715, 738-739, 299 P.2d 257 ; *Harold A. Newman Co. v. Nero* (1973) 31 Cal.App.3d 490, 497, 107 Cal.Rptr. 464]. It does not render enforceable contracts required to be in writing by the statute of frauds [*Boyd v. Big Three Ranch Co.* (1913) 22 Cal.App. 108, 110, 133 P. 623]. The rule does not require compliance with a contract to which a person or entity is not a party if the person or entity accepted only a portion of the contract's benefits [*Recorded Picture Co. v. Nelson Entertainment, Inc.* (1997) 53 Cal.App.4th 350, 363-365, 61 Cal.Rptr.2d 742].

LexisNexis Matthew Bender Expert Practice Tip--Benefits Lead to Responsibilities: The idea of a party taking benefits leads most jurors to the conclusion that attendant responsibilities should follow. By Rex Heeseman

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 3, *California Judicial Council Contracts Instructions*]:

CACI No. 309 Contract Formation--Acceptance

CACI No. 310 Contract Formation--Acceptance by Silence

CACI No. 311 Contract Formation--Rejection of Offer

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Contracts Law Formation General Overview Contracts Law Formation Acceptance Methods of Acceptance General Overview Contracts Law Formation Acceptance Methods of Acceptance Overt Acts Contracts Law Formation Acceptance Methods of Acceptance Silence

John F. Wells and Lise A. Pearlman were the original authors of this chapter. It has since been updated to reflect changes in the law, additional case citations and practice pointers by other lawyers as well as revisions including cross-references to the official CACI instructions.



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CHAPTER 3A Matthew Bender Formation of Contract Instructions PART B. CONSENT

1-3A California Forms of Jury Instruction MB 300A.27

MB 300A.27 Acceptance of Same Thing Offered

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

To form a contract by offer and acceptance, the parties must agree on the same thing in the same sense. If each party is mistaken as to the meaning of the other, no contract is formed unless one of the parties so carelessly expressed himself or herself that the other was caused to reasonably believe that an agreement existed.

Authority: *Chakmak v. H. J. Lucas Masonry, Inc.* (1976) 55 Cal.App.3d 124, 129, 127 Cal.Rptr. 404 .

[2] Use of Instruction

This instruction should be used when there is an alleged mistake as to what was being offered and accepted and there is a question of fact as to whether one party was at fault for negligent expression of assent.

For related Judicial Council instructions, see [3][b], *below*.

[3] Comment

[a] Acceptance of Same Thing

When mistake prevents mutual consent to a contract because the parties did not agree on the same thing in the same sense, no contract is created [*Chakmak v. H. J. Lucas Masonry, Inc.* (1976) 55 Cal.App.3d 124, 129, 127 Cal.Rptr. 404 ; see *Grimes v. New Century Mortgage Corp.* (9th Cir. 2003) 340 F.3d 1007, 1010-1011 (because essential element of loan contract--rate of interest--was not determined, material issues of fact as to existence and terms of contract remained; summary judgement should not have been granted for lender on borrowers' Truth in Lending Act rescission

action)). This is the familiar law school problem posed by the two ships "Peerless" [see Witkin, Summary of California Law, vol. 1, *Contracts*, § 258 (10th ed. 2005)]. Attempts have been made to reconcile this rule with the objective theory of contracts, but Corbin considers it unnecessary to do so [see 3 Corbin on Contracts § 599 (rev. ed. 1960)]. It should simply be recognized that mistake as to the identity of the subject matter of the contract prevents formation of a contract unless one party so negligently expressed himself or herself that the other was caused reasonably to believe that an agreement existed [*Chakmak v. H. J. Lucas Masonry, Inc.* (1976) 55 Cal.App.3d 124, 127 Cal.Rptr. 404 (reversing summary judgment for trial of negligence issue)]. This is different from the right to rescind because consent to a mutually agreed performance was caused by mistake [Civ. Code § 1689(b)(1); see Ch. 3G, *Matthew Bender Rescission of Contract Instructions*].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 3, *California Judicial Council Contracts Instructions*]:

CACI No. 309 Contract Formation--Acceptance

CACI No. 310 Contract Formation--Acceptance by Silence

CACI No. 311 Contract Formation--Rejection of Offer

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Contracts Law Formation Acceptance Methods of Acceptance General Overview Contracts Law Formation Acceptance Methods of Acceptance Overt Acts Contracts Law Formation Acceptance Methods of Acceptance Silence Contracts Law Formation Ambiguity & Mistake General Overview

John F. Wells and Lise A. Pearlman were the original authors of this chapter. It has since been updated to reflect changes in the law, additional case citations and practice pointers by other lawyers as well as revisions including cross-references to the official CACI instructions.



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CHAPTER 3A Matthew Bender Formation of Contract Instructions
PART B. CONSENT

1-3A California Forms of Jury Instruction MB 300A.28

MB 300A.28 Silence as Acceptance**[1] Instruction**

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Ordinarily, silence does not operate as acceptance of an offer. However, there are exceptions to this rule. For example, silence can be considered acceptance of an offer based on (1) the offeree's retention of a benefit conferred by the offeror, (2) the past relations of the parties indicating their belief that silence operates as acceptance, or (3) the offeror's having given the offeree reason to think he or she could accept the offer by silence. If you find that the combination of _____ [offering party]'s type of offer and _____ [accepting party]'s silence fits within one of these exceptions, you may consider that silence to be an acceptance of _____ [offering party]'s offer.

Authorities: *Durgin v. Kaplan* (1968) 68 Cal.2d 81, 91, 65 Cal.Rptr. 158, 436 P.2d 70 ; *Golden Eagle Ins. Co. v. Foremost Ins. Co.* (1993) 20 Cal.App.4th 1372, 1385-1387, 25 Cal.Rptr.2d 242 .

[2] Use of Instruction

This instruction should be used when the circumstances of the case indicate that the relations of the parties, the manner of the offer, or the manner of acceptance indicate that one or both of the parties contemplated that the offer could be accepted by silence. This instruction can be given after the general instruction on acceptance in MB 300A.25. An instruction on manner of acceptance is in MB 300A.24.

For related Judicial Council instructions, see [3][b], *below*.

LexisNexis Matthew Bender Expert Practice Tip--Juries May Have Trouble Applying This

Instruction: This instruction gives several examples where silence could operate as an acceptance, and there could be others. Still, unless the other party affirms the contract in some manners (such as by

keeping the benefits), this instruction will be difficult for many juries to apply. *By Ronald Oster*

LexisNexis Matthew Bender Expert Practice Tip--Explaining Silence as Acceptance: This seems to be a complicated instruction. However, depending on the facts in question, it might be easy (or hard) to explain to a jury. *By Rex Heeseman*

[3] Comment

[a] Communication of Acceptance

Acceptance can be communicated only by some act or omission of the accepting party, by which he or she intends to communicate the acceptance, or that necessarily tends to communicate acceptance [*Civ. Code* § 1581].

In general, silence or inaction does not constitute acceptance of an offer [*Golden Eagle Ins. Co. v. Foremost Ins. Co.* (1993) 20 Cal.App.4th 1372, 1385, 25 Cal.Rptr.2d 242 ; see Witkin, Summary of California Law, vol. 1, *Contracts*, § 198 (9th ed. 1987)]. However, there are several well-recognized exceptions to this rule. For instance, acceptance may be inferred from inaction in the face of a duty to act to reject a benefit, the retention of a benefit conferred, the past relations of the parties, or the offeror's having given the offeree reason to believe acceptance would be manifested by silence [*Golden Eagle Ins. Co. v. Foremost Ins. Co.* (1993) 20 Cal.App.4th 1372, 1385-1387, 25 Cal.Rptr.2d 242 ; see *Durgin v. Kaplan* (1968) 68 Cal.2d 81, 91, 65 Cal.Rptr. 158, 436 P.2d 70].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 3, *California Judicial Council Contracts Instructions*]:

CACI No. 310 Contract Formation--Acceptance by Silence

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Contracts Law Formation Acceptance Methods of Acceptance General Overview Contracts Law Formation Acceptance Methods of Acceptance Overt Acts Contracts Law Formation Acceptance Methods of Acceptance Silence

John F. Wells and Lise A. Pearlman were the original authors of this chapter. It has since been updated to reflect changes in the law, additional case citations and practice pointers by other lawyers as well as revisions including cross-references to the official CACI instructions.



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CHAPTER 3A Matthew Bender Formation of Contract Instructions
PART B. CONSENT

1-3A California Forms of Jury Instruction MB 300A.29-MB 300A.39

[Reserved for Future Use]

MB 300A.29[Reserved for Future Use]



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CHAPTER 3A Matthew Bender Formation of Contract Instructions
PART C CONSIDERATION

1-3A California Forms of Jury Instruction MB 300A.40

MB 300A.40 Consideration--Thing of Value**[1] Instruction**[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

A promise is not enforceable as a contract unless something of value was given or agreed to be given in exchange for it. In law we call that "consideration" for the promise. Consideration may be either a benefit given or agreed to be given to the party making the promise by any other person or a detriment suffered or agreed to be suffered by that other person.

In exchange for Defendant's promise to _____ [*specify defendant's promise*], Plaintiff _____ [*gave or agreed to give*] _____ [*describe thing of value, benefit or detriment, that plaintiff contends constituted consideration*]. For that _____ [*benefit or detriment*] to be adequate consideration for Defendant's promise, it must have had some value. Any value, however slight, is sufficient consideration. How much value may be important on the question of damages, but you will be instructed about that separately. If _____ [*describe benefit or detriment claimed to constitute consideration*] had some value, then the consideration requirement has been met. If it had no value at all, then the consideration requirement has not been met, and you must find that no contract came into existence.

Authorities: Civ. Code §§ 1550, 1605, 1615; *Flojo Internat., Inc. v. Lassleben* (1992) 4 Cal.App.4th 713, 719, 6 Cal.Rptr.2d 99 ; *A.J. Industries, Inc. v. Ver Halen* (1977) 75 Cal.App.3d 751, 761, 142 Cal.Rptr. 383 ; *Blocksidge v. Broadway Sixth Co.* (1962) 207 Cal.App.2d 628, 632, 24 Cal.Rptr. 622 .

[2] Use of Instruction

This instruction should be used in cases involving oral or implied contracts when the only issue on the consideration requirement is whether the thing claimed to constitute consideration had any value. If there is no genuine issue of fact

on that issue, this instruction should not be given. If there is a consideration issue as to whether what the defendant received was the agreed-on exchange for the promise, the instruction in MB 300A.41 should be used. If both are at issue, then both instructions should be given, or the two instructions should be consolidated into one. If the agreement is in writing, use the instruction in MB 300A.44.

LexisNexis Matthew Bender Expert Practice Tip--Use Care With Your Consideration

Instructions: Consideration is a legal principle that is well-known to attorneys but generally alien to jurors. So, this and the following instructions in this Part must be put together carefully and argued to the jury in an understandable way. Sometimes that will be difficult. *By Rex Heeseman*

LexisNexis Matthew Bender Expert Practice Tip--Value Can Be Almost Anything: If you are trying to enforce a contract, the key phrase in this instruction is "Any value, however slight, is sufficient consideration." The value can be almost anything (including detriment to the other party). *By Ronald Oster*

[3] Comment

Consideration is an essential element of a contract [*Civ. Code* § 1550; *see, e.g., O'Byrne v. Santa Monica-UCLA Medical Center* (2002) 94 Cal.App.4th 797, 808-810, 114 Cal.Rptr.2d 575 (no consideration was given for medical staff bylaws adopted pursuant to 22 Cal. Code Reg. § 70703; thus bylaws did not in and of themselves constitute contract between hospital and physician on its medical staff); *see also Kremen v. Cohen* (9th Cir. 2003) 337 F.3d 1024, 1028-1029 (registrar of Internet domain name did not breach implied contract with registrant by assigning name to another party; no consideration was given for registration of domain name so no contract existed)]. A purported agreement that is without consideration is void [*HolcoMB v. Long Beach Investment Co.* (1933) 129 Cal.App. 285, 292, 19 P.2d 31]. A written instrument is presumptive evidence of consideration [*Civ. Code* § 1614; *see MB 300A.44*]. The burden of showing a want of consideration is on the party seeking to invalidate or avoid the contract [*Civ. Code* § 1615; *see MB 300A.44* (consideration for written agreements)]. Good consideration is defined by *Civ. Code* § 1605 as the following:

Any benefit conferred, or agreed to be conferred, upon the promisor, by any other person, to which the promisor is not lawfully entitled, or any prejudice suffered, or agreed to be suffered, by such person, other than such as he is at the time of consent lawfully bound to suffer, as an inducement to the promisor, is a good consideration for a promise.

Consideration thus includes detriment to the promisee, as well as benefit received by the promisor, and it does not matter from whom the consideration moves or to whom it goes. If the consideration (whether benefit or detriment) is bargained for and given in exchange for the promise, the promise is not gratuitous [*Flojo Internat., Inc. v. Lassleben* (1992) 4 Cal.App.4th 713, 719, 6 Cal.Rptr.2d 99 ; Restatement (Second) of Contracts § 71, comment e].

It is an issue of fact whether a purported consideration is sufficient to create a contract [*see Estate of Thomson* (1913) 165 Cal. 290, 296, 131 P. 1045 ; *Sharman v. Longo* (1967) 249 Cal.App.2d 948, 952, 58 Cal.Rptr. 79 ; *Patek & Co. v. Vineberg* (1962) 210 Cal.App.2d 20, 22, 26 Cal.Rptr. 293], but this does not mean that the finder of fact will inquire into the "quantum" of the consideration [*A.J. Industries, Inc. v. Ver Halen* (1977) 75 Cal.App.3d 751, 761, 142 Cal.Rptr. 383]. When a thing changes possession, as long as it has some value, it will be held to be sufficient consideration [*see Louisville Title Ins. Co. v. Surety Title & Guar. Co.* (1976) 60 Cal.App.3d 781, 790-799, 132 Cal.Rptr. 63 (evidence showed consideration as matter of law); *Estate of Freeman* (1965) 238 Cal.App.2d 486, 488-489, 48 Cal.Rptr. 1 ; *Blocksidge v. Broadway Sixth Co.* (1962) 207 Cal.App.2d 628, 632, 24 Cal.Rptr. 622].

The "mutuality of obligation" principle applies to bilateral contracts only. In the unilateral contract context, there is no mutuality of obligation [*see Asmus v. Pacific Bell* (2000) 23 Cal.4th 1, 14-15, 96 Cal.Rptr.2d 179, 999 P.2d 71 (rule governing termination of unilateral contracts is that once promisor--here, the employer--determines it will terminate or

modify contract, and provides its employees with reasonable notice of change, additional consideration is not required)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewContracts LawConsiderationGeneral
OverviewContracts LawConsiderationAdequate ConsiderationContracts LawFormationGeneral Overview

John F. Wells and Lise A. Pearlman were the original authors of this chapter. It has since been updated to reflect changes in the law, additional case citations and practice pointers by other lawyers as well as revisions including cross-references to the official CACI instructions.



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CHAPTER 3A Matthew Bender Formation of Contract Instructions PART C CONSIDERATION

1-3A California Forms of Jury Instruction MB 300A.41

MB 300A.41 Agreed-Upon Exchange

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

A promise is not enforceable as a contract unless something of value was given or agreed to be given in exchange for it. In law we call that "consideration" for the promise. The facts are that Plaintiff _____ [gave or agreed to give] _____ [describe thing of value, benefit or detriment, that plaintiff contends constituted consideration]. For that _____ [benefit or detriment] to be adequate consideration, it must have been the agreed-upon exchange for Defendant's promise. If it was the agreed-upon exchange for Defendant's promise, the consideration requirement has been met. If it was not, then the consideration requirement has not been met, and you must find that no contract came into existence.

Authorities: *Civ. Code § 1605; Jara v. Suprema Meats, Inc. (2004) 121 Cal.App.4th 1238, 1248-1252, 18 Cal.Rptr.3d 187 ; A.J. Industries, Inc. v. Ver Halen (1977) 75 Cal.App.3d 751, 761, 142 Cal.Rptr. 383 ; Blocksidge v. Broadway Sixth Co. (1962) 207 Cal.App.2d 628, 632, 24 Cal.Rptr. 622 .*

[2] Use of Instruction

This instruction should be used in cases involving oral or implied contracts when the issue is whether the thing contended to constitute consideration was in fact the agreed-upon exchange for defendant's promise. If there is also an issue as to whether it had value, this instruction should be given in combination with the instruction in MB 300A.40. If there is no genuine issue on that subject, this instruction should not be given. If the agreement is in writing, use the instruction in MB 300A.44.

[3] Comment

The consideration must be the agreed-upon exchange in return for the promise to be enforced [*Civ. Code* § 1605; *Jara v. Suprema Meats, Inc.* (2004) 121 Cal.App.4th 1238, 1248-1252, 18 Cal.Rptr.3d 187 ; *A.J. Industries, Inc. v. Ver Halen* (1977) 75 Cal.App.3d 751, 761, 142 Cal.Rptr. 383 ; *Blocksidge v. Broadway Sixth Co.* (1962) 207 Cal.App.2d 628, 632, 24 Cal.Rptr. 622]. It is not enough merely that promises were traded; each party's promise must have been given as motive or inducement for the promise of the other [*Jara v. Suprema Meats, Inc.* (2004) 121 Cal.App.4th 1238, 1248-1252, 18 Cal.Rptr.3d 187]. This requirement is in addition to the requirement that the consideration must have value, which is discussed in MB 300A.40.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Contracts Law Consideration General Overview Contracts Law Consideration Adequate Consideration Contracts Law Formation General Overview

John F. Wells and Lise A. Pearlman were the original authors of this chapter. It has since been updated to reflect changes in the law, additional case citations and practice pointers by other lawyers as well as revisions including cross-references to the official CACI instructions.



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CHAPTER 3A Matthew Bender Formation of Contract Instructions
PART C CONSIDERATION

1-3A California Forms of Jury Instruction MB 300A.42

MB 300A.42 Existing Obligation and Compromise of Existing Claim

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

A promise to do something that a person is already obligated to do is not consideration for a promise by another person. If a person is already bound by contract to do a particular act, then to specifically promise the same thing again would not be sufficient consideration for a promise by the other party.

[*OPTIONAL (See Use of Instruction)*]

An exception exists when there is a genuine dispute between the parties regarding their existing obligations. A promise to do something that a party in good faith asserts that [he/she/it] was not under an existing obligation to do is sufficient consideration for a promise by the other party to enter into an agreement compromising their dispute. This is so even if it later turns out that the party was wrong in claiming that [he/she/it] did not already have an existing obligation to do it.

Authorities: Civ. Code § 1605; *Louisville Title Ins. Co. v. Surety Title & Guar. Co.* (1976) 60 Cal.App.3d 781, 791, 132 Cal.Rptr. 63 .

[2] Use of Instruction

This instruction should be used together with the instruction in MB 300A.40 when there is an issue as to whether the consideration relied on is a pre-existing obligation. The optional paragraph applies when there is a dispute as to whether there was an existing obligation. If possible, the instruction should be particularized to reflect the fact situation presented to the jury.

LexisNexis Matthew Bender Expert Practice Tip--Draw on Everyday Experiences: It is reasonably typical that an obligation will be changed by the parties due to a compromise. However, the related explanation to the jury must draw on everyday experiences or the jury may be confused or misled by the legal terminology of this instruction. *By Rex Heeseman*

LexisNexis Matthew Bender Expert Practice Tip--Establishing "Good Faith" Can Be Difficult: The optional part of this instruction deals with the compromise of a genuine dispute. Such a compromise can constitute valid consideration so long as it is a "genuine" dispute and the party in question is acting in "good faith." The more one-sided a transaction looks, the more difficult it will be to establish "good faith." *By Ronald Oster*

[3] Comment

A promise to do what one is already legally bound to do is insufficient to support a contract [Civ. Code § 1605; *Louisville Title Ins. Co. v. Surety Title & Guar. Co.* (1976) 60 Cal.App.3d 781, 791, 132 Cal.Rptr. 63; *General Motors Accept. Corp. v. Brown* (1934) 2 Cal.App.2d 646, 650, 38 P.2d 482]. One may be legally bound to perform some act either by contract [see *Bailey v. Breetwor* (1962) 206 Cal.App.2d 287, 292, 23 Cal.Rptr. 740 (promise to fulfill one's own contract with another cannot provide consideration for promise by third party)] or by law [*Poetker v. Lowry* (1914) 25 Cal.App. 616, 619, 144 P. 981 (mother's promise to support her child)].

However, the law favors compromises and the compromise of a disagreement over preexisting obligations is supported by consideration as long as the claimant is asserting the claim in good faith. It is not essential that the claim in dispute be valid [*Louisville Title Ins. Co. v. Surety Title & Guar. Co.* (1976) 60 Cal.App.3d 781, 791, 132 Cal.Rptr. 63]. Nonetheless, compromise of a wholly invalid claim is inadequate consideration [Orange County Foundation for preservation of *Orange County Foundation v. Irvine Co.* (1983) 139 Cal.App.3d 195, 201, 188 Cal.Rptr. 552]. Although California case law does not precisely define the term "invalid," the relinquishment of a *colorable* legal claim is valid consideration [see *Murphy v. T. Rowe Price Prime Reserve Fund, Inc.* (9th Cir. 1993) 8 F.3d 1420, 1423 (claim based on two distinct legal theories was colorable and therefore not completely invalid)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Contracts Law Consideration General Overview Contracts Law Consideration Adequate Consideration Contracts Law Consideration Preexisting Duties Contracts Law Formation General Overview

John F. Wells and Lise A. Pearlman were the original authors of this chapter. It has since been updated to reflect changes in the law, additional case citations and practice pointers by other lawyers as well as revisions including cross-references to the official CACI instructions.



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CHAPTER 3A Matthew Bender Formation of Contract Instructions PART C CONSIDERATION

1-3A California Forms of Jury Instruction MB 300A.43

MB 300A.43 Past Performance Insufficient

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

The past performance of a party under a prior contract has no value in support of a new agreement. You must decide whether _____ [describe benefit or detriment that plaintiff contends constituted consideration] promised something new.

Authorities: *Simmons v. Cal. Institute of Technology* (1949) 34 Cal.2d 264, 272-273, 209 P.2d 581 ; *Star Pacific Investments, Inc. v. Oro Hills Ranch, Inc.* (1981) 121 Cal.App.3d 447, 456, 176 Cal.Rptr. 546 .

[2] Use of Instruction

This instruction should be used when there has been past performance under a prior contract and there is an issue as to whether something new was promised. It should be used in conjunction with the instruction in MB 300A.40.

[3] Comment

When the consideration for a contract is past performance under a prior contract, no detriment is imposed on the promisor, nor is a benefit conferred on the promisee beyond that obtained from the prior contract. Therefore, there is no consideration to support the contract [*Simmons v. Cal. Institute of Technology* (1949) 34 Cal.2d 264, 209 P.2d 581 (past employment not consideration for promise of a bonus)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewContracts LawConsiderationGeneral
OverviewContracts LawFormationGeneral Overview

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CHAPTER 3A Matthew Bender Formation of Contract Instructions
PART C CONSIDERATION

1-3A California Forms of Jury Instruction MB 300A.44

MB 300A.44 Consideration for Written Agreements

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

A promise is not enforceable as a contract unless something of value was given or agreed to be given in exchange for it. In law we call that "consideration" for the promise.

[*EITHER (See Use of Instruction)*]

You must find that Plaintiff gave something of value in exchange for Defendant's promise unless Defendant proves that nothing of value was in fact given.

[*OR*]

You must find that Plaintiff gave something of value in exchange for Defendant's promise unless Defendant introduces evidence that nothing of value was in fact given.

Authorities: Civ. Code §§ 1605, 1614, 1615; *Simmons v. Cal. Institute of Technology* (1949) 34 Cal.2d 264, 272, 209 P.2d 581 ; *Rancho Santa Fe Pharmacy, Inc. v. Seyfert* (1990) 219 Cal.App.3d 875, 884, 268 Cal.Rptr. 505 ; *Niederer v. Ferreira* (1983) 150 Cal.App.3d 219, 224, 197 Cal.Rptr. 685 ; *Star Pacific Investments, Inc. v. Oro Hills Ranch, Inc.* (1981) 121 Cal.App.3d 447, 456, 176 Cal.Rptr. 546 .

[2] Use of Instruction

This instruction should be used when there is an issue as to whether there is consideration for a written contract. Plaintiff will want to offer the first alternative paragraph and argue that the presumption raised by *Civ. Code* §§ 1614 and 1615 affects the burden of proof. Defendant will want to offer the second alternative paragraph and argue that the presumption raised by *Civ. Code* §§ 1614 and 1615 affects only the burden of producing evidence [see [3], *below*, for discussion of the presumption raised by *Civ. Code* §§ 1614 and 1615].

LexisNexis Matthew Bender Expert Practice Tip--Providing Something of Value for Promise:

Giving something valuable in return for a promise is a topic most jurors will appreciate. Thus, make your argument sound that way. *By Rex Heeseman*

[3] Comment

A written instrument is presumptive evidence of consideration [*Civ. Code* § 1614; see *Civ. Code* § 1605 (definition of consideration); see also MB 300A.40]. Unlike an oral or implied contract, the burden of showing a want of consideration is on the party seeking to invalidate it [*Civ. Code* § 1615]. However, it is not clear whether the presumption raised by *Civ. Code* § 1614 and the burden placed on the defendant by *Civ. Code* § 1615 concern the burden of proof or the burden of producing evidence. The statutes themselves do not address this point. In one case, the court held that "the presumption of consideration under section 1614 affects the burden of producing evidence and not the burden of proof. In light of this conclusion, we hold the jury instructions placing the burden on the [Defendants] to prove a lack of consideration were incorrect" [*Rancho Santa Fe Pharmacy, Inc. v. Seyfert* (1990) 219 Cal.App.3d 875, 884, 268 Cal.Rptr. 505]. However, in another case, the court stated that the defendant, as the party seeking to avoid enforcement of the contract, "has the burden of proving his affirmative defense of want of consideration" [*Niederer v. Ferreira* (1983) 150 Cal.App.3d 219, 224, 197 Cal.Rptr. 685]. The *Rancho Santa Fe* court dismissed *Niederer* as authority, stating that it "did not analyze the issue" [*Rancho Santa Fe Pharmacy, Inc. v. Seyfert* (1990) 219 Cal.App.3d 875, 880, 268 Cal.Rptr. 505].

Until it is clear that the holding of *Rancho Santa Fe* will be generally followed, plaintiffs will want to offer the first alternative paragraph in [1], *above*, arguing that, under *Niederer* and *Civ. Code* §§ 1614 and 1615, the defendant has the burden of proving lack of consideration, not merely the burden of producing evidence to counteract the presumption raised by the written contract. Jefferson suggests that the proper way to instruct on a presumption affecting the burden of proof is to tell the jury that it must find the presumed fact, unless the other party proves its nonexistence by a preponderance of the evidence [Jefferson, California Evidence Benchbook (3d ed. 1997), § 46.16]. This is predicated on plaintiff's proof of the preliminary fact giving rise to the presumption. Here it is assumed that plaintiff has already established the existence of a written instrument.

Extrinsic evidence is always admissible to show that there was no consideration for an agreement [*Simmons v. Cal. Institute of Technology* (1949) 34 Cal.2d 264, 272, 209 P.2d 581 ; *Star Pacific Investments, Inc. v. Oro Hills Ranch, Inc.* (1981) 121 Cal.App.3d 447, 456, 176 Cal.Rptr. 546]. However, the presumption is not rebutted by a mere denial of consideration [*Cordes v. Harding* (1915) 27 Cal.App. 474, 482, 150 P. 650]. It is doubtful that a fact issue will arise very often, but in one case the trial court held on conflicting evidence that defendant met the burden of proving no consideration existed [*Star Pacific Investments, Inc. v. Oro Hills Ranch, Inc.* (1981) 121 Cal.App.3d 447, 456, 176 Cal.Rptr. 546]. On the other hand, in another case, the jury found that no consideration existed, but the court of appeal reversed denial of judgment notwithstanding the verdict holding that the evidence showed that consideration existed as a matter of law [*Louisville Title Ins. Co. v. Surety Title & Guar. Co.* (1976) 60 Cal.App.3d 781, 132 Cal.Rptr. 63].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Contracts Law Consideration General Overview Contracts Law Consideration Adequate Consideration Contracts Law Formation General Overview

John F. Wells and Lise A. Pearlman were the original authors of this chapter. It has since been updated to reflect changes in the law, additional case citations and practice pointers by other lawyers as well as revisions including cross-references to the official CACI instructions.



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CHAPTER 3A Matthew Bender Formation of Contract Instructions
PART C CONSIDERATION

1-3A California Forms of Jury Instruction MB 300A.45

MB 300A.45 Consideration for Modification of Contract Not in Writing

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

An _____ [oral or implied] contract may be changed in any way by written consent of both parties without either party giving the other anything of additional value as consideration.

Authority: Civ. Code § 1697.

[2] Use of Instruction

This instruction should be used when an oral or implied contract has been modified by a writing. It is intended to counteract any inference the jury might draw that, based on a prior instruction on the consideration requirement for the original contract, consideration is required for such a modification.

For related Judicial Council instructions, see [3][b], *below*.

[3] Comment

[a] Means of Modification

A contract not in writing may be modified by a written agreement of the parties without any further consideration. The original contract is extinguished thereby to the extent of the modification [Civ. Code § 1697]. A plaintiff who asserts a claim for relief based on a modification of a contract has the burden of proving the elements necessary to establish the modification by a preponderance of the evidence [*Barrett v. Bank of America* (1986) 183 Cal.App.3d 1362, 1370-1371, 229 Cal.Rptr. 16].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 3, *California Judicial Council Contracts Instructions*]:

CACI No. 313 Modification

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewContracts LawConsiderationGeneral
OverviewContracts LawConsiderationAdequate ConsiderationContracts LawContract ModificationsGeneral
OverviewContracts LawFormationGeneral Overview

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CHAPTER 3A Matthew Bender Formation of Contract Instructions
PART C CONSIDERATION

1-3A California Forms of Jury Instruction MB 300A.46

MB 300A.46 Consideration Required for Modification of Written Contract by Oral Agreement

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Plaintiff asserts that the written contract was orally modified by the parties so that Plaintiff's obligation to Defendant was changed from _____ [describe alleged obligation] to _____ [describe alleged modification].

A contract in writing may be changed by later oral agreement of the parties if there is new consideration for the agreed modification. Therefore, if you find that the contract was orally modified, you must also find that there was new consideration for the modification. If you find that there was no new consideration for the modification, then the modification never took effect.

[*OPTIONAL (See Use of Instruction)*]

An agreement not to exercise a legal right is sufficient consideration to support a modification of a contract.

Authorities: Civ. Code § 1698; *Malmstrom v. Kaiser Aluminum & Chemical Corp.* (1986) 187 Cal.App.3d 299, 318, 231 Cal.Rptr. 820 ; *Coldwell Banker & Co. v. Pepper Tree Office Center Associates* (1980) 106 Cal.App.3d 272, 279-280, 165 Cal.Rptr. 51 ; *Louisville Title Ins. Co. v. Surety Title & Guar. Co.* (1976) 60 Cal.App.3d 781, 791, 132 Cal.Rptr. 63 .

[2] Use of Instruction

This instruction should be used when there is an issue as to whether an oral modification of a written contract is

supported by consideration and therefore effective. It should not be used if modification must be in writing to satisfy the statute of frauds [see Ch. 3F, *Matthew Bender Contract Defenses Instructions*] or if the terms of the written contract require written modification unless there is evidence of waiver or estoppel [see MB 300A.47].

For related Judicial Council instructions, see [3][b], *below*.

LexisNexis Matthew Bender Expert Practice Tip--Examine New Consideration: If you are contesting an alleged oral modification of a written contract, be sure to examine the new consideration. Remember that a compromise of an existing dispute is not valid consideration for the modification unless the dispute was "genuine" and the other party was acting in "good faith" [see MB 300A.42]. *By Ronald Oster*

LexisNexis Matthew Bender Expert Practice Tip--Use Care If Oral Change to Written Contract: Some jurors will be skeptical of an oral change to a written contract. *By Rex Heeseman*

[3] Comment

[a] Modification by Subsequent Oral Agreement

If there is no provision in the written agreement to the contrary, a written agreement may be modified by a subsequent oral agreement supported by new consideration, provided that the statute of frauds is satisfied [Civ. Code § 1698(c)]. An agreement to forego the exercise of a legal right is sufficient consideration to support a modification of a contract [*Coldwell Banker & Co. v. Pepper Tree Office Center Associates* (1980) 106 Cal.App.3d 272, 279-280, 165 Cal.Rptr. 51 ; *Louisville Title Ins. Co. v. Surety Title & Guar. Co.* (1976) 60 Cal.App.3d 781, 791, 132 Cal.Rptr. 63]. The provisions of Civ. Code § 1698, limiting proof of oral modification of written agreements, do not preclude a party from establishing estoppel, oral novation and substitution of a new agreement, rescission of a written contract by an oral agreement, waiver of the provisions of the written contract, or an oral independent collateral contract [Civ. Code § 1698(d)]. A plaintiff who asserts a claim for relief based on an oral modification of a written contract has the burden of proving the elements necessary to establish the modification by a preponderance of the evidence [*Barrett v. Bank of America* (1986) 183 Cal.App.3d 1362, 1370-1371, 229 Cal.Rptr. 16].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 3, *California Judicial Council Contracts Instructions*]:

CACI No. 313 Modification

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Contracts Law Consideration General Overview Contracts Law Consideration Adequate Consideration Contracts Law Contract Modifications Oral Modifications Contracts Law Formation General Overview

John F. Wells and Lise A. Pearlman were the original authors of this chapter. It has since been updated to reflect changes in the law, additional case citations and practice pointers by other lawyers as well as revisions including cross-references to the official CACI instructions.



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CHAPTER 3A Matthew Bender Formation of Contract Instructions
PART C CONSIDERATION

1-3A California Forms of Jury Instruction MB 300A.47

MB 300A.47 Oral Modification of Written Contract Dependent on Waiver or Estoppel

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

The parties' written agreement states that any modification must be in writing. Under ordinary circumstances, when parties have expressly agreed in writing that the contract may only be modified in writing, later oral agreements or representations will not have any effect. This is the oral modification rule and it has two exceptions.

The first exception allows a later oral agreement or representation to be enforced if you find the existence of a waiver, as that term will be defined for you.

The second exception allows a later oral agreement or representation to be enforced if you find the existence of estoppel, as that term will be defined for you.

Authorities: *Wade v. Markwell & Co.* (1953) 118 Cal.App.2d 410, 421, 258 P.2d 497 ; *Panno v. Russo* (1947) 82 Cal.App.2d 408, 412-413, 186 P.2d 452 ; *Bardeen v. Commander Oil Co.* (1940) 40 Cal.App.2d 341, 347, 104 P.2d 875

[2] Use of Instruction

This instruction should be used in cases involving an alleged unexecuted oral modification of a written contract when the enforceability of the modification is dependent on proof of waiver or estoppel. It should be given after the instruction in MB 300A.46.

For related Judicial Council instructions, see [3][b], *below*.

LexisNexis Matthew Bender Expert Practice Tip--Use Care in Structuring Argument: The factual scenario that forms the basis for this instruction seems unlikely to occur in most trials. However, if this instruction seems advisable, be careful how you structure the related argument to the jury. *By Rex Heeseman*

[3] Comment

[a] Effect of Waiver and Estoppel

Civ. Code § 1698 contains the general provisions governing modification of a contract in writing [see MB 300A.46]. However, *Civ. Code* § 1698 expressly states as follows: "Nothing in this section precludes in an appropriate case the application of rules of law concerning estoppel, oral novation and substitution of a new agreement, rescission of a written contract by an oral agreement, waiver of a provision of a written contract, or oral independent contracts." This instruction only concerns the effect of waiver or estoppel. Rescission is covered in Ch. 3G, *Matthew Bender Rescission of Contract Instructions*. The rule against varying written instruments by parol evidence or altering written contracts other than by written contract or executed oral agreement is subject to the exception that a party may waive performance of a condition by conduct or representation, or be estopped to deny such waiver [*Panno v. Russo* (1947) 82 Cal.App.2d 408, 412, 186 P.2d 452].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 3, *California Judicial Council Contracts Instructions*]:

CACI No. 313 Modification

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Contracts Law Consideration General Overview Contracts Law Consideration Promissory Estoppel Contracts Law Contract Modifications Oral Modifications Contracts Law Formation General Overview

John F. Wells and Lise A. Pearlman were the original authors of this chapter. It has since been updated to reflect changes in the law, additional case citations and practice pointers by other lawyers as well as revisions including cross-references to the official CACI instructions.



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CHAPTER 3A Matthew Bender Formation of Contract Instructions
PART C CONSIDERATION

1-3A California Forms of Jury Instruction MB 300A.48-MB 300A.59

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MB 300A.48Reserved for Future Use



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CHAPTER 3A Matthew Bender Formation of Contract Instructions
PART D PROMISSORY ESTOPPEL

1-3A California Forms of Jury Instruction MB 300A.60

MB 300A.60 Promissory Estoppel

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Under certain circumstances, to prevent an injustice, a judge has the power to enforce a promise that is not supported by consideration. In this case, Plaintiff has asked me to exercise that power to enforce Defendant's promise to _____ [*describe promise*]. If Defendant's promise was not supported by consideration, Plaintiff is required to prove all of the following five elements by a preponderance of the evidence before I can exercise my power to enforce that promise:

1. That Defendant promised to _____ [*describe promise*];
2. That Defendant reasonably should have expected Plaintiff to change [his/her/its] position substantially as a result of the promise;
3. That Plaintiff changed [his/her/its] position substantially as a result of the promise;
4. That Plaintiff was damaged or harmed in some way as a result of [his/her/its] change of position; and
5. That Defendant's breach of the promise was a substantial factor in causing injury to Plaintiff.

Although the law gives me the final responsibility for deciding whether to enforce a promise that is not supported by consideration, it will be your duty in this case to assist me in making my decision by determining whether Plaintiff has proven the elements I have just described and by rendering a special verdict setting out your decision on these issues.

Authorities: *C & K Engineering Contractors v. Amber Steel Co.* (1978) 23 Cal.3d 1, 6-7, 151 Cal.Rptr. 323, 587 P.2d 1136 ; *Youngman v. Nevada Irrigation Dist.* (1969) 70 Cal.2d 240, 249-250, 74 Cal.Rptr. 398, 449 P.2d 462 ; *Drennan v. Star Paving Co.* (1958) 51 Cal.2d 409, 413-415, 333 P.2d 757 ; *US Ecology, Inc. v. State of California* (2005) 129 Cal.App.4th 887, 891, 908, 28 Cal.Rptr.3d 894 ; *Smith v. City and County of San Francisco* (1990) 225 Cal.App.3d 38, 48, 275 Cal.Rptr. 17 ; *A-C Company Inc. v. Security Pacific National Bank* (1985) 173 Cal.App.3d 462, 472-474, 219 Cal.Rptr. 62 .

[PLAINTIFF'S/DEFENDANT'S] PROPOSED SPECIAL VERDICT

We, the jury in the above-entitled case, find the following special verdict on the issues submitted to us:

1. Did Defendant promise to _____ [describe promise]?

_____ Yes _____ No

If you answered "yes" to Question No. 1, please answer the next question.

2. Should Defendant reasonably have expected Plaintiff to change [his/her/its] position substantially as a result of the promise?

_____ Yes _____ No

If you answered "yes" to Question No. 2, please answer the next question.

3. Did Plaintiff change [his/her/its] position substantially as a result of Defendant's promise?

_____ Yes _____ No

If you answered "yes" to Question No. 3, please answer the next question.

4. Was Plaintiff damaged or harmed in some way as a result of [his/her/its] change of position?

_____ Yes _____ No

If you answered "yes" to Question No. 4, please answer the next question.

5. Was Defendant's breach of the promise a substantial factor in causing injury to Plaintiff?

_____ Yes _____ No

[2] Use of Instruction

This instruction, and the accompanying special verdict form, should be used when it is appropriate to have the jury render an advisory verdict determining whether the plaintiff has established the facts that are a prerequisite to the exercise of the court's power to grant plaintiff relief on a promissory estoppel claim.

Under some circumstances, it is clearly reversible error to permit the jury to decide a promissory estoppel claim and there is a serious question as to whether it is ever proper to submit such a claim to the jury. Consequently, an instruction

that asks the jury to determine whether the doctrine of promissory estoppel should be applied or what relief plaintiff may be entitled to on a promissory estoppel claim cannot be recommended; counsel considering the submission of these issues to the jury should give careful consideration to the propriety of such a course.

LexisNexis Matthew Bender Expert Practice Tip--Use Care in Presenting Estoppel: Many attorneys and judges have a vague or incorrect understanding of estoppel. So, exercise care in two respects. First, how to present the issue to the judge. And, second, how to present the issue to the jury. By *Rex Heeseman*

[3] Comment

Under the doctrine of promissory estoppel, a promise that is not supported by consideration may be enforced to prevent an injustice if all of the following four requirements are met [*C & K Engineering Contractors v. Amber Steel Co.* (1978) 23 Cal.3d 1, 6-7, 151 Cal.Rptr. 323, 587 P.2d 1136 ; *Youngman v. Nevada Irrigation Dist.* (1969) 70 Cal.2d 240, 249-250, 74 Cal.Rptr. 398, 449 P.2d 462 ; *Drennan v. Star Paving Co.* (1958) 51 Cal.2d 409, 413-415, 333 P.2d 757 ; *US Ecology, Inc. v. State of California* (2005) 129 Cal.App.4th 887, 891, 908, 28 Cal.Rptr.3d 894 (plaintiff must prove that defendant's breach was substantial factor in causing plaintiff's injury); *Smith v. City and County of San Francisco* (1990) 225 Cal.App.3d 38, 48, 275 Cal.Rptr. 17 ; *A-C Company Inc. v. Security Pacific National Bank* (1985) 173 Cal.App.3d 462, 472-474, 219 Cal.Rptr. 62 ; see *Kajima/Ray Wilson v. Los Angeles MTA* (2000) 23 Cal.4th 305, 315-317, 96 Cal.Rptr.2d 747, 1 P.3d 63 (Supreme Court applied doctrine of promissory estoppel in public contract context, holding that lowest responsible bidder that was wrongfully denied public contract has cause of action for monetary damages against public entity; however, those damages included bid preparation costs but not lost profits)]:

- The defendant reasonably should have expected the plaintiff to substantially change its position as a result of the promise;
- The plaintiff did, in fact, substantially change its position as a result of the promise;
- The plaintiff was or will be injured or damaged as a result of the change in position; and
- That defendant's breach of the promise was a substantial factor in causing injury to plaintiff.

A claim based on promissory estoppel is an equitable claim to be tried by the court; the parties are not entitled to a jury trial [*C & K Engineering Contractors v. Amber Steel Co.* (1978) 23 Cal.3d 1, 11, 151 Cal.Rptr. 323, 587 P.2d 1136 ; *A-C Company, Inc. v. Security Pacific National Bank* (1985) 173 Cal.App.3d 462, 472-474, 219 Cal.Rptr. 62]. When the plaintiff's evidence is not legally sufficient to establish a contract supported by consideration, it is reversible error to permit the jury to decide claims based on an alleged promissory estoppel [*A-C Company, Inc. v. Security Pacific National Bank* (1985) 173 Cal.App.3d 462, 472-474, 219 Cal.Rptr. 62]. Furthermore, no authority exists to allow submission of a promissory estoppel claim to the jury merely because it is joined with a legally sufficient breach of contract claim [*Raedeke v. Gibraltar Sav. & Loan Assn.* (1974) 10 Cal.3d 665, 111 Cal.Rptr. 693, 517 P.2d 1157 , often cited as authority supporting this type of procedure, is not apposite]. In *Raedeke*, the California Supreme Court held that the jury was properly allowed to decide a cause of action that was characterized as a promissory estoppel claim by the parties, but that was, in fact, based on allegations of legally sufficient consideration. The Court also pointed out that the jury's decision of a related promissory estoppel claim could not have been prejudicial since it was favorable to the appellant [*Raedeke v. Gibraltar Sav. & Loan Assn.* (1974) 10 Cal.3d 665, 672-674, 111 Cal.Rptr. 693, 517 P.2d 1157].

As long as a promissory estoppel claim is independently decided by the court, it is proper to have the jury render an advisory verdict on whether the plaintiff has established the facts that are a prerequisite to the exercise of the court's equitable power to grant plaintiff relief [*A-C Company, Inc. v. Security Pacific National Bank* (1985) 173 Cal.App.3d 462, 473-474, 219 Cal.Rptr. 62]. However, even when a jury is acting in an advisory capacity, case law provides no

authority for allowing it to decide the remaining issue raised by a promissory estoppel claim--that is, whether enforcement of the defendant's promise is necessary to avoid injustice--and that issue seems to be solely within the court's province [*cf. A-C Company, Inc. v. Security Pacific National Bank* (1985) 173 Cal.App.3d 462, 474, 219 Cal.Rptr. 62].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Contracts Law Consideration Promissory Estoppel Contracts Law Formation General Overview

John F. Wells and Lise A. Pearlman were the original authors of this chapter. It has since been updated to reflect changes in the law, additional case citations and practice pointers by other lawyers as well as revisions including cross-references to the official CACI instructions.



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CHAPTER 3B Matthew Bender Interpretation of Contract Instructions *

1-3B California Forms of Jury Instruction 3B.syn

§ 3B.syn Synopsis to Chapter 3B: Matthew Bender Interpretation of Contract Instructions *

MB 300B.01 No Conflict in Extrinsic Evidence--Court Interprets Contract

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Extrinsic Evidence

[b] Integration

[c] Related Judicial Council Jury Instructions

MB 300B.02 Conflict in Evidence--Preliminary Instruction When Interpretation Is Jury Question

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Submitting Question of Interpretation to Jury

[b] Related Judicial Council Jury Instructions

MB 300B.03 Objective Intention of Parties

1-3B California Forms of Jury Instruction 3B.syn

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Parties' Mutual Intent

[b] Related Judicial Council Jury Instructions

MB 300B.04 Surrounding Circumstances

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Surrounding Circumstances

[b] Related Judicial Council Jury Instructions

MB 300B.05 Interpretation of Words

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Interpretation of Words

[b] Related Judicial Council Jury Instructions

MB 300B.06 Several Documents Interpreted Together

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Documents Interpreted Together

[b] Related Judicial Council Jury Instructions

MB 300B.07 Interpretation in Favor of Contract

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Interpretation in Favor of Contract

[b] Related Judicial Council Jury Instructions

MB 300B.08 Implied Covenant of Good Faith and Fair Dealing

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Implied Covenant of Good Faith and Fair Dealing

[b] Related Judicial Council Jury Instructions

MB 300B.09 Implied Covenant of Good Faith and Fair Dealing Requires Party to Act Reasonably in Exercising Discretionary Power

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Exercising Discretionary Power

[b] Related Judicial Council Jury Instructions



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CHAPTER 3B Matthew Bender Interpretation of Contract Instructions *

*1-3B California Forms of Jury Instruction Scope***Scope**

SCOPE

This chapter includes jury instructions covering the interpretation of written agreements, which is ordinarily a question of law for the court. For the California Judicial Council jury instructions on contract interpretation, see Ch. 3, *California Judicial Council Contracts Instructions*. Ch. 3 also includes Judicial Council instructions on other issues relating to contracts, including formation, performance, modification, breach, defenses, and damages. The instructions in this chapter are intended to supplement the Judicial Council instructions [see *Cal. Rules of Ct.*, Rule 2.1050(e)].

Although the interpretation of written agreements ordinarily is a question of law for the court, when the interpretation of a written contract depends on the credibility of extrinsic evidence, it becomes a jury question. Therefore, this chapter includes both an instruction for cases in which there is no conflict in the extrinsic evidence, in which event the court interprets the contract, and a series of instructions for use in those cases in which there is a conflict for the jury to resolve.

Ch. 3A, *Matthew Bender Formation of Contract Instructions*, covers the related subject of formation of contracts that are partly written and partly oral. Only if there is an integrated written instrument is the question of interpretation distinct from that of formation of the contract. Thus, the rules of interpretation that are covered in the instructions in this chapter also may be appropriate in cases involving the formation of contracts that are partly written and partly oral.



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CHAPTER 3B Matthew Bender Interpretation of Contract Instructions *

1-3B California Forms of Jury Instruction MB 300B.01

MB 300B.01 No Conflict in Extrinsic Evidence--Court Interprets Contract**[1] Instruction** No Conflict in Extrinsic Evidence--Court Interprets Contract[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

The written contract admitted in evidence as Exhibit _____ governs the rights and duties of the parties. It is my job as judge to interpret the meaning of this contract, and therefore, I will tell you what the contract means. Under the contract:

1. Plaintiff had a duty to _____ [describe plaintiff's duty]; and
2. Defendant had a duty to _____ [describe defendant's duty].

Authorities: *Parsons v. Bristol Development Co.* (1965) 62 Cal.2d 861, 865, 44 Cal.Rptr. 767, 402 P.2d 839 ; *Oceanside 84, Ltd. v. Fidelity Federal Bank* (1997) 56 Cal.App.4th 1441, 1448, 1451, 66 Cal.Rptr.2d 487 ; *Home Federal Savings & Loan Assn. v. Ramos* (1991) 229 Cal.App.3d 1609, 1613, 284 Cal.Rptr. 1 ; *Greater Middleton Assn. v. Holmes Lumber Co.* (1990) 222 Cal.App.3d 980, 989-990, 271 Cal.Rptr. 917 ; *Medical Operations Management, Inc. v. National Health Laboratories, Inc.* (1986) 176 Cal.App.3d 886, 890-892, 895, 222 Cal.Rptr. 455 .

[2] Use of Instruction

This instruction should be used only when the court determines that the written contract is integrated and the extrinsic evidence, if any was admitted, bearing on its interpretation is uncontroverted. It instructs the jury that the court will interpret the contract and then sets forth the court's interpretation. The statement of obligations under the contract must be tailored to fit the individual case [see *Holz Rubber Co., Inc. v. American Star Ins. Co.* (1975) 14 Cal.3d 45, 54, 120 Cal.Rptr. 415, 533 P.2d 1055]. It should be limited to a statement of those obligations and conditions that are claimed to have been breached, or the performance of which are otherwise in dispute.

When the meaning of words used in a contract is disputed, the trial court engages in a three-step process. First, the court provisionally receives any proffered extrinsic evidence that is relevant to prove a meaning to which the language of the contract is reasonably susceptible. If, in light of the extrinsic evidence, the language is reasonably susceptible to the interpretation urged, the extrinsic evidence is then admitted to aid the court in its role in interpreting the contract. When there is no material conflict in the extrinsic evidence, the trial court interprets the contract as a matter of law. This is true even when conflicting inferences may be drawn from the undisputed extrinsic evidence or when the extrinsic evidence renders the contract terms susceptible to more than one reasonable interpretation. If, however, there is a conflict in the extrinsic evidence, the factual conflict is to be resolved by the jury [*Wolf v. Walt Disney Pictures & Television* (2008) 162 Cal.App.4th 1107, 1126-1127, 76 Cal.Rptr.3d 585].

Instructions that should be used when conflicting extrinsic evidence has been presented, thus requiring the jury to interpret the contract, are set forth in the remainder of this chapter.

For related Judicial Council instructions, see [3][c], *below*.

LexisNexis Matthew Bender Expert Practice Tip--Be Ready to Influence Court: How the judge frames the duties of each side is important. Thus, if needed, be ready to argue this instruction in order to influence the judge. *By Rex Heeseman*

LexisNexis Matthew Bender Expert Practice Tip--Be Ready to Tailor Evidence: If the court is going to instruct the jury on the contract's meaning, try to find out as soon as possible in the trial how the court will frame the duties of the parties. You need to know this to tailor your presentation of evidence, and your statements to the jury in opening and closing. *By Ronald Oster*

[3] Comment

[a] Extrinsic Evidence

When no extrinsic evidence has been presented relating to the intent of the parties, or when the extrinsic evidence is uncontroverted, questions concerning the interpretation of a fully integrated written agreement are questions of law and it is error to submit them to the jury [*Parsons v. Bristol Development Co.* (1965) 62 Cal.2d 861, 865, 44 Cal.Rptr. 767, 402 P.2d 839 ; *Oceanside 84, Ltd. v. Fidelity Federal Bank* (1997) 56 Cal.App.4th 1441, 1448, 1451, 66 Cal.Rptr.2d 487 ; *Home Federal Savings & Loan Assn. v. Ramos* (1991) 229 Cal.App.3d 1609, 1613, 284 Cal.Rptr. 1 ; *Greater Middleton Assn. v. Holmes Lumber Co.* (1990) 222 Cal.App.3d 980, 989-990, 271 Cal.Rptr. 917 ; *Medical Operations Management, Inc. v. National Health Laboratories, Inc.* (1986) 176 Cal.App.3d 886, 890-892, 895, 222 Cal.Rptr. 455 ; see *In re Crow Winthrop Operating Partnership* (9th Cir. 2001) 241 F.3d 1121, 1124 (bankruptcy court properly determined validity of change in ownership provision)]. If the extrinsic evidence is uncontroverted, the fact that it may give rise to conflicting inferences does not raise factual issues or justify the submission of questions relating to the meaning or intent of the agreement to the jury; in other words, unless there is a dispute as to the existence or nonexistence of the facts that are relevant in determining the intent of the parties (as opposed to a dispute as to the inferences that may be drawn from those facts), questions concerning the interpretation of the agreement are questions of law to be decided by the court [*Parsons v. Bristol Development Co.* (1965) 62 Cal.2d 861, 866, n.2, 44 Cal.Rptr. 767, 402 P.2d 839 ; *Greater Middleton Assn. v. Holmes Lumber Co.* (1990) 222 Cal.App.3d 980, 989-990, 271 Cal.Rptr. 917 ; *Medical Operations Management, Inc. v. National Health Laboratories, Inc.* (1986) 176 Cal.App.3d 886, 890-892, 895, 222 Cal.Rptr. 455].

[b] Integration

If the trial court decides that the writing was not an integrated agreement and parol evidence of additional terms or agreements is admitted, the jury will have to determine what constitutes the contract [see Ch. 3A, *Matthew Bender Formation of Contract Instructions*]. In such a case, there is no separate issue of interpretation identifiable as such since

the terms of the agreement may be found in various oral conversations, letters, memoranda, or the conduct of the parties [see *Carlson, Collins, Gordon & Bold v. Banducci* (1967) 257 Cal.App.2d 212, 225, 64 Cal.Rptr. 915]. A separate question of interpretation exists only when the parties have reduced their entire agreement to writing.

If the question of integration is in dispute, the court will determine that question in a hearing outside the jury's presence [*Brawthen v. H & R Block, Inc.* (1975) 52 Cal.App.3d 139, 124 Cal.Rptr. 845].

[c] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 3, *California Judicial Council Contracts Instructions*]:

CACI No. 314 Interpretation--Disputed Term

CACI No. 315 Interpretation--Meaning of Ordinary Words

CACI No. 316 Interpretation--Meaning of Technical Words

CACI No. 317 Interpretation--Construction of Contract as a Whole

CACI No. 318 Interpretation--Construction by Conduct

CACI No. 319 Interpretation--Reasonable Time

CACI No. 320 Interpretation--Construction Against Drafter

* John F. Wells and Lise A. Pearlman were the original authors of this chapter. It has since been updated to reflect changes in the law, additional case citations and practice pointers by other lawyers as well as revisions including cross-references to the official CACI instructions.



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CHAPTER 3B Matthew Bender Interpretation of Contract Instructions *

1-3B California Forms of Jury Instruction MB 300B.02

MB 300B.02 Conflict in Evidence--Preliminary Instruction When Interpretation Is Jury Question**[1] Instruction** Conflict in Evidence--Preliminary Instruction When Interpretation Is Jury Question[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

The contract admitted in evidence as Exhibit _____ governs the rights and duties of the parties.

[OPTIONAL (See Use of Instruction)]

That contract takes the place of any oral agreement on the same subject if the oral agreement was made before or at the same time as the written contract. You must not consider any evidence of such an oral agreement to add to or change the terms of the written contract.

[CONTINUE INSTRUCTION]

There is a dispute between the parties as to the meaning of that contract. Plaintiff contends that _____ [state plaintiff's contentions]. Defendant contends that _____ [state defendant's contentions]. This dispute raises a question of interpretation of the written contract that you must decide according to the following rules of interpretation.

Authorities: Civ. Code § 1625; Warner Constr. Corp. v. City of Los Angeles (1970) 2 Cal.3d 285, 291-293, 85 Cal.Rptr. 444, 466 P.2d 996 ; Masterson v. Sine (1968) 68 Cal.2d 222, 225, 65 Cal.Rptr. 545, 436 P.2d 561 .

[2] Use of Instruction

This instruction should be used when there is a conflict in the extrinsic evidence offered to interpret a written contract.

In such a case, the jury will determine the meaning of the contract based on its resolution of that conflict.

The optional paragraph regarding oral agreements is intended to make it clear that the extrinsic evidence is not to be used for a purpose prohibited by the parol evidence rule. This paragraph should be included in the instruction if the extrinsic evidence offered on the interpretation issues includes oral statements between the parties or if for any other reason the court believes this clarification would be desirable. If there is evidence of a subsequent oral agreement and one of the parties contends that the written agreement was thereby modified, then the instructions in Ch. 3A, *Matthew Bender Formation of Contract Instructions*, on that subject should also be given.

As indicated in the last sentence of this instruction, the instruction should be combined with or followed by the rules of interpretation set forth in the remainder of this chapter as may be appropriate to the particular case. If the contract consists of a group of writings, the instruction in MB 300B.06 should be substituted for the first sentence of this instruction.

For related Judicial Council instructions, see [3][b], *below*.

LexisNexis Matthew Bender Expert Practice Tip--Be Ready to Argue Issue With Court:

Submitting a contractual issue to the jury is not that common. It turns on the presence (or absence) of a related factual issue. This may be important to argue with the judge. *By Rex Heeseman*

[3] Comment

[a] Submitting Question of Interpretation to Jury

When the interpretation of a written contract depends on the credibility of extrinsic evidence, it is proper to submit the question of interpretation to the jury [*Warner Constr. Corp. v. City of Los Angeles* (1970) 2 Cal.3d 285, 291, 85 Cal.Rptr. 444, 466 P.2d 996 ; *Morey v. Vannucci* (1998) 64 Cal.App.4th 904, 914, 75 Cal.Rptr.2d 573 (when interpretation of contract term turned on assessment of conflicting evidence, trial court did not err in submitting that question to jury); *Horsemen's Benevolent & Protective Assn. v. Valley Racing Assn.* (1992) 4 Cal.App.4th 1538, 1559-1560, 6 Cal.Rptr.2d 698 ; *Sunniland Fruit, Inc. v. Verni* (1991) 233 Cal.App.3d 892, 898, 284 Cal.Rptr. 824]. Although the jury may in such a case consider oral testimony on the issue of the contract's meaning, if it is an integrated written contract it supersedes all prior oral agreements or negotiations, and they may not be considered by the jury to add to or change the terms of the written contract [Civ. Code § 1625; *Masterson v. Sine* (1968) 68 Cal.2d 222, 225, 65 Cal.Rptr. 545, 436 P.2d 561 ; *Aragon-Haas v. Family Security Ins. Services, Inc.* (1991) 231 Cal.App.3d 232, 240, 282 Cal.Rptr. 233].

A somewhat different approach to this problem was set forth in *Estate of Casey* [*Estate of Casey* (1982) 128 Cal.App.3d 867, 871, 180 Cal.Rptr. 582]. This case involved the interpretation of a will. The court stated that a fact issue created by extrinsic evidence should be tried to the jury but that once that factual dispute is resolved, the interpretation to be drawn from the established facts is a matter of law for the court. The appropriate procedure would seem to be to obtain a special verdict [see Code Civ. Proc. § 624] on the disputed fact issue, with the judge then determining the meaning of the written instrument based on the jury's finding [Jefferson, California Evidence Benchbook (3d ed., Cal. C.E.B. 1997), vol. 2, § 32.30]. This seems a logical application of the general rule that interpretation of a contract is for the court [*Parsons v. Bristol Development Co.* (1965) 62 Cal.2d 861, 865, 44 Cal.Rptr. 767, 402 P.2d 839], which might be followed in a relatively simple case when the factual conflict is discrete and easily defined for separate determination by the jury. However, if there are other factual issues to be decided that depend on how the instrument is interpreted or if there are several conflicts in the extrinsic evidence, the only practical solution will be to submit the entire question of interpretation to the jury, instructing them on the rules of interpretation to be followed. This instruction and those that follow are intended to carry out this latter approach.

LexisNexis Matthew Bender Expert Practice Tip--Consider Various Alternatives in Having Jury

Resolve Factual Disputes: As indicated in the above commentary, there are several different procedures

that can be used in having the jury resolve factual disputes in interpreting a contract. These different procedures can have a major impact on the other issues in the trial, including the timing and sequence of jury deliberations. Consider all of these alternatives and be prepared to argue for the procedure best suited to your case. *By Ronald Oster*

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 3, *California Judicial Council Contracts Instructions*]:

CACI No. 314 Interpretation--Disputed Term

CACI No. 315 Interpretation--Meaning of Ordinary Words

CACI No. 316 Interpretation--Meaning of Technical Words

CACI No. 317 Interpretation--Construction of Contract as a Whole

CACI No. 318 Interpretation--Construction by Conduct

CACI No. 319 Interpretation--Reasonable Time

CACI No. 320 Interpretation--Construction Against Drafter

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Province of Court & Jury Contracts Law Contract Interpretation Parol Evidence General Overview

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CHAPTER 3B Matthew Bender Interpretation of Contract Instructions *

1-3B California Forms of Jury Instruction MB 300B.03

MB 300B.03 Objective Intention of Parties

[1] Instruction Objective Intention of Parties

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

A contract must be interpreted to give effect to the agreement of the parties at the time of contracting. You must determine what the parties agreed to by the words used in the written contract. What the parties agreed to is based on the words and acts of the parties and not on their thoughts or unstated intentions.

Authorities: Civ. Code § 1636; *Pacific Gas & E. Co. v. G.W. Thomas Drayage etc. Co.* (1968) 69 Cal.2d 33, 69 Cal.Rptr. 561, 442 P.2d 641 ; *Brant v. California Dairies, Inc.* (1935) 4 Cal.2d 128, 48 P.2d 13 ; *Southern Pacific Transportation Company v. Santa Fe Pacific Pipelines Inc.* (1999) 74 Cal.App.4th 1232, 1246, 88 Cal.Rptr.2d 777 ; *San Diego Hospice v. County of San Diego* (1995) 31 Cal.App.4th 1048, 1053, 37 Cal.Rptr.2d 501 ; *Winet v. Price* (1992) 4 Cal.App.4th 1159, 1166, 1169, 6 Cal.Rptr.2d 554 ; *Sunniland Fruit, Inc. v. Verni* (1991) 233 Cal.App.3d 892, 898, 284 Cal.Rptr. 824 ; *H. S. Crocker Co. v. McFaddin* (1957) 148 Cal.App.2d 639, 643, 307 P.2d 429 .

[2] Use of Instruction

This instruction should be used with the instruction in MB 300B.02 in any case when the jury is asked to ascertain the contract's meaning based on extrinsic evidence. This instruction can also be used with the instruction in MB 300B.07 when it is necessary to determine that the contract interpretation is not contrary to the intent of the parties. It should be given when there is an issue as to what the parties meant by the words they used in the contract.

For related Judicial Council instructions, see [3][b], *below*.

LexisNexis Matthew Bender Expert Practice Tip --Using MB 300B .03: This is an important instruction because "hidden intentions" are irrelevant to the interpretation of a contract. This rule can be helpful in keeping out evidence of a party's beliefs and intentions that were not communicated to the other side. If the evidence comes in anyway, this instruction can be used to minimize the impact. By

Ronald Oster

LexisNexis Matthew Bender Expert Practice Tip--Use Common Saying to Your Advantage:

"Actions speak louder than words." Most jurors understand and appreciate this saying. Use it to your advantage in presenting the related argument. *By Rex Heeseman*

[3] Comment

[a] Parties' Mutual Intent

A contract must be interpreted to give effect to the mutual intention of the parties as it existed when the contract was made [Civ. Code § 1636; *AIU Ins. Co. v. Superior Court* (1990) 51 Cal.3d 807, 821-822, 274 Cal.Rptr. 820, 799 P.2d 1253; *Jordan v. Allstate Ins. Co.* (2004) 116 Cal.App.4th 1206, 1213, 11 Cal.Rptr.3d 169 (interpreting insurance policy); *Founding Members of Newport Beach Country Club v. Newport Beach Country Club, Inc.* (2003) 109 Cal.App.4th 944, 955-956, 961, 135 Cal.Rptr.2d 505 (interpreting country club's governing regulation); *People v. R.J. Reynolds Tobacco Co.* (2003) 107 Cal.App.4th 516, 525, 132 Cal.Rptr.2d 151 (interpreting terms of master settlement limiting outdoor tobacco advertising); *Roden v. Bergen Brunswick Corporation* (2003) 107 Cal.App.4th 620, 625, 633, 132 Cal.Rptr.2d 549; *Nissel v. Lloyds of London* (1998) 62 Cal.App.4th 1103, 1110, 73 Cal.Rptr.2d 174; *Shell Oil Co. v. Winterthur Swiss Ins. Co.* (1993) 12 Cal.App.4th 715, 737, 15 Cal.Rptr.2d 815; *Winet v. Price* (1992) 4 Cal.App.4th 1159, 1166, 6 Cal.Rptr.2d 554; *Stevenson v. Oceanic Bank* (1990) 223 Cal.App.3d 306, 316, 272 Cal.Rptr. 757; see *United States Cellular v. GTE Mobilnet, Inc.* (9th Cir. 2002) 281 F.3d 929, 934-936 (interpreting anti-transfer provisions in partnership agreement)]. This requires consideration of any evidence offered to show the intended meaning of the language used by the parties [*Pacific Gas & E. Co. v. G.W. Thomas Drayage etc. Co.* (1968) 69 Cal.2d 33, 69 Cal.Rptr. 561, 442 P.2d 641; *De Anza Enterprises v. Johnson* (2002) 104 Cal.App.4th 1307, 1314-1315, 1318, 128 Cal.Rptr.2d 749 (examination of joint venturers' contract terms, in context of document as whole and surrounding circumstances, led to conclusion that parties intended to fix purchase price by mutual agreement or appraisal, leaving date to follow as matter of course); *Southern Pacific Transportation Company v. Santa Fe Pacific Pipelines Inc.* (1999) 74 Cal.App.4th 1232, 1241-1246, 88 Cal.Rptr.2d 777 (trial court committed reversible error in rejecting almost all exhibits and refusing to interpret agreements to determine formula for establishing rent or to consider extrinsic evidence pertinent to issue)].

However, this determination of the parties' intent does not extend to an intent that is not objectively manifested [*Brant v. California Dairies, Inc.* (1935) 4 Cal.2d 128, 133, 48 P.2d 13 (testimony by one party to contract as to what he thought contract meant was inadmissible); *Bionghi v. Metropolitan Water District* (1999) 70 Cal.App.4th 1358, 1369, 83 Cal.Rptr.2d 388 (extrinsic evidence not admissible to vary terms of integrated contract by adding requirement of good cause for termination when words of contract not reasonably susceptible to meaning argued); *San Diego Hospice v. County of San Diego* (1995) 31 Cal.App.4th 1048, 1053, 37 Cal.Rptr.2d 501 (after explicitly waiving all claims, including unknown claims, with advice of counsel, releasing party may not contend it had no intention to release other party from unknown problems); *Winet v. Price* (1992) 4 Cal.App.4th 1159, 1166-1169, 6 Cal.Rptr.2d 554 (testimony on party's uncommunicated subjective intent as to meaning of contract not admissible to contradict terms of agreement); *Sunniland Fruit, Inc. v. Verni* (1991) 233 Cal.App.3d 892, 898, 284 Cal.Rptr. 824 (testimony of party as to his subjective intent or understanding may not be used to establish intent independent of express written terms)]. In construing contracts, the mutual intention of the parties as objectively exhibited by their language, acts, and conduct governs [*Winograd v. American Broadcasting Company* (1998) 68 Cal.App.4th 624, 632, 80 Cal.Rptr.2d 378 (interpreting oral stipulation in court regarding binding arbitration); *Medical Operations Management, Inc. v. National Health Laboratories, Inc.* (1986) 176 Cal.App.3d 886, 893, 222 Cal.Rptr. 455; *H. S. Crocker Co. v. McFaddin* (1957) 148 Cal.App.2d 639, 643, 307 P.2d 429]. Since the subjective intention of the parties is really irrelevant, it would seem desirable in jury instructions to avoid using the terms "intent" or "intention of the parties" even though these terms are frequently used in the Civil Code and in cases.

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 3, *California Judicial Council Contracts Instructions*]:

CACI No. 314 Interpretation--Disputed Term

CACI No. 315 Interpretation--Meaning of Ordinary Words

CACI No. 316 Interpretation--Meaning of Technical Words

CACI No. 317 Interpretation--Construction of Contract as a Whole

CACI No. 318 Interpretation--Construction by Conduct

CACI No. 319 Interpretation--Reasonable Time

CACI No. 320 Interpretation--Construction Against Drafter

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawContract InterpretationAmbiguities & Contra ProferentemGeneral OverviewContracts LawContract InterpretationParol EvidenceGeneral Overview

* John F. Wells and Lise A. Pearlman were the original authors of this chapter. It has since been updated to reflect changes in the law, additional case citations and practice pointers by other lawyers as well as revisions including cross-references to the official CACI instructions.



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CHAPTER 3B Matthew Bender Interpretation of Contract Instructions *

1-3B California Forms of Jury Instruction MB 300B.04

MB 300B.04 Surrounding Circumstances

[1] Instruction Surrounding Circumstances

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

In determining the meaning of the contract, you may consider all of the circumstances leading to the contract, such as the negotiations and statements of the parties before the contract, and the object, nature, and subject matter of the contract. The mutual intention of the parties is determined by objective manifestations of the parties' intent, including the words used in the agreement, as well as extrinsic evidence of objective matters such as the surrounding circumstances under which the parties negotiated or entered into the contract, the object, nature, and subject matter of the contract, and the subsequent acts and conduct of the parties.

Authorities: *Civ. Code* § 1647; *Pacific Gas & E. Co. v. G.W. Thomas Drayage etc. Co.* (1968) 69 Cal.2d 33, 40, 69 Cal.Rptr. 561, 442 P.2d 641 ; *Southern Pacific Transportation Company v. Santa Fe Pacific Pipelines Inc.* (1999) 74 Cal.App.4th 1232, 1240, 88 Cal.Rptr.2d 777 ; *City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith* (1998) 68 Cal.App.4th 445, 474, 80 Cal.Rptr.2d 329 ; *In re Marriage of Hasso* (1991) 229 Cal.App.3d 1174, 1180-1181, 280 Cal.Rptr. 919 ; see *Blackburn v. Charnley* (2004) 117 Cal.App.4th 758, 766, 11 Cal.Rptr.3d 885 .

[2] Use of Instruction

This instruction should be used with the instruction in MB 300B.02 when the jury is asked to ascertain the meaning of the contract based on extrinsic evidence. In a case in which the optional portion of the instruction in MB 300B.02 is used, it may be desirable to incorporate the language of this instruction immediately thereafter as a qualification, adding "However."

For related Judicial Council instructions, see [3][b], *below*.

LexisNexis Matthew Bender Expert Practice Tip--Carefully Craft Your Argument: Many jurors will struggle with this instruction. So, carefully craft your argument. *By Rex Heeseman*

LexisNexis Matthew Bender Expert Practice Tip --Using MB 300B .04: This is a very open-ended instruction and is one reason why many counsel will want to consider whether the interpretation issue should be decided by the court. Assuming there are factual disputes that require submission to the jury, counsel may want to consider a special verdict that identifies the issues with specificity.

On the other hand, counsel with a case that has strong jury appeal will be happy to submit as many issues as possible to the jury, and this instruction will provide wide latitude to introduce evidence both before and after the contract's execution. *By Ronald Oster*

[3] Comment

[a] Surrounding Circumstances

This instruction states the rule of *Civ. Code* § 1647 that a contract may be explained by reference to the circumstances under which it was made and the matter to which it relates. This includes the object, nature, and subject matter of the contract [*Pacific Gas & E. Co. v. G.W. Thomas Drayage etc. Co. (1968) 69 Cal.2d 33, 40, 69 Cal.Rptr. 561, 442 P.2d 641*]. For example, in one case, the enforceability of a marital settlement agreement was challenged by the husband, who claimed that approval by the parties' attorneys was a condition to enforcement because the agreement included signature lines for approval by the parties' attorneys regarding form. In interpreting the agreement, the court looked to *Civ. Code* § 1647 and considered the circumstances and conduct surrounding the execution of the agreement. Pointing out that the parties had negotiated the agreement in question and prior settlement agreements without the assistance of attorneys, the court concluded that attorney approval was not a condition to the agreement's enforcement [*In re Marriage of Hasso (1991) 229 Cal.App.3d 1174, 1181, 280 Cal.Rptr. 919*].

Another case involved interpretation of real estate purchase contracts that specified only lot numbers in an as-yet unapproved subdivision, but not the precise architectural details of the houses to be constructed on those lots. The court approved interpretation of those contracts for purposes of a judgment for specific performance based on extrinsic evidence of the developer's tract map, site plans, standard home feature sheets, floor plans and elevation plans, as well as the fact that by the time the case went to trial houses had in fact been completed on the lots at issue [*Blackburn v. Charnley (2004) 117 Cal.App.4th 758, 766, 11 Cal.Rptr.3d 885*].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 3, *California Judicial Council Contracts Instructions*]:

CACI No. 314 Interpretation--Disputed Term

CACI No. 315 Interpretation--Meaning of Ordinary Words

CACI No. 316 Interpretation--Meaning of Technical Words

CACI No. 317 Interpretation--Construction of Contract as a Whole

CACI No. 318 Interpretation--Construction by Conduct

CACI No. 319 Interpretation--Reasonable Time

CACI No. 320 Interpretation--Construction Against Drafter

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract InterpretationParol EvidenceGeneral Overview

* John F. Wells and Lise A. Pearlman were the original authors of this chapter. It has since been updated to reflect changes in the law, additional case citations and practice pointers by other lawyers as well as revisions including cross-references to the official CACI instructions.



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CHAPTER 3B Matthew Bender Interpretation of Contract Instructions *

1-3B California Forms of Jury Instruction MB 300B.05

MB 300B.05 Interpretation of Words

[1] Instruction Interpretation of Words

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

The words of a contract are to be understood in their ordinary and popular sense.

[*OPTIONAL (See Use of Instruction)*]

However, words used by the parties in a technical sense are to be interpreted as usually understood by persons in the profession or business to which they relate, unless clearly used in a different sense.

[*OPTIONAL (See Use of Instruction)*]

A party may establish that words in a contract have been given a special meaning by custom and usage if the party urging this meaning meets the burden of proving both of the following:

- 1. That there is a general, uniform, and widely accepted custom or usage; and**
- 2. That the parties had knowledge of that custom or usage. This requirement of knowledge may be satisfied if the custom or usage is of such general and universal application that the parties must have been aware of it.**

Authorities: Civ. Code §§ 1644, 1645; Code Civ. Proc. § 1861; *Texas Instruments, Inc. v. Tessera, Inc.* (Fed. Cir. 2000) 231 F.3d 1325, 1329-1331 ; *City Savings & Loan Assn. v. General Ins. Co.* (N.D. Cal. 1974) 386 F.Supp. 1210, 1219 ; *AIU Ins. Co. v. Superior Court* (1990) 51 Cal.3d 807, 822, 825, 274 Cal.Rptr. 820, 799 P.2d 1253 ; *Miller v.*

Germain Seed etc. Co. (1924) 193 Cal. 62, 69 ; Fibreboard Corp. v. Hartford Accident & Indemnity Co. (1993) 16 Cal.App.4th 492, 503, 20 Cal.Rptr.2d 376 ; State Farm Fire & Casualty Co. v. Elizabeth N. (1992) 9 Cal.App.4th 1232, 1236, 12 Cal.Rptr.2d 327 ; Sunniland Fruit, Inc. v. Verni (1991) 233 Cal.App.3d 892, 899, 284 Cal.Rptr. 824 ; Heggblade-Marguleas-Tenneco, Inc. v. Sunshine Biscuit, Inc. (1976) 59 Cal.App.3d 948, 957-958, 131 Cal.Rptr. 183 ; Roberts Distrib. Co. v. Kaye-Halbert Corp. (1954) 126 Cal.App.2d 664, 676, 272 P.2d 886 .

[2] Use of Instruction

This instruction should be used with the instruction in MB 300B.02 in a case in which the jury is asked to ascertain the meaning of the contract based on extrinsic evidence. It should be used when there is an issue over the meaning of words in the contract. The optional parts of the instruction should only be used if there is evidence supporting the applicability of one of the exceptions to the ordinary meaning rule.

For related Judicial Council instructions, see [3][b], *below*.

LexisNexis Matthew Bender Expert Practice Tip--Draw on Jury's Everyday Experiences: An argument by analogy may aid the jury in applying these legal principles. Draw on the jury's everyday experiences. *By Rex Heeseman*

[3] Comment

[a] Interpretation of Words

Civ. Code § 1644 provides that words used in a contract are to be understood in their ordinary and popular sense, unless the parties are shown to have used them in a different sense [*AIU Ins. Co. v. Superior Court (1990) 51 Cal.3d 807, 822, 825, 274 Cal.Rptr. 820, 799 P.2d 1253 ; Nissel v. Lloyds of London (1998) 62 Cal.App.4th 1103, 1110, 73 Cal.Rptr.2d 174 ; Fibreboard Corp. v. Hartford Accident & Indemnity Co. (1993) 16 Cal.App.4th 492, 503, 20 Cal.Rptr.2d 376 ; State Farm Fire & Casualty Co. v. Elizabeth N. (1992) 9 Cal.App.4th 1232, 1236, 12 Cal.Rptr.2d 327 ; Sunniland Fruit, Inc. v. Verni (1991) 233 Cal.App.3d 892, 899, 284 Cal.Rptr. 824 ; see Texas Instruments, Inc. v. Tessera, Inc. (Fed. Cir. 2000) 231 F.3d 1325, 1331 (in patent case, term "litigation" in governing law clause of license agreement was found to include International Trade Commission proceedings); see also Code Civ. Proc. § 1864 (construction--sense in which parties use words)]].*

Civ. Code § 1645 provides that technical words are interpreted as usually understood by persons in the profession or business to which they relate, again unless clearly used in a different sense. In this instruction, the principles of *Civ. Code §§ 1644 and 1645* have been combined with the requirements for "custom and usage" instructions that have been articulated by case law.

LexisNexis Matthew Bender Expert Practice Tip--Use Expert Testimony: With regard to technical terms, it may be necessary to use expert testimony to establish industry custom or usage. *By Ronald Oster*

The instruction given when custom or usage is sought to be proven must include the following two prerequisites to a finding that the parties in effect intended the meaning established by that custom or usage:

- First, the existence of a custom or usage must be established; it is inadequate to prove a few instances that do not constitute a general, uniform, and widely accepted practice [see *City Savings & Loan Assn. v. General Ins. Co. (N.D. Cal. 1974) 386 F.Supp. 1210, 1219 ; Roberts Distrib. Co. v. Kaye-Halbert Corp. (1954) 126 Cal.App.2d 664, 676, 272 P.2d 886*].
- Second, it must be shown that the parties had knowledge--either actual or constructive--of the custom or usage. Constructive knowledge is established if the custom is of such general and universal

application that knowledge will be presumed [*Miller v. Germain Seed & Plant Co.* (1924) 193 Cal. 62, 69 ; *Heggblade-Marguleas-Tenneco, Inc. v. Sunshine Biscuit, Inc.* (1976) 59 Cal.App.3d 948, 957-958, 131 Cal.Rptr. 183].

Contracts for sales of goods covered by the Uniform Commercial Code may also be interpreted by course of dealing, course of performance, or usage of trade [*Com. Code § 2202(a)*; see *Com. Code § 1303* (defining usage of trade); see also Ch. 3H, *Matthew Bender Commercial Code Sales Contract Instructions*].

Language in a contract must be construed in the context of the instrument as a whole, and in the circumstances of the particular case, and cannot be found to be ambiguous in the abstract. There cannot be an ambiguity unrelated to application of the instrument to the particular facts of the case [*Bay Cities Paving & Grading v. Lawyers' Mutual Ins. Co.* (1993) 5 Cal.4th 854, 867, 21 Cal.Rptr.2d 691, 855 P.2d 1263].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 3, *California Judicial Council Contracts Instructions*]:

CACI No. 315 Interpretation--Meaning of Ordinary Words

CACI No. 316 Interpretation--Meaning of Technical Words

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawContract InterpretationAmbiguities & Contra ProferentemGeneral OverviewContracts LawContract InterpretationParol EvidenceGeneral Overview

* John F. Wells and Lise A. Pearlman were the original authors of this chapter. It has since been updated to reflect changes in the law, additional case citations and practice pointers by other lawyers as well as revisions including cross-references to the official CACI instructions.



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CHAPTER 3B Matthew Bender Interpretation of Contract Instructions *

1-3B California Forms of Jury Instruction MB 300B.06

MB 300B.06 Several Documents Interpreted Together

[1] Instruction Several Documents Interpreted Together

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

The rights and duties of the parties are governed by the written documents that have been admitted in evidence as Exhibits _____. All of the documents, which are part of the same transaction, must be interpreted together as one contract. If there are any provisions in one of these documents limiting, explaining, or otherwise affecting the provisions of another, all these provisions should be given consideration in determining the agreement of the parties.

Authority: *Civ. Code § 1642.*

[2] Use of Instruction

This instruction should be used when the court has decided that several documents are all part of the same contract and must be interpreted together. In that situation, it should be substituted for the first sentence of the instruction in MB 300B.02.

For related Judicial Council instructions, see [3][b], *below*.

LexisNexis Matthew Bender Expert Practice Tip--"Connect the Dots" for Jury: This is another instruction where you may need to be prepared to "connect the dots" for the jury, especially if there are many documents. *By Rex Heeseman*

LexisNexis Matthew Bender Expert Practice Tip--Use Visual Aids: If the case involves multiple documents, as is true of most commercial cases, the use of visual aids is critical. Many contracts are bulky documents with only a few pages or phrases that are important to the case. Good courtroom graphics can isolate and highlight the key portions during testimony and closing argument. *By Ronald*

Oster

[3] Comment

[a] Documents Interpreted Together

Civ. Code § 1642 provides that several contracts relating to the same matters, between the same parties, and made as parts of substantially one transaction, are to be taken together. This is in reality an aspect of the integration inquiry [Corbin on Contracts (1960 ed.), vol. 3, § 549]. Whether a writing, or several writings, constitutes the entire agreement of the parties is a question of law for the court [*Brawthen v. H & R Block, Inc.* (1975) 52 Cal.App.3d 139, 124 Cal.Rptr. 845]. Therefore, the court will decide in proceedings conducted outside the presence of the jury whether the documents must be interpreted together and will instruct the jury accordingly.

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 3, *California Judicial Council Contracts Instructions*]:

CACI No. 317 Interpretation--Construction of Contract as a Whole

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawContract InterpretationParol EvidenceGeneral Overview

* John F. Wells and Lise A. Pearlman were the original authors of this chapter. It has since been updated to reflect changes in the law, additional case citations and practice pointers by other lawyers as well as revisions including cross-references to the official CACI instructions.



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CHAPTER 3B Matthew Bender Interpretation of Contract Instructions *

1-3B California Forms of Jury Instruction MB 300B.07

MB 300B.07 Interpretation in Favor of Contract

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

[*USE ONE OR MORE AS APPLICABLE (See Use of Instruction)*]

[*EITHER*]

When there is more than one interpretation of a contract, and under one interpretation the contract could have been performed without violating the law, and under the other interpretation it could not have been performed legally, you must give it the lawful interpretation. [*Use if applicable (see Use of Instruction): If the contract could have been performed legally it cannot be declared invalid just because it was performed in an illegal way.*]

[*OR*]

When there is more than one interpretation of a contract, and under one interpretation the contract could have been operative and capable of being carried into effect, and under the other interpretation it would not have been, you must give it the interpretation that makes it operative and capable of being carried into effect. A contract is operative and capable of being carried into effect when it does not require the parties to perform tasks or acts that are impossible.

[*OR*]

When there is more than one interpretation of a contract, and under one interpretation the contract could have been reasonable, and under the other interpretation it would not have been, you must give it the interpretation that makes it reasonable. A contract is reasonable if the performance of the parties would not have resulted in _____ [unusual/extraordinary/harsh/unjust/inequitable] consequences.

[CONTINUE INSTRUCTION]

However, the interpretation that you give the contract cannot be contrary to the intention of the parties.

Authorities: *Civ. Code § 1643; Entremont v. Whitsell (1939) 13 Cal.2d 290, 297, 89 P.2d 392 ; Strong v. Theis (1986) 187 Cal.App.3d 913, 919-920, 232 Cal.Rptr. 272 ; Meadows v. Grimsaard (1985) 175 Cal.App.3d 475, 484, 221 Cal.Rptr. 22 ; Marathon Steel Co. v. Tilley Steel, Inc. (1977) 66 Cal.App.3d 413, 417, 136 Cal.Rptr. 73 ; Advance Medical Diagnostic Laboratories v. County of Los Angeles (1976) 58 Cal.App.3d 263, 269-270, 129 Cal.Rptr. 723 ; Beverly Hills Oil Co. v. Beverly Hills Unified School District (1968) 264 Cal.App.2d 603, 609, 70 Cal.Rptr. 640 ; White v. Indemnity Ins. Co. (1966) 246 Cal.App.2d 160, 162, 54 Cal.Rptr. 630 ; Freeman v. Jergins (1954) 125 Cal.App.2d 536, 546, 271 P.2d 210 ; Danley v. Merced Irr. Dist. (1925) 76 Cal.App. 52, 56, 243 P. 676 .*

[2] Use of Instruction

This instruction should be used when there are two possible interpretations of a contract and one of the interpretations makes the contract lawful, reasonable, or operative and capable of being carried into effect, and the other interpretation does not. This instruction should be used in conjunction with the instruction in MB 300B.03 on determining the intention of the parties. One or more of the three alternative instructions may be used as appropriate. The instruction on the legality of the contract when it was carried out in an illegal manner may be used in applicable circumstances.

For related Judicial Council instructions, see [3][b], *below*.

LexisNexis Matthew Bender Expert Practice Tip --Using MB 300B .07: This can be a helpful instruction to a plaintiff, especially the portions that create a presumption that the contract was in effect and should be given a "reasonable" interpretation to eliminate harsh or inequitable consequences. *By Ronald Oster*

LexisNexis Matthew Bender Expert Practice Tip--Finding a Contract: Most jurors, if confronted with this situation at trial, will normally want to find for the contract's existence. Exploit or respond to that view. *By Rex Heeseman*

[3] Comment

[a] Interpretation in Favor of Contract

Under *Civ. Code § 1643*, if a contract can be interpreted in two or more ways, it must be interpreted in the way that will make it lawful [*Entremont v. Whitsell (1939) 13 Cal.2d 290, 297, 89 P.2d 392 ; Strong v. Theis (1986) 187 Cal.App.3d 913, 919-920, 232 Cal.Rptr. 272*], operative and capable of being carried into effect [*Meadows v. Grimsaard (1985) 175 Cal.App.3d 475, 484, 221 Cal.Rptr. 22 ; White v. Indemnity Ins. Co. (1966) 246 Cal.App.2d 160, 162, 54 Cal.Rptr. 630*], definite, and reasonable [*Marathon Steel Co. v. Tilley Steel, Inc. (1977) 66 Cal.App.3d 413, 417, 136 Cal.Rptr. 73 ; Beverly Hills Oil Co. v. Beverly Hills Unified School District (1968) 264 Cal.App.2d 603, 609, 70 Cal.Rptr. 640*]. If the contract could have been carried out in a way that is not in violation of the law, it is to be interpreted in this way, even if it was actually carried out in an unlawful manner [*Freeman v. Jergins (1954) 125 Cal.App.2d 536, 546, 271 P.2d 210*]. A contract is operative and capable of being carried into effect when it does not call for an impossible

condition or event as a test of performance [see *Danley v. Merced Irr. Dist.* (1925) 76 Cal.App. 52, 56, 243 P. 676]. A contract is reasonable if the performance of the parties would not have resulted in unusual, extraordinary, harsh, unjust, or inequitable consequences [*Beverly Hills Oil Co. v. Beverly Hills Unified School District* (1968) 264 Cal.App.2d 603, 609, 70 Cal.Rptr. 640].

However, the interpretation must be made in conjunction with a decision regarding the intent of the parties at the time they made the contract [see *Civ. Code § 1643* (interpretation may not violate intention of parties); *Advance Medical Diagnostic Laboratories v. County of Los Angeles* (1976) 58 Cal.App.3d 263, 269-270, 129 Cal.Rptr. 723]. A determination of the parties' intent is based not only on the words, but on the acts of the parties [see *MB 300B.03* (determining objective intent of parties)].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 3, *California Judicial Council Contracts Instructions*]:

CACI No. 314 Interpretation--Disputed Term

CACI No. 315 Interpretation--Meaning of Ordinary Words

CACI No. 316 Interpretation--Meaning of Technical Words

CACI No. 317 Interpretation--Construction of Contract as a Whole

CACI No. 318 Interpretation--Construction by Conduct

CACI No. 319 Interpretation--Reasonable Time

CACI No. 320 Interpretation--Construction Against Drafter

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts Law Contract Interpretation Ambiguities & Contra Proferentem General Overview

* John F. Wells and Lise A. Pearlman were the original authors of this chapter. It has since been updated to reflect changes in the law, additional case citations and practice pointers by other lawyers as well as revisions including cross-references to the official CACI instructions.



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California Forms of Jury Instruction

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CHAPTER 3B Matthew Bender Interpretation of Contract Instructions *

*1-3B California Forms of Jury Instruction MB 300B.08***MB 300B.08 Implied Covenant of Good Faith and Fair Dealing****[1] Instruction** Implied Covenant of Good Faith and Fair Dealing[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

In every contract or agreement there is an implied promise of good faith and fair dealing. This means that each party impliedly agrees not to do anything to destroy or injure the right of the other to receive the benefits of the contract. Thus, each party has the duty not to prevent or hinder performance by the other party.

[*OPTIONAL (See Use of Instruction)*]

However, the law does not imply any promise or duty that is contrary to the express terms of the written agreement between the parties. When the written agreement states that _____ [characterize nature of express provision in issue, e.g., a party has the right to do a particular thing], the implied promise of good faith and fair dealing does not require that party _____ [characterize nature of prohibited application, e.g., to give up that right]. In this case, the written agreement between the parties expressly stated that _____ [state substance of specific provision, e.g., Defendant had the right to terminate Plaintiff's employment at any time whether or not a good reason existed for termination]. Therefore, Defendant had no duty under the contract _____ [characterize prohibited application specifically, e.g., to continue to employ Plaintiff unless good reason existed for termination].

Authorities: *Comunale v. Traders & General Ins. Co.* (1958) 50 Cal.2d 654, 658, 328 P.2d 198 ; *Brown v. Superior Court* (1949) 34 Cal.2d 559, 564, 212 P.2d 878 ; *Universal Sales Corp. v. Cal. etc. Mfg. Co.* (1942) 20 Cal.2d 751, 771, 128 P.2d 665 ; *Storek & Storek, Inc. v. Citicorp Real Estate, Inc.* (2002) 100 Cal.App.4th 44, 55-58, 64, 122 Cal.Rptr.2d 267 ; *Ocean Services Corp. v. Ventura Port Dist.* (1993) 15 Cal.App.4th 1762, 1780-1781, 19 Cal.Rptr.2d 750 ; *Gerdlund v. Electronic Dispensers International* (1987) 190 Cal.App.3d 263, 277-278, 235 Cal.Rptr. 279 ;

Edmond's of Fresno v. MacDonald Group, Ltd. (1985) 171 Cal.App.3d 598, 605-608, 217 Cal.Rptr. 375 ; see *Pugh v. See's Candies, Inc.* (1981) 116 Cal.App.3d 311, 327-328, 171 Cal.Rptr. 917 .

[2] Use of Instruction

This instruction should be used with the instruction in MB 300B.02 when the jury is asked to ascertain the meaning of the contract based on extrinsic evidence. This instruction should only be given if the facts and circumstances are such that the jury would be entitled to find that one of the parties breached the implied covenant of good faith and fair dealing.

This instruction should not be used when express and unambiguous provisions of the contract between the plaintiff and defendant negate uncontradicted evidence establishing the implied duty or duties that the plaintiff contends were imposed on defendant. The optional provision should be used to inform the jury of the limitations on the scope of the covenant when express contract provisions negate some, but not all, of the duties that the jury might otherwise imply from the evidence presented.

For related Judicial Council instructions, see [3][b], *below*.

LexisNexis Matthew Bender Expert Practice Tip--Use Care in Arguing This Instruction: This legal principle is difficult for many attorneys and some judges. Just imagine a juror's reaction! So, spend the time and effort to make an understandable, but not too complicated, oral argument in discussing this instruction. *By Rex Heeseman*

[3] Comment

[a] Implied Covenant of Good Faith and Fair Dealing

In every contract there is an implied covenant that neither party will do anything that will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract, which means that in every contract there exists an implied covenant of good faith and fair dealing [*Comunale v. Traders & General Ins. Co.* (1958) 50 Cal.2d 654, 658, 328 P.2d 198 ; *Brown v. Superior Court* (1949) 34 Cal.2d 559, 564, 212 P.2d 878 ; *Universal Sales Corp. v. Cal. etc. Mfg. Co.* (1942) 20 Cal.2d 751, 771, 128 P.2d 665 ; *Locke v. Warner Brothers, Inc.* (1997) 57 Cal.App.4th 354, 367, 66 Cal.Rptr.2d 921 ; *Ocean Services Corp. v. Ventura Port Dist.* (1993) 15 Cal.App.4th 1762, 1780-1781, 19 Cal.Rptr.2d 750 ; see *Oracle Corp. v. Falotti* (9th Cir. 2003) 319 F.3d 1106, 1111-1112 (compensation committee did not breach covenant of good faith and fair dealing under stock option agreement); *Pasadena Live, LLC v. City of Pasadena* (2004) 114 Cal.App.4th 1089, 1092-1094, 8 Cal.Rptr.3d 233 (entertainment company adequately alleged city's breach of contract for amphitheater productions, with allegations that defendant breached implied covenant by preventing plaintiff from submitting entertainment proposals for its consideration); *Pugh v. See's Candies, Inc.* (1981) 116 Cal.App.3d 311, 327-328, 171 Cal.Rptr. 917 ; cf. *Kim v. Regents of the University of California* (2000) 80 Cal.App.4th 160, 164-165, 95 Cal.Rptr.2d 10 (civil service employee could not state cause of action for breach of contractual covenant of good faith and fair dealing, since public employment is held by statute rather than by contract)]. The implied covenant does not create a fiduciary relationship [see *Wolf v. Superior Court* (2003) 107 Cal.App.4th 25, 30-31, 130 Cal.Rptr.2d 860 (every contract requires one party to repose trust and confidence in other party to perform; contingent entitlement to future compensation within control of one party did not, alone, give rise to fiduciary relationship)]. The implied covenant of good faith and fair dealing does not supersede specific, unambiguous contractual provisions [*Gerdlund v. Electronic Dispensers International* (1987) 190 Cal.App.3d 263, 277-278, 235 Cal.Rptr. 279 ; *Cherry v. Home Sav. & Loan Assn.* (1969) 276 Cal.App.2d 574, 580, 81 Cal.Rptr. 135 , overruled on other grounds in *Wellenkamp v. Bank of America* (1978) 21 Cal.3d 943, 953, 148 Cal.Rptr. 379, 582 P.2d 970 and *Tucker v. Lassen Sav. & Loan Assn.* (1974) 12 Cal.3d 629, 640, 116 Cal.Rptr. 633, 526 P.2d 1169]. Although it may be applied to contradict an express contractual grant of discretion if necessary to protect an agreement that otherwise would be rendered illusory and unenforceable, it will not be applied if the contract is unambiguous, otherwise supported by

adequate consideration, and unnecessary to effectuate the parties' expressed desire for a binding agreement [*Storek & Storek, Inc. v. Citicorp Real Estate, Inc.* (2002) 100 Cal.App.4th 44, 55-58, 64, 122 Cal.Rptr.2d 267 (covenant of good faith and fair dealing may not be implied to prohibit defendant lender from doing what it was expressly permitted to do under loan agreement--withhold loan funds when conditions precedent to its performance were not fulfilled to its satisfaction); *Third Story Music, Inc. v. Waits* (1995) 41 Cal.App.4th 798, 806-809, 48 Cal.Rptr.2d 747]. Consequently, it is error to give an instruction on the implied covenant when it will have the effect of inviting the jury to imply an obligation that is negated by the express terms of an unambiguous agreement [*Gerdlund v. Electronic Dispensers International* (1987) 190 Cal.App.3d 263, 277-278, 235 Cal.Rptr. 279].

In a case in which the express terms of a loan agreement provided that the lender's obligation to disburse loan funds was conditional on its objectively reasonable determination that the project budget was in balance, the court of appeal held that no obligation to act in good faith can be implied to contradict or limit that express condition precedent, and no inquiry into good faith can be made. Under those circumstances, it is error to instruct the jury to evaluate the lender's determination regarding the loan balance for both reasonableness *and* good faith [*Storek & Storek, Inc. v. Citicorp Real Estate, Inc.* (2002) 100 Cal.App.4th 44, 61-62, 64, 122 Cal.Rptr.2d 267].

The implied covenant is especially relevant when a contract contains a clause requiring performance to be to the personal satisfaction of a party to the contract as opposed to the reasonable satisfaction [see Ch. 3D, *Matthew Bender Performance and Breach of Contract Instructions*]. In such a case, the party who must be satisfied is required by the implied covenant to exercise his or her judgment in good faith [*Rodriguez v. Barnett* (1959) 52 Cal.2d 154, 160, 338 P.2d 907 ; *Mattei v. Hopper* (1958) 51 Cal.2d 119, 124, 330 P.2d 625 ; *Larwin-Southern California, Inc. v. JGB Investment Co.* (1980) 101 Cal.App.3d 626, 640, 162 Cal.Rptr. 52 ; see *Chodos v. West Publishing Co, Inc.* (9th Cir. 2002) 292 F.3d 992, 997-998 (agreement between author and publisher giving publisher right to reject unacceptable manuscript was not illusory because duty to exercise discretion was limited by duty of good faith; because agreement obligated publisher to make judgment as to quality of author's work, it must make judgment in good faith)]. Although these cases dealt with mutuality of obligation rather than interpretation, when extrinsic evidence is offered to explain a satisfaction clause and the issue of the meaning of the contract goes to the jury, an instruction on the implied covenant would seem appropriate. For example, in a landlord-tenant context the implied covenant will not permit either a landlord or a tenant to avoid liability for damages under a percentage rental lease when either party conducts a competing business on adjacent premises causing a reduction of the gross receipts on the demised premises. The subject case involved interpretation of a lease that included a covenant restricting the landlord's right to lease space in an existing shopping mall to a business that was similar to that of the plaintiff. The court held that the implied covenant made the restrictive covenant in the lease applicable to an *addition* to the existing mall as well as to the existing mall itself. (Although this holding was based on the implied covenant, the court also interpreted the restrictive covenant to prohibit the landlord from allowing a competing business in an extension to the mall.) [*Edmond's of Fresno v. MacDonald Group, Ltd.* (1985) 171 Cal.App.3d 598, 605-608, 217 Cal.Rptr. 375]. However, the implied covenant does not require good cause for termination of a distributorship agreement because in that context there are no special elements of reliance or unequal bargaining power [*Gianelli Distributing Co. v. Beck & Co.* (1985) 172 Cal.App.3d 1020, 1036, 219 Cal.Rptr. 203 , *overruled on other grounds*, *Dore v. Arnold Worldwide, Inc.* (2006) 39 Cal.4th 384, 394, 46 Cal.Rptr.3d 668, 139 P.3d 56] .

For a further discussion of the various situations in which the implied covenant of good faith and fair dealing has, or has not, been held to be applicable, see Witkin, Summary of California Law, vol. 1, *Contracts*, §§ 742-750, 752 Law (9th ed. 1987).

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 3, *California Judicial Council Contracts Instructions*]:

CACI No. 314 Interpretation--Disputed Term

CACI No. 317 Interpretation--Construction of Contract as a Whole

CACI No. 318 Interpretation--Construction by Conduct

CACI No. 319 Interpretation--Reasonable Time

CACI No. 320 Interpretation--Construction Against Drafter

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawContract InterpretationGood Faith & Fair DealingContracts LawContract InterpretationParol
EvidenceGeneral Overview

* John F. Wells and Lise A. Pearlman were the original authors of this chapter. It has since been updated to reflect changes in the law, additional case citations and practice pointers by other lawyers as well as revisions including cross-references to the official CACI instructions.



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CHAPTER 3B Matthew Bender Interpretation of Contract Instructions *

1-3B California Forms of Jury Instruction MB 300B.09

MB 300B.09 Implied Covenant of Good Faith and Fair Dealing Requires Party to Act Reasonably in Exercising Discretionary Power

[1] Instruction Implied Covenant of Good Faith and Fair Dealing Requires Party to Act Reasonably in Exercising Discretionary Power

[PLAINTIFF'S/DEFENDANT'S] PROPOSED INSTR. NO. _____

A contract may give one of the parties power to take certain actions to protect [his/her/its] interests or to make sure that [he/she/it] will receive the benefits of the contract. When the contract does this, the implied promise of good faith and fair dealing requires the party to act in good faith and to deal fairly with the other party in deciding whether to use that power and in deciding what actions to take. This means that the party who is given a power to do something to protect [his/her/its] own interests may not use that power to unreasonably or unfairly harm the other party or to deprive the other party of the benefits of the contract.

In this case, the contract between Plaintiff and Defendant gave Defendant the power to _____ [describe discretionary power, e.g., apply the fire insurance proceeds toward repayment of the loan it made to Plaintiff]. The promise of good faith and fair dealing that was implied by law in the contract required Defendant to act in good faith and to deal fairly with Plaintiff in deciding _____ [characterize nature of discretion, e.g., whether to apply the fire insurance proceeds toward repayment of the loan]. Therefore, it required that Plaintiff not use the power to _____ [characterize nature of power, e.g., apply the fire insurance proceeds] in a way that unreasonably or unfairly harms Plaintiff or deprives Plaintiff of the benefits of the contract.

Authorities: *Kendall v. Ernest Pestana, Inc.* (1985) 40 Cal.3d 488, 500, 220 Cal.Rptr. 818, 709 P.2d 837 ; *Cal. Lettuce Growers v. Union Sugar Co.* (1955) 45 Cal.2d 474, 484, 289 P.2d 785 ; *Acree v. General Motors Acceptance Corp.* (2001) 92 Cal.App.4th 385, 393-396, 112 Cal.Rptr.2d 99 ; *Locke v. Warner Brothers, Inc.* (1997) 57 Cal.App.4th 354, 363-364, 66 Cal.Rptr.2d 921 ; *Barney v. Aetna Casualty & Surety Co.* (1986) 185 Cal.App.3d 966, 974, 230 Cal.Rptr.

215 ; *Schoolcraft v. Ross* (1978) 81 Cal.App.3d 75, 80-81, 146 Cal.Rptr. 57 .

[2] Use of Instruction

This instruction should be used when the plaintiff contends that a defendant breached the implied covenant of good faith and fair dealing by exercising a discretionary contractual power in an unfair or unreasonable manner. It should be given along with the instruction on the general nature of the covenant of good faith and fair dealing in MB 300B.08 and the instruction on breach in Chapter 3D, *Matthew Bender Performance and Breach of Contract Instructions*, MB 300D.03.

This instruction may also be used, with modification, when the defendant contends that the plaintiff breached the covenant of good faith and fair dealing in exercising a discretionary power. For example, it can be used when the defendant claims that compliance with a provision in a lease requiring the landlord's approval of a sublease is excused by the landlord's failure to act reasonably and in good faith in deciding whether to approve the proposed sublease.

For related Judicial Council instructions, see [3][b], *below*.

[3] Comment

[a] Exercising Discretionary Power

When a contract gives one party a discretionary power to take certain actions to protect its own interests, the implied covenant of good faith and fair dealing requires it to act fairly and in good faith in exercising that power. Accordingly, a party may not exercise a discretionary power so that the other party is unreasonably or unfairly injured or the other party is deprived of the contract benefits [*Kendall v. Ernest Pestana, Inc.* (1985) 40 Cal.3d 488, 500, 220 Cal.Rptr. 818, 709 P.2d 837 (landlord's power to approve or disapprove proposed sublease); *Cal. Lettuce Growers v. Union Sugar Co.* (1955) 45 Cal.2d 474, 484, 289 P.2d 785 (buyer's power to select accounting firm to determine price under agreed-upon formula); *Acree v. General Motors Acceptance Corp.* (2001) 92 Cal.App.4th 385, 393-396, 112 Cal.Rptr.2d 99 (finance company's power to choose method for computing insurance premium refunds or credits on cancellation); *Locke v. Warner Brothers, Inc.* (1997) 57 Cal.App.4th 354, 363-364, 66 Cal.Rptr.2d 921 (film studio's power to evaluate prospective director's proposals); *Barney v. Aetna Casualty & Surety Co.* (1986) 185 Cal.App.3d 966, 974, 230 Cal.Rptr. 215 (insurer's power to settle claims against insured); *Schoolcraft v. Ross* (1978) 81 Cal.App.3d 75, 80-81, 146 Cal.Rptr. 57 (lender's power to apply fire insurance proceeds toward repayment of loan); see *Milenbach v. Comm'r* (9th Cir. 2003) 318 F.3d 924, 930-931 (Raiders football team's broad discretion in timing construction of luxury suites to generate revenue to repay entity's loan did not render contract illusory)].

However, in a case when the express terms of a loan agreement provided that the lender's obligation to disburse loan funds was conditional on its objectively reasonable determination that the project budget was in balance, the court held that no obligation to act in good faith can be implied to contradict or limit that express condition precedent, and no inquiry into good faith can be made. Under those circumstances, it is error to instruct the jury to evaluate the lender's determination regarding the loan balance for both reasonableness and good faith [*Storek & Storek, Inc. v. Citicorp Real Estate, Inc.* (2002) 100 Cal.App.4th 44, 61-62, 64, 122 Cal.Rptr.2d 267 (holding that lender had no duty to act in good faith in determining whether condition precedent to its performance had been fulfilled; lender was required only to act reasonably)].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 3, *California Judicial Council Contracts Instructions*]:

CACI No. 314 Interpretation--Disputed Term

CACI No. 317 Interpretation--Construction of Contract as a Whole

CACI No. 318 Interpretation--Construction by Conduct

CACI No. 319 Interpretation--Reasonable Time

CACI No. 320 Interpretation--Construction Against Drafter

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawBreachCauses of ActionElements of ClaimsContracts LawContract InterpretationFiduciary
ResponsibilitiesContracts LawContract InterpretationGood Faith & Fair Dealing

* John F. Wells and Lise A. Pearlman were the original authors of this chapter. It has since been updated to reflect changes in the law, additional case citations and practice pointers by other lawyers as well as revisions including cross-references to the official CACI instructions.



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CHAPTER 3C Matthew Bender Contract Party Instructions *

1-3C California Forms of Jury Instruction 3C.syn

§ 3C.syn Synopsis to Chapter 3C: Matthew Bender Contract Party Instructions *

MB 300C.01 Equal Treatment of Organizations

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Corporations Are Persons

[b] Related Judicial Council Jury Instructions

MB 300C.02 Corporations

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Corporations Are Persons

[b] Related Judicial Council Jury Instructions

MB 300C.03 Successor Corporation Liable for Obligations of Predecessor as a Matter of Law as a Result of Merger, Consolidation, or Reorganization

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300C.04 Successor Corporation Liable for Obligations of Predecessor as a Matter of Law as a Result of Express or Implied Assumption of Liabilities

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300C.05 When Successor Corporation Liable for Obligations of Predecessor

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300C.06 Corporation Acts Through Officers and Employees

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300C.07 Ostensible Authority of Corporate Officers, Agents, and Employees

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Ostensible Authority

[b] Related Judicial Council Jury Instructions

MB 300C.08 Officer Who Participates in Management Is Fiduciary of Corporation as a Matter of Law

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300C.09 Associations

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Associations

[b] Related Judicial Council Jury Instructions

MB 300C.10 Public Entities

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Public Entity as Party

[b] Related Judicial Council Jury Instructions

MB 300C.11-MB 300C.20 Reserved for Future Use

MB 300C.21 Definition of Partnership

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Definition of Partnership

[b] Related Judicial Council Jury Instructions

MB 300C.22 Definition of Joint Venture

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Joint Venture Defined

[b] Related Judicial Council Jury Instructions

MB 300C.23 Oral or Implied Partnership Agreement

1-3C California Forms of Jury Instruction 3C.syn

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Proof of Oral Partnership Generally

[b] Burden of Proof

[c] Related Judicial Council Jury Instructions

MB 300C.24 Reserved for Future Use

MB 300C.25 Right of Management and Control

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300C.26 Reserved for Future Use

MB 300C.27 Sharing of Profits

[1] Instruction

[2] Use of Instruction

[a] Use in Business Context

[b] First Alternative: Defendant's Receipt of Share of Profits In Dispute

[c] Second Alternative: Profits Distributed Other Than as Share of Profits

[3] Comment

MB 300C.28 Reserved for Future Use

MB 300C.29 Co-Ownership of Profitable Property Is Not Equivalent to Partnership

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300C.30 Effect of Terminology Used by Parties

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300C.31 Contrary Written Agreement

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300C.32 Partnership Business Transacted in Name of Individual

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300C.33 Reserved for Future Use

MB 300C.34 Responsibility of Partnership (or Joint Venture) for Partners' Acts in Usual Course of Business

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300C.35 Reserved for Future Use

MB 300C.36 Responsibility of Partnership (or Joint Venture) for Acts Outside Usual Course of Business

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300C.37-MB 300C.49 Reserved for Future Use

MB 300C.50 Agency Defined; Liability of Principal; Burden of Proof

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Nature of Agency; Burden of Proof

[b] Related Judicial Council Jury Instructions

MB 300C.51 Liability of Principal for Acts of Agent--Agency Not Disputed

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Agency Relationship

[b] Related Judicial Council Jury Instructions

MB 300C.52 Creation of Agency Relationship

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Creation of Agency Relationship

[b] Related Judicial Council Jury Instructions

MB 300C.53 Actual Authority of Agent

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Authority of Agent

[b] Related Judicial Council Jury Instructions

MB 300C.54 Agent's Discretion in Emergency

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300C.55 Ostensible Authority

[1] Instruction

1-3C California Forms of Jury Instruction 3C.syn

[2] Use of Instruction

[3] Comment

[a] Ostensible Authority

[b] Related Judicial Council Jury Instructions

MB 300C.56 Ratification by Acceptance of Benefits

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Ratification

[b] Related Judicial Council Jury Instructions

MB 300C.57 Liability of Agent for Breach of Contract Executed in Name of Principal

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300C.58 Liability of Agent for Breach of Warranty of Authority

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300C.59 Notice to Either Agent or Principal Is Notice to Other

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300C.60-MB 300C.69 Reserved for Future Use

MB 300C.70 Minor's Right to Sue: Guardian Ad Litem

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300C.71 Minor's Right to Disaffirm

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Right to Disaffirm

[b] What Constitutes "Reasonable Time"

MB 300C.72 Liability of Minors

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300C.73 Guardian Ad Litem--Unknown Persons

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300C.74 Conservator

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300C.75 Trustee

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300C.76 Bankruptcy Trustee

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300C.77 Receiver

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300C.78 Executor or Administrator

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300C.79 Class Action--Plaintiff Class

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300C.80 Class Action--Defendant Class

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300C.81-MB 300C.89 Reserved for Future Use

MB 300C.90 Third-Party Beneficiaries

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Third Party Beneficiary

[b] Related Judicial Council Jury Instructions

MB 300C.91 Third-Party Beneficiary Must Prove Performance by Promisee

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Performance by Principal

[b] Related Judicial Council Jury Instructions

MB 300C.92 Assignee

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300C.93 When Assignment of Benefits Includes Assumption of Obligations

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Assumption of Obligations Not Automatically Included in Assignment

[b] Extent of Assignee's Liability

MB 300C.94 Guarantor or Surety

[1] Instruction

[2] Use of Instruction

[3] Comment



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CHAPTER 3C Matthew Bender Contract Party Instructions *

1-3C California Forms of Jury Instruction Scope

Scope

SCOPE

This chapter includes jury instructions on various issues that can arise regarding the nature and capacity of particular parties to lawsuits involving contracts. For the California Judicial Council jury instructions on contracts generally, see Ch. 3, *California Judicial Council Contracts Instructions*. Ch. 3 includes Judicial Council instructions on issues surrounding contract formation, performance, interpretation, modification, breach, defenses, and damages. The instructions in this chapter are intended to supplement the Judicial Council instructions [see *Cal. Rules of Ct., Rule 2.1050*].

This chapter covers the following topics:

- Part A covers organizations and includes instructions defining corporations, associations, and public entities [see *MB 300C.01 -MB 300C.10*].
- Part B includes instructions on partnerships formed under the Uniform Partnership Act of 1994 (UPA'94), and joint ventures [see *MB 300C.21 -MB 300C.36*].
- Part C includes instructions on certain aspects of agency law that may arise in a contract case [see *MB 300C.50 -MB 300C.59*].
- Part D includes instructions on representative parties and explains the special status of individuals serving as fiduciaries, such as guardians, executors, trustees, and class representatives [see *MB 300C.70 -MB 300C.80*].
- Part E includes instructions on additional parties to a contract, such as assignees, third-party beneficiaries, and guarantors [see *MB 300C.90 -MB 300C.94*].

The appropriate definitional instructions for all parties should be given at the outset in every case. Additional

1-3C California Forms of Jury Instruction Scope

instructions relating to the status of the party may or may not be necessary depending on the circumstances. Pertinent issue instructions derived from this chapter should also be included with the preinstruction on the substantive issues involved in the case.



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CHAPTER 3C Matthew Bender Contract Party Instructions *
PART A. CORPORATIONS, ASSOCIATIONS, AND PUBLIC ENTITIES

1-3C California Forms of Jury Instruction MB 300C.01

MB 300C.01 Equal Treatment of Organizations

[1] Instruction Equal Treatment of Organizations

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Your decision must not be influenced by the fact that one of the parties in this case is a natural person and the other is a _____ [describe organization or entity, e.g., corporation or partnership].

_____ [Describe organization or entity] **are entitled to the same fair treatment under the law as we give to natural persons.**

Authorities: *Civ. Code § 14; Johnson v. Goodyear Mining Co. (1899) 127 Cal. 4, 8, 59 P. 304 .*

[2] Use of Instruction

This instruction should be used when one of the parties is a corporation or other business entity and the other is a natural person.

For related Judicial Council instructions, see [3][b], *below*.

[3] Comment

[a] Corporations Are Persons

Corporations are persons within the meaning of the law and *U.S. Const., amend. 14* [Civ. Code § 14; *Pembina Con. Silver Mining etc. Co. v. Pennsylvania* (1888) 125 U.S. 181, 189, 8 S.Ct. 737, 31 L.Ed. 650 ; *Johnson v. Goodyear Mining Co. (1899) 127 Cal. 4, 8, 59 P. 304 ; see California Forms of Pleading and Practice, Ch. 160 Corporations*]. It is axiomatic that the same fair treatment must be accorded to all litigants under the law.

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 1, *California Judicial Council Pretrial Instructions*]:

CACI No. 104, Nonperson Party

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedurePartiesGeneral OverviewCivil ProcedureTrialsJury TrialsJury InstructionsGeneral Overview

* John F. Wells and Lise A. Pearlman were the original authors of this chapter. It has since been updated to reflect changes in the law, additional case citations and practice pointers by other lawyers as well as revisions including cross-references to the official CACI instructions.



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CHAPTER 3C Matthew Bender Contract Party Instructions *
PART A. CORPORATIONS, ASSOCIATIONS, AND PUBLIC ENTITIES

1-3C California Forms of Jury Instruction MB 300C.02

MB 300C.02 Corporations

[1] Instruction Corporations

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

The _____ [Plaintiff or Defendant] in this case is a corporation. A corporation is an organization formed and authorized by law to act as a natural person in carrying out its business activities.

Authorities: Civ. Code § 14; Corp. Code § 207.

[2] Use of Instruction

This instruction should be used whenever one of the parties is a corporation. If the other party is a natural person, the instruction in MB 300C.01[1] should be given as well.

For related Judicial Council instructions, see [3][b], *below*.

[3] Comment

[a] Corporations Are Persons

Corporations are persons within the meaning of the law [Civ. Code § 14; see *Pembina Con. Silver Mining etc., Co. v. Pennsylvania* (1888) 125 U.S. 181, 189, 8 S.Ct. 737, 31 L.Ed. 650 ; *Johnson v. Goodyear Mining Co.* (1899) 127 Cal. 4, 8, 59 P. 304 ; see also California Forms of Pleading and Practice, Ch. 160, *Corporations*]. As such, a corporation has all the powers of a natural person in carrying out its business activities, without limitation [Corp. Code § 207].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 1, *California Judicial Council Pretrial Instructions*]:

CACI No. 104, Nonperson Party

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate LawCorporationsFormationCorporate Existence, Powers & PurposePowersGeneral
OverviewCivil ProcedurePartiesGeneral OverviewCivil ProcedureTrialsJury TrialsJury InstructionsGeneral Overview

* John F. Wells and Lise A. Pearlman were the original authors of this chapter. It has since been updated to reflect changes in the law, additional case citations and practice pointers by other lawyers as well as revisions including cross-references to the official CACI instructions.



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CHAPTER 3C Matthew Bender Contract Party Instructions *
PART A. CORPORATIONS, ASSOCIATIONS, AND PUBLIC ENTITIES

1-3C California Forms of Jury Instruction MB 300C.03

MB 300C.03 Successor Corporation Liable for Obligations of Predecessor as a Matter of Law as a Result of Merger, Consolidation, or Reorganization

[1] Instruction Successor Corporation Liable for Obligations of Predecessor as a Matter of Law as a Result of Merger, Consolidation, or Reorganization

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

When a corporation acquires substantially all of the property and assets of another corporation in the course of a _____ [merger/consolidation/corporate reorganization], it becomes responsible for performing and fulfilling all of the obligations and paying all of the debts and liabilities of the corporation transferring the property and assets. However, it is not responsible for payment of any local agency transfer fees for licenses, permits, registrations, and other privileges granted by a local agency if the merger does not result in a change of ownership. In this case, it is [admitted/undisputed] that Defendant acquired substantially all of the property and assets of _____ [name of predecessor corporation] in the course of a _____ [merger/consolidation/corporate reorganization]. Therefore, I instruct you that Defendant has the same _____ [obligations/duties/liability] to Plaintiff that _____ [name of predecessor corporation] [has/would have had]. Plaintiff has the same right to sue Defendant for _____ [characterize plaintiff's claim, e.g., breach of contract] as [he/she/it] [has/would have had] to sue _____ [name of predecessor corporation]. Plaintiff is entitled to recover from Defendant any damages that [he/she/it] [is/would have been] entitled to recover from _____ [name of predecessor corporation] [optional:, including punitive damages].

[OPTIONAL (See Use of Instruction)]

By the same token, Defendant has the same rights in relation to Plaintiff that _____ [name of

predecessor corporation] [has/would have had] and is entitled to the benefit of any defense that
 _____ [name of predecessor corporation] may [have/have had].

Authorities: *Corp. Code § 1107*; *Ray v. Alad Corp.* (1977) 19 Cal.3d 22, 28, 136 Cal.Rptr. 574, 560 P.2d 3 ; *Marks v. Minnesota Mining & Manufacturing Co.* (1986) 187 Cal.App.3d 1429, 1434-1435, 232 Cal.Rptr. 594 ; *Moe v. Transamerica Title Ins. Co.* (1971) 21 Cal.App.3d 289, 304, 98 Cal.Rptr. 547 .

[2] Use of Instruction

This instruction should be used when the plaintiff is attempting to hold a corporate defendant liable for an obligation or for the liability of a predecessor corporation and it is admitted or established by undisputed evidence that the defendant has assumed or succeeded to the obligations and liabilities of the predecessor in connection with a merger, consolidation, or reorganization.

The optional provision is used when a corporate defendant wants to have the jury instructed that the corporation is entitled to assert any right or defense that would have been available to the predecessor corporation.

LexisNexis Matthew Bender Expert Practice Tip--Organize Your Argument: Successor liability is a challenging concept for many attorneys, let alone jurors. And, use care if using this instruction as it is complicated. Accordingly, effort should be expended in organizing the related argument--usually with analogies and/or a "flow chart." *By Rex Heeseman*

[3] Comment

Corp. Code § 1107(a) provides that when a corporation is merged into another corporation in accordance with Chapter 11 of Division I of Title I of the Corporations Code [*Corp. Code §§ 1100-1111*], the surviving corporation is subject to all of the debts and liabilities of the disappearing corporation in the same manner as if it had itself incurred them. However, *Corp. Code § 1107(b)* permits a surviving corporation to succeed to all licenses, permits, registrations, and other privileged granted by any local agency, without the payment of any local agency transfer fee, if the merger does not result in a change of ownership. For example, mergers between a corporation and its wholly owned subsidiary, between a corporation and the wholly owned subsidiary of that corporation's wholly owned subsidiary, or between two wholly owned subsidiaries of the same parent corporation, do not result in a change of ownership [*Corp. Code § 1107(b)*]. *Corp. Code § 1107(d)* provides that an action that lies or has been commenced against the disappearing corporation may be brought or maintained against the surviving corporation.

At common law, when a corporation purchases or acquires the principal assets of another in a transaction that amounts, in substance, to a merger, consolidation, or reorganization, it also assumes the obligations and liabilities of that corporation by operation of law [*Ray v. Alad Corp.* (1977) 19 Cal.3d 22, 28, 136 Cal.Rptr. 574, 560 P.2d 3 ; *Marks v. Minnesota Mining & Manufacturing Co.* (1986) 187 Cal.App.3d 1429, 1434-1435, 232 Cal.Rptr. 594 ; *Moe v. Transamerica Title Ins. Co.* (1971) 21 Cal.App.3d 289, 304, 98 Cal.Rptr. 547]. Consequently, any contract or tort action that could have been brought against the disappearing corporation may be brought against the surviving corporation [*Moe v. Transamerica Title Ins. Co.* (1971) 21 Cal.App.3d 289, 304, 98 Cal.Rptr. 547]. The liabilities imposed on the surviving corporation by operation of law include any liability for punitive damages that the disappearing corporation may have had [*Marks v. Minnesota Mining & Manufacturing Co.* (1986) 187 Cal.App.3d 1429, 1434-1435, 232 Cal.Rptr. 594 ; *Moe v. Transamerica Title Ins. Co.* (1971) 21 Cal.App.3d 289, 304, 98 Cal.Rptr. 547].

Legal Topics:

For related research and practice materials, see the following legal topics:

Mergers & Acquisitions LawLiabilities & Rights of SuccessorsSuccessor Liability DoctrineMergers & Acquisitions

LawMergersGeneral OverviewCivil ProcedureTrialsJury TrialsJury InstructionsGeneral Overview

* John F. Wells and Lise A. Pearlman were the original authors of this chapter. It has since been updated to reflect changes in the law, additional case citations and practice pointers by other lawyers as well as revisions including cross-references to the official CACI instructions.



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CHAPTER 3C Matthew Bender Contract Party Instructions *
PART A. CORPORATIONS, ASSOCIATIONS, AND PUBLIC ENTITIES

1-3C California Forms of Jury Instruction MB 300C.04

MB 300C.04 Successor Corporation Liable for Obligations of Predecessor as a Matter of Law as a Result of Express or Implied Assumption of Liabilities

[1] Instruction Successor Corporation Liable for Obligations of Predecessor as a Matter of Law as a Result of Express or Implied Assumption of Liabilities

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

When a corporation that is acquiring the property and assets of another corporation expressly or impliedly agrees to assume the liabilities of the corporation transferring the property and assets, it becomes responsible for performing and fulfilling all of the obligations and paying all of the debts and liabilities of the transferring corporation. In this case, it is [admitted/undisputed] that Defendant acquired the property and assets of _____ [name of predecessor corporation] and agreed to assume the liabilities of _____ [name of predecessor corporation]. Therefore, I instruct you that Defendant has the same _____ [select appropriate characterization, e.g., obligations or duties or liability] to Plaintiff that _____ [name of predecessor corporation] [has/would have had]. Plaintiff has the same right to sue Defendant for _____ [characterize plaintiff's claim, e.g., breach of contract] as [he/she/it] [has/would have had] to sue _____ [name of predecessor corporation]. Plaintiff is entitled to recover from Defendant any damages that [he/she/it] [is/would have been] entitled to recover from _____ [name of predecessor corporation] [optional: , including punitive damages].

[OPTIONAL (See Use of Instruction)]

By the same token, Defendant has the same rights in relation to Plaintiff that _____ [name of predecessor corporation] [has/would have had] and is entitled to the benefit of any defense that _____ [name of predecessor corporation] may [have/have had].

Authorities: *Ray v. Alad Corp.* (1977) 19 Cal.3d 22, 28, 136 Cal.Rptr. 574, 560 P.2d 3 ; *Schwartz v. McGraw-Edison Co.* (1971) 14 Cal.App.3d 767, 781, 92 Cal.Rptr. 776 .

[2] Use of Instruction

This instruction should be used when a plaintiff is attempting to hold a corporate defendant liable for an obligation or liability of a predecessor corporation and it is admitted or established by undisputed evidence that, in connection with an acquisition of its assets, the defendant has agreed to assume the liabilities of the predecessor corporation.

The optional provision is used when a corporate defendant desires to have the jury instructed that the corporation is entitled to assert any right or defense that would have been available to the predecessor corporation.

LexisNexis Matthew Bender Expert Practice Tip--Issue of Successor Liability Requires Care: As with the instruction in MB 300C.03, this topic must be addressed carefully. *By Rex Heeseman*

[3] Comment

When a corporation that purchases or acquires the assets of another corporation expressly or impliedly agrees to assume the liabilities of the other corporation, it becomes liable for all of the debts and obligations of the other corporation [*Ray v. Alad Corp.* (1977) 19 Cal.3d 22, 28, 136 Cal.Rptr. 574, 560 P.2d 3 ; *Schwartz v. McGraw-Edison Co.* (1971) 14 Cal.App.3d 767, 781, 92 Cal.Rptr. 776 ; see *Fisher v. Allis-Chalmers Corp.* (2002) 95 Cal.App.4th 1182, 1188-1190, 116 Cal.Rptr.2d 310 (manufacturer's successor-in-interest was not entitled to summary judgment because it failed to establish that its agreement to assume liabilities excluded plaintiff's product liability claim); *Franklin v. USX Corporation* (2001) 87 Cal.App.4th 615, 621-625, 105 Cal.Rptr.2d 11 (successor corporation not liable for asbestos-related injuries under theory of express or implied assumption of tort liabilities of predecessor); *Chaknova v. Wilbur-Ellis Company* (1999) 69 Cal.App.4th 962, 967-969, 81 Cal.Rptr.2d 871 (finding no express or implied assumption of liability for asbestos-related injuries)]. With regard to insurance coverage for a predecessor's liabilities, in a case in which the successor was sued for injuries arising from its predecessor's chemical products, the court held that when the successor voluntarily assumed liability by contract it did not also acquire the benefits of the predecessor's insurance policies as a matter of law [*Henkel Corp. v. Hartford* (2003) 29 Cal.4th 934, 941-943, 945, 129 Cal.Rptr.2d 828, 62 P.3d 69 (any assignment of predecessor's insurance benefits required consent of insurers; no coverage existed when policy had no-assignment clause and insurers did not consent to assignment)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Mergers & Acquisitions LawLiabilities & Rights of SuccessorsSuccessor Liability DoctrineCivil ProcedureTrialsJury TrialsJury InstructionsGeneral Overview

* John F. Wells and Lise A. Pearlman were the original authors of this chapter. It has since been updated to reflect changes in the law, additional case citations and practice pointers by other lawyers as well as revisions including cross-references to the official CACI instructions.



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CHAPTER 3C Matthew Bender Contract Party Instructions *
PART A. CORPORATIONS, ASSOCIATIONS, AND PUBLIC ENTITIES

1-3C California Forms of Jury Instruction MB 300C.05

MB 300C.05 When Successor Corporation Liable for Obligations of Predecessor

[1] Instruction When Successor Corporation Liable for Obligations of Predecessor

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

In this case, Plaintiff claims that [he/she/it] is entitled to recover damages from Defendant because Defendant is legally responsible for _____ [*characterize obligation or liability, e.g., the performance of contractual promises made or the repayment of money borrowed*] by _____ [*name of predecessor corporation*] as a result of Defendant's [acquisition/purchase] of the property and assets of _____ [*name of predecessor corporation*].

Defendant cannot be found to be legally responsible for _____ [*characterize obligation or liability, e.g., the performance of contractual promises made or the repayment of money borrowed*] by _____ [*name of predecessor corporation*] merely because it [purchased/acquired] the property and assets of _____ [*name of predecessor corporation*]. To prove that Defendant is legally responsible for _____ [*characterize obligation or liability, e.g., the performance of contractual promises made or the repayment of money borrowed*] by _____ [*name of predecessor corporation*], Plaintiff must prove that Defendant [purchased/acquired] substantially all of the property and assets of _____ [*name of predecessor corporation*] and must also prove [*if jury is to be instructed on more than one theory, add: one of the following elements:*]

[*SELECT ONE OR MORE OF THE FOLLOWING (See Use of Instruction)*]

1. The Defendant expressly or impliedly agreed to assume the liabilities of _____ [*name of predecessor corporation*];

2. The transaction in which Defendant [purchased/acquired] the property and assets of _____ [name of predecessor corporation] amounted to a merger or consolidation [if applicable: The transaction is considered in law to be a merger or consolidation if the only thing that Defendant gave in return for the property and assets of _____ (name of predecessor corporation) was shares of Defendant's stock, and if those shares of Defendant's stock were either given directly to the shareholders or owners of _____ (name of predecessor corporation) or given to _____ (name of predecessor corporation) and distributed by _____ (name of predecessor corporation) to its shareholders or owners as part of the overall transaction];

3. The Defendant is, in fact, merely a continuation of _____ [name of predecessor corporation];
or

4. _____ [Name of predecessor corporation] did not receive any substantial amount of money or anything else of any substantial value in return for transferring its property and assets to Defendant and, following the transfer, _____ [name of predecessor corporation] had no substantial funds or assets to pay or debts or obligations to satisfy that it owed to Plaintiff and its other creditors.

If you find that Defendant [purchased/acquired] substantially all of the property and assets of _____ [name of predecessor corporation], and if you also find that _____ [describe additional element relied on by plaintiff or state, e.g., Plaintiff has established the existence of one of the additional elements on which I have just instructed you], then you must find that Defendant was legally responsible for _____ [characterize obligation or liability at issue, e.g., the performance of contractual promises made or the repayment of money borrowed] by _____ [name of predecessor corporation]. If Defendant was legally responsible for _____ [characterize obligation or liability at issue, e.g., the performance of contractual promises made or the repayment of money borrowed] by _____ [name of predecessor corporation], then Plaintiff has the same right to sue Defendant for _____ [characterize plaintiff's claim, e.g., breach of contract] as [he/she/it] [has/would have had] to sue _____ [name of predecessor corporation], and Plaintiff is entitled to recover from Defendant any damages that [he/she/it] [is/would have been] entitled to recover from _____ [name of predecessor corporation] [optional: , including punitive damages].

Authorities: Corp. Code § 1107; Ray v. Alad Corp. (1977) 19 Cal.3d 22, 28, 136 Cal.Rptr. 574, 560 P.2d 3 ; Chaknova v. Wilbur-Ellis Company (1999) 69 Cal.App.4th 962, 967, 81 Cal.Rptr.2d 871 ; Rosales v. Thermex-Thermatron, Inc. (1998) 67 Cal.App.4th 187, 191, 194-195, 78 Cal.Rptr.2d 861 ; Marks v. Minnesota Mining & Manufacturing Co. (1986) 187 Cal.App.3d 1429, 1434-1435, 232 Cal.Rptr. 594 ; Moe v. Transamerica Title Ins. Co. (1971) 21 Cal.App.3d 289, 304, 98 Cal.Rptr. 547 ; Schwartz v. McGraw-Edison Co. (1971) 14 Cal.App.3d 767, 781, 92 Cal.Rptr. 776 ; Malone v. Red Top Cab (1936) 16 Cal.App.2d 268, 273-274, 60 P.2d 543 .

[2] Use of Instruction

This instruction should be used when the jury will be asked to resolve disputed factual issues raised by a plaintiff's claim that a corporate defendant is liable for an obligation or liability of a predecessor corporation as the result of a purchase or acquisition of its assets. This instruction is intended to supplement the main burden of proof instruction, which should instruct the jury that the plaintiff has the burden of proving that the defendant is legally responsible for the obligations and liabilities of the predecessor corporation. Depending on the facts of the particular case, it may be necessary or appropriate to supplement this instruction with other instructions that define the elements set forth in this instruction with greater particularity.

This instruction informs the jury of four separate grounds on which a corporate defendant can be held liable for the

obligations of a predecessor corporation. The jury should be instructed only on those grounds that are supported by the evidence.

LexisNexis Matthew Bender Expert Practice Tip--Break Down This Instruction: This is a very complex instruction that will require a lot of explanation in closing argument. At a minimum, it will be necessary to break down the instruction into parts with the use of courtroom graphics or a power point presentation, and then to relate the evidence to each part. *By Ronald Oster*

[3] Comment

In general, a corporation that purchases or acquires the assets of another corporation does not assume the liability for its debts and obligations [*Ray v. Alad Corp.* (1977) 19 Cal.3d 22, 28, 136 Cal.Rptr. 574, 560 P.2d 3 ; *Rosales v. Thermex-Thermatron, Inc.* (1998) 67 Cal.App.4th 187, 191, 193-194, 78 Cal.Rptr.2d 861 ; *Schwartz v. McGraw-Edison Co.* (1971) 14 Cal.App.3d 767, 781, 92 Cal.Rptr. 776]. However, under recognized exceptions to this rule the purchasing or acquiring corporation may be held liable for the liabilities of the transferring corporation if one or more of the following circumstances exist:

- An express or implied agreement exists for the assumption of liability [*Ray v. Alad Corp.* (1977) 19 Cal.3d 22, 28, 136 Cal.Rptr. 574, 560 P.2d 3 ; *Schwartz v. McGraw-Edison Co.* (1971) 14 Cal.App.3d 767, 781, 92 Cal.Rptr. 776 ; see *Henkel Corp. v. Hartford* (2003) 29 Cal.4th 934, 941-943, 945, 129 Cal.Rptr.2d 828, 62 P.3d 69 (successor that voluntarily assumed liability by contract did not also acquire benefits of predecessor's insurance policies as matter of law; see also MB 300C.04)];
- The transaction amounts to a merger or consolidation [*Corp. Code § 1107*; *Ray v. Alad Corp.* (1977) 19 Cal.3d 22, 28, 136 Cal.Rptr. 574, 560 P.2d 3 ; *Marks v. Minnesota Mining & Manufacturing Co.* (1986) 187 Cal.App.3d 1429, 1434-1435, 232 Cal.Rptr. 594 ; *Moe v. Transamerica Title Ins. Co.* (1971) 21 Cal.App.3d 289, 304, 98 Cal.Rptr. 547];
- The purchasing or acquiring corporation is a mere continuation of the transferring corporation [*Ray v. Alad Corp.* (1977) 19 Cal.3d 22, 28, 136 Cal.Rptr. 574, 560 P.2d 3 ; *Schwartz v. McGraw-Edison Co.* (1971) 14 Cal.App.3d 767, 781, 92 Cal.Rptr. 776 ; see *McClellan v. Northridge Park Townhome Owners Association, Inc.* (2001) 89 Cal.App.4th 746, 753-756, 107 Cal.Rptr.2d 702 (successor corporation properly named as judgment debtor in addition to bankrupt predecessor, when substantial evidence supported conclusion that successor was mere continuation of predecessor)]; and/or
- The transferring corporation receives no consideration for the transfer and is left without assets to satisfy the claims of its creditors [*Schwartz v. McGraw-Edison Co.* (1971) 14 Cal.App.3d 767, 781, 92 Cal.Rptr. 776 ; *Malone v. Red Top Cab* (1936) 16 Cal.App.2d 268, 273-274, 60 P.2d 543].

In *Ray v. Alad Corp.* [*Ray v. Alad Corp.* (1977) 19 Cal.3d 22, 136 Cal.Rptr. 574, 560 P.2d 3], the California Supreme Court stated that justification for imposing strict liability on a successor to a manufacturer rests on all of the following [*Ray v. Alad Corp.* (1977) 19 Cal.3d 22, 31, 136 Cal.Rptr. 574, 560 P.2d 3 (court did not specify whether those findings were for court or jury); see *Franklin v. USX Corporation* (2001) 87 Cal.App.4th 615, 629-630, 105 Cal.Rptr.2d 11 (successor corporation not liable for asbestos-related injuries under theories of express or implied assumption of tort liabilities of predecessor, *de facto* merger or mere continuation, or product line successor); *Chaknova v. Wilbur-Ellis Company* (1999) 69 Cal.App.4th 962, 970-973, 81 Cal.Rptr.2d 871 (corporation not liable as product line successor because facts did not satisfy three criteria of *Ray v. Alad*)]:

- The virtual destruction of the plaintiff's remedies against the original manufacturer caused by the successor's acquisition of the business;

- The successor's ability to assume the original manufacturer's risk-spreading role; and
- The fairness of requiring the successor to assume a responsibility for defective products that was a burden necessarily attached to the original manufacturer's good will being enjoyed by the successor in the continued operation of the business.

In *Rosales v. Thermex-Thermatron, Inc.* [*Rosales v. Thermex-Thermatron, Inc. (1998) 67 Cal.App.4th 187, 78 Cal.Rptr.2d 861*], the court of appeal held that the question of whether it is fair to impose successor liability is exclusively for the trial court [*Rosales v. Thermex-Thermatron, Inc. (1998) 67 Cal.App.4th 187, 196, 78 Cal.Rptr.2d 861*]. However, it further held that although the trial court erred in giving jury instructions leaving it to the jury to determine whether imposing successor liability was fair under the circumstances, the error was harmless as the facts concerning successor liability were undisputed, it was not a close question, and the trial court's grant of sanctions for defendant's failure to admit being a successor showed that it agreed with the jury's determination [*Rosales v. Thermex-Thermatron, Inc. (1998) 67 Cal.App.4th 187, 196, 78 Cal.Rptr.2d 861*].

Corp. Code § 1107(a) provides that when a corporation is merged into another corporation pursuant to Chapter 11 of Division I of Title I of the Corporations Code [*Corp. Code § 1100 et seq.*], the surviving corporation is subject to all of the debts and liabilities of the disappearing corporation in the same manner as if it had itself incurred them. *Corp. Code § 1107(b)* provides an exception by permitting a surviving corporation to succeed to all licenses, permits, registrations, and other privileges granted by any local agency, without the payment of any local agency transfer fee, if the merger does not result in a change of ownership [*Corp. Code § 1107(b)*; see *MB 300C.03*]. However, a statutory merger is not essential to the imposition of liability; liability for the debts of a disappearing corporation are imposed when there is a *de facto* merger or consolidation--a transaction that amounts in substance to a merger or consolidation [*Marks v. Minnesota Mining & Manufacturing Co. (1986) 187 Cal.App.3d 1429, 1434-1435, 232 Cal.Rptr. 594* ; *Moe v. Transamerica Title Ins. Co. (1971) 21 Cal.App.3d 289, 304, 98 Cal.Rptr. 547* ; see *Westoil Terminals Co. v. Harbor Ins. Co. (1999) 73 Cal.App.4th 634, 639-640, 86 Cal.Rptr.2d 636* (although finding of successor liability in tort does not entitle successor, by operation of law, to insurance coverage of corporate predecessor, in case of *de facto* merger, benefits of insurance policies inure to successor entity)]. A transaction is considered a *de facto* merger or consolidation when the sole consideration for the purchase of the disappearing corporation's assets is shares of stock in the surviving corporation and the stock is promptly distributed to the shareholders of the disappearing corporation [*Marks v. Minnesota Mining & Manufacturing Co. (1986) 187 Cal.App.3d 1429, 1435, 232 Cal.Rptr. 594*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Mergers & Acquisitions Law
Liabilities & Rights of Successors
Successor Liability Doctrine
Mergers & Acquisitions Law
MergersGeneral Overview
Mergers & Acquisitions Law
Sales of AssetsGeneral Overview

* John F. Wells and Lise A. Pearlman were the original authors of this chapter. It has since been updated to reflect changes in the law, additional case citations and practice pointers by other lawyers as well as revisions including cross-references to the official CACI instructions.



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CHAPTER 3C Matthew Bender Contract Party Instructions *
PART A. CORPORATIONS, ASSOCIATIONS, AND PUBLIC ENTITIES

1-3C California Forms of Jury Instruction MB 300C.06

MB 300C.06 Corporation Acts Through Officers and Employees

[1] Instruction Corporation Acts Through Officers and Employees

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

A corporation may act only through its officers, agents, and employees. Under the law, a corporation is responsible for any act performed by an officer, agent, or employee within the scope of [his/her] authority.

[*OPTIONAL (See Use of Instruction)*]

A corporation is also responsible when an officer, agent, or employee fails to do something that [he/she] should have done within the scope of [his/her] authority.

Authority: *Chamberlain v. California Edison Co. (1914) 167 Cal. 500, 502-503, 140 P. 25 .*

[2] Use of Instruction

This instruction should be used only to address the issue of actual authority. The optional paragraph applies when there is evidence of an omission to do something with the officer's, agent's, or employee's authority. For an instruction and discussion concerning ostensible authority, see *MB 300C.07*.

LexisNexis Matthew Bender Expert Practice Tip--Holding a Corporation Liable: Although a straightforward topic, this is often the main avenue in holding a corporation liable. *By Rex Heeseman*

LexisNexis Matthew Bender Expert Practice Tip--Emphasize This Instruction: Many jurors will be familiar with this concept of corporate liability, but it is worth emphasizing this instruction in closing. *By Ronald Oster*

[3] Comment

The liability of a corporation for acts of its officers, agents, and employees is a question of agency law. Thus, like all principals, corporations are responsible for the acts and omissions of their agents which acts or omissions are within the scope of the agent's authority [*Chamberlain v. California Edison Co. (1914) 167 Cal. 500, 502-503, 140 P. 25*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate LawAgency RelationshipsAuthority to ActActual AuthorityGeneral OverviewBusiness & Corporate LawAgency RelationshipsDuties & LiabilitiesAuthorized Acts of AgentsLiability of PrincipalBusiness & Corporate LawAgency RelationshipsDuties & LiabilitiesAuthorized Acts of AgentsScope of AuthorityBusiness & Corporate LawCorporationsDirectors & OfficersScope of AuthorityGeneral Overview

* John F. Wells and Lise A. Pearlman were the original authors of this chapter. It has since been updated to reflect changes in the law, additional case citations and practice pointers by other lawyers as well as revisions including cross-references to the official CACI instructions.



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CHAPTER 3C Matthew Bender Contract Party Instructions *
PART A. CORPORATIONS, ASSOCIATIONS, AND PUBLIC ENTITIES

1-3C California Forms of Jury Instruction MB 300C.07

MB 300C.07 Ostensible Authority of Corporate Officers, Agents, and Employees**[1] Instruction**[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Under certain circumstances, a corporation is responsible for an act performed by an officer, agent, or employee outside the scope of [his/her] actual authority. To establish that _____ [corporation] was responsible for the acts of _____ [name of officer, agent, or employee], Plaintiff must prove all of the following:

1. That _____ [corporation] intentionally or carelessly allowed Plaintiff to believe _____ [name of officer, agent, or employee] possessed the authority of the corporation in _____ [describe conduct for which corporation is sought to be held responsible];
2. That Plaintiff's belief was reasonable, that is, that a reasonable person would have believed that _____ [name of officer, agent, or employee] had authority to act on behalf of _____ [corporation]; and
3. That Plaintiff, acting in good faith and with due care, incurred a liability or parted with something of value in reliance on the apparent authority of _____ [name of agent, officer, or employee] to act on _____ [corporation]'s behalf.

Authorities: Civ. Code § 2317; *Torrance N. Bk. v. Enesco F. Credit Union* (1955) 134 Cal.App.2d 316, 322-323, 285 P.2d 737.

[2] Use of Instruction

This instruction should be used when ostensible authority of a corporate officer, agent, or employee is alleged [see MB 300C.55 for similar instruction covering ostensible authority of agents generally].

For related Judicial Council instructions, see [3][b], *below*.

LexisNexis Matthew Bender Expert Practice Tip--Defendants Beware: Defense arguments that a corporate officer or employee was acting without authority in entering into a contract will be greeted with skepticism by many jurors. This instruction permits recovery if it was "reasonable" for plaintiff to assume there was authority and if plaintiff was "acting in good faith and with due care." *By Ronald Oster*

LexisNexis Matthew Bender Expert Practice Tip--Use Care When Arguing Ostensible Authority: Ostensible authority is confusing to many attorneys. Thus, imagine the reaction of a jury. In some lawsuits, however, this can be key in establishing (or refuting) liability. *By Rex Heeseman*

[3] Comment

[a] Ostensible Authority

Ostensible authority is authority that a principal, intentionally or by want of ordinary care, causes or allows a third person to believe the agent possesses [Civ. Code § 2317]. The doctrine of ostensible authority applicable to corporations is the same as that applicable generally between a principal and agent [*Columbia Outfitting Co. v. Freeman* (1950) 36 Cal.2d 216, 219, 223 P.2d 21 ; but see *Saks v. Charity Mission Baptist Church* (2001) 90 Cal.App.4th 1116, 1137-1140, 110 Cal.Rptr.2d 45 (church held not liable on promissory notes signed by pastor who, by his own admission, acquiesced in scheme to wrongfully use name of eleemosynary corporation to obtain financial benefit for himself and his partners); see also MB 300C.55[3]]. It is based on the elements of estoppel [*Dickens v. Bunker* (1959) 169 Cal.App.2d 383, 387-388, 337 P.2d 489 ; see Witkin, Summary of California Law, vol. 3, *Agency and Employment*, § 144 (10th ed. 2005)]. It must be based on an act or omission of the corporation that leads another party to assume that authority exists. It cannot be based on the mere representations of the agent or employee [*Torrance N. Bk. v. Enesco F. Credit Union* (1955) 134 Cal.App.2d 316, 322, 285 P.2d 737].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 37, *California Judicial Council Vicarious Responsibility Instructions*]:

CACI No. 3709, Ostensible Agent

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate Law Agency Relationships Authority to Act Apparent Authority Proof Business & Corporate Law Agency Relationships Duties & Liabilities Authorized Acts of Agents Unauthorized Acts Business & Corporate Law Agency Relationships Establishment Estoppel, Ostensible Agency & Necessity Ostensible Agency Business & Corporate Law Corporations Directors & Officers Scope of Authority General Overview

* John F. Wells and Lise A. Pearlman were the original authors of this chapter. It has since been updated to reflect changes in the law, additional case citations and practice pointers by other lawyers as well as revisions including cross-references to the official CACI instructions.



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CHAPTER 3C Matthew Bender Contract Party Instructions *
PART A. CORPORATIONS, ASSOCIATIONS, AND PUBLIC ENTITIES

1-3C California Forms of Jury Instruction MB 300C.08

MB 300C.08 Officer Who Participates in Management Is Fiduciary of Corporation as a Matter of Law

[1] Instruction Officer Who Participates in Management Is Fiduciary of Corporation as a Matter of Law

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

An officer of a corporation who participates in management of the corporation, exercising some discretionary authority, is a fiduciary of the corporation as a matter of law.

[*OPTIONAL (See Use of Instruction)*]

A "nominal" officer with no management authority is not a fiduciary.

Authority: *GAB Business Services, Inc. v. Lindsey & Newsom Claim Services, Inc.* (2000) 83 Cal.App.4th 409, 420, 99 Cal.Rptr.2d 665 .

[2] Use of Instruction

This instruction should be used when a plaintiff is attempting to hold a corporate officer liable for breach of fiduciary duty to the corporation. The optional provision should be used when a defendant desires to have the jury instructed that he or she is not a fiduciary of the corporation.

LexisNexis Matthew Bender Expert Practice Tip--"Fiduciary" Requires Explanation: "Fiduciary" is another legal term that must be carefully explained to the jury. Sometimes, using an analogy to everyday life may make this term more understandable. *By Rex Heeseman*

[3] Comment

In *GAB Business Services, Inc. v. Lindsey & Newsom Claim Services, Inc.* [*GAB Business Services, Inc. v. Lindsey &*

Newsom Claim Services, Inc. (2000) 83 Cal.App.4th 409, 99 Cal.Rptr.2d 665], the court of appeal stated that an officer who participates in the management of a corporation, exercising some discretionary authority, is a fiduciary of the corporation as a matter of law. Conversely, a "nominal" officer with no management authority is not a fiduciary. Whether a particular officer participates in management is a question of fact. Once this factual prerequisite is established, the law imposes a fiduciary duty [*GAB Business Services, Inc. v. Lindsey & Newsom Claim Services, Inc. (2000) 83 Cal.App.4th 409, 420-421, 99 Cal.Rptr.2d 665*]. The court held that the trial court erred in refusing to instruct the jury that a former regional vice president was a fiduciary of the company as a matter of law in light of his extensive management authority [*GAB Business Services, Inc. v. Lindsey & Newsom Claim Services, Inc. (2000) 83 Cal.App.4th 409, 422, 99 Cal.Rptr.2d 665*]. The court found it reasonably probable that a jury properly instructed concerning the officer's fiduciary duty would have found a breach of that duty. Consequently, the court's instructional error was prejudicial and required reversal of the judgment [*GAB Business Services, Inc. v. Lindsey & Newsom Claim Services, Inc. (2000) 83 Cal.App.4th 409, 424, 99 Cal.Rptr.2d 665*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate LawAgency RelationshipsCauses of Action & RemediesBreach of Fiduciary DutyGeneral OverviewBusiness & Corporate LawCorporationsDirectors & OfficersManagement Duties & LiabilitiesFiduciary ResponsibilitiesGeneral OverviewBusiness & Corporate LawCorporationsDirectors & OfficersScope of AuthorityDiscretion

* John F. Wells and Lise A. Pearlman were the original authors of this chapter. It has since been updated to reflect changes in the law, additional case citations and practice pointers by other lawyers as well as revisions including cross-references to the official CACI instructions.



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CHAPTER 3C Matthew Bender Contract Party Instructions *
PART A. CORPORATIONS, ASSOCIATIONS, AND PUBLIC ENTITIES

1-3C California Forms of Jury Instruction MB 300C.09

MB 300C.09 Associations

[1] Instruction Associations

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

The _____ [Plaintiff or Defendant] is an association. An association may sue and be sued in the same manner as a natural person.

Authorities: *Code Civ. Proc. § 369.5(a); Corp. Code § 18035(a).*

[2] Use of Instruction

This instruction should be used whenever one of the parties is an association.

For related Judicial Council instructions, see [3][b], *below*.

[3] Comment

[a] Associations

Corp. Code § 18035(a) defines an unincorporated association as an unincorporated group of two or more persons joined by mutual consent for a common lawful purpose, whether organized for profit or not. Joint tenancy, tenancy in common, community property, or another form of property tenure, does not by itself establish an unincorporated association, even if co-owners share ownership of the property for a common purpose [*Corp. Code § 18035(b)*]. Marriage or the creation of a registered domestic partnership does not by itself establish an unincorporated association [*Corp. Code § 18035(c)*].

An association has the right to sue or be sued in its own name [*Code Civ. Proc.* § 369.5(a)]. Individual members are not liable for any judgment unless personally joined as a party [*see Code Civ. Proc.* § 369.5(b)]. The basic statutes governing associations are set forth in *Corp. Code* § 18000 *et seq.* (concerning unincorporated associations in general) and *Corp. Code* § 18605 *et seq.* (concerning nonprofit associations). For a summary of the law governing associations, including sample complaints and allegations, see California Forms of Pleading and Practice, Ch. 61, *Associations and Clubs* (Matthew Bender).

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [*see* Ch. 1, *California Judicial Council Pretrial Instructions*]:

CACI No. 104, Nonperson Party

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate LawUnincorporated AssociationsCivil ProcedurePartiesGeneral OverviewCivil
ProcedureTrialsJury TrialsJury InstructionsGeneral Overview

* John F. Wells and Lise A. Pearlman were the original authors of this chapter. It has since been updated to reflect changes in the law, additional case citations and practice pointers by other lawyers as well as revisions including cross-references to the official CACI instructions.



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CHAPTER 3C Matthew Bender Contract Party Instructions *
PART A. CORPORATIONS, ASSOCIATIONS, AND PUBLIC ENTITIES

1-3C California Forms of Jury Instruction MB 300C.10

MB 300C.10 Public Entities

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

The _____ [Plaintiff or Defendant] is a public entity. Public entities may sue and be sued in the same manner as individuals.

Authorities: *Gov. Code §§ 814, 945.*

[2] Use of Instruction

This instruction should be used whenever a public entity is a party to the action.

For related Judicial Council instructions, see [3][b], *below*.

[3] Comment

[a] Public Entity as Party

Public entities may sue and be sued [Gov. Code § 945]. They are subject to the general rules of civil practice unless specifically exempted from them [Gov. Code § 945.2]. The Legislature has specifically declared that the doctrine of sovereign or governmental immunity, which forms the basis of the Government Claims Act (or Tort Claims Act), does not protect public entities against actions arising out of contracts [Gov. Code § 814; *City of Stockton v. Superior Court* (2007) 42 Cal. 4th 730, 741, 68 Cal. Rptr. 3d 295, 171 P.3d 20 ("Section 814 simply reaffirms the long-standing rule that governmental immunity does not encompass contractual liability.")]. For additional discussion, see California Forms of Pleading and Practice, Ch. 464, *Public Entities and Officers: California Tort Claims Act* (Matthew Bender).

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 1, *California Judicial Council Pretrial Instructions*]:

CACI No. 104, Nonperson Party

Legal Topics:

For related research and practice materials, see the following legal topics:

GovernmentsFederal GovernmentClaims By & AgainstGovernmentsLocal GovernmentsClaims By & AgainstGovernmentsState & Territorial GovernmentsClaims By & AgainstTortsPublic Entity LiabilityImmunitySovereign Immunity

* John F. Wells and Lise A. Pearlman were the original authors of this chapter. It has since been updated to reflect changes in the law, additional case citations and practice pointers by other lawyers as well as revisions including cross-references to the official CACI instructions.



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CHAPTER 3C Matthew Bender Contract Party Instructions *
PART A. CORPORATIONS, ASSOCIATIONS, AND PUBLIC ENTITIES

1-3C California Forms of Jury Instruction MB 300C.11-MB 300C.20

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MB 300C.11Reserved for Future Use



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CHAPTER 3C Matthew Bender Contract Party Instructions *
PART B. PARTNERSHIPS AND JOINT VENTURES

1-3C California Forms of Jury Instruction MB 300C.21

MB 300C.21 Definition of Partnership

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

A partnership consists of two or more persons who go into business together as co-owners for profit. ["For profit" means that the partners' purpose it to make a profit and to share that profit.]

Authorities: Corp. Code §§ 16101(9), 16202, 16401(f).

[2] Use of Instruction

This basic instruction should be used in all cases when a partnership is a party. The bracketed language should be used when a lack of realized profits might cause juror confusion.

The instruction is the definition of partnership as set forth in the Uniform Partnership Act of 1994 (UPA'94) [*Corp. Code § 16100 et seq.*]

For related Judicial Council instructions, see [3][b], *below*.

[3] Comment

[a] Definition of Partnership

The definition of partnership is derived from *Corp. Code § 16101(9)*. That section provides that "partnership" means an association of two or more persons to carry on as co-owners a business for profit formed under *Corp. Code § 16202*, predecessor law, or comparable law of another jurisdiction. The definition excludes any partnership formed under the

Uniform Limited Partnership Act [*Corp. Code* § 15501 *et seq.* (ULPA, repealed 1/1/10)] the California Revised Limited Partnership Act [*Corp. Code* § 15611 *et seq.* (CRLPA, repealed 1/1/10)], or the Uniform Limited Partnership Act of 2008 [*Corp. Code* § 15900 *et seq.* (ULPA '08, operative 1/1/08)] but includes, for all purposes, a registered limited liability partnership [*Corp. Code* § 16101(9); *see Corp. Code* § 16101(8) (definition of registered limited liability partnership)]. If such an entity is a party, the instruction may be modified accordingly.

For an extensive discussion of partnerships, see Ballantine & Sterling, California Corporation Laws, Ch. 24, *Partnerships* (Matthew Bender).

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [*see Ch. 37, California Judicial Council Vicarious Responsibility Instructions*]:

CACI No. 3711, Partnerships

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate LawGeneral PartnershipsFormationElementsBusiness & Corporate LawLimited Liability Partnerships

* John F. Wells and Lise A. Pearlman were the original authors of this chapter. It has since been updated to reflect changes in the law, additional case citations and practice pointers by other lawyers as well as revisions including cross-references to the official CACI instructions.



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CHAPTER 3C Matthew Bender Contract Party Instructions *
PART B. PARTNERSHIPS AND JOINT VENTURES

1-3C California Forms of Jury Instruction MB 300C.22

MB 300C.22 Definition of Joint Venture

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

A joint venture is an agreement between two or more persons to undertake a business project or a series of business projects together for profit. ["For profit" means that their purpose is to make a profit and to share that profit.]

[*OPTIONAL (See Use of Instruction)*]

If the project turns out to be unprofitable, any losses are shared in the same way that profits would have been shared [unless the parties have agreed otherwise].

Authorities: *Nelson v. Abraham* (1947) 29 Cal.2d 745, 749-750, 177 P.2d 931 ; *Campagna v. Market S. R. Co.* (1944) 24 Cal.2d 304, 308, 149 P.2d 281 ; *Bank of California v. Connolly* (1973) 36 Cal.App.3d 350, 364, 111 Cal.Rptr. 468 .

[2] Use of Instruction

This instruction should be used whenever a business joint venture is alleged to exist between two or more parties. It is parallel to the instruction on partnerships [see MB 300C.21] since the incidents of both are the same, the difference being the scope and duration [see [3], below]. The optional instruction should be used only if there is an issue regarding sharing of losses. It should be used with caution when one joint venturer contributes tangible property and the other contributes services.

The specific instructions in this Part on various partnership issues apply equally to joint ventures.

For related Judicial Council instructions, see [3][b], *below*.

LexisNexis Matthew Bender Expert Practice Tip--Explain "Joint Ventures": The concept of a joint venture will be "new" to most jurors. Thus, especially for a plaintiff's counsel, a detailed explanation of this concept is usually the preferred path. *By Rex Heeseman*

[3] Comment

[a] Joint Venture Defined

A joint venture exists when there is an "agreement between the parties under which they have ... a joint interest in a common business undertaking, an understanding as to the sharing of profits and losses, and a right of joint control" [*Bank of California v. Connolly* (1973) 36 Cal.App.3d 350, 364, 111 Cal.Rptr. 468]. Whether a joint venture exists depends on the intention of the parties [*Rennick v. O.P.T.I.O.N. Care, Inc.* (9th Cir. 1996) 77 F.3d 309, 317 ; *Universal Sales Corp. v. Cal. etc. Mfg. Co.* (1942) 20 Cal.2d 751, 764-765, 128 P.2d 665 ; *April Enterprises, Inc. v. KTTV* (1983) 147 Cal.App.3d 805, 819, 195 Cal.Rptr. 421 ; *County of Riverside v. Loma Linda University* (1981) 118 Cal.App.3d 300, 313, 173 Cal.Rptr. 371], and is primarily a question of fact to be determined by the trier of fact [*Nelson v. Abraham* (1947) 29 Cal.2d 745, 749-750, 177 P.2d 931 ; *Redevelopment Agency v. International House of Pancakes, Inc.* (1992) 9 Cal.App.4th 1343, 1351 n.7, 12 Cal.Rptr.2d 358 ; *Bank of California v. Connolly* (1973) 36 Cal.App.3d 350, 364, 111 Cal.Rptr. 468].

The incidents of a joint venture are the same as those of a partnership in all essential respects, the difference between the two being that a partnership ordinarily involves a continuing business, whereas a joint venture is usually formed for a specific transaction or a single series of transactions [*Stodd v. Goldberger* (1977) 73 Cal.App.3d 827, 836, 141 Cal.Rptr. 67 ; *Bank of California v. Connolly* (1973) 36 Cal.App.3d 350, 364, 111 Cal.Rptr. 468]. The relationship is founded on contract [see, e.g., *De Anza Enterprises v. Johnson* (2002) 104 Cal.App.4th 1307, 1314-1315, 128 Cal.Rptr.2d 749 (litigation between joint venturers over buyout procedure set forth in written joint venture agreement)] and the acts of the parties over a period of time may be sufficient to raise an implied agreement of joint venture [*Campagna v. Market S. R. Co.* (1944) 24 Cal.2d 304, 308, 149 P.2d 281].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 37, *California Judicial Council Vicarious Responsibility Instructions*]:

CACI No. 3712, Joint Ventures

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate LawJoint VenturesFormationBusiness & Corporate LawJoint VenturesManagement Duties & Liabilities

* John F. Wells and Lise A. Pearlman were the original authors of this chapter. It has since been updated to reflect changes in the law, additional case citations and practice pointers by other lawyers as well as revisions including cross-references to the official CACI instructions.



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CHAPTER 3C Matthew Bender Contract Party Instructions *
PART B. PARTNERSHIPS AND JOINT VENTURES

1-3C California Forms of Jury Instruction MB 300C.23

MB 300C.23 Oral or Implied Partnership Agreement

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

The _____ [Plaintiff or Defendant] has the burden of proving that a partnership existed between _____ [names of alleged partners].

[OPTIONAL (See Use of Instruction)]

[EITHER]

A partnership agreement need not be written. It may be oral or implied by conduct.

[OR]

A partnership agreement need not be expressed entirely in writing; it may be partly written and partly oral or implied.

Authorities: *Smalley v. Baker* (1968) 262 Cal.App.2d 824, 839, 69 Cal.Rptr. 521 ; *ABC Egg Ranch v. Abdelnour* (1963) 223 Cal.App.2d 12, 15, 35 Cal.Rptr. 487 .

[2] Use of Instruction

This instruction should be used when there is a dispute as to the existence of a partnership agreement. The optional instructions should be used when the partnership was allegedly created by oral agreement or when part of the agreement was allegedly written and partly oral or implied. The instruction is also applicable to joint venture agreements [see MB 300C.22[3]]. Parol evidence issues would have to be resolved first [see [3][a], *below*].

For related Judicial Council instructions, see [3][c], *below*.

[3] Comment

[a] Proof of Oral Partnership Generally

Evidence of an oral agreement or of acts and declarations from which such an agreement may be implied is sufficient to prove the existence of a partnership [*Campagna v. Market S. R. Co.* (1944) 24 Cal.2d 304, 308, 149 P.2d 281 ; *ABC Egg Ranch v. Abdelnour* (1963) 223 Cal.App.2d 12, 15, 35 Cal.Rptr. 487]. When an express contract is partly in writing and partly oral, it is in legal effect an oral contract [*Laughlin v. Haberfelde* (1946) 72 Cal.App.2d 780, 785, 165 P.2d 544]. It is proper for the court to consider parol evidence of the parties' intention with regard to forming a partnership when the terms of their written agreement are ambiguous [*Cal. Emp. etc. Com. v. Walters* (1944) 64 Cal.App.2d 554, 558-559, 149 P.2d 17 ; see Ballantine & Sterling, California Corporation Laws, Ch. 24, *Partnerships*, § 603.01 (Matthew Bender)].

Determining whether a partnership has been created is primarily a matter of deciding whether the parties intended to do those things that would make them partners irrespective of their awareness of the legal consequences of their conduct [*Westcott v. Gilman* (1915) 170 Cal. 562, 569, 150 P. 777 ; *Constans v. Ross* (1951) 106 Cal.App.2d 381, 386-387, 235 P.2d 113 ; see MB 300C.21 for instructions defining partnership]. This is primarily a question of fact to be resolved by the trier of fact [*Smalley v. Baker* (1968) 262 Cal.App.2d 824, 837-838, 69 Cal.Rptr. 521 ; *Lyon v. MacQuarrie* (1941) 46 Cal.App.2d 119, 124, 115 P.2d 594].

[b] Burden of Proof

The party alleging the existence of a partnership has the burden of proving that fact by a preponderance of the evidence [*Drinkhouse v. Van Ness* (1927) 202 Cal. 359, 381, 260 P. 869 ; *Lyon v. MacQuarrie* (1941) 46 Cal.App.2d 119, 124, 115 P.2d 594 ; see *Gherman v. Colburn* (1977) 72 Cal.App.3d 544, 566-567, 140 Cal.Rptr. 330 ; see also *Evid. Code* § 550 (burden of producing evidence)]. Although there is language in other cases to the effect that in the absence of a written partnership agreement, proof of partnership must be by "clear and convincing evidence" [see *Welch v. Alcott* (1921) 185 Cal. 731, 742-743, 198 P. 626 ; *Smalley v. Baker* (1968) 262 Cal.App.2d 824, 839, 69 Cal.Rptr. 521 ; *Sullivan v. Schellinger* (1959) 170 Cal.App.2d 111, 113, 338 P.2d 462], this language should not be read to require a higher standard of proof than that which ordinarily applies in civil cases [*Liodas v. Sahadi* (1977) 19 Cal.3d 278, 289 n.6, 137 Cal.Rptr. 635, 562 P.2d 316].

[c] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 37, *California Judicial Council Vicarious Responsibility Instructions*]:

CACI No. 3711, Partnerships

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate LawGeneral PartnershipsFormationPartnership AgreementsContracts LawTypes of ContractsImplied-in-Fact ContractsContracts LawTypes of ContractsOral AgreementsEvidenceProcedural

ConsiderationsBurdens of ProofPreponderance of Evidence

* John F. Wells and Lise A. Pearlman were the original authors of this chapter. It has since been updated to reflect changes in the law, additional case citations and practice pointers by other lawyers as well as revisions including cross-references to the official CACI instructions.



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CHAPTER 3C Matthew Bender Contract Party Instructions *
PART B. PARTNERSHIPS AND JOINT VENTURES

1-3C California Forms of Jury Instruction MB 300C.24

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CHAPTER 3C Matthew Bender Contract Party Instructions *
PART B. PARTNERSHIPS AND JOINT VENTURES

1-3C California Forms of Jury Instruction MB 300C.25

MB 300C.25 Right of Management and Control

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

An agreement to share the profits of a business does not create a partnership unless each partner has equal rights in the management and conduct of the partnership business.

Authority: Corp. Code § 16401(f).

[2] Use of Instruction

This instruction should be used to supplement the instruction defining a partnership in MB 300C.21 whenever the existence of a partnership is disputed.

The instruction states the partners' right of management and conduct as set forth in the Uniform Partnership Act of 1994 (UPA'94) [*Corp. Code § 16100 et seq.*].

LexisNexis Matthew Bender Expert Practice Tip--Use Care When Arguing: "Equal rights" is a common phrase in life, but in a legal sense may be complex. *By Rex Heeseman*

LexisNexis Matthew Bender Expert Practice Tip--Participation in Management: The "right" to participate in management does not mean that each partner has to actually participate in management. Partners can agree to delegate management responsibilities to one or more partners. *By Ronald Oster*

[3] Comment

Absent agreement to the contrary, each partner has an equal right in the management and conduct of the partnership

business [*Corp. Code § 16401(f)*].

For an extensive discussion of partnerships, see Ballantine & Sterling, *California Corporation Laws*, Ch. 24, *Partnerships* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate LawGeneral PartnershipsManagement Duties & LiabilitiesRights of PartnersLosses & ProfitsBusiness & Corporate LawGeneral PartnershipsManagement Duties & LiabilitiesRights of PartnersManagement & VotingCivil ProcedureTrialsJury TrialsJury InstructionsSupplemental Instructions

* John F. Wells and Lise A. Pearlman were the original authors of this chapter. It has since been updated to reflect changes in the law, additional case citations and practice pointers by other lawyers as well as revisions including cross-references to the official CACI instructions.



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CHAPTER 3C Matthew Bender Contract Party Instructions *
PART B. PARTNERSHIPS AND JOINT VENTURES

1-3C California Forms of Jury Instruction MB 300C.26

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CHAPTER 3C Matthew Bender Contract Party Instructions *
PART B. PARTNERSHIPS AND JOINT VENTURES

1-3C California Forms of Jury Instruction MB 300C.27

MB 300C.27 Sharing of Profits

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

[*EITHER (See Use of Instruction)*]

If you find that Defendant received money from _____ [*partnership*], then you must find that [he/she/it] is a partner in the business.

[*OR*]

The fact that Defendant received a share of the profits of Plaintiff's business does not by itself indicate that Defendant was Plaintiff's partner. Receipt of a share of profits may also be the agreed method of payment of _____ [*describe obligation, e.g., a debt, wages, rent, consideration for the sale of goodwill of a business*].

Authority: *Corp. Code § 16202(c)(3).*

[2] Use of Instruction

[a] Use in Business Context

This instruction should be used when there is a dispute involving the sharing of profits from a partnership. The alternatives [see [b] and [c], *below*] are predicated on the existence of a business and are not intended to be used when

the parties are joint owners of property and share profits from its use. This type of a situation may still raise a question of whether they are in business together as partners [see MB 300C.25].

The alternative instructions concern the sharing of profits under the Uniform Partnership Act of 1994 (UPA'94) [*Corp. Code* § 16100 et seq.].

[b] First Alternative: Defendant's Receipt of Share of Profits In Dispute

The first alternative instruction should be used when the only disputed issue is whether the defendants received money designated by the parties as a share of the profits. The instruction is based on a suggestion for instructing the jury on presumptions affecting the burden of producing evidence when the basic fact is disputed, i.e., receipt of money designated as profits [see Jefferson, California Evidence Benchbook (3d ed., Cal. C.E.B. 1997), vol. 2, §§ 46.2, 46.7]. If there is no dispute regarding receipt of profits or evidence of a contrary purpose, the jury should simply be instructed that the partnership has been established.

[c] Second Alternative: Profits Distributed Other Than as Share of Profits

The second alternative instruction should be used when the basic fact of receipt of profits is undisputed but substantial evidence has been introduced that the profits were for a purpose other than partner compensation. The presumption disappears in such a situation and no reference to the presumed fact is appropriate [see Jefferson, California Evidence Benchbook (3d ed., Cal. C.E.B. 1997), vol. 2, § 46.15].

LexisNexis Matthew Bender Expert Practice Tip--Use Care When Arguing: The second alternative will be confusing to many jurors. Thus, the related argument must be clear. *By Rex Heeseman*

[3] Comment

A person who receives a share of the profits of a business is presumed to be a partner in the business, unless the profits were received for any of the following reasons [*Corp. Code* § 16202(c)(3)]:

- In payment of a debt by installments or otherwise.
- In payment for services as an independent contractor or of wages or other compensation to an employee.
- In payment of rent.
- In payment of an annuity or other retirement benefit to a beneficiary, representative, or designee of a deceased or retired partner.
- In payment of interest or other charge on a loan, even if the amount of payment varies with the profits of the business, including a direct or indirect present or future ownership of the collateral, or rights to income, proceeds, or increase in value derived from the collateral.
- In payment for the sale of the goodwill of a business or other property by installments or otherwise.

For an extensive discussion of partnerships, see Ballantine & Sterling, California Corporation Laws, Ch. 24, *Partnerships* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate LawGeneral PartnershipsFormationElementsBusiness & Corporate LawGeneral
PartnershipsManagement Duties & LiabilitiesRights of PartnersLosses & Profits

* John F. Wells and Lise A. Pearlman were the original authors of this chapter. It has since been updated to reflect changes in the law, additional case citations and practice pointers by other lawyers as well as revisions including cross-references to the official CACI instructions.



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CHAPTER 3C Matthew Bender Contract Party Instructions *
PART B. PARTNERSHIPS AND JOINT VENTURES

1-3C California Forms of Jury Instruction MB 300C.28

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CHAPTER 3C Matthew Bender Contract Party Instructions *
PART B. PARTNERSHIPS AND JOINT VENTURES

1-3C California Forms of Jury Instruction MB 300C.29

MB 300C.29 Co-Ownership of Profitable Property Is Not Equivalent to Partnership

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

People who own property together are not necessarily in business together as partners even if they share in _____ [profits or gross receipts] from the property.

Authority: *Corp. Code § 16202(c)(1).*

[2] Use of Instruction

This instruction should be used in cases involving co-owners of land who may or may not be business partners depending on the circumstances. The instruction concerns the co-ownership of property under the Uniform Partnership Act of 1994 (UPA'94) [*Corp. Code § 16100 et seq.*].

[3] Comment

Mere common ownership of property does not, of itself, establish a partnership [*see Corp. Code § 16202(c)(1)*]. The question of partnership is one of fact. Some degree of participation by partners in the management and control of the business is one of the primary elements of partnerships [*Billups v. Tiernan (1970) 11 Cal.App.3d 372, 379, 90 Cal.Rptr. 246*]. Therefore joint ownership of property, that is, joint tenancy, tenancy in common, tenancy by the entireties, joint property, common property, or part ownership, does not by itself establish a partnership, even if the co-owners share profits made by the use of the property [*Corp. Code § 16202(c)(1)*].

Similarly, the sharing of gross returns does not by itself establish a partnership, even if the persons sharing them have a joint or common right or interest in property from which the returns are derived [*Corp. Code § 16202(c)(2)*].

For an extensive discussion of partnerships, see Ballantine & Sterling, California Corporation Laws, Ch. 24, *Partnerships* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate LawGeneral PartnershipsFormationElementsBusiness & Corporate LawGeneral PartnershipsManagement Duties & LiabilitiesRights of PartnersPartnership Property

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CHAPTER 3C Matthew Bender Contract Party Instructions *
PART B. PARTNERSHIPS AND JOINT VENTURES

1-3C California Forms of Jury Instruction MB 300C.30

MB 300C.30 Effect of Terminology Used by Parties

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

[EITHER (See Use of Instruction)]

The fact that the parties called each other "partner" or referred to their relationship as a "partnership" does not necessarily mean that they entered into a relationship that the law recognizes as a partnership. It is only one of the factors you must consider in deciding whether a partnership existed.

[OR]

You must determine whether a partnership exists from the nature of the relation agreed on rather than the name that the parties have given to it. The fact that the parties did not call themselves "partners" is not controlling if you nevertheless are persuaded that they agreed to create a relationship that the law recognizes as a partnership.

Authorities: *Kloke v. Pongratz* (1940) 38 Cal.App.2d 395, 402, 101 P.2d 522 ; *Smalley v. Baker* (1968) 262 Cal.App.2d 824, 839, 69 Cal.Rptr. 521 ; *Constans v. Ross* (1951) 106 Cal.App.2d 381, 386-387, 235 P.2d 113 .

[2] Use of Instruction

This instruction should be used when there is a factual issue as to whether or not an oral or implied partnership was created [see MB 300C.23] to explain to the jury the significance of the terminology used by the parties. If there is a

written agreement that appears to create a different relationship, use the instruction in MB 300C.21.

The first alternative should be used when there is evidence that at least one of the parties referred to the other as "partner" or to the relationship as a "partnership." The second alternative applies when there is no evidence of this terminology.

LexisNexis Matthew Bender Expert Practice Tip--Defining "Partner": The term "partner" can be used loosely to describe many different types of relationships. This instruction is helpful in making clear that a legal partnership is a specific entity that requires more than a general label to create. *By Ronald Oster*

LexisNexis Matthew Bender Expert Practice Tip--Term's Use Does Not Always Equate With Legal Meaning: Many jurors will assume that use of a particular term equates with the legal meaning. Thus, if you are trying to make the opposite point, take time to make that point. *By Rex Heeseman*

[3] Comment

The fact that the parties may have referred to each other as partners does not compel the finding that a partnership existed [*Kloke v. Pongratz* (1940) 38 Cal.App.2d 395, 402, 101 P.2d 522 ; *Smalley v. Baker* (1968) 262 Cal.App.2d 824, 839, 69 Cal.Rptr. 521 ; see *Persson v. Smart Inventions, Inc.* (2005) 125 Cal.App.4th 1141, 1157-1159, 23 Cal.Rptr.3d 335 (shareholders in duly-formed corporation operating in accordance with legal requirements generally are not de facto partners owing fiduciary duties to each other simply because they earn same salary and refer to each other as partners)]. Similarly, the fact that the parties did not use this terminology does not mean that they were not partners. The fact that parties express an intent that the relationship *not* be classified as a partnership is immaterial if they intended to do the things that constitute a partnership. Although some weight must be given to the language of the parties, the question of whether a partnership exists is to be determined from the nature of the relation agreed on rather than the names that the parties have given to it [*Constans v. Ross* (1951) 106 Cal.App.2d 381, 386-387, 235 P.2d 113].

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate LawGeneral PartnershipsFormationElementsBusiness & Corporate LawGeneral PartnershipsFormationPartnership Agreements

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CHAPTER 3C Matthew Bender Contract Party Instructions *
PART B. PARTNERSHIPS AND JOINT VENTURES

1-3C California Forms of Jury Instruction MB 300C.31

MB 300C.31 Contrary Written Agreement

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

You must determine the question of whether a partnership exists from the nature of the relationship agreed on rather than from the name that the parties have given to it. The fact that the parties have a written agreement that appears to create a relationship that is different from a partnership is a factor for you to consider. However, it does not prevent you from determining based on other evidence that the relationship agreed on by the parties was in fact a partnership.

Authorities: *Refinite Sales Co. v. Fred R. Bright Co.* (1953) 119 Cal.App.2d 56, 63, 258 P.2d 1116 ; *Constans v. Ross* (1951) 106 Cal.App.2d 381, 386-387, 235 P.2d 113 .

[2] Use of Instruction

This instruction should be used when evidence of an oral partnership has been admitted despite the existence of a written agreement that is susceptible to an interpretation that the relationship was other than that of a partnership.

Any parol evidence problems will have to be resolved before the admission of the evidence [see Ch. 3B, *Matthew Bender Interpretation of Contract Instructions*, for appropriate interpretation instructions].

LexisNexis Matthew Bender Expert Practice Tip--Overcoming Written Document Can Be

Difficult: Many jurors will be impressed by a written document and it will be hard to overcome the writing, particularly if both parties were involved in drafting the document. Hence, if you are relying on contrary oral and other evidence, you should "take on" such an assumption. *By Rex Heeseman and Ronald Oster*

[3] Comment

"While the question of whether a partnership exists is to be determined from the nature of the relationship agreed upon rather than the name which the parties have given to it, some weight must be given to the language of the parties themselves" [*Constans v. Ross* (1951) 106 Cal.App.2d 381, 386, 235 P.2d 113]. It has been said that when the parties have entered into a written agreement, their intention should be determined chiefly from the terms of the writing [*Constans v. Ross* (1951) 106 Cal.App.2d 381, 386-387, 235 P.2d 113 ; *Kersch v. Taber* (1945) 67 Cal.App.2d 499, 504, 154 P.2d 934]. However, the courts' real concern is that the parties' intention be determined objectively and not from subjective or undisclosed intentions [*Constans v. Ross* (1951) 106 Cal.App.2d 381, 387, 235 P.2d 113]. If there is other admissible evidence showing that the transaction is in fact a partnership or joint venture for mutual profit, the mere form of the agreement between partners is immaterial [*Refinite Sales Co. v. Fred R. Bright Co.* (1953) 119 Cal.App.2d 56, 63, 258 P.2d 1116 ; *Constans v. Ross* (1951) 106 Cal.App.2d 381, 387, 235 P.2d 113]. It is the intent to do the things that constitute a partnership that determines whether or not that relationship exists [*Constans v. Ross* (1951) 106 Cal.App.2d 381, 387, 235 P.2d 113 , quoting *Chapman v. Hughes* (1894) 104 Cal. 302, 304, 37 P. 1048].

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate Law General Partnerships Formation Partnership Agreements Contracts Law Contract Interpretation Parol Evidence General Overview

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CHAPTER 3C Matthew Bender Contract Party Instructions *
PART B. PARTNERSHIPS AND JOINT VENTURES

1-3C California Forms of Jury Instruction MB 300C.32

MB 300C.32 Partnership Business Transacted in Name of Individual

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

You are instructed that _____ [*partnership*] is not responsible for the contract entered into between _____ [*individual partner*] and Plaintiff unless Plaintiff proves that _____ [*individual partner*] in fact executed the contract on behalf of the partnership. In deciding whether _____ [*individual partner*] entered into the contract on behalf of the partnership, you should consider all of the surrounding circumstances. These circumstances may include, but are not limited to, _____ [*e.g., any agreement between the partners concerning the power of individual partners to enter into contracts in their own name on behalf of the partnership, or whether the contract in this case is reflected as a partnership asset or liability on any partnership books or records, or the source of any payments on the contract, or the dealings between Plaintiff and Defendant, or the partnership's general manner of doing business with outsiders.*]

Authorities: *Refinite Sales Co. v. Fred R. Bright Co.* (1953) 119 Cal.App.2d 56, 63, 258 P.2d 1116 ; *Bank of America v. Kumle* (1945) 70 Cal.App.2d 362, 368, 160 P.2d 875 .

[2] Use of Instruction

This instruction should be used when an individual has entered into a written contract in his or her own name and there is evidence that he or she may have been acting on behalf of the partnership. There is a presumption that the partnership is not liable for such a contract. This manner of instructing on the presumption is based on the suggestion in Jefferson, California Evidence Benchbook (3d ed., Cal. C.E.B. 1997), vol. 2, § 46.3].

The instruction should be tailored to reflect the evidence in the case bearing on the issue of an individual partner's

authority to bind the partnership to contracts executed by the individual partner.

LexisNexis Matthew Bender Expert Practice Tip--Go Over Instruction Carefully and Use Visual

Aids: This is a complicated instruction. However, if your facts warrant such an argument, it may be advisable to go over this instruction line-by-line. The use of visual aids to break down the instruction might be helpful. *By Rex Heeseman and Ronald Oster*

[3] Comment

A contract executed by an individual is presumed to be the contract of the individual and not of a partnership to which the individual belongs. The party alleging liability of the partnership for the contract signed by an individual bears the burden of proof on this issue [*Refinite Sales Co. v. Fred R. Bright Co. (1953) 119 Cal.App.2d 56, 62, 258 P.2d 1116 ; Bank of America v. Kumle (1945) 70 Cal.App.2d 362, 368, 160 P.2d 875*]. The jury is entitled to consider the agreement of the partners, their conduct, and their dealings with the world [*Refinite Sales Co. v. Fred R. Bright Co. (1953) 119 Cal.App.2d 56, 65, 258 P.2d 1116*]. It is proper to show that a debt is reflected on the partnership books and to show the source of payments [*Refinite Sales Co. v. Fred R. Bright Co. (1953) 119 Cal.App.2d 56, 63, 258 P.2d 1116*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate Law Agency Relationships Authority to Act Contracts & Conveyances Liability of Principal Business & Corporate Law General Partnerships Management Duties & Liabilities Rights of Partners Authority to Act Evidence Inferences & Presumptions Presumptions

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CHAPTER 3C Matthew Bender Contract Party Instructions *
PART B. PARTNERSHIPS AND JOINT VENTURES

1-3C California Forms of Jury Instruction MB 300C.33

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CHAPTER 3C Matthew Bender Contract Party Instructions *
PART B. PARTNERSHIPS AND JOINT VENTURES

1-3C California Forms of Jury Instruction MB 300C.34

MB 300C.34 Responsibility of Partnership (or Joint Venture) for Partners' Acts in Usual Course of Business

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Plaintiff must prove that Defendant is responsible for the conduct of _____ [individual partner] in _____ [describe transaction for which liability is sought]. Every partner is an agent of the partnership for purposes of the partnership's business. Therefore, the law holds Defendant responsible for the conduct of _____ [individual partner] to the extent that [he/she/it] appeared to be carrying on the partnership business in the usual way [unless:].

[OPTIONAL (See Use of Instruction)]

- 1. [He/She/It] in fact had no authority to act for Defendant in this particular matter; and**
- 2. Plaintiff knew that _____ [name of partner]'s conduct was unauthorized or had received a notification of _____ [name of partner]'s lack of authority.**

Authorities: Corp. Code §§ 16102, 16301.

[2] Use of Instruction

This instruction should be used when the plaintiff is seeking to hold a defendant partnership liable for the actions of a particular partner that appear to have been taken in the usual course of business. Partnership terminology is interchangeable with that of a joint venture.

The instruction concerns the responsibility of a partnership under the Uniform Partnership Act of 1994 (UPA'94) [*Corp. Code* § 16100 *et seq.*].

If the existence of a partnership or joint venture is itself in issue, the instruction in MB 300C.21 or MB 300C.22 should be given before this instruction.

[3] Comment

The incidents of a joint venture and a partnership are the same in all essential respects [*Bank of California v. Connolly* (1973) 36 Cal.App.3d 350, 364, 111 Cal.Rptr. 468].

This instruction is derived from *Corp. Code* § 16301. That section provides that, subject to the effect of a statement of partnership authority under *Corp. Code* § 16303, a partner is an agent of the partnership for the purpose of its business. An act of a partner, including the execution of an instrument in the partnership name, for apparently carrying on in the ordinary course the partnership business (or business of the kind carried on by the partnership) binds the partnership, unless (1) the partner had no authority to act for the partnership in the particular matter, and (2) the person with whom the partner was dealing knew or had received notice that the partner lacked authority [*Corp. Code* § 16301(1); *see Corp. Code* § 16102 ("knowledge" and "notice" construed)]. An act of a partner that is not apparently for carrying on in the ordinary course the partnership business (or business of the kind carried on by the partnership) binds the partnership only if the other partners authorized the act [*Corp. Code* § 16301(2)]. A statement of partnership authority may authorize or limit the authority of partners to enter into transactions on behalf of the partnership [*Corp. Code* § 16303].

Since the plaintiff must show that the partnership is responsible for the contract sued on, the plaintiff should have the burden of proof on the agency issue [*Evid. Code* § 500; *see E. K. Wood Lumber Co. v. Moore Mill & Lumber Co.* (9th Cir. 1938) 97 F.2d 402, 408 (burden of proof on agency issues embroiled within contract claim falls on plaintiff)].

For further discussion of the authority of partners to act on behalf of a partnership, see Ballantine & Sterling, California Corporation Laws, Ch. 24, *Partnerships* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate LawAgency RelationshipsAgents DistinguishedJoint VenturersBusiness & Corporate LawAgency RelationshipsAuthority to ActBusiness TransactionsManagementBusiness & Corporate LawGeneral PartnershipsManagement Duties & LiabilitiesRights of PartnersAuthority to ActBusiness & Corporate LawJoint VenturesManagement Duties & Liabilities

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CHAPTER 3C Matthew Bender Contract Party Instructions *
PART B. PARTNERSHIPS AND JOINT VENTURES

1-3C California Forms of Jury Instruction MB 300C.36

MB 300C.36 Responsibility of Partnership (or Joint Venture) for Acts Outside Usual Course of Business

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Plaintiff must prove that Defendant is responsible for the conduct of _____ *[partner or joint venturer]* **in** _____ *[describe act(s) apparently outside usual course of business]*. **For Defendant to be responsible for the** _____ **[act or acts] of** _____ *[partner or joint venturer]* **in** _____ *[describe act(s)], it must be shown that the act was authorized by the other partners.*

Authority: *Corp. Code § 16301(2).*

[2] Use of Instruction

This instruction should be used when the defendant is a partnership or joint venture and the plaintiff is seeking to hold the partnership or joint venture liable for the actions of a particular partner or joint venturer that were not taken in the usual course of business. It is assumed that the judge will decide in advance whether the nature of the act is such that it is outside the usual course of business, thereby requiring the instruction in MB 300C.34.

This instruction concerns the responsibility of a partnership for partners' acts outside the usual course of business under the Uniform Partnership Act of 1994 (UPA'94) [*Corp. Code § 16100 et seq.*].

For purposes of this instruction, partnership terminology is interchangeable with that of a joint venture and the instruction should be modified accordingly if the case involves a joint venture.

[3] Comment

This instruction is derived from *Corp. Code § 16301(2)*, which provides that an act of a partner that is not apparently for carrying on in the ordinary course the partnership business (or business of the kind carried on by the partnership) binds the partnership only if the act was authorized by the other partners [*Corp. Code § 16301(2)*].

For further discussion of the authority of partners to act on behalf of a partnership under UPA'94, see Ballantine & Sterling, California Corporation Laws, Ch. 24, *Partnerships* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate LawAgency RelationshipsDuties & LiabilitiesAuthorized Acts of AgentsUnauthorized ActsBusiness & Corporate LawGeneral PartnershipsManagement Duties & LiabilitiesRights of PartnersAuthority to ActBusiness & Corporate LawJoint VenturesManagement Duties & Liabilities

* John F. Wells and Lise A. Pearlman were the original authors of this chapter. It has since been updated to reflect changes in the law, additional case citations and practice pointers by other lawyers as well as revisions including cross-references to the official CACI instructions.



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CHAPTER 3C Matthew Bender Contract Party Instructions *
PART B. PARTNERSHIPS AND JOINT VENTURES

1-3C California Forms of Jury Instruction MB 300C.37-MB 300C.49

Reserved for Future Use

MB 300C.37Reserved for Future Use



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CHAPTER 3C Matthew Bender Contract Party Instructions *
PART C. PRINCIPAL AND AGENT

1-3C California Forms of Jury Instruction MB 300C.50

MB 300C.50 Agency Defined; Liability of Principal; Burden of Proof**[1] Instruction** Agency Defined; Liability of Principal; Burden of Proof[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

An agent is a person who represents another, called the principal, in business dealings with third persons. The principal is responsible for any act of the agent within the scope of the agent's authority.

[*OPTIONAL (See Use of Instruction)*]

Plaintiff has the burden of proving that _____ [name of alleged agent] is the agent of Defendant.

[*OPTIONAL (See Use of Instruction)*]

Plaintiff also has the burden of proving that _____ [specify act(s) at issue] [was/were] within the scope of _____ [name of alleged agent]'s authority as Defendant's agent.

Authorities: Civ. Code §§ 2295, 2330; *Inglewood Teachers Assn. v. Public Employment Relations Bd.* (1991) 227 Cal.App.3d 767, 780, 278 Cal.Rptr. 228 ; *Aspen Pictures, Inc. v. Oceanic S. S. Co.* (1957) 148 Cal.App.2d 238, 253, 306 P.2d 933 .

[2] Use of Instruction

This is an introductory instruction that should be used in any contract case when there is an issue with regard to the representation of one of the parties by an agent. It should be followed by the instructions in this Part that deal with the

specific agency issues in the case.

If the existence of the agency is at issue, the first optional paragraph may be used to explain who bears the burden of proving the existence of the agency. If the existence of the agency is not disputed, the jury should be instructed as provided in MB 300C.51. If the scope of the agency is at issue, the second optional paragraph may be used to explain who bears the burden of proving the scope of the agency.

For related Judicial Council instructions, see [3][b], *below*.

LexisNexis Matthew Bender Expert Practice Tip--Explain These Points to Jury: In many lawsuits, the nature of an agency and the burden of proof will be key points. Hence, make sure the jury understands their significance. *By Rex Heeseman*

LexisNexis Matthew Bender Expert Practice Tip--Pay Attention to Scope of Agent's Authority: Many agency relationships are not spelled out in writing. Accordingly, the "scope" of an agent's authority can lead to disputes when something goes wrong. Most jurors will assume that if the agent was purporting to act on behalf of a principal, then the agent had the authority to do so. *By Ronald Oster*

[3] Comment

[a] Nature of Agency; Burden of Proof

An agent is one who represents another, called the principal, in dealings with third persons. The representation is called agency [Civ. Code § 2295; see *Jacoves v. United Merchandising Corp.* (1992) 9 Cal.App.4th 88, 103, 11 Cal.Rptr.2d 468 (citing statutory definition)]. The principal will be contractually bound by any act of the agent within the scope of the agency, just as if the act had been done by the principal [Civ. Code § 2330].

The existence of an agency relationship and the scope of the agent's authority are generally questions of fact [see *Seneris v. Haas* (1955) 45 Cal.2d 811, 831, 291 P.2d 915 ; *Universal Bank v. Lawyers Title Ins. Corp.* (1997) 62 Cal.App.4th 1062, 1066, 73 Cal.Rptr.2d 196], and the burden of proving both agency and the scope of the agent's authority rests on the party asserting the existence of the agency and seeking to hold the principal responsible for the agent's acts [*Inglewood Teachers Assn. v. Public Employment Relations Bd.* (1991) 227 Cal.App.3d 767, 780, 278 Cal.Rptr. 228 ; *Aspen Pictures, Inc. v. Oceanic S. S. Co.* (1957) 148 Cal.App.2d 238, 253, 306 P.2d 933]. It is proper to instruct the jury that the burden of proving an agency and its scope is on the party asserting the agency [*Aspen Pictures, Inc. v. Oceanic S. S. Co.* (1957) 148 Cal.App.2d 238, 253, 306 P.2d 933].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 37, *California Judicial Council Vicarious Responsibility Instructions*]:

CACI No. 3705 Existence of "Agency" Relationship Disputed

CACI No. 3709 Ostensible Agent

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate Law Agency Relationships Causes of Action & Remedies Burdens of Proof Business & Corporate Law Agency Relationships Duties & Liabilities Authorized Acts of Agents Scope of Authority Business & Corporate Law Agency Relationships Establishment Definition Business & Corporate Law Agency Relationships Establishment Proof of Agency Burdens of Proof

* John F. Wells and Lise A. Pearlman were the original authors of this chapter. It has since been updated to reflect changes in the law, additional case citations and practice pointers by other lawyers as well as revisions including cross-references to the official CACI instructions.



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CHAPTER 3C Matthew Bender Contract Party Instructions *
PART C. PRINCIPAL AND AGENT

1-3C California Forms of Jury Instruction MB 300C.51

MB 300C.51 Liability of Principal for Acts of Agent--Agency Not Disputed

[1] Instruction Liability of Principal for Acts of Agent-Agency Not Disputed

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

In dealing with Plaintiff concerning _____ [describe contract or transaction in question], Defendant was represented by _____ [name of agent]. Anything that [he/she/it] said or did within the scope of [his/her/its] authority as Defendant's agent will have the same legal effect as if it had been said or done by Defendant.

Authority: *Civ. Code § 2330.*

[2] Use of Instruction

This instruction should be used only if there is no dispute about the existence of the agency relationship. It applies the general principle of the instruction in MB 300C.50 to the parties by name. It should be followed by the instructions in this Part that deal with the agency issues in the case, e.g., as to the scope of the agent's authority. The instruction in MB 300C.52 should be used if there is a dispute as to the existence of the agency relationship,

For related Judicial Council instructions, see [3][b], *below*.

[3] Comment

[a] Agency Relationship

An agent represents the principal for all purposes within the scope of the agent's authority. All the rights and liabilities that would accrue to the agent from transactions within those limits if they had been entered into on the agent's account,

accrue to the principal [*Civ. Code* § 2330].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 37, *California Judicial Council Vicarious Responsibility Instructions*]:

CACI No. 3705 Existence of "Agency" Relationship Disputed

CACI No. 3709 Ostensible Agent

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate Law Agency Relationships Duties & Liabilities Authorized Acts of Agents Scope of Authority Business & Corporate Law Agency Relationships Establishment Definition

* John F. Wells and Lise A. Pearlman were the original authors of this chapter. It has since been updated to reflect changes in the law, additional case citations and practice pointers by other lawyers as well as revisions including cross-references to the official CACI instructions.



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CHAPTER 3C Matthew Bender Contract Party Instructions *
PART C. PRINCIPAL AND AGENT

1-3C California Forms of Jury Instruction MB 300C.52

MB 300C.52 Creation of Agency Relationship

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

The relationship of principal and agent arises whenever two parties agree that one may act for the other in dealings with third persons. Such an agreement may be written or oral, or partly written and partly oral. [The terms of the agreement may be express or implied. Express terms are stated in words. Implied terms are shown by conduct.]

[*OPTIONAL (See Use of Instruction)*]

Implied terms may also be shown by custom and usage.

Authorities: *Civ. Code* §§ 1619-1622, 2295, 2299, 2307-2309, 2316; Restatement (Second) of Agency §§ 15.16, 15.26 (1958).

[2] Use of Instruction

This instruction should be used when there is a dispute as to the existence of an agency relationship or the extent of the agent's authority. If it is contended that there was an ostensible agency or authority in addition to or in lieu of actual authority, the instruction in MB 300C.55 should be used instead of, or in addition to, this instruction, as appropriate. The bracketed language should be used if the existence of the agency or the extent of the agent's actual authority is sought to be implied from conduct, such as silence in the face of knowledge that another is representing himself or herself as an agent.

This instruction should not be given if the question is whether the agent was authorized to enter into a contract required to be in writing. The equal dignities rule requires that this authority must be written [see [3][a], *below*].

For related Judicial Council instructions, see [3][b], *below*.

[3] Comment

[a] Creation of Agency Relationship

An agent is a person who represents another, called the principal, in dealings with third persons [Civ. Code § 2295]. An agency may be created, and an authority may be conferred, by prior authorization or subsequent ratification [Civ. Code § 2307]. The relationship is consensual, and is governed by the usual rules for the formation of contracts [Restatement (Second) of Agency § 15 (1958); see Civ. Code §§ 1619-1622], except that consideration is not necessary [Civ. Code § 2308]. The objective standard of consent applies, just as with contracts generally, and the agency may be implied from the circumstances and conduct of the parties [Civ. Code § 2316; Restatement (Second) of Agency § 26 (1958)]. The instructions in Ch. 3A, *Matthew Bender Formation of Contract Instructions*, and Ch. 3B, *Matthew Bender Interpretation of Contract Instructions*, should also be consulted for their possible applicability to any disputed issues relating to an agency agreement.

An oral authorization is sufficient for any purpose, except that an authority to enter into a contract required by law to be in writing can only be given by an instrument in writing [Civ. Code § 2309; see Witkin, Summary of California Law, vol. 3, *Agency and Employment* (10th ed. 2005)].

In determining whether an agency relationship exists between a franchisor and franchisee, the courts focus on the right to control. A true principal-agency relationship exists only when the franchisor retains complete or substantial control over the daily activities of the franchisee's business [*Kaplan v. Coldwell Banker* (1997) 59 Cal.App.4th 741, 745-746, 69 Cal.Rptr.2d 640 ; *Cislaw v. Southland Corp.* (1992) 4 Cal.App.4th 1284, 1296, 6 Cal.Rptr.2d 386].

In addition to actual authority, express or implied, in which the agent is really employed by the principal [Civ. Code § 2299], the law also recognizes that a person may become contractually bound to third parties by the acts of an ostensible agent under principles of estoppel [see MB 300C.55].

LexisNexis Matthew Bender Expert Practice Tip--Use Care With Evidence: Oral evidence or "implied" evidence on the topic of creating an agency relationship may be difficult for some jurors. By *Rex Heeseman*

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 37, *California Judicial Council Vicarious Responsibility Instructions*]:

CACI No. 3705 Existence of "Agency" Relationship Disputed

CACI No. 3709 Ostensible Agent

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate LawAgency RelationshipsAuthority to ActActual AuthorityExpress AuthorityBusiness & Corporate LawAgency RelationshipsAuthority to ActActual AuthorityImplied AuthorityGeneral OverviewBusiness & Corporate LawAgency RelationshipsAuthority to ActActual AuthorityImplied AuthorityCustoms & UsagesBusiness & Corporate LawAgency RelationshipsAuthority to ActActual AuthorityOral & Written AuthorityBusiness & Corporate

LawAgency RelationshipsEstablishmentAgency AgreementsBusiness & Corporate LawAgency
RelationshipsEstablishmentDefinitionContracts LawContract InterpretationParol EvidenceCustom & Usage

* John F. Wells and Lise A. Pearlman were the original authors of this chapter. It has since been updated to reflect changes in the law, additional case citations and practice pointers by other lawyers as well as revisions including cross-references to the official CACI instructions.



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CHAPTER 3C Matthew Bender Contract Party Instructions *
PART C. PRINCIPAL AND AGENT

1-3C California Forms of Jury Instruction MB 300C.53

MB 300C.53 Actual Authority of Agent

[1] Instruction Actual Authority of Agent

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

An agent has the authority as the principal _____ [purposely gives [him/her/it] and/or carelessly allows [him/her/it] to believe [he/she/it] possesses].

[*OPTIONAL (See Use of Instruction)*]

Even though it may not be expressly stated, an agent has authority to do everything necessary or proper and usual in the ordinary course of business to carry out the purpose of the agency. However, this authority may be limited by the principal's express instructions.

Authorities: *Civ. Code §§ 2315, 2316, 2319(1).*

[2] Use of Instruction

This instruction should be used when there is a dispute about the scope of the agent's authority and there is evidence that the agent's activity fell within the general scope of the agency. If there is a question of ostensible authority, the instruction in MB 300C.55 should be considered.

The choice indicated in brackets will depend on the evidence in the case. The optional instruction will probably be appropriate in most cases in which it is contended that the agent exceeded the actual authority.

For related Judicial Council instructions, see [3][b], *below*.

LexisNexis Matthew Bender Expert Practice Tip--Explain "Actual" Authority Carefully: An agent's actual authority is usually a more straightforward concept than ostensible agency. Still, in some lawsuits, "actual" authority may need to be explained carefully. *By Rex Heeseman*

LexisNexis Matthew Bender Expert Practice Tip--Establishing Agent's Authority: The optional portion of this instruction is easier to follow. Many agency relationships are not spelled out in writing, so the optional instruction is important to establish that the agent has the authority unless the principal gives express instructions otherwise. *By Ronald Oster*

[3] Comment

[a] Authority of Agent

An agent has that authority as the principal, actually or ostensibly, confers on the agent [*Civ. Code* § 2315]. An agent's actual authority is whatever the principal intentionally confers on the agent, or intentionally, or by want of ordinary care allows the agent to believe the agent possesses [*Civ. Code* § 2316]. In general, an agent has the authority to do everything necessary or proper and usual, in the ordinary course of business, to effect the agency's purpose [*Civ. Code* § 2319(1)]. Even though the principal expressly limits the agent's authority to something less than the usual and ordinary course of business, the agent will have ostensible authority [*Civ. Code* § 2317; *see MB 300C.55*] except as to persons who have notice of the restriction [*Civ. Code* § 2318].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [*see Ch. 37, California Judicial Council Vicarious Responsibility Instructions*]:

CACI No. 3709 Ostensible Agent

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate LawAgency RelationshipsAuthority to ActActual AuthorityExpress AuthorityBusiness & Corporate LawAgency RelationshipsDuties & LiabilitiesAuthorized Acts of AgentsScope of AuthorityBusiness & Corporate LawAgency RelationshipsEstablishmentEstoppel, Ostensible Agency & NecessityOstensible Agency

* John F. Wells and Lise A. Pearlman were the original authors of this chapter. It has since been updated to reflect changes in the law, additional case citations and practice pointers by other lawyers as well as revisions including cross-references to the official CACI instructions.



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CHAPTER 3C Matthew Bender Contract Party Instructions *
PART C. PRINCIPAL AND AGENT

1-3C California Forms of Jury Instruction MB 300C.54

MB 300C.54 Agent's Discretion in Emergency

[1] Instruction Agent's Discretion in Emergency

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

In this case Defendant contends that _____ [agent] exceeded [his/her/its] authority when [he/she/it] _____ [describe activity that may have exceeded authority], and that Defendant is therefore not obligated to Plaintiff to perform _____ [describe disputed obligation]. As agent for Defendant, _____ [agent] was entitled to disobey Defendant's instructions if it was clearly in the best interest of Defendant and there was no time to communicate with Defendant.

You must first decide whether _____ [agent] exceeded [his/her/its] authority. In deciding that question, you must be guided by the instructions that _____ [I will give next or I have already given] on the scope and extent of an agent's authority. If you decide that _____ [agent] acted within [his/her/its] authority, Defendant will be obligated to Plaintiff to perform _____ [describe disputed obligation]. If, on the other hand, you decide that _____ [agent] exceeded [his/her/its] authority, Defendant will not be obligated to Plaintiff unless you find both of the following:

1. That _____ [agent]'s actions were clearly in the best interests of Defendant; and
2. That there was no time to communicate with Defendant.

Authorities: Civ. Code § 2320; Restatement (Second) of Agency § 47 (1958).

[2] Use of Instruction

This instruction should be used when the alleged principal denies the agent's authority and the third party contends that

the agent acted in the principal's best interest in an emergency, thereby binding the principal even though the agent may have exceeded the agent's authority. If it is conceded that the agent disobeyed instructions, the only issue being whether the emergency rule applies, the instruction should be modified accordingly.

[3] Comment

An agent has the power to disobey instructions in dealing with the subject of the agency when it is clearly for the interest of the principal that the agent do so, and there is no time to communicate with the principal [*Civ. Code* § 2320]. This is a special application of the general principle of implied authority that the authority of an agent is interpreted in light of the circumstances at the time the agent acts and the known purposes of the principal [Restatement (Second) of Agency § 47, Comment (a) (1958)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate Law Agency Relationships Establishment Estoppel, Ostensible Agency & Necessity Agency by Necessity

* John F. Wells and Lise A. Pearlman were the original authors of this chapter. It has since been updated to reflect changes in the law, additional case citations and practice pointers by other lawyers as well as revisions including cross-references to the official CACI instructions.



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CHAPTER 3C Matthew Bender Contract Party Instructions *
PART C. PRINCIPAL AND AGENT

1-3C California Forms of Jury Instruction MB 300C.55

MB 300C.55 Ostensible Authority

[1] Instruction Ostensible Authority

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Under certain circumstances a person is held responsible as a principal for _____ [acts performed by another person who is not in fact (his/her/its) agent or acts of an agent outside the scope of the agent's actual authority]. In this case, Plaintiff contends that Defendant is responsible for _____ [describe allegedly authorized act(s)] taken by _____ [ostensible agent].

To establish Defendant's responsibility for _____ [those acts or that act], Plaintiff must prove each of the following:

[CHOOSE FROM THE FOLLOWING (See Use of Instruction)]

1. Defendant intentionally or carelessly allowed Plaintiff to believe that _____ [ostensible agent] possessed Defendant's authority to _____ [describe allegedly authorized act(s)];

2. Plaintiff's belief was reasonable, that is, that a reasonable person would have believed that _____ [ostensible agent] had authority to so act on behalf of Defendant; and

3. In good faith and acting with due care, Plaintiff incurred a liability or parted with something of value in reliance on the apparent authority of _____ [ostensible agent] to act on Defendant's behalf.

Authorities: *C.A.R. Transportation v. Darden Restaurants, Inc.* (9th Cir. 2000) 213 F.3d 474, 479-481 ; Civ. Code §§

2317, 2334; *Seneris v. Haas* (1955) 45 Cal.2d 811, 831, 291 P.2d 915 ; *Mejia v. Community Hospital of San Bernardino* (2002) 99 Cal.App.4th 1448, 1456-1457, 122 Cal.Rptr.2d 233 ; *Kaplan v. Coldwell Banker* (1997) 59 Cal.App.4th 741, 747, 69 Cal.Rptr.2d 640 ; *Torrance N. Bk. v. Enesco F. Credit Union* (1955) 134 Cal.App.2d 316, 322-324, 285 P.2d 737 .

[2] Use of Instruction

This instruction should be used when there is evidence that the plaintiff relied on the ostensible authority of a third person who the plaintiff believed was the defendant's agent. It states each of the elements necessary to establish the liability of a principal under the doctrine of ostensible agency. If one or more of the elements is not in dispute, the instruction should be modified accordingly.

For related Judicial Council instructions, see [3][b], *below*.

LexisNexis Matthew Bender Expert Practice Tip--Use Care When Preparing Argument:

Sometimes, this is a key element of a party's case. However, ostensible agency will be a tough concept for many jurors. Hence, the related argument must be constructed carefully. *By Rex Heeseman*

LexisNexis Matthew Bender Expert Practice Tip--Emphasizing "Good Faith" and "Due Care"

Requirements: The last part of this instruction requires plaintiff to prove that plaintiff acted in "good faith" and with "due care." Defense counsel may want to highlight these elements in closing argument. *By Ronald Oster*

[3] Comment

[a] Ostensible Authority

Ostensible authority is authority that the principal, intentionally or by want of ordinary care, causes or allows a third person to believe the agent possessed [Civ. Code § 2317; *Seneris v. Haas* (1955) 45 Cal.2d 811, 831, 291 P.2d 915 ; *Mejia v. Community Hospital of San Bernardino* (2002) 99 Cal.App.4th 1448, 1460, 122 Cal.Rptr.2d 233 (trial court erred in granting nonsuit when there was triable issue as to whether negligent doctor was ostensible agent of hospital); *Jacoves v. United Merchandising Corp.* (1992) 9 Cal.App.4th 88, 103, 11 Cal.Rptr.2d 468]. Ostensible authority must be based on the acts or declarations of the principal, not on the acts or words of the alleged agent [C.A.R. *Transportation v. Darden Restaurants, Inc.* (9th Cir. 2000) 213 F.3d 474, 480 ; *Pagarigan v. Libby Care Center, Inc.* (2002) 99 Cal.App.4th 298, 301-302, 120 Cal.Rptr.2d 892 (person cannot become agent of another merely by representing himself or herself as such); *Kaplan v. Coldwell Banker* (1997) 59 Cal.App.4th 741, 747, 69 Cal.Rptr.2d 640 ; *Lindsay-Field v. Friendly* (1995) 36 Cal.App.4th 1728, 1734, 43 Cal.Rptr.2d 71 ; *Petersen v. Securities Settlement Corp.* (1991) 226 Cal.App.3d 1445, 1452, 277 Cal.Rptr. 468]. Note, however, that conduct of the principal sufficient to justify a finding of ostensible authority may include the failure to act or speak, as when the principal fails to tell a third party of secret limitations on a general agent's authority [*Leavens v. Pinkham & McKeivitt* (1912) 164 Cal. 242, 247, 128 P. 399 ; see *Jacoves v. United Merchandising Corp.* (1992) 9 Cal.App.4th 88, 103, 11 Cal.Rptr.2d 468 (principal is liable for acts of ostensible agent when principal knows agent holds himself or herself out as clothed with authority and principal remains silent)]. In addition, no ostensible authority may be found when the third party is not justified in believing that it exists [*Torrance N. Bk. v. Enesco F. Credit Union* (1955) 134 Cal.App.2d 316, 323, 325, 285 P.2d 737 ; see Witkin, Summary of California Law, vol. 3, *Agency and Employment*, § 146 (10th ed. 2005)]. The test of justifiable reliance is negligence. The person relying on the agency must have acted as a reasonably prudent person would do under the circumstances [*People v. Surety Ins. Co.* (1982) 136 Cal.App.3d 556, 562, 186 Cal.Rptr. 385]. Ostensible authority arises when the principal's conduct causes the third party reasonably to believe that the agent possesses the authority to act on the principal's behalf [*Kaplan v. Coldwell Banker* (1997) 59 Cal.App.4th 741, 748, 69 Cal.Rptr.2d 640 (triable issue of fact existed regarding whether real estate franchise company was ostensible agent of franchisee); *Petersen v. Securities Settlement Corp.* (1991) 226 Cal.App.3d 1445, 1452, 277 Cal.Rptr. 468 ; see C.A.R.

Transportation v. Darden Restaurants, Inc. (9th Cir. 2000) 213 F.3d 474, 479-481 (holding that truck drivers had ostensible authority to sign waivers of right to payment from shipper)]. However, an agent can never have authority, either actual or ostensible, to do an act that is, and is known to the person dealt with, to be a fraud on the principal [*Civ. Code* § 2306; *Saks v. Charity Mission Baptist Church* (2001) 90 Cal.App.4th 1116, 1137-1140, 110 Cal.Rptr.2d 45 (in real estate investor's action for breach of contract and fraud, church held not liable on promissory notes signed by pastor, when plaintiff acquiesced in scheme to wrongfully use church's name to obtain financial benefit for himself and his partners)].

The plaintiff has the burden of proving that a contract was entered into with the defendant [see Ch. 3A, *Matthew Bender Formation of Contract Instructions*]. This includes any agency issue embraced in the contract [*E. K. Wood Lumber Co. v. Moore Mill & Lumber Co.* (9th Cir. 1938) 97 F.2d 402, 408].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 37, *California Judicial Council Vicarious Responsibility Instructions*]:

CACI No. 3709 Ostensible Agent

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate Law Agency Relationships Establishment Estoppel, Ostensible Agency & Necessity Ostensible Agency

* John F. Wells and Lise A. Pearlman were the original authors of this chapter. It has since been updated to reflect changes in the law, additional case citations and practice pointers by other lawyers as well as revisions including cross-references to the official CACI instructions.



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CHAPTER 3C Matthew Bender Contract Party Instructions *
PART C. PRINCIPAL AND AGENT

1-3C California Forms of Jury Instruction MB 300C.56

MB 300C.56 Ratification by Acceptance of Benefits

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

An agent's act, even though it was not authorized, will be binding on the principal if the principal later ratifies it.

To establish that Defendant ratified _____ [agent]'s act(s) in _____ [describe unauthorized act(s)], Plaintiff must prove all of the following:

1. That Defendant accepted _____ [describe benefits received by defendant under contract or transaction];

[EITHER (See Use of Instruction)]

2. That in doing so, Defendant had full knowledge of the unauthorized act(s) of _____ [agent]; and

[OR]

2. That the circumstances were such that they would put a reasonable person on inquiry, and Defendant failed to investigate; and

[CONTINUE WITH INSTRUCTION]

3. That Defendant could have rejected _____ [describe benefit received by defendant] and restored the same to Plaintiff.

Authorities: Civ. Code §§ 2307, 2310; *Friddle v. Epstein* (1993) 16 Cal.App.4th 1649, 1656, 21 Cal.Rptr.2d 85 ; *Ripani v. Liberty Loan Corp.* (1979) 95 Cal.App.3d 603, 613, 157 Cal.Rptr. 272 ; *Reusche v. California Pac. Title Ins. Co.* (1965) 231 Cal.App.2d 731, 737-738, 42 Cal.Rptr. 262 ; *Pacific Bone etc. Co. v. Bleakmore* (1927) 81 Cal.App. 659, 664, 254 P. 618 .

[2] Use of Instruction

This instruction should be used when it is claimed that the defendant ratified an unauthorized act of an agent by accepting the benefits of the act.

The first alternative Paragraph 2 should be used if it is claimed that the defendant expressly ratified the act. The second alternative Paragraph 2 should be used if there is evidence that the defendant had inquiry notice of the agent's act.

The equal dignities rule will require that ratification be in writing if the original authorization was required to be in writing [see [3][a], *below*].

For related Judicial Council instructions, see [3][b], *below*.

LexisNexis Matthew Bender Expert Practice Tip--Using Ratification in Your Case: Defenses based on "lack of authority" are sometimes raised late in the game when it becomes clear that a contract or transaction will not turn out as expected. Ratification is one way to deal with this problem because a substantial delay in questioning authority can be used to support a claim of ratification. *By Ronald Oster*

LexisNexis Matthew Bender Expert Practice Tip--Plaintiff's Response to Defense of Ratification: Ratification is often the best path for a defendant to avoid responsibility for an agent's act. Thus, plaintiff's counsel needs to (1) deflect this response in some lawsuits, or (2) emphasize appropriate facts to establish liability. *By Rex Heeseman*

[3] Comment

[a] Ratification

An agency may be created or an authority may be confirmed by ratification [Civ. Code § 2307]. Ratification may be oral or implied from conduct as well as by express words, but the equal dignities rule applies to ratification as well as to an original authorization [Civ. Code § 2310; see Witkin, Summary of California Law, vol. 2, *Agency and Employment*, § 92 (10th ed. 2005)]. Ratification of part of an indivisible transaction is a ratification of the whole [Civ. Code § 2311; *Friddle v. Epstein* (1993) 16 Cal.App.4th 1649, 1656, 21 Cal.Rptr.2d 85]. The principal may not ratify the beneficial parts and refuse to affirm the rest [Civ. Code § 2311; *Friddle v. Epstein* (1993) 16 Cal.App.4th 1649, 1656, 21 Cal.Rptr.2d 85 ; see Witkin, Summary of California Law, vol. 2, *Agency and Employment*, § 98 (10th ed. 2005)].

The most typical kind of ratification by conduct occurs when one voluntarily accepts the benefits of a transaction made on his or her behalf by another [see Civ. Code § 2310; Witkin, Summary of California Law, vol. 2, *Agency and Employment*, § 97 (10th ed. 2005)]. The acceptance of benefits must be with full knowledge of the unauthorized act and its consequences [*Ripani v. Liberty Loan Corp.* (1979) 95 Cal.App.3d 603, 613, 157 Cal.Rptr. 272 ; *Johnson v. California I.M.T. Assn.* (1938) 24 Cal.App.2d 322, 336-337, 74 P.2d 1073], unless the principal's ignorance was based

on his or her own failure to investigate and the circumstances were such as to put a reasonable person on inquiry [*Reusche v. California Pac. Title Ins. Co.* (1965) 231 Cal.App.2d 731, 737, 42 Cal.Rptr. 262]. It must also be shown that at the time the principal learned of the unauthorized act he or she was in a position to reject it and restore the benefits [*Pacific Bone etc. Co. v. Bleakmore* (1927) 81 Cal.App. 659, 664, 254 P. 618 ; see *Streetscenes LLC v. ITC Entertainment Group, Inc.* (2002) 103 Cal.App.4th 233, 242-243, 126 Cal.Rptr.2d 754 (evidence was sufficient to establish that movie production company ratified or authorized movie producer's wrongful conduct; its failure to repudiate producer's acts was evidence of ratification)].

The plaintiff has the burden of proving that a contract was entered into with the defendant [see Ch. 3A, *Matthew Bender Formation of Contract Instructions*]. This includes any agency issue embraced in the contract [*E. K. Wood Lumber Co. v. Moore Mill & Lumber Co.* (9th Cir. 1938) 97 F.2d 402, 408].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 37, *California Judicial Council Vicarious Responsibility Instructions*]:

CACI No. 3710 Ratification

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate LawAgency RelationshipsDuties & LiabilitiesAuthorized Acts of AgentsUnauthorized ActsBusiness & Corporate LawAgency RelationshipsRatificationExpress & Implied Ratification

* John F. Wells and Lise A. Pearlman were the original authors of this chapter. It has since been updated to reflect changes in the law, additional case citations and practice pointers by other lawyers as well as revisions including cross-references to the official CACI instructions.



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CHAPTER 3C Matthew Bender Contract Party Instructions *
PART C. PRINCIPAL AND AGENT

1-3C California Forms of Jury Instruction MB 300C.57

MB 300C.57 Liability of Agent for Breach of Contract Executed in Name of Principal

[1] Instruction Liability of Agent for Breach of Contract Executed in Name of Principal

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Plaintiff has sued both _____ [*principal*] and _____ [*agent*] for breach of the contract to _____ [*describe contract*]. That contract was made with Plaintiff by _____ [*agent*] on behalf of _____ [*principal*]. Normally an agent is not responsible for breach of a contract made on behalf of the agent's principal. Therefore, if _____ [*agent*] acted within [his/her/its] authority, [he/she/it] will not be responsible to Plaintiff, even if you find that the contract was breached. In this type of situation, only _____ [*principal*] will be responsible.

To hold _____ [*agent*] responsible for breach of the contract, Plaintiff must prove both of the following:

1. That _____ [*agent*] entered into the contract without any authority to act on _____ [*principal*]'s behalf; and
2. That _____ [*agent*] did so without believing in good faith that [he/she/it] had the authority.

Authorities: Civ. Code §§ 2342, 2343(2); Jeppi v. Brockman Holding Co. (1949) 34 Cal.2d 11, 18-19, 206 P.2d 847 .

[2] Use of Instruction

This instruction should be used when the third person with whom a purported agent has dealt with sues both the agent and the principal for breach of contract. It should only be used if the contract was written [see [3], below].

If the purported agent has been sued for breach of warranty of his or her authority, rather than for breach of contract, use the instruction in MB 300C.58.

LexisNexis Matthew Bender Expert Practice Tip--Use Care When Arguing: The concept that an agent is liable for breach of a contract executed in the principal's name is complicated. So, care must be exercised in arguing, one side or the other. *By Rex Heeseman*

[3] Comment

One who assumes to act as an agent thereby warrants, to all who deal with him or her in that capacity, that the agent has the authority that he or she assumes [*Civ. Code* § 2342]. If the purported agent has no authority, he or she will be liable for breach of that warranty [*see MB 300C.58*]. A purported agent is liable for breach of contract as a principal only if (1) it is a written contract, and (2) the agent did not believe in good faith that he or she had authority to enter into the contract [*Civ. Code* § 2343(2); *Jeppi v. Brockman Holding Co. (1949) 34 Cal.2d 11, 18-19, 206 P.2d 847*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate LawAgency RelationshipsCauses of Action & RemediesBreach of Contract

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CHAPTER 3C Matthew Bender Contract Party Instructions *
PART C. PRINCIPAL AND AGENT

1-3C California Forms of Jury Instruction MB 300C.58

MB 300C.58 Liability of Agent for Breach of Warranty of Authority

[1] Instruction Liability of Agent for Breach of Warranty of Authority

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Plaintiff has [also] sued _____ [agent] for breach of warranty of [his/her/its] authority to act as _____ [principal]'s agent.

Normally an agent is not responsible for the breach of a contract made on behalf of the agent's principal. Therefore, if _____ [agent] acted within [his/her/its] authority, [he/she/it] will not be responsible to Plaintiff, even if you find that the contract was breached. In such a situation, only _____ [principal] will be responsible.

If, on the other hand, you find that _____ [agent] _____ [acted without authority or exceeded (his/her/its) authority], then _____ [agent] will be obligated to Plaintiff for whatever damages Plaintiff sustained because of [his/her/its] lack of authority.

Authorities: Civ. Code §§ 2342, 3318; *Cheda v. Grandi* (1950) 97 Cal.App.2d 513, 518-519, 218 P.2d 97 .

[2] Use of Instruction

This instruction should be used when an agent is sued for breach of warranty of his or her authority, in addition to or in lieu of being sued for breach of the contract that he or she purportedly made on behalf of the principal. This latter situation is covered in MB 300C.57.

[3] Comment

An agent warrants his or her authority, and will be liable to those dealing with him or her in reliance on that authority [Civ. Code § 2342; *Cheda v. Grandi* (1950) 97 Cal.App.2d 513, 518-519, 218 P.2d 97]. The measure of damages for breach of warranty of an agent's authority is the amount that could have been recovered and collected from the principal if the warranty had been complied with, and the reasonable expenses of legal proceedings, brought in good faith, to enforce the act of the agent against his or her principal [Civ. Code § 3318]. For damage instructions generally, see Ch. 3E, *Matthew Bender Contract Damages Instructions*.

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate Law Agency Relationships Causes of Action & Remedies Breach of Contract Business & Corporate Law Agency Relationships Duties & Liabilities Authorized Acts of Agents Scope of Authority

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CHAPTER 3C Matthew Bender Contract Party Instructions * PART C. PRINCIPAL AND AGENT

1-3C California Forms of Jury Instruction MB 300C.59

MB 300C.59 Notice to Either Agent or Principal Is Notice to Other

[1] Instruction Notice to Either Agent or Principal Is Notice to Other

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

A principal is considered to have notice of whatever the agent has notice of and ought, in good faith and the exercise of ordinary care, to communicate to the principal. Similarly, an agent is considered to have notice of whatever the principal has notice of and ought, in good faith and the exercise of ordinary care, to communicate to the agent.

Authorities: *Civ. Code § 2332; Syah v. Johnson (1966) 247 Cal.App.2d 534, 545, 55 Cal.Rptr. 741 .*

[2] Use of Instruction

This instruction should be used whenever there is an issue concerning the imputation of knowledge between a principal and an agent.

LexisNexis Matthew Bender Expert Practice Tip--Be Clear When Arguing: This instruction may not be common sensical to some jurors--and, thus, highlights the need to be clear in arguing agency principles. *By Rex Heeseman*

[3] Comment

As against a principal, both principal and agent are deemed to have notice of whatever either has notice of, and ought, in good faith and the exercise of ordinary care and diligence, to communicate to the other [*Civ. Code § 2332; Syah v. Johnson (1966) 247 Cal.App.2d 534, 545, 55 Cal.Rptr. 741*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate LawAgency RelationshipsDuties & LiabilitiesKnowledge & NoticeGeneral OverviewBusiness & Corporate LawAgency RelationshipsDuties & LiabilitiesKnowledge & NoticeAgent Knowledge

* John F. Wells and Lise A. Pearlman were the original authors of this chapter. It has since been updated to reflect changes in the law, additional case citations and practice pointers by other lawyers as well as revisions including cross-references to the official CACI instructions.



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CHAPTER 3C Matthew Bender Contract Party Instructions *
PART C. PRINCIPAL AND AGENT

1-3C California Forms of Jury Instruction MB 300C.60-MB 300C.69

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MB 300C.60Reserved for Future Use



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CHAPTER 3C Matthew Bender Contract Party Instructions *
PART D. REPRESENTATIVE PARTIES

1-3C California Forms of Jury Instruction MB 300C.70

MB 300C.70 Minor's Right to Sue: Guardian Ad Litem

[1] Instruction Minor's Right to Sue: Guardian Ad Litem

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Because _____ [*name of minor*] is under the age of 18, and is therefore a minor, the law requires that an adult _____ [bring or defend] the suit on [his/her] behalf. The adult is called a guardian. In this case _____ [*name of guardian and relationship, if any, to minor*] has been named as the guardian for _____ [*name of minor*].

Authorities: *Code Civ. Proc. § 372(a); Fam. Code § 6601; Prob. Code § 2462.*

[2] Use of Instruction

This instruction should be used at the outset of any case brought or defended on behalf of a minor, other than certain domestic violence cases or certain other family proceedings [see [3], below].

[3] Comment

A guardian of the estate or a guardian ad litem must be appointed to represent any minor involved in civil litigation [Code Civ. Proc. § 372(a); Fam. Code § 6601]. Guardianship proceedings are governed by Prob. Code §§ 1500-1611. Married minors and minors whose marriage has been dissolved are represented by conservators rather than by guardians unless the marriage has been declared a nullity before the appointment [Prob. Code §§ 1515, 1800.3].

However, a minor 12 years or older may appear in court without a guardian, counsel, or guardian ad litem for the purpose of requesting, or opposing a request, for any of the following [Code Civ. Proc. § 372(b) (1)]:

- An injunction or temporary restraining order (or both) to prohibit harassment [*see Code Civ. Proc.* § 527.6];
- An injunction or temporary restraining order (or both) against violence or a credible threat of violence in the workplace [*see Code Civ. Proc.* § 527.8];
- A protective order under the Domestic Violence Protective Act [*Fam. Code* § 6200 *et seq.*]; or
- Ex parte protective orders [*Code Civ. Proc.* § 372(b)(1); *see Fam. Code* §§ 7710, 7720].

Furthermore, a minor may appear in court without a guardian ad litem in the following proceedings if the minor is a parent of the child who is the subject of the proceedings [*Code Civ. Proc.* § 372(c)(1); *but see Code Civ. Proc.* § 372(c)(2) (court may appoint guardian ad litem if necessary)]:

- Family court proceedings pursuant to the Uniform Parentage Act [*see Fam. Code* § 7600 *et seq.*];
- Dependency proceedings pursuant to the Juvenile Court Law [*see Welfare & Inst. Code* § 200 *et seq.*];
- Guardianship proceedings for a minor child [*see Prob. Code* § 1500 *et seq.*]; or
- Any other proceedings concerning child custody, visitation, or support.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Parties Capacity of Parties Guardians Estate, Gift & Trust Law Conservators & Guardians Guardians for Minors Family Law Guardians Duties & Rights

* John F. Wells and Lise A. Pearlman were the original authors of this chapter. It has since been updated to reflect changes in the law, additional case citations and practice pointers by other lawyers as well as revisions including cross-references to the official CACI instructions.



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CHAPTER 3C Matthew Bender Contract Party Instructions *
PART D. REPRESENTATIVE PARTIES

1-3C California Forms of Jury Instruction MB 300C.71

MB 300C.71 Minor's Right to Disaffirm**[1] Instruction**

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

_____ [*Name of party seeking to disaffirm*] was a minor, that is, under the age of 18, when the contract was _____ [made or claimed to have been made]. The law gives a minor the right to cancel a contract of this type if the minor tells the other party that [he/she] has changed [his/her] mind before [he/she] becomes an adult or within a reasonable time after becoming an adult. The amount of time that is reasonable depends on the circumstances. _____ [*Name of party seeking to disaffirm*] must have had a reasonable opportunity after learning of _____ [his/her rights or duties] to decide what to do.

Authorities: *Fam. Code § 6700; Hurley v. Southern California Edison Co. (9th Cir. 1950) 183 F.2d 125, 132 .*

[2] Use of Instruction

This instruction should be used when a minor's contract is voidable and there is an issue as to whether the minor had a reasonable time to disaffirm [see [3][b], *below*].

[3] Comment**[a] Right to Disaffirm**

The age of majority is 18 [*Fam. Code § 6500*]. *Fam. Code § 6701* provides that minors may not:

- Give delegations of power;

- Contract regarding real property or any interest in real property; or
- Contract regarding personal property not in the possession or control of the minor.

Any such contract is void [*Burnand v. Irigoyen* (1947) 30 Cal.2d 861, 865, 186 P.2d 417].

Therefore, a minor may not enter into a partnership, since the Corporations Code [see *Corp. Code* § 16301 (UPA'94)] generally requires a delegation of authority to other partners [*Blankenship v. Hearst Corp.* (9th Cir. 1975) 519 F.2d 418, 425 (citing former *Corp. Code* § 15009 (UPA))]. In most other situations, a minor's contract is valid but may be disaffirmed [*Fam. Code* § 6700; see *Fam. Code* §§ 6712-6713, 6750-6751].

[b] What Constitutes "Reasonable Time"

When a minor has complete knowledge of his or her rights, the statute of limitations for the particular contract is a guide to what constitutes a reasonable time for disaffirmance [*Hurley v. Southern California Edison Co.* (9th Cir. 1950) 183 F.2d 125, 132 ; see Ch. 3F, *Matthew Bender Contract Defenses Instructions*, for instructions on the various statutes of limitation]. However, the analogy is inapplicable when the minor is ignorant of his or her rights. In *Hurley v. Southern California Edison Co.* [*Hurley v. Southern California Edison Co.* (9th Cir. 1950) 183 F.2d 125], a grandson, while a minor, signed dividend orders directing payment to his grandmother without consideration and in ignorance of the true nature of the transactions. He did not discover that he owned a stock interest in the corporation until his grandmother died 15 years later. His immediate disaffirmance of the dividend orders at that time--15 years later--was held to have been made within a reasonable time and the company was liable to him for the payments to his grandmother [*Hurley v. Southern California Edison Co.* (9th Cir. 1950) 183 F.2d 125].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts Law Formation Capacity of Parties Age Contracts Law Remedies Rescission & Redhibition General Overview Governments Legislation Statutes of Limitations Time Limitations

* John F. Wells and Lise A. Pearlman were the original authors of this chapter. It has since been updated to reflect changes in the law, additional case citations and practice pointers by other lawyers as well as revisions including cross-references to the official CACI instructions.



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CHAPTER 3C Matthew Bender Contract Party Instructions *
PART D. REPRESENTATIVE PARTIES

1-3C California Forms of Jury Instruction MB 300C.72

MB 300C.72 Liability of Minors

[1] Instruction Liability of Minors

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

In deciding whether _____ [*name of minor*] is responsible to Plaintiff for performing under the contract, it makes no difference that _____ [*name of minor*] was under the age of 18 when the contract was alleged to have been made. A minor is just as responsible as an adult for performing this type of contract. Plaintiff has the burden of proving _____ [*describe applicable statutory requirements (see Use of Instruction)*].

Authorities: *Fam. Code §§ 6500-6929.*

[2] Use of Instruction

This instruction should be used in cases involving statutory exceptions to the general rule of the right of a minor to disaffirm contracts. It should be given at the outset of the trial in cases when it appears necessary to counteract any misperception the jury might have as to the minor's responsibility for entering into such a contract.

The instruction must be amplified by adding the requirements of the particular statutes pursuant to which the action is brought [see [3], *below*]. The authorities for the instruction must include a reference to the particular statute as well.

The instruction should also be given with appropriate modifications if the suit involves multiple contract claims when one or more of these claims are subject to the right to disaffirm [see *MB 300C.71*] but others are not. The jury should be given both this instruction and the instruction in *MB 300C.71* with appropriate introductory language stating that different rules apply to different claims.

LexisNexis Matthew Bender Expert Practice Tip--Address Feelings of Jurors: Some jurors will

"feel sorry" for most minors. This instruction may thus seem "harsh" to those jurors. Thus, consider how to address those feelings. *By Rex Heeseman*

[3] Comment

A minor may not disaffirm an obligation, otherwise valid, entered into by him or her under the express authority or direction of a statute [*Fam. Code § 6711*]. The Family Code sets forth particular types of contracts that may not be disaffirmed, despite the fact that the contracting party had not attained the age of majority. These include the following types of contracts:

- Contracts for necessities [*Fam. Code § 6712*];
- Contracts for artistic or creative services;
- Contracts for literary, musical, or dramatic properties;
- Contracts for services as a participant or player in professional sports [*Fam. Code § 6750 et seq.*];
and
- Contracts for medical care [*Fam. Code § 6900 et seq.*], provided applicable statutory requirements are met.

The burden of establishing the statutory requirements appears to lie with the party seeking to enforce the contract [*Evid. Code § 500*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts Law Breach Causes of Action General Overview Contracts Law Formation Capacity of Parties Age Evidence Procedural Considerations Burdens of Proof Allocation

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CHAPTER 3C Matthew Bender Contract Party Instructions *
PART D. REPRESENTATIVE PARTIES

1-3C California Forms of Jury Instruction MB 300C.73

MB 300C.73 Guardian Ad Litem--Unknown Persons**[1] Instruction** Guardian Ad Litem-Unknown Persons[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Sometimes, in addition to the known parties to a lawsuit, a lawsuit involves the possible rights of _____ [unknown persons or persons not yet born]. In these situations, it is necessary to protect the rights of these persons by designating someone to represent their interests. This representative is called a guardian. In this case, the court has appointed _____ [name of guardian] to act on behalf of _____ [describe potential claimants].

Authorities: Code Civ. Proc. § 373.5; Wogman v. Wells Fargo Bank (1954) 123 Cal.App.2d 657, 666, 267 P.2d 423 .

[2] Use of Instruction

This instruction should be used when a guardian ad litem has been appointed to protect potential legal interests of unknown persons or persons not yet born. The most familiar use of this type of guardian is in a will contest. The instruction should not be used if a known person is missing. In that case, the law requires that he or she be represented by a conservator and not a guardian. An instruction for the latter situation is included in MB 300C.74.

[3] Comment

A guardian ad litem may be appointed whenever "under the terms of a written instrument, or otherwise, a person or persons of a designated class who are not ascertained or who are not in being, or a person or persons who are unknown, may be or may become legally or equitably interested in any property, real or personal" [Code Civ. Proc. § 373.5].

After appointing a guardian, the trial court and the appellate court must review the guardian's conduct to determine

whether the guardian has in fact acted to protect the ward [*Wogman v. Wells Fargo Bank* (1954) 123 Cal.App.2d 657, 666, 267 P.2d 423 ; see *Leonardini v. Wells Fargo Bank* (1955) 131 Cal.App.2d 9, 17-18, 280 P.2d 81 (guardian without power to consent to invasion of trust corpus absent showing that wards would benefit thereby)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedurePartiesCapacity of PartiesGuardiansCivil ProcedurePartiesFictitious NamesEstate, Gift & Trust
LawConservators & GuardiansGuardians for Missing & Undetermined Heirs

* John F. Wells and Lise A. Pearlman were the original authors of this chapter. It has since been updated to reflect changes in the law, additional case citations and practice pointers by other lawyers as well as revisions including cross-references to the official CACI instructions.



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CHAPTER 3C Matthew Bender Contract Party Instructions *
PART D. REPRESENTATIVE PARTIES

1-3C California Forms of Jury Instruction MB 300C.74

MB 300C.74 Conservator

[1] Instruction Conservator

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

A conservator is a representative appointed by law to protect the interests of a person when that person is unable to protect those interests _____ [himself/herself]. In this case, _____ [Plaintiff or Defendant] is the conservator for _____ [name of conservatee].

Authority: Prob. Code § 2462.

[2] Use of Instruction

This instruction should be used whenever a real party in interest is represented by a conservator.

[3] Comment

A conservator may commence and maintain actions and proceedings for the benefit of the conservatee and may defend actions and proceedings against the conservatee [*Prob. Code § 2462(a), (b)*].

Statutes governing the appointment of conservators are set forth in *Prob. Code §§ 1800 et seq., 2100 et seq., 2200 et seq., and 2300 et seq.*

Conservatorships are not limited to persons substantially unable to care for themselves. They are also available, if necessary, for married minors [*Prob. Code § 1800.3*] and for missing persons in government service [*Prob. Code §§ 1403, 1803*] or simply of unknown whereabouts [*Prob. Code § 1804*].

For in-depth coverage of conservatorships, see California Forms of Pleading and Practice, Ch. 280, *Guardianship and Conservatorship* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedurePartiesCapacity of PartiesRepresentativesEstate, Gift & Trust LawConservators & GuardiansConservatorsAppointmentEstate, Gift & Trust LawConservators & GuardiansConservatorsDuties & Rights

* John F. Wells and Lise A. Pearlman were the original authors of this chapter. It has since been updated to reflect changes in the law, additional case citations and practice pointers by other lawyers as well as revisions including cross-references to the official CACI instructions.



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CHAPTER 3C Matthew Bender Contract Party Instructions *
PART D. REPRESENTATIVE PARTIES

1-3C California Forms of Jury Instruction MB 300C.75

MB 300C.75 Trustee

[1] Instruction Trustee

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

A trustee is a person who holds property in trust for the benefit of another and takes care of it on [his/her/their] behalf. Persons for whose benefit the trust is created are called beneficiaries. In this case, _____ [Plaintiff or Defendant] is the trustee for _____ [name of beneficiary].

[*OPTIONAL (See Use of Instruction)*]

Under the law, a trust is responsible for any act performed by the trustee within the scope of [his/her/its] authority.

Authorities: *Civ. Code §§ 2216, 2218, 2267; Purdy v. Bank of America N.T. & S. Assn. (1935) 2 Cal.2d 298, 301, 40 P.2d 481 .*

[2] Use of Instruction

This instruction should be used when a trustee is a party. The optional paragraph explains to the jury the responsibility of the trust for the acts of the trustee. General instructions applicable to principals and agents may also be given in appropriate cases [*see MB 300C.50 -MB 300C.59*].

Depending on the circumstances of a particular case, it may be appropriate to give additional instructions on the role of trustees derived from specific statutes, e.g., liability for wrongs of co-trustee [*Civ. Code § 2239*], or the presumption against transactions between trustee and beneficiary [*Civ. Code § 2235*; for instructions that apply to rescission of a

transaction between a trustee and beneficiary, see the instructions applicable to confidential relationships in Ch. 3G, *Matthew Bender Rescission of Contract Instructions*].

LexisNexis Matthew Bender Expert Practice Tip--Use Everyday Analogies: These concepts, especially "trustee," may seem complicated or even strange to some jurors. Hence, use of everyday analogies may often be advisable. *By Rex Heeseman*

[3] Comment

A voluntary trust is an obligation arising out of a personal confidence reposed in, and voluntarily accepted by, one for the benefit of another [*Civ. Code* § 2216]. The person whose confidence creates a trust is the trustor and the person in whom the confidence is reposed is the trustee. The person for whose benefit the trust is created is the beneficiary [*Civ. Code* § 2218]. A trustee is a general agent for the trust property and a trustee's acts, within the scope of the authority granted by statute and the trust instrument, bind the trust to the same extent as the acts of an agent bind a principal [*Civ. Code* § 2267; *Purdy v. Bank of America N.T. & S. Assn.* (1935) 2 *Cal.2d* 298, 301-302, 40 *P.2d* 481].

The nature and creation of a trust are governed by *Civ. Code* §§ 2215-2225. *Civ. Code* §§ 2216 and 2218 specifically define the nature of a voluntary trust and the roles of the trustor, trustee, and beneficiary. The powers and obligations of a trustee are set forth in *Civ. Code* §§ 2228-2240.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Parties Capacity of Parties Trustees Estate, Gift & Trust Law Trusts Trustees Duties & Powers General Overview Estate, Gift & Trust Law Trusts Trustees Duties & Powers Claims By & Against

* John F. Wells and Lise A. Pearlman were the original authors of this chapter. It has since been updated to reflect changes in the law, additional case citations and practice pointers by other lawyers as well as revisions including cross-references to the official CACI instructions.



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CHAPTER 3C Matthew Bender Contract Party Instructions *
PART D. REPRESENTATIVE PARTIES

1-3C California Forms of Jury Instruction MB 300C.76

MB 300C.76 Bankruptcy Trustee**[1] Instruction Bankruptcy Trustee**

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

A trustee has been appointed by the bankruptcy court to manage the bankrupt's property on behalf of all of [his/her/its] creditors. The trustee is entitled to _____ [carry on or defend] a lawsuit in the same manner as the bankrupt could have done. In doing so, the trustee stands in the shoes of the bankrupt; the trustee's rights are the same as those the bankrupt had. In this case, _____ [Plaintiff or Defendant] is the trustee in bankruptcy for _____ [name of bankrupt].

Authorities: 11 U.S.C. §§ 323, 541(a); *Marin v. England* (1966) 385 U.S. 99, 101, 87 S.Ct. 274, 17 L.Ed.2d 197 ; *Reichert v. General Ins. Co.* (1968) 68 Cal.2d 822, 829, 69 Cal.Rptr. 321, 442 P.2d 377 .

[2] Use of Instruction

This instruction should be used when a bankruptcy trustee is a party.

[3] Comment

A bankruptcy trustee is the representative of the bankruptcy estate and, as such, may sue and be sued in the same manner as the bankrupt could have been sued [11 U.S.C. § 323; see 11 U.S.C. § 541(a) (property comprising bankruptcy estate)]. A bankruptcy trustee's powers and functions are derived from statute and significantly differ from those of an ordinary trustee [see *Shivell v. Hurd* (1953) 115 Cal.App.2d 405, 406, 252 P.2d 62 ; see also Witkin, California Procedure, Ch. V, *Pleading* (4th ed., 1997)].

The trustee in bankruptcy succeeds to all of the debtor's nonexempt property as of the date the bankruptcy petition was

filed, including rights arising in contract [*11 U.S.C. § 541(a)*; *Marin v. England* (1966) 385 U.S. 99, 101, 87 S.Ct. 274, 17 L.Ed.2d 197 ; *Reichert v. General Ins. Co.* (1968) 68 Cal.2d 822, 829, 69 Cal.Rptr. 321, 442 P.2d 377].

Legal Topics:

For related research and practice materials, see the following legal topics:

Bankruptcy LawCase AdministrationExaminers, Officers & TrusteesDuties & FunctionsCapacities & RolesCivil
ProcedurePartiesCapacity of PartiesTrustees

- * John F. Wells and Lise A. Pearlman were the original authors of this chapter. It has since been updated to reflect changes in the law, additional case citations and practice pointers by other lawyers as well as revisions including cross-references to the official CACI instructions.



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CHAPTER 3C Matthew Bender Contract Party Instructions *
PART D. REPRESENTATIVE PARTIES

1-3C California Forms of Jury Instruction MB 300C.77

MB 300C.77 Receiver**[1] Instruction Receiver**

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

A receiver is a person who has been appointed by the court to manage property or a fund on behalf of others. The receiver stands in the shoes of the party on whose behalf the receivership was created and has no greater or lesser rights than that party did. In this case, _____ [Plaintiff or Defendant] is the receiver for _____ [name of property or estate represented].

Authorities: *Code Civ. Proc. §§ 564(a)-(c), 568; Allen v. Ramsay (1960) 179 Cal.App.2d 843, 848, 4 Cal.Rptr. 575 .*

[2] Use of Instruction

This instruction should be used when a receiver is a party.

[3] Comment

A receiver is an officer of the court subject to its continuing control, and has only those powers granted by statute, by the order of appointment, and by subsequent orders. After appointment a receiver may request additional authority or supervision as the need arises [*Steinberg v. Goldstein (1956) 145 Cal.App.2d 692, 699, 303 P.2d 80*]. Specifically, a receiver has, under the court's control, the power to bring and defend actions in his or her name, as receiver [*Code Civ. Proc. § 568*]. Subject to court control, the receiver has the same rights as the party or estate he or she represents [*Allen v. Ramsay (1960) 179 Cal.App.2d 843, 848, 4 Cal.Rptr. 575*]. The grounds for appointment of a receiver and his or her powers and duties are set forth in *Code Civ. Proc. §§ 564-570*.

For further coverage of receivers, see *California Forms of Pleading and Practice, Ch. 486, Receivers* .

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedurePartiesCapacity of PartiesRepresentativesCivil ProcedureRemediesReceivershipsReceiversDutiesCivil ProcedureRemediesReceivershipsReceiversPowers

* John F. Wells and Lise A. Pearlman were the original authors of this chapter. It has since been updated to reflect changes in the law, additional case citations and practice pointers by other lawyers as well as revisions including cross-references to the official CACI instructions.



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CHAPTER 3C Matthew Bender Contract Party Instructions *
PART D. REPRESENTATIVE PARTIES

1-3C California Forms of Jury Instruction MB 300C.78

MB 300C.78 Executor or Administrator**[1] Instruction** Executor or Administrator

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

In this case, _____ [Plaintiff or Defendant] is the [executor/administrator] for _____ [name of deceased person], who is deceased. An [executor/administrator] is a person appointed to manage the property of a person who has died. The [executor/administrator] manages the property for the benefit of the deceased person's heirs until it can be distributed.

[SELECT ONE OF FOLLOWING ALTERNATIVES (See Use of Instruction)]

As the [executor/administrator] for _____ [name of deceased person], Plaintiff has the same right to bring a lawsuit against Defendant that _____ [name of deceased person] would have if [he/she/it] were alive and is entitled to recover any damages that _____ [name of deceased person] would have been entitled to recover.

[OR]

Because Defendant is the [executor/administrator] for _____ [name of deceased person], Plaintiff has the same right to bring a lawsuit against Defendant as [he/she/it] would have to bring a lawsuit against _____ [name of deceased person] if _____ [name of deceased person] were alive and Plaintiff is entitled to recover from Defendant any damages [he/she/it] would have been entitled to recover from _____ [name of deceased person]. By the same token, Defendant has the same right

to defend the lawsuit brought by Plaintiff that _____ [*name of deceased person*] would have if [he/she/it] were alive and is entitled to the benefit of any defense that _____ [*name of deceased person*] would have had.

Authorities: *Code Civ. Proc.* §§ 377.30, 377.40; *Prob. Code* § 9820.

[2] Use of Instruction

This instruction should be used when an executor or administrator is a party. The first of the two alternative provisions should be used when the executor or administrator is a plaintiff. The second of the two alternative provisions should be used when the executor or administrator is a defendant.

[3] Comment

As the representative for a decedent's estate [*see Prob. Code* § 58 ("personal representative" defined to include executors and administrators)], an executor or administrator is entitled to file or defend any action that survives the decedent's death [*Code Civ. Proc.* § 377.30; *Prob. Code* § 9820]. The decedent's heirs need not be joined as parties to the lawsuit [*Code Civ. Proc.* § 369(a)]. Provided that it survives the decedent's death, any action that could have been brought against the decedent may be brought against the executor or administrator [*Code Civ. Proc.* § 377.40].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Parties Capacity of Parties Executors Estate, Gift & Trust Law Probate Personal Representatives Claims By & Against Estate, Gift & Trust Law Probate Personal Representatives Duties & Powers General Overview

* John F. Wells and Lise A. Pearlman were the original authors of this chapter. It has since been updated to reflect changes in the law, additional case citations and practice pointers by other lawyers as well as revisions including cross-references to the official CACI instructions.



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CHAPTER 3C Matthew Bender Contract Party Instructions * PART D. REPRESENTATIVE PARTIES

1-3C California Forms of Jury Instruction MB 300C.79

MB 300C.79 Class Action--Plaintiff Class

[1] Instruction Class Action-Plaintiff Class

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

This action is being brought as a class action. That means that the Plaintiffs are not just acting on their own behalf, but are here representing other people with similar claims. Whatever decision you reach will affect all members of the class, not just the persons named as plaintiffs.

Authorities: Code Civ. Proc. § 382; *Daar v. Yellow Cab Co.* (1967) 67 Cal.2d 695, 703-704, 63 Cal.Rptr. 724, 433 P.2d 732 ; *Weaver v. Pasadena Tournament of Roses* (1948) 32 Cal.2d 833, 836-837, 198 P.2d 514 .

[2] Use of Instruction

This instruction should be used when a plaintiff class has been certified.

LexisNexis Matthew Bender Expert Practice Tip--Use Caution When Explaining "Class": Almost all jurors are familiar with the word "class," but not in this context. So, use caution when explaining the impact of this word. *By Rex Heeseman*

LexisNexis Matthew Bender Expert Practice Tip--Defense Has Added Burden in Class Actions: Very few class actions get tried to a jury. For those that do, the defense counsel has the added burden of trying to defeat the claims of an entire class whose members are not in the courtroom. The last sentence of this instruction is something plaintiff's counsel will want to emphasize. *By Ronald Oster*

[3] Comment

Representative actions, which are governed by Code Civ. Proc. § 382, can be brought as actions at law as well as in

equity [*Weaver v. Pasadena Tournament of Roses (1948)* 32 Cal.2d 833, 837, 198 P.2d 514]. In contrast, under California law, shareholder derivative suits must proceed in equity despite the availability of a jury trial in a shareholder derivative suit in federal court [*Rankin v. Frebank Co. (1975)* 47 Cal.App.3d 75, 92, 121 Cal.Rptr. 348]. The requirements of a class action are set forth in *Fed. R. of Civ. Pro., Rule 23*, which the California Supreme Court has found to be "in substantial coincidence with our view ... as to the applicable criteria under section 382" [*Daar v. Yellow Cab Co. (1967)* 67 Cal.2d 695, 709, 63 Cal.Rptr. 724, 433 P.2d 732].

For a discussion of representative or class suits, see California Forms of Pleading and Practice, Ch. 120, *Class Actions* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedurePartiesCapacity of PartiesRepresentativesCivil ProcedureClass ActionsCertificationCivil ProcedureClass ActionsClass MembersNamed Members

* John F. Wells and Lise A. Pearlman were the original authors of this chapter. It has since been updated to reflect changes in the law, additional case citations and practice pointers by other lawyers as well as revisions including cross-references to the official CACI instructions.



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CHAPTER 3C Matthew Bender Contract Party Instructions *
PART D. REPRESENTATIVE PARTIES

1-3C California Forms of Jury Instruction MB 300C.80

MB 300C.80 Class Action--Defendant Class

[1] Instruction Class Action--Defendant Class

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

This action is being defended as a class. This means that the Defendants are not just acting on their own behalf, but are here representing other people with similar defenses to Plaintiff's claims. Whatever decision you reach will affect all members of the class, not just the named defendants.

Authority: Code Civ. Proc. § 382.

[2] Use of Instruction

This instruction should be used when a defendant class has been certified.

[3] Comment

For discussion of class actions, see *MB 300C.79* and California Forms of Pleading and Practice, Ch. 120, *Class Actions* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsClass MembersDefendants

* John F. Wells and Lise A. Pearlman were the original authors of this chapter. It has since been updated to reflect changes in the law, additional case citations and practice pointers by other lawyers as well as revisions including

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1-3C California Forms of Jury Instruction MB 300C.81-MB 300C.89

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MB 300C.81Reserved for Future Use



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CHAPTER 3C Matthew Bender Contract Party Instructions *
PART E. ADDITIONAL PARTIES

1-3C California Forms of Jury Instruction MB 300C.90

MB 300C.90 Third-Party Beneficiaries**[1] Instruction** Third-Party Beneficiaries

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Plaintiff alleges that the contract between _____ [parties to contract] was intended to be for [his/her/its] benefit. If an agreement is made between two persons for the _____ [direct or specific] benefit of a third person, the third person may enforce the agreement even though [he/she/it] was not a party to it.

[*OPTIONAL (See Use of Instruction)*]

You must first decide whether there was an agreement between _____ [parties to alleged contract]. If you decide that there was such an agreement, then you must decide whether the agreement was made for plaintiff's _____ [direct or specific] benefit. It is not enough that the agreement had the effect of benefiting Plaintiff if that was not its purpose. On the other hand, the agreement does not have to be solely for the benefit of _____ [Plaintiff or the class of which Plaintiff is a member], nor does it have to mention _____ [Plaintiff or the class of which Plaintiff is a member] by name if one of the purposes of the parties to the agreement was to benefit _____ [Plaintiff or the class of which Plaintiff is a member].

Authorities: Civ. Code § 1559; *Prouty v. Gores Technology Group et al.* (2004) 121 Cal.App.4th 1225, 1232-1233, 18 Cal.Rptr.3d 178 ; *Macaulay v. Norlander* (1992) 12 Cal.App.4th 1, 6-8, 15 Cal.Rptr.2d 204 ; *Eastern Aviation Group, Inc. v. Airborne Express, Inc.* (1992) 6 Cal.App.4th 1448, 1452-1453, 8 Cal.Rptr.2d 355 ; *Steve Schmidt & Co. v. Berry* (1986) 183 Cal.App.3d 1299, 1313, 228 Cal.Rptr. 689 ; *Ullwelling v. Crown Coach Corp.* (1962) 206 Cal.App.2d 96,

139, 23 Cal.Rptr. 631 ; *Le Ballister v. Redwood Theatres, Inc.* (1934) 1 Cal.App.2d 447, 448-449, 36 P.2d 827 .

[2] Use of Instruction

This instruction should be used when the plaintiff is a third-party beneficiary. The second paragraph should be used when there is an alleged oral or partly oral agreement and a dispute over whether that agreement was made expressly for the plaintiff's benefit. The instruction should be modified if the existence of the agreement is stipulated and the only issue is whether it was expressly made for the plaintiff's benefit.

For related Judicial Council instructions, see [3][b], *below*.

LexisNexis Matthew Bender Expert Practice Tip--Trying Third-Party Beneficiary Cases Can Be

Difficult: The term "third-party beneficiary" will be alien to almost all jurors. And, some jurors may not "like" to benefit someone who is not a party to the contract. *By Rex Heeseman*

[3] Comment

[a] Third Party Beneficiary

A contract expressly made for the benefit of a third party may be enforced by the third party any time before the agreement is rescinded [Civ. Code § 1559; *Prouty v. Gores Technology Group et al.* (2004) 121 Cal.App.4th 1225, 1232, 18 Cal.Rptr.3d 178 ; *Eastern Aviation Group, Inc. v. Airborne Express, Inc.* (1992) 6 Cal.App.4th 1448, 1452, 8 Cal.Rptr.2d 355 ; *Ulwelling v. Crown Coach Corp.* (1962) 206 Cal.App.2d 96, 139, 23 Cal.Rptr. 631]. Courts interpret the requirement in Civ. Code § 1559 that the contract "expressly" benefit the third person to mean simply that the benefit not be incidental [*Prouty v. Gores Technology Group et al.* (2004) 121 Cal.App.4th 1225, 1232-1233, 18 Cal.Rptr.3d 178 , citing *Gilbert Financial Corp. v. Steelform Contracting Co.* (1978) 82 Cal.App.3d 65, 70, 145 Cal.Rptr. 448].

The contract need not identify the third party by name; it is sufficient if the third party can show that he, she, or it is one of a class of persons for whose benefit it was made [*Garratt v. Baker* (1936) 5 Cal.2d 745, 748, 56 P.2d 225 ; *Prouty v. Gores Technology Group et al.* (2004) 121 Cal.App.4th 1225, 1232, 18 Cal.Rptr.3d 178 ; *Macaulay v. Norlander* (1992) 12 Cal.App.4th 1, 6-8, 15 Cal.Rptr.2d 204 ; *Steve Schmidt & Co. v. Berry* (1986) 183 Cal.App.3d 1299, 1313, 228 Cal.Rptr. 689 ; see *Vahle v. Barwick* (2001) 93 Cal.App.4th 1323, 1328-1329, 1332, 113 Cal.Rptr.2d 793 (trial court erred in granting summary judgment to attorney sued for malpractice on basis that she was third party beneficiary of release agreement between plaintiff and defendant in underlying lawsuit; whether defendant was intended beneficiary was triable issue of fact); *Johnson v. Superior Court* (2000) 80 Cal.App.4th 1050, 1064-1067, 95 Cal.Rptr.2d 864 (sperm donor not specifically named in agreement between sperm bank and potential parent belonged to class of persons who were to benefit from agreement's confidentiality provisions; however, agreement precluding disclosure of donor's identity under all circumstances was contrary to public policy and unenforceable); *Neverkovec v. Fredericks* (1999) 74 Cal.App.4th 337, 348-350, 87 Cal.Rptr.2d 856 (third party not named in release was not entitled to summary judgment on ground that general release discharged him from liability)]. However, one who was benefited only incidentally is not entitled to enforce the contract [*Eastern Aviation Group, Inc. v. Airborne Express, Inc.* (1992) 6 Cal.App.4th 1448, 1452-1453, 8 Cal.Rptr.2d 355 ; *Mottashed v. Central & Pac. Impr. Corp.* (1935) 8 Cal.App.2d 256, 260, 47 P.2d 525 ; see *Benasra v. Marciano* (2001) 92 Cal.App.4th 987, 991-993, 112 Cal.Rptr.2d 358 (no evidence supported assertion that corporate officer who signed licensing agreements providing for arbitration with defendant corporation in representative capacity rather than in individual capacity was third party beneficiary of contracts; officer could not be compelled to arbitrate libel action he had brought against defendant corporation and its president); *Mariani v. Price Waterhouse* (1999) 70 Cal.App.4th 685, 701-702, 82 Cal.Rptr.2d 671 (ordinary audit engagement contracts have no express third party beneficiaries)].

Generally, it is a question of fact whether a particular third person is an intended beneficiary of a contract [*Prouty v.*

Gores Technology Group et al. (2004) 121 Cal.App.4th 1225, 1233, 18 Cal.Rptr.3d 178, citing *Bancomer, S.A. v. Superior Court (1996) 44 Cal.App.4th 1450, 1458, 52 Cal.Rptr.2d 435*]. However, when the issue can be answered by interpreting the contract as a whole in light of uncontradicted evidence of the circumstances and negotiations of the parties, the issue becomes one of law [*Prouty v. Gores Technology Group et al. (2004) 121 Cal.App.4th 1225, 1233, 18 Cal.Rptr.3d 178*]. "The test for determining whether a contract was made for the benefit of a third person is whether an intent to benefit a third person appears from the terms of the contract. If the terms of the contract necessarily require the promisor to confer a benefit on a third person, then the contract, and hence the parties thereto, contemplate a benefit to the third person. The parties are presumed to intend the consequences of a performance of the contract" [*Prouty v. Gores Technology Group et al. (2004) 121 Cal.App.4th 1225, 1232, 18 Cal.Rptr.3d 178*, quoting *Johnson v. Holmes Tuttle Lincoln-Mercury, Inc. (1958) 160 Cal.App.2d 290, 296-297, 325 P.2d 193*].

A common situation involving third-party beneficiaries is one in which a debtor and creditor agree that the debt is to be paid to the creditor's creditor. In that case, the creditor's creditor may sue in his, her, or its own name despite the fact that the promise was not made to him, her, or it [*Sacramento Lumber Co. v. Wagner (1885) 67 Cal. 293, 295, 7 P. 705*], and despite the fact that the creditor's creditor gave no consideration to the debtor for the promise [*Malone v. Crescent City M. & T. Co. (1888) 77 Cal. 38, 44, 18 P. 858* ; *Macaulay v. Norlander (1992) 12 Cal.App.4th 1, 8 n.3, 15 Cal.Rptr.2d 204*].

Another situation in which suit might be brought by a third-party beneficiary involves intended beneficiaries of a will [*Lucas v. Hamm (1961) 56 Cal.2d 583, 591, 15 Cal.Rptr. 821, 364 P.2d 685*]. Formerly, cases distinguished between donee and creditor beneficiaries, but these characterizations have been dropped [see *Gilbert Financial Corp. v. Steelform Contracting Co. (1978) 82 Cal.App.3d 65, 70-71, 145 Cal.Rptr. 448*].

A third-party beneficiary's rights are subject to the conditions of the contract [see, e.g., *Mercury Casualty Co. v. Maloney (2003) 113 Cal.App.4th 799, 802-803, 6 Cal.Rptr.3d 647* (injured passenger who received medical payments from driver's excess insurer was obligated to reimburse insurer pursuant to insurance policy provision requiring reimbursement on settlement with responsible party)].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 3, *California Judicial Council Contracts Instructions*]:

CACI No. 301 Third Party Beneficiary

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawThird PartiesBeneficiariesClaims & Enforcement

* John F. Wells and Lise A. Pearlman were the original authors of this chapter. It has since been updated to reflect changes in the law, additional case citations and practice pointers by other lawyers as well as revisions including cross-references to the official CACI instructions.



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CHAPTER 3C Matthew Bender Contract Party Instructions *
PART E. ADDITIONAL PARTIES

1-3C California Forms of Jury Instruction MB 300C.91

MB 300C.91 Third-Party Beneficiary Must Prove Performance by Promisee

[1] Instruction Third-Party Beneficiary Must Prove Performance by Promisee

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

As a third-party beneficiary, Plaintiff may not enforce greater rights than _____ [party who made contract with defendant for plaintiff's benefit]. Plaintiff must therefore prove everything that _____ [promisee] would have to prove to enforce the contract.

Authority: *Votaw Precision Tool Co. v. Air Canada* (1976) 60 Cal.App.3d 52, 56-57, 131 Cal.Rptr. 335 .

[2] Use of Instruction

This instruction should be used when a third-party beneficiary of a contract is the plaintiff in a suit to enforce the contract. It should be followed by a burden of proof instruction [see Ch. 3A, *Matthew Bender Formation of Contract Instructions*].

For related Judicial Council instructions, see [3][b], *below*.

[3] Comment

[a] Performance by Principal

A third-party beneficiary may not assert greater rights than the party who made the contract for the beneficiary's benefit. If the promisee failed to perform the contract, then the third party may not collect from the promisor [*Votaw Precision Tool Co. v. Air Canada* (1976) 60 Cal.App.3d 52, 56-57, 131 Cal.Rptr. 335].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 3, *California Judicial Council Contracts Instructions*]:

CACI No. 301 Third Party Beneficiary

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawThird PartiesBeneficiariesClaims & Enforcement

* John F. Wells and Lise A. Pearlman were the original authors of this chapter. It has since been updated to reflect changes in the law, additional case citations and practice pointers by other lawyers as well as revisions including cross-references to the official CACI instructions.



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California Forms of Jury Instruction

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CHAPTER 3C Matthew Bender Contract Party Instructions * PART E. ADDITIONAL PARTIES

1-3C California Forms of Jury Instruction MB 300C.92

MB 300C.92 Assignee

[1] Instruction Assignee

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

An assignee is a person to whom a party to a contract transfers [his/her/its] rights under the contract. The assignee stands in the shoes of the party who transferred the rights. In this case, Plaintiff is the assignee of the contract rights of _____ [name of assignor].

Authorities: *Cockerell v. Title Ins. & Trust Co. (1954) 42 Cal.2d 284, 291, 267 P.2d 16 ; Greco v. Oregon Mut. Fire Ins. Co. (1961) 191 Cal.App.2d 674, 683, 12 Cal.Rptr. 802 .*

[2] Use of Instruction

This instruction should be used when an assignee is the plaintiff in an action to enforce a contract.

[3] Comment

An assignment must be "a manifestation to another by the owner of the right indicating his intention to transfer without further action or manifestation of intention, the right to such other person, or to a third person" [*Cockerell v. Title Ins. & Trust Co. (1954) 42 Cal.2d 284, 291, 267 P.2d 16*]. It may be oral, except when a writing is expressly required by statute [*Civ. Code § 1052*]; or it may be implied by the parties' conduct [*Greco v. Oregon Mut. Fire Ins. Co. (1961) 191 Cal.App.2d 674, 683, 12 Cal.Rptr. 802*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawPerformanceAssignmentGeneral OverviewContracts LawThird PartiesDelegation of Performance

* John F. Wells and Lise A. Pearlman were the original authors of this chapter. It has since been updated to reflect changes in the law, additional case citations and practice pointers by other lawyers as well as revisions including cross-references to the official CACI instructions.



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CHAPTER 3C Matthew Bender Contract Party Instructions *
PART E. ADDITIONAL PARTIES

1-3C California Forms of Jury Instruction MB 300C.93

MB 300C.93 When Assignment of Benefits Includes Assumption of Obligations

[1] Instruction When Assignment of Benefits Includes Assumption of Obligations

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

A contract that has not yet been performed has two aspects. One is the benefit that each party to the contract is entitled to receive. The other is the obligation that each party has agreed to perform. In this case _____ [assignor] assigned the benefit of [his/her/its] contract with Plaintiff to Defendant.

[EITHER (See Use of Instruction)]

You must separately determine whether _____ [assignor] also transferred to Defendant the obligation to perform required by the contract. Plaintiff has the burden of proof on this issue. In making this determination you must decide whether _____ [assignor] and Plaintiff intended to relieve _____ [assignor] of that obligation and transfer it to Defendant. Otherwise, the responsibility to perform _____ [assignor]'s obligation under the contract remains solely with _____ [assignor].

When you make this decision, you must consider the acts and words of _____ [assignor] and Plaintiff and all of the circumstances surrounding the assignment, including the subject matter of the contract that was assigned.

[OR]

Defendant is not automatically responsible for _____ [assignor]'s obligation to perform under the contract. To hold Defendant liable for _____ [assignor]'s obligations, Plaintiff must prove both of the following:

- 1. That Defendant voluntarily accepted all of the benefits of Plaintiff's performance; and**
- 2. That Defendant knew or should have known of the contract's obligations at the time the benefits were accepted.**

Authorities: *Civ. Code § 1589; Melchior v. New Line Productions, Inc. (2003) 106 Cal.App.4th 779, 788-790, 131 Cal.Rptr.2d 347 ; Heppler v. J.M. Peters Co. (1999) 73 Cal.App.4th 1265, 1288-1292, 87 Cal.Rptr.2d 497 ; Veterans of Foreign Wars v. City of El Paso de Robles (1998) 62 Cal.App.4th 1077, 1080-1082, 73 Cal.Rptr.2d 171 ; Recorded Picture Co. v. Nelson Entertainment, Inc. (1997) 53 Cal.App.4th 350, 361-368, 61 Cal.Rptr.2d 742 ; Enterprise Leasing Corp. v. Shugart Corp. (1991) 231 Cal.App.3d 737, 745-747, 282 Cal.Rptr. 620 ; see Civ. Code § 3521.*

[2] Use of Instruction

This instruction should be used when the defendant is the assignee of a contract between the plaintiff and the defendant's assignor and the plaintiff is seeking to hold the defendant liable for performance of the assignor's duties under the contract.

The first alternative paragraph should be used when the assumption of obligations occurs by agreement between the defendant and the assignor. The second alternative paragraph should be used when the defendant received all of the benefits of the plaintiff's performance and knew or should have known of the contract's obligations at the time the benefits were accepted.

LexisNexis Matthew Bender Expert Practice Tip--Explain Instruction Thoroughly: The gist of this instruction seems fair--one gets the benefits and the burdens of a contract. However, it should be explained thoroughly in many cases because the evidence in question may not be that clear. *By Rex Heeseman*

[3] Comment

[a] Assumption of Obligations Not Automatically Included in Assignment

An assignment always carries with it all rights of the assignor unless exceptions are expressed in the assignment itself [*Civ. Code § 1084*]. However, the mere assignment of rights under a contract does not include an assumption of liabilities [*Griffin v. Williamson (1955) 137 Cal.App.2d 308, 315, 290 P.2d 361 ; Jegen v. Berger (1946) 77 Cal.App.2d 1, 6, 174 P.2d 489 ; Gregers v. Peterson Ice Cream Co., Inc. (1958) 158 Cal.App.2d 746, 751, 323 P.2d 572*]. Thus, the party seeking to hold the assignee liable for the assignor's obligations under the contract should bear the burden of proof on the issue of whether or not the assignment included an assumption of those obligations [*Evid. Code § 500*].

[b] Extent of Assignee's Liability

The leading California cases on an assignee's liability for the obligations of his or her assignor are *Recorded Picture Company v. Nelson Entertainment* [*Recorded Picture Co. v. Nelson Entertainment, Inc. (1997) 53 Cal.App.4th 350, 361-368, 61 Cal.Rptr.2d 742*] and *Enterprise Leasing v. Shugart* [*Enterprise Leasing Corp. v. Shugart Corp. (1991) 231 Cal.App.3d 737, 282 Cal.Rptr. 620*]. Both cases restate the general proposition that whether an assignee assumes the obligations of the assignor under a contract depends on the intent of the parties, evidenced "either by their acts, the subject matter of the contract, or their words" [*Recorded Picture Co. v. Nelson Entertainment, Inc. (1997) 53 Cal.App.4th 350, 362, 61 Cal.Rptr.2d 742 ; Enterprise Leasing Corp. v. Shugart Corp. (1991) 231 Cal.App.3d 737, 745, 282 Cal.Rptr. 620*]. These cases also clarify what must be shown to prove a party impliedly assumed a contract's

obligations. In *Enterprise Leasing*, the court ruled that a non-party to a computer lease that accepted its benefits could be held liable for its payment obligations, reversing summary judgment in the defendant's favor. In explaining the ruling, the court stated that "[a]ssumption of obligations may be implied from acceptance of benefits under the contract" [*Enterprise Leasing Corp. v. Shugart Corp.* (1991) 231 Cal.App.3d 737, 745, 282 Cal.Rptr. 620 ; see *Silva v. Providence Hospital of Oakland* (1939) 14 Cal.2d 762, 773-774, 97 P.2d 798 ; *Melchior v. New Line Productions, Inc.* (2003) 106 Cal.App.4th 779, 788-790, 131 Cal.Rptr.2d 347 (assignee of film production company, which accepted benefits of company's original agreement with author, also accepted obligations of original agreement; summary judgment on breach of contract reversed); *Citizens Suburban Co. v. Rosemont Dev. Co.* (1966) 244 Cal.App.2d 666, 676 n.2, 53 Cal.Rptr. 551 ; *Gregers v. Peterson Ice Cream Co., Inc.* (1958) 158 Cal.App.2d 746, 751, 323 P.2d 572].

Recorded Picture Company elaborated on the requirement that the non-party must receive all of the contract's benefits before he or she can be held liable. The court ruled that a movie sub-distributor that contracted with a distributor for home video distribution rights did not impliedly assume the broader agreement between the distributor and the movie's producer, reversing summary judgment in the producer's favor. The court rested its decision on the fact that the sub-distributor accepted only a portion of the benefits of the distribution agreement, not all of them [*Recorded Picture Co. v. Nelson Entertainment, Inc.* (1997) 53 Cal.App.4th 350, 362-365, 61 Cal.Rptr.2d 742].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawPerformanceAssignmentGeneral OverviewContracts LawThird PartiesDelegation of Performance

* John F. Wells and Lise A. Pearlman were the original authors of this chapter. It has since been updated to reflect changes in the law, additional case citations and practice pointers by other lawyers as well as revisions including cross-references to the official CACI instructions.



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CHAPTER 3C Matthew Bender Contract Party Instructions *
PART E. ADDITIONAL PARTIES

1-3C California Forms of Jury Instruction MB 300C.94

MB 300C.94 Guarantor or Surety

[1] Instruction Guarantor or Surety

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

A guarantor is a person who _____ [promises to answer for the debt or default of another person or pledges property as security for the debt or default of another person].

Defendant is the guarantor of the obligation of _____ [person whose obligation is sought to be enforced] **under the contract being sued on here.**

Authority: *Civ. Code § 2787.*

[2] Use of Instruction

This instruction should be used in cases involving guarantors or sureties. Additional instructions will depend on the facts. For instructions on defenses applicable to sureties, see Ch. 3F, *Matthew Bender Contract Defenses Instructions*.

[3] Comment

"Guarantor" and "surety" are interchangeable terms. A guarantor or surety is one who promises to answer for the debt, default, or miscarriage of another, or hypothecates property as security for another's debt or default [*Civ. Code § 2787*]. Guaranties of collection and continuing guaranties are forms of suretyship obligations. However, a letter of credit is not a form of suretyship obligation [*Civ. Code § 2787; see Com. Code § 5102(a)(10)* ("letter of credit" defined)]. There are also numerous provisions governing the creation, interpretation, liability, and exoneration of sureties that may give rise to additional instructions in a particular case [*see Civ. Code §§ 2787-2855; see also Ch. 3F, Matthew Bender Contract Defenses Instructions*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawTypes of ContractsGuaranty Contracts

* John F. Wells and Lise A. Pearlman were the original authors of this chapter. It has since been updated to reflect changes in the law, additional case citations and practice pointers by other lawyers as well as revisions including cross-references to the official CACI instructions.



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CHAPTER 3D Matthew Bender Performance and Breach of Contract Instructions

1-3D California Forms of Jury Instruction 3D.syn

§ 3D.syn Synopsis to Chapter 3D: Matthew Bender Performance and Breach of Contract Instructions

MB 300D.01 Performance

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Performance

[b] Related Judicial Council Jury Instructions

MB 300D.02 Substantial Performance

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Substantial Performance

[b] Related Judicial Council Jury Instructions

MB 300D.03 Breach

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300D.04 Performing Party's Right to Select Alternative Performance

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300D.05 Other Party's Right to Demand Choice of Performance

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300D.06 Performance of Alternative Duty

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300D.07 Partial Performance--Indivisible Contract

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300D.08 Lack of Choice in Accepting Part Performance

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300D.09 Waiver of Right to Installment Payment on Indivisible Contract

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300D.10 Right to Recover for Performance of Part of Severable Contract

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300D.11 Reasonable Satisfaction Requirement

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300D.12 Performance to Satisfaction of Other Party's Taste

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300D.13 Performance to Satisfaction of Other Party When Type of Satisfaction Is Jury Issue

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300D.14 Performance to Satisfaction of Third Party

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300D.15 Performance by Another

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300D.16 Performance by One of Several Joint Obligor

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300D.17-MB 300D.29 [Reserved]

MB 300D.30 Condition Defined

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Effect of Conditions

[b] Burden of Proof

[c] Related Judicial Council Jury Instructions

MB 300D.31 Due Diligence in Seeking to Cause Condition Precedent to Occur

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Due Diligence

[b] Related Judicial Council Jury Instructions

MB 300D.32 Condition Concurrent

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300D.33 Condition Subsequent

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300D.34 Time for Performance: Time Is of the Essence

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Time Is of the Essence

[b] Related Judicial Council Jury Instructions

MB 300D.35-MB 300D.49 [Reserved]

MB 300D.50 Definition of Tender

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300D.51 Offer of Full Performance Required

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300D.52 Person Required to Make Offer

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300D.53 Person to Whom Offer Must Be Made

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300D.54 Unwarranted Conditions

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300D.55 Time of Offer

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300D.56 Place of Offer

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300D.57 Requirement of Good Faith

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300D.58 Ability to Perform

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300D.59 Ability to Perform--Third Party Cooperation

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300D.60 Effect of Tender

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300D.61 Production of Things to Be Delivered

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300D.62 Separation of Thing Offered

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300D.63-MB 300D.69 [Reserved]

MB 300D.70 Useless Tender

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300D.71 Reasonable Certainty of Rejection

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300D.72 Notice of Refusal or Inability to Perform

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300D.73 Notice of Intended Breach of Contractual Promise

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Notice of Intended Breach

[b] Related Judicial Council Jury Instructions

MB 300D.74 Refusal in Advance to Accept Offer of Performance

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Refusal in Advance to Accept Offer of Performance

[b] Related Judicial Council Jury Instructions

MB 300D.75 Change of Position Based on Notice of Refusal to Perform

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300D.76 Clear and Definite Notice

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300D.77 Implied Repudiation

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300D.78 Performance Excused by Material Breach

[1] Instruction

[2] Use of Instruction

[a] Basic Considerations

[b] Terminology

[c] Option: Timing of Breach

[d] Option: Amount Required to Remedy Breach

[3] Comment



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CHAPTER 3D Matthew Bender Performance and Breach of Contract Instructions

1-3D California Forms of Jury Instruction Scope

Scope

SCOPE

This chapter includes jury instructions surrounding the performance and breach of contracts. For the California Judicial Council jury instructions on performance and breach of contract, see Ch. 3, *California Judicial Council Contracts Instructions*. Ch. 3 also includes Judicial Council instructions on other issues surrounding contracts, including formation, interpretation, modification, defenses, and damages. The instructions in this chapter are intended to supplement the Judicial Council instructions [see *Cal. Rules of Ct., Rule 2.1050*].

To recover damages for a defendant's breach of contract, a plaintiff must first prove his or her own performance or excuse for nonperformance. However, proof of performance may just as easily be viewed as lack of breach on plaintiff's part and proof of breach as lack of performance on defendant's part. "Performance" and "breach" are opposite sides of the same coin. Therefore, this chapter combines the two. The chapter covers the following topics:

- Part A includes instructions on the various methods of performance, part performance, and substantial performance [see *MB 300D.01 -MB 300D.16*].
- Part B includes instructions on conditions that must occur (precedent, concurrent, and subsequent), as well as time and place of performance [see *MB 300D.30-MB 300D.34*].
- Part C includes instructions on tender of performance [see *MB 300D.50-MB 300D.62*].
- Part D includes instructions on excuses for nonperformance, such as repudiation [see *MB 300D.70 -MB 300D.78*].

Ch. 3F, *Matthew Bender Contract Defenses Instructions*, covers other issues affecting performance or breach, such as waiver and estoppel.



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CHAPTER 3D Matthew Bender Performance and Breach of Contract Instructions
PART A. VARIOUS METHODS OF PERFORMANCE

1-3D California Forms of Jury Instruction MB 300D.01

MB 300D.01 Performance

[1] Instruction Performance

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

[*OPTIONAL (See Use of Instruction)*]

Plaintiff must prove that [he/she/it] fully performed [his/her/its] obligation to _____ [describe performance required of plaintiff].

[*CONTINUE WITH INSTRUCTION*]

I will now tell you the rules of law that you must follow in deciding whether Plaintiff fully performed.

Authorities: *Reichert v. General Ins. Co.* (1968) 68 Cal.2d 822, 830, 69 Cal.Rptr. 321, 442 P.2d 377 ; *Consolidated World Investments, Inc. v. Lido Preferred Ltd.* (1992) 9 Cal.App.4th 373, 380, 11 Cal.Rptr.2d 524 ; *Stone v. Carpenter* (1963) 211 Cal.App.2d 491, 498, 27 Cal.Rptr. 203 .

[2] Use of Instruction

This instruction should be used when the plaintiff's full performance is required. The first paragraph should be used to introduce any additional instruction that might apply to the issue of the plaintiff's performance such as a right to select alternative performance [see MB 300D.04] or performance to a reasonable satisfaction [see MB 300D.11]. A preponderance of the evidence instruction must be given in conjunction with this instruction [see Ch. 2, *California Judicial Council Evidence Instructions, CACI No. 200* ("More Likely True Than Not True")].

When substantial performance is sufficient, use the instruction in MB 300D.02. When tender of performance is sufficient, see the instructions in MB 300D.50-MB 300D.62. When the plaintiff's performance or tender is excused, see the instructions in MB 300D.70-MB 300D.78. When the defendant has waived or is estopped from asserting defects in the plaintiff's performance, see pertinent instructions in Ch. 3F, *Matthew Bender Contract Defenses Instructions*, Part B.

For related Judicial Council instructions, see [3][b], *below*.

[3] Comment

[a] Performance

Since contracts generally contemplate mutual obligations, full performance by one party obligates the other party to perform his or her duties under the contract [*Civ. Code* § 1473; *Consolidated World Investments, Inc. v. Lido Preferred Ltd.* (1992) 9 Cal.App.4th 373, 380, 11 Cal.Rptr.2d 524 ; *Stone v. Carpenter* (1963) 211 Cal.App.2d 491, 498, 27 Cal.Rptr. 203]. Whether full performance has occurred is a question for the trier of fact [*Coleman v. Mora* (1968) 263 Cal.App.2d 137, 151, 69 Cal.Rptr. 166].

The plaintiff will have the burden of proof on the issues of his or her performance and of the defendant's failure of performance [*Evid. Code* § 500; *Reichert v. General Ins. Co.* (1968) 68 Cal.2d 822, 830, 69 Cal.Rptr. 321, 442 P.2d 377 ; *Consolidated World Investments, Inc. v. Lido Preferred Ltd.* (1992) 9 Cal.App.4th 373, 380, 11 Cal.Rptr.2d 524 ; *Pry Corp. of America v. Leach* (1960) 177 Cal.App.2d 632, 639, 2 Cal.Rptr. 425].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 3, *California Judicial Council Contracts Instructions*]:

CACI No. 312 Substantial Performance

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawBreachNonperformanceContracts LawPerformanceAccord & SatisfactionContracts LawPerformanceSubstantial PerformanceEvidenceProcedural ConsiderationsBurdens of ProofAllocationEvidenceProcedural ConsiderationsBurdens of ProofPreponderance of Evidence

John F. Wells and Lise A. Pearlman were the original authors of this chapter. It has since been updated to reflect changes in the law, additional case citations and practice pointers by other lawyers as well as revisions including cross-references to the official CACI instructions.



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CHAPTER 3D Matthew Bender Performance and Breach of Contract Instructions
PART A. VARIOUS METHODS OF PERFORMANCE

1-3D California Forms of Jury Instruction MB 300D.02

MB 300D.02 Substantial Performance

[1] Instruction Substantial Performance

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Plaintiff must prove that [he/she/it] substantially performed [his/her/its] obligation to _____ [describe required performance]. Proof of substantial performance means that Plaintiff must prove all of the following:

- 1. That Plaintiff performed the important parts of the contract;**
- 2. That any defects in Plaintiff's performance may be easily remedied or compensated, so that Defendant can get substantially what the contract calls for; and**
- 3. That Plaintiff acted in good faith.**

[*OPTIONAL (See Use of Instruction)*]

In deciding whether or not Plaintiff substantially performed [his/her/its] obligations under the contract, you may consider the combined effect of any defects in Plaintiff's performance, any one of which standing alone would be unimportant.

Authorities: *Posner v. Grunwald-Marx, Inc.* (1961) 56 Cal.2d 169, 187, 14 Cal.Rptr. 297, 363 P.2d 313 ; *Thomas Haverty Co. v. Jones* (1921) 185 Cal. 285, 288-289, 197 P. 105 ; *Shell v. Schmidt* (1958) 164 Cal.App.2d 350, 366, 330 P.2d 817 ; *Tolstoy Constr. Co. v. Minter* (1978) 78 Cal.App.3d 665, 673, 143 Cal.Rptr. 570 ; *Bonadelle Constr. Co. v.*

Hernandez (1959) 169 Cal.App.2d 396, 399, 337 P.2d 85 .

[2] Use of Instruction

This instruction should be used in cases involving substantial, although not complete, performance. The most common application of the substantial performance doctrine is in building contracts, which are covered more extensively in Ch. 3I, *Matthew Bender Construction Contract Instructions*, but other contracts may permit such recovery as well.

The word "important" is used in the first element because the word "material," more often found in instructions, is not as readily understandable by laypersons [see *Black's Law Dictionary* (5th ed. 1979) at 880].

The optional paragraph should be used when there are numerous minor defects that, taken together, might be construed as a material deviation from the contract.

For related Judicial Council instructions, see [3][b], *below*.

LexisNexis Matthew Bender Expert Practice Tip--Appeal to Jurors' Common Sense: The concept of "substantial performance" may be difficult for some jurors to apply. However, appeal to their common sense--that is, if plaintiff performed the "important parts" in "good faith" then he/she should win. *By Rex Heeseman*

LexisNexis Matthew Bender Expert Practice Tip--Emphasis Depends on Which Party You Represent: Plaintiff will want to emphasize that "substantial performance" only requires that the important parts of the contract be performed. Defendant will want to emphasize that plaintiff must be in "good faith," so that any deliberate or wilful departure from the contract falls short of this requirement. *By Ronald Oster*

[3] Comment

[a] Substantial Performance

The doctrine of substantial performance relaxes somewhat the strict common law rule that one is not entitled to any payment until the agreed-upon performance is completed or executed [*Thomas Haverty Co. v. Jones (1921) 185 Cal. 285, 288-289, 197 P. 105*]. This rule was especially onerous in building contracts because the owner could take possession of the building but refuse payment due to minor defects in the building. The question of what constitutes substantial performance must be determined on the facts of each case [*Bonadelle Constr. Co. v. Hernandez (1959) 169 Cal.App.2d 396, 399, 337 P.2d 85*]. When applicable, the substantial performance rule permits recovery on the contract despite a lack of strict performance. It also permits an offset for defects if there has been substantial performance in good faith, when the failure to render full performance can be compensated in damages so that the promisee can get practically what he or she contracted for [*Posner v. Grunwald-Marx, Inc. (1961) 56 Cal.2d 169, 14 Cal.Rptr. 297, 363 P.2d 313* ; *Thomas Haverty Co. v. Jones (1921) 185 Cal. 285, 289, 197 P. 105*]. Substantial performance in good faith requires performance of all essential parts of the contract [*Bonadelle Constr. Co. v. Hernandez (1959) 169 Cal.App.2d 396, 399, 337 P.2d 85* , quoting *Connell v. Higgins (1915) 170 Cal. 541, 556, 150 P. 769*]. There may be no intentional major deviations from the terms of the contract [*Shell v. Schmidt (1958) 164 Cal.App.2d 350, 365-366, 330 P.2d 817*]. The performance rendered may be held to be less than substantial by reason of the accumulation of many defects, any one of which standing alone would be minor in character [*Tolstoy Constr. Co. v. Minter (1978) 78 Cal.App.3d 665, 673, 143 Cal.Rptr. 570*].

Although the doctrine of substantial performance is well known for its application to building contracts, this is not the only application [see *Suastez v. Plastic Dress-Up Co. (1982) 31 Cal.3d 774, 783, 183 Cal.Rptr. 846, 647 P.2d 122* ; *Division of Labor Law Enforcement v. Ryan Aero Co. (1951) 106 Cal.App.2d Supp. 833, 835, 236 P.2d 236* (substantial

performance to earn vacation pay); *Cline v. Yamaga* (1979) 97 Cal.App.3d 239, 248, 158 Cal.Rptr. 598 (substantial performance to earn real estate broker's commission)].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 3, *California Judicial Council Contracts Instructions*]:

CACI No. 312 Substantial Performance

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts Law Performance Substantial Performance Evidence Procedural Considerations Burdens of Proof Allocation Real Property Law Construction Law Contracts

John F. Wells and Lise A. Pearlman were the original authors of this chapter. It has since been updated to reflect changes in the law, additional case citations and practice pointers by other lawyers as well as revisions including cross-references to the official CACI instructions.



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CHAPTER 3D Matthew Bender Performance and Breach of Contract Instructions
PART A. VARIOUS METHODS OF PERFORMANCE

1-3D California Forms of Jury Instruction MB 300D.03

MB 300D.03 Breach

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Plaintiff must prove that Defendant breached [his/her/its] obligation under the contract to
_____ [*describe performance required of defendant*].

[*OPTIONAL (See Use of Instruction)*]

I will now tell you the rules of law that you must follow in deciding whether or not Defendant breached the contract.

Authorities: *Evid. Code § 500; Reichert v. General Ins. Co. (1968) 68 Cal.2d 822, 830, 69 Cal.Rptr. 321, 442 P.2d 377*

[2] Use of Instruction

This instruction should be used in all breach of contract cases. The optional paragraph should be used to introduce any additional instructions that might apply to the issues of the defendant's breach, e.g., the right to select alternative performance or performance to plaintiff's reasonable satisfaction. A preponderance of the evidence instruction should be used with this instruction [see Ch. 2, *California Judicial Council Evidence Instructions, CACI No. 200* ("Obligation to Prove--More Likely True than Not True")].

[3] Comment

The plaintiff has the burden of proof on the issue of the defendant's breach of contract [*Evid. Code* § 500; *Reichert v. General Ins. Co.* (1968) 68 Cal.2d 822, 830, 69 Cal.Rptr. 321, 442 P.2d 377].

Although the plaintiff has the burden of proving both his or her excuse from tendering performance and the defendant's breach, the plaintiff is not required to negate the existence of all justifiable excuses for the defendant's failure to tender performance. Excuses for nonperformance not apparent on the face of the contract or embraced within the facts alleged in the complaint are an affirmative defense [*Eucalyptus G. Assn. v. Orange C. N. & L. Co.* (1917) 174 Cal. 330, 335, 163 P. 45]. As such, the defendant carries the burden of proof [*Evid. Code* § 500].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawBreachCauses of ActionGeneral OverviewEvidenceProcedural ConsiderationsBurdens of ProofAllocationEvidenceProcedural ConsiderationsBurdens of ProofPreponderance of Evidence

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CHAPTER 3D Matthew Bender Performance and Breach of Contract Instructions
PART A. VARIOUS METHODS OF PERFORMANCE

1-3D California Forms of Jury Instruction MB 300D.04

MB 300D.04 Performing Party's Right to Select Alternative Performance

[1] Instruction Performing Party's Right to Select Alternative Performance

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

[EITHER (See Use of Instruction)]

As part of their contract, the parties agreed that Plaintiff would have the obligation either to _____ [describe first alternative] or to _____ [describe second alternative]. The choice of which thing to do was up to Plaintiff.

[OR]

You must decide whether Plaintiff had a choice under the contract either to _____ [describe first alternative] or to _____ [describe second alternative]. Plaintiff had that choice if you decide one of the following:

[CHOOSE FROM THE FOLLOWING (See Use of Instruction)]

1. That the parties agreed to give Plaintiff the choice;

2. That the parties agreed that performance of either alternative would be enough without indicating who had the right to choose; or

3. That the parties agreed that either alternative would be enough and gave Defendant the choice but Defendant did not give Plaintiff timely notice of [his/her/its] choice.

Authorities: *Civ. Code* §§ 1448, 1449; *San Bernardino Valley Water Dev. Co. v. San Bernardino Valley Mun. Water Dist.* (1965) 236 Cal.App.2d 238, 243, 45 Cal.Rptr. 793 .

[2] Use of Instruction

This instruction should be used in cases involving alleged alternative choices of performance. The instruction assumes that it is the plaintiff's performance of alternative obligations that is at issue. If the issue is the defendant's breach of alternative obligations, then the party designations should be reversed.

The first paragraph applies when the contract is contained in an integrated writing and the court has determined that the plaintiff had the right to choose among alternative obligations [see Ch. 3B, *Matthew Bender Interpretation of Contract Instructions*]. The optional paragraph should be used when the jury must determine whether or not the plaintiff had the right to choose. If the judge decides that the defendant had the right to choose among the performance of alternative obligations then the instruction in MB 300D.05[1] should be given instead of this instruction.

The second alternative should be used in cases in which the determination of the terms of the contract is a jury question. In using the second alternative, only those possibilities supported by evidence should be used. If the third possibility given above is applicable, then the instruction should be followed by the first alternative of the instruction in MB 300D.05[1]. If there is a fact issue as to whether such a provision was in the agreement, the second alternative in MB 300D.05[1] should be used.

[3] Comment

The right to select which of two alternative performances will be done belongs to the performing party unless the contract specifies otherwise [*Civ. Code* § 1448; *San Bernardino Valley Water Dev. Co. v. San Bernardino Valley Mun. Water Dist.* (1965) 236 Cal.App.2d 238, 247, 45 Cal.Rptr. 793]. If one party has the right to choose but does not notify the other party by the time of performance, the right passes to the other party [*Civ. Code* § 1448; see MB 300D.05[3]].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawContract Conditions & ProvisionsIntegration ClausesContracts LawContract InterpretationAmbiguities & Contra ProferentemGeneral Overview

John F. Wells and Lise A. Pearlman were the original authors of this chapter. It has since been updated to reflect changes in the law, additional case citations and practice pointers by other lawyers as well as revisions including cross-references to the official CACI instructions.



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CHAPTER 3D Matthew Bender Performance and Breach of Contract Instructions
PART A. VARIOUS METHODS OF PERFORMANCE

1-3D California Forms of Jury Instruction MB 300D.05

MB 300D.05 Other Party's Right to Demand Choice of Performance**[1] Instruction** Other Party's Right to Demand Choice of Performance[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

[EITHER (See Use of Instruction)]

As part of their contract, the parties agreed that Defendant would have the right to demand that Plaintiff perform _____ [describe first alternative] or _____ [describe second alternative] provided that Defendant notified Plaintiff of [his/her/its] choice _____ [by the time specified by the contract or before the time for performance]. If you find that the notice was given, then Plaintiff had to perform the chosen alternative. If you find that the notice was not given, Plaintiff could choose to perform either alternative.

[OR]

You must determine whether or not Defendant had a right to demand that Plaintiff _____ [describe chosen alternative]. Defendant had that right if you decide both of the following:

1. That the parties agreed that Defendant had the right to demand _____ [describe demanded performance] instead of _____ [describe alternative performed or tendered]; and

2. That Defendant notified Plaintiff of that demand _____ [by the time specified by the contract or before the time for performance].

Authorities: *Civ. Code* §§ 1448, 1449.

[2] Use of Instruction

This instruction should be used when the party to whom performance is due has the right to demand one of two or more alternative performances. The instruction assumes that the plaintiff is the party whose performance is at issue. If the issue is the defendant's breach of alternative obligations, the party designations should be reversed. The second alternative should be used when the question of whether defendant has the right to demand a particular form of performance is one for the jury to decide [*see MB 300D.04*].

[3] Comment

The right to select which of two alternative performances will be done belongs to the performing party unless the contract specifies otherwise [*Civ. Code* § 1448]. Thus, the other party will only have the right if the agreement so provides and if timely notice is given [*Civ. Code* § 1449].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawBreachCauses of ActionGeneral Overview

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CHAPTER 3D Matthew Bender Performance and Breach of Contract Instructions
PART A. VARIOUS METHODS OF PERFORMANCE

1-3D California Forms of Jury Instruction MB 300D.06

MB 300D.06 Performance of Alternative Duty

[1] Instruction Performance of Alternative Duty

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Plaintiff had the choice under the contract to perform either by _____ [describe first alternative] or by _____ [describe second alternative]. Plaintiff did not have to do both. Whichever one Plaintiff chose to perform had to be performed completely.

[*OPTIONAL (See Use of Instruction)*]

Plaintiff's duty under the contract could not be satisfied by doing part of each choice unless there was conduct on Defendant's part agreeing to a modification of the contract or amounting to waiver or estoppel.

Authority: *Civ. Code § 1450.*

[2] Use of Instruction

This instruction should be used when a party has the choice of performing one of two or more acts and there is an issue as to whether complete performance of one choice was rendered as opposed to part performance of more than one alternative. This instruction assumes that the plaintiff was the party with choice of performances. If the defendant was the party with a choice, the party designations should be reversed. The optional paragraph should be used when there is evidence that only part of both choices was performed [see [3], below]. If the optional paragraph is used, it should be accompanied by the instructions in Ch. 3F, *Matthew Bender Contract Defenses Instructions*, related to waiver and estoppel.

[3] Comment

When the performing party has the choice of performances, the performance must be one of the acts in its entirety. A purported performance consisting of parts of more than one alternative constitutes performance only with the consent of the other party [*Civ. Code § 1450*]. The doctrines of waiver and estoppel might also be invoked. These defenses are discussed in Ch. 3F, *Matthew Bender Contract Defenses Instructions*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawBreachCauses of ActionGeneral Overview

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CHAPTER 3D Matthew Bender Performance and Breach of Contract Instructions PART A. VARIOUS METHODS OF PERFORMANCE

1-3D California Forms of Jury Instruction MB 300D.07

MB 300D.07 Partial Performance--Indivisible Contract

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Plaintiff performed only part of [his/her/its] duty under the contract. Defendant had the right to accept or reject this part performance. If you find that Defendant accepted the part performance, Defendant is responsible for part payment under the contract. If you find that Defendant rejected the part performance, then part performance is failure to perform and Defendant is not responsible to Plaintiff for any payments.

Authorities: *Civ. Code § 1477; Dennison v. Chapman (1895) 105 Cal. 447, 454-456, 39 P. 61 .*

[2] Use of Instruction

This instruction should be used in cases involving part performance of an indivisible contract. Whether a particular contract calls for an indivisible obligation is a question of law for the court. It must be determined before any issue of acceptance of part performance is submitted to the jury. If a party allegedly had no choice in accepting part performance, then the instruction in MB 300D.08 should be given as well.

LexisNexis Matthew Bender Expert Practice Tip--Defendant Must Accept Part Performance: To come within this instruction, plaintiff has to show that the defendant "accepted" part performance and therefore must pay for that part. Note that "substantial performance" may require greater performance by plaintiff (i.e., all important parts of the contract) but does not require proof of defendant's acceptance. *By Ronald Oster*

LexisNexis Matthew Bender Expert Practice Tip--Address Apparent Unfairness: "Partial performance" will seem unfair to some jurors. Why should someone "win" if he/she only does part of something? So, address that assumption. *By Rex Heeseman*

[3] Comment

The partial performance of an indivisible obligation creates a proportional obligation on the part of the other party only if the latter voluntarily accepts the benefit of the partial performance [*Civ. Code* § 1477; *see MB 300D.08*]. The party to whom performance is owed need not accept the partial performance, but once such performance is accepted, that party is obligated to perform his or her duties (such as proportional payment) under the contract [*see* Witkin, Summary of California Law, vol. 1, *Contracts*, § 759 (10th ed., 2005)]. By the same token, the party rendering only partial performance cannot deny the other party's rights based on incomplete performance [*Dennison v. Chapman* (1895) 105 Cal. 447, 454-456, 39 P. 61].

The rule that acceptance of partial performance creates a concomitant duty of partial payment should be distinguished from an accord and satisfaction, when a party agrees to accept less than full performance as satisfaction of a contractual obligation. Partial performance should also be distinguished from the doctrine of substantial performance discussed in *MB 300D.02*, which does not depend on acceptance.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Province of Court & Jury Contracts Law Breach Partial Breach Contracts
Law Performance Partial Performance General Overview

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CHAPTER 3D Matthew Bender Performance and Breach of Contract Instructions
PART A. VARIOUS METHODS OF PERFORMANCE

1-3D California Forms of Jury Instruction MB 300D.08

MB 300D.08 Lack of Choice in Accepting Part Performance

[1] Instruction Lack of Choice in Accepting Part Performance

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Plaintiff performed only part of [his/her/its] obligation under the contract. If you find that Defendant had no choice in accepting the benefit of that part performance, Defendant still has the right to treat the part performance as a failure to perform by Plaintiff. If Defendant could only avoid retaining the benefit of Plaintiff's part performance by _____ [injuring [his/her/its] own property or incurring great expense or difficulty], then Defendant's retention of the benefit of Plaintiff's part performance is not assumed to be by choice.

Authority: *Civ. Code § 1477.*

[2] Use of Instruction

This instruction should be used by a defendant when the plaintiff has claimed that the defendant was liable for a partial payment for accepting partial performance [*see MB 300D.06*] when the defendant claims that retention of partial performance was not by choice.

[3] Comment

Partial performance of an indivisible obligation extinguishes a corresponding proportion of the obligation, if the benefit of such performance is voluntarily retained by the creditor, but not otherwise. If the partial performance is of such a nature that the creditor cannot avoid retaining it without injuring his or her own property, the retention is not presumed to be voluntary [*Civ. Code § 1477*]. Although the statute refers only to injury to property, it would seem logical that involuntary acceptance would also encompass situations in which retention of the benefit could only be avoided by

substantial expense or difficulty.

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawBreachPartial BreachContracts LawPerformancePartial PerformanceGeneral Overview

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CHAPTER 3D Matthew Bender Performance and Breach of Contract Instructions PART A. VARIOUS METHODS OF PERFORMANCE

1-3D California Forms of Jury Instruction MB 300D.09

MB 300D.09 Waiver of Right to Installment Payment on Indivisible Contract

[1] Instruction Waiver of Right to Installment Payment on Indivisible Contract

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

The contract provided that Plaintiff was not required to complete [his/her/its] performance until after Defendant made a partial payment. When Defendant failed to make that payment, Plaintiff had the right to stop performing. Instead, Plaintiff chose to continue. Having chosen to continue, Plaintiff became responsible for completing performance before being entitled to any payment.

Authority: *Jozovich v. Central California Berry Growers Asso.* (1960) 183 Cal.App.2d 216, 225-226, 6 Cal.Rptr. 617.

[2] Use of Instruction

This instruction should be used when there is a provision for installment payments in an indivisible contract and the plaintiff elected to continue performing despite the defendant's failure to make installment payments. It provides a different rule from that applicable to severable obligations [see *MB 300D.10*].

[3] Comment

A party who elects to continue to perform an indivisible contract without receiving installment payments loses the right to payment until the contract is completely performed [*Jozovich v. Central California Berry Growers Asso.* (1960) 183 Cal.App.2d 216, 225-226, 6 Cal.Rptr. 617].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawContract Conditions & ProvisionsWaiversGeneral OverviewContracts LawSales of GoodsBreach,
Repudiation & ExcuseInstallment ContractsContracts LawSales of GoodsPerformancePayment Tender & Payment
Before InspectionContracts LawTypes of ContractsInstallment Contracts

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CHAPTER 3D Matthew Bender Performance and Breach of Contract Instructions
PART A. VARIOUS METHODS OF PERFORMANCE

1-3D California Forms of Jury Instruction MB 300D.10

MB 300D.10 Right to Recover for Performance of Part of Severable Contract**[1] Instruction** Right to Recover for Performance of Part of Severable Contract[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

To recover, Plaintiff does not have to show that [he/she/it] performed the entire contract with Defendant. Plaintiff may show that [he/she/it] performed _____ [describe part performance sued on] and recover for that part performance.

Authorities: *Lowy v. United Pacific Ins. Co.* (1967) 67 Cal.2d 87, 92-93, 60 Cal.Rptr. 225, 429 P.2d 577 ; *Agnifili v. Lagna* (1928) 204 Cal. 262, 267, 267 P. 705 .

[2] Use of Instruction

This instruction should be used in cases involving severable contracts when the plaintiff has failed to perform one or more parts but seeks recovery on others.

[3] Comment

Breach of one part of a severable contract does not prevent recovery for performance of another part of that contract [*Lowy v. United Pacific Ins. Co.* (1967) 67 Cal.2d 87, 92-93, 60 Cal.Rptr. 225, 429 P.2d 577 ; *Agnifili v. Lagna* (1928) 204 Cal. 262, 267, 267 P. 705].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawBreachPartial BreachContracts LawContract InterpretationSeverabilityContracts LawTypes of

ContractsDivisible Contracts

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CHAPTER 3D Matthew Bender Performance and Breach of Contract Instructions PART A. VARIOUS METHODS OF PERFORMANCE

1-3D California Forms of Jury Instruction MB 300D.11

MB 300D.11 Reasonable Satisfaction Requirement

[1] Instruction Reasonable Satisfaction Requirement

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

The contract here called for Plaintiff to _____ [describe required performance] to the Defendant's satisfaction. This does not mean that Defendant had the right to reject Plaintiff's performance merely by claiming that [he/she/it] was dissatisfied. Defendant's dissatisfaction must be reasonable. In other words, Plaintiff must prove that a reasonable person would have been satisfied with [his/her/its] performance.

Authority: *Brenner v. Redlick Furniture Co.* (1931) 113 Cal.App. 343, 346-347, 298 P. 62 .

[2] Use of Instruction

This instruction should be used in the usual satisfaction cases that call for reasonably satisfactory performance based on an objective standard. It is predicated on a determination by the court that the objective test is applicable to the particular contract at issue. This instruction assumes that the plaintiff's performance is at issue. If the issue is the defendant's breach, the party designations should be reversed. For contracts calling for performance to the personal satisfaction of the other party, see *MB 300D.12*. If the contract is oral and the jury is to determine as a question of fact what type of satisfaction the parties intended, use the instruction in *MB 300D.13*.

LexisNexis Matthew Bender Expert Practice Tip--Use Care in Arguing "Reasonable Person"

Standard: The concept of a "reasonable person" (found in the last sentence of this instruction) is often found in the law but not that often in life. Hence, be careful in how you argue that point. *By Rex Heeseman*

LexisNexis Matthew Bender Expert Practice Tip--Keep in Mind Whether Defendant Acted in

Good Faith: Another way of addressing this issue is to rely on the instruction relating to the covenant of

good faith and fair dealing [see *MB 300B.08*]. In other words, a defendant's discretionary right to reject performance must be exercised in "good faith." By *Ronald Oster*

[3] Comment

There are two categories of contracts calling for performance to the satisfaction of the other party. One involves the fancy, taste, or judgment of the other party [*Tiffany v. Pacific Sewer Pipe Co. (1919) 180 Cal. 700, 702, 182 P. 428*]. The other involves performance that would be satisfactory to a reasonable person. The objective test generally applies to questions of operative fitness or mechanical utility [*Thomas Haverty Co. v. Jones (1921) 185 Cal. 285, 296, 197 P. 105* ; *Bruner v. Hegyi (1919) 42 Cal.App. 97, 99, 183 P. 369*]. Absent an explicit contractual provision dealing with subject matter that necessarily calls for personal taste, the law prefers the objective reasonable person test [*Guntert v. City of Stockton (1974) 43 Cal.App.3d 203, 209, 117 Cal.Rptr. 601*].

The reasonableness test is especially preferable when factors of commercial value or financial concern are involved, as distinct from matters of personal taste [see, e.g., *Storek & Storek, Inc. v. Citicorp Real Estate, Inc. (2002) 100 Cal.App.4th 44, 58-60, 64, 122 Cal.Rptr.2d 267* (when contract was commercial transaction involving lending of money, proper method for evaluating lender's satisfaction with budget balance--a condition precedent for making disbursements under loan agreement--was objective test; no duty of good faith was owed); see also Ch. 3B, *Matthew Bender Interpretation of Contract Instructions*, MB 300B.08]. The question of which category a particular contract falls into is generally one of law for the court [*Brenner v. Redlick Furniture Co. (1931) 113 Cal.App. 343, 346, 298 P. 62*]. The instruction given here is predicated on a determination by the court that the objective test is applicable to the particular contract at issue.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Province of Court & Jury Contracts Law Sales of Goods Breach, Repudiation & Excuse Buyer's Rights on Improper Delivery Contracts Law Sales of Goods Breach, Repudiation & Excuse Rightful Rejection Contracts Law Sales of Goods Buyer's Duty to Inspect Buyer's Right to Reject

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CHAPTER 3D Matthew Bender Performance and Breach of Contract Instructions PART A. VARIOUS METHODS OF PERFORMANCE

1-3D California Forms of Jury Instruction MB 300D.12

MB 300D.12 Performance to Satisfaction of Other Party's Taste

[1] Instruction Performance to Satisfaction of Other Party's Taste

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

This contract requires Plaintiff to perform to the Defendant's satisfaction. This means that Plaintiff agreed that [his/her/its] performance would satisfy Defendant's personal taste or judgment. However, Defendant must act in good faith. You must decide whether Defendant was in fact dissatisfied with Plaintiff's performance or whether Defendant only said that [he/she/it] was dissatisfied to avoid [his/her/its] obligation under the contract.

Authority: *Brenner v. Redlick Furniture Co. (1931) 113 Cal.App. 343, 346-347, 298 P. 62 .*

[2] Use of Instruction

This instruction should be used in cases involving contracts in which the court has determined that the performance called for involves the taste, fancy, or judgment of the other party. The evidence of such taste, fancy, or judgment is subject to the implied covenant of good faith, a general instruction on which is included in Ch. 3B, *Matthew Bender Interpretation of Contract Instructions*, and may be given before this instruction. The instruction assumes that it is the plaintiff's performance that is at issue. If the issue is the defendant's breach of a duty to perform to the plaintiff's satisfaction, then the party designations should be reversed. For contracts requiring only performance satisfactory to a reasonable person, use the instruction in MB 300D.11. If the contract is oral and the jury is to determine as a question of fact what type of satisfaction the parties intended, use the instruction in MB 300D.13.

[3] Comment

The only fact issue presented when personal fancy, taste, or judgment is involved is whether the dissatisfaction is genuine or in bad faith [*Brenner v. Redlick Furniture Co. (1931) 113 Cal.App. 343, 346-347, 298 P. 62*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawBreachCauses of ActionGeneral OverviewContracts LawContract InterpretationGood Faith & Fair Dealing

John F. Wells and Lise A. Pearlman were the original authors of this chapter. It has since been updated to reflect changes in the law, additional case citations and practice pointers by other lawyers as well as revisions including cross-references to the official CACI instructions.



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California Forms of Jury Instruction

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CHAPTER 3D Matthew Bender Performance and Breach of Contract Instructions
PART A. VARIOUS METHODS OF PERFORMANCE

1-3D California Forms of Jury Instruction MB 300D.13

MB 300D.13 Performance to Satisfaction of Other Party When Type of Satisfaction Is Jury Issue

[1] Instruction Performance to Satisfaction of Other Party When Type of Satisfaction Is Jury Issue

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

This contract requires Plaintiff to perform to the Defendant's satisfaction. This means one of two things:

- 1. That performance must satisfy Defendant's personal taste or judgment; or**
- 2. That performance need only be reasonably satisfactory.**

You must decide which of these meanings the parties agreed to. In deciding that question you should consider the nature of the thing Plaintiff agreed to do. In practical affairs, such as making a machine work to another party's satisfaction, use of the term "satisfaction" usually means that the machine works reasonably well by standards that are generally applied to such machines. All that need be shown in such case is that a reasonable person would have been satisfied with the performance. If something more personal and subjective is involved, such as an art work, then the parties' use of the term "satisfaction" may mean something different. It may mean that the parties agreed that Plaintiff's performance would suit Defendant's personal taste and judgment, whether or not other people would have found the performance satisfactory. In such a case, the dissatisfaction of the Defendant is controlling so long as [he/she/it] is acting in good faith.

Authorities: *Thomas Haverty Co. v. Jones* (1921) 185 Cal. 285, 296, 197 P. 105 ; *Brenner v. Redlick Furniture Co.* (1931) 113 Cal.App. 343, 346-347, 298 P. 62 .

[2] Use of Instruction

This instruction should be used only when the type of satisfaction intended by the parties is a question of fact for the

jury. It may be adapted and combined with the instruction in Ch. 3B, *Matthew Bender Interpretation of Contract Instructions*, MB 300B.02 and other applicable interpretation instructions in Ch. 3B, including the instruction on the implied covenant of good faith and fair dealing.

This instruction assumes that the plaintiff's performance was at issue. If the issue is the defendant's breach of an obligation to perform to the plaintiff's satisfaction, the party designations should be reversed. If the contract clearly provides for performance to the *reasonable* satisfaction of the other party, the instruction in MB 300D.11 should be used. If it clearly calls for performance to the *personal* satisfaction of the other party, the instruction in MB 300D.12 should be used.

[3] Comment

The two alternative tests of performance to the satisfaction of another party are discussed at length in *Brenner v. Redlick Furniture Co.* [*Brenner v. Redlick Furniture Co. (1931) 113 Cal.App. 343, 346-347, 298 P. 62* ; see MB 300D.11, MB 300D.12]. Generally, the question of which type of satisfaction is involved is one of law for the court [*Brenner v. Redlick Furniture Co. (1931) 113 Cal.App. 343, 346, 298 P. 62*]. However, the terms of the agreement present a jury question in the case of a disputed oral agreement, or possibly when there is a conflict in the extrinsic evidence on the interpretation of a written agreement [see Ch. 3B, *Matthew Bender Interpretation of Contract Instructions*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Province of Court & Jury Contracts Law Breach Causes of Action General Overview

John F. Wells and Lise A. Pearlman were the original authors of this chapter. It has since been updated to reflect changes in the law, additional case citations and practice pointers by other lawyers as well as revisions including cross-references to the official CACI instructions.



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CHAPTER 3D Matthew Bender Performance and Breach of Contract Instructions
PART A. VARIOUS METHODS OF PERFORMANCE

1-3D California Forms of Jury Instruction MB 300D.14

MB 300D.14 Performance to Satisfaction of Third Party**[1] Instruction** Performance to Satisfaction of Third Party[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

This contract called for Plaintiff to _____ *[describe performance required of plaintiff]* **to the satisfaction of** _____ *[name of third party]* _____ *[OPTIONAL (See Use of Instruction)]* **to be evidenced by a certificate of satisfaction].** _____ *[Name of third party]* _____ *[refused to issue the certificate or describe facts showing that third party indicated plaintiff's performance was unsatisfactory].* **You must, therefore, find that Plaintiff's performance was unsatisfactory unless Plaintiff proves that** _____ *[name of third party]'s dissatisfaction* _____ *[was obtained by fraud or mistake or was arbitrary].*

[*OPTIONAL (See Use of Instruction)*][*EITHER*]

To show that _____ *[name of third party]'s refusal was arbitrary, Plaintiff must prove that* _____ *[name of third party] had no good reason for refusing to* _____ *[certify or approve] Plaintiff's performance.*

[*OR*]

To show that _____ [name of third party]'s refusal to certify Plaintiff's work was arbitrary, Plaintiff must prove that _____ [name of third party] actually considered Plaintiff's work to be satisfactory.

Authorities: *Coplew v. Durand* (1908) 153 Cal. 278, 279-281, 95 P. 38 ; *Kinkle v. Fruit Growers Supply Co.* (1944) 63 Cal.App.2d 102, 107-108, 146 P.2d 8 .

[2] Use of Instruction

This instruction should be used when the contract at issue calls for performance to the satisfaction of a third party. Most often such contracts call for the third party to evidence satisfaction by issuing a certificate to that effect. In these cases, this instruction assumes that the third party refused to issue a certificate and that language should be used. If no certificate is involved alternative language should be included in the instruction as indicated.

The optional portion of the instruction should be used when the court has determined that the parties intended that the third party's satisfaction be reasonable, and there is evidence that the third person acted arbitrarily. Additional instructions on fraud and mistake are included in Ch. 3F, *Matthew Bender Contract Defenses Instructions*.

[3] Comment

In the case of contracts requiring third party approval, just as with contracts requiring performance to the satisfaction of a party to the contract, there is a preliminary question as to whether a subjective or objective standard is to be applied. This depends on the parties' agreement. If the parties intended an objective standard, they will not be bound by a decision of the third party that does not conform to that standard [*Kinkle v. Fruit Growers Supply Co.* (1944) 63 Cal.App.2d 102, 107-108, 146 P.2d 8]. On the other hand, if the parties intended to be bound by the third party's decision, that decision is generally deemed to be conclusive absent proof of fraud, or mistake amounting to constructive fraud [*California Sugar etc. Agency v. Penoyar* (1914) 167 Cal. 274, 279, 139 P. 671 ; *Pacific Commercial Co. v. Greer* (1933) 129 Cal.App. 751, 756, 19 P.2d 543].

There is also authority for recovery on proof that the third party arbitrarily refused to issue a certificate of satisfaction [*Coplew v. Durand* (1908) 153 Cal. 278, 279-281, 95 P. 38]. It is unclear whether arbitrariness in this context means bad faith (i.e., refusal to issue a certificate when the third party was actually satisfied) or mere lack of justification. The former is consistent with a personal satisfaction standard, the latter is consistent with an objective standard. In most cases, the court will determine which standard the parties intended and instruct the jury accordingly. If the question of interpretation turns on an issue of fact, the instruction should be modified [see MB 300D.13[2]]. When the objective test is applied, arbitrariness may be shown by a lack of justification for the claimed dissatisfaction [see, e.g., *San Bernardino Valley Water Dev. Co. v. San Bernardino Valley Mun. Water Dist.* (1965) 236 Cal.App.2d 238, 243, 45 Cal.Rptr. 793 (involving dissatisfaction of party to contract)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawBreachCauses of ActionGeneral OverviewContracts LawThird PartiesGeneral Overview

John F. Wells and Lise A. Pearlman were the original authors of this chapter. It has since been updated to reflect changes in the law, additional case citations and practice pointers by other lawyers as well as revisions including cross-references to the official CACI instructions.



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CHAPTER 3D Matthew Bender Performance and Breach of Contract Instructions
PART A. VARIOUS METHODS OF PERFORMANCE

1-3D California Forms of Jury Instruction MB 300D.15

MB 300D.15 Performance by Another**[1] Instruction** Performance by Another[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

[EITHER (See Use of Instruction)]

Plaintiff delegated the performance of [his/her/its] obligation under the contract to _____ [name of substitute]. Plaintiff must prove that _____ [name of substitute] _____ [performed or tendered performance or was excused from performing] Plaintiff's obligation.

[OR]

Plaintiff must prove that Defendant breached the contract. Defendant asserts that [he/she/it] carried out [his/her/its] obligation under the contract by having _____ [name of substitute] perform that obligation instead of Defendant. Even though Plaintiff did not agree to have _____ [name of substitute] perform instead of Defendant, Defendant is relieved from responsibility to Plaintiff for performing that obligation to the extent of _____ [name of substitute]'s performance. If _____ [name of substitute] did not fully perform, Defendant remains responsible for any difference between what [name of substitute] did and the performance required of Defendant under the contract.

Authority: Civ. Code § 1473.**[2] Use of Instruction**

This instruction should be used when the obligations of one of the parties were allegedly performed by another person delegated by that party. It assumes that the contract is one in which the duties of the parties are delegable.

The first alternative should be used when it is contended that the plaintiff's obligation was performed or tendered by a substitute; or if it is contended that performance was excused by defendant. The second alternative should be used when the defendant claims that there was no breach of contract due to the substituted performance of another.

If the other party allegedly consented to the substitution, then the jury should be instructed on novation [see Ch. 3F, *Matthew Bender Contract Defenses Instructions*].

LexisNexis Matthew Bender Expert Practice Tip--Enforcing Contract Against Defendant: The key concept here is "good faith." If it looks like defendant is using a pretext to avoid an obligation under the contract, this instruction gives the jury ample opportunity to enforce the contract. *By Ronald Oster*

LexisNexis Matthew Bender Expert Practice Tip--Proving This Instruction Can Be Challenging: Having to prove someone besides a party did (or did not do) something is sometimes challenging. When added to the concept of a contract's performance, the task is even more daunting. *By Rex Heeseman*

[3] Comment

Full performance of an obligation may be accomplished either by a party or by another person on the party's behalf [Civ. Code § 1473]. Absent a novation, the original party remains liable for any breach [Civ. Code § 1531; *Alexander v. Angel* (1951) 37 Cal.2d 856, 863, 236 P.2d 561].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawPerformanceNovationContracts LawThird PartiesDelegation of Performance

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CHAPTER 3D Matthew Bender Performance and Breach of Contract Instructions
PART A. VARIOUS METHODS OF PERFORMANCE

1-3D California Forms of Jury Instruction MB 300D.16

MB 300D.16 Performance by One of Several Joint Obligors**[1] Instruction** Performance by One of Several Joint Obligors[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Plaintiff must prove that Defendant breached the obligation to _____ [describe performance required]. That obligation was shared by Defendant and _____ [name of joint obligor]. Both of them were responsible to Plaintiff to see to it that Plaintiff received the performance agreed on. Defendant asserts that _____ [name of joint obligor]'s performance satisfied that obligation. If _____ [name of joint obligor] did fully perform, then Defendant has no further responsibility to Plaintiff. If _____ [name of joint obligor] did not fully perform, then Defendant is responsible to Plaintiff for any remaining obligation.

Authorities: Civ. Code § 1474; Lovetro v. Steers (1965) 234 Cal.App.2d 461, 477, 44 Cal.Rptr. 604 .

[2] Use of Instruction

This instruction should be used when the defendant asserts that his or her obligations under a contract with the plaintiff have been satisfied by the performance of a joint obligor who may or may not be a party to the suit. For instructions concerning the effect of release of the other obligor when the defendant contends that a guarantee was all that was intended, see Ch. 3F, *Matthew Bender Contract Defenses Instructions*.

LexisNexis Matthew Bender Expert Practice Tip--Focus Your Argument: The "sharing" of an obligation will seem strange or unfair to some jurors. So, the related argument should focus on addressing that view. *By Rex Heeseman*

[3] Comment

Performance of an obligation by one of several persons who are jointly liable under it, extinguishes the liability of all [Civ. Code § 1474]. The extinguishment of the obligation of a joint debtor operates only to the extent that the debt was paid. The other obligors are still liable for any remaining debt [*Lovetro v. Steers* (1965) 234 Cal.App.2d 461, 477, 44 Cal.Rptr. 604]. A release or contract not to sue presents different issues that are discussed in Ch. 3F, *Matthew Bender Contract Defenses Instructions*.

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawNegotiable InstrumentsEnforcementJoint & Several InstrumentsContracts LawThird PartiesJoint & Several Contracts

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CHAPTER 3D Matthew Bender Performance and Breach of Contract Instructions
PART A. VARIOUS METHODS OF PERFORMANCE

1-3D California Forms of Jury Instruction MB 300D.17-MB 300D.29

[Reserved]

MB 300D.17[Reserved]



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CHAPTER 3D Matthew Bender Performance and Breach of Contract Instructions
PART B. OCCURRENCE OF CONDITIONS

1-3D California Forms of Jury Instruction MB 300D.30

MB 300D.30 Condition Defined

[1] Instruction Condition Defined

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

The obligation of a party is conditional when [his/her/its] duty to perform the obligation depends on the happening of an uncertain event.

Authority: *Civ. Code § 1434.*

[2] Use of Instruction

This instruction should be used only if terms such as "conditional obligation" have been used during the trial. Otherwise, the jury should be instructed directly on the issue without being given the legal term "conditional obligation." When the contract is in writing, the issue of whether a condition is a condition precedent, concurrent, or subsequent is a question of interpretation for the court. When oral agreements are involved, the issue may be so intertwined with ascertaining the terms of the oral agreement that the type of condition is a question of fact for the jury. The various types of conditions are described in the following instructions.

For related Judicial Council instructions, see [3][c], *below*.

LexisNexis Matthew Bender Expert Practice Tip--Use Care in Argument: The "happening of an uncertain event" seems confusing. Thus, be careful in argument. *By Rex Heeseman*

[3] Comment

[a] Effect of Conditions

An obligation is conditional when the rights or duties of any party depend on the occurrence of an uncertain event [*Civ. Code* § 1434]. A condition is an event that must occur or be excused before performance on a contract becomes due [*In re Marriage of Hasso* (1991) 229 Cal.App.3d 1174, 1181, 280 Cal.Rptr. 919 ; Restatement (Second) of Contracts § 224]. It is for the court in the first instance to interpret a written agreement to determine whether there is a conditional obligation [see Ch. 3B, *Matthew Bender Interpretation of Contract Instructions*]. The jury can then decide the fact issue, if any, as to whether the uncertain event occurred. The occurrence or nonoccurrence of an uncertain event can operate to extinguish or create a contractual obligation. When the event is an act to be performed by a party to a contract, it becomes necessary to distinguish between conditions that depend on uncertain events and covenants. A covenant is a promise to render some performance, the breach of which gives rise to a cause of action for damages. The occurrence or nonoccurrence of an uncertain event on which a condition depends determines whether a duty to perform arises, the breach of which will give rise to an action for damages [Witkin, Summary of California Law, vol. 1, *Contracts*, § 778 (10th ed. 2005)].

[b] Burden of Proof

The plaintiff will have the burden of proof on the issue of the occurrence of uncertain events that cause defendant to have a duty to perform since such proof is necessary to establish the defendant's breach [*Evid. Code* § 500; *Reichert v. General Ins. Co.* (1968) 68 Cal.2d 822, 830, 69 Cal.Rptr. 321, 442 P.2d 377].

[c] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 3, *California Judicial Council Contracts Instructions*]:

CACI No. 321 Existence of Condition Precedent Disputed

CACI No. 322 Occurrence of Agreed Condition Precedent

CACI No. 323 Waiver of Condition Precedent

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawContract Conditions & ProvisionsConditions PrecedentContracts LawContract Conditions & ProvisionsConditions SubsequentContracts LawContract Conditions & ProvisionsExpress ConditionsGeneral Overview

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CHAPTER 3D Matthew Bender Performance and Breach of Contract Instructions
PART B. OCCURRENCE OF CONDITIONS

1-3D California Forms of Jury Instruction MB 300D.31

MB 300D.31 Due Diligence in Seeking to Cause Condition Precedent to Occur**[1] Instruction**[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Under the terms of the contract, Defendant was obligated to _____ [describe obligation, e.g., purchase the property] only if _____ [describe condition precedent, e.g., Defendant's Board of Directors approved the terms of the purchase]. However, the contract also required Defendant to make reasonable efforts to _____ [describe defendant's implied duty, e.g., obtain the approval of the Board] and, if [he/she/it] failed to do so, the law does not permit [him/her/it] to take advantage of that failure to avoid an obligation to _____ [describe obligation, e.g., purchase the property]. Consequently, if _____ [describe events constituting nonoccurrence, e.g., the lack of Board approval] was caused by Defendant's failure to make reasonable efforts to _____ [describe defendant's implied duty, e.g., obtain the approval of the Board], then Defendant is obligated to Plaintiff in the same manner as if _____ [describe events constituting fulfillment of condition, e.g., the Board had approved the terms of the purchase].

If you find that Defendant made reasonable efforts to _____ [describe defendant's implied duty, e.g., obtain the approval of the Board], you must find that Defendant had no obligation under the contract to _____ [describe obligation, e.g., purchase the property]. On the other hand, if you find that Defendant failed to make reasonable efforts to _____ [describe defendant's implied duty, e.g., obtain the approval of the Board], you must find that Defendant is obligated to Plaintiff in the same manner as if _____ [describe events constituting fulfillment of condition, e.g., the Board had approved the terms of the purchase] [optional (See Use of Instruction): unless Defendant proves, by a preponderance of the evidence, that _____ (describe events constituting nonoccurrence, e.g., the Board would not have given its approval) even if Defendant had made reasonable efforts to _____ (describe defendant's implied

duty, e.g., **obtain the Board's approval**)].

Authorities: *Campbell v. Kennedy* (1918) 177 Cal. 430, 432, 170 P. 1107 ; *Lynch v. Keystone Con. Min. Co.* (1912) 163 Cal. 690, 699, 126 P. 968 ; *Jacobs v. Tenneco West, Inc.* (1986) 186 Cal.App.3d 1413, 1417, 231 Cal.Rptr. 351 .

[2] Use of Instruction

This instruction should be used when the defendant's performance was conditioned on the occurrence of something over which the defendant had some control, such as obtaining a license. It should not be used when the occurrence or nonoccurrence is totally out of the defendant's control. The optional portion of the final sentence is used when a defendant claims that the condition precedent would have failed even if he or she had made reasonable efforts to secure its fulfillment.

This instruction assumes that the existence of the condition precedent and the nonoccurrence of the condition precedent are not disputed. If there is conflicting evidence as to the existence or failure of a condition precedent, this instruction should be modified to inform the jury that the above rules will only become applicable if it determines that there was a condition precedent to defendant's obligation and if it determines that the condition did not occur.

For related Judicial Council instructions, see [3][b], *below*.

[3] Comment

[a] Due Diligence

A party whose obligation to perform is subject to a condition precedent has an implied obligation to use reasonable diligence to secure the fulfillment of the condition [*Campbell v. Kennedy* (1918) 177 Cal. 430, 432, 170 P. 1107 ; *Lynch v. Keystone Con. Min. Co.* (1912) 163 Cal. 690, 699, 126 P. 968 ; *Jacobs v. Freeman* (1980) 104 Cal.App.3d 177, 188-191, 163 Cal.Rptr. 680]. When a party's failure to use reasonable diligence contributes materially to the nonoccurrence of a condition precedent, the condition is excused and the party will be obligated in the same manner as if the condition had occurred [*Jacobs v. Tenneco West, Inc.* (1986) 186 Cal.App.3d 1413, 1417, 231 Cal.Rptr. 351 ; *Rains v. Arnett* (1961) 189 Cal.App.2d 337, 347-348, 11 Cal.Rptr. 299]. When the plaintiff establishes that a defendant has failed to use reasonable diligence to secure the fulfillment of a condition precedent, the burden of proof shifts to the defendant; the defendant then has the burden of proving that his or her failure did not contribute materially to the nonoccurrence of the condition (i.e., that the condition would not have occurred even if defendant had used reasonable diligence) and the occurrence of the condition will be excused if defendant does not sustain this burden [*Jacobs v. Tenneco West, Inc.* (1986) 186 Cal.App.3d 1413, 1418-1419, 231 Cal.Rptr. 351].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 3, *California Judicial Council Contracts Instructions*]:

CACI No. 321 Existence of Condition Precedent Disputed

CACI No. 322 Occurrence of Agreed Condition Precedent

CACI No. 323 Waiver of Condition Precedent

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawContract Conditions & ProvisionsConditions Precedent

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CHAPTER 3D Matthew Bender Performance and Breach of Contract Instructions
PART B. OCCURRENCE OF CONDITIONS

1-3D California Forms of Jury Instruction MB 300D.32

MB 300D.32 Condition Concurrent**[1] Instruction** Condition Concurrent[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Under this contract, at the same time that Defendant was obligated to _____ [describe defendant's performance], Plaintiff was obligated to _____ [describe plaintiff's performance]. Plaintiff can only hold Defendant responsible for failing to perform if Plaintiff offered to perform at the same time that Defendant was supposed to perform.

Authorities: Civ. Code § 1437; *Katemis v. Westerlind* (1953) 120 Cal.App.2d 537, 545-546, 261 P.2d 553 .

[2] Use of Instruction

This instruction should be used when the parties agreed to exchange simultaneous performances.

[3] Comment

Concurrent conditions are conditions that are mutually dependent and to be performed at the same time [Civ. Code § 1437; *Katemis v. Westerlind* (1953) 120 Cal.App.2d 537, 545-546, 261 P.2d 553]. Whenever possible, the courts will construe promises in a bilateral contract as mutually dependent and concurrent [*Rubin v. Fuchs* (1969) 1 Cal.3d 50, 54, 81 Cal.Rptr. 373, 459 P.2d 925]. The chief practical distinction between conditions concurrent and conditions precedent is that conditions precedent require performance of an act (or the happening of some event) before an obligation arises, while performance of the concurrent condition need only be tendered for the other party to become obligated to perform his or her concurrent condition [*Pittman v. Canham* (1992) 2 Cal.App.4th 556, 559, 3 Cal.Rptr.2d 340 ; *Groobman v. Kirk* (1958) 159 Cal.App.2d 117, 123, 323 P.2d 867 ; see MB 300D.50 -MB 300D.62 (requirements for tender)].

LexisNexis Matthew Bender Expert Practice Tip--Condition Concurrent Is Unusual: The idea of two things happening "at the same time" is unusual. That is especially true as to "offered to perform" as contrasted to "supposed to perform." *By Rex Heeseman*

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawContract Conditions & ProvisionsConditions PrecedentContracts LawContract Conditions & ProvisionsExpress ConditionsGeneral Overview

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CHAPTER 3D Matthew Bender Performance and Breach of Contract Instructions
PART B. OCCURRENCE OF CONDITIONS

1-3D California Forms of Jury Instruction MB 300D.33

MB 300D.33 Condition Subsequent

[1] Instruction Condition Subsequent

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

[EITHER (See Use of Instruction)]

The parties agreed that Defendant would no longer be obligated to perform if _____ [condition subsequent] occurred. You must decide whether or not that event took place.

[OR]

You must determine whether or not Plaintiff and Defendant agreed that Defendant would not be bound to perform if _____ [condition subsequent] occurred. If you decide that they did so agree, you must then decide whether or not that event took place.

Authorities: Civ. Code § 1438; *Langford v. Eckert* (1970) 9 Cal.App.3d 439, 444-445, 88 Cal.Rptr. 429 .

[2] Use of Instruction

This instruction should be used when there is an issue involving a condition subsequent. The first alternative should be used when the court determines that there was a condition subsequent and the jury must decide whether the condition was met. The second alternative should be used when the jury must first determine whether there was a condition subsequent and then determine whether the condition was met.

LexisNexis Matthew Bender Expert Practice Tip--Use Words of This Instruction: Many attorneys

will struggle with the concept of a "condition subsequent." So, use the actual words of this instruction.
By Rex Heeseman

[3] Comment

A condition subsequent is defined as one referring to a future event, on the happening of which a contractual obligation is no longer binding on the other party, if that party chooses to avail himself or herself of the condition [*Civ. Code* § 1438]. Thus, a condition subsequent is a contractual provision that permits a party to a contract to terminate the contract on the happening of a specified future event. Before a court will construe a contract as creating a condition subsequent, an intent to create a condition subsequent must either be expressed or clearly implied [*Langford v. Eckert* (1970) 9 Cal.App.3d 439, 444-445, 88 Cal.Rptr. 429]. Examples of conditions subsequent are (1) a construction subcontract clause allowing cancellation for failure to timely perform [*Call v. Alcan Pacific Co.* (1967) 251 Cal.App.2d 442, 447-448, 59 Cal.Rptr. 763], and (2) an employment contract terminable on the sale of the company or the employee's entry into military service [*Hartman v. San Pedro Commercial Co.* (1944) 66 Cal.App.2d 935, 936-937, 153 P.2d 212]. There may be a related question as to the waiver of the right to rely on a condition subsequent [*Mitchell v. Cheney Slough Irrigation Co.* (1943) 57 Cal.App.2d 138, 143-144, 134 P.2d 34]. For instructions on waiver, see Ch. 3, *California Judicial Council Contracts Instructions*, CACI No. 336 ("Affirmative Defense--Waiver"), and Ch. 3F, *Matthew Bender Contract Defenses Instructions*.

Legal Topics:

For related research and practice materials, see the following legal topics:
 Contracts Law Contract Conditions & Provisions Conditions Subsequent

John F. Wells and Lise A. Pearlman were the original authors of this chapter. It has since been updated to reflect changes in the law, additional case citations and practice pointers by other lawyers as well as revisions including cross-references to the official CACI instructions.



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California Forms of Jury Instruction

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CHAPTER 3D Matthew Bender Performance and Breach of Contract Instructions
PART B. OCCURRENCE OF CONDITIONS

1-3D California Forms of Jury Instruction MB 300D.34

MB 300D.34 Time for Performance: Time Is of the Essence

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

The particular time of performance is not critical unless it is made critical either by the express agreement of the parties or by the circumstances of the case. If the thing to be done can be done as well at one time as another, time is not critical. On the other hand, if it is critical that performance take place at the particular time agreed on, a late offer of performance may be rejected. You must therefore decide whether the agreement of the parties or the circumstances of the case required timely performance. If so, late performance could properly be rejected.

Authorities: *Katemis v. Westerlind* (1956) 142 Cal.App.2d 799, 804-805, 807, 299 P.2d 383 ; *Major-Blakeney Corp. v. Jenkins* (1953) 121 Cal.App.2d 325, 331-332, 263 P.2d 655 .

[2] Use of Instruction

This instruction should be used when there is a factual dispute as to the parties' intent to make time of the essence or a dispute as to whether the circumstances made it so.

For related Judicial Council instructions, see [3][b], *below*.

[3] Comment

[a] Time Is of the Essence

A contractual provision making time of the essence of the contract has been held to mean at law that failure to perform by the specified time terminates the failing party's rights under the contract [*Major-Blakeney Corp. v. Jenkins* (1953)

121 Cal.App.2d 325, 331, 263 P.2d 655]. Whether time is of the essence can be determined either from the express agreement of the parties or from the nature of the contract [*Katemis v. Westerlind* (1956) 142 Cal.App.2d 799, 804-805, 807, 299 P.2d 383 ; Restatement (Second) of Contracts § 276].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 3, *California Judicial Council Contracts Instructions*]:

CACI No. 319, Interpretation--Reasonable Time

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawContract Conditions & ProvisionsExpress ConditionsTime Limitations

John F. Wells and Lise A. Pearlman were the original authors of this chapter. It has since been updated to reflect changes in the law, additional case citations and practice pointers by other lawyers as well as revisions including cross-references to the official CACI instructions.



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CHAPTER 3D Matthew Bender Performance and Breach of Contract Instructions
PART B. OCCURRENCE OF CONDITIONS

1-3D California Forms of Jury Instruction MB 300D.35-MB 300D.49

[Reserved]

MB 300D.35[Reserved]



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CHAPTER 3D Matthew Bender Performance and Breach of Contract Instructions
PART C. TENDER OF PERFORMANCE

1-3D California Forms of Jury Instruction MB 300D.50

MB 300D.50 Definition of Tender

[1] Instruction Definition of Tender

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

To establish that [he/she/it] made a valid offer to perform, Plaintiff must prove the following:

[CHOOSE FROM THE FOLLOWING (See Use of Instruction)]

1. That [his/her/its] offer was for full performance;
2. That the offer was made by _____ [Plaintiff or someone authorized to act on Plaintiff's behalf];
3. That the offer did not impose any conditions not already required by the contract;
4. That the offer was made at an appropriate time and place;
5. That the offer was made to _____ [Defendant or someone authorized to act on Defendant's behalf];
6. That the offer was made in good faith; and
7. That Plaintiff was able and willing to perform according to the offer.

I will now explain each of these requirements in more detail.

Authorities: *Civ. Code §§ 1485-1505.*

[2] Use of Instruction

This instruction should be modified to include only the elements of tender that are actually issues of fact in the particular case. It should be followed by relevant instructions in this Part on the specific issues that are raised. This instruction assumes that it is the plaintiff's tender of performance that is at issue. If the issue is whether the defendant's obligation to perform has been extinguished by a tender, the instruction should be modified accordingly.

LexisNexis Matthew Bender Expert Practice Tip--Use Checklist and Visual Aid in Going Through

Elements: The instruction in [1], *above*, is clear, but with many elements. Therefore, in arguing this instruction to a jury, you may want to utilize a checklist. In addition, a courtroom visual aid could be helpful in going over each element of the instruction and the related evidence. *By Rex Heeseman and Ronald Oster*

[3] Comment

The rules regarding offers of performance are codified in *Civ. Code §§ 1485-1505*. In summary, the tender must be:

- An offer of full performance [*Civ. Code § 1486*] with intent to extinguish the obligation [*Civ. Code § 1485*];
- Made by the obligor, or someone acting on his or her behalf and with his or her consent [*Civ. Code § 1487*], to a creditor or one authorized to act on behalf of the creditor [*Civ. Code § 1488*];
- Made at an appropriate place [*Civ. Code § 1489*] and time [*Civ. Code §§ 1490, 1491*], neither early [*Waller v. Brooks (1968) 267 Cal.App.2d 389, 394-395, 72 Cal.Rptr. 228*] nor late [*see Beauchamp v. Archer (1881) 58 Cal. 431, 434*], and without any conditions except those that the creditor is already obligated to perform [*Civ. Code §§ 1494, 1498*]; and
- Made in good faith [*Civ. Code § 1493*], with the person tendering performance able and willing to perform [*Civ. Code § 1495*].

Whether the tender is sufficient under these rules is an issue of fact [*see K. & M., Inc. v. Le Cuyer (1951) 107 Cal.App.2d 710, 717, 238 P.2d 28*; *McDorman v. Moody (1942) 50 Cal.App.2d 136, 140, 122 P.2d 639*].

The plaintiff will have the burden of proof on the issue of whether there has been a valid tender, whether the issue is the plaintiff's performance or the defendant's breach [*Evid. Code § 500*; *Reichert v. General Ins. Co. (1968) 68 Cal.2d 822, 830, 69 Cal.Rptr. 321, 442 P.2d 377*; *Pry Corp. of America v. Leach (1960) 177 Cal.App.2d 632, 639, 2 Cal.Rptr. 425*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts Law Performance Tender & Delivery Contracts Law Sales of Goods Performance Tender of Delivery Evidence Procedural Considerations Burdens of Proof Allocation

John F. Wells and Lise A. Pearlman were the original authors of this chapter. It has since been updated to reflect changes in the law, additional case citations and practice pointers by other lawyers as well as revisions including cross-references to the official CACI instructions.



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CHAPTER 3D Matthew Bender Performance and Breach of Contract Instructions
PART C. TENDER OF PERFORMANCE

1-3D California Forms of Jury Instruction MB 300D.51

MB 300D.51 Offer of Full Performance Required

[1] Instruction Offer of Full Performance Required

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

An offer of full performance means an offer to perform everything required by the contract to be performed. It is not enough to offer to do only part of what is required.

Authority: *Civ. Code § 1486.*

[2] Use of Instruction

This instruction should be used with the instruction in MB 300D.50 when there is a fact issue as to whether plaintiff tendered full performance. If there is evidence of waiver of defects in the tender, see Ch. 3F, *Matthew Bender Contract Defenses Instructions*.

[3] Comment

The Civil Code states categorically that an offer of partial performance is of no effect [*Civ. Code § 1486*]. However, this rule is subject to exceptions, such as when full performance is impossible or when there is evidence of waiver of defects in tender. For coverage of these exceptions, see Ch. 3F, *Matthew Bender Contract Defenses Instructions*.

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawPerformanceTender & DeliveryContracts LawSales of GoodsPerformanceTender of Delivery

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CHAPTER 3D Matthew Bender Performance and Breach of Contract Instructions
PART C. TENDER OF PERFORMANCE

1-3D California Forms of Jury Instruction MB 300D.52

MB 300D.52 Person Required to Make Offer

[1] Instruction Person Required to Make Offer

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

An offer of performance may be made by someone on Plaintiff's behalf if:

- 1. The person making the offer did so with Plaintiff's consent; and**
- 2. The person making the offer informed Defendant that the offer was being made on Plaintiff's behalf.**

Authorities: *Civ. Code § 1487; Mahler v. Newbaur (1867) 32 Cal. 168, 170 .*

[2] Use of Instruction

This instruction should be used with the instruction in MB 300D.50 when there is a fact issue as to whether a valid tender was made by someone acting on the debtor's behalf. The instruction assumes that it is the plaintiff's tender of performance that is at issue. If the issue is whether the defendant's obligation to perform was extinguished by a tender, the party designations should be reversed.

[3] Comment

An offer of performance must be made by the debtor or by some person on his or her behalf and with his or her assent [*Civ. Code § 1487*]. The tender is only valid if the creditor is informed on whose behalf it is made [*Mahler v. Newbaur (1867) 32 Cal. 168, 170*]. If a third party actually performs a party's obligation, it is extinguished in the same manner as if the party performed it [*Civ. Code § 1473*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawPerformanceTender & DeliveryContracts LawSales of GoodsPerformanceTender of Delivery

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CHAPTER 3D Matthew Bender Performance and Breach of Contract Instructions
PART C. TENDER OF PERFORMANCE

1-3D California Forms of Jury Instruction MB 300D.53

MB 300D.53 Person to Whom Offer Must Be Made

[1] Instruction Person to Whom Offer Must Be Made

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Plaintiff asserts that [he/she/it] made an offer to perform to _____ [name of agent or co-obligor of defendant], and that the offer was refused. If you find that the offer was made to _____ [name of agent or co-obligor of defendant], it has the same effect as an offer made to Defendant.

Authorities: *Civ. Code § 1488; Barnes v. Osgood (1930) 103 Cal.App. 730, 734, 284 P. 975 ; Hoover v. Wolfe (1914) 167 Cal. 337, 342, 139 P. 794 .*

[2] Use of Instruction

This instruction should be used with the instruction in MB 300D.50 when tender has been made to an agent or joint obligor of the other party. If there is an issue of fact as to whether or not such relationship existed, an instruction should be given on that issue as well [see Ch. 3C, *Matthew Bender Contract Party Instructions*]. This instruction assumes that it is the plaintiff's tender of performance that is at issue. If the issue is whether the defendant's obligation to perform was extinguished by a tender, the party designations should be reversed.

[3] Comment

A tender may be made to a co-obligor or person authorized to receive the tender [*Civ. Code § 1488; Barnes v. Osgood (1930) 103 Cal.App. 730, 734, 284 P. 975*]. Refusal of tender by one of the joint obligors is tender to and refusal by both [*Hoover v. Wolfe (1914) 167 Cal. 337, 342, 139 P. 794*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawPerformanceTender & DeliveryContracts LawSales of GoodsPerformanceTender of Delivery

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CHAPTER 3D Matthew Bender Performance and Breach of Contract Instructions
PART C. TENDER OF PERFORMANCE

1-3D California Forms of Jury Instruction MB 300D.54

MB 300D.54 Unwarranted Conditions

[1] Instruction Unwarranted Conditions

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Plaintiff offered to perform on condition that _____ [describe condition]. This offer was only proper if you find that the parties had agreed that the _____ [describe condition] had to occur before Plaintiff was required to perform.

Authorities: *Civ. Code §§ 1494, 1498.*

[2] Use of Instruction

This instruction should be used with the instruction in MB 300D.50 when there is a fact issue as to whether an unconditional tender was made. The instruction assumes that it is the plaintiff's tender of performance that is at issue. If the issue is whether the defendant's obligation to perform was extinguished by a tender, the party designations should be reversed.

LexisNexis Matthew Bender Expert Practice Tip--Stress Second Sentence of Instruction: The phrase "perform on condition" may be confusing to some jurors. So, stress the second sentence. *By Rex Heeseman*

[3] Comment

A party may only make his or her offer conditional if, under the agreement, such party's performance is subject to a condition precedent or concurrent [*Civ. Code § 1498*]. An offer of performance must be free from any conditions to which the other party is not bound [*Civ. Code § 1494*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawPerformanceTender & DeliveryContracts LawSales of GoodsPerformanceTender of Delivery

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CHAPTER 3D Matthew Bender Performance and Breach of Contract Instructions
PART C. TENDER OF PERFORMANCE

1-3D California Forms of Jury Instruction MB 300D.55

MB 300D.55 Time of Offer

[1] Instruction Time of Offer

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

If you find that the parties by their agreement specified a certain time when Plaintiff was required to perform, Plaintiff had to offer performance at that time, [within reasonable hours] and not before or after.

Authority: *Civ. Code § 1490.*

[2] Use of Instruction

This instruction should be used with the instruction in MB 300D.50 when there is a fact issue as to whether a specified time for performance was fixed by the parties. The bracketed language may be used if the specified time was a particular date or dates.

The instruction assumes that it is the plaintiff's tender of performance that is at issue. If the issue is whether the defendant's obligation to perform was extinguished by a tender, the party designations should be reversed.

[3] Comment

When an obligation fixes a time for its performance, an offer of performance must be made at that time, within reasonable hours, and not before or afterwards [*Civ. Code § 1490*]. This does not apply to obligations to be performed on demand. An offer to perform such obligations may be made at any time before the debtor, on a reasonable demand, has refused to perform [*Civ. Code § 1491*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawContract Conditions & ProvisionsExpress ConditionsTime LimitationsContracts LawPerformanceTender
& DeliveryContracts LawSales of GoodsPerformanceTender of Delivery

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CHAPTER 3D Matthew Bender Performance and Breach of Contract Instructions
PART C. TENDER OF PERFORMANCE

1-3D California Forms of Jury Instruction MB 300D.56

MB 300D.56 Place of Offer

[1] Instruction Place of Offer

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

You must decide whether or not Plaintiff's offer to perform was made at a proper place based on the following:

- 1. If you find that the parties agreed on a place of performance, then the offer to perform was required to be made at that place.**
- 2. If you find that the parties did not agree on a place of performance, then Plaintiff was entitled to offer to perform where Defendant was located or, if Defendant could not be located, at Defendant's home or business in California or, if neither Defendant nor [his/her/its] home or business could be located, then at any place in California.**

Authority: *Civ. Code § 1489.*

[2] Use of Instruction

This instruction should be used with MB 300D.50 when there is a fact issue as to whether a specified place for performance was fixed by the parties and, if it was not, whether the offer of performance was at a proper place.

The instruction assumes that it is the plaintiff's tender of performance that is at issue. If the issue is whether the defendant's obligation to perform was extinguished by a tender, the party designations should be reversed.

[3] Comment

In the absence of an express provision to the contrary, an offer of performance may be made, at the debtor's option [*Civ. Code* § 1489]:

- At any place appointed by the creditor;
- Wherever the person to whom the offer ought to be made can be found;
- If such person cannot, with reasonable diligence, be found in California, and within a reasonable distance from his or her residence or place of business, or if he or she evades the debtor, then at his or her residence or place of business, if the same can, with reasonable diligence, be found in California; or
- If this cannot be done, then at any place in California.

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawPerformanceTender & DeliveryContracts LawSales of GoodsPerformanceTender of Delivery

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CHAPTER 3D Matthew Bender Performance and Breach of Contract Instructions PART C. TENDER OF PERFORMANCE

1-3D California Forms of Jury Instruction MB 300D.57

MB 300D.57 Requirement of Good Faith

[1] Instruction Requirement of Good Faith

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

A good faith offer to perform means an honest offer to do what is required under the contract. [If Plaintiff was in fact unable to perform, such inability is evidence that Plaintiff's offer to perform was not made in good faith.]

Authorities: *Civ. Code § 1493; K. & M., Inc. v. Le Cuyer (1951) 107 Cal.App.2d 710, 717, 238 P.2d 28 ; McCarthy v. Grider (1925) 72 Cal.App. 393, 402, 237 P. 751 .*

[2] Use of Instruction

This instruction should be used with the instruction in MB 300D.50 when good faith of a tender is at issue. The second sentence should only be given when there is evidence that the tendering party was unable to perform.

The instruction assumes that it is the plaintiff's tender of performance that is at issue. If the issue is whether the defendant's obligation to perform was extinguished by a tender, the party designations should be reversed.

[3] Comment

An offer of performance must be made in good faith, and in such manner as is most likely, under the circumstances to benefit the offeree [*Civ. Code § 1493; K. & M., Inc. v. Le Cuyer (1951) 107 Cal.App.2d 710, 717, 238 P.2d 28*]. Good faith is a requirement that may not be waived [*Dickey v. Kuhn (1930) 106 Cal.App. 300, 304-305, 289 P. 242*]. The inability to perform is evidence of lack of good faith [*McCarthy v. Grider (1925) 72 Cal.App. 393, 402, 237 P. 751*]. However, inability to perform is also an independent ground for invalidating tender of performance [*see MB 300D.58*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawContract InterpretationGood Faith & Fair DealingContracts LawPerformanceTender & DeliveryContracts LawSales of GoodsPerformanceTender of Delivery

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CHAPTER 3D Matthew Bender Performance and Breach of Contract Instructions
PART C. TENDER OF PERFORMANCE

1-3D California Forms of Jury Instruction MB 300D.58

MB 300D.58 Ability to Perform

[1] Instruction Ability to Perform

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

An offer to perform has no effect if the person making it is not able and willing to perform according to the offer. This means that at the time performance was supposed to take place Plaintiff must have been in control of resources by which [he/she/it] could in fact have performed if called on to do so.

[*OPTIONAL (See Use of Instruction)*]

A person is able to perform if that person has the ability to borrow the required funds.

Authorities: *Civ. Code § 1495; Baber v. Pappas (1929) 97 Cal.App. 534, 536, 275 P. 978 ; Ramsdell v. Krehmke (1928) 95 Cal.App. 195, 199, 272 P. 333 .*

[2] Use of Instruction

This instruction should be used with the instruction in MB 300D.50 in any case involving a tender of performance in which ability to perform is at issue. The optional sentence should be used when the ability to borrow funds necessary for performance is an issue.

The instruction assumes that it is the plaintiff's tender of performance that is at issue. If the issue is whether the defendant's obligation to perform was extinguished by a tender, the party designations should be reversed.

LexisNexis Matthew Bender Expert Practice Tip--Willingness to Perform vs. Ability to Perform:

There is an obvious difference between being willing to perform and being able to perform. Jurors will

usually understand and appreciate this distinction. *By Rex Heeseman*

LexisNexis Matthew Bender Expert Practice Tip--Using Optional Part of Instruction: The optional portion of this instruction may be necessary if the defendant questions the plaintiff's financial ability to perform. *By Ronald Oster*

[3] Comment

An offer of performance is of no effect if the person making it is not able and willing to perform according to the offer [Civ. Code § 1495]. This ability to perform is an essential requirement of tender that cannot be waived by the other party [*Canal-Randolph Anaheim, Inc. v. Wilkoski* (1978) 78 Cal.App.3d 477, 497, 144 Cal.Rptr. 474]. Proof of ability to perform has been defined in real estate commission cases as proof that a buyer commanded resources on which he or she could have performed or could have obtained the requisite credit [*Baber v. Pappas* (1929) 97 Cal.App. 534, 536, 275 P. 978 ; *Ramsdell v. Krehmke* (1928) 95 Cal.App. 195, 199, 272 P. 333]. This same definition should be applicable in all cases involving ability to perform when the availability of credit is an issue. Good faith is a related requirement that similarly cannot be waived [see MB 300D.57].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawPerformanceTender & DeliveryContracts LawSales of GoodsPerformanceTender of Delivery

John F. Wells and Lise A. Pearlman were the original authors of this chapter. It has since been updated to reflect changes in the law, additional case citations and practice pointers by other lawyers as well as revisions including cross-references to the official CACI instructions.



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California Forms of Jury Instruction

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CHAPTER 3D Matthew Bender Performance and Breach of Contract Instructions
PART C. TENDER OF PERFORMANCE

1-3D California Forms of Jury Instruction MB 300D.59

MB 300D.59 Ability to Perform--Third Party Cooperation

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Plaintiff could only have performed [his/her/its] obligation under the agreement with the cooperation of _____ [name of third party]. To show that [he/she/it] had the ability to perform, Plaintiff must prove either that [he/she/it] had that cooperation, or that [he/she/it] could have obtained it.

Authority: Pacific Odorite Corp. v. Gersh (1949) 94 Cal.App.2d 174, 178-179, 210 P.2d 318 .

[2] Use of Instruction

This instruction should be used when the plaintiff's ability to perform is at issue and performance would have required third party cooperation.

The instruction assumes that it is the plaintiff's tender of performance that is at issue. If the issue is whether the defendant's obligation to perform was extinguished by a tender, the party designations should be reversed.

[3] Comment

When performance requires the cooperation of a third party, establishing the ability to perform includes a showing that such cooperation could have been obtained [*Pacific Odorite Corp. v. Gersh (1949) 94 Cal.App.2d 174, 178-179, 210 P.2d 318*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawPerformanceTender & DeliveryContracts LawSales of GoodsPerformanceTender of Delivery

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CHAPTER 3D Matthew Bender Performance and Breach of Contract Instructions
PART C. TENDER OF PERFORMANCE

1-3D California Forms of Jury Instruction MB 300D.60

MB 300D.60 Effect of Tender

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

A valid offer to perform must be accepted.

[EITHER (See Use of Instruction)]

If Plaintiff made a valid offer to perform, then any rejection of that offer by Defendant was a breach of the contract.

[OR]

If Defendant made a valid offer to perform that Plaintiff rejected, then Defendant did not breach the contract.

Authority: *Still v. Plaza Marina Commercial Corp.* (1971) 21 Cal.App.3d 378, 385, 98 Cal.Rptr. 414 .

[2] Use of Instruction

This instruction should be used in conjunction with the instruction in MB 300D.50 and any other applicable instructions in cases involving a fact issue of valid tender. The first alternative should be used if the plaintiff was the tendering party. If the defendant was the tendering party, then the second alternative is applicable.

[3] Comment

If the party to whom performance is properly tendered refuses to accept the tender, he or she has breached the contract [*Still v. Plaza Marina Commercial Corp.* (1971) 21 Cal.App.3d 378, 385, 98 Cal.Rptr. 414]. To a certain extent, tender has the same effect as actual performance. Proper tender may also be raised in defense of a contract action brought by the other party. The burden of proving improper tender is on the plaintiff because the plaintiff must prove the defendant's breach [*Reichert v. General Ins. Co.* (1968) 68 Cal.2d 822, 830, 69 Cal.Rptr. 321, 442 P.2d 377]. The party making the tender that is refused may (1) rescind the contract [see Ch. 3G, *Matthew Bender Rescission of Contract Instructions*], (2) sue for breach of contract, or (3) seek specific performance when that remedy is available [see Witkin, Summary of California Law, vol. 1, *Contracts*, § 769 (10th ed. 2005)].

However, the tender does not by itself discharge the principal obligation. If the tender is monetary, the debt may be extinguished by depositing payment in a bank in accordance with *Civ. Code* § 1500. Although tender does not itself discharge the obligation, it does extinguish incidents of the obligation, such as liens held as security for a debt, and stops the running of any interest on the payment [*Civ. Code* § 1504; *Universal C.I.T. Credit Corp. v. Rater* (1963) 214 Cal.App.2d 493, 494, 29 Cal.Rptr. 631 (discharge of lien); *Rose v. Hecht* (1949) 94 Cal.App.2d 662, 665, 211 P.2d 347 (stopping interest)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts Law Performance Tender & Delivery Contracts Law Sales of Goods Performance Tender of Delivery

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CHAPTER 3D Matthew Bender Performance and Breach of Contract Instructions PART C. TENDER OF PERFORMANCE

1-3D California Forms of Jury Instruction MB 300D.61

MB 300D.61 Production of Things to Be Delivered

[1] Instruction Production of Things to Be Delivered

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

The contract called for Plaintiff to deliver _____ [describe thing to be delivered] to Defendant. Plaintiff must only show that [he/she/it] offered to deliver _____ [describe thing to be delivered]. It was not necessary to go through with the actual delivery if an offer of delivery was rejected by Defendant.

Authority: *Civ. Code* § 1496.

[2] Use of Instruction

This instruction should be used with the instruction in MB 300D.50 when an offer of delivery was made but nothing was actually delivered. It assumes that it is the plaintiff's performance that is at issue. If the issue is the defendant's performance, the party designations should be reversed.

[3] Comment

This instruction is derived from *Civ. Code* § 1496, which provides that a thing to be delivered, if any, need not in any case be actually produced, on an offer of performance, unless the offer is accepted. *Civ. Code* § 1496 altered the common law formerly requiring the thing to be delivered to be physically tendered [*Galland v. Lewis* (1864) 26 Cal. 46, 49-50]. Although physical production may be excused, proof of good faith [see MB 300D.57] and ability to perform [see MB 300D.58 -MB 300D.59] are not [*Backus v. Sessions* (1941) 17 Cal.2d 380, 385, 110 P.2d 51 ; *Dickey v. Kuhn* (1930) 106 Cal.App. 300, 304-305, 289 P. 242 ; *McCarthy v. Grider* (1925) 72 Cal.App. 393, 402, 237 P. 751].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawPerformanceTender & DeliveryContracts LawSales of GoodsPerformanceTender of Delivery

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CHAPTER 3D Matthew Bender Performance and Breach of Contract Instructions
PART C. TENDER OF PERFORMANCE

1-3D California Forms of Jury Instruction MB 300D.62

MB 300D.62 Separation of Thing Offered**[1] Instruction** Separation of Thing Offered[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Plaintiff offered _____ [describe thing offered in performance] **together with**
 _____ [describe things with which it was intermingled]. **This is only a valid offer if**
 _____ [describe thing offered in performance] **could be separated immediately and without**
difficulty from _____ [describe things with which it was intermingled]. **If it could not in fact be so**
separated, Defendant was justified in refusing to accept Plaintiff's offer of performance.

Authority: *Civ. Code § 1497.*

[2] Use of Instruction

This instruction should be used with the instruction in MB 300D.50 when the tendered performance has been mingled with other things and there is a question of fact as to whether the thing tendered was separable. The party designations should be reversed if it is the validity of the defendant's tender of performance that is at issue. In both situations the burden of proof is on the plaintiff because the plaintiff must prove both the plaintiff's performance and the defendant's breach.

[3] Comment

This instruction is based on *Civ. Code § 1497*, which provides that a thing, when offered by way of performance, must not be mixed with other things from which it cannot be separated immediately and without difficulty. For coverage of contracts governed by the Commercial Code, see Ch. 3H, *Matthew Bender Commercial Code Sales Contract Instructions*.

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawPerformanceTender & DeliveryContracts LawSales of GoodsPerformanceTender of Delivery

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CHAPTER 3D Matthew Bender Performance and Breach of Contract Instructions
PART C. TENDER OF PERFORMANCE

1-3D California Forms of Jury Instruction MB 300D.63-MB 300D.69

[Reserved]

MB 300D.63[Reserved]



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CHAPTER 3D Matthew Bender Performance and Breach of Contract Instructions PART D. EXCUSES FOR NON-PERFORMANCE

1-3D California Forms of Jury Instruction MB 300D.70

MB 300D.70 Useless Tender

[1] Instruction Useless Tender

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Plaintiff contends that [he/she/it] did not offer to perform at the time required by the contract for the reason that _____ [describe facts by which plaintiff claims tender would have been useless]. Plaintiff must prove that under the circumstances an offer to perform would have been useless. If you find that such was the case, then Plaintiff was excused from offering to perform.

Authorities: *Greenstone v. Claretian Theo. Seminary* (1959) 173 Cal.App.2d 21, 33, 343 P.2d 161 ; *Enfield v. Hoffman Motor Co.* (1953) 117 Cal.App.2d 800, 807, 257 P.2d 458 .

[2] Use of Instruction

This instruction should be used when tender was allegedly useless for reasons other than a reasonable certainty of rejection [see *MB 300D.71*], notice of refusal or inability to perform [see *MB 300D.72*], and notice of refusal to accept performance [see *MB 300D.74*]. These situations all involve useless tender, and the cited instructions should be used instead of this general instruction in those specific fact situations.

This instruction assumes that it is the plaintiff's excuse for failure to tender performance that is at issue. If the issue is the defendant's excuse for failure to perform, the instruction should be modified accordingly. The determination of which party has the burden of proving the defendant's excuse depends on whether it is apparent from the terms of the contract pleaded by the plaintiff [see [3], *below*].

LexisNexis Matthew Bender Expert Practice Tip--Be Ready to Explain Facts: The word "useless" may seem strange in this context to some jurors. Therefore, be ready to explain the relevant facts. *By Rex Heeseman*

[3] Comment

This instruction reflects the general rule that the law does not require idle acts [*Greenstone v. Claretian Theo. Seminary* (1959) 173 Cal.App.2d 21, 33, 343 P.2d 161 ; *Enfield v. Hoffman Motor Co.* (1953) 117 Cal.App.2d 800, 807, 257 P.2d 458] .

The plaintiff has the burden of proof on the issue of whether there is a valid excuse for his or her nonperformance [*Evid. Code* § 500; *Reichert v. General Ins. Co.* (1968) 68 Cal.2d 822, 830, 69 Cal.Rptr. 321, 442 P.2d 377 ; *Pry Corp. of America v. Leach* (1960) 177 Cal.App.2d 632, 639, 2 Cal.Rptr. 425].

Although the plaintiff has the burden of proving both his or her excuse from tendering performance and the defendant's breach, the plaintiff is not required to negate the existence of all justifiable excuses for the defendant's failure to tender performance. Excuses for nonperformance not apparent on the face of the contract or embraced within the facts alleged in the complaint are an affirmative defense [*Eucalyptus G. Assn. v. Orange C. N. & L. Co.* (1917) 174 Cal. 330, 335, 163 P. 45]. As such, the defendant carries the burden of proof [*Evid. Code* § 500].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawBreachNonperformanceContracts LawPerformanceTender & DeliveryContracts LawSales of GoodsBreach, Repudiation & ExcuseExcuse From PerformanceContracts LawSales of GoodsPerformanceTender of Delivery

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CHAPTER 3D Matthew Bender Performance and Breach of Contract Instructions
PART D. EXCUSES FOR NON-PERFORMANCE

1-3D California Forms of Jury Instruction MB 300D.71

MB 300D.71 Reasonable Certainty of Rejection

[1] Instruction Reasonable Certainty of Rejection

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Plaintiff asserts that [he/she/it] never offered to perform because Defendant would have rejected that performance had it been offered. Plaintiff must prove that under the circumstances it was reasonably certain that Plaintiff's offer of performance would have been rejected. If so, then no offer of performance by Plaintiff was necessary.

Authority: *Hossom v. City of Long Beach* (1948) 83 Cal.App.2d 745, 750, 189 P.2d 787 .

[2] Use of Instruction

This instruction should be used when tender allegedly was not made because it appeared that it would have been rejected. If the defendant has given notice of refusal or inability to perform, use the instruction in MB 300D.72. If the defendant has given notice that the Plaintiff's performance will be rejected, use the instruction in MB 300D.73. If tender was allegedly useless for reasons other than apparent rejection, use the instruction in MB 300D.70.

This instruction assumes that the issue is the plaintiff's excuse for failing to tender performance. If the issue is the defendant's failure, then the party designations should be reversed and the defendant may have the burden of proof [see MB 300D.70[3]].

LexisNexis Matthew Bender Expert Practice Tip--Plaintiff Should Explain Reasons for Not Offering to Perform: This instruction obviously applies to cases of anticipatory repudiation of a contract. If defendant has not expressly repudiated the contract, plaintiff should explain why plaintiff did not offer to perform. For example, it may be expensive to make an offer that is reasonably certain to be rejected. Since plaintiff is under a duty to avoid unnecessary damages (i.e., the duty to mitigate), this

could explain the lack of an offer to perform. *By Ronald Oster*

LexisNexis Matthew Bender Expert Practice Tip--Use Care When Coordinating Evidence: The phrase "reasonably certain" may be confusing to some jurors. Hence, marshal the related evidence with some care. *By Rex Heeseman*

[3] Comment

An offer to perform is not necessary when it is reasonably certain that it will not be accepted [*Hossom v. City of Long Beach* (1948) 83 Cal.App.2d 745, 750, 189 P.2d 787]. The burden of proof for excuse of tender is on the plaintiff [*Evid. Code* § 500; *Reichert v. General Ins. Co.* (1968) 68 Cal.2d 822, 830, 69 Cal.Rptr. 321, 442 P.2d 377].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawBreachAnticipatory RepudiationGeneral OverviewContracts LawPerformanceTender & Delivery

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CHAPTER 3D Matthew Bender Performance and Breach of Contract Instructions
PART D. EXCUSES FOR NON-PERFORMANCE

1-3D California Forms of Jury Instruction MB 300D.72

MB 300D.72 Notice of Refusal or Inability to Perform**[1] Instruction** Notice of Refusal or Inability to Perform[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Plaintiff asserts that [he/she/it] did not offer to perform [his/her/its] obligations under the contract because Defendant notified Plaintiff that Defendant _____ [would not or could not] perform. To be excused from offering to perform, Plaintiff must prove both of the following:

- 1. Defendant gave Plaintiff clear and definite notice that Defendant _____ [would not or could not] perform when required to do so; and**
- 2. At the time such notice was given, Plaintiff's performance was not yet due.**

[OPTIONAL (See Use of Instruction)]

If Plaintiff proves both of these things, then Plaintiff's offer to perform is excused unless Defendant proves that before Plaintiff's performance was due, Defendant gave Plaintiff clear and definite notice that [he/she/it] _____ [would or could] perform when required to do so.

Authorities: Civ. Code § 1440; *Hulen v. Stuart* (1923) 191 Cal. 562, 569-571, 217 P. 750 ; *Layton v. West* (1969) 271 Cal.App.2d 508, 512, 76 Cal.Rptr. 507 ; *Hertz Driv-Ur-Self Stations, Inc. v. Schenley Distil.* (1953) 119 Cal.App.2d 754, 758, 260 P.2d 93 .

[2] Use of Instruction

This instruction should be used when there is a fact issue as to whether notice of refusal or inability to perform has been given. The optional instruction applies when a retraction has allegedly been given. If the defendant has given notice of an intended breach of a contractual promise that would substantially impair the contract's value, use the instruction in MB 300D.73. If the defendant has given notice of refusal to accept the plaintiff's performance, use the instruction in MB 300D.74.

An instruction on the requirements for the notice is set forth in MB 300D.76. If there is evidence of the plaintiff's change of position based on the defendant's notice of refusal to perform, use the instruction in MB 300D.74. The plaintiff has the burden of proving notice of the defendant's refusal [see MB 300D.70[3]] and the defendant has the burden of proving retraction [see [3], below].

[3] Comment

If one party notifies the other that he or she will not perform the contract and does not retract the notice before the time for performance is due, the other party does not have to perform [Civ. Code § 1440]. Repudiation is a question of fact to be determined from the evidence [*Hulen v. Stuart* (1923) 191 Cal. 562, 571, 217 P. 750 ; *Layton v. West* (1969) 271 Cal.App.2d 508, 512, 76 Cal.Rptr. 507 ; *Singh v. Burkhardt* (1963) 218 Cal.App.2d 285, 293, 32 Cal.Rptr. 639 ; *Hertz Driv-Ur-Self Stations, Inc. v. Schenley Distil.* (1953) 119 Cal.App.2d 754, 758-760, 260 P.2d 93]. After one party to a contract has notified the other that he or she will not, or cannot, perform, the burden is on him or her to show that before the time of performance he or she notified the other party of his or her willingness and ability to perform [*Hulen v. Stuart* (1923) 191 Cal. 562, 571, 217 P. 750].

In any event, proof of repudiation excusing tender does not dispense with the requirement that the nonrepudiating party prove ability to perform [*McDorman v. Moody* (1942) 50 Cal.App.2d 136, 140-141, 122 P.2d 639]. This does not mean that the nonrepudiating party must have completed all steps necessary to perform so long as he or she was prepared to do so [*L.A. Coin-O-Matic Laundries v. Harow* (1961) 195 Cal.App.2d 324, 330, 15 Cal.Rptr. 693].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawBreachAnticipatory RepudiationGeneral OverviewContracts LawBreachNonperformanceContracts LawPerformanceImpossibility of PerformanceGeneral OverviewEvidenceProcedural ConsiderationsBurdens of ProofAllocation

John F. Wells and Lise A. Pearlman were the original authors of this chapter. It has since been updated to reflect changes in the law, additional case citations and practice pointers by other lawyers as well as revisions including cross-references to the official CACI instructions.



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CHAPTER 3D Matthew Bender Performance and Breach of Contract Instructions
PART D. EXCUSES FOR NON-PERFORMANCE

1-3D California Forms of Jury Instruction MB 300D.73

MB 300D.73 Notice of Intended Breach of Contractual Promise

[1] Instruction Notice of Intended Breach of Contractual Promise

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INST. NO.** _____

Plaintiff asserts that [he/she/it] did not offer to perform [his/her/its] obligations under the contract because Defendant made a statement to Plaintiff indicating that [he/she/it] would breach an important contractual promise, thereby substantially impairing the value of the contract.

Authority: *Mobil Oil Exploration & Producing Southeast, Inc. v. United States* (2000) 530 U.S. 604, 120 S.Ct. 2423, 2437-2438, 147 L.Ed.2d 528 .

[2] Use of Instruction

This instruction should be used when there is a fact issue as to whether notice of intended breach of a promise that would substantially impair the value of the contract has been given. If the defendant has given notice of refusal or inability to perform, use the instruction in MB 300D.72. If defendant has given notice of refusal to accept the plaintiff's performance, use the instruction in MB 300D.74.

For related Judicial Council instructions, see [3][b], *below*.

[3] Comment

[a] Notice of Intended Breach

In *Mobil Oil Exploration & Producing Southeast, Inc. v. United States* [*Mobil Oil Exploration & Producing Southeast, Inc. v. United States* (2000) 530 U.S. 604, 120 S.Ct. 2423, 147 L.Ed.2d 528], two oil companies sought restitution

(rather than damages for breach of contract) of \$156 million that they had paid to the federal government in return for lease contracts giving them rights to explore for and develop oil off the North Carolina coast. The rights were conditioned on the companies obtaining a set of further governmental permissions. The companies claimed that the government repudiated the contracts when it denied them certain elements of the permission-seeking opportunities that the contracts had promised. The United States Supreme Court agreed that the government broke its promise and repudiated the contracts, and that it must give the companies their money back [*Mobil Oil Exploration & Producing Southeast, Inc. v. United States* (2000) 530 U.S. 604, 607, 120 S.Ct. 2423, 147 L.Ed.2d 528] .

The Court noted that when the United States enters into contractual relations its rights and duties are governed by the law applicable to contracts between private individuals. It then reviewed the applicable contract principles set forth in the Restatement of Contracts. Under the Restatement, when one party to a contract repudiates the contract, the other party is entitled to restitution for any benefit that he or she has conferred on the repudiating party by way of part performance or reliance [*Mobil Oil Exploration & Producing Southeast, Inc. v. United States* (2000) 530 U.S. 604, 607-608, 120 S.Ct. 2423, 147 L.Ed.2d 528 (citing Restatement of Contracts (2nd) § 373)]. "Repudiation" is a statement by the obligor to the obligee indicating that the obligor will commit a breach that would of itself give the obligee a claim for damages for total breach [*Mobil Oil Exploration & Producing Southeast, Inc. v. United States* (2000) 530 U.S. 604, 608, 120 S.Ct. 2423, 147 L.Ed.2d 528 (citing Restatement of Contracts (2nd) § 250)]. "Total breach" is a breach that so substantially impairs the value of the contract to the injured party at the time of the breach that it is just in the circumstances to allow him or her to recover damages based on all of his or her remaining rights to performance [*Mobil Oil Exploration & Producing Southeast, Inc. v. United States* (2000) 530 U.S. 604, 608, 120 S.Ct. 2423, 147 L.Ed.2d 528 (citing Restatement of Contracts (2nd) § 243)]. As applied to the facts of this case, those principles meant that if the government said it would break, or did break, an important contractual promise, thereby "substantially impairing the value of the contracts" to the companies, then unless the companies waived their rights to restitution, the government must give the companies their money back. Furthermore, it must do so whether or not the contracts ultimately would have proved financially beneficial to the companies [*Mobil Oil Exploration & Producing Southeast, Inc. v. United States* (2000) 530 U.S. 604, 608, 120 S.Ct. 2423, 147 L.Ed.2d 528].

In the contract, the U.S. promised the companies that they could explore for oil and develop any oil that they found provided that they received exploration and development permissions in accordance with various statutes and regulations to which the lease contracts were made subject. The Court found that (1) the Outer Continental Shelf Lands Act (OCSLA) required the Department of Interior (Interior) to approve within 30 days a submitted exploration plan that met OCSLA's requirements; (2) Interior had told Mobil that the companies' submitted plan met those requirements; (3) Interior had told Mobil that it would not approve the submitted plan for at least 13 months due to a new law (OBPA) prohibiting approval of exploration plans until additional governmental actions had taken place; and (4) Interior had never either approved or disapproved the plan. The Court then concluded that the government's actions violated the contracts, and in fact the new statute required Interior to impose the contract-violating delay. The changes made by the statute were changes in approval procedures and standards that the contracts had incorporated through cross-reference. Therefore, by communicating to the companies its intent to follow OBPA, the government was communicating its intent to violate the contracts. The Court next found that the incorporated procedures and standards amounted to a gateway to the companies' enjoyment of all other rights. To significantly narrow that gateway violated material conditions in the contracts. The breach was substantial, depriving the companies of the benefit of the bargain. The government's communication of its intent to commit that breach amounted to a repudiation of the contracts [*Mobil Oil Exploration & Producing Southeast, Inc. v. United States* (2000) 530 U.S. 604, 616-623, 120 S.Ct. 2423, 147 L.Ed.2d 528].

For further discussion, see California Points and Authorities, Ch. 50, *Contracts* (Matthew Bender).

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 3, *California Judicial Council Contracts Instructions*]:

CACI No. 324 Anticipatory Breach

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawBreachNonperformanceContracts LawPerformanceImpossibility of PerformanceGeneral Overview

John F. Wells and Lise A. Pearlman were the original authors of this chapter. It has since been updated to reflect changes in the law, additional case citations and practice pointers by other lawyers as well as revisions including cross-references to the official CACI instructions.



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California Forms of Jury Instruction

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CHAPTER 3D Matthew Bender Performance and Breach of Contract Instructions
PART D. EXCUSES FOR NON-PERFORMANCE

1-3D California Forms of Jury Instruction MB 300D.74

MB 300D.74 Refusal in Advance to Accept Offer of Performance

[1] Instruction Refusal in Advance to Accept Offer of Performance

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

If before Plaintiff's performance was due under the contract, Defendant notified Plaintiff that [he/she/it] would not accept performance, then Plaintiff was excused from offering to perform when the time came unless Defendant proves that before Plaintiff's performance was due Defendant gave Plaintiff clear and definite notice that [he/she/it] had changed [his/her/its] mind and was now willing to accept performance.

Authorities: *Civ. Code § 1515; Hulen v. Stuart (1923) 191 Cal. 562, 571, 217 P. 750 ; Nix v. Heald (1949) 90 Cal.App.2d 723, 729-730, 203 P.2d 847 .*

[2] Use of Instruction

This instruction should be used when there is evidence of the defendant's notice of refusal to accept the plaintiff's performance and retraction of such notice. Clear and definite notice is defined in MB 300D.76. If there is evidence of the plaintiff's change of position between the notice of repudiation and retraction, use the instruction in MB 300D.75. If the case involves the plaintiff's alleged notice of refusal to accept the defendant's offer of performance, the party designations should be reversed and the defendant will have the burden of proof.

For related Judicial Council instructions, see [3][b], *below*.

[3] Comment

[a] Refusal in Advance to Accept Offer of Performance

If the defendant notifies the plaintiff that he or she will refuse to accept performance when due and does not retract such notice and agree to accept performance before performance is due, the plaintiff does not have to offer performance to place the defendant in breach [*Civ. Code § 1515*]. The burden of proof on retraction is the defendant's [*see MB 300D.75[3]*].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [*see Ch. 3, California Judicial Council Contracts Instructions*]:

CACI No. 324 Anticipatory Breach

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawBreachAnticipatory RepudiationGeneral Overview

John F. Wells and Lise A. Pearlman were the original authors of this chapter. It has since been updated to reflect changes in the law, additional case citations and practice pointers by other lawyers as well as revisions including cross-references to the official CACI instructions.



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CHAPTER 3D Matthew Bender Performance and Breach of Contract Instructions
PART D. EXCUSES FOR NON-PERFORMANCE

1-3D California Forms of Jury Instruction MB 300D.75

MB 300D.75 Change of Position Based on Notice of Refusal to Perform**[1] Instruction** Change of Position Based on Notice of Refusal to Perform[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Plaintiff asserts that [he/she/it] did not offer to perform because Defendant had notified Plaintiff that Defendant _____ [would not or could not] perform, and that Plaintiff then _____ [describe facts indicating change of position]. Plaintiff must prove that before Plaintiff's performance was due Defendant gave clear and definite notice that [he/she/it] _____ [would not or could not] perform. If Plaintiff establishes that such notice was given then Defendant must prove that [he/she/it] clearly and definitely retracted such notice before Plaintiff _____ [describe facts indicating change of position] in reliance on such notice.

Authorities: *Guerrieri v. Severini* (1958) 51 Cal.2d 12, 19, 330 P.2d 635 ; *Pichignau v. Paris* (1963) 264 Cal.App.2d 138, 142, 70 Cal.Rptr. 147 .

[2] Use of Instruction

This instruction should be used when the defense of withdrawal of a repudiation is alleged. Clear and definite notice is defined in MB 300D.76.

[3] Comment

Repudiation may be retracted before performance is due, but it is too late to retract it if the other party has already changed position in reliance on the repudiation [*Guerrieri v. Severini* (1958) 51 Cal.2d 12, 19, 330 P.2d 635]. This instruction, and the instruction in MB 300D.74, treat withdrawal of repudiation before reliance as a special defense for which the defendant bears the burden of proof [see *Hulen v. Stuart* (1923) 191 Cal. 562, 571, 217 P. 750 ; *Pichignau v.*

Paris (1963) 264 Cal.App.2d 138, 142, 70 Cal.Rptr. 147 ; see also Evid. Code § 500]. The retraction must be clear and unequivocal. The repudiating party may not impose new conditions not in accord with the original contract [*Pichignau v. Paris* (1963) 264 Cal.App.2d 138, 142, 70 Cal.Rptr. 147].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawBreachAnticipatory RepudiationGeneral OverviewContracts LawDefensesGeneral Overview

John F. Wells and Lise A. Pearlman were the original authors of this chapter. It has since been updated to reflect changes in the law, additional case citations and practice pointers by other lawyers as well as revisions including cross-references to the official CACI instructions.



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CHAPTER 3D Matthew Bender Performance and Breach of Contract Instructions
PART D. EXCUSES FOR NON-PERFORMANCE

1-3D California Forms of Jury Instruction MB 300D.76

MB 300D.76 Clear and Definite Notice**[1] Instruction** Clear and Definite Notice[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Notice that a party _____ [will not or cannot perform or will not accept the other party's performance] must be clear and definite for the other party to treat such notice as an excuse for [his/her/its] own failure to perform. A threat to abandon a contract is not enough, nor is a statement by a party that [he/she/it] does not consider the contract binding. Such conduct merely amounts to a message that the contract *may* not be performed.

Authorities: *Kossler v. Palm Springs Developments, Ltd.* (1980) 101 Cal.App.3d 88, 99, 161 Cal.Rptr. 423 ; *Whitney Inv. Co. v. Westview Dev. Co.* (1969) 273 Cal.App.2d 594, 602-603, 78 Cal.Rptr. 302 .

[2] Use of Instruction

This instruction should be used with the instructions in MB 300D.72-MB 300D.75 to inform the jury of the criteria for clear and definite notice not to perform or not to accept performance.

[3] Comment

Notice that a party will not or cannot perform may not be equivocal [*Kossler v. Palm Springs Developments, Ltd.* (1980) 101 Cal.App.3d 88, 99, 161 Cal.Rptr. 423]. It must be clear, positive, and absolute [*Whitney Inv. Co. v. Westview Dev. Co.* (1969) 273 Cal.App.2d 594, 602, 78 Cal.Rptr. 302 ; *Layton v. West* (1969) 271 Cal.App.2d 508, 512, 76 Cal.Rptr. 507 ; *Daum v. Superior Court* (1964) 228 Cal.App.2d 283, 287, 39 Cal.Rptr. 443 ; *Hertz Driv-Ur-Self Stations, Inc. v. Schenley Distil.* (1953) 119 Cal.App.2d 754, 760, 260 P.2d 93]. A threat to abandon a contract is not the same as repudiation [*Gold Mining & Water Co. v. Swinerton* (1943) 23 Cal.2d 19, 28, 142 P.2d 22]; nor is a

statement by a party that it considers the contract not binding [*Copy Lease Corp. of America v. Memorex Corp.* (N.Y.D.C. 1975) 403 F.Supp. 625, 630 (federal court applied *Com. Code § 2609(1)* to hold that although seller's statement that contract was "not binding" did not amount to anticipatory repudiation and did not discharge buyer's obligation to order goods within reasonable time, statement did give buyer right to demand assurances of seller's intention to perform)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawBreachNonperformance

John F. Wells and Lise A. Pearlman were the original authors of this chapter. It has since been updated to reflect changes in the law, additional case citations and practice pointers by other lawyers as well as revisions including cross-references to the official CACI instructions.



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CHAPTER 3D Matthew Bender Performance and Breach of Contract Instructions
PART D. EXCUSES FOR NON-PERFORMANCE

1-3D California Forms of Jury Instruction MB 300D.77

MB 300D.77 Implied Repudiation

[1] Instruction Implied Repudiation

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Plaintiff contends that [he/she/it] did not perform or offer to perform because before the time [his/her/its] performance was due, Defendant _____ [describe facts by which implied repudiation allegedly occurred] and therefore had acted in such a way as to put [himself/herself/itself] in a position where [he/she/it] could not perform. To be excused from performing, Plaintiff must prove that Defendant did in fact put [himself/herself/itself] in a position where [he/she/it] could not perform. It is not enough if performance by Defendant appeared less likely or more difficult.

Authorities: *Taylor v. Johnston* (1975) 15 Cal.3d 130, 139, 123 Cal.Rptr. 641, 539 P.2d 425 ; *Zogarts v. Smith* (1948) 86 Cal.App.2d 165, 170-172, 194 P.2d 143 .

[2] Use of Instruction

This instruction should be used when the plaintiff contends that his or her tender of performance was excused because the defendant had rendered himself or herself unable to perform. If it is the defendant who contends that the plaintiff impliedly repudiated the contract, the party designations should be reversed and the defendant will have the burden of proof [see MB 300D.70[3]].

[3] Comment

Implied repudiation occurs when a party puts it out of his or her power to perform [*Taylor v. Johnston* (1975) 15 Cal.3d 130, 139, 123 Cal.Rptr. 641, 539 P.2d 425 ; *Zogarts v. Smith* (1948) 86 Cal.App.2d 165, 170-172, 194 P.2d 143]. The burden of proof is on the plaintiff to show an excuse for his or her failure to tender performance [*Reichert v. General*

Ins. Co. (1968) 68 Cal.2d 822, 830, 69 Cal.Rptr. 321, 442 P.2d 377].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawBreachAnticipatory RepudiationGeneral OverviewContracts LawPerformanceImpossibility of
PerformanceGeneral OverviewContracts LawPerformanceTender & Delivery

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CHAPTER 3D Matthew Bender Performance and Breach of Contract Instructions
PART D. EXCUSES FOR NON-PERFORMANCE

1-3D California Forms of Jury Instruction MB 300D.78

MB 300D.78 Performance Excused by Material Breach

[1] Instruction Performance Excused by Material Breach

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Plaintiff contends that [he/she/it] was excused from performing [[his/her/its] remaining obligations] under the contract because of Defendant's conduct in _____ [*describe breach*]. To establish this as an excuse, Plaintiff must prove one of the following, either:

1. That Defendant breached an important part of the contract; or
2. That Defendant's conduct was the type of breach that made it likely that Defendant would breach important parts of the contract in the future.

If either of these things is established, Plaintiff was excused from [further] performance under the contract. If not, then Plaintiff was required to continue to perform [although [he/she/it] may still be entitled to compensation for the breach].

[*OPTIONAL (See Use of Instruction)*]

A breach of contract before or at the beginning of performance may be important enough to excuse the other party from performing under the contract, although the same breach late in performance would be unimportant. [By the same token, a number of small breaches may be important even if each by itself would be unimportant.] You should consider whether the breach[es] is [are] great or small and when it [they] occurred in relation to the life of the contract. If the contract required team work and cooperation, then you should also consider the effect

of any breach[es] by Defendant on the likelihood of future team work and cooperation as well as any other factors that might indicate whether or not it was likely that Defendant would commit additional breaches of a serious nature before the contract was completed.

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

The seriousness of a breach of contract does not depend on the amount of money necessary to remedy it. A serious breach may sometimes cause very little loss if action is taken to lessen its impact.

Authority: Assoc. Lathing etc. Co. v. Lewis C. Dunn, Inc. (1955) 135 Cal.App.2d 40, 49-50, 286 P.2d 825 .

[2] Use of Instruction

[a] Basic Considerations

This instruction should be used when a defendant has committed a breach that the plaintiff has treated as excusing further performance of the contract and there is a dispute as to the materiality of the breach. It applies in an action on the contract. If material breach is alleged as a basis for rescission, see Ch. 3G, *Matthew Bender Rescission of Contract Instructions*.

The bracketed language is included in the basic instruction to be used when the contract calls for further performance and when the plaintiff, although required to continue to perform, may still be entitled to compensation for a breach by the defendant.

The instruction assumes that it is the plaintiff's performance that was allegedly excused by the defendant's breach. If the defendant is raising the plaintiff's prior material breach as an excuse for performance, the party designations should be reversed and the defendant will have the burden of proof [see [3], *below*].

LexisNexis Matthew Bender Expert Practice Tip--Use Checklist or Diagram: This instruction deals with an important issue in some lawsuits. However, this is a lengthy instruction. Consequently, use of a checklist or diagram could aid some jurors. *By Rex Heeseman*

[b] Terminology

"Important" is used as a synonym for "material" [see Ch. 3G, *Matthew Bender Rescission of Contract Instructions*], and the phrase "perform important part[s] of the contract" is used as a synonym for substantial performance [see *MB 300D.02*] to increase juror comprehension.

[c] Option: Timing of Breach

The first optional instruction, dealing with the size of the breach and its timing, should be used when the materiality of the breach is affected by its timing. The bracketed language should be used when there are a number of small breaches.

[d] Option: Amount Required to Remedy Breach

The second optional instruction on the amount of money required to remedy a breach should be used when the amount of damage from an alleged material breach is small. Its purpose is to counteract the impression a jury might otherwise have that a breach that does not cause significant damage is not material.

[3] Comment

Any breach that causes a measurable injury gives the injured party a right to compensatory damages [*Borgonovo v. Henderson* (1960) 182 Cal.App.2d 220, 231, 6 Cal.Rptr. 236]. However, the injured party is only justified in refusing further performance on his or her own part if the breach is material [see Witkin, Summary of California Law, vol. 1, *Contracts*, § 852 (10th ed. 2005)].

The materiality of a breach is primarily a question of fact [*Assoc. Lathing etc. Co. v. Lewis C. Dunn, Inc.* (1955) 135 Cal.App.2d 40, 49-50, 286 P.2d 825 ; *Smith v. Empire Sanitary Dist.* (1954) 127 Cal.App.2d 63, 73, 273 P.2d 37]. Among factors to be taken into account are the timing of the breach, the likelihood of future breaches, and the necessity for continued team work and cooperation. The seriousness of a breach is not dependent on the amount of damage that is caused [*Assoc. Lathing etc. Co. v. Lewis C. Dunn, Inc.* (1955) 135 Cal.App.2d 40, 49-50, 286 P.2d 825]. It also appears proper to consider the cumulative effect of small breaches [see *Tolstoy Constr. Co. v. Minter* (1978) 78 Cal.App.3d 665, 673, 143 Cal.Rptr. 570].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts Law Breach Material Breach Contracts Law Remedies Rescission & Redhibition General Overview

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CHAPTER 3E Matthew Bender Contract Damages Instructions

1-3E California Forms of Jury Instruction 3E.syn

§ 3E.syn Synopsis to Chapter 3E: Matthew Bender Contract Damages Instructions

MB 300E.01 Introductory Instruction: Right to Recover Damages and Determination of Damages

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Right to Compensatory Damages

[b] Right to Nominal Damages

[c] What Constitutes Nominal Damages

[d] Determination of Damages

[e] Related Judicial Council Jury Instructions

MB 300E.02 General Measure of Damages (Civ. Code § 3300)

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Applicability of Civ. Code § 3300

1-3E California Forms of Jury Instruction 3E.syn

[b] Measure of Damages Under Civ. Code § 3300

[c] Instructions on General Measure of Damages

[d] Instructions on Special Measures of Damages

[e] Emotional Distress Damages

[f] Related Judicial Council Jury Instructions

MB 300E.03 Recovery Limited to Damages Proximately Caused by Breach

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Proximate Cause Requirement

[b] Necessity of Instructing on Proximate Cause

[c] Drawbacks of "Proximate Cause" and "Legal Cause" Terminology

[d] "Substantial Factor" Formulation of Proximate Cause Requirement

[e] Related Judicial Council Jury Instructions

MB 300E.04 Damages Not Recoverable Unless Loss or Harm Would Not Have Occurred "But For" Breach

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Nature and Scope of "But For" Rule

[b] Necessity of Instructing on "But For" Rule

[c] Related Judicial Council Jury Instructions

MB 300E.05 Concurrent Causes

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Nature and Scope of "Concurrent Causes" Rule

[b] Instructions on "Concurrent Causes"

MB 300E.06 Damage Must Be Reasonably Certain; Certainty as to Amount Not Required

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Certainty as to Damages Already Sustained

[b] Certainty as to Future Damages

[c] Burden of Proof

[d] Instructing on Requirement of Certainty

[e] Related Judicial Council Jury Instructions

MB 300E.07 Effect of Contingencies That May Increase Future Damages

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Right to Damages for Future Injury

[b] Contingencies Affecting Future Damages

[c] Reduction to Present Cash Value

[d] Consideration of Inflation and Economic Trends

[e] Necessity of Instructing on Effects of Inflation and Other Economic Trends

[f] Related Judicial Council Jury Instructions

MB 300E.08 Effect of Contingencies That May Decrease Amount of Future Damages

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300E.09 Damages May Not Exceed What Plaintiff Would Have Received From Full Performance

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Nature and Purpose of Limitation Imposed by Civ. Code § 3358

[b] Applicability of Civ. Code § 3358

MB 300E.10 Choice of Alternative Methods of Determining Plaintiff's Damages

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Choosing Permissible Methods of Determining Damages

[b] Propriety of Instruction on Rule Requiring Use of Least Expensive Method

MB 300E.11 Damages Not to Be Measured by Defendant's Savings or Costs

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300E.12 Punitive Damages Not Recoverable (Jury Instructed Only on Breach of Contract)

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Punitive Damages Not Permitted in Action Based Solely on Breach of Contract

[b] Related Judicial Council Instructions

MB 300E.13 Punitive Damages Not Recoverable (Jury Also Instructed on Non-Contract Punitive Damage Claims)

[1] Instruction

[2] Use of Instruction

[3] Comment

1-3E California Forms of Jury Instruction 3E.syn

[a] Contract Claims No Bar to Punitive Damages on Tort Claim Based on Same Facts

[b] Necessity of Instructing That Punitive Damages Not Recoverable on Breach of Contract Claims

[c] Code Civ. Proc. § 625 Special Verdict Requirement Distinguished

[d] Related Judicial Council Instructions

MB 300E.14 Extent of Plaintiff's Obligation to Avoid or Minimize Damages

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Plaintiff's Obligation to Mitigate Damages

[b] Recovery Not Barred as Long as Plaintiff Acts Reasonably to Avoid Loss

[c] Nature of Obligation to Act Reasonably to Mitigate

[d] Necessity of Instructing on Plaintiff's Obligation to Mitigate Damages

[e] Related Judicial Council Jury Instructions

MB 300E.15 Obligation to Mitigate Does Not Require Obligations Beyond Plaintiff's Means

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Reasonable Effort to Mitigate

[b] Related Judicial Council Jury Instructions

MB 300E.16 Obligation to Mitigate Is Excused by Reliance on Defendant's Promises

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Obligation to Mitigate Excused by Reliance on Defendant's Promises

[b] Related Judicial Council Jury Instructions



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CHAPTER 3E Matthew Bender Contract Damages Instructions

1-3E California Forms of Jury Instruction Scope

Scope

SCOPE

This chapter includes jury instructions on the general rules governing determination of damages for breach of contract. For the California Judicial Council jury instructions on contract damages, see Ch. 3, *California Judicial Council Contracts Instructions*. Ch. 3 also includes Judicial Council instructions on other issues surrounding contracts, including formation, performance, interpretation, modification, breach, and defenses. The instructions in this chapter are intended to supplement the Judicial Council instructions [see *Cal. Rules of Ct., Rule 2.1050*].

This chapter covers the following topics:

- An introductory instruction on the right to recover damages and a determination of damages [see *MB 300E.01*].
- The general measure of damages applicable in the absence of a special statute or a specific judicial formulation [see *MB 300E.02*].
- The general rules limiting the damages recoverable (i.e., the "proximate cause" and "but for" limitations) [see *MB 300E.03, MB 300E.04*].
- Concurrent causes [see *MB 300E.05*].
- The requirement that damages be reasonably certain [see *MB 300E.06*].
- Other generally applicable rules relating to the appropriate measure and amount of damages, including instructions on the nonavailability of punitive damages in contracts cases and the obligation to mitigate [see *MB 300E.07 -MB 300E.16*].

The chapter organizes the instructions in the order in which it is recommended that they be presented to the jury and

makes other suggestions on how damage instructions should be organized to maximize juror comprehension.

Matthew Bender specific instructions on the general rules governing the determination of liability for breach of contract are contained in Chs. 3A-3D, 3F, and 3G. Liability and damage instructions for specific types of contracts are set forth in Chs. 3H (Commercial Code Sales Contracts), 3I (Construction Contracts), 23A (Insurance Contracts), and 24A (Employment Contracts).



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CHAPTER 3E Matthew Bender Contract Damages Instructions

1-3E California Forms of Jury Instruction MB 300E.01

MB 300E.01 Introductory Instruction: Right to Recover Damages and Determination of Damages

[1] Instruction Introductory Instruction: Right to Recover Damages and Determination of Damages

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Every person who suffers a loss or harm as a result of another person's breach of contract is entitled to be compensated in money for that loss or harm by the person who breached the contract. This compensation is called "damages."

If you find that Defendant breached a contract that [he/she/it] made with Plaintiff [or that was made for Plaintiff's benefit], you must award Plaintiff damages for that breach [OPTIONAL (See Use of Instruction): unless you find that Plaintiff's claim for damages was waived, released, or paid, or unless you find that Plaintiff's rights under the contract or (his/her/its) claim for damages were assigned or transferred]. You must determine the amount of the damages to be awarded to Plaintiff according to the evidence, the rules of law on which I instruct you, and the other instructions that I will give you on the subject of damages.

Authorities: Civ. Code §§ 3281, 3282, 3360; *Bergen v. Tulare Power Co.* (1916) 173 Cal. 709, 721, 161 P. 269 ; *Parke v. Frank* (1888) 75 Cal. 364, 369, 17 P. 427 ; *Hancock v. Hubbell* (1887) 71 Cal. 537, 539, 12 P. 618 ; *Browner v. Davis* (1860) 15 Cal. 9, 11 ; *Ericson v. Playgirl, Inc.* (1977) 73 Cal.App.3d 850, 859, 140 Cal.Rptr. 921 ; *Sweet v. Johnson* (1959) 169 Cal.App.2d 630, 632-633, 337 P.2d 499 ; *Steers v. City and County of San Francisco* (1931) 118 Cal.App. 361, 363, 5 P.2d 32 ; *Weaver v. Atlantian Constr. Co.* (1927) 84 Cal.App. 154, 161, 258 P. 111 ; *Weichers v. Dehail* (1919) 41 Cal.App. 547, 549, 183 P. 187 ; Restatement (Second) of Contracts § 346.

[2] Use of Instruction

This instruction should be used to instruct the jury on the basic rules relating to damages for breach of contract. It defines the term "damages," which will be used repeatedly in the instructions in this chapter. The instruction is a preface to the instructions setting forth the applicable rules governing the determination of damages.

The bracketed language referring to a contract made for the plaintiff's benefit should be used if the plaintiff claims to be a third party beneficiary of the underlying contract. The bracketed language referring to the waiver, release, satisfaction, or transfer of the plaintiff's claim should be used only when the defendant asserts that the plaintiff's claim for damages was discharged by a waiver, release, or full payment after the alleged breach of contract, or when the defendant contends that the plaintiff's claim for damages, or the plaintiff's rights to receive the benefits of the contract, have been assigned or transferred to a third person. It should only be used to the extent that it applies to claims actually made by the defendant and supported by legally sufficient evidence.

When there is no dispute as to the existence of the contract, a specific reference to the contract that is the basis of the action (e.g., the employment contract, the real property sales contract, the August 1, 2003, distributorship contract, etc.) should be substituted for the general reference to the contract in the first sentence of the second paragraph.

The last sentence of this instruction covers the necessity of determining compensatory damages in accordance with the evidence and the specific rules of law establishing the legal measure of damages. A specific instruction on this point may nullify any prejudice caused by other instructions that erroneously suggest that the jury has unbridled discretion in determining the amount of damages [*see Hasty v. Trevillian* (1929) 102 Cal.App. 405, 410-411, 283 P. 148 ; *Nielsen v. E. Gottschalk & Co., Inc.* (1926) 77 Cal.App. 481, 481-483, 246 P. 1086].

When the plaintiff asserts alternative contract and tort causes of action based on the same act or omission, the jury should also be instructed that the plaintiff is not entitled to a duplicate award of damages for breach of contract if damages are awarded on the tort theory [*see Weaver v. Bank of America* (1963) 59 Cal.2d 428, 432, 30 Cal.Rptr. 4, 380 P.2d 644 ; *Acadia, California, Ltd. v. Herbert* (1960) 54 Cal.2d 328, 336-337, 5 Cal.Rptr. 686, 353 P.2d 294 ; *Glendale Fed. Sav. & Loan Assn. v. Marina View Heights Dev. Co.* (1977) 66 Cal.App.3d 101, 136-138, 135 Cal.Rptr. 802].

For related Judicial Council instructions, see [3][e], *below*.

LexisNexis Matthew Bender Expert Practice Tip--Right to Damages, Generally: This is an introductory instruction on damages that requires the jury to award damages to plaintiff for every breach of contract (i.e., "you must award Plaintiff damages for that breach"). Even if the plaintiff cannot prove specific damages, nominal damages can be awarded [*see CACI No. 360*]. Nominal damages can be important for establishing the right to recover costs including attorney's fees and, sometimes, to seek punitive damages. Because this is an introduction, you should treat it as such. In other words, stress to the jury that this instruction is the "starting point." *By Ronald Oster and Rex Heeseman*

[3] Comment

[a] Right to Compensatory Damages

Every person who suffers loss or harm as a result of the unlawful act or omission of another is entitled to recover monetary compensation, known as damages [Civ. Code §§ 3281, 3282]. The propriety of giving an instruction on this fundamental principle along with other instructions on the subject of damages is well established [*Bergen v. Tulare Power Co.* (1916) 173 Cal. 709, 721, 161 P. 269 ; *Steers v. City and County of San Francisco* (1931) 118 Cal.App. 361, 363, 5 P.2d 32].

[b] Right to Nominal Damages

In an action for breach of contract, unlike an action in tort, a plaintiff who establishes a breach of contract is entitled to a favorable verdict and is entitled, as a matter of right, to recover at least nominal damages regardless of whether there are any actual damages resulting from the breach [Civ. Code § 3360; *Hancock v. Hubbell* (1887) 71 Cal. 537, 539, 12 P. 618 ; *Browner v. Davis* (1860) 15 Cal. 9, 11 ; *Ericson v. Playgirl, Inc.* (1977) 73 Cal.App.3d 850, 859, 140 Cal.Rptr.

921 ; *Sweet v. Johnson* (1959) 169 Cal.App.2d 630, 632, 337 P.2d 499 ; Restatement (Second) of Contracts § 346]. An instruction that directs the jury to render a verdict in the defendant's favor if it finds that the plaintiff was not damaged by a breach of contract is erroneous [*Browner v. Davis* (1860) 15 Cal. 9, 11].

The rule that a plaintiff establishing a breach of contract is entitled to at least nominal damages as a matter of right may have important consequences. Early cases, decided at a time when the applicable statute did not authorize an award of costs to a plaintiff recovering nominal damages [*Lund v. Lachman* (1915) 29 Cal.App. 31, 36, 154 P. 295], held that a failure to award nominal damages did not require reversal when the defendant was prepared to waive or remit any cost award assessed against the plaintiff and the judgment did not otherwise have the effect of determining some permanent right [*Hancock v. Hubbell* (1887) 71 Cal. 537, 540, 12 P. 618 ; *Kenyon v. Western Union Tel. Co.* (1893) 100 Cal. 454, 458-459, 35 P. 75 ; *Lund v. Lachman* (1915) 29 Cal.App. 31, 36, 154 P. 295]. However, when an amended statute gave the court discretion to award costs to a plaintiff recovering nominal damages, a failure to award nominal damages in a court trial was held to be reversible error because it deprived the judge of the opportunity to exercise discretion to award costs to the plaintiff [*Capell Associates, Inc. v. Central Valley Security Co.* (1968) 260 Cal.App.2d 773, 785-786, 67 Cal.Rptr. 463]. It is not clear whether a subsequent 1986 amendment to Code Civ. Proc. § 1032 makes an award of costs mandatory or discretionary when a plaintiff recovers nominal damages. Now, under Code Civ. Proc. § 1032, an award of costs is mandatory if the plaintiff obtains a "net monetary recovery"; it is discretionary when neither party obtains any relief or in situations not expressly provided for [see, e.g., *Goodman v. Lozano* (2010) 47 Cal.4th 1327, 1330, 104 Cal.Rptr.3d 219, 223 P.3d 77 (although plaintiff was entitled to damages, trial court entered take-nothing judgment against defendant because damages award was entirely offset by plaintiff's settlement with other defendants, and in view of plaintiff's failure to obtain any actual monetary recovery, trial court properly exercised discretion, pursuant to Code Civ. Proc. § 1032(a)(4), in awarding attorney's fees and costs to defendant)]. However, absent specific authority otherwise, the rule as stated above in *Capell Associates, Inc. v. Central Valley Security Co.* [*Capell Associates, Inc. v. Central Valley Security Co.* (1968) 260 Cal.App.2d 773, 785-786, 67 Cal.Rptr. 463] would still seem to apply. Accordingly, it appears that a failure to instruct the jury on a plaintiff's right to recover at least nominal damages may result in the reversal of a judgment for the defendant if the jury's verdict may have been based on a finding that the plaintiff did not suffer any damages.

It should be noted that attorney's fees that are recoverable by the prevailing party under the terms of a statute, including those recoverable by virtue of an attorney's fee clause in a contract and the provisions of Civ. Code § 1717, are generally treated as costs of suit [Civ. Code § 1717(a); *Beneficial Standard Properties, Inc. v. Scharps* (1977) 67 Cal.App.3d 227, 231-232, 136 Cal.Rptr. 549 ; *Committee for Sewer Referendum v. Humboldt Bay Wastewater Authority* (1978) 77 Cal.App.3d 117, 125, n. 7, 143 Cal.Rptr. 463 ; *Jeffers v. Screen Extras Guild* (1955) 134 Cal.App.2d 622, 623-624, 286 P.2d 30 ; *Woodward v. Bruner* (1951) 104 Cal.App.2d 83, 85, 230 P.2d 861 ; see also Civ. Code § 1717.5 (award of attorney's fees for prevailing party in any action on contract based on book account); Civ. Code § 1717.5 (severely limiting amount of award and parties on whom award may be imposed)]. Therefore, in addition to permitting a plaintiff to recover other costs and disbursements, an award of nominal damages may enable a plaintiff to recover attorney's fees or avoid a liability for the defendant's attorney's fees [see Civ. Code § 1717(b)(1); *Nasser v. Superior Court* (1984) 156 Cal.App.3d 52, 60-61, 202 Cal.Rptr. 552].

[c] What Constitutes Nominal Damages

By definition, nominal damages must be trifling and insubstantial [*Avina v. Spurlock* (1972) 28 Cal.App.3d 1086, 1089, 105 Cal.Rptr. 198 ; *Price v. McComish* (1937) 22 Cal.App.2d 92, 99-100, 70 P.2d 978 ; *Broads v. Mead* (1911) 159 Cal. 765, 769, 116 P. 46 ; *Maher v. Wilson* (1903) 139 Cal. 514, 520, 73 P. 418]. A number of cases, particularly older ones, define nominal in terms of a few cents or a dollar [*Avina v. Spurlock* (1972) 28 Cal.App.3d 1086, 1089, 105 Cal.Rptr. 198 ; *Price v. McComish* (1937) 22 Cal.App.2d 92, 99-100, 70 P.2d 978 ; *Broads v. Mead* (1911) 159 Cal. 765, 769, 116 P. 46 ; *Maher v. Wilson* (1903) 139 Cal. 514, 520, 73 P. 418 ; *Davidson v. Devine* (1886) 70 Cal. 519, 520, 11 P. 664]; and it has been said that one dollar is the amount usually awarded as nominal damages [*Broads v. Mead* (1911) 159 Cal. 765, 769, 116 P. 46].

Nominal damage awards of \$501 [*Avina v. Spurlock* (1972) 28 Cal.App.3d 1086, 1089, 105 Cal.Rptr. 198], \$200 [*Price v. McComish* (1937) 22 Cal.App.2d 92, 99-100, 70 P.2d 978], and \$100 [*Broads v. Mead* (1911) 159 Cal. 765, 769, 116 P. 46 ; *Chowchilla National Bank v. Nilmeier* (1927) 83 Cal.App. 18, 22, 256 P. 298] have been found excessive. However, a 1977 court of appeal case modified a judgment improperly awarding compensatory damages by substituting a \$300 nominal damage award and indicated that it may be appropriate to look to analogous statutory damage provisions in determining the amount of nominal damages [*Ericson v. Playgirl, Inc.* (1977) 73 Cal.App.3d 850, 859, 140 Cal.Rptr. 921].

[d] Determination of Damages

The nature of the damages recoverable in actions for breach of contract differs from those available in tort actions in a fundamental respect. Although the determination of damages in a tort action is largely committed to the jury's discretion and is based on the jury's experience and values [see *Beagle v. Vasold* (1961) 65 Cal.2d 166, 172, 53 Cal.Rptr. 129, 417 P.2d 673 ; *Rystinki v. Central California T. Co.* (1917) 175 Cal. 336, 344-345, 165 P. 952 ; *Lemere v. Safeway Stores, Inc.* (1951) 102 Cal.App.2d 712, 728, 228 P.2d 296], an action for breach of contract is governed by rules that establish a specific and precise measure of damages for every breach. The amount of compensatory damages recoverable in an action for breach of contract is therefore regarded as something to be established and determined as a fact on the basis of the evidence presented [*Parke v. Frank* (1888) 75 Cal. 364, 369, 17 P. 427 ; *Weaver v. Atlantian Constr. Co.* (1927) 84 Cal.App. 154, 161, 258 P. 111 ; *Weichers v. Dehail* (1919) 41 Cal.App. 547, 549, 183 P. 187].

[e] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 3, *California Judicial Council Contracts Instructions*]:

CACI No. 350, Introduction to Contract Damages

CACI No. 351, Special Damages

CACI No. 352, Loss of Profits--No Profits Earned

CACI No. 353, Loss of Profits--Some Profits Earned

CACI No. 358, Mitigation of Damages

CACI No. 359, Present Cash Value of Future Damages

CACI No. 360, Nominal Damages

CACI No. 361, Plaintiff May Not Recover Duplicate Contract and Tort Damages

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts Law Remedies Compensatory Damages General Overview Contracts Law Remedies Nominal Damages Contracts Law Third Parties Beneficiaries Claims & Enforcement

Scott Noble contributed to the original chapter for California Forms of Jury Instruction (Matthew Bender).



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California Forms of Jury Instruction

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CHAPTER 3E Matthew Bender Contract Damages Instructions

1-3E California Forms of Jury Instruction MB 300E.02

MB 300E.02 General Measure of Damages (Civ. Code § 3300)

[1] Instruction General Measure of Damages (Civ. Code § 3300)

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

If you find that Defendant breached a contract that [he/she/it] made with Plaintiff _____ [or (See Use of Instruction) that was made for Plaintiff's benefit], you must award Plaintiff damages in an amount that will fully compensate [him/her/it] for all losses and harm that the breach caused [him/her/it], unless the other rules of law on which I will instruct you limit the amount that Plaintiff is entitled to recover or the type of losses or harm for which you can award damages to Plaintiff.

Authorities: Civ. Code § 3300; *Coughlin v. Blair* (1953) 41 Cal.2d 587, 600, 262 P.2d 305 ; *Lisec v. United Airlines, Inc.* (1992) 10 Cal.App.4th 1500, 1504, 11 Cal.Rptr.2d 689 ; *DuBarry Internat., Inc. v. Southwest Forest Industries, Inc.* (1991) 231 Cal.App.3d 552, 563, 282 Cal.Rptr. 181 ; *Wickman v. Oppen* (1961) 188 Cal.App.2d 129, 132, 10 Cal.Rptr. 291 ; *Phalanx Air Freight v. National Skyway Freight Corp.* (1951) 104 Cal.App.2d 771, 776, 232 P.2d 510 .

[2] Use of Instruction

Unless all parties are in agreement that there are no causation or foreseeability issues, this instruction should always be given with the appropriate instructions on causation, proximate cause, and foreseeability of damage in MB 300E.03-MB 300E.05. The bracketed language in the first sentence referring to a contract made for the plaintiff's benefit should be used only if the plaintiff claims to be a third-party beneficiary of the underlying contract.

When an instruction on the general measure of damages is agreed to by all parties or is clearly proper under existing case law, it is preferable specifically to instruct the jury as to the particular losses or items of damage for which recovery is permitted or to utilize a specific formulation of the general measure of damages that is tailored to the facts of the particular case. This instruction should not be given if it is agreed or otherwise clear that the specific damage instruction adequately covers all components of the damages claimed by the plaintiff. In such a situation, this

instruction may confuse the jury.

This instruction should *not* be given in a case that is governed by a special statute providing a specific measure of damages for particular types of actions. In such a case, the giving of this instruction or another instruction based on *Civ. Code* § 3300 may be error [see [3][a], *below*].

For related Judicial Council instructions, see [3][f], *below*.

LexisNexis Matthew Bender Expert Practice Tip--Keep Argument Simple: Attorneys will often have difficulties with these concepts. Thus, it would be best to keep your related argument simple so that the jury can follow along as well. In addition, this instruction may be duplicative depending on the other instructions given. *By Rex Heeseman and Ronald Oster*

[3] Comment

[a] Applicability of *Civ. Code* § 3300

Civ. Code § 3300 is a general statute that sets forth the basic measure of damages in an action for breach of contract [*Coughlin v. Blair* (1953) 41 Cal.2d 587, 600, 262 P.2d 305 ; *Lisec v. United Airlines, Inc.* (1992) 10 Cal.App.4th 1500, 1504, 11 Cal.Rptr.2d 689 ; *DuBarry Internat., Inc. v. Southwest Forest Industries, Inc.* (1991) 231 Cal.App.3d 552, 563, 282 Cal.Rptr. 181 ; *Wickman v. Oppen* (1961) 188 Cal.App.2d 129, 132, 10 Cal.Rptr. 291 ; *Phalanx Air Freight v. National Skyway Freight Corp.* (1951) 104 Cal.App.2d 771, 776, 232 P.2d 510]. In the absence of a special statute establishing a specific measure of damages, the measure in *Civ. Code* § 3300 is the proper one in a breach of contract action [*Coughlin v. Blair* (1953) 41 Cal.2d 587, 600, 262 P.2d 305 ; *Wickman v. Oppen* (1961) 188 Cal.App.2d 129, 132, 10 Cal.Rptr. 291]. However, when a special statute establishing a specific measure of damages is applicable [see *Civ. Code* §§ 1951.2, 1794, 3302-3318, 3353, 3354], that statute is controlling, and use of the general measure embodied in *Civ. Code* § 3300 is error [*Code Civ. Proc.* § 1859; *Crag Lumber Co. v. Crofoot* (1956) 144 Cal.App.2d 755, 778, 301 P.2d 952 ; *Boshes v. Miller* (1953) 119 Cal.App.2d 332, 336, 259 P.2d 447].

[b] Measure of Damages Under *Civ. Code* § 3300

Essentially, *Civ. Code* § 3300 provides that a party injured by a breach of contract is entitled to recover damages for "all detriment" resulting from the breach, subject to the following two limitations:

- The loss or harm for which recovery is sought must have been "proximately caused" by the breach [*Friend & Terry L. Co. v. Miller* (1885) 67 Cal. 464, 465, 8 P. 40 ; *Southall v. Security Title Ins. etc. Co.* (1952) 112 Cal.App.2d 321, 323-324, 246 P.2d 74 ; *Reliance A. Corp. v. Hooper-Holmes Bureau* (1934) 139 Cal.App. 607, 613, 34 P.2d 762]; and
- The parties must have been able to foresee, at the time they contracted, that the loss or harm for which recovery is sought was likely to result from the breach [*Hunt Bros. Co. v. San Lorenzo etc. Co.* (1906) 150 Cal. 51, 56-57, 87 P. 1093 ; *Allen v. Jones* (1980) 104 Cal.App.3d 207, 210-211, 163 Cal.Rptr. 445 ; *Glendale Fed. Sav. & Loan Assn. v. Marina View Heights Dev. Co.* (1977) 66 Cal.App.3d 101, 125, 135 Cal.Rptr. 802].

Civ. Code § 3300 must also be interpreted and applied in conjunction with other general statutes limiting the amount of damages that can be awarded for a breach of contract [see *Civ. Code* §§ 3358, 3359] or for the type of loss or harm for which damages can be awarded [see *Civ. Code* §§ 3301, 3353, 3354]. The rules set forth in these statutes therefore represent additional limitations on an injured party's right to recover damages resulting from the breach [*Coughlin v. Blair* (1953) 41 Cal.2d 587, 600, 262 P.2d 305 ; *Phalanx Air Freight v. National Skyway Freight Corp.* (1951) 104 Cal.App.2d 771, 776, 232 P.2d 510].

[c] Instructions on General Measure of Damages

A single instruction on the general measure of damages contained in *Civ. Code* § 3300 that attempted to incorporate the prerequisites of proximate cause and foreseeability would inevitably be complex, awkward, and difficult for the jury to understand. Accordingly, the jury should be initially instructed that a person injured by a breach of contract is entitled to full compensation for all detriment resulting from the breach unless other applicable rules require that the damages be limited. The jury should then be instructed separately on the relevant limitations on the general right to recover damages, including proximate cause and foreseeability.

This approach will not affect the legal sufficiency of the instructions. It is well settled that the court is not required to use the language of the pertinent statutes or any particular language in instructing the jury as long as the instructions it gives, taken as a whole, correctly state the substance of the applicable law [*Peters v. Southern Pacific Co.* (1911) 160 Cal. 48, 69, 116 P. 400 ; *Hom v. Clark* (1963) 221 Cal.App.2d 622, 643, 35 Cal.Rptr. 11 ; *Hooper v. Bronson* (1954) 123 Cal.App.2d 243, 254-255, 266 P.2d 590].

[d] Instructions on Special Measures of Damages

In addition to statutes that establish special measures of damages for particular types of cases [see *Civ. Code* §§ 1951.2, 1794, 3302-3318, 3353, 3354], there are a number of appellate decisions that have established specific formulations of the measure of damages required by *Civ. Code* § 3300 in particular fact situations [see *Parker v. Twentieth Century-Fox Film Corp.* (1970) 3 Cal.3d 176, 181-182, 89 Cal.Rptr. 737, 474 P.2d 689 (breach of employment contract); *Coughlin v. Blair* (1953) 41 Cal.2d 587, 600, 262 P.2d 305 (breach of contract to construct improvements); *Caminetti v. Pacific Mut. Life Ins. Co.* (1943) 23 Cal.2d 94, 104-110, 142 P.2d 741 (wrongful cancellation of insurance policy); *A.A. Baxter Corp. v. Colt Industries, Inc.* (1970) 10 Cal.App.3d 144, 157-160, 88 Cal.Rptr. 842 (delay in delivery of equipment)].

[e] Emotional Distress Damages

In *Erlich v. Menezes* [*Erlich v. Menezes* (1999) 21 Cal.4th 543, 87 Cal.Rptr.2d 886, 981 P.2d 978], plaintiff homeowners sued the contractor who built a house for breach of contract, fraud, negligent misrepresentation, and negligent construction, claiming emotional distress resulting from the condition of the house and defendant's unsuccessful repair attempts. The jury found that defendant breached the construction contract by negligently constructing the house, but was not guilty of fraud or negligent misrepresentation. The jury awarded the homeowners the full cost necessary to repair their home as well as damages for emotional distress caused by the contractor's negligent performance. The court of appeal affirmed.

The California Supreme Court reversed and remanded, holding that since the contractor's negligence directly caused only economic injury and property damage, and breached no duty independent of the contract, the homeowners could not recover damages for emotional distress based on breach of a contract to build a house [*Erlich v. Menezes* (1999) 21 Cal.4th 543, 548, 87 Cal.Rptr.2d 886, 981 P.2d 978 ; see *Dunkin v. Boskey* (2000) 82 Cal.App.4th 171, 193-194, 98 Cal.Rptr.2d 44 (unmarried male partner, in action for breach of agreement by female partner to grant him paternity rights to child conceived by artificial insemination, not entitled to amend pleading to state cause of action for infliction of emotional distress, citing *Erlich*)]. The Court initially stated the rule set forth in *Civ. Code* § 3300 that in an action for breach of contract, the measure of damages is the amount that will compensate the aggrieved party for all the detriment proximately caused by the breach, or which, in the ordinary course of things, would be likely to result from the breach. Contract damages are generally limited to those within the contemplation of the parties when they entered into the contract or at least reasonably foreseeable by them at that time; consequential damages beyond the expectation of the parties are not recoverable. The Court articulated the issue in this case as whether a negligent breach of a contract will support an award of damages for emotional distress--either as tort damages for negligence, or as consequential or special contract damages [*Erlich v. Menezes* (1999) 21 Cal.4th 543, 550-551, 87 Cal.Rptr.2d 886, 981 P.2d 978].

The Court first noted that the court of appeal permitted plaintiffs to recover both full repair costs as normal contract damages and emotional distress damages as a tort remedy. However, conduct amounting to a breach of contract becomes tortious only when it also violates a duty independent of the contract arising from principles of tort law. For example, tort damages have been permitted in contract cases in which the duty that gives rise to tort liability is either completely independent of the contract or arises from conduct that is both intentional and intended to harm. Under the facts of this case, the Court concluded that tort damages were not available [*Erlich v. Menezes* (1999) 21 Cal.4th 543, 552-558, 87 Cal.Rptr.2d 886, 981 P.2d 978]. Next, the Court considered whether damages for emotional distress should be included as consequential or special damages in a contract claim. Damages for mental suffering and emotional distress are generally not recoverable in an action for breach of an ordinary commercial contract in California. Courts have carved out a narrow range of exceptions to the general rule of exclusion only when emotional tranquility is the contract's essence. The Court held that the balance of policy considerations, including the potential for significant increases in liability in amounts disproportionate to culpability, the court's inability to formulate appropriate limits on the availability of claims, and the magnitude of the impact on stability and predictability in commercial affairs, counseled against expanding contract damages to include mental distress claims in negligent construction cases [*Erlich v. Menezes* (1999) 21 Cal.4th 543, 558-561, 87 Cal.Rptr.2d 886, 981 P.2d 978]. For discussion of jury instructions specifically applicable to construction contracts, see Ch. 3I, *Matthew Bender Construction Contract Instructions*.

[f] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 3, *California Judicial Council Contracts Instructions*]:

CACI No. 350 Introduction to Contract Damages

CACI No. 351 Special Damages

CACI No. 352 Loss of Profits--No Profits Earned

CACI No. 353 Loss of Profits--Some Profits Earned

CACI No. 358 Mitigation of Damages

CACI No. 359 Present Cash Value of Future Damages

CACI No. 360 Nominal Damages

CACI No. 361 Plaintiff May Not Recover Duplicate Contract and Tort Damages

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Contracts Law Remedies Compensatory Damages General Overview Torts Damages Compensatory Damages Pain & Suffering Emotional & Mental Distress General Overview Torts Damages Proof Torts Intentional Torts

Scott Noble contributed to the original chapter for California Forms of Jury Instruction (Matthew Bender).



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CHAPTER 3E Matthew Bender Contract Damages Instructions

1-3E California Forms of Jury Instruction MB 300E.03

MB 300E.03 Recovery Limited to Damages Proximately Caused by Breach**[1] Instruction** Recovery Limited to Damages Proximately Caused by Breach[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Plaintiff is only entitled to recover damages for loss or harm that was caused by a breach of contract. In law, a breach of contract is considered to have caused a loss or harm if it was a substantial factor in bringing it about. Therefore, you may not award Plaintiff damages for a particular loss or harm unless you find that a breach of contract by Defendant was a substantial factor in bringing it about.

Authorities: Civ. Code § 3300; *Mitchell v. Gonzales* (1991) 54 Cal.3d 1041, 1048-1054, 1 Cal.Rptr.2d 913, 819 P.2d 872 ; *Friend & Terry L. Co. v. Miller* (1885) 67 Cal. 464, 466-467, 8 P. 40 ; *Postal Instant Press, Inc. v. Sealy* (1996) 43 Cal.App.4th 1704, 1713, 51 Cal.Rptr.2d 365 ; *Maupin v. Widling* (1987) 192 Cal.App.3d 568, 574-575, 237 Cal.Rptr. 521 ; *Fraijo v. Hartland Hospital* (1979) 99 Cal.App.3d 331, 345-347, 160 Cal.Rptr. 246 ; *State Farm Mut. Auto. Ins. Co. v. Allstate Ins. Co.* (1970) 9 Cal.App.3d 508, 528, 88 Cal.Rptr. 246 ; *Automatic Poultry Feeder Co. v. Wedel* (1963) 213 Cal.App.2d 509, 515-516, 28 Cal.Rptr. 795 ; *Mahar v. MacKay* (1942) 55 Cal.App.2d 869, 877, 132 P.2d 42 ; *Reliance A. Corp. v. Hooper-Holmes Bureau* (1934) 139 Cal.App. 607, 613, 34 P.2d 762 ; *Long v. Barbieri* (1932) 120 Cal.App. 207, 217-218, 7 P.2d 1082 ; Restatement of Torts §§ 430, 431 (1934); Prosser, *Proximate Cause in California*, 38 Calif. L. Rev. 369, 392 (1950).

[2] Use of Instruction

This instructions should be used immediately following the instruction on the general measure of damages in MB 300E.02. It is a general instruction on the requirements of cause-in-fact and proximate cause that are elements of the basic measure of damages for breach of contract set forth in Civ. Code § 3300.

This instruction should also be used when the jury is instructed on a special measure of damages or on specific items or elements of damages when the cause or proximate cause of some or all of the claimed elements of damage is an issue.

In such a case, this instruction should be given immediately after the instruction on the special measure or the compensable elements of the plaintiff's damages.

This instruction is not sufficient in and of itself to cover the applicable law on cause in fact and proximate cause when there is evidence of an independent, nonconcurrent cause or when there is evidence that two or more unrelated causes operated concurrently to bring about the damages sustained by the plaintiff. Under these circumstances, a specific instruction on the "but for" rule of causation [see *MB 300E.04*] or on concurrent causation [see *MB 300E.05*] should be given.

If it is feasible in light of the nature of the plaintiff's damage claims, this instruction can be tailored to the facts of a particular case by modifying the last sentence to substitute references to the specific items or elements of damages claimed by the plaintiff for the general references to loss or harm.

For related Judicial Council instructions, see [3][e], *below*.

LexisNexis Matthew Bender Expert Practice Tip--Breach Does Not Have to Be Sole Factor: This instruction uses the phrase "substantial factor" instead of the phrase "proximate cause" or "legal cause." From the plaintiff's standpoint, the important point to stress is that the breach of contract does not have to be the sole factor in bringing about the damage, just a substantial factor. Note too that the term "proximate cause" is often difficult for law students to understand. What about jurors? *By Ronald Oster and Rex Heeseman*

[3] Comment

[a] Proximate Cause Requirement

Civ. Code § 3300 limits a plaintiff's recovery in an action for breach of contract to those "proximately caused" by the breach [*Friend & Terry L. Co. v. Miller* (1885) 67 Cal. 464, 467, 8 P. 40 ; *Automatic Poultry Feeder Co. v. Wedel* (1963) 213 Cal.App.2d 509, 515-516, 28 Cal.Rptr. 795 ; *Southhall v. Security Title Ins. Etc. Co.* (1952) 112 Cal.App.2d 321, 323-324, 246 P.2d 74 ; *Reliance A. Corp. v. Hooper-Holmes Bureau* (1934) 139 Cal.App. 607, 613, 34 P.2d 762]. This rule embodies two separate limitations on recoverable damages for breach of contract. First, there must be a causal connection between the defendant's breach and the plaintiff's damages, that is, the breach must be a cause-in-fact, a necessary antecedent of the damages [*McDonald v. John P. Scripps Newspaper* (1989) 210 Cal.App.3d 100, 104, 257 Cal.Rptr. 473 ; *Camper v. McDermott* (1968) 266 Cal.App.2d 41, 46, 71 Cal.Rptr. 590 ; *Southhall v. Security Title Ins. Etc. Co.* (1952) 112 Cal.App.2d 321, 323-324, 246 P.2d 74]. Second, even if the plaintiff would not have been damaged if the defendant had not breached the contract, the causal connection between the defendant's breach and the plaintiff's damages must be sufficiently close to justify holding the defendant liable for the damages [*Friend & Terry L. Co. v. Miller* (1885) 67 Cal. 464, 467, 8 P. 40 ; *Automatic Poultry Feeder Co. v. Wedel* (1963) 213 Cal.App.2d 509, 515-516, 28 Cal.Rptr. 795 ; *Reliance A. Corp. v. Hooper-Holmes Bureau* (1934) 139 Cal.App. 607, 613, 34 P.2d 762 ; *J. Breuner Co. v. Western Union Tel. Co.* (1930) 108 Cal.App. 243, 255-256, 291 P. 445 ; *Brown v. Rives* (1919) 42 Cal.App. 482, 488-489, 184 P. 32].

[b] Necessity of Instructing on Proximate Cause

The rule that damages must be proximately caused by a breach to be recoverable is essentially a broad rule that permits the trier of fact to limit the liability of the defendant in a variety of situations in which a limitation is warranted by principles of equity and justice [*Hunt Bros. Co. v. San Lorenzo Etc. Co.* (1906) 150 Cal. 51, 55-57, 87 P. 1093 ; *Martin v. Deetz* (1894) 102 Cal. 55, 67-69, 36 P. 368 ; *Friend & Terry L. Co. v. Miller* (1885) 67 Cal. 464, 466-468, 8 P. 40]. For example, a franchisee's breach of contract in failing to timely pay past royalties was not a "proximate" cause of the franchisor's loss of future royalties, when only the franchisor's decision to terminate the agreement ended its ability to collect the future royalties from the franchisee [*Postal Instant Press, Inc. v. Sealy* (1996) 43 Cal.App.4th 1704, 1713,

51 *Cal.Rptr.2d* 365]. The rule that a defendant should not be held liable for loss or damage that could not have been foreseen is an important element of the concept of proximate cause [*Brookings L. & B. Co. v. Manufacturers' Co.* (1916) 173 *Cal.* 679, 683, 161 P. 266 ; *Hunt Bros. Co. v. San Lorenzo Etc. Co.* (1906) 150 *Cal.* 51, 55-57, 87 P. 1093 ; *Ely v. Bottini* (1960) 179 *Cal.App.2d* 287, 293-294, 3 *Cal.Rptr.* 756 ; *Reliance A. Corp. v. Hooper-Holmes Bureau* (1934) 139 *Cal.App.* 607, 613, 614, 34 P.2d 762 ; *Parkinson v. Langdon* (1918) 36 *Cal.App.* 80, 84-86, 171 P. 710]. However, a breach of contract may be held not to be a proximate cause of a foreseeable loss when, viewed in relation to other operative causes (including the conduct of the plaintiff) it played only an incidental role in bringing about the loss [see *Valencia v. Shell Oil Co.* (1944) 23 *Cal.2d* 840, 846-847, 147 P.2d 558 ; *Stultz v. Benson Lumber Co.* (1936) 6 *Cal.2d* 688, 59 P.2d 100 ; *Automatic Poultry Feeder Co. v. Wedel* (1963) 213 *Cal.App.2d* 509, 515-516, 28 *Cal.Rptr.* 795 ; *Shasta Douglas Oil Co. v. Work* (1963) 212 *Cal.App.2d* 618, 626, 28 *Cal.Rptr.* 190 ; *Brown v. Rives* (1919) 42 *Cal.App.* 482, 488-489, 184 P. 32], or when the imposition of liability will deter others from engaging in commercial transactions or produce other socially undesirable results [see *Westwater v. Grace Church* (1903) 140 *Cal.* 339, 342-343, 73 P. 1055 ; *Friend & Terry L. Co. v. Miller* (1885) 67 *Cal.* 464, 466-468, 8 P. 40]. Accordingly, even though there is considerable overlap between the requirement of foreseeability and the requirement of proximate cause, the giving of a separate instruction on foreseeability will not obviate the need to instruct the jury on proximate cause.

Although appellate decisions dealing with proximate cause in the context of an action for breach of contract are scarce, the proximate cause requirement imposed by *Civ. Code* § 3300 in breach of contract actions and the proximate cause requirement of *Civ. Code* § 3333 for actions sounding in tort are identical [*Berge v. International Harvester Co.* (1983) 142 *Cal.App.3d* 152, 161, 190 *Cal.Rptr.* 815 ; *Seaboard Music Co. v. Germano* (1972) 24 *Cal.App.3d* 618, 622, 101 *Cal.Rptr.* 255 ; *State Farm Mut. Auto. Ins. Co. v. Allstate Ins. Co.* (1970) 9 *Cal.App.3d* 508, 528, 88 *Cal.Rptr.* 246 ; *Northwestern Title Security Co. v. Flack* (1970) 6 *Cal.App.3d* 134, 146, 85 *Cal.Rptr.* 693]. Therefore, decisions arising from tort actions may properly be looked to for guidance. Under these decisions, proximate cause is generally treated as a factual issue that must be submitted to the jury [*Mosley v. Arden Farms Co.* (1945) 26 *Cal.2d* 213, 219, 157 P.2d 372 ; *Wells v. Lloyd IV* (1936) 6 *Cal.2d* 70, 86, 56 P.2d 517 ; *Osborn v. Irwin Memorial Blood Bank* (1992) 5 *Cal.App.4th* 234, 252, 7 *Cal.Rptr.2d* 101 ; *Thomsen v. Rexall Drug & Chemical Co.* (1965) 235 *Cal.App.2d* 775, 783, 45 *Cal.Rptr.* 642]. A failure to instruct the jury on the requirement of proximate cause when requested to do so has been held to be error [*Craven v. Central P. R. Co.* (1887) 72 *Cal.* 345, 347, 13 P. 878 ; *Mahar v. MacKay* (1942) 55 *Cal.App.2d* 869, 877, 132 P.2d 42 ; *Brower v. Arnstein* (1932) 126 *Cal.App.* 291, 298, 14 P.2d 863 ; *Long v. Barbieri* (1932) 120 *Cal.App.* 207, 217-218, 7 P.2d 1082], and, when there were substantial causation issues, a ground for reversal [*Long v. Barbieri* (1932) 120 *Cal.App.* 207, 217-218, 7 P.2d 1082].

[c] Drawbacks of "Proximate Cause" and "Legal Cause" Terminology

Perhaps nothing has detracted from the comprehensibility of instructions on the requirement of causation as much as the terms used to describe or refer to the legal concept of "proximate" cause.

As a number of commentators have recognized, the traditional term "proximate" does not satisfactorily express the nature of the requirement of proximate cause [see Prosser, *Proximate Cause in California*, 38 *Calif. L. Rev.* 369, 392 (1950); Charrow & Charrow, *Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions*, 79 *Colum. L. Rev.* 1306, 1353 (1979); see also *Maupin v. Widling* (1987) 192 *Cal.App.3d* 568, 573-575, 237 *Cal.Rptr.* 521]. It implies a requirement of physical nearness, of a cause and effect close together in terms of time, sequence, or distance, when in fact the concept of proximate cause does not include any requirement of chronological or physical proximity [*Mitchell v. Gonzales* (1991) 54 *Cal.3d* 1041, 1050, 1 *Cal.Rptr.2d* 913, 819 P.2d 872 ; *Maupin v. Widling* (1987) 192 *Cal.App.3d* 568, 573, 237 *Cal.Rptr.* 521 ; *John B. Gunn Law Corp. v. Maynard* (1987) 189 *Cal.App.3d* 1565, 1571, 235 *Cal.Rptr.* 180 ; see *Automatic Poultry Feeder Co. v. Wedel* (1963) 213 *Cal.App.2d* 509, 516, 28 *Cal.Rptr.* 795 ; *Osborn v. City of Whittier* (1951) 103 *Cal.App.2d* 609, 616, 230 P.2d 132 ; *Lacy Mfg. Co. v. Los Angeles Gas Etc. Co.* (1909) 12 *Cal.App.* 37, 42, 106 P. 413]. It also suggests, and is frequently confused with, the term "approximate" [see *Mitchell v. Gonzales* (1991) 54 *Cal.3d* 1041, 1051, 1 *Cal.Rptr.2d* 913, 819 P.2d 872 ; see also Charrow & Charrow, *Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions*, 79

Colum. L. Rev. 1306, 1353 (1979) (authors found that 23 percent of subjects participating in study to test comprehensibility of standard jury instructions understood "proximate" cause to be one that was an "approximate" or "estimated" cause, as opposed to an actual cause)], a term with a meaning sufficiently different and distinct that its use in instructions on causation has been held to be error [*Hart v. Farris* (1933) 218 Cal. 69, 74-75, 21 P.2d 432 ; *State Compensation Fund v. Jorn* (1921) 186 Cal. 782, 784-785, 200 P. 624]. Most important, it fails to convey the essence of the rule it purports to describe, that is, that a defendant will not be held liable for damages that were actually caused by a breach when the imposition of liability would be unjust or inequitable because, considered in relation to all other causes that contributed to the ensuing loss, the breach did not significantly increase the risk of that loss or played only an incidental or insignificant part in bringing it about [*Stultz v. Benson Lumber Co.* (1936) 6 Cal.2d 688, 59 P.2d 100 ; *Westwater v. Grace Church* (1903) 140 Cal. 339, 342-343, 73 P. 1055 ; *Automatic Poultry Feeder Co. v. Wedel* (1963) 213 Cal.App.2d 509, 515-516, 28 Cal.Rptr. 795 ; *Brown v. Rives* (1919) 42 Cal.App. 482, 488-489, 184 P. 32 ; Prosser, *Proximate Cause in California*, 38 Calif. L. Rev. 369, 374-419 (1950)].

The use of the term "legal cause" has been found to create similar problems. It is frequently understood as a phrase used to distinguish a result brought about by *legal* (i.e., lawful and permissible) conduct from one brought about by *illegal* (i.e., wrongful and impermissible) conduct [see *Mitchell v. Gonzales* (1991) 54 Cal.3d 1041, 1053, 1 Cal.Rptr.2d 913, 819 P.2d 872 ; see also Charrow & Charrow, *Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions*, 79 *Colum. L. Rev.* 1306, 1353 (1979), in which authors reported that 25 percent of subjects participating in study to test comprehensibility of standard jury instructions misconstrued simplified version of BAJI No. 3.75 (6th ed. 1977) that used term "legal cause" in place of "proximate cause" in this manner]. When so understood, the phrase "legal cause" imports a cause that is lawful and, hence, cannot be a basis for liability, a meaning precisely opposite of the one intended. The practice of using labels such as "proximate" and "legal" to distinguish the legal requirement of causation from lay concepts has done nothing but generate confusion. The jurors will be aware that they are being asked to determine questions of causation in the context of a lawsuit; they will be instructed on the legal definition of causation that they are required to apply. There is no reason to believe that they will construe other references to causation as references to some concept other than the legal concept of causation defined in the instructions if they are not qualified with some sort of descriptive label. Accordingly, this instruction does not use a label such as "proximate" or "legal" to refer to the requirement of proximate cause that is defined. Rather, it informs the jury, in clear, simple language, when a breach of contract is considered in law to be the cause of an injury.

The above approach is in accordance with the recommendations made by Charrow and Charrow as a result of their findings on the comprehensibility of the standard causation instructions in former BAJI No. 3.75 and former BAJI No. 3.76 [Charrow & Charrow, *Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions*, 79 *Colum. L. Rev.* 1306, 1352-1353 (1979)]. The findings of Charrow and Charrow, and the confusion resulting from the use of "proximate cause" and "legal cause" were discussed and relied on by the California Supreme Court in disapproving former BAJI No. 3.75 [*Mitchell v. Gonzales* (1991) 54 Cal.3d 1041, 1053, 1 Cal.Rptr.2d 913, 819 P.2d 872]. The findings of Charrow and Charrow and the decision in *Mitchell* prompted the withdrawal of BAJI No. 3.75 and the revision of BAJI No. 3.76 [see BAJI (7th ed. Supp. 1992) pp. IX, 34-35].

[d] "Substantial Factor" Formulation of Proximate Cause Requirement

California courts have never insisted on the use of any particular language to define the requirement of proximate cause. Rather, they have acknowledged that it has defied precise definition [*Mosley v. Arden Farms Co.* (1945) 26 Cal.2d 213, 220-222, 157 P.2d 372 (Traynor, J., conc.) ; *Friend & Terry L. Co. v. Miller* (1885) 67 Cal. 464, 466-467, 8 P. 40 ; *Osborn v. Irwin Memorial Blood Bank* (1992) 5 Cal.App.4th 234, 252, 7 Cal.Rptr.2d 101 ; *State Compensation Ins. Fund v. Industrial Acci. Com.* (1959) 176 Cal.App.2d 10, 20, 1 Cal.Rptr. 73]. In one of the leading cases on the subject, the Supreme Court observed that "The most that has been or that can be done, is to formulate such arbitrary rules as the subject to which they are applied considered, will in the great majority of cases afford such measure of indemnity as the ends of justice will warrant" [*Friend & Terry L. Co. v. Miller* (1885) 67 Cal. 464, 466, 8 P. 40].

The instruction in [1], *above*, is based on the "substantial factor" formulation that was initially used by the First Restatement of Torts and has since found widespread acceptance in California decisions. This instruction was found to produce proportionately the most misunderstanding (i.e., the most incorrect responses per variable) of all instructions tested [Charrow & Charrow, *Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions*, 79 *Colum. L. Rev.* 1306, 1352-1353 (1979)].

In dealing with the requirements of cause and proximate cause, the First Restatement of Torts dispensed with both the term "proximate" and the traditional definition of proximate cause as a cause that in a "natural," "continuous," "unbroken" sequence produces injury [*Chutuk v. Southern Counties Gas Co.* (1942) 21 *Cal.2d* 372, 380-381, 132 *P.2d* 193 ; *Baillargeon v. Myers* (1919) 180 *Cal.* 504, 508, 182 *P.* 37]. The Restatement substituted the concept of the "legal cause" of an injury, which it defined as a "substantial factor" in producing the injury [Restatement of Torts §§ 430, 431]. The Restatement formulation of the proximate cause requirement has been frequently endorsed in California decisions [*Vesely v. Sager* (1971) 5 *Cal.3d* 153, 163-164, 95 *Cal.Rptr.* 623, 486 *P.2d* 151 ; *Signorelli v. Potter* (1954) 43 *Cal.2d* 541, 545, 275 *P.2d* 449 ; *Benton v. Sloss* (1952) 38 *Cal.2d* 399, 405, 240 *P.2d* 575 ; *McEvoy v. American Pool Corp.* (1948) 32 *Cal.2d* 295, 298, 195 *P.2d* 783 ; *Maupin v. Widling* (1987) 192 *Cal.App.3d* 568, 575, 237 *Cal.Rptr.* 521 ; *Fraijo v. Hartland Hospital* (1979) 99 *Cal.App.3d* 331, 345-347, 160 *Cal.Rptr.* 246 ; *Thomsen v. Rexall Drug & Chemical Co.* (1965) 235 *Cal.App.2d* 775, 783, 45 *Cal.Rptr.* 642 ; *Tate v. Canonica* (1960) 180 *Cal.App.2d* 898, 909, 5 *Cal.Rptr.* 28 ; *Singh v. Frye* (1960) 177 *Cal.App.2d* 590, 593, 2 *Cal.Rptr.* 372]. In his classic article on the rule of proximate cause in California, Dean Prosser observed that, for the purpose of submitting issues of factual causation to the jury in intelligible form, it did not appear possible to improve on the Restatement's "substantial factor" formulation [Prosser, *Proximate Cause in California*, 38 *Calif. L. Rev.* 369, 421 (1950)]. California appellate courts have never questioned the use of the alternative "substantial factor" instruction [see *Espinosa v. Little Co. of Mary Hospital* (1995) 31 *Cal.App.4th* 1304, 1314, 37 *Cal.Rptr.2d* 541 ; *Maupin v. Widling* (1987) 192 *Cal.App.3d* 568, 574-575, 237 *Cal.Rptr.* 521 ; *John B. Gunn Law Corp. v. Maynard* (1987) 189 *Cal.App.3d* 1565, 1571-1573, 235 *Cal.Rptr.* 180 ; *Fraijo v. Hartland Hospital* (1979) 99 *Cal.App.3d* 331, 345-347, 160 *Cal.Rptr.* 246].

[e] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 3, *California Judicial Council Contracts Instructions*]:

CACI No. 350 Introduction to Contract Damages

CACI No. 351 Special Damages

CACI No. 430 Causation: Substantial Factor

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts Law Remedies Compensatory Damages General Overview Torts Negligence Causation Cause in Fact Torts Negligence Causation Proximate Cause General Overview

Scott Noble contributed to the original chapter for California Forms of Jury Instruction (Matthew Bender).



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CHAPTER 3E Matthew Bender Contract Damages Instructions

1-3E California Forms of Jury Instruction MB 300E.04

MB 300E.04 Damages Not Recoverable Unless Loss or Harm Would Not Have Occurred "But For" Breach

[1] Instruction Damages Not Recoverable Unless Loss or Harm Would Not Have Occurred "But For" Breach

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

If a loss or harm that Plaintiff suffered would have happened even if Defendant had fully performed the contract [he/she/it] made with Plaintiff [or that was made for Plaintiff's benefit], then any breach of that contract by Defendant may not be considered in law to be a substantial factor in bringing about that loss or harm and therefore may not be considered to be a cause of that loss or harm.

Authorities: *Signorelli v. Potter* (1954) 43 Cal.2d 541, 545, 275 P.2d 449 ; *McDonald v. John P. Scripps Newspaper* (1989) 210 Cal.App.3d 100, 105, 257 Cal.Rptr. 473 ; *Metzenbaum v. R.O.S. Associates* (1986) 188 Cal.App.3d 202, 211-214, 232 Cal.Rptr. 741 ; *Vecchione v. Carlin* (1980) 111 Cal.App.3d 351, 168 Cal.Rptr. 571 ; *Self v. General Motors Corp.* (1974) 42 Cal.App.3d 1, 10, 116 Cal.Rptr. 575 ; *Camper v. McDermott* (1968) 266 Cal.App.2d 41, 46, 71 Cal.Rptr. 590 ; *Southhall v. Security Title Ins. Etc. Co.* (1952) 112 Cal.App.2d 321, 323-324, 246 P.2d 74 ; *Feldesman v. McGovern* (1941) 44 Cal.App.2d 566, 568-569, 112 P.2d 645 .

[2] Use of Instruction

This instruction on the so-called "but for" or cause-in-fact rule should be used when there is evidence that the loss or harm at issue was produced by an independent cause, unrelated to any breach of contract, and would have occurred even if the contract had been fully performed. The instruction should be given immediately after the basic instruction on cause and proximate cause in MB 300E.03.

This instruction is an alternative to the instruction on concurrent causes in MB 300E.05. In general, this instruction is proper unless there is evidence that two or more independent causes, operating concurrently, combined to produce the loss or harm at issue, and that either of these causes, operating alone, would have produced the loss or harm. In this latter situation, the concurrent cause instruction should be given. For a more detailed discussion of concurrent causes,

see [3], *below*, and MB 300E.05[3].

When feasible, this instruction should be particularized by substituting specific references to the particular contract that is the basis for the claim and the particular element or elements of loss or harm at issue. Particularization is especially appropriate when there is evidence that some, but not all, of the elements of loss or harm that the plaintiff claims to have suffered would have occurred even if the contract had been performed.

For related Judicial Council instructions, see [3][c], *below*.

LexisNexis Matthew Bender Expert Practice Tip--Structure "But For" Into Closing: "But for" is a concept that most jurors will understand and be able to apply. Hence, structure your closing accordingly.
By Rex Heeseman

LexisNexis Matthew Bender Expert Practice Tip--"Substantial Factor" Can Be Plaintiff's Counter to "Damages Would Have Happened Anyway": Causation can be an issue in cases involving consequential damages when a breach of contract allegedly results in loss of other contracts, other customers, or even plaintiff's ability to continue in business. This instruction provides that if defendant can show the damage would have happened anyway, there can be no recovery. To counter this defense, plaintiff need only prove that the breach was a substantial factor, not the sole factor in causing the consequential damages. *By Ronald Oster*

[3] Comment

[a] Nature and Scope of "But For" Rule

The "but for" rule precludes the recovery of damages for a loss or harm unless the breach at issue was a necessary antecedent of that loss or harm, that is, unless the loss or harm would not have occurred "but for" the breach. Under the "but for" rule, if a loss or harm would have occurred even if a legal or contractual obligation had been fully performed, a breach of that obligation cannot be considered to be a cause of that loss or harm [*Signorelli v. Potter* (1954) 43 Cal.2d 541, 545, 275 P.2d 449 ; *Burt v. Bank of California Nat'l Assn.* (1931) 211 Cal. 548, 550, 296 P. 68 ; *McDonald v. John P. Scripps Newspaper* (1989) 210 Cal.App.3d 100, 105, 257 Cal.Rptr. 473 ; *Southall v. Security Title Ins. Etc. Co.* (1952) 112 Cal.App.2d 321, 323-324, 246 P.2d 74 ; *Feldesman v. McGovern* (1941) 44 Cal.App.2d 566, 568-569, 112 P.2d 645 ; *McVay v. Central California Inv. Co.* (1907) 6 Cal.App. 184, 188-189, 91 P. 745 ; Restatement (Second) of Torts § 432, subd. 1, p. 430 (1979)].

The "but for" rule expresses a requirement of cause-in-fact that is generally essential to a determination that a breach of an obligation proximately caused a loss or harm [*Signorelli v. Potter* (1954) 43 Cal.2d 541, 545, 275 P.2d 449 ; *Burt v. Bank of California Nat. Assn.* (1931) 211 Cal. 548, 557, 296 P. 68 ; *Metzenbaum v. R.O.S. Associates* (1986) 188 Cal.App.3d 202, 211-214, 232 Cal.Rptr. 741 ; *Vecchione v. Carlin* (1980) 111 Cal.App.3d 351, 359, 168 Cal.Rptr. 571 ; *Self v. General Motors Corp.* (1974) 42 Cal.App.3d 1, 10, 116 Cal.Rptr. 575 ; *Camper v. McDermott* (1968) 266 Cal.App.2d 41, 46, 71 Cal.Rptr. 590 ; *Southall v. Security Title Ins. Etc. Co.* (1952) 112 Cal.App.2d 321, 323-324, 246 P.2d 74 ; *Feldesman v. McGovern* (1941) 44 Cal.App.2d 566, 568-569, 112 P.2d 645 ; *McVay v. Central California Inv. Co.* (1907) 6 Cal.App. 184, 188-189, 91 P. 745]. The only significant exception to the "but for" rule is the "concurrent causes" rule first enunciated in *Thomsen v. Rexall Drug & Chemical Co.* [*Thomsen v. Rexall Drug & Chemical Co.* (1965) 235 Cal.App.2d 775, 782-783, 45 Cal.Rptr. 642]. Under this rule, when the breach of an obligation and an independent cause that is operating concurrently combine to bring about a loss or harm and when both the breach and the independent cause would have been sufficient, operating alone, to cause the loss or harm, the defendant will not be relieved of liability because the loss or harm would have occurred even if the obligation had not been breached [*Vecchione v. Carlin* (1980) 111 Cal.App.3d 351, 359, 168 Cal.Rptr. 571 ; *Thomsen v. Rexall Drug & Chemical Co.* (1965) 235 Cal.App.2d 775, 782-783, 45 Cal.Rptr. 642 ; Restatement (Second) of Torts § 432(2), p. 430 (1979)]. The "concurrent causes" rule is discussed more fully in MB 300E.05.

[b] Necessity of Instructing on "But For" Rule

Except in those cases when the *Thomsen* "concurrent causes" rule applies [*Thomsen v. Rexall Drug & Chemical Co.* (1965) 235 Cal.App.2d 775, 45 Cal.Rptr. 642 ; see [a], above, and MB 300E.05], a specific instruction on the "but for" rule is proper [*McGee v. Cessna Aircraft Co.* (1983) 139 Cal.App.3d 179, 190-191, 188 Cal.Rptr. 542 ; *Vecchione v. Carlin* (1980) 111 Cal.App.3d 351, 359, 168 Cal.Rptr. 571 ; *Self v. General Motors Corp.* (1974) 42 Cal.App.3d 1, 10, 116 Cal.Rptr. 575], and a failure to specifically instruct the jury on the "but for" rule will constitute reversible error when there are substantial cause-in-fact issues [*McGee v. Cessna Aircraft Co.* (1983) 139 Cal.App.3d 179, 190-191, 188 Cal.Rptr. 542 ; *Self v. General Motors Corp.* (1974) 42 Cal.App.3d 1, 10-11, 116 Cal.Rptr. 575]. This is so even when the jury is otherwise instructed that a breach of an obligation is the legal cause of a loss or injury only if it was a substantial factor in bringing about that loss or harm [*McGee v. Cessna Aircraft Co.* (1983) 139 Cal.App.3d 179, 190-191, 188 Cal.Rptr. 542 ; *Self v. General Motors Corp.* (1974) 42 Cal.App.3d 1, 10, 116 Cal.Rptr. 575].

The court in *Self v. General Motors Corp.* [*Self v. General Motors Corp.* (1974) 42 Cal.App.3d 1, 10, 116 Cal.Rptr. 575] held that the trial court prejudicially erred not only in refusing to instruct the jury on the "but for" rule but in refusing a particularized instruction applying the rule to the central causation issue in the case. The instruction read: "If you find that the gasoline tank in the 1962 Chevrolet station wagon was improperly located, but that the fire would have occurred even if the tank had been properly located, its location was not a substantial factor in bringing about the fire and was, therefore, not a contributing cause thereof." The court specifically noted the importance of particularizing causation instructions [*Self v. General Motors Corp.* (1974) 42 Cal.App.3d 1, 10, 116 Cal.Rptr. 575].

[c] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 3, *California Judicial Council Contracts Instructions*]:

CACI No. 350 Introduction to Contract Damages

CACI No. 351 Special Damages

CACI No. 430 Causation: Substantial Factor

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts Law Remedies Compensatory Damages General Overview Torts Negligence Causation Cause in Fact

Scott Noble contributed to the original chapter for California Forms of Jury Instruction (Matthew Bender).



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CHAPTER 3E Matthew Bender Contract Damages Instructions

1-3E California Forms of Jury Instruction MB 300E.05

MB 300E.05 Concurrent Causes

[1] Instruction Concurrent Causes

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

In law, more than one act, omission, or event may be considered to be a cause of loss or harm. The fact that an independent cause that was operating at the same time caused or would have caused a loss or harm claimed by Plaintiff does not necessarily mean that a breach of contract cannot also be considered to be a cause of that loss or harm.

If a breach of contract by Defendant actually caused some loss or harm to Plaintiff or if it would have caused that loss or harm if the independent cause was not operating, the breach of contract is considered in law to be a cause of that loss or harm as long as it was or would have been a substantial factor in bringing it about. This is so even if the independent cause would have produced the loss or harm suffered by Plaintiff if the contract had been fully performed.

Authorities: *Bromme v. Pavitt* (1992) 5 Cal.App.4th 1487, 1498, 1507, 7 Cal.Rptr.2d 608 ; *John B. Gunn Law Corp. v. Maynard* (1987) 189 Cal.App.3d 1565, 1571-1573, 235 Cal.Rptr. 180 ; *McGee v. Cessna Aircraft Co.* (1983) 139 Cal.App.3d 179, 190-191, 188 Cal.Rptr. 542 ; *Vecchione v. Carlin* (1980) 111 Cal.App.3d 351, 358-359, 168 Cal.Rptr. 571 ; *Hart v. Browne* (1980) 103 Cal.App.3d 947, 959-962, 163 Cal.Rptr. 356 ; *Fraijo v. Hartland Hospital* (1979) 99 Cal.App.3d 331, 346-347, 160 Cal.Rptr. 246 ; *Seaboard Music Co. v. Germano* (1972) 24 Cal.App.3d 618, 622, 101 Cal.Rptr. 255 ; *State Farm Mut. Auto. Ins. Co. v. Allstate Ins. Co.* (1970) 9 Cal.App.3d 508, 528, 88 Cal.Rptr. 246 ; *Northwestern Title Security Co. v. Flack* (1970) 6 Cal.App.3d 134, 146, 85 Cal.Rptr. 693 ; *McDonald v. Schwartz* (1966) 239 Cal.App.2d 900, 905-906, 49 Cal.Rptr. 242 ; *Thomsen v. Rexall Drug & Chemical Co.* (1965) 235 Cal.App.2d 775, 783, 45 Cal.Rptr. 642 .

[2] Use of Instruction

This instruction, on the rule of concurrent causes established by *Thomsen v. Rexall Drug & Chemical Co.* [*Thomsen v. Rexall Drug & Chemical Co.* (1965) 235 Cal.App.2d 775, 45 Cal.Rptr. 642], a negligence action, should be given immediately following the general instruction on cause and proximate cause in MB 300E.03. This rule is applicable only when there is evidence that both the breach and some other unrelated cause operating at the same time would have been sufficient to bring about the loss or harm at issue if they had been operating alone. When this instruction is given, it may be reversible error to give a proximate cause instruction using the traditional "natural, continuous, unbroken sequence" formulation rather than the "substantial factor" formulation embodied in the general instruction in MB 300E.03.

There is no direct California authority declaring this rule to be applicable in an action for breach of contract, and the instruction should be used with caution [see [3][a], *below*].

If the concurrent causes instruction is applicable, the jury should not be instructed on the "but for" rule [see MB 300E.04].

Whenever feasible, this instruction should be particularized by substituting specific references to the contract at issue, the particular items or elements of loss or harm claimed to have been produced by some cause other than the breach, and the independent cause claimed to have produced the loss or harm at issue in the second paragraph.

LexisNexis Matthew Bender Expert Practice Tips--Explain Carefully in Closing and Do Not Give with "But For" Instruction: This instruction could be very confusing and will strike some jurors as counterintuitive. If given, the instruction should be carefully explained in closing argument. Also, note that this instruction should not be given along with the "but for" instruction [see MB 300E.04], which sets up a different test of causation that conflicts with this instruction. *By Ronald Oster*

LexisNexis Matthew Bender Expert Practice Tips--Keep in Mind Difficulty of Concept: "Concurrent causation" is hard for attorneys and judges to apply and to understand. Remember that when fashioning your closing. *By Rex Heeseman*

[3] Comment

[a] Nature and Scope of "Concurrent Causes" Rule

The case of *Thomsen v. Rexall Drug & Chemical Co.* [*Thomsen v. Rexall Drug & Chemical Co.* (1965) 235 Cal.App.2d 775, 783, 45 Cal.Rptr. 642] recognized a narrow exception to the "but for" rule of causation. It held that when a defendant's breach of a duty and an independent, unrelated concurrent cause combine to produce an injury and when both the breach and the independent cause would have produced the injury if they had been operating alone, the defendant will not be absolved of liability on the ground that the injury would have occurred without the breach. The breach will be deemed to be a proximate cause of the injury if it was otherwise a substantial factor in bringing it about. The validity of the *Thomsen* rule in tort cases is now well established [*Bromme v. Pavitt* (1992) 5 Cal.App.4th 1487, 1498, 7 Cal.Rptr.2d 608 ; *McGee v. Cessna Aircraft Co.* (1983) 139 Cal.App.3d 179, 190-191, 188 Cal.Rptr. 542 ; *Vecchione v. Carlin* (1980) 111 Cal.App.3d 351, 358-359, 168 Cal.Rptr. 571 ; *Hart v. Browne* (1980) 103 Cal.App.3d 947, 959-962, 163 Cal.Rptr. 356 ; *Fraijo v. Hartland Hospital* (1979) 99 Cal.App.3d 331, 346-347, 160 Cal.Rptr. 246 ; *McDonald v. Schwartz* (1966) 239 Cal.App.2d 900, 905-906, 49 Cal.Rptr. 242 ; Restatement (Second) of Torts § 432(2) (1979)].

No subsequent California appellate decisions have considered the nature or scope of the *Thomsen* rule in the context of an action for breach of contract. However, the *Thomsen* case assumes that the plaintiff was entitled to recover on a breach of warranty theory as well as on a negligence theory. Additionally, the rule adopted by the *Thomsen* court is based on a determination of the scope and meaning of the statutory requirement of proximate cause contained in *Civ. Code* § 3333 and the proximate cause requirement imposed by *Civ. Code* § 3300 has been held to be the same as that

imposed by Civ. Code § 3333 [*Seaboard Music Co. v. Germano* (1972) 24 Cal.App.3d 618, 622, 101 Cal.Rptr. 255 ; *State Farm Mut. Auto. Ins. Co. v. Allstate Ins. Co.* (1970) 9 Cal.App.3d 508, 528, 88 Cal.Rptr. 246 ; *Northwestern Title Security Co. v. Flack* (1970) 6 Cal.App.3d 134, 146, 85 Cal.Rptr. 693]. Therefore, the *Thomsen* rule should apply to a determination of whether loss or harm was proximately caused by a breach of contract.

[b] Instructions on "Concurrent Causes"

It has been held that it is reversible error to instruct the jury on the "but for" rule rather than the "concurrent causes" rule when there is evidence that either the breach at issue or an independent concurrent cause would have been sufficient, operating alone, to bring about the plaintiff's injuries [*John B. Gunn Law Corp. v. Maynard* (1987) 189 Cal.App.3d 1565, 1571-1573, 235 Cal.Rptr. 180 ; *Hart v. Browne* (1980) 103 Cal.App.3d 947, 959-962, 163 Cal.Rptr. 356]. On the other hand, unless there is evidence that both the breach and an independent concurrent cause would have been sufficient in and of themselves to cause the injury, it is improper to instruct the jury on the concurrent causes rule [*Vecchione v. Carlin* (1980) 111 Cal.App.3d 351, 359, 168 Cal.Rptr. 571].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts Law Remedies Compensatory Damages General Overview Torts Negligence Causation Proximate Cause Concurrent Causation

Scott Noble contributed to the original chapter for California Forms of Jury Instruction (Matthew Bender).



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California Forms of Jury Instruction

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CHAPTER 3E Matthew Bender Contract Damages Instructions

1-3E California Forms of Jury Instruction MB 300E.06

MB 300E.06 Damage Must Be Reasonably Certain; Certainty as to Amount Not Required

[1] Instruction Damage Must Be Reasonably Certain; Certainty as to Amount Not Required

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Plaintiff is not entitled to recover damages for a particular loss or type of harm unless [he/she/it] proves that it is reasonably certain that [he/she/it] has suffered [or will suffer] such a loss or type of harm as a result of a breach by Defendant. However, once Plaintiff proves that it is reasonably certain that [he/she/it] has suffered [or will suffer] a particular loss or type of harm as a result of a breach by Defendant, the law does not require Plaintiff to prove the exact amount of that loss or harm.

If it is reasonably certain that [he/she/it] has suffered [or will suffer] a particular loss or type of harm as a result of a breach by Defendant, Plaintiff is entitled to recover damages for that loss or harm as long as there is some reasonable basis for estimating or approximating the amount of the loss or harm. Plaintiff may not be denied damages merely because the amount of the loss or harm is uncertain or difficult to determine.

Authorities: Civ. Code §§ 3283, 3301; *Cal. Lettuce Growers v. Union Sugar Co.* (1955) 45 Cal.2d 474, 487, 289 P.2d 785 ; *Stott v. Johnston* (1951) 36 Cal.2d 864, 875, 229 P.2d 348 ; *Acree v. General Motors Acceptance Corp.* (2001) 92 Cal.App.4th 385, 396-398, 112 Cal.Rptr.2d 99 ; *Ericson v. Playgirl, Inc.* (1977) 73 Cal.App.3d 850, 854-855, 140 Cal.Rptr. 921 ; *Guntert v. City of Stockton* (1976) 55 Cal.App.3d 131, 143, 126 Cal.Rptr. 690 ; *Carpenter Foundation v. Oakes* (1972) 26 Cal.App.3d 784, 799-800, 103 Cal.Rptr. 368 ; *Mendoyoma, Inc. v. County of Mendocino* (1970) 8 Cal.App.3d 873, 880-881, 87 Cal.Rptr. 740 ; *Israel v. Campbell* (1958) 163 Cal.App.2d 806, 816, 330 P.2d 83 ; *Noble v. Tweedy* (1949) 90 Cal.App.2d 738, 744-746, 203 P.2d 778 ; see *Vestar Development v. General Dynamics Corp.* (9th Cir. 2001) 249 F.3d 958, 961-962 .

[2] Use of Instruction

This instruction should be used when there is an issue in the case as to the statutory rules prohibiting the recovery of

damages for items or elements of damage that are uncertain, speculative, or hypothetical [see *Civ. Code* §§ 3301, 3283]. Because the plaintiff has the burden of proving the nature and extent of the damages caused by a defendant's breach of contract, this instruction should be given whenever a defendant contends that the plaintiff has failed to prove with the requisite degree of certainty some or all of the items or elements of damage for which recovery is sought. It should be given immediately following the instructions on causation in MB 300E.03-MB 300E.05.

This instruction is not intended to cover fully a situation in which the amount of damages may be contingent on future events. If a claim is made that the damages may be increased or decreased as a result of the occurrence or nonoccurrence of some future event, counsel should consider requesting the instructions on contingencies affecting the amount of damage in MB 300E.07 and MB 300E.08 in addition to this instruction.

Although the law is not entirely clear on this point, it does not appear that *Civ. Code* §§ 3301 and 3283 affect the quantum of proof or evidence necessary to establish the nature and extent of the plaintiff's damages. The intent of these statutes seems to be to require the plaintiff to establish, as a certain and definite fact rather than as a hypothesis or surmise, that the damages sought actually have been or will be sustained. Accordingly, it is recommended that the jury also be instructed that the plaintiff has the burden of proving the nature and extent of the damages claimed by a preponderance of the evidence [see Ch. 2, *California Judicial Council Evidence Instructions*, CACI No. 200 ("More Likely True than Not True")].

When the plaintiff is seeking to recover for future losses or damages, the bracketed "[or will suffer]" alternatives should be used. Whenever feasible, this instruction should be particularized by substituting specific references to the items or elements of damage at issue (e.g., a loss of profits, a decrease in the fair market value of the property) for the general references to a particular loss or type of harm.

For related Judicial Council instructions, see [3][e], *below*.

LexisNexis Matthew Bender Expert Practice Tips--Plaintiff's Counsel Should Explain Rationale; Defense Can Use Instruction to Cast Doubt: This is a very important instruction for the plaintiff. The thrust of the instruction is that once plaintiff establishes with reasonable certainty that plaintiff has been damaged, then plaintiff is entitled to estimate or approximate the amount of that damage. In closing argument, plaintiff's counsel should take time to explain the rationale behind the rule: In many cases, the breach of contract by the defendant prevents the plaintiff (and the jury) from knowing exactly what would have happened. By allowing plaintiff to estimate or approximate the loss, this rule prevents the defendant from unfairly benefitting from this situation.

Conversely, this instruction is often a good way for the defense to cast doubt on the plaintiff's claim for damages. So, if you are the defense counsel, strongly consider how to take advantage of this instruction.
By Ronald Oster and Rex Heeseman

[3] Comment

[a] Certainty as to Damages Already Sustained

Civ. Code § 3301 provides that damages may not be recovered in an action for breach of contract unless they are "clearly ascertainable in both their nature and origin." Although such a requirement is not found in the language of the statute, California courts (probably for want of a more precise or suitable way of paraphrasing what is essentially a rule prohibiting speculative or hypothetical damages) have consistently stated that *Civ. Code* § 3301 requires the plaintiff to prove "with reasonable certainty" that the elements of damage for which recovery is sought were in fact suffered and were in fact caused by the defendant's breach of contract [*Stott v. Johnston* (1951) 36 Cal.2d 864, 875, 229 P.2d 348 ; *GHK Associates v. Mayer Group, Inc.* (1990) 224 Cal.App.3d 856, 873, 274 Cal.Rptr. 168 ; *Ericson v. Playgirl, Inc.* (1977) 73 Cal.App.3d 850, 854-855, 140 Cal.Rptr. 921 ; *Carpenter Foundation v. Oakes* (1972) 26 Cal.App.3d 784,

799-800, 103 Cal.Rptr. 368 ; *Mendoyoma, Inc. v. County of Mendocino* (1970) 8 Cal.App.3d 873, 880-881, 87 Cal.Rptr. 740 ; *Walnut Creek Pipe Distributors, Inc. v. Gates Rubber Co.* (1964) 228 Cal.App.2d 810, 819, 39 Cal.Rptr. 767 ; see *Vestar Development v. General Dynamics Corp.* (9th Cir. 2001) 249 F.3d 958, 961-962 (district court properly dismissed action for breach of agreement to negotiate when only damages sought were lost profits, which could not be proven with reasonable certainty as required by Civ. Code § 3301)].

The requirement that the plaintiff establish the elements of the damages claimed with "reasonable certainty" is limited to a showing of the existence and cause of the damages. Once the plaintiff proves the existence and cause of damages, recovery will not be denied because the amount of damages is uncertain, contingent, or difficult to determine [*Cal. Lettuce Growers v. Union Sugar Co.* (1955) 45 Cal.2d 474, 487, 289 P.2d 785 ; *Stott v. Johnston* (1951) 36 Cal.2d 864, 875, 229 P.2d 348 ; *Pacific Etc. Co. v. Packers' Assn.* (1903) 138 Cal. 632, 638, 72 P. 161 ; *DuBarry Internat., Inc. v. Southwest Forest Industries, Inc.* (1991) 231 Cal.App.3d 552, 562-563, 282 Cal.Rptr. 181 ; *Guntert v. City of Stockton* (1976) 55 Cal.App.3d 131, 143, 126 Cal.Rptr. 690 ; *Israel v. Campbell* (1958) 163 Cal.App.2d 806, 816, 330 P.2d 83]. All that is required is that there be some reasonable basis for estimating or approximating the amount [*Western Union Tel. Co. v. Commercial Pac. C. Co.* (1918) 177 Cal. 577, 585, 171 P. 317 ; *Pacific Etc. Co. v. Packers' Assn.* (1903) 138 Cal. 632, 638, 72 P. 161 ; *Acree v. General Motors Acceptance Corp.* (2001) 92 Cal.App.4th 385, 396-398, 112 Cal.Rptr.2d 99 (jury was presented with reasonable basis for computing damages resulting from contract breach involving method used to calculate premium refunds); *GHK Associates v. Mayer Group, Inc.* (1990) 224 Cal.App.3d 856, 873, 274 Cal.Rptr. 168 ; *DuBarry Internat., Inc. v. Southwest Forest Industries, Inc.* (1991) 231 Cal.App.3d 552, 562-563, 282 Cal.Rptr. 181 ; *Guntert v. City of Stockton* (1976) 55 Cal.App.3d 131, 143, 126 Cal.Rptr. 690 ; *Israel v. Campbell* (1958) 163 Cal.App.2d 806, 816, 330 P.2d 83 ; *Allen v. Gardner* (1954) 126 Cal.App.2d 335, 340-342, 272 P.2d 99].

[b] Certainty as to Future Damages

Civ. Code § 3283 applies to both breach of contract and tort actions [*Brix v. Peoples Mut. Life Ins. Co.* (1935) 2 Cal.2d 446, 452-453, 41 P.2d 537]. It authorizes an award of damages "for detriment ... certain to result in the future." Notwithstanding the difference in the language contained in the two statutes, Civ. Code § 3283 has been held to impose essentially the same requirements as Civ. Code § 3301. It precludes the plaintiff from recovering for prospective injury unless the nature, existence, and cause of future damages is proven "with reasonable certainty" [*Caminetti v. Pacific Mut. Life Ins. Co.* (1943) 23 Cal.2d 94, 103, 142 P.2d 741 ; *Fisher v. Hampton* (1975) 44 Cal.App.3d 741, 748, 118 Cal.Rptr. 811 ; *Noble v. Tweedy* (1949) 90 Cal.App.2d 738, 745, 203 P.2d 778 ; *Parsell v. San Diego Consol. G. & E. Co.* (1941) 46 Cal.App.2d 212, 216, 115 P.2d 539]. However, once it is reasonably certain that the plaintiff will suffer a particular element of damages in the future, uncertainty as to the amount of those damages will not bar recovery [*Seymour v. Oelrichs* (1909) 156 Cal. 782, 803, 106 P. 88 , *disapproved on other grounds*, *Sterling v. Taylor* (2007) 40 Cal. 4th 757, 770 ; *Guntert v. City of Stockton* (1976) 55 Cal.App.3d 131, 143, 126 Cal.Rptr. 690 ; *Fisher v. Hampton* (1975) 44 Cal.App.3d 741, 748, 118 Cal.Rptr. 811 ; *Noble v. Tweedy* (1949) 90 Cal.App.2d 738, 745, 203 P.2d 778].

[c] Burden of Proof

The authority on this point indicates that a requirement that elements of damage be shown with "reasonable certainty" is one that relates to what plaintiff is required to prove and not to the quantum of evidence required to prove it. That is, it is an element of the plaintiff's case that it is reasonably certain that the plaintiff sustained the damages for which recovery is sought, but the plaintiff is only required to establish this element by a preponderance of the evidence [*Khan v. Southern Pac. Co.* (1955) 132 Cal.App.2d 410, 416, 282 P.2d 78 ; *Parsell v. San Diego Consol. G. & E. Co.* (1941) 46 Cal.App.2d 212, 216, 115 P.2d 539].

[d] Instructing on Requirement of Certainty

Although appellate courts have occasionally held that the evidence presented at trial was legally insufficient to establish

the requisite degree of certainty [*Bellman v. San Francisco H. S. Dist.* (1938) 11 Cal.2d 576, 588-589, 81 P.2d 894 ; *Ericson v. Playgirl, Inc.* (1977) 73 Cal.App.3d 850, 854-855, 140 Cal.Rptr. 921], the determination of whether the plaintiff has shown claimed elements of damage with "reasonable certainty" is generally regarded as one to be made by the trier of fact [*Varjabedian v. Madera* (1977) 20 Cal.3d 285, 294-295, 142 Cal.Rptr. 429, 572 P.2d 43 ; *Pacific Etc. Co. v. Packers' Assn.* (1903) 138 Cal. 632, 637-638, 72 P. 161 ; *Fisher v. Hampton* (1975) 44 Cal.App.3d 741, 748-750, 118 Cal.Rptr. 811 ; *Carpenter Foundation v. Oakes* (1972) 26 Cal.App.3d 784, 800, 103 Cal.Rptr. 368 ; *Khan v. Southern Pac. Co.* (1955) 132 Cal.App.2d 410, 416-417, 282 P.2d 78 ; *Bauman v. San Francisco* (1940) 42 Cal.App.2d 144, 163-164, 108 P.2d 989]. A failure to instruct the jury, on request, as to a requirement that elements of damage be established with reasonable certainty is probably error [see *Melone v. Sierra Railway Co.* (1907) 151 Cal. 113, 116-117, 91 P. 522 ; *Christy v. City of Alhambra* (1935) 9 Cal.App.2d 499, 503, 50 P.2d 454 ; *Lindner v. Barkley* (1930) 109 Cal.App. 337, 293 P. 112 ; *Hasty v. Trevillian* (1929) 102 Cal.App. 405, 410-411, 283 P. 148], although it is likely to be regarded as harmless if the instructions as a whole adequately inform the jury that an element of damages must be established as a definite fact and that an award may not be based on speculation [see *Pacific Etc. Co. v. Packers' Assn.* (1903) 138 Cal. 632, 637-638, 72 P. 161 ; *Christy v. City of Alhambra* (1935) 9 Cal.App.2d 499, 503, 50 P.2d 454 ; *Lindner v. Barkley* (1930) 109 Cal.App. 337, 293 P. 112 ; *Hasty v. Trevillian* (1929) 102 Cal.App. 405, 410-411, 283 P. 148].

[e] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 3, *California Judicial Council Contracts Instructions*]:

CACI No. 350 Introduction to Contract Damages

CACI No. 351 Special Damages

CACI No. 352 Loss of Profits--No Profits Earned

CACI No. 353 Loss of Profits--Some Profits Earned

CACI No. 358 Mitigation of Damages

CACI No. 359 Present Cash Value of Future Damages

CACI No. 360 Nominal Damages

CACI No. 361 Plaintiff May Not Recover Duplicate Contract and Tort Damages

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts Law Remedies Compensatory Damages General Overview Evidence Procedural Considerations Burdens of Proof Allocation Torts Damages Compensatory Damages Pain & Suffering Future Pain & Suffering Torts Damages Proof

Scott Noble contributed to the original chapter for California Forms of Jury Instruction (Matthew Bender).



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CHAPTER 3E Matthew Bender Contract Damages Instructions

1-3E California Forms of Jury Instruction MB 300E.07

MB 300E.07 Effect of Contingencies That May Increase Future Damages

[1] Instruction Effect of Contingencies That May Increase Future Damages

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

In determining the amount of damages that will compensate Plaintiff for loss or harm that [he/she/it] is reasonably certain to suffer in the future, you may not consider the effect of possible future events that could increase Plaintiff's damages unless you find that it is reasonably certain that those events will occur.

Authorities: *Guntert v. City of Stockton* (1976) 55 Cal.App.3d 131, 150-153, 127 Cal.Rptr. 602 ; *Fisher v. Hampton* (1975) 44 Cal.App.3d 741, 748, 118 Cal.Rptr. 811 ; *Meyers v. Nolan* (1936) 18 Cal.App.2d 319, 324, 63 P.2d 1216 .

[2] Use of Instruction

This instruction should be used when the plaintiff seeks to recover damages for future loss or harm and when there is evidence or argument concerning contingencies that may increase the amount of any future loss or harm. It is set forth as a separate instruction to make it clear to the jury that the requirement that future damages be established with reasonable certainty applies to proof of the extent of such damages and is not satisfied merely by a showing that some future damages will result.

This instruction should be given immediately after the general instruction on the requirement that future damages be established with reasonable certainty [see MB 300E.06].

The instruction may be particularized by substituting specific references to the contingencies at issue for the general references to possible future events.

For related Judicial Council instructions, see [3][f], *below*.

LexisNexis Matthew Bender Expert Practice Tip--Defense's Use of "Reasonably Certain": The

concept of "reasonably certain" will be challenging to some jurors. However, it is a concept that can often be used skillfully by defense counsel. *By Rex Heeseman*

LexisNexis Matthew Bender Expert Practice Tip--Use Expert Testimony: This instruction can be used to take into account the effects of inflation and other future economic factors. To be persuasive, expert testimony will probably be required. *By Ronald Oster*

[3] Comment

[a] Right to Damages for Future Injury

Civ. Code § 3283 expressly authorizes the recovery of damages "for detriment ... certain to result in the future." By virtue of its provisions, the damages that may be recovered for a breach of contract include damages for future losses or harm that will result from the breach [*Caminetti v. Pacific Mut. Life Ins. Co.* (1943) 23 Cal.2d 94, 104-110, 142 P.2d 741 ; *Cleaning & P. Co. v. Hollywood L. Service* (1932) 217 Cal. 131, 134, 17 P.2d 712 ; *Guntert v. City of Stockton* (1976) 55 Cal.App.3d 131, 150, 126 Cal.Rptr. 690].

When there is an anticipatory or other total breach of a contract, recoverable future damages include damages for the value of performance of obligations that, under the terms of the contract, are due to be performed at some point in the future [*Caminetti v. Pacific Mut. Life Ins. Co.* (1943) 23 Cal.2d 94, 104-110, 142 P.2d 741 ; *Guntert v. City of Stockton* (1976) 55 Cal.App.3d 131, 150, 127 Cal.Rptr. 602 ; *Daum Development Corp. v. Yuba Plaza, Inc.* (1970) 11 Cal.App.3d 65, 76-77, 89 Cal.Rptr. 458]. However, when there is only a partial breach, or when the plaintiff has elected to treat a breach as a partial breach, the plaintiff may not recover damages for the anticipated breach of obligations that have not become due under the contract [*Coughlin v. Blair* (1953) 41 Cal.2d 587, 598-599, 262 P.2d 305 ; *Guntert v. City of Stockton* (1976) 55 Cal.App.3d 131, 150-151, 126 Cal.Rptr. 690].

[b] Contingencies Affecting Future Damages

An award of damages may not be predicated on the possible occurrence of some future event that would have increased the benefits the plaintiff would have obtained from performance or that may otherwise increase the plaintiff's damages [*Guntert v. City of Stockton* (1976) 55 Cal.App.3d 131, 150-153, 126 Cal.Rptr. 690 ; *Fisher v. Hampton* (1975) 44 Cal.App.3d 741, 748, 118 Cal.Rptr. 811 ; *Meyers v. Nolan* (1936) 18 Cal.App.2d 319, 324, 63 P.2d 1216]. Put another way, damages that will only be sustained on the happening of some future event are not reasonably certain to occur unless the event itself is reasonably certain to occur [*Guntert v. City of Stockton* (1976) 55 Cal.App.3d 131, 150-153, 126 Cal.Rptr. 690 ; *Fisher v. Hampton* (1975) 44 Cal.App.3d 741, 748, 118 Cal.Rptr. 811 ; *Meyers v. Nolan* (1936) 18 Cal.App.2d 319, 324, 63 P.2d 1216].

[c] Reduction to Present Cash Value

Damages that may be awarded to compensate a plaintiff for a loss that will be suffered in the future are limited to the present cash value of the amount required to compensate the plaintiff at the time the loss occurs [*Caminetti v. Pacific Mut. Life Ins. Co.* (1943) 23 Cal.2d 94, 104-110, 142 P.2d 741 ; *Daum Development Corp. v. Yuba Plaza, Inc.* (1970) 11 Cal.App.3d 65, 76-77, 89 Cal.Rptr. 458 ; *Noble v. Tweedy* (1949) 90 Cal.App.2d 738, 744-748, 203 P.2d 778]. The present cash value of an element of future damage is the amount which, together with the investment income earned in the interim, will be sufficient to fully compensate plaintiff for the future loss or harm when it occurs [see *Aetna Life Ins. Co. v. Geher* (9th Cir. 1931) 50 F.2d 657, 659-660 ; *Caminetti v. Pacific Mut. Life Ins. Co.* (1943) 23 Cal.2d 94, 104-110, 142 P.2d 741 ; *Fox v. Pacific Southwest Airlines* (1982) 133 Cal.App.3d 565, 568-570, 184 Cal.Rptr. 87 ; *Wilson v. Gilbert* (1972) 25 Cal.App.3d 607, 613-614, 102 Cal.Rptr. 31 ; *Daum Development Corp. v. Yuba Plaza, Inc.* (1970) 11 Cal.App.3d 65, 76-77, 89 Cal.Rptr. 458].

The case law reflects two radically different approaches to the determination of present value. One line of cases holds

that the present value of future damages should be determined by discounting them at the legal interest rate, i.e., by assuming that the plaintiff will earn a rate of return equal to the legal interest rate by investing a lump-sum award [see *Aetna Life Ins. Co. v. Geher* (9th Cir. 1931) 50 F.2d 657, 659-660]. This approach has been used in cases involving the determination of damages for anticipatory breach of a contract to pay specific sums or to furnish goods or services at a specific price in the future [*Aetna Life Ins. Co. v. Geher* (9th Cir. 1931) 50 F.2d 657, 659-660 ; *Caminetti v. Pacific Mut. Life Ins. Co.* (1943) 23 Cal.2d 94, 104-110, 142 P.2d 741 ; *Daum Development Corp. v. Yuba Plaza, Inc.* (1970) 11 Cal.App.3d 65, 76-77, 89 Cal.Rptr. 458 ; see *Noble v. Tweedy* (1949) 90 Cal.App.2d 738, 744-748, 203 P.2d 778]. Although this approach, like the legal interest rate, may not be firmly grounded in present-day economic reality, it does have the virtue of supplying some degree of consistency to the assumptions made by the law about the value of the use of money.

Another line of cases holds that the present value of future damages should be determined by discounting them at the prevailing market rates established by the evidence, i.e., by assuming that the plaintiff will earn a rate of return equal to the highest obtainable market rate for a reasonably secure investment by investing a lump-sum award. This approach, used primarily in personal injury and wrongful death cases, views the determination of present value as a factual question, the resolution of which is committed to the sound discretion of the trier of fact [*Canavin v. Pacific Southwest Airlines* (1983) 148 Cal.App.3d 512, 520-524, 196 Cal.Rptr. 82 ; *Stratton v. Tejani* (1982) 139 Cal.App.3d 204, 213, 187 Cal.Rptr. 231 ; *Fox v. Pacific Southwest Airlines* (1982) 133 Cal.App.3d 565, 568-570, 184 Cal.Rptr. 87 ; *Deshotel v. Atchison, T. & S. F. Ry. Co.* (1956) 144 Cal.App.2d 224, 229-231, 300 P.2d 910 ; *Emery v. Southern Cal. Gas Co.* (1946) 72 Cal.App.2d 821, 823-826, 165 P.2d 695].

Under this approach, the parties have a right to present evidence of the actual value of the use of damages awardable for future injuries and computations of present value based on that evidence [*Stratton v. Tejani* (1982) 139 Cal.App.3d 204, 213, 187 Cal.Rptr. 231 ; *Fox v. Pacific Southwest Airlines* (1982) 133 Cal.App.3d 565, 568-570, 184 Cal.Rptr. 87 ; *Emery v. Southern Cal. Gas Co.* (1946) 72 Cal.App.2d 821, 823-826, 165 P.2d 695]. In the absence of some evidentiary basis for a computation of present value, the jury need not be instructed on the standards for determining present value [*Wilson v. Gilbert* (1972) 25 Cal.App.3d 607, 613-614, 102 Cal.Rptr. 31].

It seems inconsistent to use the legal interest rate to establish the damages that the plaintiff sustained by being denied the use of monies wrongfully withheld [see *Civ. Code* §§ 3287, 3302] and a substantially higher market rate to determine the value of the use of monies to be awarded the plaintiff for prospective injuries [see *Stratton v. Tejani* (1982) 139 Cal.App.3d 204, 213, 187 Cal.Rptr. 231 (specific performance action in which court held that equitable considerations required use of actual market rates in determining offset reflecting value of interim use of purchase monies retained by buyer as well as discount to be made in determining buyer's prospective damages)].

[d] Consideration of Inflation and Economic Trends

A consideration that is frequently overlooked is the fact that the determination of damages for prospective injuries is a two-step process. The ultimate goal is to generate an amount that will be sufficient to compensate plaintiff at the time the future loss is sustained. The first step in the process is to determine the amount that will be required in the future to compensate plaintiff for his or her loss.

The amount required to compensate the plaintiff for future loss is not necessarily the same as the amount necessary to compensate the plaintiff for the same loss at the time of trial. The law has long recognized the economic reality of inflation and other economic trends that decrease the purchasing power of the dollar or otherwise increase the amount required in the future to compensate the plaintiff. The plaintiff's right to have the trier of fact take these factors into account in determining damages for future losses is well established [*Kircher v. Atchison, T. & S. F. Ry. Co.* (1948) 32 Cal.2d 176, 187, 195 P.2d 427 ; *Fox v. Pacific Southwest Airlines* (1982) 133 Cal.App.3d 565, 570, 184 Cal.Rptr. 87 ; *Rodriguez v. McDonnell Douglas Corp.* (1978) 87 Cal.App.3d 626, 662, 151 Cal.Rptr. 399 ; *Burke v. City & County of San Francisco* (1952) 111 Cal.App.2d 314, 320-322, 244 P.2d 708].

The effects of inflation and other economic trends will not always be applied. In the case of the breach of an agreement that requires the payment of money at some point in the future, the plaintiff will be given all of the benefits of performance by an award of the present value of the agreed-upon amount of the future payment. On the other hand, in the case of an agreement to supply goods or services or to construct improvements at some point in the future, an award of the current cost of securing a substitute performance that is then reduced to present value will not give the plaintiff the benefit of the bargain. This approach fails to take into account the fact that, as a result of inflation, the cost of securing the goods and services or of constructing the improvements will have increased by the time performance would have been due under the contract.

[e] Necessity of Instructing on Effects of Inflation and Other Economic Trends

In an appropriate case, it is clearly proper to instruct the jury that it may take inflationary and economic trends into consideration in determining the damages necessary to compensate the plaintiff for future injuries [*Kircher v. Atchison, T. & S. F. Ry. Co.* (1948) 32 Cal.2d 176, 187, 195 P.2d 427 ; *Chadek v. Spira* (1956) 146 Cal.App.2d 360, 368, 303 P.2d 879 ; *Risley v. Lenwell* (1954) 129 Cal.App.2d 608, 650, 277 P.2d 897 ; *Guerra v. Balestrieri* (1954) 127 Cal.App.2d 511, 520, 274 P.2d 443 ; *Burke v. City & County of San Francisco* (1952) 111 Cal.App.2d 314, 320-322, 244 P.2d 708].

However, two appellate cases have held that it is not error to refuse an instruction that the jury may consider the decreased purchasing power of the dollar in determining damages [*Flores v. McCoy* (1960) 186 Cal.App.2d 502, 508, 9 Cal.Rptr. 349 ; *Lemere v. Safeway Stores, Inc.* (1951) 102 Cal.App.2d 712, 728, 228 P.2d 296]. The only rationale advanced for this holding is that an instruction on the effects of inflation is unnecessary because the members of a jury will be well aware of the effects of inflation and will consider them even if an instruction is not given [*Risley v. Lenwell* (1954) 129 Cal.App.2d 608, 650, 277 P.2d 897 ; *Guerra v. Balestrieri* (1954) 127 Cal.App.2d 511, 520, 274 P.2d 443 ; *Lemere v. Safeway Stores, Inc.* (1951) 102 Cal.App.2d 712, 728, 228 P.2d 296].

At least as applied to damages for future injuries, the basic premise of these cases, i.e., that because jurors are aware of the effects of inflation they will necessarily consider them in determining damages, is faulty. Jurors are instructed to follow the law as stated to them by the court. Presumably, a substantial number of jurors make a conscientious attempt to base their decisions solely on the law as it is stated to them. When they are specifically instructed on the manner in which damages must be determined and the factors to be considered, it is illogical to assume that they will make an adjustment for inflationary trends or that they will take into account a factor that is not mentioned in the instructions merely because they are aware of it.

Of the two cases that held that it was not error to refuse an instruction on the effect of inflation, the only one that expressly discussed the reasons for this holding focused on a contention that, in the absence of such an instruction, the jury may have based its determination of damages for *past* injuries on *past* values of the dollar. In that case, the plaintiff's contention was that the jury should have been instructed that damages for past injuries must be based on the *current* value of the dollar [*Lemere v. Safeway Stores, Inc.* (1951) 102 Cal.App.2d 712, 728, 228 P.2d 296]. The other case appears merely to have accepted this earlier holding without any discussion of either the reasons for applying it or the damage aspects of the case at bar [*Flores v. McCoy* (1960) 186 Cal.App.2d 502, 508, 9 Cal.Rptr. 349].

It is one thing to say, as do these authorities, that a juror will assume that damages for past injuries are to be based on the current value of the dollar without a specific instruction to that effect. It is quite another to say that, in the absence of a specific instruction, a juror will assume that damages for future injuries are to be based on the projected future value of the dollar. Accordingly, as applied to future damages, the cases holding that it is not error to refuse an instruction on the effects of inflation are of questionable validity.

In a case involving damages for future losses, the plaintiff is entitled to counter the defendant's evidence of the amount

that can be earned with monies awarded as damages with evidence that its real value will decrease as a result of inflation [*Fox v. Pacific Southwest Airlines* (1982) 133 Cal.App.3d 565, 570, 184 Cal.Rptr. 87 ; *Rodriguez v. McDonnell Douglas Corp.* (1978) 87 Cal.App.3d 626, 662, 151 Cal.Rptr. 399]. There is no justification for instructions that specifically direct the jury to discount the damages awarded for future injuries to present value but omit any reference to the plaintiff's right to have the effects of inflation taken into account in determining these damages.

[f] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 3, *California Judicial Council Contracts Instructions*]:

CACI No. 359 Present Cash Value of Future Damages

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts Law Remedies Compensatory Damages General Overview Torts Damages Compensatory Damages Pain & Suffering Future Pain & Suffering Torts Damages Proof

Scott Noble contributed to the original chapter for California Forms of Jury Instruction (Matthew Bender).



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CHAPTER 3E Matthew Bender Contract Damages Instructions

1-3E California Forms of Jury Instruction MB 300E.08

MB 300E.08 Effect of Contingencies That May Decrease Amount of Future Damages

[1] Instruction Effect of Contingencies That May Decrease Amount of Future Damages

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

If you determine that it is reasonably certain that Plaintiff will suffer a particular loss or type of harm in the future, you may not consider the effect of possible future events that could reduce Plaintiff's damages unless you find that those events are reasonably likely to occur and unless the nature and timing of the reduction in damages will be such that you can make a reasonable determination of its present value.

Authority: Noble v. Tweedy (1949) 90 Cal.App.2d 738, 744-746, 203 P.2d 778 .

[2] Use of Instruction

This instruction should be used when the plaintiff seeks to recover damages for future losses or harm and there is evidence or argument concerning contingencies that may reduce the amount of the plaintiff's future damages. It will inform the jury of the rule that the plaintiff cannot be denied the right to recover damages that are otherwise certain to be sustained in the future merely because it is possible that hypothetical events could reduce the damages.

This instruction should be given immediately following the instruction on contingencies that may increase the plaintiff's future damages in MB 300E.07. If the jury is not instructed on such contingencies, this instruction should be given after the general instruction on the requirement that future damages be established with certainty in MB 300E.06.

This instruction may be particularized by substituting specific references to the contingencies at issue (e.g., the possibility of plaintiff's going out of business, the possibility that the property might be destroyed) for the general references to possible future events.

LexisNexis Matthew Bender Expert Practice Tip--Jurors Likely to Be Skeptical of Predictions of Future Events: Predictions as to future events that will reduce damages are likely to be greeted with skepticism by many jurors, especially in cases when the jury finds the defendant liable. *By Ronald Oster*

[3] Comment

This instruction is based on the decision in *Noble v. Tweedy* [*Noble v. Tweedy* (1949) 90 Cal.App.2d 738, 203 P.2d 778], a case in which the trial court awarded the tenants of a commercial building damages for the loss of promised improvements over the remaining nine year term of their lease. On appeal, the landlord contended that the trial court should have reduced the award of future damages to reflect the possibility that the lease might be terminated before the lease term's expiration because of the tenants' breach, the destruction of the property, the failure of the landlords' business, or a number of other potential occurrences. The court of appeal concluded that future damages that are otherwise certain to result could not be reduced because of the possibility of future speculative or hypothetical events. It held that contingencies that may reduce future damages could be considered only if they "are reasonably probable of occurrence and are reducible to a present monetary value" and must be disregarded if they are "wholly conjectural and have no ascertainable present worth" [*Noble v. Tweedy* (1949) 90 Cal.App.2d 738, 746, 203 P.2d 778].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts Law Remedies Compensatory Damages General Overview Torts Damages Compensatory Damages Pain & Suffering Future Pain & Suffering

Scott Noble contributed to the original chapter for California Forms of Jury Instruction (Matthew Bender).



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CHAPTER 3E Matthew Bender Contract Damages Instructions

1-3E California Forms of Jury Instruction MB 300E.09

MB 300E.09 Damages May Not Exceed What Plaintiff Would Have Received From Full Performance

[1] Instruction Damages May Not Exceed What Plaintiff Would Have Received From Full Performance

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

A person injured by a breach of contract will be fully compensated by an award of damages that will place [him/her/it] in the position that [he/she/it] would have been in if the contract had been fully performed. [He/She/It] is not entitled to recover damages in any greater amount. Therefore, you may not award Plaintiff damages that will place [him/her/it] in a better position than [he/she/it] would have been in if both [he/she/it] and Defendant had fully performed all of their obligations under the contract.

Authorities: Civ. Code § 3358; *Steelduct Co. v. Henger-Seltzer Co.* (1945) 26 Cal.2d 634, 648-649, 160 P.2d 804 ; *Lisec v. United Airlines, Inc.* (1992) 10 Cal.App.4th 1500, 1503, 11 Cal.Rptr.2d 689 ; *Smith v. Mady* (1983) 146 Cal.App.3d 129, 132-133, 194 Cal.Rptr. 42 ; *Wickman v. Oppen* (1961) 188 Cal.App.2d 129, 132-133, 10 Cal.Rptr. 291 ; *Phalanx Air Freight v. National Skyway Freight Corp.* (1951) 104 Cal.App.2d 771, 776-777, 232 P.2d 510 .

[2] Use of Instruction

This instructions should be used to instruct the jury on the rule of Civ. Code § 3358. That section limits the damages that may be awarded to the amount the plaintiff would have gained if the contract had been fully performed on both sides.

Civ. Code § 3358 is not applicable by its terms, and this instruction should therefore not be used, when there is a statute providing for an inconsistent element of damages. It should also not be used when there is no evidence regarding the savings or benefits plaintiff obtained by avoiding performance, when these savings or benefits cannot be ascertained with the requisite degree of certainty, and when the plaintiff has fully performed [see [3], below].

LexisNexis Matthew Bender Expert Practice Tip--Defense Can Use This Instruction to Its

Advantage: From the defendant's viewpoint, the primary purpose of this instruction is to require plaintiff

to deduct unspent costs and other savings from the breach of contract damages. In commercial cases, this can be quite complicated and may require expert testimony. However, defense counsel should exploit this instruction as it can often "raise the bar" for the plaintiff. *By Ronald Oster and Rex Heeseman*

[3] Comment

[a] Nature and Purpose of Limitation Imposed by Civ. Code § 3358

Damages are awarded in an action for breach of contract to place the injured party in the position it would have been in had the contract been fully performed [*Coughlin v. Blair* (1953) 41 Cal.2d 587, 603, 262 P.2d 305 ; *Lisec v. United Airlines, Inc.* (1992) 10 Cal.App.4th 1500, 1503, 11 Cal.Rptr.2d 689 ; *Wickman v. Oppen* (1961) 188 Cal.App.2d 129, 132, 10 Cal.Rptr. 291]. Therefore, an award of damages that permits the plaintiff to recover more for the breach of the contract than he or she would have obtained from the performance of the contract represents a windfall to the plaintiff at the defendant's expense [see *Smith v. Mady* (1983) 146 Cal.App.3d 129, 133, 194 Cal.Rptr. 42]. Civ. Code § 3358 prohibits such windfalls; it provides that "no person can recover a greater amount in damages for the breach of an obligation, than he could have gained by full performance thereof on both sides." It is therefore a limitation on the amount of damages that may be awarded under Civ. Code § 3300 and other statutes establishing a general measure of damages [*Royer v. Carter* (1951) 37 Cal.2d 544, 550, 233 P.2d 539 ; *Steelduct Co. v. Henger-Seltzer Co.* (1945) 26 Cal.2d 634, 648-649, 160 P.2d 804 ; *Wickman v. Oppen* (1961) 188 Cal.App.2d 129, 132-133, 10 Cal.Rptr. 291 ; *Phalanx Air Freight v. National Skyway Freight Corp.* (1951) 104 Cal.App.2d 771, 776-777, 232 P.2d 510]. Essentially, it prohibits the plaintiff from recovering damages that will place the plaintiff in a better position than it would have been in if all parties had fully performed all of their obligations under the contract [*Smith v. Mady* (1983) 146 Cal.App.3d 129, 133, 194 Cal.Rptr. 42]. For example, when a contract may be terminated without cause on 30 days' notice, damages for the breach of that contract are limited by Civ. Code § 3358 to the damages attributable to the 30-day period, because the contract could have been fully performed within those 30 days [*Martin v. U-Haul Co. of Fresno* (1988) 204 Cal.App.3d 396, 410-411, 251 Cal.Rptr. 17].

[b] Applicability of Civ. Code § 3358

Civ. Code § 3358 contemplates a measure of damages based on a consideration of the benefits the plaintiff obtained by avoiding performance as well as the benefits the plaintiff lost as a result of the defendant's failure to perform [see *Henderson v. Oakes-Waterman, Builders* (1941) 44 Cal.App.2d 615, 618, 112 P.2d 662]. In practice, its application appears to have been restricted to cases in which an award is based only on what the plaintiff would have received from the defendant's performance and fails to offset savings that the plaintiff effected or other benefits that the plaintiff obtained as a result of not having to perform its obligations [see *Royer v. Carter* (1951) 37 Cal.2d 544, 550, 233 P.2d 539 ; *Steelduct Co. v. Henger-Seltzer Co.* (1945) 26 Cal.2d 634, 648-649, 160 P.2d 804 ; *Smith v. Mady* (1983) 146 Cal.App.3d 129, 132-133, 194 Cal.Rptr. 42 ; *Wickman v. Oppen* (1961) 188 Cal.App.2d 129, 132-133, 10 Cal.Rptr. 291 ; *Phalanx Air Freight v. National Skyway Freight Corp.* (1951) 104 Cal.App.2d 771, 776-777, 232 P.2d 510 ; *Paul v. Williams* (1944) 64 Cal.App.2d 696, 702-703, 149 P.2d 284]. It has been held to be inapplicable when there is no evidence as to what it would have cost the plaintiff to perform [*Wolfson v. Haddan* (1930) 110 Cal.App. 573, 576-577, 294 P. 772], when the savings or benefits that the plaintiff obtained by avoiding performance cannot be determined [*Benard v. Walkup* (1969) 272 Cal.App.2d 595, 605-606, 77 Cal.Rptr. 544], and when the plaintiff's obligations had been fully performed at the time of the breach [*Henderson v. Oakes-Waterman, Builders* (1941) 44 Cal.App.2d 615, 618, 112 P.2d 662].

Civ. Code § 3358 is applicable "[e]xcept as expressly provided by statute." The effect of this exception appears to be to permit the recovery of specific elements of damage that the plaintiff may not have realized in the absence of a breach when such elements are expressly made recoverable by statute. In the case of an action for breach of contract, the principle effect of this exception is to make it clear that Civ. Code § 3358 does not bar the recovery of (1) interest [Civ. Code §§ 3287, 3289], (2) liquidated damages [Civ. Code §§ 1671, 1676], or (3) when a breach of contract also

constitutes a tort or a statutory violation, exemplary or statutory damages [see Law Revision Com. Comment to *Civ. Code* § 3358; Law Revision Com. Comment to *Civ. Code* § 1671; *Recommendations Relating to Liquidated Damages*, 13 Cal. Law Revision Com. Reports 1735 (1976)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts Law Remedies Compensatory Damages General Overview

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CHAPTER 3E Matthew Bender Contract Damages Instructions

1-3E California Forms of Jury Instruction MB 300E.10

MB 300E.10 Choice of Alternative Methods of Determining Plaintiff's Damages

[1] Instruction Choice of Alternative Methods of Determining Plaintiff's Damages

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

In this case, there is more than one possible method for determining the amount of damages that is necessary to compensate Plaintiff. You should use the method that you find produces the most accurate and certain result.

[*OPTIONAL (See Use of Instruction)*]

However, if you find that either of two methods produces a result that is certain and accurate and that will fully compensate Plaintiff, you should use the method that produces the lowest amount of damages.

Authorities: *California P. Mfg. Co. v. Stafford P. Co.* (1923) 192 Cal. 479, 485, 221 P. 345 ; *A. A. Baxter Corp. v. Colt Industries, Inc.* (1970) 10 Cal.App.3d 144, 160, 88 Cal.Rptr. 842 ; *Rilovich v. Raymond* (1937) 20 Cal.App.2d 630, 644-646, 67 P.2d 1062 .

[2] Use of Instruction

This instruction should be used when there is more than one permissible measure of damages or more than one permissible method of determining or computing damages that finds support in the evidence. It should be emphasized that in numerous situations the applicable measure or method of determining damages is dictated by statute or case law and the use of alternative measures or methods, however logical or appropriate, is error [see *Civ. Code* §§ 1951.2, 1794, 3302-3318, 3353-3354; *Parker v. Twentieth Century-Fox Film Corp.* (1970) 3 Cal.3d 176, 181-182, 89 Cal.Rptr. 737, 474 P.2d 689 ; *Royer v. Carter* (1951) 37 Cal.2d 544, 548-551, 233 P.2d 539 ; *Caminetti v. Pacific Mut. Life Ins. Co.* (1943) 23 Cal.2d 94, 104-110, 142 P.2d 741 ; *Shaffer v. Debbas* (1993) 17 Cal.App.4th 33, 46-47, 21 Cal.Rptr.2d 110 ; *Kitchel v. Acree* (1963) 216 Cal.App.2d 119, 123, 30 Cal.Rptr. 714]. Accordingly, this instruction should be used with

caution.

The optional paragraph should be used in cases in which the cost of alternative approaches to remedying the effects of the breach or giving plaintiff the benefit of the bargain is significantly different. For reasons discussed in greater detail in [3][b], *below*, careful consideration should be given to the propriety of instructing the jury on the rule requiring the use of the least expensive method of compensation and to the propriety of this particular formulation. Nevertheless, it is included because there is authority for it and because it is potentially a critical rule when the difference in the cost of alternative methods of compensation is great.

LexisNexis Matthew Bender Expert Practice Tip--View Optional Portion of Instruction With

Caution: The optional portion of this instruction should be viewed with caution. As noted in the commentary in [3][b], *below*, there is very limited appellate support for it. Additionally, in cases where there are competing damage experts, the optional portion almost looks like a direction to the jury to accept the defendant's expert analysis because it will produce "the lowest amount of damages." Moreover, the phrase "certain and accurate" clearly favors the defendant. *By Ronald Oster and Rex Hesseman*

[3] Comment

[a] Choosing Permissible Methods of Determining Damages

It has long been recognized that when there are two measures or methods of determining damages that are otherwise adequate and permissible, the one yielding the more accurate and certain result should be used [*California P. Mfg. Co. v. Stafford P. Co.* (1923) 192 Cal. 479, 485, 221 P. 345 ; *A. A. Baxter Corp. v. Colt Industries, Inc.* (1970) 10 Cal.App.3d 144, 160, 88 Cal.Rptr. 842 ; *Rilovich v. Raymond* (1937) 20 Cal.App.2d 630, 644-646, 67 P.2d 1062]. In *A. A. Baxter Corp. v. Colt Industries*, the court, while recognizing the continuing validity of this rule, announced another rule to be applied by the trial court in choosing between competing methods of determining damages: "if the facts show that either of two measures of damages will fully compensate plaintiff for his loss, that measure must be adopted which is less expensive to defendant" [*A. A. Baxter Corp. v. Colt Industries, Inc.* (1970) 10 Cal.App.3d 144, 160, 88 Cal.Rptr. 842].

[b] Propriety of Instruction on Rule Requiring Use of Least Expensive Method

The rule requiring the use of the least expensive method of compensation does not appear to have any express support in appellate decisions other than the *A. A. Baxter Corp.* case [*A. A. Baxter Corp. v. Colt Industries, Inc.* (1970) 10 Cal.App.3d 144, 160, 88 Cal.Rptr.842] . However, it is consistent in theory with a number of other well settled doctrines (e.g., rules prohibiting damages that the plaintiff could have avoided, damages that cannot be determined with certainty, and punitive damages or other damages in addition to those necessary to compensate the plaintiff) that limit the damages that may be awarded and there is no reason to believe that, in a proper context, it is not valid law.

This instruction is based on the assumptions that the rule requiring the use of the least expensive measure is subordinate to the rule requiring the use of the most certain and accurate measure, and that such an instruction is applicable only when it is clear that there are two certain and accurate measures that will fully compensate the plaintiff. These assumptions are indicated by an analysis of the facts and language of the court in *A. A. Baxter Corp.* [*A. A. Baxter Corp. v. Colt Industries, Inc.* (1970) 10 Cal.App.3d 144, 160, 88 Cal.Rptr. 842] and the apparent object and purpose of the rules governing the choice between alternative measures of damages. However, it is strongly recommended that counsel make their own evaluation of the propriety of this instruction in light of the particular factual situation with which they are dealing.

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts Law Remedies Compensatory Damages General Overview

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CHAPTER 3E Matthew Bender Contract Damages Instructions

1-3E California Forms of Jury Instruction MB 300E.11

MB 300E.11 Damages Not to Be Measured by Defendant's Savings or Costs

[1] Instruction Damages Not to Be Measured by Defendant's Savings or Costs

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

[*OPTIONAL (See Use of Instruction)*]

There has been some evidence presented in this case that tends to show what savings or benefits Defendant may have obtained as a result of a breach of contract. To the extent that this evidence also tends to show what losses or harm Plaintiff may have suffered, it may be considered and used in determining any damages to be awarded to Plaintiff. However, what Defendant may or may not have gained as a result of a breach may not be considered or used in determining damages.

[*AND/OR*]

If there was a breach of contract, the amount of Plaintiff's damages cannot be reduced because they are greater than what it would have cost Defendant to perform the contract or because Defendant received no benefit from breaching the contract. By the same token, those damages may not be increased because they are less than what it would have cost Defendant to perform or because Defendant received some substantial benefit from breaching the contract.

Any award of damages that you make for breach of contract must be based only on what is necessary to compensate Plaintiff for losses or harm [he/she/it] _____ [has suffered or has suffered and will suffer].

Authorities: Gregory v. Spieker (1895) 110 Cal. 150, 155, 42 P. 576 ; Fisher v. Hampton (1975) 44

Cal.App.3d 741, 750-752, 118 Cal.Rptr. 811 ; Macken v. Martinez (1963) 214 Cal.App.2d 784, 789, 29 Cal.Rptr. 867 ; Avery v. Fredericksen and Westbrook (1944) 67 Cal.App.2d 334, 336-341, 154 P.2d 41 .

[2] Use of Instruction

This is an instruction on the rule that prohibits the determination of damages on the basis of what the defendant gained from a breach of contract rather than on what the plaintiff lost. It should be used when there is some evidence or argument from which the jury may draw inferences concerning the savings or benefits the defendant did or did not obtain as a result of a breach and when there is potentially a significant discrepancy between the losses suffered by the plaintiff and the savings or benefits obtained by the defendant as a result of the breach. In cases in which there is a very close correlation between the plaintiff's loss and the defendant's gain (e.g., in a case involving the breach of an agreement to pay money, the breach of an agreement to procure goods or services from a third party, or the breach of an agreement for the sale of property), this instruction may either be inapplicable or of marginal relevance and may generate unnecessary confusion.

When there is no direct evidence of what it would have cost the defendant to perform the contract or of any saving or benefits that the defendant obtained as a result of the breach, it is recommended that the first paragraph of the instruction not be used. However, even in the absence of direct evidence of the defendant's savings or benefits, the remaining portion of the instruction may still be appropriate when the facts are such that the jury may draw inferences as to what the defendant gained or did not gain by breaching or when there are statements or arguments of counsel suggesting that there should be some relationship between the damages awarded and the benefits or savings the defendant obtained as a result of the breach.

Depending on the circumstances of the particular case, this instruction might be offered by either party. It would certainly be important to a defendant that had breached or risked placing itself in breach to avoid the prohibitive cost of performing a contract that was not likely to produce any significant benefit to the plaintiff. However, it might be equally important to the plaintiff in a case in which the breach of a contract that defendant could have performed with relatively small effort or expense produces horrendous collateral consequences for plaintiff.

The bracketed reference to damages that the plaintiff will suffer should be included if the plaintiff is seeking future damages.

When it is agreed that the defendant gained no benefit by breaching the contract other than avoiding expenditures required to complete performance, the instruction should refer only to what it would have cost the defendant to perform.

[3] Comment

Damages for breach of contract are limited to, and must be based on, what is necessary to compensate the plaintiff for loss or injury suffered as a result of the breach. Damages may not be based on or measured by what it would have cost the defendant to perform, or on savings or benefits the defendant obtained as a result of the breach [*Gregory v. Spieker* (1895) 110 Cal. 150, 155, 42 P. 576 ; *Fisher v. Hampton* (1975) 44 Cal.App.3d 741, 750-752, 118 Cal.Rptr. 811 ; *Macken v. Martinez* (1963) 214 Cal.App.2d 784, 789, 29 Cal.Rptr. 867 ; *Avery v. Fredericksen and Westbrook* (1944) 67 Cal.App.2d 334, 336-341, 154 P.2d 41]. This rule applies when the cost of the defendant's performance is greater than the benefits the plaintiff would have obtained [*Avery v. Fredericksen and Westbrook* (1944) 67 Cal.App.2d 334, 336-341, 154 P.2d 41] when the cost of the defendant's performance is definitely ascertainable but it cannot be shown with any reasonable degree of certainty that the plaintiff would have profited from performance [*Fisher v. Hampton* (1975) 44 Cal.App.3d 741, 750-752, 118 Cal.Rptr. 811], and when a breach that resulted in little or no savings or benefit to the defendant caused substantial damages to the plaintiff [*Gregory v. Spieker* (1895) 110 Cal. 150, 155, 42 P. 576 ; *Macken v. Martinez* (1963) 214 Cal.App.2d 784, 789, 29 Cal.Rptr. 867 ; *Ojala v. Bohlin* (1960) 178 Cal.App.2d 292, 302, 2 Cal.Rptr. 919].

Notwithstanding this rule, evidence of what it would have cost the defendant to perform or of the benefits the defendant obtained as a result of the breach is admissible if it tends to prove the amount of the plaintiff's loss or harm, that is, if there is a correlation between the benefits obtained by the defendant or the cost of performing the defendant's obligations and the amount necessary to compensate the plaintiff for loss or injury resulting from the breach [*Macken v. Martinez* (1963) 214 Cal.App.2d 784, 789, 29 Cal.Rptr. 867 ; *General Paint Corp. v. Seymour* (1932) 124 Cal.App. 611, 615-616, 12 P.2d 990].

LexisNexis Matthew Bender Expert Practice Tip--Defendant's Savings or Benefits Can Shed Light on Claimed Damages: Even though defendant's savings or benefits from a breach of contract do not determine the amount of plaintiff's damage, such evidence may still be admissible to shed light on the amount of plaintiff's claimed damages. This evidence can be used by either side to provide a "reality check" on the amount of damages claimed by plaintiff. *By Ronald Oster*

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts Law Remedies Compensatory Damages General Overview

Scott Noble contributed to the original chapter for California Forms of Jury Instruction (Matthew Bender).



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California Forms of Jury Instruction

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CHAPTER 3E Matthew Bender Contract Damages Instructions

*1-3E California Forms of Jury Instruction MB 300E.12***MB 300E.12 Punitive Damages Not Recoverable (Jury Instructed Only on Breach of Contract)****[1] Instruction** Punitive Damages Not Recoverable (Jury Instructed Only on Breach of Contract)[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Damages that are intended to punish a defendant or to make an example of a defendant to discourage that defendant and others from engaging in wrongful conduct in the future are called punitive damages. Punitive damages may not be awarded on a claim based on the breach of a contract _____ [OPTIONAL (See Use of Instruction): even if a defendant intentionally breached the contract or committed other acts that were fraudulent, malicious, or oppressive]. Therefore, you may not include punitive damages, or any damages that are awarded to punish or make an example of Defendant rather to compensate Plaintiff, in any award of damages you may make.

Authorities: Civ. Code § 3294; *Crogan v. Metz* (1956) 47 Cal.2d 398, 405, 303 P.2d 1029 ; *Chelini v. Nieri* (1948) 32 Cal.2d 480, 486-487, 196 P.2d 915 ; *Mabb v. Stewart* (1901) 133 Cal. 556, 565-566, 65 P. 1085 ; *Myers Building Industries, Ltd. v. Interface Technology, Inc.* (1993) 13 Cal.App.4th 949, 959, 17 Cal.Rptr.2d 242 ; *Middlebrook-Anderson Co. v. Southwest Sav. & Loan Assn.* (1971) 18 Cal.App.3d 1023, 1038, 96 Cal.Rptr. 338 ; *Spencer v. San Francisco Brick Co.* (1907) 5 Cal.App. 126, 129, 89 P. 851 .

[2] Use of Instruction

This instruction should be used when the only causes of action that will be submitted to the jury are for breach of contract, or when causes of action for breach of contract are joined with other causes of action for which punitive damages are not recoverable. In the latter situation, the instruction should be modified by replacing the specific references to breach of contract claims with general references to the claims asserted by the plaintiff and by deleting the bracketed material.

This instruction will usually be proposed by the defendant. However, the defendant's counsel must weigh the risk that

the instruction may be construed as an adverse comment or reflection on the actions or credibility of his or her client against the risk that, if the instruction is not given, the jury may award punitive or exemplary damages in the guise of increased compensatory damages.

This instruction is most clearly warranted when there is a significant possibility that the jury may inflate an award of compensatory damages to punish a defendant or to make some kind of a statement about the defendant's conduct. Thus, serious consideration should be given to specifically instructing the jury that punitive damages are not recoverable in the following circumstances:

- When a plaintiff is particularly appealing or sympathetic;
- When a defendant is unpopular or abrasive;
- When there is evidence of a deliberate breach or other reprehensible conduct by a defendant;
- When claims for punitive or exemplary damages are initially presented and subsequently withdrawn from the jury; or
- When there are improper or inflammatory statements and arguments designed to encourage a punitive or exemplary award.

Although the bracketed material is recommended when there is evidence suggesting a deliberate breach or other morally reprehensible conduct by a defendant, counsel may wish to delete that material when the evidence is slight or nonexistent to avoid conveying the impression that the court thinks that there is some basis for concluding that the defendant has engaged in such conduct.

When both causes of action for breach of contract and other causes of action on which punitive damages are recoverable are submitted to the jury, this instruction is not proper and the instruction in MB 300E.13 should be used.

For related Judicial Council instructions, see [3][b], *below*.

LexisNexis Matthew Bender Expert Practice Tips--Consider Whether or Not to Forego This Instruction: Punitive damages are not recoverable for breach of contract. Whether or not defense counsel wants to raise the issue of punitive damages by giving this instruction depends on the circumstances, and there are arguments that go both ways. In general, unless there are some unusual factors in the case that would encourage the jury to seek punishment, many defense counsel would forego this instruction. And, as a defense counsel, ask yourself if the opposing counsel has actually raised this issue. In other words, don't have an instruction given unless there is a need for it. *By Ronald Oster and Rex Hesseman*

[3] Comment

[a] Punitive Damages Not Permitted in Action Based Solely on Breach of Contract

Civ. Code § 3294 limits the recovery of punitive or exemplary damages to actions "for the breach of an obligation not arising from contract." Accordingly, punitive or exemplary damages are not permitted in an action based solely on breach of contract [*Crogan v. Metz* (1956) 47 Cal.2d 398, 405, 303 P.2d 1029 ; *Chelini v. Nieri* (1948) 32 Cal.2d 480, 486-487, 196 P.2d 915 ; *Myers Building Industries, Ltd. v. Interface Technology, Inc.* (1993) 13 Cal.App.4th 949, 959, 17 Cal.Rptr.2d 242 ; *Middlebrook-Anderson Co. v. Southwest Sav. & Loan Assn.* (1971) 18 Cal.App.3d 1023, 1038, 96 Cal.Rptr. 338]. For example, a special jury verdict finding that the defendant had breached its contract with the plaintiff was held not to support an award of punitive damages, even though the jury found that the defendant's conduct

amounted to oppression, fraud, or malice. The court of appeal struck the punitive damage award from the judgment [*Myers Building Industries, Ltd. v. Interface Technology, Inc.* (1993) 13 Cal.App.4th 949, 959, 975, 17 Cal.Rptr.2d 242].

When punitive or exemplary damages are not recoverable, it is proper to affirmatively instruct the jury that it may not award such damages [*Mabb v. Stewart* (1901) 133 Cal. 556, 565-566, 65 P. 1085 ; *Sloane v. Southern Cal. Ry. Co.* (1896) 111 Cal. 668, 687, 44 P. 320] and a defendant requesting such an instruction is entitled to it [*Mabb v. Stewart* (1901) 133 Cal. 556, 565-566, 65 P. 1085 ; *Spencer v. San Francisco Brick Co.* (1907) 5 Cal.App. 126, 129, 89 P. 851]. Even when the jury is instructed that it may only award compensatory damages, a failure to give a requested instruction that punitive or exemplary damages may not be awarded may constitute reversible error [*Mabb v. Stewart* (1901) 133 Cal. 556, 565-566, 65 P. 1085 ; cf. *Parra v. Cleaver* (1930) 110 Cal.App. 168, 173-175, 294 P. 6]. However, when the instruction is not requested by a party, the court is probably not required to give it on its own motion and it is unlikely that its failure to do so can be successfully attacked on appeal [see *Agarwal v. Johnson* (1979) 25 Cal.3d 932, 950-951, 160 Cal.Rptr. 141, 603 P.2d 58 ; *Little v. Stuyvesant Life Ins. Co.* (1977) 67 Cal.App.3d 451, 468, 136 Cal.Rptr. 653].

[b] Related Judicial Council Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 39, *California Judicial Council Damages Instructions*]:

CACI No. 3924 No Punitive Damages

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts Law Remedies Punitive Damages

Scott Noble contributed to the original chapter for California Forms of Jury Instruction (Matthew Bender).



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CHAPTER 3E Matthew Bender Contract Damages Instructions

1-3E California Forms of Jury Instruction MB 300E.13

MB 300E.13 Punitive Damages Not Recoverable (Jury Also Instructed on Non-Contract Punitive Damage Claims)

[1] Instruction Punitive Damages Not Recoverable (Jury Also Instructed on Non-Contract Punitive Damage Claims)

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

In addition to claims for breach of contract, Plaintiff has also sued on claims for _____ [describe punitive damage claims]. In connection with these claims, Plaintiff is asking that [he/she/it] be awarded punitive damages.

Punitive damages may not be awarded on a claim for breach of contract. Damages for breach of contract are limited to those that are necessary to compensate the plaintiff for [his/her/its] injuries or losses.

Therefore, you may not include punitive damages, or any damages that are awarded to punish or to make an example of Defendant rather than to compensate Plaintiff, in any award that you may make on Plaintiff's breach of contract claims. If punitive damages may be awarded under the other rules on which I will instruct you, they may only be awarded on Plaintiff's claims for _____ [describe punitive damage claims].

Authorities: Civ. Code § 3294; *Acadia, California, Ltd. v. Herbert* (1960) 54 Cal.2d 328, 336-337, 5 Cal.Rptr. 686, 353 P.2d 294 ; *Miller v. National American Life Ins. Co.* (1976) 54 Cal.App.3d 331, 336-337, 126 Cal.Rptr. 731 ; *Kuchta v. Allied Builders Corp.* (1971) 21 Cal.App.3d 541, 549, 98 Cal.Rptr. 588 .

[2] Use of Instruction

This instruction should be used when claims for damages for breach of contract will be submitted to the jury along with tort or other claims on which the jury will be instructed on the possibility of awarding punitive damages. When the jury will not be instructed on that possibility, this instruction should not be used and the instruction in MB 300E.12 should

be considered.

A brief but accurate designation of all claims that can support an award of punitive damages should be inserted in both of the blanks.

For related Judicial Council instructions, see [3][d], *below*.

LexisNexis Matthew Bender Expert Practice Tips--Critical Instruction If Punitive Damages

Considered Simultaneously: Punitive damages are usually addressed in a separate bifurcated phase of the trial pursuant to *Civ. Code* § 3295, so this instruction will be limited to the unusual case.

Nevertheless, in cases when the jury will simultaneously consider damages for punitive and non-punitive claims, this could be a critical instruction. Among other things, the awarding of punitive damages (1) requires plaintiff to meet a higher burden of proof (i.e., clear and convincing), (2) requires specific findings of fraud, malice, oppression, or homicide, and (3) has higher requirements for employer liability [see *Civ. Code* § 3294]. Claims for breach of contract have none of these requirements, and defense counsel must make sure the jury understands the differences. The specific standards in § 3294 are often helpful to defense counsel to delineate the differences for the jury. *By Ronald Oster and Rex Heeseman*

[3] Comment

[a] Contract Claims No Bar to Punitive Damages on Tort Claim Based on Same Facts

The rule that punitive damages may not be recovered on a claim based on the breach of a contract [*Crogan v. Metz* (1956) 47 Cal.2d 398, 405, 303 P.2d 1029 ; *Chelini v. Nieri* (1948) 32 Cal.2d 480, 486-487, 196 P.2d 915 ; see MB 300E.12[3]] does not preclude the recovery of punitive damages merely because a tortious act or omission also constitutes a breach of contract [*Schroeder v. Auto Driveaway Co.* (1974) 11 Cal.3d 908, 921, 114 Cal.Rptr. 622, 523 P.2d 662 ; *Fletcher v. Western National Life Ins. Co.* (1970) 10 Cal.App.3d 376, 401, 89 Cal.Rptr. 78]. Nor does it bar an award of punitive damages on a claim that a defendant fraudulently induced the plaintiff to enter into a contract [*Schroeder v. Auto Driveaway Co.* (1974) 11 Cal.3d 908, 921-922, 114 Cal.Rptr. 622, 523 P.2d 662 ; *Kuchta v. Allied Builders Corp.* (1971) 21 Cal.App.3d 541, 549, 98 Cal.Rptr. 588] or a claim that a defendant violated a legal or statutory duty imposed as a result of the contractual relationship [*Egan v. Mutual of Omaha Ins. Co.* (1979) 24 Cal.3d 809, 818-819, 169 Cal.Rptr. 691, 620 P.2d 141 ; *Acadia, California, Ltd. v. Herbert* (1960) 54 Cal.2d 328, 335-337, 5 Cal.Rptr. 686, 353 P.2d 294 ; *Richardson v. Employers Liab. Assur. Corp.* (1972) 25 Cal.App.3d 232, 239, 102 Cal.Rptr. 547].

When the same general set of facts gives rise to claims for breach of contract and claims sounding in tort, the plaintiff is entitled to have both the contract claims and the tort claims submitted to the jury [*Glendale Fed. Sav. & Loan Assn. v. Marina View Heights Dev. Co.* (1977) 66 Cal.App.3d 101, 133-138, 135 Cal.Rptr. 802 ; *Miller v. National American Life Ins. Co.* (1976) 54 Cal.App.3d 331, 336-337, 126 Cal.Rptr. 731]. Even when alternative contract and tort claims are alleged based on the same acts or omissions and seeking damages for the same injuries, the plaintiff--although not permitted to recover on both the contract and tort claims--is entitled to have both claims submitted to the jury, unless the defendant would suffer substantial prejudice [see *Weaver v. Bank of America* (1963) 59 Cal.2d 428, 432, 30 Cal.Rptr. 4, 380 P.2d 644 ; *Acadia, California, Ltd. v. Herbert* (1960) 54 Cal.2d 328, 336-337, 5 Cal.Rptr. 686, 353 P.2d 294 ; *Glendale Fed. Sav. & Loan Assn. v. Marina View Heights Dev. Co.* (1977) 66 Cal.App.3d 101, 136-138, 135 Cal.Rptr. 802]. Moreover, a jury's decision to award compensatory damages on the contract claim rather than the alternative tort claim will not preclude it from awarding punitive damages on the tort claim as long as it finds that the plaintiff would otherwise have been entitled to compensatory damages on the tort claim [*All-West Design, Inc. v. Boozer* (1986) 183 Cal.App.3d 1212, 1225, 228 Cal.Rptr. 736].

[b] Necessity of Instructing That Punitive Damages Not Recoverable on Breach of Contract Claims

When contract and tort claims predicated on the same acts or omissions or arising from the same general set of facts are submitted to the jury, it is proper to instruct the jury that punitive damages are permitted only on the tort claims, that they may not be awarded on the contract claims, and that only compensatory damages may be recovered for a breach of contract [*Acadia, California, Ltd. v. Herbert* (1960) 54 Cal.2d 328, 336-337, 5 Cal.Rptr. 686, 353 P.2d 294 ; *Miller v. National American Life Ins. Co.* (1976) 54 Cal.App.3d 331, 336-337, 126 Cal.Rptr. 731 ; *Kuchta v. Allied Builders Corp.* (1971) 21 Cal.App.3d 541, 549, 98 Cal.Rptr. 588]. *Mabb v. Stewart* [*Mabb v. Stewart* (1901) 133 Cal. 556, 565-566, 65 P. 1085] and *Spencer v. San Francisco Brick Co.* [*Spencer v. San Francisco Brick Co.* (1907) 5 Cal.App. 126, 129, 89 P. 851] appear to compel a holding that the failure to give such an instruction when requested is error. If, as these cases hold, it is error to refuse a proper instruction that punitive damages may not be recovered in a case in which punitive damages are not mentioned to the jury and it is instructed only on compensatory damages, it would seem that it must be error to refuse such an instruction when, in connection with other claims, the jury has been expressly instructed that punitive damages may be awarded under certain circumstances.

When there are circumstances indicating that an undifferentiated general award may have included improper punitive or exemplary elements, a failure to adequately instruct the jury, on request, regarding the propriety of an award of punitive damages has been held to require reversal [*Mabb v. Stewart* (1901) 133 Cal. 556, 565-566, 65 P. 1085 ; *Lyles v. Perrin* (1897) 119 Cal. 264, 266, 51 P. 332 ; *Hall v. Berkell* (1955) 130 Cal.App.2d 800, 803-805, 279 P.2d 832 ; *Spencer v. San Francisco Brick Co.* (1907) 5 Cal.App. 126, 129, 89 P. 851]. By analogy, it would seem that when there is an undifferentiated award of compensatory damages and when there are circumstances indicating that an award of punitive damages may have been made solely on a cause of action for a breach of contract, a failure to instruct the jury that punitive damages may not be recovered on a breach of contract claim may result in a reversal of the punitive damage award. On the other hand, a party who fails to request a particular instruction regarding the circumstances under which punitive damages may be awarded probably will be held to have waived the right to attack the trial court's failure to give that instruction [see *Agarwal v. Johnson* (1979) 25 Cal.3d 932, 950-951, 160 Cal.Rptr. 141, 603 P.2d 58 ; *Little v. Stuyvesant Life Ins. Co.* (1977) 67 Cal.App.3d 451, 468, 136 Cal.Rptr. 653].

[c] Code Civ. Proc. § 625 Special Verdict Requirement Distinguished

Code Civ. Proc. § 625, which requires a written special verdict that separates punitive damages from compensatory damages, does not dispense with the need to instruct the jury that punitive damages may not be recovered on breach of contract claims. It obviously does not preclude the jury from awarding punitive damages for breach of contract. In addition, even if it furnished a reliable method of correcting an erroneous award of punitive damages, the fact that an erroneous verdict can be corrected by a motion for a new trial or a judgment now cannot be considered a justification for a failure to properly instruct the jury in the first place.

Special verdicts separating punitive damages from compensatory damages will not, in and of themselves, assure the detection and correction of erroneous punitive damage awards. Unless the jury is also required to render special verdicts or answer special interrogatories showing the individual causes of action on which it found liability and awarded punitive damages, there is no way for the parties or the court to determine whether the punitive damage award was made solely under a contract claim or even whether the jury found liability on a tort claim that would support a punitive damage award [see, e.g., *All-West Design, Inc. v. Boozer* (1986) 183 Cal.App.3d 1212, 1225, 228 Cal.Rptr. 736 (special verdicts on liability and compensatory damages furnished basis for upholding punitive damage award)].

[d] Related Judicial Council Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 39, *California Judicial Council Damages Instructions*]:

CACI No. 3924 No Punitive Damages

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsVerdictsSpecial VerdictsContracts LawRemediesPunitive
DamagesTortsDamagesProofTortsDamagesPunitive DamagesAvailabilityEmployersTortsDamagesPunitive
DamagesConduct Supporting Awards

Scott Noble contributed to the original chapter for California Forms of Jury Instruction (Matthew Bender).



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CHAPTER 3E Matthew Bender Contract Damages Instructions

1-3E California Forms of Jury Instruction MB 300E.14

MB 300E.14 Extent of Plaintiff's Obligation to Avoid or Minimize Damages

[1] Instruction Extent of Plaintiff's Obligation to Avoid or Minimize Damages

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Your determination of whether Plaintiff acted reasonably to avoid or minimize loss or harm must be based on the situation Plaintiff was in at the time [he/she/it] became aware of a breach of contract, and the knowledge, capabilities, and resources that Plaintiff had at that time. It may not be based on later events, or on knowledge, capabilities, or resources that Plaintiff did not have when [he/she/it] became aware of the breach.

In determining whether Plaintiff acted reasonably to avoid or minimize loss or harm once [he/she/it] became aware of a breach of contract, you should consider all of the following:

- 1. Plaintiff was required to act with reasonable promptness and in good faith and to do all that was reasonable under the circumstances to try to avoid or minimize the resulting loss or harm. If Plaintiff fulfilled this requirement, [he/she/it] cannot be denied the right to recover damages because [his/her/its] efforts were unsuccessful or because it now appears that some or all of the loss or harm [he/she/it] suffered could have been avoided by steps that [he/she/it] did not take.**
- 2. Plaintiff was not required to do things that were impractical or to take risks or make efforts or expenditures that were unreasonable or large in view of the loss or harm to be avoided. Plaintiff was also not required to go to unusual or extraordinary lengths to avoid or minimize damages, or to do things [he/she/it] was unable to do.**
- 3. Plaintiff was not required to assume the burden of doing the things that Defendant agreed to do under the contract unless Plaintiff was able to do so and unless it was reasonable for Plaintiff to do so under the circumstances.**

Authorities: *Guerrieri v. Severini* (1958) 51 Cal.2d 12, 23, 330 P.2d 635 ; *Valencia v. Shell Oil Co.*

(1944) 23 Cal.2d 840, 846, 147 P.2d 558 ; *Henrici v. South Feather Land etc. Co.* (1918) 177 Cal. 442, 449-450, 170 P. 1135 ; *Ash v. Soo Sing Lung* (1918) 177 Cal. 356, 361-363, 170 P. 843 ; *Camrosa County Water Dist. v. Southwest Welding & Mfg. Co.* (1975) 49 Cal.App.3d 951, 955, 123 Cal.Rptr. 93 ; *Gerwin v. Southeastern Cal. Assn. of Seventh Day Adventists* (1971) 14 Cal.App.3d 209, 219-221, 92 Cal.Rptr. 111 ; *Capaldi v. Levy* (1969) 1 Cal.App.3d 274, 282-283, 81 Cal.Rptr. 629 ; *Green v. Smith* (1968) 261 Cal.App.2d 392, 396-397, 67 Cal.Rptr. 796 ; *Basin Oil Co. v. Baash-Ross Tool Co.* (1954) 125 Cal.App.2d 578, 600-603, 271 P.2d 122 ; *Dutra v. Cabral* (1947) 80 Cal.App.2d 114, 121-123, 181 P.2d 26 .

[2] Use of Instruction

This instruction should be used to inform the jury of the plaintiff's obligation to mitigate damages. It will inform the jury, in general terms, of the nature and extent of the plaintiff's obligation to act reasonably to avoid or minimize damages and the standards for determining the reasonableness of the plaintiff's efforts.

It should be emphasized that this instruction is a general formulation based on generally applicable rules defining the nature of the plaintiff's obligation to mitigate damages. Frequently, the case law defines more specifically the requirements imposed on parties confronted with a particular type of breach [see *Bomberger v. McKelvey* (1950) 35 Cal.2d 607, 613-615, 220 P.2d 729 (party notified to cease performance); *Spurgeon v. Drumheller* (1985) 174 Cal.App.3d 659, 665, 220 Cal.Rptr. 195 (seller of real property); *Rabago-Alvarez v. Dart Industries, Inc.* (1976) 55 Cal.App.3d 91, 97-99, 127 Cal.Rptr. 222 (discharged employee); *Sutter v. Madrin* (1969) 269 Cal.App.2d 161, 169, 74 Cal.Rptr. 627 (seller of real property)]. Accordingly, before using this general instruction in a particular case, counsel should determine whether a more specific formulation is applicable.

Portions of this instruction may not be applicable in certain cases. For example, if the defendant does not contend that the plaintiff could have mitigated damages by making expenditures or incurring expenses, references to expenditures should be deleted.

For related Judicial Council instructions, see [3][e], *below*.

LexisNexis Matthew Bender Expert Practice Tip--Failure-to-Mitigate Defense Rarely Succeeds, But Can Raise Doubt: Failure to mitigate damages is a commonly asserted defense but rarely succeeds. This instruction illustrates the limitations of the defense. In short, unless plaintiff was deliberately trying to inflate damages or was manifestly unreasonable in failing to avoid harm, the defense will fail. Yet, mitigation is sometimes a good way to raise doubt in the jurors' minds about whether the plaintiff really tried to take care of this dispute or whether he/she was just looking for a windfall. *By Ronald Oster and Rex Heeseman*

[3] Comment

[a] Plaintiff's Obligation to Mitigate Damages

It is well established in California that a person who is injured by a breach of contract must act reasonably to minimize the resulting damages and that any damages the injured party could have avoided by making reasonable efforts or expenditures may not be recovered [*Valencia v. Shell Oil Co.* (1944) 23 Cal.2d 840, 844, 147 P.2d 558 ; *Henrici v. South Feather Land etc. Co.* (1918) 177 Cal. 442, 449-450, 170 P. 1135 ; *Brandon & Tibbs v. George Kevorkian Accountancy Corp.* (1990) 226 Cal.App.3d 442, 460, 277 Cal.Rptr. 40 ; *Sackett v. Spindler* (1967) 248 Cal.App.2d 220, 238-239, 56 Cal.Rptr. 435]. The defendant bears the burden of proving that all or part of the plaintiff's losses were reasonably avoidable [*Brandon & Tibbs v. George Kevorkian Accountancy Corp.* (1990) 226 Cal.App.3d 442, 460, 277 Cal.Rptr. 40]. Although California cases frequently speak of the plaintiff's "duty" to mitigate damages, it is not strictly accurate to say that a duty is imposed on the plaintiff because there is no correlative right of action for a breach [see

Green v. Smith (1968) 261 Cal.App.2d 392, 396, 67 Cal.Rptr. 796]. The rationale expressed by California courts is that when a plaintiff has the opportunity to avoid a loss that is threatened as a result of another's wrongful act and fails to make a reasonable effort to do so, the loss will be considered to have been proximately caused by the plaintiff's failure to take steps to avoid it rather than by the defendant's wrongful act or omission [*Valencia v. Shell Oil Co.* (1944) 23 Cal.2d 840, 846-847, 147 P.2d 558 ; *Vitagraph, Inc. v. Liberty Theatres Co.* (1925) 197 Cal. 694, 697-698, 242 P. 709 ; *Shasta Douglas Oil Co. v. Work* (1963) 212 Cal.App.2d 618, 626, 28 Cal.Rptr. 190].

[b] Recovery Not Barred as Long as Plaintiff Acts Reasonably to Avoid Loss

The focus of the mitigation requirement is on the reasonableness of the plaintiff's conduct rather than on the likelihood that a particular course of conduct would have avoided or minimized the plaintiff's damages. Thus, the recovery of damages is not barred merely because the plaintiff's efforts to mitigate are unsuccessful or because, in retrospect, it appears that the plaintiff could have taken some action that would have avoided some or all of the damages claimed [*Gerwin v. Southeastern Cal. Assn. of Seventh Day Adventists* (1971) 14 Cal.App.3d 209, 219-221, 92 Cal.Rptr. 111 ; *Green v. Smith* (1968) 261 Cal.App.2d 392, 396-397, 67 Cal.Rptr. 796 ; *Basin Oil Co. v. Baash-Ross Tool Co.* (1954) 125 Cal.App.2d 578, 600-603, 271 P.2d 122 ; *Johnson v. Comptoir Etc. D'Exportation* (1955) 135 Cal.App.2d 683, 689, 288 P.2d 151]. The plaintiff is obligated only to use reasonable care and diligence to avoid or minimize damages and will not be barred from recovering damages as long as he or she has done so [*Guerrieri v. Severini* (1958) 51 Cal.2d 12, 23, 330 P.2d 635 ; *Gerwin v. Southeastern Cal. Assn. of Seventh Day Adventists* (1971) 14 Cal.App.3d 209, 219-221, 92 Cal.Rptr. 111 ; *Jegen v. Berger* (1946) 77 Cal.App.2d 1, 10-11, 174 P.2d 489].

Whether a plaintiff has acted reasonably to mitigate damages is not to be determined by hindsight, but in light of the situation with which the plaintiff was confronted and the knowledge and resources the plaintiff had at the time the loss was threatened [*Gerwin v. Southeastern Cal. Assn. of Seventh Day Adventists* (1971) 14 Cal.App.3d 209, 219-221, 92 Cal.Rptr. 111 ; *Green v. Smith* (1968) 261 Cal.App.2d 392, 396-397, 67 Cal.Rptr. 796 ; *Basin Oil Co. v. Baash-Ross Tool Co.* (1954) 125 Cal.App.2d 578, 600-603, 271 P.2d 122].

[c] Nature of Obligation to Act Reasonably to Mitigate

Generally, the obligation to exercise reasonable care and diligence to mitigate damages requires the plaintiff to act in good faith and with due diligence [*Green v. Smith* (1968) 261 Cal.App.2d 392, 396-397, 67 Cal.Rptr. 796 ; *Basin Oil Co. v. Baash-Ross Tool Co.* (1954) 125 Cal.App.2d 578, 600-603, 271 P.2d 122 ; *Marshall v. Ransome Concrete Co.* (1917) 33 Cal.App. 782, 786, 166 P. 846], and to do all that is reasonable to attempt to avoid or minimize damages [*Henrici v. South Feather Land etc. Co.* (1918) 177 Cal. 442, 449-450, 170 P. 1135 ("all reasonable exertions"); *Alaska Salmon Co. v. Standard Box Co.* (1910) 158 Cal. 567, 572, 112 P. 454 ("every reasonable thing"); *Sackett v. Spindler* (1967) 248 Cal.App.2d 220, 238-239, 56 Cal.Rptr. 435 ("everything reasonably possible"); *Johnson v. Comptoir Etc. D'Exportation* (1955) 135 Cal.App.2d 683, 689, 288 P.2d 151 ("every reasonable step")]. It does not require the plaintiff to do that which is unreasonable or impractical or to go to extraordinary or unusual lengths [*Guerrieri v. Severini* (1958) 51 Cal.2d 12, 23, 330 P.2d 635 ; *Valencia v. Shell Oil Co.* (1944) 23 Cal.2d 840, 846, 147 P.2d 558 ; *Camrosa County Water Dist. v. Southwest Welding & Mfg. Co.* (1975) 49 Cal.App.3d 951, 955, 123 Cal.Rptr. 93 ; *Gerwin v. Southeastern Cal. Assn. of Seventh Day Adventists* (1971) 14 Cal.App.3d 209, 219-221, 92 Cal.Rptr. 111 ; *Scott's V. F. Exch. v. Growers Refrig Co.* (1947) 81 Cal.App.2d 437, 451, 184 P.2d 183]. It also does not require the plaintiff to assume a burden or risk that is disproportionate to the loss to be avoided or otherwise unreasonable [*Camrosa County Water Dist. v. Southwest Welding & Mfg. Co.* (1975) 49 Cal.App.3d 951, 955-957, 123 Cal.Rptr. 93 ; *Capaldi v. Levy* (1969) 1 Cal.App.3d 274, 282-283, 81 Cal.Rptr. 629 ; *Scott's V. F. Exch. v. Growers Refrig Co.* (1947) 81 Cal.App.2d 437, 450-451, 184 P.2d 183 ; *Dutra v. Cabral* (1947) 80 Cal.App.2d 114, 121-123, 181 P.2d 26], or to make relatively large or unreasonable expenditures [*Schultz v. Lakeport* (1936) 5 Cal.2d 377, 384-385, 54 P.2d 1110 ; *Camrosa County Water Dist. v. Southwest Welding & Mfg. Co.* (1975) 49 Cal.App.3d 951, 955-957, 123 Cal.Rptr. 93 ; *Gerwin v. Southeastern Cal. Assn. of Seventh Day Adventists* (1971) 14 Cal.App.3d 209, 219-221, 92 Cal.Rptr. 111 ; *Questo v. Dorado* (1955) 136 Cal.App.2d 332, 335-336, 288 P.2d 529 ; *Dutra v. Cabral* (1947) 80 Cal.App.2d 114, 121-123, 181

P.2d 26]. It does not require the plaintiff to do that which is impracticable, and, consequently, does not require the plaintiff to make expenditures or to incur obligations beyond the plaintiff's financial means [*Jordan v. Talbot* (1961) 55 Cal.2d 597, 610-611, 12 Cal.Rptr. 488, 361 P.2d 20 ; *Guerrieri v. Severini* (1958) 51 Cal.2d 12, 23, 330 P.2d 635 ; *Valencia v. Shell Oil Co.* (1944) 23 Cal.2d 840, 846, 147 P.2d 558 ; *Gerwin v. Southeastern Cal. Assn. of Seventh Day Adventists* (1971) 14 Cal.App.3d 209, 219-221, 92 Cal.Rptr. 111 ; see MB 300E.15].

The obligation to mitigate damages does not necessarily require a plaintiff to assume the burden of performing the defendant's contractual obligations or of securing a substitute performance. The plaintiff is obligated to assume such a burden only if it is practicable and the prudent thing to do under all the circumstances [*Ash v. Soo Sing Lung* (1918) 177 Cal. 356, 361-363, 170 P. 843 ; *Horne v. Peckham* (1979) 97 Cal.App.3d 404, 417-418, 158 Cal.Rptr. 714 ; *Camrosa County Water Dist. v. Southwest Welding & Mfg. Co.* (1975) 49 Cal.App.3d 951, 955, 123 Cal.Rptr. 93 ; *Capaldi v. Levy* (1969) 1 Cal.App.3d 274, 282-283, 81 Cal.Rptr. 629 ; *Dutra v. Cabral* (1947) 80 Cal.App.2d 114, 121-123, 181 P.2d 26].

[d] Necessity of Instructing on Plaintiff's Obligation to Mitigate Damages

Generally, the question of whether the injured party acted reasonably to avoid or minimize damages is one of fact and the jury's determination on the question will not be disturbed if it is supported by substantial evidence [*Green v. Smith* (1968) 261 Cal.App.2d 392, 397, 67 Cal.Rptr. 796 ; *Sackett v. Spindler* (1967) 248 Cal.App.2d 220, 239, 56 Cal.Rptr. 435 ; *Gainer v. Storck* (1959) 169 Cal.App.2d 681, 691, 338 P.2d 195 ; *Jegen v. Berger* (1946) 77 Cal.App.2d 1, 11, 174 P.2d 489]. The failure to instruct the jury in a proper case that a plaintiff may not recover damages that could have been avoided with reasonable efforts is a ground for reversal [see *Schultz v. Lakeport* (1936) 5 Cal.2d 377, 384, 54 P.2d 1110 ; *Sargent v. North End Water Co.* (1923) 190 Cal. 512, 512-513, 213 P. 33].

However, there are a number of circumstances when it may be improper to instruct the jury on the plaintiff's obligation to mitigate. Although the rule precluding recovery for losses that could have been avoided has been said to be one of proximate cause, a defendant who claims that a plaintiff is barred from recovering damages by a failure to act reasonably to minimize or avoid those damages has the burden of pleading and proving that claim [*Mass v. Board of Education* (1964) 61 Cal.2d 612, 627-628, 39 Cal.Rptr. 739, 394 P.2d 579 ; *Steelduct Co. v. Henger-Seltzer Co.* (1945) 26 Cal.2d 634, 654-655, 160 P.2d 804 ; *Vitagraph, Inc. v. Liberty Theatres Co.* (1925) 197 Cal. 694, 699-700, 242 P. 709 ; *Carnation Company v. Olivet Egg Ranch* (1986) 189 Cal.App.3d 809, 816-818, 229 Cal.Rptr. 261 ; *Mayes v. Sturdy Northern Sales, Inc.* (1979) 91 Cal.App.3d 69, 85-86, 154 Cal.Rptr. 43]. A defendant who does not plead an affirmative defense based on an alleged failure to avoid or minimize damages may be barred from raising it and may not be entitled to have it submitted to the jury [*Rosenberger v. Pacific Coast Ry. Co.* (1896) 111 Cal. 313, 317-318, 43 P. 963 ; *Mayes v. Sturdy Northern Sales, Inc.* (1979) 91 Cal.App.3d 69, 85-86, 154 Cal.Rptr. 43 ; *Hunter v. Croysdill* (1959) 169 Cal.App.2d 307, 318, 337 P.2d 126].

Some California cases have recognized a distinction between a claim that a plaintiff *could have* avoided or minimized damages and a claim that the plaintiff *did, in fact*, avoid or minimize damages [*Carlotta, Ltd. v. County of Ventura* (1975) 47 Cal.App.3d 931, 937, 121 Cal.Rptr. 171 ; *Erler v. Five Points Motors, Inc.* (1967) 249 Cal.App.2d 560, 562-569, 57 Cal.Rptr. 516 ; *Schmidt v. New Plastic Corp.* (1956) 144 Cal.App.2d Supp. 849, 851-853, 301 P.2d 131 ; *Marconi W. T. Co. v. North P. S. Co.* (1918) 36 Cal.App. 653, 655-657, 173 P. 103]. These cases indicate that because the plaintiff has the burden of proving the actual loss caused by the breach and because monies or benefits obtained as a result of not having to perform contractual obligations or as a result of efforts to mitigate damages decrease the plaintiff's actual loss, the plaintiff has the burden of proof on issues relating to monies or benefits that were actually earned or obtained as a result of efforts to mitigate damages and savings that were effected by being relieved of contractual obligations.

The implication of this view is that if the defendant claims that the plaintiff actually has reduced or avoided the damages assertedly suffered, the claim should be dealt with as part of the plaintiff's case in instructions relating to the proof and

determination of the damages actually suffered by plaintiff and not in instructions on an affirmative defense predicated on the plaintiff's obligation to avoid or minimize damages. Accordingly, when the defendant claims that the plaintiff has mitigated damages, counsel should consider carefully the propriety of this instruction.

The requirement that a plaintiff attempt to mitigate damages may not be applied to deprive the plaintiff of any benefits he or she could have obtained even if the contract had been fully performed [see *Steelduct Co. v. Henger-Seltzer Co.* (1945) 26 Cal.2d 634, 655-656, 160 P.2d 804 ; *Seaboard Music Co. v. Germano* (1972) 24 Cal.App.3d 618, 623, 101 Cal.Rptr. 255 ; *Wendt v. Smith* (1920) 50 Cal.App. 233, 237-238, 194 P. 736 ; *Nuckolls v. College of Physicians, etc.* (1907) 7 Cal.App. 233, 236-237, 94 P. 81]. When the plaintiff is not precluded by the terms or nature of the contract from entering into and profiting from other transactions or relationships, the plaintiff has no obligation to seek out or enter into substitute or alternative transactions or relationships to relieve the defendant of the consequences of the breach, and the defendant is not entitled to the benefit of such other transactions or relationships [*Seaboard Music Co. v. Germano* (1972) 24 Cal.App.3d 618, 623, 101 Cal.Rptr. 255 ; *Stephan v. Maloof* (1969) 274 Cal.App.2d 843, 851, 79 Cal.Rptr. 461 ; *Gollaher v. Midwood Constr. Co.* (1961) 194 Cal.App.2d 640, 650-651, 15 Cal.Rptr. 292 ; *Wendt v. Smith* (1920) 50 Cal.App. 233, 237-238, 194 P. 736 ; *Nuckolls v. College of Physicians, etc.* (1907) 7 Cal.App. 233, 236-237, 94 P. 81].

In a number of other situations the plaintiff may have no obligation to attempt to mitigate damages or the plaintiff's obligation may be very narrowly circumscribed and it may be reversible error to instruct the jury that the plaintiff was required to mitigate damages [see *Wendt v. Smith* (1920) 50 Cal.App. 233, 237-238, 194 P. 736]. Therefore, care should be taken to see that any instruction submitted on the plaintiff's obligation to avoid or minimize damages is limited to the evidence of the circumstances giving rise to the obligation.

[e] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 3, *California Judicial Council Contracts Instructions*]:

CACI No. 358 Mitigation of Damages

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts Law Remedies Avoidable Consequences Torts Damages Mitigation

Scott Noble contributed to the original chapter for California Forms of Jury Instruction (Matthew Bender).



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CHAPTER 3E Matthew Bender Contract Damages Instructions

1-3E California Forms of Jury Instruction MB 300E.15

MB 300E.15 Obligation to Mitigate Does Not Require Obligations Beyond Plaintiff's Means

[1] Instruction Obligation to Mitigate Does Not Require Obligations Beyond Plaintiff's Means

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

The rule that a person injured by a breach of contract should attempt to avoid or minimize the resulting loss or harm does not require that person to make expenditures or to incur debts that are beyond [his/her/its] financial means. Therefore, the fact that Plaintiff could have avoided or minimized a loss or harm resulting from a breach of contract by making reasonable expenditures or incurring reasonable debts does not prevent Plaintiff from recovering damages for that loss or harm if you find that the expenditures or debts were beyond Plaintiff's financial means.

Authorities: *Jordan v. Talbot* (1961) 55 Cal.2d 597, 610-611, 12 Cal.Rptr. 488, 361 P.2d 20 ; *Valencia v. Shell Oil Co.* (1944) 23 Cal.2d 840, 846, 147 P.2d 558 ; *Berge v. International Harvester Co.* (1983) 142 Cal.App.3d 152, 163, 190 Cal.Rptr. 815 ; *Gerwin v. Southeastern Cal. Assn. of Seventh Day Adventists* (1971) 14 Cal.App.3d 209, 219-220, 92 Cal.Rptr. 111 .

[2] Use of Instruction

This instruction should be used when the defendant presents evidence that the plaintiff could have avoided or minimized damages by making reasonable expenditures or incurring reasonable obligations and the defendant's evidence is countered with evidence that the plaintiff was not financially able to do so.

This instruction should be given immediately after the instruction on the general nature of the plaintiff's obligation to mitigate damages in MB 300E.14.

When feasible, the instruction should be particularized by substituting specific references to the loss or harm at issue (e.g., the damage to Plaintiff's crops, the lost profits) and the nature of the breach (e.g., Defendant's refusal to supply water, Defendant's failure to remedy the defects in the equipment) for the general references to these matters in the

second sentence.

For related Judicial Council instructions, see [3][b], *below*.

LexisNexis Matthew Bender Expert Practice Tip--Instruction Rarely Used: This instruction will rarely be used. The previous instruction in MB 300E.14 containseverything plaintiff needs to show that it would be "unreasonable" to require plaintiff to spend money plaintiff does not have. *By Ronald Oster*

[3] Comment

[a] Reasonable Effort to Mitigate

As a general rule, a party injured by a breach of contract is required to make reasonable expenditures to avoid or minimize damages [*Jordan v. Talbot* (1961) 55 Cal.2d 597, 610-611, 12 Cal.Rptr. 488, 361 P.2d 20 ; *Valencia v. Shell Oil Co.* (1944) 23 Cal.2d 840, 844, 147 P.2d 558 ; *Henrici v. South Feather Land etc. Co.* (1918) 177 Cal. 442, 449-450, 170 P. 1135]. When it is reasonable to do so, the injured party may be required to obtain the funds necessary to make the expenditures by borrowing money or incurring other obligations [see *Jordan v. Talbot* (1961) 55 Cal.2d 597, 610-611, 12 Cal.Rptr. 488, 361 P.2d 20]. However, the obligation to mitigate damages does not require expenditures that the injured party is unable to make. Consequently, the plaintiff will not be barred from recovering damages that could have been avoided by making reasonable expenditures or incurring reasonable obligations that were beyond the plaintiff's financial capabilities [*Jordan v. Talbot* (1961) 55 Cal.2d 597, 610-611, 12 Cal.Rptr. 488, 361 P.2d 20 ; *Valencia v. Shell Oil Co.* (1944) 23 Cal.2d 840, 846, 147 P.2d 558 ; *Berge v. International Harvester Co.* (1983) 142 Cal.App.3d 152, 163, 190 Cal.Rptr. 815 ; *Gerwin v. Southeastern Cal. Assn. of Seventh Day Adventists* (1971) 14 Cal.App.3d 209, 219-220, 92 Cal.Rptr. 111]. Whether a particular expenditure or obligation that allegedly would have reduced the plaintiff's damages was beyond the plaintiff's financial means is a factual question, generally left to the trier of fact [*Berge v. International Harvester Co.* (1983) 142 Cal.App.3d 152, 163, 190 Cal.Rptr. 815 ; *Gerwin v. Southeastern Cal. Assn. Of Seventh Day Adventists* (1971) 14 Cal.App.3d 209, 219-220, 92 Cal.Rptr. 111].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 3, *California Judicial Council Contracts Instructions*]:

CACI No. 358 Mitigation of Damages

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts Law Remedies Avoidable Consequences Torts Damages Mitigation

Scott Noble contributed to the original chapter for California Forms of Jury Instruction (Matthew Bender).



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CHAPTER 3E Matthew Bender Contract Damages Instructions

*1-3E California Forms of Jury Instruction MB 300E.16***MB 300E.16 Obligation to Mitigate Is Excused by Reliance on Defendant's Promises****[1] Instruction** Obligation to Mitigate Is Excused by Reliance on Defendant's Promises[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

A person injured by a breach of contract is not required to act to avoid or minimize the resulting loss or harm as long as [he/she/it] reasonably believes, as a result of the statements or conduct of the person who has breached the contract, that the person who has breached intends to perform [his/her/its] obligations _____
[OPTIONAL (See Use of Instruction): or take other action to avoid or minimize the resulting loss or harm].
Therefore, any failure by Plaintiff to act to avoid or minimize a loss or harm resulting from a breach of contract by Defendant does not prevent Plaintiff from recovering damages for that loss or harm if you find that Plaintiff refrained from acting because [he/she/it] reasonably believed, as a result of Defendant's statements or conduct, that Defendant intended to perform [his/her/its] obligations [or take other action to avoid or minimize Plaintiff's losses].

Authorities: *Valencia v. Shell Oil Co.* (1944) 23 Cal.2d 840, 844-846, 147 P.2d 558 ; *Questo v. Dorado* (1955) 136 Cal.App.2d 332, 335-336, 288 P.2d 529 ; *McGuire & Hester v. San Francisco* (1952) 113 Cal.App.2d 186, 192-193, 247 P.2d 934 ; *Jegen v. Berger* (1946) 77 Cal.App.2d 1, 10-11, 174 P.2d 489 .

[2] Use of Instruction

This instruction should be used when the defendant claims that the plaintiff failed to mitigate damages and there is a factual dispute as to whether that failure was excused because the plaintiff reasonably relied on the defendant's express or implied promises to perform the obligations at issue or to take other steps to minimize the damages.

This instruction should be given after the instruction on the general nature of the plaintiff's obligation to mitigate in MB 300E.14.

The bracketed material should be included only if there is evidence that the defendant expressly or impliedly promised

to take steps to minimize the plaintiff's damages in addition to promising performance under the contract.

Whenever feasible, this instruction should be particularized by substituting specific references to the loss or harm at issue (e.g., the damage to plaintiff's crops, the lost profits), the nature of the breach or alleged breach (e.g., defendant's failure to furnish water, defendant's alleged breach of warranty) and the nature of the statements or conduct allegedly relied on by plaintiff (e.g., defendant's continuing promises to supply water, defendant's attempts to repair the defects in the equipment) for the general references in the instruction.

For related Judicial Council instructions, see [3][b], *below*.

LexisNexis Matthew Bender Expert Practice Tip--Defense Can Attack "Excused by Reliance"

Claim: Like the instruction in MB 300E.15, this is another instruction that will be used only in the exceptional case when a defendant allegedly made statements that plaintiff relied on in failing to mitigate damages. However, if the opposing counsel presses for this instruction, defense counsel should be prepared to "attack" plaintiff's "excused by reliance" claim. *By Ronald Oster and Rex Heeseman*

[3] Comment

[a] Obligation to Mitigate Excused by Reliance on Defendant's Promises

A party who is injured by another's breach or other wrongful conduct is excused from complying with any obligation to mitigate damages if the failure to take action is the result of a reasonable belief, induced by the promises or actions of the wrongdoer, that the wrongdoer will perform the obligations at issue or take steps to minimize the injured party's damages [*Valencia v. Shell Oil Co. (1944) 23 Cal.2d 840, 844-846, 147 P.2d 558* ; *Questo v. Dorado (1955) 136 Cal.App.2d 332, 335-336, 288 P.2d 529* ; *McGuire & Hester v. San Francisco (1952) 113 Cal.App.2d 186, 192-193, 247 P.2d 934* ; *Jegen v. Berger (1946) 77 Cal.App.2d 1, 10-11, 174 P.2d 489*]. However, compliance with the obligation to mitigate damages is excused only as long as the wrongdoer appears to acknowledge the obligations owed to the injured party. Once the wrongdoer repudiates or conditions an express or implied promise to perform or to take steps to avoid the damages resulting from a breach, the injured party must act to mitigate [*Valencia v. Shell Oil Co. (1944) 23 Cal.2d 840, 844-846, 147 P.2d 558*]. Whether and to what extent the plaintiff is excused from complying with an obligation to mitigate damages as a result of reliance on the express or implied promises of the defendant is generally regarded as a question to be decided by the trier of fact [*Questo v. Dorado (1955) 136 Cal.App.2d 332, 335-336, 288 P.2d 529* ; *Jegen v. Berger (1946) 77 Cal.App.2d 1, 10-11, 174 P.2d 489*].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 3, *California Judicial Council Contracts Instructions*]:

CACI No. 358 Mitigation of Damages

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts Law Remedies Avoidable Consequences Torts Damages Mitigation

Scott Noble contributed to the original chapter for California Forms of Jury Instruction (Matthew Bender).



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CHAPTER 3F Matthew Bender Contract Defenses Instructions

1-3F California Forms of Jury Instruction 3F.syn

§ 3F.syn Synopsis to Chapter 3F: Matthew Bender Contract Defenses Instructions

MB 300F.01 Accord and Satisfaction

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300F.02 Acceptance of Check

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300F.03 Requirement of Payment by Deposit and Notice

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300F.04 Primary Obligor Not Bound by Contract

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Exoneration

[b] No Exoneration

[c] Indemnification and Security

MB 300F.05 Creditor's Rights Against Primary Obligor Altered

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300F.06 Creditor's Failure to Exhaust Security or Attempt to Recover From Principal Obligor

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300F.07 Creditor's Obligation to Disclose Material Facts to Guarantor

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300F.08--MB 300F.19 Reserved for Future Use

MB 300F.20 Waiver Defined

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Waiver Defined; Burden of Proof

[b] Related Judicial Council Jury Instructions

MB 300F.21 Waiver by Conduct

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Waiver by Conduct

[b] Related Judicial Council Jury Instructions

MB 300F.22 Waiver of Timely Payments

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Waiver of Timely Payments

[b] Related Judicial Council Jury Instructions

MB 300F.23 Waiver of Defects in Offer of Performance

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Objection Requirement

[b] When Objection Must Be Made

[c] Adequacy of Objection

[d] When Objection Is Not Necessary

[e] Related Judicial Council Jury Instructions

MB 300F.24 Hidden Defects

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300F.25 Waiver of Rights as Third Party Beneficiary

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Waiver of Rights of Third Party Beneficiary

[b] Related Judicial Council Jury Instructions

MB 300F.26 Waiver of Right to Treat Breach as Repudiation

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Repudiation

[b] Related Judicial Council Jury Instructions

MB 300F.27 Estoppel

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300F.28 Estoppel to Rescind Third Party Beneficiary Contract

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Estoppel to Rescind Third Party Beneficiary Contract

[b] Related Judicial Council Jury Instructions

MB 300F.29 Unclean Hands

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300F.30--MB 300F.39 Reserved for Future Use

MB 300F.40 Statute of Frauds

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] General Rule

[b] Qualified Financial Contracts

MB 300F.41 Statute of Frauds--Reasonable Time

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300F.42 Estoppel to Assert the Statute of Frauds

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300F.43 Effect of Part Performance on Statute of Frauds

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300F.44--MB 300F.49 Reserved for Future Use

MB 300F.50 General Time Limitation for Suit on Written Contract

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Limitation Period

[b] Accrual of Cause of Action

[c] Anticipatory Breach

[d] Burden of Proof

MB 300F.51 General Time Limitation for Suit on Oral or Implied Contract

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300F.52 Breach of Agreement to Pay for Continuous Services

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300F.53 Statute of Limitations Against Third Party Beneficiary

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300F.54 Statute of Limitations--Discovery of Claim

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Basis for Tolling

[b] Reasonable Diligence

[c] Special Fraud Limitations Period

MB 300F.55 Inquiry Notice

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300F.56 Statute of Limitations for Rescission of Contract

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300F.57--MB 300F.69 Reserved for Future Use

MB 300F.70 Impossibility

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300F.71 Impracticability

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300F.72 Requirement of Objective Impossibility

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300F.73 Unforeseeability Required

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300F.74 Nature of Event

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300F.75 Temporary Impossibility

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300F.76 Frustration of Purpose

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300F.77 Destruction of Value Defined

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300F.78 Partial Impossibility

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300F.79--MB 300F.89 Reserved for Future Use

MB 300F.90 Object of Contract Must Be Legal

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300F.91 Unlawful Purpose--Defrauding Creditors

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300F.92 Usury Defined

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] When Jury Issue

[b] Necessary Intent

[c] What Is Interest

[d] Burden of Proof

MB 300F.93 Loan Defined

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300F.94 Interest Defined

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300F.95 Usury--Defense of Good Faith in Case of Variable Interest

[1] Instruction

[2] Use of Instruction

[3] Comment



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CHAPTER 3F Matthew Bender Contract Defenses Instructions

1-3F California Forms of Jury Instruction Scope

Scope

SCOPE

This chapter includes jury instruction on various defenses that may be asserted to a contract action. For the California Judicial Council jury instructions on affirmative defenses in contract cases, see Ch. 3, *California Judicial Council Contracts Instructions*. Ch. 3 also includes Judicial Council instructions on other issues surrounding contracts, including formation, performance, interpretation, modification, breach, and damages. The instructions in this chapter are intended to supplement the Judicial Council instructions [see *Cal. Rules of Ct.*, Rule 2.1050].

This chapter covers the following topics:

- Part A includes instructions on discharge, including accord and satisfaction, novation, and exoneration of a guarantor or surety [see *MB 300F.01-MB 300F.07*].
- Part B includes instructions on waiver, estoppel, and unclean hands [see *MB 300F.20 -MB 300F.29*].
- Part C includes instructions on the statute of frauds [see *MB 300F.40-MB 300F.43*].
- Part D includes instructions on the statute of limitations [see *MB 300F.50-MB 300F.56*].
- Part E includes instructions on impossibility and frustration of purpose [see *MB 300F.70 -MB 300F.78*].
- Part F includes instructions on illegality [see *MB 300F.90 -MB 300F.95*].

Some of the issues addressed in this chapter may also arise as part of plaintiff's case. For example, plaintiff might urge

oral modification of a written agreement and have to prove either waiver or estoppel to assert the terms of the written agreement. The defense of usury is another example of a shield that can also be used as a sword. Practitioners should be careful when adapting instructions to substitute party designations when appropriate and to allocate the burden of proof properly.

An instruction defining the preponderance of the evidence standard of proof should be used with all instructions allocating a burden of proof to one of the parties [see Ch. 2, *California Judicial Council Evidence Instructions, CACI No. 200* ("More Likely True than Not True")].

Ch. 3D, *Matthew Bender Performance and Breach of Contract Instructions*, should be reviewed for issues that may have been pleaded as an affirmative defense but relate directly to performance or breach. Ch. 3G, *Matthew Bender Rescission of Contract Instructions*, includes instructions related to rescission.



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CHAPTER 3F Matthew Bender Contract Defenses Instructions
PART A. DISCHARGE AND EXONERATION

*1-3F California Forms of Jury Instruction MB 300F.01***MB 300F.01 Accord and Satisfaction****[1] Instruction** Accord and Satisfaction[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Defendant claims as a defense that Plaintiff accepted the sum of \$_____ in full satisfaction of Plaintiff's claim. To establish this defense, Defendant has the burden of proving all of the following:

(1) That there was an honest dispute about the amount due;

(2) That Defendant clearly notified Plaintiff that Defendant was offering payment of that sum in full satisfaction of the claim; and

(3) That Plaintiff accepted the payment.

[IF APPLICABLE (See Use of Instruction)]

Even if Plaintiff accepted Defendant's [check/draft] in the sum of \$_____, this does not constitute full satisfaction of Plaintiff's claim if Plaintiff proves that:

[USE EITHER OR BOTH OF FOLLOWING (See Use of Instruction)]

(1) Plaintiff protested against accepting the [check/draft] in full satisfaction of [his/her/its] claim by striking out or otherwise deleting the words _____ ["payment in full" or specify other words of similar import]

from the [check/draft];

[AND/OR]

(2) The acceptance of the [check/draft] was inadvertent or without knowledge that the words _____ ["payment in full" or specify other words of similar import] were notated on the [check/draft].

Authorities: *Civ. Code* §§ 1521-1523, 1526; *Potter v. Pacific Coast Lumber Co.* (1951) 37 Cal.2d 592, 597, 234 P.2d 16 ; *Thompson v. Williams* (1989) 211 Cal.App.3d 566, 571, 259 Cal.Rptr. 518 ; *Besco Enterprises, Inc. v. Carole, Inc.* (1969) 274 Cal.App.2d 42, 44, 78 Cal.Rptr. 645 .

[2] Use of Instruction

This instruction should be used when the defense of accord and satisfaction is raised to an unliquidated claim.

The final three paragraphs of the instruction are to be used if the defense of accord and satisfaction is based on the tender of a check or draft notated with "payment in full" or similar words, and the plaintiff claims that there was no accord and satisfaction for the reasons provided in *Civ. Code* § 1526(a) [see [3], below, for discussion of *Civ. Code* § 1526]. Either or both of the numbered alternative paragraphs may be included in the instruction, depending on the facts alleged by the plaintiff to defeat the accord and satisfaction defense.

This instruction does not address the issues raised by a check or draft tendered pursuant to a composition or extension agreement between a debtor and its creditors [see *Civ. Code* § 1526(b) (check or draft as accord and satisfaction when tendered pursuant to composition or extension agreement)] or a check or draft tendered pursuant to or in conjunction with a release of a claim [see *Civ. Code* § 1526(c) (check or draft as accord and satisfaction when tendered pursuant to or in connection with a release)]. For an instruction on a release by the acceptance of final payment under a construction contract, see Ch. 3I, *Matthew Bender Construction Contract Instructions*, MB 300I.93.

If acceptance of payment is predicated on an uncashed check, see MB 300F.02.

LexisNexis Matthew Bender Expert Practice Tip--Avoid This Defense By Showing Bad Faith:

Note the requirement that there be an "honest" dispute about the amount due. Even if the elements of an accord and satisfaction otherwise apply, a party may still be able to show that the dispute was in bad faith thereby avoiding this defense. But for defense counsel, in some cases this can be a powerful argument; thus, consider it. *By Ronald Oster and Rex Heeseman*

[3] Comment

Accord and satisfaction is a defense [*Potter v. Pacific Coast Lumber Co.* (1951) 37 Cal.2d 592, 597, 234 P.2d 16]. As such, the burden of proof is on the defendant [*Evid. Code* § 500]. The principle of accord and satisfaction applies to an unliquidated claim when there is an honest dispute over the amount and there has been acceptance of payment that was clearly tendered on the condition that it be in full satisfaction of the debt [*Potter v. Pacific Coast Lumber Co.* (1951) 37 Cal.2d 592, 597, 234 P.2d 16 ; *Thompson v. Williams* (1989) 211 Cal.App.3d 566, 571, 259 Cal.Rptr. 518 ; *Besco Enterprises, Inc. v. Carole, Inc.* (1969) 274 Cal.App.2d 42, 78 Cal.Rptr. 645]. An accord is an agreement to accept, in extinction of an obligation, something different from or less than that to which the accepting party is entitled [*Civ. Code* § 1521; see *Civ. Code* § 1522 (effect of accord)]. The creditor's acceptance of an accord extinguishes the obligation and is called satisfaction [*Civ. Code* § 1523].

When a check or draft is tendered by a debtor in full discharge of a disputed or unliquidated claim, and "payment in

full" or similar words are notated on the check or draft, acceptance of the check or draft is not an accord and satisfaction if the creditor protests against accepting the check or draft in full payment by striking out or otherwise deleting the notation or if the acceptance of the check or draft was inadvertent or without knowledge of the notation [*Civ. Code* § 1526(a)]. Despite this provision, the acceptance of a check or draft may constitute an accord and satisfaction if the check or draft was tendered pursuant to a composition or extension agreement between a debtor and its creditors [*see Civ. Code* § 1526(b) (check or draft as accord and satisfaction when tendered pursuant to composition or extension agreement)] or pursuant to or in conjunction with a release of a claim [*see Civ. Code* § 1526(c) (check or draft as accord and satisfaction when tendered pursuant to or in connection with a release)]; *see also* Ch. 3I, *Matthew Bender Construction Contract Instructions*, MB 300I.93 for an instruction on a release by the acceptance of final payment under a construction contract].

Before the adoption of *Civ. Code* § 1526, it was held that the creditor could not accept the benefit of the payment and reject the condition [*Potter v. Pacific Coast Lumber Co.* (1951) 37 Cal.2d 592, 599, 234 P.2d 16 ; *Thompson v. Williams* (1989) 211 Cal.App.3d 566, 575, 259 Cal.Rptr. 518]. Under *Civ. Code* § 1526, this rule clearly no longer applies to a check or draft tendered in full discharge of a disputed or unliquidated claim when "payment in full" or the like is notated on the check or draft. However, the rule should continue to govern when the statute does not apply, as when the payment alleged as an accord and satisfaction is a cash payment. Similarly, the statute does not apply when there is no notation such as "payment in full" on the check or draft and the notice and acceptance required for an accord and satisfaction are shown by means of the circumstances surrounding the transaction.

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawNegotiable InstrumentsDischarge & PaymentDischargeContracts LawNegotiable InstrumentsDischarge & PaymentPaymentGeneral OverviewContracts LawPerformanceAccord & Satisfaction

John F. Wells and Lise A. Pearlman were the original authors of this chapter. It has since been updated to reflect changes in the law, additional case citations and practice pointers by other lawyers as well as revisions including cross-references to the official CACI instructions.



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CHAPTER 3F Matthew Bender Contract Defenses Instructions
PART A. DISCHARGE AND EXONERATION

1-3F California Forms of Jury Instruction MB 300F.02

MB 300F.02 Acceptance of Check

[1] Instruction Acceptance of Check

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

A check is considered to have been accepted if it is retained and used by cashing it. A check is also considered accepted if it is retained uncashed for an unreasonable length of time without notification to _____ [person tendering check] that the check is rejected. What constitutes an unreasonable time is for you to decide under the circumstances.

[IF APPLICABLE (See Use of Instruction)]

If the creditor gives the debtor notice of rejection of the uncashed check within a reasonable time, [he/she/it] has no duty to return the uncashed check itself, unless requested to do so by the debtor.

Authorities: *Besco Enterprises, Inc. v. Carole, Inc.* (1969) 274 Cal.App.2d 42, 44, 78 Cal.Rptr. 645 ;
Sheldon Builders, Inc. v. Trojan Towers (1967) 255 Cal.App.2d 781, 788, 63 Cal.Rptr. 425 ; *Western Pacific Land Co. v. Wilson* (1912) 19 Cal.App. 338, 343, 125 P. 1076 .

[2] Use of Instruction

This instruction should be used together with MB 300F.01 when an accord and satisfaction is alleged to result from the unreasonable retention of an uncashed check offered in full satisfaction of a disputed debt. The optional sentence applies when there has been notice of rejection but no return of the check.

LexisNexis Matthew Bender Expert Practice Tip--Rejecting Acceptance Argument: It will be difficult to persuade a jury that an uncashed check has been "accepted" absent further evidence. The question of what constitutes an "unreasonable" time gives the jury plenty of room to reject the

acceptance argument. *By Ronald Oster*

[3] Comment

When a check is presented as payment and not refused, it is the payee's duty to return it without unreasonable delay if he or she does not wish to cash it. Otherwise, there will be a presumption that it constituted satisfaction of the obligation [*Sheldon Builders, Inc. v. Trojan Towers* (1967) 255 Cal.App.2d 781, 63 Cal.Rptr. 425]. It is up to the jury to determine from the circumstance whether a check is held for an unreasonable period of time so as to make its retention equivalent to payment [*Western Pacific Land Co. v. Wilson* (1912) 19 Cal.App. 338, 343, 125 P. 1076]. When prompt protest is made, the uncashed check need not be returned unless requested by the debtor [*Besco Enterprises, Inc. v. Carole, Inc.* (1969) 274 Cal.App.2d 42, 78 Cal.Rptr. 645].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawNegotiable InstrumentsDischarge & PaymentDischargeContracts LawNegotiable InstrumentsDischarge & PaymentPaymentGeneral OverviewContracts LawNegotiable InstrumentsDishonor & PresentmentPresentmentContracts LawPerformanceAccord & Satisfaction

John F. Wells and Lise A. Pearlman were the original authors of this chapter. It has since been updated to reflect changes in the law, additional case citations and practice pointers by other lawyers as well as revisions including cross-references to the official CACI instructions.



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CHAPTER 3F Matthew Bender Contract Defenses Instructions
PART A. DISCHARGE AND EXONERATION

1-3F California Forms of Jury Instruction MB 300F.03

MB 300F.03 Requirement of Payment by Deposit and Notice

[1] Instruction Requirement of Payment by Deposit and Notice

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

The parties dispute the proper amount owed by Defendant to Plaintiff. Defendant offered payment in the amount [he/she/it] claimed was due, but Plaintiff refused it as not being enough. It is up to you to decide what amount was owed, but even if you find that Defendant offered the right amount, Plaintiff will be entitled to a judgment for any amount that has not in fact been paid. The mere offer of payment does not extinguish the obligation. There must be actual payment.

Authorities: *Civ. Code § 1500; Mau v. Hollywood Commercial Buildings, Inc. (1961) 194 Cal.App.2d 459, 468-469, 15 Cal.Rptr. 181 .*

[2] Use of Instruction

This instruction should be used when there has been tender of performance without actual payment to the creditor or a bank deposit in the creditor's name.

LexisNexis Matthew Bender Expert Practice Tip--Actual Payment Is Required to Extinguish

Debt: Sometimes an "offer to pay" is either ambiguous or based on conditions that are unacceptable.

This instruction cuts through the confusion by making clear that actual payment is required to extinguish a debt. *By Ronald Oster*

[3] Comment

A debt is extinguished by payment or by deposit in a bank in the creditor's name with notice to the creditor [*Civ. Code § 1500*]. The instruction is derived from one approved in *Mau v. Hollywood Commercial Buildings, Inc.* [*Mau v. Hollywood Commercial Buildings, Inc. (1961) 194 Cal.App.2d 459, 468-469, 15 Cal.Rptr. 181*]. There, the court of

appeal held that the trial court erred in failing to give the following requested instruction:

I instruct you that an offer of partial performance of an obligation to pay money is of no effect as an extinguishment of an obligation. To extinguish an obligation for the payment of money there must not only be an offer of payment but also actual payment or the deposit of the amount due in a bank and notice of the deposit given to the creditor. The mere tender of a check does not extinguish an obligation for the payment of money.

Since the instruction only applies when no payment has been made, it appears unnecessary to instruct the jury that deposit in a bank is equivalent to payment, and that has not been included in the proposed instruction.

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawNegotiable InstrumentsDischarge & PaymentPaymentMethods & Places

John F. Wells and Lise A. Pearlman were the original authors of this chapter. It has since been updated to reflect changes in the law, additional case citations and practice pointers by other lawyers as well as revisions including cross-references to the official CACI instructions.



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CHAPTER 3F Matthew Bender Contract Defenses Instructions
PART A. DISCHARGE AND EXONERATION

1-3F California Forms of Jury Instruction MB 300F.04

MB 300F.04 Primary Obligor Not Bound by Contract**[1] Instruction** Primary Obligor Not Bound by Contract[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Defendant claims as a defense that [he/she/it] is not responsible to pay Plaintiff because _____ [principal obligor] is not bound by the contract. To establish this defense, Defendant must prove by a preponderance of the evidence that _____ [principal obligor] is _____ [not or no longer] bound by the contract, and that Defendant did not know that _____ [principal obligor] was not bound by the contract at the time Defendant agreed to be responsible to pay _____ [principal obligor's] debt to Plaintiff.

Authorities: *Civ. Code* § 2810; *Evid. Code* § 500; *Wells v. Comstock* (1956) 46 Cal.2d 528, 532-533, 297 P.2d 961 ; *Rochester Capital Leasing Corp. v. K & L Litho Corp.* (1970) 13 Cal.App.3d 697, 702-703, 91 Cal.Rptr. 827 .

[2] Use of Instruction

This instruction should be used when a defendant guarantor alleges as an affirmative defense that the principal obligor has a good defense to liability on the contract. However, this instruction should not be given when the principal obligor is not liable because of a mere personal disability [*Civ. Code* § 2810; *Gottschalk v. Draper Companies* (1972) 23 Cal.App.3d 828, 832, 100 Cal.Rptr. 434]. Nor should this instruction be given when the principal obligor's liability has been discharged solely by reason of (1) the statute of limitations, or (2) operation of law without any act or omission of the creditor [see [3][b], below]. If the fact that the principal is not bound by the contract is undisputed, then the instruction should be modified accordingly.

If the creditor claims that the guarantor has received something from the principal to reimburse the guarantor in the event he or she is required to pay the creditor, the instruction should be modified accordingly.

LexisNexis Matthew Bender Expert Practice Tip--Help Jurors Understand the Term "Bound":

This instruction uses the term "bound" three times. Some jurors will have difficulty understanding the term in this context. So, plan your closing accordingly. *By Rex Heeseman*

LexisNexis Matthew Bender Expert Practice Tip--Defendant Guarantor's Argument: A defendant guarantor might argue that this instruction improperly reverses the burden of proof by requiring the defendant guarantor to prove that the original debtor was *not* bound by the contract. The argument would be that it is plaintiff's burden to establish the validity of the original obligation. *By Ronald Oster*

[3] Comment**[a] Exoneration**

Generally, a guarantor is exonerated when the principal debtor has no liability under the contract [*Civ. Code* § 2810; *Gottschalk v. Draper Companies* (1972) 23 Cal.App.3d 828, 831, 100 Cal.Rptr. 434]. However, if the guarantor assumed liability with knowledge of the principal obligor's defense of the principal obligor, the guarantor is not exonerated [*Civ. Code* § 2810]. There is no clear authority on the allocation of the burden of proof on the question whether the surety knew that the principal had a defense to liability on the contract. The instruction allocates this burden in accordance with the general rule of *Evid. Code* § 500 that the burden of proof as to each fact is on the party to whom the existence or nonexistence of the fact is essential for the relief or defense claimed.

If the creditor has made a promise the effect of which is to impair his or her rights against the principal obligor, that promise may exonerate the surety regardless of whether the promise is unenforceable [*Civ. Code* § 2820; *Wise v. Clapper* (1968) 257 Cal.App.2d 770, 775-776, 65 Cal.Rptr. 231]. Similarly, the rescission of an agreement impairing the creditor's rights against the principal does not restore the liability of a surety who has been exonerated by the agreement [*Civ. Code* § 2821].

[b] No Exoneration

Exoneration of the guarantor does not result when the principal debtor's liability is discharged solely by reason of (1) a defense personal to the principal obligor [*Gottschalk v. Draper Companies* (1972) 23 Cal.App.3d 828, 832, 100 Cal.Rptr. 434], (2) the statute of limitations [*Civ. Code* § 2823; *Regents of University of Cal. v. Hartford Acc. & Indem. Co.* (1978) 21 Cal.3d 624, 633-639, 147 Cal.Rptr. 486, 581 P.2d 197], or (3) operation of law without an act or omission by the creditor [*Civ. Code* § 2825; *Gottschalk v. Draper Companies* (1972) 23 Cal.App.3d 828, 831, 100 Cal.Rptr. 434].

[c] Indemnification and Security

If the principal has indemnified the guarantor, the guarantor is liable to the creditor to the extent of the indemnity irrespective of the release of the principal's obligations [*Civ. Code* §§ 2819, 2822, 2824; *Ehrman v. Rosenthal* (1897) 117 Cal. 491, 497, 49 P. 460 ; *but see Maurice Merc. Co. v. American Emp. Ins. Co.* (1934) 140 Cal.App. 354, 359, 35 P.2d 1047]. Similarly, the creditor is entitled to receive any security the principal has given to the guarantor [*Civ. Code* § 2854; *Banta v. Rosasco* (1936) 12 Cal.App.2d 420, 422, 55 P.2d 601]. *Civ. Code* § 2854 does not expressly state that a creditor is entitled to the benefit of security given to the guarantor regardless of whether the principal's liability has been released. However, this would appear to be the only construction of *Civ. Code* § 2854 that is consistent with the rule expressed in *Civ. Code* § 2824 [see Cal. Jur. 3d, *Suretyship and Guaranty*, § 63; *but see Maurice Merc. Co. v. American Emp. Ins. Co.* (1934) 140 Cal.App. 354, 359, 35 P.2d 1047] .

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawDebtor & Creditor RelationsContracts LawDefensesGeneral OverviewContracts LawTypes of
ContractsGuaranty Contracts

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CHAPTER 3F Matthew Bender Contract Defenses Instructions
PART A. DISCHARGE AND EXONERATION

1-3F California Forms of Jury Instruction MB 300F.05

MB 300F.05 Creditor's Rights Against Primary Obligor Altered**[1] Instruction** Creditor's Rights Against Primary Obligor Altered[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Defendant claims as a defense that [he/she/it] is not responsible to pay Plaintiff because Plaintiff's rights against _____ [principal obligor] have been changed. To establish this defense, Defendant must prove by a preponderance of the evidence that there has been a change in Plaintiff's rights against _____ [principal obligor] and that Defendant did not consent to the change.

Authorities: Civ. Code § 2819; Evid. Code § 500; *Bloom v. Bender* (1957) 48 Cal.2d 793, 800-803, 313 P.2d 568 ; *Union Bank v. Gradsky* (1968) 265 Cal.App.2d 40, 43, 71 Cal.Rptr. 64 ; *Katz v. Haskell* (1961) 196 Cal.App.2d 144, 151-152, 16 Cal.Rptr. 453 .

[2] Use of Instruction

This instruction should be used when a defendant guarantor alleges as an affirmative defense that the creditor's rights against the principal obligor have been materially altered or impaired without the guarantor's consent.

This instruction should not be given when the creditor's rights against the principal obligor have been altered or impaired solely by operation of law without any act or omission by the creditor [see [3], *below*].

If the creditor claims that the guarantor has received something from the principal to reimburse the guarantor in the event he or she is required to pay the creditor, the instruction should be modified accordingly.

LexisNexis Matthew Bender Expert Practice Tip--Addressing "Changes" in Party's "Rights":

This instruction does not contain any requirement that the "changes" in plaintiff's rights be important, significant, or material. Plaintiff's counsel may want to amend this instruction to include that requirement. Additionally, the idea of a "change" in one party's "rights" will be challenging to many

jurors. Hence, think through how to explain this idea. *By Ronald Oster and Rex Heeseman*

[3] Comment

Generally, a guarantor is exonerated when the rights of the creditor against the principal obligor are materially altered or impaired without the guarantor's consent [*Civ. Code* § 2819; *FM Conner v. Conner* (1999) 76 *Cal.App.4th* 646, 649-652, 90 *Cal.Rptr.2d* 687 (finding no alteration of obligation as surety); *Cathay Bank v. Lee* (1993) 14 *Cal.App.4th* 1533, 1535, 18 *Cal.Rptr.2d* 420 ; *Union Bank v. Gradsky* (1968) 265 *Cal.App.2d* 40, 44-45, 71 *Cal.Rptr.* 64]. A material alteration is one that works a change in the meaning or legal effect of the contract regardless of whether it is prejudicial [*Verdugo Highlands, Inc. v. Security Ins. Co.* (1966) 240 *Cal.App.2d* 527, 530, 49 *Cal.Rptr.* 736]. The guarantor's consent to the change in the creditor's rights against the principal prevents the guarantor's exoneration regardless of whether the consent is given in advance of, simultaneously with, or after the time of the change [*Bloom v. Bender* (1957) 48 *Cal.2d* 793, 801, 313 *P.2d* 568].

Although dictum in *Braun v. Crew* [*Braun v. Crew* (1920) 183 *Cal.* 728, 733, 192 *P.* 531] suggests that the burden of proving that the surety did not consent is on the surety, there is no clear authority on the matter. This instruction allocates that burden in accordance with the general rule of *Evid. Code* § 500 that the burden of proof as to each fact is on the party to whom the existence or nonexistence of the fact is essential for the relief or defense claimed.

An agreement by a creditor to accept from the principal obligor a sum less than the balance owed on the original obligation, without the prior consent of the surety and without any other change to the underlying agreement between the creditor and principal obligor, does not exonerate the guarantor for the lesser sum agreed on by the creditor and principal obligor [*Civ. Code* § 2822(b)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawDebtor & Creditor RelationsContracts LawDefensesGeneral OverviewContracts LawTypes of ContractsGuaranty Contracts

John F. Wells and Lise A. Pearlman were the original authors of this chapter. It has since been updated to reflect changes in the law, additional case citations and practice pointers by other lawyers as well as revisions including cross-references to the official CACI instructions.



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CHAPTER 3F Matthew Bender Contract Defenses Instructions
PART A. DISCHARGE AND EXONERATION

1-3F California Forms of Jury Instruction MB 300F.06

MB 300F.06 Creditor's Failure to Exhaust Security or Attempt to Recover From Principal Obligor**[1] Instruction** Creditor's Failure to Exhaust Security or Attempt to Recover From Principal Obligor[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Defendant claims as a defense that [he/she/it] is not required to pay Plaintiff because [he/she/it] demanded that Plaintiff first seek to recover from _____ [primary obligor or the security given to plaintiff] and Plaintiff failed to do so. To establish this defense, Defendant has the burden of proving both of the following:

(1) That Defendant demanded that Plaintiff seek recovery from _____ [primary obligor or the security given to plaintiff]; and

(2) That Plaintiff failed to seek recovery from _____ [primary obligor or the security given to plaintiff].

[*OPTIONAL (See Use of Instruction)*]

If Defendant proves both of these things, Defendant is not responsible to pay anything to Plaintiff except to the extent that Plaintiff proves that Plaintiff could not have recovered from _____ [primary obligor or the security] even if Plaintiff had sought the recovery.

Authorities: Civ. Code §§ 2845, 2849; *Glickman v. Collins* (1975) 13 Cal.3d 852, 862, 120 Cal.Rptr. 76, 533 P.2d 204 ; *Sukut-Coulson, Inc. v. Allied Canon Co.* (1978) 85 Cal.App.3d 648, 654-655, 149 Cal.Rptr. 711 ; *Moffett v. Miller* (1953) 119 Cal.App.2d 712, 713-714, 260 P.2d 215 .

[2] Use of Instruction

This instruction should be used when a defendant guarantor contends, as an affirmative defense, that despite his or her demand, the creditor failed to attempt to recover from the primary obligor or exhaust the security. The burden appears to shift to the plaintiff to prove that the attempt to recover would have been unavailing [see [3], below].

LexisNexis Matthew Bender Expert Practice Tip--Use Care When Explaining This Instruction:

This instruction is complicated, especially with its references to someone or something else. So, be careful how to explain it in your closing. *By Rex Heeseman*

LexisNexis Matthew Bender Expert Practice Tip--Defendant Guarantor's Argument: As with the instruction in MB 300F.04, a defendant guarantor might argue that this instruction improperly reverses the burden of proof by requiring the defendant guarantor to prove that the original debtor was *not* bound by the contract. The argument would be that it is plaintiff's burden to establish the validity of the original obligation. *By Ronald Oster*

[3] Comment

A guarantor may require the creditor to pursue any other remedy available only to the creditor, including an action against the principal obligor, or to exhaust any security, before the guarantor may be held liable [*Civ. Code* §§ 2845, 2849; *Glickman v. Collins* (1975) 13 Cal.3d 852, 862-863, 120 Cal.Rptr. 76, 533 P.2d 204 ; *Moffett v. Miller* (1953) 119 Cal.App.2d 712, 713-714, 260 P.2d 215]. However, the creditor has no obligation to either exhaust the security or pursue any other remedy absent a demand by the surety [*Sukut-Coulson, Inc. v. Allied Canon Co.* (1978) 85 Cal.App.3d 648, 654-655, 149 Cal.Rptr. 711 ; see *Developers Small Business Investment Corp. v. Hoeckle* (9th Cir. 1968) 395 F.2d 80, 85 n. 2]. Should the creditor fail to pursue other available remedies after a demand by the surety that the creditor do so, the surety is exonerated to the extent he or she is prejudiced [*Civ. Code* § 2845; *Glickman v. Collins* (1975) 13 Cal.3d 852, 863, 120 Cal.Rptr. 76, 533 P.2d 204 ; *Moffett v. Miller* (1953) 119 Cal.App.2d 712, 714, 260 P.2d 215].

The proper allocation of the burden of proof on the question whether the surety has been prejudiced may be in doubt. This instruction allocates the burden in accordance with the holding of *Moffett v. Miller* [*Moffett v. Miller* (1953) 119 Cal.App.2d 712, 714, 260 P.2d 215]. Although acknowledging that that case is authority to the contrary, one author nonetheless has suggested that the burden should be on the surety [see California Forms of Pleading and Practice, Ch. 583, *Suretyship, Bonds, and Undertakings* (Matthew Bender)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawDebtor & Creditor RelationsContracts LawDefensesGeneral OverviewContracts LawTypes of ContractsGuaranty ContractsEvidenceProcedural ConsiderationsBurdens of ProofBurden Shifting

John F. Wells and Lise A. Pearlman were the original authors of this chapter. It has since been updated to reflect changes in the law, additional case citations and practice pointers by other lawyers as well as revisions including cross-references to the official CACI instructions.



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CHAPTER 3F Matthew Bender Contract Defenses Instructions
PART A. DISCHARGE AND EXONERATION

1-3F California Forms of Jury Instruction MB 300F.07

MB 300F.07 Creditor's Obligation to Disclose Material Facts to Guarantor**[1] Instruction** Creditor's Obligation to Disclose Material Facts to Guarantor[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Defendant claims as a defense that [he/she/it] is not responsible to pay Plaintiff because of Plaintiff's failure to disclose important facts to Defendant. To establish this defense, Defendant must prove all of the following:

1. That before Defendant guaranteed _____ [*principal obligor's*] debt to Plaintiff, Plaintiff was _____ [aware of facts or had good grounds to be aware of facts] that increased in an important way the risk that Defendant had agreed to assume;
2. That these facts were unknown to Defendant;
3. That Plaintiff had reason to believe that those facts were unknown to Defendant;
4. That Plaintiff had a reasonable opportunity to communicate those facts to Defendant; and
5. That Plaintiff did not do so before Defendant guaranteed the debt.

Authority: *Sumitomo Bank of Cal. v. Iwasaki* (1968) 70 Cal.2d 81, 90, 73 Cal.Rptr. 564, 447 P.2d 956 .

[2] Use of Instruction

This instruction should be used when a guarantor claims as an affirmative defense that he or she is not liable to the creditor because the creditor knew, or had good grounds to believe, but failed to disclose to the guarantor, material facts that increased the risk of the guarantee. The use of the word important is suggested instead of material.

LexisNexis Matthew Bender Expert Practice Tip--All Elements Must Be Satisfied: This instruction

sets forth the elements that will give rise to a duty on the part of plaintiff creditor to disclose information to a guarantor. Note that all of the elements have to be satisfied to establish a defense based on failure to disclose. And, go over each element carefully to avoid juror confusion. *By Ronald Oster and Rex Heeseman*

[3] Comment

If before the guarantor undertook his or her obligation, the creditor (1) knew, or had good grounds for believing, facts unknown to the guarantor that materially increased the guarantor's risk beyond that which the creditor had reason to believe the guarantor intended to assume, and (2) the creditor also had reason to believe that those facts were unknown to the guarantor and had a reasonable opportunity to communicate the facts to the guarantor, the creditor's failure to notify the guarantor is a defense to liability on the guarantee [*Sumitomo Bank of Cal. v. Iwasaki* (1968) 70 Cal.2d 81, 90, 73 Cal.Rptr. 564, 447 P.2d 956]. However, the creditor is not required to undertake an investigation for the guarantor's benefit or to take any unusual steps to insure that the guarantor is acquainted with facts that the creditor may assume are known to both of them [*Sumitomo Bank of Cal. v. Iwasaki* (1968) 70 Cal.2d 81, 91, 73 Cal.Rptr. 564, 447 P.2d 956 ; Restatement of Security § 124, Comment b (1941)]. On a revocable continuing guarantee of credit, the creditor owes this duty of disclosure to the guarantor before each new extension of credit to the principal obligor [*Sumitomo Bank of Cal. v. Iwasaki* (1968) 70 Cal.2d 81, 92, 73 Cal.Rptr. 564, 447 P.2d 956].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawDebtor & Creditor RelationsContracts LawDefensesFraud & MisrepresentationMaterial
MisrepresentationContracts LawTypes of ContractsGuaranty Contracts

John F. Wells and Lise A. Pearlman were the original authors of this chapter. It has since been updated to reflect changes in the law, additional case citations and practice pointers by other lawyers as well as revisions including cross-references to the official CACI instructions.



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CHAPTER 3F Matthew Bender Contract Defenses Instructions
PART A. DISCHARGE AND EXONERATION

1-3F California Forms of Jury Instruction MB 300F.08--MB 300F.19

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MB 300F.08Reserved for Future Use



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CHAPTER 3F Matthew Bender Contract Defenses Instructions
PART B. WAIVER, ESTOPPEL, AND UNCLEAN HANDS

1-3F California Forms of Jury Instruction MB 300F.20

MB 300F.20 Waiver Defined

[1] Instruction Waiver Defined

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

You may find waiver if you find that Plaintiff deliberately acted so inconsistently with an intent to enforce the right in question that a reasonable person would believe that Plaintiff had relinquished that right.

[*OPTIONAL (See Use of Instruction)*]

The right must have been in existence at the time of the acts claimed to constitute waiver. Only an existing right can be waived.

Authorities: *Soon v. Beckman* (1965) 234 Cal.App.2d 33, 36, 44 Cal.Rptr. 190 ; *Howard J. White, Inc. v. Varian Associates* (1960) 178 Cal.App.2d 348, 355, 2 Cal.Rptr. 871 ; *Richfield Oil v. Security-First Nat. Bank* (1958) 159 Cal.App.2d 184, 194, 323 P.2d 834 ; *Bettelheim v. Hagstrom Food Stores* (1952) 113 Cal.App.2d 873, 878, 249 P.2d 301 .

[2] Use of Instruction

This instruction defines the nature of waiver. If waiver allegedly consists of conduct, an additional requirement of reliance exists [see MB 300F.21]. Reliance is arguably required in express cases as well. The instruction assumes that defendant is raising the defense of waiver. If plaintiff is alleging waiver, then the designation defendant should be substituted for plaintiff. The optional paragraph should be used only when there is a question of fact as to whether the right existed at the time of the alleged waiver.

For related Judicial Council instructions, see [3][b], *below*.

LexisNexis Matthew Bender Expert Practice Tip--Explain "Waiver" to Jury: Words such as "waiver" and "waived" are foreign to most jurors. And, the phrase "so inconsistently" will confuse some jurors. Thus, make sure to spend time explaining these terms. *By Rex Heeseman*

LexisNexis Matthew Bender Expert Practice Tip--Convincing Jury to Accept Waiver Defense: Although there is no requirement in this instruction that plaintiff receive any consideration for the waiver, it may be difficult to convince a jury that the plaintiff "deliberately" gave up a valuable right for nothing. Alternatively, proving that defendant relied on plaintiff's waiver (even if plaintiff received nothing in return) is another way to convince a jury to accept this defense. *By Ronald Oster*

[3] Comment

[a] Waiver Defined; Burden of Proof

Waiver is the intentional relinquishment of a known right [*Earl of Loveless, Inc. v. Gabele* (1991) 2 Cal.App.4th 27, 35, 2 Cal.Rptr.2d 829 ; *Salton Community Services Dist. v. Southard* (1967) 256 Cal.App.2d 526, 532-533, 64 Cal.Rptr. 246]. It may result from an act that according to its natural import is so inconsistent with the intent to enforce the right in question as to induce a reasonable belief that the right has been relinquished [*Soon v. Beckman* (1965) 234 Cal.App.2d 33, 36, 44 Cal.Rptr. 190 ; *Howard J. White, Inc. v. Varian Associates* (1960) 178 Cal.App.2d 348, 355, 2 Cal.Rptr. 871].

Waiver is an affirmative defense that presents a question of fact to be determined from all of the surrounding circumstances [*Richfield Oil v. Security-First Nat. Bank* (1958) 159 Cal.App.2d 184, 194, 323 P.2d 834 ; *Banducci v. Frank T. Hickey, Inc.* (1949) 93 Cal.App.2d 658, 663, 209 P.2d 398]. As such, the burden of proof is on the defendant [*Evid. Code* § 500]. The waiver of a known right must be shown by clear and convincing evidence and not by a preponderance of the evidence [*DRG/Beverly Hills, Ltd. v. Chopstix Dim Sum Cafe & Takeout III, Ltd.* (1994) 30 Cal.App.4th 54, 60-61, 35 Cal.Rptr.2d 515 (trial court correctly instructed jury that waiver of known right must be shown by clear and convincing evidence)]. If plaintiff is alleging waiver as part of plaintiff's case in chief, such as waiver of rights under a written agreement as the basis for enforcement of an oral modification, then plaintiff will have the burden of proof [*Evid. Code* § 500; see Ch. 3A, *Matthew Bender Formation of Contract Instructions*]. The test of whether a contractual provision may be waived by one party is not whether the parties believed or assumed that it could be waived. Instead, the determinative inquiry is whether the provision was inserted for the sole benefit of one of the parties [*Wyler Summit Partnership v. Turner Broadcasting* (9th Cir. 2000) 235 F.3d 1184, 1190-1192 (trial court erred in granting summary judgment to movie studio on issue of waiver when genuine issue of material fact existed regarding whether installment provision originally was included in contract for sole benefit of director)].

An additional requirement of reliance is present in cases of waiver by conduct [see MB 300F.21]. Indeed, Witkin suggests that a waiver may always be retracted until the other party materially changes his or her position in reliance on it. Thus, Witkin states that although waiver is defined as the intentional relinquishment of a known right, it is generally not binding without an additional showing of consideration, election of one of two inconsistent rights, or estoppel. Witkin concludes that when there is no consideration and there has been no choice between inconsistent rights, the waiver, express or implied, may be retracted until the other party's reliance thereon creates an estoppel [Witkin, *Summary of California Law*, vol. 1, *Contracts*, § 825 (10th ed. 2005)].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 3, *California Judicial Council Contracts Instructions*]:

CACI No. 336 Affirmative Defense--Waiver

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts Law Contract Conditions & Provisions Waivers General Overview Evidence Procedural Considerations Burdens of Proof Clear & Convincing Proof

John F. Wells and Lise A. Pearlman were the original authors of this chapter. It has since been updated to reflect changes in the law, additional case citations and practice pointers by other lawyers as well as revisions including cross-references to the official CACI instructions.



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CHAPTER 3F Matthew Bender Contract Defenses Instructions
PART B. WAIVER, ESTOPPEL, AND UNCLEAR HANDS

1-3F California Forms of Jury Instruction MB 300F.21

MB 300F.21 Waiver by Conduct

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Waiver may be based on verbal expressions, or alternatively, on conduct. If you find waiver based on Plaintiff's conduct rather than verbal expressions, Defendant must additionally establish that [he/she/it] relied in good faith on that conduct to [his/her/its] prejudice.

Authorities: *Jones v. Sunset Oil Co.* (1953) 118 Cal.App.2d 668, 672-673, 258 P.2d 510 ; *Linnard v. Sonnenschein* (1928) 94 Cal.App. 729, 736, 272 P. 315 .

[2] Use of Instruction

This instruction should be used with the instruction in MB 300F.20 in cases involving waiver by conduct.

For related Judicial Council instructions, see [3][b], *below*.

LexisNexis Matthew Bender Expert Practice Tip--Good Faith Reliance Requirement: Note the requirement of good faith reliance if the waiver is based on conduct. *By Ronald Oster*

[3] Comment

[a] Waiver by Conduct

Waiver may result from words or conduct [*Jones v. Sunset Oil Co.* (1953) 118 Cal.App.2d 668, 672-673, 258 P.2d 510 ; *Linnard v. Sonnenschein* (1928) 94 Cal.App. 729, 735-736, 272 P. 315]. If conduct is relied on as constituting waiver, bona fide reliance on that conduct must also appear [*Jones v. Sunset Oil Co.* (1953) 118 Cal.App.2d 668, 672-673, 258 P.2d 510]. The other party must show that he or she was misled to his or her prejudice into the honest belief that waiver

was intended [*Linnard v. Sonnenschein* (1928) 94 Cal.App. 729, 736, 272 P. 315]. Since waiver may be retracted, it is arguable that a binding express waiver may also depend on a showing of reliance by the other party [Witkin, Summary of California Law, vol. 1, *Contracts*, § 825 (10th ed. 2005); see MB 300F.20[3]].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 3, *California Judicial Council Contracts Instructions*]:

CACI No. 336 Affirmative Defense--Waiver

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawContract Conditions & ProvisionsWaiversGeneral Overview

John F. Wells and Lise A. Pearlman were the original authors of this chapter. It has since been updated to reflect changes in the law, additional case citations and practice pointers by other lawyers as well as revisions including cross-references to the official CACI instructions.



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CHAPTER 3F Matthew Bender Contract Defenses Instructions
PART B. WAIVER, ESTOPPEL, AND UNCLEAN HANDS

1-3F California Forms of Jury Instruction MB 300F.22

MB 300F.22 Waiver of Timely Payments

[1] Instruction Waiver of Timely Payments

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

The contract here required Defendant to make payments according to a payment schedule. Defendant claims as a defense that Plaintiff _____ [granted oral extensions *or* engaged in conduct inconsistent with strict insistence on the terms of payment] that operated as a waiver of the payment terms. To establish this defense, Defendant must prove that Plaintiff acted so inconsistently with an intent to enforce the payment schedule as to lead Defendant reasonably to believe that Plaintiff had given up the right to enforce the payment schedule according to its terms. If you find that Plaintiff waived the payment terms, Plaintiff may not rely on the terms unless [he/she/it] later notified Defendant that the terms would be enforced and gave Defendant a reasonable time to pay.

Authorities: *Kossler v. Palm Springs Developments, Ltd.* (1980) 101 Cal.App.3d 88, 99, 161 Cal.Rptr. 423 ; *Hunt v. Smyth* (1972) 25 Cal.App.3d 807, 822, 101 Cal.Rptr. 4 ; *Bledsoe v. Pacific Ready Cut Homes, Inc.* (1928) 92 Cal.App. 641, 645 .

[2] Use of Instruction

This instruction should be used when there is an alleged waiver of a payment schedule allowing a reasonable time for payment. It is drafted on the assumption that defendant is the party claiming waiver, but is equally applicable when plaintiff alleges contractual rights predicated on defendant's alleged waiver of strict compliance with a payment schedule. In that event, the party designations should be reversed and the burden of proof will be on plaintiff.

For related Judicial Council instructions, see [3][b], *below*.

LexisNexis Matthew Bender Expert Practice Tip--Retracting a Waiver: This instruction includes a provision that a waiver of timely payments may be retracted so long as the other party is given notice and

a reasonable opportunity to perform. What constitutes a reasonable opportunity may depend on how long the waiver was in effect. And, there will likely be factual disputes that should be highlighted for the jury.
By Ronald Oster and Rex Heeseman

[3] Comment

[a] Waiver of Timely Payments

When a specified time for performance has been waived by a party, he or she must, to put the other in default, not only give notice that strict compliance will thereafter be required, but must also allow the other party a reasonable time within which to perform [*Kossler v. Palm Springs Developments, Ltd. (1980) 101 Cal.App.3d 88, 99, 161 Cal.Rptr. 423*]. Thus, when the payment of an installment has been waived, before foreclosure, the creditor must give notice of intent to require performance and a reasonable opportunity to perform [*Hunt v. Smyth (1972) 25 Cal.App.3d 807, 822, 101 Cal.Rptr. 4* ; *Bledsoe v. Pacific Ready Cut Homes, Inc. (1928) 92 Cal.App. 641, 645*]. The burden of proof is on the party alleging waiver [*Evid. Code § 500*]. Thus, when the payment of an installment has been waived, before foreclosure, the creditor must give notice of intent to require performance and a reasonable opportunity to perform [*Hunt v. Smyth (1972) 25 Cal.App.3d 807, 822, 101 Cal.Rptr. 4* ; *Bledsoe v. Pacific Ready Cut Homes, Inc. (1928) 92 Cal.App. 641, 645*]. The burden of proof is on the party alleging waiver [*Evid. Code § 500*].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 3, *California Judicial Council Contracts Instructions*]:

CACI No. 336 Affirmative Defense--Waiver

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawContract Conditions & ProvisionsWaiversAcceptance of Late PaymentContracts LawNegotiable InstrumentsDischarge & PaymentPaymentTime for PaymentContracts LawNegotiable InstrumentsDishonor & PresentmentExcused Presentment & Notice

John F. Wells and Lise A. Pearlman were the original authors of this chapter. It has since been updated to reflect changes in the law, additional case citations and practice pointers by other lawyers as well as revisions including cross-references to the official CACI instructions.



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CHAPTER 3F Matthew Bender Contract Defenses Instructions
PART B. WAIVER, ESTOPPEL, AND UNCLEAN HANDS

1-3F California Forms of Jury Instruction MB 300F.23

MB 300F.23 Waiver of Defects in Offer of Performance

[1] Instruction Waiver of Defects in Offer of Performance

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

The offer of performance by Defendant differed from the agreement. Defendant claims as a defense that Plaintiff waived the right to object because the differences could have been corrected if they had been pointed out at the time. To establish this defense, Defendant must prove both of the following:

1. That at the time the offer of performance was made Plaintiff had the opportunity to point out to Defendant that [his/her/its] performance was defective but did not do so; and

2. That Defendant could then have performed according to the agreement.

Authorities: *Civ. Code § 1501; Code Civ. Proc. § 2076; Hind v. Oriental Products Co., Inc. (1925) 195 Cal. 655, 672, 235 P. 438 .*

[2] Use of Instruction

This instruction should be used in cases involving one or more defects in a rejected tender of performance when the defects were curable if objection had been raised at the time of tender. If plaintiff's acceptance of performance was allegedly based on the fact that the defects were latent, this instruction should be followed with the instruction in MB 300F.24. The instruction assumes that it was defendant's tender that was rejected by plaintiff but is equally applicable to defendant's rejection of plaintiff's tender. If plaintiff is making the claim of waiver, then the party designations should be reversed. It then becomes an instruction on performance to be used in conjunction with the instructions in Ch. 3D, *Matthew Bender Performance and Breach of Contract Instructions*.

For related Judicial Council instructions, see [3][e], *below*.

[3] Comment**[a] Objection Requirement**

Civ. Code § 1501 and *Code Civ. Proc.* § 2076 both require a person to whom tender is made to state any objections at the time of the tender that could be obviated by the other party. Otherwise, the objections will be deemed waived [*Hind v. Oriental Products Co., Inc.* (1925) 195 Cal. 655, 672, 235 P. 438 ; *Allen v. Chatfield* (1916) 172 Cal. 60, 69, 156 P. 47]. Loss of the opportunity to correct the tender is apparently sufficient prejudice to render the waiver binding [see MB 300F.20[3]].

LexisNexis Matthew Bender Expert Practice Tip--Note Exceptions to Rule: Note the exceptions in the commentary to the rule that objections must be made at the time of performance or the objections will be waived. The biggest exception is hidden defects [see MB 300F.24]. By Ronald Oster

[b] When Objection Must Be Made

Although the statutes specify that the objections must be made at the time of tender, objection may also be made in advance so long as it fulfills the purpose of the statutes to allow the debtor an opportunity to make a conforming tender [*Noyes v. Habitation Resources, Inc.* (1975) 49 Cal.App.3d 910, 914-915, 123 Cal.Rptr. 261]. Courts have also held in the case of payment by check that refusal to cash the check plus a statement of reasons within a reasonable time thereafter is sufficient to satisfy the objection requirement [see *Sheldon Builders, Inc. v. Trojan Towers* (1967) 255 Cal.App.2d 781, 788, 63 Cal.Rptr. 425 ; *Peterson v. Kaufman* (1929) 100 Cal.App. 330, 332, 279 P. 1016]. If these situations are present, the instruction should be modified accordingly.

[c] Adequacy of Objection

The factual issue most likely to be litigated is whether and to what extent objection to the tender was made. An objection to a tender on one ground, such as amount of tender, waives all other grounds of objections [*Bogue v. Roeth* (1929) 98 Cal.App. 257, 262, 276 P. 1071]. Moreover, when the objection is to the amount of money, terms of an instrument, or kind of property, the rejecting party must generally specify the required performance or be precluded from objecting afterward [*Code Civ. Proc.* § 2076].

When a dispute exists as to the extent of the objection, it is for the trier of fact to decide whether the objection has been made [see *Fidler v. Schiller* (1963) 212 Cal.App.2d 569, 575-576, 28 Cal.Rptr. 48]. The burden of proof is on the party asserting waiver. Loss of the opportunity to correct the tender is apparently sufficient prejudice to render the waiver binding [see MB 300F.20[3]].

Generally, types of defects that should have been raised at the time of tender or not at all include the following:

- The amount of money, terms of an instrument, or amount or kind of property [*Code Civ. Proc.* § 2076; *Hohener v. Gauss* (1963) 221 Cal.App.2d 797, 799-800, 34 Cal.Rptr. 656];
- The informality of the tender [*Peardon v. Markley* (1920) 50 Cal.App. 257, 262-263, 195 P. 70 ; but see *Young v. Rocha* (1923) 65 Cal.App. 15, 19, 222 P. 861]; and
- The imposition of conditions that the offeror is not entitled to demand [*Layton v. West* (1969) 271 Cal.App.2d 508, 511-512, 76 Cal.Rptr. 507].

[d] When Objection Is Not Necessary

The purpose of the rule is to permit a person making a tender in good faith the opportunity to conform the tender to any objections [*Still v. Plaza Marina Commercial Corp.* (1971) 21 Cal.App.3d 378, 386, 98 Cal.Rptr. 414]. Thus, no

objection need be made at the time of tender if the defect in the tender amounts to a total failure to deliver [*Ward v. Lewis Lumber Co. v. Mahony* (1925) 70 Cal.App. 708, 714, 234 P. 417]. Failure to object also does not waive the requirement of Civ. Code § 1495 that the person offering the tender must be able and willing to perform [*Allen v. Chatfield* (1916) 172 Cal. 60, 68-69, 156 P. 47 ; *Canal-Randolph Anaheim, Inc. v. Wilkoski* (1978) 78 Cal.App.3d 477, 497, 144 Cal.Rptr. 474]. Other examples of situations when objections can be raised at any time include:

- The requirement that an assignee of a lease be equal to the lessee in financial and moral responsibility [*Reuling v. Sergeant* (1949) 93 Cal.App.2d 241, 243, 208 P.2d 1046];
- Tender pursuant to a contract no longer in force [*Major-Blakeney Corp. v. Jenkins* (1953) 121 Cal.App.2d 325, 332, 263 P.2d 655];
- The purported tender of a wholly different proposal [*Thomassen v. Carr* (1957) 250 Cal.App.2d 341, 349-350, 58 Cal.Rptr. 297];
- Tender of a grossly inadequate sum [*Colton v. Oakland Bank of Savings* (1902) 137 Cal. 376, 382-383, 70 P. 225 (\$10 tendered toward \$20,000 debt)];
- Tender of unmerchantable title [*Allen v. Chatfield* (1916) 172 Cal. 60, 68-69, 156 P. 47]; and
- Additional escrow instructions not within the power of the parties to perform [*Wuchner v. Goggin* (9th Cir. 1949) 175 F.2d 261].

[e] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 3, *California Judicial Council Contracts Instructions*]:

CACI No. 336 Affirmative Defense--Waiver

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawContract Conditions & ProvisionsWaiversGeneral OverviewContracts LawPerformanceTender & DeliveryContracts LawSales of GoodsBuyer's Duty to InspectBuyer's Right to RejectContracts LawSales of GoodsForm, Formation & ReadjustmentFormationModification, Rescission & WaiverContracts LawSales of GoodsPerformanceTender of Delivery

John F. Wells and Lise A. Pearlman were the original authors of this chapter. It has since been updated to reflect changes in the law, additional case citations and practice pointers by other lawyers as well as revisions including cross-references to the official CACI instructions.



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California Forms of Jury Instruction

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CHAPTER 3F Matthew Bender Contract Defenses Instructions
PART B. WAIVER, ESTOPPEL, AND UNCLEAN HANDS

1-3F California Forms of Jury Instruction MB 300F.24

MB 300F.24 Hidden Defects

[1] Instruction Hidden Defects

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Even though Plaintiff _____ [specify conduct indicating acceptance of performance], Plaintiff may show that Defendant's performance was incomplete if Plaintiff proves both of the following:

- 1. Plaintiff was unaware of the defects in Defendant's performance and had no reasonable method of determining the defects at the time; and**
- 2. Plaintiff gave notice of the defects to the Defendant within a reasonable time after determining that they existed.**

Authority: Banducci v. Frank T. Hickey, Inc. (1949) 93 Cal.App.2d 658, 663, 209 P.2d 398 .

[2] Use of Instruction

This instruction should be used when the accepting party's conduct might indicate waiver of complete performance by the other party [see MB 300F.23] but there is evidence that the defects were latent. Whether there is an additional requirement of reliance may depend on whether the waiver is express or implied [see MB 300F.20[3]]. The instruction assumes that the plaintiff is raising hidden defects in defendant's performance, thereby vitiating plaintiff's prior acceptance of Defendant's performance. It is equally applicable to a claim by defendant of latent defects in plaintiff's performance. If defendant is making the claim, the party designations should be reversed. It then becomes an instruction on performance to be used in conjunction with the instructions in Ch. 3D, *Matthew Bender Performance and Breach of Contract Instructions*.

LexisNexis Matthew Bender Expert Practice Tip--Availability of Defense: The key element in this instruction is the requirement that plaintiff had no reasonable method of determining the defect "at the

time." So long as plaintiff objects within a reasonable amount of time to defective performance, it will be difficult to prevail on this defense. *By Ronald Oster*

LexisNexis Matthew Bender Expert Practice Tip--Use Care With Closing: The term "defects" may be confusing in the context of some lawsuits. So, be careful with the related closing. *By Rex Heeseman*

[3] Comment

Whether defects are patent or latent and when they were discovered are for the jury to determine on appropriate instructions. The burden of proof appears to be on the party accepting performance since the conduct creates a presumption that the performance was proper [*Banducci v. Frank T. Hickey, Inc. (1949) 93 Cal.App.2d 658, 663, 209 P.2d 398*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract Conditions & ProvisionsWaiversGeneral Overview

John F. Wells and Lise A. Pearlman were the original authors of this chapter. It has since been updated to reflect changes in the law, additional case citations and practice pointers by other lawyers as well as revisions including cross-references to the official CACI instructions.



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CHAPTER 3F Matthew Bender Contract Defenses Instructions
PART B. WAIVER, ESTOPPEL, AND UNCLEAR HANDS

1-3F California Forms of Jury Instruction MB 300F.25

MB 300F.25 Waiver of Rights as Third Party Beneficiary**[1] Instruction** Waiver of Rights as Third Party Beneficiary[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Defendant claims as a defense that Plaintiff waived any rights under the contract between Defendant and _____ [other party to contract]. To establish this defense, Defendant must prove both of the following:

(1) That Plaintiff knew what [his/her/its] rights were under the contract; and

(2) That, with this knowledge, [he/she/it] voluntarily refused to accept the benefits of the contract.

Authorities: *Liodas v. Sahadi* (1977) 19 Cal.3d 278, 287 n. 4, 137 Cal.Rptr. 635, 562 P.2d 316 ; *Bass v. John Hancock Mut. Life Ins. Co.* (1974) 10 Cal.3d 792, 796, 112 Cal.Rptr. 195, 518 P.2d 1147 ; *Gilbert Financial Corp. v. Steelform Contracting Co.* (1978) 82 Cal.App.3d 65, 70-71, 145 Cal.Rptr. 448 ; *Stanley v. Robert S. Odell and Co.* (1950) 97 Cal.App.2d 521, 533, 218 P.2d 162 .

[2] Use of Instruction

This instruction should be used together with any other applicable instructions on waiver contained in this part in a suit by a third party beneficiary whom the defendant claims has waived the benefit of the contract.

For related Judicial Council instructions, see [3][b], *below*.

[3] Comment**[a] Waiver of Rights of Third Party Beneficiary**

The burden of proving waiver of the rights of a third party beneficiary is on the party claiming waiver. Although the court stated that the proof must be by clear and convincing evidence [*Bass v. John Hancock Mut. Life Ins. Co.* (1974) 10 Cal.3d 792, 796, 112 Cal.Rptr. 195, 518 P.2d 1147], it is doubtful that the court intended the use of this language to invoke a higher standard of proof than generally applicable in civil cases [see *Liodas v. Sahadi* (1977) 19 Cal.3d 278, 287 n. 4, 137 Cal.Rptr. 635, 562 P.2d 316 ; but see *DRG/Beverly Hills, Ltd. v. Chopstix Dim Sum Cafe & Takeout III, Ltd.* (1994) 30 Cal.App.4th 54, 60-61, 35 Cal.Rptr.2d 515 (trial court correctly instructed jury that waiver of known right must be shown by clear and convincing evidence)].

The concept of waiver of the rights of a third party beneficiary is generally described as one applying to donee beneficiaries [see, e.g., *Stanley v. Robert S. Odell and Co.* (1950) 97 Cal.App.2d 521, 533, 218 P.2d 162], but there is no reason not to apply the same rule to creditor beneficiaries [see *Gilbert Financial Corp. v. Steelform Contracting Co.* (1978) 82 Cal.App.3d 65, 70-71, 145 Cal.Rptr. 448].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 3, *California Judicial Council Contracts Instructions*]:

CACI No. 301 Third Party Beneficiary

CACI No. 336 Affirmative Defense--Waiver

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawContract Conditions & ProvisionsWaiversGeneral OverviewContracts LawThird PartiesBeneficiariesDefenses

John F. Wells and Lise A. Pearlman were the original authors of this chapter. It has since been updated to reflect changes in the law, additional case citations and practice pointers by other lawyers as well as revisions including cross-references to the official CACI instructions.



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CHAPTER 3F Matthew Bender Contract Defenses Instructions
PART B. WAIVER, ESTOPPEL, AND UNCLEAR HANDS

1-3F California Forms of Jury Instruction MB 300F.26

MB 300F.26 Waiver of Right to Treat Breach as Repudiation

[1] Instruction Waiver of Right to Treat Breach as Repudiation

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Plaintiff claims that Defendant breached the contract by _____ [describe conduct allegedly constituting repudiation]. Defendant claims as a defense that at the time Plaintiff did not treat that conduct as terminating the contract but instead elected to treat the contract as ongoing. To establish this defense, Defendant must prove that Plaintiff did not treat Defendant's conduct as terminating the contract. If this is shown, then the contract continued in effect, and Plaintiff was required to perform when the time came for Plaintiff's performance.

Authorities: *Calhoun v. Davis* (1953) 121 Cal.App.2d 167, 172, 262 P.2d 620 ; *Cook v. Nordstrand* (1948) 83 Cal.App.2d 188, 195, 188 P.2d 282 .

[2] Use of Instruction

This instruction should be used when there is a question of fact as to whether the party receiving the notice disregarded it and elected to treat the contract as ongoing. It should be used in conjunction with the instructions in Ch. 3D, *Matthew Bender Performance and Breach of Contract Instructions*, on excuse for performance. Waiver of the right to treat breach as repudiation also affects the application of the statute of limitations [see *MB 300F.50[3]*].

For related Judicial Council instructions, see [3][b], *below*.

LexisNexis Matthew Bender Expert Practice Tip--Use Care With These Concepts: The concepts of "terminating" and "ongoing" may be unique to some jurors. In addition, not every breach constitutes a termination of the contract. This instruction addresses the situation (and the consequences) that arise when plaintiff treats the contract as ongoing, including the requirement that plaintiff perform. *By Rex Heeseman and Ronald Oster*

[3] Comment**[a] Repudiation**

Repudiation is of no effect if the other party disregards it. A party may not rely on a repudiation as an excuse for nonperformance if the party continued to treat the contract as continuing after the repudiation [*Cook v. Nordstrand* (1948) 83 Cal.App.2d 188, 195, 188 P.2d 282]. Disregarding the repudiation is a form of waiver. Since waiver is an affirmative defense [*Calhoun v. Davis* (1953) 121 Cal.App.2d 167, 172, 262 P.2d 620], the burden of proof should be on the defendant.

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 3, *California Judicial Council Contracts Instructions*]:

CACI No. 324 Anticipatory Breach

CACI No. 336 Affirmative Defense--Waiver

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawBreachAnticipatory RepudiationGeneral OverviewContracts LawContract Conditions & ProvisionsWaiversGeneral Overview

John F. Wells and Lise A. Pearlman were the original authors of this chapter. It has since been updated to reflect changes in the law, additional case citations and practice pointers by other lawyers as well as revisions including cross-references to the official CACI instructions.



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CHAPTER 3F Matthew Bender Contract Defenses Instructions
PART B. WAIVER, ESTOPPEL, AND UNCLEAN HANDS

1-3F California Forms of Jury Instruction MB 300F.27

MB 300F.27 Estoppel**[1] Instruction Estoppel**

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Defendant claims as a defense that Plaintiff is barred from claiming _____ [state plaintiff's position] because of _____ [describe plaintiff's alleged prior statement or conduct to the contrary]. To establish this defense, Defendant must prove all of the following:

(1) That Plaintiff made a representation of fact by words or conduct intending that Defendant should rely on it. [ADD IF APPLICABLE (See Use of Instruction) This conduct may also include silence if Plaintiff had a duty to speak and remained silent knowing that the circumstances required [him/her/it] to speak;]

(2) That Plaintiff knew the facts;

(3) That Defendant was ignorant of the true state of facts; and

(4) That Defendant reasonably relied on Plaintiff's representation to Defendant's injury. Defendant's reliance must be reasonable in the sense that under the circumstances a reasonable person would have acted as Defendant did.

Authorities: Evid. Code § 623; *Robinson v. Fair Employment & Housing Com.* (1992) 2 Cal.4th 226, 244-245, 5 Cal.Rptr.2d 782, 825 P.2d 767; *Lusardi Construction Co. v. Aubry* (1992) 1 Cal.4th 976, 994, 4 Cal.Rptr.2d 837, 824 P.2d 643; *Shaffer v. Debbas* (1993) 17 Cal.App.4th 33, 43; *Lundeen Coatings Corp. v. Department of Water & Power* (1991) 232 Cal.App.3d 816, 829, 283 Cal.Rptr. 551; *Security Environmental Systems, Inc. v. South Coast Air Quality Management Dist.* (1991) 229 Cal.App.3d 110, 128-129, 280 Cal.Rptr. 108; *Laks v. Coast Fed. Sav. & Loan Assn.*

(1976) 60 Cal.App.3d 885, 890-891, 131 Cal.Rptr. 836 ; *Miller v. Rau* (1963) 216 Cal.App.2d 68, 79, 30 Cal.Rptr. 612 ; *Bettelheim v. Hagstrom Food Stores* (1952) 113 Cal.App.2d 873, 879, 249 P.2d 301 ; *C.I.T. Corporation v. Hawley* (1939) 34 Cal.App.2d 66, 72, 93 P.2d 216 .

[2] Use of Instruction

This instruction should be used when the defense of estoppel is tried to a jury. It can also be used together with an instruction on oral modification of a written contract either as a defense or as part of plaintiff's case in chief [see *Civ. Code* § 1698(d)]. If plaintiff is the party relying on the estoppel, the party designations should be reversed, and plaintiff has the burden of proof [*Evid. Code* § 500]. If the issue is the enforceability of an oral modification of a written contract, the instruction should be preceded by the instruction in Ch. 3A, *Matthew Bender Formation of Contract Instructions*, MB 300A.47. The optional sentence should be included if silence is relied on as creating or contributing to the estoppel. For instructions on when a party has a duty to speak, see Ch. 3G, *Matthew Bender Rescission of Contract Instructions*.

LexisNexis Matthew Bender Expert Practice Tip--If Appropriate, Explain Each Element to Jury:

Estoppel is an equitable defense that is usually tried to the court. As noted in the commentary in [3], below, there are situations when it can become an issue for the jury. The key element in the defense is proving reasonable reliance. Still, all of the elements of this instruction will seem confusing to some jurors. Thus, carefully explain each in your argument. *By Ronald Oster and Rex Heeseman*

[3] Comment

Whenever a party, by a statement or conduct, intentionally and deliberately leads another to believe a particular thing to be true and to act on this belief, he or she is not in any litigation arising out of the statement or conduct, permitted to contradict it [*Evid. Code* § 623]. The elements of estoppel are as follows [*Robinson v. Fair Employment & Housing Com.* (1992) 2 Cal.4th 226, 244-245, 5 Cal.Rptr.2d 782, 825 P.2d 767 ; *Lusardi Construction Co. v. Aubry* (1992) 1 Cal.4th 976, 994, 4 Cal.Rptr.2d 837, 824 P.2d 643 ; *Lundeen Coatings Corp. v. Department of Water & Power* (1991) 232 Cal.App.3d 816, 829, 283 Cal.Rptr. 551 ; *Security Environmental Systems, Inc. v. South Coast Air Quality Management Dist.* (1991) 229 Cal.App.3d 110, 128-129, 280 Cal.Rptr. 108 ; *Miller v. Rau* (1963) 216 Cal.App.2d 68, 79, 30 Cal.Rptr. 612]:

- That there was a representation of fact with intent that it would be acted on;
- That the party estopped knew the facts;
- That the innocent party was ignorant of the true state of facts; and
- That the innocent party reasonably relied to his or her injury on the representation.

Reliance must be reasonable [*Shaffer v. Debbas* (1993) 17 Cal.App.4th 33, 43 ; *Lundeen Coatings Corp. v. Department of Water & Power* (1991) 232 Cal.App.3d 816, 829, 283 Cal.Rptr. 551 ; *Aragon-Haas v. Family Security Ins. Services, Inc.* (1991) 231 Cal.App.3d 232, 241, 282 Cal.Rptr. 233 ; *Laks v. Coast Fed. Sav. & Loan Assn.* (1976) 60 Cal.App.3d 885, 890-891, 131 Cal.Rptr. 836]. Silence in the face of a duty to speak may create an estoppel [*Skulnick v. Roberts Express, Inc.* (1992) 2 Cal.App.4th 884, 891, 3 Cal.Rptr.2d 597 ; *Bettelheim v. Hagstrom Food Stores* (1952) 113 Cal.App.2d 873, 879, 249 P.2d 301 ; *C. I. T. Corporation v. Hawley* (1939) 34 Cal.App.2d 66, 72, 93 P.2d 216].

Although estoppel is an equitable defense [*Young v. Bank of California* (1948) 88 Cal.App.2d 184, 186, 198 P.2d 543], it may become an issue in a jury trial since estoppel is available as a defense in actions at law as well as suits in equity. When the issues are severable, the court may first decide the equitable issues and submit the legal issues to the jury if any remain. The practical reason for this procedure is that the trial of the equitable issues may dispense with the legal

issues and end the case [*Raedeke v. Gibraltar Sav. & Loan Assn.* (1974) 10 Cal.3d 665, 671, 111 Cal.Rptr. 693, 517 P.2d 1157 ; *Moss v. Bluemm* (1964) 229 Cal.App.2d 70, 73, 40 Cal.Rptr. 50]. Alternatively, the court can determine equitable issues after the jury has tried the legal issues [*Bate v. Marsteller* (1965) 232 Cal.App.2d 605, 617, 43 Cal.Rptr. 149].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawDefensesEquitable EstoppelElementsEvidenceProcedural ConsiderationsBurdens of ProofAllocation

John F. Wells and Lise A. Pearlman were the original authors of this chapter. It has since been updated to reflect changes in the law, additional case citations and practice pointers by other lawyers as well as revisions including cross-references to the official CACI instructions.



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CHAPTER 3F Matthew Bender Contract Defenses Instructions
PART B. WAIVER, ESTOPPEL, AND UNCLEAN HANDS

1-3F California Forms of Jury Instruction MB 300F.28

MB 300F.28 Estoppel to Rescind Third Party Beneficiary Contract

[1] Instruction Estoppel to Rescind Third Party Beneficiary Contract

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

One of the questions in this case is whether the contract was canceled before Plaintiff did anything of importance in reliance on it. On this question, Plaintiff must prove that [he/she/it] made an important change of position in reasonable reliance on the contract before _____ [the contract was canceled or before the right to cancel the contract arose] and that substantial damage would be caused to Plaintiff if the contract were not enforced.

Authorities: *Laks v. Coast Fed. Sav. & Loan Assn.* (1976) 60 Cal.App.3d 885, 890-891, 131 Cal.Rptr. 836 ; *R. J. Cardinal Co. v. Ritchie* (1963) 218 Cal.App.2d 124, 149, 32 Cal.Rptr. 545 ; *Silveyra v. Harper* (1947) 82 Cal.App.2d 761, 766, 187 P.2d 83 .

[2] Use of Instruction

This instruction is included among the defenses although it is more likely to arise as a defense to a defense when the defendant has alleged rescission as a defense to suit on the contract by a third party beneficiary.

For related Judicial Council instructions, see [3][b], *below*.

LexisNexis Matthew Bender Expert Practice Tip--Reasonable Reliance Is Key Element: As with the defense of estoppel [see MB 300F.27], reasonable reliance is the key element for this defense. *By Ronald Oster*

[3] Comment

[a] Estoppel to Rescind Third Party Beneficiary Contract

Absent estoppel, parties to a third party beneficiary contract may rescind the contract at any time before the third party beneficiary commences the action [*Civ. Code* § 1559; *R. J. Cardinal Co. v. Ritchie* (1963) 218 *Cal.App.2d* 124, 136, 32 *Cal.Rptr.* 545]. Evidence that before the rescission the third party had relied on the contract to his or her injury will work an estoppel [*Silveyra v. Harper* (1947) 82 *Cal.App.2d* 761, 766, 187 *P.2d* 83]. The burden of proof should be on the third party beneficiary who alleges estoppel [*Evid. Code* § 500]. Reliance must be reasonable [*Laks v. Coast Fed. Sav. & Loan Assn.* (1976) 60 *Cal.App.3d* 885, 890-891, 131 *Cal.Rptr.* 836]. However, estoppel may not give the third party the full benefit of the contract. A judgment was reversed to the extent that it awarded the third party beneficiary a recovery for the full contract price because plaintiff had not changed his position to his damage in reliance on that part of the promise. The alternative grounds for reaching this result were either that the rescission was effective to the extent there was no reliance or because the contract was never completed [*Silveyra v. Harper* (1947) 82 *Cal.App.2d* 761, 766, 187 *P.2d* 83].

For discussion of the right to submit the issues of estoppel to the jury, see *MB 300F.27*[3].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 3, *California Judicial Council Contracts Instructions*]:

CACI No. 301 Third Party Beneficiary

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawDefensesEquitable EstoppelElementsContracts LawRemediesRescission & RedhibitionGeneral OverviewEvidenceProcedural ConsiderationsBurdens of ProofAllocation

John F. Wells and Lise A. Pearlman were the original authors of this chapter. It has since been updated to reflect changes in the law, additional case citations and practice pointers by other lawyers as well as revisions including cross-references to the official CACI instructions.



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CHAPTER 3F Matthew Bender Contract Defenses Instructions
PART B. WAIVER, ESTOPPEL, AND UNCLEAN HANDS

1-3F California Forms of Jury Instruction MB 300F.29

MB 300F.29 Unclean Hands**[1] Instruction** Unclean Hands

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Defendant claims as a defense that Plaintiff's misconduct precludes [his/her/its] enforcement of Plaintiff's claim. To establish this defense, Defendant must prove that Plaintiff's conduct was unconscionable and resulted in prejudice to Defendant.

Plaintiff's misconduct must be intimately connected with Plaintiff's claims of _____ [describe plaintiff's claim] and of such a prejudicial nature that it would be unfair to allow Plaintiff to rely on _____ [describe plaintiff's claim]. If that is established by Defendant, then Plaintiff is barred from claiming _____ [describe claim].

Authorities: *Unilogic, Inc. v. Burroughs Corp.* (1992) 10 Cal.App.4th 612, 618-623, 12 Cal.Rptr.2d 741 ; *Soon v. Beckman* (1965) 234 Cal.App.2d 33, 36, 44 Cal.Rptr. 190 ; *Fibreboard Paper Products Corp. v. East Bay Union of Machinists* (1964) 227 Cal.App.2d 675, 728, 39 Cal.Rptr. 64 .

[2] Use of Instruction

This instruction should be used when the doctrine of unclean hands is given to the jury either by stipulation or because it is intertwined with the gist of the action or defense. The instruction assumes that defendant is raising the doctrine as a defense. If plaintiff is the party asserting unclean hands, the party designations should be reversed, and the burden of proof is on plaintiff.

LexisNexis Matthew Bender Expert Practice Tip--Explain Terms to Jury: Terms such as "unconscionable" and "prejudicial nature" are not common in most jurors' life experiences. *By Rex Heeseman*

LexisNexis Matthew Bender Expert Practice Tip--Application of Unclean Hands Defense: Unclean hands is an equitable defense that is usually tried to the court. Note that the alleged misconduct must be "intimately connected" to plaintiff's claim for the defense to apply. In other words, bad behavior by itself is not enough. The bad behavior must be interwoven with plaintiff's claim and must result in prejudice to the defendant. *By Ronald Oster*

[3] Comment

The defense of "unclean hands" reflects not one doctrine but various doctrines, each dependent for its substance on the context of application. Lacking a bright line to signal application of the defense, a court called on to determine whether recovery is barred by the defense must analyze analogous case law, the nature of the misconduct, and the relationship of the misconduct to the claimed injuries [*CrossTalk Productions, Inc. v. Jacobson* (1998) 65 Cal.App.4th 631, 641, 76 Cal.Rptr.2d 615, citing *Blain v. Doctor's Co.* (1990) 222 Cal.App.3d 1048, 1059-1060, 272 Cal.Rptr. 250, for "Blain doctrine" on this point].

Unclean hands is an equitable doctrine that may be asserted as an affirmative defense in an action at law [*CrossTalk Productions, Inc. v. Jacobson* (1998) 65 Cal.App.4th 631, 639-643, 76 Cal.Rptr.2d 615; *Unilogic, Inc. v. Burroughs Corp.* (1992) 10 Cal.App.4th 612, 618-623, 12 Cal.Rptr.2d 741; *Fibreboard Paper Products Corp. v. East Bay Union of Machinists* (1964) 227 Cal.App.2d 675, 728, 39 Cal.Rptr. 64]. Because the doctrine of unclean hands is an affirmative defense, the burden of proof is on defendant [Evid. Code § 500]. A plaintiff has unclean hands when he or she has engaged in unconscionable conduct of such a nature that it would, if permitted to go unnoticed, result in prejudice to the other party [*Soon v. Beckman* (1965) 234 Cal.App.2d 33, 36, 44 Cal.Rptr. 190]. The misconduct must be intimately connected with the matter in which the party seeks equitable assistance [*Unilogic, Inc. v. Burroughs Corp.* (1992) 10 Cal.App.4th 612, 620-621, 12 Cal.Rptr.2d 741; *Smoketree-Lake Murray, Ltd. v. Mills Concrete Construction Co.* (1991) 234 Cal.App.3d 1724, 1743, 286 Cal.Rptr. 435; *Blain v. Doctor's Co.* (1990) 222 Cal.App.3d 1048, 1060, 272 Cal.Rptr. 250; *Soon v. Beckman* (1965) 234 Cal.App.2d 33, 36, 44 Cal.Rptr. 190]. Like the doctrine of estoppel, the equitable defense of unclean hands may arise in a legal action [*Unilogic, Inc. v. Burroughs Corp.* (1992) 10 Cal.App.4th 612, 618-623, 12 Cal.Rptr.2d 741; *Blain v. Doctor's Co.* (1990) 222 Cal.App.3d 1048, 1059-1063, 272 Cal.Rptr. 250]. In a legal action, the issue of unclean hands may be presented to the jury either by stipulation or because it is so intertwined with legal claims that it cannot be separately tried to the judge. It has been said that "the application of the doctrine [of unclean hands] is primarily a question of fact" that is within the trial court's discretion on an application for an injunction [*Unilogic, Inc. v. Burroughs Corp.* (1992) 10 Cal.App.4th 612, 623, 12 Cal.Rptr.2d 741 (quoting text); *California Satellite Systems, Inc. v. Nichols* (1985) 170 Cal.App.3d 56, 70, 216 Cal.Rptr. 180]. In a legal action, this question of fact might properly be presented to the jury [see *Unilogic, Inc. v. Burroughs Corp.* (1992) 10 Cal.App.4th 612, 623, 12 Cal.Rptr.2d 741, quoting text as support for finding that equitable defense of unclean hands properly submitted to jury in tort action and holding equitable defense of unclean hands properly presented to jury in conversion action].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts Law Remedies Equitable Relief Unclean Hands

John F. Wells and Lise A. Pearlman were the original authors of this chapter. It has since been updated to reflect changes in the law, additional case citations and practice pointers by other lawyers as well as revisions including cross-references to the official CACI instructions.



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1-3F California Forms of Jury Instruction MB 300F.30--MB 300F.39

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MB 300F.30Reserved for Future Use



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CHAPTER 3F Matthew Bender Contract Defenses Instructions
PART C. STATUTE OF FRAUDS--CONTRACTS NOT TO BE PERFORMED WITHIN A YEAR

1-3F California Forms of Jury Instruction MB 300F.40

MB 300F.40 Statute of Frauds

[1] Instruction Statute of Frauds

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

The law does not enforce oral contracts, other than certain financial contracts, that necessarily require more than a year to perform. Plaintiff has the burden of proving by a preponderance of the evidence that the terms of the contract were such that it could be performed within one year from the date the contract was made. Even though it might take longer, it is still enforceable if there is a possibility that it could be performed within a year. The year starts from the date the contract was made, not from when the performance begins.

Authorities: Civ. Code § 1624(a)(1); *Blaustein v. Burton* (1970) 9 Cal.App.3d 161, 164, 88 Cal.Rptr. 319 ; *Barcelon v. Cortese* (1968) 263 Cal.App.2d 517, 527, 69 Cal.Rptr. 657 ; *Keller v. Pacific Turf Club* (1961) 192 Cal.App.2d 189, 196, 13 Cal.Rptr. 346 ; *Kraft v. Rooke* (1930) 103 Cal.App. 552, 554, 284 P. 935 .

[2] Use of Instruction

This instruction should be used to raise the defense of the statute of frauds. Generally, the statute of frauds presents a question of law for the court. However, a jury issue may arise when the question of whether a contract exceeds one year turns on an issue as to what are the terms of the contract. If the contract is for a reasonable time that may or may not exceed one year, this instruction should be followed by MB 300F.41. Estoppel to assert the statute of frauds may also present a jury question [see MB 300F.42].

LexisNexis Matthew Bender Expert Practice Tip--Removing Contract From Statute of Frauds:

There are numerous exceptions to the statute of frauds. In this instruction, the fact that a contract possibly could be performed within a year, even though it actually takes longer to perform, removes the contract from the statute. *By Ronald Oster*

LexisNexis Matthew Bender Expert Practice Tip--Spend Time Explaining Statute of Frauds:

Attorneys have "problems" with this legal theory. Hence, consider how to explain this to laypersons. By
Rex Heeseman

[3] Comment**[a] General Rule**

Oral and implied contracts that necessarily cannot be performed within a year are invalid under the statute of frauds, with the exception of certain financial contracts [*Civ. Code* § 1624(a)(1); see *Blaustein v. Burton* (1970) 9 *Cal.App.3d* 161, 164, 88 *Cal.Rptr.* 319 ; see also [b], below]. Even though a promise may not be performed within a year, it is not invalidated by the statute if there is a possibility that it may be. The contract itself must contain language whose reasonable interpretation shows a clear intention that it cannot be performed within the year [*Keller v. Pacific Turf Club* (1961) 192 *Cal.App.2d* 189, 196, 13 *Cal.Rptr.* 346]. The period commences when the agreement is made, not when performance begins [*Kraft v. Rooke* (1930) 103 *Cal.App.* 552, 554, 284 *P.* 935 ; see Witkin, Summary of California Law, *Contracts*, § 364 (10th ed. 2005)]. Defendant must raise the statute of frauds by demurrer, answer, or objection at trial [*Sloan v. Hiatt* (1966) 245 *Cal.App.2d* 926, 935, 54 *Cal.Rptr.* 351], but once defendant does so plaintiff has traditionally had the burden of proving that the contract is not barred by the statute of frauds [*E. K. Wood Lumber Co. v. Moore Mill & Lumber Co.* (9th Cir. 1938) 97 *F.2d* 402, 409 ; *Jamison v. Hyde* (1903) 141 *Cal.* 109, 112, 74 *P.* 695 ; *Feeney v. Howard* (1889) 79 *Cal.* 525, 527-528, 21 *P.* 984 ; *Barcelon v. Cortese* (1968) 263 *Cal.App.2d* 517, 527, 69 *Cal.Rptr.* 657 ; *Estate of Rivolo* (1961) 194 *Cal.App.2d* 773, 777, 15 *Cal.Rptr.* 268].

[b] Qualified Financial Contracts

Notwithstanding the general requirement regarding agreements not to be performed within one year [*Civ. Code* § 1624(a)(1); see [a], above], a qualified financial contract that is valid in other regards and is otherwise enforceable is not invalid for lack of a note, memorandum, or other writing and is enforceable by way of action or defense, if either of the following is true:

- There is sufficient evidence to indicate that a contract has been made see [*Civ. Code* § 1624(b)(3) (listing types of evidence)]; or
- The parties have agreed by means of a prior or subsequent written contract to be bound by the terms of the qualified financial contract from the time they reached agreement (by telephone, by exchange of electronic messages, or otherwise) on those terms [*Civ. Code* § 1624(b)(1)].

A "qualified financial contract" means an agreement as to which each party is other than a natural person and that is any of the following [*Civ. Code* § 1624(b)(2)]:

- For the purchase and sale of foreign exchange, foreign currency, bullion, coin, or precious metals on a forward, spot, next-day value or other basis.
- A contract (other than for the purchase of a commodity for future delivery on, or subject to the rules of, a contract market or board of trade) for the purchase, sale, or transfer of any commodity or any similar good, article, service, right, or interest that is presently or in the future becomes the subject of a dealing in the forward contract trade, or any product or byproduct thereof, with a maturity date more than two days after the date the contract is entered into.
- For the purchase and sale of currency, or interbank deposits denominated in United States dollars.

- For a currency option, currency swap, or cross-currency rate swap.
- For a commodity swap or a commodity option (other than an option contract traded on, or subject to the rules of, a contract market or board of trade).
- For a rate swap, basis swap, forward rate transaction, or an interest rate option.
- For a security-index swap or option, or a security or securities price swap or option.
- An agreement that involves any other similar transaction relating to a price or index (including any transaction or agreement involving any combination of the above, any cap, floor, collar, or similar transaction with respect to a rate, commodity price, commodity index, security or securities price, security index, other price index, or loan price).
- An option with regard to any of the above.

For additional discussion, see California Forms of Pleading and Practice, Ch. 530, *Statute of Frauds* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Province of Court & Jury Contracts Law Statutes of
Frauds Requirements Performance Evidence Procedural Considerations Burdens of Proof Preponderance of Evidence

John F. Wells and Lise A. Pearlman were the original authors of this chapter. It has since been updated to reflect changes in the law, additional case citations and practice pointers by other lawyers as well as revisions including cross-references to the official CACI instructions.



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California Forms of Jury Instruction

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CHAPTER 3F Matthew Bender Contract Defenses Instructions
PART C. STATUTE OF FRAUDS--CONTRACTS NOT TO BE PERFORMED WITHIN A YEAR

1-3F California Forms of Jury Instruction MB 300F.41

MB 300F.41 Statute of Frauds--Reasonable Time

[1] Instruction Statute of Frauds--Reasonable Time

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

If you find that the parties agreed that their contract was to continue for a reasonable time, then you must determine what period would constitute a reasonable time. If this reasonable time would necessarily exceed one year, then the agreement is not enforceable because it was not in writing.

Authorities: *Civ. Code § 1624(a)(1); San Francisco Brewing Corp. v. Bowman (1959) 52 Cal.2d 607, 619, 343 P.2d 1 .*

[2] Use of Instruction

This instruction should be used in cases involving future performance required under oral or implied contracts that are terminable after a reasonable time and there is a fact question as to whether a reasonable time necessarily exceeds one year. A special verdict may be used to have the jury find the exact duration of the contract.

[3] Comment

The statute of frauds requires a writing for any agreement that by its terms is not to be performed within a year from the time that it is made [*Civ. Code § 1624(a)(1)*]. Under this provision, the enforceability of an executory contract that is expressly or impliedly terminable after a reasonable time is subject to the statute of frauds if in fact the reasonable time is found to exceed one year [*San Francisco Brewing Corp. v. Bowman (1959) 52 Cal.2d 607, 619, 343 P.2d 1*]. However, to the extent the contract has been partly performed, neither party can avoid its obligations as to past transactions by objecting that it was oral and within the statute of frauds [*MacMorris Sales Corp. v. Kozak (1968) 263 Cal.App.2d 430, 442, 69 Cal.Rptr. 719*]. It is proper to instruct the jury on the statute of frauds if there is a fact issue regarding the intended duration of the agreement [*San Francisco Brewing Corp. v. Bowman (1959) 52 Cal.2d 607, 619,*

343 P.2d 1]. When plaintiff sued for the balance due on an open account for the sale of beer and the defendant cross-complained for premature termination of a distributorship, defendant raised alternate theories of an express oral agreement and an implied agreement for a reasonable time. The Supreme Court reversed the judgment for the defendant on the cross-complaint because the trial court failed to instruct the jury on the applicability of the statute of frauds to an alleged implied agreement to continue the distributorship for a reasonable period that the jury could have found to be more than one year. On retrial, the defendant abandoned the implied agreement theory, relying entirely on an alleged express contract to continue only so long as defendant exerted his best efforts to sell plaintiff's beer and to take care of the territory. This time, the court of appeal upheld the trial court's refusal to instruct the jury on the statute of frauds since the contract could have been completely performed in one year [*Burgermeister Brewing Corp. v. Bowman* (1964) 227 Cal.App.2d 274, 38 Cal.Rptr. 597].

The burden of proof appears to be on the plaintiff [see MB 300F.40[3]].

LexisNexis Matthew Bender Expert Practice Tip--Using This Defense May Be Difficult: The commentary above shows the difficulty of applying the statute of frauds to contracts that are to continue for a "reasonable time." One party simply comes up with express or implied terms that potentially limit the contract to less than one year. In addition, "reasonable time" means different things to different jurors. *By Ronald Oster and Rex Heeseman*

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts Law Statutes of Frauds Requirements Performance Evidence Procedural Considerations Burdens of Proof Allocation

John F. Wells and Lise A. Pearlman were the original authors of this chapter. It has since been updated to reflect changes in the law, additional case citations and practice pointers by other lawyers as well as revisions including cross-references to the official CACI instructions.



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CHAPTER 3F Matthew Bender Contract Defenses Instructions
PART C. STATUTE OF FRAUDS--CONTRACTS NOT TO BE PERFORMED WITHIN A YEAR

1-3F California Forms of Jury Instruction MB 300F.42

MB 300F.42 Estoppel to Assert the Statute of Frauds

[1] Instruction Estoppel to Assert the Statute of Frauds

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

The agreement claimed by Plaintiff is one that ordinarily must be in writing to be enforced. However, an exception exists if Plaintiff proves one of the following, either:

- 1. That Plaintiff was induced by Defendant to seriously change [his/her/its] position in reasonable reliance on the contract, and that unconscionable injury to Plaintiff would result from a refusal to enforce the contract; or**
- 2. That Defendant would be unjustly enriched by a refusal to enforce the contract.**

It is enough for you to find either one of these two things.

[IF APPLICABLE (See Use of Instruction)]

Evidence that Defendant promised to reduce the agreement to writing is not enough by itself to make the contract enforceable. However, you may take this evidence into account in determining whether there has been unjust enrichment or unconscionable injury.

Authorities: *Tenzer v. Superscope, Inc.* (1985) 39 Cal.3d 18, 27, 216 Cal.Rptr. 130, 702 P.2d 212 ; *Monarco v. Lo Greco* (1950) 35 Cal.2d 621, 626-627, 220 P.2d 737 ; *Estate of Housley* (1997) 56 Cal.App.4th 342, 359, 65 Cal.Rptr.2d 628 ; *Whorton v. Dillingham* (1988) 202 Cal.App.3d 447, 456, 248 Cal.Rptr. 405 ; *Tomlins v. American Ins. Co.* (1968) 258 Cal.App.2d 525, 528, 66 Cal.Rptr. 92 ; *Gressley v. Williams* (1961) 193 Cal.App.2d 636, 640-641,

14 Cal.Rptr. 496 .

[2] Use of Instruction

This instruction should be used when a statute of frauds has been raised to defeat an oral or implied contract and there is evidence to support an estoppel to assert the statute of frauds that the parties have stipulated, or the judge has decided, to submit to the jury [see MB 300F.27[3]]. The optional paragraph addresses the effect of evidence that the defendant promised to reduce the agreement to writing.

LexisNexis Matthew Bender Expert Practice Tip--Defeating Statute of Frauds: Detrimental reliance and unjust enrichment are two ways to defeat the statute of frauds. This instruction covers both of them. However, these concepts will be complicated for most jurors. For example, be careful in explaining what is an "unconscionable injury." By Ronald Oster and Rex Heeseman

[3] Comment

The plaintiff may seek to avoid the bar of the statute of frauds by alleging estoppel to assert it [*Tomlins v. American Ins. Co.* (1968) 258 Cal.App.2d 525, 527, 66 Cal.Rptr. 92]. The burden of proof is on the plaintiff [*Wilk v. Vencill* (1947) 30 Cal.2d 104, 108, 180 P.2d 351]. Estoppel to assert the statute of frauds is a question of fact [*Estate of Housley* (1997) 56 Cal.App.4th 342, 358-359, 65 Cal.Rptr.2d 628 ; *Reynolds v. Special Projects, Inc.* (1968) 260 Cal.App.2d 496, 501-502, 67 Cal.Rptr. 374]. It requires proof that unconscionable injury would result from denying the contract's enforcement after one party has been induced by the other to seriously change his or her position in reliance on the contract or unjust enrichment that would result if a party who has received the benefits of the other's performance were allowed to rely on the statute [*Tenzer v. Superscope, Inc.* (1985) 39 Cal.3d 18, 27, 216 Cal.Rptr. 130, 702 P.2d 212 ; *Monarco v. Lo Greco* (1950) 35 Cal.2d 621, 220 P.2d 737 ; *Whorton v. Dillingham* (1988) 202 Cal.App.3d 447, 456, 248 Cal.Rptr. 405 ; see *Allied Grape Growers v. Bronco Wine Co.* (1988) 203 Cal.App.3d 432, 444, 249 Cal.Rptr. 872 (estoppel applied to oral contract under state Commercial Code)]. It is not essential to show that there was a promise to reduce the agreement to writing [*Monarco v. Lo Greco* (1950) 35 Cal.2d 621, 626-627, 220 P.2d 737]. Nor is proof of a promise to reduce the agreement to writing sufficient by itself to create an estoppel. However, evidence of a promise may be a relevant factor to be taken into account in determining whether unjust enrichment or unconscionable injury would result [*Tomlins v. American Ins. Co.* (1968) 258 Cal.App.2d 525, 528, 66 Cal.Rptr. 92].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawDefensesEquitable EstoppelStatutes of Frauds

John F. Wells and Lise A. Pearlman were the original authors of this chapter. It has since been updated to reflect changes in the law, additional case citations and practice pointers by other lawyers as well as revisions including cross-references to the official CACI instructions.



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CHAPTER 3F Matthew Bender Contract Defenses Instructions
PART C. STATUTE OF FRAUDS--CONTRACTS NOT TO BE PERFORMED WITHIN A YEAR

1-3F California Forms of Jury Instruction MB 300F.43

MB 300F.43 Effect of Part Performance on Statute of Frauds

[1] Instruction Effect of Part Performance on Statute of Frauds

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Mere performance of services is not usually enough to make an oral agreement of this type enforceable. However, an exception exists if Plaintiff proves all of the following:

- (1) That Plaintiff's services were of such a peculiar or exceptional character that it is impossible to estimate their value in money;**
- (2) That the parties did not intend to measure Plaintiff's services by a money standard; and**
- (3) That, after the performance of the services, Plaintiff could not be restored to [his/her/its] previous situation.**

Authorities: *Estate of Rivolo* (1961) 194 Cal.App.2d 773, 778, 15 Cal.Rptr. 268 ; *Walker v. Calloway* (1950) 99 Cal.App.2d 675, 678, 222 P.2d 455 .

[2] Use of Instruction

This instruction should be used when part performance of unique services is alleged as a basis for avoiding the statute of frauds with regard to the contract's executory portion.

[3] Comment

Ordinarily, part performance of an oral agreement will not suffice to circumvent the statute of frauds [*Walker v. Calloway* (1950) 99 Cal.App.2d 675, 678, 222 P.2d 455]. A plaintiff may generally obtain recovery in quantum meruit

for services already performed but will not be able to circumvent the statute of frauds to enforce the contract [*Ward v. Wrixon* (1959) 168 Cal.App.2d 642, 655, 336 P.2d 640]. However, an oral contract is enforceable when a plaintiff has changed position in reliance on an agreement if the services are of such a peculiar or exceptional character that it is impossible to estimate their value by any pecuniary standard, if it is evident that the parties did not intend to measure them by any such standard, and if the plaintiff after the performance of the services could not be restored to the situation in which he or she was before the rendition of the services [*Estate of Rivolo* (1961) 194 Cal.App.2d 773, 778, 15 Cal.Rptr. 268 ; *Walker v. Calloway* (1950) 99 Cal.App.2d 675, 678, 222 P.2d 455 ; *Ward v. Wrixon* (1959) 168 Cal.App.2d 642, 655, 336 P.2d 640]. Whether or not the elements of estoppel exist depends on the particular factual context [*Ward v. Wrixon* (1959) 168 Cal.App.2d 642, 655, 336 P.2d 640]. Although the doctrine is of equitable origin, it was presented to the jury in a proceeding to enforce an oral contract of adoption for purposes of determining heirship. The burden of proof is on the party seeking to enforce the oral contract [*Estate of Rivolo* (1961) 194 Cal.App.2d 773, 777, 15 Cal.Rptr. 268].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts Law Statutes of Frauds Exceptions Partial Performance

John F. Wells and Lise A. Pearlman were the original authors of this chapter. It has since been updated to reflect changes in the law, additional case citations and practice pointers by other lawyers as well as revisions including cross-references to the official CACI instructions.



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CHAPTER 3F Matthew Bender Contract Defenses Instructions

PART C. STATUTE OF FRAUDS--CONTRACTS NOT TO BE PERFORMED WITHIN A YEAR

1-3F California Forms of Jury Instruction MB 300F.44--MB 300F.49

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CHAPTER 3F Matthew Bender Contract Defenses Instructions
PART D. STATUTE OF LIMITATIONS

*1-3F California Forms of Jury Instruction MB 300F.50***MB 300F.50 General Time Limitation for Suit on Written Contract****[1] Instruction**

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Defendant claims as a defense that Plaintiff filed this suit too late. To establish this defense, Defendant must prove that this action was not commenced within four years of the date on which the claim sued on arose. You must decide when the claim arose, that is, when _____ [describe alleged breach of defendant giving rise to cause of action]. If the _____ [alleged breach] occurred before _____ [date four years before commencement of the action], Plaintiff's suit was filed too late and is time-barred.

Authorities: Code Civ. Proc. § 337; *Balfour, Guthrie & Co. v. Hansen* (1964) 227 Cal.App.2d 173, 188-192, 38 Cal.Rptr. 525 ; *Mitchell v. County Sanitation Dist.* (1957) 150 Cal.App.2d 366, 371, 309 P.2d 930 ; *Waxman v. Citizens Nat. Trust & Sav. Bk.* (1954) 123 Cal.App.2d 145, 149, 266 P.2d 48 .

[2] Use of Instruction

This instruction should be used only when there is an issue of fact regarding the date on which the defendant breached the contract. The instruction states the general rule that the limitation for suit on a written contract is four years from date of breach. Tolling of the statute of limitations due to delayed discovery of the existence of the cause of action poses a different situation for which the burden of proof is on plaintiff. An instruction on delayed discovery is set forth in MB 300F.54.

LexisNexis Matthew Bender Expert Practice Tip--This Is a Key Instruction, But Other

Instructions Will Be Needed: This is often a key instruction. Treat it accordingly. The issue of fact under this instruction is: When did the claim arise? Depending on the type of claim involved, additional instructions will be required to deal with severable contracts, continuing breaches, and similar issues. By

Rex Heeseman and Ronald Oster

For a CACI instruction on this issue, see Ch. 3, *California Judicial Council Contracts Instructions*, CACI No. 338 (Affirmative Defense--Statute of Limitations).

[3] Comment

[a] Limitation Period

The statute of limitations for an action on a written contract is four years [*Code Civ. Proc.* § 337]. The statute of limitations is a special defense that the defendant must plead or be deemed to have waived [*Union Sugar Co. v. Hollister Estate Co.* (1935) 3 Cal.2d 740, 740, 47 P.2d 273 ; *Mitchell v. County Sanitation Dist.* (1957) 150 Cal.App.2d 366, 371, 309 P.2d 930]. If the application of the statute is apparent from the face of the complaint, the defense may be raised by demurrer [*Kunstman v. Mirizzi* (1965) 234 Cal.App.2d 753, 755, 44 Cal.Rptr. 707]. Otherwise, it must be raised as an affirmative defense [*O'Neil v. Spillane* (1975) 45 Cal.App.3d 147, 156, 119 Cal.Rptr. 245]. When the statute of limitations can be raised by demurrer, it presents the question of a fatal defect in plaintiff's case in chief that must be determined as a matter of law. Demurrer does not lie if the action may be, but is not necessarily, barred by the statute of limitations [*County of Los Angeles v. Security First National Bank* (1948) 84 Cal.App.2d 575, 580, 191 P.2d 78].

[b] Accrual of Cause of Action

The cause of action for breach of contract accrues when the contract is breached. When the cause of action accrued is a question of fact [*Jaffe v. Carroll* (1973) 35 Cal.App.3d 53, 59, 110 Cal.Rptr. 435]. Ordinarily a cause of action accrues when the promisor fails to do the thing contracted for in the manner contracted [*Balfour, Guthrie & Co. v. Hansen* (1964) 227 Cal.App.2d 173, 188-192, 38 Cal.Rptr. 525 ; *Waxman v. Citizens Nat. Trust & Sav. Bk.* (1954) 123 Cal.App.2d 145, 149, 266 P.2d 48]. If the contract does not fix a time of payment for services continuously rendered over an indefinite period, the statute does not begin to run on the right of action for payment until the services end [*Cullinan v. McColgan* (1927) 87 Cal.App. 684, 693, 263 P. 353 ; see MB 300F.53].

In actions on third party creditor beneficiary contracts, accrual is governed by the third party beneficiary agreement and not by the maturity of the original debt [*Pitzer v. Wedel* (1946) 73 Cal.App.2d 86, 90 ; *Anderson v. Calaveras Cent. Min. Corp.* (1936) 13 Cal.App.2d 338, 344, 57 P.2d 560 ; *Sherwood & Sherwood v. Gill & Lutz* (1918) 36 Cal.App. 707, 711, 173 P.171 ; see MB 300F.53].

When the contract is severable, the duty to perform each part arises independently and the statute begins to run on the severable obligations from the time the performance of each is due [see *Trigg v. Arnott* (1937) 22 Cal.App.2d 455, 459, 71 P.2d 330 ; Witkin, *California Procedure*, vol. 3, *Actions*, § 486 (4th ed. 1997)].

One exception to the general rule of accrual on breach occurs when a promise is construed as continuing, so that each failure to perform results in a new breach, giving rise to a new cause of action [*Oil Base, Inc. v. Continental Cas. Co.* (1969) 271 Cal.App.2d 378, 389, 76 Cal.Rptr. 594 ; *McGrath v. County of Butte* (1939) 30 Cal.App.2d 734, 736, 87 P.2d 381]. Another exception occurs when the promise is construed as prospective [Witkin, *California Procedure*, vol. 3, *Actions*, § 491 (4th ed. 1997)].

[c] Anticipatory Breach

If the law gives the plaintiff a choice of two or more remedies, both the applicable statute of limitations and the accrual of the cause of action may depend on that election. When the defendant commits an anticipatory breach, the injured party may elect to sue at once or to wait until the time when performance is due. If the defendant waits, the statute does not begin to run until the anticipatory repudiation becomes an actual breach [*Brewer v. Simpson* (1960) 53 Cal.2d 567,

593, 2 *Cal.Rptr.* 609, 349 *P.2d* 289 ; Witkin, California Procedure, vol. 3, *Actions*, § 492 (4th ed. 1997)]. When the defendant is obligated to perform over a period of time and commits a material breach, the plaintiff may waive it and stand on the contract until the time for final performance. Such a waiver should not prejudice the plaintiff, and the statute ought not to begin running until the date when the last performance is due [*Tahoe Pines v. Newman* (1922) 59 *Cal.App.* 186, 188, 210 *P.* 445 ; Witkin, California Procedure, vol. 3, *Actions*, § 492 (4th ed. 1997)]. If the obligation of the defendant is conditional on the happening of an event or the act of a third person, the cause of action does not accrue until that time [Witkin, California Procedure, vol. 3, *Actions*, § 494 (4th ed. 1997)].

[d] Burden of Proof

When the fact issue for the jury concerns a dispute over the date of breach, it would appear that this issue is part of defendant's affirmative defense for which defendant should have the burden of proof [*Evid. Code* § 500]. No cases specifically address this point, but this allocation of the burden of proof is identical to the rule regarding the burden of proof on illegality of a contract. If the illegality is not apparent on the face of the transaction, illegality is an affirmative defense for which defendant bears the burden of proof [*see MB 300F.90[3]*]. Trial may be bifurcated and the limitations defense tried first [*Code Civ. Proc.* § 597].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawBreachAnticipatory RepudiationGeneral OverviewContracts LawDefensesStatutes of LimitationsEvidenceProcedural ConsiderationsBurdens of ProofAllocationGovernmentsLegislationStatutes of LimitationsPleading & ProofGovernmentsLegislationStatutes of LimitationsTime Limitations

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CHAPTER 3F Matthew Bender Contract Defenses Instructions
PART D. STATUTE OF LIMITATIONS

1-3F California Forms of Jury Instruction MB 300F.51

MB 300F.51 General Time Limitation for Suit on Oral or Implied Contract

[1] Instruction General Time Limitation for Suit on Oral or Implied Contract

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Defendant claims as a defense that Plaintiff filed this suit too late. To establish this defense, Defendant must prove that this action was not commenced within two years of the date on which the claim sued on arose. You must decide when the claim arose, that is, when _____ [describe alleged breach of defendant giving rise to cause of action]. If the _____ [alleged breach] occurred before _____ [describe date two years before commencement of the action], Plaintiff's suit was filed too late and is time-barred.

Authorities: *Code Civ. Proc. § 339; Estate of Fincher (1981) 119 Cal.App.3d 343, 352, 174 Cal.Rptr. 18 .*

[2] Use of Instruction

This instruction should be used when there is an issue of fact as to when defendant breached the contract. It states the general rule that the limitation period for suit on an oral or implied contract is two years from the date of breach. The instruction regarding breach of a written contract is set forth in MB 300F.50.

LexisNexis Matthew Bender Expert Practice Tip--Other Instructions Will Be Needed: The key question under this instruction is: When did the claim arise? This will be a challenging concept to many jurors. Hence, depending on the type of contract involved, additional instructions will be required to deal with severable contracts, continuing breaches, and similar issues. *By Ronald Oster and Rex Heeseman*

[3] Comment

The statute of limitations for an oral or implied contract is generally two years from breach [*Code Civ. Proc. § 339*;

Estate of Fincher (1981) 119 Cal.App.3d 343, 352, 174 Cal.Rptr. 18]. It is a defense that the defendant must plead, and defendant should therefore have the burden of proof when the facts concerning the date of breach are in conflict [see MB 300F.50]. Tolling of the statute of limitations due to delayed discovery poses a different situation for which the burden of proof is on plaintiff [see MB 300F.54].

In a contract action based on constructive discharge from employment, the statute of limitations does not begin to run until actual termination. An employee is not barred from bringing a claim on the basis of the statute of limitations as long as the claim is brought in a timely manner after the actual termination of employment [*Mullins v. Rockwell Int'l. Corp.* (1997) 15 Cal.4th 731, 743, 63 Cal.Rptr.2d 636, 936 P.2d 1246].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts Law
 Defenses
 Statutes of Limitations
 Contracts Law
 Types of Contracts
 Implied-in-Fact Contracts
 Contracts Law
 Types of Contracts
 Oral Agreements
 Evidence
 Procedural Considerations
 Burdens of Proof
 Allocation
 Governments
 Legislation
 Statutes of Limitations
 Pleading & Proof
 Governments
 Legislation
 Statutes of Limitations
 Time Limitations

John F. Wells and Lise A. Pearlman were the original authors of this chapter. It has since been updated to reflect changes in the law, additional case citations and practice pointers by other lawyers as well as revisions including cross-references to the official CACI instructions.



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California Forms of Jury Instruction

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CHAPTER 3F Matthew Bender Contract Defenses Instructions
PART D. STATUTE OF LIMITATIONS

*1-3F California Forms of Jury Instruction MB 300F.52***MB 300F.52 Breach of Agreement to Pay for Continuous Services****[1] Instruction** Breach of Agreement to Pay for Continuous Services[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Defendant claims that Plaintiff waited too long before bringing suit on certain of the services allegedly performed by Plaintiff. Defendant has the burden of proof on this issue. If the parties agreed to periodic payments as the services were being rendered, then Defendant breached the agreement the first time [he/she/it] failed to make a payment when due. Plaintiff would then be barred from recovering any payments that were due before _____ [specify cut off date]. However, if the parties did not fix a time for payment, the time of Defendant's breach of the obligation to pay was the date the services ended. In that event, if any services were rendered after _____ [specify cut off date], Plaintiff is entitled to seek payment for all services rendered, whether before or after that date.

[IF APPLICABLE (See Use of Instruction)]

If you find from the evidence that Plaintiff's services were not in fact rendered continuously but were interrupted, then Plaintiff's claim for any services performed before _____ [specify cut off date] will be barred unless the interruption was brought about by the wrongful act of the Defendant.

Authorities: *Belletich v. Pollock* (1946) 75 Cal.App.2d 142, 145-146, 171 P.2d 57 ; *Cullinan v. McColgan* (1927) 87 Cal.App. 684, 693, 263 P. 353 .

[2] Use of Instruction

This instruction should be used when services were performed over a period of time and there is a dispute over whether

breach of a duty of payment for the services performed more than two or four years before suit are barred by the statute of limitations. If the services were part of continuous services that continued to a time within the statute of limitations, then suit is timely for all services. The optional paragraph should be used if there is a dispute over whether the services were in fact continuous. The final phrase applies only if there is evidence that the interruption in service was caused by defendant.

LexisNexis Matthew Bender Expert Practice Tip--Should You Opt to Give it, Use Care With This

Instruction: Most trial counsel do not want to argue a technical statute of limitations defense to a jury. This instruction illustrates several ways for a plaintiff to avoid the effect of the statute of limitations for services. Among other things, plaintiff can argue that payment was deferred by mutual or implied consent until a later time. In any event, many jurors will likely be confused by this instruction. So, be careful with the closing. *By Ronald Oster and Rex Heeseman*

[3] Comment

The statute of limitations for a service contract runs from the date of breach of the duty of payment for the services. If a service contract does not provide a fixed date for payment and the services are continuous, the statute of limitations does not begin to run on any of the services until the services end [*Cullinan v. McColgan* (1927) 87 Cal.App. 684, 693, 263 P. 353]. If there is a serious question whether services have been continuous, it is error not to instruct the jury on this issue [*Belletich v. Pollock* (1946) 75 Cal.App.2d 142, 145-146, 171 P.2d 57].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawBreachContinuing BreachContracts LawDefensesStatutes of LimitationsContracts LawTypes of ContractsPersonal Service Agreements

John F. Wells and Lise A. Pearlman were the original authors of this chapter. It has since been updated to reflect changes in the law, additional case citations and practice pointers by other lawyers as well as revisions including cross-references to the official CACI instructions.



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CHAPTER 3F Matthew Bender Contract Defenses Instructions
PART D. STATUTE OF LIMITATIONS

1-3F California Forms of Jury Instruction MB 300F.53

MB 300F.53 Statute of Limitations Against Third Party Beneficiary**[1] Instruction** Statute of Limitations Against Third Party Beneficiary[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Defendant claims as a defense that Plaintiff filed this suit too late. To establish this defense, Defendant must prove that the complaint was not filed within _____ [two or four] years of the time of _____ [the breach or the time _____ (name of promisee) knew or reasonably should have known of the breach by Defendant]. It does not matter that Plaintiff may have been unaware of the contract or of the time for Defendant's performance. Plaintiff has no greater rights than _____ [name of promisee].

Authorities: *Skylawn v. Superior Court* (1979) 88 Cal.App.3d 316, 318-319, 151 Cal.Rptr. 793 ; *Sanders v. American Casualty Co.* (1969) 269 Cal.App.2d 306, 310, 74 Cal.Rptr. 634 .

[2] Use of Instruction

This instruction should be used when there is an issue of fact as to whether the statute of limitations has run on a third party beneficiary contract. The alternative language applies in cases when the time limitation turns on discovery [see MB 300F.54]. A special verdict may be requested to determine the date that the jury found the cause of action to have accrued.

LexisNexis Matthew Bender Expert Practice Tip--When Statute Begins to Run: Note that the statute begins to run (1) from the date of the breach, or (2) from the date the promisee (*not* the third party beneficiary) knew or should have known of the breach. *By Ronald Oster*

[3] Comment

A third party beneficiary is subject to the same limitations period as the promisee to the contract that created the rights of the beneficiary [*Skylawn v. Superior Court* (1979) 88 Cal.App.3d 316, 318-319, 151 Cal.Rptr. 793]. The fact that the third party beneficiary may be ignorant of the contract does not toll the statute [*Sanders v. American Casualty Co.* (1969) 269 Cal.App.2d 306, 310, 74 Cal.Rptr. 634]. The statute of limitations for an oral contract is two years [Code Civ. Proc. § 339] and for a written contract is four years [Code Civ. Proc. § 337]. Whether the accrual date is the date of breach or date of discovery, or whether some other exception is applicable, is determined by the same rules applicable to contracts generally [see MB 300F.54, MB 300F.56].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Verdicts Special Verdicts Contracts Law Defenses Statutes of Limitations Contracts Law Third Parties Beneficiaries Defenses

John F. Wells and Lise A. Pearlman were the original authors of this chapter. It has since been updated to reflect changes in the law, additional case citations and practice pointers by other lawyers as well as revisions including cross-references to the official CACI instructions.



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CHAPTER 3F Matthew Bender Contract Defenses Instructions
PART D. STATUTE OF LIMITATIONS

1-3F California Forms of Jury Instruction MB 300F.54

MB 300F.54 Statute of Limitations--Discovery of Claim**[1] Instruction** Statute of Limitations--Discovery of Claim

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

The law requires that this action have been brought within [two or four] years of the time plaintiff knew or should have known _____ [describe acts allegedly in breach of agreement]. This means that Plaintiff must prove each of the following:

(1) That the alleged breach was first discovered by Plaintiff some time after _____ [specify date two or four years after breach];

(2) The circumstances under which Plaintiff made the discovery;

(3) That Plaintiff's failure to discover the alleged breach before _____ [specify date two or four years after breach] was not due to Plaintiff's own fault in that Plaintiff shows that [he/she/it] exercised reasonable care in availing [himself/herself/itself] of the opportunity to obtain knowledge of the breach from sources open to [his/her/its] investigation; and

(4) That before _____ [specify same date] Plaintiff had no knowledge of facts sufficient to put [him/her/it] on inquiry notice of the breach.

Authorities: *Kimball v. Pacific Gas & Elec. Co.* (1934) 220 Cal. 203, 215, 30 P.2d 39 ; *April Enterprises, Inc. v. KTTV* (1983) 147 Cal.App.3d 805, 833, 195 Cal.Rptr. 421 ; *Seelenfreund v. Terminix of Northern Cal., Inc.* (1978) 84 Cal.App.3d 133, 136, 148 Cal.Rptr. 307 ; *Bedolla v. Logan & Frazer* (1975) 52 Cal.App.3d 118, 129, 125 Cal.Rptr. 59 .

[2] Use of Instruction

This instruction should be used in breach of contract cases when plaintiff alleges fraud or mistake tolling the statute of limitations or breach of a duty of full disclosure. The word breach is used throughout, but wrongful act, fraud, or mistake may be substituted, if appropriate. This instruction assumes that the applicable time limit is two or four years (depending on whether the contract is oral or written) from discovery or the date discovery should have been made. However, it is arguable that the plaintiff is limited to three years from the date of discovery or the date discovery should have been made if that date is more than four years after the breach [see [3][a], *below*]. The traditional formulation of the first element of an instruction on belated discovery tells the jury that plaintiff has the burden of proving when the discovery took place. Actually, it does not matter precisely "when" so long as the date is within the applicable time limits. This instruction is worded accordingly.

The second element, proof of the circumstances of the discovery, would appear to be subsumed within proof of the first and third elements, but since it adds no greater burden to plaintiff and has traditionally been viewed as a distinct element that plaintiff must prove, it appears safer to continue to treat it as a separate element. If there is a fiduciary relationship, plaintiff generally need not prove reasonable diligence and therefore the third element should not be given in these situations. The fourth element requires plaintiff to negate inquiry notice. It should be followed with the definition of inquiry notice in MB 300F.55.

LexisNexis Matthew Bender Expert Practice Tip--Use Visual Aid: This would be a good instruction for a visual aid since there are a number of hurdles that must be overcome to fit within the discovery exception to the statute of frauds. Yet, "discovery" will be alien to some jurors. That is, they will have difficulty in understanding, for example, how someone "discovers" the alleged breach. *By Ronald Oster and Rex Heeseman*

[3] Comment

[a] Basis for Tolling

The general California rule is that the contract cause of action accrues at the date of injury [see MB 300F.50[3]]. When it appears on the face of the complaint that the action is barred by the statute of limitations, plaintiff has an obligation to anticipate the defense and plead facts to negate the bar [*Union Carbide Corp. v. Superior Court* (1984) 201 Cal.Rptr. 580, 679 P.2d 14]. One basis for tolling the statute is fraud or mistake [see, e.g., *El Pollo Loco, Inc. v. Hashim* (9th Cir. 2003) 316 F.3d 1032, 1038-1040 (discovery rule applied to toll statute of limitations in contract claim when misrepresentations and forgery hindered discovery of breach)]. When a party relies on fraud or mistake in an action governed by the limitations periods of *Code Civ. Proc.* §§ 337 and 339, the same rules apply as with cases governed by the three-year provisions of *Code Civ. Proc.* § 338(d). Plaintiff has the burden of proving (1) when the fraud or mistake was discovered, (2) the circumstances under which the fraud or mistake was discovered, (3) that plaintiff is not at fault for late discovery, and (4) that plaintiff had no actual or presumptive knowledge of facts sufficient to put him or her on inquiry [*Sears v. Rule* (1949) 27 Cal.2d 131, 147, 163 P.2d 443 ; *Kimball v. Pacific Gas & Elec. Co.* (1934) 220 Cal. 203, 215, 30 P.2d 39 ; *Bedolla v. Logan & Frazer* (1975) 52 Cal.App.3d 118, 129, 125 Cal.Rptr. 59 ; *Bowman v. McPheeters* (1945) 77 Cal.App.2d 795, 798, 176 P.2d 745].

The same rule of discovery has been extended to situations involving a defendant with a statutory duty of disclosure [*Seelenfreund v. Terminix of Northern Cal., Inc.* (1978) 84 Cal.App.3d 133, 137, 148 Cal.Rptr. 307]. Accrual on discovery was also held applicable to breaches that are committed in secret involving harm that would not be reasonably discoverable until a future time [*Gryczman v. 4550 Pico Partners, Ltd.* (2003) 107 Cal.App.4th 1, 5-6, 131 Cal.Rptr.2d 680 (delayed discovery rule applied when owner conveyed property without providing potential buyer with notice and right of first refusal); *April Enterprises, Inc. v. KTTV* (1983) 147 Cal.App.3d 805, 833, 195 Cal.Rptr. 421]. Because a plaintiff is presumed to have knowledge of injury when it occurs, it is plaintiff's burden to rebut that presumption by proving that delayed discovery was justified [*April Enterprises, Inc. v. KTTV* (1983) 147 Cal.App.3d 805, 833, 195 Cal.Rptr. 421 ; *G.D. Searle & Co. v. Superior Court* (1975) 49 Cal.App.3d 22, 26, 122 Cal.Rptr. 218].

[b] Reasonable Diligence

Whether the plaintiff exercised reasonable diligence is a question of fact [*Enfield v. Hunt* (1979) 91 Cal.App.3d 417, 419, 154 Cal.Rptr. 146 ; see *Gryczman v. 4550 Pico Partners, Ltd.* (2003) 107 Cal.App.4th 1, 6-7, 131 Cal.Rptr.2d 680 (because reasonable minds could differ as to sufficiency of plaintiff's diligence, issue of reasonable diligence under circumstances was question of fact for jury; trial court erred in granting summary judgment)]. The exercise of reasonable diligence requires plaintiff to negate the existence of an opportunity to obtain knowledge from sources open to his or her investigation [*Baker v. Beech Aircraft Corp.* (1979) 96 Cal.App.3d 321, 327, 157 Cal.Rptr. 779]. The acts and knowledge of plaintiff's agents are attributable to plaintiff [*Bedolla v. Logan & Frazer* (1975) 52 Cal.App.3d 118, 129, 125 Cal.Rptr. 59]. This rule need not be repeated in this instruction, if instructed on separately [see Ch. 3C, *Parties*].

Unlike claims between people dealing at arm's length, there is generally no requirement that the plaintiff prove exercise of reasonable diligence in actions against fiduciaries [*Bedolla v. Logan & Frazer* (1975) 52 Cal.App.3d 118, 125 Cal.Rptr. 59 ; see MB 300F.55]. However, this does not mean that plaintiff may wait until he or she has actual knowledge of all the facts constituting the claim against a fiduciary before suing. Even in cases involving fiduciaries, a plaintiff is charged with actual knowledge of all facts of which a reasonably prudent person would have been put on inquiry [*Bedolla v. Logan & Frazer* (1975) 52 Cal.App.3d 118, 131-132, 125 Cal.Rptr. 59]. The reason that it is said that there is generally no reasonable diligence requirement is because there are statutory exceptions applicable to certain fiduciary relationships. Thus, a contract action against an attorney is governed by *Code Civ. Proc.* § 340.6, which requires an action to be brought within one year after the plaintiff discovers or through the use of reasonable diligence should have discovered, the facts constituting the wrongful act or omission, or four years from the date of the wrongful act or omission, whichever occurs first (or, as of 2010, two years after post-conviction exoneration if plaintiff must establish factual innocence for underlying criminal charge as element of claim) [*Southland Mechanical Constructors Corp. v. Nixen* (1981) 119 Cal.App.3d 417, 431, 173 Cal.Rptr. 917]. However, in recognition of the fiduciary relationship, the statute is tolled during the period the attorney continues to represent the plaintiff regarding the specific subject matter and the four-year limitation is tolled during the period the attorney willfully conceals the facts constituting the wrongful act or omission [*Code Civ. Proc.* § 340.6(a) (also contains other tolling provisions)]. Actions against health care providers also require proof of reasonable diligence with specific tolling provisions [*Code Civ. Proc.* § 340.5]. Even in these cases, however, the level of required diligence is diminished because of the assumption of continued reliance on the fiduciary [*Brown v. Bleiberg* (1982) 32 Cal.3d 426, 438, 186 Cal.Rptr. 228, 651 P.2d 815].

[c] Special Fraud Limitations Period

There is another aspect of the relationship between the limitations periods of *Code Civ. Proc.* §§ 337 and 339 and *Code Civ. Proc.* § 338(d). The time for bringing an action in contract (whether two years or four years) is tolled while the right of action is concealed by the defendant's fraud. The action is timely if brought within three years of discovery of the fraud, even if discovery occurs more than two or four years after the breach [*Acme Paper Co. v. Goffstein* (1954) 125 Cal.App.2d 175, 179-180, 270 P.2d 505]. Although the otherwise applicable four year statute will be extended until three years from discovery of the fraud, the four year statute will not be shortened because discovery occurred sooner [*San Filippo v. Griffiths* (1975) 51 Cal.App.3d 640, 645, 124 Cal.Rptr. 399].

If the tolling of the statute is predicated on fraud, it should be noted that mere silence does not constitute fraudulent concealment absent a duty to disclose [*Kimball v. Pacific Gas & Elec. Co.* (1934) 220 Cal. 203, 217-218, 30 P.2d 39 ; see Ch. 3G, *Matthew Bender Rescission of Contract Instructions*]. However, a person who is under no obligation to speak but who undertakes to do so either voluntarily or in response to inquiries is bound not only to state truly what he or she tells but also not to suppress or conceal any facts within his or her knowledge that will materially qualify those stated. To tell a half truth is equivalent to concealment of the other half [*Kimball v. Pacific Gas & Elec. Co.* (1934) 220 Cal. 203, 219, 30 P.2d 39 ; see Ch. 3G, *Matthew Bender Rescission of Contract Instructions*]. The fraudulent concealment must be of a fact relating to the cause of action, not the identity of the defendant [*Staples v. Zoph* (1935) 9

Cal.App.2d 369, 370, 49 P.2d 1131].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawDefensesStatutes of LimitationsGovernmentsLegislationStatutes of LimitationsTime
LimitationsGovernmentsLegislationStatutes of LimitationsTolling

John F. Wells and Lise A. Pearlman were the original authors of this chapter. It has since been updated to reflect changes in the law, additional case citations and practice pointers by other lawyers as well as revisions including cross-references to the official CACI instructions.



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CHAPTER 3F Matthew Bender Contract Defenses Instructions
PART D. STATUTE OF LIMITATIONS

1-3F California Forms of Jury Instruction MB 300F.55

MB 300F.55 Inquiry Notice

[1] Instruction Inquiry Notice

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

As I have already instructed you, when you consider whether this suit was filed on time, you do not have to find that Plaintiff knew every fact about [his/her/its] claim to start the time running. It is enough if Plaintiff was put on inquiry notice of the facts. Inquiry notice involves both of the following:

(1) That Plaintiff had knowledge of circumstances that would have made a reasonable person suspicious of the acts and conduct of Defendant; and

(2) That inquiry thereon, if followed, would have led to knowledge of the essential facts giving rise to Plaintiff's claim.

If both of these things exist, Plaintiff is charged with actual knowledge of these facts at the time Plaintiff should have made inquiry based on [his/her/its] knowledge of the circumstances.

[IF APPLICABLE (See Use of Instruction)]

When you decide whether a reasonable person would have been suspicious of the acts and conduct of Defendant, you must take into account the relationship between Plaintiff and Defendant. Plaintiff had the right to rely on the representations of Defendant and to place trust and confidence in Defendant to disclose all important facts with regard to _____ [describe transaction] within [his/her/its] knowledge.

Authorities: *Civ. Code § 19*; *Brown v. Bleiberg* (1982) 32 Cal.3d 426, 437-438, 186 Cal.Rptr. 228, 651 P.2d 815 ; *Bedolla v. Logan & Frazer* (1975) 52 Cal.App.3d 118, 128, 125 Cal.Rptr. 59 .

[2] Use of Instruction

This instruction defines inquiry notice and should be used with the instruction in MB 300F.54 and MB 300F.56. The optional paragraph applies in cases involving fiduciaries [see MB 300F.54].

LexisNexis Matthew Bender Expert Practice Tip--Plan Closing Argument Accordingly: The word "inquiry" will not be in some jurors' vocabulary. So, plan the closing to address that. *By Rex Heeseman*

LexisNexis Matthew Bender Expert Practice Tip--Claims Against Fiduciaries: Note the special provisions applicable to claims against fiduciaries. If statute of limitations defenses are difficult to prove in front of juries, then such defenses by fiduciaries (e.g., lawyers) are even more difficult to prove. *By Ronald Oster*

[3] Comment

The instruction is derived from the constructive notice provision in *Civ. Code § 19* and the instruction on inquiry notice approved in *Bedolla v. Logan & Frazer* [*Bedolla v. Logan & Frazer* (1975) 52 Cal.App.3d 118, 128, 125 Cal.Rptr. 59]. The mere fact that means of knowledge are open and not used does not make plaintiff chargeable with knowledge if a prudent man would not have been put on inquiry notice.

Use of reasonable diligence is a separate requirement [*Baker v. Beech Aircraft Corp.* (1979) 96 Cal.App.3d 321, 333, 157 Cal.Rptr. 779 ; *Sanchez v. South Hoover Hospital* (1976) 18 Cal.3d 93, 101, 132 Cal.Rptr. 657, 553 P.2d 1129], which is set forth in MB 300F.54.

Even in cases involving wrongful acts of fiduciaries, a plaintiff is charged with inquiry notice. The fact that the relationship exists does not excuse a party who has notice of facts from investigating those facts [*Bedolla v. Logan & Frazer* (1975) 52 Cal.App.3d 118, 128, 125 Cal.Rptr. 59]. However, the fiduciary relationship can be considered in determining whether a plaintiff was on inquiry notice because a person can rely on representations of a fiduciary [*Brown v. Bleiberg* (1982) 32 Cal.3d 426, 437-438, 186 Cal.Rptr. 228, 651 P.2d 815].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawDefensesStatutes of Limitations

John F. Wells and Lise A. Pearlman were the original authors of this chapter. It has since been updated to reflect changes in the law, additional case citations and practice pointers by other lawyers as well as revisions including cross-references to the official CACI instructions.



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CHAPTER 3F Matthew Bender Contract Defenses Instructions
PART D. STATUTE OF LIMITATIONS

1-3F California Forms of Jury Instruction MB 300F.56

MB 300F.56 Statute of Limitations for Rescission of Contract

[1] Instruction Statute of Limitations for Rescission of Contract

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Defendant claims as a defense that Plaintiff filed this suit too late. To establish this defense, Defendant must prove that _____ [describe the facts on which the plaintiff bases a right to cancel the contract] occurred before [date two or four years before commencement of suit]. If so, the suit is too late, and Defendant is entitled to a verdict.

[ALTERNATIVE (See Use of Instruction)]

A suit to cancel a contract for _____ [fraud or mistake] must be brought within [two or four] years of the time Plaintiff has discovered or in the exercise of reasonable care should have discovered the true facts. This means that Plaintiff must prove all of the following:

(1) That the alleged breach was first discovered by Plaintiff some time after _____ [specify date two or four years after breach];

(2) The circumstances under which Plaintiff made the discovery;

(3) That Plaintiff's failure to discover the alleged breach before _____ [specify date two or four years after breach] was not due to Plaintiff's own fault in that Plaintiff must show that [he/she/it] exercised reasonable care in availing [himself/herself/itself] of the opportunity to obtain knowledge of the breach from sources open to [his/her/its] investigation; and

(4) That before _____ [specify same date] Plaintiff had no knowledge of facts sufficient to put [him/her/it] on inquiry notice of the breach.

Authorities: *Code Civ. Proc. §§ 337(3), 339(3).*

[2] Use of Instruction

This instruction should be used when the defendant asserts the statute of limitations as a defense to a claim of belated discovery of a right to rescind for fraud or mistake. Inquiry notice is defined in MB 300F.55. The first alternative is for situations when the issue is when the right to rescind arose; the second is for situations when the issue is when the defendant should have known that a right to rescind existed. The general instructions applicable to rescission for mistake or fraud are set forth in Ch. 3G, *Matthew Bender Rescission of Contract Instructions*.

LexisNexis Matthew Bender Expert Practice Tip--Use Visual Aid: This would be a good instruction for a visual aid in closing argument since there are a number of hurdles that must be overcome. In addition, keep in mind that whether or not some act is "too late" (see last sentence of first paragraph in this instruction) is a relative concept. *By Ronald Oster and Rex Heeseman*

[3] Comment

An action for rescission of a written contract must be brought within four years from the date the facts entitling the aggrieved party to rescind occurred [*Code Civ. Proc. § 337(3)*]. An action for rescission of a contract not in writing must be brought within two years of the date on which the facts that entitle the aggrieved party to rescind occurred [*Code Civ. Proc. § 339(3)*]. When the ground for rescission is fraud or mistake, the time does not begin to run until the discovery by the aggrieved party of the facts constituting the fraud or mistake [*Code Civ. Proc. §§ 337(3), 339(3)*]. When the ground for rescission is a misrepresentation under *Ins. Code § 359*, the time does not begin to run until the representation becomes false [*Code Civ. Proc. § 337(3)*].

The four elements that plaintiff must prove to justify belated discovery of a claim of rescission for fraud or mistake are the same as a claim for breach of contract based on fraud or mistake [see MB 300F.54[3]].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawDefensesAmbiguity & MistakeGeneral OverviewContracts LawDefensesFraud & MisrepresentationGeneral OverviewContracts LawDefensesStatutes of LimitationsContracts LawRemediesRescission & RedhibitionGeneral OverviewGovernmentsLegislationStatutes of LimitationsTime Limitations

John F. Wells and Lise A. Pearlman were the original authors of this chapter. It has since been updated to reflect changes in the law, additional case citations and practice pointers by other lawyers as well as revisions including cross-references to the official CACI instructions.



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1-3F California Forms of Jury Instruction MB 300F.57--MB 300F.69

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MB 300F.57Reserved for Future Use



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CHAPTER 3F Matthew Bender Contract Defenses Instructions PART E. IMPOSSIBILITY

1-3F California Forms of Jury Instruction MB 300F.70

MB 300F.70 Impossibility

[1] Instruction Impossibility

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Defendant claims as a defense that [his/her/its] obligation to perform under the contract was discharged because it was impossible. Defendant has the burden of proof on this defense. I will now instruct you on what I mean by impossibility.

Authorities: *Civ. Code § 1596; Oosten v. Hay Haulers etc., Union (1955) 45 Cal.2d 784, 788, 291 P.2d 17 ; Calabrese v. Rexall Drug & Chemical Co. (1963) 218 Cal.App.2d 774, 784, 32 Cal.Rptr. 665 .*

[2] Use of Instruction

This instruction should be used when impossibility is alleged as a defense. Impossibility is defined in MB 300F.71 and MB 300F.72.

[3] Comment

The object of a contract must be possible [*Civ. Code § 1597*]. Impossibility is an affirmative defense on which the defendant has the burden of proof [*Oosten v. Hay Haulers etc., Union (1955) 45 Cal.2d 784, 788, 291 P.2d 17*]. It may be shown by proof of impracticability because of extreme and unreasonable difficulty, expenses, injury, or loss [*Oosten v. Hay Haulers etc., Union (1955) 45 Cal.2d 784, 788, 291 P.2d 17 ; Calabrese v. Rexall Drug & Chemical Co. (1963) 218 Cal.App.2d 774, 784, 32 Cal.Rptr. 665*]. If the impossibility existed at the time of the contract and the parties were unaware of it, an alternative defense available to the defendant is rescission for mistake [see Ch. 3G, *Matthew Bender Rescission of Contract Instructions*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts Law Performance Impossibility of Performance General Overview Evidence Procedural Considerations Burdens of Proof Allocation

John F. Wells and Lise A. Pearlman were the original authors of this chapter. It has since been updated to reflect changes in the law, additional case citations and practice pointers by other lawyers as well as revisions including cross-references to the official CACI instructions.



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CHAPTER 3F Matthew Bender Contract Defenses Instructions PART E. IMPOSSIBILITY

1-3F California Forms of Jury Instruction MB 300F.71

MB 300F.71 Impracticability

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

The fact that performance may involve some unforeseen difficulty or expense does not establish impossibility. On the other hand, it is not necessary to show that performance was totally impossible. It is enough that an unforeseen event occurred that made performance excessively difficult or unreasonably expensive.

Authority: Oosten v. Hay Haulers etc., Union (1955) 45 Cal.2d 784, 788, 291 P.2d 17 .

[2] Use of Instruction

This instruction should be used when impracticability is asserted as the equivalent of permanent impossibility. If the impossibility was temporary, use the instruction in MB 300F.75. Objective impossibility is defined in MB 300F.72.

LexisNexis Matthew Bender Expert Practice Tip--Impossibility Defense Will Typically Not

Succeed: It will be a very unusual case where the defense of impossibility succeeds. As noted in the instruction in [1], *above*, unforeseen difficulty or expense does not establish impossibility. The obvious question the jury will ask is: Why did the defendant enter into the contract if it was impossible to perform? *By Ronald Oster*

[3] Comment

Impracticability may be shown by proof of extreme and unreasonable difficulty, expenses, injury or loss [*Schmeltzer v. Gregory* (1968) 266 Cal.App.2d 420, 424, 72 Cal.Rptr. 194 ; *Kennedy v. Reece* (1964) 225 Cal.App.2d 717, 724, 37 Cal.Rptr. 708].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawPerformanceImpossibility of PerformanceImpracticability

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CHAPTER 3F Matthew Bender Contract Defenses Instructions PART E. IMPOSSIBILITY

1-3F California Forms of Jury Instruction MB 300F.72

MB 300F.72 Requirement of Objective Impossibility

[1] Instruction Requirement of Objective Impossibility

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Impossibility refers to the nature of the thing to be done, not the inability of a person to do it. This means that it would not have been reasonably possible for anyone to perform the obligation. It is not considered impossible merely because Defendant was unable to do it.

Authorities: *Civ. Code § 1597; El Rio Oils v. Pacific Coast Asphalt Co. (1949) 95 Cal.App.2d 186, 197, 213 P.2d 1 .*

[2] Use of Instruction

This instruction should be used with MB 300F.70 or MB 300F.75 to define objective impossibility.

LexisNexis Matthew Bender Expert Practice Tip--Keep in Mind That This Is an "Objective"

Standard: This is a difficult standard to meet--that performance of the contract would be impossible for anyone. However, this is an "objective" standard and thus should involve the "reasonable person." Stress that to avoid the "anyone" concern. *By Ronald Oster and Rex Heeseman*

[3] Comment

Everything is possible except that which is impossible in the nature of things [*Civ. Code § 1597*]. Subjective impossibility is insufficient; the performance of the contract must be objectively impossible [*El Rio Oils v. Pacific Coast Asphalt Co. (1949) 95 Cal.App.2d 186, 197, 213 P.2d 1*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawPerformanceImpossibility of PerformanceGeneral Overview

John F. Wells and Lise A. Pearlman were the original authors of this chapter. It has since been updated to reflect changes in the law, additional case citations and practice pointers by other lawyers as well as revisions including cross-references to the official CACI instructions.



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CHAPTER 3F Matthew Bender Contract Defenses Instructions
PART E. IMPOSSIBILITY

1-3F California Forms of Jury Instruction MB 300F.73

MB 300F.73 Unforeseeability Required

[1] Instruction Unforeseeability Required

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Impossibility must be due to an event that was unknown to Defendant at the time of contracting and that [he/she/it] could not reasonably have foreseen. If you find that by the terms of the contract Defendant assumed the risk of _____ [describe alleged impossibility] then the fact that it occurred is not an excuse for [his/her/its] failure to perform.

Authorities: *Glens Falls Indem. Co. v. Perscallo* (1950) 96 Cal.App.2d 799, 802, 216 P.2d 567 ; *McCulloch v. Liguori* (1948) 88 Cal.App.2d 366, 372, 199 P.2d 25 .

[2] Use of Instruction

This instruction should be used when there is an issue of fact as to whether defendant assumed the risk of the particular factor allegedly causing impossibility.

LexisNexis Matthew Bender Expert Practice Tip--Standard Is Very High to Meet: As with the jury instruction in MB 300F.72, the standard for this defense is very high. Defendant must not only prove that no one could perform the contract, but also that the impossibility could not reasonably have been foreseen. *By Ronald Oster*

[3] Comment

Impossibility must be of an unforeseen occurrence the risk of which was not assumed in the contract [*Glens Falls Indem. Co. v. Perscallo* (1950) 96 Cal.App.2d 799, 802, 216 P.2d 567 ; *McCulloch v. Liguori* (1948) 88 Cal.App.2d 366, 199 P.2d 25]. If parties have contracted with reference to the continued existence of a thing and it is destroyed, the

defense of impossibility is available unless one of the parties has assumed the risk of its destruction [Restatement (Second) of Contracts §§ 460, 461; see Comment, *The Economic Implications of the Doctrine of Impossibility*, 26 *Hastings L.J.* 1251 (1978)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawPerformanceImpossibility of PerformanceGeneral Overview

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CHAPTER 3F Matthew Bender Contract Defenses Instructions
PART E. IMPOSSIBILITY

1-3F California Forms of Jury Instruction MB 300F.74

MB 300F.74 Nature of Event**[1] Instruction Nature of Event**

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

_____ [*describe event*] is the type of event that if unknown and unforeseen at the time of contracting could excuse _____ [Defendant's performance or part of Defendant's performance or postpone Defendant's performance] because of impossibility. You should consider the occurrence of this event along with other facts and circumstances in determining whether the Defendant is to be excused.

Authority: County of Yuba v. Mattoon (1958) 160 Cal.App.2d 456, 458, 325 P.2d 162 .

[2] Use of Instruction

This instruction should be used after determination by the court that the event is of the magnitude and type that could give rise to the defense of impossibility under the circumstances.

[3] Comment

It is appropriate to instruct the jury that a particular event is the type of fortuitous event that the jury may consider in deciding whether performance is excused by impossibility [*County of Yuba v. Mattoon (1958) 160 Cal.App.2d 456, 458, 325 P.2d 162*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawPerformanceImpossibility of PerformanceGeneral Overview

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CHAPTER 3F Matthew Bender Contract Defenses Instructions
PART E. IMPOSSIBILITY

1-3F California Forms of Jury Instruction MB 300F.75

MB 300F.75 Temporary Impossibility

[1] Instruction Temporary Impossibility

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

A duty to perform is suspended by temporary impossibility, but the duty resumes as soon as the thing that made it impossible is over, unless performance would then impose a substantially greater burden on Defendant than before.

Authorities: *Oosten v. Hay Haulers etc., Union* (1955) 45 Cal.2d 784, 788, 291 P.2d 17 ; *Autry v. Republic Productions, Inc.* (1947) 30 Cal.2d 144, 148, 180 P.2d 888 .

[2] Use of Instruction

This instruction should be used with the instruction in MB 300F.70 when the defense of impossibility involves a temporary impossibility. The final phrase is only applicable when the defendant is asserting that defendant's performance is discharged due to the fact that a substantially greater burden existed after temporary impossibility.

[3] Comment

Temporary impossibility of the character which, if it should become permanent, would discharge a promisor's entire contractual duty, operates as a permanent discharge if performance after the impossibility ceases would impose a substantially greater burden on the promisor; otherwise the duty is merely suspended while the impossibility exists [*Oosten v. Hay Haulers etc., Union* (1955) 45 Cal.2d 784, 788-789, 291 P.2d 17 ; *Autry v. Republic Productions, Inc.* (1947) 30 Cal.2d 144, 148, 180 P.2d 888].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawPerformanceImpossibility of PerformanceGeneral Overview

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CHAPTER 3F Matthew Bender Contract Defenses Instructions
PART E. IMPOSSIBILITY

1-3F California Forms of Jury Instruction MB 300F.76

MB 300F.76 Frustration of Purpose**[1] Instruction** Frustration of Purpose[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Defendant claims as a defense that [his/her/its] performance was excused because the object of the contract was frustrated by _____ [describe event].

To establish this defense, Defendant must prove all of the following:

- (1) That _____ [describe event] destroyed the value of the contract to Defendant;**
- (2) That the occurrence of this event was not contemplated by the parties' agreement; and**
- (3) That the event was not reasonably foreseeable by Defendant.**

Authorities: *Lloyd v. Murphy* (1944) 25 Cal.2d 48, 52, 153 P.2d 47 ; *Federal Leasing Consultants, Inc. v. Mitchell Lipsett Co.* (1978) 85 Cal.App.3d Supp. 44, 47-48, 150 Cal.Rptr. 82 .

[2] Use of Instruction

This instruction should be used when the defense of frustration of purpose is asserted.

LexisNexis Matthew Bender Expert Practice Tip--"Reasonably Foreseeable" Requirement Limits

Application of Defense: The requirement that the event was not reasonably foreseeable (element (3) of instruction) limits the applicability of this defense. Most commercial contracts involve some elements of risk, and many jurors will be skeptical of any claim that the risk could not have been anticipated.

However, the key is that the event was not "reasonably" foreseeable and that should aid some arguments

by the plaintiff. *By Ronald Oster and Rex Heeseman*

[3] Comment

The doctrine of commercial frustration applies when the whole value of the performance to one party is destroyed by an unforeseen event [*Lloyd v. Murphy* (1944) 25 Cal.2d 48, 52, 153 P.2d 47]. Frustration of purpose is a defense akin to the doctrine of impossibility. The burden of proof is on the defendant [*Lloyd v. Murphy* (1944) 25 Cal.2d 48, 56, 153 P.2d 47 ; *Dorn v. Goetz* (1948) 85 Cal.App.2d 407, 415, 193 P.2d 121] .

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts Law Performance Impossibility of Performance Frustration of Purpose Evidence Procedural
Considerations Burdens of Proof Allocation

John F. Wells and Lise A. Pearlman were the original authors of this chapter. It has since been updated to reflect changes in the law, additional case citations and practice pointers by other lawyers as well as revisions including cross-references to the official CACI instructions.



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CHAPTER 3F Matthew Bender Contract Defenses Instructions
PART E. IMPOSSIBILITY

1-3F California Forms of Jury Instruction MB 300F.77

MB 300F.77 Destruction of Value Defined

[1] Instruction Destruction of Value Defined

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Destruction of the value of the contract means that the value of Plaintiff's performance to Defendant was totally or almost totally destroyed. It is not enough for Defendant to prove that the value of the contract to Defendant was decreased or the contract was less profitable.

Authority: Lloyd v. Murphy (1944) 25 Cal.2d 48, 55, 153 P.2d 47 .

[2] Use of Instruction

This instruction should be used with the instruction in MB 300F.76 to define destruction of value.

[3] Comment

To invoke the doctrine of commercial frustration, the value of performance must be totally or nearly totally destroyed. Frustration is no defense if counter performance remains valuable, even if the value is substantially decreased [*Lloyd v. Murphy (1944) 25 Cal.2d 48, 55, 153 P.2d 47*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawPerformanceImpossibility of PerformanceGeneral OverviewContracts LawPerformanceImpossibility of PerformanceFrustration of Purpose

John F. Wells and Lise A. Pearlman were the original authors of this chapter. It has since been updated to reflect

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CHAPTER 3F Matthew Bender Contract Defenses Instructions
PART E. IMPOSSIBILITY

1-3F California Forms of Jury Instruction MB 300F.78

MB 300F.78 Partial Impossibility

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Partial impossibility only serves as an excuse for performance to the extent of the impossibility.

[IF APPLICABLE (See Use of Instruction)]

When a person makes two or more contracts that cannot each be performed in their entirety but are each capable of being partly performed, then the person is under a duty of part performance on each contract. The obligation to perform must be ratably apportioned among the contracts insofar as possible.

Authority: County of Yuba v. Mattoon (1958) 160 Cal.App.2d 456, 458, 325 P.2d 162 .

[2] Use of Instruction

This instruction should be used when the defense of partial impossibility applies. The optional paragraph applies in cases in which the defendant had several contracts and could fulfill part of each but not all of them.

LexisNexis Matthew Bender Expert Practice Tip--This Instruction Typically Will Not Apply: This instruction raises a number of issues, including: What constitutes "ratably apportioned" performance? There will not be many cases where this instruction applies. *By Ronald Oster*

[3] Comment

The defense of impossibility does not completely excuse performance if the impossibility is partial. Under circumstances in which the defendant still has limited ability to fulfill the contract, the defendant must do so to the

extent possible [*County of Yuba v. Mattoon* (1958) 160 Cal.App.2d 456, 458, 325 P.2d 162]. Thus, when a promisor makes several contracts that cannot all be performed but are capable of partial, ratable performance, the promisor is under a duty to perform each ratable [*County of Yuba v. Mattoon* (1958) 160 Cal.App.2d 456, 458, 325 P.2d 162 ; Restatement (Second) of Contracts § 464].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawPerformanceImpossibility of PerformanceGeneral Overview

John F. Wells and Lise A. Pearlman were the original authors of this chapter. It has since been updated to reflect changes in the law, additional case citations and practice pointers by other lawyers as well as revisions including cross-references to the official CACI instructions.



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CHAPTER 3F Matthew Bender Contract Defenses Instructions
PART E. IMPOSSIBILITY

1-3F California Forms of Jury Instruction MB 300F.79--MB 300F.89

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MB 300F.79Reserved for Future Use



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CHAPTER 3F Matthew Bender Contract Defenses Instructions
PART F. ILLEGALITY

1-3F California Forms of Jury Instruction MB 300F.90

MB 300F.90 Object of Contract Must Be Legal

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Defendant claims as a defense that the purpose of the contract was illegal. To establish this defense, Defendant must prove that the object of the contract when made was not _____ [describe plaintiff's alleged lawful object] but _____ [describe unlawful object].

Authority: *Civ. Code § 1608; Hamilton v. Abadjian (1947) 30 Cal.2d 49, 53, 179 P.2d 804 ; see McIntosh v. Mills (2004) 121 Cal.App.4th 333, 344, 17 Cal.Rptr.3d 66 .*

[2] Use of Instruction

This instruction should be used whenever there is a question of fact as to the legality of the object of a contract. Defendant has the burden of proof when the illegality is not apparent on the face of the transaction [see [3], below].

[3] Comment

In addition to the requirement that consideration for a contract must be lawful [*Civ. Code §§ 1607, 1608*], the object of a contract must be lawful [*Civ. Code § 1550; see, e.g., Kashani v. Tsann Kuen China Enterprise, Ltd. (2004) 118 Cal.App.4th 531, 537, 13 Cal.Rptr.3d 174* (plaintiffs not entitled to recover damages for breach of agreement to establish plant in Iran for manufacture of computer products; claim held to be based on agreement that violated law and was against public policy); *Diosdado v. Diosdado (2002) 97 Cal.App.4th 470, 474, 118 Cal.Rptr.2d 494* (contract between husband and wife providing for liquidated damages for infidelity held contrary to public policy underlying no-fault provisions for dissolution of marriage)]. If a contract has a single object that is unlawful, the entire contract is void [*Civ. Code § 1598; McIntosh v. Mills (2004) 121 Cal.App.4th 333, 344, 17 Cal.Rptr.3d 66*]. Thus, if plaintiff is unable to allege a lawful object, the contract is void, and no jury issue will be presented. On the other hand, an

independent, lawful contract will not ordinarily be denied enforcement because it is remotely connected with or indirectly aiding in the accomplishment of an illegal object [Witkin, Summary of California Law, vol. 1, *Contracts*, § 423 (10th ed. 2006)]. If a transaction is fair and regular on its face, the burden of proof of unlawful purpose is on the person asserting the illegality [*Hamilton v. Abadjian* (1947) 30 Cal.2d 49, 53, 179 P.2d 804].

If the object of a contract is only partly illegal and the agreement is severable, the legal portion may be enforced [Civ. Code § 1599; see Witkin, Summary of California Law, vol. 1, *Contracts*, § 421 (10th ed. 2005)]. The issue of severability is one of law for the court [*Keene v. Harling* (1964) 61 Cal.2d 318, 321, 38 Cal.Rptr. 513, 392 P.2d 273]. If money consideration is apportioned or capable of being readily apportioned to each of the items to be performed, the covenants are ordinarily regarded as severable [*Pacific Wharf & Storage Co. v. Standard American Dredging Co.* (1920) 184 Cal. 21, 25, 192 P. 847].

However, Civ. Code § 1599 merely authorizes, and does not require, a court to sever the illegal object of a contract from the legal object. The decision whether to sever the illegal object of a contract is informed by equitable considerations [*Yoo v. Robi* (2005) 126 Cal. App. 4th 1089, 1105, 24 Cal. Rptr. 3d 740 ; e.g., *Blanks v. Seyfarth Shaw LLP* (2009) 171 Cal. App. 4th 336, 369-371, 89 Cal. Rptr. 3d 710 (in case involving contractual relationship that evidently was governed in part by Talent Agencies Act, trial court erroneously refused to apply doctrine of severability, by which party's activities as unlicensed talent agent, which were unlawful and therefore not compensable, might have been separated from activities as personal manager, which were not unlawful and for which contractual compensation could have been allowed); *Chiba v. Greenwald* (2007) 156 Cal.App.4th 71, 81-82, 67 Cal.Rptr.3d 86 (trial court, in refusing to order severance, correctly found that agreement's lawful and unlawful objects were inextricably intertwined and correctly disregarded plaintiff's attempt, in second amended complaint, to allege separate consideration for each object, which allegation was inconsistent with two previous iterations of complaint)].

In a California Supreme Court case, the Court noted that the issue of severability was one of law but further predicated its affirmance on the trial court finding that the promise to pay the purchase price of \$50,000 was not induced by the sale of illegal bingo-type machines and that they were of minor importance compared to the legal personal property involved in the sale. The Court stated that this finding was supported by substantial evidence [*Keene v. Harling* (1964) 61 Cal.2d 318, 321, 38 Cal.Rptr. 513, 392 P.2d 273]. This leaves open the question whether a jury instruction might be given on this issue in an appropriate case.

In an earlier appellate court decision, the plaintiffs sued for the value of improvements plus a claim for loss of prospective profits pursuant to an agreement to operate a restaurant and bar for the proceeds thereof plus 25 percent of proceeds from illegal gambling devices installed on the premises. To minimize the taint of illegality, the plaintiffs waived their claim for lost profits and sought judgment solely for the value of the improvements. The court of appeal nonetheless held that the claims were not severable and thus unenforceable [*Fong v. Miller* (1951) 105 Cal.App.2d 411, 414, 233 P.2d 606]. It would seem that a jury issue could be presented on slightly different facts. In *Fong*, the parties stipulated that reference in their contract to sharing the proceeds of "amusement machines" on the premises was understood to mean gambling tables, slot machines, and the like. Thus, if a contract is ambiguous, a jury could be asked to determine whether illegal consideration was intended.

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts Law Defenses Illegal Bargains Evidence Procedural Considerations Burdens of Proof Allocation

John F. Wells and Lise A. Pearlman were the original authors of this chapter. It has since been updated to reflect changes in the law, additional case citations and practice pointers by other lawyers as well as revisions including cross-references to the official CACI instructions.



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CHAPTER 3F Matthew Bender Contract Defenses Instructions
PART F. ILLEGALITY

1-3F California Forms of Jury Instruction MB 300F.91

MB 300F.91 Unlawful Purpose--Defrauding Creditors

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Defendant claims as a defense that the contract was illegal because its purpose was to cheat creditors of _____ [name of party]. To establish this defense, Defendant must prove that the purpose of the contract was to cheat creditors. In determining whether the parties here had such an illegal purpose, you may take into account the circumstances of the contract and the negotiations leading up to it.

Authorities: *Penal Code § 531; Redke v. Silvertrust (1971) 6 Cal.3d 94, 103-104, 98 Cal.Rptr. 293, 490 P.2d 805 ; Severance v. Knight-Counihan Co. (1947) 29 Cal.2d 561, 568-570, 177 P.2d 4 .*

[2] Use of Instruction

This instruction should be used in cases involving a fact issue as to whether the purpose of the contract was to defraud creditors.

LexisNexis Matthew Bender Expert Practice Tip--This Instruction May Require Additional Guidance, But Use it Nonetheless: This instruction will probably require some additional guidance from the court as to what constitutes "cheating" creditors. Yet, many jurors will understand "cheat" more easily than many other typical "legal terms." Thus, do not avoid this instruction. *By Ronald Oster and Rex Heeseman*

[3] Comment

The fact that a contract depends on an illegal condition precedent may be shown by parol evidence when there are no express provisions in the contract inconsistent with the condition [*Severance v. Knight-Counihan Co. (1947) 29 Cal.2d*

561, 563, 177 P.2d 4]. If a transaction is fair and regular on its face, the burden of proving an unlawful purpose is on the person asserting the illegality [*Hamilton v. Abadjian* (1947) 30 Cal.2d 49, 53, 179 P.2d 804].

In *Redke v. Silvertrust* [*Redke v. Silvertrust* (1971) 6 Cal.3d 94, 103-104, 98 Cal.Rptr. 293, 490 P.2d 805], the Court concluded that in the absence of fraudulent intent by the promisee spouse, an oral agreement to make a testamentary disposition of the nature involved therein was not void as against public policy. This presented a question of fact. In *Severance v. Knight-Counihan Company* [*Severance v. Knight-Counihan Co.* (1947) 29 Cal.2d 561, 563, 177 P.2d 4], a financially troubled printer granted an option to plaintiff, his employee, to purchase certain plates at about one-fourth their value. Later plaintiff left his employment and attempted to exercise the option. The defendant testified that the purpose of the agreement was to safeguard materials for operation of the business in the event that creditors liquidated the company. The California Supreme Court found the purpose to be in accord with defendant's testimony and held that plaintiff could not recover because the agreement was made for the purpose of defrauding creditors. Thus, the case turned on a fact issue that could have been given to a jury.

Legal Topics:

For related research and practice materials, see the following legal topics:

Bankruptcy LawCase AdministrationExaminers, Officers & TrusteesFraudulent TransfersIntentMergers & Acquisitions
LawFraudulent TransfersContracts LawContract Conditions & ProvisionsConditions PrecedentContracts LawContract
InterpretationParol EvidenceGeneral OverviewContracts LawDefensesIllegal BargainsEvidenceProcedural
ConsiderationsBurden of ProofAllocationReal Property LawPurchase & SaleFraudulent Transfers

John F. Wells and Lise A. Pearlman were the original authors of this chapter. It has since been updated to reflect changes in the law, additional case citations and practice pointers by other lawyers as well as revisions including cross-references to the official CACI instructions.



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California Forms of Jury Instruction

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CHAPTER 3F Matthew Bender Contract Defenses Instructions
PART F. ILLEGALITY

1-3F California Forms of Jury Instruction MB 300F.92

MB 300F.92 Usury Defined

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Defendant claims usury as a defense, that is, that an illegal interest rate was included in the contract. To establish this defense, Defendant must prove that the parties in fact agreed to a rate of interest on the loan of Plaintiff's money to Defendant in excess of _____ [*the maximum legal rate*]. If so, then Plaintiff is entitled to recover only the principal of Plaintiff's loan to Defendant and all other charges are unlawful. In determining whether the parties agreed to usurious interest charges, you may take into account all of the circumstances of the contract and the negotiations leading up to it.

[*OPTIONAL (See Use of Instructions)*]

You are not limited by the words used by the parties. It makes no difference if additional and excessive amounts of interest are designated as payments for services or materials if they are actually disguised interest charges. Nor does it make any difference if the additional charges are in a separate agreement if they are actually intended as interest on the loan of money by Plaintiff to Defendant. However, usury does not result from the mere fact that as a condition to receiving a loan, Plaintiff required Defendant to enter into a separate agreement that was unprofitable for Defendant. To be considered usury, the additional expense to Defendant must have been an agreed charge for the use of Plaintiff's money.

Authorities: *Klett v. Security Acceptance Co.* (1952) 38 Cal.2d 770, 787-788, 242 P.2d 873 ; *Terry Trading Corp. v. Barsky* (1930) 210 Cal. 428, 434, 292 P. 474 ; *Rochester Capital Leasing Corp. v. K & L Litho Corp.* (1970) 13 Cal.App.3d 697, 703, 91 Cal.Rptr. 827 ; *Mong v. Bass* (1967) 248 Cal.App.2d 377, 381-384, 56 Cal.Rptr. 579 ;

Goldenzwig v. Shaddock (1939) 31 Cal.App.2d 719, 722, 88 P.2d 933 .

[2] Use of Instruction

This instruction should be used whenever usury is alleged as a defense to a contract that does not appear usurious on its face. It may be supplemented with the definitions of loan and interest in MB 300F.93 and MB 300F.94. The instruction is applicable whether or not payment of usurious interest has been made. If a defendant has already made some payments of usurious interest, defendant presumably will have cross-complained for recovery of usurious interest and penalties [Witkin, Summary of California Law, vol. 1, *Contracts*, § 471 (10th ed. 2005); Stats. 1919, p. lxxxiii, § 3].

The instruction can be adapted for use by plaintiff. In that event, the party designation should be reversed. If the contract provided for variable interest and was allegedly entered into in the good faith belief that it would not be usurious, the instruction in MB 300F.95 is applicable.

Constitutional and statutory prohibitions against usury are intended to aid the borrower or a personal representative of the borrower [*Roes v. Wong* (1999) 69 Cal.App.4th 375, 378, 81 Cal.Rptr.2d 596 (junior lienholder on real property was not entitled to assert usury laws against senior lenders after assuming senior indebtedness to preserve his equity)].

LexisNexis Matthew Bender Expert Practice Tip--Use Care With Terminology: "Usury" and the related terminology will be quite challenging for most jurors to understand. The optional part of this instruction will usually be necessary to show that charges for alleged services are in reality interest. By *Rex Heeseman and Ronald Oster*

[3] Comment

[a] When Jury Issue

If a transaction is usurious on its face, neither good faith nor absence of guilty intent is material [Witkin, Summary of California Law, vol. 1, *Contracts*, §§ 469, 470 (10th ed. 2005)]. That situation will not present a question of fact for the jury. However, it is always permissible to show that a transaction, ostensibly lawful, actually constituted a usurious loan [*Terry Trading Corp. v. Barsky* (1930) 210 Cal. 428, 434, 292 P. 474]. Whether on piercing the form of a transaction the substance of the transaction is usurious is essentially a question of fact [*Glaire v. La Lanne-Paris Health Spa, Inc.* (1974) 12 Cal.3d 915, 927, 117 Cal.Rptr. 541, 528 P.2d 357 ; *Mong v. Bass* (1967) 248 Cal.App.2d 377, 381-384, 56 Cal.Rptr. 579]. The test is stated as whether there was an intent to evade the law. All of the circumstances and negotiations that preceded the transaction may be material in determining intent [*Terry Trading Corp. v. Barsky* (1930) 210 Cal. 428, 434, 292 P. 474]. Once usury is shown, the lender may recover the principal of the loan, but is not entitled to claim any interest [*Rochester Capital Leasing Corp. v. K & L Litho Corp.* (1970) 13 Cal.App.3d 697, 703, 91 Cal.Rptr. 827 ; *Teichner v. Klassman* (1966) 240 Cal.App.2d, 514, 524, 49 Cal.Rptr. 742].

[b] Necessary Intent

The courts sometimes refer to the intent to evade the usury law as involving a question of good faith [*Glaire v. La Lanne-Paris Health Spa, Inc.* (1974) 12 Cal.3d 915, 927, 117 Cal.Rptr. 541, 528 P.2d 357 ; *Fox v. Federated Department Stores, Inc.* (1979) 94 Cal.App.3d 867 . 877, 156 Cal.Rptr. 893]. Generally, however, the courts invariably go on to explain that the case is not to be judged by what the parties appear to be or represent themselves to be doing, but by the substance of the transaction as disclosed by the whole evidence [*Glaire v. La Lanne-Paris Health Spa, Inc.* (1974) 12 Cal.3d 915, 927, 117 Cal.Rptr. 541, 528 P.2d 357]. Thus, it appears that the question is not good faith ignorance of the law, but whether the parties intended to do the act that the law prohibits, charging interest higher than the law allows, whether or not the parties know what the legal limit is.

[c] What Is Interest

The mere fact that a party may have been required to enter into an unprofitable contract as a condition to a loan of money does not itself make the loan usurious. On the other hand, the law would be violated if the lender provided for a lawful rate of interest in the note itself, but required additional and excessive interest by the terms of a collateral agreement. Nor would it make any difference that the additional and excessive amounts of interest were designated as payments for services or materials furnished by the lender if they were actually intended as interest [*Terry Trading Corp. v. Barsky* (1930) 210 Cal. 428, 434, 292 P. 474 ; see Witkin, Summary of California Law, vol. 1, *Contracts*, § 471 (10th ed. 2005)].

[d] Burden of Proof

The burden of proof is on the party alleging usury [*Mong v. Bass* (1967) 248 Cal.App.2d 377, 381-384, 56 Cal.Rptr. 579 ; *Goldenzwig v. Shaddock* (1939) 31 Cal.App.2d 719, 722, 88 P.2d 933].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawDefensesUsuryEvidenceProcedural ConsiderationsBurdens of ProofGeneral Overview

John F. Wells and Lise A. Pearlman were the original authors of this chapter. It has since been updated to reflect changes in the law, additional case citations and practice pointers by other lawyers as well as revisions including cross-references to the official CACI instructions.



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CHAPTER 3F Matthew Bender Contract Defenses Instructions
PART F. ILLEGALITY

1-3F California Forms of Jury Instruction MB 300F.93

MB 300F.93 Loan Defined

[1] Instruction Loan Defined

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

A loan of money is a contract by which one person, the lender, delivers a sum of money to another person, the borrower, and the borrower agrees to return the money at some future time.

Authority: Civ. Code § 1912.

[2] Use of Instruction

This instruction should be used to define the nature of a loan whenever a transaction appears to be other than a loan and defendant has alleged that the parties in fact intended a usurious loan.

[3] Comment

This definition of loan is derived from the provisions of *Civ. Code § 1912*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawDebtor & Creditor RelationsContracts LawDefensesUsury

John F. Wells and Lise A. Pearlman were the original authors of this chapter. It has since been updated to reflect changes in the law, additional case citations and practice pointers by other lawyers as well as revisions including cross-references to the official CACI instructions.



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CHAPTER 3F Matthew Bender Contract Defenses Instructions
PART F. ILLEGALITY

1-3F California Forms of Jury Instruction MB 300F.94

MB 300F.94 Interest Defined

[1] Instruction Interest Defined

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Interest is the amount of payment fixed by the parties for [the use of money or refraining from the collection of money or detaining money].

Authorities: Civ. Code §§ 1914, 1915.

[2] Use of Instruction

This instruction should be used to define the nature of interest.

[3] Comment

Civ. Code § 1915 defines interest as the payment allowed by law or fixed by the parties for the use, forbearance, or detention of money.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawDefensesUsury

John F. Wells and Lise A. Pearlman were the original authors of this chapter. It has since been updated to reflect changes in the law, additional case citations and practice pointers by other lawyers as well as revisions including cross-references to the official CACI instructions.



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CHAPTER 3F Matthew Bender Contract Defenses Instructions
PART F. ILLEGALITY

1-3F California Forms of Jury Instruction MB 300F.95

MB 300F.95 Usury--Defense of Good Faith in Case of Variable Interest

[1] Instruction Usury--Defense of Good Faith in Case of Variable Interest

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Plaintiff claims that [he/she/it] is not liable to Defendant for charging too much interest because [he/she/it] acted in good faith in agreeing to a variable interest rate. To establish this claim, Plaintiff must prove that at the time the interest rate was fixed by the parties Plaintiff was acting in the honest belief that the interest charge would not exceed _____ [specify applicable legal rate].

Authority: Arneill Ranch v. Petit (1976) 64 Cal.App.3d 277, 293-294, 134 Cal.Rptr. 456 .

[2] Use of Instruction

This instruction should be used only in cases involving variable interest. In these cases, good faith may be alleged as a justification for an otherwise usurious interest charge. Although good faith also is mentioned in other situations when usury is charged, it does not appear to have the same meaning [see *MB 300F.92*] and has not been incorporated in the general instruction on usury.

[3] Comment

The lawfulness of variable interest that exceeds the usury rate depends on a determination whether the provisions were entered into in good faith and without intent to violate the usury law [*Arneill Ranch v. Petit (1976) 64 Cal.App.3d 277, 293, 134 Cal.Rptr. 456*]. It appears that good faith in this context refers not to knowledge or ignorance of the law but of the facts, that is, whether at the time the variable rate was fixed, the party charging the interest honestly believed that the fluctuations in the rate would not exceed the maximum legal rate.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawDefensesUsury

John F. Wells and Lise A. Pearlman were the original authors of this chapter. It has since been updated to reflect changes in the law, additional case citations and practice pointers by other lawyers as well as revisions including cross-references to the official CACI instructions.



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CHAPTER 3G Matthew Bender Rescission of Contract Instructions

1-3G California Forms of Jury Instruction 3G.syn

§ 3G.syn Synopsis to Chapter 3G: Matthew Bender Rescission of Contract Instructions

MB 300G.01 Rescission

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300G.02 Rescission by Consent

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Mutual Consent

[b] Right to Jury Trial

[c] Alternative Theories

MB 300G.03 Acceptance of Repudiation

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300G.04 Rescission of Third Party Beneficiary Contract

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300G.05 Improperly Obtained Consent

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300G.06 Rescission Based on Improper Conduct of Third Party

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300G.07 Material Failure of Consideration

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300G.08 Rescission for Breach

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Rescission for Breach

[b] Related Judicial Council Jury Instructions

MB 300G.09 Causation

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300G.10-MB 300G.19 [Reserved for Future Use]

MB 300G.20 Consent Obtained by Mistake

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Rescission Based on Mistake

[b] Related Judicial Council Jury Instructions

MB 300G.21 Types of Mistake

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Types of Mistake

[b] Related Judicial Council Jury Instructions

MB 300G.22 Mutual Mistake

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Mutual Mistake

[b] Related Judicial Council Jury Instructions

MB 300G.23 Unilateral Mistake

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Unilateral Mistake

[b] Related Judicial Council Jury Instructions

MB 300G.24 Mistake of Fact Defined

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Mistake of Fact Defined

[b] Related Judicial Council Jury Instructions

MB 300G.25 Mistake of Law Defined

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Mistake of Law Defined

[b] Related Judicial Council Jury Instructions

MB 300G.26 Mistake--Neglect of Legal Duty

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300G.27 Mistake--Risk Assumed

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300G.28 Rescission Due to Mistake--Necessity of Injury

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Necessity of Injury

[b] Related Judicial Council Jury Instructions

MB 300G.29-MB 300G.39 [Reserved for Future Use]

MB 300G.40 Affirmative Misrepresentation

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Affirmative Misrepresentation

[b] Related Judicial Council Jury Instructions

MB 300G.41 Statement of Opinion or Statement About the Law

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Statement of Opinion or Fact

[b] Related Judicial Council Jury Instructions

MB 300G.42 Concealment

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Concealment

[b] Related Judicial Council Jury Instructions

MB 300G.43 Duty to Disclose--Sole Access

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Duty to Disclose

[b] Related Judicial Council Jury Instructions

MB 300G.44 Duty to Disclose to Correct Misleading Statements

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Fraudulent Suppression

[b] Related Judicial Council Jury Instructions

MB 300G.45 Active Prevention of Investigation

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300G.46 Effect of Independent Investigation

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300G.47 Effect of Defrauded Party's Failure to Investigate

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Failure to Investigate

[b] Related Judicial Council Jury Instructions

MB 300G.48 Promise Without Intent to Perform

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Promise Without Intent to Perform

[b] Related Judicial Council Jury Instructions

MB 300G.49 Materiality of Misrepresentation

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] When Misrepresented Fact Is Material

[b] Related Judicial Council Jury Instructions

MB 300G.50-MB 300G.59 [Reserved for Future Use]

MB 300G.60 Constructive Fraud

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300G.61 Existence of Confidential Relationship

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300G.62 Fiduciary Relationship Is Confidential

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300G.63 Advantage Defined

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300G.64 Full Disclosure Defined

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300G.65 Constructive Fraud of Agent

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300G.66 Undue Influence in Confidential Relationship

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Definition of Undue Influence

[b] Presumption

[c] Related Judicial Council Jury Instructions

MB 300G.67 Undue Influence Absent Confidential Relationship

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Undue Influence Depends on Facts

[b] Related Judicial Council Jury Instructions

MB 300G.68 Weakness of Mind Defined

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300G.69 Lack of Understanding as to Nature of Transaction

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300G.70-MB 300G.79 [Reserved for Future Use]

MB 300G.80 Traditional Duress or Menace

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Duress

[b] Related Judicial Council Jury Instructions

MB 300G.81 Economic Duress

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Economic Duress

[b] Related Judicial Council Jury Instructions

MB 300G.82 Nature of Threat

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Nature of Threat

[b] Related Judicial Council Jury Instructions

MB 300G.83-MB 300G.89 [Reserved for Future Use]

MB 300G.90 Effect of Delay

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300G.91 Waiver of Right to Cancel

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Waiver

[b] Related Judicial Council Jury Instructions

MB 300G.92 Effect of Confidential Relationship on Waiver

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Waiver Induced by Fraud

[b] Related Judicial Council Jury Instructions



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CHAPTER 3G Matthew Bender Rescission of Contract Instructions

1-3G California Forms of Jury Instruction Scope

Scope

SCOPE

This chapter includes jury instructions on various issues involving rescission (i.e., cancellation) of contracts that are likely to be presented to a jury. For the California Judicial Council jury instructions on damages and affirmative defenses in contract cases, see Ch. 3, *California Judicial Council Contracts Instructions*. Ch. 3 also includes Judicial Council instructions on other issues surrounding contracts, including formation, performance, interpretation, modification, and breach. The instructions in this chapter are intended to supplement the Judicial Council instructions [see *Cal. Rules of Ct.*, Rule 2.1050].

Rescission can go to the jury either in a plaintiff's suit for rescission and damages or as a defense to a contract action.

This chapter covers the following topics:

- Part A includes general instructions on the elements of rescission, causation, and the bases for rescission, including special contexts such as acquiescence in repudiation and cancellation of a third party beneficiary contract [see MB 300G.01-MB 300G.09].
- Part B includes instructions related to rescission for mistake [see MB 300G.20-MB 300G.28].
- Part C includes instructions related to rescission for fraud, including negligent misrepresentation [see MB 300G.40 -MB 300G.49].
- Part D includes instructions related to constructive fraud and undue influence [see MB 300G.60 -MB 300G.69].
- Part E includes instructions on rescission for duress or menace, including economic duress [see MB 300G.80 -MB 300G.82].

- Part F includes instructions on defenses to rescission, including the effect of the rescinding party's delay in giving notice of rescission [see *MB 300G.90*], waiver of the right to rescind [see *MB 300G.91*], and the effect of a confidential relationship on the issue of waiver [see *MB 300G.92*].

Instructions in Ch. 3A, *Matthew Bender Formation of Contract Instructions*, apply if rescission is alleged to be by mutual consent.

Ch. 3D, *Matthew Bender Performance and Breach of Contract Instructions*, should be consulted if there is an issue as to the rescinding party's right to rescind because of that party's own prior breach.

Ch. 3E, *Matthew Bender Contract Damages Instructions*, should be consulted if damages are sought on rescission. No attempt has been made to formulate a damage instruction specific to rescission. The right to damages as well as other relief is governed by *Civ. Code § 1692*. Restoration of benefits as a condition of judgment is governed by *Civ. Code §§ 1691 and 1692*. It may be best to handle the particular conditions of recovery by stipulation or court determination separate from the submission of the damage issue to the jury.

The defenses dealt with in this chapter are specific to rescission. Ch. 3F, *Matthew Bender Contract Defenses Instructions*, includes other contract defenses that may apply.



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CHAPTER 3G Matthew Bender Rescission of Contract Instructions
PART A. GENERAL BASES FOR RESCISSION

1-3G California Forms of Jury Instruction MB 300G.01

MB 300G.01 Rescission

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

_____ [*Party claiming rescission*] **has the burden of proving that the contract with**
_____ [*other party*] **was canceled. I will now tell you the rules of law that you must follow in**
deciding whether or not the contract was canceled.

Authorities: *Civ. Code § 1692; Evid. Code § 500.*

[2] Use of Instruction

This instruction should be used to introduce the applicable instructions on rescission. The word "cancel" is suggested because it is a widely recognized synonym for the word "rescind" and because it is a much easier word for the jury to hear and to understand. However, counsel should observe caution in making this substitution. In strict legal parlance, cancellation of a contract means only termination, whereas rescission technically means something more: to unmake a contract and wipe it out from the beginning as if it had never been [Black's Law Dictionary (6th ed. 1990) at 206, 1306; *see PWS, Inc. v. Ban* (1991) 234 Cal.App.3d 223, 285 Cal.Rptr. 598 (effect of rescission is to void contract *ab initio*)]. The importance of this distinction is that all previously accrued rights survive a cancellation and are enforceable, but a rescission restores the parties to their positions before the contract. Thus, recovery for prior performance is available under a canceled contract, but not under a rescinded contract [Witkin, Summary of California Law, vol. 1, *Contracts*, § 926 (10th ed. 2005)]. So long as the jury is properly instructed on the consequences of rescission in a given case, there should be no problem in using the term "cancel." If a confidential relationship is involved, use the instruction that reflects the more limited issues on which the rescinding party has the burden of proof [*see MB 300G.60*]. If defenses to rescission are alleged, the burden of proof of the defenses is on the party asserting them [*see Part F*]. Damages will almost invariably be sought by a plaintiff and may or may not be sought by a defendant by way of cross-complaint in

addition to raising rescission as a defense.

For general damage instructions and the additional burden of proof placed on the other party, see Ch. 3E, *Matthew Bender Contract Damages Instructions*.

A preponderance of the evidence instruction must be used with this instruction [see Ch. 2, *California Judicial Council Evidence Instructions*, CACI No. 200 ("Obligation to Prove--More Likely True Than Not True")].

LexisNexis Matthew Bender Expert Practice Tip--Use Care With Terms: The term "canceled" is preferable to "rescinded" and should be used in closing argument. Still, some jurors may be uncertain about the meaning of "canceled." Thus, explain it as related to the facts. *By Ronald Oster and Rex Heeseman*

[3] Comment

By statute, when a contract has been rescinded in whole or in part, any party may seek relief based on the rescission by bringing an action to recover any money or thing owing to him or her as a consequence of the rescission or by asserting the rescission by way of defense or cross-complaint [*Civ. Code* § 1692]. Restoration of benefits as a condition of rescission is governed by *Civ. Code* §§ 1691 and 1692. The party relying on the rescission has the burden of proof as to whether the contract was rescinded [*Evid. Code* § 500].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Contracts Law Remedies Rescission & Redhibition General Overview Evidence Procedural Considerations Burdens of Proof Allocation

John F. Wells and Lise A. Pearlman were the original authors of this chapter. It has since been updated to reflect changes in the law, additional case citations and practice pointers by other lawyers as well as revisions including cross-references to the official CACI instructions.



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CHAPTER 3G Matthew Bender Rescission of Contract Instructions
PART A. GENERAL BASES FOR RESCISSION

1-3G California Forms of Jury Instruction MB 300G.02

MB 300G.02 Rescission by Consent

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Parties may consent to cancel an agreement between them. When that happens their agreement is at an end; each gives up the right to enforce it against the other.

[IF APPLICABLE (See Use of Instruction)]

Consent to cancel a written agreement need not be expressed in writing; it may be oral or implied by conduct. The parties need not use special words, or any words at all, so long as the conduct on the part of both parties is clearly inconsistent with keeping the agreement in force.

[IF APPLICABLE (See Use of Instruction)]

Parties may cancel their agreement at any stage, not just at the beginning.

Authorities: Civ. Code § 1689(a); *Pennel v. Pond Union School Dist.* (1973) 29 Cal.App.3d 832, 837-838, 105 Cal.Rptr. 817 ; *Griffin v. Beresa, Inc.* (1956) 143 Cal.App.2d 299, 301, 300 P.2d 31 .

[2] Use of Instruction

This instruction should be used when one of the parties is alleging rescission by mutual consent and there is a fact issue as to whether the rescission took place. If questions are presented regarding the rescission agreement's formation, see

Ch. 3A, *Matthew Bender Formation of Contract Instructions*, for applicable instructions. If there are more than two parties to the original agreement, the instruction should be modified to clarify that the agreement may only be rescinded with the consent of all of the parties. The first optional provision is intended for use when the original contract was in writing and the alleged rescission is not. Although the case law describes conduct supporting rescission as having to be "positive" [see [3][a], *below*], it would appear unnecessary to attempt to instruct the jury on what is meant by positive conduct. If the type of conduct is insufficient to support a finding of rescission, the court should not let the issue go to the jury. The second optional paragraph is intended for use when the alleged rescission took place after the parties had been operating under their agreement for some time. Its purpose is to counteract any inference that it was too late to rescind the agreement at the time rescission allegedly occurred.

LexisNexis Matthew Bender Expert Practice Tip--Silence Implies Consent: Rescission (or cancellation) by consent can occur when neither party takes any action to follow the terms of a contract, or when one party claims the contract is canceled, and the other party does not dispute the claim. This is a situation where "silence implies consent." However, be sure to set forth the facts that support your view of this issue. *By Ronald Oster and Rex Heeseman*

[3] Comment

[a] Mutual Consent

A contract may be rescinded by mutual consent at any stage [*Civ. Code* § 1689(a); *Griffin v. Beresa, Inc.* (1956) 143 Cal.App.2d 299, 301, 300 P.2d 31]. Offer and acceptance of rescission are governed by the rules generally governing formation of contracts [*Harriman v. Tetik* (1962) 56 Cal.2d 805, 810, 17 Cal.Rptr. 134, 366 P.2d 486]. This means the burden of proof of rescission is on the party alleging the agreement to rescind [see *Reichert v. General Ins. Co.* (1968) 68 Cal.2d 822, 830, 69 Cal.Rptr. 321, 442 P.2d 377]. Consideration is supplied by each party giving up the right to enforce the agreement against the other [*Schertzinger v. Williams* (1961) 198 Cal.App.2d 242, 17 Cal.Rptr. 719]. An agreement to rescind may be oral or implied by conduct [*Pennel v. Pond Union School Dist.* (1973) 29 Cal.App.3d 832, 837, 105 Cal.Rptr. 817] even if the original agreement was in writing [Witkin, Summary of California Law, vol. 1, *Contracts*, §§ 927-928 (10th ed., 2005)]. The parol evidence rule has no application because the acts giving rise to rescission are subsequent to the writing [*Code Civ. Proc.* § 1856(a)]. No special words are necessary or any words at all, but if rescission is implied, the acts and conduct relied on must be positive, unequivocal, and inconsistent with the contract [*Pennel v. Pond Union School Dist.* (1973) 29 Cal.App.3d 832, 838, 105 Cal.Rptr. 817].

[b] Right to Jury Trial

The right to a jury trial in actions to enforce rescission is governed by the nature of the substantive relief requested. If the gist of the action is the recovery of damages, a jury trial is available [*Paularena v. Superior Court* (1965) 231 Cal.App.2d 906, 913, 42 Cal.Rptr. 366]. If no damages or restitution of consideration is sought, there is no right to a jury trial [*Porter v. Superior Court* (1977) 73 Cal.App.3d 793, 797-798, 141 Cal.Rptr. 59]. In an action at law the court may require the plaintiff to return property received as a condition to an award of damages. Although the offsetting process is in the nature of an accounting, it does not convert the damage action to one in equity [*Paularena v. Superior Court* (1965) 231 Cal.App.2d 906, 914, 42 Cal.Rptr. 366]. For general instructions on damages, see Ch. 3E, *Matthew Bender Contract Damages Instructions*.

[c] Alternative Theories

An alternative theory to mutual rescission is unilateral rescission [*Civ. Code* § 1689(b)(2); *Pennel v. Pond Union School Dist.* (1973) 29 Cal.App.3d 832, 838, 105 Cal.Rptr. 817 ; see MB 300G.23]. Other theories that might fit the facts are oral modification [see Ch. 3A, *Matthew Bender Formation of Contract Instructions*] or novation [see Ch. 3F, *Matthew Bender Contract Defenses Instructions*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewContracts LawRemediesRescission &
RedhibitionGeneral OverviewContracts LawTypes of ContractsAgreements of RescissionEvidenceProcedural
ConsiderationsBurdens of ProofAllocation

John F. Wells and Lise A. Pearlman were the original authors of this chapter. It has since been updated to reflect changes in the law, additional case citations and practice pointers by other lawyers as well as revisions including cross-references to the official CACI instructions.



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CHAPTER 3G Matthew Bender Rescission of Contract Instructions PART A. GENERAL BASES FOR RESCISSION

1-3G California Forms of Jury Instruction MB 300G.03

MB 300G.03 Acceptance of Repudiation

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

An agreement is canceled if one party refuses to recognize that a binding agreement exists and the other party thereafter treats the agreement as canceled.

Authorities: *Griffin v. Beresa, Inc.* (1956) 143 Cal.App.2d 299, 301, 300 P.2d 31 ; *McCreary v. Mercury Lumber Distributors* (1954) 124 Cal.App.2d 477, 486, 268 P.2d 762 ; *Dessert Seed Co. v. Garbus* (1944) 66 Cal.App.2d 838, 847, 153 P.2d 184 .

[2] Use of Instruction

This instruction should be used together with the instruction in MB 300G.01 when one party alleges that the other repudiated the contract and the response is that rescission resulted from acquiescence in the repudiation. The use of the word "cancel" is suggested instead of "rescind" [see MB 300G.01].

LexisNexis Matthew Bender Expert Practice Tip--Need for Outward Expression of Intent: A party disputing cancellation of a contract may be able to show that protestations would have been futile.

However, some outward expression of dissent will be necessary to avoid the impact of this instruction.

By Ronald Oster

[3] Comment

Acquiescence in the repudiation of a contract is a form of rescission by mutual consent [*Griffin v. Beresa, Inc.* (1956) 143 Cal.App.2d 299, 301, 300 P.2d 31 ; *McCreary v. Mercury Lumber Distributors* (1954) 124 Cal.App.2d 477, 486, 268 P.2d 762 ; *Dessert Seed Co. v. Garbus* (1944) 66 Cal.App.2d 838, 847, 153 P.2d 184]. The general rules governing

consensual rescission are discussed in MB 300G.01.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Contracts Law Remedies Rescission & Redhibition General Overview Contracts Law Types of Contracts Agreements of Rescission

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CHAPTER 3G Matthew Bender Rescission of Contract Instructions PART A. GENERAL BASES FOR RESCISSION

1-3G California Forms of Jury Instruction MB 300G.04

MB 300G.04 Rescission of Third Party Beneficiary Contract

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

A contract for the benefit of a third person may be cancelled by agreement of both parties to the contract without the consent of the third person for whose benefit the contract was made.

Authorities: Civ. Code § 1559; *R. J. Cardinal Co. v. Ritchie* (1963) 218 Cal.App.2d 124, 136, 32 Cal.Rptr. 545 ; *Silveyra v. Harper* (1947) 82 Cal.App.2d 761, 766, 187 P.2d 83 .

[2] Use of Instruction

This instruction should be used when the defendant is sued by a third party beneficiary and alleges rescission as a defense. The use of the word "cancel" is suggested instead of rescind [see MB 300G.01]. The instruction should be followed by whatever general rescission instructions are applicable. If there is evidence of estoppel to rescind the contract, an estoppel instruction should be included [see Ch. 3F, *Matthew Bender Contract Defenses Instructions*]. For instructions on establishing a third party beneficiary contract, see Ch. 3, *California Judicial Council Contracts Instructions*, CACI No. 301, and Ch. 3C, *Matthew Bender Contract Party Instructions*.

LexisNexis Matthew Bender Expert Practice Tip--Detrimental Reliance Can Alter Rule: This instruction states the general rule. However, detrimental reliance by a third party beneficiary can alter the general rule. And, some jurors may be concerned about "fairness" here. Thus, emphasize that this is the law. *By Ronald Oster and Rex Heeseman*

[3] Comment

Absent an estoppel, the parties to a third party beneficiary contract may rescind the agreement at any time before

commencement of an action by the third party beneficiary [*Civ. Code* § 1559; *R. J. Cardinal Co. v. Ritchie* (1963) 218 Cal.App.2d 124, 136, 32 Cal.Rptr. 545 ; *Silveyra v. Harper* (1947) 82 Cal.App.2d 761, 766, 187 P.2d 83]. The principles governing rescission of third party beneficiary contracts are the same as those applicable to contracts generally [*R.J. Cardinal Co. v. Ritchie* (1963) 218 Cal.App.2d 124, 135-136, 32 Cal.Rptr. 545]. The recitation in some cases [see *R.J. Cardinal Co. v. Ritchie* (1963) 218 Cal.App.2d 124, 136, 32 Cal.Rptr. 545] that a third party beneficiary contract cannot be rescinded or revoked as long as the promisor retains or continues to receive the consideration from the original promisee is misleading. The rules governing rescission of a third-party beneficiary contract include all of the principles by which any rescinding party may be relieved from the obligation of restoring everything of value received under the contract [*R.J. Cardinal Co. v. Ritchie* (1963) 218 Cal.App.2d 124, 150, 32 Cal.Rptr. 545 (directing trial court on remand to incorporate applicable rules relevant to unilateral rescission into jury instructions)].

Estoppel may not give the third party the full benefit of the contract. In one case, the court reversed the judgment to the extent that it awarded the third party beneficiary a recovery for the full contract price because he had only changed his position to his damage in reliance on part of the promise. The court's alternative grounds for reaching this result were either that the rescission was effective to the extent there was no reliance or because the contract was never completed [*Silveyra v. Harper* (1947) 82 Cal.App.2d 761, 766-768, 187 P.2d 83]. The submission of the estoppel issue to the jury is discussed in Ch. 3F, *Matthew Bender Contract Defenses Instructions*.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Contracts Law Consideration Detrimental
Reliance Contracts Law Remedies Rescission & Redhibition General Overview Contracts Law Third
Parties Beneficiaries General Overview Contracts Law Third Parties Beneficiaries Claims & Enforcement Contracts
Law Types of Contracts Agreements of Rescission

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CHAPTER 3G Matthew Bender Rescission of Contract Instructions PART A. GENERAL BASES FOR RESCISSION

1-3G California Forms of Jury Instruction MB 300G.05

MB 300G.05 Improperly Obtained Consent

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Normally, each party to a contract is bound by it and neither may cancel the contract or ignore any duties under it because, by hindsight, it turns out to have been a bad bargain. A contract is still valid even if it was based on bad judgment. However, consent to an agreement must be freely given. A party's consent is not freely given if two things are shown: (1) consent was obtained under circumstances that the law considers improper, and (2) consent would not have been given without the improper circumstances. I will now tell you what rules to apply to determine if _____ [*rescinding party's*] consent to the contract was improperly obtained.

Authorities: Civ. Code §§ 1565-1568; *Odorizzi v. Bloomfield School Dist.* (1966) 246 Cal.App.2d 123, 132, 54 Cal.Rptr. 533 .

[2] Use of Instruction

This instruction should be used when rescission is claimed based on lack of free consent. It may either be raised by the defendant in defense of an action on the contract or by the plaintiff in a suit to rescind. This instruction should be followed by one or more of the specific instructions in this chapter on various theories of rescission.

LexisNexis Matthew Bender Expert Practice Tip--Validity of Contract: This is an introductory instruction that sets forth the important concept that a contract is still valid even if based on bad judgment. Absent extraordinary circumstances (that are the subject of the following instructions), most jurors will respond favorably to the argument that "a deal is a deal" even if one side benefits more than the other. However, be careful when explaining what is "improper" in this context. *By Ronald Oster and Rex Heeseman*

[3] Comment

There are second thoughts to every bargain. Hindsight may not be used to avoid a bad bargain. Second thoughts are a risk inherent in managing one's affairs [*Odorizzi v. Bloomfield School Dist.* (1966) 246 Cal.App.2d 123, 132, 54 Cal.Rptr. 533]. However, a party may rescind a contract if his or her consent was not freely given [Civ. Code §§ 1565, 1566]. Apparent consent is not free when obtained through duress, menace, fraud, undue influence, or mistake [Civ. Code § 1567]. Rescission may only be obtained for one of these causes if it is shown that consent would not have otherwise been given [Civ. Code § 1568].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Contracts Law Defenses Duress & Undue Influence General Overview Contracts Law Defenses Fraud & Misrepresentation General Overview Contracts Law Remedies Rescission & Redhibition General Overview

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CHAPTER 3G Matthew Bender Rescission of Contract Instructions
PART A. GENERAL BASES FOR RESCISSION

1-3G California Forms of Jury Instruction MB 300G.06

MB 300G.06 Rescission Based on Improper Conduct of Third Party**[1] Instruction**[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

A person may not knowingly take advantage of another's wrongdoing. You must determine whether
_____ [*other party*] **knew or had reason to know that** _____ [*rescinding party's*]
consent was caused by the _____ [*describe improper conduct*] **of** _____ [*third*
person] **before** _____ [*other party*] **performed, promised to perform, or made an important**
change in [his/her/its] position in reliance on the contract.

Authorities: Civ. Code § 1689(b)(1); *Leeper v. Beltrami* (1959) 53 Cal.2d 195, 206, 1 Cal.Rptr. 12, 347 P.2d 12 .

[2] Use of Instruction

This instruction should be used when the improper conduct allegedly justifying rescission is that of a third party. The word "important" is suggested instead of "material" [see Black's Law Dictionary (5th ed. 1979) at p. 880] because it is more likely to be correctly understood by the jury. The word "serious" is an alternate suggestion. If the third party does not act with the connivance of the party sought to be held but with a jointly interested party, the instruction should be modified accordingly [see [3], below].

LexisNexis Matthew Bender Expert Practice Tip--Show Connection Between Improper Conduct and Other Party to Contract: Mere knowledge of improper conduct by an unrelated third party may be sufficient to cancel a contract. However, most attorneys will want to show some greater connection between the improper conduct and the other party to the contract to support cancellation of the contract.
By Ronald Oster

[3] Comment

Rescission is permitted not only when a party obtains the consent of another by his or her own improper conduct, but also when that consent has been wrongfully induced by a third person with the "connivance of" the party against whom rescission is sought or by a party jointly interested in the contract [Civ. Code § 1689(b)(1)]. "Connivance" means advantage, knowingly taken, of the wrongdoing of third parties [*Leeper v. Beltrami* (1959) 53 Cal.2d 195, 206, 1 Cal.Rptr. 12, 347 P.2d 12]. This rule makes voidable a contract obtained by the improper conduct of a third party when one party has reason to know of the improper means used to obtain the other party's consent. The nonrescinding party's knowledge must have been obtained before that party gave or promised to give something of value in the transaction or materially changed position in reliance on the transaction [*Leeper v. Beltrami* (1959) 53 Cal.2d 195, 206, 1 Cal.Rptr. 12, 347 P.2d 12 ; *Hall v. Department of Adoptions* (1975) 47 Cal.App.3d 898, 903, 121 Cal.Rptr. 223] .

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewContracts LawRemediesRescission & RedhibitionGeneral OverviewContracts LawThird PartiesGeneral Overview

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CHAPTER 3G Matthew Bender Rescission of Contract Instructions
PART A. GENERAL BASES FOR RESCISSION

1-3G California Forms of Jury Instruction MB 300G.07

MB 300G.07 Material Failure of Consideration

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

A party to a contract may cancel the contract if for any reason [he/she/it] does not receive what was promised in exchange by the other party or if an important part of what was promised is missing. You must decide whether an important part of what was promised is missing. Something is important to a contract if it would be likely to cause a reasonable person not to have made the contract if that part was missing.

Authorities: *Civ. Code § 1689; Wyler v. Feuer (1978) 85 Cal.App.3d 392, 403-404, 149 Cal.Rptr. 626 ; Wood v. Kalbaugh (1974) 39 Cal.App.3d 926, 930, 114 Cal.Rptr. 673 .*

[2] Use of Instruction

This instruction should be used when the basis for rescission is failure of consideration from any cause before it is rendered to the rescinding party. If there is failure of consideration due to material breach by the other party, then the instruction in MB 300G.08 should be given. The instruction contemplates material failure rather than complete failure of consideration since complete failure is unlikely to present a jury question. The phrase "what was promised in exchange" is suggested instead of "consideration" since it is more likely to be understood by the average juror.

LexisNexis Matthew Bender Expert Practice Tip--Missing Consideration Must Be Important Part of What Was Promised: The key language in this instruction is that the missing consideration must be an important part of "what was promised." Just because a contract does not turn out to be as advantageous as one side expected is not a ground for cancellation unless the missing element is part of "what was promised." You need to explain, in light of the facts, "what was promised." *By Ronald Oster and Rex Heeseman*

[3] Comment

A contract may be rescinded if the consideration fails in a material regard from any cause before the consideration is rendered to the rescinding party [*Civ. Code* § 1689(b)(4)]. The materiality of failure of consideration is a question of fact [*Calabrese v. Rexall Drug & Chemical Co.* (1963) 218 Cal.App.2d 774, 782, 32 Cal.Rptr. 665]. A fact is material if it would be likely to affect the conduct of a reasonable person with reference to the transaction [*Wood v. Kalbaugh* (1974) 39 Cal.App.3d 926, 930, 114 Cal.Rptr. 673].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewCivil ProcedureTrialsJury TrialsProvince of Court & JuryContracts LawBreachMaterial BreachContracts LawConsiderationSufficient ConsiderationContracts LawRemediesRescission & RedhibitionGeneral Overview

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CHAPTER 3G Matthew Bender Rescission of Contract Instructions
PART A. GENERAL BASES FOR RESCISSION

1-3G California Forms of Jury Instruction MB 300G.08

MB 300G.08 Rescission for Breach

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

A party to a contract may cancel the contract if the other party breaches the contract by failing to perform an important part of what he or she promised to do. Something is an important part of a party's promised performance under a contract if a reasonable person would not have made the contract if that part of the promise had not been made.

Authorities: *Civ. Code § 1689(b)(2); Wyler v. Feuer (1978) 85 Cal.App.3d 392, 403-404, 149 Cal.Rptr. 626 ; Wood v. Kalbaugh (1974) 39 Cal.App.3d 926, 930, 114 Cal.Rptr. 673 .*

[2] Use of Instruction

This instruction should be used when there is an issue as to whether a contract can be rescinded because of a material breach of contract by the other party.

For related Judicial Council instructions, see [3][b], *below*.

LexisNexis Matthew Bender Expert Practice Tip--Be Prepared to Explain Rescission for Breach:

Most jurors will not have difficulty understanding that if one side fails to perform an important part of the bargain, the contract may be canceled. The other party is then entitled to recover amounts paid under the contract. Still, it is sometimes difficult to explain what happened through the eyes of hindsight. *By Ronald Oster and Rex Heeseman*

[3] Comment

[a] Rescission for Breach

A contract may be canceled if the consideration for the obligation of the cancelling party fails, in whole or in part, through the fault of the party as to whom he or she cancels [*Civ. Code* § 1689(b)(2)]. It is proper to instruct the jury that the failure of consideration must be material to justify rescission [*Wylar v. Feuer* (1978) 85 Cal.App.3d 392, 404, 149 Cal.Rptr. 626]. Even a slight breach at the outset may justify cancellation if it is indicative of future problems [*Pennel v. Pond Union School Dist.* (1973) 29 Cal.App.3d 832, 105 Cal.Rptr. 817 ; see Ch. 3D, *Matthew Bender Performance and Breach of Contract Instructions*].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 3, *California Judicial Council Contracts Instructions*]:

CACI No. 324 Anticipatory Breach

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawBreachCauses of ActionGeneral OverviewContracts LawBreachMaterial BreachContracts LawRemediesRescission & RedhibitionGeneral Overview

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CHAPTER 3G Matthew Bender Rescission of Contract Instructions
PART A. GENERAL BASES FOR RESCISSION

1-3G California Forms of Jury Instruction MB 300G.09

MB 300G.09 Causation**[1] Instruction**[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

A party may only cancel a contract if consent would not have been given absent the _____ [*alleged cause for rescission*]. It is not necessary for _____ [*rescinding party*] to prove that the _____ [*alleged cause for rescission*] was the sole reason for entering into the contract, but only that _____ [*alleged cause for rescission*] was of such nature, weight, and force that, without it, the contract would not have been made.

Authorities: Civ. Code § 1568; *Ford v. Cournale* (1973) 36 Cal.App.3d 172, 183 n.10, 111 Cal.Rptr. 334 ; *Reid v. Landon* (1958) 166 Cal.App.2d 476, 483, 333 P.2d 432 .

[2] Use of Instruction

This instruction should be used in all cases involving a claim of rescission due to duress, menace, fraud, undue influence, or mistake when there is an issue as to whether the consent was affected by the basis for cancellation.

LexisNexis Matthew Bender Expert Practice Tip--Reason for Canceling Contract Need Not Be Sole Reason for Entering Into Contract: This is an important instruction for a party seeking to cancel a contract--the reason for canceling the contract does not have to be the sole reason for entering into the contract. However, some jurors may be wondering if the canceling party acted "fairly." Consequently, stress (or attack) the facts in that regard. *By Ronald Oster and Rex Heeseman*

[3] Comment

To obtain rescission for duress, menace, fraud, undue influence, or mistake, it must be shown that consent would not

have been given had the cause not existed [*Civ. Code* § 1568; *Merced County Mut. Fire Ins. Co. v. State of California* (1991) 233 *Cal.App.3d* 765, 772, 284 *Cal.Rptr.* 680 (misrepresentation or mistake); *Ford v. Cournale* (1973) 36 *Cal.App.3d* 172, 183, 111 *Cal.Rptr.* 334 (fraud); *Keithley v. Civil Service Bd.* (1970) 11 *Cal.App.3d* 443, 451, 89 *Cal.Rptr.* 809 (undue influence); *Reid v. Landon* (1958) 166 *Cal.App.2d* 476, 483, 333 *P.2d* 432 (mistake)]. The instruction is modeled after the one approved in *Ford v. Cournale* [*Ford v. Cournale* (1973) 36 *Cal.App.3d* 172, 183 *n.10*, 111 *Cal.Rptr.* 334].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawDefensesAmbiguity & MistakeGeneral OverviewContracts LawDefensesDuress & Undue
InfluenceGeneral OverviewContracts LawDefensesFraud & MisrepresentationGeneral OverviewContracts
LawRemediesRescission & RedhibitionGeneral Overview

John F. Wells and Lise A. Pearlman were the original authors of this chapter. It has since been updated to reflect changes in the law, additional case citations and practice pointers by other lawyers as well as revisions including cross-references to the official CACI instructions.



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California Forms of Jury Instruction

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CHAPTER 3G Matthew Bender Rescission of Contract Instructions
PART A. GENERAL BASES FOR RESCISSION

1-3G California Forms of Jury Instruction MB 300G.10-MB 300G.19

[Reserved for Future Use]

MB 300G.10[Reserved for Future Use]



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California Forms of Jury Instruction

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CHAPTER 3G Matthew Bender Rescission of Contract Instructions
PART B. MISTAKE

1-3G California Forms of Jury Instruction MB 300G.20

MB 300G.20 Consent Obtained by Mistake

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

A party may cancel a contract if [his/her/its] consent was given by mistake under the limited circumstances about which I will now instruct you.

Authority: *Civ. Code § 1689(b)(1).*

[2] Use of Instruction

This instruction should be used to introduce the applicable additional instructions on mistake that follow. The word "cancel" is suggested instead of "rescind" [see MB 300G.01[2]].

For related Judicial Council instructions, see [3][b], *below*.

LexisNexis Matthew Bender Expert Practice Tip--Use Care When Arguing Mistake: Many jurors will look with some doubt on a party talking about a "mistake." Thus, structure the closing accordingly.
By Rex Heeseman

LexisNexis Matthew Bender Expert Practice Tip--Mistake Must Fit "Limited Circumstances": Most disadvantageous contracts are entered into by mistake. The key words in this instruction are that the mistake must fit the "limited circumstances" described in the following instructions [see MB 300G.21 -MB 300G.28]. *By Ronald Oster*

[3] Comment

[a] Rescission Based on Mistake

An injured party may rescind a contract based on mistake [Civ. Code § 1689(b)(1); see *Harris v. Rudin, Richman & Appel* (2002) 95 Cal.App.4th 1332, 1339-1341, 116 Cal.Rptr.2d 552 (concluding that defendants raised triable issues of fact as to whether they were entitled to rescind settlement agreement based on mutual mistake of fact or law); see also MB 300G.25]. The mistake must be material [*Merced County Mut. Fire Ins. Co. v. State of California* (1991) 233 Cal.App.3d 765, 772, 284 Cal.Rptr. 680 ; *Bellwood Discount Corp. v. Empire Steel Buildings Co.* (1959) 175 Cal.App.2d 432, 435, 346 P.2d 467 ; see MB 300G.09]. It may be of fact or law [Civ. Code § 1576; see MB 300G.21], mutual [*Guthrie v. Times-Mirror Co.* (1975) 51 Cal.App.3d 879, 884, 124 Cal.Rptr. 577 ; see MB 300G.22], or unilateral [see MB 300G.23], provided that it was the mistake of the complaining party [*Wood v. Metzenbaum* (1951) 107 Cal.App.2d 727, 731, 237 P.2d 703]. The other party must be aware or have reason to be aware of the mistake [see MB 300G.23]. Proof of injury may also be required [*Guthrie v. Times-Mirror Co.* (1975) 51 Cal.App.3d 879, 886, 124 Cal.Rptr. 577 ; see MB 300G.28]. The rescinding party must also show that but for the mistake, he or she would not have entered into the contract [Civ. Code § 1568; *Reid v. Landon* (1958) 166 Cal.App.2d 476, 483, 333 P.2d 432 ; see MB 300G.09].

Relief based on rescission will not be denied because of delay in giving notice of rescission unless delay has been substantially prejudicial to the other party [Civ. Code § 1693; see MB 300G.90]. Rescission will be denied if the mistake was the result of the neglect of a legal duty [Civ. Code § 1577; see MB 300G.26].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 3, *California Judicial Council Contracts Instructions*]:

CACI No. 330 Affirmative Defense--Unilateral Mistake of Fact

CACI No. 331 Affirmative Defense--Bilateral Mistake

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawDefensesAmbiguity & MistakeMutual MistakeContracts LawDefensesAmbiguity & MistakeUnilateral MistakeContracts LawRemediesRescission & RedhibitionGeneral Overview

John F. Wells and Lise A. Pearlman were the original authors of this chapter. It has since been updated to reflect changes in the law, additional case citations and practice pointers by other lawyers as well as revisions including cross-references to the official CACI instructions.



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CHAPTER 3G Matthew Bender Rescission of Contract Instructions
PART B. MISTAKE

1-3G California Forms of Jury Instruction MB 300G.21

MB 300G.21 Types of Mistake

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Mistake may be either a mistake about a fact or mistake about the law.

Authorities: *Civ. Code § 1576; Guthrie v. Times-Mirror Co. (1975) 51 Cal.App.3d 879, 884, 124 Cal.Rptr. 577 .*

[2] Use of Instruction

This instruction should be used in all cases involving mistake but it is only necessary when both types of mistake are alleged. It should be followed by the definitional instructions in MB 300G.24 and MB 300G.25.

For related Judicial Council instructions, see [3][b], *below*.

[3] Comment

[a] Types of Mistake

This instruction is derived from *Civ. Code § 1576*. The Civil Code distinguishes between the two types of mistake [*Civ. Code §§ 1577, 1578*], but specifically provides that a mistake of foreign law is to be treated as a mistake of fact [*Civ. Code § 1579*]. However, very little distinction exists in the case law. Thus, under California law, a mutual mistake, whether of fact or law, which affects an essential element of the contract and is harmful to one of the parties, is subject to rescission by the party harmed [*Guthrie v. Times-Mirror Co. (1975) 51 Cal.App.3d 879, 884-886, 124 Cal.Rptr. 577*].

However, there may still be a difference under California law regarding the effect of unilateral mistake of fact and law. *Civ. Code* § 1578 requires that the other party be aware of a mistake of law. There is authority that the other party must only have reason to be aware of the mistake of fact [*Neptune Gunite Co. v. Monroe Enterprises* (1964) 229 Cal.App.2d 439, 442, 40 Cal.Rptr. 367]. Thus, the only difference under California law between the effect of a unilateral mistake of law and mistake of fact is if the court interprets *Civ. Code* § 1578 to require actual knowledge as opposed to reason to know for a mistake of law. No cases were found that dealt with this point, but it appears likely that California courts would recognize rescission for mistake of law when the other party has reason to know of such mistake just as they recognize the right to rescind for mistake of fact under the same circumstances [see Witkin, Summary of California Law, vol. 1, *Contracts*, §§ 267, 274 (10th ed. 2005); see also MB 300G.23].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 3, *California Judicial Council Contracts Instructions*]:

CACI No. 330 Affirmative Defense--Unilateral Mistake of Fact

CACI No. 331 Affirmative Defense--Bilateral Mistake

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawDefensesAmbiguity & MistakeGeneral OverviewContracts LawDefensesAmbiguity & MistakeUnilateral MistakeContracts LawFormationAmbiguity & MistakeGeneral OverviewContracts LawFormationAmbiguity & MistakeUnilateral Mistake

John F. Wells and Lise A. Pearlman were the original authors of this chapter. It has since been updated to reflect changes in the law, additional case citations and practice pointers by other lawyers as well as revisions including cross-references to the official CACI instructions.



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California Forms of Jury Instruction

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CHAPTER 3G Matthew Bender Rescission of Contract Instructions
PART B. MISTAKE

1-3G California Forms of Jury Instruction MB 300G.22

MB 300G.22 Mutual Mistake

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

A party may cancel a contract for mistake if both parties made basically the same mistake as to an important part of the contract.

Authorities: Civ. Code §§ 1578, 1689(b)(1); *Guthrie v. Times-Mirror Co.* (1975) 51 Cal.App.3d 879, 884, 124 Cal.Rptr. 577 .

[2] Use of Instruction

This instruction should be used if mutual mistake is alleged. The use of the word "important" is suggested for "material" [see Black's Law Dictionary (5th ed. 1979) at p. 880]. The necessity of an injury instruction may be given with this instruction [see MB 300G.28].

For related Judicial Council instructions, see [3][b], *below*.

LexisNexis Matthew Bender Expert Practice Tip--Mutual Mistake Is Uncommon: Cancellation for mutual mistake is not very common. Usually one side knows the real situation. Further, several jurors will find it difficult to believe that both sides "made the same mistake." *By Ronald Oster and Rex Heeseman*

[3] Comment

[a] Mutual Mistake

A mutual mistake, whether of fact or law, which affects an essential element of the contract and is harmful to one of the parties, is subject to rescission by the party harmed [*Civ. Code* §§ 1578, 1689(b)(1); *Guthrie v. Times-Mirror Co.* (1975) 51 Cal.App.3d 879, 884, 124 Cal.Rptr. 577; see *Harris v. Rudin, Richman & Appel* (2002) 95 Cal.App.4th 1332, 1339-1341, 116 Cal.Rptr.2d 552 (concluding that defendants raised triable issues of fact as to whether they were entitled to rescind settlement agreement based on mutual mistake of fact or law); see also MB 300G.25].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 3, *California Judicial Council Contracts Instructions*]:

CACI No. 331 Affirmative Defense--Bilateral Mistake

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawDefensesAmbiguity & MistakeMutual MistakeContracts LawFormationAmbiguity & MistakeMutual MistakeContracts LawRemediesRescission & RedhibitionGeneral Overview

John F. Wells and Lise A. Pearlman were the original authors of this chapter. It has since been updated to reflect changes in the law, additional case citations and practice pointers by other lawyers as well as revisions including cross-references to the official CACI instructions.



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CHAPTER 3G Matthew Bender Rescission of Contract Instructions
PART B. MISTAKE

1-3G California Forms of Jury Instruction MB 300G.23

MB 300G.23 Unilateral Mistake

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

A party may cancel a contract because [he/she/it] made a mistake if the mistake was due to the fault of the other party or the other party knew about the mistake _____ [or had reason to know about it] at the time of contracting.

[IF APPLICABLE (See Use of Instruction)]

If a plaintiff has no reason to know of and does not cause the defendant's unilateral mistake of fact, the defendant must establish all of the following facts to obtain the contract's rescission:

- (1) The defendant made a mistake regarding a basic assumption on which the defendant made the contract;**
- (2) The mistake has a material effect on the agreed exchange of performances that is adverse to the defendant;**
- (3) The defendant does not bear the risk of the mistake; and**
- (4) The effect of the mistake is such that the contract's enforcement would be unconscionable.**

Authorities: *Donovan v. RRL Corp.* (2001) 26 Cal.4th 261, 281-282, 109 Cal.Rptr.2d 807, 27 P.3d 702 ; *Architects & Contractors Estimating Service, Inc. v. Smith* (1985) 164 Cal.App.3d 1001, 1007-1008, 211 Cal.Rptr. 45 ; *Larsen v. Johannes* (1970) 7 Cal.App.3d 491, 503, 86 Cal.Rptr. 744 ; *Neptune Gunit Co. v. Monroe Enterprises* (1964) 229

Cal.App.2d 439, 442, 40 Cal.Rptr. 367.

[2] Use of Instruction

This instruction should be used if unilateral mistake is asserted. The optional language in brackets is clearly applicable in cases involving mistake of fact and may also apply in cases involving mistake of law. If the mistake is caused by the other party's misrepresentation, counsel will also want to consider instructions on rescission for fraud in MB 300G.40-MB 300G.49.

The optional paragraph is applicable when a plaintiff attempts to enforce a contract, which the defendant attempts to rescind based on unilateral mistake.

For related Judicial Council instructions, see [3][b], *below*.

LexisNexis Matthew Bender Expert Practice Tip--Use Care When Arguing Unilateral Mistake:

Many jurors will struggle with the concept of a "unilateral mistake." In addition, the optional paragraph, if applicable, creates a series of hurdles that must be overcome to cancel a contract. The opposing side will want to highlight each of these hurdles in closing argument, preferably with the use of visual aids.
By Rex Heeseman and Ronald Oster

[3] Comment

[a] Unilateral Mistake

If a unilateral mistake of law has been made, rescission is available if the other party was aware of it and did not correct it [*Larsen v. Johannes* (1970) 7 Cal.App.3d 491, 503, 86 Cal.Rptr. 744]. Rescission for unilateral mistake of fact is available if the mistake was due to the fault of the other party or the other party knew or had reason to know about it [*Architects & Contractors Estimating Service, Inc. v. Smith* (1985) 164 Cal.App.3d 1001, 1007-1008, 211 Cal.Rptr. 45 ; *Neptune Gunit Co. v. Monroe Enterprises* (1964) 229 Cal.App.2d 439, 442, 40 Cal.Rptr. 367]. Whether the latter rule also applies to a mistake of law is not clear [see MB 300G.21[3]].

In *Donovan v. RRL Corporation* [*Donovan v. RRL Corp.* (2001) 26 Cal.4th 261, 109 Cal.Rptr.2d 807, 27 P.3d 702], the California Supreme Court stated that when a plaintiff has no reason to know of and does not cause the defendant's unilateral mistake of fact, the defendant must establish the four facts listed in the instruction in MB 300G.23[1] to obtain rescission of the contract. The Court stated that California law does not adhere to the original Restatement of Contract's requirements for rescission based on unilateral mistake of fact, *i.e.*, only in circumstances when the other party knew of the mistake or caused the mistake. The Court adopted as California law the rule set forth in the Restatement Second of Contracts, § 153(a), authorizing rescission for unilateral mistake of fact when enforcement would be unconscionable [*Donovan v. RRL Corp.* (2001) 26 Cal.4th 261, 281-282, 109 Cal.Rptr.2d 807, 27 P.3d 702 (auto dealership's lack of knowledge regarding typographical error in advertised price of car constituted mistake of fact; rescission was warranted because evidence established that unilateral mistake of fact was made in good faith, defendant did not bear risk of mistake, and contract's enforcement with erroneous price would be unconscionable)].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 3, *California Judicial Council Contracts Instructions*]:

CACI No. 330 Affirmative Defense--Unilateral Mistake of Fact

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawDefensesAmbiguity & MistakeUnilateral MistakeContracts LawDefensesFraud &
MisrepresentationMaterial MisrepresentationContracts LawFormationAmbiguity & MistakeUnilateral
MistakeContracts LawRemediesRescission & RedhibitionGeneral Overview

John F. Wells and Lise A. Pearlman were the original authors of this chapter. It has since been updated to reflect changes in the law, additional case citations and practice pointers by other lawyers as well as revisions including cross-references to the official CACI instructions.



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CHAPTER 3G Matthew Bender Rescission of Contract Instructions
PART B. MISTAKE

1-3G California Forms of Jury Instruction MB 300G.24

MB 300G.24 Mistake of Fact Defined

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

A mistake of fact refers to a misunderstanding about something happening at the time of the contract or something that had already happened before the contract was made. The misunderstanding must be about some basic fact that is important to the contract. It can be the result of one of two things:

1. Innocent ignorance or forgetfulness; or
2. Innocent belief that something has happened that did not happen.

[IF APPLICABLE (See Use of Instruction)]

Since in this case the misunderstanding relied on is about the quality or characteristics of _____ [describe thing sold], the contract can be cancelled only if the difference between _____ [describe thing sold] as it really is and as it was supposed to be was so great that it is as if _____ [describe thing sold] is a different thing than it was supposed to be.

Authorities: Civ. Code § 1577; *Donovan v. RRL Corp.* (2001) 26 Cal.4th 261, 278-279, 109 Cal.Rptr.2d 807, 27 P.3d 702 ; *Architects & Contractors Estimating Service, Inc. v. Smith* (1985) 164 Cal.App.3d 1001, 1007-1008, 211 Cal.Rptr. 45 ; *Bellwood Discount Corp. v. Empire Steel Buildings Co.* (1959) 175 Cal.App.2d 432, 435, 346 P.2d 467 ; *Vickerson v. Frey* (1950) 100 Cal.App.2d 621, 628, 224 P.2d 126 .

[2] Use of Instruction

This instruction should be used to define mistake. The use of the word "important" is suggested for "material" [see Black's Law Dictionary (5th ed. 1979) at p. 880]. The word "cancel" is suggested instead of "rescind" [see MB 300G.01]. If there is evidence of neglect on the part of the mistaken party, use the instruction in MB 300G.26 as well. The optional paragraph is applicable when the mistake concerns the quality or characteristics of the thing sold.

For related Judicial Council instructions, see [3][b], *below*.

LexisNexis Matthew Bender Expert Practice Tip--Use Care in Explaining Impact of Instruction:

This instruction seems confusing and complicated. If it is used, be careful in explaining its impact. In addition, the instruction seems to be at odds with the concept that a contract is still valid even if based on bad judgment [see MB 300G.05]. "Innocent ignorance" or "forgetfulness" are very general concepts that cover a lot of circumstances. Most jurors will therefore probably require more than "forgetfulness" to support cancellation of a contract. *By Rex Heeseman and Ronald Oster*

[3] Comment

[a] Mistake of Fact Defined

This instruction is based on *Civ. Code § 1577*, which provides that a mistake of fact consists of an unconscious ignorance or forgetfulness of a fact past or present, or a belief in the present existence of a thing that does not exist, or in the past existence of a thing that has not existed [see *Donovan v. RRL Corp.* (2001) 26 Cal.4th 261, 278-279, 109 Cal.Rptr.2d 807, 27 P.3d 702 (auto dealership's lack of knowledge regarding typographical error in advertised price of car constituted mistake of fact); *Architects & Contractors Estimating Service, Inc. v. Smith* (1985) 164 Cal.App.3d 1001, 1007-1008, 211 Cal.Rptr. 45]. The mistake must be material [*Bellwood Discount Corp. v. Empire Steel Buildings Co.* (1959) 175 Cal.App.2d 432, 435, 346 P.2d 467 ; see Witkin, Summary of California Law, vol. 1, *Contracts*, § 260 (10th ed. 2005)]. The mistake must not be the result of neglect on the part of the party harmed [*Civ. Code § 1577*; see MB 300G.26]. When a mistake occurs regarding the quality or characteristics of something, the mistake is not ground for rescission unless the difference between the real and supposed quality is so extreme as to make it virtually a different thing [*Vickerson v. Frey* (1950) 100 Cal.App.2d 621, 628, 224 P.2d 126].

No distinction is drawn in the instruction between mistake of fact and mistake of judgment. Although such a distinction used to be drawn [see *M. F. Kemper Constr. Co. v. Los Angeles* (1951) 37 Cal.2d 696, 701-702, 235 P.2d 7], the rule appears to be that the facts surrounding the mistake and not the label should control [*White v. Berrenda Mesa Water Dist.* (1970) 7 Cal.App.3d 894, 907, 87 Cal.Rptr. 338 ; see *Guthrie v. Times-Mirror Co.* (1975) 51 Cal.App.3d 879, 886, 124 Cal.Rptr. 577 (refusing to hold as matter of law that mutual mistake of judgment about legal effect court would give to transaction could not form basis for rescission for mutual mistake)].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 3, *California Judicial Council Contracts Instructions*]:

CACI No. 330 Affirmative Defense--Unilateral Mistake of Fact

CACI No. 331 Affirmative Defense--Bilateral Mistake

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawDefensesAmbiguity & MistakeGeneral OverviewContracts LawDefensesAmbiguity & MistakeMutual MistakeContracts LawDefensesAmbiguity & MistakeUnilateral MistakeContracts LawRemediesRescission &

RedhibitionGeneral Overview

John F. Wells and Lise A. Pearlman were the original authors of this chapter. It has since been updated to reflect changes in the law, additional case citations and practice pointers by other lawyers as well as revisions including cross-references to the official CACI instructions.



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CHAPTER 3G Matthew Bender Rescission of Contract Instructions
PART B. MISTAKE

1-3G California Forms of Jury Instruction MB 300G.25

MB 300G.25 Mistake of Law Defined

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

A mistake of law occurs when a person knows the specific facts on which his or her rights depend but is mistaken about the rules of law that apply to those facts. The mistake must be about a law that has an important effect on the contract.

[IF APPLICABLE (See Use of Instruction)]

Mistake about the law may occur if there is a mistaken opinion concerning the legal effect a court will give to a contract.

Authorities: Civ. Code § 1578; *Harris v. Rudin, Richman & Appel* (2002) 95 Cal.App.4th 1332, 1339-1341, 116 Cal.Rptr.2d 552 ; *Guthrie v. Times-Mirror Co.* (1975) 51 Cal.App.3d 879, 884-885, 124 Cal.Rptr. 577 .

[2] Use of Instruction

This instruction should be used when a mistake of law must be defined. The use of the word "important" is suggested instead of "material" [see Black's Law Dictionary (5th ed. 1979) at p. 880]. The optional paragraph may be used when a mistaken legal opinion is involved and the court has determined that it is of the type for which rescission may be available.

For related Judicial Council instructions, see [3][b], *below*.

LexisNexis Matthew Bender Expert Practice Tip--Use Care With Mistake of Law Defense: Many

jurors will be skeptical of a defense based on mistake of law. This is especially true if a party is represented by an attorney at the time the contract was formed. *By Ronald Oster*

LexisNexis Matthew Bender Expert Practice Tip--Ignorance of Law Is No Excuse: Some jurors will recall the saying "ignorance of the law is no excuse." Exploit, or explain away as the case may be, this saying. *By Rex Heeseman*

[3] Comment

[a] Mistake of Law Defined

A mistake of law occurs when a person knows the specific facts on which his or her rights depend but is ignorant of the rules of law the courts will apply to the facts [*Guthrie v. Times-Mirror Co. (1975) 51 Cal.App.3d 879, 884-886, 124 Cal.Rptr. 577*]. For example, in a case involving a legal malpractice action for preparation of a trust exposing the trustees to tax liability, all parties were unaware of a recent Probate Code amendment that eliminated the tax problem. The court of appeal held that defendants raised triable issues of fact as to whether they were entitled to rescind the agreement based on a mutual mistake of fact or law [*Harris v. Rudin, Richman & Appel (2002) 95 Cal.App.4th 1332, 1339-1341, 116 Cal.Rptr.2d 552* (finding that parties' mutual mistake regarding applicable Probate Code section went to heart of settlement agreement)].

It is possible that mistake of judgment as to the legal effect a court will give to a contract may under some circumstances give rise to rescission for mistake [*Guthrie v. Times-Mirror Co. (1975) 51 Cal.App.3d 879, 884-886, 124 Cal.Rptr. 577*]. However, this does not include mistakes as to matters that the contracting parties had in mind as possibilities and as to the existence of which they took the risk [*Guthrie v. Times-Mirror Co. (1975) 51 Cal.App.3d 879, 885, 124 Cal.Rptr. 577* ; *see MB 300G.27*].

A mistake of foreign laws is treated as a mistake of fact [*Civ. Code § 1579*].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 3, *California Judicial Council Contracts Instructions*]:

CACI No. 330 Affirmative Defense--Unilateral Mistake of Fact

CACI No. 331 Affirmative Defense--Bilateral Mistake

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawDefensesAmbiguity & MistakeGeneral OverviewContracts LawFormationAmbiguity & MistakeGeneral OverviewContracts LawRemediesRescission & RedhibitionGeneral Overview

John F. Wells and Lise A. Pearlman were the original authors of this chapter. It has since been updated to reflect changes in the law, additional case citations and practice pointers by other lawyers as well as revisions including cross-references to the official CACI instructions.



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CHAPTER 3G Matthew Bender Rescission of Contract Instructions
PART B. MISTAKE

1-3G California Forms of Jury Instruction MB 300G.26

MB 300G.26 Mistake--Neglect of Legal Duty**[1] Instruction**[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

A party is not entitled to cancel a contract for mistake if the mistake resulted from that party's own neglect of a legal duty. By neglect of a legal duty, I do not mean ordinary carelessness. I mean extreme departure from the ordinary standards of conduct by which reasonable people are governed. If the type of mistake is one that will sometimes occur in the conduct of reasonable persons, then it does not amount to the neglect of a legal duty.

Authorities: *Civ. Code* § 1577; *Donovan v. RRL Corp.* (2001) 26 Cal.4th 261, 283-284, 109 Cal.Rptr.2d 807, 27 P.3d 702 ; *Van Meter v. Bent Construction Co.* (1956) 46 Cal.2d 588, 594, 297 P.2d 644 ; *M. F. Kemper Constr. Co. v. Los Angeles* (1951) 37 Cal.2d 696, 702, 235 P.2d 7 ; *Architects & Contractors Estimating Service, Inc. v. Smith* (1985) 164 Cal.App.3d 1001, 1008, 211 Cal.Rptr. 45 ; *Williams v. Puccinelli* (1965) 236 Cal.App.2d 512, 518, 46 Cal.Rptr. 285 .

[2] Use of Instruction

This instruction should be used when mistake is alleged as a basis for rescission and there is a question of fact as to whether the mistake resulted from the rescinding party's own neglect of a legal duty. The word "cancel" is suggested instead of "rescind" [see MB 300G.01]. If the jury is also being instructed on the alternative theory of fraudulent misrepresentation, counsel should note that a different test of the plaintiff's conduct is applicable to negligent misrepresentation [see MB 300G.47], and the defense of neglect of legal duty is generally unavailable if rescission is based on intentional misrepresentations.

LexisNexis Matthew Bender Expert Practice Tip--Define "Legal Duty" for Jury: This could be a confusing instruction without some further definition of what constitutes a "legal duty." In addition, "extreme departure" is a strange idea. *By Ronald Oster and Rex Heeseman*

[3] Comment

Mistake of fact is a mistake not caused by the neglect of a legal duty on the part of the person making the mistake [Civ. Code § 1577]. The same rule would presumably apply to defeat a claim for rescission based on mistake of law although there appears to be no case on point. Whether there has been neglect of a legal duty is a question of fact [*Williams v. Puccinelli* (1965) 236 Cal.App.2d 512, 518, 46 Cal.Rptr. 285]. Ordinary negligence is insufficient to constitute "neglect of a legal duty" [*Donovan v. RRL Corp.* (2001) 26 Cal.4th 261, 283, 288-289, 109 Cal.Rptr.2d 807, 27 P.3d 702 (absent evidence of bad faith, violation of any obligation imposed by Veh. Code § 11713.1--which creates Vehicle Code violation for dealer to fail to sell vehicle at advertised price--did not constitute neglect of legal duty precluding rescission for unilateral mistake of fact); *Architects & Contractors Estimating Service, Inc. v. Smith* (1985) 164 Cal.App.3d 1001, 1008, 211 Cal.Rptr. 45 ; see *Harris v. Rudin, Richman & Appel* (2002) 95 Cal.App.4th 1332, 1341-1342, 116 Cal.Rptr.2d 552 (even if defendants' failure to discover amendment to applicable Probate Code section constituted mistake of fact, breach of duty to monitor pending Legislative bills would be no more than ordinary negligence and would not preclude rescission of agreement settling legal malpractice action)]. Gross negligence is required [*M. F. Kemper Constr. Co. v. Los Angeles* (1951) 37 Cal.2d 696, 702, 235 P.2d 7 ; *French v. Construction Laborers Pension Trust* (1975) 44 Cal.App.3d 479, 487, 118 Cal.Rptr. 731]. Gross negligence has been said to mean the want of even scant care or an extreme departure from the ordinary standard conduct [*Van Meter v. Bent Construction Co.* (1956) 46 Cal.2d 588, 594, 297 P.2d 644].

One difference between a claim for rescission based on fraudulent misrepresentation and a claim for rescission based on mistake is the test applied to evaluate the effect of the plaintiff's own conduct. If rescission is sought for intentional fraud, the rescinding party's negligence is no defense to the claim for rescission [*Seeger v. Odell* (1941) 18 Cal.2d 409, 414-415, 115 P.2d 977]. When the fraud is the result of negligent misrepresentations, the victim's failure to investigate is only a defense if the conduct in the light of his or her own intelligence and information is preposterous or irrational [*Van Meter v. Bent Construction Co.* (1956) 46 Cal.2d 588, 594-595, 297 P.2d 644 ; see MB 300G.47].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawDefensesAmbiguity & MistakeGeneral OverviewContracts LawDefensesFraud & MisrepresentationGeneral OverviewContracts LawRemediesRescission & RedhibitionGeneral OverviewTortsNegligenceStandards of CareReasonable CareGeneral Overview

John F. Wells and Lise A. Pearlman were the original authors of this chapter. It has since been updated to reflect changes in the law, additional case citations and practice pointers by other lawyers as well as revisions including cross-references to the official CACI instructions.



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CHAPTER 3G Matthew Bender Rescission of Contract Instructions
PART B. MISTAKE

1-3G California Forms of Jury Instruction MB 300G.27

MB 300G.27 Mistake--Risk Assumed

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

[CHOOSE ONE OR BOTH OF FOLLOWING (See Use of Instruction)]

The kind of mistake for which a party may cancel a contract does not include possibilities that the parties had in mind at the time they entered into the contract. If at the time the contract was entered into, the parties were aware that a doubt exists in regard to a certain matter and proceeded with their contract anyway, they took the risk that what they considered to be a possibility when they entered into the contract turns out to be a fact.

[OR]

A party bears the risk of a mistake when the party knows, at the time that the contract is made, that [he/she/it] has only limited knowledge about the fact[s] to which the mistake relates but treats [his/her/its] knowledge as sufficient.

Authorities: *In re Marriage of Hahn* (1990) 224 Cal.App.3d 1236, 1241, 273 Cal.Rptr. 516 ; *Guthrie v. Times-Mirror Co.* (1975) 51 Cal.App.3d 879, 885, 124 Cal.Rptr. 577 ; Restatement (Second) of Contracts § 154(b).

[2] Use of Instruction

This instruction should be used when there is an issue of fact as to whether the party seeking rescission assumed the risk of the mistake that the party now offers as a basis for rescission. Either or both of the alternative paragraphs may be

used, depending on which paragraph or paragraphs fit the facts of the case. The word "cancel" is suggested instead of "rescind" [see MB 300G.01].

LexisNexis Matthew Bender Expert Practice Tip--Bad Judgment Is Not Basis for Canceling

Contract: This could be a critical instruction for a party opposing cancellation of a contract. Every bargain contains some element of risk. If the risk is the type that normally applies in similar situations, or similar contracts, cancellation is not proper. Bad judgment is not a proper basis for canceling a contract [see MB 300G.05]. Remember, many jurors believe "a deal is a deal." *By Ronald Oster and Rex Heeseman*

[3] Comment

When parties are aware at the time the contract was entered into that a doubt exists with regard to a certain matter and contract on that assumption, the risk of the existence of the doubtful matter is assumed as an element of the bargain [*Guthrie v. Times-Mirror Co. (1975) 51 Cal.App.3d 879, 885, 124 Cal.Rptr. 577* , citing Restatement of Contracts § 502, Comment f; see *Hannah v. Steinman (1911) 159 Cal. 142, 147, 112 P. 1094*]. Stated differently, the kind of mistake that renders a contract voidable does not include mistakes as to matters that the contracting parties had in mind as possibilities and as to the existence of which they took the risk [*Guthrie v. Times-Mirror Co. (1975) 51 Cal.App.3d 879, 885, 124 Cal.Rptr. 577*]. Similarly, a party bears the risk of a mistake when the party knows, at the time that the contract is made, that he or she has only limited knowledge about the facts to which the mistake relates but treats his or her knowledge as sufficient [*In re Marriage of Hahn (1990) 224 Cal.App.3d 1236, 1241, 273 Cal.Rptr. 516* ; Restatement (Second) of Contracts § 154(b)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawDefensesAmbiguity & MistakeGeneral OverviewContracts LawFormationAmbiguity & MistakeGeneral OverviewContracts LawRemediesRescission & RedhibitionGeneral Overview

John F. Wells and Lise A. Pearlman were the original authors of this chapter. It has since been updated to reflect changes in the law, additional case citations and practice pointers by other lawyers as well as revisions including cross-references to the official CACI instructions.



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CHAPTER 3G Matthew Bender Rescission of Contract Instructions
PART B. MISTAKE

1-3G California Forms of Jury Instruction MB 300G.28

MB 300G.28 Rescission Due to Mistake--Necessity of Injury**[1] Instruction**[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

A contract may be cancelled for mistake only if the mistake has an _____ [important or serious] and harmful effect on a basic part of the contract, making it more burdensome to the party seeking to cancel than it would have been had _____ [the law or the facts] been as [he/she/it] believed them to be.

[IF APPLICABLE (See Use of Instruction)]

An _____ [important or serious] effect does not have to involve a loss of money.

Authority: *Guthrie v. Times-Mirror Co.* (1975) 51 Cal.App.3d 879, 886, 124 Cal.Rptr. 577 .

[2] Use of Instruction

This instruction should be used when there is a threshold question of fact as to whether there has been material injury caused by mistake. If there is pecuniary damage allegedly caused by the mistake, that will be the subject of a separate damage instruction [see Ch. 3E, *Matthew Bender Contract Damages Instructions*]. The giving of such damage instruction is predicated on the assumption that all of the requirements for rescission have been met. The word "cancel" is suggested for "rescind" [see MB 300G.01] and "important" or "serious" is suggested for "material" [see *Black's Law Dictionary* (5th ed. 1979) at p. 880].

For related Judicial Council instructions, see [3][b], *below*.

[3] Comment**[a] Necessity of Injury**

A contract is voidable for mistake only if enforcement would be materially harmful or more onerous to the party seeking avoidance than it would have been had the law or the facts been as believed [*Guthrie v. Times-Mirror Co.* (1975) 51 Cal.App.3d 879, 886, 124 Cal.Rptr. 577, citing Restatement of Contracts § 502]. This is stated to be a necessary corollary to the principle that the mistake, whether of law or fact, must materially affect an essential element of the contract [*Guthrie v. Times-Mirror Co.* (1975) 51 Cal.App.3d 879, 886, 124 Cal.Rptr. 577]. In support of the injury requirement, the court cites cases holding that a party seeking to rescind a contract must show material injury or prejudice although pecuniary loss is not required [*Guthrie v. Times-Mirror Co.* (1975) 51 Cal.App.3d 879, 886, 124 Cal.Rptr. 577; Witkin, California Procedure, vol. 4, Pleading, § 506 (4th ed. 1997)].

Nonetheless, it is questionable whether there really is a separate requirement of injury or, if there is, that it ever presents a jury issue. In a case involving rescission based on fraud, the California Supreme Court reasoned that injury necessarily follows from being fraudulently induced to consent to a contractual obligation to which a party would not otherwise have agreed [*Earl v. Saks & Co.* (1951) 36 Cal.2d 602, 611, 226 P.2d 340]. This would likewise seem inevitable if cause exists to vitiate consent to an agreement for mistake, duress, or undue influence.

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 3, *California Judicial Council Contracts Instructions*]:

CACI No. 330 Affirmative Defense--Unilateral Mistake of Fact

CACI No. 331 Affirmative Defense--Bilateral Mistake

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawDefensesAmbiguity & MistakeGeneral OverviewContracts LawDefensesFraud & MisrepresentationGeneral OverviewContracts LawRemediesRescission & RedhibitionGeneral Overview

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CHAPTER 3G Matthew Bender Rescission of Contract Instructions
PART B. MISTAKE

1-3G California Forms of Jury Instruction MB 300G.29-MB 300G.39

[Reserved for Future Use]

MB 300G.29[Reserved for Future Use]



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CHAPTER 3G Matthew Bender Rescission of Contract Instructions
PART C. FRAUD

1-3G California Forms of Jury Instruction MB 300G.40

MB 300G.40 Affirmative Misrepresentation

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

1. _____ [*Other party*] **made a representation;**
2. **The representation was important to the contract;**
3. **The representation was** _____ **[false or was partly false in an important regard];**
4. _____ [*Other party*] _____ **[believed that the representation was false when the representation was made or made the representation without any reasonable ground for believing it to be true];**
5. _____ [*Other party*] **made the representation for the purpose of causing**
_____ **[rescinding party] to enter into the contract;**
6. _____ [*Rescinding party*] **was not aware that the representation was false and would not have otherwise consented to the contract.**

[*IF APPLICABLE (See Use of Instruction)*]

The misrepresentation may be of a fact, an opinion, or a statement about the law.

Authorities: *Civ. Code* §§ 1567, 1568, 1572; *Wood v. Kalbaugh* (1974) 39 Cal.App.3d 926, 114 Cal.Rptr. 673 .

[2] Use of Instruction

This instruction applies to all representations of fact. The final paragraph applies when opinions or representations of law by a fiduciary are involved. For an instruction on when a statement of law or opinion by a non-fiduciary may be treated as a statement of fact, see *MB 300G.41*. If a misleading half-truth is asserted, follow this instruction with the instruction on half-truths and concealment in *MB 300G.42* and *MB 300G.43*. The use of the word "important" is suggested instead of "material" [see *Black's Law Dictionary* (5th ed. 1979) at p. 880]. The requirement of materiality is further explained by the instruction in *MB 300G.49*. Causation is explained in *MB 300G.09*.

For related Judicial Council instructions, see [3][b], *below*.

LexisNexis Matthew Bender Expert Practice Tip--Use Instruction as Checklist in Closing: This instruction contains the basic elements of a claim for fraud in the inducement. The instruction provides a convenient checklist to go over in closing argument, preferably with the use of graphic aids to highlight the evidence applicable to each element. And, go over each element carefully so that the elements do not blur. *By Ronald Oster and Rex Heeseman*

[3] Comment

[a] Affirmative Misrepresentation

The most obvious type of fraud is the act of inducing a party to enter into a contract by the intentional misrepresentation that something is true which is not true by a person who does not believe it to be true [*Civ. Code* § 1572]. Fraud also includes the unwarranted assertion as true of something that is not true even though the person making the representation believes it to be true [*Civ. Code* § 1572]. A misrepresentation justifies rescission only if the misrepresentation is material [*Wood v. Kalbaugh* (1974) 39 Cal.App.3d 926, 930, 114 Cal.Rptr. 673].

If a confidential relationship exists, a misrepresentation of law is treated the same as a misrepresentation of fact [*Bank of America v. Sandez* (1934) 3 Cal.App.2d 238, 242-243, 38 P.2d 787]. The same is true of representations of opinion by fiduciaries. Outside a fiduciary relationship, misrepresentations of law are treated generally in the same way as misrepresentations of factual opinion [Witkin, Summary of California Law, vol. 5, *Torts*, § 784 (10th ed. 2005); see *MB 300G.41*]. Mixed misrepresentations of fact and law are treated as misrepresentations of fact [*Bobak v. Mackey* (1951) 107 Cal.App.2d 55, 57, 236 P.2d 626]. Rescission is available for unilateral mistake of law when caused by the fault of the other party [*Civ. Code* § 1578; see *MB 300G.23*].

Consent is only deemed to have been obtained by fraud when it would not have been given absent the fraud [*Civ. Code* § 1568; see *MB 300G.09*].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 19, *California Judicial Council Fraud or Deceit Instructions*]:

CACI No. 1900 Intentional Misrepresentation

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawDefensesFraud & MisrepresentationGeneral OverviewContracts LawDefensesFraud & MisrepresentationConstructive FraudContracts LawDefensesFraud & MisrepresentationIntentional FraudContracts

LawDefensesFraud & MisrepresentationMaterial MisrepresentationContracts LawRemediesRescission &
RedhibitionGeneral Overview

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CHAPTER 3G Matthew Bender Rescission of Contract Instructions
PART C. FRAUD

1-3G California Forms of Jury Instruction MB 300G.41

MB 300G.41 Statement of Opinion or Statement About the Law

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

A _____ [statement of opinion *or* statement about the law] is not a representation of fact unless the _____ [opinion *or* statement] was stated in such a way that the other party reasonably relied on it as a fact.

[IF APPLICABLE (See Use of Instruction)]

It is reasonable to rely on another person's _____ [statement of opinion *or* statement about the law] as a fact if that other person holds himself or herself out as basing such _____ [opinion *or* statement] on superior knowledge or special information that the person relying on the opinion does not possess.

Authorities: *Harazim v. Lynam* (1968) 267 Cal.App.2d 127, 131, 72 Cal.Rptr. 670 ; *Sime v. Malouf* (1949) 95 Cal.App.2d 82, 101, 212 P.2d 946 .

[2] Use of Instruction

This instruction should be used in any case when no confidential relationship exists between the parties and there is a dispute as to whether a statement of opinion or a statement about the law was represented as a fact. The optional paragraph applies only when there is evidence that the defendant was stating an opinion based on expert knowledge or special information. When a confidential relationship has been established, reliance on an opinion is automatically considered justified [see MB 300G.40[3]].

For related Judicial Council instructions, see [3][b], *below*.

LexisNexis Matthew Bender Expert Practice Tip--Give Substance to This Instruction in Closing:

It is sometimes difficult to differentiate between a "fact" and an "opinion," and between an "opinion" and a "statement about the law." And, this a general instruction that provides little guidance to the jury as to what constitutes reasonable reliance on a statement of opinion. Thus, in closing argument counsel will have to appeal to the jury's common sense and provide concrete examples to give substance to this instruction. *By Rex Heeseman and Ronald Oster*

[3] Comment

[a] Statement of Opinion or Fact

Absent a confidential relationship, it is a question of fact whether a statement is an opinion or a representation of fact [*Sime v. Malouf* (1949) 95 Cal.App.2d 82, 101, 212 P.2d 946]. The same rule applies to misrepresentations of law by one who has superior knowledge [*Bank of America v. Sandez* (1934) 3 Cal.App.2d 238, 242-243, 38 P.2d 787]. A false affirmation of opinion is actionable when the one making it has superior knowledge or special information concerning the subject matter of the representation [*Harazim v. Lynam* (1968) 267 Cal.App.2d 127, 131, 72 Cal.Rptr. 670].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 19, *California Judicial Council Fraud or Deceit Instructions*]:

CACI No. 1904 Opinions as Statements of Fact

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawDefensesFraud & MisrepresentationGeneral OverviewContracts LawDefensesFraud & MisrepresentationMaterial MisrepresentationContracts LawRemediesRescission & RedhibitionGeneral Overview

John F. Wells and Lise A. Pearlman were the original authors of this chapter. It has since been updated to reflect changes in the law, additional case citations and practice pointers by other lawyers as well as revisions including cross-references to the official CACI instructions.



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CHAPTER 3G Matthew Bender Rescission of Contract Instructions
PART C. FRAUD

1-3G California Forms of Jury Instruction MB 300G.42

MB 300G.42 Concealment**[1] Instruction**

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

1. _____ [*Other party*] **failed to disclose an important fact that he or she knew or believed to be true;**
2. _____ [*Other party*] **was under a duty to disclose the fact to** _____ [*rescinding party*];
3. _____ [*Other party*] **acted with the intent to cause** _____ [*rescinding party*] **to enter into the contract;**
4. _____ [*Rescinding party*] **was unaware of the fact and would not have otherwise entered into the contract.**

Authorities: *Civ. Code § 1572; Goodman v. Kennedy (1976) 18 Cal.3d 335, 346-348, 134 Cal.Rptr. 375, 556 P.2d 737*

[2] Use of Instruction

This instruction should be used when there is evidence of a duty to disclose and concealment. Instructions on circumstances giving rise to a duty to disclose are set forth in MB 300G.43-MB 300G.46 for nonfiduciaries. A fiduciary's duty of disclosure is set forth in Part D. Required disclosures in real estate sales transactions are discussed in Ch. 75A, *Matthew Bender Real Property Sales Instructions*.

For related Judicial Council instructions, see [3][b], *below*.

LexisNexis Matthew Bender Expert Practice Tip--Arguing Concealment: The key issue in concealment cases usually turns on the presence or absence of a legal "duty" to disclose. This issue is frequently addressed in advance of trial by way of a motion for summary judgment. However, if it needs to be addressed in closing, use a checklist for each element and explain each one carefully. *By Ronald Oster and Rex Heeseman*

[3] Comment

[a] Concealment

Fraud includes the suppression of that which is true, by one having knowledge or belief of the fact who is acting with the intent to induce the other party to enter into the contract [Civ. Code § 1572]. Proof of causation is required [Civ. Code § 1568]. However, nondisclosure is not actionable unless there is a duty to disclose [*Goodman v. Kennedy* (1976) 18 Cal.3d 335, 347, 134 Cal.Rptr. 375, 556 P.2d 737]. Absent a fiduciary relationship, a duty to disclose only exists in the following three situations [*Goodman v. Kennedy* (1976) 18 Cal.3d 335, 347, 134 Cal.Rptr. 375, 556 P.2d 737 ; *Warner Constr. Corp. v. City of Los Angeles* (1970) 2 Cal.3d 285, 294, 85 Cal.Rptr. 444, 466 P.2d 996 ; see MB 300G.43 -MB 300G.46]:

- When a party has made representations that were likely to mislead for want of the disclosures;
- When a party has actively concealed undisclosed matters; or
- When a party has sole knowledge or access to material facts and knows that these facts are not known to or reasonably discoverable by the other party.

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 19, *California Judicial Council Fraud or Deceit Instructions*]:

CACI No. 1901 Concealment

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawContract InterpretationFiduciary ResponsibilitiesContracts LawDefensesFraud & MisrepresentationGeneral OverviewContracts LawRemediesRescission & RedhibitionGeneral OverviewReal Property LawPurchase & SaleContracts of SaleEnforceabilityFraud & MisrepresentationReal Property LawPurchase & SaleRemediesDuty to DiscloseReal Property LawPurchase & SaleRemediesRescission & Restitution

John F. Wells and Lise A. Pearlman were the original authors of this chapter. It has since been updated to reflect changes in the law, additional case citations and practice pointers by other lawyers as well as revisions including cross-references to the official CACI instructions.



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CHAPTER 3G Matthew Bender Rescission of Contract Instructions
PART C. FRAUD

1-3G California Forms of Jury Instruction MB 300G.43

MB 300G.43 Duty to Disclose--Sole Access

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

A duty to disclose important facts arises when one party to a contract has sole knowledge or access to important facts and knows that these facts are not known to or reasonably discoverable by the other party.

Authorities: *Goodman v. Kennedy* (1976) 18 Cal.3d 335, 346-347, 134 Cal.Rptr. 375, 556 P.2d 737 ; *Warner Constr. Corp. v. City of Los Angeles* (1970) 2 Cal.3d 285, 294, 85 Cal.Rptr. 444, 466 P.2d 996 .

[2] Use of Instruction

This instruction should be used with the instruction in MB 300G.42 when there is evidence that one party concealed material facts of which that party had sole knowledge or access. If a fiduciary relationship existed, this instruction is unnecessary. In such a case, use the instruction in MB 300G.61. If there is evidence of misleading half-truths and concealment of other facts, see the instruction in MB 300G.44. If there is evidence of active concealment, use the instruction in MB 300G.45.

For related Judicial Council instructions, see [3][b], *below*.

LexisNexis Matthew Bender Expert Practice Tip--Arguing Duty to Disclose: Some lawsuits will turn on whether or not there was a "duty to disclose." The critical element in this instruction is the requirement of "sole knowledge or access" to important facts. If the other party could discover the facts, the instruction does not apply. Counsel can argue that the more important the facts are, the greater the duty to investigate. *By Ronald Oster and Rex Heeseman*

[3] Comment

[a] Duty to Disclose

One situation in which a duty to disclose exists is when a party has sole knowledge or access to material facts and knows that these facts are not known to or reasonably discoverable by the other party [*Goodman v. Kennedy* (1976) 18 Cal.3d 335, 347, 134 Cal.Rptr. 375, 556 P.2d 737 ; *Warner Constr. Corp. v. City of Los Angeles* (1970) 2 Cal.3d 285, 294, 85 Cal.Rptr. 444, 466 P.2d 996].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 19, *California Judicial Council Fraud or Deceit Instructions*]:

CACI No. 1901 Concealment

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawContract InterpretationFiduciary ResponsibilitiesContracts LawDefensesFraud & MisrepresentationGeneral OverviewContracts LawRemediesRescission & RedhibitionGeneral Overview

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CHAPTER 3G Matthew Bender Rescission of Contract Instructions
PART C. FRAUD

1-3G California Forms of Jury Instruction MB 300G.44

MB 300G.44 Duty to Disclose to Correct Misleading Statements

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Normally, each party to a contract must look out for his or her own interest. This means that each party to a contract has a right to remain silent about facts within his or her knowledge that might affect the other party's decision to enter into the contract. However, once a party makes a representation to the other party, an obligation arises not to mislead. A party who makes a representation that is misleading because of other important facts known to that party has a duty to disclose these other facts.

Authorities: *Goodman v. Kennedy* (1976) 18 Cal.3d 335, 346-347, 134 Cal.Rptr. 375, 556 P.2d 737 ; *Mesmer v. White* (1953) 121 Cal.App.2d 665, 670-671, 264 P.2d 60 .

[2] Use of Instruction

This instruction should be used together with the instruction in MB 300G.42 when misleading statements are made.

For related Judicial Council instructions, see [3][b], *below*.

LexisNexis Matthew Bender Expert Practice Tip--Misleading Statements: This instruction introduces two important elements. First, a party has the right to remain silent about his or her knowledge of important facts (assuming the facts are otherwise reasonably discoverable [see MB 300G.43]). Second, once a party speaks, there is a duty to speak truthfully. In other words, half-truths and incomplete statements are treated the same as affirmative misrepresentations. *By Ronald Oster*

[3] Comment

[a] Fraudulent Suppression

This instruction is predicated on the knowledge or belief of the concealed facts since knowledge is an essential element of fraudulent suppression [see *Civ. Code* § 1572]. Generally, absent a fiduciary relationship, a party has no duty to disclose facts known to him or her but not known to the other party [*Mesmer v. White* (1953) 121 Cal.App.2d 665, 670, 264 P.2d 60]. However, a duty to disclose arises when a party has made representations that were likely to mislead for want of further disclosures [*Goodman v. Kennedy* (1976) 18 Cal.3d 335, 346-347, 134 Cal.Rptr. 375, 556 P.2d 737 ; see *Architects & Contractors Estimating Service, Inc. v. Smith* (1985) 164 Cal.App.3d 1001, 1008, 211 Cal.Rptr. 45]. For other situations when a duty to disclose arises, see MB 300G.43 and MB 300G.45.

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 19, *California Judicial Council Fraud or Deceit Instructions*]:

CACI No. 1901 Concealment

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawDefensesFraud & MisrepresentationGeneral OverviewContracts LawDefensesFraud & MisrepresentationMaterial MisrepresentationContracts LawRemediesRescission & RedhibitionGeneral Overview

John F. Wells and Lise A. Pearlman were the original authors of this chapter. It has since been updated to reflect changes in the law, additional case citations and practice pointers by other lawyers as well as revisions including cross-references to the official CACI instructions.



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CHAPTER 3G Matthew Bender Rescission of Contract Instructions
PART C. FRAUD

1-3G California Forms of Jury Instruction MB 300G.45

MB 300G.45 Active Prevention of Investigation

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Normally, a party to a contract has a right to remain silent about facts within his or her knowledge that might affect the other party's decision to enter into a contract. However, a party who actively prevents investigation and discovery of important facts by the other party is under a duty to disclose those facts.

Authority: Goodman v. Kennedy (1976) 18 Cal.3d 335, 346-348, 134 Cal.Rptr. 375, 556 P.2d 737 .

[2] Use of Instruction

This instruction should be used with the instruction in MB 300G.42 when active prevention of discovery is alleged.

LexisNexis Matthew Bender Expert Practice Tip--Explain Basis of Law: Most jurors will have no difficulty with this instruction. In addition to the instruction, counsel can argue that the legal principle in question is based on common sense and fundamental fairness. However, it might be difficult to prove "actively presents." *By Ronald Oster and Rex Heeseman*

[3] Comment

Silence is not enough to constitute fraud if there is no duty to disclose. However, active prevention of discovery of material facts by the other party gives rise to a duty of disclosure; the failure to meet this duty is the basis for an action for fraud [*Goodman v. Kennedy (1976) 18 Cal.3d 335, 347, 134 Cal.Rptr. 375, 556 P.2d 737*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawDefensesFraud & MisrepresentationGeneral OverviewContracts LawDefensesFraud & MisrepresentationConstructive FraudContracts LawDefensesFraud & MisrepresentationIntentional FraudContracts LawRemediesRescission & RedhibitionGeneral Overview

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CHAPTER 3G Matthew Bender Rescission of Contract Instructions
PART C. FRAUD

1-3G California Forms of Jury Instruction MB 300G.46

MB 300G.46 Effect of Independent Investigation

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

A party may not cancel a contract based on the fraud of the other party if, before entering into the contract, the party claiming to have been defrauded made an independent investigation of the subject matter of the alleged false representation and decided to enter into the contract as the result of the independent investigation.

[IF APPLICABLE (See Use of Instruction)]

However, an independent investigation makes no difference if one of the following is shown:

- 1. The fraud was not readily apparent on independent investigation;**
- 2. The fraud was based on claimed superior knowledge; or**
- 3. The inspecting party was not competent to judge the facts without expert assistance, which [he/she/it] did not have.**

Authorities: *Bagdasarian v. Gragnon* (1948) 31 Cal.2d 744, 748, 192 P.2d 935 ; *Curran v. Heslop* (1953) 115 Cal.App.2d 476, 482, 252 P.2d 378 .

[2] Use of Instruction

This instruction should be used by the party against whom rescission is sought, who will want to use the instruction

when an independent investigation was undertaken by the party seeking to rescind. The other party would then request that the applicable exceptions be included in the instruction.

LexisNexis Matthew Bender Expert Practice Tip--Using Optional Part of Instruction: The optional part of this instruction applies to situations where there is a clear disparity in resources between the contracting parties (e.g., an individual versus a corporation). In addition, because only one of the three exceptions needs to be shown, it may be important to emphasize the word "or" in this list. *By Ronald Oster and Rex Heeseman*

[3] Comment

An independent investigation precludes reliance on representations unless the falsity of the statement is not apparent from an inspection, the person making the representations has superior knowledge, or the party relying on the representations is not competent to judge the facts without expert assistance [*Bagdasarian v. Gragnon* (1948) 31 Cal.2d 744, 748, 192 P.2d 935 ; *Curran v. Heslop* (1953) 115 Cal.App.2d 476, 482, 252 P.2d 378].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawDefensesFraud & MisrepresentationGeneral OverviewContracts LawDefensesFraud & MisrepresentationConstructive FraudContracts LawDefensesFraud & MisrepresentationIntentional FraudContracts LawRemediesRescission & RedhibitionGeneral Overview

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CHAPTER 3G Matthew Bender Rescission of Contract Instructions
PART C. FRAUD

1-3G California Forms of Jury Instruction MB 300G.47

MB 300G.47 Effect of Defrauded Party's Failure to Investigate

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

If the representation that _____ [*rescinding party*] claims _____ [*other party*] made was such that under the circumstances it was absurd for _____ [*rescinding party*] to accept it as true without checking further, then _____ [*rescinding party*] may not cancel the contract based on a claim of fraud. In deciding whether it was absurd for _____ [*rescinding party*] not to have checked out the facts independently, you must look at the situation from _____ [*rescinding party*]'s point of view in light of his or her experience, knowledge, and intelligence. You should not decide this issue based on what you or someone else would have done.

Authorities: *Van Meter v. Bent Construction Co.* (1956) 46 Cal.2d 588, 593-594, 297 P.2d 644 ; *Seeger v. Odell* (1941) 18 Cal.2d 409, 415, 115 P.2d 977 .

[2] Use of Instruction

This instruction should be used when there is an issue as to whether a party seeking to rescind on the basis of fraud had a duty to investigate the truth. This issue should only arise in a claim based on negligent misrepresentation [see [3][a], *below*]. Courts have described the test to be applied as whether it was "manifestly unreasonable," "preposterous," or "irrational" for the plaintiff to rely on the defendant's misrepresentation [see [3][a], *below*]. The word "absurd" is suggested as a more common synonym for "preposterous" or "irrational."

For related Judicial Council instructions, see [3][b], *below*.

LexisNexis Matthew Bender Expert Practice Tip--Relying on the "Absurd": This instruction provides a common sense exception for "absurd" situations when reliance is unreasonable without an

investigation. Note, however, that the reliance is based on the subjective "experience, knowledge, and intelligence" of the party in question. Moreover, different jurors will have different views of what is "absurd." *By Ronald Oster and Rex Heeseman*

[3] Comment

[a] Failure to Investigate

The general rule is that the plaintiff's negligence in accepting the defendant's statements without making an independent inquiry or investigation is not a defense to intentional fraud [*Seeger v. Odell* (1941) 18 Cal.2d 409, 415-416, 115 P.2d 977]. Even in cases involving negligent misrepresentation, the fact that an investigation would have revealed the falsity of the misrepresentation does not bar recovery unless the failure to investigate was "manifestly unreasonable" in light of the rescinding party's own intelligence and information [*Seeger v. Odell* (1941) 18 Cal.2d 409, 415-416, 115 P.2d 977 ; *Winn v. McCulloch Corp.* (1976) 60 Cal.App.3d 663, 671, 131 Cal.Rptr. 597]. "Manifestly unreasonable" means that the plaintiff "may not put faith in representations which are preposterous, or which are shown by facts within his observation to be so patently and obviously false that he must have closed his eyes to avoid discovery of the truth" [*Seeger v. Odell* (1941) 18 Cal.2d 409, 415, 115 P.2d 977]. In a subsequent case, the Supreme Court explained that a defendant in a fraud action may not assert that the plaintiff's reliance on any misrepresentations was negligent unless the plaintiff's conduct, in light of his intelligence and information, is preposterous or irrational [*Van Meter v. Bent Construction Co.* (1956) 46 Cal.2d 588, 593-594, 297 P.2d 644]. The Court's rejection of simple negligence of the plaintiff to defeat a claim for rescission for fraud was predicated on a comparison of mistaken plaintiffs with defrauded plaintiffs. As discussed in MB 300G.26[3], ordinary negligence of the plaintiff is not a defense to rescission for mistake; gross negligence is required [*Van Meter v. Bent Construction Co.* (1956) 46 Cal.2d 588, 593-594, 297 P.2d 644]. Since a mistaken party is only charged with neglect of a legal duty if his or her conduct amounts to an extreme departure from ordinary conduct, there is even more reason for relieving a plaintiff from his or her own negligent reliance on misrepresentations of the defendant unless the plaintiff's conduct is preposterous or irrational [*Van Meter v. Bent Construction Co.* (1956) 46 Cal.2d 588, 593-594, 297 P.2d 644 ; *Hartong v. Partake, Inc.* (1968) 266 Cal.App.2d 942, 965, 72 Cal.Rptr. 722].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 19, *California Judicial Council Fraud or Deceit Instructions*]:

CACI No. 1907 Reliance

CACI No. 1908 Reasonable Reliance

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawDefensesFraud & MisrepresentationConstructive FraudContracts LawDefensesFraud & MisrepresentationIntentional FraudContracts LawDefensesFraud & MisrepresentationMaterial MisrepresentationContracts LawRemediesRescission & RedhibitionGeneral OverviewTortsBusiness TortsFraud & MisrepresentationNegligent MisrepresentationGeneral OverviewTortsBusiness TortsFraud & MisrepresentationNondisclosureGeneral Overview

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CHAPTER 3G Matthew Bender Rescission of Contract Instructions
PART C. FRAUD

1-3G California Forms of Jury Instruction MB 300G.48

MB 300G.48 Promise Without Intent to Perform

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

1. _____ [*Other party*] **made a promise about a matter important to the contract and, at the time the promise was made, did not intend to perform it;**
2. _____ [*Other party*] **made the promise with an intent to cause** _____ [*rescinding party*] **to rely on it; and**
3. _____ [*Rescinding party*] **was unaware of** _____ [*other party's*] **intention not to perform the promise and entered into the contract based on the promise.**

Authority: *Civ. Code § 1572.*

[2] Use of Instruction

This instruction should be used when promissory fraud is asserted as the basis for rescission.

For related Judicial Council instructions, see [3][b], *below*.

LexisNexis Matthew Bender Expert Practice Tip--Proving Promise Without Intent to Perform

Can Be Difficult: A promise made without intent to perform is simply another species of fraud. Without an admission by the other party (i.e. the smoking gun document), these can be difficult cases to prove. *By Ronald Oster*

[3] Comment

[a] Promise Without Intent to Perform

Fraud includes a promise made without any intention of performing it [*Civ. Code* § 1572]. Justifiable reliance is not required, since this type of fraud by definition is intentional [*see MB 300G.47[3][a]*].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [*see Ch. 19, California Judicial Council Fraud or Deceit Instructions*]:

CACI No. 1902 False Promise

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts Law Defenses Fraud & Misrepresentation Intentional Fraud Contracts Law Remedies Rescission & Redhibition General Overview Torts Business Torts Fraud & Misrepresentation Actual Fraud General Overview

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CHAPTER 3G Matthew Bender Rescission of Contract Instructions
PART C. FRAUD

1-3G California Forms of Jury Instruction MB 300G.49

MB 300G.49 Materiality of Misrepresentation

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

A fact is important to the contract if its existence or nonexistence would be likely to affect the conduct of a reasonable person in deciding to enter into the contract.

Authority: *Wood v. Kalbaugh* (1974) 39 Cal.App.3d 926, 930, 114 Cal.Rptr. 673 .

[2] Use of Instruction

This instruction should be used as a follow-up to the instruction in MB 300G.40 when there is an issue as to whether a misrepresented fact was material to the contract.

For related Judicial Council instructions, see [3][b], *below*.

LexisNexis Matthew Bender Expert Practice Tip--Objective Test of Materiality: This instruction provides an objective test of materiality based on the reasonable person standard. Note that the phrase "likely to affect" will have different meanings to different jurors. *By Ronald Oster and Rex Heeseman*

[3] Comment

[a] When Misrepresented Fact Is Material

A misrepresented fact is material if it would be likely to affect the conduct of a reasonable person with reference to the transaction [*Wood v. Kalbaugh* (1974) 39 Cal.App.3d 926, 114 Cal.Rptr. 673].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 19, *California Judicial Council Fraud or Deceit Instructions*]:

CACI No. 1905 Definition of Important Fact/Promise

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawDefensesFraud & MisrepresentationMaterial MisrepresentationContracts LawRemediesRescission & RedhibitionGeneral Overview

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CHAPTER 3G Matthew Bender Rescission of Contract Instructions
PART C. FRAUD

1-3G California Forms of Jury Instruction MB 300G.50-MB 300G.59

[Reserved for Future Use]

MB 300G.50[Reserved for Future Use]



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CHAPTER 3G Matthew Bender Rescission of Contract Instructions
PART D. CONSTRUCTIVE FRAUD AND UNDUE INFLUENCE

1-3G California Forms of Jury Instruction MB 300G.60

MB 300G.60 Constructive Fraud

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

When a relationship of trust and confidence exists between two persons, it imposes a special duty on one person not to gain an unfair advantage over the other person. Plaintiff has the burden of proving both of the following:

- 1. That a confidential relationship existed between the Plaintiff and Defendant; and**
- 2. That the contract gave Defendant an advantage over Plaintiff.**

Once Plaintiff proves these two things, you must find that Plaintiff is entitled to cancel the contract for unfairness unless Defendant proves by a preponderance of the evidence that the contract is fair and that Defendant acted in good faith in all regards.

[IF APPLICABLE (See Use of Instruction)]

A contract that gives Defendant an advantage over Plaintiff is not fair if the contract resulted from Defendant's breach of [his/her/its] duty of full disclosure to Plaintiff.

Authorities: Civ. Code § 1573; *Main v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.* (1977) 67 Cal.App.3d 19, 32, 136 Cal.Rptr. 378 ; *Smith v. Zak* (1971) 20 Cal.App.3d 785, 793, 98 Cal.Rptr. 242 ; *Boyd v. Bevilacqua* (1966) 247 Cal.App.2d 272, 290, 55 Cal.Rptr. 610 .

[2] Use of Instruction

This instruction should be used when rescission due to constructive fraud is alleged. It assumes that plaintiff is the rescinding party. If rescission for constructive fraud is asserted as a defense, the party designations should be reversed. The instruction is worded to reflect the presumption that applies on proof of the confidential relationship and an advantage. It follows the approach suggested by Jefferson for instructing on presumptions affecting the burden of proof [see Jefferson, California Evidence Benchbook (3d ed., Cal. C.E.B. 1997), vol. 2, §§ 46.2, 46.8]. If the advantage was gained by someone claiming under the breaching fiduciary or if the prejudice resulted to someone claiming under the person of whom advantage was taken, the instruction should be modified accordingly. If there is a question of fact about the existence of the confidential relationship, MB 300G.61 should be given first. If a confidential relationship is established as a matter of law, the jury should be so instructed and this instruction modified accordingly. The instruction in MB 300G.62 should be used when the jury must decide issues of fact that would establish a confidential relationship by virtue of the existence of a fiduciary relationship. The optional paragraph is suggested if there is a question of fact regarding the nondisclosure of material facts by the fiduciary. This instruction should then be followed by the instruction in MB 300G.64 defining the duty of full disclosure.

A preponderance of the evidence instruction must be used with this instruction [see Ch. 2, *California Judicial Council Evidence Instructions*, CACI No. 200 ("Obligation to Prove--More Likely True Than Not True")].

LexisNexis Matthew Bender Expert Practice Tip--Use Care With Terms: This instruction contains general language with little specific guidance to the jury. The definition of a "confidential relationship" is critical but largely undefined [see MB 300G.61]. The definition of an "advantage" is likewise very open-ended [see MB 300G.63]. There is no definition of "unfairness." Counsel will have to appeal to the common sense of the jury. So, be thorough in marshaling your facts to support your points. *By Ronald Oster and Rex Heeseman*

[3] Comment

Constructive fraud arises from a breach of duty by a person in a confidential or fiduciary relationship to another person that gains an advantage to the person breaching the duty [*Gold v. Los Angeles Democratic League* (1975) 49 Cal.App.3d 365, 373, 122 Cal.Rptr. 732 ; Civ. Code § 1573]. The Civil Code requires proof of causation in rescission cases based on constructive fraud [Civ. Code §§ 1568, 1571]. Once it is determined that a fiduciary relationship exists between the parties and there is a showing of an advantage to one of them in a joint transaction, the transaction is presumptively fraudulent and the burden shifts to the party gaining the advantage to show good faith and fairness in all regards [*Solon v. Lichtenstein* (1952) 39 Cal.2d 75, 82, 244 P.2d 907 ; *Ball v. Posey* (1986) 176 Cal.App.3d 1209, 1214, 222 Cal.Rptr. 746 ; *Smith v. Zak* (1971) 20 Cal.App.3d 785, 793, 98 Cal.Rptr. 242 ; *Boyd v. Bevilacqua* (1966) 247 Cal.App.2d 272, 290, 55 Cal.Rptr. 610 ; see Evid. Code § 605; see also *Barrett v. Bank of America* (1986) 183 Cal.App.3d 1362, 1368-1369, 229 Cal.Rptr. 16].

It thus appears that causation is presumed from the existence of the confidential relationship and the advantage (i.e., it is assumed that the confidential relationship was used to gain an advantage). The burden then shifts to the defendant to show good faith and fairness (i.e., no misuse of the confidential relationship to cause the other party to enter into an unfair contract).

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawContract InterpretationFiduciary ResponsibilitiesContracts LawDefensesFraud & MisrepresentationConstructive FraudContracts LawRemediesRescission & RedhibitionGeneral OverviewTortsBusiness TortsFraud & MisrepresentationConstructive FraudElementsTortsBusiness TortsFraud & MisrepresentationNondisclosureElements

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CHAPTER 3G Matthew Bender Rescission of Contract Instructions
PART D. CONSTRUCTIVE FRAUD AND UNDUE INFLUENCE

1-3G California Forms of Jury Instruction MB 300G.61

MB 300G.61 Existence of Confidential Relationship

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

A confidential relationship exists whenever one person places trust and confidence in the integrity and faithfulness of another. It can occur in the context of a family relationship such as husband and wife or brother and sister. It can also occur in a formal business relationship such as attorney and client.

[IF APPLICABLE (See Use of Instruction)]

The mere fact that a label can be put on the relationship does not by itself establish that the persons in such relationship do place trust and confidence in each other.

[IF APPLICABLE (See Use of Instruction)]

These are examples, not limitations, of the situations in which a confidential relationship may arise. It may also arise between two persons who do not have any formal relationship or family ties. In deciding whether a confidential relationship existed, you may take into account the following factors:

- 1. The length of the parties' relationship;**
- 2. The closeness of the relationship; and**

3. The amount of reliance placed by _____ [party alleging confidential relationship] in _____ [other party] over the course of their relationship.

Authorities: *O'Neil v. Spillane* (1975) 45 Cal.App.3d 147, 153, 119 Cal.Rptr. 245 ; *Faulkner v. Beatty* (1958) 161 Cal.App.2d 547, 550, 327 P.2d 41 ; *Kloehn v. Prendiville* (1957) 154 Cal.App.2d 156, 160, 316 P.2d 17 .

[2] Use of Instruction

This instruction should be used when a question of fact is presented regarding the existence of a confidential relationship between the parties or persons under whom they claim. The examples can be changed to reflect the fact situation. The first optional paragraph applies when there is a formal or family relationship and there is a question of fact whether trust and confidence really was placed in the integrity and faithfulness of the other. The second optional paragraph applies when there is no formal or family relationship between the parties. The instruction in MB 300G.62 should be used when the jury must decide issues of fact that would establish a confidential relationship by virtue of the existence of a fiduciary relationship. These issues most commonly arise when the cause of action includes allegations of undue influence [see MB 300G.66].

LexisNexis Matthew Bender Expert Practice Tip--Confidential Relationships: If a relationship comes within one of the examples listed in the instruction (e.g., husband/wife or attorney/client), the elements of trust and confidence will usually be obvious. For other relationships, counsel will have to develop facts to show why these relationships should be treated with the same degree of closeness and confidentiality. *By Ronald Oster*

[3] Comment

Close family relationships or formal relationships such as that of attorney and client or trustee and beneficiary are the usual type of relationship that is found to be confidential, but even in these relationships liability is imposed only when actual trust and confidence is shown to exist [*Buchmayer v. Buchmayer* (1945) 68 Cal.App.2d 462, 157 P.2d 9 ; *Steinberger v. Steinberger* (1943) 60 Cal.App.2d 116, 122-123, 140 P.2d 31]. The existence of a formal relationship or family tie is not a prerequisite to the finding of a confidential relationship [see *Steinberger v. Steinberger* (1943) 60 Cal.App.2d 116, 122-123, 140 P.2d 31 (listing numerous relationships qualifying as confidential)]. Each case turns on its own facts [*O'Neil v. Spillane* (1975) 45 Cal.App.3d 147, 153, 119 Cal.Rptr. 245 (holding that a long-time friend was liable for restoration of real property obtained through breach of confidential relationship); see also *Faulkner v. Beatty* (1958) 161 Cal.App.2d 547, 550, 327 P.2d 41 ; *Kloehn v. Prendiville* (1957) 154 Cal.App.2d 156, 160, 316 P.2d 17]. However, the existence of a formal relationship that can be characterized as a fiduciary relationship creates a rebuttable presumption of a confidential relationship [see MB 300G.62[3]].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawContract InterpretationFiduciary ResponsibilitiesContracts LawDefensesFraud & MisrepresentationConstructive FraudContracts LawRemediesRescission & RedhibitionGeneral OverviewTortsBusiness TortsFraud & MisrepresentationConstructive FraudElements

John F. Wells and Lise A. Pearlman were the original authors of this chapter. It has since been updated to reflect changes in the law, additional case citations and practice pointers by other lawyers as well as revisions including cross-references to the official CACI instructions.



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California Forms of Jury Instruction

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CHAPTER 3G Matthew Bender Rescission of Contract Instructions
PART D. CONSTRUCTIVE FRAUD AND UNDUE INFLUENCE

1-3G California Forms of Jury Instruction MB 300G.62

MB 300G.62 Fiduciary Relationship Is Confidential**[1] Instruction**

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

However, there are some relationships--these are sometimes called fiduciary relationships--that are deemed to be confidential relationships because of the position of the persons involved in them. An example of a fiduciary relationship is that of _____ [attorney and client/real estate broker and client/trustee and beneficiary].

[*USE ONE OF THE FOLLOWING (See Use of Instruction)*]

If you find that _____ [*name*] [was/is] _____ [an attorney/a real estate broker/a trustee], you must find that a confidential relationship existed between _____ [*plaintiff*] and _____ [*defendant*].

[*or*]

If you find that _____ [*plaintiff*] and _____ [*defendant*] had _____ [an attorney-client/a real estate broker-client/a trustee-beneficiary] relationship, you must find that they had a confidential relationship.

Authorities: Civ. Code § 2235; Rev. & Tax. Code § 17006; *Sodikoff v. State Bar of California* (1975) 14 Cal.3d 422, 429, 121 Cal.Rptr. 467, 535 P.2d 331 ; *Batson v. Strehlow* (1968) 68 Cal.2d 662, 674-675, 68 Cal.Rptr. 589, 441 P.2d

101 ; *Bradner v. Vasquez* (1954) 43 Cal.2d 147, 151, 272 P.2d 11 ; *Estate of Cover* (1922) 188 Cal. 133, 143, 204 P. 583 ; *Soule v. Hayward* (1850) 1 Cal. 345, 346 ; *Barrett v. Bank of America* (1986) 183 Cal.App.3d 1362, 1369, 229 Cal.Rptr. 16 ; *Ball v. Posey* (1986) 176 Cal.App.3d 1209, 1214, 222 Cal.Rptr. 746 ; *Ford v. Cournale* (1973) 36 Cal.App.3d 172, 180-181, 111 Cal.Rptr. 334 ; *Szekeres v. Reed* (1950) 96 Cal.App.2d 348, 357, 215 P.2d 522 .

[2] Use of Instruction

This instruction should be used in conjunction with the instruction in MB 300G.61 when the confidential relationship in issue is one that would be characterized as a fiduciary relationship. These two instructions will most commonly be used in conjunction with the instruction in MB 300G.66 on undue influence in a confidential relationship.

Choose the proper instruction on factual findings on the existence of the relationship according to the issue in question. The names of other fiduciary relationships may be substituted for the ones listed in the instruction as appropriate.

LexisNexis Matthew Bender Expert Practice Tip--Use Terms Other Than "Fiduciary": California law is arguably not that clear on what is a "fiduciary relationship." In addition, the term "fiduciary" will be unknown or confusing to many jurors (it sounds like something to do with a bank). Counsel should use "confidential relationship" or "special relationship" or other similar terms whenever possible. *By Rex Heeseman and Ronald Oster*

[3] Comment

Confidential and fiduciary relations are synonymous in law and exist whenever one person reposes trust and confidence in another [*Estate of Cover* (1922) 188 Cal. 133, 143, 204 P. 583 ; *Barrett v. Bank of America* (1986) 183 Cal.App.3d 1362, 1369, 229 Cal.Rptr. 16]. The word "fiduciary" is used to denote a person occupying a specific position in which trust and confidence is placed [*Soule v. Hayward* (1850) 1 Cal. 345, 346 ; *see, e.g., Rev. & Tax. Code § 17006* (fiduciary means guardian, trustee, executor, administrator, receiver, conservator for any person, estate, or trust)]. Examples of persons in fiduciary positions are:

- An attorney [*Sodikoff v. State Bar of California* (1975) 14 Cal.3d 422, 429, 121 Cal.Rptr. 467, 535 P.2d 331 ; *Ball v. Posey* (1986) 176 Cal.App.3d 1209, 1214, 222 Cal.Rptr. 746 ; *Szekeres v. Reed* (1950) 96 Cal.App.2d 348, 357, 215 P.2d 522].
- A stockbroker--even before execution of a brokerage agreement, in some cases [*Brown v. Wells Fargo Bank, N.A.* (2008) 168 Cal.App.4th 938, 959-961, 85 Cal.Rptr.3d 817 (in "unique factual circumstances" of this case, defendant "knowingly induced the elderly and increasingly frail couple to rely on it to handle their financial affairs, thus creating a fiduciary relationship between Wells Fargo and the Browns" before brokerage agreement was executed)].
- A real estate broker [*Batson v. Strehlow* (1968) 68 Cal.2d 662, 674-675, 68 Cal.Rptr. 589, 441 P.2d 101 ; *Ford v. Cournale* (1973) 36 Cal.App.3d 172, 180-181, 111 Cal.Rptr. 334].
- A trustee [*Civ. Code § 2235*].

When an individual acting in a fiduciary capacity gains an advantage, a presumption of undue influence arises [*Bradner v. Vasquez* (1954) 43 Cal.2d 147, 151, 272 P.2d 11 ; *Ball v. Posey* (1986) 176 Cal.App.3d 1209, 1214, 222 Cal.Rptr. 746]. Thus, for instance, when a preexisting attorney-client relationship exists at the time of a transaction, a rebuttable presumption of undue influence arises if the attorney benefits from the transaction [*Hicks v. Clayton* (1977) 67 Cal.App.3d 251, 262, 136 Cal.Rptr. 512 ; *Walton v. Broglio* (1975) 52 Cal.App.3d 400, 403, 125 Cal.Rptr. 123 ; *see BGI Associates, LLC v. Wilson* (2003) 113 Cal.App.4th 1217, 1221, 1226-1230, 7 Cal.Rptr.3d 140 (presumption of undue influence under *Prob. Code § 16004* was not rebutted)]. For instructions and discussion on the fiduciary status

and duties of real estate brokers, see Ch. 75A, *Matthew Bender Real Property Sales Instructions*, MB 7500A.30 through MB 7500A.36.

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawContract InterpretationFiduciary ResponsibilitiesContracts LawRemediesRescission & RedhibitionGeneral OverviewReal Property LawBrokersFiduciary Responsibilities

John F. Wells and Lise A. Pearlman were the original authors of this chapter. It has since been updated to reflect changes in the law, additional case citations and practice pointers by other lawyers as well as revisions including cross-references to the official CACI instructions.



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CHAPTER 3G Matthew Bender Rescission of Contract Instructions
PART D. CONSTRUCTIVE FRAUD AND UNDUE INFLUENCE

1-3G California Forms of Jury Instruction MB 300G.63

MB 300G.63 Advantage Defined

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

An advantage is obtained by a person whenever that person's position is improved or he or she obtains a favorable opportunity or otherwise gains, benefits, or profits.

Authorities: *Rader v. Thrasher* (1962) 57 Cal.2d 244, 250, 18 Cal.Rptr. 736, 368 P.2d 360 ; *Main v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.* (1977) 67 Cal.App.3d 19, 31, 136 Cal.Rptr. 378 .

[2] Use of Instruction

This instruction should be used with the instruction in MB 300G.60 to define advantage to a fiduciary. The use of the word "person" is suggested because it is more understandable than "fiduciary" and should not result in any confusion since it follows MB 300G.60 defining persons in a confidential relationship. More specific terms can be substituted such as lawyer and client or husband and wife.

LexisNexis Matthew Bender Expert Practice Tip--Jurors Will Know What Constitutes

"Advantage": This is a very open-ended instruction. Note that the definition of an "advantage" includes a "favorable opportunity" as well as an actual gain or benefit. But most jurors will know what an "advantage" is and is not. *By Ronald Oster and Rex Heeseman*

[3] Comment

When a fiduciary enters into a transaction with a beneficiary whereby the fiduciary's position is improved or he or she obtains a favorable opportunity or otherwise gains, benefits, or profits, it may fairly be said that an advantage has been obtained [*Rader v. Thrasher* (1962) 57 Cal.2d 244, 250, 18 Cal.Rptr. 736, 368 P.2d 360 ; *Main v. Merrill, Lynch,*

Pierce, Fenner & Smith, Inc. (1977) 67 Cal.App.3d 19, 31, 136 Cal.Rptr. 378].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts Law Contract Interpretation Fiduciary Responsibilities

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CHAPTER 3G Matthew Bender Rescission of Contract Instructions
PART D. CONSTRUCTIVE FRAUD AND UNDUE INFLUENCE

1-3G California Forms of Jury Instruction MB 300G.64

MB 300G.64 Full Disclosure Defined**[1] Instruction**

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

A duty of full disclosure existed between _____ [*fiduciary*] and _____ [*beneficiary*] with regard to the _____ [*describe transaction*]. A duty of full disclosure means a duty to reveal everything of importance that a person knows about a transaction before obtaining the other person's consent to the transaction.

Authorities: *Montoya v. McLeod* (1985) 176 Cal.App.3d 57, 64-65, 221 Cal.Rptr. 353 ; *Main v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.* (1977) 67 Cal.App.3d 19, 32, 136 Cal.Rptr. 378 ; *Smith v. Zak* (1971) 20 Cal.App.3d 785, 793, 98 Cal.Rptr. 242 .

[2] Use of Instruction

This instruction should be used when an explanation of the duty of full disclosure is necessary, such as when concealment is alleged [see MB 300G.42, MB 300G.60].

LexisNexis Matthew Bender Expert Practice Tip--Duty of Full Disclosure: One of the key elements of a fiduciary relationship is a legal duty of full disclosure. This instruction sets forth the requirement that "everything of importance" be disclosed. Yet, the word "full" in this context may be challenging for some jurors. By *Ronald Oster and Rex Heeseman*

[3] Comment

A fiduciary has the duty of full and complete disclosure of all material facts [*Montoya v. McLeod* (1985) 176 Cal.App.3d 57, 64-65, 221 Cal.Rptr. 353 ; *Main v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.* (1977) 67 Cal.App.3d

19, 32, 136 Cal.Rptr. 378].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawContract InterpretationFiduciary ResponsibilitiesContracts LawDefensesFraud & MisrepresentationGeneral OverviewTortsBusiness TortsFraud & MisrepresentationNondisclosureGeneral Overview

John F. Wells and Lise A. Pearlman were the original authors of this chapter. It has since been updated to reflect changes in the law, additional case citations and practice pointers by other lawyers as well as revisions including cross-references to the official CACI instructions.



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CHAPTER 3G Matthew Bender Rescission of Contract Instructions
PART D. CONSTRUCTIVE FRAUD AND UNDUE INFLUENCE

1-3G California Forms of Jury Instruction MB 300G.65

MB 300G.65 Constructive Fraud of Agent

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

A principal has a right to rely on the truth of a representation made to [him/her/it] by [his/her/its] agent about the terms of the transaction for which the agent is employed. An agent is charged with the duty of fullest disclosure of all important facts within his or her knowledge that might affect the principal's decision. You should treat any failure of the agent to disclose important facts known to him or her the same as if the agent had affirmatively misrepresented those facts to the principal.

[IF APPLICABLE (See Use of Instruction)]

It does not matter if Plaintiff could have found out the truth by doing [his/her/its] own investigation of the facts. Defendant was under no duty to investigate those facts for [himself/herself/itself].

Authorities: *Batson v. Strehlow* (1968) 68 Cal.2d 662, 674-675, 68 Cal.Rptr. 589, 441 P.2d 101 ; *Montoya v. McLeod* (1985) 176 Cal.App.3d 57, 64-65, 221 Cal.Rptr. 353 ; *Ford v. Cournale* (1973) 36 Cal.App.3d 172, 182, 111 Cal.Rptr. 334 .

[2] Use of Instruction

This instruction should be used when defendant is the principal and alleges the constructive fraud of plaintiff as agent as a ground for rescission of the contract that plaintiff seeks to enforce. If the rescinding party is the plaintiff, the designations should be reversed. The optional paragraph should be used to counteract any inference that the principal could have found out the truth by independent investigation when the principal is under no duty to conduct such an

investigation.

LexisNexis Matthew Bender Expert Practice Tip--Use Care With Terms: Be careful when using subjective words such as "fullest," "important" and "affirmatively." *By Rex Heeseman*

LexisNexis Matthew Bender Expert Practice Tip--Principal Not Required to Investigate Facts: This instruction sets a very high standard for the duty of disclosure by an agent. Note that the principal is not required to investigate the facts even if the investigation would have uncovered the truth. *By Ronald Oster*

[3] Comment

This instruction is a simplified form of the instructions approved by the court of appeal in *Ford v. Cournale* [*Ford v. Cournale* (1973) 36 Cal.App.3d 172, 182 n. 8, 111 Cal.Rptr. 334].

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate Law Agency Relationships Duties & Liabilities Unlawful Acts of Agents Fraud & Misrepresentation Contracts Law Defenses Fraud & Misrepresentation Constructive Fraud Contracts Law Remedies Rescission & Redhibition General Overview Torts Business Torts Fraud & Misrepresentation Constructive Fraud Elements Torts Business Torts Fraud & Misrepresentation Nondisclosure Elements

John F. Wells and Lise A. Pearlman were the original authors of this chapter. It has since been updated to reflect changes in the law, additional case citations and practice pointers by other lawyers as well as revisions including cross-references to the official CACI instructions.



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CHAPTER 3G Matthew Bender Rescission of Contract Instructions
PART D. CONSTRUCTIVE FRAUD AND UNDUE INFLUENCE

1-3G California Forms of Jury Instruction MB 300G.66

MB 300G.66 Undue Influence in Confidential Relationship

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

A _____ [confidential relationship with *or* position of authority over] another person imposes a special duty not to take unfair advantage over that other person. The use of _____ [the confidence placed in a person by another *or* the use of authority over another] for the purpose of obtaining an unfair advantage is improper. To establish the right to cancel the contract, Plaintiff has the burden of proving by a preponderance of the evidence both of the following:

1. That a confidential relationship existed between the parties; and
2. That Defendant caused Plaintiff to enter into a contract that gave Defendant an advantage over Plaintiff.

Once Plaintiff proves these two things, you must find that Plaintiff is entitled to cancel the contract for unfairness unless defendant proves by a preponderance of the evidence that the contract is fair and that Defendant acted in good faith in all regards.

[IF APPLICABLE (See Use of Instruction)]

The fact that Plaintiff did not receive independent advice does not by itself indicate that the contract was unfair.

Authorities: Civ. Code §§ 1567, 1575; *Ball v. Posey* (1986) 176 Cal.App.3d 1209, 1214, 222 Cal.Rptr. 746 ; *O'Neil v. Spillane* (1975) 45 Cal.App.3d 147, 153, 155, 119 Cal.Rptr. 245 ; *Odorizzi v. Bloomfield School Dist.* (1966) 246

Cal.App.2d 123, 131, 54 Cal.Rptr. 533 .

[2] Use of Instruction

This instruction should be used when undue influence of a fiduciary or person in a position of authority over another is alleged. If the breach of fiduciary duty is due to lack of complete disclosure, use the instruction for constructive fraud in MB 300G.60. The instruction is worded to reflect the presumption that applies on proof of the confidential relationship and an advantage. Confidential relationship is defined in MB 300G.61, fiduciary relationship as a confidential relationship is *covered in MB 300G.62*, and advantage is defined in MB 300G.63. This instruction follows the approach suggested by Jefferson for instructing on presumptions affecting the burden of proof [*see* Jefferson, California Evidence Benchbook (3d ed., Cal. C.E.B. 1997), vol. 2, §§ 46.2, 46.8]. If the existence of a confidential relationship is disputed, use MB 300G.61, and if a fiduciary relationship is in issue, use MB 300G.62 followed by this instruction and MB 300G.67, depending on the determination of the confidential relationship issue.

A preponderance of the evidence instruction must be used with this instruction [*see* Ch. 2, *California Judicial Council Evidence Instructions, CACI No. 200* ("Obligation to Prove--More Likely True than Not True")].

For related Judicial Council instructions, see [3][c], *below*.

LexisNexis Matthew Bender Expert Practice Tip--May Need to Elaborate on Basis of Unfairness:

This instruction does not define the term "unfair advantage." Some situations of "unfairness" will be obvious. In other situations, counsel will have to introduce testimony (i.e. custom and practice, industry standards, similar contracts) to show that the transaction should be canceled. That is particularly true as to "special duty" and "unfairness." *By Ronald Oster and Rex Heeseman*

[3] Comment

[a] Definition of Undue Influence

Apparent consent is not real or free when obtained by undue influence [*Civ. Code § 1567*]. Rescission is therefore available for undue influence. Undue influence has been characterized as a species of constructive fraud [*O'Neil v. Spillane* (1975) 45 *Cal.App.3d* 147, 159, 119 *Cal.Rptr.* 245]. However, unlike the classic constructive fraud situation, it does not require any misrepresentations or concealment [*Odorizzi v. Bloomfield School Dist.* (1966) 246 *Cal.App.2d* 123, 130, 54 *Cal.Rptr.* 533]. Undue influence consists of any of the following [*Civ. Code § 1575*]:

- The use, by one in whom a confidence is reposed by another or who holds a real or apparent authority over another, of such confidence or authority for the purpose of obtaining an unfair advantage;
- Taking an unfair advantage of another's weakness of mind; or
- Taking a grossly oppressive and unfair advantage of another's necessities or distress.

Examples of cases involving undue influence by persons in a position of authority over others, as opposed to fiduciaries, include a police officer's entering into a real estate contract with a prisoner [*Grimes v. Allen* (1949) 93 *Cal.App.2d* 653, 209 *P.2d* 651] and a school teacher's resignation to a school board [*Odorizzi v. Bloomfield School Dist.* (1966) 246 *Cal.App.2d* 123, 54 *Cal.Rptr.* 533 ; *cf. Robison v. City of Manteca* (2000) 78 *Cal.App.4th* 452, 457-458, 92 *Cal.Rptr.2d* 748 (employee's allegations that he was "coerced" by employee-organization representative into signing substance abuse recovery agreement were inadequate to establish undue influence)].

[b] Presumption

Undue influence is persuasion that tends to be coercive in nature, persuasion that overcomes the will without convincing

the judgment [*Odorizzi v. Bloomfield School Dist.* (1966) 246 Cal.App.2d 123, 130, 54 Cal.Rptr. 533]. If a substantial benefit has been obtained by the fiduciary or person in position of authority and a detriment has been worked on the other party, a presumption arises that there was undue influence in the transaction [*Bradner v. Vasquez* (1954) 43 Cal.2d 147, 151, 272 P.2d 11 ; *Ball v. Posey* (1986) 176 Cal.App.3d 1209, 1214, 222 Cal.Rptr. 746 ; *O'Neil v. Spillane* (1975) 45 Cal.App.3d 147, 154, 119 Cal.Rptr. 245 ; see *BGJ Associates, LLC v. Wilson* (2003) 113 Cal.App.4th 1217, 1221, 1226-1230, 7 Cal.Rptr.3d 140 (presumption of undue influence under Prob. Code § 16004 was not rebutted)]. Causation appears to be presumed and the burden shifts to defendant to prove fairness and good faith in all regards [*O'Neil v. Spillane* (1975) 45 Cal.App.3d 147, 155, 119 Cal.Rptr. 245 ; see MB 300G.60 (causation in constructive fraud cases generally)]. It has been held that there can be no recovery for undue influence absent proof of injury [*Leathers v. Leathers* (1946) 77 Cal.App.2d 134, 140, 174 P.2d 875], but this is merely a different way of saying that the presumption of undue influence may be overcome by evidence of adequacy of consideration and general fairness and mutuality [*Leathers v. Leathers* (1946) 77 Cal.App.2d 134, 140, 174 P.2d 875].

[c] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 3, *California Judicial Council Contracts Instructions*]:

CACI No. 334, Affirmative Defense--Undue Influence

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts Law Contract Interpretation Fiduciary Responsibilities Contracts Law Defenses Duress & Undue Influence General Overview Contracts Law Remedies Rescission & Redhibition General Overview

John F. Wells and Lise A. Pearlman were the original authors of this chapter. It has since been updated to reflect changes in the law, additional case citations and practice pointers by other lawyers as well as revisions including cross-references to the official CACI instructions.



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California Forms of Jury Instruction

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CHAPTER 3G Matthew Bender Rescission of Contract Instructions
PART D. CONSTRUCTIVE FRAUD AND UNDUE INFLUENCE

1-3G California Forms of Jury Instruction MB 300G.67

MB 300G.67 Undue Influence Absent Confidential Relationship

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

A contract can be cancelled if _____ [*other party*] obtained the consent of _____ [*rescinding party*] by _____ [taking an unfair advantage of the other's weakness of mind or taking a grossly oppressive and unfair advantage of the other's necessities or distress].

[IF APPLICABLE (See Use of Instruction)]

A grossly oppressive advantage is something far greater than the ordinary efforts of persuasion that may be present any time parties negotiate a contract. It means the use of high pressure tactics approaching force. In determining whether grossly oppressive advantage was taken you should consider all of the circumstances, including all of the following:

- (1) Whether discussion of the contract took place at an unusual or inappropriate time;
- (2) Whether the contract was completed in an unusual place;
- (3) Whether there was insistent demand that the business be finished at once;
- (4) Whether there was extreme emphasis on terrible consequences for delay;
- (5) Whether there were more people present on behalf of the party attempting to persuade than the party

persuaded;

(6) Whether there were any independent parties present advising the party persuaded; and

(7) Whether statements were made that there was no time to consult financial advisers or attorneys.

Authorities: *Civ. Code* § 1575; *Channell v. Anthony* (1976) 58 Cal.App.3d 290, 305-306, 129 Cal.Rptr. 704 ; *Keithley v. Civil Service Bd.* (1970) 11 Cal.App.3d 443, 451, 89 Cal.Rptr. 809 ; *Odorizzi v. Bloomfield School Dist.* (1966) 246 Cal.App.2d 123, 133, 54 Cal.Rptr. 533 ; *Buchmayer v. Buchmayer* (1945) 68 Cal.App.2d 462, 467, 157 P.2d 9 .

[2] Use of Instruction

This instruction should be used when there is evidence of undue influence but no confidential relationship. It should be followed by the instruction on causation in MB 300G.09. If a confidential relationship has been established, use MB 300G.66. If there is a question of fact as to the existence of a confidential relationship, use MB 300G.60 followed by instructions to the jury on both standards of undue influence. Appropriate introductory language should be used indicating that these are alternative standards depending on the existence or nonexistence of a confidential relationship. The two standards differ most notably in the burden of proof. When no confidential relationship exists, no presumption applies from the advantage gained by one party that undue influence was used. If weakness of mind is the basis for this undue influence instruction, it should be followed by the definitional instruction in MB 300G.69. The optional paragraph should be used when there is evidence of grossly oppressive advantage.

For related Judicial Council instructions, see [3][b], *below*.

LexisNexis Matthew Bender Expert Practice Tip--Assemble Your Facts Accordingly: This instruction provides a checklist of potentially applicable factors to go over with the jury in closing argument. However, the instruction is complicated and contains some subjective terms like "insistent demand" and "extreme emphasis." So, put together the facts accordingly. *By Rex Heeseman and Ronald Oster*

[3] Comment

[a] Undue Influence Depends on Facts

Undue influence consists of taking an unfair advantage of another's weakness of mind or of taking a grossly oppressive and unfair advantage of another's necessities or distress [*Civ. Code* § 1575]. The existence of undue influence depends on the facts and circumstances of the particular case [*Sparks v. Sparks* (1950) 101 Cal.App.2d 129, 135, 225 P.2d 238]. It is something far greater than ordinary efforts at persuasion [*Odorizzi v. Bloomfield School Dist.* (1966) 246 Cal.App.2d 123, 132, 54 Cal.Rptr. 533 , citing *Estate of Anderson* (1921) 185 Cal. 700, 706-707, 198 P. 407]. Undue influence results from the use of high pressure that works on mental, moral, or emotional weakness to such an extent that it approaches force. It overcomes the will and induces someone to do an act that he or she would not do if left to act freely [*Keithley v. Civil Service Bd.* (1970) 11 Cal.App.3d 443, 89 Cal.Rptr. 809]. Overpersuasion is generally accompanied by certain characteristic elements which, when simultaneously present in a significant number, characterize the persuasion as excessive. These elements are [*Channell v. Anthony* (1976) 58 Cal.App.3d 290, 306, 129 Cal.Rptr. 704 ; *Odorizzi v. Bloomfield School Dist.* (1966) 246 Cal.App.2d 123, 133, 54 Cal.Rptr. 533]:

- Discussion of the transaction at an unusual or inappropriate time;
- Consummation of the transaction in an unusual place;
- Insistent demand that the business be finished at once;

- Extreme emphasis on untoward consequences of delay;
- The use of multiple persuaders by the dominant side against a single servient party;
- Absence of third-party advisers to the servient party; and
- Statements that there is no time to consult financial advisers or attorneys.

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 3, *California Judicial Council Contracts Instructions*]:

CACI No. 334 Affirmative Defense--Undue Influence

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts Law Defenses Duress & Undue Influence General Overview Contracts Law Remedies Rescission & Redhibition General Overview

John F. Wells and Lise A. Pearlman were the original authors of this chapter. It has since been updated to reflect changes in the law, additional case citations and practice pointers by other lawyers as well as revisions including cross-references to the official CACI instructions.



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CHAPTER 3G Matthew Bender Rescission of Contract Instructions
PART D. CONSTRUCTIVE FRAUD AND UNDUE INFLUENCE

1-3G California Forms of Jury Instruction MB 300G.68

MB 300G.68 Weakness of Mind Defined

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Weakness of mind must either have been known by the other party at the time of contracting or readily apparent so that the other party should have been aware of it. It need not be long lasting or completely disabling. It may consist of lack of full vigor due to age, physical condition, emotional anguish, or a combination of these factors.

Authorities: *Civ. Code § 1575; Smalley v. Baker (1968) 262 Cal.App.2d 824, 835, 69 Cal.Rptr. 521 ; Odorizzi v. Bloomfield School Dist. (1966) 246 Cal.App.2d 123, 131, 54 Cal.Rptr. 533 .*

[2] Use of Instruction

This instruction should be used together with the instruction in MB 300G.67 when the alleged undue influence consists of taking advantage of another's weakness of mind.

LexisNexis Matthew Bender Expert Practice Tip--Consider Not Using Statutory Phrase

"Weakness of Mind:" Most parties do not want to be described by their counsel as having "weakness of mind." In situations where a party entered into a one-sided contract following physical or emotional trauma, counsel may want to describe the party as being "vulnerable" or "defenseless" to high pressure tactics. If the disability is temporary, counsel should show that the party objected or at least questioned the contract as soon as the condition was removed. Hence, it may be advisable to ask the judge not to use the phrase "weakness of mind." *By Ronald Oster and Rex Heeseman*

[3] Comment

Weakness of mind as referred to in *Civ. Code* § 1575 does not mean total lack of capacity. Total incapacity to make any contract is defined in *Civ. Code* § 38 and renders a contract void. A lesser weakness of mind ("unsound mind, but not entirely without understanding") renders a contract rescindable without proof of undue influence under *Civ. Code* § 39(a). The weakness of mind standard set forth in *Civ. Code* § 1575 is an easier standard to satisfy than either that of *Civ. Code* §§ 38 or 39 but must be coupled with a showing of the taking of unfair advantage of this condition by the other party [*Smalley v. Baker* (1968) 262 Cal.App.2d 824, 836, 69 Cal.Rptr. 521 ; *Odorizzi v. Bloomfield School Dist.* (1966) 246 Cal.App.2d 123, 131, 54 Cal.Rptr. 533]. Thus, when there was no evidence that the other party knew or was aware of the plaintiff's mental illness or that plaintiff took advantage of the illness, *Civ. Code* § 1575 was not applicable [*Smalley v. Baker* (1968) 262 Cal.App.2d 824, 836, 69 Cal.Rptr. 521]. The mentally weakened condition may be shown by evidence that the promisor was lacking in the mental vigor needed to protect against an imposition [*O'Neil v. Spillane* (1975) 45 Cal.App.3d 147, 155, 119 Cal.Rptr. 245 ; *Peterson v. Ellebrecht* (1962) 205 Cal.App.2d 718, 721-722, 23 Cal.Rptr. 349]. Cases involving will contests that require the total destruction of free agency and substitution of the volition of another are not applicable to contract situations [*O'Neil v. Spillane* (1975) 45 Cal.App.3d 147, 155, 119 Cal.Rptr. 245].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts Law Defenses Duress & Undue Influence General Overview Contracts Law Formation Capacity of Parties General Overview Contracts Law Remedies Rescission & Redhibition General Overview

John F. Wells and Lise A. Pearlman were the original authors of this chapter. It has since been updated to reflect changes in the law, additional case citations and practice pointers by other lawyers as well as revisions including cross-references to the official CACI instructions.



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CHAPTER 3G Matthew Bender Rescission of Contract Instructions
PART D. CONSTRUCTIVE FRAUD AND UNDUE INFLUENCE

1-3G California Forms of Jury Instruction MB 300G.69

MB 300G.69 Lack of Understanding as to Nature of Transaction

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

A person may cancel a contract if at the time of contracting, his or her mental state was such that he or she did not understand the nature, purpose, and effect of the contract. You must decide whether _____ [*rescinding party*] understood the nature of the particular contract to which [he/she/it] consented, its purpose, and its effect. If _____ [*rescinding party*] was substantially unable to manage his or her own finances, or was unable to resist fraud or undue influence, _____ [*other party*] has the burden of proving that _____ [*rescinding party*] understood the nature, purpose, and effect of the contract. _____ [*Rescinding party*]'s substantial inability cannot be proved solely by isolated incidents of negligence or poor judgment.

Authorities: *Civ. Code* § 39; *Smalley v. Baker* (1968) 262 Cal.App.2d 824, 832, 69 Cal.Rptr. 521 ; *Drum v. Bummer* (1947) 77 Cal.App.2d 453, 460, 175 P.2d 879 .

[2] Use of Instruction

This instruction should be used when there is evidence that would justify rescission for incapacity. If the facts justify this instruction, they will also likely justify alternative instructions on mistake, fraud, or undue influence set forth in this chapter.

[3] Comment

This instruction is based on *Civ. Code* § 39 which permits rescission when a person was of unsound mind but not entirely without understanding. It is unlikely that a jury issue will occur in a case in which a contract was made with

someone totally without understanding. If total incapacity can be shown or has already been judicially determined, the contract is void, not just voidable under *Civ. Code* § 38. Both *Civ. Code* §§ 38 and 39 differ from *Civ. Code* § 1575(2), which permits rescission on a lesser showing of weakness of mind if there is evidence that it was exploited by undue influence as discussed in MB 300G.68.

A party is entitled to rescind a contract pursuant to *Civ. Code* § 39 if at the time of contracting, he or she was not mentally competent to deal with the subject. The test in each instance is whether he or she understood the nature, purpose, and effect of what he or she did [*Smalley v. Baker* (1968) 262 Cal.App.2d 824, 832, 69 Cal.Rptr. 521 ; *Drum v. Bummer* (1947) 77 Cal.App.2d 453, 460, 175 P.2d 879]. One may be incapable of contracting even though the incapacity is the result of voluntary intoxication [*Guidici v. Guidici* (1935) 2 Cal.2d 497, 41 P.2d 932]. However, it is not necessary to show that the person was incompetent to make any kind of contract or to transact any business but only that the party was not mentally competent to deal with the subject before him or her with a full understanding of his or her rights [*Pomeroy v. Collins* (1926) 198 Cal. 46, 68-69, 243 P. 657]. The level of understanding required will vary among different types of contracts [*Smalley v. Baker* (1968) 262 Cal.App.2d 824, 832, 69 Cal.Rptr. 521 ; *Pomeroy v. Collins* (1926) 198 Cal. 46, 68-69, 243 P. 657]. The evidence presented on the issue of capacity must therefore focus on whether the party was capable of understanding the type of contract involved; a more complex contract will require a higher degree of capacity.

A rebuttable presumption affecting the burden of proof that a person is of unsound mind exists for purposes of *Civ. Code* § 39 if the person is substantially unable to manage his or her own financial resources or resist fraud or undue influence. However, substantial inability is not proved solely by isolated incidents of negligence or improvidence [*Civ. Code* § 39(b)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawDefensesDuress & Undue InfluenceGeneral OverviewContracts LawDefensesFraud & MisrepresentationGeneral OverviewContracts LawFormationCapacity of PartiesGeneral OverviewContracts LawFormationCapacity of PartiesMental CapacityContracts LawRemediesRescission & RedhibitionGeneral Overview

John F. Wells and Lise A. Pearlman were the original authors of this chapter. It has since been updated to reflect changes in the law, additional case citations and practice pointers by other lawyers as well as revisions including cross-references to the official CACI instructions.



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CHAPTER 3G Matthew Bender Rescission of Contract Instructions
PART D. CONSTRUCTIVE FRAUD AND UNDUE INFLUENCE

1-3G California Forms of Jury Instruction MB 300G.70-MB 300G.79

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MB 300G.70[Reserved for Future Use]



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CHAPTER 3G Matthew Bender Rescission of Contract Instructions
PART E. DURESS AND MENACE

1-3G California Forms of Jury Instruction MB 300G.80

MB 300G.80 Traditional Duress or Menace**[1] Instruction**[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

A party may cancel a contract if his or her consent was given out of fear caused by wrongful conduct on the part of the other party.

[IF APPLICABLE (See Use of Instruction)]

It may involve harm or threats to the safety or liberty of the person or of a member of his or her family. It may also involve harm or threats to a person's property.

Here, _____ [rescinding party] claims that _____ [describe alleged wrongful conduct]. There are two things you must decide:

1. Whether _____ [alleged wrongful conduct] took place; and

2. Whether _____ [rescinding party] agreed to the contract because of _____ [wrongful conduct] and would not have otherwise agreed to the contract.

In deciding the second question, you determine the state of mind of _____ [rescinding party]. If _____ [rescinding party] would have consented to the contract anyway, then the contract may be enforced even if the other party acted wrongfully. In deciding this issue, you may consider the means used by _____ [other party] and the age, sex, state of health, and mental characteristics of

_____ [*rescinding party*].

Authorities: *McKay v. Retail Auto. S. L. Union No. 1067* (1940) 16 Cal.2d 311, 321, 106 P.2d 373, cert. denied, 313 U.S. 566 (1941) ; *In re Marriage of Gonzalez* (1976) 57 Cal.App.3d 736, 743-744, 129 Cal.Rptr. 566 ; *Balling v. Finch* (1962) 203 Cal.App.2d 413, 418, 21 Cal.Rptr. 490 ; *Gross v. Needham* (1960) 184 Cal.App.2d 446, 461, 7 Cal.Rptr. 664 ; *Lewis v. Fahn* (1952) 113 Cal.App.2d 95, 99, 247 P.2d 831 .

[2] Use of Instruction

This instruction should be used when the jury will be allowed to consider evidence that consent to a contract was obtained by noneconomic duress. The word "cancel" is suggested instead of "rescind" [see MB 300G.01]. This instruction is equally appropriate for rescission based on menace. In cases involving economic duress, use the instruction in MB 300G.81; for an instruction on the nature of the threat, see MB 300G.82.

For related Judicial Council instructions, see [3][b], *below*.

LexisNexis Matthew Bender Expert Practice Tip--Threats of Violence vs. Economic Duress: By its terms, this instruction appears to be limited to threats of violence to person or property. For economic duress, see MB 300G.81. *By Ronald Oster*

[3] Comment

[a] Duress

The concept of duress as molded by California case law is much broader than the definition of duress in *Civ. Code* § 1569 [*In re Marriage of Gonzalez* (1976) 57 Cal.App.3d 736, 743, 129 Cal.Rptr. 566]. Although menace is technically a threat of duress [*Civ. Code* § 1570], the terms are used interchangeably by the courts [see California Forms of Pleading & Practice, Ch. 215, *Duress, Menace, Fraud, Undue Influence, and Mistake* (Matthew Bender)]. Duress, as discussed herein, therefore includes menace. Generally, an act constituting duress may be either a tort or a crime [Witkin, Summary of California Law, vol. 1, *Contracts*, § 313 (10th ed. 2005)]. It involves any contract obtained by so oppressing a person by threats regarding his or her safety or liberty, property, or family, as to deprive him or her of the free exercise of will and prevent the necessary meeting of minds [*In re Marriage of Broderick* (1989) 209 Cal.App.3d 489, 499, 257 Cal.Rptr. 397 ; *Lewis v. Fahn* (1952) 113 Cal.App.2d 95, 99, 247 P.2d 831 ; see *Tarpy v. County of San Diego* (2003) 110 Cal.App.4th 267, 276-279, 1 Cal.Rptr.3d 607 (dog owner failed to raise triable issue of fact as to whether county's retention of dog was unlawful so as to establish statutory duress in signing release for neutering)].

Duress has also been defined to include whatever destroys a person's free agency and constrains him or her to do what is against his or her will. It may be exercised by threats, importunity, or any species of mental coercion [*Gross v. Needham* (1960) 184 Cal.App.2d 446, 461, 7 Cal.Rptr. 664]. The case law is divided regarding the appropriate test for duress, whether it should be subjective or objective. Thus, it has repeatedly been said that duress is to be tested not by the nature of the threats, but rather by the state of mind induced thereby in the victim. The means used to produce that condition, the age, sex, state of health, and mental characteristics of the alleged injured party are only evidentiary of the ultimate fact in issue, whether the person was bereft of the free exercise of will power. His or her resisting power, under all the circumstances of the situation and not any arbitrary standard, is to be considered in determining whether there was duress [*In re Marriage of Gonzalez* (1976) 57 Cal.App.3d 736, 744, 129 Cal.Rptr. 566 , quoting *Lewis v. Fahn* (1952) 113 Cal.App.2d 95, 99, 247 P.2d 831].

This instruction is predicated on the subjective standard described above. However, there is also a line of economic duress cases that applies an objective standard discussed in MB 300G.81.

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 3, *California Judicial Council Contracts Instructions*]:

CACI No. 332 Affirmative Defense--Duress

CACI No. 333 Affirmative Defense--Economic Duress

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawDefensesDuress & Undue InfluenceGeneral OverviewContracts LawRemediesRescission & RedhibitionGeneral Overview

John F. Wells and Lise A. Pearlman were the original authors of this chapter. It has since been updated to reflect changes in the law, additional case citations and practice pointers by other lawyers as well as revisions including cross-references to the official CACI instructions.



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CHAPTER 3G Matthew Bender Rescission of Contract Instructions
PART E. DURESS AND MENACE

1-3G California Forms of Jury Instruction MB 300G.81

MB 300G.81 Economic Duress**[1] Instruction**[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

The law allows a party to cancel a contract if consent to the contract was obtained by wrongful economic pressure. Wrongful economic pressure occurs when one party causes the other to agree to a contract by a threat of wrongful action to cause harm to his or her business or otherwise cause him or her to suffer economic loss. To determine this issue, you must decide all of the following:

1. Whether _____ [*alleged wrongful economic pressure*] was used by _____ [*other party*];
2. Whether _____ [*rescinding party*] entered into the contract because of the wrongful pressure; and
3. Whether a reasonable alternative was available to _____ [*rescinding party*].

A party claiming that he or she was the victim of wrongful economic pressure must show that no reasonable alternative course existed. An alternative is reasonable if a reasonably prudent person would have chosen it instead of giving in to the other party's demand.

Authorities: *Leeper v. Beltrami* (1959) 53 Cal.2d 195, 204, 1 Cal.Rptr. 12, 347 P.2d 12 ; *Rich & Whillock, Inc. v. Ashton Development, Inc.* (1984) 157 Cal.App.3d 1154, 1158, 204 Cal.Rptr. 86 ; *Louisville Title Ins. Co. v. Surety Title & Guar. Co.* (1976) 60 Cal.App.3d 781, 801-802, 132 Cal.Rptr. 63 .

[2] Use of Instruction

This instruction should be used when the basis for rescission is economic duress. For other situations including duress or menace, use the instruction in MB 300G.80. The use of the word "cancel" is suggested instead of "rescind" [see MB 300G.01]. If all three issues are not presented by the facts, the instruction should be modified accordingly.

For related Judicial Council instructions, see [3][b], *below*.

LexisNexis Matthew Bender Expert Practice Tip--Provide Alternatives If Opposing Claim of Economic Duress: One of the key elements in this instruction is the requirement of "no reasonable alternative." In opposing a claim of economic duress, counsel will want to present as many alternatives as the facts will allow. This approach is obviously much better if your party is "sympathetic." *By Ronald Oster and Rex Heeseman*

[3] Comment

[a] Economic Duress

Under modern law, duress is not limited to threats against the person. It may also consist of threats to business or property interests [*Louisville Title Ins. Co. v. Surety Title & Guar. Co.* (1976) 60 Cal.App.3d 781, 807, 132 Cal.Rptr. 63, quoting *Leeper v. Beltrami* (1959) 53 Cal.2d 195, 203, 1 Cal.Rptr. 12, 347 P.2d 12]. The threat must be sufficiently coercive to cause a reasonably prudent person faced with no reasonable alternative to succumb to the perpetrator's pressure [*Philippine Export & Foreign Loan Guarantee Corp. v. Chuidian* (1990) 218 Cal.App.3d 1058, 1078, 267 Cal.Rptr. 457; *Rich & Whillock, Inc. v. Ashton Development, Inc.* (1984) 157 Cal.App.3d 1154, 1158, 204 Cal.Rptr. 86, citing *Leeper v. Beltrami* (1959) 53 Cal.2d 195, 203-205, 1 Cal.Rptr. 12, 347 P.2d 12; see *Crosstalk Productions, Inc. v. Jacobson* (1998) 65 Cal.App.4th 631, 644-646, 76 Cal.Rptr.2d 615]. It is a question of fact whether a reasonably prudent person would yield to the other party's threats instead of taking an alternative course [*Leeper v. Beltrami* (1959) 53 Cal.2d 195, 205, 1 Cal.Rptr. 12, 347 P.2d 12; *Philippine Export & Foreign Loan Guarantee Corp. v. Chuidian* (1990) 218 Cal.App.3d 1058, 1078-1081, 267 Cal.Rptr. 457; *Louisville Title Ins. Co. v. Surety Title & Guar. Co.* (1976) 60 Cal.App.3d 781, 801-802, 132 Cal.Rptr. 63].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 3, *California Judicial Council Contracts Instructions*]:

CACI No. 332 Affirmative Defense--Duress

CACI No. 333 Affirmative Defense--Economic Duress

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawDefensesDuress & Undue InfluenceEconomic DuressContracts LawRemediesRescission & RedhibitionGeneral Overview

John F. Wells and Lise A. Pearlman were the original authors of this chapter. It has since been updated to reflect changes in the law, additional case citations and practice pointers by other lawyers as well as revisions including cross-references to the official CACI instructions.



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CHAPTER 3G Matthew Bender Rescission of Contract Instructions
PART E. DURESS AND MENACE

1-3G California Forms of Jury Instruction MB 300G.82

MB 300G.82 Nature of Threat

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Whether a threat is wrongful depends on what is threatened. Generally, a person may threaten to do what he or she has a legal right to do. A person may give warning of his or her intentions and allow the other person to avoid the consequences. It is only the threat of wrongful conduct that is improper.

[IF APPLICABLE (See Use of Instruction)]

So long as a party to a contract acts in good faith, that party has a legal right to take a different view of his or her contract rights and obligations than the view held by the other party to the contract. This is true even if it turns out that he or she is mistaken.

Thus, a person has a legal right to refuse in good faith to proceed with a contract even though the refusal might later be found wrong. It is only improper to _____ [refuse or threaten to refuse] to perform if both of the following are shown:

- 1. That the _____ [refusal or threat not to perform] was made in bad faith; and**
- 2. That the _____ [refusal or threat] was made with the intent to force the other party to do something that he or she would not have otherwise been willing to do.**

[IF APPLICABLE (See Use of Instruction)]

A party has a legal right to bring suit or take other legal action or threaten to do so even if it would cause great economic harm to another party unless the party who does so acts with the knowledge that the claims that would be made in the suit are false.

Authorities: *Louisville Title Ins. Co. v. Surety Title & Guar. Co.* (1976) 60 Cal.App.3d 781, 801, 132 Cal.Rptr. 63 ; see *Thompson Crane & Trucking Co. v. Eymean* (1954) 123 Cal.App.2d 904, 909, 267 P.2d 1043 .

[2] Use of Instruction

This instruction should be used when there is evidence of threatened conduct that could be considered proper. Use the first optional paragraph when the alleged threat involves a breach of contract. Use the second optional paragraph when a civil action is threatened.

For related Judicial Council instructions, see [3][b], *below*.

LexisNexis Matthew Bender Expert Practice Tip--Party Must Know Its Refusal Was Wrong:

Some cases may present pros (and cons) in discussing what a party "has a legal right to do." If the "wrongful conduct" is the refusal to proceed with a contract, the party asserting economic duress must show that the refusal was made in "bad faith." In practice, this usually means that the other party actually knew (not merely should have known) that its refusal was wrong. *By Rex Heeseman and Ronald Oster*

[3] Comment

[a] Nature of Threat

It is not an act of duress or menace to threaten to do what one has a legal right to do [*McKay v. Retail Auto. S. L. Union No. 1067* (1940) 16 Cal.2d 311, 321, 106 P.2d 373 ; *U.S. Hertz, Inc. v. Niobrara Farms* (1974) 41 Cal.App.3d 68, 81, 116 Cal.Rptr. 44]. Threatened breach of contract is not improper if it is the result of a mistaken view of contractual rights [*London Homes, Inc. v. Korn* (1965) 234 Cal.App.2d 233, 240, 44 Cal.Rptr. 262], but it is wrongful if it is asserted in bad faith with the intent to force the other party to do something that he or she would not have otherwise been willing to do [*Rich & Whillock, Inc. v. Ashton Development, Inc.* (1984) 157 Cal.App.3d 1154, 1160, 204 Cal.Rptr. 86 ; *Louisville Title Ins. Co. v. Surety Title & Guar. Co.* (1976) 60 Cal.App.3d 781, 801, 132 Cal.Rptr. 63 ; see *Crosstalk Productions, Inc. v. Jacobson* (1998) 65 Cal.App.4th 631, 644-646, 76 Cal.Rptr.2d 615]. A threat of legal action is only improper if the claims asserted are known to be false [*Leeper v. Beltrami* (1959) 53 Cal.2d 195, 204, 1 Cal.Rptr. 12, 347 P.2d 12].

These cases involve a threat of civil action. A threat of criminal prosecution is viewed differently. It is against public policy to use a threat of criminal prosecution as a means of collecting a debt [*Shasta Water Co. v. Croke* (1954) 128 Cal.App.2d 760, 764, 276 P.2d 88]. Such threats are considered threats of injury to the character constituting menace [see Witkin, Summary of California Law, vol. 1, *Contracts*, §§ 311, 312 (10th ed. 2005); see also MB 300G.80 (menace instruction)].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 3, *California Judicial Council Contracts Instructions*]:

CACI No. 332, Affirmative Defense--Duress

CACI No. 333, Affirmative Defense--Economic Duress

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawContract InterpretationGood Faith & Fair DealingContracts LawDefensesDuress & Undue
InfluenceGeneral OverviewContracts LawRemediesRescission & RedhibitionGeneral Overview

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CHAPTER 3G Matthew Bender Rescission of Contract Instructions
PART E. DURESS AND MENACE

1-3G California Forms of Jury Instruction MB 300G.83-MB 300G.89

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MB 300G.83[Reserved for Future Use]



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CHAPTER 3G Matthew Bender Rescission of Contract Instructions PART F. DEFENSES TO RESCISSION

1-3G California Forms of Jury Instruction MB 300G.90

MB 300G.90 Effect of Delay

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

A party may lose the right to cancel a contract by delaying too long before giving notice of cancellation if the other party proves by a preponderance of the evidence that the delay caused him or her substantial harm.

Authorities: Civ. Code § 1693; *Saret-Cook v. Gilbert, Kelly, Crowley & Jennett* (1999) 74 Cal.App.4th 1211, 1227, 88 Cal.Rptr.2d 732 ; *Wilke v. Coinway, Inc.* (1967) 257 Cal.App.2d 126, 140, 64 Cal.Rptr. 845 .

[2] Use of Instruction

This instruction should be used by the nonrescinding party when there is evidence of prejudice from delay in receiving notice of rescission. The word "harm" is suggested instead of "prejudice" because it is more likely to be understood by the jury. If the delay is coupled with other evidence showing an intent to waive the right to rescind, a separate instruction on waiver of the right to rescind should be given [see MB 300G.91].

A preponderance of the evidence instruction must be used with this instruction [see Ch. 2, *California Judicial Council Evidence Instructions*, CACI No. 200 ("Obligation to Prove--More Likely True than Not True")].

LexisNexis Matthew Bender Expert Practice Tip--Harm Must Be Substantial: The key work in this instruction is "substantial" harm caused by the delay to assert a right to cancel. Thus, the related facts must be organized accordingly. *By Ronald Oster and Rex Heeseman*

[3] Comment

Delay in giving notice of rescission is only a basis for denying relief if the delay has substantially prejudiced the other

party [Civ. Code § 1693; see *Saret-Cook v. Gilbert, Kelly, Crowley & Jennett* (1999) 74 Cal.App.4th 1211, 1227, 88 Cal.Rptr.2d 732 (employee's delay in giving notice of rescission of settlement agreement resulted in substantial prejudice to employer)]. The existence of prejudice from delay in seeking rescission is a question of fact [*Wilke v. Coinway, Inc.* (1967) 257 Cal.App.2d 126, 140, 64 Cal.Rptr. 845]. Prejudice from delayed notice of rescission is an affirmative defense [*In re Consol. Pretrial Proceedings in Airwest* (N.D. Cal. 1977) 436 F.Supp. 1281, 1290]. As such, defendant bears the burden of proof [Evid. Code § 500].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawContract Conditions & ProvisionsWaiversGeneral OverviewContracts LawContract Conditions & ProvisionsWaiversContinued PerformanceContracts LawRemediesRescission & RedhibitionGeneral Overview

John F. Wells and Lise A. Pearlman were the original authors of this chapter. It has since been updated to reflect changes in the law, additional case citations and practice pointers by other lawyers as well as revisions including cross-references to the official CACI instructions.



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CHAPTER 3G Matthew Bender Rescission of Contract Instructions
PART F. DEFENSES TO RESCISSION

1-3G California Forms of Jury Instruction MB 300G.91

MB 300G.91 Waiver of Right to Cancel

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

A party may waive a right to cancel a contract if, after full discovery of the facts giving rise to the right to cancel, that party takes steps to _____ [affirm the contract *or* to modify the contract]. The party's words and acts must indicate that the party has made a definite choice to affirm the contract in spite of knowing all the facts on which he or she might be entitled to cancel the contract.

[IF APPLICABLE (See Use of Instruction)]

Waiver does not necessarily follow from the fact that plaintiff continued to make contract payments to defendant after discovering the facts giving rise to plaintiff's claim. You must consider the duration of the payments and the circumstances under which they were made.

[IF APPLICABLE (See Use of Instruction)]

Waiver may not occur if the acts of waiver are themselves caused by _____ [fraud or other improper conduct].

Authorities: *Channell v. Anthony* (1976) 58 Cal.App.3d 290, 304, 129 Cal.Rptr. 704 ; *Beason v. Griff* (1954) 127 Cal.App.2d 382, 391, 274 P.2d 47 ; *Schied v. Bodinson Mfg. Co.* (1947) 79 Cal.App.2d 134, 142-143, 179 P.2d 380 ; *Mobley v. Richfield Oil Corp.* (1942) 53 Cal.App.2d 406, 411-412, 128 P.2d 105 .

[2] Use of Instruction

This instruction should be used after the general instruction defining waiver [see Ch. 3, *California Judicial Council Contracts Instructions*, CACI No. 336, and Ch. 3F, *Matthew Bender Contract Defenses Instructions*] when there is evidence of waiver of a right to rescind for mistake or fraud. If the basis for rescission is undue influence, duress, or menace, then waiver should still be an available defense but the issue would not be whether the act of waiver occurred after full discovery of the facts but whether the improper pressure had been removed before the act of waiver. In those cases, the instruction should be modified accordingly. The first optional paragraph applies if there is evidence of continued payments after full discovery of the facts. The second optional paragraph applies if there is evidence that fraud or other improper conduct permeated the alleged waiver. If the party alleging waiver is a fiduciary, see *MB 300G.92*.

For related Judicial Council instructions, see [3][b], *below*.

LexisNexis Matthew Bender Expert Practice Tip--Establishing Waiver: To establish a waiver, counsel will want to show that the other party had alternatives, but chose to go along with the contract even when the facts were known. In other words, counsel will want to emphasize what the other party did not do, as well as show what was done, and prove that it was "intentional." *By Ronald Oster and Rex Heeseman*

[3] Comment

[a] Waiver

The right to rescind for fraud may be waived, if after full discovery of fraud, a party takes steps to affirm the transaction [*Beason v. Griff* (1954) 127 Cal.App.2d 382, 391, 274 P.2d 47 ; *Schied v. Bodinson Mfg. Co.* (1947) 79 Cal.App.2d 134, 142-143, 179 P.2d 380] or enters into new arrangements [*Channell v. Anthony* (1976) 58 Cal.App.3d 290, 304, 129 Cal.Rptr. 704]. Waiver should be equally available to a claim of rescission for other causes. Whether waiver of the right to rescind has taken place is a question of fact [*Esau v. Briggs* (1948) 201 P.2d 25]. The burden of proof is on the party seeking to establish waiver. The payments constitute merely acts to be considered by the trier of fact along with other circumstances [*Flash Cleaners v. Columbia Appliance* (1956) 156 Cal.App.2d 455, 459, 319 P.2d 454 ; *Mobley v. Richfield Oil Corp.* (1942) 53 Cal.App.2d 406, 410, 128 P.2d 105]. Mere continuance of contract payments for a short period pending negotiations does not amount to waiver [*Mobley v. Richfield Oil Corp.* (1942) 53 Cal.App.2d 406, 412, 128 P.2d 105]. Waiver may not occur when the acts allegedly constituting waiver were themselves induced by fraud or undue influence or other improper conduct [*Channell v. Anthony* (1976) 58 Cal.App.3d 290, 304-306, 129 Cal.Rptr. 704].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 3, *California Judicial Council Contracts Instructions*]:

CACI No. 335 Affirmative Defense--Fraud

CACI No. 336 Affirmative Defense--Waiver

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts Law Contract Conditions & Provisions Waivers General Overview Contracts Law Defenses Duress & Undue Influence General Overview Contracts Law Defenses Fraud & Misrepresentation General Overview Contracts Law Remedies Rescission & Redhibition General Overview

John F. Wells and Lise A. Pearlman were the original authors of this chapter. It has since been updated to reflect changes in the law, additional case citations and practice pointers by other lawyers as well as revisions including cross-references to the official CACI instructions.



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California Forms of Jury Instruction

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CHAPTER 3G Matthew Bender Rescission of Contract Instructions
PART F. DEFENSES TO RESCISSION

1-3G California Forms of Jury Instruction MB 300G.92

MB 300G.92 Effect of Confidential Relationship on Waiver

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

You may not find that Plaintiff waived the right to cancel the contract if Defendant improperly induced plaintiff to waive the right to cancel the contract against Plaintiff's better judgment. Defendant must have fully disclosed all important facts before obtaining Plaintiff's waiver, and Defendant must not have used Plaintiff's trust and confidence in Defendant to cause Plaintiff to waive Plaintiff's rights.

[IF APPLICABLE (See Use of Instruction)]

The fact _____ [that the relationship had become strained or that Plaintiff had obtained information that caused him or her to entertain grave doubts about defendant's trustworthiness] by the time _____ [alleged acts of waiver] took place does not mean that plaintiff no longer reposed any trust or confidence in defendant. It is only a factor for you to take into account.

Channell v. Anthony (1976) 58 Cal.App.3d 290, 304-305, 129 Cal.Rptr. 704 ; *Sime v. Malouf* (1949) 95 Cal.App.2d 82, 97, 212 P.2d 946, 213 P.2d 788 .

[2] Use of Instruction

This instruction should be used when waiver is alleged as a defense to rescission of a contract between persons in a fiduciary relationship. For the definition of full disclosure, see *MB 300G.64*. For an instruction on undue influence in obtaining consent to the original contract, see *MB 300G.66*.

For related Judicial Council instructions, see [3][b], *below*.

LexisNexis Matthew Bender Expert Practice Tip--Waivers Are Subjected to More Scrutiny: As long as a relationship of trust and confidence continues, transactions (including waivers) are subjected to heightened scrutiny and can be set aside much more easily than arms-length contracts. *By Ronald Oster*

LexisNexis Matthew Bender Expert Practice Tip--Be Prepared to Argue Whether There Has Been Full Disclosure: There may be a key controversy as to whether the defendant "fully disclosed all important facts." As defense counsel, there are several options in putting together the appropriate closing. *By Rex Heeseman*

[3] Comment

[a] Waiver Induced by Fraud

Waiver may not occur when the acts allegedly constituting waiver were themselves induced by fraud or undue influence or other improper conduct [*Channell v. Anthony* (1976) 58 Cal.App.3d 290, 304, 129 Cal.Rptr. 704]. A person may still rely in part on the representations of a fiduciary even when their relationship has become strained [*Sime v. Malouf* (1949) 95 Cal.App.2d 82, 97, 212 P.2d 946, 213 P.2d 788] or the person obtains information that causes him or her to entertain grave doubts [*Channell v. Anthony* (1976) 58 Cal.App.3d 290, 305, 129 Cal.Rptr. 704].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 3, *California Judicial Council Contracts Instructions*]:

CACI No. 335 Affirmative Defense--Fraud

CACI No. 336 Affirmative Defense--Waiver

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawContract InterpretationFiduciary ResponsibilitiesContracts LawDefensesDuress & Undue InfluenceGeneral OverviewContracts LawDefensesFraud & MisrepresentationGeneral OverviewContracts LawRemediesRescission & RedhibitionGeneral Overview

John F. Wells and Lise A. Pearlman were the original authors of this chapter. It has since been updated to reflect changes in the law, additional case citations and practice pointers by other lawyers as well as revisions including cross-references to the official CACI instructions.



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CHAPTER 3H Matthew Bender Commercial Code Sales Contracts Instructions

2-3H California Forms of Jury Instruction 3H.syn

§ 3H.syn Synopsis to Chapter 3H: Matthew Bender Commercial Code Sales Contracts Instructions

MB 300H.01 Definition of Conforming Goods and Performance

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Conforming Goods and Performance

[b] Related Judicial Council Jury Instructions

MB 300H.02 Identification of Contract Goods

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300H.03 Definition of Commercial Unit

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300H.04 Definition of Seller

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300H.05 Definition of Buyer

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300H.06 Definition of Merchant and Transactions Between Merchants

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300H.07 Definition of Agreement

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300H.08 Definition of Contract and Contract for Sale

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300H.09 Definition of Contract Terms

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Definition of Contract Terms

[b] Related Judicial Council Jury Instructions

MB 300H.10 Good Faith Obligation

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300H.11 Course of Dealing Defined

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300H.12 Usage of Trade Defined

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300H.13 Course of Performance Defined

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300H.14 Definition of Reasonable Time

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Reasonable Time

[b] Related Judicial Council Jury Instructions

MB 300H.15 Definition of Seasonably

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300H.16 Notice of a Fact

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300H.17 Giving Notice or Notification

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Notice

[b] Related Judicial Council Jury Instructions

MB 300H.18 Receiving Notice

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300H.19 Definition of Send

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300H.20 Definition of Signed

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300H.21 Definition of a Writing and Written

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300H.22 Definition of Bill of Lading

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300H.23-MB 300H.29 Reserved for Future Use

MB 300H.30 Statute of Frauds Generally

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300H.31 Agreement in Signed Writing

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300H.32 Confirming Writing Between Merchants

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300H.33 Confirmation of Contract by Seller's Performance

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300H.34 Confirmation of Contract by Acceptance of Payment or Delivery

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300H.35 Admission That Contract Was Made

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Exception to Writing Requirement

[b] In-Court Admission by Party Against Whom Enforcement Is Sought

[c] What Constitutes an Admission

[d] Contents of Admission

[e] Voluntary and Involuntary Admissions

[f] Effect of Admission

MB 300H.36-MB 300H.39 Reserved for Future Use

MB 300H.40 Formation of Contracts for the Sale of Goods

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Formation of Contracts

[b] Related Judicial Council Jury Instructions

MB 300H.41 Offer and Acceptance Generally

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Offer and Acceptance Generally

[b] Related Judicial Council Jury Instructions

MB 300H.42 Offer Defined

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Offer Defined

[b] Related Judicial Council Jury Instructions

MB 300H.43 Revocable and Irrevocable Offers

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Revocable and Irrevocable Offers

[b] Related Judicial Council Jury Instructions

MB 300H.44 Firm Offer by Merchant to Construction Contractor

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300H.45 Acceptance Generally

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Acceptance

[b] Related Judicial Council Jury Instructions

MB 300H.46 Acceptance by Shipment

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300H.47 Acceptance or Confirmation Stating Additional Terms

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300H.48 Agreement Evidenced by Conduct

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300H.49-MB 300H.59 Reserved for Future Use

MB 300H.60 General Instruction

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Contract Terms

[b] Related Judicial Council Jury Instructions

MB 300H.61 Evidence Supplementing and Explaining Terms

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300H.62 Evidence of Consistent Additional Terms

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300H.63 Added Terms in Non-Merchant's Acceptance or Confirmation

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300H.64 Added Terms in Merchants' Acceptance or Confirmation

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300H.65-MB 300H.69 Reserved for Future Use

MB 300H.70 Requirement of Written Modification or Rescission

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Modification or Rescission

[b] Related Judicial Council Jury Instructions

MB 300H.71 Waiver

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Waiver

[b] Related Judicial Council Jury Instructions

MB 300H.72 Retraction of Waiver

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Retraction of Waiver

[b] Related Judicial Council Jury Instructions

MB 300H.73 Delegation of Performance

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300H.74 Assignment of Rights

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300H.75-MB 300H.89 Reserved for Future Use

MB 300H.90 Interpretation of Contract Terms

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Interpretation of Contract Terms

[b] Related Judicial Council Jury Instructions

MB 300H.91-MB 300H.99 Reserved for Future Use

MB 300H.100 General Obligations of Parties

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Fundamental Obligations of Parties

[b] Incomplete Agreements

MB 300H.101-MB 300H.109 Reserved for Future Use

MB 300H.110 Open Price Term: Reasonable Price

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Market Quotation Distinguished; Course of Dealing, Usage of Trade, or Course of Performance Controls Over Open Price Term

[b] Intent of Parties; Question of Fact

[c] Open Price Term No Bar to Remedy for Breach

[d] Wrongful Interference

MB 300H.111 One Party to Set Price

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300H.112 Failure to Cooperate in Setting a Price

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300H.113 Quantity Under Output Contract

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300H.114 Quantity Under Requirements Contract

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300H.115 Exclusive Dealing Contract

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300H.116 Number of Deliveries and Payments

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300H.117 Place for Delivery of Goods

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300H.118 Time for Shipment or Delivery

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300H.119 Contracts of Indefinite Duration

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300H.120 Notice of Contract Termination

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300H.121 Time for Payment of Contract Price

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300H.122 Time for Payment of Contract Price Against Documents

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300H.123 Time for Running of Credit Period

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300H.124 Performance to Be Specified by a Party

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300H.125 Duty of Cooperation

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300H.126 Did Parties "Otherwise Agree"?

[1] Instruction

[2] Use of Instruction

[a] When to Use This Instruction

[b] How to Use This Instruction; Examples

[3] Comment

[a] Implied Agreements

[b] Definitions

MB 300H.127-MB 300H.139 Reserved for Future Use

MB 300H.140 Warranties in General

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Express and Implied Warranties

[b] Related Judicial Council Jury Instructions

MB 300H.141 Terms of Warranty of Title

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300H.142 Exclusion or Modification of Warranty of Title

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300H.143 Warranty Against Infringement

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300H.144 Breach of Warranty of Title--Burden of Proof

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300H.145 Express Warranties Defined

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Creation of Express Warranty

[b] Related Judicial Council Jury Instructions

MB 300H.146 Statement of Fact Distinguished From Expression of Opinion

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300H.147 Express Warranties Arising From a Course of Dealing or Usage of Trade

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300H.148 Breach of Express Warranty--Burden of Proof

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Breach of Express Warranty; Burden of Proof

[b] Related Judicial Council Jury Instructions

MB 300H.149 Implied Warranties of Fitness for Purpose Defined

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Implied Warranty--Reliance

[b] Related Judicial Council Jury Instructions

MB 300H.150 Seller's Knowledge of Buyer's Particular Purpose

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Implied Warranty--Seller's Knowledge

[b] Related Judicial Council Jury Instructions

MB 300H.151 Buyer's Reliance on Seller's Skill

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Buyer's Reliance

[b] Related Judicial Council Jury Instructions

MB 300H.152 Breach of Implied Warranty of Fitness

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Breach of Implied Warranty

[b] Related Judicial Council Jury Instructions

MB 300H.153 Implied Warranty of Merchantability Defined

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Implied Warranty of Merchantability

[b] Related Judicial Council Jury Instructions

MB 300H.154 Breach of Implied Warranty of Merchantability

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Implied Warranty of Merchantability

[b] Related Judicial Council Jury Instructions

MB 300H.155 Notice of Breach of Warranty

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Notice of Breach

[b] Related Judicial Council Jury Instructions

MB 300H.156 Disclaimer of Implied Warranties

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Disclaimer of Implied Warranties

[b] Related Judicial Council Jury Instructions

MB 300H.157 Disclaimer of Express Warranties

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Disclaimer of Express Warranties

[b] Related Judicial Council Jury Instructions

MB 300H.158-MB 300H.169 Reserved for Future Use

MB 300H.170 General Shipping Terms Definition

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300H.171 F.O.B. Definition

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300H.172 F.A.S. Definition

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300H.173 C.I.F. Definition

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300H.174 C. & F. Definition

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300H.175 No Arrival; No Sale

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300H.176 Ex-Ship Definition

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300H.177-MB 300H.189 Reserved for Future Use

MB 300H.190 Repudiation

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300H.191 Substantial Impairment

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300H.192 Retraction of Repudiation

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300H.193 Demand for Adequate Assurance

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300H.194 Grounds for Insecurity

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300H.195 Adequate Assurance

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300H.196-MB 300H.209 Reserved for Future Use

MB 300H.210 Tender of Goods Generally

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300H.211 Tender by Seller Under Shipment and Destination Contracts

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300H.212-MB 300H.219 Reserved for Future Use

MB 300H.220 Acceptance and Rejection Generally

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300H.221 Acceptance by Buyer

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300H.222 Notice of Breach as to Accepted Goods

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300H.223 Grounds for Revocation of Acceptance

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300H.224 Requirements of an Effective Rejection

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300H.225 Buyer's Failure to Specify Defects

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300H.226-MB 300H.239 Reserved for Future Use

MB 300H.240 Excuse of Performance--Special Findings

[1] Instruction

[2] Use of Instruction

[a] In General

[b] Question of Law or Fact

[3] Comment

MB 300H.241 Excuse of Performance for Increased Cost

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300H.242 Seller's Duty to Allocate Supply

[1] Instruction

[2] Use of Instruction

[a] In General

[b] Question of Law or Fact

[3] Comment

MB 300H.243 Buyer's Option to Terminate or Modify on Notice of Allocation or Delay

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300H.244 Substitution of Delivery Arrangements

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300H.245 Commercial Impracticability Defined

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300H.246-MB 300H.249 Reserved for Future Use

MB 300H.250 Seller's Action for Contract Price

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300H.251 Seller's Damages Recoverable After Resale

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300H.252 Seller's Damages for Buyer's Nonacceptance or Repudiation

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Measure of Damages

[b] Proof of Market Price

MB 300H.253 Seller's Incidental Damages

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300H.254 Buyer's Incidental Damages

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300H.255 Buyer's Consequential Damages

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Measures of Consequential Damages; Foreseeability

[b] Contractual Disclaimer

[c] Buyer's Obligation to Mitigate Damages

[d] Breach of Warranty; Proximate Cause

MB 300H.256 Damages to Buyer Who Has "Covered"

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300H.257 Buyer's Damages for Seller's Non-Delivery or Repudiation

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300H.258 Buyer's Damages for Accepted Goods and for Breach of Warranty

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] When Nonconformity Is Not Breach of Warranty

[b] When Non-Conformity Is Breach of Warranty

[c] When Value of Goods Is Determined

[d] Notice Requirements

[e] Burden of Proving Breach

MB 300H.259 Liquidated Damages

[1] Instruction

[2] Use of Instruction

[3] Comment



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CHAPTER 3H Matthew Bender Commercial Code Sales Contracts Instructions

2-3H California Forms of Jury Instruction Scope

Scope

SCOPE

This chapter includes specialized jury instructions for use in sale of goods cases arising under the Uniform Commercial Code's Sales Article as adopted in California. For the California Judicial Council jury instructions on contracts generally, see Ch. 3, *California Judicial Council Contracts Instructions*. Ch. 3 includes Judicial Council instructions on issues surrounding contract formation, performance, interpretation, modification, breach, damages, and defenses. The instructions in this chapter are intended to supplement the Judicial Council instructions [see *Cal. Rules of Ct.*, Rule 2.1050].

The relevant provisions of California's Commercial Code are found in Division 2, Com. Code §§ 2101-2724, and the general provisions in Chapter 1, Com. Code §§ 1101-1208. Instructions are included for most Commercial Code sales provisions, grouped under the following topics:

- Part A: Definitions [see *MB 300H.01 -MB 300H.22*].
- Part B: Statute of Frauds [see *MB 300H.30 -MB 300H.35*].
- Part C: Formation of Contract [see *MB 300H.40 -MB 300H.48*].
- Part D: Contract Terms [see *MB 300H.60 -MB 300H.64*].
- Part E: Modification and Waiver of Contract Terms [see *MB 300H.70-MB 300H.74*].
- Part F: Interpretation of Contract Terms [see *MB 300H.90*].
- Part G: General Obligations, including open terms, warranties, and shipping and credit terms [see *MB 300H.100 -MB 300H.176*].

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- Part H: Contract Repudiation [see MB 300H.190 -MB 300H.195]
- Part I: Tender [see MB 300H.210, MB 300H.211].
- Part J: Acceptance and Rejection [see MB 300H.220 -MB 300H.225].
- Part K: Excuse of Performance [see MB 300H.240 -MB 300H.245].
- Part L: Measure of Proof and Damages [see MB 300H.250 -MB 300H.259].

Additional necessary instructions are set forth in other chapters. In particular, when the existence of a contract is an issue, instructions contained in Ch. 3A, *Matthew Bender Formation of Contract Instructions*, on offer and acceptance should be consulted in addition to those in Part C, as well as the instructions contained in Ch. 3D, *Matthew Bender Performance and Breach of Contract Instructions*, setting forth what must be proved to establish a breach. Instructions on such matters as expert testimony (see Ch. 2, *California Judicial Council Evidence Instructions*, CACI Nos. 219-221), proximate cause (see Ch. 4, *California Judicial Council Negligence Instructions*, CACI No. 430 ("Causation: Substantial Factor")), agency (see Ch. 3C, *Matthew Bender Contract Party Instructions*, MB 300C.50), good faith (see Ch. 3B, *Matthew Bender Interpretation of Contract Instructions*, MB 300B.08, and Ch. 3D, *Matthew Bender Performance and Breach of Contract Instructions*, MB 300D.57), and waiver (see Ch. 3G, *Matthew Bender Rescission Instructions*, MB 300G.91) are cross-referenced in the comments in this chapter and should be consulted when these issues arise. Instructions on issues peculiar to construction contracts are contained in Ch. 3I, *Matthew Bender Construction Contract Instructions*.

In such areas as warranties, contract modification, and remedies in the event of breach, the Commercial Code controls when parties to the contract have not agreed otherwise (whether expressly or implicitly). As a result, some of the following instructions are relevant only when the parties have failed to agree on terms to deal with the items in dispute. In those cases when the terms of the agreement govern, general instructions on contract interpretation (see Ch. 3B, *Matthew Bender Interpretation of Contract Instructions*) may be more relevant even though the Commercial Code applies to the contract as a whole.



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CHAPTER 3H Matthew Bender Commercial Code Sales Contracts Instructions
PART A. DEFINITIONS FOR SALE OF GOODS CONTRACTS

2-3H California Forms of Jury Instruction MB 300H.01

MB 300H.01 Definition of Conforming Goods and Performance

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Goods "conform to the contract" when (1) they are of the type, quality, and quantity called for by the contract, (2) they are supplied in the manner called for by the contract, and (3) they are otherwise in accordance with what the contract requires.

The conduct required of any party as part of contract performance conforms to the contract when it is in accordance with that party's obligations under the contract.

Authority: *Com. Code § 2106(2).*

[2] Use of Instruction

This instruction should be used when there is an issue as to whether or not goods or performance conform to the contract. For example, this instruction should be given with the instructions on acceptance and rejection in Part J.

For related Judicial Council instructions, see [3][b], *below*.

[3] Comment

[a] Conforming Goods and Performance

This Commercial Code definition of conforming goods embodies the so-called perfect tender rule requiring that the goods conform exactly to the parties' agreement [*Com. Code § 2106(2)*]. The common law rule of substantial

performance is covered in Ch. 3D, *Matthew Bender Performance and Breach of Contract Instructions*.

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 3, *California Judicial Council Contracts Instructions*]:

CACI No. 312 Substantial Performance

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Breach, Repudiation & ExcuseBuyer's Rights on Improper
DeliveryCommercial Law (UCC)Sales (Article 2)Subject MatterGoodsDefinitionContracts LawSales of GoodsBreach,
Repudiation & ExcuseBuyer's Rights on Improper Delivery

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CHAPTER 3H Matthew Bender Commercial Code Sales Contracts Instructions
PART A. DEFINITIONS FOR SALE OF GOODS CONTRACTS

2-3H California Forms of Jury Instruction MB 300H.02

MB 300H.02 Identification of Contract Goods

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

The phrase "identification of goods to the contract" means designating goods as those to which the contract refers. Identification may be made at any time and in any manner expressly agreed on by the parties. If the parties fail to agree, identification occurs either:

1. When the contract is made, if the contract is for the sale of goods already existing and identified; or
2. When the goods are shipped, marked, or otherwise designated by the seller as goods to which the contract refers.

Authority: *Com. Code § 2501(1).*

[2] Use of Instruction

This instruction should be used with instructions that pose the issue of whether or not the goods were identified to the contract, such as the damage instructions in Part L and the instruction in MB 300H.117.

LexisNexis Matthew Bender Expert Practice Tip--Explain Terms: This instruction could be confusing to many jurors. For instance, when was the contract "made" and what does "otherwise designated" mean? These terms will need to be explained. Hence, craft your closing accordingly. *By Rex Heeseman*

[3] Comment

This definition is based on *Com. Code § 2501(1)*. That section also contains special provisions for identifying crops and livestock [*Com. Code § 2501(1)(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Subject MatterGeneral OverviewCommercial Law (UCC)Sales (Article 2)Subject MatterDefinitionsGeneral OverviewCommercial Law (UCC)Sales (Article 2)Subject MatterGoodsGeneral Overview

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CHAPTER 3H Matthew Bender Commercial Code Sales Contracts Instructions
PART A. DEFINITIONS FOR SALE OF GOODS CONTRACTS

2-3H California Forms of Jury Instruction MB 300H.03

MB 300H.03 Definition of Commercial Unit

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

As used in these instructions, a "commercial unit" is a unit of goods that is in commercial usage treated as a single whole for purposes of sale. A unit of goods is a "commercial unit" if the division of the unit would decrease its market value or its usefulness, or would materially impair its quality.

Authority: *Com. Code § 2105(6).*

[2] Use of Instruction

This instruction should be used when it is necessary to define a "commercial unit," as with the option on acceptance of part of a commercial unit in the instruction on partial acceptance in MB 300H.221.

LexisNexis Matthew Bender Expert Practice Tip--Explain Instruction; Use Examples: This is a complicated instruction. Both of these sentences need to be carefully explained. The use of examples may help to clarify it. For example, no one buys a single left or right shoe, so a pair of shoes is a "commercial unit" for most people. Depending on the goods involved in the case, expert testimony may be required to demonstrate why division of a "commercial unit" into smaller lots or batches will decrease its market value or impair its quality. *By Rex Heeseman and Ronald Oster*

[3] Comment

This instruction is based on *Com. Code § 2105(6)*. A commercial unit may be a single item such as a machine, a set of articles (for example, a suite of furniture), or a commercially usable quantity (for example, a ton of coal or a cord of wood). Commercial units may also include a quantity of assorted items such as a gross of hats of assorted sizes [*Com.*

Code § 2105(6)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Breach, Repudiation & ExcuseAcceptance of GoodsGeneral
OverviewCommercial Law (UCC)Sales (Article 2)Subject MatterDefinitionsGeneral OverviewCommercial Law
(UCC)Sales (Article 2)Subject MatterGoodsGeneral Overview

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CHAPTER 3H Matthew Bender Commercial Code Sales Contracts Instructions PART A. DEFINITIONS FOR SALE OF GOODS CONTRACTS

2-3H California Forms of Jury Instruction MB 300H.04

MB 300H.04 Definition of Seller

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

As used in these instructions, "seller" means a person who sells or contracts to sell goods. The seller in this case is _____ [*name of party*].

Authority: *Com. Code § 2103(1)(d).*

[2] Use of Instruction

It is useful to give this short instruction the first time the term "seller" is used or when the parties are first identified.

[3] Comment

This instruction is based on *Com. Code § 2103(1)(d)*. When price is payable in whole or in part in goods by both parties, then each party is a seller of the goods which he or she is to transfer [*Com. Code § 2304(1)*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Subject MatterDefinitionsGeneral OverviewCommercial Law (UCC)Sales (Article 2)Subject MatterGoodsGeneral Overview

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CHAPTER 3H Matthew Bender Commercial Code Sales Contracts Instructions
PART A. DEFINITIONS FOR SALE OF GOODS CONTRACTS

2-3H California Forms of Jury Instruction MB 300H.05

MB 300H.05 Definition of Buyer

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

As used in these instructions, "buyer" means a person who buys or contracts to buy goods. The buyer in this case is _____ [*name of party*].

Authority: *Com. Code § 2103(1)(a).*

[2] Use of Instruction

It is helpful to give this short instruction at the time the term "buyer" is first used in the instructions or when the parties are first identified.

[3] Comment

This instruction is based on *Com. Code § 2103(1)(a)*.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Commercial Law (UCC) Sales (Article 2) Subject Matter Definitions General Overview

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CHAPTER 3H Matthew Bender Commercial Code Sales Contracts Instructions
PART A. DEFINITIONS FOR SALE OF GOODS CONTRACTS

2-3H California Forms of Jury Instruction MB 300H.06

MB 300H.06 Definition of Merchant and Transactions Between Merchants

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

[CHOOSE FROM THE FOLLOWING (See Use of Instruction)]

A merchant is one who engages in a trade, business, or a type of commerce to such an extent that [he/she/it] has or should have knowledge of common business practices.

[OR]

A merchant is one who deals in goods of the kind involved in the transaction at issue in this case.

[OR]

A merchant is one whose occupation indicates that [he/she/it] has particular knowledge about, or skill in, the practice or goods involved in the transaction.

[OR]

An individual or an organization is considered to be a merchant when [he/she/it] hires an agent, broker, or other

intermediary to act for [him/her/it], and the occupation of the _____ [person or organization] employed indicates a particular knowledge about, or skill in, the practice or goods involved in the transaction.

[CONTINUE INSTRUCTION]

A transaction between merchants is one in which both parties are merchants as defined in the preceding instruction.

Authorities: *Com. Code § 2104(1), (3); U.C.C. Comment No. 2 to Com. Code § 2104; Com. Code § 1201(27).*

[2] Use of Instruction

This instruction should be used when merchant status is a disputed issue of fact on which reasonable people could differ. Use the definition of merchant that comports with the use of the term in the substantive instruction. Any one paragraph can be given independently, except the last, which refers to whichever definition of merchant has been used.

LexisNexis Matthew Bender Expert Practice Tip--Explain Terms: The fourth optional paragraph is awkward and, if applicable to the case, needs to be explained. The terms "agent, broker, or other intermediary" will also require further explanation. *By Ronald Oster*

[3] Comment

This instruction is based on the definition of "merchant" in *Com. Code § 2104(1)*, and the definition of "between merchants" in *Com. Code § 2104(3)*. *Com. Code § 1201(27)* is cited to show that the term "person" used in the statutory definition of a merchant includes both individuals and organizations.

The Commercial Code states various rules that apply "between merchants" or "as against a merchant," but do not apply to a casual or inexperienced seller or buyer [U.C.C. Comment No. 1 to *Com. Code § 2104*]. When the practices involved in the transaction are nonspecialized business practices, such as answering mail, then the term is applied very broadly, and almost anyone in business would be considered a "merchant." For example, even a university is presumed to know how to answer its mail and thus to be a merchant for purposes of such a nonspecialized transaction [U.C.C. Comment No. 2 to *Com. Code § 2104*]. Commercial Code sections employing the term this broadly include *Com. Code §§ 2201(2), 2207, and 2209*. The key to being a merchant under statutes like these is having knowledge or skill peculiar to the nonspecialized business practices involved in the transaction [U.C.C. Comment No. 2 to *Com. Code § 2104*].

Other Commercial Code provisions apply only to individuals or organizations who have the knowledge or skill of a merchant with regard to goods of the kind involved in the transaction. A public transit district, for example, has knowledge and skill peculiar to buying buses [*Sacramento Regional Transit Dist. v. Grumman Flexible* (1984) 158 Cal.App.3d 289, 295, 204 Cal.Rptr. 736]. These provisions include *Com. Code §§ 2314* (warranty of merchantability), 2402(2) (merchant-sellers), and 2403(2) (entrusting goods). A third group of Commercial Code statutes applies to persons who are merchants in either of the first two senses--that is, merchants under either the "practices" or the "goods" aspect of the definition. Commercial Code sections using the term in that sense include *Com. Code §§ 2509* (risk of loss), 2603 (rejected goods), 2605 (waiver of objections), and 2609 (adequacy of assurances).

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)General Provisions (Article 1)Application & ConstructionGeneral OverviewCommercial Law (UCC)Sales (Article 2)Subject MatterDefinitionsGeneral OverviewCommercial Law (UCC)Sales (Article 2)Subject MatterDefinitionsMerchant

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CHAPTER 3H Matthew Bender Commercial Code Sales Contracts Instructions
PART A. DEFINITIONS FOR SALE OF GOODS CONTRACTS

2-3H California Forms of Jury Instruction MB 300H.07

MB 300H.07 Definition of Agreement

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

"Agreement," as distinguished from "contract," means the bargain of the parties in fact. The nature of the parties' bargain can be determined from the language used by the parties and from the surrounding circumstances of the transaction, including earlier dealings between the parties, commonly understood customs and practices in the trade or business, and the subsequent conduct of the parties in carrying out the agreement in question.

Authority: *Com. Code § 1201(3).*

[2] Use of Instruction

This instruction should be used together with the applicable offer and acceptance instructions in Part C when the existence of an agreement or the specific terms agreed on are an issue of fact on which persons might reasonably differ.

[3] Comment

This instruction is based on *Com. Code § 1201(3)*. The parties' agreement is distinguished from their contract in that the contract includes terms imposed by law as well as those expressly or impliedly agreed on [*Com. Code § 1201(a)(12)*]. In one case, the court found that no implied agreement by a buyer to pay freight for ocean transport arose when the cargo was purchased "C+F, freight prepaid for delivery to Los Angeles," and the seller's check for freight was accepted by the shipper, although eventually it was dishonored. Terms in the shipper's bill of lading purporting to impose liability for freight are broadly defined, and "Merchant" did not bind the C+F buyer in the absence of that buyer's signature or other evidence of acceptance of the terms [*Mitsui O.S.K. Lines, Ltd. v. Dynasea Corp.* (1999) 72 Cal.App.4th 208,

210-213, 85 Cal.Rptr.2d 1].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)General Provisions (Article 1)Definitions & InterpretationGeneral OverviewCommercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentGeneral OverviewCommercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentOffer & Acceptance

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CHAPTER 3H Matthew Bender Commercial Code Sales Contracts Instructions
PART A. DEFINITIONS FOR SALE OF GOODS CONTRACTS

2-3H California Forms of Jury Instruction MB 300H.08

MB 300H.08 Definition of Contract and Contract for Sale

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

The term "contract," as distinguished from "agreement," encompasses the total legal obligation resulting from the parties' agreement. The parties' legal obligations include duties imposed by law that may not appear in the agreement itself.

A contract for sale means a contract to pass ownership of goods from the seller to the buyer for a price, either at the time of making the contract or at a future time.

Authorities: *Com. Code §§ 1201(a)(12), 2106(1).*

[2] Use of Instruction

This instruction should be used as a general introductory instruction when contract terms are in dispute or as appropriate with other code definitions.

[3] Comment

This instruction is based on *Com. Code §§ 1201(a)(12)* and *2106(1)*. The Code's distinction between "agreement" and "contract" is largely technical [see *MB 300H.07[3]*]. However, it may be helpful to use instructions defining these Code terms when the case involves obligations beyond the express terms of the parties' agreement, such as implied warranties not disclaimed by the agreement and obligations of good faith and fair dealing.

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)General Provisions (Article 1)Definitions & InterpretationGeneral OverviewCommercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentGeneral OverviewCommercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentOffer & Acceptance

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CHAPTER 3H Matthew Bender Commercial Code Sales Contracts Instructions
PART A. DEFINITIONS FOR SALE OF GOODS CONTRACTS

2-3H California Forms of Jury Instruction MB 300H.09

MB 300H.09 Definition of Contract Terms

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

A "term" is a portion of an agreement that relates to a particular matter. The terms of the parties' agreement are those particular matters that the parties have in fact agreed on or that are imposed by law.

Authorities: *Com. Code §§ 1201(a)(40), 2202.*

[2] Use of Instruction

This instruction should be used in conjunction with the instruction in MB 300H.08, defining agreement, and those instructions requiring the jury to look beyond the written or oral terms to determine the full extent of the parties' agreement.

For related Judicial Council instructions, see [3][b], *below*.

[3] Comment

[a] Definition of Contract Terms

This instruction is based on *Com. Code § 1201(a)(40)*. Contract terms include those express and implied terms that can be found in the language and conduct of the parties, as well as past dealings and trade practices [*Com. Code § 2202*]. Contract terms also include those provided by the Commercial Code such as open terms and implied warranties.

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 3, *California Judicial Council Contracts Instructions*]:

CACI No. 304 Oral or Written Contract Terms

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)General Provisions (Article 1)Definitions & InterpretationGeneral OverviewCommercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentGeneral OverviewCommercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentParol EvidenceGap-Filler Provisions

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CHAPTER 3H Matthew Bender Commercial Code Sales Contracts Instructions
PART A. DEFINITIONS FOR SALE OF GOODS CONTRACTS

2-3H California Forms of Jury Instruction MB 300H.10

MB 300H.10 Good Faith Obligation

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Every contract for the sale of goods imposes an obligation to act in good faith in the performance and enforcement of the contract. Good faith means honesty in fact.

Authorities: *Com. Code §§ 1201(a)(20), 1304.*

[2] Use of Instruction

This instruction contains the basic rule and definitions regarding good faith conduct. It should be used in conjunction with other instructions when good faith is an issue, such as in the instructions in MB 300H.110-MB 300H.126 regarding open terms. It applies except as otherwise provided in *Com. Code § 5101 et seq.* (governing letters of credit) [*Com. Code § 1201(a)(20)*].

LexisNexis Matthew Bender Expert Practice Tip--Good Faith Obligation: This could be an important instruction for the plaintiff. Many jurors are receptive to the argument that the law imposes a higher standard of good faith and fair dealing than the "morals of the market place." *By Ronald Oster*

LexisNexis Matthew Bender Expert Practice Tip--Explain Terms: A key here is making the jury understand the evidence related to "what is commercially reasonable." *By Rex Heeseman*

[3] Comment

This instruction is based on *Com. Code §§ 1201(a)(20)* and *1304*.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewCommercial Law (UCC)General Provisions (Article 1)Definitions & InterpretationGood FaithCommercial Law (UCC)Sales (Article 2)Subject MatterDefinitionsGeneral Overview

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CHAPTER 3H Matthew Bender Commercial Code Sales Contracts Instructions
PART A. DEFINITIONS FOR SALE OF GOODS CONTRACTS

2-3H California Forms of Jury Instruction MB 300H.11

MB 300H.11 Course of Dealing Defined

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

A "course of dealing" is a sequence of conduct concerning previous transactions between the parties that can be fairly regarded as establishing a common basis for the parties' understanding or interpretation of their expressions and other conduct in the context of _____ [*specify transaction*]. A course of dealing is relevant in ascertaining the meaning of the parties' agreement, gives meaning to specific terms of the agreement, and supplements or qualifies the terms of the parties' agreement.

Authorities: *Com. Code § 1303(b), (d); Insurance Co. of North America v. NNR Aircargo Service (USA), Inc. (9th Cir. 2000) 201 F.3d 1111, 1113-1115 .*

[2] Use of Instruction

This instruction should be used when one of the parties relies on a course of dealing to supplement or interpret the terms of their agreement. Usage of trade is defined in MB 300H.12.

[3] Comment

This instruction is based on *Com. Code § 1303(b), (d)*. An inference of the parties' common understanding that is based on a prior course of dealing is a question of fact [*Insurance Co. of North America v. NNR Aircargo Service (USA), Inc. (9th Cir. 2000) 201 F.3d 1111, 1113*]. One court has held that under former *Com. Code § 1205(1)* [*now see Com. Code § 1303(b)*] (amended and renumbered by Stats. 2006, ch. 254, § 23)], the receipt of 47 identical invoices for 47 separate transactions was sufficient to constitute a course of dealing, modifying a shipping agreement [*Insurance Co. of North America v. NNR Aircargo Service (USA), Inc. (9th Cir. 2000) 201 F.3d 1111, 1113-1115*].

Under *Com. Code § 2202*, a party may introduce extrinsic evidence of a course of dealing, course of performance, or usage of trade that supplements or explains, but does not contradict, the agreement of the parties. The express terms of an agreement and any applicable course of performance, course of dealing, and usage of trade must be construed whenever reasonable as consistent with each other. However, if such a construction is unreasonable, express terms prevail over course of performance, course of dealing, and usage of trade; course of performance prevails over course of dealing and usage of trade; and course of dealing prevails over usage of trade [*Com. Code § 1303(e)*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)General Provisions (Article 1)Definitions & InterpretationGeneral OverviewCommercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentParol EvidenceGap-Filler Provisions

Irene Sall Holmes and Lock Holmes contributed to the original chapter for California Forms of Jury Instruction (Matthew Bender).



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California Forms of Jury Instruction

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CHAPTER 3H Matthew Bender Commercial Code Sales Contracts Instructions
PART A. DEFINITIONS FOR SALE OF GOODS CONTRACTS

2-3H California Forms of Jury Instruction MB 300H.12

MB 300H.12 Usage of Trade Defined**[1] Instruction**[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

A "usage of trade" is any practice or method of dealing that is followed in a certain community, occupation, or trade regularly enough to justify an expectation that it will be observed with regard to this transaction. Whether such usage, and what is required by it, are questions of fact for you to decide based on the evidence in this case. A usage of trade gives particular meaning to and supplements or qualifies the terms of their agreement.

Plaintiff contends that _____ **[specify usage of trade] is a usage of trade where**
 _____ **[location of performance]. If you find that Plaintiff has proved this usage of trade, and**
that Defendant had actual knowledge of it, or should have known about it because of its general application to
 _____ **[specify business], then you must interpret the parties' agreement as including**
 _____ **[specify usage] but only with regard to the part of the agreement that required**
Defendant's performance at _____ **[location of performance].**

Authorities: Com. Code § 1303(c), (d); Heggblade-Marguleas-Tenneco, Inc. v. Sunshine Biscuit, Inc. (1976) 59 Cal.App.3d 948, 956-958, 131 Cal.Rptr. 183 .

[2] Use of Instruction

This instruction should be used when one of the parties contends a custom or usage of trade either supplements or interprets the parties' agreement. Additional instructions must be given when usage is embodied in a code of conduct or similar record.

The designation of the parties is for illustrative purposes only and should be changed if necessary.

LexisNexis Matthew Bender Expert Practice Tip--Use Caution With "Usage of Trade" Argument:

Although "usage of trade" does not require universal acceptance, any variation in actual practices will make it difficult for a party to rely on this concept. Moreover, the more important the practice is to the lawsuit, the greater the argument becomes that if it is so important, why is it not spelled out in the contract? *By Ronald Oster*

LexisNexis Matthew Bender Expert Practice Tip--Go Over "Usage of Trade" With Jury: It is one thing for the jury to see and hear about the agreement in question. However, "usage of trade" is more vague and subjective. So, go over this phrase in some detail. *By Rex Heeseman*

[3] Comment

This instruction is based on *Com. Code § 1303(c), (d)*. Under *Com. Code § 1303(c)*, if an applicable usage of trade is embodied in a trade code or similar record, the interpretation of the record is a question of law. The Code also requires a party intending to introduce evidence of a trade usage to give advance notice of the intention to the opposing party to avoid unfair surprise [*Com. Code § 1303(g)*].

Persons engaged in a particular trade are deemed to be aware of the prominent trade customs of that business or industry [*Heggblade-Marguleas-Tenneco, Inc. v. Sunshine Biscuit, Inc. (1976) 59 Cal.App.3d 948, 956-957, 131 Cal.Rptr. 183*].

The relationship between the express agreement, trade usage or custom, and course of dealing is discussed in *MB 300H.11[3]*. Trade usage or custom cannot supplant express contract terms but can qualify or supplement the contract, even a formal and final writing [U.C.C. Comment No. 1 to former *Com. Code § 1205 (now see Com. Code § 1303)*]. A trade usage need not be "ancient or immemorial" as a custom at common law, nor need it be universally observed; but it must have the requisite "regularity of observance" [U.C.C. Comment No. 5 to former *Com. Code § 1205 (now see Com. Code § 1303)*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)General Provisions (Article 1)General OverviewCommercial Law (UCC)General Provisions (Article 1)Application & ConstructionGap-Filler ProvisionsCommercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentParol EvidenceGap-Filler Provisions

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2-3H California Forms of Jury Instruction MB 300H.13

MB 300H.13 Course of Performance Defined

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Plaintiff contends that the meaning of the agreement between [him/her/it] and Defendant should be determined by the _____ [Plaintiff's or Defendant's] course of performance. "Course of performance" means any repeated performance under the agreement by one of the parties that is known to the other party and to which the other party had an opportunity to object. Any course of performance that is accepted or assented to without objection is relevant to determine the meaning of the parties' agreement and may supplement or modify that agreement. Therefore, if you find that _____ [Plaintiff or Defendant] was engaged in a course of performance, you must determine the meaning of the parties' agreement in light of that course of performance.

Authorities: *Com. Code §§ 2202, 1303(a); U.C.C. Comment No. 2 to former Com. Code § 1205 (now see Com. Code § 1303).*

[2] Use of Instruction

This instruction should be used in connection with instructions that require the jury to interpret the conduct of the parties as that conduct may supplement, modify, or add meaning to their agreement, such as the instruction in MB 300H.61, on evidence supplementing and explaining terms, and the instruction in MB 300H.90, on interpretation of contract terms. The designation of the parties is for illustrative purposes only and should be changed if necessary.

LexisNexis Matthew Bender Expert Practice Tip--Using Course of Performance Evidence:

"Course of performance" evidence can be useful in overcoming boilerplate contract language that the parties never followed before the present dispute arose. Note that such evidence is stronger than "usage of trade" evidence [*see MB 300H.12*] because "course of performance" can not only supplement but also

"modify" the parties' written agreement. *By Ronald Oster*

[3] Comment

This instruction is based on *Com. Code § 2202* and *Com. Code § 1303(a)*. The express terms of the contract must be construed consistently with any course of performance, course of dealing, or usage of trade whenever reasonable. However, when that construction is unreasonable, express terms prevail over course of performance, course of dealing, and usage of trade; course of performance prevails over course of dealing and usage of trade; and course of dealing prevails over usage of trade [*Com. Code § 1303(e)*].

A course of performance may also show a waiver or modification of any term inconsistent with the course of performance [*see Com. Code § 1303(f)*]. For example, a course of performance extending the time for performance has been held to constitute a waiver of a contract performance date [*In re Humboldt Fir, Inc. (N.D. Cal. 1977) 426 F.Supp. 292, 297*]. When it is difficult to distinguish between a course of performance amounting to a waiver versus a modification of the contract, the Code gives preference to a finding of waiver [U.C.C. Comment No. 3 to former *Com. Code § 2208*]. This interpretation is preferred because a waiver can be retracted pursuant to the provisions of *Com. Code § 2209*, whereas a modification by implied agreement must be mutually rescinded.

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)General Provisions (Article 1)Application & ConstructionGap-Filler ProvisionsCommercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentParol EvidenceGap-Filler ProvisionsCommercial Law (UCC)Sales (Article 2)Subject MatterDefinitionsGeneral Overview

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California Forms of Jury Instruction

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2-3H California Forms of Jury Instruction MB 300H.14

MB 300H.14 Definition of Reasonable Time

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

You must determine whether _____ [*action taken*] was done within a reasonable time. What is a reasonable time depends on the nature, purpose, and circumstances of the action.

Authority: *Com. Code § 1205(a).*

[2] Use of Instruction

This instruction should be used when there is an issue as to what is a reasonable time.

For related Judicial Council instructions, see [3][b], *below*.

LexisNexis Matthew Bender Expert Practice Tip--Explain "Reasonable Time": The phrase "reasonable time" sounds understandable. But it must be explained in light of the "nature, purpose, and circumstances" of the particular lawsuit. *By Rex Heeseman*

[3] Comment

[a] Reasonable Time

This instruction is based on *Com. Code § 1205(a)*.

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 12, *California Judicial Council Products Liability Instructions*]:

CACI No. 1243 Notification/Reasonable Time

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewCommercial Law (UCC)General Provisions (Article 1)General OverviewCommercial Law (UCC)General Provisions (Article 1)Definitions & InterpretationReasonable Time & Seasonableness

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2-3H California Forms of Jury Instruction MB 300H.15

MB 300H.15 Definition of Seasonably

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

An action is taken seasonably if it is taken at or within the time agreed. When no time is agreed on, an action is taken seasonably when it is taken within a reasonable time.

Authority: *Com. Code § 1205(b).*

[2] Use of Instruction

This instruction should be used whenever there is an issue as to whether a particular action was seasonably taken. The instruction should be accompanied by the instruction in MB 300H.14, defining "reasonable time."

LexisNexis Matthew Bender Expert Practice Tip--Explain "Seasonably": "Seasonably" is a strange word, especially in the context of this instruction. Hence, explain it. *By Rex Heeseman*

[3] Comment

The definition of "seasonably" given in this instruction is based on the definition in *Com. Code § 1205(b)*.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Commercial Law (UCC) General Provisions (Article 1) Definitions & Interpretation General Overview Commercial Law (UCC) Sales (Article 2) Performance General Overview

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PART A. DEFINITIONS FOR SALE OF GOODS CONTRACTS

2-3H California Forms of Jury Instruction MB 300H.16

MB 300H.16 Notice of a Fact**[1] Instruction**[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

_____ [A person or An organization] had notice of a fact when:

1. [He/She/It] actually knew of the fact; or
2. [He/She/It] was notified of the fact; or
3. From all the circumstances known to [him/her/it] at the time in question, [he/she/it] had reason to know that the fact existed.

[OPTIONAL (See Use of Instruction)]

_____ [Name of entity's] notice or knowledge of a fact was effective for _____ [describe transaction] from the time it was brought to the attention of _____ [individual conducting transaction], or from the time the notice or knowledge would have been brought to the attention of _____ [individual conducting transaction] if _____ [name of entity] exercised due diligence. An organization exercises due diligence if it maintains reasonable routines for communicating significant information to the person conducting the transaction, and the organization reasonably complies with these routines. Due diligence does not require a particular individual working for the organization to communicate the notice, unless that communication is part of that individual's regular duties, or the individual has reason to know of the transaction and that the transaction would be significantly affected by the information.

Authority: *Com. Code §§ 1201(a)(25), (27), 1202(a), (f).*

[2] Use of Instruction

This instruction should be used in conjunction with instructions requiring notice of a fact by either party. If the giving of notice is an issue, MB 300H.17 and MB 300H.19 should be consulted. If receipt of notice is an issue, MB 300H.18 should be consulted.

The optional paragraph should be used with the basic instruction when the party alleged to have notice is not a natural person.

LexisNexis Matthew Bender Expert Practice Tip--Explain Instruction With Examples: This instruction will have to be explained with examples. It is not obvious from the instruction what the differences are between knowing a fact (Paragraph 1), being notified of a fact (Paragraph 2), and having reason to know that the fact existed (Paragraph 3). Further, the optional portion of the instruction seems too detailed. Consequently, if you use it, you should be careful how to structure the instruction itself and your related argument. *By Ronald Oster and Rex Heeseman*

[3] Comment

This instruction is based on *Com. Code §§ 1201(a)(25), (27), 1202(a), (f)*. "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government, governmental subdivision, agency, or instrumentality, public corporation, or any other legal or commercial entity [*Com. Code § 1201(a)(27)*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewCommercial Law (UCC)General Provisions (Article 1)General OverviewCommercial Law (UCC)Secured Transactions (Article 9)Application & ConstructionDefinitionsGeneral Overview

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PART A. DEFINITIONS FOR SALE OF GOODS CONTRACTS

2-3H California Forms of Jury Instruction MB 300H.17

MB 300H.17 Giving Notice or Notification

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

A person "notifies" or "gives" a notice to another person by taking those steps that are reasonably necessary in the ordinary course of events to inform the other person, whether or not the other person actually does receive the notice.

Authority: Com. Code § 1202(d).

[2] Use of Instruction

This instruction should be used with those substantive instructions incorporating the concept of "giving notice" and "notification" under Commercial Code provisions.

For related Judicial Council instructions, see [3][b], *below*.

[3] Comment

[a] Notice

This instruction is based on *Com. Code § 1202(d)*. Certain Commercial Code sections only require that notice be given. Others, such as *Com. Code § 2616*, require that notice actually be received. Care should be taken to use the proper notice instruction and to distinguish giving and receiving notice from situations in which one party may be charged with constructive notice, as in MB 300H.18.

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 12, *California Judicial Council Products Liability Instructions*]:

CACI No. 1243 Notification/Reasonable Time

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewCommercial Law (UCC)General Provisions (Article 1)Definitions & InterpretationNotice & KnowledgeCommercial Law (UCC)Sales (Article 2)Subject MatterDefinitionsGeneral Overview

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2-3H California Forms of Jury Instruction MB 300H.18

MB 300H.18 Receiving Notice**[1] Instruction**[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

_____ [A person or An organization] "receives" a notice when:

(1) It comes to [his/her/its] attention; or

(2) It is duly delivered in a form reasonable under the circumstances at the place of business through which the contract was made, or at any other place held out by the receiving party as a place for receipt of notices.

[*OPTIONAL (See Use of Instruction)*]

_____ [*Name of entity's*] **notice or knowledge of a fact was effective for** _____ [*describe transaction*] **from the time it was brought to the attention of** _____ [*individual conducting transaction*], **or from the time the notice or knowledge would have been brought to the attention of** _____ [*individual conducting transaction*] **if** _____ [*name of entity*] **exercised due diligence. An organization exercises due diligence if it maintains reasonable routines for communicating significant information to the person conducting the transaction and the organization reasonably complies with these routines. Due diligence does not require a particular individual working for the organization to communicate the notice, unless it is part of that individual's regular duties, or the individual has reason to know of the transaction and that the transaction would be significantly affected by the information.**

Authority: *Com. Code §§ 1201(a)(25), (27), 1202(e), (f).*

[2] Use of Instruction

This instruction should be used only when receipt of notice or notification is at issue. The optional paragraph should be included when the party allegedly receiving notice is not a natural person.

[3] Comment

This instruction is based on *Com. Code* §§ 1201(a)(25), (27), 1202(e), (f). When only the giving of notice is required, the Commercial Code does not require that it be actually received so long as reasonable steps to inform are taken [*Com. Code* § 1202(d)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewCommercial Law (UCC)General Provisions (Article 1)Definitions & InterpretationNotice & KnowledgeCommercial Law (UCC)Sales (Article 2)Subject MatterDefinitionsGeneral Overview

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CHAPTER 3H Matthew Bender Commercial Code Sales Contracts Instructions
PART A. DEFINITIONS FOR SALE OF GOODS CONTRACTS

2-3H California Forms of Jury Instruction MB 300H.19

MB 300H.19 Definition of Send

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

"Send" means to deposit a properly addressed writing in the mail, or to deliver it for transmission by any other usual means of communication, with postage or other cost of transmission paid. The proper address is _____ [the address agreed to by Plaintiff and Defendant or any address reasonable under the circumstances].

Authority: *Com. Code § 1201(a)(36).*

[2] Use of Instruction

This instruction should be used to define "send" only in the context of the transmission of communications, not of goods. The choice in the second sentence depends on whether or not there has been an agreement as to the proper address.

[3] Comment

This instruction is based on *Com. Code § 1201(a)(36)*. A communication is also deemed to be properly sent if it arrives within the time it would have arrived if properly sent [*Com. Code § 1201(a)(36)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)General Provisions (Article 1)General Overview

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PART A. DEFINITIONS FOR SALE OF GOODS CONTRACTS

2-3H California Forms of Jury Instruction MB 300H.20

MB 300H.20 Definition of Signed

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

"Signed" includes using any symbol executed or adopted with intention at that time to have the legal effect of a signature.

Authority: *Com. Code § 1201(a)(37).*

[2] Use of Instruction

This instruction should be used with instructions on the statute of frauds, contract modification, and related provisions in Parts B and C requiring signed writings.

LexisNexis Matthew Bender Expert Practice Tip--Signature May Need Further Explanation: Most jurors are only accustomed to a person's signature (or initials). If that is not the situation in your case, you may need to carefully explain this. *By Rex Heeseman*

LexisNexis Matthew Bender Expert Practice Tip--Signatures and E-Mails: More and more commerce is conducted through the use of e-mails without the traditional signing of a contract. This instruction is broad enough to cover these situations. *By Ronald Oster*

[3] Comment

This instruction is based on *Com. Code § 1201(a)(37)*. It is unclear how this definition applies in the age of electronic mail, computer-generated documentation, and similar "writings" that are not signed in the ordinary sense. However, it may be argued that adoption of a specific user code, as in a telex number, may comply with the broad definition of

signed [*see* U.C.C. Comment No. 39 to *Com. Code* § 1201].

The California Supreme Court has held that a car dealership's name in a printed newspaper advertisement was a "signature" sufficient to satisfy the statute of frauds. The Court stated that when an advertisement reasonably justifies the recipient's understanding that the communication was intended as an offer, the offeror's intent to authenticate his or her name as a signature can be established from the face of the advertisement [*Donovan v. RRL Corp.* (2001) 26 Cal.4th 261, 276-278, 109 Cal.Rptr.2d 807, 27 P.3d 702].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)General Provisions (Article 1)Definitions & InterpretationGeneral OverviewCommercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentStatutes of FraudsGeneral OverviewCommercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentStatutes of FraudsFormal RequirementsCommercial Law (UCC)Sales (Article 2)Subject MatterDefinitionsGeneral Overview

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2-3H California Forms of Jury Instruction MB 300H.21

MB 300H.21 Definition of a Writing and Written

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

The terms "writing" and "written" include printing, typewriting, or any other intentional reduction of information to tangible form.

Authority: *Com. Code § 1201(a)(43).*

[2] Use of Instruction

This instruction should be used to define "writing" with instructions involving the statute of frauds, parol evidence, and contract modification.

LexisNexis Matthew Bender Expert Practice Tip--Explain Terms: The phrase "or any other intentional reduction of information to tangible form" should be explained. The basic requirement is to provide some physical record of what took place. *By Ronald Oster*

[3] Comment

This instruction is based on *Com. Code § 1201(a)(43)*. This definition of a writing suggests that electronic messages may not be considered written because they are not necessarily in tangible form. It could be argued, for example, that a telex or telegram is not a writing if it is reduced to tangible form by the receiving party and not the sending party. Similarly, computer-generated communications may be recorded internally in the machine or in storage, but it is difficult to consider this recording tangible. The Code appears to require some physical evidence of the parties' intent, even though it is no more than a match book with penciled notes [U.C.C. Comment No. 1 to *Com. Code § 2201*]. On this basis, an electronic communication, such as an e-mail, may nevertheless qualify if it is recorded by the sender in a

medium that permits reliable reproduction.

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentModification, Rescission & WaiverCommercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentParol EvidenceGeneral OverviewCommercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentStatutes of FraudsGeneral OverviewCommercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentStatutes of FraudsFormal Requirements

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PART A. DEFINITIONS FOR SALE OF GOODS CONTRACTS

2-3H California Forms of Jury Instruction MB 300H.22

MB 300H.22 Definition of Bill of Lading

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

A "bill of lading" is a document that is issued by a person who is in the business of transporting or forwarding goods. It shows that the goods were received for shipment.

Authority: *Com. Code § 1201(a)(6).*

[2] Use of Instruction

This instruction should be used when the term "bill of lading" is used.

[3] Comment

This instruction is based on *Com. Code § 1201(a)(6)*.

In one case, the court found that no implied agreement by a buyer to pay freight for ocean transport arose when the cargo was purchased "C+F, freight prepaid for delivery to Los Angeles," and the seller's check for freight was accepted by the shipper, although eventually it was dishonored. Terms in the shipper's bill of lading purporting to impose liability for freight on a broadly defined "Merchant" did not bind the C+F buyer in the absence of that buyer's signature or other evidence of acceptance of the terms [*Mitsui O.S.K. Lines, Ltd. v. Dynasea Corp.* (1999) 72 Cal.App.4th 208, 210-213, 85 Cal.Rptr.2d 1]. For an instruction and discussion relating to the definition of "agreement," see MB 300H.07. For an instruction and discussion on the definition of "C. & F.," see MB 300H.174.

In another bill of lading case, 49 U.S.C. § 14706, which requires a carrier to issue a bill of lading that can limit its

liability for loss or damage to goods, was found to preempt state shipping statutes [*see Dictor v. David & Simon, Inc.* (2003) 106 Cal.App.4th 238, 249-250, 130 Cal.Rptr.2d 588 (in case arising out of interstate shipment of computer equipment by common carrier, plaintiff's conversion claim seeking monetary damages beyond limitation on liability in bill of lading was preempted)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC) Documents of Title (Article 7) Bills of Lading

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CHAPTER 3H Matthew Bender Commercial Code Sales Contracts Instructions
PART A. DEFINITIONS FOR SALE OF GOODS CONTRACTS

2-3H California Forms of Jury Instruction MB 300H.23-MB 300H.29

Reserved for Future Use

MB 300H.23Reserved for Future Use



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CHAPTER 3H Matthew Bender Commercial Code Sales Contracts Instructions
PART B. STATUTE OF FRAUDS

2-3H California Forms of Jury Instruction MB 300H.30

MB 300H.30 Statute of Frauds Generally

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

The law requires that Plaintiff demonstrate the existence of the alleged contract with certain written evidence or by unambiguous evidence of whole or partial performance. This requirement is called the statute of frauds. In this case, Plaintiff contends the parties' agreement satisfies the statute of frauds because _____ [state basis alleged for compliance].

As is set forth in the following instruction, it is your duty to determine whether there is sufficient evidence of the contract claimed by Plaintiff.

Authority: *Com. Code § 2201.*

[2] Use of Instruction

This introductory instruction should be used whenever one party has raised the statute of frauds as a bar to enforcing an agreement the other party asserts by way of claim or defense. This instruction should be followed by one or more of the following instructions on specific ways of satisfying the statute of frauds. Consult Ch. 3F, *Matthew Bender Contract Defenses Instructions*, for additional instructions on the statute of frauds. The designation of the parties is for illustrative purposes only and should be changed if necessary.

To claim that the statute of frauds instruction is overcome by the doctrine of equitable estoppel (detrimental reliance), use the instruction in Ch. 3F, *Matthew Bender Contract Defenses Instructions*, MB 300F.42.

LexisNexis Matthew Bender Expert Practice Tip--Plan Closing Accordingly: Attorneys often have difficulty with the statute of frauds. Thus, consider how a jury will react and plan your closing

accordingly. *By Rex Heeseman*

[3] Comment

The statute of frauds writing requirement is set forth in *Com. Code § 2201*. Generally, the party asserting the validity of the contract by way of affirmative claim or defense has the burden of proving that the contract satisfies the statute of frauds [*E. K. Wood Lumber Co. v. Moore Mill & Lumber Co.* (9th Cir. 1938) 97 F.2d 402, 408].

The general requirement set forth in *Com. Code § 2201(1)* does not apply to certain "qualified financial contracts" [see *Civ. Code § 1624(b)(2)*] if either of the following is true:

- There is sufficient evidence to indicate that a contract has been made [see *Civ. Code § 1624(b)(3)*];
- or
- The parties have agreed, by means of a prior or subsequent written contract, to be bound by the terms of the qualified financial contract from the time they reach agreement (by telephone, by exchange of electronic messages, or otherwise) on those terms [*Com. Code § 2201(4)*].

For discussion of qualified financial contracts, see Ch. 3F, *Matthew Bender Contract Defenses Instructions*, MB 300F.40[3].

The doctrine of equitable estoppel can be used to overcome the statute of frauds requirement if the party can show that he or she would suffer an unconscionable injury if the statute of frauds would prevent enforcement of an oral contract [*Allied Grape Growers v. Bronco Wine Co.* (1988) 203 Cal.App.3d 432, 444, 249 Cal.Rptr. 872 ; *Irving Tier Co. v. Griffin* (1966) 244 Cal.App.2d 852, 863-864, 53 Cal.Rptr. 469]. Unconscionable injury results from denying enforcement of a contract after one party is induced by another party to seriously change position relying on the oral agreement [*Allied Grape Growers v. Bronco Wine Co.* (1988) 203 Cal.App.3d 432, 444, 249 Cal.Rptr. 872 ; see *Monarco v. Lo Greco* (1950) 35 Cal.2d 621, 623-624, 220 P.2d 737 (estoppel to assert statute of frauds when necessary to prevent unconscionable injury or unjust enrichment)].

For instructions on exceptions to the writing requirement, see *MB 300H.33 -MB 300H.35*.

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentStatutes of FraudsGeneral
OverviewCommercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentStatutes of FraudsFormal
RequirementsComputer & Internet LawInternet BusinessContractsDigital SignaturesContracts LawDefensesEquitable
EstoppelStatutes of Frauds

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CHAPTER 3H Matthew Bender Commercial Code Sales Contracts Instructions
PART B. STATUTE OF FRAUDS

2-3H California Forms of Jury Instruction MB 300H.31

MB 300H.31 Agreement in Signed Writing

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Plaintiff alleges that there is a written agreement signed by Defendant sufficient to indicate that a contract for sale of a specific quantity of goods has been made between the parties. A writing is not insufficient merely because it omits or incorrectly states a term agreed on by the parties, such as the price term.

To prevail, Plaintiff must prove that the writing admitted in evidence:

- 1. Is sufficient to indicate a contract of sale was made between the parties;**
- 2. Specifies an identifiable quantity of goods; and**
- 3. Was signed by Defendant.**

If you find the writing satisfies all of these requirements, the contract is enforceable to the extent of the quantity of goods specified in the writing.

[*OPTIONAL (See Use of Instruction)*]

It is not necessary that there be only one writing or that each writing be signed or include all contract terms.

Authority: *Com. Code § 2201(1).*

[2] Use of Instruction

This instruction should be used when the basis for satisfying the statute of frauds is alleged to be a writing signed by the party against whom it is to be enforced. The optional sentence is for use when more than one writing has been admitted and claimed to be the contract. A preponderance of evidence instruction must be used with this instruction [see Ch. 2, *California Judicial Council Evidence Instructions*, CACI No. 200 ("Obligation to Prove--More Likely True Than Not True")]. The designation of the parties is for illustrative purposes only and should be changed if necessary.

LexisNexis Matthew Bender Expert Practice Tip--Explain Underlying Reasons for Law: Some jurors will be surprised to learn that a written agreement can still be valid even if it omits terms such as price. Counsel should explain the reasons for the rule and the protections the law provides in these situations (e.g., the price must be reasonable, based on market quotations, etc.). *By Ronald Oster*

[3] Comment

A notation on a slip of paper indicating the sale of a certain quantity of goods and authenticated (as by a letterhead or initialing) by the person against whom enforcement is sought suffices to satisfy the statute [*Com. Code* § 2201(1); see U.C.C. Comment No. 1. to *Com. Code* § 2201]. A sufficient writing may be assembled from several documents, each containing portions of the agreement [*Goodman v. Community S. & L. Ass'n.* (1966) 246 Cal.App.2d 13, 22, 54 Cal.Rptr. 456].

The writing must be signed by the party against whom enforcement is sought, unless both parties are merchants [*Com. Code* § 2201(1), (2)]. In that instance, use MB 300H.32 on confirming a writing between merchants. The California Supreme Court has held that a car dealership's name in a printed newspaper advertisement was a "signature" sufficient to satisfy the statute of frauds [*Donovan v. RRL Corp.* (2001) 26 Cal.4th 261, 276-278, 109 Cal.Rptr.2d 807, 27 P.3d 702 ; see MB 300H.20].

The required writing need not state all the material terms of the agreement, nor need it be precise as to the terms it does state. However, there must be some quantity stated, and recovery is limited to the quantity stated. The writing must afford a basis for believing that the testimony as to an oral agreement rests on a real transaction [U.C.C. Comment No. 1. to *Com. Code* § 2201].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentStatutes of FraudsExceptionsGeneral OverviewCommercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentStatutes of FraudsExceptionsEstoppelCommercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentStatutes of FraudsExceptionsStatutory ExceptionsCommercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentStatutes of FraudsFormal Requirements

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CHAPTER 3H Matthew Bender Commercial Code Sales Contracts Instructions
PART B. STATUTE OF FRAUDS

2-3H California Forms of Jury Instruction MB 300H.32

MB 300H.32 Confirming Writing Between Merchants

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Plaintiff claims that the parties' agreement is an enforceable contract because it was confirmed in a writing that was received by Defendant. To establish an effective confirmation, Plaintiff must prove that each of the following elements have been established:

- 1. Plaintiff and Defendant were both merchants;**
- 2. Plaintiff sent a signed writing sufficient to indicate a contract of sale was made between the parties, specifying an identifiable quantity of goods;**
- 3. Defendant in fact received the confirming writing from Plaintiff within a reasonable time of the making of the alleged agreement;**
- 4. Defendant had reason to know the contents of the confirming writing; and**
- 5. Defendant failed to object in writing to the contents of the confirmation within 10 days of receiving the confirmation.**

If you find that each of these elements has been established, the contract is enforceable against Defendant.

Authority: Com. Code § 2201(2).

[2] Use of Instruction

This instruction should be used when the party asserting the contract by way of claim or defense is a merchant and contends that the statute of frauds is satisfied by a confirming writing received by a merchant. "Merchant" is defined in MB 300H.06.

Instructions should only be given on the elements that are at issue. A preponderance of evidence instruction must be used with this instruction [see Ch. 2, *California Judicial Council Evidence Instructions, CACI No. 200* ("Obligation to Prove--More Likely True Than Not True")]. The designation of the parties is for illustrative purposes only and should be changed if necessary.

LexisNexis Matthew Bender Expert Practice Tip--Silence Implies Consent: This is another situation where "silence implies consent." A merchant has 10 days to object to a confirmation or the merchant will be bound. *By Ronald Oster*

[3] Comment

If one merchant sends a writing in confirmation of the contract to another merchant, the writing satisfies the statute of frauds as to the recipient if (1) the writing satisfies the statute of frauds as to the sender, (2) the recipient has reason to know of the contents, and (3) the recipient fails to object to the contents in writing within 10 days of receipt [*Com. Code* § 2201(2)].

There is disagreement as to whether anyone in a trade or business should be considered a merchant for purposes of this instruction [see MB 300H.06 on the definition of "merchant"].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentStatutes of FraudsGeneral
OverviewCommercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentStatutes of
FraudsExceptionsMerchant RuleCommercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentStatutes of
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CHAPTER 3H Matthew Bender Commercial Code Sales Contracts Instructions
PART B. STATUTE OF FRAUDS

2-3H California Forms of Jury Instruction MB 300H.33

MB 300H.33 Confirmation of Contract by Seller's Performance

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Plaintiff contends that an enforceable oral agreement with Defendant was confirmed by partial performance by Plaintiff. For the agreement to be an enforceable contract, Plaintiff must prove each of the following:

- 1. That the goods were to be specially manufactured for Defendant;**
- 2. That the goods were not suitable for sale to others in the ordinary course of Plaintiff's business;**
- 3. That, before receiving notice of Defendant's repudiation, Plaintiff made _____
[a substantial beginning on the manufacture of the goods or commitments to procure the goods];
and**
- 4. That Plaintiff's _____ [substantial beginning or commitment for procurement]
was taken under circumstances that reasonably indicated that the goods were for Defendant.**

Authority: *Com. Code § 2201(3)(a).*

[2] Use of Instruction

This instruction should be used when the statute of frauds has been raised in defense and the seller asserts the partial performance exception for specially manufactured goods [see [3], below]. The optional language in the last two enumerations reflects the language of the Code and the appropriate choice should be made depending on the circumstances of a particular case. A preponderance of evidence instruction as the applicable standard of proof must be

used with this instruction [see Ch. 2, *California Judicial Council Evidence Instructions, CACI No. 200* ("Obligation to Prove--More Likely True Than Not True")]. The designation of the parties is for illustrative purposes only and should be changed if necessary.

LexisNexis Matthew Bender Expert Practice Tip--Conveying Meaning May Be Difficult:

Sometimes, it may be difficult to convey to jurors what is meant by this instruction. For example, in the second element how should you explain the meaning of "not suitable for sale to others"? *By Rex Heeseman*

[3] Comment

An oral contract is enforceable if goods are to be specially manufactured for the buyer and are not suitable for sale to others in the ordinary course of the seller's business. For the contract to be enforceable the seller, before repudiation and under circumstances that reasonably indicate that the goods are for the buyer, must have made either a substantial beginning on the manufacture of the goods or commitments for their procurement [*Com. Code § 2201(3)(a)*]. The rule of apportionment that applies in cases of partial payment or delivery [see *MB 300H.34*] may not apply here. One court enforced an entire oral contract although only a part was for specially manufactured goods [*Distribu-Dor Inc. v. Karadanis* (1970) 11 Cal.App.3d 463, 468, 90 Cal.Rptr. 231].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentStatutes of FraudsGeneral OverviewCommercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentStatutes of FraudsExceptionsStatutory ExceptionsCommercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentStatutes of FraudsFormal Requirements

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CHAPTER 3H Matthew Bender Commercial Code Sales Contracts Instructions
PART B. STATUTE OF FRAUDS

2-3H California Forms of Jury Instruction MB 300H.34

MB 300H.34 Confirmation of Contract by Acceptance of Payment or Delivery

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

[*EITHER (See Use of Instruction)*]

Plaintiff contends that an enforceable oral agreement with Defendant was confirmed by Defendant's acceptance of payment. For the agreement to be enforceable, Plaintiff must prove that [he/she/it] made payment for the goods and that the payment was accepted by Defendant. If payment was made and accepted for only a portion of the goods, the contract is enforceable against Defendant only to the extent of the goods for which payment was made and accepted.

[*OR*]

Plaintiff contends that an enforceable oral agreement with Defendant was confirmed by Defendant's acceptance of the goods. For the agreement to be enforceable, Plaintiff must prove that Defendant received and accepted the goods. If the amount of any goods that Plaintiff proves were received and accepted by Defendant was less than the total amount agreed on, the agreement is enforceable only to the extent of the goods received and accepted.

Authority: *Com. Code § 2201(3)(c).*

[2] Use of Instruction

The first paragraph of this instruction should be used when the buyer contends that the statute of frauds was satisfied by

the seller's acceptance of payment. The second paragraph should be used when the seller contends that the goods were received and accepted by the buyer thereby satisfying the statute of frauds. A preponderance of evidence instruction must be used with this instruction [*see* Ch. 2, *California Judicial Council Evidence Instructions, CACI No. 200* ("Obligation to Prove--More Likely True Than Not True")]. The designation of the parties is for illustrative purposes only and should be changed if necessary.

[3] Comment

A contract that does not satisfy the statute of frauds is enforceable with regard to goods for which payment has been made and accepted, or that have been received and accepted [*Com. Code* § 2201(3)(c)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentGeneral OverviewCommercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentStatutes of FraudsExceptionsGeneral OverviewCommercial Law (UCC)Sales (Article 2)PerformanceGeneral OverviewCommercial Law (UCC)Sales (Article 2)PerformancePayment Tender

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CHAPTER 3H Matthew Bender Commercial Code Sales Contracts Instructions
PART B. STATUTE OF FRAUDS

2-3H California Forms of Jury Instruction MB 300H.35

MB 300H.35 Admission That Contract Was Made**[1] Instruction**[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

[EITHER (See Use of Instruction)]

Plaintiff contends that Defendant has confirmed the existence of an enforceable oral agreement for the sale of _____ [specify quantity and type of goods] by admitting _____ [in (his/her/its) _____ (testimony/pleadings/ or specify other source of in-court admission)] that this agreement exists. For the agreement to be an enforceable contract, Plaintiff must prove that Defendant admitted both of the following:

1. That Defendant agreed to [buy/sell] _____ [specify type of goods] [from/to] Plaintiff; and

2. That this agreement was for the [purchase/sale] of _____ [specify quantity and type of goods].

[OR]

Defendant has admitted that [he/she/it] and Plaintiff entered into a contract for the sale of _____ [specify quantity and type of goods]. You are therefore to regard the existence of the contract and the quantity of _____ [specify type of goods] to be sold as established facts. There is

a conflict between Plaintiff and Defendant as to the terms of that contract. Plaintiff claims _____
[specify contract terms alleged by Plaintiff]. Defendant claims _____ [specify contract terms
alleged by Defendant]. It is your duty to weigh the evidence offered by both sides and decide what the terms of
that contract are.

Authorities: *Com. Code § 2201(3)(b)*; U.C.C. Comment No. 7 to *Com. Code § 2201*.

[2] Use of Instruction

This instruction should be used when it is alleged that the party against whom enforcement is sought has admitted the existence of an oral contract for the sale of goods [*Com. Code § 2201(3)(b)*; see [3][c], *below*]. The first alternative should be used when the existence of the contract is a question for determination by the jury. The second alternative should be used when the facts admitted establish the existence of the contract as a matter of law [see [3][f], *below* (effect of admission)]. A preponderance of evidence instruction as the applicable standard of proof must be used with this instruction [see Ch. 2, *California Judicial Council Evidence Instructions, CACI No. 200* ("Obligation to Prove--More Likely True Than Not True")]. The designation of parties is for illustrative purposes only and should be changed if necessary.

LexisNexis Matthew Bender Expert Practice Tip--Must Still Prove Terms: There are many situations where parties agree that they entered into an oral contract, but disagree on the terms of the oral contract. The admission takes the oral contract out of the statute of frauds. However, the terms of the contract still have to be proved. *By Ronald Oster*

[3] Comment

[a] Exception to Writing Requirement

An otherwise valid contract that is not evidenced by a writing sufficient to satisfy the requirements of *Com. Code § 2201(1)* (statute of frauds) [see *MB 300H.30* (requirements of *Com. Code § 2201(1)*)] is nonetheless enforceable if the party against whom enforcement is sought admits in his or her pleading, in testimony, or otherwise in court that a contract for sale was made. However, the contract is not enforceable beyond the quantity of goods admitted [*Com. Code § 2201(3)(b)*]. The adoption of *Com. Code § 2201(3)(b)* in California [*Com. Code § 2201(3)(b)* was adopted in 1988, but did not become effective until January 1, 1990. Stats. 1988, ch. 1368, § 18; Stats. 1988, ch. 1359, § 11] means that it is no longer possible to admit the contract in court and still treat the statute of frauds as a defense [U.C.C. Comment No. 7 to *Com. Code § 2201*]. What constitutes an admission sufficient to overcome the statute of frauds, and the effect of such an admission once made, are discussed in [b] through [f], *below*. For further discussion, see Bender's U.C.C. Service, Duesenberg & King, Sales and Bulk Transfers, § 2.04[3].

[b] In-Court Admission by Party Against Whom Enforcement Is Sought

Com. Code § 2201(3)(b) provides that the admission of a contract must be made by "the party against whom enforcement was sought ... in his or her pleading, testimony, or otherwise in court." The admission must be an in-court admission, sometimes referred to as a "judicial admission" [see, e.g., *Roth Steel Products v. Sharon Steel Corp.* (6th Cir. 1983) 705 F.2d 134, 142]. This means that, for example, an admission concerning the same contract in a different action involving a different party does not meet the requirements of *Com. Code § 2201(3)(b)* because it is not an in-court admission [*International Commodities Export Co. v. Wolfkill Feed & Fertilizer Corp.* (9th Cir. 1981) 32 U.C.C. Rptg. Serv. 687, 691]. The courts have recognized admissions in depositions [*Roth Steel Products v. Sharon Steel Corp.* (6th Cir. 1983) 705 F.2d 134, 142 ; *Oskey Gasoline & Oil Co., Inc. v. Continental Oil* (8th Cir. 1976) 534 F.2d 1281, 1284 ; *Ursa Farmers Cooperative Co. v. Trent* (1978) 58 Ill. App. 3d 930, 374 N.E.2d 1123, 1125], on cross-examination [*Farmers Elevator Co. of Reserve v. Anderson* (Mont. 1976) 552 P.2d 63, 65], and even in affidavits as in-court admissions [*Davis v. Aandewiel* (Ariz. App. 1972) 492 P.2d 758, 759]. A deposition is not "in court" when it is not properly before the trial court [*Lippold v. Beanblossom* (1974) 23 Ill. App. 3d 595, 319 N.E. 2d

548, 550].

Obviously a party is bound by its own admissions. When a party will be bound by an admission by another person is a question of agency law [Bender's U.C.C. Service, Duesenberg & King, Sales and Bulk Transfers, § 2.04[3]]. If an agent or officer who is authorized to contract on behalf of a party admits the existence of an oral contract, the agent's or officer's admission is effective against the party under *Com. Code § 2201(3)(b)* [*Roth Steel Products v. Sharon Steel Corp.* (6th Cir. 1983) 705 F.2d 134, 142-143 (agent); *Providence Granite Co., Inc. v. Joseph Rugo, Inc.* (Mass. 1972) 291 N.E. 2d 159, 160 (officer)]. The deposition of a former employee is not binding on the former employer [*Miller v. Sirloin Stockade* (Kan. 1978) 578 P.2d 247, 249].

[c] What Constitutes an Admission

For an oral contract to be enforceable under *Com. Code § 2201(3)(b)*, the in-court statement [see [b], above] must be an admission. A hypothetical or conditional statement is not an admission [*Lish v. Compton* (Utah 1976) 547 P.2d 223, 226 ; Bender's U.C.C. Service, Duesenberg & King, Sales and Bulk Transfers, § 2.04[3]], but it is not necessary that the party expressly declare that a contract was made. It is enough if the words or admitted conduct of the party reasonably lead to that conclusion [*Quaney v. Tobyne* (1984) 236 Kan. 201, 689 P.2d 844, 850-851]. Even when the party expressly denies the existence of a contract, there may be an admission if the party testifies to facts that establish a contract [*Quaney v. Tobyne* (1984) 236 Kan. 201, 689 P.2d 844, 850-851 ; *Lewis v. Hughes* (Md. App. 1975) 276 Md. 247, 346 A.2d 231, 234-235 ; see Bender's U.C.C. Service, Duesenberg & King, Sales and Bulk Transfers, § 2.04[3]].

A merely technical and procedural admission, as when a mere technical admission is made solely in connection with a motion to dismiss [*Anthony v. Tidwell* (Tenn. 1977) 560 S.W. 2d 908, 910, 23 U.C.C. Rptg. Serv. 561], is not considered an actual admission for the purposes of *Com. Code § 2201(3)(b)* [Hawkland UCC Series § 2-201:06; White & Summers, Uniform Commercial Code, Ch. 2, § 2-5 (2d ed. 1980)].

[d] Contents of Admission

The only term that the admission must contain is a quantity term, because *Com. Code § 2201(3)(b)* provides that the contract admitted may not be enforced beyond the quantity of goods admitted. Even the quantity term need be only definite enough to permit the court to enforce it. For example, a promise "to pay for those cans necessary for the canning season then underway" has been enforced under *Com. Code § 2201(3)(b)* as a sufficient admission of a requirements contract [*Continental Can Co. v. Poultry Processing, Inc.* (D. Me. 1986) 649 F.Supp. 570, 575]. The determination of the disputed terms of the contract is an issue of fact to be resolved consistently with the admitted terms [*Dangerfield v. Markel* (N.D. 1974) 222 N.W. 2d 373]. The admission does not require "a contract complete in all its terms, but ... a transaction sufficient to stand as proof that the parties did in fact enter into a contractual relationship" [*Jackson v. Meadows* (1980) 153 Ga. App. 1, 264 S.E. 2d 503, 505].

[e] Voluntary and Involuntary Admissions

Although there has been some controversy on this point, especially in pre-Code cases [see discussion in Bender's U.C.C. Service, Duesenberg & King, Sales and Bulk Transfers, § 2.04[3]], most courts [see, e.g., *Lewis v. Hughes* (Md. App. 1975) 276 Md. 247, 346 A.2d 231, 235-236 ; *Cohn v. Fisher* (1972) 118 N.J. Super. 286, 287 A.2d 222, 227], and most scholars [see, e.g., Bender's U.C.C. Service, Duesenberg & King, Sales and Bulk Transfers, § 2.04[3]; Duesenberg, *The Statue of Frauds in its 300th Year: The Challenge of Admissions in Court and Estoppel*, 33 Bus. Law. 1859, 1861-1864 (1978); Comment, *The Use of Oral Admissions To Lift the Bar of the Statute of Frauds: UCC Section 2-201(3)(b)*, 65 Cal. L. Rev. 150, 160 (1977)], now agree that the admission required by *Com. Code § 2201(3)(b)* need not be voluntary. "The other party to the purported agreement may be compelled to admit or deny the oral agreement" [*Dangerfield v. Markel* (N.D. 1974) 222 N.W. 2d 373, 378 ; see, e.g., *Oskey Gasoline & Oil Co., Inc. v. Continental Oil* (8th Cir. 1976) 534 F.2d 1281, 1283-1285 (admission elicited during deposition)].

[f] Effect of Admission

The in-court admission does not conclusively establish the contract. The admission is merely evidence against the party making it of the truth of the facts so admitted. As against the other party, it is not even evidence [U.C.C. Comment No. 7 to *Com. Code* § 2201]. This is to prevent the defendant from binding the plaintiff by an admission that misrepresents the terms of the contract [Comment, *The Use of Oral Admissions To Lift the Bar of the Statute of Frauds: UCC Section 2-201(3)(b)*, 65 *Cal. L. Rev.* 150, 153 (1977)]. Although the in-court admission is merely evidence of the contract, the facts admitted may establish the existence of the contract as a matter of law [*Lewis v. Hughes* (Md. App. 1975) 276 Md. 247, 346 A.2d 231, 235-236 ; Bender's U.C.C. Service, Duesenberg & King, Sales and Bulk Transfers, § 2.04[3]], or the question may be one for jury determination [Bender's U.C.C. Service, Duesenberg & King, Sales and Bulk Transfers, § 2.04[3]]. Once the contract is admitted, the bar of the statute of frauds is removed [U.C.C. Comment No. 7 to *Com. Code* § 2201; *Continental Can Co. v. Poultry Processing, Inc.* (D. Me. 1986) 649 F.Supp. 570, 575] , and the other terms of the contract may be established by parol evidence [*Continental Can Co. v. Poultry Processing, Inc.* (D. Me. 1986) 649 F.Supp. 570, 575 ; *Dangerfield v. Markel* (N.D. 1974) 222 N.W. 2d 373 ; *Giant Peanut Company v. Carolina Chemicals, Inc.* (1973) 129 Ga. App. 718, 200 S.E. 2d 918, 920 ; but see *Allen v. Harris Truck and Trailer Sales, Inc.* (E.D. Mo. 1980) 490 F.Supp. 488, 489-490 (holding that there is no admission when both parties agree contract was made but disagree as to its terms, because defendant has not then admitted to contract on terms alleged by plaintiff), which was criticized as incorrect in Benfield, *General Provisions, Sales, Bulk Sales*, 36 *Bus. Law.* 1267, 1270 (1981) and in Hawkland UCC Series § 2-201:06]. A quantity term must be admitted, because "the contract is not enforceable ... beyond the quantity of goods admitted" [*Com. Code* § 2201(3)(b)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentParol EvidenceGeneral
 OverviewCommercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentStatutes of FraudsGeneral
 OverviewCommercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentStatutes of
 FraudsExceptionsEstoppelCommercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentStatutes of
 FraudsExceptionsStatutory ExceptionsCommercial Law (UCC)Sales (Article 2)Form, Formation &
 ReadjustmentStatutes of FraudsFormal RequirementsContracts LawTypes of ContractsOral Agreements

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CHAPTER 3H Matthew Bender Commercial Code Sales Contracts Instructions
PART B. STATUTE OF FRAUDS

2-3H California Forms of Jury Instruction MB 300H.36-MB 300H.39

Reserved for Future Use

MB 300H.36Reserved for Future Use



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CHAPTER 3H Matthew Bender Commercial Code Sales Contracts Instructions
PART C. FORMATION OF CONTRACTS

2-3H California Forms of Jury Instruction MB 300H.40

MB 300H.40 Formation of Contracts for the Sale of Goods

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

A contract for the sale of goods may be made in any manner sufficient to show an agreement between the parties, including conduct by both parties that recognizes the existence of such an agreement.

It is not necessary to establish the moment that the contract was made to find that an agreement existed that was sufficient to constitute a contract for the sale of goods.

Authority: *Com. Code § 2204.*

[2] Use of Instruction

This instruction should be used as an introduction to one or more of the following instructions on offer and acceptance. The instruction in MB 300H.07 defining "agreement" should also be used with this instruction.

For related Judicial Council instructions, see [3][b], *below*.

LexisNexis Matthew Bender Expert Practice Tip--Careful Planning Is Advisable: Usually, proving the existence of an agreement is not challenging. Yet, particularly if the proof relates to the "conduct by both parties," careful planning is advisable. *By Rex Heeseman*

LexisNexis Matthew Bender Expert Practice Tip--Using Instruction: The last portion of this instruction applies to situations when a contract consists of several exchanges of writings, or a combination of writings and conduct. *By Ronald Oster*

[3] Comment**[a] Formation of Contracts**

This instruction is based on *Com. Code § 2204*. The instruction reflects the Commercial Code's liberal approach toward contract formation. However, the contract may still fail for indefiniteness if the court determines there is no reasonably certain basis for giving an appropriate remedy [*Com. Code § 2204*]. When the parties merely leave out one of the terms that can be supplied by the Commercial Code's term filling provisions [*Com. Code §§ 2304-2311*], there is no difficulty in enforcing the agreement. Oral contracts or those based on the conduct of the parties carry a much greater risk that an indispensable term will not be sufficiently articulated, causing the contract to fail for indefiniteness.

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 3, *California Judicial Council Contracts Instructions*]:

CACI No. 307, Contract Formation--Offer

CACI No. 308, Contract Formation--Revocation of Offer

CACI No. 309, Contract Formation--Acceptance

CACI No. 310, Contract Formation--Acceptance by Silence

CACI No. 311, Contract Formation--Rejection of Offer

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentGeneral OverviewCommercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentOffer & AcceptanceCommercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentParol EvidenceGap-Filler Provisions

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CHAPTER 3H Matthew Bender Commercial Code Sales Contracts Instructions
PART C. FORMATION OF CONTRACTS

2-3H California Forms of Jury Instruction MB 300H.41

MB 300H.41 Offer and Acceptance Generally

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

To establish a contract for the sale of goods, Plaintiff must prove both of the following:

- 1. That one of the parties made an unmistakable offer to sell or buy the goods in question; and**
- 2. That the other party accepted the offer by a definite and timely expression of acceptance.**

It is for you to decide, based on all of the circumstances of the transaction, including the written and oral statements of the parties, their conduct, and the surrounding circumstances, whether a contract for the sale of goods was made by the parties in this case.

Authorities: *Com. Code § 2204; Lonergan v. Scolnick (1954) 129 Cal.App.2d 179, 182, 276 P.2d 8 .*

[2] Use of Instruction

This instruction should be used as the basic instruction on offer and acceptance. Appropriate instructions defining offer and acceptance should be selected from the following instructions or from the instructions in Ch. 3A, *Matthew Bender Formation of Contract Instructions*. When a contract by conduct is alleged, the instruction in MB 300H.48 should be used. A preponderance of evidence instruction must be used with this instruction [see Ch. 2, *California Judicial Council Evidence Instructions, CACI No. 200* ("Obligation to Prove--More Likely True Than Not True")]. The designation of the parties is for illustrative purposes only and should be changed if necessary.

For related Judicial Council instructions, see [3][b], *below*.

LexisNexis Matthew Bender Expert Practice Tip--Alternate Phrase: The phrase "unmistakable offer" in the first element seems awkward. An alternate term is "definite offer." *By Ronald Oster*

[3] Comment

[a] Offer and Acceptance Generally

Com. Code § 2204 states generally the manner of contract formation, broadly providing that a contract for the sale of goods may be made "in any manner sufficient to show agreement." However, this instruction focuses on the traditional exchange of offer and acceptance [*Loneragan v. Scolnick* (1954) 129 Cal.App.2d 179, 182, 276 P.2d 8 ; see Restatement (Second) of Contracts § 22].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 3, *California Judicial Council Contracts Instructions*]:

CACI No. 307, Contract Formation--Offer

CACI No. 308, Contract Formation--Revocation of Offer

CACI No. 309, Contract Formation--Acceptance

CACI No. 310, Contract Formation--Acceptance by Silence

CACI No. 311, Contract Formation--Rejection of Offer

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentGeneral OverviewCommercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentOffer & Acceptance

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CHAPTER 3H Matthew Bender Commercial Code Sales Contracts Instructions
PART C. FORMATION OF CONTRACTS

2-3H California Forms of Jury Instruction MB 300H.42

MB 300H.42 Offer Defined

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

An offer is a proposal to make a contract for the sale of goods inviting acceptance by the party to whom it is made. An offer may be communicated in writing, orally, or by conduct indicating an intention to make a contract.

Authorities: *Com. Code §§ 2204, 2206.*

[2] Use of Instruction

This instruction should be used as the basic offer instruction together with instructions MB 300H.40 and MB 300H.41.

For related Judicial Council instructions, see [3][b], *below*.

LexisNexis Matthew Bender Expert Practice Tip--Proving Offer: This instruction is straight forward. However, in some litigation proving an "offer" may be complicated. *By Rex Heeseman*

[3] Comment

[a] Offer Defined

Although the term "offer" is not explicitly defined in the Commercial Code, it is clear that an offer is a proposal inviting acceptance [*Com. Code § 2206(1)(a)*]. The Commercial Code recognizes that offers may be communicated in any of several ways, written, oral, or by conduct [*Com. Code § 2204*; U.C.C. Comment No. 1 to *Com. Code § 2204*]. Instructions in Ch. 3A, *Matthew Bender Formation of Contract Instructions*, address some of the special issues that may arise regarding communication and definiteness of the offer.

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 3, *California Judicial Council Contracts Instructions*]:

CACI No. 307, Contract Formation--Offer

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)General Provisions (Article 1)Definitions & InterpretationGeneral OverviewCommercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentGeneral OverviewCommercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentFirm OffersCommercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentOffer & Acceptance

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CHAPTER 3H Matthew Bender Commercial Code Sales Contracts Instructions
PART C. FORMATION OF CONTRACTS

2-3H California Forms of Jury Instruction MB 300H.43

MB 300H.43 Revocable and Irrevocable Offers

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

[EITHER (See Use of Instruction)]

If Defendant proves that the offer was revoked at any time before it was accepted, there was no contact between the parties.

[OR]

Defendant's attempted revocation of the offer was not effective if Plaintiff proves all of the following:

- 1. That the offer was written and signed;**
- 2. That the offer stated that it _____ [will be "held open" or is "firm" or is "guaranteed"] _____ [for a stated time or until the happening of a stated event]; and**
- 3. That the offer was accepted before the time set in it.**

[OR]

Defendant's attempted revocation of the offer was not effective if Plaintiff proves all of the following:

1. That the offer was written and signed;

2. That the offer stated that it _____ [will be "held open" or is "firm" or is "guaranteed"] _____ until a reasonable period of time has passed; and

3. That the offer was accepted before a reasonable period of time had passed.

It is for you to determine what a reasonable period of time was under the circumstances.

Authorities: Civ. Code § 1586; Com. Code § 2205(a).

[2] Use of Instruction

This instruction should be used when revocation is an issue. The first option should be used when one party contends that the offer was revoked before acceptance. When necessary, general instructions defining consideration or revocation should be included [see Ch. 3A, *Matthew Bender Formation of Contract Instructions*]. If the offer is a firm offer for a stated time by a merchant, the second optional instruction should be given. The third option is used when the merchant's firm offer does not state a time for acceptance. The definition of "merchant" in MB 300H.06, and "signed" in MB 300H.20, should be given as well. A preponderance of evidence instruction must be used with this instruction [see Ch. 2, *California Judicial Council Evidence Instructions, CACI No. 200* ("Obligation to Prove--More Likely True Than Not True")]. The designation of the parties is for illustrative purposes only and should be changed if necessary.

For related Judicial Council instructions, see [3][b], *below*.

LexisNexis Matthew Bender Expert Practice Tip--Closing Requires Care: The term "revoke" will not be familiar to some jurors. Especially when there is a "checklist" of points to prove, your closing must follow the related evidence with care. *By Rex Heeseman*

[3] Comment

[a] Revocable and Irrevocable Offers

Ordinarily, an offer can be revoked any time before acceptance [*Civ. Code § 1586*]. The Commercial Code is unique in limiting revocation of offers unsupported by consideration. However, this limitation applies only when a "firm" offer is made in a signed writing by a merchant [*Com. Code § 2205(a)*]. The writing need be no more than a hand written memorandum signed by the merchant or on the merchant's letterhead. A telegram with a typewritten signature also satisfies the requirement of a signed writing [U.C.C. Comment No. 2 to *Com. Code § 2205*].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 3, *California Judicial Council Contracts Instructions*]:

CACI No. 307, Contract Formation--Offer

CACI No. 308, Contract Formation--Revocation of Offer

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Breach, Repudiation & ExcuseAcceptance of GoodsRevocation of

AcceptanceGeneral OverviewCommercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentOffer &
AcceptanceCommercial Law (UCC)Sales (Article 2)Subject MatterDefinitionsGeneral Overview

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CHAPTER 3H Matthew Bender Commercial Code Sales Contracts Instructions
PART C. FORMATION OF CONTRACTS

2-3H California Forms of Jury Instruction MB 300H.44

MB 300H.44 Firm Offer by Merchant to Construction Contractor**[1] Instruction**[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Defendant's attempt to revoke the offer to supply goods to Plaintiff was not effective if Plaintiff proves all of the following:

- 1. That the offer was made during a period of 10 days after award of the construction contract to the prime contractor;**
- 2. That Defendant knew or should have known that Plaintiff was licensed; and**
- 3. That Defendant knew or should have known that Plaintiff would rely on the offer in making its bid on a construction contract with a third party.**

[*OPTIONAL (See Use of Instruction)*]

However, if you find that Defendant's offer was made orally or by telephone for a price of \$2,500 or more, _____ [Plaintiff or Plaintiff's agent] must have confirmed it by a writing _____ [sent or mailed] within 48 hours after the offer was made, or Defendant was not bound by the offer and Plaintiff may not recover from Defendant.

Authority: *Com. Code § 2205(b).*

[2] Use of Instruction

The instruction should be used in suits by contractors when the merchant failed to honor a bid and the contractor was forced to buy the goods elsewhere at greater expense or effort or loss of time. For a burden of proof instruction on the same subject, see Ch. 3I, *Matthew Bender Construction Contract Instructions*, MB 300I.05. The optional instruction must be used when there is a fact issue as to whether the offer was oral or for more than \$2,500 or as to whether a confirmation was sent within 48 hours. A preponderance of evidence instruction must be used with this instruction [see Ch. 2, *California Judicial Council Evidence Instructions*, CACI No. 200 ("Obligation to Prove--More Likely True Than Not True")]. The designation of the parties is for illustrative purposes only and should be changed if necessary.

[3] Comment

When a merchant renders an offer, oral or written, to a licensed contractor and the merchant knows or should know that the contractor is licensed and that the contractor will rely on the offer in submitting a bid on a construction contract, the offer is irrevocable for 10 days after the award of the contract to the prime contractor. However, the offer is only irrevocable for 90 days after the date the offer was made. An oral offer for a price of \$2,500 or more must be confirmed in writing by the contractor within 48 hours after it is rendered or the merchant is released from the offer [*Com. Code § 2205(b)*].

Before the enactment of *Com. Code § 2205(b)*, reliance on an offer unsupported by consideration gave rise to a promissory estoppel, allowing the offeree who detrimentally relied to enforce the contract [see *Drennan v. Star Paving Co.* (1958) 51 Cal.2d 409, 414-415, 333 P.2d 757].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentGeneral OverviewCommercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentOffer & AcceptanceCommercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentStatutes of FraudsExceptionsMerchant RuleContracts LawFormationOffersIrrevocable Offers

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CHAPTER 3H Matthew Bender Commercial Code Sales Contracts Instructions
PART C. FORMATION OF CONTRACTS

2-3H California Forms of Jury Instruction MB 300H.45

MB 300H.45 Acceptance Generally

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

An offer to make a contract can be accepted by any means and in any manner that is reasonable under the circumstances.

[*OPTIONAL (See Use of Instruction)*]

An offer to make a contract that expressly states a particular manner or means of acceptance can be accepted only by the means or manner stated.

[*OPTIONAL (See Use of Instruction)*]

An offer to make a contract under circumstances that require the offer to be accepted only by a particular manner or means, can be accepted only by that manner or means.

Authority: *Com. Code § 2206(1)(a).*

[2] Use of Instruction

This basic acceptance instruction should be used with the general offer and acceptance instructions [see *MB 300H.40, MB 300H.41*]. The optional instructions should be included when one party contends the offer expressly or impliedly required a particular method of acceptance. Instructions in Ch. 3A, *Matthew Bender Formation of Contract Instructions*, may apply when the adequacy or definiteness of the acceptance is an issue.

For related Judicial Council instructions, see [3][b], *below*.

[3] Comment

[a] Acceptance

The Commercial Code gives wide latitude in the method or manner in which an offer may be accepted. An offer is to be construed as inviting acceptance in any manner and by any medium reasonable under the circumstances. However, a specific manner of acceptance may be required by the offer itself or the circumstances [*Com. Code* § 2206(1)].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 3, *California Judicial Council Contracts Instructions*]:

CACI No. 309, Contract Formation--Acceptance

CACI No. 310, Contract Formation--Acceptance by Silence

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentOffer & AcceptanceCommercial Law (UCC)Sales (Article 2)Subject MatterDefinitionsGeneral Overview

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CHAPTER 3H Matthew Bender Commercial Code Sales Contracts Instructions
PART C. FORMATION OF CONTRACTS

2-3H California Forms of Jury Instruction MB 300H.46

MB 300H.46 Acceptance by Shipment

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] PROPOSED INSTR. NO. _____

Plaintiff's order for prompt or current shipment was accepted if Plaintiff proves that Defendant _____ [made a prompt promise to ship the goods or promptly shipped by third party carrier conforming or nonconforming goods].

[OPTIONAL (See Use of Instruction)]

However, shipment of nonconforming goods does not constitute an acceptance if Defendant notified Plaintiff within a reasonable time that the shipment was offered only as an accommodation to Defendant.

Authorities: *Com. Code* §§ 2206(1)(b), 2504; U.C.C. Comment No. 2 to *Com. Code* § 2206.

[2] Use of Instruction

This instruction should be used when it is contended that an order for prompt shipment of goods was accepted by shipment of goods or a promise to do so. The optional paragraph may be given if nonconforming goods were shipped merely to accommodate the defendant. A preponderance of evidence instruction must be used with this instruction [see Ch. 2, *California Judicial Council Evidence Instructions*, CACI No. 200 ("Obligation to Prove--More Likely True Than Not True")]. The designation of the parties is for illustrative purposes only and should be changed if necessary.

[3] Comment

Com. Code § 2206 expressly permits acceptance of an order by prompt shipment of the ordered goods. Shipment

means by common carrier, not by the seller's truck [*Com. Code* § 2504; U.C.C. Comment No. 2 to *Com. Code* § 2206]. However, unless this beginning of performance is promptly followed by notice of acceptance, the offeror is not bound [*Com. Code* § 2206(2)].

Another variation is when the offer, by its terms or circumstances, specifically invites acceptance by conduct without notice to the offeror, taking it out of the above general rule. In such an instance, acceptance by shipment alone is arguably in accordance with the manner specified and is binding on the offeror [*Davis v. Jacoby* (1934) 1 Cal.2d 370, 378, 34 P.2d 1026].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Breach, Repudiation & ExcuseAcceptance of GoodsGeneral
OverviewCommercial Law (UCC)Sales (Article 2)Contract TermsGap-Filler ProvisionsGeneral OverviewCommercial
Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentOffer & AcceptanceCommercial Law (UCC)Sales
(Article 2)Subject MatterDefinitionsGeneral OverviewContracts LawSales of GoodsForm, Formation &
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CHAPTER 3H Matthew Bender Commercial Code Sales Contracts Instructions
PART C. FORMATION OF CONTRACTS

2-3H California Forms of Jury Instruction MB 300H.47

MB 300H.47 Acceptance or Confirmation Stating Additional Terms

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

A definite and timely expression of acceptance by Plaintiff stating terms additional to or different from those offered by Defendant is effective to form a contract, unless Defendant proves that the acceptance expressly required that Defendant agree to the additional or different terms.

[*OPTIONAL (See Use of Instruction)*]

If you determine that the acceptance expressly required Defendant to agree to _____ [*additional or different terms*] in the acceptance, you must also find that Defendant accepted these terms to find that the offer and acceptance of the parties created a contract.

Authorities: *Com. Code § 2207(1); Textile Unlimited, Inc. v. A.B.M.H. & Co., Inc.* (9th Cir. 2001) 240 F.3d 781, 787-788 ; *Steiner v. Mobil Oil Corp.* (1977) 20 Cal.3d 90, 93-94, 141 Cal.Rptr. 157, 569 P.2d 751 ; *PMC Inc. v. Porthole Yachts Ltd.* (1998) 65 Cal.App.4th 882, 887-889, 76 Cal.Rptr.2d 832 .

[2] Use of Instruction

This instruction should be used only when it is contended that additional or different terms in an acceptance rendered the acceptance ineffective. The optional paragraph is for use when there has been an express conditional acceptance. Sections MB 300H.63 and MB 300H.64 address the question of what the terms of the contract are when the acceptance contains additional or different terms. A preponderance of evidence instruction must be used with this instruction [see Ch. 2, *California Judicial Council Evidence Instructions, CACI No. 200* ("Obligation to Prove--More Likely True Than Not True")]. The designation of the parties is for illustrative purposes only and should be changed if necessary.

LexisNexis Matthew Bender Expert Practice Tip--Contract Formation: This instruction deals with the common situation when the buyer and seller use their own standard forms that do not match. A contract can still be formed even though the terms of the contract will have to be decided by the court or the jury [see MB 300H.63 for additional terms in non-merchant acceptances, and MB 300H.64 for additional terms in merchant acceptances]. By *Ronald Oster*

[3] Comment

The Commercial Code recognizes that in many commercial transactions the parties intend to make a contract, and may even complete performance, before it is realized that the terms of their offer and acceptance do not match [*Steiner v. Mobil Oil Corp.* (1977) 20 Cal.3d 90, 141 Cal.Rptr. 157, 569 P.2d 751]. *Com. Code* § 2207 attempts to preserve the parties' basic intent by permitting acceptances stating different terms to operate as effective acceptances unless they clearly require the other party to agree to the added or different terms [see *National Controls, Inc. v. Commodore Bus. Machines, Inc.* (1985) 163 Cal.App.3d 688, 693, 209 Cal.Rptr. 636]. Thus, conditional acceptances must expressly state that they are conditional to prevent a contract's formation without acquiescence in the additional terms [see *Textile Unlimited, Inc. v. A.B.M.H. & Co., Inc.* (9th Cir. 2001) 240 F.3d 781, 787-788 (contract containing new terms including arbitration clause was not formed under *Com. Code* § 2207(1) when acceptance was expressly made conditional on assent to new terms and no specific and unequivocal assent was given); *PMC Inc. v. Porthole Yachts Ltd.* (1998) 65 Cal.App.4th 882, 887-889, 76 Cal.Rptr.2d 832 (no acceptance found under *Com. Code* § 2207(1) due to timing of addendum to agreement sent on last day to accept, contents of addendum that contained new term, and cover letter emphasizing conditional nature of acceptance)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentOffer & AcceptanceCommercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentParol EvidenceAdditional Terms

Irene Sall Holmes and Lock Holmes contributed to the original chapter for California Forms of Jury Instruction (Matthew Bender).



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CHAPTER 3H Matthew Bender Commercial Code Sales Contracts Instructions
PART C. FORMATION OF CONTRACTS

2-3H California Forms of Jury Instruction MB 300H.48

MB 300H.48 Agreement Evidenced by Conduct

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] PROPOSED INSTR. NO. ____

To establish that a contract existed between the parties, Plaintiff must prove that there was conduct by the parties that recognizes the existence of a contract for the sale of goods even though the parties' written documents were not sufficient to show agreement.

In determining whether the conduct of the parties establishes a contract, you should consider all of the evidence before you, including the statements of the parties, their conduct, and the surrounding circumstances.

If you find that the conduct of the parties establishes a contract, the terms of the contract are those on which the writings of both parties agree and any additional terms supplied by law.

Authorities: *Com. Code § 2207(3); Textile Unlimited, Inc. v. A.B.M.H. & Co., Inc. (9th Cir. 2001) 240 F.3d 781, 788 .*

[2] Use of Instruction

This instruction should be used alone or in conjunction with the general offer and acceptance instructions when it is contended that the conduct of the parties is sufficient to establish a contract. The court will instruct the jury as to what terms are supplied by operation of law [see MB 300H.110 -MB 300H.126 (open terms), MB 300H.140-MB 300H.157 (warranties)]. The designation of the parties is for illustrative purposes only and should be changed if necessary.

LexisNexis Matthew Bender Expert Practice Tip--Closing Must Be Clear: Some jurors will be reluctant to "find" a contract when there is nothing in writing that specific. Thus, if your closing relies in effect on circumstantial evidence, you need to be particularly clear in your statements. *By Rex Heeseman*

[3] Comment

Com. Code § 2207(3) is a catch-all provision intended to operate when the parties conduct themselves as if there is an agreement such as by delivering goods and making payment, without ever agreeing on contract terms. This situation can arise when the acceptance is expressly conditional on different terms and these terms are never agreed to, but the parties proceed as if they have a contract. *Com. Code § 2207(3)* recognizes that a contract is in existence in this type of situation [see, e.g., *Textile Unlimited, Inc. v. A.BMH & Co., Inc.* (9th Cir. 2001) 240 F.3d 781, 788 (although contract was not formed under *Com. Code § 2207(1)*, parties did not dispute that through their actions they formed contract under *Com. Code § 2207(3)*)]. The terms are those on which the party's writings agreed, plus any other terms implied by law. One court has held that when conduct by a subcontractor and seller showed that a contract had been formed despite materially differing terms of the purchase order and invoice, the trial court's failure to instruct the jury on *Com. Code § 2207* was prejudicial error [*Steiny and Company, Inc. v. California Electric Supply Co., Inc.* (2000) 79 Cal.App.4th 285, 294-296, 93 Cal.Rptr.2d 920].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Contract TermsGap-Filler ProvisionsGeneral OverviewCommercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentGeneral OverviewCommercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentOffer & Acceptance

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CHAPTER 3H Matthew Bender Commercial Code Sales Contracts Instructions
PART C. FORMATION OF CONTRACTS

2-3H California Forms of Jury Instruction MB 300H.49-MB 300H.59

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MB 300H.49Reserved for Future Use



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CHAPTER 3H Matthew Bender Commercial Code Sales Contracts Instructions
PART D. CONTRACT TERMS

2-3H California Forms of Jury Instruction MB 300H.60

MB 300H.60 General Instruction

[1] Instruction

[*PLAINTIFF'S/DEFENDANT'S*] **PROPOSED INSTR. NO.** _____

The terms of the parties' contract are those on which their confirming writings agree or those terms set forth in a writing intended to be the written expression of their agreement.

However, the terms of the parties' basic agreement may be supplemented, explained, or modified as described in the following instructions.

Authorities: *Com. Code* §§ 2202, 2207.

[2] Use of Instruction

This instruction should be used, as appropriate, to introduce one or more of the instructions in this Part on contract terms.

For related Judicial Council instructions, see [3][b], *below*.

[3] Comment

[a] Contract Terms

This instruction is based on *Com. Code* § 2202. It restates the general proposition that in determining what terms are part of the contract, the Code starts with the parties' confirming memoranda or written expression of their agreement. Additional terms may be provided by several sources, including different terms in the acceptance [see *MB 300H.63*], evidence of trade custom or usage [see *MB 300H.61*], or consistent additional terms from other sources [see *MB*

300H.62]. Before any of these additional terms may be considered for inclusion in the contract, the Code's parol evidence requirements must be met [*see MB 300H.61*].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [*see Ch. 3, California Judicial Council Contracts Instructions*]:

CACI No. 304, Oral or Written Contract Terms

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentGeneral OverviewCommercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentParol EvidenceGeneral OverviewCommercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentParol EvidenceAdditional TermsContracts LawContract InterpretationParol EvidenceGeneral OverviewContracts LawContract InterpretationParol EvidenceCustom & Usage

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CHAPTER 3H Matthew Bender Commercial Code Sales Contracts Instructions
PART D. CONTRACT TERMS

2-3H California Forms of Jury Instruction MB 300H.61

MB 300H.61 Evidence Supplementing and Explaining Terms

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] PROPOSED INSTR. NO. _____

The parties' agreement may be supplemented or explained by any of the following:

- 1. A course of dealing between the parties;**
- 2. A practice or custom of trade; or**
- 3. A course of performance.**

Plaintiff contends that the parties' agreement may be supplemented or explained in the following way[s]:
_____ [*list supplemental or explanatory material*].

To sustain this contention, Plaintiff must prove that there was such a course of dealing, practice or custom of trade, or course of performance and how it supplemented or explained the contract between the parties.

Authority: *Com. Code § 2202(a).*

[2] Use of Instruction

This instruction should be used when evidence is offered to explain or supplement contract terms. Instructions defining course of dealing [see *MB 300H.11*], course of performance [see *MB 300H.13*], and trade usage [see *MB 300H.12*] should be included as appropriate. A preponderance of evidence instruction must be used with this instruction [see Ch. 2, *California Judicial Council Evidence Instructions, CACI No. 200* ("Obligation to Prove--More Likely True Than Not True")]. The designation of the parties is for illustrative purposes only and should be changed if necessary.

[3] Comment

The Commercial Code's parol evidence rule [*Com. Code § 2202*] does not bar evidence that explains or supplements agreed-on terms. Even an integrated agreement can be explained or supplemented by evidence of a course of dealing, course of performance, or trade usage [U.C.C. Comment No. 2 to *Com. Code § 2202*]. If this evidence is sufficient to show the bargain of the parties, the supplemental terms become part of the parties' agreement [*Com. Code § 1201(a)(3)*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)General Provisions (Article 1)Application & ConstructionGap-Filler ProvisionsCommercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentParol EvidenceGap-Filler ProvisionsContracts LawContract InterpretationParol EvidenceGeneral OverviewContracts LawContract InterpretationParol EvidenceCourse of DealingContracts LawContract InterpretationParol EvidenceCustom & UsageEvidenceDocumentary EvidenceParol Evidence

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CHAPTER 3H Matthew Bender Commercial Code Sales Contracts Instructions
PART D. CONTRACT TERMS

2-3H California Forms of Jury Instruction MB 300H.62

MB 300H.62 Evidence of Consistent Additional Terms

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] PROPOSED INSTR. NO. _____

In addition to those terms that appear in the parties' _____ [confirming writings or final written expression of agreement], you may find that the parties agreed to additional terms.

In this case Plaintiff contends that the following additional terms were agreed on by the parties:
_____ [list additional terms].

For these terms to be considered part of the contract, Plaintiff must prove that they were offered and accepted by the parties.

Authority: *Com. Code § 2202(b).*

[2] Use of Instruction

This instruction should be used when there is an issue as to the parties' agreement on supplemental terms. This instruction should be used only after the court has ruled that the parties' written agreement is not a final integration under *Com. Code § 2202(b)* and that the additional terms are not contradictory. A preponderance of evidence instruction must be used with this instruction [see Ch. 2, *California Judicial Council Evidence Instructions, CACI No. 200* ("Obligation to Prove--More Likely True Than Not True")]. The designation of the parties is for illustrative purposes only and should be changed if necessary.

LexisNexis Matthew Bender Expert Practice Tip: Providing proof of "additional terms" may often be difficult. *By Rex Heeseman*

[3] Comment

In general, the written terms of the contract may be supplemented by evidence of consistent, additional terms [*Com. Code § 2202(b)*]. However, before evidence of consistent additional terms can go to the jury, *Com. Code § 2202(b)* explicitly requires the court to determine that the parties did not intend their written agreement to be the complete and exclusive statement of the contract's terms. There is no similar statement of the court's role regarding evidence of contradictory terms. However, it appears the court must also find that the additional terms are consistent with the other terms that the parties have agreed on before it can admit evidence of agreement on those terms. Therefore, the instruction does not require the jury to determine whether the terms are consistent.

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentGeneral OverviewCommercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentParol EvidenceAdditional Terms

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CHAPTER 3H Matthew Bender Commercial Code Sales Contracts Instructions
PART D. CONTRACT TERMS

2-3H California Forms of Jury Instruction MB 300H.63

MB 300H.63 Added Terms in Non-Merchant's Acceptance or Confirmation

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] PROPOSED INSTR. NO. _____

An acceptance may contain terms in addition to or different from the terms of the offer. These additional or different terms do not become part of the contract, unless they are accepted by the other party.

In this case Plaintiff contends that the following _____ [additional or different] terms were offered to and subsequently accepted by Defendant: _____ [list additional or different terms in acceptance].

To find that these terms became part of the parties' agreement, Plaintiff must prove that Defendant indicated acceptance of these terms within a reasonable time.

Authorities: *Com. Code §§ 2206(1)(a), 2207(2).*

[2] Use of Instruction

This instruction should be used with the instruction on acceptance in MB 300H.47 when the parties dispute the acceptance of different or additional terms included in the initial acceptance. It applies when both parties to the transaction are not merchants. The instruction in MB 300H.64 should be used when both parties are merchants. If merchant status is an issue, the instruction in MB 300H.06 should be given first. A preponderance of evidence instruction must be used with this instruction [see Ch. 2, *California Judicial Council Evidence Instructions, CACI No. 200* ("Obligation to Prove--More Likely True Than Not True")]. The designation of the parties is for illustrative purposes only and should be changed if necessary.

LexisNexis Matthew Bender Expert Practice Tip--Showing Acceptance Can Be Difficult: It often will be difficult to demonstrate that terms "in addition to or different" were "accepted" by the other side.

Particularly "different" terms will not resonate with some jurors. *By Rex Heeseman*

LexisNexis Matthew Bender Expert Practice Tip--Contract Formation on Original Offer: This instruction sets forth the rule for non-merchant acceptances that include additional terms. The rule is that a contract is still formed based on the original offer. The additional terms are merely a proposal that must be accepted by the other party to become part of the contract. *By Ronald Oster*

[3] Comment

Under *Com. Code § 2207*, the common law mirror image rule for offer and acceptance has been abandoned. An acceptance may now state different or added terms and still operate as an effective acceptance, unless acceptance is expressly conditioned on agreement to such added or different terms. As between non-merchants or a merchant and a non-merchant, the offeree's added terms are merely proposed for acceptance by the offeror. They do not become part of the contract unless agreed to by the offeree. The additional terms must be accepted in a reasonable time [*Com. Code § 2206(1)(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentGeneral OverviewCommercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentOffer & AcceptanceCommercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentParol EvidenceAdditional TermsContracts LawSales of GoodsForm, Formation & ReadjustmentFormationAdditional & Different Terms

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CHAPTER 3H Matthew Bender Commercial Code Sales Contracts Instructions
PART D. CONTRACT TERMS

2-3H California Forms of Jury Instruction MB 300H.64

MB 300H.64 Added Terms in Merchants' Acceptance or Confirmation

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] PROPOSED INSTR. NO. _____

An acceptance may contain terms in addition to or different from the terms of the offer. Any such additional or different terms become part of the contract unless:

- 1. The additional or different terms were previously objected to by the receiving party; or**
- 2. Notice of objection to the additional or different terms was given within a reasonable time after the terms were received.**

Authorities: *Com. Code § 2207(2); Steiner v. Mobil Oil Corp. (1977) 20 Cal.3d. 90, 141 Cal.Rptr. 157, 569 P.2d 751 .*

[2] Use of Instruction

This instruction should be used when both parties are merchants and the acceptance contained terms in addition to or different from the offer. However, it should only be given when there is some disputed issue of fact to be considered by the jury, such as whether the additional or different terms were previously objected to, and only the issues in dispute should be contained in the instruction.

LexisNexis Matthew Bender Expert Practice Tip--Silence Implies Consent: In transactions between merchants, additional terms in the acceptance automatically become part of the contract absent a prior objection, or a later objection within a reasonable time. This is another situation where "silence implies consent." *By Ronald Oster*

[3] Comment

When between merchants an acceptance contains additional terms, the terms become part of the contract unless the offer expressly limits acceptance to the terms, the terms materially alter the contract, or the terms have already been, or are within a reasonable time objected to [*Com. Code* § 2207(2); see *Southwest Concrete Products v. Gosh Construction Corp.* (1990) 51 Cal.3d 701, 708-709, 274 Cal.Rptr. 404, 798 P.2d 1247 (provision in delivery tickets and invoices for late charges became part of contract under *Com. Code* § 2207)]. This instruction only contains the notification issues since the other issues are most likely not factual issues for the jury [*Windsor Mills, Inc. v. Collins & Aikman Corp.* (1972) 25 Cal.App.3d 987, 101 Cal.Rptr. 347].

When clauses in confirming forms sent by both parties conflict, each party is assumed to object to the conflicting clauses in the other party's confirmation [U.C.C. Comment No. 6 to *Com. Code* § 2207].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentGeneral OverviewCommercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentParol EvidenceAdditional Terms

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2-3H California Forms of Jury Instruction MB 300H.65-MB 300H.69

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MB 300H.65Reserved for Future Use



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CHAPTER 3H Matthew Bender Commercial Code Sales Contracts Instructions
PART E. MODIFICATION AND WAIVER OF CONTRACT OF TERMS

2-3H California Forms of Jury Instruction MB 300H.70

MB 300H.70 Requirement of Written Modification or Rescission

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] PROPOSED INSTR. NO. _____

If you decide that the parties signed an agreement that precludes _____ [modification or rescission] except by a signed writing, any _____ [modification or rescission] is not binding unless Defendant proves that Plaintiff signed a writing containing the _____ [modification or rescission].

Authority: *Com. Code § 2209(2).*

[2] Use of Instruction

This instruction should be used when there are questions of fact regarding the parties' intentions as they relate to written modification or rescission. The court should normally decide whether the parties' agreement requires written modification or rescission. The definition of "signed" in MB 300H.20 and "writing" in MB 300H.21 may be used with this instruction. A preponderance of evidence instruction must be used with this instruction [see Ch. 2, *California Judicial Council Evidence Instructions, CACI No. 200* ("Obligation to Prove--More Likely True Than Not True")]. The designation of the parties is for illustrative purposes only and should be changed if necessary.

For related Judicial Council instructions, see [3][b], *below*.

[3] Comment

[a] Modification or Rescission

Merchants and non-merchants can expressly agree to require written contract modification or rescission [*Com. Code §*

2209(2)]. However, the requirement of a writing has the potential of surprising the non-merchant; therefore, there is a requirement that non-merchants separately sign these provisions in forms prepared by merchants [*Com. Code* § 2209(2)]. This requirement is not included in the instruction because it probably does not present a jury issue.

Consideration is not required for an agreement modifying a contract [*Com. Code* § 2209(5)].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [*see* Ch. 3, *California Judicial Council Contracts Instructions*]:

CACI No. 313, Modification

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentModification, Rescission & Waiver

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CHAPTER 3H Matthew Bender Commercial Code Sales Contracts Instructions
PART E. MODIFICATION AND WAIVER OF CONTRACT OF TERMS

2-3H California Forms of Jury Instruction MB 300H.71

MB 300H.71 Waiver

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

[EITHER (See Use of Instruction)]

Acquiescence in a course of performance that is inconsistent with the terms or conditions of the contract may waive the right to performance in accordance with those terms or conditions.

[OR]

An attempted modification or rescission that is not in writing and therefore is not effective may nevertheless waive rights under the contract.

[CONTINUE WITH INSTRUCTION]

In this case, Plaintiff contends and must prove that Defendant waived the following contract term(s):
_____ [list contract term(s) allegedly waived]. **In determining whether a waiver occurred, you should consider all of the evidence before you, including the oral and written statements of the parties, their conduct, and the surrounding circumstances.**

Authorities: *Com. Code §§ 1303(f), 2209(4).*

[2] Use of Instruction

This instruction should be used when one of the parties contends that the other waived one or more contract requirements by either a course of performance or an oral modification or rescission. A general definition of waiver and elements of a waiver defense are included in Ch. 3F, *Matthew Bender Contract Defenses Instructions*. As set forth in MB 300H.72, waivers may be retracted with proper notice. A preponderance of evidence instruction must be used with this instruction [see Ch. 2, *California Judicial Council Evidence Instructions*, CACI No. 200 ("Obligation to Prove--More Likely True Than Not True")]. The designation of the parties is for illustrative purposes only and should be changed if necessary.

For related Judicial Council instructions, see [3][b], *below*.

LexisNexis Matthew Bender Expert Practice Tip--Waiver, Generally: The standards in this instruction may not seem challenging. But recall that a waiver is "an intentional relinquishment of a known right." In that context, these standards will often be hard to satisfy. *By Rex Heeseman*

LexisNexis Matthew Bender Expert Practice Tip--Inconsistent Behavior Can Result in Waiver: "Course of performance" evidence can be useful in demonstrating that boilerplate language included in a contract was not followed by the parties before the dispute in question. This instruction provides that such inconsistent behavior can result in a waiver that does not require a written modification of the contract. The instruction can be especially important in construction cases when performance extends over a period of time and the contract contains many technical requirements that are not strictly followed by the parties. *By Ronald Oster*

[3] Comment

[a] Waiver

Conduct of the parties that does not amount to an agreement to modify or rescind the contract or that fails to satisfy a written modification or rescission provision may be considered a waiver under *Com. Code § 2209(4)*. *Com. Code § 1303(f)* also provides that a course of performance may be relevant to show a waiver or modification of any term inconsistent with the course of performance. For a discussion of types of conduct that may demonstrate a waiver, see *J.T. Jenkins Co. v. Kennedy* [*J.T. Jenkins Co. v. Kennedy* (1975) 45 Cal.App.3d 474, 483, 119 Cal.Rptr. 578].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 3, *California Judicial Council Contracts Instructions*]:

CACI No. 323, Waiver of Condition Precedent

CACI No. 336, Affirmative Defense--Waiver

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentModification, Rescission & Waiver

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CHAPTER 3H Matthew Bender Commercial Code Sales Contracts Instructions
PART E. MODIFICATION AND WAIVER OF CONTRACT OF TERMS

2-3H California Forms of Jury Instruction MB 300H.72

MB 300H.72 Retraction of Waiver

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] PROPOSED INSTR. NO. ____

A party who waives a portion of a contract that has not yet been performed may retract the waiver if the other party receives reasonable notice that strict performance will be required of any term waived. The notice must be received before the other party has materially changed [his/her/its] position in reliance on the waiver.

In this case Plaintiff contends that any waiver of _____ [list relevant contract terms] was retracted. To sustain this contention, Plaintiff must prove that, before _____ [date], when the court has determined that Defendant materially changed [his/her/its] position in reliance on the waiver, Defendant received reasonable notification that strict performance of _____ [list contract terms] would be required.

Authority: *Com. Code § 2209(5).*

[2] Use of Instruction

This instruction should be used when there is a question of fact as to whether reasonable notice of retraction was received before the other party materially changed position in reliance on the waiver. The instruction in MB 300H.18, on receiving notification, should also be given. A preponderance of evidence instruction must be used with this instruction [see Ch. 2, *California Judicial Council Evidence Instructions, CACI No. 200* ("Obligation to Prove--More Likely True Than Not True")]. The designation of the parties is for illustrative purposes only and should be changed if necessary.

For related Judicial Council instructions, see [3][b], *below*.

[3] Comment**[a] Retraction of Waiver**

A waiver may be retracted as to any future performance by reasonable notification received by the other party that strict performance will be required. The notification must be received before the other party materially changed position in reliance on the waiver [*Com. Code* § 2209(3)]. Generally, it is for the court to decide whether retraction would be unjust in view of the other parties' change of position.

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [*see* Ch. 3, *California Judicial Council Contracts Instructions*]:

CACI No. 323, Waiver of Condition Precedent

CACI No. 336, Affirmative Defenses--Waiver

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentModification, Rescission & Waiver

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CHAPTER 3H Matthew Bender Commercial Code Sales Contracts Instructions
PART E. MODIFICATION AND WAIVER OF CONTRACT OF TERMS

2-3H California Forms of Jury Instruction MB 300H.73

MB 300H.73 Delegation of Performance

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] PROPOSED INSTR. NO. _____

Plaintiff's delegation to _____ [name of assignee] of Plaintiff's duty to perform under the contract did not constitute a breach of contract unless Defendant proves that _____ [the contract prohibited delegation or Defendant had a substantial interest in having Plaintiff perform or control performance under the contract].

The party delegating its obligations under the contract remains obligated to see that the contract is performed and remains responsible in case of any breach of contract.

Authority: *Com. Code § 2210(1).*

[2] Use of Instruction

This instruction should be used when the jury requires instruction on the rights and effects of delegation. Whether the parties have in fact agreed not to allow delegation or whether the other party has a substantial interest in the other party's performance are generally questions for the jury. A preponderance of evidence instruction must be used with this instruction [see Ch. 2, *California Judicial Council Evidence Instructions, CACI No. 200* ("Obligation to Prove--More Likely True Than Not True")]. The designation of the parties is for illustrative purposes only and should be changed if necessary.

LexisNexis Matthew Bender Expert Practice Tip--Explain "Delegation" to Jury: The term "delegation" will have to be explained to the jury. As used in this instruction, the term means something more than merely obtaining help from others to perform a contract. The term "delegation" implies a formal turning over of control to a third party, usually by way of a separate contract. *By Ronald Oster*

[3] Comment

A party may perform a duty through a delegate unless otherwise agreed or unless the other party has a substantial interest in having the original promisor perform or control the acts required by the contract. A delegation does not relieve the original party of any duty or liability for breach [*Com. Code § 2210(1)*].

The other party may treat a delegation of performance as creating reasonable grounds for insecurity and may without prejudice to rights against the assignor demand assurances from the assignee under *Com. Code § 2609* [*Com. Code § 2210(5)*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Breach, Repudiation & ExcuseAssurances of PerformanceCommercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentThird Party ContractsCommercial Law (UCC)Sales (Article 2)PerformanceGeneral OverviewContracts LawThird PartiesDelegation of Performance

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CHAPTER 3H Matthew Bender Commercial Code Sales Contracts Instructions
PART E. MODIFICATION AND WAIVER OF CONTRACT OF TERMS

2-3H California Forms of Jury Instruction MB 300H.74

MB 300H.74 Assignment of Rights**[1] Instruction**

[PLAINTIFF'S/DEFENDANT'S] PROPOSED INSTR. NO. _____

Plaintiff's assignment of rights under the contract to _____ [name of third party] was not a breach of contract unless Defendant proves that _____ [CHOOSE FROM THE FOLLOWING (See Use of Instruction) the assignment materially changed the Defendant's duty or the assignment materially increased the burden of the contract on Defendant or the assignment materially increased the risk undertaken by Defendant in making the contract or the assignment materially impaired Defendant's chance of obtaining return performance or the parties agreed not to allow assignments].

Authority: *Com. Code § 2210(2).*

[2] Use of Instruction

This instruction should be used when one party contends that assignment was prohibited by the provisions of *Com. Code § 2210(2)* [see [3], below]. It should be noted that *Com. Code § 2210(2)* contains no prohibition on the assignment of a right to damages for breach or for moneys due following full performance. One or more of the alternative clauses should be selected based on the facts of the case. A preponderance of evidence instruction must be used with this instruction [see Ch. 2, *California Judicial Council Evidence Instructions, CACI No. 200* ("Obligation to Prove--More Likely True Than Not True")]. The designation of the parties is for illustrative purposes only and should be changed if necessary.

LexisNexis Matthew Bender Expert Practice Tip--Keep Closing Simple and Clear: Many jurors will not be familiar with the term "assignment." That, coupled with the apparent complexity of this instruction, means your closing should be simple but clear. *By Rex Heeseman*

[3] Comment

Unless otherwise agreed, all rights of either buyer or seller can be assigned except when the assignment would materially change the duty of the other party, increase materially the burden or risk imposed on the other party, or impair materially the other party's chance of obtaining return performance. A right to damages for breach of the whole contract or a right arising out of the assignor's due performance of the entire contract can be assigned despite an agreement to the contrary [*Com. Code § 2210(2)*; but see *Com. Code § 9406* (exceptions applicable in secured transactions)].

Contract language barring assignment of "the contract" bars only delegation of performance, not assignment of a party's rights, unless the circumstances of the contract indicate otherwise [*Com. Code § 2210(3)*]. If this contract language is an issue in the case and persons might reasonably differ over whether or not the assignment of rights was also banned, an instruction stating the above rule would be appropriate.

Conversely, however, an assignment of "the contract" is considered a delegation of performance and assignment of rights, unless the language of the assignment or the circumstances of its making indicate that only an assignment of rights is intended. Similarly, such an assignment of rights obligates the assignee to perform the contract unless the contrary is indicated by the language or circumstances of the assignment. The obligation is enforceable by both the assignor and by the other party to the contract being assigned [*Com. Code § 2210(4)*]. The most common circumstance that would indicate an assignment of rights, only without delegation of performance, is when the contract is assigned for security.

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentThird Party Contracts

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CHAPTER 3H Matthew Bender Commercial Code Sales Contracts Instructions
PART E. MODIFICATION AND WAIVER OF CONTRACT OF TERMS

2-3H California Forms of Jury Instruction MB 300H.75-MB 300H.89

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MB 300H.75Reserved for Future Use



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CHAPTER 3H Matthew Bender Commercial Code Sales Contracts Instructions
PART F. INTERPRETATION OF CONTRACT TERMS

2-3H California Forms of Jury Instruction MB 300H.90

MB 300H.90 Interpretation of Contract Terms

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] PROPOSED INSTR. NO. _____

Insofar as is possible, the contract's terms are to be interpreted to give effect to the expressed intentions of the parties. In determining the intention of the parties, you should consider the contract's express terms, any course of performance, any course of dealing, and any usage of trade.

Whenever reasonable, the express terms, course of performance, course of dealing, and usage of trade must be construed in a manner consistent with each other. However, when consistent construction is not unreasonable, express terms prevail over a course of performance, course of dealing, and usage of trade. A course of performance prevails over both a course of dealing and usage of trade. Course of dealing prevails over usage of trade.

Authorities: *Com. Code § 1303(e).*

[2] Use of Instruction

This instruction should be used with one or more of the contract interpretation instructions in Ch. 3B, *Interpretation of Written Agreements*. The instruction should be given together with the instruction on use of extrinsic evidence to explain agreements [see MB 300H.61], and with instructions defining course of performance [see MB 300H.13], course of dealing [see MB 300H.11], and trade usage [see MB 300H.12].

For related Judicial Council instructions, see [3][b], *below*.

LexisNexis Matthew Bender Expert Practice Tip--Interpretation Is Usually for the Court: In most cases, contract interpretation is a question for the judge. However, if the jury is involved marshal your evidence carefully. *By Rex Heeseman*

LexisNexis Matthew Bender Expert Practice Tip--Simplify This Instruction: This instruction could be confusing because it uses several terms of art and establishes a series of priorities among them (e.g., course of dealing prevails over usage of trade). Thus, counsel should try to streamline the instruction by eliminating those terms that do not apply to the case at hand, and carefully explaining with examples the terms that do apply. *By Ronald Oster*

[3] Comment

[a] Interpretation of Contract Terms

Under *Com. Code* § 2202, certain extrinsic evidence is admissible to explain or supplement contract terms, including, in particular, evidence of a course of dealing, usage of trade, or course of performance. However, terms with regard to which the confirming memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with regard to such terms may not be contradicted by evidence of a prior agreement or of a contemporaneous oral agreement, although they may be explained or supplemented [*Com. Code* § 2202; see *Com. Code* § 1303 (definitions); see also Ch. 3B, *Matthew Bender Interpretation of Contract Instructions*, on other rules of contract interpretation].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 3, *California Judicial Council Contracts Instructions*]:

CACI No. 314 Interpretation--Disputed Term

CACI No. 315 Interpretation--Meaning of Ordinary Words

CACI No. 316 Interpretation--Meaning of Technical Words

CACI No. 317 Interpretation--Construction of Contract as a Whole

CACI No. 318 Interpretation--Construction by Conduct

CACI No. 319 Interpretation--Reasonable Time

CACI No. 320 Interpretation--Construction Against Drafter

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Contract TermsGeneral OverviewCommercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentGeneral OverviewCommercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentGeneral OverviewCommercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentParol EvidenceGap-Filler ProvisionsContracts LawContract InterpretationGeneral Overview

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CHAPTER 3H Matthew Bender Commercial Code Sales Contracts Instructions
PART F. INTERPRETATION OF CONTRACT TERMS

2-3H California Forms of Jury Instruction MB 300H.91-MB 300H.99

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CHAPTER 3H Matthew Bender Commercial Code Sales Contracts Instructions

PART G. GENERAL OBLIGATIONS

1. General Obligations of Parties

2-3H California Forms of Jury Instruction MB 300H.100

MB 300H.100 General Obligations of Parties

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Under a contract for the sale of goods, the fundamental obligation of the seller is to transfer and deliver goods in accordance with the contract, and the fundamental obligation of the buyer is to accept and pay for the goods in accordance with the contract. The parties' agreement may include all or most of the terms needed to define the specific manner in which buyer and seller meet these obligations. When the parties have failed to agree on specific terms, the law provides certain standard terms and obligations for inclusion in a contract for the sale of goods.

In this case, it is contended that the following additional terms are supplied by law: _____ [list open terms, warranties, or code definitions alleged]. As set forth in the following instructions, you must decide whether to apply these provisions in this case.

Authorities: *Com. Code §§ 2204, 2301.*

[2] Use of Instruction

This instruction should be used as an introduction to instructions on open price terms, implied warranties, and code definitions found in Chapter 3 of the Commercial Code. This instruction should be given only if the court finds that reasonable people might differ as to whether the parties expressly or impliedly reached their own agreement on terms supplied by code provisions in the absence of this type of agreement.

LexisNexis Matthew Bender Expert Practice Tip: Many jurors will balk at having to figure out the contract when the parties "have failed to agree on specific terms." *By Rex Heeseman*

[3] Comment**[a] Fundamental Obligations of Parties**

Under a contract for the sale of goods, the obligation of the seller is to transfer and deliver in accordance with the contract, and the obligation of the buyer is to accept and pay in accordance with the contract [*Com. Code § 2301*]. To determine what is "in accordance with the contract," usage of trade, course of dealing and performance, and the general circumstances must be considered in conjunction with the lay meaning of the words in the contract [U.C.C. Comment to *Com. Code § 2301*].

[b] Incomplete Agreements

An agreement need not be complete in all aspects to be enforceable. As long as the alleged agreement provides a reasonably certain basis for giving an appropriate remedy, the agreement can be enforced by way of claim or defense [*Com. Code § 2204*]. The Code specifically permits the parties to reach an enforceable agreement while failing to specify certain key terms, including price [*Com. Code § 2305*], time and manner of performance [*Com. Code §§ 2307-2311*], and even quantity, if output and requirements contracts are involved [*Com. Code § 2306*]. When the parties leave agreement on a term to a later time and fail to agree, or inadvertently omit a term of the contract, the Code's "gap filling" provisions take over, supplying the missing terms when appropriate. Similarly, unless the parties effectively disclaimed all warranties, code provisions will imply at least warranties of title and merchantability [*Com. Code §§ 2312, 2314*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Contract TermsGeneral OverviewCommercial Law (UCC)Sales (Article 2)Contract TermsGap-Filler ProvisionsDelivery & Shipping TermsCommercial Law (UCC)Sales (Article 2)Contract TermsGap-Filler ProvisionsOpen PriceCommercial Law (UCC)Sales (Article 2)Contract TermsGap-Filler ProvisionsOutput, Exclusive & Requirements Agreements

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CHAPTER 3H Matthew Bender Commercial Code Sales Contracts Instructions

PART G. GENERAL OBLIGATIONS

1. General Obligations of Parties

2-3H California Forms of Jury Instruction MB 300H.101-MB 300H.109

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CHAPTER 3H Matthew Bender Commercial Code Sales Contracts Instructions

PART G. GENERAL OBLIGATIONS

2. Open Terms

2-3H California Forms of Jury Instruction MB 300H.110

MB 300H.110 Open Price Term: Reasonable Price

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Plaintiff claims that [he/she/it] and Defendant have a contract for the sale of _____ [goods], and asks that this contract be enforced, even though the written agreement signed by Plaintiff and Defendant does not set a specific price for the goods to be sold. In this contract,

[CHOOSE ONE OR MORE OF THE FOLLOWING (See Use of Instruction)]

1. Nothing was said by the parties as to price.

[OR]

2. The price was left for later agreement, but the parties failed to agree.

[OR]

3. The price was to be fixed according to an _____ [agreed standard or established market] as _____ [set or recorded] by a third person, but the price was not so _____ [set or recorded].

[CONTINUE WITH INSTRUCTION]

To enforce this contract, Plaintiff has the burden of proving that the parties did intend to conclude a contract even though they failed to set a specific price for the goods.

If you find that Plaintiff has proved that the parties did nevertheless intend to conclude a contract, then you must decide, based on the evidence before you, what was a reasonable price for the goods at the time they _____ [were or were supposed to be] delivered.

If you find that the parties did not intend to be bound unless _____ [they reached agreement on the price or the price was fixed according to an agreed standard or established market] and that the price was not so _____ [agreed on or fixed] then you must find in favor of _____ [party denying existence of a contract], and any _____ [goods delivered or money paid] must be returned.

Authority: *Com. Code § 2305(1), (4).*

[2] Use of Instruction

This instruction should be used if the jury is asked to decide whether there was a contract despite the failure to fix a price term. This instruction assumes that the contract did not fix a price term. If there is a preliminary issue of fact as to whether the contract, including terms to be implied from course of dealing and trade usage, was silent on price, the instructions in MB 300H.40 et seq. on contract formation and MB 300H.60 et seq. on contract terms must be consulted, as well as the instruction in MB 300H.11 on course of dealing and MB 300H.12 on trade usage.

This instruction should be followed by an instruction setting forth the appropriate remedy or measure of damages if the jury finds that there was a contract, and if goods were identified to the contract.

A preponderance of evidence instruction should be used with this instruction [see Ch. 2, *California Judicial Council Evidence Instructions*, CACI No. 200 ("Obligation to Prove--More Likely True Than Not True")].

LexisNexis Matthew Bender Expert Practice Tip--No Agreement on Price: Some jurors will find it difficult to believe that the parties did not agree on a "specific price." Thus, if you are the plaintiff's attorney be careful in putting together the case; if you are representing the defense, exploit this reluctance. *By Rex Heeseman*

[3] Comment

[a] Market Quotation Distinguished; Course of Dealing, Usage of Trade, or Course of Performance Controls Over Open Price Term

An open price term is not the same as a market quotation with regard to which the price will be set. The open price term is applied if the parties intended to conclude a contract but no agreement on price was reached at the time of contracting, because [*Com. Code § 2305(1)*]:

- The parties decided to postpone the agreement at the time of contracting;
- Price was not discussed; or

- Price was to be set on the occurrence of some outside event, but, due to the fault of neither party, it was not so set.

Under the Commercial Code, a course of dealing, usage of trade, or course of performance sufficient to show agreement on price will control over the Code's open price provisions [*Com. Code* §§ 1303, 2202(a)].

[b] Intent of Parties; Question of Fact

Whether the parties intended to conclude a contract is in most cases a question for the trier of fact [U.C.C. Comment No. 2 to *Com. Code* § 2305]. If it is determined that the parties intended to have a binding agreement, the Code will give effect to that intention, even though a price will have to be supplied.

The only situation in which the contract will not be enforced is if the trier of fact determines that the parties intended not to have a contract unless they mutually agreed on a price. If, on the other hand, the contract provides that they will agree on a price at a later time and they fail to agree, *Com. Code* § 2305 provides that the price will be a reasonable price at the time of delivery, unless it was further agreed that there would be no contract if a price was not established [*Com. Code* § 2305(1), (4); U.C.C. Comment No. 2 to *Com. Code* § 2305].

[c] Open Price Term No Bar to Remedy for Breach

The Commercial Code specifically rejects the notion that an open price term defeats the agreement on the ground of indefiniteness [U.C.C. Comment No. 1 to *Com. Code* § 2305]. Generally, a reasonable price at the time of delivery can be determined from market sources or other objective standards. A "reasonably certain basis for giving an appropriate remedy" [*see Com. Code* § 2204(3)] usually exists in case of breach even though there is no contract price since remedies such as cover [*see Com. Code* § 2712], resale [*see Com. Code* § 2706], and specific performance [*see Com. Code* § 2716] are available under the Commercial Code [U.C.C. Comment No. 1 to *Com. Code* § 2305].

[d] Wrongful Interference

Wrongful interference by one side with an agreed on price setting mechanism can be treated by the other party either as a repudiation of the contract [U.C.C. Comment No. 5 to *Com. Code* § 2305; *see MB 300H.190*] or as a failure to cooperate that permits the wronged party to fix a reasonable price [U.C.C. Comment No. 5 to *Com. Code* § 2305; *see Com. Code* § 2311; *MB 300H.112*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Contract TermsGap-Filler ProvisionsOpen PriceCommercial Law (UCC)Sales (Article 2)RemediesGeneral OverviewTortsBusiness TortsGeneral Overview

Irene Sall Holmes and Lock Holmes contributed to the original chapter for California Forms of Jury Instruction (Matthew Bender).



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CHAPTER 3H Matthew Bender Commercial Code Sales Contracts Instructions
PART G. GENERAL OBLIGATIONS
2. Open Terms

2-3H California Forms of Jury Instruction MB 300H.111

MB 300H.111 One Party to Set Price

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] PROPOSED INSTR. NO. _____

Plaintiff claims that [he/she/it] and Defendant intended to conclude a contract for the sale of goods. Plaintiff bears the burden of proving this claim. If you find that Plaintiff has proved that the parties did intend to conclude a contract for the sale of goods, then that contract is binding on the parties and is enforceable even though the price of the goods was not settled.

The parties may provide that the price of the goods under the contract is to be fixed by _____ [buyer or seller]. If you find that the parties did provide that the price was to be set by _____ [buyer or seller], then _____ [buyer or seller] must set the price in good faith.

Authority: *Com. Code § 2305.*

[2] Use of Instruction

This instruction should be used together with the instruction in MB 300H.10[1] defining good faith and good faith for merchants. A preponderance of evidence instruction must also be used with this instruction [see Ch. 2, *California Judicial Council Evidence Instructions*, CACI No. 200 ("Obligation to Prove--More Likely True Than Not True")]. If a failure to set the price in good faith is alleged, this instruction may be used with the instruction in MB 300H.124[1] on specification by a party.

LexisNexis Matthew Bender Expert Practice Tip--Explain These Contracts to Jury: Some jurors will find it strange that one party to the contract gets to set the price after the agreement is made. In addition to explaining the "good faith" requirement included in this instruction, counsel should also

explain why such contracts are typical in the particular business involved in the transaction. *By Ronald Oster*

[3] Comment

A contract for the sale of goods with an open price term may nonetheless be binding, if the parties intended to conclude a contract [*Com. Code* §§ 2204, 2305(1)]. If the parties agreed that the price was to be set by one of them, then that party must set the price in good faith [*Com. Code* § 2305(2); see *Lazar v. Hertz Corp.* (1983) 143 Cal.App.3d 128, 141, 191 Cal.Rptr. 849]. Use of a market price or other prevailing price generally satisfies the good faith requirement [U.C.C. Comment No. 3 to *Com. Code* § 2305].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Contract TermsGap-Filler ProvisionsOpen Price

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CHAPTER 3H Matthew Bender Commercial Code Sales Contracts Instructions
PART G. GENERAL OBLIGATIONS
2. Open Terms

2-3H California Forms of Jury Instruction MB 300H.112

MB 300H.112 Failure to Cooperate in Setting a Price

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] PROPOSED INSTR. NO. _____

Plaintiff and Defendant have a contract for the sale of _____ [describe goods] that provided that the price of _____ [goods] would be set by _____ [state means other than mutual agreement]. Plaintiff _____ [claims a breach of this contract or wishes to set a reasonable price for the goods to be sold]. To _____ [prove the breach or prove the right to set the contract price], Plaintiff must prove both of the following:

- (1) That Defendant wrongfully interfered with the setting of the contract price; and**
- (2) That because of Defendant's wrongful interference, no price for the goods was set.**

You must decide whether Plaintiff has proved these two things.

Authority: *Com. Code § 2305(3).*

[2] Use of Instruction

This instruction should be used if it is alleged that the defendant has interfered with the fixing of a price left to be fixed by some means other than the agreement of the parties. A preponderance of evidence instruction must be used with this instruction [see Ch. 2, *California Judicial Council Evidence Instructions, CACI No. 200* ("Obligation to Prove--More Likely True Than Not True")]. The instruction in MB 300H.10[1] on good faith should also be included with this instruction. The designation of the parties is for illustrative purposes only and should be changed if necessary.

[3] Comment

Com. Code § 2305(3) provides that if the parties to a contract for the sale of goods leave the price of the goods to be fixed by any means other than the agreement of the parties, and if by the fault of one party the price fails to be fixed, then the other party has the right to fix a reasonable price, or in the alternative, to treat the contract as canceled and seek remedies provided for breach [see *Com. Code §§ 2106(4), 2720*; U.C.C. Comment No. 5 to *Com. Code § 2305*]. *Com. Code § 1201(a)(17)* defines "fault" as a default, breach, or wrongful act or omission.

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Breach, Repudiation & ExcuseGeneral OverviewCommercial Law (UCC)Sales (Article 2)Contract TermsGeneral OverviewCommercial Law (UCC)Sales (Article 2)Contract TermsGap-Filler ProvisionsOpen PriceCommercial Law (UCC)Sales (Article 2)RemediesBuyer's RemediesGeneral OverviewCommercial Law (UCC)Sales (Article 2)RemediesSeller's RemediesGeneral Overview

Irene Sall Holmes and Lock Holmes contributed to the original chapter for California Forms of Jury Instruction (Matthew Bender).



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CHAPTER 3H Matthew Bender Commercial Code Sales Contracts Instructions

PART G. GENERAL OBLIGATIONS

2. Open Terms

*2-3H California Forms of Jury Instruction MB 300H.113***MB 300H.113 Quantity Under Output Contract****[1] Instruction**

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Plaintiff and Defendant agreed on a contract for the sale of _____ [goods]. The amount of goods that Defendant agreed to sell and Plaintiff agreed to buy was Defendant's entire good faith output from _____ to _____ [give dates].

[*OPTIONAL (See Use of Instruction)*]

However, Defendant, the seller, may not offer for delivery an amount of goods that is unreasonably out of proportion to _____ [the estimate of output stated in the agreement or Defendant's comparable prior output], regardless of Defendant's actual output.

[*CONTINUE WITH INSTRUCTION*]

Plaintiff claims that Defendant has breached this contract for the sale of Defendant's output to Plaintiff. To prove this breach, Plaintiff must prove _____ [CHOOSE ONE OR MORE (See Use of Instruction) that Defendant did not produce [his/her/its] output in good faith and/or that Defendant offered for delivery an amount of goods that was unreasonably out of proportion to the estimate of output stated in the agreement, which was _____ and/or that Defendant offered for delivery an amount of goods that was unreasonably out of proportion to Defendant's comparable prior output].

Authorities: *Com. Code § 2306(1); Shea-Kaiser-Lockheed-Healy v. Department of Water & Power (1977) 73 Cal.App.3d 679, 686-688, 140 Cal.Rptr. 884 .*

[2] Use of Instruction

This instruction should be used when the plaintiff, a buyer, claims a breach of the quantity term of an output contract. The instruction assumes that the provision setting the seller's output as the measure of quantity is not itself in dispute. Omit the optional paragraph if the plaintiff's claim of a breach is based solely on the defendant's alleged bad faith. Include the optional paragraph if the claim of breach is based wholly or in part on a tender of delivery unreasonably disproportionate to a stated estimate or to prior comparable output. In the last paragraph, use as many of the three alternative sentences as fit the allegations of the case. This instruction should be given with the instruction in MB 300H.10[1] on good faith. A preponderance of evidence instruction must be used with this instruction [see Ch. 2, *California Judicial Council Evidence Instructions, CACI No. 200* ("Obligation to Prove--More Likely True Than Not True")].

LexisNexis Matthew Bender Expert Practice Tip--Include Estimates in Contract: This instruction illustrates why it is important to include estimates, or statements of prior output, in output contracts. Without these benchmarks, it can be difficult to prove that the actual output was unreasonably "out of proportion" to the expectations of the parties. *By Ronald Oster*

[3] Comment

A contract term that measures the quantity to be sold under the contract by the output of the seller means the actual good faith output of the seller. However, the seller may not tender for delivery a quantity of goods that is unreasonably disproportionate to (1) any stated estimate of output, or (2) any normal or otherwise comparable prior output, regardless of the seller's actual output [see *Com. Code § 2306(1); see also Shea-Kaiser-Lockheed-Healy v. Department of Water & Power (1977) 73 Cal.App.3d 679, 686-688, 140 Cal.Rptr. 884* (successful breach of contract action under *Com. Code § 2306(1)* based on a requirements contract)]. *Com. Code § 2306* applies to nonproducing establishments, such as dealers and distributors, as well as to manufacturers [U.C.C. Comment No. 1 to *Com. Code § 2306*].

U.C.C. Comments 2 and 4 to *Com. Code § 2306* address special circumstances such as the expansion, closing, or sale of businesses as they affect output and requirements contracts.

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Contract TermsGap-Filler ProvisionsOutput, Exclusive & Requirements Agreements

Irene Sall Holmes and Lock Holmes contributed to the original chapter for California Forms of Jury Instruction (Matthew Bender).



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CHAPTER 3H Matthew Bender Commercial Code Sales Contracts Instructions
PART G. GENERAL OBLIGATIONS
2. Open Terms

2-3H California Forms of Jury Instruction MB 300H.114

MB 300H.114 Quantity Under Requirements Contract

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Plaintiff and Defendant agreed on a contract for the sale of _____ [goods]. The amount of goods that Plaintiff agreed to sell and Defendant agreed to buy was Defendant's entire good faith requirements from _____ [date] to _____ [date].

[*OPTIONAL (See Use of Instruction)*]

However, Defendant, the buyer, may not demand delivery of an amount of goods that is unreasonably out of proportion to _____ [the estimate of Defendant's requirements stated in the agreement or Defendant's comparable prior requirements], regardless of Defendant's actual requirements.

[*CONTINUE WITH INSTRUCTION*]

Plaintiff claims that Defendant has breached the contract to buy [his/her/its] requirements from Plaintiff. To prove this breach, Plaintiff must prove:

[*CHOOSE ONE OR MORE (See Use of Instruction)*]

(1) That Defendant did not act in good faith in [his/her/its] demands for delivery of goods.

[OR]

(2) That Defendant demanded the delivery of an amount of goods that was unreasonably out of proportion to the estimate of requirements stated in the agreement, which was _____.

[OR]

(3) That Defendant demanded the delivery of an amount of goods that was unreasonably out of proportion to Defendant's comparable prior requirements.

Authorities: *Com. Code § 2306(1); Shea-Kaiser-Lockheed-Healy v. Department of Water & Power* (1977) 73 Cal.App.3d 679, 686-688, 140 Cal.Rptr. 884 .

[2] Use of Instruction

This instruction should be used when the plaintiff, a seller, claims a breach of the quantity term of a requirements contract. The instruction assumes that the provision setting the buyer's requirements as the measure of quantity is not itself in dispute. Omit the optional paragraph if the plaintiff's claim of a breach is based solely on the defendant's alleged bad faith. Include the optional paragraph if the claim of breach is based wholly or in part on a tender of delivery unreasonably disproportionate to a stated estimate or to prior comparable requirements. Use as many of the three concluding alternative paragraphs as fit the allegations of your case. This instruction should be given with the instruction in MB 300H.10[1] on good faith. A preponderance of evidence instruction must be used with this instruction [see Ch. 2, *California Judicial Council Evidence Instructions, CACI No. 200* ("Obligation to Prove--More Likely True Than Not True")].

LexisNexis Matthew Bender Expert Practice Tip--Use Care With This Issue: The concept of a "requirements contract" will be alien to many jurors. So, exercise care in making your points on this issue. *By Rex Heeseman*

LexisNexis Matthew Bender Expert Practice Tip--Include Estimates in Contract: This instruction highlights the importance of including estimates, or statements of prior requirements, in a requirements contract. Without these benchmarks, it can be difficult to prove that the actual requirements were unreasonably "out of proportion" to the expectations of the parties. *By Ronald Oster*

[3] Comment

The rules for requirements contracts are essentially the same as the requirements for output contracts, and both are governed by *Com. Code § 2306(1)* [see MB 300H.113[3]]. This section of the Commercial Code has been applied to a requirements contract for the sale of construction material. In that case, a seller under a requirements contract recovered against the buyer for deliveries made under protest. The court found that the deliveries demanded were unreasonably disproportionate to a stated estimate of the buyer's requirements [*Shea-Kaiser-Lockheed-Healy v. Department of Water & Power* (1977) 73 Cal.App.3d 679, 686-688, 140 Cal.Rptr. 884].

Com. Code § 2306(1) expressly intends that there be reasonable elasticity in the quantity of goods under a requirements contract. The key in permitting variations from a stated estimate or from prior comparable requirements is that the party must be acting in good faith [U.C.C. Comment No. 2 to *Com. Code § 2306*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Contract TermsGap-Filler ProvisionsOutput, Exclusive & Requirements
Agreements

Irene Sall Holmes and Lock Holmes contributed to the original chapter for California Forms of Jury Instruction
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CHAPTER 3H Matthew Bender Commercial Code Sales Contracts Instructions
PART G. GENERAL OBLIGATIONS
2. Open Terms

2-3H California Forms of Jury Instruction MB 300H.115

MB 300H.115 Exclusive Dealing Contract

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] PROPOSED INSTR. NO. _____

Plaintiff and Defendant have an exclusive dealing contract for the sale of _____ [goods]. An exclusive dealing contract means that the seller agrees to sell goods of a certain kind exclusively to the buyer within the market served by the buyer, and that the buyer agrees to buy goods of a certain kind exclusively from the seller.

Under an exclusive dealing contract, a seller must use best efforts to supply the goods, and the buyer must use best efforts to promote and market the goods.

This obligation to use best efforts applies even though it is not stated in the contract, unless you find that the parties have agreed otherwise.

Plaintiff, the _____ [seller or buyer], claims that Defendant, the _____ [buyer or seller], breached this contract by failing to use best efforts to _____ [promote and market the goods or supply the goods].

Defendant, the _____ [buyer or seller], claims that [he/she/it] and Plaintiff agreed that best efforts were not required. Defendant also denies that [he/she/it] failed to use best efforts to _____ [promote and market the goods or supply the goods].

If you find that Plaintiff has proved that Defendant did not use best efforts, then you must find that there was a

breach, unless you find that Defendant and Plaintiff agreed that best efforts were not required. The burden is on Plaintiff to prove both that best efforts were required and that Defendant did not use best efforts.

Authorities: *Com. Code § 2306(2)* and U.C.C. Comment No. 5.

[2] Use of Instruction

This instruction should be used to explain the general obligations of an exclusive dealing contract. It assumes that the existence of an exclusive dealing contract is not in dispute to focus on issues of fact more likely to be presented to the jury. Use this instruction with the instruction in MB 300H.126[1] on agreement to do otherwise. A preponderance of evidence instruction must be used with this instruction [*see Ch. 2, California Judicial Council Evidence Instructions, CACI No. 200 ("Obligation to Prove--More Likely True Than Not True")*].

LexisNexis Matthew Bender Expert Practice Tip--Exclusive Contracts: The idea of an "exclusive" may strike some jurors as an unusual practice. Further, the term "best efforts," set out throughout this instruction, is inherently subjective and gives wide latitude to the party marketing the goods. In closing argument, counsel may also wish to stress the "good faith" requirement that is included in every contract [*see MB 300H.10*]. By Rex Heeseman and Ronald Oster

[3] Comment

Com. Code § 2306(2) provides that a contract for exclusive dealing in goods imposes, unless otherwise agreed, an obligation of the seller to use best efforts to sell the goods and of the buyer to use best efforts to promote the sale of those goods. This section gives substance to the obligations imposed on both parties to an exclusive dealing contract to act with reasonable diligence and in good faith [U.C.C. Comment No. 5 to *Com. Code § 2306*]. *Com. Code § 2306(2)* is consistent with prior California law which stated that no party should do that which deprives the other of the fruits of his or her contract [California Comment No. 1 to *Com. Code § 2306*].

The contract may specify further things that each side must do pursuant to the exclusive dealing arrangement. These further requirements should be interpreted in light of the requirement of good faith [*see Com. Code § 1304*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)General Provisions (Article 1)Definitions & InterpretationGood FaithCommercial Law (UCC)Sales (Article 2)Contract TermsGap-Filler ProvisionsOutput, Exclusive & Requirements Agreements

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CHAPTER 3H Matthew Bender Commercial Code Sales Contracts Instructions
PART G. GENERAL OBLIGATIONS
2. Open Terms

2-3H California Forms of Jury Instruction MB 300H.116

MB 300H.116 Number of Deliveries and Payments

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] PROPOSED INSTR. NO. _____

Plaintiff and Defendant have a contract for the sale of _____ [goods]. This contract does not say anything about the number of deliveries for the goods. Unless the parties agree otherwise, delivery of all goods called for by the contract must be offered in a single lot. Payment of the contract price in full is due at the time of that offer of delivery.

[OPTIONAL (See Use of Instruction)]

However, the law does not require the [seller to deliver or buyer to take delivery of] all the goods in a single lot, if it was not commercially feasible to do so under the circumstances. If you find that the circumstances gave _____ [buyer or seller] the right to _____ [make or demand] delivery in lots, the price, if it was reasonably apportionable, could be demanded for each lot at the time it was offered for delivery.

[CONTINUE INSTRUCTION]

Plaintiff, the _____ [buyer or seller], claims that Defendant, the _____ [seller or buyer], breached the single delivery requirement. To prove this, Plaintiff must prove that Defendant did not _____ [offer the goods in a single delivery or accept the offer of the goods in a single delivery or pay for the goods on delivery]. If you find that Plaintiff has proved this, then Defendant has breached the

contract, unless you also find that _____ [(delivery or acceptance of delivery) of a single lot was not commercially reasonable].

Authority: *Com. Code § 2307.*

[2] Use of Instruction

This instruction should be used when the contract does not contain an express delivery term. A preponderance of evidence instruction must be used with this instruction [see Ch. 2, *California Judicial Council Evidence Instructions*, CACI No. 200 ("Obligation to Prove--More Likely True Than Not True")]. The instruction twice offers the user an option. The options may be used if the jury might reasonably find that delivery in one lot was not commercially feasible, as when the buyer could not receive the entire delivery at one time for lack of storage space or the seller could not ship all at once for lack of sufficient shipping capacity [U.C.C. Comment No. 3 to *Com. Code § 2306*].

LexisNexis Matthew Bender Expert Practice Tip: The contrast between a "single lot" and "delivery in lots" will be confusing to many jurors. *By Rex Heeseman*

[3] Comment

The Commercial Code takes the position that a single delivery is necessary when the contract is silent on delivery, unless a single delivery is not commercially practicable and thus delivery in lots is justified [*Com. Code § 2307*; U.C.C. Comment No. 3 to *Com. Code § 2307*]. Further, any time an agreement makes no provision on a point, including delivery, that point may be controlled by an implicit agreement based on trade usage, course of dealing [See *MB 300H.11* ("course of dealing" defined), *MB 300H.12* ("trade usage" defined)], or course of performance [*Com. Code §§ 1201(a)(3), 1303*; see *MB 300H.13* ("course of performance" defined)]. For an instruction on and discussion of these implicit agreements, see *MB 300H.60* and *MB 300H.61*.

A justified partial delivery must be followed by delivery of the remaining lots seasonably [*Com. Code § 2608*] and in a reasonable manner [*Com. Code § 2503*]. Partial delivery may nevertheless be rejected if the circumstances indicate that the seller will default or repudiate as to the remainder [see *MB 300H.190*] or otherwise give the buyer grounds to demand assurance of due performance [*Com. Code § 2609*; see *MB 300H.193*].

Even if partial delivery is not justified by impracticability, the seller may be entitled to cure [*Com. Code § 2508*], or circumstances beyond the parties' control may entitle the seller, on notice, to allocate deliveries [*Com. Code § 2615(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)General Provisions (Article 1)General OverviewCommercial Law (UCC)Sales (Article 2)PerformanceTender, Shipment, Delivery & CureContracts LawSales of GoodsBreach, Repudiation & ExcuseAssurances of PerformanceContracts LawSales of GoodsObligation & ConstructionDelivery & Shipping Terms

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CHAPTER 3H Matthew Bender Commercial Code Sales Contracts Instructions

PART G. GENERAL OBLIGATIONS

2. Open Terms

2-3H California Forms of Jury Instruction MB 300H.117

MB 300H.117 Place for Delivery of Goods

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] PROPOSED INSTR. NO. _____

Unless Plaintiff, the buyer, and Defendant, the seller, have agreed otherwise, the place for delivery of goods is Defendant/seller's place of business or, if Defendant has no place of business, Defendant's residence.

[OPTIONAL (See Use of Instruction)]

If the contract is for the sale of identified goods, and if both Plaintiff and Defendant know when the contract is made that the goods are not at the Defendant's _____ [place of business or residence], then the place for delivery is the location of the goods when the contract is made, unless Plaintiff and Defendant agree otherwise.

[CONTINUE INSTRUCTION]

Plaintiff claims that Defendant/Seller has breached their contract for the sale of goods, because Defendant did not deliver the goods to Plaintiff at the Defendant's _____ [place of business or residence]. Defendant claims that the goods were properly delivered to _____, because that is where the goods were when the contract was made.

The burden is on Plaintiff to prove what the contract terms regarding delivery were, and also to prove that those

terms were breached.

If you find that Plaintiff has proved that the goods were not delivered to [him/her/it] at the Defendant's _____ [place of business or residence], then Defendant has breached the contract, unless you next find all of the following:

1. That the contract was for the sale of identified goods;
2. That both Plaintiff and Defendant knew when the contract was made that the goods were not at the Defendant's _____ [place of business or residence]; and
3. That the goods were delivered to Plaintiff at the place where they were located when the contract was made.

Authority: *Com. Code § 2308(a), (b).*

[2] Use of Instruction

This instruction should be used to explain the rules that apply if the contract and the parties' conduct does not indicate agreement on place of delivery. It should be noted that shipping terms such as F.O.B., F.A.S., C.I.F., and C. & F. also convey meaning as to place of delivery. See instructions in MB 300H.170-MB 300H.176 regarding shipping terms.

The optional instruction applies when the seller does not have physical possession of the goods, as when they are in the possession of a bailee. The instruction in MB 300H.02[1] defining identification of goods to the contract may be given with this instruction.

If the plaintiff claims that the defendant breached the agreement by failing to deliver the goods to the locations required by *Com. Code § 2308*, and the defendant claims that he or she is not in breach because the parties had agreed on a different place of delivery, then use this instruction with the instruction in MB 300H.126[1].

A preponderance of evidence instruction must be used with this instruction [see Ch. 2, *California Judicial Council Evidence Instructions*, CACI No. 200 ("Obligation to Prove--More Likely True Than Not True")].

[3] Comment

Unless the parties have agreed otherwise, the place for delivery of goods is the seller's place of business or, if the seller has no place of business, the seller's residence [*Com. Code § 2308(a)*]. However, if the contract is for the sale of identified goods, and if both parties know when the contract is made that the goods are not at the seller's place of business or residence, then the place for delivery is the location of the goods when the contract is made, unless the parties agree otherwise [*Com. Code § 2308(b)*].

Surrounding circumstances, usage of trade, or a course of dealing or performance may constitute implied agreement on a place of delivery [U.C.C. Comment No. 4 to *Com. Code § 2308*; see MB 300H.126].

When the goods are in the possession of a bailee, the seller must also obtain the bailee's acknowledgment that the buyer has the right to have the goods [see U.C.C. Comment No. 2 to *Com. Code § 2308*; see also *Com. Code § 2503(4)* (tendering goods in possession of bailee)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Contract TermsGeneral OverviewCommercial Law (UCC)Sales (Article 2)Contract TermsGap-Filler ProvisionsDelivery & Shipping TermsCommercial Law (UCC)Sales (Article 2)PerformanceTender, Shipment, Delivery & Cure

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CHAPTER 3H Matthew Bender Commercial Code Sales Contracts Instructions
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2. Open Terms

2-3H California Forms of Jury Instruction MB 300H.118

MB 300H.118 Time for Shipment or Delivery

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Plaintiff, the buyer, and Defendant, the seller, made a contract for the sale of goods. The contract does not specifically say when the goods were to be delivered. When the parties have not agreed otherwise, the time for shipment or delivery under a contract for the sale of goods must be at a reasonable time.

Plaintiff claims that Defendant has breached this contract by failing to deliver the goods within a reasonable time. To prove this, Plaintiff must prove both of the following:

- 1. That Defendant did not deliver the goods within a reasonable time; and**
- 2. That [he/she/it] gave Defendant a reasonable notice of this failure.**

Defendant claims that:

[CHOOSE ONE OR BOTH (See Use of Instruction)]

[He/She/It] made the delivery within a reasonable time.

[OR]

[He/She/It] and Plaintiff had agreed to another time for delivery by an implied agreement through

_____ [custom of trade or course of dealing or course of performance or surrounding circumstances].

[CONTINUE INSTRUCTION]

If you find that Plaintiff has proved that Defendant did not deliver the goods within a reasonable time after a reasonable notice, then Defendant has breached the contract.

[OPTIONAL (See Use of Instruction)]

However, Defendant has not committed a breach of contract if you find that Defendant and Plaintiff had agreed to a different delivery time.

Authority: *Com. Code § 2309(1).*

[2] Use of Instruction

This instruction should be used together with the instruction in MB 300H.14[1] defining reasonable time and the instruction in MB 300H.10[1] on good faith obligation. When the instruction asks the user to choose one or both of the following paragraphs, the user should choose whatever fits the facts of his or her case. If the user chooses the second of these two paragraphs, then the user will also want to use the optional final paragraph and the instruction in MB 300H.126[1].

A preponderance of evidence instruction must be used with this instruction [see Ch. 2, *California Judicial Council Evidence Instructions*, CACI No. 200 ("Obligation to Prove--More Likely True Than Not True")].

LexisNexis Matthew Bender Expert Practice Tip--"Reasonable Time" Is Subjective: The concept of "reasonable time," set out throughout this instruction, is subjective. Thus, different jurors may consider this term differently. *By Rex Heeseman*

[3] Comment

When the parties have not agreed otherwise, the time for shipment or delivery under the contract is at a reasonable time [*Com. Code § 2309*; see *Com. Code § 1205(a)* ("reasonable time" defined); see also *MB 300H.14[1]*]. As with the other open term instructions, the jury can find an implied agreement on the time for shipment or delivery in the surrounding circumstances, a trade usage, prior dealings, or the parties' course of performance [U.C.C. Comment No. 1 to *Com. Code § 2309*; see *MB 300H.126*].

Unreasonably early demands or requests for delivery, when time is not specified, do not, without more, constitute a breach [U.C.C. Comment No. 4 to *Com. Code § 2309*].

Unreasonable delay in offering or demanding delivery requires notice before failure to perform may be treated as a breach. Unreasonable delay by both parties may terminate the contract by abandonment [U.C.C. Comment No. 5 to *Com. Code § 2309*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Breach, Repudiation & ExcuseGeneral OverviewCommercial Law

(UCC)Sales (Article 2)Contract TermsGeneral OverviewCommercial Law (UCC)Sales (Article 2)Contract
TermsGap-Filler ProvisionsDelivery & Shipping TermsCommercial Law (UCC)Sales (Article 2)Form, Formation &
ReadjustmentParol EvidenceGap-Filler ProvisionsCommercial Law (UCC)Sales (Article 2)PerformanceTender,
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CHAPTER 3H Matthew Bender Commercial Code Sales Contracts Instructions
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2-3H California Forms of Jury Instruction MB 300H.119

MB 300H.119 Contracts of Indefinite Duration

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Plaintiff and Defendant have a contract for the sale of goods that calls for successive performances and that does not say how long the contract is going to last. A contract with these provisions is valid for a reasonable time.

[*OPTIONAL (See Use of Instruction)*]

Unless the parties to a contract agree on a different rule for termination, a contract of indefinite duration that provides for successive performances may be terminated by either party at any time.

[*CONTINUE WITH INSTRUCTION*]

Plaintiff claims that Defendant has breached this contract by _____ [state what defendant did or failed to do that allegedly breached the contract].

[*CHOOSE ONE OR BOTH (See Use of Instruction)*]

Defendant claims that [he/she/it] did not breach the contract because the contract was no longer in effect due to the fact that more than a reasonable period of time had passed by the time Defendant _____ [

describe alleged breach].

[OR]

Defendant _____ [claims or also claims] that [he/she/it] did not breach the contract because the contract was no longer in effect due to the fact that Defendant terminated the contract before [he/she/it] _____ [describe alleged breach].

[CONTINUE WITH INSTRUCTION]

The burden is on Plaintiff to prove what the provisions of the contract were and to prove that the contract was breached. If you find that Plaintiff has proved that _____ [state what defendant did or failed to do that allegedly breached the contract] before a reasonable time had passed after the contract was made, then Defendant did breach the contract.

[OPTIONAL (See Use of Instruction)]

However, if you find that the contract could be terminated at will by either party, and that Defendant terminated the contract, then Defendant did not breach the contract.

Authority: *Com. Code § 2309(2).*

[2] Use of Instruction

This instruction should be used to define the right to terminate at one party's option. It does not apply to cancellation for breach. The instruction should be used with MB 300H.14[1], which defines reasonable time. The first optional paragraph should be used when the parties dispute the right to terminate a contract calling for successive performances, such as a requirements contract. If this option is chosen, then the user should use the second paragraph under "Choose One or Both" and also the last optional paragraph. The instruction in MB 300H.120[1] on notice of contract termination must be given with the optional instruction.

If it is alleged that the contract was not valid for "a reasonable time" [*Com. Code § 2309(2)*] because the parties came to an implied agreement as to duration by the circumstances, a custom of trade, a course of performance, or by a course of dealing, then this instruction must be used with MB 300H.126[1] regarding whether the parties "otherwise agreed."

A preponderance of evidence instruction must be used with this instruction [*see Ch. 2, California Judicial Council Evidence Instructions, CACI No. 200* ("Obligation to Prove--More Likely True Than Not True")]. The designation of the parties is for illustrative purposes only and should be changed if necessary.

LexisNexis Matthew Bender Expert Practice Tip--Reasonable Notice of Termination Is Required:

Even if a contract is terminable at will, the terminating party still has to provide "reasonable notice" so that the other party can make substitute arrangements [*see MB 300H.120* (notice of contract termination)]. *By Ronald Oster*

[3] Comment

Normally the court will seek to find the parties' intent regarding duration by examining the contract. If this examination is unavailing and the contract's duration is an issue of fact, the jury may be instructed to make a finding in accordance

with this instruction. The rules on contracts of indefinite duration stated in this instruction are based on *Com. Code* § 2309(2).

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Contract TermsGeneral OverviewCommercial Law (UCC)Sales (Article 2)Contract TermsGap-Filler ProvisionsGeneral OverviewCommercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentParol EvidenceGap-Filler ProvisionsCommercial Law (UCC)Sales (Article 2)PerformanceGeneral OverviewCommercial Law (UCC)Sales (Article 2)PerformanceTender, Shipment, Delivery & CureContracts LawSales of GoodsTermination Notices

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CHAPTER 3H Matthew Bender Commercial Code Sales Contracts Instructions
PART G. GENERAL OBLIGATIONS
2. Open Terms

2-3H California Forms of Jury Instruction MB 300H.120

MB 300H.120 Notice of Contract Termination

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

If either party has the right to terminate a contract, then reasonable notice of the termination must be received by the other party. The notice received is reasonable if it allows the other party a reasonable time to look for a substitute arrangement for the _____ [sale of [his/her/its] goods or purchase of the goods that [he/she/it] needs].

Authorities: *Com. Code § 2309(3); U.C.C. Comment No. 8 to Com. Code § 2309.*

[2] Use of Instruction

This instruction should be used when the contract or a Commercial Code provision gives either party the right to terminate the contract for a reason other than the breach of that contract. The instruction in MB 300H.18[1] on receipt of notice should be given with this instruction, as should the instruction in MB 300H.14[1] defining "reasonable time."

LexisNexis Matthew Bender Expert Practice Tip--Explain "Reasonable": This instruction utilizes the word "reasonable" three times. Your closing argument should explain the differences in their usage.

By Rex Heeseman

[3] Comment

If either party has the right to terminate a contract, except on an agreed event [*Com. Code § 2309(3)*] or on termination for breach of contract, then reasonable notice of the termination must be received by the other party. The purpose of requiring notice is to give the non-terminating party the opportunity to make alternate arrangements, and a notice that

accomplishes this purpose is "reasonable" within the meaning of the statute [U.C.C. Comment No. 8 to *Com. Code* § 2309]. Although notice may generally be dispensed with by agreement of the parties, such an agreement is invalid if its operation would be unconscionable [*Com. Code* § 2309(3)]. Cancellation is a remedy for breach of contract, and is not the kind of termination covered by *Com. Code* § 2309(3) [U.C.C. Comment No. 9 to *Com. Code* § 2309].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Contract TermsGeneral OverviewCommercial Law (UCC)Sales (Article 2)Contract TermsGap-Filler ProvisionsGeneral OverviewContracts LawSales of GoodsTermination Notices

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CHAPTER 3H Matthew Bender Commercial Code Sales Contracts Instructions
PART G. GENERAL OBLIGATIONS
2. Open Terms

2-3H California Forms of Jury Instruction MB 300H.121

MB 300H.121 Time for Payment of Contract Price

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

If you find that the parties did not specify a time for payment of the contract price, then payment is due at the time and place at which the buyer is to receive the goods [, after a reasonable opportunity for the buyer to inspect the goods].

Authorities: *Com. Code §§ 2310, 2513.*

[2] Use of Instruction

This instruction should be used if the parties failed to specify a time for payment. It should be used in all situations except when delivery is by tender of documents. The bracketed clause should be included unless the contract is C.O.D [Com. Code § 2513(3)(a)]. If delivery is by tender of documents, then use the instruction in MB 300H.122[1].

[3] Comment

Unless otherwise agreed, payment is due at the time and place at which the buyer is to receive the goods [Com. Code § 2310(a)]. The buyer must be allowed a reasonable opportunity to inspect the goods before payment, unless the parties agree otherwise or delivery is C.O.D [Com. Code § 2513(3)(a)] or by way of documents of title that do not permit inspection of the goods [Com. Code §§ 2310(b), 2513(1), (3)]. For discussion of deliveries by documents of title, see MB 300H.122[3].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Contract TermsGeneral OverviewCommercial Law (UCC)Sales (Article 2)Contract TermsGap-Filler ProvisionsDelivery & Shipping TermsCommercial Law (UCC)Sales (Article 2)PerformancePayment Tender

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CHAPTER 3H Matthew Bender Commercial Code Sales Contracts Instructions

PART G. GENERAL OBLIGATIONS

2. Open Terms

2-3H California Forms of Jury Instruction MB 300H.122

MB 300H.122 Time for Payment of Contract Price Against Documents

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

[For documents of title issued on or after January 1, 2007 (see Stats. 2006, ch. 254, § 81)]:

If delivery is authorized and made by delivery of documents of title, payment is due regardless of where the goods are to be received either at the time and place at which the buyer is to receive delivery of the tangible documents, or at the time the buyer is to receive delivery of the electronic documents and at the seller's place of business or, if none, the seller's residence.

[OR, for documents of title issued before January 1, 2007 (see Stats. 2006, ch. 254, § 81)]:

If delivery is authorized and made by delivery of documents of title, payment is due at the time and place at which the buyer is to receive the documents, regardless of the time and place at which the goods are to be received.

Authority: *Com. Code § 2310(c).*

[2] Use of Instruction

This instruction should be used when delivery was to be made by way of documents of title, such as a bill of lading, warehouse receipt, or other bailee receipt. The code definition of "documents of title" [see *Com. Code § 1201(a)(16)*] (as

amended by Stats. 2006, ch. 254, § 16)] should be included with this instruction. This instruction does not deal with delivery by document of title when the goods are shipped with a security interest reserved in the seller [*see Com. Code* §§ 2310(b), 2505].

[3] Comment

Contracts for the sale of goods in the hands of a bailee, such as a warehouse or common storage facility, frequently provide for delivery by tender of documents of title issued by the bailee to cover goods in the bailee's possession. Unless the parties agree otherwise, payment is to be made against the documents of title. For documents of title issued before January 1, 2007, payment is due at the time and place at which the buyer is to receive the documents, regardless of the time and place at which the goods are to be received [*Com. Code* § 2310(c) (prior to amendment by Stats. 2006, ch. 254)]. For documents of title issued on or after January 1, 2007, *Com. Code* § 2310(c), as amended by Stats. 2006, ch. 254, § 35, differentiates between tangible documents and electronic documents. For documents of title issued on or after January 1, 2007, regardless of where the goods are to be received, payment is due either at the time and place where the buyer is to receive delivery of tangible documents, or at the time the buyer is to receive delivery of electronic documents and at the seller's place of business, or if none, the seller's residence [*Com. Code* § 2310(c)]. The buyer's right to inspect is limited by *Com. Code* § 2513.

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Contract TermsGap-Filler ProvisionsGeneral OverviewCommercial Law (UCC)Sales (Article 2)PerformancePayment TenderCommercial Law (UCC)Sales (Article 2)PerformanceTender, Shipment, Delivery & Cure

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CHAPTER 3H Matthew Bender Commercial Code Sales Contracts Instructions

PART G. GENERAL OBLIGATIONS

2. Open Terms

2-3H California Forms of Jury Instruction MB 300H.123

MB 300H.123 Time for Running of Credit Period

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

If the seller is authorized or required to ship the goods on credit, the credit period begins to run at the time of shipment.

[*OPTIONAL (See Use of Instruction)*]

If the invoice is postdated by the seller, then the credit period begins to run at the date stated on the invoice.

[*OPTIONAL (See Use of Instruction)*]

If the invoice is delayed by the seller, then the credit period begins to run at the time the invoice is sent.

Authority: *Com. Code § 2310(d).*

[2] Use of Instruction

This instruction should be used if the jury is required to make some calculation—for example, to determine the amount of damages—for which it must know when the credit period began and the contract does not specify when the credit period began. The optional paragraphs should be given when appropriate to the facts in the case, that is, when the seller postdated the invoice or delayed sending it. The designation of the parties is for illustrative purposes only and should be

changed if necessary.

[3] Comment

If the seller is required or authorized to ship the goods on credit, the credit period runs from the time of shipment, but if the seller postdates the invoice or delays sending the invoice, then the start of the credit period is correspondingly delayed [*Com. Code* § 2310(d)]. The Commercial Code embodies the general commercial practice of invoicing on shipment of goods. Any delay in invoicing does not prejudice the buyer under *Com. Code* § 2310 [U.C.C. Comment No. 5 to *Com. Code* § 2310].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Contract TermsGap-Filler ProvisionsDelivery & Shipping TermsCommercial Law (UCC)Sales (Article 2)PerformanceGeneral OverviewCommercial Law (UCC)Sales (Article 2)PerformancePayment Tender

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PART G. GENERAL OBLIGATIONS
2. Open Terms

2-3H California Forms of Jury Instruction MB 300H.124

MB 300H.124 Performance to Be Specified by a Party

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

The contract in this case between Plaintiff, the _____ [seller or buyer], and Defendant, the _____ [buyer or seller], provided that Defendant should specify _____ [state aspect of performance that party named was required to specify; see Use of Instruction for examples]. **Plaintiff claims that Defendant breached this requirement. To prove this breach of contract, Plaintiff bears the burden of proving that Defendant did not specify _____ [state aspect of performance that party named was required to specify]**

[CHOOSE ONE OR MORE OF THE FOLLOWING (See Use of Instruction)]

in the manner required by the contract.

[OR]

in good faith.

[OR]

in a commercially reasonable manner.

[CONTINUE WITH INSTRUCTION]

In making this determination you should consider evidence of the prior dealings of the parties, customs in the trade, and the course of performance of this contract.

If you find that Plaintiff has proved that Defendant did not:

[CHOOSE ONE OR MORE OF THE FOLLOWING (See Use of Instruction)]

specify in the manner required by the contract,

[OR]

specify in good faith,

[OR]

specify in a commercially reasonable manner,

[CONTINUE WITH INSTRUCTION]

then you must find in favor of Plaintiff on [his/her/its] _____ [claim or counterclaim] for _____ [state relief sought or describe particular claim on which jury is finding for that party; see Use of Instruction for example].

Authorities: *Com. Code § 2311(1); Cal. Lettuce Growers v. Union Sugar Co. (1955) 45 Cal.2d 474, 484, 289 P.2d 785*

[2] Use of Instruction

This instruction should be used when it is not disputed that one party was required to specify certain particulars of performance, but it is contended that the party did not specify these in accordance with what the contract required, or did so unreasonably or in bad faith. When the failure to specify in a timely way is specifically at issue, the instruction in MB 300H.125[1] on duty of cooperation should also be given.

A preponderance of evidence instruction should be used with this instruction [see Ch. 2, *California Judicial Council Evidence Instructions*, CACI No. 200 ("Obligation to Prove--More Likely True Than Not True")]. Instructions defining good faith [see MB 300H.10[1]], course of dealings, trade customs [see MB 300H.12[1]], and course of performance [see MB 300H.13[1]] are available, and should also be used. "Course of dealings" is here referred to as "prior dealings of the parties" [see MB 300H.11[1]].

Aspects of performance that a party may typically be required to specify include (1) frequency of deliveries, (2) assortment of goods [see *Com. Code § 2311(2)*], (3) mode of shipping [see *Com. Code § 2311(2)*], (4) the exercise of

an option as to place of delivery, (5) selection of a ship by the buyer when delivery is F.O.B. vessel [*see Com. Code § 2319(1)*], (6) selection of a port or berth when delivery is F.O.B. or F.A.S. vessel [*see Com. Code § 2319(3)*], and (7) exercise of the option to accept goods "as is" or reject them [*see Com. Code § 2613(b)*; U.C.C. Comment No. 3 to *Com. Code § 2613*; MB 300H.175]. Selection among the remaining two sets of three options depends on the nature of the failure alleged in the case. When good faith and commercial reasonableness are not specifically raised, the first paragraph, completed with the statement of what the party was required by the contract to specify, should be used.

The last paragraph of the instruction on what finding the jury must make will name either the plaintiff or defendant (or cross-claimant, cross-defendant, etc.) and instruct the jury to find for the appropriate party. For a simple example, it might be undisputed that it was the practice of the parties that the buyer specify each month which of its three plants is to receive a standard shipment from the seller. After failing to specify any delivery in August, the buyer demands two deliveries in September and the seller refuses to make more than one. In its subsequent action against the seller, the buyer claims that it is entitled to recover its costs flowing from the seller's alleged repudiation, and the seller claims that the buyer's specification was unreasonable. The jury would be instructed that, if it concludes from the evidence that the buyer's specification was commercially unreasonable, it must "find in favor of the defendant on the plaintiff's claim for damages arising from the defendant's refusal to make an extra delivery during the month of September." In this example, it might be instructed further that if, on the other hand, it finds the buyer's specification to have been reasonable, the jury should go on to consider what the buyer's damages were.

[3] Comment

Particulars of performance may be left for later specification so long as the contract is sufficiently definite under *Com. Code § 2204*, but the specification must be made in good faith and must be commercially reasonable [*see Com. Code § 2311(1)*]. Because the power to specify is limited by the requirements of good faith and commercial reasonableness, there is no surprise [U.C.C. Comment No. 1 to *Com. Code § 2311*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)General Provisions (Article 1)Definitions & InterpretationGood FaithCommercial Law (UCC)Sales (Article 2)Contract TermsGap-Filler ProvisionsDelivery & Shipping TermsCommercial Law (UCC)Sales (Article 2)PerformanceTender, Shipment, Delivery & Cure

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California Forms of Jury Instruction

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CHAPTER 3H Matthew Bender Commercial Code Sales Contracts Instructions

PART G. GENERAL OBLIGATIONS

2. Open Terms

*2-3H California Forms of Jury Instruction MB 300H.125***MB 300H.125 Duty of Cooperation****[1] Instruction**

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

If you find that Defendant failed to _____ [either make such timely specification as would allow Plaintiff to proceed with performance or cooperate in a timely way as was necessary to Plaintiff's performance],

[CHOOSE ONE OF THE FOLLOWING (See Use of Instruction)]

and you find that Plaintiff proceeded with [his/her/its] own performance in any reasonable way, then you must find that Plaintiff was _____ [excused or not liable in damages] for any delay in [his/her/its] performance caused by Defendant's failure or delay in _____ [specifying or cooperating].

[OR]

and you find that the time for a significant part of Plaintiff's own performance had passed, then you must find that [he/she/it] did not breach the contract by _____ [describe action taken by plaintiff, such as canceling contract, or refusing further performance, that he or she was entitled to take].

Authority: Com. Code § 2311(3).

[2] Use of Instruction

This instruction should be used when the contract required timely cooperation and one party fails to cooperate, thereby impeding the other party's performance. If the delay was such that the other party's time for performance had passed, the second alternative paragraph should be used. If the issue is the delay of the other party in performing, the first alternative paragraph should be used. The designation of the parties is for illustrative purposes only and should be changed if necessary.

LexisNexis Matthew Bender Expert Practice Tip--Explain "Cooperation": Whether the defendant "cooperated" or not is a difficult issue. Hence, your closing must explain that issue in an understandable manner. *By Rex Heeseman*

[3] Comment

Com. Code § 2311(3) restates the common sense rule that a party is excused from any delay resulting from the other party's failure to act reasonably or in good faith in specifying the particulars of performance required by the contract. If the failure to specify or otherwise cooperate materially prejudices the contract-keeping party, that party may treat the failure as a breach.

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)General Provisions (Article 1)Definitions & InterpretationGood FaithCommercial Law (UCC)Sales (Article 2)Contract TermsGap-Filler ProvisionsDelivery & Shipping TermsCommercial Law (UCC)Sales (Article 2)PerformanceTender, Shipment, Delivery & Cure

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CHAPTER 3H Matthew Bender Commercial Code Sales Contracts Instructions

PART G. GENERAL OBLIGATIONS

2. Open Terms

*2-3H California Forms of Jury Instruction MB 300H.126***MB 300H.126 Did Parties "Otherwise Agree"?****[1] Instruction**

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

If Plaintiff and Defendant did not agree to do otherwise, then _____ [*state rule that applies if parties did not otherwise agree; see Use of Instruction for example*]. **This is the general rule that the Commercial Code applies to agreements that are silent about _____** [*state subject of agreement, e.g., the number of deliveries or the time that the contract was to remain in effect*].

Plaintiff claims that the parties did not agree to do otherwise and that Defendant is in breach of their contract for the sale of _____ [*specify type of goods*], **because Defendant _____** [*state what defendant did or failed to do that violated rule that applies if parties did not otherwise agree; see Use of Instruction for example*].

_____ [The surrounding circumstances or A custom of trade or A course of dealing or A course of performance] may be an agreement to do otherwise. Words or written agreements are not necessary.

Defendant claims that [he/she/it] and Plaintiff did agree to do otherwise, and that this agreement may be seen in _____ [the surrounding circumstances or a custom of trade or a course of dealing or a course of performance].

The burden is on Plaintiff to prove what the provisions of the contract were, and also to prove that those provisions were breached by Defendant.

If you find that there was an agreement between Plaintiff and Defendant on _____ [state subject of agreement, e.g., the number of deliveries or the time that the contract was to remain in effect] based on _____ [the surrounding circumstances or a custom of trade or a course of dealing or a course of performance], then that is the rule by which you must judge Defendant's performance, because any specific agreement, even an agreement based on conduct, controls over the general rule that the Commercial Code applies to agreements that are silent about _____ [state subject of agreement, e.g., the number of deliveries or the time that the contract was to remain in effect].

Authorities: *Com. Code §§ 1201(a)(3), 2202; U.C.C. Comment No. 3 to Com. Code § 1201.*

[2] Use of Instruction

[a] When to Use This Instruction

In some cases when a term of a contract for the sale of goods is left open or indefinite, the Commercial Code provides the missing term or gives a more definite meaning to the term [*see, e.g., Com. Code §§ 2306-2311*]. This rule imposed by the Commercial Code usually applies only "unless otherwise agreed" [*see, e.g., Com. Code §§ 2306-2311*]. Thus, this instruction should be used when it is alleged that the parties otherwise agreed. This instruction does not attempt to address the situation when it is alleged that the parties expressly agreed to do otherwise. In most cases, the meaning of an express agreement will be a question of law for the court. This instruction is intended for those cases when it is alleged that an implied agreement to do otherwise exists because of the circumstances or the conduct of the parties. These issues are much more likely to present questions of fact for a jury. If there is or may be more than one implied agreement to do otherwise, then this instruction must be used with the instruction in MB 300H.90 on interpretation, which explains the priority rules for these implied contract terms. A preponderance of evidence instruction must be used with this instruction [*see Ch. 2, California Judicial Council Evidence Instructions, CACI No. 200 ("Obligation to Prove--More Likely True Than Not True")*].

LexisNexis Matthew Bender Expert Practice Tip--Simplify This Instruction: This complex instruction should be streamlined whenever possible by eliminating portions that do not apply to the case at hand (e.g., custom of trade, etc.). And, the idea of "otherwise agree" will seem strange (or even incorrect) to some jurors. *By Ronald Oster and Rex Heeseman*

[b] How to Use This Instruction; Examples

If, for example, a buyer and a seller agree to exclusive dealing in a certain type of goods, then that agreement by law imposes, unless otherwise agreed, an obligation for the seller to use best efforts to supply the goods, and for the buyer to use best efforts to promote and market the goods [*see Com. Code § 2306(2); see also MB 300H.115*]. This means that in such a case, the rule that applies unless the parties agree otherwise might be that the buyer must use best efforts to promote and market the goods. What the plaintiff claims that the buyer failed to do would obviously be that the buyer did not use best efforts to promote and market the goods.

If, as a second example, the contract is silent on the number of deliveries, the Commercial Code provides that a single delivery is required, unless a single delivery is not commercially practicable [*Com. Code § 2307; U.C.C. Comment No. 3 to Com. Code § 2307*]. However, any time an agreement makes no provision on a point, including delivery, that point may be controlled by an implicit agreement based on trade usage, course of dealing, or course of performance [*Com. Code §§ 1201(a)(3), 1303*]. This means that the rule that applies unless the parties agree otherwise would be that the seller must deliver all the goods due under the contract in a single delivery. What the plaintiff claims that the seller failed to do would be that the seller did not deliver all the goods due under the contract in a single delivery. For further discussion of the single delivery requirement, see *MB 300H.116*.

[3] Comment

[a] Implied Agreements

The court may find an agreement by the parties to do something other than the Commercial Code provides by looking to the surrounding circumstances, a custom of trade, a course of dealing, or a course of performance, as well as in their express language. First, note that *Com. Code § 2202* provides that although a final written agreement may not be contradicted by prior writings or by contemporaneous oral agreements, it may be explained or supplemented by course of dealing, custom of trade, or course of performance. Second, under the Commercial Code "agreement" is defined as the bargain of the parties in fact as found in their language or inferred from other circumstances, including course of dealing, usage of trade, or course of performance [*Com. Code § 1201(a)(3)*]. This includes agreements permitted under the Code to displace stated rules of law [U.C.C. Comment No. 3 to *Com. Code § 1201*].

[b] Definitions

For definition of course of dealing, see *MB 300H.11*. For definition of usage of trade, see *MB 300H.12*. For definition of course of performance, see *MB 300H.13*.

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)General Provisions (Article 1)Application & ConstructionGap-Filler ProvisionsCommercial Law (UCC)Sales (Article 2)Contract TermsGap-Filler ProvisionsGeneral OverviewCommercial Law (UCC)Sales (Article 2)Contract TermsGap-Filler ProvisionsDelivery & Shipping TermsCommercial Law (UCC)Sales (Article 2)PerformanceGeneral OverviewCommercial Law (UCC)Sales (Article 2)PerformanceTender, Shipment, Delivery & Cure

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CHAPTER 3H Matthew Bender Commercial Code Sales Contracts Instructions

PART G. GENERAL OBLIGATIONS

2. Open Terms

2-3H California Forms of Jury Instruction MB 300H.127-MB 300H.139

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MB 300H.127Reserved for Future Use



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CHAPTER 3H Matthew Bender Commercial Code Sales Contracts Instructions

PART G. GENERAL OBLIGATIONS

3. Warranties

2-3H California Forms of Jury Instruction MB 300H.140

MB 300H.140 Warranties in General

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Contracts for the sale of goods may contain warranties regarding the character or fitness of the goods sold. A warranty is a promise by the seller that the goods will conform to the description or standard contained in the warranty.

An express warranty is a statement or affirmation of fact about the goods made by the seller to the buyer. An implied warranty is one that arises from the circumstances of the sale and does not require a statement or affirmation by the seller.

In this case, Plaintiff contends that the following warranties apply to the parties' transaction:

_____ [*list express and/or implied warranties claimed*]. **Plaintiff claims that Defendant has breached these warranties.**

Authorities: *Com. Code §§ 2313, 2314, 2315.*

[2] Use of Instruction

This instruction should be used to introduce the concepts of express and implied warranties and to introduce further breach of warranty instructions. The designation of the parties is for illustrative purposes only and should be changed if necessary.

For related Judicial Council instructions, see [3][b], *below*.

LexisNexis Matthew Bender Expert Practice Tip--Warranties, Generally: Warranties will be unique to some jurors and commonplace to other jurors. That "balancing" should be kept in mind in your closing. *By Rex Heeseman*

[3] Comment

[a] Express and Implied Warranties

Express warranties are created by promises, descriptions, or samples by or from the seller [*Com. Code* § 2313]. Implied warranties are implied by law under certain circumstances [*Com. Code* §§ 2314, 2315]. Actions for breach of warranty normally include claims for breach of both express and implied warranties. Care should be taken to separate the instructions for each claim of breach to avoid confusing the jury.

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [*see* Ch. 12, *California Judicial Council Products Liability Instructions*]:

CACI No. 1230, Express Warranty--Essential Factual Elements

CACI No. 1231, Implied Warranty of Merchantability--Essential Factual Elements

CACI No. 1232, Implied Warranty of Fitness for a Particular Purpose--Essential Factual Elements

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)WarrantiesGeneral OverviewCommercial Law (UCC)Sales (Article 2)WarrantiesExpress WarrantiesCommercial Law (UCC)Sales (Article 2)WarrantiesFitnessCommercial Law (UCC)Sales (Article 2)WarrantiesMerchantability

Irene Sall Holmes and Lock Holmes contributed to the original chapter for California Forms of Jury Instruction (Matthew Bender).



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CHAPTER 3H Matthew Bender Commercial Code Sales Contracts Instructions

PART G. GENERAL OBLIGATIONS

3. Warranties

2-3H California Forms of Jury Instruction MB 300H.141

MB 300H.141 Terms of Warranty of Title

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

A contract for the sale of goods includes a warranty by Defendant that:

- 1. Title to the goods conveyed by Defendant is good; and**
- 2. Transfer of title by Defendant is [proper or rightful]; and**
- 3. The goods are not security for money owed to a third party unless Plaintiff knew of the security interest at the time of contracting.**

In this case, Plaintiff contends and must prove that Defendant breached the implied warranty of title by _____ [description of alleged breach]. You are to determine from the evidence presented whether the breach occurred.

Authority: *Com. Code § 2312(1).*

[2] Use of Instruction

This instruction should be used when the buyer contends the seller failed to transfer title to the goods free of undisclosed liens. The instruction in MB 300H.155, on notice of breach, should be given with this instruction. A preponderance of evidence instruction must be used with this instruction [see Ch. 2, *California Judicial Council Evidence Instructions*, CACI No. 200 ("Obligation to Prove--More Likely True Than Not True")]. The designation of

the parties is for illustrative purposes only and should be changed if necessary.

LexisNexis Matthew Bender Expert Practice Tip--Explain Terms to Jury: The term "title" will have to be explained to the jury in the context of the case. Title to real property (e.g., a deed) or an automobile (e.g., a pink slip) will be easy to understand, but other situations will require greater explanation. The term "security" will also have to be explained. *By Ronald Oster*

[3] Comment

The terms of the warranty of title are set forth in *Com. Code § 2312(1)*. A common dispute under *Com. Code § 2312* involves the sale of motor vehicles by private parties. The seller fails to disclose a lender's security interest in the vehicle or the fact that title is claimed by another party. Sale of the vehicle to the buyer would breach the implied warranty of title. To avoid application of the warranty, the seller must clearly convey to the buyer that the buyer is acquiring only those rights as the seller may have. For an instruction on the exclusion or modification of the warranty of title, see *MB 300H.142*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Sales (Article 2)WarrantiesWarranties of Title

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CHAPTER 3H Matthew Bender Commercial Code Sales Contracts Instructions
PART G. GENERAL OBLIGATIONS
3. Warranties

2-3H California Forms of Jury Instruction MB 300H.142

MB 300H.142 Exclusion or Modification of Warranty of Title

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Defendant did not warrant [his/her/its] title and thus is not liable for breach of the implied warranty of title if Defendant proves that:

[*EITHER (See Use of Instruction)*]

Specific language in the contract stated that there was no warranty of title.

[*OR*]

There were circumstances that gave Plaintiff reason to know that the Defendant did not claim to own title to the goods or that the Defendant was selling only limited rights or title to the goods.

Authority: *Com. Code § 2312(2).*

[2] Use of Instruction

This instruction should be used when the seller defends a breach claim on the ground that the implied warranty of title was modified or excluded. The first optional paragraph should be used if the claim of exclusion or modification is based on specific language in the contract. The second optional paragraph should be used if the claim of exclusion or

modification is based on the circumstances of the transaction.

The instruction in MB 300H.16, on notice of a fact, should be included. A preponderance of evidence instruction must be used with this instruction [see Ch. 2, *California Judicial Council Evidence Instructions, CACI No. 200* ("Obligation to Prove--More Likely True Than Not True")]. The designation of the parties is for illustrative purposes only and should be changed if necessary.

LexisNexis Matthew Bender Expert Practice Tip--Explain Warranty of Title to Jury: "Warranty of title" will be alien to most jurors. Thus, your closing should explain the concept and related evidence in an understandable manner. *By Rex Heeseman*

[3] Comment

A warranty of title can be excluded or modified by specific language in the contract or circumstances that give the buyer reason to know that the seller does not claim title itself or that the seller is purporting to sell only that title as the seller or a third person may have [*Com. Code § 2312(2)*]. The warranty of title is not an implied warranty and thus is not subject to *Com. Code § 2316(3)* on disclaimer of implied warranties [U.C.C. Comment No. 6 to *Com. Code § 2312(2)*].

It is, by comparison, easier to modify or exclude the warranty of title than to exclude or modify other implied warranties under the Commercial Code. In theory, the circumstances of the transaction, including, for example, the price paid together with knowledge that the seller was having business difficulties, may be adequate reason for the buyer to know that the seller is only transferring the title as the seller may have. Clearly, the buyer at a sheriff's auction has reason to know that the seller's title may not be good or free from encumbrances [U.C.C. Comment No. 3 to *Com. Code § 2312*]. On the other hand, negation of the implied warranty of title arising from the purchase of a merchant's goods in the ordinary course of business may require an express written disclaimer signed by the buyer to overcome the strong circumstantial inference that the buyer will receive good title.

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)WarrantiesExclusion & ModificationCommercial Law (UCC)Sales (Article 2)WarrantiesWarranties of Title

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PART G. GENERAL OBLIGATIONS
3. Warranties

2-3H California Forms of Jury Instruction MB 300H.143

MB 300H.143 Warranty Against Infringement

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

There is a warranty that the goods would not infringe on patent or similar rights held by a third party if Plaintiff proves that:

- 1. Defendant dealt regularly in the type of goods in the contract;**
- 2. The agreement did not specifically exclude the noninfringement warranty; and**
- 3. Defendant breached that warranty if Plaintiff proves that the goods were subject to valid infringement claims by a third party.**

[*OPTIONAL (See Use of Instruction)*]

Defendant is not liable for breach of that warranty if Defendant proves that Plaintiff furnished specifications to Defendant for use in manufacturing the goods and the claim of infringement arose out of the Defendant's compliance with the buyer's specifications.

Authority: *Com. Code § 2312(3).*

[2] Use of Instruction

This instruction should be used when the buyer is seeking damages for having been forced to defend a third party claim of infringement involving goods purchased from a merchant. The optional instruction should be used when the seller claims the infringement was caused by the buyer's specifications. A preponderance of evidence instruction must be used with this instruction [see Ch. 2, *California Judicial Council Evidence Instructions*, CACI No. 200 ("Obligation to Prove--More Likely True Than Not True")]. The designation of the parties is for illustrative purposes only and should be changed if necessary.

[3] Comment

Unless otherwise agreed, a seller who is a merchant regularly dealing in the goods of the kind warrants that the goods will be delivered free of the rightful claim of any third person by way of infringement or the like, but a buyer who furnishes specifications to the seller must hold the seller harmless against any such claim that arises out of compliance with the specifications [*Com. Code* § 2312(3)].

The California Commercial Code Comment indicates that the warranty of *Com. Code* § 2312(3) applies only to claims of patent and trademark infringement [Cal. Comment No. 4 to *Com. Code* § 2312]. However, it might be argued that a buyer who requires a seller to follow the buyer's specifications on the manufacture of a product should hold the seller harmless against third party suits based on defects in the buyer's specifications [see *Carpenter Steel Co. v. Pellegrin* (1965) 237 Cal.App.2d 35, 43, 46 Cal.Rptr. 502 ; U.C.C. Comment No. 9 to *Com. Code* § 2316].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)WarrantiesExclusion & ModificationCommercial Law (UCC)Sales (Article 2)WarrantiesWarranties of Title

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PART G. GENERAL OBLIGATIONS

3. Warranties

*2-3H California Forms of Jury Instruction MB 300H.144***MB 300H.144 Breach of Warranty of Title--Burden of Proof****[1] Instruction**[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

For Plaintiff to recover from Defendant on Plaintiff's claim of breach of warranty of title, Plaintiff must prove all of the following:

1. Defendant sold the _____ [description of goods in issue] to Plaintiff;

2. Defendant warranted Plaintiff's title to _____ [description of goods in issue];

[EITHER (See Use of Instruction)]

3. The title to _____ [description of goods in issue] was not good;

[OR]

3. The _____ [description of goods in issue] infringed the patent of _____ [name of third party];

4. Plaintiff notified Defendant of the breach _____ [within a reasonable time or within a reasonable time after having been sued for infringement]; and

5. Plaintiff's damage was caused by the breach.

Authorities: *Com. Code* §§ 2312, 2607(3)(A), (B), (4), 2714.

[2] Use of Instruction

This instruction should be used to set forth the elements of a cause of action for breach of warranty of title. It should be used together with the preceding instructions on the creation of warranties of title. The optional paragraphs are for an action for failure to deliver good title and an action for damages for infringement on the title. The notice of breach of warranty instruction in MB 300H.155 should be given with this instruction. A preponderance of evidence instruction must be used with this instruction [see Ch. 2, *California Judicial Council Evidence Instructions, CACI No. 200* ("Obligation to Prove--More Likely True Than Not True")]. In addition, the instruction defining the term "cause" set forth in Ch. 3E, *Matthew Bender Contract Damages Instructions*, MB 300E.03, must also be used with this instruction.

[3] Comment

A seller warrants the title of goods sold, unless the warranty is excluded by specific language or the buyer had reason to know the title was not warranted [*Com. Code* § 2312]. The warranty is defined in MB 300H.141 and MB 300H.143. When the buyer has accepted the goods and the warranty is breached, the buyer can recover damages [*Com. Code* § 2714]. The measure of damages is discussed in MB 300H.258. The buyer must notify the seller of the breach within a reasonable time after he or she discovered or should have discovered the breach [*Com. Code* § 2607(3)(A)]. If the breach of warranty is based on infringement of a third party's patent, notice must be given within a reasonable time after the buyer is sued for the infringement [*Com. Code* § 2607(3)(B)]. The burden of proof is on the buyer to establish any breach with regard to the goods accepted [*Com. Code* § 2607(4)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)WarrantiesExclusion & ModificationCommercial Law (UCC)Sales (Article 2)WarrantiesWarranties of TitleEvidenceProcedural ConsiderationsBurdens of ProofAllocationEvidenceProcedural ConsiderationsBurdens of ProofPreponderance of Evidence

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CHAPTER 3H Matthew Bender Commercial Code Sales Contracts Instructions

PART G. GENERAL OBLIGATIONS

3. Warranties

2-3H California Forms of Jury Instruction MB 300H.145

MB 300H.145 Express Warranties Defined

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

It is not necessary for the seller to use formal words such as "warranty" or "guarantee" to create an express warranty, nor is it necessary for the seller to specifically intend to make a warranty. An express warranty may be found in the written or oral statements of the seller or in the conduct of the parties, including their course of dealing. Whether the seller gave an express warranty is for you to decide considering the facts of this case in light of the following instructions.

[CHOOSE ONE OR BOTH (See Use of Instruction)]

A [description or sample or model] of the goods that is made a part of the basis of the bargain creates an express warranty.

[OR]

A seller's statement of fact or promise to the buyer that relates to the goods and becomes part of the basis of the parties' bargain creates an express warranty that the goods will conform to the seller's statement or promise.

Authorities: Com. Code § 2313; *Keith v. Buchanan* (1985) 173 Cal.App.3d 13, 19, 220 Cal.Rptr. 392 .

[2] Use of Instruction

This instruction should be used to introduce the basis for the plaintiff's claim of breach of express warranty. The paragraph relating to descriptions, samples, and models should be used only if the plaintiff is asserting a breach of a warranty arising from a description, sample, or model. Similarly, the paragraph relating to statements of facts and promises should be used only if the plaintiff is asserting a breach of a warranty arising from a statement of fact or promise. Further instructions on breach of express warranty must be given with this instruction as appropriate.

For related Judicial Council instructions, see [3][b], *below*.

[3] Comment

[a] Creation of Express Warranty

The Commercial Code recognizes that an express warranty may be created by (1) specific representations of the seller; (2) descriptions, samples, or models; or (3) conduct of the parties, including a course of dealing or trade usage, which may establish a standard to which the goods must conform [*Com. Code* § 2313(1); Cal. Comment Nos. 1, 4 to *Com. Code* § 2313].

The Commercial Code contemplates that sellers will frequently make these affirmations of fact, or provide descriptions or samples in the ordinary course of negotiating an agreement. It is further assumed that any such affirmations, descriptions, or samples become part of the basis for the parties' bargain unless there is clear affirmative evidence to the contrary [U.C.C. Comment No. 3 to *Com. Code* § 2313; *Keith v. Buchanan* (1985) 173 Cal.App.3d 13, 23, 220 Cal.Rptr. 392]. There is a general presumption that affirmations, descriptions, and samples are intended to become part of the parties' bargain [U.C.C. Comment No. 6 to *Com. Code* § 2313]. The buyer is not required to show reliance on the seller's affirmation, description, or model to incorporate the warranty into the parties' agreement [U.C.C. Comment No. 3 to *Com. Code* § 2313; *Keith v. Buchanan* (1985) 173 Cal.App.3d 13, 22-23, 220 Cal.Rptr. 392].

Under prior case law and the Uniform Sales Act, warranties by sample, warranties of description, and warranties implied from conduct were generally considered implied warranties [Cal. Comment Nos. 4, 5 to *Com. Code* § 2313]. Under *Com. Code* § 2313 these warranties are express, making them more difficult to disclaim under *Com. Code* § 2316 [Cal. Comment No. 6 to *Com. Code* § 2313].

It should also be noted that the seller's warranty need not be made at the time of the original agreement. Subsequent affirmations, descriptions, or samples may become part of the parties' agreement as a result of express or implied modifications, such as when additional assurances are given to a buyer about to take delivery of the goods [U.C.C. Comment No. 7 to *Com. Code* § 2316].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 12, *California Judicial Council Products Liability Instructions*]:

CACI No. 1230 Express Warranty--Essential Factual Elements

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)WarrantiesExpress WarrantiesContracts LawContract Conditions & ProvisionsExpress WarrantiesContracts LawContract Conditions & ProvisionsImplied WarrantiesGeneral Overview

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3. Warranties

2-3H California Forms of Jury Instruction MB 300H.146

MB 300H.146 Statement of Fact Distinguished From Expression of Opinion

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

As I have explained, a statement of fact relating to the goods sold may create an express warranty. However, a statement that merely expresses the seller's opinion about the goods is not considered in law to be a statement of fact and cannot create an express warranty. One of the things you must decide in this case is whether Defendant's statement that _____ [*quote, paraphrase, or describe statement*] was a statement of fact or a statement of Defendant's opinion.

The term "statement of fact," as used in these instructions, refers to any positive statement of fact made by the seller concerning the goods sold. A statement that a seller makes about the goods sold must be considered to be a statement of fact unless it is shown that the buyer could only have reasonably understood the statement as a statement of the seller's opinion.

The term "statement of opinion," as used in these instructions, refers to a statement that is merely an expression of the seller's subjective impression, belief, conclusion, or judgment and that does not claim to be based on any special knowledge. In determining whether a particular statement was a statement of fact or merely the expression of opinion, you may consider the circumstances under which it was made, the manner in which it was made, and the ordinary meaning of the words used. You may also consider the relationship of the parties and the subject matter of the statement.

Authorities: Com. Code § 2313(2); *Keith v. Buchanan* (1985) 173 Cal.App.3d 13, 20-23, 220 Cal.Rptr. 392 .

[2] Use of Instruction

This instruction should be used in conjunction with the instruction in MB 300H.145 defining express warranties when there is an issue of whether a statement was an opinion or a representation.

LexisNexis Matthew Bender Expert Practice Tip--"Fact" vs. "Opinion": The line between "fact" and "opinion" has become blurred in the case law so it is no surprise that juries will struggle with these concepts. Many defense counsel will want to pursue an "opinion" defense by way of motion before trial.
By Ronald Oster

[3] Comment

An affirmation merely of the value of the good or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty [*Com. Code § 2313(2)*]. Despite the fact that the Commercial Code presumes that all statements of the seller relating to the goods become a basis for and are incorporated in the parties' bargain [U.C.C. Comment No. 8 to *Com. Code § 2313*; *Keith v. Buchanan* (1985) 173 Cal.App.3d 13, 21, 220 Cal.Rptr. 392], it is clear that some seller statements cannot be reasonably viewed as conveying more than unsupported opinion as to the value or general quality of the goods. *Com. Code § 2313(2)* allows the trier of fact to conclude that these statements by the seller may not be viewed as entering into the bargain [U.C.C. Comment No. 8 to *Com. Code § 2313*; *Keith v. Buchanan* (1985) 173 Cal.App.3d 13, 21, 220 Cal.Rptr. 392].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)WarrantiesGeneral OverviewCommercial Law (UCC)Sales (Article 2)WarrantiesExpress Warranties

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CHAPTER 3H Matthew Bender Commercial Code Sales Contracts Instructions

PART G. GENERAL OBLIGATIONS

3. Warranties

2-3H California Forms of Jury Instruction MB 300H.147

MB 300H.147 Express Warranties Arising From a Course of Dealing or Usage of Trade

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

An express warranty that the goods conform to a particular standard or quality arises when:

[CHOOSE FROM THE FOLLOWING (See Use of Instruction)]

A course of dealing between the buyer and seller can be fairly regarded as establishing a common basis of understanding that the goods will conform to that standard or quality.

[OR]

A usage of trade, practice, or method of dealing is so regularly observed in a place, business, or trade that it is reasonable to expect that the goods will conform to that usual standard or quality.

[OR]

A course of performance between the buyer and seller fairly indicates that the parties have modified their agreement to include an understanding that the goods will conform to that standard or quality.

Authorities: *Com. Code § 2313*; U.C.C. Comment No. 7 to *Com. Code § 2313*; Cal. Comment No. 4 to *Com. Code § 2313*.

[2] Use of Instruction

This instruction should be used when it is alleged that an express warranty arose from the conduct of the parties or usage of trade. The appropriate definitions on course of dealing (MB 300H.11), performance (MB 300H.13), and usage of trade (MB 300H.12) should also be included.

LexisNexis Matthew Bender Expert Practice Tip--Closing Should Address Uncertainty: It may be uncertain what is an "express warranty" or the "usual standard or quality." Hence, your closing should address these points. *By Rex Heeseman*

[3] Comment

The California Commercial Code Comments specifically recognize that a course of prior dealing or usage of trade may form the basis for an express warranty [Cal. Comment No. 4 to *Com. Code § 2313*]. Further, nothing in *Com. Code § 2313* defining express warranties precludes subsequent modification of the parties' agreement, such as by a course of dealing, so as to include express warranties not found in the original agreement [U.C.C. Comment No. 7 to *Com. Code § 2313*].

Com. Code § 2314(3) also recognizes that implied warranties other than merchantability or fitness for purpose may arise from a course of dealing or trade usage [U.C.C. Comment No. 12 to *Com. Code § 2314*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)WarrantiesGeneral OverviewCommercial Law (UCC)Sales (Article 2)WarrantiesExpress Warranties

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CHAPTER 3H Matthew Bender Commercial Code Sales Contracts Instructions

PART G. GENERAL OBLIGATIONS

3. Warranties

2-3H California Forms of Jury Instruction MB 300H.148

MB 300H.148 Breach of Express Warranty--Burden of Proof

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

For Plaintiff to recover from Defendant on Plaintiff's claim of breach of an express warranty, Plaintiff must prove all of the following:

1. Defendant sold the _____ [description of goods in issue];

[EITHER (See Use of Instruction)]

2. Defendant made an affirmation of fact or promise to the buyer relating to the goods that became a part of the basis of the parties' bargain;

[OR]

2. Defendant's description of the goods was a part of the basis of the parties' bargain;

[OR]

2. Defendant's sample or model was a part of the basis of the parties' bargain;

[CONTINUE INSTRUCTION]

**3. The _____ [description of goods in issue] did not conform to _____
[Defendant's affirmation of fact or promise or Defendant's description or the sample or model];**

4. Plaintiff notified Defendant of the breach within a reasonable time; and

5. Plaintiff's damage was caused by the breach.

Authorities: *Com. Code* §§ 2313, 2607(3)(A), (4), 2714; *Keith v. Buchanan* (1985) 173 Cal.App.3d 13, 19-24, 220 Cal.Rptr. 392 .

[2] Use of Instruction

This instruction should be used to set forth the elements of a cause of action for breach of express warranty. It should be used together with the preceding instructions on the creation of express warranties. The notice of breach of warranty instruction in MB 300H.155 should be given with this instruction. A preponderance of evidence instruction must also be used with this instruction [see Ch. 2, *California Judicial Council Evidence Instructions, CACI No. 200* ("Obligation to Prove--More Likely True Than Not True")]. Further, the instruction defining the term "cause" set forth in Ch. 3E, *Matthew Bender Contract Damages Instructions*, MB 300E.03, must also be used with this instruction.

For related Judicial Council instructions, see [3][b], *below*.

[3] Comment

[a] Breach of Express Warranty; Burden of Proof

Affirmations of fact or promises, descriptions of goods, and samples or models made by the part of the parties' bargain are express warranties [*Com. Code* § 2313; *Keith v. Buchanan* (1985) 173 Cal.App.3d 13, 19-24, 220 Cal.Rptr. 392]. These warranties are defined in MB 300H.145 and MB 300H.147. When the buyer has accepted the goods and the warranty is breached, the buyer can recover damages [*Com. Code* § 2714]. The measure of damages is discussed in MB 300H.258. The buyer must notify the seller of the breach within a reasonable time after he or she discovered or should have discovered the breach [*Com. Code* § 2607(3)(A)]. The burden of proof is on the buyer to establish any breach with regard to the goods accepted [*Com. Code* § 2607(4)].

Unlike implied warranties, privity is not required to recover for breach of express warranty, and therefore a person who did not buy the goods from the plaintiff may recover damages for the breach of the express warranty [*Rodrigues v. Campbell Industries* (1978) 87 Cal.App.3d 494, 500, 151 Cal.Rptr. 90]. However, at least one case suggests that if privity is absent some form of reliance should be shown [*Smith v. Gates Rubber Co.* (1965) 237 Cal.App.2d 766, 769, 47 Cal.Rptr. 307].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 12, *California Judicial Council Products Liability Instructions*]:

CACI No. 1230, Express Warranty--Essential Factual Elements

CACI No. 1243, Notification/Reasonable Time

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)WarrantiesGeneral OverviewCommercial Law (UCC)Sales (Article 2)WarrantiesExpress WarrantiesEvidenceProcedural ConsiderationsBurdens of ProofAllocationEvidenceProcedural ConsiderationsBurdens of ProofPreponderance of Evidence

Irene Sall Holmes and Lock Holmes contributed to the original chapter for California Forms of Jury Instruction (Matthew Bender).



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CHAPTER 3H Matthew Bender Commercial Code Sales Contracts Instructions

PART G. GENERAL OBLIGATIONS

3. Warranties

2-3H California Forms of Jury Instruction MB 300H.149

MB 300H.149 Implied Warranties of Fitness for Purpose Defined

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

A warranty that goods are fit for a particular purpose is implied by law in a contract for their sale, if the seller, at the time the contract is made, has reason to know both of the following:

- 1. The buyer requires the goods for a particular purpose; and**
- 2. The buyer is relying on the seller's skill and judgment to select or furnish goods suitable for that purpose.**

Authorities: *Com. Code § 2315; Keith v. Buchanan (1985) 173 Cal.App.3d 13, 24-25, 220 Cal.Rptr. 392 .*

[2] Use of Instruction

This instruction should be used to define the warranty when breach of the implied warranty of fitness for purpose is claimed. Instructions on reliance on the seller's knowledge of the buyer's particular purpose (MB 300H.150) and the buyer's reliance on the seller's skill and judgment (MB 300H.151) should be included as necessary. The appropriate breach (MB 300H.152) and notice of breach (MB 300H.155) instructions must also be given.

For related Judicial Council instructions, see [3][b], *below*.

[3] Comment

[a] Implied Warranty--Reliance

This instruction is based on *Com. Code § 2315*. The Commercial Code does not require the buyer to communicate, expressly or implicitly, a particular purpose for the goods or the buyer's reliance on the seller's skill and judgment. It is sufficient that the seller has reason to know of the buyer's purpose and reliance [U.C.C. Comment No. 1 to *Com. Code § 2315*; *Keith v. Buchanan* (1985) 173 Cal.App.3d 13, 25, 220 Cal.Rptr. 392] .

It is necessary to establish that the buyer actually relied on the seller's skill and judgment in selecting goods suitable for the buyer's particular purpose [U.C.C. Comment No. 1 to *Com. Code § 2315*; *Keith v. Buchanan* (1985) 173 Cal.App.3d 13, 25, 220 Cal.Rptr. 392] . The seller's reason to know of the buyer's purpose and reliance, and the buyer's actual reliance are, of course, the essential issues for the jury.

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 12, *California Judicial Council Products Liability Instructions*]:

CACI No. 1232, Implied Warranty of Fitness for a Particular Purpose--Essential Factual Elements

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Sales (Article 2)WarrantiesFitness

Irene Sall Holmes and Lock Holmes contributed to the original chapter for California Forms of Jury Instruction
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CHAPTER 3H Matthew Bender Commercial Code Sales Contracts Instructions

PART G. GENERAL OBLIGATIONS

3. Warranties

2-3H California Forms of Jury Instruction MB 300H.150

MB 300H.150 Seller's Knowledge of Buyer's Particular Purpose

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] PROPOSED INSTR. NO. _____

As used in these instructions, the buyer's "particular purpose" refers to the buyer's intended use and specific requirements for the goods in question. For example, shoes may be purchased by the buyer for the particular purpose of mountain climbing, rather than the ordinary purpose of walking.

Plaintiff must prove that Defendant had reason to know of the particular purpose for which the Plaintiff intended the goods. Plaintiff need not show actual knowledge on Defendant's part, if, from all the facts and circumstances known to the Defendant at the time of contracting, you conclude that Defendant had sufficient reason to know of Plaintiff's particular purpose.

Authorities: *Com. Code § 2315; U.C.C. Comment No. 1 to Com. Code § 2315; Keith v. Buchanan (1985) 173 Cal.App.3d 13, 24-25, 220 Cal.Rptr. 392 .*

[2] Use of Instruction

This instruction, defining particular purpose, should be given with the instruction in MB 300H.149, defining the implied warranty of fitness for particular purpose. This instruction obviously assumes that the plaintiff is the buyer, and that the defendant seller has breached the warranty of fitness for a particular purpose. A preponderance of evidence instruction must be used with this instruction [*see Ch. 2, California Judicial Council Evidence Instructions, CACI No. 200 ("Obligation to Prove--More Likely True Than Not True")*].

For related Judicial Council instructions, see [3][b], *below*.

LexisNexis Matthew Bender Expert Practice Tip--Contacts Can Help Establish Seller's

Knowledge: It may be challenging to demonstrate how "particular purpose" is proved. All contacts with the seller, especially by sales representatives, can be helpful in establishing that the seller knew or should have known that the buyer had a particular use in mind for the goods in question. *By Rex Heeseman and Ronald Oster*

[3] Comment**[a] Implied Warranty--Seller's Knowledge**

For an implied warranty of fitness for a particular purpose to arise, the seller must have reason to know of the particular purpose [*Com. Code § 2315; Keith v. Buchanan (1985) 173 Cal.App.3d 13, 24-25, 220 Cal.Rptr. 392*]. A particular purpose differs from the ordinary purpose for which the goods are used in that it envisages a specific use by the buyer that is peculiar to the nature of the buyer's business, whereas the ordinary purposes for which goods are used are those involved in the concept of merchantability [U.C.C. Comment No. 2 to *Com. Code § 2315*]. The implied warranty of merchantability is discussed in *MB 300H.153*.

The Commercial Code's emphasis on the seller's reason to know the buyer's particular purpose is intended to extend the warranty of fitness of purpose beyond those cases in which the buyer expressly informs the seller of the intended use for the goods to cases in which the seller should have known of the buyer's particular purpose [Cal. Comment No. 1 to *Com. Code § 2315*].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 12, *California Judicial Council Products Liability Instructions*]:

CACI No. 1232, Implied Warranty of Fitness for a Particular Purpose--Essential Factual Elements

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)WarrantiesGeneral OverviewCommercial Law (UCC)Sales (Article 2)WarrantiesFitnessCommercial Law (UCC)Sales (Article 2)WarrantiesMerchantability

Irene Sall Holmes and Lock Holmes contributed to the original chapter for California Forms of Jury Instruction (Matthew Bender).



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CHAPTER 3H Matthew Bender Commercial Code Sales Contracts Instructions

PART G. GENERAL OBLIGATIONS

3. Warranties

2-3H California Forms of Jury Instruction MB 300H.151

MB 300H.151 Buyer's Reliance on Seller's Skill

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] PROPOSED INSTR. NO. _____

As used in these instructions, "buyer's reliance on the seller's skill and judgment" refers to the Defendant's recommendation of the goods as suitable for Plaintiff's particular purpose and Plaintiff's reliance on the recommendation.

Plaintiff must prove that [he/she/it] relied on Defendant's skill or judgment in selecting or furnishing suitable goods. Whether Plaintiff relied on Defendant's skill and judgment is a question of fact for you to decide based on the facts of this case. However, it is not necessary for Plaintiff to prove that Defendant had actual knowledge of Plaintiff's reliance, if the circumstances were such that Defendant had reason to realize that Plaintiff was relying on Defendant's skill and judgment.

Authorities: *Com. Code § 2315; U.C.C. Comment No. 1 to Com. Code § 2315; Keith v. Buchanan (1985) 173 Cal.App.3d 13, 24-25, 220 Cal.Rptr. 392 .*

[2] Use of Instruction

This instruction should be used in conjunction with the general instruction in MB 300H.149, defining the implied warranty of fitness to define the necessary reliance. See *MB 300H.150[2]* for further comments relevant to using this instruction.

For related Judicial Council instructions, see [3][b], *below*.

[3] Comment**[a] Buyer's Reliance**

It is necessary that the buyer establish that he or she relied on the seller's skill or judgment to select or furnish suitable goods [*Com. Code* § 2315; U.C.C. Comment No. 1 to *Com. Code* § 2315; *Keith v. Buchanan* (1985) 173 Cal.App.3d 13, 25, 220 Cal.Rptr. 392]. The buyer's reliance is a question for the trier of fact. For example, if the buyer merely refers to particular goods by a brand name, but relies on the seller to recommend the goods for a particular purpose, the buyer should be entitled to invoke the warranty of fitness for purpose [*Lindberg v. Coutches* (1959) 167 Cal.App.2d Supp. 828, 831, 334 P.2d 701]. If the buyer insists on a particular brand name or provides specifications for the seller to follow, reliance is cast in doubt [U.C.C. Comment Nos. 2, 5 to *Com. Code* § 2315]. However, it is clear that the buyer does not rely on the seller's skill and judgment when the buyer provides detailed specifications and requires the seller to manufacture goods to meet those specifications [U.C.C. Comment Nos. 2, 5 to *Com. Code* § 2315].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 12, *California Judicial Council Products Liability Instructions*]:

CACI No. 1232, Implied Warranty of Fitness for a Particular Purpose--Essential Factual Elements

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)WarrantiesGeneral OverviewCommercial Law (UCC)Sales (Article 2)WarrantiesFitness

Irene Sall Holmes and Lock Holmes contributed to the original chapter for California Forms of Jury Instruction (Matthew Bender).



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CHAPTER 3H Matthew Bender Commercial Code Sales Contracts Instructions

PART G. GENERAL OBLIGATIONS

3. Warranties

2-3H California Forms of Jury Instruction MB 300H.152

MB 300H.152 Breach of Implied Warranty of Fitness

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

For Plaintiff to recover from the Defendant on Plaintiff's claim of breach of the implied warranty of fitness for a particular purpose, Plaintiff must prove all of the following:

- 1. That Defendant sold the _____ [description of goods in issue];**
- 2. That Defendant impliedly warranted the _____ [goods in issue] would be suitable for the particular purpose of _____ [plaintiff's claimed purposes];**
- 3. That the _____ [goods in issue] were not suitable for the particular purpose as warranted by defendant;**

[EITHER (See Use of Instruction)]

- 4. That Plaintiff was the buyer of the goods;**

[OR]

- 4. That a member of Plaintiff's family was the buyer of the goods;**

[OR]

4. That Plaintiff's employer was the buyer of the goods;

[CONTINUE INSTRUCTION]

5. That Plaintiff notified Defendant of the breach within a reasonable time; and

6. That Plaintiff's damage was caused by the breach.

Authorities: *Com. Code* §§ 2315, 2607(3)(A), (4); 2714; *Hauter v. Zogarts* (1975) 14 Cal.3d 104, 114 n. 8, 120 Cal.Rptr. 681, 534 P.2d 377 ; *Peterson v. Lamb Rubber Co.* (1960) 54 Cal.2d 339, 353 P.2d 575 ; *Keith v. Buchanan* (1985) 173 Cal.App.3d 13, 24-25, 220 Cal.Rptr. 392 .

[2] Use of Instruction

This instruction should be used as the basic breach of warranty of fitness instruction, in conjunction with preceding instructions on the creation of an implied warranty of fitness, buyer's reliance, and seller's knowledge. The relevant optional paragraph should be used depending on the plaintiff's status. The notice of breach of warranty instruction in MB 300H.155 should be given with this instruction. A preponderance of evidence instruction must be used with this instruction [see Ch. 2, *California Judicial Council Evidence Instructions, CACI No. 200* ("Obligation to Prove--More Likely True Than Not True")]. In addition, the instruction defining the term "cause" set forth in Ch. 3E, *Matthew Bender Contract Damages Instructions*, MB 300E.03, must also be used with this instruction.

For related Judicial Council instructions, see *MB 300H.152[3][b]*.

LexisNexis Matthew Bender Expert Practice Tip: The terms "implied warranty" and "fitness" will be difficult to prove (or rebut) in some lawsuits. *By Rex Heeseman*

[3] Comment

[a] Breach of Implied Warranty

When the seller has reason to know of the buyer's particular purpose for acquiring the goods and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is an implied warranty that the goods will be fit for the particular purpose [*Com. Code* § 2315; *Keith v. Buchanan* (1985) 173 Cal.App.3d 13, 24-25, 220 Cal.Rptr. 392]. The elements of the warranty are discussed in *MB 300H.149*. When the buyer has accepted the goods and the warranty is breached, the buyer can recover damages [*Com. Code* § 2714]. The measure of damages is discussed in *MB 300H.258*. The buyer must notify the seller of the breach within a reasonable time after he or she discovered or should have discovered the breach [*Com. Code* § 2607(3)(A)]. The burden of proof is on the buyer to establish any breach with regard to the goods accepted [*Com. Code* § 2607(4)].

It is important to note that privity still remains an issue in breach of implied warranty cases [see, e.g., *All West Electronics, Inc. v. M-B-W, Inc.* (1998) 64 Cal.App.4th 717, 725-727, 75 Cal.Rptr.2d 509 (privity of contract required for implied warranty liability under *Burr v. Sherwin Williams*)]. For example, *Burr v. Sherwin Williams* [*Burr v. Sherwin Williams* (1954) 42 Cal.2d 682, 695, 268 P.2d 1041] is often cited for the proposition that privity is required to recover economic damage under implied warranties. However, that decision is a pre-Commercial Code case. Subsequently, California failed to adopt *U.C.C. § 2318* spelling out privity requirements similar to *Burr*, in part because

§ 2318 was considered a step backwards [see Cal. Comments to U.C.C. § 2318]. It seems clear in California that in personal injury cases a member of the buyer's family can recover for breach of an implied warranty [*Hauter v. Zogarts* (1975) 14 Cal.3d 104, 114 n. 8, 120 Cal.Rptr. 681, 534 P.2d 377], as can the buyer's employees [*Peterson v. Lamb Rubber Co.* (1960) 54 Cal.2d 339, 347, 353 P.2d 575]. However, California appears to still have a privity requirement in implied warranty cases involving economic damages only [*Rodrigues v. Campbell Industries* (1978) 87 Cal.App.3d 494, 500, 151 Cal.Rptr. 90 ; *Anthony v. Kelsey-Hayes Co.* (1972) 25 Cal.App.3d 442, 448, 102 Cal.Rptr. 113].

The privity requirement is not always strictly applied, however. If the manufacturer or supplier of goods affirmatively engages in conduct directly with the ultimate buyer, so that functionally the manufacturer or supplier is in the position of the direct seller, then it is fair and appropriate to hold that manufacturer or supplier to an implied warranty that the goods will be fit for the buyer's purposes, if all other elements of the buyer's claim have been established [*Cardinal Health 301, Inc. v. Tyco Electronics Corp.* (2008) 169 Cal.App.4th 116, 144, 87 Cal.Rptr. 3d 5 ; e.g., *U.S. Roofing, Inc. v. Credit Alliance Corp.* (1991) 228 Cal.App.3d 1431, 1441-1442, 1445, 279 Cal.Rptr. 533 (roofing contractor negotiated with equipment supplier for specific item at agreed price; unrelated finance lessor then bought that item from supplier and leased it to contractor, because lease was financially advantageous for contractor; court held that implied warranty of fitness ran from supplier to contractor, in spite of lack of actual privity between them, because of their direct dealings; participation of finance lessor as accommodation party was disregarded)].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 12, *California Judicial Council Products Liability Instructions*]:

CACI No. 1232, Implied Warranty of Fitness for a Particular Purpose--Essential Factual Elements

CACI No. 1243, Notification/Reasonable Time

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)WarrantiesGeneral OverviewCommercial Law (UCC)Sales (Article 2)WarrantiesFitnessTortsProducts LiabilityBreach of Warranty

Irene Sall Holmes and Lock Holmes contributed to the original chapter for California Forms of Jury Instruction (Matthew Bender).



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CHAPTER 3H Matthew Bender Commercial Code Sales Contracts Instructions

PART G. GENERAL OBLIGATIONS

3. Warranties

2-3H California Forms of Jury Instruction MB 300H.153

MB 300H.153 Implied Warranty of Merchantability Defined

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

A warranty that goods are merchantable is implied in a contract for the sale of the goods if the seller is a merchant dealing in goods that are of the same kind as those sold to the buyer.

To be merchantable, goods must meet all of the following standards:

- 1. Be fit for the ordinary purposes for which the goods are used;**
- 2. Pass without objection in the trade under the description in the contract;**

[CHOOSE FROM THE FOLLOWING (See Use of Instruction)]

- 3. If the goods are interchangeable, be of average quality within the description in the contract;**
- 4. Within the limits permitted by the contract, be of even kind, quality, and quantity within each unit and among all units;**
- 5. Be adequately contained, packaged, and labeled in the manner required in the contract; and**
- 6. Conform to the promises or affirmations of fact made on the container or label.**

In this case, Plaintiff contends and must prove that the goods were not merchantable because
 _____ [*list deviations from merchantability*].

Authority: *Com. Code* § 2314.

[2] Use of Instruction

This instruction should be given as a general introduction to breach of implied warranty of merchantability claims, together with the instruction in MB 300H.06 defining "merchant."

Those optional instructions numbered 3 through 6 that apply to the type of goods involved should also be given when applicable. That is, if the goods are fungible, 3 should be given; if they come in lots or units, 4 should be given; if they are packaged or labeled, or if the contract so requires, 5 should be given; if any information is written on the container or label, 6 should be given.

A preponderance of evidence instruction must be used with this instruction [see Ch. 2, *California Judicial Council Evidence Instructions*, CACI No. 200 ("Obligation to Prove--More Likely True Than Not True")].

For related Judicial Council instructions, see [3][b], *below*.

LexisNexis Matthew Bender Expert Practice Tip--Explain Terms to Jury: The words "merchant" and, especially, "merchantable" will be alien to many jurors. So, plan your closing accordingly, including the use of examples to explain these terms. *By Rex Heeseman and Ronald Oster*

[3] Comment

[a] Implied Warranty of Merchantability

Under the implied warranty of merchantability, the Commercial Code establishes certain minimum standards for goods sold by merchants, unless this implied warranty is excluded or modified in accordance with *Com. Code* § 2316. Generally, the goods must be of a quality comparable to that usually accepted in the relevant trade under their description. The most significant of these listed qualities is the requirement that the goods be fit for ordinary purposes for which goods of that type are used [*Com. Code* § 2314].

In addition to the implied warranty of merchantability, *Com. Code* § 2314(3) recognizes that other implied warranties may arise from a course of dealing or usage of trade.

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 12, *California Judicial Council Products Liability Instructions*]:

CACI No. 1231, Implied Warranty of Merchantability--Essential Factual Elements

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Subject MatterDefinitionsGeneral OverviewCommercial Law (UCC)Sales (Article 2)WarrantiesGeneral OverviewCommercial Law (UCC)Sales (Article 2)WarrantiesMerchantability

Irene Sall Holmes and Lock Holmes contributed to the original chapter for California Forms of Jury Instruction

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CHAPTER 3H Matthew Bender Commercial Code Sales Contracts Instructions

PART G. GENERAL OBLIGATIONS

3. Warranties

2-3H California Forms of Jury Instruction MB 300H.154

MB 300H.154 Breach of Implied Warranty of Merchantability

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

For Plaintiff to recover from Defendant on Plaintiff's claim of breach of the implied warranty of merchantability, Plaintiff must prove all of the following:

- 1. That Defendant sold the _____ [description of goods in issue];**
- 2. That Defendant was a merchant with regard to the kind of goods sold to Plaintiff;**
- 3. That the _____ [goods in issue] were not of merchantable quality as warranted by Defendant;**

[EITHER (See Use of Instruction)]

- 4. That Plaintiff was the buyer of the goods;**

[OR]

- 4. That a member of Plaintiff's family was the buyer of the goods;**

[OR]

4. That Plaintiff's employer was the buyer of the goods;

[CONTINUE WITH INSTRUCTION]

5. Plaintiff notified Defendant of the breach within a reasonable time; and

6. Plaintiff's damage was caused by the breach.

Authorities: *Com. Code* §§ 2314, 2607(3)(A), (4), 2714.

[2] Use of Instruction

This instruction should be used as the basic breach instruction for claims based on the implied warranty of merchantability. Instructions MB 300H.153 defining the implied warranty of merchantability, MB 300H.06 defining merchant, and MB 300H.155 defining notice within a reasonable time should also be included. The relevant optional paragraph should be used depending on the plaintiff's status. A preponderance of evidence instruction must be used with this instruction [see Ch. 2, *California Judicial Council Evidence Instructions*, CACI No. 200 ("Obligation to Prove--More Likely True Than Not True")]. In addition, the instruction defining the term "cause" in Ch. 3E, *Matthew Bender Contract Damages Instructions*, MB 300E.03, must also be used with this instruction.

For related Judicial Council instructions, see [3][b], *below*.

[3] Comment

[a] Implied Warranty of Merchantability

An implied warranty of merchantability is implied when a merchant of that kind of goods sells them [*Com. Code* § 2314]. The warranty is defined in MB 300H.153[1]. When the buyer has accepted the goods and the warranty is breached, the buyer can recover damages [*Com. Code* § 2714]. The measure of damages is discussed in MB 300H.258. The buyer must notify the seller of the breach within a reasonable time after he or she discovered or should have discovered it [*Com. Code* § 2607(3)(A)]. A reasonable notice instruction is set forth in MB 300H.155[1]. The burden of proof is on the buyer to establish any breach with regard to the goods accepted [*Com. Code* § 2607(4)].

The issue of when privity of contract is required to recover on an implied warranty is discussed in MB 300H.152.

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 12, *California Judicial Council Products Liability Instructions*]:

CACI No. 1231, Implied Warranty of Merchantability--Essential Factual Elements

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)WarrantiesGeneral OverviewCommercial Law (UCC)Sales (Article 2)WarrantiesMerchantabilityEvidenceProcedural ConsiderationsBurdens of ProofPreponderance of Evidence

Irene Sall Holmes and Lock Holmes contributed to the original chapter for California Forms of Jury Instruction
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CHAPTER 3H Matthew Bender Commercial Code Sales Contracts Instructions

PART G. GENERAL OBLIGATIONS

3. Warranties

2-3H California Forms of Jury Instruction MB 300H.155

MB 300H.155 Notice of Breach of Warranty

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

A buyer must notify the seller of a breach of warranty within a reasonable time after the buyer discovers, or should have discovered, a breach of warranty. The notice need not be specific as to the nature of the breach or type of damage. However, the notice must be adequate to warn the seller that there is a problem with the goods. The notice may be in writing or oral; no particular form of notice is required.

Whether the notice is within a reasonable time depends on the circumstances of the transaction, the type of goods, and the nature of the buyer. Whether the buyer's notice was adequate and within a reasonable time is for you to decide based on the evidence in this case.

Authorities: *Com. Code § 2607(3)(A); U.C.C. Comment No. 4 to Com. Code § 2607.*

[2] Use of Instruction

This instruction must be used when there is an issue as to the adequacy or timeliness of notice of breach of warranty.

For related Judicial Council instructions, see [3][b], *below*.

[3] Comment

[a] Notice of Breach

A prerequisite to recovery for breach of warranty is notice of the breach within a reasonable time after the buyer discovered or should have discovered the breach [*Com. Code* § 2607(3)(A)]. The notice must be adequate to warn the seller that there is a problem, but no particular type of notice is required. Since the reason for requiring notification is to defeat commercial bad faith, not to deprive a retail consumer of a remedy, what a reasonable time is may depend on whether the buyer is in a commercial situation or is a retail consumer [U.C.C. Comment No. 4 to *Com. Code* § 2607].

The buyer has the burden of proving reasonable notice. The question whether notice was properly given must be determined from the particular circumstances, and when only one inference can be drawn from undisputed facts, the issue may be determined as a matter of law [*Cardinal Health 301, Inc. v. Tyco Electronics Corp.* (2008) 169 Cal. App. 4th 116, 135-136, 87 Cal. Rptr. 3d 5].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 12, *California Judicial Council Products Liability Instructions*]:

CACI No. 1243, Notification/Reasonable Time

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Breach, Repudiation & ExcuseAcceptance of GoodsNotice RequirementsNotice of BreachCommercial Law (UCC)Sales (Article 2)Breach, Repudiation & ExcuseAcceptance of GoodsNotice RequirementsNotice of ClaimCommercial Law (UCC)Sales (Article 2)RemediesBuyer's RemediesGeneral OverviewCommercial Law (UCC)Sales (Article 2)WarrantiesGeneral Overview

Irene Sall Holmes and Lock Holmes contributed to the original chapter for California Forms of Jury Instruction (Matthew Bender).



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California Forms of Jury Instruction

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CHAPTER 3H Matthew Bender Commercial Code Sales Contracts Instructions

PART G. GENERAL OBLIGATIONS

3. Warranties

2-3H California Forms of Jury Instruction MB 300H.156

MB 300H.156 Disclaimer of Implied Warranties

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Defendant is not liable for breach of implied warranty if Defendant proves:

[CHOOSE FROM THE FOLLOWING (See Use of Instruction)]

That [he/she/it] expressly informed Plaintiff that the sale was without warranty by _____ [describe conduct or language excluding implied warranties e.g., stating that the sale was "as is" or "with all faults"].

[OR]

That Plaintiff, before entering into the contract has examined _____ [the goods or the sample or the model] as fully as desired and the defect claimed should have been revealed by the examination.

[OR]

That Plaintiff refused to examine _____ [the goods or the sample or the model] and the defect claimed would have been revealed by the examination.

[OR]

That there was _____ [a course of dealing or a usage of trade or a course of performance] that should have made it clear to Plaintiff that there were no implied warranties.

Authority: *Com. Code § 2316(3).*

[2] Use of Instruction

This instruction should be used when defendant contends that some or all implied warranties were disclaimed. Only the applicable alternatives should be given. As appropriate, Instructions MB 300H.11, MB 300H.12, and MB 300H.13 defining a course of dealing, trade usage, or course of performance should also be given.

For related Judicial Council instructions, see [3][b], *below*.

LexisNexis Matthew Bender Expert Practice Tip--"As Is" Sales: Most jurors will understand an "as is" sale. Consequently, if you are counsel for the plaintiff, exploit that understanding. *By Rex Heeseman*

LexisNexis Matthew Bender Expert Practice Tip--Use of Optional Paragraphs: Several of the optional paragraphs will be difficult to sell to the jury. The idea that an inspection would have revealed the defect, but that the buyer failed to inspect or performed an inadequate inspection, might strike some jurors as unfair (e.g., how many people thoroughly inspect items that they buy in a store). These optional paragraphs therefore apply to specialized situations when inspections are almost mandatory. *By Ronald Oster*

[3] Comment

[a] Disclaimer of Implied Warranties

The Commercial Code recognizes certain relatively informal ways to disclaim all implied warranties. Use of the term "as is" or similar language is commonly understood to call the buyer's attention to the fact that the seller makes no representations as to the quality of the goods. Similarly, when the buyer inspects the goods thoroughly or refuses to inspect them, it is reasonable to assume that the buyer has knowingly assumed the risk of obvious defects. Finally, implied warranties may be excluded by a course of dealing, course of performance, or usage of trade inconsistent with such warranties [*Com. Code § 2316(3)*].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [*see Ch. 12, California Judicial Council Products Liability Instructions*]:

CACI No. 1242, Affirmative Defense--Exclusion of Implied Warranties

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)WarrantiesExclusion & ModificationCommercial Law (UCC)Sales (Article 2)WarrantiesFitnessCommercial Law (UCC)Sales (Article 2)WarrantiesMerchantability

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CHAPTER 3H Matthew Bender Commercial Code Sales Contracts Instructions

PART G. GENERAL OBLIGATIONS

3. Warranties

2-3H California Forms of Jury Instruction MB 300H.157

MB 300H.157 Disclaimer of Express Warranties

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

In determining the effect of words or conduct by the parties that would limit or negate express warranties, the following rules apply:

- 1. Wherever it is reasonable to do so, words or conduct that create express warranties must be understood to be consistent with words or conduct that limit or negate warranties; but**
- 2. If the words or conduct are not reasonably consistent, the limitations or negation of the express warranties are of no effect and the express warranties are a part of the contract.**

Authority: *Com. Code § 2316(1).*

[2] Use of Instruction

This instruction should be used when there is an issue as to the disclaimer of express warranties. Generally, the court will interpret the terms of any written agreement and limit the effect of disclaimers as required by *Com. Code § 2316(1)*. However, when the intentions of the parties must be determined by the jury from the conduct of the parties, it may be necessary to give the above instructions.

For related Judicial Council instructions, see [3][b], *below*.

[3] Comment

[a] Disclaimer of Express Warranties

Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty must be construed whenever reasonable as consistent with each other. However, negation or limitation is inoperative to the extent that the construction is unreasonable. The parole evidence rule may prevent the introduction of any parole evidence on express warranties by an integration clause in the agreement [*Com. Code* § 2316(2)].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 12, *California Judicial Council Products Liability Instructions*]:

CACI No. 1241 Affirmative Defense--Exclusion or Modification of Express Warranty

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)WarrantiesGeneral OverviewCommercial Law (UCC)Sales (Article 2)WarrantiesExclusion & ModificationCommercial Law (UCC)Sales (Article 2)WarrantiesExpress Warranties

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CHAPTER 3H Matthew Bender Commercial Code Sales Contracts Instructions

PART G. GENERAL OBLIGATIONS

3. Warranties

2-3H California Forms of Jury Instruction MB 300H.158-MB 300H.169

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MB 300H.158Reserved for Future Use



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CHAPTER 3H Matthew Bender Commercial Code Sales Contracts Instructions

PART G. GENERAL OBLIGATIONS

4. Shipping and Credit Terms

2-3H California Forms of Jury Instruction MB 300H.170

MB 300H.170 General Shipping Terms Definition

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

The contract in this case uses shipping terms that are common to contracts for the sale and delivery of goods. These terms are understood in the trade, but they may not be familiar to you. I will now instruct you on what those terms are and what they required each of the parties to this contract to do.

Occasionally I will refer to one party having the risk of loss. The party with the risk of loss is responsible for paying for or making good any loss or damage to the goods while in transit, until the goods reach the point at which the risk passes to another party.

You will later be required to decide whether each party to the contract fulfilled [his/her/its] obligations as I will now describe them to you.

Authorities: *Com. Code §§ 2509, 2510.*

[2] Use of Instruction

This instruction should be used to introduce the other shipping terms instructions in MB 300H.171-MB 300H.176 and to define risk of loss, which is used in those instructions.

LexisNexis Matthew Bender Expert Practice Tip--Evidence Must Address Shipping Terms: Many jurors will only be vaguely aware of "shipping terms." Make sure the evidence addresses that concept. *By Rex Heeseman*

[3] Comment

Although risk of loss is not actually defined in the Commercial Code, the definition in this instruction is consistent with its use in *Com. Code* §§ 2509 and 2510. If the allocation of risk of loss or damage is specifically an issue in the case, this paragraph should be omitted, and a specific instruction on risk of loss based on *Com. Code* §§ 2509, 2510, and 2516 should be drafted to instruct the jury as to who must bear the loss.

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)General Provisions (Article 1)Definitions & InterpretationGeneral OverviewCommercial Law (UCC)Sales (Article 2)PerformanceRisk of LossCommercial Law (UCC)Sales (Article 2)PerformanceTender, Shipment, Delivery & Cure

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PART G. GENERAL OBLIGATIONS

4. Shipping and Credit Terms

2-3H California Forms of Jury Instruction MB 300H.171

MB 300H.171 F.O.B. Definition

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

F.O.B. means "free on board."

[EITHER (See Use of Instruction)]

This contract specified that delivery of the goods by the seller be F.O.B. _____ [place of shipment]. This required the seller to pay the cost of bringing the goods to _____ [place of shipment] and there putting them in the hands of a carrier, and to bear the risk of loss or damage until the goods were in the hands of the carrier. This also required the buyer to pay the seller for the goods when the bill of lading was tendered to [him/her/it].

[OR]

This contract specified that delivery of goods by the seller be F.O.B. _____ [place of shipment and manner of conveyance as specified in contract]. This required the seller to pay the cost of bringing the goods to _____ [place of shipment] and of then loading them on _____ [conveyance specified in contract] and to bear the risk of loss or damage until the goods were loaded.

This required the seller to give timely instructions as to _____ [state specification that contract

required buyer to provide regarding name, location, and departure date of ship or other conveyance]. This also required the buyer to pay the seller for the goods when the bill of lading was tendered to [him/her/it].

[OR]

This contract specified that delivery of goods by the seller be F.O.B. _____ [place of destination]. This required the seller to pay the cost of transporting the goods to _____ [place of destination] and to bear the risk of loss or damage until the goods were tendered to the buyer at _____ [place of destination].

Authority: *Com. Code § 2319(1).*

[2] Use of Instruction

The first alternative should be used when the contract is F.O.B. place of shipment. The place of shipment and names of the parties in the roles of seller and buyer should be supplied as required.

The second alternative should be used when the contract is F.O.B. a particular vessel or other mode of conveyance departing from a particular location. If the contract required that the seller await instruction regarding the conveyance from the buyer and there is no issue that the buyer properly did so, that conveyance specified should be stated when the instruction refers to "conveyance specified in contract." If there is an issue as to whether the buyer reasonably or properly specified, the next paragraph should be given and the relevant part of the first paragraph should state "and of then loading them according to the buyer's instructions." In cases involving the failure to specify or failure of the specified conveyance, the instruction in MB 300H.125, on duty to cooperate (*Com. Code § 2311*) and the instruction in MB 300H.244, on substituted performance (*Com. Code § 2614*) should also be consulted.

If there is an issue regarding time of payment or proper tender of documents, the last paragraph should be given together with the appropriate instruction.

The third alternative should be used when the contract is F.O.B. Destination.

The definition of "bill of lading" in MB 300H.22[1] should be used with this instruction.

[3] Comment

This instruction is based on *Com. Code § 2319(1)*.

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Contract TermsGap-Filler ProvisionsDelivery & Shipping TermsCommercial Law (UCC)Sales (Article 2)PerformanceRisk of LossCommercial Law (UCC)Sales (Article 2)PerformanceTender, Shipment, Delivery & CureContracts LawSales of GoodsPerformanceSeller's Delivery & Shipment of Goods

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PART G. GENERAL OBLIGATIONS

4. Shipping and Credit Terms

*2-3H California Forms of Jury Instruction MB 300H.172***MB 300H.172 F.A.S. Definition****[1] Instruction**

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

F.A.S. means "free alongside." This contract specified shipment of goods by the seller be F.A.S.

_____ [*name of vessel or of dock*] at _____ [*name of port*]. **This required the seller to pay the cost of delivering the goods _____ [either alongside the vessel (*name of vessel*) in the manner customary at (*name of port*) or on dock (*number or name of dock*) provided by the buyer at (*name of port*)], and to obtain a receipt for the goods and give it to carrier in exchange for a bill of lading. This required the buyer to pay the seller for the goods on tender to [him/her/it] of the bill of lading.**

The seller had the risk of loss or damage to the goods until they were delivered _____ [either alongside the vessel (*name of vessel*) or to dock (*number or name of dock*)].

The buyer was required to give the seller timely instructions as to _____ [*either the name, location, and sailing date of the vessel or the location of the dock*] to which the goods were to be delivered.

Authority: *Com. Code § 2319(2).*

[2] Use of Instruction

This instruction should be used with F.A.S. contracts requiring delivery either to the dock alongside a particular shipping vessel or, as is more common, to a particular dock at a named port. The vessel or dock, and the port and names of the parties in their roles as either buyer or seller should be supplied as indicated. The "bill of lading" definition instruction in MB 300H.22 should be given with this instruction. The instruction in MB 300H.125 on the duty of

cooperation should also be given if timeliness of instructions is an issue. This instruction should only include the provisions relevant to the issues in dispute.

[3] Comment

This instruction is based on *Com. Code* § 2319(2).

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Contract TermsGap-Filler ProvisionsDelivery & Shipping TermsCommercial Law (UCC)Sales (Article 2)PerformanceRisk of LossCommercial Law (UCC)Sales (Article 2)PerformanceTender, Shipment, Delivery & CureContracts LawSales of GoodsPerformanceSeller's Delivery & Shipment of Goods

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PART G. GENERAL OBLIGATIONS

4. Shipping and Credit Terms

2-3H California Forms of Jury Instruction MB 300H.173

MB 300H.173 C.I.F. Definition

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

This contract specified that delivery of goods by the seller be C.I.F. _____ [name of place of destination]. C.I.F. means cost, insurance, freight. This required the seller to pay the cost of all of the following:

- 1. Delivering the goods to the carrier at the port of shipment and obtaining a bill or bills of lading covering the entire transportation to _____ [place of destination];**
- 2. Loading the goods and obtaining a receipt from the carrier showing that the freight charges had been paid or provided for;**
- 3. Obtaining a policy or certificate of insurance of the kind and on terms then usual in that port, in the currency of the contract, shown to cover the same goods covered by the bills of lading, in the usual amount, providing for payment to the _____ [buyer or "to whom it may concern"] in case of loss;**
- 4. Preparing an invoice and obtaining any other documents required [to make the shipment or by the contract]; and**
- 5. Forwarding and tendering these documents with commercial promptness with all necessary endorsements so that the buyer will be entitled to possession of the goods when they arrive at _____ [place of destination].**

This also required the buyer to pay the seller for the goods when these documents were tendered to [him/her/it].

[*OPTIONAL (See Use of Instructions)*]

The [C.I.F. or C. & F.] contract in this case contained the term _____ [either net landed weight or delivered weight or outturn quantity or outturn quality or statement of any warranty of quality or condition of goods on arrival], meaning that the seller took the risk of the ordinary _____ [deterioration or shrinkage] in the goods during transport.

Payment of the seller's price was required on tender of documents. The seller was required to make a settlement with the buyer with commercial promptness after arrival of the goods, as reimbursement for any ordinary [deterioration or shrinkage] during transport.

Authorities: *Com. Code §§ 2320(3), 2321(1), (2).*

[2] Use of Instruction

This instruction should be used to define C.I.F. contracts, requiring the seller to pay the freight and to take out insurance in favor of the buyer, thereby shifting the risk of loss or damage to the buyer for the entire transport. The "bill of lading" definition instruction in MB 300H.22 should be given with this instruction.

The optional instruction should be used when the seller has, under a C.I.F. or C. & F. contract, guaranteed the quality or quantity of goods on arrival against ordinary deterioration during transit.

[3] Comment

This instruction is based on *Com. Code §§ 2320(3), 2321(1), (2)*. An outturn quantity or similar contract term shifts to the seller only the risk of ordinary shrinkage and deterioration, not other loss or damage [*Com. Code § 2321(2)*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawSales of GoodsPerformanceRisk of LossContracts LawSales of GoodsPerformanceSeller's Delivery & Shipment of GoodsTransportation LawCarrier Duties & LiabilitiesBills of Lading

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CHAPTER 3H Matthew Bender Commercial Code Sales Contracts Instructions

PART G. GENERAL OBLIGATIONS

4. Shipping and Credit Terms

2-3H California Forms of Jury Instruction MB 300H.174

MB 300H.174 C. & F. Definition

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

This contract specified that delivery of goods by the seller be C. & F. _____ [name of place of destination]. C. & F. means cost and freight. This required the seller to pay the cost of all of the following:

- 1. Delivering the goods to the carrier at the port of shipment and obtaining a bill or bills of lading covering the entire transportation to [place of destination];**
- 2. Loading the goods and obtaining a receipt from the carrier showing that the freight charges had been paid or provided for;**
- 3. Preparing an invoice and obtaining any other documents required _____ [to make the shipment or by the contract];**
- 4. Forwarding and tendering these documents with commercial promptness with all necessary endorsements so that buyer would be entitled to possession of the goods when they arrived at _____ [place of destination].**

This also required the buyer to pay the seller for the goods on tender of these documents to [him/her/it].

Authority: *Com. Code § 2320(3).*

[2] Use of Instruction

This instruction should be used with C. & F. contracts, when the seller pays the freight and the buyer must seek recovery from the carrier in case of loss or damage. The optional paragraph in MB 300H.173 regarding shrinkage or deterioration during transit can be used with this instruction. The "bill of lading" definition instruction in MB 300H.22 should be given with this instruction.

[3] Comment

This instruction is based on *Com. Code* § 2320(3).

In *Mitsui O.S.K. Lines, Ltd. v. Dynasea Corp.*, the court found that no implied agreement by a buyer to pay freight for ocean transport arose when the cargo was purchased "C+F, freight prepaid for delivery to Los Angeles," and the seller's check for freight was accepted by the shipper, although eventually it was dishonored. Terms in the shipper's bill of lading purporting to impose liability for freight on a broadly defined "Merchant" did not bind the C+F buyer in the absence of that buyer's signature or other evidence of acceptance of the terms [*Mitsui O.S.K. Lines, Ltd. V. Dynasea Corp.* (1999) 72 Cal.App.4th 208, 210-213, 85 Cal.Rptr.2d 1]. For an instruction and discussion relating to the definition of "agreement," see MB 300H.07. For an instruction and discussion relating to the definition of "bill of lading," see MB 300H.22.

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawSales of GoodsPerformanceRisk of LossContracts LawSales of GoodsPerformanceSeller's Delivery & Shipment of GoodsTransportation LawCarrier Duties & LiabilitiesBills of Lading

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CHAPTER 3H Matthew Bender Commercial Code Sales Contracts Instructions

PART G. GENERAL OBLIGATIONS

4. Shipping and Credit Terms

2-3H California Forms of Jury Instruction MB 300H.175

MB 300H.175 No Arrival; No Sale

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

This contract provided for delivery of goods on the basis of "no arrival, no sale." This required the seller to offer the goods to the buyer if they did arrive, but relieved the seller of liability if the goods did not arrive, provided [he/she/it] in no way caused their nonarrival.

[*OPTIONAL (See Use of Instruction)*]

Under the "no arrival, no sale" clause, if, without fault of the seller, _____ [the goods arrived damaged or not all the goods contracted for arrived or the goods delivered had deteriorated so as not to conform to the contract or the goods arrived after the contract time], the buyer had the choice of either voiding the contract or accepting the goods "as is" with a reduction in the contract price, but the buyer is entitled to no other remedy.

Authorities: *Com. Code §§ 2324, 2613.*

[2] Use of Instruction

This instruction should be used when there is a "no arrival, no sale" contract term. The optional paragraph should be given when the goods arrived late or damaged, or only part of the goods arrived, with the clause appropriate to the facts selected. The names of the parties should be substituted for the terms "buyer" and "seller."

[3] Comment

This instruction is based on *Com. Code* §§ 2320(3), 2613. Under a "no arrival, no sale" provision, if the loss is total the contract is avoided. If the loss is partial, the buyer can take the goods with an allowance for the deterioration or avoid the contract [*Com. Code* § 2613].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC) Sales (Article 2) Breach, Repudiation & Excuse Casualty to Identified Goods Contracts
Law Sales of Goods Breach, Repudiation & Excuse Buyer's Rights on Improper Delivery Contracts Law Sales of
Goods Performance Seller's Delivery & Shipment of Goods

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CHAPTER 3H Matthew Bender Commercial Code Sales Contracts Instructions

PART G. GENERAL OBLIGATIONS

4. Shipping and Credit Terms

2-3H California Forms of Jury Instruction MB 300H.176

MB 300H.176 Ex-Ship Definition

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

This contract provided for delivery "ex-ship." This required that the seller (1) pay shipping and freight charges on _____ [name of ship] to the port at _____ [destination], (2) provide for delivery at that port in a place and manner suitable to the type of goods, and (3) give the buyer documents that would entitle the buyer to delivery from the carrier. The seller had the risk of loss until the goods were unloaded from the ship.

Authority: *Com. Code § 2322.*

[2] Use of Instruction

This instruction should be used when there is an "ex-ship" contract term, requiring the seller to provide for delivery by the carrier at the port of destination. The names of the parties should be substituted for the terms "buyer" and "seller."

[3] Comment

This instruction is based on *Com. Code § 2322*.

Legal Topics:

For related research and practice materials, see the following legal topics:
 Commercial Law (UCC)Sales (Article 2)Contract TermsGap-Filler ProvisionsDelivery & Shipping Terms

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2-3H California Forms of Jury Instruction MB 300H.177-MB 300H.189

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MB 300H.177Reserved for Future Use



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CHAPTER 3H Matthew Bender Commercial Code Sales Contracts Instructions
PART H. CONTRACT REPUDIATION

2-3H California Forms of Jury Instruction MB 300H.190

MB 300H.190 Repudiation

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

A party may _____ [sue for breach of contract *or* stop its own performance of a contract] if the other party has repudiated either all of the contract, or so much of it as to impair substantially the value of the contract to the non-repudiating party.

A repudiation is a statement or action showing a clear and absolute intention not to perform one's obligations under the contract.

In this case, Plaintiff must prove that Defendant repudiated the contract by:

[CHOOSE FROM THE FOLLOWING (See Use of Instruction)]

1. Expressing an unequivocal intent not to perform the contract at any time.
2. Taking such action as to make [his/her/its] performance of the contract impossible.
3. Taking action that shows an irrevocable decision not to perform the contract.
4. Failing to provide adequate assurance of due performance within [30 days *or* a reasonable time] of receiving a justified demand to do so.

If you find that Defendant repudiated the contract, _____ [Defendant breached the contract or Plaintiff did not breach the contract by stopping [his/her/its] own performance].

Authorities: *Com. Code* §§ 2609, 2610; U.C.C. Comment No. 1 to *Com. Code* § 2610.

[2] Use of Instruction

This instruction should be used when repudiation is alleged in support of a claim of breach or in defense of a claim for nonperformance [see Ch. 3D, *Matthew Bender Performance and Breach of Contract*]. The alternatives are for use to describe the acts alleged to constitute repudiation. The instruction in MB 300H.195 on adequate assurance should be given if alternative 4 is used. When repudiation of less than the whole contract is alleged, the instruction in MB 300H.191 on substantial impairment must be given. A preponderance of evidence instruction must be used with this instruction [see Ch. 2, *California Judicial Council Evidence Instructions, CACI No. 200* ("Obligation to Prove--More Likely True Than Not True")]. The designation of the parties is for illustrative purposes only and should be changed if necessary.

LexisNexis Matthew Bender Expert Practice Tip--"Repudiation" May Seem Unusual to Jury: The act of "repudiation" may seem unusual to some jurors. So, be sure to go over the four elements in this instruction thoroughly. *By Rex Heeseman*

LexisNexis Matthew Bender Expert Practice Tip--"Adequate Assurance": In the commercial context, demands for "adequate assurance" (see alternative 4 in instruction) are common but may be unfamiliar to most jurors. If a party fails to respond to such a demand, or provides an inadequate response, this will be treated the same as an outright repudiation of the contract. *By Ronald Oster*

[3] Comment

Anticipatory repudiation requires an overt communication of intention or an action that renders performance impossible or demonstrates a clear determination not to continue with performance [U.C.C. Comment No. 1 to *Com. Code* § 2610]. A demand for more than a party is entitled to under the contract is not alone sufficient unless it includes a statement not to perform except on conditions that go beyond the contract [see U.C.C. Comment No. 2 to *Com. Code* § 2610; see also *National Farmers Org'n v. Bartlett & Co. Grain* (8th Cir. 1977) 560 F.2d 1350]. When there is no overt repudiation, a demand for adequate assurance that is not responded to makes it possible for the nonrepudiating party to suspend its own performance in the face of a possible repudiation [*Com. Code* § 2609; see MB 300H.193].

After a repudiation, the other party may resort to any remedy for breach even though the other party has notified the repudiating party that the other party will await performance and has urged retraction [*Com. Code* § 2610(b)]. The Commercial Code also sets forth other actions that a party may take in response to a repudiation, including identifying goods to the contract and salvaging goods that were in the process of fabrication at the time of repudiation [*Com. Code* § 2610(c)].

The nonrepudiating party may await performance for a reasonable time, at least until the time for performance stated in the contract, without having waived the repudiation [*Com. Code* § 2610(a)]. However, this may give the repudiating party the opportunity to retract [see *Com. Code* § 2611; see also MB 300H.192].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)RemediesGeneral OverviewContracts LawSales of GoodsBreach, Repudiation & ExcuseAnticipatory Repudiation & Constructive BreachContracts LawSales of GoodsBreach, Repudiation & ExcuseAssurances of Performance

Irene Sall Holmes and Lock Holmes contributed to the original chapter for California Forms of Jury Instruction
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CHAPTER 3H Matthew Bender Commercial Code Sales Contracts Instructions
PART H. CONTRACT REPUDIATION

2-3H California Forms of Jury Instruction MB 300H.191

MB 300H.191 Substantial Impairment

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

In this case you must decide whether Defendant's partial repudiation substantially impaired the value of the whole contract to Plaintiff.

The test of whether the value of a contract is substantially impaired is whether material inconvenience or injustice will result if the Plaintiff is forced to wait and receive Defendant's performance minus the part or aspect of the contract that was repudiated.

Authorities: *Com. Code § 2610*; U.C.C. Comment No. 3 to *Com. Code § 2610*.

[2] Use of Instruction

This instruction should be used with MB 300H.190 when the jury must apply the standard of substantial impairment to determine whether partial repudiation is ground for stopping performance or a breach. The designation of the parties is for illustrative purposes only and should be changed if necessary.

[3] Comment

This test is based on U.C.C. Comment No. 3 to *Com. Code § 2610*.

Substantial impairment is an issue of fact for the jury [*Gantry Constr. Co. v. American Pipe & Constr. Co. (1975) 49 Cal.App.3d 186, 193, 122 Cal.Rptr. 834 (decided under Com. Code § 2612)*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC) Sales (Article 2) Breach, Repudiation & Excuse General Overview Contracts Law Breach Partial
Breach Contracts Law Sales of Goods Breach, Repudiation & Excuse Anticipatory Repudiation & Constructive Breach

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CHAPTER 3H Matthew Bender Commercial Code Sales Contracts Instructions
PART H. CONTRACT REPUDIATION

2-3H California Forms of Jury Instruction MB 300H.192

MB 300H.192 Retraction of Repudiation

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Defendant contends that even if it repudiated the contract, it retracted that repudiation on _____ [date] by _____ [acts alleged to have retracted repudiation]. These acts are a retraction if they clearly indicated to Plaintiff that Defendant intended to perform according to the contract. No specific words or acts are required.

[*OPTIONAL (See Use of Instruction)*]

The retraction contained adequate assurance of performance.

Defendant had the right to retract [his/her/its] repudiation and reinstate the contract if at the time of the retraction all of the following existed:

- 1. Defendant's next performance under the contract was not yet due;**
- 2. Plaintiff had not canceled the contract; and**
- 3. Plaintiff had not materially changed [his/her/its] position or otherwise indicated that [he/she/it] considered the repudiation final.**

Defendant must prove that [he/she/it] retracted the repudiation and that the retraction was effective because the

three conditions described above were met. If you find that the retraction was effective, the contract was reinstated and Plaintiff may not recover based on the repudiation.

Authority: *Com. Code § 2611.*

[2] Use of Instruction

This instruction should be used when there is an issue of fact as to whether a retraction was made and was effective. The optional sentence is for use when the repudiation was based on failure to provide adequate assurance of performance. Adequate assurances are defined in MB 300H.195. The designation of the parties is for illustrative purposes only and should be changed if necessary.

LexisNexis Matthew Bender Expert Practice Tip--Proving Retraction May Be Difficult: A party that repudiates a contract will have a difficult time proving that the repudiation was later "retracted." Among other things, the "retraction" will be ineffective if the other party changed its position, or otherwise considered the repudiation "final," a relatively low threshold for the other party to cross. *By Ronald Oster*

[3] Comment

Until the repudiating party's next performance is due, he or she can retract the repudiation unless the other party has since the repudiation canceled or materially changed position or otherwise indicated that the repudiation is final. A retraction may be by any method that clearly indicates that the repudiating party intends to perform. However, if the repudiation was based on failure to provide assurance of performance [*see MB 300H.193*], the retraction must include the justifiably demanded assurance [*Com. Code §§ 2611(1), (2)*]. An effective retraction reinstates the repudiating party's rights under the contract. However, the other party must be allowed more time if the repudiation caused a delay [*Com. Code § 2611(3)*].

Although "the repudiating party's right to reinstate the contract is entirely dependent on the action taken by the aggrieved party" [U.C.C. Comment No. 1 to *Com. Code § 2611*], it seems clear conversely that the repudiating party has the right to retract if the aggrieved party takes no action, unless sufficient time has elapsed that it would be commercially unreasonable.

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawSales of GoodsBreach, Repudiation & ExcuseAnticipatory Repudiation & Constructive BreachContracts LawSales of GoodsBreach, Repudiation & ExcuseAssurances of PerformanceContracts LawSales of GoodsPerformanceGeneral Overview

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CHAPTER 3H Matthew Bender Commercial Code Sales Contracts Instructions
PART H. CONTRACT REPUDIATION

2-3H California Forms of Jury Instruction MB 300H.193

MB 300H.193 Demand for Adequate Assurance

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Plaintiff claims that Defendant repudiated the contract because Defendant did not provide Plaintiff with adequate assurance of performance after Plaintiff asked for that assurance. To establish a repudiation for this reason, Plaintiff must prove all of the following:

- 1. That Plaintiff had reasonable grounds for insecurity about Defendant's performance of the contract;**
- 2. That Plaintiff demanded in writing that Defendant provide adequate assurance of performance; and**
- 3. That Defendant failed to provide adequate assurance of performance within a reasonable time after receipt of the demand.**

Authority: *Com. Code § 2609.*

[2] Use of Instruction

This instruction should be used when one party claims that the other party repudiated the contract by failure to provide adequate assurances of performance. The instruction in MB 300H.14 defining reasonable time must be used with this instruction. A preponderance of evidence instruction must also be used with this instruction [see Ch. 2, *California Judicial Council Evidence Instructions, CACI No. 200* ("Obligation to Prove--More Likely True Than Not True")]. The designation of the parties is for illustrative purposes only and should be changed if necessary.

LexisNexis Matthew Bender Expert Practice Tip--Choose Terms Carefully: In this context, the word "insecurity" [see *Com. Code* § 2609(1)] in the first element seems strange. Some jurors will connect that word with "feeling," not a view about the other party's performance of a contract. An alternative term for "insecurity" would be "doubt." *By Rex Heeseman and Ronald Oster*

[3] Comment

A contract for sale imposes an obligation on each party that the others' expectation of receiving due performance will not be impaired. When reasonable grounds for insecurity arise with regard to the performance of either party, the other party may demand in writing adequate assurance of due performance. Until this assurance is received, the demanding party may suspend any performance for which he or she has not already received the agreed return, if the suspension would be commercially reasonable [*Com. Code* § 2609].

The right to assurance of performance is an extension of the doctrine of anticipatory breach, giving a party who has reason to doubt the other party's future performance a remedy that minimizes his or her own damages if the other cannot or does not intend to carry out the contract [see Witkin, *Summary of California Law*, Ch. V, *Sales*, § 175 (10th ed., 2005)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawSales of GoodsBreach, Repudiation & ExcuseAnticipatory Repudiation & Constructive BreachContracts LawSales of GoodsBreach, Repudiation & ExcuseAssurances of Performance

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CHAPTER 3H Matthew Bender Commercial Code Sales Contracts Instructions
PART H. CONTRACT REPUDIATION

2-3H California Forms of Jury Instruction MB 300H.194

MB 300H.194 Grounds for Insecurity

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Each party to this contract had the right to continue to expect the other party to perform the contract. Knowledge of any event or circumstance that would reasonably cause doubt as to the other party's willingness or ability to carry out the contract fully is grounds for insecurity.

[*OPTIONAL (See Use of Instruction)*]

The grounds for insecurity are based on commercial standards.

Authorities: *Com. Code* § 2609; U.C.C. Comment Nos. 1, 3 to *Com. Code* § 2609.

[2] Use of Instruction

This instruction should be used with the instruction in MB 300H.193 on demand for adequate assurance to define grounds for insecurity. The optional paragraph is for use when the contract is between merchants.

[3] Comment

Whether there are reasonable grounds for insecurity is a question of fact [*American Bronze Corp. v. Streamway Products (Ohio 1982)* 456 N.E. 2d 1295, 1303]. The basis for the right to demand adequate assurances because of reasonable grounds for insecurity is the fact that parties bargain for performance, not for a promise plus the right to win a lawsuit [*Com. Code* § 2609; U.C.C. Comment No. 1 to *Com. Code* § 2609]. Grounds for insecurity in a contract

between merchants are measured by commercial standards and can arise in the contract's performance, in the other party's performance of other contracts, or without relation to contract performance [see U.C.C. Comment Nos. 3 and 4 to *Com. Code* § 2609].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Breach, Repudiation & ExcuseGeneral OverviewCommercial Law (UCC)Sales (Article 2)Breach, Repudiation & ExcuseAssurances of Performance

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CHAPTER 3H Matthew Bender Commercial Code Sales Contracts Instructions
PART H. CONTRACT REPUDIATION

2-3H California Forms of Jury Instruction MB 300H.195

MB 300H.195 Adequate Assurance

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Adequate assurance is what is reasonable under the circumstances to assure Plaintiff that Defendant will perform under the contract. Adequate assurance may require Defendant to do more than promise to perform if a promise is not adequate assurance. The adequacy of the assurance is not measured by the Plaintiff's personal satisfaction but by Plaintiff's good faith satisfaction.

[*OPTIONAL (See Use of Instruction)*]

The adequacy of assurance is based on commercial standards.

Authorities: *Com. Code* § 2609; U.C.C. Comment Nos. 3, 4 to *Com. Code* § 2609.

[2] Use of Instruction

This instruction should be used with the instruction in MB 300H.193 on demand for adequate assurance to define grounds for insecurity. The optional paragraph should be used when the contract is between merchants. The designation of the parties is for illustrative purposes only and should be changed if necessary.

LexisNexis Matthew Bender Expert Practice Tip--Adequacy of Assurance: The last sentence in this instruction could be confusing. The key point is that the adequacy of the assurance is measured by an objective standard (i.e., good faith satisfaction) as opposed to a subjective standard (i.e., personal satisfaction). *By Ronald Oster*

[3] Comment

The assurance must be adequate, which may include more than a promise to perform if a promise is not sufficient to reasonably assure the demanding party [*Com. Code* § 2609; U.C.C. Comment Nos. 3, 4 to *Com. Code* § 2609]. The adequacy of the assurance is measured not by the demanding party's personal satisfaction but by good faith, and between merchants, by accepted commercial standards [U.C.C. Comment No. 4 to *Com. Code* § 2609].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawSales of GoodsBreach, Repudiation & ExcuseAssurances of Performance

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CHAPTER 3H Matthew Bender Commercial Code Sales Contracts Instructions
PART H. CONTRACT REPUDIATION

2-3H California Forms of Jury Instruction MB 300H.196-MB 300H.209

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MB 300H.196Reserved for Future Use



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CHAPTER 3H Matthew Bender Commercial Code Sales Contracts Instructions
PART I. TENDER

2-3H California Forms of Jury Instruction MB 300H.210

MB 300H.210 Tender of Goods Generally

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Defendant is not liable to pay for the goods unless Plaintiff properly tendered delivery of the goods to Defendant.

To establish a proper tender of delivery, Plaintiff must prove all of the following:

- 1. That [he/she/it] put goods that conformed to the contract at Defendant's disposition in the manner required by the contract, which was _____ [describe manner required in contract];**
- 2. That [he/she/it] gave Defendant such notice as was reasonably necessary to allow Defendant to take delivery of the goods; and**
- 3. That [he/she/it] held the goods at Defendant's disposition at a reasonable hour and for a period of time that was reasonably necessary to allow the buyer to take delivery of the goods.**

Reasonableness must be considered in light of custom and usage of the trade and of the circumstances in this case.

Authority: *Com. Code § 2503(1).*

[2] Use of Instruction

This is a general tender of goods instruction that should be used when the contract does not require tender of documents

and when the seller does not ship the goods. If usage of trade is at issue, the definition instruction in MB 300H.12 must be given.

When the buyer's failure to provide suitable facilities to receive the goods, as required by *Com. Code § 2503(1)(b)*, is an issue, the instruction in MB 300H.125 on duty to cooperate may be used with this instruction. When the manner of notifying the buyer is an issue, the instruction in MB 300H.17 on giving notice may be used with this instruction. The instruction in MB 300H.01 on conforming goods may also be given with this instruction. A preponderance of evidence instruction must be used with this instruction [see Ch. 2, *California Judicial Council Evidence Instructions, CACI No. 200* ("Obligation to Prove--More Likely True Than Not True")]. The designation of the parties is for illustrative purposes only and should be changed if necessary.

[3] Comment

Tender of delivery requires that the seller put and hold conforming goods at the buyer's disposition and give the buyer any notification reasonably necessary to enable him or her to take delivery. The manner, time, and place for tender are determined by the agreement and by relevant provisions of the Commercial Code [*Com. Code § 2503(1)*]. *Com. Code § 2503(1)* requires that tender be at a reasonable hour, and goods must be held available for the period reasonably necessary to enable the buyer to take possession, but unless otherwise agreed, the buyer must furnish facilities reasonably suited to the receipt of the goods.

It is important to consider usage of trade and other circumstances of the case in determining what is a reasonable time and holding period before the buyer must take delivery [U.C.C. Comment No. 3 to *Com. Code § 2503*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Contract TermsGap-Filler ProvisionsGeneral OverviewCommercial Law (UCC)Sales (Article 2)PerformanceTender, Shipment, Delivery & CureContracts LawSales of GoodsPerformanceSeller's Delivery & Shipment of GoodsContracts LawSales of GoodsPerformanceTender of Delivery

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CHAPTER 3H Matthew Bender Commercial Code Sales Contracts Instructions
PART I. TENDER

2-3H California Forms of Jury Instruction MB 300H.211

MB 300H.211 Tender by Seller Under Shipment and Destination Contracts

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Defendant is not liable to pay for the goods unless Plaintiff properly tendered delivery of the goods to Defendant.

To establish a proper tender of delivery, Plaintiff must prove all of the of following:

- 1. That [he/she/it] put the goods in the possession of a carrier that was reasonable considering the kind of goods and the circumstances of the transaction;**
- 2. That [he/she/it] made a shipping contract with the carrier that was reasonable given the nature of the goods and the circumstances of the transaction;**
- 3. That [he/she/it] obtained and promptly delivered or tendered to Defendant any documents necessary for Defendant to take possession of the goods; and**
- 4. That [he/she/it] promptly notified Defendant of the shipment.**

[*OPTIONAL (See Use of Instruction)*]

Even if you find that Plaintiff did not promptly notify Defendant or that the shipping terms were unreasonable, Defendant was not justified in rejecting the goods unless a material delay or loss was caused by the failure to notify or unreasonable shipping terms.

Authority: *Com. Code § 2504.*

[2] Use of Instruction

This instruction should be used when the seller is authorized to send the goods to the seller and the contract does not require that the goods be delivered at a particular destination, such as an F.O.B. point of shipment contract or a C.I.F. or C. & F. contract [see U.C.C. Comment No. 1 to *Com. Code § 2504*]. Additional obligations of these contracts are contained in MB 300H.171, MB 300H.173, and MB 300H.174 on obligations under shipping terms.

When the manner of notifying the buyer is an issue, the instruction in MB 300H.17 on giving notice may be used with this instruction. A preponderance of evidence instruction must be used with this instruction [see Ch. 2, *California Judicial Council Evidence Instructions, CACI No. 200* ("Obligation to Prove--More Likely True Than Not True")]. The designation of the parties is for illustrative purposes only and should be changed if necessary.

[3] Comment

This instruction is based on *Com. Code § 2504*. The seller has the choice of any reasonable carrier, routing, and other arrangements. Reasonable arrangements may require refrigeration, watering of livestock, protection against cold, or similar arrangements [U.C.C. Comment No. 1 to *Com. Code § 2504*]. The buyer may not reject the goods for failure by the seller to notify the buyer of the shipment or to enter into proper shipment contract unless the failure results in loss or material delay [*Com. Code § 2504*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Sales (Article 2)PerformanceTender, Shipment, Delivery & Cure

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CHAPTER 3H Matthew Bender Commercial Code Sales Contracts Instructions
PART I. TENDER

2-3H California Forms of Jury Instruction MB 300H.212-MB 300H.219

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CHAPTER 3H Matthew Bender Commercial Code Sales Contracts Instructions
PART J. ACCEPTANCE AND REJECTION

2-3H California Forms of Jury Instruction MB 300H.220

MB 300H.220 Acceptance and Rejection Generally

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

When Plaintiff tendered the goods to Defendant, Defendant either accepted or rejected the goods. You must determine whether acceptance or rejection of the goods occurred based on the following instructions.

Authorities: *Com. Code §§ 2601, 2602, 2606(1).*

[2] Use of Instruction

This instruction should be used as an introduction to the more specific instructions on acceptance and rejection that follow. The designation of the parties is for illustrative purposes only and should be changed if necessary.

[3] Comment

Com. Code § 2601 gives the buyer the right to reject or accept goods when a tender fails in any regard to conform to the contract. Goods are accepted if they are not properly rejected [*Com. Code § 2606*]. Therefore, on tender of the goods, either rejection or acceptance occurs.

Under the Commercial Code, the buyer's obligation to accept or reject is an important milestone. *Com. Code § 2601* embodies the Code's perfect tender rule, allowing the buyer to reject goods that are in any regard nonconforming. Although the perfect tender rule is moderated somewhat by provisions allowing the seller to cure certain nonconforming tenders [*Com. Code § 2508*], the buyer basically has the right to insist on the contract's strict performance before acceptance.

Once the goods have been accepted, whether conforming or nonconforming, the position of the parties changes dramatically. The buyer must pay for the goods [*Com. Code* § 2607(1)] and is entitled to only revoke acceptance in limited circumstances [*Com. Code* § 2608]. The buyer's major remaining remedy for defective or nonconforming goods is a claim for breach, with the burden of proving defective goods on the buyer [*Com. Code* § 2607(4)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Breach, Repudiation & ExcuseAcceptance of GoodsGeneral
OverviewCommercial Law (UCC)Sales (Article 2)Breach, Repudiation & ExcuseBuyer's Rights on Improper
DeliveryCommercial Law (UCC)Sales (Article 2)PerformanceTender, Shipment, Delivery & Cure

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CHAPTER 3H Matthew Bender Commercial Code Sales Contracts Instructions
PART J. ACCEPTANCE AND REJECTION

2-3H California Forms of Jury Instruction MB 300H.221

MB 300H.221 Acceptance by Buyer

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Plaintiff contends that Defendant accepted the goods tendered by Plaintiff. To establish that the goods were accepted, Plaintiff must prove that Defendant accepted the goods by:

[CHOOSE FROM THE FOLLOWING (See Use of Instruction)]

Indicating to Plaintiff, after a reasonable opportunity to inspect, that the goods conformed to the contract.

[OR]

Indicating to Plaintiff, after a reasonable opportunity to inspect, that the goods would be taken or retained despite their nonconformity to the contract.

[OR]

Failing to make a proper rejection as described in the following instruction after Defendant has had reasonable opportunity to inspect the goods.

[OR]

Performing any act inconsistent with Plaintiff's ownership.

[*OPTIONAL (See Use of Instruction)*]

Acceptance of any part of a commercial unit is acceptance of the whole unit.

If you find that Defendant accepted the goods, Defendant is obligated to pay for them at the contract price.

Authorities: *Com. Code* §§ 2606, 2607(1).

[2] Use of Instruction

This instruction should be used when the seller contends the buyer expressly or impliedly accepted the goods tendered by the buyer. The alternative relevant to the facts at issue should be used. The final option should be used when part of a commercial unit has been accepted by any of the preceding methods. The definition of "conforming goods" in MB 300H.01 and "commercial unit" in MB 300H.03 should be given with this instruction. A preponderance of evidence instruction must be used with this instruction [*see* Ch. 2, *California Judicial Council Evidence Instructions, CACI No. 200* ("Obligation to Prove--More Likely True Than Not True")]. The designation of the parties is for illustrative purposes only and should be changed if necessary.

LexisNexis Matthew Bender Expert Practice Tip--Explain Terms: Words such as "tendered" and, in this context, "accepted," will need to be explained in your closing argument. *By Rex Heeseman*

[3] Comment

The methods of acceptance are based on *Com. Code* § 2606. Once the goods are accepted, the buyer must pay for them at the contract rate [*Com. Code* § 2607(1)]. The seller may seek to establish the buyer's acceptance of the goods to move the burden of proving breach to the buyer [*Com. Code* § 2607(4)]. Unless acceptance occurs, the seller generally has the burden of proving a breach by wrongful rejection of the goods.

The Commercial Code does not specify the actions by which the buyer indicates acceptance. It is not necessary that the buyer verbally communicate acceptance. The intent to accept may be inferred from payment, for example, but payment alone is not necessarily conclusive [*U.C.C. Comment No. 3* § 2606].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Breach, Repudiation & ExcuseAcceptance of GoodsGeneral
OverviewCommercial Law (UCC)Sales (Article 2)Breach, Repudiation & ExcuseAcceptance of GoodsBurdens of
ProofCommercial Law (UCC)Sales (Article 2)Breach, Repudiation & ExcuseAcceptance of GoodsEffectsCommercial
Law (UCC)Sales (Article 2)Subject MatterDefinitionsGeneral Overview

Irene Sall Holmes and Lock Holmes contributed to the original chapter for California Forms of Jury Instruction
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California Forms of Jury Instruction

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CHAPTER 3H Matthew Bender Commercial Code Sales Contracts Instructions
PART J. ACCEPTANCE AND REJECTION

2-3H California Forms of Jury Instruction MB 300H.222

MB 300H.222 Notice of Breach as to Accepted Goods

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Plaintiff is claiming that the goods [he/she/it] accepted breached the contract. To recover for this breach, Plaintiff must prove that [he/she/it] gave Defendant notice of the breach within a reasonable time after Plaintiff discovered or should have discovered the breach.

[*OPTIONAL (See Use of Instruction)*]

The notice must have been sufficient to put Defendant on notice that there was a problem with the goods.

Authority: *Com. Code § 2607(3)(A).*

[2] Use of Instruction

This instruction should be used when there is an issue as to whether or not the buyer gave notice of breach of contract of accepted goods. The optional sentence is for use when there is an issue as to the adequacy of the notice. This instruction should be given with the instruction in MB 300H.258 on damages for defective accepted goods. The definition of reasonable time in MB 300H.14 should also be given with this instruction.

[3] Comment

After goods have been accepted, the buyer must notify the seller of any breach within a reasonable time after he or she discovered or should have discovered the breach [*Com. Code § 2607(3)(A)*]. The notice must merely be sufficient to let

the seller know that the transaction is still troublesome and must be watched. All of the objections need not be stated nor does the notice have to be a claim for damages or threat of litigation [U.C.C. Comment No. 4 to *Com. Code* § 2607]. However when performance spanned several years and numerous communications were made between the parties, it has been held that the buyer must inform the seller that the buyer regards the seller to be in breach [*Eastern Airlines, Inc. v. McDonnell Douglas Corp.* (5th Cir. 1967) 532 F.2d 957, 972-980]. A consumer buyer may have more time to give notice of breach than a merchant [U.C.C. Comment No. 4 to *Com. Code* § 2607].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Breach, Repudiation & ExcuseAcceptance of GoodsBurdens of ProofCommercial Law (UCC)Sales (Article 2)Breach, Repudiation & ExcuseAcceptance of GoodsEffectsCommercial Law (UCC)Sales (Article 2)Breach, Repudiation & ExcuseAcceptance of GoodsNotice RequirementsNotice of BreachCommercial Law (UCC)Sales (Article 2)Breach, Repudiation & ExcuseAcceptance of GoodsRevocation of AcceptanceBuyer's Duties & Rights

Irene Sall Holmes and Lock Holmes contributed to the original chapter for California Forms of Jury Instruction (Matthew Bender).



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CHAPTER 3H Matthew Bender Commercial Code Sales Contracts Instructions
PART J. ACCEPTANCE AND REJECTION

2-3H California Forms of Jury Instruction MB 300H.223

MB 300H.223 Grounds for Revocation of Acceptance

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Defendant contends that [his/her/its] acceptance of the goods was revoked. To establish an effective revocation, Defendant must prove all of the following:

1. There was a breach that substantially impaired the value of the goods to Defendant;

[*EITHER (See Use of Instruction)*]

2. Defendant accepted the goods on the reasonable assumption that the breach would be cured but the breach was not cured within a reasonable time;

[*OR*]

2. Defendant had not discovered the breach before acceptance and Defendant's acceptance of the goods was reasonably induced by the difficulty of discovering the breach before acceptance or by Plaintiff's assurances that the goods conformed;

[*CONTINUE WITH INSTRUCTION*]

3. The revocation was made within a reasonable time after Defendant discovered or could have discovered the ground for it;

4. The revocation was made before any substantial change in the condition of the goods not caused by their own defects; and

5. Defendant notified Plaintiff of the revocation.

Authority: Com. Code § 2608(1), (2).

[2] Use of Instruction

This instruction should be used when the parties dispute the propriety of the buyer's attempted revocation of an acceptance. The instructions in MB 300H.14 on reasonable time and in MB 300H.17 on notice should be given with this instruction. A preponderance of evidence instruction must be used with this instruction [see Ch. 2, *California Judicial Council Evidence Instructions, CACI No. 200* ("Obligation to Prove--More Likely True Than Not True")]. The designation of the parties is for illustrative purposes only and should be changed if necessary.

LexisNexis Matthew Bender Expert Practice Tip--Establishing Revocation: "Revocation" and "revoked" are not everyday words or acts. Hence, consider the use of a multifaceted argument in proving (or disproving) these standards. The easiest method of establishing revocation of an acceptance is to prove that the seller claimed that the goods conformed, or that any problems would be corrected. A buyer can also base a revocation on a "reasonable assumption" that the breach would be cured, but this will be more difficult. *By Rex Heeseman and Ronald Oster*

[3] Comment

The Commercial Code treats acceptance as final, precluding the buyer from subsequently rejecting the goods under the Code's perfect tender rule except in those limited circumstances when acceptance can be revoked [*Com. Code § 2607(2)*]. The Commercial Code limits revocation of acceptance to cases of non-trivial defects, when the buyer reasonably failed to discover the defect or assumed it would be cured, based on the seller's representations, conduct, and presumably the circumstance of the transaction [*Com. Code §§ 2607(2), 2608(1)*]. The harder the defect is to locate, the stronger the case for revocation.

The revocation must occur within a reasonable time after the buyer discovers or should have discovered the ground for it and before a substantial change in the condition of the goods not caused by their own defects. The revocation is not effective until the buyer notifies the seller of the revocation [*Com. Code § 2608(2)*]. The reasonable time period should extend in most cases beyond the time for notification of breach, beyond the time for discovery of nonconformity after acceptance, and beyond the time for rejection after tender [*U.C.C. Comment No. 4 to Com. Code § 2608(2)*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Breach, Repudiation & ExcuseAcceptance of GoodsRevocation of AcceptanceGeneral OverviewCommercial Law (UCC)Sales (Article 2)Breach, Repudiation & ExcuseAcceptance of GoodsRevocation of AcceptanceBuyer's Duties & RightsCommercial Law (UCC)Sales (Article 2)Breach, Repudiation & ExcuseAcceptance of GoodsRevocation of AcceptanceNonconforming Goods

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CHAPTER 3H Matthew Bender Commercial Code Sales Contracts Instructions
PART J. ACCEPTANCE AND REJECTION

2-3H California Forms of Jury Instruction MB 300H.224

MB 300H.224 Requirements of an Effective Rejection

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Plaintiff contends that Defendant improperly rejected the goods tendered by Plaintiff. To establish that the goods were improperly rejected, Plaintiff must prove that:

[CHOOSE ONE OR MORE OF THE FOLLOWING (See Use of Instruction)]

The goods conformed to the contract.

[OR]

Defendant did not reject the goods within a reasonable time after tender or delivery.

[OR]

Defendant did not notify the seller of the rejection within a reasonable time.

[CONTINUE INSTRUCTION]

If you find from the evidence in this case that Defendant's rejection was improper, the goods are considered accepted.

Authorities: *Com. Code* §§ 2601, 2602, 2606(1)(b).

[2] Use of Instruction

This instruction should be used when the seller disputes the effectiveness of the buyer's rejection. Proof of any one of the choices offered is sufficient to show that the rejection was improper. The parties may agree to limit the time in which the buyer can reject provided the limitation conforms to *Com. Code* § 2719. When a limitation is proper, the instruction must be modified to conform to the party's agreement. The instructions on conforming goods in MB 300H.01 and reasonable time in MB 300H.14 should also be given. In addition, a preponderance of evidence instruction must be used with this instruction [see Ch. 2, *California Judicial Council Evidence Instructions, CACI No. 200* ("Obligation to Prove--More Likely True Than Not True")]. The designation of the parties is for illustrative purposes only and should be changed if necessary.

[3] Comment

A buyer can only reject goods that do not conform to the contract [*Com. Code* § 2601]. The buyer's rejection must come within a reasonable time and notice must be given to the seller within a reasonable time to be effective [*Com. Code* § 2602]. A reasonable time is determined by the circumstances in each case [U.C.C. Comment No. 1 to *Com. Code* § 2602]. Holding the goods for several weeks may be sufficient to cut off the right of rejection [see *Stockton Lumber Co. v. Mulcahy* (1927) 86 Cal.App. 505, 260 P. 897]. If customs exist concerning the extent of inspection at the time of sale, then these customs are relevant to a determination of whether later inspection and rejection are reasonable [*Miron v. Yonkers Raceway, Inc.* (2d Cir. 1968) 400 F.2d 112, 118-119 (noting that, in the case of live animals such as race horses, immediate inspection is generally the custom)].

Failure to make an effective rejection constitutes an acceptance [*Com. Code* § 2606(1)(b)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Breach, Repudiation & ExcuseBuyer's Rights on Improper
DeliveryCommercial Law (UCC)Sales (Article 2)Breach, Repudiation & ExcuseRightful RejectionCommercial Law
(UCC)Sales (Article 2)PerformanceTender, Shipment, Delivery & Cure

Irene Sall Holmes and Lock Holmes contributed to the original chapter for California Forms of Jury Instruction
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CHAPTER 3H Matthew Bender Commercial Code Sales Contracts Instructions
PART J. ACCEPTANCE AND REJECTION

2-3H California Forms of Jury Instruction MB 300H.225

MB 300H.225 Buyer's Failure to Specify Defects

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Even if you find that Defendant's rejection is otherwise proper, Defendant may not rely on unstated defects as a basis for rejection of nonconforming goods if Plaintiff proves that:

[*EITHER (See Use of Instruction)*]

Defendant failed to specify defects discoverable by reasonable inspection when Plaintiff could have cured the defects if Defendant specified the defect within a reasonable time.

[*OR*]

Defendant failed to specify defects discoverable by reasonable inspection when both parties were merchants and Plaintiff made a written request for a full and final statement of all defects on which Defendant proposed to rely as a basis for rejection.

Authority: Com. Code § 2605(1).

[2] Use of Instruction

This instruction should be used when the seller contends the buyer is relying on defects to show breach, but the buyer failed to particularize the defects when required to do so. The definition of reasonable time in MB 300H.14 and the

definition of merchant in MB 300H.06 should be given with this instruction. A preponderance of evidence instruction must be used with this instruction [see Ch. 2, *California Judicial Council Evidence Instructions*, CACI No. 200 ("Obligation to Prove--More Likely True Than Not True")]. The designation of the parties is for illustrative purposes only and should be changed if necessary.

[3] Comment

It is usually clear when the time for performance has not run, and the seller is still entitled to cure defects in tender. In these cases the buyer must specify known or discoverable defects or lose the right to reject on the basis of the defects. Likewise, the buyer loses the right to rely on defects when, after rejection, the seller has made a demand for a final written statement of all defects on which the buyer will rely and the buyer fails to specify the defects [*Com. Code* § 2605(1)]. These rights rest on a policy of permitting the buyer to give a quick and informal notice of defects in a tender without penalizing him or her for omissions in the statement, while at the same time protecting a seller who is reasonably misled by the buyer's failure to state curable defects [U.C.C. Comment No. 1 to *Com. Code* § 2605].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Breach, Repudiation & ExcuseAcceptance of GoodsNotice RequirementsGeneral OverviewCommercial Law (UCC)Sales (Article 2)Breach, Repudiation & ExcuseAcceptance of GoodsNotice RequirementsNotice of BreachCommercial Law (UCC)Sales (Article 2)Breach, Repudiation & ExcuseBuyer's Rights on Improper DeliveryCommercial Law (UCC)Sales (Article 2)PerformanceTender, Shipment, Delivery & Cure

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CHAPTER 3H Matthew Bender Commercial Code Sales Contracts Instructions
PART J. ACCEPTANCE AND REJECTION

2-3H California Forms of Jury Instruction MB 300H.226-MB 300H.239

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MB 300H.226Reserved for Future Use



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CHAPTER 3H Matthew Bender Commercial Code Sales Contracts Instructions
PART K. EXCUSE

2-3H California Forms of Jury Instruction MB 300H.240

MB 300H.240 Excuse of Performance--Special Findings

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Defendant is in breach for _____ [*specify, e.g., delayed delivery or non-delivery or failure to perform the contract*] unless you find that [he/she/it] was excused from performing that part of the contract.

The burden of proving that [he/she/it] was excused is on Defendant.

Unless you find that the contract by its terms imposed on Defendant an absolute duty to perform, you must find that Defendant was excused if you find all of the following:

1. That performance of the contract as agreed was made commercially impracticable by _____ [*describe intervening contingency*], which happened between the time of agreement and the time for performance;

[CHOOSE FROM THE FOLLOWING (See Use of Instruction)]

2. That _____ [*contingency*] was not an event that the parties can reasonably be thought to have foreseen, and the risk of its occurring was not explicitly or implicitly assumed by either Plaintiff or Defendant;

[OR]

2. That Plaintiff and Defendant made their contract on the assumption that _____ [*contingency*]

] would not happen;

[OR]

2. That what happened to make performance impracticable was Defendant's good faith compliance with a government _____ [order or regulation or act] that Defendant did not encourage, solicit, or induce;

[CONTINUE WITH INSTRUCTION]

3. That Defendant gave reasonable notice to Plaintiff that there would be _____ [delay or allocation or describe non-performance or deviation from contract]; and

4. That Defendant performed the contract to the extent that the circumstances would permit.

Authorities: *Com. Code § 2615*; U.C.C. Comment No. 11 to *Com. Code § 2615*.

[2] Use of Instruction

[a] In General

This instruction should be used when excuse is alleged in defense of a claim of breach by the seller for late delivery, non-delivery, partial delivery, or some other failure to perform. This instruction should not be given in the case of impossibility due to destruction of identified goods [*see Com. Code § 2613*] or due to the impracticability of the agreed manner of delivery [*see Com. Code § 2614(1)*; *see also MB 300H.244*]. A preponderance of evidence instruction should be used with this instruction [*see Ch. 2, California Judicial Council Evidence Instructions, CACI No. 200* ("Obligation to Prove--More Likely True Than Not True")].

Whether or not either party has assumed an absolute obligation to perform is generally an issue of contract interpretation for the court, unless the assumption is alleged to arise from course of dealing or trade usage and the evidence raises an issue of fact [*see U.C.C. Comment No. 8 to Com. Code § 2615*].

LexisNexis Matthew Bender Expert Practice Tip--Plan Case Accordingly: Almost all jurors will understand the idea of an "excuse" and some jurors will be sympathetic to that claim. Consequently, depending on your party's case, plan how to address this and the related findings. *By Rex Heeseman*

LexisNexis Matthew Bender Expert Practice Tip--Excuse Defense Is Limited: Almost every contract contains an element of risk (e.g., the market for that product will go up or down). The key elements in the "excuse" defense are that the event could *not* have been reasonably foreseen *and* that the risk of the unforeseen event was not assumed by one of the parties. These conditions limit the "excuse" defense to a narrow category of extraordinary events. *By Ronald Oster*

[b] Question of Law or Fact

Counsel should take careful note that this instruction asks the jury to decide whether performance is impracticable, even though California courts [*see Mitchell v. Ceazan Tires, Ltd. (1944) 25 Cal.2d 45, 48, 153 P.2d 53* ; *Glens Falls Indem. Co. v. Perscallo (1950) 96 Cal.App.2d 799, 802, 216 P.2d 567*], federal courts [*see Waegemann v. Montgomery Ward & Co., Inc. (9th Cir. 1983) 713 F.2d 452, 453*], and the American Law Institute [*see Restatement (Second) of Contracts Introductory Notes to Chapter 11; § 212, Comment d*] are unanimous in declaring that excuse of performance because

of impossibility or frustration, on which the Commercial Code's doctrine of "commercial impracticability" is based, is a question of law for the court.

This instruction gives that apparent question of law to the jury for two reasons. First, there is the desire to avoid the possibly disastrous consequences of not letting the jury have a say. Second, there is the paucity of decisions under the California Commercial Code or the Uniform Commercial Code directly on this point.

Specifically, counsel should consider using this instruction as written to avoid a possible retrial. If the question of impracticability is left only to the judge in a jury trial, an appellate court that disagrees with this procedure will not merely reverse, it will of necessity order a new trial. However, if the judge asks the jury for special findings on each point necessary to the defense of excuse by commercial impracticability, then either agrees or disagrees with that verdict as he or she believes the law requires, an appellate court can simply uphold either the judge or the jury, and no new trial is necessary.

If counsel feels entirely confident that this question of impracticability is indeed one of law, as it appears to be, then counsel may wish to modify this instruction by removing that question alone from the jury. The remainder of this instruction could still be used to ask the jury for special findings on the other points of fact that must be found to exist before commercial impracticability may be applied under the Commercial Code.

[3] Comment

Under *Com. Code § 2615*, it is essential that there be an intervening occurrence not foreseen by the parties, the risk of which was not expressly or implicitly assumed by either party. Moreover, that occurrence must be the cause of the impracticability of performance. Although *Com. Code § 2615* is worded in terms of non-performance by the seller, U.C.C. Comment No. 9 to *Com. Code § 2615* specifically refers to excuse of the buyer, and *Com. Code § 2615* has been held to apply to buyers [see *Nora Springs Co-op Co. v. Brandau* (1976 Iowa) 247 N.W.2d 744, 748].

This section applies specifically to the failure of an assumed condition [U.C.C. Comment No. 9 to *Com. Code § 2615*], or a specific condition stated in the contract [U.C.C. Comment No. 5 to *Com. Code § 2615*]. Conversely, excuse may not be available when the alleged condition is not stated in the contract [see *Nora Springs Co-op Co. v. Brandau* (1976 Iowa) 247 N.W.2d 744, 748].

The burden of proving this excuse is on the one who claims it as a defense [see *Hensler v. City of Los Angeles* (1954) 124 Cal.App.2d 71, 83, 268 P.2d 12].

When there is a particular source of supply whose continued existence is assumed by the parties as a condition of the contract, its failure will excuse performance if the seller has taken all possible measures to assure its continued existence [U.C.C. Comment No. 5 to *Com. Code § 2615*]. Also, the seller must turn over any rights against the defaulting supplier to the buyer, up to the extent of the contract [U.C.C. Comment No. 5 to *Com. Code § 2615*].

When a failure of condition renders performance burdensome, but not commercially impracticable, good faith may require that the other party adjust the contract or permit time to determine whether the contract should be adjusted [U.C.C. Comment No. 7 to *Com. Code § 2615*]. The adjustments have, in effect, been made by the courts [*Aluminum Co. of America v. Essex Group, Inc.* (W.D. Pa. 1980) 499 F.Supp. 53].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Breach, Repudiation & ExcuseGeneral OverviewCommercial Law (UCC)Sales (Article 2)Breach, Repudiation & ExcuseExcuse From PerformanceContracts LawSales of GoodsBreach,

Repudiation & ExcuseExcuse From Performance

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CHAPTER 3H Matthew Bender Commercial Code Sales Contracts Instructions
PART K. EXCUSE

2-3H California Forms of Jury Instruction MB 300H.241

MB 300H.241 Excuse of Performance for Increased Cost

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

An increase in the cost to the seller of performing is not an excuse for the seller's failure to perform unless the cost increase is itself caused by an unforeseen intervening event that changes the essential nature of the performance.

Authority: U.C.C. Comment No. 4 to *Com. Code* § 2615.

[2] Use of Instruction

This instruction should be given when excuse of non-performance is sought on the ground that the cost of performing increased after the contract was made.

[3] Comment

Increases in the seller's cost of performing do not excuse the seller's failure to perform, unless the cost increase is itself due to an unforeseen intervening event that changes the essential nature of the performance [U.C.C. Comment No. 4 to *Com. Code* § 2615]. The rationale of this rule is that the parties could have protected themselves against foreseeable contingencies, and indeed may have implicitly allocated the foreseeable risks by not protecting against them in the contract [*Eastern Air Lines, Inc. v. Gulf Oil Corp.* (S.D. Fla. 1975) 415 F.Supp. 429].

However, at least one court has taken the view that unforeseeability is not required, especially when the loss incurred is very large [see *Aluminum Co. of America v. Essex Group, Inc.* (W.D. Pa. 1980) 499 F.Supp. 53]. California courts have recognized that a change in assumed circumstances, coupled with a major increase in the cost of performance, can

excuse non-performance [*see Mineral Park Land Co. v. Howard (1916) 172 Cal. 289, 292-293, 156 P. 458*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Breach, Repudiation & ExcuseGeneral OverviewCommercial Law
(UCC)Sales (Article 2)Breach, Repudiation & ExcuseExcuse From PerformanceContracts LawSales of GoodsBreach,
Repudiation & ExcuseExcuse From Performance

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CHAPTER 3H Matthew Bender Commercial Code Sales Contracts Instructions
PART K. EXCUSE

2-3H California Forms of Jury Instruction MB 300H.242

MB 300H.242 Seller's Duty to Allocate Supply

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Defendant, the seller, is excused for partial delivery under the contract in this case, and is not in breach of that contract if you find that all of the following are true:

1. That complete delivery by the seller under the contract was made commercially impracticable by
_____ [*describe intervening contingency*];

[*CHOOSE ONE OF THE FOLLOWING (See Use of Instruction)*]

2. That _____ [*contingency*] **was not an event that the parties can reasonably be thought to have foreseen, and the risk of its occurring was not explicitly or implicitly assumed by either Plaintiff or Defendant;**

[*OR*]

2. That Plaintiff and Defendant made their contract on the assumption that _____ [*contingency*] **would not happen;**

[*OR*]

2. That what happened to make performance impracticable was Defendant's good faith compliance with a government _____ [order or regulation or act] that Defendant did not encourage, solicit, or induce;

[CONTINUE WITH INSTRUCTION]

3. That Defendant, the seller, seasonably notified Plaintiff/Buyer of the allocation and of what the buyer's estimated quota would be; and

4. That Defendant allocated production and deliveries among its customers in a way that was fair and reasonable. You are instructed that Defendant/Seller may as a matter of law include its own manufacturing requirements, and regular customers who are not under contract, in its allocation plan.

The burden of proving that [he/she/it] was excused is on Defendant.

Authorities: *Com. Code* § 2615(b); U.C.C. Comment No. 11 to *Com. Code* § 2615; *Terry v. Atlantic Richfield Co.* (1977) 72 Cal.App.3d 962, 965-967, 971, 140 Cal.Rptr. 510 ; *Hensler v. City of Los Angeles* (1954) 124 Cal.App.2d 71, 83, 268 P.2d 12 .

[2] Use of Instruction

[a] In General

This instruction should be used to describe the seller's rights and obligations when a failure of supply requires that the seller allocate among its customers. A preponderance of evidence instruction should be used with this instruction [see Ch. 2, *California Judicial Council Evidence Instructions*, CACI No. 200 ("Obligation to Prove--More Likely True Than Not True")]. Choice among the three alternative paragraphs is governed by the nature of the intervening contingency [see MB 300H.240[3] on excuse generally].

[b] Question of Law or Fact

Counsel should take careful note that this instruction asks the jury to decide whether performance is impracticable, even though California courts [see *Mitchell v. Ceazan Tires, Ltd.* (1944) 25 Cal.2d 45, 48, 153 P.2d 53 ; *Glens Falls Indem. Co. v. Perscallo* (1950) 96 Cal.App.2d 799, 802, 216 P.2d 567], federal courts [see *Waegemann v. Montgomery Ward & Co., Inc.* (9th Cir. 1983) 713 F.2d 452, 453], and the American Law Institute [see Restatement (Second) of Contracts Introductory Notes to Chapter 11, § 212, Comment d] are unanimous in declaring that excuse of performance because of impossibility or frustration, on which the Commercial Code's doctrine of "commercial impracticability" is based, is a question of law for the court.

This instruction gives that apparent question of law to the jury for two reasons. First, there is the desire to avoid the possibly disastrous consequences of not letting the jury have a say. Second, there is the paucity of decisions under the California Commercial Code or the Uniform Commercial Code directly on this point.

Specifically, counsel should consider using this instruction as written to avoid a possible retrial. If the question of impracticability is left only to the judge in a jury trial, an appellate court that disagrees with this procedure will not merely reverse, it will of necessity order a new trial. However, if the judge asks the jury for special findings on each point necessary to the defense of excuse by commercial impracticability, then either agrees or disagrees with that verdict as he or she believes the law requires, an appellate court can simply uphold either the judge or the jury, and no new trial is necessary.

If counsel feels entirely confident that this question of impracticability is indeed one of law, as it appears to be, then counsel may wish to modify this instruction by removing that question alone from the jury. The remainder of this instruction could still be used to ask the jury for special findings on the other points of fact that must be found to exist before commercial impracticability may be applied under the Commercial Code.

Whether the seller's allocation is fair and reasonable is, however, definitely a question of fact to be decided by the jury [*Terry v. Atlantic Richfield Co.* (1977) 72 Cal.App.3d 962, 966-967, 140 Cal.Rptr. 510].

[3] Comment

Com. Code § 2616 both excuses the seller from full performance when it is rendered impracticable and imposes the obligation of allocating in a fair and reasonable way when partial performance is practical [*Terry v. Atlantic Richfield Co.* (1977) 72 Cal.App.3d 962, 965-967, 971, 140 Cal.Rptr. 510]. The burden of proving this excuse is on the one who claims it as a defense [see *Hensler v. City of Los Angeles* (1954) 124 Cal.App.2d 71, 83, 268 P.2d 12]. The jury must find that the circumstances for excuse exist and that the seller complied with its obligations to give notice and to allocate fairly. An excused seller must fulfill his or her contract to the extent that the intervening contingency permits. If the seller's customers are generally affected, then he or she must take account of all in supplying one [U.C.C. Comment No. 11 to *Com. Code § 2615*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Breach, Repudiation & ExcuseExcuse From PerformanceContracts LawSales of GoodsBreach, Repudiation & ExcuseExcuse From Performance

Irene Sall Holmes and Lock Holmes contributed to the original chapter for California Forms of Jury Instruction
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CHAPTER 3H Matthew Bender Commercial Code Sales Contracts Instructions
PART K. EXCUSE

2-3H California Forms of Jury Instruction MB 300H.243

MB 300H.243 Buyer's Option to Terminate or Modify on Notice of Allocation or Delay

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

[CHOOSE ONE OF THE FOLLOWING (See Use of Instruction)]

A buyer who has been notified by its seller that there will be _____ [an (indefinite/material) delay in delivering contract goods *or* delivery of less than the contract amount under an allocation by the seller] may terminate the contract by written notice to the seller if the [delay/allocation] substantially impairs the value to the buyer of the entire contract.

[OR]

A buyer who has been notified by its seller that there will be _____ [an (indefinite/material) delay in delivering contract goods *or* delivery of less than the contract amount under an allocation by the seller] may modify the contract by agreeing within 30 days of receiving this notification to take the available allocation in substitution. In the absence of an agreement to [modify *or* accept the allocated amount], the contract lapses as to the deliveries affected.

Authority: Com. Code § 2616.

[2] Use of Instruction

This instruction should be given when it is alleged that a contract was terminated, modified, or lapsed as a result of a

delay or allocation caused by an unforeseen intervening occurrence. If it is alleged that the buyer terminated the contract, then the first alternative should be used. If it is alleged that the contract was modified or that it lapsed, then the second alternative should be used.

This instruction should be used with the instruction in MB 300H.240 on excuse and the instruction in MB 300H.18 on receiving notice.

[3] Comment

Com. Code § 2616 sets out what responses the buyer may make to a notice of claim of excuse. The buyer may (1) terminate any executory portion of the agreement, (2) modify the contract by agreeing to accept partial performance, or (3) by failing to take any action, may be deemed to have terminated the agreement [U.C.C. Comment to *Com. Code § 2616*]. *Com. Code § 2616(3)* makes ineffective any express contract term that requires the buyer to stand ready to accept delivery, even though the seller claims to be excused from delivery.

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Breach, Repudiation & ExcuseExcuse From PerformanceCommercial Law (UCC)Sales (Article 2)RemediesBuyer's RemediesGeneral OverviewContracts LawSales of GoodsPerformanceBuyer's RightsContracts LawTypes of ContractsExecutory Contracts

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CHAPTER 3H Matthew Bender Commercial Code Sales Contracts Instructions
PART K. EXCUSE

2-3H California Forms of Jury Instruction MB 300H.244

MB 300H.244 Substitution of Delivery Arrangements**[1] Instruction**[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Plaintiff, the _____ [seller or buyer] claims that Defendant, the _____ [buyer or seller], breached their contract for the sale of _____ [specify goods] by failing to _____ [accept or make] substitute arrangements for their delivery.

[EITHER (See Use of Instruction)]

To prove this breach, Plaintiff/Seller must bear the burden of proving all of the following:

1. That the agreed _____ [type of carrier or other means of delivery] became _____ [unavailable or otherwise commercially impracticable];
2. That the agreed _____ [means of delivery] became _____ [commercially impracticable] without either Plaintiff or Defendant being at fault;
3. That Plaintiff made substitute arrangements to deliver the goods;
4. That these substitute arrangements were commercially reasonable; and
5. That Defendant/Buyer refused to accept this substitute delivery.

[OR]

To prove this breach, Plaintiff/Buyer must bear the burden of proving all of the following:

1. That the agreed _____ [type of carrier or other means of delivery] became _____ [unavailable or otherwise commercially impracticable];
2. That the agreed _____ [means of delivery] became _____ [commercially impracticable] without either Plaintiff or Defendant being at fault; and
3. That Defendant/Seller did not make _____ [substitute arrangements to deliver the goods or commercially reasonable substitute arrangements to deliver the goods].

Authority: *Com. Code § 2614(1).*

[2] Use of Instruction

This instruction should be used when either seller or buyer contends the other party failed to make or accept commercially reasonable substitute delivery or shipping arrangements. The instruction in MB 300H.245[1] defining commercial impracticability can be used with this instruction. A preponderance of evidence instruction should be used with this instruction [see Ch. 2, *California Judicial Council Evidence Instructions, CACI No. 200* ("Obligation to Prove--More Likely True Than Not True")].

[3] Comment

Com. Code § 2614(1) in effect limits excuse for non-performance to those obligations that go to the heart of the parties' agreement. As this instruction indicates, commercial impracticability may preclude use of the agreed-on means of delivery. Instead of excusing performance, *Com. Code § 2614(1)* requires the seller to use any reasonable substitute and likewise requires the buyer to accept the substitute.

Com. Code § 2614(2) provides a different result if the buyer's obligation to pay is affected by a change in foreign currency regulations. In these cases, the seller is entitled to withhold delivery until the buyer provides a commercially acceptable substitute means of payment [U.C.C. Comment No. 2 to *Com. Code § 2614*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Breach, Repudiation & ExcuseExcuse From PerformanceCommercial Law (UCC)Sales (Article 2)Breach, Repudiation & ExcuseSubstituted PerformanceCommercial Law (UCC)Sales (Article 2)PerformanceTender, Shipment, Delivery & Cure

Irene Sall Holmes and Lock Holmes contributed to the original chapter for California Forms of Jury Instruction (Matthew Bender).



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CHAPTER 3H Matthew Bender Commercial Code Sales Contracts Instructions PART K. EXCUSE

2-3H California Forms of Jury Instruction MB 300H.245

MB 300H.245 Commercial Impracticability Defined

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Performance of a contractual obligation is "commercially impracticable" if performance is something worse than just not practical and something less than impossible. It is not enough that performance would be expensive, burdensome, or unprofitable. Performance is "commercially impracticable" only if it would be positively unjust to hold Defendant bound to perform as required by the contract.

Authority: *Eastern Air Lines, Inc. v. Gulf Oil Corp. (S.D. Fla. 1975) 415 F.Supp. 429, 438-439 .*

[2] Use of Instruction

This instruction should be used whenever the term "commercially impracticable" is used. It must, for example, be used with the instructions in MB 300H.240[1] and MB 300H.242[1], and may be required with the instruction in MB 300H.244[1].

LexisNexis Matthew Bender Expert Practice Tip--Add Specifics: This instruction contains general language with few specifics to guide the jury. Essentially, the instruction tells the jury that a contract is commercially impractical if it would be "positively unjust" to hold the defendant to it. *By Ronald Oster*

[3] Comment

Com. Code § 2615 on excuse of non-performance by failure of presupposed conditions uses the term "impracticable," and more precisely identifies it in U.C.C. Comment 3 to that section as the "test of commercial impracticability," but does not define it. The courts have said that performance may be excused for impracticability only if to hold the parties bound by the contract would be positively unjust [*Eastern Air Lines, Inc. v. Gulf Oil Corp. (S.D. Fla. 1975) 415*

F.Supp. 429, 438-439]. The meaning of "impracticable" has been said to lie between "impractical" and "impossible" [see *Aluminum Co. of America v. Essex Group, Inc.* (W.D. Pa. 1980) 499 *F.Supp.* 53, 72 ; see also Restatement (Second) Contracts § 261, Comment d].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)General Provisions (Article 1)General OverviewCommercial Law (UCC)Sales (Article 2)Breach, Repudiation & ExcuseGeneral OverviewCommercial Law (UCC)Sales (Article 2)Breach, Repudiation & ExcuseExcuse From Performance

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CHAPTER 3H Matthew Bender Commercial Code Sales Contracts Instructions
PART K. EXCUSE

2-3H California Forms of Jury Instruction MB 300H.246-MB 300H.249

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MB 300H.246Reserved for Future Use



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CHAPTER 3H Matthew Bender Commercial Code Sales Contracts Instructions
PART L. DAMAGES AND OTHER REMEDIES

2-3H California Forms of Jury Instruction MB 300H.250

MB 300H.250 Seller's Action for Contract Price

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

[CHOOSE FROM THE FOLLOWING (See Use of Instruction)]

If you find that the goods were delivered and accepted [OPTIONAL (See Use of Instruction), and acceptance was not justifiably revoked], but that Defendant failed to pay the contract price when it was due, you should award Plaintiff, as damages from Defendant, the contract price plus incidental damages.

[OR]

If you _____ [find or are instructed] that (1) the goods were _____ [lost or damaged] within a commercially reasonable time after the risk of loss had passed to Defendant, (2) the goods had been identified to the contract, and (3) Plaintiff has proved that the goods conformed to the contract at the time risk of loss passed to Defendant, then you should award Plaintiff, as damages from Defendant, the contract price plus incidental damages.

[OR]

If you find that Defendant breached the contract by failing to accept the goods, and that _____ [Plaintiff could not resell goods identified to the contract at a reasonable price after making reasonable efforts to

do so or the circumstances reasonably indicate that Plaintiff could not have resold goods identified to the contract at a reasonable price], then you should award Plaintiff, as damages from Defendant, the contract price plus incidental damages.

Authority: *Com. Code § 2709.*

[2] Use of Instruction

One or more of the alternative instructions should be used, depending on what finding or findings the jury may make based on the evidence. In each case, the instruction in MB 300H.253, on the seller's incidental damages, should also be given.

The first alternative should be given with the instructions in MB 300H.221 on acceptance of goods and MB 300H.223 on revocation of acceptance.

The second alternative should be given when the goods are damaged or lost before acceptance, but after the risk of loss passed to the buyer. The remaining findings in the second alternative are legal conclusions on which the court will instruct the jury. Passing of the risk of loss is governed by *Com. Code § 2509* as modified by *Com. Code § 2510* when there has been a breach. The seller's right to identify goods to the contract in the event of repudiation by the buyer is stated in *Com. Code § 2704* [see MB 300H.02].

The third alternative should be given when the seller either attempted to resell the goods (first clause in brackets) or when the goods were such, as in the case of specially manufactured goods, that they clearly could not have been resold at a reasonable price (second clause in brackets).

LexisNexis Matthew Bender Expert Practice Tip--Use Care With Terms: "Incidental damages" is a term not understood by many attorneys--just think about a juror! *By Rex Heeseman*

[3] Comment

The situations covered by this instruction are the only circumstances in which the seller can recover the contract price as damages [U.C.C. Comment No. 6 to *Com. Code § 2709*]. The usual remedy envisioned by the Commercial Code for nonacceptance is resale by the seller under *Com. Code § 2706* and an action for damages under *Com. Code § 2708*. Under *Com. Code § 2709(3)*, these damages can be awarded in the action for the contract price when the requirements of *Com. Code § 2709* are not met.

Com. Code § 2709(2) also requires the seller who sues for the contract price to hold the identified goods for the buyer. If the seller recovers the contract price as damages, the buyer is entitled to the goods. If the seller resells any of these goods before judgment, the buyer must be credited with the proceeds against any damages assessed.

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)RemediesSeller's RemediesDamagesAction for PriceCommercial Law (UCC)Sales (Article 2)RemediesSeller's RemediesDamagesIncidental DamagesCommercial Law (UCC)Sales (Article 2)RemediesSeller's RemediesDamagesNonacceptance & RepudiationCommercial Law (UCC)Sales (Article 2)RemediesSeller's RemediesResale of Goods

Irene Sall Holmes and Lock Holmes contributed to the original chapter for California Forms of Jury Instruction (Matthew Bender).



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CHAPTER 3H Matthew Bender Commercial Code Sales Contracts Instructions
PART L. DAMAGES AND OTHER REMEDIES

2-3H California Forms of Jury Instruction MB 300H.251

MB 300H.251 Seller's Damages Recoverable After Resale**[1] Instruction**[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

_____ [If you find for Plaintiff on (his/her/its) claim for damages for Defendant's breach or If you _____ (find or are instructed) that Plaintiff resold the contract goods in good faith and in a commercially reasonable manner], you should award damages to Plaintiff calculated as follows:

1. The difference between the resale price and the contract price;
2. Plus incidental damages;
3. Minus any expenses that Plaintiff saved in consequence of Defendant's breach.

Authorities: *Com. Code § 2706; see Allied Grape Growers v. Bronco Wine Co. (1988) 203 Cal.App.3d 432, 445, 249 Cal.Rptr. 872.*

[2] Use of Instruction

This instruction should be used to state the measure of the seller's damages when the buyer has repudiated or wrongfully rejected goods and the seller has complied with the resale requirements of *Com. Code § 2706(3) and (4)*. It must be given with the instruction in MB 300H.253 on the seller's incidental damages.

Generally, the first phrase in brackets should be used since the determination as to whether the seller's resale was commercially reasonable will be made by the court.

If the jury is to make findings of fact bearing on whether resale was commercially reasonable, the factors stated at *Com. Code* § 2706(4) must be considered as well as any other circumstances of the case bearing on the price obtained [see U.C.C. Comments 5-9 to *Com. Code* § 2706; Hawkland, U.C.C. Series, vol. 3, §§ 2-706:02, 2-706:03].

If the sale was private and the only issue of fact is notice to the buyer under *Com. Code* § 2706(3), the jury may be instructed in the preliminary paragraph to find that "the seller reasonably notified the buyer of the intention to resell."

[3] Comment

Under the conditions stated in *Com. Code* § 2703 dealing with the seller's remedies in general, the seller may resell the goods concerned or the undelivered balance on the goods. When the resale is made in good faith and in a commercially reasonable manner [see *Allied Grape Growers v. Bronco Wine Co.* (1988) 203 Cal.App.3d 432, 445, 249 Cal.Rptr. 872], the seller may recover the difference between the resale price and the contract price together with any incidental damages [see MB 300H.253], but less expenses saved in consequence of the buyer's breach [*Com. Code* § 2706(1)]. If the seller makes a profit on the resale net of the expenses of reselling, the seller need not account for them to the buyer [*Com. Code* § 2706(6)].

Identification of the goods is required for a commercially reasonable sale [U.C.C. Comment No. 7 to *Com. Code* § 2706]. Failure to do so relegates the seller to damages under *Com. Code* § 2708 [see MB 300H.252].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)RemediesSeller's RemediesDamagesAction for PriceCommercial Law (UCC)Sales (Article 2)RemediesSeller's RemediesDamagesIncidental DamagesCommercial Law (UCC)Sales (Article 2)RemediesSeller's RemediesDamagesNonacceptance & RepudiationCommercial Law (UCC)Sales (Article 2)RemediesSeller's RemediesResale of Goods

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CHAPTER 3H Matthew Bender Commercial Code Sales Contracts Instructions
PART L. DAMAGES AND OTHER REMEDIES

2-3H California Forms of Jury Instruction MB 300H.252

MB 300H.252 Seller's Damages for Buyer's Nonacceptance or Repudiation

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

If you find for Plaintiff on [his/her/its] claim of damages for _____ [nonacceptance of the goods or repudiation of the contract], you should award damages to Plaintiff calculated as follows:

[EITHER (See Use of Instruction)]

1. The unpaid contract price;

2. Minus the market price _____ [at the time and place for tender or at the time Plaintiff learned of Defendant's repudiation];

3. Plus the incidental damages incurred by Plaintiff;

4. Minus the expenses saved by Plaintiff as a result of Defendant's breach.

[OR]

1. Plaintiff's anticipated profit, including reasonable overhead, from full performance of the contract;

2. Plus incidental damages incurred by Plaintiff;

3. Plus allowances for costs reasonably incurred;**4. Minus the proceeds of resale.**

Authorities: *Com. Code* §§ 2708, 2723(1).

[2] Use of Instruction

This instruction should be used to give the measure of the seller's nonacceptance damages when they have not been determined by resale under *Com. Code* § 2706 [see *MB 300H.251*]. It also applies when the seller has not complied with the requirements of *Com. Code* § 2706 on commercially reasonable resale. It must be given with the instruction in *MB 300H.253* on the seller's incidental damages.

This instruction may also be used as the measure of the seller's damages when the buyer's salvage resale is found to be not commercially reasonable or not in good faith [*Com. Code* § 2603].

In the first alternative, the phrase "at the time [the seller] learned of [the buyer's] repudiation" incorporates *Com. Code* § 2723(1) into *Com. Code* § 2708 and must be used when the buyer has repudiated and the seller's suit for damages comes to trial before the time for performance under the contract [see *Hawkland*, U.C.C. Series, vol. 3, § 2-708:03].

The second alternative is intended to be applied principally in the case of fixed price articles, when profit can be determined by the list price less cost to the dealer, or list price less manufacturing cost to the manufacturer [U.C.C. Comment No. 2 to *Com. Code* § 2708]. However, to apply this measure, the court must first determine that the measure of damages provided in *Com. Code* § 2708(1) is inadequate to put the seller in as good a position as performance would have done [*Com. Code* § 2708(2)]. In cases when there is evidence that the seller is a "lost volume seller," the seller may be entitled to avoid any setoff for proceeds of resale, in which case Item 4 of the second alternative ("Minus the proceeds of resale") may not be appropriate [see [3][a], *below*].

LexisNexis Matthew Bender Expert Practice Tip--Use Care With Terms: Terms such as "nonacceptance" and "repudiation" are beyond the life experiences of many jurors. Thus, plan your closing accordingly. *By Rex Heeseman*

[3] Comment**[a] Measure of Damages**

If adequate to put the seller in as good a position as performance would have done, the measure of damages for nonacceptance or repudiation by the buyer is the difference between the market price at the time and place for tender and the unpaid contract price together with any incidental damages [see *MB 300H.253*], but less expenses saved in consequence of the buyer's breach [*Com. Code* § 2708(1)].

If the above measure of damages is determined to be inadequate, then the measure of damages is the profit (including reasonable overhead) that the seller would have made from full performance by the buyer, together with any incidental damages [see *MB 300H.253*], due allowance for costs reasonably incurred, and due credit for payments or proceeds of resale [*Com. Code* § 2708(2)]. The seller may be entitled to keep any proceeds of resale if the seller qualifies as a "lost volume seller," that is, one who proves that even though the contract goods were resold, that sale to a third party would have been made regardless of the buyer's breach. A lost volume seller must establish that had the breaching buyer performed, the seller would have realized profits from two sales [*National Controls, Inc. v. Commodore Bus. Machines, Inc.* (1985) 163 Cal.App.3d 688, 697-699, 209 Cal.Rptr. 636].

[b] Proof of Market Price

If an action based on anticipatory repudiation comes to trial before the time for performance with regard to some or all of the goods, any damages based on market price are to be determined according to the price of the goods prevailing at the time when the aggrieved party learned of the repudiation [*Com. Code* § 2723(1)].

If evidence of a price prevailing at that time or at the place specified is not readily available, the price prevailing within any reasonable time before or after that time or at any other place that, in commercial judgment or under usage of trade, would serve as a reasonable substitute may be used, making any proper allowance for the cost of transporting the goods to or from such other place [*Com. Code* § 2723(2)].

Evidence of a relevant price prevailing at another time or place offered by one party is not admissible unless and until he or she has given the other party that notice as the court finds sufficient to prevent unfair surprise [*Com. Code* § 2723(3)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)RemediesSeller's RemediesDamagesGeneral OverviewCommercial Law (UCC)Sales (Article 2)RemediesSeller's RemediesDamagesAction for PriceCommercial Law (UCC)Sales (Article 2)RemediesSeller's RemediesDamagesIncidental DamagesCommercial Law (UCC)Sales (Article 2)RemediesSeller's RemediesDamagesNonacceptance & Repudiation

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CHAPTER 3H Matthew Bender Commercial Code Sales Contracts Instructions
PART L. DAMAGES AND OTHER REMEDIES

2-3H California Forms of Jury Instruction MB 300H.253

MB 300H.253 Seller's Incidental Damages**[1] Instruction**

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

If you find for Plaintiff, [he/she/it] is entitled to recover any incidental damages suffered in connection with any breach by Defendant. Incidental damages are all expenses reasonably incurred by Plaintiff as a direct consequence of Defendant's breach.

Plaintiff in this case has introduced evidence of the following items of incidental expense:

[CHOOSE FROM THE FOLLOWING (See Use of Instruction)]

1. \$ _____ for stopping delivery to Defendant;
2. \$ _____ for reselling goods;
3. \$ _____ for transporting the goods;
4. \$ _____ for caring for the goods;
5. \$ _____ for storing the goods;
6. \$ _____ commissions to _____ [broker paid to sell goods] for reselling the goods;

7. \$_____ [*other reasonable expenses of resale and maintenance of goods*].

[*CONTINUE WITH INSTRUCTION*]

You should award as an item of incidental damage each expense that you find that Plaintiff has proven was:

- 1. Actually incurred;**
- 2. Reasonably incurred; and**
- 3. Incurred as a direct consequence of Defendant's breach.**

Authority: *Com. Code § 2710.*

[2] Use of Instruction

This instruction should be given with the instructions in MB 300H.250-MB 300H.252. As many of the items of expense numbered 1 through 7 should be used as apply in the case.

LexisNexis Matthew Bender Expert Practice Tip--Use Instruction as Visual Aid: This instruction could be enlarged and would make a good visual aid "checklist" for closing argument. *By Ronald Oster*

[3] Comment

Incidental damages to an aggrieved seller include any commercially reasonable charges, expenses, or commissions incurred in stopping delivery, in the transportation, care, and custody of goods after the buyers' breach, in connection with return or resale of the goods or otherwise resulting from the breach [*Com. Code § 2710*]. *Com. Code § 2710* intends to reimburse the seller for "all commercially reasonable expenditures made" as a result of the breach [U.C.C. Comment to *Com. Code § 2710*].

The Commercial Code permits recovery by the seller of incidental but not of consequential damages [*see Com. Code § 1106(1)*]. Therefore, only those additional expenses *directly* incident to the breach are recoverable. Generally, this will mean that losses involving third parties are not recoverable by the seller. By contrast, *Com. Code § 2714(3)* provides for the recovery of consequential as well as incidental damages by the buyer in a proper case [*see Com. Code § 2715; see also MB 300H.255*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)RemediesSeller's RemediesDamagesIncidental Damages

Irene Sall Holmes and Lock Holmes contributed to the original chapter for California Forms of Jury Instruction (Matthew Bender).



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California Forms of Jury Instruction

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CHAPTER 3H Matthew Bender Commercial Code Sales Contracts Instructions
PART L. DAMAGES AND OTHER REMEDIES

2-3H California Forms of Jury Instruction MB 300H.254

MB 300H.254 Buyer's Incidental Damages**[1] Instruction**

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

If you find for Plaintiff in this case, you should award [him/her/it] incidental damages. Incidental damages are all expenses reasonably incurred by Plaintiff incident to the _____ [delay or breach by Defendant].

Plaintiff in this case has introduced evidence of the following items of incidental expense:

[CHOOSE FROM THE FOLLOWING (See Use of Instruction)]

1. \$ _____ for receiving and inspecting rejected goods;
2. \$ _____ for storing rejected goods;
3. \$ _____ for transporting rejected goods;
4. \$ _____ for caring for rejected goods;
5. \$ _____ to obtain substitute goods;
6. \$ _____ commissions paid to _____ [broker] to obtain substitute goods;

7. \$ _____ for storing goods until Plaintiff revoked acceptance;
8. \$ _____ for caring for goods until Plaintiff revoked acceptance;
9. \$ _____ for reselling rejected goods;
10. \$ _____ for revoking acceptance of non-conforming goods;
11. \$ _____ for _____ [other reasonable expenses of rejecting non-conforming goods, obtaining cover, and caring for goods pending revocation].

[CONTINUE WITH INSTRUCTION]

You should award as an item of incidental damage each expense that you find that Plaintiff has proven was:

1. Actually incurred;
2. Reasonably incurred; and
3. Incurred as a direct consequence of Defendant's breach.

Authority: *Com. Code § 2715.*

[2] Use of Instruction

As many of the items of expense numbered 1 through 11 should be used as apply in the case. This instruction should be given with the instructions in MB 300H.256 and MB 300H.257.

LexisNexis Matthew Bender Expert Practice Tip--Use Instruction as Visual Aid: This instruction could be enlarged and would make a good visual aid "checklist" for closing argument. *By Ronald Oster*

[3] Comment

Incidental damages resulting from the seller's breach include (1) expenses reasonably incurred in the inspection, receipt, transportation, and care and custody of goods rightfully rejected, (2) any commercially reasonable charges, expenses, or commissions in connection with effecting cover, and (3) any other reasonable expense incident to the delay or other breach [*Com. Code § 2715(1)*]. The types of incidental damage enumerated are illustrative, not exhaustive [*U.C.C. Comment No. 1 to Com. Code § 2714*].

Although the buyer is permitted by *Com. Code §§ 2712, 2713, and 2714* to recover both incidental and consequential damages, distinction between them would be required, for instance, when the contract disclaims the right to recover consequential damages [*Hawkland, U.C.C. Series, vol. 3, § 2-715:01*]. For an instruction on the measure of the buyer's consequential damages, see *MB 300H.255*.

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)RemediesBuyer's RemediesCoverCommercial Law (UCC)Sales (Article 2)RemediesBuyer's RemediesDamagesGeneral OverviewCommercial Law (UCC)Sales (Article 2)RemediesBuyer's RemediesDamagesIncidental & Consequential Damages

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CHAPTER 3H Matthew Bender Commercial Code Sales Contracts Instructions
PART L. DAMAGES AND OTHER REMEDIES

2-3H California Forms of Jury Instruction MB 300H.255

MB 300H.255 Buyer's Consequential Damages

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

If you find for Plaintiff, you must also award Plaintiff, as additional damages, the amount necessary to compensate [him/her/it] for any loss that Plaintiff has proven

[*EITHER*]

resulted from Defendant's failure to fulfill general or specific requirements and needs of Plaintiff that Defendant had reason to know about at the time of contracting [optional (see Use of Instruction): minus the amount of any (loss/losses) that Defendant has proven could reasonably have been prevented by cover or otherwise].

[*OR*]

resulted from an injury to person or property that was caused by Defendant's breach of warranty. Under the law, Defendant's breach of warranty caused Plaintiff's loss if that breach was a substantial factor in bringing about the loss. Therefore, in instructing you that Plaintiff must have proven that Defendant's breach caused the loss, I mean that Plaintiff must have proven that the breach was a substantial factor in bringing about the loss.

[*CONTINUE INSTRUCTION*]

These additional damages are called consequential damages.

Authorities: *Com. Code § 2715; Carnation Co. v. Olivet Egg Ranch (1986) 189 Cal.App.3d 809, 814-819, 229 Cal.Rptr. 261 ; R.B. Matthews v. Transamerica Transp. Services (9th Cir. 1991) 945 F.2d 269, 274-276 .*

[2] Use of Instruction

In preacceptance cases when the seller breached by repudiation or other nondelivery, or the buyer rightfully rejected nonconforming goods or justifiably revoked acceptance, this instruction should be used with the instruction in MB 300H.256 if the buyer obtained substitute goods to cover. If the buyer in such a case did not cover or the cover was found unreasonable, this instruction should be given with the instruction in MB 300H.257.

This instruction contains alternative provisions that set forth the different measures of damages provided for by *Com. Code § 2715*. The first alternative is used when the buyer's claim is not based on an alleged breach of warranty. The optional provision included in this alternative should be used in cases when the seller claims that the buyer has unreasonably failed to obtain "cover" (substitute goods) or otherwise mitigate damages.

The second alternative is used in breach of warranty cases. To improve juror comprehension, this alternative uses the term "caused" in lieu of the more traditional language based on "proximate cause" [see Ch. 3E, *Matthew Bender Contract Damages Instructions*, MB 300E.03].

LexisNexis Matthew Bender Expert Practice Tip--Explaining Damages: Obviously, it is critical how you explain (or refute) to the jury the awarding of damages. Remember that for some jurors this will be the first time they will be making such an award. *By Rex Heeseman*

[3] Comment

[a] Measures of Consequential Damages; Foreseeability

Com. Code § 2715 provides for recovery of two different types of consequential damages by the buyer. Under *Com. Code § 2715(2)(a)*, the buyer is entitled to recover for any loss that was a foreseeable result of the seller's failure to fulfill general or specific requirements and needs of the buyer that the seller had reason to know about at the time of contracting [U.C.C. Comment No. 3 to *Com. Code § 2715; R.B. Matthews v. Transamerica Transp. Services (9th Cir. 1991) 945 F.2d 269, 274 ; Gerwin v. Southeastern Cal. Assn. of Seventh Day Adventists (1971) 14 Cal.App.3d 209, 220-221, 92 Cal.Rptr. 111*]. Lost resale profits are one example of this type of consequential damages [Cal. Comment No. 3 to *Com. Code § 2715; R.B. Matthews v. Transamerica Transp. Services (9th Cir. 1991) 945 F.2d 269, 274*]. Under *Com. Code § 2715(2)(b)*, the buyer is entitled to recover for any loss occasioned by an injury to person or property that was a proximate and foreseeable result of a breach of warranty by the seller [U.C.C. Comment No. 5 to *Com. Code § 2715; De La Hoya v. Slim's Gun Shop (1978) 80 Cal.App.3d Supp. 6, 10-12, 146 Cal.Rptr. 68*]. For instructions on proximate causation and foreseeability, see Ch. 3E, *Matthew Bender Contract Damages Instructions*.

[b] Contractual Disclaimer

The parties may contract to limit or exclude consequential damages unless the limitation or exclusion is unconscionable [*Com. Code § 2719(3)*]. "Unconscionability" involves the absence of meaningful choice for one party together with contract terms unreasonably favorable to the other party [*Nunes Turfgrass, Inc. v. Vaughan-Jacklin Seed Co., Inc. (1988) 200 Cal.App.3d 1518, 1534, 246 Cal.Rptr. 823*]. If the limitation applies to personal injuries from consumer goods, the limitation is invalid unless the party relying on the limitation proves that it is not unconscionable [*Com. Code § 2719(3)*]. However, if the limitation applies to commercial loss, the burden of proof is reversed, and the limitation is valid unless it is proved to be unconscionable [*Com. Code § 2719(3)*]. The seller may disclaim warranties as provided in *Com. Code § 2316*.

[c] Buyer's Obligation to Mitigate Damages

When damages are sought for the seller's failure to fulfill general or specific requirements or needs of the buyer, *Com. Code* § 2715(2)(a) provides that the buyer may only recover for those losses that could not reasonably have been prevented by cover or otherwise. The intent of this provision is to make the general rules relating to the buyer's obligation to mitigate damages applicable to a claim under *Com. Code* § 2715(2)(a) [*Carnation Co. v. Olivet Egg Ranch* (1986) 189 Cal.App.3d 809, 814-819, 229 Cal.Rptr. 261 ; *Gerwin v. Southeastern Cal. Assn. of Seventh Day Adventists* (1971) 14 Cal.App.3d 209, 219-220, 92 Cal.Rptr. 111]. Accordingly, when a claim is made under *Com. Code* § 2715(2)(a), the seller has the burden of proving that losses claimed by the buyer could reasonably have been prevented by cover or other efforts to mitigate damages [*Carnation Co. v. Olivet Egg Ranch* (1986) 189 Cal.App.3d 809, 814-819, 229 Cal.Rptr. 261]. For general instructions on mitigation of damages, see Ch. 3E, *Matthew Bender Contract Damages Instructions*.

[d] Breach of Warranty; Proximate Cause

In breach of warranty cases, consequential damages include damages resulting from injury to person or property proximately resulting from any breach of warranty [*Com. Code* § 2715(2)(b)]. Although *Com. Code* § 2715(2)(b) does not contain an express provision precluding recovery of losses that could have been prevented by the buyer, general rules relating to the buyer's obligation to mitigate damages may be applicable in some circumstances. Of course, if the buyer's misuse or carelessness caused the injury, the seller's breach may not have proximately caused the injury [U.C.C. Comment No. 5 to *Com. Code* § 2714; see *Kaiser Cement & Gypsum Corp. v. Allis-Chalmers Mfg. Co.* (1973) 35 Cal.App.3d 948, 958-962, 111 Cal.Rptr. 210] .

For discussion on proximate cause and mitigation, see Ch. 3E, *Matthew Bender Contract Damages Instructions*.

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Breach, Repudiation & ExcuseAcceptance of GoodsRevocation of AcceptanceGeneral OverviewCommercial Law (UCC)Sales (Article 2)RemediesBuyer's RemediesGeneral OverviewCommercial Law (UCC)Sales (Article 2)RemediesBuyer's RemediesCoverCommercial Law (UCC)Sales (Article 2)RemediesBuyer's RemediesDamagesGeneral OverviewCommercial Law (UCC)Sales (Article 2)RemediesBuyer's RemediesDamagesIncidental & Consequential Damages

Irene Sall Holmes and Lock Holmes contributed to the original chapter for California Forms of Jury Instruction (Matthew Bender).



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CHAPTER 3H Matthew Bender Commercial Code Sales Contracts Instructions
PART L. DAMAGES AND OTHER REMEDIES

2-3H California Forms of Jury Instruction MB 300H.256

MB 300H.256 Damages to Buyer Who Has "Covered"

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

If you find in favor of Plaintiff on [his/her/its] claim for damages resulting from a breach by Defendant, you should award Plaintiff damages calculated as follows:

- 1. The difference between the cost to Plaintiff of substitute goods and the contract price;**
- 2. Plus Plaintiff's incidental damages;**
- 3. Minus any expenses Plaintiff saved because of Defendant's breach.**

[*OPTIONAL (See Use of Instruction)*]

- 4. Plus Plaintiff's consequential damages;**
- 5. Plus amounts already paid to Defendant for the goods.**

Authorities: *Com. Code* §§ 2711(1), (3), 2712(2); *KGM Harvesting Co. v. Fresh Network* (1995) 36 Cal.App.4th 376, 389, 42 Cal.Rptr.2d 286 ; *R.B. Matthews v. Transamerica Transp. Services* (9th Cir. 1991) 945 F.2d 269, 274-276 .

[2] Use of Instruction

This instruction should be given in preacceptance cases when the seller breached by repudiation or other nondelivery or

the buyer rightfully rejected nonconforming goods or justifiably revoked acceptance, and the buyer obtained substitute goods to cover.

Item 4 should be omitted if the contract disclaimed the right to recover consequential damages. Item 5 is required only if the buyer prepaid on the contract.

This instruction requires a preliminary determination by the court that cover was effected in good faith and without unreasonable delay, and was a reasonable purchase or contract to purchase substitute goods [*Com. Code* § 2712(1)].

This instruction should be given with the instruction in MB 300H.254 on the buyer's incidental damages and, when appropriate, with the instruction in MB 300H.255 on consequential damages.

[3] Comment

When the seller fails to make delivery or repudiates or when the buyer rightfully rejects or justifiably revokes acceptance, then with regard to any goods involved (and with regard to the whole if the breach goes to the whole contract), the buyer may cancel and, whether or not he or she has done so, may in addition to recovering as much of the price as he or she has paid, cover and have damages under *Com. Code* § 2712 as to all the goods affected whether or not they have been identified to the contract [*Com. Code* § 2711(1)].

If the buyer decides to cover, he or she may recover from the seller as damages the difference between the cost of cover and the contract price together with any incidental or consequential damages, but less any expenses saved in consequence of the seller's breach [*Com. Code* § 2712(2); *KGM Harvesting Co. v. Fresh Network* (1995) 36 *Cal.App.4th* 376, 389, 42 *Cal.Rptr.2d* 286 ; *R.B. Matthews v. Transamerica Transp. Services* (9th Cir. 1991) 945 *F.2d* 269, 274]. This contract-cover differential is not limited by *Com. Code* § 1305(a) (requiring aggrieved party to be put in as good a position as if other party had fully performed), even if the aggrieved buyer is ultimately able to pass on its additional costs to the other parties [*Com. Code* § 2712(2); *KGM Harvesting Co. v. Fresh Network* (1995) 36 *Cal.App.4th* 376, 384, 389, 42 *Cal.Rptr.2d* 286 (holding that "[w]hat the buyer chooses to do with the benefit of its bargain is not relevant to the determination of damages under § 2712")].

As provided in *Com. Code* § 2711(1), the buyer is not required to cover. The pre-acceptance measure of damages for a buyer who has not covered or whose cover is found unreasonable is *Com. Code* § 2713 [see MB 300H.257]. However, failure to obtain cover without undue delay, if it was available, will bar recovery of consequential damages [*Com. Code* § 2715(2)(a); see *R.B. Matthews v. Transamerica Transp. Services* (9th Cir. 1991) 945 *F.2d* 269, 274-276 (award of consequential damages for breach reversed and case remanded to determine whether buyer had opportunity to cover)]. If the buyer cannot obtain cover, he or she may be entitled to specific performance [*Com. Code* § 2716(1)].

When the seller fails to deliver due to insolvency, the buyer's remedy is under *Com. Code* § 2502.

A buyer in possession of rejected goods may resell them under the conditions stated in *Com. Code* § 2706(3) and (4) and set off the proceeds of sale against the price paid and incidental and consequential damages.

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Breach, Repudiation & ExcuseBuyer's Rights on Improper DeliveryCommercial Law (UCC)Sales (Article 2)RemediesBuyer's RemediesCoverCommercial Law (UCC)Sales (Article 2)RemediesBuyer's RemediesDamagesIncidental & Consequential DamagesCommercial Law (UCC)Sales (Article 2)RemediesBuyer's RemediesDamagesNondelivery & Repudiation

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CHAPTER 3H Matthew Bender Commercial Code Sales Contracts Instructions
PART L. DAMAGES AND OTHER REMEDIES

2-3H California Forms of Jury Instruction MB 300H.257

MB 300H.257 Buyer's Damages for Seller's Non-Delivery or Repudiation

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

If you find in favor of Plaintiff on [his/her/its] claim for damages due to Defendant's breach, you should award Plaintiff damages calculated as follows:

- 1. The difference between the market price at the place of _____ [tender or arrival] when Plaintiff learned of the breach, and the contract price;**
- 2. Plus Plaintiff's incidental damages;**
- 3. Minus any expenses saved by Plaintiff because of Defendant's breach.**

[*OPTIONAL (See Use of Instruction)*]

- 4. Plus Plaintiff's consequential damages.**

Authority: *Com. Code § 2713.*

[2] Use of Instruction

This instruction should be given in pre-acceptance cases when the buyer has not covered or the buyer's cover has been found unreasonable. It applies in cases of the seller's breach by repudiation or other non-delivery or when the buyer rightfully rejected nonconforming goods or justifiably revoked acceptance. Item 4 should be omitted if the contract

disclaimed the right to recover consequential damages. This instruction may not be appropriate if the buyer had a resale contract and the seller knew of that fact [*see* [3], *below*].

This instruction should be given with the instructions in MB 300H.254 and MB 300H.255 on incidental and consequential damages.

Choice of "tender" or "arrival" in the bracket depends on the type of breach. Place of tender is appropriate in nondelivery cases; place of arrival must be used in cases of revocation of acceptance and rejection after arrival of the goods [*Com. Code* § 2713(2)].

[3] Comment

The measure of damages for nondelivery or repudiation by the seller is the difference between the market price at the time the buyer learned of the breach and the contract price together with any incidental and consequential damages, less expenses saved in consequence of the seller's breach. Market price is to be determined as of the place for tender or, in cases of rejection after arrival or revocation of acceptance, as of the place of arrival [*Com. Code* § 2713(2)]. The buyer has the burden of proving the market price. For discussion of proof of market price and evidence admissible on the issue, see *MB 300H.252*[3] [*see* U.C.C. Comment No. 3 to *Com. Code* § 2713]. *Com. Code* § 2713 does not specifically provide for lost profits as an element of the buyer's damages, as it does for the seller under *Com. Code* § 2708, but the buyer may recover consequential damages, one item of which may be profits lost on the contemplated resale of the goods [*Com. Code* § 2713(1); Cal. Comment No. 3 to *Com. Code* § 2715; *R.B. Matthews v. Transamerica Transp. Services* (9th Cir. 1991) 945 F.2d 269, 274 ; *Gerwin v. Southeastern Cal. Assn. of Seventh Day Adventists* (1971) 14 Cal.App.3d 209, 219-220, 92 Cal.Rptr. 111].

In some situations when the buyer had a resale contract, its damages may be limited to its expected profits on resale when the difference between market price and contract price grossly exceeds the profit that the buyer would have realized on resale. In a case when (1) the buyer had a resale contract and the seller knew of that fact, (2) the buyer had not shown that it would be liable in damages to the buyer on its forward contract, and (3) there was no showing of bad faith on the part of the seller, the court relied on the policy of former *Com. Code* § 1106(1) (*now see Com. Code* § 1305(a)) (that aggrieved party be put in as good a position as if other party had performed) in holding that the award of damages to the buyer be limited to its actual loss, i.e., the amount it expected to make on the forward contract [*Allied Cannery & Packers, Inc. v. Victor Packing Co.* (1984) 162 Cal.App.3d 905, 913-916, 209 Cal.Rptr. 60].

When there is an anticipatory repudiation and the buyer elects to await performance for a commercially reasonable period of time but does not cover, damages will still be based on the market price at the time the buyer learned of the breach [*see* discussion in *First Nat. Bank of Chicago v. Jefferson Mtg. Co.* (3d Cir. 1978) 576 F.2d 479, 492-493] .

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)RemediesBuyer's RemediesCoverCommercial Law (UCC)Sales (Article 2)RemediesBuyer's RemediesDamagesIncidental & Consequential DamagesCommercial Law (UCC)Sales (Article 2)RemediesBuyer's RemediesDamagesNondelivery & Repudiation

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CHAPTER 3H Matthew Bender Commercial Code Sales Contracts Instructions
PART L. DAMAGES AND OTHER REMEDIES

2-3H California Forms of Jury Instruction MB 300H.258

MB 300H.258 Buyer's Damages for Accepted Goods and for Breach of Warranty

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

If you find in favor of Plaintiff on [his/her/its] claim for damages on account of Defendant's breach and you find further that Plaintiff gave adequate notice to Defendant of a claim of breach regarding the goods, then you should award to Plaintiff:

[*EITHER (See Use of Instruction)*]

Damages for the loss to Plaintiff that resulted, in the ordinary course of events, from Defendant's breach, including incidental [and consequential] damages.

[*OR*]

Damages calculated as follows at the time and place of acceptance:

1. The difference between the value the accepted goods would have had if they had been as warranted and minus the value of the goods accepted;

2. Plus incidental damages;

[*OPTIONAL (See Use of Instruction)*]

3. Plus consequential damages;

4. Minus any amount of the contract price that was withheld as a set-off against damages.

[OR]

Damages that Plaintiff has proven were caused by a loss due to Defendant's breach of warranty.

Under the law, Defendant's breach of warranty caused Plaintiff's loss if that breach was a substantial factor in bringing about the loss. Therefore, in instructing you that Plaintiff must have proven that Defendant's breach caused the loss, I mean that Plaintiff must have proven that the breach was a substantial factor in bringing about the loss.

Authorities: *Com. Code* §§ 2714, 2717.

[2] Use of Instruction

This instruction should be given as the measure of damages when the buyer seeks damages for accepted but nonconforming goods and the time for revocation of acceptance has passed [U.C.C. Comment No. 1 to *Com. Code* § 2714]. It should be used with the instruction in MB 300H.222 on notice of breach.

Choice among the alternate damage calculations is governed by the type of nonconformity and the damage evidence adduced. The first alternative should be used in cases not involving breach of warranty and applies to such breaches as late deliveries and deficient quantity, or other nonconformity.

The second alternative includes the "usual, standard" method of calculating breach of warranty damages but is not exclusive [U.C.C. Comment No. 3 to *Com. Code* § 2714]. Item 3 should be omitted if the contract disclaims, so far as the law permits, the right to recover consequential damages. Item 4, which refers to the right of set-off provided by *Com. Code* § 2717, should be omitted if the buyer did not withhold any of the contract price as a set-off.

The third alternative applies if special circumstances have produced proximate damages that are different from those in the second alternative. The reference to incidental and consequential damages is omitted because they will be included among damages proximately resulting from the breach. To improve juror comprehension, this alternative uses the term "caused" in lieu of the more traditional language based on "proximate cause" [see Ch. 3E, *Matthew Bender Contract Damages Instructions*, MB 300E.03].

If incidental and consequential damages are expressly included, the instructions in MB 300H.254 and MB 300H.255 should also be given.

[3] Comment

[a] When Nonconformity Is Not Breach of Warranty

In cases in which the nonconformity is not a breach of warranty, the buyer may recover as damages for any nonconformity of tender the loss resulting in the ordinary course of events from the seller's breach as determined "in any manner which is reasonable" [*Com. Code* § 2714(1)]. This may include the cost of cover if there was a deficiency in quantity, expenses occasioned by the seller's delay, or the cost of repair of defective goods [see *Lidstrand v. Silvercrest*

Industries (Wash. 1981) 623 P.2d 710]. In proper cases, any incidental and consequential damages under *Com. Code § 2715* may also be recovered [*Com. Code § 2714(3)*; see *MB 300H.254, MB 300H.255*].

[b] When Non-Conformity Is Breach of Warranty

The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount [*Com. Code § 2714(2)*]. In proper cases, any incidental and consequential damages under *Com. Code § 2715* may also be recovered [*Com. Code § 2714(3)*; see *MB 300H.254, MB 300H.255*].

The value of the goods had they been as warranted may or may not be the contract price. For example, in one case the court awarded damages based on a finding that the computer system sold, had it been as warranted, would have been worth over four times the contract price [*Chatlos Systems, Inc. v. National Cash Register Corp. (3d Cir. 1982) 670 F.2d 1304*]. However, in another case, the court treated the contract price as the value of the computer system if it had been as warranted [*Schatz Distributing Co. Inc. v. Olivetti Corp. of America (Kan. 1982) 647 P.2d 820*].

The cost of repairing defective goods is often accepted as the measure of damages in warranty cases [see *City of New York v. Pullman Inc. (2d Cir. 1981) 662 F.2d 910*].

[c] When Value of Goods Is Determined

Value of goods is determined as of the time and place of acceptance [*Com. Code § 2714(2)*]. However, if the buyer could have revoked acceptance and decided not to do so, value is determined as of the time and place of the buyer's decision not to revoke [U.C.C. Comment No. 3 to *Com. Code § 2714*].

[d] Notice Requirements

In all instances of breach with regard to accepted goods, the buyer must comply with the notice of breach requirements of *Com. Code § 2607*. These requirements are stated in the instructions in *MB 300H.222* on notice of breach and *MB 300H.155* on notice of breach of warranty.

[e] Burden of Proving Breach

The buyer has the burden of proving the breach with regard to accepted goods, whether in the position of plaintiff or defendant in the case [*Com. Code § 2607(4)*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Breach, Repudiation & ExcuseAcceptance of GoodsBurdens of ProofCommercial Law (UCC)Sales (Article 2)RemediesBuyer's RemediesDamagesBreach Following AcceptanceCommercial Law (UCC)Sales (Article 2)RemediesBuyer's RemediesDamagesIncidental & Consequential DamagesCommercial Law (UCC)Sales (Article 2)WarrantiesGeneral Overview

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CHAPTER 3H Matthew Bender Commercial Code Sales Contracts Instructions
PART L. DAMAGES AND OTHER REMEDIES

2-3H California Forms of Jury Instruction MB 300H.259

MB 300H.259 Liquidated Damages

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

If you find in favor of Plaintiff [optional (see Use of Instruction): and if you find that the parties agreed on an amount to be paid in the event of Defendant's breach, then] you should find for Plaintiff in the amount agreed on, with interest on that amount at the rate of _____ percent per year [optional (see Use of Instruction): unless Defendant proves that the amount of damages agreed on was unreasonable under the circumstances existing at the time the contract was made].

[*OPTIONAL (See Use of Instruction)*]

In deciding whether the amount of damages agreed on was unreasonable, you may consider all of the circumstances that existed when the contract was made. The circumstances that you may consider include the following:

- 1. The relationship of the agreed-on damages to the range of harm that reasonably could have been anticipated;**
- 2. The relative equality of the bargaining power of Plaintiff and Defendant;**
- 3. Whether or not Plaintiff and Defendant were represented by lawyers when the contract was made;**
- 4. The anticipation of Plaintiff and Defendant that proving actual damages would be costly or inconvenient;**

5. The difficulty of proving causation and foreseeability of damages; and**6. Whether or not the contract is a form contract.**

Because you must consider the circumstances at the time the contract was made, you must not consider the amount of damages actually suffered by Plaintiff in determining whether the damages agreed to were unreasonable.

Authorities: *Com. Code § 2718; Civ. Code § 1671; Cal. Law Revision Com. Comment to Civ. Code § 1671.*

[2] Use of Instruction

This instruction should be given when the contract at issue provides for liquidated damages in the event of the type of breach complained of. The first optional clause should be included if there is an issue of fact as to whether the parties agreed on liquidated damages. The contract interest or statutory rate should be applied.

Com. Code § 2718(1) requires that a liquidated damages provision in a contract for the sale of goods comply with the requirements of *Civ. Code § 1671*. For liquidated damages provisions subject to *Civ. Code § 1671*, the second and third options should be used if the defendant challenges the reasonableness of the liquidated damages provision.

LexisNexis Matthew Bender Expert Practice Tip--Use Care When Arguing Liquidated Damages:

The concept of "liquidated damages" will be difficult for some attorneys and judges to apply or understand. What about a juror? Each of the numbered paragraphs in this instruction will have to be explained in closing argument, because it is not obvious from the instruction which way each of these factors cuts. The final unnumbered paragraph will be counter-intuitive to some jurors who will not understand why evidence of the actual damage is irrelevant and must not be considered. The key point is that a "liquidated damages" clause can be reasonable at the time the parties entered into the contract, even if the ultimate actual damages turn out to be much less. If the actual damages are very small, or non-existent, plaintiff's counsel will probably want to exclude the evidence altogether by way of a motion *in limine*. This instruction will support such a motion. *By Rex Heeseman and Ronald Oster*

[3] Comment

Com. Code § 2718(1) requires a liquidated damages provision in a contract for the sale of goods to comply with *Civ. Code § 1671*. A liquidated damages provision that does not comply with *Civ. Code § 1671* is ineffective, and the aggrieved party is left with the remedies provided in Division 2 of the California Commercial Code [*see Com. Code § 2101 et seq.*]. For discussion of the requirements of *Civ. Code § 1671*, see *Ch. 75A, Matthew Bender Real Property Sales Instructions, MB 7500A.74[3]*.

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)RemediesBuyer's RemediesDamagesGeneral OverviewCommercial Law (UCC)Sales (Article 2)RemediesLimitation & ModificationLiquidated DamagesCommercial Law (UCC)Sales (Article 2)RemediesSeller's RemediesDamagesGeneral Overview

Irene Sall Holmes and Lock Holmes contributed to the original chapter for California Forms of Jury Instruction (Matthew Bender).



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Special Alert--Chapter 3I Special Alert to Chapter 3I, Matthew Bender Construction Contract Instructions

2-3ISA California Forms of Jury Instruction Scope

Scope

Proposed Revision of California Mechanics' Lien Law

In 1999, the California Law Revision Commission was asked to undertake a study of the law governing mechanics' liens and associated construction remedies in California. The resulting recommendation, which includes proposed legislation, was sent to the governor and the legislature in February, 2008 [see http://www.clrc.ca.gov/pub/PrintedReports/REC_H821.pdf]. The recommendation provided the basis for SB 1691, which was introduced during the 2007-2008 session, passed both the Assembly and Senate but was vetoed by the governor as not being of sufficiently high priority. The legislation has been resurrected in the 2009-2010 session as SB 189, which, as of December 2009, is under consideration by the Senate Committee on the Judiciary. In its current form, SB 189 closely tracks the Commission's proposed legislation, and if enacted, would be operative January 1, 2011. Provided the legislation is enacted, it will be fully incorporated into this chapter in a future release.

Significant changes to current mechanics' lien law that would be made by the proposed legislation include the following:

1. Reorganization. The proposed legislation relocates the provisions of the mechanics' lien law relating to private works of improvement to the end of the Civil Code, beginning with Section 8000. This avoids the confusion of using old Civil Code section numbers for new and different provisions, and allows for future expansion without resorting to decimal section numbering.

The proposed legislation also relocates the statutes governing public work construction remedies, such as the stop notice and payment bond. The public work provisions would be moved into the Public Contract Code, beginning with Section 41010. This is intended to solve the problems created by multiple sets of corresponding but dissimilar provisions for public and private works.

2. Terminology. The proposed legislation cleans up and systematizes the statutory definitions to provide more consistent usage throughout the mechanics' lien law.

3. Standardization of notice provisions. The current mechanics' lien law provides for many types of notice, including preliminary notice, stop notice, notice of overdue laborer compensation, notice of non-responsibility, notice to principal and surety, stop work notice, notice of completion, and notice of cessation. Each notice is subject to unique provisions governing content, service, and proof of service. The proposed legislation standardizes these notice provisions to provide consistency throughout the range of remedies [see proposed Civ. Code §§ 8100-8118]. For example, the legislation prescribes standard content applicable to all notices [see proposed Civ. Code § 8102; proposed Pub. Con. Code § 42120]. It replaces the individual variants in existing law applicable to one type of notice or another by establishing a general procedure for giving notice to be applied throughout the mechanics lien law [see Code Civ. Proc. § 415.20]. It also standardizes the proof of mailing and proof of delivery provisions and adds a provision for proof of electronic notice [see proposed Civ. Code § 8118; proposed Pub. Con. Code § 42190].

4. Preliminary notice. Although the proposed legislation retains most of the substance of the preliminary notice provisions of existing law, the existing provisions are broken into smaller, more comprehensible pieces, streamlines and simplifies their wording, and clarifies the language of the notice [compare Civ. Code §§ 3097, 3098 with proposed Civ. Code §§ 8200-8214].

The proposed legislation eliminates the existing provision that seems to both require a direct contractor to give preliminary notice to the construction lender and exempts the contractor from having to do so [see Civ. Code § 3097(b)]. Under the proposed legislation, the contractor is required to give the lender preliminary notice [see proposed Civ. Code § 8200].

5. Notice of claim of lien. Existing law does not require a lien claimant to notify the owner when a claim of lien is recorded, nor does it require the county recorder to do so except in certain counties, on request. Recognizing that the constitutionality and fairness of the mechanics' lien law would be enhanced if the lien claimant were required to notify the owner on recording a claim of lien, the proposed legislation imposes a recording requirement [see proposed Civ. Code §§ 8418, 8420].

6. Lis pendens requirement. The proposed legislation requires that a claimant who commences an action to enforce a lien claim record a lis pendens disclosing the enforcement action within 110 days of recording the lien claim. Failure to do so results in expiration of the claim, rather than having to wait a year or more [see proposed Civ. Code § 8460(a)].



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CHAPTER 3I Matthew Bender Construction Contract Instructions

2-3I California Forms of Jury Instruction 3I.syn

§ 3I.syn Synopsis to Chapter 3I: Matthew Bender Construction Contract Instructions

MB 300I.01 Contractor's Withdrawal of Bid on Public Works Project

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Bid Withdrawal Generally

[b] Relief From Forfeiture

[c] Grounds for Relief

[d] Procedure for Relief

MB 300I.02 Contractor's Reliance on Public Entity Complying With Prescribed Bidding Procedure

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300I.02A Contract with Public Entity Later Determined to Be Invalid Because of Defects in Competitive Bidding Process

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300I.03 Prime Contractor's Failure to Execute Contract With Listed Subcontractor

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300I.04 Contractor's Reliance on Bid of Subcontractor (Promissory Estoppel)

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Rights and Duties of Prime Contractor and Subcontractor

[b] Reasonable Reliance on Subcontractor's Bid

MB 300I.05 Irrevocable Bid of Supplier (Com. Code § 2205(b))

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300I.06 Breach of Contract

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Elements of Cause of Action for Breach of Contract

[b] Related Judicial Council Jury Instructions

MB 300I.07 Recovery Against Payment Bond Surety on Private Work Project

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Purpose of Payment Bonds

[b] Statutory Bonds Versus Common Law Bonds

[c] Payment Bond Beneficiaries

[d] Defenses

MB 300I.08 Recovery Against Payment Bond Surety on Public Works Contract

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] When Payment Bond Must Be Provided

[b] Execution and Filing of Payment Bond

[c] Primary and Direct Obligation of Surety

[d] Requirement of Plaintiff's Labor, Services, Equipment, or Materials

[e] Application to Vendors of Materialmen

[f] Attorney's Fees

[g] Enforcing Claim on Public Work Payment Bond; Required Notice

MB 300I.09 Recovery Against Offsite Improvement Payment Bond Surety or Other Security for Public Improvements in Subdivision Development

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300I.10 Action by Owner Against Contractor's Performance Bond Surety

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Governing Law; Form of Performance Bond

[b] Contract Between Principal and Obligee; Conditions of Surety's Obligation

[c] Liability of Surety

[d] Damages

[e] Defenses

MB 300I.11 Action by Subcontractor or Materialman Against Prime Contractor's Performance Bond Surety as Beneficiary of That Bond

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Interpretation of Bond: Who Benefits?

[b] Interpretation of Bond: Who Is Liable?

[c] Exoneration as Defense

MB 300I.12 Recovery Against Contractor's State License Bond Surety

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Bond as License Requirement; Acting in Capacity of Contractor

[b] Beneficiaries of Bond

[c] Distribution of Bond to Cover Claims

[d] Attorneys' Fees

[e] Exoneration

MB 300I.13 Recovery by Contractor as Third Party Beneficiary of Owner's Other Contracts

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Contractor as Third-Party Beneficiary

[b] Related Judicial Council Jury Instructions

MB 300I.14 Breach of Express Warranty

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Warranty Liability

[b] Scope of Warranty and Proper Plaintiffs

MB 300I.15 Breach of Implied Warranty in Sale of New Construction

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300I.16 Representation or Warranty of Subsurface Conditions by Public Agency

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Warranty Liability

[b] Disclaimers

MB 300I.17 Strict Liability for Construction Defects

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Strict Liability; Other Theories of Recovery Distinguished

[b] Strict Liability for Construction Defects

[c] Damages

[d] Related Judicial Council Jury Instructions

MB 300I.18 Breach of Construction Contract for Failure to Follow Plans and Specifications

[1] Instruction

[2] Use of Instructions

[3] Comment

[a] Builder's Obligation

[b] Related Judicial Council Jury Instructions

MB 300I.19 Recovery of Liquidated Damages From Supplier Causing Delay

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Inducing Breach of Contract

[b] Related Judicial Council Instructions

MB 300I.20 Recovery of Damages From Builder for Damages Resulting From Construction Defects in New Residence Sold on or After January 1, 2003

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Actions for Defective Construction in New Residences Sold on or After January 1, 2003--Overview and Applicability

[b] Mandatory Pre-Litigation Procedure

[c] Claimant's Cause of Action; Burden of Proof

[d] Damages

[e] Affirmative Defenses

MB 300I.21-MB 300I.29 Reserved for Future Use

MB 300I.30 Extra Work

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300I.31 Change in Scope of Work

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300I.32 Implied Covenant of Good Faith and Fair Dealing

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300I.33 Prevention of Performance

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300I.34 Nondisclosure of Material Facts

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300I.35 Implied Warranty of Accuracy of Plans and Specifications

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300I.36 Implied Covenant to Control Third Parties

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300I.37 Refusing to Approve "Or Equal" Item--Public Work

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300I.38 Failure to Make Timely Progress Payments

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300I.39 Abandonment by Contractor of Construction Contract

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300I.40 through MB 300I.49 [Reserved]

MB 300I.50 Notice of Claim Under Contract

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300I.51 Notice of Claim Under Government Code on Public Work Project

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Presentation of Claim as Prerequisite for Suit

[b] Time for Presenting Claim

[c] Fraudulent Breaches of Contract: Extension of Time for Presenting Claim

[d] Estoppel

MB 300I.52 Architect/Engineer Decision Requirement

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300I.53 Written Change Order Requirement

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Written Change Order as Contractual Prerequisite to Payment for Extra Work

[b] Oral Modifications

[c] Waiver

[d] Fraud

MB 300I.54 No Damage for Delay

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300I.55 Forfeitures

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300I.56 Payment Dependent on Existence of Fund

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300I.57 Substantial Completion and Final Acceptance

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300I.58 Rescission of Contract as Defense to Contractor's Action as Third-Party Beneficiary of Owner's Contract

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300I.59 Proper Contractor's License

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] License Requirement; Substantial Compliance

[b] Persons Not Subject to License Requirement

[c] Burden of Proof

[d] When Failure to Comply With License Requirement Is Not a Defense

[e] Recovery of Compensation Paid to Unlicensed Contractor

MB 300I.60 Preliminary 20-Day Notice (Private Work)

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Preliminary 20-Day Notice as Condition Precedent to Recovery on Lien or Payment Bond

[b] Who Must Receive Notice

[c] Timeliness of Notice

[d] Labor, Services, Equipment, and Materials Covered by Notice

[e] Contents of Notice

[f] Service of Notice

[g] Estoppel and Waiver

MB 300I.61 Written Notice to Surety and Bond Principal--Private Work

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300I.62 Defense Against Mechanics' Lien or Private Work Stop Notice Claim--False Stop Notice

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300I.63 Defense Against Mechanics' Lien or Private Work Stop Notice Claim--Claim in Stop Notice for Labor, etc., Not Furnished

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300I.64 Defense Against Mechanics' Lien--Notice of Nonresponsibility

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300I.65 Defense Against Mechanics' Lien--Claim for Labor, etc., Not Furnished

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300I.66 Defense Against Mechanics' Lien--Claim for Labor, etc., Not Included in the Contract Between the Owner and the Prime Contractor

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300I.67 Defense Against Mechanics' Lien--Failure to Serve Stop Notice After Demand

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300I.68 Preliminary 20-Day Notice (Public Work)

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300I.69 False Stop Notice Given to Public Entity

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300I.70 Claim for Labor, etc., Not Furnished Made in Stop Notice Given to Public Entity

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300I.71 Written Notice to Surety and Bond Principal--Public Work

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300I.72 Exoneration of a Surety

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300I.73 Timeliness of Action to Recover Against Payment Bond Surety on Private Work Project

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300I.74 Deduction of Prior Payments From Obligation of Surety on Payment Bond

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300I.75 Balance Due to Contractor as Offset Against Owner's Damages in Action Against Contractor's Performance Bond Surety

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300I.76 Statute of Repose

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Statutes of Repose

[b] Latent and Patent Defects Defined

[c] Exclusions and Exceptions

[d] Cross-Complaints for Indemnity

[e] Commencement of Limitation Period for Patent Defects

[f] Commencement of Limitation Period for Latent Defects

[g] Equitable Tolling of Period of Repose

[h] Question of Law or Fact

MB 300I.77 Delayed Discovery of Negligence Cause of Action

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Statute of Limitations for Injuries to Real Property

[b] Commencement of Limitations Period

MB 300I.78 Statute of Limitations for Breach of Warranty in Case of Progressively Developing Damage

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300I.79 Statute of Limitations for Breach of Prospective Warranty

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300I.80 Notice Defenses for Claims of Breach of Implied Warranty

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300I.81 Affirmative Defenses to Claim for Violation of Statutory Construction Standards for New Residence Sold on or After January 1, 2003

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Actions for Defective Construction in New Residences Sold on or After January 1, 2003--Overview and Applicability

[b] Affirmative Defenses

[c] Applicable Time Periods for Filing Action

MB 300I.82-MB 300I.89 Reserved for Future Use

MB 300I.90 Change Order as Accord and Satisfaction

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300I.91 Lien Claim Waivers

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300I.92 Joint Payee Checks

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300I.93 Release by Acceptance of Final Payment

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300I.94 Payment and Acceptance by Owner as Waiver of Defects

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300I.95-MB 300I.99 [Reserved]

MB 300I.100 Measure of Damages for Breach of Construction Contract--Failure to Construct Work

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Damages for Failure to Construct Improvements

[b] Related Judicial Council Jury Instructions

MB 300I.101 Measure of Damages for Breach of Construction Contract--Work Does Not Conform to Plans and Specifications

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Damages for Failure to Comply With Plans and Specifications

[b] Related Judicial Council Jury Instructions

MB 300I.102 Measure of Liquidated Damages for Delay by Contractor

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300I.103 Measure--Failure to Make Timely or Complete Progress Payments

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Progress Payments

[b] Related Judicial Council Jury Instructions

MB 300I.104 Measure of Damages for Expenditures Made by Contractor Due to Delays, Inefficiencies, or Acceleration

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Damages for Delay or Acceleration

[b] Overhead and Profit

[c] Recovery of Effects of Inflation or Costs of Borrowing Money

MB 300I.105 Measure of Damages on Mechanics' Lien

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300I.106 Measure of Damages on Payment Bond

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300I.107 Measure of Damages for Completion of Construction Contract Abandoned by Builder (Work Performed on Property Owned by Plaintiff)

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Damages for Breach of Construction Contract

[b] Related Judicial Council Jury Instructions

MB 300I.108 Measure of Damages for Lost Profits on Deleted Work

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300I.109 Measure of Damages for Extra Work

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300I.110 Measure of Damages for Violation of Statutory Construction Standards for New Residence Sold on or After January 1, 2003

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Actions for Defective Construction in New Residences Sold on or After January 1, 2003--Overview and Applicability

[b] Damages

MB 300I.111-MB 300I.119 Reserved for Future Use

MB 300I.120 Government Party

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300I.121 "Stop Notice" Defined

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300I.122 "Bonded Stop Notice" Defined

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 300I.123 Contract Consisting of Standard Form and Printed Provisions

[1] Instruction

[2] Use of Instruction

[3] Comment



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CHAPTER 3I Matthew Bender Construction Contract Instructions

2-3I California Forms of Jury Instruction Scope

Scope

SCOPE

This chapter includes jury instructions that are peculiar to construction industry litigation. For the California Judicial Council jury instructions (CACI) on contracts generally, see Ch. 3, *California Judicial Council Contracts Instructions*. Ch. 3 includes Judicial Council instructions on issues surrounding contract formation, performance, interpretation, modification, breach, damages, and defenses. The instructions in this chapter are intended to supplement the Judicial Council instructions [see *Cal. Rules of Ct.*, Rule 2.1050].

This chapter covers the following topics:

- Part A includes instructions on the burden of proof, including instructions on breaches of contract, recovery against payment bonds, and breaches of warranty [see *MB 300I.01 -MB 300I.19*].
- Part B includes instructions on the specific types of breaches of contract that recur in construction projects [see *MB 300I.30 -MB 300I.39*].
- Part C includes instructions on common conditions in construction contracts and frequently asserted defenses [see *MB 300I.50 -MB 300I.80*].
- Part D includes instructions on releases and waivers that may bar recovery [see *MB 300I.90 -MB 300I.94*].
- Part E includes instructions on the measures of damages that apply in construction disputes [see *MB 300I.100 -MB 300I.109*].
- Part F includes instructions on a government agency as a party [see *MB 300I.120*], the definitions of "stop notice" and "bonded stop notice" [see *MB 300I.121, MB 300I.122*], and contracts containing standard forms and printed provision [see *MB 300I.123*].

2-3I California Forms of Jury Instruction Scope

The instructions in this chapter generally presume the existence of a contract. The instructions in Ch. 3A, *Matthew Bender Formation of Contract Instructions*, should be consulted if there are contract formation questions. In addition, the instructions in this chapter on contract interpretation, breaches, damages, and defenses are keyed to the problems typically encountered with construction disputes. When they do not seem to cover the particular situation, the instructions in Chs. 3B through 3F should be examined.

There are some references to the Uniform Commercial Code in these instructions. For more complete coverage, see Ch. 3H, *Matthew Bender Commercial Code Sales Contract Instructions*.

Finally, these instructions are based on clauses in contract documents that are fairly common in the construction industry. If the contract in the particular case has different terms in it, those terms may produce different legal consequences and, of course, require modification of these instructions.



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CHAPTER 3I Matthew Bender Construction Contract Instructions
PART A. BURDEN OF PROOF INSTRUCTIONS

2-3I California Forms of Jury Instruction MB 300I.01

MB 300I.01 Contractor's Withdrawal of Bid on Public Works Project

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Plaintiff has the burden of proving all of the following:

- 1. That Plaintiff made a mistake in the preparation of [his/her/its] bid.**
- 2. That Plaintiff gave written notice of the mistake to Defendant within five working days, excluding Saturdays, Sundays, and state holidays, after the bids were opened, and this notice specified in detail how the mistake occurred.**
- 3. That the mistake made the bid materially different from what Plaintiff had intended it to be.**
- 4. That the mistake was made in filling out the bid form.**

[*OPTIONAL (See Use of Instruction)*]

- 5. That the mistake was not due to an error in judgment by Plaintiff.**
- 6. That the mistake was not due to any carelessness by Plaintiff in inspecting the site of the work.**
- 7. That the mistake was not due to Plaintiff's carelessness in reading of the plans or specifications.**

Authority: *Pub. Contract Code § 5103.*

[2] Use of Instruction

This instruction should be used when a contractor awarded a public works project made a mistake in the bid. The contractor will seek to avoid doing the work and to prevent its bid bond or other bid security from being forfeited. The statute seems to place on the plaintiff the burden of proving the nonexistence of the facts covered by Paragraphs 5, 6, and 7 of this instruction. No cases have discussed this point. However, no instruction should be given unless there is some factual basis for it. Therefore, Paragraphs 5, 6, and 7 should only be given when the public entity can point to some evidence that raises those particular issues. A preponderance of evidence instruction must be given with this instruction [see Ch. 2, *California Judicial Council Evidence Instructions, CACI No. 200* ("More Likely True Than Not True")].

LexisNexis Matthew Bender Expert Practice Tip--Review Applicable Case Law: The literal wording of this instruction and the optional paragraphs seem to preclude relief except in cases where plaintiff has made a clerical error in filling out the bid form. However, the cases discussed in the commentary in [3], *below*, seem to provide for additional grounds for relief. Plaintiff's counsel should therefore review the cases that may be applicable to the case at hand. And, if this instruction is given, both counsel should use a checklist in proving (or disproving) the listed elements. *By Ronald Oster and Rex Heeseman*

[3] Comment

[a] Bid Withdrawal Generally

A bid submitted to a public entity is generally considered to be in the nature of an irrevocable option. It is a contract right of which the entity cannot be deprived without its consent, unless the requirements for rescission are met [*M. F. Kemper Constr. Co. v. Los Angeles* (1951) 37 Cal.2d 696, 700, 235 P.2d 7]. If the entity awards the contract, but the contractor refuses to execute the contract documents, the security the contractor posted with the bid can be forfeited [see, e.g., *Pub. Contract Code §§ 5106, 10181, 20172*].

[b] Relief From Forfeiture

Various statutes permit relief from forfeiture [see *Pub. Contract Code §§ 5100-5107*], even before the forfeiture actually occurs [*Balliet Bros. Constr. Corp. v. Regents of University of California* (1978) 80 Cal.App.3d 321, 326-327, 145 Cal.Rptr. 498], by prescribing the terms and manner in which bids can be withdrawn. These statutes establish the exclusive procedures under which bidders on public works projects may be relieved of their bids [*A & A Electric Inc. v. City of King* (1976) 54 Cal.App.3d 457, 463-465, 126 Cal.Rptr. 585].

[c] Grounds for Relief

The present statutory scheme for relief from forfeiture does not alter the grounds for granting such relief that were formulated under prior statutes [*Balliet Bros. Constr. Corp. v. Regents of University of California* (1978) 80 Cal.App.3d 321, 327, 145 Cal.Rptr. 498]. *Pub. Contract Code § 5103* allows for relief when the mistake in the bid presented makes the bid materially different from that intended and is in filling out the bid form [*Valley Crest Landscape v. City Council* (1996) 41 Cal.App.4th 1432, 1442, 49 Cal.Rptr.2d 184 ; see *MCM Construction, Inc. v. City & County of San Francisco* (1998) 66 Cal.App.4th 359, 377, 78 Cal.Rptr.2d 44 (failure to state dollar amount of work to be performed by seven of nine subcontractors was similar to error found in *Valley Crest*)]. Mistakes that qualify for relief include (1) failure to add in a subcontractor's bid on the work sheet on which the prime contractor computed its own bid [*Elsinore Union etc. Sch. Dist. v. Kastorff* (1960) 54 Cal.2d 380, 388-389, 6 Cal.Rptr. 1, 353 P.2d 713], (2) failure of the prime contractor to carry over the cost of part of the work from one worksheet to another in computing its bid [*M. F. Kemper Constr. Co. v. Los Angeles* (1951) 37 Cal.2d 696, 702-703, 235 P.2d 7], and (3) misstating the

correct percentage of the work to be performed by a subcontractor [*Ghilotti Const. Co. v. City of Richmond* (1996) 45 Cal.App.4th 897, 910, 53 Cal.Rptr.2d 389]. Relief is available even when there are mistakes of both fact and judgment, such as erroneous excavation computations resulting from failure to give work descriptions on plans precedence over inconsistent soil reports [*White v. Berrenda Mesa Water Dist.* (1970) 7 Cal.App.3d 894, 902-907, 87 Cal.Rptr. 338]. Relief will also be given to a prime contractor whose subcontractor's mistake causes a material effect on the prime's bid which would qualify for relief [*Saliba-Kringlen Corp. v. Allen Engineering Co.* (1971) 15 Cal.App.3d 95, 105, 92 Cal.Rptr. 799].

[d] Procedure for Relief

For most public entity projects, the procedure for withdrawal of bids in *Pub. Contract Code* §§ 5100-5107 is applicable.

Legal Topics:

For related research and practice materials, see the following legal topics:

Public Contracts LawBids & FormationGeneral OverviewPublic Contracts LawVoiding the ContractGeneral OverviewPublic Contracts LawVoiding the ContractAmbiguity & MistakeGeneral OverviewPublic Contracts LawVoiding the ContractAmbiguity & MistakeMutual MistakePublic Contracts LawVoiding the ContractAmbiguity & MistakeUnilateral Mistake



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CHAPTER 3I Matthew Bender Construction Contract Instructions
PART A. BURDEN OF PROOF INSTRUCTIONS

2-3I California Forms of Jury Instruction MB 300I.02

MB 300I.02 Contractor's Reliance on Public Entity Complying With Prescribed Bidding Procedure

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Plaintiff has the burden of proving all of the following:

1. That Defendant was required to award the contract to the bidder who _____ [insert appropriate language from applicable statute, city charter provision, ordinance, or portion of bid invitation, e.g., **was the lowest responsible bidder].**

2. That Defendant failed to comply with that requirement when it awarded the contract.

3. That Plaintiff suffered losses because [he/she/it] reasonably relied on that bidding requirement by preparing and submitting its bid to Defendant.

[*OPTIONAL (See Use of Instruction)*]

4. That an injustice to Plaintiff can be avoided only if Plaintiff is permitted to recover the damages Plaintiff suffered by preparing and submitting [his/her/its] bid.

5. That Defendant's failure to comply with the bidding requirement caused the damages that Plaintiff complains of.

6. The nature and extent of the damages Plaintiff suffered as a result of preparing and submitting the bid.

Authorities: *Swinerton Walberg Co. v. City of Inglewood-L.A. County Civic Center Authority* (1974) 40 Cal.App.3d 98, 103-105, 114 Cal.Rptr. 834 ; Restatement (Second) of Contracts § 90 (1981).

[2] Use of Instruction

This instruction should be used when a public entity fails to follow the prescribed procedure in awarding a contract, and the contractor who would have been awarded the work if the procedures had been followed seeks damages.

The instruction presumes that the detriment suffered by the plaintiff was the value of the effort of preparing and submitting the bid. If the detriment was something else, then Paragraph 3 must be modified accordingly.

The Restatement (Second) of Contracts § 90 requires that plaintiff prove "injustice can be avoided only by enforcement of the promise." This element is established as a matter of law if the public entity fails to award the contract to the lowest responsible bidder [*Swinerton Walberg Co. v. City of Inglewood-L.A. County Civic Center Authority* (1974) 40 Cal.App.3d 98, 104, 114 Cal.Rptr. 834]. That may not necessarily obtain if the public entity failed to comply with some other requirement of the competitive bidding scheme. In that case optional Paragraph 4 should be used.

Paragraph 5 may be omitted if the causal relationship between the defendant's failure to follow bidding requirements and the plaintiff's damages is not at issue.

A preponderance of evidence instruction must be given with this instruction [see Ch. 2, *California Judicial Council Evidence Instructions*, CACI No. 200 ("More Likely True than Not True")]. In addition, the instruction defining "proximate cause" in Ch. 3E, *Matthew Bender Contract Damages Instructions*, MB 300E.03, must be used with this instruction. If foreseeability of damage is an issue, an instruction on this issue must be given [see Ch. 3, *California Judicial Council Contracts Instructions*, CACI No. 350 ("Introduction to Contract Damages")].

LexisNexis Matthew Bender Expert Practice Tip--Use Checklist: Use of this instruction indicates the need to use a checklist for the jury. *By Rex Heeseman*

[3] Comment

The competitive bidding scheme described in the applicable statutes, city charter provisions, ordinances, or the invitation for bids may require that a particular bidder be awarded the contract. Nonetheless, that bidder can neither compel the public entity to award the contract to it [*Pozar v. Department of Transportation* (1983) 145 Cal.App.3d 269, 271, 193 Cal.Rptr. 202], nor recover damages in tort if the contract is awarded to another bidder [*Rubino v. Lolli* (1970) 10 Cal.App.3d 1059, 1062-1063, 89 Cal.Rptr. 320]. However, if that bidder can prove it reasonably relied to its detriment on the competitive bidding scheme, then it can recover damages under the doctrine of promissory estoppel for the entity's breach of its promise to award the contract according to that scheme [*Swinerton Walberg Co. v. City of Inglewood-L.A. County Civic Center Authority* (1974) 40 Cal.App.3d 98, 103-105, 114 Cal.Rptr. 834 ; Restatement (Second) of Contracts § 90 (1981)]. One case has suggested that the damages recoverable may be limited to expenses incurred in the bidding process but did not rule out the possibility that the damages could include loss of profits [*Swinerton Walberg Co. v. City of Inglewood-L.A. County Civic Center Authority* (1974) 40 Cal.App.3d 98, 105, 114 Cal.Rptr. 834].

LexisNexis Matthew Bender Expert Practice Tip--Available Damages: Plaintiff's counsel should note that the cases discussed above may allow for the recovery of damages beyond the cost of preparing and submitting plaintiff's bid. *By Ronald Oster*

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawConsiderationPromissory EstoppelPublic Contracts LawBids & FormationCompetitive ProposalsPublic
Contracts LawDispute ResolutionGeneral OverviewPublic Contracts LawDispute ResolutionBid Protests



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California Forms of Jury Instruction

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CHAPTER 3I Matthew Bender Construction Contract Instructions
PART A. BURDEN OF PROOF INSTRUCTIONS

2-3I California Forms of Jury Instruction MB 300I.02A

MB 300I.02A Contract with Public Entity Later Determined to Be Invalid Because of Defects in Competitive Bidding Process

[1] Instruction Contract with Public Entity Later Determined to Be Invalid Because of Defects in Competitive Bidding Process

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Plaintiff has the burden of proving all of the following:

- 1. The contract was determined to be invalid due to a defect or defects in the competitive bidding process caused solely by the public entity;**
- 2. The contractor proceeded with construction, alteration, repair, or improvement based on a good faith belief that the contract was valid;**
- 3. The public entity has reasonably determined that the work performed is satisfactory;**
- 4. The contractor did not commit fraud in the obtaining or performance of the contract; and**
- 5. The contract does not otherwise violate statutory or constitutional limitations.**

Authority: *Pub. Contract Code § 5110.*

[2] Use of Instruction

This instruction should be used when a contract with a public agency was entered into pending final decision on a challenge in accordance with *Pub. Contract Code § 5110* but later was determined to be invalid due to defects in the competitive bidding process caused solely by the public entity. The contractor is entitled to be paid the reasonable cost

of the labor, equipment, materials, and services furnished by the contractor before the date of the determination that the contract is invalid if the conditions listed in the instruction are met. It is not entitled to recover any profit [*Pub. Contract Code § 5110(a)*].

[3] Comment

When a public works project is competitively bid and any intended or actual award of the contract is challenged, the contract may be entered into pending final decision of the challenge. If the contract is later determined to be invalid due to defects in the competitive bidding process caused solely by the public entity, the contractor who entered into the contract with the public entity is entitled to be paid the reasonable cost (specifically excluding profit) of the labor, equipment, materials, and services furnished by the contractor before the date of the determination that the contract is invalid if all of the following conditions are met [*Pub. Contract Code § 5110(a)*]:

- The contractor proceeded with construction, alteration, repair, or improvement based on a good faith belief that the contract was valid;
- The public entity has reasonably determined that the work performed is satisfactory;
- Contractor fraud did not occur in the obtaining or performance of the contract; and
- The contract does not otherwise violate statutory or constitutional limitations.

Payment to the contractor may not exceed either of the following [*Pub. Contract Code § 5110(b)*]:

- The contractor's costs as included in its bid plus the cost of any approved change orders; or
- The amount of the contract less profit at the point in time the contract is determined to be invalid.

These provisions do not affect any protest and legal proceedings, whether contractual, administrative, or judicial, to challenge the award of the public works contract and enforce competitive bidding laws, nor do they affect any rights under *Code Civ. Proc. § 337.1* or *337.15* (statutes of limitations) [*Pub. Contract Code § 5110(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Public Contracts LawBids & FormationCompetitive ProposalsPublic Contracts LawBids & FormationOffer & AcceptanceAcceptances & AwardsPublic Contracts LawDispute ResolutionBid ProtestsPublic Contracts LawTerminationsDamagesPublic Contracts LawTypes of ContractsConstruction Contracts



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CHAPTER 3I Matthew Bender Construction Contract Instructions
PART A. BURDEN OF PROOF INSTRUCTIONS

2-3I California Forms of Jury Instruction MB 300I.03

MB 300I.03 Prime Contractor's Failure to Execute Contract With Listed Subcontractor

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Plaintiff has the burden of proving all of the following:

- 1. That Plaintiff was listed by Defendant in Defendant's bid to _____ [name of public entity] as a subcontractor that would do a portion of the work on _____ [describe project];**
- 2. That Plaintiff was ready, willing, and able to do that portion of the work;**
- 3. That Defendant did not permit Plaintiff to do that portion of the work;**
- 4. That Defendant's refusal to permit Plaintiff to do that portion caused the damages that Plaintiff complains of; and**
- 5. The nature and extent of the damages Plaintiff suffered.**

Authorities: *Southern Cal. Acoustics Co. v. C. V. Holder, Inc.* (1969) 71 Cal.2d 719, 726-727, 79 Cal.Rptr. 319, 456 P.2d 975 ; *R.J. Land & Assocs. Constr. Co. v. Kiewit-Shea* (1999) 69 Cal.App.4th 416, 419, 425-428, 81 Cal.Rptr.2d 615 .

[2] Use of Instruction

This instruction should be used when a listed subcontractor seeks damages because it was not used on the project by the prime contractor. A preponderance of evidence instruction must be given with this instruction [see Ch. 2, *California*

Judicial Council Evidence Instructions, CACI No. 200 ("More Likely True than Not True"). In addition, the instruction defining "proximate cause" in Ch. 3E, *Matthew Bender Contract Damages Instructions*, MB 300E.03, must be used with this instruction. If foreseeability of damage is an issue, an instruction on this issue must also be given [see Ch. 3, *California Judicial Council Contracts Instructions, CACI No. 350* ("Introduction to Contract Damages")].

The damages are usually the benefit the subcontractor would have realized from the work [*Southern Cal. Acoustics Co. v. C. V. Holder, Inc.* (1969) 71 Cal.2d 719, 726-727, 79 Cal.Rptr. 319, 456 P.2d 975 ; *R.J. Land & Assocs. Constr. Co. v. Kiewit-Shea* (1999) 69 Cal.App.4th 416, 421, 81 Cal.Rptr.2d 615] and this point should be covered in a separate damages instruction [see Part E].

LexisNexis Matthew Bender Expert Practice Tip--Using This Instruction: This instruction only applies in cases where the bidder did not comply with the procedures and requirements to substitute subcontractors or do the work itself. *By Ronald Oster*

[3] Comment

Bidders on public works projects are usually required to submit a list of the subcontractors who are going to perform substantial portions of the work [see *Pub. Contract Code § 4104*]. That listing alone creates no contract between the bidder and the listed subcontractor [*Klose v. Sequoia Union High School Dist.* (1953) 118 Cal.App.2d 636, 640-641, 258 P.2d 515]. However, if the listed subcontractor is not awarded the subcontract, it has a statutory right to recover the benefit of the bargain it would have realized from the work, unless it fails to execute the subcontract documents or unless the bidder follows the proper procedure and satisfies the requirements to substitute another subcontractor for the listed one [*Southern Cal. Acoustics Co. v. C. V. Holder, Inc.* (1969) 71 Cal.2d 719, 726-727, 79 Cal.Rptr. 319, 456 P.2d 975 ; *R.J. Land & Assocs. Constr. Co. v. Kiewit-Shea* (1999) 69 Cal.App.4th 416, 421, 81 Cal.Rptr.2d 615]. The same is true when the bidder does the work itself instead of obtaining another subcontractor [*Fred J. Early, Jr., Co. v. County Sanitation Dist.* (1963) 214 Cal.App.2d 505, 507-508, 29 Cal.Rptr. 633]. Any doubt about the bidder's compliance with the procedure and requirements to substitute another subcontractor should have been resolved in the hearing before the public entity or in a writ proceeding to review that hearing [*Cal-Air Conditioning, Inc. v. Auburn Union High School District* (1993) 21 Cal.App.4th 655, 661-662, 26 Cal.Rptr.2d 703 ; *Interior Systems, Inc. v. Del E. Webb Corp.* (1981) 121 Cal.App.3d 312, 317-320, 175 Cal.Rptr. 301].

Legal Topics:

For related research and practice materials, see the following legal topics:

Public Contracts LawBids & FormationSubcontracts & SubcontractorsGeneral OverviewPublic Contracts LawBids & FormationSubcontracts & SubcontractorsSubcontract RequirementsPublic Contracts LawPerformanceSubcontracts & SubcontractorsPublic Contracts LawTerminationsDamages



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CHAPTER 3I Matthew Bender Construction Contract Instructions
PART A. BURDEN OF PROOF INSTRUCTIONS

2-3I California Forms of Jury Instruction MB 300I.04

MB 300I.04 Contractor's Reliance on Bid of Subcontractor (Promissory Estoppel)

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Plaintiff has the burden of proving all of the following:

- 1. That Defendant submitted a bid to Plaintiff to do a portion of the work for _____ [describe project];**
- 2. That Defendant knew or should have known that Plaintiff would rely on Defendant's bid;**
- 3. That Plaintiff did in fact rely on Defendant's bid by using it to calculate Plaintiff's own bid for the project;**
- 4. That Plaintiff's reliance on Defendant's bid was a reasonable thing to do under the circumstances;**
- 5. That Plaintiff accepted Defendant's bid within a reasonable time;**
- 6. That Defendant failed to execute a contract to perform according to its bid;**
- 7. That Defendant's failure to execute a contract caused the damages Plaintiff complains of; and**
- 8. The nature and extent of Plaintiff's damages.**

Authorities: *Drennan v. Star Paving Co.* (1958) 51 Cal.2d 409, 413-415, 333 P.2d 757 ; *Saliba-Kringlen Corp. v. Allen Engineering Co.* (1971) 15 Cal.App.3d 95, 102-103, 92 Cal.Rptr. 799 ; Restatement (Second) of Contracts § 90

(1981).

[2] Use of Instruction

This instruction should be used when the prime contractor seeks damages from a prospective subcontractor who refused to execute a subcontract based on its bid. Although phrased as a conventional burden of proof instruction, the elements of the plaintiff's case could be recast in the form of special interrogatories to the jury, resulting in special findings [see *Code Civ. Proc.* § 625]. Because promissory estoppel is an equitable doctrine, there is no right to a jury trial unless there are legal issues being tried as well, in which case the jury's verdict on the estoppel issues is advisory only. It remains the trial court's duty to make independent findings and adopt or reject the jury's findings as it deems proper [*C & K Engineering Contractors v. Amber Steel Co.* (1978) 23 Cal.3d 1, 6-11, 151 Cal.Rptr. 323, 587 P.2d 1136 ; *A-C Company, Inc. v. Security Pacific National Bank* (1985) 173 Cal.App.3d 462, 473-474, 219 Cal.Rptr. 62] .

The jury's finding should be restricted to the facts. It would be improper to ask the jury to decide whether injustice could be avoided only by enforcing the promise or whether plaintiffs acted inequitably or had unclean hands. These are issues that are clearly for the court [*A-C Company, Inc. v. Security Pacific National Bank* (1985) 173 Cal.App.3d 462, 473-474, 219 Cal.Rptr. 62].

This instruction presumes the plaintiff first learned the subcontractor would not perform when the plaintiff tendered the written subcontract. If the subcontractor had earlier tried to revoke its bid, thereby making the tender of the subcontract pointless [*Civ. Code* §§ 1515, 3532], then Paragraph 5 should be revised accordingly.

A preponderance of evidence instruction must be given with this instruction [see Ch. 2, *California Judicial Council Evidence Instructions*, CACI No. 200 ("More Likely True than Not True")]. In addition, the instruction defining "proximate cause" in Ch. 3E, *Matthew Bender Contract Damages Instructions*, MB 300E.03, must also be used with this instruction. If foreseeability of damage is an issue, an instruction on this issue must also be given [see Ch. 3, *California Judicial Council Contracts Instructions*, CACI No. 350 ("Introduction to Contract Damages")].

The damages usually are the difference between the subcontractor's bid and the ultimate cost to do that work [*Norcross v. Winters* (1962) 209 Cal.App.2d 207, 221-223, 25 Cal.Rptr. 821], and this point should be covered in a separate damages instruction [see Part E].

This instruction does not apply to bids from suppliers. They are governed by *Com. Code* § 2205 [see MB 300I.05]. However, it would seem to apply when a subcontractor has relied on a bid from a lower tier subcontractor in preparing the bid to submit to the prime contractor.

LexisNexis Matthew Bender Expert Practice Tip--Use Care Structuring Your Closing: Most attorneys and many judges struggle with the legal concepts of "promissory estoppel." Thus, be careful how to structure the closing. *By Rex Heeseman*

[3] Comment

[a] Rights and Duties of Prime Contractor and Subcontractor

When a subcontractor submits a bid to a prime contractor, the subcontractor may not revoke its bid if it knows, or should know, that the bid is going to be used by the prime contractor to compute the prime contractor's bid to the owner [*Drennan v. Star Paving Co.* (1958) 51 Cal.2d 409, 413-415, 333 P.2d 757 ; see Restatement (Second) of Contracts § 90 (1981)].

However, the prime contractor is not free to delay acceptance of the bid, nor can it re-open negotiations with the subcontractor while claiming a continuing right to accept the original offer [*Drennan v. Star Paving Co.* (1958) 51

Cal.2d 409, 415, 333 P.2d 757].

There is no obligation on the prime contractor to accept the bid of the subcontractor until the contract has been awarded [*Saliba-Kringlen Corp. v. Allen Engineering Co. (1971) 15 Cal.App.3d 95, 106-108, 92 Cal.Rptr. 799*]. On public works projects, the opening of bids and the award of the contract are not necessarily coincidental in time. The interval between them depends on the nature of the awarding authority and the statutory constraints under which it operates.

[b] Reasonable Reliance on Subcontractor's Bid

The prime contractor's reliance on the subcontractor's bid must be reasonable [*MacIsaac & Menke Co. v. Freeman (1961) 194 Cal.App.2d 327, 335, 15 Cal.Rptr. 48*]. Whether that reliance was reasonable is a question of fact [*Saliba-Kringlen Corp. v. Allen Engineering Co. (1971) 15 Cal.App.3d 95, 102-103, 92 Cal.Rptr. 799* ; *Diede Construction, Inc. v. Monterey Mechanical Co. (2004) 125 Cal.App.4th 380, 392, 22 Cal.Rptr.3d 763*]. In one case, a general contractor was not required to request relief from its bid on a city contract as a condition of holding responsible a subcontractor who made a clerical error in its bid for the subcontract, because relief for a clerical error is available under *Pub. Contract Code §§ 5101 and 5103* only for errors in the general contractor's bid. However, the contractor's right to recover from the subcontractor on the basis of promissory estoppel was dependent on its proving that it reasonably relied on the subcontractor's mistaken bid in calculating the amount of its bid to the city [*Diede Construction, Inc. v. Monterey Mechanical Co. (2004) 125 Cal.App.4th 380, 387-388, 22 Cal.Rptr.3d 763*].

LexisNexis Matthew Bender Expert Practice Tip--Reliance Must Be Reasonable: In cases where the subcontractor has submitted an erroneous bid because of obvious clerical or computational errors, the subcontractor can avoid liability by establishing that plaintiff's reliance was not reasonable under the circumstances. *By Ronald Oster*

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawTypes of ContractsConstruction ContractsPublic Contracts LawBids & FormationOffer & AcceptanceGeneral OverviewPublic Contracts LawBids & FormationSubcontracts & SubcontractorsGeneral OverviewPublic Contracts LawTerminationsDamagesPublic Contracts LawTypes of ContractsConstruction Contracts



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CHAPTER 3I Matthew Bender Construction Contract Instructions
PART A. BURDEN OF PROOF INSTRUCTIONS

2-3I California Forms of Jury Instruction MB 300I.05

MB 300I.05 Irrevocable Bid of Supplier (Com. Code § 2205(b))

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Plaintiff has the burden of proving all of the following:

- 1. That Defendant submitted a bid to Plaintiff to provide a portion of the materials required for _____ [describe project].**
- 2. That Defendant knew, or should have known, that Plaintiff would rely on Defendant's bid.**
- 3. That Plaintiff did rely on Defendant's bid when the Plaintiff submitted [his/her/its] bid for the project.**

[*OPTIONAL (See Use of Instruction)*]

- 4. That within 48 hours after Defendant gave Plaintiff the bid, Plaintiff gave Defendant a written confirmation of the bid.**

[*EITHER (See Use of Instruction)*]

- 5. That Plaintiff accepted Defendant's bid within 10 days after Plaintiff was awarded the contract, and the date of that acceptance was within 90 days of the date that Defendant originally made the bid to sell the materials.**

[OR]

5. That Plaintiff accepted Defendant's bid within the time the Defendant specified the bid could be accepted.

6. That at the time Defendant submitted a bid to Plaintiff, Defendant knew or should have known from the circumstances that Plaintiff was a licensed contractor.

7. That Defendant's refusal to supply Plaintiff with materials according to the terms of the accepted bid caused the damages that Plaintiff complains of.

8. The nature and extent of Plaintiff's damages.

Authority: *Com. Code § 2205(b).*

[2] Use of Instruction

This instruction should be used by a contractor seeking damages from a prospective supplier who reneges on a contract resulting from the acceptance of an irrevocable bid to supply materials.

The instruction includes several elements that may or may not be at issue. For example, if the supplier's bid was oral and was for a price of \$2,500 or more, then optional Paragraph 4 should be included if there is a question whether or not the plaintiff actually confirmed the oral bid within the 48-hour time limit. Under the statute, it appears that when the contractor "confirms," the bid then becomes irrevocable for the periods set out as alternatives in Paragraph 5 of the instruction. Those alternatives are based on the statutory requirement that a bid remain irrevocable for 10 days after the contract was awarded (but in no event for more than 90 days after the bid was given), or for so long as the bidder specifies in its bid [*Com. Code § 2205(b)*].

Although *Com. Code § 2205(b)* requires plaintiff to have been a licensed contractor at the time of the bid, and requires defendant to have actual or imputed knowledge of that fact, this will rarely be an issue. If it is not an issue, Paragraph 6 of the instruction should be omitted.

A preponderance of evidence instruction must be given with this instruction [*see Ch. 2, California Judicial Council Evidence Instructions, CACI No. 200* ("More Likely True than Not True")]. In addition, the instruction defining "proximate cause" in Ch. 3E, *Matthew Bender Contract Damages Instructions*, MB 300E.03, must also be used with this instruction. If foreseeability of damage is an issue, an instruction on this issue must also be given [*see Ch. 3, California Judicial Council Contracts Instructions, CACI No. 350* ("Introduction to Contract Damages")].

[3] Comment

This instruction is based on *Com. Code § 2205(b)*, which makes a merchant's bid irrevocable when the merchant knows the bid will be relied on by a licensed contractor to bid on a construction contract. The bid is then irrevocable for 10 days after the contractor's bid is accepted but not for more than 90 days or for the time specified in the merchant's bid. *Com. Code § 2205(b)* was a legislative reaction to reverse the holding of a federal case [*C.R. Frederick, Inc. v. Borg-Warner Corp.* (9th Cir. 1977) 552 F.2d 852, 856-857], which held that promissory estoppel could not be used against suppliers, as it is against subcontractors, because of the statute of fraud provisions in the Commercial Code.

Although *Com. Code § 2205(b)* appears to authorize an action based on the equitable doctrine of promissory estoppel, unlike the Restatement (Second) of Contracts § 90, it does not require that the contractor's reliance be reasonable. There are no decisions implying reasonable reliance under *Com. Code § 2205(b)*, so it would seem that if the supplier's

contention is that the plaintiff unreasonably relied on, for example, an obvious clerical mistake, then the supplier should raise this as a defense and be required to prove it.

Also, unlike the Restatement (Second) of Contracts § 90, *Com. Code § 2205(b)* does not require a determination that injustice can be avoided only by enforcing the plaintiff's right to recover. Since that aspect of the Restatement (Second) of Contracts § 90 was a primary underpinning of the Supreme Court's holding that no right to a jury trial exists in promissory estoppel actions [*C. & K. Engineering Contractors v. Amber Steel Co. (1978) 23 Cal.3d 1, 7-8, 151 Cal.Rptr. 323, 587 P.2d 1136*], the argument can be made that a right to a jury trial exists independent of whether there are legal issues in the case. The absence of equitable elements in *Com. Code § 2205(b)* could be used to overcome the contention that no right to a jury exists for actions for which the right did not exist at common law.

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawConsiderationPromissory EstoppelReal Property LawConstruction LawGeneral OverviewReal Property LawConstruction LawBidsReal Property LawConstruction LawContracts



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California Forms of Jury Instruction

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CHAPTER 3I Matthew Bender Construction Contract Instructions
PART A. BURDEN OF PROOF INSTRUCTIONS

2-3I California Forms of Jury Instruction MB 300I.06

MB 300I.06 Breach of Contract

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Plaintiff has the burden of proving all of the following:

- 1. Plaintiff entered into a contract with Defendant;**
- 2. Defendant breached the contract;**
- 3. Before the particular breach occurred, either:**
 - a. Plaintiff had performed whatever, if anything, Plaintiff was required to do under the contract as a prerequisite to obtaining the performance from Defendant, which performance Defendant failed to give and thereby breached the contract; or**
 - b. Plaintiff was excused from offering that prerequisite performance by Defendant's failure to do something required to do under the contract;**
- 4. The breach was the legal [proximate] cause of damages to Plaintiff; and**
- 5. The nature and extent of Plaintiff's damages.**

Authorities: *Amelco Electric v. City of Thousand Oaks* (2002) 27 Cal.4th 228, 243, 115 Cal.Rptr.2d 900, 38 P.3d 1120 ; *Reichert v. General Ins. Co.* (1968) 68 Cal.2d 822, 830, 69 Cal.Rptr. 321, 442 P.2d 377 ; *Careau & Co. v. Security*

Pacific Business Credit, Inc. (1990) 222 Cal.App.3d 1371, 1388, 272 Cal.Rptr. 387 .

[2] Use of Instruction

This general breach of contract instruction should be used in virtually all construction cases. The instruction should be modified and made specific as the circumstances dictate. For example, in most cases Paragraph 1 of the instruction can be omitted because there will be no issue concerning the existence of a contract. Similarly, Paragraph 3 should be modified if excuse from performance is not an issue, or should be omitted altogether if the plaintiff's performance is not an issue.

This instruction must be followed by one describing in some detail how defendant allegedly breached the contract. Most construction contracts are voluminous and consist of several interrelated documents, e.g., invitation to bids, agreement, plans, special provisions, standard specifications, reference specifications, permits, and even statutes, ordinances, or regulations. As a result, the court frequently will permit only the portions pertaining to the disputed issues to go to the jury. In that case, additional instructions may be necessary to explain to the jury what portions of the contract documents the jury is getting and how those documents must be interpreted.

A preponderance of evidence instruction must be given with this instruction [*see* Ch. 2, *California Judicial Council Evidence Instructions, CACI No. 200* ("More Likely True than Not True")]. In addition, the instruction defining "proximate cause" in Ch. 3E, *Matthew Bender Contract Damages Instructions, MB 300E.03*, must also be used with this instruction. If foreseeability of damage is an issue, an instruction on this issue must also be given [*see* Ch. 3, *California Judicial Council Contracts Instructions, CACI No. 350* ("Introduction to Contract Damages")].

In an unpublished opinion, the court of appeal opined that the basic breach of contract jury instruction was overly broad [*Kingston Constructors, Inc. v. Jacobs Constructors, Inc. (1st Appellate Dist., 1997) A074067 & A074701, p. 5*]. To avoid such a determination, this instruction should be combined with instructions relative to specific breaches in MB 300I.30-MB 300I.39.

For related Judicial Council instructions, see [3][b], *below*.

LexisNexis Matthew Bender Expert Practice Tip--Consider Including Statement of Nature of Breach in Instruction: This instruction is a version of the general breach of contract instruction [*see CACI No. 303*]. Since many construction contracts are voluminous and complicated, counsel may wish to include in the instruction a specific statement as to the nature of the alleged breach. If the contract is extremely complicated, counsel may also want (1) to submit a special verdict to focus the jury on the specific facts giving rise to the alleged breach, and (2) to use a visual aid to assist the jury's understanding of these elements. *By Ronald Oster and Rex Heeseman*

[3] Comment

[a] Elements of Cause of Action for Breach of Contract

The essential elements of a cause of action for breach of contract are [*Civ. Code § 3300; Amelco Electric v. City of Thousand Oaks (2002) 27 Cal.4th 228, 243, 115 Cal.Rptr.2d 900, 38 P.3d 1120 ; Reichert v. General Ins. Co. (1968) 68 Cal.2d 822, 830, 69 Cal.Rptr. 321, 442 P.2d 377 ; Careau & Co. v. Security Pacific Business Credit, Inc. (1990) 222 Cal.App.3d 1371, 1388, 272 Cal.Rptr. 387 ; Metzenbaum v. R.O.S. Associates (1986) 188 Cal.App.3d 202, 211-212, 232 Cal.Rptr. 741*]:

- The contract;
- The plaintiff's performance or excuse for nonperformance;

- The defendant's breach;
- The resulting damages to plaintiff; and
- Proximate causation of those damages.

In the case of a construction contract, full performance is not a prerequisite to a suit on the contract for damages; substantial performance is sufficient [*Lowy v. United Pacific Ins. Co.* (1967) 67 Cal.2d 87, 92-93, 60 Cal.Rptr. 225, 429 P.2d 577 ; see MB 300I.57].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 3, *California Judicial Council Contracts Instructions*]:

CACI No. 302 Contract Formation--Essential Factual Elements

CACI No. 303 Breach of Contract--Essential Factual Elements

CACI No. 307 Contract Formation--Offer

CACI No. 308 Contract Formation--Revocation of Offer

CACI No. 309 Contract Formation--Acceptance

CACI No. 311 Contract Formation--Rejection of Offer

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawBreachCauses of ActionGeneral OverviewContracts LawBreachCauses of ActionElements of ClaimsContracts LawRemediesCompensatory DamagesGeneral OverviewReal Property LawConstruction LawContracts



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California Forms of Jury Instruction

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CHAPTER 3I Matthew Bender Construction Contract Instructions
PART A. BURDEN OF PROOF INSTRUCTIONS

2-3I California Forms of Jury Instruction MB 300I.07

MB 300I.07 Recovery Against Payment Bond Surety on Private Work Project

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Plaintiff has the burden of proving all of the following:

1. That a payment bond for the project was executed by _____ [*name of contractor or subcontractor*] and Defendant and was delivered to _____ [*owner*];
2. That Plaintiff provided labor, services, equipment, or materials for the project that were bestowed on, used in, or consumed in the project;
3. That these materials were requested by _____ [*name of subcontractor*], who is a subcontractor of _____ [*name of principal*], the principal on the payment bond;
4. That Plaintiff caused [a preliminary 20-day private work notice or a written notice of its claim] to be given to the appropriate persons. I will instruct you on the service, sufficiency, and timeliness of this notice;
5. That Plaintiff has not been paid for all the labor, services, equipment, or materials [he/she/it] it provided; and
6. The nature and extent of Plaintiff's damages.

Authorities: *Civ. Code §§ 3096, 3097, 3226, 3227, 3235-3237, 3239-3240, 3242, 3267.*

[2] Use of Instruction

2-3I California Forms of Jury Instruction MB 300I.07

This instruction should be used when a party seeks to recover against the surety on a payment bond on a private work project. Since this is a legal action by a third-party beneficiary on the contract, there is a right to a jury [see *Civ. Code* § 1559; *Code Civ. Proc.* § 592]. A preponderance of evidence instruction must be given with this instruction [see Ch. 2, *California Judicial Council Evidence Instructions, CACI No. 200* ("More Likely True than Not True")].

The payment bond should be carefully scrutinized. It is a contract that can have a variety of terms creating the need for additional instructions [see *Sanders v. American Casualty Co.* (1969) 269 Cal.App.2d 306, 310, 74 Cal.Rptr. 634].

This instruction can be used in conjunction with actions to foreclose a mechanics' lien or a stop notice (private work) when those causes of action are also being pursued.

Paragraph 3 should be modified to reflect the identity of the party who requested the work [*Civ. Code* § 3267].

In Paragraph 4, choose the first alternative if the plaintiff gave a preliminary 20-day notice (private work) as specified by *Civ. Code* § 3097. If this alternative is appropriate, the instruction in MB 300I.60 should also be used. The second alternative is for use when the plaintiff did not give a preliminary 20-day notice, but instead gave the written notice to the surety and bond principal after completing the work of improvement as specified by *Civ. Code* § 3242(b). If this alternative is chosen, the instruction in MB 300I.61 should also be used.

This instruction does not cover liability of the owner when there is a payment bond [*Civ. Code* §§ 3235, 3236]. It also does not cover the situation when two projects have the same owner and use the same contractor, but only one project is bonded [see *Phillips Constr. Co. v. Argonaut Ins. Co.* (1978) 77 Cal.App.3d 575, 580, 143 Cal.Rptr. 671].

LexisNexis Matthew Bender Expert Practice Tip--Keep Your Closing Basic: Most jurors will be unfamiliar with terms such as "payment bond" and "principal." Thus, make your closing as direct and basic as possible. *By Rex Heeseman*

LexisNexis Matthew Bender Expert Practice Tip--Be Prepared to Modify Instruction: This instruction may have to be modified to take into account the specific terms of the payment bond that impose additional conditions and limitations. *By Ronald Oster*

[3] Comment

[a] Purpose of Payment Bonds

The purpose of the payment bond [*Civ. Code* § 3096] is to provide additional security for the lien claimant. It is not mandatory for an owner to require a payment bond from the contractor on a private project [*R. D. Reeder Lathing Co. v. Allen* (1967) 66 Cal.2d 373, 380, 57 Cal.Rptr. 841, 425 P.2d 785 ; see *Civ. Code* § 3110.5 (security requirements on contract for improvement when contract's value is more than \$5,000,000, if owner has fee simple absolute interest in property, or more than \$1,000,000, if owner has less than fee simple absolute interest; these requirements are subject to many exceptions (e.g., they do not apply to contracts for improvement of single family residences or when contracting owner is a publicly traded company), and thus *Civ. Code* § 3110.5 should be carefully reviewed to determine its applicability)].

[b] Statutory Bonds Versus Common Law Bonds

When the owner records the bond and it is in an amount not less than 50 percent of the contract price, the owner's liability is limited to the contract price [*Civ. Code* §§ 3235, 3236]. An unrecorded payment bond, or common law bond, leaves the owner's property liable to mechanics' lien claimants for the full reasonable value of the labor, services, equipment, or materials provided, or the price agreed between the claimant and the person the claimant contracted with, whichever is less, even if those claims exceed the original contract price. However, failure to record the bond does not

relieve the surety of its obligations under the bond [*Culbertson v. Cizek* (1964) 225 Cal.App.2d 451, 467, 37 Cal.Rptr. 548 ; see Civ. Code § 3123].

[c] Payment Bond Beneficiaries

As with mechanics' liens, the plaintiff must have provided labor, services, equipment, or materials that were bestowed on, used in, or consumed in the project [Civ. Code § 3226]. However, those who may pursue an action on a payment bond (private work) are not identical to those who may foreclose a mechanics' lien. Beneficiaries are limited to those who performed work for the principal on the payment bond or one of his or her subcontractors [Civ. Code § 3267].

[d] Defenses

To enforce a claim against a payment bond given in connection with a private work, the claimant must give the same preliminary 20-day notice (private work) that is required as a prerequisite to establishing a mechanics' lien or stop notice [Civ. Code § 3242(a); see Civ. Code § 3097; see also MB 300I.60]. If preliminary notice is not given, a claimant may nonetheless enforce a claim against the bond by giving written notice to the surety and the bond principal, within 15 days after a notice of completion has been recorded. If a notice of completion is not recorded, the time for giving written notice to the surety is extended to 75 days after completing the work of improvement [Civ. Code § 3242(b); see MB 300I.61].

The action on the statutory payment bond must be commenced within the time specified on the bond, which cannot be less than six months [Civ. Code § 3239; *Progress Glass Co. v. American Ins. Co.* (1980) 100 Cal.App.3d 720, 725 n.5, 161 Cal.Rptr. 243 ; see MB 300I.73 (timeliness of action on bond as defense)]. However, if a surety on a payment bond records the bond in the office of the county recorder of the county in which the property is situated before the work of improvement is completed, then any action against the surety or sureties must be commenced no later than six months after the completion of the work of improvement [Civ. Code § 3240].

Other defenses of the surety include prior payment of the legitimate claims of others [see MB 300I.74], defenses of the principal other than personal defenses [Civ. Code § 2810; *Post Bros. Constr. Co. v. Yoder* (1977) 20 Cal.3d 1, 8, 141 Cal.Rptr. 28, 569 P.2d 133], and exoneration [Civ. Code §§ 2819-2825, 2839, 2845; see MB 300I.72].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawTypes of ContractsGuaranty ContractsReal Property LawConstruction LawContractsReal Property LawConstruction LawContractors & SubcontractorsReal Property LawNonmortgage LiensMechanics' Liens



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California Forms of Jury Instruction

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CHAPTER 3I Matthew Bender Construction Contract Instructions
PART A. BURDEN OF PROOF INSTRUCTIONS

2-3I California Forms of Jury Instruction MB 300I.08

MB 300I.08 Recovery Against Payment Bond Surety on Public Works Contract

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Plaintiff has the burden of proving all of the following:

1. That a payment bond for the project was executed by _____ [contractor or subcontractor] and _____ [surety] and was delivered to _____ [public entity that awarded contract];

2. That Plaintiff provided labor, services, equipment, materials, provisions, or supplies:

a. For the project;

b. Which were bestowed on, used in, or consumed in the project; and

c. Which were requested by _____ [name of principal or subcontractor], _____ [the principal or one of the subcontractors of the principal] on the payment bond;

3. That Plaintiff caused [a preliminary 20-day public work notice or a written notice of its claim] to be given to the appropriate persons. I will instruct you on the service, sufficiency, and timeliness of this notice;

4. That Plaintiff has not been paid for all of the labor, services, equipment, or materials that [he/she/it] provided; and

5. The nature and extent of the Plaintiff's damages.

Authorities: *Civ. Code* §§ 3098, 3181, 3247-3252, 3267; *Gov. Code* §§ 66499-66499.10; *Pub. Contract Code* §§ 10221-10223, 20457; *Sts. & Hy. Code* § 30154; *American Buildings Co. v. Bay Commercial Construction, Inc.* (2002) 99 Cal.App.4th 1193, 1197, 121 Cal.Rptr.2d 539; *Union Asphalt, Inc. v. Planet Ins. Co.* (1994) 21 Cal.App.4th 1762, 1765-1767, 27 Cal.Rptr.2d 371; *California Elec. Supply Co. v. United Pac. Life Ins. Co.* (1964) 227 Cal.App.2d 138, 149, 38 Cal.Rptr. 479; *Western Concrete Structures Co. v. James I. Barnes Constr. Co.* (1962) 206 Cal.App.2d 1, 10, 23 Cal.Rptr. 506.

[2] Use of Instruction

This instruction should be used when the plaintiff seeks to recover against the surety on a payment bond on a public works project. A preponderance of evidence instruction must be given with this instruction [see Ch. 2, *California Judicial Council Evidence Instructions*, CACI No. 200 ("More Likely True than Not True")].

In Paragraph 3, choose the first alternative if the plaintiff gave a preliminary 20-day notice (public work) as specified by *Civ. Code* § 3098. If this alternative is appropriate, the instruction in MB 300I.68 should also be used. The second alternative is for use when the plaintiff did not give a preliminary 20-day notice, but instead gave the written notice to the surety and bond principal after completing the work of improvement as specified by *Civ. Code* § 3252(b). If this alternative is chosen, the instruction in MB 300I.71 should also be used.

An additional instruction should be included if there is a dispute on the timing of the action. This instruction presumes that the action was commenced within six months after the period in which stop notices must be filed under *Civ. Code* § 3184 [*Civ. Code* § 3249; *Div. Labor Standards Enforcement v. Seaboard Surety Co.* (1996) 50 Cal.App.4th 1501, 1511, 58 Cal.Rptr.2d 532 (holding that *Civ. Code* § 3249 statute of limitations applies to action for payment of prevailing wages against surety on payment bond); *Fidelity Sound Systems, Inc. v. American Bonding Co.* (1978) 85 Cal.App.3d Supp. 13, 17-19, 149 Cal.Rptr. 674].

LexisNexis Matthew Bender Expert Practice Tip--Keep Your Closing Basic: Most jurors will be unfamiliar with terms such as "payment bond" and "principal." Thus, make your closing as direct and basic as possible. *By Rex Heeseman*

LexisNexis Matthew Bender Expert Practice Tip--Be Prepared to Modify Instruction: This instruction may have to be modified to take into account the specific terms of the payment bond that impose additional conditions and limitations. *By Ronald Oster*

[3] Comment

[a] When Payment Bond Must Be Provided

The general requirements for payment bonds on public works projects are embodied in *Civ. Code* §§ 3247-3252, which among other things, require that every contractor who executes a contract directly with a public agency for a public works project in excess of \$25,000 must provide a payment bond [*Civ. Code* § 3247]. Pursuant to a different statute, a contractor entering into a contract in excess of \$25,000 with a "state entity" must provide a payment bond [*Pub. Contract Code* § 7103(a)(1)]. In this context, "state entity" means every state office department, division, bureau, board, or commission. The term does not include the Legislature, the courts, any agency in the judicial branch, or the University of California, all of which are subject to the provisions of *Civ. Code* § 3247 [*Pub. Contract Code* § 7103(d)].

A payment bond is specifically required for all of the following:

- The construction of toll bridges and highway crossings [*Sts. & Hy. Code* § 30154];

- Contracts for construction by state agencies [*Pub. Contract Code* §§ 10221-10223];
- Improvement Act of 1911 street work [*Pub. Contract Code* § 20457]; and
- Public improvements projects for subdivisions [*Gov. Code* §§ 66499-66499.10].

In addition, charter cities and counties may have provisions in charters, ordinances, or resolutions of the awarding authority that require a payment bond.

[b] Execution and Filing of Payment Bond

The bond must be executed by an admitted surety insurer [*Code Civ. Proc.* § 995.311] and must be filed with the public entity [*Civ. Code* § 3247]. If it is not properly filed, the prime contractor cannot be paid, and the subcontractors and materialmen must pursue their stop notice remedies [*Civ. Code* § 3251].

[c] Primary and Direct Obligation of Surety

The bond creates a primary and direct obligation of the surety, not affected by performance of the prime contract [*Western Concrete Structures Co. v. James I. Barnes Constr. Co.* (1962) 206 Cal.App.2d 1, 10, 23 Cal.Rptr. 506], to compensate those who furnished labor, services, equipment, or materials [*California Elec. Supply Co. v. United Pac. Life Ins. Co.* (1964) 227 Cal.App.2d 138, 149, 38 Cal.Rptr. 479]. The terms of the prime contract and whether the contractor breached it are irrelevant [*Cooley v. Freeman* (1928) 204 Cal. 59, 61-62, 266 P. 545]. A sub-subcontractor has no personal claim against the prime contractor if he or she is not paid; he or she must proceed against the bond [*Powers Regulator Co. v. Seaboard Surety Co.* (1962) 204 Cal.App.2d 338, 346, 22 Cal.Rptr. 373].

[d] Requirement of Plaintiff's Labor, Services, Equipment, or Materials

As with mechanics' liens, the plaintiff's labor, services, equipment, or materials must have been bestowed on, used in, or consumed in the project [*Civ. Code* §§ 3110, 3111, 3112, 3181, 3248(b); see *A. L. Young Machinery Co. v. Cupps* (1931) 213 Cal. 210, 213-217, 2 P.2d 321 ; *Consolidated Elec. Distributors, Inc. v. Kirkham, Chaon & Kirkham, Inc.* (1971) 18 Cal.App.3d 54, 56-60, 95 Cal.Rptr. 673]. Tires for trucks of truckers on a project do not qualify as labor, services, equipment, materials, provisions, or supplies, bestowed on, used in, or consumed in the project [*George F. Kennedy, Inc. v. Miles & Sons Constr.* (1970) 5 Cal.App.3d 516, 521, 85 Cal.Rptr. 298]. Similarly, except for the original contractor, the same class of claimants who would be entitled to a mechanics' lien, were it not a public project, are protected by the bond [*Civ. Code* § 3248; see *Civ. Code* §§ 3110, 3112, 3181; *Contractors Labor Pool, Inc. v. Westway Contractors, Inc.* (1997) 53 Cal.App.4th 152, 163, 61 Cal.Rptr.2d 715 (corporation furnishing laborers was claimant protected by Mechanics' Lien Law and entitled to recover on payment bond)].

[e] Application to Vendors of Materialmen

It is not clear whether *Civ. Code* § 3181, by including persons "furnishing provisions, provender, or other supplies," in addition to the customary mechanics' lien claimants, was meant to expand the class of potential bond claimants to embrace those who are vendors of materials to materialmen. "Materialmen's materialmen" have long been considered outside the protection of mechanics' lien and stop notice statutes [*Theisen v. County of Los Angeles* (1960) 54 Cal.2d 170, 177-178, 5 Cal.Rptr. 161, 352 P.2d 529 (holding, however, that vendor of materials that were custom-made to meet specifications of prime contract was subcontractor, and that its supplier of custom-made doors was entitled to stop notice remedies)].

The reference to furnishing provisions, provender, or other supplies in *Civ. Code* § 3181 probably adds nothing to the definition of "materialman" [see *Civ. Code* § 3090]; and, in any event, the class of bond claimants is clearly limited by

Civ. Code § 3267, which provides that nothing in the mechanics' lien law gives any person any right of action on an original contractor's work payment bond unless the work forming the basis for the claim was performed by the person for the principal on the bond, or for one of its subcontractors, pursuant to the contract between the original contractor and the owner [see California Real Estate Law & Practice, Ch. 450, *Introduction to the Mechanics' Lien Law* (Matthew Bender), for discussion of who may be a mechanic's lien, stop notice, or payment bond claimant]. However, as long as the claimant performed work for the principal and the other basic requirements for filing a claim against a payment bond are satisfied, it makes no difference how far down the ladder a potential claimant finds him or herself. For example, in the face of an argument that claims should be limited to first-tier material suppliers and second-tier subcontractors, a court of appeal held that such an interpretation was in conflict with the mechanics' lien statutes, which give lien rights to all subcontractors, and that there is no basis in the statutes themselves, or in the legislative history, to deny third-tier subcontractors the right to file a claim against a payment bond [*Union Asphalt, Inc. v. Planet Ins. Co.* (1994) 21 Cal.App.4th 1762, 1765-1767, 27 Cal.Rptr.2d 371].

[f] Attorney's Fees

Attorney's fees can be recovered by persons who successfully bring an action to recover on the bond [*Civ. Code* § 3248(b)].

[g] Enforcing Claim on Public Work Payment Bond; Required Notice

To enforce a claim on a public work payment bond, a claimant must have given both the surety and bond principal a prescribed 20-day public works preliminary bond notice [*Civ. Code* § 3252(a); see *Civ. Code* § 3098; *American Buildings Co. v. Bay Commercial Construction, Inc.* (2002) 99 Cal.App.4th 1193, 1197, 121 Cal.Rptr.2d 539 ; see also MB 300I.68]. If the preliminary 20-day notice is not given, a claimant may nonetheless enforce a claim by giving written notice to the surety and bond principal within 15 days after a notice of completion has been recorded. If no notice of completion is recorded, the time to give written notice to the surety and bond principal is extended to 75 days after the work of improvement is completed [*Civ. Code* § 3252(b); see *Civ. Code* § 3227; *American Buildings Co. v. Bay Commercial Construction, Inc.* (2002) 99 Cal.App.4th 1193, 1200, 1202, 121 Cal.Rptr.2d 539 ; see also MB 300I.71]. The notice must be sufficient; however, the dollar amount does not have to be identical to that claimed in subsequent litigation [*Blair Excavators, Inc. v. Paschen Contractors, Inc.* (1992) 9 Cal.App.4th 1815, 1817, 12 Cal.Rptr.2d 420].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawTypes of ContractsGuaranty ContractsGovernmentsPublic ImprovementsGeneral OverviewPublic Contracts LawPerformanceSubcontracts & SubcontractorsPublic Contracts LawTerminationsPerformance BondsPublic Contracts LawTypes of ContractsConstruction Contracts



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CHAPTER 3I Matthew Bender Construction Contract Instructions
PART A. BURDEN OF PROOF INSTRUCTIONS

2-3I California Forms of Jury Instruction MB 300I.09

MB 300I.09 Recovery Against Offsite Improvement Payment Bond Surety or Other Security for Public Improvements in Subdivision Development

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] PROPOSED INSTR. NO. _____

Plaintiff has the burden of proving all of the following four facts:

1. A payment bond for the project was executed by _____ [name of developer] and _____ [name of surety] and was delivered to _____ [name of public entity];

2. Plaintiff provided labor, services, equipment, or materials for the project to _____ [name of prime contractor on project or name of its subcontractor], _____ [the prime contractor or a subcontractor of the prime contractor];

3. Plaintiff has not been paid for all of the labor, services, equipment, or materials that [he/she/it] provided; and

4. The nature and extent of Plaintiff's damages.

Authorities: Gov. Code § 66499 et seq.; *Sukut-Coulson, Inc. v. Allied Canon Co.* (1978) 85 Cal.App.3d 648, 653-655, 149 Cal.Rptr. 711 .

[2] Use of Instruction

This instruction should be used when a party seeks to recover against the surety on an offsite improvement bond. However, it can be adapted for suits against the holders of other forms of security for offsite improvements. A preponderance of evidence instruction must be given with this instruction [see Ch. 2, *California Judicial Council*

Evidence Instructions, CACI No. 200 ("More Likely True than Not True")].

This instruction does not cover the other claimants under the mechanics' lien law who might be included by the language of the bond, for example, a trust fund. It also does not cover any other additional rights or remedies that may be provided by the language of the bond.

If the plaintiff is the prime contractor, the phrase in brackets in Paragraph 2 should be omitted.

LexisNexis Matthew Bender Expert Practice Tip--Keep Your Closing Basic: As with the instructions in MB 300I.07 and MB 300I.08, this instruction deals with matters beyond most jurors' experiences. Thus, keep your closing as direct and basic as possible. *By Rex Heeseman*

LexisNexis Matthew Bender Expert Practice Tip--Be Prepared to Modify Instruction: This instruction may have to be modified to take into account the specific terms of the payment bond that impose additional conditions and limitations. *By Ronald Oster*

[3] Comment

Under the Subdivision Map Act [*Gov. Code § 66410 et seq.*], developers are sometimes required to construct public improvements such as streets, sewers, storm drains, curbs, and gutters. Since the mechanics' lien laws generally do not apply to public improvements, and since the lack of government funds means no public work stop notice remedy is available to the contractors and materialmen in these situations, the developer is required to provide other security [*Sukut-Coulson, Inc. v. Allied Canon Co. (1978) 85 Cal.App.3d 648, 653-654, 149 Cal.Rptr. 711*]. The various types of security are enumerated in *Gov. Code § 66499*. Those most often used are corporate surety bonds, cash deposits, and instruments of credit, and the "contractor, his subcontractors, and ... persons furnishing labor, materials or equipment to them for the improvement ..." who are not paid can recover against that security [*Gov. Code § 66499.10*]. The liability of the security is a primary and direct obligation, without reference either to the liability of the developer or prime contractor to the claimant, or to the existence of other remedies for the claimant [*Sukut-Coulson, Inc. v. Allied Canon Co. (1978) 85 Cal.App.3d 648, 654, 149 Cal.Rptr. 711*].

When a corporate surety bond is used, it must comply with *Gov. Code § 66499.2*, even though that section extends the coverage of the bond beyond the scope of *Gov. Code § 66499.10* and to all persons or entities covered by the mechanics' lien laws [*Civ. Code §§ 3082-3267*]. Furthermore, if the particular bond form grants additional rights or remedies to the claimant (e.g., attorney fees), they may also be enforced [*Sukut-Coulson, Inc. v. Allied Canon Co. (1978) 85 Cal.App.3d 648, 655, 149 Cal.Rptr. 711*]. Unless a corporate surety bond provided as security specifically provides for an award of attorney fees, such an award can only be made when the public entity sues the security on behalf of the contractors and materialmen, not when the claimants themselves sue directly [*Gov. Code § 66499.4*].

The Subdivision Map Act contains no express restrictions on the surety comparable to *Civ. Code § 3239*, pertaining to private work payment bonds, which prevent attempts to shorten the four-year statute of limitations [see *Code Civ. Proc. § 337*]. Nor does it contain the statutory limitations on the defense of exoneration that govern other statutorily mandated payment bonds [see *Civ. Code §§ 3225, 3226, 3263*]. For a full discussion of exoneration and an exoneration instruction, see *MB 300I.72*.

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawTypes of ContractsGuaranty ContractsGovernmentsPublic ImprovementsGeneral OverviewGovernmentsPublic ImprovementsBridges & RoadsReal Property LawConstruction LawContractsReal Property LawSubdivisionsGeneral Overview



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California Forms of Jury Instruction

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CHAPTER 3I Matthew Bender Construction Contract Instructions
PART A. BURDEN OF PROOF INSTRUCTIONS

2-3I California Forms of Jury Instruction MB 300I.10

MB 300I.10 Action by Owner Against Contractor's Performance Bond Surety

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Plaintiff has the burden of proving all of the following:

- 1. That Plaintiff entered into a contract with _____ [contractor] for the project.**
- 2. That Defendant executed a surety bond that provided that _____ [quote appropriate provisions from bond].**
- 3. That _____ [contractor] failed to _____ [describe contractor's default] as required by the contract.**

[OPTIONAL (See Use of Instruction)]

- 4. That Plaintiff declared _____ [contractor] to be in default under the contract.**

[CONTINUE INSTRUCTION]

- 5. That default of _____ [contractor] caused Plaintiff damages.**
- 6. The nature and extent of Plaintiff's damages.**

Authorities: *Civ. Code* §§ 2799, 2806-2809, 2837; *City of Sacramento v. Trans Pacific Industries, Inc.* (1979) 98 Cal.App.3d 389, 402-403, 159 Cal.Rptr. 514 ; *Burnett & Doty Development Co. v. Phillips* (1978) 84 Cal.App.3d 384, 389, 148 Cal.Rptr. 569 ; *Culbertson v. Cizek* (1964) 225 Cal.App.2d 451, 467, 37 Cal.Rptr. 548 ; *Continental Casualty Co. v. Hartford Acci. & Indem. Co.* (1966) 243 Cal.App.2d 565, 568, 52 Cal.Rptr. 533 ; *Bowman v. Maryland Casualty Co.* (1928) 88 Cal.App. 481, 487-495, 263 P. 826 ; *Stephens v. Daugherty* (1917) 33 Cal.App. 733, 735, 166 P. 375 ; *Callan v. Empire State Surety Co.* (1912) 20 Cal.App. 483, 486, 129 P. 978 .

[2] Use of Instruction

This instruction should be used when the owner (or the lender) brings an action against the contractor's performance bond surety. Paragraphs 2 and 3 should quote or paraphrase from the bond or contract the appropriate language that covers the facts of the case. Paragraph 4 need only be given when notice is required to be given as discussed in [3][c], *below*.

A preponderance of evidence instruction must be given with this instruction [see Ch. 2, *California Judicial Council Evidence Instructions*, CACI No. 200 ("More Likely True than Not True")]. In addition, the instruction defining "proximate cause" in Ch. 3E, *Matthew Bender Contract Damages Instructions*, MB 300E.03, must also be used with this instruction.

LexisNexis Matthew Bender Expert Practice Tip--Be Prepared to Modify Instruction: This instruction may have to be modified to take into account the specific terms of the performance bond that impose additional conditions and limitations. And, the jury needs to understand what is a "performance bond." *By Ronald Oster and Rex Heeseman*

[3] Comment

[a] Governing Law; Form of Performance Bond

Performance bonds are governed by the general laws of suretyship [*Civ. Code* § 2787 *et seq.*]. Private work performance bonds can vary widely, depending on the form of the bond executed [*Code Civ. Proc.* § 1933] by the principal (the contractor) and the obligor (the surety) for the benefit of the obligee (the owner and sometimes the lender). The form of public works performance bonds is generally governed by the statutes, city charters, and ordinances that mandate their use [see *Pub. Contract Code* §§ 10221, 20129, 20426, 20473, 20483, 20501, 20537, 20569, 20589, 20603]. Note that most public works statutes require that the bond be executed by an admitted surety insurer. In these instances, the wording of item 2 of the instruction should be changed accordingly.

[b] Contract Between Principal and Obligor; Conditions of Surety's Obligation

The purpose of a performance bond is to assure (at least to some extent) the principal's performance of its contract with the obligee [see *Stephens v. Daugherty* (1917) 33 Cal.App. 733, 735, 166 P. 375]. The bond has to be construed in light of the provisions of that contract [*City of Sacramento v. Trans Pacific Industries, Inc.* (1979) 98 Cal.App.3d 389, 402-403, 159 Cal.Rptr. 514 ; *Callan v. Empire State Surety Co.* (1912) 20 Cal.App. 483, 486, 129 P. 978]. One typical performance bond is American Institute of Architects, Performance Bond, AIA Document A311. It conditions the obligation of the surety on the prompt and faithful performance of the contract. This normally includes all of the material requirements of the contract [*Culbertson v. Cizek* (1964) 225 Cal.App.2d 451, 467, 37 Cal.Rptr. 548], including warranty work. Other bonds may be more limited: some only condition the surety's obligation on faithful performance of the work contracted to be performed [*Crane Co. v. Borwick Trenching Corp., Ltd.* (1934) 138 Cal.App. 319, 321-322, 32 P.2d 387]; some merely provide an assurance of indemnity by the principal [*Ramey v. Hopkins* (1934) 138 Cal.App. 685, 687, 33 P.2d 443]. However, if the contract is incorporated by reference into the bond, all provisions of the contract become provisions of the bond for which the surety is liable, including, but not limited to, completion deadlines [*Cates Construction, Inc. v. Talbot Partners* (1999) 21 Cal.4th 28, 40-41, 86 Cal.Rptr.2d 855,

980 P.2d 407 ; *Continental Casualty Co. v. Hartford Acc. & Indem. Co.* (1966) 243 Cal.App.2d 565, 568, 52 Cal.Rptr. 533].

[c] Liability of Surety

Generally, the surety's liability may not exceed that of the principal [Civ. Code § 2809]. However, since these are common law bonds, the surety's liability can be less, if the language of the bond so provides [*Rexroth & Rexroth, Inc. v. General Cas. Co.* (1966) 242 Cal.App.2d 363, 368-370, 51 Cal.Rptr. 505].

The surety's liability generally occurs on the default of the principal and without any demand or notice by the owner [Civ. Code § 2807]. However, the surety may be entitled to notice, if it was unable to learn of the default in the exercise of due diligence and the owner knew of the default [Civ. Code § 2808], or if the bond requires notice [see *Verdugo Highlands, Inc. v. Security Ins. Co.* (1966) 240 Cal.App.2d 527, 532-533, 49 Cal.Rptr. 736]. The contractor's default is usually a material breach of the contract. Such a default can include simply failing to prevent subcontractors or materialmen from recording liens, whether or not the owner actually paid the lien claimants [*Ceremony v. Drummond* (1918) 37 Cal.App. 446, 447-448, 174 P. 696].

A surety may be held liable under contract theory only. The California Supreme Court has held that a construction performance bond is not an insurance policy and tort recovery for breach of the implied covenant of good faith and fair dealing implied in the bond is not appropriate [*Cates Construction Inc. v. Talbot Partners* (1999) 21 Cal.4th 28, 60, 86 Cal.Rptr.2d 855, 980 P.2d 407].

LexisNexis Matthew Bender Expert Practice Tip--Performance Bond Is Not Insurance Policy: As noted in the above commentary, a performance bond is not deemed to be an insurance policy so that extra-contractual recoveries are not available. *By Ronald Oster*

[d] Damages

Damages are generally the same as would be recoverable against the principal for its breach [Civ. Code § 2808; *Bowman v. Maryland Casualty Co.* (1928) 88 Cal.App. 481, 487-495, 263 P. 826], including consequential damages [*Cates Construction, Inc. v. Talbot Partners* (1999) 21 Cal.4th 28, 40, 86 Cal.Rptr.2d 855, 980 P.2d 407 ; *Burnett & Doty Development Co. v. Phillips* (1978) 84 Cal.App.3d 384, 389, 148 Cal.Rptr. 569 ; see Part E and Ch. 3E, *Matthew Bender Contract Damages Instructions*].

When a developer who is contractually responsible for constructing public improvements fails to perform, the public entity's damages are measured by the value of its unfulfilled right, that is, the cost of bringing the subdivision into compliance by installing the bargained-for improvements. These damages are recoverable even if the public entity has not actually completed the improvements [*City of Merced v. American Motorists Ins. Co.* (2005) 126 Cal.App.4th 1316, 1323, 24 Cal.Rptr.3d 788].

[e] Defenses

Defenses or limitations on recovery include the offset of any balance due to the contractor under the contract against the plaintiff's claim against the surety [see MB 300I.75], and exoneration [see MB 300I.72]. Failure of a condition precedent can also be a defense [Civ. Code §§ 2806, 1434-1442]. Finally, if the contractor has a defense so that its default was excused [Civ. Code §§ 1511-1515], this defense inures to the surety's benefit [Civ. Code § 2809; *Powers Regulator Co. v. Seaboard Surety Co.* (1962) 204 Cal.App.2d 338, 345, 22 Cal.Rptr. 373].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawContract Conditions & ProvisionsConditions PrecedentContracts LawTypes of ContractsGuaranty

ContractsReal Property LawConstruction LawContractsReal Property LawConstruction LawContractors &
Subcontractors



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California Forms of Jury Instruction

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CHAPTER 3I Matthew Bender Construction Contract Instructions
PART A. BURDEN OF PROOF INSTRUCTIONS

2-3I California Forms of Jury Instruction MB 300I.11

MB 300I.11 Action by Subcontractor or Materialman Against Prime Contractor's Performance Bond Surety as Beneficiary of That Bond

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Plaintiff has the burden of proving all of the following:

1. That a performance bond for the project was executed by _____ [*contractor*] and _____ [*surety*] and was delivered to _____ [*owner*];
2. That the bond provided _____ [*appropriate language from bond*];
3. That Plaintiff provided labor, services, equipment, or materials for the project to the contractor;
4. That Plaintiff has not been paid for all of the labor, services, equipment, or materials that [he/she/it] provided; and
5. The nature and extent of Plaintiff's damages.

Authorities: *Ryan v. Shannahan* (1930) 209 Cal. 98, 102-104, 285 P. 1045 ; *C.O. Sparks, Inc. v. Pac. Coast Paving Co.* (1958) 159 Cal.App.2d 513, 516-518, 324 P.2d 293 ; *Crane Co. v. Borwick Trenching Corp. Ltd.* (1934) 138 Cal.App. 319, 322-324, 32 P.2d 387 ; *Pacific States Co. v. U.S. Fidelity & G. Co.* (1930) 109 Cal.App. 691, 694-695, 293 P. 812 .

[2] Use of Instruction

This instruction should be used when a subcontractor or materialman seeks to recover from the prime contractor's performance bond surety on the theory that the subcontractor or materialman is a beneficiary of that bond. A preponderance of evidence instruction must be given with this instruction [see Ch. 2, *California Judicial Council Evidence Instructions*, CACI No. 200 ("More Likely True than Not True")].

Paragraph 2 should quote or paraphrase the language from the bond or contract that covers the facts of the case.

Additional instructions will be required if there are issues concerning construction of the language of the bond or the contract or both together. This is especially so if there is an apparent conflict between the documents, or if the liability on the bond requires the court to imply some language.

This instruction can be used by a sub-subcontractor or materialman against a subcontractor's performance bond. However, for a complaint by an owner, prime contractor, or surety claimant, Paragraphs 3 and 4 will have to be modified to set forth their particular relationships to the bond in question.

LexisNexis Matthew Bender Expert Practice Tip--Review Both Bond and Case Law: The specific terms of the performance bond, and the cases discussed below, will have to be carefully reviewed to determine whether this remedy is even available to a subcontractor. Presumably, though, this legal topic will have already been addressed by the judge. *By Ronald Oster and Rex Heeseman*

[3] Comment

[a] Interpretation of Bond: Who Benefits?

A performance bond is usually required by the obligee (i.e., the one protected by the bond, usually the owner) to protect its own interests, but sometimes that bond is construed as a payment bond for the benefit of unpaid subcontractors and materialmen [*Ryan v. Shannahan* (1930) 209 Cal. 98, 102-104, 285 P. 1045]. The construction of the bond depends on the intention of the parties as expressed in the language of the bond and the related contract [*French v. Farmer* (1918) 178 Cal. 218, 221-222, 172 P. 1102 ; *Crane Co. v. Borwick Trenching Corp., Ltd.* (1934) 138 Cal.App. 319, 322-324, 32 P.2d 387].

To prevent courts from construing the bond as a payment bond, the surety may insert language that specifically limits any rights or causes of action on the bond to the obligee [*Hopper Bros. Quarries v. Merchants Mutual Bond. Co.* (8th Cir. 1958) 255 F.2d 147, 148 ; *C.O. Sparks, Inc. v. Pac. Coast Paving Co.* (1958) 159 Cal.App.2d 513, 518, 324 P.2d 293 ; *Luke v. Southern Surety Co.* (1930) 104 Cal.App. 727, 729, 286 P. 490].

If both a performance and a payment bond were provided, then the courts have construed the performance bond as being solely for the benefit of the named obligee, with the subcontractors and materialmen being allowed only their remedy on the payment bond [*Summerbell v. Weller* (1930) 110 Cal.App. 406, 407-408, 294 P. 414]. However, when the payment bond was provided by a different principal than the one that provided the performance bond, some courts have construed that performance bond as an additional payment bond [*Pacific States Co. v. U.S. Fidelity & G. Co.* (1930) 109 Cal.App. 691, 694-695, 293 P. 812 ; *contra, Glens Falls Indemnity Co. v. American Seating Co.* (9th Cir. 1957) 248 F.2d 846, 850].

[b] Interpretation of Bond: Who Is Liable?

The surety has been held liable when the language of the bond released the obligation of the surety only "if the Principal shall pay and fully satisfy all obligations for material, equipment, labor, taxes, insurance, and all other things required ..." [*Gordy v. United Pacific Ins. Group* (1966) 243 Cal.App.2d 445, 447, 52 Cal.Rptr. 438]. As a result of the bond being construed in light of the contract provision that it assures performance of [*City of Sacramento v. Trans Pacific Industries, Inc.* (1979) 98 Cal.App.3d 389, 402-403, 159 Cal.Rptr. 514 ; *Callan v. Empire State Surety Co.* (1912) 20

Cal.App. 483, 486, 129 P. 978], the surety also has been held liable when that contract expressly required payment of subcontractors and material suppliers [*Continental Casualty Co. v. Hartford Acc. & Indem. Co. (1966) 243 Cal.App.2d 565, 568, 52 Cal.Rptr. 533*], and even when it required this payment only by implication [*C. O. Sparks, Inc. v. Pac. Coast Paving Co. (1958) 159 Cal.App.2d 513, 517-518, 324 P.2d 293*].

Liability has been found on a subcontractor's performance bond given to the prime contractor [*Pacific States Co. v. U.S. Fidelity & G. Co. (1930) 109 Cal.App. 691, 692-695, 293 P. 812*]. Liability has extended to sub-subcontractors [*C.O. Sparks, Inc. v. Pac. Coast Paving Co. (1958) 159 Cal.App.2d 513, 516-518, 324 P.2d 293*], to the owner who has paid off lien claimants [*Callan v. Empire State Surety Co. (1912) 20 Cal.App. 483, 485, 129 P. 978*], and to the prime contractor's payment bond surety that had paid off the subcontractor's materialmen [*Continental Casualty Co. v. Hartford Acc. & Indem. Co. (1966) 243 Cal.App.2d 565, 566-567, 52 Cal.Rptr. 533*].

[c] Exoneration as Defense

Exoneration is a defense [*Civ. Code §§ 2819-2825, 2839, 2845*]. For an instruction and a comment on this defense and its limitations, see *MB 300I.72*.

Legal Topics:

For related research and practice materials, see the following legal topics:

Public Contracts LawBids & FormationSubcontracts & SubcontractorsGeneral OverviewPublic Contracts LawPerformanceSubcontracts & SubcontractorsPublic Contracts LawTerminationsPerformance Bonds



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California Forms of Jury Instruction

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CHAPTER 3I Matthew Bender Construction Contract Instructions
PART A. BURDEN OF PROOF INSTRUCTIONS

2-3I California Forms of Jury Instruction MB 300I.12

MB 300I.12 Recovery Against Contractor's State License Bond Surety

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Plaintiff has the burden of proving all of the following:

[EITHER (See Use of Instruction)]

1. That a contractor's bond was executed by _____ [surety] and filed with the registrar of contractors in connection with the issuance of the contractor's license to _____ [contractor].

[OR]

1. That _____ [contractor] deposited cash or securities with Defendant Registrar of Contracts in connection with the issuance of the contractor's license to _____ [contractor].

[EITHER (See Use of Instruction)]

2. That while _____ [contractor] was acting in the capacity of a contractor, [he/she/it] willfully and deliberately _____ [violated the Contractors License Law or committed fraud in the execution or performance of a construction contract].

[OR]

2. That while _____ [*contractor*] was acting in the capacity of a contractor, [he/she/it] failed to pay Plaintiff wages Plaintiff had earned as an employee of _____ [*contractor*].

[OR]

2. That while _____ [*contractor*] was acting in the capacity of a contractor, [he/she/it] failed to make all or part of any employer payments to _____ [*express trust fund*] for employees of _____ [*contractor*] covered by the collective bargaining agreement or other employment agreement that established _____ [*express trust fund*].

3. That this conduct by _____ [*contractor*] caused damages to Plaintiff.

4. The nature and extent of Plaintiff's damages.

Authorities: *Bus. & Prof. Code §§ 7071.5-7071.12, 7140; Denver D. Darling, Inc. v. Controlled Environments Construction, Inc. (2001) 89 Cal.App.4th 1221, 1243, 108 Cal. Rptr. 2d 213 ; Brown v. Surety Co. of Pacific (1981) 122 Cal.App.3d 614, 619-622, 176 Cal.Rptr. 143 ; Boliver v. Surety Co. (1977) 72 Cal.App.3d Supp. 22, 30-33, 140 Cal.Rptr. 259 .*

[2] Use of Instruction

This instruction should be used when a party seeks to recover against a contractor's state license bond surety. If the suit is against the Registrar of Contractors to recover against the deposit of cash or securities, the second Paragraph 1 should be used. If the suit is by an employee for wages [*Bus. & Prof. Code §§ 7071.5(c), 7071.10(d)*], the second Paragraph 2 should be used. If the suit is by an express trust fund for employer payments [*Bus. & Prof. Code §§ 7071.5(d), 7071.10(e)*], the third Paragraph 2 should be used. If suit is brought against both the firm's bond [*Bus. & Prof. Code § 7071.6*] and the bond of the responsible managing officer or employee [*Bus. & Prof. Code § 7071.9*], this instruction should be used twice, once for each bond.

If the plaintiff is a homeowner who contracted for a home improvement on his or her own personal family residence, then the phrase "willfully and deliberately" should be omitted from Paragraph 2.

A preponderance of evidence instruction must be given with this instruction [see Ch. 2, *California Judicial Council Evidence Instructions, CACI No. 200* ("More Likely True Than Not True")]. In addition, the instruction defining "proximate cause" in Ch. 3E, *Matthew Bender Contract Damages Instructions, MB 300E.03*, must also be used with this instruction. If foreseeability of damage is an issue, an instruction on this issue must also be given [see Ch. 3, *California Judicial Council Contracts Instructions, CACI No. 350* ("Introduction to Contract Damages")].

This instruction must be supplemented with quotations of the provisions of the Contractors' State License Law that plaintiff claims were violated. The provisions most often involved are *Bus. & Prof. Code §§ 7107, 7108, 7108.5, 7109, 7109.5, 7110, 7110.1, 7113, 7114, 7115, 7116, 7119, 7120, 7159, 7160, and 7161*.

There is an issue as to whether state remedies for the collection of benefits under plans covered by the federal Employee Retirement Income Security Act of 1974 (ERISA) [29 U.S.C. § 1001 *et seq.*] are preempted by that Act. The California Supreme Court held that any state law remedy for enforcing an employer's contribution to an ERISA plan, including mechanics lien rights given by *Civ. Code § 3111*, was preempted by ERISA [*Carpenters So. Cal. Admin. Corp. v. El*

Capitan Development Co. (1991) 53 Cal.3d 1041, 1049-1054, 282 Cal.Rptr. 277, 811 P.2d 296]. A subsequent California appeals court applied preemption specifically to *Bus. & Prof. Code § 7071.5(d)* [see *Carpenters Health & Welfare Trust Fund v. Surety Co. (1993) 13 Cal.App.4th 1406, 1409, 18 Cal.Rptr.2d 661*]. The California Legislature amended *Civ. Code § 3111* and *Bus. & Prof. Code § 7071.5* in 1999 to attempt to avoid preemption, based on principles set forth in various United States Supreme Court and Ninth Circuit cases [see *Cal. Div. of Labor Standards Enforcement v. Dillingham Construction (1997) 519 U.S. 316, 117 S.Ct. 832, 136 L.Ed.2d 791* ; *New York State Conference of Blue Cross and Blue Shield Plans et al. v. Travelers (1995) 514 U.S. 645, 115 S.Ct. 1671, 131 L.Ed.2d 695* ; *WSB Electric, Inc. v. Curry (9th Cir. 1996) 88 F.3d 788* ; *Operating Engineers Health & Welfare v. JWJ Contracting Co. (9th Cir. 1998) 135 F.3d 671*].

[3] Comment

[a] Bond as License Requirement; Acting in Capacity of Contractor

The Contractor's State License Board requires as a condition precedent to the issuance, reinstatement, reactivation, renewal, or continued maintenance of a license that the applicant or licensee file or have on file a contractor's bond in the sum of \$12,500 [*Bus. & Prof. Code § 7071.6(a)*]. The bond requirement does not apply to a the holder of a license that has been inactivated on the board's official records during the period the license is inactive [*Bus. & Prof. Code § 7071.6(c)*].

In general, the aggregate liability of a surety on claims brought against the contractor's bond is limited to \$7,500. The bond proceeds in excess of that amount must be reserved exclusively for the claims of a homeowner contracting for home improvement on his or her personal family residence damaged as a result of a violation of the Licensing Law. In fact, such a claimant is entitled to claim and recover the full measure of the bond [*Bus. & Prof. Code § 7071.6(b)*; see *Bus. & Prof. Code § 7071.5(a)*].

The amount of the bond may be substantially higher if the contractor has been disciplined previously [see *Bus. & Prof. Code §§ 7071.6(d), 7071.8(b)*]. Instead of posting a bond, the licensee or applicant may give a deposit of cash or securities in accordance with the applicable provisions of the Code of Civil Procedure [*Bus. & Prof. Code § 7071.12(a)*; see *Code Civ. Proc. §§ 995.710-995.770*].

The bond remains in force for the entire term of the license for which it was given and any renewal terms, or until canceled by the surety [*Code Civ. Proc. § 995.440*]. A contractor's license expires two years from the last day of the month it is issued or two years from the date the renewed license last expired [*Bus. & Prof. Code § 7140*].

The licensee must have been acting in the capacity of a contractor before the license bond can be subjected to liability [*Brown v. Surety Co. of Pacific (1981) 122 Cal.App.3d 614, 619-622, 176 Cal.Rptr. 143*].

[b] Beneficiaries of Bond

The bond is for the benefit of all of the following:

- Any homeowner contracting for a home improvement on his or her own personal family residence damaged as the result of a violation of the Contractors' State License Law [*Bus. & Prof. Code §§ 7071.5(a), 7071.10(a)*];
- Any property owner contracting for construction of a single-family dwelling damaged as a result of a licensee's violation of the Contractors' State License Law; provided the dwelling was not intended for sale or offered for sale at the time the damages were incurred [*Bus. & Prof. Code §§ 7071.5(b), 7071.10(b)*];

- Any person damaged as the result of a willful and deliberate violation of the Contractors' State License Law [*Bus. & Prof. Code §§ 7071.5(c), 7071.10(c)* ("willful and deliberate" language added in 1979, apparently to overturn *Bailey-Sperber, Inc. v. Yosemite Ins. Co. (1976) 64 Cal.App.3d 725, 729, 134 Cal.Rptr. 740*)];
- Any person damaged by the licensee's fraud in the execution or performance of a construction contract [*Bus. & Prof. Code §§ 7071.5(c), 7071.10(c)*];
- An employee of the licensee not paid his or her wage [*Bus. & Prof. Code §§ 7071.5(d), 7071.10(d)*]; and
- Certain persons or entities, including express trust funds, to whom a portion of the compensation of an employee of a licensee is paid by agreement with that employee or agent of that employee [*Bus. & Prof. Code §§ 7071.5(e), 7071.10(e)*].

Any of these people or entities may file suit against the surety on the bond [*Code Civ. Proc. § 995.850*].

[c] Distribution of Bond to Cover Claims

If the aggregate of all known claims exceeds the bond's penal sum, then it must be distributed pro rata [*Bus. & Prof. Code § 7071.11(a)*]. If there are two bonds, one for the firm [*Bus. & Prof. Code § 7071.6*] and another for the responsible managing officer or employee [*Bus. & Prof. Code § 7071.9*], and liability exists under both, then the penal sums of both can be used to satisfy claims [*Boliver v. Surety Co. (1977) 72 Cal.App.3d Supp. 22, 34, 140 Cal.Rptr. 259*].

[d] Attorneys' Fees

If the underlying construction contract had an attorneys' fees clause, plaintiff may be able to recover them in the suit on the contractor's license bond [*Boliver v. Surety Co. (1977) 72 Cal.App.3d Supp. 22, 30-33, 140 Cal.Rptr. 259*].

[e] Exoneration

Exoneration is a defense [*Civ. Code §§ 2819-2825, 2839, 2845; see MB 300I.72*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawTypes of ContractsGuaranty ContractsGovernmentsState & Territorial GovernmentsLicensesReal Property LawConstruction LawGeneral OverviewReal Property LawConstruction LawContractors & Subcontractors



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California Forms of Jury Instruction

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CHAPTER 3I Matthew Bender Construction Contract Instructions
PART A. BURDEN OF PROOF INSTRUCTIONS

2-3I California Forms of Jury Instruction MB 300I.13

MB 300I.13 Recovery by Contractor as Third Party Beneficiary of Owner's Other Contracts

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Plaintiff has the burden of proving all of the following:

1. That _____ [owner] and _____ [other party] **entered into a contract, the full performance of which would have satisfied a duty owed by** _____ [defendant, owner, or other party] **to Plaintiff;**
2. **That Defendant breached the contract;**
3. **That this breach caused damages to Plaintiff; and**
4. **The nature and extent of the Plaintiff's damages.**

Authorities: *Civ. Code § 1559; COAC, Inc. v. Kennedy Engineers (1977) 67 Cal.App.3d 916, 919-920, 136 Cal.Rptr. 890 .*

[2] Use of Instruction

This instruction should be used when the plaintiff seeks to recover as a third party beneficiary of a contract to which he or she is not a party. Additional instructions may be required to define the "duty" owed by the defendant to the plaintiff in the particular case [see *COAC, Inc. v. Kennedy Engineers (1977) 67 Cal.App.3d 916, 920-923, 136 Cal.Rptr. 890* (court reversed dismissal of contractor's complaint alleging that it was third party beneficiary of contract between public agency and engineering firm to provide plans and environmental impact report (EIR) for project on which plaintiff was

general contractor; court held that since agency owed contractor duty not to hinder or delay latter's performance by failing to obtain necessary clearances for project, contract for engineering services and EIR was in part to discharge that duty to contractor, making contractor creditor beneficiary of contract for engineering services)]. Since the exclusive remedy for claims on construction loan funds are the mechanics' lien and stop notice statutes [*Civ. Code* § 3264], no third party beneficiary recovery is available to reach the funds [*Sofias v. Bank of America* (1985) 172 Cal.App.3d 583, 586, 218 Cal.Rptr. 388].

A preponderance of evidence instruction must be given with this instruction [see Ch. 2, *California Judicial Council Evidence Instructions*, CACI No. 200 ("More Likely True than Not True")]. In addition, the instruction defining "proximate cause" in Ch. 3E, *Matthew Bender Contract Damages Instructions*, MB 300E.03, must also be used with this instruction. If foreseeability of damage is an issue, an instruction on this issue must also be given [see Ch. 3, *California Judicial Council Contracts Instructions*, CACI No. 350 ("Introduction to Contract Damages")].

This instruction can be adapted to other third party beneficiary situations, e.g., when a subcontractor is a beneficiary of the prime contract or when the owner contracted separately with the supplier of equipment or materials that the prime contractor was to install.

For related Judicial Council instructions, see [3][b], *below*.

LexisNexis Matthew Bender Expert Practice Tip--Expanding Sources of Recovery: Third party beneficiary principles may provide a creative means of expanding the sources of potential recovery, especially on troubled construction projects where payment and performance bonds are exhausted or otherwise unavailable. *By Ronald Oster*

LexisNexis Matthew Bender Expert Practice Tip--Third Party Rights: Some jurors may question whether a "third party" has, or should have, any rights under this contract. *By Rex Heeseman*

[3] Comment

[a] Contractor as Third-Party Beneficiary

Frequently, the owner will enter into separate contracts with an architect, engineer, or other consultant, and sometimes there will be several prime contracts. When performance of those other contracts will satisfy an actual, supposed, or asserted duty of the owner to the plaintiff, then the plaintiff can enforce that contract as a third party beneficiary [*Civ. Code* § 1559; *COAC, Inc. v. Kennedy Engineers* (1977) 67 Cal.App.3d 916, 919-920, 136 Cal.Rptr. 890].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 3, *California Judicial Council Contracts Instructions*]:

CACI No. 301 Third Party Beneficiary

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts Law Third Parties Beneficiaries Claims & Enforcement Real Property Law Construction Law Contracts Real Property Law Construction Law Contractors & Subcontractors



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CHAPTER 3I Matthew Bender Construction Contract Instructions
PART A. BURDEN OF PROOF INSTRUCTIONS

2-3I California Forms of Jury Instruction MB 300I.14

MB 300I.14 Breach of Express Warranty

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Plaintiff alleges that Defendant made an express warranty that _____ [describe warranty, e.g., material and workmanship will meet certain performance standards or a particular component will be fit for a particular use or a particular component will be free of defects for a specified period of time].

For you to find Defendant liable for breach of an express warranty, Plaintiff has the burden of proving all of the following facts:

- 1. Defendant made an affirmation of fact or a promise about the quality or characteristics of the _____ [describe construction project or particular component or portion of project];**
- 2. Plaintiff relied on Defendant's affirmation of fact or promise;**
- 3. The finished construction [does not/did not] conform to Defendant's affirmation of fact or promise;**
- 4. Plaintiff suffered damages; and**
- 5. The damage to Plaintiff was caused by Defendant's failure to construct the _____ [describe construction project] to conform to Defendant's affirmation of fact or promise.**

In determining whether a statement or promise by Defendant was a warranty, you must consider that a statement that merely expresses an opinion, belief, judgment, or estimate is not a warranty.

[*OPTIONAL (See Use of Instruction)*]

The written contract contains the following guarantee: _____ [*insert language from contract*].

Authorities: *Aced v. Hobbs-Sesack Plumbing Co.* (1961) 55 Cal.2d 573, 580-582, 12 Cal.Rptr. 257, 360 P.2d 897 ; *Presiding Bishop v. Cavanaugh* (1963) 217 Cal.App.2d 492, 504-506, 512, 32 Cal.Rptr. 144 .

[2] Use of Instruction

This instruction should be used when the construction contract contains an express warranty or when it is alleged that the construction contract as supplemented by additional documents or parole evidence creates an express warranty. The admissibility of the parole evidence will be a question for the court. If there are contract formation questions, the instructions in Ch. 3, *California Judicial Council Contracts Instructions*, and Ch. 3A, *Matthew Bender Formation of Contract Instructions*, should be consulted. The optional language at the end of the instruction may be used when there is a guarantee written into the contract.

This instruction may be given concurrently with instructions on breach of implied warranty [see MB 300I.15], breach of contract [see MB 300I.06], failure to follow plans and specifications [see MB 300I.18], and indemnity.

A preponderance of evidence instruction must be given with this instruction [see Ch. 2, *California Judicial Council Evidence Instructions*, CACI No. 200 ("More Likely True Than Not True")].

LexisNexis Matthew Bender Expert Practice Tip--Consider Motion for Summary Judgment: The dividing line between an "opinion, belief, judgment, or estimate" and an "affirmation of fact" can be blurry. Counsel may want to seek a legal ruling before trial by way of a motion for summary judgment. But nowadays at least some jurors will understand the concept of a "warranty." *By Ronald Oster and Rex Heeseman*

[3] Comment

[a] Warranty Liability

In construction litigation, the essence of a warranty is a material promise or a material affirmation of fact by the builder from which a contractual or quasi-contractual obligation may be implied [*Presiding Bishop v. Cavanaugh* (1963) 217 Cal.App.2d 492, 504, 32 Cal.Rptr. 144]. Representations that merely express an opinion, belief, judgment, or estimate do not constitute a warranty [*Presiding Bishop v. Cavanaugh* (1963) 217 Cal.App.2d 492, 504, 32 Cal.Rptr. 144]. When the work is done according to plans and specifications drawn up by the owner's architect, a query by the owner as to the merits of specified materials is merely a request for an opinion, and the builder's reply does not constitute a warranty [*Presiding Bishop v. Cavanaugh* (1963) 217 Cal.App.2d 492, 504-505, 32 Cal.Rptr. 144].

In limited circumstances, the Commercial Code provisions on express warranty will apply to the construction of real property [see *Com. Code* § 2313 (affirmation of fact or promise made by seller to buyer, which relates to goods sold, creates express undertaking that goods will conform to affirmation or promise, and any description of goods that is part of basis of bargain creates express warranty that goods will conform to description); see also Ch. 3H, *Matthew Bender Commercial Code Sales Contract Instructions*, MB 300H.145]. When the manufacturer of a one-ply roofing product sold that product as a roofing system to be installed under the supervision of the manufacturer's representative, the Nebraska Supreme Court held that the transaction was a sale of goods and was covered by the Uniform Commercial Code. The promises made in the roofing manufacturer's brochures and advertisements were therefore held to be express contractual warranties governed by Uniform Commercial Code § 2-313 (*Com. Code* § 2313) [*Mennonite Deaconess*

Home & Hospital, Inc. v. Gates Engineering Company (1985) 219 Neb. 303, 363 N.W.2d 155].

[b] Scope of Warranty and Proper Plaintiffs

A property owner is usually in privity of contract with the general contractor and will therefore generally proceed directly against the general contractor for breach of express warranty. The exact scope and duration of a contractor's warranty will be determined by reference to the individual contract documents. For example, the common standard form of the American Institute of Architects governing General Conditions of the Contract for Construction provides broadly that labor, materials, and equipment are all included within the terms of the general contractor's warranty [American Institute of Architects General Conditions of the Contract for Construction, Document A201 (1987 ed.), §§ 3.5.1, 1.1.3]. Under this warranty, the contractor warrants the quality of his work for one year following substantial completion of the work of improvement [American Institute of Architects General Conditions of the Contract for Construction, Document A201 (1987 ed.), § 12.2.2].

Under certain circumstances, the lack of privity between the property owner and the defendant will not defeat an action for breach of warranty. For example, a manufacturer of polyethylene pipe for use in radiant heating systems was held responsible for breach of warranty to a property owner by virtue of brochures and pamphlets distributed to the consuming public, even though the brochures were distributed to the property owner's engineer. The court held that a realistic view of the manufacturer's purpose in making its representations to those engaged in designing and installing radiant heating systems showed that its purpose was to influence engineers and general contractors to use and install its product, and that "[t]he person whose ultimate action was sought to be induced was the one for whom the construction would be done. In this case that person was the plaintiff" [*Presiding Bishop v. Cavanaugh* (1963) 217 Cal.App.2d 492, 513-514, 32 Cal.Rptr. 144].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawContract Conditions & ProvisionsExpress WarrantiesContracts LawThird PartiesBeneficiariesClaims & EnforcementReal Property LawConstruction LawContractsReal Property LawConstruction LawContractors & SubcontractorsReal Property LawConstruction LawDefects



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CHAPTER 3I Matthew Bender Construction Contract Instructions
PART A. BURDEN OF PROOF INSTRUCTIONS

2-3I California Forms of Jury Instruction MB 300I.15

MB 300I.15 Breach of Implied Warranty in Sale of New Construction

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Plaintiff claims that Defendant breached an implied warranty that _____ [describe work of improvement] was designed and constructed in a reasonably workmanlike manner. To prove this claim, Plaintiff has the burden of proving all of the following facts:

- 1. Defendant is a [builder/seller/builder and seller] of new _____ [describe type of construction at issue];**
- 2. Defendant sold _____ [describe work of improvement] to Plaintiff;**
- 3. The _____ [describe work of improvement] was not designed and constructed in a reasonably workmanlike manner;**
- 4. Plaintiff suffered damage; and**
- 5. The damage to Plaintiff was caused by Defendant's failure to design and construct _____ [describe work of improvement] in a reasonably workmanlike manner.**

[OPTIONAL (See Use of Instruction)]

The builder of new construction is generally held to have impliedly warranted that the completed structure was

designed and constructed in a reasonably workmanlike manner. Under this implied warranty, the builder warrants that the finished construction, both in its workmanship and its materials, will be reasonably fit for its intended use. However, a builder of new construction who faithfully complies with plans and specifications supplied by the owner or developer is only held to an implied warranty of good workmanship. The builder does not impliedly warrant the adequacy of the plans and specifications to achieve a desired result.

Authorities: *Pollard v. Saxe & Yolles Dev. Co.* (1974) 12 Cal.3d 374, 377-380, 115 Cal.Rptr. 648, 525 P.2d 88 ; *Aced v. Hobbs-Sesack Plumbing Co.* (1961) 55 Cal.2d 573, 582, 12 Cal.Rptr. 257, 360 P.2d 897 ; *Sunbeam Construction Co. v. Fisci* (1969) 2 Cal.App.3d 181, 186-187, 82 Cal.Rptr. 446 .

[2] Use of Instruction

This instruction should be used when construction defects are discovered in new residential construction and the plaintiff is the original buyer. However, if the builder is in direct privity with the plaintiff, the specificity of any plans and specifications supplied by the owner must be evaluated to determine whether and to what extent an implied warranty exists. This instruction may be given concurrently with instructions on breach of express warranty [see MB 300I.14], breach of contract [see MB 300I.06], implied warranty of workmanship, failure to follow plans and specifications [see MB 300I.18], and failure to give reasonable notice of breach of warranty [see MB 300I.80]. This instruction presumes the existence of a contract.

A preponderance of evidence instruction must be given with this instruction [see Ch. 2, *California Judicial Council Evidence Instructions*, CACI No. 200 ("More Likely True than Not True")].

[3] Comment

Builders and sellers of new construction are held to an implied warranty that the completed structure is designed and constructed in a reasonably workmanlike manner [*Pollard v. Saxe & Yolles Dev. Co.* (1974) 12 Cal.3d 374, 380, 115 Cal.Rptr. 648, 525 P.2d 88]. The builder or seller warrants that the finished product is fit for its intended use, both as to workmanship and materials [*Aced v. Hobbs-Sesack Plumbing Co.* (1961) 55 Cal.2d 573, 582, 360 P.2d 897]. Because the breach of implied warranty theory is derived from the California Commercial Code, the buyer must give notice to the builder or seller within a reasonable time after he or she discovers or should have discovered the breach of warranty [*Pollard v. Saxe & Yolles Dev. Co.* (1974) 12 Cal.3d 374, 380, 115 Cal.Rptr. 648, 525 P.2d 88]. For discussion of this requirement and an instruction raising this requirement as a defense to a breach of warranty claim, see MB 300I.80.

Unlike actions for breach of an express warranty, actions for breach of an implied warranty are restricted to parties in privity with the seller or builder [*Huang v. Garner* (1984) 157 Cal.App.3d 404, 419, 203 Cal.Rptr. 800 (nonsuit properly granted on remote buyer's implied warranty claim against original owner/builder due to lack of privity)]. In addition, a condominium association may maintain a cause of action based on an alleged breach of implied warranty for damage to common areas [*Code Civ. Proc. § 383(a)*; *Windham at Carmel Mountain Ranch Assn. v. Superior Court* (2003) 109 Cal.App.4th 1162, 1173, 135 Cal.Rptr.2d 834]. However, a property owner may sue a subcontractor for breach of the implied warranty of fitness despite the apparent lack of privity because the owner is a third party beneficiary of the contract [*Gilbert Financial Corp. v. Steelform Contracting Co.* (1978) 82 Cal.App.3d 65, 69-71, 145 Cal.Rptr. 448]. For more on third party beneficiaries, see Ch. 3, *California Judicial Council Contracts Instructions*, CACI No. 301 "Third Party Beneficiary," and Ch. 3C, *Matthew Bender Contract Party Instructions*, MB 300C.90.

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawContract Conditions & ProvisionsImplied WarrantiesGeneral OverviewContracts LawThird PartiesBeneficiariesClaims & EnforcementReal Property LawConstruction LawContractsReal Property

LawConstruction LawContractors & SubcontractorsReal Property LawConstruction LawDefects



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CHAPTER 3I Matthew Bender Construction Contract Instructions
PART A. BURDEN OF PROOF INSTRUCTIONS

2-3I California Forms of Jury Instruction MB 300I.16

MB 300I.16 Representation or Warranty of Subsurface Conditions by Public Agency

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Plaintiff seeks to recover damages from _____ [*public agency*] for the breach of a warranty of subsurface conditions. Plaintiff alleges that during construction it found _____ [*describe subsurface site condition*], which was different from the description of conditions given to Plaintiff in the _____ [*describe soils report or other representation of subsurface site condition*]. Plaintiff alleges that because of this difference in subsurface conditions at the job site, [he/she/it] incurred extra costs in having to _____ [*describe extra work*].

For Plaintiff to recover for breach of warranty of subsurface conditions, Plaintiff must prove all of the following facts:

1. That _____ [*public agency*] made a representation of fact to Plaintiff about the _____ [*describe subsurface condition at issue*]. Plaintiff alleges that _____ [*public agency*] made the following representation about the site conditions: _____ [*quote particular contract language from contract soils report or other document made available as basis for bids*];
2. That Plaintiff relied on the representation of subsurface conditions;
3. That Plaintiff's reliance on _____ [*public agency*]'s representation was reasonable;
4. That _____ [*public agency*]'s misrepresentation of the subsurface condition caused Plaintiff damages; and

5. The nature and extent of Plaintiff's damages.

[*OPTIONAL* (See Use of Instruction)]

The contract documents contain a disclaimer, which reads as follows: _____ [*quote contract language that allegedly disclaims any representations of site condition*].

In considering the above disclaimer, I will instruct you that if a public agency makes a positive and material representation about a subsurface condition presumably within the agency's knowledge and on which the plaintiff had a right to rely, then the agency has warranted that the condition is as represented despite a general provision in the contract requiring an onsite inspection by the contractor.

Authorities: *Warner Constr. Corp. v. City of Los Angeles* (1970) 2 Cal.3d 285, 292, n.2, 85 Cal.Rptr. 444, 466 P.2d 996 ; *E. H. Morrill Co. v. State of California* (1967) 65 Cal.2d 787, 792-793, 56 Cal.Rptr. 479, 423 P.2d 551 .

[2] Use of Instruction

This instruction should be used in litigation between public works contractors and public agencies when the contract does not contain a differing site condition clause and the contractor claims that it has relied on incorrect information about site conditions provided by the public agency, causing the contractor to incur extra costs. Most public works contracts contain a contract clause or bid requirement that mandates job site investigation, a disclaimer of representations and warranties with regard to site inspections by the builder, or both. When the contract includes a general disclaimer, the optional clause should be used. If the contract contains a specific disclaimer, then this instruction should be supplemented or revised.

This instruction should generally be accompanied by contract interpretation instructions [see Ch. 3, *California Judicial Council Contracts Instructions*, CACI Nos. 314- 320, and Ch. 3B, *Matthew Bender Interpretation of Contract Instructions*]. The instruction may also require accompanying instructions on implied warranty of accuracy of plans and specifications [see MB 300I.35] and nondisclosure of material facts [see MB 300I.34].

A preponderance of evidence instruction must be given with this instruction [see Ch. 2, *California Judicial Council Evidence Instructions*, CACI No. 200 ("More Likely True than Not True")].

LexisNexis Matthew Bender Expert Practice Tip--Use Visual Aid: Some jurors may struggle with the meaning of "subsurface conditions." Thus, a visual aid seems advisable. *By Rex Heeseman*

LexisNexis Matthew Bender Expert Practice Tip--Common Disputes: Whenever there is a major problem on a substantial construction project, there is almost always a dispute over who had the obligation to inspect, or what standards were used, or where the standards came from. Notwithstanding contract disclaimers, these issues frequently end up in front of the jury as the optional paragraph of this instruction indicates. *By Ronald Oster*

[3] Comment**[a] Warranty Liability**

When a public agency furnishes inaccurate project information, such as soils reports, as a basis for bids on a public works contract, it may generally be held liable for a breach of warranty [*Souza & McCue Const. Co. v. Superior Court* (1962) 57 Cal.2d 508, 510-511, 20 Cal.Rptr. 634, 370 P.2d 338 ; *A. Teichert & Son, Inc. v. State of Cal.* (1965) 238

Cal.App.2d 736, 755, 48 *Cal.Rptr.* 225, disapproved on other grounds, *E.H. Morrill v. State of Cal.* (1967) 65 *Cal.2d* 787, 793, 56 *Cal.Rptr.* 479, 423 P.2d 551], and a successful plaintiff may recover for the extra costs it incurred due to the misrepresented site conditions and, when applicable, for lost profits [*Warner v. City of Los Angeles* (1970) 2 *Cal.3d* 285, 301, 85 *Cal.Rptr.* 444, 466 P.2d 996]. The public agency may be held responsible only when its data is inaccurate. When the public agency submits accurate test data and the builder makes inaccurate deductions from that data, the builder bears the risk of loss [*Warner Constr. Corp. v. City of Los Angeles* (1970) 2 *Cal.3d* 285, 292, 85 *Cal.Rptr.* 444, 466 P.2d 996].

Disputed questions of fact as to whether the misrepresentation of site conditions was material, whether the plaintiff relied on it, and whether that reliance was reasonable, all are proper questions for submission to the jury [*Warner v. City of Los Angeles* (1970) 2 *Cal.3d* 285, 292-293, 85 *Cal.Rptr.* 444, 466 P.2d 996].

[b] Disclaimers

An alleged warranty or representation can be disclaimed [*Wunderlich v. State of California* (1967) 65 *Cal.2d* 777, 786, 56 *Cal.Rptr.* 473, 423 P.2d 545], and it is possible by express disclaimer to negate an erroneous statement about the subject matter of a contract [*Fredrickson & Watson Constr. Co. v. Dept. Pub. Wks.* (1972) 28 *Cal.App.3d* 514, 518, 104 *Cal.Rptr.* 421 ; *Roberts Distrib. Co. v. Kaye-Halbert Corp.* (1954) 126 *Cal.App.2d* 664, 669, 272 P.2d 886]. The facts of each case will determine whether or not a disclaimer is effective. Factors to consider include (1) the language of the representation, (2) the disclaimer's language, and (3) the location of the disclaimer in the contract in relation to the representation. For example, it is very easy to disclaim an alleged warranty or representation when the statements alleged to constitute the warranty are neither positive nor specific, and the builder's reliance on those statements is therefore unjustified [*MacArthur Bros. Co. v. United States* (1919) 258 U.S. 6, 9-13, 42 S.Ct. 225, 66 L.Ed. 433 ; *Wunderlich v. State of California* (1967) 65 *Cal.2d* 777, 786, 56 *Cal.Rptr.* 473, 423 P.2d 545].

Conversely, the responsibility of a governmental agency for positive representations it is deemed to have made through defective plans, specifications, or soils reports is not overcome by general clauses requiring the contractor to examine the site, to check up on the plans, and to assume responsibility for the work [*United States v. Spearin* (1918) 248 U.S. 132, 137, 39 S.Ct. 59, 63 L.Ed. 166 ; *E.H. Morrill Co. v. State of California* (1967) 65 *Cal.2d* 787, 792-793, 56 *Cal.Rptr.* 479, 423 P.2d 551]. Accordingly, standard clauses in government contracts that require the bidder to "satisfy himself as to the character of surface and subsurface materials or obstacles to be encountered" cannot be relied on to overcome positive representations in the construction documents that those materials and obstacles do not exist [*United States v. Spearin* (1918) 248 U.S. 132, 137, 39 S.Ct. 59, 63 L.Ed. 166 ; *Warner Constr. Corp. v. City of Los Angeles* (1970) 2 *Cal.3d* 285, 292, 85 *Cal.Rptr.* 444, 466 P.2d 996 ; *E.H. Morrill Co. v. State of California* (1967) 65 *Cal.2d* 787, 792-793, 56 *Cal.Rptr.* 479, 423 P.2d 551].

Finally, one court found the absence of a cross-reference to "be of significance" in concluding that a warranty in the special conditions was not negated by a purported disclaimer located far away in the general conditions of the contract [*E.H. Morrill Co. v. State of California* (1967) 65 *Cal.2d* 787, 792-793, 56 *Cal.Rptr.* 479, 423 P.2d 551].

Legal Topics:

For related research and practice materials, see the following legal topics:

Public Contracts LawContract ProvisionsGeneral OverviewPublic Contracts LawContract ProvisionsSite Condition
ClausesPublic Contracts LawDispute ResolutionGeneral Overview



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CHAPTER 3I Matthew Bender Construction Contract Instructions
PART A. BURDEN OF PROOF INSTRUCTIONS

2-3I California Forms of Jury Instruction MB 300I.17

MB 300I.17 Strict Liability for Construction Defects

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Plaintiff alleges that [he/she/it] has suffered damage as a result of a defect in _____ [describe work of improvement]. Plaintiff seeks to recover these damages by using a legal theory known as strict liability.

To recover on [his/her/its] strict liability claim, Plaintiff has the burden of proving all of the following:

- 1. Plaintiff took possession of Defendant's finished construction without making a substantial change in its finished condition;**
- 2. Defendant knew that _____ [Plaintiff or the original buyer] would take possession of the finished construction without substantial inspection for defects in its design and construction;**
- 3. Plaintiff used the finished construction in the manner that it was intended to be used;**
- 4. Plaintiff was injured or suffered property damage, or the construction has suffered damage, as a result of a defect in Defendant's design or construction of the _____ [describe work of improvement]; and**
- 5. Plaintiff was unaware that the defect made the finished construction unsafe or inappropriate for its intended use.**

In determining whether _____ [describe work of improvement] is defective, the test is one of reasonableness and not perfection.

Authorities: *Oliver v. Superior Court* (1989) 211 Cal.App.3d 86, 259 Cal.Rptr. 160 ; *Avner v. Longridge Estates* (1969) 272 Cal.App.2d 607, 614-615, 77 Cal.Rptr. 633 ; *Kriegler v. Eichler Homes, Inc.* (1969) 269 Cal.App.2d 224, 227-228, 74 Cal.Rptr. 749 ; *Gutierrez v. Superior Court* (1966) 243 Cal.App.2d 710, 727, 52 Cal.Rptr. 592 .

[2] Use of Instruction

This instruction should be used only when the court makes a preliminary finding that the defendant is a mass producer of the defective real property and the plaintiff is a consumer who bought the mass-produced real property without inspection for defects. The instruction will therefore be used mostly in cases involving tract homes, planned unit developments, condominiums, and other common area or planned developments. This instruction is also limited to claims for personal injury, death, or property damage [see [3][c], *below*]. A negligence instruction will be necessary if the plaintiff seeks to recover economic damages.

A preponderance of evidence instruction must be given with this instruction [see Ch. 2, *California Judicial Council Evidence Instructions*, CACI No. 200 ("More Likely True than Not True")].

For related Judicial Council instructions, see [3][d], *below*.

LexisNexis Matthew Bender Expert Practice Tip--Cases Brought By Consumers: This instruction will be useful in construction defect cases brought by consumers when there is no privity with the original builder or developer. But keep in mind that the idea of "strict liability" may seem "unfair" to some jurors. *By Ronald Oster and Rex Heeseman*

[3] Comment

[a] Strict Liability; Other Theories of Recovery Distinguished

The doctrine of strict liability in tort is sometimes referred to as "enterprise liability," and it is defined in the Restatement (Second) of Torts § 402A as follows: "A person engaged in the business of selling or manufacturing a product is liable, notwithstanding the exercise of due care, for harm or damage caused by a defective condition present in the product when it leaves the hands of the seller or manufacturer, if the defective condition renders the product unreasonably dangerous or unsafe to the user or consumer."

Strict liability in tort is very different from liability based on warranties or negligence. Strict liability in tort attaches even if the seller of the real property has exercised all possible care in the manufacture and sale of the real property [*Greenman v. Yuba Power Products, Inc.* (1963) 59 Cal.2d 57, 63-64, 27 Cal.Rptr. 697, 377 P.2d 897 ; *Avner v. Longridge Estates* (1969) 272 Cal.App.2d 607, 610-611, 77 Cal.Rptr. 633 ; *Kriegler v. Eichler Homes, Inc.* (1969) 269 Cal.App.2d 224, 227, 74 Cal.Rptr. 749 ; *Gutierrez v. Superior Court* (1966) 243 Cal.App.2d 710, 726-727, 52 Cal.Rptr. 592]. The defendant therefore may not use contract or warranty defenses that might be available in an action for breach of warranty, such as a lack of privity of contract [*Huang v. Garner* (1984) 157 Cal.App.3d 404, 423, 203 Cal.Rptr. 800], lack of notice of breach of warranty [*Pollard v. Saxe & Yolles Dev. Co.* (1974) 12 Cal.3d 374, 380, 115 Cal.Rptr. 648, 525 P.2d 88], or lack of reliance [*Southern California Edison v. Harnischfeger Corp.* (1981) 120 Cal.App.3d 842, 855, 175 Cal.Rptr. 67].

[b] Strict Liability for Construction Defects

Buyers of real property may recover against the builders, sellers, and developers of that property for damages resulting from defects in structures [*Kriegler v. Eichler Homes, Inc.* (1969) 269 Cal.App.2d 224, 227-229, 74 Cal.Rptr. 749] or defects in the way the land itself was developed into lots [*Avner v. Longridge Estates* (1969) 272 Cal.App.2d 607, 615, 77 Cal.Rptr. 633]. However, strict liability in tort for construction defects is limited to recovery by consumers [*Sumitomo Bank v. Taurus Developers, Inc.* (1986) 185 Cal.App.3d 211, 226-227, 229 Cal.Rptr. 719] against "mass

producers" [*Oliver v. Superior Court* (1989) 211 Cal.App.3d 86, 259 Cal.Rptr. 160]. California law on strict liability in tort for construction defects stems from four principal decisions.

In *Kriegler v. Eichler Homes, Inc.* [*Kriegler v. Eichler Homes, Inc.* (1969) 269 Cal.App.2d 224, 74 Cal.Rptr. 749], the court of appeal held the theory of strict products liability applicable to a builder of mass-produced tract homes. The builder of the tract homes was held liable to a second purchaser of a tract home on the theory of strict liability, because the builder was a mass producer of housing, and therefore the doctrine of strict liability should apply just as it would apply to a mass producer of personal property [*Kriegler v. Eichler Homes, Inc.* (1969) 269 Cal.App.2d 224, 227, 74 Cal.Rptr. 749] .

In *Avner v. Longridge Estates* [*Avner v. Longridge Estates* (1969) 272 Cal.App.2d 607, 77 Cal.Rptr. 633], the doctrine of strict liability was extended to a "manufacturer" of residential lots for sale to the public. The plaintiff's predecessor-in-interest bought the lot in question in 1960 and built a house on it. When part of the rear slope of the lot later subsided, the corporate landowner that manufactured the residential lots for sale to the public was held strictly liable in tort, even though the plaintiff was a remote purchaser from the original buyer [*Avner v. Longridge Estates* (1969) 272 Cal.App.2d 607, 615, 77 Cal.Rptr. 633] .

In *Del Mar Beach Club Owners Association v. Imperial Contracting Co.* [*Del Mar Beach Club Owners Assn. v. Imperial Contracting Co.* (1981) 123 Cal.App.3d 898, 176 Cal.Rptr. 886], the doctrine of strict liability in tort was extended to a defective condominium development, even though the complaint did not allege that the defendant was engaged in a continuous course of business in land development. The court found that the building and marketing of a condominium project with 192 units was a sufficient showing that the defendant was engaged in the business of developing and selling residential units and therefore subject to the doctrine of strict liability [*Del Mar Beach Club Owners Assn. v. Imperial Contracting Co.* (1981) 123 Cal.App.3d 898, 911-912, 176 Cal.Rptr. 886] .

In *Sumitomo Bank v. Taurus Developers, Inc.* [*Sumitomo Bank v. Taurus Developers, Inc.* (1986) 185 Cal.App.3d 211, 229 Cal.Rptr. 719], the court held that strict liability is intended primarily for the benefit of consumers and that a construction lender for a condominium project is not entitled to invoke the strict liability theory of recovery [*Sumitomo Bank v. Taurus Developers, Inc.* (1986) 185 Cal.App.3d 211, 226-227, 229 Cal.Rptr. 719] .

Because the remedy of strict liability for construction defects is only available to protect the consumer against a builder or manufacturer that is a mass producer, recovery is not available against a builder who builds two homes [*Oliver v. Superior Court* (1989) 211 Cal.App.3d 86, 89, 259 Cal.Rptr. 160], or against a subcontractor hired by a developer. In the latter case, the consumer is already protected by the developer's strict liability for the negligence of its subcontractors [*La Jolla Village Homeowners' Assn. v. Superior Court* (1989) 212 Cal.App.3d 1131, 1144, 261 Cal.Rptr. 146] .

[c] Damages

In a strict liability claim for construction defects, a plaintiff is entitled to recover the damages for actual physical damage to the property and for personal injury and death [*Huang v. Garner* (1984) 157 Cal.App.3d 404, 423, 203 Cal.Rptr. 800]. The courts have refrained from expanding strict tort liability in the construction context to encompass recovery for economic damages [see *Huang v. Garner* (1984) 157 Cal.App.3d 404, 423, 203 Cal.Rptr. 800] .

[d] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 12, *California Judicial Council Products Liability Instructions*]:

CACI No. 1200, Strict Liability--Essential Factual Elements

CACI No. 1201, Strict Liability--Manufacturing Defect--Essential Factual Elements

CACI No. 1202, Strict Liability--"Manufacturing Defect" Explained

CACI No. 1203, Strict Liability Design Defect--Consumer Expectation Test--Essential Factual Elements

CACI No. 1204, Strict Liability Design Defect--Risk-Benefit Test--Elements Factual Elements--Shifting Burden of Proof

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property LawConstruction LawContractsReal Property LawConstruction LawDefectsTortsStrict LiabilityGeneral Overview



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California Forms of Jury Instruction

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CHAPTER 3I Matthew Bender Construction Contract Instructions
PART A. BURDEN OF PROOF INSTRUCTIONS

2-3I California Forms of Jury Instruction MB 300I.18

MB 300I.18 Breach of Construction Contract for Failure to Follow Plans and Specifications

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Plaintiff claims that Defendant breached the contract between them by [his/her/its] failure to build _____ [describe project] in conformity with the _____ [describe plan, diagram, specifications, or other graphic representations incorporated into construction contract]. For you to find that Defendant did breach the contract in this manner, plaintiff has the burden of proving all of the following:

1. Defendant agreed to build _____ [describe project] for Plaintiff in accordance with the _____ [plans/specifications/diagrams or specify other graphic representation] prepared by _____ [name of preparer];

2. The _____ [plans/specifications/diagrams or specify other graphic representation] required Defendant to _____ [describe disputed work];

3. Defendant failed to build _____ [describe project] in conformity with the _____ [plans/specifications/diagrams or specify other graphic representation];

4. Defendant's failure to follow the _____ [plans/specifications/diagrams or specify other graphic representation] caused the damages that Plaintiff complains of; and

5. The nature and extent of Plaintiff's damages.

Authorities: *Kossler v. Palm Springs Developments, Ltd.* (1980) 101 Cal.App.3d 88, 101, 161 Cal.Rptr. 423 ;

Greenwald v. Royal Indemnity Co. (1952) 112 Cal.App.2d 183, 185, 245 P.2d 1115 .

[2] Use of Instructions

This instruction should be used when there is a disputed issue of fact over whether a builder has completed all of the work described in the plans and specifications incorporated in a construction contract. This issue will generally arise when a builder has a direct contract with a property owner or a developer has a contract to build and sell a completed work of improvement to conform to a particular plan. The instruction will generally be offered by the owner. In response, the builder will generally ask that it be accompanied by an instruction on substantial performance [see *MB 300I.57*; see also Ch. 3, *California Judicial Council Contracts Instructions*, CACI No. 312, "Substantial Performance," and Ch. 3D, *Matthew Bender Performance and Breach of Contract Instructions*, MB 300D.02].

If the failure to comply with plans and specifications results in damaged or defective work, the owner may also wish to use one (or more) of the instructions governing claims for deficiencies in design or construction [see *MB 300I.17* (strict liability for construction defects)]. The instruction in MB 300I.101 on damages for failure to follow plans and specifications should be given with this instruction.

A preponderance of evidence instruction must be given with this instruction [see Ch. 2, *California Judicial Council Evidence Instructions*, CACI No. 200 ("More Likely True than Not True")].

For related Judicial Council instructions, see [3][b], *below*.

LexisNexis Matthew Bender Expert Practice Tip--Be Clear in Closing: Some jurors will understand "plans and specifications," but some jurors will not. Be clear then in the closing. *By Rex Heeseman*

[3] Comment

[a] Builder's Obligation

Most construction contracts obligate the builder to construct the work of improvement according to plans and specifications that are part of the construction documents [see *California Real Estate Law & Practice*, Ch. 432, *The Owner-Prime Contractor Relationship and Contract* (Matthew Bender)]. A builder satisfies its obligation if it builds the work of improvement substantially in accordance with the contract documents without any willful or material deviations or omissions [*Lowy v. United Pacific Ins. Co. (1967) 67 Cal.2d 87, 60 Cal.Rptr. 225, 429 P.2d 577* ; *U.S. Industries v. Vadnais (1969) 270 Cal.App.2d 520, 526, 76 Cal.Rptr. 44*]. Thus, if there are minor deviations from the plans or specifications or minor defects in the work that has been performed, the contractor is still deemed entitled to payment for the contract price, less an amount necessary to compensate the owner for imperfections in performance [*Lowy v. United Pacific Ins. Co. (1967) 67 Cal.2d 87, 60 Cal.Rptr. 225, 429 P.2d 577* ; *U.S. Industries v. Vadnais (1969) 270 Cal.App.2d 520, 526, 76 Cal.Rptr. 44*]. However, a builder may not demand full performance from an owner based on a contention that the builder has substantially performed [*Kossler v. Palm Springs Developments, Ltd. (1980) 101 Cal.App.3d 88, 101-102, 161 Cal.Rptr. 423* (build-to-suit developer could not demand entire purchase price from buyer when work of improvement, although substantially completed, did not conform to the original plans and specifications)].

Whether or not a contractor has substantially performed its contract, however, an owner is entitled to recover damages from the contractor for failure to follow plans and specifications and can deduct these damages from the sums due the contractor [*Lowy v. United Pacific Ins. Co. (1967) 67 Cal.2d 87, 60 Cal.Rptr. 225, 429 P.2d 577* ; *U.S. Industries v. Vadnais (1969) 270 Cal.App.2d 520, 526, 76 Cal.Rptr. 44*]. The owner has the burden of proving that the contractor failed to follow the plans and specifications and there are defects in the work [*Mitchell v. Preston (1950) 101 Cal.App.2d 205, 207, 225 P.2d 229*]. On the other hand, the contractor has the burden of proving that its work constituted substantial performance notwithstanding deficiencies in the construction [*Lowy v. United Pacific Ins. Co.*

(1967) 67 Cal.2d 87, 60 Cal.Rptr. 225, 429 P.2d 577 (contract 90 percent complete); *Thomas Haverty Co. v. Jones* (1921) 185 Cal. 285, 197 P. 105 (contract 90 percent complete)].

Generally, when the contractor has substantially performed its contract obligations but there are deviations, omissions, and defects in the completed construction, the owner is entitled to costs of correction [*Thomas Haverty Co. v. Jones* (1921) 185 Cal. 285, 197 P. 105 ; *Greenwald v. Royal Indemnity Co.* (1952) 112 Cal.App.2d 183, 245 P.2d 1115], unless the deviations from the contract plans and specifications cannot be corrected without causing unreasonable economic waste, in which case the owner is entitled to damages for the reduction in the value of the improvements resulting from the deviations [*Shell v. Schmidt* (1958) 164 Cal.App.2d 350, 358-362, 366, 330 P.2d 817].

LexisNexis Matthew Bender Expert Practice Tip--Substantial Performance: Most of the time the factual disputes will focus on whether the builder has "substantially" performed. Even then, the owner will usually be entitled to the costs of correction. *By Ronald Oster*

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 3, *California Judicial Council Contracts Instructions*]:

CACI No. 312 Substantial Performance

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawTypes of ContractsConstruction ContractsReal Property LawConstruction LawContractsReal Property LawConstruction LawContractors & Subcontractors



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CHAPTER 3I Matthew Bender Construction Contract Instructions
PART A. BURDEN OF PROOF INSTRUCTIONS

2-3I California Forms of Jury Instruction MB 300I.19

MB 300I.19 Recovery of Liquidated Damages From Supplier Causing Delay

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Defendant was a supplier of _____ [*describe product or material*] to Plaintiff. Plaintiff was under a contract with [the owner/the general contractor] requiring the completion of _____ [*specify work to be completed*] _____ [*specify time limits, e.g., by _____, (date) or within _____ weeks of the start of construction*]. Plaintiff alleges that Defendant negligently failed to supply _____ [*describe product or material*] in a timely manner, which caused Plaintiff to fail to complete its contract within the required time, resulting in the assessment of [delay damages/contract damages/liquidated damages] against Plaintiff by [the owner/the general contractor].

To recover on this claim, Plaintiff has the burden of proving all of the following:

- (1) Defendant knew of the contract between Plaintiff and the [owner/general contractor];
- (2) Defendant's conduct was negligent;
- (3) It was foreseeable that Defendant's negligent conduct would cause a delay in the general contract's completion, which would be a breach of the contract between Plaintiff and the [owner/general contractor];
- (4) The contract between Plaintiff and the [owner/general contractor] was actually disrupted by delay;
- (5) The delay resulted from Defendant's conduct; and

(6) Plaintiff was damaged by [delay damages/contract damages/liquidated damages] that were imposed because of this delay.

Authorities: *Buckaloo v. Johnson* (1975) 14 Cal.3d 815, 827, 122 Cal.Rptr. 745, 537 P.2d 865, disapproved on other grounds, *Della Penna v. Toyota Motor Sales, U.S.A., Inc.* (1995) 11 Cal.4th 376, 393 n.5, 45 Cal.Rptr.2d 436, 902 P.2d 740; *Chameleon Engineering Corp. v. Air Dynamics, Inc.* (1980) 101 Cal.App.3d 418, 423, 161 Cal.Rptr. 463.

[2] Use of Instruction

This instruction should be used when a general contractor has been assessed liquidated damages for a delay that was allegedly caused by the negligence of a supplier. A general negligence instruction should be given with this instruction. This instruction may also be given concurrently with instructions on breach of contract [see Ch. 3 *California Judicial Council Contracts Instructions*, CACI No. 303, and MB 300I.06, MB 300I.30-MB 300I.37; see also Ch. 3D, *Matthew Bender Performance and Breach of Contract Instructions*], comparative negligence, and specific negligence standards applicable to suppliers of products and equipment to a construction project.

A preponderance of evidence instruction must be given with this instruction [see Ch. 2, *California Judicial Council Evidence Instructions*, CACI No. 200 ("More Likely True than Not True")].

For related Judicial Council instructions, see [3][b], *below*.

LexisNexis Matthew Bender Expert Practice Tip--Use Care With Terms: This is a complicated instruction, involving multiple parties, and will have to be carefully explained in closing. Avoid using the term "liquidated damages," which will mean nothing to the jury. Use the term "delay damages" or "contract damages" or similar terms. Note, however, that such damages are presumably mentioned in the contract--take advantage of that. *By Ronald Oster and Rex Heeseman*

[3] Comment

[a] Inducing Breach of Contract

The tort of inducing a breach of contract has expanded to permit liability even when the defendant does not induce a breach of contract, but simply makes the plaintiff's performance of the contract more expensive or burdensome [*Lipman v. Brisbane Elementary Sch. Dist.* (1961) 55 Cal.2d 224, 232, 11 Cal.Rptr. 97, 359 P.2d 465] or interferes with the formation of a prospective economic relationship [*Buckaloo v. Johnson* (1975) 14 Cal.3d 815, 826-827, 122 Cal.Rptr. 745, 537 P.2d 865, disapproved on other grounds, *Della Penna v. Toyota Motor Sales, U.S.A., Inc.* (1995) 11 Cal.4th 376, 393 n.5, 45 Cal.Rptr.2d 436, 902 P.2d 740].

In *Chameleon Engineering Corp. v. Air Dynamics, Inc.* [*Chameleon Engineering Corp. v. Air Dynamics, Inc.* (1980) 101 Cal.App.3d 418, 161 Cal.Rptr. 463], a California court of appeal held that a supplier to a subcontractor of a general contractor who has entered into a construction contract requiring the completion of the work of construction within a specified time, may be held liable in tort for liquidated damages assessed against the general contractor when the supplier negligently fails to supply essential components necessary to the timely completion of the contract. The general contractor's cause of action is one for negligent interference with prospective economic advantage [*Chameleon Engineering Corp. v. Air Dynamics, Inc.* (1980) 101 Cal.App.3d 418, 420, 161 Cal.Rptr. 463].

Recovery for negligent interference with prospective economic advantage is available only when a duty of care was reasonably owed and breached [*J'Aire Corp. v. Gregory* (1979) 24 Cal.3d 799, 808, 157 Cal.Rptr. 407, 598 P.2d 60]. The existence of a duty of care depends on the foreseeability of the injury and the nexus between the defendant's conduct and the plaintiff's injury [*J'Aire Corp. v. Gregory* (1979) 24 Cal.3d 799, 808, 157 Cal.Rptr. 407, 598 P.2d 60]. Determination of whether a duty of care is owed requires an analysis of all of the following six factors [*Christensen v.*

Superior Court (1991) 54 Cal.3d 868, 891, 2 Cal.Rptr.2d 79, 820 P.2d 181 ; J'Aire Corp. v. Gregory (1979) 24 Cal.3d 799, 808, 157 Cal.Rptr. 407, 598 P.2d 60 ; Biakanja v. Irving (1958) 49 Cal.2d 647, 650, 320 P.2d 16 ; Chameleon Engineering Corp. v. Air Dynamics, Inc. (1980) 101 Cal.App.3d 418, 422-423, 161 Cal.Rptr. 463]:

- The extent to which the transaction was intended to affect the plaintiff;
- The foreseeability of harm to the plaintiff;
- The degree of certainty that the plaintiff suffered injury;
- The closeness of the connection between the defendant's conduct and the injury suffered;
- The moral blame attached to the defendant's conduct; and
- The policy of preventing future harm.

The tort of negligent interference with prospective economic advantage is not limited to situations in which the plaintiff and the defendant have contractual privity, and it may be used by a general contractor against a subcontractor's supplier [*Chameleon Engineering Corp. v. Air Dynamics, Inc. (1980) 101 Cal.App.3d 418, 422-423, 161 Cal.Rptr. 463*].

[b] Related Judicial Council Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 22, *California Judicial Council Economic Interference Instructions*]:

CACI No. 2200 Inducing Breach of Contract

CACI No. 2204 Negligent Interference With Prospective Economic Relations

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawTypes of ContractsConstruction ContractsReal Property LawConstruction LawContractors & SubcontractorsTortsBusiness TortsCommercial InterferenceContractsElements



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CHAPTER 3I Matthew Bender Construction Contract Instructions
PART A. BURDEN OF PROOF INSTRUCTIONS

2-3I California Forms of Jury Instruction MB 300I.20

MB 300I.20 Recovery of Damages From Builder for Damages Resulting From Construction Defects in New Residence Sold on or After January 1, 2003

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Plaintiff alleges that [he/she] has suffered damage as a result of [a] construction defect[s] in [his/her] residence. To recover on [his/her] claim, Plaintiff has the burden of proving all of the following:

1. Plaintiff's residence at _____ [address of plaintiff's residence] was sold by Defendant as a new home on or after January 1, 2003.

2. Plaintiff's residence fails to meet the statutory construction standard(s) prescribed by _____ [cite relevant standard (see Civ. Code § 896)] in that _____ [describe specific defect, e.g., the foundation contains significant cracks, which has caused significant vertical displacement of the structure].

3. The failure to meet the statutory construction standard arises out of, pertains to, or is related to, the original construction of Plaintiff's residence by Defendant.

4. Before filing this action for damages, Plaintiff provided Defendant with a written notice of claim that the construction of Plaintiff's residence was in violation of _____ [cite relevant standard (Civ. Code § 896)], and the parties attempted, without success, to resolve the problem in accordance with Business and Professions Code Sections 910 through 938 .

Authorities: Civ. Code §§ 910, 938, 941(e).

[2] Use of Instruction

This instruction should be used when a new residence, sold on or after January 1, 2003, does not meet one or more of the construction standards prescribed by *Civ. Code* §§ 896, 897.

A damages instruction must be given with this instruction [*see MB 300I.110*]. If relevant, an instruction on available statutory affirmative defenses may also be required [*see MB 300I.82*].

[3] Comment

[a] Actions for Defective Construction in New Residences Sold on or After January 1, 2003--Overview and Applicability

In accordance with Division 2, Part 2, Title 7 of the Civil Code, "Requirements for Actions for Construction Defects" [*Civ. Code* § 895 *et seq.*], any action against a builder, general contractor, subcontractor, individual product manufacturer, or design professional, seeking recovery of damages arising out of, or related to deficiencies in, residential construction, design, specifications, surveying, planning, supervision, testing, or observation of construction when the property involved is a new residential unit (excluding a condominium conversion) when the purchase agreement with the buyer was signed by the seller on or after January 1, 2003, is governed by detailed statutory standards related to the various functions and components of the building [*see Civ. Code* §§ 896, 938]. The action must be preceded by a mandatory pre-litigation procedure, which provides the potential defendant with a right to attempt a repair of any alleged defect before litigation. The pre-litigation procedure also includes inspections and exchanges of documentation between the parties under certain circumstances, and mediation at various points, all pursuant to statutory time frames [*see Civ. Code* §§ 910-938].

At least in the case of construction defect situations involving new residential units (excluding condominium conversions) when the purchase agreement with the buyer was signed by the seller on or after January 1, 2003, the Legislature effectively rendered inapplicable the effects of a decision in which the Supreme Court held, among other things, that construction defects must cause actual damage before they can be actionable in tort [*see Aas v. Superior Court* (2000) 24 Cal.4th 627, 636-647, 101 Cal.Rptr.2d 718, 12 P.3d 1125].

The provisions, standards, rights, and obligations set forth in Title 7 are binding on all original purchasers and their successors-in-interest. Associations are considered to be original purchasers and have standing to enforce these provisions, standards, rights, and obligations [*Civ. Code* § 945].

Title 7 does not apply to any action by a claimant to enforce a contract or express contract provision, or any action for fraud, personal injury, or violation of a statute (other than Title 7) [*Civ. Code* § 943(a)].

Title 7 does not eliminate or abrogate the requirements of *Code Civ. Proc.* § 411.35, which requires plaintiff's counsel to furnish an Attorney's Certificate in an action against a design professional, for claims and damages that are not covered by the statutory scheme governing construction defect litigation [*Civ. Code* § 937].

[b] Mandatory Pre-Litigation Procedure

Before a homeowner can file an action seeking damages for alleged construction defects based on the statutory construction standards, he or she must initiate a process the main component of which is the builder's right to attempt to repair any alleged defects before the homeowner can initiate litigation [*Civ. Code* § 910]. The goal of the pre-litigation process is to afford the parties the opportunity for quick and fair resolution of construction defect claims without having to resort to lengthy and expensive litigation [*see 2002 Stats.*, ch. 722, § 1(c)].

In lieu of this statutory process, a builder may provide, by contract, for its own non-adversarial procedure. If the builder

does so, however, and the contractual procedure either fails to resolve the construction defects or is subsequently found to be unenforceable, the builder may not then require adherence with the statutory procedure [*Civ. Code* § 914(a)].

If the builder fails to comply with the requirements of a non-adversarial procedure or elects not to go through with such a procedure, the homeowner is released from the obligation to participate in the procedure and may proceed to file an action to resolve the alleged construction defects [*Civ. Code* § 915].

[c] Claimant's Cause of Action; Burden of Proof

To state a cause of action for damages resulting from a violation of the statutory construction standards, a homeowner need only demonstrate, in accordance with the applicable evidentiary standard, that the home does not meet the applicable standard, subject to specified statutory affirmative defenses [*see Civ. Code* § 945.5; *see also* [e], *below*]. No further showing of causation or damages is required to meet the burden of proof regarding a violation of the statutory construction standards, provided that the violation arises out of, pertains to, or is related to, the original construction [*Civ. Code* § 942].

No other cause of action for a claim for construction defects covered by Title 7 is allowed. Title 7 does not apply to any action by a claimant to enforce a contract or express contract provision, or any action for fraud, personal injury, or violation of a statute other than Title 7 [*Civ. Code* § 943(a)].

[d] Damages

The homeowner is entitled to recover all of the following as damages in an action on a claim based on violation of the statutory construction standards [*Civ. Code* § 944; *see MB 300I.110*]:

- The reasonable cost of repairing any violation of the statutory construction standards.
- The reasonable cost of repairing any damages caused by the repair efforts.
- The reasonable cost of repairing and rectifying any damages resulting from the home's failure to meet the standards.
- The reasonable cost of removing and replacing any improper repair by the builder.
- Reasonable relocation and storage expenses.
- Lost business income if the home was used as a principal place of business licensed to be operated from the home.
- Reasonable investigative costs for each established violation.
- All other costs or fees recoverable by contract or statute.

As to any claims involving a detached single-family home, the homeowner's right to the reasonable value of repairing any nonconformity is limited to the repair costs, or the diminution in the home's current value caused by the nonconformity, whichever is less, subject to the common law personal use exception [*Civ. Code* § 943(b)].

Damages awarded in an action by the claimant that was not brought under Title 7--for example, an action to enforce a contract or express contractual provision, or an action for fraud, personal injury, or violation of another statute--must be reduced by any amounts recovered for the same items in an action under Title 7 [*Civ. Code* § 943(a)].

[e] Affirmative Defenses

Under the principles of comparative fault pertaining to affirmative defenses, a builder, general contractor, subcontractor, material supplier, individual product manufacturer, or design professional may be excused, in whole or in part, from any obligation, damage, loss, or liability if he or she can demonstrate that the claimed violation of the statutory construction standards was caused by any of the following [*Civ. Code § 945.5(a)-(d)*; see *MB 300I.81*]:

- An unforeseen act of nature, defined as a weather condition, earthquake, or manmade event such as war, terrorism, or vandalism, in excess of the design criteria expressed by the applicable building codes, regulations, and ordinances in effect at the time of the original construction.
- A homeowner's unreasonable failure to minimize or prevent the claimed damages in a timely manner, including (1) the homeowner's failure to allow reasonable and timely access for inspections and repairs, and (2) the homeowner's failure to give timely notice to the builder after discovering a violation; but excluding damages due to the builder's untimely or inadequate response to the homeowner's claim.
- The failure of the homeowner or his or her agent, employee, subcontractor, independent contractor, or consultant to follow the builder's or manufacturer's recommendations, or commonly accepted homeowner maintenance obligations; provided the builder can show that the homeowner had written notice of these recommendations and that the recommendations were reasonable at the time they were issued.
- The homeowner's, his or her agent's, or an independent third party's alterations, ordinary wear and tear, misuse, abuse, or neglect, or by the structure's use for something other than its intended purpose.

Other affirmative defenses include establishing that [*Civ. Code § 945.5(e)-(g)*]:

- The applicable statute of limitations has expired.
- The builder has obtained a valid release for the particular violation claimed.
- The builder has successfully repaired the particular violation claimed.

All affirmative defenses are preserved as to any causes of action to which Title 7 does not apply [*Civ. Code § 945.5(h)*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property Law Construction Law Contracts Real Property Law Construction Law Contractors & Subcontractors Real Property Law Construction Law Defects



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CHAPTER 3I Matthew Bender Construction Contract Instructions
PART A. BURDEN OF PROOF INSTRUCTIONS

2-3I California Forms of Jury Instruction MB 300I.21-MB 300I.29

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MB 300I.21Reserved for Future Use



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California Forms of Jury Instruction

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CHAPTER 3I Matthew Bender Construction Contract Instructions
PART B. TYPICAL SPECIFIC BREACHES OF THE CONSTRUCTION CONTRACT

2-3I California Forms of Jury Instruction MB 300I.30

MB 300I.30 Extra Work

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Plaintiff has the burden of proving by a preponderance of the evidence all the facts necessary to establish all of the following:

1. That Defendant required Plaintiff to provide labor, services, equipment, or materials of a character not required for the performance of the contract; and

a. That the labor, services, equipment, or materials were not contemplated by the parties at the time of contracting; or

b. That the labor, services, equipment, or materials was more work than was required by the contract;

2. That Plaintiff provided the labor, services, equipment, or materials;

3. That the provision of the labor, services, equipment, or materials was a legal cause of damages to Plaintiff; and

4. The nature and extent of those damages.

Authorities: *C. F. Bolster Co. v. J. C. Boespflug etc. Co.* (1959) 167 Cal.App.2d 143, 151, 334 P.2d 247 ; *Byson v. Los Angeles* (1957) 149 Cal.App.2d 469, 473, 308 P.2d 765 ; *Frank T. Hickey, Inc. v. L.A. J.C. Council* (1954) 128

Cal.App.2d 676, 683, 276 P.2d 52 .

[2] Use of Instruction

This instruction should be used in a suit for breach of an express construction contract by requiring but not paying for extra work not required by the contract. If the action is on an implied contract for the extra work, instructions defining implied contracts will be required [see Ch. 3, *California Judicial Council Contracts Instructions*, CACI No. 305, and Ch. 3A, *Matthew Bender Formation of Contract Instructions*].

Most construction contracts contain provisions for the issuance of change orders to cover extra work [see *Pub. Contract Code § 10227*; California Department of Transportation, Standard Specifications (1999 ed.), § 4-1.03D]. Those provisions may attempt to restrict recovery for extra work [see *MB 300I.53*]. This instruction may have to be modified or supplemented to reflect the provisions of these contracts.

This instruction should be used with the instruction in MB 300I.109 on damages for extra work.

The instruction may have to be supplemented with others explaining what work was required under the contract's terms.

If the action is by a subcontractor against the prime contractor, the references to the contract in the instruction should be changed to subcontract.

LexisNexis Matthew Bender Expert Practice Tip--Choose Terms Carefully: The wording of Paragraph 1 may be confusing. Instead of instructing the jury that the additional labor or materials were "of a character not required for the performance of the contract," it may be better to describe them as labor or materials that were "in addition to those required for performance of the contract." Or simply describe them as "extra" labor or materials. *By Ronald Oster*

[3] Comment

"Extra work" arises outside of the contract's terms. It is labor, services, equipment, or materials that were not required by the contract and that were not contemplated by the parties when the contract was executed [*C. F. Bolster Co. v. J. C. Boespflug etc. Co. (1959) 167 Cal.App.2d 143, 151, 334 P.2d 247* ; *Frank T. Hickey, Inc. v. L.A. J.C. Council (1954) 128 Cal.App.2d 676, 683, 276 P.2d 52*].

A contractor or subcontractor can comply with demands that it do extra work and then sue either for (1) breach of the express contract [*Byson v. Los Angeles (1957) 149 Cal.App.2d 469, 473, 308 P.2d 765*], or (2) an implied contract for the extra work only [*Benson Electric Co. v. Hale Bros. Associates, Inc. (1966) 246 Cal.App.2d 686, 697-698, 55 Cal.Rptr. 73*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawTypes of ContractsExpress ContractsReal Property LawConstruction LawContractsReal Property LawConstruction LawContractors & Subcontractors



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CHAPTER 3I Matthew Bender Construction Contract Instructions
PART B. TYPICAL SPECIFIC BREACHES OF THE CONSTRUCTION CONTRACT

2-3I California Forms of Jury Instruction MB 300I.31

MB 300I.31 Change in Scope of Work

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Plaintiff has the burden of proving by a preponderance of the evidence all the facts necessary to establish all of the following:

- 1. Defendant required Plaintiff _____ [to do or to eliminate] work; and**
 - a.**
That the nature and extent of that work, when taken together, so greatly _____
[exceeded or diminished] the scope of work provided for in the contract;
 - b.**
That the purpose of the original contract was altered;
- 2. That the _____ [added or eliminated] work was a legal cause of the damages to Plaintiff; and**
- 3. The nature and extent of those damages.**

Authorities: *Coleman Engineering Co. v. North American Aviation, Inc.* (1966) 65 Cal.2d 396, 406-407, 55 Cal.Rptr. 1, 420 P.2d 713 ; *C. Norman Peterson Co. v. Container Corp. of America* (1985) 172 Cal.App.3d 628, 640-644, 218 Cal.Rptr. 592 ; *Daugherty Co. v. Kimberly-Clark Corp.* (1971) 14 Cal.App.3d 151, 155-157, 92 Cal.Rptr. 120 ; *Hensler v. City of Los Angeles* (1954) 124 Cal.App.2d 71, 78-82, 268 P.2d 12 .

[2] Use of Instruction

2-3I California Forms of Jury Instruction MB 300I.31

This instruction should be used when a contractor seeks to recover for breach of an express contract caused by the impact of such significant additions to, or deletions from, the contracted work that the nature of the agreement was changed. If the action is on an implied contract, instructions defining implied contracts will be required [see Ch. 3, *California Judicial Council Contracts Instructions*, CACI No. 305, and Ch. 3A, *Matthew Bender Formation of Contract Instructions*].

Many construction contracts attempt to address change in the scope of the work situations. For example, Southern California Chapter of American Public Works Association and Southern California District Association of General Contractors of California Joint Cooperative Commission Standard Specifications for Public Works Construction (1982 edition), § 3-2.1, only permits change orders up to a limit, additive and deductive, of 25 percent of the contract price. Anything over that requires a separately negotiated supplemental agreement. These contract provisions are quite mechanical in their application, so they may or may not cover the particular situation, but if they do, this instruction may have to be modified to incorporate their provisions.

This instruction does not cover the issues that may arise from ordinary claims for extra work [see MB 300I.30], which may be pursued as an alternative theory of recovery.

The instruction may have to be supplemented with others explaining what work was required under the contract's terms.

This instruction should be used with the instruction in MB 300I.108 on damages for changes in the scope of the work.

If the action is by a subcontractor against the prime contractor, the references to the contract in the instruction should be changed to subcontract.

LexisNexis Matthew Bender Expert Practice Tip--Explain Changes to Contract: It may be easier for a jury to understand why "additions" to a contract justify payment of damages as opposed to "deletions" from the contract. If the fundamental nature of the contract has been altered by deletions (e.g., less profit, less opportunity, damage to reputation), this will have to be carefully explained in closing argument. However, any "change" may bother some jurors; so, depending on your perspective, exploit, or explain, that point carefully. *By Ronald Oster and Rex Heeseman*

[3] Comment

Although most construction contracts contain provisions that allow the owner to modify the work by issuing change orders [see MB 300I.30], that authority has limits [*Freund v. United States* (1922) 260 U.S. 60, 64-67, 43 S.Ct. 70, 67 L.Ed. 131]. That power does not permit the owner to (1) unduly increase the contract's cost [*Valley Constr. Co. v. Calistoga* (1946) 72 Cal.App.2d 839, 842, 165 P.2d 521], (2) abrogate or change the nature of the contract that the parties executed, or (3) defeat the object of the contract that is reasonably deducible from its terms [*Hensler v. City of Los Angeles* (1954) 124 Cal.App.2d 71, 79-80, 268 P.2d 12]. Such a significant deviation from the contract's original object is considered to be a change in the scope of the work. In the federal courts, the term "cardinal change" is frequently used to describe this phenomenon [*Edward R. Marden Corporation v. United States* (Ct. Cl. 1971) 442 F.2d 364, 370]. A change in the scope of the work occurs when the modifications, viewed against the background of the work described in the contract, either fail to be clearly directed to the achievement of a more satisfactory project or eliminate work that was integrally necessary to the project as a whole [*Hensler v. City of Los Angeles* (1954) 124 Cal.App.2d 71, 80, 268 P.2d 12].

A change in the scope of the work can consist of different or additional work [*Coleman Engineering Co. v. North American Aviation, Inc.* (1966) 65 Cal.2d 396, 405-407, 55 Cal.Rptr. 1, 420 P.2d 713 ; *C. Norman Peterson Co. v. Container Corp. of America* (1985) 172 Cal.App.3d 628, 640-641, 218 Cal.Rptr. 592 ; *Daugherty Co. v. Kimberly-Clark Corp.* (1971) 14 Cal.App.3d 151, 156-158, 92 Cal.Rptr. 120] or deletions from the work [*Hensler v.*

City of Los Angeles (1954) 124 Cal.App.2d 71, 79-80, 268 P.2d 12].

The plaintiff can comply with the defendant's demands and then sue on the contract for the breach [*Hensler v. City of Los Angeles* (1954) 124 Cal.App.2d 71, 79-80, 268 P.2d 12]. The contractor can also treat the contract as abandoned, complete the project as requested by the owner, and recover on an implied contract for the extra work [*C. Norman Peterson Co. v. Container Corp. of America* (1985) 172 Cal.App.3d 628, 640-641, 645-646, 218 Cal.Rptr. 592 (recovery allowed for reasonable value of services on quantum meruit basis); *Daugherty Co. v. Kimberly-Clark Corp.* (1971) 14 Cal.App.3d 151, 158, 92 Cal.Rptr. 120]. Alternatively, the plaintiff can treat the contract as abandoned, cease work altogether, and sue for the work done to date [*Coleman Engineering Co. v. North American Aviation, Inc.* (1966) 65 Cal.2d 396, 401-407, 55 Cal.Rptr. 1, 420 P.2d 713].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawTypes of ContractsExpress ContractsContracts LawTypes of ContractsImplied-in-Fact ContractsReal Property LawConstruction LawContractsReal Property LawConstruction LawContractors & Subcontractors



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CHAPTER 3I Matthew Bender Construction Contract Instructions
PART B. TYPICAL SPECIFIC BREACHES OF THE CONSTRUCTION CONTRACT

2-3I California Forms of Jury Instruction MB 300I.32

MB 300I.32 Implied Covenant of Good Faith and Fair Dealing

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Plaintiff has the burden of proving by a preponderance of the evidence all the facts necessary to establish all of the following:

- 1. That in every contract there is an implied covenant of good faith and fair dealing; and**
 - a. That Defendant had a duty to refrain from doing anything that would interfere with the rights of Plaintiff to receive the benefits of the contract; or**
 - b. That Defendant had a duty to refrain from doing anything that would render the performance by Plaintiff impossible;**
- 2. That Defendant had a duty to do everything that the contract presupposes that it would do to accomplish the contract's purpose;**
- 3. That the breach of the implied covenant of good faith and fair dealing was the legal cause of the damages to Plaintiff; and**
- 4. The nature and extent of those damages.**

Authorities: *Zurn Engineers v. State of California ex rel. Dept. Water Resources* (1977) 69 Cal.App.3d 798, 833, 138 Cal.Rptr. 478, cert. denied, 434 U.S. 985 ; *Berkeley Lawn Bowling Club v. City of Berkeley* (1974) 42 Cal.App.3d 280,

286-287, 116 Cal.Rptr. 762 ; *Steinmeyer v. Warner Cons. Corp.* (1974) 42 Cal.App.3d 515, 519, 116 Cal.Rptr. 57 ; *Harm v. Frasher* (1960) 181 Cal.App.2d 405, 417, 5 Cal.Rptr. 367 .

[2] Use of Instruction

This instruction should be used when one party to a contract contends that conduct of another party to that contract amounted to a breach of the implied covenant of good faith and fair dealing in the contract and therefore was a breach of the contract. It may have to be supplemented with other instructions explaining what rights the contract gave or what it presupposed the parties would do.

If the action is by a subcontractor against the prime contractor, the references to the contract in the instruction should be changed to subcontract.

LexisNexis Matthew Bender Expert Practice Tip--Use Care Explaining Implied Covenant: The implied covenant of good faith and fair dealing is a legal concept that is not understood by many lawyers and judges. Hence, be careful and "slow" in explaining this concept. *By Rex Heeseman*

LexisNexis Matthew Bender Expert Practice Tip--Plaintiff's Burden of Proof: The first two paragraphs of this instruction are a statement of existing law. Accordingly, plaintiff should not be required to "prove" these elements as part of its burden of proof. The third paragraph should probably be divided into two separate elements--breach and causation--as independent elements of plaintiff's burden of proof. *By Ronald Oster*

[3] Comment

Every contract contains an implied covenant of good faith and fair dealing. This means that neither party will do anything that would have the effect of destroying or injuring the right of the other to receive the fruits of the contract [*Careau & Co. v. Security Pacific Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1393, 272 Cal.Rptr. 387 ; *Berkeley Lawn Bowling Club v. City of Berkeley* (1974) 42 Cal.App.3d 280, 286-287, 116 Cal.Rptr. 762]. That covenant not only imposes on each contracting party the duty to refrain from doing anything that would render the contract's performance impossible by any act of each party, but also the duty to do everything that the contract presupposes that the party will do to accomplish its purpose [*Berkeley Lawn Bowling Club v. City of Berkeley* (1974) 42 Cal.App.3d 280, 286-287, 116 Cal.Rptr. 762 ; *Steinmeyer v. Warner Cons. Corp.* (1974) 42 Cal.App.3d 515, 519, 116 Cal.Rptr. 57 ; *Harm v. Frasher* (1960) 181 Cal.App.2d 405, 417, 5 Cal.Rptr. 367]. The covenant can be breached when the contract confers on one party a discretionary power affecting the rights of the other party, and that power is not exercised in good faith and in accordance with fair dealing [*Kendall v. Ernest Pestana, Inc.* (1985) 40 Cal.3d 488, 500, 220 Cal.Rptr. 818 ; *Cal. Lettuce Growers v. Union Sugar Co.* (1955) 45 Cal.2d 474, 484, 289 P.2d 785].

The covenant is also implied into public works construction contracts [*Zurn Engineers v. State of California ex rel. Dept. Water Resources* (1977) 69 Cal.App.3d 798, 833, 138 Cal.Rptr. 478].

The covenant is implied to the extent that there are no express covenants to the contrary [*Kenworthy v. State of California* (1965) 236 Cal.App.2d 378, 401, 46 Cal.Rptr. 396]. Further, the covenant supplements the express covenants of the contract to prevent one party from acts or omissions which, while not a breach of the express covenants, frustrate the other party from obtaining the benefits that it should under the contract, thereby giving rise to a breach of contract [*Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 683-684, 689-690, 254 Cal.Rptr. 211 ; *Racine & Laramie, Ltd., Inc. v. Cal. Dept. of Parks & Recreation* (1992) 11 Cal.App.4th 1026, 1031-1032, 14 Cal.Rptr.2d 335].

Enforcement of an implied covenant of good faith and fair dealing depends on the contractual purposes [*Love v. Fire Ins. Exchange* (1990) 221 Cal.App.3d 1136, 1147, 1153, 271 Cal.Rptr. 246].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawContract InterpretationGood Faith & Fair DealingContracts LawTypes of ContractsConstruction
ContractsReal Property LawConstruction LawContracts



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CHAPTER 3I Matthew Bender Construction Contract Instructions
PART B. TYPICAL SPECIFIC BREACHES OF THE CONSTRUCTION CONTRACT

2-3I California Forms of Jury Instruction MB 300I.33

MB 300I.33 Prevention of Performance

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Plaintiff has the burden of proving by a preponderance of the evidence all the facts necessary to establish all of the following:

- 1. That Defendant prevented or hindered Plaintiff's performance of the contract;**
- 2. That the prevention of performance or hindering of performance was the legal cause of damages to Plaintiff; and**
- 3. The nature and extent of those damages.**

[*OPTIONAL (See Use of Instruction)*]

Every building contract includes an implied promise that the contractor will be allowed to construct the building in accordance with the contract's terms without interference by the owner and that [he/she/it] will be given sufficient possession of the premises to enable [him/her/it] to carry on the construction and complete the work that [he/she/it] contracted to do. If the owner refuses to allow the contractor to have the necessary possession of the premises, then this is a breach of the contract by the owner, and the contractor has the right to cease performance of the contract.

Authorities: *Civ. Code §§ 1511, 1512, 1655, 1656; Bomberger v. McKelvey (1950) 35 Cal.2d 607, 613, 220 P.2d 729 ;*

Gray v. Bekins (1921) 186 Cal. 389, 394-395, 199 P. 767 ; *Kenworthy v. State of California* (1965) 236 Cal.App.2d 378, 383-384, 46 Cal.Rptr. 396 .

[2] Use of Instruction

This instruction should be used when a party seeks to recover for the acts and omissions of the other party that prevented or hindered the contract's performance and therefore breached the contract. If the action is on an implied contract, instructions defining implied contracts will be required [see Ch. 3, *California Judicial Council Contracts Instructions*, CACI No. 305, and Ch. 3A, *Matthew Bender Formation of Contract Instructions*].

The optional paragraph may be used when the contractor claims that the owner has physically impeded the contractor's access to the job site. This option may, for example, be offered by the contractor as a defense to claims of wrongful abandonment of construction or as a defense to claims for damages resulting from a delay in the project's completion [see MB 300I.107 (damages for completion of abandoned project)].

Owners frequently try to avoid the application of this rule through specific contract language [see *Maurice L. Bein, Inc. v. Housing Authority* (1958) 157 Cal.App.2d 670, 678-682, 321 P.2d 753 ; *Hensler v. City of Los Angeles* (1954) 124 Cal.App.2d 71, 82-83, 268 P.2d 12]. If these situations arise, additional instructions will be required, and the optional paragraph will have to be revised, as it assumes that there are no express covenants to the contrary [see [3], below, for discussion of the effect of express covenant to the contrary].

If the action is by a subcontractor against the prime contractor, the references to the contract in the instruction should be changed to subcontract.

[3] Comment

In every construction contract that contains no express covenant to the contrary, there is an implied covenant to the effect that the contractor will be permitted to proceed with the work without interference by the owner and will be given such possession of the premises as is necessary to do the work [Civ. Code §§ 1655, 1656; *Bomberger v. McKelvey* (1950) 35 Cal.2d 607, 613, 220 P.2d 729 ; *Gray v. Bekins* (1921) 186 Cal. 389, 395, 199 P. 767]. This covenant also is implied in subcontracts [*Johnson v. de Waard* (1931) 113 Cal.App. 417, 420-421, 298 P. 92]. It is an aspect of the covenant of good faith and fair dealing implied in all contracts [*Kenworthy v. State of California* (1965) 236 Cal.App.2d 378, 383-384, 46 Cal.Rptr. 396 ; see MB 300I.32].

A breach of this covenant can either excuse further performance by plaintiff [Civ. Code § 1511] or allow the plaintiff to proceed and recover for the extra work on a theory of breach of contract [Civ. Code § 1512; *Lapp-Gifford Co. v. Muscoy Water Co.* (1913) 166 Cal. 25, 30, 134 P. 989]. Alternatively, the plaintiff can recover for what was done before work was stopped, or for extra work done to complete its performance, on an implied contract theory [*Gray v. Bekins* (1921) 186 Cal. 389, 394-395, 199 P. 767]. If a property owner forbids a contractor to enter the premises, this denial of access is a sufficient breach of the covenant to excuse performance of the construction contract and also to constitute a breach or anticipatory breach of the contract [*Bomberger v. McKelvey* (1950) 35 Cal.2d 607, 613, 220 P.2d 729].

A variation on the theme of this doctrine is the implied covenant that the owner will provide all easements, permits, environmental impact reports, and other documentation that is reasonably required for the project and that the contract does not expressly require the contractor to provide [*COAC, Inc. v. Kennedy Engineers* (1977) 67 Cal.App.3d 916, 920-922, 136 Cal.Rptr. 890].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawTypes of ContractsConstruction ContractsContracts LawTypes of ContractsCovenantsReal Property
LawConstruction LawContracts



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CHAPTER 3I Matthew Bender Construction Contract Instructions
PART B. TYPICAL SPECIFIC BREACHES OF THE CONSTRUCTION CONTRACT

2-3I California Forms of Jury Instruction MB 300I.34

MB 300I.34 Nondisclosure of Material Facts

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Plaintiff has the burden of proving by a preponderance of the evidence all the facts necessary to establish all of the following:

- 1. That Defendant made representations to Plaintiff concerning the project; and**
 - a. Defendant failed to disclose facts that materially qualified the facts that were disclosed;**
 - b. Defendant failed to disclose other material facts, the absence of which made the facts disclosed likely to mislead plaintiff;**
 - c. Defendant failed to disclose other material facts that were known or accessible only to Defendant, and that Defendant knew were not known by Plaintiff, nor reasonably discoverable by Plaintiff; or**
 - d. Defendant failed to disclose other material facts and actively concealed those facts from Plaintiff;**
- 2. That Plaintiff relied on the representations made by Defendant;**
- 3. That the lack of the other facts was a proximate cause of the damages to Plaintiff; and**
- 4. The nature and extent of those damages.**

Authorities: *Warner Constr. Corp. v. City of Los Angeles* (1970) 2 Cal.3d 285, 294, 85 Cal.Rptr. 444, 466 P.2d 996 ; *La Jolla Village Homeowners' Assn. v. Superior Court* (1989) 212 Cal.App.3d 1131, 1150, 261 Cal.Rptr. 146 ; *Welch v. State of California* (1983) 139 Cal.App.3d 546, 555-557, 188 Cal.Rptr. 726 .

[2] Use of Instruction

This instruction should be used when a contractor claims that the contract was breached by the other party's failure to disclose material facts about the project.

Owners frequently try to avoid the application of this theory by disclaimers concerning the information given. Sometimes those disclaimers work [*Wunderlich v. State of California* (1967) 65 Cal.2d 777, 785-787, 56 Cal.Rptr. 473, 423 P.2d 545], but more often they do not [*E.H. Morrill Co. v. State of California* (1967) 65 Cal.2d 787, 791-793, 56 Cal.Rptr. 479, 423 P.2d 551 ; *Welch v. State of California* (1983) 139 Cal.App.3d 546, 551, 188 Cal.Rptr. 726]. In any event, if there is a disclaimer, it may have to be covered in another instruction.

This instruction may have to be supplemented with others that explain what kinds of facts may be considered material in the context of the particular case [see *Welch v. State of California* (1983) 139 Cal.App.3d 546, 558, 188 Cal.Rptr. 726]. In many circumstances that will also require other instructions explaining what work was within the terms of the contract or how to interpret those terms; these can be fact questions [*Warner Constr. Corp. v. City of Los Angeles* (1970) 2 Cal.3d 285, 293, 85 Cal.Rptr. 444, 466 P.2d 996].

If the action is by a subcontractor against the prime contractor, the references to the contract in the instruction should be changed to subcontract.

LexisNexis Matthew Bender Expert Practice Tip--Use Care With Terms: This instruction sets forth the general requirements to establish fraud, but the same facts can establish breach of contract. Many jurors will need to be "educated" about what is a "material" fact. In addition, in other instructions the term "material facts" is frequently replaced with "important facts" and the term "proximate cause" is replaced with "legal cause" or "substantial factor." *By Ronald Oster and Rex Heeseman*

[3] Comment

This instruction comes from the statement of what constitutes a nondisclosure of material facts in *Warner Construction Corp. v. City of Los Angeles* [*Warner Constr. Corp. v. City of Los Angeles* (1970) 2 Cal.3d 285, 294, 85 Cal.Rptr. 444, 466 P.2d 996 ; see also *La Jolla Village Homeowners' Assn. v. Superior Court* (1989) 212 Cal.App.3d 1131, 1150, 261 Cal.Rptr. 146]. The plaintiff does not need to prove active and intentional concealment. Mere failure to disclose a fact by a defendant who gives other facts that are likely to mislead for want of communication of the nondisclosed fact is actionable as a breach of contract [*Welch v. State of California* (1983) 139 Cal.App.3d 546, 555-557, 188 Cal.Rptr. 726 ; *Gogo v. L.A. etc. Flood Control Dist.* (1941) 45 Cal.App.2d 334, 341-342, 114 P.2d 65].

Even if the nondisclosure is fraudulent, it can still be pursued as a breach of contract, rather than a tort [*Souza & McCue Const. Co. v. Superior Court* (1962) 57 Cal.2d 508, 510-511, 20 Cal.Rptr. 634, 370 P.2d 338].

Although this theory is most frequently applied on public works projects because public entities cannot be sued for fraud, it is equally applicable to private works [*Coleman Engineering Co. v. North American Aviation, Inc.* (1966) 65 Cal.2d 396, 404, 55 Cal.Rptr. 1, 420 P.2d 713] and by subcontractors against prime contractors [*Healy v. Brewster* (1967) 251 Cal.App.2d 541, 550-551, 59 Cal.Rptr. 752].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawDefensesFraud & MisrepresentationGeneral OverviewContracts LawDefensesFraud &
MisrepresentationMaterial MisrepresentationReal Property LawConstruction LawContractsReal Property
LawConstruction LawContractors & Subcontractors



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CHAPTER 3I Matthew Bender Construction Contract Instructions
PART B. TYPICAL SPECIFIC BREACHES OF THE CONSTRUCTION CONTRACT

2-3I California Forms of Jury Instruction MB 300I.35

MB 300I.35 Implied Warranty of Accuracy of Plans and Specifications

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Plaintiff has the burden of proving by a preponderance of the evidence all the facts necessary to establish all of the following:

- 1. That Defendant provided Plaintiff with plans and specifications for the project;**
- 2. That the plans and specifications were not full, complete, and/or accurate;**
- 3. That Plaintiff relied on the plans and specifications;**
- 4. That the lack of full, complete, and/or accurate plans and specifications was the legal cause of damages to Plaintiff; and**
- 5. The nature and extent of those damages.**

Authorities: *Warner Constr. Corp. v. City of Los Angeles* (1970) 2 Cal.3d 285, 294, 85 Cal.Rptr. 444, 466 P.2d 996 ; *E.H. Morrill Co. v. State of California* (1967) 65 Cal.2d 787, 791, 56 Cal.Rptr. 479, 423 P.2d 551 ; *Coleman Engineering Co. v. North American Aviation, Inc.* (1966) 65 Cal.2d 396, 404, 55 Cal.Rptr. 1, 420 P.2d 713 ; *Souza & McCue Const. Co. v. Superior Court* (1962) 57 Cal.2d 508, 510-511, 20 Cal.Rptr. 634, 370 P.2d 338 ; *Healy v. Brewster* (1967) 251 Cal.App.2d 541, 550, 59 Cal.Rptr. 752 ; *MacIsaac & Menke Co. v. Cardox Corp.* (1961) 193 Cal.App.2d 661, 669, 14 Cal.Rptr. 523 .

[2] Use of Instruction

This instruction should be used when a contractor claims the contract was breached because the plans and specifications were not full, complete, or accurate enough for the contractor to use to do the work.

Owners frequently try to avoid the application of this theory by disclaimers concerning the information given, as discussed in *MB 300I.34*.

If the action is by a subcontractor against the prime contractor, the references to the contract in the instruction should be changed to subcontract.

LexisNexis Matthew Bender Expert Practice Tip--Avoid Using "Preponderance of the Evidence":

Many other instructions no longer use the term "preponderance of the evidence" because it is confusing to the jury. The alternate formulation is simply that plaintiff "has the burden of proving" the following facts. *By Ronald Oster*

[3] Comment

This implied warranty comes from several sources. *Pub. Contract Code § 10120* requires state agencies to prepare full, complete, and accurate plans and specifications and estimates of cost, including such directions as will enable any competent mechanic or other builder to carry them out. Even without any specific statutory basis, the courts have had no difficulty implying this warranty just from the nature of the relationship. As early as 1918, it was well settled that the owner is responsible for the consequences of defects in the plans and specifications provided by it, even though the contract contains the usual clauses requiring builders to visit the site, to check the plans, and to inform themselves of the requirements of the work [*United States v. Spearin* (1918) 248 U.S. 132, 136, 39 S.Ct. 59, 63 L.Ed. 166].

The implied warranty is well established in California, both in public works contracts [*Warner Constr. Corp. v. City of Los Angeles* (1970) 2 Cal.3d 285, 294, 85 Cal.Rptr. 444, 466 P.2d 996 ; *E.H. Morrill Co. v. State of California* (1967) 65 Cal.2d 787, 791, 56 Cal.Rptr. 479, 423 P.2d 551 ; *Souza & McCue Const. Co. v. Superior Court* (1962) 57 Cal.2d 508, 510-511, 20 Cal.Rptr. 634, 370 P.2d 338] and in private works contracts [*Coleman Engineering Co. v. North American Aviation, Inc.* (1966) 65 Cal.2d 396, 404, 55 Cal.Rptr. 1, 420 P.2d 713]. It also is implied into subcontracts [*Healy v. Brewster* (1967) 251 Cal.App.2d 541, 550, 59 Cal.Rptr. 752 ; *MacIsaac & Menke Co. v. Cardox Corp.* (1961) 193 Cal.App.2d 661, 669, 14 Cal.Rptr. 523].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawContract Conditions & ProvisionsImplied WarrantiesGeneral OverviewPublic Contracts LawContract InterpretationSpecificationsPublic Contracts LawContract ProvisionsGeneral OverviewReal Property LawConstruction LawContractsReal Property LawConstruction LawContractors & Subcontractors



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California Forms of Jury Instruction

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CHAPTER 3I Matthew Bender Construction Contract Instructions
PART B. TYPICAL SPECIFIC BREACHES OF THE CONSTRUCTION CONTRACT

2-3I California Forms of Jury Instruction MB 300I.36

MB 300I.36 Implied Covenant to Control Third Parties

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Plaintiff has the burden of proving by a preponderance of the evidence all the facts necessary to establish all of the following:

- 1. That the contract could not be performed without the consent or cooperation of _____ [third party];**
- 2. That Defendant agreed to obtain the consent or cooperation of _____ [third party]; and**
- 3. That _____ [third party] failed to give its consent or cooperation even though that failure resulted from causes beyond the Defendant's control.**

Authorities: *Klauber v. San Diego St. Car Co.* (1892) 95 Cal. 353, 357-358, 30 P. 555 ; *Hensler v. City of Los Angeles* (1954) 124 Cal.App.2d 71, 82-83, 268 P.2d 12 .

[2] Use of Instruction

This instruction should be used when a contractor contends that its contract was breached by the other party's failure to obtain the cooperation or consent of third parties necessary to proceed with the work.

If the action is by a subcontractor against the prime contractor, the references to the contract in the instruction should be changed to subcontract.

LexisNexis Matthew Bender Expert Practice Tip--Avoid Using "Preponderance of the Evidence":

Many other instructions no longer use the term "preponderance of the evidence" because it is confusing to the jury. The alternate formulation is simply that plaintiff "has the burden of proving" the following facts. *By Ronald Oster*

LexisNexis Matthew Bender Expert Practice Tip--Use Analogy: Several jurors will think it unusual that a third party was involved with a contract's performance. Perhaps the use of an analogy is therefore advisable. *By Rex Heeseman*

[3] Comment

A party that agrees to obtain the consent of a third party and is unable to do so is not relieved of liability because of its inability to obtain the required consent or cooperation; this is merely a subjective impossibility and does not excuse a failure to perform [see *Klauber v. San Diego St. Car Co.* (1892) 95 Cal. 353, 357-358, 30 P. 555 ; *Hensler v. City of Los Angeles* (1954) 124 Cal.App.2d 71, 83, 268 P.2d 12].

This doctrine applies to both private works and public works [*Hensler v. City of Los Angeles* (1954) 124 Cal.App.2d 71, 83-83, 268 P.2d 12]. It finds particular application when the owner has entered into multiple prime contracts and thereby has a duty to coordinate the work [*Paccon, Inc. v. United States (Ct. Cl.* 1968) 399 F.2d 162, 169-170], but the owner may successfully disclaim or shift this responsibility [*Broadway Maintenance Corp. v. Rutgers* (1982) 90 N.J. 253, 447 A.2d 906, 912]. It can also be employed against an owner who fails to obtain the easements [*D.A. Parrish & Sons v. County Sanitation Dist.* (1959) 174 Cal.App.2d 406, 410-413, 344 P.2d 883 ; *McGuire & Hester v. San Francisco* (1952) 113 Cal.App.2d 186, 187-192, 247 P.2d 934], permits, environmental impact reports, or other documents reasonably required for the project to proceed in an orderly manner [see *COAC, Inc. v. Kennedy Engineers* (1977) 67 Cal.App.3d 916, 920-922, 136 Cal.Rptr. 890].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawTypes of ContractsCovenantsPublic Contracts LawContract ProvisionsGeneral OverviewPublic Contracts LawDispute ResolutionGeneral OverviewReal Property LawConstruction LawContractsReal Property LawConstruction LawContractors & Subcontractors



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California Forms of Jury Instruction

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CHAPTER 3I Matthew Bender Construction Contract Instructions
PART B. TYPICAL SPECIFIC BREACHES OF THE CONSTRUCTION CONTRACT

2-3I California Forms of Jury Instruction MB 300I.37

MB 300I.37 Refusing to Approve "Or Equal" Item--Public Work

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Plaintiff has the burden of proving by a preponderance of the evidence all the facts necessary to establish all of the following:

- 1. That Plaintiff submitted a proper and timely request to substitute another material, product, thing, or service for one that was specified in the plans and specifications;**
- 2. That the proposed substitute met the standards of construction and quality required by the plans and specifications;**
- 3. That Defendant refused to approve that substitution;**
- 4. That the refusal to approve the substitution was the legal cause of the damages to Plaintiff; and**
- 5. The nature and extent of those damages.**

Authorities: *Pub. Contract Code § 3400(b); Argo Constr. Co. v. County of Los Angeles (1969) 271 Cal. App.2d 54, 57-59, 76 Cal. Rptr. 361 .*

[2] Use of Instruction

This instruction should be used when a contractor contends that the public entity breached the contract by refusing to accept a proposed substitution item that was equal to the one specified.

It may be necessary to augment this instruction with others either quoting or paraphrasing the appropriate provisions in the contract governing the time and manner in which requests were to be made. However, it should be noted that such contract requirements can be waived by the public entity [*Argo Constr. Co. v. County of Los Angeles* (1969) 271 Cal.App.2d 54, 59, 76 Cal.Rptr. 361] and, if the contractor makes that contention, then any additional instructions should also cover waiver.

This instruction also may have to be supplemented with others explaining what standards of construction and quality are required by the plans and specifications. This is particularly so if the dispute is characterized by one side as involving aesthetics.

If the subcontract incorporated the plans and specifications from the prime contract, the subcontractor should be able to sue the prime contractor (who should then sue the public entity) when the subcontractor's proposed substitutions were improperly rejected. In that case, the reference in the instruction to the contract should be changed to subcontract.

LexisNexis Matthew Bender Expert Practice Tip--Avoid Using "Preponderance of the Evidence":

Many instructions no longer use the term "preponderance of the evidence" because it is confusing to the jury. The alternate formulation is simply that plaintiff "has the burden of proving" the following facts. *By Ronald Oster*

LexisNexis Matthew Bender Expert Practice Tip--Address Substitution Issue: The "substitution" of something will strike some jurors as unfair. Address, or exploit, that concern. *By Rex Heeseman*

[3] Comment

When a public works construction contract calls for a designated material, product, thing, or service by a specific brand or trade name, it must list at least two brand or trade names of comparable quality or utility followed by the words "or equal," so that the contractor can furnish any equal material, product, thing, or service [*Pub. Contract Code* § 3400(b); see *Pub. Contract Code* § 3400(a) (statutory intent)]. However, *Pub. Contract Code* § 3400(c) makes the following exceptions to this rule:

- To allow a field test or experiment to be made to determine the product's suitability for future use;
- To match other products in use on a particular public improvement either completed or in the course of completion;
- To obtain a necessary item that is available only from one source;
- To respond to an emergency declared by a local agency if the declaration is approved by a four fifths vote of the governing board of the local agency issuing the invitation for bid or request for proposals; or
- To respond to an emergency declared by the state, a state agency, or political subdivision of the state if the facts setting forth the reasons for the finding of the emergency are contained in the public records of the authority issuing the invitation for bid or request for proposals.

One example of contract language complying with the provision requiring that at least two brand or trade names be listed is in California Department of Transportation, Standard Specifications (1999 ed.), § 6-1.05. This clause also sets forth typical requirements governing the time and manner in which requests for substitutions must be made.

The substitution need meet only the standards of construction and quality required by the plans and specifications; it cannot be rejected merely because it does not satisfy aesthetic requirements [see *Argo Constr. Co. v. County of Los*

Angeles (1969) 271 Cal.App.2d 54, 57-59, 76 Cal.Rptr. 361].

Legal Topics:

For related research and practice materials, see the following legal topics:

Public Contracts LawContract InterpretationSpecificationsPublic Contracts LawContract ProvisionsGeneral
OverviewPublic Contracts LawDispute ResolutionGeneral OverviewPublic Contracts LawDispute
ResolutionSubcontractorsGeneral Overview



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California Forms of Jury Instruction

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CHAPTER 3I Matthew Bender Construction Contract Instructions
PART B. TYPICAL SPECIFIC BREACHES OF THE CONSTRUCTION CONTRACT

2-3I California Forms of Jury Instruction MB 300I.38

MB 300I.38 Failure to Make Timely Progress Payments

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

_____ [*The builder*] **claims that** _____ [*the owner*] **breached the contract by failing to make progress payment[s] to** _____ [*the builder*] **in a timely manner after the progress payment[s] became due under the terms of the construction contract. The contract provides as follows:**
_____ [*insert progress payment provision(s)*].

For you to find that _____ [*the owner*] **breached the construction contract by failing to make [a] progress payment[s],** _____ [*the builder*] **must prove both of the following:**

1.

_____ [**Builder**] **substantially completed the work required under the contract for**
_____ [*describe contested progress payment(s)*] **to become due; and**

2.

_____ [**Owner**] **failed to make the progress payment[s] within a reasonable time after:**

(a) **The payment[s] became due under the contract's terms; and**

(b)

_____ [**Builder**] made demand for the progress payment[s].

[*OPTIONAL (See Use of Instruction)*]

A builder's obligation to construct a work of improvement and an owner's obligation to make progress payments are independent obligations, unless the contract provides otherwise. Because these are independent obligations, a slight deviation in the time or the amount of a progress payment does not give a builder the right to cease work under a construction contract. Instead, a builder has the right to cease work under a construction contract only when there has been a total or a material breach of the contract by the owner.

A failure to make timely progress payments is a material breach of contract only if there has been a substantial failure on the owner's part to comply with [his/her/its] payment obligation. A "substantial failure" would involve an unreasonable delay in payment, an absolute refusal to pay, or an imposition of new and burdensome conditions to the payment.

If you find that _____ [owner]'s failure to pay was a substantial breach, then you must also determine whether _____ [builder] was [himself/herself/itself] in default in any material regard. If _____ [builder] is also in default, then _____ [builder] may not cease performance unless [his/her/its] default had no relation to _____ [owner]'s obligation to make the progress payment[s].

Authorities: *Integrated, Inc. v. Alec Fergusson Electrical Contractor* (1967) 250 Cal.App.2d 287, 295-298, 58 Cal.Rptr. 503 ; *Kenworthy v. State of California* (1965) 236 Cal.App.2d 378, 383, 46 Cal.Rptr. 396 ; *Asso. Lathing etc. Co. v. Louis C. Dunn, Inc.* (1955) 135 Cal.App.2d 40, 49, 286 P.2d 825 ; *Smith v. Empire Sanitary Dist.* (1954) 127 Cal.App.2d 63, 73, 273 P.2d 37 ; *Karz v. Dept. of Professional & Vocational Standards* (1936) 11 Cal.App.2d 554, 557, 54 P.2d 35 .

[2] Use of Instruction

This instruction should be used by an owner or a builder when the builder alleges that the owner has breached the construction contract by failing to make timely payment of progress payments specified in the contract. This issue usually arises when the builder has abandoned the project or claims damages from late or unpaid progress payments, or when the failure to pay otherwise serves as an excuse for the builder's nonperformance or late performance of its own contract obligations. The instruction will generally be accompanied by instructions on contract interpretation [see Ch. 3, *California Judicial Council Contracts Instructions*, CACI Nos. 314- 320, and Ch. 3B, *Matthew Bender Interpretation of Contract Instructions*], extra work [see MB 300I.30, MB 300I.53], excuse of performance [see Part C; see also Ch. 3, *California Judicial Council Contracts Instructions*, CACI Nos. 330- 337 (affirmative defenses), and Ch. 3F, *Matthew Bender Contract Defenses Instructions*], owner's breach of contract [see Ch. 3, *California Judicial Council Contracts Instructions*, CACI No. 303], and waiver [see Ch. 3, *California Judicial Council Contracts Instructions*, CACI No. 336, and Ch. 3F, *Matthew Bender Contract Defenses Instructions*, MB 300F.20-MB 300F.26]. This instruction should be used with the instruction in MB 300I.103 on damages for failure to make progress payments. In addition, a preponderance of evidence instruction must be given with this instruction [see Ch. 2, *California Judicial Council Evidence Instructions*, CACI No. 200 ("More Likely True than Not True")].

The optional part of the instruction may be used when the builder has abandoned the construction project for nonpayment of progress payments or extras.

LexisNexis Matthew Bender Expert Practice Tip--Explain Terms to Jurors: The idea of a "progress

payment" will seem unusual to some jurors. Further, the optional paragraph describes the obligation to continue working and the obligation to make progress payments as "independent obligations." This should be explained more fully in closing argument together with the rationale for the legal rule. *By Rex Heeseman and Ronald Oster*

[3] Comment

When a contractor performs work under a written construction contract entitling the contractor to receive a progress payment or a voucher payment, the owner is obligated to make payment within a reasonable time of the contractor's demand, and the contractor is entitled to interest on the sums due from the date of the request for payment [*Integrated, Inc. v. Alec Fergusson Electrical Contractor* (1967) 250 Cal.App.2d 287, 295, 58 Cal.Rptr. 503]. If the contract specifies a particular type of request for payment as a condition precedent to payment, then the contractor is not entitled to the progress payment until it complies with the contract by making a request in the required manner [*Sinnott v. Schumacher* (1919) 45 Cal.App. 46, 49-51, 187 P. 105]. When the construction contract calls for periodic payments such as progress payments, the owner or general contractor will have a reasonable time after receiving a proper request for progress payment to tender the progress payment [see *S.F. Bridge Co. v. Dumbarton L. & I. Co.* (1897) 119 Cal. 272, 275, 51 P. 335 ; *Integrated, Inc. v. Alec Fergusson Electrical Contractor* (1967) 250 Cal.App.2d 287, 295, 58 Cal.Rptr. 503].

The payment of progress payments during construction is generally not a condition precedent to the continued performance of the work by the contractor. The contractor's obligation to build the improvements and the owner's obligation to pay for the improvements during the course of the construction are generally treated as independent covenants. Therefore, if the owner fails to make a progress payment when due, the contractor's recourse depends on whether the owner's default is "substantial" or "material." In each case whether the owner's default in payment is substantial or material is a question of fact [*Integrated, Inc. v. Alec Fergusson Electrical Contractor* (1967) 250 Cal.App.2d 287, 297-298, 58 Cal.Rptr. 503 ; *Asso. Lathing etc. Co. v. Louis C. Dunn, Inc.* (1955) 135 Cal.App.2d 40, 49, 286 P.2d 825 ; *Smith v. Empire Sanitary Dist.* (1954) 127 Cal.App.2d 63, 73, 273 P.2d 37].

The facts of each case must be evaluated individually to first determine what contract term was breached, and whether the breach was so substantial or material to justify rescission and recovery of the reasonable value of labor and materials furnished as opposed to authorizing a contractor to abandon work and sue for damages [*American-Hawaiian Engineering & Constr. Co. v. Butler* (1913) 165 Cal. 497, 516, 133 P. 280 ; *Fairchild etc. Co. v. Southern etc. Co.* (1910) 158 Cal. 264, 273-274, 110 P. 951 ; *San Francisco Bridge Co. v. Dumbarton L. & I. Co.* (1897) 119 Cal. 272, 275, 51 P. 335 ; *Golden Gate Lumber Co. v. Sahrbacher* (1894) 105 Cal. 114, 117-118, 38 P. 635 ; *Porter v. Arrowhead Reservoir Co.* (1893) 100 Cal. 500, 502, 35 P. 146 ; *Cox v. McLaughlin* (1888) 76 Cal. 60, 66, 67, 18 P. 100 ; *Integrated, Inc. v. Alec Fergusson Electrical Contractor* (1967) 250 Cal.App.2d 287, 296, 58 Cal.Rptr. 503 ; see *Smoll v. Webb* (1942) 55 Cal.App.2d 456, 458, 130 P.2d 773 ; *Big Boy D. Corp. Ltd. v. Etheridge* (1941) 44 Cal.App.2d 114, 119, 111 P.2d 953]. The finder of fact must evaluate the facts of each case to determine whether the failure to make the progress payment was a substantial or material breach [*Golden Gate Lumber Co. v. Sahrbacher* (1894) 105 Cal. 114, 117-118, 38 P. 635 ; *Porter v. Arrowhead Reservoir Co.* (1893) 100 Cal. 500, 502, 35 P. 146 ; *Barris v. Atlas Rock Co.* (1931) 118 Cal.App. 606, 610, 5 P.2d 670]. If a nonpayment is of a minor nature and is not a substantial breach of the owner's duty to pay for the work of improvement, and not material in comparison to the nature of the contract and the contractor's obligations, the contractor must continue to perform its obligations under the contract and may not stop construction [*Integrated, Inc. v. Alec Fergusson Electrical Contractor* (1967) 250 Cal.App.2d 287, 296-297, 58 Cal.Rptr. 503].

If the finder of fact determines the nonpayment was substantial or material, then the contractor has a right to rescind and sue for the reasonable value of services rendered. If the breach was not material, or the withholding of payment was justified because the contractor breached, then the owner may sue the contractor for breach of contract [*Golden Gate Lumber Co. v. Sahrbacher* (1894) 105 Cal. 114, 116, 38 P. 635]. The payment for extra work ordered by the owner is

deemed an independent covenant. Therefore, the nonpayment by the owner for extra work ordered by the owner is not a sufficient cause for the contractor to stop work or rescind the contract. Instead, the contractor must continue the construction and seek the money due for the extras after the job is completed [*Karz v. Dept. of Professional & Vocational Standards* (1936) 11 Cal.App.2d 554, 557, 54 P.2d 35]. However, if the extra changes are extensive resulting from the conditions for the project being significantly different than anticipated, then nonpayment of extra charges may form the basis of a defense of mistake [*Healy v. Brewster* (1967) 251 Cal.App.2d 541, 551, 59 Cal.Rptr. 752].

When there is a material breach by nonpayment or late payment of an installment, the builder must choose one of the following three courses of action [*Oliver v. Campbell* (1954) 43 Cal.2d 298, 302, 273 P.2d 15 ; *Alder v. Drudis* (1947) 30 Cal.2d 372, 381, 182 P.2d 195 ; *B.C. Richter Contracting Co. v. Continental Cas. Co.* (1964) 230 Cal.App.2d 491, 499, 41 Cal.Rptr. 98]:

- Treat the contract as rescinded and sue in quantum meruit;
- Keep the contract alive for the benefit of both parties; or
- Treat the repudiation as ending the contract and sue for the profits.

A builder who elects to rescind may sue in quantum meruit to recover the reasonable value of its services and materials even if the recovery exceeds the contract price [*Oliver v. Campbell* (1954) 43 Cal.2d 298, 304, 273 P.2d 15 ; *Lessing v. Gibbons* (1935) 6 Cal.App.2d 598, 607, 45 P.2d 258]. However, a party who elects to affirm the contract and complete performance is limited to contractual damages [*House of Piercy* (1919) 181 Cal. 247, 251, 183 P. 807 ; *Ely v. Bottini* (1960) 179 Cal.App.2d 287, 296, 3 Cal.Rptr. 756]. Damages for breach by nonpayment include the unpaid contract price plus any additional expenses attributable to the breach [*Civ. Code* § 3300; *Higgins v. Desert Braemar, Inc.* (1963) 219 Cal.App.2d 744, 751, 33 Cal.Rptr. 527 ; *Standard Iron Works v. Globe Jewelry & Loan, Inc.* (1958) 164 Cal.App.2d 108, 116, 330 P.2d 271]. Election of one remedy is a bar to invoking the other [*Alder v. Drudis* (1947) 30 Cal.2d 372, 383, 182 P.2d 195 ; *Lenard v. Edmonds* (1957) 151 Cal.App.2d 764, 768, 312 P.2d 308].

Construction contracts may contain clauses that either obligate a contractor to continue working despite a dispute over payment or disclaim such an obligation. Thus, a provision that required a subcontractor to finish its work despite any dispute or controversy on any matter with the contractor or with any other subcontractor, served as an advance waiver of any right to rescind after partial performance. This clause made a breach of contract action the subcontractor's exclusive remedy [*B.C. Richter Contracting Co. v. Continental Cas. Co.* (1964) 230 Cal.App.2d 491, 501, 41 Cal.Rptr. 98 ; *Nelson v. Spence* (1960) 182 Cal.App.2d 493, 497, 6 Cal.Rptr. 312]. The contractor was compelled to complete his contract and sue for damages [*B.C. Richter Contracting Co. v. Continental Cas. Co.* (1964) 230 Cal.App.2d 491, 501, 41 Cal.Rptr. 98 ; *Canepa v. Sun Pacific, Inc.* (1954) 126 Cal.App.2d 706, 712-713, 272 P.2d 860].

Note that a contractor's abandonment of work may be excused by failure to make progress payments [*S. F. Bridge Co. v. Dumbarton L. & I. Co.* (1897) 119 Cal. 272, 274, 51 P. 335].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts Law Breach Causes of Action General Overview Contracts Law Remedies Equitable Relief Quantum Meruit Contracts Law Remedies Rescission & Redhibition General Overview Real Property Law Construction Law Contracts Real Property Law Construction Law Contractors & Subcontractors



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California Forms of Jury Instruction

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CHAPTER 3I Matthew Bender Construction Contract Instructions
PART B. TYPICAL SPECIFIC BREACHES OF THE CONSTRUCTION CONTRACT

2-3I California Forms of Jury Instruction MB 300I.39

MB 300I.39 Abandonment by Contractor of Construction Contract

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Plaintiff has the burden of proving by a preponderance of the evidence all facts necessary to establish that Defendant stopped work before the contract was substantially completed [*Optional (See Use of Instruction)* , unless Defendant proves that Plaintiff prevented the Defendant from completing (his/her/its) performance of the contract].

[*OPTIONAL (See Use of Instruction)*]

In determining whether Defendant stopped work and breached the contract, you may not consider whether the cessation of work was willful and intentional, or due to physical or financial disabilities.

Authorities: *Lowy v. United Pacific Ins. Co.* (1967) 67 Cal.2d 87, 92, 60 Cal.Rptr. 225, 429 P.2d 577 ; *Benson v. Andrews* (1955) 138 Cal.App.2d 123, 134-135, 292 P.2d 39 ; *Bacigalupi v. Phoenix Bldg. etc. Co.* (1910) 14 Cal.App. 632, 637, 112 P. 892 .

[2] Use of Instruction

This instruction should be used when the plaintiff claims that the builder abandoned the contract by ceasing to perform before the contract was substantially completed. The builder may defend against this claim by alleging substantial completion or a prior breach by the plaintiff, such as a change in the scope of the work [see *MB 300I.31* for instruction on change in scope of work] or the failure to make timely progress payments [see *MB 300I.38* for instruction on failure to make timely progress payments].

2-3I California Forms of Jury Instruction MB 300I.39

The optional phrase at the end of the first paragraph should be used if the defendant claims that its performance of the contract was prevented by the plaintiff [see MB 300I.33 for instruction on prevention of performance as breach of contract]. The optional second paragraph may be used to explain to the jury that the failure to complete need not be willful to be a breach of the contract [see [3], below].

This instruction should be used with the burden of proof instruction on breach of contract in MB 300I.06. If substantial completion is an issue, the instruction on substantial completion in MB 300I.57 should also be given. This instruction will generally be accompanied by instructions on contract interpretation [see Ch. 3, *California Judicial Council Contracts Instructions*, CACI Nos. 314- 320, and Ch. 3B, *Matthew Bender Interpretation of Contract Instructions*], excuse of performance [see Ch. 3, *California Judicial Council Contracts Instructions*, CACI Nos. 330- 337 (affirmative defenses), and MB 300I.50-MB 300I.80; see also Ch. 3F, *Matthew Bender Contract Defenses Instructions*], alleged breaches of contract by the owner [see Ch. 3, *California Judicial Council Contracts Instructions*, CACI No. 303, and MB 300I.30-MB 300I.38], and damages [see Ch. 3, *California Judicial Council Contracts Instructions*, CACI No. 354, and MB 300I.100, MB 300I.107].

LexisNexis Matthew Bender Expert Practice Tip--Focus on Reasons for Stopping Work: The explanations for (or the attack with regard to) the reason or reasons for "stopping" is often the crux of this instruction. *By Rex Heeseman*

LexisNexis Matthew Bender Expert Practice Tip--Use Care With Optional Portion of Instruction; Willfulness Is Not Required: The optional paragraph could be confusing to the jury as worded. The point to be made is that abandonment by the contractor constitutes a breach whether or not the cessation of work was willful, and whether or not it was caused by financial difficulties. In other words: (1) it is not necessary to prove "willfulness" to establish a breach of contract, and (2) financial difficulties will not excuse a breach of contract. *By Ronald Oster*

[3] Comment

A contractor who abandons a construction contract by ceasing performance of the contract before the contract is substantially completed has breached the contract [*Benson v. Andrews* (1955) 138 Cal.App.2d 123, 134-135, 292 P.2d 39 ; *Bacigalupi v. Phoenix Bldg. etc. Co.* (1910) 14 Cal.App. 632, 637, 112 P. 892], unless the contractor's performance of the remainder of the contract is prevented by the owner or legally excused [*Lowy v. United Pacific Ins. Co.* (1967) 67 Cal.2d 87, 92, 60 Cal.Rptr. 225, 429 P.2d 577 ; see MB 300I.33 for instruction on prevention of performance as breach of contract]. A building contractor will be held to have abandoned a construction contract whenever the contractor ceases performance without legal justification, whether the cessation of work is willful and intentional, or due to physical or financial disabilities that prevent performance [*Benson v. Andrews* (1955) 138 Cal.App.2d 123, 134-135, 292 P.2d 39 ; *Tremble v. Tuman* (1919) 41 Cal.App. 8, 10-11, 181 P. 800].

"Abandonment," in the context of construction contracts, also refers to a situation in which an owner imposes on the contractor an excessive number of changes such that the final project has become materially different from the project contracted for. In these cases, the contractor may recover the reasonable value of all its work [*Amelco Electric v. City of Thousand Oaks* (2002) 27 Cal.4th 228, 239, 115 Cal.Rptr.2d 900, 38 P.3d 1120 ; see MB 300I.31[3]]. The theory of abandonment does not apply to public works contracts because applying it would render the notion of competitive bidding "meaningless" [*Amelco Electric v. City of Thousand Oaks* (2002) 27 Cal.4th 228, 239, 115 Cal.Rptr.2d 900, 38 P.3d 1120].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawBreachCauses of ActionGeneral OverviewContracts LawDefensesGeneral OverviewReal Property

LawConstruction LawContractsReal Property LawConstruction LawContractors & Subcontractors



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California Forms of Jury Instruction

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CHAPTER 3I Matthew Bender Construction Contract Instructions
PART B. TYPICAL SPECIFIC BREACHES OF THE CONSTRUCTION CONTRACT

2-3I California Forms of Jury Instruction MB 300I.40 through MB 300I.49

[Reserved]

MB 300I.40[Reserved]



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CHAPTER 3I Matthew Bender Construction Contract Instructions
PART C DEFENSES AND CONDITIONS THAT MAY BAR OR LIMIT RECOVERY

2-3I California Forms of Jury Instruction MB 300I.50

MB 300I.50 Notice of Claim Under Contract

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

The _____ [contract or subcontract] provides _____ [quote or paraphrase contract provisions that require notice of claims].

If you find that the parties to this contract intended no recovery could be had on a claim unless a notice of claim was given and that the notice was not given, then you must find for Defendant on that breach of contract claim.

[OPTIONAL (See Use of Instruction)]

However, if Defendant waived compliance with the claim requirement by Plaintiff, then the notice of claim requirement is not a bar to Plaintiff's claim for breach of contract.

Authorities: Civ. Code §§ 1436, 1439-1442, 1511, 1512, 1515, 1670.5, 3513, 3515.

[2] Use of Instruction

This instruction should be used when one of the parties is asserting a notice of claim requirement in the contract as a condition precedent to the recovery sought by the other party for a breach of the contract. The initial question of whether the parties intended the notice provisions to be a condition precedent will only be a jury question if it turns on the credibility of extrinsic evidence [see *Warner Constr. Corp. v. City of Los Angeles* (1970) 2 Cal.3d 285, 293, 85 Cal.Rptr. 444, 466 P.2d 996 ; *Yamanishi v. Bleily & Collishaw, Inc.* (1972) 29 Cal.App.3d 457, 461-462, 105 Cal.Rptr. 580]. If it is a jury question, additional instructions to guide the jury in interpreting the contract will probably be needed

[see Ch. 3, *California Judicial Council Contracts Instructions*, CACI Nos. 314- 320, and Ch. 3B, *Matthew Bender Interpretation of Contract Instructions*]. If not, and if the court finds the notice requirement to be a condition precedent, then the second paragraph of this instruction should be omitted.

Use the optional paragraph on defendant's waiver when waiver is raised to claim relief from the contract's notice of claim requirement.

Additional instructions may also be required to explain excuse and waiver [see Ch. 3, *California Judicial Council Contracts Instructions*, CACI No. 336, and Ch. 3F, *Matthew Bender Contract Defenses Instructions*] concepts to the jury.

This instruction does not cover other theories on which plaintiff may claim relief from the effect of these requirements, such as estoppel or executed oral modifications of the contract [see MB 300I.53[2], [3]].

The instruction also does not cover any notice of claim requirements that may have been inserted into a public works construction contract under *Gov. Code §§ 930-930.6* [but see *Pub. Contract Code § 19100*, which seems to prevent resort to *Gov. Code §§ 930-930.6* in contracts with the state].

LexisNexis Matthew Bender Expert Practice Tip--Address Notice Issues in Closing: This is a brief instruction that potentially covers a lot of issues. As discussed in the comment in [3], *below*, there are multiple issues involved in a notice defense that can be addressed in closing argument. For example, some jurors may think it is "unfair" that a notice of claim under the contract must be given. Explain that it is a condition (or part) of the contract. *By Ronald Oster and Rex Heeseman*

[3] Comment

Construction contracts routinely have provisions requiring the contractor to give the owner notice of changed conditions, extra work, or other claims, and frequently the contract further provides that failure to give this notice is deemed to be a waiver of claims for additional time or compensation [see California Department of Transportation, Standard Specifications (1999 ed.), §§ 4-1.03A, 8-1.06, 8-1.07, 9-1.04, 9-1.07B].

When the owner raises failure to strictly comply with these requirements as a defense, the first question is whether the parties intended the requirements to be a condition precedent to recovery or merely a covenant [*Civ. Code §§ 1436, 1636; Code Civ. Proc. § 1859; see Schwab v. Bridge (1915) 27 Cal.App. 204, 206, 149 P. 603 ; Restatement (Second) of Contracts, § 226 (1981)*]. The courts will usually try to avoid construing these requirements as a condition precedent when to do so would cause a forfeiture [*Civ. Code §§ 1442, 1670.5; see Ballard v. MacCallum (1940) 15 Cal.2d 439, 444, 101 P.2d 692 ; Hawley v. Orange County Flood etc. Dist. (1963) 211 Cal.App.2d 708, 713, 27 Cal.Rptr. 478 ; Restatement (Second) of Contracts § 227 (1981)*].

The court can exercise its inherent equitable power to excuse, or give relief from, a condition precedent that results in a forfeiture [*Civ. Code §§ 3275, 3369; O'Morrow v. Borad (1946) 27 Cal.2d 794, 800-801, 167 P.2d 483 ; Restatement (Second) of Contracts § 229 (1981)*]. In the case of these notice requirements in construction contracts, the courts frequently refuse to enforce them when the conduct of the parties has made it clear that formal adherence would serve no useful purpose, usually because either the owner is the source of the problem or the owner got adequate notice through some other means [see *Hoel-Steffen Construction Co. v. United States (Ct. Cl. 1972) 456 F.2d 760, 766-768 ; Copco Steel & Engineering Co. v. U.S. (Ct. Cl. 1965) 341 F.2d 590, 598*].

If the requirement is going to be enforced as a condition precedent, the next question is whether the owner has itself fully complied with all related conditions precedent and concurrent imposed on the owner [*Civ. Code § 1439; see Acoustics, Inc. v. Trepte Constr. Co. (1971) 14 Cal.App.3d 887, 909-913, 92 Cal.Rptr. 723*].

If the owner has fully complied, the next question is whether performance of the condition by the contractor was excused [*Civ. Code* §§ 1440, 1441, 1511, 1512, 1515; *Peter Kiewit Sons' Co. v. Pasadena City Junior College Dist.* (1963) 59 *Cal.2d* 241, 243-245, 28 *Cal.Rptr.* 714, 379 *P.2d* 18 ; see *General Insurance Co. v. Commerce Hyatt House* (1970) 5 *Cal.App.3d* 460, 469-471, 85 *Cal.Rptr.* 317 ; Restatement (Second) of Contracts §§ 246, 247 (1981)].

If performance was not excused, the next question is whether performance of the condition was waived by the owner [*Civ. Code* §§ 3513, 3515; *Weeshoff Constr. Co. v. Los Angeles County Flood Control Dist.* (1979) 88 *Cal.App.3d* 579, 589-592, 152 *Cal.Rptr.* 19].

When the claim arose from misrepresentation or nondisclosure, willful acts or omissions by the owner, or a violation of law by the owner, the notice requirement may be unenforceable [*Civ. Code* § 1668; *Klein v. Asgrow Seed Co.* (1966) 246 *Cal.App.2d* 87, 100-101, 54 *Cal.Rptr.* 609].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts Law Contract Conditions & Provisions Conditions Precedent Real Property Law Construction Law Contracts Real Property Law Construction Law Contractors & Subcontractors



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California Forms of Jury Instruction

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CHAPTER 3I Matthew Bender Construction Contract Instructions
PART C DEFENSES AND CONDITIONS THAT MAY BAR OR LIMIT RECOVERY

2-3I California Forms of Jury Instruction MB 300I.51

MB 300I.51 Notice of Claim Under Government Code on Public Work Project

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Plaintiff was required to file a claim with Defendant within one year after the date on which Plaintiff was entitled to sue for breach of contract.

Plaintiff filed a claim on _____ [date]. Therefore, you must find for Defendant unless Plaintiff was not entitled to sue on the contract until after _____ [date one year before claim was filed]. Plaintiff was entitled to sue for breach of contract after the breach when Plaintiff either completed [his/her/its] performance under the contract or when Plaintiff elected to stop performing.

[*OPTIONAL (See Use of Instruction)*]

However, if Defendant is estopped to rely on this requirement, then the failure to file a timely claim is not a bar to Plaintiff's cause of action.

Authorities: Gov. Code §§ 901, 905, 905.2, 911.2, 945.4; Pub. Contract Code § 19100; *Union Sugar Co. v. Hollister Estate Co.* (1935) 3 Cal.2d 740, 745-746, 47 P.2d 273 ; *Richter v. Union Land, etc. Co.* (1900) 129 Cal. 367, 375, 62 P. 39 ; *Worthington v. Kaiser Foundation Health Plan, Inc.* (1970) 8 Cal.App.3d 435, 441-442, 87 Cal.Rptr. 272 ; *Lubin v. Lubin* (1956) 144 Cal.App.2d 781, 789-791, 302 P.2d 49 ; *McMillan Process Co. v. Brown* (1939) 33 Cal.App.2d 279, 284-285, 91 P.2d 613 ; *Ross v. Tabor* (1921) 53 Cal.App. 605, 614-615, 200 P. 971 .

[2] Use of Instruction

This instruction should be used when compliance with the claim filing requirements of the Government Code is an issue. If plaintiff claims that defendant is estopped to assert these requirements, then use the optional paragraph and add an instruction defining "estoppel" in the context of the case. In addition, if the breach of contract at issue is fraudulent, then a new instruction will be needed to point out that a cause of action for a fraudulent breach does not accrue until the fraud is discovered [see [3][c], *below*].

This instruction does not address notice of claim requirements that may have been inserted in the contract under Gov. Code §§ 930-930.6.

LexisNexis Matthew Bender Expert Practice Tip--Note Exceptions to One Year Rule; Explain "Estopped": Counsel should note the exceptions to the one year rule discussed in [3][c], *below*. In addition, the term "estopped" in the optional paragraph will have to be explained to the jury in closing argument. *By Ronald Oster*

LexisNexis Matthew Bender Expert Practice Tip--Special Considerations for Public Contracts: Public contracts often have more restrictive terms and/or the public entity is given "advantages" (e.g., shorter time period to make claim). *By Rex Heeseman*

[3] Comment

[a] Presentation of Claim as Prerequisite for Suit

Although the Government Code still makes presentation of a claim to the state a prerequisite to a suit by a contractor for money or damages on an express contract [Gov. Code §§ 905.2, 945.4], this requirement no longer applies to state construction projects [Pub. Contract Code § 19100]. However, it does still apply to local public entity contracts, except in connection with stop notice claims [Gov. Code § 905], unless there is a different requirement set forth in the contract itself [Gov. Code § 930.2].

[b] Time for Presenting Claim

The claim must be presented not later than one year after the cause of action accrues [Gov. Code § 911.2]. The date of the cause of action's accrual for this purpose is the date on which the cause of action would have been deemed to accrue within the meaning of the statute of limitations applicable to breaches of contract [Gov. Code § 901]. So long as the contractor continues to perform despite the owner's breaches of contract, the cause of action has not accrued; it accrues when the contractor either completes its performance or elects to cease further performance [*Union Sugar Co. v. Hollister Estate Co.* (1935) 3 Cal.2d 740, 745-746, 47 P.2d 273 ; *Richter v. Union Land, etc. Co.* (1900) 129 Cal. 367, 375, 62 P. 39 ; *Worthington v. Kaiser Foundation Health Plan, Inc.* (1970) 8 Cal.App.3d 435, 441-442, 87 Cal.Rptr. 272 ; *Lubin v. Lubin* (1956) 144 Cal.App.2d 781, 789-791, 302 P.2d 49 ; *McMillan Process Co. v. Brown* (1939) 33 Cal.App.2d 279, 284-285, 91 P.2d 613 ; *Ross v. Tabor* (1921) 53 Cal.App. 605, 614-615, 200 P. 971].

[c] Fraudulent Breaches of Contract: Extension of Time for Presenting Claim

The rules in [b], *above*, govern all of the various breach of contract theories that may be asserted by the contractor [see Part B], even an alleged fraudulent breach of the contract [*A. Teichert & Son, Inc. v. State of Cal.* (1965) 238 Cal.App.2d 736, 752-753, 48 Cal.Rptr. 225 , *disapproved on other grounds*, *E.H. Morrill Co. v. State of California* (1967) 65 Cal.2d 787, 792, 56 Cal.Rptr. 479, 423 P.2d 551]. However, the normal statute of limitations can be extended because of a fraudulent breach of contract to the date the fraud was discovered [*San Filippo v. Griffiths* (1975) 51 Cal.App.3d 640, 645-646, 124 Cal.Rptr. 399]. Thus, a claim filed two years after the project was completed can still be timely when based on a fraudulent breach of contract that was not discovered until a few months before the date the claim was filed [*Souza & McCue Const. Co. v. Superior Court* (1962) 57 Cal.2d 508, 509-511, 20 Cal.Rptr. 634, 370 P.2d 338].

[d] Estoppel

The government entity can be estopped to assert the claim filing requirement [*Fredrichsen v. City of Lakewood* (1971) 6 Cal.3d 353, 357, 99 Cal.Rptr. 13, 491 P.2d 805].

Legal Topics:

For related research and practice materials, see the following legal topics:

GovernmentsLocal GovernmentsClaims By & AgainstGovernmentsState & Territorial GovernmentsClaims By & AgainstPublic Contracts LawContract ProvisionsGeneral OverviewPublic Contracts LawDispute ResolutionGeneral Overview



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CHAPTER 3I Matthew Bender Construction Contract Instructions
PART C DEFENSES AND CONDITIONS THAT MAY BAR OR LIMIT RECOVERY

2-3I California Forms of Jury Instruction MB 300I.52

MB 300I.52 Architect/Engineer Decision Requirement**[1] Instruction**

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

The _____ [contract or subcontract] provides that _____ [quote or paraphrase contract provisions that authorize architect or engineer to make binding decisions, as arbitrator, on disputes between owner and contractor]. The decision of the _____ [architect or engineer] is binding on the parties unless:

1. The evidence to support the decision of the _____ [architect or engineer] is not substantial; or
2. The decision of the _____ [architect or engineer] was fraudulent, capricious, arbitrary, or so grossly erroneous as necessarily to imply bad faith.

Authorities: Civ. Code § 1670; *Graham v. Scissor-Tail, Inc.* (1981) 28 Cal.3d 807, 826-828, 171 Cal.Rptr. 604, 623 P.2d 165 ; *Zurn Engineers v. State of California ex rel. Dept. Water Resources* (1977) 69 Cal.App.3d 798, 823, 830, 138 Cal.Rptr. 478 .

[2] Use of Instruction

This instruction should be used when a party contests the conclusiveness of a decision on the claims made by the architect or engineer according to contractual procedures. The instruction must be augmented with others defining substantial evidence, fraud, caprice, arbitrary, and gross error.

LexisNexis Matthew Bender Expert Practice Tip--Terms Must Be Explained: This instruction contains numerous terms of art that will have to be explained to the jury (e.g., "binding," "substantial" evidence, "bad faith," etc.). The key in many cases will be: what is the meaning of "substantial" in this

context? By Ronald Oster and Rex Heeseman

[3] Comment

Construction contracts frequently have a clause that requires submission of disputes to the architect or engineer for a quasi-judicial decision, which is then binding on the parties [see *Zurn Engineers v. State of California ex rel. Dept. Water Resources* (1977) 69 Cal.App.3d 798, 808 n. 8, 138 Cal.Rptr. 478]. These clauses must be clearly expressed, without ambiguity, to be enforceable [*Walnut Creek Electric v. Reynolds Constr. Co.* (1968) 263 Cal.App.2d 511, 514-516, 69 Cal.Rptr. 667]. Additionally, these clauses only apply to disputes arising under the contract, not disputes over a breach of the contract [*Boomer v. Abbett* (1953) 121 Cal.App.2d 449, 462-463, 263 P.2d 476]. If the requirement is enforceable, the procedures detailed in the relevant contract clauses must be followed and exhausted as a condition precedent to the cause of action's accrual [*A. Teichert & Son, Inc. v. State of Cal.* (1965) 238 Cal.App.2d 736, 48 Cal.Rptr. 225 , *disapproved on other grounds*, *E.H. Morrill v. State of California* (1967) 65 Cal.2d 787, 793, 56 Cal.Rptr. 479, 423 P.2d 551].

This type of clause in a state construction contract was construed to permit the state's own engineer to conclusively decide disputes between the state and the contractor, so long as there was substantial evidence to support the decision and the decision was not fraudulent, capricious, arbitrary, or so grossly erroneous as necessarily to imply bad faith [*Zurn Engineers v. State of California ex rel. Dept. Water Resources* (1977) 69 Cal.App.3d 798, 822-830, 138 Cal.Rptr. 478]. The Legislature immediately responded with Civ. Code § 1670, which overturned *Zurn* by requiring an independent arbitration or court trial in all cases involving public works projects.

Zurn still applies to private works contracts. However, the California Supreme Court held that any contract that purports to designate one of the parties, or a third party with identical interest in the outcome, as the arbitrator of disputes arising from the contract, is an illusory contract to that extent, and, therefore, is unenforceable as being unconscionable [*Graham v. Scissor-Tail, Inc.* (1981) 28 Cal.3d 807, 826-828, 171 Cal.Rptr. 604, 623 P.2d 165].

Thus, any determination by the architect or engineer that the contract requires to be conclusive on the parties will only be enforceable if the architect or engineer is in fact an independent party and is not so closely identified with the owner or contractor as to make the architect's or engineer's decision that of his or her employer or client. If the decision of the architect or engineer is enforceable, then a finding that the decision is not binding for either reason (1) or (2) in this instruction should result in remanding the case back to the architect or engineer for a new, proper determination [*Zurn Engineers v. State of California ex rel. Dept. Water Resources* (1977) 69 Cal.App.3d 798, 838-839, 138 Cal.Rptr. 478 ; *but see Pascal & Ludwig, Inc. v. State of California ex rel. Dept. Water Resources* (1981) 127 Cal.App.3d 178, 190-191, 179 Cal.Rptr. 403].

Another issue presented by the requirement of the architect or engineer decision is whether the decision is binding on the parties, absent a timely or otherwise contractually mandated protest. In that case, the issue at trial will be whether a protest was made consistent with the contract requirements [*Boomer v. Abbett* (1953) 121 Cal.App.2d 449, 460, 263 P.2d 476].

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property Law Construction Law Contracts Real Property Law Construction Law Contractors & Subcontractors Real Property Law Construction Law Design Professionals



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CHAPTER 3I Matthew Bender Construction Contract Instructions
PART C DEFENSES AND CONDITIONS THAT MAY BAR OR LIMIT RECOVERY

2-3I California Forms of Jury Instruction MB 300I.53

MB 300I.53 Written Change Order Requirement

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

The _____ [contract or subcontract] provides that _____ [quote or paraphrase contract provisions that require written change orders before contractor will be paid for extra work]. **Therefore, you must find for Defendant on any claims for extra work that were not authorized by a written change order unless the parties entered into an oral agreement authorizing Plaintiff to do the extra work that Plaintiff did or unless Defendant waived the change order requirement.**

Authorities: Civ. Code §§ 1436, 1498, 1698; *Weeshoff Constr. Co. v. Los Angeles County Flood Control Dist.* (1979) 88 Cal.App.3d 579, 590, 152 Cal.Rptr. 19 ; *Bailey v. Breetwor* (1962) 206 Cal.App.2d 287, 291-292, 23 Cal.Rptr. 740 ; *MacIsaac & Menke Co. v. Cardox Corp.* (1961) 193 Cal.App.2d 661, 670, 14 Cal.Rptr. 523 ; *Howard J. White, Inc. v. Varian Associates* (1960) 178 Cal.App.2d 348, 353-355, 2 Cal.Rptr. 871 ; *C. F. Bolster Co. v. J. C. Boespflug etc. Co.* (1959) 167 Cal.App.2d 143, 152-153, 334 P.2d 247 .

[2] Use of Instruction

This instruction should be used if a party contends that the failure to obtain a written change order as required by the contract is a bar to recovery for extra work. If the oral agreement or the waiver phrases are not applicable, they should be omitted.

The instruction should be supplemented with one defining "extra work" [see MB 300I.30].

It also might be appropriate to define "waiver" [see Ch. 3, *California Judicial Council Contracts Instructions*, CACI No. 336, and Ch. 3F, *Matthew Bender Contract Defenses Instructions*] in a separate instruction.

This instruction does not cover those occasional situations in which the conduct of the parties has been construed as an abandonment of the written contract [*see Opdyke & Butler v. Silver* (1952) 111 Cal.App.2d 912, 915-919, 245 P.2d 306], nor does it cover a rescission of the requirement for written change orders [*Bavin & Burch Co. v. Bard* (1927) 81 Cal.App. 722, 730-731, 255 P. 200], with a resulting enforcement of oral change orders.

This instruction also does not cover those situations in which the conduct of the parties might estop the owner from enforcing the requirement that change orders be in writing, even if the owner is a public entity [*Berkeley Lawn Bowling Club v. City of Berkeley* (1974) 42 Cal.App.3d 280, 288-289, 116 Cal.Rptr. 762 ; *Maurice L. Bein, Inc. v. Housing Authority* (1958) 157 Cal.App.2d 670, 678-680, 321 P.2d 753].

LexisNexis Matthew Bender Expert Practice Tip--Note Exceptions Before Trial: There are numerous exceptions to the written change order requirement that many counsel will want to address by way of motion in advance of trial. *By Ronald Oster*

LexisNexis Matthew Bender Expert Practice Tip--Simple Existence of Order May Be Issue: There may be a dispute as to the existence or not of such a "written change order." If so, be careful in explaining that in the closing. *By Rex Heeseman*

[3] Comment

[a] Written Change Order as Contractual Prerequisite to Payment for Extra Work

Most construction contracts require, as a condition precedent [Civ. Code §§ 1436, 1498] to payment for extra work [*see MB 300I.30*], that the contractor obtain a written change order, and provide that failure to comply with this condition can result in releasing the owner from liability [*see Acoustics, Inc. v. Trepte Constr. Co.* (1971) 14 Cal.App.3d 887, 912, 92 Cal.Rptr. 723]. However, that condition is routinely circumvented [*see [b]-[d], below*].

[b] Oral Modifications

The written contract can be modified by an executed oral agreement to the extent that the oral agreement has been performed [Civ. Code § 1698(b)]. In other words, an oral change order can be enforced to the extent plaintiff actually did the extra work called for by that order [*Sanders Construction Co. v. San Joaquin First Fed. Sav. & Loan Assn.* (1982) 136 Cal.App.3d 387, 397 n.2, 186 Cal.Rptr. 218 ; *Healy v. Brewster* (1967) 251 Cal.App.2d 541, 551-552, 59 Cal.Rptr. 752 ; *MacIsaac & Menke Co. v. Cardox Corp.* (1961) 193 Cal.App.2d 661, 670, 14 Cal.Rptr. 523]. This is true even if the contract expressly provides otherwise [Civ. Code § 1698(c)], because, as the Law Revision Commission Comment points out, "[S]uch a provision would not apply to an oral modification [which was executed and is therefore] valid under [Civ. Code § 1698(b)]." The penultimate paragraph of this instruction covers the point: it requires (1) an oral modification, (2) new consideration in the form of extra work [*see Bailey v. Breetwor* (1962) 206 Cal.App.2d 287, 291-292, 23 Cal.Rptr. 740], and (3) execution by the performance of that extra work.

As the court observed in *Girard v. Ball*, there is a "commonly known custom and practice in the construction industry where oral agreements frequently modify or extend written agreements" [*Girard v. Ball* (1981) 125 Cal.App.3d 772, 785, 178 Cal.Rptr. 406].

[c] Waiver

Defendant can also waive the requirement of a written change order [*Howard J. White, Inc. v. Varian Associates* (1960) 178 Cal.App.2d 348, 353-355, 2 Cal.Rptr. 871 ; *C. F. Bolster Co. v. J. C. Boespflug etc. Co.* (1959) 167 Cal.App.2d 143, 152-153, 334 P.2d 247]. Notwithstanding the general rule that subordinate field personnel may not waive requirements of a government contract [*Acoustics, Inc. v. Trepte Constr. Co.* (1971) 14 Cal.App.3d 887, 912, 92 Cal.Rptr. 723], public entities can waive the written change order requirement by their conduct [*Weeshoff Constr. Co.*

v. Los Angeles County Flood Control Dist. (1979) 88 Cal.App.3d 579, 590, 152 Cal.Rptr. 19].

[d] Fraud

If the claim arose from fraud, misrepresentation, or nondisclosure, or the willful act or omission of the owner, or a violation of law, reliance on the written change order requirement by the owner may be defeated [*Civ. Code* § 1668; *Klein v. Asgrow Seed Co. (1966) 246 Cal.App.2d 87, 100-101, 54 Cal.Rptr. 609].*

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawContract ModificationsGeneral OverviewPublic Contracts LawContract ProvisionsChanges ClausesReal Property LawConstruction LawContractsReal Property LawConstruction LawContractors & Subcontractors



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CHAPTER 3I Matthew Bender Construction Contract Instructions
PART C DEFENSES AND CONDITIONS THAT MAY BAR OR LIMIT RECOVERY

2-3I California Forms of Jury Instruction MB 300I.54

MB 300I.54 No Damage for Delay

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

The _____ [contract or subcontract] provides that _____ [quote or paraphrase language that could be interpreted to say that contractor assumes all risks connected with work and/or that contractor must have no claim for any compensation or damage for delay in performance of work].

However, these provisions may not be enforced against Plaintiff:

[CHOOSE ONE OR MORE (See Use of Instruction)]

1. If the delay was the result of a breach of the _____ [contract or subcontract] by Defendant;
2. If Defendant, by its conduct, gave up its right to enforce that provision; [and/or]
3. If Defendant represented to Plaintiff that [he/she/it] would compensate Plaintiff for the delay to induce Plaintiff to proceed with the work, and Plaintiff relied on that representation.

[OPTIONAL (See Use of Instruction)]

The delay provision is likewise not enforceable against the Plaintiff if the contract is a _____ [construction contract with a public agency or subcontract under a construction contract with a public agency],

and if Plaintiff can prove all of the following:

- 1. That the contract limited Defendant's liability for delay to an extension of time;**
- 2. That this limitation applied to a delay that the Defendant was responsible for;**
- 3. That this limitation applied to a delay that was unreasonable under the circumstances; and**
- 4. That this limitation applied to a delay that Plaintiff and Defendant did not have in mind when they agreed to the contract.**

Authorities: *Pub. Contract Code* § 7102; *Hawley v. Orange County Flood etc. Dist.* (1963) 211 Cal.App.2d 708, 714-717, 27 Cal.Rptr. 478 ; *Maurice L. Bein, Inc. v. Housing Authority* (1958) 157 Cal.App.2d 670, 681-682, 321 P.2d 753 ; *McGuire & Hester v. San Francisco* (1952) 113 Cal.App.2d 186, 188-192, 247 P.2d 934 ; *Milovich v. City of Los Angeles* (1941) 42 Cal.App.2d 364, 377-378, 108 P.2d 960 .

[2] Use of Instruction

This instruction should be used when a party contends that a clause in the contract limits or prevents any recovery of damages for delay. The language of the no-damage-for-delay clause in the contract may require modifications of this instruction. Use only those optional paragraphs that apply to the facts in the case.

Paragraph 1 of the first option in the instruction covers all breaches of contract by the owner. Especially significant may be nondisclosure of material facts [*see MB 300I.34*], and breach of the implied covenant to control third parties [*see MB 300I.36*]. Paragraph 3 of the first option in the instruction is adapted from the discussion of estoppel in *Maurice L. Bein, Inc. v. Housing Authority* [*Maurice L. Bein, Inc. v. Housing Authority* (1958) 157 Cal.App.2d 670, 678-682, 321 P.2d 753].

If a subcontract is involved, the prime contractor is in the position of the owner, and the subcontractor is in the position of the prime contractor.

Use the second option of the instruction when the defendant is a public agency that raises as a defense a no-damages-for-delay clause like that described in *Pub. Contract Code* § 7102 [*see* [3], *below*].

It may be possible to resolve this issue as a matter of law [*Civ. Code* § 1670.5], in which case, an instruction should be given that explains the court's decision to the jury so the jury does not inadvertently apply this clause during its deliberation.

[3] Comment

Unless the contract provides otherwise, the owner is liable to the contractor for all damages caused by delays not attributable to the contractor [*Frank T. Hickey, Inc. v. L.A. J.C. Council* (1954) 128 Cal.App.2d 676, 685, 276 P.2d 52]. As a result, most construction contracts try to place all of the risk for delay on the contractor, sometimes even for delays caused by the owner [*see, e.g., California Department of Transportation, Standard Specifications* (1999 ed.), § 8-1.07]. However, these clauses will not be enforced unless the language of the contract evidences a plain, unequivocal intention by the parties to so restrict the remedy of the contractor [*K & F Construction v. Los Angeles Unified School Dist.* (1981) 123 Cal.App.3d 1063, 1064-1065, 176 Cal.Rptr. 842 ; *Milovich v. City of Los Angeles* (1941) 42 Cal.App.2d 364, 377-378, 108 P.2d 960]. Even then the clauses will not be enforced if the delay was caused by the owner [*Hawley v. Orange County Flood etc. Dist.* (1963) 211 Cal.App.2d 708, 714-717, 27 Cal.Rptr. 478 ; *McGuire & Hester v. San Francisco* (1952) 113 Cal.App.2d 186, 189-192, 247 P.2d 934].

Pub. Contract Code § 7102 precludes the application of no-damages-for-delay provisions under certain circumstances. It provides that if the contract is a construction contract with a public agency, or a subcontract under such a contract, then the no-damages-for-delay provision may not be interpreted to prevent the contractor or subcontractor from recovering damages for delay, if all of the following are true [*Pub. Contract Code § 7102*; see *Howard Contracting, Inc. v. G.A. MacDonald Construction Co., Inc.* (1998) 71 Cal.App.4th 38, 49-51, 83 Cal.Rptr.2d 590]:

- Contract provisions limit the contractee's liability to an extension of time for a delay for which the contractee is responsible;
- The delay is unreasonable under the circumstances involved; and
- The delay was not within the contemplation of the parties to the contract or subcontract.

Pub. Contract Code § 7102 also provides that any contractual provision that purports to waive, alter, or limit its applicability is void. However, it does not void any provision in a construction contract that requires notice of delays, provides for arbitration or settlement procedures, or provides for liquidated damages [*Pub. Contract Code § 7102*].

As with any other condition, the no-damage-for-delay clause can be waived by the owner [see *Weeshoff Constr. Co. v. Los Angeles County Flood Control Dist.* (1979) 88 Cal.App.3d 579, 590, 152 Cal.Rptr. 19], or the owner can be estopped to enforce it [*Maurice L. Bein, Inc. v. Housing Authority* (1958) 157 Cal.App.2d 670, 681-682, 321 P.2d 753].

If the claim arose from fraud, misrepresentation, or non-disclosure, or a willful act or omission of the owner, or a violation of law, reliance on the written change order requirement by the owner may be defeated [*Civ. Code § 1668*; *Klein v. Asgrow Seed Co.* (1966) 246 Cal.App.2d 87, 100-101, 54 Cal.Rptr. 609].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawContract Conditions & ProvisionsWaiversGeneral OverviewContracts LawRemediesGeneral OverviewReal Property LawConstruction LawContracts



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California Forms of Jury Instruction

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CHAPTER 3I Matthew Bender Construction Contract Instructions
PART C DEFENSES AND CONDITIONS THAT MAY BAR OR LIMIT RECOVERY

2-3I California Forms of Jury Instruction MB 300I.55

MB 300I.55 Forfeitures

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

The _____ [contract or subcontract] provides that _____ [quote or paraphrase language that could be interpreted to make contract unusual, extraordinary, harsh, unjust, or inequitable, or that would result in absurdity or forfeiture or would put one party at mercy of other].

However, _____ [this provision or these provisions] must be strictly interpreted to avoid making the contract unusual, harsh, or unjust, to avoid causing a forfeiture, and to avoid putting one party at the mercy of the other:

1. Unless it was the unmistakable intention of the parties to cause _____ [this result or one of these results]; or

2. Unless no other interpretation of _____ [this provision or these provisions] is reasonably possible.

Authorities: Civ. Code §§ 3520, 3542; *Yamanishi v. Bleily & Collishaw, Inc.* (1972) 29 Cal.App.3d 457, 462-463, 105 Cal.Rptr. 580 ; *Hertzka & Knowles v. Salter* (1970) 6 Cal.App.3d 325, 335, 86 Cal.Rptr. 23 ; *Hawley v. Orange County Flood etc. Dist.* (1963) 211 Cal.App.2d 708, 713-717, 27 Cal.Rptr. 478 .

[2] Use of Instruction

This instruction should be used when a party contends that a contract clause limits or prevents recovery, and the other party contends that the clause would be unenforceable if it had that meaning, because it would then amount to a

forfeiture. The instruction should only be used when interpretation of the clause at issue has become a question of fact for the jury because it depends on extrinsic evidence, instead of a question of law for the court [*Warner Constr. Corp. v. City of Los Angeles* (1970) 2 Cal.3d 285, 293, 85 Cal.Rptr. 444, 466 P.2d 996 ; *Yamanishi v. Bleily & Collishaw, Inc.* (1972) 29 Cal.App.3d 457, 461-462, 105 Cal.Rptr. 580]. If the interpretation is a question of law [see Civ. Code § 1670.5], an instruction should be given that explains the court's decision to the jury, so that the jury does not inadvertently apply a contrary interpretation of the clause during its deliberations.

LexisNexis Matthew Bender Expert Practice Tip--Court Will Usually Decide Forfeiture: The issue addressed by this instruction will usually be a matter of law to be decided by the court. Yet, if the jury addresses the presence (or non-presence) of a "delay" and the reason for the presence (or non-presence) of the delay, explain carefully your perspective in the closing. Some jurors may react negatively to a "delay" as just an excuse. *By Ronald Oster and Rex Heeseman*

[3] Comment

The interpretation of the contract must be reasonable [Civ. Code § 3542]. It should not permit one party to suffer by the acts of the other [Civ. Code § 3520]. An interpretation that will make the contract "unusual, extraordinary, harsh, unjust or inequitable" should be avoided [*Hertzka & Knowles v. Salter* (1970) 6 Cal.App.3d 325, 335, 86 Cal.Rptr. 23]. So should one that places one party at the mercy of the other [*Hawley v. Orange County Flood etc. Dist.* (1963) 211 Cal.App.2d 708, 716, 27 Cal.Rptr. 478]. Any clause that has the ultimate result of imposing a forfeiture should be strictly construed so as to avoid the forfeiture if reasonably possible [*Yamanishi v. Bleily & Collishaw, Inc.* (1972) 29 Cal.App.3d 457, 462-463, 105 Cal.Rptr. 580 ; *Hawley v. Orange County Flood etc. Dist.* (1963) 211 Cal.App.2d 708, 713, 27 Cal.Rptr. 478]. Forfeiture clauses will not apply to claims arising from a breach of contract caused by the other party [*D. A. Parrish & Sons v. County Sanitation Dist.* (1959) 174 Cal.App.2d 406, 414, 344 P.2d 883].

If the claim arose from fraud, misrepresentation, or nondisclosure, or a willful act or omission of the owner, or a violation of law, reliance on the written change order requirement by the owner may be defeated [Civ. Code § 1668; *Klein v. Asgrow Seed Co.* (1966) 246 Cal.App.2d 87, 100-101, 54 Cal.Rptr. 609].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawContract Conditions & ProvisionsForfeiture ClausesContracts LawTypes of ContractsConstruction ContractsReal Property LawConstruction LawContracts



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CHAPTER 3I Matthew Bender Construction Contract Instructions
PART C DEFENSES AND CONDITIONS THAT MAY BAR OR LIMIT RECOVERY

2-3I California Forms of Jury Instruction MB 300I.56

MB 300I.56 Payment Dependent on Existence of Fund

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

The contract provides that _____ [*quote or paraphrase language specifying payment of money on contract was to be made from specific fund*].

If that fund no longer existed at the time that this lawsuit was commenced, then you must find for Defendant on the breach of contract claims.

Authority: *Parsons v. Bristol Development Co. (1965) 62 Cal.2d 861, 867-869, 44 Cal.Rptr. 767, 402 P.2d 839* .

[2] Use of Instruction

This instruction should be used when a party contends that the contract is tied to a specific fund and, since the fund is exhausted, recovery on the contract is barred. The instruction should not be used if the existence of the fund is a defense asserted by the one who had the obligation to secure the fund [*Parsons v. Bristol Development Co. (1965) 62 Cal.2d 861, 868-869, 44 Cal.Rptr. 767, 402 P.2d 839* ; see *MB 300I.33*]. In addition, the instruction does not apply when plaintiff is relying on the doctrine of equitable estoppel [*Parsons v. Bristol Development Co. (1965) 62 Cal.2d 861, 869, 44 Cal.Rptr. 767, 402 P.2d 839*].

The instruction may need to be modified depending on the language of the contract and whether notice was required [*Parsons v. Bristol Development Co. (1965) 62 Cal.2d 861, 869-870, 44 Cal.Rptr. 767, 402 P.2d 839*].

This instruction cannot be used by an owner against the contractor unless the owner has raised the existence of a special fund as an affirmative defense [*Bilardi Constr., Inc. v. Spencer (1970) 6 Cal.App.3d 771, 774-779, 86 Cal.Rptr. 406*].

On a public work, the instruction may be adapted for use in a subcontractor's suit against an owner on a stop notice. The owner then may assert that there are no monies due or to become due the contractor because the cost of completion exceeded the unpaid balance on the contract, and therefore, there are no funds subject to the stop notice [*Harsco Corp. v. Department of Public Works* (1971) 21 Cal.App.3d 272, 276-278, 98 Cal.Rptr. 337].

[3] Comment

When a contract contains language specifying that payment must be made only from a specific fund, such as construction loan funds, then the lack of funds will defeat plaintiff's right to recovery [*Parsons v. Bristol Development Co.* (1965) 62 Cal.2d 861, 867-869, 44 Cal.Rptr. 767, 402 P.2d 839]. As with any other condition precedent, it will be strictly construed against the party relying on it [*Yamanishi v. Bleily & Collishaw, Inc.* (1972) 29 Cal.App.3d 457, 462-463, 105 Cal.Rptr. 580].

If the defendant, by the defendant's own action, has prevented performance of the condition, defendant may not rely on nonexistence of the fund [*Patrick J. Ruane, Inc. v. Parker* (1960) 185 Cal.App.2d 488, 504, 8 Cal.Rptr. 379]. For example, a defendant could not rely on a paid-when-paid clause by a prime contractor in refusing to pay a subcontractor [*Wm. R. Clarke Corp. v. Safeco Ins. Co.* (1997) 15 Cal.4th 882, 64 Cal.Rptr.2d 578, 938 P.2d 372].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawTypes of ContractsConstruction ContractsPublic Contracts LawContract ProvisionsPayment SchedulesPublic Contracts LawDispute ResolutionSubcontractorsGeneral OverviewReal Property LawConstruction LawContractsReal Property LawConstruction LawContractors & Subcontractors



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CHAPTER 3I Matthew Bender Construction Contract Instructions
PART C DEFENSES AND CONDITIONS THAT MAY BAR OR LIMIT RECOVERY

2-3I California Forms of Jury Instruction MB 300I.57

MB 300I.57 Substantial Completion and Final Acceptance

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

You must determine when the project was substantially complete. A project can be substantially complete, even if some additional work is required to fully comply with the plans and specifications, so long as the owner has taken possession of the project and is enjoying the benefit of its intended use. However, for the project to be substantially complete, the work remaining to be done must meet all of the following requirements:

- 1. The remaining work must not impair the building or structure as a whole;**
- 2. The remaining work must not require great expenditure to do or cause damage to other parts of the structure when done;**
- 3. The remaining work must not amount to a defect running through the whole project so that the owner's object in having it done in a particular way is defeated; and**
- 4. The remaining work must not be so substantial that if the cost of the work remaining to be done is deducted from the contract price, the owner will not have essentially what [he/she/it] contracted to have done.**

Authority: Tolstoy Constr. Co. v. Minter (1978) 78 Cal.App.3d 665, 671-672, 143 Cal.Rptr. 570 .

[2] Use of Instruction

This instruction should be used when either the occurrence or the date of substantial completion of the project is at issue. Select only those subparagraphs of the instruction that the facts of the case might support as reasons for viewing

the project as less than substantially complete. There should also be an instruction that explains to the jury the ramifications of substantial completion in the case [see, e.g., *MB 300I.101*].

LexisNexis Matthew Bender Expert Practice Tip--Address Subjective Elements in This

Instruction: There are a lot of subjective elements in this instruction for the jury to consider. The reasons *why* the contractor did not complete the project may be just as important to the jury as *what* the contractor did not complete. Moreover, whether there was "substantial completion" may mean many different things to many different jurors. *By Ronald Oster and Rex Heeseman*

[3] Comment

The doctrine of substantial completion has long been recognized as applicable to construction projects [*Thomas Haverly Co. v. Jones* (1921) 185 Cal. 285, 288-289, 197 P. 105]. Once substantial completion has been established, the contractor can sue on the contract for the contract price, less an offset for the cost of the additional work necessary to achieve full performance [*Tolstoy Constr. Co. v. Minter* (1978) 78 Cal.App.3d 665, 671-672, 143 Cal.Rptr. 570].

Notwithstanding contract provisions calling for a formal acceptance of the project by a public entity owner, substantial completion by the contractor, coupled with beneficial occupancy by the entity terminates the accrual of liquidated damages and triggers the owner's duty to make final payment, less any appropriate offset [*Westinghouse Electric Corp. v. County of Los Angeles* (1982) 129 Cal.App.3d 771, 779, 181 Cal.Rptr. 332 ; see *Peter Kiewit Sons' Co. v. Pasadena City Junior College Dist.* (1963) 59 Cal.2d 241, 245-246, 28 Cal.Rptr. 714, 379 P.2d 18 ; *Continental Illinois National Bank & Trust Co. v. United States (Ct. Cl. 1952)* 101 F.Supp. 755, 758]. However, the property's physical occupancy without the benefit of equipment required to be installed under the contract does not stop the running of liquidated damages and would not seem to constitute substantial compliance [*Vrgora v. Los Angeles United School Dist.* (1984) 152 Cal.App.3d 1178, 200 Cal.Rptr. 130].

What constitutes substantial completion of the project is a fact question that focuses first on what was done and then on what remains to be done [*Tolstoy Constr. Co. v. Minter* (1978) 78 Cal.App.3d 665, 671-672, 143 Cal.Rptr. 570].

Legal Topics:

For related research and practice materials, see the following legal topics:

Public Contracts LawContract ProvisionsLiquidated DamagesPublic Contracts LawPerformanceGeneral OverviewReal Property LawConstruction LawContractsReal Property LawConstruction LawContractors & Subcontractors



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CHAPTER 3I Matthew Bender Construction Contract Instructions
PART C DEFENSES AND CONDITIONS THAT MAY BAR OR LIMIT RECOVERY

2-3I California Forms of Jury Instruction MB 300I.58

MB 300I.58 Rescission of Contract as Defense to Contractor's Action as Third-Party Beneficiary of Owner's Contract

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Plaintiff may not recover on _____ [*describe owner's contract with third party on which plaintiff seeks to recover*] **if Defendant has met [his/her/its] burden of proving that the contract was [canceled/rescinded] by its parties before Plaintiff sought to enforce it.**

To prove that the contract was [canceled/rescinded], Defendant must prove _____ [*see Use of Instruction*].

[2] Use of Instruction

This instruction should be used when the defendant claims that the plaintiff may not recover on the owner's contract as a third-party beneficiary because the contract was rescinded before the plaintiff sought to enforce it. The instruction should be given after the instruction in MB 300I.13[1]. For an instruction on the elements of rescission of a contract, see Ch. 3G, *Matthew Bender Rescission of Contract Instructions*.

LexisNexis Matthew Bender Expert Practice Tip--Choose Terms Carefully: Many other jury instructions no longer use the term "rescinded" because it can be confusing to the jury [see *generally* Ch. 3G, *Matthew Bender Rescission of Contract Instructions*, MB 300G.01]. The alternate term is "canceled." And, the phrase "by its parties" may be confusing or incorrect in light of the facts in question (e.g., a unilateral act). By *Ronald Oster and Rex Heeseman*

[3] Comment

For instructions and authorities concerning third-party beneficiaries and rescission, see Chs. 3C, *Matthew Bender Contract Party Instructions*, and 3G, *Matthew Bender Rescission of Contract Instructions*, respectively.

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts Law Remedies Rescission & Redhibition General Overview Contracts Law Third Parties General Overview Contracts Law Third Parties Beneficiaries Claims & Enforcement Real Property Law Construction Law Contracts Real Property Law Construction Law Contractors & Subcontractors



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CHAPTER 3I Matthew Bender Construction Contract Instructions
PART C DEFENSES AND CONDITIONS THAT MAY BAR OR LIMIT RECOVERY

2-3I California Forms of Jury Instruction MB 300I.59

MB 300I.59 Proper Contractor's License

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

[*USE ONE OF THE FOLLOWING (See Use of Instruction)*]

If Plaintiff did not have a valid contractor's license at the time that [he/she/it] began to perform under the contract, or if Plaintiff did not maintain that license all through the time that [he/she/it] was performing the contract, then you must find for Defendant on the breach of contract claims.

[*OR*]

If Defendant did not have a valid contractor's license at the time that [he/she/it] began to perform any _____ [act or contract], or if Defendant did not maintain that license all through the time that [he/she/it] was performing the _____ [act or contract], then you must find that Plaintiff is entitled to recover from Defendant all amounts that [he/she/it] paid to Defendant or other compensation that [he/she/it] gave to Defendant to perform the _____ [act or contract].

Authorities: *Bus. & Prof. Code § 7031; Pub. Contract Code § 10164; MW Erectors, Inc. v. Niederhauser Ornamental & Metal Works Co. (2005) 36 Cal.4th 412, 426, 30 Cal.Rptr.3d 755, 115 P.3d 41 ; Lewis & Queen v. N.M. Ball Sons (1957) 48 Cal.2d 141, 146-154, 308 P.2d 713 .*

[2] Use of Instruction

This instruction should be used when the contractor's possession of the required license is at issue. The first alternative should be used when the lack of a contractor's license is a defense to a breach of contract claim brought by the contractor. The second alternative should be used when a person who uses the services of an unlicensed contractor brings an action to recover compensation paid for the performance of any act or contract.

When a party claims that its activity was covered by an exemption from the licensing requirements, an additional instruction will be required that quotes the exemption.

LexisNexis Matthew Bender Expert Practice Tip--Unlicensed Contractors Face Severe Penalty:

This instruction sets forth the heavy penalty an unlicensed contractor faces--no ability to recover for breach of contract and disgorgement of amounts previously received. Note the exceptions discussed in [3][b], *below*. In addition, be careful with the facts as to whether the license was "valid" or "not maintained" [see [3][a], *below*]. By Ronald Oster and Rex Heeseman

[3] Comment

[a] License Requirement; Substantial Compliance

A contractor is required to possess a valid contractor's license at the time it enters into the contract [*MW Erectors, Inc. v. Niederhauser Ornamental & Metal Works Co. (2005) 36 Cal.4th 412, 426, 30 Cal.Rptr.3d 755, 115 P.3d 41* ; *Lewis & Queen v. N.M. Ball Sons (1957) 48 Cal.2d 141, 146-154, 308 P.2d 713*]. A contractor bidding on a state public works contract must be licensed at the time the contract is awarded [*Pub. Contract Code § 10164*]. To bring an action for compensation for the performance of any act or contract for which the law requires a contractor's license, a person must allege that he or she was a duly licensed contractor at all times during the performance of the act or contract [*Bus. & Prof. Code § 7031(a)*; *Denver D. Darling, Inc. v. Controlled Environments Construction, Inc. (2001) 89 Cal.App.4th 1221, 1229 n.1, 108 Cal.Rptr.2d 213*]. A contractor who was unlicensed at any time during contractual performance may not recover compensation for individual acts performed while he or she was duly licensed [*MW Erectors, Inc. v. Niederhauser Ornamental & Metal Works Co. (2005) 36 Cal.4th 412, 425, 30 Cal.Rptr.3d 755, 115 P.3d 41*]. A person who uses the services of an unlicensed contractor may bring an action to recover all compensation paid to the unlicensed contractor for performance of any act or contract [*Bus. & Prof. Code § 7031(b)*].

If licensure or proper licensure is controverted, the contractor must prove licensure by producing a verified certificate of licensure from the Contractors' State License Board that establishes that the contractor was duly licensed in the proper classification at all times during the performance of any act or contract covered by the action [*Bus. & Prof. Code § 7031(d)*; see [c], *below*, regarding burden of proof].

A general denial is sufficient to controvert a contractor's pleading of licensure so that the contractor must produce a verified certificate [*Advantec Group, Inc. v. Edwin's Plumbing Co. (2007) 153 Cal.App.4th 621, 627, 63 Cal.Rptr.3d 195*]. Strict adherence to the license requirement is required, and the judicial doctrine of substantial compliance does not apply when the person who engaged in the business or acted in the capacity of a contractor has never been a duly licensed contractor in California. The court may determine that there was substantial compliance if it is shown at an evidentiary hearing that the person in question [*Bus. & Prof. Code § 7031(e)*; see *Bus. & Prof. Code § 7031(f)*; see also *Slatkin v. White (2002) 102 Cal.App.4th 963, 968-969, 126 Cal.Rptr.2d 54* (substantial compliance found); *Constr. Financial, LLC v. Perlite Plastering Co., Inc. (1997) 53 Cal.App.4th 170, 173, 61 Cal.Rptr.2d 574* (substantial compliance not found)]:

- Had been duly licensed before the contract's performance;
- Acted reasonably and in good faith to maintain proper licensure;
- Did not know or reasonably should not have known that he or she was not duly licensed when

performance commenced; and

- Acted promptly and in good faith to reinstate his or her license on learning it was invalid.

The meaning of "compensation" in *Bus. & Prof. Code § 7031* is construed broadly [see *Hydrotech Systems, Ltd. v. Oasis Waterpark* (1991) 52 Cal.3d 988, 997, 277 Cal.Rptr. 517, 803 P.2d 370]. Thus, an unlicensed contractor is also barred from bringing an action against a landowner for breach of contract when the contract does not call for payment of money by the landowner to the contractor, but instead gives the contractor exclusive rights to use the property [*K & K Services, Inc. v. City of Irwindale* (1996) 47 Cal.App.4th 818, 823-824, 54 Cal.Rptr.2d 836].

For further discussion of the doctrine of substantial compliance, see California Real Estate Law & Practice, Ch. 430, *Licensing of Contractors* (Matthew Bender).

[b] Persons Not Subject to License Requirement

The requirement of a contractor's license does not apply to any of the following:

- One who furnishes only materials or supplies without making a substantial on-site contribution to the contractor's work [*Bus. & Prof. Code § 7052*; *Walker v. Thornsberry* (1979) 97 Cal.App.3d 842, 844-848, 158 Cal.Rptr. 862 ; *Scientific Cages, Inc. v. Banks* (1978) 81 Cal.App.3d 885, 887-889, 146 Cal.Rptr. 780];
- One who furnishes finished products [*Bus. & Prof. Code § 7045*; see *Johnson v. Mattox* (1968) 257 Cal.App.2d 714, 718, 65 Cal.Rptr. 185];
- Employees for wages [*Bus. & Prof. Code § 7053*];
- Architects and engineers acting solely in their professional capacity, and licensed structural pest control operators, geologists, and geophysicists acting within the scope of their licenses [*Bus. & Prof. Code § 7051*];
- Real estate licensees acting within the course and scope of their license [*Bus. & Prof. Code § 7044.1*];
- Admitted surety insurers engaging contractors to undertake the completion of contracts on which performance or completion bonds were issued by the surety insurers, provided all actual construction work is performed by duly licensed contractors [*Bus. & Prof. Code § 7044.2*]; and
- Owner-builders [*Bus. & Prof. Code § 7044*; see *Ranchwood Communities Limited Partnership v. Jim Beat Construction Co.* (1996) 49 Cal.App.4th 1397, 1415-1416, 57 Cal.Rptr.2d 386 (developers not owner-builders)].

The term "contractor" does not include persons who perform construction management services. The licensing law does not identify construction managers as workers requiring licensure [*The Fifth Day LLC v. Bolotin* (2009) 172 Cal.App.4th 939, 950, 91 Cal.Rptr.3d 633].

"Master builders" or "master developers," that is, developers who provide labor and materials through licensed, third-party general contractors, are contractors and required to be licensed [*Vallejo Development Co. v. Beck Development Co.* (1994) 24 Cal.App.4th 929, 939-943, 29 Cal.Rptr.2d 669]. In an illustration of the strictness of this requirement, a licensed contractor whose unlicensed corporation entered in a subcontract with a general contractor

could not sue to recover compensation, even though the contractor's individual license number appeared on all documents relating to the contract. The corporation was the contracting party and because it was unlicensed, recovery was barred [*Opp v. State Farm Fire & Marine Ins. Co.* (2007) 154 Cal.App.4th 71, 76, 64 Cal.Rptr.3d 260].

[c] Burden of Proof

The contractor has the burden of proof to establish that he or she was a duly licensed contractor and thus can maintain suit. In a case in which the trial judge instructed the jury that the burden of proof shifted to the developer on whether the contractor was duly licensed, the court held that the instruction was erroneous and constituted prejudicial error [*Buzgheia v. Leasco Sierra Grove* (1997) 60 Cal.App.4th 374, 393, 398, 70 Cal.Rptr.2d 427]. The instruction read: "Plaintiff may establish licensure ... through a certified copy of the license history of [plaintiff's company]. The certificate of licensure establishes a rebuttable presumption that [plaintiff's company] was duly licensed at all times during performance of the contracts with the defendants. The effect of such presumption is to impose on the defendants the burden of proof as to the nonexistence of the presumed fact" [*Buzgheia v. Leasco Sierra Grove* (1997) 60 Cal.App.4th 374, 383, 70 Cal.Rptr.2d 427].

[d] When Failure to Comply With License Requirement Is Not a Defense

Causes of action that do not seek "the collection of compensation for the performance of any act or contract for which a license is required" are beyond the scope of *Bus. & Prof. Code* § 7031. Therefore, *Bus. & Prof. Code* § 7031 did not prevent an unlicensed subcontractor from pursuing a claim against a general contractor under 42 U.S.C. § 1981 for racial discrimination during the performance of the contract, but barred him from seeking damages for the contractor's failure to pay sums due under the contract [*Holland v. Morse Diesel Internat., Inc.* (2001) 86 Cal.App.4th 1443, 1449-1453, 104 Cal.Rptr.2d 239].

An unlicensed contractor may also sue his or her partner for an accounting of the earnings of the unlicensed partnership [*Norwood v. Judd* (1949) 93 Cal.App.2d 276, 277-290, 209 P.2d 24]. Further, he or she may sue third parties for breach of warranty for defective merchandise [*Davis Company v. Superior Court* (1969) 1 Cal.App.3d 156, 158-159, 81 Cal.Rptr. 453] and may bring suit against the owner for fraud in the inducement of the contract [*Grant v. Weatherholt* (1954) 123 Cal.App.2d 34, 42-44, 266 P.2d 185]. Thus, if the unlicensed contractor sues on a cause of action not based on the contract, he or she may still recover. For example, in one case developers/general contractors acted not only as general contractors and thus were required to be licensed to pursue an action for compensation for their work, but also acted as developers who could be held strictly liable in damages to the homeowners in actions for defective construction. Their tort-based claims as developers for indemnity and contribution were not subject to a bar by their lack of contractors' licenses. However, their contract-based theories of recovery were barred by their noncompliance with licensing requirements [*Ranchwood Communities Limited Partnership v. Jim Beat Construction Co.* (1996) 49 Cal.App.4th 1397, 1409-1421, 57 Cal.Rptr.2d 386].

[e] Recovery of Compensation Paid to Unlicensed Contractor

The Legislature amended *Bus. & Prof. Code* § 7031 in 2001 to allow a person who uses the services of an unlicensed contractor to bring an action to recover all compensation paid to the unlicensed contractor for performance of any act or contract [*Bus. & Prof. Code* § 7031(b)]. The amended statute supersedes previous cases that held that the license requirement could be used only as a shield by the person being sued by an unlicensed contractor, not as a sword against the contractor [see *Vitek, Inc. v. Alvarado Ice Palace, Inc.* (1973) 34 Cal.App.3d 586, 593-594, 110 Cal.Rptr. 86], and that an unlicensed contractor does not have to pay back money paid to him or her for work done [see *Comet Theatre Enterprises v. Cartwright* (9th Cir. 1952) 195 F.2d 80]. It is unclear whether the amended statute supersedes earlier decisions holding that an unlicensed contractor can assert his or her claim as an offset [see *S & Q Construction Co. v. Palma Ceia Development Organization* (1960) 179 Cal.App.2d 364, 367, 3 Cal.Rptr. 690]. The recovery authorized by *Bus. & Prof. Code* § 7031(b) may not be reduced by an unlicensed contractor's claim of offset for materials and services

provided in connection with the unlicensed work or for work performed during a period that it held a license [*Alatrisme v. Cesar's Exterior Designs Inc.* (2010) 183 Cal. App. 4th 656, 672-673, 108 Cal. Rptr. 3d 277; *White v. Cridlebaugh* (2009) 178 Cal. App. 4th 506, 520-521, 100 Cal. Rptr. 3d 434].

Legal Topics:

For related research and practice materials, see the following legal topics:

GovernmentsState & Territorial GovernmentsLicensesPublic Contracts LawContract ProvisionsGeneral
OverviewPublic Contracts LawDispute ResolutionGeneral OverviewReal Property LawConstruction LawContractsReal
Property LawConstruction LawContractors & Subcontractors



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California Forms of Jury Instruction

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CHAPTER 3I Matthew Bender Construction Contract Instructions
PART C DEFENSES AND CONDITIONS THAT MAY BAR OR LIMIT RECOVERY

2-3I California Forms of Jury Instruction MB 300I.60

MB 300I.60 Preliminary 20-Day Notice (Private Work)

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

To recover on [his/her/its] [mechanics' lien *and/or* stop notice *and/or* payment bond] claim, Plaintiff was required to cause a preliminary 20-day notice to be given to the owner or reputed owner, [and] to the prime contractor or reputed prime contractor [and/or to the construction lender or reputed construction lender] within 20 days of the date on which Plaintiff furnished the first labor, services, equipment, or materials for which Plaintiff is now making a claim.

That notice was required by law to contain all of the following:

- 1. A general description of the labor, services, equipment, and materials furnished or to be furnished by Plaintiff, and an estimate of the total price of these items;**
- 2. Plaintiff's name and address;**
- 3. The name and address of the person with whom Plaintiff had [his/her/its] contract;**
- 4. A description of the jobsite that was enough to identify that jobsite; and**
- 5. The following statement in boldface type:**

NOTICE TO PROPERTY OWNER

If bills are not paid in full for the labor, services, equipment, or materials furnished or to be furnished, a mechanic's lien leading to the loss, through court foreclosure proceedings, of all or part of your property being so improved may be placed against the property even though you have paid your contractor in full. You may wish to protect yourself against this consequence by (1) requiring your contractor to furnish a signed release by the person or firm giving you this notice before making payment to your contractor, or (2) any other method or device that is appropriate under the circumstances. Other than residential homeowners of dwellings containing fewer than five units, private project owners must notify the original contractor and any lien claimant who has provided the owner with a preliminary 20-day lien notice in accordance with *Section 3097 of the Civil Code* that a notice of completion or notice of cessation has been recorded within 10 days of its recordation. Notice shall be by registered mail, certified mail, or first-class mail, evidenced by a certificate of mailing. Failure to notify will extend the deadlines to record a lien.

[*OPTIONAL (See Use of Instruction)*]

If an invoice for materials furnished by Plaintiff contained all of the above information, and it was served in the manner I will now describe to you, that is a sufficient notice.

[*CONTINUE INSTRUCTION*]

The notice was required to be delivered to the owner or reputed owner, [and] prime contractor or reputed prime contractor [and/or construction lender or reputed construction lender] personally, or by leaving it with some person in charge at their residences or places of business, or by mailing it by first-class registered or certified mail, postage prepaid, to them at their residences or places of business.

If Plaintiff failed to comply with all these requirements, then you must find for Defendant on _____ [the mechanics' lien *and/or* the stop notice *and/or* the payment bond] claim.

[*OPTIONAL (See Use of Instruction)*]

However, Defendant may not use the requirement of a notice to prevent Plaintiff from recovering on [his/her/its] claim if you find that Defendant is estopped from relying on this requirement.

[*OPTIONAL (See Use of Instruction)*]

However, Defendant may not use this requirement of a notice to prevent Plaintiff from recovering on [his/her/its] claim if you find that Defendant waived this requirement.

Authorities: Civ. Code §§ 3097, 3097.1, 3114, 3160.

[2] Use of Instruction

This instruction should be used when the service, timeliness, or sufficiency of the preliminary 20-day notice (private work) is at issue. Use the bracketed references to the construction lender and reputed construction lender when the suit is against the lender or both owner and lender. Only those portions of the instruction that cover disputed issues should be used. For example, the lack of a 20-day notice to the construction lender should not affect the validity of a

mechanics' lien--so long as the construction loan has priority--although it will clearly defeat any stop notice to the lender [*Romak Iron Works v. Prudential Ins. Co. (1980) 104 Cal.App.3d 767, 773-777, 163 Cal.Rptr. 869*]. In addition, if there is no dispute over the contents of the notice or the sufficiency of the delivery, omit those portions of the instruction.

This instruction does not cover the plaintiffs who are certificated architects, registered engineers, or licensed land surveyors. The timing on their notices is governed by *Civ. Code* § 3097(c)(6). If they are involved, this instruction must be modified to comply with the requirements of that section.

In addition, this instruction does not cover two of the statutory requirements for the contents of the notice. One is the boldface "NOTICE TO PROPERTY OWNER" paragraph [*Civ. Code* § 3097(c)(5)] and the other is the information concerning certain trust funds [*Civ. Code* § 3097(c)(6)]. If either is involved, this instruction can be augmented accordingly.

The instruction also does not cover service at the address shown on the building permit or the "Construction Trust Deed" [*Civ. Code* § 3097(f)(1), (j)], nor service on parties who do not reside in California [*Civ. Code* § 3097(f)(2)]. If either of those factors are involved, this instruction must be modified.

This instruction does not specifically cover the proof of service requirements [*Civ. Code* § 3097.1]. If there is an unresolved issue on this, an additional instruction will be required.

If the plaintiff claims to have made a sufficient notice by delivery of an invoice as allowed by *Civ. Code* § 3097(c)(6), use the appropriate optional paragraph.

If there is an estoppel or waiver issue, use the appropriate optional paragraph or paragraphs, and add separate instructions setting forth the elements of estoppel, or waiver, or both [see Ch. 3, *California Judicial Council Contracts Instructions*, CACI No. 336, and Ch. 3F, *Matthew Bender Contract Defenses Instructions*].

LexisNexis Matthew Bender Expert Practice Tip--Use Instruction as Checklist for Closing: This is a complex instruction that covers many different points. Counsel may wish to use this instruction as a checklist for closing argument, preferably with visual aids. If applicable, the terms "estopped" and "waived" in the last two optional paragraphs will require further instructions. *By Ronald Oster*

[3] Comment

[a] Preliminary 20-Day Notice as Condition Precedent to Recovery on Lien or Payment Bond

A condition precedent to recovery by a subcontractor or materialman on a mechanics' lien [*Civ. Code* § 3114], stop notice [*Civ. Code* § 3160], or payment bond [*Civ. Code* § 3096], is service of a timely and sufficient preliminary 20-day notice (private work) [*Civ. Code* §§ 3097.1, 3242(a)]. *Civ. Code* § 3097(a) also requires the prime contractor to give a preliminary 20-day notice if it does not have a "direct contract with the owner," for example, if it has a contract with a lessee. However, this provision does not often come into play, because, absent a notice of nonresponsibility, the lessee is deemed to be the agent of the owner [*Civ. Code* § 3129] so that the contract with the lessee amounts to a contract with the owner [see *M. Arthur Gensler, Jr., & Associates, Inc. v. Larry Barrett, Inc. (1972) 7 Cal.3d 695, 706-708, 103 Cal.Rptr. 247, 499 P.2d 503*]. The courts have also found others to be the owner's agent for this purpose, such as a spouse [*Frank Pisano & Associates v. Taggart (1972) 29 Cal.App.3d 1, 17-18, 105 Cal.Rptr. 414*]. People performing actual labor for wages [*Rich-Lee Equipment Rentals, Inc. v. Intermountain Constr. Co. (1978) 79 Cal.App.3d 581, 585-590, 145 Cal.Rptr. 106*] and certain trust funds are not required to serve preliminary 20-day notices [*Civ. Code* § 3097(a), (b)].

In the case of a payment bond claim, if plaintiff did not give a preliminary 20-day notice, he or she may nonetheless

enforce a claim against the bond by giving written notice to the surety and the bond principal within 15 days after a notice of completion has been recorded. If a notice of completion is not recorded, the time for giving written notice to the surety is extended to 75 days after completion of the work of improvement [*Civ. Code* § 3242(b); *see Civ. Code* § 3227; *see also MB 300I.61*].

[b] Who Must Receive Notice

The preliminary 20-day notice must be given to the owner or reputed owner, the original contractor or reputed contractor, and the construction lender or reputed construction lender, if any [*Civ. Code* § 3097(a)]. In the case of a reputed owner, the subcontractor or materialman can rely on information given to it by the prime contractor, so long as that reliance is reasonable and in good faith, even if this reliance results in no notice being given to the actual owner [*Brown Co. v. Appellate Department* (1983) 148 Cal.App.3d 891, 898-903, 196 Cal.Rptr. 258]. However, in the case of a reputed lender, the subcontractor or materialman may be charged with constructive notice of the identity of the persons to be served, if that information was made available in the statutorily prescribed manner [*Civ. Code* § 3097(m); *see Brown Co. v. Appellate Department* (1983) 148 Cal.App.3d 891, 902-903, 196 Cal.Rptr. 258 ; *Romak Iron Works v. Prudential Ins. Co.* (1980) 104 Cal.App.3d 767, 773-775, 163 Cal.Rptr. 869].

[c] Timeliness of Notice

The notice must be served not later than 20 days after the plaintiff first furnished labor, services, equipment, or materials to the jobsite. A claimant who failed to give timely notice is not precluded from giving notice late. However, the claimant will be entitled to record a lien, file a stop notice, and assert a claim against a payment bond only for labor, services, equipment, or materials furnished within 20 days before the notice and any time thereafter [*Civ. Code* § 3097(d)].

[d] Labor, Services, Equipment, and Materials Covered by Notice

The notice will cover all labor, services, equipment, and materials provided within the 20 days preceding the service of the notice, and at any time thereafter, but not for any labor, services, equipment, or materials provided before that 20-day period [*Civ. Code* § 3097(d)]. The notice may be provided before the 20-day period expires and will not be deemed defective as being premature, even if it is delivered before the claimant has provided any labor, services, equipment, or materials to the project [*Brown Co. v. Appellate Department* (1983) 148 Cal.App.3d 891, 896-898, 196 Cal.Rptr. 258].

[e] Contents of Notice

The requirements for the contents of the notice are set forth in *Civ. Code* § 3097(c). Only one notice need be given, unless the plaintiff had contracts with more than one subcontractor [*Civ. Code* § 3097(g)]. An invoice that is transmitted in the manner required by a notice and that contains the information required in a notice is expressly allowed to constitute notice by *Civ. Code* § 3097(c)(6).

Substantial compliance with the requirements for the contents of the notice is sufficient [*Civ. Code* § 3097(g); *Fidelity Sound Systems, Inc. v. American Bonding Co.* (1978) 85 Cal.App.3d Supp. 13, 19-22, 149 Cal.Rptr. 674 ; *but see San Joaquin Blocklite, Inc. v. Willden* (1986) 184 Cal.App.3d 361, 228 Cal.Rptr. 842 (questioning whether substantial compliance is enough and arguing that strict compliance is necessary)]. However, the notice must be in writing [*Windsor Mills v. Richard B. Smith, Inc.* (1969) 272 Cal.App.2d 336, 340-341, 77 Cal.Rptr. 300].

[f] Service of Notice

The requirements for service of the notice are set forth in *Civ. Code* § 3097(f) and the proof of service requirements are contained in *Civ. Code* § 3097.1. Compliance with these requirements is strictly enforced [*IGA Aluminum Products,*

Inc. v. Manufacturers Bank (1982) 130 Cal.App.3d 699, 706, 181 Cal.Rptr. 859].

[g] Estoppel and Waiver

The defendant can be estopped to rely on the claimant's failure to give a timely and sufficient preliminary 20-day notice [*Scott, Blake & Wynne v. Summit Ridge Estates, Inc.* (1967) 251 Cal.App.2d 347, 353, 59 Cal.Rptr. 587]. However, estoppel must have been specially pleaded in the complaint [*Windsor Mills v. Richard B. Smith, Inc.* (1969) 272 Cal.App.2d 336, 341-342, 77 Cal.Rptr. 300]. The owner may not waive the requirement of a notice [Civ. Code § 3097(e)], although other defendants can. Waiver must also be specially pleaded [*Windsor Mills v. Richard B. Smith, Inc.* (1969) 272 Cal.App.2d 336, 342, 77 Cal.Rptr. 300].

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property LawConstruction LawContractsReal Property LawConstruction LawContractors & SubcontractorsReal Property LawNonmortgage LiensMechanics' Liens



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California Forms of Jury Instruction

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CHAPTER 3I Matthew Bender Construction Contract Instructions
PART C DEFENSES AND CONDITIONS THAT MAY BAR OR LIMIT RECOVERY

2-3I California Forms of Jury Instruction MB 300I.61

MB 300I.61 Written Notice to Surety and Bond Principal--Private Work

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

To recover on [his/her/its] payment bond claim, Plaintiff was required to cause a written notice to be given to the surety and to the _____ [contractor or subcontractor], who is the principal on the bond, within _____ [15 days after a notice of completion was recorded or, if no notice of completion was recorded 75 days after the work of improvement was completed].

The notice was required by law to contain all of the following:

1. A description of the kind of labor, services, equipment, or materials that the Plaintiff furnished or agreed to furnish;
2. The name of the person to or for whom the labor, services, equipment, or materials were furnished; and
3. The approximate value of any labor, services, equipment, or materials already furnished or to be furnished.

The notice was required to be given to the surety and to the _____ [contractor or subcontractor] by personal delivery, or by properly addressing and mailing it by either certified or registered mail with the postage prepaid.

If Plaintiff failed to comply with all of these requirements, then you must find for Defendant on the payment bond claim.

Authorities: *Civ. Code* §§ 3096, 3227, 3242.

[2] Use of Instruction

This instruction should be used when service, timeliness, or sufficiency of the written notice from the plaintiff to the surety and bond principal is at issue in a case involving a claim on a payment bond. This written notice is an alternative to a plaintiff who failed to serve a preliminary 20-day notice (private work) in accordance with *Civ. Code* §§ 3097, 3242(a) [see MB 300I.60]. Only those portions of the instruction that cover disputed issues should be used. For example, if there is no dispute over the contents or sufficiency of the notice, omit those portions of the instruction.

This instruction also does not cover the specific requirements for delivering notice to the bond principal and surety. If these requirements are at issue, the instruction must be modified [see *Civ. Code* § 3227(a), discussed in [3], below].

LexisNexis Matthew Bender Expert Practice Tip--Explain Instruction in Closing: This is a detailed instruction that must be explained to the jury in closing argument, preferably with the use of visual aids. Moreover, make sure that the jury understands words such as "surety" and "principal." *By Ronald Oster and Rex Heeseman*

[3] Comment

To enforce a claim against a payment bond given in connection with a private work, the claimant must give the same 20-day preliminary notice that is required as a prerequisite to establishing a mechanics' lien or stop notice [*Civ. Code* § 3242(a); see *Civ. Code* §§ 3096, 3097; see also MB 300I.60]. If preliminary notice is not given as prescribed by *Civ. Code* § 3242(a), a claimant may nonetheless enforce a claim against the bond by giving written notice to the surety and the bond principal within 15 days after a notice of completion has been recorded. If a notice of completion is not recorded, the time for giving written notice to the surety is extended to 75 days after completion of the work of improvement [*Civ. Code* § 3242(b)].

The written notice given to the surety or bond principal when no 20-day preliminary notice was given must include all of the following information [*Civ. Code* § 3227(b)]:

- A description of the kind of labor, services, equipment, or materials furnished or agreed to be furnished by the claimant;
- The name of the person to or for whom the labor, services, equipment, or materials were furnished; and
- The amount in value, as near as may be determined, of any labor, services, equipment, or materials already furnished or to be furnished.

The notice may be personally delivered or deposited in the mail, postage prepaid, certified or registered, and addressed in any of the following ways that apply [*Civ. Code* § 3227(a)]:

- If the surety is an individual, to the surety's residence or place of business, if known. If the surety's residence address is unknown, the notice should be addressed to the clerk of the county in which the bond has been recorded.
- If the surety is a corporation to (1) the office of or in care of the agent designated on the bond, (2) the office of or in care of any of the surety's officers who are located in California, or (3) the office of or in care of the surety's statutory agent in California.

- To the bond principal at the principal's last known address.
- In the same manner provided for service of summons in civil actions [*see Code Civ. Proc. § 415.10 et seq.*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawTypes of ContractsGuaranty ContractsReal Property LawConstruction LawContractsReal Property LawConstruction LawContractors & SubcontractorsReal Property LawNonmortgage LiensMechanics' Liens



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CHAPTER 3I Matthew Bender Construction Contract Instructions
PART C DEFENSES AND CONDITIONS THAT MAY BAR OR LIMIT RECOVERY

2-3I California Forms of Jury Instruction MB 300I.62

MB 300I.62 Defense Against Mechanics' Lien or Private Work Stop Notice Claim--False Stop Notice**[1] Instruction**[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Defendant can prevent Plaintiff from _____ **[foreclosing or enforcing] [his/her/its]**
 _____ **[mechanics' lien or stop notice] against** _____ **[name property subject to**
lien or stop notice], if Defendant has met [his/her/its] burden of proving that Plaintiff willfully gave a false
 _____ **[stop notice or bonded stop notice].**

Authority: *Civ. Code § 3168.***[2] Use of Instruction**

This instruction should be used to bar foreclosure of a mechanics' lien or enforcement of a stop notice if the defendant claims that the plaintiff willfully gave a false stop notice or bonded stop notice. For the definition of "stop notice," see *MB 300I.121[1]*. For the definition of "bonded stop notice," see *MB 300I.122[1]*.

LexisNexis Matthew Bender Expert Practice Tip--Explain Terms in Closing: The key term in this instruction is "willfully," which will have to be addressed in closing argument. Furthermore, many jurors will not understand a "mechanics' lien" or a "stop notice." *By Ronald Oster and Rex Heeseman*

[3] Comment

Any person who willfully gives a false stop notice or bonded stop notice forfeits all right to a mechanics' lien and all right to participate in the pro rata distribution of money withheld pursuant to the private work stop notice [*Civ. Code § 3168*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property LawConstruction LawContractsReal Property LawConstruction LawContractors & SubcontractorsReal
Property LawNonmortgage LiensMechanics' Liens



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CHAPTER 3I Matthew Bender Construction Contract Instructions
PART C DEFENSES AND CONDITIONS THAT MAY BAR OR LIMIT RECOVERY

2-3I California Forms of Jury Instruction MB 300I.63

MB 300I.63 Defense Against Mechanics' Lien or Private Work Stop Notice Claim--Claim in Stop Notice for Labor, etc., Not Furnished

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Defendant can prevent Plaintiff from _____ [foreclosing or enforcing] [his/her/its] _____ [mechanics' lien or stop notice] against _____ [name property subject to lien], if Defendant has met [his/her/its] burden of proving that Plaintiff willfully included in a _____ [stop notice or bonded stop notice] a claim for labor, services, equipment, or materials not furnished for the project.

Authority: Civ. Code § 3168.

[2] Use of Instruction

This instruction should be used to bar foreclosure of a mechanics' lien or enforcement of a stop notice if the defendant claims that the plaintiff willfully included in a stop notice or a bonded stop notice a claim for labor, services, equipment, or materials not furnished for the project. For the definition of "stop notice," see *MB 300I.121[1]*. For the definition of "bonded stop notice," see *MB 300I.122[1]*.

LexisNexis Matthew Bender Expert Practice Tip--Explain Terms in Closing: As with the instruction in MB 300I.62, the key term in this instruction is again the word "willfully," which will have to be addressed in closing argument. Furthermore, many jurors will not understand a "mechanics' lien" or a "stop notice." By *Ronald Oster and Rex Heeseman*

[3] Comment

Any person who willfully includes in his or her stop notice or bonded stop notice labor, services, equipment, or materials not furnished for the property described in the notice, forfeits all right to a mechanics' lien and all right to participate in the pro rata distribution of money withheld pursuant to the private work stop notice [*Civ. Code* § 3168].

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property Law Construction Law Contracts Real Property Law Construction Law Contractors & Subcontractors Real Property Law Nonmortgage Liens Mechanics' Liens



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CHAPTER 3I Matthew Bender Construction Contract Instructions
PART C DEFENSES AND CONDITIONS THAT MAY BAR OR LIMIT RECOVERY

2-3I California Forms of Jury Instruction MB 300I.64

MB 300I.64 Defense Against Mechanics' Lien--Notice of Nonresponsibility

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Defendant can prevent Plaintiff from foreclosing [his/her/its] mechanics' lien against _____ [name property subject to lien], if Defendant has met [his/her/its] burden of proving that [he/she/it] timely posted and recorded a sufficient notice of nonresponsibility. To meet [his/her/its] burden, Defendant must prove all of the following:

- 1. That Defendant did not cause Plaintiff to do the work for which the lien is claimed;**
- 2. That Defendant owns the property that was improved or claims an interest in that property;**
- 3. That Defendant or [his/her/its] agent signed and verified the notice of nonresponsibility;**
- 4. That the notice of nonresponsibility was in writing;**
- 5. That the notice contained a description of the property sufficient for identification;**
- 6. That the notice contained the Defendant's name and the nature of [his/her/its] title or interest;**
- 7. That the notice contained the name of the purchaser under contract, if any, or lessee, if known;**
- 8. That the notice contained a statement that the Defendant would not be responsible for any claims arising from the work of improvement; and**

9. That within 10 days of receiving knowledge of the work of improvement, Defendant posted the notice of nonresponsibility on the property and recorded it in the office of the county recorder of the county where the property or a part of the property is located.

Authorities: *Civ. Code* §§ 3094, 3129; *Baker v. Hubbard* (1980) 101 Cal.App.3d 226, 231-234, 161 Cal.Rptr. 551 ; *Los Banos Gravel Co. v. Freeman* (1976) 58 Cal.App.3d 785, 797-798, 130 Cal.Rptr. 180 .

[2] Use of Instruction

This instruction should be used when Defendant claims that foreclosure of Plaintiff's lien has been barred by the posting of a timely and sufficient notice of nonresponsibility. If the notice was signed and verified by an agent of defendant, an additional instruction on agency may be required.

LexisNexis Matthew Bender Expert Practice Tip--Use Instruction as Checklist: This instruction provides a convenient checklist that counsel can use in closing argument with the use of visual aids. Note that there are words (such as "notice of nonresponsibility") that will be unknown to many jurors. By *Ronald Oster and Rex Heeseman*

[3] Comment

When the contractor is not hired by the property owner, the owner can protect its interest from any lien by timely posting and recording a notice of nonresponsibility [*Civ. Code* §§ 3094, 3129; *Baker v. Hubbard* (1980) 101 Cal.App.3d 226, 231-234, 161 Cal.Rptr. 551], unless the owner compelled the tenant to make the improvements [*Los Banos Gravel Co. v. Freeman* (1976) 58 Cal.App.3d 785, 797-798, 130 Cal.Rptr. 180]. The required timing and contents of the notice of nonresponsibility are detailed in *Civ. Code* § 3094.

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property LawConstruction LawContractsReal Property LawConstruction LawContractors & SubcontractorsReal Property LawNonmortgage LiensMechanics' Liens



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California Forms of Jury Instruction

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CHAPTER 3I Matthew Bender Construction Contract Instructions
PART C DEFENSES AND CONDITIONS THAT MAY BAR OR LIMIT RECOVERY

2-3I California Forms of Jury Instruction MB 300I.65

MB 300I.65 Defense Against Mechanics' Lien--Claim for Labor, etc., Not Furnished

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Plaintiff loses [his/her/its] mechanics' lien against _____ [name property subject to lien], if Defendant has met [his/her/its] burden of proving that Plaintiff willfully included in the lien a claim for labor, services, equipment, or materials not furnished for the project.

Authority: Civ. Code § 3118.

[2] Use of Instruction

This instruction should be used to bar foreclosure of a mechanics' lien even if the defendant claims that the plaintiff willfully made a lien claim for labor, services, equipment, or materials not furnished for the project.

LexisNexis Matthew Bender Expert Practice Tip--Address Terms in Closing: The key word in this instruction is the term "willfully" that counsel must address in closing argument. *By Ronald Oster*

[3] Comment

Civ. Code § 3118 provides that: "Any person who shall willfully include in his claim of lien labor, services, equipment, or materials not furnished for the property described in such claim shall thereby forfeit his lien."

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property Law Construction Law Contracts Real Property Law Construction Law Contractors & Subcontractors Real

Property LawNonmortgage LiensMechanics' Liens



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CHAPTER 3I Matthew Bender Construction Contract Instructions
PART C DEFENSES AND CONDITIONS THAT MAY BAR OR LIMIT RECOVERY

2-3I California Forms of Jury Instruction MB 300I.66

MB 300I.66 Defense Against Mechanics' Lien--Claim for Labor, etc., Not Included in the Contract Between the Owner and the Prime Contractor

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] PROPOSED INSTR. NO. _____

Defendant can prevent Plaintiff from foreclosing [his/her/its] mechanics' lien against _____ [name property subject to lien], if Defendant has met [his/her/its] burden of proving both of the following:

1. That Plaintiff's claim of lien was a claim for labor, services, equipment, or materials that were not included in the contract between _____ [owner] and _____ [prime contractor], or in any modifications to that contract; and

2. That Plaintiff had _____ [either actual knowledge or constructive notice] of that contract and any modifications before [he/she/it] furnished that labor, services, equipment, or materials.

[OPTIONAL (See Use of Instruction)]

If the contract between _____ [owner] and _____ [prime contractor], or a modification of that contract, was filed with the county recorder of _____ [name] county, then Plaintiff is considered to have received actual notice of the contract.

Authority: Civ. Code § 3124.

[2] Use of Instruction

This instruction should be used to bar foreclosure of a mechanics' lien even when defendant claims that the plaintiff made a lien claim that included a claim for labor, services, equipment, or materials not included in the contract between the owner and the original contractor or in any modifications of that contract. Use the optional paragraph if the contract or modification has been filed with the county recorder in the manner required by *Civ. Code § 3124*.

LexisNexis Matthew Bender Expert Practice Tip--Explain Terms in Closing: The term "constructive notice" in the second element of this defense could be confusing to jurors in any case, let alone a construction case. The term will have to be carefully explained in closing argument together with an explanation of the rationale for the rule. The same is true for the term "foreclosing" as well as, perhaps, "modifications to the contract" and "actual notice." *By Ronald Oster and Rex Heeseman*

[3] Comment

A lien claimant employed by a contractor or a subcontractor may not make a claim for labor, services, equipment, or materials not included in the contract between the owner and the original contractor and not in any modification of that contract, if the claimant had actual knowledge or constructive notice of the contract provisions before furnishing the labor, services, equipment, or materials [*Civ. Code § 3124*]. Filing the contract or its modifications with the county recorder of the county in which the property to be improved is located before work begins constitutes actual notice of the contract's provisions and of any modifications [*Civ. Code § 3124*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property Law Construction Law Contracts Real Property Law Construction Law Contractors & Subcontractors Real Property Law Nonmortgage Liens Mechanics' Liens



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CHAPTER 3I Matthew Bender Construction Contract Instructions
PART C DEFENSES AND CONDITIONS THAT MAY BAR OR LIMIT RECOVERY

2-3I California Forms of Jury Instruction MB 300I.67

MB 300I.67 Defense Against Mechanics' Lien--Failure to Serve Stop Notice After Demand

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Plaintiff loses [his/her/its] mechanics' lien against _____ [name property subject to lien], if Defendant has met [his/her/its] burden of proving that Plaintiff failed to serve a stop notice on Defendant after Defendant had made a written demand on Plaintiff for one.

Authority: *Civ. Code § 3158.*

[2] Use of Instruction

This instruction should be used to bar foreclosure of a mechanics' lien when the defendant claims that plaintiff failed to serve a stop notice after a demand for one.

[3] Comment

Any person who fails to serve the owner with a stop notice after a written demand for it from the owner forfeits his or her right to a mechanics' lien [*Civ. Code § 3158*]. "Stop notice" is defined in *Civ. Code § 3103* and in MB 300I.121. The stop notice must be served within the time in which a mechanics' lien must be recorded [*Civ. Code §§ 3115, 3116, 3117, 3160*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property Law Construction Law Contracts Real Property Law Construction Law Contractors & Subcontractors Real

Property LawNonmortgage LiensMechanics' Liens



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CHAPTER 3I Matthew Bender Construction Contract Instructions
PART C DEFENSES AND CONDITIONS THAT MAY BAR OR LIMIT RECOVERY

2-3I California Forms of Jury Instruction MB 300I.68

MB 300I.68 Preliminary 20-Day Notice (Public Work)

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

To recover on [his/her/its] _____ [stop notice *and/or* payment bond claim], Plaintiff was required to cause a preliminary 20-day notice to be given to _____ [*prime contractor*] and to _____ [*public entity*] within 20 days of the date on which Plaintiff furnished the first labor, services, equipment, or materials for which Plaintiff is now making a claim.

[*OPTIONAL (See Use of Instruction)*]

That notice was required to contain a substantially accurate general description of the labor, services, equipment, and materials being furnished by Plaintiff and the name of the party to whom Plaintiff was furnishing the labor, services, equipment, and materials.

[*OPTIONAL (See Use of Instruction)*]

That notice was required to be delivered to _____ [*prime contractor*] and _____ [*public entity*] personally or by mailing it to them by first class mail, by registered mail, or by certified mail, postage prepaid. [Service by registered or certified mail is complete at the time of deposit.]

[*CONTINUE INSTRUCTION*]

If Plaintiff failed to comply with this requirement, then you must find for Defendant on the _____ [stop notice and/or payment bond] claim.

Authorities: *Civ. Code* §§ 3098, 3183, 3252(a); *American Buildings Co. v. Bay Commercial Construction, Inc.* (2002) 99 Cal.App.4th 1193, 1197, 121 Cal.Rptr.2d 539 .

[2] Use of Instruction

This instruction should be used if the service, timeliness, or sufficiency of a preliminary 20-day notice (public work) is at issue. Use the optional parts of the instruction if the contents of the notice or the manner of its delivery is at issue.

Except for the Department of Public Works and the Department of General Services, the statute does not explain who at the public entity is to be served [*Civ. Code* § 3098(a)]. If this is an issue, then an additional instruction may be required. Additional instructions may also be required if there is an issue over whether service by mail was made on the contractor at a place where it maintains an office, conducts business, or resides [*Civ. Code* § 3098(a)].

LexisNexis Matthew Bender Expert Practice Tip--Explain Terms in Closing: This instruction contains several terms of art that will have to be explained in closing (e.g., "payment bond," "stop notice," and "preliminary notice"). Note the inconsistencies in the case law discussed in the comment below on the issue of whether estoppel and waiver defenses apply to public works projects. *By Ronald Oster*

[3] Comment

A condition precedent to recovery on a stop notice or payment bond claim on a public works project [*Civ. Code* § 3183] by a subcontractor or materialman who has no direct contractual relationship with the prime contractor is service of a timely and sufficient preliminary 20-day notice (public work) on the prime contractor and the public agency concerned [*Civ. Code* § 3098; *American Buildings Co. v. Bay Commercial Construction, Inc.* (2002) 99 Cal.App.4th 1193, 1197, 121 Cal.Rptr.2d 539]. Those who have a direct contract with the prime contractor [*Civ. Code* § 3098(a)], those who perform actual labor for wages [*Civ. Code* § 3098(a); *Rich-Lee Equipment Rentals, Inc. v. Intermountain Constr. Co.* (1978) 79 Cal.App.3d 581, 585-590, 145 Cal.Rptr. 106], and certain trust funds are not required to serve preliminary 20-day notices [*Civ. Code* § 3098(a), (c)].

The notice must be in writing [*Civ. Code* § 3098(a); *Windsor Mills v. Richard B. Smith, Inc.* (1969) 272 Cal.App.2d 336, 340-341, 77 Cal.Rptr. 300] and must state with substantial accuracy a general description of the labor, services, equipment, or materials furnished or to be furnished and the name of the party to whom it is being furnished (i.e., the party with whom the plaintiff had its contract) [*Civ. Code* § 3098(a)]. The notice must be served within 20 days after the plaintiff first furnished labor, services, equipment, or materials to the jobsite [*Civ. Code* § 3098(d); *American Buildings Co. v. Bay Commercial Construction, Inc.* (2002) 99 Cal.App.4th 1193, 1197, 121 Cal.Rptr.2d 539]. A claimant who failed to give timely notice is not precluded from giving notice late. However, the claimant will be entitled to assert a claim against a payment bond and file a stop notice only for labor, services, equipment, or materials furnished within 20 days before the notice and any time thereafter [*Civ. Code* § 3098(d)]. The requirements for service are set forth in *Civ. Code* § 3098(a).

Although the defendants on private works can waive the requirements or can be estopped to rely on the plaintiff's failure to give a timely and sufficient preliminary 20-day notice [*Windsor Mills v. Richard B. Smith, Inc.* (1969) 272 Cal.App.2d 336, 341-342, 77 Cal.Rptr. 300 ; *Scott, Blake & Wynne v. Summit Ridge Estates, Inc.* (1967) 251 Cal.App.2d 347, 353, 59 Cal.Rptr. 587 ; see MB 300I.60], waiver and estoppel may not be applicable on public works projects [see *A.J. Setting Co. v. Trustees of Cal. State University & Colleges* (1981) 119 Cal.App.3d 374, 384-385, 174 Cal.Rptr. 43 (estoppel may not be invoked to extend time limits of *Civ. Code* § 3210); but see *Structural Steel*

Fabricators, Inc. v. City of Orange (1991) 234 Cal.App.3d 1206, 1210-1212, 286 Cal.Rptr. 24 (estoppel may be asserted to extend time for filing action to enforce stop notice on public works project when city lulled claimant into sitting on its rights and city will not be exposed to paying twice for same work); *Structural Steel Fabricators, Inc. v. City of Orange* (1995) 40 Cal.App.4th 459, 465-467, 46 Cal.Rptr.2d 867 (trial court did not err in applying doctrine of equitable tolling to defeat city's Civ. Code § 3210 statute of limitations defense when subcontractor satisfied three elements of timely notice, lack of prejudice, and good faith conduct)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Public Contracts LawDispute ResolutionGeneral OverviewPublic Contracts LawDispute

ResolutionSubcontractorsGeneral OverviewPublic Contracts LawTerminationsPerformance Bonds



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PART C DEFENSES AND CONDITIONS THAT MAY BAR OR LIMIT RECOVERY

2-3I California Forms of Jury Instruction MB 300I.69

MB 300I.69 False Stop Notice Given to Public Entity

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Defendant can prevent Plaintiff from enforcing [his/her/its] claim on a stop notice on a public work project if Defendant proves that Plaintiff willfully gave Defendant a false stop notice.

Authority: Civ. Code § 3192.

[2] Use of Instruction

This instruction should be used when the defendant, a public entity, claims that the plaintiff is barred from any participation in funds withheld pursuant to a stop notice because the plaintiff gave a false stop notice. For the definition of "stop notice," see *MB 300I.121*.

LexisNexis Matthew Bender Expert Practice Tip--Explain Terms and Concepts in Closing: The key term in this instruction is the word "willfully." However, many jurors may be confused by the phrase "willfully gave Defendant a false stop notice." So, explain that concept carefully. *By Ronald Oster and Rex Heeseman*

[3] Comment

A public entity receiving a stop notice is required to withhold from the original contractor, or anyone acting under that contractor's authority, money or bonds sufficient to meet the claim stated in the stop notice and sufficient to pay the public entity's reasonable cost of any litigation under the stop notice. The public entity may satisfy this requirement by refusing to release money held in escrow [Civ. Code § 3186; see Pub. Contract Code §§ 10263, 22300]. However, Civ. Code § 3192 provides that any person who willfully gives a false stop notice to a public entity forfeits all right to

participate in the distribution of money or bonds withheld pursuant to that stop notice.

Legal Topics:

For related research and practice materials, see the following legal topics:

Public Contracts LawPerformanceGeneral OverviewPublic Contracts LawPerformanceSubcontracts &
SubcontractorsPublic Contracts LawTerminationsPerformance Bonds



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CHAPTER 3I Matthew Bender Construction Contract Instructions
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2-3I California Forms of Jury Instruction MB 300I.70

MB 300I.70 Claim for Labor, etc., Not Furnished Made in Stop Notice Given to Public Entity

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Defendant can prevent Plaintiff from enforcing [his/her/its] claim on a stop notice on a public work project if Defendant proves that Plaintiff willfully included in [his/her/its] stop notice a claim for labor, services, equipment, or materials not furnished for the work of improvement for which the notice was given.

Authority: Civ. Code § 3192.

[2] Use of Instruction

This instruction should be used when the defendant claims as a defense to enforcement of a stop notice that the Plaintiff included in a stop notice given to a public entity a claim for labor, services, equipment, or materials not furnished to the public project for which the stop notice was given. For the definition of "stop notice," see *MB 300I.121*.

LexisNexis Matthew Bender Expert Practice Tip--Explain Terms in Closing: The key term in this instruction is the word "willfully." And, the latter part of this instruction may confuse some jurors. *By Ronald Oster and Rex Heeseman*

[3] Comment

Any person who willfully includes in a stop notice on a public project a claim for labor, services, equipment, or materials not furnished to the work of improvement for which that notice was given forfeits all right to participate in the distribution of money or bonds pursuant to that stop notice [*Civ. Code § 3192*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Public Contracts LawPerformanceGeneral OverviewPublic Contracts LawPerformanceSubcontracts &
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CHAPTER 3I Matthew Bender Construction Contract Instructions
PART C DEFENSES AND CONDITIONS THAT MAY BAR OR LIMIT RECOVERY

2-3I California Forms of Jury Instruction MB 300I.71

MB 300I.71 Written Notice to Surety and Bond Principal--Public Work

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

To recover on [his/her/its] payment bond claim, Plaintiff was required to cause a written notice to be given to the surety and to the _____ [contractor or subcontractor], who is the principal on the bond, within _____ [15 days after a notice of completion was recorded or, if no notice of completion was recorded, 75 days after the work of improvement was completed].

The notice was required by law to contain all of the following:

1. A description of the kind of labor, services, equipment, or materials that Plaintiff furnished or agreed to furnish;
2. The name of the person to or for whom the labor, services, equipment, or materials were furnished; and
3. The approximate value of any labor, services, equipment, or materials already furnished or to be furnished.

The notice was required to be given to the surety and to the _____ [contractor or subcontractor] by personal delivery, or by properly addressing and mailing it by either certified or registered mail with the postage prepaid.

If Plaintiff failed to comply with all of these requirements, then you must find for Defendant on the payment bond claim.

Authorities: *Civ. Code* §§ 3096, 3227, 3252; *American Buildings Co. v. Bay Commercial Construction, Inc.* (2002) 99 Cal.App.4th 1193, 1197, 121 Cal.Rptr.2d 539 .

[2] Use of Instruction

This instruction should be used when service, timeliness, or sufficiency of the written notice from the plaintiff to the surety and bond principal is at issue in a case involving a claim on a payment bond. This written notice is an alternative to a plaintiff who failed to serve a preliminary 20-day notice (public work) in accordance with *Civ. Code* §§ 3098, 3252(a) [see MB 300I.68]. Only those portions of the instruction that cover disputed issues should be used. For example, if there is no dispute over the contents or sufficiency of the notice, omit those portions of the instruction.

This instruction also does not cover the specific requirements for delivering notice to the bond principal and surety. If these requirements are at issue, the instruction must be modified [see *Civ. Code* §§ 3227, 3252(b), discussed in [3], below].

LexisNexis Matthew Bender Expert Practice Tip--Use Instruction as Checklist: This is a detailed instruction that can be used as a convenient checklist in closing argument with the use of visual aids. Note that the instruction contains a few unfamiliar words or concepts that will need to be explained to the jury. *By Ronald Oster and Rex Heeseman*

[3] Comment

To enforce a claim against a payment bond given in connection with a public work, the claimant must give the same 20-day preliminary notice that is required as a prerequisite to establishing a stop notice [*Civ. Code* § 3252(a); see *Civ. Code* §§ 3096, 3098; see also MB 300I.68]. If preliminary notice is not given as prescribed by *Civ. Code* § 3252(a), a claimant may nonetheless enforce a claim against the bond by giving written notice to the surety and the bond principal within 15 days after a notice of completion has been recorded. If a notice of completion is not recorded, the time for giving written notice to the surety is extended to 75 days after completion of the work of improvement [*Civ. Code* § 3252(b); *American Buildings Co. v. Bay Commercial Construction, Inc.* (2002) 99 Cal.App.4th 1193, 1197, 121 Cal.Rptr.2d 539].

The written notice given to the surety or bond principal when no 20-day preliminary notice was given must include all of the following information [*Civ. Code* §§ 3227, 3252(b)]:

- A description of the kind of labor, services, equipment, or materials furnished or agreed to be furnished by the claimant;
- The name of the person to or for whom the labor, services, equipment, or materials were furnished; and
- The amount in value, as near as may be determined, of any labor, services, equipment, or materials already furnished or to be furnished.

The notice may be personally delivered or deposited in the mail, postage prepaid, certified or registered, and addressed in any of the following ways that apply [*Civ. Code* §§ 3227, 3252(b)]:

- If the surety is an individual, to the surety's residence or place of business, if known. If the surety's residence address is unknown, the notice should be addressed to the clerk of the county in which the bond has been recorded.
- If the surety is a corporation to (1) the office of or in care of the agent designated on the bond, (2) the

office of or in care of any of the surety's officers who are located in California, or (3) the office of or in care of the surety's statutory agent in California.

- To the bond principal at the principal's last known address.

- In the same manner provided for service of summons in civil actions [*see Code Civ. Proc. § 415.10 et seq.*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Public Contracts LawPerformanceGeneral OverviewPublic Contracts LawPerformanceSubcontracts & SubcontractorsPublic Contracts LawTerminationsPerformance Bonds



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PART C DEFENSES AND CONDITIONS THAT MAY BAR OR LIMIT RECOVERY

2-3I California Forms of Jury Instruction MB 300I.72

MB 300I.72 Exoneration of a Surety

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

"Exoneration of a surety" means that the surety has been released from liability on [his/her/its] promise to answer for _____ [the debt or default or miscarriage] of _____ [name of principal]. Exoneration is a defense to Plaintiff's action for _____ [identify plaintiff's cause of action against surety]. This means that Defendant is not liable to Plaintiff if Defendant has met [his/her/its] burden of proving any of the following:

1. That the obligations of _____ [principal] to Plaintiff were fully performed, or an offer of full performance was properly made by _____ [principal] to Plaintiff;
2. That after Defendant asked Plaintiff to do so, Plaintiff failed to proceed first against _____ [principal] or to pursue another remedy available to Plaintiff and not available to Defendant that would have lightened Defendant's burdens;
3. That the remedies or rights of Plaintiff against _____ [principal] were impaired or suspended as a result of acts or omissions of Plaintiff without the Defendant's consent. However, mere delay by Plaintiff in proceeding against _____ [principal] or in seeking to enforce other remedies available to Plaintiff does not exonerate Defendant; or
4. That the original obligation of _____ [principal] was altered in any regard, as a result of acts or omissions of Plaintiff without the Defendant's consent, other than an agreement by Plaintiff to accept less than the balance owed on the original obligation.

[*OPTIONAL (See Use of Instruction)*]

However, Defendant may not be exonerated by any of the following:

- 1. Any change, alteration, or modification of any contracts, plans, specifications, or agreements concerning the project or the furnishing of labor, services, equipment, or materials for the project;**
- 2. Any change or modification of any terms of payment or any extension of the time for any payment having to do with the project;**
- 3. Any rescission or attempted rescission of the contract or agreement for the project or of the bond provided by Defendant;**
- 4. Any language in the bond provided by Defendant attempting to limit the right of recovery of claimants like Plaintiff who otherwise would be entitled to recover under that bond or the contract or agreement for the project;**
- 5. Any fraud practiced by any person other than Plaintiff;**
- 6. Any breach of the contract between _____ [owner] and _____ [prime contractor] by _____ [owner or prime contractor or other obligee of bond]; or**
- 7. Any act by _____ [owner] done in good faith and in compliance with any of the following provisions of the Civil Code: _____ [quote or paraphrase provision involved].**

Authorities: *Civ. Code* §§ 2787, 2819-2825, 2839, 2845, 3225, 3226, 3263; *Wexler v. McLucas* (1975) 48 Cal.App.3d Supp. 9, 14, 121 Cal.Rptr. 453 .

[2] Use of Instruction

This instruction should be used to define exoneration when that has been asserted by a surety as a defense. This defense is available against the causes of action set out in MB 300I.07-MB 300I.12 and should be given after those instructions. The final paragraph is optional because it is only for use when the bond was given pursuant to one of the requirements of *Civ. Code* § 3082 *et seq.*

This instruction does not cover advance waivers in the bond itself of acts that would otherwise constitute an exoneration [*City of Sacramento v. Trans Pacific Industries, Inc.* (1979) 98 Cal.App.3d 389, 400-401, 159 Cal.Rptr. 514].

LexisNexis Matthew Bender Expert Practice Tip--Explain Instruction in Closing: This complex instruction could be confusing to the jury because it involves multiple parties (plaintiff, principal, and surety) and numerous terms of art. Counsel should carefully explain the instruction in closing argument, preferably with the use of visual aids. And, by slowly going over each element. *By Ronald Oster and Rex Heeseman*

[3] Comment

A surety is one who promises to answer for the debt, default, or miscarriage of another, or who hypothecates property for that purpose [*Civ. Code* § 2787; *see* Ch. 3C, *Matthew Bender Contract Party Instructions*, MB 900C.94, for an instruction setting forth definition of a surety]. The "exoneration" of a surety means the release of the surety from

liability on its promise to answer for another [see *Wexler v. McLucas* (1975) 48 Cal.App.3d Supp. 9, 14, 121 Cal.Rptr. 453], which means that exoneration is a defense against actions to enforce that promise.

This instruction follows the general statutory definitions of what amounts to exoneration of a surety. Paragraph 1 comes from *Civ. Code* § 2839; Paragraph 2 comes from *Civ. Code* § 2845; Paragraph 3 comes from *Civ. Code* §§ 2819 and 2823; and Paragraph 4 comes from *Civ. Code* §§ 2819 and 2822(b). However, this defense is severely restricted in the case of statutory payment bonds provided under *Civ. Code* § 3082 *et seq.* for certain private and public works of improvement [*Civ. Code* §§ 3225, 3226, 3263]. These restrictions are set forth in the final paragraph.

For further discussion, see California Real Estate Law & Practice, Ch. 422, *Insurance and Bonding Practice* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawTypes of ContractsGuaranty ContractsPublic Contracts LawTerminationsPerformance Bonds



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PART C DEFENSES AND CONDITIONS THAT MAY BAR OR LIMIT RECOVERY

2-3I California Forms of Jury Instruction MB 300I.73

MB 300I.73 Timeliness of Action to Recover Against Payment Bond Surety on Private Work Project**[1] Instruction**[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Defendant can prevent Plaintiff from recovering against Defendant's payment bond if Defendant has met [his/her/its] burden of proving that the work of improvement was completed before _____ [date at least four years before action was filed].

Authority: *Code Civ. Proc. § 337.*

[2] Use of Instruction

This instruction should be used when the defendant surety claims that the action against its bond is barred by the four-year statute of limitations applicable to statutory payment bonds [*see Code Civ. Proc. § 337*].

[3] Comment

The time for commencing an action on an obligation founded on a written instrument, including a statutory payment bond, is four years [*see Code Civ. Proc. § 337*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawDefensesStatutes of LimitationsContracts LawTypes of ContractsGuaranty ContractsReal Property LawConstruction LawContractsReal Property LawConstruction LawContractors & Subcontractors



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California Forms of Jury Instruction

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CHAPTER 3I Matthew Bender Construction Contract Instructions
PART C DEFENSES AND CONDITIONS THAT MAY BAR OR LIMIT RECOVERY

2-3I California Forms of Jury Instruction MB 300I.74

MB 300I.74 Deduction of Prior Payments From Obligation of Surety on Payment Bond**[1] Instruction**[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

The Defendant can only be liable to pay up to \$ _____ [*amount of bond*], which is the amount of its _____ [*payment bond or off-site improvement bond*]. Any payments that Defendant has met its burden of proving were properly made to other claimants must be subtracted from this _____ [*payment bond or offsite improvement bond*] amount of \$ _____ to determine how much is available to satisfy Plaintiff's claim.

Authority: *Roystone Co. v. Darling* (1915) 171 Cal. 526, 543, 154 P. 15 .

[2] Use of Instruction

This instruction should be used when the defendant surety claims that the plaintiff's recovery on the payment bond, the offsite improvement bond, or the contractor's state license bond is limited by the amount of the penal sum of that bond. The instruction should follow the plaintiff's burden of proof instruction on the particular bond involved.

[3] Comment

Payment bonds [see MB 300I.07, MB 300I.08], offsite improvement bonds [see MB 300I.09], and contractor's state license bonds [see MB 300I.12] are limited in their liability. If the defendant's prior payment of the legitimate claims of others when deducted from the penal sum of the bond leaves an amount inadequate to completely satisfy the plaintiff's claim, then the plaintiff's claim may be satisfied only to the extent the penal sum of the bond has not been exhausted [see *Roystone Co. v. Darling* (1915) 171 Cal. 526, 543, 154 P. 15].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawTypes of ContractsGuaranty ContractsPublic Contracts LawTerminationsPerformance BondsReal
Property LawConstruction LawContractsReal Property LawConstruction LawContractors & Subcontractors



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CHAPTER 3I Matthew Bender Construction Contract Instructions
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2-3I California Forms of Jury Instruction MB 300I.75

MB 300I.75 Balance Due to Contractor as Offset Against Owner's Damages in Action Against Contractor's Performance Bond Surety

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

If Defendant has met its burden of proving that there is a balance due to _____ [contractor] under the contract, then this amount must be offset against any damages suffered by Plaintiff.

Authorities: *Civ. Code §§ 2849, 2850; State Ath. Com. v. Mass. Bonding etc. Co. (1941) 46 Cal.App.2d 823, 828-830, 117 P.2d 75 .*

[2] Use of Instruction

This instruction should be used when the defendant claims that there is a balance due to the contractor that must be offset against the damages claimed by the owner in an action against a contractor's payment bond surety. The instruction should follow the owner's burden of proof instruction in MB 300I.10[1].

LexisNexis Matthew Bender Expert Practice Tip--Pay Attention to Terms Used: The term "offset" could be replaced with the term "subtracted" or "deducted." *By Ronald Oster*

[3] Comment

Any balance due to the contractor under the contract must be offset against the plaintiff's claim against the surety [*Civ. Code §§ 2849, 2850; see State Ath. Com. v. Mass. Bonding etc. Co. (1941) 46 Cal.App.2d 823, 828-830, 117 P.2d 75*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawTypes of ContractsGuaranty ContractsReal Property LawConstruction LawContractsReal Property
LawConstruction LawContractors & Subcontractors



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CHAPTER 3I Matthew Bender Construction Contract Instructions
PART C DEFENSES AND CONDITIONS THAT MAY BAR OR LIMIT RECOVERY

2-3I California Forms of Jury Instruction MB 300I.76

MB 300I.76 Statute of Repose**[1] Instruction**

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Defendant has raised the defense that Plaintiff's action is barred by the statute of repose. Defendant has the burden of proving this defense.

The statute of repose is a special limitation period that applies to lawsuits against a _____ [builder/contractor or specify other defendant protected by statutes of repose] for construction defects. Under the statute of repose, a person must bring the lawsuit within a certain period of time or lose the right to sue. If the defect complained of is discoverable by a reasonable inspection, then the lawsuit must be filed within four years after the substantial completion of the work. If the defect complained of is *not* discoverable by a reasonable inspection, then the lawsuit must be filed within 10 years after the substantial completion of the work.

In this case, the work on _____ [specify work of improvement] was substantially completed on _____ [date], which is more than four years before _____ [date], the date that this lawsuit was filed. This means that if you find that _____ [specify defect(s) at issue] [was/were] discoverable by a reasonable inspection, then you must find that Plaintiff cannot recover. [Optional (See Use of Instruction) If you find that only some of _____ (specify defect(s) at issue) were discoverable by a reasonable inspection, then the statute of repose bars recovery for those defects only.]

Authorities: Code Civ. Proc. §§ 337.1, 337.15; *Lantzy v. Centex Homes* (2003) 31 Cal.4th 363, 366, 2 Cal.Rptr.3d 655, 73 P.3d 517 ; *Mills v. Forestex Co.* (2003) 108 Cal.App.4th 625, 642, 134 Cal.Rptr.2d 273 ; *Winston Square Homeowner's Assn. v. Centex West, Inc.* (1989) 213 Cal.App.3d 282, 290, 261 Cal.Rptr. 605 ; *Renown, Inc. v. Hensel Phelps Construction Co.* (1984) 154 Cal.App.3d 413, 420, 201 Cal.Rptr. 242 .

[2] Use of Instruction

This instruction should be used when the defendant alleges that the plaintiff's claim is barred by the statute of repose because the defects complained of are patent defects and the action was filed more than four years after the work was substantially completed. The instruction may be used only if the court decides that whether the defects were patent or latent defects is a question of fact for the jury [see [3][h], *below*, for discussion of whether this determination is a question of law or fact].

If there is a question of fact about the date of substantial completion of the work of improvement, a further instruction on that point will be necessary.

A preponderance of evidence instruction must be given with this instruction [see Ch. 2, *California Judicial Council Evidence Instructions*, CACI No. 200 ("More Likely True than Not True")].

LexisNexis Matthew Bender Expert Practice Tip--Using Statute of Limitation Defense in

Construction Defect Cases: The conventional wisdom is that statute of limitation defenses do not sit well with juries, and that a motion for summary judgment is the best way to present the defense. Of course, issues of fact can defeat a motion for summary judgment and this instruction focuses on the factual issue of whether a construction defect was discoverable by a "reasonable inspection." Unless the defect is plainly visible (e.g., the lack of a fence around a swimming pool), defense counsel faces an uphill battle. Note the comment in [3][h], *below*, that the California Supreme Court has not yet ruled on whether the latent/patent determination is for the court or the jury. *By Ronald Oster*

[3] Comment

[a] Statutes of Repose

There are two statutes that establish two different outside time limits for actions against builders or design professionals. In addition to those who actually build the improvement, the protected professionals include any person furnishing or performing the design, specifications, surveying, planning, supervision, or observation of the construction of an improvement to real property [*Code Civ. Proc.* §§ 337.1(a), 337.15(a)]. In actions for latent defects, developers, sureties, and persons who furnish or perform testing in the construction of an improvement to real property are also protected [*Code Civ. Proc.* § 337.15(a)] for defects in the construction of real property. Which time limit applies depends on whether the defect is considered "patent" or "latent" [see [b], *below*]. An action for damages for a patent deficiency must be brought within four years after the improvement's substantial completion [*Code Civ. Proc.* § 337.1(a)]. An action for damages for a latent deficiency must be brought within 10 years after the substantial completion of the development or improvement [*Code Civ. Proc.* § 337.15(a)(1); *Lantzy v. Centex Homes* (2003) 31 Cal.4th 363, 366, 2 Cal.Rptr.3d 655, 73 P.3d 517; *Mills v. Forestex Co.* (2003) 108 Cal.App.4th 625, 643, 134 Cal.Rptr.2d 273].

[b] Latent and Patent Defects Defined

A "patent" deficiency is a deficiency that is apparent by reasonable inspection [*Code Civ. Proc.* § 337.1(e); *Mills v. Forestex Co.* (2003) 108 Cal.App.4th 625, 643, 134 Cal.Rptr.2d 273]. A "latent" deficiency is a deficiency that is not apparent by reasonable inspection [*Code Civ. Proc.* § 337.15(b); *Mills v. Forestex Co.* (2003) 108 Cal.App.4th 625, 643, 134 Cal.Rptr.2d 273]. The courts have expanded on these definitions, adding that a patent defect is one that can be discovered "by such an inspection as would be made in the exercise of ordinary care and prudence." Conversely, a latent defect is one that is hidden and would not be discovered by a reasonably careful inspection [*Geertz v. Ausonio* (1992) 4 Cal.App.4th 1363, 1367, 6 Cal.Rptr.2d 318 ; *Wagner v. State of California* (1978) 86 Cal.App.3d 922, 927, 150 Cal.Rptr. 489]. For example, an engineer's allegedly negligent design and posting of an intersection created a patent defect [*Wagner v. State of California* (1978) 86 Cal.App.3d 922, 927, 150 Cal.Rptr. 489 ; see *Mattingly v. Anthony*

Industries, Inc. (1980) 109 Cal.App.3d 506, 511, 167 Cal.Rptr. 292 (absence of swimming pool fence a patent defect)], but a defectively designed and installed heating and air conditioning system was a latent defect when none of the defendants could pinpoint the cause of the malfunctions or fix the system [*Baker v. Walker & Walker, Inc. (1982) 133 Cal.App.3d 746, 759, 184 Cal.Rptr. 245*].

The latent/patent determination, as applied to residential construction, is an objective test based on the reasonable expectations of the average consumer. The question is whether the defect is open and obvious and within the common experience of the average consumer in the community [*Mills v. Forestex Co. (2003) 108 Cal.App.4th 625, 644, 134 Cal.Rptr.2d 273* ; *Geertz v. Ausonio (1992) 4 Cal.App.4th 1363, 1368, 1370, 6 Cal.Rptr.2d 318* ; *Mattingly v. Anthony Industries, Inc. (1980) 109 Cal.App.3d 506, 511, 167 Cal.Rptr. 292* (absence of swimming pool fence a patent defect even though defect was not readily apparent to plaintiff, an 18 month old child)].

Whether a defect is patent or latent is determined by the defect's nature at the time construction was completed [*Eden v. Van Tine (1978) 83 Cal.App.3d 879, 887-888, 148 Cal.Rptr. 215*].

[c] Exclusions and Exceptions

The limitations prescribed in *Code Civ. Proc.* §§ 337.1 and 337.15 may not be asserted by any person owning, possessing, or controlling the improvement at the time a deficiency proximately causes injury [*Code Civ. Proc.* §§ 337.1(d), 337.15(e); *Lantzy v. Centex Homes (2003) 31 Cal.4th 363, 373, 2 Cal.Rptr.3d 655, 73 P.3d 517*]. Furthermore, the statute of repose for latent defects does not apply as a defense against any of the following:

- Actions based on willful misconduct or fraudulent concealment [*Code Civ. Proc.* § 337.15(f); see *Lantzy v. Centex Homes (2003) 31 Cal.4th 363, 373, 2 Cal.Rptr.3d 655, 73 P. 3d 517* ; *Barnhouse v. City of Pinole (1982) 133 Cal.App.3d 171, 187, 183 Cal.Rptr. 881* (fraudulent concealment)];
- Actions based on the strict liability or negligence of a manufacturer of products [*Baker v. Walker & Walker, Inc. (1982) 133 Cal.App.3d 746, 752-758, 184 Cal.Rptr. 245*];
- Actions for personal injuries or wrongful death [*Martinez v. Traubner (1982) 32 Cal.3d 755, 759-761, 187 Cal.Rptr. 251, 653 P.2d 1046*]; and
- Cross-complaints for indemnity under *Code Civ. Proc.* § 428.10(b) [see [d], below].

[d] Cross-Complaints for Indemnity

The statute of repose for latent defects excludes from its 10-year limitation period a cross-complaint for indemnity filed under *Code Civ. Proc.* § 428.10(b) in an action that has been brought within the time period set by *Code Civ. Proc.* § 337.15(a) [*Code Civ. Proc.* § 337.15(c)]. Thus, if a plaintiff timely begins an action against another party for construction defects, that defendant can cross-complain against other parties for indemnity in accord with *Code Civ. Proc.* § 428.10, and the action for indemnity will be timely [*Lantzy v. Centex Homes (2003) 31 Cal.4th 363, 373, 2 Cal.Rptr.3d 655, 73 P.3d 517* ; *Valley Circle Estates v. VTN Consolidated, Inc. (1983) 33 Cal.3d 604, 613, 189 Cal.Rptr. 871, 659 P.2d 1160* ; *FNB Mortgage Corp. v. Pacific General Group (1999) 76 Cal.App.4th 1116, 1126-1129, 90 Cal.Rptr.2d 841* ; *Time for Living, Inc. v. Guy Hatfield Homes/All American Development Co. (1991) 230 Cal.App.3d 30, 37-38, 280 Cal.Rptr. 904*]. A cross-complaint for indemnity qualifies for this exception only when the defendant and the other party were engaged in work on the same development or work of improvement [*Time for Living, Inc. v. Guy Hatfield Homes/All American Development Co. (1991) 230 Cal.App.3d 30, 40-42, 280 Cal.Rptr. 904* ; *Sandy v. Superior Court (1988) 201 Cal.App.3d 1277, 1284, 247 Cal.Rptr. 677*].

However, under *Code Civ. Proc.* § 337.1, even a cross-complaint for indemnity, when filed after the four-year period's

expiration, is barred by the statute [*Wagner v. State of California* (1978) 86 Cal.App.3d 922, 928, 930, 150 Cal.Rptr. 489].

[e] Commencement of Limitation Period for Patent Defects

The limitation period for the statute of repose for patent defects begins to run on the improvement's substantial completion [*Code Civ. Proc. § 337.1(a)*; *Lantzy v. Centex Homes* (2003) 31 Cal.4th 363, 366, 2 Cal.Rptr.3d 655, 73 P.3d 517 ; *Mills v. Forestex Co.* (2003) 108 Cal.App.4th 625, 644, 134 Cal.Rptr.2d 273]. Neither the statute nor reported decisions define the term "substantial completion."

[f] Commencement of Limitation Period for Latent Defects

The limitation period for the statute of repose for latent defects also begins to run on "the substantial completion of the development or improvement" [*Code Civ. Proc. § 337.15(a)*]. However, the statute further provides that "[t]he date of substantial completion shall relate specifically to the performance or furnishing" of the designated services "by each trade or profession rendering services to the improvement" [*Code Civ. Proc. § 337.15(g)*]. The 10-year limitation period therefore begins to run when an individual (or entity) substantially completes his or her (or its) work on the improvement, rather than when the improvement itself is substantially completed [*Industrial Risk Insurers v. Rust Engineering Co.* (1991) 232 Cal.App.3d 1038, 1040, 1046, 283 Cal.Rptr. 873].

Code Civ. Proc. § 337.15(g) also provides that the 10-year period will commence not later than the earliest of the following:

- The date of final inspection by the applicable public agency;
- The date of a valid notice of completion's recording;
- The date of the improvement's use or occupation; or
- One year after termination or cessation of work on the improvement.

[g] Equitable Tolling of Period of Repose

The statute of repose for latent defects may not be equitably tolled during any period when the contractor, who has breached a warranty, claims that the defect can be repaired and attempts to make repairs [*Lantzy v. Centex Homes* (2003) 31 Cal.4th 363, 383, 2 Cal.Rptr.3d 655, 73 P.3d 517 ; *FNB Mortgage Corp. v. Pacific General Group* (1999) 76 Cal.App.4th 1116, 1131-1134, 90 Cal.Rptr.2d 841].

An intermediate appellate court held that when certification is denied in a class action, the statute of repose on an individual plaintiff's latent construction defect claim may be tolled while the class action was awaiting certification, if the plaintiff was a potential member of that class [*Becker v. McMillin Construction Co.* (1991) 226 Cal.App.3d 1493, 1497, 1502, 277 Cal.Rptr. 491]. According to the court, whether the statute of repose for such a claim will be tolled depends on whether the filing of the class action gave the defendant adequate notice of the identity of the plaintiff and the nature of the substantive claims in the individual action [*Becker v. McMillin Construction Co.* (1991) 226 Cal.App.3d 1493, 1498-1502, 277 Cal.Rptr. 491]. However, the California Supreme Court's reasons in a subsequent case for not tolling the statute of limitations in *Code Civ. Proc. § 337.15* may bring the *Becker* decision into question [*Lantzy v. Centex Homes* (2003) 31 Cal.4th 363, 373-383, 2 Cal.Rptr.3d 655, 73 P.3d 517].

[h] Question of Law or Fact

It has been said that whether a defect is apparent by a reasonable inspection (and therefore is a patent defect) is a

question of fact [*Geertz v. Ausonio* (1992) 4 Cal.App.4th 1363, 1368, 6 Cal.Rptr.2d 318 ; *Winston Square Homeowner's Assn. v. Centex West, Inc.* (1989) 213 Cal.App.3d 282, 290, 261 Cal.Rptr. 605 ; see *Anderson v. Brouwer* (1979) 99 Cal.App.3d 176, 181, 160 Cal.Rptr. 65 (whether inspection would have disclosed extent of defects is normally question of fact)]. However, the question is one of fact only when reasonable minds could differ on whether the defect would be apparent by a reasonable inspection [*Geertz v. Ausonio* (1992) 4 Cal.App.4th 1363, 1371, 6 Cal.Rptr.2d 318]. At least two courts have held that certain types of construction defects are patent defects as a matter of law [*Preston v. Goldman* (1986) 42 Cal.3d 108, 123, 227 Cal.Rptr. 817, 720 P.2d 476 ; *Mattingly v. Anthony Industries, Inc.* (1980) 109 Cal.App.3d 506, 511, 167 Cal.Rptr. 292]. These cases have involved obvious defects such as the absence of a fence around a swimming pool or a bathing pond [*Preston v. Goldman* (1986) 42 Cal.3d 108, 123, 227 Cal.Rptr. 817, 720 P.2d 476 ; *Mattingly v. Anthony Industries, Inc.* (1980) 109 Cal.App.3d 506, 511, 167 Cal.Rptr. 292]. Cases that involve defects in actual construction such as roofing, drainage, plastering, gutters, chimneys, trim, or balconies, have viewed the determination of whether the defect is apparent by a reasonable inspection as a question of fact for the trier of fact [*Winston Square Homeowner's Assn. v. Centex West, Inc.* (1989) 213 Cal.App.3d 282, 290, 261 Cal.Rptr. 605 ; *Renown, Inc. v. Hensel Phelps Construction Co.* (1984) 154 Cal.App.3d 413, 420-421, 201 Cal.Rptr. 242]. The practitioner proposing to use this instruction is advised to track the development of the law in this area. The cases deciding this issue as a matter of law did not explain their rationale for doing so, and the California Supreme Court has not yet ruled on whether the latent/patent determination is a question of law for the court or a question of fact for a jury.

Legal Topics:

For related research and practice materials, see the following legal topics:

Governments
Legislation
Statutes of Repose
Real Property Law
Construction Law
Contracts
Real Property Law
Construction Law
Defects



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CHAPTER 3I Matthew Bender Construction Contract Instructions
PART C DEFENSES AND CONDITIONS THAT MAY BAR OR LIMIT RECOVERY

2-3I California Forms of Jury Instruction MB 300I.77

MB 300I.77 Delayed Discovery of Negligence Cause of Action

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Defendant has raised the defense that Plaintiff's action for negligence is barred by the statute of limitations. Defendant has the burden of proving this defense.

The statute of limitations is a law that required Plaintiff to bring [his/her/its] lawsuit for negligent damage to _____ [specify real property at issue] within three years. This three-year period is calculated from the date that Plaintiff either (1) actually discovered [his/her/its] injury and its negligent cause, or (2) could have discovered the injury and its cause through the exercise of reasonable diligence.

In this case, Plaintiff filed [his/her/its] complaint on _____ [date]. Therefore, the question for you to decide is whether, on or before _____ [insert date three years before filing of complaint], Plaintiff knew, or could have known through the exercise of reasonable diligence, not only about _____ [specify construction defects at issue in case], but that Defendant's alleged negligence was the cause of these defects.

Authority: *Leaf v. City of San Mateo (1980) 104 Cal.App.3d 398, 407-409, 163 Cal.Rptr. 711 .*

[2] Use of Instruction

This instruction should be used in negligence actions based on construction defects discovered more than three years after the completion of the work of improvement. The instruction should only be used when the issue is whether or not the plaintiff exercised reasonable diligence in discovering the construction defect and the negligent cause of the construction defect. Whether a plaintiff exercised reasonable diligence is a question of fact for the court or jury to

decide [*Leaf v. City of San Mateo* (1980) 104 Cal.App.3d 398, 409, 163 Cal.Rptr. 711 ; *Enfield v. Hunt* (1979) 91 Cal.App.3d 417, 419, 154 Cal.Rptr. 146]. This instruction is not to be used in cases involving breach of contract or breach of warranty, because different rules apply to the statute of limitations in those cases.

A preponderance of evidence instruction must be given with this instruction [see Ch. 2, *California Judicial Council Evidence Instructions*, CACI No. 200 ("More Likely True than Not True")].

LexisNexis Matthew Bender Expert Practice Tip--Explain Concepts Thoroughly: Although perhaps its best argument, defense counsel will need to explain thoroughly the concept of "could have discovered ... through ... reasonable diligence." By *Rex Heeseman*

LexisNexis Matthew Bender Expert Practice Tip--When Plaintiff Discovers Defect Can Be Critical: The last clause of this instruction can be critical. The three year statute does not begin to run until after plaintiff knew or should have known of the construction defect, and after the plaintiff knew or should have known that it was defendant's negligence that caused the defect. This last element may not occur until after plaintiff consults with another contractor to determine what went wrong and why. By *Ronald Oster*

[3] Comment

[a] Statute of Limitations for Injuries to Real Property

Code Civ. Proc. § 338(b) provides a three-year statute of limitations for actions for injury to real property [*Regents of University of Cal. v. Hartford Acc. & Indem. Co.* (1978) 21 Cal.3d 624, 641, 147 Cal.Rptr. 486, 581 P.2d 197 (claim against architect for negligent injury to real property); *Liptak v. Diane Apartments, Inc.* (1980) 109 Cal.App.3d 762, 769, 167 Cal.Rptr. 440 (action against contractors for injuries to real property)].

[b] Commencement of Limitations Period

A cause of action for damages to real property sounding in negligence does not accrue until the plaintiff discovers his or her injury and the negligent cause of the injury, or until the plaintiff could have discovered the injury and its negligent cause through the exercise of reasonable diligence [*Leaf v. City of San Mateo* (1980) 104 Cal.App.3d 398, 407-409, 163 Cal.Rptr. 711]. When the defendant is an architect or engineer, the cases generally concern negligent preparation of plans or specifications or negligent supervision, which subsequently results in property damage or construction delay [*Huber, Hunt & Nichols, Inc. v. Moore* (1977) 67 Cal.App.3d 278, 301-302, 136 Cal.Rptr. 603 (contractor's claims for extras and damages for delay); *Cooper v. Jevne* (1976) 56 Cal.App.3d 860, 867-868, 128 Cal.Rptr. 724 (negligent preparation of plans and negligent supervision of construction)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts Law Defenses Statutes of Limitations Real Property Law Construction Law Contracts Real Property Law Construction Law Defects



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CHAPTER 3I Matthew Bender Construction Contract Instructions
PART C DEFENSES AND CONDITIONS THAT MAY BAR OR LIMIT RECOVERY

2-3I California Forms of Jury Instruction MB 300I.78

MB 300I.78 Statute of Limitations for Breach of Warranty in Case of Progressively Developing Damage

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Defendant has raised the defense that Plaintiff's action for breach of warranty is barred by the statute of limitations. Defendant has the burden of proving this defense.

Under the statute of limitations that applies to warranties, an action for breach of warranty must be commenced within four years from the date that Plaintiff discovered, or should have discovered, the construction defect and the breach of warranty. If you find that Plaintiff did discover, or should have discovered _____ [specify defects at issue] on or before _____ [insert date four years before filing of complaint], then you must return a verdict for Defendant and deny Plaintiff's claim for breach of warranty.

If you find that Plaintiff did discover, or should have discovered, only some of _____ [specify defects at issue] on or before _____ [insert date four years before filing of complaint], then you must decide whether Plaintiff may recover for the defects that appeared after _____ [insert date four years before filing of complaint]. When a property owner discovers construction defects, [he/she/it] has a duty to make a reasonable attempt to determine the extent of the construction deficiency. If you find that a reasonable inspection and investigation of the construction defects appearing before _____ [insert date four years before filing of complaint] would have led to the discovery of the construction defects that appeared later, then the statute of limitations bars recovery for these defects, and you must return a verdict for Defendant and deny Plaintiff's claim for breach of warranty.

Authorities: Code Civ. Proc. § 337(1); *Anderson v. Brouwer* (1979) 99 Cal.App.3d 176, 181, 160 Cal.Rptr. 65 ; *Bradler v. Craig* (1969) 274 Cal.App.2d 466, 471-472, 79 Cal.Rptr. 401 ; *Oakes v. McCarthy Co.* (1968) 267

Cal.App.2d. 231, 249-250, 254-256, 73 Cal.Rptr. 127 .

[2] Use of Instruction

This instruction should be used when there are progressively developing construction defects that first appeared more than four years before the complaint was filed. In these cases, the plaintiff will allege that the deficiencies that occurred outside of the limitations period were not sufficient to cause a reasonable person to investigate and to discover the construction deficiencies. The instruction will generally be used in connection with claims for breach of express warranty and breach of implied warranty.

A preponderance of evidence instruction must be given with this instruction [see Ch. 2, *California Judicial Council Evidence Instructions, CACI No. 200* ("More Likely True than Not True")].

LexisNexis Matthew Bender Expert Practice Tip--Explain Instruction in Closing; Use Visual Aid:

This could be a confusing instruction that will have to be carefully explained in closing argument.

Therefore, a time line or similar visual aid may be advisable. *By Ronald Oster and Rex Heeseman*

[3] Comment

Code Civ. Proc. § 337(1) creates a four-year statute of limitations for an action on a contract, obligation, or liability based on a written instrument. In actions based on progressively developing or continuing wrongs when the nature, extent, or permanence of the harm is difficult to discover, the running of the statute of limitations is postponed until the plaintiff discovers, or has an opportunity to discover, the facts [*Anderson v. Brouwer* (1979) 99 *Cal.App.3d* 176, 181, 160 *Cal.Rptr.* 65 ; *Bradler v. Craig* (1969) 274 *Cal.App.2d* 466, 471, 79 *Cal.Rptr.* 401 ; *Oakes v. McCarthy Co.* (1968) 267 *Cal.App.2d.* 231, 249-250, 254-256, 73 *Cal.Rptr.* 127].

A property owner who learns enough to put a reasonable person on inquiry has an obligation to investigate [*Mills v. Forestex Co.* (2003) 108 *Cal.App.4th* 625, 648, 134 *Cal.Rptr.2d* 273]. On discovering the initial construction defects, an owner must make reasonable efforts to determine the extent of the construction deficiencies [*Anderson v. Brouwer* (1979) 99 *Cal.App.3d* 176, 181, 160 *Cal.Rptr.* 65]. Whether a reasonable inspection and further inquiry after discovery of the initial defects would have shown the extent of the construction deficiencies that subsequently appeared is normally a question of fact for the trier of fact [*Anderson v. Brouwer* (1979) 99 *Cal.App.3d* 176, 181, 160 *Cal.Rptr.* 65].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawContract Conditions & ProvisionsExpress WarrantiesContracts LawContract Conditions & ProvisionsImplied WarrantiesGeneral OverviewContracts LawDefensesStatutes of LimitationsReal Property LawConstruction LawContractsReal Property LawConstruction LawDefects



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California Forms of Jury Instruction

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CHAPTER 3I Matthew Bender Construction Contract Instructions
PART C DEFENSES AND CONDITIONS THAT MAY BAR OR LIMIT RECOVERY

2-3I California Forms of Jury Instruction MB 300I.79

MB 300I.79 Statute of Limitations for Breach of Prospective Warranty

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Defendant has raised the defense that Plaintiff's action is barred by the statute of limitations. Defendant has the burden of proving this defense.

An action for breach of warranty must be commenced within four years from the date of the contract's completion. However, if a warranty relates to a future event and the defect cannot be discovered before that future event by the exercise of reasonable diligence, the warranty, though accompanied by a representation as to present condition, is a prospective warranty, and the statute of limitations begins to run at the time of the future event.

[*OPTIONAL (See Use of Instruction)*]

For example, an implied warranty that _____ [describe work of improvement] will be fit for its intended use as _____ [specify intended use] includes a prospective warranty that _____ [describe work of improvement] will not _____ [specify how work allegedly failed to be fit for its intended purpose, e.g., leak or corrode or collapse] for a reasonable length of time after _____ [describe work of improvement] is completed. The statute of limitations on this prospective warranty therefore does not begin to run until the future event occurs. That is, the statute of limitations does not begin to run until _____ [describe work of improvement] _____ [specify how work allegedly failed to be fit for its intended purpose, e.g., leaks or corrodes or collapses].

Authorities: *Aced v. Hobbs-Sesack Plumbing Co.* (1961) 55 Cal.2d 573, 584, 12 Cal.Rptr. 257, 360 P.2d 897 ; *Kaiser Cement & Gypsum Corp. v. Allis-Chalmers Mfg. Co.* (1973) 35 Cal.App.3d 948, 960, 111 Cal.Rptr. 210 .

[2] Use of Instruction

This instruction should be used when the plaintiff has filed suit more than four years after completion of the work of improvement, but less than four years after discovering that the work of improvement failed to comply with an express or implied warranty. However, counsel should first examine pertinent contract documents to determine if a different limitation period has been agreed on by the parties. If this instruction is given in connection with instructions on breach of implied warranty, then the jury may be asked to determine whether the "reasonable time" for the existence of the warranty expired more than four years before the filing of the complaint [see [3], below, for discussion of prospective implied warranties that last for a reasonable time]. In these cases, counsel may use the optional part of the instruction.

A preponderance of evidence instruction must be given with this instruction [see Ch. 2, *California Judicial Council Evidence Instructions*, CACI No. 200 ("More Likely True than Not True")].

LexisNexis Matthew Bender Expert Practice Tip--Use Care With Terms: The optional paragraph of this instruction helps explain what could be a confusing concept to the jury. Still, there are many words that may puzzle the jury. *By Ronald Oster and Rex Heeseman*

[3] Comment

If a warranty relates to a future event before which the defect cannot be discovered by the exercise of reasonable diligence, the warranty, though accompanied by a representation as to present condition, is prospective in character and the statute of limitations begins to run at the time of the future event [*Aced v. Hobbs-Sesack Plumbing Co.* (1961) 55 Cal.2d 573, 584, 12 Cal.Rptr. 257, 360 P.2d 897]. This rule applies to both implied and express warranties [*Aced v. Hobbs-Sesack Plumbing Co.* (1961) 55 Cal.2d 573, 584, 12 Cal.Rptr. 257, 360 P.2d 897].

An implied warranty that a work of improvement is fit for a particular purpose includes a prospective warranty that the work will continue to be fit for that purpose for a reasonable length of time. Thus, it has been held that an implied warranty that tubing is fit for use in a heating system includes a prospective warranty that the tubing will not corrode and leak for a reasonable period of time. The future event for this prospective warranty was the leaking of the defective tubing, not discovered by the general contractor until several years after the installation was complete. The California Supreme Court held that the action was timely, even though it had been filed more than four years after delivery of the work of improvement [*Aced v. Hobbs-Sesack Plumbing Co.* (1961) 55 Cal.2d 573, 584-585, 12 Cal.Rptr. 257, 360 P.2d 897]. In these cases, a primary jury question may be: What is the reasonable time that an implied warranty should be deemed to cover?

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawContract Conditions & ProvisionsExpress WarrantiesContracts LawContract Conditions & ProvisionsImplied WarrantiesGeneral OverviewContracts LawDefensesStatutes of LimitationsReal Property LawConstruction LawContractsReal Property LawConstruction LawDefects



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California Forms of Jury Instruction

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CHAPTER 3I Matthew Bender Construction Contract Instructions
PART C DEFENSES AND CONDITIONS THAT MAY BAR OR LIMIT RECOVERY

2-3I California Forms of Jury Instruction MB 300I.80

MB 300I.80 Notice Defenses for Claims of Breach of Implied Warranty

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

To recover damages from Defendant for breach of implied warranty, Plaintiff must prove that [he/she/it] gave Defendant notice of the breach within a reasonable time after Plaintiff discovered or should have discovered the breach.

[*OPTIONAL (See Use of Instruction)*]

The notice given must be sufficient to let Defendant know that Plaintiff claims there was a breach.

[*OPTIONAL (See Use of Instruction)*]

However, if you find that Defendant has entirely abandoned the contract and the project under facts that make it clear that Defendant does not intend to return to the job and finish the construction, you may find that notice of breach of warranty is unnecessary.

Authorities: *Com. Code § 2607(3)(A); U.C.C. Comment No. 4 to Com. Code § 2607; Pollard v. Saxe & Yolles Dev. Co. (1974) 12 Cal.3d 374, 380, 115 Cal.Rptr. 648, 525 P.2d 88 ; Pierce v. Wright (1953) 117 Cal.App.2d 718, 725, 256 P.2d 1049 ; New England Etc. Co. v. Chicago Etc. Co. (1918) 36 Cal.App. 584, 585, 172 P. 1122 .*

[2] Use of Instruction

This instruction should be used when the defendant claims that the plaintiff did not give notice of the alleged breach of warranty or that the notice given was late or insufficient. The first option may be used if there is an issue as to the notice's adequacy. If the plaintiff claims that notice was futile because the defendant had abandoned the project, the second option may be used. However, counsel should note that the authority for the second option is not entirely on point [see [3], *below*, for discussion of authority for lack of need for notice of breach of warranty when builder has abandoned project].

A preponderance of evidence instruction must be given with this instruction [see Ch. 2, *California Judicial Council Evidence Instructions*, CACI No. 200 ("More Likely True Than Not True")].

[3] Comment

Builders and sellers of new construction are generally held to an implied warranty that a completed structure was designed and constructed in a reasonably workmanlike manner [*Pollard v. Saxe & Yolles Dev. Co.* (1974) 12 Cal.3d 374, 380, 115 Cal.Rptr. 648, 525 P.2d 88 ; see MB 300I.15]. By analogy to the Commercial Code provisions on the sale of goods [see *Com. Code* §§ 2101-2801; see also Ch. 3H, *Matthew Bender Commercial Code Sales Contract Instructions*], the California Supreme Court concluded that this common law implied warranty should be subject to the notice requirement of former *Com. Code* § 2607(3) [now see *Com. Code* § 2607(3)(A)], which provides that recovery for breach of warranty requires notice of the alleged breach within a reasonable time after the buyer discovers or should have discovered the breach [*Pollard v. Saxe & Yolles Dev. Co.* (1974) 12 Cal.3d 374, 380, 115 Cal.Rptr. 648, 525 P.2d 88]. This notice requirement is designed to allow the defendant an opportunity to repair the defective item, to reduce damages, to avoid defective products in the future, and to negotiate a settlement. The requirement also protects against stale claims [*Pollard v. Saxe & Yolles Dev. Co.* (1974) 12 Cal.3d 374, 380, 115 Cal.Rptr. 648, 525 P.2d 88].

The notice given must be sufficient to let the defendant know that the plaintiff claims there was a breach [U.C.C. Comment No. 4 to *Com. Code* § 2607].

Notice to a contractor has been held to be unnecessary when the contractor entirely abandons the contract and the project under facts that make it clear that the contractor does not intend to return to the job and finish the construction [*Pierce v. Wright* (1953) 117 Cal.App.2d 718, 725, 256 P.2d 1049 ; *New England Etc. Co. v. Chicago Etc. Co.* (1918) 36 Cal.App. 584, 585, 172 P. 1122 ; *Bacigalupi v. Phoenix Bldg. Etc. Co.* (1910) 14 Cal.App. 632, 639, 112 P. 892]. However, these cases all dealt with contractual provisions requiring notice to the contractor in certain contingencies, and none of them is very recent. Whether and how these holdings would be applied to the court-imposed requirement of notice of breach of warranty is not at all clear.

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawContract Conditions & ProvisionsImplied WarrantiesGeneral OverviewReal Property LawConstruction LawContractsReal Property LawConstruction LawDefects



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CHAPTER 3I Matthew Bender Construction Contract Instructions
PART C DEFENSES AND CONDITIONS THAT MAY BAR OR LIMIT RECOVERY

2-3I California Forms of Jury Instruction MB 300I.81

MB 300I.81 Affirmative Defenses to Claim for Violation of Statutory Construction Standards for New Residence Sold on or After January 1, 2003

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Defendant has raised the defense that

[Choose among the following (see Civ. Code § 945.5)]

Plaintiff's residence failed to meet construction standard _____ [specify standard] due to _____ [describe unforeseen act of nature], which I have determined to be an unforeseen act of nature.

[OR]

Plaintiff's residence failed to meet construction standard _____ [specify standard] because Plaintiff unreasonably failed to minimize or prevent any resulting damage in a timely manner. [Add if alleged by defendant: This includes Plaintiff's failure to allow Defendant reasonable and timely access for inspections and repairs and/or to give Defendant timely notice after Plaintiff discovered the violation of the construction standard.] [Continue] This does not include damages due to Defendant's untimely or inadequate response to Plaintiff's claim that the construction standard had been violated.

[OR]

Plaintiff's residence failed to meet construction standard _____ [specify standard] because Plaintiff [OR] _____ [insert name of plaintiff's agent, employee, subcontractor, independent contractor, or consultant] who is Plaintiff's [agent/employee/subcontractor, independent contractor/consultant], failed to follow Defendant's recommendations. For this defense to be successful, you must find that Defendant has shown that Plaintiff had written notice of Defendant's recommended schedules and recommendations and that the recommendations were reasonable at the time they were issued.

[OR]

Plaintiff's residence failed to meet construction standard _____ [specify standard] due to [alterations/ordinary wear and tear/misuse/neglect/use for something other than intended use] by Plaintiff [OR] _____ (insert name of plaintiff's agent or an independent third party) who is _____ (Plaintiff's agent or an independent third party)].

[OR]

The time period for filing an action for failure to meet construction standard _____ [specify standard] had expired when this action was filed. This action is therefore barred. The time period within which an action for failure to meet standard _____ [specify standard] is _____ is _____ [specify applicable time period (see Civ. Code § 896(f), (g)(6), (9), (10), (12), (14), 941(d))].

[OR]

He/She has obtained a valid release from liability for any violation of construction standard _____ [specify standard].

[OR]

He/She has successfully corrected the violation of construction standard _____ [specify standard], which is the subject of Plaintiff's claim.

[Continue]

If you find that Defendant has proved this defense, Plaintiff's damages must be reduced by your determination of any percentage of Plaintiff's responsibility. I will calculate any actual reduction.

Authorities: Civ. Code § 945.5.

[2] Use of Instruction

This instruction should be used when the defendant has alleged and presented evidence supporting any of the statutory affirmative defenses to the plaintiff's claim of a construction defect based on a violation of the construction standards. In the first option in this instruction, it is assumed that what constitutes an "unforeseen act of nature" is a question of law

and not a question of fact that the jury will be asked to decide.

[3] Comment

[a] Actions for Defective Construction in New Residences Sold on or After January 1, 2003--Overview and Applicability

In accordance with Division 2, Part 2, Title 7 of the Civil Code, "Requirements for Actions for Construction Defects" [*Civ. Code* § 895 *et seq.*], any action against a builder, general contractor, subcontractor, individual product manufacturer, or design professional, seeking recovery of damages arising out of, or related to deficiencies in, residential construction, design, specifications, surveying, planning, supervision, testing, or observation of construction when the property involved is a new residential unit (excluding a condominium conversion) when the purchase agreement with the buyer was signed by the seller on or after January 1, 2003, is governed by detailed statutory standards related to the various functions and components of the building [*see Civ. Code* §§ 896, 938]. The action must be preceded by a mandatory pre-litigation procedure, which provides the potential defendant with a right to attempt a repair of any alleged defect before litigation. The pre-litigation procedure also includes inspections and exchanges of documentation between the parties under certain circumstances, and mediation at various points, all pursuant to statutory time frames [*see Civ. Code* §§ 910-938].

At least in the case of construction defect situations involving new residential units (excluding condominium conversions) when the purchase agreement with the buyer was signed by the seller on or after January 1, 2003, the Legislature effectively rendered inapplicable the effects of a decision in which the Supreme Court held, among other things, that construction defects must cause actual damage before they can be actionable in tort [*see Aas v. Superior Court* (2000) 24 Cal.4th 627, 636-647, 101 Cal.Rptr.2d 718, 12 P.3d 1125].

The provisions, standards, rights, and obligations set forth in Title 7 are binding on all original purchasers and their successors-in-interest. Associations are considered to be original purchasers and have standing to enforce these provisions, standards, rights, and obligations [*Civ. Code* § 945].

Title 7 does not apply to any action by a claimant to enforce a contract or express contract provision, or any action for fraud, personal injury, or violation of a statute (other than Title 7) [*Civ. Code* § 943(a)].

Title 7 does not eliminate or abrogate the requirements of *Code Civ. Proc.* § 411.35, which requires plaintiff's counsel to furnish an Attorney's Certificate in an action against a design professional, for claims and damages that are not covered by the statutory scheme governing construction defect litigation [*Civ. Code* § 937].

[b] Affirmative Defenses

Under the principles of comparative fault pertaining to affirmative defenses, a builder, general contractor, subcontractor, material supplier, individual product manufacturer, or design professional may be excused, in whole or in part, from any obligation, damage, loss, or liability if he or she can demonstrate that the claimed violation of the statutory construction standards was caused by any of the following [*Civ. Code* § 945.5(a)-(d)]:

- An unforeseen act of nature, defined as a weather condition, earthquake, or manmade event such as war, terrorism, or vandalism, in excess of the design criteria expressed by the applicable building codes, regulations, and ordinances in effect at the time of the original construction.
- A homeowner's unreasonable failure to minimize or prevent the claimed damages in a timely manner, including (1) the homeowner's failure to allow reasonable and timely access for inspections and repairs, and (2) the homeowner's failure to give timely notice to the builder after discovering a violation;

but excluding damages due to the builder's untimely or inadequate response to the homeowner's claim.

- The failure of the homeowner or his or her agent, employee, subcontractor, independent contractor, or consultant to follow the builder's or manufacturer's recommendations, or commonly accepted homeowner maintenance obligations; provided the builder can show that the homeowner had written notice of these recommendations and that the recommendations were reasonable at the time they were issued.
- The homeowner's, his or her agent's, or an independent third party's alterations, ordinary wear and tear, misuse, abuse, or neglect, or by the structure's use for something other than its intended purpose.

Other affirmative defenses include establishing that [*Civ. Code* § 945.5(e)-(g)]:

- The applicable statute of limitations has expired [*see* [c], *below*].
- The builder has obtained a valid release for the particular violation claimed.
- The builder has successfully repaired the particular violation claimed.

All affirmative defenses are preserved as to any causes of action to which Title 7 does not apply [*Civ. Code* § 945.5(h)].

[c] Applicable Time Periods for Filing Action

With certain limited exceptions listed below, any action brought under Title 7 must be filed within 10 years after substantial completion of the residence, but not later than 10 years after the date a valid notice of completion was recorded [*see Civ. Code* §§ 938, 941]. The four-year statute of limitations specified for patent defects and the 10-year statute of limitations for latent defects, specified by *Code Civ. Proc.* §§ 337.1 and 337.15, respectively, do not apply to these actions [*Civ. Code* § 941(d)].

Exceptions to the 10-year limitation period include all of the following:

- Four years for actions alleging improper operation of electrical systems [*Civ. Code* § 896(f)].
- One year from original occupancy of adjacent unit for actions alleging noncompliance with governmental inter-unit noise transmission standards [*Civ. Code* § 896(g)(6)].
- Four years from close of escrow for actions alleging improper installation of untreated steel fences and adjacent components [*Civ. Code* § 896(g)(9)].
- Five years from close of escrow for actions alleging improper application of paint and stains [*Civ. Code* § 896(g)(10)].
- Two years from close of escrow for actions alleging improper installation of landscaping systems [*Civ. Code* § 896(g)(12)].
- Two years from close of escrow for actions alleging improper installation of dryer ducts [*Civ. Code* § 896(g)(14)].

"Close of escrow" means the date of the close of escrow between the builder and the original homeowner. If the claimant is an association, "close of escrow" means the date of substantial completion [*see Civ. Code* § 1351(a)], or the

date the builder relinquishes control over the association's ability to decide whether to initiate a claim, whichever is later [*Civ. Code* § 895(c)].

The applicable statute of limitations may be tolled pending the outcome of the mandatory pre-litigation process [*see Civ. Code* § 928].

The statute of limitations cannot be asserted by way of defense by any person in actual possession or control, as owner, tenant, or otherwise, of the subject residential property, at the time any deficiency in the residence constitutes the proximate cause for which it is proposed to make a claim or bring an action [*Civ. Code* § 941(c)].

Existing statutory and decisional law governing the tolling of statutes of limitations applies to the time periods for filing an action or making a claim for violation of the statutory construction standards, except for the special tolling provisions related to the pre-litigation procedure [*Civ. Code* § 941(e); *see Civ. Code* § 927].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawDefensesStatutes of LimitationsGovernmentsLegislationStatutes of LimitationsTime LimitationsReal Property LawConstruction LawContractsReal Property LawConstruction LawContractors & SubcontractorsReal Property LawConstruction LawDefectsReal Property LawPurchase & SaleRemediesLiability of Developers & Vendors



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CHAPTER 3I Matthew Bender Construction Contract Instructions
PART C DEFENSES AND CONDITIONS THAT MAY BAR OR LIMIT RECOVERY

2-3I California Forms of Jury Instruction MB 300I.82-MB 300I.89

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MB 300I.82Reserved for Future Use



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CHAPTER 3I Matthew Bender Construction Contract Instructions
PART D TYPICAL RELEASES AND WAIVERS THAT MAY BAR RECOVERY

2-3I California Forms of Jury Instruction MB 300I.90

MB 300I.90 Change Order as Accord and Satisfaction

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Defendant has the burden of proving that when Plaintiff signed change order numbers _____ [numbers], Plaintiff was agreeing to accept the particular change order as full compensation not only for the work specifically described in the change order, but also for all of the effects of that change order on any other work and on the time allowed to complete the project. If Defendant meets the burden of proving this fact, then no damages can be awarded to Plaintiff for any of the effects caused by the particular change order.

Authorities: Civ. Code §§ 1521-1523; *Huber, Hunt & Nichols, Inc. v. Moore* (1977) 67 Cal.App.3d 278, 302, 136 Cal.Rptr. 603 ; *Rabinowitz v. Kandel* (1969) 1 Cal.App.3d 961, 965, 81 Cal.Rptr. 897 ; *Higson v. Montgomery Ward & Co.* (1968) 263 Cal.App.2d 333, 343-344, 69 Cal.Rptr. 497 .

[2] Use of Instruction

This instruction should be used when the defendant contends that executed change orders amounted to accords and satisfactions, thus barring recovery.

Frequently there are several change orders and only some of them are actually signed by the plaintiff; this instruction is designed to be adjusted accordingly by inserting the numbers of those change orders actually at issue. This instruction should follow the plaintiff's burden of proof instructions on the particular cause of action involved [see MB 300I.01 -MB 300I.19].

[3] Comment

When it is clear from the express language of a fully executed, written change order, that the parties intended the change order to be an accord and satisfaction on all issues related to the change, i.e., both as to the specific work described and as to any impact on the balance of the project, then that change order may amount to a waiver of any claim the contractor has for delay or for any other impact caused by the change order [*see Huber, Hunt & Nichols, Inc. v. Moore* (1977) 67 Cal.App.3d 278, 302, 136 Cal.Rptr. 603 ; *but see General Constr. Co. v. Oregon State Fish Com.* (1976) 26 Or. App. 577, 554 P.2d 185, 188-189 ; *J. A. Ross & Co. v. United States* (Ct. Cl. 1953) 115 F.Supp. 187, 192].

As an accord and satisfaction [Civ. Code §§ 1521-1523], a change order is governed by the same principles as apply to any contract; [*Rabinowitz v. Kandel* (1969) 1 Cal.App.3d 961, 965, 81 Cal.Rptr. 897] its language must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time the change order was executed [Civ. Code § 1636; *Salinas v. Souza & McCue Const. Co.* (1967) 66 Cal.2d 217, 223-224, 57 Cal.Rptr. 337, 424 P.2d 921 , *overruled on other grounds, Helfend v. So. Cal. Rapid Transit Dist.* (1970) 2 Cal.3d 1, 84 Cal.Rptr. 173, 465 P.2d 61]. That may require an analysis of the circumstances under which the change order was made [Code Civ. Proc. § 1860], including the conduct of the parties [*California Metal Enameling Co. v. Waddington* (1977) 74 Cal.App.3d 391, 395-396, 141 Cal.Rptr. 443].

The defendant has the burden of proving that a change order was an accord and satisfaction [*Rabinowitz v. Kandel* (1969) 1 Cal.App.3d 961, 965, 81 Cal.Rptr. 897 ; *Higson v. Montgomery Ward & Co.* (1968) 263 Cal.App.2d 333, 343-344, 69 Cal.Rptr. 497].

LexisNexis Matthew Bender Expert Practice Tip--Overcoming Boilerplate Language: The terms of the change order will be important but not dispositive on this issue. Boilerplate language can be overcome by course of conduct, oral modifications, or waivers. *By Ronald Oster*

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawContract ModificationsGeneral OverviewContracts LawPerformanceAccord & SatisfactionReal Property LawConstruction LawContracts



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CHAPTER 3I Matthew Bender Construction Contract Instructions
PART D TYPICAL RELEASES AND WAIVERS THAT MAY BAR RECOVERY

2-3I California Forms of Jury Instruction MB 300I.91

MB 300I.91 Lien Claim Waivers

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Defendant has the burden of proving that Plaintiff or Plaintiff's authorized agent signed a waiver of the lien claim.

[*OPTIONAL (See Use of Instruction)*]

Defendant also has the burden of proving that Plaintiff was actually paid the amount set forth in the conditional waiver.

[*CONTINUE WITH INSTRUCTION*]

If Defendant meets the burden of proving _____ [this fact or these facts], then Plaintiff may not recover payment from Defendant for the work described in the lien claim waiver.

Authority: *Civ. Code* § 3262.

[2] Use of Instruction

This instruction should be used when one of the parties contends that a lien claim waiver by a subcontractor or materialman bars recovery. The instruction should follow the plaintiff's burden of proof instructions on the particular cause of action involved [see *MB 300I.01 -MB 300I.19*]. The instruction assumes that the court has made a legal

determination that the waiver involved is substantially in the form required by the statute [*Civ. Code* § 3262; see *J. A. Jones Constr. Co. v. Superior Court* (1994) 27 *Cal.App.4th* 1568, 1579-1584, 33 *Cal.Rptr.2d* 206].

The optional sentence is for use when a conditional waiver is at issue. Conditional waivers are not effective unless there is evidence of payment of the amount set forth in the waiver to the claimant [*Civ. Code* § 3262(a), (d)].

[3] Comment

Owners and prime contractors often require subcontractors and materialmen to waive their lien claim rights as a condition to receiving progress payments. This practice led to abuses when a contractor or subcontractor was required to sign a waiver but was not actually paid, and the waiver was later used as a defense to the unpaid claim by the owner [see *Bentz Plumbing & Heating v. Favaloro* (1982) 128 *Cal.App.3d* 145, 151-152, 180 *Cal.Rptr.* 223 ; see also *Western Landscape Const. v. Bank of America* (1997) 58 *Cal.App.4th* 57, 59, 67 *Cal.Rptr.2d* 868 (lien and stop notice waiver form did not extinguish subcontractors' rights to recover retention)]. The purpose of *Civ. Code* § 3262 is to regulate lien claim waivers.

Neither the owner nor the original contractor may waive the claims and liens of other persons without their written consent. The written consent is not effective unless the claimant executes a written waiver. The waiver is only binding to release the owner, construction lender, or surety if it is substantially in one of the forms set forth in *Civ. Code* § 3262. Further, if the waiver is a conditional waiver, it is not effective unless the condition has been met by the actual payment of the amount set forth in the waiver. Evidence of payment may be by the claimant's endorsement on a single or joint payee check that has been paid by the bank on which it has been drawn or by written acknowledgment of payment given by the claimant [*Civ. Code* § 3262].

The California Supreme Court delineated the circumstances when lien rights are waived as follows [*Wm. R. Clarke Corp. v. Safeco Ins. Co.* (1997) 15 *Cal.4th* 882, 889, 64 *Cal.Rptr.2d* 578, 938 *P.2d* 372]:

- A conditional waiver and release on progress payment;
- An unconditional waiver and release on progress payment;
- A conditional waiver and release on final payment; and
- An unconditional waiver and release on final payment.

A waiver and release of mechanic's lien rights is permitted only in conjunction with payment, or a promise of payment, and a conditional release is effective only if the claimant is actually paid [*Wm. R. Clarke Corp. v. Safeco Ins. Co.* (1997) 15 *Cal.4th* 882, 889, 64 *Cal.Rptr.2d* 578, 938 *P.2d* 372]. The Supreme Court rejected the argument that because a pay-if-paid clause was not "precisely" a waiver, it was not subject to *Civ. Code* § 3262 [*Wm. R. Clarke Corp. v. Safeco Ins. Co.* (1997) 15 *Cal.4th* 882, 890, 64 *Cal.Rptr.2d* 578, 938 *P.2d* 372 (pay-if-paid clause in private work void); see also *Capitol Steel Fabricators, Inc. v. Mega Construction Co.* (1997) 58 *Cal.App.4th* 1049, 1061-1062, 68 *Cal.Rptr.2d* 672 (pay-if-paid clause in public work void)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property Law Construction Law Contracts Real Property Law Construction Law Contractors & Subcontractors Real Property Law Nonmortgage Liens Mechanics' Liens



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California Forms of Jury Instruction

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CHAPTER 3I Matthew Bender Construction Contract Instructions
PART D TYPICAL RELEASES AND WAIVERS THAT MAY BAR RECOVERY

2-3I California Forms of Jury Instruction MB 300I.92

MB 300I.92 Joint Payee Checks

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Defendant has the burden of proving that Defendant issued a check that met all of the following requirements:

- 1. The check was intended to be a payment for labor, services, equipment, or materials provided to the project;**
- 2. The check was made payable jointly to Plaintiff and _____ [other payees];**
- 3. The check was endorsed by Plaintiff; and**
- 4. The check was not governed by instructions given by Defendant concerning how the proceeds of the check should be divided between Plaintiff and _____ [other payees].**

If Defendant meets the burden of proving these facts, then the full amount of the check is assumed to have been paid to Plaintiff, regardless of the amount actually received by Plaintiff, and Plaintiff may not recover damages from Defendant in this action for labor, services, equipment, or materials intended to be paid for by the check.

Authority: *Post Bros. Constr. Co. v. Yoder* (1977) 20 Cal.3d 1, 5-8, 141 Cal.Rptr. 28, 569 P.2d 133 .

[2] Use of Instruction

This instruction should be used when one of the parties contends that endorsement of a joint check bars recovery. If there were several joint checks, this instruction must be modified accordingly. The instruction should follow the plaintiff's burden of proof instructions on the particular cause of action involved [see MB 300I.01 -MB 300I.19].

[3] Comment

Since the use of joint checks is well established by custom and practice in the construction industry, courts have held that, absent an agreement as to allocation of proceeds, the subcontractor or materialman who endorses the joint check is deemed to have received the money due and, to that extent, has given up any claim against the check's maker [*Post Bros. Constr. Co. v. Yoder* (1977) 20 Cal.3d 1, 5-8, 141 Cal.Rptr. 28, 569 P.2d 133].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawNegotiable InstrumentsGeneral OverviewContracts LawNegotiable InstrumentsEnforcementDuties & Liabilities of PartiesTypes of PartiesPayeesContracts LawTypes of ContractsConstruction ContractsReal Property LawConstruction LawContractors & Subcontractors



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California Forms of Jury Instruction

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CHAPTER 3I Matthew Bender Construction Contract Instructions
PART D TYPICAL RELEASES AND WAIVERS THAT MAY BAR RECOVERY

2-3I California Forms of Jury Instruction MB 300I.93

MB 300I.93 Release by Acceptance of Final Payment**[1] Instruction**[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** __________ [*Name of defendant*] **has the burden of proving both of the following two facts:**

1. The contract provided that _____ [*quote or paraphrase contract language making acceptance of final payment operate as release of all claims*] **; and**

2. _____ [*Name of plaintiff*] **accepted the final payment, as set forth in the contract, which had the effect of releasing** _____ [*name of defendant*] **from all claims.**

If _____ [*name of defendant*] **meets the burden of proving these two facts,**
_____ [*name of plaintiff*] **may not recover from** _____ [*name of defendant*] **any damages under the contract that** _____ [*name of plaintiff*] **knew or suspected to exist at the time**
_____ [*name of plaintiff*] **accepted the final payment.**

Authorities: Civ. Code §§ 1541-1542; *Ramos v. City of Santa Clara* (1973) 35 Cal.App.3d 93, 96-97, 110 Cal.Rptr. 485 ; see Civ. Code §§ 1521-1525.

[2] Use of Instruction

This instruction should be used when the defendant claims as a defense that the plaintiff accepted a final payment as set forth in a contract provision that makes such an acceptance a release of all claims. The instruction should follow the plaintiff's burden of proof instructions on the particular cause of action [see MB 300I.01 -MB 300I.19]. For an instruction on what constitutes acceptance of a check, see Ch. 3F, *Matthew Bender Contract Defenses Instructions*, MB

300F.02.

LexisNexis Matthew Bender Expert Practice Tip--Legal Effect of Acceptance: Many jurors may reject this argument by the plaintiff as an "excuse" to avoid accountability. Further, if plaintiff reserved its rights at the time it accepted the final payment, or otherwise indicated that plaintiff intended to preserve its claims, it is difficult to see how a court would view this as a release. The place to raise this issue is the second paragraph of this instruction that sets forth the legal conclusion regarding the legal effect of the acceptance. *By Rex Heeseman and Ronald Oster*

[3] Comment

Ramos v. City of Santa Clara [*Ramos v. City of Santa Clara* (1973) 35 Cal.App.3d 93, 96-97, 110 Cal.Rptr. 485] upheld the enforcement of a contract clause providing that acceptance of final payment operated as a release of all claims. In *Ramos*, although the language of the provision was that of a release [see Civ. Code §§ 1541-1542], the court based its decision on its characterization of the clause as an accord and satisfaction [see Civ. Code §§ 1521-1525]. Although it is unlikely that any clause in a contract executed before a dispute arose could satisfy the elements of an accord and satisfaction [see *Rabinowitz v. Kandel* (1969) 1 Cal.App.3d 961, 965, 81 Cal.Rptr. 897 (accord is agreement to accept in extinction of obligation, something different from or less than that to which person agreeing to accept is entitled); *B & W Engineering Co. v. Beam* (1913) 23 Cal.App. 164, 170, 137 P. 624 ("accord and satisfaction" means substitution of new agreement for and in satisfaction of preexisting agreement between same parties)], it is very likely to be enforceable as a release [see Civ. Code §§ 1541-1542; *Cohn v. Bugas* (1974) 42 Cal.App.3d 381, 390-391, 116 Cal.Rptr. 810 (new consideration not necessary for release)]. Sometimes waiver language is used in the contract for this purpose. The release cannot extend to claims that the plaintiff does not know or suspect to exist at the time the release is executed, which if known to the plaintiff would have materially affected the settlement with the defendant [Civ. Code § 1542; *Cohn v. Bugas* (1974) 42 Cal.App.3d 381, 390-391, 116 Cal.Rptr. 810]. When enforceable, these release clauses are valid only in private works contracts, as they have been deemed against public policy in public works contracts [Pub. Contract Code § 7100].

Although Civ. Code § 1526 limits the circumstances under which the acceptance of a check or a draft will operate as an accord and satisfaction, the acceptance of a check or draft by a creditor nonetheless constitutes an accord and satisfaction if the check or draft is issued pursuant to or in conjunction with the release of a claim [Civ. Code § 1526(c); see Ch. 3F, *Matthew Bender Contract Defenses Instructions*, MB 300F.01, Ch. 24A, *Matthew Bender Employment Contract Instructions*, MB 2400A.46 (instructions on accord and satisfaction)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawPerformanceAccord & SatisfactionPublic Contracts LawDispute ResolutionGeneral OverviewPublic Contracts LawPerformanceGeneral OverviewReal Property LawConstruction LawContractsReal Property LawConstruction LawContractors & Subcontractors



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CHAPTER 3I Matthew Bender Construction Contract Instructions
PART D TYPICAL RELEASES AND WAIVERS THAT MAY BAR RECOVERY

2-3I California Forms of Jury Instruction MB 300I.94

MB 300I.94 Payment and Acceptance by Owner as Waiver of Defects

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Defendant claims that Plaintiff has waived any claim to damages for construction defects because Plaintiff paid Defendant \$ _____, the [full contract price/adjusted contract price/total progress payment], and accepted _____ [*describe work of improvement*]. For you to find that Plaintiff has waived [his/her/its] right to damages for deficiencies in _____ [*describe work of improvement*], Defendant has the burden of proving all of the following facts:

1. On completion of _____ [*describe work of improvement or state: the work required for the progress payment to become due*], the defects or inadequacies in the construction were obvious, apparent, and known to Plaintiff;
2. Plaintiff, with knowledge of the defects or inadequacies in the construction, made no objection to Defendant with regard to the defects or inadequacies in the construction;
3. Plaintiff made no effort to reserve its claims against Defendant; and
4. Plaintiff knowingly accepted _____ [*describe work of improvement*] and paid the [contract price/progress payment].

Authorities: *Atowich v. Zimmer* (1933) 218 Cal. 763, 768, 25 P.2d 6 ; *Leonard v. Home Builders* (1916) 174 Cal. 65, 69, 161 P. 1151 ; *American-Hawaiian Eng. etc. Co. v. Butler* (1913) 165 Cal. 497, 519, 133 P. 280 .

[2] Use of Instruction

This instruction should be used when the defendant in a construction defect action claims, as a defense, that the construction defects were known to both parties when the plaintiff accepted and paid for the work in question. If the contract provides that payment of the contract price does not constitute a waiver of deficiencies, or if there are contractual procedures for construction deficiency claims, this instruction will not apply. If the plaintiff claims that his or her acceptance was induced by fraud or resulted from a mistake, then additional instructions will be necessary. Additional instructions on waivers and releases may be appropriate with this instruction [see Ch. 3F, *Matthew Bender Contract Defenses Instructions*].

A preponderance of evidence instruction must be given with this instruction [see Ch. 2, *California Judicial Council Evidence Instructions*, CACI No. 200 ("More Likely True than Not True")].

LexisNexis Matthew Bender Expert Practice Tip--These Cases Are Rare: It will be an unusual case where defendant can prove that the owner had full knowledge of contract defects and knowingly waived any right to recovery. If nothing else, the owner can argue that it did not know the full extent of the defects or the cost of correction. And, a jury may consider this argument as an "unfair" way to avoid responsibility. *By Ronald Oster and Rex Heeseman*

[3] Comment

Payment of the contract price and acceptance of the work does not waive an owner's right to damages for defects unless the circumstances show an intent to waive that right [*Leonard v. Home Builders* (1916) 174 Cal. 65, 69, 161 P. 1151 ; *Kavalakis v. Anthony Brothers, Inc.* (1963) 217 Cal.App.2d 737, 742, 32 Cal.Rptr. 205 ; *Machinery & Electrical Co. v. Y.M.C.A.* (1913) 22 Cal.App. 416, 419, 134 P. 724]. Whether the owner's acts constitute a waiver of construction defects is a question of fact to be determined from all the circumstances of the case [*Leonard v. Home Builders* (1916) 174 Cal. 65, 68-69, 161 P. 1151 ; *Banducci v. Frank T. Hickey, Inc.* (1949) 93 Cal.App.2d 658, 662-663, 209 P.2d 398 ; *Sirch E. & T. Laboratories v. Garbutt* (1910) 13 Cal.App. 435, 438-439, 110 P. 140].

When the construction defects are known to the property owner and there is no fraud or mistake, payment and acceptance with no reservation of claims is generally held to waive the owner's claims against the builder for construction defects [*Atowich v. Zimmer* (1933) 218 Cal. 763, 768, 25 P.2d 6 ; *Smith v. Mathews Constr. Co.* (1919) 179 Cal. 797, 179 P. 205 ; *Mannix v. Wilson* (1912) 18 Cal.App. 595, 601, 123 P. 981 ; *Sirch E. & T. Laboratories v. Garbutt* (1910) 13 Cal.App. 435, 438-439, 110 P. 140 ; see *American-Hawaiian Eng. etc. Co. v. Butler* (1913) 165 Cal. 497, 133 P. 280 (waiver of delay damage claim by payment of progress payments when contractor behind schedule)]. Acceptance does not waive claims against the builder for defects that are unknown to the owner at the time the work of improvement is accepted and the contract price is paid [*Balfour, Guthrie & Co. v. Hansen* (1964) 227 Cal.App.2d 173, 184, 38 Cal.Rptr. 525 ; *Summers v. L.F.S. Syndicate* (1920) 46 Cal.App. 250, 255, 189 P. 286].

Most construction contracts include a provision that governs the effect of payment and acceptance on the owner's claims against the contractor [see California Legal Forms, Ch. 30D, *Construction Contracts and Subcontracts* (Matthew Bender)]. These contract clauses have been enforced by the courts [*Monson v. Fischer* (1931) 118 Cal.App. 503, 518-519, 5 P.2d 628].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts Law Contract Conditions & Provisions Waivers General Overview Real Property Law Construction Law Contracts Real Property Law Construction Law Defects



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California Forms of Jury Instruction

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CHAPTER 3I Matthew Bender Construction Contract Instructions
PART D TYPICAL RELEASES AND WAIVERS THAT MAY BAR RECOVERY

2-3I California Forms of Jury Instruction MB 300I.95-MB 300I.99

[Reserved]

MB 300I.95[Reserved]



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CHAPTER 3I Matthew Bender Construction Contract Instructions
PART E DAMAGES

2-3I California Forms of Jury Instruction MB 300I.100

MB 300I.100 Measure of Damages for Breach of Construction Contract--Failure to Construct Work

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

If, under the court's instruction, you find that Plaintiff is entitled to a verdict against Defendant for breach of contract for failure to construct the work, you must award Plaintiff the difference between the contract price of \$_____ and the reasonable cost of doing the work according to the plans and specifications.

Authority: Fairlane Estates v. Carrico Constr. Co. (1964) 228 Cal.App.2d 65, 72, 39 Cal.Rptr. 35 .

[2] Use of Instruction

This instruction should be used when the contractor has breached the contract by a complete failure to construct the improvements. If additional damages are sought, the appropriate instructions in Ch. 3E, *Matthew Bender Contract Damages Instructions*, should also be used.

For related Judicial Council instructions, see [3][b], *below*.

[3] Comment

[a] Damages for Failure to Construct Improvements

When a plaintiff contracts for improvements on real property owned by the plaintiff, and defendant breaches by failing to construct the improvements, the measure of damages is the excess of the cost of construction over the original contract price [*Fairlane Estates v. Carrico Constr. Co. (1964) 228 Cal.App.2d 65, 72, 39 Cal.Rptr. 35*].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 3, *California Judicial Council Contracts Instructions*]:

CACI No. 354 Owner's/Lessor's Damages for Breach of Contract to Construct Improvements on Real Property

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts Law Remedies Compensatory Damages General Overview Real Property Law Construction Law General Overview Real Property Law Construction Law Contracts Real Property Law Construction Law Contractors & Subcontractors



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California Forms of Jury Instruction

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CHAPTER 3I Matthew Bender Construction Contract Instructions
PART E DAMAGES

2-3I California Forms of Jury Instruction MB 300I.101

MB 300I.101 Measure of Damages for Breach of Construction Contract--Work Does Not Conform to Plans and Specifications

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

If, under the court's instruction, you find that Plaintiff is entitled to a verdict against Defendant for breach of contract for failure to construct the _____ [describe constructed work] according to the plans and specifications, you must award Plaintiff the reasonable cost of _____ [conforming it to the plans and specifications or completing the work according to the plans and specifications].

Authority: Authorities: *Coughlin v. Blair* (1953) 41 Cal.2d 587, 600, 262 P.2d 305 ; *Kossler v. Palm Springs Developments, Ltd.* (1980) 101 Cal.App.3d 88, 100-102 ; *Jones v. Kvistad* (1971) 19 Cal.App.3d 836, 843, 97 Cal.Rptr. 100 ; *Shell v. Schmidt* (1958) 164 Cal.App.2d 350, 352, 360, 366, 330 P.2d 817 .

[2] Use of Instruction

This instruction should be used when the contractor has breached the contract by construction that does not conform to the plans and specifications but can be conformed to the plans and specifications by further work. If additional damages are sought, the appropriate instructions in Ch. 3E, *Matthew Bender Contract Damages Instructions*, should also be used.

Although this instruction is designed for use by the owner against the prime contractor, it can be adapted for use by an owner against the performance bond surety [*Callan v. Empire State Surety Co.* (1912) 20 Cal.App. 483, 486-490, 129 P. 978] or by any contractor against a lower tier contractor or supplier.

The alternative measures of damages stated in the final sentence of the instruction are simply different ways of stating essentially the same measure of damages, and both have been used by the courts, as explained in [3][a], *below*. Counsel

may use whichever seems most useful in the case at hand.

For related Judicial Council instructions, see [3][b], *below*.

[3] Comment

[a] Damages for Failure to Comply With Plans and Specifications

When a building contractor breaches its contract by failing to comply with the plans and specifications, the measure of damages for this breach is the reasonable cost of making the building conform to the contract plans and specifications [*Jones v. Kvistad* (1971) 19 Cal.App.3d 836, 843, 97 Cal.Rptr. 100 ; *Shell v. Schmidt* (1958) 164 Cal.App.2d 350, 352, 360, 366, 330 P.2d 817]. This measure of damages has also been phrased as the reasonable cost of completing the work in accordance with the plans and specifications in the contract [*Coughlin v. Blair* (1953) 41 Cal.2d 587, 600, 262 P.2d 305 ; *Kossler v. Palm Springs Developments, Ltd.* (1980) 101 Cal.App.3d 88, 101, 161 Cal.Rptr. 423]. However, if making the building conform to the contract would result in substantial economic waste, such as when the building would have to be torn down and reconstructed, the measure of damages is the difference in value between the building as it should have been and the value as it is [*Bayuk v. Edson* (1965) 236 Cal.App.2d 309, 316, 46 Cal.Rptr. 49 ; *Shell v. Schmidt* (1958) 164 Cal.App.2d 350, 358-366, 330 P.2d 817]. This measure of damages is also used when the plaintiff does not own the real property on which the improvement was made [*Coughlin v. Blair* (1953) 41 Cal.2d 587, 600, 262 P.2d 305 ; *Glendale Fed. Sav. & Loan Assn. v. Marina View Heights Dev. Co.* (1977) 66 Cal.App.3d 101, 124, 135 Cal.Rptr. 802].

An alternate measure of damages when a contractor breaches its contract for services on a rental project may be lost rents. The United States District Court for the Northern District of California, applying California law, held that apartment complex owners were entitled to recover lost rent from a video and audio service provider for their breach of contract if the lost rent was reasonably foreseeable at the time of contracting [*Civic Center Drive Apartments Ltd. v. Southwestern Bell Video Services* (2003) 295 F.Supp.2d 1091, 1108-1109].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 3, *California Judicial Council Contracts Instructions*]:

CACI No. 354 Owner's/Lessor's Damages for Breach of Contract to Construct Improvements on Real Property

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts Law Remedies Compensatory Damages General Overview Real Property Law Construction Law Contracts Real Property Law Construction Law Contractors & Subcontractors Real Property Law Construction Law Defects



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CHAPTER 3I Matthew Bender Construction Contract Instructions
PART E DAMAGES

*2-3I California Forms of Jury Instruction MB 300I.102***MB 300I.102 Measure of Liquidated Damages for Delay by Contractor****[1] Instruction**

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

If, under the court's instruction, you find that Plaintiff is entitled to a verdict against Defendant because the project was not substantially complete by the contract completion date, you must award Plaintiff liquidated damages in the amount of \$ _____ for each working day between the contract completion date and the date on which the project was substantially complete.

The contract provides that the project was supposed to have been completed by _____ [date].

[OPTIONAL (See Use of Instruction)]

You must add to that date all of the time extensions that were, or should have been granted to _____ [contractor] to determine the contract completion date.

The liquidated damages are the only damages you may award to _____ [owner] for any delay in completion of the project.

Authorities: Civ. Code § 1671; Gov. Code § 53069.35; Pub. Contract Code § 10226; *Better Food Mkts. v. Amer. Dist. Teleg. Co.* (1953) 40 Cal.2d 179, 186-188, 253 P.2d 10 ; *Westinghouse Electric Corp. v. County of Los Angeles* (1982) 129 Cal.App.3d 771, 780-783, 181 Cal.Rptr. 332 .

[2] Use of Instruction

This instruction should be used when the owner seeks to recover liquidated damages for delay in completing the project. The third paragraph is only necessary if there is a dispute over whether the contractor is entitled to more time than the owner gave it. When part of the delay was caused by the owner, part by the contractor, and part by both, only that portion caused solely by the contractor can be used to assess liquidated damages against the contractor [*Nomellini Constr. Co. v. State of California ex rel. Dept. of Wat. Resources* (1971) 19 Cal.App.3d 240, 244-247, 96 Cal.Rptr. 682]. It may be necessary to give other instructions that quote or paraphrase the contract provisions governing time extensions to explain to the jury how it is to determine whether the contractor is entitled to more time. Instructions in MB 300I.55[1] (forfeitures), MB 300I.57[1] (substantial completion), and MB 300I.90[1] (change orders) should also be considered. If additional damages are sought, the appropriate instructions in Ch. 3E, *Matthew Bender Contract Damages Instructions*, should also be used.

LexisNexis Matthew Bender Expert Practice Tip--Use of Term "Liquidated Damages": The term "liquidated damages" will be unfamiliar to many jurors. An alternate term is "delay damages" or "contract damages." But if "liquidated damages" is a term in the contract, stress that the parties agree to this remedy. *By Ronald Oster and Rex Heeseman*

[3] Comment

Construction contracts frequently impose liquidated damages on the contractor for delays in completion [see California Department of Transportation, Standard Specifications (1999 ed.), § 8-1.07]. Those provisions are required in public works contracts and are generally unassailable [*Gov. Code* § 53069.85; *Pub. Contract Code* § 10226; *Westinghouse Electric Corp. v. County of Los Angeles* (1982) 129 Cal.App.3d 771, 780-783, 181 Cal.Rptr. 332]. By statute, a liquidated damages provision is deemed valid in private works contracts, unless the contractor establishes that it was unreasonable under the circumstances existing at the time the contract was made [*Civ. Code* § 1671].

When the liquidated damages provision is enforceable, the amount set forth in it is the exclusive remedy for the type of loss covered by the clause (usually damages for delay in completion), regardless of whether the actual loss is a greater or lesser amount [*Better Food Mkts. v. Amer. Dist. Teleg. Co.* (1953) 40 Cal.2d 179, 186-188, 253 P.2d 10].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts Law Remedies Liquidated Damages Public Contracts Law Contract Provisions Liquidated Damages Real Property Law Construction Law Contracts Real Property Law Construction Law Contractors & Subcontractors



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CHAPTER 3I Matthew Bender Construction Contract Instructions
PART E DAMAGES

2-3I California Forms of Jury Instruction MB 300I.103

MB 300I.103 Measure--Failure to Make Timely or Complete Progress Payments

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

[CHOOSE FROM THE FOLLOWING (See Use of Instruction)]

With regard to progress payments, the contract provides _____ [*progress payment provision*].

[OR]

The contract required Defendant to pay to Plaintiff any amount that the Defendant received from _____ [*person or entity making progress payments to defendant*] **on account of work performed by Plaintiff, as a progress payment, within 10 days after it was received from** _____ [*person or entity making progress payments to defendant*].

[CONTINUE INSTRUCTION]

If, under the court's instruction, you find that Plaintiff is entitled to a verdict against Defendant because _____ [*owner or prime contractor*] **breached the contract by failing to make complete or timely progress payments, you must award Plaintiff simple interest, at** _____ [*lawful rate*] **percent, on the unpaid portion of progress payments from the dates on which those payments should have been made to the dates they were made.**

Authorities: *Civ. Code* § 3302; *Gray v. Bekins* (1921) 186 Cal. 389, 399, 199 P. 767 ; *Central Industrial Engineering Co. v. Strauss Construction Co.* (1979) 98 Cal.App.3d 460, 466, 159 Cal.Rptr. 564 .

[2] Use of Instruction

This instruction should be used when a party contends that it was not fully or timely paid progress payments during its work on the project. If additional damages are sought, the appropriate instructions in Ch. 3E, *Matthew Bender Contract Damages Instructions*, should also be used.

Two alternatives are provided for the initial sentence, which instructs the jury on the amounts and due dates of progress payments the defendant was obligated to make. The first alternative should be used when the contract expressly provides for progress payments. The second alternative should be used when a subcontractor is claiming entitlement to progress payments under the provisions of *Bus. & Prof. Code* § 7108.5 or *Pub. Contract Code* § 10262.

For related Judicial Council instructions, see [3][b], *below*.

LexisNexis Matthew Bender Expert Practice Tip--Help Jurors Understand Difficult Issues: Some jurors may need assistance in understanding the meaning of a "progress payment." Further, interest calculations (even simple ones) can be complicated and should be presented as part of the evidence of plaintiff's case-in-chief, or failing that, carefully explained in closing argument. *By Rex Heeseman and Ronald Oster*

[3] Comment

[a] Progress Payments

Most construction contracts and subcontracts call for progress payments at specific intervals during construction [see California Department of Transportation, Standard Specifications (1999 ed.), § 9 1.06]. In the absence of provisions to the contrary, a contractor who receives a progress payment is obligated to pay subcontractors within 10 days the respective portions of the payment made on account of their work [*Bus. & Prof. Code* § 7108.5(b); *Pub. Contract Code* § 10262]. If there is a good faith dispute as to the amount due on a progress payment, *Bus. & Prof. Code* § 7108.5 allows the contractor receiving the progress payment to withhold up to 150 percent of the disputed amount [*Bus. & Prof. Code* § 7108.5(c)]. A violation of *Bus. & Prof. Code* § 7108.5 subjects the licensee, in addition to disciplinary action, to a penalty payable to the subcontractor of 2 percent of the amount due per month for every month that payment is not made [*Bus. & Prof. Code* § 7108.5(b), (d)]. *Bus. & Prof. Code* § 7108.5 is applicable to all private works of improvement and to all public works of improvement except those governed by *Pub. Contract Code* § 10262 [*Bus. & Prof. Code* § 7108.5(a)].

The failure to make timely or complete progress payments normally is not a sufficient breach to allow the contractor to abandon the work and sue for damages [*Integrated, Inc. v. Alec Fergusson Electrical Contractor* (1967) 250 Cal.App.2d 287, 295-297, 58 Cal.Rptr. 503]. However, the contractor is entitled to interest on the amount unpaid from the date it should have been paid [*Civ. Code* §§ 3289, 3302; *Gray v. Bekins* (1921) 186 Cal. 389, 399, 199 P. 767 ; *Central Industrial Engineering Co. v. Strauss Construction Co.* (1979) 98 Cal.App.3d 460, 466, 159 Cal.Rptr. 564 ; *accord*, *Civ. Code* § 3287; *Maurice L. Bein, Inc. v. Housing Authority* (1958) 157 Cal.App.2d 670, 685-687, 321 P.2d 753].

For further discussion, see California Real Estate Law & Practice, Ch. 433, *Subcontractors and Subcontracts* (Matthew Bender).

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 3, *California Judicial Council Contracts Instructions*]:

CACI No. 355 Obligation to Pay Money Only

Legal Topics:

For related research and practice materials, see the following legal topics:

Public Contracts LawDispute ResolutionGeneral OverviewPublic Contracts LawPerformanceGeneral OverviewReal Property LawConstruction LawContractsReal Property LawConstruction LawContractors & Subcontractors



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California Forms of Jury Instruction

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CHAPTER 3I Matthew Bender Construction Contract Instructions
PART E DAMAGES

2-3I California Forms of Jury Instruction MB 300I.104

MB 300I.104 Measure of Damages for Expenditures Made by Contractor Due to Delays, Inefficiencies, or Acceleration

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] PROPOSED INSTR. NO. _____

If, under the court's instruction, you find that Plaintiff is entitled to a verdict against Defendant for breach of contract, then you must determine those damages that are legally caused by the breach of contract if:

1. The breach was a substantial factor in bringing about the damages; and

2. Either:

a. This type of damage _____ [for delays in the work or inefficiencies in the work or acceleration of the work] could have been reasonably contemplated or foreseen by the parties, at the time they made the contract, as being the probable result of such a breach; or

b. The party who breached the contract knew or should have known, at the time of entering into the contract, that this type of damage _____ [for delays in the work or inefficiencies in the work or acceleration of the work] could probably be suffered by the other party if [he/she/it] breached the contract.

Then you must award damages to plaintiff in an amount that will compensate plaintiff for all the detriment legally caused by the breach of contract including all of the following:

1. Expenditures Plaintiff made for labor, services, equipment, or materials, which Plaintiff would not otherwise have made but for _____ [delays in the work or inefficiencies in the work or acceleration of the

work] caused by Defendant's breach of the contract;

2. Overhead and profit Plaintiff could otherwise have earned from its expenditures for additional labor, services, equipment, and materials; and

3. Increases in the cost of those items already required under the contract.

Authorities: *City of Salinas v. Souza & McCue Const. Co.* (1967) 66 Cal.2d 217, 225, 57 Cal.Rptr. 337, 424 P.2d 921, overruled on other grounds, *Helfend v. So. Cal. Rapid Transit Dist.* (1970) 2 Cal.3d 1, 84 Cal.Rptr. 173, 465 P.2d 61; *B.C. Richter Contracting Co. v. Continental Cas. Co.* (1964) 230 Cal.App.2d 491, 500, 502-503, 41 Cal.Rptr. 98; *Israel v. Campbell* (1958) 163 Cal.App.2d 806, 817-819, 330 P.2d 83; *Maurice L. Bein, Inc. v. Housing Authority* (1958) 157 Cal.App.2d 670, 688-689, 321 P.2d 753; *Allen v. Gardner* (1954) 126 Cal.App.2d 335, 343-345, 272 P.2d 99.

[2] Use of Instruction

This instruction should be used when one of the parties is claiming damages due to delays or acceleration in the performance of the work on the project by the defendant. The instruction can also be used in suits by subcontractors. If additional damages are sought, the appropriate instructions in Ch. 3E, *Matthew Bender Contract Damages Instructions*, should also be used.

The overhead and profit part of the instruction can also be used when the plaintiff is seeking recovery for "extra work" as discussed in *MB 300I.30*.

LexisNexis Matthew Bender Expert Practice Tip--May Need Expert: This is a lengthy and complicated instruction. Therefore, the closing should be planned, including the use of a checklist. By *Rex Heeseman*

[3] Comment

[a] Damages for Delay or Acceleration

When the contractor has continued to perform, despite breaches of the contract by the owner, the measure of its damages for the breaches is the unpaid contract price plus any additional expense attributable to the breach [*B.C. Richter Contracting Co. v. Continental Cas. Co.* (1964) 230 Cal.App.2d 491, 500, 502-503, 41 Cal.Rptr. 98].

These additional expenses can include both additional labor, services, equipment, or materials required to be provided and escalations in the prices on those items already required under the contract [*Maurice L. Bein, Inc. v. Housing Authority* (1958) 157 Cal.App.2d 670, 689, 321 P.2d 753]. Those expenditures can be the product of (1) delays resulting from the defendant's breach of contract [*Israel v. Campbell* (1958) 163 Cal.App.2d 806, 817-818, 330 P.2d 83], (2) inefficiencies in the work resulting from the defendant's breach of contract [*Israel v. Campbell* (1958) 163 Cal.App.2d 806, 818-819, 330 P.2d 83; *Maurice L. Bein, Inc. v. Housing Authority* (1958) 157 Cal.App.2d 670, 677-678, 688-689, 321 P.2d 753; see *C. Norman Peterson Co. v. Container Corp. of America* (1985) 172 Cal.App.3d 628, 644-647, 218 Cal.Rptr. 592 (delays due to redesign because of poor engineering and excessive number of required changes not originally contemplated by parties)], or (3) acceleration of the work resulting from the defendant's breach [*Tombigbee Constructors v. United States (Ct. Cl. 1970)* 420 F.2d 1037, 1046-1048; see *Huber, Hunt & Nichols, Inc. v. Moore* (1977) 67 Cal.App.3d 278, 307, 136 Cal.Rptr. 603].

[b] Overhead and Profit

To the fair and reasonable value of the additional labor, services, equipment, and materials the plaintiff had to provide on account of the defendant's breaches of the contract, appropriate amounts should be added to cover overhead expenses

and the profit the plaintiff could have earned on these expenditures [*Salinas v. Souza & McCue Const. Co.* (1967) 66 Cal.2d 217, 225, 57 Cal.Rptr. 337, 424 P.2d 921 , *overruled on other grounds*, *Helfend v. So. Cal. Rapid Transit Dist.* (1970) 2 Cal.3d 1, 84 Cal.Rptr. 173, 465 P.2d 61 ; *see C. Norman Peterson Co. v. Container Corp. of America* (1985) 172 Cal.App.3d 628, 644-647, 649-650, 218 Cal.Rptr. 592 (trial court award of unreimbursed costs, plus 6.68 percent to cover overhead and profit, was affirmed)]. The plaintiff must introduce evidence to support its claim of overhead expense [*Allen v. Gardner* (1954) 126 Cal.App.2d 335, 343-345, 272 P.2d 99] and to support its claim of the profit it would otherwise have earned [*Warner Constr. Corp. v. City of Los Angeles* (1970) 2 Cal.3d 285, 301-302, 85 Cal.Rptr. 444, 466 P.2d 996]. If the contract contains provisions for mark-ups on extra work [see California Department of Transportation, Standard Specifications (1999 ed.), § 9-1.103] which are fair and adequate, they are generally accepted for this purpose.

This instruction does not apply to lost profits for work the contractor was not permitted to do [see *De Flavio v. Estell* (1959) 173 Cal.App.2d 226, 231-233, 343 P.2d 150 ; *Stark v. Shaw* (1957) 155 Cal.App.2d 171, 180-181, 317 P.2d 182 ; *Hensler v. City of Los Angeles* (1954) 124 Cal.App.2d 71, 87-88, 268 P.2d 12] nor to overhead in that situation [*Dallman Co. v. Southern Heater Co.* (1968) 68 Cal.Rptr. 873].

LexisNexis Matthew Bender Expert Practice Tip--May Need Expert: Calculations of overhead and profit may require expert testimony. *By Ronald Oster*

[c] Recovery of Effects of Inflation or Costs of Borrowing Money

In California, a contractor is not permitted to recover damages to compensate for the effects of inflation or the costs of borrowing money resulting from the defendant's wrongful withholding of money due in the absence of an express agreement between the parties that these items may be included as an element of damage [*C. Norman Peterson Co. v. Container Corp. of America* (1985) 172 Cal.App.3d 628, 649-651, 218 Cal.Rptr. 592].

To the extent that recognition has been given to these factors, the issue has arisen in the context of tort cases wherein the purposes and calculation of damages differ from those in contract disputes [see *Rovetti v. City and County of San Francisco* (1982) 131 Cal.App.3d 973, 183 Cal.Rptr. 1 (leak in sewage line); *Camrosa County Water Dist. v. Southwest Welding & Mfg. Co.* (1975) 49 Cal.App.3d 951, 123 Cal.Rptr. 93 (breach of warranty)]. At the federal level, the Contract Disputes Act of 1978 [41 U.S.C. § 611 *et seq.*] permits federal contractors to recover interest on their contract claims and Congress has indicated that the cost of money to finance a contractor's additional work while pursuing its legal remedy is a legitimate cost of performing the additional work, and is recoverable under that Act. California does not have a similar statute.

Legal Topics:

For related research and practice materials, see the following legal topics:

Public Contracts LawDispute ResolutionGeneral OverviewPublic Contracts LawPerformanceGeneral OverviewPublic Contracts LawPerformanceExcusable DelayPublic Contracts LawTerminationsDamagesReal Property LawConstruction LawContractsReal Property LawConstruction LawContractors & Subcontractors



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California Forms of Jury Instruction

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CHAPTER 3I Matthew Bender Construction Contract Instructions
PART E DAMAGES

2-3I California Forms of Jury Instruction MB 300I.105

MB 300I.105 Measure of Damages on Mechanics' Lien

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

If, under the court's instruction, you find that Plaintiff is entitled to a verdict against Defendant on Plaintiff's mechanics' lien, you must award Plaintiff the reasonable value of the labor, services, equipment, and materials provided by Plaintiff, or the agreed on price in Plaintiff's contract with _____ [person with whom plaintiff contracted], whichever is less.

Authorities: *Gayle Mfg. Co. v. Federal Sav. & Loan Ins. Corp.* (9th Cir. 1990) 910 F.2d 574, 583 ; *Civ. Code* § 3123; *Neptune Gunit Co. v. Monroe Enterprises* (1964) 229 Cal.App.2d 439, 446-447, 40 Cal.Rptr. 367 .

[2] Use of Instruction

This instruction should be used in mechanics' lien foreclosure actions to set forth the amount that can be recovered. If the preliminary 20-day notice was given late, so the plaintiff only seeks recovery for labor and materials provided after the 20th day before that notice was given [*Civ. Code* § 3097(d)], then this instruction must be modified accordingly. In addition, if there is a dispute over whether the agreed on price in plaintiff's contract was increased by extra work for which change orders should have been executed, then this instruction must be modified or augmented accordingly. If additional damages are sought, the appropriate instructions in Ch. 3E, *Matthew Bender Contract Damages Instructions*, should also be used.

[3] Comment

The maximum recovery on a mechanics' lien is the reasonable value of the labor, services, equipment and materials furnished by the plaintiff or the contract price of the plaintiff's contract, whichever is less [*Civ. Code* § 3123(a); see

Gayle Mfg. Co. v. Federal Sav. & Loan Ins. Corp. (9th Cir. 1990) 910 F.2d 574, 583 ; *Neptune Gunit Co. v. Monroe Enterprises* (1964) 229 Cal.App.2d 439, 446-447, 40 Cal.Rptr. 367]. The claimant may include in the lien any amount due for labor, services, equipment, or materials furnished based on a written modification of the contract or as a result of the contract's rescission, abandonment, or breach. If the contract is rescinded, abandoned, or breached, the amount of the lien may not exceed the reasonable value of the labor, services, equipment, and materials furnished by the claimant [Civ. Code § 3123(b); see *Basic Modular Facilities, Inc. v. Ehsanipour* (1999) 70 Cal.App.4th 1480, 1484-1485, 83 Cal.Rptr.2d 462 (in case of excessive mechanics' lien, trial court need not strike lien in its entirety but instead may reduce lien to its proper amount)].

This instruction does not cover the situation in which the plaintiff only completed a portion of the contract and therefore the maximum amount the plaintiff can recover on the lien is a pro rata portion of the contract price [*University Casework Systems, Inc. v. Superior Court* (1974) 41 Cal.App.3d 263, 266-267, 115 Cal.Rptr. 836]. Nor does this instruction cover offsets to which the owner may be entitled against the claim of a prime contractor plaintiff for the amount of liens recorded by subcontractors and for the costs of defending foreclosure suits on them [Civ. Code §§ 3140, 3153; see *Ferelli v. Weaver* (1962) 210 Cal.App.2d 108, 114, 26 Cal.Rptr. 439]. This instruction also does not cover priority problems that may arise among lien claimants and others [see Civ. Code §§ 3130, 3134-3140; *Lambert Steel Co. v. Heller Financial, Inc.* (1993) 16 Cal.App.4th 1034, 1038-1039, 20 Cal.Rptr.2d 453].

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property LawConstruction LawContractsReal Property LawConstruction LawContractors & SubcontractorsReal Property LawNonmortgage LiensMechanics' Liens



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California Forms of Jury Instruction

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CHAPTER 3I Matthew Bender Construction Contract Instructions
PART E DAMAGES

2-3I California Forms of Jury Instruction MB 300I.106

MB 300I.106 Measure of Damages on Payment Bond

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

If, under the court's instruction, you find that Plaintiff is entitled to a verdict against Defendant _____ [surety] on the payment bond, you must award Plaintiff the entire amount that is owed to Plaintiff by _____ [party with whom plaintiff contracted]. However, Plaintiff's recovery may not exceed the amount of the bond, which is \$_____.

Authorities: *Civ. Code §§ 2787, 2809, 3096, 3226, 3235, 3248; Gov. Code § 66499.2; Amerson v. Christman (1968) 261 Cal.App.2d 811, 825, 68 Cal.Rptr. 378 .*

[2] Use of Instruction

This instruction should be used in an action against a surety to define the amount of damages that can be awarded against the surety on a payment bond on private work [see *MB 300I.07*], on public work [see *MB 300I.08*], or on an off-site improvement [see *MB 300I.09*]. There may be conditions in a private work payment bond, especially a bond not covered by the statutes [*Civ. Code §§ 3226, 3235*] that may limit the extent of the damages recoverable from the surety. If additional damages are sought, the appropriate instructions in Ch. 3E, *Matthew Bender Contract Damages Instructions*, should also be used.

This instruction could also apply to a suit by subcontractors on the prime contractor's performance bond [see *MB 300I.11*].

[3] Comment

As a general rule, the surety stands in the shoes of its principal and has all the liability of its principal up to the bond's penal sum [Civ. Code §§ 2787, 2808, 2809, 3096; see *T&R Painting Construction, Inc. v. St. Paul Fire & Marine Ins. Co.* (1994) 23 Cal.App.4th 738, 746, 29 Cal.Rptr.2d 199 ; *Amerson v. Christman* (1968) 261 Cal.App.2d 811, 825, 68 Cal.Rptr. 378]. In the case of the public works payment bond, the surety is also liable for all legitimate claims of subcontractors and materialmen down the line, to the extent of the statutory coverage [Civ. Code §§ 3226, 3248; *Powers Regulator Co. v. Seaboard Surety Co.* (1962) 204 Cal.App.2d 338, 341-342, 350, 22 Cal.Rptr. 373]. That means the claimant can recover the balance of the contract price, and even interest pursuant to the contract, against the payment bond surety [*General Elec. Co. v. Central Surety & Ins. Corp.* (1965) 232 Cal.App.2d 590, 602-603, 43 Cal.Rptr. 48 ; *Hollywood Elec. Co. v. Jack Baskin, Inc.* (1956) 146 Cal.App.2d 399, 403-405, 303 P.2d 1049]. The same rule arguably applies to private work payment bonds [see Civ. Code §§ 3096, 3226, 3235], and off-site improvement payment bonds [see Gov. Code § 66499.2].

The surety's liability on the bond is determined by the contract price between the claimant and the person with whom the claimant contracted; it is not limited to the reasonable value as is the recovery on a mechanics' lien [*John A. Artukovich Sons, Inc. v. American Fidelity Fire Ins. Co.* (1977) 72 Cal.App.3d 940, 946-947, 140 Cal.Rptr. 434 (private work payment bond); see *Washington Int'l Ins. Co. v. Superior Court (Backlund)* (1998) 62 Cal.App.4th 981, 988-989, 73 Cal.Rptr.2d 282 (surety's liability on public work payment bond included statutory interest penalty)].

If the underlying contract for which the plaintiff is seeking recovery under the payment bond includes an attorneys' fee provision, the plaintiff should be able to recover those fees from the surety despite the fact that the bond itself does not include a provision for attorneys' fees. However, any recovery is subject to the overall limitation on the amount of the surety's liability, i.e., the penal sum of the bond [see *T&R Painting Construction, Inc. v. St. Paul Fire & Marine Ins. Co.* (1994) 23 Cal.App.4th 738, 746, 29 Cal.Rptr.2d 199 (subcontractor allowed to recover its attorneys' fees from contractor's surety based on provision in subcontract)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawTypes of ContractsGuaranty ContractsPublic Contracts LawTerminationsPerformance BondsReal Property LawConstruction LawContractsReal Property LawConstruction LawContractors & Subcontractors



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CHAPTER 3I Matthew Bender Construction Contract Instructions
PART E DAMAGES

2-3I California Forms of Jury Instruction MB 300I.107

MB 300I.107 Measure of Damages for Completion of Construction Contract Abandoned by Builder (Work Performed on Property Owned by Plaintiff)

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

If you find that _____ [*builder*] breached its contract with _____ [*owner*] by ceasing performance of the building contract before the contract was substantially completed, you are to award _____ [*owner*] damages for breach of contract measured by the reasonable cost to _____ [*owner*] of completing the construction contract. You may also award damages resulting from the delayed completion of _____ [*describe project*].

_____ [*Owner*]'s damages are to be computed by subtracting the amount of the original contract price from the total amount expended by the plaintiff to complete the original contract. The costs to complete the original contract include all of the following costs:

1. The cost of discharging any mechanics' liens recorded against the building project by any unpaid subcontractors to _____ [*builder*];
2. The costs of engaging another contractor to finish the original contract work;
3. All payments by _____ [*owner*] to subcontractors and suppliers engaged by _____ [*builder*] who either:
 - (a) [Filed/Threatened to file] mechanic's liens; or

(b) Refused to work any further on the building project or to furnish any more materials or supplies to the project until any unpaid balances on their subcontracts were paid; and

4. The cost of fixing _____ [builder]'s work if any of _____ [builder]'s work was found to be defective.

Although the reasonable cost of completing the work is the measure of _____ [owner]'s right of recovery, _____ [owner]'s actual cost of completing the construction contract is evidence of the reasonable cost of completion.

Finally, _____ [owner] is entitled to recover any losses that [he/she/it] suffered because the job's completion was delayed beyond the date provided in the contract. [Unless you find that the contract provided its own measure of damages for delay,] [The/the] measure of damages for the delayed completion of the construction is the property's rental value during the time that _____ [owner] has lost the use of the property. [OPTIONAL (See Use of Instruction) _____ (The owner) may also recover any other damages caused by the delay if Defendant could have been expected to realize, at the time the contract was made, that a breach of the contract was likely to cause those types of loss or harm.]

Authorities: *Tally v. Ganahl* (1907) 151 Cal. 418, 423-424, 90 P. 1049 ; *Long Beach Etc. Dist. v. Dodge* (1902) 135 Cal. 401, 405-406, 67 P. 499 ; *Amerson v. Christman* (1968) 261 Cal.App.2d 811, 822-825, 68 Cal.Rptr. 378 ; *Benson v. Andrews* (1955) 138 Cal.App.2d 123, 135, 292 P.2d 39 ; *Gerwin v. Southeastern Cal. Assn. of Seventh Day Adventists* (1971) 14 Cal.App.3d 209, 218-219, 92 Cal.Rptr. 111 ; *Sabraw v. Kaplan* (1962) 211 Cal.App.2d 224, 225, 226, 27 Cal.Rptr. 81 ; *Mahone v. Thompson* (1927) 83 Cal.App. 561, 565, 257 P. 127 ; *O'Brien v. Garibaldi* (1911) 15 Cal.App. 518, 523, 115 P. 249 ; *Bacigalupi v. Phoenix Bldg. Etc. Co.* (1910) 14 Cal.App. 632, 637, 112 P. 892 .

[2] Use of Instruction

This instruction, or applicable portions of this instruction, should be used when a building contractor breaches the contract and abandons construction of the building project and the property owner completes construction himself or herself or by using another contractor. The instruction is only to be used when the plaintiff is the property owner seeking damages for completion of construction [see [3][a], *below*, for discussion of how measure of damages depends on injured party's ownership of property to be improved].

When this instruction is given, the contractor may request an instruction on the right to stop work for failure to make progress payments [see *MB 300I.38*] or on other types of breach of contract or legal excuse [see *MB 300I.30 -MB 300I.39* (typical breaches), *MB 300I.50-MB 300I.80* (defenses); see also Ch. 3, *California Judicial Council Contracts Instructions*, *CACI* Nos. 330- 337 (defenses), and Ch. 3F, *Matthew Bender Contract Defenses Instructions*]. If the project was abandoned because of a dispute over the terms of the construction contract, this instruction should be given with instructions on contract interpretation [see Ch. 3, *California Judicial Council Contracts Instruction*, *CACI* Nos. 314- 320, and Ch. 3B, *Matthew Bender Interpretation of Contract Instructions*].

If the plaintiff claims additional damages beyond the reasonable cost of completion plus reasonable rental value as damages for delay, the optional final sentence may be used.

For related Judicial Council instructions, see [3][b], *below*.

LexisNexis Matthew Bender Expert Practice Tip--Use Checklist: This complex damages instruction could easily be converted into a checklist for closing argument with the use of visual aids. *By Ronald Oster*

[3] Comment

[a] Damages for Breach of Construction Contract

The proper measure of damages for breach of a contract to construct improvements on the plaintiff's property is ordinarily the reasonable cost to the plaintiff of completing the work and not the difference between the value of the property and its value had the improvements been constructed [*Glendale Fed. Sav. & Loan Assn. v. Marina View Heights Dev. Co.* (1977) 66 Cal.App.3d 101, 123, 135 Cal.Rptr. 802 ; *Jones v. Kvistad* (1971) 19 Cal.App.3d 836, 843, 97 Cal.Rptr. 100 ; *Kitchel v. Acree* (1963) 216 Cal.App.2d 119, 123, 30 Cal.Rptr. 714 ; *Shell v. Schmidt* (1958) 164 Cal.App.2d 350, 357-366, 330 P.2d 817]. If the improvements are to be made on property not owned by the plaintiff or the injured party is otherwise unable to complete the work itself, the proper measure of damages is the difference in value of the property with and without the promised performance, because that is the contractual benefit of which the injured party is deprived [*Coughlin v. Blair* (1953) 41 Cal.2d 587, 600, 262 P.2d 305 ; *Glendale Fed. Sav. & Loan Assn. v. Marina View Heights Dev. Co.* (1977) 66 Cal.App.3d 101, 124, 135 Cal.Rptr. 802 ; *Scott v. Travelodge Corp.* (1968) 265 Cal.App.2d 881, 883, 71 Cal.Rptr. 547 ; *Rakish v. Valerga* (1954) 125 Cal.App.2d 274, 277-278, 270 P.2d 50].

When a building contractor abandons a building contract and the owner elects to complete the construction, the owner's damages are computed by subtracting the amount of the original contract price from the total amounts expended by the owner to complete the original contract [*Amerson v. Christman* (1968) 261 Cal.App.2d 811, 823-824, 68 Cal.Rptr. 378 ; *Bacigalupi v. Phoenix Bldg. etc. Co.* (1910) 14 Cal.App. 632, 637, 112 P. 892]. The costs of completion include the costs of discharging any mechanics' liens recorded against the building project by unpaid subcontractors to the contractor, and the costs of engaging another contractor to finish the original contract work [*Benson v. Andrews* (1955) 138 Cal.App.2d 123, 135, 292 P.2d 39]. The costs of completion also include the sums paid by the owner to subcontractors and materialmen engaged by the departed contractor who file mechanics' liens or refuse to work any further on the project until the unpaid balances on their subcontracts are paid [*Tally v. Ganahl* (1907) 151 Cal. 418, 423-424, 90 P. 1049 ; *O'Brien v. Garibaldi* (1911) 15 Cal.App. 518, 523, 115 P. 249]. If the contractor's work is found to have been defective, the cost of correcting these defects is part of the cost of completing the original contract [*Long Beach Etc. Dist. v. Dodge* (1902) 135 Cal. 401, 405-406, 67 P. 499].

Although the reasonable cost of completing the work called for by the contract is the measure of the project owner's right of recovery, in the absence of evidence to the contrary, the actual cost of completion is evidence of the reasonable cost of completion [*Bacigalupi v. Phoenix Bldg. etc. Co.* (1910) 14 Cal.App. 632, 637, 112 P. 892 ; *see Gerwin v. Southeastern Cal. Assn. of Seventh Day Adventists* (1971) 14 Cal.App.3d 209, 218, 219, 92 Cal.Rptr. 111 (evidence of cost, uncontradicted by other evidence, is sufficient evidence of value)]. The project owner may also be able to recover consequential or special damages proximately caused by the contractor's abandonment [Civ. Code § 3300 (measure of damages for breach of contract is amount that will compensate injured party for all detriment proximately caused by breach); *Amerson v. Christman* (1968) 261 Cal.App.2d 811, 822-825, 68 Cal.Rptr. 378].

Finally, when a building contractor fails to complete the building contract, the project owner can recover from the building contractor any losses the project owner suffers because the completion of the job was delayed beyond the date provided in the contract [*Sabraw v. Kaplan* (1962) 211 Cal.App.2d 224, 225-226, 27 Cal.Rptr. 81 ; *Mahone v. Thompson* (1927) 83 Cal.App. 561, 565, 257 P. 127]. The measure of damages for the delayed completion of the construction is generally the property's rental value during the period that the owner has lost the property's use [*Sabraw v. Kaplan* (1962) 211 Cal.App.2d 224, 227, 27 Cal.Rptr. 81 ; *Mahone v. Thompson* (1927) 83 Cal.App. 561, 565-566, 257 P. 127].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 3, *California Judicial Council Contracts Instructions*]:

CACI No. 354 Owner's/Lessor's Damages for Breach of Contract to Construct Improvements on Real Property

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts Law Remedies Compensatory Damages General Overview Real Property Law Construction Law Contracts Real Property Law Construction Law Contractors & Subcontractors



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California Forms of Jury Instruction

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CHAPTER 3I Matthew Bender Construction Contract Instructions
PART E DAMAGES

2-3I California Forms of Jury Instruction MB 300I.108

MB 300I.108 Measure of Damages for Lost Profits on Deleted Work

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

If, under the court's instruction, you find that Plaintiff is entitled to a verdict against Defendant for requiring Plaintiff to eliminate work of such a scope that the contract's object or purpose was altered, then you must award Plaintiff the profits that [he/she/it] would have made if Defendant had not eliminated this work.

Authority: Boomer v. Abbett (1957) 154 Cal.App.2d 218, 228-229, 315 P.2d 924 .

[2] Use of Instruction

This instruction should be used to explain the measure of damages in a suit for the breach of a construction contract when it is alleged that the defendant breached the contract by requiring such significant deletions from the contracted work that the agreement's nature was changed. This instruction should be used with the instruction in MB 300I.31 on changes in the scope of the work as a breach of the construction contract.

If it is alleged that the claim for loss of profits is uncertain, speculative, or hypothetical, one or both parties may wish to offer an instruction on the requirement of reasonable certainty in contract damages under *Civ. Code* § 3301. For an instruction on this point, see Ch. 3E, *Matthew Bender Contract Damages Instructions*, MB 300E.06.

If the action is by a subcontractor against the prime contractor, the references to the contract in the instruction should be changed to subcontract.

[3] Comment

When a property owner or a contractor breaches a construction contract by deleting part of the work that the contractor or subcontractor was to perform under the contract, the contractor or subcontractor may recover as damages the profits lost because of this breach [*Boomer v. Abbett* (1957) 154 Cal.App.2d 218, 228-229, 315 P.2d 924]. The deletion of work called for by a construction contract is a breach of the contract only if the deletion materially alters the contract's fundamental object [*Boomer v. Abbett* (1957) 154 Cal.App.2d 218, 226, 315 P.2d 924 ; see MB 300I.31[3] for discussion of when change in scope of work amounts to breach of construction contract].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts Law Remedies General Overview Contracts Law Types of Contracts Construction Contracts Real Property Law Construction Law Contracts Real Property Law Construction Law Contractors & Subcontractors



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CHAPTER 3I Matthew Bender Construction Contract Instructions
PART E DAMAGES

2-3I California Forms of Jury Instruction MB 300I.109

MB 300I.109 Measure of Damages for Extra Work

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

If, under the court's instruction, you find that Plaintiff is entitled to a verdict against Defendant because Defendant breached the contract, then you must determine those damages that are legally caused by the breach of contract if:

1. The breach was a substantial factor in bringing about the damages; and

2. Either:

a. This type of damage

_____ [for labor, services, equipment, or materials that Plaintiff was not required to furnish under the contract] could have been reasonably contemplated or foreseen by the parties, at the time they made the contract, as being the probable result of such a breach; or

b. The party who breached the contract knew or should have known, at the time the party entered into the contract, that this type of damage

_____ [for labor, services, equipment, or materials that Plaintiff was not required to furnish under the contract] could probably be suffered by the other party if the party breached the contract.

Then you must award damages to plaintiff in an amount that will compensate plaintiff for all the detriment legally caused by the breach of contract including the reasonable value of the labor, services, equipment, or materials not required to be furnished under the contract.

Authorities: *City Street Imp. Co. v. Kroh* (1910) 158 Cal. 308, 323, 110 P. 933 ; *Bolster Co. v. J.C. Boespflug etc. Co.* (1959) 167 Cal.App.2d 143, 151, 334 P.2d 247 ; *Parkford v. Union Drilling Co.* (1931) 118 Cal.App. 538, 544, 5 P.2d 440 .

[2] Use of Instruction

This instruction should be used to explain the measure of damages in a suit for the breach of a construction contract when it is alleged that the defendant required the plaintiff to do extra work, then failed to compensate the plaintiff for that extra work. The instruction should be used only when the extras are of a different character from the work called for in the contract and no price has been agreed on for the extra work [see *Bolster Co. v. J.C. Boespflug etc. Co.* (1959) 167 Cal.App.2d 143, 151, 334 P.2d 247 ; see also [3], below]. This instruction should be used with the instruction in MB 300I.30 on extra work as a breach of the construction contract.

If the action is by a subcontractor against the prime contractor, the references to the contract in the instruction should be changed to subcontract.

LexisNexis Matthew Bender Expert Practice Tip--Consider Using Alternative Language: The last sentence of this instruction could be confusing to the jury. The instruction could be re-phrased to say that the plaintiff is entitled to recover the reasonable value of the labor and services that were "in addition to those required to be furnished under the contract." *By Ronald Oster*

LexisNexis Matthew Bender Expert Practice Tip--Foreseeability Will Require Some Explanation: The idea of "foreseeability" will be alien to some jurors. So, plan the closing accordingly. *By Rex Heeseman*

[3] Comment

When a property owner or a contractor breaches a construction contract by requiring a contractor or subcontractor to perform extra work [see MB 300I.30[3] for discussion of what constitutes extra work], the contractor or subcontractor is entitled to recover damages for that breach. When the extras are of a different character from the work called for in the contract and no price is agreed on for the extra work, the plaintiff is entitled to recover the reasonable value of the work performed [*City Street Imp. Co. v. Kroh* (1910) 158 Cal. 308, 323, 110 P. 933 ; *Bolster Co. v. J.C. Boespflug etc. Co.* (1959) 167 Cal.App.2d 143, 151, 334 P.2d 247 ; *Parkford v. Union Drilling Co.* (1931) 118 Cal.App. 538, 544, 5 P.2d 440]. However, if the extra work is of the same character as work already provided for in the original contract, then the additional work is to be paid for according to the schedule of prices set in that original contract [see *Frank T. Hickey, Inc. v. L.A. J.C. Council* (1954) 128 Cal.App.2d 676, 684, 276 P.2d 52 (when contract was for fixed amount of excavation work at so much per cubic yard, additional excavation was to be compensated at same price per cubic yard)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts Law Remedies Compensatory Damages General Overview Real Property Law Construction Law Contracts Real Property Law Construction Law Contractors & Subcontractors



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CHAPTER 3I Matthew Bender Construction Contract Instructions
PART E DAMAGES

2-3I California Forms of Jury Instruction MB 300I.110

MB 300I.110 Measure of Damages for Violation of Statutory Construction Standards for New Residence Sold on or After January 1, 2003

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

If, under the court's instruction, you find that Plaintiff is entitled to a verdict against Defendant because Plaintiff's residence does not meet construction standard _____ [specify standard], then you must determine [include if appropriate: , subject to your finding on the defense that _____ (specify affirmative defense) ,] those damages that are legally permitted for a violation of that standard.

For a violation of construction standard _____ [specify standard], Plaintiff is entitled to damages for the following:

[Choose as appropriate to evidence presented]

The reasonable cost of repairing the violation.

[and/or]

The reasonable cost of repairing any damages caused by Defendant's repair efforts.

[and/or]

The reasonable cost of repairing and rectifying any damages resulting from the failure of Plaintiff's residence to meet the standard.

[*and/or*]

The reasonable cost of removing and replacing any improper repair by Defendant.

[*and/or*]

Plaintiff's reasonable relocation and storage expenses.

[*and/or*]

Any lost business income resulting from Plaintiff's loss of his/her principal place of business licensed to be operated from the residence.

[*and/or*]

Plaintiff's reasonable costs incurred in investigating the violation.

Authorities: *Civ. Code* § 944.

[2] Use of Instruction

This instruction should be used to instruct the jury on the statutorily-prescribed damages that may be awarded on the jury's finding that one or more of the statutory construction standards were violated. Modification of the instruction may be required if the plaintiff's residence is a detached single-family home. In such a case, the right to the reasonable value of repairing any nonconformity is limited to the repair costs, or the diminution in the home's current value caused by the nonconformity, whichever is less, subject to the common law personal use exception [*Civ. Code* § 943(b)].

[3] Comment

[a] Actions for Defective Construction in New Residences Sold on or After January 1, 2003--Overview and Applicability

In accordance with Division 2, Part 2, Title 7 of the Civil Code, "Requirements for Actions for Construction Defects" [*Civ. Code* § 895 *et seq.*], any action against a builder, general contractor, subcontractor, individual product manufacturer, or design professional, seeking recovery of damages arising out of, or related to deficiencies in, residential construction, design, specifications, surveying, planning, supervision, testing, or observation of construction when the property involved is a new residential unit (excluding a condominium conversion) when the purchase agreement with the buyer was signed by the seller on or after January 1, 2003, is governed by detailed statutory standards related to the various functions and components of the building [*see Civ. Code* §§ 896, 938]. The action must be preceded by a mandatory pre-litigation procedure, which provides the potential defendant with a right to attempt a repair of any alleged defect before litigation. The pre-litigation procedure also includes inspections and exchanges of documentation between the parties under certain circumstances, and mediation at various points, all pursuant to

statutory time frames [*see Civ. Code §§ 910-938*].

At least in the case of construction defect situations involving new residential units (excluding condominium conversions) when the purchase agreement with the buyer was signed by the seller on or after January 1, 2003, the Legislature effectively rendered inapplicable the effects of a decision in which the Supreme Court held, among other things, that construction defects must cause actual damage before they can be actionable in tort [*see Aas v. Superior Court (2000) 24 Cal.4th 627, 636-647, 101 Cal.Rptr.2d 718, 12 P.3d 1125*].

The provisions, standards, rights, and obligations set forth in Title 7 are binding on all original purchasers and their successors-in-interest. Associations are considered to be original purchasers and have standing to enforce these provisions, standards, rights, and obligations [*Civ. Code § 945*].

Title 7 does not apply to any action by a claimant to enforce a contract or express contract provision, or any action for fraud, personal injury, or violation of a statute (other than Title 7) [*Civ. Code § 943(a)*].

Title 7 does not eliminate or abrogate the requirements of *Code Civ. Proc. § 411.35*, which requires plaintiff's counsel to furnish an Attorney's Certificate in an action against a design professional, for claims and damages that are not covered by the statutory scheme governing construction defect litigation [*Civ. Code § 937*].

[b] Damages

The homeowner is entitled to recover all of the following as damages in an action on a claim based on violation of the statutory construction standards [*Civ. Code § 944*]:

- The reasonable cost of repairing any violation of the statutory construction standards.
- The reasonable cost of repairing any damages caused by the repair efforts.
- The reasonable cost of repairing and rectifying any damages resulting from the home's failure to meet the standards.
- The reasonable cost of removing and replacing any improper repair by the builder.
- Reasonable relocation and storage expenses.
- Lost business income if the home was used as a principal place of business licensed to be operated from the home.
- Reasonable investigative costs for each established violation.
- All other costs or fees recoverable by contract or statute.

As to any claims involving a detached single-family home, the homeowner's right to the reasonable value of repairing any nonconformity is limited to the repair costs, or the diminution in the home's current value caused by the nonconformity, whichever is less, subject to the common law personal use exception [*Civ. Code § 943(b)*].

Damages awarded in an action by the claimant that was not brought under Title 7--for example, an action to enforce a contract or express contractual provision, or an action for fraud, personal injury, or violation of another statute--must be reduced by any amounts recovered for the same items in an action under Title 7 [*Civ. Code § 943(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts Law Remedies General Overview Governments Legislation Statutory Remedies & Rights Real Property
Law Construction Law Contracts Real Property Law Construction Law Contractors & Subcontractors Real Property
Law Construction Law Defects Real Property Law Purchase & Sale Remedies Liability of Developers & Vendors



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CHAPTER 3I Matthew Bender Construction Contract Instructions
PART E DAMAGES

2-3I California Forms of Jury Instruction MB 300I.111-MB 300I.119

Reserved for Future Use

MB 300I.111Reserved for Future Use



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CHAPTER 3I Matthew Bender Construction Contract Instructions
PART F. MISCELLANEOUS

2-3I California Forms of Jury Instruction MB 300I.120

MB 300I.120 Government Party

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

When _____ [government party] enters into a contract, it is liable for a breach of that contract in the same manner as a private party would be.

Authorities: *Souza & McCue Const. Co. v. Superior Court of San Benito County* (1962) 57 Cal.2d 508, 510, 20 Cal.Rptr. 634, 370 P.2d 338 ; *M. F. Kemper Constr. Co. v. Los Angeles* (1951) 37 Cal.2d 696, 704, 235 P.2d 7 ; *Chapman v. State of California* (1894) 104 Cal. 690, 694, 38 P. 457 ; *Hensler v. City of Los Angeles* (1954) 124 Cal.App.2d 71, 78, 268 P.2d 12 .

[2] Use of Instruction

This instruction should be used when one of the parties is a governmental entity.

LexisNexis Matthew Bender Expert Practice Tip--Special Concerns Exist When Dealing With

Governmental Entities: There is always a concern that a government party will be given special treatment by some jurors who are concerned about taxpayer dollars. This instruction helps address that concern. *By Ronald Oster*

[3] Comment

A contract entered into by a governmental entity and a private party is governed by the same rules that apply to contracts between private parties [*Souza & McCue Const. Co. v. Superior Court* (1962) 57 Cal.2d 508, 510, 20 Cal.Rptr. 634, 370 P.2d 338 ; *M. F. Kemper Constr. Co. v. Los Angeles* (1951) 37 Cal.2d 696, 704, 235 P.2d 7 ; *Chapman v. State of California* (1894) 104 Cal. 690, 694, 38 P. 457 ; *Hensler v. City of Los Angeles* (1954) 124

Cal.App.2d 71, 78, 268 P.2d 12]. This instruction is necessary to disabuse any juror of the idea that governmental entities are to be treated any differently than private parties.

Legal Topics:

For related research and practice materials, see the following legal topics:

GovernmentsLocal GovernmentsClaims By & AgainstGovernmentsState & Territorial GovernmentsClaims By & AgainstPublic Contracts LawDispute ResolutionGeneral Overview



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CHAPTER 3I Matthew Bender Construction Contract Instructions
PART F. MISCELLANEOUS

2-3I California Forms of Jury Instruction MB 300I.121

MB 300I.121 "Stop Notice" Defined

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

A "stop notice" is a written notice, signed and verified by the lien claimant or [his/her/its] agent, stating all of the following:

- (1) The kind of labor, services, equipment, or materials furnished or agreed to be furnished by the claimant;
- (2) The name of the person to or for whom these things were done or furnished;
- (3) The amount in value of that already done or furnished and of all that was agreed to be done or furnished; and
- (4) The claimant's name and address.

Authority: *Civ. Code § 3103.*

[2] Use of Instruction

This instruction should be used with the instructions in MB 300I.62, MB 300I.63, MB 300I.69, and MB 300I.70 to define "stop notice."

[3] Comment

This definition of "stop notice" is taken from *Civ. Code § 3103*. Stop notices may not be applied to construction funds

held and administered in California for private works of improvement on sites located outside of California. Because a stop notice may only be served and enforced by a party entitled to record a mechanic's lien, a stop notice is not an available remedy to enforce payment for labor or materials furnished to a private work of improvement outside of California when a mechanics' lien obviously could not be recorded under California law [*Mechanical Wholesale Corp. v. Fuji Bank, Ltd.* (1996) 42 Cal.App.4th 1647, 1651, 50 Cal.Rptr.2d 466].

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property LawConstruction LawContractsReal Property LawConstruction LawContractors & SubcontractorsReal Property LawNonmortgage LiensMechanics' Liens



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CHAPTER 3I Matthew Bender Construction Contract Instructions
PART F. MISCELLANEOUS

2-3I California Forms of Jury Instruction MB 300I.122

MB 300I.122 "Bonded Stop Notice" Defined

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

A "bonded stop notice" is a stop notice given to a construction lender and accompanied by a bond with good and sufficient sureties for 11/4 times the amount claimed. This bond must be conditioned for payment so that if Defendant gets the judgment in the action on _____ [the stop notice claim *or* the lien filed by the claimant], then the claimant will pay all costs that are awarded against the owner, the original contractor, the construction lender, or any of them, and also all the damages that the owner, the original contractor, or the construction lender suffer because of the equitable garnishment resulting from _____ [the stop notice claim *or* the lien]. However, the claimant will not pay more than the bond's amount.

The bonded stop notice must be delivered to a responsible officer or person at the construction lender's office or sent to that office by registered mail. If the lender has branch offices, the notice is not effective unless delivered or sent to the branch office that administers or holds the construction funds.

Authority: Civ. Code § 3083.

[2] Use of Instruction

This instruction should be used with the instructions in MB 300I.62, MB 300I.63, MB 300I.69, and MB 300I.70 to define "bonded stop notice."

LexisNexis Matthew Bender Expert Practice Tip--Explain Terms of Art to Jury: This complicated instruction contains numerous terms of art that will have to be explained to the jury. In fact, for some cases and with some jurors, this instruction perhaps should not be given. *By Ronald Oster and Rex Heeseman*

[3] Comment

Civ. Code § 3083 defines "bonded stop notice" as that phrase is defined in [1], *above*. Stop notices may not be applied to construction funds held and administered in California for private works of improvement on sites located outside of California. Because a stop notice may only be served and enforced by a party entitled to record a mechanic's lien, a stop notice is not an available remedy to enforce payment for labor or materials furnished to a private work of improvement outside of California when a mechanics' lien obviously could not be recorded under California law [*Mechanical Wholesale Corp. v. Fuji Bank, Ltd.* (1996) 42 Cal.App.4th 1647, 1651, 50 Cal.Rptr.2d 466].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Remedies Bonds General Overview Real Property Law Construction Law Contracts Real Property Law Construction Law Contractors & Subcontractors Real Property Law Nonmortgage Liens Mechanics' Liens



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CHAPTER 3I Matthew Bender Construction Contract Instructions
PART F. MISCELLANEOUS

2-3I California Forms of Jury Instruction MB 300I.123

MB 300I.123 Contract Consisting of Standard Form and Printed Provisions

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

The construction contract between _____ [party] and _____ [party] is a standard form published by _____ [e.g., the American Institute of Architects or specify other source of form]. The contract refers to [and incorporates] additional documents, [specifically or including _____ (describe additional documents, e.g., plans, specifications, drawings, general conditions, special conditions, and manuscript agreements), which describe in detail _____ [describe content of additional documents, e.g., the specifics of the construction, the method of the construction, and the materials to be used].

All of the referenced [and incorporated] documents are part of the contract and all of the contract documents must be interpreted together in determining the obligations of _____ [party] and _____ [party]. If there is any ambiguity or inconsistency between the printed form and any typewritten or handwritten provisions, the typewritten or handwritten provisions control. If there are both general and specific provisions covering the same subject matter, the specific provision takes precedence over the general provision.

If any printed form provisions are absolutely repugnant to written provisions, the printed form provision must be disregarded.

Authorities: Civ. Code § 1651; Code Civ. Proc. § 1863; *Burns v. Peters* (1936) 5 Cal.2d 619, 623, 55 P.2d 1182 ; *Bird v. American Surety Co.* (1917) 175 Cal. 625, 629, 166 P. 1009 ; *Integrated, Inc. v. Alec Fergusson Electrical Contractor* (1967) 250 Cal.App.2d 287, 58 Cal.Rptr. 503 ; *Meyers v. Housing Authority of Stanislaus County* (1966)

241 Cal.App.2d 721, 723 ; *Wilson v. Keefe* (1957) 150 Cal.App.2d 178, 309 P.2d 516 .

[2] Use of Instruction

This instruction should be used when there are factual issues as to the specific work that the contractor is obligated to perform by the terms of a contract that is partly printed and partly written. If there is a dispute regarding which documents, plans, or specifications were intended by the parties to be incorporated into the contract, an additional instruction on that particular issue will have to be formulated. For additional instructions on the interpretation of written agreements, see Ch. 3, *California Judicial Council Contracts Instructions*, CACI Nos. 314- 320, and Ch. 3B, *Matthew Bender Interpretation of Contract Instructions*.

LexisNexis Matthew Bender Expert Practice Tip--Explain Terms of Art to Jury and Provide

Examples: This is a complicated instruction that contains numerous terms of art that will be unfamiliar to many jurors. The instruction will have to be broken down and explained, with examples, in closing argument. Furthermore, some jurors will be suspicious about a standard form contract being "changed" by more paragraphs or documents. *By Ronald Oster and Rex Heeseman*

[3] Comment

The contract documents for most construction contracts are usually incorporated into the contract by reference, and include plans or drawings, specifications, and general and special conditions [see *Bird v. American Surety Co.* (1917) 175 Cal. 625, 629, 166 P. 1009 ; *Meyers v. Housing Authority of Stanislaus County* (1966) 241 Cal.App.2d 721, 723 ; *Wilson v. Keefe* (1957) 150 Cal.App.2d 178, 309 P.2d 516 ; see also California Real Estate Law & Practice, Ch. 432, *The Owner-Prime Contractor Relationship and Contract* (Matthew Bender); California Legal Forms, Ch. 30D, *Construction Contracts and Subcontracts* (Matthew Bender)]. Even when the contract does not specify that drawings and specifications are made part of the agreement, they are nonetheless part of the contract when the details of the work to be done cannot be determined without reference to these documents [*Bird v. American Surety Co.* (1917) 175 Cal. 625, 629, 166 P. 1009].

If a printed form contract is used as the basis of an agreement that also contains written or typewritten provisions, the written provisions will prevail over the printed terms if there is an inconsistency [Civ. Code § 1651; Code Civ. Proc. § 1863; *Burns v. Peters* (1936) 5 Cal.2d 619, 623, 55 P.2d 1182 ; *Gollaher v. Midwood Constr. Co.* (1961) 194 Cal.App.2d 640, 648, 15 Cal.Rptr. 292]. The printed terms must be disregarded to the extent that they are absolutely repugnant to the written provisions [Civ. Code § 1651]. It is presumed that, unlike the written provisions, the printed terms were composed without reference to particular parties or their intentions [*Integrated, Inc. v. Alec Fergusson Electrical Contractor* (1967) 250 Cal.App.2d 287, 294, 58 Cal.Rptr. 503].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawContract InterpretationGeneral OverviewContracts LawTypes of ContractsConstruction ContractsReal Property LawConstruction LawContracts



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CHAPTER 4 California Judicial Council Negligence Instructions

2-4 California Forms of Jury Instruction 4.syn

§ 4.syn Synopsis to Chapter 4: California Judicial Council Negligence Instructions

CACI 400 Essential Factual Elements

CACI 401 Basic Standard of Care

CACI 402 Standard of Care for Minors

CACI 403 Standard of Care for Physically Disabled Person

CACI 404 Intoxication

CACI 405 Comparative Fault of Plaintiff

CACI 406 Apportionment of Responsibility

CACI 407 Comparative Fault of Decedent

CACI 408 Primary Assumption of Risk

CACI 409 Liability of Instructors, Trainers, or Coaches

CACI 410 Parental Liability (Nonstatutory)

CACI 411 Reliance on Good Conduct of Others

CACI 412 Duty of Care Owed Children

CACI 413 Custom or Practice

CACI 414 Amount of Caution Required In Dangerous Situations

CACI 415 Employee Required to Work in Dangerous Situations

CACI 416 Amount of Caution Required in Transmitting Electric Power

CACI 417 Special Doctrines: Res ipsa loquitur

CACI 418 Presumption of Negligence per se

CACI 419 Presumption of Negligence per se (Causation Only at Issue)

CACI 420 Negligence per se: Rebuttal of the Presumption of Negligence (Violation Excused)

CACI 421 Negligence per se: Rebuttal of the Presumption of Negligence (Violation of Minor Excused)

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

CACI 423 Public Entity Liability for Failure to Perform Mandatory Duty

CACI 424 Negligence not Contested--Essential Factual Elements

CACI 425 "Gross Negligence" Explained

CACI 426 Negligent Hiring, Supervision, or Retention of Employee

CACI 427-CACI 429 Reserved for Future Use

CACI 430 Causation: Substantial Factor

CACI 431 Causation: Multiple Causes

CACI 432 Causation: Third-Party Conduct as Superseding Cause

CACI 433 Causation: Intentional Tort/Criminal Act as Superseding Cause

CACI 434 Alternative Causation

CACI 435 Causation for Asbestos-Related Cancer Claims

CACI 436-CACI 449 Reserved for Future Use

CACI 450 Good Samaritan

CACI 451 Express Assumption of Risk

CACI 452 Sudden Emergency

CACI 453 Rescue

CACI 454 Affirmative Defense--Statute of Limitations

CACI 455 Statute of Limitations--Delayed Discovery

CACI 456 Statute of Limitations--Delayed Discovery

CACI 457 Statute of Limitations--Equitable Tolling--Other Prior Proceeding

CACI 458-CACI 459 Reserved for Future Use

CACI 460 Strict Liability for Ultrahazardous Activities--Essential Factual Elements

CACI 461 Strict Liability for Injury Caused by Wild Animal--Essential Factual Elements

CACI 462 Strict Liability for Injury Caused by Domestic Animal With Dangerous Propensities--Essential Factual Elements

CACI 463 Dog Bite Statute (Civ. Code, § 3342)--Essential Factual Elements

CACI 464-CACI 499 Reserved for Future Use

CACI VF-400 Negligence--Single Defendant

CACI VF-401 Negligence--Single Defendant--Plaintiff's Negligence at Issue--Fault of Others Not at Issue

CACI VF-402 Negligence--Fault of Plaintiff and Others at Issue

CACI VF-403 Primary Assumption of Risk

CACI VF-404 Liability of Instructors, Trainers, or Coaches

CACI VF-405 Parental Liability (Nonstatutory)

CACI VF-406 Negligence--Sale of Alcoholic Beverages to Obviously Intoxicated Minor

CACI VF-407 Strict Liability--Ultrahazardous Activities

CACI VF-408 Strict Liability for Domestic Animal With Dangerous Propensities

CACI VF-409 Dog Bite Statute (Civ. Code, § 3342)

CACI VF-410 Statute of Limitations--Delayed Discovery--Reasonable Investigation Would Not Have Disclosed Pertinent Facts

CACI VF-411-CACI VF-499 Reserved for Future Use



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CHAPTER 4 California Judicial Council Negligence Instructions

2-4 California Forms of Jury Instruction Scope

Scope

SCOPE

This chapter contains the California Judicial Council's "Negligence Series" of jury instructions [*CACI No. 400 et seq.*]. The Judicial Council of California Civil Jury Instructions (CACI) included in this publication are the product of the Judicial Council of California Task Force on Jury Instructions, which are updated by the Judicial Council of California Advisory Committee on Civil Jury Instructions.

This chapter includes instructions on the following topics:

- Negligence causes of action in general [*CACI Nos. 400-424*], including instructions on essential factual elements [*CACI No. 400*], applicable standards of care [*CACI Nos. 401-403*], contributory negligence [*CACI No. 405, CACI No. 406*], negligence per se [*CACI Nos. 418-421*], sale of alcohol to minors [*CACI No. 422*], public entity liability [*CACI No. 423*], the essential elements if negligence is not contested [*CACI No. 424*], the definition of "gross negligence" [*CACI No. 425*], and negligent hiring [*CACI No. 426*].
- Causation issues in general negligence cases [*CACI Nos. 430-435*].
- Assumption of risk [*CACI No. 451*], sudden emergencies [*CACI No. 452*], and rescue [*CACI No. 453*].
- Statute of limitations defenses [*CACI Nos. 454-457*].
- Strict liability [*CACI Nos. 460-462*] and the dog bite statute [*CACI No. 463*].

The negligence series also includes special verdict forms [*CACI Nos. VF-400-VF-410*].



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CHAPTER 4 California Judicial Council Negligence Instructions

2-4 California Forms of Jury Instruction CACI 400

CACI 400 Essential Factual Elements

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

- 1. That [*name of defendant*] was negligent;**
- 2. That [*name of plaintiff*] was harmed; and**
- 3. That [*name of defendant*]'s negligence was a substantial factor in causing [*name of plaintiff*]'s harm.**

New September 2003; Revised June 2005, December 2007

Directions for Use

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

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

Sources and Authority

- *Civil Code section 1714(a)* provides, in part: "Everyone is responsible, not only for the result of his or her willful acts, but also for an injury occasioned to another by his or her want of ordinary care or skill

in the management of his or her property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself or herself." This statute is the foundation of negligence law in California. (*Rowland v. Christian* (1968) 69 Cal.2d 108, 111-112 [70 Cal.Rptr. 97, 443 P.2d 561] .)

■ The basic elements of a negligence action are: (1) The defendant had a legal duty to conform to a standard of conduct to protect the plaintiff, (2) the defendant failed to meet this standard of conduct, (3) the defendant's failure was the proximate or legal cause of the resulting injury, and (4) the plaintiff was damaged. (*Ladd v. County of San Mateo* (1996) 12 Cal.4th 913, 917 [50 Cal.Rptr.2d 309, 911 P.2d 496] .)

■ The issue of whether a legal duty exists is an issue of law, not an issue of fact for the jury. (*Ky. Fried Chicken of Cal. v. Superior Court* (1997) 14 Cal.4th 814, 819 [59 Cal.Rptr.2d 756, 927 P.2d 1260] .)

■ "[T]he concept of foreseeability of risk of harm in determining whether a duty should be imposed is to be distinguished from the concept of P foreseeability" in two more focused, fact-specific settings' to be resolved by a trier of fact. 'First, the [trier of fact] may consider the likelihood or foreseeability of injury in determining whether, in fact, the particular defendant's conduct was negligent in the first place. Second, foreseeability may be relevant to the [trier of fact's] determination of whether the defendant's negligence was a proximate or legal cause of the plaintiff's injury.' " (*Burns v. Neiman Marcus Group, Inc.* (2009) 173 Cal.App.4th 479, 488, fn. 8 [93 Cal.Rptr.3d 130] , internal citation omitted.)

■ "[W]hile foreseeability with respect to duty is determined by focusing on the general character of the event and inquiring whether such event is 'likely enough in the setting of modern life that a reasonably thoughtful [person] would take account of it in guiding practical conduct', foreseeability in evaluating negligence and causation requires a 'more focused, fact-specific' inquiry that takes into account a particular plaintiff's injuries and the particular defendant's conduct." (*Laabs v. Southern California Edison Company* (2009) 175 Cal.App.4th 1260, 1273 [97 Cal.Rptr.3d 241] , internal citation omitted.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 831-838, 860-862, 865, 866

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

1 Levy et al., *California Torts, Ch. 1, Negligence: Duty and Breach*, §§ 1.01 -1.31, *Ch. 2, Causation*, §§ 2.01 -2.11, *Ch. 3, Proof of Negligence*, §§ 3.01 -3.34 (Matthew Bender)

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

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

Publisher's Notes

This instruction replaces BAJI No. 3.00.

"In determining whether there is a duty owed to a particular individual there are numerous matters that need to be balanced: (1) the foreseeability of harm to the plaintiff, (2) the degree of certainty plaintiff suffered injury, (3) the closeness of the connection between the defendant's conduct and the injury suffered, (4) the moral blame attached to the defendant's conduct, (5) the policy of preventing future

harm, (6) the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for the breach, and (8) [sic] the availability, cost, and prevalence of insurance for the risk involved." (*Bragg v. Valdez* (2003) 111 Cal.App.4th 421, 431 [3 Cal.Rptr.3d 804] , citing *Rowland*, *supra* .)

LexisNexis Matthew Bender Expert Practice Tip--Address Each Element Early on in Case:

Although *CACI No. 400* would seem very basic to attorneys, it is important that a litigator address each element early on in the case. Since it is the plaintiff's burden of proof, you can be assured that the defendant will be attacking some if not all of these elements. Frame the elements with your facts and evidence presented during opening and closing arguments so that when the jury goes back to deliberate they will recognize the instruction and the facts that you wish to apply. *By Dona Cohn-Payne*

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsProvince of Court & JuryTortsMalpractice & Professional LiabilityGeneral
OverviewTortsNegligenceActionsGeneral OverviewTortsNegligenceDutyGeneral
OverviewTortsNegligenceProofBurdens of Proof



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CHAPTER 4 California Judicial Council Negligence Instructions

2-4 California Forms of Jury Instruction CACI 401

CACI 401 Basic Standard of Care

Negligence is the failure to use reasonable care to prevent harm to oneself or to others.

A person can be negligent by acting or by failing to act. A person is negligent if he or she does something that a reasonably careful person would not do in the same situation or fails to do something that a reasonably careful person would do in the same situation.

You must decide how a reasonably careful person would have acted in [*name of plaintiff/defendant*]'s situation.

New September 2003

- "The formulation of the standard of care is a question of law for the court. Once the court has formulated the standard, its application to the facts of the case is a task for the trier of fact if reasonable minds might differ as to whether a party's conduct has conformed to the standard." (*Ramirez v. Plough, Inc.* (1993) 6 Cal.4th 539, 546 [25 Cal.Rptr.2d 97, 863 P.2d 167] , internal citations omitted.)

- *Restatement Second of Torts, section 282*, defines negligence as "conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm."

- *Restatement Second of Torts, section 283*, provides: "Unless the actor is a child, the standard of conduct to which he must conform to avoid being negligent is that of a reasonable man under like circumstances."

- The California Supreme Court has stated: "Because application of [due care] is inherently situational,

the amount of care deemed reasonable in any particular case will vary, while at the same time the standard of conduct itself remains constant, i.e., due care commensurate with the risk posed by the conduct taking into consideration all relevant circumstances. [Citations]." (*Flowers v. Torrance Memorial Hospital Medical Center* (1994) 8 Cal.4th 992, 997 [35 Cal.Rptr.2d 685, 884 P.2d 142] ; see also *Tucker v. Lombardo* (1956) 47 Cal.2d 457, 464 [303 P.2d 1041] .)

■ The proper conduct of a reasonable person in a particular situation may become settled by judicial decision or may be established by statute or administrative regulation. (*Ramirez, supra*, 6 Cal.4th at p. 547 .) (See CACI Nos. 418 to 421 on negligence per se.)

■ Negligence can be found in the doing of an act, as well as in the failure to do an act. (*Rest.2d Torts*, § 284.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 867, 868

California Tort Guide (Cont.Ed.Bar 3d ed.) § 1.3

1 Levy et al., California Torts, Ch. 1, *Negligence: Duty and Breach*, §§ 1.01, 1.02, 1.30 (Matthew Bender)

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

16 California Points and Authorities, Ch. 165, *Negligence*, § 165.31 (Matthew Bender)

Publisher's Notes

This instruction covers issues presented in BAJI Nos. 3.10, 3.11, and 3.12.

LexisNexis Matthew Bender Expert Practice Tip--Avoiding a Mistrial: Remember to avoid saying in your argument to the jury "what would you do in like circumstances" because that will possibly cause a mistrial. Although this "reasonable man" standard obviously suggests that question to the jury, an attorney is not allowed to so state. Instead you must argue what a reasonable person would do in similar circumstances and argue your case accordingly. *By Dona Cohn-Payne*

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsNegligenceStandards of CareGeneral OverviewTortsNegligenceStandards of CareAppropriate StandardProvince of Court & JuryTortsNegligenceStandards of CareReasonable CareGeneral Overview



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CHAPTER 4 California Judicial Council Negligence Instructions

2-4 California Forms of Jury Instruction CACI 402

CACI 402 Standard of Care for Minors

[Name of plaintiff/defendant] is a child who was _____ years old at the time of the incident. Children are not held to the same standards of behavior as adults. A child is required to use the amount of care that a reasonably careful child of the same age, intelligence, knowledge, and experience would use in that same situation.

New September 2003

- "Children are judged by a special subjective standard. ... They are only required to exercise that degree of care expected of children of like age, experience and intelligence." (*Daun v. Truax* (1961) 56 Cal.2d 647, 654 [16 Cal.Rptr. 351, 365 P.2d 407] .)
- If the negligence is negligence per se, violation of a statute will create a presumption of negligence that "may be rebutted by a showing that the child, in spite of the violation of the statute, exercised the care that children of his maturity, intelligence and capacity ordinarily exercise under similar circumstances." (*Daun, supra*, 56 Cal.2d at p. 655 .)
- *Restatement Second of Torts*, section 283A, provides: "If the actor is a child, the standard of conduct to which he must conform to avoid being negligent is that of a reasonable person of like age, intelligence, and experience under like circumstances."
- The standard of care for minors is not the standard of an "average" child of the same age; the standard is subjective, based on the conduct of a child of the same age, intelligence, and experience as the minor plaintiff or defendant. (*Cummings v. County of Los Angeles* (1961) 56 Cal.2d 258, 263 [14 Cal.Rptr. 668, 363 P.2d 900] .)

■ An exception to this reduced standard of care may be found if the minor was engaging in an adult activity, such as driving. (*Prichard v. Veterans Cab Co.* (1965) 63 Cal.2d 727, 732 [47 Cal.Rptr. 904, 408 P.2d 360] ; *Neudeck v. Bransten* (1965) 233 Cal.App.2d 17, 21 [43 Cal.Rptr. 250] ; see also *Rest.2d Torts*, § 283A, *com. c.*)

■ Children under the age of five are incapable of contributory negligence as a matter of law. (*Christian v. Goodwin* (1961) 188 Cal.App.2d 650, 655 [10 Cal.Rptr. 507] .)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 998-1000

California Tort Guide (Cont.Ed.Bar 3d ed.) § 1.19

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

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

16 *California Points and Authorities*, Ch. 165, *Negligence*, §§ 165.121, 165.190 (Matthew Bender)

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

Publisher's Notes

This instruction replaces BAJI No. 3.35, and covers issues presented in BAJI Nos. 360 and 361.

LexisNexis Matthew Bender Expert Practice Tip--Children as Parties: It is very important that if you have a child as a plaintiff or defendant and negligence is an issue for that child's actions that you try to get jurors that also have children close in age so that they can appreciate the reasonable child standard accordingly to age, intellect, etc. Further, if you have a child that has limited experience, you must bring that out in your case so that the jury can take that into consideration. *By Dona Cohn-Payne*

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsNegligenceProofViolations of LawStandards of CareTortsNegligenceProofViolations of
LawStatutesTortsNegligenceStandards of CareAppropriate StandardSubjectivityTortsNegligenceStandards of
CareSpecial CareChildren



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CHAPTER 4 California Judicial Council Negligence Instructions

2-4 California Forms of Jury Instruction CACI 403

CACI 403 Standard of Care for Physically Disabled Person

A person with a physical disability is required to use the amount of care that a reasonably careful person who has the same physical disability would use in the same situation.

New September 2003

By "same" disability, this instruction is referring to the effect of the disability, not the cause.

- *Restatement Second of Torts, section 283C*, provides: "If the actor is ill or otherwise physically disabled, the standard of conduct to which he must conform to avoid being negligent is that of a reasonable man under like disability." (See also *Conjorsky v. Murray* (1955) 135 Cal.App.2d 478, 482 [287 P.2d 505] ; *Jones v. Bayley* (1942) 49 Cal.App.2d 647, 654 [122 P.2d 293] .)

- Persons with mental illnesses are not covered by the same standard as persons with physical illnesses. (See *Bashi v. Wodarz* (1996) 45 Cal.App.4th 1314, 1323 [53 Cal.Rptr.2d 635] .)

- *Civil Code section 41* provides: "A person of unsound mind, of whatever degree, is civilly liable for a wrong done by the person, but is not liable in exemplary damages unless at the time of the act the person was capable of knowing that the act was wrongful." This section applies to negligence. (*Bashi, supra*, 45 Cal.App.4th at p. 1321 .)

- *Restatement Second of Torts, section 283B*, provides: "Unless the actor is a child, his insanity or other mental deficiency does not relieve the actor from liability for conduct which does not conform to the standard of a reasonable man under like circumstances."

■ As to contributory negligence, the courts agree with the Restatement's position that mental deficiency that falls short of insanity does not excuse conduct that is otherwise contributory negligence. (*Fox v. City and County of San Francisco* (1975) 47 Cal.App.3d 164, 169 [120 Cal.Rptr. 779] ; Rest.2d Torts, § 464, com. g.)

Secondary Sources

California Tort Guide (Cont.Ed.Bar 3d ed.) § 1.20

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

Publisher's Notes

This instruction replaces BAJI No. 3.36.

LexisNexis Matthew Bender Expert Practice Tip--Using CACI No. 403: Although this instruction cannot be used if you have a person who has mental deficiencies, you should bring up the issue with regard to your particular client should that apply. *By Dona Cohn-Payne*

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsNegligenceDefensesContributory NegligenceLimits on ApplicationGeneral

OverviewTortsNegligenceDefensesContributory NegligenceLimits on

ApplicationAgeTortsNegligenceDefensesContributory NegligenceLimits on ApplicationEmotional & Mental

IncapacityTortsNegligenceStandards of CareSpecial CareDisabled Persons



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CHAPTER 4 California Judicial Council Negligence Instructions

*2-4 California Forms of Jury Instruction CACI 404***CACI 404 Intoxication**

A person is not necessarily negligent just because he or she used alcohol [or drugs]. However, people who drink alcohol [or take drugs] must act just as carefully as those who do not.

New September 2003

This instruction should be given only if there is evidence of alcohol or drug consumption. This instruction is not intended for situations in which intoxication is grounds for a negligence per se instruction (e.g., driving under the influence).

- Mere consumption of alcohol is not negligence in and of itself: "The fact that a person when injured was intoxicated is not in itself evidence of contributory negligence, but it is a circumstance to be considered in determining whether his intoxication contributed to his injury." (*Coakley v. Ajuria* (1930) 209 Cal. 745, 752 [290 P. 33] .)

- Intoxication is not generally an excuse for failure to comply with the reasonable-person standard. (*Cloud v. Market Street Railway Co.* (1946) 74 Cal.App.2d 92, 97 [168 P.2d 191] .)

- Intoxication is not negligence as a matter of law, but it is a circumstance for the jury to consider in determining whether such intoxication was a contributing cause of an injury and is also a question of fact for the jury. (*Pittman v. Boiven* (1967) 249 Cal.App.2d 207, 217 [57 Cal.Rptr. 319] ; *Barr v. Scott* (1955) 134 Cal.App.2d 823, 827-828 [286 P.2d 552] ; see also *Emery v. Los Angeles Ry. Corp.* (1943) 61 Cal.App.2d 455, 461 [143 P.2d 112] .)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, § 1320

2 Levy et al., California Torts, Ch. 20, *Motor Vehicles*, §§ 20.02, 20.04 (Matthew Bender)

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

Publisher's Notes

There is no BAJI instruction on this subject.

LexisNexis Matthew Bender Expert Practice Tip--Evidence of "Use" of Alcohol/Drugs Without Evidence of Impairment Is Prejudicial: This entirely new instruction was not found in BAJI with good reason. Cases referenced in the "Sources and Authority" describe situations involving "*intoxication*." *CACI No. 404* states: "A person is not necessarily negligent just because he or she *used* alcohol [or drugs]" (emphasis added). Obviously, if there is some evidence that use of alcohol or drugs caused impairment or intoxication, this would be an appropriate instruction. However, mere "use" without any evidence of impairment would be a very prejudicial issue on which to instruct the jury. Thus, consider a Motion in Limine to exclude any reference, suggestion, or evidence that alcohol or drugs have been "used" if there is no evidence that a party was impaired or intoxicated at the time of the incident. If there is no such evidence, the motion should be granted under *Evid. Code § 352*. *By Joseph Devine*

LexisNexis Matthew Bender Expert Practice Tip--Explore Evidence of Intoxication Before Trial: *CACI No. 404* is important when you have a plaintiff who was intoxicated at the time of his or her injury. Should the defense wish to introduce the plaintiff's intoxication at trial, make sure you fully explore in pre-trial discovery if they have evidence that the intoxication contributed to the occurrence or the injury. If not, then a Motion in Limine may be in order. *By Dona Cohn-Payne*

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsNegligenceDefensesContributory NegligenceLimits on ApplicationPhysical IncapacityTortsNegligenceStandards of CareReasonable CareGeneral OverviewTortsNegligenceStandards of CareReasonable CareReasonable Person



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CHAPTER 4 California Judicial Council Negligence Instructions

2-4 California Forms of Jury Instruction CACI 405

CACI 405 Comparative Fault of Plaintiff

[*Name of defendant*] **claims that** [*name of plaintiff*]'s **own negligence contributed to** [his/her] harm. **To succeed on this claim, [*name of defendant*] must prove both of the following:**

- 1. That [*name of plaintiff*] was negligent; and**
- 2. That [*name of plaintiff*]'s negligence was a substantial factor in causing [his/her] harm.**

If [*name of defendant*] proves the above, [*name of plaintiff*]'s damages are reduced by your determination of the percentage of [*name of plaintiff*]'s responsibility. I will calculate the actual reduction.

New September 2003; Revised December 2009

This instruction should not be given absent substantial evidence that plaintiff was negligent. (*Drust v. Drust* (1980) 113 Cal.App.3d 1, 6 [169 Cal.Rptr. 750] .)

If there are multiple defendants or alleged nondefendant tortfeasors, also give CACI No. 406, *Apportionment of Responsibility*.

- In *Li v. Yellow Cab Co.* (1975) 13 Cal.3d 804, 810 [119 Cal.Rptr. 858, 532 P.2d 1226] , the court concluded that the "all-or-nothing" rule of contributory negligence should be abandoned in favor of a rule that assesses liability in proportion to fault.

- *Restatement Second of Torts*, section 463, defines "contributory negligence" as "conduct on the part

of the plaintiff which falls below the standard to which he should conform for his own protection, and which is a legally contributing cause cooperating with the negligence of the defendant in bringing about the plaintiff's harm."

■ It is settled that the issue of contributory negligence must be presented to the jury whenever it is asserted as a defense and there is "some evidence of a substantial character" to support it. (*Hasson v. Ford Motor Co.* (1977) 19 Cal.3d 530, 548 [138 Cal.Rptr. 705, 564 P.2d 857] ; *Scott v. Alpha Beta Co.* (1980) 104 Cal.App.3d 305, 310 [163 Cal.Rptr. 544] .)

■ Courts have found that it is not error to use the phrase "contributory negligence" in a jury instruction on comparative negligence: "The use by the trial court of the phrase 'contributory negligence' in instructing on the concept of comparative negligence is innocuous. *Li v. Yellow Cab Co.* [citation] abolished the legal doctrine, but not the phrase or the concept of 'contributory negligence.' A claimant's negligence contributing causally to his own injury may be considered now not as a bar to his recovery, but merely as a factor to be considered in measuring the amount thereof." (*Bradfield v. Trans World Airlines, Inc.* (1979) 88 Cal.App.3d 681, 686 [152 Cal.Rptr. 172] .)

■ The defendant has the burden of proving contributory negligence. (*Drust, supra*, 113 Cal.App.3d at p. 6 .)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1003, 1295-1303

California Tort Guide (Cont.Ed.Bar 3d ed.) §§ 1.38-1.39

1 Levy et al., *California Torts, Ch. 4, Comparative Negligence, Assumption of the Risk, and Related Defenses*, § 4.04 (Matthew Bender)

4 *California Trial Guide, Unit 90, Closing Argument*, § 90.91 (Matthew Bender)

33 *California Forms of Pleading and Practice, Ch. 380, Negligence*, § 380.170 (Matthew Bender)

16 *California Points and Authorities, Ch. 165, Negligence*, § 165.380 (Matthew Bender)

Publisher's Notes

This instruction replaces BAJI No. 3.50.

LexisNexis Matthew Bender Expert Practice Tip--Use Discovery Devices: Invariably, the defense will try to place some fault on the plaintiff to reduce the damages awarded. During the discovery process, use Request for Admissions regarding contributory negligence issues along with other discovery requests. Should the defense deny liability in the Request for Admissions and the jury finds the defendant 100 percent at fault, plaintiff's counsel may be entitled to attorney's fees for having to prove that portion of the case that should have been admitted. *By Dona Cohn-Payne*

LexisNexis Matthew Bender Expert Practice Tip--Using CACI No. 405: The Directions for Use for the "Plaintiff's Contributory Negligence" instruction advises that the instruction "should be used only where the defendant claims that plaintiff was negligent, *there is only one defendant*, and *the defendant does not claim that any other factor caused the harm*" (emphasis added). These limitations on use of CACI No. 405 do not appear appropriate. Proposition 51 led to the enactment of *Civ. Code* § 1431.2,

which provides in part "[e]ach defendant shall be liable only for the amount of non-economic damages allocated to that defendant ..." [Civ. Code § 1431.2(a)]. In addition, damages must be apportioned among the "universe of tortfeasors," including non-joined defendants [*Roslan v. Permea, Inc.* (1993) 17 Cal. App. 4th 110, 113, 21 Cal. Rptr. 2d 66] . Thus, if there is substantial evidence that the plaintiff was negligent, argue that this instruction should be given in all such cases, even if there are multiple defendants, or other factors may have caused the harm. *By Joseph Devine*

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsNegligenceDefensesContributory NegligenceGeneral OverviewTortsNegligenceDefensesContributory NegligenceProcedureGeneral OverviewTortsNegligenceDefensesContributory NegligenceProcedureBurdens of ProofTortsNegligenceDefensesContributory NegligenceProcedureProvince of Court & Jury



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CHAPTER 4 California Judicial Council Negligence Instructions

2-4 California Forms of Jury Instruction CACI 406

CACI 406 Apportionment of Responsibility

[[*Name of defendant*] claims that the [negligence/fault] of [*insert name(s) or description(s) of nonparty tortfeasor(s)*] [also] contributed to [*name of plaintiff*]'s harm. To succeed on this claim, [*name of defendant*] must prove both of the following:

- 1. That [*insert name(s) or description(s) of nonparty tortfeasor(s)*] [was/were] [negligent/at fault]; and**
- 2. That the [negligence/fault] of [*insert name(s) or description(s) of nonparty tortfeasor(s)*] was a substantial factor in causing [name of plaintiff]'s harm.]**

If you find that the [negligence/fault] of more than one person including [*name of defendant*] [and] [[*name of plaintiff*]/ [and] [*name(s) or description(s) of nonparty tortfeasor(s)*]] was a substantial factor in causing [*name of plaintiff*]'s harm, you must then decide how much responsibility each has by assigning percentages of responsibility to each person listed on the verdict form. The percentages must total 100 percent.

You will make a separate finding of [*name of plaintiff*]'s total damages, if any. In determining an amount of damages, you should not consider any person's assigned percentage of responsibility.

["Person" can mean an individual or a business entity.]

New September 2003; Revised June 2006, December 2007, December 2009

Directions for Use

This instruction is designed to assist the jury in completing *CACI No. VF-402, Negligence--Fault of*

Plaintiff and Others at Issue, which must be given in a multiple-tortfeasor case to determine comparative fault. VF-402 is designed to compare the conduct of all defendants, the conduct of the plaintiff, and the conduct of any nonparty tortfeasors.

Throughout, select "fault" if there is a need to allocate responsibility between tortfeasors whose alleged liability is based on conduct other than negligence, e.g., strict products liability.

Include the first paragraph if the defendant has presented evidence that the conduct of one or more nonparties contributed to the plaintiff's harm. "Nonparties" include the universe of tortfeasors who are not present at trial, including defendants who settled before trial and nonjoined alleged tortfeasors. (*Dafonte v. Up-Right* (1992) 2 Cal.4th 593, 603 [7 Cal.Rptr.2d 238, 828 P.2d 140] .) Include "also" if the defendant concedes some degree of liability.

If the plaintiff's comparative fault is also at issue, give CACI No. 405, *Comparative Fault of Plaintiff*, in addition to this instruction.

Include the last paragraph if any of the defendants or others alleged to have contributed to the plaintiff's harm is not an individual.

Sources and Authority

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

- The Supreme Court has held that the doctrine of joint and several liability survived the adoption of comparative negligence: "[W]e hold that after *Li*, a concurrent tortfeasor whose negligence is a proximate cause of an indivisible injury remains liable for the total amount of damages, diminished only 'in proportion to the amount of negligence attributable to the person recovering.' " (*American Motorcycle Assn. v. Superior Court* (1978) 20 Cal.3d 578, 590 [146 Cal.Rptr. 182, 578 P.2d 899] , citing *Li v. Yellow Cab Co.* (1975) 13 Cal.3d 804, 829 [119 Cal.Rptr. 858, 532 P.2d 1226] .)

- The Supreme Court in *American Motorcycle Assn.* also modified the equitable indemnity rule "to permit a concurrent tortfeasor to obtain partial indemnity from other concurrent tortfeasors on a comparative fault basis." (*American Motorcycle Assn.*, *supra*, 20 Cal.3d at p. 591 .)

- "[A] 'defendant[s]' liability for noneconomic damages cannot exceed his or her proportionate share of fault as compared with all fault responsible for the plaintiff's injuries, not merely that of 'defendant[s]' present in the lawsuit." (*Dafonte*, *supra*, 2 Cal.4th at p. 603 , original italics.)

- "[U]nder Proposition 51, fault will be allocated to an entity that is immune from *paying* for its tortious acts, but will not be allocated to an entity that is not a tortfeasor, that is, one whose actions have been declared not to be tortious." (*Taylor v. John Crane, Inc.* (2003) 113 Cal.App.4th 1063, 1071 [6 Cal.Rptr.3d 695] , original italics.)

- "A defendant bears the burden of proving affirmative defenses and indemnity cross-claims.

Apportionment of noneconomic damages is a form of equitable indemnity in which a defendant may reduce his or her damages by establishing others are also at fault for the plaintiff's injuries. Placing the burden on defendant to prove fault as to nonparty tortfeasors is not unjustified or unduly onerous." (*Wilson v. Ritto* (2003) 105 Cal.App.4th 361, 369 [129 Cal.Rptr.2d 336] .)

■ "When a defendant is liable *only* by reason of a derivative nondelegable duty arising from his status as employer or landlord or vehicle owner or conspirator, or from his role in the chain of distribution of a single product in a products liability action, his liability is *secondary* (vicarious) to that of the actor and he is not entitled to the benefits of Proposition 51." (*Bayer-Bel v. Litovsky* (2008) 159 Cal.App.4th 396, 400 [71 Cal.Rptr.3d 518] , original italics, internal citations omitted.)

■ *Restatement Third of Torts, Apportionment Liability, section 7, comment (g)*, provides, in part: "Percentages of responsibility are assigned by special verdict to any plaintiff, defendant, settlor, immune person, or other relevant person ... whose negligence or other legally culpable conduct was a legal cause of the plaintiff's injury. The percentages of responsibility must total 100 percent. The factfinder makes a separate finding of the plaintiff's total damages. Those damages are reduced by the percentage of responsibility the factfinder assigns to the plaintiff. The resulting amount constitutes the plaintiff's 'recoverable damages.' "

■ *Restatement Third of Torts, Apportionment Liability, section 26, comment (h)*, provides, in part: "A more attractive solution is to place the burden of proof on the party seeking to avoid responsibility for the entire injury, along with relaxing the burden of production. This allows the factfinder to divide damages based on the available evidence. Ultimately, however, the sufficiency of the evidence is determined by applicable procedural rules."

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 50, 52-56, 59, 60, 63, 64, 68

California Tort Guide (Cont.Ed.Bar 3d ed.) §§ 1.52-1.59

1 Levy et al., *California Torts, Ch. 4, Comparative Negligence, Assumption of the Risk, and Related Defenses*, §§ 4.04 -4.03, 4.07 -4.08 (Matthew Bender)

5 Levy et al., *California Torts, Ch. 74, Resolving Multiparty Tort Litigation*, § 74.03 (Matthew Bender)

4 *California Trial Guide, Unit 90, Closing Argument*, § 90.91 (Matthew Bender)

California Products Liability Actions, Ch. 2, Liability for Defective Products, § 2.14A, *Ch. 9, Damages*, § 9.01 (Matthew Bender)

25 *California Forms of Pleading and Practice, Ch. 300, Indemnity and Contribution*, § 300.61 (Matthew Bender)

11 *California Points and Authorities, Ch. 115, Indemnity and Contribution*, § 115.04 et seq. (Matthew Bender)

16 *California Points and Authorities, Ch. 165, Negligence*, §§ 165.284, 165.380 (Matthew Bender)

Publisher's Notes

This instruction covers issues presented in BAJI Nos. 3.77, 14.91, 15.01.

LexisNexis Matthew Bender Expert Practice Tip--Apportionment of Liability: *CACI No. 406* should be requested whenever there is evidence that (1) the plaintiff was negligent, or (2) any other "tortfeasor" may have been negligent. *By Joseph Devine*

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsNegligenceDefensesComparative NegligenceGeneral OverviewTortsNegligenceDefensesContributory NegligenceGeneral OverviewTortsNegligenceDefensesContributory NegligenceProcedureGeneral OverviewTortsProcedureMultiple DefendantsGeneral OverviewTortsProcedureMultiple DefendantsJoint & Several Liability



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California Forms of Jury Instruction

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CHAPTER 4 California Judicial Council Negligence Instructions

2-4 California Forms of Jury Instruction CACI 407

CACI 407 Comparative Fault of Decedent

[*Name of defendant*] **claims that [*name of decedent*]'s own negligence contributed to [his/her] death. To succeed on this claim, [*name of defendant*] must prove both of the following:**

- 1. That [*name of decedent*] was negligent; and**
- 2. That [*name of decedent*]'s negligence was a substantial factor in causing [his/her] death.**

If [*name of defendant*] proves the above, [*name of plaintiff*]'s damages are reduced by your determination of the percentage of [*name of decedent*]'s responsibility. I will calculate the actual reduction.

New September 2003; Revised December 2009

This instruction should not be given absent evidence that the decedent was negligent. (*Drust v. Drust* (1980) 113 Cal.App.3d 1, 6 [169 Cal.Rptr. 750] .)

- "[P]rinciples of comparative fault and equitable indemnification support an apportionment of liability among those responsible for the loss, including the decedent, whether it be for personal injury or wrongful death." (*Horwich v. Superior Court* (1999) 21 Cal.4th 272, 285 [87 Cal.Rptr.2d 222, 980 P.2d 927] .)

- "[I]n wrongful death actions, the fault of the decedent is attributable to the surviving heirs whose recovery must be offset by the same percentage. [Citation.]" (*Atkins v. Strayhorn* (1990) 223 Cal.App.3d 1380, 1395 [273 Cal.Rptr. 231] .)

Secondary Sources

6 Witkin, *Summary of California Law* (10th ed. 2005) Torts, § 1400

1 Levy et al., *California Torts, Ch. 4, Comparative Negligence, Assumption of the Risk, and Related Defenses*, § 4.07 (Matthew Bender)

4 Levy et al., *California Torts, Ch. 55, Death and Survival Actions*, § 55.05 (Matthew Bender)

15 *California Forms of Pleading and Practice, Ch. 181, Death and Survival Actions*, § 181.12 (Matthew Bender)

6 *California Points and Authorities, Ch. 66, Death and Survival Actions*, § 66.20 et seq. (Matthew Bender)

Publisher's Notes

This instruction replaces BAJI No. 3.53

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsNegligenceDefensesComparative NegligenceMultiple PartiesGeneral
OverviewTortsNegligenceDefensesComparative NegligenceProcedureTortsNegligenceDefensesContributory
NegligenceProcedureGeneral OverviewTortsProcedureMultiple DefendantsGeneral OverviewTortsWrongful Death &
Survival ActionsDefensesComparative & Contributory Negligence



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CHAPTER 4 California Judicial Council Negligence Instructions

2-4 California Forms of Jury Instruction CACI 408

CACI 408 Primary Assumption of Risk

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

- 1. That [name of defendant] either intentionally injured [name of plaintiff] or acted so recklessly that [his/her] conduct was entirely outside the range of ordinary activity involved in [sport or other activity];**
- 2. That [name of plaintiff] was harmed; and**
- 3. That [name of defendant]'s conduct was a substantial factor in causing [name of plaintiff]'s harm.**

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

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

New September 2003; Revised April 2004, October 2008, April 2009

Sources and Authority

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

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

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

■ "[W]e conclude that a participant in an active sport breaches a legal duty of care to other participants--i.e., engages in conduct that properly may subject him or her to financial liability--only if the participant intentionally injures another player or engages in conduct that is so reckless as to be totally outside the range of the ordinary activity involved in the sport." (*Knight v. Jewett* (1992) 3 Cal.4th 296, 320 [11 Cal.Rptr.2d 2, 834 P.2d 696] .)

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

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

■ "[G]olfers have a limited duty of care to other players, breached only if they intentionally injure them or engage in conduct that is 'so reckless as to be totally outside the range of the ordinary activity involved in the sport.' " (*Shin v. Ahn* (2007) 42 Cal.4th 482, 497 [64 Cal.Rptr.3d 803, 165 P.3d 581] .)

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

■ "Although we recognize the Court of Appeal decisions specifically addressing the point are in

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

■ "Primary assumption of the risk is an objective test. It does not depend on a particular plaintiff's subjective knowledge or appreciation of the potential for risk." (*Saville*, *supra*, 133 Cal.App.4th at p 866.)

■ "A jury could find that, by using a snowboard without the retention strap, in violation of the rules of the ski resort and a county ordinance, defendant unnecessarily increased the danger that his snowboard might escape his control and injure other participants such as plaintiff. The absence of a retention strap could therefore constitute conduct not inherent to the sport which increased the risk of injury." (*Campbell v. Derylo* (1999) 75 Cal.App.4th 823, 829 [89 Cal.Rptr.2d 519] .)

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

■ "[T]he doctrine [of primary assumption of risk] applies not only to sports, but to other activities involving an inherent risk of injury to voluntary participants ... , where the risk cannot be eliminated without altering the fundamental nature of the activity." (*Beninati v. Black Rock City, LLC* (2009) 175 Cal.App.4th 650, 658 [96 Cal.Rptr.3d 105] .)

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

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

■ "Even were we to conclude that [plaintiff]'s decision to jump off the boat was a voluntary one, and that therefore he assumed a risk inherent in doing so, this is not enough to provide a complete defense. Because voluntary assumption of risk as a complete defense in a negligence action was abandoned in *Li v. Yellow Cab Co.* (1975) 13 Cal.3d 804, 829 [119 Cal.Rptr. 858, 532 P.2d 1226] , only the absence of duty owed a plaintiff under the doctrine of primary assumption of risk would provide such a defense. But that doctrine does not come into play except when a plaintiff and a defendant are engaged in certain types of activities, such as an 'active sport.' That was not the case here; plaintiff was merely the passenger on a boat. Under *Li*, he may have been contributorily negligent but this would only go to reduce the amount of damages to which he is entitled." (*Kindrich, supra*, 167 Cal.App.4th at p. 1258 .)

Secondary Sources

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

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

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

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

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

Publisher's Notes

This instruction replaces BAJI No. 4.70.

LexisNexis Matthew Bender Expert Practice Tip--Use of CACI No. 408: There are numerous times when we watch a sporting event and see examples of conduct so intentional or reckless that they are "outside the range of ordinary activity." For instance, when Mike Tyson bit the ear off of Evander Holyfield during a boxing match in 1997. Although that example is an extreme, there are many times when participants in amateur sports are subjected to intentional or reckless conduct by teammates or opponents that would not be considered "part of the game." *By Dona Cohn-Payne*

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsNegligenceDefensesAssumption of RiskAthletic & Recreational ActivitiesTortsNegligenceDefensesAssumption
of RiskElements & NatureGeneral OverviewTortsNegligenceDefensesAssumption of RiskProcedure



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CHAPTER 4 California Judicial Council Negligence Instructions

2-4 California Forms of Jury Instruction CACI 409

CACI 409 Liability of Instructors, Trainers, or Coaches

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

- 1. That [*name of defendant*] was [*name of plaintiff*]'s [coach/trainer/instructor];**
- 2. That [*name of defendant*] intended to cause [*name of plaintiff*] injury or acted recklessly in that [his/her] conduct was entirely outside the range of ordinary activity involved in teaching or coaching the sport in which [*name of plaintiff*] was participating;**
- 3. That [*name of plaintiff*] was harmed; and**
- 4. That [*name of defendant*]'s conduct was a substantial factor in causing [*name of plaintiff*]'s harm.**

New September 2003; Revised April 2004

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

2-4 California Forms of Jury Instruction CACI 409

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

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

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

■ "[W]e conclude that a participant in an active sport breaches a legal duty of care to other participants--i.e., engages in conduct that properly may subject him or her to financial liability--only if the participant intentionally injures another player or engages in conduct that is so reckless as to be totally outside the range of the ordinary activity involved in the sport." (*Knight v. Jewett* (1992) 3 Cal.4th 296, 320 [11 Cal.Rptr.2d 2, 834 P.2d 696] .)

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

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

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

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

■ " '[T]he existence and scope of a defendant's duty of care is a legal question which depends on the nature of the sport or activity in question and on the parties' general relationship to the activity, and is an issue to be decided by the court, rather than the jury.' Thus, when the injury occurs in a sports setting the court must decide whether the nature of the sport and the relationship of the defendant and the plaintiff to the sport as coparticipant, coach, premises owner or spectator support the legal conclusion of duty." (

Mastro v. Petrick (2001) 93 Cal.App.4th 83, 88 [112 Cal.Rptr.2d 185] , internal citations omitted.)

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

Secondary Sources

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

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

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

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

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

Publisher's Notes

There is no BAJI instruction on this subject.

LexisNexis Matthew Bender Expert Practice Tip--Liability of Coaches and Instructors: Coaches and instructors should not increase the risk of injury during an event. When a coach or instructor ignores or does not address a danger issue, whether it is from the actions of a co-participant or of the environment in which the event is taking place, liability can arise. *By Dona Cohn-Payne*

Legal Topics:

For related research and practice materials, see the following legal topics:

Education Law Civil Liability Injuries of Student Athletes Torts Negligence Defenses Assumption of Risk Athletic & Recreational Activities Torts Negligence Defenses Assumption of Risk Elements & Nature General Overview Torts Negligence Defenses Assumption of Risk Elements & Nature Relationships Between Parties Torts Negligence Defenses Assumption of Risk Procedure



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CHAPTER 4 California Judicial Council Negligence Instructions

2-4 California Forms of Jury Instruction CACI 410

CACI 410 Parental Liability (Nonstatutory)

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

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

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

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

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

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

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

[take reasonable precautions to prevent harm to others;]

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

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

New September 2003

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

■ "While it is the rule in California ... that there is no vicarious liability on a parent for the torts of a child there is 'another rule of the law relating to the torts of minors, which is somewhat in the nature of an exception, and that is that a parent may become liable for an injury caused by the child where the parent's negligence made it possible for the child to cause the injury complained of, and probable that it would do so.' " (*Ellis v. D'Angelo* (1953) 116 Cal.App.2d 310, 317 [253 P.2d 675] , internal citations omitted.)

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

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

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

Secondary Sources

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

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

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

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

32 *California Forms of Pleading and Practice*, Ch. 364, *Minors* (Matthew Bender)

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

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

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

1 California Civil Practice: Torts (Thomson West) §§ 3:32-3:35

Publisher's Notes

This instruction covers issues presented in BAJI No. 13.75.

LexisNexis Matthew Bender Expert Practice Tip--Use of CACI No. 410: *CACI No. 410* is useful when a minor drives a car and has a history of poor and/or reckless driving. If the minor has had moving violations or a history of drug or alcohol consumption and the parent still allows the minor to drive a car, then the parent can be held liable. This instruction has also been used when a minor has had a party at the parent's home where alcohol and/or drugs were consumed by other minor children and an injury has occurred. *By Dona Cohn-Payne*

Legal Topics:

For related research and practice materials, see the following legal topics:

Family Law Family Relationships & Torts Tort Liability Child Torts Torts Intentional Torts General Overview Torts Vicarious Liability Family Members Children & Parents



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CHAPTER 4 California Judicial Council Negligence Instructions

2-4 California Forms of Jury Instruction CACI 411

CACI 411 Reliance on Good Conduct of Others

Every person has a right to expect that every other person will use reasonable care [and will not violate the law], unless he or she knows, or should know, that the other person will not use reasonable care [or will violate the law].

New September 2003

This instruction should not be used if the only other actor is the plaintiff and there is no evidence that the plaintiff acted unreasonably. (*Springer v. Reimers* (1970) 4 Cal.App.3d 325, 336 [84 Cal.Rptr. 486] .)

- The general rule is that "every person has a right to presume that every other person will perform his duty and obey the law and in the absence of reasonable grounds to think otherwise, it is not negligence to assume that he is not exposed to danger which could come to him only from violation of law or duty by such other person." (*Celli v. Sports Car Club of America, Inc.* (1972) 29 Cal.App.3d 511, 523 [105 Cal.Rptr. 904] .) "However, this rule does not extend to a person who is not exercising ordinary care, nor to one who knows or, by the exercise of such care, would know that the law is not being observed." (*Malone v. Perryman* (1964) 226 Cal.App.2d 227, 234 [37 Cal.Rptr. 864] .)

- Defendants are entitled to rely on the reasonable conduct of third parties who owe a duty of care to the plaintiff. (*Tucker v. Lombardo* (1956) 47 Cal.2d 457, 467 [303 P.2d 1041] .) The central issue addressed by the instruction is whether or not the bad act of the third person was foreseeable by the defendant. (*Whitton v. State of California* (1979) 98 Cal.App.3d 235, 244-246 [159 Cal.Rptr. 405] .) "If the likelihood that a third person may act in a particular manner is the hazard or one of the hazards which makes the actor negligent, such an act whether innocent, negligent, intentionally tortious, or criminal

does not prevent the actor from being liable for harm caused thereby." (*Rest.2d Torts*, § 449; *Bigbee v. Pacific Telephone and Telegraph Co.* (1983) 34 Cal.3d 49, 58 [192 Cal.Rptr. 857, 665 P.2d 947] .)

■ Many cases involving issues of third-party criminal conduct are analyzed as questions of law--i.e., existence of a duty, which may require analysis of foreseeability. (See *Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 678 [25 Cal.Rptr.2d 137, 863 P.2d 207] ; *Ky. Fried Chicken of Cal. v. Superior Court* (1997) 14 Cal.4th 814, 819 [59 Cal.Rptr.2d 756, 927 P.2d 1260].)

■ In cases where a third party commits a criminal act, the defendant is generally not liable for failure to protect the plaintiff from the resulting harm. The exceptions are (1) where the defendant has a special relationship to the plaintiff, (2) where the defendant has undertaken an obligation to protect the plaintiff, or (3) where the defendant's conduct created or increased the risk of harm through the misconduct. (*Rest.2d Torts*, § 302B, *com. e.*)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1311-1313

1 Levy et al., California Torts, Ch. 1, *Negligence*, § 1.02 (Matthew Bender)

4 *California Trial Guide, Unit 90, Closing Argument*, §§ 90.88, 90.90 (Matthew Bender)

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

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

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

Publisher's Notes

This instruction covers issues presented in BAJI Nos. 3.13 and 3.13.1.

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsNegligenceDutyAffirmative Duty to ActSpecial RelationshipsGeneral OverviewTortsNegligenceDutyAffirmative Duty to ActSpecial RelationshipsDangerous Persons



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CHAPTER 4 California Judicial Council Negligence Instructions

*2-4 California Forms of Jury Instruction CACI 412***CACI 412 Duty of Care Owed Children**

An adult must anticipate the ordinary behavior of children. An adult must be more careful when dealing with children than with other adults.

New September 2003

This instruction is to be used where the plaintiff seeks damages for injury to a minor.

For standard of care for minors, see *CACI No. 402, Standard of Care for Minors*.

■ "'A child of immature years is expected to exercise only such care as pertains to childhood, and all persons dealing with such a child are chargeable with such knowledge. As a result, one dealing with children is bound to exercise a greater amount of caution than he would were he dealing with an adult.' [Citations]." (*Kataoka v. May Dept. Stores Co. (1943) 60 Cal.App.2d 177, 182-183 [140 P.2d 467]* .)

■ *Schwartz v. Helms Bakery, Ltd. (1967) 67 Cal.2d 232, 240, 243 [60 Cal.Rptr. 510, 430 P.2d 68]* ; *Hilyar v. Union Ice Co. (1955) 45 Cal.2d 30, 37 [286 P.2d 21]* .

■ "A greater degree of care is generally owed to children because of their lack of capacity to appreciate risks and to avoid danger." (*McDaniel v. Sunset Manor Co. (1990) 220 Cal.App.3d 1, 7 [269 Cal.Rptr. 196]* , citing *Casas v. Maulhardt Buick, Inc. (1968) 258 Cal.App.2d 692, 697-700 [66 Cal.Rptr. 44]* .)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1001, 1002

California Tort Guide (Cont.Ed.Bar 3d ed.) § 1.19

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

4 *California Trial Guide, Unit 90, Closing Argument*, § 90.88 (Matthew Bender)

California Products Liability Actions, Ch. 10, *Trial*, § 10.05 (Matthew Bender)

32 California Forms of Pleading and Practice, Ch. 364, *Minors* (Matthew Bender)

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

16 *California Points and Authorities, Ch. 165, Negligence*, § 165.120 (Matthew Bender)

Publisher's Notes

This instruction covers issues presented in BAJI No. 3.38.

Because of the special relationship between District and its students, District had a heightened duty to make the school safe. If it is reasonably foreseeable that persons to whom a lower standard of care applies, such as children, may be exposed to a substantial risk of injury from the property, the public entity should be required to take reasonable precautions to protect such persons from that risk. (*Joyce v. Simi Valley Unified School Dist.* (2003) 110 Cal.App.4th 292, 304-305 [1 Cal.Rptr.3d 712] .)

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsNegligenceDutyAffirmative Duty to ActSpecial RelationshipsGeneral OverviewTortsNegligenceDutyAffirmative Duty to ActSpecial RelationshipsChildren & ParentsTortsNegligenceDutyAffirmative Duty to ActSpecial RelationshipsSchools



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CHAPTER 4 California Judicial Council Negligence Instructions

2-4 California Forms of Jury Instruction CACI 413

CACI 413 Custom or Practice

You may consider customs or practices in the community in deciding whether [*name of plaintiff/defendant*] acted reasonably. Customs and practices do not necessarily determine what a reasonable person would have done in [*name of plaintiff/defendant*]'s situation. They are only factors for you to consider.

Following a custom or practice does not excuse conduct that is unreasonable. You should consider whether the custom or practice itself is reasonable.

New September 2003

An instruction stating that evidence of custom is not controlling on the issue of standard of care should not be given in professional malpractice cases in which expert testimony is used to set the standard of care. (See *Osborn v. Irwin Memorial Blood Bank* (1992) 5 Cal.App.4th 234, 277 [7 Cal.Rptr.2d 101] .) The instruction may be used if the standard of care is within common knowledge. (See *Leonard v. Watsonville Community Hospital* (1956) 47 Cal.2d 509, 519 [305 P.2d 36] .)

This instruction is also inappropriate in cases involving strict liability (*Titus v. Bethlehem Steel Corp.* (1979) 91 Cal.App.3d 372, 378 [154 Cal.Rptr. 122]) or cases involving negligence in the use of public roads (*Shuff v. Irwindale Trucking Co.* (1976) 62 Cal.App.3d 180, 187 [132 Cal.Rptr. 897]).

■ Evidence of custom and practice is relevant, but not conclusive, on the issue of the standard of care in cases of ordinary negligence. (*Holt v. Department of Food and Agriculture* (1985) 171 Cal.App.3d 427, 435 [218 Cal.Rptr. 1] .)

● *Restatement Second of Torts, section 295A*, provides: "In determining whether conduct is negligent, the customs of the community, or of others under like circumstances, are factors to be taken into account, but are not controlling where a reasonable man would not follow them."

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 897, 898

1 Levy et al., California Torts, Ch. 1, *Negligence*, § 1.30, Ch. 3, *Proof of Negligence*, § 3.33 (Matthew Bender)

California Products Liability Actions, Ch. 2, *Liability for Defective Products*, §§ 2.11, 2.21 (Matthew Bender)

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

16 *California Points and Authorities*, Ch. 165, *Negligence*, § 165.31 (Matthew Bender)

Publisher's Notes

This instruction covers issues presented in BAJI No. 3.16.

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsMalpractice & Professional LiabilityGeneral OverviewTortsNegligenceProofCustomGeneral
OverviewTortsNegligenceProofEvidenceExpert TestimonyTortsNegligenceStandards of CareAppropriate
StandardGeneral OverviewTortsNegligenceStandards of CareReasonable CareReasonable
PersonTortsNegligenceStandards of CareSpecial CareHighly Skilled Professionals



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CHAPTER 4 California Judicial Council Negligence Instructions

2-4 California Forms of Jury Instruction CACI 414

CACI 414 Amount of Caution Required In Dangerous Situations

People must be extremely careful when they deal with dangerous items or participate in dangerous activities. [Insert type of dangerous item or activity] is dangerous in and of itself. The risk of harm is so great that the failure to use extreme caution is negligence.

New September 2003

An instruction on the standard of care for extremely dangerous activities is proper only "in situations where the nature of the activity or substance is so inherently dangerous or complex, as such, that the hazard persists despite the exercise of ordinary care." (*Benwell v. Dean* (1964) 227 Cal.App.2d 226, 233 [38 Cal.Rptr. 542] ; see also *Menchaca v. Helms Bakeries, Inc.* (1968) 68 Cal.2d 535, 544 [67 Cal.Rptr. 775, 439 P.2d 903] .)

This instruction should not be given at the same time as an instruction pertaining to standard of care for employees who have to work in dangerous situations. In appropriate cases, juries may be instructed that a person of ordinary prudence is required to exercise extreme caution when engaged in a dangerous activity. (*Borenkraut v. Whitten* (1961) 56 Cal.2d 538, 544-546 [15 Cal.Rptr. 635, 364 P.2d 467] .) However, this rule does not apply when a person's lawful employment requires that he or she must work in a dangerous situation. (*McDonald v. City of Oakland* (1967) 255 Cal.App.2d 816, 827 [63 Cal.Rptr. 593] .) This is because "reasonable men who are paid to give at least part of their attention to their job" may not be as able to maintain the same standards for personal safety as nonemployees. (*Young v. Aro Corp.* (1974) 36 Cal.App.3d 240, 245 [111 Cal.Rptr. 535] .) (See CACI No. 415, *Employee Required to Work in Dangerous Situations*.)

■ Even a slight deviation from the standards of care will constitute negligence in cases involving dangerous instrumentalities. (*Borenkraut, supra*, 56 Cal.2d at p. 545 .)

■ Dangerous instrumentalities include fire, firearms, explosive or highly inflammable materials, and corrosive or otherwise dangerous or noxious fluids. (*Warner v. Santa Catalina Island Co.* (1955) 44 Cal.2d 310, 317 [282 P.2d 12] .)

■ In *Menchaca*, the Court held that "[d]riving a motor vehicle may be sufficiently dangerous to warrant special instructions, but it is not so hazardous that it always requires 'extreme caution.' " (*Menchaca, supra*, 68 Cal.2d at p. 544 .)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 918-922

1 Levy et al., California Torts, Ch. 1, *Negligence*, §§ 1.02, 1.30 (Matthew Bender)

California Products Liability Actions, Ch. 2, *Liability for Defective Products*, § 2.14 (Matthew Bender)

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

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

Publisher's Notes

This instruction replaces BAJI No. 3.41.

LexisNexis Matthew Bender Expert Practice Tip--Instruction Not Appropriate for Simple Car Crash Cases: Although some may consider an automobile to be a dangerous instrumentality, it would be unusual to use this instruction for a simple motor vehicle collision. *By Dona Cohn-Payne*

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsNegligenceStandards of CareAppropriate StandardGeneral OverviewTortsNegligenceStandards of CareReasonable CareReasonable PersonTortsNegligenceStandards of CareSpecial CareGeneral OverviewTortsVicarious LiabilityEmployersActivities & ConditionsGeneral Overview



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CHAPTER 4 California Judicial Council Negligence Instructions

2-4 California Forms of Jury Instruction CACI 415

CACI 415 Employee Required to Work in Dangerous Situations

An employee required to work under dangerous conditions must use the amount of care for [his/her] own safety that a reasonably careful employee would use under the same conditions.

In deciding whether [name of plaintiff] was negligent, you should consider how much attention [his/her] work demanded. You should also consider whether [name of plaintiff]'s job required [him/her] to take risks that a reasonably careful person would not normally take under ordinary circumstances.

New September 2003

This type of instruction should not be given in cases involving freeway collisions between private and commercial vehicles. (*Shuff v. Irwindale Trucking Co.* (1976) 62 Cal.App.3d 180, 187 [132 Cal.Rptr. 897] .)

An instruction on this principle is "aimed at situations where the employment conditions lessen the plaintiff's ability to take precautions." (*Von Beltz v. Stuntman, Inc.* (1989) 207 Cal.App.3d 1467, 1485 [255 Cal.Rptr. 755] .) It does not apply where the plaintiff has ample opportunity to consider various precautions (*ibid.*) or when employees act pursuant to choice rather than necessity. (*Roberts v. Guillory* (1972) 25 Cal.App.3d 859, 861-862] .)

■ This type of instruction "soften[ed] the impact of instructing on the issue of contributory negligence" (*Young v. Aro Corp.* (1974) 36 Cal.App.3d 240, 244 [111 Cal.Rptr. 535]) at a time when contributory negligence was a complete bar to a plaintiff's recovery. The instruction may be given in cases involving comparative fault. (See, e.g., *Johnson v. Tosco Corp.* (1991) 1 Cal.App.4th 123, 136-137 [1 Cal.Rptr.2d

747] .)

■ "It has long been recognized that 'where a person must work in a position of possible danger the amount of care which he is bound to exercise for his own safety may well be less by reason of the necessity of his giving attention to his work than would otherwise be the case.' [Citations]." (*Austin v. Riverside Portland Cement Co.* (1955) 44 Cal.2d 225, 239 [282 P.2d 69] .)

■ "Considered in the light of the realities of his working life, the laborer's duty may become considerably restricted in scope. In some instances he may find himself powerless to abandon the task at hand with impunity whenever he senses a possible danger; in others, he may be uncertain as to which person has supervision of the job or control of the place of employment, and therefore unsure as to whom he should direct his complaint; in still others, having been encouraged to continue working under conditions where danger lurks but has not materialized, he may be baffled in making an on-the-spot decision as to the imminence of harm. All of these factors enter into a determination whether his conduct falls below a standard of due care." (*Gyerman v. United States Lines Co.* (1972) 7 Cal.3d 488, 501 [102 Cal.Rptr. 795, 498 P.2d 1043] , citation omitted.)

Secondary Sources

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

Publisher's Notes

This instruction covers issues presented in BAJI No. 3.40.

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsNegligenceDefensesComparative NegligenceGeneral OverviewTortsNegligenceDefensesContributory NegligenceProcedureGeneral OverviewTortsNegligenceStandards of CareAppropriate StandardGeneral OverviewTortsNegligenceStandards of CareReasonable CareReasonable Person



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CHAPTER 4 California Judicial Council Negligence Instructions

2-4 California Forms of Jury Instruction CACI 416

CACI 416 Amount of Caution Required in Transmitting Electric Power

People and companies must be very careful in constructing, insulating, inspecting, maintaining, and repairing power lines and transmission equipment at all places where it is reasonably probable that they will cause harm to persons or property.

New September 2003

The cases have crafted a specific standard of care for the construction and maintenance of power lines, and juries must be instructed on this standard upon request. (*Sally v. Pacific Gas and Electric Co.* (1972) 23 Cal.App.3d 806, 816 [100 Cal.Rptr. 501] .)

- Electric power lines are considered dangerous instrumentalities. (*Polk v. City of Los Angeles* (1945) 26 Cal.2d 519, 525 [159 P.2d 931] .)

- The requirement to insulate wires applies to only those wires that may come into contact with people or property: "While an electric company is not under an absolute duty to insulate or make the wires safe in any particular manner, it does have a duty to make the wires safe under all the exigencies created by the surrounding circumstances. The duty of an electric company is alternative, i.e., either to insulate the wires or to so locate them to make them comparatively harmless." (*Sally, supra*, 23 Cal.App.3d at pp. 815-816 .)

- *Dunn v. Pacific Gas & Electric Co.* (1954) 43 Cal.2d 265, 272-274 [272 P.2d 745]; *McKenzie v. Pacific Gas and Electric Co.* (1962) 200 Cal.App.2d 731, 736 [19 Cal.Rptr. 628] (disapproved on another ground in *Di Mare v. Cresci* (1962) 58 Cal.2d 292, 299 [23 Cal.Rptr. 772, 373 P.2d 860] .)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, § 919

California Tort Guide (Cont.Ed.Bar 3d ed.) §§ 7.1-7.12

23 California Forms of Pleading and Practice, Ch. 277, *Gas and Electricity* (Matthew Bender)

Publisher's Notes

This instruction covers issues presented in BAJI No. 3.42.

LexisNexis Matthew Bender Expert Practice Tip-- CACI No. 416 vs. BAJI No. 3.42: At first glance, it appears that *CACI No. 416* regarding the "Amount of Caution Required in Transmitting Electric Power" is simpler and more easily understood than BAJI No. 3.42. However, it also appears that the standard of care required may have increased. BAJI No. 3.42 states: "The exercise of *ordinary care* ..." is required. "In installing, maintaining and supervising electric transmission lines and facilities, *caution commensurate with the existing danger is required*" (emphasis added). *CACI No. 416* states: "People and companies *must be very careful* in constructing ... power lines and transmission equipment" "Very careful" seems to be a higher standard than "ordinary care" or "commensurate with the existing danger." Both instructions relied on the same authority [*Sally v. Pacific Gas and Electric Co. (1972) 23 Cal. App. 3d 806, 816, 100 Cal. Rptr. 501*] . In addition, there is no instruction defining the phrase "very careful." Thus, if you represent a defendant against a claim of negligence in an electric power case, consider asking that the old BAJI No. 3.42 instruction be given. This instruction "properly state[s] the existing law, and failure to instruct the jury thereon constitute[s] error" [*Sally v. Pacific Gas and Electric Co. (1972) 23 Cal. App. 3d 806, 816, 100 Cal. Rptr. 501*] . By Joseph Devine

Legal Topics:

For related research and practice materials, see the following legal topics:

Energy & Utilities LawElectric Power IndustryElectricity Distribution & TransmissionGeneral OverviewEnergy & Utilities LawElectric Power IndustryState RegulationGeneral OverviewEnergy & Utilities LawTransportation & PipelinesElectricity TransmissionTortsNegligenceStandards of CareSpecial CareGeneral Overview



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CHAPTER 4 California Judicial Council Negligence Instructions

2-4 California Forms of Jury Instruction CACI 417

CACI 417 Special Doctrines: Res ipsa loquitur

In this case, [name of plaintiff] may prove that [name of defendant]'s negligence caused [his/her] harm if [he/she] proves all of the following:

- 1. That [name of plaintiff]'s harm ordinarily would not have happened unless someone was negligent;**
- 2. That the harm was caused by something that only [name of defendant] controlled; and**
- 3. That [name of plaintiff]'s voluntary actions did not cause or contribute to the event[s] that harmed [him/her].**

If you decide that [name of plaintiff] did not prove one or more of these three things, then [insert one of the following:]

[your verdict must be for [name of defendant].]

[or]

[you must decide whether [name of defendant] was negligent in light of the other instructions I have read.]

If you decide that [name of plaintiff] proved all of these three things, you may, but are not required to, find that [name of defendant] was negligent or that [name of defendant]'s negligence was a substantial factor in causing [name of plaintiff]'s harm, or both.

You must carefully consider the evidence presented by both [name of plaintiff] and [name of defendant] before

you make your decision. You should not decide in favor of [name of plaintiff] unless you believe, after weighing all of the evidence, that it is more probable than not that [name of defendant] was negligent and that [his/her] negligence was a substantial factor in causing [name of plaintiff]'s harm.

New September 2003

In the second paragraph, the first bracketed option is to be used when plaintiff is relying solely on a res ipsa loquitur theory and has introduced no other evidence of defendant's negligence. The second option is to be used when plaintiff has introduced other evidence of defendant's negligence.

"It follows that where part of the facts basic to the application of the doctrine of res ipsa loquitur is established as a matter of law but that others are not, the court should instruct that application of the doctrine by the jury depends only upon the existence of the basic facts not conclusively established." (*Rimmele v. Northridge Hospital Foundation* (1975) 46 Cal.App.3d 123, 130 [120 Cal.Rptr. 39] .)

■ "In California, the doctrine of res ipsa loquitur is defined by statute as 'a presumption affecting the burden of producing evidence.' The presumption arises when the evidence satisfies three conditions: '(1) the accident must be of a kind which ordinarily does not occur in the absence of someone's negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff.' A presumption affecting the burden of producing evidence 'require[s] the trier of fact to assume the existence of the presumed fact' unless the defendant introduces evidence to the contrary. The presumed fact, in this context, is that 'a proximate cause of the occurrence was some negligent conduct on the part of the defendant' If the defendant introduces 'evidence which would support a finding that he was not negligent or that any negligence on his part was not a proximate cause of the occurrence,' the trier of fact determines whether defendant was negligent without regard to the presumption, simply by weighing the evidence." (*Brown v. Poway Unified School Dist.* (1993) 4 Cal.4th 820, 825-826 [15 Cal.Rptr.2d 679, 843 P.2d 624] , internal citations omitted.)

■ "Stated less mechanically, a plaintiff suing in a personal injury action is entitled to the benefit of res ipsa loquitur when: 'the accident is of such a nature that it can be said, in the light of past experience, that it probably was the result of negligence by someone and that the defendant is probably the person who is responsible.' " (*Rimmele, supra*, 46 Cal.App.3d at p. 129 , internal citations omitted.)

■ *Evidence Code section 646(c)* provides:

If the evidence, or facts otherwise established, would support a res ipsa loquitur presumption and the defendant has introduced evidence which would support a finding that he was not negligent or that any negligence on his part was not a proximate cause of the occurrence, the court may, and upon request shall, instruct the jury to the effect that:

(1) If the facts which would give rise to a res ipsa loquitur presumption are found or otherwise established, the jury may draw the inference from such facts that a proximate cause of the occurrence was some negligent conduct on the part of the defendant; and

(2) The jury shall not find that a proximate cause of the occurrence was some negligent conduct on the part of the defendant unless the jury believes, after weighing all the evidence in the case and drawing such inferences therefrom as the jury believes are warranted, that it is more probable than not that the occurrence was caused by some

negligent conduct on the part of the defendant.

■ Under *Evidence Code* section 604, a presumption affecting the burden of producing evidence "require[s] the trier of fact to assume the existence of the presumed fact" unless the defendant introduces evidence to the contrary. Here, the presumed fact is that "a proximate cause of the occurrence was some negligent conduct on the part of the defendant." (*Evid. Code*, § 646(c)(1); *Brown*, *supra*, 4 Cal.4th at p. 826 .)

■ "The doctrine of *res ipsa loquitur* is fundamentally a doctrine predicated upon inference deducible from circumstantial evidence." (*Hale v. Venuto* (1982) 137 Cal.App.3d 910, 918 [187 Cal.Rptr. 357] .)

■ The doctrine "is based on a theory of 'probability' where there is no direct evidence of defendant's conduct, permitting a common sense inference of negligence from the happening of the accident." (*Gicking v. Kimberlin* (1985) 170 Cal.App.3d 73, 75 [215 Cal.Rptr. 834] .)

■ "All of the cases hold, in effect, that it must appear, either as a matter of common experience or from evidence in the case, that the accident is of a type which probably would not happen unless someone was negligent." (*Zentz v. Coca Cola Bottling Co. of Fresno* (1952) 39 Cal.2d 436, 442-443 [247 P.2d 344] .)

■ The purpose of the second "control" requirement is to "link the defendant with the probability, already established, that the accident was negligently caused." (*Newing v. Cheatham* (1975) 15 Cal.3d 351, 362 [124 Cal.Rptr. 193, 540 P.2d 33] .) The control requirement is not absolute. (*Zentz*, *supra*, 39 Cal.2d at p. 443 .)

■ "The purpose of [the third] requirement, like that of control by the defendant is to establish that the defendant is the one probably responsible for the accident. The plaintiff need not show that he was entirely inactive at the time of the accident in order to satisfy this requirement, so long as the evidence is such as to eliminate his conduct as a factor contributing to the occurrence." (*Newing*, *supra*, 15 Cal.3d at p. 363 , internal citations omitted.)

■ The third condition "should not be confused with the problem of contributory negligence, as to which defendant has the burden of proof. ... [I]ts purpose, like that of control by the defendant, is merely to assist the court in determining whether it is more probable than not that the defendant was responsible for the accident." (*Zentz*, *supra*, 39 Cal.2d at p. 444 .)

Secondary Sources

1 Witkin, California Evidence (4th ed. 2000) Burden of Proof and Presumptions, §§ 114-118, pp. 250-256

1 Levy et al., California Torts, Ch. 3, *Proof of Negligence*, § 3.20 et seq. (Matthew Bender)

1A *California Trial Guide*, Unit 11, *Opening Statement*, § 11.42, Unit 90, *Closing Argument*, § 90.90 (Matthew Bender)

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

16 *California Points and Authorities*, Ch. 165, *Negligence*, § 165.340 et seq. (Matthew Bender)

Publisher's Notes

This instruction covers issues presented in BAJI Nos. 4.00, 4.01, 4.02, and 4.03.

LexisNexis Matthew Bender Expert Practice Tip--Res Ipsa Loquitur Cases: CACI No. 417 should be viewed by the plaintiff's litigator early on if it appears that there may be facts to support the *res ipsa*

loquitur scenario. An airplane crash where the plaintiff is merely a passenger is an example of when the theory of res ipsa loquitur may come into play. It is an advantage to have the burden shifted to the defendant in these types of cases. *By Dona Cohn-Payne*

LexisNexis Matthew Bender Expert Practice Tip--CACI vs. BAJI: *CACI No. 417* replaces four previous BAJI instructions--BAJI Nos. 4.00, 4.01, 4.02, and 4.03. In my opinion, *CACI No. 417* is more confusing than the BAJI instructions it replaced (and it is no improvement to repeatedly refer to the plaintiff and defendant by name). The four BAJI instructions regarding "Res Ipsa Loquitur" were a flexible combination that allowed a difficult legal concept to be reasonably easy to understand. As such, consider requesting that the court instruct the jury on the theory of Res Ipsa Loquitur by using an appropriate combination of BAJI Nos. 4.00, 4.01, 4.02, and 4.03, rather than *CACI No. 417* because it will be less likely the jury may be confused by the issue. *By Joseph Devine*

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsNegligenceProofRes Ipsa LoquiturGeneral OverviewTortsNegligenceProofRes Ipsa
LoquiturElementsCausationTortsNegligenceProofRes Ipsa LoquiturElementsControlTortsNegligenceProofRes Ipsa
LoquiturElementsType of EventTortsNegligenceProofRes Ipsa LoquiturEvidentiary Effect



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CHAPTER 4 California Judicial Council Negligence Instructions

2-4 California Forms of Jury Instruction CACI 418

CACI 418 Presumption of Negligence per se

[Insert citation to statute, regulation, or ordinance] states:

If you decide

1. That [name of plaintiff/defendant] violated this law and
2. That the violation was a substantial factor in bringing about the harm,

then you must find that [name of plaintiff/defendant] was negligent [unless you also find that the violation was excused].

If you find that [name of plaintiff/defendant] did not violate this law or that the violation was not a substantial factor in bringing about the harm [or if you find the violation was excused], then you must still decide whether [name of plaintiff/defendant] was negligent in light of the other instructions.

New September 2003; Revised December 2005

If a rebuttal is offered on the ground that the violation was excused, then the bracketed portion in the second and last paragraphs should be read. For an instruction on excuse, see *CACI No. 420, Negligence per se: Rebuttal of the Presumption of Negligence (Violation Excused)*.

If the statute is lengthy, the judge may want to read it at the end of this instruction instead of at the beginning. The instruction would then need to be revised, to tell the jury that they will be hearing the

statute at the end.

Rebuttal of the presumption of negligence is addressed in the instructions that follow (see *CACI Nos. 420* and *421*).

■ *Evidence Code* section 669 codifies the common law presumption of negligence per se and the grounds for rebutting the presumption. Subdivision (a) sets forth the conditions that cause the presumption to arise:

The failure of a person to exercise due care is presumed if:

- (1) He violated a statute, ordinance, or regulation of a public entity;
- (2) The violation proximately caused death or injury to person or property;
- (3) The death or injury resulted from an occurrence of the nature which the statute, ordinance, or regulation was designed to prevent; and
- (4) The person suffering the death or the injury to his person or property was one of the class of persons for whose protection the statute, ordinance, or regulation was adopted.

■ In general, the first two elements of *Evidence Code* section 669(a) are questions to be decided by the trier of fact, while the last two are always questions of law. (*Cade v. Mid-City Hospital Corp.* (1975) 45 Cal.App.3d 589, 597 [119 Cal.Rptr. 571] ; see also Law Revision Cal. Com., *Evid. Code*, § 669.) However, in some circumstances violation of the law and/or causation can be decided as questions of law. In those cases, it is unnecessary to instruct the jury on the elements decided by the court.

■ This jury instruction addresses the establishment of the two factual elements underlying the presumption of negligence. If they are not established, then a finding of negligence cannot be based on the alleged statutory violation. However, negligence can still be proven by other means. (*Nunneley v. Edgar Hotel* (1950) 36 Cal.2d 493, 500-501 [225 P.2d 497] .)

■ Statutory negligence, or negligence per se, sets the conduct prescribed by the statute as the standard of care. (*Casey v. Russell* (1982) 138 Cal.App.3d 379, 383 [188 Cal.Rptr. 18] .) Criminal statutes may be used to set the applicable standard of care. (See *Ramirez v. Plough, Inc.* (1993) 6 Cal.4th 539, 547 [25 Cal.Rptr.2d 97, 863 P.2d 167] .) Federal statutes and regulations may be adopted as the standard of care in a negligence action. (*DiRosa v. Showa Denko K. K.* (1996) 44 Cal.App.4th 799, 808 [52 Cal.Rptr.2d 128] .)

■ Safety orders and regulations of administrative agencies may be used to set the standard of care. However, an administrative agency cannot independently impose a duty of care unless the Legislature has properly delegated that authority to the agency. (*California Service Station & Auto. Repair Assn. v. American Home Assurance Co.* (1998) 62 Cal.App.4th 1166, 1175 [73 Cal.Rptr.2d 182] .)

■ OSHA regulations, where applicable, may be used as a basis for negligence per se instructions. (*Lab. Code*, § 6304.5; *Elsner v. Uveges* (2004) 34 Cal.4th 915, 935-936 [22 Cal.Rptr.3d 530, 102 P.3d 915] .)

■ This doctrine applies to negligence of the defendant or contributory negligence of the plaintiff. (*Nevis v. Pacific Gas and Electric Co.* (1954) 43 Cal.2d 626, 631, fn. 1 [275 P.2d 761] .)

Secondary Sources

2-4 California Forms of Jury Instruction CACI 418

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 871-896

California Tort Guide (Cont.Ed.Bar 3d ed.) §§ 1.28-1.31

1 Levy et al., California Torts, Ch. 3, *Proof of Negligence*, §§ 3.10, 3.13 (Matthew Bender)

4 *California Trial Guide, Unit 90, Closing Argument*, §§ 90.88, 90.89 (Matthew Bender)

California Products Liability Actions, Ch. 7, *Proof*, § 7.04 (Matthew Bender)

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

16 *California Points and Authorities, Ch. 165, Negligence*, §§ 165.70, 165.80, 165.81 (Matthew Bender)

Publisher's Notes

This instruction covers issues presented in BAJI No. 3.45.

"A regulatory violation is presumed to constitute negligence and that presumption will be conclusive unless the defendant rebuts it." Absent an express instruction on negligence per se, the jury was allowed to either consider or disregard any regulatory violation. Without an instruction on negligence per se, it is "reasonably probable the significance and weight attributed by the jury to the evidence showing" a violation of the regulations in question was "substantially and unduly diminished." (*Norman v. Life Care Centers of America, Inc.* (2003) 107 Cal.App.4th 1233, 1251 [132 Cal.Rptr.2d 765] .)

LexisNexis Matthew Bender Expert Practice Tip--If Appropriate, Get Negligence Per Se

Instruction: Whenever you have a violation of an ordinance, statute, or regulation you want to get a negligence per se instruction. This carries a lot of weight with a jury when deliberating. *By Dona Cohn-Payne*

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsNegligenceProofViolations of LawGeneral OverviewTortsNegligenceProofViolations of LawOrdinancesTortsNegligenceProofViolations of LawRules & RegulationsTortsNegligenceProofViolations of LawStandards of CareTortsNegligenceProofViolations of LawStatutes



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CHAPTER 4 California Judicial Council Negligence Instructions

2-4 California Forms of Jury Instruction CACI 419

CACI 419 Presumption of Negligence per se (Causation Only at Issue)

[*Insert citation to statute, regulation, or ordinance*] **states:**

_____.

A violation of this law has been established and is not an issue for you to decide.

[However, you must decide whether the violation was excused. If it was not excused, then you] [You] must decide whether the violation was a substantial factor in harming [*name of plaintiff*].

If you decide that the violation was a substantial factor, then you must find that [*name of plaintiff/defendant*] was negligent.

New September 2003

The California Law Revision Commission comment on *Evidence Code* section 669 states that the trier of fact usually decides the question of whether the violation occurred. However, "if a party admits the violation or if the evidence of the violation is undisputed, it is appropriate for the judge to instruct the jury that a violation of the statute, ordinance, or regulation has been established as a matter of law." In such cases, the jury would decide causation and, if applicable, the existence of any justification or excuse. For an instruction on excuse, see *CACI No. 420, Negligence per se: Rebuttal of the Presumption of Negligence (Violation Excused)*.

● *Evidence Code* section 669.

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 871-896

California Tort Guide (Cont.Ed.Bar 3d ed.) §§ 1.28-1.31

1 Levy et al., California Torts, Ch. 3, *Proof of Negligence*, § 3.10 (Matthew Bender)

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

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

16 *California Points and Authorities, Ch. 165, Negligence*, §§ 165.70, 165.80 (Matthew Bender)

Publisher's Notes

This instruction covers issues presented in BAJI No. 3.45.

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsNegligenceCausationGeneral OverviewTortsNegligenceProofEvidenceProvince of Court & JuryTortsNegligenceProofViolations of LawGeneral Overview



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CHAPTER 4 California Judicial Council Negligence Instructions

2-4 California Forms of Jury Instruction CACI 420

CACI 420 Negligence per se: Rebuttal of the Presumption of Negligence (Violation Excused)

A violation of a law is excused if one of the following is true:

- (a) The violation was reasonable because of [name of plaintiff/defendant]'s [specify type of "incapacity"]; [or]**
- (b) Despite using reasonable care, [name of plaintiff/defendant] was not able to obey the law; [or]**
- (c) [Name of plaintiff/defendant] faced an emergency that was not caused by [his/her] own misconduct; [or]**
- (d) Obeying the law would have involved a greater risk of harm to [name of plaintiff/defendant] or to others; [or]**
- (e) [Other reason excusing or justifying noncompliance.]**

New September 2003

Subparagraph (b), regarding an attempt to comply with the applicable statute or regulation, should not be given where the evidence does not show such an attempt. (*Atkins v. Bisigier* (1971) 16 Cal.App.3d 414, 423 [94 Cal.Rptr. 49] .) Subparagraph (b) should be used only in special cases because it relies on the concept of due care to avoid a charge of negligence per se.

■ *Evidence Code section 669(b)(1)* provides: "This presumption may be rebutted by proof that [t]he

person violating the statute, ordinance, or regulation did what might reasonably be expected of a person of ordinary prudence, acting under similar circumstances, who desired to comply with the law."

■ The language of section 669(b)(1) appears to be based on the following Supreme Court holding: "In our opinion the correct test is whether the person who has violated a statute has sustained the burden of showing that he did what might reasonably be expected of a person of ordinary prudence, acting under similar circumstances, who desired to comply with the law." (*Alarid v. Vanier* (1958) 50 Cal.2d 617, 624 [327 P.2d 897] .)

■ In *Casey v. Russell* (1982) 138 Cal.App.3d 379 [188 Cal.Rptr. 18] , the court held that an instruction that tracked the language of section 669(b)(1) was erroneous because it "[did] not adequately convey that there must be some special circumstances which justify violating the statute." (*Id.* at p. 385 .) The court's opinion cited *section 288A of the Restatement Second of Torts* for a list of the types of emergencies or unusual circumstances that may justify or excuse a violation of the statute:

- (a) The violation is reasonable because of the actor's incapacity;
- (b) He neither knows nor should know of the occasion for compliance;
- (c) He is unable after reasonable diligence or care to comply;
- (d) He is confronted by an emergency not due to his own misconduct;
- (e) Compliance would involve a greater risk of harm to the actor or to others.

According to the Restatement comment, this list of circumstances is not meant to be exclusive.

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 871-896

California Tort Guide (Cont.Ed.Bar 3d ed.) §§ 1.28-1.31

1 Levy et al., California Torts, Ch. 3, *Proof of Negligence*, § 3.13 (Matthew Bender)

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

16 *California Points and Authorities*, Ch. 165, *Negligence*, § 165.81 (Matthew Bender)

Publisher's Notes

This instruction covers issues presented in BAJI No. 3.45.

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsNegligenceProofEvidenceGeneral OverviewTortsNegligenceProofViolations of LawGeneral OverviewTortsNegligenceStandards of CareReasonable CareSudden Emergencies



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CHAPTER 4 California Judicial Council Negligence Instructions

2-4 California Forms of Jury Instruction CACI 421

CACI 421 Negligence per se: Rebuttal of the Presumption of Negligence (Violation of Minor Excused)

[Name of plaintiff/defendant] claims that even if [he/she] violated the law, [he/she] is not negligent because [he/she] was ____ years old at the time of the incident. If you find that [name of plaintiff/defendant] was as careful as a reasonably careful child of the same age, intelligence, knowledge, and experience would have been in the same situation, then [name of plaintiff/defendant] was not negligent.

New September 2003

This instruction does not apply if the minor is engaging in an adult activity. (*Evid. Code*, § 669(b)(2).)

- *Evidence Code* section 669(b)(2) provides: "The presumption may be rebutted by proof that [t]he person violating the statute, ordinance, or regulation was a child and exercised the degree of care ordinarily exercised by persons of his maturity, intelligence, and capacity under similar circumstances, but the presumption may not be rebutted by such proof if the violation occurred in the course of an activity normally engaged in only by adults and requiring adult qualifications."

- "The per se negligence instruction is predicated on the theory that the Legislature has adopted a statutory standard of conduct that no reasonable man would violate, and that all reasonable adults would or should know such standard. But this concept does not apply to children." (*Daun v. Truax* (1961) 56 Cal.2d 647, 654 [16 Cal.Rptr. 351, 365 P.2d 407] .)

- An exception to this reduced standard of care may be found if the minor was engaging in an adult activity, such as driving. (*Prichard v. Veterans Cab Co.* (1965) 63 Cal.2d 727, 732 [47 Cal.Rptr. 904, 408 P.2d 360] ; *Neudeck v. Bransten* (1965) 233 Cal.App.2d 17, 21 [43 Cal.Rptr. 250] ; see also *Rest.2d*

Torts, § 283A, com. c.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 871-896

California Tort Guide (Cont.Ed.Bar 3d ed.) §§ 1.28-1.31

1 Levy et al., California Torts, Ch. 3, *Proof of Negligence*, § 3.13 (Matthew Bender)

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

Publisher's Notes

This instruction covers issues presented in BAJI No. 3.45.

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsNegligenceProofViolations of LawGeneral OverviewTortsNegligenceProofViolations of LawStandards of CareTortsNegligenceProofViolations of LawStatutesTortsNegligenceStandards of CareSpecial CareChildren



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CHAPTER 4 California Judicial Council Negligence Instructions

2-4 California Forms of Jury Instruction CACI 422

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

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

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

- 1. That [*name of defendant*] was [licensed/authorized/required to be licensed or authorized] to sell alcoholic beverages;**
- 2. That [*name of defendant*] sold or gave alcoholic beverages to [*name of alleged minor*];**
- 3. That [*name of alleged minor*] was less than 21 years old at the time;**
- 4. That when [*name of defendant*] provided the alcoholic beverages, [*name of alleged minor*] displayed symptoms that would lead a reasonable person to conclude that [he/she] was obviously intoxicated;**
- 5. That [*name of alleged minor*] harmed [*name of plaintiff*]; and**
- 6. That [*name of defendant*]'s selling or giving alcoholic beverages to [*name of alleged minor*] was a substantial factor in causing [*name of plaintiff*]'s harm.**

In deciding whether [*name of alleged minor*] was obviously intoxicated, you may consider whether [he/she] displayed one or more of the following symptoms to [*name of defendant*] before the alcoholic beverages were provided: impaired judgment; alcoholic breath; incoherent or slurred speech; poor muscular coordination; staggering or unsteady walk or loss of balance; loud, boisterous, or argumentative conduct; flushed face; or

other symptoms of intoxication. The mere fact that [name of alleged minor] had been drinking is not enough.

New September 2003; Revised December 2009

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

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

- *Business and Professions Code section 25602.1* provides, in relevant part: "[A] cause of action may be brought by or on behalf of any person who has suffered injury or death against any person licensed, or required to be licensed ... or any person authorized by the federal government to sell alcoholic beverages on a military base or other federal enclave, who sells, furnishes, gives or causes to be sold, furnished or sold, any alcoholic beverage, to any obviously intoxicated minor where the furnishing, sale or giving of that beverage to the minor is the proximate cause of the personal injury or death sustained by that person."

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

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

- The description of symptoms is derived from an instruction approved in *Jones v. Toyota Motor Co. (1988) 198 Cal.App.3d 364, 370 [243 Cal.Rptr. 611]* .

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

- "It is our conclusion that the terms of section 25602.1 should be construed strictly, so as to require that the negligence resulting in liability of the alcohol purveyor be that of the very person who purchased the beverage." (*Salem v. Superior Court (1989) 211 Cal.App.3d 595, 600 [259 Cal.Rptr. 447]* .)

- "[O]bviously intoxicated minors who are served alcohol by a licensed purveyor of liquor, may bring a cause of action for negligence against the purveyor for [their own] subsequent injuries." (*Chalup, supra*, 175 Cal.App.3d at p. 979 .)

Secondary Sources

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

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

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

Publisher's Notes

This instruction replaces BAJI No. 4.50.

LexisNexis Matthew Bender Expert Practice Tip--When to Use CACI No. 422: This instruction is very important to review when you have a case that involves the sale of alcohol to a minor and then a subsequent injury or death occurs due to negligence. This scenario often arises in drunk driving cases with teens if they were provided alcohol at a business establishment. *By Dona Cohn-Payne*

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsNegligenceDutyAlcohol ProvidersDram Shop StatutesTortsNegligenceDutyAlcohol ProvidersKnowledge RequirementsTortsNegligenceProofViolations of LawStatutes



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California Forms of Jury Instruction

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CHAPTER 4 California Judicial Council Negligence Instructions

2-4 California Forms of Jury Instruction CACI 423

CACI 423 Public Entity Liability for Failure to Perform Mandatory Duty

[Name of plaintiff] **claims that [he/she] was harmed because [name of defendant] violated [insert reference to statute, regulation, or ordinance] which states: _____ [insert relevant language]. To establish this claim, [name of plaintiff] must prove all of the following:**

1. **That [name of defendant] violated [insert reference to statute, regulation, or ordinance];**
2. **That [name of plaintiff] was harmed; and**
3. **That [name of defendant]'s failure to perform its duty was a substantial factor in causing [name of plaintiff]'s harm.**

[Name of defendant], **however, is not responsible for [name of plaintiff]'s harm if [name of defendant] proves that it made reasonable efforts to perform its duties under the [statute/regulation/ordinance].**

New September 2003

The judge decides the issues of whether the statute imposes a mandatory duty and whether it was designed to protect against the type of harm suffered. (*Haggis v. City of Los Angeles* (2000) 22 Cal.4th 490, 499 [93 Cal.Rptr.2d 327, 993 P.2d 983] .)

■ *Government Code section 815.6* provides: "Where a public entity is under a mandatory duty imposed by an enactment that is designed to protect against the risk of a particular kind of injury, the public entity is liable for an injury of that kind proximately caused by its failure to discharge the duty unless the public

entity establishes that it exercised reasonable diligence to discharge the duty."

■ "Before the state will be required to confront a rebuttable presumption of negligence, plaintiff must demonstrate that: (1) the statute which was violated imposes a mandatory duty, (2) the statute was intended to protect against the type of harm suffered, and (3) breach of the statute's mandatory duty was a proximate cause of the injury suffered." (*Braman v. State of California* (1994) 28 Cal.App.4th 344, 349 [33 Cal.Rptr.2d 608] , internal citation omitted.)

■ "'Government Code section 815.6 contains a three-pronged test for determining whether liability may be imposed on a public entity: (1) an enactment must impose a mandatory, not discretionary, duty ... ; (2) the enactment must intend to protect against the kind of risk of injury suffered by the party asserting section 815.6 as a basis for liability ... ; and (3) breach of the mandatory duty must be a proximate cause of the injury suffered.' All three elements must be met before a government entity is required to confront the rebuttable presumption of negligence." (*Walt Rankin & Associates, Inc. v. City of Murrieta* (2000) 84 Cal.App.4th 605, 614 [101 Cal.Rptr.2d 48] , internal citation omitted.)

■ "In order to recover plaintiffs have to show that there is some specific statutory mandate that was violated by the County, which violation was a proximate cause of the accident." (*Washington v. County of Contra Costa* (1995) 38 Cal.App.4th 890, 896-897 [45 Cal.Rptr.2d 646] , internal citations omitted.)

■ "Courts have recognized that as a practical matter the standard for determining whether a mandatory duty exists is 'virtually identical' to the test for an implied statutory duty of care under *Evidence Code* section 669." (*Alejo v. City of Alhambra* (1999) 75 Cal.App.4th 1180, 1185, fn. 3 [89 Cal.Rptr.2d 768] , internal citations omitted.)

■ "Financial limitations of governments have never been, and cannot be, deemed an excuse for a public employee's failure to comply with mandatory duties imposed by law." (*Scott v. County of Los Angeles* (1994) 27 Cal.App.4th 125, 146 [32 Cal.Rptr.2d 643] , internal citations omitted.)

■ "Questions of statutory immunity do not become relevant until it has been determined that the defendant otherwise owes a duty of care to the plaintiff and thus would be liable in the absence of such immunity. However, a defendant may not be held liable for the breach of a duty if such an immunity in fact exists." (*Washington, supra*, 38 Cal.App.4th at p. 896 , internal citations omitted.)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 245-248

5 Levy et al., California Torts, Ch. 60, *General Principles of Liability and Immunity of Public Entities and Employees*, Ch. 61, *Particular Liabilities and Immunities of Public Entities and Public Employees* (Matthew Bender)

40 California Forms of Pleading and Practice, Ch. 464, *Public Entities and Officers* (Matthew Bender)

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

Publisher's Notes

This instruction replaces BAJI No. 11.52.

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsNegligenceProofViolations of LawStatutesTortsPublic Entity LiabilityImmunityGeneral OverviewTortsPublic
Entity LiabilityLiabilityGeneral Overview



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CHAPTER 4 California Judicial Council Negligence Instructions

2-4 California Forms of Jury Instruction CACI 424

CACI 424 Negligence not Contested--Essential Factual Elements

[*Name of plaintiff*] **claims that [he/she] was harmed by [*name of defendant*]'s negligence. [*Name of defendant*] agrees that [he/she/it] was negligent, but denies that the negligence caused [[*name of plaintiff*] any harm/the full extent of the harm claimed by [*name of plaintiff*]].**

To establish [his/her/its] claim against [*name of defendant*], [*name of plaintiff*] must prove both of the following:

- 1. That [*name of plaintiff*] was harmed; and**
- 2. That [*name of defendant*]'s negligence was a substantial factor in causing [*name of plaintiff*]'s harm.**

New June 2005

This instruction is intended for cases in which the defendant "admits" liability, but contests causation and damages. This instruction can be modified for use in cases involving claims that are not based on negligence.

Secondary Sources

1 Levy et al., *California Torts*, Ch. 1, *Negligence: Duty and Breach*, Ch. 2, *Causation* (Matthew Bender)

Publisher's Notes

There is no BAJI instruction on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsNegligenceCausationGeneral Overview



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CHAPTER 4 California Judicial Council Negligence Instructions

2-4 California Forms of Jury Instruction CACI 425

CACI 425 "Gross Negligence" Explained

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

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

New April 2008

Directions for Use

Give this instruction if a particular statute that is at issue in the case creates a distinction based on a standard of gross negligence. (See, e.g., *Gov. Code*, § 831.7(c)(5) [immunity for public entity or employee to liability to participant in or spectator to hazardous recreational activity does not apply if act of gross negligence is proximate cause of injury].) Courts generally resort to this definition if gross negligence is at issue under a statute. (See, e.g., *Wood v. County of San Joaquin* (2003) 111 *Cal.App.4th* 960, 971 [4 *Cal.Rptr.3d* 340] .)

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

This instruction may also be given if case law has created a distinction between gross and ordinary negligence. For example, under the doctrine of express assumption of risk, a signed waiver of liability may release liability for ordinary negligence only, not for gross negligence. (See *City of Santa Barbara v. Superior Court* (2007) 41 *Cal.4th* 747, 777 [62 *Cal.Rptr.3d* 527, 161 *P.3d* 1095] ; see also *CACI No. 451, Express Assumption of Risk*.)

Sources and Authority

■ "'Gross negligence' long has been defined in California and other jurisdictions as either a 'want of even scant care' or 'an extreme departure from the ordinary standard of conduct.'" (*City of Santa Barbara*, *supra*, 41 Cal.4th at p. 754 , internal citations omitted.)

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

■ "The theory that there are degrees of negligence has been generally criticized by legal writers, but a distinction has been made in this state between ordinary and gross negligence. Gross negligence has been said to mean the want of even scant care or an extreme departure from the ordinary standard of conduct." (*Van Meter v. Bent Constr. Co.* (1956) 46 Cal.2d 588, 594 [297 P.2d 644] , internal citation omitted.)

■ "Numerous California cases have discussed the doctrine of gross negligence. Invariably these cases have turned upon an interpretation of a statute which has used the words 'gross negligence' in the text." (*Cont'l Ins. Co. v. Am. Prot. Indus.* (1987) 197 Cal.App.3d 322, 329 [242 Cal.Rptr. 784] .)

■ "[P]ublic policy generally precludes enforcement of an agreement that would remove an obligation to adhere to even a *minimal* standard of care. Applying that general rule here, we hold that an agreement purporting to release liability for future gross negligence committed against a developmentally disabled child who participates in a recreational camp designed for the needs of such children violates public policy and is unenforceable." (*City of Santa Barbara*, *supra*, 41 Cal.4th at p. 777 , original italics.)

■ "'Prosser on Torts (1941) page 260, also cited by the *Van Meter* court for its definition of gross negligence, reads as follows: 'Gross Negligence. This is very great negligence, or the want of even scant care. It has been described as a failure to exercise even that care which a careless person would use. Many courts, dissatisfied with a term so devoid of all real content, have interpreted it as requiring wilful misconduct, or recklessness, or such utter lack of all care as will be evidence of either--sometimes on the ground that this must have been the purpose of the legislature. But most courts have considered that 'gross negligence' falls short of a reckless disregard of consequences, and differs from ordinary negligence only in degree, and not in kind. *So far as it has any accepted meaning, it is merely an extreme departure from the ordinary standard of care.*'" (*Decker v. City of Imperial Beach* (1989) 209 Cal.App.3d 349, 358 [257 Cal.Rptr. 356] , original italics, internal citations omitted.)

■ "California courts require a showing of 'the want of even scant care or an extreme departure from the ordinary standard of conduct' in order to establish gross negligence. Generally it is a triable issue of fact whether there has been such a lack of care as to constitute gross negligence but not always." (*Decker*, *supra*, 209 Cal.App.3d at p. 358 , internal citations omitted.)

■ "The Legislature has enacted numerous statutes ... which provide immunity to persons providing emergency assistance except when there is gross negligence. (See *Bus. & Prof. Code*, § 2727.5 [immunity for licensed nurse who in good faith renders emergency care at the scene of an emergency occurring outside the place and course of nurse's employment unless the nurse is grossly negligent]; *Bus. & Prof. Code*, § 2395.5 [immunity for a licensed physician who serves on-call in a hospital emergency room who in good faith renders emergency obstetrical services unless the physician was grossly negligent, reckless, or committed willful misconduct]; *Bus. & Prof. Code*, § 2398 [immunity for licensed

physician who in good faith and without compensation renders voluntary emergency medical assistance to a participant in a community college or high school athletic event for an injury suffered in the course of that event unless the physician was grossly negligent]; *Bus. & Prof. Code*, § 3706 [immunity for certified respiratory therapist who in good faith renders emergency care at the scene of an emergency occurring outside the place and course of employment unless the respiratory therapist was grossly negligent]; *Bus. & Prof. Code*, § 4840.6 [immunity for a registered animal health technician who in good faith renders emergency animal health care at the scene of an emergency unless the animal health technician was grossly negligent]; *Civ. Code*, § 1714.2 [immunity to a person who has completed a basic cardiopulmonary resuscitation course for cardiopulmonary resuscitation and emergency cardiac care who in good faith renders emergency cardiopulmonary resuscitation at the scene of an emergency unless the individual was grossly negligent]; *Health & Saf. Code*, § 1799.105 [immunity for poison control center personnel who in good faith provide emergency information and advice unless they are grossly negligent]; *Health & Saf. Code*, § 1799.106 [immunity for a firefighter, police officer or other law enforcement officer who in good faith renders emergency medical services at the scene of an emergency unless the officer was grossly negligent]; *Health & Saf. Code*, § 1799.107 [immunity for public entity and emergency rescue personnel acting in good faith within the scope of their employment unless they were grossly negligent].) (*Decker, supra*, 209 Cal.App.3d at pp. 356-357 .)

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

Secondary Sources

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

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

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

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

Publisher's Notes

There is no BAJI instruction on this subject.



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CHAPTER 4 California Judicial Council Negligence Instructions

2-4 California Forms of Jury Instruction CACI 426

CACI 426 Negligent Hiring, Supervision, or Retention of Employee

[*Name of plaintiff*] **claims that [he/she] was harmed by [*name of employee*] and that [*name of employer defendant*] is responsible for that harm because [*name of employer defendant*] negligently [hired/ supervised/ [or] retained] [*name of employee*]. To establish this claim, [*name of plaintiff*] must prove all of the following:**

- 1. That [*name of employee*] was [unfit/ [or] incompetent] to perform the work for which [he/she] was hired;**
- 2. That [*name of employer defendant*] knew or should have known that [*name of employee*] was [unfit/ [or] incompetent] and that this [unfitness/ [or] incompetence] created a particular risk to others;**
- 3. That [*name of employee*]'s [unfitness/ [or] incompetence] harmed [*name of plaintiff*]; and**
- 4. That [*name of employer defendant*]'s negligence in [hiring/ supervising/ [or] retaining] [*name of employee*] was a substantial factor in causing [*name of plaintiff*]'s harm.**

New December 2009

Directions for Use

Give this instruction if the plaintiff alleges that the employer of an employee who caused harm was negligent in the hiring, supervision, or retention of the employee after actual or constructive notice of the employee's unfitness. For instructions holding the employer vicariously liable (without fault) for the acts of the employee, see the Vicarious Responsibility series, *CACI No. 3700 et seq.*

It appears that liability may also be imposed on the hirer of an independent contractor for the negligent selection of the contractor. (See *Noble v. Sears, Roebuck & Co.* (1973) 33 Cal.App.3d 654, 662-663 [109 Cal.Rptr. 269] .)

Sources and Authority

- "California case law recognizes the theory that an employer can be liable to a third person for negligently hiring, supervising, or retaining an unfit employee." (*Doe v. Capital Cities* (1996) 50 Cal.App.4th 1038, 1054 [58 Cal.Rptr.2d 122] .)
- "Negligence liability will be imposed on an employer if it 'knew or should have known that hiring the employee created a particular risk or hazard and that particular harm materializes.' " (*Phillips v. TLC Plumbing, Inc.* (2009) 172 Cal.App.4th 1133, 1139 [91 Cal.Rptr.3d 864] .)
- "Liability for negligent supervision and/or retention of an employee is one of direct liability for negligence, not vicarious liability." (*Delfino v. Agilent Technologies, Inc.* (2006) 145 Cal.App.4th 790, 815 [52 Cal.Rptr.3d 376] .)
- "Liability for negligent hiring and supervision is based upon the reasoning that if an enterprise hires individuals with characteristics which might pose a danger to customers or other employees, the enterprise should bear the loss caused by the wrongdoing of its incompetent or unfit employees. The tort has developed in California in factual settings where the plaintiff's injury occurred in the workplace, or the contact between the plaintiff and the employee was generated by the employment relationship." (*Mendoza v. City of Los Angeles* (1998) 66 Cal.App.4th 1333, 1339-1340 [78 Cal.Rptr.2d 525] .)
- "We are cited to no authority, nor have we found any authority basing liability on lack of, or on inadequate, supervision, in the absence of knowledge by the principal that the agent or servant was a person who could not be trusted to act properly without being supervised." (*Noble, supra*, 33 Cal.App.3d at p. 664 .)
- "Apparently, [defendant] had no actual knowledge of [the employee]'s past. But the evidence recounted above presents triable issues of material fact regarding whether the [defendant] had reason to believe [the employee] was unfit or whether the [defendant] failed to use reasonable care in investigating [the employee]." (*Evan F. v. Hughson United Methodist Church* (1992) 8 Cal.App.4th 828, 843 [10 Cal.Rptr.2d 748] ; cf. *Flores v. AutoZone West Inc.* (2008) 161 Cal.App.4th 373, 384-386 [74 Cal.Rptr.3d 178] [employer had no duty to investigate and discover that job applicant had a juvenile delinquency record].)
- *Restatement Third of Agency*, section 7.05(1), states: "A principal who conducts an activity through an agent is subject to liability for harm to a third party caused by the agent's conduct if the harm was caused by the principal's negligence in selecting, training, retaining, supervising, or otherwise controlling the agent."

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, § 1190

Chin et al., California Practice Guide: Employment Litigation (The Rutter Group) P 5:615 et seq.

3 California Torts, Ch. 40B, Employment Discrimination and Harassment, § 40B.21 (Matthew Bender)

21 *California Forms of Pleading and Practice*, Ch. 248, *Employer's Liability for Employee's Torts*, § 248.12 (Matthew Bender)

10 *California Points and Authorities*, Ch. 100A, *Employer and Employee: Respondeat Superior*, § 100A.22 (Matthew Bender)

Publisher's Notes

There is no BAJI instruction on this subject.



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CHAPTER 4 California Judicial Council Negligence Instructions

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CACI 427Reserved for Future Use



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CHAPTER 4 California Judicial Council Negligence Instructions

2-4 California Forms of Jury Instruction CACI 430

CACI 430 Causation: Substantial Factor

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

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

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

Directions for Use

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

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

The "but for" test of the last optional sentence does not apply to concurrent independent causes, which are multiple forces operating at the same time and independently, each of which would have been

sufficient by itself to bring about the same harm. (*Viner v. Sweet* (2003) 30 Cal.4th 1232, 1240 [135 Cal.Rptr.2d 629, 70 P.3d 1046] ; *Barton v. Owen* (1977) 71 Cal.App.3d 484, 503-504 [139 Cal.Rptr. 494] ; see *Rest.2d Torts*, § 432(2).) Accordingly, do not include the last sentence in a case involving concurrent independent causes.

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

In asbestos-related cancer cases, *Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, 977 [67 Cal.Rptr.2d 16, 941 P.2d 1203] requires a different instruction regarding exposure to a particular product. Give CACI No. 435, *Causation for Asbestos-Related Cancer Claims*, and do not give this instruction.

Sources and Authority

- This instruction incorporates *Restatement Second of Torts*, section 431, comment a, which provides, in part: "The word 'substantial' is used to denote the fact that the defendant's conduct has such an effect in producing the harm as to lead reasonable men to regard it as a cause, using that word in the popular sense, in which there always lurks the idea of responsibility, rather than in the so-called 'philosophic sense' which includes every one of the great number of events without which any happening would not have occurred."

- "California has definitively adopted the substantial factor test of the Restatement Second of Torts for cause-in-fact determinations. Under that standard, a cause in fact is something that is a substantial factor in bringing about the injury. The substantial factor standard generally produces the same results as does the 'but for' rule of causation which states that a defendant's conduct is a cause of the injury if the injury would not have occurred 'but for' that conduct. The substantial factor standard, however, has been embraced as a clearer rule of causation--one which subsumes the 'but for' test while reaching beyond it to satisfactorily address other situations, such as those involving independent or concurrent causes in fact." (*Rutherford*, *supra*, 16 Cal.4th at pp. 968-969 , internal citations omitted.)

- "The term 'substantial factor' has not been judicially defined with specificity, and indeed it has been observed that it is 'neither possible nor desirable to reduce it to any lower terms.' This court has suggested that a force which plays only an 'infinitesimal' or 'theoretical' part in bringing about injury, damage, or loss is not a substantial factor. Undue emphasis should not be placed on the term 'substantial.' For example, the substantial factor standard, formulated to aid plaintiffs as a broader rule of causality than the 'but for' test, has been invoked by defendants whose conduct is clearly a 'but for' cause of plaintiff's injury but is nevertheless urged as an insubstantial contribution to the injury. Misused in this way, the substantial factor test 'undermines the principles of comparative negligence, under which a party is responsible for his or her share of negligence and the harm caused thereby.' " (*Rutherford*, *supra*, 16 Cal.4th at pp. 968-969 , internal citations omitted.)

- "The substantial factor standard is a relatively broad one, requiring only that the contribution of the individual cause be more than negligible or theoretical. Thus, 'a force which plays only an "infinitesimal" or "theoretical" part in bringing about injury, damage, or loss is not a substantial factor', but a very minor force that does cause harm is a substantial factor. This rule honors the principle of comparative fault." (*Bockrath v. Aldrich Chemical Co.* (1999) 21 Cal.4th 71, 79 [86 Cal.Rptr.2d 846, 980 P.2d 398] , internal citations omitted.)

■ "The text of *Restatement Torts second section 432* demonstrates how the 'substantial factor' test subsumes the traditional 'but for' test of causation. Subsection (1) of section 432 provides: 'Except as stated in Subsection (2), the actor's negligent conduct *is not a substantial factor* in bringing about harm to another *if the harm would have been sustained even if the actor had not been negligent.*' ... Subsection (2) states that if 'two forces are actively operating ... and each of itself is sufficient to bring about harm to another, the actor's negligence may be found to be a substantial factor in bringing it about.' " (*Viner, supra*, 30 Cal. 4th at p. 1240 , original italics.)

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

■ "The first element of legal cause is cause in fact The 'but for' rule has traditionally been applied to determine cause in fact. The Restatement formula uses the term *substantial factor* 'to denote the fact that the defendant's conduct has such an effect in producing the harm as to lead reasonable men to regard it as a cause.' " (*Mayes v. Bryan* (2006) 139 Cal.App.4th 1075, 1095 [44 Cal.Rptr.3d 14] , internal citations omitted.)

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

■ "However the test is phrased, causation in fact is ultimately a matter of probability and common sense." (*Osborn v. Irwin Memorial Blood Bank* (1992) 5 Cal.App.4th 234, 253 [7 Cal.Rptr.2d 101] , relying on *Rest.2d Torts*, § 433B, *com. b.*)

■ *Restatement Second of Torts, section 431*, provides: "The actor's negligent conduct is a legal cause of harm to another if (a) his conduct is a substantial factor in bringing about the harm, and, (b) there is no rule of law relieving the actor from liability because of the manner in which his negligence has resulted in the harm." This section "correctly states California law as to the issue of causation in tort cases." (*Wilson v. Blue Cross of Southern California* (1990) 222 Cal.App.3d 660, 673 [271 Cal.Rptr. 876] .)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1185-1189, 1191

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

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

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

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

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

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

Publisher's Notes

This instruction replaces BAJI No. 3.76.

Viner v. Sweet (2003) 30 Cal.4th 1232 [135 Cal.Rptr.2d 629, 70 P.3d 1046] , discusses the "but for" and substantial factor test for causation in fact, specifically in the context of legal malpractice in the performance of transactional work alleged to have caused financial loss. "[M]ust the client prove this causation element according to the 'but for' test, meaning that the harm or loss would not have occurred without the attorney's malpractice. The answer is yes." *Mitchell v. Gonzales* (1991) 54 Cal.3d 1041 [1 Cal.Rptr.2d 913, 819 P.2d 872] "did not abandon or repudiate the requirement that the plaintiff must prove that *but for* the alleged negligence, the harm would not have happened. On the contrary, *Mitchell* ... recognized that 'the "substantial factor" test *subsumes* the "but for" test.' " (*Viner v. Sweet* (2003) 30 Cal.4th 1232, 1235, 1239 [135 Cal.Rptr.2d 629, 70 P.3d 1046] .)

LexisNexis Matthew Bender Expert Practice Tip--Meaning of Substantial Factor: Substantial factor has also meant "more likely than not." There is no rule of law that puts a percentage on the "substantial" portion of CACI No. 430. By *Dona Cohn-Payne*

LexisNexis Matthew Bender Expert Practice Tip--Substantial Factor Test of Causation: Perhaps the most controversial new Judicial Council jury instruction is CACI No. 430, "Causation: Substantial Factor." This instruction replaces BAJI No. 3.76, "Cause--Substantial Factor Test," which defined "cause." BAJI No. 3.76 states as follows: "The law defines cause in its own particular way. A cause of [injury] [damage] [loss] [or] [harm] is something that is a substantial factor in bringing about an [injury] [damage] [loss] [or] [harm]." This instruction was an attempt to define for the jury the word "cause." It defined the word "cause" to mean that which is a "substantial factor."

CACI No. 430 does not define the word "cause." Instead, it defines the phrase "substantial factor" and states: "A substantial factor in causing harm is a factor that a reasonable person would consider to have *contributed* to the harm. It must be *more than a remote or trivial* factor. It does not have to be the only cause of the harm" (emphasis added).

Both BAJI and CACI make reference to the Restatement Second of Torts, § 431, comment a: "The word 'substantial' is used to denote the fact that the defendant's conduct has such an effect in producing the

harm as to lead reasonable men to regard it as a cause, using that word in the popular sense" It stretches the imagination to believe that reasonable people, using the word in the popular sense, would conclude that a "substantial" factor caused harm if it merely "contributed" to the harm.

In light of the above, the "Tip" here is that anyone who could possibly be considered to be within the "Universe of Tortfeasors" likely would meet this "substantial factor" test of causation. If evidence against a defendant is not "substantial," consider argument in pretrial motions that any evidence of negligence should be allowed to show any other factor "contributed" to the harm as long as it was not "remote" or "trivial." Such evidence and argument to the jury should be allowed under *Civ. Code § 1431.2* (regarding several liability for non-economic damages). *By Joseph Devine*

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsNegligenceCausationGeneral OverviewTortsNegligenceCausationCause in FactTortsNegligenceCausationProximate CauseConcurrent CausationTortsNegligenceDefensesComparative NegligenceMultiple PartiesContribution



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CHAPTER 4 California Judicial Council Negligence Instructions

2-4 California Forms of Jury Instruction CACI 431

CACI 431 Causation: Multiple Causes

A person's negligence may combine with another factor to cause harm. If you find that [name of defendant]'s negligence was a substantial factor in causing [name of plaintiff]'s harm, then [name of defendant] is responsible for the harm. [Name of defendant] cannot avoid responsibility just because some other person, condition, or event was also a substantial factor in causing [name of plaintiff]'s harm.

New September 2003

This instruction will apply only when negligence is the theory asserted against the defendant. This instruction should be modified if the defendant is sued on a theory of product liability or intentional tort.

- Multiple causation, or "concurrent cause," is the basis for the doctrine of comparative fault: "For there to be comparative fault there must be more than one contributory or concurrent legal cause of the injury for which recompense is sought." (*Douplik v. General Motors Corp.* (1991) 225 Cal.App.3d 849, 866 [275 Cal.Rptr. 715] .)

- In *Logacz v. Limansky* (1999) 71 Cal.App.4th 1149, 1152 [84 Cal.Rptr.2d 257] , the appellate court held that the trial court's error in refusing a concurrent cause instruction was prejudicial.

- In *Espinosa v. Little Company of Mary Hospital* (1995) 31 Cal.App.4th 1304 [37 Cal.Rptr.2d 541] , the Court of Appeal reversed the trial court's grant of nonsuit in a medical malpractice case. The plaintiff produced evidence indicating that three causes were responsible for his brain damage, including two that were attributable to the defendants. The trial court ruled in favor of the nonsuit, finding that the plaintiff had not shown causation. The reviewing court disagreed: "Clearly, where a defendant's negligence is a

concurring cause of an injury, the law regards it as a legal cause of the injury, regardless of the extent to which it contributes to the injury." (*Id.* at pp. 1317-1318 .)

■ A concurrent cause can be either another party's negligence or a natural cause. In *Hughey v. Candoli* (1958) 159 Cal.App.2d 231 [323 P.2d 779] , the court held that the defendant's negligence in an automobile accident was a proximate cause of the death of a fetus, even though the fetus also had a heart defect: "In this situation the concurrence of the nontortious cause does not absolve defendant from liability for the tortious one." (*Id.* at p. 240 .)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, § 1193

California Tort Guide (Cont.Ed.Bar 3d ed.) § 1.16

1 Levy et al., California Torts, Ch. 2, *Causation*, § 2.11 (Matthew Bender)

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

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

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

16 *California Points and Authorities*, Ch. 165, *Negligence*, §§ 165.280 -165.284 (Matthew Bender)

Publisher's Notes

This instruction covers issues presented in BAJI No. 3.77.

LexisNexis Matthew Bender Expert Practice Tip--Use of CACI No. 431: This instruction should be used when there are multiple defendants or persons who are not a party to the action but may have contributed to the harm. *By Dona Cohn-Payne*

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsNegligenceCausationGeneral OverviewTortsNegligenceCausationProximate CauseConcurrent CausationTortsNegligenceDefensesComparative NegligenceGeneral OverviewTortsProcedureMultiple DefendantsContributionGeneral Overview



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CHAPTER 4 California Judicial Council Negligence Instructions

2-4 California Forms of Jury Instruction CACI 432

CACI 432 Causation: Third-Party Conduct as Superseding Cause

[*Name of defendant*] **claims that [he/she/it] is not responsible for [*name of plaintiff*]'s harm because of the later misconduct of [*insert name of third party*]. To avoid legal responsibility for the harm, [*name of defendant*] must prove all of the following:**

- 1. That [*name of third party*]'s conduct occurred after the conduct of [*name of defendant*];**
- 2. That a reasonable person would consider [*name of third party*]'s conduct as a highly unusual or an extraordinary response to the situation;**
- 3. That [*name of defendant*] did not know and had no reason to expect that [*name of third party*] would act in a [negligent/wrongful] manner; and**
- 4. That the kind of harm resulting from [*name of third party*]'s conduct was different from the kind of harm that could have been reasonably expected from [*name of defendant*]'s conduct.**

New September 2003

California courts have held that a superseding cause instruction must be given where the issue is raised by the evidence. (*Paverud v. Niagara Machine and Tool Works* (1987) 189 Cal.App.3d 858, 863 [234 Cal.Rptr. 585] .) The issue of superseding cause should be addressed directly in a specific instruction. (*Self v. General Motors Corp.* (1974) 42 Cal.App.3d 1, 10 [116 Cal.Rptr. 575].)

Defendants, not plaintiffs, would normally request this type of instruction. In *Fish v. Los Angeles Dodgers Baseball Club* (1976) 56 Cal.App.3d 620 [128 Cal.Rptr. 807] , plaintiff requested the

superseding cause instruction in response to defendant's closing argument. However, the court found that the doctrine of superseding causation was inapplicable to the facts of that case. (*Id.* at p. 639 .) Instead, the court held that failure to give the concurrent cause instruction on behalf of plaintiff was error. (*Id.* at p. 641 .)

Where, as a matter of law, a party is liable for subsequent negligence, as in subsequent medical negligence, this instruction should not be given.

- *Restatement Second of Torts, section 440*, provides: "A superseding cause is an act of a third person or other force which by its intervention prevents the actor from being liable for harm to another which his antecedent negligence is a substantial factor in bringing about."

- The California courts have adopted the Restatement sections on superseding causation. (*Stewart v. Cox* (1961) 55 Cal.2d 857, 864 [13 Cal.Rptr. 521, 362 P.2d 345] ; *Brewer v. Teano* (1995) 40 Cal.App.4th 1024 [47 Cal.Rptr.2d 348] .)

- "Under the theory of supervening cause, the chain of causation that would otherwise flow from an initial negligent act is broken when an independent act intervenes and supersedes the initial act." (*Hardison v. Bushnell* (1993) 18 Cal.App.4th 22, 26 [22 Cal.Rptr.2d 106] .)

- Superseding cause is an affirmative defense that must be proved by the defendant. (*Maupin v. Widling* (1987) 192 Cal.App.3d 568, 578 [237 Cal.Rptr. 521] .) If a third party's negligence is asserted as a superseding cause, "[t]he elements of the defense include either foreseeability of the third party's negligence or of the harm, or the highly extraordinary nature or manner of the third party's acts." (*Paverud, supra*, 189 Cal.App.3d at p. 863 .)

- The issue of superseding cause turns on foreseeability as it relates to both (1) the defendant's conduct, and (2) the nature of the resulting injury. (*Akins v. County of Sonoma* (1967) 67 Cal.2d 185, 199-200 [60 Cal.Rptr. 499, 430 P.2d 57] ; *Paverud, supra*, 189 Cal.App.3d at pp. 862-863 ; *Martinez v. Vintage Petroleum* (1998) 68 Cal.App.4th 695, 700-701 [80 Cal.Rptr.2d 449] .)

- Courts have emphasized that "even if the intervening negligent conduct is not foreseeable, [defendant] is not relieved of liability unless the risk of harm suffered also was unforeseeable. [Citations.]." (*Pappert v. San Diego Gas and Electric Co.* (1982) 137 Cal.App.3d 205, 210-211 [186 Cal.Rptr. 847] .) In *Pappert*, the court found that the trial court erred in submitting to the jury the issue of whether decedent's negligence was a superseding cause: "Here, the injury sustained, death by electrocution ... is precisely and directly the result to be expected when a person trimming a tree on his residential property is exposed to the charge from an uninsulated 12,000 volt power line passing through its foliage." (*Id.* at 211 .)

- California courts approach the issue of superseding cause by addressing it after affirmative findings have been made on both negligence and causation. Some opinions have noted that this approach may be analytically incorrect because, if a superseding cause is found, then it negates any causation involving the defendant. (*Ewart v. Southern California Gas Co.* (1965) 237 Cal.App.2d 163, 169 [46 Cal.Rptr. 631] .)

- Much of this instruction is based on *section 447 of the Restatement Second of Torts*:

The fact that an intervening act of a third person is negligent in itself or is done in a

negligent manner does not make it a superseding cause of harm to another which the actor's negligent conduct is a substantial factor in bringing about, if

(a) the actor at the time of his negligent conduct should have realized that a third person might so act, or

(b) a reasonable man knowing the situation existing when the act of the third person was done would not regard it as highly extraordinary that the third person had so acted, or

(c) the intervening act is a normal consequence of a situation created by the actor's conduct and the manner in which it is done is not extraordinarily negligent.

■ Note that section 447 is phrased in the negative. It sets forth the three circumstances in which a third party's negligence is *not* a superseding cause. Section 447 does not state when an intervening force *is* a superseding cause, except by negative implication. However, if all three factors are absent, the independent cause must be superseding. To make this point clearer, this instruction is phrased in the affirmative at the outset and requires the defendant to prove that all the factors are absent. (See *Martinez, supra*, 68 Cal.App.4th at p. 702 .)

■ In this instruction, the term "extraordinary" means "unforeseeable," as in "statistically extremely improbable" or "unpredictable." (*Campodonico v. State Auto Parks, Inc.* (1970) 10 Cal.App.3d 803, 807 [89 Cal.Rptr. 270] .)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1197, 1198

California Tort Guide (Cont.Ed.Bar 3d ed.) § 1.17

1 Levy et al., California Torts, Ch. 2, *Causation*, § 2.11 (Matthew Bender)

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

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

16 *California Points and Authorities*, Ch. 165, *Negligence*, §§ 165.301, 165.321 (Matthew Bender)

Publisher's Notes

This instruction covers issues presented in BAJI No. 3.79.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions Requests for Instructions Torts Malpractice & Professional Liability Healthcare Providers Torts Negligence Causation Proximate Cause Intervening Causation



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CHAPTER 4 California Judicial Council Negligence Instructions

2-4 California Forms of Jury Instruction CACI 433

CACI 433 Causation: Intentional Tort/Criminal Act as Superseding Cause

[Name of defendant] **claims that [he/she/it] is not responsible for [name of plaintiff]'s harm because of the later [criminal/intentional] conduct of [insert name of third party]. [Name of defendant] is not responsible for [name of plaintiff]'s harm if [name of defendant] proves both of the following:**

- 1. That the [intentional/criminal] conduct of [name of third party] happened after the conduct of [name of defendant]; and**
- 2. That [name of defendant] did not know and could not have reasonably foreseen that another person would be likely to take advantage of the situation created by [name of defendant]'s conduct to commit this type of act.**

New September 2003

■ *Restatement Second of Torts, section 448*, provides: "The act of a third person in committing an intentional tort or crime is a superseding cause of harm to another resulting therefrom, although the actor's negligent conduct created a situation which afforded an opportunity to the third person to commit such a tort or crime, unless the actor at the time of his negligent conduct realized or should have realized the likelihood that such a situation might be created, and that a third person might avail himself of the opportunity to commit such a tort or crime."

■ The California courts have adopted section 448. (*Kane v. Hartford Accident and Indemnity Co.* (1979) 98 Cal.App.3d 350, 360 [159 Cal.Rptr. 446] .)

2-4 California Forms of Jury Instruction CACI 433

■ Section 449 provides: "If the likelihood that a third person may act in a particular manner is the hazard or one of the hazards which makes the actor negligent, such an act whether innocent, negligent, intentionally tortious, or criminal does not prevent the actor from being liable for harm caused thereby." The Court in *Landeros v. Flood* (1976) 17 Cal.3d 399, 411 [131 Cal.Rptr. 69, 551 P.2d 389] , relied on section 449.

■ If the criminal or tortious conduct encountered by the plaintiff was not foreseeable at the time of defendant's negligence, then the defendant will not be liable. (*Kane, supra*, 98 Cal.App.3d at p. 360 [rape not a result of failure to uncover bonded employee's prior theft-related offenses].)

■ Courts have observed that "[c]riminal conduct which causes injury will ordinarily be deemed the proximate cause of an injury, superseding any prior negligence which might otherwise be deemed a contributing cause. [Citation.]" (*Koepke v. Loo* (1993) 18 Cal.App.4th 1444, 1449 [23 Cal.Rptr.2d 34] .) However, "[t]he common law rule that an intervening criminal act is, by its very nature, a superseding cause has lost its universal application and its dogmatic rigidity." (*Kane, supra*, 98 Cal.App.3d at p. 360 .)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1214-1216

California Tort Guide (Cont.Ed.Bar 3d ed.) § 1.17

1 Levy et al., California Torts, Ch. 2, *Causation*, § 2.11 (Matthew Bender)

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

16 California Points and Authorities, Ch. 165, *Negligence*, §§ 165.301, 165.303, 165.322 (Matthew Bender)

Publisher's Notes

This instruction covers issues presented in BAJI No. 3.13.1.

LexisNexis Matthew Bender Expert Practice Tip--Prior Similar Acts Provide Reasonable Foreseeability of Crime: CACI No. 433 has been used in cases when a defendant property owner has negligently maintained his or her premises (e.g., improper lighting, absence of security when there is a contract for same) and a person on the premises is a victim of a crime. Facts supporting prior similar criminal acts on the property or in the immediate surrounding area would probably give the defendant property owner reasonable foreseeability of a crime as required by the jury instruction. *By Dona Cohn-Payne*

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsIntentional TortsGeneral OverviewTortsNegligenceCausationProximate CauseIntervening Causation



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CHAPTER 4 California Judicial Council Negligence Instructions

2-4 California Forms of Jury Instruction CACI 434

CACI 434 Alternative Causation

You may decide that more than one of the defendants was negligent, but that the negligence of only one of them could have actually caused [name of plaintiff]'s harm. If you cannot decide which defendant caused [name of plaintiff]'s harm, you must decide that each defendant is responsible for the harm.

However, if a defendant proves that [he/she/it] did not cause [name of plaintiff]'s harm, then you must conclude that defendant is not responsible.

New September 2003

- This instruction is based on the rule stated in the case of *Summers v. Tice* (1948) 33 Cal.2d 80, 86 [199 P.2d 1] , in which the Court held that the burden of proof on causation shifted to the two defendants to prove that each was not the cause of plaintiff's harm: "They brought about a situation where the negligence of one of them injured the plaintiff, hence it should rest with them each to absolve himself if he can. The injured party has been placed by defendants in the unfair position of pointing to which defendant caused the harm. If one can escape the other may also and plaintiff is remediless."

- *Restatement Second of Torts*, section 433B(3), provides: "Where the conduct of two or more actors is tortious, and it is proved that harm has been caused to the plaintiff by only one of them, but there is uncertainty as to which one has caused it, the burden is upon each such actor to prove that he has not caused the harm."

- The *Summers* rule applies to multiple causes, at least one of which is tortious. (*Vahey v. Sacia* (1981) 126 Cal.App.3d 171, 177, fn. 2 [178 Cal.Rptr. 559] .) Thus, it can apply where there is only one

defendant. (*Id. at p. 177* .) However, California courts apply the alternative liability theory only when all potential tortfeasors have been joined as defendants. (*Setliff v. E. I. Du Pont De Nemours & Co. (1995)* 32 Cal.App.4th 1525, 1534-1535 [38 Cal.Rptr.2d 763] .)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, § 1194

California Tort Guide (Cont.Ed.Bar 3d ed.) § 1.16

1 Levy et al., California Torts, Ch. 2, *Causation*, § 2.03 (Matthew Bender)

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

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

16 California Points and Authorities, Ch. 165, *Negligence*, § 165.330 (Matthew Bender)

Publisher's Notes

This instruction replaces BAJI No. 3.80.

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsNegligenceCausationGeneral OverviewTortsNegligenceCausationProximate CauseConcurrent CausationTortsProcedureMultiple DefendantsGeneral OverviewTortsProcedureMultiple DefendantsAlternative Liability



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CHAPTER 4 California Judicial Council Negligence Instructions

2-4 California Forms of Jury Instruction CACI 435

CACI 435 Causation for Asbestos-Related Cancer Claims

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

[Name of plaintiff] may prove that exposure to asbestos from [name of defendant]'s product was a substantial factor causing [his/her/[name of decedent]'s] illness by showing, through expert testimony, that there is a reasonable medical probability that the exposure was a substantial factor contributing to [his/her] risk of developing cancer.

New September 2003; Revised December 2007

Directions for Use

If the issue of medical causation is tried separately, revise this instruction to focus on that issue.

If necessary, *CACI No. 431, Causation: Multiple Causes* may also be given. Unless there are other defendants who are not asbestos manufacturers or suppliers, do not give *CACI No. 430, Causation: Substantial Factor*.

Sources and Authority

- "In the context of a cause of action for asbestos-related latent injuries, the plaintiff must first establish some threshold *exposure* to the defendant's defective asbestos-containing products, and must further establish in reasonable medical probability that a particular exposure or series of exposures was a 'legal cause' of his injury, i.e., a *substantial factor* in bringing about the injury. In an asbestos-related

cancer case, the plaintiff need *not* prove that fibers from the defendant's product were the ones, or among the ones, that actually began the process of malignant cellular growth. Instead, the plaintiff may meet the burden of proving that exposure to defendant's product was a substantial factor causing the illness by showing that in reasonable medical probability it was a substantial factor contributing to the plaintiff's or decedent's risk of developing cancer. The jury should be so instructed. The standard instructions on substantial factor and concurrent causation remain correct in this context and should also be given." (*Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, 982-983 [67 Cal.Rptr.2d 16, 941 P.2d 1203] , original italics, internal citation and footnotes omitted.)

- "The term 'substantial factor' has not been judicially defined with specificity, and indeed it has been observed that it is 'neither possible nor desirable to reduce it to any lower terms.' This court has suggested that a force which plays only an 'infinitesimal' or 'theoretical' part in bringing about injury, damage, or loss is not a substantial factor. Undue emphasis should not be placed on the term 'substantial.' For example, the substantial factor standard, formulated to aid plaintiffs as a broader rule of causality than the 'but for' test, has been invoked by defendants whose conduct is clearly a 'but for' cause of plaintiff's injury but is nevertheless urged as an insubstantial contribution to the injury. Misused in this way, the substantial factor test 'undermines the principles of comparative negligence, under which a party is responsible for his or her share of negligence and the harm caused thereby.' " (*Rutherford, supra*, 16 Cal.4th at p. 969 , internal citations omitted.)

- "[A] very minor force that does cause harm is a substantial factor. This rule honors the principle of comparative fault." (*Bockrath v. Aldrich Chem. Co.* (1999), 21 Cal.4th 71, 79 [86 Cal.Rptr.2d 846, 980 P.2d 398] , internal citation omitted.)

- "Contrary to defendant's assertion, the California Supreme Court's decision in *Viner v. Sweet* (2003) 30 Cal.4th 1232 [135 Cal. Rptr. 2d 629, 70 P.3d 1046] (*Viner*) did not alter the causation requirement in asbestos-related cases. In *Viner*, the court noted that subsection (1) of section 432 of the *Restatement Second of Torts*, which provides that 'the actor's negligent conduct is not a substantial factor in bringing about harm to another if the harm would have been sustained even if the actor had not been negligent,' 'demonstrates how the "substantial factor" test subsumes the traditional "but for" test of causation.' (*Viner, supra*, at p. 1240.) Defendant argues that *Viner* required plaintiffs to show that defendant's product 'independently caused [plaintiff's] injury or that, but for that exposure, [plaintiff] would not have contracted lung cancer.' *Viner*, however, is a legal malpractice case. It does not address the explicit holding in *Rutherford* that "plaintiffs may prove causation in asbestos-related cancer cases by demonstrating that the plaintiff's exposure to defendant's asbestos-containing product in reasonable medical probability was a substantial factor in contributing to the aggregate dose of asbestos the plaintiff or decedent inhaled or ingested, and hence to the risk of developing asbestos-related cancer, without the need to demonstrate that fibers from the defendant's particular product were the ones, or among the ones, that actually produced the malignant growth." (*Rutherford, supra*, 16 Cal.4th at pp. 976-977 , fn. omitted.) *Viner* is consistent with *Rutherford* insofar as *Rutherford* requires proof that an individual asbestos-containing product is a substantial factor contributing to the plaintiff's risk or probability of developing cancer. (*Id.* at p. 977 .) " (*Jones v. John Crane, Inc.* (2005) 132 Cal.App.4th 990, 998, fn. 3 [35 Cal.Rptr.3d 144] .)

- "A threshold issue in asbestos litigation is exposure to the defendant's product. The plaintiff bears the burden of proof on this issue. If there has been no exposure, there is no causation. Plaintiffs may prove causation in an asbestos case by demonstrating that the plaintiff's or decedent's exposure to defendant's asbestos-containing product in reasonable medical probability was a substantial factor in contributing to the aggregate dose of asbestos the plaintiff or decedent inhaled or ingested, and hence to the risk of developing asbestos-related cancer." (*McGonnell v. Kaiser Gypsum Co., Inc.* (2002) 98 Cal.App.4th

1098, 1103 [120 Cal.Rptr.2d 23] , internal citations omitted.)

■ "Many factors are relevant in assessing the medical probability that an exposure contributed to plaintiff's asbestos disease. Frequency of exposure, regularity of exposure, and proximity of the asbestos product to plaintiff are certainly relevant, although these considerations should not be determinative in every case. Additional factors may also be significant in individual cases, such as the type of asbestos product to which plaintiff was exposed, the type of injury suffered by plaintiff, and other possible sources of plaintiff's injury. 'Ultimately, the sufficiency of the evidence of causation will depend on the unique circumstances of each case.' " (*Lineaweaver v. Plant Insulation Co.* (1995) 31 Cal.App.4th 1409, 1416-1417 [37 Cal.Rptr.2d 902] , internal citations omitted.)

Secondary Sources

3 Witkin, California Procedure (4th ed. 1996) Actions, § 527

Flahavan et al., California Practice Guide: Personal Injury (The Rutter Group) PP 2:767.2, 2:984d, 5:180.2

1 Levy et al., *California Torts*, Ch. 2, *Causation*, § 2.03 (Matthew Bender)

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

33 *California Forms of Pleading and Practice*, Ch. 380, *Negligence*, § 380.72 (Matthew Bender)

Publisher's Notes

This instruction replaces BAJI No. 3.78.

Legal Topics:

For related research and practice materials, see the following legal topics:

Environmental Law Hazardous Wastes & Toxic Substances Asbestos General

Overview Torts Negligence Causation General Overview Torts Negligence Causation Cause in

Fact Torts Negligence Causation Proximate Cause Concurrent Causation



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CHAPTER 4 California Judicial Council Negligence Instructions

2-4 California Forms of Jury Instruction CACI 436-CACI 449

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CACI 436Reserved for Future Use



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CHAPTER 4 California Judicial Council Negligence Instructions

2-4 California Forms of Jury Instruction CACI 450

CACI 450 Good Samaritan

Revoked June 2010

Legislation amending *Health and Safety Code section 1799.102* was enacted in August 2009 in response to the California Supreme Court's decision in *Van Horn v. Watson (2008) 45 Cal.4th 322*, which construed that statute to apply only to immunize good samaritans who provide medical care at the scene of a medical emergency. Because *CACI No. 450*, as currently written, does not comport with the specific language of the revised statute and the cited authorities no longer apply, the current instruction must be revoked. A replacement instruction will be considered in the next CACI release cycle.

Legal Topics:

For related research and practice materials, see the following legal topics:

Healthcare Law Good Samaritan Laws Torts Negligence Duty Affirmative Duty to Act Voluntary Assumption of Duty Torts Negligence Standards of Care Reasonable Care General Overview



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CHAPTER 4 California Judicial Council Negligence Instructions

2-4 California Forms of Jury Instruction CACI 451

CACI 451 Express Assumption of Risk

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

If [name of defendant] proves that there was such an agreement and that it applies to [name of plaintiff]'s claim, then you must find that [name of defendant] is not responsible for [name of plaintiff]'s harm.

New September 2003

Directions for Use

This instruction will be given in very limited circumstances. In reviewing the case law in this area, it appears that both the interpretation of a waiver agreement and application of its legal effect are generally resolved by the judge before trial. This is probably because "[t]he existence of a duty is a question of law for the court" [citation]. So is the interpretation of a written instrument where the interpretation does not turn on the credibility of extrinsic evidence." (*Allabach v. Santa Clara County Fair Assn., Inc.* (1996) 46 Cal.App.4th 1007, 1011 [54 Cal.Rptr.2d 330] .)

There may be contract law defenses (such as fraud, lack of consideration, duress, unconscionability) that could be asserted by the plaintiff to contest the validity of a waiver. If these defenses were to be considered by a jury, then an instruction on express assumption of the risk would probably be necessary.

Sources and Authority

- "Express assumption occurs when the plaintiff, in advance, expressly consents ... to relieve the

defendant of an obligation of conduct toward him, and to take his chances of injury from a known risk arising from what the defendant is to do or leave undone. ... The result is that ... being under no duty, [the defendant] cannot be charged with negligence." (*Saenz v. Whitewater Voyages, Inc.* (1990) 226 Cal.App.3d 758, 764 [276 Cal.Rptr. 672] , internal citations omitted.)

- "[C]ases involving express assumption of risk are concerned with instances in which, as the result of an express agreement, the defendant owes no duty to protect the plaintiff from an injury-causing risk. Thus in this respect express assumption of risk properly can be viewed as analogous to primary assumption of risk." (*Knight v. Jewett* (1992) 3 Cal.4th 296, 308-309, fn. 4 [11 Cal.Rptr.2d 2, 834 P.2d 696] .)

- A release may also bar a wrongful death action, depending on the circumstances and terms of an agreement. (See *Coates v. Newhall Land and Farming, Inc.* (1987) 191 Cal.App.3d 1, 7-8 [236 Cal.Rptr. 181] .)

- Valid waivers will be upheld provided that they are not contrary to the "public interest." (*Tunkl v. Regents of Univ. of California* (1963) 60 Cal.2d 92, 101 [32 Cal.Rptr. 33, 383 P.2d 441] .)

- "The issue [of whether something is in the public interest] is tested *objectively*, by the activity's importance to the *general public*, not by its subjective importance to the particular plaintiff." (*Booth v. Santa Barbara Biplane Tours, LLC* (2008) 158 Cal.App.4th 1173, 1179-1180 [70 Cal.Rptr.3d 660] , original italics.)

- "[P]ublic policy generally precludes enforcement of an agreement that would remove an obligation to adhere to even a *minimal* standard of care. Applying that general rule here, we hold that an agreement purporting to release liability for future gross negligence committed against a developmentally disabled child who participates in a recreational camp designed for the needs of such children violates public policy and is unenforceable." (*City of Santa Barbara v. Superior Court* (2007), 41 Cal.4th 747, 777 [62 Cal.Rptr.3d 527, 161 P.3d 1095] , original italics.)

- "To be valid and enforceable, a written release exculpating a tortfeasor from liability for future negligence or misconduct must be clear, unambiguous and explicit in expressing the intent of the parties. ... Whether a contract provision is clear and unambiguous is a question of law, not of fact." (*Madison v. Superior Court* (1988) 203 Cal.App.3d 589, 598 [250 Cal.Rptr. 299] .)

- *Restatement Second of Torts* section 496B provides: "A plaintiff who by contract or otherwise expressly agrees to accept a risk of harm arising from the defendant's negligent ... conduct cannot recover for such harm, unless the agreement is invalid as contrary to public policy."

Secondary Sources

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

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

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

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

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

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

Publisher's Notes

This instruction replaces BAJI No. 4.30.

LexisNexis Matthew Bender Expert Practice Tip--Written Waiver and Assumption of Risk Cases:

Just because you have a signed waiver of liability does not necessarily mean that there is an express assumption of the risk. Look at the activity involved as well as the language in the waiver. A review of case law for similar facts is required before a decision regarding assumption of the risk can be made. *By Dona Cohn-Payne*

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Contracts Law Types of Contracts Express
Contracts Torts Negligence Defenses Assumption of Risk Elements & Nature Express Assumption of
Risk Torts Negligence Defenses Assumption of Risk Procedure



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CHAPTER 4 California Judicial Council Negligence Instructions

2-4 California Forms of Jury Instruction CACI 452

CACI 452 Sudden Emergency

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

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

New September 2003

Directions for Use

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

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

Sources and Authority

- The doctrine of imminent peril may be used by either the plaintiff or the defendant, or, in a proper

case, both. (*Smith v. Johe* (1957) 154 Cal.App.2d 508, 511-512 [316 P.2d 688] .)

- "Whether the conditions for application of the imminent peril doctrine exist is itself a question of fact to be submitted to the jury." (*Damele v. Mack Trucks, Inc.* (1990) 219 Cal.App.3d 29, 37 [267 Cal.Rptr. 197] ; see also *Leo v. Dunham* (1953) 41 Cal.2d 712, 715 [264 P.2d 1] .)

- "[A] person who, without negligence on his part, is suddenly and unexpectedly confronted with peril, arising from either the actual presence, or the appearance, of imminent danger to himself or to others, is not expected nor required to use the same judgment and prudence that is required of him in the exercise of ordinary care in calmer and more deliberate moments." (*Leo, supra*, 41 Cal.2d at p. 714 .)

- The "doctrine is properly applied only in cases where an unexpected physical danger is so suddenly presented as to deprive the injured party [or the defendant] of his power of using reasonable judgment." (*Sadoian v. Modesto Refrigerating Co.* (1958) 157 Cal.App.2d 266, 274 [320 P.2d 583] .) The exigent nature of the circumstances effectively lowers the standard of care: "The test is whether the actor took one of the courses of action which a standard man in that emergency might have taken, and such a course is not negligent even though it led to an injury which might have been prevented by adopting an alternative course of action." [Citation.]" (*Schultz v. Mathias* (1970) 3 Cal.App.3d 904, 912-913 [83 Cal.Rptr. 888] .)

- The doctrine of imminent peril does not apply to a person whose conduct causes or contributes to the imminent peril. (*Pittman v. Boiven* (1967) 249 Cal.App.2d 207, 216 [57 Cal.Rptr. 319] .)

- The doctrine applies when a person perceives danger to himself or herself as well as when he or she perceives a danger to others. (*Damele, supra*, 219 Cal.App.3d at p. 36 .)

- "[T]he mere appearance of an imminent peril to others--not an actual imminent peril--is all that is required." (*Damele, supra*, 219 Cal.App.3d at p. 37 .)

Secondary Sources

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

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

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

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

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

Publisher's Notes

This instruction replaces BAJI No. 4.40, and covers issues presented in BAJI No. 441.

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsNegligenceCausationGeneral OverviewTortsNegligenceProofEvidenceProvince of Court & JuryTortsNegligenceStandards of CareReasonable CareSudden Emergencies



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CHAPTER 4 California Judicial Council Negligence Instructions

2-4 California Forms of Jury Instruction CACI 453

CACI 453 Rescue

[*Name of plaintiff*] claims that [he/she] was not responsible for [his/her] own injury because [he/she] was attempting to rescue a person who was placed in danger as a result of [*name of defendant*]'s negligence.

[*Name of plaintiff*] is not responsible for [his/her] own injuries if [he/she] proves all of the following:

- 1. That there was an emergency situation in which someone was in actual or apparent danger of immediate injury;**
- 2. That the emergency was created by [*name of defendant*]'s negligence; and**
- 3. That [*name of plaintiff*] did not act rashly or recklessly when [he/she] attempted to rescue the victim.**

New September 2003

Sources and Authority

■ In *Solgaard v. Guy F. Atkinson Co.* (1971) 6 Cal.3d 361 [99 Cal.Rptr. 29, 491 P.2d 821], the Court stated the rescue doctrine as follows: "The cases have developed the rule that persons injured in the course of undertaking a necessary rescue may, absent rash or reckless conduct on their part, recover from the person whose negligence created the peril which necessitated the rescue." (*Id.* at p. 368.) The Court found that a doctor, who was injured while attempting to rescue two injured workers, was "entitled to the benefits of the rescue doctrine, including an instruction to the jury that as a rescuer, plaintiff could recover on the basis of defendant's negligence to [the victims], if plaintiff's injury was a proximate result

thereof, and if plaintiff acted neither rashly nor recklessly under the circumstances." (*Id.* at p. 369 .)

■ Before *Li v. Yellow Cab Co.* (1975) 13 Cal.3d 804 [119 Cal.Rptr. 858, 532 P.2d 1226] , the rescue doctrine helped plaintiffs establish duty and was also a defense to the former bar of contributory negligence. (*Solgaard, supra*, 6 Cal.3d at p. 368 .) The rescue doctrine may still be a viable counter to a charge of contributory negligence.

■ In *Neighbarger v. Irwin Industries, Inc.* (1994) 8 Cal.4th 532 [34 Cal.Rptr.2d 630, 882 P.2d 347] , the Court observed that "a person is not contributorily negligent who, with due care, encounters the risk created by the defendant's negligence in order to perform a rescue necessitated by that negligence." (*Id.* at p. 537 .) This observation was not essential to the holding of the case, which focused on the issue of duty. Nevertheless, it suggests that the rescue doctrine may still play a role in determining whether or not the plaintiff was at fault.

■ "There is some disagreement among the authorities where the danger is only to property. In *Henshaw v. Belyea* (1934) 220 C. 458, 31 P.2d 348 , plaintiff ran from a safe place on the sidewalk in an attempt to save his employer's truck from slipping downhill by placing a block under a wheel, and his foot was crushed. The court approved the extension of the rescue doctrine to such a case. (220 C. 463 .) (See 23 Cal. L. Rev. 110; 8 So. Cal. L. Rev. 159.)" (6 Witkin Summary of California Law (10th ed. 2005) Torts, § 1308.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1306-1308

California Tort Guide (Cont.Ed.Bar 3d ed.) § 1.41

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

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

33 *California Forms of Pleading and Practice, Ch. 380, Negligence*, § 380.30[5][e][v] (Matthew Bender)

16 *California Points and Authorities, Ch. 165, Negligence*, § 165.140 (Matthew Bender)

Publisher's Notes

This instruction replaces BAJI No. 4.60.

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsNegligenceDefensesComparative NegligenceCommon Law

ConceptsRescuesTortsNegligenceDefensesContributory NegligenceLimits on ApplicationRescues



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CHAPTER 4 California Judicial Council Negligence Instructions

2-4 California Forms of Jury Instruction CACI 454

CACI 454 Affirmative Defense--Statute of Limitations

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

New April 2007; Revised December 2007

Directions for Use

This instruction states the common-law rule that an action accrues on the date of injury. (*Jolly v. Eli Lilly & Co.* (1988) 44 Cal.3d 1103, 1109 [245 Cal.Rptr. 658, 751 P.2d 923] .) The date to be inserted is the applicable limitation period before the filing date. For example, if the limitation period is two years and the filing date is August 31, 2007, the date is August 31, 2005.

For an instruction on the delayed-discovery rule, see CACI No. 455, *Statute of Limitations--Delayed Discovery*. See also verdict form CACI No. VF-410, *Statute of Limitations --Delayed Discovery--Reasonable Investigation Would Not Have Disclosed Pertinent Facts*.

Do not use this instruction for attorney malpractice. (See CACI No. 610, *Affirmative Defense--Statute of Limitations--Attorney Malpractice--One-Year Limit*, and CACI No. 611, *Affirmative Defense--Statute of Limitations--Attorney Malpractice--Four-Year Limit*.)

"Claimed harm" refers to all of the elements of the cause of action, which must have occurred before the cause of action accrues and the limitation period begins. (*Glue-Fold, Inc. v. Slautterback Corp.* (2000) 82 Cal.App.4th 1018, 1029 [98 Cal.Rptr.2d 661] .) In some cases, it may be necessary to modify this term to refer to specific facts that give rise to the cause of action.

Sources and Authority

■ *Code of Civil Procedure section 335.1* provides a two-year limitation period for an action for assault, battery, or injury to, or for the death of, an individual caused by the wrongful act or neglect of another.

■ *Code of Civil Procedure section 338(c)* provides a three-year limitation period for an action for taking, detaining, or injuring any goods or chattels, including an action for the specific recovery of personal property.

■ *Code of Civil Procedure section 340.2(c)* provides a one-year limitation period for an action for the wrongful death of any plaintiff's decedent, based on exposure to asbestos, measured by the later of the date of death or the date the plaintiff first knew, or through the exercise of reasonable diligence should have known, that the death was caused or contributed to by exposure to asbestos.

■ "A limitation period does not begin until a cause of action accrues, i.e., all essential elements are present and a claim becomes legally actionable." (*Glue-Fold, Inc.*, *supra*, 82 Cal.App.4th at p. 1029 , internal citations omitted.)

■ "In tort actions, the statute of limitations commences when the last element essential to a cause of action occurs. The statute of limitations does not begin to run and no cause of action accrues in a tort action until damage has occurred. If the last element of the cause of action to occur is damage, the statute of limitations begins to run on the occurrence of 'appreciable and actual harm, however uncertain in amount,' that consists of more than nominal damages. '... [O]nce plaintiff has suffered actual and appreciable harm, neither the speculative nor uncertain character of damages nor the difficulty of proof will toll the period of limitation.' Cases contrast actual and appreciable harm with nominal damages, speculative harm or the threat of future harm. The mere breach of duty--causing only nominal damages, speculative harm or the threat of future harm not yet realized--normally does not suffice to create a cause of action." (*San Francisco Unified School Dist. v. W. R. Grace & Co.* (1995) 37 Cal.App.4th 1318, 1326 [44 Cal.Rptr.2d 305] , internal citations omitted.)

■ " '[R]esolution of the statute of limitations issue is normally a question of fact' " (*Romano v. Rockwell Internat., Inc.* (1996) 14 Cal.4th 479, 487 [59 Cal.Rptr.2d 20, 926 P.2d 1114] .)

Secondary Sources

3 Witkin, *California Procedure* (4th ed. 1996) Actions, §§ 459-473, 517-545

5 Levy et al., *California Torts*, Ch. 71, *Commencement, Prosecution, and Dismissal of Tort Actions*, §§ 71.01 -71.06 (Matthew Bender)

30 *California Forms of Pleading and Practice*, Ch. 345, *Limitation of Actions*, §§ 345.19, 345.20 (Matthew Bender)

33 *California Forms of Pleading and Practice*, Ch. 380, *Negligence*, § 380.150 (Matthew Bender)

14 *California Points and Authorities*, Ch. 143, *Limitation of Actions*, §§ 143.20 -143.65 (Matthew Bender)

1 *Matthew Bender Practice Guide: California Pretrial Civil Procedure*, Ch. 4, *Limitation of Actions*, 4.05, 4.14, 4.38, 4.39

Publisher's Notes

There is no BAJI instruction on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Environmental LawHazardous Wastes & Toxic SubstancesAsbestosStatutes of LimitationsTortsProcedureStatutes of
LimitationsGeneral OverviewTortsProcedureStatutes of LimitationsAccrual of ActionsDiscovery
RuleTortsProcedureStatutes of LimitationsAccrual of ActionsOccurrence of TortTortsWrongful Death & Survival
ActionsDefensesStatutes of Limitations



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CHAPTER 4 California Judicial Council Negligence Instructions

2-4 California Forms of Jury Instruction CACI 455

CACI 455 Statute of Limitations--Delayed Discovery

If [name of defendant] proves that [name of plaintiff]'s claimed harm occurred before [insert date from applicable statute of limitations], [name of plaintiff]'s lawsuit was still filed on time if [name of plaintiff] proves that before that date,

[[name of plaintiff] did not discover, and did not know of facts that would have caused a reasonable person to suspect, that [he/she/it] had suffered harm that was caused by someone's wrongful conduct.]

[or]

[[name of plaintiff] did not discover, and a reasonable and diligent investigation would not have disclosed, that [specify factual basis for cause of action, e.g., "a medical device" or "inadequate medical treatment"] contributed to [name of plaintiff]'s harm.]

New April 2007; Revised December 2007, April 2009, December 2009

Directions for Use

Read this instruction with the first option after *CACI No. 454, Affirmative Defense--Statute of Limitations*, if the plaintiff seeks to overcome the statute-of-limitations defense by asserting the "delayed-discovery rule" or "discovery rule." The discovery rule provides that the accrual date of a cause of action is delayed until the plaintiff is aware of his or her injury and its negligent cause. (*Jolly v. Eli Lilly & Co.* (1988) 44 Cal.3d 1103, 1109 [245 Cal.Rptr. 658, 751 P.2d 923] .) The date to be inserted is the applicable limitation period before the filing date. For example, if the limitation period is two years and the filing date is August 31, 2009, the date is August 31, 2007.

If the facts suggest that even if the plaintiff had conducted a timely and reasonable investigation, it would not have disclosed the limitation-triggering information, read the second option. (See *Fox v. Ethicon Endo-Surgery* (2005) 35 Cal.4th 797 [27 Cal.Rptr.3d 661, 110 P.3d 914] [fact that plaintiff suspected her injury was caused by surgeon's negligence and timely filed action for medical negligence against health care provider did not preclude "discovery rule" from delaying accrual of limitations period on products liability cause of action against medical staple manufacturer whose role in causing injury was not known and could not have been reasonably discovered within the applicable limitations period commencing from date of injury].)

See also verdict form CACI No. VF-410, *Statute of Limitations --Delayed Discovery-- Reasonable Investigation Would Not Have Disclosed Pertinent Facts*.

Do not use this instruction for medical malpractice (see CACI No. 555, *Affirmative Defense--Statute of Limitations--Medical Malpractice--One-Year Limit*, and CACI No. 556, *Affirmative Defense--Statute of Limitations--Medical Malpractice--Three-Year Limit*) or attorney malpractice (see CACI No. 610, *Affirmative Defense--Statute of Limitations--Attorney Malpractice--One-Year Limit*, and CACI No. 611, *Affirmative Defense--Statute of Limitations--Attorney Malpractice--Four-Year Limit*). Also, do not use this instruction if the case was timely but a fictitiously named defendant was identified and substituted in after the limitation period expired. (See *McOwen v. Grossman* (2007) 153 Cal.App.4th 937, 942 [63 Cal.Rptr.3d 615] [if lawsuit is initiated within the applicable period of limitations against one party and the plaintiff has complied with *Code Civ. Proc.*, § 474 by alleging the existence of unknown additional defendants, the relevant inquiry when the plaintiff seeks to substitute a real defendant for one sued fictitiously is what facts the plaintiff actually knew at the time the original complaint was filed].)

"Claimed harm" refers to all of the elements of the cause of action, which must have occurred before the cause of action accrues and the limitation period begins. (*Glue-Fold, Inc. v. Slautterback Corp.* (2000) 82 Cal.App.4th 1018, 1029 [98 Cal.Rptr.2d 661] .) In some cases, it may be necessary to modify this term to refer to specific facts that give rise to the cause of action.

Sources and Authority

- "An exception to the general rule for defining the accrual of a cause of action--indeed, the 'most important' one--is the discovery rule. ... It postpones accrual of a cause of action until the plaintiff discovers, or has reason to discover, the cause of action. [P] ... [T]he plaintiff discovers the cause of action when he at least suspects a factual basis, as opposed to a legal theory, for its elements, even if he lacks knowledge thereof--when, simply put, he at least 'suspects ... that someone has done something wrong' to him, 'wrong' being used, not in any technical sense, but rather in accordance with its 'lay understanding.' He has reason to discover the cause of action when he has reason at least to suspect a factual basis for its elements. He has reason to suspect when he has 'notice or information of circumstances to put a reasonable person on inquiry'; he need not know the 'specific "facts" necessary to establish' the cause of action; rather, he may seek to learn such facts through the 'process contemplated by pretrial discovery'; but, within the applicable limitations period, he must indeed seek to learn the facts necessary to bring the cause of action in the first place--he 'cannot wait for' them to 'find him' and 'sit on' his 'rights'; he 'must go find' them himself if he can and 'file suit' if he does." (*Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 397-398 [87 Cal.Rptr.2d 453, 981 P.2d 79] , original italics, internal citations and footnote omitted.)

- "[I]t is the discovery of facts, not their legal significance, that starts the statute." (*Jolly, supra*, 44 Cal.3d at p. 1113 .)

■ "While ignorance of the existence of an injury or cause of action may delay the running of the statute of limitations until the date of discovery, the general rule in California has been that ignorance of the identity of the defendant is not essential to a claim and therefore will not toll the statute." (*Bernson v. Browning-Ferris Industries* (1994) 7 Cal.4th 926, 932 [30 Cal.Rptr.2d 440, 873 P.2d 613] .)

■ "[U]nder the delayed discovery rule, a cause of action accrues and the statute of limitations begins to run when the plaintiff has reason to suspect an injury and some wrongful cause, unless the plaintiff pleads and proves that a reasonable investigation at that time would not have revealed a factual basis for that particular cause of action. In that case, the statute of limitations for that cause of action will be tolled until such time as a reasonable investigation would have revealed its factual basis." (*Fox, supra*, 35 Cal.4th at p. 803 .)

■ "[A]s *Fox* teaches, claims based on two independent legal theories against two separate defendants can accrue at different times." (*E-Fab, Inc. v. Accountants, Inc. Services* (2007) 153 Cal.App.4th 1308, 1323 [64 Cal.Rptr.3d 9] .)

■ "A limitation period does not begin until a cause of action accrues, i.e., all essential elements are present and a claim becomes legally actionable. Developed to mitigate the harsh results produced by strict definitions of accrual, the common law discovery rule postpones accrual until a plaintiff discovers or has reason to discover the cause of action." (*Glue-Fold, Inc, supra*, 82 Cal.App.4th at p. 1029 , internal citations omitted.)

■ "[T]he plaintiff may discover, or have reason to discover, the cause of action even if he does not suspect, or have reason to suspect, the identity of the defendant. That is because the identity of the defendant is not an element of any cause of action. It follows that failure to discover, or have reason to discover, the identity of the defendant does not postpone the accrual of a cause of action, whereas a like failure concerning the cause of action itself does. 'Although never fully articulated, the rationale for distinguishing between ignorance' of the defendant and 'ignorance' of the cause of action itself 'appears to be premised on the commonsense assumption that once the plaintiff is aware of' the latter, he 'normally' has 'sufficient opportunity,' within the 'applicable limitations period,' 'to discover the identity' of the former. He may 'often effectively extend[]' the limitations period in question 'by the filing' and amendment 'of a Doe complaint' and invocation of the relation-back doctrine. 'Where' he knows the 'identity of at least one defendant ... , [he] must' proceed thus." (*Norgart, supra*, 21 Cal.4th at p. 399 , internal citations and footnote omitted.)

■ "The discovery rule only delays accrual until the plaintiff has, or should have, inquiry notice of the cause of action. The discovery rule does not encourage dilatory tactics because plaintiffs are charged with presumptive knowledge of an injury if they have ' ' 'information of circumstances to put [them] on inquiry' ' ' or if they have ' ' 'the opportunity to obtain knowledge from sources open to [their] investigation.' ' ' In other words, plaintiffs are required to conduct a reasonable investigation after becoming aware of an injury, and are charged with knowledge of the information that would have been revealed by such an investigation." (*Fox, supra*, 35 Cal.4th at pp. 807-808 , internal citations omitted.)

■ There is no doctrine of constructive or imputed suspicion arising from media coverage. "[Defendant]'s argument amounts to a contention that, having taken a prescription drug, [plaintiff] had an obligation to read newspapers and watch television news and otherwise seek out news of dangerous side effects not disclosed by the prescribing doctor, or indeed by the drug manufacturer, and that if she failed in this obligation, she could lose her right to sue. We see no such obligation." (*Nelson v. Indevus Pharmaceuticals, Inc.* (2006) 142 Cal.App.4th 1202, 1206 [48 Cal.Rptr.3d 668] .)

■ "The statute of limitations does not begin to run when some members of the public have a suspicion of wrongdoing, but only '[o]nce the plaintiff *has* a suspicion of wrongdoing.' " (*Unruh-Haxton v. Regents of University of California* (2008) 162 Cal.App.4th 343, 364 [76 Cal.Rptr.3d 146] , original italics.)

■ "When it is apparent from the face of the complaint that, but for the delayed discovery rule, the action would be time barred, it is the plaintiff's burden to show diligence." (*McKelvey v. Boeing North Am. Inc.* (1999) 74 Cal.App.4th 151, 160 [86 Cal.Rptr.2d 645] .)

■ " '[R]esolution of the statute of limitations issue is normally a question of fact ... ' " (*Romano v. Rockwell Internat., Inc.* (1996) 14 Cal.4th 479, 487 [59 Cal.Rptr.2d 20, 926 P.2d 1114] .)

Secondary Sources

3 Witkin, *California Procedure* (4th ed. 1996) Actions, §§ 459-473, 517-545

Flahavan et al., *California Practice Guide: Personal Injury* (The Rutter Group) PP 5:108-5:111.6

5 Levy et al., *California Torts, Ch. 71, Commencement, Prosecution, and Dismissal of Tort Actions*, § 71.03[3] (Matthew Bender)

30 *California Forms of Pleading and Practice, Ch. 345, Limitation of Actions*, § 345.19[3] (Matthew Bender)

14 *California Points and Authorities, Ch. 143, Limitation of Actions*, §§ 143.47, 143.52 -143.64 (Matthew Bender)

1 *Matthew Bender Practice Guide: California Pretrial Civil Procedure, Ch. 4, Limitation of Actions*, 4.15

Publisher's Notes

There is no BAJI instruction on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

GovernmentsLegislationStatutes of LimitationsTime LimitationsTortsMalpractice & Professional

LiabilityAttorneysTortsProcedureStatutes of LimitationsAccrual of ActionsGeneral OverviewTortsProcedureStatutes of

LimitationsAccrual of ActionsDiscovery Rule



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California Forms of Jury Instruction

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CHAPTER 4 California Judicial Council Negligence Instructions

2-4 California Forms of Jury Instruction CACI 456

CACI 456 Statute of Limitations--Delayed Discovery

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

- 1. That [*name of defendant*] said or did something that caused [*name of plaintiff*] to believe that it would not be necessary to file a lawsuit;**
- 2. That [*name of plaintiff*] relied on [*name of defendant*]'s conduct and therefore did not file the lawsuit within the time otherwise required;**
- 3. That a reasonable person in [*name of plaintiff*]'s position would have relied on [*name of defendant*]'s conduct;**
- 4. That after the limitation period had expired, [*name of defendant*]'s representations by words or conduct proved to not be true; and**
- 5. That [*name of plaintiff*] proceeded diligently to file suit once [he/she/it] discovered the actual facts.**

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

New October 2008

Directions for Use

There is perhaps a question as to whether all the elements of equitable estoppel must be proved in order to establish an estoppel to rely on a statute of limitations. These elements are (1) the party to be estopped must know the facts; (2) the party must intend that his or her conduct will be acted on, or must act in such a way that the party asserting the estoppel had the right to believe that the conduct was so intended; (3) the party asserting the estoppel must be ignorant of the true state of facts; and, (4) that party must rely upon the conduct to his or her detriment. (See *Ashou v. Liberty Mutual Fire Ins. Co.* (2006) 138 Cal.App.4th 748, 766-767 [41 Cal.Rptr.3d 819] .)

Most cases do not frame the issue as one of equitable estoppel and its four elements. All that is required is that the defendant's conduct actually have misled the plaintiff, and that plaintiff reasonably have relied on that conduct. Bad faith or an intent to mislead is not required. (*Lantzy v. Centex Homes* (2003) 31 Cal.4th 363, 384 [2 Cal.Rptr.3d 655, 73 P.3d 517] ; *Shaffer v. Debbas* (1993) 17 Cal.App.4th 33, 43 [21 Cal.Rptr.2d 110] .) Nor does it appear that there is a requirement that the defendant specifically intended to induce the plaintiff to defer filing suit. Therefore, no specific intent element has been included.

Sources and Authority

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

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

■ " 'An estoppel may arise although there was no designed fraud on the part of the person sought to be estopped. ... To create an equitable estoppel, "it is enough if the party has been induced to refrain from using such means or taking such action as lay in his power, by which he might have retrieved his position and saved himself from loss. ... Where the delay in commencing action is induced by the conduct of the defendant it cannot be availed of by him as a defense." ' " (*Vu v. Prudential Property & Casualty Ins. Co.* (2001) 26 Cal.4th 1142, 1152-1153 [113 Cal.Rptr.2d 70, 33 P.3d 487] .)

■ " 'A defendant will be estopped to invoke the statute of limitations where there has been "some conduct by the defendant, relied on by the plaintiff, which induces the belated filing of the action." It is not necessary that the defendant acted in bad faith or intended to mislead the plaintiff. [Citations.] It is sufficient that the defendant's conduct in fact induced the plaintiff to refrain from instituting legal proceedings. [Citation.] "[W]hether an estoppel exists--whether the acts, representations or conduct lulled a party into a sense of security preventing him from instituting proceedings before the running of

the statute, and whether the party relied thereon to his prejudice--is a question of fact and not of law." [Citations.] " (*Holdgrafer v. Unocal Corp.* (2008) 160 Cal.App.4th 907, 925-926 [73 Cal.Rptr.3d 216] , internal citations omitted.)

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

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

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

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

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

■ " 'It is well settled that a public entity may be estopped from asserting the limitations of the claims statute where its agents or employees have prevented or deterred the filing of a timely claim by some

affirmative act.' Estoppel as a bar to a public entity's assertion of the defense of noncompliance arises when a plaintiff establishes by a preponderance of the evidence (1) the public entity was apprised of the facts, (2) it intended its conduct to be acted upon, (3) the plaintiff was ignorant of the true state of facts, and (4) relied upon the conduct to his detriment." (*K.J. v. Arcadia Unified School Dist.* (2009) 172 Cal.App.4th 1229, 1239-1240 [92 Cal.Rptr.3d 1] , internal citation omitted.)

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

Secondary Sources

3 Witkin, *California Procedure* (4th ed. 1996) Actions, §§ 523-536

Flahavan et al., *California Practice Guide: Personal Injury* (The Rutter Group) § 5:111.6

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

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

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

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

Publisher's Notes

There is no BAJI instruction on this subject.



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CHAPTER 4 California Judicial Council Negligence Instructions

2-4 California Forms of Jury Instruction CACI 457

CACI 457 Statute of Limitations--Equitable Tolling--Other Prior Proceeding

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

- 1. That [name of defendant] received timely notice that [name of plaintiff] was [e.g., seeking workers' compensation] instead of filing a lawsuit;**
- 2. That the facts of the two claims were so similar that an investigation of the [e.g., workers' compensation claim] gave or would have given [name of defendant] the information needed to defend the lawsuit; and**
- 3. That [name of plaintiff] was acting reasonably and in good faith by [e.g., seeking workers' compensation].**

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

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

New December 2009

Directions for Use

The verdict form should ask the jury to find the period of time that the limitation period was tolled on account of the other proceeding. The court can then add the additional time to the limitation period and determine whether the action is timely.

Equitable tolling is not available for legal malpractice (see *Laird v. Blacker* (1992) 2 Cal.4th 606, 618 [7 Cal.Rptr.2d 550, 828 P.2d 691] [statutory tolling provisions of Code Civ. Proc., § 340.6 are exclusive for both one-year and four-year limitation periods]; see also CACI No. 610, *Affirmative Defense--Statute of Limitations--Attorney Malpractice--One-Year Limit*, and CACI No. 611, *Affirmative Defense--Statute of Limitations--Attorney Malpractice--Four-Year Limit*) nor for medical malpractice with regard to the three-year limitation period of Code of Civil Procedure section 340.5. (See *Belton v. Bowers Ambulance Serv.* (1999) 20 Cal.4th 928, 934 [86 Cal.Rptr.2d 107, 978 P.2d 591] [statutory tolling provisions of Code Civ. Proc., § 340.5 are exclusive only for three-year period; one-year period may be tolled on other grounds]; see also CACI No. 555, *Affirmative Defense--Statute of Limitations--Medical Malpractice--One-Year Limit*, and CACI No. 556, *Affirmative Defense--Statute of Limitations--Medical Malpractice--Three-Year Limit*.)

Sources and Authority

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

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

- "[T]he effect of equitable tolling is that the limitations period stops running during the tolling event, and begins to run again only when the tolling event has concluded. As a consequence, the tolled interval, no matter when it took place, is tacked onto the end of the limitations period, thus extending the deadline for suit by the entire length of time during which the tolling event previously occurred." (*Lantzy v. Centex Homes* (2003) 31 Cal.4th 363, 370-371 [2 Cal.Rptr.3d 655, 73 P.3d 517] .)

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

- "[A]pplication of the doctrine of equitable tolling requires timely notice, and lack of prejudice, to the defendant, and reasonable and good faith conduct on the part of the plaintiff. These elements seemingly

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

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

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

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

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

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

■ "[V]oluntary abandonment [of the first proceeding] does not categorically bar application of

equitable tolling, but it may be relevant to whether a plaintiff can satisfy the three criteria for equitable tolling." (*McDonald, supra*, 45 Cal.4th at p. 111 .)

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

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

Secondary Sources

Brown et al., California Practice Guide: Civil Procedure Before Trial (The Rutter Group) P 1:57.2

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

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

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

Publisher's Notes

There is no BAJI instruction on this subject.



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CHAPTER 4 California Judicial Council Negligence Instructions

2-4 California Forms of Jury Instruction CACI 458-CACI 459

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CHAPTER 4 California Judicial Council Negligence Instructions

*2-4 California Forms of Jury Instruction CACI 460***CACI 460 Strict Liability for Ultrahazardous Activities--Essential Factual Elements**

[Name of plaintiff] claims that [name of defendant] was engaged in an ultrahazardous activity that caused [him/her/it] to be harmed and that [name of defendant] is responsible for that harm.

People who engage in ultrahazardous activities are responsible for the harm these activities cause others, regardless of how carefully they carry out these activities. [Insert ultrahazardous activity] is an ultrahazardous activity.

To establish [his/her/its] claim, [name of plaintiff] must prove all of the following:

- 1. That [name of defendant] was engaged in [insert ultrahazardous activity];**
- 2. That [name of plaintiff] was harmed;**
- 3. That [name of plaintiff]'s harm was the kind of harm that would be anticipated as a result of the risk created by [insert ultrahazardous activity]; and**
- 4. That [name of defendant]'s [insert ultrahazardous activity] was a substantial factor in causing [name of plaintiff]'s harm.**

New September 2003

Sources and Authority

- "The doctrine of ultrahazardous activity provides that one who undertakes an ultrahazardous activity

is liable to every person who is injured as a proximate result of that activity, regardless of the amount of care he uses." (*Pierce v. Pacific Gas & Electric Co.* (1985) 166 Cal.App.3d 68, 85 [212 Cal.Rptr. 283] , internal citations omitted.)

■ Whether an activity is ultrahazardous is a question of law to be determined by the court. (*Luthringer v. Moore* (1948) 31 Cal.2d 489, 496 [190 P.2d 1] .)

■ *Restatement of Torts Second, section 519*, provides:

(1) One who carries on an abnormally dangerous activity is subject to liability for harm to the person, land or chattels of another resulting from the activity, although he has exercised the utmost care to prevent the harm.

(2) This strict liability is limited to the kind of harm, the possibility of which makes the activity abnormally dangerous.

■ *Restatement of Torts Second, section 520*, provides:

In determining whether an activity is abnormally dangerous, the following factors are to be considered:

(a) existence of a high degree of risk of some harm to the person, land or chattels of others;

(b) likelihood that the harm that results from it will be great;

(c) inability to eliminate the risk by the exercise of reasonable care;

(d) extent to which the activity is not a matter of common usage;

(e) inappropriateness of the activity to the place where it is carried on; and

(f) extent to which its value to the community is outweighed by its dangerous attributes.

■ Section 519 formerly provided, in part, that "one who carries on an ultrahazardous activity is liable to another whose person, land or chattels the actor should recognize is likely to be harmed by the unpreventable miscarriage of the activity for harm resulting thereto from that which makes the activity ultrahazardous, although the utmost care is exercised to prevent the harm." This section was followed by the court in *Luthringer, supra* , and by other courts in subsequent cases. (See *Garcia v. Estate of Norton* (1986) 183 Cal.App.3d 413, 418 [228 Cal.Rptr. 108] .) This statement regarding foreseeability is evidently still good law in California, even though the wording of section 519 does not presently contain the limitation.

■ Strict liability in this context has been confined to "consequences which lie within the extraordinary risk posed by the abnormally dangerous activity and is limited to the 'class of persons who are threatened by the abnormal danger, and the kind of damage they may be expected to incur.' " (*Goodwin v. Reilley* (1985) 176 Cal.App.3d 86, 92 [221 Cal.Rptr. 374] , citing Prosser & Keeton, *The Law of Torts* (5th ed. 1984) § 75, p. 562.)

■ "The important factor is that certain activities under certain conditions may be so hazardous to the public generally, and of such relative infrequent occurrence, that it may well call for strict liability as the best public policy." (

Luthringer, supra, 31 Cal.2d at p. 500 .)

■ "It is axiomatic that an essential element of a plaintiff's cause of action, whether based on negligence or strict liability, is the existence of a causal connection between defendant's act and the injury which plaintiff suffered." (*Smith v. Lockheed Propulsion Co. (1967) 247 Cal.App.2d 774, 780 [56 Cal.Rptr. 128]* , internal citations omitted.)

■ Defendant contended that the strict liability doctrine "cannot be applied unless the defendant is aware of the abnormally dangerous condition or activity." This is unsound: One who carried on such an "activity is liable for injuries to a person whom the actor reasonably should recognize as likely to be harmed ... , even though 'the utmost care is exercised to prevent the harm.' " (*Garcia, supra, 183 Cal.App.3d at p. 420* , internal citation omitted.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1414-1427

1 Levy et al., *California Torts, Ch. 7, Strict Liability for Hazardous Activities, §§ 7.01 -7.06*

1 California Environmental Law & Land Use Practice, Ch. 1, *Nuisance, Trespass, and Strict Liability for Ultrahazardous Activities* (Matthew Bender)

1A *California Trial Guide, Unit 11, Opening Statement, § 11.55* (Matthew Bender)

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

23 California Points and Authorities, Ch. 234, *Ultrahazardous Activities* (Matthew Bender)

1 California Civil Practice: Torts (Thomson West) §§ 2:4-2:10

Publisher's Notes

This instruction replaces BAJI No. 6.60.

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsNegligenceCausationProximate CauseGeneral OverviewTortsStrict LiabilityAbnormally Dangerous ActivitiesActivities & ConditionsTortsStrict LiabilityAbnormally Dangerous ActivitiesDeterminations



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CHAPTER 4 California Judicial Council Negligence Instructions

2-4 California Forms of Jury Instruction CACI 461

CACI 461 Strict Liability for Injury Caused by Wild Animal--Essential Factual Elements

[*Name of plaintiff*] **claims that** [*name of defendant*]'s [*insert type of animal*] **harmed [him/her] and that** [*name of defendant*] **is responsible for that harm.**

People who own wild animals are responsible for the harm that these animals cause to others, no matter how carefully they guard or restrain their animals.

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

- 1. That [*name of defendant*] owned a [*insert type of animal*];**
- 2. That [*name of plaintiff*] was harmed; and**
- 3. That [*name of defendant*]'s [*insert type of animal*] was a substantial factor in causing [*name of plaintiff*]'s harm.**

New September 2003

- Lions, tigers, bears, elephants, wolves, monkeys, and sharks have been characterized as wild animals. (*Rosenbloom v. Hanour Corp.* (1998) 66 Cal.App.4th 1477, 1479, fn. 1 [78 Cal.Rptr.2d 686] .)

- An owner of a wild animal is strictly liable to persons who are injured by the animal: "In such instances the owner is an insurer against the acts of the animal, to one who is injured without fault, and the question of the owner's negligence is not in the case." (*Opelt v. Al G. Barnes Co.* (1919) 41 Cal.App.

776, 779 [183 P. 241] .)

■ "[I]f the animal which inflicted the injury is vicious and dangerous, known to the defendant to be such, an allegation of negligence on the part of defendant is unnecessary and the averment, if made, may be treated as surplusage." (*Baugh v. Beatty* (1949) 91 Cal.App.2d 786, 791 [205 P.2d 671] .)

■ A wild animal, of a type to be known to have a vicious nature, is presumed to be vicious. (*Baugh, supra*, 91 Cal.App.2d at p. 791 .) Accordingly, an instruction on the owner's knowledge of its ferocity is unnecessary. (*Id.* at pp. 791-792 .)

■ "It is commonly said that scienter, or knowledge of such propensities, must be proved in the case of domestic animals, but is presumed in the case of wild animals." (6 Witkin, Summary of California Law (10th ed. 2005) Torts, § 1403.)

■ "The owner of a naturally dangerous animal may be excused from the usual duty of care: 'In cases involving "primary assumption of risk"--where, by virtue of the nature of the activity and the parties' relationship to the activity, the defendant owes no legal duty to protect the plaintiff from the particular risk of harm that caused the injury--the doctrine ... operates as a complete bar to the plaintiff's recovery.' " (*Rosenbloom, supra*, 66 Cal.App.4th at p. 1479 , internal citation omitted.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, § 1403

California Tort Guide (Cont.Ed.Bar 3d ed.) §§ 3.3-3.6

1 Levy et al., California Torts, Ch. 6, *Strict Liability for Injuries Caused by Animals*, §§ 6.01-6.10

3 California Forms of Pleading and Practice, Ch. 23, *Animals: Civil Liability* (Matthew Bender)

1 California Civil Practice: Torts (Thomson West) §§ 2:20-2:21

Publisher's Notes

This instruction replaces BAJI No. 6.65.

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsNegligenceDutyAnimal OwnersOwnershipTortsNegligenceProofEvidenceInferences & PresumptionsTortsStrict LiabilityHarm Caused by AnimalsGeneral OverviewTortsStrict LiabilityHarm Caused by AnimalsDangerous AnimalsTortsStrict LiabilityHarm Caused by AnimalsDefenses



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CHAPTER 4 California Judicial Council Negligence Instructions

2-4 California Forms of Jury Instruction CACI 462

CACI 462 Strict Liability for Injury Caused by Domestic Animal With Dangerous Propensities--Essential Factual Elements

[*Name of plaintiff*] **claims that** [*name of defendant*]'s [*insert type of animal*] **harmed [him/her] and that** [*name of defendant*] **is responsible for that harm.**

People who own, keep, or control animals with unusually dangerous natures or tendencies can be held responsible for the harm that their animals cause to others, no matter how carefully they guard or restrain their animals.

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

- 1. That [*name of defendant*] owned, kept, or controlled a [*insert type of animal*];**
- 2. That the [*insert type of animal*] had an unusually dangerous nature or tendency;**
- 3. That before [*name of plaintiff*] was injured, [*name of defendant*] knew or should have known that the [*insert type of animal*] had this nature or tendency;**
- 4. That [*name of plaintiff*] was harmed; and**
- 5. That the [*insert type of animal*]'s unusually dangerous nature or tendency was a substantial factor in causing [*name of plaintiff*]'s harm.**

For an instruction on statutory strict liability under the dog-bite statute, see *CACI No. 463, Dog Bite Statute (Civ. Code, § 3342)--Essential Factual Elements*.

■ "A common law strict liability cause of action may also be maintained if the owner of a domestic animal that bites or injures another person knew or had reason to know of the animal's vicious propensities. If [defendant] knew or should have known of his dog's vicious propensities and failed to inform [plaintiff] of such facts, he could be found to have exposed [plaintiff] to an *unknown risk* and thereby be held strictly liable at common law for her injuries. Under such circumstances, the defense of primary assumption of risk would not bar [plaintiff]'s claim since she could not be found to have assumed a risk of which she was unaware." (*Priebe v. Nelson* (2006) 39 Cal.4th 1112, 1115-1116 [47 Cal.Rptr.3d 553, 140 P.3d 848] , original italics, internal citations omitted.)

■ "California has long followed the common law rule of strict liability for harm done by a domestic animal with known vicious or dangerous propensities abnormal to its class." (*Drake v. Dean* (1993) 15 Cal.App.4th 915, 921 [19 Cal.Rptr.2d 325] .)

■ Any propensity that is likely to cause injury under the circumstances is a dangerous or vicious propensity within the meaning of the law. (*Talizin v. Oak Creek Riding Club* (1959) 176 Cal.App.2d 429, 437 [1 Cal.Rptr. 514] .)

■ The question of whether a domestic animal is vicious or dangerous is ordinarily a factual one for the jury. (*Heath v. Fruzia* (1942) 50 Cal.App.2d 598, 601 [123 P.2d 560] .)

■ *Section 509 of the Restatement Second of Torts* provides:

(1) A possessor of a domestic animal that he knows or has reason to know has dangerous propensities abnormal to its class, is subject to liability for harm done by the animal to another, although he has exercised the utmost care to prevent it from doing the harm.

(2) This liability is limited to harm that results from the abnormally dangerous propensity of which the possessor knows or has reason to know.

■ "The gist of the action is not the manner of keeping the vicious animal, but the keeping him at all with knowledge of the vicious propensities. In such instances the owner is an insurer against the acts of the animal, to one who is injured without fault, and the question of the owner's negligence is not in the case." (*Hillman v. Garcia-Ruby* (1955) 44 Cal.2d 625, 626 [283 P.2d 1033] , internal citations omitted.)

■ "The absolute duty to restrain the dog could not be invoked unless the jury found, not only that the dog had the alleged dangerous propensity, but that defendants knew or should have known that it had." (*Hillman, supra*, 44 Cal.2d at p. 628 .)

■ "[N]egligence may be predicated on the characteristics of the animal which, although not abnormal to its class, create a foreseeable risk of harm. As to those characteristics, the owner has a duty to anticipate the harm and to exercise ordinary care to prevent the harm." (*Drake, supra*, 15 Cal.App.4th at p. 929 .)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1414-1427

California Tort Guide (Cont.Ed.Bar 3d ed.) §§ 3.3-3.6

1 Levy et al., California Torts, Ch. 6, *Strict Liability for Injuries Caused by Animals*, §§ 6.01-6.10 (Matthew Bender)

3 California Forms of Pleading and Practice, Ch. 23, *Animals: Civil Liability* (Matthew Bender)

1 California Civil Practice: Torts (Thomson West) §§ 2:20-2:21

Publisher's Notes

This instruction replaces BAJI No. 6.66.

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsNegligenceDutyAnimal OwnersControl & RestraintTortsNegligenceDutyAnimal
OwnersOwnershipTortsNegligenceDutyAnimal OwnersScienterTortsStrict LiabilityHarm Caused by AnimalsGeneral
OverviewTortsStrict LiabilityHarm Caused by AnimalsDangerous AnimalsTortsStrict LiabilityHarm Caused by
AnimalsDefenses



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CHAPTER 4 California Judicial Council Negligence Instructions

2-4 California Forms of Jury Instruction CACI 463

CACI 463 Dog Bite Statute (Civ. Code, § 3342)--Essential Factual Elements

[*Name of plaintiff*] claims that [*name of defendant*]'s dog bit [him/her] and that [*name of defendant*] is responsible for that harm.

People who own dogs can be held responsible for the harm from a dog bite, no matter how carefully they guard or restrain their dogs.

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

- 1. That [*name of defendant*] owned a dog;**
- 2. That the dog bit [*name of plaintiff*] while [he/she] was in a public place or lawfully on private property;**
- 3. That [*name of plaintiff*] was harmed; and**
- 4. That [*name of defendant*]'s dog was a substantial factor in causing [*name of plaintiff*]'s harm.**

[[*Name of plaintiff*] was lawfully on private property of the owner if [he/she] was performing any duty required by law or was on the property at the invitation, express or implied, of the owner.]

New September 2003; Revised April 2007

Read the last optional paragraph if there is an issue regarding whether the plaintiff was lawfully on private property when he or she was bitten.

For an instruction on common-law liability based on the defendant's knowledge of his or her pet's dangerous propensities, see *CACI No. 462, Strict Liability for Injury Caused by Domestic Animal With Dangerous Propensities--Essential Factual Elements*.

- *Civil Code section 3342(a)* provides: "The owner of any dog is liable for the damages suffered by any person who is bitten by the dog while in a public place or lawfully in a private place, including the property of the owner of the dog, regardless of the former viciousness of the dog or the owner's knowledge of such viciousness. A person is lawfully upon the private property of such owner within the meaning of this section when he is on such property in the performance of any duty imposed upon him by the laws of this state or by the laws or postal regulations of the United States, or when he is on such property upon the invitation, express or implied, of the owner."

- This statute creates an exception to the general rule that an owner is not strictly liable for harm caused by a domestic animal absent knowledge of the animal's vicious propensity. (*Hicks v. Sullivan* (1932) 122 Cal.App. 635, 639 [10 P.2d 516] .)

- It is not necessary that the skin be broken in order for the statute to apply. (*Johnson v. McMahan* (1998) 68 Cal.App.4th 173, 176 [80 Cal.Rptr.2d 173] .)

- "The defenses of assumption of the risk and contributory negligence may still be asserted" in an action brought under section 3342. (*Johnson, supra*, 68 Cal.App.4th at p. 176 .)

- "A veterinarian or a veterinary assistant who accepts employment for the medical treatment of a dog, aware of the risk that *any* dog, regardless of its previous nature, might bite while being treated, has assumed this risk as part of his or her occupation." (*Nelson v. Hall* (1985) 165 Cal.App.3d 709, 715 [211 Cal.Rptr. 668] , original italics.)

- "[Plaintiff], by virtue of the nature of her occupation as a kennel worker, assumed the risk of being bitten or otherwise injured by the dogs under her care and control while in the custody of the commercial kennel where she worked pursuant to a contractual boarding agreement. The Court of Appeal correctly concluded a strict liability cause of action under the dog bite statute (§ 3342) was therefore unavailable to [plaintiff]." (*Priebe v. Nelson* (2006) 39 Cal.4th 1112, 1132 [47 Cal.Rptr.3d 553, 140 P.3d 848] .)

- The definition of "lawfully upon the private property of such owner" effectively prevents trespassers from obtaining recovery under the Dog Bite Statute. (*Fullerton v. Conan* (1948) 87 Cal.App.2d 354, 358 [197 P.2d 59] .)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1408-1412

California Tort Guide (Cont.Ed.Bar 3d ed.) § 3.2

1 Levy et al., California Torts, Ch. 6, *Strict Liability for Injuries Caused by Animals*, § 6.12 (Matthew Bender)

3 California Forms of Pleading and Practice, Ch. 23, *Animals: Civil Liability* (Matthew Bender)

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

1 California Civil Practice: Torts (Thomson West) § 2:16

Publisher's Notes

This instruction replaces BAJI No. 6.67.

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsNegligenceDutyAnimal OwnersGeneral OverviewTortsNegligenceDutyAnimal OwnersStatutory DutiesTortsStrict LiabilityHarm Caused by AnimalsGeneral OverviewTortsStrict LiabilityHarm Caused by AnimalsDangerous AnimalsTortsStrict LiabilityHarm Caused by AnimalsDefensesTortsStrict LiabilityHarm Caused by AnimalsStatutory Liability



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CHAPTER 4 California Judicial Council Negligence Instructions

2-4 California Forms of Jury Instruction CACI 464-CACI 499

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CACI 464Reserved for Future Use



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CHAPTER 4 California Judicial Council Negligence Instructions

2-4 California Forms of Jury Instruction CACI VF-400

CACI VF-400 Negligence--Single Defendant

We answer the questions submitted to us as follows:

1. Was [name of defendant] negligent?

_____ Yes _____ No

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

2. Was [name of defendant]'s negligence a substantial factor in causing harm to [name of plaintiff]?

_____ Yes _____ No

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

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

[a. Past economic loss

[lost earnings..... \$_____].....

[lost profits..... \$_____].....

2-4 California Forms of Jury Instruction CACI VF-400

[medical expenses..... \$_____].....

[other past economic loss..... \$_____].....

..... Total Past Economic Damages: \$_____]

[b. Future economic loss

[lost earnings..... \$_____].....

[lost profits..... \$_____].....

[medical expenses..... \$_____].....

[other future economic loss..... \$_____].....

..... Total Future Economic Damages: \$_____]

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

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

..... TOTAL \$_____

Signed: _____

Presiding Juror

Dated: _____

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

New September 2003; Revised April 2007

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

This verdict form is based on *CACI No. 400, Essential Factual Elements*.

If specificity is not required, users do not have to itemize all the damages listed in question 3. The breakdown is optional depending on the circumstances.

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

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

Publisher's Notes

This verdict form covers issued presented in BAJI No. 16.00.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsVerdictsGeneral OverviewCivil ProcedureTrialsJury TrialsVerdictsSpecial
VerdictsTortsProcedureGeneral Overview



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CHAPTER 4 California Judicial Council Negligence Instructions

2-4 California Forms of Jury Instruction CACI VF-401

CACI VF-401 Negligence--Single Defendant--Plaintiff's Negligence at Issue--Fault of Others Not at Issue

We answer the questions submitted to us as follows:

1. Was [*name of defendant*] negligent?

_____ Yes _____ No

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

2. Was [*name of defendant*]'s negligence a substantial factor in causing harm to [*name of plaintiff*]?

_____ Yes _____ No

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

3. What are [*name of plaintiff*]'s total damages? Do not reduce the damages based on the fault, if any, of [*name of plaintiff*].

[a. Past economic loss

[lost earnings..... \$_____].....

[lost profits..... \$_____].....

[medical expenses..... \$_____].....

[other past economic loss..... \$_____].....

..... Total Past Economic Damages: \$_____]

[b. Future economic loss

[lost earnings..... \$_____].....

[lost profits..... \$_____].....

[medical expenses.....\$_____].....

[other future economic loss \$_____]

..... Total Future Economic Damages: \$_____]

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

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

..... **TOTAL \$_____**

If [name of plaintiff] has proved any damages, then answer question 4. If [name of plaintiff] has not proved any damages, then stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Was [name of plaintiff] negligent?

_____ Yes _____ No

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

5. Was [name of plaintiff]'s negligence a substantial factor in causing [his/her] harm?

_____ Yes _____ No

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

6. What percentage of responsibility for [name of plaintiff]'s harm do you assign to:

[Name of defendant]: _____%

[Name of plaintiff]: _____%

TOTAL 100 %

Signed: _____
Presiding Juror

Dated: _____

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

New September 2003; Revised April 2007

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

This verdict form is based on *CACI No. 400, Essential Factual Elements*, and *CACI No. 405, Comparative Fault of Plaintiff*.

If specificity is not required, users do not have to itemize all the damages listed in question 3. The breakdown is optional depending on the circumstances.

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

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

Publisher's Notes

This verdict form covers issues presented in BAJI No. 16.00.

LexisNexis Matthew Bender Expert Practice Tip--Have Judge Use Your Verdict Form: You should always try to get the judge to use your verdict form and if you are the plaintiff, make sure the lines where money damages are placed are as long as possible. It is always important to go over the verdict form in closing argument with the jury. I sometimes blow up the verdict form and then fill it out during my closing argument. *By Dona Cohn-Payne*

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsVerdictsGeneral OverviewCivil ProcedureTrialsJury TrialsVerdictsSpecial VerdictsTortsNegligenceDefensesContributory NegligenceProcedureProvince of Court & JuryTortsProcedureGeneral Overview



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CHAPTER 4 California Judicial Council Negligence Instructions

2-4 California Forms of Jury Instruction CACI VF-402

CACI VF-402 Negligence--Fault of Plaintiff and Others at Issue

We answer the questions submitted to us as follows:

1. Was [name of first defendant] negligent?

_____ Yes _____ No

Was [name of second defendant] negligent?

_____ Yes _____ No

[Repeat as necessary for other defendants.]

If you answered yes in any part of question 1, then answer question 2. If you answered no to all parts of question 1, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. For each defendant that received a "yes" answer in question 1, answer the following:

Was [name of first defendant]'s negligence a substantial factor in causing harm to [name of plaintiff]?

_____ Yes _____ No

Was [name of second defendant]'s negligence a substantial factor in causing harm to [name of plaintiff]?

_____ Yes _____ No

[Repeat as necessary for other defendants.]

If you answered yes in any part of question 2, then answer question 3. If you answered no to all parts of question 2, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. What are [name of plaintiff]'s total damages? Do not reduce the damages based on the fault, if any, of [name of plaintiff] or others.

[a. Past economic loss

[lost earnings..... \$_____]

[lost profits..... \$_____]

[medical expenses..... \$_____]

[other past economic loss.....\$_____]

..... **Total Past Economic Damages: \$_____]**

[b. Future economic loss

[lost earnings..... \$_____]

[lost profits..... \$_____]

[medical expenses..... \$_____]

[other future economic loss..... \$_____]

..... **Total Future Economic Damages: \$_____]**

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

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

..... **TOTAL \$_____**

If [name of plaintiff] has proved any damages, then answer question 4. If [name of plaintiff] has not proved any damages, then stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Was [name of plaintiff] negligent?

_____ Yes _____ No

If your answer to question 4 is yes, then answer question 5. If you answered no, answer question 6.

5. Was [*name of plaintiff*]'s negligence a substantial factor in causing [his/her] harm?

_____ Yes _____ No

If your answer to question 5 is yes, then answer question 6. If you answered no, insert the number zero next to [*name of plaintiff*]'s name in question 8 and answer question 6.

6. Was [*name/description of first nonparty*] negligent?

_____ Yes _____ No

Was [*name/description of second nonparty*] negligent?

_____ Yes _____ No

If you answered yes in any part of 6, then answer question 7. If you answered no to all parts of question 6, answer question 8.

7. For each person who received a "yes" answer in question 6, answer the following:

Was [*name/description of first nonparty*]'s negligence a substantial factor in causing harm to [*name of plaintiff*]?

_____ Yes _____ No

Was [*name/description of second nonparty*]'s negligence a substantial factor in causing harm to [*name of plaintiff*]?

_____ Yes _____ No

If you answered yes in any part of question 7, then answer question 8. If you answered no regarding all persons in question 7, then insert the number zero next to their names in question 8 and answer question 8.

8. What percentage of responsibility for [*name of plaintiff*]'s harm do you assign to the following? Insert a percentage for only those who received "yes" answers in questions 2, 5, or 7:

[<i>Name of first defendant</i>]:	_____ %
[<i>Name of second defendant</i>]:	_____ %
[<i>Name of plaintiff</i>]:	_____ %
[<i>Name/description of first nonparty</i>]:	_____ %
[<i>Name/description of second nonparty</i>]:	_____ %
TOTAL	100 %

Signed: _____

Presiding Juror

Dated: _____

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

New September 2003; Revised April 2007, December 2009

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

This verdict form is based on *CACI No. 400, Essential Factual Elements*, *CACI No. 405, Comparative Fault of Plaintiff*, and *CACI No. 406, Apportionment of Responsibility*.

If specificity is not required, users do not have to itemize all the damages listed in question 3. The breakdown is optional depending on the circumstances.

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

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

Users may wish to have the jury specify the liability and causation of each nonparty actor.

If a second plaintiff is also alleged to have been negligent, add his or her name to the list of possible contributing persons, notwithstanding the fact that the bracket is currently designated as "nonparty."

If superseding cause is an issue, insert a question on that issue after question 5.

This form may be modified if a nonparty is a product manufacturer.

Publisher's Notes

This verdict form covers issues presented in BAJI Nos. 16.00, 16.72, 16.73, and 16.91.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Verdicts Special Verdicts Torts Negligence Defenses Comparative Negligence Multiple Parties General Overview Torts Negligence Defenses Comparative Negligence Procedure Torts Negligence Defenses Contributory Negligence General Overview Torts Negligence Defenses Contributory Negligence Procedure Province of Court & Jury



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California Forms of Jury Instruction

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CHAPTER 4 California Judicial Council Negligence Instructions

2-4 California Forms of Jury Instruction CACI VF-403

CACI VF-403 Primary Assumption of Risk

We answer the questions submitted to us as follows:

1. Did [*name of defendant*] either intentionally injure [*name of plaintiff*] or act so recklessly that [his/her] conduct was entirely outside the range of ordinary activity involved in [specify sport or activity, e.g., touch football]?

_____ Yes _____ No

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

2. Was [*name of defendant*]'s conduct a substantial factor in causing harm to [*name of plaintiff*]?

_____ Yes _____ No

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

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

[a. Past economic loss

[lost earnings..... \$_____].....

[lost profits..... \$_____].....

[medical expenses..... \$_____].....

[other past economic loss..... \$_____].....

..... Total Past Economic Damages: \$_____]

[b. Future economic loss

[lost earnings..... \$_____].....

[lost profits..... \$_____].....

[medical expenses..... \$_____].....

[other future economic loss..... \$_____].....

..... Total Future Economic Damages: \$_____]

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

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

..... **TOTAL \$_____**

Signed: _____

Presiding Juror

Dated: _____

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

New September 2003; Revised April 2004, April 2007, April 2009

Directions for Use

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

This verdict form is based on *CACI No. 408, Primary Assumption of Risk*.

If specificity is not required, users do not have to itemize all the damages listed in question 3 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

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

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

Publisher's Notes

There is no BAJI verdict form on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Verdicts Special Verdicts Torts Negligence Causation General Overview



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CHAPTER 4 California Judicial Council Negligence Instructions

2-4 California Forms of Jury Instruction CACI VF-404

CACI VF-404 Liability of Instructors, Trainers, or Coaches

We answer the questions submitted to us as follows:

1. Was [name of defendant] [name of plaintiff]'s [coach/trainer/instructor]?

_____ Yes _____ No

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

2. Did [name of defendant] intend to cause [name of plaintiff] injury or act recklessly in that [his/her] conduct was entirely outside the range of ordinary activity involved in teaching or coaching the sport in which [name of plaintiff] was participating?

_____ Yes _____ No

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

3. Was [name of defendant]'s conduct a substantial factor in causing harm to [name of plaintiff]?

_____ Yes _____ No

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

4. What are [name of plaintiff]'s damages?**[a. Past economic loss**

[lost earnings..... \$_____]

[lost profits..... \$_____]

[medical expenses..... \$_____]

[other past economic loss..... \$_____]

..... **Total Past Economic Damages: \$_____]****[b. Future economic loss**

[lost earnings..... \$_____]

[lost profits..... \$_____]

[medical expenses..... \$_____]

[other future economic loss..... \$_____]

..... **Total Future Economic Damages: \$_____]****[c. Past noneconomic loss, including [physical
pain/mental suffering:]..... \$_____]****[d. Future noneconomic loss, including [physical
pain/mental suffering:]..... \$_____]**..... **TOTAL \$_____****Signed: _____****Presiding Juror****Dated: _____****[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the
[clerk/bailiff/judge].**

New September 2003; Revised April 2004, April 2007

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

This verdict form is based on *CACI No. 409, Liability of Instructors, Trainers, or Coaches*.

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

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

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

Publisher's Notes

There is no BAJI verdict form on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsVerdictsSpecial VerdictsTortsDamagesCompensatory DamagesLost IncomeGeneral OverviewTortsDamagesCompensatory DamagesMedical ExpensesTortsDamagesCompensatory DamagesPain & SufferingGeneral OverviewTortsProcedureMultiple DefendantsGeneral Overview



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CHAPTER 4 California Judicial Council Negligence Instructions

2-4 California Forms of Jury Instruction CACI VF-405

CACI VF-405 Parental Liability (Nonstatutory)

We answer the questions submitted to us as follows:

1. Was [*name of defendant*] aware of habits or tendencies of [*name of minor*] that created an unreasonable risk of harm to other persons and led to [*name of plaintiff*]'s harm?

_____ Yes _____ No

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

2. Did [*name of defendant*] have the opportunity and ability to control the conduct of [*name of minor*]?

_____ Yes _____ No

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

3. Was [*name of defendant*] negligent because [he/she] failed to exercise reasonable care to prevent [*name of minor*]'s conduct?

_____ Yes _____ No

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

4. Was [*name of defendant*]'s negligence a substantial factor in causing harm to [*name of plaintiff*]?

_____ Yes _____ No

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

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

[a. Past economic loss

[lost earnings..... \$_____]

[lost profits..... \$_____]

[medical expenses..... \$_____]

[other past economic loss..... \$_____]

..... Total Past Economic Damages: \$_____]

[b. Future economic loss

[lost earnings..... \$_____]

[lost profits..... \$_____]

[medical expenses..... \$_____]

[other future economic loss..... \$_____]

..... Total Future Economic Damages: \$_____]

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

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

..... TOTAL \$_____

Signed: _____

Presiding Juror

Dated: _____

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

[clerk/bailiff/judge].

New September 2003; Revised April 2007

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

This verdict form is based on *CACI No. 410, Parental Liability (Nonstatutory)*. Questions 1 and 3 can be altered to correspond to one or both of the alternative bracketed option in elements 1 and 3 of *CACI No. 410*.

If specificity is not required, users do not have to itemize all the damages listed in question 5 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

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

Publisher's Notes

There is no BAJI verdict form on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Verdicts Special Verdicts Family Law Family Relationships & Torts Tort Liability Child Torts Torts Damages Compensatory Damages Lost Income General Overview Torts Damages Compensatory Damages Medical Expenses Torts Damages Compensatory Damages Pain & Suffering Emotional & Mental Distress General Overview Torts Vicarious Liability Family Members Children & Parents



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CHAPTER 4 California Judicial Council Negligence Instructions

2-4 California Forms of Jury Instruction CACI VF-406

CACI VF-406 Negligence--Sale of Alcoholic Beverages to Obviously Intoxicated Minor

We answer the questions submitted to us as follows:

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

_____ Yes _____ No

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

2. Did [*name of defendant*] sell or give alcoholic beverages to [*name of alleged minor*]?

_____ Yes _____ No

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

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

_____ Yes _____ No

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

4. Did [*name of alleged minor*] display symptoms that would lead a reasonable person to conclude

that [*name of alleged minor*] was obviously intoxicated?

_____ Yes _____ No

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

5. Did [*name of alleged minor*] later harm [*name of plaintiff*]?

_____ Yes _____ No

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

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

_____ Yes _____ No

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

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

[a. Past economic loss

[lost earnings..... \$_____].....

[lost profits..... \$_____].....

[medical expenses..... \$_____].....

[other past economic loss..... \$_____].....

..... Total Past Economic Damages: \$_____]

[b. Future economic loss

[lost earnings..... \$_____].....

[lost profits..... \$_____].....

[medical expenses..... \$_____].....

[other future economic loss..... \$_____].....

..... Total Future Economic Damages: \$_____]

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

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

..... TOTAL \$_____

Signed: _____
Presiding Juror

Dated: _____

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

New September 2003; Revised April 2007, December 2009

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

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

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

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

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

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

Publisher's Notes

There is no BAJI verdict form on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsVerdictsSpecial VerdictsTortsDamagesCompensatory DamagesLost IncomeGeneral OverviewTortsDamagesCompensatory DamagesMedical ExpensesTortsDamagesCompensatory DamagesPain & SufferingGeneral OverviewTortsNegligenceDutyAlcohol ProvidersGeneral OverviewTortsNegligenceDutyAlcohol ProvidersDram Shop StatutesTortsNegligenceDutyAlcohol ProvidersKnowledge Requirements



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CHAPTER 4 California Judicial Council Negligence Instructions

2-4 California Forms of Jury Instruction CACI VF-407

CACI VF-407 Strict Liability--Ultrahazardous Activities

We answer the questions submitted to us as follows:

1. Was [name of defendant] engaged in [insert ultrahazardous activity]?

_____ Yes _____ No

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

2. Was [name of plaintiff] harmed?

_____ Yes _____ No

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

3. Was [name of plaintiff]'s harm the kind of harm that would be anticipated as a result of the risk created by [insert ultrahazardous activity]?

_____ Yes _____ No

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

4. Was [name of defendant]'s [insert ultrahazardous activity] a substantial factor in causing [name

of plaintiff]'s harm?

_____ Yes _____ No

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

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

[a. Past economic loss

[lost earnings..... \$_____].....

[lost profits..... \$_____].....

[medical expenses..... \$_____].....

[other past economic loss..... \$_____].....

..... Total Past Economic Damages: \$_____]

[b. Future economic loss

[lost earnings..... \$_____].....

[lost profits..... \$_____].....

[medical expenses..... \$_____].....

[other future economic loss..... \$_____].....

..... Total Future Economic Damages: \$_____]

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

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

..... TOTAL \$_____

Signed: _____

Presiding Juror

Dated: _____

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

New September 2003; Revised April 2007

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

This verdict form is based on *CACI No. 460, Strict Liability for Ultrahazardous Activities--Essential Factual Elements*.

If specificity is not required, users do not have to itemize all the damages listed in question 5. The breakdown is optional depending on the circumstances.

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

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

Publisher's Notes

There is no BAJI verdict form on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsDamagesCompensatory DamagesLost IncomeGeneral OverviewTortsDamagesCompensatory DamagesMedical ExpensesTortsDamagesCompensatory DamagesPain & SufferingGeneral OverviewTortsStrict LiabilityAbnormally Dangerous ActivitiesActivities & Conditions



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California Forms of Jury Instruction

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CHAPTER 4 California Judicial Council Negligence Instructions

2-4 California Forms of Jury Instruction CACI VF-408

CACI VF-408 Strict Liability for Domestic Animal With Dangerous Propensities

We answer the questions submitted to us as follows:

1. Did [name of defendant] own, keep, or control a [insert type of animal]?

_____ Yes _____ No

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

2. Did the [insert type of animal] have an unusually dangerous nature or tendency?

_____ Yes _____ No

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

3. Did [name of defendant] know, or should [he/she] have known, that the [insert type of animal] had this nature or tendency?

_____ Yes _____ No

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

4. Was the [insert type of animal]'s unusually dangerous nature or tendency a substantial factor in

causing harm to [*name of plaintiff*]?

_____ Yes _____ No

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

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

[a. Past economic loss

[lost earnings..... \$_____].....

[lost profits..... \$_____].....

[medical expenses..... \$_____].....

[other past economic loss..... \$_____].....

..... Total Past Economic Damages: \$_____]

[b. Future economic loss

[lost earnings..... \$_____].....

[lost profits..... \$_____].....

[medical expenses..... \$_____].....

[other future economic loss..... \$_____].....

..... Total Future Economic Damages: \$_____]

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

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

..... TOTAL \$_____

Signed: _____

Presiding Juror

Dated: _____

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

New September 2003; Revised April 2007

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

This verdict form is based on *CACI No. 462, Strict Liability for Injury Caused by Domestic Animal With Dangerous Propensities--Essential Factual Elements*.

If specificity is not required, users do not have to itemize all the damages listed in question 5. The breakdown is optional depending on the circumstances.

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

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

Publisher's Notes

There is no BAJI verdict form on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsDamagesCompensatory DamagesLost IncomeGeneral OverviewTortsDamagesCompensatory DamagesMedical ExpensesTortsDamagesCompensatory DamagesPain & SufferingEmotional & Mental DistressGeneral OverviewTortsNegligenceDutyAnimal OwnersGeneral OverviewTortsNegligenceDutyAnimal OwnersOwnershipTortsNegligenceDutyAnimal OwnersScienter



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CHAPTER 4 California Judicial Council Negligence Instructions

*2-4 California Forms of Jury Instruction CACI VF-409***CACI VF-409 Dog Bite Statute (Civ. Code, § 3342)**

We answer the questions submitted to us as follows:

1. Did [name of defendant]'s dog bite [name of plaintiff]?

_____ Yes _____ No

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

2. Was [name of plaintiff] in a public place or lawfully on private property when [he/she] was bitten?

_____ Yes _____ No

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

3. Was the dog a substantial factor in causing harm to [name of plaintiff]?

_____ Yes _____ No

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

4. What are the damages, if any, that [name of plaintiff] suffered as a result of the dog bite?

[a. Past economic loss

[lost earnings..... \$_____]

[lost profits..... \$_____]

[medical expenses..... \$_____]

[other past economic loss..... \$_____]

..... **Total Past Economic Damages: \$_____]****[b. Future economic loss**

[lost earnings..... \$_____]

[lost profits..... \$_____]

[medical expenses..... \$_____]

[other future economic loss..... \$_____]

..... **Total Future Economic Damages: \$_____]****[c. Past noneconomic loss, including [physical
pain/mental suffering:]..... \$_____]****[d. Future noneconomic loss, including [physical
pain/mental suffering:]..... \$_____]**..... **TOTAL \$_____****Signed: _____****Presiding Juror****Dated: _____****[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the
[clerk/bailiff/judge].**

New September 2003; Revised April 2007

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

This verdict form is based on *CACI No. 463, Dog Bite Statute (Civ. Code, § 3342)--Essential Factual Elements*.

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

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

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

Publisher's Notes

There is no BAJI verdict form on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsDamagesCompensatory DamagesLost IncomeGeneral OverviewTortsDamagesCompensatory DamagesMedical ExpensesTortsDamagesCompensatory DamagesPain & SufferingGeneral OverviewTortsNegligenceDutyAnimal OwnersStatutory Duties



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CHAPTER 4 California Judicial Council Negligence Instructions

2-4 California Forms of Jury Instruction CACI VF-410

CACI VF-410 Statute of Limitations--Delayed Discovery--Reasonable Investigation Would Not Have Disclosed Pertinent Facts

We answer the questions submitted to us as follows:

1. Did [name of plaintiff]'s claimed harm occur before [insert date from applicable statute of limitations]?

_____ Yes _____ No

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

2. Before [insert date from applicable statute of limitations], did [name of plaintiff] know of facts that would have caused a reasonable person to suspect that [he/she/it] had suffered harm that was caused by someone's wrongful conduct?

_____ Yes _____ No

[or]

2. Would a reasonable and diligent investigation have disclosed before [insert date from applicable statute of limitations] that [specify factual basis for cause of action, e.g., "a medical device" or "inadequate medical treatment"] contributed to [name of plaintiff]'s harm?

_____ Yes _____ No

Signed: _____
Presiding Juror

Dated: _____

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

New December 2007

Directions for Use

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

This verdict form is based on *CACI No. 454, Affirmative Defense--Statute of Limitations*, and *CACI No. 455, Statute of Limitations--Delayed Discovery*. If the only issue is whether the plaintiff's harm occurred before or after the limitation date, omit question 2. If the plaintiff claims that the delayed-discovery rule applies to save the action, use the first option for question 2. If the plaintiff claims that a reasonable investigation would not have disclosed the pertinent information before the limitation date, use the second option for question 2.

The date to be inserted throughout is the applicable limitation period before the filing date. For example, if the limitation period is two years and the filing date is August 31, 2007, the date is August 31, 2005.

In question 1, "claimed harm" refers to all of the elements of the cause of action, which must have occurred before the cause of action accrues and the limitation period begins. (*Glue-Fold, Inc. v. Slautterback Corp.* (2000) 82 Cal.App.4th 1018, 1029 [98 Cal.Rptr.2d 661] .) In some cases, it may be necessary to modify this term to refer to specific facts that give rise to the cause of action.

The first option for question 2 may be modified to refer to specific facts that the plaintiff may have known.

Publisher's Notes

There is no BAJI instruction on this subject.



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CHAPTER 4 California Judicial Council Negligence Instructions

2-4 California Forms of Jury Instruction CACI VF-411-CACI VF-499

Reserved for Future Use

CACI VF-411Reserved for Future Use



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CHAPTER 5 California Judicial Council Medical Negligence Instructions

2-5 California Forms of Jury Instruction 5.syn

§ 5.syn Synopsis to Chapter 5: California Judicial Council Medical Negligence Instructions

CACI 500 Essential Factual Elements

CACI 501 Standard of Care for Health Care Professionals

CACI 502 Standard of Care for Medical Specialists

CACI 503A Psychotherapist's Duty to Protect Intended Victim From Patient's Threat

CACI 503B Affirmative Defense--Psychotherapist's Warning to Victim and Law Enforcement

CACI 504 Standard of Care for Nurses

CACI 505 Success Not Required

CACI 506 Alternative Methods of Care

CACI 507 Duty to Warn Patient

CACI 508 Duty to Refer to a Specialist

CACI 509 Abandonment of Patient

CACI 510 Derivative Liability of Surgeon

CACI 511 Wrongful Birth--Sterilization/Abortion--Essential Factual Elements

CACI 512 Wrongful Birth--Essential Factual Elements

CACI 513 Wrongful Life--Essential Factual Elements

CACI 514 Duty of Hospital

CACI 515 Duty of Hospital to Provide Safe Environment

CACI 516 Duty of Hospital to Screen Medical Staff

CACI 517 Affirmative Defense--Patient's Duty to Provide for His or Her Own Well-Being

CACI 518 Medical Malpractice: Res ipsa loquitur

CACI 519-CACI 529 Reserved for Future Use

CACI 530A Medical Battery

CACI 530B Medical Battery--Conditional Consent

CACI 531 Consent on Behalf of Another

CACI 532 Informed Consent--Definition

CACI 533 Failure to Obtain Informed Consent--Essential Factual Elements

CACI 534 Informed Refusal--Definition

CACI 535 Risks of Nontreatment--Essential Factual Elements

CACI 536-CACI 549 Reserved for Future Use

CACI 550 Affirmative Defense--Plaintiff Would Have Consented

CACI 551 Affirmative Defense--Waiver

CACI 552 Affirmative Defense--Simple Procedure

CACI 553 Affirmative Defense--Emotional State of Patient

CACI 554 Affirmative Defense--Emergency

CACI 555 Affirmative Defense--Statute of Limitations--Medical Malpractice--One-Year Limit (Code Civ. Proc., § 340.5)

CACI 556 Affirmative Defense--Statute of Limitations--Medical Malpractice--Three-Year Limit (Code Civ. Proc., § 340.5)

CACI 557-CACI 599 Reserved for Future Use

CACI VF-500 Medical Negligence

CACI VF-501 Medical Negligence--Informed Consent--Affirmative Defense--Plaintiff Would Have Consented Even If Informed

CACI VF-502 Medical Negligence--Informed Consent--Affirmative Defense--Emergency

CACI VF-503-CACI VF-599. Reserved for Future Use



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CHAPTER 5 California Judicial Council Medical Negligence Instructions

2-5 California Forms of Jury Instruction Scope

Scope

SCOPE

This chapter contains the California Judicial Council's "Medical Negligence Series" of jury instructions [*CACI No. 500 et seq.*]. The Judicial Council of California Civil Jury Instructions (CACI) included in this publication are the product of the Judicial Council of California Task Force on Jury Instructions, which are updated by the Judicial Council of California Advisory Committee on Civil Jury Instructions.

This chapter includes instructions on the following topics:

- Medical negligence causes of action in general [*CACI Nos. 500-518*], including instructions on essential factual elements [*CACI No. 500*], applicable standards of care [*CACI Nos. 501, 502, 504*], the duty to protect and warn [*CACI Nos. 503A, 503B, 507*], wrongful birth and life [*CACI Nos. 511-513*], duties of a hospital [*CACI Nos. 514-516*], and res ipsa loquitur [*CACI No. 518*].
- Medical battery and consent issues [*CACI Nos. 530A-534*], including essential factual elements regarding the risks of nontreatment [*CACI No. 535*].
- Affirmative defenses [*CACI Nos. 517, 550-556*].

The medical negligence series also includes verdict forms [*CACI Nos. VF-500-VF-502*].



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CHAPTER 5 California Judicial Council Medical Negligence Instructions

2-5 California Forms of Jury Instruction CACI 500

CACI 500 Essential Factual Elements

Please see CACI No. 400, Essential Factual Elements (Negligence)

New September 2003

In medical malpractice or professional negligence cases, the word "medical" or "professional" should be added before the word "negligence" in the first paragraph of *CACI No. 400*.

- From a theoretical standpoint, "medical negligence" is still considered "negligence": "With respect to professionals, their specialized education and training do not serve to impose an increased duty of care but rather are considered additional 'circumstances' relevant to an overall assessment of what constitutes 'ordinary prudence' in a particular situation." (*Flowers v. Torrance Memorial Hospital Medical Center* (1994) 8 Cal.4th 992, 997-998, [35 Cal.Rptr.2d 685, 884 P.2d 142] .)

Accordingly, "[s]ince the standard of care remains constant in terms of 'ordinary prudence,' it is clear that denominating a cause of action as one for 'professional negligence' does not transmute its underlying character. For substantive purposes, it merely serves to establish the basis by which 'ordinary prudence' will be calculated and the defendant's conduct evaluated." (*Flowers, supra*, 8 Cal.4th at p. 998 .)

- The distinction between "professional" as opposed to "ordinary" negligence is relevant in relation to certain statutory provisions such as the statute of limitations and Medical Injury Compensation Reform Act (MICRA). (*Flowers, supra*, at pp. 998-999 .)

- *Code of Civil Procedure* section 340.5, which sets the statute of limitations for medical malpractice

cases based on professional negligence, and *Civil Code sections 3333.1 and 3333.2* (MICRA) define "professional negligence" as "a negligent act or omission to act by a health care provider in the rendering of professional services, which act or omission is the proximate cause of a personal injury or wrongful death, provided that such services are within the scope of services for which the provider is licensed and which are not within any restriction imposed by the licensing agency or licensed hospital."

■ The statutory definition of "professional negligence" "focuses on whether the negligence occurs in the rendering of professional services, rather than whether a high or low level of skill is required. [Citation.]" (*Bellamy v. Appellate Dep't of the Superior Court* (1996) 50 Cal.App.4th 797, 807] .)

■ A formal physician-patient relationship is not always a prerequisite to bringing a malpractice action: "[E]ven in the absence of a physician-patient relationship, a physician has liability to an examinee for negligence or professional malpractice for injuries incurred during the examination itself." (*Mero v. Sadoff* (1995) 31 Cal.App.4th 1466, 1478 [37 Cal.Rptr.2d 769] .)

Secondary Sources

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

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

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

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

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

36 *California Forms of Pleading and Practice*, Ch. 414, *Physicians and Other Medical Personnel* (Matthew Bender)

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

Publisher's Notes

This instruction replaces BAJI No. 6.00.

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsMalpractice & Professional LiabilityHealthcare ProvidersTortsNegligenceStandards of CareReasonable CareReasonable PersonTortsNegligenceStandards of CareSpecial CareHighly Skilled Professionals



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CHAPTER 5 California Judicial Council Medical Negligence Instructions

2-5 California Forms of Jury Instruction CACI 501

CACI 501 Standard of Care for Health Care Professionals

[A/An] [insert type of medical practitioner] is negligent if [he/she] fails to use the level of skill, knowledge, and care in diagnosis and treatment that other reasonably careful [insert type of medical practitioners] would use in the same or similar circumstances. This level of skill, knowledge, and care is sometimes referred to as "the standard of care."

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

New September 2003; Revised October 2004, December 2005

Directions for Use

This instruction is intended to apply to nonspecialist physicians, surgeons, and dentists. The standards of care for nurses, specialists, and hospitals are addressed in separate instructions.

The second paragraph should be used only in cases where the court determines that expert testimony is necessary to establish the standard of care.

In appropriate cases where the standard of care is set by statute or regulation, refer to instructions on negligence per se (*CACI Nos. 418 -421*). (See *Galvez v. Frields (2001) 88 Cal.App.4th 1410 [107 Cal.Rptr.2d 50]* .)

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

Sources and Authority

■ "With unimportant variations in phrasing, we have consistently held that a physician is required to possess and exercise, in both diagnosis and treatment, that reasonable degree of knowledge and skill which is ordinarily possessed and exercised by other members of his profession in similar circumstances." (*Landeros v. Flood* (1976) 17 Cal.3d 399, 408 [131 Cal.Rptr. 69, 551 P.2d 389] ; see also *Brown v. Colm* (1974) 11 Cal.3d 639, 642-643 [114 Cal.Rptr. 128, 522 P.2d 688] .)

■ "The courts require only that physicians and surgeons exercise in diagnosis and treatment that reasonable degree of skill, knowledge, and care ordinarily possessed and exercised by members of the medical profession under similar circumstances." (*Mann v. Cracchiolo* (1985) 38 Cal.3d 18, 36 [210 Cal.Rptr. 762, 694 P.2d 1134] .)

■ In *Hinson v. Clairemont Community Hospital* (1990) 218 Cal.App.3d 1110, 1119-1120 [267 Cal.Rptr. 503] (disapproved on other grounds in *Alexander v. Superior Court* (1993) 5 Cal.4th 1218, 1228 [23 Cal.Rptr.2d 397, 859 P.2d 96]), the court observed that failure to possess the requisite level of knowledge and skill is negligence, although a breach of this portion of the standard of care does not, by itself, establish actionable malpractice.

■ "[T]he standard of care for physicians is the reasonable degree of skill, knowledge and care ordinarily possessed and exercised by members of the medical profession *under similar circumstances*. The test for determining familiarity with the standard of care is knowledge of similar conditions. Geographical location may be a factor considered in making that determination, but, by itself, does not provide a practical basis for measuring similar circumstances. Over 30 years ago, our Supreme Court observed that '[t]he unmistakable general trend ... has been toward liberalizing the rules relating to the testimonial qualifications of medical experts.' " (*Avivi v. Centro Medico Urgente Medical Center* (2008) 159 Cal.App.4th 463, 470-471 [71 Cal.Rptr.3d 707] , original italics, internal citations omitted.)

■ "The standard of care against which the acts of a medical practitioner are to be measured is a matter peculiarly within the knowledge of experts; it presents the basic issue in a malpractice action and can only be proved by their testimony, unless the conduct required by the particular circumstances is within the common knowledge of laymen." (*Alef v. Alta Bates Hospital* (1992) 5 Cal.App.4th 208, 215 [6 Cal.Rptr.2d 900] .)

■ "'Ordinarily, the standard of care required of a doctor, and whether he exercised such care, can be established only by the testimony of experts in the field.' 'But to that rule there is an exception that is as well settled as the rule itself, and that is where "negligence on the part of a doctor is demonstrated by facts which can be evaluated by resort to common knowledge, expert testimony is not required since scientific enlightenment is not essential for the determination of an obvious fact." ' " (*Gannon v. Elliot* (1993) 19 Cal.App.4th 1, 6 [23 Cal.Rptr.2d 86] , internal citations omitted.)

■ "We have already held upon authority that the failure to remove a sponge from the abdomen of a patient is negligence of the ordinary type and that it does not involve knowledge of *materia medica* or surgery but that it belongs to that class of mental lapses which frequently occur in the usual routine of business and commerce, and in the multitude of commonplace affairs which come within the group of ordinary actionable negligence. The layman needs no scientific enlightenment to see at once that the omission can be accounted for on no other theory than that someone has committed actionable negligence." (*Ales v. Ryan* (1936) 8 Cal.2d 82, 93 [64 P.2d 409] .)

■ The medical malpractice standard of care applies to veterinarians. (*Williamson v. Prida* (1999) 75 Cal.App.4th 1417, 1425 [89 Cal.Rptr.2d 868] .)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 933, 934, 971, 975

California Tort Guide (Cont.Ed.Bar 3d ed.) § 9.1

3 Levy et al., *California Torts, Ch. 30, General Principles of Liability of Professionals*, § 30.12, *Ch. 31, Liability of Physicians and Other Medical Practitioners*, § 31.11 (Matthew Bender)

17 *California Forms of Pleading and Practice, Ch. 209, Dentists*, § 209.42 (Matthew Bender)

25 *California Forms of Pleading and Practice, Ch. 295, Hospitals*, §§ 295.13, 295.43, 295.45 (Matthew Bender)

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

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

Publisher's Notes

This instruction covers issues presented in BAJI Nos. 6.00.1 and 6.30.

LexisNexis Matthew Bender Expert Practice Tip--Obtaining Expert Witnesses: In a medical negligence case, it is imperative that you seek competent, qualified medical experts who can testify well and relate to a jury. The earlier a litigator can find and retain an expert, the better framed your case will be. Further, your expert should be consulted early on so that information/evidence is developed during the discovery phase. *By Dona Cohn-Payne*

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsMalpractice & Professional LiabilityHealthcare ProvidersTortsNegligenceStandards of CareReasonable CareReasonable PersonTortsNegligenceStandards of CareSpecial CareHighly Skilled Professionals



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CHAPTER 5 California Judicial Council Medical Negligence Instructions

2-5 California Forms of Jury Instruction CACI 502

CACI 502 Standard of Care for Medical Specialists

[A/An] [insert type of medical specialist] is negligent if [he/she] fails to use the level of skill, knowledge, and care in diagnosis and treatment that other reasonably careful [insert type of medical specialists] would use in similar circumstances. This level of skill, knowledge, and care is sometimes referred to as "the standard of care."

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

New September 2003; Revised October 2004

Directions for Use

This instruction is intended to apply to physicians, surgeons, and dentists who are specialists in a particular practice area.

The second paragraph should be used except in cases where the court determines that expert testimony is not necessary to establish the standard of care.

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

Sources and Authority

- Specialists, such as anesthesiologists and ophthalmologists, are "held to that standard of learning and skill normally possessed by such specialists in the same or similar locality under the same or similar

circumstances." (*Quintal v. Laurel Grove Hospital* (1964) 62 Cal.2d 154, 159-160 [41 Cal.Rptr. 577, 397 P.2d 161] .) This standard adds a further level to the general standard of care for medical professionals: "In the first place, the special obligation of the professional is exemplified by his duty not merely to perform his work with ordinary care but to use the skill, prudence, and diligence commonly exercised by practitioners of his profession. If he further specializes within the profession, he must meet the standards of knowledge and skill of such specialists." (*Neel v. Magana, Olney, Levy, Cathcart & Gelfand* (1971) 6 Cal.3d 176, 188 [98 Cal.Rptr. 837, 491 P.2d 421] .)

- California imposes a "higher standard of care upon physicians with a specialized practice." (*Neel, supra*, 6 Cal.3d 176 at p. 188, fn. 22 .) This higher standard refers to the level of skill that must be exercised, not to the standard of care. (*Valentine v. Kaiser Foundation Hospitals* (1961) 194 Cal.App.2d 282, 294 [15 Cal.Rptr. 26] (disapproved on other grounds by *Siverson v. Weber* (1962) 57 Cal.2d 834, 839 [22 Cal.Rptr. 337, 372 P.2d 97]).)

- Psychotherapists are considered specialists in their field. (*Tarasoff v. Regents of Univ. of Cal.* (1976) 17 Cal.3d 425, 438 [131 Cal.Rptr. 14, 551 P.2d 334] ; *Kockelman v. Segal* (1998) 61 Cal.App.4th 491, 505 [71 Cal.Rptr.2d 552] .)

- "[T]he standard of care for physicians is the reasonable degree of skill, knowledge and care ordinarily possessed and exercised by members of the medical profession *under similar circumstances*. The test for determining familiarity with the standard of care is knowledge of similar conditions. Geographical location may be a factor considered in making that determination, but, by itself, does not provide a practical basis for measuring similar circumstances. Over 30 years ago, our Supreme Court observed that '[t]he unmistakable general trend ... has been toward liberalizing the rules relating to the testimonial qualifications of medical experts.' " (*Avivi v. Centro Medico Urgente Medical Center* (2008) 159 Cal.App.4th 463, 470-471 [71 Cal.Rptr.3d 707] , original italics, internal citations omitted.)

Secondary Sources

California Tort Guide (Cont.Ed.Bar 3d ed.) § 9.2

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

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

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

Publisher's Notes

This instruction covers issues presented in BAJI No. 6.01.

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsMalpractice & Professional LiabilityHealthcare ProvidersTortsNegligenceProofEvidenceExpert
TestimonyTortsNegligenceStandards of CareAppropriate StandardProvince of Court & JuryTortsNegligenceStandards
of CareReasonable CareReasonable PersonTortsNegligenceStandards of CareSpecial CareHighly Skilled Professionals



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CHAPTER 5 California Judicial Council Medical Negligence Instructions

2-5 California Forms of Jury Instruction CACI 503A

CACI 503A Psychotherapist's Duty to Protect Intended Victim From Patient's Threat

[Name of plaintiff] claims that [name of defendant]'s failure to protect [name of plaintiff/decedent] was a substantial factor in causing [injury to [name of plaintiff]/the death of [name of decedent]]. To establish this claim, [name of plaintiff] must prove all of the following:

- 1. That [name of defendant] was a psychotherapist;**
- 2. That [name of patient] was [name of defendant]'s patient;**
- 3. That [name of patient] communicated to [name of defendant] a serious threat of physical violence;**
- 4. That [name of plaintiff/decedent] was a reasonably identifiable victim of [name of patient]'s threat;**
- 5. That [name of patient] [injured [name of plaintiff]/killed [name of decedent]];**
- 6. That [name of defendant] failed to make reasonable efforts to protect [name of plaintiff/decedent]; and**
- 7. That [name of defendant]'s failure was a substantial factor in causing [[name of plaintiff]'s injury/the death of [name of decedent]].**

Derived from former CACI No. 503 April 2007

Directions for Use

Read this instruction for a *Tarasoff* cause of action for professional negligence against a psychotherapist for failure to protect a victim from a patient's act of violence after the patient made a threat to the therapist against the victim. (See *Tarasoff v. Regents of Univ. of Cal.* (1976) 17 Cal.3d 425 [131 Cal.Rptr. 14, 551 P.2d 334] .) The liability imposed by *Tarasoff* is modified by the provisions of *Civil Code* section 43.92(a). First read CACI No. 503B, *Affirmative Defense--Psychotherapist's Warning to Victim and Law Enforcement*, if the therapist asserts that he or she is immune from liability under *Civil Code* section 43.92(b) by having made reasonable efforts to warn the victim and a law enforcement agency of the threat.

In a wrongful death case, insert the name of the decedent victim where applicable.

Sources and Authority

- *Civil Code* section 43.92(a) provides:

"There shall be no monetary liability on the part of, and no cause of action shall arise against, any person who is a psychotherapist as defined in *Section 1010 of the Evidence Code* in failing to warn of and protect from a patient's threatened violent behavior or failing to predict and warn of and protect from a patient's violent behavior except where the patient has communicated to the psychotherapist a serious threat of physical violence against a reasonably identifiable victim or victims."

- "[T]herapists cannot escape liability merely because [the victim] was not their patient. When a therapist determines, or pursuant to the standards of his profession should determine, that his patient presents a serious danger of violence to another, he incurs an obligation to use reasonable care to protect the intended victim against such danger. The discharge of this duty may require the therapist to take one or more of various steps, depending upon the nature of the case. Thus it may call for him to warn the intended victim or others likely to apprise the victim of the danger, to notify the police, or to take whatever other steps are reasonably necessary under the circumstances." (*Tarasoff, supra*, 17 Cal.3d at p. 431 .)

- *Civil Code* section 43.92 was enacted to limit the liability of psychotherapists under *Tarasoff* regarding a therapist's duty to warn an intended victim. (*Barry v. Turek* (1990) 218 Cal.App.3d 1241, 1244-1245 [267 Cal.Rptr. 553] .) Under this provision, "[p]sychotherapists thus have immunity from *Tarasoff* claims except where the plaintiff proves that the patient has communicated to his or her psychotherapist a serious threat of physical violence against a reasonably identifiable victim or victims." (*Barry, supra*, 218 Cal.App.3d at p. 1245 .)

- "When the communication of the serious threat of physical violence is received by the therapist from a member of the patient's immediate family and is shared for the purpose of facilitating and furthering the patient's treatment, the fact that the family member is not technically a 'patient' is not crucial to the statute's purpose." (*Ewing v. Goldstein* (2004) 120 Cal.App.4th 807, 817 [15 Cal.Rptr.3d 864] .)

- "Section 43.92 strikes a reasonable balance in that it does not compel the therapist to predict the dangerousness of a patient. Instead, it requires the therapist to attempt to protect a victim under limited circumstances, even though the therapist's disclosure of a patient confidence will potentially disrupt or destroy the patient's trust in the therapist. However, the requirement is imposed upon the therapist only after he or she determines that the patient has made a credible threat of serious physical violence against

a person." (*Calderon v. Glick* (2005) 131 Cal.App.4th 224, 231 [31 Cal.Rptr.3d 707] .)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1050, 1051

26 *California Forms of Pleading and Practice*, Ch. 304, *Insane and Other Incompetent Persons*, § 304.93 (Matthew Bender)

11 *California Points and Authorities*, Ch. 117, *Insane and Incompetent Persons: Actions Involving Mental Patients*, § 117.30 (Matthew Bender)

Publisher's Notes

This instruction covers issues presented in BAJI No. 6.00.2.

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsMalpractice & Professional LiabilityHealthcare ProvidersTortsNegligenceDutyAffirmative Duty to ActSpecial RelationshipsDangerous PersonsTortsNegligenceDutyAffirmative Duty to ActSpecial RelationshipsHealthcare ProvidersTortsNegligenceStandards of CareReasonable CareReasonable Person



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CHAPTER 5 California Judicial Council Medical Negligence Instructions

2-5 California Forms of Jury Instruction CACI 503B

CACI 503B Affirmative Defense--Psychotherapist's Warning to Victim and Law Enforcement

[Name of defendant] is not responsible for [[name of plaintiff]'s injury/the death of [name of decedent]] if [name of defendant] proves that [he/she] made reasonable efforts to communicate the threat to [name of plaintiff/decedent] and to a law enforcement agency.

Derived from former CACI No. 503 April 2007

Directions for Use

Read this instruction for a *Tarasoff* cause of action for professional negligence against a psychotherapist (*Tarasoff v. Regents of Univ. of Cal.* (1976) 17 Cal.3d 425 [131 Cal.Rptr. 14, 551 P.2d 334]) if there is a dispute of fact regarding whether the defendant made reasonable efforts to warn the victim and a law enforcement agency of a threat made by the defendant's patient. The therapist is immune from liability under *Tarasoff* if he or she makes reasonable efforts to communicate the threat to the victim and to a law enforcement agency. (Civ. Code, § 43.92(b).) CACI No. 503A, *Psychotherapist's Duty to Warn and Protect Intended Victim From Patient's Threat*, sets forth the elements of a *Tarasoff* cause of action if the defendant is not immune.

In a wrongful death case, insert the name of the decedent victim where applicable.

Sources and Authority

- Civil Code section 43.92(b) provides:

"There shall be no monetary liability on the part of, and no cause of action shall arise

against, a psychotherapist who, under the limited circumstances specified above, discharges his or her duty to warn and protect by making reasonable efforts to communicate the threat to the victim or victims and to a law enforcement agency."

■ Failure to inform a law enforcement agency concerning a homicidal threat made by a patient against his work supervisor did not abrogate the "firefighter's rule" and, therefore, did not render the psychiatrist liable to a police officer who was subsequently shot by the patient. (*Tilley v. Schulte* (1999) 70 Cal.App.4th 79, 85-86 [82 Cal.Rptr.2d 497] .)

■ "When the communication of the serious threat of physical violence is received by the therapist from a member of the patient's immediate family and is shared for the purpose of facilitating and furthering the patient's treatment, the fact that the family member is not technically a 'patient' is not crucial to the statute's purpose." (*Ewing v. Goldstein* (2004) 120 Cal.App.4th 807, 817 [15 Cal.Rptr.3d 864] .)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1050, 1051

26 *California Forms of Pleading and Practice*, Ch. 304, *Insane and Other Incompetent Persons*, § 304.93 (Matthew Bender)

11 *California Points and Authorities*, Ch. 117, *Insane and Incompetent Persons: Actions Involving Mental Patients*, § 117.30 (Matthew Bender)

Publisher's Notes

This instruction covers issues presented in BAJI No. 6.00.2.

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsMalpractice & Professional LiabilityHealthcare ProvidersTortsNegligenceDutyAffirmative Duty to ActSpecial RelationshipsDangerous PersonsTortsNegligenceDutyAffirmative Duty to ActSpecial RelationshipsHealthcare ProvidersTortsNegligenceStandards of CareReasonable CareReasonable Person



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CHAPTER 5 California Judicial Council Medical Negligence Instructions

2-5 California Forms of Jury Instruction CACI 504

CACI 504 Standard of Care for Nurses

[A/An] [insert type of nurse] is negligent if [he/she] fails to use the level of skill, knowledge, and care in diagnosis and treatment that other reasonably careful [insert type of nurses] would use in similar circumstances. This level of skill, knowledge, and care is sometimes referred to as "the standard of care."

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

New September 2003; Revised October 2004, June 2010

Directions for Use

The appropriate level of nurse should be inserted where indicated--i.e., registered nurse, licensed vocational nurse, nurse practitioner.

The second paragraph should be included unless the court determines that expert testimony is not necessary to establish the standard of care.

Sources and Authority

■ "[A] nurse is negligent if he or she fails to meet the standard of care--that is, fails to use the level of skill, knowledge, and care that a reasonably careful nurse would use in similar circumstances." (*Massey v. Mercy Med. Ctr. Redding* (2009) 180 Cal.App.4th 690, 694 [103 Cal.Rptr.3d 209 [citing this instruction]]).)

■ "[T]oday's nurses are held to strict professional standards of knowledge and performance.' But '[s]ome difficulties are presented [in the nursing malpractice context] by the fact that a nurse's traditional role has involved "both routine, nontechnical tasks as well as specialized nursing tasks. If, in considering the case law in this area, the dispute is analyzed in terms of what action by the nurse is being complained about, it is possible to make some sense out of the relevant decisions." ' ' (*Massey, supra*, 180 *Cal.App.4th* at p. 697 , internal citation omitted.)

■ Courts have held that "a nurse's conduct must not be measured by the standard of care required of a physician or surgeon, but by that of other nurses in the same or similar locality and under similar circumstances." (*Alef v. Alta Bates Hospital* (1992) 5 *Cal.App.4th* 208, 215 [6 *Cal.Rptr.2d* 900] .)

■ The jury should not be instructed that the standard of care for a nurse practitioner must be measured by the standard of care for a physician or surgeon when the nurse is examining a patient or making a diagnosis. (*Fein v. Permanente Medical Group* (1985) 38 *Cal.3d* 137, 150 [211 *Cal.Rptr.* 368, 695 P.2d 665] .) Courts have observed that nurses are trained, "but to a lesser degree than a physician, in the recognition of the symptoms of diseases and injuries." (*Cooper v. National Motor Bearing Co.* (1955) 136 *Cal.App.2d* 229, 238 [288 P.2d 581] .)

■ "[E]xpert opinion testimony is required to prove that a defendant nurse did not meet the standard of care and therefore was negligent, 'except in cases where the negligence is obvious to laymen.' " (*Massey, supra*, 180 *Cal.App.4th* at pp. 694-695 .)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 995-997

California Tort Guide (Cont.Ed.Bar 3d ed.) § 9.52

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

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

Publisher's Notes

This instruction covers issues presented in BAJI No. 6.25.

LexisNexis Matthew Bender Expert Practice Tip--Obtaining Expert Witnesses: Your plaintiff's retained expert nurse should be in the same area of expertise as the defendant nurses in your case. In other words, you want to have an expert PACU nurse if you are attempting to show that another PACU nurse was negligent. *By Dona Cohn-Payne*

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsMalpractice & Professional LiabilityHealthcare ProvidersTortsNegligenceStandards of CareAppropriate StandardGeneral OverviewTortsNegligenceStandards of CareReasonable CareReasonable Person



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CHAPTER 5 California Judicial Council Medical Negligence Instructions

2-5 California Forms of Jury Instruction CACI 505

CACI 505 Success Not Required

[A/An] [insert type of medical practitioner] is not necessarily negligent just because [his/her] efforts are unsuccessful or [he/she] makes an error that was reasonable under the circumstances. [A/An] [insert type of medical practitioner] is negligent only if [he/she] was not as skillful, knowledgeable, or careful as other reasonable [insert type of medical practitioners] would have been in similar circumstances.

New September 2003

Directions for Use

Plaintiffs have argued that this type of instruction "provides too easy an 'out' for malpractice defendants." (*Fraijo v. Hartland Hospital* (1979) 99 Cal.App.3d 331, 343 [160 Cal.Rptr. 246] .) Nevertheless, in California, instructions on this point have been sustained when challenged. (*Rainer v. Community Memorial Hospital* (1971) 18 Cal.App.3d 240, 260 [95 Cal.Rptr. 901] .)

Sources and Authority

- "While a physician cannot be held liable for mere errors of judgment or for erroneous conclusions on matters of opinion, he must use the judgment and form the opinions of one possessed of knowledge and skill common to medical men practicing, in the same or like community and that he may have done his best is no answer to an action of this sort." (*Sim v. Weeks* (1935) 7 Cal.App.2d 28, 36 [45 P.2d 350] .)
- "The 'law has never held a physician or surgeon liable for every untoward result which may occur in medical practice' but it 'demands only that a physician or surgeon have the degree of learning and skill ordinarily possessed by practitioners of the medical profession in the same locality and that he exercise

ordinary care in applying such learning and skill to the treatment of his patient.' " (*Huffman v. Lindquist* (1951) 37 Cal.2d 465, 473 [234 P.2d 34] , internal citations omitted.)

■ It is appropriate to instruct a jury that "they do not necessarily adjudge whether there was negligence in terms of the result achieved" (*Dincau v. Tamayose* (1982) 131 Cal.App.3d 780, 800 [182 Cal.Rptr. 855] .)

■ "[A] physician and surgeon is not required to make a perfect diagnosis but is only required to have that degree of skill and learning ordinarily possessed by physicians of good standing practicing in the same locality and to use ordinary care and diligence in applying that learning to the treatment of his patient." (*Ries v. Reinard* (1941) 47 Cal.App.2d 116, 119 [117 P.2d 386] .)

■ "A doctor is not a warrantor of cures nor is he required to guarantee results and in the absence of a want of reasonable care and skill will not be held responsible for untoward results." (*Sanchez v. Rodriguez* (1964) 226 Cal.App.2d 439, 449 [38 Cal.Rptr. 110] .)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 933, 934

California Tort Guide (Cont.Ed.Bar 3d ed.) § 9.5

3 Levy et al., *California Torts*, Ch. 30, *General Principles of Liability of Professionals*, § 30.01 (Matthew Bender)

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

17 *California Points and Authorities*, Ch. 175, *Physicians and Surgeons*, § 175.38 (Matthew Bender)

Publisher's Notes

This instruction replaces BAJI No. 6.02.

Legal Topics:

For related research and practice materials, see the following legal topics:

Healthcare Law Actions Against Healthcare Workers Doctors & Physicians Healthcare Law Actions Against Healthcare Workers Surgeons Torts Malpractice & Professional Liability Healthcare Providers Torts Negligence Proof Custom Medical Customs Torts Negligence Standards of Care Reasonable Care General Overview



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CHAPTER 5 California Judicial Council Medical Negligence Instructions

2-5 California Forms of Jury Instruction CACI 506

CACI 506 Alternative Methods of Care

[A/An] [insert type of medical practitioner] is not necessarily negligent just because [he/she] chooses one medically accepted method of treatment or diagnosis and it turns out that another medically accepted method would have been a better choice.

New September 2003

Sources and Authority

- "A difference of medical opinion concerning the desirability of one particular medical procedure over another does not ... establish that the determination to use one of the procedures was negligent." (*Clemens v. Regents of Univ. of California* (1970) 8 Cal.App.3d 1, 13 [87 Cal.Rptr. 108] .)
- "Medicine is not a field of absolutes. There is not ordinarily only one correct route to be followed at any given time. There is always the need for professional judgment as to what course of conduct would be most appropriate with regard to the patient's condition." (*Barton v. Owen* (1977) 71 Cal.App.3d 484, 501-502 [139 Cal.Rptr. 494] .)
- This type of instruction may be important in arriving at a fair decision: "[I]n determining whether defendants breached a standard of care owed decedent, the jury may not engage in 'but for' reasoning." (*Meier v. Ross General Hospital* (1968) 69 Cal.2d 420, 435 [71 Cal.Rptr. 903, 445 P.2d 519] .)
- "[I]n order for CACI No. 506 to be given, there must have been expert testimony presented to the jury to the effect that a medical practitioner chose a medically accepted method of diagnosis (or treatment) from among alternative medically accepted methods of diagnosis (or treatment)." (*Ayala v.*

Arroyo Vista Family Health Center (2008) 160 Cal.App.4th 1350, 1353 [73 Cal.Rptr.3d 486] .)

Secondary Sources

3 Levy et al., *California Torts, Ch. 31, Liability of Physicians and Other Medical Practitioners*, § 31.11 (Matthew Bender)

36 *California Forms of Pleading and Practice, Ch. 415, Physicians: Medical Malpractice*, § 415.13 (Matthew Bender)

17 *California Points and Authorities, Ch. 175, Physicians and Surgeons: Medical Malpractice*, § 175.34 (Matthew Bender)

Publisher's Notes

This instruction replaces BAJI No. 6.03.

Legal Topics:

For related research and practice materials, see the following legal topics:

Healthcare Law Actions Against Healthcare Workers General Overview Torts Malpractice & Professional Liability Healthcare Providers Torts Negligence Proof Custom Medical Customs



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CHAPTER 5 California Judicial Council Medical Negligence Instructions

2-5 California Forms of Jury Instruction CACI 507

CACI 507 Duty to Warn Patient

[Name of plaintiff] claims that [name of defendant] was negligent because [he/she] did not warn [name of patient] that [his/her] condition presented a danger to others.

[Name of defendant] was negligent if [name of plaintiff] proves that [he/she] did not take reasonable steps to warn [name of patient] that [his/her] condition presented a danger to others.

New September 2003

This instruction is intended to cover situations where a patient's condition foreseeably causes harm to a third party.

- "To avoid liability in this case, [defendants] should have taken whatever steps were reasonable under the circumstances to protect [plaintiff] and other foreseeable victims of [patient]'s dangerous conduct. What is a reasonable step to take will vary from case to case." (*Myers v. Quesenberry* (1983) 144 Cal.App.3d 888, 894 [193 Cal.Rptr. 733] , internal citations omitted.) "Our holding does not require the physician to do anything other than what he was already obligated to do for the protection of the patient. Thus, even though it may appear that the scope of liability has been expanded to include injuries to foreseeable victims other than the patient, the standard of medical care to the patient remains the same." (*Ibid.*)

- "When the avoidance of foreseeable harm to a third person requires a defendant to control the conduct of a person with whom the defendant has a special relationship (such as physician and patient) or to warn the person of the risks involved in certain conduct, the defendant's duty extends to a third

person with whom the defendant does not have a special relationship." (*Reisner v. Regents of Univ. of California* (1995) 31 Cal.App.4th 1195, 1198-1199 [37 Cal.Rptr.2d 518] [infected sex partner could maintain action against his partner's physicians for failing to tell the young woman that she had received HIV-tainted blood].)

- Proof of causation is still required: "[Defendants] will be liable only if [plaintiff] is able to prove their failure to warn [patient] not to drive in an irrational and uncontrolled diabetic condition was a substantial factor in causing his injuries." (*Myers, supra*, 144 Cal.App.3d at p. 895 .)

- This obligation to third parties appears to be limited to healthcare professionals and does not apply to ordinary citizens. (*Koepke v. Loo* (1993) 18 Cal.App.4th 1444, 1456-1457 [23 Cal.Rptr.2d 34] .)

Secondary Sources

3 Levy et al., California Torts, Ch. 31, *Liability of Physicians and Other Medical Practitioners*, § 31.16 (Matthew Bender)

36 California Forms of Pleading and Practice, Ch. 414, *Physicians and Other Medical Personnel* (Matthew Bender)

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

Publisher's Notes

This instruction covers issues presented in BAJI No. 6.00.1.1.

LexisNexis Matthew Bender Expert Practice Tip--Using CACI No. 507: This instruction may be used in cases involving a defendant psychiatrist/psychologist that fails to warn of foreseeable harm to the patient or to an identifiable person known to the defendant psychiatrist/psychologist. *By Dona Cohn-Payne*

Legal Topics:

For related research and practice materials, see the following legal topics:

Healthcare Law Actions Against Healthcare Workers General Overview Torts Malpractice & Professional Liability Healthcare Providers Torts Negligence Duty Affirmative Duty to Act Special Relationships Healthcare Providers Torts Negligence Proof Custom Medical Customs Torts Negligence Standards of Care Reasonable Care Reasonable Person



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CHAPTER 5 California Judicial Council Medical Negligence Instructions

2-5 California Forms of Jury Instruction CACI 508

CACI 508 Duty to Refer to a Specialist

If a reasonably careful [insert type of medical practitioner] in the same situation would have referred [name of patient] to a [insert type of medical specialist], then [name of defendant] was negligent if [he/she] did not do so.

However, if [name of defendant] treated [name of patient] with as much skill and care as a reasonable [insert type of medical specialist] would have, then [name of defendant] was not negligent.

New September 2003

■ Physicians who elect to treat a patient even though the patient should have been referred to a specialist will be held to the standard of care of that specialist. If the physician meets the higher standard of care, he or she is not negligent. (*Simone v. Sabo* (1951) 37 Cal.2d 253, 257 [231 P.2d 19] .)

■ If the evidence establishes that the failure of a nurse to consult the attending physician under the circumstances presented in the case is not in accord with the standard of care of the nursing profession, this instruction may be applicable. (*Fraijo v. Hartland Hospital* (1979) 99 Cal.App.3d 331, 344 [160 Cal.Rptr. 246] .)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 933, 934

California Tort Guide (Cont.Ed.Bar 3d ed.) § 9.6

3 Levy et al., California Torts, Ch. 30, *General Principles of Liability of Professionals*, § 30.12, Ch. 31, *Liability of*

Physicians and Other Medical Practitioners, § 31.13 (Matthew Bender)

17 *California Forms of Pleading and Practice*, Ch. 209, *Dentists*, § 209.11 (Matthew Bender)

36 *California Forms of Pleading and Practice*, Ch. 414, *Physicians and Other Medical Personnel* (Matthew Bender)

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

Publisher's Notes

This instruction covers issues presented in BAJI No. 6.04.

Legal Topics:

For related research and practice materials, see the following legal topics:

Healthcare Law Actions Against Healthcare Workers General Overview Torts Malpractice & Professional Liability Healthcare Providers Torts Negligence Duty Affirmative Duty to Act Special Relationships Healthcare Providers Torts Negligence Proof Custom Medical Customs Torts Negligence Standards of Care Reasonable Care Reasonable Person Torts Negligence Standards of Care Special Care Highly Skilled Professionals



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CHAPTER 5 California Judicial Council Medical Negligence Instructions

2-5 California Forms of Jury Instruction CACI 509

CACI 509 Abandonment of Patient

[*Name of plaintiff*] **claims** [*name of defendant*] **was negligent because [he/she] did not give** [*name of patient*] **enough notice before withdrawing from the case. To succeed, [*name of plaintiff*] must prove both of the following:**

- 1. That [*name of defendant*] withdrew from [*name of patient*]'s care and treatment; and**
- 2. That [*name of defendant*] did not provide sufficient notice for [*name of patient*] to obtain another medical practitioner.**

However, [*name of defendant*] was not negligent if [he/she] proves that [*name of patient*] consented to the withdrawal or declined further medical care.

New September 2003

■ As a general proposition, "a physician who abandons a patient may do so 'only ... after due notice, and an ample opportunity afforded to secure the presence of other medical attendance.' [Citation.]" (*Payton v. Weaver* (1982) 131 Cal.App.3d 38, 45 [182 Cal.Rptr. 225] .)

■ "A physician cannot just walk away from a patient after accepting the patient for treatment. ... In the absence of the patient's consent, the physician must notify the patient he is withdrawing and allow ample opportunity to secure the presence of another physician." (*Hongsathavij v. Queen of Angels/Hollywood Presbyterian Medical Center* (1998) 62 Cal.App.4th 1123, 1138 [73 Cal.Rptr.2d 695] .)

■ "When a competent, informed adult directs the withholding or withdrawal of medical treatment, even at the risk of hastening or causing death, medical professionals who respect that determination will not incur criminal or civil liability: the patient's decision discharges the physician's duty." (*Thor v. Superior Court* (1993) 5 Cal.4th 725, 743 [21 Cal.Rptr.2d 357, 855 P.2d 375] .)

Secondary Sources

California Tort Guide (Cont.Ed.Bar 3d ed.) § 9.8

3 Levy et al., California Torts, Ch. 31, *Liability of Physicians and Other Medical Practitioners*, § 31.42 (Matthew Bender)

36 California Forms of Pleading and Practice, Ch. 414, *Physicians and Other Medical Personnel* (Matthew Bender)

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

Publisher's Notes

This instruction covers issues presented in BAJI No. 6.05.

Legal Topics:

For related research and practice materials, see the following legal topics:

Healthcare LawActions Against Healthcare WorkersGeneral OverviewHealthcare LawTreatmentPatient ConsentGeneral OverviewTortsMalpractice & Professional LiabilityHealthcare ProvidersTortsNegligenceDutyAffirmative Duty to ActSpecial RelationshipsHealthcare Providers



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CHAPTER 5 California Judicial Council Medical Negligence Instructions

2-5 California Forms of Jury Instruction CACI 510

CACI 510 Derivative Liability of Surgeon

A surgeon is responsible for the negligence of other medical practitioners or nurses who are under his or her supervision and control and actively participating during an operation.

New September 2003; Revised April 2007

Give this instruction in a case in which the plaintiff seeks to hold a surgeon vicariously responsible under the "captain-of-the-ship" doctrine for the negligence of nurses or other hospital employees that occurs during the course of an operation. There is some disagreement in the courts regarding whether the captain-of-the-ship doctrine remains a viable rule of law. (Compare *Truhitte v. French Hospital* (1982) 128 Cal.App.3d 332, 348 [180 Cal.Rptr. 152] (doctrine has been eroded) with *Baumgardner v. Yusuf* (2006) 144 Cal.App.4th 1381, 1397-1398 [51 Cal.Rptr.3d 277] (doctrine remains viable).)

- The "captain of the ship" doctrine imposes liability on a surgeon under the doctrine of respondeat superior for the acts of those under the surgeon's special supervision and control during the operation. (*Thomas v. Intermedics Orthopedics, Inc.* (1996) 47 Cal.App.4th 957, 967 [55 Cal.Rptr.2d 197] .)

- "The doctrine has been explained as follows: 'A physician generally is not liable for the negligence of hospital or other nurses, attendants, or internes, who are not his employees, particularly where he has no knowledge thereof or no connection therewith. On the other hand, a physician is liable for the negligence of hospital or other nurses, attendants, or internes, who are not his employees, where such negligence is discoverable by him in the exercise of ordinary care, he is negligent in permitting them to attend the patient, or the negligent acts were performed under conditions where, in the exercise of ordinary care, he could have or should have been able to prevent their injurious effects and did not. [P]

The mere fact that a physician or surgeon gives instructions to a hospital employee does not render the physician or surgeon liable for negligence of the hospital employee in carrying out the instructions. Similarly, the mere right of a physician to supervise a hospital employee is not sufficient to render the physician liable for the negligence of such employee. On the other hand, if the physician has the right to exercise control over the work to be done by the hospital employee and the manner of its performance, or an employee of a hospital is temporarily detached in whole or in part from the hospital's general control so as to become the temporary servant of the physician he assists, the physician will be subject to liability for the employee's negligence. [P] Thus, where a hospital employee, although not in the regular employ of an operating surgeon, *is under his special supervision and control during the operation*, the relationship of master and servant exists, and the surgeon is liable, under the doctrine of respondeat superior, for the employee's negligence.' " (*Thomas, supra*, 47 Cal.App.4th at pp. 966-967 , original italics.)

- This doctrine applies only to medical personnel who are actively participating in the surgical procedure. (*Thomas, supra*, 47 Cal.App.4th at pp. 966-967 .)

- While the "captain of the ship" doctrine has never been expressly rejected, it has been eroded by modern courts. "A theory that the surgeon directly controls *all* activities of whatever nature in the operating room certainly is not realistic in present day medical care." (*Truhitte, supra*, 128 Cal.App.3d at p. 348 , original italics.)

- "[T]he *Truhitte* court ignores what we have already recognized as the special relationship between a vulnerable hospital patient and the surgeon operating on the patient. A helpless patient on the operating table who cannot understand or control what is happening reasonably expects a surgeon to oversee her care and to look out for her interests. We find this special relationship sufficient justification for the continued application of captain of the ship doctrine. Moreover, in light of the Supreme Court's expressions of approval of the doctrine ... , we feel compelled to adhere to the doctrine." (*Baumgardner, supra*, 144 Cal.App.4th at pp. 1397-1398, internal citations omitted.)

- Absent evidence of right to control, an operating surgeon is generally not responsible for the conduct of anesthesiologists or others who independently carry out their duties. (*Seneris v. Haas* (1955) 45 Cal.2d 811, 828 [291 P.2d 915] ; *Marvulli v. Elshire* (1972) 27 Cal.App.3d 180, 187 [103 Cal.Rptr. 461] .)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, § 976

California Tort Guide (Cont.Ed.Bar 3d ed.) § 9.4

3 Levy et al., California Torts, Ch. 31, *Liability of Physicians and Other Medical Practitioners*, § 31.45 (Matthew Bender)

36 California Forms of Pleading and Practice, Ch. 414, *Physicians and Other Medical Personnel* (Matthew Bender)

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

Publisher's Notes

This instruction covers issues presented in BAJI No. 6.06.

Legal Topics:

For related research and practice materials, see the following legal topics:

Healthcare LawActions Against FacilitiesApparent Agency & Respondeat SuperiorRespondeat SuperiorHealthcare
LawActions Against Healthcare WorkersGeneral OverviewHealthcare LawActions Against Healthcare WorkersDoctors
& PhysiciansHealthcare LawActions Against Healthcare WorkersSurgeonsTortsMalpractice & Professional
LiabilityHealthcare ProvidersTortsNegligenceDutyAffirmative Duty to ActSpecial RelationshipsHealthcare Providers



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CHAPTER 5 California Judicial Council Medical Negligence Instructions

2-5 California Forms of Jury Instruction CACI 511

CACI 511 Wrongful Birth--Sterilization/Abortion--Essential Factual Elements

[*Name of plaintiff*] **claims that** [*name of defendant*] **negligently failed to prevent the birth of her child. To establish this claim, [*name of plaintiff*] must prove both of the following:**

- 1. That [*name of defendant*] performed a negligent [sterilization/abortion] procedure; and**
- 2. That [*name of plaintiff*] gave birth to an unplanned child after this procedure was performed.**

New September 2003

The general medical negligence instructions--instructions on the standard of care and causation--could be used in conjunction with this one.

- "California law now permits a mother to hold medical personnel liable for their negligent failure to prevent or to terminate a pregnancy." (*Foy v. Greenblott* (1983) 141 Cal.App.3d 1, 8 [190 Cal.Rptr. 84] .)
- Negligent sterilization procedure that leads to the birth of a child, either normal or disabled, can form the basis of a wrongful birth action. (*Custodio v. Bauer* (1967) 251 Cal.App.2d 303, 323-325 [59 Cal.Rptr. 463] ; *Morris v. Frudenberg* (1982) 135 Cal.App.3d 23, 37 [185 Cal.Rptr. 76] .) The same is true of an unsuccessful abortion procedure. (*Stills v. Gratton* (1976) 55 Cal.App.3d 698, 707-709 [127 Cal.Rptr. 652] .)
- A wrongful birth claim based on a negligently performed sterilization or abortion procedure does not

support an action for wrongful life: "California courts do recognize a wrongful life claim by an 'impaired' child for special damages (but not for general damages), when the physician's negligence is the proximate cause of the child's need for extraordinary medical care and training. No court, however, has expanded tort liability to include wrongful life claims by children born without any mental or physical impairment." (*Alexandria S. v. Pac. Fertility Medical Ctr.* (1997) 55 Cal.App.4th 110, 122 [64 Cal.Rptr.2d 23].)

■ *Civil Code section 43.6(b)* provides: "The failure or refusal of a parent to prevent the live birth of his or her child shall not be a defense in any action against a third party, nor shall the failure or refusal be considered in awarding damages in any such action."

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, § 977

California Tort Guide (Cont.Ed.Bar 3d ed.) § 9.22

3 Levy et al., California Torts, Ch. 31, *Liability of Physicians and Other Medical Practitioners*, §§ 31.15, 31.50 (Matthew Bender)

36 California Forms of Pleading and Practice, Ch. 414, *Physicians and Other Medical Personnel* (Matthew Bender)

Publisher's Notes

This instruction covers issues presented in BAJI No. 6.08.

Legal Topics:

For related research and practice materials, see the following legal topics:

Healthcare Law Actions Against Healthcare Workers Doctors & Physicians Torts Malpractice & Professional Liability Healthcare Providers Torts Negligence Actions Wrongful Birth General Overview Torts Negligence Actions Wrongful Birth Defenses Torts Negligence Actions Wrongful Birth Elements Torts Negligence Actions Wrongful Birth Remedies



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CHAPTER 5 California Judicial Council Medical Negligence Instructions

2-5 California Forms of Jury Instruction CACI 512

CACI 512 Wrongful Birth--Essential Factual Elements

[*Name of plaintiff*] **claims that [*name of defendant*] was negligent because [*name of defendant*] failed to inform [him/her] of the risk that [he/she] would have a [genetically impaired/disabled] child. To establish this claim, [*name of plaintiff*] must prove all of the following:**

1. That [*name of defendant*] negligently failed to [diagnose/ [or] warn [*name of plaintiff*] of] the risk that [*name of child*] would be born with a [genetic impairment/disability];]

[or]

[1. That [*name of defendant*] negligently failed to [perform appropriate tests/advise [*name of plaintiff*] of tests] that would more likely than not have disclosed the risk that [*name of child*] would be born with a [genetic impairment/disability];]

2. That [*name of child*] was born with a [genetic impairment/disability];

3. That if [*name of plaintiff*] had known of the [genetic impairment/disability], [*insert name of mother*] would not have conceived [*name of child*] [or would not have carried the fetus to term]; and

4. That [*name of defendant*]'s negligence was a substantial factor in causing [*name of plaintiff*] to have to pay extraordinary expenses to care for [*name of child*].

New September 2003; Revised April 2007

2-5 California Forms of Jury Instruction CACI 512

The general medical negligence instructions on the standard of care and causation (see *CACI Nos. 500-502*) may be used in conjunction with this instruction. Read also *CACI No. 513, Wrongful Life--Essential Factual Elements*, if the parents' cause of action for wrongful birth is joined with the child's cause of action for wrongful life.

In element 1, select the first option if the claim is that the defendant failed to diagnose or warn the plaintiff of a possible genetic impairment. Select the second option if the claim is that the defendant failed to order or advise of available genetic testing. In a testing case, there is no causation unless the chances that the test would disclose the impairment were at least 50 percent. (See *Simmons v. West Covina Medical Clinic* (1989) 212 Cal.App.3d 696, 702-703 [260 Cal.Rptr. 772] .)

■ "Claims for 'wrongful life' are essentially actions for malpractice based on negligent genetic counseling and testing." (*Gami v. Mullikin Medical Center* (1993) 18 Cal.App.4th 870, 883 [22 Cal.Rptr.2d 819] .) Since the wrongful life action corresponds to the wrongful birth action, it is reasonable to conclude that this principle applies to wrongful birth actions.

■ Regarding wrongful-life actions, courts have observed: "[A]s in any medical malpractice action, the plaintiff must establish: '(1) the duty of the professional to use such skill, prudence, and diligence as other members of his profession commonly possess and exercise; (2) a breach of that duty; (3) a proximate causal connection between the negligent conduct and the resulting injury; and (4) actual loss or damage resulting from the professional's negligence.'" (*Gami, supra*, 18 Cal.App.4th at p. 877 .)

■ The negligent failure to administer a test that had only a 20 percent chance of detecting Down syndrome did not establish a reasonably probable causal connection to the birth of a child with this genetic abnormality. (*Simmons, supra* .)

■ Both parent and child may recover damages to compensate for "the extraordinary expenses necessary to treat the hereditary ailment." (*Turpin v. Sortini* (1982) 31 Cal.3d 220, 239 [182 Cal.Rptr. 337, 643 P.2d 954] .)

■ In wrongful-birth actions, parents are permitted to recover the medical expenses incurred on behalf of a disabled child. The child may also recover medical expenses in a wrongful-life action, though both parent and child may not recover the same expenses. (*Turpin, supra*, 31 Cal.3d at pp. 238-239 .)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 979-985

California Tort Guide (Cont.Ed.Bar 3d ed.) §§ 9.21-9.22

3 Levy et al., California Torts, Ch. 31, *Liability of Physicians and Other Medical Practitioners*, §§ 31.15, 31.50 (Matthew Bender)

36 California Forms of Pleading and Practice, Ch. 414, *Physicians and Other Medical Personnel* (Matthew Bender)

Publisher's Notes

This instruction covers issues presented in BAJI No. 6.08.

Legal Topics:

For related research and practice materials, see the following legal topics:

Healthcare Law Actions Against Healthcare Workers Doctors & Physicians Torts Damages Compensatory
Damages Medical Expenses Torts Malpractice & Professional Liability Healthcare
Providers Torts Negligence Actions Wrongful Birth Elements Torts Negligence Actions Wrongful
Birth Remedies Torts Negligence Proof Custom Medical Customs Torts Negligence Standards of Care Reasonable
Care Reasonable Person



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CHAPTER 5 California Judicial Council Medical Negligence Instructions

2-5 California Forms of Jury Instruction CACI 513

CACI 513 Wrongful Life--Essential Factual Elements

[*Name of plaintiff*] **claims that [*name of defendant*] was negligent because [he/she] failed to inform [*name of plaintiff*]'s parents of the risk that [he/she] would be born [genetically impaired/disabled]. To establish this claim, [*name of plaintiff*] must prove all of the following:**

[1. That [*name of defendant*] negligently failed to [diagnose/ [or] warn [*name of plaintiff*]'s parents of] the risk that [*name of plaintiff*] would be born with a [genetic impairment/disability];]

[or]

[1. That [*name of defendant*] negligently failed to [perform appropriate tests/advise [*name of plaintiff*]'s parents of tests] that would more likely than not have disclosed the risk that [*name of plaintiff*] would be born with a [genetic impairment/disability];]

2. That [*name of plaintiff*] was born with a [genetic impairment/disability];

3. That if [*name of plaintiff*]'s parents had known of the [genetic impairment/disability], [his/her] mother would not have conceived [him/her] [or would not have carried the fetus to term]; and

4. That [*name of defendant*]'s negligence was a substantial factor in causing [*name of plaintiff*]'s parents to have to pay extraordinary expenses for [*name of plaintiff*].

New September 2003; Revised April 2007, April 2008

Directions for Use

The general medical negligence instructions on the standard of care and causation (see *CACI* Nos. 500-502) may be used in conjunction with this instruction. Read also *CACI* No. 512, *Wrongful Birth--Essential Factual Elements*, if the parents' cause of action for wrongful birth is joined with the child's cause of action for wrongful life.

In element 1, select the first option if the claim is that the defendant failed to diagnose or warn the plaintiff of a possible genetic impairment. Select the second option if the claim is that the defendant failed to order or advise of available genetic testing. In a testing case, there is no causation unless the chances that the test would disclose the impairment were at least 50 percent. (See *Simmons v. West Covina Medical Clinic* (1989) 212 Cal.App.3d 696, 702-703 [260 Cal.Rptr. 772] .)

In order for this instruction to apply, the genetic impairment must result in a physical or mental disability. This is implied by the fourth element in the instruction.

Sources and Authority

- "[I]t may be helpful to recognize that although the cause of action at issue has attracted a special name--'wrongful life'--plaintiff's basic contention is that her action is simply one form of the familiar medical or professional malpractice action. The gist of plaintiff's claim is that she has suffered harm or damage as a result of defendants' negligent performance of their professional tasks, and that, as a consequence, she is entitled to recover under generally applicable common law tort principles." (*Turpin v. Sortini* (1982) 31 Cal.3d 220, 229 [182 Cal.Rptr. 337, 643 P.2d 954] .)
- "Claims for 'wrongful life' are essentially actions for malpractice based on negligent genetic counseling and testing." (*Gami v. Mullikin Medical Center* (1993) 18 Cal.App.4th 870, 883 [22 Cal.Rptr.2d 819] .)
- General damages are not available: "[W]e conclude that while a plaintiff-child in a wrongful life action may not recover general damages for being born impaired as opposed to not being born at all, the child--like his or her parents--may recover special damages for the extraordinary expenses necessary to treat the hereditary ailment." (*Turpin, supra*, 31 Cal.3d at p. 239 .)
- A child may not recover for loss of earning capacity in a wrongful-life action. (*Andalon v. Superior Court* (1984) 162 Cal.App.3d 600, 614 [208 Cal.Rptr. 899] .)
- The negligent failure to administer a test that had only a 20 percent chance of detecting Down syndrome did not establish a reasonably probable causal connection to the birth of a child with this genetic abnormality. (*Simmons, supra* .)
- Wrongful life does not apply to normal children. (*Alexandria S. v. Pac. Fertility Medical Ctr.* (1997) 55 Cal.App.4th 110, 122 [64 Cal.Rptr.2d 23] .)
- *Civil Code* section 43.6(a) provides: "No cause of action arises against a parent of a child based upon the claim that the child should not have been conceived or, if conceived, should not have been allowed to have been born alive."

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 979-985

California Tort Guide (Cont.Ed.Bar 3d ed.) §§ 9.21-9.22

3 Levy et al., *California Torts, Ch. 31, Liability of Physicians and Other Medical Practitioners*, §§ 31.15, 31.50 (Matthew Bender)

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

16 *California Points and Authorities, Ch. 165, Negligence*, § 165.70 (Matthew Bender)

Publisher's Notes

This instruction covers issues presented in BAJI No. 6.08.

Legal Topics:

For related research and practice materials, see the following legal topics:

Healthcare Law Actions Against Healthcare Workers Doctors & Physicians Torts Malpractice & Professional Liability Healthcare Providers Torts Negligence Actions Wrongful Birth Elements Torts Negligence Actions Wrongful Birth Remedies Torts Negligence Proof Custom Medical Customs Torts Negligence Standards of Care Reasonable Care Reasonable Person



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CHAPTER 5 California Judicial Council Medical Negligence Instructions

2-5 California Forms of Jury Instruction CACI 514

CACI 514 Duty of Hospital

A hospital is negligent if it does not use reasonable care toward its patients. A hospital must provide procedures, policies, facilities, supplies, and qualified personnel reasonably necessary for the treatment of its patients.

[When you are deciding whether [*name of defendant*] was negligent, you must base your decision only on the testimony of the expert witnesses who have testified in this case.]

New September 2003

This instruction may be augmented by *CACI Nos. 515, Duty of Hospital to Provide Safe Environment*, and/or *516, Duty of Hospital to Screen Medical Staff*.

The second paragraph should be used except in cases where the court determines that expert testimony is not necessary to establish the standard of care.

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

This instruction is not intended for cases where the hospital is being sued based on the negligence of an agent or employee. See instructions in the Vicarious Responsibility series and adapt accordingly.

■ The amount of care that a hospital must exercise toward a patient varies depending on the patient's condition: "[T]he duty imposed by law on the hospital is that it must exercise such reasonable care toward a patient as his mental and physical condition, if known, require" (*Vistica v. Presbyterian Hospital & Medical Center, Inc.* (1967) 67 Cal.2d 465, 469 [62 Cal.Rptr. 577, 432 P.2d 193] .)

■ A hospital has a duty "to use reasonable care and diligence in safeguarding a patient committed to its charge [citations] and such care and diligence are measured by the capacity of the patient to care for himself." (*Thomas v. Seaside Memorial Hospital* (1947) 80 Cal.App.2d 841, 847 [183 P.2d 288] .)

■ A hospital's duty extends to both treatment and care: "It is the duty of any hospital that undertakes the treatment of an ill or wounded person to use reasonable care and diligence not only in operating upon and treating but also in safeguarding him, and such care and diligence is measured by the capacity of the patient to care for himself." (*Valentin v. La Societe Francaise de Bienfaisance Mutuelle* (1946) 76 Cal.App.2d 1, 4 [172 P.2d 359] .)

■ Hospitals must maintain safe conditions on their premises: "[T]he professional duty of a hospital ... is primarily to provide a safe environment within which diagnosis, treatment, and recovery can be carried out. Thus if an unsafe condition of the hospital's premises causes injury to a patient ... there is a breach of the hospital's duty *qua* hospital." (*Murillo v. Good Samaritan Hospital* (1979) 99 Cal.App.3d 50, 56-57 [160 Cal.Rptr. 33] .)

■ Hospitals must monitor a patient's condition: "Defendant ... was under a duty to observe and know the condition of a patient. Its business is caring for ill persons, and its conduct must be in accordance with that of a person of ordinary prudence under the circumstances, a vital part of those circumstances being the illness of the patient and incidents thereof." (*Rice v. California Lutheran Hospital* (1945) 27 Cal.2d 296, 302 [163 P.2d 860] .)

■ "If a hospital is obliged to maintain its premises and its instrumentalities for the comfort of its patients with such care and diligence as will reasonably assure their safety, it should be equally bound to observe the progress of a patient in his recovery from a major operation with such care and diligence as his condition reasonably requires for his comfort and safety and promptly to employ such agencies as may reasonably appear necessary for the patient's safety." (*Valentin, supra*, 76 Cal.App.2d at p. 5 .)

■ A hospital has a duty to provide sufficient staff: "No expert opinion is required to prove the hospital's failure to provide an adequate number of trained, qualified personnel at the most critical time in postoperative care was negligent." (*Czubinsky v. Doctors Hospital* (1983) 139 Cal.App.3d 361, 367 [188 Cal.Rptr. 685] .)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 986-989

California Tort Guide (Cont.Ed.Bar 3d ed.) §§ 9.55-9.64

3 Levy et al., California Torts, Ch. 31, *Liability of Physicians and Other Medical Practitioners*, § 31.81 (Matthew Bender)

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

Publisher's Notes

This instruction covers issues presented in BAJI No. 6.20.

LexisNexis Matthew Bender Expert Practice Tip--Getting Discovery from Hospitals: Make sure that a hospital produces its procedures and policies during the discovery process. It is very common for

the hospital to just object to these requests. Thus, a litigator must be steadfast in obtaining them as they relate directly to this jury instruction. *By Dona Cohn-Payne*

Legal Topics:

For related research and practice materials, see the following legal topics:

Healthcare LawActions Against FacilitiesGeneral OverviewHealthcare LawActions Against FacilitiesFacility LiabilityHospitalsHealthcare LawActions Against FacilitiesStandards of CareHospitalsTortsNegligenceDutyAffirmative Duty to ActSpecial RelationshipsHealthcare ProvidersTortsNegligenceProofEvidenceExpert TestimonyTortsNegligenceStandards of CareReasonable CareReasonable Person



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CHAPTER 5 California Judicial Council Medical Negligence Instructions

2-5 California Forms of Jury Instruction CACI 515

CACI 515 Duty of Hospital to Provide Safe Environment

If [name of defendant hospital] knew or reasonably should have known it was likely that [name of patient] would harm [himself/herself/another], then [name of defendant hospital] had to use reasonable care to prevent such harm.

New September 2003

Always read CACI No. 514, *Duty of Hospital*, in conjunction with this instruction.

■ "[T]he duty extends to safeguarding the patient from dangers due to mental incapacity; and where the hospital has notice or knowledge of facts from which it might reasonably be concluded that a patient would be likely to harm himself or others unless preclusive measures were taken, then the hospital must use reasonable care in the circumstances to prevent such harm." (*Vistica v. Presbyterian Hospital & Medical Center, Inc.* (1967) 67 Cal.2d 465, 469 [62 Cal.Rptr. 577, 432 P.2d 193] .)

■ In *Meier v. Ross General Hospital* (1968) 69 Cal.2d 420, 423-424 [71 Cal.Rptr. 903, 445 P.2d 519], the Court held that absent reasonable care, the treating doctor and the hospital can be liable even though a suicidal patient's acts are "voluntary." That is, the doctor and the hospital must use reasonable care to prevent the patient from harming herself by her own acts, be they voluntary or involuntary.

■ For duty of a hospital that cares for alcoholics, see *Wood v. Samaritan Inst.* (1945) 26 Cal.2d 847, 853 [161 P.2d 556] , and *Emerick v. Raleigh Hills Hospital* (1982) 133 Cal.App.3d 575, 581 [184 Cal.Rptr. 92] .

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 986-989

California Tort Guide (Cont.Ed.Bar 3d ed.) §§ 9.55-9.62

3 Levy et al., California Torts, Ch. 31, *Liability of Physicians and Other Medical Practitioners*, § 31.81 (Matthew Bender)

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

Publisher's Notes

This instruction covers issues presented in BAJI No. 6.20.

Legal Topics:

For related research and practice materials, see the following legal topics:

Healthcare LawActions Against FacilitiesGeneral OverviewHealthcare LawActions Against FacilitiesFacility
LiabilityHospitalsHealthcare LawActions Against FacilitiesStandards of
CareHospitalsTortsNegligenceDutyAffirmative Duty to ActSpecial RelationshipsHealthcare
ProvidersTortsNegligenceStandards of CareReasonable CareReasonable Person



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CHAPTER 5 California Judicial Council Medical Negligence Instructions

2-5 California Forms of Jury Instruction CACI 516

CACI 516 Duty of Hospital to Screen Medical Staff

A hospital is negligent if it does not use reasonable care to select and periodically evaluate its medical staff so that its patients are provided adequate medical care.

New September 2003

Always read *CACI No. 514, Duty of Hospital*, in conjunction with this instruction.

- "[W]e hold a hospital is accountable for negligently screening the competency of its medical staff to insure the adequacy of medical care rendered to patients at its facility." (*Elam v. College Park Hospital* (1982) 132 Cal.App.3d 332, 346 [183 Cal.Rptr. 156] .)

- A hospital has a professional responsibility to ensure the competence of its medical staff through careful selection and periodic review. (*Bell v. Sharp Cabrillo Hospital* (1989) 212 Cal.App.3d 1034, 1050 [260 Cal.Rptr. 886] .)

- "The hospital has 'a direct and independent responsibility to its patients of insuring the competency of its medical staff and the quality of medical care provided' [Citation.] Hospitals must be able to establish high standards of professional work and to maintain those standards through careful selection and review of staff. And they are required to do so by both state and federal law. [Citations.]" (*Rhee v. El Camino Hospital Dist.* (1988) 201 Cal.App.3d 477, 489 [247 Cal.Rptr. 244] .)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 986-989

California Tort Guide (Cont.Ed.Bar 3d ed.) §§ 9.55-9.62

3 Levy et al., California Torts, Ch. 31, *Liability of Physicians and Other Medical Practitioners*, § 31.81 (Matthew Bender)

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

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

Publisher's Notes

This instruction covers issues presented in BAJI No. 6.20.

Legal Topics:

For related research and practice materials, see the following legal topics:

Healthcare LawActions Against FacilitiesGeneral OverviewHealthcare LawActions Against FacilitiesFacility LiabilityHospitalsHealthcare LawActions Against FacilitiesStandards of CareHospitalsHealthcare LawBusiness Administration & OrganizationHospital PrivilegesProfessional ReviewHealthcare LawBusiness Administration & OrganizationHospital PrivilegesRestrictions



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CHAPTER 5 California Judicial Council Medical Negligence Instructions

2-5 California Forms of Jury Instruction CACI 517

CACI 517 Affirmative Defense--Patient's Duty to Provide for His or Her Own Well-Being

A patient must use reasonable care to provide for his or her own well-being. This includes a responsibility to [follow [a/an] [insert type of medical practitioner]'s instructions] [seek medical assistance] when a reasonable person in the same situation would do so.

[Name of defendant] claims that [name of plaintiff]'s harm was caused, in whole or in part, by [name of plaintiff]'s negligence in failing to [follow [name of defendant]'s instructions] [seek medical assistance]. To succeed, [name of defendant] must prove both of the following:

- 1. That [name of plaintiff] did not use reasonable care in [following [name of defendant]'s instructions] [seeking medical assistance]; and**
- 2. That [name of plaintiff]'s failure to [follow [name of defendant]'s instructions] [seek medical assistance] was a substantial factor in causing [his/her] harm.**

New September 2003

It is error to give this type of instruction absent evidence that the patient was contributorily negligent. (*LeMons v. Regents of University of California* (1978) 21 Cal.3d 869, 874 [148 Cal.Rptr. 355, 582 P.2d 946].) At least one court has held that it is error to give this kind of instruction absent expert testimony that the plaintiff was negligent. (*Bolen v. Woo* (1979) 96 Cal.App.3d 944, 952 [158 Cal.Rptr. 454] .)

Read this instruction in conjunction with basic comparative fault and damages instructions (CACI Nos. 405, 406, and 407).

■ The defendant has the burden of proving that the plaintiff was contributorily negligent and that this negligence was a cause of the harm. (*Maertins v. Kaiser Foundation Hospitals* (1958) 162 Cal.App.2d 661, 666-667 [328 P.2d 494] .)

■ Mere refusal to follow instructions is not sufficient to show contributory negligence or failure to mitigate damages. The failure must be unreasonable. (*Dodds v. Stellar* (1946) 77 Cal.App.2d 411, 422-423 [175 P.2d 607] .)

■ The issues of contributory negligence and mitigation of damages can become confused in cases involving a patient's failure to follow instructions. (*LeMons, supra*, 21 Cal.3d at pp. 874 -875.) However, because contributory negligence is no longer a complete bar to recovery, the distinction may be less critical today.

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, § 1624

California Tort Guide (Cont.Ed.Bar 3d ed.) § 9.66

3 Levy et al., California Torts, Ch. 31, *Liability of Physicians and Other Medical Practitioners*, § 31.61 (Matthew Bender)

25 California Forms of Pleading and Practice, Ch. 295, *Hospitals*, § 295.14 (Matthew Bender)

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

Publisher's Notes

This instruction covers issues presented in BAJI No. 6.28.

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsMalpractice & Professional LiabilityHealthcare ProvidersTortsNegligenceDefensesComparative NegligenceProcedureTortsNegligenceDefensesContributory NegligenceProcedureBurdens of ProofTortsNegligenceStandards of CareReasonable CareReasonable Person



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CHAPTER 5 California Judicial Council Medical Negligence Instructions

2-5 California Forms of Jury Instruction CACI 518

CACI 518 Medical Malpractice: Res ipsa loquitur

In this case, [name of plaintiff] may prove that [name of defendant]'s negligence caused [his/her] harm if [he/she] proves all of the following:

- 1. That [name of plaintiff]'s harm ordinarily would not have occurred unless someone was negligent [In deciding this issue, you must consider [only] the testimony of the expert witnesses];**
- 2. That the harm occurred while [name of plaintiff] was under the care and control of [name of defendant]; and**
- 3. That [name of plaintiff]'s voluntary actions did not cause or contribute to the event[s] that harmed [him/her].**

If you decide that [name of plaintiff] did not prove one or more of these three things, then [insert one of the following]

[your verdict must be for [name of defendant].]

[you must decide whether [name of defendant] was negligent in light of the other instructions I have read.]

If you decide that [name of plaintiff] proved all of these three things, you may, but are not required to, find that [name of defendant] was negligent or that [name of defendant]'s negligence was a substantial factor in causing [name of plaintiff]'s harm, or both.

You must carefully consider the evidence presented by both [name of plaintiff] and [name of defendant] before you make your decision. You should not decide in favor of [name of plaintiff] unless you believe, after weighing

all of the evidence, that it is more likely than not that [name of defendant] was negligent and that [his/her] negligence was a substantial factor in causing [name of plaintiff]'s harm

New September 2003

The bracketed sentence in element 1 should be read only if expert testimony is introduced. The word "only" within that sentence is to be used only in those cases where the court has determined that the issue of the defendant's negligence involves matters beyond common knowledge.

In the second paragraph, the first bracketed option is to be used when plaintiff is relying solely on a res ipsa loquitur theory and has introduced no other evidence of defendant's negligence. The second option is to be used when plaintiff has introduced other evidence of defendant's negligence.

"It follows that where part of the facts basic to the application of the doctrine of res ipsa loquitur is established as a matter of law but that others are not, the court should instruct that application of the doctrine by the jury depends only upon the existence of the basic facts not conclusively established." (*Rimmele v. Northridge Hospital Foundation* (1975) 46 Cal.App.3d 123, 130 [120 Cal.Rptr. 39] .)

■ "In California, the doctrine of res ipsa loquitur is defined by statute as 'a presumption affecting the burden of producing evidence.' The presumption arises when the evidence satisfies three conditions: '(1) the accident must be of a kind which ordinarily does not occur in the absence of someone's negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff.'" ' A presumption affecting the burden of producing evidence 'require[s] the trier of fact to assume the existence of the presumed fact' unless the defendant introduces evidence to the contrary. The presumed fact, in this context, is that 'a proximate cause of the occurrence was some negligent conduct on the part of the defendant. ...' If the defendant introduces 'evidence which would support a finding that he was not negligent or that any negligence on his part was not a proximate cause of the occurrence,' the trier of fact determines whether defendant was negligent without regard to the presumption, simply by weighing the evidence." (*Brown v. Poway Unified School Dist.* (1993) 4 Cal.4th 820, 825-826 [15 Cal.Rptr.2d 679, 843 P.2d 624] , internal citations omitted.)

■ "Stated less mechanically, a plaintiff suing in a personal injury action is entitled to the benefit of res ipsa loquitur when: 'the accident is of such a nature that it can be said, in the light of past experience, that it probably was the result of negligence by someone and that the defendant is probably the person who is responsible.'" (*Rimmele, supra*, 46 Cal.App.3d at p. 129 , internal citations omitted.)

■ *Evidence Code section 646(c)* provides:

If the evidence, or facts otherwise established, would support a res ipsa loquitur presumption and the defendant has introduced evidence which would support a finding that he was not negligent or that any negligence on his part was not a proximate cause of the occurrence, the court may, and upon request shall, instruct the jury to the effect that:

(1) If the facts which would give rise to a res ipsa loquitur presumption are found or otherwise established, the jury may draw the inference from such facts that a proximate cause of the occurrence was some negligent conduct on the part of the defendant; and

(2) The jury shall not find that a proximate cause of the occurrence was some negligent conduct on the part of the defendant unless the jury believes, after weighing all the evidence in the case and drawing such inferences therefrom as the jury believes are warranted, that it is more probable than not that the occurrence was caused by some negligent conduct on the part of the defendant.

■ Under *Evidence Code* section 604, a presumption affecting the burden of producing evidence "require[s] the trier of fact to assume the existence of the presumed fact" unless the defendant introduces evidence to the contrary. Here, the presumed fact is that "a proximate cause of the occurrence was some negligent conduct on the part of the defendant." (*Evid. Code*, § 646(c)(1); *Brown, supra*, 4 Cal.4th at p. 826 .)

■ "The doctrine of *res ipsa loquitur* is fundamentally a doctrine predicated upon inference deducible from circumstantial evidence." (*Hale v. Venuto* (1982) 137 Cal.App.3d 910, 918 [187 Cal.Rptr. 357] .)

■ The doctrine "is based on a theory of 'probability' where there is no direct evidence of defendant's conduct, permitting a common sense inference of negligence from the happening of the accident." (*Gicking v. Kimberlin* (1985) 170 Cal.App.3d 73, 75 [215 Cal.Rptr. 834] .)

■ "All of the cases hold, in effect, that it must appear, either as a matter of common experience or from evidence in the case, that the accident is of a type which probably would not happen unless someone was negligent." (*Zentz v. Coca Cola Bottling Co. of Fresno* (1952) 39 Cal.2d 436, 442-443 [247 P.2d 344] .)

■ "In determining the applicability of *res ipsa loquitur*, courts have relied on both expert testimony and common knowledge. The standard of care in a professional negligence case can be proved only by expert testimony unless the conduct required by the particular circumstances is within the common knowledge of the layperson." (*Blackwell v. Hurst* (1996) 46 Cal.App.4th 939, 943 [54 Cal.Rptr.2d 209] , internal citations omitted.)

■ "Under the doctrine of *res ipsa loquitur* and this common knowledge exception, it is proper to instruct the jury that it can infer negligence from the happening of the accident itself, if it finds based on common knowledge, the testimony of physicians called as expert witnesses, and all the circumstances, that the injury was more likely than not the result of negligence." (*Gannon v. Elliot* (1993) 19 Cal.App.4th 1, 6 [23 Cal.Rptr.2d 86] , internal citation omitted.)

■ "The fact that a particular injury rarely occurs does not in itself justify an inference of negligence unless some other evidence indicates negligence. To justify *res ipsa loquitur* instructions, appellant must have produced sufficient evidence to permit the jury to make the necessary decision. He must have presented 'some substantial evidence which, if believed by the jury, would entitle it to draw an inference of negligence from the happening of the accident itself.' " (*Blackwell, supra*, 46 Cal.App.4th at p. 944 , internal citations omitted.)

■ The purpose of the second "control" requirement is to "link the defendant with the probability, already established, that the accident was negligently caused." (*Newing v. Cheatham* (1975) 15 Cal.3d 351, 362 [124 Cal.Rptr. 193, 540 P.2d 33] .) The control requirement is not absolute. (*Zentz, supra*, 39 Cal.2d at p. 443 .)

■ "The purpose of [the third] requirement, like that of control by the defendant is to establish that the defendant is the one probably responsible for the accident. The plaintiff need not show that he was entirely inactive at the time of the accident in order to satisfy this requirement, so long as the evidence is such as to eliminate his conduct as a factor contributing to the occurrence. (*Newing, supra*, 15 Cal.3d at p. 363 , internal citations omitted.)

■ The third condition "should not be confused with the problem of contributory negligence, as to which defendant has the burden of proof. ... [I]ts purpose, like that of control by the defendant, is merely to assist the court in determining whether it is more probable than not that the defendant was responsible for the accident." (*Zentz, supra*, 39 Cal.2d at p.

444 .)

Secondary Sources

1 Witkin, California Evidence (4th ed. 2000) Burden of Proof and Presumptions, §§ 114-118

3 Levy et al., California Torts, Ch. 31, *Liability of Physicians and Other Medical Practitioners*, § 31.32 (Matthew Bender)

36 California Forms of Pleading and Practice, Ch. 414, *Physicians and Other Medical Personnel* (Matthew Bender)

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

Publisher's Notes

This instruction covers issues presented in BAJI Nos. 6.35 and 6.36.

LexisNexis Matthew Bender Expert Practice Tip--Using CACI No. 518: This instruction is commonly used in a case when a surgical tool, etc. is left in a patient during surgery while under anesthesia. This shifts the burden of proof to the medical provider. *By Dona Cohn-Payne*

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsMalpractice & Professional LiabilityHealthcare ProvidersTortsNegligenceCausationProximate CauseGeneral
OverviewTortsNegligenceProofEvidenceExpert TestimonyTortsNegligenceProofRes Ipsa LoquiturGeneral
OverviewTortsNegligenceProofRes Ipsa LoquiturElementsType of EventTortsNegligenceProofRes Ipsa
LoquiturEvidentiary Effect



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CHAPTER 5 California Judicial Council Medical Negligence Instructions

2-5 California Forms of Jury Instruction CACI 519-CACI 529

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CACI 519Reserved for Future Use



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CHAPTER 5 California Judicial Council Medical Negligence Instructions

2-5 California Forms of Jury Instruction CACI 530A

CACI 530A Medical Battery

[*Name of plaintiff*] **claims that** [*name of defendant*] **committed a medical battery. To establish this claim, [*name of plaintiff*] must prove all of the following:**

1. [That [*name of defendant*] performed a medical procedure without [*name of plaintiff*]'s consent; [or]]

[That [*name of plaintiff*] consented to one medical procedure, but [*name of defendant*] performed a substantially different medical procedure;]

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

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

A patient can consent to a medical procedure by words or conduct.

Derived from former CACI No. 530, April 2007; Revised October 2008

Directions for Use

Select either or both of the two bracketed options in the first element depending on the nature of the case. In a case of a conditional consent in which it is alleged that the defendant proceeded without the condition having occurred, give *CACI No. 530B, Medical Battery--Conditional Consent*.

Sources and Authority

■ Battery may also be found if a substantially different procedure is performed: "Where a doctor obtains consent of the patient to perform one type of treatment and subsequently performs a substantially different treatment for which consent was not obtained, there is a clear case of battery." (*Cobbs v. Grant* (1972) 8 Cal.3d 229, 239 [104 Cal.Rptr. 505, 502 P.2d 1] .)

■ "The battery theory should be reserved for those circumstances when a doctor performs an operation to which the patient has not consented. When the patient gives permission to perform one type of treatment and the doctor performs another, the requisite element of deliberate intent to deviate from the consent given is present. However, when the patient consents to certain treatment and the doctor performs that treatment but an undisclosed inherent complication with a low probability occurs, no intentional deviation from the consent given appears; rather, the doctor in obtaining consent may have failed to meet his due care duty to disclose pertinent information. In that situation the action should be pleaded in negligence." (*Cobbs, supra*, 8 Cal.3d at p. 240 .)

■ "Our high court has made it clear that battery and lack of informed consent are separate causes of action. A claim based on lack of informed consent--which sounds in negligence--arises when the doctor performs a procedure without first adequately disclosing the risks and alternatives. In contrast, a battery is an intentional tort that occurs when a doctor performs a procedure without obtaining any consent." (*Saxena v. Goffney* (2008) 159 Cal.App.4th 316, 324 [71 Cal.Rptr.3d 469] .)

■ "Confusion may arise in the area of 'exceeding a patient's consent.' In cases where a doctor exceeds the consent and such excess surgery is found necessary due to conditions arising during an operation which endanger the patient's health or life, the consent is presumed. The surgery necessitated is proper (though exceeding specific consent) on the theory of assumed consent, were the patient made aware of the additional need." (*Peddesky v. Bleiberg* (1967) 251 Cal.App.2d 119, 123 [59 Cal.Rptr. 294] .)

■ "Consent to medical care, including surgery, may be express or may be implied from the circumstances." (*Bradford v. Winter* (1963) 215 Cal.App.2d 448, 454 [30 Cal.Rptr. 243] .)

■ "It is elemental that consent may be manifested by acts or conduct and need not necessarily be shown by a writing or by express words." (*Kritzer v. Citron* (1950) 101 Cal.App.2d 33, 38-39 [224 P.2d 808] .)

■ "[T]he reason why *CACI No. 530B* has an explicit intent and knowledge requirement and *CACI No. 530A* does not is clear. The law presumes that '[w]hen the patient gives permission to perform one type of treatment and the doctor performs another, the requisite element of deliberate intent to deviate from the consent given is present.' That situation is covered by *CACI No. 530A*." (*Dennis v. Southard* (2009) 174 Cal.App.4th 540, 544 [94 Cal.Rptr.3d 559] , internal citation omitted.)

■ "In the absence of any definitive case law establishing whether operating on the wrong disk within inches of the correct disk is a 'substantially different procedure,' we conclude the matter is a factual question for a finder of fact to decide and at least in this instance, not one capable of being decided on demurrer." (*Kaplan v. Mamelak* (2008) 162 Cal.App.4th 637, 647 [75 Cal.Rptr.3d 861] .)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 388-635

California Tort Guide (Cont.Ed.Bar 3d ed.) §§ 9.11-9.16

3 Levy et al., *California Torts, Ch. 31, Liability of Physicians and Other Medical Practitioners*, § 31.41, Ch. 41, *Assault and Battery*, § 41.01 (Matthew Bender)

6 *California Forms of Pleading and Practice, Ch. 58, Assault and Battery*, § 58.14 (Matthew Bender)

36 *California Forms of Pleading and Practice, Ch. 415, Physicians: Medical Malpractice*, §§ 415.13, 415.20 (Matthew Bender)

2 *California Points and Authorities, Ch. 21, Assault and Battery*, § 21.20 et seq. (Matthew Bender)

17 *California Points and Authorities, Ch. 175, Physicians and Surgeons: Medical Malpractice*, § 175.28 et seq. (Matthew Bender)

33 *California Legal Forms, Ch. 104, Health Care Transactions, Consents, and Directives*, § 104.11 (Matthew Bender)

Publisher's Notes

This instruction covers issues presented in BAJI No. 6.10.5.

LexisNexis Matthew Bender Expert Practice Tip--Allege Necessary Facts in Complaint: For the unwary litigator, do not forget to allege the necessary facts for a medical battery in your complaint if you want to proceed with this type of claim and receive this type of instruction. *By Dona Cohn-Payne*

Legal Topics:

For related research and practice materials, see the following legal topics:

Healthcare Law Actions Against Healthcare Workers Doctors & Physicians Healthcare Law Treatment Patient Consent General Overview Healthcare Law Treatment Patient Consent Informed Consent Torts Intentional Torts Assault & Battery Elements of Battery Torts Malpractice & Professional Liability Healthcare Providers



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CHAPTER 5 California Judicial Council Medical Negligence Instructions

2-5 California Forms of Jury Instruction CACI 530B

CACI 530B Medical Battery--Conditional Consent

[*Name of plaintiff*] **claims that [*name of defendant*] committed a medical battery. To establish this claim, [*name of plaintiff*] must prove all of the following:**

1. **That [*name of plaintiff*] consented to a medical procedure, but only on the condition that [*describe what had to occur before consent would be given*];**
2. **That [*name of defendant*] proceeded without this condition having occurred;**
3. **That [*name of defendant*] intended to perform the procedure with knowledge that the condition had not occurred;**
4. **That [*name of plaintiff*] was harmed; and**
5. **That [*name of defendant*]'s conduct was a substantial factor in causing [*name of plaintiff*]'s harm.**

A patient can consent to a medical procedure by words or conduct.

Derived from former CACI No. 530, April 2007; Revised October 2008

Directions for Use

Give this instruction in a case of a conditional consent in which it is alleged that the defendant proceeded without the condition having occurred. If the claim is that the defendant proceeded without any consent or deviated from the consent given, give *CACI No. 530A, Medical Battery*.

Sources and Authority

■ Battery may also be found if a conditional consent is violated: "[I]t is well recognized a person may place conditions on [his or her] consent. If the actor exceeds the terms or conditions of the consent, the consent does not protect the actor from liability for the excessive act." (*Ashcraft v. King* (1991) 228 Cal.App.3d 604, 610 [278 Cal.Rptr. 900] .)

■ Battery is an intentional tort. Therefore, a claim for battery against a doctor as a violation of conditional consent requires proof that the doctor intentionally violated the condition placed on the patient's consent. (*Piedra v. Dugan* (2004) 123 Cal.App.4th 1483, 1498 [21 Cal.Rptr.3d 36] , internal citations omitted.)

■ "[T]he reason why CACI No. 530B has an explicit intent and knowledge requirement and CACI No. 530A does not is clear. The law presumes that '[w]hen the patient gives permission to perform one type of treatment and the doctor performs another, the requisite element of deliberate intent to deviate from the consent given is present.' That situation is covered by CACI No. 530A. On the other hand, in a case involving conditional consent, the requisite element of deliberate intent to deviate from the consent given cannot be presumed simply from the act itself. This is because if the intent element is not explicitly stated in the instruction, it would be possible for a jury (incorrectly) to find a doctor liable for medical battery even if it believed the doctor negligently forgot about the condition precedent." (*Dennis v. Southard* (2009) 174 Cal.App.4th 540, 544 [94 Cal.Rptr.3d 559] , internal citation omitted.)

■ "Our high court has made it clear that battery and lack of informed consent are separate causes of action. A claim based on lack of informed consent--which sounds in negligence--arises when the doctor performs a procedure without first adequately disclosing the risks and alternatives. In contrast, a battery is an intentional tort that occurs when a doctor performs a procedure without obtaining any consent." (*Saxena v. Goffney* (2008) 159 Cal.App.4th 316, 324 [71 Cal.Rptr.3d 469] .)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 388-635

California Tort Guide (Cont.Ed.Bar 3d ed.) §§ 9.11-9.16

3 Levy et al., *California Torts, Ch. 31, Liability of Physicians and Other Medical Practitioners*, § 31.41, Ch. 41, *Assault and Battery*, § 41.01 (Matthew Bender)

6 *California Forms of Pleading and Practice, Ch. 58, Assault and Battery*, § 58.14 (Matthew Bender)

36 *California Forms of Pleading and Practice, Ch. 415, Physicians: Medical Malpractice*, §§ 415.13, 415.20 (Matthew Bender)

2 *California Points and Authorities, Ch. 21, Assault and Battery*, § 21.25 (Matthew Bender)

17 *California Points and Authorities, Ch. 175, Physicians and Surgeons: Medical Malpractice*, § 175.28 et seq. (Matthew Bender)

33 *California Legal Forms, Ch. 104, Health Care Transactions, Consents, and Directives*, § 104.11 (Matthew Bender)

Publisher's Notes

This instruction covers issues presented in BAJI No. 6.10.5.

Legal Topics:

For related research and practice materials, see the following legal topics:

Healthcare LawActions Against Healthcare WorkersDoctors & PhysiciansHealthcare LawTreatmentPatient
ConsentGeneral OverviewHealthcare LawTreatmentPatient ConsentInformed ConsentTortsIntentional TortsAssault &
BatteryElements of BatteryTortsMalpractice & Professional LiabilityHealthcare Providers



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CHAPTER 5 California Judicial Council Medical Negligence Instructions

2-5 California Forms of Jury Instruction CACI 531

CACI 531 Consent on Behalf of Another

In this case [name of patient] could not consent to the [insert medical procedure] because [he/she] was [insert reason--e.g., a minor/incompetent/unconscious]. In this situation, the law allows [name of authorized person] to give consent on behalf of [name of patient].

You must decide whether [name of authorized person] consented to the [insert medical procedure] performed on [name of patient].

New September 2003

■ "If the patient is a minor or incompetent, the authority to consent is transferred to the patient's legal guardian or closest available relative." (*Cobbs v. Grant* (1972) 8 Cal.3d 229, 244 [104 Cal.Rptr. 505, 502 P.2d 1] ; *Farber v. Olkon* (1953) 40 Cal.2d 503, 509 [254 P.2d 520] .)

■ *Family Code* section 6910 provides: "The parent, guardian, or caregiver of a minor who is a relative of the minor and who may authorize medical care and dental care under Section 6550, may authorize in writing an adult into whose care a minor has been entrusted to consent to medical care or dental care, or both, for the minor."

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 389, 392

California Tort Guide (Cont.Ed.Bar 3d ed.) § 9.16

3 Levy et al., *California Torts, Ch. 31, Liability of Physicians and Other Medical Practitioners*, § 31.14 (Matthew Bender)

6 *California Forms of Pleading and Practice, Ch. 58, Assault and Battery*, § 58.14

32 *California Forms of Pleading and Practice, Ch. 365, Minors: Contract Actions*, § 365.13; *Ch. 366, Minors: Court Consent for Medical Care or Enlistment*, § 366.10 (Matthew Bender)

34 *California Forms of Pleading and Practice, Ch. 394, Parent and Child*, § 394.54 (Matthew Bender)

36 *California Forms of Pleading and Practice, Ch. 415, Physicians: Medical Malpractice*, § 415.13 (Matthew Bender)

33 *California Legal Forms, Ch. 104, Health Care Transactions, Consents, and Directives*, § 104.11 (Matthew Bender)

Publisher's Notes

This instruction replaces BAJI No. 6.12.

Legal Topics:

For related research and practice materials, see the following legal topics:

Healthcare LawActions Against Healthcare WorkersDoctors & PhysiciansHealthcare LawTreatmentIncompetent, Minor & Mentally Disabled PatientsGeneral OverviewHealthcare LawTreatmentPatient ConsentGeneral OverviewHealthcare LawTreatmentPatient ConsentConsent by Guardians & ParentsTortsMalpractice & Professional LiabilityHealthcare Providers



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CHAPTER 5 California Judicial Council Medical Negligence Instructions

2-5 California Forms of Jury Instruction CACI 532

CACI 532 Informed Consent--Definition

A patient's consent to a medical procedure must be "informed." A patient gives an "informed consent" only after the [insert type of medical practitioner] has fully explained the proposed treatment or procedure.

[A/An] [insert type of medical practitioner] must explain the likelihood of success and the risks of agreeing to a medical procedure in language that the patient can understand. [A/An] [insert type of medical practitioner] must give the patient as much information as [he/she] needs to make an informed decision, including any risk that a reasonable person would consider important in deciding to have the proposed treatment or procedure, and any other information skilled practitioners would disclose to the patient under the same or similar circumstances. The patient must be told about any risk of death or serious injury or significant potential complications that may occur if the procedure is performed. [A/An] [insert type of medical practitioner] is not required to explain minor risks that are not likely to occur.

New September 2003; Revised December 2005, October 2008

Directions for Use

This instruction should be read in conjunction with *CACI No. 533, Failure to Obtain Informed Consent--Essential Factual Elements*. Do not give this instruction with *CACI No. 530A, Medical Battery*, or *530B, Medical Battery--Conditional Consent*. (See *Saxena v. Goffney* (2008) 159 Cal.App.4th 316, 324 [71 Cal.Rptr.3d 469] .)

If the patient is a minor or is incapacitated, tailor the instruction accordingly.

Also, see *CACI No. 531, Consent on Behalf of Another*.

Sources and Authority

■ A physician is required to disclose "all information relevant to a meaningful decisional process." (*Cobbs v. Grant* (1972) 8 Cal.3d 229, 242 [104 Cal.Rptr. 505, 502 P.2d 1] .)

■ "When a doctor recommends a particular procedure then he or she must disclose to the patient all material information necessary to the decision to undergo the procedure, including a reasonable explanation of the procedure, its likelihood of success, the risks involved in accepting or rejecting the proposed procedure, and any other information a skilled practitioner in good standing would disclose to the patient under the same or similar circumstances." (*Mathis v. Morrissey* (1992) 11 Cal.App.4th 332, 343 [13 Cal.Rptr.2d 819] .)

■ "A physician has a duty to inform a patient in lay terms of the dangers inherently and potentially involved in a proposed treatment." (*McKinney v. Nash* (1981) 120 Cal.App.3d 428, 440 [174 Cal.Rptr. 642] .)

■ Courts have observed that *Cobbs* created a two-part test for disclosure. "First, a physician must disclose to the patient the potential of death, serious harm, and other complications associated with a proposed procedure." (*Daum v. SpineCare Medical Group, Inc.* (1997) 52 Cal.App.4th 1285, 1301 [61 Cal.Rptr.2d 260] .) "Second, '[b]eyond the foregoing minimal disclosure, a doctor must also reveal to his patient such additional information as a skilled practitioner of good standing would provide under similar circumstances.' " (*Id.* at p. 1302, citation omitted.) The doctor has no duty to discuss minor risks inherent in common procedures when it is common knowledge that such risks are of very low incidence. (*Cobbs, supra*, 8 Cal.3d at p. 244 .)

■ The courts have defined "material information" as follows: "Material information is that which the physician knows or should know would be regarded as significant by a reasonable person in the patient's position when deciding to accept or reject the recommended medical procedure. To be material, a fact must also be one which is not commonly appreciated. If the physician knows or should know of a patient's unique concerns or lack of familiarity with medical procedures, this may expand the scope of required disclosure." (*Truman v. Thomas* (1980) 27 Cal.3d 285, 291 [165 Cal.Rptr. 308, 611 P.2d 902] , internal citations omitted.)

■ "Obviously involved in the equation of materiality are countervailing factors of the seriousness and remoteness of the dangers involved in the medical procedure as well as the risks of a decision not to undergo the procedure." (*McKinney, supra*, 120 Cal.App.3d at p. 441 .)

■ Expert testimony is not required to establish the duty to disclose the potential of death, serious harm, and other complications. (*Cobbs, supra*, 8 Cal.3d at p. 244 .) Expert testimony is admissible to show what other information a skilled practitioner would have given under the circumstances. (*Arato v. Avedon* (1993) 5 Cal.4th 1172, 1191-1192 [23 Cal.Rptr.2d 131, 858 P.2d 598] .)

■ A physician must also disclose personal interests unrelated to the patient's health, whether research or economic, that may affect his or her medical judgment. (*Moore v. Regents of Univ. of Cal.* (1990) 51 Cal.3d 120, 129-132 [271 Cal.Rptr. 146, 793 P.2d 479] , cert. denied, 499 U.S. 936 (1991) .)

■ Appellate courts have rejected a general duty of disclosure concerning a treatment or procedure a physician does not recommend. However, in some cases, "there may be evidence that would support the conclusion that a doctor should have disclosed information concerning a nonrecommended procedure." (

Vandi v. Permanente Medical Group, Inc. (1992) 7 Cal.App.4th 1064, 1071 [9 Cal.Rptr.2d 463] .)

■ "Our high court has made it clear that battery and lack of informed consent are separate causes of action. A claim based on lack of informed consent--which sounds in negligence--arises when the doctor performs a procedure without first adequately disclosing the risks and alternatives. In contrast, a battery is an intentional tort that occurs when a doctor performs a procedure without obtaining any consent." (*Saxena, supra*, 159 Cal.App.4th at p. 324 .)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 395, 400-507

California Tort Guide (Cont.Ed.Bar 3d ed.) § 9.11

3 Levy et al., *California Torts, Ch. 31, Liability of Physicians and Other Medical Practitioners*, § 31.41 (Matthew Bender)

6 *California Forms of Pleading and Practice, Ch. 58, Assault and Battery*, § 58.14 (Matthew Bender)

36 *California Forms of Pleading and Practice, Ch. 415, Physicians: Medical Malpractice*, §§ 415.13, 415.20 (Matthew Bender)

2 *California Points and Authorities, Ch. 21, Assault and Battery*, § 21.20 (Matthew Bender)

17 *California Points and Authorities, Ch. 175, Physicians and Surgeons: Medical Malpractice*, § 175.28 (Matthew Bender)

33 *California Legal Forms, Ch. 104, Health Care Transactions, Consents, and Directives*, § 104.11 (Matthew Bender)

Publisher's Notes

This instruction covers issues presented in BAJI No. 6.11.

LexisNexis Matthew Bender Expert Practice Tip--Informed Consent: Lack of informed consent is usually plead in a plaintiff's complaint. A review of CACI No. 532 will assist in formulating your discovery plan. By *Dona Cohn-Payne*

Legal Topics:

For related research and practice materials, see the following legal topics:

Healthcare Law Actions Against Healthcare Workers Doctors & Physicians Healthcare Law Treatment Failures to Disclose & Warn General Overview Healthcare Law Treatment Patient Consent Informed Consent Torts Malpractice & Professional Liability Healthcare Providers



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CHAPTER 5 California Judicial Council Medical Negligence Instructions

2-5 California Forms of Jury Instruction CACI 533

CACI 533 Failure to Obtain Informed Consent--Essential Factual Elements

[*Name of plaintiff*] **claims that** [*name of defendant*] **was negligent because** [he/she] **performed** [a/an] [*insert medical procedure*] **on** [*name of plaintiff*] **without first obtaining** [his/her] **informed consent. To establish this claim, [*name of plaintiff*] must prove all of the following:**

- 1. That [*name of defendant*] performed [a/an] [*insert medical procedure*] on [*name of plaintiff*];**
- 2. That [*name of plaintiff*] did not give [his/her] informed consent for the [*insert medical procedure*];**
- 3. That a reasonable person in [*name of plaintiff*]'s position would not have agreed to the [*insert medical procedure*] if he or she had been fully informed of the results and risks of [and alternatives to] the procedure; and**
- 4. That [*name of plaintiff*] was harmed by a result or risk that [*name of defendant*] should have explained before the [*insert medical procedure*] was performed.**

New September 2003

This instruction should be read in conjunction with *CACI No. 532, Informed Consent--Definition*.

If the patient is a minor or is incapacitated, tailor the instruction accordingly.

Also, see *CACI No. 531, Consent on Behalf of Another*.

■ A physician's duty of reasonable disclosure for purposes of consent to a proposed medical procedure was established in *Cobbs v. Grant* (1972) 8 Cal.3d 229 [104 Cal.Rptr. 505, 502 P.2d 1] .

■ On causation: "There must be a causal relationship between the physician's failure to inform and the injury to the plaintiff. Such causal connection arises only if it is established that had revelation been made consent to treatment would not have been given." (*Cobbs, supra*, 8 Cal.3d at p. 245 .)

■ A doctor generally does not have a duty to disclose information concerning non-recommended procedures. (*Vandi v. Permanente Medical Group, Inc.* (1992) 7 Cal.App.4th 1064, 1071 [9 Cal.Rptr.2d 463] .) However, a doctor must make "such disclosures as are required for competent practice within the medical community." (*Ibid.*)

■ The objective test is whether a reasonable person in plaintiff's position would have refused consent if he or she had been fully informed. (*Cobbs, supra*, 8 Cal.3d at p. 245 .) However, the defendant can seek to prove that this particular plaintiff still would have consented even if properly informed (as an affirmative defense). (*Warren v. Schechter* (1997) 57 Cal.App.4th 1189, 1206 [67 Cal.Rptr.2d 573] .)

■ "[A]n action for failure to obtain informed consent lies where 'an undisclosed inherent complication ... occurs,' not where a disclosed complication occurs." (*Warren, supra*, 57 Cal.App.4th at p. 1202 (citation omitted).)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 395, 397, 398, 400-507

California Tort Guide (Cont.Ed.Bar 3d ed.) § 9.11

3 Levy et al., California Torts, Ch. 31, *Liability of Physicians and Other Medical Practitioners* (Matthew Bender)

6 *California Forms of Pleading and Practice*, Ch. 58, *Assault and Battery*, § 58.14 (Matthew Bender)

36 *California Forms of Pleading and Practice*, Ch. 414, *Physicians and Other Medical Personnel* (Matthew Bender)

2 *California Points and Authorities*, Ch. 21, *Assault and Battery* (Matthew Bender)

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

Publisher's Notes

This instruction covers issues presented in BAJI Nos. 6.10 and 6.11.

Legal Topics:

For related research and practice materials, see the following legal topics:

Healthcare LawTreatmentFailures to Disclose & WarnGeneral OverviewHealthcare LawTreatmentFailures to Disclose & WarnMedical ProceduresHealthcare LawTreatmentPatient ConsentInformed ConsentTortsMalpractice & Professional LiabilityHealthcare ProvidersTortsNegligenceCausationGeneral Overview



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CHAPTER 5 California Judicial Council Medical Negligence Instructions

*2-5 California Forms of Jury Instruction CACI 534***CACI 534 Informed Refusal--Definition**

[A/An] [insert type of medical practitioner] must explain the risks of refusing a procedure in language that the patient can understand and give the patient as much information as [he/she] needs to make an informed decision, including any risk that a reasonable person would consider important in deciding not to have [a/an] [insert medical procedure]. The patient must be told about any risk of death or serious injury or significant potential complications that may occur if the procedure is refused. [A/An] [insert type of medical practitioner] is not required to explain minor risks that are not likely to occur.

New September 2003

This instruction should be read in conjunction with *CACI No. 535, Risks of Nontreatment--Essential Factual Elements*.

If the patient is a minor or is incapacitated, tailor the instruction accordingly.

Also, see *CACI No. 531, Consent on Behalf of Another*.

- The definition of "informed consent" in *Cobbs v. Grant* (1972) 8 Cal.3d 229 [104 Cal.Rptr. 505, 502 P.2d 1] applies "whether the procedure involves treatment or a diagnostic test." (*Truman v. Thomas* (1980) 27 Cal.3d 285, 292 [165 Cal.Rptr. 308, 611 P.2d 902] .)

- In *Truman*, "the high court extended the duty to make disclosure to include recommended diagnostic as well as therapeutic procedures and to include situations in which the patient declines the recommended procedure." (*Vandi v. Permanente Medical Group, Inc.* (1992) 7 Cal.App.4th 1064, 1069

[9 Cal.Rptr.2d 463] .) This has been termed the "informed refusal" doctrine. (*Townsend v. Turk* (1990) 218 Cal.App.3d 278, 284 [266 Cal.Rptr. 821] .)

■ "In a nutshell, a doctor has a duty to disclose all material information to his patient which will enable that patient to make an informed decision regarding the taking or refusal to take such a test." (*Moore v. Preventive Medicine Medical Group, Inc.* (1986) 178 Cal.App.3d 728, 736 [223 Cal.Rptr. 859] .)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 395, 400-404, 406, 407, 409, 410

California Tort Guide (Cont.Ed.Bar 3d ed.) § 9.12

3 Levy et al., California Torts, Ch. 31, *Liability of Physicians and Other Medical Practitioners*, § 31.14 (Matthew Bender)

36 California Forms of Pleading and Practice, Ch. 414, *Physicians and Other Medical Personnel* (Matthew Bender)

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

33 *California Legal Forms*, Ch. 104, *Health Care Transactions, Consents, and Directives*, § 104.11 (Matthew Bender)

Publisher's Notes

This instruction covers issues presented in BAJI No. 6.11.5.

Legal Topics:

For related research and practice materials, see the following legal topics:

Healthcare Law Actions Against Healthcare Workers Doctors & Physicians Healthcare Law Treatment Failures to Disclose & Warn Medical Procedures Healthcare Law Treatment Patient Consent Informed Consent Healthcare Law Treatment Patient Consent Right to Refuse Treatment Torts Malpractice & Professional Liability Healthcare Providers



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CHAPTER 5 California Judicial Council Medical Negligence Instructions

2-5 California Forms of Jury Instruction CACI 535

CACI 535 Risks of Nontreatment--Essential Factual Elements

[Name of plaintiff] claims that [name of defendant] was negligent because [he/she] did not fully inform [name of plaintiff] about the risks of refusing the [insert medical procedure]. To establish this claim, [name of plaintiff] must prove all of the following:

- 1. That [name of defendant] did not perform the [insert medical procedure] on [name of plaintiff];**
- 2. That [name of defendant] did not fully inform [name of plaintiff] about the risks of refusing the [insert medical procedure];**
- 3. That a reasonable person in [name of plaintiff]'s position would have agreed to the [insert medical procedure] if he or she had been fully informed about these risks; and**
- 4. That [name of plaintiff] was harmed by the failure to have the [insert medical procedure] performed.**

New September 2003

This instruction should be read in conjunction with *CACI No. 534, Informed Refusal--Definition*.

If the patient is a minor or is incapacitated, tailor the instruction accordingly.

Also, see *CACI No. 531, Consent on Behalf of Another*.

■ The definition of "informed consent" in *Cobbs v. Grant* (1972) 8 Cal.3d 229 [104 Cal.Rptr. 505, 502 P.2d 1] applies "whether the procedure involves treatment or a diagnostic test." (*Truman v. Thomas* (1980) 27 Cal.3d 285, 292 [165 Cal.Rptr. 308, 611 P.2d 902] .)

■ In *Truman*, "the high court extended the duty to make disclosure to include recommended diagnostic as well as therapeutic procedures and to include situations in which the patient declines the recommended procedure." (*Vandi v. Permanente Medical Group, Inc.* (1992) 7 Cal.App.4th 1064, 1069 [9 Cal.Rptr.2d 463] .) This has been termed the "informed refusal" doctrine. (*Townsend v. Turk* (1990) 218 Cal.App.3d 278, 284 [266 Cal.Rptr. 821] .)

■ "In a nutshell, a doctor has a duty to disclose all material information to his patient which will enable that patient to make an informed decision regarding the taking or refusal to take such a test." (*Moore v. Preventive Medicine Medical Group, Inc.* (1986) 178 Cal.App.3d 728, 736 [223 Cal.Rptr. 859] .)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 395, 400-404, 406, 407, 409, 410

California Tort Guide (Cont.Ed.Bar 3d ed.) § 9.12

3 Levy et al., California Torts, Ch. 31, *Liability of Physicians and Other Medical Practitioners*, § 31.14 (Matthew Bender)

36 California Forms of Pleading and Practice, Ch. 414, *Physicians and Other Medical Personnel* (Matthew Bender)

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

Publisher's Notes

This instruction covers issues presented in BAJI No. 6.11.5.

Legal Topics:

For related research and practice materials, see the following legal topics:

Healthcare LawTreatmentFailures to Disclose & WarnMedical ProceduresHealthcare LawTreatmentFailures to Disclose & WarnTreatment OptionsHealthcare LawTreatmentPatient ConsentConsent by Guardians & ParentsHealthcare LawTreatmentPatient ConsentRight to Refuse TreatmentTortsMalpractice & Professional LiabilityHealthcare Providers



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CHAPTER 5 California Judicial Council Medical Negligence Instructions

2-5 California Forms of Jury Instruction CACI 536-CACI 549

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CACI 536Reserved for Future Use



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CHAPTER 5 California Judicial Council Medical Negligence Instructions

2-5 California Forms of Jury Instruction CACI 550

CACI 550 Affirmative Defense--Plaintiff Would Have Consented

[Name of defendant] **claims that even if a reasonable person in [name of plaintiff]'s position might not have consented to the [insert medical procedure] if he or she had been given enough information about its risks, [name of plaintiff] still would have consented to the procedure.**

If you decide [name of defendant] has proved that [name of plaintiff] would have consented, you must conclude that [his/her] failure to inform [name of plaintiff] of the risks was not a substantial factor in causing [name of plaintiff]'s harm.

New September 2003

"Whenever appropriate, the court should instruct the jury on the defenses available to a doctor who has failed to make the disclosure required by law." (*Cobbs v. Grant* (1972) 8 Cal.3d 229, 245 [104 Cal.Rptr. 505, 502 P.2d 1] .)

This instruction could be modified to cover "informed refusal" cases by redrafting it to state, in substance, that even if the plaintiff had known of the risks of refusal, he or she still would have refused the test.

- The objective test is whether a reasonable person in plaintiff's position would have refused consent if he or she had been fully informed. (*Cobbs, supra*, 8 Cal.3d at p. 245 .) However, the defendant can seek to prove that this particular plaintiff still would have consented even if properly informed (as an affirmative defense). (*Warren v. Schechter* (1997) 57 Cal.App.4th 1189, 1206 [67 Cal.Rptr.2d 573] .)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 395, 398

California Tort Guide (Cont.Ed.Bar 3d ed.) § 9.11

3 Levy et al., California Torts, Ch. 31, *Liability of Physicians and Other Medical Practitioners*, § 31.14 (Matthew Bender)

36 California Forms of Pleading and Practice, Ch. 414, *Physicians and Other Medical Personnel* (Matthew Bender)

Publisher's Notes

This instruction covers issues presented in BAJI No. 6.11.

Legal Topics:

For related research and practice materials, see the following legal topics:

Healthcare LawActions Against Healthcare WorkersDoctors & PhysiciansHealthcare LawTreatmentPatient

ConsentGeneral OverviewHealthcare LawTreatmentPatient ConsentInformed ConsentHealthcare LawTreatmentPatient

ConsentRight to Refuse TreatmentTortsMalpractice & Professional LiabilityHealthcare Providers



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CHAPTER 5 California Judicial Council Medical Negligence Instructions

2-5 California Forms of Jury Instruction CACI 551

CACI 551 Affirmative Defense--Waiver

[Name of defendant] **claims that [he/she] did not have to inform [name of patient] of the risks of the [insert medical procedure] because [name of patient] asked not to be told of the risks.**

If [name of defendant] has proved that [name of patient] told [him/her] that [he/she] did not want to be informed of the risks of the [insert medical procedure], then you must conclude that [name of defendant] was not negligent in failing to inform [name of patient] of the risks.

New September 2003

"Whenever appropriate, the court should instruct the jury on the defenses available to a doctor who has failed to make the disclosure required by law." (*Cobbs v. Grant* (1972) 8 Cal.3d 229, 245 [104 Cal.Rptr. 505, 502 P.2d 1] .) This instruction could be modified to cover "informed refusal" cases by redrafting it to state, in substance, that the plaintiff indicated that he or she did not want to be informed of the risks of refusing the test.

- "[A] medical doctor need not make disclosure of risks when the patient requests that he not be so informed." (*Cobbs, supra*, 8 Cal.3d at p. 245 .)

- This defense is considered a "justification." Justification for failure to disclose is an affirmative defense on which the defendant has the burden of proof. (*Mathis v. Morrissey* (1992) 11 Cal.App.4th 332, 347, fn. 9 [13 Cal.Rptr.2d 819] .)

- In *Putensen v. Clay Adams, Inc.* (1970) 12 Cal.App.3d 1062, 1083-1084 [91 Cal.Rptr. 319] , the

court held that it was not error for the court to refuse an instruction on informed consent where the evidence showed that the doctor's attempt to explain the medical procedure was prevented by the plaintiff's insistence on remaining ignorant of the risks involved.

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 395, 398

California Tort Guide (Cont.Ed.Bar 3d ed.) § 9.11

3 Levy et al., California Torts, Ch. 31, *Liability of Physicians and Other Medical Practitioners*, § 31.14 (Matthew Bender)

36 California Forms of Pleading and Practice, Ch. 414, *Physicians and Other Medical Personnel* (Matthew Bender)

Publisher's Notes

This instruction covers issues presented in BAJI No. 6.11.

Legal Topics:

For related research and practice materials, see the following legal topics:

Healthcare Law Actions Against Healthcare Workers Doctors & Physicians Healthcare Law Treatment Patient Consent General Overview Healthcare Law Treatment Patient Consent Informed Consent Torts Malpractice & Professional Liability Healthcare Providers Torts Negligence Defenses General Overview



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CHAPTER 5 California Judicial Council Medical Negligence Instructions

*2-5 California Forms of Jury Instruction CACI 552***CACI 552 Affirmative Defense--Simple Procedure**

[*Name of defendant*] **claims that [he/she] did not have to inform [*name of plaintiff*] of the risks of [a/an] [*insert medical procedure*]. [A/An] [*insert type of medical practitioner*] is not required to tell a patient about the dangers of a simple procedure if it is commonly understood that the dangers are not likely to occur.**

If [*name of defendant*] has proved that [a/an] [*insert medical procedure*] is a simple procedure, and that it is commonly understood that any dangers are not likely to occur, then [*name of defendant*] was not required to inform [*name of plaintiff*] of the risks.

New September 2003

"Whenever appropriate, the court should instruct the jury on the defenses available to a doctor who has failed to make the disclosure required by law." (*Cobbs v. Grant* (1972) 8 Cal.3d 229, 245 [104 Cal.Rptr. 505, 502 P.2d 1] .) This instruction could be modified to cover "informed refusal" cases by redrafting it to state, in substance, that the risks of refusing the test were commonly understood to be unlikely to occur.

- "[A] disclosure need not be made if the procedure is simple and the danger remote and commonly appreciated to be remote." (*Cobbs, supra*, 8 Cal.3d at p. 245 .)

- "[T]here is no physician's duty to discuss the relatively minor risks inherent in common procedures, when it is common knowledge that such risks inherent in the procedure are of very low incidence." (*Cobbs, supra*, 8 Cal.3d at p. 244 .)

■ This defense is considered a "justification." Justification for failure to disclose is an affirmative defense on which the defendant has the burden of proof. (*Mathis v. Morrissey* (1992) 11 Cal.App.4th 332, 347, fn. 9 [13 Cal.Rptr.2d 819] .)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 395, 398

California Tort Guide (Cont.Ed.Bar 3d ed.) § 9.11

3 Levy et al., California Torts, Ch. 31, *Liability of Physicians and Other Medical Practitioners*, § 31.14 (Matthew Bender)

6 *California Forms of Pleading and Practice*, Ch. 58, *Assault and Battery*, § 58.14 (Matthew Bender)

36 *California Forms of Pleading and Practice*, Ch. 414, *Physicians and Other Medical Personnel* (Matthew Bender)

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

33 *California Legal Forms*, Ch. 104, *Health Care Transactions, Consents, and Directives*, § 104.11 (Matthew Bender)

Publisher's Notes

This instruction covers issues presented in BAJI No. 6.11.

Legal Topics:

For related research and practice materials, see the following legal topics:

Healthcare Law Actions Against Healthcare Workers Doctors & Physicians Healthcare Law Treatment Patient Consent General Overview Healthcare Law Treatment Patient Consent Informed Consent Torts Malpractice & Professional Liability Healthcare Providers Torts Negligence Defenses General Overview



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CHAPTER 5 California Judicial Council Medical Negligence Instructions

2-5 California Forms of Jury Instruction CACI 553

CACI 553 Affirmative Defense--Emotional State of Patient

[Name of defendant] claims that [he/she] did not have to inform [name of plaintiff] of the risks of the [insert medical procedure]. [A/An] [insert type of medical practitioner] does not have to provide information about risks if the information will so seriously upset the patient that the patient will not be able to reasonably consider the risks of refusing to have the medical procedure.

If [name of defendant] has proved that [name of plaintiff] would have been so seriously upset by being told of the risks that [he/she] would not have been able to reasonably consider the risks of refusing to have the [insert medical procedure], then [name of defendant] was not required to inform [name of plaintiff] of the risks.

New September 2003

"Whenever appropriate, the court should instruct the jury on the defenses available to a doctor who has failed to make the disclosure required by law." (*Cobbs v. Grant* (1972) 8 Cal.3d 229, 245 [104 Cal.Rptr. 505, 502 P.2d 1] .) This instruction could be modified to cover "informed refusal" cases by redrafting it to state, in substance, that the information regarding the risks of refusing the test would have seriously upset the patient.

- "A disclosure need not be made beyond that required within the medical community when a doctor can prove by a preponderance of the evidence he relied upon facts which would demonstrate to a reasonable man the disclosure would have so seriously upset the patient that the patient would not have been able to dispassionately weigh the risks of refusing to undergo the recommended treatment." (*Cobbs, supra*, 8 Cal.3d at p. 246 .)

■ This defense is considered a "justification." Justification for failure to disclose is an affirmative defense on which the defendant has the burden of proof. (*Mathis v. Morrissey* (1992) 11 Cal.App.4th 332, 347, fn. 9 [13 Cal.Rptr.2d 819] .)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 395, 398

California Tort Guide (Cont.Ed.Bar 3d ed.) § 9.11

3 Levy et al., California Torts, Ch. 31, *Liability of Physicians and Other Medical Practitioners*, § 31.14 (Matthew Bender)

36 California Forms of Pleading and Practice, Ch. 414, *Physicians and Other Medical Personnel* (Matthew Bender)

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

33 *California Legal Forms*, Ch. 104, *Health Care Transactions, Consents, and Directives*, § 104.11 (Matthew Bender)

Publisher's Notes

This instruction covers issues presented in BAJI No. 6.11.

Legal Topics:

For related research and practice materials, see the following legal topics:

Healthcare LawActions Against Healthcare WorkersDoctors & PhysiciansHealthcare LawTreatmentPatient ConsentInformed ConsentHealthcare LawTreatmentPatient ConsentRight to Refuse TreatmentTortsMalpractice & Professional LiabilityHealthcare ProvidersTortsNegligenceDefensesGeneral Overview



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CHAPTER 5 California Judicial Council Medical Negligence Instructions

2-5 California Forms of Jury Instruction CACI 554

CACI 554 Affirmative Defense--Emergency

[Name of defendant] claims that [he/she] did not have to obtain [name of patient/authorized person]'s informed consent to the [insert medical procedure] because an emergency existed.

To succeed, [name of defendant] must prove both of the following:

1. That [name of defendant] reasonably believed the [insert medical procedure] had to be done immediately in order to preserve the life or health of [name of patient]; and

2. That [insert one or more of the following:]

[[name of patient] was unconscious] [or]

[there was not enough time to inform [name of patient]] [or]

[there was not enough time to get consent from an authorized person].

New September 2003

"Whenever appropriate, the court should instruct the jury on the defenses available to a doctor who has failed to make the disclosure required by law." (*Cobbs v. Grant* (1972) 8 Cal.3d 229, 245 [104 Cal.Rptr. 505, 502 P.2d 1] .) This instruction could be modified to cover "informed refusal" cases by redrafting it to state, in substance, that the emergency situation made it impossible to inform the patient regarding the risks of refusing the test.

■ Consent is implied in an emergency situation. (*Cobbs, supra*, 8 Cal.3d at p. 243 .)

■ *Business and Professions Code* sections 2397(a) and 1627.7(a) provide that a medical practitioner shall not be liable for injury caused in emergency situations by reason of the failure to inform if: (1) the patient was unconscious, (2) there was not enough time to inform the patient, or (3) there was not enough time to get consent from an authorized person.

■ This defense is considered a "justification." Justification for failure to disclose is an affirmative defense on which the defendant has the burden of proof. (*Mathis v. Morrissey* (1992) 11 Cal.App.4th 332, 347, fn. 9 [13 Cal.Rptr.2d 819] .)

■ The existence of an emergency situation can also be a defense to battery. (*Wheeler v. Barker* (1949) 92 Cal.App.2d 776, 781 [208 P.2d 68] ; *Preston v. Hubbell* (1948) 87 Cal.App.2d 53, 57-58 [196 P.2d 113] ; *Hundley v. St. Francis Hospital* (1958) 161 Cal.App.2d 800, 802 [327 P.2d 131] .)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, § 399

California Tort Guide (Cont.Ed.Bar 3d ed.) § 9.15

3 Levy et al., California Torts, Ch. 31, *Liability of Physicians and Other Medical Practitioners*, §§ 31.14, 31.62 (Matthew Bender)

6 *California Forms of Pleading and Practice*, Ch. 58, *Assault and Battery*, § 58.14 (Matthew Bender)

36 *California Forms of Pleading and Practice*, Ch. 414, *Physicians and Other Medical Personnel* (Matthew Bender)

2 *California Points and Authorities*, Ch. 21, *Assault and Battery* (Matthew Bender)

33 *California Legal Forms*, Ch. 104, *Health Care Transactions, Consents, and Directives*, § 104.11 (Matthew Bender)

Publisher's Notes

This instruction covers issues presented in BAJI Nos. 6.13, 6.14, 6.15, and 6.16.

Legal Topics:

For related research and practice materials, see the following legal topics:

Healthcare Law Actions Against Healthcare Workers Doctors & Physicians Healthcare Law Treatment Patient Consent Informed Consent Torts Malpractice & Professional Liability Healthcare Providers



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CHAPTER 5 California Judicial Council Medical Negligence Instructions

2-5 California Forms of Jury Instruction CACI 555

CACI 555 Affirmative Defense--Statute of Limitations--Medical Malpractice--One-Year Limit (Code Civ. Proc., § 340.5)

[Name of defendant] contends that [name of plaintiff]'s lawsuit was not filed within the time set by law. To succeed on this defense, [name of defendant] must prove that before [insert date one year before date of filing], [name of plaintiff] discovered, or knew of facts that would have caused a reasonable person to suspect, that [he/she] had suffered harm that was caused by someone's wrongful conduct.

[If, however, [name of plaintiff] proves [insert tolling provision(s) of general applicability, e.g., Code Civ. Proc., §§ 351 [absence from California], 352 [insanity], 352.1 [prisoners], 352.5 [restitution orders], 353.1 [court's assumption of attorney's practice], 354 [war], 356 [injunction]], the period within which [name of plaintiff] had to file the lawsuit is extended for the amount of time that [insert tolling provision, e.g., [name of defendant] was absent from California].]

New April 2009

Directions for Use

Use CACI No. 556, *Affirmative Defense--Statute of Limitations--Medical Malpractice--Three-Year Limit*, if the three-year limitation provision is at issue.

If the notice of intent to sue required by *Code of Civil Procedure* section 364 is served within 90 days of the date on which the statute of limitations will run, the statute of limitations is tolled for 90 days beyond the end of the limitations period. (See *Code Civ. Proc.*, § 364; *Woods v. Young* (1991) 53 Cal.3d 315, 325-326 [279 Cal.Rptr. 613, 807 P.2d 455] .) Adjust the "date one year before the date of filing" in the instruction accordingly. If there is an issue of fact with regard to compliance with the requirements of section 364, the instruction may need to be modified accordingly.

Give the optional last paragraph if there is a question of fact concerning a tolling provision from the Code of Civil Procedure. If so, the verdict form should ask the jury to find (1) the "discovery" date (the date on which the plaintiff discovered or knew of facts that would have caused a reasonable person to suspect that he or she had suffered harm that was caused by someone's wrongful conduct); (2) whether the tolling provision applies; and (3) if so, for what period of time. The court can then add the additional time to the discovery date and determine whether the action is timely.

Contrary to the otherwise applicable rule (see *CACI No. 455, Statute of Limitations--Delayed Discovery*), the defendant has been given the burden of proving that the plaintiff discovered or should have discovered the facts alleged to constitute the defendant's wrongdoing more than one year before filing the action. (See *Samuels v. Mix* (1999) 22 Cal.4th 1, 8-10 [91 Cal.Rptr.2d 273, 989 P.2d 701] [construing structurally similar *Code Civ. Proc.*, § 340.6, on legal malpractice, to place burden regarding delayed discovery on the defendant and disapproving *Burton v. Kaiser Foundation Hospitals* (1979) 93 Cal.App.3d 813 [155 Cal.Rptr. 763], which had reached the opposite result under *Code Civ. Proc.*, § 340.5].) See also *CACI No. 610, Affirmative Defense--Statute of Limitations--Attorney Malpractice--One-Year Limit*.

Sources and Authority

- *Code of Civil Procedure* section 340.5 provides:

In an action for injury or death against a health care provider based upon such person's alleged professional negligence, the time for the commencement of action shall be three years after the date of injury or one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the injury, whichever occurs first. In no event shall the time for commencement of legal action exceed three years unless tolled for any of the following: (1) upon proof of fraud, (2) intentional concealment, or (3) the presence of a foreign body, which has no therapeutic or diagnostic purpose or effect, in the person of the injured person. Actions by a minor shall be commenced within three years from the date of the alleged wrongful act except that actions by a minor under the full age of six years shall be commenced within three years or prior to his eighth birthday whichever provides a longer period. Such time limitation shall be tolled for minors for any period during which parent or guardian and defendant's insurer or health care provider have committed fraud or collusion in the failure to bring an action on behalf of the injured minor for professional negligence.

For the purposes of this section:

- (1) "Health care provider" means any person licensed or certified pursuant to Division 2 (commencing with Section 500) of the Business and Professions Code, or licensed pursuant to the Osteopathic Initiative Act, or the Chiropractic Initiative Act, or licensed pursuant to Chapter 2.5 (commencing with Section 1440) of Division 2 of the Health and Safety Code and any clinic, health dispensary, or health facility, licensed pursuant to Division 2 (commencing with Section 1200) of the Health and Safety Code. "Health care provider" includes the legal representatives of a health care provider;
- (2) "Professional negligence" means a negligent act or omission to act by a health care provider in the rendering of professional services, which act or omission is the proximate cause of a personal injury or wrongful death, provided that such services are within the

scope of services for which the provider is licensed and which are not within any restriction imposed by the licensing agency or licensed hospital.

■ *Code of Civil Procedure section 364(a)* provides:

No action based upon the health care provider's professional negligence may be commenced unless the defendant has been given at least 90 days' prior notice of the intention to commence the action.

■ *Code of Civil Procedure section 364(d)* provides:

If the notice is served within 90 days of the expiration of the applicable statute of limitations, the time for the commencement of the action shall be extended 90 days from the service of the notice.

■ "[T]he *Jolly* [*Jolly v. Eli Lilly & Co. (1988) 44 Cal.3d 1103, 1109 [245 Cal.Rptr. 658, 751 P.2d 923]*] analysis applies to section 340.5: 'The one-year period [section 340.5] commences when the plaintiff is aware of both the physical manifestation of the injury and its negligent cause.' [P] 'Our Supreme Court has often discussed the one-year rule's requirement of discovery of the negligent cause of injury. When a plaintiff has information which would put a reasonable person on inquiry, when a plaintiff's "reasonably founded suspicions [have been] aroused" and the plaintiff has "become alerted to the necessity for investigation and pursuit of her remedies," the one-year period commences. "Possession of 'presumptive' as well as 'actual' knowledge will commence the running of the statute." ' ' ' (*Dolan v. Borelli (1993) 13 Cal.App.4th 816, 823 [16 Cal.Rptr.2d 714]* , internal citations omitted.)

■ "We see no reason to apply the second sentence of section 340.5 to the one-year period it does not mention, in addition to the three-year period it does mention. The general purpose of MICRA does not require us to expand that sentence beyond its language." (*Belton v. Bowers Ambulance Serv. (1999) 20 Cal.4th 928, 934 [86 Cal.Rptr.2d 107, 978 P.2d 591]* [*Code Civ. Proc.*, § 352.1, which tolls statutes of limitation for prisoners, applies to extend one-year period of *Code Civ. Proc.*, § 340.5].)

■ "The implications of *Belton's* analysis for our case here is inescapable. Like tolling the statute of limitations for confined prisoners under section 352.1, tolling under section 351 for a defendant's absence from California is of general applicability [and therefore extends the one-year period of *Code of Civil Procedure section 340.5*]. (For other general tolling provisions, see § 352 [minors or insanity]; § 352.5 [restitution orders]; § 353.1 [court's assumption of attorney's practice]; § 354 [war]; § 356 [injunction].)" (*Kaplan v. Mamelak (2008) 162 Cal.App.4th 637, 643 [75 Cal.Rptr.3d 861]* .)

■ "[A] plaintiff's minority as such does not toll the limitations period of section 340.5. When the Legislature added the separate statute of limitations for minors to section 340.5 in 1975, it clearly intended that the general provision for tolling of statutes of limitation during a person's minority (§ 352, subd. (a)(1)) should no longer apply to medical malpractice actions." (*Steketee v. Lintz (1985) 38 Cal.3d 46, 53 [210 Cal.Rptr 781, 694 P.2d 1153]* , internal citations omitted.)

■ "Section 340.5 creates two separate statutes of limitations, both of which must be satisfied if a plaintiff is to timely file a medical malpractice action. First, the plaintiff must file within one year after she first 'discovers' the injury *and the negligent cause* of that injury. Secondly, she must file within three years after she first experiences harm from the injury. This means that if a plaintiff does not 'discover' the negligent cause of her injury until more than three years after she first experiences harm from the injury, she will not be able to bring a malpractice action against the medical practitioner or hospital whose malpractice caused her injury." (*Ashworth v. Mem'l Hosp. (1988) 206 Cal.App.3d 1046, 1054 [254 Cal.Rptr. 104]* , original italics.)

■ "That legislative purpose [re: *Code Civ. Proc.*, § 364] is best effectuated by construing section 364(d) as tolling the

one-year statute of limitations when section 364(a)'s ninety-day notice of intent to sue is served during, but not before, the last ninety days of the one-year limitations period. Because the statute of limitations is tolled for 90 days and not merely extended by 90 days from the date of service of the notice, this construction results in a period of 1 year and 90 days in which to file the lawsuit. In providing for a waiting period of at least 90 days before suit can be brought, this construction achieves the legislative objective of encouraging negotiated resolutions of disputes." (*Woods, supra*, 53 Cal.3d at p. 325.)

Secondary Sources

Haning et al., *California Practice Guide: Personal Injury* (The Rutter Group) PP 1:67.1, 5:109

California Tort Guide (Cont.Ed.Bar 3d ed.) §§ 9.26, 9.67-9.72

4 Levy et al., *California Torts, Ch. 31, Liability of Physicians and Other Medical Professionals*, § 31.60 (Matthew Bender)

36 *California Forms of Pleading and Practice, Ch. 415, Physicians: Medical Malpractice*, § 415.47 (Matthew Bender)

17 *California Points and Authorities, Ch. 175, Physicians and Surgeons: Medical Malpractice*, § 175.45 et seq. (Matthew Bender)

1 *Matthew Bender Practice Guide: California Pretrial Civil Procedure, Ch. 4, Limitation of Actions*, 4.27

1 *California Medical Malpractice: Law and Practice* (Thomson West) §§ 7:1-7:7

Publisher's Notes

There is no BAJI instruction on this subject.



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California Forms of Jury Instruction

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CHAPTER 5 California Judicial Council Medical Negligence Instructions

2-5 California Forms of Jury Instruction CACI 556

CACI 556 Affirmative Defense--Statute of Limitations--Medical Malpractice--Three-Year Limit (Code Civ. Proc., § 340.5)

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

[If, however, [*name of plaintiff*] proves

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

[that [he/she/it] did not discover the alleged wrongful act or omission because [*name of defendant*] acted fraudulently[,; or]]

[that [*name of defendant*] intentionally concealed facts constituting the wrongful act or omission[,; or]]

[that the alleged wrongful act or omission involved the presence of an object that had no therapeutic or diagnostic purpose or effect in [*name of plaintiff*]'s body[,;]

the period within which [*name of plaintiff*] had to file the lawsuit is extended for the amount of time that [*insert tolling provision, e.g., [name of defendant] intentionally concealed the facts*].]

New April 2009

Use CACI No. 555, *Affirmative Defense--Statute of Limitations--Medical Malpractice--One-Year Limit*, if the one-year limitation provision is at issue.

If no tolling provision from *Code of Civil Procedure* section 340.5 is at issue, read only the first paragraph. Read the rest of the instruction if there is a question of fact concerning a tolling provision. If so, the verdict form should ask the jury to find (1) the date on which the alleged injury occurred; (2) whether the tolling provision applies; and (3) if so, for what period of time. The court can then add the additional time to the date of injury and determine whether the action is timely.

If the notice of intent to sue required by *Code of Civil Procedure* section 364 is served within 90 days of the date on which the statute of limitations will run, the statute of limitations is tolled for 90 days beyond the end of the limitation period. (See *Code Civ. Proc.*, § 364; *Russell v. Stanford Univ. Hosp.* (1997) 15 Cal.4th 783, 789-790 [64 Cal.Rptr.2d 97, 937 P.2d 640] .) If there is an issue of fact with regard to compliance with the requirements of section 364, the instruction may need to be modified accordingly.

■ *Code of Civil Procedure* section 340.5 provides:

In an action for injury or death against a health care provider based upon such person's alleged professional negligence, the time for the commencement of action shall be three years after the date of injury or one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the injury, whichever occurs first. In no event shall the time for commencement of legal action exceed three years unless tolled for any of the following: (1) upon proof of fraud, (2) intentional concealment, or (3) the presence of a foreign body, which has no therapeutic or diagnostic purpose or effect, in the person of the injured person. Actions by a minor shall be commenced within three years from the date of the alleged wrongful act except that actions by a minor under the full age of six years shall be commenced within three years or prior to his eighth birthday whichever provides a longer period. Such time limitation shall be tolled for minors for any period during which parent or guardian and defendant's insurer or health care provider have committed fraud or collusion in the failure to bring an action on behalf of the injured minor for professional negligence.

For the purposes of this section:

(1) "Health care provider" means any person licensed or certified pursuant to Division 2 (commencing with Section 500) of the Business and Professions Code, or licensed pursuant to the Osteopathic Initiative Act, or the Chiropractic Initiative Act, or licensed pursuant to Chapter 2.5 (commencing with Section 1440) of Division 2 of the Health and Safety Code and any clinic, health dispensary, or health facility, licensed pursuant to Division 2 (commencing with Section 1200) of the Health and Safety Code. "Health care provider" includes the legal representatives of a health care provider;

(2) "Professional negligence" means a negligent act or omission to act by a health care provider in the rendering of professional services, which act or omission is the proximate cause of a personal injury or wrongful death, provided that such services are within the scope of services for which the provider is licensed and which are not within any restriction imposed by the licensing agency or licensed hospital.

■ "No tolling provision outside of MICRA can extend the three-year maximum time period that section 340.5 establishes." (*Belton v. Bowers Ambulance Serv.* (1999) 20 Cal.4th 928, 931 [86 Cal.Rptr.2d 107, 978 P.2d 591] ; see

also *Fogarty v. Superior Court* (1981) 117 Cal.App.3d 316, 319-321 [172 Cal.Rptr. 594] [Code Civ. Proc., § 352 does not toll statute for insanity].)

■ "The three-year limitations period of section 340.5 provides an outer limit which terminates all malpractice liability and it commences to run when the patient is aware of the physical manifestation of her injury without regard to awareness of the negligent cause." (*Hills v. Aronsohn* (1984) 152 Cal.App.3d 753, 760 [199 Cal.Rptr. 816] .)

■ "Section 340.5 creates two separate statutes of limitations, both of which must be satisfied if a plaintiff is to timely file a medical malpractice action. First, the plaintiff must file within one year after she first 'discovers' the injury *and the negligent cause* of that injury. Secondly, she must file within three years after she first experiences harm from the injury. This means that if a plaintiff does not 'discover' the negligent cause of her injury until more than three years after she first experiences harm from the injury, she will not be able to bring a malpractice action against the medical practitioner or hospital whose malpractice caused her injury." (*Ashworth v. Mem'l Hosp.* (1988) 206 Cal.App.3d 1046, 1054 [254 Cal.Rptr. 104] , original italics.)

■ "The same considerations of legislative intent that compelled us, in [*Woods v. Young* (1991) 53 Cal.3d 315, 325-326 [279 Cal.Rptr. 613, 807 P.2d 455]] , to construe *Code of Civil Procedure* section 364, subdivision (d), as 'tolling' the one-year limitations period also apply to the three-year limitation. Unless the limitations period is so construed, the legislative purpose of reducing the cost and increasing the efficiency of medical malpractice litigation by, among other things, encouraging negotiated resolution of disputes will be frustrated. Moreover, a plaintiff's attorney who gives notice within the last 90 days of the 3-year limitations period will confront the dilemma we addressed in *Woods*, i.e., a choice between preserving the plaintiff's cause of action by violating the 90-day notice period under *Code of Civil Procedure* section 364, subdivision (d)--thereby invoking potential disciplinary proceedings by the State Bar--and forfeiting the client's cause of action. In the absence of tolling, the practical effect of the statute would be to shorten the statutory limitations period from three years to two years and nine months. As in the case of the one-year limitation, we discern no legislative intent to do so." (*Russell, supra*, 15 Cal.4th at pp. 789-790 .)

Secondary Sources

Haning et al., *California Practice Guide: Personal Injury* (The Rutter Group) P 1:67.1

California Tort Guide (Cont.Ed.Bar 3d ed.) §§ 9.26, 9.67-9.72

4 Levy et al., *California Torts, Ch. 31, Liability of Physicians and Other Medical Professionals*, § 31.60 (Matthew Bender)

36 *California Forms of Pleading and Practice, Ch. 415, Physicians: Medical Malpractice*, § 415.47 (Matthew Bender)

17 *California Points and Authorities, Ch. 175, Physicians and Surgeons: Medical Malpractice*, § 175.45 et seq. (Matthew Bender)

1 *Matthew Bender Practice Guide: California Pretrial Civil Procedure, Ch. 4, Limitation of Actions*, 4.27

1 *California Medical Malpractice: Law and Practice* (Thomson West) §§ 7:1-7:7

Publisher's Notes

There is no BAJI instruction on this subject.



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CHAPTER 5 California Judicial Council Medical Negligence Instructions

2-5 California Forms of Jury Instruction CACI 557-CACI 599

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CACI 557Reserved for Future Use



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CHAPTER 5 California Judicial Council Medical Negligence Instructions

2-5 California Forms of Jury Instruction CACI VF-500

CACI VF-500 Medical Negligence

We answer the questions submitted to us as follows:

1. Was [name of defendant] negligent in the diagnosis or treatment of [name of plaintiff]?

_____ Yes _____ No

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

2. Was [name of defendant]'s negligence a substantial factor in causing harm to [name of plaintiff]?

_____ Yes _____ No

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

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

[a. Past economic loss

[lost earnings..... \$_____].....

[lost profits..... \$_____].....

[medical expenses..... \$_____].....

[other past economic loss..... \$_____].....

..... Total Past Economic Damages: \$_____]

[b. Future economic loss

[lost earnings..... \$_____].....

[lost profits..... \$_____].....

[medical expenses..... \$_____].....

[other future economic loss..... \$_____].....

..... Total Future Economic Damages: \$_____]

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

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

..... TOTAL \$_____

Signed: _____

Presiding Juror

Dated: _____

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

New September 2003; Revised April 2007

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

This verdict form is based on *CACI No. 500, Essential Factual Elements*.

If specificity is not required, users do not have to itemize all the damages listed in question 3. The breakdown is optional depending on the circumstances.

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

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

Publisher's Notes

This verdict form covers issued presented in BAJI No. 16.01.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsVerdictsSpecial VerdictsHealthcare LawActions Against Healthcare WorkersDoctors & PhysiciansTortsMalpractice & Professional LiabilityHealthcare Providers



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CHAPTER 5 California Judicial Council Medical Negligence Instructions

2-5 California Forms of Jury Instruction CACI VF-501

CACI VF-501 Medical Negligence--Informed Consent--Affirmative Defense--Plaintiff Would Have Consented Even If Informed

We answer the questions submitted to us as follows:

1. Did [*name of defendant*] perform a [*insert medical procedure*] on [*name of plaintiff*]?

_____ Yes _____ No

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

2. Did [*name of plaintiff*] give [his/her] informed consent for the [*insert medical procedure*]?

_____ Yes _____ No

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

3. Would a reasonable person in [*name of plaintiff*]'s position have refused the [*insert medical procedure*] if he or she had been fully informed of the possible results and risks of [and alternatives to] the [*insert medical procedure*]?

_____ Yes _____ No

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

4. Would [name of plaintiff] have consented to the [insert medical procedure] even if [he/she] had been given enough information about the risks of the [insert medical procedure]?

_____ Yes _____ No

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

5. Was [name of plaintiff] harmed as a consequence of a result or risk that [name of defendant] should have explained before the [insert medical procedure] was performed?

_____ Yes _____ No

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

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

[a. Past economic loss

[lost earnings..... \$_____].....

[lost profits..... \$_____].....

[medical expenses..... \$_____].....

[other past economic loss..... \$_____].....

..... **Total Past Economic Damages: \$_____]**

[b. Future economic loss

[lost earnings..... \$_____].....

[lost profits..... \$_____].....

[medical expenses..... \$_____].....

[other future economic loss..... \$_____].....

..... **Total Future Economic Damages: \$_____]**

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

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

..... **TOTAL \$_____**

Signed: _____
Presiding Juror

Dated: _____

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

New September 2003; Revised April 2007

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

This verdict form is based on *CACI No. 533, Failure to Obtain Informed Consent--Essential Factual Elements*, and *CACI No. 550, Affirmative Defense--Plaintiff Would Have Consented*.

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

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

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

If the affirmative defense, which is contained in question 4, is not an issue in the case, question 4 should be omitted and the remaining questions renumbered accordingly.

Publisher's Notes

This verdict form covers issues presented in BAJI Nos. 16.01 and 16.01.1.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Verdicts Special Verdicts Healthcare Law Actions Against Healthcare Workers Doctors & Physicians Healthcare Law Treatment Patient Consent Informed Consent Healthcare Law Treatment Patient Consent Right to Refuse Treatment Torts Malpractice & Professional Liability Healthcare Providers



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CHAPTER 5 California Judicial Council Medical Negligence Instructions

2-5 California Forms of Jury Instruction CACI VF-502

CACI VF-502 Medical Negligence--Informed Consent--Affirmative Defense--Emergency

We answer the questions submitted to us as follows:

1. Did [name of defendant] perform a [insert medical procedure] on [name of plaintiff]?

_____ Yes _____ No

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

2. Did [name of plaintiff] give [his/her] informed consent to the [insert medical procedure]?

_____ Yes _____ No

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

3. Would a reasonable person in [name of plaintiff]'s position have refused the [insert medical procedure] if he or she had been fully informed of the possible results and risks of [and alternatives to] the [insert medical procedure]?

_____ Yes _____ No

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

4. Was [name of plaintiff] harmed as a consequence of a result or risk that [name of defendant] should have explained before the [insert medical procedure] was performed?

_____ Yes _____ No

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

5. Did [name of defendant] reasonably believe the [insert medical procedure] had to be done immediately in order to preserve the life or health of [name of plaintiff]?

_____ Yes _____ No

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

6. Was [name of plaintiff] unconscious?

_____ Yes _____ No

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

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

[a. Past economic loss

[lost earnings..... \$_____].....

[lost profits..... \$_____].....

[medical expenses..... \$_____].....

[other past economic loss..... \$_____].....

..... **Total Past Economic Damages: \$_____]**

[b. Future economic loss

[lost earnings..... \$_____].....

[lost profits..... \$_____].....

[medical expenses..... \$_____].....

[other future economic loss..... \$_____].....

..... **Total Future Economic Damages: \$_____]**

[c. Past noneconomic loss, including [physical

pain/mental suffering:..... \$_____]

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

..... TOTAL \$_____

Signed: _____

Presiding Juror

Dated: _____

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

New September 2003; Revised April 2007, October 2008

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

This verdict form is based on *CACI No. 533, Failure to Obtain Informed Consent--Essential Factual Elements*, and *CACI No. 554, Affirmative Defense--Emergency*.

Depending on the facts, alternative language may be substituted for question 6 as in item 2 of *CACI No. 554*. If specificity is not required, users do not have to itemize all the damages listed in question 7. The breakdown is optional depending on the circumstances.

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

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

If the affirmative defense, which is contained in questions 5 and 6, is not an issue in the case, then questions 5 and 6 should be omitted and the remaining questions renumbered accordingly.

Publisher's Notes

This verdict form covers issued presented in BAJI Nos. 16.01 and 16.01.1.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Verdicts Special Verdicts Healthcare Law Treatment Patient Consent Informed Consent Healthcare Law Treatment Patient Consent Right to Refuse Treatment Torts Intentional Torts Defenses Consent Torts Malpractice & Professional Liability Healthcare Providers



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CHAPTER 5 California Judicial Council Medical Negligence Instructions

2-5 California Forms of Jury Instruction CACI VF-503-CACI VF-599

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CACI VF-503Reserved for Future Use



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CHAPTER 6 California Judicial Council Professional Negligence Instructions

2-6 California Forms of Jury Instruction 6.syn

§ 6.syn Synopsis to Chapter 6: California Judicial Council Professional Negligence Instructions

CACI 600 Standard of Care

CACI 601 Damages for Negligent Handling of Legal Matter

CACI 602 Success Not Required

CACI 603 Alternative Legal Decisions or Strategies

CACI 604 Referral to Legal Specialist

CACI 605 Breach of Fiduciary Duty--Essential Factual Elements

CACI 606 Legal Malpractice Causing Criminal Conviction--Actual Innocence

CACI 607-CACI 609 Reserved for Future Use

CACI 610 Affirmative Defense--Statute of Limitations--Attorney Malpractice--One-Year Limit (Code Civ. Proc., § 340.6)

CACI 611 Affirmative Defense--Statute of Limitations--Attorney Malpractice--Four-Year Limit (Code Civ. Proc., § 340.6)



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CHAPTER 6 California Judicial Council Professional Negligence Instructions

2-6 California Forms of Jury Instruction Scope

Scope

SCOPE

This chapter contains the California Judicial Council's "Professional Negligence Series" of jury instructions [*CACI No. 600 et seq.*]. The Judicial Council of California Civil Jury Instructions (CACI) included in this publication are the product of the Judicial Council of California Task Force on Jury Instructions, which are updated by the Judicial Council of California Advisory Committee on Civil Jury Instructions.

This chapter includes instructions on the following topics:

- The standard of care in professional negligence cases [*CACI No. 600*].
- Damages available for the negligent handling of a legal matter [*CACI No. 601*].
- That success is not required [*CACI No. 602*].
- Alternative legal decisions or strategies [*CACI No. 603*].
- Referral to a legal specialist [*CACI No. 604*].
- In a legal malpractice action for a criminal conviction, the requirement to find actual innocence in the underlying action [*CACI No. 606*].
- Statute of limitations defenses in cases of attorney malpractice [*CACI Nos. 610, 611*].



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CHAPTER 6 California Judicial Council Professional Negligence Instructions

2-6 California Forms of Jury Instruction CACI 600

CACI 600 Standard of Care

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

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

New September 2003; Revised October 2004, December 2007

Directions for Use

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

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

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

If the defendant is a specialist in his or her field, this instruction should be modified to reflect that the defendant is held to the standard of care of a specialist. (*Wright v. Williams* (1975) 47 Cal.App.3d 802,

810 [121 Cal.Rptr. 194] .) The standard of care for claims related to a specialist's expertise is determined by expert testimony. (*Id.* at pp. 810-811 .)

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

Sources and Authority

■ The elements of a cause of action in tort for professional negligence are "(1) the duty of the professional to use such skill, prudence, and diligence as other members of his profession commonly possess and exercise; (2) a breach of that duty; (3) a proximate causal connection between the negligent conduct and the resulting injury; and (4) actual loss or damage resulting from the professional's negligence." (*Budd v. Nixen* (1971) 6 Cal.3d 195, 200 [98 Cal.Rptr. 849, 491 P.2d 433] ; *Carlton v. Quint* (2000) 77 Cal.App.4th 690, 699 [91 Cal.Rptr.2d 844] .)

■ " 'In addressing breach of duty, 'the crucial inquiry is whether [the attorney's] advice was so legally deficient when it was given that he [or she] may be found to have failed to use 'such skill, prudence, and diligence as lawyers of ordinary skill and capacity commonly possess and exercise in the performance of the tasks which they undertake.' ... " ' ' ' (*Blanks v. Seyfarth Shaw LLP* (2009) 171 Cal.App.4th 336, 357 [89 Cal.Rptr.3d 710] .)

■ "[T]he issue of negligence in a legal malpractice case is ordinarily an issue of fact." (*Blanks, supra*, 171 Cal.App.4th at p. 376 .)

■ "It is well settled that an attorney is liable for malpractice when his negligent investigation, advice, or conduct of the client's affairs results in loss of the client's meritorious claim." (*Gutierrez v. Mofid* (1985) 39 Cal.3d 892, 900 [218 Cal.Rptr. 313, 705 P.2d 886] .)

■ "The standard is that of members of the profession 'in the same or a similar locality under similar circumstances'... . The duty encompasses both a knowledge of law and an obligation of diligent research and informed judgment." (*Wright, supra*, 47 Cal.App.3d at p. 802 , internal citations omitted; but see *Avivi v. Centro Medico Urgente Medical Center* (2008) 159 Cal.App.4th 463, 470-471 [71 Cal.Rptr.3d 707] [geographical location may be a factor to be considered, but, by itself, does not provide a practical basis for measuring similar circumstances].)

■ *Rules of Professional Conduct, rule 3-110* (Failing to Act Competently) provides:

(A) A member shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence.

(B) For purposes of this rule, "competence" in any legal service shall mean to apply the 1) diligence, 2) learning and skill, and 3) mental, emotional, and physical ability reasonably necessary for the performance of such service.

(C) If a member does not have sufficient learning and skill when the legal service is undertaken, the member may nonetheless perform such services competently by 1) associating with or, where appropriate, professionally consulting another lawyer

reasonably believed to be competent, or 2) by acquiring sufficient learning and skill before performance is required.

■ Lawyers who hold themselves out as specialists "must exercise the skill, prudence, and diligence exercised by other specialists of ordinary skill and capacity specializing in the same field." (*Wright, supra*, 47 Cal.App.3d at p. 810 .) The standard of care for claims related to a specialist's expertise is determined by expert testimony. (*Id.* at pp. 810-811.)

■ If the failure to exercise due care is so clear that a trier of fact may find professional negligence without expert assistance, then expert testimony is not required: " 'In other words, if the attorney's negligence is readily apparent from the facts of the case, then the testimony of an expert may not be necessary.' " (*Stanley v. Richmond* (1995) 35 Cal.App.4th 1070, 1093 [41 Cal.Rptr.2d 768] , internal citations omitted.)

Secondary Sources

1 Witkin, California Procedure (4th ed. 1996) Attorneys, §§ 315-318, pp. 385-387

4 Witkin, California Procedure (4th ed. 1996) Pleadings, § 552

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

Vapnek et al., California Practice Guide: Professional Responsibility (The Rutter Group) PP 1:39, 6:230-6:234

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

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

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

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

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

Publisher's Notes

This instruction covers issues presented in BAJI Nos. 6.37, 6.37.1, and 6.37.4.

Note: There is no such thing in the law as clerical malpractice. (*Nally v. Grace Community Church* (1988) 47 Cal.3d 278, 298 [253 Cal.Rptr. 97, 763 P.2d 948] ; *Richelle L. v. Roman Catholic Archbishop* (2003) 106 Cal.App.4th 257, 269 [130 Cal.Rptr.2d 601] .)



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CHAPTER 6 California Judicial Council Professional Negligence Instructions

2-6 California Forms of Jury Instruction CACI 601

CACI 601 Damages for Negligent Handling of Legal Matter

To recover damages from [name of defendant], [name of plaintiff] must prove that [he/she/it] would have obtained a better result if [name of defendant] had acted as a reasonably careful attorney.

New September 2003

In *Mattco Forge, Inc. v. Arthur Young & Co.* (1997) 52 Cal.App.4th 820 [60 Cal.Rptr.2d 780], the trial-within-a-trial method was applied to accountants. In cases involving professionals other than attorneys, this instruction would need to be modified by inserting the type of the professional in place of "attorney."

The issue of collectibility does not apply to every legal malpractice action: "It is only where the alleged malpractice consists of mishandling a client's claim that the plaintiff must show proper prosecution of the matter would have resulted in a favorable judgment and collection thereof." (*DiPalma v. Seldman* (1994) 27 Cal.App.4th 1499, 1506 [33 Cal.Rptr.2d 219] .)

- "If the allegedly negligent conduct does not cause damage, it generates no cause of action in tort. [Citations.] The mere breach of a professional duty, causing only nominal damages, speculative harm, or the threat of future harm--not yet realized--does not suffice to create a cause of action for negligence." (*Budd v. Nixen* (1971) 6 Cal.3d 195, 200 [98 Cal.Rptr. 849, 491 P.2d 433] ; *Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison* (1998) 18 Cal.4th 739, 749-750 [76 Cal.Rptr.2d 749, 958 P.2d 1062] .)

- The trial-within-a-trial method "is the most effective safeguard yet devised against speculative and conjectural claims in this era of ever expanding litigation. It is a standard of proof designed to limit

damages to those actually *caused* by a professional's malfeasance." (*Mattco Forge, supra*, 52 *Cal.App.4th* at p. 834 .)

■ "For the reasons given above, we conclude that, just as in litigation malpractice actions, a plaintiff in a transactional malpractice action must show that *but for* the alleged malpractice, it is more likely than not that the plaintiff would have obtained a more favorable result." (*Viner v. Sweet* (2003) 30 *Cal.4th* 1232, 1244 [135 *Cal.Rptr.2d* 629, 70 *P.3d* 1046] , original italics.)

■ To prove damages in a legal malpractice action, plaintiff must show the probable value of the lawsuit that he or she has lost. Plaintiff must also prove that careful management of his or her claim would have resulted in a favorable judgment and collection of it. (*Campbell v. Magana* (1960) 184 *Cal.App.2d* 751, 754 [8 *Cal.Rptr.* 32] .) There is no damage in the absence of these latter elements. (*DiPalma, supra*, 27 *Cal.App.4th* at pp. 1506-1507 .)

■ "Because of the legal malpractice, the original target is out of range; thus, the misperforming attorney must stand in and submit to being the target instead of the former target which the attorney negligently permitted to escape. This is the essence of the case-within-a-case doctrine." (*Arciniega v. Bank of San Bernardino* (1997) 52 *Cal.App.4th* 213, 231 [60 *Cal.Rptr.2d* 495] .)

■ The measure of damages in a case predicated on legal malpractice "is the difference between what was recovered and what would have been recovered but for the attorney's wrongful act or omission. ... [I]f a reasonably competent attorney would have obtained a \$3 million recovery for the client but the negligent attorney obtained only a \$2 million recovery, the client's damage due to the attorney's negligence would be \$1 million--the difference between what a competent attorney would have obtained and what the negligent attorney obtained." (*Norton v. Superior Court* (1994) 24 *Cal.App.4th* 1750, 1758 [30 *Cal.Rptr.2d* 217] .)

■ "The trial-within-a-trial method does not "recreate what a particular judge or fact finder would have done. Rather, the jury's task is to determine what a reasonable judge or fact finder would have done" ... Even though "should" and "would" are used interchangeably by the courts, the standard remains an *objective* one. The trier of fact determines what *should* have been, not what the result *would* have been, or could have been, or might have been, had the matter been before a *particular judge* or jury. ..." (*Blanks v. Seyfarth Shaw LLP* (2009) 171 *Cal.App.4th* 336, 357 [89 *Cal.Rptr.3d* 710] , original italics.)

■ "If the underlying issue originally was a factual question that would have gone to a tribunal rather than a judge, it is the jury who must decide what a reasonable tribunal would have done. The identity or expertise of the original trier of fact (i.e., a judge or an arbitrator or another type of adjudicator) does not alter the jury's responsibility in the legal malpractice trial-within-a-trial." (*Blanks, supra*, 171 *Cal.App.4th* at pp. 357-358 .)

Secondary Sources

1 Witkin, *California Procedure* (4th ed. 1996) Attorneys, § 338, pp. 413- 415

3 Levy et al., *California Torts, Ch. 32, Liability of Attorneys*, § 32.10 et seq. (Matthew Bender)

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

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

Publisher's Notes

This instruction replaces BAJI No. 6.37.5.



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CHAPTER 6 California Judicial Council Professional Negligence Instructions

2-6 California Forms of Jury Instruction CACI 602

CACI 602 Success Not Required

[A/An] [insert type of professional] is not necessarily negligent just because [his/her] efforts are unsuccessful or [he/she] makes an error that was reasonable under the circumstances. [A/An] [insert type of professional] is negligent only if [he/she] was not as skillful, knowledgeable, or careful as other reasonable [insert type of professional] would have been in similar circumstances.

New September 2003; Revised December 2007

Directions for Use

Use this instruction for all professional negligence cases other than professional medical negligence, for which *CACI No. 505, Success Not Required*, should be used.

Sources and Authority

■ "The services of experts are sought because of their special skill. They have a duty to exercise the ordinary skill and competence of members of their profession, and a failure to discharge that duty will subject them to liability for negligence. Those who hire such persons are not justified in expecting infallibility, but can expect only reasonable care and competence. They purchase service, not insurance." (*Gagne v. Bertran* (1954) 43 Cal.2d 481, 489 [275 P.2d 15] .)

■ "This rule [of *Gagne v. Bertran*, *supra*] has been consistently followed in this state with respect to professional services (*Roberts v. Karr*, 178 Cal.App.2d 535 [3 Cal.Rptr. 98] (surveyor); *Gautier v. General Telephone Co.*, 234 Cal.App.2d 302 [44 Cal.Rptr. 404] (communications services); *Bonadiman-McCain, Inc. v. Snow*, 183 Cal.App.2d 58 [6 Cal.Rptr. 52] (engineer); *Lindner v. Barlow*,

2-6 California Forms of Jury Instruction CACI 602

Davis & Wood, 210 Cal.App.2d 660 [27 Cal.Rptr. 101] (accountant); *Pancoast v. Russell*, 148 Cal.App.2d 909 [307 P.2d 719] (architect))." (*Allied Properties v. John A. Blume & Associates* (1972) 25 Cal.App.3d 848, 856 [102 Cal.Rptr. 259] .)

■ "The attorney is not liable for every mistake he may make in his practice; he is not, in the absence of an express agreement, an insurer of the soundness of his opinions or of the validity of an instrument that he is engaged to draft; and he is not liable for being in error as to a question of law on which reasonable doubt may be entertained by well-informed lawyers." (*Lucas v. Hamm* (1961) 56 Cal.2d 583, 591 [15 Cal.Rptr. 821, 364 P.2d 685] , cert. denied (1962) 368 U.S. 987 [82 S.Ct. 603, 7 L.Ed.2d 525] , internal citations omitted.)

■ Jury instructions stating this principle are proper: "[A]n attorney does not ordinarily guarantee the soundness of his opinions and, accordingly, is not liable for every mistake he may make in his practice. He is expected, however, to possess knowledge of those plain and elementary principles of law which are commonly known by well informed attorneys, and to discover those additional rules of law which, although not commonly known, may readily be found by standard research techniques." (*Smith v. Lewis* (1975) 13 Cal.3d 349, 358 [118 Cal.Rptr. 621, 530 P.2d 589] , overruled in part on other grounds in *In re Marriage of Brown* (1976) 15 Cal.3d 838, 851 [126 Cal.Rptr. 633, 544 P.2d 561] .)

■ "In order to prevail on this theory and escape a negligence finding, an attorney must show that there were unsettled or debatable areas of the law that were the subject of the legal advice rendered and this advice was based upon 'reasonable research in an effort to ascertain relevant legal principles and to make an informed decision as to a course of conduct based upon an intelligent assessment of the problem.' " (*Blanks v. Seyfarth Shaw LLP* (2009) 171 Cal.App.4th 336, 378-379 [89 Cal.Rptr.3d 710] .)

Secondary Sources

1 Witkin, California Procedure (4th ed. 1996) Attorneys, §§ 342-345, pp. 418-424

Vapnek et al., California Practice Guide: Professional Responsibility (The Rutter Group) P 6:234

3 Levy et al., *California Torts*, Ch. 32, *Liability of Attorneys*, §§ 32.11, 32.62 (Matthew Bender)

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

1 *California Legal Forms*, Ch. 1A, *Role of Counsel in Starting a New Business*, §§ 1A.30 -1A.32 (Matthew Bender)

Publisher's Notes

This instruction covers issues presented in BAJI No. 6.37.2.



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CHAPTER 6 California Judicial Council Professional Negligence Instructions

2-6 California Forms of Jury Instruction CACI 603

CACI 603 Alternative Legal Decisions or Strategies

An attorney is not necessarily negligent just because he or she [chooses one legal strategy/makes a decision/makes a recommendation] and it turns out that another [strategy/decision/recommendation] would have been a better choice.

New September 2003

- "We recognize, of course, that an attorney engaging in litigation may have occasion to choose among various alternative strategies available to his client" (*Smith v. Lewis* (1975) 13 Cal.3d 349, 359 [118 Cal.Rptr. 621, 530 P.2d 589] , overruled in part on other grounds in *In re Marriage of Brown* (1976) 15 Cal.3d 838, 851 [126 Cal.Rptr. 633, 544 P.2d 561] .)

- " 'In view of the complexity of the law and the circumstances which call for difficult choices among possible courses of action, the attorney cannot be held legally responsible for an honest and reasonable mistake of law or an unfortunate selection of remedy or other procedural step.' [Citation.]" (*Banerian v. O'Malley* (1974) 42 Cal.App.3d 604, 613 [116 Cal.Rptr. 919] .)

Secondary Sources

3 Levy et al., California Torts, Ch. 32, *Liability of Attorneys*, § 32.11 (Matthew Bender)

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

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

Publisher's Notes

This instruction covers issues presented in BAJI No. 6.03.



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CHAPTER 6 California Judicial Council Professional Negligence Instructions

2-6 California Forms of Jury Instruction CACI 604

CACI 604 Referral to Legal Specialist

If a reasonably careful attorney in a similar situation would have referred [name of plaintiff] to a legal specialist, then [name of defendant] was negligent if [he/she] did not do so.

However, if [name of defendant] handled the matter with as much skill and care as a reasonable legal specialist would have, then [name of defendant] was not negligent.

New September 2003

■ This type of an instruction was approved for use in legal malpractice cases in *Horne v. Peckham* (1979) 97 Cal.App.3d 404, 414-415 [158 Cal.Rptr. 714], disapproved on other grounds in *ITT Small Business Finance Corp. v. Niles* (1994) 9 Cal.4th 245, 256 [36 Cal.Rptr.2d 552, 885 P.2d 965].

■ *Rule of Professional Conduct: Rule 3-110 (C)* (Failing to Act Competently) provides: "If a member does not have sufficient learning and skill when the legal service is undertaken, the member may nonetheless perform such services competently by 1) associating with or, where appropriate, professionally consulting another lawyer reasonably believed to be competent, or 2) by acquiring sufficient learning and skill before performance is required."

Secondary Sources

1 Witkin, California Procedure (4th ed. 1996) Attorneys, § 319, pp. 387-388

Publisher's Notes

This instruction covers issues presented in BAJI No. 6.04.



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CHAPTER 6 California Judicial Council Professional Negligence Instructions

2-6 California Forms of Jury Instruction CACI 605

CACI 605 Breach of Fiduciary Duty--Essential Factual Elements

Renumbered to CACI No. 4106, December 2007



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CHAPTER 6 California Judicial Council Professional Negligence Instructions

2-6 California Forms of Jury Instruction CACI 606

CACI 606 Legal Malpractice Causing Criminal Conviction--Actual Innocence

[Name of plaintiff] alleges that [name of defendant] was negligent in defending [him/her] in a criminal case, and as a result, [he/she] was wrongly convicted. To establish this claim, [name of plaintiff] must first prove that [he/she] was actually innocent of the charges for which [he/she] was convicted.

New April 2009

Directions for Use

Give this instruction after *CACI No. 400, Essential Factual Elements*, and *CACI No. 600, Standard of Care*, in a legal malpractice action arising from an underlying criminal case.

To prove actual innocence, the plaintiff must first prove legal exoneration. (See *Coscia v. McKenna & Cuneo* (2001) 25 Cal.4th 1194, 1201 [108 Cal.Rptr.2d 471, 25 P.3d 670] .) Presumably, exoneration will be decided by the court as a matter of law. If there is a question of fact regarding exoneration, this instruction should be modified accordingly.

However, one may be exonerated without actually being innocent of the charges; for example, by the People's decision not to retry the case on remand because of insufficient evidence. (See *Coscia, supra*, 25 Cal.4th at p. 1205 [exoneration is *prerequisite* to proving actual innocence (emphasis added)].) Do not give this instruction if the court determines as a matter of law that the exoneration does establish actual innocence; for example, if later-discovered DNA evidence conclusively proved that the plaintiff could not have committed the offense.

Sources and Authority

■ *Code of Civil Procedure section 340.6(a)* provides in part: "If the plaintiff is required to establish his or her factual innocence for an underlying criminal charge as an element of his or her claim, the action shall be commenced within two years after the plaintiff achieves postconviction exoneration in the form of a final judicial disposition of the criminal case."

■ "In a legal malpractice action arising from a civil proceeding, the elements are (1) the duty of the attorney to use such skill, prudence, and diligence as members of his or her profession commonly possess and exercise; (2) a breach of that duty; (3) a proximate causal connection between the breach and the resulting injury; and (4) actual loss or damage resulting from the attorney's negligence. In a legal malpractice case arising out of a criminal proceeding, California, like most jurisdictions, also requires proof of actual innocence." (*Wilkinson v. Zelen* (2008) 167 Cal.App.4th 37, 45 [83 Cal.Rptr.3d 779] , internal citations omitted.)

■ "If the defendant has in fact committed a crime, the remedy of a new trial or other relief is sufficient reparation in light of the countervailing public policies and considering the purpose and function of constitutional guaranties." *Wiley v. County of San Diego* (1998) 19 Cal.4th 532, 543 [79 Cal.Rptr.2d 672, 966 P.2d 983] .)

■ "The question of actual innocence is inherently factual. While proof of the government's inability to prove guilt may involve technical defenses and evidentiary rules, proof of actual innocence obliges the malpractice plaintiff 'to convince the civil jurors of his innocence.' Thus, the determination of actual innocence is rooted in the goal of reliable factfinding." (*Salisbury v. County of Orange* (2005) 131 Cal.App.4th 756, 764-765 [31 Cal.Rptr.3d 831] , internal citations omitted.)

■ "[A]n individual convicted of a criminal offense must obtain reversal of his or her conviction, or other exoneration by postconviction relief, in order to establish actual innocence in a criminal malpractice action. ... [P]ublic policy considerations require that only an innocent person wrongly convicted be deemed to have suffered a legally compensable harm. Unless a person convicted of a criminal offense is successful in obtaining postconviction relief, the policies reviewed in *Wiley* [*supra*] preclude recovery in a legal malpractice action." (*Coscia, supra*, 25 Cal.4th at p. 1201 .)

■ "[A] plaintiff must obtain postconviction relief in the form of a final disposition of the underlying criminal case--for example, by acquittal after retrial, reversal on appeal with directions to dismiss the charges, reversal followed by the People's refusal to continue the prosecution, or a grant of habeas corpus relief--as a prerequisite to proving actual innocence in a malpractice action against former criminal defense counsel." (*Coscia, supra*, 25 Cal.4th at p. 1205 .)

■ "[T]he rationale of *Wiley* and *Coscia* requires a plaintiff in a criminal legal malpractice case to show actual innocence and postconviction exoneration on any guilty finding for a lesser included offense, even though the plaintiff alleges he received negligent representation only on the greater offense." (*Sangha v. LaBarbera* (2006) 146 Cal.App.4th 79, 87 [52 Cal.Rptr.3d 640] .)

■ "[Plaintiff] must be exonerated of all transactionally related offenses in order to satisfy the holding in *Coscia*. Because the judicially noticed facts unequivocally demonstrate that [plaintiff] plead no contest to two offenses transactionally related to the felony charge of battery on a custodial officer in order to settle the criminal action, and she was placed on probation for those offenses, she cannot in good faith plead exoneration." (*Wilkinson, supra*, 167 Cal.App.4th at p. 48 .)

Secondary Sources

1 Witkin, *California Procedure* (4th ed. 1997) Attorneys, § 315

Vapnek et al., *California Practice Guide: Professional Responsibility* (The Rutter Group) PP 6:935-6:944

3 Levy et al., *California Torts, Ch. 32, Liability of Attorneys*, § 32.02 (Matthew Bender)

7 *California Forms of Pleading and Practice, Ch. 76, Attorney Professional Liability*, §§ 76.10, 76.381 (Matthew Bender)

2A *California Points and Authorities, Ch. 24A, Attorneys at Law: Malpractice*, § 24A.32 (Matthew Bender)

Publisher's Notes

There is no BAJI instruction on this subject.



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CHAPTER 6 California Judicial Council Professional Negligence Instructions

2-6 California Forms of Jury Instruction CACI 607-CACI 609

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CACI 607Reserved for Future Use



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CHAPTER 6 California Judicial Council Professional Negligence Instructions

2-6 California Forms of Jury Instruction CACI 610

CACI 610 Affirmative Defense--Statute of Limitations--Attorney Malpractice--One-Year Limit (Code Civ. Proc., § 340.6)

[Name of defendant] contends that [name of plaintiff]'s lawsuit was not filed within the time set by law. To succeed on this defense, [name of defendant] must prove that before [insert date one year before date of filing] [name of plaintiff] knew, or with reasonable diligence should have discovered, the facts of [name of defendant]'s alleged wrongful act or omission.

[If, however, [name of plaintiff] proves

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

[that [he/she/it] did not sustain actual injury until on or after [insert date one year before date of filing];/ or]]

[that on or after [insert date one year before date of filing] [name of defendant] continued to represent [name of plaintiff] regarding the specific subject matter in which the wrongful act or omission occurred[/; or]]

[that on or after [insert date one year before date of filing] [he/she/it] was under a legal or physical disability that restricted [his/her/its] ability to file a lawsuit[/;]

the period within which [name of plaintiff] had to file the lawsuit is extended for the amount of time that [insert tolling provision, e.g., [name of defendant] continued to represent [name of plaintiff]].]

New April 2007; Revised April 2009

Directions for Use

Use CACI No. 611, *Affirmative Defense--Statute of Limitations--Attorney Malpractice--Four-Year Limit*, if the four-year limitation provision is at issue.

The court may need to define the term "actual injury" depending on the facts and circumstances of the particular case.

If no tolling provision from *Code of Civil Procedure* section 340.6 is at issue, read only through the end of the first paragraph. Read the rest of the instruction if there is a question of fact concerning a tolling provision. If so, the verdict form should ask the jury to find (1) the "discovery" date (the date on which the plaintiff discovered or knew of facts that would have caused a reasonable person to suspect that he or she had suffered harm that was caused by someone's wrongful conduct); (2) whether the tolling provision applies; and (3) if so, for what period of time. The court can then add the additional time to the discovery date and determine whether the action is timely.

Sources and Authority

- *Code of Civil Procedure* section 340.6 provides:

(a) An action against an attorney for a wrongful act or omission, other than for actual fraud, arising in the performance of professional services shall be commenced within one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the facts constituting the wrongful act or omission, or four years from the date of the wrongful act or omission, whichever occurs first. If the plaintiff is required to establish his or her factual innocence for an underlying criminal charge as an element of his or her claim, the action shall be commenced within two years after the plaintiff achieves postconviction exoneration in the form of a final judicial disposition of the criminal case. Except for a claim for which the plaintiff is required to establish his or her factual innocence, in no event shall the time for commencement of legal action exceed four years except that the period shall be tolled during the time that any of the following exist:

(1) The plaintiff has not sustained actual injury;

(2) The attorney continues to represent the plaintiff regarding the specific subject matter in which the alleged wrongful act or omission occurred;

(3) The attorney willfully conceals the facts constituting the wrongful act or omission when such facts are known to the attorney, except that this subdivision shall toll only the four-year limitation; and

(4) The plaintiff is under a legal or physical disability which restricts the plaintiff's ability to commence legal action.

(b) In an action based upon an instrument in writing, the effective date of which depends upon some act or event of the future, the period of limitations provided for by this section shall commence to run upon the occurrence of that act or event.

■ *Code of Civil Procedure* section 352 provides:

(a) If a person entitled to bring an action, mentioned in Chapter 3 (commencing with Section 335) is, at the time the cause of action accrued either under the age of majority or insane, the time of the disability is not part of the time limited for the commencement of the action.

(b) This section does not apply to an action against a public entity or public employee upon a cause of action for which a claim is required to be presented in accordance with Chapter 1 (commencing with Section 900) or Chapter 2 (commencing with Section 910) of Part 3, or Chapter 3 (commencing with Section 950) of Part 4, of Division 3.6 of Title 1 of the Government Code. This subdivision shall not apply to any claim presented to a public entity prior to January 1, 1971.

■ "Under section 340.6, the one-year limitations period commences when the plaintiff actually or constructively discovers the facts of the wrongful act or omission, but the period is tolled until the plaintiff sustains actual injury. That is to say, the statute of limitations will not run during the time the plaintiff cannot bring a cause of action for damages from professional negligence." (*Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison* (1998) 18 Cal.4th 739, 751 [76 Cal.Rptr.2d 749, 958 P.2d 1062] .)

■ "Actual injury refers only to the legally cognizable damage necessary to assert the cause of action. There is no requirement that an adjudication or settlement must first confirm a causal nexus between the attorney's error and the asserted injury. The determination of actual injury requires only a factual analysis of the claimed error and its consequences. The inquiry necessarily is more qualitative than quantitative because the fact of damage, rather than the amount, is the critical factor." (*Truong v. Glasser* (2009) 181 Cal.App.4th 102, 113 [103 Cal.Rptr.3d 811] .)

■ "[P]rior to the enactment of section 340.6 the running of the statute of limitations coincided with accrual of the plaintiff's malpractice cause of action, including damages. By contrast, under the provisions of section 340.6, discovery of the negligent act or omission initiates the statutory period, and the absence of injury or damages serves as a tolling factor." (*Adams v. Paul* (1995) 11 Cal.4th 583, 589, fn. 2 [46 Cal.Rptr.2d 594, 904 P.2d 1205] , internal citations omitted.)

■ "[A] defendant must prove the facts necessary to enjoy the benefit of a statute of limitations." (*Samuels v. Mix* (1999) 22 Cal.4th 1, 10 [91 Cal.Rptr.2d 273, 989 P.2d 701] , internal citations omitted.)

■ "[D]efendant, if he is to avail himself of the statute's one-year-from-discovery limitation defense, has the burden of proving, under the 'traditional allocation of the burden of proof' that plaintiff discovered or should have discovered the facts alleged to constitute defendant's wrongdoing more than one year prior to filing this action." (*Samuels, supra*, 22 Cal.4th at pp. 8-9 , internal citations omitted.)

■ "In ordinary tort and contract actions, the statute of limitations, it is true, begins to run upon the occurrence of the last element essential to the cause of action. The plaintiff's ignorance of the cause of action, or of the identity of the wrongdoer, does not toll the statute. In cases of professional malpractice, however, postponement of the period of limitations until discovery finds justification in the special nature of the relationship between the professional man and his client." (*Neel v. Magana, Olney, Levy, Cathcart & Gelfand* (1971) 6 Cal.3d 176, 187-188 [98 Cal.Rptr. 837, 491 P.2d 421] , footnote omitted.)

■ "We hold that a cause of action for legal malpractice does not accrue until the client discovers, or should discover,

the facts establishing the elements of his cause of action." (*Neel, supra*, 6 Cal.3d at p. 194 .)

■ "If the allegedly negligent conduct does not cause damage, it generates no cause of action in tort. The mere breach of a professional duty, causing only nominal damages, speculative harm, or the threat of future harm--not yet realized--does not suffice to create a cause of action for negligence. Hence, until the client suffers appreciable harm as a consequence of his attorney's negligence, the client cannot establish a cause of action for malpractice." (*Budd v. Nixen* (1971) 6 Cal.3d 195, 200 [98 Cal.Rptr. 849, 491 P.2d 433] , internal citations omitted.)

■ "[W]here a client hires a law firm to represent it, the provisions of section 340.6 apply to that firm; the term 'attorney' in section 340.6 may embrace the entire partnership, law corporation, or other legal entity the client retains. [P] That either an attorney or a firm may be the subject of an action does not support a reading under which representation by one attorney or firm might toll the limitations period as to another no longer affiliated attorney or firm. Rather, the text implies an action against a law firm is tolled so long as *that firm* continues representation, just as an action against an attorney is tolled so long as *that attorney* continues representation, but representation by one attorney or firm does not toll claims that may exist against a different, unaffiliated attorney or firm." (*Beal Bank, SSB v. Arter & Hadden, LLP* (2007) 42 Cal.4th 503, 509 [66 Cal.Rptr.3d 52, 167 P.3d 666] , original italics.)

■ "'Ordinarily, an attorney's representation is not completed until the agreed tasks or events have occurred, the client consents to termination or a court grants an application by counsel for withdrawal.' 'The rule is that, for purposes of the statute of limitations, the attorney's representation is concluded when the parties so agree, and that result does not depend upon formal termination, such as withdrawing as counsel of record.' 'Continuity of representation ultimately depends, not on the client's subjective beliefs, but rather on evidence of an ongoing mutual relationship and of activities in furtherance of the relationship.' " (*Nielsen v. Beck* (2007) 157 Cal.App.4th 1041, 1049 [69 Cal.Rptr.3d 435] , internal citations omitted.)

■ "Section 340.6, subdivision (a), states that 'in no event' shall the prescriptive period be tolled except under those circumstances specified in the statute. Thus, the Legislature expressly intended to disallow tolling under any circumstances not enumerated in the statute." (*Laird v. Blacker* (1992) 2 Cal.4th 606, 618 [7 Cal.Rptr.2d 550, 828 P.2d 691] [applying rule to one-year limitation period]; cf. *Belton v. Bowers Ambulance Serv.* (1999) 20 Cal.4th 928, 934 [86 Cal.Rptr.2d 107, 978 P.2d 591] [substantially similar language in *Code Civ. Proc.*, § 340.5, applicable to medical malpractice, construed to apply only to three-year limitation period].)

Secondary Sources

3 Witkin, *California Procedure* (4th ed. 1996) Actions, §§ 577-595

3 Levy et al., *California Torts, Ch. 32, Liability of Attorneys*, § 32.60 (Matthew Bender)

1 *Matthew Bender Practice Guide: California Pretrial Civil Procedure, Ch. 4, Limitation of Actions*, 4.05

7 *California Forms of Pleading and Practice, Ch. 76, Attorney Professional Liability*, §§ 76.170, 76.430 (Matthew Bender)

33 *California Forms of Pleading and Practice, Ch. 380, Negligence*, § 380.150 (Matthew Bender)

Publisher's Notes

There is no BAJI instruction on this subject.



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California Forms of Jury Instruction

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CHAPTER 6 California Judicial Council Professional Negligence Instructions

2-6 California Forms of Jury Instruction CACI 611

CACI 611 Affirmative Defense--Statute of Limitations--Attorney Malpractice--Four-Year Limit (Code Civ. Proc., § 340.6)

[*Name of defendant*] **contends that** [*name of plaintiff*]'s lawsuit was not filed within the time set by law. To succeed on this defense, [*name of defendant*] **must prove that** [his/her/its] alleged wrongful act or omission occurred before [*insert date four years before date of filing*].

[If, however, [*name of plaintiff*] proves

[Choose one or more of the following four options:]

[that [he/she/it] did not sustain actual injury until on or after [*insert date four years before date of filing*]][/,; or]]

[that on or after [*insert date four years before date of filing*] [*name of defendant*] continued to represent [*name of plaintiff*] regarding the specific subject matter in which the wrongful act or omission occurred [/,; or]]

[that on or after [*insert date four years before date of filing*] [*name of defendant*] knowingly concealed the facts constituting the wrongful act or omission [/,; or]]

[that on or after [*insert date four years before date of filing*] [he/she/it] was under a legal or physical disability that restricted [his/her/its] ability to file a lawsuit[,;]

the period within which [*name of plaintiff*] had to file the lawsuit is extended for the amount of time that [*insert tolling provision, e.g., [name of defendant] knowingly concealed the facts*].]

New April 2007; Revised April 2009

Directions for Use

Use CACI No. 610, *Affirmative Defense--Statute of Limitations--Attorney Malpractice--One-Year Limit*, if the one-year limitation provision is at issue.

If no tolling provision from *Code of Civil Procedure* section 340.6 is at issue, read only through the end of the first paragraph. Read the rest of the instruction if there is a question of fact concerning a tolling provision. If so, the verdict form should ask the jury to find (1) the date on which the alleged wrongful act or omission occurred; (2) whether the tolling provision applies; and (3) if so, for what period of time. The court can then add the additional time to the date on which the alleged wrongful act or omission occurred and determine whether the action is timely.

The court may need to define the term "actual injury" depending on the facts and circumstances of the particular case.

Sources and Authority

- *Code of Civil Procedure* section 340.6 provides:

(a) An action against an attorney for a wrongful act or omission, other than for actual fraud, arising in the performance of professional services shall be commenced within one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the facts constituting the wrongful act or omission, or four years from the date of the wrongful act or omission, whichever occurs first. If the plaintiff is required to establish his or her factual innocence for an underlying criminal charge as an element of his or her claim, the action shall be commenced within two years after the plaintiff achieves postconviction exoneration in the form of a final judicial disposition of the criminal case. Except for a claim for which the plaintiff is required to establish his or her factual innocence, in no event shall the time for commencement of legal action exceed four years except that the period shall be tolled during the time that any of the following exist:

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(4) The plaintiff is under a legal or physical disability which restricts the plaintiff's ability to commence legal action.

(b) In an action based upon an instrument in writing, the effective date of which depends upon some act or event of the future, the period of limitations provided for by this section shall commence to run upon the occurrence of that act or event.

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(b) This section does not apply to an action against a public entity or public employee upon a cause of action for which a claim is required to be presented in accordance with Chapter 1 (commencing with Section 900) or Chapter 2 (commencing with Section 910) of Part 3, or Chapter 3 (commencing with Section 950) of Part 4, of Division 3.6 of Title 1 of the Government Code. This subdivision shall not apply to any claim presented to a public entity prior to January 1, 1971.

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■ "[W]here a client hires a law firm to represent it, the provisions of section 340.6 apply to that firm; the term 'attorney' in section 340.6 may embrace the entire partnership, law corporation, or other legal entity the client retains. [P] That either an attorney or a firm may be the subject of an action does not support a reading under which representation by one attorney or firm might toll the limitations period as to another no longer affiliated attorney or firm. Rather, the text implies an action against a law firm is tolled so long as *that firm* continues representation, just as an action against an attorney is tolled so long as *that attorney* continues representation, but representation by one attorney or firm does not toll claims that may exist against a different, unaffiliated attorney or firm." (*Beal Bank, SSB v. Arter & Hadden, LLP* (2007) 42 Cal.4th 503, 509 [66 Cal.Rptr.3d 52, 167 P.3d 666] , original italics.)

■ " 'Ordinarily, an attorney's representation is not completed until the agreed tasks or events have occurred, the client consents to termination or a court grants an application by counsel for withdrawal.' 'The rule is that, for purposes of the statute of limitations, the attorney's representation is concluded when the parties so agree, and that result does not depend upon formal termination, such as withdrawing as counsel of record.' 'Continuity of representation ultimately depends, not on the client's subjective beliefs, but rather on evidence of an ongoing mutual relationship and of activities in furtherance of the relationship.' " (*Nielsen v. Beck* (2007) 157 Cal.App.4th 1041, 1049 [69 Cal.Rptr.3d 435] , internal citations omitted.)

Secondary Sources

3 Witkin, California Procedure (4th ed. 1996) Actions, §§ 577-595

3 Levy et al., *California Torts, Ch. 32, Liability of Attorneys*, § 32.60 (Matthew Bender)

1 *Matthew Bender Practice Guide: California Pretrial Civil Procedure, Ch. 4, Limitation of Actions*, 4.05

7 *California Forms of Pleading and Practice, Ch. 76, Attorney Professional Liability*, §§ 76.170, 76.430 (Matthew Bender)

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Publisher's Notes

There is no BAJI instruction on this subject.



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CHAPTER 7 California Judicial Council Motor Vehicles and Highway Safety Instructions

2-7 California Forms of Jury Instruction 7.syn

§ 7.syn Synopsis to Chapter 7: California Judicial Council Motor Vehicles and Highway Safety Instructions

CACI 700 Basic Standard of Care

CACI 701 Definition of Right-of-Way

CACI 702 Waiver of Right-of-Way

CACI 703 Definition of "Immediate Hazard"

CACI 704 Left Turns (Veh. Code, § 21801)

CACI 705 Turning (Veh. Code, § 22107)

CACI 706 Basic Speed Law (Veh. Code, § 22350)

CACI 707 Speed Limit (Veh. Code, § 22352)

CACI 708 Maximum Speed Limit (Veh. Code, §§ 22349, 22356)

CACI 709 Driving Under the Influence (Veh. Code, §§ 23152, 23153)

CACI 710 Duties of Care for Pedestrians and Drivers

CACI 711 The Passenger's Duty of Care for Own Safety

CACI 712 Affirmative Defense--Failure to Wear a Seat Belt

CACI 713-CACI 719 Reserved for Future Use

CACI 720 Motor Vehicle Owner Liability--Permissive Use of Vehicle

CACI 721 Motor Vehicle Owner Liability--Affirmative Defense--Use Beyond Scope of Permission

CACI 722 Adult's Liability for Minor's Permissive Use of Motor Vehicle

CACI 723 Liability of Cosigner of Minor's Application for Driver's License

CACI 724 Negligent Entrustment of Motor Vehicle

CACI 725-CACI 729 Reserved for Future Use

CACI 730 Emergency Vehicle Exemption (Veh. Code, § 21055)

CACI 731 Definition of "Emergency" (Veh. Code, § 21055)

CACI 732-CACI 799 Reserved for Future Use

CACI VF-700 Motor Vehicle Owner Liability--Permissive Use of Vehicle

CACI VF-701 Motor Vehicle Owner Liability--Permissive Use of Vehicle--Affirmative Defense--Use Beyond Scope of Permission

CACI VF-702 Adult's Liability for Minor's Permissive Use of Motor Vehicle

CACI VF-703 Liability of Cosigner of Minor's Application for Driver's License

CACI VF-704 Negligent Entrustment of Motor Vehicle

CACI VF-705-CACI VF-799. Reserved for Future Use



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California Forms of Jury Instruction

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CHAPTER 7 California Judicial Council Motor Vehicles and Highway Safety Instructions

2-7 California Forms of Jury Instruction Scope

Scope

SCOPE

This chapter contains the California Judicial Council's "Motor Vehicles and Highway Safety Series" of jury instructions [CACI No. 700 et seq.]. The Judicial Council of California Civil Jury Instructions (CACI) included in this publication are the product of the Judicial Council of California Task Force on Jury Instructions, which are updated by the Judicial Council of California Advisory Committee on Civil Jury Instructions.

This chapter includes instructions on the following topics:

- The basic standard of care [CACI No. 700] and specific duties of care for pedestrians, drivers, and passengers [CACI Nos. 710, 711].
- The definition and waiver of "right-of-way" [CACI Nos. 701, 702].
- The definition of "immediate hazard" [CACI No. 703].
- Left turns and turning generally [CACI Nos. 704, 705]
- Speeding [CACI Nos. 706- 708].
- Driving under the influence [CACI No. 709].
- Failure to wear a seat belt [CACI No. 712].
- Liability, including an owner's or adult's liability for a vehicle's permissive use [CACI Nos. 720-722], a cosignor's liability of a minor's application for a driver's license [CACI No. 723], and liability for negligent entrustment of a motor vehicle [CACI No. 724].
- Emergencies, including the emergency vehicle exemption from liability [CACI No. 730] and the

definition of "emergency" [*CACI No. 731*].

The motor vehicle and highway safety series also includes special verdict forms [*CACI Nos. VF-700-VF-704*].



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CHAPTER 7 California Judicial Council Motor Vehicles and Highway Safety Instructions

2-7 California Forms of Jury Instruction CACI 700

CACI 700 Basic Standard of Care

A person must use reasonable care in driving a vehicle. Drivers must keep a lookout for pedestrians, obstacles, and other vehicles. They must also control the speed and movement of their vehicles. The failure to use reasonable care in driving a vehicle is negligence.

New September 2003

This instruction states the common-law standard of reasonable care in driving. It applies to negligent conduct that is not covered by provisions of the Vehicle Code: "Aside from the mandate of the statute, the driver of a motor vehicle is bound to use reasonable care to anticipate the presence on the streets of other persons having equal rights with himself to be there." (*Zarzana v. Neve Drug Co. (1919) 180 Cal. 32, 37 [179 P. 203]* .)

The instructions in this series should be used in conjunction with instructions on the elements of negligence contained in the negligence series.

- The common-law duty supplements statutory driving regulations: "[A driver is] under a duty, both by statute and common law, to operate his vehicle without negligence so as to abstain from injuring any other person or his property." (*Bewley v. Riggs (1968) 262 Cal.App.2d 188, 194 [68 Cal.Rptr. 520]* .)

- The standard of care is that of a reasonably careful person under the circumstances: "[The driver] was required to act as a reasonably prudent person under the same or similar circumstances" (*Watkins v. Ohman (1967) 251 Cal.App.2d 501, 502-503 [59 Cal.Rptr. 709]* .)

■ "The degree of care required in watching the movements of a particular machine depends upon the facts and circumstances existing at the time and place of the accident' and a driver is required to use that degree of care, only, which would be required of a reasonably prudent driver under similar circumstances." (*Whitford v. Pacific Gas and Electric Co.* (1955) 136 Cal.App.2d 697, 702 [289 P.2d 278] , internal citations omitted.)

■ The common-law requirement goes to the issues of lookout and control. Regardless of whether a driver was complying with the speed limit, "[he was] still bound to anticipate that he might meet persons at any point of the street and in order to avoid a charge of negligence he was bound to use ordinary care and to keep an ordinarily careful lookout for such persons and keep his machine under such control as would enable him to avoid a collision." (*Boccalero v. Wadleigh* (1931) 113 Cal.App. 376, 379, [298 P. 526] , internal citation omitted.)

■ "The operator of a vehicle must keep a proper lookout for other vehicles or persons on the highway and must keep his car under such control as will enable him to avoid a collision; failure to keep such a lookout constitutes negligence." (*Downing v. Barrett Mobile Home Transport, Inc.* (1974) 38 Cal.App.3d 519, 524 [113 Cal.Rptr. 277] .)

■ On the lookout requirement, one court observed: "The driver of an automobile is bound to use reasonable care to anticipate the presence on the highway of others who have equal right to be there and the fact that his vision is temporarily interfered with, either by the glaring sun or headlights, does not relieve him from that duty." (*Hill v. Peres* (1934) 136 Cal.App. 132, 137 [28 P.2d 946] , internal citations omitted.)

■ On the control requirement, one court observed: "Cases in which the problem has been presented adhere to the view that a driver must at all times exercise ordinary care to avoid a collision including swerving or altering his course, in addition to applying his brakes, if that would be a reasonable means of avoiding the collision." (*Guyton v. City of Los Angeles* (1959) 174 Cal.App.2d 354, 362 [344 P.2d 910] .)

■ "The age of a minor who operates a motor vehicle will not excuse him from liability for driving it in a negligent manner, and he will be required to meet the standard established primarily for adults." (*Prichard v. Veterans Cab Co.* (1965) 63 Cal.2d 727, 732 [47 Cal.Rptr. 904, 408 P.2d 360] .)

■ Drivers with mental disabilities are required to exercise the ordinary care required of an adult without such disability. (*Fox v. City and County of San Francisco* (1975) 47 Cal.App.3d 164, 173 [120 Cal.Rptr. 779] .)

Secondary Sources

California Tort Guide (Cont.Ed.Bar 3d ed.) §§ 4.1-4.5

2 Levy et al., *California Torts*, Ch. 20, *Motor Vehicles*, § 20.01 (Matthew Bender)

8 *California Forms of Pleading and Practice*, Ch. 82, *Automobiles: Causes of Action*, § 82.10 (Matthew Bender)

2 *California Civil Practice: Torts* (Thomson West) § 25:22

Publisher's Notes

This instruction replaces BAJI No. 5.00.

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsNegligenceStandards of CareAppropriate StandardGeneral OverviewTortsNegligenceStandards of
CareReasonable CareGeneral OverviewTortsNegligenceStandards of CareSpecial CareGeneral
OverviewTortsTransportation TortsMotor VehiclesPersonal Vehicles



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CHAPTER 7 California Judicial Council Motor Vehicles and Highway Safety Instructions

2-7 California Forms of Jury Instruction CACI 701

CACI 701 Definition of Right-of-Way

When the law requires a [driver/pedestrian] to "yield the right-of-way" to [another/a] [vehicle/pedestrian], this means that the [driver/pedestrian] must let the [other] [vehicle/pedestrian] go first.

Even if someone has the right-of-way, that person must use reasonable care to avoid an accident.

New September 2003

This instruction should be given following a reading of the appropriate Vehicle Code section.

If the case involves a statutory right-of-way, the jury could also be given instructions on negligence per se, if applicable. Statutes concerning who has the right-of-way include:

Vehicle Code section 21800: Intersection Right of Way; Uncontrolled Intersection; Driver on "Terminating Highway"; Intersection Controlled by Stop Signs; Intersection with Inoperative Signals

Vehicle Code section 21801: Left-Turn Right-of-Way

Vehicle Code section 21802: Approaching Entrance to Intersection

Vehicle Code section 21803: Intersection Controlled by Yield Right-of-Way Sign

Vehicle Code section 21804: Entry onto Highway

Vehicle Code section 21805: Equestrian Crossings

Vehicle Code section 21806: Authorized Emergency Vehicles

■ *Vehicle Code section 525* provides: " 'Right-of-way' is the privilege of the immediate use of the highway." Courts have observed that "[r]ight of way rules have been described as simply establishing 'a practical basis for necessary courtesy on the highway.' " (*Eagar v. McDonnell Douglas Corp.* (1973) 32 Cal.App.3d 116, 122 [107 Cal.Rptr. 819] , internal citation omitted.)

■ Having the statutory right-of-way does not excuse the failure to use due care: "Of course, even if [defendant] had the right of way, he had a duty to exercise reasonable care to avoid an accident, and the jury was so instructed." (*Eagar, supra*, 32 Cal.App.3d. at p. 123, fn. 3 , internal citation omitted.)

■ "When, as here, each motorist has acted reasonably and the pedestrian has failed to exercise due care for her own safety, the law of this state does not permit the technical violation of the pedestrian's right of way statute to impose negligence on the motorists as a matter of law. The statute creates a preferential, but not absolute, right in favor of the pedestrian who is still under a duty to exercise ordinary care." (*Byrne v. City and County of San Francisco* (1980) 113 Cal.App.3d 731, 742 [170 Cal.Rptr. 302] .)

■ " 'Even where a right of way is given by statute, if conditions so require it to avoid injury to others, the right of way must be yielded.' " (*Bove v. Beckman* (1965) 236 Cal.App.2d 555, 563 [46 Cal.Rptr. 164] , internal citation omitted.)

■ "Although such a driver may have the right-of-way, he is not absolved of the duty to exercise ordinary care; may not proceed blindly in disregard of an obvious danger; and must be watchful of the direction in which danger is most likely to be apprehended." (*Malone v. Perryman* (1964) 226 Cal.App.2d 227, 234 [37 Cal.Rptr. 864] .)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 879, 880

California Tort Guide (Cont.Ed.Bar 3d ed.) § 4.15

2 Levy et al., California Torts, Ch. 20, *Motor Vehicles*, § 20.68 (Matthew Bender)

8 *California Forms of Pleading and Practice*, Ch. 82, *Automobiles: Causes of Action*, §§ 82.10, 82.68 (Matthew Bender)

2 California Civil Practice: Torts (Thomson West) § 25:26

Publisher's Notes

This instruction replaces BAJI No. 5.10.

LexisNexis Matthew Bender Expert Practice Tip--"Right-of-Way" Issues: Automobile accident instructions CACI Nos. 701 and 702 use the phrase "go first," referring to a driver's "right-of-way." BAJI No. 510 defined the "right-of-way" as the "privilege given by law to one person over another of the immediate use of the same space on a highway." "Go first" is certainly easier to understand. However, the phrase "go first" might be confusing. For example: Assume an intersection with four way stop signs with the first driver (Driver Number 1) reaching the intersection and coming to a complete stop. Driver Number 2 approaches seconds later and also stops. Driver Number 2 waits a reasonable time expecting

the first car to proceed. Believing that Driver Number 1 has yielded, Driver Number 2 proceeds and is in the intersection when Driver Number 1 accelerates from the stop sign hitting Driver Number 2's car. I can imagine Driver Number 2 arguing that he/she had the right to "go first" under *CACI Nos. 701* and *702*. Of course, the injured driver might argue that Driver 1 "gave up" his/her right to go first.

CACI Nos. 701 and *702* are not objectionable, per se. How simplistic does an instruction have to be so the law can be understood? Sometimes I think juries deserve more credit than they are given. *By Joseph Devine*

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsNegligenceProofViolations of LawStatutesTortsTransportation TortsMotor VehiclesPersonal VehiclesTransportation LawPrivate VehiclesTraffic RegulationGeneral Overview



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CHAPTER 7 California Judicial Council Motor Vehicles and Highway Safety Instructions

2-7 California Forms of Jury Instruction CACI 702

CACI 702 Waiver of Right-of-Way

A [driver/pedestrian] who has the right-of-way may give up that right and let [another vehicle/a pedestrian] go first. If a [driver/pedestrian] reasonably believes that [[another/a] driver/a pedestrian] has given up the right-of-way, then he or she may go first.

New September 2003

- "[I]f one who has the right of way 'conducts himself in such a definite manner as to create a reasonable belief in the mind of another person that the right-of-way has been waived, then such other person is entitled to assume that the right of way has been given up to him ...'." (*Hopkins v. Tye* (1959) 174 Cal.App.2d 431, 433 [344 P.2d 640] .)

- "A conscious intentional act of waiver of the right of way by the pedestrian is not required. Whether there is a waiver depends upon the acts of the pedestrian. If they are such that a driver could reasonably believe that the pedestrian did not intend to assert her right of way, a waiver occurs." (*Cohen v. Bay Area Pie Company* (1963) 217 Cal.App.2d 69, 72-73 [31 Cal.Rptr. 426] , internal citation omitted.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 879, 880

California Tort Guide (Cont.Ed.Bar 3d ed.) § 4.15

2 Levy et al., California Torts, Ch. 20, *Motor Vehicles*, § 20.68[1][c] (Matthew Bender)

Publisher's Notes

This instruction replaces BAJI No. 5.11.

See also "LexisNexis Matthew Bender Expert Practice Tip" for CACI No. 701.

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsNegligenceProofViolations of LawGeneral OverviewTortsTransportation TortsGeneral OverviewTransportation
LawPrivate VehiclesTraffic RegulationGeneral Overview



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CHAPTER 7 California Judicial Council Motor Vehicles and Highway Safety Instructions

2-7 California Forms of Jury Instruction CACI 703

CACI 703 Definition of "Immediate Hazard"

The statute just read to you uses the words "immediate hazard." An immediate hazard exists if the approaching vehicle is so near or is approaching so fast that a reasonably careful person would realize that there is a danger of collision [or accident].

New September 2003

This instruction is designed to be given as a supplement to the several Vehicle Code provisions that contain the term "immediate hazard." (*Veh. Code*, §§ 21802 [Approaching intersection entrance], 21803 [Yield right of way], 21804 [Public or private property], 21805 [Equestrian crossings], 21950 [Crosswalks], 21953 [Tunnel or overhead crossing], 21954 [Pedestrian outside crosswalk], 22451 [Train signals].)

- "It is to be noted that the legislature has not set a hard and fast rule for the conduct of drivers approaching through highways but has provided the general rule that such drivers must yield the right of way to others traveling on the highway who are approaching so closely as to constitute 'an immediate hazard.' Our complex traffic problems are such that the circumstances of the traffic on a through highway as a driver approaches must govern his conduct in determining whether it is an immediate hazard. Whether a driver acts with due care or negligently in proceeding across a through highway must as a general rule be left to the determination of the jury in view of all the circumstances." (*Wilkinson v. Marcellus* (1952) 51 Cal.App.2d 630, 633 [125 P.2d 584] .)

- At least one court has held that the term "immediate hazard" should be defined for the jury if a party so requests. (*Hickenbottom v. Jeppesen* (1956) 144 Cal.App.2d 115, 121 [300 P.2d 689] .) However,

any error in failing to define the term will be considered harmless if other instructions cover that point:
 "The words 'immediate hazard' seem reasonably clear in the context in which they appear, both in the
 statute and in the instruction given; the hazard of a collision." (*Ibid.*)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 879, 880

California Tort Guide (Cont.Ed.Bar 3d ed.) §§ 4.10-4.11

Publisher's Notes

This instruction covers issues presented in BAJI Nos. 5.12, 5.13, and 5.22.

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsNegligenceStandards of CareReasonable CareRecognition of RiskTortsTransportation TortsMotor
 VehiclesPersonal VehiclesTransportation LawPrivate VehiclesTraffic RegulationGeneral Overview



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CHAPTER 7 California Judicial Council Motor Vehicles and Highway Safety Instructions

2-7 California Forms of Jury Instruction CACI 704

CACI 704 Left Turns (Veh. Code, § 21801)

The statute just read to you uses the word "hazard." A "hazard" exists if any approaching vehicle is so near or is approaching so fast that a reasonably careful person would realize that there is a danger of a collision [or accident].

[A driver who is attempting to make a left turn must make sure that no oncoming vehicles are close enough to be a hazard before he or she proceeds across each lane.]

New September 2003

The bracketed paragraph should be given in appropriate cases involving multiple lanes of oncoming traffic. (*Sesler v. Ghumman* (1990) 219 Cal.App.3d 218, 227 [268 Cal.Rptr. 70] .)

- *Vehicle Code section 21801(a)* provides: "The driver of a vehicle intending to turn to the left or to complete a U-turn ... shall yield the right-of-way to all vehicles approaching from the opposite direction which are close enough to constitute a hazard at any time during the turning movement, and shall continue to yield the right-of-way to the approaching vehicles until the left turn or U-turn can be made with reasonable safety."

- "We hold section 21802, subdivision (a), requires that where, as here, some, but not all, of the oncoming vehicles have yielded their right-of-way to a left-turning driver, that driver has a continuing duty during the turning movement to ascertain, before proceeding across the next open lane(s), if any vehicle is approaching from the opposite direction so close as to constitute a hazard." (*Sesler, supra*, 219 Cal.App.3d at pp. 224-225)

● Noting that in 1957 the Legislature added the phrase "at any time during the turning movement" to this section, the court in *In re Kirk* (1962) 202 Cal.App.2d 288, 291 [20 Cal.Rptr. 787] , reasoned that "if the oncoming vehicle in the lane closest to the left turning vehicle surrenders its right of way by indicating to the operator of the left turning vehicle that it desires him to proceed, such operator may not proceed beyond that first lane of traffic, now effectively blocked by the waiving vehicle, if in fact other vehicles approaching in any of the other oncoming lanes will constitute a hazard to the left turning vehicle during the turning movement."

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 879, 880

California Tort Guide (Cont.Ed.Bar 3d ed.) §§ 4.10-4.11

2 Levy et al., California Torts, Ch. 20, *Motor Vehicles*, § 20.68[2][g] (Matthew Bender)

Publisher's Notes

This instruction replaces BAJI No. 5.21.

Legal Topics:

For related research and practice materials, see the following legal topics:

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CHAPTER 7 California Judicial Council Motor Vehicles and Highway Safety Instructions

2-7 California Forms of Jury Instruction CACI 705

CACI 705 Turning (Veh. Code, § 22107)

A driver must use reasonable care when turning [or moving to the right or to the left].

New September 2003

An instruction on this point should be given only if the jury is instructed on *Vehicle Code* section 22107. It should be read after that section has been given. (*Anderson v. Latimer* (1985) 166 Cal.App.3d 667, 672-673 [212 Cal.Rptr. 544] .)

- *Vehicle Code* section 22107 provides: "No person shall turn a vehicle from a direct course or move right or left upon a roadway until such movement can be made with reasonable safety and then only after the giving of an appropriate signal in the manner provided in this chapter in the event any other vehicle may be affected by the movement."

- "This provision does not require the driver to know that a turn can be made with safety but only that he must exercise reasonable care, and whether such care has been exercised is normally a question of fact." (*Butigan v. Yellow Cab Co.* (1958) 49 Cal.2d 652, 656 [320 P.2d 500] .)

- Courts have held that a reading of section 22107 should be followed by an instruction clarifying that the driver is under a duty to exercise only as much care as a reasonably prudent person when making a turn or movement: "An instruction to a jury concerning *Vehicle Code*, section 544 [now 22107] must make it clear that the driver who is about to turn must exercise such care as would a reasonably prudent man under similar circumstances, no more and no less." (*Lewis v. Franklin* (1958) 161 Cal.App.2d 177, 184 [326 P.2d 625] .)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 883, 884, 886

California Tort Guide (Cont.Ed.Bar 3d ed.) §§ 4.10-4.11

2 Levy et al., California Torts, Ch. 20, *Motor Vehicles*, § 20.67 (Matthew Bender)

8 *California Forms of Pleading and Practice*, Ch. 82, *Automobiles: Causes of Action*, §§ 82.66, 82.67 (Matthew Bender)

Publisher's Notes

This instruction replaces BAJI No. 5.20.

Legal Topics:

For related research and practice materials, see the following legal topics:

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CHAPTER 7 California Judicial Council Motor Vehicles and Highway Safety Instructions

2-7 California Forms of Jury Instruction CACI 706

CACI 706 Basic Speed Law (Veh. Code, § 22350)

A person must drive at a reasonable speed. Whether a particular speed is reasonable depends on the circumstances such as traffic, weather, visibility, and road conditions. Drivers must not drive so fast that they create a danger to people or property.

If [name of plaintiff/defendant] has proved that [name of defendant/plaintiff] was not driving at a reasonable speed at the time of the accident, then [name of defendant/plaintiff] was negligent.

New September 2003

- *Vehicle Code section 22350* provides: "No person shall drive a vehicle upon a highway at a speed greater than is reasonable or prudent having due regard for weather, visibility, the traffic on, and the surface and width of, the highway, and in no event at a speed which endangers the safety of persons or property."

- "The so-called basic speed law is primarily a regulation of the conduct of the operators of vehicles. They are bound to know the conditions which dictate the speeds at which they can drive with a reasonable degree of safety. They know, or should know, their cars and their own ability to handle them, and especially their ability to come to a stop at different speeds and under different conditions of the surface of the highway." (*Wilding v. Norton* (1957) 156 Cal.App.2d 374, 379 [319 P.2d 440] .)

- "Whether *Vehicle Code section 22350* has been violated is a question of fact." (*Leighton v. Dodge* (1965) 236 Cal.App.2d 54, 57 [45 Cal.Rptr. 820] , internal citation omitted.)

■ "A number of cases have held that it is proper to give an instruction in the terms of this section and to inform the jury that a violation of the statute is negligence." (*Hardin v. San Jose City Lines, Inc.* (1953) 41 Cal.2d 432, 438 [260 P.2d 63] .)

■ The burden of proving negligence in a civil action is on the party charging negligence, and even if such party has established speed in excess of the applicable prima facie limit the party must establish negligence under the circumstances. (*Faselli v. Southern Pacific Co.* (1957) 150 Cal.App.2d 644, 648 [310 P.2d 698] .)

■ Compliance with the posted speed law does not negate negligence as a matter of law. (*Maxwell v. Colburn* (1980) 105 Cal.App.3d 180, 186 [163 Cal.Rptr. 912] .)

■ Drivers who are driving at the maximum speed limit on a multi-lane freeway are not under a duty to move their vehicles to the right into the next slower lane when another vehicle approaches them from behind in the same lane at a speed in excess of the posted maximum speed limit. (*Monreal v. Tobin* (1998) 61 Cal.App.4th 1337, 1354-1355 [72 Cal.Rptr.2d 168] .)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, § 878

California Tort Guide (Cont.Ed.Bar 3d ed.) § 4.16

2 Levy et al., California Torts, Ch. 20, *Motor Vehicles*, § 20.63[3][a] (Matthew Bender)

Publisher's Notes

This instruction replaces BAJI No. 5.30.

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsNegligenceProofViolations of LawGeneral OverviewTortsNegligenceStandards of CareReasonable CareGeneral OverviewTortsTransportation TortsMotor VehiclesPersonal VehiclesTransportation LawPrivate VehiclesTraffic RegulationGeneral Overview



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CHAPTER 7 California Judicial Council Motor Vehicles and Highway Safety Instructions

2-7 California Forms of Jury Instruction CACI 707

CACI 707 Speed Limit (Veh. Code, § 22352)

The speed limit where the accident occurred was [*insert number*] miles per hour.

The speed limit is a factor to consider when you decide whether or not [*name of plaintiff/name of defendant*] was negligent. A driver is not necessarily negligent just because he or she was driving faster than the speed limit. However, a driver may be negligent even if he or she was driving at or below the speed limit.

New September 2003

- The prima facie speed limits are set by *Vehicle Code* section 22352.
- *Vehicle Code* section 40831 provides: "In any civil action proof of speed in excess of any prima facie limit declared in Section 22352 at a particular time and place does not establish negligence as a matter of law but in all such actions it shall be necessary to establish as a fact that the operation of a vehicle at the excess speed constituted negligence."
- A party is entitled to an instruction that the prima facie speed limit is a factor for the jury to consider in making its negligence determination. (*Hardin v. San Jose City Lines, Inc.*(1953) 41 Cal.2d 432, 439 [260 P.2d 63].)
- "The mere driving of an automobile in excess of the speed limit does not show negligence as a matter of law. The jury was free to find [defendant] not guilty of negligence even if they found that he was exceeding the speed limit." (*Williams v. Cole* (1960) 181 Cal.App.2d 70, 74 [5 Cal.Rptr. 24] , internal citations omitted.)

■ The burden of proving negligence in a civil action is on the party charging negligence, and even if such party has established speed in excess of the applicable prima facie limit the party must establish negligence under the circumstances. (*Faselli v. Southern Pacific Co.* (1957) 150 Cal.App.2d 644, 648 [310 P.2d 698] .)

■ "Even though the Texaco truck was traveling at a speed less than the maximum specified in the Vehicle Code, the reasonableness of its speed was a question of fact under all the circumstances, and circumstances may make travel at a speed less than the maximum rate a negligent operation of a motor vehicle." (*Scott v. Texaco, Inc.* (1966) 239 Cal.App.2d 431, 436-437 [48 Cal.Rptr. 785] , internal citations omitted.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, § 878

California Tort Guide (Cont.Ed.Bar 3d ed.) § 4.18

2 Levy et al., California Torts, Ch. 20, *Motor Vehicles*, § 20.63[2][c], [4] (Matthew Bender)

8 *California Forms of Pleading and Practice*, Ch. 82, *Automobiles: Causes of Action*, § 82.10 (Matthew Bender)

Publisher's Notes

This instruction replaces BAJI No. 5.31.

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsNegligenceProofViolations of LawGeneral OverviewTortsNegligenceStandards of CareReasonable CareGeneral OverviewTortsTransportation TortsMotor VehiclesPersonal VehiclesTransportation LawPrivate VehiclesTraffic RegulationGeneral Overview



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CHAPTER 7 California Judicial Council Motor Vehicles and Highway Safety Instructions

2-7 California Forms of Jury Instruction CACI 708

CACI 708 Maximum Speed Limit (Veh. Code, §§ 22349, 22356)

The maximum speed limit where the accident occurred was [*insert number*] miles per hour.

New September 2003

An instruction on maximum speed limits could be useful to help frame the issue for the jury. On the other hand, a specific instruction on the maximum speed limits may be unnecessary. In the event that there is sufficient evidence to support an instruction that one of the parties violated the maximum speed limit, the judge could give the negligence per se instructions while reciting the specific code section. In that event, the judge would not give an instruction on the basic speed law. (See *Hargrave v. Winkquist* (1982) 134 Cal.App.3d 916 [185 Cal.Rptr. 30] .)

- Two statutes set the maximum speed limit. *Vehicle Code* section 22349(a) sets the general maximum speed at 65 miles per hour, and section 22349(b) sets the basic maximum for two-lane, undivided highways at 55 miles per hour. *Vehicle Code* section 22356 sets the maximum speed at 70 miles per hour at selected locations.

- *Vehicle Code* section 22400(a) states the "minimum speed law" and provides as follows: "No person shall drive upon a highway at such a slow speed as to impede or block the normal and reasonable movement of traffic unless the reduced speed is necessary for safe operation, because of a grade, or in compliance with law. No person shall bring a vehicle to a complete stop upon a highway so as to impede or block the normal and reasonable movement of traffic unless the stop is necessary for safe operation or in compliance with law."

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, § 878

California Tort Guide (Cont.Ed.Bar 3d ed.) § 4.17

2 Levy et al., California Torts, Ch. 20, *Motor Vehicles*, § 20.63[2][b], [4][b][iii] (Matthew Bender)

Publisher's Notes

This instruction replaces BAJI No. 5.32.

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsNegligenceProofViolations of LawGeneral OverviewTortsNegligenceStandards of CareReasonable CareGeneral
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CHAPTER 7 California Judicial Council Motor Vehicles and Highway Safety Instructions

2-7 California Forms of Jury Instruction CACI 709

CACI 709 Driving Under the Influence (Veh. Code, §§ 23152, 23153)

The statute just read to you uses the term "under the influence." A driver is not necessarily "under the influence" just because he or she has consumed some alcohol [or drugs]. A driver is "under the influence" when he or she has consumed an amount of alcohol [or drugs] that impairs his or her ability to drive in a reasonably careful manner.

New September 2003

This instruction is designed to supplement a negligence per se instruction on driving under the influence.

The presumption of intoxication based on a 0.08 blood level applies to criminal prosecutions only. There is no statutory or case authority supporting the conclusion that the presumption applies in civil cases. (*Hyatt v. Sierra Boat Co.* (1978) 79 Cal.App.3d 325, 334 [145 Cal.Rptr. 47] .)

For a definition of "drug," see *Vehicle Code* section 312: "The term 'drug' means any substance or combination of substances, other than alcohol, which could so affect the nervous system, brain, or muscles of a person as to impair, to an appreciable degree, his ability to drive a vehicle in the manner that an ordinarily prudent and cautious man, in full possession of his faculties, using reasonable care, would drive a similar vehicle under like conditions."

■ *Vehicle Code* section 23152(a) provides: "It is unlawful for any person who is under the influence of any alcoholic beverage or drug, or under the combined influence of any alcoholic beverage and drug, to drive a vehicle."

■ *Vehicle Code section 23153(a)* provides: "It is unlawful for any person, while under the influence of any alcoholic beverage or drug, or under the combined influence of any alcoholic beverage and drug, to drive a vehicle and concurrently do any act forbidden by law or neglect any duty imposed by law in driving the vehicle, which act or neglect proximately causes bodily injury to any person other than the driver."

■ "All of the decided cases on the subject recognize that it is negligence as a matter of law to drive a vehicle upon a public highway while in an intoxicated condition." (*Zamucen v. Crocker* (1957) 149 Cal.App.2d 312, 316 [308 P.2d 384] , internal citations omitted.)

■ The term "under the influence" was first defined in *People v. Dingle* (1922) 56 Cal.App. 445, 449 [205 P. 705] , as follows: "[I]f intoxicating liquor has so far affected the nervous system, brain, or muscles of the driver of an automobile as to impair, to an appreciable degree, his ability to operate his car in the manner that an ordinarily prudent and cautious man, in the full possession of his faculties, using reasonable care, would operate or drive a similar vehicle under like conditions, then such driver is 'under the influence of intoxicating liquor' within the meaning of the statute."

■ "One is not necessarily under the influence of intoxicating liquor as the result of taking one or more drinks. The circumstances and effect must be considered; whether or not a person was under the influence of intoxicating liquor at a certain time is a question of fact for the jury to decide." (*Pittman v. Boiven* (1967) 249 Cal.App.2d 207, 217 [57 Cal.Rptr. 319] .)

■ Driving while "under the influence" under *Vehicle Code sections 23152 and 23153* is not the same as "being under the influence" of a controlled substance under *Health and Safety Code section 11550*. Under the Vehicle Code provisions, "the defendant's ability to drive must actually be impaired," while the Health and Safety Code provision is violated as soon as the influence is present "in any detectable manner." (*People v. Enriquez* (1996) 42 Cal.App.4th 661, 665 [49 Cal.Rptr.2d 710] .)

■ Courts have also distinguished the "under the influence" standard from the "obvious intoxication" standard used in *Business and Professions Code section 25602.1*. (*Jones v. Toyota Motor Co.* (1988) 198 Cal.App.3d 364, 368 [243 Cal.Rptr. 611] : " 'Under the influence' is defined by a person's capability to drive safely, whereas 'obvious intoxication' is defined by a person's appearance.")

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 883, 884, 886

California Tort Guide (Cont.Ed.Bar 3d ed.) § 4.25

2 Levy et al., California Torts, Ch. 20, *Motor Vehicles*, § 20.02[3][b] (Matthew Bender)

2 California Civil Practice: Torts (Thomson West) § 25:28

Publisher's Notes

This instruction replaces BAJI Nos. 5.40 and 5.41.

Legal Topics:

For related research and practice materials, see the following legal topics:

Criminal Law & Procedure Criminal Offenses Vehicular Crimes Driving Under the Influence General

OverviewTortsNegligenceProofViolations of LawGeneral OverviewTortsTransportation TortsMotor VehiclesPersonal
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CHAPTER 7 California Judicial Council Motor Vehicles and Highway Safety Instructions

2-7 California Forms of Jury Instruction CACI 710

CACI 710 Duties of Care for Pedestrians and Drivers

The duty to use reasonable care does not require the same amount of caution from drivers and pedestrians. While both drivers and pedestrians must be aware that motor vehicles can cause serious injuries, drivers must use more care than pedestrians.

New September 2003

- Driving is not considered a highly dangerous activity, though it may require a specific instruction: "Driving a motor vehicle may be sufficiently dangerous to warrant special instructions, but it is not so hazardous that it always requires 'extreme caution.' " (*Menchaca v. Helms Bakeries, Inc.* (1968) 68 Cal.2d 535, 544 [67 Cal.Rptr. 775, 439 P.2d 903] , internal citations omitted.)

- Failure to give an instruction upon request on the relative duties of the driver and the pedestrian has been held to be error. (*Cucinella v. Weston Biscuit Co.* (1954) 42 Cal.2d 71, 81 [265 P.2d 513] [error not prejudicial in this case].)

- In *Dawson v. Lallane* (1937) 22 Cal.App.2d 314, 315 [70 P.2d 1002] , the court held it was error to refuse to instruct the jury that "the plaintiff and the defendant were both chargeable only with the exercise of ordinary care, but a greater amount of such care was required of the defendant at the time of the accident in question by reason of the fact that he was driving and operating an automobile, which is an instrumentality capable of inflicting serious and often fatal injuries upon others using the highway."

- The purpose of instructions concerning the relative standards of care for pedestrians and drivers is "to inform the jury that the elements of action constituting conduct which qualifies as ordinary care are

those commensurable with the responsibility involved and depend upon the character of the instrumentality being used or the nature of the act which is being performed, all as related to the surrounding circumstances." (*Cucinella, supra*, 42 Cal.2d at p. 80 .)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 881, 882, 885

California Tort Guide (Cont.Ed.Bar 3d ed.) §§ 4.72-4.73

2 Levy et al., California Torts, Ch. 20, *Motor Vehicles*, §§ 20.10-20.12 (Matthew Bender)

8 *California Forms of Pleading and Practice*, Ch. 82, *Automobiles: Causes of Action*, § 82.10 (Matthew Bender)

Publisher's Notes

This instruction replaces BAJI Nos. 5.50 and 5.51.

LexisNexis Matthew Bender Expert Practice Tip--Drivers vs. Pedestrians: BAJI No. 5.51 was a confusing instruction. *CACI No. 710* replaces it by attempting to define the "Duties of Care for Pedestrians and Drivers." Apparently, the conclusion that "drivers must use more care than pedestrians" is based on dicta cited in the Sources and Authority case of *Dawson v. Lallane* (1937) 22 Cal. App. 2d 314, 315, 70 P.2d 1002 . Certainly automobiles carry far more potential for harm than pedestrians who challenge highways. It seems that a reasonably careful pedestrian, knowing full well the damage a driver can inflict, should be careful when crossing the street. I do not believe the change in the jury instruction reflects any corresponding change in the duty of care. Thus, if you represent a driver against a claim by a pedestrian, argue against giving *CACI No. 710* as it requires a higher standard of care for drivers than for pedestrians without sufficient legal authority. *By Joseph Devine*

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsNegligenceStandards of CareAppropriate StandardGeneral OverviewTortsNegligenceStandards of CareReasonable CareGeneral OverviewTortsTransportation TortsMotor VehiclesPersonal VehiclesTransportation LawPrivate VehiclesGeneral Overview



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California Forms of Jury Instruction

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CHAPTER 7 California Judicial Council Motor Vehicles and Highway Safety Instructions

2-7 California Forms of Jury Instruction CACI 711

CACI 711 The Passenger's Duty of Care for Own Safety

A passenger is not required to be aware of the conditions on the highway and is entitled to expect that a driver will use reasonable care. However, if a passenger becomes aware of [a danger on the highway] [the driver's impairment or failure to use reasonable care], then the passenger must take reasonable steps to protect his or her safety.

New September 2003

■ "In the absence of some fact brought to his attention which would cause a person of ordinary prudence to act otherwise, a passenger in an automobile has no duty to observe traffic conditions on the highway, and his mere failure to do so, without more, will not support a finding of contributory negligence. In other words, an automobile passenger's "duty to look" does not arise until some factor of danger comes to his attention, thus charging him as a person of ordinary prudence to take steps for his own safety. ..." (*Casey v. Russell* (1982) 138 Cal.App.3d 379, 386-387 [188 Cal.Rptr. 18] , internal citations omitted.)

■ "Even when negligence of a driver may not be imputed to him, the passenger is bound to exercise ordinary care for his own safety. He may not shut his eyes to an obvious danger; he may not blindly rely on the driver in approaching a place of danger. He is normally bound to protest against actual negligence or recklessness of the driver, the extent of his duty in this regard depending upon the particular circumstances of each case and ordinarily being a question of fact for the jury." (*Pobor v. Western Pacific Railroad Co.* (1961) 55 Cal.2d 314, 324 [11 Cal.Rptr. 106, 359 P.2d 474] , internal citations omitted.)

Secondary Sources

California Tort Guide (Cont.Ed.Bar 3d ed.) §§ 4.67-4.71

2 Levy et al., California Torts, Ch. 20, *Motor Vehicles*, § 20.03[2][c] (Matthew Bender)

2 California Civil Practice: Torts (Thomson West) § 25:29

Publisher's Notes

This instruction covers issues presented in BAJI Nos. 3.72, 13.60.

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsNegligenceDefensesContributory NegligenceGeneral OverviewTortsNegligenceStandards of CareReasonable
CareGeneral OverviewTortsTransportation TortsMotor VehiclesPersonal Vehicles



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CHAPTER 7 California Judicial Council Motor Vehicles and Highway Safety Instructions

2-7 California Forms of Jury Instruction CACI 712

CACI 712 Affirmative Defense--Failure to Wear a Seat Belt

[*Name of defendant*] **claims that** [*name of plaintiff*] **was negligent because** [he/she] **failed to wear a seat belt. To succeed, [*name of defendant*] must prove all of the following:**

- 1. That a working seat belt was available;**
- 2. That a reasonably careful person in [*name of plaintiff*]'s situation would have used the seat belt;**
- 3. That [*name of plaintiff*] failed to wear a seat belt; and**
- 4. That [*name of plaintiff*]'s injuries would have been avoided or less severe if [he/she] had used the seat belt.**

[In deciding whether a reasonably careful person would have used a seat belt, you may consider *Vehicle Code* section 27315, which states: [*insert pertinent provision*].]

New September 2003; Revised October 2008

Note that *Vehicle Code* section 27315 applies only to persons 16 years or older. No case law regarding whether persons under 16 can be found comparatively negligent for failing to wear a seat belt has been found.

- *Vehicle Code* section 27315, the "Motor Vehicle Safety Act," was adopted in 1985.

■ Defendants must prove two elements to establish the seat belt defense: "Defendants ... are required to prove two issues of fact: (1) the defendant must show whether in the exercise of ordinary care the plaintiff should have used the seat belt which was available to him. ... (2) The defendant must show what the consequence to the plaintiff would have been had seat belts been used." (*Franklin v. Gibson* (1982) 138 Cal.App.3d 340, 343 [188 Cal.Rptr. 23] .)

■ The second requirement must almost always be established by expert testimony, and it appears to overlap somewhat with the issue of causation: "Upon a retrial the court or jury will determine whether in the exercise of ordinary care [plaintiff] should have used the seat belt; expert testimony will be required to prove whether [plaintiff] would have been injured, and, if so, the extent of the injuries he would have sustained if he had been using the seat belt" (*Truman v. Vargas* (1969) 275 Cal.App.2d 976, 983 [80 Cal.Rptr. 373] .)

■ In *Housley v. Godinez* (1992) 4 Cal.App.4th 737, 747 [6 Cal.Rptr.2d 111] , the court approved of the following jury instruction, which was read in addition to section 27315: "The Defendants have raised the seat belt defense in this case. First, you must decide whether in the exercise of ordinary care, the Plaintiff should have used seat belts, if available to him. Second you must determine with expert testimony the nature of injuries and damages Plaintiff would have sustained if he had used seat belts."

■ In *Housley, supra*, 4 Cal.App.4th at page 747 , the court held that the jury may be instructed "on the existence of the seat belt statute [section 27315] in appropriate cases, while allowing the jury to decide what weight, if any, to give the statute in determining the standard of reasonable care."

■ Subdivision (j) provides that violations of section 27315 "shall not establish negligence as a matter of law or negligence per se for comparative fault purposes, but negligence may be proven as a fact without regard to the violation." The *Housley* court observed that "nothing in the statute prohibits a jury from knowing and considering its very existence when determining the reasonableness of driving without a seat belt." (*Housley, supra*, 4 Cal.App.4th at p. 744 .)

■ Failure to wear a seat belt is not considered a supervening cause. (*Hardison v. Bushnell* (1993) 18 Cal.App.4th 22, 28 [22 Cal.Rptr.2d 106] .)

■ "Expert testimony is not always required to prove that failure to use a seat belt may cause at least some, if not all, of plaintiff's claimed injuries. [P] Depending on the facts of the case, expert testimony may be necessary for the jury to distinguish the injuries that [plaintiff] unavoidably sustained in the collision from the injuries he could have avoided if he had worn a seat belt." (*Lara v. Nevitt* (2004) 123 Cal.App.4th 454, 458-459 [19 Cal.Rptr.3d 865] , internal citation omitted.)

■ "The seat belt defense does not depend on a Vehicle Code violation nor is it eviscerated by a Vehicle Code exemption from the requirement to wear seat belts." (*Lara, supra*, 123 Cal.App.4th at p. 461 fn. 3 .)

Secondary Sources

California Tort Guide (Cont.Ed.Bar 3d ed.) § 4.71

2 Levy et al., California Torts, Ch. 20, *Motor Vehicles*, § 20.05[2] (Matthew Bender)

8 California Forms of Pleading and Practice, Ch. 82, *Automobiles: Causes of Action*, § 82.10 (Matthew Bender)

2 California Civil Practice: Torts (Thomson West) § 25:26

Publisher's Notes

This instruction covers issues presented in BAJI Nos. 5.90 and 5.91.

LexisNexis Matthew Bender Expert Practice Tip--Expert Testimony Required for Seatbelt Cases:

In any motor vehicle collision when the use of a seatbelt is an issue, expert testimony from a medical expert and/or biomechanical expert is required to prevail. Note that an instruction can be drafted by the defendant for a bicyclist's failure to wear a helmet should the plaintiff bicyclist claim head injuries. *By Dona Cohn-Payne*

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsNegligenceDefensesContributory NegligenceGeneral OverviewTortsNegligenceProofViolations of LawGeneral OverviewTortsNegligenceStandards of CareReasonable CareGeneral OverviewTortsTransportation TortsMotor VehiclesPersonal VehiclesTransportation LawPrivate VehiclesSafety StandardsGeneral Overview



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CHAPTER 7 California Judicial Council Motor Vehicles and Highway Safety Instructions

2-7 California Forms of Jury Instruction CACI 713-CACI 719

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CACI 713Reserved for Future Use



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CHAPTER 7 California Judicial Council Motor Vehicles and Highway Safety Instructions

2-7 California Forms of Jury Instruction CACI 720

CACI 720 Motor Vehicle Owner Liability--Permissive Use of Vehicle

[Name of plaintiff] claims that [he/she] was harmed and that [name of defendant] is responsible for the harm because [name of defendant] gave [name of driver] permission to operate the vehicle. To establish this claim, [name of plaintiff] must prove all of the following:

- 1. That [name of driver] was negligent in operating the vehicle;**
- 2. That [name of defendant] was an owner of the vehicle at the time of the injury to [name of plaintiff]; and**
- 3. That [name of defendant], by words or conduct, gave permission to [name of driver] to use the vehicle.**

In determining whether permission was given, you may consider the relationship between the owner and the operator. [For example, if the parties are related or the owner and the operator are employer and employee, such a relationship may support a finding that there was implied permission to use the vehicle.]

[If the vehicle owner has given a person permission to use the vehicle, and that person authorizes a third person to operate the vehicle, the third person may be considered to have used the vehicle with the permission of the owner.]

New September 2003

Separate instructions will be necessary regarding the negligence of the driver and that it caused harm to the plaintiff. Read bracketed language if appropriate to the facts. If ownership of the vehicle is

uncontested, element 2 may be deleted.

■ *Vehicle Code section 17150* provides: "Every owner of a motor vehicle is liable and responsible for death or injury to person or property resulting from a negligent or wrongful act or omission in the operation of the motor vehicle, in the business of the owner or otherwise, by any person using or operating the same with the permission, express or implied, of the owner."

■ *Vehicle Code section 17151(a)* provides, in part: "The liability of an owner ... is limited to the amount of fifteen thousand dollars (\$15,000) for the death of or injury to one person ... and ... to the amount of thirty thousand dollars (\$30,000) for the death of or injury to more than one person ... and is limited to the amount of five thousand dollars (\$5,000) for damage to property."

■ The statutory limitation under section 17151(a) "does not apply ... to a vehicle owner's own common law negligence, as distinguished from the owner's statutory vicarious liability for the operator's negligence." (*Fremont Compensation Insurance Co. v. Hartnett* (1993) 19 Cal.App.4th 669, 675-676 [23 Cal.Rptr.2d 567] .)

■ "[U]nless the evidence points to one conclusion only, the question of the existence of the requisite permission under [section 17150] is one to be determined by the trier of fact, 'upon the facts and circumstances in evidence and the inferences reasonably to be drawn therefrom.' " (*Peterson v. Grieger, Inc.* (1961) 57 Cal.2d 43, 51 [17 Cal.Rptr. 828, 367 P.2d 420] , internal citations omitted.)

■ "[P]ermission cannot be left to speculation or conjecture nor be assumed, but must be affirmatively proved, and the fact of permission is just as important to sustain the imposition of liability as is the fact of ownership." (*Scheff v. Roberts* (1950) 35 Cal.2d 10, 12 [215 P.2d 925] , internal citations omitted.)

■ "Where the issue of implied permissive use is involved, the general relationship existing between the owner and the operator, is of paramount importance. Where, for example, the parties are related by blood, or marriage, or where the relationship between the owner and the operator is that of principal and agent, weaker direct evidence will support a finding of such use than where the parties are only acquaintances or strangers." (*Elkinton v. California State Automobile Assn., Interstate Insurance Bureau* (1959) 173 Cal.App.2d 338, 344 [343 P.2d 396] , internal citations omitted.)

■ "There is no doubt that the word 'owner' as used in [the predecessor to *Vehicle Code section 17150*] for the purpose of creating a liability thereunder, is not synonymous with that word as used in the ordinary sense of referring to a person or persons whose title is good as against all others. Under the Vehicle Code there may be several such 'owners' at any one time. One or more persons may be an 'owner,' and thus liable for the injuries of a third party, even though no such 'owner' possesses all of the normal incidents of ownership." (*Stoddart v. Peirce* (1959) 53 Cal.2d 105, 115 [346 P.2d 774] , internal citation omitted.)

■ "The question whether the [defendant] was an owner for purposes of imposition of liability for negligence [under *Vehicle Code section 17150*] was one of fact." (*Campbell v. Security Pacific Nat. Bank* (1976) 62 Cal.App.3d 379, 385 [133 Cal.Rptr. 77] .)

■ "Strict compliance with *Vehicle Code section 5602* [regarding the sale or transfer of a vehicle] is required to enable a transferring owner to escape the liability imposed by section 17150 on account of an accident occurring before notice of the transfer is received by the Motor Vehicle Department." (*Laureano v. Christensen* (1971) 18 Cal.App.3d 515, 520-521 [95 Cal.Rptr. 872] .)

■ "[T]he true and actual owner of an automobile [is not] relieved from liability by the expedient of registration in the name of another. ... It is clear that it was the legislative intent to make the actual owners of automobiles liable for the negligence of those to whom permission is given to drive them. According to the allegations of the complaint defendants ... were in fact the true owners of the car and had control of it, the registration being in the name of defendant [driver] for the purpose of avoiding liability." (*McCalla v. Grosse* (1941) 42 Cal.App.2d 546, 549-550 [109 P.2d 358] .)

■ "[I]t is a question of fact in cases of co-ownership, as it is in cases of single ownership, whether the operation of an automobile is with or without the consent, express or implied, of an owner who is not personally participating in such operation. The mere fact of co-ownership does not necessarily or conclusively establish that the common owners have consented to any usage or possession among themselves of a type for which permission is essential." (*Krum v. Malloy* (1943) 22 Cal.2d 132, 136 [137 P.2d 18] .)

■ "The immunity of the negligent operator under the [Workers' Compensation] Act does not insulate a vehicle owner who is neither the plaintiff's employer nor co-employee from liability under section 17150. [P] Since the owner's liability does not arise from the status or liability of the operator, the defenses applicable to the operator are not available to the owner." (*Galvis v. Petito* (1993) 13 Cal.App.4th 551, 554 [16 Cal.Rptr.2d 560] .)

■ "The doctrine of 'negligent entrustment' is clearly distinguishable from the theory of 'vicarious liability.' Negligent entrustment is a common law liability doctrine. Conversely, the obligation of a lending owner of an automobile is one of statutory liability. An owner of an automobile may be independently negligent in entrusting it to an incompetent driver. California is one of several states which recognizes the liability of an automobile owner who has entrusted a car to an incompetent, reckless, or inexperienced driver, and has supplemented the common law doctrine of negligent entrustment by enactment of a specific consent statute." (*Syah v. Johnson* (1966) 247 Cal.App.2d 534, 538 [55 Cal.Rptr. 741] , internal citations omitted.)

■ For purposes of liability under the permissive use statute, "[s]ince defendant [car owner] had the opportunity of making such investigation as he deemed necessary to satisfy himself as to the identity of the [renter] to whom he intrusted his automobile, he should not be permitted to escape liability to a third party because of any fraudulent misrepresentation made by the renter of the car to him." (*Tuderios v. Hertz Drivurself Stations, Inc.* (1945) 70 Cal.App.2d 192, 198 [160 P.2d 554] .)

■ "[T]he provisions of Proposition 51 do not operate to reduce the liability of vehicle owners imposed by *Vehicle Code* section 17150." (*Rashtian v. BRAC-BH, Inc.* (1992) 9 Cal.App.4th 1847, 1849 [12 Cal.Rptr.2d 411] .)

■ "[I]f the evidence shows that an automobile was being driven by an employee of the owner at the time of an accident, the jury may infer that the employee was operating the automobile with the permission of the owner." (*Hicks v. Reis* (1943) 21 Cal.2d 654, 659 [134 P.2d 788] , internal quotation marks and citations omitted.)

■ "The mere fact that at the time of an accident one is driving an automobile belonging to another is not, of itself, sufficient to establish that the former was driving the car with the permission of the owner." (*Di Rebaylio v. Herndon* (1935) 6 Cal.App.2d 567, 569 [44 P.2d 581] .)

■ "[I]mplied permission to use an automobile may be found even where the owner and permittee

expressly deny that permission was given." (*Anderson v. Wagnon* (1952) 110 Cal.App.2d 362, 366 [242 P.2d 915] .)

■ "[I]n determining whether there has been an implied permission, it is not necessary that the owner have prior knowledge that the driver intends to use the car, but it must be 'under circumstances from which consent to use the car is necessarily implied.' " (*Mucci v. Winter* (1951) 103 Cal.App.2d 627, 631 [230 P.2d 22] , internal citation omitted.)

■ For purposes of statutory vicarious liability, "if the owner entrusts his car to another he invests him with the same authority to select an operator which the owner has in the first instance. ... [P] ... The owner is thus liable for negligent acts by a subpermittee even though the subpermittee operated the owner's vehicle with authorization only from the permittee, since the foundation of the statutory liability is the permission given to another to use an instrumentality which if improperly used is a danger and menace to the public." (*Peterson v. Grieger, Inc.* (1961) 57 Cal.2d 43, 54 [17 Cal.Rptr. 828, 367 P.2d 420] , internal quotation marks and citations omitted.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1260-1265, 1271

California Tort Guide (Cont.Ed.Bar 3d ed.) Automobiles, §§ 4.28-4.32, 4.37

2 Levy et al., California Torts, Ch. 20, *Motor Vehicles*, § 20.20 (Matthew Bender)

8 *California Forms of Pleading and Practice*, Ch. 82, *Automobiles: Causes of Action*, §§ 82.11, 82.16 (Matthew Bender)

2 California Civil Practice: Torts (Thomson West) §§ 25:44-25:45

Publisher's Notes

This instruction covers issues presented in BAJI Nos. 13.50, 13.51, and 13.52.

LexisNexis Matthew Bender Expert Practice Tip--Statutory Limitation: There is a statutory liability limit for damages by a motor vehicle owner who gives permissive use of a vehicle [*Veh. Code* § 17151(a)] unless a plaintiff can prove that the owner was actively negligent in providing the vehicle to the permissive driver. Note the difference for an adult's liability for a minor's permissive use in *CACI* No. 722. *By Dona Cohn-Payne*

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsNegligenceActionsNegligent EntrustmentTortsTransportation TortsMotor VehiclesPersonal VehiclesTortsVicarious LiabilityGeneral Overview



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CHAPTER 7 California Judicial Council Motor Vehicles and Highway Safety Instructions

2-7 California Forms of Jury Instruction CACI 721

CACI 721 Motor Vehicle Owner Liability--Affirmative Defense--Use Beyond Scope of Permission

[*Name of defendant*] **claims that [he/she] is not responsible for [*name of plaintiff*]'s harm because [*name of driver*]'s use of the vehicle exceeded the scope of the permission given. To succeed, [*name of defendant*] must prove both of the following:**

- 1. That [*name of defendant*], by words or conduct, gave permission to [*name of driver*] to use the vehicle for a limited time, place, or purpose; and**
- 2. That [*name of driver*]'s use of the vehicle substantially violated the time, place, or purpose specified.**

New September 2003

This instruction is intended for use when the vehicle owner contends that the use of the vehicle exceeded the scope of the permission, thereby terminating the permission.

- *Vehicle Code section 17150* provides: "Every owner of a motor vehicle is liable and responsible for death or injury to person or property resulting from a negligent or wrongful act or omission in the operation of the motor vehicle, in the business of the owner or otherwise, by any person using or operating the same with the permission, express or implied, of the owner."

- "[W]here the permission is granted for a limited time, any use after the expiration of the period is without consent, and the owner is not liable, unless the circumstances justify an inference of implied consent to further use. [P] ... On principle, there is no fundamental ground of distinction between a

limitation of time and one of purpose or place, insofar as permission is concerned; and it would seem clear that a substantial violation of either limitation terminates the original express consent and makes the subsequent use without permission. ... [P] ... [T]he substantial violation of limitations as to locality or purpose of use operate in the same manner as violation of time limitations, absolving the owner from liability." (*Henrietta v. Evans* (1938) 10 Cal.2d 526, 528-529 [75 P.2d 1051] , internal citations omitted.)

■ "[W]here restrictions by the owner as to time, purpose, or area are involved, the owner's permission is considered terminated only where there has been a substantial violation of such restrictions, and it is a question of fact whether under all the circumstances presented, such restrictions as to time, purpose, or area have been substantially violated prior to the occurrence of the accident so as to vitiate the owner's permission and thus absolve him from the vicarious liability imposed under [the predecessor to section 17150]." (*Peterson v. Grieger, Inc.* (1961) 57 Cal.2d 43, 52 [17 Cal.Rptr. 828, 367 P.2d 420] , internal citations omitted.)

■ "What is a substantial deviation from a permitted use is a question of fact under the circumstances of each case." (*Garmon v. Sebastian* (1960) 181 Cal.App.2d 254, 260 [5 Cal.Rptr. 101] .)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, § 1272

California Tort Guide (Cont.Ed.Bar 3d ed.) Automobiles, §§ 4.35-4.36

2 Levy et al., California Torts, Ch. 20, *Motor Vehicles*, § 20.20[5][c] (Matthew Bender)

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

Publisher's Notes

This instruction replaces BAJI No. 13.53.

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsNegligenceDefensesGeneral OverviewTortsTransportation TortsMotor VehiclesPersonal VehiclesTortsVicarious LiabilityGeneral Overview



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CHAPTER 7 California Judicial Council Motor Vehicles and Highway Safety Instructions

2-7 California Forms of Jury Instruction CACI 722

CACI 722 Adult's Liability for Minor's Permissive Use of Motor Vehicle

[Name of plaintiff] claims that [he/she] was harmed and that [name of defendant] is responsible for the harm because [name of defendant] gave [name of minor] permission to operate the vehicle. To establish this claim, [name of plaintiff] must prove all of the following:

- 1. That [name of minor] was negligent in operating the vehicle;**
- 2. That [name of plaintiff] was harmed;**
- 3. That [name of minor]'s negligence was a substantial factor in causing the harm; and**
- 4. That [name of defendant], by words or conduct, gave [name of minor] permission to use the vehicle.**

New September 2003; Revised April 2004, October 2004

Under *Vehicle Code* section 17708, an element of this cause of action is that the defendant must have "custody" of the minor driver. The instruction omits this element because it will most likely be stipulated to or decided by the judge as a matter of law. If there are contested issues of fact regarding this element, this instruction may be augmented to include the specific factual findings necessary to arrive at a determination of custody.

● *Vehicle Code* section 17708 provides: "Any civil liability of a minor, whether licensed or not under this code, arising out of his driving a motor vehicle upon a highway with the express or implied

permission of the parents or the person or guardian having custody of the minor is hereby imposed upon the parents, person, or guardian and the parents, person, or guardian shall be jointly and severally liable with the minor for any damages proximately resulting from the negligent or wrongful act or omission of the minor in driving a motor vehicle."

■ "[I]t was incumbent upon [plaintiffs], in order to fasten liability upon [the parents] for the minor's negligence, to establish two necessary facts. These facts were, first, that at the time the collision occurred respondents had custody of the minor and, second, that they had given to the minor their permission, either express or implied, to his driving the automobile by the negligent operation of which the injuries were caused." (*Sommers v. Van Der Linden* (1938) 24 Cal.App.2d 375, 380 [75 P.2d 83] .)

■ "Whether or not a sufficient custody existed, within the meaning of the statute, might well depend upon evidence of specific facts showing the nature, kind and extent of the custody and right of control which the respondent [grandfather] actually had." (*Hughes v. Wardwell* (1953) 117 Cal.App.2d 406, 409 [255 P.2d 881] .)

■ "In the absence of statute, ordinarily a parent is not liable for the torts of his minor child. A parent, however, becomes liable for the torts of his minor child if that child in committing a tort is his agent and acting within the child's authority." (*Van Den Eikhof v. Hocker* (1978) 87 Cal.App.3d 900, 904-905 [151 Cal.Rptr. 456] , internal citations omitted.)

■ " '[P]erson * * * having custody of the minor' means person having permanent legal custody, and not a person such as a school teacher whose control over his pupils is limited in time and scope." (*Hathaway v. Siskiyou Union High School Dist.* (1944) 66 Cal.App.2d 103, 114 [151 P.2d 861] .)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1256-1259

California Tort Guide (Cont.Ed.Bar 3d ed.) Automobiles, §§ 4.42-4.43

2 Levy et al., California Torts, Ch. 20, *Motor Vehicles*, § 20.30[1] (Matthew Bender)

8 *California Forms of Pleading and Practice*, Ch. 82, *Automobiles: Causes of Action*, § 82.16, Ch. 83, *Automobiles: Bringing the Action*, § 83.133 (Matthew Bender)

2 California Civil Practice: Torts (Thomson West) § 25:52

Publisher's Notes

This instruction replaces BAJI Nos. 13.65 and 13.66.

Legal Topics:

For related research and practice materials, see the following legal topics:

Family Law Family Relationships & Torts Tort Liability General Overview Torts Transportation Torts Motor Vehicles Personal Vehicles Torts Vicarious Liability Family Members Children & Parents



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California Forms of Jury Instruction

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CHAPTER 7 California Judicial Council Motor Vehicles and Highway Safety Instructions

2-7 California Forms of Jury Instruction CACI 723

CACI 723 Liability of Cosigner of Minor's Application for Driver's License

[Name of plaintiff] claims that [he/she] was harmed by [name of minor]'s negligence in operating the vehicle and that [name of defendant] is responsible for the harm because [name of defendant] signed [name of minor]'s application for a driver's license. To establish this claim, [name of plaintiff] must prove all of the following:

- 1. That [name of minor] was negligent in operating the vehicle;**
- 2. That [name of plaintiff] was harmed;**
- 3. That [name of minor]'s negligence was a substantial factor in causing the harm;**
- 4. That [name of defendant] signed [name of minor]'s application for a driver's license; and**
- 5. That at the time of the collision [name of minor]'s driver's license had not been canceled or revoked by the Department of Motor Vehicles.**

New September 2003

■ *Vehicle Code section 17707* provides, in part: "Any civil liability of a minor arising out of his driving a motor vehicle upon a highway during his minority is hereby imposed upon the person who signed and verified the application of the minor for a license and the person shall be jointly and severally liable with the minor for any damages proximately resulting from the negligent or wrongful act or omission of the minor in driving a motor vehicle, except that an employer signing the application shall be subject to the provisions of this section only if an unrestricted driver's license has been issued to the minor pursuant to

the employer's written authorization."

■ *Vehicle Code section 17710* provides: "The person signing a minor's application for a license is not liable under this chapter for a negligent or wrongful act or omission of the minor committed when the minor is acting as the agent or servant of any person."

■ *Vehicle Code section 17711* provides: "Any person who has signed and verified the application of a minor for a driver's license or any employer who has authorized the issuance of a license to a minor and who desires to be relieved from the joint and several liability imposed by reason of having signed and verified such application, may file a verified application with the department requesting that the license of the minor be canceled. The department shall cancel the license, except as provided in subdivision (e) of Section 17712. Thereafter, the person shall be relieved from the liability imposed under this chapter by reason of having signed and verified the original application on account of any subsequent willful misconduct or negligent operation of a motor vehicle by the minor."

■ "Cancellation accomplishes voluntarily what revocation [of minor's driver's license] accomplishes involuntarily. If termination is accomplished by the latter method, resort to the former becomes superfluous. Once revocation occurs, the driving privilege is at an end. Thereafter there is no reason and no necessity for a voluntary application to terminate that which has already been terminated involuntarily. Both means are equally effective to terminate the driving privilege and to terminate the signer's liability." (*Hamilton v. Dick* (1967) 254 Cal.App.2d 123, 125 [61 Cal.Rptr. 894] .)

■ "[T]he negligence of the minor son of the [parents] is imputed to them ... by virtue of their having signed his application for an operator's license, which was not revoked or cancelled at the time of the accident in question, notwithstanding the fact that the license was then temporarily suspended" and even though the parents specifically forbade the minor from operating the vehicle. (*Sleeper v. Woodmansee* (1936) 11 Cal.App.2d 595, 598 [54 P.2d 519] .)

■ "It seems quite evident that, in adopting [the predecessors to sections 17150 and 17707] of the Vehicle Code, the legislature intended to create a limited liability for imputed negligence against both the owner of an automobile and the signer of a driver's license. ... We must assume the legislature intended to fix a limited liability ... for imputed negligence against the owner of an automobile and the signer of a driver's license or either of them and that it did not intend to double that limited liability when the same individual was both the owner of the machine and the signer of the license." (*Rogers v. Foppiano* (1937) 23 Cal.App.2d 87, 92-93 [72 P.2d 239] .)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1256-1259

California Tort Guide (Cont.Ed.Bar 3d ed.) Automobiles, §§ 4.41, 4.43

2 Levy et al., California Torts, Ch. 20, *Motor Vehicles*, § 20.30[2] (Matthew Bender)

8 *California Forms of Pleading and Practice*, Ch. 82, *Automobiles: Causes of Action*, § 82.16, Ch. 83, *Automobiles: Bringing the Action*, § 83.134 (Matthew Bender)

2 California Civil Practice: Torts (Thomson West) § 25:52

Publisher's Notes

This instruction replaces BAJI No. 13.67.

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsTransportation TortsMotor VehiclesPersonal VehiclesTortsVicarious LiabilityFamily MembersGeneral
OverviewTransportation LawPrivate VehiclesOperator LicensesGeneral Overview



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California Forms of Jury Instruction

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CHAPTER 7 California Judicial Council Motor Vehicles and Highway Safety Instructions

2-7 California Forms of Jury Instruction CACI 724

CACI 724 Negligent Entrustment of Motor Vehicle

[*Name of plaintiff*] **claims that [he/she] was harmed because [*name of defendant*] negligently permitted [*name of driver*] to use [*name of defendant*]'s vehicle. To establish this claim, [*name of plaintiff*] must prove all of the following:**

- 1. That [*name of driver*] was negligent in operating the vehicle;**
- 2. That [*name of defendant*] [owned the vehicle operated by [*name of driver*]/had possession of the vehicle operated by [*name of driver*] with the owner's permission];**
- 3. That [*name of defendant*] knew, or should have known, that [*name of driver*] was incompetent or unfit to drive the vehicle;**
- 4. That [*name of defendant*] permitted [*name of driver*] to drive the vehicle; and**
- 5. That [*name of driver*]'s incompetence or unfitness to drive was a substantial factor in causing harm to [*name of plaintiff*].**

New September 2003; Revised December 2009

For a definition of "negligence," see *CACI No. 401, Basic Standard of Care*.

● *Vehicle Code section 14606(a)* provides: "No person shall employ or hire any person to drive a motor vehicle nor shall he knowingly permit or authorize the driving of a motor vehicle, owned by him

or her or under his or her control, upon the highways by any person unless the person is then licensed for the appropriate class of vehicle to be driven."

- *Vehicle Code section 14607* provides: "No person shall cause or knowingly permit his child, ward, or employee under the age of 18 years to drive a motor vehicle upon the highways unless such child, ward, or employee is then licensed under this code."

- *Vehicle Code section 14608(a)* provides, in part: "No person shall rent a motor vehicle to another unless: [P] ... [t]he person to whom the vehicle is rented is licensed under this code or is a nonresident who is licensed under the laws of the state or country of his or her residence."

- "A rental car company may be held liable for negligently entrusting one of its cars to a customer. ... In determining whether defendant was negligent in entrusting its car to [the driver], defendant's conduct is to be measured by what an ordinarily prudent person would do in similar circumstances." (*Osborn v. Hertz Corp.* (1988) 205 Cal.App.3d 703, 709 [252 Cal.Rptr. 613] , internal citations omitted.)

- *Vehicle Code section 14606(a)* and its predecessors "make a motor vehicle owner who knowingly entrusts his vehicle to an unlicensed driver liable for a third party's injuries caused by the driver's negligence. ... The cause of action parallels that at common law for negligent entrustment, resting on a demonstration of knowing entrustment to an incompetent or dangerous driver with actual or constructive knowledge of his incompetence." (*Dodge Center v. Superior Court* (1988) 199 Cal.App.3d 332, 338 [244 Cal.Rptr. 789] , internal citations omitted.)

- "Liability for negligent entrustment is determined by applying general principles of negligence, and ordinarily it is for the jury to determine whether the owner has exercised the required degree of care." (*Allen v. Toledo* (1980) 109 Cal.App.3d 415, 421 [167 Cal.Rptr. 270] , internal citations omitted.)

- " 'It is generally recognized that one who places or entrusts his motor vehicle in the hands of one whom he knows, or from the circumstances is charged with knowing, is incompetent or unfit to drive, may be held liable for an injury inflicted by the use made thereof by that driver, provided the plaintiff can establish that the injury complained of was proximately caused by the driver's disqualification, incompetency, inexperience or recklessness' [P] ... Under the theory of 'negligent entrustment,' liability is imposed on vehicle owner or permitter because of his own independent negligence and not the negligence of the driver, in the event plaintiff can prove that the injury or death resulting therefrom was proximately caused by the driver's incompetency." (*Syah v. Johnson* (1966) 247 Cal.App.2d 534, 539 [55 Cal.Rptr. 741] , internal citations omitted.)

- "[O]rdinarily, in the absence of a special relationship between the parties, there is no duty to control the conduct of a third person so as to prevent him from causing harm to another and ... this rule applies even where the third person's conduct is made possible only because the defendant has relinquished control of his property to the third person, unless the defendant has reason to believe that the third person is incompetent to manage it." (*Grafton v. Mollica* (1965) 231 Cal.App.2d 860, 863 [42 Cal.Rptr. 306] .)

- "In its simplest form the question is whether the owner when he permits an incompetent or reckless person, who he knows to be incompetent or reckless, to take and operate his car, acts as an ordinarily prudent person would be expected to act under the circumstances. ... [C]onsideration for the safety of others requires him to withhold his consent and thereby refrain from participating in any accident that is liable to happen from the careless and reckless driving of such a dangerous instrumentality." (*Rocca v. Steinmetz* (1923) 61 Cal.App. 102, 109 [214 P. 257] .)

■ "[T]he tort requires demonstration of actual knowledge of facts showing or suggesting the driver's incompetence--not merely his lack of a license. ... For liability to exist, knowledge must be shown of the user's incompetence or inability safely to use the [vehicle]." (*Dodge Center, supra*, 199 Cal.App.3d at p. 341 , internal citations omitted.)

■ "Knowledge of possession of a temporary permit allowing a person to drive only if accompanied by a licensed driver is sufficient to put the entrustor 'upon inquiry as to the competency of' the unlicensed driver. ... It is then for the jury to determine under the circumstances whether the entrustor is negligent in permitting the unlicensed driver to operate the vehicle." (*Nault v. Smith* (1961) 194 Cal.App.2d 257, 267-268 [14 Cal.Rptr. 889] , internal citations omitted.)

■ "[E]ntrustment of a vehicle to an intoxicated person is not negligence per se. A plaintiff must prove defendant had knowledge of plaintiff's incompetence when entrusting the vehicle." (*Blake v. Moore* (1984) 162 Cal.App.3d 700, 706 [208 Cal.Rptr. 703] .)

■ "[T]he mere sale of an automobile to an unlicensed and inexperienced person does not constitute negligence per se." (*Perez v. G & W Chevrolet, Inc.* (1969) 274 Cal.App.2d 766, 768 [79 Cal.Rptr. 287] .)

■ "One who supplies an automobile for the use of another whom the supplier (1) knows, or (2) from facts known to him should know, to be likely, because of his inexperience (or incompetency), to use it in a manner involving unreasonable risk of bodily harm to others whom the supplier should expect to be in the vicinity of its use is subject to liability for bodily harm caused thereby to them." (*Johnson v. Casetta* (1961) 197 Cal.App.2d 272, 274 [17 Cal.Rptr. 81] , internal quotation marks omitted.)

■ "It is well-settled that where a company knows that an employee has no operator's license that such knowledge is sufficient to put the employer on inquiry as to his competency; it is for the jury to determine under such circumstances whether the employer was negligent in permitting the employee to drive a vehicle." (*Syah, supra*, 247 Cal.App.2d at p. 545 .)

■ "[I]t has generally been held that the owner of an automobile is under no duty to persons who may be injured by its use to keep it out of the hands of a third person in the absence of facts putting the owner on notice that the third person is incompetent to handle it." (*Richards v. Stanley* (1954) 43 Cal.2d 60, 63 [271 P.2d 23] , internal citations omitted.)

■ "[T]he mere fact of co-ownership does not prevent one co-owner from controlling use of the vehicle by the other co-owner. Thus, where ... plaintiff alleges that one co-owner had power over the use of the vehicle by the other and that the negligent co-owner drove with the express or implied consent of such controlling co-owner, who knew of the driver's incompetence, the basis for a cause of action for negligent entrustment has been stated." (*Mettelka v. Superior Court* (1985) 173 Cal.App.3d 1245, 1250 [219 Cal.Rptr. 697] .)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1221-1226

California Tort Guide (Cont.Ed.Bar 3d ed.) Automobiles, § 4.38

2 Levy et al., *California Torts*, Ch. 20, *Motor Vehicles*, § 20.21 (Matthew Bender)

8 *California Forms of Pleading and Practice*, Ch. 82, *Automobiles: Causes of Action*, § 82.11 (Matthew Bender)

2 California Civil Practice: Torts (Thomson West) § 25:47

Publisher's Notes

This instruction replaces BAJI No. 13.80.

LexisNexis Matthew Bender Expert Practice Tip--Examples: Examples of negligently entrusting a motor vehicle would be when an owner gives up the keys to his/her car knowing the driver is intoxicated, or when the owner lets someone drive knowing the driver has a medical condition that renders him/her unfit or incompetent to drive. *By Dona Cohn-Payne*

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsNegligenceActionsNegligent EntrustmentTortsTransportation TortsMotor VehiclesPersonal VehiclesTortsVicarious LiabilityGeneral OverviewTransportation LawPrivate VehiclesVehicle RegistrationGeneral Overview



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California Forms of Jury Instruction

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2-7 California Forms of Jury Instruction CACI 725-CACI 729

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CACI 725Reserved for Future Use



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CHAPTER 7 California Judicial Council Motor Vehicles and Highway Safety Instructions

2-7 California Forms of Jury Instruction CACI 730

CACI 730 Emergency Vehicle Exemption (Veh. Code, § 21055)

[Name of defendant] claims that [name of public employee] was not required to comply with Vehicle Code section [insert section number] because [he/she] was operating an authorized emergency vehicle and was responding to an emergency at the time of the accident.

To establish that [name of public employee] was not required to comply with section [insert section number], [name of defendant] must prove all of the following:

- 1. That [name of public employee] was operating an authorized emergency vehicle;**
- 2. That [name of public employee] was responding to an emergency situation at the time of the accident; and**
- 3. That [name of public employee] sounded a siren when reasonably necessary and displayed front red warning lights.**

If you decide that [name of defendant] proved all of these things, then you cannot find it negligent for a violation of section [insert section number]. However, even if you decide that [name of defendant] proved all of these things, you may find it negligent if [name of public employee] failed to operate [his/her] vehicle with reasonable care, taking into account the emergency situation.

New September 2003

For a definition of "emergency," see CACI No. 731, *Definition of "Emergency"*.

For a definition of "authorized emergency vehicle," see *Vehicle Code section 165*.

Note that *Vehicle Code section 17004* provides: "A public employee is not liable for civil damages on account of personal injury to or death of any person or damage to property resulting from the operation, in the line of duty, of an authorized emergency vehicle while responding to an emergency call or when in the immediate pursuit of an actual or suspected violator of the law, or when responding to but not upon returning from a fire alarm or other emergency call."

- *Vehicle Code section 21055* provides, in part:

The driver of an authorized emergency vehicle is exempt from [specified Vehicle Code sections] under all of the following conditions:

(a) If the vehicle is being driven in response to an emergency call or while engaged in rescue operations or is being used in the immediate pursuit of an actual or suspected violator of the law or is responding to, but not returning from, a fire alarm, except that fire department vehicles are exempt whether directly responding to an emergency call or operated from one place to another as rendered desirable or necessary by reason of an emergency call and operated to the scene of the emergency or operated from one fire station to another or to some other location by reason of the emergency call.

(b) If the driver of the vehicle sounds a siren as may be reasonably necessary and the vehicle displays a lighted red lamp visible from the front as a warning to other drivers and pedestrians.

- "The purpose of the statute is to provide a 'clear and speedy pathway' for these municipal vehicles on their flights to emergencies in which the entire public are necessarily concerned." (*Peerless Laundry Services v. City of Los Angeles* (1952) 109 Cal.App.2d 703, 707 [241 P.2d 269] .)

- *Vehicle Code section 21056* provides: "Section 21055 does not relieve the driver of a vehicle from the duty to drive with due regard for the safety of all persons using the highway, nor protect him from the consequences of an arbitrary exercise of the privileges granted in that section."

- "The effect of *Vehicle Code sections 21055* and *21056* is: where the driver of an authorized emergency vehicle is engaged in a specified emergency function he may violate certain rules of the road, such as speed and right of way laws, if he activates his red light and where necessary his siren in order to alert other users of the road to the situation. In such circumstances the driver may not be held to be negligent solely upon the violation of specified rules of the road, but may be held to be negligent if he fails to exercise due regard for the safety of others under the circumstances. Where the driver of an emergency vehicle fails to activate his red light, and where necessary his siren, he is not exempt from the rules of the road even though he may be engaged in a proper emergency function, and negligence may be based upon the violation of the rules of the road." (*City of Sacramento v. Superior Court* (1982) 131 Cal.App.3d 395, 402-403 [182 Cal.Rptr. 443] , internal citations omitted.)

- "Notwithstanding [*Vehicle Code section 17004*], a public entity is liable for injuries proximately caused by negligent acts or omissions in the operation of any motor vehicle by an employee of the public entity, acting within the scope of his or her employment." (*City of San Jose v. Superior Court* (1985) 166 Cal.App.3d 695, 698 [212 Cal.Rptr. 661] , internal citations omitted.)

- "If the driver of an authorized emergency vehicle is responding to an emergency call and gives the prescribed warnings by red light and siren, a charge of negligence against him may not be predicated on his violation of the

designated Vehicle Code sections; but if he does not give the warnings, the contrary is true; and in the event the charged negligence is premised on conduct without the scope of the exemption a common-law standard of care is applicable." (*Grant v. Petronella* (1975) 50 Cal.App.3d 281, 286 [123 Cal.Rptr. 399] , internal citations omitted.)

■ "Where the driver of an emergency vehicle responding to an emergency call does not give the warnings prescribed by section 21055, the legislative warning policy expressed in that section dictates the conclusion [that] the common-law standard of care governing his conduct does not include a consideration of the emergency circumstances attendant upon his response to an emergency call." (*Grant, supra*, 50 Cal.App.3d at p. 289 , footnote omitted.)

■ The exemption created by section 21055 is an affirmative defense, and the defendant must prove compliance with the conditions. (*Washington v. City and County of San Francisco* (1954) 123 Cal.App.2d 235, 242 [266 P.2d 828] .)

■ "In short the statute exempts the employer of such a driver from liability for negligence attributable to his failure to comply with specified statutory provisions, but it does not in any manner purport to exempt the employer from liability due to negligence attributable to the driver's failure to maintain that standard of care imposed by the common law." (*Torres v. City of Los Angeles* (1962) 58 Cal.2d 35, 47 [22 Cal.Rptr. 866, 372 P.2d 906] .)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 297, 331-335

2 Government Tort Liability Practice (Cont.Ed.Bar 4th ed.) §§ 11.140-11.144

2 Levy et al., California Torts, Ch. 20, *Motor Vehicles*, § 20.55 (Matthew Bender)

20 California Forms of Pleading and Practice, Ch. 246, *Emergency Vehicles* (Matthew Bender)

Publisher's Notes

This instruction replaces BAJI No. 5.80.

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsNegligenceDefensesGeneral OverviewTortsNegligenceStandards of CareGeneral OverviewTortsTransportation
TortsMotor VehiclesGeneral Overview



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CHAPTER 7 California Judicial Council Motor Vehicles and Highway Safety Instructions

2-7 California Forms of Jury Instruction CACI 731

CACI 731 Definition of "Emergency" (Veh. Code, § 21055)

An "emergency" exists if the driver of an authorized emergency vehicle is [insert one of the following]

[responding to an emergency call.]

[involved in rescue operations.]

[in the immediate pursuit of an actual or suspected violator of the law.]

[responding to, but not returning from, a fire alarm.]

[operating a fire department vehicle while traveling from one place to another place because of an emergency call.]

New September 2003

This instruction is based on the language of *Vehicle Code section 21055(a)* and is only intended for cases in which there is a factual issue regarding whether the defendant was acting in response to an emergency at the time of the accident. (*Washington v. City and County of San Francisco* (1954) 123 Cal.App.2d 235, 241 [266 P.2d 828] .)

■ *Vehicle Code section 21055(a)* provides: "The driver of an authorized emergency vehicle is exempt from [specified Vehicle Code sections] under all of the following conditions: If the vehicle is being driven in response to an emergency call or while engaged in rescue operations or is being used in the

immediate pursuit of an actual or suspected violator of the law or is responding to, but not returning from, a fire alarm, except that fire department vehicles are exempt whether directly responding to an emergency call or operated from one place to another as rendered desirable or necessary by reason of an emergency call and operated to the scene of the emergency or operated from one fire station to another or to some other location by reason of the emergency call."

■ "Whether a vehicle is driven in response to an emergency call depends on the nature of the call received and the situation as presented to the mind of the driver and not upon whether there is an emergency in fact. The driver, of course, should have reasonable grounds to believe that there is an emergency." (*Gallup v. Sparks-Mundo Engineering Co.* (1954) 43 Cal.2d 1, 5 [271 P.2d 34] , internal citations omitted.)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 297, 331-335

2 Government Tort Liability Practice (Cont.Ed.Bar 4th ed.) §§ 11.140-11.144

Publisher's Notes

This instruction covers issues presented in BAJI No. 5.81.



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CHAPTER 7 California Judicial Council Motor Vehicles and Highway Safety Instructions

2-7 California Forms of Jury Instruction CACI 732-CACI 799

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CACI 732Reserved for Future Use



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CHAPTER 7 California Judicial Council Motor Vehicles and Highway Safety Instructions

2-7 California Forms of Jury Instruction CACI VF-700

CACI VF-700 Motor Vehicle Owner Liability--Permissive Use of Vehicle

We answer the questions submitted to us as follows:

1. Was [name of defendant] an owner of the vehicle at the time of the injury to [name of plaintiff]?

_____ Yes _____ No

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

2. Did [name of defendant], by words or conduct, give permission to [name of driver] to use the vehicle?

_____ Yes _____ No

Signed: _____

Presiding Juror

Dated: _____

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

New September 2003

This is for use in conjunction with the general negligence verdict forms involving motor vehicles. The two questions here should be incorporated into the verdict form regarding the underlying case. The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on *CACI No. 720, Motor Vehicle Owner Liability--Permissive Use of Vehicle*.

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

Publisher's Notes

This verdict form covers issues presented in BAJI Nos. 16.60.1 and 16.92.

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsTransportation TortsMotor VehiclesPersonal VehiclesTortsVicarious LiabilityGeneral Overview



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CHAPTER 7 California Judicial Council Motor Vehicles and Highway Safety Instructions

2-7 California Forms of Jury Instruction CACI VF-701

CACI VF-701 Motor Vehicle Owner Liability--Permissive Use of Vehicle--Affirmative Defense--Use Beyond Scope of Permission

We answer the questions submitted to us as follows:

1. Was [*name of defendant*] an owner of the vehicle at the time of the injury to [*name of plaintiff*]?

_____ Yes _____ No

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

2. Did [*name of defendant*], by words or conduct, give permission to [*name of driver*] to use the vehicle?

_____ Yes _____ No

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

3. Was [*name of defendant*]'s permission to use the vehicle given for a limited time, place, or purpose?

_____ Yes _____ No

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

4. Did [name of driver]'s use of the vehicle substantially violate the limitations as to time, place, or purpose?

_____ Yes _____ No

Signed: _____

Presiding Juror

Dated: _____

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

New September 2003

This is for use in conjunction with the general negligence verdict forms involving motor vehicles. The four questions here should be incorporated into the verdict form regarding the underlying case. The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on *CACI No. 720, Motor Vehicle Owner Liability--Permissive Use of Vehicle*, and *CACI No. 721, Motor Vehicle Owner Liability--Affirmative Defense--Use Beyond Scope of Permission*.

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

Publisher's Notes

This verdict form covers issues presented in BAJI Nos. 16.60.1 and 16.92.

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsNegligenceDefensesGeneral OverviewTortsTransportation TortsMotor VehiclesPersonal VehiclesTortsVicarious LiabilityGeneral Overview



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CHAPTER 7 California Judicial Council Motor Vehicles and Highway Safety Instructions

2-7 California Forms of Jury Instruction CACI VF-702

CACI VF-702 Adult's Liability for Minor's Permissive Use of Motor Vehicle

We answer the questions submitted to us as follows:

1. Was [*name of minor*] negligent in operating the vehicle?

_____ Yes _____ No

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

2. Was [*name of minor*]'s negligence a substantial factor in causing harm to [*name of plaintiff*]?

_____ Yes _____ No

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

3. Did [*name of defendant*], by words or conduct, give [*name of minor*] permission to use the vehicle?

_____ Yes _____ No

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

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

[a. Past economic loss

[lost earnings..... \$_____]

[lost profits..... \$_____]

[medical expenses..... \$_____]

[other past economic loss..... \$_____]

..... **Total Past Economic Damages: \$_____]****[b. Future economic loss**

[lost earnings..... \$_____]

[lost profits..... \$_____]

[medical expenses..... \$_____]

[other future economic loss..... \$_____]

..... **Total Future Economic Damages: \$_____]****[c. Past noneconomic loss, including [physical
pain/mental suffering:]..... \$_____]****[d. Future noneconomic loss, including [physical
pain/mental suffering:]..... \$_____]**..... **TOTAL \$_____****Signed: _____****Presiding Juror****Dated: _____****[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the
[clerk/bailiff/judge].**

New September 2003; Revised October 2004, April 2007

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

This verdict form is based on *CACI No. 722, Adult's Liability for Minor's Permissive Use of Motor Vehicle*.

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

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

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

Publisher's Notes

There is no BAJI verdict form on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawFamily Relationships & TortsTort LiabilityGeneral OverviewTortsTransportation TortsMotor VehiclesPersonal VehiclesTortsVicarious LiabilityGeneral Overview



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CHAPTER 7 California Judicial Council Motor Vehicles and Highway Safety Instructions

2-7 California Forms of Jury Instruction CACI VF-703

CACI VF-703 Liability of Cosigner of Minor's Application for Driver's License

We answer the questions submitted to us as follows:

1. Was [*name of minor*] negligent in operating the vehicle?

_____ Yes _____ No

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

2. Was [*name of minor*]'s negligence a substantial factor in causing harm to [*name of plaintiff*]?

_____ Yes _____ No

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

3. Did [*name of defendant*] sign [*name of minor*]'s application for a driver's license?

_____ Yes _____ No

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

4. At the time of the collision, had [*name of minor*]'s driver's license been cancelled or revoked by the Department of Motor Vehicles?

_____ Yes _____ No

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

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

[a. Past economic loss

[lost earnings..... \$ _____].....

[lost profits..... \$ _____].....

[medical expenses..... \$ _____].....

[other past economic loss..... \$ _____].....

..... **Total Past Economic Damages: \$ _____]**

[b. Future economic loss

[lost earnings..... \$ _____].....

[lost profits..... \$ _____].....

[medical expenses..... \$ _____].....

[other future economic loss..... \$ _____].....

..... **Total Future Economic Damages: \$ _____]**

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

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

..... **TOTAL \$ _____**

Signed: _____

Presiding Juror

Dated: _____

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

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

This verdict form is based on *CACI No. 723, Liability of Cosigner of Minor's Application for Driver's License*.

If specificity is not required, users do not have to itemize all the damages listed in question 5 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

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

Publisher's Notes

There is no BAJI verdict form on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsTransportation TortsMotor VehiclesPersonal VehiclesTortsVicarious LiabilityGeneral OverviewTransportation LawPrivate VehiclesOperator LicensesGeneral Overview



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CHAPTER 7 California Judicial Council Motor Vehicles and Highway Safety Instructions

2-7 California Forms of Jury Instruction CACI VF-704

CACI VF-704 Negligent Entrustment of Motor Vehicle

We answer the questions submitted to us as follows:

1. Was [*name of driver*] negligent in operating the vehicle?

_____ Yes _____ No

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

2. Was [*name of defendant*] an owner of the vehicle operated by [*name of driver*]?

_____ Yes _____ No

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

3. Did [*name of defendant*] know, or should [he/she] have known, that [*name of driver*] was incompetent or unfit to drive?

_____ Yes _____ No

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

4. Did [*name of defendant*] permit [*name of driver*] to use the vehicle?

_____ Yes _____ No

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

5. Was [*name of driver*]'s incompetence or unfitness to drive a substantial factor in causing harm to [*name of plaintiff*]?

_____ Yes _____ No

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

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

[a. Past economic loss

[lost earnings..... \$ _____].....

[lost profits..... \$ _____].....

[medical expenses..... \$ _____].....

[other past economic loss..... \$ _____].....

..... Total Past Economic Damages: \$ _____]

[b. Future economic loss

[lost earnings..... \$ _____].....

[lost profits..... \$ _____].....

[medical expenses..... \$ _____].....

[other future economic loss..... \$ _____].....

..... Total Future Economic Damages: \$ _____]

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

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

..... TOTAL \$ _____

Signed: _____

Presiding Juror**Dated:** _____

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

New September 2003; Revised April 2007

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

This verdict form is based on *CACI No. 724, Negligent Entrustment of Motor Vehicle*. Modify to include elements of negligence instruction against the driver if plaintiff is suing both driver and owner.

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

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

Publisher's Notes

This verdict form covers issues presented in BAJI No. 16.93.

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsNegligenceActionsNegligent EntrustmentTortsTransportation TortsMotor VehiclesPersonal VehiclesTortsVicarious LiabilityGeneral OverviewTransportation LawPrivate VehiclesGeneral Overview



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CHAPTER 7 California Judicial Council Motor Vehicles and Highway Safety Instructions

2-7 California Forms of Jury Instruction CACI VF-705-CACI VF-799

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CACI VF-705Reserved for Future Use



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CHAPTER 8 California Judicial Council Railroad Crossings Instructions

2-8 California Forms of Jury Instruction 8.syn

§ 8.syn Synopsis to Chapter 8: California Judicial Council Railroad Crossings Instructions

CACI 800 Basic Standard of Care for Railroads

CACI 801 Duty to Comply With Safety Regulations

CACI 802 Reserved for Future Use

CACI 803 Regulating Speed

CACI 804 Lookout for Crossing Traffic

CACI 805 Installing Warning Systems

CACI 806 Comparative Fault--Duty to Approach Crossing With Care

CACI 807-CACI 899 Reserved for Future Use



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CHAPTER 8 California Judicial Council Railroad Crossings Instructions

2-8 California Forms of Jury Instruction Scope

Scope

SCOPE

This chapter contains the California Judicial Council's "Railroad Crossings Series" of jury instructions [*CACI No. 800 et seq.*]. The Judicial Council of California Civil Jury Instructions (CACI) included in this publication are the product of the Judicial Council of California Task Force on Jury Instructions, which are updated by the Judicial Council of California Advisory Committee on Civil Jury Instructions.

This chapter includes instructions on the following topics:

- The basic standard of care for railroads [*CACI No. 800*].
- The duty of railroads to comply with safety regulations [*CACI No. 801*].
- Regulating speed of trains in railroad crossings [*CACI No. 803*].
- Lookout for crossing traffic [*CACI No. 804*].
- Installing warning systems [*CACI No. 805*].
- Contributory negligence and the duty to approach a railroad crossing with care [*CACI No. 806*].



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CHAPTER 8 California Judicial Council Railroad Crossings Instructions

2-8 California Forms of Jury Instruction CACI 800

CACI 800 Basic Standard of Care for Railroads

Railroad companies must use reasonable care to avoid causing injury to anyone crossing railroad tracks from a street or roadway. [Railroad companies must use reasonable care in the design and maintenance of warning signals and protective devices at railroad crossings.] [Train operators must use reasonable care in operating their trains at railroad crossings.] The failure to use reasonable care is negligence.

New September 2003

The instructions in this series should be used together with one or more of the instructions that follow, which give specific guidance on the nature and scope of a railroad's duties of care regarding grade crossings.

Consideration should be given as to whether any of the asserted theories of liability are preempted by federal law (see *CSX Transportation, Inc. v. Easterwood* (1993) 507 U.S. 658 [113 S.Ct. 1732, 123 L.Ed.2d 387] and *Norfolk Southern Railway Co. v. Shanklin* (2000) 529 U.S. 344 [120 S.Ct. 1467, 146 L.Ed.2d 374]). If so, it may be necessary to modify this instruction to avoid indirect reference to these theories.

- The California Supreme Court has stated the duty of railroads at crossings as follows: "Generally speaking, the duty to exercise reasonable or ordinary care is imposed upon the operator of a railroad at public highway crossings with respect to persons traveling upon the highway and over the crossing, both as to the manner of operating the train and the maintenance of the crossing. The standard of care is that of the man of ordinary prudence under the circumstances." (*Peri v. Los Angeles Junction Ry. Co.* (1943) 22 Cal.2d 111, 120 [137 P.2d 441] , internal citations omitted.)

■ "Ordinarily the issue of the negligence in crossing cases, whether the railroad was negligent in the design and maintenance of the crossing or in the operation of the train, is one of fact as in other negligence cases." (*Romo v. Southern Pacific Transportation Co.* (1977) 71 Cal.App.3d 909, 916 [139 Cal.Rptr. 787] , internal citations omitted.)

■ The amount of care that is "reasonable" varies in proportion to the circumstances constituting the probable danger. (*Romo, supra*, 71 Cal.App.3d at p. 916 .)

■ "Where the conditions existing at the crossing create an unusual hazard or danger, the operator of the railroad must exercise care commensurate with those circumstances, and whether he has done so is a question of fact." (*Peri, supra*, 22 Cal.2d at p. 123 .)

■ "We hold that ... federal regulations adopted by the Secretary of Transportation pre-empt respondent's negligence action only insofar as it asserts that petitioner's train was traveling at an excessive speed." (*CSX Transportation, Inc., supra*, 507 U.S. at p. 676 .)

■ "When the [Federal Highway Administration] approves a crossing improvement project and the State installs the warning devices using federal funds, [federal regulations] establish a federal standard for the adequacy of those devices that displaces state tort law addressing the same subject." (*Norfolk Southern Railway Co., supra*, 529 U.S. at p. 357 .)

Secondary Sources

California Tort Guide (Cont.Ed.Bar 3d ed.) Railroad Crossings, § 12.2 2 Levy et al., California Torts, Ch. 23, *Carriers*, §§ 23.25-23.26 (Matthew Bender)

42 California Forms of Pleading and Practice, Ch. 485, *Railroads* (Matthew Bender)

Publisher's Notes

This instruction replaces BAJI No. 6.45.

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsNegligenceProofViolations of LawGeneral OverviewTortsNegligenceStandards of CareReasonable CareGeneral OverviewTortsTransportation TortsRail TransportationRailroad CrossingsTransportation LawRail TransportationMaintenance & Safety



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CHAPTER 8 California Judicial Council Railroad Crossings Instructions

*2-8 California Forms of Jury Instruction CACI 801***CACI 801 Duty to Comply With Safety Regulations**

An [ordinance/regulation] of the [*insert name of entity*] provides as follows: [*insert text of ordinance or regulation*]

Railroad companies must obey safety regulations. Regulations state only the minimum measure of care required of a railroad company. Particular conditions and situations may require a company to use more care than the regulations require.

New September 2003

Regulations adopted by the Secretary of Transportation pursuant to the Federal Railroad Safety Act preempt state common-law negligence claims based on general allegations of "excessive speed." (*CSX Transportation, Inc. v. Easterwood* (1993) 507 U.S. 658, 675 [113 S.Ct. 1732, 123 L.Ed.2d 387] .) Also, claims alleging inadequate warning devices are preempted where federally funded grade crossing improvements have been installed. (*Norfolk Southern Railway Co. v. Shanklin* (2000) 529 U.S. 344, 359 [120 S.Ct. 1467, 146 L.Ed.2d 374] .) This instruction is not intended to apply to situations in which a railroad's compliance with these federal safety regulations would preempt state law negligence claims.

■ " "It is well settled that such statutory regulations constitute only the minimum measure of care required by the railroad, and it is usually a matter for the jury to determine whether something more than the minimum was required under the evidence in the case." " A railroad company is not necessarily free from negligence, even though it may have literally complied with safety statutes or rules. The circumstances may require it to do more." (*Hogue v. Southern Pacific Co.* (1969) 1 Cal.3d 253, 258 [81 Cal.Rptr. 765, 460 P.2d 965] , internal citations omitted; *Peri v. Los Angeles Junction Ry. Co.* (1943) 22

Cal.2d 111, 126 [137 P.2d 441] .)

■ "If the peculiar characteristics of a crossing call for the installation of automatic protection--or the upgrading of existing automatic protection--the railroad may be guilty of negligence in failing to provide such protection." (*Romo v. Southern Pacific Transportation Co.* (1977) 71 Cal.App.3d 909, 916 [139 Cal.Rptr. 787] , internal citations omitted.)

■ "We hold that ... federal regulations adopted by the Secretary of Transportation pre-empt respondent's negligence action only insofar as it asserts that petitioner's train was traveling at an excessive speed." (*CSX Transportation, Inc.*, *supra*, 507 U.S. at p. 676 .)

■ "When the [Federal Highway Administration] approves a crossing improvement project and the State installs the warning devices using federal funds, [federal regulations] establish a federal standard for the adequacy of those devices that displaces state tort law addressing the same subject." (*Norfolk Southern Railway Co.*, *supra*, 529 U.S. at p. 357 .)

Secondary Sources

California Tort Guide (Cont.Ed.Bar 3d ed.) Railroad Crossings, § 12.4

2 Levy et al., California Torts, Ch. 23, *Carriers*, § 23.25[4] (Matthew Bender)

42 California Forms of Pleading and Practice, Ch. 485, *Railroads* (Matthew Bender)

Publisher's Notes

This instruction replaces BAJI No. 6.48.

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsNegligenceProofViolations of LawGeneral OverviewTortsTransportation TortsRail TransportationRailroad CrossingsTransportation LawRail TransportationMaintenance & Safety



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CHAPTER 8 California Judicial Council Railroad Crossings Instructions

2-8 California Forms of Jury Instruction CACI 802

Reserved for Future Use

CACI 802Reserved for Future Use



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CHAPTER 8 California Judicial Council Railroad Crossings Instructions

2-8 California Forms of Jury Instruction CACI 803

CACI 803 Regulating Speed

[A railroad company] [A train operator] must use reasonable care to control the train's speed as it approaches and passes through a railroad crossing. The [railroad company] [train operator] must control train speed with due regard for the safety of human life and property, taking into consideration the location and conditions of the crossing.

New September 2003

This instruction may not be appropriate in certain cases. Regulations adopted by the Secretary of Transportation pursuant to the Federal Railroad Safety Act preempt state common-law negligence claims based on general allegations of "excessive speed." (*CSX Transportation, Inc. v. Easterwood* (1993) 507 U.S. 658, 675 [113 S.Ct. 1732, 123 L.Ed.2d 387] .) However, a negligence action based on a duty to slow or stop a train to avoid a specific, individual hazard is not preempted. (*CSX Transportation, Inc., supra*, 507 U.S. at 676, fn. 15 .)

- "We hold that ... federal regulations adopted by the Secretary of Transportation pre-empt respondent's negligence action only insofar as it asserts that petitioner's train was traveling at an excessive speed." (*CSX Transportation, Inc., supra*, 507 U.S. at p. 676 .)

- "While it is true that no rate of speed is negligence per se in the absence of a statute or ordinance, it does not follow that a railroad company will be permitted to run its trains under all conditions at any rate of speed it may choose. It must regulate its speed with proper regard for the safety of human life and property, especially when running through towns and cities. ... [T]he question whether or not a rate of speed is excessive is one of fact for the jury." (*Young v. Pacific Electric Ry. Co.* (1929) 208 Cal. 568,

572-573 [283 P. 61] .)

- "The 'reasonably prudent person' test applies also to the speed at which a train approaches and passes a crossing, and material in the application of that test is 'that no unnecessary risk shall be cast upon the public' considering the 'location and surroundings' of the crossing involved. Specially mentioned is a 'crossing in a thickly populated community and extensively used.' " (*Rice v. Southern Pacific Co.* (1967) 247 Cal.App.2d 701, 707 [55 Cal.Rptr. 840] , internal citations omitted.)

- "[I]t is for the jury to say whether the speed of a train was too high for a particular intersection." (*Romo v. Southern Pacific Transportation Co.* (1977) 71 Cal.App.3d 909, 916 [139 Cal.Rptr. 787] .)

- Even when crossing protection is provided and the company speed limit is not exceeded, speeding is still a question of fact. (*Herrera v. Southern Pacific Co.* (1957) 155 Cal.App.2d 781, 787 [318 P.2d 784] .)

Secondary Sources

California Tort Guide (Cont.Ed.Bar 3d ed.) Railroad Crossings, § 12.5

2 Levy et al., California Torts, Ch. 23, *Carriers*, § 23.26[6] (Matthew Bender)

42 California Forms of Pleading and Practice, Ch. 485, *Railroads* (Matthew Bender)

Publisher's Notes

This instruction replaces BAJI Nos. 6.46 and 6.47.

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsNegligenceProofViolations of LawGeneral OverviewTortsNegligenceStandards of CareReasonable CareGeneral OverviewTortsTransportation TortsRail TransportationGeneral OverviewTransportation LawRail TransportationMaintenance & Safety



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CHAPTER 8 California Judicial Council Railroad Crossings Instructions

2-8 California Forms of Jury Instruction CACI 804

CACI 804 Lookout for Crossing Traffic

A train operator must keep a reasonable lookout for vehicles and people. If an operator discovers, or should have discovered, that a vehicle or a person is on or near the track, the operator must use reasonable care to avoid causing harm.

New September 2003

For an instruction regarding the right to expect that others will use reasonable care, see *CACI No. 411, Reliance on Good Conduct of Others*.

Regulations adopted by the Secretary of Transportation pursuant to the Federal Railroad Safety Act preempt state common-law negligence claims based on general allegations of "excessive speed." (*CSX Transportation, Inc. v. Easterwood* (1993) 507 U.S. 658, 675 [113 S.Ct. 1732, 123 L.Ed.2d 387] .) However, a negligence action based on a duty to slow or stop a train to avoid a specific, individual hazard is not preempted. (*CSX Transportation, Inc., supra*, 507 U.S. at p. 675, fn. 15 .)

- "Obviously, the railroad may not be required to guarantee the safety of those crossing its tracks. It is not required to anticipate that at every crossing, an automobile will be driven in the path of the train. It is only required to exercise ordinary care to discover such automobiles and to thereafter exercise care to avoid a collision." (*Essick v. Union Pacific Ry. Co.* (1960) 182 Cal.App.2d 456, 463 [6 Cal.Rptr. 208] .)

- The following instruction was approved in *Essick, supra*, 182 Cal.App.2d at p. 461 : "The duty of [defendant] toward persons using the private crossing we are here concerned with was to exercise ordinary care to discover any such persons on or near the crossing and to exercise ordinary care to avoid

injuring such persons after their presence on or near the track was discovered.' "

■ "The train crew cannot assume that a highway crossing in the middle of a city will be clear and they must keep a reasonable lookout for the presence of intersecting traffic. This implies as a corollary the further obligation to have the train under such control as may be reasonably necessary to deal with situations which an ordinarily prudent operator would anticipate." (*Herrera v. Southern Pacific Co.* (1957) 155 Cal.App.2d 781, 785 [318 P.2d 784] , internal citations omitted.)

■ "The installation and maintenance of automatic signals does not relieve a railroad company of this duty of keeping a reasonable lookout for other traffic." (*Herrera, supra*, 155 Cal.App.2d at p. 786 , internal citations omitted.)

■ "We hold that ... federal regulations adopted by the Secretary of Transportation pre-empt respondent's negligence action only insofar as it asserts that petitioner's train was traveling at an excessive speed." (*CSX Transportation, Inc., supra*, 507 U.S. at p. 676 .) However, a negligence action based on a duty to slow or stop a train to avoid a specific, individual hazard is not preempted. (*Ibid*, fn. 15.)

■ In a thoughtful opinion, the Oklahoma Supreme Court has held the following: "We hold that a specific, individual hazard is a person, vehicle, obstruction, object, or event which is not a fixed condition or feature of the crossing and which is not capable of being taken into account by the Secretary of Transportation in the promulgation of uniform, national speed regulations. In short, a specific, individual hazard refers to a unique occurrence which could lead to a specific and imminent collision and not to allegedly dangerous conditions at a particular crossing." (*Myers v. Missouri Pacific Railroad Co.* (Okla. 2002) 52 P.3d 1014, 1027 , footnotes omitted.)

Secondary Sources

California Tort Guide (Cont.Ed.Bar 3d ed.) Railroad Crossings, § 12.6

2 Levy et al., California Torts, Ch. 23, *Carriers*, § 23.26[2] (Matthew Bender)

42 California Forms of Pleading and Practice, Ch. 485, *Railroads* (Matthew Bender)

Publisher's Notes

This instruction covers issues presented in BAJI No. 6.45.

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsNegligenceStandards of CareReasonable CareGeneral OverviewTortsTransportation TortsRail
TransportationRailroad CrossingsTransportation LawRail TransportationMaintenance & Safety



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CHAPTER 8 California Judicial Council Railroad Crossings Instructions

2-8 California Forms of Jury Instruction CACI 805

CACI 805 Installing Warning Systems

Railroad companies must post signs or other devices that give the public reasonable warning of the presence of its tracks. A railroad company must use reasonable care in the design, installation, operation, and maintenance of its warning signals and protective systems. The amount of care that is reasonable depends on the particular characteristics of each crossing.

New September 2003

This instruction may not be appropriate in certain cases. Claims alleging inadequate warning devices are preempted where federally funded grade crossing improvements have been installed. (*Norfolk Southern Railway Co. v. Shanklin* (2000) 529 U.S. 344, 353 [120 S.Ct. 1467, 146 L.Ed.2d 374] .)

- "[O]nce the [Federal Highway Administration] has funded the crossing improvement and the warning devices are actually installed and operating, the regulation 'displace[s] state and private decision-making authority by establishing a federal-law requirement that certain devices be installed or federal approval obtained.' " (*Norfolk Southern Railway Co.*, *supra*, 529 U.S. at p. 354 , internal citation omitted.)

- "It should be noted that nothing prevents a State from revisiting the adequacy of devices installed using federal funds. States are free to install more protective devices at such crossings with their own funds or with additional funding from the FHWA. What States cannot do--once they have installed federally funded devices at a particular crossing--is hold the railroad responsible for the adequacy of those devices." (*Norfolk Southern Railway Co.*, *supra*, 529 U.S. at p. 358 .)

■ "If the peculiar characteristics of a crossing call for the installation of automatic protection--or the upgrading of existing automatic protection--the railroad may be guilty of negligence in failing to provide such protection." (*Romo v. Southern Pacific Transportation Co.* (1977) 71 Cal.App.3d 909, 916 [139 Cal.Rptr. 787] , internal citation omitted.)

■ "Whether a railroad is negligent in the design and maintenance of the crossing is a question of fact for the jury." (*Wilkinson v. Southern Pacific Co.* (1964) 224 Cal.App.2d 478, 487-488 [36 Cal.Rptr. 689] , internal citation omitted.)

■ "The defendant, having undertaken to warn travelers of the approach of its trains by the use of a wigwag, was under a duty to use reasonable care in the construction and maintenance of the signal system lest the appearance of safety created by the presence of the device constitute a trap for persons relying upon it for protection." (*Startup v. Pacific Electric Ry. Co.* (1947) 29 Cal.2d 866, 869 [180 P.2d 896] .)

■ "Whatever may be the purpose of maintaining an automatic wig-wag signal at a railroad crossing, even though it be intended to merely warn travelers of the approach of trains, common justice demands that it shall be so constructed and maintained that it will not lure travelers on the highway into danger. It follows that a company which does maintain such a defective system will be held liable for injuries sustained as the result of those imperfections, regardless of whether the system was designed to warn travelers of the approach of trains rather than to inform them of the danger from stationary cars which block the crossings." (*Mallett v. Southern Pacific Co.* (1937) 20 Cal.App.2d 500, 509 [68 P.2d 281] .)

Secondary Sources

California Tort Guide (Cont.Ed.Bar 3d ed.) Railroad Crossings, §§ 12.8-12.9

2 Levy et al., California Torts, Ch. 23, *Carriers*, § 23.25[4] (Matthew Bender)

42 California Forms of Pleading and Practice, Ch. 485, *Railroads* (Matthew Bender)

Publisher's Notes

This instruction covers issues presented in BAJI No. 6.45.

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsNegligenceProofViolations of LawGeneral OverviewTortsNegligenceStandards of CareReasonable CareGeneral OverviewTortsTransportation TortsRail TransportationRailroad CrossingsTransportation LawRail TransportationGeneral Overview



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CHAPTER 8 California Judicial Council Railroad Crossings Instructions

2-8 California Forms of Jury Instruction CACI 806

CACI 806 Comparative Fault--Duty to Approach Crossing With Care

A driver approaching a railroad crossing is required to use reasonable care to discover whether a train is approaching. The amount of care that is reasonable will depend on the circumstances. A railroad track is itself a warning of danger. If the driver's view of approaching trains is blocked, he or she must use greater care than when the view is clear.

If a bell or signal has been placed to warn drivers of danger, a driver is not required to use as much care as when there are no such warnings. However, even if the warning devices are not activated, a driver must use reasonable care in looking and listening for approaching trains.

New September 2003; Revised December 2009

For an instruction regarding the prima facie speed limits set by *Vehicle Code* section 22352, see *CACI No. 707, Speed Limit*. For an instruction on the duty of care of a passenger, see *CACI No. 711, The Passenger's Duty of Care for Own Safety*. For instructions on negligence per se, see *CACI Nos. 418 to 421*.

■ *Vehicle Code* section 22451 provides:

- (a) The driver of any vehicle or pedestrian approaching a railroad or rail transit grade crossing shall stop not less than 15 feet from the nearest rail and shall not proceed until he or she can do so safely, whenever the following conditions exist:
 - (1) A clearly visible electric or mechanical signal device or a flagman gives warning of the approach or passage of a train or car.

(2) An approaching train or car is plainly visible or is emitting an audible signal and, by reason of its speed or nearness, is an immediate hazard.

(b) No driver or pedestrian shall proceed through, around, or under any railroad or rail transit crossing gate while the gate is closed.

(c) Whenever a railroad or rail transit crossing is equipped with an automated enforcement system, a notice of a violation of this section is subject to the procedures provided in Section 40518.

■ *Vehicle Code section 22352(a)(1)* provides that the prima facie speed limit is 15 miles per hour under the following circumstances: "(A) When traversing a railway grade crossing, if during the last 100 feet of the approach to the crossing the driver does not have a clear and unobstructed view of the crossing and of any traffic on the railway for a distance of 400 feet in both directions along the railway. This subdivision does not apply in the case of any railway grade crossing where a human flagman is on duty or a clearly visible electrical or mechanical railway crossing signal device is installed but does not then indicate the immediate approach of a railway train or car, and (B) When traversing any intersection of highways if during the last 100 feet of the driver's approach to the intersection the driver does not have a clear and unobstructed view of the intersection and of any traffic upon all of the highways entering the intersection for a distance of 100 feet along all those highways, except at an intersection protected by stop signs or yield right-of-way signs or controlled by official traffic control signals."

■ "[T]hat the driver's view is somewhat obstructed does not make him contributorily negligent as a matter of law; whether his failure to stop, the place from which he looks and the character and extent of the obstruction to his view are such that a reasonably prudent person would not have so conducted himself are questions for the jury in determining whether he was guilty of contributory negligence." (*Lucas v. Southern Pacific Co. (1971) 19 Cal.App.3d 124, 139 [96 Cal.Rptr. 356]* .)

■ "A railroad track is itself a warning of danger and a driver intending to cross must avail himself of every opportunity to look and listen; if there are obstructions to the view, he is required to take greater care." (*Wilkinson v. Southern Pacific Co. (1964) 224 Cal.App.2d 478, 488 [36 Cal.Rptr. 689]* , internal citation omitted.)

■ "A railroad company will not be permitted to encourage persons to relax their vigil concerning the dangers that lurk in railroad crossings by assuring them, through the erection of safety devices, that the danger has been removed or minimized, and, at the same time, to hold them to the same degree of care as would be required if those devices had not been provided." (*Will v. Southern Pacific Co. (1941) 18 Cal.2d 468, 474 [116 P.2d 44]* , internal citation omitted.)

■ "[A] driver may not cross tracks in reliance upon the safety appliances installed by the railroad with complete disregard for his own safety and recover damages for injuries sustained by reason of his own failure to use reasonable care." (*Will, supra*, 18 Cal.2d at p. 475 .)

■ "Violation of the railroad's statutory duty to sound bell and whistle at a highway crossing does not absolve a driver from his failure to look and listen and, if necessitated by circumstances such as obstructed vision, even to stop." (*Wilkinson, supra*, 224 Cal.App.2d at p. 489 .)

■ "It is settled that a railroad may not encourage persons traveling on highways to rely on safety devices and then hold them to the same degree of care as if the devices were not present." (*Startup v. Pacific Electric Ry. Co. (1947) 29 Cal.2d 866, 871 [180 P.2d 896]* .)

■ "When a flagman or mechanical warning device has been provided at a railroad crossing, the driver of an

automobile is thereby encouraged to relax his vigilance, and, in using other means to discover whether there is danger of approaching trains, he is not required to exercise the same quantum of care as would otherwise be necessary." (*Spendlove v. Pacific Electric Ry. Co.* (1947) 30 Cal.2d 632, 634 [184 P.2d 873] , internal citations omitted.)

■ An instruction that a driver must stop, look, and listen when his or her view is obstructed was held prejudicially erroneous in *Anello v. Southern Pacific Co.* (1959) 174 Cal.App.2d 317, 322 [344 P.2d 843] .

Secondary Sources

California Tort Guide (Cont.Ed.Bar 3d ed.) Railroad Crossings, §§ 12.10-12.12

2 Levy et al., *California Torts*, Ch. 23, *Carriers*, § 23.27 (Matthew Bender)

42 California Forms of Pleading and Practice, Ch. 485, *Railroads* § 485.67 (Matthew Bender)

Publisher's Notes

This instruction covers issues presented in BAJI Nos. 6.40, 6.41, 6.42, and 6.43.

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsNegligenceDefensesContributory NegligenceGeneral OverviewTortsNegligenceStandards of CareReasonable CareGeneral OverviewTortsTransportation TortsRail TransportationRailroad CrossingsTransportation LawRail TransportationGeneral Overview



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CHAPTER 8 California Judicial Council Railroad Crossings Instructions

2-8 California Forms of Jury Instruction CACI 807-CACI 899

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CACI 807Reserved for Future Use



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CHAPTER 9 California Judicial Council Common Carriers Instructions

2-9 California Forms of Jury Instruction 9.syn

§ 9.syn Synopsis to Chapter 9: California Judicial Council Common Carriers Instructions

CACI 900 Introductory Instruction

CACI 901 Status of Common Carrier Disputed

CACI 902 Duty of Common Carrier

CACI 903 Duty to Provide and Maintain Safe Equipment

CACI 904 Duty of Common Carrier Toward Disabled/Infirm Passengers

CACI 905 Duty of Common Carrier Toward Minor Passengers

CACI 906 Duty of Passenger for Own Safety

CACI 907 Status of Passenger Disputed

CACI 908 Duty to Protect Passengers From Assault

CACI 909-CACI 999 Reserved for Future Use



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CHAPTER 9 California Judicial Council Common Carriers Instructions

2-9 California Forms of Jury Instruction Scope

Scope

SCOPE

This chapter contains the California Judicial Council's "Common Carriers Series" of jury instructions [*CACI No. 900 et seq.*]. The Judicial Council of California Civil Jury Instructions (CACI) included in this publication are the product of the Judicial Council of California Task Force on Jury Instructions, which are updated by the Judicial Council of California Advisory Committee on Civil Jury Instructions.

This chapter includes instructions on the following topics:

- An introductory instruction [*CACI No. 900*].
- When the defendant's status as a common carrier is disputed [*CACI No. 901*].
- The various duties of a common carrier, including the general duty [*CACI No. 902*], the duty to provide and maintain safe equipment [*CACI No. 903*], the duty to disabled, infirm, and minor passengers [*CACI Nos. 904, 905*], and the duty to protect passengers from assault [*CACI No. 908*].
- The duty of a passenger for his or her own safety [*CACI No. 906*].
- When the status of the plaintiff as a "passenger" is disputed [*CACI No. 907*].



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CHAPTER 9 California Judicial Council Common Carriers Instructions

*2-9 California Forms of Jury Instruction CACI 900***CACI 900 Introductory Instruction**

[Name of plaintiff] claims that [he/she] was harmed by [name of defendant]'s negligence while [he/she] was a passenger on [name of defendant]'s [insert type of carrier -- e.g., train].

[In this case, [name of defendant] was a common carrier at the time of the incident. A common carrier provides transportation to the general public.]

[or]

[[Name of plaintiff] also claims that [name of defendant] was a common carrier at the time of the incident.]

New September 2003

Give either one of the bracketed sentences, depending on whether the defendant's status as a common carrier is contested or not.

This instruction is intended as an introductory instruction to frame the issues. *CACI No. 400, Essential Factual Elements (Negligence)*, would still be given to set forth the elements that plaintiff has to prove in order to recover (i.e., negligence, harm, and causation).

■ *Civil Code section 2168* provides: "Everyone who offers to the public to carry persons, property, or messages, excepting only telegraphic messages, is a common carrier of whatever he thus offers to carry."

■ *Civil Code section 2085* provides: "[C]arriage is a contract for the conveyance of property, persons,

or messages, from one place to another."

■ "[A] common carrier within the meaning of *Civil Code* section 2168 is any entity which holds itself out to the public generally and indifferently to transport goods or persons from place to place for profit." (*Squaw Valley Ski Corporation v. Superior Court* (1992) 2 Cal.App.4th 1499, 1508 [3 Cal.Rptr.2d 897] .)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 923-932

2 Levy et al., California Torts, Ch. 23, *Carriers*, § 23.00 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 109, *Carriers* (Matthew Bender)

2 California Civil Practice: Torts (Thomson West) § 28:1

Publisher's Notes

This instruction replaces BAJI No. 6.50.

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsTransportation TortsMotor VehiclesGeneral OverviewTransportation LawCarrier Duties & LiabilitiesGeneral Overview



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CHAPTER 9 California Judicial Council Common Carriers Instructions

2-9 California Forms of Jury Instruction CACI 901

CACI 901 Status of Common Carrier Disputed

To prove that [*name of defendant*] was a common carrier, [*name of plaintiff*] must prove that it was in the business of transporting [the property of] the general public.

In deciding this issue, you may consider whether any of the following factors apply. These factors suggest that a carrier is a common carrier:

- (a) The carrier maintains a regular place of business for the purpose of transporting passengers [or property].**
- (b) The carrier advertises its services to the general public.**
- (c) The carrier charges standard fees for its services.**
- (d) [*Insert other applicable factor(s).*]**

A carrier can be a common carrier even if it does not have a regular schedule of departures, a fixed route, or a transportation license.

If you find that [*name of defendant*] was not a common carrier, then [*name of defendant*] did not have the duty of a common carrier, only a duty of ordinary care.

New September 2003

The court should give the ordinary negligence instructions in conjunction with this one. Ordinary

negligence is the standard applicable to private carriers.

- Whether a party is a common carrier is a question of fact, but it can be decided as a matter of law where the facts are undisputed. (*Squaw Valley Ski Corporation v. Superior Court* (1992) 2 Cal.App.4th 1499, 1506 [3 Cal.Rptr.2d 897] .)

- *Civil Code* section 2168 provides: "Everyone who offers to the public to carry persons, property, or messages, excepting only telegraphic messages, is a common carrier of whatever he thus offers to carry."

- *Civil Code* section 2085 provides: "The contract of carriage is a contract for the conveyance of property, persons, or messages, from one place to another."

- "[A] common carrier within the meaning of *Civil Code* section 2168 is any entity which holds itself out to the public generally and indifferently to transport goods or persons from place to place for profit." (*Squaw Valley, supra*, 2 Cal.App.4th at p. 1508 , internal citations omitted.)

- "A private carrier ... is bound only to accept carriage pursuant to special agreement." (*Webster v. Ebright* (1992) 3 Cal.App.4th 784, 787 [4 Cal.Rptr.2d 714] .) Private carriers " 'make no public profession that they will carry for all who apply, but ... occasionally or upon the particular occasion undertake for compensation to carry the goods of others upon such terms as may be agreed upon.' " (*Id.* at p. 788 , internal citations omitted.)

- Private carriers are not held to the "utmost care" standard of common carriers, but are instead required to exercise only ordinary care. (*Webster, supra*, 3 Cal.App.4th at p. 787 .)

- " '[T]he law applicable to common carriers is peculiarly rigorous, and it ought not to be extended to persons who have not expressly assumed that character, or by their conduct and from the nature of their business justified the belief on the part of the public that they intended to assume it.' " (*Samuelson v. Public Utilities Com.* (1951) 36 Cal.2d 722, 730 [227 P.2d 256] , internal citation omitted.)

- It does not matter if the service is specialized in nature and thus of use to only a small number of people: "To be a common carrier, the entity merely must be of the character that members of the general public may, if they choose, avail themselves of it." (*Squaw Valley, supra*, 2 Cal.App.4th at pp. 1509-1510 , internal citation omitted.)

- In *Gradus v. Hanson Aviation, Inc.* (1984) 158 Cal.App.3d 1038 [205 Cal.Rptr. 211] , the court approved of an instruction stating that the plaintiff had the burden of proving that the defendant "undertook either expressly or by course of conduct generally and for all persons indifferently to carry and deliver them for hire, so long as it had room." (*Id.* at pp. 1047-1048 .) The court also approved of giving the jury the factors of regular place of business, advertising, and standard charges. (*Id.* at p. 1048 .) Note that these factors may not be applicable in all cases. For example, ski lifts, elevators, and escalators are considered common carriers even though they do not generally advertise as such or charge a fee. The rationale for the higher standard of care is that "[a]lthough a store does not charge for use of its elevators or escalators, it profits from the utilization of these devices to assist customers in shopping at the store." (*Squaw Valley, supra*, 2 Cal.App.4th at p. 1508 .)

- Carriers that are typically thought of as common carriers can, by special arrangement, temporarily become private carriers: "In the situation at bar, the Yellow Cab Company's motor cars were customarily and daily cruising the streets for patronage or awaiting calls of the public. It was a common carrier in

transporting such patrons. But when it agreed to act as carrier of handicapped school children under agreement for its operators to escort the pupils to and from their schools and homes to the cab and to render such service exclusively for them at designated hours, the company ceased to be a common carrier while transporting the specified children during such hours." (*Hopkins v. Yellow Cab Co. (1952) 114 Cal.App.2d 394, 398 [250 P.2d 330]* .)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, § 924

2 Levy et al., California Torts, Ch. 23, *Carriers*, § 23.01 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 109, *Carriers* (Matthew Bender)

2 California Civil Practice: Torts (Thomson West) §§ 28:1-28:2

Publisher's Notes

There is no BAJI instruction for this subject.

LexisNexis Matthew Bender Expert Practice Tip--Common Carriers: Common carriers not only include buses and taxis but also bicyclists that carry passengers in tourist areas such as Fisherman's Wharf in San Francisco. The higher standard of care is always a good instruction to receive if you are the plaintiff. *By Dona Cohn-Payne*

Legal Topics:

For related research and practice materials, see the following legal topics:

Antitrust & Trade Law Industry Regulation Transportation Common Carriers Torts Transportation Torts Motor Vehicles Motor Carriers Transportation Law Carrier Duties & Liabilities General Overview



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CHAPTER 9 California Judicial Council Common Carriers Instructions

2-9 California Forms of Jury Instruction CACI 902

CACI 902 Duty of Common Carrier

Common carriers must carry passengers [or property] safely. Common carriers must use the highest care and the vigilance of a very cautious person. They must do all that human care, vigilance, and foresight reasonably can do under the circumstances to avoid harm to passengers [or property].

While a common carrier does not guarantee the safety of its passengers [or property that it transports], it must use reasonable skill to provide everything necessary for safe transportation, in view of the transportation used and the practical operation of the business.

New September 2003

- *Civil Code section 2100* provides: "A carrier of persons for reward must use the utmost care and diligence for their safe carriage, must provide everything necessary for that purpose, and must exercise to that end a reasonable degree of skill."

- "Common carriers bind themselves to carry safely those whom they take into their vehicles, and owe both a duty of utmost care and the vigilance of a very cautious person towards their passengers. Such carriers are responsible for any, even the slightest, negligence and are required to do all that human care, vigilance, and foresight reasonably can do under all the circumstances." (*Acosta v. Southern California Rapid Transit Dist.* (1970) 2 Cal.3d 19, 27 [84 Cal.Rptr. 184, 465 P.2d 72], internal citations omitted.)

- The elevated standard of care for common carriers is "based on a recognition that the privilege of serving the public as a common carrier necessarily entails great responsibility, requiring common carriers to exercise a high duty of care towards their customers." (*Squaw Valley Ski Corporation v. Superior*

Court (1992) 2 Cal.App.4th 1499, 1507 [3 Cal.Rptr.2d 897] , internal citations omitted.)

■ Common carriers are not insurers of their passengers' safety. "Rather, the degree of care and diligence which they must exercise is only such as can reasonably be exercised consistent with the character and mode of conveyance adopted and the practical operation of the business of the carrier." (*Lopez v. Southern Cal. Rapid Transit Dist.* (1985) 40 Cal.3d 780, 785 [221 Cal.Rptr. 840, 710 P.2d 907] , internal citations omitted.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 923, 925

2 Levy et al., California Torts, Ch. 23, *Carriers*, § 23.02 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 109, *Carriers* (Matthew Bender)

2A California Points and Authorities, Ch. 33, *Carriers* (Matthew Bender)

22 *California Legal Forms*, Ch. 54, *Shipment of Property*, § 54.32 (Matthew Bender)

2 California Civil Practice: Torts (Thomson West) §§ 28:6-28:9

Publisher's Notes

This instruction and *CACI 903* replace BAJI No. 6.51.

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsNegligenceStandards of CareSpecial CareCommon CarriersTortsTransportation TortsMotor VehiclesMotor CarriersTransportation LawCarrier Duties & LiabilitiesGeneral Overview



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CHAPTER 9 California Judicial Council Common Carriers Instructions

2-9 California Forms of Jury Instruction CACI 903

CACI 903 Duty to Provide and Maintain Safe Equipment

Common carriers must use the highest care in constructing, servicing, inspecting, and maintaining their vehicles and equipment for transporting passengers [or property].

A common carrier is responsible for a defect in its vehicles and equipment used for transporting passengers [or property] if the common carrier:

- (a) Created the defect; or**
- (b) Knew of the defect; or**
- (c) Would have known of the defect if it had used the highest care.**

Common carriers must keep up with modern improvements in transportation. While they are not required to seek out and use every new invention, they must adopt commonly accepted safety designs and devices in the vehicles and equipment they use for transporting passengers [or property].

New September 2003

To correct the impression that a carrier is absolutely liable for unsafe equipment, this instruction should be given together with instructions stating that a common carrier does not guarantee the safety of its passengers and that the level of care is the highest that reasonably can be exercised consistent with the mode of transportation used and the practical operation of its business as a carrier (see *CACI No. 902, Duty of Common Carrier*). (*Gradus v. Hanson Aviation, Inc. (1984) 158 Cal.App.3d 1038, 1049-1050 [205 Cal.Rptr. 211]* .)

■ *Civil Code section 2101* provides: "A carrier of persons for reward is bound to provide vehicles safe and fit for the purposes to which they are put, and is not excused for default in this respect by any degree of care."

■ "The duty of care imposed on a common carrier of passengers includes the duty to furnish safe facilities for their passage." (*Cooper v. National Railroad Passenger Corporation* (1975) 45 Cal.App.3d 389, 395 [119 Cal.Rptr. 541] , internal citations omitted, disapproved on other grounds in *Ewing v. Cloverleaf Bowl* (1978) 20 Cal.3d 389, 401 [143 Cal.Rptr. 13, 572 P.2d 1155] .)

■ Failure to give an instruction on *Civil Code section 2101* may not be error where an instruction on the "utmost care" standard is given. (*Powell v. Dell-Air Aviation, Inc.* (1968) 268 Cal.App.2d 451, 457-458 [74 Cal.Rptr. 3] .)

■ The Supreme Court found error where an instruction omitted the duty to inspect: "An owner is bound to use the utmost care and diligence in the maintenance of elevators. In the fulfillment of this obligation something more than regular and frequent inspections is required. Perfunctory inspections, although regularly and frequently made, would not meet the obligation appellant owed to respondents. In order to fulfill the duty imposed upon it by law appellant was required to use due care in servicing, inspecting and maintaining the elevator and all the appliances appurtenant thereto. The instruction erroneously failed to include this requirement." (*Brown v. George Pepperdine Foundation* (1943) 23 Cal.2d 256, 261 [143 P.2d 929] , internal citations omitted.)

■ "The [equipment] must, therefore, under the standard of utmost care required of a carrier, be constructed, maintained and operated with the purpose and design to prevent injury" (*Vandagriff v. J.C. Penney* (1964) 228 Cal.App.2d 579, 582 [39 Cal.Rptr. 671] .)

■ Notice of defect is required where the carrier did not create dangerous condition: "In our view, the high degree of care required of a common carrier might impose a greater duty to inspect and thus make notice or knowledge more easily established, but the concept of the carrier's legal responsibility does not exclude the factor of notice or knowledge. The weight of authority supports the proposition that, in cases such as the instant one, actual or constructive notice is a prerequisite to the carrier's liability." (*Gray v. City and County of San Francisco* (1962) 202 Cal.App.2d 319, 330-331 [20 Cal.Rptr. 894] .)

■ Common carriers "must keep pace with science and art and modern improvement in their application to the carriage of passengers." (*Greyhound Lines, Inc. v. Superior Court* (1970) 3 Cal.App.3d 356, 359 [83 Cal.Rptr. 343] , citing *Treadwell v. Whittier* (1889) 80 Cal. 574, 592, 600 [22 P. 266] .)

■ In *Treadwell*, the court approved of a jury instruction stating that while elevator operators "were not required to seek and apply every new invention, they must adopt such as are found by experience to combine the greater safety with practical use." The court said the instruction "is but a fair deduction from the rule that the defendants must use the utmost care and diligence to carry safely those who ride in their [conveyance]" (*Treadwell, supra*, 80 Cal. at pp. 599-600 .) The court held that common carriers "are bound for defects in the vehicles which they furnish, which might have been discovered by the most careful examination" (*Id.* at p. 595 .)

Secondary Sources

2 Levy et al., California Torts, Ch 23, *Carriers*, § 23.03[5] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 109, *Carriers* (Matthew Bender)

2 California Civil Practice: Torts (Thomson West) § 28:15

Publisher's Notes

This instruction and *CACI 902* replace BAJI No. 6.51.

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsNegligenceStandards of CareSpecial CareCommon CarriersTortsTransportation TortsMotor VehiclesMotor
CarriersTransportation LawCarrier Duties & LiabilitiesGeneral Overview



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California Forms of Jury Instruction

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CHAPTER 9 California Judicial Council Common Carriers Instructions

2-9 California Forms of Jury Instruction CACI 904

CACI 904 Duty of Common Carrier Toward Disabled/Infirm Passengers

If a common carrier voluntarily accepts an ill or a disabled person as a passenger and is aware of that person's condition, it must use as much additional care as is reasonably necessary to ensure the passenger's safety.

New September 2003

■ If a carrier voluntarily accepts an ill or disabled person as a passenger and is aware of the passenger's condition, it must exercise as much care as is reasonably necessary to ensure the safety of the passenger, in view of his mental and physical condition. (*McBride v. Atchison, Topeka & Santa Fe Ry. Co.* (1955) 44 Cal.2d 113, 119-120 [279 P.2d 966] .)

Secondary Sources

2 Levy et al., California Torts, Ch. 23, *Carriers*, § 23.02[6] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 109, *Carriers* (Matthew Bender)

2A California Points and Authorities, Ch. 33, *Carriers* (Matthew Bender)

2 California Civil Practice: Torts (Thomson West) § 28:6

Publisher's Notes

There is no BAJI instruction on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsNegligenceStandards of CareSpecial CareCommon CarriersTortsNegligenceStandards of CareSpecial
CareDisabled PersonsTortsTransportation TortsMotor VehiclesMotor CarriersTransportation LawCarrier Duties &
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CHAPTER 9 California Judicial Council Common Carriers Instructions

2-9 California Forms of Jury Instruction CACI 905

CACI 905 Duty of Common Carrier Toward Minor Passengers

If a common carrier voluntarily accepts a child as a passenger, it must use as much additional care as is reasonably necessary to ensure the child's safety.

New September 2003

■ A common carrier owes a greater duty of care to minor passengers: "It is settled law that a carrier owes a greater quantum of care to a child of tender years accepted by it as a passenger than it would to an adult." (*Brizzolari v. Market Street Ry. Co. (1935) 7 Cal.App.2d 246, 248 [46 P.2d 783]* .)

■ "In this instruction, the court admonished the jury that a carrier of passengers owes to children who are passengers on its cars a greater degree of care than it owes to adults. Such an instruction is proper." (*Mudrick v. Market Street Ry. Co. (1938) 11 Cal.2d 724, 734 [81 P.2d 950]* .)

Secondary Sources

2 Levy et al., California Torts, Ch. 23, *Carriers*, § 23.02[6] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 109, *Carriers* (Matthew Bender)

2 California Civil Practice: Torts (Thomson West) § 28:6

Publisher's Notes

This instruction covers issues presented in BAJI No. 3.38.

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsNegligenceStandards of CareSpecial CareChildrenTortsNegligenceStandards of CareSpecial CareCommon
CarriersTortsTransportation TortsMotor VehiclesMotor CarriersTransportation LawCarrier Duties & LiabilitiesGeneral
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CHAPTER 9 California Judicial Council Common Carriers Instructions

2-9 California Forms of Jury Instruction CACI 906

CACI 906 Duty of Passenger for Own Safety

While a common carrier must use the highest care for its passengers' safety, passengers need only use reasonable care for their own safety.

New September 2003

■ This instruction is intended to clarify that passengers and common carriers have different standards of care. Courts have addressed the potential for confusion in this area when contributory negligence of the passenger is at issue: "As applied to the standard of care imposed upon the common carrier as compared to the standard imposed on the passenger it is both erroneous and misleading to tell the jury, as was done here, that there are no degrees of negligence or contributory negligence in California, since the common carrier is in fact held to a higher degree of care than is the passenger. To follow this erroneous and misleading statement with the instruction, in the identical language used in another instruction concerning the defendant carrier's duty of care, that 'any negligence, however slight,' of the decedent proximately contributing to her death would bar a recovery, was to inform the jury that in determining negligence and contributory negligence they must apply the same standard of care." (*Wilson v. City and County of San Francisco* (1959) 174 Cal.App.2d 273, 276 [344 P.2d 828] .)

Secondary Sources

2 Levy et al., California Torts, Ch. 23, *Carriers*, § 23.07[1] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 109, *Carriers* (Matthew Bender)

2 California Civil Practice: Torts (Thomson West) § 28:32

Publisher's Notes

This instruction replaces BAJI No. 6.54.

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsNegligenceDefensesContributory NegligenceGeneral OverviewTortsNegligenceStandards of CareReasonable
CareGeneral OverviewTortsNegligenceStandards of CareSpecial CareCommon CarriersTortsTransportation TortsMotor
VehiclesMotor CarriersTransportation LawCarrier Duties & LiabilitiesGeneral Overview



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CHAPTER 9 California Judicial Council Common Carriers Instructions

2-9 California Forms of Jury Instruction CACI 907

CACI 907 Status of Passenger Disputed

A common carrier owes the highest care and vigilance to persons only while they are passengers. [Name of plaintiff] claims that [he/she] was [name of defendant]'s passenger at the time of the incident.

To establish that [name of plaintiff] was a passenger, [he/she] must prove all of the following:

- 1. That [name of plaintiff] intended to become a passenger;**
- 2. That [name of plaintiff] was accepted as a passenger by [name of defendant]; and**
- 3. That [name of plaintiff] placed [himself/herself] under the control of [name of defendant].**

To be a passenger, it is not necessary for the person to actually enter the carrier's vehicle [or name mode of travel, e.g., bus, train]; however, the carrier must have taken some action indicating acceptance of the person as a passenger. A person continues to be a passenger until he or she safely leaves the carrier's vehicle [or equipment].

A common carrier must use the highest care and vigilance in providing its passengers with a safe place to get on and off its vehicles [or equipment].

New September 2003

■ The heightened degree of care for common carriers is owed only while "passengers are in transitu, and until they have safely departed the carrier's vehicle." (*Marshall v. United Airlines* (1973) 35 Cal.App.3d 84, 86 [110 Cal.Rptr. 416] .)

■ The relationship of carrier and passenger is "created when one offers to become a passenger, and is accepted as a passenger after he has placed himself under the control of the carrier." (*Grier v. Ferrant* (1944) 62 Cal.App.2d 306, 310 [144 P.2d 631] .)

■ It is not necessary that the passenger have entered the vehicle for the relationship to exist: " 'The relation is in force when one, intending in good faith to become a passenger, goes to the place designated as the site of departure at the appropriate time and the carrier takes some action indicating acceptance of the passenger as a traveler.' " (*Orr v. Pacific Southwest Airlines* (1989) 208 Cal.App.3d 1467, 1473 [257 Cal.Rptr. 18] , internal citations omitted.)

■ The carrier-passenger relationship terminates once the passenger has disembarked and entered a place of relative safety. (*McGettigan v. Bay Area Rapid Transit Dist.* (1997) 57 Cal.App.4th 1011, 1018 [67 Cal.Rptr.2d 516] .)

■ Carriers must exercise utmost care " '[u]ntil the passenger reaches a place outside the sphere of any activity of the carrier which might reasonably constitute a mobile or animated hazard to the passenger.' " (*Brandelius v. City and County of San Francisco* (1957) 47 Cal.2d 729, 735 [306 P.2d 432] , internal citations omitted.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 926, 927

2 Levy et al., California Torts, Ch. 23, *Carriers*, § 23.02[4] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 109, *Carriers* (Matthew Bender)

2A California Points and Authorities, Ch. 33, *Carriers* (Matthew Bender)

2 California Civil Practice: Torts (Thomson West) § 28:7

Publisher's Notes

This instruction covers issues presented in BAJI Nos. 6.53, 6.54.5, and 6.55.

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsNegligenceStandards of CareSpecial CareCommon CarriersTortsTransportation TortsMotor VehiclesMotor CarriersTransportation LawCarrier Duties & LiabilitiesGeneral Overview



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CHAPTER 9 California Judicial Council Common Carriers Instructions

2-9 California Forms of Jury Instruction CACI 908

CACI 908 Duty to Protect Passengers From Assault

[*Name of plaintiff*] claims that [*name of defendant*] was negligent in failing to prevent an attack by another. To establish this claim, [*name of plaintiff*] must prove both of the following:

- 1. That [*name of defendant*] knew or, by using the highest care, should have known that a passenger was reasonably likely to attack another passenger; and**
- 2. That by using the highest care, [*name of defendant*] could have prevented or reduced the harm from the attack.**

New September 2003

This instruction must be used in conjunction with the instructions in the negligence series.

■ *Restatement Second of Torts, section 315* states:

As a general rule, one owes no duty to control the conduct of another, nor to warn those endangered by such conduct. Such a duty may arise, however, if

(a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or

(b) a special relation exists between the actor and the other which gives the other a right of protection.

- The Supreme Court has held that "[t]he relationship between a common carrier and its passengers is ... a special

relationship." (*Lopez v. Southern Cal. Rapid Transit Dist.* (1985) 40 Cal.3d 780, 789 [221 Cal.Rptr. 840, 710 P.2d 907] .)

■ The common carrier standard of "utmost care" applies to the duty of a carrier to protect a passenger from assaults by fellow passengers. (*Terrell v. Key System* (1945) 69 Cal.App.2d 682, 686 [159 P.2d 704] .) However, the duty can only arise if "in the exercise of the required degree of care the carrier has or should have knowledge of conditions from which it may reasonably be apprehended that an assault on a passenger may occur, and has the ability in the exercise of that degree of care to prevent the injury." (*Ibid.*, internal citations omitted.)

■ The *Lopez* court stated the standard of care as follows: "[C]arriers are not insurers of their passenger's safety and will not automatically be liable, regardless of the circumstances, for any injury suffered by a passenger at the hands of a fellow passenger. Rather, a carrier is liable for injuries resulting from an assault by one passenger upon another only where, in the exercise of the required degree of care, the carrier has or should have knowledge from which it may reasonably be apprehended that an assault on a passenger may occur, and has the ability in the exercise of that degree of care to prevent the injury." (*Lopez, supra*, 40 Cal.3d at p. 791 , internal citation omitted.)

■ There is no liability when a sudden assault occurs with no warning. (*City and County of San Francisco v. Superior Court* (1994) 31 Cal.App.4th 45, 49 [36 Cal.Rptr.2d 372] .)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 930, 931

2 Levy et al., California Torts, Ch. 23, *Carriers*, § 23.03[3] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 109, *Carriers* (Matthew Bender)

2A California Points and Authorities, Ch. 33, *Carriers* (Matthew Bender)

2 California Civil Practice: Torts (Thomson West) § 28:16

Publisher's Notes

This instruction covers issues presented in BAJI No. 6.51.

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsNegligenceStandards of CareSpecial CareCommon CarriersTortsTransportation TortsMotor VehiclesGeneral OverviewTransportation LawCarrier Duties & LiabilitiesGeneral Overview



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CHAPTER 9 California Judicial Council Common Carriers Instructions

2-9 California Forms of Jury Instruction CACI 909-CACI 999

Reserved for Future Use

CACI 909Reserved for Future Use



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CHAPTER 10 California Judicial Council Premises Liability Instructions

2-10 California Forms of Jury Instruction 10.syn

§ 10.syn Synopsis to Chapter 10: California Judicial Council Premises Liability Instructions

CACI 1000 Essential Factual Elements

CACI 1001 Basic Duty of Care

CACI 1002 Extent of Control Over Premises Area

CACI 1003 Unsafe Conditions

CACI 1004 Obviously Unsafe Conditions

CACI 1005 Business Proprietor's Liability for the Negligent/Intentional/Criminal Conduct of Others

CACI 1006 Landlord's Duty

CACI 1007 Sidewalk Abutting Property

CACI 1008 Liability for Adjacent Altered Sidewalk--Essential Factual Elements

CACI 1009A Liability to Employees of Independent Contractors for Unsafe Concealed Conditions

CACI 1009B Liability to Employees of Independent Contractors for Unsafe Conditions--Retained Control

CACI 1009C Liability to Employees of Independent Contractors for Unsafe Conditions--Nondelegable Duty

CACI 1009D Liability to Employees of Independent Contractors for Unsafe Conditions--Defective Equipment

CACI 1010 Affirmative Defense--Recreation Immunity (Civ. Code, § 846)

CACI 1011 Constructive Notice Regarding Dangerous Conditions on Property

CACI 1012 Knowledge of Employee Imputed to Owner

CACI 1013-CACI 1099 Reserved for Future Use

CACI VF-1000 Premises Liability--Comparative Negligence of Others Not at Issue

CACI VF-1001 Premises Liability--Affirmative Defense--Recreation Immunity

CACI VF-1002 Premises Liability--Comparative Fault of Plaintiff at Issue

CACI VF-1003-CACI VF-1099 Reserved for Future Use



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CHAPTER 10 California Judicial Council Premises Liability Instructions

2-10 California Forms of Jury Instruction Scope

Scope

SCOPE

This chapter contains the California Judicial Council's "Premises Liability Series" of jury instructions [*CACI No. 1000 et seq.*]. The Judicial Council of California Civil Jury Instructions (CACI) included in this publication are the product of the Judicial Council of California Task Force on Jury Instructions, which are updated by the Judicial Council of California Advisory Committee on Civil Jury Instructions.

This chapter includes instructions on the following topics:

- The essential factual elements of a premises liability case [*CACI No. 1000*] and the basic duty of care [*CACI No. 1001*].
- The extent of the defendant's control over the premises area [*CACI No. 1002*].
- Unsafe concealed conditions [*CACI No. 1003*] and obviously unsafe conditions [*CACI No. 1004*].
- A business proprietor's liability for the negligent, intentional, or criminal conduct of others [*CACI No. 1005*].
- A landlord's duty for maintaining premises [*CACI No. 1006*].
- Sidewalk abutting property [*CACI No. 1007*].
- Liability for an adjacent altered sidewalk [*CACI No. 1008*] and liability to employees of independent contractors for dangerous conditions [*CACI Nos. 1009A-1009D*].
- The recreational immunity under *Civ. Code § 846* [*CACI No. 1010*].
- A store owner's constructive notice regarding a dangerous condition on his or her property [*CACI*

No. 1011].

- Imputation of employee's knowledge to owner [*CACI No. 1012*].

The premises liability series also includes special verdict forms [*CACI Nos. VF-1000-VF-1002*].

LexisNexis Matthew Bender Expert Practice Tip--CACI vs. BAJI: The CACI instructions on Premises Liability are well written and much cleaner and clearer than the replaced BAJI instructions [*compare CACI 1000 Series with BAJI Nos. 8.00 et seq.*]. *By Joseph Devine*



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CHAPTER 10 California Judicial Council Premises Liability Instructions

2-10 California Forms of Jury Instruction CACI 1000

CACI 1000 Essential Factual Elements

[Name of plaintiff] claims that [he/she] was harmed because of the way [name of defendant] managed [his/her/its] property. To establish this claim, [name of plaintiff] must prove all of the following:

- 1. That [name of defendant] [owned/leased/occupied/controlled] the property;**
- 2. That [name of defendant] was negligent in the use or maintenance of the property;**
- 3. That [name of plaintiff] was harmed; and**
- 4. That [name of defendant]'s negligence was a substantial factor in causing [name of plaintiff]'s harm.**

New September 2003; Revised June 2005

For cases involving public entity defendants, see instructions on dangerous conditions of public property (CACI No. 1100 et seq.).

- As a general rule, "[e]veryone is responsible, not only for the result of his or her willful acts, but also for an injury occasioned to another by his or her want of ordinary care or skill *in the management of his or her property* or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself or herself." (Civ. Code, § 1714(a), italics added.)

- " Since *Rowland v. Christian* (1968) 69 Cal.2d 108 [70 Cal.Rptr. 97, 443 P.2d 561] , the liability of

landowners for injuries to people on their property has been governed by general negligence principles." (*Pineda v. Ennabe* (1998) 61 Cal.App.4th 1403, 1407 [72 Cal.Rptr.2d 206] .)

■ Premises liability is a "form of negligence" in which the owner has a duty to exercise ordinary care in the management of the premises to avoid exposing persons to an unreasonable risk of harm. (*Brooks v. Eugene Burger Management Corp.* (1989) 215 Cal.App.3d 1611, 1619 [264 Cal.Rptr. 756] .)

■ The general rule of premises liability is set forth in *Sprecher v. Adamson Companies* (1981) 30 Cal.3d 358, 368 [178 Cal.Rptr. 783, 636 P.2d 1121] , which states that a landowner has a "duty to take affirmative action for the protection of individuals coming upon the land" This duty arises because ownership of land includes the right to control and manage the premises. The landowner's "mere possession with its attendant right to control conditions on the premises is a sufficient basis for the imposition of an affirmative duty to act." (*Id.* at p. 370 .) The right to control the premises lies at " 'the very heart of the ascription of tortious responsibility' " in premises liability actions. (*Id.* at p. 369 .)

■ Ordinarily, "[a] defendant cannot be held liable for the defective or dangerous condition of property which it [does] not own, possess, or control." (*Isaacs v. Huntington Memorial Hospital* (1985) 38 Cal.3d 112, 134 [211 Cal.Rptr. 356, 695 P.2d 653] .) However, "[a] defendant need not own, possess and control property in order to be held liable; control alone is sufficient." (*Alcaraz v. Vece* (1997) 14 Cal.4th 1149, 1162 [60 Cal.Rptr.2d 448, 929 P.2d 1239] .)

■ Mere maintenance does not establish control. A landowner's duty to warn or prevent injury from known hazards on abutting property derives from ownership, possession, or control, not mere maintenance. (*Alcaraz, supra*, 14 Cal.4th at p. 1170 .)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1082-1086

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

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

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

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

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

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

Publisher's Notes

This instruction replaces BAJI No. 8.00.

Legal Topics:

For related research and practice materials, see the following legal topics:

Torts Premises Liability & Property General Premises Liability General Overview



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CHAPTER 10 California Judicial Council Premises Liability Instructions

2-10 California Forms of Jury Instruction CACI 1001

CACI 1001 Basic Duty of Care

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

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

- (a) The location of the property;**
- (b) The likelihood that someone would come on to the property in the same manner as [*name of plaintiff*] did;**
- (c) The likelihood of harm;**
- (d) The probable seriousness of such harm;**
- (e) Whether [*name of defendant*] knew or should have known of the condition that created the risk of harm;**
- (f) The difficulty of protecting against the risk of such harm; [and]**
- (g) The extent of [*name of defendant*]'s control over the condition that created the risk of harm; [and]**

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

New September 2003; Revised June 2010

Directions for Use

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

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

Sources and Authority

- "Broadly speaking, premises liability alleges a defendant property owner allowed a dangerous condition on its property or failed to take reasonable steps to secure its property against criminal acts by third parties." (*Delgado v. American Multi-Cinema, Inc.* (1999) 72 Cal.App.4th 1403, 1406, fn. 1 [85 Cal.Rptr.2d 838] , internal citation omitted.)

- A landowner owes a duty to exercise reasonable care to maintain his or her property in such a manner as to avoid exposing others to an unreasonable risk of injury. (*Alcaraz v. Vece* (1997) 14 Cal.4th 1149, 1156 [60 Cal.Rptr.2d 448, 929 P.2d 1239] ; *Scott v. Chevron U.S.A.* (1992) 5 Cal.App.4th 510, 515 [6 Cal.Rptr.2d 810] .) The failure to fulfill the duty is negligence. (*Sprecher v. Adamson Companies* (1981) 30 Cal.3d 358, 371-372 [178 Cal.Rptr. 783, 636 P.2d 1121] .) The existence of a duty of care is an issue of law for the court. (*Alcaraz, supra*, 14 Cal.4th at p. 1162, fn. 4 .)

- "It is now well established that California law requires landowners to maintain land in their possession and control in a reasonably safe condition." (*Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 674 [25 Cal.Rptr.2d 137, 863 P.2d 207] , internal citations omitted.)

- "The proper test to be applied to the liability of the possessor of land ... is whether in the management of his property he has acted as a reasonable man in view of the probability of injury to others" (*Rowland v. Christian* (1968) 69 Cal.2d 108, 119 [70 Cal.Rptr. 97, 443 P.2d 561] .)

- A visitor's status on the property--as a trespasser, a licensee, or an invitee--no longer establishes the extent of the owner's duties to the visitor, although status may be relevant to the specific nature or scope of those duties or to the foreseeability that the visitor might be harmed. (*Ann M., supra*, 6 Cal.4th at pp. 674-675 .)

- "As stated in *Beauchamp v. Los Gatos Golf Course* (1969) 273 Cal.App.2d 20, 25 [77 Cal.Rptr. 914] , '[t]he term "invitee" has not been abandoned, nor have "trespasser" and "licensee." In the minds of the jury, whether a possessor of the premises has acted as a reasonable man toward a plaintiff, in view of the probability of injury to him, will tend to involve the circumstances under which he came upon defendant's land; and the probability of exposure of plaintiff and others of his class to the risk of injury; as well as whether the condition itself presented an unreasonable risk of harm, in view of the foreseeable use of the property.' Thus, the court concluded, and we agree, *Rowland* 'does not generally abrogate the

decisions declaring the substantive duties of the possessor of land to invitees nor those establishing the correlative rights and duties of invitees.' (*Id.*, at p. 27 .)" (*Williams v. Carl Karcher Enterprises, Inc.* (1986) 182 Cal.App.3d 479, 486-487 [227 Cal.Rptr. 465] , overruled on other grounds in *Soule v. GM Corp.* (1994) 8 Cal.4th 548 [34 Cal.Rptr.2d 607, 882 P.2d 298] .)

■ "The distinction between artificial and natural conditions [has been] rejected." (*Sprecher, supra*, 30 Cal.3d at p. 371 .)

■ "It must also be emphasized that the liability imposed is for negligence. The question is whether in the management of his property, the possessor of land has acted as a reasonable person under all the circumstances. The likelihood of injury to plaintiff, the probable seriousness of such injury, the burden of reducing or avoiding the risk, the location of the land, and the possessor's degree of control over the risk-creating condition are among the factors to be considered by the trier of fact in evaluating the reasonableness of a defendant's conduct." (*Sprecher, supra*, 30 Cal.3d at p. 372 .)

■ "A landowner's duty of care to avoid exposing others to a risk of injury is not limited to injuries that occur on premises owned or controlled by the landowner. Rather, the duty of care encompasses a duty to avoid exposing persons to risks of injury that occur off-site if the landowner's property is maintained in such a manner as to expose persons to an unreasonable risk of injury off-site." (*Barnes v. Black* (1999) 71 Cal.App.4th 1473, 1478-1479 [84 Cal.Rptr.2d 634] , internal citations omitted.)

■ "The duty which a possessor of land owes to others to put and maintain it in reasonably safe condition is nondelegable. If an independent contractor, no matter how carefully selected, is employed to perform it, the possessor is answerable for harm caused by the negligent failure of his contractor to put or maintain the buildings and structures in reasonably safe condition, irrespective of whether the contractor's negligence lies in his incompetence, carelessness, inattention or delay." (*Brown, supra*, 23 Cal.2d at p. 260.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, § 1086

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

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

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

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

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

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

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

Publisher's Notes

This instruction covers issues presented in BAJI Nos. 8.01 and 8.02.

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsPremises Liability & PropertyGeneral Premises LiabilityDuties of CareDuty off PremisesGeneral
OverviewTortsPremises Liability & PropertyGeneral Premises LiabilityDuties of CareDuty on PremisesGeneral
Overview



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California Forms of Jury Instruction

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CHAPTER 10 California Judicial Council Premises Liability Instructions

2-10 California Forms of Jury Instruction CACI 1002

CACI 1002 Extent of Control Over Premises Area

[Name of plaintiff] claims that [name of defendant] controlled the property involved in [name of plaintiff]'s harm, even though [name of defendant] did not own or lease it. A person controls property that he or she does not own or lease when he or she uses the property as if it were his or her own. A person is responsible for maintaining, in reasonably safe condition, all areas he or she controls.

New September 2003

Directions for Use

Use this instruction only for property that is not actually owned or leased by the defendant.

Sources and Authority

■ "[I]t is clear from [*Alcaraz v. Vece* (1997) 14 Cal.4th 1149, 1167 [60 Cal.Rptr.2d 448, 929 P.2d 1239]] that simple maintenance of an adjoining strip of land owned by another does not constitute an exercise of control over that property. Although evidence of maintenance is considered 'relevant on the issue of control,' the court limited its holding by stating that 'the simple act of mowing a lawn on adjacent property (or otherwise performing minimal, neighborly maintenance of property owned by another) generally will [not], standing alone, constitute an exercise of control over [the] property' " (*Contreras v. Anderson* (1997) 59 Cal.App.4th 188, 198-199 [69 Cal.Rptr.2d 69] .)

■ "In *Alcaraz* ... , our Supreme Court held that a landowner who exercises control over an adjoining strip of land has a duty to protect or warn others entering the adjacent land of a known hazard there. This duty arises even if the person does not own or exercise control over the hazard and even if the person

does not own the abutting property on which the hazard is located. ... [P] The *Alcaraz* court concluded that such evidence was 'sufficient to raise a triable issue of fact as to whether defendants exercised control over the strip of land containing the meter box and thus owed a duty of care to protect or warn plaintiff of the allegedly dangerous condition of the property.' " (*Contreras, supra*, 59 Cal.App.4th at pp. 197-198, footnote and internal citations omitted.)

■ " ' "The crucial element is control." [Citation.] ' "[W]e have placed major importance on the existence of possession and control as a basis for tortious liability for conditions on the land.' " (*Salinas v. Martin* (2008) 166 Cal.App.4th 404, 414 [82 Cal.Rptr.3d 735] , original italics, internal citations omitted.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1083, 1084

1 Levy et al., *California Torts*, Ch. 15, *General Premises Liability*, §§ 15.02- 15.03 (Matthew Bender)

11 *California Real Estate Law and Practice*, Ch. 381, *Tort Liability of Property Owners*, §§ 381.03 -381.04 (Matthew Bender)

29 *California Forms of Pleading and Practice*, Ch. 334, *Landlord and Tenant: Claims for Damages*, § 334.52 (Matthew Bender)

36 *California Forms of Pleading and Practice*, Ch. 421, *Premises Liability* , § 421.15 (Matthew Bender)

17 *California Points and Authorities*, Ch. 178, *Premises Liability* , § 178.60 et seq. (Matthew Bender)

1 *California Civil Practice: Torts* (Thomson West) § 16:2

Publisher's Notes

There is no BAJI instruction on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsPremises Liability & PropertyGeneral Premises LiabilityDuties of CareDuty off PremisesGeneral
OverviewTortsPremises Liability & PropertyGeneral Premises LiabilityDuties of CareDuty on PremisesGeneral
OverviewTortsPremises Liability & PropertyLessees & LessorsLiabilities of LessorsGeneral OverviewTortsPremises
Liability & PropertyLessees & LessorsLiability of Lessees



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CHAPTER 10 California Judicial Council Premises Liability Instructions

2-10 California Forms of Jury Instruction CACI 1003

CACI 1003 Unsafe Conditions

[*Name of defendant*] **was negligent in the use or maintenance of the property if:**

- 1. A condition on the property created an unreasonable risk of harm;**
- 2. [*Name of defendant*] knew or, through the exercise of reasonable care, should have known about it; and**
- 3. [*Name of defendant*] failed to repair the condition, protect against harm from the condition, or give adequate warning of the condition.**

New September 2003; Revised April 2007, October 2008

Directions for Use

Read this instruction with *CACI No. 1000, Essential Factual Elements*, in a premises liability case involving an unsafe condition on property. If there is an issue as to the owner's constructive knowledge of the condition (element 2), also give *CACI No. 1011, Constructive Notice Regarding Dangerous Conditions on Property*.

Sources and Authority

- "Where the occupier of land is aware of a concealed condition involving in the absence of precautions an unreasonable risk of harm to those coming in contact with it and is aware that a person on the premises is about to come in contact with it, the trier of fact can reasonably conclude that a failure to

2-10 California Forms of Jury Instruction CACI 1003

warn or to repair the condition constitutes negligence. Whether or not a guest has a right to expect that his host will remedy dangerous conditions on his account, he should reasonably be entitled to rely upon a warning of the dangerous condition so that he, like the host, will be in a position to take special precautions when he comes in contact with it." (*Rowland v. Christian* (1968) 69 Cal.2d 108, 119 [70 Cal.Rptr. 97, 443 P.2d 561] .)

■ "[T]he proprietor of a store who knows of, or by the exercise of reasonable care could discover, an artificial condition upon his premises which he should foresee exposes his business visitors to an unreasonable risk, and who has no basis for believing that they will discover the condition or realize the risk involved, is under a duty to exercise ordinary care either to make the condition reasonably safe for their use or to give a warning adequate to enable them to avoid the harm. ..." [Plaintiff] was entitled to have the jury so instructed." (*Williams v. Carl Karcher Enters., Inc.* (1986) 182 Cal.App.3d 479, 488 [227 Cal.Rptr. 465] , internal citations omitted, disapproved on other grounds in *Soule v. GM Corp.* (1994) 8 Cal.4th 548, 574, 580 [34 Cal.Rptr.2d 607, 882 P.2d 298] .)

■ "Because the owner is not the insurer of the visitor's personal safety, the owner's actual or constructive knowledge of the dangerous condition is a key to establishing its liability. Although the owner's lack of knowledge is not a defense, '[t]o impose liability for injuries suffered by an invitee due to [a] defective condition of the premises, the owner or occupier "must have either actual or constructive knowledge of the dangerous condition or have been able by the exercise of ordinary care to discover the condition, which if known to him, he should realize as involving an unreasonable risk to invitees on his premises. ..."' (*Ortega v. Kmart Corp.* (2001) 26 Cal.4th 1200, 1206 [114 Cal.Rptr.2d 470, 36 P.3d 11] , internal citation omitted.)

■ "Where the dangerous or defective condition of the property which causes the injury has been created by reason of the negligence of the owner of the property or his employee acting within the scope of the employment, the owner of the property cannot be permitted to assert that he had no notice or knowledge of the defective or dangerous condition in an action by an invitee for injuries suffered by reason of the dangerous condition. Under such circumstances knowledge thereof is imputed to him. Where the dangerous condition is brought about by natural wear and tear, or third persons, or acts of God or by other causes which are not due to the negligence of the owner, or his employees, then to impose liability the owner must have either actual or constructive knowledge of the dangerous condition or have been able by the exercise of ordinary care to discover the condition, which if known to him, he should realize as involving an unreasonable risk to invitees on his premises. His negligence in such cases is founded upon his failure to exercise ordinary care in remedying the defect after he has discovered it or as a man of ordinary prudence should have discovered it." (*Hatfield v. Levy Bros.* (1941) 18 Cal.2d 798, 806 [117 P.2d 841] , internal citation omitted.)

■ "[U]nder current California law, a store owner's choice of a particular 'mode of operation' does not eliminate a slip-and-fall plaintiff's burden of proving the owner had knowledge of the dangerous condition that caused the accident. Moreover, it would not be prudent to hold otherwise. Without this knowledge requirement, certain store owners would essentially incur strict liability for slip-and-fall injuries, i.e., they would be insurers of the safety of their patrons. For example, whether the french fry was dropped 10 seconds or 10 hours before the accident would be of no consequence to the liability finding. However, this is not to say that a store owner's business choices do not impact the negligence analysis. If the store owner's practices create a higher risk that dangerous conditions will exist, ordinary care will require a corresponding increase in precautions." (*Moore v. Wal-Mart Stores, Inc.* (2003) 111 Cal.App.4th 472, 479 [3 Cal.Rptr. 3d 813] .)

■ "Although liability might easily be found where the landowner has actual knowledge of the

dangerous condition, '[the] landowner's lack of knowledge of the dangerous condition is not a defense. He has an affirmative duty to exercise ordinary care to keep the premises in a reasonably safe condition, and therefore must inspect them or take other proper means to ascertain their condition. And if, by the exercise of reasonable care, he would have discovered the dangerous condition, he is liable.' " (*Swanberg v. O'Mectin* (1984) 157 Cal.App.3d 325, 330 [203 Cal.Rptr. 701] , internal citation omitted.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1119-1123

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

6 *California Real Estate Law and Practice*, Ch. 170, *The Premises: Duties and Liabilities*, § 170.02 (Matthew Bender)

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

29 *California Forms of Pleading and Practice*, Ch. 334, *Landlord and Tenant: Claims for Damages*, § 334.51 (Matthew Bender)

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

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

California Civil Practice: Torts (Thomson West) § 16:4

Publisher's Notes

This instruction covers issues presented in BAJI Nos. 8.01, 8.20, 8.20.1, and 8.21.

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsPremises Liability & PropertyGeneral Premises LiabilityDangerous ConditionsGeneral Overview



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CHAPTER 10 California Judicial Council Premises Liability Instructions

2-10 California Forms of Jury Instruction CACI 1004

CACI 1004 Obviously Unsafe Conditions

If an unsafe condition of the property is so obvious that a person could reasonably be expected to observe it, then the [owner/lessor/occupier/one who controls the property] does not have to warn others about the dangerous condition.

New September 2003

Directions for Use

Defendants may have a duty to take precautions to protect against the risk of harm from an obviously unsafe condition, even if they do not have a duty to warn. (*Osborn v. Mission Ready Mix* (1990) 224 Cal.App.3d 104, 121-122 [273 Cal.Rptr. 457] .)

Sources and Authority

■ Generally, if a danger is so obvious that a person could reasonably be expected to see it, the condition itself serves as a warning, and the landowner is under no further duty to remedy or warn of the condition. (6 Witkin, Summary of California Law (10th ed. 2005) Torts, § 1126.) However, this is not true in all cases. "[I]t is foreseeable that even an obvious danger may cause injury, if the practical necessity of encountering the danger, when weighed against the apparent risk involved, is such that under the circumstances, a person might choose to encounter the danger. The foreseeability of injury, in turn, when considered along with various other policy considerations such as the extent of the burden to the defendant and consequences to the community of imposing a duty to remedy such danger may lead to the legal conclusion that the defendant 'owes a duty of due care' [to the person injured.]" (*Osborn, supra*, 224 Cal.App.3d at p. 121 , internal citations omitted.)

■ It is incorrect to instruct a jury categorically that a business owner cannot be held liable for an injury resulting from an obvious danger. (*Osborn, supra*, 224 Cal.App.3d at p. 116 .) There may be a duty to remedy a dangerous condition, even though there is no duty to warn thereof, if the condition is foreseeable. (*Id. at pp. 121-122 .*)

■ In *Felmlee v. Falcon Cable TV* (1995) 36 Cal.App.4th 1032, 1039-1040 [43 Cal.Rptr.2d 158] , the court found that an instruction stating that the defendant "owed no duty to warn plaintiff of a danger which was obvious or which should have been observed in the exercise of ordinary care" was proper: "The jury was free to consider whether Falcon was directly negligent in failing to correct any foreseeable, dangerous condition of the cables which may have contributed to the cause of Felmlee's injuries." (*Id. at p. 1040 .*)

■ One court has observed: "[T]he 'obvious danger' exception to a landowner's ordinary duty of care is in reality a recharacterization of the former assumption of the risk doctrine, i.e., where the condition is so apparent that the plaintiff must have realized the danger involved, he assumes the risk of injury even if the defendant was negligent. ... [T]his type of assumption of the risk has now been merged into comparative negligence." (*Donohue v. San Francisco Housing Authority* (1993) 16 Cal.App.4th 658, 665 [20 Cal.Rptr.2d 148] , internal citations omitted.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1125-1127

1 Levy et al., *California Torts*, Ch. 15, *General Premises Liability*, § 15.04[4] (Matthew Bender)

11 *California Real Estate Law and Practice*, Ch. 381, *Tort Liability of Property Owners*, §§ 381.20, 381.32 (Matthew Bender)

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

17 *California Points and Authorities*, Ch. 178, *Premises Liability*, § 178.25 et seq. (Matthew Bender)

Publisher's Notes

This instruction covers issues presented in BAJI No. 8.20.

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsPremises Liability & PropertyGeneral Premises LiabilityDangerous ConditionsGeneral Overview



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CHAPTER 10 California Judicial Council Premises Liability Instructions

2-10 California Forms of Jury Instruction CACI 1005

CACI 1005 Business Proprietor's Liability for the Negligent/Intentional/Criminal Conduct of Others

[An owner of a business that is open to the public/A landlord] must use reasonable care to protect [patrons/guests/tenants] from another person's harmful conduct on [his/her/its] property if the [owner/landlord] can reasonably anticipate such conduct.

New September 2003

Sources and Authority

- "[O]nly when 'heightened' foreseeability of third party criminal activity on the premises exists--shown by prior similar incidents or other indications of a reasonably foreseeable risk of violent criminal assaults in that location--does the scope of a business proprietor's special-relationship-based duty *include an obligation to provide guards* to protect the safety of patrons." (*Delgado v. Trax Bar & Grill* (2005) 36 Cal.4th 224, 240 [30 Cal.Rptr.3d 145, 113 P.3d 1159] , internal citations and footnote omitted, original italics.)
- "Even when proprietors ... have no duty ... to provide a security guard or undertake other similarly burdensome preventative measures, the proprietor is not necessarily insulated from liability under the special relationship doctrine. A proprietor that has no duty ... to hire a security guard or to undertake other similarly burdensome preventative measures still owes a duty of due care to a patron or invitee by virtue of the special relationship, and there are circumstances (apart from the failure to provide a security guard or undertake other similarly burdensome preventative measures) that may give rise to liability based upon the proprietor's special relationship." (*Delgado, supra*, 36 Cal.4th at pp. 240-241 .)
- A business proprietor is not an insurer of the safety of his invitees, "but he is required to exercise

reasonable care for their safety and is liable for injuries resulting from a breach of this duty. The general duty includes not only the duty to inspect the premises in order to uncover dangerous conditions, but, as well, the duty to take affirmative action to control the wrongful acts of third persons which threaten invitees where the occupant has reasonable cause to anticipate such acts and the probability of injury resulting therefrom." (*Taylor v. Centennial Bowl, Inc.* (1966) 65 Cal.2d 114, 121 [52 Cal.Rptr. 561, 416 P.2d 793] , internal citations omitted.)

■ "Once a court finds that the defendant was under a duty to protect the plaintiff, it is for the factfinder to decide whether the security measures were reasonable under the circumstances. The jury must decide whether the security was adequate." (*Isaacs v. Huntington Memorial Hospital* (1985) 38 Cal.3d 112, 131 [211 Cal.Rptr. 356, 695 P.2d 653] , internal citation omitted.)

■ "[A]s frequently recognized, a duty to take affirmative action to control the wrongful acts of a third party will be imposed only where such conduct can be reasonably anticipated." (*Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 676 [25 Cal.Rptr.2d 137, 863 P.2d 207] , internal citations omitted.)

■ "In the case of a landlord, this general duty of maintenance, which is owed to tenants and patrons, has been held to include the duty to take reasonable steps to secure common areas against foreseeable criminal acts of third parties that are likely to occur in the absence of such precautionary measures." (*Ann M., supra*, 6 Cal.4th at p. 674 , internal citation omitted; *Frances T. v. Village Green Owners Assn.* (1986) 42 Cal.3d 490, 499-501 [229 Cal.Rptr. 456, 723 P.2d 573] .)

■ *Restatement Second of Torts, section 344*, provides:

A possessor of land who holds it open to the public for entry for his business purposes is subject to liability to members of the public while they are upon the land for such a purpose, for physical harm caused by the accidental, negligent, or intentionally harmful acts of third persons or animals, and by the failure to the possessor to exercise reasonable care to

(a) discover that such acts are being done or are likely to be done, or

(b) give a warning adequate to enable the visitors to avoid the harm, or otherwise to protect them against it.

■ Section 344 has been followed by California courts. (See *Peterson v. San Francisco Community College Dist.* (1984) 36 Cal.3d 799, 807 [205 Cal.Rptr. 842, 685 P.2d 1193] ; *Ky. Fried Chicken of Cal. v. Superior Court* (1997) 14 Cal.4th 814, 823 [59 Cal.Rptr.2d 756, 927 P.2d 1260] .)

■ Comment (f) to section 344 further explains the section's intent: "Since the possessor is not an insurer of the visitor's safety, he is ordinarily under no duty to exercise any care until he knows or has reason to know that the acts of the third person are occurring, or are about to occur. He may, however, know or have reason to know, from past experience, that there is a likelihood of conduct on the part of third persons in general which is likely to endanger the safety of the visitor, even though he has no reason to expect it on the part of any particular individual. If the place or character of his business, or his past experience, is such that he should reasonably anticipate careless or criminal conduct on the part of third persons, either generally or at some particular time, he may be under a duty to take precautions against it, and to provide a reasonably sufficient number of servants to afford a reasonable protection."

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1129-1149

1 Levy et al., *California Torts*, Ch. 15, *General Premises Liability*, § 15.06 (Matthew Bender)

6 *California Real Estate Law and Practice*, Ch. 170, *The Premises: Duties and Liabilities*, § 170.05 (Matthew Bender)

11 *California Real Estate Law and Practice*, Ch. 381, *Tort Liability of Property Owners*, § 381.21 (Matthew Bender)

29 *California Forms of Pleading and Practice*, Ch. 334, *Landlord and Tenant: Claims for Damages*, §§ 334.12, 334.23, 334.57 (Matthew Bender)

36 *California Forms of Pleading and Practice*, Ch. 421, *Premises Liability*, § 421.30 et seq. (Matthew Bender)

17 *California Points and Authorities*, Ch. 178, *Premises Liability*, § 178.60 et seq. (Matthew Bender)

1 *California Practice: Torts* (Thomson West) § 16:5

Publisher's Notes

This instruction covers issues presented in BAJI Nos. 8.05, 8.23, and 8.24.

"[A] store owner's choice of a particular 'mode of operation' does not eliminate a slip-and-fall plaintiff's burden of proving the owner had knowledge of the dangerous condition that caused the accident ... However, this is not to say that a store owner's business choices do not impact the negligence analysis. If the store owner's practices create a higher risk that dangerous conditions will exist, ordinary care will require a corresponding increase in precautions." (*Moore v. Wal-Mart Stores, Inc. (2003) 111 Cal.App.4th 472, 479 [3 Cal.Rptr.3d 813]* .)

Legal Topics:

For related research and practice materials, see the following legal topics:

Torts Premises Liability & Property General Premises Liability Activities & Conditions Criminal Activity Torts Premises Liability & Property General Premises Liability Premises Stores



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CHAPTER 10 California Judicial Council Premises Liability Instructions

2-10 California Forms of Jury Instruction CACI 1006

CACI 1006 Landlord's Duty

A landlord must conduct reasonable periodic inspections of rental property whenever the landlord has the legal right of possession. Before giving possession of leased property to a tenant [or on renewal of a lease] [or after retaking possession from a tenant], a landlord must conduct a reasonable inspection of the property for unsafe conditions and must take reasonable precautions to prevent injury due to the conditions that were or reasonably should have been discovered in the process. The inspection must include common areas under the landlord's control.

After a tenant has taken possession, a landlord must take reasonable precautions to prevent injury due to any unsafe condition in an area of the premises under the landlord's control if the landlord knows or reasonably should have known about it.

[After a tenant has taken possession, a landlord must take reasonable precautions to prevent injury due to any unsafe condition in an area of the premises under the tenant's control if the landlord has actual knowledge of the condition and the right and ability to correct it.]

New September 2003; Revised April 2008, April 2009, December 2009, June 2010

Directions for Use

Give this instruction with *CACI No. 1000, Essential Factual Elements*, *CACI No. 1001, Basic Duty of Care*, and *CACI No. 1003, Unsafe Conditions*, if the injury occurred on rental property and the landlord is alleged to be liable. Include the last paragraph if the property is not within the landlord's immediate control.

Include "or on renewal of a lease" for commercial tenancies. (See *Mora v. Baker Commodities, Inc.*

(1989) 210 Cal.App.3d 771, 781 [258 Cal.Rptr. 669] .) While no case appears to have specifically addressed a landlord's duty to inspect on renewal of a residential lease, it would seem impossible to impose such a duty with regard to a month-to-month tenancy. Whether there might be a duty to inspect on renewal of a long-term residential lease appears to be unresolved.

Under the doctrine of nondelegable duty, a landlord cannot escape liability for failure to maintain property in a safe condition by delegating the duty to an independent contractor. (*Srithong v. Total Investment Co.* (1994) 23 Cal.App.4th 721, 726 [28 Cal.Rptr.2d 672] .) For an instruction for use with regard to a landlord's liability for the acts of an independent contractor, see CACI No. 3713, *Nondelegable Duty*.

Sources and Authority

■ "A landlord owes a duty of care to a tenant to provide and maintain safe conditions on the leased premises. This duty of care also extends to the general public. 'A lessor who leases property for a purpose involving the admission of the public is under a duty to see that it is safe for the purposes intended, and to exercise reasonable care to inspect and repair the premises before possession is transferred so as to prevent any unreasonable risk of harm to the public who may enter. An agreement to renew a lease or relet the premises ... cannot relieve the lessor of his duty to see that the premises are reasonably safe at that time.' [P] Where there is a duty to exercise reasonable care in the inspection of premises for dangerous conditions, the lack of awareness of the dangerous condition does not generally preclude liability. 'Although liability might easily be found where the landowner has actual knowledge of the dangerous condition "[t]he landowner's lack of knowledge of the dangerous condition is not a defense. He has an affirmative duty to exercise ordinary care to keep the premises in a reasonably safe condition, and therefore must inspect them or take other proper means to ascertain their condition. And if, by the exercise of reasonable care, he would have discovered the dangerous condition, he is liable." ' " (*Portillo v. Aiassa* (1994) 27 Cal.App.4th 1128, 1134 [32 Cal.Rptr.2d 755] , internal citations omitted.)

■ "Historically, the public policy of this state generally has precluded a landlord's liability for injuries to his tenant or his tenant's invitees from a dangerous condition on the premises which comes into existence after the tenant has taken possession. This is true even though by the exercise of reasonable diligence the landlord might have discovered the condition. [P] The rationale for this rule has been that property law regards a lease as equivalent to a sale of the land for the term of the lease. As stated by Prosser: 'In the absence of agreement to the contrary, the lessor surrenders both possession and control of the land to the lessee, retaining only a reversionary interest; and he has no right even to enter without the permission of the lessee. Consequently, it is the general rule that he is under no obligation to anyone to look after the premises or keep them in repair, and is not responsible, either to persons injured on the land or to those outside of it, for conditions which develop or are created by the tenant after possession has been transferred. Neither is he responsible, in general, for the activities which the tenant carries on upon the land after such transfer, even when they create a nuisance.' " (*Uccello v. Laudenslayer* (1975) 44 Cal.App.3d 504, 510-511 [118 Cal.Rptr. 741] , internal citations omitted.)

■ "To this general rule of nonliability, the law has developed a number of exceptions, such as where the landlord covenants or volunteers to repair a defective condition on the premises, where the landlord has actual knowledge of defects which are unknown and not apparent to the tenant and he fails to disclose them to the tenant, where there is a nuisance existing on the property at the time the lease is made or renewed, when a safety law has been violated, or where the injury occurs on a part of the premises over which the landlord retains control, such as common hallways, stairs, elevators, or roof. [P] A common element in these exceptions is that either at or after the time possession is given to the tenant

the landlord retains or acquires a recognizable degree of control over the dangerous condition with a concomitant right and power to obviate the condition and prevent the injury. In these situations, the law imposes on the landlord a duty to use ordinary care to eliminate the condition with resulting liability for injuries caused by his failure so to act." (*Uccello, supra*, 44 Cal.App.3d at p. 511 , internal citations omitted.)

■ "[W]here a landlord has relinquished control of property to a tenant, a 'bright line' rule has developed to moderate the landlord's duty of care owed to a third party injured on the property as compared with the tenant who enjoys possession and control. ' "Because a landlord has relinquished possessory interest in the land, his or her duty of care to third parties injured on the land is attenuated as compared with the tenant who enjoys possession and control. Thus, before liability may be thrust on a landlord for a third party's injury due to a dangerous condition on the land, the plaintiff must show that the landlord had actual knowledge of the dangerous condition in question, plus the right and ability to cure the condition." [P] Limiting a landlord's obligations releases it from needing to engage in potentially intrusive oversight of the property, thus permitting the tenant to enjoy its tenancy unmolested.' " (*Salinas v. Martin* (2008) 166 Cal.App.4th 404, 412 [82 Cal.Rptr.3d 735] , internal citations omitted.)

■ "[A] commercial landowner cannot totally abrogate its landowner responsibilities merely by signing a lease. As the owner of property, a lessor out of possession must exercise due care and must act reasonably toward the tenant as well as to unknown third persons. At the time the lease is executed and upon renewal a landlord has a right to reenter the property, has control of the property, and must inspect the premises to make the premises reasonably safe from dangerous conditions. Even if the commercial landlord executes a contract which requires the tenant to maintain the property in a certain condition, the landlord is obligated at the time the lease is executed to take reasonable precautions to avoid unnecessary danger." (*Mora v. Baker Commodities, Inc.* (1989) 210 Cal.App.3d 771, 781 [258 Cal.Rptr. 669] , internal citations omitted.)

■ "[T]he landlord's responsibility to inspect is limited. Like a residential landlord, the duty to inspect charges the lessor 'only with those matters which would have been disclosed by a reasonable inspection.' The burden of reducing or avoiding the risk and the likelihood of injury will affect the determination of what constitutes a reasonable inspection. The landlord's obligation is only to do what is reasonable under the circumstances. The landlord need not take extraordinary measures or make unreasonable expenditures of time and money in trying to discover hazards unless the circumstances so warrant. When there is a potential serious danger, which is foreseeable, a landlord should anticipate the danger and conduct a reasonable inspection before passing possession to the tenant. However, if no such inspection is warranted, the landlord has no such obligation." (*Mora, supra*, 210 Cal.App.3d at p. 782 , internal citations and footnote omitted.)

■ "It is one thing for a landlord to leave a tenant alone who is complying with its lease. It is entirely different, however, for a landlord to ignore a defaulting tenant's possible neglect of property. Neglected property endangers the public, and a landlord's detachment frustrates the public policy of keeping property in good repair and safe. To strike the right balance between safety and disfavored self-help, we hold that [the landlord]'s duty to inspect attached upon entry of the judgment of possession in the unlawful detainer action and included reasonable periodic inspections thereafter." (*Stone v. Center Trust Retail Properties, Inc.* (2008) 163 Cal.App.4th 608, 613 [77 Cal.Rptr.3d 556] .)

■ "[I]t is established that a landlord owes a duty of care to its tenants to take reasonable steps to secure the common areas under its control." (*Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 675 [25 Cal.Rptr.2d 137, 863 P.2d 207] .)

■ "The reasonableness of a landlord's conduct under all the circumstances is for the jury. A triable issue of fact exists as to whether the defendants' maintenance of a low, open, unguarded window in a common hallway where they knew young children were likely to play constituted a breach of their duty to take reasonable precautions to prevent children falling out of the window." (*Amos v. Alpha Prop. Mgmt.* (1999) 73 Cal.App.4th 895, 904 [87 Cal.Rptr.2d 34] , internal citation omitted.)

■ "Simply stated, ' "[t]he duty which a possessor of land owes to others to put and maintain it in reasonably safe condition is nondelegable. If an independent contractor, no matter how carefully selected, is employed to perform it, the possessor is answerable for harm caused by the negligent failure of his contractor to put or maintain the buildings and structures in reasonably safe condition[.]" ' " (*Srithong*, *supra*, 23 Cal.App.4th at p. 726 .)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1142, 1143

1 Levy et al., *California Torts*, Ch. 15, *General Premises Liability*, § 15.02 (Matthew Bender)

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

29 *California Forms of Pleading and Practice*, Ch. 334, *Landlord and Tenant: Claims for Damages*, §§ 334.10, 334.53 (Matthew Bender)

36 *California Forms of Pleading and Practice*, Ch. 421, *Premises Liability*, §§ 421.01-421.121 (Matthew Bender)

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

1 *California Civil Practice: Torts* (Thomson West) §§ 16:12-16:16

Publisher's Notes

This instruction covers issues presented in BAJI Nos. 8.03, 8.20.1, and 8.22.

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property LawLandlord & TenantDuty to RepairReal Property LawLandlord & TenantTenant's Remedies & RightsGeneral OverviewTortsPremises Liability & PropertyLessees & LessorsLiabilities of LessorsGeneral Overview



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CHAPTER 10 California Judicial Council Premises Liability Instructions

*2-10 California Forms of Jury Instruction CACI 1007***CACI 1007 Sidewalk Abutting Property**

[An owner of/A lessee of/An occupier of/One who controls] property must avoid creating an unsafe condition on the surrounding public streets or sidewalks.

New September 2003

Sources and Authority

- Generally, absent statutory authority to the contrary, a landowner is under no duty to maintain in a safe condition a public street or sidewalk abutting his property (*Sexton v. Brooks* (1952) 39 Cal.2d 153, 157 [245 P.2d 496]). However, "[a]n abutting owner has always had a duty to refrain from affirmative conduct which would render the sidewalk dangerous to the public." (*Selger v. Steven Brothers, Inc.* (1990) 222 Cal.App.3d 1585, 1592 [272 Cal.Rptr. 544] , internal citations omitted.)

- The occupier must maintain his or her land in a manner so as not to injure the users of an abutting street or sidewalk. (*Swanberg v. O'Mectin* (1984) 157 Cal.App.3d 325, 330 [203 Cal.Rptr. 701] ; *Lompoc Unified School Dist. v. Superior Court* (1993) 20 Cal.App.4th 1688, 1693 [26 Cal.Rptr.2d 122] .)

- "An ordinance requiring the abutting landowner to maintain the sidewalk would be construed to create a duty of care to third persons only if the ordinance clearly and unambiguously so provided." (*Selger, supra*, 222 Cal.App.3d at p. 1590 , internal citations omitted.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1090-1093

1 Levy et al., *California Torts*, Ch. 15, *General Premises Liability*, § 15.03[4] (Matthew Bender)

11 *California Real Estate Law and Practice*, Ch. 381, *Tort Liability of Property Owners*, § 381.03 (Matthew Bender)

17 *California Points and Authorities*, Ch. 178, *Premises Liability*, § 178.29 (Matthew Bender)

Publisher's Notes

This instruction covers issues presented in BAJI Nos. 8.50.1 and 8.51.

Legal Topics:

For related research and practice materials, see the following legal topics:

GovernmentsPublic ImprovementsGeneral OverviewReal Property LawAdjoining LandownersGeneral
OverviewTortsPremises Liability & PropertyGeneral Premises LiabilityDuties of CareDuty off PremisesSidewalks &
Streets



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CHAPTER 10 California Judicial Council Premises Liability Instructions

2-10 California Forms of Jury Instruction CACI 1008

CACI 1008 Liability for Adjacent Altered Sidewalk--Essential Factual Elements

[*Name of plaintiff*] **claims that [he/she] was harmed because [*name of defendant*] was negligent in constructing and maintaining an altered portion of the sidewalk next to [his/her/its] property. To establish this claim, [*name of plaintiff*] must prove all of the following:**

- 1. That [*name of defendant*] [or a previous owner] altered [or requested the city to alter] the portion of the sidewalk that caused the harm;**
- 2. That the alteration provided a benefit solely to [*name of defendant*]'s property;**
- 3. That the alteration served a purpose different from ordinary sidewalk use;**
- 4. That [*name of defendant*] failed to use reasonable care in creating or maintaining the altered portion of the sidewalk;**
- 5. That [*name of plaintiff*] was harmed; and**
- 6. That [*name of defendant*]'s negligence was a substantial factor in causing [*name of plaintiff*]'s harm.**

New September 2003

- An abutting landowner who has altered an adjacent sidewalk for the benefit of his property apart from the ordinary use for which it was designed has a duty to employ ordinary care in making such

alteration and in maintaining that portion of the sidewalk in a reasonably safe condition. (*Peters v. City & County of San Francisco* (1953) 41 Cal.2d 419, 423 [260 P.2d 55] ; see *Selger v. Steven Brothers, Inc.* (1990) 222 Cal.App.3d 1585, 1594 [272 Cal.Rptr. 544] .)

■ The duty of care regarding altered sidewalks usually arises in cases "involving traps on sidewalks, including ' 'coal holes, meter boxes, and other devices of similar character located in the sidewalk which benefit the abutting owner and are located where the general public is likely to walk"' (*Contreras v. Anderson* (1997) 59 Cal.App.4th 188, 202 [69 Cal.Rptr.2d 69] , internal citation omitted.)

■ Liability depends on findings of (1) special benefit to the owner's property, (2) alteration of sidewalk for a nontypical purpose, and (3) the degree of exclusivity of benefit. (*Contreras, supra*, 59 Cal.App.4th at p. 202 .)

■ "The significance of the degree of exclusivity is that proportionately, the greater the exclusivity of use, the more an improvement benefits solely the adjoining property and the more reasonable it is to impose upon the landowner a duty to maintain the improvement in a reasonably safe condition." (*Seaber v. Hotel Del Coronado* (1991) 1 Cal.App.4th 481, 491 [2 Cal.Rptr.2d 405] .)

■ The requirement of due care in altering a sidewalk applies only to that portion of the sidewalk that is actually altered: "The rule cited by plaintiff requires the owner to keep the altered portion in reasonably safe condition or be liable for injuries resulting therefrom. Plaintiff did not trip on defendant's floral displays, she slipped on the dog dropping, a hazard which defendant did not create." (*Selger, supra*, 222 Cal.App.3d at p. 1595 .)

■ "The duty to maintain portions of a sidewalk which have been altered for the benefit of the property runs with the land, and a property owner cannot avoid liability on the ground that the condition was created by or at the request of his predecessors in title." (*Peters, supra*, 41 Cal.2d at p. 423 .)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1090-1093

1 Levy et al., California Torts, Ch. 15, *General Premises Liability*, § 15.03[4] (Matthew Bender)

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

Publisher's Notes

This instruction covers issues presented in BAJI No. 8.50.

Legal Topics:

For related research and practice materials, see the following legal topics:

Torts Premises Liability & Property General Premises Liability Dangerous Conditions General Overview Torts Premises Liability & Property General Premises Liability Duties of Care Duty off Premises Sidewalks & Streets



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CHAPTER 10 California Judicial Council Premises Liability Instructions

2-10 California Forms of Jury Instruction CACI 1009A

CACI 1009A Liability to Employees of Independent Contractors for Unsafe Concealed Conditions

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

- 1. That [*name of defendant*] [owned/leased/occupied/controlled] the property;**
- 2. That [*name of defendant*] knew, or reasonably should have known, of a preexisting unsafe concealed condition on the property;**
- 3. That [*name of plaintiff's employer*] neither knew nor could be reasonably expected to know of the unsafe concealed condition;**
- 4. That the condition was not part of the work that [*name of plaintiff's employer*] was hired to perform;**
- 5. That [*name of defendant*] failed to warn [*name of plaintiff's employer*] of the condition;**
- 6. That [*name of plaintiff*] was harmed; and**
- 7. That [*name of defendant*]'s conduct was a substantial factor in causing [*name of plaintiff*]'s harm.**

An unsafe condition is concealed if either it is not visible or its dangerous nature is not apparent to a reasonable person.

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

Directions for Use

This instruction is for use if a concealed dangerous condition on property causes injury to an employee of an independent contractor hired to perform work on the property. For an instruction for injuries to others due to a concealed condition, see *CACI No. 1003, Unsafe Conditions*. For an instruction for injuries based on the owner's retained control, see *CACI No. 1009B, Liability to Employees of Independent Contractors for Unsafe Conditions--Retained Control*. For an instruction for injuries based on a nondelegable duty, see *CACI No. 1009C, Liability to Employees of Independent Contractors for Unsafe Conditions--Nondelegable Duty*. For an instruction for injuries based on the property owner's providing defective equipment, see *CACI No. 1009D, Liability to Employees of Independent Contractors for Unsafe Conditions--Defective Equipment*.

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

Sources and Authority

- "[T]he hirer as landowner may be independently liable to the contractor's employee, even if it does not retain control over the work, if: (1) it knows or reasonably should know of a concealed, preexisting hazardous condition on its premises; (2) the contractor does not know and could not reasonably ascertain the condition; and (3) the landowner fails to warn the contractor." (*Kinsman v. Unocal Corp. (2005) 37 Cal.4th 659, 675 [36 Cal.Rptr.3d 495, 123 P.3d 931]* .)

- "[T]here is no reason to distinguish conceptually between premises liability based on a hazardous substance that is concealed because it is invisible to the contractor and known only to the landowner and premises liability based on a hazardous substance that is visible but is known to be hazardous only to the landowner. If the hazard is not reasonably apparent, and is known only to the landowner, it is a concealed hazard, whether or not the substance creating the hazard is visible." (*Kinsman, supra*, 37 Cal.4th at p. 678 .)

- "A landowner's duty generally includes a duty to inspect for concealed hazards. But the responsibility for job safety delegated to independent contractors may and generally does include explicitly or implicitly a limited duty to inspect the premises as well. Therefore, ... the landowner would not be liable when the contractor has failed to engage in inspections of the premises implicitly or explicitly delegated to it. Thus, for example, an employee of a roofing contractor sent to repair a defective roof would generally not be able to sue the hirer if injured when he fell through the same roof due to a structural defect, inasmuch as inspection for such defects could reasonably be implied to be within the scope of the contractor's employment. On the other hand, if the same employee fell from a ladder because the wall on which the ladder was propped collapsed, assuming that this defect was not related to the roof under repair, the employee may be able to sustain a suit against the hirer. Put in other terms, the contractor was not being paid to inspect the premises generally, and therefore the duty of general inspection could not be said to have been delegated to it. Under those circumstances, the landowner's failure to reasonably inspect the premises, when a hidden hazard leads directly to the employee's injury, may well result in liability." (*Kinsman, supra*, 37 Cal.4th at pp. 677-678 , internal citations omitted.)

Secondary Sources

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

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

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

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

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

Publisher's Notes

This instruction covers issues presented in BAJI No. 8.31.

Legal Topics:

For related research and practice materials, see the following legal topics:

Torts Premises Liability & Property General Premises Liability Dangerous Conditions General Overview Torts Vicarious Liability Independent Contractors General Overview



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CHAPTER 10 California Judicial Council Premises Liability Instructions

2-10 California Forms of Jury Instruction CACI 1009B

CACI 1009B Liability to Employees of Independent Contractors for Unsafe Conditions--Retained Control

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

- 1. That [*name of defendant*] [owned/leased/occupied/controlled] the property;**
- 2. That [*name of defendant*] retained control over safety conditions at the worksite;**
- 3. That [*name of defendant*] negligently exercised [his/her/its] retained control over safety conditions by [*specify alleged negligent acts or omissions*];**
- 4. That [*name of plaintiff*] was harmed; and**
- 5. That [*name of defendant*]'s negligent exercise of [his/her/its] retained control over safety conditions was a substantial factor in causing [*name of plaintiff*]'s harm.**

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

Directions for Use

This instruction is for use if a dangerous condition on property causes injury to an employee of an independent contractor hired to perform work on the property. The basis of liability is that the defendant retained control over the safety conditions at the worksite. For an instruction for injuries to others due to a concealed condition, see *CACI No. 1003, Unsafe Conditions*. For an instruction for injuries based on unsafe conditions not discoverable by the plaintiff's employer, see *CACI No. 1009A, Liability to*

Employees of Independent Contractors for Unsafe Concealed Conditions. For an instruction for injuries based on a nondelegable duty, see CACI No. 1009C, *Liability to Employees of Independent Contractors for Unsafe Conditions--Nondelegable Duty*. For an instruction for injuries based on the property owner's providing defective equipment, see CACI No. 1009D, *Liability to Employees of Independent Contractors for Unsafe Conditions--Defective Equipment*.

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

Sources and Authority

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

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

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

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

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

Secondary Sources

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

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

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

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

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

Publisher's Notes

This instruction covers issues presented in BAJI No. 8.30.

"[T]he appropriate test for all retained control situations is that stated in *Hooker*: 'If a hirer does retain control over safety conditions at a worksite and negligently exercises that control in a manner that affirmatively contributes to an employee's injuries, it is only fair to impose liability on the hirer.' " (*Park v. Burlington Northern Santa Fe Railway Co.* (2003) 108 Cal.App.4th 595, 613 [133 Cal.Rptr.2d 757] .)

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsPremises Liability & PropertyGeneral Premises LiabilityDangerous ConditionsGeneral OverviewTortsVicarious LiabilityIndependent ContractorsGeneral Overview



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CHAPTER 10 California Judicial Council Premises Liability Instructions

*2-10 California Forms of Jury Instruction CACI 1009C***CACI 1009C Liability to Employees of Independent Contractors for Unsafe Conditions--Nondelegable Duty**

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

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

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

New April 2008; Revised April 2009

Directions for Use

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

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

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

Sources and Authority

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

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

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

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

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

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

■ "Notwithstanding *Evard*'s conclusion that the regulation at issue imposed a nondelegable duty, we do not agree with plaintiff's inference from that case that in every instance Cal-OSHA regulations impose a nondelegable duty. While a nondelegable duty may arise when a statute or regulation requires specific safeguards or precautions to insure others' safety, it is the nature of the regulation itself that determines whether the duties it creates are nondelegable." (*Padilla*, *supra*, 166 Cal.App.4th at pp. 672-673 , internal citations omitted.)

Secondary Sources

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

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

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

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

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

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

Publisher's Notes

This instruction covers issues presented in BAJI No. 13.22.



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CHAPTER 10 California Judicial Council Premises Liability Instructions

2-10 California Forms of Jury Instruction CACI 1009D

CACI 1009D Liability to Employees of Independent Contractors for Unsafe Conditions--Defective Equipment

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

- 1. That [*name of defendant*] [owned/leased/occupied/controlled] the property;**
- 2. That [*name of defendant*] negligently provided unsafe equipment that contributed to [*name of plaintiff*]'s injuries;**
- 3. That [*name of plaintiff*] was harmed; and**
- 4. That [*name of defendant*]'s conduct was a substantial factor in causing [*name of plaintiff*]'s harm.**

Derived from CACI No. 1009B April 2009

Directions for Use

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

Contractors for Unsafe Conditions--Retained Control. For an instruction for injuries based on a nondelegable duty, see *CACI No. 1009C, Liability to Employees of Independent Contractors for Unsafe Conditions--Nondelegable Duty*.

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

Sources and Authority

■ "[W]hen a hirer of an independent contractor, by negligently furnishing unsafe equipment to the contractor, affirmatively contributes to the injury of an employee of the contractor, the hirer should be liable to the employee for the consequences of the hirer's own negligence." (*Elsner v. Uveges* (2004) 34 Cal.4th 915, 937 [22 Cal.Rptr.3d 530, 102 P.3d 915] .)

■ "[W]here the hiring party actively contributes to the injury by supplying defective equipment, it is the hiring party's own negligence that renders it liable, not that of the contractor." (*McKown v. Wal-Mart Stores, Inc.* (2002) 27 Cal.4th 219, 225 [115 Cal.Rptr.2d 868, 38 P.3d 1094] , internal citation omitted.)

Secondary Sources

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

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

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

36 *California Forms of Pleading and Practice, Ch. 421, Premises Liability*, § 421.15 (Matthew Bender)

17 *California Points and Authorities, Ch. 178, Premises Liability*, § 178.24 (Matthew Bender)

Publisher's Notes

This instruction covers issues presented in BAJI Nos. 8.30, 8.31.



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California Forms of Jury Instruction

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CHAPTER 10 California Judicial Council Premises Liability Instructions

2-10 California Forms of Jury Instruction CACI 1010

CACI 1010 Affirmative Defense--Recreation Immunity (Civ. Code, § 846)

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

[Choose one of the following three options:]

[unless [name of plaintiff] proves all of the following:

- 1. That [name of defendant] knew or should have known of the [condition/use/structure/activity on the property] that created an unreasonable risk of serious injury;**
- 2. That [name of defendant] knew or should have known that someone would probably be seriously injured by the dangerous [condition/use/structure/activity]; and**
- 3. That [name of defendant] knowingly failed to protect others from the dangerous [condition/use/structure/activity].]**

[or]

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

[or]

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

New September 2003; Revised October 2008

Depending on the facts, the court could instruct that the activity involved was a "recreational purpose" as a matter of law. For a comprehensive list of "recreational purposes," refer to *Civil Code section 846*.

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

■ *Civil Code section 846 provides:*

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

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

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

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

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

2-10 California Forms of Jury Instruction CACI 1010

■ The California Supreme Court has summarized the effect of *Civil Code section 846* on a landowner's duty of care: "[A]n owner of ... real property owes no duty of care to keep the premises safe for entry or use by others for recreational purposes or to give recreational users warning of hazards on the property, unless: (1) the landowner willfully or maliciously fails to guard or warn against a dangerous condition, use, structure or activity; (2) permission to enter for a recreational purpose is granted for a consideration; or (3) the landowner expressly invites rather than merely permits the user to come upon the premises. The landowner's duty to the nonpaying, uninvited recreational user is, in essence, that owed a trespasser under the common law as it existed prior to *Rowland v. Christian*" (*Ornelas v. Randolph* (1993) 4 Cal.4th 1095, 1099-1100 [17 Cal.Rptr.2d 594, 847 P.2d 560] .)

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

■ In *Hubbard v. Brown* (1990) 50 Cal.3d 189, 196 [266 Cal.Rptr. 491, 785 P.2d 1183] , the Supreme Court stated that the phrase "interest in real property" should not be given a narrow or technical interpretation, holding that a federal grazing permit is an interest in real property sufficient to qualify for the immunity.

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

■ A landowner's conduct becomes willful or malicious only if three elements are present: "(1) actual or constructive knowledge of the peril to be apprehended, (2) actual or constructive knowledge that injury is a probable, as opposed to a possible, result of the danger, and (3) conscious failure to act to avoid the peril." (*New v. Consolidated Rock Products Co.* (1985) 171 Cal.App.3d 681, 689-690 [217 Cal.Rptr. 522] , internal citations omitted.)

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

■ *Lostritto v. Southern Pacific Transportation Co.* (1977) 73 Cal.App.3d 737 [140 Cal.Rptr. 905] , involved a case in which the plaintiff was injured when he dove from the defendant's trestle into the river below. The court held that the defendant's willful and malicious misconduct could potentially be found when the evidence showed that the trestle was near and accessible to a popular swimming area, that diving from the trestle was a longstanding practice of which the defendant was aware, that the defendant was informed that swimmers had been hurt diving from its trestle, and that the defendant posted no warning signs and failed to erect inexpensive barriers to prevent the practice. (*Id.* at pp. 744-745 .)

■ "Clearly, consideration means some type of entrance fee or charge for permitting a person to use specially constructed facilities. There are many amusement facilities in government-owned parks that

charge admission fees and a consideration in this or a similar context was intended." (*Moore v. City of Torrance* (1979) 101 Cal.App.3d 66, 72 [166 Cal.Rptr. 192] , disapproved of on other grounds in *Delta Farms Reclamation Dist. v. Superior Court* (1983) 33 Cal.3d 699, 707 [190 Cal.Rptr. 494, 660 P.2d 1168] .)

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

- The exceptions for consideration and express invitees should be construed narrowly. (*Johnson, supra*, 21 Cal.App.4th at pp. 315-316 .)

Secondary Sources

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

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

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

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

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

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

Publisher's Notes

There is no BAJI instruction on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Torts Premises Liability & Property General Premises Liability Premises Recreational Facilities Recreational Use Statutes



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California Forms of Jury Instruction

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CHAPTER 10 California Judicial Council Premises Liability Instructions

2-10 California Forms of Jury Instruction CACI 1011

CACI 1011 Constructive Notice Regarding Dangerous Conditions on Property

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

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

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

New September 2003; Revised February 2007, October 2008

Directions for Use

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

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

Sources and Authority

■ "It is well established in California that although a store owner is not an insurer of the safety of its patrons, the owner does owe them a duty to exercise reasonable care in keeping the premises reasonably safe." (*Ortega, supra*, 26 Cal.4th at p. 1205 , internal citation omitted.)

■ "We conclude that a plaintiff may prove a dangerous condition existed for an unreasonable time with circumstantial evidence, and that ... 'evidence that an inspection had not been made within a particular period of time prior to an accident may warrant an inference that the defective condition existed long enough so that a person exercising reasonable care would have discovered it.' " (*Ortega, supra*, 26 Cal.4th at p. 1210 , internal citation omitted.)

■ "A store owner exercises ordinary care by making reasonable inspections of the portions of the premises open to customers, and the care required is commensurate with the risks involved." (*Ortega, supra*, 26 Cal.4th at p. 1205 , internal citation omitted.)

■ "Because the owner is not the insurer of the visitor's personal safety, the owner's actual or constructive knowledge of the dangerous condition is a key to establishing its liability." (*Ortega, supra*, 26 Cal.4th at p. 1206 , internal citations omitted.)

■ "Courts have also held that where the plaintiff relies on the failure to correct a dangerous condition to prove the owner's negligence, the plaintiff has the burden of showing that the owner had notice of the defect in sufficient time to correct it." (*Ortega, supra*, 26 Cal.4th at p. 1206 , internal citations omitted.)

■ "The plaintiff need not show actual knowledge where evidence suggests that the dangerous condition was present for a sufficient period of time to charge the owner with constructive knowledge of its existence." (*Ortega, supra*, 26 Cal.4th at p. 1206 , internal citations omitted.)

■ "We emphasize that allowing the inference does not change the rule that if a store owner has taken care in the discharge of its duty, by inspecting its premises in a reasonable manner, then no breach will be found even if a plaintiff does suffer injury." (*Ortega, supra*, 26 Cal.4th at p. 1211 , internal citations omitted.)

■ "We conclude that plaintiffs still have the burden of producing evidence that the dangerous condition existed for at least a sufficient time to support a finding that the defendant had constructive notice of the hazardous condition. We also conclude, however, that plaintiffs may demonstrate the storekeeper had constructive notice of the dangerous condition if they can show that the site had not been inspected within a reasonable period of time so that a person exercising due care would have discovered and corrected the hazard. In other words, if the plaintiffs can show an inspection was not made within a particular period of time prior to an accident, they may raise an inference the condition did exist long enough for the owner to have discovered it. It remains a question of fact for the jury whether, under all the circumstances, the defective condition existed long enough so that it would have been discovered and remedied by an owner in the exercise of reasonable care." (*Ortega, supra*, at pp. 1212-1213 , internal citations omitted.)

Secondary Sources

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

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

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

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

Publisher's Notes

This instruction covers issues presented in BAJI No. 8.24.

If "there is no direct evidence of the length of time the dangerous condition existed, the plaintiff can demonstrate that the store owner had constructive notice of the dangerous condition by showing that the site had not been inspected within a reasonable period of time," raising an inference that "the condition existed long enough for the owner to have discovered it." A plaintiff must show that the owner had notice of the defect in sufficient time to correct it. (*Moore v. Wal-Mart Stores, Inc.* (2003) 111 Cal.App.4th 472, 477 [3 Cal.Rptr.3d 813] , citing *Ortega*.)

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsPremises Liability & PropertyGeneral Premises LiabilityDangerous ConditionsGeneral Overview



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CHAPTER 10 California Judicial Council Premises Liability Instructions

2-10 California Forms of Jury Instruction CACI 1012

CACI 1012 Knowledge of Employee Imputed to Owner

If you find that the condition causing the risk of harm was created by [*name of defendant*] or [his/her/its] employee acting within the scope of [his/her] employment, then you must conclude that [*name of defendant*] knew of this condition.

New October 2004

■ "Where the dangerous or defective condition of the property which causes the injury has been created by reason of the negligence of the owner of the property or his employee acting within the scope of the employment, the owner of the property cannot be permitted to assert that he had no notice or knowledge of the defective or dangerous condition in an action by an invitee for injuries suffered by reason of the dangerous condition. Under such circumstances knowledge thereof is imputed to him." (*Hatfield v. Levy Bros. (1941) 18 Cal.2d 798, 806 [117 P.2d 841]* , internal citation omitted.)

■ "When an unsafe condition which causes injury to an invitee has been created by the owner of the property himself or by an employee within the scope of his employment, the invitee need not prove the owner's notice or knowledge of the dangerous condition; the knowledge is imputed to the owner." (*Sanders v. MacFarlane's Candies (1953) 119 Cal.App.2d 497, 501 [259 P.2d 1010]* , internal citation omitted.)

■ "Where the evidence shows, as it does in this case, that the condition which caused the injury was created by the employees of the respondent, or the evidence is such that a reasonable inference can be drawn that the condition was created by employees of the respondent, then respondent is charged with notice of the dangerous condition." (*Oldham v. Atchison, T. & S.F. Ry. Co. (1948) 85 Cal.App.2d 214,*

218-219 [192 P.2d 516] .)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, § 1120

1 Levy et al., California Torts, Ch. 15, *General Premises Liability*, §§ 15.04[5], 15.08 (Matthew Bender)

11 California Real Estate Law and Practice, Ch. 381, *Tort Liability of Property Owners*, § 381.20[1] (Matthew Bender)

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

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

Publisher's Notes

This instruction covers issues presented in BAJI No. 8.21.

Legal Topics:

For related research and practice materials, see the following legal topics:

Torts Premises Liability & Property General Premises Liability Dangerous Conditions General Overview



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CHAPTER 10 California Judicial Council Premises Liability Instructions

2-10 California Forms of Jury Instruction CACI 1013-CACI 1099

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CACI 1013Reserved for Future Use



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CHAPTER 10 California Judicial Council Premises Liability Instructions

2-10 California Forms of Jury Instruction CACI VF-1000

CACI VF-1000 Premises Liability--Comparative Negligence of Others Not at Issue

We answer the questions submitted to us as follows:

1. Did [*name of defendant*] [own/lease/occupy/control] the property?

_____ Yes _____ No

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

2. Was [*name of defendant*] negligent in the use or maintenance of the property?

_____ Yes _____ No

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

3. Was [*name of defendant*]'s negligence a substantial factor in causing harm to [*name of plaintiff*]?

_____ Yes _____ No

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

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

[a. Past economic loss

[lost earnings..... \$_____]

[lost profits..... \$_____]

[medical expenses..... \$_____]

[other past economic loss..... \$_____]

..... **Total Past Economic Damages: \$_____]****[b. Future economic loss**

[lost earnings..... \$_____]

[lost profits..... \$_____]

[medical expenses..... \$_____]

[other future economic loss..... \$_____]

..... **Total Future Economic Damages: \$_____]****[c. Past noneconomic loss, including [physical
pain/mental suffering:]..... \$_____]****[d. Future noneconomic loss, including [physical
pain/mental suffering:]..... \$_____]**..... **TOTAL \$_____****Signed: _____****Presiding Juror****Dated: _____****[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the
[clerk/bailiff/judge].**

New September 2003; Revised April 2007

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

This verdict form is based on *CACI No. 1000, Essential Factual Elements*.

If specificity is not required, users do not have to itemize all the damages listed in question 4. The

breakdown is optional depending on the circumstances.

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

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

Publisher's Notes

This verdict form covers issues presented in BAJI No. 16.02.

Legal Topics:

For related research and practice materials, see the following legal topics:

Torts Premises Liability & Property General Premises Liability Defenses Comparative & Contributory Negligence



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CHAPTER 10 California Judicial Council Premises Liability Instructions

2-10 California Forms of Jury Instruction CACI VF-1001

CACI VF-1001 Premises Liability--Affirmative Defense--Recreation Immunity

We answer the questions submitted to us as follows:

1. Did [name of defendant] [own/lease/occupy/control] the property?

_____ Yes _____ No

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

2. Was [name of defendant] negligent in the [use/maintenance] of the property?

_____ Yes _____ No

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

3. Was [name of defendant]'s negligence a substantial factor in causing harm to [name of plaintiff]?

_____ Yes _____ No

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

4. Did [name of plaintiff] enter on or use [name of defendant]'s property for a recreational

purpose?

_____ Yes _____ No

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

5. Did [*name of defendant*] know or should [he/she/it] have known of a [condition/use/structure/activity on the property] that created an unreasonable risk of serious injury?

_____ Yes _____ No

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

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

_____ Yes _____ No

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

7. Did [*name of defendant*] knowingly fail to protect others from the dangerous [condition/use/structure/activity]?

_____ Yes _____ No

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

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

[a. Past economic loss

[lost earnings..... \$_____].....

[lost profits..... \$_____].....

[medical expenses..... \$_____].....

[other past economic loss..... \$_____].....

..... Total Past Economic Damages: \$_____]

[b. Future economic loss

[lost earnings..... \$_____].....

[lost profits..... \$_____].

[medical expenses..... \$_____].

[other future economic loss..... \$_____].

..... Total Future Economic Damages: \$_____]

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

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

..... TOTAL \$_____

Signed: _____

Presiding Juror

Dated: _____

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

New September 2003; Revised April 2007, October 2008

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

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

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

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

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

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

Publisher's Notes

This verdict form covers issues presented in BAJI No. 16.02.

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsPremises Liability & PropertyGeneral Premises LiabilityPremisesRecreational FacilitiesRecreational Use Statutes



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CHAPTER 10 California Judicial Council Premises Liability Instructions

2-10 California Forms of Jury Instruction CACI VF-1002

CACI VF-1002 Premises Liability--Comparative Fault of Plaintiff at Issue

We answer the questions submitted to us as follows:

1. Did [*name of defendant*] [own/lease/occupy/control] the property?

_____ Yes _____ No

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

2. Was [*name of defendant*] negligent in the use or maintenance of the property?

_____ Yes _____ No

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

3. Was [*name of defendant*]'s negligence a substantial factor in causing harm to [*name of plaintiff*]?

_____ Yes _____ No

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

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

[a. Past economic loss

[lost earnings..... \$_____]

[lost profits..... \$_____]

[medical expenses..... \$_____]

[other past economic loss..... \$_____]

..... **Total Past Economic Damages: \$_____]****[b. Future economic loss**

[lost earnings..... \$_____]

[lost profits..... \$_____]

[medical expenses..... \$_____]

[other future economic loss..... \$_____]

..... **Total Future Economic Damages: \$_____]****[c. Past noneconomic loss, including [physical
pain/mental suffering:]..... \$_____]****[d. Future noneconomic loss, including [physical
pain/mental suffering:]..... \$_____]**..... **TOTAL \$_____**

If [name of plaintiff] has proved any damages, then answer question 5. If [name of plaintiff] has not proved any damages, then stop here, answer no further questions, and have the presiding juror sign and date this form.

5. Was [name of plaintiff] also negligent?

_____ Yes _____ No

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

6. Was [name of plaintiff]'s negligence a substantial factor in causing [his/her] harm?

_____ Yes _____ No

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

7. What percentage of responsibility for [name of plaintiff]'s harm do you assign to the following?

[Name of defendant]: _____ %

[Name of plaintiff]: _____ %

TOTAL **100 %****Signed:** _____**Presiding Juror****Dated:** _____**[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the [clerk/bailiff/judge].**

New February 2005; Revised April 2007, December 2009

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

This verdict form is based on *CACI No. 1000, Essential Factual Elements*, *CACI No. 405, Comparative Fault of Plaintiff*, and *CACI No. 406, Apportionment of Responsibility*.

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

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

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

Publisher's Notes

This verdict form covers issues presented in BAJI No. 16.02.

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsPremises Liability & PropertyGeneral Premises LiabilityDefensesComparative & Contributory Negligence



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CHAPTER 10 California Judicial Council Premises Liability Instructions

2-10 California Forms of Jury Instruction CACI VF-1003-CACI VF-1099

Reserved for Future Use

CACI VF-1003Reserved for Future Use



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CHAPTER 11 California Judicial Council Dangerous Condition of Public Property Instructions

2-11 California Forms of Jury Instruction 11.syn

§ 11.syn Synopsis to Chapter 11: California Judicial Council Dangerous Condition of Public Property Instructions

CACI 1100 Dangerous Condition on Public Property--Essential Factual Elements (Gov. Code, § 835)

CACI 1101 Control

CACI 1102 Definition of "Dangerous Condition" (Gov. Code, § 830(a))

CACI 1103 Notice (Gov. Code, § 835.2)

CACI 1104 Inspection System (Gov. Code, § 835.2(b)(1) & (2))

CACI 1105-CACI 1109 Reserved for Future Use

CACI 1110 Affirmative Defense--Natural Conditions (Gov. Code, § 831.2)

CACI 1111 Affirmative Defense--Condition Created by Reasonable Act or Omission (Gov. Code, § 835.4(a))

CACI 1112 Affirmative Defense--Reasonable Act or Omission to Correct (Gov. Code, § 835.4(b))

CACI 1113-CACI 1119 Reserved for Future Use

CACI 1120 Failure to Provide Traffic Control Signals (Gov. Code, § 830.4)

CACI 1121 Failure to Provide Traffic Warning Signals, Signs, or Markings (Gov. Code, § 830.8)

CACI 1122 Affirmative Defense--Weather Conditions Affecting Streets and Highways (Gov. Code, § 831)

CACI 1123 Loss of Design Immunity (Cornette)

CACI 1124-CACI 1199 Reserved for Future Use

CACI VF-1100 Dangerous Condition of Public Property

CACI VF-1101 Dangerous Condition of Public Property--Affirmative Defense--Reasonable Act or Omission (Gov. Code, § 835.4)

CACI VF-1102-CACI VF-1199 Reserved for Future Use



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CHAPTER 11 California Judicial Council Dangerous Condition of Public Property Instructions

2-11 California Forms of Jury Instruction Scope

Scope

SCOPE

This chapter contains the California Judicial Council's "Dangerous Condition of Public Property Series" of jury instructions [CACI No. 1100 et seq.]. The Judicial Council of California Civil Jury Instructions (CACI) included in this publication are the product of the Judicial Council of California Task Force on Jury Instructions, which are updated by the Judicial Council of California Advisory Committee on Civil Jury Instructions.

This chapter includes instructions on the following topics:

- Essential factual elements for a cause of action under *Gov. Code § 835* [CACI No. 1100].
- Control [CACI No. 1101].
- The definition of "dangerous condition" under *Gov. Code § 830(a)* [CACI No. 1102].
- The notice requirement under *Gov. Code § 835.2* [CACI No. 1103].
- The inspection system under *Gov. Code § 835.2(b)(1), (2)* [CACI No. 1104].
- Affirmative defenses, including the defenses of a natural condition [CACI No. 1110], a condition created by a reasonable act or omission [CACI No. 1111] or a reasonable act or omission to correct [CACI No. 1112], and weather conditions affecting streets and highways [CACI No. 1122].
- The failure to provide traffic control signals [CACI No. 1120] and traffic warning signals, signs, or markings [CACI No. 1121].
- The loss of design immunity [CACI No. 1123].

The dangerous condition of public property series also includes special verdict forms [*CACI Nos. VF-1100, VF-1101*].



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CHAPTER 11 California Judicial Council Dangerous Condition of Public Property Instructions

2-11 California Forms of Jury Instruction CACI 1100

CACI 1100 Dangerous Condition on Public Property--Essential Factual Elements (Gov. Code, § 835)

[*Name of plaintiff*] **claims that [he/she] was harmed by a dangerous condition of [*name of defendant*]'s property. To establish this claim, [*name of plaintiff*] must prove all of the following:**

- 1. That [*name of defendant*] owned [or controlled] the property;**
 - 2. That the property was in a dangerous condition at the time of the incident;**
 - 3. That the dangerous condition created a reasonably foreseeable risk of the kind of incident that occurred;**
 - 4. [That negligent or wrongful conduct of [*name of defendant*]'s employee acting within the scope of his or her employment created the dangerous condition;]**
- [or]**
- [That [*name of defendant*] had notice of the dangerous condition for a long enough time to have protected against it;]**
- 5. That [*name of plaintiff*] was harmed; and**
 - 6. That the dangerous condition was a substantial factor in causing [*name of plaintiff*]'s harm.**

New September 2003; Revised October 2008

Directions for Use

The concepts of notice, "dangerous condition," "protect against," and "property of a public entity" are addressed in subsequent instructions.

For element 4, choose either or both options depending on whether liability is alleged under *Government Code* section 835(a), 835(b), or both.

Sources and Authority

- *Government Code* section 835 provides:

Except as provided by statute, a public entity is liable for injury caused by a dangerous condition of its property if the plaintiff establishes that the property was in a dangerous condition at the time of the injury, that the injury was proximately caused by the dangerous condition, that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred, and either:

(a) A negligent or wrongful act or omission of an employee of the public entity within the scope of his employment created the dangerous condition; or

(b) The public entity had actual or constructive notice of the dangerous condition under Section 835.2 a sufficient time prior to the injury to have taken measures to protect against the dangerous condition.

- *Government Code* section 835.2(a) provides: "A public entity had actual notice of a dangerous condition within the meaning of subdivision (b) of section 835 if it had actual knowledge of the existence of the condition and knew or should have known of its dangerous character."

- *Government Code* section 835.2(b) provides, in part: "A public entity had constructive notice of a dangerous condition within the meaning of subdivision (b) of Section 835 only if the plaintiff establishes that the condition had existed for such a period of time and was of such an obvious nature that the public entity, in the exercise of due care, should have discovered the condition and its dangerous character."

- *Government Code* section 830 provides:

As used in this chapter:

(a) "Dangerous condition" means a condition of property that creates a substantial (as distinguished from a minor, trivial or insignificant) risk of injury when such property or adjacent property is used with due care in a manner in which it is reasonably foreseeable that it will be used.

(b) "Protect against" includes repairing, remedying or correcting a dangerous condition, providing safeguards against a dangerous condition, or warning of a dangerous condition.

(c) "Property of a public entity" and "public property" mean real or personal property owned or controlled by the public entity, but do not include easements, encroachments and other property that are located on the property of the public entity but are not owned or controlled by the public entity.

■ "[A] public entity is not liable for injuries except as provided by statute [*Gov. Code*, § 815] and [*Government Code*] section 835 sets out the exclusive conditions under which a public entity is liable for injuries caused by a dangerous condition of public property." (*Brown v. Poway Unified School Dist.* (1993) 4 Cal.4th 820, 829 [15 Cal.Rptr.2d 679, 843 P.2d 624] .)

■ The Supreme Court has observed: "Subdivisions (a) and (b) of section 835 obviously address two different types of cases. However, what distinguishes the two types of cases is not simply whether the public entity has notice of the dangerous condition. Instead, what distinguishes the two cases in practice is who created the dangerous condition. Because an entity must act through its employees, virtually all suits brought on account of dangerous conditions created by the entity will be brought under subdivision (a). In contrast, subdivision (b) can also support suits based on dangerous conditions not created by the entity or its employees." (*Brown, supra*, 4 Cal.4th at p. 836 .)

■ In section 835(a), "the term 'created' must be defined as the sort of involvement by an employee that would justify a presumption of notice on the entity's part." (*Brown, supra*, 4 Cal.4th at p. 836 .) The *res ipsa loquitur* presumption does not satisfy section 835(a). (*Ibid.*)

■ "Focusing on the language in *Pritchard, supra*, 178 Cal.App.2d at page 256, stating that where the public entity 'has itself created the dangerous condition it is *per se* culpable,' plaintiff argues that the negligence that section 835, subdivision (a), refers to is not common law negligence, but something that exists *whenever* the public entity creates the dangerous condition of property. We disagree. If the Legislature had wanted to impose liability whenever a public entity created a dangerous condition, it would merely have required plaintiff to establish that an act or omission of an employee of the public entity within the scope of his employment created the dangerous condition. Instead, section 835, subdivision (a), requires the plaintiff to establish that a '*negligent or wrongful* act or omission of an employee of the public entity within the scope of his employment created the dangerous condition.' (Italics added.) Plaintiff's interpretation would transform the highly meaningful words 'negligent or wrongful' into meaningless surplusage, contrary to the rule of statutory interpretation that courts should avoid a construction that makes any word surplusage." (*Metcalf v. County of San Joaquin* (2008) 42 Cal.4th 1121, 1135 [72 Cal.Rptr.3d 382, 176 P.3d 1121] , original italics, internal citation omitted.)

■ The plaintiff need not prove both that the public entity was negligent in creating the condition and that it had notice of the condition; either negligence or notice is sufficient. (*Curtis v. State of California* (1982) 128 Cal.App.3d 668, 693 [180 Cal.Rptr. 843] .)

■ "For liability to be imposed on a public entity for a dangerous condition of property, the entity must be in a position to protect against or warn of the hazard. Therefore, the crucial element is not ownership, but rather control." (*Mamola v. State of California ex rel. Dept. of Transportation* (1979) 94 Cal.App.3d 781, 788 [156 Cal.Rptr. 614] , internal citation omitted.)

■ "Liability for injury caused by a dangerous condition of property has been imposed when an unreasonable risk of harm is created by a combination of defect in the property and acts of third parties. However, courts have consistently refused to characterize harmful third party conduct as a dangerous condition--absent some concurrent contributing defect in the property itself." (*Hayes v. State of California* (1974) 11 Cal.3d 469, 472 [113 Cal.Rptr. 599, 521 P.2d 855] , internal citations omitted.)

■ "The existence of a dangerous condition is ordinarily a question of fact but 'can be decided as a matter of law if reasonable minds can come to only one conclusion.' " (*Cerna v. City of Oakland* (2008) 161 Cal.App.4th 1340, 1347 [75 Cal.Rptr.3d 168] .)

Secondary Sources

2-11 California Forms of Jury Instruction CACI 1100

5 Witkin, *Summary of California Law* (10th ed. 2005) Torts, §§ 249-285

2 *California Government Tort Liability Practice* (Cont.Ed.Bar 4th ed.) §§ 12.9-12.55

5 Levy et al., *California Torts, Ch. 61, Particular Liabilities and Immunities of Public Entities and Public Employees, § 61.01* (Matthew Bender)

40 *California Forms of Pleading and Practice, Ch. 464, Public Entities and Officers: California Tort Claims Act, § 464.81* (Matthew Bender)

19A *California Points and Authorities, Ch. 196, Public Entities, § 196.11* (Matthew Bender)

Publisher's Notes

This instruction replaces BAJI Nos. 11.53 and 11.54, and covers issues presented in BAJI No. 1165.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Torts Premises Liability & Property General Premises Liability Dangerous Conditions General Overview Torts Public Entity Liability Liability State Tort Claims Acts General Overview



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CHAPTER 11 California Judicial Council Dangerous Condition of Public Property Instructions

2-11 California Forms of Jury Instruction CACI 1101

CACI 1101 Control

[Name of plaintiff] claims that [name of defendant] controlled the property at the time of the incident. In deciding whether [name of defendant] controlled the property, you should consider whether it had the power to prevent, fix, or guard against the dangerous condition. You should also consider whether [name of defendant] treated the property as if it were its property.

New September 2003

Directions for Use

This instruction will not be necessary in most cases. Ownership of public property is generally established as a matter of law by evidence of holding title or other similar evidence.

The power to regulate privately owned facilities is not enough, in and of itself, to impose liability on a public entity (i.e., it is not "control"). (*Aaitui v. Grande Properties* (1994) 29 Cal.App.4th 1369, 1377-1378 [35 Cal.Rptr.2d 123] .)

Sources and Authority

- *Government Code* section 830(c) provides: " 'Property of a public entity' and 'public property' mean real or personal property owned or controlled by the public entity, but do not include easements, encroachments and other property that are located on the property of the public entity but are not owned or controlled by the public entity."

- "Where the public entity's relationship to the dangerous property is not clear, aid may be sought by

inquiring whether the particular defendant had control, in the sense of power to prevent, remedy or guard against the dangerous condition; whether his ownership is a naked title or whether it is coupled with control; and whether a private defendant, having a similar relationship to the property, would be responsible for its safe condition." (*Low v. City of Sacramento* (1970) 7 Cal.App.3d 826, 833-834 [87 Cal.Rptr. 173] [city and county jointly liable for defect in parking strip fronting county hospital].)

■ "The *Low*-type inquiry and result are only appropriate '... [where] the public entity's relationship to the dangerous property is not clear' " (*Searcy v. Hemet Unified School Dist.* (1986) 177 Cal.App.3d 792, 800 [223 Cal.Rptr. 206] , internal citation omitted.)

■ "For liability to be imposed on a public entity for a dangerous condition of property, the entity must be in a position to protect against or warn of the hazard. Therefore, the crucial element is not ownership, but rather control." (*Mamola v. State of California ex rel. Dept. of Transportation* (1979) 94 Cal.App.3d 781, 788 [156 Cal.Rptr. 614] , internal citation omitted.)

■ "[I]n identifying the defendant with whom control resides, location of the power to correct the dangerous condition is an aid." (*Low, supra*, 7 Cal.App.3d at p. 832 .)

■ The issue of control may be decided as a matter of law if the facts are uncontroverted. (*Aaitui, supra*, 29 Cal.App.4th at p. 1377 ; *Low, supra*, 7 Cal.App.3d at p. 834 .)

■ In *Holmes v. City of Oakland* (1968) 260 Cal.App.2d 378, 385 [67 Cal.Rptr. 197] , the court found that the city had control over a railroad right-of-way over a city street where a city ordinance had reserved extensive powers to regulate and inspect the railroad company's easement.

■ The requisite ownership or control must exist at the time of the incident. (*Longfellow v. County of San Luis Obispo* (1983) 144 Cal.App.3d 379, 383 [192 Cal.Rptr. 580] ; *Tolan v. State of California ex rel. Dept. of Transportation* (1979) 100 Cal.App.3d 980, 983 [161 Cal.Rptr. 307] .)

■ "[A] public entity can be held liable for an accident caused by a condition that exists on property adjacent to a public highway if the condition ' ' 'is so connected with or in such proximity to the traveled portion of the highway as to render it unsafe to those traveling thereon.' " ' " (*Carson v. Facilities Development Co.* (1984) 36 Cal.3d 830, 841 [206 Cal.Rptr. 136, 686 P.2d 656] , internal citations omitted.)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 250-257

2 California Government Tort Liability Practice (Cont.Ed.Bar 4th ed.) §§ 12.9-12.14

5 Levy et al., *California Torts, Ch. 61, Particular Liabilities and Immunities of Public Entities and Public Employees*, § 61.01[3][b] (Matthew Bender)

40 *California Forms of Pleading and Practice, Ch. 464, Public Entities and Officers: California Torts Claim Act*, § 464.81 (Matthew Bender)

19A *California Points and Authorities, Ch. 196, Public Entities*, § 196.11 (Matthew Bender)

Publisher's Notes

This instruction covers issues presented in BAJI No. 11.55.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewTortsPremises Liability & PropertyGeneral Premises
LiabilityDangerous ConditionsGeneral OverviewTortsPublic Entity LiabilityLiabilityState Tort Claims ActsGeneral
Overview



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CHAPTER 11 California Judicial Council Dangerous Condition of Public Property Instructions

2-11 California Forms of Jury Instruction CACI 1102

CACI 1102 Definition of "Dangerous Condition" (Gov. Code, § 830(a))

A "dangerous condition" is a condition of public property that creates a substantial risk of injury to members of the general public when the property [or adjacent property] is used with reasonable care and in a reasonably foreseeable manner. A condition that creates only a minor risk of injury is not a dangerous condition. [Whether the property is in a dangerous condition is to be determined without regard to whether [[name of plaintiff]/ [or] [name of third party]] exercised or failed to exercise reasonable care in [his/her] use of the property.]

New September 2003; Revised June 2010

Directions for Use

Give the last sentence if comparative fault is at issue. It clarifies that comparative fault does not negate the possible existence of a dangerous condition. (See *Fredette v. City of Long Beach* (1986) 187 Cal.App.3d 122, 131 [231 Cal.Rptr. 598] .)

Sources and Authority

- *Government Code* section 830(a) provides: "'Dangerous condition' means a condition of property that creates a substantial (as distinguished from a minor, trivial or insignificant) risk of injury when such property or adjacent property is used with due care in a manner in which it is reasonably foreseeable that it will be used."

- The Government Code permits the court to decide this issue as a matter of law. Section 830.2 provides: "A condition is not a dangerous condition within the meaning of this chapter if the trial or appellate court, viewing the evidence most favorably to the plaintiff, determines as a matter of law that

the risk created by the condition was of such a minor, trivial or insignificant nature in view of the surrounding circumstances that no reasonable person would conclude that the condition created a substantial risk of injury when such property or adjacent property was used with due care in a manner in which it was reasonably foreseeable that it would be used."

- "In general, '[whether] a given set of facts and circumstances creates a dangerous condition is usually a question of fact and may only be resolved as a question of law if reasonable minds can come to but one conclusion.' " (*Peterson v. San Francisco Community College Dist.* (1984) 36 Cal.3d 799, 810 [205 Cal.Rptr. 842, 685 P.2d 1193] , internal citation omitted.)

- "An initial and essential element of recovery for premises liability under the governing statutes is proof a dangerous condition existed. The law imposes no duty on a landowner--including a public entity--to repair trivial defects, or 'to maintain [its property] in an absolutely perfect condition.' " (*Stathoulis v. City of Montebello* (2008) 164 Cal.App.4th 559, 566 [78 Cal.Rptr.3d 910] , internal citations omitted.)

- "The negligence of a plaintiff-user of public property ... is a defense which may be asserted by a public entity; it has no bearing upon the determination of a 'dangerous condition' in the first instance. So long as a plaintiff-user can establish that a condition of the property creates a substantial risk to any foreseeable user of the public property who uses it with due care, he has successfully alleged the existence of a dangerous condition regardless of his personal lack of due care. If, however, it can be shown that the property is safe when used with due care and that a risk of harm is created only when foreseeable users fail to exercise due care, then such property is not 'dangerous' within the meaning of section 830, subdivision (a)." (*Fredette, supra*, 187 Cal.App.3d at p. 131 , internal citation omitted.)

- "Even though it is foreseeable that persons may use public property without due care, a public entity may not be held liable for failing to take precautions to protect such persons." (*Fredette, supra*, 187 Cal.App.3d at p. 132 , internal citation omitted.)

- "With respect to public streets, courts have observed 'any property can be dangerous if used in a sufficiently improper manner. For this reason, a public entity is only required to provide roads that are safe for reasonably foreseeable careful use. [Citation.] 'If [] it can be shown that the property is safe when used with due care and that a risk of harm is created only when foreseeable users fail to exercise due care, then such property is not 'dangerous' within the meaning of section 830, subdivision (a).' [Citation.]' " (*Sun v. City of Oakland* (2008) 166 Cal.App.4th 1177, 1183 [83 Cal.Rptr.3d 372] , internal citations omitted.)

- "Although public entities may be held liable for injuries occurring to reasonably foreseeable users of the property, even when the property is used for a purpose for which it is not designed or which is illegal, liability may ensue only if the property creates a substantial risk of injury when it is used with due care. Whether a condition creates a substantial risk of harm depends on how the general public would use the property exercising due care, including children who are held to a lower standard of care. (§ 830.) The standard is an objective one; a plaintiff's particular condition ..., does not alter the standard." (*Schonfeldt v. State of California* (1998) 61 Cal.App.4th 1462, 1466 [72 Cal.Rptr.2d 464] , internal citations omitted.)

- "The majority of cases ... have concluded that third party conduct by itself, unrelated to the condition of the property, does not constitute a 'dangerous condition' for which a public entity may be held liable. ... Nothing in the provisions of section 835, however, specifically precludes a finding that a public entity may be under a duty, given special circumstances, to protect against harmful criminal conduct on its

property." (*Peterson, supra*, 36 Cal.3d at pp. 810-811 , internal citations omitted.)

■ "Two points applicable to this case are ... well established: first, that the location of public property, by virtue of which users are subjected to hazards on adjacent property, may constitute a 'dangerous condition' under sections 830 and 835; second, that a physical condition of the public property that increases the risk of injury from third party conduct may be a 'dangerous condition' under the statutes." (*Bonanno v. Central Contra Costa Transit Authority* (2003) 30 Cal.4th 139, 154 [132 Cal.Rptr.2d 341, 65 P.3d 807] .)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, § 269

2 California Government Tort Liability Practice (Cont.Ed.Bar 4th ed.) § 12.15

5 Levy et al., *California Torts, Ch. 61, Particular Liabilities and Immunities of Public Entities and Public Employees*, § 61.01[2][a] (Matthew Bender)

40 *California Forms of Pleading and Practice, Ch. 464, Public Entities and Officers: California Torts Claim Act*, § 464.81 (Matthew Bender)

19A *California Points and Authorities, Ch. 196, Public Entities*, § 196.11 (Matthew Bender)

Publisher's Notes

This instruction covers issues presented in BAJI No. 11.54.

A dangerous condition of public property includes property which, because of its general use and operation, creates a substantial risk of harm to foreseeable users. (*Joyce v. Simi Valley Unified School Dist.* (2003) 110 Cal.App.4th 292, 304-305 [1 Cal.Rptr.3d 712] .)

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewTortsPremises Liability & PropertyGeneral Premises LiabilityDangerous ConditionsGeneral OverviewTortsPublic Entity LiabilityLiabilityState Tort Claims ActsGeneral Overview



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CHAPTER 11 California Judicial Council Dangerous Condition of Public Property Instructions

2-11 California Forms of Jury Instruction CACI 1103

CACI 1103 Notice (Gov. Code, § 835.2)

[Name of plaintiff] must prove that [name of defendant] had notice of the dangerous condition before the incident occurred. To prove that there was notice, [name of plaintiff] must prove:

[That [name of defendant] knew of the condition and knew or should have known that it was dangerous. A public entity knows of a dangerous condition if an employee knows of the condition and reasonably should have informed the entity about it.]

[or]

[That the condition had existed for enough time before the incident and was so obvious that the [name of defendant] reasonably should have discovered the condition and known that it was dangerous.]

New September 2003

This instruction is intended to be used where the plaintiff relies on *Government Code section 835(b)*. This instruction should be modified if the plaintiff is relying on both section 835(a) and section 835(b) to clarify that proof of notice is not necessary under section 835(a).

For an instruction regarding reasonable inspection systems, see *CACI No. 1104, Inspection System*.

■ *Government Code section 835.2* addresses actual and constructive notice. Section 835.2(a) provides: "A public entity had actual notice of a dangerous condition within the meaning of subdivision (b) of section 835 if it had actual knowledge of the existence of the condition and knew or should have known

of its dangerous character."

■ *Government Code section 835.2(b)* provides, in part: "A public entity had constructive notice of a dangerous condition within the meaning of subdivision (b) of Section 835 only if the plaintiff establishes that the condition had existed for such a period of time and was of such an obvious nature that the public entity, in the exercise of due care, should have discovered the condition and its dangerous character."

■ "'It is well settled that constructive notice can be shown by the long continued existence of the dangerous or defective condition, and it is a question of fact for the jury to determine whether the condition complained of has existed for a sufficient time to give the public agency constructive notice.'" (*Erfurt v. State of California* (1983) 141 Cal.App.3d 837, 844-845 [190 Cal.Rptr 569] , internal citations omitted.)

■ "'To establish 'actual notice,' it is not enough to show that the state employees had a general knowledge that people do leave hot coals on public beaches. There must be some evidence that the employees had knowledge of the particular dangerous condition in question.'" (*State of California v. Superior Court* (1968) 263 Cal.App.2d 396, 399-400 [69 Cal.Rptr. 683] , internal citations omitted.)

■ "Briefly stated, constructive notice may be imputed if it can be shown that an obvious danger existed for an adequate period of time before the accident to have permitted the state employees, in the exercise of due care, to discover and remedy the situation had they been operating under a reasonable plan of inspection. In the instant case, it can be validly argued that there was a triable issue on the question of inspection, but in determining whether there is constructive notice, the method of inspection has been held to be secondary. The primary and indispensable element of constructive notice is a showing that the obvious condition existed a sufficient period of time before the accident." (*State of California, supra*, at p. 400 , internal citation omitted.)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, § 271

2 California Government Tort Liability Practice (Cont.Ed.Bar 4th ed.) §§ 12.45-12.51

5 Levy et al., California Torts, Ch. 61, *Particular Liabilities and Immunities of Public Entities and Public Employees*, § 61.01[4][b] (Matthew Bender)

40 *California Forms of Pleading and Practice*, Ch. 464, *Public Entities and Officers: California Torts Claim Act*, § 464.81 (Matthew Bender)

19A *California Points and Authorities*, Ch. 196, *Public Entities*, § 196.11 (Matthew Bender)

Publisher's Notes

This instruction replaces BAJI Nos. 11.56 and 11.57, and covers issues presented in BAJI Nos. 11.58, 11.66, and 11.67.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Torts Premises Liability & Property General Premises Liability Dangerous Conditions General Overview Torts Premises Liability & Property General Premises

Liability Dangerous Conditions Known Dangers Torts Public Entity Liability Liability State Tort Claims Acts General
Overview



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CHAPTER 11 California Judicial Council Dangerous Condition of Public Property Instructions

2-11 California Forms of Jury Instruction CACI 1104

CACI 1104 Inspection System (Gov. Code, § 835.2(b)(1) & (2))

In deciding whether [*name of defendant*] should have discovered the dangerous condition, you may consider whether it had a reasonable inspection system and whether a reasonable system would have revealed the dangerous condition.

[In determining whether an inspection system is reasonable, you may consider the practicality and cost of the system and balance those factors against the likelihood and seriousness of the potential danger if no such system existed.]

[*and/or*]

[If [*name of defendant*] had a reasonable inspection system but did not detect the dangerous condition, you may consider whether it used reasonable care in maintaining and operating the system.]

New September 2003

Read the first paragraph and one or both of the bracketed paragraphs as appropriate to the facts.

- *Government Code section 835.2(b)* provides, in part:

On the issue of due care, admissible evidence includes but is not limited to evidence as to:

(1) Whether the existence of the condition and its dangerous character would have been discovered by an inspection system that was reasonably adequate (considering the practicality and cost of inspection weighed against the likelihood and magnitude of the

potential danger to which failure to inspect would give rise) to inform the public entity whether the property was safe for the use or uses for which the public entity used or intended others to use the public property and for uses that the public entity actually knew others were making of the public property or adjacent property.

(2) Whether the public entity maintained and operated such an inspection system with due care and did not discover the condition.

■ "Constructive notice may be found where the dangerous condition would have been discovered by a reasonable inspection." (*Straughter v. State of California* (1976) 89 Cal.App.3d 102, 109 [152 Cal.Rptr. 147] , citing to *Stanford v. City of Ontario* (1972) 6 Cal.3d 870, 882 [101 Cal.Rptr. 97, 495 P.2d 425] .)

■ "The questions of whether a dangerous condition could have been discovered by reasonable inspection and whether there was adequate time for preventive measures are properly left to the jury." (*Carson v. Facilities Development Co.* (1984) 36 Cal.3d 830, 843 [206 Cal.Rptr. 136, 686 P.2d 656] , internal citations omitted.)

■ "Although judicial decisions do not always link the issue of constructive notice to the reasonable inspection system ... , the Tort Claims Act indicates that, absent other persuasive evidence, the relationship between constructive notice and inspection may be crucial." (California Government Tort Liability Practice (Cont.Ed.Bar 3d ed. 1992), § 3.37.)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, § 271

2 California Government Tort Liability Practice (Cont.Ed.Bar 4th ed.) §§ 12.48-12.50

5 Levy et al., California Torts, Ch. 61, *Particular Liabilities and Immunities of Public Entities and Public Employees*, § 61.03[4][b] (Matthew Bender)

40 *California Forms of Pleading and Practice*, Ch. 464, *Public Entities and Officers: California Torts Claim Act*, § 464.81 (Matthew Bender)

19A *California Points and Authorities*, Ch. 196, *Public Entities*, § 196.11 (Matthew Bender)

Publisher's Notes

This instruction covers issues presented in BAJI No. 11.67.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Torts Premises Liability & Property General Premises Liability Dangerous Conditions Duty to Inspect Torts Premises Liability & Property General Premises Liability Dangerous Conditions Known Dangers Torts Public Entity Liability Liability State Tort Claims Acts General Overview



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CHAPTER 11 California Judicial Council Dangerous Condition of Public Property Instructions

2-11 California Forms of Jury Instruction CACI 1105-CACI 1109

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CACI 1105Reserved for Future Use



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CHAPTER 11 California Judicial Council Dangerous Condition of Public Property Instructions

2-11 California Forms of Jury Instruction CACI 1110

CACI 1110 Affirmative Defense--Natural Conditions (Gov. Code, § 831.2)

A public entity is not responsible for harm caused by a natural condition of an unimproved public property. If [name of defendant] proves that [name of plaintiff]'s injury was caused by such a condition, then it is not responsible for the injury.

New September 2003

Sources and Authority

- *Government Code* section 831.2 provides: "Neither a public entity nor a public employee is liable for an injury caused by a natural condition of any unimproved public property, including but not limited to any natural condition of any lake, stream, bay, river or beach."
- Section 831.2 "provides absolute immunity for public entities against claims for injuries caused by natural conditions of unimproved public property. Section 831.2 was enacted to ensure that public entities will not prohibit public access to recreational areas caused by the burden and expense of defending against personal injury suits and of placing such land in a safe condition. Immunity provisions of the tort claims act generally prevail over all sections imposing liability." (*Arroyo v. State of California* (1995) 34 Cal.App.4th 755, 761 [40 Cal.Rptr.2d 627] .)
- Section 831.21(a) provides: "Public beaches shall be deemed to be in a natural condition and unimproved notwithstanding the provision or absence of public safety services such as lifeguards, police or sheriff patrols, medical services, fire protection services, beach cleanup services, or signs. The provisions of this section shall apply only to natural conditions of public property and shall not limit any liability or immunity that may otherwise exist pursuant to this division." This section abrogated *Gonzales*

v. *San Diego* (1982) 130 Cal.App.3d 882 [182 Cal.Rptr. 73] [provision of lifeguard services held to have created "hybrid" condition]. (*Knight v. City of Capitola* (1992) 4 Cal.App.4th 918, 929-930 [6 Cal.Rptr.2d 874] .)

■ "Given the intent of the Legislature in enacting section 831.2, we hold that wild animals are a natural part of the condition of unimproved public property within the meaning of the statute." (*Arroyo, supra*, 34 Cal.App.4th at p. 762 .)

■ "Case precedent establishes that at least 'some form of physical change in the condition of the property at the location of the injury, which justifies the conclusion that the public entity is responsible for reasonable risk management in that area' is required [to preclude application of the immunity.]" (*Keyes v. Santa Clara Valley Water Dist.* (1982) 128 Cal.App.3d 882, 888 [180 Cal.Rptr. 586] , internal citation omitted.)

■ "[I]mprovement of a portion of a park does not remove the immunity from the unimproved areas." (*Rendak v. State of California* (1971) 18 Cal.App.3d 286, 288 [95 Cal.Rptr. 665] .)

■ "It is now generally settled that human-altered conditions, especially those that have existed for some years, which merely duplicate models common to nature are still 'natural conditions' as a matter of law for the purposes of *Government Code* section 831.2." (*Tessier v. City of Newport Beach* (1990) 219 Cal.App.3d 310, 314 [268 Cal.Rptr. 233] ; see also *Morin v. County of Los Angeles* (1989) 215 Cal.App.3d 184, 188 [263 Cal.Rptr. 479] .)

■ "The mere attachment of a rope on defendant's undeveloped land by an unknown third party did not change the 'natural condition' of the land." (*Kuykendall v. State of California* (1986) 178 Cal.App.3d 563, 566 [223 Cal.Rptr. 763] .)

■ Manmade lakes are covered by the *Government Code* section 831.2 immunity. (*Osgood v. County of Shasta* (1975) 50 Cal.App.3d 586, 590 [123 Cal.Rptr. 442] ; see also *Knight, supra*, 4 Cal.App.4th at p. 926 [artificially rebuilt beach].)

Secondary Sources

5 Witkin, *Summary of California Law* (10th ed. 2005) Torts, §§ 250, 256

2 California Government Tort Liability Practice (Cont.Ed.Bar 4th ed.) §§ 12.82-12.87

5 Levy et al., *California Torts, Ch. 61, Particular Liabilities and Immunities of Public Entities and Public Employees*, § 61.03 (Matthew Bender)

40 *California Forms of Pleading and Practice, Ch. 464, Public Entities and Officers: California Torts Claim Act*, § 464.85 (Matthew Bender)

19A *California Points and Authorities, Ch. 196, Public Entities*, §§ 196.12, 196.214 (Matthew Bender)

Publisher's Notes

There is no BAJI instruction on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewTortsPremises Liability & PropertyGeneral Premises
LiabilityDefensesGeneral OverviewTortsPublic Entity LiabilityLiabilityState Tort Claims ActsGeneral Overview



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CHAPTER 11 California Judicial Council Dangerous Condition of Public Property Instructions

2-11 California Forms of Jury Instruction CACI 1111

CACI 1111 Affirmative Defense--Condition Created by Reasonable Act or Omission (Gov. Code, § 835.4(a))

A public entity is not legally responsible for harm caused by a dangerous condition if the act or omission of its employee that created the dangerous condition was reasonable. If [*name of defendant*] proves that the act or omission that created the dangerous condition was reasonable, then your verdict must be for [*name of defendant*].

In determining whether the employee's conduct was reasonable, you must weigh the likelihood and the seriousness of the potential injury against the practicality and cost of either:

- (a) taking alternative action that would not have created the risk of injury; or**
- (b) protecting against the risk of injury.**

New September 2003; Revised April 2007, April 2008

Directions for Use

This instruction states a defense to the theory that the entity created a dangerous condition of public property. (Gov. Code, §§ 835(a), 835.4(a).)

Sources and Authority

- *Government Code section 835.4(a)* provides: "A public entity is not liable under subdivision (a) of Section 835 for injury caused by a condition of its property if the public entity establishes that the act or omission that created the condition was reasonable. The reasonableness of the act or omission that

created the condition shall be determined by weighing the probability and gravity of potential injury to persons and property foreseeably exposed to the risk of injury against the practicability and cost of taking alternative action that would not create the risk of injury or of protecting against the risk of injury."

■ *Government Code section 835.4 is an affirmative defense. (Hibbs v. Los Angeles County Flood Control Dist. (1967) 252 Cal.App.2d 166, 172 [60 Cal.Rptr. 364] .)*

■ "[T]he question of the reasonableness of a public entity's action in any particular situation is one of fact for a jury." (*Swaner v. City of Santa Monica (1984) 150 Cal.App.3d 789, 810 [198 Cal.Rptr. 208]* .)

■ "The Court of Appeal found conceptual difficulties in the interplay between section 835, subdivision (a) (plaintiff must establish negligence) and section 835.4, subdivision (a) (providing a defense if the public entity establishes that the act or omission that created the condition was reasonable). As it noted, normally 'negligence is the absence of reasonableness.' That being the case, the court reasoned, one cannot reasonably act negligently. Because of this conundrum, the Court of Appeal found that section 835.4 does not provide an affirmative defense. (P) We disagree. Section 835.4 clearly creates an affirmative defense that the public entity must establish. Moreover, the Legislature created this defense specifically for public entities. The California Law Revision Commission explained, 'Under this section, a public entity may absolve itself from liability for creating or failing to remedy a dangerous condition by showing that it would have been too costly and impractical for the public entity to have done anything else. ... This defense has been provided public entities in recognition that, despite limited manpower and budgets, there is much that they are required to do. Unlike private enterprise, a public entity often cannot weigh the advantage of engaging in an activity against the cost and decide not to engage in it. Government cannot 'go out of the business' of governing. Therefore, a public entity should not be liable for injuries caused by a dangerous condition if it is able to show that under all the circumstances, including the alternative courses of action available to it and the practicability and cost of pursuing such alternatives, its action in creating or failing to remedy the condition was not unreasonable.' " (*Metcalf v. County of San Joaquin (2008) 42 Cal.4th 1121, 1137-1138 [72 Cal.Rptr.3d 382, 176 P.3d 654]* , footnote and internal citation omitted.)

■ "The reasonableness standard referred to in section 835.4 differs from the reasonableness standard that applies under sections 830 and 835 and ordinary tort principles. Under the latter principles, the reasonableness of the defendant's conduct does not depend upon the existence of other, conflicting claims on the defendant's resources or the political barriers to acting in a reasonable manner." (*Metcalf, supra*, 42 Cal.4th at p. 1138 .)

■ "In sum, we conclude that negligence under section 835, subdivision (a), is established under ordinary tort principles concerning the reasonableness of a defendant's conduct in light of the foreseeable risk of harm. The plaintiff has the burden to demonstrate that the defendant's conduct was unreasonable under this standard If the plaintiff carries this burden, the public entity may defend under the provisions of section 835.4--a defense that is unique to public entities." (*Metcalf, supra*, 42 Cal.4th at p. 1139 .)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, § 272

2 California Government Tort Liability Practice (Cont.Ed.Bar 4th ed.) §§ 12.61-12.62

5 Levy et al., *California Torts, Ch. 61, Particular Liabilities and Immunities of Public Entities and Public Employees*, § 61.03 (Matthew Bender)

40 *California Forms of Pleading and Practice*, Ch. 464, *Public Entities and Officers: California Torts Claim Act*, § 464.86 (Matthew Bender)

19A *California Points and Authorities*, Ch. 196, *Public Entities*, §§ 196.12, 196.300 (Matthew Bender)

Publisher's Notes

This instruction replaces BAJI No. 11.61.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewTortsPremises Liability & PropertyGeneral Premises LiabilityDefensesGeneral OverviewTortsPublic Entity LiabilityLiabilityState Tort Claims ActsGeneral Overview



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CHAPTER 11 California Judicial Council Dangerous Condition of Public Property Instructions

2-11 California Forms of Jury Instruction CACI 1112

CACI 1112 Affirmative Defense--Reasonable Act or Omission to Correct (Gov. Code, § 835.4(b))

A public entity is not responsible for harm caused by a dangerous condition if its failure to take sufficient steps to protect against the risk of injury was reasonable. If [name of defendant] proves that its conduct was reasonable, then your verdict must be for [name of defendant].

In determining whether [name of defendant]'s conduct was reasonable, you must consider how much time and opportunity it had to take action. You must also weigh the likelihood and the seriousness of the potential injury against the practicality and cost of protecting against the risk of injury.

New September 2003; Revised April 2007, April 2008

Directions for Use

This instruction states a defense to the theory that the entity had notice of a dangerous condition (that it did not create) and failed to take adequate protective measures. (*Gov. Code, §§ 835(b), 835.4(b).*)

Sources and Authority

- *Government Code section 835.4(b)* provides: "A public entity is not liable under subdivision (b) of Section 835 for injury caused by a dangerous condition of its property if the public entity establishes that the action it took to protect against the risk of injury created by the condition or its failure to take such action was reasonable. The reasonableness of the action or inaction of the public entity shall be determined by taking into consideration the time and opportunity it had to take action and by weighing the probability and gravity of potential injury to persons and property foreseeably exposed to the risk of injury against the practicability and cost of protecting against the risk of such injury."

■ *Government Code section 835.4 is an affirmative defense. (Hibbs v. Los Angeles County Flood Control Dist. (1967) 252 Cal.App.2d 166, 172 [60 Cal.Rptr. 364] .)*

■ "[T]he question of the reasonableness of a public entity's action in any particular situation is one of fact for a jury." (*Swaner v. City of Santa Monica (1984) 150 Cal.App.3d 789, 810 [198 Cal.Rptr. 208]* ; see also *Ducey v. Argo Sales Co. (1979) 25 Cal.3d 707, 720 [159 Cal.Rptr. 835, 602 P.2d 755]* .)

■ "Unlike section 830.6 relating to design immunity, section 835.4 subdivision (b), does not provide that the reasonableness of the action taken shall be determined by the 'trial or appellate court.' " (*De La Rosa v. City of San Bernardino (1971) 16 Cal.App.3d 739, 749 [94 Cal.Rptr. 175]* .)

■ "The reasonableness standard referred to in section 835.4 differs from the reasonableness standard that applies under sections 830 and 835 and ordinary tort principles. Under the latter principles, the reasonableness of the defendant's conduct does not depend upon the existence of other, conflicting claims on the defendant's resources or the political barriers to acting in a reasonable manner. But, as the California Law Revision Commission recognized, public entities may also defend against liability on the basis that, because of financial or political constraints, the public entity may not be able to accomplish what reasonably would be expected of a private entity." (*Metcalfe v. County of San Joaquin (2008) 42 Cal.4th 1121, 1138 [72 Cal.Rptr.3d 382, 176 P.3d 654]* .)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, § 272

2 California Government Tort Liability Practice (Cont.Ed.Bar 4th ed.) §§ 12.63-12.65

5 Levy et al., *California Torts, Ch. 61, Particular Liabilities and Immunities of Public Entities and Public Employees*, § 61.03 (Matthew Bender)

40 *California Forms of Pleading and Practice, Ch. 464, Public Entities and Officers: California Torts Claim Act*, § 464.86 (Matthew Bender)

19A *California Points and Authorities, Ch. 196, Public Entities*, §§ 196.12, 196.300 (Matthew Bender)

Publisher's Notes

This instruction covers issues presented in BAJI No. 11.62.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Torts Premises Liability & Property General Premises Liability Defenses General Overview Torts Public Entity Liability Liability State Tort Claims Acts General Overview



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CHAPTER 11 California Judicial Council Dangerous Condition of Public Property Instructions

2-11 California Forms of Jury Instruction CACI 1113-CACI 1119

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CACI 1113Reserved for Future Use



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CHAPTER 11 California Judicial Council Dangerous Condition of Public Property Instructions

2-11 California Forms of Jury Instruction CACI 1120

CACI 1120 Failure to Provide Traffic Control Signals (Gov. Code, § 830.4)

You may not find that [name of defendant]'s property was in a dangerous condition just because it did not provide a [insert device or marking]. However, you may consider the lack of a [insert device or marking], along with other circumstances shown by the evidence, in determining whether [name of defendant]'s property was dangerous.

New September 2003

Sources and Authority

- *Government Code section 830.4* provides: "A condition is not a dangerous condition within the meaning of this chapter merely because of the failure to provide regulatory traffic control signals, stop signs, yield right-of-way signs, or speed restriction signs, as described by the Vehicle Code, or distinctive roadway markings as described in *Section 21460 of the Vehicle Code*."

- "Cases interpreting this statute have held that it provides a shield against liability only in those situations where the alleged dangerous condition exists solely as a result of the public entity's failure to provide a regulatory traffic device or street marking. If a traffic intersection is dangerous for reasons other than the failure to provide regulatory signals or street markings, the statute provides no immunity." (*Washington v. City and County of San Francisco* (1990) 219 Cal.App.3d 1531, 1534-1535 [269 Cal.Rptr. 58] .)

- "A public entity does not create a dangerous condition on its property 'merely because of the failure to provide regulatory traffic control signals, stop signs, yield right-of-way signs, or speed restriction signs' (§ 830.4.) If, on the other hand, the government installs traffic signals and invites the public to

justifiably rely on them, liability will attach if the signals malfunction, confusing or misleading motorists, and causing an accident to occur. The reasoning behind this rule is that the government creates a dangerous condition and a trap when it operates traffic signals that, for example, direct motorists to 'go' in all four directions of an intersection simultaneously, with predictable results." (*Chowdhury v. City of Los Angeles* (1995) 38 Cal.App.4th 1187, 1194-1195 [45 Cal.Rptr.2d 657] , internal citations omitted.)

■ "If the government turns off traffic signals entirely to avoid confusion, liability does not attach. 'When the [traffic] lights were turned off, their defective condition could no longer mislead or misdirect the injured party.' The same result obtains whether the traffic signals are extinguished by design or by accident." (*Chowdhury, supra*, 38 Cal.App.4th at p. 1195 , internal citations omitted.)

■ "Although section 830.4 ... provides that a condition of public property is not a dangerous one merely because of the failure to provide regulatory traffic control signals, the absence of such signals for the protection of pedestrians must be taken into consideration, together with other factors. ... [T]he lack of crosswalk markings, better illumination and warning signs became important factors in the case when the [pedestrian] subway itself was in a dangerous condition." (*Gardner v. City of San Jose* (1967) 248 Cal.App.2d 798, 803 [57 Cal.Rptr. 176] .)

■ "In short, a dangerous condition proven to exist, for reasons other than or in addition to the mere failure to provide the controls or markings described in section 830.4, may constitute a proximate cause of injury without regard to whether such condition also constitutes a 'trap,' as described by section 830.8, to one using the public improvement with due care because of the failure to post signs different from those dealt with by section 830.4 warning of that dangerous condition." (*Washington, supra*, 219 Cal.App.3d at p. 1537 .)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, § 264

2 California Government Tort Liability Practice (Cont.Ed.Bar 4th ed.) § 12.75

5 Levy et al., *California Torts, Ch. 61, Particular Liabilities and Immunities of Public Entities and Public Employees*, § 61.03[4] (Matthew Bender)

40 *California Forms of Pleading and Practice, Ch. 464, Public Entities and Officers: California Torts Claim Act*, § 464.85 (Matthew Bender)

19A *California Points and Authorities, Ch. 196, Public Entities*, §§ 196.12, 196.210 (Matthew Bender)

Publisher's Notes

This instruction replaces BAJI No. 11.59.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Torts Premises Liability & Property General Premises Liability Defenses General Overview Torts Public Entity Liability Liability State Tort Claims Acts General Overview Transportation Law Private Vehicles Traffic Regulation General Overview



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CHAPTER 11 California Judicial Council Dangerous Condition of Public Property Instructions

2-11 California Forms of Jury Instruction CACI 1121

CACI 1121 Failure to Provide Traffic Warning Signals, Signs, or Markings (Gov. Code, § 830.8)

A public entity is not responsible for harm caused by the lack of a [insert relevant warning device] unless a reasonably careful person would not notice or anticipate a dangerous condition of property without the [insert relevant warning device].

New September 2003

Sources and Authority

- *Government Code section 830.8* provides: "Neither a public entity nor a public employee is liable under this chapter for an injury caused by the failure to provide traffic or warning signals, signs, markings or devices described in the Vehicle Code. Nothing in this section exonerates a public entity or public employee from liability for injury proximately caused by such failure if a signal, sign, marking or device (other than one described in Section 830.4) was necessary to warn of a dangerous condition which endangered the safe movement of traffic and which would not be reasonably apparent to, and would not have been anticipated by, a person exercising due care."

- "Section 830.8 provides a limited immunity for public entities exercising their discretion in the placement of warning signs described in the Vehicle Code. 'The broad discretion allowed a public entity in the placement of road control signs is limited, however, by the requirement that there be adequate warning of dangerous conditions not reasonably apparent to motorists.' Thus where the failure to post a warning sign results in a concealed trap for those exercising due care, section 830.8 immunity does not apply." (*Kessler v. State of California* (1988) 206 Cal.App.3d 317, 321-322 [253 Cal.Rptr. 537] , internal citations omitted.)

■ "A public entity may be liable for accidents proximately caused by its failure to provide a signal, sign, marking or device to warn of a dangerous condition which endangers the safe movement of traffic 'and which would not be reasonably apparent to, and would not have been anticipated by, a person exercising due care.' This 'concealed trap' statute applies to accidents proximately caused when, for example, the public entity fails to post signs warning of a sharp or poorly banked curve ahead on its road or of a hidden intersection behind a promontory, or where a design defect in the roadway causes moisture to freeze and create an icy road surface, a fact known to the public entity but not to unsuspecting motorists, or where road work is being performed on a highway." (*Chowdhury v. City of Los Angeles* (1995) 38 Cal.App.4th 1187, 1196-1197 [45 Cal.Rptr.2d 657] , internal citations omitted.)

■ "[W]arning devices are required under *Government Code* section 830.8 and 830 (fog) only if a dangerous condition exists." (*Callahan v. City and County of San Francisco* (1971) 15 Cal.App.3d 374, 380 [93 Cal.Rptr. 122] .)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 264, 265

2 California Government Tort Liability Practice (Cont.Ed.Bar 4th ed.) §§ 12.76-12.79

5 Levy et al., *California Torts, Ch. 61, Particular Liabilities and Immunities of Public Entities and Public Employees*, § 61.03[4] (Matthew Bender)

40 *California Forms of Pleading and Practice, Ch. 464, Public Entities and Officers: California Torts Claim Act*, § 464.85 (Matthew Bender)

19A *California Points and Authorities, Ch. 196, Public Entities*, §§ 196.12, 196.304 (Matthew Bender)

Publisher's Notes

This instruction replaces BAJI No. 11.60.

In *Joyce v. Simi Valley Unified School Dist.* (2003) 110 Cal.App.4th 292, 301 [1 Cal.Rptr.3d 712] , because the plaintiff did not claim that the school district breached a duty to install traffic signs and signals or modify the crosswalk, the trial court did not err in not instructing on several statutory immunities governing traffic signs and signals. The trial court found that the instructions would confuse and mislead the jury.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Torts Public Entity Liability Liability State Tort Claims Acts General Overview Transportation Law Private Vehicles Traffic Regulation General Overview



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California Forms of Jury Instruction

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CHAPTER 11 California Judicial Council Dangerous Condition of Public Property Instructions

2-11 California Forms of Jury Instruction CACI 1122

CACI 1122 Affirmative Defense--Weather Conditions Affecting Streets and Highways (Gov. Code, § 831)

[*Name of defendant*] **claims it cannot be held responsible for [*name of plaintiff*]'s harm because the harm was caused by [*insert weather condition, e.g., fog, wind, rain, flood, ice, or snow*] affecting the use of a public street or highway. To succeed, [*name of defendant*] must prove both of the following:**

- 1. That [*insert weather condition, e.g., fog, wind, rain, flood, ice, or snow*] affecting the use of a public street or highway was the cause of [*name of plaintiff*]'s harm; and**
- 2. That a reasonably careful person using the public streets and highways would have noticed the [*insert weather condition, e.g., fog, wind, rain, flood, ice, or snow*] and anticipated its effect on the use of the street or highway.**

New September 2003

Directions for Use

The immunity provided by *Government Code* section 831 does not apply to: (1) effects that would not be reasonably apparent to and anticipated by a person exercising reasonable care, (2) situations where the weather effect combines with other factors that make the road dangerous, (3) sunlight that blinds drivers, or (4) where the weather conditions resulted in physical damage to or deterioration of the street or highway. (*Erfurt v. State of California* (1983) 141 Cal.App.3d 837, 845-846 [190 Cal.Rptr. 569] ; see *Flournoy v. State of California* (1969) 275 Cal.App.2d 806, 814 [80 Cal.Rptr. 485] .)

Sources and Authority

■ *Government Code section 831* provides: "Neither a public entity nor a public employee is liable for an injury caused by the effect on the use of streets and highways of weather conditions as such. Nothing in this section exonerates a public entity or public employee from liability for injury proximately caused by such effect if it would not be reasonably apparent to, and would not be anticipated by, a person exercising due care. For the purpose of this section, the effect on the use of streets and highways of weather conditions includes the effect of fog, wind, rain, flood, ice or snow but does not include physical damage to or deterioration of streets and highways resulting from weather conditions."

■ Weather immunity is an affirmative defense. (*Bossi v. State of California* (1981) 119 Cal.App.3d 313, 321 [174 Cal.Rptr. 93] [jury properly instructed regarding section 831, but issue was moot because jury did not reach it]; see also *Allyson v. Department of Transportation* (1997) 53 Cal.App.4th 1304, 1319 [62 Cal.Rptr.2d 490] .)

■ CalTrans's duty regarding transitory conditions affecting road surface and highway safety is discretionary, not mandatory. (*Allyson, supra*, 53 Cal.App.4th at p. 1319 .) Accordingly, section 831 immunity is available to CalTrans in appropriate circumstances. (*Id.* at pp. 1320-1321 .)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, § 279

2 California Government Tort Liability Practice (Cont.Ed.Bar 4th ed.) §§ 12.80-12.81

5 Levy et al., *California Torts, Ch. 61, Particular Liabilities and Immunities of Public Entities and Public Employees*, § 61.03[5] (Matthew Bender)

40 *California Forms of Pleading and Practice, Ch. 464, Public Entities and Officers: California Torts Claim Act*, § 464.85 (Matthew Bender)

19A *California Points and Authorities, Ch. 196, Public Entities*, §§ 196.12, 196.301 (Matthew Bender)

Publisher's Notes

There is no BAJI instruction on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Torts Premises Liability & Property General Premises Liability Defenses General Overview Torts Public Entity Liability Liability State Tort Claims Acts General Overview



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CHAPTER 11 California Judicial Council Dangerous Condition of Public Property Instructions

2-11 California Forms of Jury Instruction CACI 1123

CACI 1123 Loss of Design Immunity (*Cornette*)

[*Name of defendant*] **is not responsible for harm caused to [*name of plaintiff*] based on the plan or design of the [*insert type of property, e.g., "highway"*] unless [*name of plaintiff*] proves the following:**

1. That the [*insert type of property, e.g., "highway"*]'s plan[s] or design[s] had become dangerous because of a change in physical conditions;

2. That [*name of defendant*] had notice of the dangerous condition created because of the change in physical conditions; and

3. [That [*name of defendant*] had a reasonable time to obtain the funds and carry out the necessary corrective work to conform the property to a reasonable design or plan;]

[or]

[That [*name of defendant*] was unable to correct the condition due to practical impossibility or lack of funds but did not reasonably attempt to provide adequate warnings of the dangerous condition.]

New September 2003; Revised June 2010

Directions for Use

Give this instruction if the public entity defendant is entitled to design immunity unless the changed-conditions exception can be established. Read either or both options for element 3 depending on the facts of the case.

A public entity claiming design immunity must establish three elements: (1) a causal relationship between the plan or design and the accident; (2) discretionary approval of the plan or design before construction; and (3) substantial evidence supporting the reasonableness of the plan or design. (*Cornette v. Dept. of Transportation* (2001) 26 Cal.4th 63, 66 [109 Cal.Rptr.2d 1, 26 P.3d 332] .) The third element, substantial evidence of reasonableness, must be tried by the court, not the jury. (*Id.* at pp. 66-67 ; see *Gov. Code*, § 830.6.) The first two elements, causation and discretionary approval, are issues of fact for the jury to decide. (*Cornette*, *supra*, 26 Cal.4th at pp. 74-75 ; see also *Alvis v. County of Ventura* (2009) 178 Cal.App.4th 536, 550 [100 Cal.Rptr.3d 494] [elements may only be resolved as issues of law if facts are undisputed].) But, as a practical matter, these elements are usually stipulated to or otherwise established so they seldom become issues for the jury.

Users should include *CACI No. 1102, Definition of "Dangerous Condition,"* and *CACI No. 1103, Notice*, to define "notice" and "dangerous condition" in connection with this instruction. Additionally, the meaning and legal requirements for a "change of physical condition" have been the subject of numerous decisions involving specific contexts. Appropriate additional instructions to account for these decisions may be necessary.

Sources and Authority

- *Government Code* section 830.6 provides, in part: "Neither a public entity nor a public employee is liable under this chapter for an injury caused by the plan or design of a construction of, or an improvement to, public property where such plan or design has been approved in advance of the construction or improvement by the legislative body of the public entity or by some other body or employee exercising discretionary authority to give such approval or where such plan or design is prepared in conformity with standards previously so approved, if the trial or appellate court determines that there is any substantial evidence upon the basis of which (a) a reasonable public employee could have adopted the plan or design or the standards therefor or (b) a reasonable legislative body or other body or employee could have approved the plan or design or the standards therefor."

- "Design immunity does not necessarily continue in perpetuity. To demonstrate loss of design immunity a plaintiff must also establish three elements: (1) the plan or design has become dangerous because of a change in physical conditions; (2) the public entity had actual or constructive notice of the dangerous condition thus created; and (3) the public entity had a reasonable time to obtain the funds and carry out the necessary remedial work to bring the property back into conformity with a reasonable design or plan, or the public entity, unable to remedy the condition due to practical impossibility or lack of funds, had not reasonably attempted to provide adequate warnings." (*Cornette*, *supra*, 26 Cal.4th at p. 66 , internal citations omitted.)

- "The rationale for design immunity is to prevent a jury from second-guessing the decision of a public entity by reviewing the identical questions of risk that had previously been considered by the government officers who adopted or approved the plan or design." (*Cornette*, *supra*, 26 Cal.4th at p. 69 , internal citation omitted.)

- "Section 830.6 makes it quite clear that 'the trial or appellate court' is to determine whether 'there is any substantial evidence upon the basis of which (a) a reasonable public employee could have adopted the plan or design or the standards therefor or (b) a reasonable legislative body or other body or employee could have approved the plan or design or the standards therefor.' The question presented by this case is whether the Legislature intended that the three issues involved in determining whether a

public entity has lost its design immunity should also be tried by the court. Our examination of the text of section 830.6, the legislative history of that section, and our prior decisions leads us to the conclusion that, where triable issues of material fact are presented, as they were here, a plaintiff has a right to a jury trial as to the issues involved in loss of design immunity." (*Cornette, supra*, 26 Cal.4th at pp. 66-67 .)

Secondary Sources

5 Levy et al., *California Torts*, Ch. 61, *Particular Liabilities and Immunities of Public Entities and Public Employees*, § 61.03[3][b] (Matthew Bender)

40 *California Forms of Pleading and Practice*, Ch. 464, *Public Entities and Officers: California Torts Claim Act*, § 464.85 (Matthew Bender)

19A *California Points and Authorities*, Ch. 196, *Public Entities*, § 196.12 (Matthew Bender)

Publisher's Notes

This instruction replaces BAJI No. 11.68.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Torts Negligence Defenses Private Immunities General Overview Torts Premises Liability & Property General Premises Liability Defenses General Overview Torts Public Entity Liability Liability State Tort Claims Acts General Overview



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California Forms of Jury Instruction

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CHAPTER 11 California Judicial Council Dangerous Condition of Public Property Instructions

2-11 California Forms of Jury Instruction CACI 1124-CACI 1199

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CACI 1124Reserved for Future Use



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CHAPTER 11 California Judicial Council Dangerous Condition of Public Property Instructions

2-11 California Forms of Jury Instruction CACI VF-1100

CACI VF-1100 Dangerous Condition of Public Property

We answer the questions submitted to us as follows:

1. Did [name of defendant] own [or control] the property?

_____ Yes _____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Was the property in a dangerous condition at the time of the incident?

_____ Yes _____ No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Did the dangerous condition create a reasonably foreseeable risk that this kind of incident would occur?

_____ Yes _____ No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. [Did the negligent or wrongful conduct of [name of defendant]'s employee acting within the

scope of his or her employment create the dangerous condition?]

[or]

[Did [*name of defendant*] have notice of the dangerous condition for a long enough time for [*name of defendant*] to have protected against it?]

_____ Yes _____ No

If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. Was the dangerous condition a substantial factor in causing harm to [*name of plaintiff*]?

_____ Yes _____ No

If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. What are [*name of plaintiff*]'s damages?

[a. Past economic loss

[lost earnings..... \$_____].....

[lost profits..... \$_____].....

[medical expenses..... \$_____].....

[other past economic loss..... \$_____].....

..... Total Past Economic Damages: \$_____]

[b. Future economic loss

[lost earnings..... \$_____].....

[lost profits..... \$_____].....

[medical expenses..... \$_____].....

[other future economic loss..... \$_____].....

..... Total Future Economic Damages: \$_____]

[c. Past noneconomic loss, including [physical pain/mental suffering:]..... \$_____]

[d. Future noneconomic loss, including [physical pain/mental suffering:] \$_____]

..... TOTAL \$_____

Signed: _____

Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the [clerk/bailiff/judge].

New September 2003; Revised April 2007

Directions for Use

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on *CACI No. 1100, Dangerous Condition on Public Property--Essential Factual Elements*.

If specificity is not required, users do not have to itemize all the damages listed in question 6. The breakdown is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

This form may be modified if the jury is being given the discretion under *Civil Code section 3288* to award prejudgment interest on specific losses that occurred prior to judgment.

Publisher's Notes

This verdict form covers issues presented in BAJI No. 16.30.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Torts Premises Liability & Property General Premises Liability Dangerous Conditions General Overview Torts Public Entity Liability Liability State Tort Claims Acts General Overview



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CHAPTER 11 California Judicial Council Dangerous Condition of Public Property Instructions

2-11 California Forms of Jury Instruction CACI VF-1101

CACI VF-1101 Dangerous Condition of Public Property--Affirmative Defense--Reasonable Act or Omission (Gov. Code, § 835.4)

We answer the questions submitted to us as follows:

1. Did [name of defendant] own [or control] the property?

_____ Yes _____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Was the property in a dangerous condition at the time of the incident?

_____ Yes _____ No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Did the dangerous condition create a reasonably foreseeable risk that this kind of incident would occur?

_____ Yes _____ No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. [Did negligent or wrongful conduct of [*name of defendant*]'s employee acting within the scope of his or her employment create the dangerous condition?]

_____ Yes _____ No

[or]

[Did [*name of defendant*] have notice of the dangerous condition for a long enough time to have protected against it?]

_____ Yes _____ No

If your answer to [either option for] question 4 is yes, then answer question 5. If you answered no [to both options], stop here, answer no further questions, and have the presiding juror sign and date this form.

5. Was the dangerous condition a substantial factor in causing harm to [*name of plaintiff*]?

_____ Yes _____ No

If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. [Answer if you answered yes to the first option for question 4: When you consider the likelihood and seriousness of potential injury, compared with the practicality and cost of either (a) taking alternative action that would not have created the risk of injury, or (b) protecting against the risk of injury, was [*name of defendant*]'s [act/ specify failure to act] that created the dangerous condition reasonable under the circumstances?]

_____ Yes _____ No

[or]

[Answer if you answered yes to the second option for question 4: When you consider the likelihood and seriousness of potential injury, compared with (a) how much time and opportunity [*name of defendant*] had to take action, and (b) the practicality and cost of protecting against the risk of injury, was [*name of defendant*]'s failure to take sufficient steps to protect against the risk of injury created by the dangerous condition reasonable under the circumstances?]

_____ Yes _____ No

If your answer to [either option for] question 6 is no, then answer question 7. If you answered yes [to both options], stop here, answer no further questions, and have the presiding juror sign and date this form.

7. What are [*name of plaintiff*]'s damages?

[a. Past economic loss

[lost earnings..... \$_____].....

[lost profits..... \$_____].

[medical expenses..... \$_____].

[other past economic loss..... \$_____].

..... Total Past Economic Damages: \$_____]

[b. Future economic loss

[lost earnings..... \$_____].

[lost profits..... \$_____].

[medical expenses..... \$_____].

[other future economic loss..... \$_____].

..... Total Future Economic Damages: \$_____]

**[c. Past noneconomic loss, including [physical
pain/mental suffering:]]..... \$_____]**

**[d. Future noneconomic loss, including [physical
pain/mental suffering:]]..... \$_____]**

..... **TOTAL \$_____**

Signed: _____

Presiding Juror

Dated: _____

**[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the
[clerk/bailiff/judge].**

New September 2003; Revised April 2007, April 2008, October 2008, June 2010

Directions for Use

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on *CACI No. 1100, Dangerous Condition on Public Property--Essential Factual Elements*, *CACI No. 1111, Affirmative Defense--Condition Created by Reasonable Act or Omission*, and *CACI No. 1112, Affirmative Defense--Reasonable Act or Omission to Correct*.

For questions 4 and 6, choose the first bracketed options if liability is alleged because of an employee's

negligent conduct under *Government Code section 835(a)*. Use the second bracketed options if liability is alleged for failure to act after actual or constructive notice under *Government Code section 835(b)*. Both options may be given if the plaintiff is proceeding under both theories of liability.

If specificity is not required, users do not have to itemize all the damages listed in question 7. The breakdown is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

This form may be modified if the jury is being given the discretion under *Civil Code section 3288* to award prejudgment interest on specific losses that occurred prior to judgment.

Publisher's Notes

This verdict form covers issues presented in BAJI No. 16.30.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewTortsPremises Liability & PropertyGeneral Premises LiabilityDangerous ConditionsGeneral OverviewTortsPublic Entity LiabilityLiabilityState Tort Claims ActsGeneral Overview



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CHAPTER 11 California Judicial Council Dangerous Condition of Public Property Instructions

2-11 California Forms of Jury Instruction CACI VF-1102-CACI VF-1199

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CACI VF-1102Reserved for Future Use



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CHAPTER 12 California Judicial Council Products Liability Instructions

2-12 California Forms of Jury Instruction 12.syn

§ 12.syn Synopsis to Chapter 12: California Judicial Council Products Liability Instructions

CACI 1200 Strict Liability--Essential Factual Elements

CACI 1201 Strict Liability--Manufacturing Defect--Essential Factual Elements

CACI 1202 Strict Liability--"Manufacturing Defect" Explained

CACI 1203 Strict Liability--Design Defect--Consumer Expectation Test--Essential Factual Elements

CACI 1204 Strict Liability--Design Defect--Risk-Benefit Test--Essential Factual Elements--Shifting Burden of Proof

CACI 1205 Strict Liability--Failure to Warn--Essential Factual Elements

CACI 1206 Strict Liability--Failure to Warn--Products Containing Allergens (Not Prescription Drugs)--Essential Factual Elements

CACI 1207A Strict Liability--Comparative Fault of Plaintiff

CACI 1207B Strict Liability--Comparative Fault of Third Person

CACI 1208-CACI 1219 Reserved for Future Use

CACI 1220 Negligence--Essential Factual Elements

CACI 1221 Negligence--Basic Standard of Care

CACI 1222 Negligence--Manufacturer or Supplier--Duty to Warn--Essential Factual Elements

CACI 1223 Negligence--Recall/Retrofit

CACI 1224 Negligence--Negligence for Product Rental/Standard of Care

CACI 1225-CACI 1229 Reserved for Future Use

CACI 1230 Express Warranty--Essential Factual Elements

CACI 1231 Implied Warranty of Merchantability--Essential Factual Elements

CACI 1232 Implied Warranty of Fitness for a Particular Purpose--Essential Factual Elements

CACI 1233 Implied Warranty of Merchantability for Food--Essential Factual Elements

CACI 1234-CACI 1239 Reserved for Future Use

CACI 1240 Affirmative Defense to Express Warranty--Not "Basis of Bargain"

CACI 1241 Affirmative Defense--Exclusion or Modification of Express Warranty

CACI 1242 Affirmative Defense--Exclusion of Implied Warranties

CACI 1243 Notification/Reasonable Time

CACI 1244 Affirmative Defense--Sophisticated User

CACI 1245 Affirmative Defense--Product Misuse or Modification

CACI 1246 Affirmative Defense--Design Defect--Government Contractor

CACI 1247-CACI 1299 Reserved for Future Use

CACI VF-1200 Strict Products Liability--Manufacturing Defect--Comparative Fault at Issue

CACI VF-1201 Strict Products Liability--Design Defect--Consumer Expectation Test--Affirmative Defense--Misuse or Modification

CACI VF-1202 Strict Products Liability--Design Defect--Risk-Benefit Test

CACI VF-1203 Strict Products Liability--Failure to Warn

CACI VF-1204 Products Liability--Negligence--Comparative Fault of Plaintiff at Issue

CACI VF-1205 Products Liability--Negligent Failure to Warn

CACI VF-1206 Products Liability--Express Warranty--Affirmative Defense--Not "Basis of Bargain"

CACI VF-1207 Products Liability--Implied Warranty of Merchantability--Affirmative Defense--Exclusion of Implied Warranties

CACI VF-1208 Products Liability--Implied Warranty of Fitness for a Particular Purpose

CACI VF-1209-CACI VF-1299 Reserved for Future Use



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CHAPTER 12 California Judicial Council Products Liability Instructions

2-12 California Forms of Jury Instruction Scope

Scope

SCOPE

This chapter contains the California Judicial Council's "Product Liability Series" of jury instructions [*CACI No. 1200 et seq.*]. The Judicial Council of California Civil Jury Instructions (CACI) included in this publication are the product of the Judicial Council of California Task Force on Jury Instructions, which are updated by the Judicial Council of California Advisory Committee on Civil Jury Instructions.

This chapter includes instructions on the following topics:

- Strict liability causes of action, including essential factual elements generally [*CACI No. 1200*], manufacturing defects [*CACI Nos. 1201, 1202*], design defects [*CACI Nos. 1203, 1204*], the failure to warn [*CACI Nos. 1205, 1206*], and comparative fault/contributory negligence [*CACI Nos. 1207A, 1207B*].
- Negligence causes of action, including essential factual elements [*CACI No. 1220*], the basic standard of care [*CACI No. 1221*] and the standard of care in a product rental case [*CACI No. 1224*], the duty to warn [*CACI No. 1222*], and recall/retrofit [*CACI No. 1223*].
- Warranties, including essential factual elements for an express warranty [*CACI No. 1230*], the implied warranty of merchantability [*CACI No. 1231*], the implied warranty of fitness for a particular purpose [*CACI No. 1232*], and the implied warranty of merchantability for food [*CACI No. 1233*].
- Affirmative defenses [*CACI Nos. 1241-1242, 1244, 1246*] and notification/reasonable time [*CACI No. 1243*].

The products liability series also includes special verdict forms [*CACI Nos. VF-1200-VF-1208*].



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CHAPTER 12 California Judicial Council Products Liability Instructions

*2-12 California Forms of Jury Instruction CACI 1200***CACI 1200 Strict Liability--Essential Factual Elements**

[*Name of plaintiff*] **claims that [he/she] was harmed by a product [distributed/manufactured/sold] by [name of defendant] that:**

[contained a manufacturing defect;] [or]

[was defectively designed;] [or]

[did not include sufficient [instructions] [or] [warning of potential safety hazards].]

New September 2003

Sources and Authority

■ "A manufacturer, distributor, or retailer is liable in tort if a defect in the manufacture or design of its product causes injury while the product is being used in a reasonably foreseeable way." (*Soule v. GM Corp.* (1994) 8 Cal.4th 548, 560 [34 Cal.Rptr.2d 607, 882 P.2d 298] , internal citations omitted.)

■ "Strict liability has been invoked for three types of defects--manufacturing defects, design defects, and 'warning defects,' i.e., inadequate warnings or failures to warn." (*Anderson v. Owens-Corning Fiberglas Corp.* (1991) 53 Cal.3d 987, 995 [281 Cal.Rptr. 528, 810 P.2d 549] .)

■ "A manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being. ... The purpose of such liability is to insure that the costs of injuries resulting from defective products are

borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves." (*Greenman v. Yuba Power Products, Inc.* (1963) 59 Cal.2d 57, 62-63 [27 Cal.Rptr. 697, 377 P.2d 897] .)

■ "Beyond manufacturers, anyone identifiable as 'an integral part of the overall producing and marketing enterprise' is subject to strict liability." (*Arriaga v. CitiCapital Commercial Corp.* (2008) 167 Cal.App.4th 1527, 1534 [85 Cal.Rptr.3d 143] .)

■ "[T]o hold a defendant strictly liable under a marketing/distribution theory, the plaintiff must demonstrate that: '(1) the defendant received a direct financial benefit from its activities and from the sale of the product; (2) the defendant's role was integral to the business enterprise such that the defendant's conduct was a necessary factor in bringing the product to the initial consumer market; and (3) the defendant had control over, or a substantial ability to influence, the manufacturing or distribution process.' " (*Arriaga, supra*, 167 Cal.App.4th at p. 1535 .)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1428-1437

California Products Liability Actions, Ch. 2, Liability for Defective Products, § 2.10 (Matthew Bender)

40 *California Forms of Pleading and Practice, Ch. 460, Products Liability, § 460.11* (Matthew Bender)

19 *California Points and Authorities, Ch. 190, Products Liability, § 190.20 et seq.* (Matthew Bender)

Publisher's Notes

This instruction replaces BAJI Nos. 9.00 and 9.01.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Torts Products Liability Design Defects Torts Products Liability Duty to Warn Torts Products Liability Manufacturing Defects Torts Products Liability Strict Liability



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California Forms of Jury Instruction

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CHAPTER 12 California Judicial Council Products Liability Instructions

*2-12 California Forms of Jury Instruction CACI 1201***CACI 1201 Strict Liability--Manufacturing Defect--Essential Factual Elements**

[*Name of plaintiff*] **claims that the [*product*] contained a manufacturing defect. To establish this claim, [*name of plaintiff*] must prove all of the following:**

- 1. That [*name of defendant*] [manufactured/distributed/sold] the [*product*];**
- 2. That the [*product*] contained a manufacturing defect when it left [*name of defendant*]'s possession;**
- 3. That [*name of plaintiff*] was harmed while using the [*product*] in a reasonably foreseeable way; and**
- 4. That the [*product*]'s defect was a substantial factor in causing [*name of plaintiff*]'s harm.**

New September 2003; Revised April 2009, December 2009

Directions for Use

Product misuse is a complete defense to strict products liability if the defendant proves that an unforeseeable abuse or alteration of the product after it left the manufacturer's hands was the sole reason that the product caused injury. (*Campbell v. Southern Pacific Co.* (1978) 22 Cal.3d 51, 56 [148 Cal.Rptr. 596, 583 P.2d 121] .) See CACI No. 1245, *Affirmative Defense--Product Misuse or Modification*. Misuse or modification that was a substantial factor in, but not the sole cause of, plaintiff's harm may also be considered in determining the comparative fault of the plaintiff or of third persons. See CACI No. 1207A, *Strict Liability--Comparative Fault of Plaintiff*, and CACI No. 1207B, *Strict Liability--Comparative Fault of Third Person*.

Sources and Authority

■ " 'Regardless of the theory which liability is predicated upon ... it is obvious that to hold a producer, manufacturer, or seller liable for injury caused by a particular product, there must first be proof that the defendant produced, manufactured, sold, or was in some way responsible for the product' " (*Garcia v. Joseph Vince Co.* (1978) 84 Cal.App.3d 868, 874 [148 Cal.Rptr. 843] , internal citation omitted.)

■ "[W]here a plaintiff alleges a product is defective, proof that the product has malfunctioned is essential to establish liability for an injury *caused by the defect*." (*Khan v. Shiley Inc.* (1990) 217 Cal.App.3d 848, 855 [266 Cal.Rptr. 106] , original italics.)

■ In California, there is no requirement that the plaintiff prove that the defect made the product "unreasonably dangerous." (*Cronin v. J.B.E. Olson Corp.* (1972) 8 Cal.3d 121, 134-135 [104 Cal.Rptr. 433, 501 P.2d 1153] .) Also, the plaintiff does not have to prove that he or she was unaware of the defect. (*Luque v. McLean* (1972) 8 Cal.3d 136, 146 [104 Cal.Rptr. 443, 501 P.2d 1163] .)

■ "A manufacturer is liable only when a defect in its product was a legal cause of injury. A tort is a legal cause of injury only when it is a substantial factor in producing the injury." (*Soule v. General Motors Corp.* (1972) 8 Cal.4th 548, 572 [34 Cal.Rptr.2d 607, 882 P.2d 298] , internal citations omitted.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1428-1437

California Products Liability Actions, Ch. 2, *Liability for Defective Products*, § 2.11, Ch. 7, *Proof*, § 7.06 (Matthew Bender)

40 *California Forms of Pleading and Practice*, Ch. 460, *Products Liability*, §§ 460.11, 460.30 (Matthew Bender)

19 California Points and Authorities, Ch. 190, *Products Liability* , § 190.140 (Matthew Bender)

Publisher's Notes

This instruction covers issues presented in BAJI No. 9.00.3.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Torts Negligence Causation Proximate Cause General Overview Torts Products Liability Manufacturing Defects Torts Products Liability Strict Liability



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CHAPTER 12 California Judicial Council Products Liability Instructions

*2-12 California Forms of Jury Instruction CACI 1202***CACI 1202 Strict Liability--"Manufacturing Defect" Explained**

A product contains a manufacturing defect if the product differs from the manufacturer's design or specifications or from other typical units of the same product line.

New September 2003

Sources and Authority

- The Supreme Court has defined a manufacturing defect as follows: "In general, a manufacturing or production defect is readily identifiable because a defective product is one that differs from the manufacturer's intended result or from other ostensibly identical units of the same product line." (*Barker v. Lull Engineering Co.* (1978) 20 Cal.3d 413, 429 [143 Cal.Rptr. 225, 573 P.2d 443] .)
- "[A] defective product is viewed as one which fails to match the quality of most like products, and the manufacturer is then liable for injuries resulting from deviations from the norm" (*Jiminez v. Sears, Roebuck & Co.* (1971) 4 Cal.3d 379, 383 [93 Cal.Rptr. 769, 482 P.2d 681] .)

Publisher's Notes

This instruction covers issues presented in BAJI No. 9.00.3.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Torts Products Liability Manufacturing Defects



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CHAPTER 12 California Judicial Council Products Liability Instructions

2-12 California Forms of Jury Instruction CACI 1203

CACI 1203 Strict Liability--Design Defect--Consumer Expectation Test--Essential Factual Elements

[*Name of plaintiff*] **claims the [*product*]'s design was defective because the [*product*] did not perform as safely as an ordinary consumer would have expected it to perform. To establish this claim, [*name of plaintiff*] must prove all of the following:**

1. That [*name of defendant*] **[manufactured/distributed/sold] the [*product*];**
2. That the [*product*] **did not perform as safely as an ordinary consumer would have expected at the time of use;**
3. That [*name of plaintiff*] **was harmed while using the [*product*] in a reasonably foreseeable way; and**
4. That the [*product*]'s **failure to perform safely was a substantial factor in causing [*name of plaintiff*]'s harm.**

New September 2003; Revised December 2005, April 2009, December 2009

Directions for Use

If both tests (the consumer expectation test and the risk-benefit test) for design defect are asserted by the plaintiff, the burden-of-proof instructions must make it clear that the two tests are alternatives. (*Bracisco v. Beech Aircraft Corp.* (1984) 159 Cal.App.3d 1101, 1106-1107 [206 Cal.Rptr. 431] .)

Product misuse is a complete defense to strict products liability if the defendant proves that an unforeseeable abuse or alteration of the product after it left the manufacturer's hands was the sole reason

that the product caused injury. (*Campbell v. Southern Pacific Co.* (1978) 22 Cal.3d 51, 56 [148 Cal.Rptr. 596, 583 P.2d 121] .) See CACI No. 1245, *Affirmative Defense--Product Misuse or Modification*. Misuse or modification that was a substantial factor in, but not the sole cause of, plaintiff's harm may also be considered in determining the comparative fault of the plaintiff or of third persons. See CACI No. 1207A, *Strict Liability--Comparative Fault of Plaintiff*, and CACI No. 1207B, *Strict Liability--Comparative Fault of Third Person*.

Sources and Authority

- "A manufacturer, distributor, or retailer is liable in tort if a defect in the manufacture or design of its product causes injury while the product is being used in a reasonably foreseeable way." (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 560 [34 Cal.Rptr.2d 607, 882 P.2d 298] .)

- In *Barker v. Lull Engineering* (1978) 20 Cal.3d 413 [143 Cal.Rptr. 225, 573 P.2d 443] , the court established two alternative tests for determining whether a product is defectively designed. Under the first test, a product may be found defective in design if the plaintiff demonstrates that the product "failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner." (*Id.* at p. 429 .) Under the second test, a product is defective if the risk of danger inherent in the design outweighs the benefits of such design. (*Id.* at p. 430 .)

- "[The] dual standard for design defect assures an injured plaintiff protection from products that either fall below ordinary consumer expectations as to safety or that, on balance, are not as safely designed as they should be." (*Barker, supra*, 20 Cal.3d at p. 418 .)

- The consumer expectation test "acknowledges the relationship between strict tort liability for a defective product and the common law doctrine of warranty, which holds that a product's presence on the market includes an implied representation 'that it [will] safely do the jobs for which it was built.' " (*Soule, supra*, 8 Cal.4th at p. 562 , internal citations omitted.)

- "[T]he jury may not be left free to find a violation of ordinary consumer expectations whenever it chooses. Unless the facts actually permit an inference that the product's performance did not meet the minimum safety expectations of its ordinary users, the jury must engage in the balancing of risks and benefits required by the second prong of *Barker*. Accordingly, as *Barker* indicated, instructions are misleading and incorrect if they allow a jury to avoid this risk-benefit analysis in a case where it is required." (*Soule, supra*, 8 Cal.4th at p. 568 .)

- "[T]he consumer expectation test is reserved for cases in which the *everyday experience* of the product's users permits a conclusion that the product's design violated *minimum* safety assumptions, and is thus defective *regardless of expert opinion about the merits of the design*." (*Soule, supra*, 8 Cal.4th at p. 567 , original italics.)

- "In determining whether a product's safety satisfies [the consumer expectation test], the jury considers the expectations of a hypothetical reasonable consumer, rather than those of the particular plaintiff in the case." (*Campbell v. General Motors Corp.* (1982) 32 Cal.3d 112, 126, fn. 6 [184 Cal.Rptr. 891, 649 P.2d 224] .)

- State-of-the-art evidence is not relevant when the plaintiff relies on a consumer expectation theory of design defect. (*Morton v. Owens-Corning Fiberglas Corp.* (1995) 33 Cal.App.4th 1529, 1536 [40 Cal.Rptr.2d 22] .)

■ "Where liability depends on the proof of a design defect, no practical difference exists between negligence and strict liability; the claims merge." (*Lambert v. General Motors* (1998) 67 Cal.App.4th 1179, 1185 [76 Cal.Rptr.2d 657].)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1449-1467

California Products Liability Actions, Ch. 2, *Liability for Defective Products*, § 2.11, Ch. 7, *Proof*, § 7.02 (Matthew Bender)

40 *California Forms of Pleading and Practice*, Ch. 460, *Products Liability*, § 460.11 (Matthew Bender)

19 California Points and Authorities, Ch. 190, *Products Liability*, § 190.116 (Matthew Bender)

Publisher's Notes

This instruction covers issues presented in BAJI Nos. 9.00.5, 9.00.6.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Torts Products Liability Design Defects Torts Products Liability Strict Liability



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CHAPTER 12 California Judicial Council Products Liability Instructions

2-12 California Forms of Jury Instruction CACI 1204

CACI 1204 Strict Liability--Design Defect--Risk-Benefit Test--Essential Factual Elements--Shifting Burden of Proof

[*Name of plaintiff*] **claims that the [*product*]'s design caused harm to [*name of plaintiff*]. To establish this claim, [*name of plaintiff*] must prove all of the following:**

- 1. That [*name of defendant*] [manufactured/distributed/sold] the [*product*];**
- 2. That [*name of plaintiff*] was harmed while using the [*product*] in a reasonably foreseeable way;
and**
- 3. That the [*product*]'s design was a substantial factor in causing harm to [*name of plaintiff*].**

If [*name of plaintiff*] has proved these three facts, then your decision on this claim must be for [*name of plaintiff*] unless [*name of defendant*] proves that the benefits of the design outweigh the risks of the design. In deciding whether the benefits outweigh the risks, you should consider the following:

- (a) The gravity of the potential harm resulting from the use of the [*product*];**
- (b) The likelihood that this harm would occur;**
- (c) The feasibility of an alternative safer design at the time of manufacture;**
- (d) The cost of an alternative design; [and]**
- (e) The disadvantages of an alternative design; [and]**

(f) [*Other relevant factor(s)*].

New September 2003; Revised February 2007, April 2009, December 2009

Directions for Use

If the plaintiff asserts both tests for design defect (the consumer expectation test and the risk-benefit test), the instructions must make it clear that the two tests are alternatives. (*Bracisco v. Beech Aircraft Corp.* (1984) 159 Cal.App.3d 1101, 1106-1107 [206 Cal.Rptr. 431] .) Risk-benefit weighing is not a formal part of, nor may it serve as a defense to, the consumer expectations test. (*Bresnahan v. Chrysler Corp.* (1995) 32 Cal.App.4th 1559, 1569 [38 Cal.Rptr.2d 446] .)

Product misuse is a complete defense to strict products liability if the defendant proves that an unforeseeable abuse or alteration of the product after it left the manufacturer's hands was the sole reason that the product caused injury. (*Campbell v. Southern Pacific Co.* (1978) 22 Cal.3d 51, 56 [148 Cal.Rptr. 596, 583 P.2d 121] .) See CACI No. 1245, *Affirmative Defense--Product Misuse or Modification*. Misuse or modification that was a substantial factor in, but not the sole cause of, plaintiff's harm may also be considered in determining the comparative fault of the plaintiff or of third persons. See CACI No. 1207A, *Strict Liability--Comparative Fault of Plaintiff*, and CACI No. 1207B, *Strict Liability--Comparative Fault of Third Person*.

Sources and Authority

- Under the risk-benefit test, the plaintiff does not have to prove the presence of a defect. Rather, once the plaintiff makes a prima facie showing that the product's design caused the injury, the burden shifts to the defendant to prove the design was not defective. A jury instruction stating that the plaintiff had the burden of proving that a design was defective in a case based on the risk-benefit test was held to be error in *Moreno v. Fey Manufacturing Corp.* (1983) 149 Cal.App.3d 23, 27 [196 Cal.Rptr. 487] , and in *Lunghi v. Clark Equipment Co., Inc.* (1984) 153 Cal.App.3d 485, 498 [200 Cal.Rptr. 387] .

- " '[I]n evaluating the adequacy of a product's design pursuant to [the risk-benefit] standard, a jury may consider, among other relevant factors, the gravity of the danger posed by the challenged design, the likelihood that such danger would occur, the mechanical feasibility of a safer alternative design, the financial cost of an improved design, and the adverse consequences to the product and to the consumer that would result from an alternative design.' '[O]nce the plaintiff makes a prima facie showing that the injury was proximately caused by the product's design, the burden should appropriately shift to the defendant to prove, in light of the relevant factors, that the product is not defective.' " (*Gonzalez v. Autoliv ASP, Inc.* (2007) 154 Cal.App.4th 780, 786-787 [64 Cal.Rptr.3d 908] , internal citations omitted.)

- "Taken together, section 2, subdivision (b), and section 5 of the Restatement indicate that a component part manufacturer may be held liable for a defect in the component. When viewed in its entirety, the Restatement does not support [defendant]'s argument that '[o]nly if the component part analysis establishes sufficient control over the design of the alleged defect should the component manufacturer be held to the standard of the risk-benefit test.' Instead, the test considering foreseeable risks of harm and alternative designs is applied to the component part manufacturer when the alleged defect is in the component." (*Gonzalez, supra*, 154 Cal.App.4th at pp. 789-790 .)

■ The plaintiff does not have to prove the existence of a feasible alternative design. (*Bernal v. Richard Wolf Medical Instruments Corp.* (1990) 221 Cal.App.3d 1326, 1335 [272 Cal.Rptr. 41] , disapproved and overruled on another point in *Soule v. GM Corp.* (1994) 8 Cal.4th 548, 580 [34 Cal.Rptr.2d 607, 882 P.2d 298] .)

■ "Where liability depends on the proof of a design defect, no practical difference exists between negligence and strict liability; the claims merge." (*Lambert v. General Motors* (1998) 67 Cal.App.4th 1179, 1185 [76 Cal.Rptr.2d 657].)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1449-1467

California Products Liability Actions, Ch. 7, Proof, § 7.02 (Matthew Bender)

40 *California Forms of Pleading and Practice*, Ch. 460, Products Liability, § 460.11 (Matthew Bender)

19 *California Points and Authorities*, Ch. 190, Products Liability, §§ 190.110, 190.118-190.122 (Matthew Bender)

Publisher's Notes

This instruction covers issues presented in BAJI No. 9.00.5.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Evidence Procedural Considerations Burdens of Proof Burden Shifting Torts Products Liability Design Defects Torts Products Liability Strict Liability



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CHAPTER 12 California Judicial Council Products Liability Instructions

2-12 California Forms of Jury Instruction CACI 1205

CACI 1205 Strict Liability--Failure to Warn--Essential Factual Elements

[*Name of plaintiff*] **claims that the [*product*] lacked sufficient [instructions] [or] [warning of potential [risks/side effects/allergic reactions]]. To establish this claim, [*name of plaintiff*] must prove all of the following:**

1. That [*name of defendant*] **[manufactured/distributed/sold] the [*product*];**
2. That the [*product*] **had potential [risks/side effects/allergic reactions] that were [known] [or] [knowable by the use of scientific knowledge available] at the time of [manufacture/distribution/sale];**
3. That the potential [risks/side effects/allergic reactions] **presented a substantial danger to users of the [*product*];**
4. That ordinary consumers would not have recognized the potential [risks/side effects/allergic reactions];
5. That [*name of defendant*] **failed to adequately warn [or instruct] of the potential [risks/side effects/allergic reactions];**
6. That [*name of plaintiff*] **was harmed while using the [*product*] in a reasonably foreseeable way; and**
7. That the lack of sufficient [instructions] [or] [warnings] **was a substantial factor in causing [*name of plaintiff*]'s harm.**

[The warning must be given to the prescribing physician and must include the potential risks, side effects, or

allergic reactions that may follow the foreseeable use of the product. [Name of defendant] had a continuing duty to warn physicians as long as the product was in use.]

New September 2003; Revised April 2009, December 2009

Directions for Use

A fuller definition of "scientific knowledge" may be appropriate in certain cases. Such a definition would advise that the defendant did not adequately warn of a potential risk, side effect, or allergic reaction that was "knowable in light of the generally recognized and prevailing best scientific and medical knowledge available." (*Carlin v. Superior Court* (1996) 13 Cal.4th 1104, 1112 [56 Cal.Rptr.2d 162, 920 P.2d 1347] .)

The last bracketed paragraph should be read only in prescription product cases: "In the case of prescription drugs and implants, the physician stands in the shoes of the 'ordinary user' because it is through the physician that a patient learns of the properties and proper use of the drug or implant. Thus, the duty to warn in these cases runs to the physician, not the patient." (*Valentine v. Baxter Healthcare Corp.* (1999) 68 Cal.App.4th 1467, 1483 [81 Cal.Rptr.2d 252] .)

Product misuse is a complete defense to strict products liability if the defendant proves that an unforeseeable abuse or alteration of the product after it left the manufacturer's hands was the sole reason that the product caused injury. (*Campbell v. Southern Pacific Co.* (1978) 22 Cal.3d 51, 56 [148 Cal.Rptr. 596, 583 P.2d 121] .) See CACI No. 1245, *Affirmative Defense--Product Misuse or Modification*. Misuse or modification that was a substantial factor in, but not the sole cause of, plaintiff's harm may also be considered in determining the comparative fault of the plaintiff or of third persons. See CACI No. 1207A, *Strict Liability--Comparative Fault of Plaintiff*, and CACI No. 1207B, *Strict Liability--Comparative Fault of Third Person*.

Sources and Authority

- "Our law recognizes that even 'a product flawlessly designed and produced may nevertheless possess such risks to the user without a suitable warning that it becomes 'defective' simply by the absence of a warning.' ... Thus, manufacturers have a duty to warn consumers about the hazards inherent in their products. The purpose of requiring adequate warnings is to inform consumers about a product's hazards and faults of which they are unaware, so that the consumer may then either refrain from using the product altogether or avoid the danger by careful use." (*Taylor v. Elliott Turbomachinery Co., Inc.* (2009) 171 Cal.App.4th 564, 577 [90 Cal.Rptr.3d 414] , internal citations and footnote omitted.)

- "Negligence and strict products liability are separate and distinct bases for liability that do not automatically collapse into each other because the plaintiff might allege both when a product warning contributes to her injury." (*Conte v. Wyeth, Inc.* (2008) 168 Cal.App.4th 89, 101 [85 Cal.Rptr.3d 299] .)

- "[F]ailure to warn in strict liability differs markedly from failure to warn in the negligence context. Negligence law in a failure-to-warn case requires a plaintiff to prove that a manufacturer or distributor did not warn of a particular risk for reasons which fell below the acceptable standard of care, i.e., what a reasonably prudent manufacturer would have known and warned about. Strict liability is not concerned with the standard of due care or the reasonableness of a manufacturer's conduct. The rules of strict liability require a plaintiff to prove only that the defendant did not adequately warn of a particular risk

that was known or knowable in light of the generally recognized and prevailing best scientific and medical knowledge available at the time of manufacture and distribution. ... [P] [T]he manufacturer is liable if it failed to give warning of dangers that were known to the scientific community at the time it manufactured or distributed the product." (*Anderson v. Owens-Corning Fiberglas Corp.* (1991) 53 Cal.3d 987, 1002-1003 [281 Cal.Rptr. 528, 810 P.2d 549] .)

■ "It is true that the two types of failure to warn claims are not necessarily exclusive: 'No valid reason appears to require a plaintiff to elect whether to proceed on the theory of strict liability in tort or on the theory of negligence. ... [P] Nor does it appear that instructions on the two theories will be confusing to the jury. There is nothing inconsistent in instructions on the two theories and to a large extent the two theories parallel and supplement each other.' Despite the often significant overlap between the theories of negligence and strict liability based on a product defect, a plaintiff is entitled to instructions on both theories if both are supported by the evidence." (*Oxford v. Foster Wheeler LLC* (2009) 177 Cal.App.4th 700, 717 [99 Cal.Rptr.3d 418] .)

■ "The actual knowledge of the individual manufacturer, even if reasonably prudent, is not the issue. We view the standard to require that the manufacturer is held to the knowledge and skill of an expert in the field; it is obliged to keep abreast of any scientific discoveries and is presumed to know the results of all such advances." (*Carlin, supra*, 13 Cal.4th at p. 1113, fn. 3 .)

■ "[A] defendant in a strict products liability action based upon an alleged failure to warn of a risk of harm may present evidence of the state of the art, i.e., evidence that the particular risk was neither known nor knowable by the application of scientific knowledge available at the time of manufacture and/or distribution." (*Anderson, supra*, 53 Cal.3d at p. 1004 .)

■ "[T]here can be no liability for failure to warn where the instructions or warnings sufficiently alert the user to the possibility of danger." (*Aguayo v. Crompton & Knowles Corp.* (1986) 183 Cal.App.3d 1032, 1042 [228 Cal.Rptr. 768] , internal citation omitted.)

■ "A duty to warn or disclose danger arises when an article is or should be known to be dangerous for its intended use, either inherently or because of defects." (*DeLeon v. Commercial Manufacturing and Supply Co.* (1983) 148 Cal.App.3d 336, 343 [195 Cal.Rptr. 867] , internal citation omitted.)

■ "... California is well settled into the majority view that knowledge, actual or constructive, is a requisite for strict liability for failure to warn" (*Anderson, supra*, 53 Cal.3d at p. 1000 .)

■ "[T]he duty to warn is not conditioned upon [actual or constructive] knowledge [of a danger] where the defectiveness of a product depends on the adequacy of instructions furnished by the supplier which are essential to the assembly and use of its product." (*Midgley v. S. S. Kresge Co.* (1976) 55 Cal.App.3d 67, 74 [127 Cal.Rptr. 217] .)

■ Under *Cronin*, plaintiffs in cases involving manufacturing and design defects do not have to prove that a defect made a product unreasonably dangerous; however, that case "did not preclude weighing the degree of dangerousness in the failure to warn cases." (*Cavers v. Cushman Motor Sales, Inc.* (1979) 95 Cal.App.3d 338, 343 [157 Cal.Rptr. 142] .)

■ "[T]he warning requirement is not limited to unreasonably or unavoidably dangerous products. Rather, directions or warnings are in order where reasonably required to prevent the use of a product from becoming unreasonably dangerous. It is the lack of such a warning which renders a product unreasonably dangerous and therefore defective." (*Gonzales v. Carmenita Ford Truck Sales, Inc.* (1987)

192 *Cal.App.3d* 1143, 1151 [238 *Cal.Rptr.* 18] , original italics.)

■ "In most cases, ... the adequacy of a warning is a question of fact for the jury." (*Jackson v. Deft, Inc.* (1990) 223 *Cal.App.3d* 1305, 1320 [273 *Cal.Rptr.* 214] .)

■ "[A] pharmaceutical manufacturer may not be required to provide warning of a risk known to the medical community." (*Carlin, supra*, 13 *Cal.4th* at p. 1116 .)

■ "[A] manufacturer's liability to the ultimate consumer may be extinguished by 'intervening cause' where the manufacturer either provides adequate warnings to a middleman or the middleman alters the product before passing it to the final consumer." (*Garza v. Asbestos Corp., Ltd.* (2008) 161 *Cal.App.4th* 651, 661 [74 *Cal.Rptr.3d* 359] .)

■ " 'A manufacturer's duty to warn is a continuous duty which lasts as long as the product is in use.' ... [T]he manufacturer must continue to provide physicians with warnings, at least so long as it is manufacturing and distributing the product." (*Valentine, supra*, 68 *Cal.App.4th* at p. 1482 .)

■ "[T]he law now requires a manufacturer to foresee some degree of misuse and abuse of his product, either by the user or by third parties, and to take reasonable precautions to minimize the harm that may result from misuse and abuse." (*Self v. General Motors Corp.* (1974) 42 *Cal.App.3d* 1, 7 [116 *Cal.Rptr.* 575] , disapproved and overruled on another issue in *Soule v. GM Corp.* (1994) 8 *Cal.4th* 548, 580 [34 *Cal.Rptr.2d* 607, 882 *P.2d* 298] .)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1467-1479

California Products Liability Actions, Ch. 2, *Liability for Defective Products*, § 2.11, Ch. 7, *Proof*, § 7.05 (Matthew Bender)

40 *California Forms of Pleading and Practice*, Ch. 460, *Products Liability*, §§ 460.11, 460.164 (Matthew Bender)

19 *California Points and Authorities*, Ch. 190, *Products Liability*, § 190.194 (Matthew Bender)

Publisher's Notes

This instruction and CACI 1206 replace BAJI No. 9.00.7. This instruction covers issues presented in BAJI No. 9.70.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Torts Products Liability Duty to Warn Torts Products Liability Strict Liability



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CHAPTER 12 California Judicial Council Products Liability Instructions

2-12 California Forms of Jury Instruction CACI 1206

CACI 1206 Strict Liability--Failure to Warn--Products Containing Allergens (Not Prescription Drugs)--Essential Factual Elements

[*Name of plaintiff*] claims that the [*product*] was defective because it lacked sufficient warnings of potential allergic reactions. To establish this claim, [*name of plaintiff*] must prove all of the following:

- 1. That [*name of defendant*] [manufactured/distributed/sold] the [*product*];**
- 2. That a substantial number of people are allergic to an ingredient in the [*product*];**
- 3. That the danger of the ingredient is not generally known, or, if known, the ingredient is one that a consumer would not reasonably expect to find in the [*product*];**
- 4. That [*name of defendant*] knew or, by the use of scientific knowledge available at the time, should have known of the ingredient's danger and presence;**
- 5. That [*name of defendant*] failed to provide sufficient warnings concerning the ingredient's danger or presence;**
- 6. That [*name of plaintiff*] was harmed; and**
- 7. That the lack of sufficient warnings was a substantial factor in causing [*name of plaintiff*]'s harm.**

New September 2003

A fuller definition of "scientific knowledge" may be appropriate in certain cases. Such a definition would advise that the defendant did not adequately warn of a potential risk, side effect, or allergic reaction that was "knowable in light of the generally recognized and prevailing best scientific and medical knowledge available," (*Carlin v. Superior Court* (1996) 13 Cal.4th 1104, 1112 [56 Cal.Rptr.2d 162, 920 P.2d 1347]), and knowable " 'by the application of reasonable, developed human skill and foresight.' " (*Livingston v. Marie Callenders Inc.* (1999) 72 Cal.App.4th 830, 839 [85 Cal.Rptr.2d 528] .)

- This instruction is based on the holding in *Livingston v. Marie Callenders, Inc.* (1999) 72 Cal.App.4th 830, 838-839 [85 Cal.Rptr.2d 528] , adopting *Restatement Second of Torts, section 402A, comment j*, and *Restatement Third of Torts: Products Liability, section 2, comment k*, in cases involving allergic reactions.

- "California has adopted the *Restatement Second of Torts, section 402A, comment j*, application of strict tort liability failure to warn in the case of allergies. Several Court of Appeal decisions in the context of allergic reactions to nonfood products are consistent with or have expressly adopted comment j." (*Livingston, supra*, 72 Cal.App.4th at p. 838 .)

- *Restatement Second of Torts, section 402A, comment j*, states: "In order to prevent the product from being unreasonably dangerous, the seller may be required to give directions or warning, on the container, as to its use. The seller may reasonably assume that those with common allergies, as for example to eggs or strawberries, will be aware of them, and he is not required to warn against them. Where, however, the product contains an ingredient to which a substantial number of the population are allergic, and the ingredient is one whose danger is not generally known, or if known is one which the consumer would reasonably not expect to find in the product, the seller is required to give warning against it, if he has knowledge, or by the application of reasonable, developed human skill and foresight should have knowledge, of the presence of the ingredient and the danger. Likewise in the case of poisonous drugs, or those unduly dangerous"

- "[A] defendant may be liable to a plaintiff who suffered an allergic reaction to a product on a strict liability failure to warn theory when: the defendant's product contained 'an ingredient to which a substantial number of the population are allergic'; the ingredient 'is one whose danger is not generally known, or if known is one which the consumer would reasonably not expect to find in the product'; and where the defendant knew or 'by the application of reasonable, developed human skill and foresight should have know[n], of the presence of the ingredient and the danger.' " (*Livingston, supra*, 72 Cal.App.4th at p. 839 .)

- "The recently adopted *Restatement Third of Torts: Products Liability, section 2, comment k*, ... similarly states: 'Cases of adverse allergic or idiosyncratic reactions involve a special subset of products that may be defective because of inadequate warnings [P] The general rule in cases involving allergic reactions is that a warning is required when the harm-causing ingredient is one to which a substantial number of persons are allergic.' Further, the *Restatement Third of Torts: Products Liability, section 2, comment k* notes: 'The ingredient that causes the allergic reaction must be one whose danger or whose presence in the product is not generally known to consumers. ... When the presence of the allergenic ingredient would not be anticipated by a reasonable user or consumer, warnings concerning its presence are required.' " (*Livingston, supra*, 72 Cal.App.4th at pp. 838-839.)

- "[T]hose issues [noted in the Restatement] are for the trier of fact to determine." (*Livingston, supra*, 72 Cal.App.4th at p. 840 .)

■ *Livingston* was a food product case; however there are several non-food product cases that are consistent with or have also expressly adopted comment j. (See *McKinney v. Revlon, Inc.* (1992) 2 Cal.App.4th 602, 607, 608 fn. 3 [3 Cal.Rptr.2d 72] [home hair-frosting product]; *Oakes v. E.I. DuPont de Nemours & Co., Inc.* (1969) 272 Cal.App.2d 645, 649 [77 Cal.Rptr. 709] [weed killer]; *Harris v. Belton* (1968) 258 Cal.App.2d 595, 608 [65 Cal.Rptr. 808] [skin tone cream].)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1467-1479

40 *California Forms of Pleading and Practice*, Ch. 460, *Products Liability*, §§ 460.11, 460.165 (Matthew Bender)

Publisher's Notes

This instruction and *CACI 1205* replace BAJI No. 9.00.7. This instruction covers issues presented in BAJI No. 9.70.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Torts Products Liability Duty to Warn Torts Products Liability Strict Liability



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CHAPTER 12 California Judicial Council Products Liability Instructions

2-12 California Forms of Jury Instruction CACI 1207A

CACI 1207A Strict Liability--Comparative Fault of Plaintiff

[*Name of defendant*] **claims that** [*name of plaintiff*]'s own negligence contributed to [his/her] harm. To succeed on this claim, [*name of defendant*] **must prove both of the following:**

1. [*insert one or more of the following:*]

[That [*name of plaintiff*] negligently [used/misused/modified] the [*product*];] [or]

[That [*name of plaintiff*] was [otherwise] negligent;]

and

2. That this negligence was a substantial factor in causing [*name of plaintiff*]'s harm.

If [*name of defendant*] proves the above, [*name of plaintiff*]'s damages are reduced by your determination of the percentage of [*name of plaintiff*]'s responsibility. I will calculate the actual reduction.

Derived from former CACI No. 1207 April 2009; Revised December 2009

Directions for Use

Give this instruction if the defendant alleges that the plaintiff's own negligence contributed to his or her harm. See also CACI No. 405, *Comparative Fault of Plaintiff*. For an instruction on the comparative fault of a third person, see CACI No. 1207B, *Strict Liability--Comparative Fault of Third Person*.

Subsequent misuse or modification may be considered in determining comparative fault if it was a

substantial factor in causing the plaintiff's injury. (See *Torres v. Xomox Corp.* (1996) 49 Cal.App.4th 1, 17 [56 Cal.Rptr.2d 455] .) Unforeseeable misuse or modification can be a complete defense if it is the sole cause of the plaintiff's harm. (See *Campbell v. Southern Pacific Co.* (1978) 22 Cal.3d 51, 56 [148 Cal.Rptr. 596, 583 P.2d 121] .) See also CACI No. 1245, *Affirmative Defense--Product Misuse or Modification*.

Sources and Authority

- In *Daly v. General Motors Corp.* (1978) 20 Cal.3d 725, 737 [144 Cal.Rptr. 380, 575 P.2d 1162] , the California Supreme Court held that comparative fault applies to strict products liability actions. The court explained: "[W]e do not permit plaintiff's own conduct relative to the product to escape unexamined, and as to that share of plaintiff's damages which flows from his own fault we discern no reason of policy why it should, following *Li*, be borne by others."

- "[A] petitioner's recovery may accordingly be reduced, but not barred, where his lack of reasonable care is shown to have contributed to his injury." (*Bradfield v. Trans World Airlines, Inc.* (1979) 88 Cal.App.3d 681, 686 [152 Cal.Rptr. 172] .)

- "The record does not support [defendant]'s assertion that modification of the bracket was the sole cause of the accident. The record does indicate that if the bracket had not been modified there would have been no need to remove it to reach the flange bolts, and thus the modification was one apparent cause of [plaintiff]'s death. However, a number of other causes, or potential causes, were established, including: [plaintiff]'s failure to wear protective clothing; [third party]'s failure to furnish the correct replacement bracket for the valve; [third party]'s failure to furnish [employer] with all of the literature it received from [defendant]; and negligence on the part of [employer] independent of its modification of the valve, including violations of various federal Occupational Safety and Health Administration regulations governing equipment and training in connection with the accident." (*Torres, supra*, 49 Cal.App.4th at p. 17 .)

Secondary Sources

Witkin, Summary of California Law (10th ed. 2005) Torts, § 1542

California Products Liability Actions, Ch. 8, *Defenses*, §§ 8.03, 8.04 (Matthew Bender)

40 *California Forms of Pleading and Practice*, Ch. 460, *Products Liability*, §§ 460.53, 460.182 (Matthew Bender)

19 *California Points and Authorities*, Ch. 190, *Products Liability*, § 190.253 (Matthew Bender)

Publisher's Notes

This instruction covers issues presented in BAJI Nos. 9.03, 9.04.



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CHAPTER 12 California Judicial Council Products Liability Instructions

2-12 California Forms of Jury Instruction CACI 1207B

CACI 1207B Strict Liability--Comparative Fault of Third Person

[*Name of defendant*] **claims that the [negligence/fault] of [*name(s) or description(s) of nonparty tortfeasor(s)*] [also] contributed to [*name of plaintiff*]'s harm. To succeed on this claim, [*name of defendant*] must prove both of the following:**

1. [*Insert one or both of the following:*]

[That [*name(s) or description(s) of nonparty tortfeasor(s)*] **negligently modified the [*product*];**] [or]

[That [*name(s) or description(s) of nonparty tortfeasor(s)*] **was [otherwise] [negligent/at fault];**]

and

2. That this [negligence/fault] **was a substantial factor in causing [*name of plaintiff*]'s harm.**

If you find that the [negligence/fault] of more than one person, including [*name of defendant*], [*name of plaintiff*], and [*name(s) or description(s) of nonparty tortfeasor(s)*], was a substantial factor in causing [*name of plaintiff*]'s harm, you must then decide how much responsibility each has by assigning percentages of responsibility to each person listed on the verdict form. The percentages must total 100 percent.

You will make a separate finding of [*name of plaintiff*]'s total damages, if any. In determining an amount of damages, you should not consider any person's assigned percentage of responsibility.

["Person" can mean an individual or a business entity.]

Derived from former CACI No. 1207 April 2009; Revised December 2009

Directions for Use

Give this instruction if the defendant has raised the issue of the comparative fault of a third person who is not also a defendant at trial, including defendants who settled before trial and nonjoined alleged tortfeasors. (See *Dafonte v. Up-Right, Inc.* (1992) 2 Cal.4th 593, 603 [7 Cal.Rptr.2d 238, 828 P.2d 140] ; see also CACI No. 406, *Apportionment of Responsibility*.) For an instruction on the comparative fault of the plaintiff, see CACI No. 1207A, *Strict Liability--Comparative Fault of Plaintiff*.

In the first sentence, include "also" if the defendant concedes some degree of liability or alleges the comparative fault of the plaintiff, and select "fault" unless the only basis for liability at issue is negligence. Include the last paragraph if any of the defendants or others alleged to have contributed to the plaintiff's harm are not individuals.

Subsequent misuse or modification may be considered in determining comparative fault if it was a substantial factor in causing the plaintiff's injury. (See *Torres v. Xomox Corp.* (1996) 49 Cal.App.4th 1, 17 [56 Cal.Rptr.2d 455] .) Unforeseeable misuse or modification can be a complete defense if it is the sole cause of the plaintiff's harm. (See *Campbell v. Southern Pacific Co.* (1978) 22 Cal.3d 51, 56 [148 Cal.Rptr. 596, 583 P.2d 121] .) See also CACI No. 1245, *Affirmative Defense--Product Misuse or Modification*.

Sources and Authority

■ In *Daly v. General Motors Corp.* (1978) 20 Cal.3d 725, 737 [144 Cal.Rptr. 380, 575 P.2d 1162] , the California Supreme Court held that comparative fault applies to strict products liability actions. The court explained: "[W]e do not permit plaintiff's own conduct relative to the product to escape unexamined, and as to that share of plaintiff's damages which flows from his own fault we discern no reason of policy why it should, following *Li*, be borne by others."

■ "[A] petitioner's recovery may accordingly be reduced, but not barred, where his lack of reasonable care is shown to have contributed to his injury." (*Bradfield v. Trans World Airlines, Inc.* (1979) 88 Cal.App.3d 681, 686 [152 Cal.Rptr. 172] .)

■ "The record does not support [defendant]'s assertion that modification of the bracket was the sole cause of the accident. The record does indicate that if the bracket had not been modified there would have been no need to remove it to reach the flange bolts, and thus the modification was one apparent cause of [plaintiff]'s death. However, a number of other causes, or potential causes, were established, including: [plaintiff]'s failure to wear protective clothing; [third party]'s failure to furnish the correct replacement bracket for the valve; [third party]'s failure to furnish [employer] with all of the literature it received from [defendant]; and negligence on the part of [employer] independent of its modification of the valve, including violations of various federal Occupational Safety and Health Administration regulations governing equipment and training in connection with the accident." (*Torres, supra*, 49 Cal.App.4th at p. 17 .)

Secondary Sources

Witkin, Summary of California Law (10th ed. 2005) Torts, § 1542

California Products Liability Actions, Ch. 8, Defenses, §§ 8.03, 8.04 (Matthew Bender)

40 *California Forms of Pleading and Practice*, Ch. 460, *Products Liability*, §§ 460.53, 460.182 (Matthew Bender)

19 *California Points and Authorities*, Ch. 190, *Products Liability*, § 190.253 (Matthew Bender)

Publisher's Notes

This instruction covers issues presented in BAJI Nos. 9.03, 9.04.



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CHAPTER 12 California Judicial Council Products Liability Instructions

2-12 California Forms of Jury Instruction CACI 1208-CACI 1219

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CACI 1208Reserved for Future Use



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CHAPTER 12 California Judicial Council Products Liability Instructions

2-12 California Forms of Jury Instruction CACI 1220

CACI 1220 Negligence--Essential Factual Elements

[*Name of plaintiff*] [also] claims that [he/she] was harmed by [*name of defendant*]'s negligence and that [he/she/it] should be held responsible for that harm. To establish this claim, [*name of plaintiff*] must prove all of the following:

- 1. That [*name of defendant*] [designed/manufactured/supplied/installed/inspected/repaired/rented] the [*product*];**
- 2. That [*name of defendant*] was negligent in [designing/manufacturing/supplying/installing/inspecting/repairing/renting] the [*product*];**
- 3. That [*name of plaintiff*] was harmed; and**
- 4. That [*name of defendant*]'s negligence was a substantial factor in causing [*name of plaintiff*]'s harm.**

New September 2003

■ "No valid reason appears to require a plaintiff to elect whether to proceed on the theory of strict liability in tort or on the theory of negligence. ... Nor does it appear that instructions on the two theories will be confusing to the jury. There is nothing inconsistent in instructions on the two theories and to a large extent the two theories parallel and supplement each other." (*Jiminez v. Sears, Roebuck & Co.* (1971) 4 Cal.3d 379, 387 [93 Cal.Rptr. 769, 482 P.2d 681] .)

■ "The courts of this state are committed to the doctrine that the duty of care exists in the absence of privity of contract not only where the article manufactured is inherently dangerous but also where it is reasonably certain, if negligently manufactured or constructed, to place life and limb in peril." (*Sheward v. Virtue* (1942) 20 Cal.2d 410, 412 [126 P.2d 345] , internal citations omitted.)

■ Manufacturers or other suppliers of goods and buyers or users have a "special relationship" giving rise to an affirmative duty to assist or protect. (6 Witkin, Summary of Cal. Law (10th ed. 2005) §§ 1038-1042, 1048, 1049.)

■ *Restatement Second of Torts, section 388, comment (c)*, provides: "These rules ... apply to sellers, lessors, donors, or lenders, irrespective of whether the chattel is made by them or by a third person. They apply to all kinds of bailors. ... They also apply to one who undertakes the repair of a chattel and who delivers it back with knowledge that it is defective because of the work which he is employed to do upon it."

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, § 1431

California Products Liability Actions, Ch. 2, *Liability for Defective Products*, § 2.20 (Matthew Bender)

40 *California Forms of Pleading and Practice*, Ch. 460, *Products Liability*, § 460.32 (Matthew Bender)

19 California Points and Authorities, Ch. 190, *Products Liability* (Matthew Bender)

Publisher's Notes

This instruction replaces BAJI No. 9.19.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Torts Negligence General Overview Torts Negligence Causation Proximate Cause General Overview Torts Products Liability Negligence



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CHAPTER 12 California Judicial Council Products Liability Instructions

2-12 California Forms of Jury Instruction CACI 1221

CACI 1221 Negligence--Basic Standard of Care

A [designer/manufacturer/supplier/installer/repairer] is negligent if [he/she/it] fails to use the amount of care in [designing/ manufacturing/inspecting/installing/repairing] the product that a reasonably careful [designer/manufacturer/supplier/installer/ repairer] would use in similar circumstances to avoid exposing others to a foreseeable risk of harm.

In determining whether [name of defendant] used reasonable care, you should balance what [name of defendant] knew or should have known about the likelihood and severity of potential harm from the product against the burden of taking safety measures to reduce or avoid the harm.

New September 2003

Directions for Use

The duty to inspect or test is included in the "knew or should have known" standard of this instruction: "If the manufacturer designs the product safely, manufactures the product safely, and provides an adequate warning of dangers inherent in the use of the product, then a failure to test the product cannot, standing alone, cause any injury. The duty to test is a subpart of the other three duties because a breach of the duty to test cannot by itself cause any injury." (*Valentine v. Baxter Healthcare Corp.* (1999) 68 Cal.App.4th 1467, 1486 [81 Cal.Rptr.2d 252] , quoting *Kociemba v. G.D. Searle & Co.* (D.Minn. 1989) 707 F.Supp. 1517, 1527 .)

Presumably, the judge will have already determined that the manufacturer owed the plaintiff a duty because the product was of a type that could endanger others if it was negligently made. Accordingly, that element is eliminated in this instruction.

Sources and Authority

■ "A manufacturer/seller of a product is under a duty to exercise reasonable care in its design so that it can be safely used as intended by its buyer/consumer." (*Williams v. Beechnut Nutrition Corp.* (1986) 185 Cal.App.3d 135, 141 [229 Cal.Rptr. 605] .) This duty " 'extends to all persons within the range of potential danger.' " (*Ibid.*, internal citations omitted.)

■ "In determining what precautions, if any, were required under the circumstances, the likelihood of harm, and the gravity of the harm if it happens, must be balanced against the burden of the precaution which would be effective to avoid the harm." (*Putensen v. Clay Adams, Inc.* (1970) 12 Cal.App.3d 1062, 1077-1078 [91 Cal.Rptr. 319] , internal citations omitted.)

■ *Restatement Second of Torts*, section 395, provides: "A manufacturer who fails to exercise reasonable care in the manufacture of a chattel which, unless carefully made, he should recognize as involving an unreasonable risk of causing physical harm to those who use it for a purpose for which the manufacturer should expect it to be used and to those whom he should expect to be endangered by its probable use, is subject to liability for physical harm caused to them by its lawful use in a manner and for a purpose for which it is supplied."

■ In a non-res ipsa loquitur case involving a manufacturing defect only, the failure to follow *Jiminez v. Sears, Roebuck & Co.* (1971) 4 Cal.3d 379, 387 [93 Cal.Rptr. 769, 482 P.2d 681] by refusing to give negligence instructions does not require reversal. (*Montez v. Ford Motor Co.* (1980) 101 Cal.App.3d 315, 317 [161 Cal.Rptr. 578] .)

■ "[F]reedom from negligence does not inure to the manufacturer because it purchased parts from another which were defective." (*Sheward v. Virtue* (1942) 20 Cal.2d 410, 412 [126 P.2d 345] .)

■ *Restatement Second of Torts*, section 398, provides: "A manufacturer of a chattel made under a plan or design which makes it dangerous for the uses for which it is manufactured is subject to liability to others whom he should expect to use the chattel or to be endangered by its probable use for physical harm caused by his failure to exercise reasonable care in the adoption of a safe plan or design."

■ Section 398 was cited with approval in *Pike v. Frank G. Hough Co.* (1970) 2 Cal.3d 465, 470 [85 Cal.Rptr. 629, 467 P.2d 229] .

■ "What is 'reasonable care,' of course, varies with the facts of each case, but it involves a balancing of the likelihood of harm to be expected from a machine with a given design and the gravity of harm if it happens against the burden of the precaution which would be effective to avoid the harm." (*Pike, supra*, 2 Cal.3d at p. 470 , internal citation omitted.)

■ "A danger is unreasonable when it is foreseeable, and the manufacturer's ability, actual, constructive, or potential, to forestall unreasonable danger is the measure of its duty in the design of its product." (*Balido v. Improved Machinery, Inc.* (1972) 29 Cal.App.3d 633, 640 [105 Cal.Rptr. 890] , disapproved on other grounds in *Regents of University of California v. Hartford Accident & Indemnity Co.* (1978) 21 Cal.3d 624, 641-642 [147 Cal.Rptr. 486, 581 P.2d 197] .)

■ "With respect to tests or inspections, it is well settled that where an article is such that it is reasonably certain, if negligently manufactured or designed, to place life and limb in peril, the manufacturer is chargeable with negligence if the defective condition could be disclosed by reasonable

inspection and tests, and such inspection and tests are omitted." (*Putensen, supra*, 12 Cal.App.3d at p. 1078 , internal citations omitted.)

■ *Restatement Second of Torts*, section 396, provides: "A manufacturer of a chattel is subject to liability under the rules stated in sections 394 and 395 although the dangerous character or condition of the chattel is discoverable by an inspection which the seller or any other person is under a duty to the person injured to make."

■ "[W]here an article is either inherently dangerous or reasonably certain to place life and limb in peril when negligently made, a manufacturer owes a duty of care to those who are the ultimate users. This duty requires reasonable care to be exercised in assembling component parts and inspecting and testing them before the product leaves the plant." (*Reynolds v. Natural Gas Equipment, Inc.* (1960) 184 Cal.App.2d 724, 736 [7 Cal.Rptr. 879] , internal citations omitted.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1467-1479

California Products Liability Actions, Ch. 2, *Liability for Defective Products*, § 2.21 (Matthew Bender)

19 California Points and Authorities, Ch. 190, *Products Liability* (Matthew Bender)

Publisher's Notes

This instruction covers issues presented in BAJI Nos. 3.10, 9.21, and 9.22.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Torts Negligence General Overview Torts Negligence Duty Foreseeability of Injury Torts Negligence Standards of Care Reasonable Care General Overview Torts Products Liability Negligence



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CHAPTER 12 California Judicial Council Products Liability Instructions

2-12 California Forms of Jury Instruction CACI 1222

CACI 1222 Negligence--Manufacturer or Supplier--Duty to Warn--Essential Factual Elements

[*Name of plaintiff*] **claims that** [*name of defendant*] **was negligent by not using reasonable care to warn [or instruct] about the [*product*]'s dangerous condition or about facts that make the [*product*] likely to be dangerous. To establish this claim, [*name of plaintiff*] must prove all of the following:**

1. That [*name of defendant*] **[manufactured/distributed/sold] the [*product*];**
2. That [*name of defendant*] **knew or reasonably should have known that the [*product*] was dangerous or was likely to be dangerous when used in a reasonably foreseeable manner;**
3. That [*name of defendant*] **knew or reasonably should have known that users would not realize the danger;**
4. That [*name of defendant*] **failed to adequately warn of the danger [or instruct on the safe use of the [*product*]];**
5. That a reasonable [manufacturer/distributor/seller] under the same or similar circumstances would have warned of the danger [or instructed on the safe use of the [*product*]];
6. That [*name of plaintiff*] **was harmed; and**
7. That [*name of defendant*]'s failure to warn [or instruct] was a substantial factor in causing [*name of plaintiff*]'s harm.

[The warning must be given to the prescribing physician and must include the potential risks or side effects that may follow the foreseeable use of the product. [*Name of defendant*] had a continuing duty to warn physicians as

long as the product was in use.]

New September 2003

Directions for Use

The last bracketed paragraph is to be used in prescription drug cases only.

Sources and Authority

■ A manufacturer "has a duty to use reasonable care to give warning of the dangerous condition of the product or of facts which make it likely to be dangerous to those whom he should expect to use the product or be endangered by its probable use, if the manufacturer has reason to believe that they will not realize its dangerous condition." (*Putensen v. Clay Adams, Inc.* (1970) 12 Cal.App.3d 1062, 1076-1077 [91 Cal.Rptr. 319] .)

■ "Negligence and strict products liability are separate and distinct bases for liability that do not automatically collapse into each other because the plaintiff might allege both when a product warning contributes to her injury." (*Conte v. Wyeth, Inc.* (2008) 168 Cal.App.4th 89, 101 [85 Cal.Rptr.3d 299] .)

■ "[F]ailure to warn in strict liability differs markedly from failure to warn in the negligence context. Negligence law in a failure-to-warn case requires a plaintiff to prove that a manufacturer or distributor did not warn of a particular risk for reasons which fell below the acceptable standard of care, i.e., what a reasonably prudent manufacturer would have known and warned about. Strict liability is not concerned with the standard of due care or the reasonableness of a manufacturer's conduct. The rules of strict liability require a plaintiff to prove only that the defendant did not adequately warn of a particular risk that was known or knowable in light of the generally recognized and prevailing best scientific and medical knowledge available at the time of manufacture and distribution. Thus, in strict liability, as opposed to negligence, the reasonableness of the defendant's failure to warn is immaterial." (*Anderson v. Owens-Corning Fiberglas Corp.* (1991) 53 Cal.3d 987, 1002 [281 Cal.Rptr. 528, 810 P.2d 549] .)

■ "It is true that the two types of failure to warn claims are not necessarily exclusive: 'No valid reason appears to require a plaintiff to elect whether to proceed on the theory of strict liability in tort or on the theory of negligence. ... [P] Nor does it appear that instructions on the two theories will be confusing to the jury. There is nothing inconsistent in instructions on the two theories and to a large extent the two theories parallel and supplement each other.' Despite the often significant overlap between the theories of negligence and strict liability based on a product defect, a plaintiff is entitled to instructions on both theories if both are supported by the evidence." (*Oxford v. Foster Wheeler LLC* (2009) 177 Cal.App.4th 700, 717 [99 Cal.Rptr.3d 418] .)

■ *Restatement Second of Torts section 388* provides:

One who supplies directly or through a third person a chattel for another to use is subject to liability to those whom the supplier should expect to use the chattel with the consent of the other or to be endangered by its probable use, for physical harm caused by the use of the chattel in the manner for which and by a person for whose use it is supplied, if the supplier

(a) knows or has reason to know that the chattel is or is likely to be dangerous for the use for which it is supplied, and

(b) has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition, and

(c) fails to exercise reasonable care to inform them of its dangerous condition or of the facts which make it likely to be dangerous.

■ *Restatement Second of Torts section 394* provides: "The manufacturer of a chattel which he knows or has reason to know to be, or to be likely to be, dangerous for use is subject to the liability of a supplier of chattels with such knowledge."

■ These sections have been cited with approval by California courts. (See *Putensen, supra*, 12 Cal.App.3d at p. 1077 and cases cited therein.)

■ There is no duty to warn of obvious defects. (*Krawitz v. Rusch* (1989) 209 Cal.App.3d 957, 966 [257 Cal.Rptr. 610] ; *Holmes v. J.C. Penney Co.* (1982) 133 Cal.App.3d 216, 220 [183 Cal.Rptr. 777] ; *Morris v. Toy Box* (1962) 204 Cal.App.2d 468, 471 [22 Cal.Rptr. 572] .)

■ "When a manufacturer or distributor has no effective way to convey a product warning to the ultimate consumer, the manufacturer should be permitted to rely on downstream suppliers to provide the warning. 'Modern life would be intolerable unless one were permitted to rely to a certain extent on others doing what they normally do, particularly if it is their duty to do so.' " (*Persons v. Salomon N. Am.* (1990) 217 Cal.App.3d 168, 178 [265 Cal.Rptr. 773] , internal citation omitted.)

■ The duty of a manufacturer to warn about the potential hazards of its product, even when that product is only a component of an item manufactured or assembled by a third party, has been recognized, but is limited. (See *Garza v. Asbestos Corp., Ltd.* (2008) 161 Cal.App.4th 651, 661 [74 Cal.Rptr.3d 359] ; *Artiglio v. General Electric Co.* (1998) 61 Cal.App.4th 830, 837 [71 Cal.Rptr.2d 817] .)

Secondary Sources

California Products Liability Actions, Ch. 2, *Liability for Defective Products*, § 2.21, Ch. 7, *Proof*, § 7.05 (Matthew Bender)

40 *California Forms of Pleading and Practice*, Ch. 460, *Products Liability*, § 460.11 (Matthew Bender)

19 *California Points and Authorities*, Ch. 190, *Products Liability*, 190.165 et seq. (Matthew Bender)

Publisher's Notes

This instruction replaces BAJI No. 9.20.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Torts Negligence General Overview Torts Products Liability Duty to Warn Torts Products Liability Negligence



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California Forms of Jury Instruction

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CHAPTER 12 California Judicial Council Products Liability Instructions

2-12 California Forms of Jury Instruction CACI 1223

CACI 1223 Negligence--Recall/Retrofit

[Name of plaintiff] claims that [name of defendant] was negligent because [he/she/it] failed to [recall/retrofit] the [product]. To establish this claim, [name of plaintiff] must prove all of the following:

- 1. That [name of defendant] [manufactured/distributed/sold] the [product];**
- 2. That [name of defendant] knew or reasonably should have known that the [product] was dangerous or was likely to be dangerous when used in a reasonably foreseeable manner;**
- 3. That [name of defendant] became aware of this defect after the [product] was sold;**
- 4. That [name of defendant] failed to [recall/retrofit] [or warn of the danger of] the [product];**
- 5. That a reasonable [manufacturer/distributor/seller] under the same or similar circumstances would have [recalled/retrofitted] the [product];**
- 6. That [name of plaintiff] was harmed; and**
- 7. That [name of defendant]'s failure to [recall/retrofit] the [product] was a substantial factor in causing [name of plaintiff]'s harm.**

New September 2003; Revised October 2004

If the issue concerns a negligently conducted recall, modify this instruction accordingly.

■ "Failure to conduct an adequate retrofit campaign may constitute negligence apart from the issue of defective design." (*Hernandez v. Badger Construction Equipment Co. (1994) 28 Cal.App.4th 1791, 1827 [34 Cal.Rptr.2d 732]* , internal citation omitted.)

■ In *Lunghi v. Clark Equipment Co. (1984) 153 Cal.App.3d 485 [200 Cal.Rptr. 387]* , the court observed that, where the evidence showed that the manufacturer became aware of dangers after the product had been on the market, the jury "could still have found that Clark's knowledge of the injuries caused by these features imposed a *duty to warn* of the danger, and/or a *duty to conduct an adequate retrofit campaign*." The failure to meet the standard of reasonable care with regard to either of these duties could have supported a finding of negligence. (*Id. at p. 494* , original italics.)

■ In *Balido v. Improved Machinery, Inc. (1972) 29 Cal.App.3d 633 [105 Cal.Rptr. 890]* (disapproved on other grounds in *Regents of University of California v. Hartford Accident & Indemnity Co. (1978) 21 Cal.3d 624, 641-642 [147 Cal.Rptr. 486, 581 P.2d 197]*), the court concluded that a jury could reasonably have found negligence based upon the manufacturer's failure to retrofit equipment determined to be unsafe after it was sold, even though the manufacturer told the equipment's owners of the safety problems and offered to correct those problems for \$500. (*Id. at p. 649* .)

■ If a customer fails to comply with a recall notice, this will not automatically absolve the manufacturer from liability: "A manufacturer cannot delegate responsibility for the safety of its product to dealers, much less purchasers." (*Springmeyer v. Ford Motor Co. (1998) 60 Cal.App.4th 1541, 1562-1563 [71 Cal.Rptr.2d 190]* , internal citations omitted.)

Publisher's Notes

There is no BAJI instruction on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Torts Negligence General Overview Torts Products Liability Negligence



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CHAPTER 12 California Judicial Council Products Liability Instructions

2-12 California Forms of Jury Instruction CACI 1224

CACI 1224 Negligence--Negligence for Product Rental/Standard of Care

[A person who rents products to others for money is negligent if he or she fails to use reasonable care to:

- 1. Inspect the products for defects;**
- 2. Make them safe for their intended use; and**
- 3. Adequately warn of any known dangers.]**

[or]

[A person who lends products to others without charge only is required to use reasonable care to warn of known defects.]

New September 2003

Use this instruction in conjunction with *CACI No. 1220, Negligence--Essential Factual Elements*, and instead of *CACI No. 1221, Negligence--Basic Standard of Care*, in cases involving rentals.

If the case involves a product lent gratuitously for the mutual benefit of the parties (e.g., to a prospective purchaser), the first paragraph is applicable and the instruction needs to be modified.

In a purely gratuitous lending case, if the object is a "dangerous instrumentality" there may be a duty to conduct a reasonable inspection before lending. (See *Tierstein v. Licht* (1959) 174 Cal.App.2d 835, 842 [345 P.2d 341] .)

■ If a bailment is for hire, or provides a mutual benefit, the bailor has a duty to the bailee and to third persons to (1) warn of actually known defects and (2) to use reasonable care to make an examination of the good before lending it "in order to make certain that it [is] fit for the use known to be intended." (*Tierstein, supra*, 174 Cal.App.2d at pp. 840-841 .)

■ A bailment, otherwise gratuitous, where made to induce a purchase, has been considered sufficient to give rise to the same duty of reasonable care on the part of the bailor as an ordinary bailment for hire. This is regarded as a bailment for mutual benefit. (*Tierstein, supra*, 174 Cal.App.2d at p. 842 .)

■ Under either a negligence or an implied warranty theory, "the essential inquiry ... is whether [the defendants] made such inspection of their equipment as was necessary to discharge their duty of reasonable care." (*McNeal v. Greenberg* (1953) 40 Cal.2d 740, 742 [255 P.2d 810] .) The bailor is not an insurer or guarantor. (*Tierstein, supra*, 174 Cal.App.2d at p. 841 .)

■ *Civil Code section 1955* provides: "Except as otherwise agreed by the lessor and the lessee in lease agreements for a term of more than 20 days, one who leases personal property must deliver it to the lessee, secure his or her quiet enjoyment thereof against all lawful claimants, put it into a condition fit for the purpose for which he or she leases it, and repair all deteriorations thereof not occasioned by the fault of the lessee and not the natural result of its use."

■ *Restatement Second of Torts, section 408*, provides: "One who leases a chattel as safe for immediate use is subject to liability to those whom he should expect to use the chattel, or to be endangered by its probable use, for physical harm caused by its use in a manner for which, and by a person for whose use, it is leased, if the lessor fails to exercise reasonable care to make it safe for such use or to disclose its actual condition to those who may be expected to use it."

■ This Restatement section was cited with approval in *Rae v. California Equipment Co.* (1939) 12 Cal.2d 563, 569 [86 P.2d 352] .

■ "The general rule is that the only duty which a gratuitous bailor owes either to the bailee or to third persons is to warn them of actually known defects which render the chattel dangerous for the purpose for which it is ordinarily used; he has no liability for injuries caused by defects in the subject matter of the bailment of which he was not aware." (*Tierstein, supra*, 174 Cal.App.2d at p. 841 .)

Publisher's Notes

This instruction covers issues presented in BAJI Nos. 9.25, 9.25.1, 9.26, and 9.27.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Torts Negligence General Overview Torts Products Liability Duty to Warn Torts Products Liability Negligence



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CHAPTER 12 California Judicial Council Products Liability Instructions

2-12 California Forms of Jury Instruction CACI 1225-CACI 1229

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CACI 1225Reserved for Future Use



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CHAPTER 12 California Judicial Council Products Liability Instructions

2-12 California Forms of Jury Instruction CACI 1230

CACI 1230 Express Warranty--Essential Factual Elements

[*Name of plaintiff*] **claims that [he/she/it] was harmed by the [product] because [name of defendant] represented, either by words or actions, that the [product] [insert description of alleged express warranty, e.g., "was safe"], but the [product] was not as represented. To establish this claim, [name of plaintiff] must prove all of the following:**

1. That [name of defendant] [insert one or more of the following:]

[made a [statement of fact/promise] [to/received by] [name of plaintiff] that the [product] [insert description of alleged express warranty];] [or]

[gave [name of plaintiff] a description of the [product];] [or]

[gave [name of plaintiff] a sample or model of the [product];]

2. That the [product] [insert one or more of the following :]

[did not perform as [stated/promised];] [or]

[did not meet the quality of the [description/sample/model];]

3. [That [name of plaintiff] took reasonable steps to notify [name of defendant] within a reasonable time that the [product] was not as represented, whether or not [name of defendant] received such notice;]

4. That [name of plaintiff] was harmed; and

5. That the failure of the [product] to be as represented was a substantial factor in causing [name of plaintiff]'s harm.

[Formal words such as "warranty" or "guarantee" are not required to create a warranty. It is also not necessary for [name of defendant] to have specifically intended to create a warranty. But a warranty is not created if [name of defendant] simply stated the value of the goods or only gave [his/her] opinion of or recommendation regarding the goods.]

New September 2003; Revised February 2005

The giving of notice to the seller is not required in personal injury or property damage lawsuits against a manufacturer or another supplier with whom the plaintiff has not directly dealt. (*Greenman v. Yuba Power Products, Inc.* (1963) 59 Cal.2d 57, 61 [27 Cal.Rptr. 697, 377 P.2d 897] ; *Ghera v. Ford Motor Co.* (1966) 246 Cal.App.2d 639, 652-653 [55 Cal.Rptr. 94] .)

If an instruction on the giving of notice to the seller is needed, see CACI No. 1243, *Notification/Reasonable Time*.

■ "A warranty relates to the title, character, quality, identity, or condition of the goods. The purpose of the law of warranty is to determine what it is that the seller has in essence agreed to sell." (*Keith v. Buchanan* (1985) 173 Cal.App.3d 13, 20 [220 Cal.Rptr. 392] , internal citation omitted.)

■ "A warranty is a contractual term concerning some aspect of the sale, such as title to the goods, or their quality or quantity." (4 Witkin, *Summary of California Law* (10th ed. 2005) Sales, § 51.)

■ *California Commercial Code section 2313* provides:

(1) Express warranties by the seller are created as follows:

(a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.

(b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.

(c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.

(2) It is not necessary to the creation of an express warranty that the seller use formal words such as "warrant" or "guarantee" or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty.

■ *California Commercial Code section 2102* provides: "Unless the context otherwise requires, this division applies to transactions in goods." Section 2105 defines "goods" as "all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale."

■ "Privity is not required for an action based upon an express warranty." (*Hauter v. Zogarts* (1975) 14 Cal.3d 104, 115, fn. 8 [120 Cal.Rptr. 681, 534 P.2d 377] .)

■ "The determination as to whether a particular statement is an expression of opinion or an affirmation of a fact is often difficult, and frequently is dependent upon the facts and circumstances existing at the time the statement is made." (*Keith, supra*, 173 Cal.App.3d at p. 21 , internal citation omitted.)

■ "Statements made by a seller during the course of negotiation over a contract are presumptively affirmations of fact unless it can be demonstrated that the buyer could only have reasonably considered the statement as a statement of the seller's opinion. Commentators have noted several factors which tend to indicate an opinion statement. These are (1) a lack of specificity in the statement made, (2) a statement that is made in an equivocal manner, or (3) a statement which reveals that the goods are experimental in nature." (*Keith, supra*, 173 Cal.App.3d at p. 21 .)

■ "It is important to note ... that even statements of opinion can become warranties under the code if they become part of the basis of the bargain." (*Hauter, supra*, 14 Cal.3d at p. 115, fn. 10 .)

■ The California Supreme Court has stated that "[t]he basis of the bargain requirement represents a significant change in the law of warranties. Whereas plaintiffs in the past have had to prove their reliance upon specific promises made by the seller, the Uniform Commercial Code requires no such proof." (*Hauter, supra*, 14 Cal.3d at p. 115 , internal citations omitted.) However, the Court also noted that there is some controversy as to the role, if any, of reliance in this area.

■ The court in *Keith, supra*, 173 Cal.App.3d at p. 23 , held that the seller has the burden of proving that the bargain did not rest at all on the representation, for example, by showing that the buyer inspected and discovered the defect before the contract was made.

■ "It is immaterial whether defendant had actual knowledge of the contraindications. 'The obligation of a warranty is absolute, and is imposed as a matter of law irrespective of whether the seller knew or should have known of the falsity of his representations.' " (*Grinnell v. Charles Pfizer & Co.* (1969) 274 Cal.App.2d 424, 442 [79 Cal.Rptr. 369] , internal citations omitted.)

■ "[A] sale is ordinarily an essential element of any warranty, express or implied" (*Fogo v. Cutter Laboratories, Inc.* (1977) 68 Cal.App.3d 744, 759 [137 Cal.Rptr. 417] , internal citations omitted.)

Secondary Sources

4 Witkin, Summary of California Law (10th ed. 2005) Sales, §§ 56-66

California Products Liability Actions, Ch. 2, *Liability for Defective Products*, §§ 2.31-2.33, Ch. 7, *Proof*, § 7.03 (Matthew Bender)

44 *California Forms of Pleading and Practice*, Ch. 502, *Sales: Warranties*, §§ 502.23, 502.42 -502.50, 502.140 -502.150 (Matthew Bender)

20 California Points and Authorities, Ch. 206, *Sales* (Matthew Bender)

Publisher's Notes

This instruction covers issues presented in BAJI Nos. 9.40, 9.44, 9.50, and 9.85.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewTortsProducts LiabilityBreach of Warranty



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California Forms of Jury Instruction

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CHAPTER 12 California Judicial Council Products Liability Instructions

2-12 California Forms of Jury Instruction CACI 1231

CACI 1231 Implied Warranty of Merchantability--Essential Factual Elements

[*Name of plaintiff*] [also] **claims that [he/she/it] was harmed by the [product] that [he/she/it] bought from [name of defendant] because the [product] did not have the quality that a buyer would expect. To establish this claim, [name of plaintiff] must prove all of the following:**

1. **That [name of plaintiff] bought the [product] from [name of defendant];**
2. **That, at the time of purchase, [name of defendant] was in the business of selling these goods [or by [his/her/its] occupation held [himself/herself/itself] out as having special knowledge or skill regarding these goods];**
3. **That the [product] [insert one or more of the following:]**
[was not of the same quality as those generally acceptable in the trade;]
[was not fit for the ordinary purposes for which such goods are used;]
[did not conform to the quality established by the parties' prior dealings or by usage of trade;]
[other ground as set forth in Commercial Code section 2314(2);]
4. **[That [name of plaintiff] took reasonable steps to notify [name of defendant] within a reasonable time that the [product] did not have the expected quality;]**
5. **That [name of plaintiff] was harmed; and**

6. That the failure of the [product] to have the expected quality was a substantial factor in causing [name of plaintiff]'s harm.

New September 2003

This cause of action could also apply to products that are leased. If so, modify the instruction accordingly.

The giving of notice to the seller is not required in personal injury or property damage lawsuits against a manufacturer or another supplier with whom the plaintiff has not directly dealt. (*Greenman v. Yuba Power Products, Inc.* (1963) 59 Cal.2d 57, 61 [27 Cal.Rptr. 697, 377 P.2d 897]; *Gherna v. Ford Motor Co.* (1966) 246 Cal.App.2d 639, 652-653 [55 Cal.Rptr. 94] .)

If an instruction on the giving of notice to the seller is needed, see CACI No. 1243, *Notification/Reasonable Time*.

- "A warranty is a contractual term concerning some aspect of the sale, such as title to the goods, or their quality or quantity." (4 Witkin, Summary of California Law (10th ed. 2005) Sales, § 51.)

- "Unlike express warranties, which are basically contractual in nature, the implied warranty of merchantability arises by operation of law. It does not 'impose a general requirement that goods precisely fulfill the expectation of the buyer. Instead, it provides for a minimum level of quality.' " (*American Suzuki Motor Corp. v. Superior Court* (1995) 37 Cal.App.4th 1291, 1295-1296 [44 Cal.Rptr.2d 526] , internal citations omitted.)

- It has been observed that "in cases involving personal injuries resulting from defective products, the theory of strict liability in tort has virtually superseded the concept of implied warranties." (*Grinnell v. Charles Pfizer & Co.* (1969) 274 Cal.App.2d 424, 432 [79 Cal.Rptr. 369] .)

- *Commercial Code section 2314* provides:

(1) Unless excluded or modified (Section 2316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale.

(2) Goods to be merchantable must be at least such as

(a) Pass without objection in the trade under the contract description; and

(b) In the case of fungible goods, are of fair average quality within the description; and

(c) Are fit for the ordinary purposes for which such goods are used; and

(d) Run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and

(e) Are adequately contained, packaged, and labeled as the agreement may require; and

(f) Conform to the promises or affirmations of fact made on the container or label if any.

(3) Unless excluded or modified (Section 2316) other implied warranties may arise from course of dealing or usage of trade.

■ "Vertical privity is a prerequisite in California for recovery on a theory of breach of the implied warranties of fitness and merchantability." (*United States Roofing, Inc. v. Credit Alliance Corp.* (1991) 228 Cal.App.3d 1431, 1441 [279 Cal.Rptr. 533] , internal citations omitted.)

■ Although privity appears to be required for actions based upon the implied warranty of merchantability, there are exceptions to this rule, such as one for members of the purchaser's family. (*Hauter v. Zogarts* (1975) 14 Cal.3d 104, 115, fn. 8 [120 Cal.Rptr. 681, 534 P.2d 377] .) Vertical privity is also waived for employees. (*Peterson v. Lamb Rubber Co.* (1960) 54 Cal.2d 339 [5 Cal.Rptr. 863, 353 P.2d 575] .) A plaintiff satisfies the privity requirement when he or she leases or negotiates the sale or lease of the product. (*United States Roofing, Inc., supra.*)

■ *Commercial Code section 2104(1)* defines "merchant," in relevant part, as "a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction."

■ *Commercial Code section 2105(1)* defines "goods," in relevant part, as "all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid."

■ *Commercial Code section 1303* provides:

(a) A "course of performance" is a sequence of conduct between the parties to a particular transaction that exists if:

(1) the agreement of the parties with respect to the transaction involves repeated occasions for performance by a party; and

(2) the other party, with knowledge of the nature of the performance and opportunity for objection to it, accepts the performance or acquiesces in it without objection.

(b) A "course of dealing" is a sequence of conduct concerning previous transactions between the parties to a particular transaction that is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct.

(c) A "usage of trade" is any practice or method of dealing having such regularity of observance in a place, vocation, or trade as to justify an expectation that it will be observed with respect to the transaction in question. The existence and scope of such a usage must be proved as facts. If it is established that such a usage is embodied in a trade code or similar record, the interpretation of the record is a question of law.

(d) A course of performance or course of dealing between the parties or usage of trade in the vocation or trade in which they are engaged or of which they are or should be aware is relevant in ascertaining the meaning of the parties' agreement, may give particular meaning to specific terms of the agreement, and may supplement or qualify the terms of the agreement. A usage of trade applicable in the place in which part of the performance under the agreement is to occur may be so utilized as to that part of the

performance.

(e) Except as otherwise provided in subdivision (f), the express terms of an agreement and any applicable course of performance, course of dealing, or usage of trade must be construed whenever reasonable as consistent with each other. If such a construction is unreasonable:

(1) express terms prevail over course of performance, course of dealing, and usage of trade;

(2) course of performance prevails over course of dealing and usage of trade;

(3) course of dealing prevails over usage of trade.

(f) Subject to Section 2209, a course of performance is relevant to show a waiver or modification of any term inconsistent with the course of performance.

(g) Evidence of a relevant usage of trade offered by one party is not admissible unless that party has given the other party notice that the court finds sufficient to prevent unfair surprise to the other party.

Secondary Sources

4 Witkin, Summary of California Law (10th ed. 2005) Sales, § 51

California Products Liability Actions, Ch. 2, *Liability for Defective Products*, §§ 2.31-2.33, Ch. 7, *Proof*, § 7.03 (Matthew Bender)

44 *California Forms of Pleading and Practice*, Ch. 502, *Sales: Warranties*, §§ 502.24, 502.51, 502.200 -502.214 (Matthew Bender)

20 California Points and Authorities, Ch. 206, *Sales* (Matthew Bender)

Publisher's Notes

This instruction replaces BAJI Nos. 9.40, 9.60, and 9.85, and covers issues presented in BAJI No. 9.61.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Contracts Law Sales of Goods Warranties Merchantability Torts Products Liability Breach of Warranty



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California Forms of Jury Instruction

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CHAPTER 12 California Judicial Council Products Liability Instructions

2-12 California Forms of Jury Instruction CACI 1232

CACI 1232 Implied Warranty of Fitness for a Particular Purpose--Essential Factual Elements

[*Name of plaintiff*] **claims that [he/she/it] was harmed by the [*product*] that [he/she/it] bought from [*name of defendant*] because the [*product*] was not suitable for [*name of plaintiff*]'s intended purpose. To establish this claim, [*name of plaintiff*] must prove all of the following:**

- 1. That [*name of plaintiff*] bought the [*product*] from [*name of defendant*];**
- 2. That, at the time of purchase, [*name of defendant*] knew or had reason to know that [*name of plaintiff*] intended to use the product for a particular purpose;**
- 3. That, at the time of purchase, [*name of defendant*] knew or had reason to know that [*name of plaintiff*] was relying on [his/her/its] skill and judgment to select or furnish a product that was suitable for the particular purpose;**
- 4. That [*name of plaintiff*] justifiably relied on [*name of defendant*]'s skill and judgment;**
- 5. That the [*product*] was not suitable for the particular purpose;**
- 6. [That [*name of plaintiff*] took reasonable steps to notify [*name of defendant*] within a reasonable time that the [*product*] was not suitable;]**
- 7. That [*name of plaintiff*] was harmed; and**
- 8. That the failure of the [*product*] to be suitable was a substantial factor in causing [*name of plaintiff*]'s harm.**

New September 2003

This cause of action could also apply to products that are leased. If so, modify the instruction accordingly.

The giving of notice to the seller is not required in personal injury or property damage lawsuits against a manufacturer or another supplier with whom the plaintiff has not directly dealt. (*Greenman v. Yuba Power Products, Inc.* (1963) 59 Cal.2d 57, 61 [27 Cal.Rptr. 697, 377 P.2d 897]; *Ghera v. Ford Motor Co.* (1966) 246 Cal.App.2d 639, 652-653 [55 Cal.Rptr. 94] .)

If an instruction on the giving of notice to the seller is needed, see CACI No. 1243, *Notification/Reasonable Time*.

- "A warranty is a contractual term concerning some aspect of the sale, such as title to the goods, or their quality or quantity." (4 Witkin, Summary of California Law (10th ed. 2005) Sales, § 51.)

- *Commercial Code section 2315* provides: "Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose."

- "An implied warranty of fitness for a particular purpose arises only where (1) the purchaser at the time of contracting intends to use the goods for a particular purpose, (2) the seller at the time of contracting has reason to know of this particular purpose, (3) the buyer relies on the seller's skill or judgment to select or furnish goods suitable for the particular purpose, and (4) the seller at the time of contracting has reason to know that the buyer is relying on such skill and judgment." (*Keith v. Buchanan* (1985) 173 Cal.App.3d 13, 25 [220 Cal.Rptr. 392] , internal citation omitted.)

- " 'A "particular purpose" differs from the ordinary purpose for which the goods are used in that it envisages a specific use by the buyer which is peculiar to the nature of his business whereas the ordinary purposes for which goods are used are those envisaged in the concept of merchantability and go to uses which are customarily made of the goods in question.' " (*American Suzuki Motor Corp. v. Superior Court* (1995) 37 Cal.App.4th 1291, 1295, fn. 2 [44 Cal.Rptr.2d 526] , internal citation omitted.)

- "The warranty of fitness for a particular purpose is not limited to sales by a merchant as is the warranty of merchantability. It may be imposed on any seller possessing sufficient skill and judgment to justify the buyer's reliance. The Code drafters suggest, however, that a nonmerchant seller will only in particular circumstances have that degree of skill and judgment necessary to justify imposing the warranty." (4 Witkin, Summary of California Law (10th ed. 2005) Sales, § 75.)

- "The reliance elements are important to the consideration of whether an implied warranty of fitness for a particular purpose exists. ... The major question in determining the existence of an implied warranty of fitness for a particular purpose is the reliance by the buyer upon the skill and judgment of the seller to select an article suitable for his needs." (*Keith, supra*, 173 Cal.App.3d at p. 25 , internal citations omitted.)

- In *Keith*, the reviewing court upheld the trial court's finding that there was no reliance because "the plaintiff did not rely on the skill and judgment of the defendants to select a suitable vessel, but that he

rather relied on his own experts." (*Keith, supra*, 173 Cal.App.3d at p. 25 .)

- "Vertical privity is a prerequisite in California for recovery on a theory of breach of the implied warranties of fitness and merchantability." (*United States Roofing, Inc. v. Credit Alliance Corp.* (1991) 228 Cal.App.3d 1431, 1441 [279 Cal.Rptr. 533] , internal citations omitted.)

- Although privity appears to be required for actions based upon the implied warranty of merchantability, there are exceptions to this rule, such as one for members of the purchaser's family. (*Hauter v. Zogarts* (1975) 14 Cal.3d 104, 115, fn. 8 [120 Cal.Rptr. 681, 534 P.2d 377] .) Vertical privity is also waived for employees. (*Peterson v. Lamb Rubber Co.* (1960) 54 Cal.2d 339 [5 Cal.Rptr. 863, 353 P.2d 575] .) A plaintiff satisfies the privity requirement when he or she leases or negotiates the sale or lease of the product. (*United States Roofing, supra* .)

Secondary Sources

California Products Liability Actions, Ch. 2, *Liability for Defective Products*, § 2.31 (Matthew Bender)

44 *California Forms of Pleading and Practice*, Ch. 502, *Sales: Warranties*, §§ 502.24, 502.51, 502.220 (Matthew Bender)

20 *California Points and Authorities*, Ch. 206, *Sales* (Matthew Bender)

Publisher's Notes

This instruction replaces BAJI Nos. 9.40, 9.55, and 9.85.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Contracts Law Sales of Goods Warranties Fitness Torts Products Liability Breach of Warranty



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CHAPTER 12 California Judicial Council Products Liability Instructions

2-12 California Forms of Jury Instruction CACI 1233

CACI 1233 Implied Warranty of Merchantability for Food--Essential Factual Elements

[*Name of plaintiff*] **claims that [he/she] was harmed by the [food product] that was sold by [name of defendant] because the [food product] was not fit for human consumption. To establish this claim, [name of plaintiff] must prove all of the following:**

1. That [*name of plaintiff*] **[ate/drank] a [food product] sold by [name of defendant];**
2. That, at the time of purchase, [*name of defendant*] **was in the business of selling the [food product] [or by [his/her] occupation held [himself/herself/itself] out as having special knowledge or skill regarding this [food product]];**
3. That the [*food product*] **was harmful when consumed;**
4. That the harmful condition would not reasonably be expected by the average consumer;
5. That [*name of plaintiff*] **was harmed; and**
6. That the [*food product*] **was a substantial factor in causing [name of plaintiff]'s harm.**

New September 2003

If an instruction on the giving of notice to the seller is needed, see *CACI No. 1243, Notification/Reasonable Time*.

The advisory committee believes that the judge, not the jury, would decide whether the food substance is

natural or foreign under *Mexicali Rose v. Superior Court* (1992) 1 Cal.4th 617 [4 Cal.Rptr.2d 145, 822 P.2d 1292] .

■ "In the peculiar context of foodstuffs, the theory of breach of an implied warranty of merchantability has closer affinities to tort law than to contract law because it allows recovery of damages, without regard to privity of contract, for personal injuries as well as economic loss." (*Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.* (2000) 78 Cal.App.4th 847, 871 [93 Cal.Rptr.2d 364] , internal citations omitted.)

■ "If the injury-producing substance is natural to the preparation of the food served, it can be said that it was reasonably expected by its very nature and the food cannot be determined unfit or defective. A plaintiff in such a case has no cause of action in strict liability or implied warranty. If, however, the presence of the natural substance is due to a restaurateur's failure to exercise due care in food preparation, the injured patron may sue under a negligence theory." (*Mexicali Rose v. Superior Court* (1992) 1 Cal.4th 617, 633 [4 Cal.Rptr.2d 145, 822 P.2d 1292] .)

■ "If the injury-causing substance is foreign to the food served, then the injured patron may also state a cause of action in implied warranty and strict liability, and the trier of fact will determine whether the substance (i) could be reasonably expected by the average consumer and (ii) rendered the food unfit or defective." (*Mexicali Rose, supra*, 1 Cal.4th at p. 633 .)

■ The *Mexicali Rose* decision was limited to commercial restaurant establishments. (*Mexicali Rose, supra*, 1 Cal.4th at p. 619, fn. 1 .) However, the reasoning of that case has been applied to supermarkets. (*Ford v. Miller Meat Co.* (1994) 28 Cal.App.4th 1196 [33 Cal.Rptr.2d 899] .)

■ "The term 'natural' refers to bones and other substances natural to the product served, and does not encompass substances such as mold, botulinus bacteria or other substances (like rat flesh or cow eyes) not natural to the *preparation* of the product served." (*Mexicali Rose, supra*, 1 Cal.4th at p. 631, fn. 5 .)

■ It appears that the court would decide as a matter of law if the injury-producing substance is "natural" or not: "If the injury-producing substance is natural to the preparation of the food served, it can be said that it was reasonably expected by its very nature and the food cannot be determined unfit or defective. A plaintiff in such a case has no cause of action in strict liability or implied warranty." (*Mexicali Rose, supra*, 1 Cal.4th at p. 633 .)

Secondary Sources

California Products Liability Actions, Ch. 2, *Liability for Defective Products*, § 2.32 (Matthew Bender)

22 California Forms of Pleading and Practice, Ch. 268, *Food* (Matthew Bender)

44 *California Forms of Pleading and Practice*, Ch. 502, *Sales: Warranties*, § 502.201 (Matthew Bender)

20 California Points and Authorities, Ch. 206, *Sales* (Matthew Bender)

Publisher's Notes

This instruction replaces BAJI Nos. 9.40, 9.56, and 9.85.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewContracts LawSales of
GoodsWarrantiesMerchantabilityGovernmentsAgriculture & FoodProduct QualityTortsProducts LiabilityBreach of
Warranty



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CHAPTER 12 California Judicial Council Products Liability Instructions

2-12 California Forms of Jury Instruction CACI 1234-CACI 1239

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CACI 1234Reserved for Future Use



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CHAPTER 12 California Judicial Council Products Liability Instructions

2-12 California Forms of Jury Instruction CACI 1240

CACI 1240 Affirmative Defense to Express Warranty--Not "Basis of Bargain"

Revoked June 2010

See *Weinstat v. Dentsply Internat., Inc.* (2010) 180 Cal App 4th 1213, 1234 .

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewContracts LawDefensesGeneral OverviewContracts LawSales of GoodsWarrantiesExpress WarrantiesGovernmentsAgriculture & FoodProduct QualityTortsProducts LiabilityBreach of Warranty



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CHAPTER 12 California Judicial Council Products Liability Instructions

2-12 California Forms of Jury Instruction CACI 1241

CACI 1241 Affirmative Defense--Exclusion or Modification of Express Warranty

[*Name of defendant*] **claims that [he/she/it] is not responsible for any harm to [*name of plaintiff*] because [*name of defendant*], by words or conduct, limited [his/her/its] representations regarding the [*product*]. To succeed, [*name of defendant*] must prove that [he/she/it] clearly limited the representations regarding [*insert alleged warranty, e.g., "seaworthiness"*].**

New September 2003

Directions for Use

Limitation can be by words or conduct.

Sources and Authority

- *Commercial Code section 2316(1)* provides: "Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other; but subject to the provisions of this division on parol or extrinsic evidence (Section 2202) negation or limitation is inoperative to the extent that such construction is unreasonable."

- "Although section 2316 has drawn criticism for its vagueness, its purpose is clear. No warranty, express or implied, can be modified or disclaimed unless a seller *clearly* limits his liability." (*Hauter v. Zogarts* (1975) 14 Cal.3d 104, 118-119 [120 Cal.Rptr. 681, 534 P.2d 377] , internal citations omitted.)

- "Because a disclaimer or modification is inconsistent with an express warranty, words of disclaimer

or modification give way to words of warranty unless some clear agreement between the parties dictates the contrary relationship. At the very least, section 2316 allows limitation of warranties only by means of words that clearly communicate that a particular risk falls on the buyer." (*Hauter, supra*, 14 Cal.3d at p. 119 , internal citation omitted.)

- The Uniform Commercial Code Comment to section 2316 states: "This section is designed principally to deal with those frequent clauses in sales contracts which seek to exclude 'all warranties, express or implied.' It seeks to protect a buyer from unexpected and unbargained language of express warranty"

- "[A]ny disclaimer or modification must be strictly construed against the seller." (*Hauter, supra*, 14 Cal.3d at p. 119 .)

- "Strict construction against the person who has both warranted a particular fact to be true and then attempted to disclaim the warranty is especially appropriate in light of the fact that '[a] disclaimer of an express warranty is essentially contradictory, ...' " (*Fundin v. Chicago Pneumatic Tool Co.* (1984) 152 Cal.App.3d 951, 958 [199 Cal.Rptr. 789] , internal citation omitted.)

- "A disclaimer of warranties must be specifically bargained for so that a disclaimer in a warranty given to the buyer *after* he signs the contract is *not* binding." (*Dorman v. International Harvester Co.* (1975) 46 Cal.App.3d 11, 19-20 [120 Cal.Rptr. 516] .)

- "Interpretation of a written document, where extrinsic evidence is unnecessary, is a question of law for the trial court to determine." (*Temple v. Velcro USA, Inc.* (1983) 148 Cal.App.3d 1090, 1095 [196 Cal.Rptr. 531] , internal citations omitted.)

Secondary Sources

California Products Liability Actions, Ch. 8, *Defenses*, § 8.07 (Matthew Bender)

44 *California Forms of Pleading and Practice*, Ch. 502, *Sales: Warranties*, § 502.23 (Matthew Bender)

Publisher's Notes

This instruction covers issues presented in BAJI No. 9.80.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Contracts Law Sales of Goods Warranties Exclusion & Modification Contracts Law Sales of Goods Warranties Express Warranties Torts Products Liability Breach of Warranty



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CHAPTER 12 California Judicial Council Products Liability Instructions

2-12 California Forms of Jury Instruction CACI 1242

CACI 1242 Affirmative Defense--Exclusion of Implied Warranties

[*Name of defendant*] **claims that [he/she/it] is not responsible for any harm to [*name of plaintiff*] because [*name of defendant*] eliminated any implied representations relating to [the quality that a buyer would expect from the [*product*]]** [or] [the [*product*]'s fitness for a particular purpose]. To succeed, [*name of defendant*] **must prove:**

[*Insert one or more of the following:*]

[That the sale of the [*product*] included notice using words such as "with all faults," "as is," or other language that would have made a buyer aware that the [*product*] was being sold without any guarantees.]

[That, before entering into the contract, [*name of plaintiff*] examined the [product/sample/model] as fully as desired and that a complete examination would have revealed the [*product*]'s deficiency.]

[That [*name of plaintiff*] refused, after a demand by [*name of defendant*], to examine the [product/sample/model] and that such examination would have revealed the [*product*]'s deficiency.]

[That the parties' prior dealings, course of performance, or usage of trade had eliminated any implied representations.]

New September 2003

Sources and Authority

- *Commercial Code section 2316(2)* provides, in part: "Subject to subdivision (3), to exclude or modify the implied warranty of merchantability or any part of it the language must mention

merchantability and in case of a writing must be conspicuous"

- The Uniform Commercial Code Comment to this section states: "Disclaimer of the implied warranty of merchantability is permitted under subsection (2), but with the safeguard that such disclaimers must mention merchantability and in case of a writing must be conspicuous."

- In most cases, it appears that a jury would be instructed on this theory of disclaimer only if the alleged disclaimer was made orally: "Interpretation of a written document, where extrinsic evidence is unnecessary, is a question of law for the trial court to determine." (*Temple v. Velcro USA, Inc.* (1983) 148 Cal.App.3d 1090, 1095 [196 Cal.Rptr. 531] , internal citations omitted.)

- *Commercial Code section 2316(2)* also provides, in part: "Language to exclude all implied warranties of fitness is sufficient if it states, for example, that 'There are no warranties which extend beyond the description on the face hereof.' "

- The Uniform Commercial Code Comment to section 2316 states: "Unlike the implied warranty of merchantability, implied warranties of fitness for a particular purpose may be excluded by general language, but only if it is in writing and conspicuous." Accordingly, disclaimers of warranties for a particular purpose are probably issues for the court only. Section 1201(10) provides: "A term or clause is conspicuous when it is so written that a reasonable person against whom it is to operate ought to have noticed it. A printed heading in capitals (as: NONNEGOTIABLE BILL OF LADING) is conspicuous. Language in the body of a form is 'conspicuous' if it is in larger or other contrasting type or color. But in a telegram any stated term is 'conspicuous.' Whether a term or clause is 'conspicuous' or not is for decision by the court."

- The Uniform Commercial Code Comment to section 2316 observes that "oral language of disclaimer may raise issues of fact as to whether reliance by the buyer occurred and whether the seller had 'reason to know' under the section on implied warranty of fitness for a particular purpose."

- "A disclaimer of warranties must be specifically bargained for so that a disclaimer in a warranty given to the buyer *after* he signs the contract is *not* binding." (*Dorman v. International Harvester Co.* (1975) 46 Cal.App.3d 11, 19-20 [120 Cal.Rptr. 516] .)

- "[A]ny disclaimer or modification must be strictly construed against the seller." (*Hauter v. Zogarts* (1975) 14 Cal.3d 104, 119 [120 Cal.Rptr. 681, 534 P.2d 377] .)

- *Commercial Code section 2316(3)* provides:

Notwithstanding subdivision (2)

(a) Unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like "as is," "with all faults" or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty; and

(b) When the buyer before entering into the contract has examined the goods or the sample or model as fully as he desired or has refused to examine the goods there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to him; and

(c) An implied warranty can also be excluded or modified by course of dealing or course

of performance or usage of trade.

■ The Uniform Commercial Code Comment to section 2316 states that the three exceptions listed under subdivision (3) "are common factual situations in which the circumstances surrounding the transaction are in themselves sufficient to call the buyer's attention to the fact that no implied warranties are made or that a certain implied warranty is being excluded."

■ The Uniform Commercial Code comment to section 2316 states: "Paragraph (a) of subsection (3) deals with general terms such as 'as is,' 'as they stand,' 'with all faults,' and the like. Such terms in ordinary commercial usage are understood to mean that the buyer takes the entire risk as to the quality of the goods involved."

■ The Uniform Commercial Code comment to section 2316 states: "In order to bring the transaction within the scope of 'refused to examine' in paragraph (b), it is not sufficient that the goods are available for inspection. There must in addition be a demand by the seller that the buyer examine the goods fully."

■ The Uniform Commercial Code comment to section 2316 states: "The particular buyer's skill and the normal method of examining goods in the circumstances determine what defects are excluded by the examination."

■ "Interpretation of a written document, where extrinsic evidence is unnecessary, is a question of law for the trial court to determine." (*Temple, supra*, 148 Cal.App.3d at p. 1095 , internal citations omitted.)

Secondary Sources

California Products Liability Actions, Ch. 8, Defenses, § 8.07 (Matthew Bender)

44 *California Forms of Pleading and Practice, Ch. 502, Sales: Warranties, § 502.24* (Matthew Bender)

Publisher's Notes

This instruction covers issues presented in BAJI Nos. 9.72 and 9.81.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Contracts Law Sales of Goods Warranties Exclusion & Modification Contracts Law Sales of Goods Warranties Merchantability Torts Products Liability Breach of Warranty



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CHAPTER 12 California Judicial Council Products Liability Instructions

2-12 California Forms of Jury Instruction CACI 1243

CACI 1243 Notification/Reasonable Time

If a buyer is required to notify the seller that a product [is not as represented] [does not have the expected quality] [is not suitable] [is in a harmful condition], [he/she/it] must do so within a reasonable time after [he/she/it] discovers or should have discovered this. A reasonable time depends on the circumstances of the case. In determining whether notice was given within a reasonable time, you must apply a more relaxed standard to a retail consumer than you would to a merchant buyer. A buyer notifies a seller by taking such steps as may be reasonably required to inform the seller [regardless of whether the seller actually receives the notice].

New September 2003

Sources and Authority

- *Commercial Code section 2607(3)* provides: "Where a tender has been accepted [t]he buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy."
- *Commercial Code section 1202(d)* defines "notification" as follows: "A person 'notifies' or 'gives' a notice or notification to another person by taking such steps as may be reasonably required to inform the other person in ordinary course, whether or not the other person actually comes to know of it."
- *Commercial Code section 1205(a)* provides: "Whether a time for taking an action required by this code is reasonable depends on the nature, purpose, and circumstances of the action."
- The Uniform Commercial Code comment to section 2-607(4) states: "The time of notification is to be determined by applying commercial standards to a merchant buyer. 'A reasonable time' for

notification from a retail consumer is to be judged by different standards so that in his case it will be extended, for the rule of requiring notification is designed to defeat commercial bad faith, not to deprive a good faith consumer of his remedy. [P] The content of the notification need merely be sufficient to let the seller know that the transaction is still troublesome and must be watched. There is no reason to require that the notification which saves the buyer's rights under this section must include a clear statement of all the objections that will be relied on by the buyer, as under the section covering statements of defects upon rejection (Section 2-605). Nor is there reason for requiring the notification to be a claim for damages or of any threatened litigation or other resort to a remedy. The notification which saves the buyer's rights under this Article need only be such as informs the seller that the transaction is claimed to involve a breach, and thus opens the way for normal settlement through negotiation."

- A plaintiff is not required to prove that he or she gave notice of a breach of warranty in personal injury and property damage lawsuits against a manufacturer or another supplier with whom the plaintiff has not directly dealt. (*Greenman v. Yuba Power Products, Inc.* (1963) 59 Cal.2d 57, 61 [27 Cal.Rptr. 697, 377 P.2d 897] ; *Ghera v. Ford Motor Co.* (1966) 246 Cal.App.2d 639, 652-653 [55 Cal.Rptr. 94] .)

- Notice is more likely to be required in disputes between merchants. (See *Fieldstone Co. v. Briggs Plumbing Products, Inc.* (1997) 54 Cal.App.4th 357, 369-370 [62 Cal.Rptr.2d 701] .)

- When required, notice must be pleaded and proved. (*Vogel v. Thrifty Drug Co.* (1954) 43 Cal.2d 184, 188 [272 P.2d 1] .)

- The purpose of the demand for notice is to protect the seller from stale claims (*Whitfield v. Jessup* (1948) 31 Cal.2d 826, 828 [193 P.2d 1] ; *Metowski v. Traid Corp.* (1972) 28 Cal.App.3d 332, 339 [104 Cal.Rptr. 599]) and to give the defendant an opportunity to repair the defective item, reduce damages, improve products in the future, and negotiate settlements. (*Pollard v. Saxe & Yolles Development Co.* (1974) 12 Cal.3d 374, 380 [115 Cal.Rptr. 648, 525 P.2d 88] .)

Secondary Sources

California Products Liability Actions, Ch. 8, *Defenses*, § 8.07 (Matthew Bender)

44 *California Forms of Pleading and Practice*, Ch. 502, *Sales: Warranties*, §§ 502.28, 502.100 (Matthew Bender)

Publisher's Notes

This instruction covers issues presented in BAJI No. 9.90.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Contracts Law Defenses General Overview Torts Products Liability Breach of Warranty Torts Products Liability Plaintiff's Conduct



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CHAPTER 12 California Judicial Council Products Liability Instructions

2-12 California Forms of Jury Instruction CACI 1244

CACI 1244 Affirmative Defense--Sophisticated User

[*Name of defendant*] **claims that [he/she/it] is not responsible for any harm to [*name of plaintiff*] based on a failure to warn because [*name of plaintiff*] is a sophisticated user of the [*product*]. To succeed on this defense, [*name of defendant*] must prove that, at the time of the injury, [*name of plaintiff*], because of [his/her] particular position, training, experience, knowledge, or skill, knew or should have known of the [*product*]'s risk, harm, or danger.**

New October 2008

Directions for Use

Give this instruction as a defense to *CACI No. 1205, Strict Liability--Failure to Warn--Essential Factual Elements*, or *CACI No. 1222, Negligence--Manufacturer or Supplier--Duty to Warn--Essential Factual Elements*.

Sources and Authority

- "A manufacturer is not liable to a sophisticated user of its product for failure to warn of a risk, harm, or danger, if the sophisticated user knew or should have known of that risk, harm, or danger." (*Johnson v. American Standard, Inc.* (2008) 43 Cal.4th 56, 71 [74 Cal.Rptr.3d 108, 179 P.3d 905] .)
- "The sophisticated user defense exempts manufacturers from their typical obligation to provide product users with warnings about the products' potential hazards. The defense is considered an exception to the manufacturer's general duty to warn consumers, and therefore, in most jurisdictions, if successfully argued, acts as an affirmative defense to negate the manufacturer's duty to warn." (*Johnson*,

supra, 43 Cal.4th at p. 65 , internal citation omitted.)

■ "Under the sophisticated user defense, sophisticated users need not be warned about dangers of which they are already aware or should be aware. Because these sophisticated users are charged with knowing the particular product's dangers, the failure to warn about those dangers is not the legal cause of any harm that product may cause. The rationale supporting the defense is that 'the failure to provide warnings about risks already known to a sophisticated purchaser usually is not a proximate cause of harm resulting from those risks suffered by the buyer's employees or downstream purchasers.' This is because the user's knowledge of the dangers is the equivalent of prior notice." (*Johnson, supra*, 43 Cal.4th at p. 65 , internal citations omitted.)

■ "[T]he defense applies equally to strict liability and negligent failure to warn cases. The duty to warn is measured by what is generally known or should have been known to the class of sophisticated users, rather than by the individual plaintiff's subjective knowledge." (*Johnson, supra*, 43 Cal.4th at pp. 65-66 , internal citations omitted.)

■ "[A] manufacturer is not liable to a sophisticated user for failure to warn, even if the failure to warn is a failure to provide a warning required by statute." (*Johnson v. Honeywell Internat. Inc.* (2009) 179 Cal.App.4th 549, 556 [101 Cal.Rptr.3d 726] .)

■ "The sophisticated user defense concerns warnings. Sophisticated users 'are charged with knowing the particular product's dangers.' The rationale supporting the defense is that 'the failure to provide warnings about risks already known to a sophisticated purchaser usually is not a proximate cause of harm resulting from those risks suffered by the buyer's employees or downstream purchasers.' [Citation.]' [P] [Plaintiff]'s design defect cause of action was not concerned with warnings. Instead, he alleged that respondents' design of their refrigerant was defective. We see no logical reason why a defense that is based on the need for warning should apply." (*Johnson, supra*, 179 Cal.App.4th at p. 559 , internal citations omitted.)

■ "The relevant time for determining user sophistication for purposes of this exception to a manufacturer's duty to warn is when the sophisticated user is injured and knew or should have known of the risk." (*Johnson, supra*, 43 Cal.4th at p. 73 .)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1467, 1537, 1541-1542

40 *California Forms of Pleading and Practice*, Ch. 460, *Products Liability*, § 460.185 (Matthew Bender)

19 *California Points and Authorities*, Ch. 190, *Products Liability*, § 190.246 (Matthew Bender)

Publisher's Notes

There is no BAJI instruction on this subject.



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CHAPTER 12 California Judicial Council Products Liability Instructions

2-12 California Forms of Jury Instruction CACI 1245

CACI 1245 Affirmative Defense--Product Misuse or Modification

[*Name of defendant*] **claims that [he/she/it] is not responsible for [*name of plaintiff*]'s claimed harm because the [*product*] was [misused/ [or] modified] after it left [*name of defendant*]'s possession. To succeed on this defense, [*name of defendant*] must prove that:**

- 1. The [*product*] was [misused/ [or] modified] after it left [*name of defendant*]'s possession;**
- 2. That the [misuse/ [or] modification] was not reasonably foreseeable to [*name of defendant*]; and**
- 3. That the [misuse/ [or] modification] was the sole cause of [*name of plaintiff*]'s harm.**

New April 2009; Revised December 2009

Directions for Use

Give this instruction if the defendant claims a complete defense to strict product liability because the product was misused or modified after it left the defendant's possession and control, and the subsequent misuse or modification was so unforeseeable that it should be deemed the sole or superseding cause. If misuse or modification was a substantial factor contributing to, but not the sole or superseding cause of, plaintiff's harm, there is no complete defense, but the conduct of the plaintiff or of third parties may be considered under principles of comparative negligence or fault. (See *Torres v. Xomox Corp.* (1996) 49 Cal.App.4th 1, 15-21 [56 Cal.Rptr.2d 455] .) See CACI No. 1207A, *Strict Liability--Comparative Fault of Plaintiff*, and CACI No. 1207B, *Strict Liability--Comparative Fault of Third Person*.

Sources and Authority

■ "[T]he law now requires a manufacturer to foresee some degree of misuse and abuse of his product, either by the user or by third parties, and to take reasonable precautions to minimize the harm that may result from misuse and abuse. ... [T]he extent to which designers and manufacturers of dangerous machinery are required to anticipate safety neglect presents an issue of fact. ... [A] manufacturer owes a foreseeable user of its product a duty to warn of risks of using the product." (*Wright v. Stang Mfg. Co.* (1997) 54 Cal.App.4th 1218, 1235 [63 Cal.Rptr.2d 422] .)

■ "[P]roduct misuse [is] a defense to strict products liability only when the defendant prove[s] that an unforeseeable abuse or alteration of the product after it left the manufacturer's hands was the sole reason that the product caused injury." (*Campbell v. Southern Pacific Co.* (1978) 22 Cal.3d 51, 56 [148 Cal.Rptr. 596, 583 P.2d 121] , original italics, internal citations omitted.)

■ "[S]trict liability should not be imposed upon a manufacturer when injury results from a use of its product that is not reasonably foreseeable." (*Cronin v. J.B.E. Olson Corp.* (1972) 8 Cal.3d 121, 126 [104 Cal.Rptr. 433, 501 P.2d 1153] .)

■ "'Misuse' is a defense only when that misuse is the actual cause of the plaintiff's injury, not when some other defect produces the harm. This causation is one of the elements of the 'misuse' affirmative defense and thus the burden falls on the defendant to prove it." (*Huynh v. Ingersoll-Rand* (1993) 16 Cal.App.4th 825, 831 [20 Cal.Rptr.2d 296] , internal citation omitted.)

■ "[Defendant] further contends that [plaintiff]'s injuries arose not from a defective product, but rather, from his parents' modification of the product or their negligent supervision of its use. These arguments cannot be advanced by demurrer. Creation of an unreasonable risk of harm through product modification or negligent supervision is not clearly established on the face of [plaintiff]'s complaint. Instead, these theories must be pled as affirmative defenses." (*Williams v. Beechnut Nutrition Corp.* (1986) 185 Cal.App.3d 135, 141 [229 Cal.Rptr. 605] .)

■ "[T]here are cases in which the modification of a product has been determined to be so substantial and unforeseeable as to constitute a superseding cause of an injury as a matter of law. However, foreseeability is a question for the jury unless undisputed facts leave no room for a reasonable difference of opinion. Thus, the issue of superseding cause is generally one of fact. Superseding cause has been viewed as an issue of fact even in cases where 'safety neglect' by an employer has increased the risk of injury, or modification of the product has made it more dangerous." (*Torres, supra*, 49 Cal.App.4th at p. 19 , internal citations omitted.)

Secondary Sources

Witkin, Summary of California Law (10th ed. 2005) Torts, § 1530

California Product Liability Actions, Ch. 2, *Liability for Defective Products*, § 2.13[4] (Matthew Bender)

40 *California Forms of Pleading and Practice*, Ch. 460, *Products Liability*, § 460.183 (Matthew Bender)

19 *California Points and Authorities*, Ch. 190, *Products Liability*, § 190.201 (Matthew Bender)

Publisher's Notes

There is no BAJI instruction on this subject.



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CHAPTER 12 California Judicial Council Products Liability Instructions

2-12 California Forms of Jury Instruction CACI 1246

CACI 1246 Affirmative Defense--Design Defect--Government Contractor

[*Name of defendant*] **may not be held liable for design defects in the [*product*] if it proves all of the following:**

- 1. That [*name of defendant*] contracted with the United States government to provide the [*product*] for military use;**
- 2. That the United States approved reasonably precise specifications for the [*product*];**
- 3. That the [*product*] conformed to those specifications; and**
- 4. That [*name of defendant*] warned the United States about the dangers in the use of the [*product*] that were known to [*name of defendant*] but not to the United States.**

New June 2010

Directions for Use

This instruction is for use if the defendant's product whose design is challenged was provided to the United States government for military use. The essence of the defense is that the plaintiff should not be able to impose on a government contractor a duty under state law that is contrary to the duty imposed by the government contract. (See *Boyle v. United Technologies Corp.* (1988) 487 U.S. 500, 508-509 [108 S.Ct. 2510, 101 L.Ed.2d 442] .) It has been stated that the defense is not limited to military contracts (see *Oxford v. Foster Wheeler LLC* (2009) 177 Cal.App.4th 700, 710 [99 Cal.Rptr.3d 418]), though no California court has expressly so held. There would appear to be no policy reason why this defense should be limited to military contracts.

Different standards and elements apply in a failure-to-warn case. This instruction must be modified for use in such a case. (See *Oxford, supra*, 177 Cal.App.4th at p. 712 ; *Butler v. Ingalls Shipbuilding* (9th Cir. 1996) 89 F.3d 582, 586 .)

Sources and Authority

- "The [United States] Supreme Court noted that in areas of ' "uniquely federal interests" ' state law may be preempted or displaced by federal law, and that civil liability arising from the performance of federal procurement contracts is such an area. The court further determined that preemption or displacement of state law occurs in an area of uniquely federal interests only where a ' "significant conflict" ' exists between an identifiable federal policy or interest and the operation of state law. The court concluded that 'state law which holds Government contractors liable for design defects in military equipment does in some circumstances present a "significant conflict" with federal policy and must be displaced.' " (*Oxford, supra*, 177 Cal.App.4th at p. 708 , quoting *Boyle, supra*, 487 U.S. at pp. 500 , 504, 507, 512.)

- "Liability for design defects in military equipment cannot be imposed, pursuant to state law, when (1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States. The first two of these conditions assure that the suit is within the area where the policy of the 'discretionary function' would be frustrated--i.e., they assure that the design feature in question was considered by a Government officer, and not merely by the contractor itself. The third condition is necessary because, in its absence, the displacement of state tort law would create some incentive for the manufacturer to withhold knowledge of risks, since conveying that knowledge might disrupt the contract but withholding it would produce no liability. We adopt this provision lest our effort to protect discretionary functions perversely impede them by cutting off information highly relevant to the discretionary decision." (*Boyle, supra*, 487 U.S. at pp. 512-513 .)

- "[T]he fact that a company supplies goods to the military does not, in and of itself, immunize it from liability for the injuries caused by those goods. Where the goods ordered by the military are those readily available, in substantially similar form, to commercial users, the military contractor defense does not apply." (*In re Hawaii Federal Asbestos Cases* (9th Cir. 1992) 960 F.2d 806, 811 .)

- "In our view, if a product is produced according to military specifications and used by the military because of particular qualities which serve a military purpose, and is incidentally sold commercially as well, that product may nonetheless still qualify as military equipment under the military contractor defense." (*Jackson v. Deft, Inc.* (1990) 223 Cal.App.3d 1305, 1319 [273 Cal.Rptr. 214] .)

- "While courts such as the court in *Hawaii* have sought to confine the government contractor defense to products that are made exclusively for the military, we agree with the court in *Jackson* that this limitation is unduly confining. Though the court in *Boyle* discussed the parameters of the contractor defense in terms of 'military equipment,' use of that term appears to have followed from the facts of that case. Other courts considering this issue have concluded the defense is not limited to military contracts. ... [Boyle's] application focuses instead on whether the issue or area is one involving 'uniquely federal interests' and, if so, whether the application of state law presents a 'significant conflict' with federal policy." (*Oxford, supra*, 177 Cal.App.4th at p. 710 ; the split on this issue in the federal and other state courts is noted in *Carley v. Wheeled Coach* (3d Cir. 1993) 991 F.2d 1117, 1119, fn. 1 .)

■ "[T]he Supreme Court in *Boyle* did not expressly limit its holding to products liability causes of action. Thus, the government contractor defense is applicable to related negligence claims." (*Oxford, supra*, 177 Cal.App.4th at p. 711 .)

■ "In a failure-to-warn action, where no conflict exists between requirements imposed under a federal contract and a state law duty to warn, regardless of any conflict which may exist between the contract and state law design requirements, *Boyle* commands that we defer to the operation of state law." (*Butler, supra*, 89 F.3d at p. 586 .)

■ "The appellate court in *Tate* [*Tate v. Boeing Helicopters* (6th Cir. 1995) 55 F.3d 1150, 1156-1157] offered an alternative test for applying the government contractor defense in the context of failure to warn claims: 'When state law would otherwise impose liability for a failure to warn of dangers in using military equipment, that law is displaced if the contractor can show: (1) the United States exercised its discretion and approved the warnings, if any; (2) the contractor provided warnings that conformed to the approved warnings; and (3) the contractor warned the United States of the dangers in the equipment's use about which the contractor knew, but the United States did not.' " (*Oxford, supra*, 177 Cal.App.4th at p. 712 .)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, § 1538 1 *California Products Liability Actions, Ch. 8, Defenses*, § 8.05 (Matthew Bender) 2 Levy et al., *California Torts, Ch. 21, Aviation Tort Law*, § 21.02[6] (Matthew Bender) 2 *California Forms of Pleading and Practice, Ch. 16, Airplanes and Airports*, § 16.10[5] (Matthew Bender) 40 *California Forms of Pleading and Practice, Ch. 460, Products Liability*, § 460.104[23] (Matthew Bender)

Publisher's Notes

This instruction covers issues presented in BAJI No. 9.30.



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CHAPTER 12 California Judicial Council Products Liability Instructions

2-12 California Forms of Jury Instruction CACI 1247-CACI 1299

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CACI 1247Reserved for Future Use



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CHAPTER 12 California Judicial Council Products Liability Instructions

2-12 California Forms of Jury Instruction CACI VF-1200

CACI VF-1200 Strict Products Liability--Manufacturing Defect--Comparative Fault at Issue

We answer the questions submitted to us as follows:

1. Did [*name of defendant*] [manufacture/distribute/sell] the [*product*]?

_____ Yes _____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Did the [*product*] contain a manufacturing defect when it left [*name of defendant*]'s possession?

_____ Yes _____ No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Was the [*product*] used in a way that was reasonably foreseeable to [*name of defendant*]?

_____ Yes _____ No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Was the manufacturing defect a substantial factor in causing harm to [*name of plaintiff*]?

_____ Yes _____ No

If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. What are [*name of plaintiff*]'s damages? Do not reduce the damages based on the fault, if any, of [*name of plaintiff*] or [*name/description of other person*].

[a. Past economic loss

[lost earnings..... \$_____].....

[lost profits..... \$_____].....

[medical expenses..... \$_____].....

[other past economic loss..... \$_____].....

..... Total Past Economic Damages: \$_____]

[b. Future economic loss

[lost earnings..... \$_____].....

[lost profits..... \$_____].....

[medical expenses..... \$_____].....

[other future economic loss..... \$_____].....

..... Total Future Economic Damages: \$_____]

[c. Past noneconomic loss, including [physical pain/mental suffering:]..... \$_____]

[d. Future noneconomic loss, including [physical pain/mental suffering:]..... \$_____]

..... TOTAL \$_____

If [*name of plaintiff*] has proved any damages, answer question 6. If [*name of plaintiff*] has not proved any damages, then stop here, answer no further questions, and have the presiding juror sign and date this form.

6. Was [*name of plaintiff*] negligent?

_____ Yes _____ No

If your answer to question 6 is yes, then answer question 7. If you answered no, insert the number zero next to [*name of plaintiff*]'s name in question 10 and answer question 8.

7. Was [*name of plaintiff*]'s negligence a substantial factor in causing [his/her] harm?

_____ Yes _____ No

If your answer to question 7 is yes, then answer question 8. If you answered no, insert the number zero next to [*name of plaintiff*]'s name in question 10 and answer question 8.

8. Was [*name/description of other person*] negligent?

_____ Yes _____ No

If your answer to question 8 is yes, then answer question 9. If you answered no, insert the number zero next to [*name/description of other person*]'s name in question 10 and answer question 10.

9. Was [*name/description of other person*]'s negligence a substantial factor in causing harm to [*name of plaintiff*]?

_____ Yes _____ No

If your answer to question 9 is yes, then answer question 10. If you answered no, insert the number zero next to [*name/description of other person*]'s name in question 10 and answer question 10.

10. What percentage of responsibility for [*name of plaintiff*]'s harm do you assign to:

[<i>Name of defendant</i>]:	_____ %
[<i>Name of plaintiff</i>]:	_____ %
[<i>Name/description of other person</i>]:	_____ %

TOTAL	100 %

Signed: _____

Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the [clerk/bailiff/judge].

New September 2003; Revised April 2007, April 2009, December 2009

Directions for Use

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on CACI No. 1201, *Strict Liability--Manufacturing Defect--Essential Factual Elements*, CACI No. 1207A, *Strict Liability--Comparative Fault of Plaintiff*, and CACI No. 1207B, *Strict Liability--Comparative Fault of Third Person*. If product misuse or modification is alleged as a complete defense, questions 2 and 3 of CACI No. VF-1201, *Strict Products Liability --Design Defect-- Consumer*

Expectation Test--Affirmative Defense--Misuse or Modification, may be included after question 1.

If the negligence or fault of more than one third person is alleged to have contributed to the plaintiff's injury, repeat questions 8 and 9.

If specificity is not required, users do not have to itemize all the damages listed in question 5. The breakdown is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

This form may be modified if the jury is being given the discretion under *Civil Code section 3288* to award prejudgment interest on specific losses that occurred prior to judgment.

Publisher's Notes

This verdict form covers issues presented in BAJI Nos. 16.10 and 16.12.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewTortsProducts LiabilityDesign DefectsTortsProducts LiabilityManufacturing DefectsTortsProducts LiabilityStrict Liability



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CHAPTER 12 California Judicial Council Products Liability Instructions

2-12 California Forms of Jury Instruction CACI VF-1201

CACI VF-1201 Strict Products Liability--Design Defect--Consumer Expectation Test--Affirmative Defense--Misuse or Modification

We answer the questions submitted to us as follows:

1. Did [*name of defendant*] [manufacture/distribute/sell] the [*product*]?

_____ Yes _____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Was the [*product*] [misused/ [or] modified] after it left [*name of defendant*]'s possession in a way that was not reasonably foreseeable to [him/her/it]?

_____ Yes _____ No

If your answer to question 2 is yes, then answer question 3. If you answered no, skip question 3 and answer question 4.

3. Was the [misuse/ [or] modification] the sole cause of [*name of plaintiff*]'s harm?

_____ Yes _____ No

If your answer to question 3 is no, then answer question 4. If you answered yes, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Did the [*product*] fail to perform as safely as an ordinary consumer would have expected?

_____ Yes _____ No

If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. Was the [*product*] used in a way that was reasonably foreseeable to [*name of defendant*]?

_____ Yes _____ No

If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. Was the [*product*]'s design a substantial factor in causing harm to [*name of plaintiff*]?

_____ Yes _____ No

If your answer to question 6 is yes, then answer question 7. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

7. What are [*name of plaintiff*]'s damages?

[a. Past economic loss

[lost earnings..... \$_____]

[lost profits..... \$_____]

[medical expenses..... \$_____]

[other past economic loss..... \$_____]

..... **Total Past Economic Damages: \$_____]**

[b. Future economic loss

[lost earnings..... \$_____]

[lost profits..... \$_____]

[medical expenses..... \$_____]

[other future economic loss..... \$_____]

..... **Total Future Economic Damages: \$_____]**

[c. Past noneconomic loss, including [physical pain/mental suffering:]..... \$_____]

[d. Future noneconomic loss, including [physical
pain/mental suffering:]..... \$_____]

..... TOTAL \$_____

Signed: _____
Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the
[clerk/bailiff/judge].

New September 2003; Revised October 2004, April 2007, April 2009

Directions for Use

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on *CACI No. 1203, Strict Liability --Design Defect-- Consumer Expectation Test--Essential Factual Elements*, and *CACI No. 1245, Affirmative Defense--Product Misuse or Modification*. If the comparative fault or negligence of the plaintiff or of third persons is at issue, questions 6 through 10 of *CACI No. VF-1200, Strict Products Liability--Manufacturing Defect--Comparative Fault at Issue*, may be added at the end.

If specificity is not required, users do not have to itemize all the damages listed in question 7. The breakdown is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form. However, do not combine this verdict form with *CACI No. VF-1202, Strict Products Liability --Design Defect-- Risk-Benefit Test*. The verdict forms must make it clear to the jury that the two tests are alternative theories of liability (*Bracisco v. Beech Aircraft Corp. (1984) 159 Cal.App.3d 1101, 1106-1107 [206 Cal.Rptr. 431]*) and that the burden shifting to the defendant to prove that the benefits outweigh the risks does not apply to the consumer-expectation test.

This form may be modified if the jury is being given the discretion under *Civil Code section 3288* to award prejudgment interest on specific losses that occurred prior to judgment.

Publisher's Notes

This verdict form covers issues presented in BAJI No. 16.10.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Verdicts Special Verdicts Torts Products Liability Design Defects Torts Products Liability Strict Liability



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CHAPTER 12 California Judicial Council Products Liability Instructions

2-12 California Forms of Jury Instruction CACI VF-1202

CACI VF-1202 Strict Products Liability--Design Defect--Risk-Benefit Test

We answer the questions submitted to us as follows:

1. Did [*name of defendant*] [manufacture/distribute/sell] the [*product*]?

_____ Yes _____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Was the [*product*] used in a way that was reasonably foreseeable to [*name of defendant*]?

_____ Yes _____ No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Was the [*product*]'s design a substantial factor in causing harm to [*name of plaintiff*]?

_____ Yes _____ No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Did the risks of the [*product*]'s design outweigh the benefits of the design?

_____ Yes _____ No

If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. What are [*name of plaintiff*]'s damages?

[a. Past economic loss

[lost earnings..... \$_____].....

[lost profits..... \$_____].....

[medical expenses..... \$_____].....

[other past economic loss..... \$_____].....

..... Total Past Economic Damages: \$_____]

[b. Future economic loss

[lost earnings..... \$_____].....

[lost profits..... \$_____].....

[medical expenses..... \$_____].....

[other future economic loss..... \$_____].....

..... Total Future Economic Damages: \$_____]

[c. Past noneconomic loss, including [physical pain/mental suffering:]..... \$_____]

[d. Future noneconomic loss, including [physical pain/mental suffering:]..... \$_____]

..... TOTAL \$_____

Signed: _____

Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the [clerk/bailiff/judge].

Directions for Use

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on *CACI No. 1204, Strict Liability --Design Defect-- Risk-Benefit Test --Essential Factual Elements-- Shifting Burden of Proof*. If product misuse or modification is alleged as a complete defense, questions 2 and 3 of *CACI No. VF-1201, Strict Products Liability --Design Defect--Consumer Expectation Test--Affirmative Defense--Misuse or Modification*, may be included after question 1. If the comparative fault or negligence of the plaintiff or of third persons is at issue, questions 6 through 10 of *CACI No. VF-1200, Strict Products Liability--Manufacturing Defect--Comparative Negligence at Issue*, may be added at the end.

If specificity is not required, users do not have to itemize all the damages listed in question 6. The breakdown is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form. However, do not combine this verdict form with *CACI No. VF-1201, Strict Products Liability --Design Defect-- Consumer Expectation Test--Affirmative Defense--Misuse or Modification*. The verdict forms must make it clear to the jury that the two tests are alternative theories of liability (*Bracisco v. Beech Aircraft Corp. (1984) 159 Cal.App.3d 1101, 1106-1107 [206 Cal.Rptr. 431]*) and that the burden shifting to the defendant to prove that the benefits outweigh the risks does not apply to the consumer-expectation test.

This form may be modified if the jury is being given the discretion under *Civil Code section 3288* to award prejudgment interest on specific losses that occurred prior to judgment.

Publisher's Notes

This verdict form covers issues presented in BAJI No. 16.10.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Verdicts Special Verdicts Torts Products Liability Design Defects Torts Products Liability Strict Liability



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California Forms of Jury Instruction

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CHAPTER 12 California Judicial Council Products Liability Instructions

2-12 California Forms of Jury Instruction CACI VF-1203

CACI VF-1203 Strict Products Liability--Failure to Warn

We answer the questions submitted to us as follows:

1. Did [name of defendant] [manufacture/distribute/sell] the [product]?

_____ Yes _____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Did the [product] have potential [risks/side effects/allergic reactions] that were [known] [or] [knowable through the use of scientific knowledge available] at the time of [manufacture/distribution/sale]?

_____ Yes _____ No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Did the potential [risks/side effects/allergic reactions] present a substantial danger to users of the [product]?

_____ Yes _____ No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Would ordinary consumers have recognized the potential [risks/side effects/allergic reactions]?

_____ Yes _____ No

If your answer to question 4 is no, then answer question 5. If you answered yes, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. Did [*name of defendant*] fail to adequately warn [or instruct] of the potential [risks/side effects/allergic reactions]?

_____ Yes _____ No

If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. Was the [*product*] used in a way that was reasonably foreseeable to [*name of defendant*]?

_____ Yes _____ No

If your answer to question 6 is yes, then answer question 7. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

7. Was the lack of sufficient [instructions] [or] [warnings] a substantial factor in causing harm to [*name of plaintiff*]?

_____ Yes _____ No

If your answer to question 7 is yes, then answer question 8. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

8. What are [*name of plaintiff*]'s damages?**[a. Past economic loss**

[lost earnings..... \$_____].....

[lost profits..... \$_____].....

[medical expenses..... \$_____].....

[other past economic loss..... \$_____].....

..... Total Past Economic Damages: \$_____]

[b. Future economic loss

[lost earnings..... \$_____].....

[lost profits..... \$_____].....

[medical expenses..... \$_____].....

[other future economic loss..... \$_____].....

..... Total Future Economic Damages: \$_____]

[c. Past noneconomic loss, including [physical
pain/mental suffering:]..... \$_____]

[d. Future noneconomic loss, including [physical
pain/mental suffering:]..... \$_____]

..... TOTAL \$_____

Signed: _____

Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the
[clerk/bailiff/judge].

New September 2003; Revised April 2007, April 2009

Directions for Use

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on *CACI No. 1205, Strict Liability--Failure to Warn--Essential Factual Elements*. If product misuse or modification is alleged as a complete defense, questions 2 and 3 of *CACI No. VF-1201, Strict Products Liability --Design Defect--Consumer Expectation Test--Affirmative Defense--Misuse or Modification*, may be included after question 1. If the comparative fault or negligence of the plaintiff or of third persons is at issue, questions 6 through 10 of *CACI No. VF-1200, Strict Products Liability--Manufacturing Defect--Comparative Negligence at Issue*, may be added at the end.

If specificity is not required, users do not have to itemize all the damages listed in question 8. The breakdown is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

This form may be modified if the jury is being given the discretion under *Civil Code section 3288* to award prejudgment interest on specific losses that occurred prior to judgment.

Publisher's Notes

This verdict form covers issues presented in BAJI No. 16.10.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsVerdictsSpecial VerdictsTortsProducts LiabilityDuty to WarnTortsProducts
LiabilityStrict Liability



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California Forms of Jury Instruction

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CHAPTER 12 California Judicial Council Products Liability Instructions

2-12 California Forms of Jury Instruction CACI VF-1204

CACI VF-1204 Products Liability--Negligence--Comparative Fault of Plaintiff at Issue

We answer the questions submitted to us as follows:

1. Did [*name of defendant*] [design/manufacture/supply/install/inspect/repair/rent] the [*product*]?

_____ Yes _____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Was [*name of defendant*] negligent in [designing/manufacturing/supplying/installing/inspecting/repairing/renting] the [*product*]?

_____ Yes _____ No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Was [*name of defendant*]'s negligence a substantial factor in causing harm to [*name of plaintiff*]?

_____ Yes _____ No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. What are [name of plaintiff]'s total damages? Do not reduce the damages based on the fault, if any, of [name of plaintiff].

[a. Past economic loss

[lost earnings..... \$ _____].....

[lost profits..... \$ _____].....

[medical expenses..... \$ _____].....

[other past economic loss..... \$ _____].....

..... **Total Past Economic Damages: \$ _____]**

[b. Future economic loss

[lost earnings..... \$ _____].....

[lost profits..... \$ _____].....

[medical expenses..... \$ _____].....

[other future economic loss..... \$ _____].....

..... **Total Future Economic Damages: \$ _____]**

[c. Past noneconomic loss, including [physical pain/mental suffering:]..... \$ _____]

[d. Future noneconomic loss, including [physical pain/mental suffering:]..... \$ _____]

..... **TOTAL \$ _____**

If [name of plaintiff] has proved any damages, answer question 5. If [name of plaintiff] has not proved any damages, then stop here, answer no further questions, and have the presiding juror sign and date this form.

5. Was [name of plaintiff] negligent?

_____ Yes _____ No

If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. Was [name of plaintiff]'s negligence a substantial factor in causing [his/her] harm?

_____ Yes _____ No

If your answer to question 6 is yes, then answer question 7. If you answered no, stop here, answer no further

questions, and have the presiding juror sign and date this form.

7. What percentage of responsibility for [*name of plaintiff*]'s harm do you assign to:

[*Name of defendant*]: _____ %

[*Name of plaintiff*]: _____ %

TOTAL **100 %**

Signed: _____

Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the [clerk/bailiff/judge].

New September 2003; Revised April 2007, December 2009

Directions for Use

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on *CACI No. 1220, Negligence--Essential Factual Elements*, and *CACI No. 405, Comparative Fault of Plaintiff*.

If specificity is not required, users do not have to itemize all the damages listed in question 4. The breakdown is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

This form may be modified if the jury is being given the discretion under *Civil Code section 3288* to award prejudgment interest on specific losses that occurred prior to judgment.

Publisher's Notes

This verdict form covers issues presented in BAJI No. 16.11.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Verdicts Special Verdicts Torts Products Liability Negligence Torts Products Liability Plaintiff's Conduct



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CHAPTER 12 California Judicial Council Products Liability Instructions

2-12 California Forms of Jury Instruction CACI VF-1205

CACI VF-1205 Products Liability--Negligent Failure to Warn

We answer the questions submitted to us as follows:

1. Did [name of defendant] [manufacture/distribute/sell] the [product]?

_____ Yes _____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Did [name of defendant] know or should [he/she/it] reasonably have known that the [product] was dangerous or was likely to be dangerous when used in a reasonably foreseeable manner?

_____ Yes _____ No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Did [name of defendant] know or should [he/she/it] reasonably have known that users would not realize the danger?

_____ Yes _____ No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Did [name of defendant] fail to adequately warn of the danger [or instruct on the safe use of] the [product]?

_____ Yes _____ No

If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. Would a reasonable [manufacturer/distributor/seller] under the same or similar circumstances have warned of the danger [or instructed on the safe use of] the [product]?

_____ Yes _____ No

If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. Was [name of defendant]'s failure to warn a substantial factor in causing harm to [name of plaintiff]?

_____ Yes _____ No

If your answer to question 6 is yes, then answer question 7. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

7. What are [name of plaintiff]'s damages?

[a. Past economic loss

[lost earnings..... \$_____].....

[lost profits..... \$_____].....

[medical expenses..... \$_____].....

[other past economic loss..... \$_____].....

..... **Total Past Economic Damages: \$_____]**

[b. Future economic loss

[lost earnings..... \$_____].....

[lost profits..... \$_____].....

[medical expenses..... \$_____].....

[other future economic loss..... \$_____].....

..... **Total Future Economic Damages: \$_____]**

[c. Past noneconomic loss, including [physical pain/mental suffering:]]..... \$_____]

[d. Future noneconomic loss, including [physical pain/mental suffering:]]..... \$_____]

..... **TOTAL \$_____**

Signed: _____

Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the [clerk/bailiff/judge].

New September 2003; Revised April 2007

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on *CACI No. 1222, Negligence--Manufacturer or Supplier--Duty to Warn--Essential Factual Elements*.

If specificity is not required, users do not have to itemize all the damages listed in question 7. The breakdown is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

This form may be modified if the jury is being given the discretion under *Civil Code section 3288* to award prejudgment interest on specific losses that occurred prior to judgment.

Publisher's Notes

This verdict form covers issues presented in BAJI No. 16.11.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Verdicts Special Verdicts Torts Products Liability Duty to Warn Torts Products Liability Negligence



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California Forms of Jury Instruction

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CHAPTER 12 California Judicial Council Products Liability Instructions

2-12 California Forms of Jury Instruction CACI VF-1206

CACI VF-1206 Products Liability--Express Warranty--Affirmative Defense--Not "Basis of Bargain"

We answer the questions submitted to us as follows:

1. Did [*name of defendant*] represent to [*name of plaintiff*] by a [statement of fact/promise/description/sample/model] that the [*product*] [*insert description of alleged express warranty*]?

_____ Yes _____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Did [*name of plaintiff*] rely on [*name of defendant*]'s [statement of fact/promise/description/sample/model] in deciding to [purchase/use] the [*product*]?

_____ Yes _____ No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Did the [*product*] fail to [perform] [or] [have the same quality] as represented?

_____ Yes _____ No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Was the failure of the [*product*] to [perform] [or] [meet the quality] as represented a substantial factor in causing harm to [*name of plaintiff*]?

_____ Yes _____ No

If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. What are [*name of plaintiff*]'s damages?

[a. Past economic loss

[lost earnings..... \$_____]

[lost profits..... \$_____]

[medical expenses..... \$_____]

[other past economic loss..... \$_____]

..... **Total Past Economic Damages: \$_____]**

[b. Future economic loss

[lost earnings..... \$_____]

[lost profits..... \$_____]

[medical expenses..... \$_____]

[other future economic loss..... \$_____]

..... **Total Future Economic Damages: \$_____]**

[c. Past noneconomic loss, including [physical pain/mental suffering:]..... \$_____]

[d. Future noneconomic loss, including [physical pain/mental suffering:]..... \$_____]

..... **TOTAL \$_____**

Signed: _____

Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the

[clerk/bailiff/judge].

New September 2003; Revised February 2005, April 2007

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

Under various circumstances, the plaintiff must also prove that he or she made a reasonable attempt to notify the defendant of the defect. Thus, where appropriate, the following question should be added prior to the question regarding the plaintiff's harm: "Did [*name of plaintiff*] take reasonable steps to notify [*name of defendant*] within a reasonable time that the [*product*] [was not/did not perform] as requested?"

This verdict form is based on *CACI No. 1230, Express Warranty--Essential Factual Elements*, and *CACI No. 1240, Affirmative Defense to Express Warranty--Not "Basis of Bargain."*

If specificity is not required, users do not have to itemize all the damages listed in question 5. The breakdown is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

This form may be modified if the jury is being given the discretion under *Civil Code section 3288* to award prejudgment interest on specific losses that occurred prior to judgment.

Do not include question 2 if the affirmative defense is not at issue.

Publisher's Notes

This verdict form covers issues presented in BAJI No. 16.13.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Verdicts Special Verdicts Contracts Law Defenses General Overview Contracts Law Sales of Goods Warranties Express Warranties Torts Products Liability Breach of Warranty



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CHAPTER 12 California Judicial Council Products Liability Instructions

2-12 California Forms of Jury Instruction CACI VF-1207

CACI VF-1207 Products Liability--Implied Warranty of Merchantability--Affirmative Defense--Exclusion of Implied Warranties

We answer the questions submitted to us as follows:

1. Did [*name of plaintiff*] buy the [*product*] from [*name of defendant*]?

_____ Yes _____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Was [*name of defendant*] in the business of selling these goods?

_____ Yes _____ No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Did the sale of the [*product*] include notice that would have made a buyer aware that it was being sold without any representations relating to the quality that a buyer would expect?

_____ Yes _____ No

If your answer to question 3 is no, then answer question 4. If you answered yes, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Was the [*product*] fit for the ordinary purposes for which such goods are used?

_____ Yes _____ No

If your answer to question 4 is no, then answer question 5. If you answered yes, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. Was the failure of the [*product*] to have the expected quality a substantial factor in causing harm to [*name of plaintiff*]?

_____ Yes _____ No

If your answer to question 5 is yes, then answer question 6. If you answered no stop here, answer no further questions, and have the presiding juror sign and date this form.

6. What are [*name of plaintiff*]'s damages?

[a. Past economic loss

[lost earnings..... \$ _____].....

[lost profits..... \$ _____].....

[medical expenses..... \$ _____].....

[other past economic loss..... \$ _____].....

..... Total Past Economic Damages: \$ _____]

[b. Future economic loss

[lost earnings..... \$ _____].....

[lost profits..... \$ _____].....

[medical expenses..... \$ _____].....

[other future economic loss..... \$ _____].....

..... Total Future Economic Damages: \$ _____]

[c. Past noneconomic loss, including [physical pain/mental suffering:]..... \$ _____]

[d. Future noneconomic loss, including [physical pain/mental suffering:]..... \$ _____]

..... TOTAL \$ _____

Signed: _____
Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the clerk/bailiff/judge].

New September 2003; Revised April 2007

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on *CACI No. 1231, Implied Warranty of Merchantability--Essential Factual Elements*, and *CACI No. 1242, Affirmative Defense--Exclusion of Implied Warranties*.

Under various circumstances, the plaintiff must also prove that he or she made a reasonable attempt to notify the defendant of the defect. Thus, where appropriate, the following question should be added prior to the question regarding the plaintiff's harm: "Did [*name of plaintiff*] take reasonable steps to notify [*name of defendant*] within a reasonable time that the [*product*] [was not/did not perform] as requested?"

If specificity is not required, users do not have to itemize all the damages listed in question 6. The breakdown is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

This form may be modified if the jury is being given the discretion under *Civil Code section 3288* to award prejudgment interest on specific losses that occurred prior to judgment.

Question 2 should be modified if the defendant held himself or herself out as having special knowledge or skill regarding the goods. Question 3 should be modified if a different ground of liability is asserted under *Commercial Code section 2314(2)*. Question 6 should be modified if the defendant is asserting other grounds under *Commercial Code section 2316(3)*. This form should also be modified if notification is an issue.

Do not include question 3 if the affirmative defense is not at issue.

Publisher's Notes

There is no BAJI verdict form on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Verdicts Special Verdicts Contracts Law Sales of Goods Warranties Exclusion & Modification Contracts Law Sales of Goods Warranties Merchantability Torts Products Liability Breach of Warranty



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CHAPTER 12 California Judicial Council Products Liability Instructions

2-12 California Forms of Jury Instruction CACI VF-1208

CACI VF-1208 Products Liability--Implied Warranty of Fitness for a Particular Purpose

We answer the questions submitted to us as follows:

1. Did [name of plaintiff] buy the [product] from [name of defendant]?

_____ Yes _____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. At the time of purchase, did [name of defendant] know or have reason to know that [name of plaintiff] intended to use the [product] for a particular purpose?

_____ Yes _____ No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. At the time of purchase, did [name of defendant] know that [name of plaintiff] was relying on [name of defendant]'s skill and judgment to select or furnish a product that was suitable for the particular purpose?

_____ Yes _____ No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Did [name of plaintiff] justifiably rely on [name of defendant]'s skill and judgment?

_____ Yes _____ No

If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. Was the [product] suitable for the particular purpose?

_____ Yes _____ No

If your answer to question 5 is no, then answer question 6. If you answered yes, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. Was the failure of the [product] to be suitable a substantial factor in causing harm to [name of plaintiff]?

_____ Yes _____ No

If your answer to question 6 is yes, then answer question 7. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

7. What are [name of plaintiff]'s damages?

[a. Past economic loss

[lost earnings..... \$_____].....

[lost profits..... \$_____].....

[medical expenses..... \$_____].....

[other past economic loss..... \$_____].....

..... **Total Past Economic Damages: \$_____]**

[b. Future economic loss

[lost earnings..... \$_____].....

[lost profits..... \$_____].....

[medical expenses..... \$_____].....

[other future economic loss..... \$_____].....

..... **Total Future Economic Damages: \$_____]**

[c. Past noneconomic loss, including [physical

pain/mental suffering:..... \$_____]

[d. Future noneconomic loss, including [physical
pain/mental suffering:..... \$_____]

..... TOTAL \$_____

Signed: _____

Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the [clerk/bailiff/judge].

New September 2003; Revised April 2007

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on *CACI No. 1232, Implied Warranty of Fitness for a Particular Purpose--Essential Factual Elements*.

If specificity is not required, users do not have to itemize all the damages listed in question 7. The breakdown is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

This form may be modified if the jury is being given the discretion under *Civil Code section 3288* to award prejudgment interest on specific losses that occurred prior to judgment.

Question 2 of this form should be modified if the defendant held himself or herself out as having special knowledge or skill regarding the goods. Question 3 should be modified if a different ground of liability is asserted under *Commercial Code section 2314(2)*. This form should also be modified if notification is an issue.

Publisher's Notes

This verdict form covers issues presented in BAJI No. 16.13.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Verdicts Special Verdicts Contracts Law Sales of Goods Warranties Fitness Torts Products Liability Breach of Warranty



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CHAPTER 12 California Judicial Council Products Liability Instructions

2-12 California Forms of Jury Instruction CACI VF-1209-CACI VF-1299

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CACI VF-1209Reserved for Future Use



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CHAPTER 13 California Judicial Council Assault and Battery Instructions

3-13 California Forms of Jury Instruction 13.syn

§ 13.syn Synopsis to Chapter 13: California Judicial Council Assault and Battery Instructions

CACI 1300 Battery--Essential Factual Elements

CACI 1301 Assault--Essential Factual Elements

CACI 1302 Consent Explained

CACI 1303 Invalid Consent

CACI 1304 Self-Defense/Defense of Others

CACI 1305 Battery by Peace Officer

CACI 1306 Sexual Battery--Essential Factual Elements

CACI 1307-CACI 1319 Reserved for Future Use

CACI 1320 Intent

CACI 1321 Transferred Intent

CACI 1322-CACI 1399 Reserved for Future Use

CACI VF-1300 Battery

CACI VF-1301 Battery--Self-Defense/Defense of Others at Issue

CACI VF-1302 Assault

CACI VF-1303 Battery by Peace Officer

CACI VF-1304-CACI VF-1399 Reserved for Future Use



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CHAPTER 13 California Judicial Council Assault and Battery Instructions

3-13 California Forms of Jury Instruction Scope

Scope

SCOPE

This chapter contains the California Judicial Council's "Assault and Battery Series" of jury instructions [*CACI No. 1300 et seq.*]. The Judicial Council of California Civil Jury Instructions (CACI) included in this publication are the product of the Judicial Council of California Task Force on Jury Instructions, which are updated by the Judicial Council of California Advisory Committee on Civil Jury Instructions.

This chapter includes instructions on the following topics:

- The essential factual elements for a cause of action in battery [*CACI No. 1300*] and assault [*CACI No. 1301*].
- Consent explained [*CACI No. 1302*] and invalid consent [*CACI No. 1303*].
- Self-defense and the defense of others [*CACI No. 1304*].
- Battery by a peace officer [*CACI No. 1305*].
- Sexual battery [*CACI No. 1306*].
- The intent requirement and transferred intent [*CACI Nos. 1320, 1321*].

The assault and battery series also includes special verdict forms [*CACI Nos. VF-1300-VF-1303*].



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CHAPTER 13 California Judicial Council Assault and Battery Instructions

*3-13 California Forms of Jury Instruction CACI 1300***CACI 1300 Battery--Essential Factual Elements**

[*Name of plaintiff*] **claims that [*name of defendant*] committed a battery. To establish this claim, [*name of plaintiff*] must prove all of the following:**

- 1. That [*name of defendant*] [touched [*name of plaintiff*]] [or] [caused [*name of plaintiff*] to be touched] with the intent to harm or offend [him/her];**
- 2. That [*name of plaintiff*] did not consent to the touching; and**
- 3. That [*name of plaintiff*] was harmed [or offended] by [*name of defendant*]'s conduct; [and]**
- [4. That a reasonable person in [*name of plaintiff*]'s situation would have been offended by the touching.]**

New September 2003; Revised October 2004

Give the bracketed words in element 3 and the last bracketed element only if the offensive nature of the conduct is at issue. In most cases, it will be clear whether the alleged conduct was offensive. The offensive nature of the conduct will most likely not be at issue if the conduct was clearly harmful.

For a definition of "intent," see *CACI No. 1320, Intent*.

- "A battery is any intentional, unlawful and harmful contact by one person with the person of another. ... A harmful contact, intentionally done is the essence of a battery. A contact is 'unlawful' if it is

3-13 California Forms of Jury Instruction CACI 1300

unconsented to." (*Ashcraft v. King* (1991) 228 Cal.App.3d 604, 611 [278 Cal.Rptr. 900] , internal citations omitted.)

■ "A battery is a violation of an individual's interest in freedom from intentional, unlawful, harmful or offensive unconsented contacts with his or her person." (*Rains v. Superior Court* (1984) 150 Cal.App.3d 933, 938 [198 Cal.Rptr. 249] .)

■ "Although it is not incorrect to say that battery is an unlawful touching, ... it is redundant to use 'unlawful' in defining battery in a jury instruction, and may be misleading to do so without informing the jury what would make the conduct unlawful." (*Barouh v. Haberman* (1994) 26 Cal.App.4th 40, 45 [31 Cal.Rptr.2d 259] , internal citation omitted.)

■ "The crimes of assault and battery are intentional torts. In the perpetration of such crimes negligence is not involved. As between the guilty aggressor and the person attacked the former may not shield himself behind the charge that his victim may have been guilty of contributory negligence, for such a plea is unavailable to him." (*Bartosh v. Banning* (1967) 251 Cal.App.2d 378, 385 [59 Cal.Rptr. 382] .)

■ *Restatement Second of Torts, section 13* provides:

An actor is subject to liability to another for battery if

(a) he acts intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such a contact, and

(b) a harmful contact with the person of the other directly or indirectly results.

■ " 'It has long been established, both in tort and criminal law, that "the least touching" may constitute battery. In other words, force against the person is enough; it need not be violent or severe, it need not cause bodily harm or even pain, and it need not leave any mark.' " (*People v. Mansfield* (1988) 200 Cal.App.3d 82, 88 [245 Cal.Rptr. 800] , internal citations omitted.)

■ *Civil Code section 3515* provides: "He who consents to an act is not wronged by it."

■ "The element of lack of consent to the particular contact is an essential element of battery." (*Rains, supra*, 150 Cal.App.3d at p. 938 .)

■ "As a general rule, one who consents to a touching cannot recover in an action for battery. ... However, it is well-recognized a person may place conditions on the consent. If the actor exceeds the terms or conditions of the consent, the consent does not protect the actor from liability for the excessive act." (*Ashcraft, supra*, 228 Cal.App.3d at pp. 609-610 .)

■ "In an action for civil battery the element of intent is satisfied if the evidence shows defendant acted with a 'willful disregard' of the plaintiff's rights." (*Ashcraft, supra*, 228 Cal.App.3d at p. 613 , internal citation omitted.)

■ *Restatement Second of Torts, section 19* provides: "A bodily contact is offensive if it offends a reasonable sense of personal dignity."

■ " 'The usages of decent society determine what is offensive.' " (*Barouh, supra*, 26 Cal.App.4th at p. 46, fn. 5 , internal citation omitted.)

■ "Even though pushing a door cannot be deemed a harmful injury, the pushing of a door which was touching the

prosecutrix could be deemed an offensive touching and a battery is defined as a harmful or offensive touching." (*People v. Puckett* (1975) 44 Cal.App.3d 607, 614-615 [118 Cal.Rptr. 884] .)

■ " 'If defendant unlawfully aims at one person and hits another he is guilty of assault and battery on the party he hit, the injury being the direct, natural and probable consequence of the wrongful act.' " (*Singer v. Marx* (1956) 144 Cal.App.2d 637, 642 [301 P.2d 440] , internal citation omitted.)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 381-416

3 Levy et al., California Torts, Ch. 41, *Assault and Battery*, § 41.01[3] (Matthew Bender)

6 *California Forms of Pleading and Practice*, Ch. 58, *Assault and Battery*, § 58.13 (Matthew Bender)

2 California Points and Authorities, Ch. 21, *Assault and Battery* (Matthew Bender)

1 California Civil Practice: Torts (Thomson West) §§ 12:7-12:9

Publisher's Notes

This instruction replaces BAJI Nos. 7.50 and 7.51.

LexisNexis Matthew Bender Expert Practice Tip--Pleading Assault and Battery: Assault and battery causes of action should usually be pled in a case involving false arrest and/or imprisonment by security personnel. See *CACI No. 1400* for further elements. By *Dona Cohn-Payne*

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Torts Intentional Torts Assault & Battery Elements of Battery



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CHAPTER 13 California Judicial Council Assault and Battery Instructions

3-13 California Forms of Jury Instruction CACI 1301

CACI 1301 Assault--Essential Factual Elements

[*Name of plaintiff*] **claims that** [*name of defendant*] **assaulted** [him/her]. **To establish this claim,** [*name of plaintiff*] **must prove all of the following:**

1. That [*name of defendant*] **acted, intending to cause harmful [or offensive] contact;**

2. That [*name of plaintiff*] **reasonably believed that** [he/she] **was about to be touched in a harmful [or an offensive] manner;**

[or]

[1. That [*name of defendant*] **threatened to touch** [*name of plaintiff*] **in a harmful [or an offensive] manner;**

2. That it reasonably appeared to [*name of plaintiff*] **that** [*name of defendant*] **was about to carry out the threat;**

3. That [*name of plaintiff*] **did not consent to** [*name of defendant*]'s **conduct;**

4. That [*name of plaintiff*] **was harmed; and**

5. That [*name of defendant*]'s **conduct was a substantial factor in causing** [*name of plaintiff*]'s **harm.**

[A touching is offensive if it offends a reasonable sense of personal dignity.]

[Words alone do not amount to an assault.]

New September 2003; Revised October 2004, June 2005

For a definition of "intent," see *CACI No. 1320, Intent*. The last bracketed sentence should be read in cases in which there is a dispute as to whether the defendant's conduct involved more than words.

■ "'Generally speaking, an assault is a demonstration of an unlawful intent by one person to inflict immediate injury on the person of another then present.' A civil action for assault is based upon an invasion of the right of a person to live without being put in fear of personal harm." (*Lowry v. Standard Oil Co. of California* (1944) 63 Cal.App.2d 1, 6-7 [146 P.2d 57] , internal citation omitted.)

■ "The tort of assault is complete when the anticipation of harm occurs." (*Kiseskey v. Carpenters' Trust for Southern California* (1983) 144 Cal.App.3d 222, 232 [192 Cal.Rptr 492] .)

■ *Restatement Second of Torts, section 21* provides:

(1) An actor is subject to liability to another for assault if
(a) he acts intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such a contact, and

(b) the other is thereby put in such imminent apprehension.

(2) An action which is not done with the intention stated in Subsection (1, a) does not make the actor liable to the other for an apprehension caused thereby although the act involves an unreasonable risk of causing it and, therefore, would be negligent or reckless if the risk threatened bodily harm.

■ Words alone do not amount to an assault. (*Tomblinson v. Nobile* (1951) 103 Cal.App.2d 266, 269 [229 P.2d 97] .)

■ *Restatement Second of Torts, section 31* provides: "Words do not make the actor liable for assault unless together with other acts or circumstances they put the other in reasonable apprehension of an imminent harmful or offensive contact with his person."

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 381-416

3 Levy et al., California Torts, Ch. 41, *Assault and Battery*, § 41.01[4] (Matthew Bender)

6 *California Forms of Pleading and Practice*, Ch. 58, *Assault and Battery*, § 58.15 (Matthew Bender)

2 California Points and Authorities, Ch. 21, *Assault and Battery* (Matthew Bender)

1 California Civil Practice: Torts (Thomson West) §§ 12:3-12:6

Publisher's Notes

There is no BAJI instruction on this subject.

LexisNexis Matthew Bender Expert Practice Tip--Liability vs. Damages: *CACI No. 1301* appears to be an accurate instruction on the tort of assault. *CACI No. 1301* requires that a plaintiff prove that he or she was "harmed" to establish the cause of action. As a practical matter, this might be the hardest element to prove in an assault case. Thus, the "Tip" here is that there can be liability for the threat of offensive touching without actual contact, although there may be no actual damages. If that is the case, the plaintiff would be limited to recovery of nominal damages. Punitive damages may also be available if the plaintiff can prove by "clear and convincing" evidence that the assault occurred as a result of the defendant's oppression or malice. *By Joseph Devine*

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Torts Intentional Torts Assault & Battery Elements of Battery



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CHAPTER 13 California Judicial Council Assault and Battery Instructions

3-13 California Forms of Jury Instruction CACI 1302

CACI 1302 Consent Explained

A plaintiff may express consent by words or acts that are reasonably understood by another person as consent.

A plaintiff may also express consent by silence or inaction if a reasonable person would understand that the silence or inaction intended to indicate consent.

New September 2003

See *CACI No. 1303, Invalid Consent*, if there is an issue concerning the validity of plaintiff's consent.

■ *Restatement Second of Torts, section 892* provides:

(1) Consent is willingness in fact for conduct to occur. It may be manifested by action or inaction and need not be communicated to the actor.

(2) If words or conduct are reasonably understood by another to be intended as consent, they constitute apparent consent and are as effective as consent in fact.

■ *Civil Code section 3515* provides: "He who consents to an act is not wronged by it."

■ "The element of lack of consent to the particular contact is an essential element of battery." (*Rains v. Superior Court* (1984) 150 Cal.App.3d 933, 938 [198 Cal.Rptr. 249] .)

■ "Consent to an act, otherwise a battery, normally vitiates the wrong." (*Barbara A. v. John G.* (1983) 145

Cal.App.3d 369, 375 [193 *Cal.Rptr.* 422] .)

■ "As a general rule, one who consents to a touching cannot recover in an action for battery. ... However, it is well-recognized a person may place conditions on the consent. If the actor exceeds the terms or conditions of the consent, the consent does not protect the actor from liability for the excessive act." (*Ashcraft v. King* (1991) 228 *Cal.App.3d* 604, 609-610 [278 *Cal.Rptr.* 900] .)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 386-416

3 Levy et al., California Torts, Ch. 41, *Assault and Battery*, § 41.20 (Matthew Bender)

6 *California Forms of Pleading and Practice*, Ch. 58, *Assault and Battery*, § 58.91 (Matthew Bender)

2 California Points and Authorities, Ch. 21, *Assault and Battery* (Matthew Bender)

1 California Civil Practice: Torts (Thomson West) §§ 12:9, 12:18-12:19

Publisher's Notes

This instruction and *CACI 1303* replace BAJI No. 7.52.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Torts Intentional Torts Assault & Battery Defenses Torts Intentional Torts Assault & Battery Elements of Assault Torts Intentional Torts Assault & Battery Elements of Battery



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CHAPTER 13 California Judicial Council Assault and Battery Instructions

3-13 California Forms of Jury Instruction CACI 1303

CACI 1303 Invalid Consent

[Name of plaintiff] claims that [his/her] consent [was obtained by fraud/mistake/duress] [was obtained as a result of [his/her] incapacity] [or that [name of defendant]'s conduct went beyond the scope of [his/her] limited consent].

If [name of plaintiff] proves that [his/her] consent was [insert ground for vitiating consent, e.g., "obtained by fraud," "exceeded"], then you must find that [he/she] did not consent.

New September 2003

For instructions on fraud, mistake, and duress, see other instructions in the *Contracts* and *Fraud or Deceit* series.

■ *Restatement Second of Torts, section 892B* provides:

- (1) Except as stated in subsection (2), consent to conduct of another is effective for all consequences of the conduct and for the invasion of any interests resulting from it.
- (2) If the person consenting to the conduct of another is induced to consent by a substantial mistake concerning the nature of the invasion of his interests or the extent of the harm to be expected from it and the mistake is known to the other or is induced by the other's misrepresentation, the consent is not effective for the unexpected invasion or harm.
- (3) Consent is not effective if it is given under duress.

■ Consent may be invalidated if the act exceeds the scope of the consent or if the consent is fraudulently induced. (*Barbara A. v. John G.* (1983) 145 Cal.App.3d 369, 375 [193 Cal.Rptr. 422] .)

■ Liability may be found where a physician "intentionally deceive[s] another into submitting to otherwise offensive touching to achieve a nontherapeutic purpose known only to the physician." (*Rains v. Superior Court* (1984) 150 Cal.App.3d 933, 941 [198 Cal.Rptr. 249] .)

■ "As a general rule, one who consents to a touching cannot recover in an action for battery. ... However, it is well-recognized a person may place conditions on the consent. If the actor exceeds the terms or conditions of the consent, the consent does not protect the actor from liability for the excessive act." (*Ashcraft v. King* (1991) 228 Cal.App.3d 604, 609-610 [278 Cal.Rptr. 900] .)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 386-416

3 Levy et al., California Torts, Ch. 41, *Assault and Battery*, § 41.20 (Matthew Bender)

6 *California Forms of Pleading and Practice*, Ch. 58, *Assault and Battery*, §§ 58.57, 58.91 (Matthew Bender)

2 California Points and Authorities, Ch. 21, *Assault and Battery* (Matthew Bender)

1 California Civil Practice: Torts (Thomson West) §§ 12:9, 12:18-12:19

Publisher's Notes

This instruction and CACI 1302 replace BAJI No. 7.52.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Torts Intentional Torts Assault & Battery Defenses Torts Intentional Torts Assault & Battery Elements of Assault Torts Intentional Torts Assault & Battery Elements of Battery



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CHAPTER 13 California Judicial Council Assault and Battery Instructions

3-13 California Forms of Jury Instruction CACI 1304

CACI 1304 Self-Defense/Defense of Others

[*Name of defendant*] **claims that [he/she] is not responsible for [*name of plaintiff*]'s harm because [he/she] was acting in [self-defense/defense of another]. To succeed, [*name of defendant*] must prove both of the following:**

1. That [*name of defendant*] reasonably believed that [*name of plaintiff*] was going to harm [him/her/[*insert identification of other person*]]; and

2. That [*name of defendant*] used only the amount of force that was reasonably necessary to protect [himself/herself/[*insert identification of other person*]].

New September 2003

Sources and Authority

- *Civil Code section 50* provides, in part: "Any necessary force may be used to protect from wrongful injury the person or property of oneself, ... or member of one's family, or of a ward, servant, master, or guest."

- "Self-defense being an affirmative defense, it must, in a civil action, be established by the defendant by a preponderance of the evidence." (*Bartosh v. Banning* (1967) 251 Cal.App.2d 378, 386 [59 Cal.Rptr. 382] .)

- "The right to use force against another has long been limited by the condition that the force be no more than 'that which reasonably appears necessary, in view of all the circumstances of the case, to prevent the impending injury.' ' When the amount of force used is justifiable under the circumstances, it

is not willful and the actor may escape liability for intentionally injurious conduct that is otherwise actionable. But if force is applied in excess of that which is justified, the actor remains subject to liability for the damages resulting from the excessive use of force. ... When an alleged act of self-defense or defense of property is at issue, the question of what force was reasonable and justified is peculiarly one for determination by the trier of fact." (*Calvillo-Silva v. Home Grocery* (1998) 19 Cal.4th 714, 730-731 [80 Cal.Rptr.2d 506, 968 P.2d 65] , internal citations omitted.)

■ "The right of self-defense is not limited by actualities. The correct rule ... [is]: 'Generally ... , the force that one may use in self-defense is that which reasonably appears necessary, in view of all the circumstances of the case, to prevent the impending injury.' In emphasizing that the law of self-defense is a law of necessity courts should never lose sight of the fact that the necessity may be either real or apparent." (*Vaughn v. Jonas* (1948) 31 Cal.2d 586, 599-600 [191 P.2d 432] , internal citations omitted.)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 417-421, 423

3 Levy et al., *California Torts*, Ch. 41, Assault and Battery, § 41.21 (Matthew Bender)

6 *California Forms of Pleading and Practice*, Ch. 58, Assault and Battery, §§ 58.19 -58.20, 58.70 -58.71 (Matthew Bender)

2 *California Points and Authorities*, Ch. 21, Assault and Battery, § 21.40 et seq. (Matthew Bender)

1 California Civil Practice: Torts (Thomson West) §§ 12:20-12:21

Publisher's Notes

This instruction replaces BAJI No. 7.55.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Torts Intentional Torts Assault & Battery Defenses Torts Intentional Torts Assault & Battery Elements of Assault Torts Intentional Torts Assault & Battery Elements of Battery



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CHAPTER 13 California Judicial Council Assault and Battery Instructions

3-13 California Forms of Jury Instruction CACI 1305

CACI 1305 Battery by Peace Officer

[*Name of plaintiff*] **claims that [*name of defendant*] harmed [him/her] by using unreasonable force to [arrest [him/her]/prevent [his/her] escape/overcome [his/her] resistance/[*insert other applicable action*]]. To establish this claim, [*name of plaintiff*] must prove all of the following:**

- 1. That [*name of defendant*] intentionally touched [*name of plaintiff*] [or caused [*name of plaintiff*] to be touched];**
- 2. That [*name of defendant*] used unreasonable force to [arrest/prevent the escape of/overcome the resistance of/ *insert other applicable action*] [*name of plaintiff*];**
- 3. That [*name of plaintiff*] did not consent to the use of that force;**
- 4. That [*name of plaintiff*] was harmed; and**
- 5. That [*name of defendant*]'s use of unreasonable force was a substantial factor in causing [*name of plaintiff*]'s harm.**

[A/An] [*insert type of peace officer*] may use reasonable force to arrest or detain a person when he or she has reasonable cause to believe that that person has committed a crime. Even if the [*insert type of peace officer*] is mistaken, a person being arrested or detained has a duty not to use force to resist the [*insert type of peace officer*] unless the [*insert type of peace officer*] is using unreasonable force.

In deciding whether [*name of defendant*] used unreasonable force, you must determine the amount of force that would have appeared reasonable to [a/an] [*insert type of peace officer*] in [*name of defendant*]'s position under the same or similar circumstances. You should consider, among other factors, the following:

(a) The seriousness of the crime at issue;

(b) Whether [name of plaintiff] reasonably appeared to pose an immediate threat to the safety of [name of defendant] or others; and

(c) Whether [name of plaintiff] was actively resisting arrest or attempting to evade arrest.

[[A/An] [insert type of peace officer] who makes or attempts to make an arrest is not required to retreat or cease from his or her efforts because of the resistance or threatened resistance of the person being arrested.]

New September 2003

Directions for Use

Coerced consent is frequently an issue in these cases.

Sources and Authority

■ *California Penal Code section 835a* states: "Any peace officer, who has reasonable cause to believe that the person to be arrested has committed a public offense, may use reasonable force to effect the arrest, to prevent escape or to overcome resistance. A peace officer who makes or attempts to make an arrest need not retreat or desist from his efforts by reason of the resistance or threatened resistance of the person being arrested; nor shall such officer be deemed an aggressor or lose his right to self-defense by the use of reasonable force to effect the arrest or to prevent escape or to overcome resistance."

■ *California Penal Code section 834a* states: "If a person has knowledge, or by the exercise of reasonable care, should have knowledge, that he is being arrested by a peace officer, it is the duty of such person to refrain from using force or any weapon to resist such arrest."

■ A plaintiff bringing a battery action against a police officer has the burden of proving unreasonable force as an element of the tort. (*Edson v. City of Anaheim* (1998) 63 Cal.App.4th 1269, 1272 [74 Cal.Rptr.2d 614] .)

■ " ' "The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. ... [T]he question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation. ... ' ' In calculating whether the amount of force was excessive, a trier of fact must recognize that peace officers are often forced to make split-second judgments, in tense circumstances, concerning the amount of force required." (*Brown v. Ransweiler* (2009) 171 Cal.App.4th 516, 527-528 [89 Cal.Rptr.3d 801] , internal citations omitted.)

■ "A police officer's use of deadly force is reasonable if ' ' 'the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others.' ... ' ' (*Brown, supra*, 171 Cal.App.4th at p. 528 .)

■ "[T]here is no right to use force, reasonable or otherwise, to resist an unlawful detention" (*Evans v. City of Bakersfield* (1994) 22 Cal.App.4th 321, 333 [27 Cal.Rptr.2d 406] .)

■ "[E]xecution of an unlawful arrest or detention does not give license to an individual to strike or assault the officer unless excessive force is used or threatened; excessive force in that event triggers the individual's right of self-defense." (*Evans, supra*, 22 *Cal.App.4th* at p. 331 , internal citation omitted.)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, § 424

3 Levy et al., *California Torts*, Ch. 41, *Assault and Battery*, § 41.24 (Matthew Bender)

6 *California Forms of Pleading and Practice*, Ch. 58, *Assault and Battery*, §§ 58.22, 58.61, 58.92 (Matthew Bender)

2 *California Points and Authorities*, Ch. 21, *Assault and Battery*, § 21.20 *et seq.* (Matthew Bender)

1 California Civil Practice: Torts (Thomson West) § 12:22

Publisher's Notes

This instruction replaces BAJI No. 7.54.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Governments Local Governments Claims By & Against Torts Intentional Torts Assault & Battery Elements of Assault Torts Intentional Torts Assault & Battery Elements of Battery Torts Public Entity Liability Liability State Tort Claims Acts Employees



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CHAPTER 13 California Judicial Council Assault and Battery Instructions

3-13 California Forms of Jury Instruction CACI 1306

CACI 1306 Sexual Battery--Essential Factual Elements

[*Name of plaintiff*] **claims that** [*name of defendant*] **committed a sexual battery. To establish this claim, [*name of plaintiff*] must prove the following:**

1. [(a) That [*name of defendant*] intended to cause a harmful [or offensive] contact with [*name of plaintiff*]'s [sexual organ/anus/groin/buttocks/ [or] breast], and a sexually offensive contact with [*name of plaintiff*] resulted, either directly or indirectly;]

[OR]

[(b) That [*name of defendant*] intended to cause a harmful [or offensive] contact with [*name of plaintiff*] by use of [*name of defendant*]'s [sexual organ/anus/groin/buttocks/ [or] breast], and a sexually offensive contact with [*name of plaintiff*] resulted, either directly or indirectly;]

[OR]

[(c) That [*name of defendant*] caused an imminent fear of a harmful [or offensive] contact with [*name of plaintiff*]'s [sexual organ/anus/groin/buttocks/ [or] breast]/ [or] [*name of plaintiff*] by use of [*name of defendant*]'s [sexual organ/anus/groin/buttocks/ [or] breast]], and a sexually offensive contact with [*name of plaintiff*] resulted, either directly or indirectly;]

AND

2. That [*name of plaintiff*] did not consent to the touching; and

3. That [*name of plaintiff*] was harmed [or offended] by [*name of defendant*]'s conduct.

["Offensive contact" means contact that offends a reasonable sense of personal dignity.]

New October 2008

Directions for Use

Omit any of the options for element 1 that are not supported by the evidence. If more than one are at issue, include the word "OR" between them.

Give the bracketed words "or offensive" in element 1 and "or offended" in element 3 and include the optional last sentence if the offensive nature of the conduct is at issue. In most cases, it will be clear whether the alleged conduct was offensive. The offensive nature of the conduct will most likely not be at issue if the conduct was clearly harmful.

For a definition of "intent," see *CACI No. 1320, Intent*.

Sources and Authority

■ *Civil Code section 1708.5* provides:

(a) A person commits a sexual battery who does any of the following:

(1) Acts with the intent to cause a harmful or offensive contact with an intimate part of another, and a sexually offensive contact with that person directly or indirectly results.

(2) Acts with the intent to cause a harmful or offensive contact with another by use of his or her intimate part, and a sexually offensive contact with that person directly or indirectly results.

(3) Acts to cause an imminent apprehension of the conduct described in paragraph (1) or (2), and a sexually offensive contact with that person directly or indirectly results.

(b) A person who commits a sexual battery upon another is liable to that person for damages, including, but not limited to, general damages, special damages, and punitive damages.

(c) The court in an action pursuant to this section may award equitable relief, including, but not limited to, an injunction, costs, and any other relief the court deems proper.

(d) For the purposes of this section "intimate part" means the sexual organ, anus, groin, or buttocks of any person, or the breast of a female.

(e) The rights and remedies provided in this section are in addition to any other rights and remedies provided by law.

(f) For purposes of this section "offensive contact" means contact that offends a reasonable sense of personal dignity.

■ *Civil Code section 3515* provides: "He who consents to an act is not wronged by it."

3-13 California Forms of Jury Instruction CACI 1306

■ "A cause of action for sexual battery under *Civil Code section 1708.5* requires the batterer intend to cause a 'harmful or offensive' contact and the batteree suffer a 'sexually offensive contact.' Moreover, the section is interpreted to require that the batteree did not consent to the contact." (*Angie M. v. Superior Court* (1995) 37 Cal.App.4th 1217, 1225 [44 Cal.Rptr.2d 197] , internal citation omitted.)

■ "The element of lack of consent to the particular contact is an essential element of battery." (*Rains v. Superior Court* (1984) 150 Cal.App.3d 933, 938 [198 Cal.Rptr. 249] .)

■ "As a general rule, one who consents to a touching cannot recover in an action for battery. ... However, it is well-recognized a person may place conditions on the consent. If the actor exceeds the terms or conditions of the consent, the consent does not protect the actor from liability for the excessive act." (*Ashcraft v. King* (1991) 228 Cal.App.3d 604, 609-610 [278 Cal.Rptr. 900] .)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 381-416

3 Levy et al., *California Torts, Ch. 41, Assault and Battery, § 41.01[3]* (Matthew Bender)

6 *California Forms of Pleading and Practice, Ch. 58, Assault and Battery, §§ 58.27, 58.55* (Matthew Bender)

2 *California Points and Authorities, Ch. 21, Assault and Battery, § 21.27* (Matthew Bender)

1 California Civil Practice: Torts (Thomson West) §§ 12:7-12:9, 12:36-12:39

Publisher's Notes

This instruction replaces BAJI No. 7.56.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Governments Local Governments Claims By & Against Torts Intentional Torts Assault & Battery Elements of Assault Torts Intentional Torts Assault & Battery Elements of Battery Torts Public Entity Liability Liability State Tort Claims Acts Employees



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CHAPTER 13 California Judicial Council Assault and Battery Instructions

3-13 California Forms of Jury Instruction CACI 1307-CACI 1319

Reserved for Future Use

CACI 1307Reserved for Future Use



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CHAPTER 13 California Judicial Council Assault and Battery Instructions

3-13 California Forms of Jury Instruction CACI 1320

CACI 1320 Intent

[Name of defendant] acted intentionally if [he/she] intended to [insert facts, e.g., "assault [name of plaintiff]," "commit a battery"] or if [he/she] was substantially certain that the [insert facts, e.g., "assault," "battery"] would result from [his/her] conduct.

New September 2003

This instruction may be used to define intent for other intentional torts, where appropriate.

■ "In an action for civil battery the element of intent is satisfied if the evidence shows defendant acted with a 'willful disregard' of the plaintiff's rights." (*Ashcraft v. King* (1991) 228 Cal.App.3d 604, 613 [278 Cal.Rptr. 900] , internal citation omitted.)

■ "As a general rule, California law recognizes that '... every person is presumed to intend the natural and probable consequences of his acts.' Thus, a person who acts willfully may be said to intend ' " those consequences which (a) represent the very purpose for which an act is done (regardless of the likelihood of occurrence), or (b) are known to be substantially certain to result (regardless of desire).' " ' The same definition is applied to many intentional torts." (*Gomez v. Acquistapace* (1996) 50 Cal.App.4th 740, 746 [57 Cal.Rptr.2d 821] , internal citations omitted.)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, § 384

6 California Forms of Pleading and Practice, Ch. 58, *Assault and Battery* (Matthew Bender)

2 California Points and Authorities, Ch. 21, *Assault and Battery* (Matthew Bender)

Publisher's Notes

There is no BAJI instruction on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsStandard InstructionsTortsIntentional TortsAssault & BatteryElements of AssaultTortsIntentional TortsAssault & BatteryElements of Battery



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CHAPTER 13 California Judicial Council Assault and Battery Instructions

3-13 California Forms of Jury Instruction CACI 1321

CACI 1321 Transferred Intent

If [*name of defendant*] intended to commit a battery or assault on one person, but by mistake or accident committed the act on [*name of plaintiff*], then the battery or assault is the same as if the intended person had been the victim.

New October 2008

Directions for Use

Use this instruction with *CACI No. 1300, Battery--Essential Factual Elements*, or 1301, *Assault--Essential Factual Elements*, if it is alleged that the defendant intended to batter or assault one person, and mistakenly or accidentally battered or assaulted the plaintiff.

Sources and Authority

■ "While throwing rocks at trees or into the street ordinarily is an innocent and lawful pastime, that same act when directed at another person is wrongful. The evidence at bar ... warrants an inference that [defendant] threw at [third party] and inadvertently struck [plaintiff]. In such circumstances the doctrine of "transferred intent" renders him liable to [plaintiff]. ... 'If defendant unlawfully aims at one person and hits another he is guilty of assault and battery on the party he hit, the injury being the direct, natural and probable consequence of the wrongful act.' The rule is not confined to criminal cases, as argued by respondents." (*Singer v. Marx* (1956) 144 Cal.App.2d 637, 642 [301 P.2d 440] , internal citations omitted.)

Secondary Sources

3-13 California Forms of Jury Instruction CACI 1321

5 Witkin, Summary of California Law (10th ed. 2005) Torts, § 384

3 Levy et al., California Torts, Ch. 41, *Assault and Battery* (Matthew Bender)

6 *California Forms of Pleading and Practice*, Ch. 58, *Assault and Battery*, §§ 58.13, 58.15 (Matthew Bender)

2 *California Points and Authorities*, Ch. 21, *Assault and Battery*, § 21.22 (Matthew Bender)

1 California Civil Practice: Torts (Thomson West) § 12:8

Publisher's Notes

There is no BAJI instruction on this subject.



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CHAPTER 13 California Judicial Council Assault and Battery Instructions

3-13 California Forms of Jury Instruction CACI 1322-CACI 1399

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CACI 1322Reserved for Future Use



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CHAPTER 13 California Judicial Council Assault and Battery Instructions

3-13 California Forms of Jury Instruction CACI VF-1300

CACI VF-1300 Battery

We answer the questions submitted to us as follows:

1. Did [*name of defendant*] [touch [*name of plaintiff*]] [or] [cause [*name of plaintiff*] to be touched] with the intent to harm or offend [him/her]?

_____ Yes _____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Did [*name of plaintiff*] consent to be touched?

_____ Yes _____ No

If your answer to question 2 is no, then answer question 3. If you answered yes, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Was [*name of plaintiff*] harmed [or offended] by [*name of defendant*]'s conduct?

_____ Yes _____ No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

[4. Would a reasonable person in [*name of plaintiff*]'s situation have been offended by the

touching?

_____ Yes _____ No

If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.]

5. What are [*name of plaintiff*]'s damages?

[a. Past economic loss

[lost earnings..... \$_____].....

[lost profits..... \$_____].....

[medical expenses..... \$_____].....

[other past economic loss..... \$_____].....

..... Total Past Economic Damages: \$_____]

[b. Future economic loss

[lost earnings..... \$_____].....

[lost profits..... \$_____].....

[medical expenses..... \$_____].....

[other future economic loss..... \$_____].....

..... Total Future Economic Damages: \$_____]

[c. Past noneconomic loss, including [physical pain/mental suffering:]..... \$_____]

[d. Future noneconomic loss, including [physical pain/mental suffering:]..... \$_____]

..... TOTAL \$_____

Signed: _____

Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the [clerk/bailiff/judge].

New September 2003; Revised October 2004, April 2007

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on *CACI No. 1300, Battery--Essential Factual Elements*.

Give the bracketed words in question 3 and bracketed question 4 only if the offensive nature of the conduct is at issue. In most cases, it will be clear whether the alleged conduct was offensive. The offensive nature of the conduct will most likely not be at issue if the conduct was clearly harmful.

If specificity is not required, users do not have to itemize all the damages listed in question 5 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

This form may be modified if the jury is being given the discretion under *Civil Code section 3288* to award prejudgment interest on specific losses that occurred prior to judgment.

Publisher's Notes

There is no BAJI verdict form on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Verdicts Special Verdicts Torts Intentional Torts Assault & Battery Elements of Battery



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CHAPTER 13 California Judicial Council Assault and Battery Instructions

3-13 California Forms of Jury Instruction CACI VF-1301

CACI VF-1301 Battery--Self-Defense/Defense of Others at Issue

We answer the questions submitted to us as follows:

1. Did [*name of defendant*] [touch [*name of plaintiff*]] [or] [cause [*name of plaintiff*] to be touched] with the intent to harm or offend [him/her]?

_____ Yes _____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Did [*name of plaintiff*] consent to be touched?

_____ Yes _____ No

If your answer to question 2 is no, then answer question 3. If you answered yes, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Was [*name of plaintiff*] harmed [or offended] by [*name of defendant*]'s conduct?

_____ Yes _____ No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

[4. Would a reasonable person in [*name of plaintiff*]'s situation have been offended by the

touching?

_____ Yes _____ No

If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.]

5. Did [*name of defendant*] reasonably believe that [*name of plaintiff*] was going to harm [him/her/[*insert identification of other person*]]?

_____ Yes _____ No

If your answer to question 5 is yes, then answer question 6. If you answered no, skip question 6 and answer question 7.

6. Did [*name of defendant*] use only the amount of force that was reasonably necessary to protect [himself/herself/[*insert identification of other person*]]?

_____ Yes _____ No

If your answer to question 6 is no, then answer question 7. If you answered yes, stop here, answer no further questions, and have the presiding juror sign and date this form.

7. What are [*name of plaintiff*]'s damages?

[a. Past economic loss

[lost earnings..... \$_____].....

[lost profits..... \$_____].....

[medical expenses..... \$_____].....

[other past economic loss..... \$_____].....

..... Total Past Economic Damages: \$_____]

[b. Future economic loss

[lost earnings..... \$_____].....

[lost profits..... \$_____].....

[medical expenses..... \$_____].....

[other future economic loss..... \$_____].....

..... Total Future Economic Damages: \$_____]

[c. Past noneconomic loss, including [physical

pain/mental suffering:..... \$_____]

[d. Future noneconomic loss, including [physical
pain/mental suffering:..... \$_____]

..... TOTAL \$_____

Signed: _____

Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the
[clerk/bailiff/judge].

New September 2003; Revised October 2004, April 2007

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on *CACI No. 1300, Battery--Essential Factual Elements*, and *CACI No. 1304, Self-Defense/Defense of Others*.

Give the bracketed words in question 3 and bracketed question 4 only if the offensive nature of the conduct is at issue. In most cases, it will be clear whether the alleged conduct was offensive. The offensive nature of the conduct will most likely not be at issue if the conduct was clearly harmful.

If specificity is not required, users do not have to itemize all the damages listed in question 7 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

This form may be modified if the jury is being given the discretion under *Civil Code section 3288* to award prejudgment interest on specific losses that occurred prior to judgment.

Publisher's Notes

There is no BAJI verdict form on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Verdicts Special Verdicts Torts Intentional Torts Assault & Battery Defenses Torts Intentional Torts Assault & Battery Elements of Battery



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CHAPTER 13 California Judicial Council Assault and Battery Instructions

3-13 California Forms of Jury Instruction CACI VF-1302

CACI VF-1302 Assault

We answer the questions submitted to us as follows:

[1. Did [*name of defendant*] act, intending to cause a harmful [or an offensive] contact with [*name of plaintiff*] or intending to place [him/her] in fear of a harmful or an offensive contact?

_____ Yes _____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Did [*name of plaintiff*] reasonably believe that [he/she] was about to be touched in a harmful [or an offensive] manner?

_____ Yes _____ No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.]

[1. Did [*name of defendant*] threaten to touch [*name of plaintiff*] in a harmful [or an offensive] manner?

_____ Yes _____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Did it reasonably appear to [*name of plaintiff*] that [he/she] was about to be touched in a harmful [or an offensive] manner?

_____ Yes _____ No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.]

3. Did [*name of plaintiff*] consent to [*name of defendant*]'s conduct?

_____ Yes _____ No

If your answer to question 3 is no, then answer question 4. If you answered yes, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Was [*name of defendant*]'s conduct a substantial factor in causing harm to [*name of plaintiff*]?

_____ Yes _____ No

If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. What are [*name of plaintiff*]'s damages?

[a. Past economic loss

[lost earnings..... \$_____].....

[lost profits..... \$_____].....

[medical expenses..... \$_____].....

[other past economic loss..... \$_____].....

..... **Total Past Economic Damages: \$_____]**

[b. Future economic loss

[lost earnings..... \$_____].....

[lost profits..... \$_____].....

[medical expenses..... \$_____].....

[other future economic loss..... \$_____].....

..... **Total Future Economic Damages: \$_____]**

[c. Past noneconomic loss, including [physical

pain/mental suffering:..... \$_____]

[d. Future noneconomic loss, including [physical
pain/mental suffering:..... \$_____]

..... TOTAL \$_____

Signed: _____

Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the
[clerk/bailiff/judge].

New September 2003; Revised October 2004, June 2005, April 2007

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

As appropriate to the facts of the case, read one of the bracketed alternative sets of questions 1 and 2. This verdict form is based on *CACI No. 1301, Assault--Essential Factual Elements*.

Give the bracketed words in question 2 only if the offensive nature of the conduct is at issue. In most cases, it will be clear whether the alleged conduct was offensive. The offensive nature of the conduct will most likely not be at issue if the conduct was clearly harmful.

If specificity is not required, users do not have to itemize all the damages listed in question 5 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

This form may be modified if the jury is being given the discretion under *Civil Code section 3288* to award prejudgment interest on specific losses that occurred prior to judgment.

Publisher's Notes

There is no BAJI verdict form on this subject.

LexisNexis Matthew Bender Expert Practice Tip--Seek Punitive Damages Too: Do not forget to plead exemplary damages in your complaint for assault. Remember to also then seek a special verdict for exemplary damages in your verdict form. *By Dona Cohn-Payne*

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Verdicts Special Verdicts Torts Intentional Torts Assault & Battery Elements of Assault



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CHAPTER 13 California Judicial Council Assault and Battery Instructions

3-13 California Forms of Jury Instruction CACI VF-1303

CACI VF-1303 Battery by Peace Officer

We answer the questions submitted to us as follows:

1. Did [*name of defendant*] intentionally touch [*name of plaintiff*] [or cause [*name of plaintiff*] to be touched]?

_____ Yes _____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Did [*name of defendant*] use unreasonable force in [arresting/preventing the escape of/overcoming the resistance of/[*insert other applicable action*]] [*name of plaintiff*]?

_____ Yes _____ No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Did [*name of plaintiff*] consent to the use of that force?

_____ Yes _____ No

If your answer to question 3 is no, then answer question 4. If you answered yes, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Was [name of defendant]'s use of unreasonable force a substantial factor in causing harm to [name of plaintiff]?

_____ Yes _____ No

If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. What are [name of plaintiff]'s damages?

[a. Past economic loss

[lost earnings..... \$_____].....

[lost profits..... \$_____].....

[medical expenses..... \$_____].....

[other past economic loss..... \$_____].....

..... **Total Past Economic Damages: \$_____]**

[b. Future economic loss

[lost earnings..... \$_____].....

[lost profits..... \$_____].....

[medical expenses..... \$_____].....

[other future economic loss..... \$_____].....

..... **Total Future Economic Damages: \$_____]**

[c. Past noneconomic loss, including [physical pain/mental suffering:]..... \$_____]

[d. Future noneconomic loss, including [physical pain/mental suffering:]..... \$_____]

..... **TOTAL \$_____**

Signed: _____
Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the [clerk/bailiff/judge].

New September 2003; Revised April 2007

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on *CACI No. 1305, Battery by Peace Officer*.

If specificity is not required, users do not have to itemize all the damages listed in question 5 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

Publisher's Notes

There is no BAJI verdict form on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Verdicts Special Verdicts Torts Intentional Torts Assault & Battery Elements of Battery



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CHAPTER 13 California Judicial Council Assault and Battery Instructions

3-13 California Forms of Jury Instruction CACI VF-1304-CACI VF-1399

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CACI VF-1304Reserved for Future Use



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CHAPTER 14 California Judicial Council False Imprisonment Instructions

3-14 California Forms of Jury Instruction 14.syn

§ 14.syn Synopsis to Chapter 14: California Judicial Council False Imprisonment Instructions

CACI 1400 Essential Factual Elements--No Arrest Involved

CACI 1401 Essential Factual Elements--False Arrest Without Warrant by Peace Officer

CACI 1402 False Arrest Without Warrant--Affirmative Defense-Peace Officer--Probable Cause to Arrest

CACI 1403 Essential Factual Elements--False Arrest Without Warrant by Private Citizen

CACI 1404 False Arrest Without Warrant--Affirmative Defense--Private Citizen--Probable Cause to Arrest

CACI 1405 Essential Factual Elements--False Arrest With Warrant

CACI 1406 False Arrest With Warrant--Peace Officer--Affirmative Defense--"Good-Faith" Exception

CACI 1407 Essential Factual Elements--Unnecessary Delay in Processing/Releasing

CACI 1408 Affirmative Defense--Police Officer's Lawful Authority to Detain

CACI 1409 Common Law Right to Detain for Investigation

CACI 1410-CACI 1499 Reserved for Future Use

CACI VF-1400 False Imprisonment--No Arrest Involved

CACI VF-1401 False Imprisonment--No Arrest Involved--Affirmative Defense--Right to Detain for Investigation

CACI VF-1402 False Arrest Without Warrant

CACI VF-1403 False Arrest Without Warrant by Peace Officer--Affirmative Defense--Probable Cause to Arrest

CACI VF-1404 False Arrest Without Warrant by Private Citizen--Affirmative Defense--Probable Cause to Arrest

CACI VF-1405 False Arrest With Warrant

CACI VF-1406 False Arrest With Warrant--Peace Officer--Affirmative Defense--"Good-Faith" Exception

CACI VF-1407 False Imprisonment--Unnecessary Delay in Processing/Releasing

CACI VF-1408-CACI VF-1499 Reserved for Future Use



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California Forms of Jury Instruction

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CHAPTER 14 California Judicial Council False Imprisonment Instructions

3-14 California Forms of Jury Instruction Scope

Scope

SCOPE

This chapter contains the California Judicial Council's "False Imprisonment Series" of jury instructions [*CACI No. 1400 et seq.*]. The Judicial Council of California Civil Jury Instructions (CACI) included in this publication are the product of the Judicial Council of California Task Force on Jury Instructions, which are updated by the Judicial Council of California Advisory Committee on Civil Jury Instructions.

This chapter includes instructions on the following topics:

- The essential factual elements for a cause of action when no arrest is involved [*CACI No. 1400*] and when there has been a false arrest without a warrant [*CACI No. 1401*].
- The affirmative defense of probable cause to arrest when there has been a false arrest without a warrant by a peace officer [*CACI No. 1402*].
- The essential factual elements for a cause of action regarding a false arrest by a private citizen without a warrant [*CACI No. 1403*].
- The affirmative defense of probable cause to arrest when there has been a false arrest without a warrant by a private citizen [*CACI No. 1404*].
- The essential factual elements for a cause of action for a false arrest with a warrant [*CACI No. 1405*].
- A peace officer's affirmative defense of "good faith" when a false arrest is made with a warrant [*CACI No. 1406*].
- The essential factual elements for a cause of action for the unnecessary delay in a plaintiff's processing or release [*CACI No. 1407*].

- The affirmative defense of a police officer's lawful authority to detain [*CACI No. 1408*].
- The common law right to detain for investigation [*CACI No. 1409*].

The false imprisonment series also includes special verdict forms [*CACI Nos. VF-1400- 1407*].



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CHAPTER 14 California Judicial Council False Imprisonment Instructions

3-14 California Forms of Jury Instruction CACI 1400

CACI 1400 Essential Factual Elements--No Arrest Involved

[*Name of plaintiff*] **claims that [he/she] was wrongfully [restrained/confined/detained] by [name of defendant]**.
To establish this claim, [name of plaintiff] must prove all of the following:

- 1. That [name of defendant] intentionally deprived [name of plaintiff] of [his/her] freedom of movement by use of [physical barriers/force/threats of force/menace/fraud/deceit/unreasonable duress]; [and]**
- 2. That [name of plaintiff] did not consent;**
- 3. That [name of plaintiff] was [actually] harmed; and**
- 4. That [name of defendant]'s conduct was a substantial factor in causing [name of plaintiff]'s harm.**

New September 2003

Element 2 should be either eliminated or modified by inserting the words "knowingly" or "voluntarily" before the word "consent" if it is alleged that fraud was involved: "Because '[t]here is no real or free consent when it is obtained through fraud' ... the girls' confinement on the aircraft was nonconsensual and therefore actionable as a false imprisonment." (*Scofield v. Critical Air Medicine, Inc.* (1996) 45 Cal.App.4th 990, 1006, fn. 16 [52 Cal.Rptr.2d 915] , internal citations omitted.)

If plaintiff is seeking nominal damages as an alternative to actual damages, insert the following paragraph above element 3:

3-14 California Forms of Jury Instruction CACI 1400

If you find both of the above, then the law assumes that [name of plaintiff] has been harmed and [he/she] is entitled to a nominal sum such as one dollar. [Name of plaintiff] is also entitled to additional damages if [he/she] proves the following:

The second sentence of the above paragraph, along with the final two elements of this instruction, should be omitted if plaintiff is seeking nominal damages only. Read "actually" in the third element only if nominal damages are also being sought.

If the defendant alleges that he or she had a lawful privilege, the judge should read the applicable affirmative defense instructions immediately following this one.

The confinement must be for "an appreciable length of time, however short." (*City of Newport Beach v. Sasse* (1970) 9 Cal.App.3d 803, 810 [88 Cal.Rptr. 476] .) If this is an issue, the judge can instruct on this point as follows: "There is no requirement that the confinement last for a particular period of time."

Insert the following at the end of the instruction if applicable: "At the time, [name of plaintiff] need not have been aware that [he/she] was being [restrained/confined/detained]." (See *Scofield, supra*, 45 Cal.App.4th at pp. 1006-1007 .)

- Penal Code section 236 provides: "False imprisonment is the unlawful violation of the personal liberty of another." Courts have held that this statutory definition applies whether the offense is treated as a tort or a crime. (See *Fermino v. Fedco, Inc.* (1994) 7 Cal.4th 701, 715 [30 Cal.Rptr.2d 18, 872 P.2d 559] ; *Molko v. Holy Spirit Ass'n* (1988) 46 Cal.3d 1092, 1123 [252 Cal.Rptr. 122, 762 P.2d 46] ; see also *Wilson v. Houston Funeral Home* (1996) 42 Cal.App.4th 1124, 1135 [50 Cal.Rptr.2d 169] [the tort of false imprisonment is "a willful and wrongful interference with the freedom of movement of another against his will"].)

- "[T]he tort [of false imprisonment] consists of the " 'nonconsensual, intentional confinement of a person, without lawful privilege, for an appreciable length of time, however short.' " " (*Scofield, supra*, 45 Cal.App.4th at p. 1001 , internal citations omitted.)

- "The only mental state required to be shown to prove false imprisonment is the intent to confine, or to create a similar intrusion." (*Fermino, supra*, 7 Cal.4th at p. 716 .)

- There is no requirement that the restraint last for any particular period of time. (See *Alterauge v. Los Angeles Turf Club* (1950) 97 Cal.App.2d 735, 736 [218 P.2d 802] [15 minutes was sufficient for false imprisonment]; see also *City of Newport Beach, supra*, 9 Cal.App.3d at p. 810 [restraint must be for an "appreciable length of time, however short"].)

- False imprisonment "requires some restraint of the person and that he be deprived of his liberty or compelled to stay where he does not want to remain, or compelled to go where he does not wish to go; and that the person be restrained of his liberty without sufficient complaint or authority." (*Collins v. County of Los Angeles* (1966) 241 Cal.App.2d 451, 459-460 [50 Cal.Rptr. 586] , internal citations omitted.)

- "[I]t is clear that force or the threat of force are not the only means by which the tort of false imprisonment can be achieved. Fraud or deceit or any unreasonable duress are alternative methods of

accomplishing the tort." (*Scofield, supra*, 45 Cal.App.4th at p. 1002 , internal citations omitted.)

- "[C]ontemporaneous awareness of the false imprisonment is not, and need not be, an essential element of the tort." (*Scofield, supra*, 45 Cal.App.4th at p. 1006 .)

- "[T]he critical question as to causation in intentional torts is whether the actor's conduct is a substantial factor in bringing about the type of harm which he intended from his original act." (*Null v. City of Los Angeles* (1988) 206 Cal.App.3d 1528, 1536, fn. 6 [254 Cal.Rptr. 492] , internal citations omitted.)

- "[T]he law of this state clearly allows a cause of action for false imprisonment notwithstanding the fact a plaintiff suffered merely nominal damage." (*Scofield, supra*, 45 Cal.App.4th at p. 1007 .)

- "In addition to recovery for emotional suffering and humiliation, one subjected to false imprisonment is entitled to compensation for other resultant harm, such as loss of time, physical discomfort or inconvenience, any resulting physical illness or injury to health, business interruption, and damage to reputation, as well as punitive damages in appropriate cases." (*Scofield, supra*, 45 Cal.App.4th at p. 1009 , internal citation omitted.)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 426-429

3 Levy et al., California Torts, Ch. 42, *False Imprisonment and False Arrest*, §§ 42.01, 42.07, 42.20 (Matthew Bender)

22 California Forms of Pleading and Practice, Ch. 257, *False Imprisonment* (Matthew Bender)

10 California Points and Authorities, Ch. 103, *False Imprisonment* (Matthew Bender)

1 California Civil Practice: Torts (Thomson West) §§ 13:8-13:10

Publisher's Notes

This instruction covers issues presented in BAJI No. 7.60.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Torts Intentional Torts False Imprisonment Elements



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CHAPTER 14 California Judicial Council False Imprisonment Instructions

3-14 California Forms of Jury Instruction CACI 1401

CACI 1401 Essential Factual Elements--False Arrest Without Warrant by Peace Officer

[*Name of plaintiff*] **claims that [he/she] was wrongfully arrested by [*name of defendant*]. To establish this claim, [*name of plaintiff*] must prove all of the following:**

- 1. That [*name of defendant*] arrested [*name of plaintiff*] without a warrant;**
- 2. That [*name of plaintiff*] was [actually] harmed; and**
- 3. That [*name of defendant*]'s conduct was a substantial factor in causing [*name of plaintiff*]'s harm.**

New September 2003

Give CACI No. 1402, *False Arrest Without Warrant-- Affirmative Defense --Peace Officer-- Probable Cause to Arrest*, if applicable, immediately after this instruction.

If plaintiff is seeking nominal damages as an alternative to actual damages, insert the following paragraph above element 2:

If you find the above, then the law assumes that [*name of plaintiff*] has been harmed and [he/she] is entitled to a nominal sum such as one dollar. [*Name of plaintiff*] is also entitled to additional damages if [he/she] proves the following:

The second sentence of the above paragraph, along with the final two elements of this instruction, should be omitted if plaintiff is seeking nominal damages only. Read "actually" in the second element only if

nominal damages are also being sought.

■ *Penal Code section 834* provides: "An arrest is taking a person into custody, in a case and in the manner authorized by law. An arrest may be made by a peace officer or by a private person."

■ "'[F]alse arrest' and 'false imprisonment' are not separate torts. False arrest is but one way of committing a false imprisonment, and they are distinguishable only in terminology." (*Collins v. City and County of San Francisco* (1975) 50 Cal.App.3d 671, 673 [123 Cal.Rptr. 525] .)

■ *Government Code section 820.4* provides: "A public employee is not liable for his act or omission, exercising due care, in the execution or enforcement of any law. Nothing in this section exonerates a public employee from liability for false arrest or false imprisonment."

■ A person is liable for false imprisonment if he or she " 'authorizes, encourages, directs, or assists an officer to do an unlawful act, or procures an unlawful arrest, without process, or participates in the unlawful arrest ... ' " (*Du Lac v. Perma Trans Products, Inc.* (1980) 103 Cal.App.3d 937, 941 [163 Cal.Rptr. 335] , internal citation omitted.) Where a defendant "knowingly [gives] the police false or materially incomplete information, of a character that could be expected to stimulate an arrest" ... "such conduct can be a basis for imposing liability for false imprisonment." (*Id.* at p. 942 .)

■ "It has long been the law that a cause of action for false imprisonment is stated where it is alleged that there was an arrest without process, followed by imprisonment and damages. Upon proof of those facts the burden is on the defendant to prove justification for the arrest." (*Cervantez v. J.C. Penney Co.* (1979) 24 Cal.3d 579, 592 [156 Cal.Rptr. 198, 595 P.2d 975].)

■ *Penal Code section 830* and following provisions define who are peace officers in California.

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 434-440

3 Levy et al., California Torts, Ch. 42, *False Imprisonment and False Arrest*, § 42.23 (Matthew Bender)

22 California Forms of Pleading and Practice, Ch. 257, *False Imprisonment* (Matthew Bender)

1 California Civil Practice: Torts (Thomson West) § 13:20

Publisher's Notes

There is no BAJI instruction on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Torts Intentional Torts False Imprisonment Elements



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CHAPTER 14 California Judicial Council False Imprisonment Instructions

3-14 California Forms of Jury Instruction CACI 1402

CACI 1402 False Arrest Without Warrant--Affirmative Defense--Peace Officer--Probable Cause to Arrest

[*Name of defendant*] **claims the arrest was not wrongful because [he/she] had the authority to arrest [*name of plaintiff*] without a warrant.**

[If [*name of defendant*] **proves that** [*insert facts that, if proved, would constitute reasonable cause to believe that plaintiff had committed a crime in defendant's presence*], **then** [*name of defendant*] **had the authority to arrest [*name of plaintiff*] without a warrant.**]

[or]

[If [*name of defendant*] **proves that** [*insert facts that, if proved, would establish that defendant had reasonable cause to believe that plaintiff had committed a felony, whether or not a felony had actually been committed*], **then** [*name of defendant*] **had the authority to arrest [*name of plaintiff*] without a warrant.**]

New September 2003

Directions for Use

In the brackets, the judge must insert the fact or facts that are actually controverted and that may be necessary to arrive at the probable cause determination. There may be one or more facts or combinations of facts that are necessary to make this determination, in which case they can be phrased in the alternative.

If a criminal act is alleged as justification, it may be necessary to instruct whether the crime is a felony, misdemeanor, or public offense.

Penal Code section 836 provides, in part, that a warrantless arrest may be made if a person has committed a felony, although not in the officer's presence. While the requirement of probable cause is not explicitly stated, it would seem that the officer must always have probable cause at the time of the arrest and that subsequent conviction of a felony does not sanitize an improper arrest.

If the first bracketed paragraph is used, the judge should include "in the officer's presence" as part of the facts that the jury needs to find if there is a factual dispute on this point.

Sources and Authority

- *Penal Code section 836(a)* provides, in part:

A peace officer ... without a warrant, may arrest a person whenever any of the following circumstances occur:

- (1) The officer has probable cause to believe that the person to be arrested has committed a public offense in the officer's presence.
- (2) The person arrested has committed a felony, although not in the officer's presence.
- (3) The officer has probable cause to believe that the person to be arrested has committed a felony, whether or not a felony, in fact, has been committed.

- *Penal Code section 15* provides: "A crime or public offense is an act committed or omitted in violation of a law forbidding or commanding it, and to which is annexed, upon conviction, either of the following punishments: (1) death; (2) imprisonment; (3) fine; (4) removal from office; or, (5) disqualification to hold and enjoy any office of honor, trust, or profit in this State."

- *Penal Code section 17(a)* provides: "A felony is a crime which is punishable with death or by imprisonment in the state prison. Every other crime or public offense is a misdemeanor except those offenses that are classified as infractions."

- *Penal Code section 830* and following provisions define who are peace officers in California.

- "An officer is not liable for false imprisonment for the arrest without a warrant of a person whom he has reasonable grounds to believe is guilty of a crime. The question of the existence of probable cause to believe that one is guilty of a crime must be determined as a matter of law from the facts and circumstances of the case." (*Allen v. McCoy* (1933) 135 Cal.App. 500, 507-508 [27 P.2d 423] .)

- "It has long been the law that a cause of action for false imprisonment is stated where it is alleged that there was an arrest without process, followed by imprisonment and damages. Upon proof of those facts the burden is on the defendant to prove justification for the arrest. Considerations of both a practical and policy nature underlie this rule. The existence of justification is a matter which ordinarily lies peculiarly within the knowledge of the defendant. The plaintiff would encounter almost insurmountable practical problems in attempting to prove the negative proposition of the nonexistence of any justification. This rule also serves to assure that official intermeddling is justified, for it is a serious matter to accuse someone of committing a crime and to arrest him without the protection of the warrant process." (*Cervantez v. J. C. Penney Co.* (1979) 24 Cal.3d 579, 592 [156 Cal.Rptr. 198, 595 P.2d 975] , footnote and internal citations omitted.)

- "The existence of probable cause depends upon facts known by the arresting officer at the time of the arrest." (

Hamilton v. City of San Diego (1990) 217 Cal.App.3d 838, 844 [266 Cal.Rptr. 215] , internal citations omitted.)

■ "If the facts that gave rise to the arrest are undisputed, the issue of probable cause is a question of law for the trial court. When, however, the facts that gave rise to the arrest are controverted, the trial court must instruct the jury as to what facts, if established, would constitute probable cause. 'The trier of fact's function in false arrest cases is to resolve conflicts in the evidence. Accordingly, where the evidence is conflicting with respect to probable cause, " 'it [is] the duty of the court to instruct the jury as to what facts, if established, would constitute probable cause.' " ... The jury then decides whether the evidence supports the necessary factual findings.' " (*Levin v. United Air Lines, Inc.* (2008) 158 Cal.App.4th 1002, 1018-1019 [70 Cal.Rptr.3d 535] , internal citations omitted.)

■ " 'Presence' is not mere physical proximity but is determined by whether the offense is apparent to the officer's senses." (*People v. Sjosten* (1968) 262 Cal.App.2d 539, 543-544 [68 Cal.Rptr. 832] , internal citations omitted.)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 436, 438

3 Levy et al., *California Torts*, Ch. 42, *False Imprisonment and False Arrest*, § 42.23 (Matthew Bender)

22 *California Forms of Pleading and Practice*, Ch. 257, *False Imprisonment*, § 257.20 (Matthew Bender)

10 *California Points and Authorities*, Ch. 103, *False Imprisonment*, § 103.65 et seq. (Matthew Bender)

1 California Civil Practice: Torts (Thomson West) §§ 13:22-13:24

Publisher's Notes

This instruction replaces BAJI No. 7.63.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Torts Intentional Torts False Imprisonment Defenses Justification Torts Intentional Torts False Imprisonment Elements



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CHAPTER 14 California Judicial Council False Imprisonment Instructions

3-14 California Forms of Jury Instruction CACI 1403

CACI 1403 Essential Factual Elements--False Arrest Without Warrant by Private Citizen

[*Name of plaintiff*] **claims that [he/she] was wrongfully arrested by [*name of defendant*]. To establish this claim, [*name of plaintiff*] must prove all of the following:**

- 1. That [*name of defendant*] intentionally caused [*name of plaintiff*] to be arrested without a warrant; [and]**
- 2. That [*name of plaintiff*] was [actually] harmed; and**
- 3. That [*name of defendant*]'s conduct was a substantial factor in causing [*name of plaintiff*]'s harm.**

[A private person does not need to physically restrain a suspect in order to make a citizen's arrest. A private person can make a citizen's arrest by calling for a peace officer, reporting the offense, and pointing out the suspect.]

New September 2003

Give CACI No. 1404, *False Arrest Without Warrant--Affirmative Defense--Private Citizen--Probable Cause to Arrest*, if applicable, immediately after this instruction.

If the plaintiff is seeking nominal damages as an alternative to actual damages, insert the following paragraph above element 2:

If you find the above, then the law assumes that [*name of plaintiff*] has been harmed and [he/she] is

3-14 California Forms of Jury Instruction CACI 1403

entitled to a nominal sum such as one dollar. [Name of plaintiff] is also entitled to additional damages if [he/she] proves the following:

The second sentence, along with the final two elements of this instruction, should be omitted if plaintiff is seeking nominal damages only. Read "actually" in the second element only if nominal damages are also being sought.

- *Penal Code section 834* provides: "An arrest is taking a person into custody, in a case and in the manner authorized by law. An arrest may be made by a peace officer or by a private person."

- "'[F]alse arrest' and 'false imprisonment' are not separate torts. False arrest is but one way of committing a false imprisonment, and they are distinguishable only in terminology." (*Collins v. City and County of San Francisco* (1975) 50 Cal.App.3d 671, 673 [123 Cal.Rptr. 525] .)

- A person is liable for false imprisonment if he or she " 'authorizes, encourages, directs, or assists an officer to do an unlawful act, or procures an unlawful arrest, without process, or participates in the unlawful arrest ... ' " (*Du Lac v. Perma Trans Products, Inc.* (1980) 103 Cal.App.3d 937, 941 [163 Cal.Rptr. 335] , internal citation omitted.) Where a defendant "knowingly [gives] the police false or materially incomplete information, of a character that could be expected to stimulate an arrest"... "such conduct can be a basis for imposing liability for false imprisonment." (*Id.* at p. 942 .)

- "It has long been the law that a cause of action for false imprisonment is stated where it is alleged that there was an arrest without process, followed by imprisonment and damages. Upon proof of those facts the burden is on the defendant to prove justification for the arrest." (*Cervantez v. J.C. Penney Co.* (1979) 24 Cal.3d 579, 592 [156 Cal.Rptr. 198, 595 P.2d 975].)

- "'[T]he delegation of the physical act of arrest need not be express, but may be implied from the citizen's act of summoning an officer, reporting the offense, and pointing out the suspect.' " (*Johanson v. Dept. of Motor Vehicles* (1995) 36 Cal.App.4th 1209, 1216 [43 Cal.Rptr.2d 42] , internal citations omitted.)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 438, 439

3 Levy et al., California Torts, Ch. 42, *False Imprisonment and False Arrest*, § 42.22 (Matthew Bender)

22 California Forms of Pleading and Practice, Ch. 257, *False Imprisonment* (Matthew Bender)

1 California Civil Practice: Torts (Thomson West) §§ 13:8-13:10

Publisher's Notes

This instruction covers issues presented in BAJI No. 7.60.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Torts Intentional Torts False Imprisonment Elements



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CHAPTER 14 California Judicial Council False Imprisonment Instructions

3-14 California Forms of Jury Instruction CACI 1404

CACI 1404 False Arrest Without Warrant--Affirmative Defense--Private Citizen--Probable Cause to Arrest

[*Name of defendant*] **claims the citizen's arrest was not wrongful because [he/she] had the authority to cause [*name of plaintiff*] to be arrested without a warrant.**

[If [*name of defendant*] proves that [*name of plaintiff*] committed or attempted to commit a crime in [*name of defendant*]'s presence, then the arrest was lawful.]

[or]

[If [*name of defendant*] proves that a felony was committed and that [*insert facts, that if proved, would establish that defendant had reasonable cause to believe that plaintiff had committed a felony*], then the arrest was lawful.]

New September 2003

The judge must insert in the brackets the fact or facts that are actually controverted and that may be necessary to arrive at the probable cause determination. There may be one or more facts or combinations of facts that are necessary to make this determination, in which case they can be phrased in the alternative.

If a criminal act is alleged as justification, it may be necessary to instruct whether the crime is a felony, misdemeanor, or public offense.

Penal Code section 837 provides, in part, that a warrantless arrest may be made if a person has committed a felony, although not in the citizen's presence. While the requirement of probable cause is not explicitly stated, it would seem that the citizen must always have probable cause at the time of the

arrest and that subsequent conviction of a felony does not sanitize an improper arrest.

■ *Penal Code section 837* provides:

A private person may arrest another:

1. For a public offense committed or attempted in his presence.
2. When the person arrested has committed a felony, although not in his presence.
3. When a felony has been in fact committed, and he has reasonable cause for believing the person arrested to have committed it.

■ *Penal Code section 15* provides: "A crime or public offense is an act committed or omitted in violation of a law forbidding or commanding it, and to which is annexed, upon conviction, either of the following punishments: (1) death; (2) imprisonment; (3) fine; (4) removal from office; or, (5) disqualification to hold and enjoy any office of honor, trust, or profit in this State."

■ *Penal Code section 17(a)* provides: "A felony is a crime which is punishable with death or by imprisonment in the state prison. Every other crime or public offense is a misdemeanor except those offenses that are classified as infractions."

■ "What is probable cause, as has been often announced, is not a question of fact for the jury, but one of law for the court, to be decided in accordance with the circumstances at the time of the detention, unhampered by the outcome of the charge against the plaintiff of the public offense or by the conclusions of the trial court." (*Collyer v. S.H. Kress Co.* (1936) 5 Cal.2d 175, 181 [54 P.2d 20] , internal citations omitted.)

■ "'Presence' is not mere physical proximity but is determined by whether the offense is apparent to the [person]'s senses." (*People v. Sjosten* (1968) 262 Cal.App.2d 539, 543-544 [68 Cal.Rptr. 832] , internal citations omitted.)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 438, 439

3 Levy et al., California Torts, Ch. 42, *False Imprisonment and False Arrest*, § 42.22 (Matthew Bender)

22 California Forms of Pleading and Practice, Ch. 257, *False Imprisonment* (Matthew Bender)

10 California Points and Authorities, Ch. 103, *False Imprisonment* (Matthew Bender)

1 California Civil Practice: Torts (Thomson West) § 13:11

Publisher's Notes

This instruction replaces BAJI No. 7.64.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Torts Intentional Torts False Imprisonment Defenses Justification Torts Intentional Torts False Imprisonment Elements



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3-14 California Forms of Jury Instruction CACI 1405

CACI 1405 Essential Factual Elements--False Arrest With Warrant

[*Name of plaintiff*] **claims that [he/she] was wrongfully arrested by [*name of defendant*]. To establish this claim, [*name of plaintiff*] must prove all of the following:**

1. [That [*name of defendant*] arrested [*name of plaintiff*];]

**[That [*name of defendant*] intentionally caused [*name of plaintiff*] to be wrongfully arrested;]
[and]**

2. That [*insert facts supporting the invalidity of the warrant or the unlawfulness of the arrest, e.g., "the warrant for [name of plaintiff]'s arrest had expired"];*

3. That [*name of plaintiff*] was [actually] harmed; and

4. That [*name of defendant*]'s conduct was a substantial factor in causing [*name of plaintiff*]'s harm.

New September 2003

CACI No. 1406, False Arrest With Warrant --Peace Officer-- Affirmative Defense--"Good-Faith" Exception, should be given after this instruction if that defense is asserted.

If the plaintiff is seeking nominal damages as an alternative to actual damages, insert the following paragraph above element 3:

If you find both of the above, then the law assumes that [name of plaintiff] has been harmed and [he/she] is entitled to a nominal sum such as one dollar. [Name of plaintiff] is also entitled to additional damages if [he/she] proves the following:

The second sentence of the above paragraph, along with the final two elements of this instruction, should be omitted if plaintiff is seeking nominal damages only. Read "actually" in the third element only if nominal damages are also being sought.

- *Penal Code section 834* provides: "An arrest is taking a person into custody, in a case and in the manner authorized by law. An arrest may be made by a peace officer or by a private person."

- "'[F]alse arrest' and 'false imprisonment' are not separate torts. False arrest is but one way of committing a false imprisonment, and they are distinguishable only in terminology." (*Collins v. City and County of San Francisco* (1975) 50 Cal.App.3d 671, 673 [123 Cal.Rptr. 525] .)

- *Government Code section 820.4* provides: "A public employee is not liable for his act or omission, exercising due care, in the execution or enforcement of any law. Nothing in this section exonerates a public employee from liability for false arrest or false imprisonment."

- A person is liable for false imprisonment if he or she " 'authorizes, encourages, directs, or assists an officer to do an unlawful act, or procures an unlawful arrest, without process, or participates in the unlawful arrest ... ' " (*Du Lac v. Perma Trans Products, Inc.* (1980) 103 Cal.App.3d 937, 941 [163 Cal.Rptr. 335] , internal citation omitted.) Where a defendant "knowingly gives the police false or materially incomplete information, of a character that could be expected to stimulate an arrest"... "such conduct can be a basis for imposing liability for false imprisonment." (*Id. at p. 942* .)

- Where an arrest is made without process, plaintiff does not need to allege that "such arrest was unlawful... ." [However,] "if process was employed, the facts constituting the invalidity thereof must be set forth." (*Peters v. Bigelow* (1934) 137 Cal.App. 135, 138 [30 P.2d 450] .)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 441-443

3 Levy et al., California Torts, Ch. 42, *False Imprisonment and False Arrest*, § 42.25 (Matthew Bender)

22 California Forms of Pleading and Practice, Ch. 257, *False Imprisonment* (Matthew Bender)

1 California Civil Practice: Torts (Thomson West) §§ 13:26-13:30

Publisher's Notes

There is no BAJI instruction on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Torts Intentional Torts False Imprisonment Elements



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California Forms of Jury Instruction

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CHAPTER 14 California Judicial Council False Imprisonment Instructions

3-14 California Forms of Jury Instruction CACI 1406

CACI 1406 False Arrest With Warrant--Peace Officer--Affirmative Defense--"Good-Faith" Exception

[*Name of defendant*] **claims that the arrest was not wrongful. To succeed, [*name of defendant*] must prove all of the following:**

- 1. That the arrest warrant would have appeared valid to a reasonably intelligent and informed person;**
- 2. That [*name of defendant*] believed the warrant was valid; and**
- 3. That [*name of defendant*] had a reasonable belief that [*name of plaintiff*] was the person referred to in the warrant.**

If [*name of defendant*] has proven all of the above, then the arrest was not wrongful.

New September 2003

The absence-of-malice requirement is satisfied if the officer believes the warrant is valid and the warrant is valid on its face, notwithstanding any personal hostility or ill will.

■ *Civil Code section 43.55(a)* provides: "There shall be no liability on the part of, and no cause of action shall arise against, any peace officer who makes an arrest pursuant to a warrant of arrest regular upon its face if the peace officer in making the arrest acts without malice and in the reasonable belief that the person arrested is the one referred to in the warrant."

■ "With regard to *Civil Code* section 43.55, the immunity set forth therein for arrests made pursuant to a regular warrant is only conditional. A failure of any condition prevents the immunity from attaching to a public entity or employee." (*Harden v. Bay Area Rapid Transit Dist.* (1989) 215 Cal.App.3d 7, 14 [263 Cal.Rptr. 549] .)

■ " 'Malice,' as that term is used in section 43.55, refers not to the actual physical execution of the warrant, but to the officer's state of mind in procuring or executing the warrant. For instance, malice for purposes of section 43.55 has been found in situations where the officer purposefully withheld exculpatory evidence from the magistrate issuing the arrest warrant, where the officer knowingly used false information in order to obtain the warrant, or where the officer executes the warrant with knowledge that it has been recalled or is no longer valid." (*Ting v. U.S.* (9th Cir. 1991) 927 F.2d 1504, 1514 , internal citations omitted.)

■ Courts have described the meaning of a warrant "regular on its face" as follows: "Unless there is a clear absence of jurisdiction on the part of the court or magistrate issuing the process, it is sufficient if upon its face it [the warrant] appears to be valid in the judgment of an ordinarily intelligent and informed layman." (*Allison v. County of Ventura* (1977) 68 Cal.App.3d 689, 697 [137 Cal.Rptr. 542] .)

■ "Peace officers are not required to investigate the supportive legal proceedings from which a warrant issues. However, they are required to exercise the judgment of an 'ordinarily intelligent and informed layman' to observe the blatant and patent inadequacy of a warrant emanating from a civil action which directs arrest and neither sets bail nor informs the arrestee of the offense charged for which arrest is ordered." (*Allison, supra*, 68 Cal.App.3d at p. 703 .)

■ "A police officer must use reasonable prudence and diligence to determine whether a party being arrested is the one described in the warrant. The officer may not refuse to act upon information offered him which discloses the warrant is being served on the wrong person. But, the prudence and diligence required of an arresting officer in determining whether to make an arrest must be balanced against the need to act swiftly and to make on-the-spot evaluations, often under chaotic conditions." (*Lopez v. City of Oxnard* (1989) 207 Cal.App.3d 1, 7 [254 Cal.Rptr. 556] .)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 441-443

3 Levy et al., California Torts, Ch. 42, *False Imprisonment and False Arrest*, § 42.25 (Matthew Bender)

22 California Forms of Pleading and Practice, Ch. 257, *False Imprisonment* (Matthew Bender)

10 California Points and Authorities, Ch. 103, *False Imprisonment* (Matthew Bender)

1 California Civil Practice: Torts (Thomson West) §§ 13:26-13:30

Publisher's Notes

There is no BAJI instruction on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Torts Intentional Torts False

ImprisonmentDefensesJustificationTortsIntentional TortsFalse ImprisonmentElements



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CHAPTER 14 California Judicial Council False Imprisonment Instructions

3-14 California Forms of Jury Instruction CACI 1407

CACI 1407 Essential Factual Elements--Unnecessary Delay in Processing/Releasing

[*Name of plaintiff*] **claims that [he/she] was wrongfully confined by [*name of defendant*]. To establish this claim, [*name of plaintiff*] must prove all of the following:**

- 1. That [*name of defendant*] held [*name of plaintiff*] in custody;**
- 2. That there was an unnecessary delay [*insert facts, e.g., "in taking [name of plaintiff] before a judge" or "in releasing [name of plaintiff]"*]; [and]**
- 3. That [*name of plaintiff*] did not consent to the delay;**
- 4. That [*name of plaintiff*] was [actually] harmed; and**
- 5. That [*name of defendant*]'s conduct was a substantial factor in causing [*name of plaintiff*]'s harm.**

New September 2003

If the plaintiff is seeking nominal damages as an alternative to actual damages, insert the following paragraph above element 4:

If you find the above, then the law assumes that [*name of plaintiff*] has been harmed and [he/she] is entitled to a nominal sum such as one dollar. [*Name of plaintiff*] is also entitled to additional damages if [he/she] proves the following:

3-14 California Forms of Jury Instruction CACI 1407

The second sentence of the above paragraph, along with the final two elements of this instruction, should be omitted if plaintiff is seeking nominal damages only. Read "actually" in the fourth element only if nominal damages are also being sought.

- *Penal Code section 834* provides: "An arrest is taking a person into custody, in a case and in the manner authorized by law. An arrest may be made by a peace officer or by a private person."

- *Penal Code section 825(a)* provides, in part: "[T]he defendant shall in all cases be taken before the magistrate without unnecessary delay, and, in any event, within 48 hours after his or her arrest, excluding Sundays and holidays."

- "The critical factor is the necessity for any delay in arraignment. These provisions do not authorize a two-day detention in all cases. Instead, 'a limit [is placed] upon what may be considered a necessary delay, and a detention of less than two days, if unreasonable under the circumstances, is in violation of the statute' and of the Constitution." (*People v. Thompson (1980) 27 Cal.3d 303, 329 [165 Cal.Rptr. 289, 611 P.2d 883]* .)

- *Government Code section 820.4* provides: "A public employee is not liable for his act or omission, exercising due care, in the execution or enforcement of any law. Nothing in this section exonerates a public employee from liability for false arrest or false imprisonment."

- "'[F]alse arrest' and 'false imprisonment' are not separate torts. False arrest is but one way of committing a false imprisonment, and they are distinguishable only in terminology." (*Collins v. City and County of San Francisco (1975) 50 Cal.App.3d 671, 673 [123 Cal.Rptr. 525]* .)

- A person is liable for false imprisonment if he or she " 'authorizes, encourages, directs, or assists an officer to do an unlawful act, or procures an unlawful arrest, without process, or participates in the unlawful arrest ... ' " (*Du Lac v. Perma Trans Products, Inc. (1980) 103 Cal.App.3d 937, 941 [163 Cal.Rptr. 335]* , internal citation omitted.) Where a defendant "knowingly [gives] the police false or materially incomplete information, of a character that could be expected to stimulate an arrest" ... "such conduct can be a basis for imposing liability for false imprisonment." (*Id. at p. 942* .)

- "In determining which delays are necessary, this court has rejected arguments that the delay was 'not unusual' or made 'the work of the police and the district attorney easier.' As the Court of Appeal recently observed, '[t]here is no authority to delay for the purpose of investigating the case. Subject to obvious health considerations the only permissible delay between the time of arrest and bringing the accused before a magistrate is the time necessary: to complete the arrest; to book the accused; to transport the accused to court; or the district attorney to evaluate the evidence for the limited purpose of determining what charge, if any, is to be filed; and to complete the necessary clerical and administrative tasks to prepare a formal pleading.' " (*Youngblood v. Gates (1988) 200 Cal.App.3d 1302, 1319 [246 Cal.Rptr. 775]* , internal citations omitted.)

- "Although both false imprisonment and malicious prosecution may cause a person to be restrained or confined, under *Asgari* (*Asgari v. City of Los Angeles (1997) 15 Cal.4th 744 [63 Cal.Rptr.2d 842, 937 P.2d 273]*) only damages attributable to injuries arising from false arrest and false imprisonment are compensable in an action under state law against a public entity and its employees. False imprisonment ends at the point malicious prosecution begins which, under *Asgari*, is the point at which the person is arraigned." (*County of Los Angeles v. Superior Court (2000) 78 Cal.App.4th 212, 220-221 [92 Cal.Rptr.2d 668]* .)

■ "[W]here the arrest is lawful, subsequent unreasonable delay in taking the person before a magistrate will not affect the legality of the arrest, although it will subject the offending person to liability for so much of the imprisonment as occurs after the period of necessary or reasonable delay." (*Dragna v. White* (1955) 45 Cal.2d 469, 473 [289 P.2d 428] .)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, § 445

3 Levy et al., California Torts, Ch. 42, *False Imprisonment and False Arrest*, § 42.26 (Matthew Bender)

22 California Forms of Pleading and Practice, Ch. 257, *False Imprisonment* (Matthew Bender)

10 California Points and Authorities, Ch. 103, *False Imprisonment* (Matthew Bender)

1 California Civil Practice: Torts (Thomson West) §§ 13:31-13:34

Publisher's Notes

This instruction covers issues presented in BAJI No. 7.60.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Torts Intentional Torts False Imprisonment Elements



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CHAPTER 14 California Judicial Council False Imprisonment Instructions

3-14 California Forms of Jury Instruction CACI 1408

CACI 1408 Affirmative Defense--Police Officer's Lawful Authority to Detain

[*Name of defendant*] **claims that the detention was not wrongful because [he/she] had a right to detain [*name of plaintiff*] for questioning or other limited investigation.**

If [*name of defendant*] has proven that [*insert facts, that if established, would constitute a reasonable suspicion*], then [*name of defendant*] had a right to detain [*name of plaintiff*] for questioning or other limited investigation.

New September 2003

This instruction is intended to apply to false imprisonment actions not involving an arrest. The inserted facts must support a finding of reasonable suspicion as a matter of law.

If the factual issues are too complicated, consider bifurcating the trial.

■ "In an action for false arrest and imprisonment, the question of reasonable or probable cause is ordinarily one for the court, and not for the jury. When the facts are admitted or are beyond controversy, the question is to be determined by the court alone. When the facts are controverted or the evidence conflicting, the determination of their legal effect by the court is necessarily hypothetical and the jury is to be told that if it finds the facts in a designated way such facts do or do not amount to probable cause." (*Whaley v. Jansen* (1962) 208 Cal.App.2d 222, 227 [25 Cal.Rptr. 184] .)

■ "Although the line may at times be a fine one, there is a well-settled distinction in law between an arrest and a detention. A detention is a lesser intrusion upon a person's liberty requiring less cause and consisting of briefly stopping a person for questioning or other limited investigation." (*Cervantez v. J.C.*

Penney Co. (1979) 24 Cal.3d 579, 591, fn. 5 [156 Cal.Rptr. 198, 595 P.2d 975] .)

■ *Government Code section 820.4* provides: "A public employee is not liable for his act or omission, exercising due care, in the execution or enforcement of any law. Nothing in this section exonerates a public employee from liability for false arrest or false imprisonment."

■ "The *Fourth Amendment to the United States Constitution* prohibits seizures of persons, including brief investigative stops, when they are 'unreasonable.' Our state Constitution has a similar provision. A seizure occurs whenever a police officer 'by means of physical force or show of authority' restrains the liberty of a person to walk away." (*People v. Souza (1994) 9 Cal.4th 224, 229 [36 Cal.Rptr.2d 569, 885 P.2d 982]* , internal citations omitted.)

■ "A detention ... has been said to occur 'if the suspect is not free to leave at will--if he is kept in the officer's presence by physical restraint, threat of force, or assertion of authority.' " (*Evans v. City of Bakersfield (1994) 22 Cal.App.4th 321, 330 [27 Cal.Rptr.2d 406]* , internal citation omitted.)

■ "It is settled that circumstances short of probable cause to make an arrest may justify a police officer stopping and briefly detaining a person for questioning or other limited investigation." (*In re Tony C. (1978) 21 Cal.3d 888, 892 [148 Cal.Rptr. 366, 582 P.2d 957]* .)

■ "A detention is reasonable under the *Fourth Amendment* when the detaining officer can point to specific articulable facts that, considered in light of the totality of the circumstances, provide some objective manifestation that the person detained may be involved in criminal activity." (*Souza, supra*, 9 Cal.4th at p. 231 .)

■ "The state bears the burden of justifying a detention, as with all warrantless intrusions." (*People v. Wilkins (1986) 186 Cal.App.3d 804, 809 [231 Cal.Rptr. 1]* , internal citation omitted.)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, § 431

3 Levy et al., California Torts, Ch. 42, *False Imprisonment and False Arrest*, § 42.20 (Matthew Bender)

22 California Forms of Pleading and Practice, Ch. 257, *False Imprisonment* (Matthew Bender)

10 California Points and Authorities, Ch. 103, *False Imprisonment* (Matthew Bender)

Publisher's Notes

This instruction replaces BAJI No. 7.66.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Torts Intentional Torts False Imprisonment Defenses Justification Torts Intentional Torts False Imprisonment Elements



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CHAPTER 14 California Judicial Council False Imprisonment Instructions

3-14 California Forms of Jury Instruction CACI 1409

CACI 1409 Common Law Right to Detain for Investigation

[*Name of defendant*] **claims that the detention was not wrongful because [he/she] had a right to detain [*name of plaintiff*]. To succeed, [*name of defendant*] must prove all of the following:**

- 1. That [*name of defendant*] was the [owner/employer/employee/agent] of a business;**
- 2. That [*name of defendant*] had reasonable grounds to believe that [*name of plaintiff*] had wrongfully [taken or damaged merchandise or other personal property] [secured services] from the business. If you find that [*insert facts, that if established, would constitute reasonable grounds*], then [*name of defendant*] had reasonable grounds to detain [*name of plaintiff*];**
- 3. That [*name of defendant*] detained [*name of plaintiff*] for a reasonable amount of time; and**
- 4. That [*name of defendant*] detained [*name of plaintiff*] in a reasonable manner.**

New September 2003

■ "[W]e conclude that the merchant's probable cause defense is limited to suits based upon a detention and does not extend to suits based upon an arrest." (*Cervantez v. J.C. Penney Co.* (1979) 24 Cal.3d 579, 591 [156 Cal.Rptr. 198, 595 P.2d 975] .)

■ "Ordinarily, the owner of property, in the exercise of his inherent right to protect the same, is justified in restraining another who seeks to interfere with or injure it." (*Collyer v. S.H. Kress Co.* (1936) 5 Cal.2d 175, 180 [54 P.2d 20] , internal citation omitted.)

■ "Merchants who detain individuals whom they have probable cause to believe are about to injure their property are privileged against a false imprisonment action. The detention itself must be carried out for a reasonable time and in a reasonable manner." (*Fermino v. Fedco, Inc.* (1994) 7 Cal.4th 701, 716 [30 Cal.Rptr.2d 18, 872 P.2d 559] .)

■ "We note that the merchant's privilege is a defense to a false imprisonment action. As such, the lack of that privilege on defendant's part need not be specifically pleaded by plaintiff. Although a false imprisonment must involve an 'unlawful' restraint on an individual's liberty, [plaintiff's] allegations sufficiently plead that her confinement was unlawful. Moreover, the question of whether a detainment was reasonable is generally a question of fact." (*Fermino, supra*, 7 Cal.4th at p. 723, fn. 8 , internal citations omitted.)

■ *Penal Code section 490.5(f)* provides, in part: "A merchant may detain a person for a reasonable time for the purpose of conducting an investigation in a reasonable manner whenever the merchant has probable cause to believe the person to be detained is attempting to unlawfully take or has unlawfully taken merchandise from the merchant's premises."

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 431, 432

3 Levy et al., California Torts, Ch. 42, *False Imprisonment and False Arrest*, § 42.20 (Matthew Bender)

22 California Forms of Pleading and Practice, Ch. 257, *False Imprisonment* (Matthew Bender)

10 California Points and Authorities, Ch. 103, *False Imprisonment* (Matthew Bender)

1 California Civil Practice: Torts (Thomson West) § 13:11

Publisher's Notes

This instruction covers issues presented in BAJI No. 7.65.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Torts Intentional Torts False Imprisonment Defenses Justification Torts Intentional Torts False Imprisonment Elements



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3-14 California Forms of Jury Instruction CACI 1410-CACI 1499

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CACI 1410Reserved for Future Use



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CHAPTER 14 California Judicial Council False Imprisonment Instructions

3-14 California Forms of Jury Instruction CACI VF-1400

CACI VF-1400 False Imprisonment--No Arrest Involved

We answer the questions submitted to us as follows:

1. Did [*name of defendant*] intentionally deprive [*name of plaintiff*] of [his/her] freedom of movement by use of [physical barriers/force/threats of force/menace/fraud/deceit/unreasonable duress]?

_____ Yes _____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Did [*name of plaintiff*] consent?

_____ Yes _____ No

If your answer to question 2 is no, then answer question 3. If you answered yes, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Was [*name of defendant*]'s conduct a substantial factor in causing harm to [*name of plaintiff*]?

_____ Yes _____ No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. What are [name of plaintiff]'s damages?**[a. Past economic loss**

[lost earnings..... \$_____]

[lost profits..... \$_____]

[medical expenses..... \$_____]

[other past economic loss..... \$_____]

..... **Total Past Economic Damages: \$_____]****[b. Future economic loss**

[lost earnings..... \$_____]

[lost profits..... \$_____]

[medical expenses..... \$_____]

[other future economic loss..... \$_____]

..... **Total Future Economic Damages: \$_____]****[c. Past noneconomic loss, including [physical
pain/mental suffering:]..... \$_____]****[d. Future noneconomic loss, including [physical
pain/mental suffering:]..... \$_____]**..... **TOTAL \$_____****Signed: _____****Presiding Juror****Dated: _____****[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the
[clerk/bailiff/judge].**

New September 2003; Revised April 2007

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on *CACI No. 1400, Essential Factual Elements--No Arrest Involved*.

If the jury returns a verdict of no harm, the plaintiff is still entitled to an award of nominal damages, such as one dollar. If nominal damages are being sought, modify the directions after question 3 to direct the jury to skip question 4 and answer question 5 if they find no harm. Then add a new question 5: "What amount of nominal damages do you award [*name of plaintiff*]?" If this is done, add a direction after question 4 that the jury should not answer question 5. Please note that the committee has found no cases requiring the jury to determine the amount of nominal damages.

If specificity is not required, users do not have to itemize all the damages listed in question 4 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

Publisher's Notes

There is no BAJI verdict form on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Verdicts Special Verdicts Torts Intentional Torts False Imprisonment General Overview



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CHAPTER 14 California Judicial Council False Imprisonment Instructions

3-14 California Forms of Jury Instruction CACI VF-1401

CACI VF-1401 False Imprisonment--No Arrest Involved--Affirmative Defense--Right to Detain for Investigation

We answer the questions submitted to us as follows:

1. Did [*name of defendant*] intentionally deprive [*name of plaintiff*] of [his/her] freedom of movement by use of [physical barriers/force/threats of force/menace/fraud/deceit/unreasonable duress]?

_____ Yes _____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Did [*name of defendant*] have the right to detain [*name of plaintiff*]?

_____ Yes _____ No

If your answer to question 2 is no, then answer question 3. If you answered yes, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Did [*name of plaintiff*] consent?

_____ Yes _____ No

If your answer to question 3 is no, then answer question 4. If you answered yes, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Was [name of defendant]'s conduct a substantial factor in causing harm to [name of plaintiff]?

_____ Yes _____ No

If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. What are [name of plaintiff]'s damages?

[a. Past economic loss

[lost earnings..... \$_____].....

[lost profits..... \$_____].....

[medical expenses..... \$_____].....

[other past economic loss..... \$_____].....

..... **Total Past Economic Damages: \$_____]**

[b. Future economic loss

[lost earnings..... \$_____].....

[lost profits..... \$_____].....

[medical expenses..... \$_____].....

[other future economic loss..... \$_____].....

..... **Total Future Economic Damages: \$_____]**

[c. Past noneconomic loss, including [physical pain/mental suffering:]..... \$_____]

[d. Future noneconomic loss, including [physical pain/mental suffering:]..... \$_____]

..... **TOTAL \$_____**

Signed: _____

Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the [clerk/bailiff/judge].

New September 2003; Revised April 2007

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case. This verdict form is based on *CACI No. 1400, Essential Factual Elements--No Arrest Involved*, and *CACI No. 1409, Common Law Right to Detain for Investigation*.

If the jury returns a verdict of no harm, the plaintiff is still entitled to an award of nominal damages, such as one dollar. If nominal damages are being sought, modify the directions after question 4 to direct the jury to skip question 5 and answer question 6 if they find no harm. Then add a new question 6: "What amount of nominal damages do you award [*name of plaintiff*]?" If this is done, add a direction after question 5 that the jury should not answer question 6. Please note that the committee has found no cases requiring the jury to determine the amount of nominal damages.

If specificity is not required, users do not have to itemize all the damages listed in question 5 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

Publisher's Notes

There is no BAJI verdict form on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Verdicts Special Verdicts Torts Intentional Torts False Imprisonment General Overview Torts Intentional Torts False Imprisonment Defenses Justification



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California Forms of Jury Instruction

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CHAPTER 14 California Judicial Council False Imprisonment Instructions

3-14 California Forms of Jury Instruction CACI VF-1402

CACI VF-1402 False Arrest Without Warrant

We answer the questions submitted to us as follows:

1. Did [name of defendant] [arrest [name of plaintiff]/intentionally cause [name of plaintiff] to be arrested] without a warrant?

_____ Yes _____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Was [name of defendant]'s conduct a substantial factor in causing harm to [name of plaintiff]?

_____ Yes _____ No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. What are [name of plaintiff]'s damages?

[a. Past economic loss

[lost earnings..... \$_____].....

[lost profits..... \$_____].....

[medical expenses..... \$_____].....

[other past economic loss..... \$_____].....

..... Total Past Economic Damages: \$_____]

[b. Future economic loss

[lost earnings..... \$_____].....

[lost profits..... \$_____].....

[medical expenses..... \$_____].....

[other future economic loss..... \$_____].....

..... Total Future Economic Damages: \$_____]

**[c. Past noneconomic loss, including [physical
pain/mental suffering:]..... \$_____]**

**[d. Future noneconomic loss, including [physical
pain/mental suffering:]..... \$_____]**

..... TOTAL \$_____

Signed: _____

Presiding Juror

Dated: _____

**[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the
[clerk/bailiff/judge].**

New September 2003; Revised April 2007

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case. This verdict form is based on *CACI No. 1401, Essential Factual Elements--False Arrest Without Warrant by Peace Officer*.

If the jury returns a verdict of no harm, the plaintiff is still entitled to an award of nominal damages, such as one dollar. If nominal damages are being sought, modify the directions after question 2 to direct the jury to skip question 3 and answer question 4 if they find no harm. Then add a new question 4: "What amount of nominal damages do you award [name of plaintiff]?" If this is done, add a direction after question 3 that the jury should not answer question 4. Please note that the committee has found no cases requiring the jury to determine the amount of nominal damages.

If specificity is not required, users do not have to itemize all the damages listed in question 3 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case.

The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

Publisher's Notes

There is no BAJI verdict form on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsVerdictsSpecial VerdictsTortsIntentional TortsFalse ImprisonmentGeneral Overview



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California Forms of Jury Instruction

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CHAPTER 14 California Judicial Council False Imprisonment Instructions

3-14 California Forms of Jury Instruction CACI VF-1403

CACI VF-1403 False Arrest Without Warrant by Peace Officer--Affirmative Defense--Probable Cause to Arrest

We answer the questions submitted to us as follows:

1. Did [name of defendant] arrest [name of plaintiff] without a warrant?

_____ Yes _____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. [Did [insert facts that, if proved, would constitute reasonable cause to believe that plaintiff had committed a crime in defendant's presence]?]

[or]

[Did [insert facts that, if proved, would establish that defendant had reasonable cause to believe that plaintiff had committed a felony, whether or not a felony had actually been committed]?]

_____ Yes _____ No

If your answer to question 2 is no, then answer question 3. If you answered yes, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Was [name of defendant]'s conduct a substantial factor in causing harm to [name of plaintiff]?

_____ Yes _____ No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. What are [*name of plaintiff*]'s damages?

[a. Past economic loss

[lost earnings..... \$ _____].....

[lost profits..... \$ _____].....

[medical expenses..... \$ _____].....

[other past economic loss..... \$ _____].....

..... Total Past Economic Damages: \$ _____]

[b. Future economic loss

[lost earnings..... \$ _____].....

[lost profits..... \$ _____].....

[medical expenses..... \$ _____].....

[other future economic loss..... \$ _____].....

..... Total Future Economic Damages: \$ _____]

[c. Past noneconomic loss, including [physical pain/mental suffering:]..... \$ _____]

[d. Future noneconomic loss, including [physical pain/mental suffering:]..... \$ _____]

..... TOTAL \$ _____

Signed: _____

Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the [clerk/bailiff/judge].

New September 2003; Revised April 2007

The special verdict forms in this section are intended only as models. They may need to be modified

depending on the facts of the case. This verdict form is based on *CACI No. 1401, Essential Factual Elements--False Arrest Without Warrant by Peace Officer*, and *CACI No. 1402, False Arrest Without Warrant--Affirmative Defense--Peace Officer--Probable Cause to Arrest*.

If the jury returns a verdict of no harm, the plaintiff is still entitled to an award of nominal damages, such as one dollar. If nominal damages are being sought, modify the directions after question 3 to direct the jury to skip question 4 and answer question 5 if they find no harm. Then add a new question 5: "What amount of nominal damages do you award [*name of plaintiff*]?" If this is done, add a direction after question 4 that the jury should not answer question 5. Please note that the committee has found no cases requiring the jury to determine the amount of nominal damages.

If specificity is not required, users do not have to itemize all the damages listed in question 4 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

Publisher's Notes

There is no BAJI verdict form on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Verdicts Special Verdicts Torts Intentional Torts False Imprisonment General Overview Torts Intentional Torts False Imprisonment Defenses Justification



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California Forms of Jury Instruction

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CHAPTER 14 California Judicial Council False Imprisonment Instructions

3-14 California Forms of Jury Instruction CACI VF-1404

CACI VF-1404 False Arrest Without Warrant by Private Citizen--Affirmative Defense--Probable Cause to Arrest

We answer the questions submitted to us as follows:

1. Did [name of defendant] intentionally cause [name of plaintiff] to be arrested without a warrant?

_____ Yes _____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. [Did [name of plaintiff] commit or attempt to commit a crime in [name of defendant]'s presence?]

[or]

[Was a felony committed and [insert facts, that if proved, would establish that defendant had reasonable cause to believe that plaintiff had committed a felony]?]

_____ Yes _____ No

If your answer to question 2 is no, then answer question 3. If you answered yes, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Was [name of defendant]'s conduct a substantial factor in causing harm to [name of plaintiff]?

_____ Yes _____ No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. What are [*name of plaintiff*]'s damages?

[a. Past economic loss

[lost earnings..... \$ _____].....

[lost profits..... \$ _____].....

[medical expenses..... \$ _____].....

[other past economic loss..... \$ _____].....

..... Total Past Economic Damages: \$ _____]

[b. Future economic loss

[lost earnings..... \$ _____].....

[lost profits..... \$ _____].....

[medical expenses..... \$ _____].....

[other future economic loss..... \$ _____].....

..... Total Future Economic Damages: \$ _____]

[c. Past noneconomic loss, including [physical pain/mental suffering:]..... \$ _____]

[d. Future noneconomic loss, including [physical pain/mental suffering:]..... \$ _____]

..... TOTAL \$ _____

Signed: _____

Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the [clerk/bailiff/judge].

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case. This verdict form is based on *CACI No. 1403, Essential Factual Elements--False Arrest Without Warrant by Private Citizen*, and *CACI No. 1404, False Arrest Without Warrant--Affirmative Defense--Private Citizen--Probable Cause to Arrest*.

If specificity is not required, users do not have to itemize all the damages listed in question 4 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If the jury returns a verdict of no harm, the plaintiff is still entitled to an award of nominal damages, such as one dollar. If nominal damages are being sought, modify the directions after question 3 to direct the jury to skip question 4 and answer question 5 if they find no harm. Then add a new question 5: "What amount of nominal damages do you award [*name of plaintiff*]?" If this is done, add a direction after question 4 that the jury should not answer question 5. Please note that the committee has found no cases requiring the jury to determine the amount of nominal damages.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

Publisher's Notes

There is no BAJI verdict form on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Verdicts Special Verdicts Torts Intentional Torts False Imprisonment General Overview Torts Intentional Torts False Imprisonment Defenses Justification



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California Forms of Jury Instruction

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CHAPTER 14 California Judicial Council False Imprisonment Instructions

3-14 California Forms of Jury Instruction CACI VF-1405

CACI VF-1405 False Arrest With Warrant

We answer the questions submitted to us as follows:

1. Did [name of defendant] [arrest [name of plaintiff]/intentionally cause [name of plaintiff] to be arrested]?

_____ Yes _____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. [Insert question regarding facts supporting the invalidity of the warrant or the unlawfulness of the arrest, e.g., "Had the warrant for [name of plaintiff]'s arrest expired?"]

_____ Yes _____ No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Was [name of defendant]'s conduct a substantial factor in causing harm to [name of plaintiff]?

_____ Yes _____ No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. What are [name of plaintiff]'s damages?**[a. Past economic loss**

[lost earnings..... \$_____]

[lost profits..... \$_____]

[medical expenses..... \$_____]

[other past economic loss..... \$_____]

..... **Total Past Economic Damages: \$_____]****[b. Future economic loss**

[lost earnings..... \$_____]

[lost profits..... \$_____]

[medical expenses..... \$_____]

[other future economic loss..... \$_____]

..... **Total Future Economic Damages: \$_____]****[c. Past noneconomic loss, including [physical
pain/mental suffering:]..... \$_____]****[d. Future noneconomic loss, including [physical
pain/mental suffering:]..... \$_____]**..... **TOTAL \$_____****Signed: _____****Presiding Juror****Dated: _____****[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the
[clerk/bailiff/judge].**

New September 2003; Revised April 2007

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case. This verdict form is based on *CACI No. 1405, Essential Factual Elements--False Arrest With Warrant*.

If the jury returns a verdict of no harm, the plaintiff is still entitled to an award of nominal damages, such

as one dollar. If nominal damages are being sought, modify the directions after question 3 to direct the jury to skip question 4 and answer question 5 if they find no harm. Then add a new question 5: "What amount of nominal damages do you award [*name of plaintiff*]?" If this is done, add a direction after question 4 that the jury should not answer question 5. Please note that the committee has found no cases requiring the jury to determine the amount of nominal damages.

If specificity is not required, users do not have to itemize all the damages listed in question 4 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

Publisher's Notes

There is no BAJI verdict form on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Verdicts Special Verdicts Torts Intentional Torts False Imprisonment General Overview



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California Forms of Jury Instruction

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CHAPTER 14 California Judicial Council False Imprisonment Instructions

3-14 California Forms of Jury Instruction CACI VF-1406

CACI VF-1406 False Arrest With Warrant--Peace Officer--Affirmative Defense--"Good-Faith" Exception

We answer the questions submitted to us as follows:

1. Did [name of defendant] arrest [name of plaintiff]?

_____ Yes _____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. [Insert question regarding facts supporting the invalidity of the warrant or the unlawfulness of the arrest, e.g., "Had the warrant for [name of plaintiff]'s arrest expired?"]

_____ Yes _____ No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Would the arrest warrant have appeared valid to a reasonably intelligent and informed person?

_____ Yes _____ No

If your answer to question 3 is yes, then answer question 4. If you answered no, skip questions 4 and 5 and answer question 6.

4. Did [name of defendant] believe the warrant was valid?

_____ Yes _____ No

If your answer to question 4 is yes, then answer question 5. If you answered no, skip question 5 and answer question 6.

5. Did [*name of defendant*] have a reasonable belief that [*name of plaintiff*] was the person referred to in the warrant?

_____ Yes _____ No

If your answer to question 5 is no, then answer question 6. If you answered yes, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. Was [*name of defendant*]'s conduct a substantial factor in causing harm to [*name of plaintiff*]?

_____ Yes _____ No

If your answer to question 6 is yes, then answer question 7. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

7. What are [*name of plaintiff*]'s damages?

[a. Past economic loss

[lost earnings..... \$_____].....

[lost profits..... \$_____].....

[medical expenses..... \$_____].....

[other past economic loss..... \$_____].....

..... Total Past Economic Damages: \$_____]

[b. Future economic loss

[lost earnings..... \$_____].....

[lost profits..... \$_____].....

[medical expenses..... \$_____].....

[other future economic loss..... \$_____].....

..... Total Future Economic Damages: \$_____]

[c. Past noneconomic loss, including [physical pain/mental suffering:]..... \$_____]

[d. Future noneconomic loss, including [physical pain/mental suffering:]..... \$_____]

..... **TOTAL \$_____**

Signed: _____
Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the [clerk/bailiff/judge].

New September 2003; Revised April 2007

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on *CACI No. 1405, Essential Factual Elements--False Arrest With Warrant*, and *CACI No. 1406, False Arrest With Warrant --Peace Officer-- Affirmative Defense--"Good-Faith" Exception*.

If the jury returns a verdict of no harm, the plaintiff is still entitled to an award of nominal damages, such as one dollar. If nominal damages are being sought, modify the directions after question 6 to direct the jury to skip question 7 and answer question 8 if they find no harm. Then add a new question 8: "What amount of nominal damages do you award [name of plaintiff]?" If this is done, add a direction after question 7 that the jury should not answer question 8. Please note that the committee has found no cases requiring the jury to determine the amount of nominal damages.

If specificity is not required, users do not have to itemize all the damages listed in question 7 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

Publisher's Notes

There is no BAJI verdict form on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Verdicts Special Verdicts Torts Intentional Torts False Imprisonment General Overview Torts Intentional Torts False Imprisonment Defenses Justification



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California Forms of Jury Instruction

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CHAPTER 14 California Judicial Council False Imprisonment Instructions

3-14 California Forms of Jury Instruction CACI VF-1407

CACI VF-1407 False Imprisonment--Unnecessary Delay in Processing/Releasing

We answer the questions submitted to us as follows:

1. Did [name of defendant] hold [name of plaintiff] in custody?

_____ Yes _____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Was there an unnecessary delay [insert facts, e.g., "in taking [name of plaintiff] before a judge" or "in releasing [name of plaintiff]"]?

_____ Yes _____ No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Did [name of plaintiff] consent to the delay?

_____ Yes _____ No

If your answer to question 3 is no, then answer question 4. If you answered yes, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Was [name of defendant]'s conduct a substantial factor in causing harm to [name of plaintiff]?

_____ Yes _____ No

If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. What are [*name of plaintiff*]'s damages?

[a. Past economic loss

[lost earnings..... \$ _____].....

[lost profits..... \$ _____].....

[medical expenses..... \$ _____].....

[other past economic loss..... \$ _____].....

..... **Total Past Economic Damages: \$ _____]**

[b. Future economic loss

[lost earnings..... \$ _____].....

[lost profits..... \$ _____].....

[medical expenses..... \$ _____].....

[other future economic loss..... \$ _____].....

..... **Total Future Economic Damages: \$ _____]**

[c. Past noneconomic loss, including [physical pain/mental suffering:]..... \$ _____]

[d. Future noneconomic loss, including [physical pain/mental suffering:]..... \$ _____]

..... **TOTAL \$ _____**

Signed: _____

Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the [clerk/bailiff/judge].

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case. This verdict form is based on *CACI No. 1407, Essential Factual Elements--Unnecessary Delay in Processing/Releasing*.

If the jury returns a verdict of no harm, the plaintiff is still entitled to an award of nominal damages, such as one dollar. If nominal damages are being sought, modify the directions after question 4 to direct the jury to skip question 5 and answer question 6 if they find no harm. Then add a new question 6: "What amount of nominal damages do you award [*name of plaintiff*]?" If this is done, add a direction after question 5 that the jury should not answer question 6. Please note that the committee has found no cases requiring the jury to determine the amount of nominal damages.

If specificity is not required, users do not have to itemize all the damages listed in question 5 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

Publisher's Notes

There is no BAJI verdict form on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Verdicts Special Verdicts Torts Intentional Torts False Imprisonment General Overview



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California Forms of Jury Instruction

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CHAPTER 14 California Judicial Council False Imprisonment Instructions

3-14 California Forms of Jury Instruction CACI VF-1408-CACI VF-1499

Reserved for Future Use

CACI VF-1408Reserved for Future Use



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CHAPTER 15 California Judicial Council Malicious Prosecution Instructions

3-15 California Forms of Jury Instruction 15.syn

§ 15.syn Synopsis to Chapter 15: California Judicial Council Malicious Prosecution Instructions

CACI 1500 Former Criminal Proceeding

CACI 1501 Wrongful Use of Civil Proceedings

CACI 1502 Wrongful Use of Administrative Proceedings

CACI 1503-CACI 1504 Reserved for Future Use

CACI 1505 Affirmative Defense--Reliance on Counsel

CACI 1506 Public Entities and Employees (Gov. Code, § 821.6)

CACI 1507-CACI 1519 Reserved for Future Use

CACI 1520 Abuse of Process--Essential Factual Elements

CACI 1521-CACI 1599 Reserved for Future Use

CACI VF-1500 Malicious Prosecution--Former Criminal Proceeding

CACI VF-1501 Malicious Prosecution--Wrongful Use of Civil Proceedings

CACI VF-1502 Malicious Prosecution--Wrongful Use of Civil Proceedings--Affirmative Defense--Reliance on Counsel

CACI VF-1503 Malicious Prosecution--Wrongful Use of Administrative Proceedings

CACI VF-1504 Abuse of Process

CACI VF-1505-CACI VF-1599 Reserved for Future Use



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CHAPTER 15 California Judicial Council Malicious Prosecution Instructions

3-15 California Forms of Jury Instruction Scope

Scope

SCOPE

This chapter contains the California Judicial Council's "Malicious Prosecution Series" of jury instructions [*CACI No. 1500 et seq.*]. The Judicial Council of California Civil Jury Instructions (CACI) included in this publication are the product of the Judicial Council of California Task Force on Jury Instructions, which are updated by the Judicial Council of California Advisory Committee on Civil Jury Instructions.

This chapter includes instructions on the following topics:

- Former criminal proceedings [*CACI No. 1500*].
- Wrongful use of civil [*CACI No. 1501*] and administrative [*CACI No. 1502*] proceedings.
- Reliance on counsel as an affirmative defense [*CACI No. 1505*].
- Public entities and employees [*CACI No. 1506*].
- Essential factual elements for an action for abuse of process [*CACI No. 1520*].

The malicious prosecution series also includes special verdict forms [*CACI Nos. VF-1500-VF-1504*].



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CHAPTER 15 California Judicial Council Malicious Prosecution Instructions

3-15 California Forms of Jury Instruction CACI 1500

CACI 1500 Former Criminal Proceeding

[Name of plaintiff] claims that [name of defendant] wrongfully caused a criminal proceeding to be brought against [him/her/it]. To establish this claim, [name of plaintiff] must prove all of the following:

- 1. That [name of defendant] was actively involved in causing [name of plaintiff] to be prosecuted [or in causing the continuation of the prosecution];**
- [2. That the criminal proceeding ended in [name of plaintiff]'s favor;]**
- [3. That no reasonable person in [name of defendant]'s circumstances would have believed that there were grounds for causing [name of plaintiff] to be arrested or prosecuted;]**
- 4. That [name of defendant] acted primarily for a purpose other than to bring [name of plaintiff] to justice;**
- 5. That [name of plaintiff] was harmed; and**
- 6. That [name of defendant]'s conduct was a substantial factor in causing [name of plaintiff]'s harm.**

[The law requires that the trial judge, rather than the jury, decide if [name of plaintiff] has proven element 2 above, whether the criminal proceeding ended in [his/her/its] favor. But before I can do so, you must decide whether [name of plaintiff] has proven the following:

[List all factual disputes that must be resolved by the jury.]

The special [verdict/interrogatory] form will ask for your finding on [this/these] issue[s].]

[The law [also] requires that the trial judge, rather than the jury, decide if [name of plaintiff] has proven element 3 above, whether a reasonable person in [name of defendant]'s circumstances would have believed that there were grounds for causing [name of plaintiff] to be arrested or prosecuted. But before I can do so, you must decide whether [name of plaintiff] has proven the following:

[List all factual disputes that must be resolved by the jury.]

The special [verdict/interrogatory] form will ask for your finding on [this/these] issue[s].]

New September 2003; Revised April 2008, October 2008

Directions for Use

Malicious prosecution requires that the criminal proceeding have ended in the plaintiff's favor (element 2) and that the defendant did not reasonably believe that there were any grounds (probable cause) to initiate the proceeding (element 3). Probable cause is to be decided by the court as a matter of law. However, it may require the jury to find some preliminary facts before the court can make its legal determination, including facts regarding what the defendant knew or did not know at the time. (See *Sheldon Appel Co. v. Albert & Olier* (1989) 47 Cal.3d 863, 881 [254 Cal.Rptr. 336, 765 P.2d 498] .) If so, include element 3 and also the bracketed part of the instruction that refers to element 3.

Favorable termination is handled in much the same way. If a proceeding is terminated other than on the merits, there may be disputed facts that the jury must find in order to determine whether there has been a favorable termination. (See *Fuentes v. Berry* (1995) 38 Cal.App.4th 1800, 1808 [45 Cal.Rptr.2d 848] .) If so, include element 2 and also the bracketed part of the instruction that refers to element 2. Once these facts are determined, the jury does not then make a second determination as to whether there has been a favorable termination. The matter is determined by the court based on the resolution of the disputed facts. See *Sierra Club Found. v. Graham* (1999) 72 Cal.App.4th 1135, 1159 [85 Cal.Rptr.2d 726] [element of favorable termination is for court to decide].)

Either or both of the elements of probable cause and favorable termination should be omitted if there are no disputed facts regarding that element for the jury.

Element 4 expresses the malice requirement.

Sources and Authority

- *Restatement Second of Torts* section 653 provides:

A private person who initiates or procures the institution of criminal proceedings against another who is not guilty of the offense charged is subject to liability for malicious prosecution if

(a) he initiates or procures the proceedings without probable cause and primarily for a purpose other than that of bringing an offender to justice, and

(b) the proceedings have terminated in favor of the accused.

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■ *Restatement Second of Torts section 657* provides: "The fact that the person against whom criminal proceedings are instituted is guilty of the crime charged against him, is a complete defense against liability for malicious prosecution."

■ *Restatement Second of Torts, section 673* provides:

- (1) In an action for malicious prosecution the court determines whether
 - (a) the proceedings of which the plaintiff complains were criminal in character;
 - (b) the proceedings were terminated in favor of the plaintiff;
 - (c) the defendant had probable cause for initiating or continuing the proceedings;
 - (d) the harm suffered by the plaintiff is a proper element for the jury to consider in assessing damages.

(2) In an action for malicious prosecution, subject to the control of the court, the jury determines

- (a) the circumstances under which the proceedings were initiated in so far as this determination may be necessary to enable the court to determine whether the defendant had probable cause for initiating or continuing the proceedings;
- (b) whether the defendant acted primarily for a purpose other than that of bringing an offender to justice;
- (c) the circumstances under which the proceedings were terminated;
- (d) the amount that the plaintiff is entitled to recover as damages;
- (e) whether punitive damages are to be awarded, and if so, their amount.

■ *Government Code section 821.6* provides: "A public employee is not liable for injury caused by his instituting or prosecuting any judicial or administrative proceeding within the scope of his employment, even if he acts maliciously and without probable cause."

■ "Malicious prosecution consists of initiating or procuring the arrest and prosecution of another under lawful process, but from malicious motives and without probable cause." (*Cedars-Sinai Medical Center v. Superior Court* (1988) 206 Cal.App.3d 414, 417 [253 Cal.Rptr. 561] , internal citation omitted.)

■ "The remedy of a malicious prosecution action lies to recompense the defendant who has suffered out of pocket loss in the form of attorney fees and costs, as well as emotional distress and injury to reputation because of groundless allegations made in pleadings which are public records." (*Sagonowsky v. More* (1998) 64 Cal.App.4th 122, 132 [75 Cal.Rptr.2d 118] , internal citations omitted.)

■ The Supreme Court has observed: "Cases dealing with actions for malicious prosecution against private persons require that the defendant has at least sought out the police or prosecutorial authorities and falsely reported facts to them indicating that plaintiff has committed a crime." (*Sullivan v. County of Los Angeles* (1974) 12 Cal.3d 710, 720 [117 Cal.Rptr. 241, 527 P.2d 865] , internal citations omitted.)

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■ "The test is whether the defendant was actively instrumental in causing the prosecution." (*Cedars-Sinai Medical Center*, *supra*, 206 Cal.App.3d at p. 417 .)

■ In *Lujan v. Gordon* (1977) 70 Cal.App.3d 260, 263 [138 Cal.Rptr. 654] , the court observed that the Supreme Court in an 1861 case had approved a jury instruction whose effect "was to impose liability upon one who had not taken part until after the commencement of the prosecution."

■ "Originally the common law tort of malicious prosecution was limited to criminal cases, but the tort was extended to afford a remedy for the malicious prosecution of a civil action." (*Merlet v. Rizzo* (1998) 64 Cal.App.4th 53, 58 [75 Cal.Rptr.2d 83] , internal citation omitted.)

■ " 'Probable cause' [is defined] as 'a suspicion founded upon circumstances sufficiently strong to warrant a reasonable man in the belief that the charge is true.' " (*Clary v. Hale* (1959) 175 Cal.App.2d 880, 886 [1 Cal.Rptr. 91] , internal citation omitted.)

■ "When there is a dispute as to the state of the defendant's knowledge and the existence of probable cause turns on resolution of that dispute, ... the jury must resolve the threshold question of the defendant's factual knowledge or belief. Thus, when ... there is evidence that the defendant may have known that the factual allegations on which his action depended were untrue, the jury must determine what facts the defendant knew before the trial court can determine the legal question whether such facts constituted probable cause to institute the challenged proceeding." (*Sheldon Appel Co.*, *supra*, 47 Cal.3d at p. 881 , internal citations omitted.)

■ In *Bertero* [*Bertero v. National General Corp.* (1974) 13 Cal.3d 43 [118 Cal.Rptr. 184, 529 P.2d 608]] , the court approved a jury instruction stating that liability can be found if the prior action asserts a legal theory that is brought without probable cause, even if alternate theories are brought with probable cause. (*Bertero*, *supra*, 13 Cal.3d at pp. 55-57 .) This holding was reaffirmed in *Crowley v. Katleman* (1994) 8 Cal.4th 666, 695 [34 Cal.Rptr.2d 386, 881 P.2d 1083] .)

■ " '[T]he plaintiff in a malicious prosecution action must plead and prove that the prior judicial proceeding of which he complains terminated in his favor.' Termination of the prior proceeding is not necessarily favorable simply because the party prevailed in the prior proceeding; the termination must relate to the merits of the action by reflecting either on the innocence of or lack of responsibility for the misconduct alleged against him." (*Sagonowsky*, *supra*, 64 Cal.App.4th at p. 128 , internal citations omitted.)

■ " 'The theory underlying the requirement of favorable termination is that it tends to indicate the innocence of the accused, and coupled with the other elements of lack of probable cause and malice, establishes the tort, that is, the malicious and unfounded charge of crime against an innocent person.' " (*Cote v. Henderson* (1990) 218 Cal.App.3d 796, 804 [267 Cal.Rptr. 274] , quoting *Jaffe v. Stone* (1941) 18 Cal.2d 146, 150 [114 P.2d 335] .)

■ "Where a proceeding is terminated other than on the merits, the reasons underlying the termination must be examined to see if it reflects the opinion of the court or the prosecuting party that the action would not succeed. If a conflict arises as to the circumstances explaining a failure to prosecute an action further, the determination of the reasons underlying the dismissal is a question of fact." (*Fuentes*, *supra*, 38 Cal.App.4th at p. 1808 , internal citations omitted.)

■ "The plea of nolo contendere is considered the same as a plea of guilty. Upon a plea of nolo contendere the court shall find the defendant guilty, and its legal effect is the same as a plea of guilty for all purposes. It negates the element of a favorable termination, which is a prerequisite to stating a cause of action for malicious prosecution." (*Cote*, *supra*, 218 Cal.App.3d at p. 803 , internal citation omitted.)

■ In *Verdier v. Verdier* (1957) 152 Cal.App.2d 348, 352, fn. 3 [313 P.2d 123] , the court observed that "[a]cquittal of the criminal charge, in the criminal action, did not create a conflict of evidence on the issue of probable cause. [Citations.]"

■ " 'Should a conflict arise as to the circumstances explaining the failure to prosecute, the trier of fact must exercise its traditional role in deciding the conflict.' " (*Weaver v. Superior Court* (1979) 95 Cal.App.3d 166, 185 [156 Cal.Rptr. 745] , original italics, internal citations omitted, disapproved on other grounds in *Sheldon Appel Co., supra*, 47 Cal.3d at p. 882 .)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 469-485, 511

4 Levy et al., *California Torts*, Ch. 43, *Malicious Prosecution and Abuse of Process*, §§ 43.01 -43.06 (Matthew Bender)

31 *California Forms of Pleading and Practice*, Ch. 357, *Malicious Prosecution and Abuse of Process*, §§ 357.10 -357.32 (Matthew Bender)

14 *California Points and Authorities*, Ch. 147, *Malicious Prosecution and Abuse of Process*, §§ 147.20 -147.53 (Matthew Bender)

Publisher's Notes

This instruction covers issues presented in BAJI No. 7.30.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Torts Intentional Torts Malicious Prosecution Elements General Overview Torts Intentional Torts Malicious Prosecution Elements Favorable Termination



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California Forms of Jury Instruction

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CHAPTER 15 California Judicial Council Malicious Prosecution Instructions

3-15 California Forms of Jury Instruction CACI 1501

CACI 1501 Wrongful Use of Civil Proceedings

[*Name of plaintiff*] **claims that** [*name of defendant*] **wrongfully brought a lawsuit against** [him/her/it]. **To establish this claim, [*name of plaintiff*] must prove all of the following:**

- 1. That [*name of defendant*] was actively involved in bringing [or continuing] the lawsuit;**
- [2. That the lawsuit ended in [*name of plaintiff*]'s favor;]**
- [3. That no reasonable person in [*name of defendant*]'s circumstances would have believed that there were reasonable grounds to bring the lawsuit against [*name of plaintiff*];]**
- 4. That [*name of defendant*] acted primarily for a purpose other than succeeding on the merits of the claim;**
- 5. That [*name of plaintiff*] was harmed; and**
- 6. That [*name of defendant*]'s conduct was a substantial factor in causing [*name of plaintiff*]'s harm.**

[The law requires that the trial judge, rather than the jury, decide if [*name of plaintiff*] has proven element 2 above, whether the criminal proceeding ended in [his/her/its] favor. But before I can do so, you must decide whether [*name of plaintiff*] has proven the following:

[*List all factual disputes that must be resolved by the jury.*]

The special [verdict/interrogatory] form will ask for your finding on [this/these] issue[s].]

[The law [also] requires that the trial judge, rather than the jury, decide if [name of plaintiff] has proven element 3 above, whether [name of defendant] had reasonable grounds for bringing the earlier lawsuit against [him/her/it]. But before I can do so, you must decide whether [name of plaintiff] has proven the following:

[List all factual disputes that must be resolved by the jury.]

The special [verdict/interrogatory] form will ask for your finding on [this/these] issue[s].]

New September 2003; Revised April 2008, October 2008

Directions for Use

Malicious prosecution requires that the proceeding have ended in the plaintiff's favor (element 2) and that the defendant did not reasonably believe that there were any grounds (probable cause) to initiate the proceeding (element 3). Probable cause is to be decided by the court as a matter of law. However, the jury may be required to find some preliminary facts before the court can make its legal determination, including facts regarding what the defendant knew or did not know at the time. (See *Sheldon Appel Co. v. Albert & Olier (1989)* 47 Cal.3d 863, 881 [254 Cal.Rptr. 336, 765 P.2d 498] .) If so, include element 3 and also the bracketed part of the instruction that refers to element 3.

Favorable termination is handled in much the same way. If a proceeding is terminated other than on the merits, there may be disputed facts that the jury must find in order to determine whether there has been a favorable termination. (See *Fuentes v. Berry (1995)* 38 Cal.App.4th 1800, 1808 [45 Cal.Rptr.2d 848] .) If so, include element 2 and also the bracketed part of the instruction that refers to element 2. Once these facts are determined, the jury does not then make a second determination as to whether there has been a favorable termination. The matter is determined by the court based on the resolution of the disputed facts. See *Sierra Club Found. v. Graham (1999)* 72 Cal.App.4th 1135, 1159 [85 Cal.Rptr.2d 726] [element of favorable termination is for court to decide].)

Either or both of the elements of probable cause and favorable termination should be omitted if there are no disputed facts regarding that element for the jury to decide.

Element 4 expresses the malice requirement.

Sources and Authority

- "Although the tort is usually called 'malicious prosecution,' the word 'prosecution' is not a particularly apt description of the underlying civil action. The Restatement uses the term 'wrongful use of civil proceedings' to refer to the tort." (5 Witkin, Summary of California Law (10th ed. 2005) Torts, § 486, internal citations omitted.)

- *Government Code* section 821.6 provides: "A public employee is not liable for injury caused by his instituting or prosecuting any judicial or administrative proceeding within the scope of his employment, even if he acts maliciously and without probable cause."

- "To establish a cause of action for the malicious prosecution of a civil proceeding, a plaintiff must plead and prove that the prior action (1) was commenced by or at the direction of the defendant and was

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pursued to a legal termination in his, plaintiff's, favor; (2) was brought without probable cause; and (3) was initiated with malice." (*Bertero v. National General Corp.* (1974) 13 Cal.3d 43, 50 [118 Cal.Rptr. 184, 529 P.2d 608] , internal citations omitted.)

■ "The remedy of a malicious prosecution action lies to recompense the defendant who has suffered out of pocket loss in the form of attorney fees and costs, as well as emotional distress and injury to reputation because of groundless allegations made in pleadings which are public records." (*Sagonowsky v. More* (1998) 64 Cal.App.4th 122, 132 [75 Cal.Rptr.2d 118] , internal citations omitted.)

■ "The malicious commencement of a civil proceeding is actionable because it harms the individual against whom the claim is made, and also because it threatens the efficient administration of justice. The individual is harmed because he is compelled to defend against a fabricated claim which not only subjects him to the panoply of psychological pressures most civil defendants suffer, but also the additional stress of attempting to resist a suit commenced out of spite or ill will, often magnified by slanderous allegations in the pleadings." (*Merlet v. Rizzo* (1998) 64 Cal.App.4th 53, 59 [75 Cal.Rptr.2d 83] , internal citation omitted.)

■ The litigation privilege of *Civil Code* section 47 does not preclude malicious prosecution actions. (See *Kimmel v. Goland* (1990) 51 Cal.3d 202, 209 [271 Cal.Rptr. 191, 793 P.2d 524] [litigation privilege "has been interpreted to apply to virtually all torts except malicious prosecution"]; *Silberg v. Anderson* (1990) 50 Cal.3d 205, 216 [266 Cal.Rptr. 638, 786 P.2d 365] ["only exception ... has been for malicious prosecution actions"]; *Mattco Forge, Inc. v. Arthur Young & Co.* (1992) 5 Cal.App.4th 392, 406 [6 Cal.Rptr.2d 781] ["privilege applies only to tort causes of action, and not to the tort of malicious prosecution"].)

■ A person who had no part in the commencement of the action but who participated in it at a later time may be held liable for malicious prosecution: "There does not appear to be any good reason not to impose liability upon a person who inflicts harm by aiding or abetting a malicious prosecution which someone else has instituted." (*Lujan v. Gordon* (1977) 70 Cal.App.3d 260, 264 [138 Cal.Rptr. 654] .)

■ "[A] cause of action for malicious prosecution lies when predicated on a claim for affirmative relief asserted in a cross-pleading even though intimately related to a cause asserted in the complaint." (*Bertero, supra*, 13 Cal.3d at p. 53 .)

■ "Our repeated references in *Bertero* to the types of harm suffered by an 'individual' who is forced to defend against a baseline suit do not indicate ... that a malicious prosecution action can be brought only by an individual. On the contrary, there are valid policies which would be furthered by allowing nonindividuals to sue for malicious prosecution." (*City of Long Beach v. Bozek* (1982), 31 Cal.3d 527, 531 [183 Cal.Rptr. 86, 645 P.2d 137] , reiterated on remand from *United States Supreme Court* at 33 Cal.3d 727 [but holding that public entity cannot sue for malicious prosecution].)

■ "[T]he courts have refused to permit malicious prosecution claims when they are based on a prior proceeding that is (1) less formal or unlike the process in the superior court (i.e., a small claims hearing, an investigation or application not resulting in a formal proceeding), (2) purely defensive in nature, or (3) a continuation of an existing proceeding." (*Merlet, supra*, 64 Cal.App.4th at p. 60 .)

■ "[I]t is not enough that the present plaintiff (former defendant) prevailed in the action. The termination must 'reflect on the merits,' and be such that it 'tended to indicate [the former defendant's] innocence of or lack of responsibility for the alleged misconduct.' " (*Drummond v. Desmarais* (2009) 176 Cal.App.4th 439, 450 [98 Cal.Rptr.3d 183] , internal citations omitted.)

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- "[A] voluntary dismissal on technical grounds, such as lack of jurisdiction, laches, the statute of limitations or prematurity, does not constitute a favorable termination because it does not reflect on the substantive merits of the underlying claim. ..." (*Drummond, supra*, 176 Cal.App.4th at p. 456 .)
- "[A] malicious prosecution plaintiff is not precluded from establishing favorable termination where severable claims are adjudicated in his or her favor." (*Sierra Club Found., supra*, 72 Cal.App.4th at p. 1153 , internal citation omitted.)
- "Where a proceeding is terminated other than on the merits, the reasons underlying the termination must be examined to see if it reflects the opinion of the court or the prosecuting party that the action would not succeed. If a conflict arises as to the circumstances explaining a failure to prosecute an action further, the determination of the reasons underlying the dismissal is a question of fact." (*Fuentes, supra*, 38 Cal.App.4th at p. 1808 , internal citations omitted.)
- "[W]hen a dismissal results from negotiation, settlement, or consent, a favorable termination is normally not recognized. Under these latter circumstances, the dismissal reflects ambiguously on the merits of the action." (*Weaver v. Superior Court* (1979) 95 Cal.App.3d 166, 184-185 [156 Cal.Rptr. 745] , internal citations omitted, disapproved on other grounds in *Sheldon Appel Co., supra*, 47 Cal.3d at p. 882 .)
- " 'Should a conflict arise as to the circumstances explaining the failure to prosecute, the trier of fact must exercise its traditional role in deciding the conflict.' " (*Weaver, supra*, 95 Cal.App.3d at p. 185 , original italics, internal citations omitted.)
- "Not every case in which a terminating sanctions motion is granted necessarily results in a 'favorable termination.' But where the record from the underlying action is devoid of any attempt during discovery to substantiate allegations in the complaint, and the court's dismissal is justified by the plaintiff's lack of evidence to submit the case to a jury at trial, a prima facie showing of facts sufficient to satisfy the 'favorable termination' element of a malicious prosecution claim is established" (*Daniels v. Robbins* (2010) 182 Cal.App.4th 204, 219 [105 Cal.Rptr.3d 683] .)
- " 'Probable cause exists when a cause of action is, objectively speaking, legally tenable.' ... The claim need not be meritorious in fact, but only 'arguably tenable ... ' " (*Drummond, supra*, 176 Cal.App.4th at p. 453 , original italics, internal citations omitted.)
- In *Bertero*, the court approved a jury instruction stating that liability can be found if the prior action asserts a legal theory that is brought without probable cause, even if alternate theories are brought with probable cause. (*Bertero, supra*, 13 Cal.3d at pp. 55-57 .) This holding was reaffirmed in *Crowley v. Katleman* (1994) 8 Cal.4th 666, 695 [34 Cal.Rptr.2d 386, 881 P.2d 1083] .)
- "[T]he existence or absence of probable cause has traditionally been viewed as a question of law to be determined by the court, rather than a question of fact for the jury [P] [It] requires a sensitive evaluation of legal principles and precedents, a task generally beyond the ken of lay jurors" (*Sheldon Appel Co., supra*, 47 Cal.3d at p. 875 .)
- "When there is a dispute as to the state of the defendant's knowledge and the existence of probable cause turns on resolution of that dispute, ... the jury must resolve the threshold question of the defendant's factual knowledge or belief. Thus, when ... there is evidence that the defendant may have known that the factual allegations on which his action depended were untrue, the jury must determine

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what facts the defendant knew before the trial court can determine the legal question whether such facts constituted probable cause to institute the challenged proceeding." (*Sheldon Appel Co., supra*, 47 Cal.3d at p. 881 , internal citations omitted.)

■ "Whereas the malice element is directly concerned with the *subjective* mental state of the defendant in instituting the prior action, the probable cause element calls on the trial court to make an objective determination of the 'reasonableness' of the defendant's conduct, i.e., to determine whether, on the basis of the facts known to the defendant, the institution of the prior action was legally tenable." (*Sheldon Appel Co., supra*, 47 Cal.3d at p. 878 , original italics.)

■ " 'The facts to be analyzed for probable cause are those known to the defendant [in the malicious prosecution action] at the time the underlying action was filed.' " (*Walsh v. Bronson* (1988) 200 Cal.App.3d 259, 264 [245 Cal.Rptr. 888] , internal citations omitted.)

■ "A litigant will lack probable cause for his action either if he relies upon facts which he has no reasonable cause to believe to be true, or if he seeks recovery upon a legal theory which is untenable under the facts known to him." (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 292 [46 Cal.Rptr.3d 638, 139 P.3d 30] .)

■ "Probable cause may be present even where a suit lacks merit. ... Suits which all reasonable lawyers agree totally lack merit--that is, those which lack probable cause--are the least meritorious of all meritless suits. Only this subgroup of meritless suits present[s] no probable cause." (*Roberts v. Sentry Life Insurance* (1999) 76 Cal.App.4th 375, 382 [90 Cal.Rptr.2d 408] .)

■ "[A]n attorney may be held liable for malicious prosecution for continuing to prosecute a lawsuit discovered to lack probable cause." (*Zamos v. Stroud* (2004) 32 Cal.4th 958, 970 [12 Cal.Rptr.3d 54, 87 P.3d 802] .)

■ "California courts have held that victory at trial, though reversed on appeal, conclusively establishes probable cause." (*Roberts, supra*, 76 Cal.App.4th at p. 383 .)

■ "As an element of the tort of malicious prosecution, malice at its core refers to an improper *motive* for bringing the prior action. As an element of liability it reflects the core function of the tort, which is to secure compensation for harm inflicted by *misusing* the judicial system, i.e., using it for something other than to enforce legitimate rights and secure remedies to which the claimant may tenably claim an entitlement. Thus the cases speak of malice as being present when a suit is actuated by hostility or ill will, or for some purpose other than to secure relief. It is also said that a plaintiff acts with malice when he asserts a claim with knowledge of its falsity, because one who seeks to establish such a claim 'can only be motivated by an improper purpose.' A lack of probable cause will therefore support an inference of malice." (*Drummond, supra*, 176 Cal.App.4th at pp. 451-452 , original italics, internal citations omitted.)

■ "Because malice concerns the former plaintiff's actual mental state, it necessarily presents a question of fact." (*Drummond, supra*, 176 Cal.App.4th at p. 452 .)

■ "Negligence does not equate with malice. Nor does the negligent filing of a case necessarily constitute the malicious prosecution of that case." (*Grindle v. Lorbeer* (1987) 196 Cal.App.3d 1461, 1468 [242 Cal.Rptr. 562] .)

■ "The motive of the defendant must have been something other than that of bringing a perceived

guilty person to justice or the satisfaction in a civil action of some personal or financial purpose. The plaintiff must plead and prove actual ill will or some improper ulterior motive. It may range anywhere from open hostility to indifference." (*Downey Venture v. LMI Insurance Co.* (1998) 66 Cal.App.4th 478, 494 [78 Cal.Rptr.2d 142] , internal citations omitted.)

■ "Suits with the hallmark of an improper purpose are those in which: '... (1) the person initiating them does not believe that his claim may be held valid; (2) the proceedings are begun primarily because of hostility or ill will; (3) the proceedings are initiated solely for the purpose of depriving the person against whom they are initiated of a beneficial use of his property; (4) the proceedings are initiated for the purpose of forcing a settlement which has no relation to the merits of the claim.'" (*Sierra Club Found.*, *supra*, 72 Cal.App.4th at pp. 1156-1157 .)

■ "Although *Zamos* [*supra*] did not explicitly address the malice element of a malicious prosecution case, its holding and reasoning compel us to conclude that malice formed after the filing of a complaint is actionable." (*Daniels*, *supra*, 182 Cal.App.4th at p. 226 .)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 471, 474, 477-484, 486-512

4 Levy et al., *California Torts*, Ch. 43, *Malicious Prosecution and Abuse of Process*, §§ 43.01 -43.06 (Matthew Bender)

31 *California Forms of Pleading and Practice*, Ch. 357, *Malicious Prosecution and Abuse of Process*, §§ 357.10 -357.32 (Matthew Bender)

14 *California Points and Authorities*, Ch. 147, *Malicious Prosecution and Abuse of Process*, §§ 147.20 -147.53 (Matthew Bender)

Publisher's Notes

This instruction covers issues presented in BAJI No. 7.30.

In *George F. Hillenbrand, Inc. v. Insurance Co. of North America* (2002) 104 Cal.App.4th 784, 819 [128 Cal.Rptr.2d 586] , the jury was instructed that it could infer malice from the absence of probable cause and on the meaning of malice for malicious prosecution. The court approved the challenged instruction because it did not suggest that the inference of malice drawn from the absence of probable cause was sufficient to demonstrate malice. When taken in the context of all the instructions on the elements of malicious prosecution and malice, it correctly informed the jury that one inference to be drawn from the frivolous nature of the lawsuits was a malicious intent.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Torts Intentional Torts Malicious Prosecution Elements General Overview



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California Forms of Jury Instruction

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CHAPTER 15 California Judicial Council Malicious Prosecution Instructions

3-15 California Forms of Jury Instruction CACI 1502

CACI 1502 Wrongful Use of Administrative Proceedings

[*Name of plaintiff*] **claims that [*name of defendant*] wrongfully brought an administrative proceeding against [him/her/it]. To establish this claim, [*name of plaintiff*] must prove all of the following:**

- 1. That [*name of defendant*] was actively involved in bringing [or continuing] the administrative proceeding;**
- 2. That [*name of administrative body*] did not conduct an independent investigation;**
- [3. That the proceeding ended in [*name of plaintiff*]'s favor;]**
- [4. That no reasonable person in [*name of defendant*]'s circumstances would have believed that there were reasonable grounds to bring the proceeding against [*name of plaintiff*];]**
- 5. That [*name of defendant*] acted primarily for a purpose other than succeeding on the merits of the claim;**
- 6. That [*name of plaintiff*] was harmed; and**
- 7. That [*name of defendant*]'s conduct was a substantial factor in causing [*name of plaintiff*]'s harm.**

[The law requires that the trial judge, rather than the jury, decide if [*name of plaintiff*] has proven element 3 above, whether the criminal proceeding ended in [his/her/its] favor. But before I can do so, you must decide whether [*name of plaintiff*] has proven the following:

[List all factual disputes that must be resolved by the jury.]

The special [verdict/interrogatory] form will ask for your finding on [this/these] issue[s].

[The law [also] requires that the trial judge, rather than the jury, decide if [name of plaintiff] has proven element 4 above, whether a reasonable person in [name of defendant]'s circumstances would have believed that there were there were reasonable grounds for bringing the proceeding against [name of plaintiff]. But before I can do so, you must decide whether [name of plaintiff] has proven the following:

[List all factual disputes that must be resolved by the jury.]

The special [verdict/interrogatory] form will ask for your finding on [this/these] issue[s].

New September 2003; Revised April 2008, October 2008

Directions for Use

Malicious prosecution requires that the proceeding have ended in the plaintiff's favor (element 3) and that the defendant did not reasonably believe that there were any grounds (probable cause) to initiate the proceeding (element 4). Probable cause is to be decided by the court as a matter of law. However, it may require the jury to find some preliminary facts before the court can make its legal determination, including facts regarding what the defendant knew or didn't know at the time. (See *Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863, 881 [254 Cal.Rptr. 336, 765 P.2d 498] .) If so, include element 4 and also the bracketed part of the instruction that refers to element 4.

Favorable termination is handled in much the same way. If a proceeding is terminated other than on the merits, there may be disputed facts that the jury must find in order to determine whether there has been a favorable termination. (See *Fuentes v. Berry* (1995) 38 Cal.App.4th 1800, 1808 [45 Cal.Rptr.2d 848] .) If so, include element 3 and also the bracketed part of the instruction that refers to element 3. Once these facts are determined, the jury does not then make a second determination as to whether there has been a favorable termination. The matter is determined by the court based on the resolution of the disputed facts. See *Sierra Club Found. v. Graham* (1999) 72 Cal.App.4th 1135, 1159 [85 Cal.Rptr.2d 726] [element of favorable termination is for court to decide].)

Either or both of the elements of probable cause and favorable termination should be omitted if there are no disputed facts regarding that element for the jury.

Element 5 expresses the malice requirement.

Sources and Authority

- *Restatement Second of Torts*, section 680 provides:

One who takes an active part in the initiation, continuation or procurement of civil proceedings against another before an administrative board that has power to take action adversely affecting the legally protected interests of the other, is subject to liability for any special harm caused thereby, if

(a) he acts without probable cause to believe that the charge or claim on which the proceedings are based may be well founded, and primarily for a purpose other than that of

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securing appropriate action by the board, and

(b) except where they are ex parte, the proceedings have terminated in favor of the person against whom they are brought.

■ *Government Code section 821.6* provides: "A public employee is not liable for injury caused by his instituting or prosecuting any judicial or administrative proceeding within the scope of his employment, even if he acts maliciously and without probable cause."

■ " 'Where the prosecuting officer acts on an independent investigation of his own instead of on the statement of facts by the party making the complaint, the latter has not caused the prosecution and cannot be held liable in an action for malicious prosecution.' " (*Werner v. Hearst Publications, Inc.* (1944) 65 Cal.App.2d 667, 673 [151 P.2d 308] , internal citation omitted.)

■ "We adopt the rule set forth in section 680 of the Restatement of Torts and hold that an action for malicious prosecution may be founded upon the institution of a proceeding before an administrative agency." (*Hardy v. Vial* (1957) 48 Cal.2d 577, 581 [311 P.2d 494] .)

■ *Government Code section 821.6* provides: "A public employee is not liable for injury caused by his instituting or prosecuting any judicial or administrative proceeding within the scope of his employment, even if he acts maliciously and without probable cause."

■ " 'Where the prosecuting officer acts on an independent investigation of his own instead of on the statement of facts by the party making the complaint, the latter has not caused the prosecution and cannot be held liable in an action for malicious prosecution.' " (*Werner v. Hearst Publications, Inc.* (1944) 65 Cal.App.2d 667, 673 [151 P.2d 308] , internal citation omitted.)

■ "[W]e hold that the State Bar, not respondents, initiated, procured or continued the disciplinary proceedings of [plaintiff]. Therefore, [plaintiff] failed to allege the elements required for a malicious prosecution of an administrative proceeding against respondents." (*Stanwyck v. Horne* (1983) 146 Cal.App.3d 450, 459 [194 Cal.Rptr. 228] .)

■ "The [Board of Medical Quality Assurance] is similar to the State Bar Association. Each is empowered and directed to conduct an independent investigation of all complaints from the public prior to the filing of an accusation." (*Hogen v. Valley Hospital* (1983) 147 Cal.App.3d 119, 125 [195 Cal.Rptr. 5] , internal citation omitted.)

■ "*Hogen* and *Stanwyck* placed an additional pleading burden upon the plaintiff in a malicious prosecution case based upon the favorable termination of an administrative proceeding. Those cases held that since it is the administrative body, and not the individual initiating the complaint, which actually files the disciplinary proceeding, a cause of action for malicious prosecution will not lie if the administrative body conducts an independent preliminary investigation prior to initiating disciplinary proceedings." (*Johnson v. Superior Court* (1994) 25 Cal.App.4th 1564, 1568 [31 Cal.Rptr.2d 199] .)

■ "Where a proceeding is terminated other than on the merits, the reasons underlying the termination must be examined to see if it reflects the opinion of the court or the prosecuting party that the action would not succeed. If a conflict arises as to the circumstances explaining a failure to prosecute an action further, the determination of the reasons underlying the dismissal is a question of fact." (*Fuentes, supra*, 38 Cal.App.4th at p. 1808 , internal citation omitted.)

■ The same rules for determining probable cause in the wrongful institution of civil proceedings apply to cases alleging the wrongful institution of administrative proceedings. (*Nicholson v. Lucas* (1994) 21 Cal.App.4th 1657, 1666,

fn. 4 [26 Cal.Rptr.2d 778] .)

■ "When there is a dispute as to the state of the defendant's knowledge and the existence of probable cause turns on resolution of that dispute, ... the jury must resolve the threshold question of the defendant's factual knowledge or belief. Thus, when ... there is evidence that the defendant may have known that the factual allegations on which his action depended were untrue, the jury must determine what facts the defendant knew before the trial court can determine the legal question whether such facts constituted probable cause to institute the challenged proceeding." (*Sheldon Appel Co.*, *supra*, 47 Cal.3d at p. 881 , internal citations omitted.)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 513-516

4 Levy et al., *California Torts*, Ch. 43, *Malicious Prosecution and Abuse of Process*, §§ 43.01 -43.06 (Matthew Bender)

31 *California Forms of Pleading and Practice*, Ch. 357, *Malicious Prosecution and Abuse of Process*, §§ 357.10-357.32 (Matthew Bender)

14 *California Points and Authorities*, Ch. 147, *Malicious Prosecution and Abuse of Process*, §§ 147.20-147.53 (Matthew Bender)

Publisher's Notes

There is no BAJI instruction on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Torts Intentional Torts Malicious Prosecution Elements General Overview



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CACI 1503Reserved for Future Use



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CHAPTER 15 California Judicial Council Malicious Prosecution Instructions

3-15 California Forms of Jury Instruction CACI 1505

CACI 1505 Affirmative Defense--Reliance on Counsel

[*Name of defendant*] **claims that [he/she] had reasonable grounds for [causing or continuing the criminal proceeding/bringing or continuing a [lawsuit/administrative proceeding]] because [he/she] was relying on the advice of an attorney. To succeed, [*name of defendant*] must prove both of the following:**

- 1. That [*name of defendant*] made a full and honest disclosure of all the important facts known to [him/her] to the [district attorney/attorney]; and**
- 2. That [he/she] reasonably relied on the [district attorney/attorney]'s advice.**

New September 2003

- " 'Probable cause may be established by the defendants in a malicious institution proceeding when they prove that they have in good faith consulted a lawyer, have stated all the facts to him, have been advised by the lawyer that they have a good cause of action and have honestly acted upon the advice of the lawyer.' " (*Sosinsky v. Grant* (1992) 6 Cal.App.4th 1548, 1556 [8 Cal.Rptr.2d 552] , internal citation omitted.)

- "[I]f the initiator acts in bad faith or withholds from counsel facts he knew or should have known would defeat a cause of action otherwise appearing from the information supplied, [the] defense fails." (*Bertero v. National General Corp.* (1974) 13 Cal.3d 43, 53-54 [118 Cal.Rptr. 184, 529 P.2d 608] .)

- "[T]he defense that a criminal prosecution was commenced upon the advice of counsel is unavailing in an action for malicious prosecution if it appears ... that the defendant did not believe that the accused

was guilty of the crime charged." (*Singleton v. Singleton* (1945) 68 Cal.App.2d 681, 695 [157 P.2d 886] .)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, § 509

4 California Torts, Ch. 43, *Malicious Prosecution and Abuse of Process*, § 43.07 (Matthew Bender)

31 California Forms of Pleading and Practice, Ch. 357, *Malicious Prosecution and Abuse of Process* (Matthew Bender)

14 California Points and Authorities, Ch. 147, *Malicious Prosecution and Abuse of Process* (Matthew Bender)

Publisher's Notes

This instruction covers issues presented in BAJI No. 7.36.

"If the defendant acted in bad faith or withheld facts from counsel he or she knew or should have known would have defeated the cause of action, probable cause is not established." (*Palmer v. Zaklama* (2003) 109 Cal.App.4th 1367, 1383 [1 Cal.Rptr.3d 116] .)

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Torts Intentional Torts Malicious Prosecution Defenses Torts Intentional Torts Malicious Prosecution Elements General Overview



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CHAPTER 15 California Judicial Council Malicious Prosecution Instructions

3-15 California Forms of Jury Instruction CACI 1506

CACI 1506 Public Entities and Employees (Gov. Code, § 821.6)

[Name of defendant] claims that [he/she] cannot be held responsible for [name of plaintiff]'s harm, if any, because [he/she] was a public employee acting within the scope of [his/her] employment. To establish this defense, [name of defendant] must prove that [he/she] was acting within the scope of [his/her] employment.

New September 2003

For an instruction on scope of employment, see *CACI No. 3720, Scope of Employment*, in the Vicarious Responsibility series.

■ *Government Code section 821.6* provides: "A public employee is not liable for injury caused by his instituting or prosecuting any judicial or administrative proceeding within the scope of his employment, even if he acts maliciously and without probable cause."

■ In *Tur v. City of Los Angeles* (1996) 51 Cal.App.4th 897, 904 [59 Cal.Rptr.2d 470], the court concluded that "the failure to instruct under section 821.6 was prejudicial error." The court observed that "[d]efendants did not enjoy an unqualified immunity from suit. Their immunity would have depended on their proving by a preponderance of the evidence [that] they were acting within the scope of their employment in doing the acts alleged to constitute malicious prosecution." (*Ibid.*)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, § 368

4 California Torts, Ch. 43, *Malicious Prosecution and Abuse of Process*, § 43.06 (Matthew Bender)

31 California Forms of Pleading and Practice, Ch. 357, *Malicious Prosecution and Abuse of Process* (Matthew Bender)

14 California Points and Authorities, Ch. 147, *Malicious Prosecution and Abuse of Process* (Matthew Bender)

Publisher's Notes

There is no BAJI instruction on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsStandard InstructionsGovernmentsLocal GovernmentsClaims By & AgainstGovernmentsState & Territorial GovernmentsClaims By & AgainstTortsIntentional TortsMalicious ProsecutionGeneral Overview



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CHAPTER 15 California Judicial Council Malicious Prosecution Instructions

3-15 California Forms of Jury Instruction CACI 1507-CACI 1519

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CHAPTER 15 California Judicial Council Malicious Prosecution Instructions

3-15 California Forms of Jury Instruction CACI 1520

CACI 1520 Abuse of Process--Essential Factual Elements

[*Name of plaintiff*] **claims that** [*name of defendant*] **wrongfully** [*insert legal procedure, e.g., "took a deposition"*].
To establish this claim, [*name of plaintiff*] must prove all of the following:

- 1. That [*name of defendant*] [*insert legal procedure, e.g., "took the deposition of [name of deponent]"*];**
- 2. That [*name of defendant*] intentionally used this legal procedure to [*insert alleged improper purpose that procedure was not designed to achieve*];**
- 3. That [*name of plaintiff*] was harmed; and**
- 4. That [*name of defendant*]'s conduct was a substantial factor in causing [*name of plaintiff*]'s harm.**

New September 2003

■ "To establish a cause of action for abuse of process, a plaintiff must plead two essential elements: that the defendant (1) entertained an ulterior motive in using the process and (2) committed a wilful act in a wrongful manner." (*Coleman v. Gulf Insurance Group* (1986) 41 Cal.3d 782, 792 [226 Cal.Rptr. 90, 718 P.2d 77] , internal citations omitted.)

■ This tort has been "long recognized at common law but infrequently utilized." (*Kappel v. Bartlett* (1988) 200 Cal.App.3d 1457, 1463 [246 Cal.Rptr. 815] , internal citation omitted.)

3-15 California Forms of Jury Instruction CACI 1520

■ *Restatement Second of Torts, section 682* provides: "One who uses a legal process, whether criminal or civil, against another primarily to accomplish a purpose for which it is not designed, is subject to liability to the other for harm caused by the abuse of process."

■ "Malicious prosecution and abuse of process are distinct. The former concerns a meritless lawsuit (and all the damage it inflicted). The latter concerns the misuse of the tools the law affords litigants once they are in a lawsuit (regardless of whether there was probable cause to commence that lawsuit in the first place). Hence, abuse of process claims typically arise for improper or excessive attachments or improper use of discovery." (*Bidna v. Rosen* (1993) 19 Cal.App.4th 27, 40 [23 Cal.Rptr.2d 251] , internal citations omitted.)

■ "The gist of the tort is the misuse of the power of the court: It is an act done under the authority of the court for the purpose of perpetrating an injustice, i.e., a perversion of the judicial process to the accomplishment of an improper purpose. Some definite act or threat not authorized by the process or aimed at an objective not legitimate in the use of the process is required. And, generally, an action lies only where the process is used to obtain an unjustifiable collateral advantage. For this reason, mere vexation [and] harassment are not recognized as objectives sufficient to give rise to the tort." (*Younger v. Solomon* (1974) 38 Cal.App.3d 289, 297 [113 Cal.Rptr. 113] , internal citations omitted.)

■ "Process is action taken pursuant to judicial authority. It is not action taken without reference to the power of the court." (*Adams v. Superior Court* (1992) 2 Cal.App.4th 521, 530 [3 Cal.Rptr.2d 49] .)

■ "The term 'process' as used in the tort of abuse of process has been broadly interpreted to encompass the entire range of procedures incident to litigation. ... This broad reach of the 'abuse of process' tort can be explained historically, since the tort evolved as a 'catch-all' category to cover improper uses of the judicial machinery that did not fit within the earlier established, but narrowly circumscribed, action of malicious prosecution." (*Younger, supra*, 38 Cal.App.3d at p. 296 , internal citations omitted.)

■ " 'The improper purpose usually takes the form of coercion to obtain a collateral advantage, not properly involved in the proceeding itself, such as the surrender of property or the payment of money, by the use of the process as a threat or a club.' " (*Spellens v. Spellens* (1957) 49 Cal.2d 210, 232-233 [317 P.2d 613] , internal citation omitted.)

■ "[A]n improper purpose may consist in achievement of a benefit totally extraneous to or of a result not within its legitimate scope. Mere ill will against the adverse party in the proceedings does not constitute an ulterior or improper motive." (*Ion Equipment Corp. v. Nelson* (1980) 110 Cal.App.3d 868, 876 [168 Cal.Rptr. 361] , internal citations omitted.)

■ "Merely obtaining or seeking process is not enough; there must be subsequent abuse, by a misuse of the judicial process for a purpose other than that which it was intended to serve. The gist of the tort is the improper use of the process after it is issued." (*Adams, supra*, 2 Cal.App.4th at pp. 530-531 , internal citations omitted.)

■ " 'Some definite act or threat not authorized by the process, or aimed at an objective not legitimate in the use of the process, is required; and there is no liability where the defendant has done nothing more than carry out the process to its authorized conclusion, even though with bad intentions.' " (*Clark Equipment Co. v. Wheat* (1979) 92 Cal.App.3d 503, 524 [154 Cal.Rptr. 874] , internal citations omitted.)

■ *Civil Code section 47* provides, in part, that a privileged publication or broadcast is one made "(b) ...

(2) in any judicial proceeding." The privilege applies to statements that are (1) made in judicial or quasi-judicial proceedings, (2) by litigants or other participants authorized by law, (3) to achieve the objects of the litigation, and (4) that [have] some connection or logical relation to the action." (*Kimmel v. Goland* (1990) 51 Cal.3d 202, 209 [271 Cal.Rptr. 191, 793 P.2d 524] .)

■ "[I]t is consistent with the purpose of section 47, subdivision (2) to exempt malicious prosecution while still applying the privilege to abuse of process causes of action." (*Abraham v. Lancaster Community Hospital* (1990) 217 Cal.App.3d 796, 824 [266 Cal.Rptr. 360] .)

■ "[T]he scope of 'publication or broadcast' includes noncommunicative conduct like the filing of a motion for a writ of sale, the filing of assessment liens, or the filing of a mechanic's lien. The privilege also applies to conduct or publications occurring outside the courtroom, to conduct or publications which are legally deficient for one reason or another, and even to malicious or fraudulent conduct or publications." (*O'Keefe v. Kompa* (2000) 84 Cal.App.4th 130, 134 [100 Cal.Rptr.2d 602] , internal citations omitted.)

■ The litigation privilege can defeat an abuse-of-process claim. (*Merlet v. Rizzo* (1998) 64 Cal.App.4th 53, 65 [75 Cal.Rptr.2d 83] .)

■ "The use of the machinery of the legal system for an ulterior motive is a classic indicia of the tort of abuse of process. However, the tort requires abuse of legal process, not just filing suit. Simply filing a lawsuit for an improper purpose is not abuse of process." (*Trear v. Sills* (1999) 69 Cal.App.4th 1341, 1359 [82 Cal.Rptr.2d 281] , internal citations omitted.)

■ "[T]he essence of the tort 'abuse of process' lies in the misuse of the power of the court; it is an act done in the name of the court and under its authority for the purpose of perpetrating an injustice.' [P] We have located no authority extending the tort of abuse of process to administrative proceedings. Application of the tort to administrative proceedings would not serve the purpose of the tort, which is to preserve the integrity of the court." (*Stolz v. Wong Communications Ltd. Partnership* (1994) 25 Cal.App.4th 1811, 1822-1823 [31 Cal.Rptr.2d 229] , internal citations omitted.)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 517-528

4 California Torts, Ch. 43, *Malicious Prosecution and Abuse of Process*, §§ 43.20-43.25 (Matthew Bender)

31 California Forms of Pleading and Practice, Ch. 357, *Malicious Prosecution and Abuse of Process* (Matthew Bender)

14 California Points and Authorities, Ch. 147, *Malicious Prosecution and Abuse of Process* (Matthew Bender)

Publisher's Notes

This instruction covers issues presented in BAJI Nos. 7.70, 7.71, and 7.73.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Torts Intentional Torts Abuse of Process Elements



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California Forms of Jury Instruction

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CHAPTER 15 California Judicial Council Malicious Prosecution Instructions

3-15 California Forms of Jury Instruction CACI 1521-CACI 1599

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CACI 1521Reserved for Future Use



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CHAPTER 15 California Judicial Council Malicious Prosecution Instructions

3-15 California Forms of Jury Instruction CACI VF-1500

CACI VF-1500 Malicious Prosecution--Former Criminal Proceeding

We answer the questions submitted to us as follows:

1. Was [*name of defendant*] actively involved in causing [*name of plaintiff*] to be prosecuted [or in causing the continuation of the prosecution]?

_____ Yes _____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Did [*name of defendant*] act primarily for a purpose other than that of bringing [*name of plaintiff*] to justice?

_____ Yes _____ No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Was [*name of defendant*]'s conduct a substantial factor in causing harm to [*name of plaintiff*]?

_____ Yes _____ No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. What are [name of plaintiff]'s damages?**[a. Past economic loss**

[lost earnings \$_____].....

[lost profits \$_____].....

[medical expenses \$_____].....

[other past economic loss \$_____].....

..... **Total Past Economic Damages: \$_____]****[b. Future economic loss**

[lost earnings \$_____].....

[lost profits \$_____].....

[medical expenses \$_____].....

[other future economic loss \$_____].....

..... **Total Future Economic Damages: \$_____]****[c. Past noneconomic loss, including [physical
pain/mental suffering:] \$_____]****[d. Future noneconomic loss, including [physical
pain/mental suffering:] \$_____]**..... **TOTAL \$_____****Signed:** _____**Presiding Juror****Dated:** _____**[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the
[clerk/bailiff/judge].**

*New September 2003; Revised April 2007, April 2008***Directions for Use**

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case. This verdict form is based on *CACI No. 1500, Former Criminal Proceeding*. This form can be adapted to include the affirmative defense of reliance on counsel. See

VF-1502 for a form that includes this affirmative defense.

If there are disputed issues of fact on the elements of probable cause or favorable termination that the jury must resolve, include additional questions or provide special interrogatories on these elements. (See *CACI Nos. 1503, Reasonable Grounds*, and 1504, *Favorable Termination*).

If specificity is not required, users do not have to itemize all the damages listed in question 4 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

Publisher's Notes

There is no BAJI verdict form on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Verdicts Special Verdicts Torts Intentional Torts Malicious Prosecution Elements General Overview Torts Intentional Torts Malicious Prosecution Elements Favorable Termination



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CHAPTER 15 California Judicial Council Malicious Prosecution Instructions

3-15 California Forms of Jury Instruction CACI VF-1501

CACI VF-1501 Malicious Prosecution--Wrongful Use of Civil Proceedings

We answer the questions submitted to us as follows:

1. Was [*name of defendant*] actively involved in bringing [or continuing] a lawsuit against [*name of plaintiff*]?

_____ Yes _____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Did [*name of defendant*] act primarily for a purpose other than succeeding on the merits of the claim?

_____ Yes _____ No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Was [*name of defendant*]'s conduct a substantial factor in causing harm to [*name of plaintiff*]?

_____ Yes _____ No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. What are [name of plaintiff]'s damages?**[a. Past economic loss**

[lost earnings \$_____].....

[lost profits \$_____].....

[medical expenses \$_____].....

[other past economic loss \$_____].....

..... **Total Past Economic Damages: \$_____]****[b. Future economic loss**

[lost earnings \$_____].....

[lost profits \$_____].....

[medical expenses \$_____].....

[other future economic loss \$_____].....

..... **Total Future Economic Damages: \$_____]****[c. Past noneconomic loss, including [physical
pain/mental suffering:] \$_____]****[d. Future noneconomic loss, including [physical
pain/mental suffering:] \$_____]**..... **TOTAL \$_____****Signed: _____****Presiding Juror****Dated: _____****[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the
[clerk/bailiff/judge].**

*New September 2003; Revised April 2007, April 2008***Directions for Use**

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

3-15 California Forms of Jury Instruction CACI VF-1501

This verdict form is based on *CACI No. 1501, Wrongful Use of Civil Proceedings*. See *VF-1502* for a form that includes the affirmative defense of reliance on counsel.

If there are disputed issues of fact on the elements of probable cause or favorable termination that the jury must resolve, include additional questions or provide special interrogatories on these elements. (See *CACI Nos. 1503, Reasonable Grounds*, and *1504, Favorable Termination*).

If specificity is not required, users do not have to itemize all the damages listed in question 4 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

Publisher's Notes

There is no BAJI verdict form on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Verdicts Special Verdicts Torts Intentional Torts Malicious Prosecution Elements General Overview Torts Intentional Torts Malicious Prosecution Elements Favorable Termination



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CHAPTER 15 California Judicial Council Malicious Prosecution Instructions

3-15 California Forms of Jury Instruction CACI VF-1502

CACI VF-1502 Malicious Prosecution--Wrongful Use of Civil Proceedings--Affirmative Defense--Reliance on Counsel

We answer the questions submitted to us as follows:

1. Was [*name of defendant*] actively involved in bringing [or continuing] the lawsuit against [*name of plaintiff*]?

_____ Yes _____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Did [*name of defendant*] make a full and honest disclosure of all the important facts known to [him/her] to [his/her] attorney?

_____ Yes _____ No

If your answer to question 2 is yes, then answer question 3. If you answered no, skip question 3 and answer question 4.

3. Did [*name of defendant*] reasonably rely on [his/her] attorney's advice?

_____ Yes _____ No

If your answer to question 3 is no, then answer question 4. If you answered yes, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Did [name of defendant] act primarily for a purpose other than succeeding on the merits of the claim?

_____ Yes _____ No

If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. Was [name of defendant]'s conduct a substantial factor in causing harm to [name of plaintiff]?

_____ Yes _____ No

If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. What are [name of plaintiff]'s damages?

[a. Past economic loss

[lost earnings \$_____].....

[lost profits \$_____].....

[medical expenses \$_____].....

[other past economic loss \$_____].....

..... **Total Past Economic Damages: \$_____]**

[b. Future economic loss

[lost earnings \$_____].....

[lost profits \$_____].....

[medical expenses \$_____].....

[other future economic loss \$_____].....

..... **Total Future Economic Damages: \$_____]**

[c. Past noneconomic loss, including [physical pain/mental suffering:] \$_____]

[d. Future noneconomic loss, including [physical pain/mental suffering:] \$_____]

..... **TOTAL \$_____**

Signed: _____
Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the [clerk/bailiff/judge].

New September 2003; Revised April 2007, April 2008

Directions for Use

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on *CACI No. 1501, Wrongful Use of Civil Proceedings*, and *CACI No. 1505, Affirmative Defense--Reliance on Counsel*.

If there are disputed issues of fact on the elements of probable cause or favorable termination that the jury must resolve, include additional questions or provide special interrogatories on these elements. (See *CACI Nos. 1503, Reasonable Grounds*, and *1504, Favorable Termination*.)

If specificity is not required, users do not have to itemize all the damages listed in question 6 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

Publisher's Notes

There is no BAJI verdict form on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Verdicts Special Verdicts Torts Intentional Torts Malicious
 Prosecution Defenses Torts Intentional Torts Malicious Prosecution Elements General Overview



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California Forms of Jury Instruction

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CHAPTER 15 California Judicial Council Malicious Prosecution Instructions

3-15 California Forms of Jury Instruction CACI VF-1503

CACI VF-1503 Malicious Prosecution--Wrongful Use of Administrative Proceedings

We answer the questions submitted to us as follows:

1. Was [*name of defendant*] actively involved in bringing [or continuing] an administrative proceeding against [*name of plaintiff*]?

_____ Yes _____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Did [*name of administrative body*] conduct an independent investigation?

_____ Yes _____ No

If your answer to question 2 is no, then answer question 3. If you answered yes, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Did [*name of defendant*] act primarily for a purpose other than succeeding on the merits of the claim?

_____ Yes _____ No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Was [name of defendant]'s conduct a substantial factor in causing harm to [name of plaintiff]?

_____ Yes _____ No

If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. What are [name of plaintiff]'s damages?

[a. Past economic loss

[lost earnings \$_____].....

[lost profits \$_____].....

[medical expenses \$_____].....

[other past economic loss \$_____].....

..... Total Past Economic Damages: \$_____]

[b. Future economic loss

[lost earnings \$_____].....

[lost profits \$_____].....

[medical expenses \$_____].....

[other future economic loss \$_____].....

..... Total Future Economic Damages: \$_____]

[c. Past noneconomic loss, including [physical pain/mental suffering:] \$_____]

[d. Future noneconomic loss, including [physical pain/mental suffering:] \$_____]

..... TOTAL \$_____

Signed: _____

Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the [clerk/bailiff/judge].

New September 2003; Revised April 2007, April 2008

Directions for Use

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on *CACI No. 1502, Wrongful Use of Administrative Proceedings*. See *VF-1502* for a form that includes the affirmative defense of reliance on counsel.

If there are disputed issues of fact on the elements of probable cause or favorable termination that the jury must resolve, include additional questions or provide special interrogatories on these elements. (See *CACI Nos. 1503, Reasonable Grounds*, and *1504, Favorable Termination*.)

If specificity is not required, users do not have to itemize all the damages listed in question 5 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

Publisher's Notes

There is no BAJI verdict form on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Verdicts Special Verdicts Torts Intentional Torts Malicious Prosecution Elements General Overview



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California Forms of Jury Instruction

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CHAPTER 15 California Judicial Council Malicious Prosecution Instructions

3-15 California Forms of Jury Instruction CACI VF-1504

CACI VF-1504 Abuse of Process

We answer the questions submitted to us as follows:

1. Did [name of defendant] [insert legal procedure, e.g., "take the deposition of [name of deponent] "]?

_____ Yes _____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Did [name of defendant] intentionally use this legal procedure to [insert alleged improper purpose that procedure was not designed to achieve]?

_____ Yes _____ No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Was [name of defendant]'s conduct a substantial factor in causing harm to [name of plaintiff]?

_____ Yes _____ No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. What are [name of plaintiff]'s damages?**[a. Past economic loss**

[lost earnings..... \$_____]

[lost profits..... \$_____]

[medical expenses..... \$_____]

[other past economic loss..... \$_____]

..... **Total Past Economic Damages: \$_____]****[b. Future economic loss**

[lost earnings..... \$_____]

[lost profits..... \$_____]

[medical expenses..... \$_____]

[other future economic loss..... \$_____]

..... **Total Future Economic Damages: \$_____]****[c. Past noneconomic loss, including [physical
pain/mental suffering:]..... \$_____]****[d. Future noneconomic loss, including [physical
pain/mental suffering:]..... \$_____]**..... **TOTAL \$_____****Signed: _____****Presiding Juror****Dated: _____****[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the
[clerk/bailiff/judge].**

New September 2003; Revised April 2007

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on *CACI No. 1520, Abuse of Process--Essential Factual Elements*.

If specificity is not required, users do not have to itemize all the damages listed in question 4 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

Publisher's Notes

There is no BAJI verdict form on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Verdicts Special Verdicts Torts Intentional Torts Abuse of Process Elements



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CHAPTER 15 California Judicial Council Malicious Prosecution Instructions

3-15 California Forms of Jury Instruction CACI VF-1505-CACI VF-1599

Reserved for Future Use

CACI VF-1505Reserved for Future Use



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CHAPTER 16 California Judicial Council Emotional Distress Instructions

3-16 California Forms of Jury Instruction 16.syn

§ 16.syn Synopsis to Chapter 16: California Judicial Council Emotional Distress Instructions

CACI 1600 Intentional Infliction of Emotional Distress--Essential Factual Elements

CACI 1601 Intentional Infliction of Emotional Distress--Fear of Cancer, HIV, or AIDS

CACI 1602 Intentional Infliction of Emotional Distress--"Outrageous Conduct" Defined

CACI 1603 Intentional Infliction of Emotional Distress--"Reckless Disregard" Defined

CACI 1604 Intentional Infliction of Emotional Distress--"Severe Emotional Distress" Defined

CACI 1605 Intentional Infliction of Emotional Distress--Affirmative Defense--Privileged Conduct

CACI 1606-CACI 1619 Reserved for Future Use

CACI 1620 Negligent Infliction of Emotional Distress--Direct Victim--Essential Factual Elements

CACI 1621 Negligent Infliction of Emotional Distress--Bystander--Essential Factual Elements

CACI 1622 Negligent Infliction of Emotional Distress--Fear of Cancer, HIV, or AIDS

CACI 1623 Negligent Infliction of Emotional Distress--Fear of Cancer, HIV, or AIDS--Malicious, Oppressive, or Fraudulent Conduct

CACI 1624-CACI 1699 Reserved for Future Use

CACI VF-1600 Intentional Infliction of Emotional Distress

CACI VF-1601 Intentional Infliction of Emotional Distress--Affirmative Defense--Privileged Conduct

CACI VF-1602 Intentional Infliction of Emotional Distress--Fear of Cancer, HIV, or AIDS

CACI VF-1603 Negligent Infliction of Emotional Distress--Direct Victim

CACI VF-1604 Negligent Infliction of Emotional Distress--Bystander

CACI VF-1605 Negligent Infliction of Emotional Distress--Fear of Cancer, HIV, or AIDS

CACI VF-1606 Negligent Infliction of Emotional Distress--Fear of Cancer, HIV, or AIDS--Malicious, Oppressive,
or Fraudulent Conduct

CACI VF-1607-CACI VF-1699 Reserved for Future Use



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CHAPTER 16 California Judicial Council Emotional Distress Instructions

3-16 California Forms of Jury Instruction Scope

Scope

SCOPE

This chapter contains the California Judicial Council's "Emotional Distress Series" of jury instructions [*CACI No. 1600 et seq.*]. The Judicial Council of California Civil Jury Instructions (CACI) included in this publication are the product of the Judicial Council of California Task Force on Jury Instructions, which are updated by the Judicial Council of California Advisory Committee on Civil Jury Instructions.

This chapter includes instructions on the following topics:

- Essential factual elements for a cause of action for intentional infliction of emotional distress [*CACI No. 1600*], including an instruction based on fear of cancer, HIV, or AIDS [*CACI No. 1601*].
- Definitions of "outrageous conduct" [*CACI No. 1602*], "reckless disregard" [*CACI No. 1603*], and "severe emotional distress" [*CACI No. 1604*].
- Privileged conduct as an affirmative defense to an action for intentional infliction of emotional distress [*CACI No. 1605*].
- Essential factual elements for causes of action for negligent infliction of emotional distress [*CACI No. 1620* (direct victim), *CACI No. 1621* (bystander)], including instructions based on fear of cancer, HIV, or AIDS [*CACI No. 1622*; *CACI No. 1623* (malicious, oppressive, or fraudulent conduct)].

The emotional distress series also includes special verdict forms [*CACI Nos. VF-1600-VF-1606*].



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California Forms of Jury Instruction

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CHAPTER 16 California Judicial Council Emotional Distress Instructions

3-16 California Forms of Jury Instruction CACI 1600

CACI 1600 Intentional Infliction of Emotional Distress--Essential Factual Elements

[Name of plaintiff] claims that [name of defendant]'s conduct caused [him/her] to suffer severe emotional distress. To establish this claim, [name of plaintiff] must prove all of the following:

1. That [name of defendant]'s conduct was outrageous;

2. [That [name of defendant] intended to cause [name of plaintiff] emotional distress;]

[or]

[That [name of defendant] acted with reckless disregard of the probability that [name of plaintiff] would suffer emotional distress, knowing that [name of plaintiff] was present when the conduct occurred;]

3. That [name of plaintiff] suffered severe emotional distress; and

4. That [name of defendant]'s conduct was a substantial factor in causing [name of plaintiff]'s severe emotional distress.

New September 2003

Directions for Use

CACI Nos. 1602-1604, regarding the elements of intentional infliction of emotional distress, should be given with the above instruction.

Depending on the facts of the case, a plaintiff could choose one or both of the bracketed choices in element 2.

Sources and Authority

■ "A cause of action for intentional infliction of emotional distress exists when there is '(1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff's suffering severe or extreme emotional distress; and (3) actual and proximate causation of the emotional distress by the defendant's outrageous conduct.' A defendant's conduct is 'outrageous' when it is so 'extreme as to exceed all bounds of that usually tolerated in a civilized community.' And the defendant's conduct must be 'intended to inflict injury or engaged in with the realization that injury will result.' " (*Hughes v. Pair* (2009) 46 Cal.4th 1035, 1050-1051 [95 Cal.Rptr.3d 636, 209 P.3d 963])

■ " '[I]t is generally held that there can be no recovery for mere profanity, obscenity, or abuse, without circumstances of aggravation, or for insults, indignities or threats which are considered to amount to nothing more than mere annoyances.' " (*Yurick v. Superior Court* (1989) 209 Cal.App.3d 1116, 1128 [257 Cal.Rptr. 665] , internal citations omitted.)

■ "It is not enough that the conduct be intentional and outrageous. It must be conduct directed at the plaintiff, or occur in the presence of a plaintiff of whom the defendant is aware." (*Christensen v. Superior Court* (1991) 54 Cal.3d 868, 903-904 [2 Cal.Rptr.2d 79, 820 P.2d 181] .)

■ "Severe emotional distress [is] emotional distress of such substantial quantity or enduring quality that no reasonable man in a civilized society should be expected to endure it." (*Fletcher v. Western Life Insurance Co.* (1970) 10 Cal.App.3d 376, 397 [89 Cal.Rptr. 78] .)

■ " 'It is for the court to determine whether on the evidence severe emotional distress can be found; it is for the jury to determine whether, on the evidence, it has in fact existed.' " (*Fletcher, supra*, 10 Cal.App.3d at p. 397 , internal citation omitted.)

■ " 'The law limits claims of intentional infliction of emotional distress to egregious conduct toward plaintiff proximately caused by defendant.' The only exception to this rule is that recognized when the defendant is aware, but acts with reckless disregard of, the plaintiff and the probability that his or her conduct will cause severe emotional distress to that plaintiff. Where reckless disregard of the plaintiff's interests is the theory of recovery, the presence of the plaintiff at the time the outrageous conduct occurs is recognized as the element establishing a higher degree of culpability which, in turn, justifies recovery of greater damages by a broader group of plaintiffs than allowed on a negligent infliction of emotional distress theory." (*Christensen, supra*, 54 Cal.3d at pp. 905-906 , internal citations omitted.)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 451-454

4 Levy et al., *California Torts*, Ch. 44, *Intentional Infliction of Emotional Distress*, § 44.01 (Matthew Bender)

32 *California Forms of Pleading and Practice*, Ch. 362, *Mental Suffering and Emotional Distress*, § 362.10 (Matthew Bender)

15 *California Points and Authorities*, Ch. 153, *Mental Suffering and Emotional Distress*. § 153.20 et seq. (Matthew

Bender)

Publisher's Notes

This instruction replaces BAJI No. 12.70.

LexisNexis Matthew Bender Expert Practice Tip--Plaintiff's Prior Psychological/Psychiatric History: Remember that any claim for *severe* emotional distress will probably open the door to the plaintiff's prior psychological/psychiatric history. A plaintiff's litigator should diligently protect a plaintiff's right to privacy and prevent disclosure of psychological/psychiatric treatment if a subpoena is overbroad and/or if the plaintiff's claims are just for emotional distress resulting from a harm caused by the defendant in which the plaintiff did not seek psychological/psychiatric treatment. *By Dona Cohn-Payne*

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsIntentional TortsIntentional Infliction of Emotional DistressGeneral OverviewTortsIntentional TortsIntentional Infliction of Emotional DistressElements



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California Forms of Jury Instruction

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CHAPTER 16 California Judicial Council Emotional Distress Instructions

3-16 California Forms of Jury Instruction CACI 1601

CACI 1601 Intentional Infliction of Emotional Distress--Fear of Cancer, HIV, or AIDS

[Name of plaintiff] claims that [name of defendant]'s conduct caused [him/her] to suffer severe emotional distress by exposing [name of plaintiff] to [insert applicable carcinogen, toxic substance, HIV, or AIDS]. To establish this claim, [name of plaintiff] must prove all of the following:

- 1. That [name of defendant]'s conduct was outrageous;**
- 2. That [name of defendant]'s conduct exposed [name of plaintiff] to [insert applicable carcinogen, toxic substance, HIV, or AIDS];**
- 3. [That [name of defendant] intended to cause [name of plaintiff] emotional distress;] [or]**
[That [name of defendant] acted with reckless disregard of the probability that [[name of plaintiff]/the group of individuals including [name of plaintiff]] would suffer emotional distress, knowing that [he/she/they] [was/were] present when the conduct occurred;]
- 4. That [name of plaintiff] suffered severe emotional distress from a reasonable fear of developing [insert applicable cancer, HIV, or AIDS]; and**
- 5. That [name of defendant]'s conduct was a substantial factor in causing [name of plaintiff]'s severe emotional distress.**

A fear of developing [insert applicable cancer, HIV, or AIDS] is "reasonable" if the fear stems from the knowledge, confirmed by reliable medical or scientific opinion, that a person's risk of [insert applicable cancer, HIV, or AIDS] has significantly increased and that the resulting risk is significant.

New September 2003

Directions for Use

CACI Nos. 1602-1604, regarding the elements of intentional infliction of emotional distress, should be given with the above instruction. Depending on the facts of the case, a plaintiff could choose one or both of the bracketed choices in element 3.

There may be other harmful agents and medical conditions that could support this cause of action.

See *CACI Nos. 1622 and 1623* for claims of negligent infliction of emotional distress involving fear of cancer, HIV, or AIDS.

Sources and Authority

■ "The elements of the tort of intentional infliction of emotional distress are: '(1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff's suffering severe or extreme emotional distress; and (3) actual and proximate causation of the emotional distress by the defendant's outrageous conduct.' " (*Christensen v. Superior Court* (1991) 54 Cal.3d 868, 903 [2 Cal.Rptr.2d 79, 820 P.2d 181] , internal citation omitted; *Potter v. Firestone Tire and Rubber Co.* (1993) 6 Cal.4th 965, 1001 [25 Cal.Rptr.2d 550, 863 P.2d 795] .)

■ " 'The law limits claims of intentional infliction of emotional distress to egregious conduct toward plaintiff proximately caused by defendant.' The only exception to this rule is that recognized when the defendant is aware of, but acts with reckless disregard of, the plaintiff and the probability that his or her conduct will cause severe emotional distress to that plaintiff. Where reckless disregard of the plaintiff's interests is the theory of recovery, the presence of the plaintiff at the time the outrageous conduct occurs is recognized as the element establishing a higher degree of culpability which, in turn, justifies recovery of greater damages by a broader group of plaintiffs than allowed on a negligent infliction of emotional distress theory." (*Christensen, supra*, 54 Cal.3d at pp. 905-906 , internal citations omitted.)

■ "Severe emotional distress [is] emotional distress of such substantial quantity or enduring quality that no reasonable [person] in a civilized society should be expected to endure it." (*Fletcher v. Western Life Insurance Co.* (1970) 10 Cal.App.3d 376, 397 [89 Cal.Rptr. 78] ; *Potter, supra*, 6 Cal.4th at p. 1004 .)

■ "[I]t must ... be established that plaintiff's fear of cancer is reasonable, that is, that the fear is based upon medically or scientifically corroborated knowledge that the defendant's conduct has significantly increased the plaintiff's risk of cancer and that the plaintiff's actual risk of the threatened cancer is significant." (*Potter, supra*, 6 Cal.4th at p. 1004 .)

■ The court in *Herbert v. Regents of University of California* (1994) 26 Cal.App.4th 782, 787-788 [31 Cal.Rptr.2d 709] held that the rules relating to recovery of damages for fear of cancer apply to fear of AIDS. See also *Kerins v. Hartley* (1994) 27 Cal.App.4th 1062, 1075 [33 Cal.Rptr.2d 172] .

Secondary Sources

32 *California Forms of Pleading and Practice*, Ch. 362, *Mental Suffering and Emotional Distress*, § 362.11[3][c]

(Matthew Bender)

15 *California Points and Authorities, Ch. 153, Mental Suffering and Emotional Distress, § 153.38* (Matthew Bender)

Publisher's Notes

This instruction replaces BAJI No. 12.71.

LexisNexis Matthew Bender Expert Practice Tip--Pleading and Proving Both Intentional and Negligent Infliction of Emotional Distress: *CACI No. 1601* can also be used for any sexually transmitted disease (i.e. herpes). Both intentional infliction of emotional distress and negligent infliction of emotional distress should be plead in a complaint. Further, this instruction could be used as well as *CACI No. 1622* (negligent infliction of emotional distress), should the jury conclude that the actions were not intentional. Attempting to prove that a defendant "intended" to cause emotional distress may be difficult so use the negligent instruction as well. *By Dona Cohn-Payne*

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsIntentional TortsIntentional Infliction of Emotional DistressGeneral OverviewTortsIntentional TortsIntentional Infliction of Emotional DistressElements



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CHAPTER 16 California Judicial Council Emotional Distress Instructions

3-16 California Forms of Jury Instruction CACI 1602

CACI 1602 Intentional Infliction of Emotional Distress--"Outrageous Conduct" Defined

"Outrageous conduct" is conduct so extreme that it goes beyond all possible bounds of decency. Conduct is outrageous if a reasonable person would regard the conduct as intolerable in a civilized community. Outrageous conduct does not include trivialities such as indignities, annoyances, hurt feelings, or bad manners that a reasonable person is expected to endure.

In deciding whether [name of defendant]'s conduct was outrageous, you may consider, among other factors, the following:

- (a) Whether [name of defendant] abused a position of authority or a relationship that gave [him/her] real or apparent power to affect [name of plaintiff]'s interests;**
- (b) Whether [name of defendant] knew that [name of plaintiff] was particularly vulnerable to emotional distress; and**
- (c) Whether [name of defendant] knew that [his/her] conduct would likely result in harm due to mental distress.**

New September 2003

Directions for Use

Read the appropriate factors that apply to the facts of the case. Factors that do not apply may be deleted from this instruction.

Sources and Authority

■ "Conduct to be outrageous must be so extreme as to exceed all bounds of that usually tolerated in a civilized community." (*Davidson v. City of Westminster* (1982) 32 Cal.3d 197, 209 [185 Cal.Rptr. 252, 649 P.2d 894] .)

■ "[L]iability 'does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities. ... There is no occasion for the law to intervene ... where someone's feelings are hurt.' " (*Agarwal v. Johnson* (1979) 25 Cal.3d 932, 946 [160 Cal.Rptr. 141, 603 P.2d 58] , quoting *Rest.2d Torts*, § 46, *com. d*, overruled on other grounds in *White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 579-580 [88 Cal.Rptr.2d 19, 981 P.2d 944] .)

■ " 'Behavior may be considered outrageous if a defendant (1) abuses a relation or position that gives him power to damage the plaintiff's interests; (2) knows the plaintiff is susceptible to injuries through mental distress; or (3) acts intentionally or unreasonably with the recognition that the acts are likely to result in illness through mental distress. ...' " (*Molko v. Holy Spirit Ass'n* (1988) 46 Cal.3d 1092, 1122 [252 Cal.Rptr. 122, 762 P.2d 46] , internal citation omitted.)

■ Relationships that have been recognized as significantly contributing to the conclusion that particular conduct was outrageous include: employer-employee (*Alcorn v. Anbro Engineering, Inc.* (1970) 2 Cal.3d 493, 498, *fn.2* [86 Cal.Rptr. 88, 468 P.2d 216]), insurer-insured (*Fletcher v. Western National Life Insurance Co.* (1970) 10 Cal.App.3d 376, 403-404 [89 Cal.Rptr. 78]), landlord-tenant (*Aweeka v. Bonds* (1971) 20 Cal.App.3d 278, 281-282 [97 Cal.Rptr. 650]), hospital-patient (*Bundren v. Superior Court* (1983) 145 Cal.App.3d 784, 791-792 [193 Cal.Rptr. 671]), attorney-client (*McDaniel v. Gile* (1991) 230 Cal.App.3d 363, 373 [281 Cal.Rptr. 242]), collecting creditors (*Bundren, supra*, at p. 791, *fn. 8*), and religious institutions (*Molko, supra*, 46 Cal.3d at pp. 1122-1123).

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 451-454

4 Levy et al., *California Torts*, Ch. 44, *Intentional Infliction of Emotional Distress*, §§ 44.01, 44.03 (Matthew Bender)

32 *California Forms of Pleading and Practice*, Ch. 362, *Mental Suffering and Emotional Distress*, § 362.10[3][c] (Matthew Bender)

15 *California Points and Authorities*, Ch. 153, *Mental Suffering and Emotional Distress*, § 153.20 (Matthew Bender)

Publisher's Notes

This instruction replaces BAJI Nos. 12.74, 12.75, and 12.76.

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsIntentional TortsIntentional Infliction of Emotional DistressGeneral OverviewTortsIntentional TortsIntentional Infliction of Emotional DistressElements



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California Forms of Jury Instruction

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CHAPTER 16 California Judicial Council Emotional Distress Instructions

3-16 California Forms of Jury Instruction CACI 1603

CACI 1603 Intentional Infliction of Emotional Distress--"Reckless Disregard" Defined

[*Name of defendant*] **acted with reckless disregard in causing [*name of plaintiff*] emotional distress if:**

1. [*Name of defendant*] **knew that emotional distress would probably result from [his/her] conduct; or**
2. [*Name of defendant*] **gave little or no thought to the probable effects of [his/her] conduct.**

New September 2003

Sources and Authority

- "[I]t is not essential to liability that a trier of fact find a malicious or evil purpose. It is enough that defendant 'devoted little or no thought' to probable consequences of his conduct." (*KOVR-TV, Inc. v. Superior Court* (1995) 31 Cal.App.4th 1023, 1031-1032 [37 Cal.Rptr.2d 431] , internal citation omitted.)
- The requirement of reckless conduct is satisfied by a showing that the defendant acted in reckless disregard of the probability that the plaintiff would suffer emotional distress. (*Little v. Stuyvesant Life Insurance Co.* (1977) 67 Cal.App.3d 451, 462 [136 Cal.Rptr. 653] ; *Cervantez v. J.C. Penney Co.* (1979) 24 Cal.3d 579, 593 [156 Cal.Rptr. 198, 595 P.2d 975] .)
- "Where reckless disregard of the plaintiff's interests is the theory of recovery, the presence of the plaintiff at the time the outrageous conduct occurs is recognized as the element establishing a higher degree of culpability which, in turn, justifies recovery of greater damages by a broader group of plaintiffs than allowed on a negligent infliction of emotional distress theory." (*Christensen v. Superior Court*

(1991) 54 Cal.3d 868, 905 [2 Cal.Rptr.2d 79, 820 P.2d 181] .)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 451, 453

4 Levy et al., *California Torts, Ch. 44, Intentional Infliction of Emotional Distress*, § 44.01 (Matthew Bender)

32 *California Forms of Pleading and Practice, Ch. 362, Mental Suffering and Emotional Distress*, § 362.10[4] (Matthew Bender)

15 *California Points and Authorities, Ch. 153, Mental Suffering and Emotional Distress*, § 153.21 (Matthew Bender)

Publisher's Notes

This instruction replaces BAJI No. 12.77.

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsIntentional TortsIntentional Infliction of Emotional DistressGeneral OverviewTortsIntentional TortsIntentional Infliction of Emotional DistressElements



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CHAPTER 16 California Judicial Council Emotional Distress Instructions

3-16 California Forms of Jury Instruction CACI 1604

CACI 1604 Intentional Infliction of Emotional Distress--"Severe Emotional Distress" Defined

Emotional distress includes suffering, anguish, fright, horror, nervousness, grief, anxiety, worry, shock, humiliation, and shame.

"Severe emotional distress" is not mild or brief; it must be so substantial or long lasting that no reasonable person in a civilized society should be expected to bear it. [*Name of plaintiff*] is not required to prove physical injury to recover damages for severe emotional distress.

New September 2003

Sources and Authority

- " 'It is for the court to determine whether on the evidence severe emotional distress can be found; it is for the jury to determine whether, on the evidence, it has in fact existed.' " (*Fletcher v. Western National Life Insurance Co.* (1970) 10 Cal.App.3d 376, 397 [89 Cal.Rptr. 78] , internal citation omitted.)

- "Emotional distress" includes any "highly unpleasant mental reactions, such as fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, or worry." (*Fletcher, supra*, 10 Cal.App.3d at p. 397 .)

- "With respect to the requirement that the plaintiff show severe emotional distress, this court has set a high bar. 'Severe emotional distress means "emotional distress of such substantial quality or enduring quality that no reasonable [person] in civilized society should be expected to endure it." ' " (*Hughes v. Pair* (2009) 46 Cal.4th 1035, 1051 [95 Cal.Rptr.3d 636, 209 P.3d 963] .)

■ " 'One who has wrongfully and intentionally [suffered severe emotional distress] may recover compensatory damages even though he or she has suffered no physical injury,' and 'the right to compensation exists even though no monetary loss has been sustained.' " (*Grimes v. Carter* (1966) 241 Cal.App.2d 694, 699 [50 Cal.Rptr. 808] .)

Secondary Sources

4 Levy et al., *California Torts*, Ch. 44, *Intentional Infliction of Emotional Distress*, § 44.01 (Matthew Bender)

32 *California Forms of Pleading and Practice*, Ch. 362, *Mental Suffering and Emotional Distress*, § 362.10 (Matthew Bender)

15 *California Points and Authorities*, Ch. 153, *Mental Suffering and Emotional Distress*, § 153.26 (Matthew Bender)

Publisher's Notes

This instruction replaces BAJI Nos. 12.72 and 12.73.

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsIntentional TortsIntentional Infliction of Emotional DistressGeneral OverviewTortsIntentional TortsIntentional Infliction of Emotional DistressElementsTortsIntentional TortsIntentional Infliction of Emotional DistressRemedies



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CHAPTER 16 California Judicial Council Emotional Distress Instructions

3-16 California Forms of Jury Instruction CACI 1605

CACI 1605 Intentional Infliction of Emotional Distress--Affirmative Defense--Privileged Conduct

[*Name of defendant*] **claims that [he/she] is not responsible for [*name of plaintiff*]'s harm, if any, because [*name of defendant*]'s conduct was permissible. To succeed, [*name of defendant*] must prove all of the following:**

- 1. That [*name of defendant*] was [exercising [his/her] legal right to [*insert legal right*]] [or] [protecting [his/her] economic interests];**
- 2. That [*name of defendant*]'s conduct was lawful and consistent with community standards; and**
- 3. That [*name of defendant*] had a good-faith belief that [he/she] had a legal right to engage in the conduct.**

If you find all of the above, then [*name of defendant*]'s conduct was permissible.

New September 2003

Directions for Use

Whether a given communication is within the privileges afforded by *Civil Code* section 47 is a legal question for the judge.

Sources and Authority

- "Whether treated as an element of the prima facie case or as a matter of defense, it must also appear that the defendants' conduct was unprivileged." (*Fletcher v. Western National Life Insurance Co.* (1970))

10 Cal.App.3d 376, 394 [89 Cal.Rptr. 78] .)

- The statutory privileges that *Civil Code section 47* affords to certain oral and written communications are applicable to claims for intentional infliction of emotional distress. (*Agostini v. Strycula* (1965) 231 Cal.App.2d 804, 808 [42 Cal.Rptr. 314] .)

- "The usual formulation is that the [litigation] privilege applies to any communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that have some connection or logical relation to the action." (*Silberg v. Anderson* (1990) 50 Cal.3d 205, 212 [266 Cal.Rptr. 638, 786 P.2d 365] .)

- "Where an employer seeks to protect his own self-interest and that of his employees in good faith and without abusing the privilege afforded him, the privilege obtains even though it is substantially certain that emotional distress will result from uttered statements." (*Deaile v. General Telephone Co. of California* (1974) 40 Cal.App.3d 841, 849-850 [115 Cal.Rptr. 582] .)

- "Nevertheless, the exercise of the privilege to assert one's legal rights must be done in a permissible way and with a good faith belief in the existence of the rights asserted. It is well established that one who, in exercising the privilege of asserting his own economic interests, acts in an outrageous manner may be held liable for intentional infliction of emotional distress." (*Fletcher, supra*, 10 Cal.App.3d at p. 395 , internal citations omitted.)

- "While it is recognized that the creditor possesses a qualified privilege to protect its economic interest, the privilege may be lost should the creditor use outrageous and unreasonable means in seeking payment." (*Bundren v. Superior Court* (1983) 145 Cal.App.3d 784, 789 [193 Cal.Rptr. 671] .)

- "In determining whether the conduct is sufficiently outrageous or unreasonable to become actionable, it is not enough that the creditor's behavior is rude or insolent. However, such conduct may rise to the level of outrageous conduct where the creditor knows the debtor is susceptible to emotional distress because of her physical or mental condition." (*Symonds v. Mercury Savings & Loan Assn.* (1990) 225 Cal.App.3d 1458, 1469 [275 Cal.Rptr. 871] , internal citations omitted.)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, § 455

4 Levy et al., *California Torts*, Ch. 44, *Intentional Infliction of Emotional Distress*, § 44.06 (Matthew Bender)

32 *California Forms of Pleading and Practice*, Ch. 362, *Mental Suffering and Emotional Distress*, § 362.10[8] (Matthew Bender)

15 *California Points and Authorities*, Ch. 153, *Mental Suffering and Emotional Distress*, § 153.27 (Matthew Bender)

Publisher's Notes

This instruction replaces BAJI No. 12.78.

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsIntentional TortsIntentional Infliction of Emotional DistressGeneral OverviewTortsIntentional TortsIntentional

Infliction of Emotional DistressDefensesTortsIntentional TortsIntentional Infliction of Emotional DistressElements



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CHAPTER 16 California Judicial Council Emotional Distress Instructions

3-16 California Forms of Jury Instruction CACI 1606-CACI 1619

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CACI 1606Reserved for Future Use



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CHAPTER 16 California Judicial Council Emotional Distress Instructions

3-16 California Forms of Jury Instruction CACI 1620

CACI 1620 Negligent Infliction of Emotional Distress--Direct Victim--Essential Factual Elements

[*Name of plaintiff*] **claims that** [*name of defendant*]'s conduct caused [him/her] to suffer serious emotional distress. To establish this claim, [*name of plaintiff*] **must prove all of the following:**

1. That [*name of defendant*] **was negligent;**
2. That [*name of plaintiff*] **suffered serious emotional distress; and**
3. That [*name of defendant*]'s **negligence was a substantial factor in causing** [*name of plaintiff*]'s **serious emotional distress.**

Emotional distress includes suffering, anguish, fright, horror, nervousness, grief, anxiety, worry, shock, humiliation, and shame. Serious emotional distress exists if an ordinary, reasonable person would be unable to cope with it.

New September 2003

Directions for Use

The California Supreme Court has allowed plaintiffs to bring negligent infliction of emotional distress actions as "direct victims" in only three types of factual situations: (1) the negligent mishandling of corpses (*Christensen v. Superior Court* (1991) 54 Cal.3d 868, 879 [2 Cal.Rptr.2d 79, 820 P.2d 181]); (2) the negligent misdiagnosis of a disease that could potentially harm another (*Molien v. Kaiser Foundation Hospitals* (1980) 27 Cal.3d 916, 923 [167 Cal.Rptr. 831, 616 P.2d 813]); and (3) the negligent breach of a duty arising out of a preexisting relationship (*Burgess v. Superior Court* (1992) 2 Cal.4th 1064, 1076 [9 Cal.Rptr.2d 615, 831 P.2d 1197]).

The judge will normally decide whether a duty was owed to the plaintiff as a direct victim. If the issue of whether the plaintiff is a direct victim is contested, a special instruction with the factual dispute laid out for the jury will need to be drafted.

This instruction should be read in conjunction with either *CACI No. 401, Basic Standard of Care*, or *CACI No. 418, Presumption of Negligence per se*.

This instruction is for use if the plaintiff is a "direct victim" of defendant's negligent conduct. If the plaintiff witnesses the injury of another, use *CACI No. 1621, Negligent Infliction of Emotional Distress--Bystander--Essential Factual Elements*.

Elements 1 and 3 of this instruction could be modified for use in a strict products liability case. A plaintiff may seek damages for the emotional shock of viewing the injuries of another when the incident is caused by defendant's defective product. (*Kately v. Wilkinson* (1983) 148 Cal.App.3d 576, 587 [195 Cal.Rptr. 902] .)

Sources and Authority

■ "[The] negligent causing of emotional distress is not an independent tort but the tort of negligence ... 'The traditional elements of duty, breach of duty, causation, and damages apply. Whether a defendant owes a duty of care is a question of law. Its existence depends upon the foreseeability of the risk and upon a weighing of policy considerations for and against imposition of liability.' " (*Marlene F. v. Affiliated Psychiatric Medical Clinic, Inc.* (1989) 48 Cal.3d 583, 588 [257 Cal.Rptr. 98, 770 P.2d 278] , internal citations omitted.)

■ "'Direct victim' cases are cases in which the plaintiff's claim of emotional distress is not based upon witnessing an injury to someone else, but rather is based upon the violation of a duty owed directly to the plaintiff." (*Wooden v. Raveling* (1998) 61 Cal.App.4th 1035, 1038 [71 Cal.Rptr.2d 891] , internal citations omitted.)

■ "[D]uty is found where the plaintiff is a 'direct victim,' in that the emotional distress damages result from a duty owed the plaintiff 'that is "assumed by the defendant or imposed on the defendant as a matter of law, or that arises out of a relationship between the two." ' " (*McMahon v. Craig* (2009) 176 Cal.App.4th 222, 230 [97 Cal.Rptr.3d 555] .)

■ In a negligence action, damages may be recovered for serious emotional distress unaccompanied by physical injury: "We agree that the unqualified requirement of physical injury is no longer justifiable." (*Molien, supra*, 27 Cal.3d at p. 928 .)

■ "[S]erious mental distress may be found where a reasonable man, normally constituted, would be unable to adequately cope with the mental stress engendered by the circumstances of the case." (*Molien, supra*, 27 Cal.3d at pp. 927-928 .)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, § 1004

1 *California Torts, Ch. 5, Negligent Infliction of Emotional Distress*, § 5.03 (Matthew Bender)

32 *California Forms of Pleading and Practice*, Ch. 362, *Mental Suffering and Emotional Distress*, § 362.11 (Matthew Bender)

15 *California Points and Authorities*, Ch. 153, *Mental Suffering and Emotional Distress*, § 153.31 *et seq.* (Matthew Bender)

Publisher's Notes

This instruction replaces BAJI No. 12.80.

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsNegligenceActionsNegligent Infliction of Emotional DistressGeneral OverviewTortsNegligenceActionsNegligent Infliction of Emotional DistressElementsTortsNegligenceActionsNegligent Infliction of Emotional DistressPotential Plaintiffs



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CHAPTER 16 California Judicial Council Emotional Distress Instructions

3-16 California Forms of Jury Instruction CACI 1621

CACI 1621 Negligent Infliction of Emotional Distress--Bystander--Essential Factual Elements

[*Name of plaintiff*] **claims that [he/she] suffered serious emotional distress as a result of perceiving [an injury to/the death of] [*name of injury victim*]. To establish this claim, [*name of plaintiff*] must prove all of the following:**

- 1. That [*name of defendant*] negligently caused [injury to/the death of] [*name of injury victim*];**
- 2. That [*name of plaintiff*] was present at the scene of the injury when it occurred and was aware that [*name of injury victim*] was being injured;**
- 3. That [*name of plaintiff*] suffered serious emotional distress; and**
- 4. That [*name of defendant*]'s conduct was a substantial factor in causing [*name of plaintiff*]'s serious emotional distress.**

Emotional distress includes suffering, anguish, fright, horror, nervousness, grief, anxiety, worry, shock, humiliation, and shame. Serious emotional distress exists if an ordinary, reasonable person would be unable to cope with it.

New September 2003

Directions for Use

This instruction is for use in bystander cases, where a plaintiff seeks recovery for damages suffered as a percipient witness of injury to others. If the plaintiff is a direct victim of tortious conduct, use *CACI No. 1620, Negligent Infliction of Emotional Distress --Direct Victim--Essential Factual Elements*.

This instruction should be read in conjunction with either *CACI No. 401, Basic Standard of Care*, or *CACI No. 418, Presumption of Negligence per se*.

In element 2, the phrase "was being injured" is intended to reflect contemporaneous awareness of injury.

Whether the plaintiff had a sufficiently close relationship with the victim should be determined as an issue of law because it is integral to the determination of whether a duty was owed to the plaintiff.

Sources and Authority

- A bystander who witnesses the negligent infliction of death or injury of another may recover for resulting emotional trauma even though he or she did not fear imminent physical harm. (*Dillon v. Legg* (1968) 68 Cal.2d 728, 746-747 [69 Cal.Rptr. 72, 441 P.2d 912] .)
- "As an introductory note, we observe that plaintiffs ... framed both negligence and negligent infliction of emotional distress causes of action. To be precise, however, 'the [only] tort with which we are concerned is negligence. Negligent infliction of emotional distress is not an independent tort' " (*Catsouras v. Department of California Highway Patrol* (2010) 181 Cal.App.4th 856, 875-876 [104 Cal.Rptr.3d 352] .)
- "In the absence of physical injury or impact to the plaintiff himself, damages for emotional distress should be recoverable only if the plaintiff: (1) is closely related to the injury victim, (2) is present at the scene of the injury-producing event at the time it occurs and is then aware that it is causing injury to the victim and, (3) as a result suffers emotional distress beyond that which would be anticipated in a disinterested witness." (*Thing v. La Chusa* (1989) 48 Cal.3d 644, 647 [257 Cal.Rptr. 865, 771 P.2d 814] .)
- "Absent exceptional circumstances, recovery should be limited to relatives residing in the same household, or parents, siblings, children, and grandparents of the victim." (*Thing, supra*, 48 Cal.3d at p. 668, fn. 10 .)
- The close relationship required between the plaintiff and the injury victim does not include the relationship found between unmarried cohabitants. (*Elden v. Sheldon* (1988) 46 Cal.3d 267, 273 [250 Cal.Rptr.254, 758 P.2d 582] .)
- "Although a plaintiff may establish presence at the scene through nonvisual sensory perception, 'someone who hears an accident but does not then know it is causing injury to a relative does not have a viable [bystander] claim for [negligent infliction of emotional distress], even if the missing knowledge is acquired moments later.' " (*Ra v. Superior Court* (2007) 154 Cal.App.4th 142, 149 [64 Cal.Rptr.3d 539] , internal citation omitted.)
- "[I]t is not necessary that a plaintiff bystander actually have witnessed the infliction of injury to her child, provided that the plaintiff was at the scene of the accident and was sensorially aware, in some important way, of the accident and the necessarily inflicted injury to her child." (*Wilks v. Hom* (1992) 2 Cal.App.4th 1264, 1271 [3 Cal.Rptr.2d 803] .)
- " '[S]erious mental distress may be found where a reasonable man, normally constituted, would be unable to adequately cope with the mental stress engendered by the circumstances of the case.' " (*Molien*

v. Kaiser Foundation Hospitals (1980) 27 Cal.3d 916, 927-928 [167 Cal.Rptr. 831, 616 P.2d 813] .)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1007-1021

1 Levy et al., *California Torts, Ch. 5, Negligent Infliction of Emotional Distress*, § 5.04 (Matthew Bender)

32 *California Forms of Pleading and Practice, Ch. 362, Mental Suffering and Emotional Distress*, § 362.11 (Matthew Bender)

15 *California Points and Authorities, Ch. 153, Mental Suffering and Emotional Distress*, §§ 153.31 et seq., 153.45 et seq. (Matthew Bender)

Publisher's Notes

This instruction replaces BAJI No. 12.83.

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsNegligenceActionsNegligent Infliction of Emotional DistressGeneral OverviewTortsNegligenceActionsNegligent Infliction of Emotional DistressElementsTortsNegligenceActionsNegligent Infliction of Emotional DistressPotential Plaintiffs



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CHAPTER 16 California Judicial Council Emotional Distress Instructions

3-16 California Forms of Jury Instruction CACI 1622

CACI 1622 Negligent Infliction of Emotional Distress--Fear of Cancer, HIV, or AIDS

[Name of plaintiff] claims that [name of defendant]'s conduct caused [him/her] to suffer serious emotional distress by exposing [name of plaintiff] to [insert applicable carcinogen, toxic substance, HIV, or AIDS]. To establish this claim, [name of plaintiff] must prove all of the following:

- 1. That [name of plaintiff] was exposed to [insert applicable carcinogen, toxic substance, HIV, or AIDS] as a result of [name of defendant]'s negligence;**
- 2. That [name of plaintiff] suffered serious emotional distress from a fear that [he/she] will develop [insert applicable cancer, HIV, or AIDS] as a result of the exposure;**
- 3. That reliable medical or scientific opinion confirms that it is more likely than not that [name of plaintiff] will develop [insert applicable cancer, HIV, or AIDS] as a result of the exposure; and**
- 4. That [name of defendant]'s negligence was a substantial factor in causing [name of plaintiff]'s serious emotional distress.**

Emotional distress includes suffering, anguish, fright, horror, nervousness, grief, anxiety, worry, shock, humiliation, and shame. Serious emotional distress exists if an ordinary, reasonable person would be unable to cope with it.

New September 2003

There may be other harmful agents and medical conditions that could support this cause of action.

3-16 California Forms of Jury Instruction CACI 1622

This instruction should be read in conjunction with either *CACI No. 401, Basic Standard of Care*, or *CACI No. 418, Presumption of Negligence per se*.

If plaintiff alleges that defendant's conduct constituted oppression, fraud, or malice, then *CACI No. 1623, Negligent Infliction of Emotional Distress-- Fear of Cancer, HIV, or AIDS--Malicious, Oppressive, or Fraudulent Conduct*, should be read.

■ "[D]amages for negligently inflicted emotional distress may be recovered in the absence of physical injury or impact" (*Potter v. Firestone Tire and Rubber Co. (1993) 6 Cal.4th 965, 986 [25 Cal.Rptr.2d 550, 863 P.2d 795]* , internal citation omitted.)

■ "[T]he way to avoid damage awards for unreasonable fear, i.e., in those cases where the feared cancer is at best only remotely possible, is to require a showing of the actual likelihood of the feared cancer to establish its significance." (*Potter, supra, 6 Cal.4th at p. 990 .*)

■ "[D]amages for fear of cancer may be recovered only if the plaintiff pleads and proves that (1) as a result of the defendant's negligent breach of a duty owed to the plaintiff, the plaintiff is exposed to a toxic substance which threatens cancer; and (2) the plaintiff's fear stems from a knowledge, corroborated by reliable medical or scientific opinion, that it is more likely than not that the plaintiff will develop the cancer in the future due to the toxic exposure." (*Potter, supra, 6 Cal.4th at p. 997 .*)

■ The California Supreme Court has acknowledged the Hawaii Supreme Court's definition of "serious emotional distress": " '[S]erious mental distress may be found where a reasonable man, normally constituted, would be unable to adequately cope with the mental stress engendered by the circumstances of the case.' " (*Molien v. Kaiser Foundation Hospitals (1980) 27 Cal.3d 916, 927-928 [167 Cal.Rptr. 831, 616 P.2d 813]* , quoting *Rodrigues v. State (1970) 52 Haw. 156, 173 [472 P.2d 509]* .)

■ "[W]e hold that the cost of medical monitoring is a compensable item of damages where the proofs demonstrate, through reliable medical expert testimony, that the need for future monitoring is a reasonably certain consequence of a plaintiff's toxic exposure and that the recommended monitoring is reasonable." (*Potter, supra, 6 Cal.4th at p. 1009 .*)

■ Courts have applied the reasoning of *Potter, supra* , to cases alleging that defendant's conduct caused plaintiff emotional distress based on fear of contracting AIDS. (See *Kerins v. Hartley (1994) 27 Cal.App.4th 1062, 1073-1075 [33 Cal.Rptr.2d 172]* ; *Herbert v. Regents of University of California (1994) 26 Cal.App.4th 782, 785-788 [31 Cal.Rptr.2d 709]* .)

■ Comparative fault principles may be applied to reduce amount of recovery for emotional distress based on fear of developing cancer when plaintiff's smoking is negligent and a portion of the fear of cancer is attributable to the smoking. (*Potter, supra, 6 Cal.4th at pp. 965 , 974.*)

Secondary Sources

1 Levy et al., *California Torts*, Ch. 5, *Negligent Infliction of Emotional Distress*, § 5.02 (Matthew Bender)

32 *California Forms of Pleading and Practice*, Ch. 362, *Mental Suffering and Emotional Distress* (Matthew Bender)

15 *California Points and Authorities*, Ch. 153, *Mental Suffering and Emotional Distress* (Matthew Bender)

Publisher's Notes

This instruction replaces BAJI No. 12.80.1.

LexisNexis Matthew Bender Expert Practice Tip--Using CACI No. 1622: *CACI No. 1622* can be used for medical conditions that include sexually transmitted diseases. In this case the cause of action does not require proof that defendant intended to cause harm, but you will need expert testimony that states the plaintiff has a 51 percent chance or better in developing the medical condition. *By Dona Cohn-Payne*

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsNegligenceActionsNegligent Infliction of Emotional DistressGeneral OverviewTortsNegligenceActionsNegligent Infliction of Emotional DistressElements



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CHAPTER 16 California Judicial Council Emotional Distress Instructions

3-16 California Forms of Jury Instruction CACI 1623

CACI 1623 Negligent Infliction of Emotional Distress--Fear of Cancer, HIV, or AIDS--Malicious, Oppressive, or Fraudulent Conduct

[*Name of plaintiff*] **claims that [*name of defendant*] acted with [malice/oppression/fraudulent intent] in exposing [*name of plaintiff*] to [insert applicable carcinogen, toxic substance, HIV, or AIDS] and that this conduct caused [*name of plaintiff*] to suffer serious emotional distress. To establish this claim, [*name of plaintiff*] must prove all of the following:**

1. That [*name of plaintiff*] was exposed to [insert applicable carcinogen, toxic substance, HIV, or AIDS] as a result of [*name of defendant*]'s negligent conduct;

2. That [*name of defendant*] acted with [malice/oppression/fraudulent intent] because [insert one or more of the following, as applicable]:

[[*Name of defendant*] intended to cause injury to [*name of plaintiff*];] [or]

[[*Name of defendant*]'s conduct was despicable and was carried out with a willful or conscious disregard of [*name of plaintiff*]'s rights or safety;] [or]

[[*Name of defendant*]'s conduct was despicable and subjected [*name of plaintiff*] to cruel and unjust hardship in conscious disregard of [*name of plaintiff*]'s rights;] [or]

[[*Name of defendant*] intentionally misrepresented or concealed a material fact known to [*name of defendant*], intending to cause [*name of plaintiff*] harm;]

3. That [*name of plaintiff*] suffered serious emotional distress from a fear that [he/she] will develop [insert applicable cancer, HIV, or AIDS] as a result of the exposure;

4. That reliable medical or scientific opinion confirms that [name of plaintiff]'s risk of developing [insert applicable cancer, HIV, or AIDS] was significantly increased by the exposure and has resulted in an actual risk that is significant; and

5. That [name of defendant]'s conduct was a substantial factor in causing [name of plaintiff]'s serious emotional distress.

Emotional distress includes suffering, anguish, fright, horror, nervousness, grief, anxiety, worry, shock, humiliation, and shame. Serious emotional distress exists if an ordinary, reasonable person would be unable to cope with it.

"Despicable conduct" is conduct that is so mean, vile, base, or contemptible that it would be looked down on and despised by reasonable people.

New September 2003

Use CACI No. 1622, *Negligent Infliction of Emotional Distress--Fear of Cancer, HIV, or AIDS*, if plaintiff alleges the same tort without punitive conduct.

This instruction should be read in conjunction with either CACI No. 401, *Basic Standard of Care*, or CACI No. 418, *Presumption of Negligence per se*.

"Oppression, fraud, or malice" is used here as defined by *Civil Code section 3294*, except that the higher "clear and convincing" burden of proof is not required in this context.

In some cases the judge should make clear that the defendant does not need to have known of the individual plaintiff where there is a broad exposure and plaintiff is a member of the class that was exposed.

■ "[D]amages for negligently inflicted emotional distress may be recovered in the absence of physical injury or impact" (*Potter v. Firestone Tire and Rubber Co.* (1993) 6 Cal.4th 965, 986 [25 Cal.Rptr.2d 550, 863 P.2d 795] , quoting *Burgess v. Superior Court* (1992) 2 Cal.4th 1064, 1074 [9 Cal.Rptr.2d 615, 831 P.2d 1197] .)

■ "[A] toxic exposure plaintiff need not meet the more likely than not threshold for fear of cancer recovery in a negligence action if the plaintiff pleads and proves that the defendant's conduct in causing the exposure amounts to 'oppression, fraud, or malice' as defined in *Civil Code section 3294*." (*Potter*, *supra*, 6 Cal.4th at p. 998 .)

■ The California Supreme Court has acknowledged the Hawaii Supreme Court's definition of "serious emotional distress": " '[S]erious mental distress may be found where a reasonable man, normally constituted, would be unable to adequately cope with the mental stress engendered by the circumstances of the case.' " (*Molien v. Kaiser Foundation Hospitals* (1980) 27 Cal.3d 916, 927-928 [167 Cal.Rptr. 831, 616 P.2d 813] , quoting *Rodrigues v. State* (1970) 52 Haw. 156, 173 [472 P.2d 509] .)

■ Courts have applied the reasoning of *Potter*, *supra* , to cases alleging that defendant's conduct caused plaintiff emotional distress based on fear of contracting AIDS. (See *Kerins v. Hartley* (1994) 27

Cal.App.4th 1062, 1073-1075 [33 Cal.Rptr.2d 172] ; Herbert v. Regents of University of California (1994) 26 Cal.App.4th 782, 785-788 [31 Cal.Rptr.2d 709] .)

■ *Civil Code section 3294(c)* provides:

As used in this section, the following definitions apply:

(1) "Malice" means conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others.

(2) "Oppression" means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights.

(3) "Fraud" means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury.

■ "Despicable conduct is conduct which is so vile, base, contemptible, miserable, wretched or loathsome that it would be looked down upon and despised by ordinary decent people." (*Mock v. Mich. Millers Mut. Ins. Co.* (1992) 4 *Cal.App.4th* 306, 331 [5 *Cal.Rptr.2d* 594].)

■ "Used in its ordinary sense, the adjective 'despicable' is a powerful term that refers to circumstances that are 'base,' 'vile,' or 'contemptible.'" (*College Hospital, Inc. v. Superior Court* (1994) 8 *Cal.4th* 704, 725 [34 *Cal.Rptr.2d* 898, 882 *P.2d* 894] .)

■ [Although] "*Civil Code section 3294* requires a plaintiff to prove oppression, fraud, or malice by 'clear and convincing evidence' for purposes of punitive damages," this higher burden of proof has not been applied to fear-of-cancer cases. (*Potter, supra*, 6 *Cal.4th* at p. 1000, fn. 20 .)

■ Comparative fault principles may be applied to reduce amount of recovery for emotional distress based on fear of developing cancer when plaintiff's smoking is negligent and a portion of the fear of cancer is attributable to the smoking. (*Potter, supra*, 6 *Cal.4th* at p. 965 .)

Secondary Sources

1 Levy et al., *California Torts*, Ch. 5, *Negligent Infliction of Emotional Distress*, § 5.02 (Matthew Bender)

32 *California Forms of Pleading and Practice*, Ch. 362, *Mental Suffering and Emotional Distress* (Matthew Bender)

15 *California Points and Authorities*, Ch. 153, *Mental Suffering and Emotional Distress* (Matthew Bender)

Publisher's Notes

This instruction replaces BAJI No. 12.80.2.

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsNegligenceActionsNegligent Infliction of Emotional DistressGeneral OverviewTortsNegligenceActionsNegligent Infliction of Emotional DistressElementsTortsNegligenceActionsNegligent Infliction of Emotional DistressPotential Plaintiffs



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California Forms of Jury Instruction

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CHAPTER 16 California Judicial Council Emotional Distress Instructions

3-16 California Forms of Jury Instruction CACI 1624-CACI 1699

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CACI 1624Reserved for Future Use



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CHAPTER 16 California Judicial Council Emotional Distress Instructions

3-16 California Forms of Jury Instruction CACI VF-1600

CACI VF-1600 Intentional Infliction of Emotional Distress

We answer the questions submitted to us as follows:

1. Was [*name of defendant*]'s conduct outrageous?

_____ Yes _____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. [Did [*name of defendant*] intend to cause [*name of plaintiff*] emotional distress?] [or]

[Did [*name of defendant*] act with reckless disregard of the probability that [*name of plaintiff*] would suffer emotional distress, knowing that [*name of plaintiff*] was present when the conduct occurred?]

_____ Yes _____ No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Did [*name of plaintiff*] suffer severe emotional distress?

_____ Yes _____ No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer

no further questions, and have the presiding juror sign and date this form.

4. Was [*name of defendant*]'s conduct a substantial factor in causing [*name of plaintiff*]'s severe emotional distress?

_____ Yes _____ No

If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. What are [*name of plaintiff*]'s damages?

[a. Past economic loss

[lost earnings..... \$_____].....

[lost profits..... \$_____].....

[medical expenses..... \$_____].....

[other past economic loss..... \$_____].....

..... Total Past Economic Damages: \$_____]

[b. Future economic loss

[lost earnings..... \$_____].....

[lost profits..... \$_____].....

[medical expenses..... \$_____].....

[other future economic loss..... \$_____].....

..... Total Future Economic Damages: \$_____]

[c. Past noneconomic loss, including [physical pain/mental suffering:]..... \$_____]

[d. Future noneconomic loss, including [physical pain/mental suffering:]..... \$_____]

..... TOTAL \$_____

Signed: _____
Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the [clerk/bailiff/judge].

New September 2003; Revised April 2007

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on *CACI No. 1600, Intentional Infliction of Emotional Distress--Essential Factual Elements*.

If specificity is not required, users do not have to itemize all the damages listed in question 5 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

Publisher's Notes

There is no BAJI verdict form on this subject.

LexisNexis Matthew Bender Expert Practice Tip--Seeking Damages in Intentional Tort Cases:

Any intentional tort should be accompanied by a demand for punitive damages and accordingly placed in the verdict form. Insurance companies have universally stopped covering acts involving intentional torts so it may be prudent to use negligence as your theory if your only way to collect damages is through an insurance policy. *By Dona Cohn-Payne*

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsIntentional TortsIntentional Infliction of Emotional DistressGeneral OverviewTortsIntentional TortsIntentional Infliction of Emotional DistressRemedies



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CHAPTER 16 California Judicial Council Emotional Distress Instructions

3-16 California Forms of Jury Instruction CACI VF-1601

CACI VF-1601 Intentional Infliction of Emotional Distress--Affirmative Defense--Privileged Conduct

We answer the questions submitted to us as follows:

1. Was [*name of defendant*] exercising [his/her] legal rights or protecting [his/her] economic interests?

_____ Yes _____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, skip questions 2 and 3 and answer question 4.

2. Was [*name of defendant*]'s conduct lawful and consistent with community standards?

_____ Yes _____ No

If your answer to question 2 is yes, then answer question 3. If you answered no, skip question 3 and answer question 4.

3. Did [*name of defendant*] have a good-faith belief that [he/she] had a legal right to engage in the conduct?

_____ Yes _____ No

If your answer to question 3 is no, then answer question 4. If you answered yes, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Was [name of defendant]'s conduct outrageous?

_____ Yes _____ No

If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. [Did [name of defendant] intend to cause [name of plaintiff] emotional distress?]

[or]

[Did [name of defendant] act with reckless disregard of the probability that [name of plaintiff] would suffer emotional distress, knowing that [name of plaintiff] was present when the conduct occurred?]

_____ Yes _____ No

If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. Did [name of plaintiff] suffer severe emotional distress?

_____ Yes _____ No

If your answer to question 6 is yes, then answer question 7. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

7. Was [name of defendant]'s conduct a substantial factor in causing [name of plaintiff]'s severe emotional distress?

_____ Yes _____ No

If your answer to question 7 is yes, then answer question 8. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

8. What are [name of plaintiff]'s damages?

[a. Past economic loss

[lost earnings..... \$_____].....

[lost profits..... \$_____].....

[medical expenses..... \$_____].....

[other past economic loss..... \$_____].....

..... **Total Past Economic Damages: \$_____]**

[b. Future economic loss

[lost earnings..... \$_____].

[lost profits..... \$_____].

[medical expenses..... \$_____].

[other future economic loss..... \$_____].

..... Total Future Economic Damages: \$_____]

[c. [Past noneconomic loss, including [physical pain/mental suffering:]]..... \$_____]

[d. [Future noneconomic loss, including [physical pain/mental suffering:]]..... \$_____]

..... TOTAL \$_____

Signed: _____

Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the [clerk/bailiff/judge].

New September 2003; Revised April 2007

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on *CACI No. 1600, Intentional Infliction of Emotional Distress--Essential Factual Elements*, and *CACI No. 1605, Intentional Infliction of Emotional Distress--Affirmative Defense--Privileged Conduct*.

If specificity is not required, users do not have to itemize all the damages listed in question 8 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

Publisher's Notes

There is no BAJI verdict form on this subject.



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CHAPTER 16 California Judicial Council Emotional Distress Instructions

3-16 California Forms of Jury Instruction CACI VF-1602

CACI VF-1602 Intentional Infliction of Emotional Distress--Fear of Cancer, HIV, or AIDS

We answer the questions submitted to us as follows:

1. Was [*name of defendant*]'s conduct outrageous?

_____ Yes _____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Did [*name of defendant*]'s conduct expose [*name of plaintiff*] to [*insert applicable carcinogen, toxic substance, HIV, or AIDS*]?

_____ Yes _____ No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. [Did [*name of defendant*] intend to cause [*name of plaintiff*] emotional distress?] [or]

[Did [*name of defendant*] act with reckless disregard of the probability that [*name of plaintiff*]/the group of individuals including [*name of plaintiff*]] would suffer emotional distress, knowing that [he/she/they] [was/were] present when the conduct occurred?]

_____ Yes _____ No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Did [*name of plaintiff*] suffer severe emotional distress from a reasonable fear of developing [*insert cancer, HIV, or AIDS*]?

_____ Yes _____ No

If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. Was [*name of defendant*]'s conduct a substantial factor in causing [*name of plaintiff*]'s severe emotional distress?

_____ Yes _____ No

If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. What are [*name of plaintiff*]'s damages?

[a. Past economic loss

[lost earnings..... \$_____].....

[lost profits..... \$_____].....

[medical expenses..... \$_____].....

[other past economic loss..... \$_____].....

..... Total Past Economic Damages: \$_____]

[b. Future economic loss

[lost earnings..... \$_____].....

[lost profits..... \$_____].....

[medical expenses..... \$_____].....

[other future economic loss..... \$_____].....

..... Total Future Economic Damages: \$_____]

[c. Past noneconomic loss, including [physical pain/mental suffering:]..... \$_____]

[d. Future noneconomic loss, including [physical pain/mental suffering:]..... \$_____]

..... TOTAL \$_____

Signed: _____

Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the [clerk/bailiff/judge].

New September 2003; Revised April 2007

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on *CACI No. 1601, Intentional Infliction of Emotional Distress--Fear of Cancer, HIV, or AIDS*.

If specificity is not required, users do not have to itemize all the damages listed in question 6 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

Publisher's Notes

There is no BAJI verdict form on this subject.



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CHAPTER 16 California Judicial Council Emotional Distress Instructions

3-16 California Forms of Jury Instruction CACI VF-1603

CACI VF-1603 Negligent Infliction of Emotional Distress--Direct Victim

We answer the questions submitted to us as follows:

1. Was [*name of defendant*] negligent?

_____ Yes _____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Did [*name of plaintiff*] suffer serious emotional distress?

_____ Yes _____ No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Was [*name of defendant*]'s negligence a substantial factor in causing [*name of plaintiff*]'s serious emotional distress?

_____ Yes _____ No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. What are [*name of plaintiff*]'s damages?

[a. Past economic loss

[lost earnings..... \$_____]

[lost profits..... \$_____]

[medical expenses..... \$_____]

[other past economic loss..... \$_____]

..... **Total Past Economic Damages: \$_____]****[b. Future economic loss**

[lost earnings..... \$_____]

[lost profits..... \$_____]

[medical expenses..... \$_____]

[other future economic loss..... \$_____]

..... **Total Future Economic Damages: \$_____]****[c. Past noneconomic loss, including [physical
pain/mental suffering:]..... \$_____]****[d. Future noneconomic loss, including [physical
pain/mental suffering:]..... \$_____]**..... **TOTAL \$_____****Signed: _____****Presiding Juror****Dated: _____****[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the
[clerk/bailiff/judge].**

New September 2003; Revised April 2007

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on *CACI No. 1620, Negligent Infliction of Emotional Distress --Direct Victim-- Essential Factual Elements*.

If specificity is not required, users do not have to itemize all the damages listed in question 4 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

Publisher's Notes

There is no BAJI verdict form on this subject.



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CHAPTER 16 California Judicial Council Emotional Distress Instructions

3-16 California Forms of Jury Instruction CACI VF-1604

CACI VF-1604 Negligent Infliction of Emotional Distress--Bystander

We answer the questions submitted to us as follows:

1. Did [*name of defendant*] negligently cause [injury to/the death of] [*name of injury victim*]?

_____ Yes _____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Was [*name of plaintiff*] present at the scene of the injury when it occurred, and was [he/she] aware that [*name of injury victim*] was being injured?

_____ Yes _____ No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Did [*name of plaintiff*] suffer serious emotional distress?

_____ Yes _____ No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Was [*name of defendant*]'s conduct a substantial factor in causing [*name of plaintiff*]'s serious

emotional distress?

_____ Yes _____ No

If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. What are [*name of plaintiff*]'s damages?

[a. Past economic loss

[lost earnings..... \$_____].....

[lost profits..... \$_____].....

[medical expenses..... \$_____].....

[other past economic loss..... \$_____].....

..... Total Past Economic Damages: \$_____]

[b. Future economic loss

[lost earnings..... \$_____].....

[lost profits..... \$_____].....

[medical expenses..... \$_____].....

[other future economic loss..... \$_____].....

..... Total Future Economic Damages: \$_____]

[c. Past noneconomic loss, including [physical pain/mental suffering:]..... \$_____]

[d. Future noneconomic loss, including [physical pain/mental suffering:]..... \$_____]

..... TOTAL \$_____

Signed: _____

Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the [clerk/bailiff/judge].

New September 2003; Revised April 2007

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on *CACI No. 1620, Negligent Infliction of Emotional Distress --Direct Victim-- Essential Factual Elements*.

If specificity is not required, users do not have to itemize all the damages listed in question 5 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

Publisher's Notes

There is no BAJI verdict form on this subject.



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CHAPTER 16 California Judicial Council Emotional Distress Instructions

3-16 California Forms of Jury Instruction CACI VF-1605

CACI VF-1605 Negligent Infliction of Emotional Distress--Fear of Cancer, HIV, or AIDS

We answer the questions submitted to us as follows:

1. Was [name of plaintiff] exposed to [insert applicable carcinogen, toxic substance, HIV, or AIDS] as a result of [name of defendant]'s negligence?

_____ Yes _____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Did [name of plaintiff] suffer serious emotional distress from a fear that [he/she] would develop [insert applicable cancer, HIV, or AIDS] as a result of the exposure?

_____ Yes _____ No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Does reliable medical or scientific opinion confirm that it is more likely than not that [name of plaintiff] will develop [insert applicable cancer, HIV, or AIDS] as a result of the exposure?

_____ Yes _____ No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Was [name of defendant]'s negligence a substantial factor in causing [name of plaintiff]'s serious emotional distress?

_____ Yes _____ No

If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. What are [name of plaintiff]'s damages?

[a. Past economic loss

[lost earnings..... \$_____]

[lost profits..... \$_____]

[medical expenses..... \$_____]

[other past economic loss..... \$_____]

..... **Total Past Economic Damages: \$_____]**

[b. Future economic loss

[lost earnings..... \$_____]

[lost profits..... \$_____]

[medical expenses..... \$_____]

[other future economic loss..... \$_____]

..... **Total Future Economic Damages: \$_____]**

[c. Past noneconomic loss, including [physical pain/mental suffering:]..... \$_____]

[d. Future noneconomic loss, including [physical pain/mental suffering:]..... \$_____]

..... **TOTAL \$_____**

Signed: _____

Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the

[clerk/bailiff/judge].

New September 2003; Revised April 2007

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on *CACI No. 1622, Negligent Infliction of Emotional Distress--Fear of Cancer, HIV, or AIDS*.

If specificity is not required, users do not have to itemize all the damages listed in question 5 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

Publisher's Notes

There is no BAJI verdict form on this subject.



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CHAPTER 16 California Judicial Council Emotional Distress Instructions

3-16 California Forms of Jury Instruction CACI VF-1606

CACI VF-1606 Negligent Infliction of Emotional Distress--Fear of Cancer, HIV, or AIDS--Malicious, Oppressive, or Fraudulent Conduct

We answer the questions submitted to us as follows:

1. Was [name of plaintiff] exposed to [insert applicable carcinogen, toxic substance, HIV, or AIDS] as a result of [name of defendant]'s conduct?

_____ Yes _____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Did [name of defendant] act with [malice/oppression/fraudulent intent] because [insert one or more of the following, as applicable:]

[[name of defendant] intended to cause injury to [name of plaintiff]?] [or]

[[name of defendant]'s conduct was despicable and was carried out with a willful or conscious disregard of [name of plaintiff]'s rights or safety?] [or]

[[name of defendant]'s conduct was despicable and subjected [name of plaintiff] to cruel and unjust hardship in conscious disregard of [name of plaintiff]'s rights?] [or]

[[name of defendant] intentionally misrepresented or concealed a material fact known to [name of defendant], intending to cause [name of plaintiff] harm?]

_____ Yes _____ No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Did [name of plaintiff] suffer serious emotional distress from a fear, confirmed by reliable medical or scientific opinion, that [name of plaintiff]'s risk of developing [insert applicable cancer, HIV, or AIDS] was significantly increased by the exposure and has resulted in an actual risk that is significant?

_____ Yes _____ No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Was [name of defendant]'s conduct a substantial factor in causing [name of plaintiff]'s serious emotional distress?

_____ Yes _____ No

If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. What are [name of plaintiff]'s damages?

[a. Past economic loss

[lost earnings..... \$_____].....

[lost profits..... \$_____].....

[medical expenses..... \$_____].....

[other past economic loss..... \$_____].....

..... **Total Past Economic Damages: \$_____]**

[b. Future economic loss

[lost earnings..... \$_____].....

[lost profits..... \$_____].....

[medical expenses..... \$_____].....

[other future economic loss..... \$_____].....

..... **Total Future Economic Damages: \$_____]**

[c. Past noneconomic loss, including [physical

pain/mental suffering:]..... \$_____]

[d. Future noneconomic loss, including [physical
pain/mental suffering:]..... \$_____]

..... TOTAL \$_____

Signed: _____

Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the
[clerk/bailiff/judge].

New September 2003; Revised April 2007

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on *CACI No. 1623, Negligent Infliction of Emotional Distress--Fear of Cancer, HIV, or AIDS--Malicious, Oppressive, or Fraudulent Conduct*.

If specificity is not required, users do not have to itemize all the damages listed in question 5 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

Publisher's Notes

There is no BAJI verdict form on this subject.



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California Forms of Jury Instruction

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CHAPTER 16 California Judicial Council Emotional Distress Instructions

3-16 California Forms of Jury Instruction CACI VF-1607-CACI VF-1699

Reserved for Future Use

CACI VF-1607Reserved for Future Use



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CHAPTER 17 California Judicial Council Defamation Instructions

3-17 California Forms of Jury Instruction 17.syn

§ 17.syn Synopsis to Chapter 17: California Judicial Council Defamation Instructions

CACI 1700 Defamation per se--Essential Factual Elements (Public Officer/Figure and Limited Public Figure)

CACI 1701 Defamation per quod--Essential Factual Elements (Public Officer/Figure and Limited Public Figure)

CACI 1702 Defamation per se--Essential Factual Elements (Private Figure--Matter of Public Concern)

CACI 1703 Defamation per quod--Essential Factual Elements (Private Figure--Matter of Public Concern)

CACI 1704 Defamation per se--Essential Factual Elements (Private Figure--Matter of Private Concern)

CACI 1705 Defamation per quod--Essential Factual Elements (Private Figure--Matter of Private Concern)

CACI 1706 Definition of Statement

CACI 1707 Fact Versus Opinion

CACI 1708 Coerced Self-Publication

CACI 1709-CACI 1719 Reserved for Future Use

CACI 1720 Affirmative Defense--Truth

CACI 1721 Affirmative Defense--Consent

CACI 1722 Retraction: Newspaper or Broadcast (Civ. Code, § 48a)

CACI 1723 Qualified Privilege (Civ. Code, § 47(c))

CACI 1724 Affirmative Defense--Statute of Limitations--Defamation

CACI 1725-CACI 1799 Reserved for Future Use

CACI VF-1700 Defamation per se--Essential Factual Elements (Public Officer/Figure and Limited Public Figure)

CACI VF-1701 Defamation per quod--Essential Factual Elements (Public Officer/Figure and Limited Public Figure)

CACI VF-1702 Defamation per se--Essential Factual Elements (Private Figure--Matter of Public Concern)

CACI VF-1703 Defamation per quod--Essential Factual Elements (Private Figure--Matter of Public Concern)

CACI VF-1704 Defamation per se--Affirmative Defense--Truth (Private Figure--Matter of Private Concern)

CACI VF-1705 Defamation per quod (Private Figure--Matter of Private Concern)

CACI VF-1706-CACI VF-1799 Reserved for Future Use

Table A Defamation Per Se

Table B Defamation Per Quod



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CHAPTER 17 California Judicial Council Defamation Instructions

3-17 California Forms of Jury Instruction Scope

Scope

SCOPE

This chapter contains the California Judicial Council's "Defamation Series" of civil jury instructions [*CACI No. 1700 et seq.*]. The Judicial Council of California Civil Jury Instructions (CACI) included in this publication are the product of the Judicial Council of California Task Force on Jury Instructions, which are updated by the Judicial Council of California Advisory Committee on Civil Jury Instructions.

This chapter includes instructions on the following topics:

- Essential factual elements for causes of action for defamation per se [*CACI No. 1700* (public officer, public figure, and limited public figure); *CACI No. 1702* (private figure--matter of public concern); *CACI No. 1704* (private figure--matter of private concern)].
- Essential factual elements for causes of action for defamation per quod [*CACI No. 1701* (public officer, public figure, and limited public figure); *CACI No. 1703* (private figure--matter of public concern); *CACI No. 1705* (private figure--matter of private concern)].
- Definition of statement [*CACI No. 1706*].
- Fact versus opinion [*CACI No. 1707*].
- Coerced self-publication [*CACI No. 1708*].
- Defenses of truth [*CACI No. 1720*] and consent [*CACI No. 1721*].
- Retraction in a newspaper or broadcast under *Civ. Code* § 48a [*CACI No. 1722*].
- Qualified privilege under *Civ. Code* § 47(c) [*CACI No. 1723*].

- Defense of statute of limitations in defamation action [*CACI No. 1724*].

The defamation series also includes special verdict forms [*CACI Nos. VF-1700-VF-1705*].

A table outlining defamation per se and defamation per quod is included at the end of this chapter.



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CHAPTER 17 California Judicial Council Defamation Instructions

3-17 California Forms of Jury Instruction CACI 1700

CACI 1700 Defamation per se--Essential Factual Elements (Public Officer/Figure and Limited Public Figure)

[*Name of plaintiff*] **claims that [*name of defendant*] harmed [him/her] by making [one or more of] the following statement(s): [*list all claimed per se defamatory statements*]. To establish this claim, [*name of plaintiff*] must prove that all of the following are more likely true than not true:**

Liability

- 1. That [*name of defendant*] made [one or more of] the statement(s) to [a person/persons] other than [*name of plaintiff*];**
- 2. That [this person/these people] reasonably understood that the statement(s) [was/were] about [*name of plaintiff*];**
- 3. [That [this person/these people] reasonably understood the statement(s) to mean that [*insert ground(s) for defamation per se, e.g., "[name of plaintiff] had committed a crime"*]]; and**
- 4. That the statement(s) [was/were] false.**

In addition, [*name of plaintiff*] must prove by clear and convincing evidence that [*name of defendant*] knew the statement(s) [was/were] false or had serious doubts about the truth of the statement(s).

Actual Damages

If [*name of plaintiff*] has proved all of the above, then [he/she] is entitled to recover [his/her] actual damages if [he/she] proves that [*name of defendant*]'s wrongful conduct was a substantial factor in causing any of the following:

- a. Harm to [name of plaintiff]'s property, business, trade, profession, or occupation;**
- b. Expenses [name of plaintiff] had to pay as a result of the defamatory statements;**
- c. Harm to [name of plaintiff]'s reputation; or**
- d. Shame, mortification, or hurt feelings.**

Assumed Damages

Even if [name of plaintiff] has not proved any actual damages for harm to reputation or shame, mortification or hurt feelings, the law nonetheless assumes that [he/she] has suffered this harm. Without presenting evidence of damage, [name of plaintiff] is entitled to receive compensation for this assumed harm in whatever sum you believe is reasonable. You must award at least a nominal sum, such as one dollar.

Punitive Damages

[Name of plaintiff] may also recover damages to punish [name of defendant] if [he/she] proves by clear and convincing evidence that [name of defendant] acted with malice, oppression, or fraud.

[For specific provisions, see CACI Nos. 3940 -3949.]

New September 2003; Revised April 2008

Directions for Use

Special verdict form CACI No. VF-1700, *Defamation per se (Public Officer/Figure and Limited Public Figure)*, should be used in this type of case.

Use the bracketed element 3 only if the statement is not defamatory on its face (i.e., if the judge has not determined that the statement is defamatory as a matter of law). For statutory grounds of defamation per se, see *Civil Code* sections 45 (libel) and 46 (slander). Note that certain specific grounds of libel per se have been defined by case law.

Sources and Authority

- *Civil Code* section 44 provides:

Defamation is effected by either of the following:

(a) Libel.

(b) Slander.

- *Civil Code* section 45 provides: "Libel is a false and unprivileged publication by writing, printing, picture, effigy, or other fixed representation to the eye, which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation."

- *Civil Code* section 45a provides: "A libel which is defamatory of the plaintiff without the necessity of explanatory

matter, such as an inducement, innuendo or other extrinsic fact, is said to be a libel on its face. Defamatory language not libelous on its face is not actionable unless the plaintiff alleges and proves that he has suffered special damage as a proximate result thereof. Special damage is defined in Section 48a of this code."

■ *Civil Code section 46* provides:

Slander is a false and unprivileged publication, orally uttered, and also communications by radio or any mechanical or other means which:

1. Charges any person with crime, or with having been indicted, convicted, or punished for crime;
2. Imputes in him the present existence of an infectious, contagious, or loathsome disease;
3. Tends directly to injure him in respect to his office, profession, trade or business, either by imputing to him general disqualification in those respects which the office or other occupation peculiarly requires, or by imputing something with reference to his office, profession, trade, or business that has a natural tendency to lessen its profits;
4. Imputes to him impotence or a want of chastity; or
5. Which, by natural consequence, causes actual damage.

■ *Section 558 of the Restatement Second of Torts* provides:

To create liability for defamation there must be:

- (a) a false and defamatory statement concerning another;
- (b) an unprivileged publication to a third party;
- (c) fault amounting at least to negligence on the part of the publisher; and
- (d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.

■ "Defamation is an invasion of the interest in reputation. The tort involves the intentional publication of a statement of fact that is false, unprivileged, and has a natural tendency to injure or which causes special damage." (*Smith v. Maldonado* (1999) 72 Cal.App.4th 637, 645 [85 Cal.Rptr.2d 397] .)

■ California does not follow the majority rule, which is that all libel is actionable per se. If the court determines that the statement is reasonably susceptible to a defamatory interpretation, it is for the jury to determine if a defamatory meaning was in fact conveyed to a listener or reader. (*Kahn v. Bower* (1991) 232 Cal.App.3d 1599, 1608 [284 Cal.Rptr. 244] .)

■ A plaintiff is not required to allege special damages if the statement is libelous per se (either on its face or by jury finding). (*Selleck v. Globe Int'l, Inc.* (1985) 166 Cal.App.3d 1123, 1130 [212 Cal.Rptr. 838] .)

■ "A slander that falls within the first four subdivisions of *Civil Code* section 46 is slander per se and requires no proof of actual damages. A slander that does not fit into those four subdivisions is slander per quod, and special damages are required for there to be any recovery for that slander." (*The Nethercutt Collection v. Regalia* (2009) 172 Cal.App.4th 361, 367 [90 Cal.Rptr.3d 882] , internal citations omitted.)

■ "With respect to slander per se, the trial court decides if the alleged statement falls within *Civil Code* section 46, subdivisions 1 through 4. It is then for the trier of fact to determine if the statement is defamatory. This allocation of responsibility may appear, at first glance, to result in an overlap of responsibilities because a trial court determination that the statement falls within those categories would seemingly suggest that the statement, if false, is necessarily defamatory. But a finder of fact might rely upon extraneous evidence to conclude that, under the circumstances, the statement was not defamatory." (*The Nethercutt Collection*, *supra*, 172 Cal.App.4th at pp. 368-369 .)

■ "[T]he jury was instructed that if it found that defendant published matter that was defamatory on its face and it found by clear and convincing evidence that defendant knew the statement was false or published it in reckless disregard of whether it was false, then the jury 'also may award plaintiff presumed general damages.' Presumed damages 'are those damages that necessarily result from the publication of defamatory matter and are presumed to exist. They include reasonable compensation for loss of reputation, shame, mortification, and hurt feeling. No definite standard or method of calculation is prescribed by law by which to fix reasonable compensation for presumed damages, and no evidence of actual harm is required. Nor is the opinion of any witness required as to the amount of such reasonable compensation. In making an award for presumed damages, you shall exercise your authority with calm and reasonable judgment and the damages you fix shall be just and reasonable in the light of the evidence. You may in the exercise of your discretion award nominal damages only, namely an insignificant sum such as one dollar.' [PP] ... [T]he instant instruction, which limits damages to 'those damages that necessarily result from the publication of defamatory matter,' constitutes substantial compliance with [*Civil Code*] section 3283. Thus, the instant instructions, 'if obeyed, did not allow the jurors to "enter the realm of speculation" regarding future suffering.' " (*Sommer v. Gabor* (1995) 40 Cal.App.4th 1455, 1472-1473 [48 Cal.Rptr.2d 235] , internal citations omitted.)

■ The distinction between fact and opinion is not absolute. "A statement of opinion ... may still be actionable 'if it implies the allegation of undisclosed defamatory facts as the basis for the opinion.' " (*Copp v. Paxton* (1996) 45 Cal.App.4th 829, 837 [52 Cal.Rptr.2d 831] , internal citations omitted.)

■ "In defamation actions generally, factual truth is a defense which it is the defendant's burden to prove. In a defamation action against a newspaper by a private person suing over statements of public concern, however, the First Amendment places the burden of proving falsity on the plaintiff. As a matter of constitutional law, therefore, media statements on matters of public interest, including statements of opinion which reasonably imply a knowledge of facts, 'must be provable as false before there can be liability under state defamation law.' Whether a statement contains provably false factual assertions is a question of law for the trial court to decide." (*Eisenberg v. Alameda Newspapers* (1999) 74 Cal.App.4th 1359, 1382 [88 Cal.Rptr.2d 802] , internal citations omitted.)

■ In matters involving public concern, the First Amendment protection applies to nonmedia defendants, putting the burden of proving falsity of the statement on the plaintiff. (*Nizam-Aldine v. City of Oakland* (1996) 47 Cal.App.4th 364, 375 [54 Cal.Rptr.2d 781] .)

■ "Publication means communication to some third person who understands the defamatory meaning of the statement and its application to the person to whom reference is made. Publication need not be to the 'public' at large; communication to a single individual is sufficient." (*Smith*, *supra*, 72 Cal.App.4th at p. 645 , internal citations omitted.)

■ "[W]hen a party repeats a slanderous charge, he is equally guilty of defamation, even though he states the source of the charge and indicates that he is merely repeating a rumor." (*Jackson v. Paramount Pictures Corp.* (1998) 68 Cal.App.4th 10, 26 [80 Cal.Rptr.2d 1] , internal citation omitted.)

■ "At common law, one who republishes a defamatory statement is deemed thereby to have adopted it and so may be held liable, together with the person who originated the statement, for resulting injury to the reputation of the defamation victim. California has adopted the common law in this regard, although by statute the republication of defamatory statements is privileged in certain defined situations." (*Khawar v. Globe Internat.* (1998) 19 Cal.4th 254, 268 [79 Cal.Rptr.2d 178, 965 P.2d 696] , internal citations omitted.)

■ The general rule is that "a plaintiff cannot manufacture a defamation cause of action by publishing the statements to third persons; the publication must be done by the defendant." There is an exception to this rule. [When it is foreseeable that the plaintiff] " 'will be under a strong compulsion to disclose the contents of the defamatory statement to a third person after he has read it or been informed of its contents.' " (*Live Oak Publishing Co. v. Cohagan* (1991) 234 Cal.App.3d 1277, 1284 [286 Cal.Rptr. 198] , internal citations omitted.)

■ Whether a plaintiff in a defamation action is a public figure is a question of law for the trial court. (*Reader's Digest Assn. v. Superior Court* (1984) 37 Cal.3d 244, 252 [208 Cal.Rptr. 137, 690 P.2d 610] .) "The question whether a plaintiff is a public figure is to be determined by the court, not the jury." (*Stolz v. KSFM 102 FM* (1994) 30 Cal.App.4th 195, 203 [35 Cal.Rptr.2d 740] , internal citation omitted.)

■ "To qualify as a limited purpose public figure, a plaintiff 'must have undertaken some voluntary [affirmative] act[ion] through which he seeks to influence the resolution of the public issues involved.' " (*Rudnick v. McMillan* (1994) 25 Cal.App.4th 1183, 1190 [31 Cal.Rptr.2d 193] ; see also *Mosesian v. McClatchy Newspapers* (1991) 233 Cal.App.3d 1685, 1689 [285 Cal.Rptr. 430] .)

■ "The First Amendment limits California's libel law in various respects. When, as here, the plaintiff is a public figure, he cannot recover unless he proves by clear and convincing evidence that the defendant published the defamatory statement with actual malice, i.e., with 'knowledge that it was false or with reckless disregard of whether it was false or not.' Mere negligence does not suffice. Rather, the plaintiff must demonstrate that the author 'in fact entertained serious doubts as to the truth of his publication,' or acted with a 'high degree of awareness of ... probable falsity.' " (*Masson v. New Yorker Magazine* (1991) 501 U.S. 496, 510 [111 S.Ct. 2419, 115 L.Ed.2d 447] , internal citations omitted; see *St. Amant v. Thompson* (1968) 390 U.S. 727, 731 [88 S.Ct. 1323, 20 L.Ed.2d 262] ; *New York Times v. Sullivan* (1964) 376 U.S. 254, 279-280 [84 S.Ct. 710, 11 L.Ed.2d 686] .)

■ The *New York Times v. Sullivan* standard applies to private individuals with respect to presumed or punitive damages if the statement involves a matter of public concern. (*Gertz v. Robert Welch, Inc.* (1974) 418 U.S. 323, 349 [94 S.Ct. 2997, 41 L.Ed.2d 789] .)

■ "California ... permits defamation liability so long as it is consistent with the requirements of the United States Constitution." (*Melaleuca, Inc. v. Clark* (1998) 66 Cal.App.4th 1344, 1359 [78 Cal.Rptr.2d 627] , citing *Brown v. Kelly Broadcasting Co.* (1989) 48 Cal.3d 711, 740-742 [257 Cal.Rptr. 708, 771 P.2d 406] .)

■ "Actual malice under the *New York Times* standard should not be confused with the concept of malice as an evil intent or a motive arising from spite or ill will. ... In place of the term actual malice, it is better practice that jury instructions refer to publication of a statement with knowledge of falsity or reckless disregard as to truth or falsity." (*Masson, supra*, 501 U.S. at pp. 510-511 , internal citations omitted.)

■ Actual malice "does not require that the reporter hold a devout belief in the truth of the story being reported, only that he or she refrain from either reporting a story he or she knows to be false or acting in reckless disregard of the truth." (*Jackson, supra*, 68 Cal.App.4th at p. 35 .)

■ "The law is clear [that] the recklessness or doubt which gives rise to actual or constitutional malice is subjective

recklessness or doubt." (*Melaleuca, supra*, 66 Cal.App.4th at p. 1365 .)

■ To show reckless disregard, "[t]here must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice." (*St. Amant, supra*, 390 U.S. at p. 731 .)

■ "Although the issue turns on the subjective good faith of the defendant, the plaintiff may attempt to prove reckless disregard for truth by circumstantial evidence. 'A failure to investigate, anger and hostility toward the plaintiff, reliance upon sources known to be unreliable, or known to be biased against the plaintiff--such factors may, in an appropriate case, indicate that the publisher himself had serious doubts regarding the truth of his publication.' " (*Copp, supra*, 45 Cal.App.4th at p. 847 , internal citations omitted, quoting *Reader's Digest Assn., supra*, 37 Cal.3d at p. 258 , footnote omitted.)

■ "An entity other than a natural person may be libeled." (*Live Oak Publishing Co., supra*, 234 Cal.App.3d at p. 1283 .)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 529-555, 601-612

4 Levy et al., *California Torts, Ch. 45, Defamation*, §§ 45.04, 45.13 (Matthew Bender)

30 *California Forms of Pleading and Practice, Ch. 340, Libel and Slander*, §§ 340.10-340.75 (Matthew Bender)

14 *California Points and Authorities, Ch. 142, Libel and Slander*, §§ 142.24-142.27 (*Defamation*) (Matthew Bender)

1 California Civil Practice: Torts (Thomson West) §§ 21:1-21:2, 21:22-21:25, 21:44-21:52

Publisher's Notes

This instruction covers issues presented in BAJI Nos. 7.00, 7.02, 7.04 and 7.11.

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsIntentional TortsDefamationGeneral OverviewTortsIntentional TortsDefamationPer
SeTortsIntentional TortsDefamationElementsGeneral OverviewTortsIntentional
TortsDefamationElementsLibelTortsIntentional TortsDefamationElementsSlander



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California Forms of Jury Instruction

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CHAPTER 17 California Judicial Council Defamation Instructions

3-17 California Forms of Jury Instruction CACI 1701

CACI 1701 Defamation per quod--Essential Factual Elements (Public Officer/Figure and Limited Public Figure)

[*Name of plaintiff*] **claims that** [*name of defendant*] **harmed [him/her] by making [one or more of] the following statement(s):** [*list all claimed per quod defamatory statements*].

Liability

To establish this claim, [*name of plaintiff*] must prove that all of the following are more likely true than not true:

- 1. That [*name of defendant*] made [one or more of] the statement(s) to [a person/persons] other than [*name of plaintiff*];**
- 2. That [this person/these people] reasonably understood that the statement(s) [was/were] about [*name of plaintiff*];**
- 3. That because of the facts and circumstances known to the [listener(s)/reader(s)] of the statement(s), [it/they] tended to injure [*name of plaintiff*] in [his/her] occupation [or to expose [him/her] to hatred, contempt, ridicule, or shame] [or to discourage others from associating or dealing with [him/her]];**
- 4. That the statement(s) [was/were] false;**
- 5. That [*name of plaintiff*] suffered harm to [his/her] property, business, profession, or occupation [including money spent as a result of the statement(s)]; and**
- 6. That the statement(s) [was/were] a substantial factor in causing [*name of plaintiff*]'s harm.**

In addition, [name of plaintiff] must prove by clear and convincing evidence that [name of defendant] knew the statement(s) [was/were] false or had serious doubts about the truth of the statement(s).

Actual Damages

If [name of plaintiff] has proved all of the above, then [he/she] is entitled to recover if [he/she] proves it is more likely true than not true that [name of defendant]'s wrongful conduct was a substantial factor in causing any of the following actual damages:

- a. Harm to [name of plaintiff]'s property, business, trade, profession, or occupation;**
- b. Expenses [name of plaintiff] had to pay as a result of the defamatory statements;**
- c. Harm to [name of plaintiff]'s reputation; or**
- d. Shame, mortification, or hurt feelings;**

Punitive Damages

[Name of plaintiff] may also recover damages to punish [name of defendant] if [he/she] proves by clear and convincing evidence that [name of defendant] acted with malice, oppression, or fraud.

[For specific provisions, see CACI Nos. 3940 -3949.]

New September 2003; Revised April 2008

Directions for Use

Special verdict form VF-1701, *Defamation per quod (Public Officer/Figure and Limited Public Figure)*, should be used in this type of case.

Presumed damages either are not available or will likely not be sought in a per quod case.

Sources and Authority

- *Civil Code section 44* provides:

Defamation is effected by either of the following:

(a) Libel.

(b) Slander.

- *Civil Code section 45* provides: "Libel is a false and unprivileged publication by writing, printing, picture, effigy, or other fixed representation to the eye, which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation."

- *Civil Code section 45a* provides: "A libel which is defamatory of the plaintiff without the necessity of explanatory matter, such as an inducement, innuendo or other extrinsic fact, is said to be a libel on its face. Defamatory language not

libelous on its face is not actionable unless the plaintiff alleges and proves that he has suffered special damage as a proximate result thereof. Special damage is defined in Section 48a of this code."

■ *Civil Code section 46* provides:

Slander is a false and unprivileged publication, orally uttered, and also communications by radio or any mechanical or other means which:

1. Charges any person with crime, or with having been indicted, convicted, or punished for crime;
2. Imputes in him the present existence of an infectious, contagious, or loathsome disease;
3. Tends directly to injure him in respect to his office, profession, trade or business, either by imputing to him general disqualification in those respects which the office or other occupation peculiarly requires, or by imputing something with reference to his office, profession, trade, or business that has a natural tendency to lessen its profits;
4. Imputes to him impotence or a want of chastity; or
5. Which, by natural consequence, causes actual damage.

■ *Civil Code section 48a(4)(b)* provides: " 'Special damages' are all damages which plaintiff alleges and proves that he has suffered in respect to his property, business, trade, profession or occupation, including such amounts of money as the plaintiff alleges and proves he has expended as a result of the alleged libel, and no other."

■ "If [a] defamatory meaning would appear only to readers who might be able to recognize it through some knowledge of specific facts and/or circumstances, not discernible from the face of the publication, and which are not matters of common knowledge rationally attributable to all reasonable persons, then the libel cannot be libel per se but will be libel per quod." (*Palm Springs Tennis Club v. Rangel* (1999) 73 Cal.App.4th 1, 5 [86 Cal.Rptr.2d 73] , internal citation omitted.)

■ "In pleading a case of libel per quod the plaintiff cannot assume that the court has access to the reader's special knowledge of extrinsic facts but must specially plead and prove those facts." (*Palm Springs Tennis Club, supra*, 73 Cal.App.4th at p. 7 .)

■ "A libel 'per quod,' ... requires that the injurious character or effect be established by allegation and proof." (*Slaughter v. Friedman* (1982) 32 Cal.3d 149, 153-154 [185 Cal.Rptr. 244, 649 P.2d 886] .)

■ "In the libel context, 'inducement' and 'innuendo' are terms of art: '[W]here the language is ambiguous and an explanation is necessary to establish the defamatory meaning, the pleader must do two things: (1) Allege his interpretation of the defamatory meaning of the language (the "innuendo," ...); (2) support that interpretation by alleging facts showing that the readers or hearers to whom it was published would understand it in that defamatory sense (the "inducement").' " (*Barnes-Hind, Inc. v. Superior Court* (1986) 181 Cal.App.3d 377, 387 [226 Cal.Rptr. 354] , internal citations omitted.)

■ "A slander that falls within the first four subdivisions of *Civil Code section 46* is slander per se and requires no proof of actual damages. A slander that does not fit into those four subdivisions is slander per quod, and special damages are required for there to be any recovery for that slander." (*The Nethercutt Collection v. Regalia* (2009) 172

Cal.App.4th 361, 367 [90 Cal.Rptr.3d 882] , internal citations omitted.)

■ "The question whether a plaintiff is a public figure is to be determined by the court, not the jury." (*Stolz v. KSFM 102 FM* (1994) 30 *Cal.App.4th* 195, 203-204 [35 *Cal.Rptr.2d* 740] , internal citation omitted.)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 529-555, 601-612

4 Levy et al., *California Torts, Ch. 45, Defamation*, §§ 45.04, 45.13 (Matthew Bender)

30 *California Forms of Pleading and Practice, Ch. 340, Libel and Slander*, §§ 340.10-340.75 (Matthew Bender)

14 *California Points and Authorities, Ch. 142, Libel and Slander (Defamation)*, §§ 142.24-142.27 (Matthew Bender)

1 California Civil Practice: Torts (Thomson West) §§ 21:1-21:2, 21:22-21:25, 21:44-21:52

Publisher's Notes

This instruction covers issues presented in BAJI Nos. 7.04 and 7.11.

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsIntentional TortsDefamationGeneral OverviewTortsIntentional TortsDefamationDefamation Per
QuodTortsIntentional TortsDefamationElementsGeneral OverviewTortsIntentional
TortsDefamationElementsLibelTortsIntentional TortsDefamationElementsSlander



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California Forms of Jury Instruction

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CHAPTER 17 California Judicial Council Defamation Instructions

3-17 California Forms of Jury Instruction CACI 1702

CACI 1702 Defamation per se--Essential Factual Elements (Private Figure--Matter of Public Concern)

[*Name of plaintiff*] **claims that** [*name of defendant*] **harmed [him/her] by making [one or more of] the following statement(s):** [*list all claimed per se defamatory statement(s)*]. **To establish this claim, [*name of plaintiff*] must prove all of the following:**

Liability

- 1. That [*name of defendant*] made [one or more of] the statement(s) to [a person/persons] other than [*name of plaintiff*];**
- 2. That [this person/these people] reasonably understood that the statement(s) [was/were] about [*name of plaintiff*];**
- 3. [That [this person/these people] reasonably understood the statement(s) to mean that [*insert ground(s) for defamation per se, e.g., "[name of plaintiff] had committed a crime"*]];**
- 4. That the statement(s) [was/were] false; and**
- 5. That [*name of defendant*] failed to use reasonable care to determine the truth or falsity of the statement(s).**

Actual Damages

If [*name of plaintiff*] has proved all of the above, then [he/she] is entitled to recover [his/her] actual damages if [he/she] proves that [*name of defendant*]'s wrongful conduct was a substantial factor in causing any of the following:

- a. Harm to [name of plaintiff]'s property, business, trade, profession, or occupation;**
- b. Expenses [name of plaintiff] had to pay as a result of the defamatory statements;**
- c. Harm to [name of plaintiff]'s reputation; or**
- d. Shame, mortification, or hurt feelings.**

Assumed Damages

If [name of plaintiff] has not proved any actual damages for harm to reputation or shame, mortification, or hurt feelings but proves by clear and convincing evidence that [name of defendant] knew the statement(s) [was/were] false or that [he/she] had serious doubts about the truth of the statement(s), then the law assumes that [name of plaintiff]'s reputation has been harmed and that [he/she] has suffered shame, mortification, or hurt feelings. Without presenting evidence of damage, [name of plaintiff] is entitled to receive compensation for this assumed harm in whatever sum you believe is reasonable. You must award at least a nominal sum, such as one dollar.

Punitive Damages

[Name of plaintiff] may also recover damages to punish [name of defendant] if [he/she] proves by clear and convincing evidence that [name of defendant] either knew the statement(s) [was/were] false or had serious doubts about the truth of the statement(s), and that [he/she] acted with malice, oppression, or fraud.

[For specific provisions, see CACI Nos. 3940 -3949.]

New September 2003; Revised April 2008, October 2008, December 2009

Directions for Use

Special verdict form CACI No. VF-1702, *Defamation per se (Private Figure--Matter of Public Concern)*, should be used in this type of case.

For statutes and cases on libel and slander and on the difference between defamation per se and defamation per quod, see the Sources and Authority to CACI No. 1700, *Defamation per se--Essential Factual Elements (Public Officer/Figure and Limited Public Figure)*.

Use the bracketed element 3 only if the statement is not defamatory on its face (i.e., if the judge has not determined that the statement is defamatory as a matter of law). For statutory grounds of defamation per se, see *Civil Code* sections 45 (libel) and 46 (slander). Note that certain specific grounds of libel per se have been defined by case law.

Sources and Authority

■ "Defamation is an invasion of the interest in reputation. The tort involves the intentional publication of a statement of fact that is false, unprivileged, and has a natural tendency to injure or which causes special damage." (*Smith v. Maldonado* (1999) 72 Cal.App.4th 637, 645 [85 Cal.Rptr.2d 397] .)

3-17 California Forms of Jury Instruction CACI 1702

■ "The question whether a plaintiff is a public figure is to be determined by the court, not the jury." (*Stolz v. KSFM 102 FM* (1994) 30 *Cal.App.4th* 195, 203-204 [35 *Cal.Rptr.2d* 740] , internal citation omitted.)

■ A private plaintiff is not required to prove malice to recover actual damages. (*Gertz v. Robert Welch, Inc.* (1974) 418 U.S. 323, 347-348 [94 S.Ct. 2997, 41 L.Ed.2d 789] ; *Brown v. Kelly Broadcasting Co.* (1989) 48 *Cal.3d* 711, 742 [257 *Cal.Rptr.* 708, 771 P.2d 406] .)

■ " '[I]f the issue was being debated publicly and if it had foreseeable and substantial ramifications for nonparticipants, it was a public controversy.' " (*Copp v. Paxton* (1996) 45 *Cal.App.4th* 829, 845 [52 *Cal.Rptr.2d* 831] , quoting *Waldbaum v. Fairchild Publications, Inc.* (D.C. Cir. 1980) 627 F.2d 1287, 1297 .)

■ "[T]he jury was instructed that if it found that defendant published matter that was defamatory on its face and it found by clear and convincing evidence that defendant knew the statement was false or published it in reckless disregard of whether it was false, then the jury 'also may award plaintiff presumed general damages.' Presumed damages 'are those damages that necessarily result from the publication of defamatory matter and are presumed to exist. They include reasonable compensation for loss of reputation, shame, mortification, and hurt feeling. No definite standard or method of calculation is prescribed by law by which to fix reasonable compensation for presumed damages, and no evidence of actual harm is required. Nor is the opinion of any witness required as to the amount of such reasonable compensation. In making an award for presumed damages, you shall exercise your authority with calm and reasonable judgment and the damages you fix shall be just and reasonable in the light of the evidence. You may in the exercise of your discretion award nominal damages only, namely an insignificant sum such as one dollar.' [PP] ... [T]he instant instruction, which limits damages to 'those damages that necessarily result from the publication of defamatory matter,' constitutes substantial compliance with [Civil Code] section 3283. Thus, the instant instructions, 'if obeyed, did not allow the jurors to "enter the realm of speculation" regarding future suffering.' " (*Sommer v. Gabor* (1995) 40 *Cal.App.4th* 1455, 1472-1473 [48 *Cal.Rptr.2d* 235] , internal citations omitted.)

■ The jury should be instructed that the defendant's negligence is an element of libel if the plaintiff is a private figure. (*Carney v. Santa Cruz Women Against Rape* (1990) 221 *Cal.App.3d* 1009, 1016 [271 *Cal.Rptr.* 30] .)

■ "When the speech involves a matter of public concern, a private-figure plaintiff has the burden of proving the falsity of the defamation." (*Brown, supra*, 48 *Cal.3d* at p. 747 .)

■ "Suffice it to say that actual injury is not limited to out-of-pocket loss. Indeed, the more customary types of actual harm inflicted by defamatory falsehood include impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering. Of course, juries must be limited by appropriate instructions, and all awards must be supported by competent evidence concerning the injury, although there need be no evidence which assigns an actual dollar value to the injury." (*Gertz, supra*, 418 U.S. at p. 350 .)

■ Private-figure plaintiffs must prove actual malice to recover punitive or presumed damages for defamation if the matter is one of public concern. They are only required to prove negligence to recover damages for actual injury to reputation. (*Khawar v. Globe Internat.* (1998) 19 *Cal.4th* 254, 273-274 [79 *Cal.Rptr.2d* 178, 965 P.2d 696] .)

■ "A private-figure plaintiff must prove at least negligence to recover any damages and, when the

speech involves a matter of public concern, he must also prove *New York Times* malice ... to recover presumed or punitive damages. This malice must be established by 'clear and convincing proof.' " (*Brown, supra*, 48 Cal.3d at p. 747 , internal citations omitted.)

■ When the court is instructing on punitive damages, it is error to fail to instruct that *New York Times* malice is required when the statements at issue involve matters of public concern. (*Carney, supra*, 221 Cal.App.3d at p. 1022 .)

■ "To prove actual malice ... a plaintiff must 'demonstrate with clear and convincing evidence that the defendant realized that his statement was false or that he subjectively entertained serious doubts as to the truth of his statement.' " (*Khawar, supra*, 19 Cal.4th at p. 275 , internal citation omitted.)

■ "Because actual malice is a higher fault standard than negligence, a finding of actual malice generally includes a finding of negligence" (*Khawar, supra*, 19 Cal.4th at p. 279 .)

■ "The inquiry into the protected status of speech is one of law, not fact." (*Nizam-Aldine v. City of Oakland* (1996) 47 Cal.App.4th 364, 375 [54 Cal.Rptr.2d 781] , quoting *Connick v. Myers* (1983) 461 U.S. 138, 148, fn. 7 [103 S.Ct. 1684, 75 L.Ed.2d 708] .)

■ "For the *New York Times* standard to be met, 'the publisher must come close to willfully blinding itself to the falsity of its utterance.' " (*Brown, supra*, 48 Cal.3d at p. 747 , internal citation omitted.)

■ " 'While such speech is not totally unprotected by the First Amendment, its protections are less stringent' [than that applying to speech on matters of public concern]." (*Savage v. Pacific Gas & Electric Co.* (1993) 21 Cal.App.4th 434, 445 [26 Cal.Rptr.2d 305] , internal citation omitted.)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 529-555, 613-615

4 Levy et al., *California Torts*, Ch. 45, *Defamation*, §§ 45.04, 45.13 (Matthew Bender)

30 *California Forms of Pleading and Practice*, Ch. 340, *Libel and Slander*, §§ 340.12-340.13, 340.18 (Matthew Bender)

14 *California Points and Authorities*, Ch. 142, *Libel and Slander (Defamation)*, §§ 142.30-142.40, 142.87 et seq. (Matthew Bender)

1 *California Civil Practice: Torts* (Thomson West) §§ 21:1-21:2, 21:22-21:25, 21:51

Publisher's Notes

This instruction covers issues presented in BAJI Nos. 7.10. 7.10.1, and 7.11.

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsIntentional TortsDefamationGeneral OverviewTortsIntentional TortsDefamationDefamation Per SeTortsIntentional TortsDefamationElementsGeneral Overview



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California Forms of Jury Instruction

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CHAPTER 17 California Judicial Council Defamation Instructions

3-17 California Forms of Jury Instruction CACI 1703

CACI 1703 Defamation per quod--Essential Factual Elements (Private Figure--Matter of Public Concern)

[*Name of plaintiff*] **claims that** [*name of defendant*] **harmed [him/her] by making [one or more of] the following statement(s):** [*insert all claimed per quod defamatory statements*]. **To establish this claim, [*name of plaintiff*] must prove all of the following:**

Liability

- 1. That [*name of defendant*] made [one or more of] the statement(s) to [a person/persons] other than [*name of plaintiff*];**
- 2. That [this person/these people] reasonably understood that the statement(s) [was/were] about [*name of plaintiff*];**
- 3. That because of the facts and circumstances known to the [listener(s)/reader(s)] of the statement(s), [it/they] tended to injure [*name of plaintiff*] in [his/her] occupation [or to expose [him/her] to hatred, contempt, ridicule, or shame] [or to discourage others from associating or dealing with [him/her]];**
- 4. That the statement(s) [was/were] false;**
- 5. That [*name of defendant*] failed to use reasonable care to determine the truth or falsity of the statement(s);**
- 6. That [*name of plaintiff*] suffered harm to [his/her] property, business, profession, or occupation [including money spent as a result of the statement(s)]; and**

7. That the statements [was/were] a substantial factor in causing [name of plaintiff]'s harm.

Actual Damages

If [name of plaintiff] has proved all of the above, then [he/she] is entitled to recover if [he/she] proves that [name of defendant]'s wrongful conduct was a substantial factor in causing any of the following actual damages:

- a. Harm to [name of plaintiff]'s property, business, trade, profession, or occupation;**
- b. Expenses [name of plaintiff] had to pay as a result of the defamatory statements;**
- c. Harm to [name of plaintiff]'s reputation; or**
- d. Shame, mortification, or hurt feelings.**

Punitive Damages

[Name of plaintiff] may also recover damages to punish [name of defendant] if [he/she] proves by clear and convincing evidence that [name of defendant] either knew the statement(s) [was/were] false or had serious doubts about the truth of the statement(s), and that [he/she] acted with malice, oppression, or fraud.

[For specific provisions, see CACI Nos. 3940 -3949.]

New September 2003; Revised April 2008, December 2009

Directions for Use

Special verdict form VF-1703, *Defamation per quod (Private Figure--Matter of Public Concern)*, should be used in this type of case.

For statutes and cases on libel and slander and on the difference between defamation per se and defamation per quod, see the Sources and Authority to CACI No. 1701, *Defamation per quod--Essential Factual Elements (Public Officer/Figure and Limited Public Figure)*.

Presumed damages either are not available or will likely not be sought in a per quod case.

Sources and Authority

- *Civil Code section 45a* provides: "A libel which is defamatory of the plaintiff without the necessity of explanatory matter, such as an inducement, innuendo or other extrinsic fact, is said to be a libel on its face. Defamatory language not libelous on its face is not actionable unless the plaintiff alleges and proves that he has suffered special damage as a proximate result thereof. Special damage is defined in Section 48a of this code."

- *Civil Code section 48a(4)(b)* provides: "'Special damages' are all damages which plaintiff alleges

and proves that he has suffered in respect to his property, business, trade, profession or occupation, including such amounts of money as the plaintiff alleges and proves he has expended as a result of the alleged libel, and no other."

- "Libel is recognized as either being per se (on its face), or per quod (literally meaning, 'whereby'), and each requires a different standard of pleading." (*Palm Springs Tennis Club v. Rangel* (1999) 73 Cal.App.4th 1, 5 [86 Cal.Rptr.2d 73] .)

- "If [a] defamatory meaning would appear only to readers who might be able to recognize it through some knowledge of specific facts and/or circumstances, not discernible from the face of the publication, and which are not matters of common knowledge rationally attributable to all reasonable persons, then the libel cannot be libel per se but will be libel per quod." (*Palm Springs Tennis Club, supra*, 73 Cal.App.4th at p. 5 , internal citation omitted.)

- "In pleading a case of libel per quod the plaintiff cannot assume that the court has access to the reader's special knowledge of extrinsic facts but must specially plead and prove those facts." (*Palm Springs Tennis Club, supra*, 73 Cal.App.4th at p. 7 , footnote omitted.)

- "A libel 'per quod' ... requires that the injurious character or effect be established by allegation and proof." (*Slaughter v. Friedman* (1982) 32 Cal.3d 149, 153-154 [185 Cal.Rptr. 244, 649 P.2d 886] .)

- "In the libel context, 'inducement' and 'innuendo' are terms of art: '[W]here the language is ambiguous and an explanation is necessary to establish the defamatory meaning, the pleader must do two things: (1) Allege his interpretation of the defamatory meaning of the language (the "innuendo," ...); (2) support that interpretation by alleging facts showing that the readers or hearers to whom it was published would understand it in that defamatory sense (the "inducement").' " (*Barnes-Hind, Inc. v. Superior Court* (1986) 181 Cal.App.3d 377, 387 [226 Cal.Rptr. 354] .)

- "A defamatory publication not libelous on its face is not actionable unless the plaintiff alleges that he has suffered special damages as a result thereof." (*Selleck v. Globe Int'l, Inc.* (1985) 166 Cal.App.3d 1123, 1130 [212 Cal.Rptr. 838] .)

- "The question whether a statement is reasonably susceptible to a defamatory interpretation is a question of law for the trial court. Only once the court has determined that a statement is reasonably susceptible to such a defamatory interpretation does it become a question for the trier of fact whether or not it was so understood." (*Smith v. Maldonado* (1999) 72 Cal.App.4th 637, 647 [85 Cal.Rptr.2d 397] , internal citations omitted.)

- Private-figure plaintiffs must prove actual malice to recover punitive or presumed damages for defamation if the matter is one of public concern. They are only required to prove negligence to recover damages for actual injury to reputation. (*Khawar v. Globe Internat.* (1998) 19 Cal.4th 254, 273-274 [79 Cal.Rptr.2d 178, 965 P.2d 696] .)

- " '[I]f the issue was being debated publicly and if it had foreseeable and substantial ramifications for nonparticipants, it was a public controversy.' " (*Copp v. Paxton* (1996) 45 Cal.App.4th 829, 845 [52 Cal.Rptr.2d 831] , quoting *Waldbaum v. Fairchild Publications, Inc.* (D.C. Cir. 1980) 627 F.2d 1287, 1297 .)

- If the language is not defamatory on its face, there is no distinction between libel and slander: "In either case, the fact that a statement is not defamatory on its face requires only that the plaintiff plead and

prove the defamatory meaning and special damages." (*Savage v. Pacific Gas & Electric Co.* (1993) 21 Cal.App.4th 434, 447 [26 Cal.Rptr.2d 305] .)

■ A plaintiff must prove that the defendant was at least negligent in failing to ascertain the truth or falsity of the statement. (*Gertz v. Robert Welch, Inc.* (1974) 418 U.S. 323, 345-347 [94 S.Ct. 2997, 41 L.Ed.2d 789] .)

■ "The question whether a plaintiff is a public figure is to be determined by the court, not the jury." (*Stolz v. KSFM 102 FM* (1994) 30 Cal.App.4th 195, 203-204 [35 Cal.Rptr.2d 740] , internal citation omitted.)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 529-555, 613-615

4 Levy et al., *California Torts*, Ch. 45, *Defamation*, §§ 45.04, 45.13 (Matthew Bender)

30 *California Forms of Pleading and Practice*, Ch. 340, *Libel and Slander*, §§ 340.11, 340.13 (Matthew Bender)

14 *California Points and Authorities*, Ch. 142, *Libel and Slander (Defamation)*, §§ 142.30-142.40 (Matthew Bender)

1 California Civil Practice: Torts (Thomson West) §§ 21:1-21:2, 21:22-21:25, 21:51

Publisher's Notes

This instruction covers issues presented in BAJI Nos. 7.10 and 7.11.

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsIntentional TortsDefamationGeneral OverviewTortsIntentional TortsDefamationDefamation Per QuodTortsIntentional TortsDefamationElementsGeneral Overview



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California Forms of Jury Instruction

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CHAPTER 17 California Judicial Council Defamation Instructions

3-17 California Forms of Jury Instruction CACI 1704

CACI 1704 Defamation per se--Essential Factual Elements (Private Figure--Matter of Private Concern)

[*Name of plaintiff*] **claims that** [*name of defendant*] **harmed [him/her] by making [one or more of] the following statement(s):** [*list all claimed per se defamatory statement(s)*]. **To establish this claim, [*name of plaintiff*] must prove all of the following:**

Liability

- 1. That [*name of defendant*] made [one or more of] the statement(s) to [a person/persons] other than [*name of plaintiff*];**
- 2. That [this person/these people] reasonably understood that the statement(s) [was/were] about [*name of plaintiff*];**
- 3. [That [this person/these people] reasonably understood the statement(s) to mean that [*insert ground(s) for defamation per se, e.g., "[name of plaintiff] had committed a crime"*]];**
- 4. That [*name of defendant*] failed to use reasonable care to determine the truth or falsity of the statement(s).**

Actual Damages

[If [*name of plaintiff*] has proved all of the above, then [he/she] is entitled to recover [his/her] actual damages if [he/she] proves that [*name of defendant*]'s wrongful conduct was a substantial factor in causing any of the following:

- a. Harm to [*name of plaintiff*]'s property, business, trade, profession, or occupation;**

b. Expenses [*name of plaintiff*] had to pay as a result of the defamatory statements;

c. Harm to [*name of plaintiff*]'s reputation; or

d. Shame, mortification, or hurt feelings.

Assumed Damages

Even if [*name of plaintiff*] has not proved any actual damages for harm to reputation or shame, mortification or hurt feelings, the law assumes that [he/she] has suffered this harm. Without presenting evidence of damage, [*name of plaintiff*] is entitled to receive compensation for this assumed harm in whatever sum you believe is reasonable. You must award at least a nominal sum, such as one dollar.

Punitive Damages

[*Name of plaintiff*] may also recover damages to punish [*name of defendant*] if [he/she] proves by clear and convincing evidence that [*name of defendant*] acted with malice, oppression, or fraud.

[*For specific provisions, see CACI Nos. 3940 -3949.*]

New September 2003; Revised April 2008, December 2009

Directions for Use

Special verdict form VF-1704, *Defamation per se--Affirmative Defense--Truth (Private Figure--Matter of Private Concern)*, may be used in this type of case.

For statutes and cases on libel and slander and on the difference between defamation per se and defamation per quod, see the Sources and Authority to *CACI No. 1700, Defamation per se--Essential Factual Elements (Public Officer/Figure and Limited Public Figure)*.

Use the bracketed element 3 only if the statement is not defamatory on its face (i.e., if the judge has not determined that the statement is defamatory as a matter of law). For statutory grounds of defamation per se, see *Civil Code sections 45 (libel) and 46 (slander)*. Note that certain specific grounds of libel per se have been defined by case law.

Sources and Authority

- "Defamation is an invasion of the interest in reputation. The tort involves the intentional publication of a statement of fact that is false, unprivileged, and has a natural tendency to injure or which causes special damage." (*Smith v. Maldonado* (1999) 72 Cal.App.4th 637, 645 [85 Cal.Rptr.2d 397] .)
- "The question whether a plaintiff is a public figure [or not] is to be determined by the court, not the jury." (*Stolz v. KSFM 102 FM* (1994) 30 Cal.App.4th 195, 203-204 [35 Cal.Rptr.2d 740] , internal citation omitted.)
- The jury should be instructed that the defendant's negligence is an element of libel if the plaintiff is a

private figure. (*Carney v. Santa Cruz Women Against Rape* (1990) 221 Cal.App.3d 1009, 1016 [271 Cal.Rptr. 30] .)

■ "A private-figure plaintiff must prove at least negligence to recover any damages and, when the speech involves a matter of public concern, he must also prove *New York Times* malice ... to recover presumed or punitive damages." (*Brown v. Kelly Broadcasting Co.* (1989) 48 Cal.3d 711, 747 [257 Cal.Rptr. 708, 771 P.2d 406] .)

■ "The First Amendment trumps the common law presumption of falsity in defamation cases involving private-figure plaintiffs when the allegedly defamatory statements pertain to a matter of public interest." (*Nizam-Aldine v. City of Oakland* (1996) 47 Cal.App.4th 364, 375 [54 Cal.Rptr.2d 781] .)

■ "Thus, in a defamation action the burden is normally on the defendant to prove the truth of the allegedly defamatory communications. However, in accommodation of First Amendment considerations (which are implicated by state defamation laws), where the plaintiff is a public figure, the 'public-figure plaintiff must show the falsity of the statements at issue in order to prevail in a suit for defamation.' " (*Stolz, supra*, 30 Cal.App.4th at p. 202 , internal citations omitted.)

■ "Since the statements at issue here involved a matter of purely private concern communicated between private individuals, we do not regard them as raising a First Amendment issue. 'While such speech is not totally unprotected by the First Amendment, its protections are less stringent' [than that applying to speech on matters of public concern]." (*Savage v. Pacific Gas & Electric Co.* (1993) 21 Cal.App.4th 434, 445 [26 Cal.Rptr.2d 305] , quoting *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.* (1985) 472 U.S. 749, 760 [105 S.Ct. 2939, 86 L.Ed.2d 593] , internal citation omitted.)

■ "We conclude that permitting recovery of presumed and punitive damages in defamation cases absent a showing of 'actual malice' does not violate the First Amendment when the defamatory statements do not involve matters of public concern." (*Dun & Bradstreet, Inc., supra*, 472 U.S. at p. 763 .)

■ "When the speech is of exclusively private concern and the plaintiff is a private figure, as in *Dun & Bradstreet*, the constitutional requirements do not necessarily force any change in at least some of the features of the common-law landscape." (*Philadelphia Newspapers, Inc. v. Hepps* (1986) 475 U.S. 767, 775 [106 S.Ct. 1558, 89 L.Ed.2d 783] .)

■ "[T]he jury was instructed that if it found that defendant published matter that was defamatory on its face and it found by clear and convincing evidence that defendant knew the statement was false or published it in reckless disregard of whether it was false, then the jury 'also may award plaintiff presumed general damages.' Presumed damages 'are those damages that necessarily result from the publication of defamatory matter and are presumed to exist. They include reasonable compensation for loss of reputation, shame, mortification, and hurt feeling. No definite standard or method of calculation is prescribed by law by which to fix reasonable compensation for presumed damages, and no evidence of actual harm is required. Nor is the opinion of any witness required as to the amount of such reasonable compensation. In making an award for presumed damages, you shall exercise your authority with calm and reasonable judgment and the damages you fix shall be just and reasonable in the light of the evidence. You may in the exercise of your discretion award nominal damages only, namely an insignificant sum such as one dollar.' [PP] ... [T]he instant instruction, which limits damages to 'those damages that necessarily result from the publication of defamatory matter,' constitutes substantial compliance with [Civil Code] section 3283. Thus, the instant instructions, 'if obeyed, did not allow the jurors to "enter the realm of speculation" regarding future suffering.' " (*Sommer v. Gabor* (1995) 40

Cal.App.4th 1455, 1472-1473 [48 Cal.Rptr.2d 235] , internal citations omitted.)

■ "In defamation actions generally, factual truth is a defense which it is the defendant's burden to prove. In a defamation action against a newspaper by a private person suing over statements of public concern, however, the First Amendment places the burden of proving falsity on the plaintiff." (*Eisenberg v. Alameda Newspapers* (1999) 74 Cal.App.4th 1359, 1382 [88 Cal.Rptr.2d 802] .)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 529-555, 615

4 Levy et al., *California Torts*, Ch. 45, *Defamation*, §§ 45.04, 45.13 (Matthew Bender)

30 *California Forms of Pleading and Practice*, Ch. 340, *Libel and Slander*, § 340.18 (Matthew Bender)

14 *California Points and Authorities*, Ch. 142, *Libel and Slander (Defamation)*, § 142.87 (Matthew Bender)

1 California Civil Practice: Torts (Thomson West) §§ 21:1-21:2, 21:22-21:25, 21:51

Publisher's Notes

This instruction covers issues presented in BAJI Nos. 7.04.1, 7.10, 7.10.1, and 7.11.

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsIntentional TortsDefamationGeneral OverviewTortsIntentional TortsDefamationDefamation Per SeTortsIntentional TortsDefamationElementsGeneral Overview



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California Forms of Jury Instruction

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CHAPTER 17 California Judicial Council Defamation Instructions

3-17 California Forms of Jury Instruction CACI 1705

CACI 1705 Defamation per quod--Essential Factual Elements (Private Figure--Matter of Private Concern)

[*Name of plaintiff*] **claims that** [*name of defendant*] **harmed [him/her] by making [one or more of] the following statement(s):** [*insert all claimed per quod defamatory statements*]. **To establish this claim, [*name of plaintiff*] must prove all of the following:**

Liability

- 1. That [*name of defendant*] made [one or more of] the statement(s) to [a person/persons] other than [*name of plaintiff*];**
- 2. That [this person/these people] reasonably understood that the statement(s) [was/were] about [*name of plaintiff*];**
- 3. That because of the facts and circumstances known to the [listener(s)/reader(s)] of the statement(s), [it/they] tended to injure [*name of plaintiff*] in [his/her] occupation [or to expose [him/her] to hatred, contempt, ridicule, or shame] [or to discourage others from associating or dealing with [him/her]];**
- 4. That [*name of defendant*] failed to use reasonable care to determine the truth or falsity of the statement(s);**
- 5. That [*name of plaintiff*] suffered harm to [his/her] property, business, profession, or occupation [including money spent as a result of the statement(s)]; and**
- 6. That the statement(s) [was/were] a substantial factor in causing [*name of plaintiff*]'s harm.**

Actual Damages

If [name of plaintiff] has proved all of the above, then [he/she] is entitled to recover if [he/she] proves that [name of defendant]'s wrongful conduct was a substantial factor in causing any of the following actual damages:

- a. Harm to [name of plaintiff]'s property, business, trade, profession, or occupation;
- b. Expenses [name of plaintiff] had to pay as a result of the defamatory statements;
- c. Harm to [name of plaintiff]'s reputation; or
- d. Shame, mortification, or hurt feelings.

Punitive Damages

[Name of plaintiff] may also recover damages to punish [name of defendant] if [he/she] proves by clear and convincing evidence that [name of defendant] acted with malice, oppression, or fraud.

[For specific provisions, see CACI Nos. 3940 -3949.]

New September 2003; Revised April 2008, December 2009

Directions for Use

Special verdict form VF-1705, *Defamation per quod (Private Figure--Matter of Private Concern)*, should be used in this type of case.

Presumed damages either are not available or will likely not be sought in a per quod case.

For statutes and cases on libel and slander and on the difference between defamation per se and defamation per quod, see the Sources and Authority to CACI No. 1701, *Defamation per quod--Essential Factual Elements (Public Officer/Figure and Limited Public Figure)*.

Sources and Authority

- *Civil Code section 45a* provides: "A libel which is defamatory of the plaintiff without the necessity of explanatory matter, such as an inducement, innuendo or other extrinsic fact, is said to be a libel on its face. Defamatory language not libelous on its face is not actionable unless the plaintiff alleges and proves that he has suffered special damage as a proximate result thereof. Special damage is defined in Section 48a of this code."

- *Civil Code section 48a(4)(b)* provides: " 'Special damages' are all damages which plaintiff alleges and proves that he has suffered in respect to his property, business, trade, profession or occupation, including such amounts of money as the plaintiff alleges and proves he has expended as a result of the alleged libel, and no other."

- "Libel is recognized as either being per se (on its face), or per quod (literally meaning, 'whereby'), and each requires a different standard of pleading." (*Palm Springs Tennis Club v. Rangel* (1999) 73

Cal.App.4th 1, 5 [86 Cal.Rptr.2d 73] .)

■ "If [a] defamatory meaning would appear only to readers who might be able to recognize it through some knowledge of specific facts and/or circumstances, not discernible from the face of the publication, and which are not matters of common knowledge rationally attributable to all reasonable persons, then the libel cannot be libel per se but will be libel per quod." (*Palm Springs Tennis Club, supra*, 73 *Cal.App.4th* at p. 5 , internal citation omitted.)

■ "In pleading a case of libel per quod the plaintiff cannot assume that the court has access to the reader's special knowledge of extrinsic facts but must specially plead and prove those facts." (*Palm Springs Tennis Club, supra*, 73 *Cal.App.4th* at p. 7 , footnote omitted.)

■ "A libel 'per quod' ... requires that the injurious character or effect be established by allegation and proof." (*Slaughter v. Friedman* (1982) 32 *Cal.3d* 149, 153-154 [185 *Cal.Rptr.* 244, 649 P.2d 886] .)

■ "In the libel context, 'inducement' and 'innuendo' are terms of art: '[W]here the language is ambiguous and an explanation is necessary to establish the defamatory meaning, the pleader must do two things: (1) allege his interpretation of the defamatory meaning of the language (the "innuendo," ...); (2) support that interpretation by alleging facts showing that the readers or hearers to whom it was published would understand it in that defamatory sense (the "inducement").' " (*Barnes-Hind, Inc. v. Superior Court* (1986) 181 *Cal.App.3d* 377, 387 [226 *Cal.Rptr.* 354] .)

■ "A defamatory publication not libelous on its face is not actionable unless the plaintiff alleges that he has suffered special damages as a result thereof." (*Selleck v. Globe Int'l, Inc.* (1985) 166 *Cal.App.3d* 1123, 1130 [212 *Cal.Rptr.* 838] .)

■ "The question whether a statement is reasonably susceptible to a defamatory interpretation is a question of law for the trial court. Only once the court has determined that a statement is reasonably susceptible to such a defamatory interpretation does it become a question for the trier of fact whether or not it was so understood." (*Smith v. Maldonado* (1999) 72 *Cal.App.4th* 637, 647 [85 *Cal.Rptr.2d* 397] , internal citations omitted.)

■ Private-figure plaintiffs must prove actual malice to recover punitive or presumed damages for defamation if the matter is one of public concern. They are required to prove only negligence to recover damages for actual injury to reputation. (*Khawar v. Globe Internat.* (1998) 19 *Cal.4th* 254, 273-274 [79 *Cal.Rptr.2d* 178, 965 P.2d 696] .)

■ If the language is not defamatory on its face, there is no distinction between libel and slander: "In either case, the fact that a statement is not defamatory on its face requires only that the plaintiff plead and prove the defamatory meaning and special damages." (*Savage v. Pacific Gas & Electric Co.* (1993) 21 *Cal.App.4th* 434, 447 [26 *Cal.Rptr.2d* 305] .)

■ A plaintiff must prove that the defendant was at least negligent in failing to ascertain the truth or falsity of the statement. (*Gertz v. Robert Welch, Inc.* (1974) 418 U.S. 323, 345-347 [94 S.Ct. 2997, 41 L.Ed.2d 789] .)

■ "The question whether a plaintiff is a public figure is to be determined by the court, not the jury." (*Stolz v. KSF 102 FM* (1994) 30 *Cal.App.4th* 195, 203-204 [35 *Cal.Rptr.2d* 740] , internal citation omitted.)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 529-555, 615

4 Levy et al., *California Torts*, Ch. 45, *Defamation*, §§ 45.04, 45.13 (Matthew Bender)

30 *California Forms of Pleading and Practice*, Ch. 340, *Libel and Slander*, §§ 340.12-340.13 (Matthew Bender)

14 California Points and Authorities, Ch. 142, *Libel and Slander (Defamation)*, §§ 142.20-142.32 (Matthew Bender)

1 California Civil Practice: Torts (Thomson West) §§ 21:1-21:2, 21:22-21:25, 21:51

Publisher's Notes

This instruction covers issues presented in BAJI Nos. 7.10 and 7.11.

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsIntentional TortsDefamationGeneral OverviewTortsIntentional TortsDefamationDefamation Per
QuodTortsIntentional TortsDefamationElementsGeneral Overview



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CHAPTER 17 California Judicial Council Defamation Instructions

3-17 California Forms of Jury Instruction CACI 1706

CACI 1706 Definition of Statement

The word "statement" in these instructions refers to any form of communication or representation, including spoken or written words [or] pictures [or] [insert audible or visual representations].

New September 2003

This instruction may be necessary in every case, but could be useful in cases where defamatory material is not written or verbal.

■ *Civil Code section 45* provides: "Libel is a false and unprivileged publication by writing, printing, picture, effigy, or other fixed representation to the eye, which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation."

■ *Civil Code section 46* provides:

Slander is a false and unprivileged publication, orally uttered, and also communications by radio or any mechanical or other means which:

1. Charges any person with crime, or with having been indicted, convicted, or punished for crime;
2. Imputes in him the present existence of an infectious, contagious, or loathsome disease;
3. Tends directly to injure him in respect to his office, profession, trade or business, either by imputing to him general disqualification in those respects which the office or other

occupation peculiarly requires, or by imputing something with reference to his office, profession, trade, or business that has a natural tendency to lessen its profits;

4. Imputes to him impotence or a want of chastity; or

5. Which, by natural consequence, causes actual damage.

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 529-555

4 Levy et al., California Torts, Ch. 45, *Defamation*, § 45.02 (Matthew Bender)

30 California Forms of Pleading and Practice, Ch. 340, *Libel and Slander* (Matthew Bender)

14 California Points and Authorities, Ch. 142, *Libel and Slander (Defamation)* (Matthew Bender)

1 California Civil Practice: Torts (Thomson West) § 21:2

Publisher's Notes

There is no BAJI instruction on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsIntentional TortsDefamationGeneral OverviewTortsIntentional TortsDefamationElementsGeneral
OverviewTortsIntentional TortsDefamationElementsLibelTortsIntentional TortsDefamationElementsSlander



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CHAPTER 17 California Judicial Council Defamation Instructions

3-17 California Forms of Jury Instruction CACI 1707

CACI 1707 Fact Versus Opinion

For [name of plaintiff] to recover, [name of defendant]'s statement(s) must have been statements of fact, not opinion. A statement of fact is a statement that can be proved to be true or false. An opinion may be considered a statement of fact if the opinion suggests that facts exist.

In deciding this issue, you should consider whether the average [reader/listener] would conclude from the language of the statement and its context that [name of defendant] was making a statement of fact.

New September 2003

This instruction may not be necessary in all cases: "The critical determination of whether an allegedly defamatory statement constitutes fact or opinion is a question of law for the court and therefore suitable for resolution by demurrer. If the court concludes the statement could reasonably be construed as either fact or opinion, the issue should be resolved by a jury." (*Campanelli v. Regents of Univ. of Cal.* (1996) 44 Cal.App.4th 572, 578 [51 Cal.Rptr.2d 891], internal citations omitted.)

- The statutory definitions of libel in slander "can be meaningfully applied only to statements that are capable of being proved as false or true." (*Savage v. Pacific Gas & Electric Co.* (1993) 21 Cal.App.4th 434, 445 [26 Cal.Rptr.2d 305] .)

- "Thus, 'rhetorical hyperbole,' 'vigorous epithet[s],' 'lusty and imaginative expressions[s] of ... contempt,' and language used 'in a loose, figurative sense' have all been accorded constitutional protection." (*Ferlauto v. Hamsher* (1999) 74 Cal.App.4th 1394, 1401 [88 Cal.Rptr.2d 843] .)

■ "If a speaker says, 'In my opinion John Jones is a liar,' he implies a knowledge of facts which lead to the conclusion that Jones told an untruth. Even if the speaker states the facts upon which he bases his opinion, if those facts are either incorrect or incomplete, or if his assessment of them is erroneous, the statement may still imply a false assertion of fact." (*Milkovich v. Lorain Journal Co.* (1990) 497 U.S. 1, 18 [110 S.Ct. 2695, 111 L.Ed.2d 1] .)

■ California courts use a "totality of the circumstances" test to determine if a statement is one of fact or of opinion. (*Baker v. Los Angeles Herald Examiner* (1986) 42 Cal.3d 254, 260 [228 Cal.Rptr. 206, 721 P.2d 87] .) "The court must put itself in the place of an average reader and decide the natural and probable effect of the statement." (*Hofmann Co. v. E.I. Du Pont de Nemors & Co.* (1988) 202 Cal.App.3d 390, 398 [248 Cal.Rptr. 384] .)

■ "[S]ome statements are ambiguous and cannot be characterized as factual or nonfactual as a matter of law. 'In these circumstances, it is for the jury to determine whether an ordinary reader would have understood the article as a factual assertion' " (*Kahn v. Bower* (1991) 232 Cal.App.3d 1599, 1608 [284 Cal.Rptr. 244] , internal citations omitted.)

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 546, 547, 549

4 Levy et al., California Torts, Ch. 45, *Defamation*, §§ 45.05-45.06 (Matthew Bender)

30 California Forms of Pleading and Practice, Ch. 340, *Libel and Slander* (Matthew Bender)

14 California Points and Authorities, Ch. 142, *Libel and Slander (Defamation)* (Matthew Bender)

1 California Civil Practice: Torts (Thomson West) §§ 21:20-21:21

Publisher's Notes

This instruction covers issues presented in BAJI Nos. 7.00.1 and 7.01.

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsIntentional TortsDefamationGeneral OverviewTortsIntentional TortsDefamationElementsGeneral OverviewTortsIntentional TortsDefamationProcedure



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CHAPTER 17 California Judicial Council Defamation Instructions

3-17 California Forms of Jury Instruction CACI 1708

CACI 1708 Coerced Self-Publication

[*Name of plaintiff*] **claims that [*name of defendant*] is responsible for [his/her] harm even though [*name of defendant*] did not communicate the statement(s) to anyone other than [*name of plaintiff*]. To succeed, [*name of plaintiff*] must prove all of the following:**

- 1. That [*name of defendant*] made the statement(s) to [*name of plaintiff*];**
- 2. That [*name of plaintiff*] was under strong pressure to communicate [*name of defendant*]'s statement(s) to another person; and**
- 3. That when [*name of defendant*] made the statements, [he/she] should have known that [*name of plaintiff*] would be under strong pressure to communicate them to another person.**

If [*name of plaintiff*] has proved all of the above, then you must find that [*name of defendant*] was responsible for the communication of the statement(s).

New September 2003

- The general rule is that "[a] plaintiff cannot manufacture a defamation cause of action by publishing the statements to third persons; the publication must be done by the defendant." The exception to the rule occurs "when it [is] foreseeable that the defendant's act would result in plaintiff's publication to a third person." (*Live Oak Publishing Co. v. Cohagan* (1991) 234 Cal.App.3d 1277, 1284 [286 Cal.Rptr. 198] .)

- [A] "self-publication of the alleged defamatory statement may be imputed to the originator of the

statement if 'the person defamed is operating under a strong compulsion to republish the defamatory statement and the circumstances which create the strong compulsion are known to the originator of the defamatory statement at the time he communicates it to the person defamed.' " (*Davis v. Consolidated Freightways* (1994) 29 Cal.App.4th 354, 373 [34 Cal.Rptr.2d 438] , quoting *McKinney v. County of Santa Clara* (1980) 110 Cal.App.3d 787, 797-798 [168 Cal.Rptr. 89] .)

■ "This exception has been limited to a narrow class of cases, usually where a plaintiff is compelled to republish the statements in aid of disproving them." (*Live Oak Publishing Co., supra*, 234 Cal.App.3d at p. 1285 .)

■ To determine if the coercion exception applies, the test is "whether 'because of some necessity he was under to communicate the matter to others, it was reasonably to be anticipated that he would do so.' " (*Live Oak Publishing Co., supra*, 234 Cal.App.3d at p. 1285 .)

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 537, 616

30 California Forms of Pleading and Practice, Ch. 340, *Libel and Slander* (Matthew Bender)

14 California Points and Authorities, Ch. 142, *Libel and Slander (Defamation)* (Matthew Bender)

1 California Civil Practice: Torts (Thomson West) § 21:15

Publisher's Notes

This instruction replaces BAJI No. 7.03

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsIntentional TortsDefamationGeneral Overview



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CHAPTER 17 California Judicial Council Defamation Instructions

3-17 California Forms of Jury Instruction CACI 1709-CACI 1719

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CACI 1709Reserved for Future Use



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CHAPTER 17 California Judicial Council Defamation Instructions

3-17 California Forms of Jury Instruction CACI 1720

CACI 1720 Affirmative Defense--Truth

[Name of defendant] is not responsible for [name of plaintiff]'s harm, if any, if [he/she] proves that [his/her] statement(s) about [name of plaintiff] [was/were] true. [Name of defendant] does not have to prove that the statement(s) [was/were] true in every detail, so long as the statement(s) [was/were] substantially true.

New September 2003; Revised October 2008

This instruction is to be used only in cases involving private plaintiffs on matters of private concern. In cases involving public figures or matters of public concern, the burden of proving falsity is on the plaintiff.

■ *Section 581A of the Restatement Second of Torts* provides: "One who publishes a defamatory statement of fact is not subject to liability for defamation if the statement is true."

■ "Truth, of course, is an absolute defense to any libel action. In order to establish the defense, the defendant need not prove the literal truth of the allegedly libelous accusation, so long as the imputation is substantially true so as to justify the 'gist or sting' of the remark." (*Campanelli v. Regents of Univ. of Cal.* (1996) 44 Cal.App.4th 572, 581-582 [51 Cal.Rptr.2d 891], internal citations omitted.)

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 556-560, 611, 614

4 Levy et al., California Torts, Ch. 45, *Defamation*, § 45.10 (Matthew Bender)

30 *California Forms of Pleading and Practice*, Ch. 340, *Libel and Slander*, § 340.55 (Matthew Bender)

14 *California Points and Authorities, Ch. 142, Libel and Slander (Defamation), § 142.39* (Matthew Bender)

1 California Civil Practice: Torts (Thomson West) §§ 21:19, 21:52

Publisher's Notes

This instruction replaces BAJI No. 7.07.

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsIntentional TortsDefamationGeneral OverviewTortsIntentional TortsDefamationDefensesTruth



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CHAPTER 17 California Judicial Council Defamation Instructions

3-17 California Forms of Jury Instruction CACI 1721

CACI 1721 Affirmative Defense--Consent

[Name of defendant] is not responsible for [name of plaintiff]'s harm, if any, if [he/she] proves that [name of plaintiff] consented, by words or conduct, to [name of defendant]'s communication of the statement(s) to others. In deciding whether [name of plaintiff] consented to the communication, you should consider the circumstances surrounding the words or conduct.

New September 2003; Revised October 2008

■ *Restatement Second of Torts, section 583*, provides, in part: "[T]he consent of another to the publication of defamatory matter concerning him is a complete defense to his action for defamation."

■ "One of the oldest and most widely recognized defenses to the publication of defamatory matter is the doctrine of consent, which has been classified as a form of absolute privilege." (*Royer v. Steinberg* (1979) 90 Cal.App.3d 490, 498 [153 Cal.Rptr. 499] .)

■ "One of the primary purposes of the doctrine of consent in defamation law is to prevent a party from inviting or inducing indiscretion and thereby laying the foundation of a lawsuit for his own pecuniary gain." (*Royer, supra*, 90 Cal.App.3d at p. 499 .)

■ This rule applies when the plaintiff asks the defendant to repeat the statement to others and when the plaintiff himself repeats the statements to others. (*Royer, supra*, 90 Cal.App.3d at p. 498 [but see CACI No. 1708, *Coerced Self-Publication*].)

30 *California Forms of Pleading and Practice, Ch. 340, Libel and Slander, § 340.68* (Matthew Bender)

14 *California Points and Authorities, Ch. 142, Libel and Slander, § 142.54 (Defamation)* (Matthew Bender)

1 *California Civil Practice: Torts* (Thomson West) § 21:28

Publisher's Notes

There is no BAJI instruction on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsIntentional TortsDefamationGeneral OverviewTortsIntentional TortsDefamationDefensesGeneral Overview



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CHAPTER 17 California Judicial Council Defamation Instructions

3-17 California Forms of Jury Instruction CACI 1722

CACI 1722 Retraction: Newspaper or Broadcast (Civ. Code, § 48a)

Because [*name of defendant*] is a [newspaper/broadcaster], [*name of plaintiff*] may recover only the following:

- (a) Damages to property, business, trade, profession, or occupation; and**
- (b) Damages for money spent as a result of the defamation.**

However, this limitation does not apply if [*name of plaintiff*] proves both of the following:

1. That [*name of plaintiff*] demanded a correction of the statement within 20 days of discovering the statement; and

2. That [*name of defendant*] did not publish an adequate correction;

[or]

That [*name of defendant*]'s correction was not substantially as conspicuous as the original [publication/broadcast];

[or]

That [*name of defendant*]'s correction was not [published/broadcast] within three weeks of [*name of plaintiff*]'s demand.

The judge should decide whether the demand for a retraction was served in compliance with the statute. (*O'Hara v. Storer Communications, Inc.* (1991) 231 Cal.App.3d 1101, 1110 [282 Cal.Rptr. 712] .)

■ *Civil Code section 48a* provides:

(1) In any action for damages for the publication of a libel in a newspaper, or of a slander by radio broadcast, plaintiff shall recover no more than special damages unless a correction be demanded and be not published or broadcast, as hereinafter provided. Plaintiff shall serve upon the publisher, at the place of publication or broadcaster at the place of broadcast, a written notice specifying the statements claimed to be libelous and demanding that the same be corrected. Said notice and demand must be served within 20 days after knowledge of the publication or broadcast of the statements claimed to be libelous.

(2) If a correction be demanded within said period and be not published or broadcast in substantially as conspicuous a manner in said newspaper or on said broadcasting station as were the statements claimed to be libelous, in a regular issue thereof published or broadcast within three weeks after such service, plaintiff, if he pleads and proves such notice, demand and failure to correct, and if his cause of action be maintained, may recover general, special and exemplary damages; provided that no exemplary damages may be recovered unless the plaintiff shall prove that defendant made the publication or broadcast with actual malice and then only in the discretion of the court or jury, and actual malice shall not be inferred or presumed from the publication or broadcast.

(3) A correction published or broadcast in substantially as conspicuous a manner in said newspaper or on said broadcasting station as the statements claimed in the complaint to be libelous, prior to receipt of a demand therefor, shall be of the same force and effect as though such correction had been published or broadcast within three weeks after a demand therefor.

(4) [Definitions.] As used herein, the terms "general damages," "special damages," "exemplary damages" and "actual malice," are defined as follows:

(a) "General damages" are damages for loss of reputation, shame, mortification and hurt feelings;

(b) "Special damages" are all damages which plaintiff alleges and proves that he has suffered in respect to his property, business, trade, profession or occupation, including such amounts of money as the plaintiff alleges and proves he has expended as a result of the alleged libel, and no other;

(c) "Exemplary damages" are damages which may in the discretion of the court or jury be recovered in addition to general and special damages for the sake of example and by way of punishing a defendant who has made the publication or broadcast with actual malice;

(d) "Actual malice" is that state of mind arising from hatred or ill will toward the plaintiff; provided, however, that such a state of mind occasioned by a good faith belief on the part of the defendant in the truth of the libelous publication or broadcast at the time it is published or broadcast shall not constitute actual malice.

■ "Under California law, a newspaper gains immunity from liability for all but 'special damages' when it prints a retraction satisfying the requirements of section 48a." (*Pierce v. San Jose Mercury News* (1989) 214 Cal.App.3d 1626, 1631 [263 Cal.Rptr. 410] ; see also *Twin Coast Newspapers, Inc. v. Superior Court* (1989) 208 Cal.App.3d 656, 660-661 [256 Cal.Rptr. 310] .)

■ "An equivocal or incomplete retraction obviously serves no purpose even if it is published in 'substantially as conspicuous a manner ... as were the statements claimed to be libelous.' " (*Weller v. American Broadcasting Companies, Inc.* (1991) 232 Cal.App.3d 991, 1011 [283 Cal.Rptr. 644] .)

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 629-639

4 Levy et al., California Torts, Ch. 45, *Defamation*, § 45.24 (Matthew Bender)

30 *California Forms of Pleading and Practice*, Ch. 340, *Libel and Slander*, § 340.68 (Matthew Bender)

14 *California Points and Authorities*, Ch. 142, *Libel and Slander (Defamation)*, § 142.54 (Matthew Bender)

1 California Civil Practice: Torts (Thomson West) §§ 21:55-21:57

Publisher's Notes

This instruction covers issues presented in BAJI No. 7.08.

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsIntentional TortsDefamationGeneral OverviewTortsIntentional TortsDefamationRemediesRetractions



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CHAPTER 17 California Judicial Council Defamation Instructions

3-17 California Forms of Jury Instruction CACI 1723

CACI 1723 Qualified Privilege (Civ. Code, § 47(c))

Under the circumstances of this case, [name of plaintiff] cannot recover damages from [name of defendant], even if the statement(s) [was/were] false, unless [he/she] also proves that [name of defendant] acted with hatred or ill will toward [him/her].

If [name of defendant] acted without reasonable grounds for believing the truth of the statement(s), this is a factor you may consider in determining whether [he/she] acted with hatred or ill will toward [name of plaintiff].

New September 2003

This instruction is applicable only if the judge determines that the conditions supporting the *Civil Code section 47(c)* privilege have arisen.

The judge determines all the other *Civil Code section 47* privileges as a matter of law.

- *Civil Code section 47(c)* grants a conditional privilege against defamation to communications made without malice on subjects of mutual interest. A privileged publication is made "without malice, to a person interested therein, (1) by one who is also interested, or (2) by one who stands in such a relation to the person interested as to afford a reasonable ground for supposing the motive for the communication to be innocent, or (3) who is requested by the person interested to give the information."

- Civil Code section 48 provides that, with respect to section 47(c), "malice is not inferred from the communication."

- For purposes of this section "malice has been defined as 'a state of mind arising from hatred or ill will, evidencing a willingness to vex, annoy or injure another person.' " (*Brown v. Kelly Broadcasting Co.* (1989) 48 Cal.3d 711, 723 [257 Cal.Rptr. 708, 771 P.2d 406] , internal citation omitted.)
- "[M]aliciousness cannot be derived from negligence. Malice entails more than sloppiness or, as in this case, an easily explained typo." (*Bierbower v. FHP, Inc.* (1999) 70 Cal.App.4th 1, 9 [82 Cal.Rptr.2d 393] .)
- Instructing the jury on "malice" as defined in the context of the common-interest privilege is insufficient by itself to impose liability for defamation. (*Carney v. Santa Cruz Women Against Rape* (1990) 221 Cal.App.3d 1009, 1016 [271 Cal.Rptr. 30] .) Even in matters of private interest, the jury must find that the defendant was at least negligent. (*Ibid.*)
- While defendants have the burden of proving that an allegedly defamatory statement falls within the scope of the common-interest privilege, plaintiffs have the burden of proving that that the statement was made with malice. (*Lundquist v. Reusser* (1994) 7 Cal.4th 1193, 1203 [31 Cal.Rptr.2d 776, 875 P.2d 1279] .)
- "[I]f malice is shown, the privilege is not merely overcome; it never arises in the first instance... . [T]he characterization of the privilege as qualified or conditional is incorrect to the extent that it suggests the privilege is defeasible." (*Brown, supra*, 48 Cal.3d at p. 723, fn. 7 .)

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 163, 556, 585-600

4 Levy et al., California Torts, Ch. 45, *Defamation*, § 45.12 (Matthew Bender)

30 California Forms of Pleading and Practice, Ch. 340, *Libel and Slander* (Matthew Bender)

14 California Points and Authorities, Ch. 142, *Libel and Slander (Defamation)* (Matthew Bender)

1 California Civil Practice: Torts (Thomson West) §§ 21:40-21:41

Publisher's Notes

This instruction covers issues presented in BAJI Nos. 7.05, 7.05.1.

Legal Topics:

For related research and practice materials, see the following legal topics:

Torts Intentional Torts Defamation General Overview Torts Intentional Torts Defamation Defenses Privileges Qualified Privileges



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CHAPTER 17 California Judicial Council Defamation Instructions

3-17 California Forms of Jury Instruction CACI 1724

CACI 1724 Affirmative Defense--Statute of Limitations--Defamation

[Name of defendant] contends that [name of plaintiff]'s lawsuit was not filed within the time set by law. To succeed on this defense, [name of defendant] must prove that [he/she/it] first communicated the alleged defamatory statement to a person other than [name of plaintiff] before [insert date one year before date of filing]. [For statements made in a publication, the claimed harm occurred when the publication was first generally distributed to the public.]

[If, however, [name of plaintiff] proves that on [insert date one year before date of filing] [he/she/it] had not discovered the facts constituting the defamation, and with reasonable diligence could not have discovered those facts, the lawsuit was filed on time.]

New April 2009

Directions for Use

This instruction is for use if the defendant claims that the plaintiff's action was not filed within the applicable one-year limitation period for defamation. (See *Code Civ. Proc.*, § 340(c).)

If the defamation was published in a publication such as a book, newspaper, or magazine, include the last sentence of the first paragraph, and do not include the second paragraph. The delayed-discovery rule does not apply to these statements. (*Shively v. Bozanich* (2003) 31 Cal.4th 1230, 1250-1251 [7 Cal.Rptr.3d 576, 80 P.3d 676] .) Otherwise, include the second paragraph if the plaintiff alleges that the delayed-discovery rule avoids the limitation defense.

The plaintiff bears the burden of pleading and proving delayed discovery. (See *McKelvey v. Boeing North Am. Inc.* (1999) 74 Cal.App.4th 151, 160 [86 Cal.Rptr.2d 645] .) See also the Sources and

Authority to CACI No. 455, *Statute of Limitations--Delayed Discovery*.

The delayed discovery rule can apply to matters published in an inherently secretive manner. (*Hebrew Academy of San Francisco v. Goldman* (2007) 42 Cal.4th 883, 894 [70 Cal.Rptr.3d 178, 173 P.3d 1004] . Modify the instruction if inherent secrecy is at issue and depends on disputed facts. It is not clear whether the plaintiff has the burden of proving inherent secrecy or the defendant has the burden of proving its absence.

Sources and Authority

- *Code of Civil Procedure* section 340 provides in part:

Within one year:

(c) An action for libel, slander, false imprisonment, seduction of a person below the age of legal consent, or by a depositor against a bank for the payment of a forged or raised check, or a check that bears a forged or unauthorized endorsement, or against any person who boards or feeds an animal or fowl or who engages in the practice of veterinary medicine as defined in *Section 4826 of the Business and Professions Code*, for that person's neglect resulting in injury or death to an animal or fowl in the course of boarding or feeding the animal or fowl or in the course of the practice of veterinary medicine on that animal or fowl.

- "In a claim for defamation, as with other tort claims, the period of limitations commences when the cause of action accrues. ... [A] cause of action for defamation accrues at the time the defamatory statement is 'published' (using the term 'published' in its technical sense). [P] [I]n defamation actions the general rule is that publication occurs when the defendant communicates the defamatory statement to a person other than the person being defamed. As also has been noted, with respect to books and newspapers, publication occurs (and the cause of action accrues) when the book or newspaper is first generally distributed to the public." (*Shively, supra*, 31 Cal.4th at pp. 1246-1247 , internal citations omitted.)

- "This court and other courts in California and elsewhere have recognized that in certain circumstances it may be appropriate to apply the discovery rule to delay the accrual of a cause of action for defamation or to impose an equitable estoppel against defendants who assert the defense after the limitations period has expired." (*Shively, supra*, 31 Cal.4th at pp. 1248-1249 .)

- "[A]pplication of the discovery rule to statements contained in books and newspapers would undermine the single-publication rule and reinstate the indefinite tolling of the statute of limitations intended to be cured by the adoption of the single-publication rule. If we were to recognize delayed accrual of a cause of action based upon the allegedly defamatory statement contained in the book ... on the basis that plaintiff did not happen to come across the statement until some time after the book was first generally distributed to the public, we would be adopting a rule subjecting publishers and authors to potential liability during the entire period in which a single copy of the book or newspaper might exist and fall into the hands of the subject of a defamatory remark. Inquiry into whether delay in discovering the publication was reasonable has not been permitted for publications governed by the single-publication rule. Nor is adoption of the rule proposed by plaintiff appropriate simply because the originator of a privately communicated defamatory statement may, together with the author and the publisher of a book, be liable for the defamation contained in the book. Under the rationale for the single-publication rule, the originator, who is jointly responsible along with the author and the publisher, should not be liable for millions of causes of action for a single edition of the book. Similarly, consistent with that rationale, the originator, like the author or the publisher, should not

be subject to suit many years after the edition is published." (*Shively, supra*, 31 Cal.4th at p. 1251 .)

■ "The single-publication rule as described in our opinion in *Shively* and as codified in *Civil Code section 3425.3* applies without limitation to all publications." (*Hebrew Academy of San Francisco, supra*, 42 Cal.4th at p. 893 .)

■ "[T]he single-publication rule applies not only to books and newspapers that are published with general circulation (as we addressed in *Shively*), but also to publications like that in the present case that are given only limited circulation and, thus, are not generally distributed to the public. Further, the discovery rule, which we held in *Shively* does not apply when a book or newspaper is generally distributed to the public, does not apply even when, as in the present case, a publication is given only limited distribution." (*Hebrew Academy of San Francisco, supra*, 42 Cal.4th at p. 890 .)

■ " '... [C]ourts uniformly have *rejected* the application of the discovery rule to libels published in books, magazines, and newspapers,' stating that 'although application of the discovery rule may be justified when the defamation was communicated in confidence, that is, "in an inherently secretive manner," the justification does not apply when the defamation occurred by means of a book, magazine, or newspaper that was distributed to the public. [Citation.]' " (*Hebrew Academy of San Francisco, supra*, 42 Cal.4th at p. 894 , original italics, internal citations omitted.)

Secondary Sources

Haning et al., *California Practice Guide: Personal Injury* (The Rutter Group) P 5:176.10

4 Levy et al., *California Torts, Ch. 45, Defamation*, § 45.21 (Matthew Bender)

30 *California Forms of Pleading and Practice, Ch. 340, Libel and Slander*, § 340.290 (Matthew Bender)

14 *California Points and Authorities, Ch. 142, Libel and Slander (Defamation)*, § 142.56 (Matthew Bender)

Publisher's Notes

There is no BAJI instruction on this subject.



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CHAPTER 17 California Judicial Council Defamation Instructions

3-17 California Forms of Jury Instruction CACI 1725-CACI 1799

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CACI 1725Reserved for Future Use



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CHAPTER 17 California Judicial Council Defamation Instructions

3-17 California Forms of Jury Instruction CACI VF-1700

CACI VF-1700 Defamation per se--Essential Factual Elements (Public Officer/Figure and Limited Public Figure)

We answer the questions submitted to us as follows:

1. Did [name of defendant] make the following statement to [a person/persons] other than [name of plaintiff]? [Insert claimed per se defamatory statement.]

_____ Yes _____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Did the [person/people] to whom the statement was made reasonably understand that the statement was about [name of plaintiff]?

_____ Yes _____ No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Did [this person/these people] reasonably understand the statement to mean that [insert ground(s) for defamation per se, e.g., "[name of plaintiff] had committed a crime"]?

_____ Yes _____ No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer

no further questions, and have the presiding juror sign and date this form.

4. Was the statement false?

_____ Yes _____ No

If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. Did [name of plaintiff] prove by clear and convincing evidence that [name of defendant] knew the statement was false or had serious doubts about the truth of the statement?

_____ Yes _____ No

If your answer to question 5 is yes, then answer questions 6, 7, and 8. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

ACTUAL DAMAGES

6. Was [name of defendant]'s conduct a substantial factor in causing [name of plaintiff] actual harm?

_____ Yes _____ No

If your answer to question 6 is yes, then answer question 7. If you answered no, skip question 7 and answer question 8.

7. What are [name of plaintiff]'s actual damages for:

[a. Harm to [name of plaintiff]'s property, business, trade, profession, or occupation? \$_____]

[b. Expenses [name of plaintiff] had to pay as a result of the defamatory statements? \$_____]

[c. Harm to [name of plaintiff]'s reputation? \$_____]

[d. Shame, mortification, or hurt feelings? \$_____]

[If [name of plaintiff] has not proved any actual damages for either c or d, then answer question 8. If [name of plaintiff] has proved actual damages for both c and d, skip question 8 and answer question 9.]

ASSUMED DAMAGES

8. What are the damages you award [name of plaintiff] for the assumed harm to [his/her] reputation, and for shame, mortification, or hurt feelings? You must award at least a nominal sum.
\$_____

PUNITIVE DAMAGES

9. Did [name of plaintiff] prove by clear and convincing evidence that [name of defendant] acted with malice, oppression, or fraud?

_____ Yes _____ No

If your answer to question 9 is yes, then answer question 10. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

10. What is your award of punitive damages, if any, against [name of defendant]?
\$_____

Signed: _____

Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the [clerk/bailiff/judge].

New September 2003; Revised December 2005, April 2008, October 2008

Directions for Use

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on *CACI No. 1700, Defamation per se--Essential Factual Elements (Public Officer/Figure and Limited Public Figure)*.

Multiple statements may need to be set out separately, and if separate damages are claimed as to each statement, separate verdict forms may be needed for each statement because all the elements may need to be found as to each statement.

Give the jury question 3 only if the statement is not defamatory on its face.

In question 7, omit damage items c and d if the plaintiff elects not to present proof of actual damages for harm to reputation and for shame mortification, or hurt feelings. Whether or not proof for both categories is offered, include question 8. For these categories, the jury may find that no actual damages have been proven but must still make an award of assumed damages.

Omit question 10 if the issue of punitive damages has been bifurcated.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

This form may be modified if the jury is being given the discretion under *Civil Code section 3288* to

award prejudgment interest on specific losses that occurred prior to judgment.

Publisher's Notes

There is no BAJI verdict form on this subject.



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CHAPTER 17 California Judicial Council Defamation Instructions

3-17 California Forms of Jury Instruction CACI VF-1701

CACI VF-1701 Defamation per quod--Essential Factual Elements (Public Officer/Figure and Limited Public Figure)

We answer the questions submitted to us as follows:

1. Did [*name of defendant*] make the following statement to [a person/persons] other than [*name of plaintiff*]? [*Insert claimed per quod defamatory statement.*]

_____ Yes _____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Did the [person/people] to whom the statement was made reasonably understand that the statement was about [*name of plaintiff*]?

_____ Yes _____ No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Was the statement false?

_____ Yes _____ No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Did [name of plaintiff] prove by clear and convincing evidence that [name of defendant] knew the statement was false or had serious doubts about the truth of the statement?

_____ Yes _____ No

If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. Is the statement, because of facts known to the people who heard or read it, the kind that would tend to injure [name of plaintiff] in [his/her] occupation?

_____ Yes _____ No

If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. Did [name of plaintiff] suffer harm to [his/her] property, business, profession, or occupation [including money spent as a result of the statement]?

_____ Yes _____ No

If your answer to question 6 is yes, then answer question 7. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

ACTUAL DAMAGES

7. Was [name of defendant]'s conduct a substantial factor in causing [name of plaintiff] actual harm?

_____ Yes _____ No

If your answer to question 7 is yes, then answer questions 8. If you answered no, skip question 8 and answer question 9.

8. What are [name of plaintiff]'s actual damages?[\$_____]

PUNITIVE DAMAGES

9. Did [name of plaintiff] prove by clear and convincing evidence that [name of defendant] acted with malice, oppression, or fraud?

_____ Yes _____ No

If your answer to question 9 is yes, then answer question 10. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

10. What is your award of punitive damages, if any, against [name of defendant]?
\$_____

Signed: _____
Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the [clerk/bailiff/judge].

New September 2003; Revised December 2005

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on *CACI No. 1701, Defamation per quod--Essential Factual Elements (Public Officer/Figure and Limited Public Figure)*.

Multiple statements may need to be set out separately, and if separate damages are claimed as to each statement, separate verdict forms may be needed for each statement because all the elements may need to be found as to each statement.

Users may need to itemize all the damages listed in question 8 if, for example, there are multiple defendants and issues regarding apportionment of damages under Proposition 51.

Question 5 may be modified by referring to one of the other two grounds listed in element 3 of *CACI No. 1701, Defamation per quod--Essential Factual Elements (Public Officer/Figure and Limited Public Figure)*, depending on which ground is applicable in the case.

Additional questions may be needed on the issue of punitive damages if the defendant is a corporate or other entity.

Omit question 10 if the issue of punitive damages has been bifurcated.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

This form may be modified if the jury is being given the discretion under *Civil Code section 3288* to award prejudgment interest on specific losses that occurred prior to judgment.

Publisher's Notes

There is no BAJI verdict form on this subject.



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CHAPTER 17 California Judicial Council Defamation Instructions

3-17 California Forms of Jury Instruction CACI VF-1702

CACI VF-1702 Defamation per se--Essential Factual Elements (Private Figure--Matter of Public Concern)

We answer the questions submitted to us as follows:

1. Did [name of defendant] make the following statement to [a person/persons] other than [name of plaintiff]? [Insert claimed per se defamatory statement.]

_____ Yes _____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Did the [person/people] to whom the statement was made reasonably understand that the statement was about [name of plaintiff]?

_____ Yes _____ No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Did [this person/these people] reasonably understand the statement to mean that [insert ground(s) for defamation per se, e.g., "[name of plaintiff] had committed a crime"]?

_____ Yes _____ No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Was the statement false?

_____ Yes _____ No

If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. Did [*name of defendant*] fail to use reasonable care to determine the truth or falsity of the statement?

_____ Yes _____ No

If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

ACTUAL DAMAGES**6. Was [*name of defendant*]'s conduct a substantial factor in causing [*name of plaintiff*] actual harm?**

_____ Yes _____ No

If your answer to question 6 is yes, then answer question 7. If you answered no, skip question 7 and answer question 8.

7. What are [*name of plaintiff*]'s actual damages for:

[a. Harm to [*name of plaintiff*]'s property,
business, trade, profession, or occupation? \$_____]

[b. Expenses [*name of plaintiff*] had to pay
as a result of the defamatory statements? \$_____]

[c. Harm to [*name of plaintiff*]'s reputation? \$_____]

[d. Shame, mortification, or hurt feelings? \$_____]

[If [*name of plaintiff*] has not proved any actual damages for either c or d, then answer question 8.
If [*name of plaintiff*] has proved actual damages for both c and d, skip question 8 and 9 and
answer question 10.]

ASSUMED DAMAGES**8. Did [*name of plaintiff*] prove by clear and convincing evidence that [*name of defendant*] knew the statement was false or had serious doubts about the truth of the statement?**

_____ Yes _____ No

If your answer to question 8 is yes, then answer question 9. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

9. What are the damages you award [*name of plaintiff*] for the assumed harm to [his/her] reputation and for shame, mortification, or hurt feelings? You must award at least a nominal sum.
.....\$_____

Regardless of your answer to question 9, skip question 10 and answer question 11.

PUNITIVE DAMAGES

10. Did [*name of plaintiff*] prove by clear and convincing evidence that [*name of defendant*] knew the statement was false or had serious doubts about the truth of the statement?

_____ Yes _____ No

If your answer to question 10 is yes, then answer question 11. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

11. Did [*name of plaintiff*] prove by clear and convincing evidence that [*name of defendant*] acted with malice, oppression, or fraud?

_____ Yes _____ No

If your answer to question 11 is yes, then answer question 12. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

12. What amount, if any, do you award as punitive damages against [*name of defendant*]?
.....\$_____

Signed: _____
Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the [clerk/bailiff/judge].

New September 2003; Revised December 2005, April 2008, October 2008

Directions for Use

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on CACI No. 1702, *Defamation per se--Essential Factual Elements (Private Figure-Matter of Public Concern)*.

Multiple statements may need to be set out separately, and if separate damages are claimed as to each statement, separate verdict forms may be needed for each statement because all the elements may need to be found as to each statement.

Give the jury question 3 only if the statement is not defamatory on its face.

In question 7, omit damage items c and d if the plaintiff elects not to present proof of actual damages for harm to reputation and for shame, mortification, or hurt feelings. Whether or not proof for both categories is offered, include question 8. For these categories, the jury may find that no actual damages have been proven but must still make an award of assumed damages.

Additional questions may be needed on the issue of punitive damages if the defendant is a corporate or other entity.

Omit question 12 if the issue of punitive damages has been bifurcated.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

This form may be modified if the jury is being given the discretion under *Civil Code section 3288* to award prejudgment interest on specific losses that occurred prior to judgment.

Publisher's Notes

There is no BAJI verdict form on this subject.



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California Forms of Jury Instruction

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CHAPTER 17 California Judicial Council Defamation Instructions

3-17 California Forms of Jury Instruction CACI VF-1703

CACI VF-1703 Defamation per quod--Essential Factual Elements (Private Figure--Matter of Public Concern)

We answer the questions submitted to us as follows:

1. Did [*name of defendant*] make the following statement to [a person/persons] other than [*name of plaintiff*]? [*Insert claimed per quod defamatory statement.*]

_____ Yes _____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Did the [person/people] to whom the statement was made reasonably understand that the statement was about [*name of plaintiff*]?

_____ Yes _____ No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Was the statement false?

_____ Yes _____ No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Did [*name of defendant*] fail to use reasonable care to determine the truth or falsity of the statement?

_____ Yes _____ No

If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. Is the statement, because of facts known to the people who heard or read the statement, the kind of statement that would tend to injure [*name of plaintiff*] in [his/her] occupation?

_____ Yes _____ No

If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. Did [*name of plaintiff*] suffer harm to [his/her] property, business, profession, or occupation [including money spent as a result of the statement]?

_____ Yes _____ No

If your answer to question 6 is yes, then answer question 7. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

7. Was the statement a substantial factor in causing [*name of plaintiff*]'s harm?

_____ Yes _____ No

If your answer to question 7 is yes, then answer question 8. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

ACTUAL DAMAGES

8. What are [*name of plaintiff*]'s actual damages?[\$_____]

If [*name of plaintiff*] has not proved any actual damages, stop here, answer no further questions, and have the presiding juror sign and date this form. If you awarded actual damages, answer question 9.

PUNITIVE DAMAGES

9. Did [name of plaintiff] prove by clear and convincing evidence that [name of defendant] knew the statement was false or had serious doubts about the truth of the statement?

_____ Yes _____ No

If your answer to question 9 is yes, then answer question 10. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

10. Has [name of plaintiff] proved by clear and convincing evidence that [name of defendant] acted with malice, oppression, or fraud?

_____ Yes _____ No

If your answer to question 10 is yes, then answer question 11. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

11. What amount, if any, do you award as punitive damages against [name of defendant]?
\$_____

Signed: _____

Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the [clerk/bailiff/judge].

New September 2003; Revised December 2005

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on *CACI No. 1703, Defamation per quod--Essential Factual Elements (Private Figure--Matter of Public Concern)*.

Multiple statements may need to be set out separately, and if separate damages are claimed as to each statement, separate verdict forms may be needed for each statement because all the elements may need to be found as to each statement.

Users may need to itemize all the damages listed in question 8 if, for example, there are multiple defendants and issues regarding apportionment of damages under Proposition 51.

Question 5 may be modified by referring to one of the other two grounds listed in element 3 of *CACI No. 1703, Defamation per quod--Essential Factual Elements (Private Figure--Matter of Public Concern)*, depending on which ground is applicable in the case.

Additional questions may be needed on the issue of punitive damages if the defendant is a corporate or other entity.

Omit question 11 if the issue of punitive damages has been bifurcated.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

This form may be modified if the jury is being given the discretion under *Civil Code section 3288* to award prejudgment interest on specific losses that occurred prior to judgment.

Publisher's Notes

There is no BAJI verdict form on this subject.



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California Forms of Jury Instruction

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CHAPTER 17 California Judicial Council Defamation Instructions

3-17 California Forms of Jury Instruction CACI VF-1704

CACI VF-1704 Defamation per se--Affirmative Defense--Truth (Private Figure--Matter of Private Concern)

We answer the questions submitted to us as follows:

1. Did [name of defendant] make the following statement to [a person/persons] other than [name of plaintiff]? [Insert claimed per se defamatory statement.]

_____ Yes _____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Did the [person/people] to whom the statement was made reasonably understand that the statement was about [name of plaintiff]?

_____ Yes _____ No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Did [this person/these people] reasonably understand the statement to mean that [insert ground(s) for defamation per se, e.g., "[name of plaintiff] had committed a crime"]?

_____ Yes _____ No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Was the statement substantially true?

_____ Yes _____ No

If your answer to question 4 is no, then answer question 5. If you answered yes, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. Did [name of defendant] fail to use reasonable care to determine the truth or falsity of the statement?

_____ Yes _____ No

If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

ACTUAL DAMAGES**6. Was [name of defendant]'s conduct a substantial factor in causing [name of plaintiff] actual harm?**

_____ Yes _____ No

If your answer to question 6 is yes, then answer question 7. If you answered no, skip question 7 and answer question 8.

7. What are [name of plaintiff]'s actual damages for:

[a. Harm to [name of plaintiff]'s property,
business, trade, profession, or occupation? \$_____]

[b. Expenses [name of plaintiff] had to pay
as a result of the defamatory statements? \$_____]

[c. Harm to [name of plaintiff]'s reputation? \$_____]

[d. Shame, mortification, or hurt feelings? \$_____]

[If [name of plaintiff] has not proved any actual damages for either c or d, then answer question 8.
If [name of plaintiff] has proved actual damages for both c and d, skip question 8 and answer question 9.]

ASSUMED DAMAGES

8. What are the damages you award [name of plaintiff] for the assumed harm to [his/her] reputation and for shame, mortification, or hurt feelings? You must award at least a nominal sum.
.....\$_____

Regardless of your answer to question 8, answer question 9.

PUNITIVE DAMAGES

9. Has [*name of plaintiff*] proved by clear and convincing evidence that [*name of defendant*] acted with malice, oppression, or fraud?

_____ Yes _____ No

If your answer to question 9 is yes, then answer question 10. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

10. What amount, if any, do you award as punitive damages against [*name of defendant*]?
\$_____

Signed: _____

Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the [clerk/bailiff/judge].

New September 2003; Revised December 2005, April 2008, October 2008

Directions for Use

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case. This verdict form is based on *CACI No. 1704, Defamation per se--Essential Factual Elements (Private Figure--Matter of Private Concern)*, and *CACI No. 1720, Affirmative Defense--Truth*. Delete question 4 if the affirmative defense of the truth is not at issue.

Multiple statements may need to be set out separately, and if separate damages are claimed as to each statement, separate verdict forms may be needed for each statement because all the elements may need to be found as to each statement.

If specificity is not required, users do not have to itemize all the damages listed in question 7. The breakdown is optional depending on the circumstances.

Give the jury question 3 only if the statement is not defamatory on its face.

In question 7, omit damage items c and d if the plaintiff elects not to present proof of actual damages for harm to reputation and for shame, mortification, or hurt feelings. Whether or not proof for both categories is offered, include question 8. For these categories, the jury may find that no actual damages have been proven but must still make an award of assumed damages.

Additional questions on the issue of punitive damages may be needed if the defendant is a corporate or other entity.

Omit question 10 if the issue of punitive damages has been bifurcated.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

This form may be modified if the jury is being given the discretion under *Civil Code section 3288* to award prejudgment interest on specific losses that occurred prior to judgment.

Publisher's Notes

There is no BAJI verdict form on this subject.



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California Forms of Jury Instruction

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CHAPTER 17 California Judicial Council Defamation Instructions

3-17 California Forms of Jury Instruction CACI VF-1705

CACI VF-1705 Defamation per quod (Private Figure--Matter of Private Concern)

We answer the questions submitted to us as follows:

1. Did [*name of defendant*] make the following statement to [a person/persons] other than [*name of plaintiff*]? [*Insert claimed per quod defamatory statement.*]

_____ Yes _____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Did the [person/people] to whom the statement was made reasonably understand that the statement was about [*name of plaintiff*]?

_____ Yes _____ No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Did [*name of defendant*] fail to use reasonable care to determine the truth or falsity of the statement?

_____ Yes _____ No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Did the statement tend to injure [*name of plaintiff*] in [his/her] occupation?

_____ Yes _____ No

If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. Did [*name of plaintiff*] suffer harm to [his/her] property, business, profession, or occupation [including money spent as a result of the statement]?

_____ Yes _____ No

If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. Was the statement a substantial factor in causing [*name of plaintiff*]'s harm?

_____ Yes _____ No

If your answer to question 6 is yes, then answer questions 7 and 8. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

ACTUAL DAMAGES

7. What are [*name of plaintiff*]'s actual damages?

**[a. [Past economic loss, including harm to
[*name of plaintiff*]'s property, business, trade,
profession, or occupation, and expenses
[*name of plaintiff*] had to pay as a result of
the defamatory statements]..... \$_____]**

**[b. [Future economic loss, including harm to
[*name of plaintiff*]'s property, business, trade,
profession, or occupation, and expenses
[*name of plaintiff*] will have to pay as a result
of the defamatory statements]..... \$_____]**

**[c. Past noneconomic loss including shame,
mortification, or hurt feelings, and harm to
[*name of plaintiff*]'s reputation]..... \$_____]**

**[d. Future noneconomic loss including shame,
mortification, or hurt feelings, and harm to
[*name of plaintiff*]'s reputation]\$_____]**

..... TOTAL \$_____

If [*name of plaintiff*] has not proved any actual damages, stop here, answer no further questions, and have the presiding juror sign and date this form. If you awarded actual damages, answer question 8.

PUNITIVE DAMAGES

8. Has [*name of plaintiff*] proved by clear and convincing evidence that [*name of defendant*] acted with malice, oppression, or fraud?

_____ Yes _____ No

If your answer to question 8 is yes, then answer question 9. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

9. What amount, if any, do you award as punitive damages against [*name of defendant*]?
\$_____

Signed: _____
 Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the [clerk/bailiff/judge].

New September 2003; Revised December 2005

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on *CACI No. 1703, Defamation per quod--Essential Factual Elements (Private Figure--Matter of Public Concern)*.

Multiple statements may need to be set out separately, and if separate damages are claimed as to each statement, separate verdict forms may be needed for each statement because all the elements may need to be found as to each statement.

Users may need to itemize all the damages listed in question 7 if, for example, there are multiple defendants and issues regarding apportionment of damages under Proposition 51.

Question 4 may be modified by referring to one of the other two grounds listed in element 3 of *CACI No. 1705, Defamation per quod--Essential Factual Elements (Private Figure--Matter of Private Concern)*,

depending on which ground is applicable in the case.

Additional questions may be needed on the issue of punitive damages if the defendant is a corporate or other entity.

Omit question 9 if the issue of punitive damages has been bifurcated.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

This form may be modified if the jury is being given the discretion under *Civil Code section 3288* to award prejudgment interest on specific losses that occurred prior to judgment.

Publisher's Notes

There is no BAJI verdict form on this subject.



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California Forms of Jury Instruction

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CHAPTER 17 California Judicial Council Defamation Instructions

3-17 California Forms of Jury Instruction CACI VF-1706-CACI VF-1799

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CACI VF-1706Reserved for Future Use



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CHAPTER 17 California Judicial Council Defamation Instructions

3-17 California Forms of Jury Instruction Table A

Table A Defamation Per Se

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CHAPTER 17 California Judicial Council Defamation Instructions

3-17 California Forms of Jury Instruction Table B

Table B Defamation Per Quod

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CHAPTER 18 California Judicial Council Right of Privacy Instructions

3-18 California Forms of Jury Instruction 18.syn

§ 18.syn Synopsis to Chapter 18: California Judicial Council Right of Privacy Instructions

CACI 1800 Intrusion Into Private Affairs

CACI 1801 Public Disclosure of Private Facts

CACI 1802 False Light

CACI 1803 Appropriation of Name or Likeness

CACI 1804A Use of Name or Likeness (Civ. Code, § 3344)

CACI 1804B Use of Name or Likeness--Use in Connection With News, Public Affairs, or Sports Broadcast or Account, or Political Campaign (Civ. Code, § 3344(d))

CACI 1805 Affirmative Defense to Use or Appropriation of Name or Likeness--First Amendment (Comedy III)

CACI 1806 Reserved for Future Use

CACI 1807 Affirmative Defense--Invasion of Privacy Justified

CACI 1808 Stalking (Civ. Code, § 1708.7)

CACI 1809 Recording of Confidential Information (Pen. Code, §§ 632, 637.2)

CACI 1810-CACI 1819 Reserved for Future Use

CACI 1820 Damages

CACI 1821 Damages Under Civil Code Section 3344

CACI 1822-CACI 1899 Reserved for Future Use

CACI VF-1800 Privacy--Intrusion Into Private Affairs

CACI VF-1801 Privacy--Public Disclosure of Private Facts

CACI VF-1802 Privacy--False Light

CACI VF-1803 Privacy--Appropriation of Name or Likeness

CACI VF-1804 Privacy--Use of Name or Likeness (Civ. Code, § 3344)

CACI VF-1805-CACI VF-1806 Reserved for Future Use

CACI VF-1807 Privacy--Recording of Confidential Information (Pen. Code, §§ 632, 637.2)

CACI VF-1808-CACI VF-1899 Reserved for Future Use



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CHAPTER 18 California Judicial Council Right of Privacy Instructions

3-18 California Forms of Jury Instruction Scope

Scope

SCOPE

This chapter contains the California Judicial Council's "Right of Privacy Series" of jury instructions [*CACI No. 1800 et seq.*]. The Judicial Council of California Civil Jury Instructions (CACI) included in this publication are the product of the Judicial Council of California Task Force on Jury Instructions, which are updated by the Judicial Council of California Advisory Committee on Civil Jury Instructions.

This chapter includes instructions on the following topics:

- Intrusion into private affairs [*CACI No. 1800*].
- Public disclosure of private facts [*CACI No. 1801*] and false light [*CACI No. 1802*].
- Appropriation and use of name or likeness [*CACI Nos. 1803, 1804A, 1804B*], and the First Amendment defense to appropriating or using name or likeness [*CACI No. 1805*].
- Affirmative defense to the constitutional right of privacy [*CACI No. 1807*].
- Stalking under *Civ. Code* § 1708.7 [*CACI No. 1808*].
- Recording of confidential information [*CACI No. 1809*].
- Damages [*CACI Nos. 1820, 1821*].

The defamation series also includes special verdict forms [*CACI Nos. VF-1800-VF-1804, VF-1807*].



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California Forms of Jury Instruction

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CHAPTER 18 California Judicial Council Right of Privacy Instructions

3-18 California Forms of Jury Instruction CACI 1800

CACI 1800 Intrusion Into Private Affairs

[*Name of plaintiff*] **claims that** [*name of defendant*] **violated** [his/her] **right to privacy. To establish this claim, [**
name of plaintiff **] must prove all of the following:**

- 1. That** [*name of plaintiff*] **had a reasonable expectation of privacy in** [*specify place or other circumstance*];
- 2. That** [*name of defendant*] **intentionally intruded in** [*specify place or other circumstance*];
- 3. That** [*name of defendant*]'s **intrusion would be highly offensive to a reasonable person;**
- 4. That** [*name of plaintiff*] **was harmed; and**
- 5. That** [*name of defendant*]'s **conduct was a substantial factor in causing** [*name of plaintiff*]'s **harm.**

In deciding whether [*name of plaintiff*] **had a reasonable expectation of privacy in** [*specify place or other circumstance*], **you should consider, among other factors, the following:**

- (a) The identity of** [*name of defendant*];
- (b) The extent to which other persons had access to** [*specify place or other circumstance*] **and could see or hear** [*name of plaintiff*]; **and**
- (c) The means by which the intrusion occurred.**

In deciding whether an intrusion is highly offensive to a reasonable person, you should consider, among other factors, the following:

- (a) The extent of the intrusion;**
- (b) [*Name of defendant*]'s motives and goals; and**
- (c) The setting in which the intrusion occurred.**

New September 2003; Revised June 2010

Directions for Use

If the plaintiff is asserting more than one privacy right, give an introductory instruction stating that a person's right to privacy can be violated in more than one way and listing the legal theories under which the plaintiff is suing.

Sources and Authority

■ "Seventy years after Warren and Brandeis proposed a right to privacy, Dean William L. Prosser analyzed the case law development of the invasion of privacy tort, distilling four distinct kinds of activities violating the privacy protection and giving rise to tort liability: (1) intrusion into private matters; (2) public disclosure of private facts; (3) publicity placing a person in a false light; and (4) misappropriation of a person's name or likeness ... Prosser's classification was adopted by the Restatement Second of Torts in sections 652A-652E. California common law has generally followed Prosser's classification of privacy interests as embodied in the Restatement." (*Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 24 [26 Cal.Rptr.2d 834, 865 P.2d 633] .)

■ The tort of intrusion "encompasses unconsented-to physical intrusion into the home, hospital room or other place the privacy of which is legally recognized, as well as unwarranted sensory intrusions such as eavesdropping, wiretapping, and visual or photographic spying." (*Shulman v. Group W Productions, Inc.* (1998) 18 Cal.4th 200, 230 [74 Cal.Rptr.2d 843, 955 P.2d 469] , internal citation omitted.)

■ The right of privacy was first recognized in California in the case of *Melvin v. Reid* (1931) 112 Cal.App. 285, 291 [297 P. 91] . The court found a legal foundation for the tort in the right to pursue and obtain happiness found in *article 1, section 1 of the California Constitution*.

■ "The foregoing arguments have been framed throughout this action in terms of both the common law and the state Constitution. These two sources of privacy protection 'are not unrelated' under California law. (*Shulman, supra*, 18 Cal.4th 200, 227; accord, *Hill, supra*, 7 Cal.4th 1, 27; but see *Katzberg v. Regents of University of California* (2002) 29 Cal.4th 300, 313, fn. 13 [127 Cal.Rptr.2d 482, 58 P.3d 339] [suggesting it is an open question whether the state constitutional privacy provision, which is otherwise self-executing and serves as the basis for injunctive relief, can also provide direct and sole support for a damages claim].)" (*Hernandez v. Hillsides, Inc.* (2009) 47 Cal.4th 272, 286 [97 Cal.Rptr.3d 274, 211 P.3d 1063] .)

■ "[W]e will assess the parties' claims and the undisputed evidence under the rubric of both the common law and constitutional tests for establishing a privacy violation. Borrowing certain shorthand

language from *Hill, supra*, 7 Cal.4th 1, which distilled the largely parallel elements of these two causes of action, we consider (1) the nature of any intrusion upon reasonable expectations of privacy, and (2) the offensiveness or seriousness of the intrusion, including any justification and other relevant interests." (*Hernandez, supra*, 47 Cal.4th at p. 288 .)

- The element of intrusion "is not met when the plaintiff has merely been observed, or even photographed or recorded, in a public place. Rather, 'the plaintiff must show the defendant penetrated some zone of physical or sensory privacy surrounding, or obtained unwanted access to data about, the plaintiff.' " (*Sanders v. American Broadcasting Co.* (1999) 20 Cal.4th 907, 914-915 [85 Cal.Rptr.2d 909, 978 P.2d 67] , internal citations omitted.)

- "As to the first element of the common law tort, the defendant must have 'penetrated some zone of physical or sensory privacy ... or obtained unwanted access to data' by electronic or other covert means, in violation of the law or social norms. In either instance, the expectation of privacy must be 'objectively reasonable.' In *Sanders* [*supra*, at p. 907] ... , this court linked the reasonableness of privacy expectations to such factors as (1) the identity of the intruder, (2) the extent to which other persons had access to the subject place, and could see or hear the plaintiff, and (3) the means by which the intrusion occurred." (*Hernandez, supra*, 47 Cal.4th at pp. 286-287 .)

- The plaintiff does not have to prove that he or she had a "complete expectation of privacy": "Privacy for purposes of the intrusion tort must be evaluated with respect to the identity of the alleged intruder and the nature of the intrusion." (*Sanders, supra*, 20 Cal.4th at pp. 917-918 .)

- "The second common law element essentially involves a 'policy' determination as to whether the alleged intrusion is 'highly offensive' under the particular circumstances. Relevant factors include the degree and setting of the intrusion, and the intruder's motives and objectives. Even in cases involving the use of photographic and electronic recording devices, which can raise difficult questions about covert surveillance, 'California tort law provides no bright line on ["offensiveness"]'; each case must be taken on its facts.' " (*Hernandez, supra*, 47 Cal. 4th at p. 287 , internal citations omitted.)

- "While what is 'highly offensive to a reasonable person' suggests a standard upon which a jury would properly be instructed, there is a preliminary determination of 'offensiveness' which must be made by the court in discerning the existence of a cause of action for intrusion. ... A court determining the existence of 'offensiveness' would consider the degree of intrusion, the context, conduct and circumstances surrounding the intrusion as well as the intruder's motives and objectives, the setting into which he intrudes, and the expectations of those whose privacy is invaded." (*Miller v. National Broadcasting Co.* (1986) 187 Cal.App.3d 1463, 1483-1484 [232 Cal.Rptr. 668] .)

- "Plaintiffs must show more than an intrusion upon reasonable privacy expectations. Actionable invasions of privacy also must be 'highly offensive' to a reasonable person, and 'sufficiently serious' and unwarranted as to constitute an 'egregious breach of the social norms.' " (*Hernandez, supra*, 47 Cal.4th at p. 295 , internal citation omitted.)

- "[L]iability under the intrusion tort requires that the invasion be highly offensive to a reasonable person, considering, among other factors, the motive of the alleged intruder." (*Sanders, supra*, 20 Cal.4th at p. 911 , internal citations omitted.)

- Damages flowing from an invasion of privacy "logically would include an award for mental suffering and anguish." (*Miller, supra*, 187 Cal.App.3d at p. 1484 , citing *Fairfield v. American Photocopy Equipment Co.* (1955) 138 Cal.App.2d 82 [291 P.2d 194] .)

■ Related statutory actions can be brought for stalking (*Civ. Code*, § 1708.7), invasion of privacy to capture physical impression (*Civ. Code*, § 1708.8), and eavesdropping and wiretapping (*Pen. Code*, § 637.2). *Civil Code* section 1708.8 was enacted in 1998 as an anti-paparazzi measure. To date there are no reported cases based on this statute.

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 651, 652, 656-659

6 Witkin, Summary of California Law (10th ed. 2005) Torts, § 1704

4 Levy et al., *California Torts*, Ch. 46, *Invasion of Privacy*, § 46.02 (Matthew Bender)

37 *California Forms of Pleading and Practice*, Ch. 429, *Privacy*, § 429.16 (Matthew Bender)

18 *California Points and Authorities*, Ch. 183, *Privacy: State Constitutional Rights*, § 183.30 (Matthew Bender)

1 *California Civil Practice: Torts* (Thomson West) § 20:8

Publisher's Notes

This instruction replaces BAJI No. 7.20.

The court in *Marich v. MGM/UA Telecommunications, Inc.* (2003) 113 Cal. App. 4th 415, 421 n3, 422, 7 Cal. Rptr. 3d 60, discussed the intent element of the tort of intrusion into private affairs by noting that the civil jury instruction as given had since been rewritten, and that the instruction now provides a dual definition of intent for general use in intentional torts. This definition is based on the Restatement (Second of Torts), § 8A, in which intent denotes "that the actor desires to cause consequences of his act, or that he believes that the consequences are substantially certain to result from it." (Italics added.)

LexisNexis Matthew Bender Expert Practice Tip--Use CACI Instructions: There are more complaints of intrusion into private affairs by public celebrities and individuals being filed these days. The CACI instructions are very clear on the standards and should ably assist both the litigator and the jury. By *Dona Cohn-Payne*

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsIntentional TortsInvasion of PrivacyIntrusionGeneral OverviewTortsIntentional TortsInvasion of PrivacyIntrusionElementsTortsIntentional TortsInvasion of PrivacyIntrusionRemedies



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California Forms of Jury Instruction

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CHAPTER 18 California Judicial Council Right of Privacy Instructions

3-18 California Forms of Jury Instruction CACI 1801

CACI 1801 Public Disclosure of Private Facts

[*Name of plaintiff*] **claims that [*name of defendant*] violated [his/her] right to privacy. To establish this claim, [*name of plaintiff*] must prove all of the following:**

- 1. That [*name of defendant*] publicized private information concerning [*name of plaintiff*];**
- 2. That a reasonable person in [*name of plaintiff*]'s position would consider the publicity highly offensive;**
- 3. That [*name of defendant*] knew, or acted with reckless disregard of the fact, that a reasonable person in [*name of plaintiff*]'s position would consider the publicity highly offensive;**
- 4. That the private information was not of legitimate public concern [or did not have a substantial connection to a matter of legitimate public concern];**
- 5. That [*name of plaintiff*] was harmed; and**
- 6. That [*name of defendant*]'s conduct was a substantial factor in causing [*name of plaintiff*]'s harm.**

In deciding whether the information was a matter of legitimate public concern, you should consider, among other factors, the following:

- (a) The social value of the information;**
- (b) The extent of the intrusion into [*name of plaintiff*]'s privacy; [and]**

(c) Whether [name of plaintiff] consented to the publicity explicitly or by voluntarily seeking public attention or a public office; [and]

(d) [Insert other applicable factor].

[In deciding whether [name of defendant] publicized the information, you should determine whether it was made public either by communicating it to the public at large or to so many people that the information was substantially certain to become public knowledge.]

New September 2003

Directions for Use

If the plaintiff is asserting more than one privacy right, give an introductory instruction stating that a person's right to privacy can be violated in more than one way and listing the legal theories under which the plaintiff is suing.

Comment (a) to *Restatement Second of Torts*, section 652D states that "publicity" "means that the matter is made public, by communicating it to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge." This point has been placed in brackets because it may not be an issue in every case.

Sources and Authority

■ "[T]he allegations involve a public disclosure of private facts. The elements of this tort are ' "(1) public disclosure (2) of a private fact (3) which would be offensive and objectionable to the reasonable person and (4) which is not of legitimate public concern." ' The absence of any one of these elements is a complete bar to liability." (*Moreno v. Hanford Sentinel, Inc.* (2009) 172 Cal.App.4th 1125, 1129-1130 [91 Cal.Rptr.3d 858] , internal citations omitted.)

■ *Restatement Second of Torts*, section 652D provides:

One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that

(a) would be highly offensive to a reasonable person, and

(b) is not of legitimate concern to the public.

■ "California common law has generally followed Prosser's classification of privacy interests as embodied in the Restatement." (*Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 24 [26 Cal.Rptr.2d 834, 865 P.2d 633] , internal citation omitted.)

■ "Generally speaking, matter which is already in the public domain is not private, and its publication is protected." (*Diaz v. Oakland Tribune* (1983) 139 Cal.App.3d 118, 131 [188 Cal.Rptr. 762] , internal citations omitted.) However, "matter which was once of public record may be protected as private facts where disclosure of that information would not be newsworthy." (*Id.* at p. 132 .)

3-18 California Forms of Jury Instruction CACI 1801

■ Because of the right to freedom of speech, the Supreme Court has stated: "[W]e find it reasonable to require a plaintiff to prove, in each case, that the publisher invaded his privacy with reckless disregard for the fact that reasonable men would find the invasion highly offensive." (*Briscoe v. Reader's Digest Assn., Inc.* (1971) 4 Cal.3d 529, 542-543 [93 Cal.Rptr. 866, 483 P.2d 34] .)

■ In *Johnson v. Harcourt, Brace, Jovanovich, Inc.* (1974) 43 Cal.App.3d 880, 891, fn. 11 [118 Cal.Rptr. 370] , the court observed: "If a jury finds that a publication discloses private facts which are 'highly offensive and injurious to the reasonable man' [citation] then it would *inter alia* also satisfy the reckless disregard requirement."

■ "*Diaz* ... expressly makes the lack of newsworthiness part of the plaintiff's case in a private facts action. ... We therefore agree with defendants that under California common law the dissemination of truthful, newsworthy material is not actionable as a publication of private facts." (*Shulman v. Group W Productions, Inc.* (1998) 18 Cal.4th 200, 215 [74 Cal.Rptr.2d 843, 955 P.2d 469] , internal citations omitted.)

■ "In the matter before us, however, there is no indication that any issue of public interest or freedom of the press was involved. ' "In determining what is a matter of legitimate public interest, account must be taken of the customs and conventions of the community; and in the last analysis what is proper becomes a matter of the community mores. The line is to be drawn when the publicity ceases to be the giving of information to which the public is entitled, and becomes a morbid and sensational prying into private lives for its own sake, with which a reasonable member of the public, with decent standards, would say that he had no concern." ' Put another way, morbid and sensational eavesdropping or gossip 'serves no legitimate public interest and is not deserving of protection. [Citations.]' " (*Catsouras v. Department of California Highway Patrol* (2010) 181 Cal.App.4th 856, 874 [104 Cal.Rptr.3d 352] , internal citation omitted.)

■ "Almost any truthful commentary on public officials or public affairs, no matter how serious the invasion of privacy, will be privileged." (*Briscoe, supra*, 4 Cal.3d at p. 535, fn. 5 .)

■ Courts have devised a three-part test for evaluating newsworthiness: " '[1] the social value of the facts published, [2] the depth of the article's intrusion into ostensibly private affairs, and [3] the extent to which the party voluntarily acceded to a position of public notoriety.' " (*Briscoe, supra*, 4 Cal.3d at p. 541 , internal citations omitted.)

■ "[T]he right of privacy is purely personal. It cannot be asserted by anyone other than the person whose privacy has been invaded." (*Moreno, supra*, 172 Cal.App.4th at p. 1131 .)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 664-667

4 Levy et al., *California Torts*, Ch. 46, *Invasion of Privacy*, § 46.03 (Matthew Bender)

37 *California Forms of Pleading and Practice*, Ch. 429, *Privacy*, § 429.32 (Matthew Bender)

18 *California Points and Authorities*, Ch. 184, *Privacy: Invasion of Privacy*, § 184.20 (Matthew Bender)

1 California Civil Practice: Torts (Thomson West) §§ 20:1-20:2

Publisher's Notes

This instruction covers issues presented in BAJI No. 7.21.

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsIntentional TortsInvasion of PrivacyPublic Disclosure of Private FactsGeneral OverviewTortsIntentional
TortsInvasion of PrivacyPublic Disclosure of Private FactsDefensesTortsIntentional TortsInvasion of PrivacyPublic
Disclosure of Private FactsElements



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California Forms of Jury Instruction

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CHAPTER 18 California Judicial Council Right of Privacy Instructions

3-18 California Forms of Jury Instruction CACI 1802

CACI 1802 False Light

[*Name of plaintiff*] **claims that [*name of defendant*] violated [his/her] right to privacy. To establish this claim, [*name of plaintiff*] must prove all of the following:**

1. That [*name of defendant*] publicized information or material that showed [*name of plaintiff*] in a false light;

2. That the false light created by the publication would be highly offensive to a reasonable person in [*name of plaintiff*]'s position;

3. [That there is clear and convincing evidence that [*name of defendant*] knew the publication would create a false impression about [*name of plaintiff*] or acted with reckless disregard for the truth;]

[*or*]

[That [*name of defendant*] was negligent in determining the truth of the information or whether a false impression would be created by its publication;]

4. [That [*name of plaintiff*] was harmed; and]

[*or*]

[That [*name of plaintiff*] sustained harm to [his/her] property, business, profession, or occupation [including money spent as a result of the statement(s)]; and]

5. That [name of defendant]'s conduct was a substantial factor in causing [name of plaintiff]'s harm.

[In deciding whether [name of defendant] publicized the information or material, you should determine whether it was made public either by communicating it to the public at large or to so many people that the information or material was substantially certain to become public knowledge.]

New September 2003

Directions for Use

If the plaintiff is asserting more than one privacy right, give an introductory instruction stating that a person's right to privacy can be violated in more than one way and listing the legal theories under which the plaintiff is suing.

The bracketed options for element 3 should be used in the alternative, depending on whether the conduct involves a matter of public concern.

Comment (a) to *Restatement Second of Torts*, section 652D states that "publicity" "means that the matter is made public, by communicating it to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge." This point has been placed in brackets because it may not be an issue in every case.

As reflected in the citations below, false light claims are subject to the same constitutional protections that apply to defamation claims. Thus, a knowing violation or reckless disregard for the plaintiff's rights is required where the plaintiff is a public figure or the subject matter of the communication is a matter of public concern. If a false light claim is combined with a defamation or libel claim, the standard applied in the instructions should be equivalent.

If plaintiff has combined a false light claim with a claim of defamation or libel, the court should consider whether separate instructions on each claim should be given in light of *Eisenberg v. Alameda Newspapers* (1999) 74 Cal.App.4th 1359, 1385, fn. 13 [88 Cal.Rptr.2d 802] and *Briscoe v. Reader's Digest Assn.* (1971) 4 Cal.3d 529, 543 [93 Cal.Rptr. 866, 483 P.2d 34] .

Sources and Authority

- *Restatement Second of Torts*, section 652E provides:

One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy, if
(a) the false light in which the other was placed would be highly offensive to a reasonable person, and

(b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.

- "California common law has generally followed Prosser's classification of privacy interests as embodied in the Restatement." (*Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 24 [26 Cal.Rptr.2d 834, 865 P.2d 633] , internal citation omitted.)

■ "In order to be actionable, the false light in which the plaintiff is placed must be highly offensive to a reasonable person. Although it is not necessary that the plaintiff be defamed, publicity placing one in a highly offensive false light will in most cases be defamatory as well." (*Fellows v. National Enquirer* (1986) 42 Cal.3d 234, 238-239 [228 Cal.Rptr. 215, 721 P.2d 97] , internal citation omitted.)

■ "When a false light claim is coupled with a defamation claim, the false light claim is essentially superfluous, and stands or falls on whether it meets the same requirements as the defamation cause of action." (*Eisenberg, supra*, 74 Cal.App.4th at p. 1385, fn. 13 , internal citations omitted.)

■ "[A] 'false light' cause of action 'is in substance equivalent to ... [a] libel claim, and should meet the same requirements of the libel claim ... including proof of malice.' " (*Briscoe, supra*, 4 Cal.3d at p. 543 , internal citation omitted.)

■ "The *New York Times* decision defined a zone of constitutional protection within which one could publish concerning a public figure without fear of liability. That constitutional protection does not depend on the label given the stated cause of action; it bars not only actions for defamation, but also claims for invasion of privacy." (*Reader's Digest Assn., Inc. v. Superior Court* (1984) 37 Cal.3d 244, 265 [208 Cal.Rptr. 137, 690 P.2d 610] , internal citations omitted.)

■ In *Time, Inc. v. Hill* (1967) 385 U.S. 374 [87 S.Ct. 534, 17 L.Ed.2d 456] , the Court held that the *New York Times v. Sullivan* malice standard applied to a privacy action that was based on a "false light" statute where the matter involved a public figure. Given the similarities between defamation and false light actions, it appears likely that the negligence standard for private figure defamation plaintiffs announced in *Gertz v. Robert Welch, Inc.* (1974) 418 U.S. 323 [94 S.Ct. 2997, 41 L.Ed.2d 789] should apply to private figure false light plaintiffs.

■ Plaintiffs must comply with the retraction statute (*Civ. Code*, § 48a) to recover more than special damages in a false light cause of action. (*Briscoe, supra*, 4 Cal.3d at p. 543 .)

■ "We hold that whenever a claim for false light invasion of privacy is based on language that is defamatory within the meaning of section 45a, pleading and proof of special damages are required." (*Fellows, supra*, 42 Cal.3d at p. 251 .)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 673-675

4 Levy et al., *California Torts*, Ch. 46, *Invasion of Privacy*, § 46.04 (Matthew Bender)

37 *California Forms of Pleading and Practice*, Ch. 429, *Privacy*, § 429.33 (Matthew Bender)

18 *California Points and Authorities*, Ch. 184, *Privacy: Invasion of Privacy*, § 184.21 (Matthew Bender)

1 *California Civil Practice: Torts* (Thomson West) §§ 20:12-20:15

Publisher's Notes

This instruction replaces BAJI No. 7.22.

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsIntentional TortsDefamationGeneral OverviewTortsIntentional TortsInvasion of PrivacyFalse Light

PrivacyGeneral OverviewTortsIntentional TortsInvasion of PrivacyFalse Light PrivacyDefensesTortsIntentional
TortsInvasion of PrivacyFalse Light PrivacyElementsTortsIntentional TortsInvasion of PrivacyFalse Light
PrivacyRemedies



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CHAPTER 18 California Judicial Council Right of Privacy Instructions

3-18 California Forms of Jury Instruction CACI 1803

CACI 1803 Appropriation of Name or Likeness

[*Name of plaintiff*] **claims that [*name of defendant*] violated [his/her] right to privacy. To establish this claim, [*name of plaintiff*] must prove all of the following:**

- 1. That [*name of defendant*] used [*name of plaintiff*]'s name, likeness, or identity without [his/her] permission;**
- 2. That [*name of defendant*] gained a commercial benefit [or some other advantage] by using [*name of plaintiff*]'s name, likeness, or identity;**
- 3. That [*name of plaintiff*] was harmed; [and]**
- 4. That [*name of defendant*]'s conduct was a substantial factor in causing [*name of plaintiff*]'s harm; [and]**
- [5. That the privacy interests of [*name of plaintiff*] outweigh the public interest served by [*name of defendant*]'s use of [his/her] name, likeness, or identity.**

In deciding whether [*name of plaintiff*]'s privacy interest outweighs the public's interest, you should consider where the information was used, the extent of the use, the public interest served by the use, and the seriousness of the interference with [*name of plaintiff*]'s privacy.]

New September 2003

Directions for Use

If the plaintiff is asserting more than one privacy right, give an introductory instruction stating that a person's right to privacy can be violated in more than one way and listing the legal theories under which the plaintiff is suing.

If the alleged "benefit" is not commercial, the judge will need to determine whether the advantage gained by the defendant qualifies as "some other advantage."

If suing under both the common law and *Civil Code section 3344*, the judge may need to explain that a person's voice, for example, may qualify as "identity" if the voice is sufficient to cause listeners to identify the plaintiff. The two causes of action overlap, and the same conduct should be covered by both.

The last bracketed element and the last bracketed paragraph are appropriate in cases that implicate a defendant's First Amendment right to freedom of expression and freedom of the press. (See *Gionfriddo v. Major League Baseball* (2001) 94 Cal.App.4th 400, 409-410 [114 Cal.Rptr.2d 307] .)

Sources and Authority

- "A common law cause of action for appropriation of name or likeness may be pleaded by alleging (1) the defendant's use of the plaintiff's identity; (2) the appropriation of plaintiff's name or likeness to defendant's advantage, commercially or otherwise; (3) lack of consent; and (4) resulting injury." (*Eastwood v. Superior Court* (1983) 149 Cal.App.3d 409, 417 [198 Cal.Rptr. 342] , internal citations omitted.)

- *Section 652C of the Restatement Second of Torts* provides: "One who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of his privacy."

- "California common law has generally followed Prosser's classification of privacy interests as embodied in the Restatement." (*Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 24 [26 Cal.Rptr.2d 834, 865 P.2d 633] , internal citation omitted.)

- "[T]he appearance of an 'endorsement' is not the *sine qua non* of a claim for commercial appropriation." (*Eastwood, supra*, 149 Cal.App.3d at p. 419 .)

- "[N]o cause of action will lie for the '[p]ublication of matters in the public interest, which rests on the right of the public to know and the freedom of the press to tell it.' " (*Montana v. San Jose Mercury News* (1995) 34 Cal.App.4th 790, 793 [40 Cal.Rptr.2d 639] , internal citation omitted.)

- "The difficulty in defining the boundaries of the right, as applied in the publication field, is inherent in the necessity of balancing the public interest in the dissemination of news, information and education against the individuals' interest in peace of mind and freedom from emotional disturbances. When words relating to or actual pictures of a person or his name are published, the circumstances may indicate that public interest is predominant. Factors deserving consideration may include the medium of publication, the extent of the use, the public interest served by the publication, and the seriousness of the interference with the person's privacy." (*Gill v. Curtis Publishing Co.* (1952) 38 Cal.2d 273, 278-279 [239 P.2d 630] .)

- "Even if each of these elements is established, however, the common law right does not provide relief for every publication of a person's name or likeness. The First Amendment requires that the right to be protected from unauthorized publicity 'be balanced against the public interest in the dissemination of

news and information consistent with the democratic processes under the constitutional guaranties of freedom of speech and of the press.' " (*Gionfriddo, supra*, 94 Cal.App.4th at pp. 409-410 , internal citations and footnote omitted.)

■ "Public interest attaches to people who by their accomplishments or mode of living create a bona fide attention to their activities." (*Dora v. Frontline Video, Inc.* (1993) 15 Cal.App.4th 536, 542 [18 Cal.Rptr.2d 790] , internal citation omitted.)

■ Civil Code section 3344 complements the common law tort of appropriation. (*Eastwood, supra*, 149 Cal.App.3d at pp. 416-417 .)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 676-678

4 Levy et al., *California Torts*, Ch. 46, *Invasion of Privacy*, § 46.05 (Matthew Bender)

37 *California Forms of Pleading and Practice*, Ch. 429, *Privacy*, §§ 429.35, 429.36 (Matthew Bender)

18 *California Points and Authorities*, Ch. 184, *Privacy: Invasion of Privacy*, § 184.22 (Matthew Bender)

1 California Civil Practice: Torts (Thomson West) § 20:16

Publisher's Notes

This instruction replaces BAJI No. 7.23.

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsIntentional TortsInvasion of PrivacyGeneral OverviewTortsIntentional TortsInvasion of PrivacyAppropriationGeneral OverviewTortsIntentional TortsInvasion of PrivacyAppropriationElements



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CHAPTER 18 California Judicial Council Right of Privacy Instructions

3-18 California Forms of Jury Instruction CACI 1804A

CACI 1804A Use of Name or Likeness (Civ. Code, § 3344)

[*Name of plaintiff*] **claims that** [*name of defendant*] **violated** [his/her] **right to privacy. To establish this claim, [**
name of plaintiff **]** **must prove all of the following:**

1. **That** [*name of defendant*] **knowingly used** [*name of plaintiff*]'s
 [name/voice/signature/photograph/likeness] [on merchandise/ [or] to advertise or sell [*describe*
what is being advertised or sold]];
2. **That the use did not occur in connection with a news, public affairs, or sports broadcast or
 account, or with a political campaign;**
3. **That** [*name of defendant*] **did not have** [*name of plaintiff*]'s **consent;**
4. **That** [*name of defendant*]'s **use of** [*name of plaintiff*]'s
 [name/voice/signature/photograph/likeness] **was directly connected to** [*name of defendant*]'s
commercial purpose;
5. **That** [*name of plaintiff*] **was harmed; and**
6. **That** [*name of defendant*]'s **conduct was a substantial factor in causing** [*name of plaintiff*]'s
harm.

Derived from former CACI No. 1804 April 2008; Revised April 2009

Directions for Use

3-18 California Forms of Jury Instruction CACI 1804A

If the plaintiff is asserting more than one privacy right, give an introductory instruction stating that a person's right to privacy can be violated in more than one way and listing the legal theories under which the plaintiff is suing. One's name and likeness are protected under both the common law and under *Civil Code* section 3344. As the statutory remedy is cumulative (*Civ. Code*, § 3344(g)), both this instruction and *CACI No. 1803, Appropriation of Name or Likeness*, which sets forth the common-law cause of action, will normally be given.

Different standards apply if the use is in connection with a news, public affairs, or sports broadcast or account, or with a political campaign. (See *Civ. Code*, § 3344(d); *Eastwood v. Superior Court* (1983) 149 Cal.App.3d 409, 421-426 [198 Cal.Rptr. 342] .) The plaintiff bears the burden of proving the nonapplicability of these exceptions. (*Gionfriddo v. Major League Baseball* (2001) 94 Cal.App.4th 400, 416-417 [114 Cal.Rptr.2d 307] .) Element 2 may be omitted if there is no question of fact with regard to this issue. See *CACI No. 1804B, Use of Name or Likeness--Use in Connection With News, Public Affairs, or Sports Broadcast or Account, or Political Campaign*, for an instruction to use if one of the exceptions of *Civil Code* section 3344(d) applies.

If plaintiff alleges that the use was not covered by *Civil Code* section 3344(d) (e.g., not a "news" account) but that even if it were covered it is not protected under the standards of *Eastwood*, then both this instruction and *CACI No. 1804B* should be given in the alternative. In that case, it should be made clear to the jury that if the plaintiff fails to prove the inapplicability of *Civil Code* section 3344(d) as set forth in element 2, the claim is still viable if the plaintiff proves all the elements of *CACI No. 1804B*.

Note that a plaintiff is entitled to the sum of \$750 under *Civil Code* section 3344(a) even if actual damages are not proven. (See *Miller v. Collectors Universe, Inc.* (2008) 159 Cal.App.4th 988, 1008 [72 Cal.Rptr.3d 194] [claim for 14,060 misappropriations of plaintiff's name under section 3344(a) constitutes single cause of action for which statutory damages are \$750].)

Sources and Authority

- *Civil Code* section 3344(a) provides: "Any person who knowingly uses another's name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods or services, without such person's prior consent, or, in the case of a minor, the prior consent of his parent or legal guardian, shall be liable for any damages sustained by the person or persons injured as a result thereof. In addition, in any action brought under this section, the person who violated the section shall be liable to the injured party or parties in an amount equal to the greater of seven hundred fifty dollars (\$750) or the actual damages suffered by him or her as a result of the unauthorized use, and any profits from the unauthorized use that are attributable to the use and are not taken into account in computing the actual damages. In establishing such profits, the injured party or parties are required to present proof only of the gross revenue attributable to such use, and the person who violated this section is required to prove his or her deductible expenses. Punitive damages may also be awarded to the injured party or parties. The prevailing party in any action under this section shall also be entitled to attorney's fees and costs."

- *Civil Code* section 3344(d) provides: "For purposes of this section, a use of a name, voice, signature, photograph, or likeness in connection with any news, public affairs, or sports broadcast or account, or any political campaign, shall not constitute a use for which consent is required under subdivision (a)."

- *Civil Code* section 3344 is "a commercial appropriation statute which complements the common law tort of appropriation." (*KNB Enters. v. Matthews* (2000) 78 Cal.App.4th 362, 366-367 [92 Cal.Rptr.2d

713] .)

■ "[C]alifornia's appropriation statute is not limited to celebrity plaintiffs." (*KNB Enters., supra*, 78 *Cal.App.4th* at p. 367 .)

■ "The differences between the common law and statutory actions are: (1) Section 3344, subdivision (a) requires a knowing use whereas under case law, mistake and inadvertence are not a defense against commercial appropriation; and (2) Section 3344, subdivision (g) expressly provides that its remedies are cumulative and in addition to any provided for by law." (*Eastwood, supra*, 149 *Cal.App.3d* at p. 417, *fn.* 6 , internal citation omitted.)

■ In addition to the common law elements, a party seeking the statutory remedy provided in section 3344 must also allege "a knowing use of the plaintiff's name, photograph or likeness" and "a 'direct' connection must be alleged between the use and the commercial purpose." (*Eastwood, supra*, 149 *Cal.App.3d* at pp. 417-418 , internal citation omitted; see *Johnson v. Harcourt, Brace, Jovanovich, Inc.* (1974) 43 *Cal.App.3d* 880, 895 [118 *Cal.Rptr.* 370] .)

■ "[T]he single-publication rule as codified in [Civil Code] section 3425.3 applies, in general, to a cause of action for unauthorized commercial use of likeness." (*Christoff v. Nestle USA, Inc.* (2009) 47 *Cal.4th* 468, 476 [97 *Cal.Rptr.3d* 798, 213 *P.3d* 132] .)

■ "Any facts which tend to disprove one of the allegations raised in a complaint may be offered in the defendant's answer based upon a general denial and need not be raised by affirmative defense. ... Throughout this litigation plaintiffs have borne the burden of establishing that their names and likenesses were used in violation of section 3344, and this burden has always required proof that the disputed uses fell outside the exemptions granted by subdivision (d)." (*Gionfriddo, supra*, 94 *Cal.App.4th* at pp. 416-417 , internal citation omitted.)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 681-683

4 Levy et al., *California Torts*, Ch. 46, *Invasion of Privacy*, § 46.05 (Matthew Bender)

37 *California Forms of Pleading and Practice*, Ch. 429, *Privacy*, §§ 429.35 -429.36 (Matthew Bender)

18 *California Points and Authorities*, Ch. 184, *Privacy: Invasion of Privacy*, §§ 184.22 -184.24 (Matthew Bender)

1 *California Civil Practice: Torts* (Thomson West) § 20:17

Publisher's Notes

This instruction covers issues presented in BAJI No. 7.24.



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California Forms of Jury Instruction

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CHAPTER 18 California Judicial Council Right of Privacy Instructions

3-18 California Forms of Jury Instruction CACI 1804B

CACI 1804B Use of Name or Likeness--Use in Connection With News, Public Affairs, or Sports Broadcast or Account, or Political Campaign (Civ. Code, § 3344(d))

[*Name of plaintiff*] **claims that [*name of defendant*] violated [his/her] right to privacy. To establish this claim, [*name of plaintiff*] must prove all of the following:**

- 1. That [*name of defendant*] knowingly used [*name of plaintiff*]'s [name/voice/signature/photograph/likeness] [on merchandise/ [or] to advertise or sell [*describe what is being advertised or sold*]];**
- 2. That the use occurred in connection with a [[news/public affairs/sports] broadcast or account/political campaign];**
- 3. That the use contained false information;**
- 4. [*Use for public figure* : That [*name of defendant*] knew the [broadcast or account/campaign material] was false or that [he/she/it] acted with reckless disregard of its falsity;]**

[*or*]

[*Use for private individual* : **That [*name of defendant*] was negligent in determining the truth of the [broadcast or account/campaign material];**]

- 5. That [*name of defendant*]'s use of [*name of plaintiff*]'s [name/voice/signature/photograph/likeness] was directly connected to [*name of defendant*]'s commercial purpose;**

6. That [name of plaintiff] was harmed; and

7. That [name of defendant]'s conduct was a substantial factor in causing [name of plaintiff]'s harm.

Derived from former CACI No. 1804 April 2008; Revised April 2009

Directions for Use

Give this instruction if the plaintiff's name or likeness has been used in connection with a news, public affairs, or sports broadcast or account, or with a political campaign. In this situation, consent is not required. (*Civ. Code*, § 3344(d).) However, in *Eastwood v. Superior Court*, the court held that the constitutional standards under defamation law apply under section 3344(d) and that the statute as it applies to news does not provide protection for a knowing or reckless falsehood. (*Eastwood v. Superior Court* (1983) 149 Cal.App.3d 409, 421-426 [198 Cal.Rptr. 342] .) Under defamation law, this standard applies only to public figures, and private individuals may sue for negligent publication of defamatory falsehoods. (*Id.* at p. 424 .) Presumably, the same distinction between public figures and private individuals would apply under *Civil Code* section 3344(d). Element 4 provides for the standards established and suggested by *Eastwood*.

Give *CACI No. 1804A, Use of Name or Likeness*, if there is no issue whether one of the exceptions of *Civil Code* section 3344(d) applies. If plaintiff alleges that the use was not covered by subdivision (d) (e.g., not a "news" account) but that even if it were covered it is not protected under the standards of *Eastwood*, then both this instruction and *CACI No. 1804A* should be given in the alternative. In that case, it should be made clear to the jury that if the plaintiff fails to prove the inapplicability of *Civil Code* section 3344(d) as set forth element 2 of *CACI No. 1804A*, the claim is still viable if the plaintiff proves all the elements of this instruction.

If the plaintiff is asserting more than one privacy right, give an introductory instruction stating that a person's right to privacy can be violated in more than one way and listing the legal theories under which the plaintiff is suing. One's name and likeness are protected under both the common law and under *Civil Code* section 3344. As the statutory remedy is cumulative (*Civ. Code*, § 3344(g)), both this instruction and *CACI No. 1803, Appropriation of Name or Likeness*, which sets forth the common-law cause of action, will normally be given.

Note that a plaintiff is entitled to the sum of \$750 under *Civil Code* section 3344(a) even if actual damages are not proven. (See *Miller v. Collectors Universe, Inc.* (2008) 159 Cal.App.4th 988, 1008 [72 Cal.Rptr.3d 194] [claim for 14,060 misappropriations of plaintiff's name under section 3344(a) constitutes single cause of action for which statutory damages are \$750].)

Even though consent is not required, it may be an affirmative defense. *CACI No. 1721, Affirmative Defense--Consent* (to defamation), may be used in this situation.

Sources and Authority

- *Civil Code* section 3344(a) provides: "Any person who knowingly uses another's name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods or services,

without such person's prior consent, or, in the case of a minor, the prior consent of his parent or legal guardian, shall be liable for any damages sustained by the person or persons injured as a result thereof. In addition, in any action brought under this section, the person who violated the section shall be liable to the injured party or parties in an amount equal to the greater of seven hundred fifty dollars (\$750) or the actual damages suffered by him or her as a result of the unauthorized use, and any profits from the unauthorized use that are attributable to the use and are not taken into account in computing the actual damages. In establishing such profits, the injured party or parties are required to present proof only of the gross revenue attributable to such use, and the person who violated this section is required to prove his or her deductible expenses. Punitive damages may also be awarded to the injured party or parties. The prevailing party in any action under this section shall also be entitled to attorney's fees and costs."

- *Civil Code section 3344(d)* provides: "For purposes of this section, a use of a name, voice, signature, photograph, or likeness in connection with any news, public affairs, or sports broadcast or account, or any political campaign, shall not constitute a use for which consent is required under subdivision (a)."

- *Civil Code section 3344* is "a commercial appropriation statute which complements the common law tort of appropriation." (*KNB Enters. v. Matthews* (2000) 78 Cal.App.4th 362, 366-367 [92 Cal.Rptr.2d 713] .)

- "[C]alifornia's appropriation statute is not limited to celebrity plaintiffs." (*KNB Enters.*, *supra*, 78 Cal.App.4th at p. 367 .)

- "The differences between the common law and statutory actions are: (1) Section 3344, subdivision (a) requires a knowing use whereas under case law, mistake and inadvertence are not a defense against commercial appropriation; and (2) Section 3344, subdivision (g) expressly provides that its remedies are cumulative and in addition to any provided for by law." (*Eastwood*, *supra*, 149 Cal.App.3d at p. 417, fn. 6 , internal citation omitted.)

- In addition to the common law elements, a party seeking the statutory remedy provided in section 3344 must also allege "a knowing use of the plaintiff's name, photograph or likeness" and "a 'direct' connection must be alleged between the use and the commercial purpose." (*Eastwood*, *supra*, 149 Cal.App.3d at pp. 417-418 , internal citation omitted; see *Johnson v. Harcourt, Brace, Jovanovich, Inc.* (1974) 43 Cal.App.3d 880, 895 [118 Cal.Rptr. 370] .)

- "The spacious interest in an unfettered press is not without limitation. This privilege is subject to the qualification that it shall not be so exercised as to abuse the rights of individuals. Hence, in defamation cases, the concern is with defamatory lies masquerading as truth. Similarly, in privacy cases, the concern is with nondefamatory lies masquerading as truth. Accordingly, we do not believe that the Legislature intended to provide an exemption from liability for a knowing or reckless falsehood under the canopy of 'news.' We therefore hold that *Civil Code section 3344, subdivision (d)*, as it pertains to news, does not provide an exemption for a knowing or reckless falsehood." (*Eastwood*, *supra*, 149 Cal.App.3d at p. 426 , internal citations omitted.)

- The burden of proof as to knowing or reckless falsehood under *Civil Code section 3344(d)* is on the plaintiff. (See *Eastwood*, *supra*, 149 Cal.App.3d at p. 426 .)

- "[T]he single-publication rule as codified in [*Civil Code*] section 3425.3 applies, in general, to a cause of action for unauthorized commercial use of likeness." (*Christoff v. Nestle USA, Inc.* (2009) 47 Cal.4th 468, 476 [97 Cal.Rptr.3d 798, 213 P.3d 132] .)

■ "Any facts which tend to disprove one of the allegations raised in a complaint may be offered in the defendant's answer based upon a general denial and need not be raised by affirmative defense. ... Throughout this litigation plaintiffs have borne the burden of establishing that their names and likenesses were used in violation of section 3344, and this burden has always required proof that the disputed uses fell outside the exemptions granted by subdivision (d)." (*Gionfriddo v. Major League Baseball* (2001) 94 Cal.App.4th 400, 416-417 [114 Cal.Rptr.2d 307] , internal citation omitted.)

■ "We presume that the Legislature intended that the category of public affairs would include things that would not necessarily be considered news. Otherwise, the appearance of one of those terms in the subsection would be superfluous, a reading we are not entitled to give to the statute. We also presume that the term 'public affairs' was intended to mean something less important than news. Public affairs must be related to real-life occurrences." (*Dora v. Frontline Video, Inc.* (1993) 15 Cal.App.4th 536, 546 [18 Cal.Rptr.2d 790] , internal citations omitted.)

■ "[N]o cause of action will lie for the 'publication of matters in the public interest, which rests on the right of the public to know and the freedom of the press to tell it.' " (*Montana v. San Jose Mercury News* (1995) 34 Cal.App.4th 790, 793 [40 Cal.Rptr.2d 639] , internal citations omitted.)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 681-683

4 Levy et al., *California Torts, Ch. 46, Invasion of Privacy*, § 46.05 (Matthew Bender)

37 *California Forms of Pleading and Practice, Ch. 429, Privacy*, § 429.36 (Matthew Bender)

18 *California Points and Authorities, Ch. 184, Privacy: Invasion of Privacy*, § 184.35 (Matthew Bender)

1 California Civil Practice: Torts (Thomson West) § 20:17

Publisher's Notes

This instruction covers issues presented in BAJI No. 7.24.



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CHAPTER 18 California Judicial Council Right of Privacy Instructions

3-18 California Forms of Jury Instruction CACI 1805

CACI 1805 Affirmative Defense to Use or Appropriation of Name or Likeness--First Amendment (*Comedy III*)

[*Name of defendant*] **claims that [he/she] has not violated [*name of plaintiff*]'s right of privacy because the [*insert type of work, e.g., "picture"*] is protected by the First Amendment's guarantee of freedom of speech and expression. To succeed, [*name of defendant*] must prove either of the following:**

- 1. That the [*insert type of work, e.g., "picture"*] adds something new to [*name of plaintiff*]'s likeness, giving it a new expression, meaning, or message; or**
- 2. That the value of the [*insert type of work, e.g., "picture"*] does not result primarily from [*name of plaintiff*]'s fame.**

New September 2003; Revised October 2008

Directions for Use

This instruction assumes that the plaintiff is the celebrity whose likeness is the subject of the trial. This instruction will need to be modified if the plaintiff is not the actual celebrity.

Sources and Authority

- "In sum, when an artist is faced with a right of publicity challenge to his or her work, he or she may raise as affirmative defense that the work is protected by the First Amendment inasmuch as it contains significant transformative elements or that the value of the work does not derive primarily from the celebrity's fame." (*Comedy III Productions, Inc. v. Gary Saderup, Inc.* (2001) 25 Cal.4th 387, 407 [106 Cal.Rptr.2d 126, 21 P.3d 797] .)

■ "[C]ourts can often resolve the question as a matter of law simply by viewing the work in question and, if necessary, comparing it to an actual likeness of the person or persons portrayed. Because of these circumstances, an action presenting this issue is often properly resolved on summary judgment or, if the complaint includes the work in question, even demurrer." (*Winter v. DC Comics* (2003) 30 Cal.4th 881, 891-892 [134 Cal.Rptr.2d 634, 69 P.3d 473] , internal citation omitted.)

■ "Although surprisingly few courts have considered in any depth the means of reconciling the right of publicity and the First Amendment, we follow those that have in concluding that depictions of celebrities amounting to little more than the appropriation of the celebrity's economic value are not protected expression under the First Amendment." (*Comedy III Productions, Inc.*, *supra*, 25 Cal.4th at p. 400 .)

■ "Furthermore, in determining whether a work is sufficiently transformative, courts may find useful a subsidiary inquiry, particularly in close cases: does the marketability and economic value of the challenged work derive primarily from the fame of the celebrity depicted? If this question is answered in the negative, then there would generally be no actionable right of publicity. When the value of the work comes principally from some source other than the fame of the celebrity--from the creativity, skill, and reputation of the artist--it may be presumed that sufficient transformative elements are present to warrant First Amendment protection. If the question is answered in the affirmative, however, it does not necessarily follow that the work is without First Amendment protection--it may still be a transformative work." (*Comedy III Productions, Inc.*, *supra*, 25 Cal.4th at p. 407 .)

■ "As the Supreme Court has stated, the central purpose of the inquiry into this fair use factor 'is to see ... whether the new work merely "supersede[s] the objects" of the original creation, or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is "transformative." ' " (*Comedy III Productions, Inc.*, *supra*, 25 Cal.4th at p. 404 , internal citations omitted.)

■ "We emphasize that the transformative elements or creative contributions that require First Amendment protection are not confined to parody and can take many forms, from factual reporting to fictionalized portrayal, from heavy-handed lampooning to subtle social criticism." (*Comedy III Productions, Inc.*, *supra*, 25 Cal.4th at p. 406 .)

■ "This 'transformative use' defense poses 'what is essentially a balancing test between the First Amendment and the right of publicity.' " (*Hilton v. Hallmark Cards* (9th Cir. 2009) 580 F.3d 874, 889 .)

■ "The application of the defense, which the California Supreme Court based loosely on the intersection of the First Amendment and copyright liability, depends upon 'whether the celebrity likeness is one of the "raw materials" from which an original work is synthesized, or whether the depiction or imitation of the celebrity is the very sum and substance of the work in question.' In other words, '[w]e ask ... whether a product containing a celebrity's likeness is so transformed that it has become primarily the defendant's own expression rather than the celebrity's likeness. And when we use the word "expression," we mean expression of something other than the likeness of the celebrity.' '[U]nder [this] test,' yet another formulation cautions, 'when an artist's skill and talent is manifestly subordinated to the overall goal of creating a conventional portrait of a celebrity so as to commercially exploit his or her fame, then the artist's right of free expression is outweighed by the right of publicity.' " (*Hilton*, *supra*, 580 F.3d at p. 889 , footnote and internal citations omitted.)

■ "The distinction between parody and other forms of literary expression is irrelevant to the *Comedy*

III transformative test. It does not matter what precise literary category the work falls into. What matters is whether the work is transformative, not whether it is parody or satire or caricature or serious social commentary or any other specific form of expression." (*Winter, supra*, 30 Cal.4th at p. 891 .)

Secondary Sources

37 *California Forms of Pleading and Practice*, Ch. 429, *Privacy*, § 429.36 (Matthew Bender)

18 *California Points and Authorities*, Ch. 184, *Privacy: Invasion of Privacy*, § 184.38 (Matthew Bender)

Publisher's Notes

This instruction covers issues presented in BAJI Nos. 7.24.1 and 7.24.2.

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsIntentional TortsInvasion of PrivacyAppropriationGeneral OverviewTortsIntentional TortsInvasion of PrivacyAppropriationDefenses



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CHAPTER 18 California Judicial Council Right of Privacy Instructions

3-18 California Forms of Jury Instruction CACI 1806

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CACI 1806Reserved for Future Use



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CHAPTER 18 California Judicial Council Right of Privacy Instructions

3-18 California Forms of Jury Instruction CACI 1807

CACI 1807 Affirmative Defense--Invasion of Privacy Justified

[Name of defendant] claims that even if [name of plaintiff] has proven all of the above, [his/her/its] conduct was justified. [Name of defendant] must prove that the circumstances justified the invasion of privacy because the invasion of privacy substantially furthered [insert relevant legitimate or compelling competing interest].

If [name of defendant] proves that [his/her/its] conduct was justified, then you must find for [name of defendant] unless [name of plaintiff] proves that there was a practical, effective, and less invasive method of achieving [name of defendant]'s purpose.

New September 2003; Revised October 2008, June 2010

Sources and Authority

- "A defendant may prevail in a state constitutional privacy case by negating any of the three elements just discussed or by pleading and proving, as an affirmative defense, that the invasion of privacy is justified because it substantively furthers one or more countervailing interests. The plaintiff, in turn, may rebut a defendant's assertion of countervailing interests by showing there are feasible and effective alternatives to defendant's conduct which have a lesser impact on privacy interests. Of course, a defendant may also plead and prove other available defenses, e.g., consent, unclean hands, etc., that may be appropriate in view of the nature of the claim and the relief requested." (*Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 40 [26 Cal.Rptr.2d 834, 865 P.2d 633] .)

- "The existence of a sufficient countervailing interest or an alternative course of conduct present threshold questions of law for the court. The relative strength of countervailing interests and the feasibility of alternatives present mixed questions of law and fact. Again, in cases where material facts

are undisputed, adjudication as a matter of law may be appropriate." (*Hill, supra*, 7 Cal.4th at p. 40 .)

■ "Hill and its progeny further provide that no constitutional violation occurs, i.e., a 'defense' exists, if the intrusion on privacy is justified by one or more competing interests. For purposes of this balancing function--and except in the rare case in which a 'fundamental' right of personal autonomy is involved--the defendant need not present a 'compelling' countervailing interest; only 'general balancing tests are employed.' To the extent the plaintiff raises the issue in response to a claim or defense of competing interests, the defendant may show that less intrusive alternative means were not reasonably available. A relevant inquiry in this regard is whether the intrusion was limited, such that no confidential information was gathered or disclosed." (*Hernandez v. Hillsides, Inc.* (2009) 47 Cal.4th 272, 288 [97 Cal.Rptr.3d 274, 211 P.3d 1063] , internal citations omitted.)

■ Note that whether the countervailing interest needs to be "compelling" or "legitimate" depends on the status of the defendant. "In general, where the privacy violation is alleged against a private entity, the defendant is not required to establish a 'compelling interest' but, rather, one that is 'legitimate' or 'important.' " (*Pettus v. Cole* (1996) 49 Cal.App.4th 402, 440 [57 Cal.Rptr.2d 46] .)

Secondary Sources

7 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, §§ 575-603

4 Levy et al., *California Torts*, Ch. 46, *Invasion of Privacy*, § 46.06 (Matthew Bender)

37 *California Forms of Pleading and Practice*, Ch. 429, *Privacy*, § 429.16 (Matthew Bender)

18 *California Points and Authorities*, Ch. 183, *Privacy: State Constitutional Rights*, § 183.20 (Matthew Bender)

1 California Civil Practice: Torts (Thomson West) §§ 20:18-20:20

Publisher's Notes

This instruction replaces BAJI No. 7.25.2.

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsIntentional TortsInvasion of PrivacyGeneral OverviewTortsIntentional TortsInvasion of PrivacyDefenses



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CHAPTER 18 California Judicial Council Right of Privacy Instructions

3-18 California Forms of Jury Instruction CACI 1808

CACI 1808 Stalking (Civ. Code, § 1708.7)

[*Name of plaintiff*] **claims that [*name of defendant*] violated [his/her] right to privacy. To establish this claim, [*name of plaintiff*] must prove all of the following:**

- 1. That [*name of defendant*] engaged in a pattern of conduct with the intent to [follow/alarm/harass] [*name of plaintiff*]. The pattern of conduct must be supported by evidence in addition to [*name of plaintiff*]'s testimony;**
- 2. That as a result of this conduct [*name of plaintiff*] reasonably feared for [his/her] own safety [or for the safety of an immediate family member]; and**
- 3. (a) That, as part of the pattern of conduct, [*name of defendant*] made a believable threat with the intent to place [*name of plaintiff*] in reasonable fear for [his/her] safety [or the safety of an immediate family member]; and**
 - (b) That [*name of plaintiff*] clearly demanded at least once that [*name of defendant*] stop; and**
 - (c) That [*name of defendant*] persisted in [his/her] pattern of conduct;**

[or]

That [*name of defendant*] violated a restraining order prohibiting the pattern of conduct;
- 4. That [*name of plaintiff*] was harmed; and**

5. That [*name of defendant*]'s conduct was a substantial factor in causing [*name of plaintiff*]'s harm.

["Harass" means a knowing and willful course of conduct directed at [*name of plaintiff*] that seriously alarms, annoys, torments, or terrorizes [him/her], and which serves no legitimate purpose. The course of conduct must be such as would cause a reasonable person to suffer substantial emotional distress, and must actually cause substantial emotional distress to [*name of plaintiff*].

A "pattern of conduct" means a series of words or actions over a period of time, however short, that reflects an ongoing purpose.

New September 2003

Sources and Authority

■ *Civil Code section 1708.7* provides:

(a) A person is liable for the tort of stalking when the plaintiff proves all of the following elements of the tort:

(1) The defendant engaged in a pattern of conduct the intent of which was to follow, alarm, or harass the plaintiff. In order to establish this element, the plaintiff shall be required to support his or her allegations with independent corroborating evidence.

(2) As a result of that pattern of conduct, the plaintiff reasonably feared for his or her safety, or the safety of an immediate family member. For purposes of this paragraph, "immediate family" means a spouse, parent, child, any person related by consanguinity or affinity within the second degree, or any person who regularly resides, or, within the six months preceding any portion of the pattern of conduct, regularly resided, in the plaintiff's household.

(3) One of the following:

(A) The defendant, as a part of the pattern of conduct specified in paragraph (1), made a credible threat with the intent to place the plaintiff in reasonable fear for his or her safety, or the safety of an immediate family member and, on at least one occasion, the plaintiff clearly and definitively demanded that the defendant cease and abate his or her pattern of conduct and the defendant persisted in his or her pattern of conduct.

(B) The defendant violated a restraining order, including, but not limited to, any order issued pursuant to *Section 527.6 of the Code of Civil Procedure*, prohibiting any act described in subdivision (a).

(b) For the purposes of this section:

(1) "Pattern of conduct" means conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose. Constitutionally protected activity is not included within the meaning of "pattern of conduct."

(2) "Credible threat" means a verbal or written threat, including that communicated by means of an electronic communication device, or a threat implied by a pattern of conduct or a combination of verbal, written, or electronically communicated statements and conduct, made with the intent and apparent ability to carry out the threat so as to cause the person who is the target of the threat to reasonably fear for his or her safety or the safety of his or her immediate family.

(3) "Electronic communication device" includes, but is not limited to, telephones, cellular telephones, computers, video recorders, fax machines, or pagers. "Electronic communication" has the same meaning as the term defined in Subsection 12 of *Section 2510 of Title 18 of the United States Code*.

(4) "Harass" means a knowing and willful course of conduct directed at a specific person which seriously alarms, annoys, torments, or terrorizes the person, and which serves no legitimate purpose. The course of conduct must be such as would cause a reasonable person to suffer substantial emotional distress, and must actually cause substantial emotional distress to the person.

(c) A person who commits the tort of stalking upon another is liable to that person for damages, including, but not limited to, general damages, special damages, and punitive damages pursuant to Section 3294.

(d) In an action pursuant to this section, the court may grant equitable relief, including, but not limited to, an injunction.

(e) The rights and remedies provided in this section are cumulative and in addition to any other rights and remedies provided by law.

(f) This section shall not be construed to impair any constitutionally protected activity, including, but not limited to, speech, protest, and assembly.

Secondary Sources

5 Witkin, *Summary of California Law* (10th ed. 2005) Torts, § 662

6 *California Forms of Pleading and Practice*, Ch. 58, *Assault and Battery*, § 58.28 (Matthew Bender)

2 *California Points and Authorities*, Ch. 21, *Assault and Battery*, § 21.28 (Matthew Bender)

Publisher's Notes

This instruction replaces BAJI No. 7.58.

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsIntentional TortsGeneral Overview



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CHAPTER 18 California Judicial Council Right of Privacy Instructions

3-18 California Forms of Jury Instruction CACI 1809

CACI 1809 Recording of Confidential Information (Pen. Code, §§ 632, 637.2)

[*Name of plaintiff*] **claims that** [*name of defendant*] **violated** [his/her] **right to privacy. To establish this claim, [**
name of plaintiff **] must prove all of the following:**

- 1. That [*name of defendant*] intentionally [eavesdropped on/recorded] [*name of plaintiff*]'s conversation by using an electronic device;**
- 2. That [*name of plaintiff*] had a reasonable expectation that the conversation was not being overheard or recorded; [and]**
- 3. That [*name of defendant*] did not have the consent of all parties to the conversation to [eavesdrop on/record] it;**
- 4. [That [*name of plaintiff*] was harmed; and]**
- 5. [That [*name of defendant*]'s conduct was a substantial factor in causing [*name of plaintiff*]'s harm.]**

New September 2003

Directions for Use

If the plaintiff is asserting more than one privacy right, give an introductory instruction stating that a person's right to privacy can be violated in more than one way and listing the legal theories under which the plaintiff is suing.

Elements 4 and 5 are in brackets because if there is no actual harm, plaintiff can recover the statutory penalty. If plaintiff is seeking actual damages, such damages must be proven along with causation.

Sources and Authority

■ *Penal Code section 632(a)* provides: "Every person who, intentionally and without the consent of all parties to a confidential communication, by means of any electronic amplifying or recording device, eavesdrops upon or records the confidential communication, whether the communication is carried on among the parties in the presence of one another or by means of a telegraph, telephone, or other device, except a radio, shall be punished by a fine not exceeding two thousand five hundred dollars (\$2,500), or imprisonment in the county jail not exceeding one year, or in the state prison, or by both that fine and imprisonment. If the person has previously been convicted of a violation of this section or Section 631, 632.5, 632.6, 632.7, or 636, the person shall be punished by a fine not exceeding ten thousand dollars (\$10,000), by imprisonment in the county jail not exceeding one year, or in the state prison, or by both that fine and imprisonment."

■ *Penal Code section 637.2* provides:

(a) Any person who has been injured by a violation of this chapter may bring an action against the person who committed the violation for the greater of the following amounts:
(1) Five thousand dollars (\$5,000).

(2) Three times the amount of actual damages, if any, sustained by the plaintiff.

(b) Any person may, in accordance with Chapter 3 (commencing with Section 525) of Title 7 of Part 2 of the Code of Civil Procedure, bring an action to enjoin and restrain any violation of this chapter, and may in the same action seek damages as provided by subdivision (a).

(c) It is not a necessary prerequisite to an action pursuant to this section that the plaintiff has suffered, or be threatened with, actual damages.

■ "[A] conversation is confidential under section 632 if a party to that conversation has an objectively reasonable expectation that the conversation is not being overheard or recorded." (*Flanagan v. Flanagan* (2002) 27 Cal.4th 766, 776-777 [117 Cal.Rptr.2d 574, 41 P.3d 575] .)

■ "'A communication must be protected if either party reasonably expects the communication to be confined to the parties.'" (*Coulter v. Bank of America National Trust and Savings Assn.* (1994) 28 Cal.App.4th 923, 929 [33 Cal.Rptr.2d 766] , internal citation omitted.)

■ "While one who imparts private information risks the betrayal of his confidence by the other party, a substantial distinction has been recognized between the secondhand repetition of the contents of a conversation and its simultaneous dissemination to an unannounced second auditor, whether that auditor be a person or a mechanical device." (*Ribas v. Clark* (1985) 38 Cal.3d 355, 360-361 [212 Cal.Rptr. 143, 696 P.2d 637] .)

■ "We hold that an actionable violation of section 632 does not require disclosure of a confidential communication to a third party." (*Friddle v. Epstein* (1993) 16 Cal.App.4th 1649, 1660 [21 Cal.Rptr.2d 85] .)

■ "The right to recover [the] statutory minimum accrue[s] at the moment the privacy act [is] violated." (*Friddle*,

supra, 16 Cal.App.4th at p. 1661 .)

■ "If the plaintiff has suffered injuries akin to those for emotional distress, 'i.e., anxiety, embarrassment, humiliation, shame, depression, feelings of powerlessness, anguish, etc.,' these are 'actual' damages which shall be trebled." (*Friddle, supra*, 16 Cal.App.4th at p. 1660 .)

■ "Because the right to [the statutory] award accrues at the moment of the violation, it is not barred by the judicial privilege. ... Section 637.2 therefore permits him to pursue his statutory remedy of a civil lawsuit for \$3,000, even though the judicial privilege bars his recovery for the only actual damage he claims to have suffered." (*Ribas, supra*, 38 Cal.3d at p. 365 .)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 660, 661, 666

4 Levy et al., *California Torts*, Ch. 46, *Invasion of Privacy*, § 46.07[8] (Matthew Bender)

37 *California Forms of Pleading and Practice*, Ch. 429, *Privacy*, § 429.283 (Matthew Bender)

18 *California Points and Authorities*, Ch. 184, *Privacy: Invasion of Privacy*, § 184.25A (Matthew Bender)

Publisher's Notes

There is no BAJI instruction on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Criminal Law & Procedure Criminal Offenses Miscellaneous Offenses Illegal Eavesdropping General Overview Torts Intentional Torts Invasion of Privacy General Overview



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CHAPTER 18 California Judicial Council Right of Privacy Instructions

3-18 California Forms of Jury Instruction CACI 1810-CACI 1819

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CACI 1810Reserved for Future Use



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California Forms of Jury Instruction

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CHAPTER 18 California Judicial Council Right of Privacy Instructions

3-18 California Forms of Jury Instruction CACI 1820

CACI 1820 Damages

If you decide that [name of plaintiff] has proved [his/her/its] claim against [name of defendant], you also must decide how much money will reasonably compensate [name of plaintiff] for the harm. This compensation is called "damages."

The amount of damages must include an award for all harm that was caused by [name of defendant], even if the particular harm could not have been anticipated.

[Name of plaintiff] must prove the amount of [his/her/its] damages. However, [name of plaintiff] does not have to prove the exact amount of damages that will provide reasonable compensation for the harm. You must not speculate or guess in awarding damages.

The following are the specific items of damages claimed by [name of plaintiff]:

- 1. [Mental suffering/anxiety/humiliation/emotional distress;]**
- 2. [Harm to reputation and loss of standing in the community;]**
- 3. [The commercial value of [name of plaintiff]'s name or likeness;]**
- 4. [Insert other applicable item of damage.]**

No fixed standard exists for deciding the amount of damages for [insert item of mental or emotional distress]. You must use your judgment to decide a reasonable amount based on the evidence and your common sense.

[To recover for future [insert item of mental or emotional distress], [name of plaintiff] must prove that [he/she] is

reasonably certain to suffer that harm.]

New September 2003

This instruction is not intended for cases involving invasion of privacy by false light. Damages for false light are similar to the damages available in defamation (see *CACI Nos. 1700 to 1705*).

Item 2 will probably not be relevant in all cases. It will have particular application to the aspect of this tort involving the publication of private facts. (See *Diaz v. Oakland Tribune, Inc. (1983) 139 Cal.App.3d 118, 137 [188 Cal.Rptr. 762]* .)

Item 3 is intended only for cases involving violation of privacy by appropriation.

■ *Restatement Second of Torts, section 652H* provides:

One who has established a cause of action for invasion of his privacy is entitled to recover damages for

(a) the harm to his interest in privacy resulting from the invasion;

(b) his mental distress proved to have been suffered if it is of a kind that normally results from such an invasion; and

(c) special damage of which the invasion is a legal cause.

Note that this Restatement section has not been cited by any published California cases.

■ "Damages recoverable in California for invasion of a privacy right were discussed in detail in *Fairfield v. American Photocopy Equipment Co.* The Court of Appeal declared that because the interest involved privacy, the damages flowing from its invasion logically would include an award for mental suffering and anguish. *Fairfield* was an appropriation case, but the principles it laid down concerning damage awards in privacy cases relied on a body of California law which had already recognized violation of the right of privacy as a tort." (*Miller v. National Broadcasting Co. (1986) 187 Cal.App.3d 1463, 1484 [232 Cal.Rptr. 668]* , internal citation omitted.)

■ "The elements of emotional distress damages, i.e., anxiety, embarrassment, humiliation, shame, depression, feelings of powerlessness, anguish, etc., would thus be subjects of legitimate inquiry by a jury in the action before us, taking into account all of the consequences and events which flowed from the actionable wrong." (*Miller, supra, 187 Cal.App.3d at p. 1485* .)

■ "The actual injury involved herein is not limited to out-of-pocket loss. It generally includes 'impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering.'" (*Diaz, supra, 139 Cal.App.3d at p. 137* , internal citation omitted.)

■ In *Time, Inc. v. Hill (1967) 385 U.S. 374, 384, fn. 9 [87 S.Ct. 534, 17 L.Ed.2d 456]* , the court stated: "In the 'right of privacy' cases the primary damage is the mental distress from having been exposed to public view, although injury to reputation may be an element bearing upon such damage."

■ "There is a distinction between causes of action for invasion of privacy and defamation with regard to the respective interests protected and compensated by each. The gist of a cause of action in a privacy case is not injury to the character

or reputation but a direct wrong of a personal character resulting in injury to the feelings without regard to any effect which the publication may have on the property, business, pecuniary interest, or the standing of the individual in the community. The right of privacy concerns one's own peace of mind, while the right of freedom from defamation concerns primarily one's reputation. The injury is mental and subjective.' " (*Selleck v. Globe Int'l, Inc.* (1985) 166 Cal.App.3d 1123, 1135 [212 Cal.Rptr. 838], internal citations omitted.)

■ "California recognizes the right to profit from the commercial value of one's identity as an aspect of the right of publicity." (*Gionfriddo v. Major League Baseball* (2001) 94 Cal.App.4th 400, 409 [114 Cal.Rptr.2d 307] , internal citations omitted.)

■ "What may have originated as a concern for the right to be left alone has become a tool to control the commercial use and, thus, protect the economic value of one's name, voice, signature, photograph, or likeness." (*KNB Enterprises v. Matthews* (2000) 78 Cal.App.4th 362, 366 [92 Cal.Rptr.2d 713] .)

■ "The first type of appropriation is the right of publicity ... which is 'in essence that the reaction of the public to name and likeness, which may be fortuitous or which may be managed or planned, endows the name and likeness of the person involved with commercially exploitable opportunities.' The other is the appropriation of the name and likeness that brings injury to the feelings, that concerns one's own peace of mind, and that is mental and subjective." (*Dora v. Frontline Video, Inc.* (1993) 15 Cal.App.4th 536, 541-542 [18 Cal.Rptr.2d 790] , internal citations omitted.)

Secondary Sources

4 Levy et al., California Torts, Ch. 46, *Invasion of Privacy*, § 46.13 (Matthew Bender)

37 California Forms of Pleading and Practice, Ch. 429, *Privacy* (Matthew Bender)

18 California Points and Authorities, Ch. 185, *Privacy* (Matthew Bender)

Publisher's Notes

This instruction replaces BAJI Nos. 7.26 and 7.27.

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsIntentional TortsInvasion of PrivacyGeneral OverviewTortsIntentional TortsInvasion of PrivacyAppropriationGeneral OverviewTortsIntentional TortsInvasion of PrivacyPublic Disclosure of Private FactsGeneral OverviewTortsIntentional TortsInvasion of PrivacyRemedies



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California Forms of Jury Instruction

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CHAPTER 18 California Judicial Council Right of Privacy Instructions

3-18 California Forms of Jury Instruction CACI 1821

CACI 1821 Damages Under Civil Code Section 3344

If you decide that [name of plaintiff] has proved [his/her] claim against [name of defendant], you also must decide how much money will reasonably compensate [name of plaintiff] for the harm. This compensation is called "damages."

[Name of plaintiff] must prove the amount of [his/her] damages. However, [name of plaintiff] does not have to prove the exact amount of damages that will provide reasonable compensation for the harm. You must not speculate or guess in awarding damages.

The following are the specific items of damages claimed by [name of plaintiff]:

- 1. Humiliation, embarrassment, and mental distress;**
- 2. Harm to [name of plaintiff]'s reputation; [and]**
- 3. [Insert other item(s) of claimed harm].**

If [name of plaintiff] has not proved the above damages, or has proved an amount of damages less than \$750, then you must award [him/her] \$750.

In addition, [name of plaintiff] may recover any profits that [name of defendant] received from the use of [name of plaintiff]'s [name/voice/signature/photograph/likeness] [that have not already been taken into account in computing the above damages]. To establish the amount of such profits you must:

- 1. Determine the gross, or total, revenue that [name of defendant] received from such use;**

2. Determine the expenses that [name of defendant] had in obtaining the gross revenue; and

3. Deduct [name of defendant]'s expenses from the gross revenue.

[Name of plaintiff] must prove the amount of gross revenue, and [name of defendant] must prove the amount of expenses.

New September 2003

Give the bracketed phrase in the last full paragraph only if profits have been included in the calculation of actual damages.

The advisory committee recognizes some ambiguity in *Civil Code section 3344* regarding whether the minimum measure of damages is \$750 plus profits or just \$750. If the court decides that \$750 is to be awarded as an alternative to all other damages, including profits, then the sentence regarding \$750 should be moved to the end of the instruction.

■ *Civil Code section 3344(a)* provides: "Any person who knowingly uses another's name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods or services, without such person's prior consent, or, in the case of a minor, the prior consent of his parent or legal guardian, shall be liable for any damages sustained by the person or persons injured as a result thereof. In addition, in any action brought under this section, the person who violated the section shall be liable to the injured party or parties in an amount equal to the greater of seven hundred fifty dollars (\$750) or the actual damages suffered by him or her as a result of the unauthorized use, and any profits from the unauthorized use that are attributable to the use and are not taken into account in computing the actual damages. In establishing such profits, the injured party or parties are required to present proof only of the gross revenue attributable to such use, and the person who violated this section is required to prove his or her deductible expenses. Punitive damages may also be awarded to the injured party or parties. The prevailing party in any action under this section shall also be entitled to attorney's fees and costs."

■ "[Plaintiff] alleges, and submits evidence to show, that he was injured economically because the ad will make it difficult for him to endorse other automobiles, and emotionally because people may be led to believe he has abandoned his current name and assume he has renounced his religion. These allegations suffice to support his action. Injury to a plaintiff's right of publicity is not limited to present or future economic loss, but 'may induce humiliation, embarrassment, and mental distress.' " (*Abdul-Jabbar v. General Motors Corp.* (9th Cir. 1996) 85 F.3d 407, 416 , internal citation omitted.)

Secondary Sources

4 Levy et al., *California Torts*, Ch. 46, *Invasion of Privacy*, § 46.13 (Matthew Bender)

37 *California Forms of Pleading and Practice*, Ch. 429, *Privacy* (Matthew Bender)

18 *California Points and Authorities*, Ch. 185, *Privacy* (Matthew Bender)

Publisher's Notes

This instruction replaces BAJI No. 7.28.

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsIntentional TortsInvasion of PrivacyAppropriationGeneral OverviewTortsIntentional TortsInvasion of
PrivacyAppropriationRemedies



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CHAPTER 18 California Judicial Council Right of Privacy Instructions

3-18 California Forms of Jury Instruction CACI 1822-CACI 1899

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CACI 1822Reserved for Future Use



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CHAPTER 18 California Judicial Council Right of Privacy Instructions

3-18 California Forms of Jury Instruction CACI VF-1800

CACI VF-1800 Privacy--Intrusion Into Private Affairs

We answer the questions submitted to us as follows:

1. Did [*name of plaintiff*] have a reasonable expectation of privacy in [*insert facts regarding the place, conversation, or other circumstance*]?

_____ Yes _____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Did [*name of defendant*] intentionally intrude in [*insert facts regarding the place, conversation, or other circumstance*]?

_____ Yes _____ No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Would [*name of defendant*]'s intrusion be highly offensive to a reasonable person?

_____ Yes _____ No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Was [name of defendant]'s conduct a substantial factor in causing harm to [name of plaintiff]?

_____ Yes _____ No

If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. What are [name of plaintiff]'s damages?

[a. Past economic loss

[lost earnings..... \$_____].....

[lost profits..... \$_____].....

[medical expenses..... \$_____].....

[other past economic loss..... \$_____].....

..... Total Past Economic Damages: \$_____]

[b. Future economic loss

[lost earnings..... \$_____].....

[lost profits..... \$_____].....

[medical expenses..... \$_____].....

[other future economic loss..... \$_____].....

..... Total Future Economic Damages: \$_____]

[c. Past noneconomic loss, including [physical pain/mental suffering:]..... \$_____]

[d. Future noneconomic loss, including [physical pain/mental suffering:]..... \$_____]

..... TOTAL \$_____

Signed: _____

Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the [clerk/bailiff/judge].

New September 2003; Revised April 2007

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on *CACI No. 1800, Intrusion Into Private Affairs*.

If specificity is not required, users do not have to itemize all the damages listed in question 5 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

Publisher's Notes

There is no BAJI verdict form on this subject.



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CHAPTER 18 California Judicial Council Right of Privacy Instructions

3-18 California Forms of Jury Instruction CACI VF-1801

CACI VF-1801 Privacy--Public Disclosure of Private Facts

We answer the questions submitted to us as follows:

1. Did [*name of defendant*] publicize private information concerning [*name of plaintiff*]?

_____ Yes _____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Would a reasonable person in [*name of plaintiff*]'s position consider the publicity highly offensive?

_____ Yes _____ No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Did [*name of defendant*] know or act with reckless disregard of the fact that a reasonable person in [*name of plaintiff*]'s position would consider the publicity highly offensive?

_____ Yes _____ No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Was the private information of legitimate public concern [or did it have a substantial connection to a matter of legitimate public concern]?

_____ Yes _____ No

If your answer to question 4 is no, then answer question 5. If you answered yes, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. Was [*name of defendant*]'s conduct a substantial factor in causing harm to [*name of plaintiff*]?

_____ Yes _____ No

If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. What are [*name of plaintiff*]'s damages?

[a. Past economic loss

[lost earnings \$_____].

[lost profits \$_____].

[medical expenses \$_____].

[other past economic loss \$_____].

..... **Total Past Economic Damages: \$_____]**

[b. Future economic loss

[lost earnings \$_____].

[lost profits \$_____].

[medical expenses \$_____].

[other future economic loss \$_____].

..... **Total Future Economic Damages: \$_____]**

[c. Past noneconomic loss, including [physical pain/mental suffering:] \$_____]

[d. Future noneconomic loss, including [physical pain/mental suffering:] \$_____]

..... **TOTAL \$_____**

Signed: _____
Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the clerk/bailiff/judge].

New September 2003; Revised April 2007

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on *CACI No. 1801, Public Disclosure of Private Facts*.

If specificity is not required, users do not have to itemize all the damages listed in question 6 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

Publisher's Notes

There is no BAJI verdict form on this subject.



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CHAPTER 18 California Judicial Council Right of Privacy Instructions

3-18 California Forms of Jury Instruction CACI VF-1802

CACI VF-1802 Privacy--False Light

We answer the questions submitted to us as follows:

1. Did [*name of defendant*] publicize information or material that showed [*name of plaintiff*] in a false light?

_____ Yes _____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Would a reasonable person in [*name of plaintiff*]'s position consider the false light created by the publication to be highly offensive?

_____ Yes _____ No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Is there clear and convincing evidence that [*name of defendant*] either knew the publication would create a false impression about [*name of plaintiff*] or acted with reckless disregard for the truth?

_____ Yes _____ No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer

no further questions, and have the presiding juror sign and date this form.

4. Was [name of defendant]'s conduct a substantial factor in causing harm to [name of plaintiff]?

_____ Yes _____ No

If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. What are [name of plaintiff]'s damages?

[a. Past economic loss

[lost earnings \$_____].....

[lost profits \$_____].....

[medical expenses \$_____].....

[other past economic loss \$_____].....

..... **Total Past Economic Damages: \$_____]**

[b. Future economic loss

[lost earnings \$_____].....

[lost profits \$_____].....

[medical expenses \$_____].....

[other future economic loss \$_____].....

..... **Total Future Economic Damages: \$_____]**

[c. Past noneconomic loss, including [physical pain/mental suffering:] \$_____]

[d. Future noneconomic loss, including [physical pain/mental suffering:] \$_____]

..... **TOTAL \$_____**

Signed: _____

Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the

[clerk/bailiff/judge].

New September 2003; Revised April 2007

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on *CACI No. 1802, False Light*.

If the conduct does not involve a matter of public concern, then substitute the following for question number 3: "Was [*name of defendant*] negligent in determining the truth of the information or whether a false impression would be created by its publication?" If the conduct involved material that is not defamatory on its face, the following question should be added to this form: "Did [*name of plaintiff*] sustain harm to [his/her] property, business, profession, or occupation [including money spent as a result of the statements(s)]?"

If specificity is not required, users do not have to itemize all the damages listed in question 5 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

Publisher's Notes

There is no BAJI verdict form on this subject.



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CHAPTER 18 California Judicial Council Right of Privacy Instructions

3-18 California Forms of Jury Instruction CACI VF-1803

CACI VF-1803 Privacy--Appropriation of Name or Likeness

We answer the questions submitted to us as follows:

1. Did [name of defendant] use [name of plaintiff]'s name, likeness, or identity without [name of plaintiff]'s permission?

_____ Yes _____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Did [name of defendant] gain a commercial benefit [or some other advantage] by using [name of plaintiff]'s name, likeness, or identity?

_____ Yes _____ No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Was [name of defendant]'s conduct a substantial factor in causing harm to [name of plaintiff]?

_____ Yes _____ No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. What are [name of plaintiff]'s damages?**[a. Past economic loss**

[lost earnings \$_____].....

[lost profits \$_____].....

[medical expenses \$_____].....

[other past economic loss \$_____].....

..... **Total Past Economic Damages: \$_____]****[b. Future economic loss**

[lost earnings \$_____].....

[lost profits \$_____].....

[medical expenses \$_____].....

[other future economic loss \$_____].....

..... **Total Future Economic Damages: \$_____]****[c. Past noneconomic loss, including [physical
pain/mental suffering:] \$_____]****[d. Future noneconomic loss, including [physical
pain/mental suffering:] \$_____]**..... **TOTAL \$_____****Signed: _____****Presiding Juror****Dated: _____****[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the
[clerk/bailiff/judge].**

New September 2003; Revised April 2007

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on *CACI No. 1803, Appropriation of Name or Likeness*.

If specificity is not required, users do not have to itemize all the damages listed in question 4 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

Publisher's Notes

There is no BAJI verdict form on this subject.



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California Forms of Jury Instruction

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CHAPTER 18 California Judicial Council Right of Privacy Instructions

3-18 California Forms of Jury Instruction CACI VF-1804

CACI VF-1804 Privacy--Use of Name or Likeness (Civ. Code, § 3344)

We answer the questions submitted to us as follows:

1. Did [name of defendant] knowingly use [name of plaintiff]'s [name/voice/signature/photograph/likeness] on merchandise or to advertise or sell products or services?

_____ Yes _____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Did [name of defendant] have [name of plaintiff]'s consent?

_____ Yes _____ No

If your answer to question 2 is no, then answer question 2. If you answered yes, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Was [name of defendant]'s use of [name of plaintiff]'s [name/voice/signature/photograph/likeness] directly connected to [name of defendant]'s commercial purpose?

_____ Yes _____ No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer

no further questions, and have the presiding juror sign and date this form.

4. Was [name of defendant]'s conduct a substantial factor in causing harm to [name of plaintiff]?

_____ Yes _____ No

If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. What are [name of plaintiff]'s damages?

[a. Past economic loss

[lost earnings \$_____].....

[lost profits \$_____].....

[medical expenses \$_____].....

[other past economic loss \$_____].....

..... **Total Past Economic Damages: \$_____]**

[b. Future economic loss

[lost earnings \$_____].....

[lost profits \$_____].....

[medical expenses \$_____].....

[other future economic loss \$_____].....

..... **Total Future Economic Damages: \$_____]**

[c. Past noneconomic loss, including [physical pain/mental suffering:] \$_____]

[d. Future noneconomic loss, including [physical pain/mental suffering:] \$_____]

..... **TOTAL \$_____**

Signed: _____

Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the

[clerk/bailiff/judge].

New September 2003; Revised April 2007, April 2008

Directions for Use

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on *CACI No. 1804A, Use of Name or Likeness*.

Additional questions may be necessary if the facts implicate *Civil Code section 3344(d)* (see Directions for Use under *CACI No. 1804B, Use of Name or Likeness--Use in Connection With News, Public Affairs, or Sports Broadcast or Account, or Political Campaign*).

If specificity is not required, users do not have to itemize all the damages listed in question 5 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

Publisher's Notes

There is no BAJI verdict form on this subject.



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California Forms of Jury Instruction

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CHAPTER 18 California Judicial Council Right of Privacy Instructions

3-18 California Forms of Jury Instruction CACI VF-1805-CACI VF-1806

Reserved for Future Use

CACI VF-1805Reserved for Future Use



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CHAPTER 18 California Judicial Council Right of Privacy Instructions

3-18 California Forms of Jury Instruction CACI VF-1807

CACI VF-1807 Privacy--Recording of Confidential Information (Pen. Code, §§ 632, 637.2)

We answer the questions submitted to us as follows:

1. Did [*name of defendant*] intentionally [eavesdrop on/record] [*name of plaintiff*]'s conversation by using an electronic device?

_____ Yes _____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Did [*name of plaintiff*] have a reasonable expectation that the conversation was not being overheard or recorded?

_____ Yes _____ No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Did [*name of defendant*] have the consent of all parties to the conversation to [eavesdrop on/record] it?

_____ Yes _____ No

If your answer to question 3 is no, then answer question 4. If you answered yes, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Was [name of defendant]'s conduct a substantial factor in causing harm to [name of plaintiff]?

_____ Yes _____ No

If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. What are [name of plaintiff]'s damages?

[a. Past economic loss

[lost earnings \$_____].....

[lost profits \$_____].....

[medical expenses \$_____].....

[other past economic loss \$_____].....

..... **Total Past Economic Damages: \$_____]**

[b. Future economic loss

[lost earnings \$_____].....

[lost profits \$_____].....

[medical expenses \$_____].....

[other future economic loss \$_____].....

..... **Total Future Economic Damages: \$_____]**

[c. Past noneconomic loss, including [physical pain/mental suffering:] \$_____]

[d. Future noneconomic loss, including [physical pain/mental suffering:] \$_____]

..... **TOTAL \$_____**

Signed: _____
Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the [clerk/bailiff/judge].

New September 2003; Revised April 2007

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on *CACI No. 1809, Recording of Confidential Information*.

Questions 4 and 5 do not have to be read if the plaintiff is seeking the statutory penalty only.

If specificity is not required, users do not have to itemize all the damages listed in question 5 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

Publisher's Notes

There is no BAJI verdict form on this subject.



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CHAPTER 18 California Judicial Council Right of Privacy Instructions

3-18 California Forms of Jury Instruction CACI VF-1808-CACI VF-1899

Reserved for Future Use

CACI VF-1808Reserved for Future Use



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CHAPTER 19 California Judicial Council Fraud or Deceit Instructions

3-19 California Forms of Jury Instruction 19.syn

§ 19.syn Synopsis to Chapter 19: California Judicial Council Fraud or Deceit Instructions

CACI 1900 Intentional Misrepresentation

CACI 1901 Concealment

CACI 1902 False Promise

CACI 1903 Negligent Misrepresentation

CACI 1904 Opinions as Statements of Fact

CACI 1905 Definition of Important Fact/Promise

CACI 1906 Misrepresentations Made to Persons Other Than the Plaintiff

CACI 1907 Reliance

CACI 1908 Reasonable Reliance

CACI 1909 Reserved for Future Use

CACI 1910 Real Estate Seller's Nondisclosure of Material Facts

CACI 1911-CACI 1919 Reserved for Future Use

CACI 1920 Buyer's Damages for Purchase or Acquisition of Property

CACI 1921 Buyer's Damages for Purchase or Acquisition of Property--Lost Profits

CACI 1922 Seller's Damages for Sale or Exchange of Property

CACI 1923 Damages--"Out of Pocket" Rule

CACI 1924 Damages--"Benefit of the Bargain" Rule

CACI 1925 Affirmative Defense--Statute of Limitation--Fraud or Mistake

CACI 1926-CACI 1999 Reserved for Future Use

CACI VF-1900 Intentional Misrepresentation

CACI VF-1901 Concealment

CACI VF-1902 False Promise

CACI VF-1903 Negligent Misrepresentation

CACI VF-1904-CACI VF-1999 Reserved for Future Use



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CHAPTER 19 California Judicial Council Fraud or Deceit Instructions

3-19 California Forms of Jury Instruction Scope

Scope

SCOPE

This chapter contains the California Judicial Council's "Fraud or Deceit Series" of jury instructions [*CACI No. 1900 et seq.*]. The Judicial Council of California Civil Jury Instructions (CACI) included in this publication are the product of the Judicial Council of California Task Force on Jury Instructions, which are updated by the Judicial Council of California Advisory Committee on Civil Jury Instructions.

This chapter includes instructions on the following topics:

- Intentional [*CACI No. 1900*] and negligent [*CACI No. 1903*] misrepresentation.
- Concealment [*CACI No. 1901*] and false promise [*CACI No. 1902*].
- Opinions as statements of fact [*CACI No. 1904*].
- Definition of important fact/promise [*CACI No. 1905*].
- Misrepresentations made to persons other than the plaintiff [*CACI No. 1906*].
- Reliance [*CACI No. 1907*] and reasonable reliance [*CACI No. 1908*].
- Real estate seller's nondisclosure of material facts [*CACI No. 1910*].
- Damages, including the buyer's damages [*CACI Nos. 1920, 1921*], the seller's damages [*CACI No. 1922*], and the "out of pocket" [*CACI No. 1923*] and "benefit of the bargain" [*CACI No. 1924*] rules.
- Defense of statute of limitations [*CACI Nos. 1925*].

The fraud or deceit series also includes special verdict forms [*CACI Nos. VF-1900-VF-1903*].

LexisNexis Matthew Bender Expert Practice Tip--Inserting Party Names: The task for the lawyer preparing *CACI* fraud or deceit instructions, although difficult, is not impossible. For example, *CACI Nos. 1900-1903* provide for the insertion of the names of the parties repeatedly. (Specifically, for these four instructions, a jury will hear the plaintiff's name recited 32 times and the defendant's name addressed on 27 occasions.) The Judicial Council appeared to recognize this issue, at least in part, by providing as follows ["Guide for Using Judicial Council of California Civil Jury Instructions"; see *MB 100A.02[5]*]:

Multiple Parties: Because jurors more easily understand instructions that refer to parties by name rather than by legal terms such as 'plaintiff' and 'defendant,' the instructions provide for insertion of names. For simplicity of presentation, the instructions use single party plaintiffs and defendants as examples. If a case involves multiple parties or cross-complaints and counterclaims, the user will want to modify the instructions. Rather than naming a number of parties in each place calling for names, the user may consider putting the names of all applicable parties in the beginning and thereafter identifying them as 'plaintiffs,' 'defendants,' 'cross-complaints,' etc.

The judge can probably get through the reading of *CACI Nos. 1900-1903* without offending his or her constituency. However, the poor jury forced to sit through the tedious repetition of name calling may lose sight of the law they are supposed to apply to the disputed facts. *By Joseph Devine*

LexisNexis Matthew Bender Expert Practice Tip--Use Judicial Council's Fraud or Deceit Instructions Early On in Your Case: In preparing a witness or party for testimony it is imperative that the attorney use these jury instructions early on. A lot of the *CACI* Fraud or Deceit instructions have multiple points that must be addressed during the testimony of a witness at trial if one is to prevail. Use of the instructions in the pre-trial preparation is extremely helpful in organizing your witnesses and evidence.

During closing argument, the attorney should go over each of the points listed in the applicable instructions and apply the evidence/testimony facts to each point for the jury. Using a visual aid in the form of a blow up of the applicable instructions is always helpful. This way the jury will already be familiar with the instructions when they retire to deliberate. *By Dona Cohn-Payne*



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CHAPTER 19 California Judicial Council Fraud or Deceit Instructions

3-19 California Forms of Jury Instruction CACI 1900

CACI 1900 Intentional Misrepresentation

[*Name of plaintiff*] **claims that [*name of defendant*] made a false representation that harmed [him/her/it]. To establish this claim, [*name of plaintiff*] must prove all of the following:**

- 1. That [*name of defendant*] represented to [*name of plaintiff*] that an important fact was true;**
- 2. That [*name of defendant*]'s representation was false;**
- 3. That [*name of defendant*] knew that the representation was false when [he/she] made it, or that [he/she] made the representation recklessly and without regard for its truth;**
- 4. That [*name of defendant*] intended that [*name of plaintiff*] rely on the representation;**
- 5. That [*name of plaintiff*] reasonably relied on [*name of defendant*]'s representation;**
- 6. That [*name of plaintiff*] was harmed; and**
- 7. That [*name of plaintiff*]'s reliance on [*name of defendant*]'s representation was a substantial factor in causing [his/her/its] harm.**

New September 2003

Directions for Use

If it is disputed that a representation was made, the jury should be instructed that "a representation may be made orally, in writing, or by nonverbal conduct."

Sources and Authority

■ "Fraud" and "deceit" are defined in *Civil Code* sections 1572, 1709, and 1710. Courts appear to refer to the terms interchangeably, though technically "fraud" applies to only contract actions.

■ *Civil Code* section 1709 defines "deceit" generally: "One who willfully deceives another with intent to induce him to alter his position to his injury or risk, is liable for any damage which he thereby suffers."

■ *Civil Code* section 1710 specifies four kinds of deceit. This instruction applies to the first:

A deceit, within the meaning of [section 1709], is either:

1. The suggestion, as a fact, of that which is not true, by one who does not believe it to be true [intentional misrepresentation of fact];
2. The assertion, as a fact, of that which is not true, by one who has no reasonable ground for believing it to be true [negligent misrepresentation of fact];
3. The suppression of a fact, by one who is bound to disclose it, or who gives information of other facts which are likely to mislead for want of communication of that fact [concealment or suppression of fact]; or,
4. A promise, made without any intention of performing it [promissory fraud].

■ *Civil Code* section 1572, dealing specifically with fraud in the making of contracts, restates these definitions in slightly differing language, with the addition of a fifth kind of deceit, described generally as "[a]ny other act fitted to deceive." Fraud in the context of contract formation is covered by other instructions.

■ The tort of deceit or fraud requires: " '(a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or 'scienter'); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage.' " (*Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 974 [64 Cal.Rptr.2d 843, 938 P.2d 903] , internal quotation marks omitted; see also *Molko v. Holy Spirit Ass'n* (1988) 46 Cal.3d 1092, 1108 [252 Cal.Rptr. 122, 762 P.2d 46] .)

■ Sometimes this tort is stated with four elements instead of five: "(1) a knowingly false representation by the defendant; (2) an intent to deceive or induce reliance; (3) justifiable reliance by the plaintiff; and (4) resulting damages." (*Service by Medallion, Inc. v. Clorox Co.* (1996) 44 Cal.App.4th 1807, 1816 [52 Cal.Rptr.2d 650] .)

■ The representation must ordinarily be an affirmation of fact, as opposed to an opinion. Under the *Restatement Second of Torts* section 538A, a representation is an opinion "if it expresses only (a) the belief of the maker, without certainty, as to the existence of a fact; or (b) his judgment as to quality, value, authenticity, or other matters of judgment." Opinions are addressed in CACI No. 1904, *Opinions as Statements of Fact*.

■ "Puffing," or sales talk, is generally considered opinion, unless it involves a representation of product safety. (*Hauter v. Zogarts* (1975) 14 Cal.3d 104, 112 [120 Cal.Rptr. 681, 534 P.2d 377] .)

■ "Fraud is an intentional tort; it is the element of fraudulent intent, or intent to deceive, that distinguishes it from actionable negligent misrepresentation and from nonactionable innocent misrepresentation. It is the element of intent which makes fraud actionable, irrespective of any contractual or fiduciary duty one party might owe to the other." (*City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith* (1998) 68 Cal.App.4th 445, 482 [80 Cal.Rptr.2d 329] , internal

citations omitted.)

■ "A misrepresentation need not be oral; it may be implied by conduct." (*Thrifty-Tel, Inc. v. Bezenek* (1996) 46 Cal.App.4th 1559, 1567 [54 Cal.Rptr.2d 468] , internal citations omitted.)

■ " '[F]alse representations made recklessly and without regard for their truth in order to induce action by another are the equivalent of misrepresentations knowingly and intentionally uttered.' " (*Engalla, supra*, 15 Cal.4th at p. 974 , quoting *Yellow Creek Logging Corp. v. Dare* (1963) 216 Cal.App.2d 50, 55 [30 Cal.Rptr. 629] .)

■ "Actual reliance occurs when a misrepresentation is " 'an immediate cause of [a plaintiff's] conduct, which alters his legal relations,' " and when, absent such representation, " 'he would not, in all reasonable probability, have entered into the contract or other transaction.' " 'It is not ... necessary that [a plaintiff's] reliance upon the truth of the fraudulent misrepresentation be the sole or even the predominant or decisive factor in influencing his conduct. ... It is enough that the representation has played a substantial part, and so has been a substantial factor, in influencing his decision.' " (*Engalla, supra*, 15 Cal.4th at pp. 976-977 , internal citations omitted.)

■ "Justifiable reliance is an essential element of a claim for fraudulent misrepresentation, and the reasonableness of the reliance is ordinarily a question of fact." (*Guido v. Koopman* (1991) 1 Cal.App.4th 837, 843 [2 Cal.Rptr.2d 437] internal citations omitted.)

■ "A 'complete causal relationship' between the fraud or deceit and the plaintiff's damages is required. ... Causation requires proof that the defendant's conduct was a " 'substantial factor' " in bringing about the harm to the plaintiff." (*Williams v. Wraxall* (1995) 33 Cal.App.4th 120, 132 [39 Cal.Rptr.2d 658] , internal citations omitted.)

■ "In order to recover for fraud, as in any other tort, the plaintiff must plead and prove the 'detriment proximately caused' by the defendant's tortious conduct. Deception without resulting loss is not actionable fraud." (*Service by Medallion, Inc., supra*, 44 Cal.App.4th at p. 1818 , internal citations omitted.)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 243, 767-817, 821, 822, 826

3 Levy et al., *California Torts, Ch. 40, Fraud and Deceit and Other Business Torts*, §§ 40.02, 40.05 (Matthew Bender)

23 California Forms of Pleading and Practice, Ch. 269, *Fraud and Deceit* (Matthew Bender)

10 California Points and Authorities, Ch. 105, *Fraud and Deceit* (Matthew Bender)

2 California Civil Practice: Torts (Thomson West) § 22:12

Publisher's Notes

This instruction replaces BAJI Nos. 12.30 and 12.31.

LexisNexis Matthew Bender Expert Practice Tip--Terminology of CACI No. 1900: Although courts sometimes use legal terms interchangeably (e.g., fraud and deceit), be careful as to where your claim fits in the legal sense. New CACI No. 1900 uses the term "important fact" in place of the older term "material fact." Since materiality is often a critical issue in fraud cases, the change in terminology should help clarify this issue for the jury. *By Rex Heeseman and Ronald Oster*

See also LexisNexis Matthew Bender Expert Practice Tips following the "Scope" note for Chapter 19.

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsBusiness TortsFraud & MisrepresentationGeneral OverviewTortsBusiness TortsFraud & MisrepresentationActual
FraudGeneral OverviewTortsBusiness TortsFraud & MisrepresentationNondisclosureGeneral Overview



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California Forms of Jury Instruction

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CHAPTER 19 California Judicial Council Fraud or Deceit Instructions

3-19 California Forms of Jury Instruction CACI 1901

CACI 1901 Concealment

[*Name of plaintiff*] **claims that [he/she] was harmed because [*name of defendant*] concealed certain information. To establish this claim, [*name of plaintiff*] must prove all of the following:**

[1. (a) That [*name of defendant*] and [*name of plaintiff*] were [*insert type of fiduciary relationship, e.g., "business partners"*]; and

(b) That [*name of defendant*] intentionally failed to disclose an important fact to [*name of plaintiff*];]

[*or*]

[1. That [*name of defendant*] disclosed some facts to [*name of plaintiff*] but intentionally failed to disclose [other/another] important fact(s), making the disclosure deceptive;]

[*or*]

[1. That [*name of defendant*] intentionally failed to disclose an important fact that was known only to [him/her/it] and that [*name of plaintiff*] could not have discovered;]

[*or*]

[1. That [*name of defendant*] actively concealed an important fact from [*name of plaintiff*] or prevented [him/her/it] from discovering that fact;]

2. That [*name of plaintiff*] did not know of the concealed fact;

3. That [*name of defendant*] **intended to deceive** [*name of plaintiff*] **by concealing the fact;**
4. That [*name of plaintiff*] **reasonably relied on** [*name of defendant*]'s **deception;**
5. That [*name of plaintiff*] **was harmed; and**
6. That [*name of defendant*]'s **concealment was a substantial factor in causing** [*name of plaintiff*]'s **harm.**

New September 2003; Revised October 2004

Directions for Use

Under the second, third, and fourth bracketed instructions under element 1, if the defendant asserts that there was no relationship based on a transaction giving rise to a duty to disclose, then the jury should also be instructed to determine whether the requisite relationship existed. Regarding the fourth bracketed instruction, the parties may wish to research whether active concealment alone is sufficient to support a cause of action for fraud in tort or whether it is merely grounds for voiding a contract under *Civil Code* section 1572. (See *Williams v. Graham* (1948) 83 Cal.App.2d 649, 652 [189 P.2d 324] .)

Element 2 may be deleted if the third alternative bracketed instruction under element 1 is used.

Sources and Authority

- *Civil Code* section 1710 specifies four kinds of deceit. This instruction is derived from the third kind:

A deceit, within the meaning of [section 1709], is either:

1. The suggestion, as a fact, of that which is not true, by one who does not believe it to be true;
2. The assertion, as a fact, of that which is not true, by one who has no reasonable ground for believing it to be;
3. The suppression of a fact, by one who is bound to disclose it, or who gives information of other facts which are likely to mislead for want of communication of that fact; or,
4. A promise, made without any intention of performing it.

- "[T]he elements of an action for fraud and deceit based on a concealment are: (1) the defendant must have concealed or suppressed a material fact, (2) the defendant must have been under a duty to disclose the fact to the plaintiff, (3) the defendant must have intentionally concealed or suppressed the fact with the intent to defraud the plaintiff, (4) the plaintiff must have been unaware of the fact and would not have acted as he did if he had known of the concealed or suppressed fact, and (5) as a result of the concealment or suppression of the fact, the plaintiff must have sustained damage." (*Marketing West, Inc. v. Sanyo Fisher (USA) Corp.* (1992) 6 Cal.App.4th 603, 612-613 [7 Cal.Rptr.2d 859] .)

- "There are 'four circumstances in which nondisclosure or concealment may constitute actionable

fraud: (1) when the defendant is in a fiduciary relationship with the plaintiff; (2) when the defendant had exclusive knowledge of material facts not known to the plaintiff; (3) when the defendant actively conceals a material fact from the plaintiff; and (4) when the defendant makes partial representations but also suppresses some material facts. ... Each of the [three nonfiduciary] circumstances in which nondisclosure may be actionable presupposes the existence of some other relationship between the plaintiff and defendant in which a duty to disclose can arise. ... [P] ... [S]uch a relationship can only come into being as a result of some sort of transaction between the parties. ... Thus, a duty to disclose may arise from the relationship between seller and buyer, employer and prospective employee, doctor and patient, or parties entering into any kind of contractual agreement.' All of these relationships are created by transactions between parties from which a duty to disclose facts material to the transaction arises under certain circumstances." (*Limandri v. Judkins* (1997) 52 Cal.App.4th 326, 336-337 [60 Cal.Rptr.2d 539] , internal citations, italics, and footnote omitted.)

■ "Ordinarily, failure to disclose material facts is not actionable fraud unless there is some fiduciary relationship giving rise to a duty to disclose ... [however,] '[t]he duty to disclose may arise without any confidential relationship where the defendant alone has knowledge of material facts which are not accessible to the plaintiff.' " (*Magpali v. Farmers Group, Inc.* (1996) 48 Cal.App.4th 471, 482 [55 Cal.Rptr.2d 225] , internal citations omitted.)

■ "In transactions which do not involve fiduciary or confidential relations, a cause of action for non-disclosure of material facts may arise in at least three instances: (1) the defendant makes representations but does not disclose facts which materially qualify the facts disclosed, or which render his disclosure likely to mislead; (2) the facts are known or accessible only to defendant, and defendant knows they are not known to or reasonably discoverable by the plaintiff; (3) the defendant actively conceals discovery from the plaintiff." (*Warner Construction Corp. v. City of Los Angeles* (1970) 2 Cal.3d 285, 294 [85 Cal.Rptr. 444, 466 P.2d 996] , footnotes omitted.)

■ "[A]ctive concealment of facts and mere nondisclosure of facts may under certain circumstances be actionable without [a fiduciary or confidential] relationship. For example, a duty to disclose may arise without a confidential or fiduciary relationship where the defendant, a real estate agent or broker, alone has knowledge of material facts which are not accessible to the plaintiff, a buyer of real property." (*La Jolla Village Homeowners' Assn. v. Superior Court* (1989) 212 Cal.App.3d 1131, 1151 [261 Cal.Rptr. 146] , internal citations omitted.)

■ "Even if a fiduciary relationship is not involved, a non-disclosure claim arises when the defendant makes representations but fails to disclose additional facts which materially qualify the facts disclosed, or which render the disclosure likely to mislead." (*Roddenberry v. Roddenberry* (1996) 44 Cal.App.4th 634, 666 [51 Cal.Rptr.2d 907] , internal citations omitted.)

■ " '[T]he rule has long been settled in this state that although one may be under no duty to speak as to a matter, "if he undertakes to do so, either voluntarily or in response to inquiries, he is bound not only to state truly what he tells but also not to suppress or conceal any facts within his knowledge which materially qualify those stated. If he speaks at all he must make a full and fair disclosure." ' " (*Marketing West, Inc., supra*, 6 Cal.App.4th at p. 613 , internal citation omitted.)

■ "Contrary to plaintiffs' assertion, it is not logically impossible to prove reliance on an omission. One need only prove that, had the omitted information been disclosed, one would have been aware of it and behaved differently." (*Mirkin v. Wasserman* (1993) 5 Cal.4th 1082, 1093 [23 Cal.Rptr.2d 101, 858 P.2d 568] .)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 793-799

3 Levy et al., *California Torts, Ch. 40, Fraud and Deceit and Other Business Torts*, § 40.03[2][b] (Matthew Bender)

23 *California Forms of Pleading and Practice, Ch. 269, Fraud and Deceit*, § 269.26 (Matthew Bender)

10 *California Points and Authorities, Ch. 105, Fraud and Deceit*, § 105.70 et seq. (Matthew Bender)

2 California Civil Practice: Torts (Thomson West) § 22:16

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsBusiness TortsFraud & MisrepresentationGeneral OverviewTortsBusiness TortsFraud &
MisrepresentationNondisclosureGeneral OverviewTortsBusiness TortsFraud &
MisrepresentationNondisclosureElements



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California Forms of Jury Instruction

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CHAPTER 19 California Judicial Council Fraud or Deceit Instructions

3-19 California Forms of Jury Instruction CACI 1902

CACI 1902 False Promise

[*Name of plaintiff*] **claims [he/she] was harmed because [*name of defendant*] made a false promise. To establish this claim, [*name of plaintiff*] must prove all of the following:**

- 1. That [*name of defendant*] made a promise to [*name of plaintiff*];**
- 2. That this promise was important to the transaction;**
- 3. That [*name of defendant*] did not intend to perform this promise when [he/she] made it;**
- 4. That [*name of defendant*] intended that [*name of plaintiff*] rely on this promise;**
- 5. That [*name of plaintiff*] reasonably relied on [*name of defendant*]'s promise;**
- 6. That [*name of defendant*] did not perform the promised act;**
- 7. That [*name of plaintiff*] was harmed; and**
- 8. That [*name of plaintiff*]'s reliance on [*name of defendant*]'s promise was a substantial factor in causing [his/her/its] harm.**

New September 2003

Directions for Use

Insert brief description of transaction in elements 2 and 5 if it can be simply stated.

Sources and Authority

- *Civil Code section 1710* specifies four kinds of deceit. This instruction is based on the fourth one:

A deceit, within the meaning of [section 1709], is either:

1. The suggestion, as a fact, of that which is not true, by one who does not believe it to be true;
2. The assertion, as a fact, of that which is not true, by one who has no reasonable ground for believing it to be true;
3. The suppression of a fact, by one who is bound to disclose it, or who gives information of other facts which are likely to mislead for want of communication of that fact; or,
4. A promise, made without any intention of performing it.

■ "'Promissory fraud' is a subspecies of fraud and deceit. A promise to do something necessarily implies the intention to perform; hence, where a promise is made without such intention, there is an implied misrepresentation of fact that may be actionable fraud. [P] An action for promissory fraud may lie where a defendant fraudulently induces the plaintiff to enter into a contract.' " (*Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 973-974 [64 Cal.Rptr.2d 843, 938 P.2d 903] , internal citations omitted.)

■ "A promise of future conduct is actionable as fraud only if made without a present intent to perform. 'A declaration of intention, although in the nature of a promise, made in good faith, without intention to deceive, and in the honest expectation that it will be fulfilled, even though it is not carried out, does not constitute a fraud.' Moreover, ' "something more than nonperformance is required to prove the defendant's intent not to perform his promise." ... [I]f plaintiff adduces no further evidence of fraudulent intent than proof of nonperformance of an oral promise, he will never reach a jury.' " (*Magpali v. Farmers Group, Inc.* (1996) 48 Cal.App.4th 471, 481 [55 Cal.Rptr.2d 225] , internal citations omitted.)

■ "[I]n order to support a claim of fraud based upon the alleged failure to perform a promise, it must be shown that the promisor did not intend to perform at the time the promise was made." (*Conrad v. Bank of America* (1996) 45 Cal.App.4th 133, 157 [53 Cal.Rptr.2d 336] , citing *Tenzer v. Superscope, Inc.* (1985) 39 Cal.3d 18, 30 [216 Cal.Rptr. 130, 702 P.2d 212] .)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 781-786

3 Levy et al., *California Torts, Ch. 40, Fraud and Deceit and Other Business Torts*, § 40.03[1][a] (Matthew Bender)

23 California Forms of Pleading and Practice, Ch. 269, *Fraud and Deceit* (Matthew Bender)

10 California Points and Authorities, Ch. 105, *Fraud and Deceit* (Matthew Bender)

2 California Civil Practice: Torts (Thomson West) § 22:20

Publisher's Notes

This instruction replaces BAJI Nos. 12.30 and 12.40, and covers issues presented in BAJI No. 12.41.

LexisNexis Matthew Bender Expert Practice Tip--Difficulty in Proving False Claim: This can be a difficult claim to prove because something more than non-performance is required to prove defendant's intent not to perform (*see Authority, above*). However, if you have the facts, obviously you should pursue this claim and not another. *By Ronald Oster and Rex Heeseman*

See also LexisNexis Matthew Bender Expert Practice Tips following the "Scope" note for Chapter 19.

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsBusiness TortsFraud & MisrepresentationGeneral OverviewTortsBusiness TortsFraud & MisrepresentationActual
FraudGeneral Overview



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CHAPTER 19 California Judicial Council Fraud or Deceit Instructions

3-19 California Forms of Jury Instruction CACI 1903

CACI 1903 Negligent Misrepresentation

[Name of plaintiff] claims [he/she/it] was harmed because [name of defendant] negligently misrepresented an important fact. To establish this claim, [name of plaintiff] must prove all of the following:

- 1. That [name of defendant] represented to [name of plaintiff] that an important fact was true;**
- 2. That [name of defendant]'s representation was not true;**
- 3. That [although [name of defendant] may have honestly believed that the representation was true,] [[name of defendant]/he/she] had no reasonable grounds for believing the representation was true when [he/she] made it;**
- 4. That [name of defendant] intended that [name of plaintiff] rely on this representation;**
- 5. That [name of plaintiff] reasonably relied on [name of defendant]'s representation;**
- 6. That [name of plaintiff] was harmed; and**
- 7. That [name of plaintiff]'s reliance on [name of defendant]'s representation was a substantial factor in causing [his/her/its] harm.**

New September 2003; Revised December 2009

Directions for Use

If both negligent misrepresentation and intentional misrepresentation are alleged in the alternative, give

both this instruction and *CACI No.1900, Intentional Misrepresentation*. If only negligent misrepresentation is alleged, the bracketed reference to the defendant's honest belief in the truth of the representation in element 3 may be omitted. (See *Bily v. Arthur Young & Co. (1992) 3 Cal.4th 370, 407-408 [11 Cal.Rptr.2d 51, 834 P.2d 745]* .)

Sources and Authority

- *Civil Code section 1710* specifies four kinds of deceit. This instruction is based on the second one:

A deceit, within the meaning of [section 1709], is either:

1. The suggestion, as a fact, of that which is not true, by one who does not believe it to be true [intentional misrepresentation of fact];
2. The assertion, as a fact, of that which is not true, by one who has no reasonable ground for believing it to be true [negligent misrepresentation of fact];
3. The suppression of a fact, by one who is bound to disclose it, or who gives information of other facts which are likely to mislead for want of communication of that fact [concealment or suppression of fact]; or,
4. A promise, made without any intention of performing it.

- "Negligent misrepresentation is a separate and distinct tort, a species of the tort of deceit. 'Where the defendant makes false statements, honestly believing that they are true, but without reasonable ground for such belief, he may be liable for negligent misrepresentation, a form of deceit.' " (*Bily, supra*, 3 Cal.4th at pp. 407 , internal citations omitted.)

- "This is not merely a case where the defendants made false representations of matters within their personal knowledge which they had *no reasonable grounds for believing to be true*. Such acts clearly would constitute actual fraud under California law. In such situations the defendant *believes* the representations to be true but is without reasonable grounds for such belief. His liability is based on negligent misrepresentation which has been made a form of actionable deceit. On the contrary, in the instant case, the court found that the defendants *did not believe* in the truth of the statements. Where a person makes statements which he does not believe to be true, in a reckless manner without knowing whether they are true or false, the element of scienter is satisfied and he is liable for intentional misrepresentation." (*Yellow Creek Logging Corp. v. Dare (1963) 216 Cal.App.2d 50, 57 [30 Cal.Rptr. 629]* , original italics, internal citations omitted.)

- "Negligent misrepresentation is a form of deceit, the elements of which consist of (1) a misrepresentation of a past or existing material fact, (2) without reasonable grounds for believing it to be true, (3) with intent to induce another's reliance on the fact misrepresented, (4) ignorance of the truth and justifiable reliance thereon by the party to whom the misrepresentation was directed, and (5) damages." (*Fox v. Pollack (1986) 181 Cal.App.3d 954, 962 [226 Cal.Rptr. 532]* , internal citation omitted.)

- " 'To be actionable deceit, the representation need not be made with knowledge of actual falsity, but need only be an "assertion, as a fact, of that which is not true, by one who has no reasonable ground for believing it to be true" and made "with intent to induce [the recipient] to alter his position to his injury or his risk. ...' " The elements of negligent misrepresentation also include justifiable reliance on the representation, and resulting damage." (*B.L.M. v. Sabo & Deitsch (1997) 55 Cal.App.4th 823, 834 [64 Cal.Rptr.2d 335]* , internal citations omitted.)

- "As is true of negligence, responsibility for negligent misrepresentation rests upon the existence of a legal duty,

imposed by contract, statute or otherwise, owed by a defendant to the injured person. The determination of whether a duty exists is primarily a question of law." (*Eddy v. Sharp* (1988) 199 Cal.App.3d 858, 864 [245 Cal.Rptr. 211] , internal citations omitted.)

■ " ' "Where the defendant makes false statements, honestly believing that they are true, but without reasonable ground for such belief, he may be liable for negligent misrepresentation, a form of deceit." ' If defendant's belief 'is both honest and reasonable, the misrepresentation is innocent and there is no tort liability.' " (*Diediker v. Peelle Financial Corp.* (1997) 60 Cal.App.4th 288, 297 [70 Cal.Rptr.2d 442] , internal citations omitted.)

■ "Parties cannot read something into a neutral statement in order to justify a claim for negligent misrepresentation. The tort requires a 'positive assertion.' 'An "implied" assertion or representation is not enough.' " (*Diediker, supra*, 60 Cal.App.4th at pp. 297-298 , internal citations omitted.)

■ "Whether a defendant had reasonable ground for believing his or her false statement to be true is ordinarily a question of fact." (*Quality Wash Group V, Ltd. v. Hallak* (1996) 50 Cal.App.4th 1687, 1696 [58 Cal.Rptr.2d 592] , internal citations omitted.)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 818-820, 823-826

3 Levy et al., *California Torts, Ch. 40, Fraud and Deceit and Other Business Torts*, § 40.10 (Matthew Bender)

23 California Forms of Pleading and Practice, Ch. 269, *Fraud and Deceit* (Matthew Bender)

10 *California Points and Authorities, Ch. 105, Fraud and Deceit*, § 105.270 et seq. (Matthew Bender)

2 California Civil Practice: Torts (Thomson West) §§ 22:13-22:15

Publisher's Notes

This instruction replaces BAJI Nos. 12.30 and 12.45.

LexisNexis Matthew Bender Expert Practice Tip--Use of Negligent Misrepresentation: A negligent misrepresentation claim may be helpful in pursuing alternative theories, finding insurance coverage, or in situations with proof challenges (i.e., can you prove it was intentional?). By *Rex Heeseman*

See also LexisNexis Matthew Bender Expert Practice Tips following the "Scope" note for Chapter 19.

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsBusiness TortsFraud & MisrepresentationGeneral OverviewTortsBusiness TortsFraud & MisrepresentationNegligent MisrepresentationGeneral OverviewTortsBusiness TortsFraud & MisrepresentationNegligent MisrepresentationElements



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CHAPTER 19 California Judicial Council Fraud or Deceit Instructions

3-19 California Forms of Jury Instruction CACI 1904

CACI 1904 Opinions as Statements of Fact

Ordinarily, an opinion is not considered a representation of fact. An opinion is a person's belief that a fact exists, a statement regarding a future event, or a judgment about quality, value, authenticity, or similar matters. However, [name of defendant]'s opinion is considered a representation of fact if [name of plaintiff] proves that:

[[Name of defendant] claimed to have special knowledge about the subject matter that [name of plaintiff] did not have;] [or]

[[Name of defendant] made a representation, not as a casual expression of belief, but in a way that declared the matter to be true;] [or]

[[Name of defendant] had a relationship of trust and confidence with [name of plaintiff];] [or]

[[Name of defendant] had some other special reason to expect that [name of plaintiff] would rely on his or her opinion.]

New September 2003; Revised April 2004

This is not a stand-alone instruction. It should be read in conjunction with one of the elements instructions (CACI Nos. 1900-1903).

The second bracketed option appears to be limited to cases involving professional opinions. (*Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370, 408 [11 Cal.Rptr.2d 51, 834 P.2d 745] .)

Alternative bracketed options that do not apply to the facts of the case may be deleted.

■ Restatement of Torts, section 542 states:

The recipient of a fraudulent misrepresentation solely of the maker's opinion is not justified in relying upon it in a transaction with the maker, unless the fact to which the opinion relates is material, and the maker

(a) purports to have special knowledge of the matter that the recipient does not have, or

(b) stands in a fiduciary or other similar relation of trust and confidence to the recipient, or

(c) has successfully endeavored to secure the confidence of the recipient, or

(d) has some other special reason to expect that the recipient will rely on his opinion.

■ *Restatement Second of Torts, section 538A* states: "A representation is one of opinion if it expresses only (a) the belief of the maker, without certainty, as to the existence of a fact; or (b) his judgment as to quality, value, authenticity, or other matters of judgment."

■ *Restatement Second of Torts, section 539* states:

(1) A statement of opinion as to facts not disclosed and not otherwise known to the recipient may, if it is reasonable to do so, be interpreted by him as an implied statement

(a) that the facts known to the maker are not incompatible with his opinion; or

(b) that he knows facts sufficient to justify him in forming it.

(2) In determining whether a statement of opinion may reasonably be so interpreted, the recipient's belief as to whether the maker has an adverse interest is important.

■ "Generally, actionable misrepresentation must be one of existing fact; 'predictions as to future events, or statements as to future action by some third party, are deemed opinions, and not actionable fraud' But there are exceptions to this rule: '(1) where a party holds himself out to be specially qualified and the other party is so situated that he may reasonably rely upon the former's superior knowledge; (2) where the opinion is by a fiduciary or other trusted person; [and,] (3) where a party states his opinion as an existing fact or as implying facts which justify a belief in the truth of the opinion.' " (*Cohen v. S&S Construction Co. (1983) 151 Cal.App.3d 941, 946 [201 Cal.Rptr. 173]* , internal citations omitted.)

■ "A statement couched as an opinion, by one having special knowledge of the subject, may be treated as an actionable misstatement of fact. Whether a statement is nonactionable opinion or actionable misrepresentation of fact is a question of fact for the jury." (*Furla v. Jon Douglas Co. (1998) 65 Cal.App.4th 1069, 1080-1081 [76 Cal.Rptr.2d 911]* , internal citations omitted.)

■ "Puffing," or sales talk, is generally considered opinion, unless it involves a representation that a product is safe. (*Hauter v. Zogarts (1975) 14 Cal.3d 104 [120 Cal.Rptr. 681, 534 P.2d 377]* ; see also *Continental Airlines, Inc. v. McDonnell Douglas Corp. (1989) 216 Cal.App.3d 388, 424 [264 Cal.Rptr. 779]* .)

■ "Under certain circumstances, expressions of professional opinion are treated as representations of fact. When a statement, although in the form of an opinion, is 'not a casual expression of belief' but 'a deliberate affirmation of the matters stated,' it may be regarded as a positive assertion of fact. Moreover, when a party possesses or holds itself out as possessing superior knowledge or special information or expertise regarding the subject matter and a plaintiff is so situated that it may reasonably rely on such supposed knowledge, information, or expertise, the defendant's representation may be treated as one of material fact." (*Bily, supra*, 3 Cal.4th at p. 408 , internal citations omitted.)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 774-778

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.03[1][b] (Matthew Bender)

23 California Forms of Pleading and Practice, Ch. 269, *Fraud and Deceit* (Matthew Bender)

10 California Points and Authorities, Ch. 105, *Fraud and Deceit* (Matthew Bender)

2 California Civil Practice: Torts (Thomson West) §§ 22:21-22:28

Publisher's Notes

This instruction replaces BAJI No. 12.32.

LexisNexis Matthew Bender Expert Practice Tip--Statements of Fact vs. Opinion: In some situations, it may be difficult deciding whether the statement was one of fact or opinion. Statements of opinion cause more difficulties for the plaintiff. Sometimes that can be avoided by presenting the case in a certain way. *By Rex Heeseman*

LexisNexis Matthew Bender Expert Practice Tip--"Special Reason" for Relying on Opinion: The instruction that an opinion may be considered a representation of fact, if there was a "special reason" for plaintiff to rely on the opinion, requires special care. Be sure that the "special reason" is legally recognized as a valid basis for making a statement of opinion actionable. *By Ronald Oster*

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsBusiness TortsFraud & MisrepresentationGeneral OverviewTortsBusiness TortsFraud & MisrepresentationNegligent MisrepresentationElements



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CHAPTER 19 California Judicial Council Fraud or Deceit Instructions

3-19 California Forms of Jury Instruction CACI 1905

CACI 1905 Definition of Important Fact/Promise

A [fact/promise] is important if it would influence a reasonable person's judgment or conduct. A [fact/promise] is also important if the person who [represents/makes] it knows that the person to whom the [representation/promise] is made is likely to be influenced by it even if a reasonable person would not.

New September 2003

■ "According to the Restatement of Torts, '[r]eliance upon a fraudulent misrepresentation is not justifiable unless the matter misrepresented is material. ... The matter is material if ... a reasonable [person] would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question' But materiality is a jury question, and a 'court may [only] withdraw the case from the jury if the fact misrepresented is so obviously unimportant that the jury could not reasonably find that a reasonable man would have been influenced by it.' " (*Charpentier v. Los Angeles Rams* (1999) 75 Cal.App.4th 301, 312-313 [89 Cal.Rptr.2d 115] , internal citations omitted.)

■ "Viewed in terms of materiality, '[a] false representation which cannot possibly affect the intrinsic merits of a business transaction must necessarily be immaterial because reliance upon it could not produce injury in a legal sense.' " (*Service by Medallion, Inc. v. Clorox Co.* (1996) 44 Cal.App.4th 1807, 1818 [52 Cal.Rptr.2d 650] , internal citation omitted.)

■ "A misrepresentation of fact is material if it induced the plaintiff to alter his position to his detriment. Stated in terms of reliance, materiality means that without the misrepresentation, the plaintiff would not have acted as he did. 'It must be shown that the plaintiff actually relied upon the misrepresentation; i.e., that the representation was "an immediate cause of his conduct which alters his legal relations," and that

without such representation, "he would not, in all reasonable probability, have entered into the contract or other transaction." ' ' ' (*Okun v. Morton* (1988) 203 Cal.App.3d 805, 828 [250 Cal.Rptr. 220] , internal citations omitted.)

Secondary Sources

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.03[4] (Matthew Bender)

23 California Forms of Pleading and Practice, Ch. 269, *Fraud and Deceit* (Matthew Bender)

10 California Points and Authorities, Ch. 105, *Fraud and Deceit* (Matthew Bender)

2 California Civil Practice: Torts (Thomson West) § 22:29

Publisher's Notes

There is no BAJI instruction on this subject.

LexisNexis Matthew Bender Expert Practice Tip--Frame Your Case Carefully: These concepts (fact and promise) may be easy for the jury to grasp in some cases, but more difficult in other cases. How you frame the case may be important. *By Rex Heeseman*

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsBusiness TortsFraud & MisrepresentationGeneral OverviewTortsBusiness TortsFraud & MisrepresentationActual FraudGeneral OverviewTortsBusiness TortsFraud & MisrepresentationActual FraudElements



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CHAPTER 19 California Judicial Council Fraud or Deceit Instructions

3-19 California Forms of Jury Instruction CACI 1906

CACI 1906 Misrepresentations Made to Persons Other Than the Plaintiff

[Name of defendant] is responsible for a representation that was not made directly to [name of plaintiff] if [he/she/it] made the representation [to a group of persons including [name of plaintiff]] [or] [to another person, intending or reasonably expecting that it would be repeated to [name of plaintiff]].

New September 2003

An instruction on concealment made to a person other than the plaintiff is not necessary; this point is covered by the third option of element 1 in *CACI No. 1901, Concealment*.

■ *Civil Code section 1711* provides: "One who practices a deceit with intent to defraud the public, or a particular class of persons, is deemed to have intended to defraud every individual in that class, who is actually misled by the deceit."

■ "It is true that in order for a defendant to be liable for fraud, he or she must intend that a particular representation (or concealment) be relied upon by a specific person or persons. However, it is also established that a defendant cannot escape liability if he or she makes a representation to one person while intending or having reason to expect that it will be repeated to and acted upon by the plaintiff (or someone in the class of persons of which plaintiff is a member). This is the principle of indirect deception described in *section 533 of the Restatement Second of Torts* (section 533): 'The maker of a fraudulent misrepresentation is subject to liability for pecuniary loss to another who acts in justifiable reliance upon it if the misrepresentation, although not made directly to the other, is made to a third person and the maker intends or has reason to expect that its terms will be repeated or its substance communicated to the other, and that it will influence his conduct in the transaction or type of transaction

involved.' *Comment d to section 533* makes it clear the rule of section 533 applies where the maker of the misrepresentation has information that gives him special reason to expect that the information will be communicated to others and will influence their conduct. *Comment g* goes on to explain that it is not necessary that the maker of the misrepresentation have the particular person in mind. It is enough that it is intended to be repeated to a particular class of persons." (*Shapiro v. Sutherland* (1998) 64 Cal.App.4th 1534, 1548 [76 Cal.Rptr.2d 101] , internal citations omitted; see also *Geernaert v. Mitchell* (1995) 31 Cal.App.4th 601, 605-606 [37 Cal.Rptr.2d 483] .)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 802-806

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.05[3] (Matthew Bender)

23 California Forms of Pleading and Practice, Ch. 269, *Fraud and Deceit* (Matthew Bender)

10 California Points and Authorities, Ch. 105, *Fraud and Deceit* (Matthew Bender)

2 California Civil Practice: Torts (Thomson West) § 22:34

Publisher's Notes

This instruction covers issues presented in BAJI No. 12.50.

LexisNexis Matthew Bender Expert Practice Tip--Misrepresentations to Third Parties: It may be challenging to prove that a statement to a third party was later made to the plaintiff. *By Rex Heeseman*

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsBusiness TortsFraud & MisrepresentationGeneral OverviewTortsBusiness TortsFraud & MisrepresentationActual FraudGeneral OverviewTortsBusiness TortsFraud & MisrepresentationActual FraudElements



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CHAPTER 19 California Judicial Council Fraud or Deceit Instructions

3-19 California Forms of Jury Instruction CACI 1907

CACI 1907 Reliance

[*Name of plaintiff*] **relied on** [*name of defendant*]'s [misrepresentation/concealment] if it caused [him/her/it] to [*insert brief description of the action, e.g., "buy the house"*], and if [he/she/it] would probably not have done so without such [misrepresentation/concealment].

It is not necessary for a [misrepresentation/concealment] to be the only reason for [*name of plaintiff*]'s conduct. It is enough if a [misrepresentation/concealment] substantially influenced [*name of plaintiff*]'s choice, even if it was not the only reason for [his/her/its] conduct.

New September 2003

■ "It is settled that a plaintiff, to state a cause of action for deceit based on a misrepresentation, must plead that he or she actually relied on the misrepresentation." (*Mirkin v. Wasserman* (1993) 5 Cal.4th 1082, 1088 [23 Cal.Rptr.2d 101, 858 P.2d 568] , internal citations omitted.)

■ "Reliance exists when the misrepresentation or nondisclosure was an immediate cause of the plaintiff's conduct which altered his or her legal relations, and when without such misrepresentation or nondisclosure he or she would not, in all reasonable probability, have entered into the contract or other transaction. 'Except in the rare case where the undisputed facts leave no room for a reasonable difference of opinion, the question of whether the plaintiff's reliance is reasonable is a question of fact.' " (*Alliance Mortgage Co. v. Rothwell* (1995) 10 Cal.4th 1226, 1239 [44 Cal.Rptr.2d 352, 900 P.2d 601] , internal citations omitted.)

■ "In establishing the reliance element of a cause of action for fraud, it is settled that the alleged fraud

need not be the sole cause of a party's reliance. Instead, reliance may be established on the basis of circumstantial evidence showing the alleged fraudulent misrepresentation or concealment substantially influenced the party's choice, even though other influences may have operated as well." (*Sangster v. Paetkau* (1998) 68 Cal.App.4th 151, 170 [80 Cal.Rptr.2d 66] , internal citations omitted.)

■ "[A] presumption, or at least an inference, of reliance arises wherever there is a showing that a misrepresentation was material. A misrepresentation is judged to be 'material' if 'a reasonable man would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question' and as such, materiality is generally a question of fact unless the 'fact misrepresented is so obviously unimportant that the jury could not reasonably find that a reasonable man would have been influenced by it.' " (*Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 977 [64 Cal.Rptr.2d 843, 938 P.2d 903] .)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 808-815

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, §§ 40.05-40.06 (Matthew Bender)

23 California Forms of Pleading and Practice, Ch. 269, *Fraud and Deceit* (Matthew Bender)

10 California Points and Authorities, Ch. 105, *Fraud and Deceit* (Matthew Bender)

2 California Civil Practice: Torts (Thomson West) § 22:31

Publisher's Notes

This instruction replaces BAJI No. 12.51.

LexisNexis Matthew Bender Expert Practice Tip--Proving Reliance Can Be Difficult: It is sometimes difficult to prove "reliance." Thus, care must be given to putting together the "best evidence."
By Rex Heeseman

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsBusiness TortsFraud & MisrepresentationGeneral OverviewTortsBusiness TortsFraud & MisrepresentationActual FraudGeneral OverviewTortsBusiness TortsFraud & MisrepresentationNondisclosureElements



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California Forms of Jury Instruction

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CHAPTER 19 California Judicial Council Fraud or Deceit Instructions

3-19 California Forms of Jury Instruction CACI 1908

CACI 1908 Reasonable Reliance

You must determine the reasonableness of [name of plaintiff]'s reliance by taking into account [his/her] mental capacity, knowledge, and experience.

New September 2003; Revised October 2004

This instruction is appropriate for cases in which evidence of the plaintiff's greater or lesser personal knowledge, education, experience, or capacity has been introduced. Trial of class actions may require a different instruction. (See *Vasquez v. Superior Court* (1971) 4 Cal.3d 800, 814 n. 9 [94 Cal.Rptr. 796, 484 P.2d 964] ; see also *Wilner v. Sunset Life Insurance Co.* (2000) 78 Cal.App.4th 952, 963 [93 Cal.Rptr.2d 413] .)

- "Whether reliance is justified is a question of fact for the determination of the trial court; the issue is whether the person who claims reliance was justified in believing the representation in the light of his own knowledge and experience." (*Gray v. Don Miller & Associates, Inc.* (1984) 35 Cal.3d 498, 503 [198 Cal.Rptr. 551, 674 P.2d 253] , internal citations omitted.)

- The "leading case" (see *Blankenheim v. E.F. Hutton, Co., Inc.* (1990) 217 Cal.App.3d 1463, 1474 [266 Cal.Rptr. 593]) on justifiable reliance states: "[N]or is a plaintiff held to the standard of precaution or of minimum knowledge of a hypothetical, reasonable man. Exceptionally gullible or ignorant people have been permitted to recover from defendants who took advantage of them in circumstances where persons of normal intelligence would not have been misled. 'No rogue should enjoy his ill-gotten plunder for the simple reason that his victim is by chance a fool.' If the conduct of the plaintiff in the light of his own intelligence and information was manifestly unreasonable, however, he will be denied a recovery.

'He may not put faith in representations which are preposterous, or which are shown by facts within his observation to be so patently and obviously false that he must have closed his eyes to avoid discovery of the truth.' " (Quoting *Seeger v. Odell* (1941) 18 Cal.2d 409, 415 [115 P.2d 977] , internal citations omitted.)

■ "Except in the rare case where the undisputed facts leave no room for a reasonable difference of opinion, the question of whether a plaintiff's reliance is reasonable is a question of fact. 'What would constitute fraud in a given instance might not be fraudulent when exercised toward another person. The test of the representation is its actual effect on the particular mind' " (*Blankenheim, supra*, 217 Cal.App.3d at p. 1475 , internal citation omitted.)

■ "[Plaintiff]'s deposition testimony on which appellants rely also reveals that she is a practicing attorney and uses releases in her practice. In essence, she is asking this court to rule that a practicing attorney can rely on the advice of an equestrian instructor as to the validity of a written release of liability that she executed without reading. In determining whether one can reasonably or justifiably rely on an alleged misrepresentation, the knowledge, education and experience of the person claiming reliance must be considered. Under these circumstances, we conclude as a matter of law that any such reliance was not reasonable." (*Guido v. Koopman* (1991) 1 Cal.App.4th 837, 843-844 [2 Cal.Rptr.2d 437] , internal citations omitted.)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 812-815

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.06 (Matthew Bender)

23 California Forms of Pleading and Practice, Ch. 269, *Fraud and Deceit* (Matthew Bender)

10 California Points and Authorities, Ch. 105, *Fraud and Deceit* (Matthew Bender)

2 California Civil Practice: Torts (Thomson West) § 22:32

Publisher's Notes

This instruction covers issues presented in BAJI No. 12.52.

LexisNexis Matthew Bender Expert Practice Tip--Proving Reasonable Reliance Is Difficult:

Proving "reliance" may be difficult (see *CACI No. 1907*), but proving a "reasonable reliance" may be even more of a challenge. *By Rex Heeseman*

If "a statement is targeted at unsophisticated members of the public, it is appropriate to adjust the 'reasonable consumer' standard accordingly." (*Brockey v. Moore* (2003) 107 Cal.App.4th 86, 101-102 [131 Cal.Rptr.2d 746] .)

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsBusiness TortsFraud & MisrepresentationGeneral OverviewTortsBusiness TortsFraud & MisrepresentationActual FraudGeneral OverviewTortsBusiness TortsFraud & MisrepresentationActual FraudElements



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CHAPTER 19 California Judicial Council Fraud or Deceit Instructions

3-19 California Forms of Jury Instruction CACI 1909

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CACI 1909Reserved for Future Use



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CHAPTER 19 California Judicial Council Fraud or Deceit Instructions

3-19 California Forms of Jury Instruction CACI 1910

CACI 1910 Real Estate Seller's Nondisclosure of Material Facts

[*Name of plaintiff*] claims that [*name of defendant*] failed to disclose certain information, and that because of this failure to disclose, [*name of plaintiff*] was harmed. In order to establish this claim, [*name of plaintiff*] must prove all of the following:

- 1. That [*name of plaintiff*] purchased [*describe real property*] from [*name of defendant*];**
- 2. That [*name of defendant*] knew that [*specify information that was not disclosed*];**
- 3. That [*name of defendant*] did not disclose this information to [*name of plaintiff*];**
- 4. That [*name of plaintiff*] did not know, and could not reasonably have discovered, this information;**
- 5. That [*name of defendant*] knew that [*name of plaintiff*] did not know, and could not reasonably have discovered, this information;**
- 6. That this information significantly affected the value or desirability of the property;**
- 7. That [*name of plaintiff*] was harmed; and**
- 8. That [*name of defendant*]'s failure to disclose the information was a substantial factor in causing [*name of plaintiff*]'s harm.**

Directions for Use

This instruction sets forth the common law duty of disclosure that a real estate seller has to his or her buyer. Nondisclosure is tantamount to a misrepresentation. (See *Calemine v. Samuelson* (2009) 171 Cal.App.4th 153, 161 [89 Cal.Rptr.3d 495] .)

For certain transfers, there is also a statutory duty of disclosure. (See *Civ. Code*, § 1102 *et seq.*) The scope of the required disclosure is set forth on a statutory form. (See *Civ. Code*, § 1102.6.) The common law duty is not preempted by the statutory duty (see *Civ. Code*, § 1102.1(a)), but breach of the statutory duty can constitute proof of breach of the common law duty if all of the elements are established. (See, e.g., *Calemine*, *supra*, 171 Cal.App.4th at pp. 164-165 [seller did not disclose earlier lawsuits, as required by statutory form].)

Sources and Authority

- *Civil Code* section 1102.13 provides: "No transfer subject to this article shall be invalidated solely because of the failure of any person to comply with any provision of this article. However, any person who willfully or negligently violates or fails to perform any duty prescribed by any provision of this article shall be liable in the amount of actual damages suffered by a transferee."

- "A real estate seller has both a common law and statutory duty of disclosure. [Under the common law duty]: 'In the context of a real estate transaction, " ... where the seller knows of facts materially affecting the value or desirability of the property ... and also knows that such facts are not known to, or within the reach of the diligent attention and observation of the buyer, the seller is under a duty to disclose them to the buyer. [Citations.]' [Citations.] Undisclosed facts are material if they would have a significant and measurable effect on market value. [Citation.]' A seller's duty of disclosure is limited to material facts; once the essential facts are disclosed a seller is not under a duty to provide details that would merely serve to elaborate on the disclosed facts. Where a seller fails to disclose a material fact, he may be subject to liability 'for mere nondisclosure since his conduct in the transaction amounts to a representation of the nonexistence of the facts which he has failed to disclose [citation].' Generally, whether the undisclosed matter was of sufficient materiality to have affected the value or desirability of the property is a question of fact." (*Calemine*, *supra*, 171 Cal.App.4th at p. 161 , internal citations omitted.)

- "Generally, where one party to a transaction has sole knowledge or access to material facts and knows that such facts are not known or reasonably discoverable by the other party, then a duty to disclose exists." (See *Shapiro v. Sutherland* (1998) 64 Cal.App.4th 1534, 1544 [76 Cal.Rptr.2d 101] .)

- "Failure of the seller to fulfill [the] duty of disclosure constitutes actual fraud." (*Lingsch v. Savage* (1963) 213 Cal.App.2d 729, 736 [29 Cal.Rptr. 201] .)

- "When and where the action by the purchaser is based on conditions that are visible and that a personal inspection at once discloses and, when it is admitted that such personal inspection was in fact made, then manifestly it cannot be successfully contended that the purchaser relied upon any alleged misrepresentations with regard to such visible conditions. But personal inspection is no defense when and where the conditions are not visible and are known only to the seller, and 'where material facts are accessible to the vendor only and he knows them not to be within the reach of the diligent attention and observation of the vendee, the vendor is bound to disclose such facts to the vendee.' " (*Buist v. C. Dudley De Velbiss Corp.* (1960) 182 Cal.App.2d 325, 331 [6 Cal.Rptr. 259] .)

3-19 California Forms of Jury Instruction CACI 1910

■ "In enacting [*Civil Code section 1102 et seq.*], the Legislature made clear it did not intend to alter a seller's common law duty of disclosure. The purpose of the enactment was instead to make the required disclosures specific and clear. (*Calemine, supra*, 171 *Cal.App.4th* at pp. 161-162 .)

■ "The legislation was sponsored by the California Association of Realtors to provide a framework for formal disclosure of facts relevant to a decision to purchase realty. The statute therefore confirms and perhaps clarifies a disclosure obligation that existed previously at common law." (*Shapiro, supra*, 64 *Cal.App.4th* at p. 1539, fn. 6 .)

Secondary Sources

1 *California Real Estate Law and Practice, Ch. 71, Real Property Purchase and Sale Agreements*, § 71.30 (Matthew Bender)

10 *California Forms of Pleading and Practice, Ch. 103, Brokers*, § 103.31 (Matthew Bender)

50 *California Forms of Pleading and Practice, Ch. 569, Vendor and Purchaser of Real Property*, § 569.11 (Matthew Bender)

2A *California Points and Authorities, Ch. 31, Brokers and Salesperson*, § 31.142 (Matthew Bender)

Greenwald et al., *California Practice Guide: Real Property Transactions* (The Rutter Group) P 4:351 et seq.

Publisher's Notes

There is no BAJI instruction on this subject.



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CHAPTER 19 California Judicial Council Fraud or Deceit Instructions

3-19 California Forms of Jury Instruction CACI 1911-CACI 1919

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CACI 1911Reserved for Future Use



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CHAPTER 19 California Judicial Council Fraud or Deceit Instructions

3-19 California Forms of Jury Instruction CACI 1920

CACI 1920 Buyer's Damages for Purchase or Acquisition of Property

If you decide that [name of plaintiff] has proved [his/her/its] claim against [name of defendant], you also must decide how much money will reasonably compensate [name of plaintiff] for the harm. This compensation is called "damages."

[Name of plaintiff] must prove the amount of [his/her/its] damages. However, [name of plaintiff] does not have to prove the exact amount of damages that will provide reasonable compensation for the harm. You must not speculate or guess in awarding damages.

The following are the specific items of damages claimed by [name of plaintiff]:

- 1. The difference between [the amount that [name of plaintiff] paid] [or] [the fair market value of what [name of plaintiff] exchanged for the property] and the fair market value of the property at the time of sale;**
 - 2. Amounts that [name of plaintiff] reasonably spent in reliance on [name of defendant]'s [false representation/failure to disclose/promise] if those amounts would not otherwise have been spent in the purchase or acquisition of the property; [and]**
 - 3. [Insert additional harm arising from the transaction] to the extent that [name of defendant]'s [false representation/failure to disclose/promise] was a substantial factor in causing that [insert additional harm arising from the transaction]; [and]**
 - 4. [Lost profits [or other gains].]**
-

New September 2003

For an instruction on damages for loss of use, see *CACI No. 3903G, Loss of Use of Real Property (Economic Damage)*.

The first element of this instruction should be modified in cases involving promissory fraud: "In cases of promissory fraud, the damages are measured by market value as of the date the promise was breached because that is the date when the damage occurred." (*Glendale Fed. Sav. & Loan Assn. v. Marina View Heights Dev. Co.* (1977) 66 Cal.App.3d 101, 145-146 [135 Cal.Rptr. 802].)

■ *Civil Code section 3343 provides:*

(a) One defrauded in the purchase, sale or exchange of property is entitled to recover the difference between the actual value of that with which the defrauded person parted and the actual value of that which he received, together with any additional damage arising from the particular transaction, including any of the following:

(1) Amounts actually and reasonably expended in reliance upon the fraud.

(2) An amount which would compensate the defrauded party for loss of use and enjoyment of the property to the extent that any such loss was proximately caused by the fraud.

(3) Where the defrauded party has been induced by reason of the fraud to sell or otherwise part with the property in question, an amount which will compensate him for profits or other gains which might reasonably have been earned by use of the property had he retained it.

(4) Where the defrauded party has been induced by reason of the fraud to purchase or otherwise acquire the property in question, an amount which will compensate him for any loss of profits or other gains which were reasonably anticipated and would have been earned by him from the use or sale of the property had it possessed the characteristics fraudulently attributed to it by the party committing the fraud, provided that lost profits from the use or sale of the property shall be recoverable only if and only to the extent that all of the following apply:

(i) The defrauded party acquired the property for the purpose of using or reselling it for a profit.

(ii) The defrauded party reasonably relied on the fraud in entering into the transaction and in anticipating profits from the subsequent use or sale of the property.

(iii) Any loss of profits for which damages are sought under this paragraph have been proximately caused by the fraud and the defrauded party's reliance on it.

(b) Nothing in this section shall do either of the following:

(1) Permit the defrauded person to recover any amount measured by the difference between the value of property as represented and the actual value thereof.

(2) Deny to any person having a cause of action for fraud or deceit any legal or equitable remedies to

which such person may be entitled.

■ "As they apply to damages for fraud, subdivisions (a)(2) and (a)(3) of section 3343 are limited to recovery of damages by sellers of real property, while subdivision (a)(4) deals with purchasers of real property." (*Channell v. Anthony* (1976) 58 Cal.App.3d 290, 309 [129 Cal.Rptr. 704] , footnote omitted.)

■ "Before 1935 the California courts had no statutory mandate on the measure of damages for fraud. While the 'benefit of the bargain' measure of damages was generally employed, on occasion California courts sometimes applied the 'out of pocket' rule when the 'loss of bargain' rule was difficult to apply or would work a hardship on plaintiff or defendant." (*Channell, supra*, 58 Cal.App.3d at p. 309 .)

■ "We find nothing in section 3343 as amended which requires that a plaintiff show 'out-of-pocket' loss (i.e., an amount by which the consideration paid exceeded the value of the property received) in order to be entitled to any recovery for fraud in a property transaction." (*Stout v. Turney* (1978) 22 Cal.3d 718, 729 [150 Cal.Rptr. 637, 586 P.2d 1228] .)

■ "All doubt concerning this matter was set at rest, however, in the carefully considered opinion in *Bagdasarian v. Gragnon* (1948) 31 Cal.2d 744, 753 [192 P.2d 935] where it was definitely and finally determined that the term 'actual value,' as used in the statute, was that same market value so frequently defined in actions for condemnation." (*Nece v. Bennett* (1963) 212 Cal.App.2d 494, 497 [28 Cal.Rptr. 117] , internal citation omitted.)

■ "[P]ursuant to *Civil Code* section 3343, amounts paid for escrow fees, moving to and from the property, building permits, telephone connections, fences, yard cleaning, garage materials, door locks, shrubbery, taxes, rent and labor are examples of recoverable damages when reasonably expended in reliance on the fraud." (*Cory v. Villa Properties* (1986) 180 Cal.App.3d 592, 603 [225 Cal.Rptr. 628] , internal citations omitted.)

■ "To recover damages for fraud, a plaintiff must have sustained damages proximately caused by the misrepresentation. A damage award for fraud will be reversed where the injury is not related to the misrepresentation." (*Las Palmas Associates v. Las Palmas Center Associates* (1991) 235 Cal.App.3d 1220, 1252 [1 Cal.Rptr.2d 301] , internal citations omitted.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1714-1716

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.23 (Matthew Bender)

23 California Forms of Pleading and Practice, Ch. 269, *Fraud and Deceit* (Matthew Bender)

10 California Points and Authorities, Ch. 105, *Fraud and Deceit* (Matthew Bender)

Publisher's Notes

This instruction covers issues presented in BAJI No. 12.56.

The measure of damages in a case of intentional misrepresentation by a fiduciary is not limited to out-of-pocket losses. (*Fragale v. Faulkner* (2003) 110 Cal.App.4th 229, 239 [1 Cal.Rptr.3d 616] .)

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsBusiness TortsFraud & MisrepresentationGeneral OverviewTortsBusiness TortsFraud & MisrepresentationActual
FraudGeneral OverviewTortsBusiness TortsFraud & MisrepresentationActual FraudRemedies



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CHAPTER 19 California Judicial Council Fraud or Deceit Instructions

3-19 California Forms of Jury Instruction CACI 1921

CACI 1921 Buyer's Damages for Purchase or Acquisition of Property--Lost Profits

[*Name of plaintiff*] may recover damages for profits [or other gains] [he/she/it] would have made if the property had been as represented. [*Name of plaintiff*] can recover these profits [or other gains] only if [he/she/it] has proved all of the following:

- 1. That [*name of plaintiff*] acquired the property for the purpose of using or reselling it for a [profit/gain];**
- 2. That [*name of plaintiff*] reasonably relied on [*name of defendant*]'s [false representation/failure to disclose/promise] in entering into the transaction and in anticipating [profits/gains] from the use or sale of the property; and**
- 3. That [*name of defendant*]'s [false representation/failure to disclose/promise] and [*name of plaintiff*]'s reliance on it were both substantial factors in causing the lost profits.**

You do not have to calculate the amount of the lost profits with mathematical precision, but there must be a reasonable basis for computing the loss.

New September 2003

This instruction should be read immediately after *CACI No. 1920, Buyer's Damages for Purchase or Acquisition of Property*, if the plaintiff is claiming lost profits.

■ *Civil Code section 3343(a)(4) provides:*

Where the defrauded party has been induced by reason of the fraud to purchase or otherwise acquire the property in question, an amount which will compensate him for any loss of profits or other gains which were reasonably anticipated and would have been earned by him from the use or sale of the property had it possessed the characteristics fraudulently attributed to it by the party committing the fraud, provided that lost profits from the use or sale of the property shall be recoverable only if and only to the extent that all of the following apply:

(i) The defrauded party acquired the property for the purpose of using or reselling it for a profit.

(ii) The defrauded party reasonably relied on the fraud in entering into the transaction and in anticipating profits from the subsequent use or sale of the property.

(iii) Any loss of profits for which damages are sought under this paragraph have been proximately caused by the fraud and the defrauded party's reliance on it.

■ "With glaring inconsistency, California's statutory structure before 1971 permitted recovery of lost profits and earnings under *Civil Code* section 3333 in fraud cases which did not concern the 'purchase, sale or exchange of property,' and even in simple negligence cases and breach of contract cases the injured parties could recover lost profits and earnings, while the 'out of pocket' rule barred the fraud victim in property transaction cases from recovering more than the difference between the amount he paid for the property and its actual value." (*Channell v. Anthony* (1976) 58 Cal.App.3d 290, 312 [129 Cal.Rptr. 704] , internal citations and footnote omitted.)

■ "The Legislature removed all doubt concerning the recovery of loss of profits resulting from the fraudulently induced property acquisition. Clearly and specifically, lost profits proximately caused are recoverable. The cases cited, the arguments made concerning *Civil Code* section 3343 limitations are simply not relevant to post-1971 proceedings, where profits are the claimed loss. *Civil Code* section 3343 as amended, in so many words, authorizes recovery of lost profits." (*Hartman v. Shell Oil Co.* (1977) 68 Cal.App.3d 240, 247 [137 Cal.Rptr. 244] .)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1714-1716

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.23 (Matthew Bender)

23 California Forms of Pleading and Practice, Ch. 269, *Fraud and Deceit* (Matthew Bender)

10 California Points and Authorities, Ch. 105, *Fraud and Deceit* (Matthew Bender)

Publisher's Notes

This instruction covers issues presented in BAJI No. 12.56.

LexisNexis Matthew Bender Expert Practice Tip--Lost Profits Can Be a Difficult Concept: "Lost profits" is a hard concept for many jurors (and some judges) to fathom. It is an area of significant potential for damages, but it is also amorphous and subject to discrediting. *By Rex Heeseman*

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsBusiness TortsFraud & MisrepresentationGeneral OverviewTortsBusiness TortsFraud & MisrepresentationActual

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CHAPTER 19 California Judicial Council Fraud or Deceit Instructions

3-19 California Forms of Jury Instruction CACI 1922

CACI 1922 Seller's Damages for Sale or Exchange of Property

If you decide that [name of plaintiff] has proved [his/her/its] claim against [name of defendant], you also must decide how much money will reasonably compensate [name of plaintiff] for the harm. This compensation is called "damages."

[Name of plaintiff] must prove the amount of [his/her/its] damages. However, [name of plaintiff] does not have to prove the exact amount of damages that will provide reasonable compensation for the harm. You must not speculate or guess in awarding damages.

The following are the specific items of damages claimed by [name of plaintiff]:

- 1. The difference between the fair market value of the property at the time of sale and [the amount that [name of plaintiff] received] [or] [the fair market value of what [name of plaintiff] received in exchange for the property];**
- 2. Amounts that [name of plaintiff] reasonably spent in reliance on [name of defendant]'s [false representation/failure to disclose/promise] if those amounts would not otherwise have been spent in the sale or exchange of the property;**
- 3. Loss of use and enjoyment of the property from [insert beginning date] to [insert end date], to the extent that [name of defendant]'s [false representation/failure to disclose/promise] was a substantial factor in causing that loss of use and enjoyment of the property;**
- 4. Profits or other gains from [insert beginning date] to [insert end date], that [name of plaintiff] might reasonably have earned by use of the property if [he/she] had kept it; and**

5. Any additional damage arising from the particular transaction.

New September 2003

This instruction should be tailored to fit the facts and evidence in the particular case: "If the seller parts with title and elects to forego his right of rescission and sue for damages only, then of course subdivisions (a)(2) and (a)(3) of section 3343 do not apply and should not be given by the trial court (unless, as here, the contract itself creates such rights). In each case in which a seller of property is defrauded by a buyer, the trial court will have to examine the circumstances of the particular case and decide whether the questioned portions of section 3343 do or do not apply." (*Channell v. Anthony* (1976) 58 Cal.App.3d 290, 317 [129 Cal.Rptr. 704] .)

The first element of this instruction should be modified in cases involving promissory fraud: "In cases of promissory fraud, the damages are measured by market value as of the date the promise was breached because that is the date when the damage occurred." (*Glendale Fed. Sav. & Loan Assn. v. Marina View Heights Dev. Co.* (1977) 66 Cal.App.3d 101, 145-146 [135 Cal.Rptr. 802].)

For an instruction on lost profits, see *CACI No. 3903N, Lost Profits (Economic Damage)*.

■ *Civil Code section 3343 provides:*

(a) One defrauded in the purchase, sale or exchange of property is entitled to recover the difference between the actual value of that with which the defrauded person parted and the actual value of that which he received, together with any additional damage arising from the particular transaction, including any of the following:

(1) Amounts actually and reasonably expended in reliance upon the fraud.

(2) An amount which would compensate the defrauded party for loss of use and enjoyment of the property to the extent that any such loss was proximately caused by the fraud.

(3) Where the defrauded party has been induced by reason of the fraud to sell or otherwise part with the property in question, an amount which will compensate him for profits or other gains which might reasonably have been earned by use of the property had he retained it.

(4) Where the defrauded party has been induced by reason of the fraud to purchase or otherwise acquire the property in question, an amount which will compensate him for any loss of profits or other gains which were reasonably anticipated and would have been earned by him from the use or sale of the property had it possessed the characteristics fraudulently attributed to it by the party committing the fraud, provided that lost profits from the use or sale of the property shall be recoverable only if and only to the extent that all of the following apply:

(i) The defrauded party acquired the property for the purpose of using or reselling it for a profit.

(ii) The defrauded party reasonably relied on the fraud in entering into the transaction and in anticipating profits from the subsequent use or sale of the property.

3-19 California Forms of Jury Instruction CACI 1922

(iii) Any loss of profits for which damages are sought under this paragraph have been proximately caused by the fraud and the defrauded party's reliance on it.

(b) Nothing in this section shall do either of the following:

(1) Permit the defrauded person to recover any amount measured by the difference between the value of property as represented and the actual value thereof.

(2) Deny to any person having a cause of action for fraud or deceit any legal or equitable remedies to which such person may be entitled.

■ "As they apply to damages for fraud, subdivisions (a)(2) and (a)(3) of section 3343 are limited to recovery of damages by sellers of real property, while subdivision (a)(4) deals with purchasers of real property." (*Channell, supra*, 58 Cal.App.3d at p. 309 , footnote omitted.)

■ "Before 1935 the California courts had no statutory mandate on the measure of damages for fraud. While the 'benefit of the bargain' measure of damages was generally employed, on occasion California courts sometimes applied the 'out of pocket' rule when the 'loss of bargain' rule was difficult to apply or would work a hardship on plaintiff or defendant." (*Channell, supra*, 58 Cal.App.3d at p. 309 , footnote omitted.)

■ "The 1971 amendment to section 3343 took the form of an addition to the 'out of pocket' rule. The statute had previously permitted recovery of 'additional damages,' but the 1971 amendment enumerated specific types of consequential damages which are included within the term 'additional damages.' " (*Channell, supra*, 58 Cal.App.3d at p. 312 , footnote omitted.)

■ "[T]he legislature clearly ruled out by the 1971 amendment any recovery of damages for fraud measured by the traditional 'loss of bargain' formula." (*Channell, supra*, 58 Cal.App.3d at p. 313 , footnote omitted.)

■ "[O]ut of pocket" loss under section 3343 is "the difference between what [plaintiffs] received for their property and the fair market value of the same at the time of the transfer." (*Channell, supra*, 58 Cal.App.3d at p. 314 .)

■ "[N]othing in section 3343 as amended ... requires that a plaintiff show 'out-of-pocket' loss (i.e., an amount by which the consideration paid exceeded the value of the property received) in order to be entitled to any recovery for fraud in a property transaction." (*Stout v. Turney* (1978) 22 Cal.3d 718, 730 [150 Cal.Rptr. 637, 586 P.2d 1228] .)

■ "In the absence of a fiduciary relationship, section 3343 governs the measure of damages in fraudulent property transactions." (*Croeni v. Goldstein* (1994) 21 Cal.App.4th 754, 759 [26 Cal.Rptr.2d 412] .)

■ "In the case of a seller ... the defrauded victim is entitled to recover not only the difference between the actual value of that with which he parted and the actual value of that which he received (out-of-pocket) but also any additional damage arising from the particular transaction including any of the following: 1. amounts expended in reliance upon the fraud; 2. amounts compensating for loss of use and enjoyment of the property due to the fraud; and 3. an amount which would compensate him for the profits or other gains by the use of the property had he retained it." (*Channell, supra*, 58 Cal.App.3d at p. 312 , internal citation omitted.)

■ "What that time span [for damages for lost use and lost profits] should be would be determined by the peculiar circumstances of the particular case before the court and should present no insurmountable difficulty for a court in fixing a reasonable period contemplated by the statute." (*Channell, supra*, 58 Cal.App.3d at p. 317 , footnote omitted.)

■ "To recover damages for fraud, a plaintiff must have sustained damages proximately caused by the misrepresentation. A damage award for fraud will be reversed where the injury is not related to the misrepresentation." (*Las Palmas Associates v. Las Palmas Center Associates* (1991) 235 Cal.App.3d 1220, 1252 [1 Cal.Rptr.2d 301] , internal citations omitted.)

■ "Mental distress is not an element of damages allowable under *Civil Code* section 3343." (*Channell, supra*, 58 Cal.App.3d at p. 315 , internal citations omitted.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1714-1716

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.23 (Matthew Bender)

23 California Forms of Pleading and Practice, Ch. 269, *Fraud and Deceit* (Matthew Bender)

10 California Points and Authorities, Ch. 105, *Fraud and Deceit* (Matthew Bender)

Publisher's Notes

This instruction covers issues presented in BAJI No. 12.56.

LexisNexis Matthew Bender Expert Practice Tip--Evaluating Seller's Damages: Evaluation may be difficult to prove or explain to the jury. *By Rex Heeseman*

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsBusiness TortsFraud & MisrepresentationGeneral OverviewTortsBusiness TortsFraud & MisrepresentationActual FraudGeneral OverviewTortsBusiness TortsFraud & MisrepresentationActual FraudRemedies



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California Forms of Jury Instruction

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CHAPTER 19 California Judicial Council Fraud or Deceit Instructions

3-19 California Forms of Jury Instruction CACI 1923

CACI 1923 Damages--"Out of Pocket" Rule

If you decide that [name of plaintiff] has proved [his/her/its] claim against [name of defendant], you also must decide how much money will reasonably compensate [name of plaintiff] for the harm. This compensation is called "damages."

The amount of damages must include an award for all harm that [name of defendant] was a substantial factor in causing, even if the particular harm could not have been anticipated.

[Name of plaintiff] must prove the amount of [his/her/its] damages. However, [name of plaintiff] does not have to prove the exact amount of damages that will provide reasonable compensation for the harm. You must not speculate or guess in awarding damages.

To decide the amount of damages you must determine the [fair market] value of what [name of plaintiff] gave and subtract from that amount the [fair market] value of what [he/she/it] received.

["Fair market value" is the highest price that a willing buyer would have paid on the date of the transaction to a willing seller, assuming:

- 1. That there is no pressure on either one to buy or sell; and**
- 2. That the buyer and seller know all the uses and purposes for which the [insert item] is reasonably capable of being used.]**

[Name of plaintiff] may also recover amounts that [he/she/it] reasonably spent in reliance on [name of defendant]'s [false representation/failure to disclose/false promise] if those amounts would not otherwise have been spent.

New September 2003; Revised December 2009

Directions for Use

For discussion of damages if there is both a breach of fiduciary duty and intentional misrepresentation, see the Directions for Use to *CACI No. 1924, Damages--"Benefit of the Bargain" Rule*.

Sources and Authority

- *Civil Code section 1709* provides: "One who willfully deceives another with intent to induce him to alter his position to his injury or risk, is liable for any damage which he thereby suffers."

- *Civil Code section 3333* provides: "For the breach of an obligation not arising from contract, the measure of damages, except where otherwise expressly provided by this code, is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not."

- *Civil Code section 3343* provides, in part: "One defrauded in the purchase, sale or exchange of property is entitled to recover the difference between the actual value of that with which the defrauded person parted and the actual value of that which he received"

- This instruction should be modified in cases involving promissory fraud: "In cases of promissory fraud, the damages are measured by market value as of the date the promise was breached because that is the date when the damage occurred." (*Glendale Fed. Sav. & Loan Assn. v. Marina View Heights Dev. Co.* (1977) 66 Cal.App.3d 101, 145-146 [135 Cal.Rptr. 802] .)

- "There are two measures of damages for fraud: out of pocket and benefit of the bargain. The 'out-of-pocket' measure of damages 'is directed to restoring the plaintiff to the financial position enjoyed by him prior to the fraudulent transaction, and thus awards the difference in actual value at the time of the transaction between what the plaintiff gave and what he received. The "benefit-of-the-bargain" measure, on the other hand, is concerned with satisfying the expectancy interest of the defrauded plaintiff by putting him in the position he would have enjoyed if the false representation relied upon had been true; it awards the difference in value between what the plaintiff actually received and what he was fraudulently led to believe he would receive.' 'In California, a defrauded party is ordinarily limited to recovering his "out-of-pocket" loss'" (*Alliance Mortgage Co. v. Rothwell* (1995) 10 Cal.4th 1226, 1240 [44 Cal.Rptr.2d 352, 900 P.2d 601] , internal citations omitted.)

- "Of the two measures the 'out-of-pocket' rule has been termed more consistent with the logic and purpose of the tort form of action (i.e., compensation for loss sustained rather than satisfaction of contractual expectations) while the 'benefit-of-the-bargain' rule has been observed to be a more effective deterrent (in that it contemplates an award even when the property received has a value equal to what was given for it)." (*Stout v. Turney* (1978) 22 Cal.3d 718, 725 [150 Cal.Rptr. 637, 586 P.2d 1228] .)

- "In fraud cases involving the 'purchase, sale or exchange of property,' the Legislature has expressly provided that the 'out-of-pocket' rather than the 'benefit-of-the-bargain' measure of damages should apply. *Civil Code section 3343* provides the exclusive measure of damages for fraud in such cases." (*Fragale v. Faulkner* (2003) 110 Cal.App.4th 229, 236 [1 Cal.Rptr.3d 616] .)

■ "Civil Code section 3343 does not apply, however, 'when a victim is defrauded by its fiduciaries.' Instead, in the case of fraud by a fiduciary, 'the "broader" measure of damages provided by sections 1709 and 3333 applies.' ... [P] In the case of a negligent misrepresentation by a fiduciary, 'a plaintiff is only entitled to its actual or "out-of-pocket" losses suffered because of [the] fiduciary's negligent misrepresentation under section 3333.' [P] The Supreme Court has not decided whether 'the measure of damages under section 3333 might be greater for a fiduciary's *intentional* misrepresentation' " (*Fragale, supra*, 110 Cal.App.4th at pp. 236-237 , original italics, internal citations omitted.)

■ "We have previously held that a plaintiff is only entitled to its actual or 'out-of-pocket' losses suffered because of fiduciary's negligent misrepresentation under section 3333. While the measure of damages under section 3333 might be greater for a fiduciary's intentional misrepresentation, we need not address that issue here." (*Alliance Mortgage Co., supra*, 10 Cal.4th at pp. 1249-1250 .)

■ "To recover damages for fraud, a plaintiff must have sustained damages proximately caused by the misrepresentation. A damage award for fraud will be reversed where the injury is not related to the misrepresentation." (*Las Palmas Associates v. Las Palmas Center Associates* (1991) 235 Cal.App.3d 1220, 1252 [1 Cal.Rptr.2d 301] , internal citations omitted.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1710-1717

3 Levy et al., *California Torts, Ch. 40, Fraud and Deceit and Other Business Torts*, § 40.23 (Matthew Bender)

23 *California Forms of Pleading and Practice, Ch. 269, Fraud and Deceit* § 269.27 (Matthew Bender)

10 *California Points and Authorities, Ch. 105, Fraud and Deceit* § 105.252 (Matthew Bender)

Publisher's Notes

This instruction covers issues presented in BAJI No. 12.56.

LexisNexis Matthew Bender Expert Practice Tip--Present Your Case Clearly: Many jurors can be confused by a term such as "out of pocket" unless your evidence and/or argument is clear. *By Rex Heeseman*

The measure of damages in a case of intentional misrepresentation by a fiduciary is not limited to out-of-pocket losses. (*Fragale v. Faulkner* (2003) 110 Cal.App.4th 229, 239 [1 Cal.Rptr.3d 616] .)

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsBusiness TortsFraud & MisrepresentationGeneral OverviewTortsBusiness TortsFraud & MisrepresentationActual FraudGeneral OverviewTortsBusiness TortsFraud & MisrepresentationActual FraudRemedies



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CHAPTER 19 California Judicial Council Fraud or Deceit Instructions

3-19 California Forms of Jury Instruction CACI 1924

CACI 1924 Damages--"Benefit of the Bargain" Rule

If you decide that [*name of plaintiff*] has proved [his/her/its] claim against [*name of defendant*], you also must decide how much money will reasonably compensate [*name of plaintiff*] for the harm. This compensation is called "damages."

The amount of damages must include an award for all harm that [*name of defendant*] was a substantial factor in causing, even if the particular harm could not have been anticipated.

[*Name of plaintiff*] must prove the amount of [his/her/its] damages. However, [*name of plaintiff*] does not have to prove the exact amount of damages that will provide reasonable compensation for the harm. You must not speculate or guess in awarding damages.

To determine the amount of damages, you must:

- 1. Determine the fair market value that [*name of plaintiff*] would have received if the representations made by [*name of defendant*] had been true; and**
- 2. Subtract the fair market value of what [he/she/it] did receive.**

The resulting amount is [*name of plaintiff*]'s damages. "Fair market value" is the highest price that a willing buyer would have paid to a willing seller, assuming:

- 1. That there is no pressure on either one to buy or sell; and**
- 2. That the buyer and seller know all the uses and purposes for which the [*insert item*] is reasonably capable of being used.**

Fair market value must be determined as of the date that [name of plaintiff] discovered [name of defendant]'s [false representation/ failure to disclose].

[Name of plaintiff] may also recover amounts that [he/she/it] reasonably spent in reliance on [name of defendant]'s [false representation/failure to disclose/false promise] if those amounts would not otherwise have been spent.

New September 2003; Revised December 2009

Directions for Use

There is a split of authority regarding whether benefit-of-the-bargain damages can ever be recovered for intentional misrepresentation in the sale or exchange of property. It is settled that in a nonfiduciary relationship, damages are limited to the out-of-pocket measure, even if the misrepresentation is intentional. (See *Alliance Mortgage Co. v. Rothwell* (1995) 10 Cal.4th 1226, 1240 [44 Cal.Rptr.2d 352, 900 P.2d 601] ; Civ. Code, § 3343.) However, there is disagreement on the proper measure if there is a fiduciary relationship.

Some courts have held that benefit-of-the-bargain damages are available if there is both a fiduciary relationship and intentional misrepresentation. (See *Fragale v. Faulkner* (2003) 110 Cal.App.4th 229, 235-239 [1 Cal.Rptr.3d 616] ; *Salahutdin v. Valley of California, Inc.* (1994) 24 Cal.App.4th 555, 564 [29 Cal.Rptr.2d 463] ; see also *Alfaro v. Community Housing Improvement System & Planning Assn., Inc.* (2009) 171 Cal.App.4th 1356, 1383 [89 Cal.Rptr.3d 659] .) At least one court has held to the contrary, that only out-of-pocket losses may be recovered. (See *Hensley v. McSweeney* (2001) 90 Cal.App.4th 1081, 1086 [109 Cal.Rptr.2d 489] .)

This instruction should be modified in cases involving promissory fraud: "In cases of promissory fraud, the damages are measured by market value as of the date the promise was breached because that is the date when the damage occurred." (*Glendale Fed. Sav. & Loan Assn. v. Marina View Heights Dev. Co.* (1977) 66 Cal.App.3d 101, 145-146 [135 Cal.Rptr. 802] .)

Sources and Authority

- *Civil Code section 1709* provides: "One who willfully deceives another with intent to induce him to alter his position to his injury or risk, is liable for any damage which he thereby suffers."

- *Civil Code section 3333* provides: "For the breach of an obligation not arising from contract, the measure of damages, except where otherwise expressly provided by this code, is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not."

- "There are two measures of damages for fraud: out of pocket and benefit of the bargain. The 'out-of-pocket' measure of damages 'is directed to restoring the plaintiff to the financial position enjoyed by him prior to the fraudulent transaction, and thus awards the difference in actual value at the time of the transaction between what the plaintiff gave and what he received. The "benefit-of-the-bargain" measure, on the other hand, is concerned with satisfying the expectancy interest of the defrauded plaintiff by putting him in the position he would have enjoyed if the false representation relied upon had been true; it awards the difference in value between what the plaintiff actually received and what he was

fraudulently led to believe he would receive.' 'In California, a defrauded party is ordinarily limited to recovering his "out-of-pocket" loss' " (*Alliance Mortgage Co. supra*, 10 Cal.4th at p. 1240 , internal citations omitted.)

■ "Of the two measures the 'out-of-pocket' rule has been termed more consistent with the logic and purpose of the tort form of action (i.e., compensation for loss sustained rather than satisfaction of contractual expectations) while the 'benefit-of-the-bargain' rule has been observed to be a more effective deterrent (in that it contemplates an award even when the property received has a value equal to what was given for it.)" (*Stout v. Turney* (1978) 22 Cal.3d 718, 725 [150 Cal.Rptr. 637, 586 P.2d 1228] .)

■ "We have previously held that a plaintiff is only entitled to its actual or 'out-of-pocket' losses suffered because of fiduciary's negligent misrepresentation under section 3333. While the measure of damages under section 3333 might be greater for a fiduciary's intentional misrepresentation, we need not address that issue here." (*Alliance Mortgage Co., supra*, 10 Cal.4th at pp. 1249-1250 .)

■ "The measure of damages for a real estate broker's intentional misrepresentation to a buyer for whom he acts as agent is not limited to the out-of-pocket losses suffered by the buyer. Because the broker is a fiduciary, damages for intentional fraud may be measured by the broader benefit-of-the-bargain rule." (*Fragale, supra*, 110 Cal.App.4th at p. 232 .)

■ "[T]he measure of damages for fraud by a fiduciary is out-of-pocket damages, not the benefit of the bargain computation normally applicable to contract causes of action." (*Hensley, supra*, 90 Cal.App.4th at p. 1085 .)

■ "Recognizing a split of authority on the matter, we follow those cases adopting the broader measure of damages under sections 1709 and 3333, a course that is not only consonant with the position we have taken in the past but just. This division has consistently applied the broader measure of damages for fiduciary fraud, refusing to limit damages to the 'out of pocket' measure." (*Salahutdin, supra*, 24 Cal.App.4th at pp. 566-567 .)

■ "Unlike the 'out of pocket' measure of damages, which are usually calculated at the time of the transaction, 'benefit of the bargain' damages may appropriately be calculated as of the date of discovery of the fraud." (*Salahutdin, supra*, 24 Cal.App.4th at p. 568 .)

■ "To recover damages for fraud, a plaintiff must have sustained damages proximately caused by the misrepresentation. A damage award for fraud will be reversed where the injury is not related to the misrepresentation." (*Las Palmas Associates v. Las Palmas Center Associates* (1991) 235 Cal.App.3d 1220, 1252 [1 Cal.Rptr.2d 301] , internal citations omitted.)

■ "[O]ne may recover compensation for time and effort expended in reliance on a defendant's misrepresentation." (*Block v. Tobin* (1975) 45 Cal.App.3d 214, 220 [119 Cal.Rptr. 288] , internal citations omitted.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1710-1717

3 Levy et al., *California Torts, Ch. 40, Fraud and Deceit and Other Business Torts*, § 40.23

23 *California Forms of Pleading and Practice, Ch. 269, Fraud and Deceit*, § 269.27 (Matthew Bender)

10 *California Points and Authorities, Ch. 105, Fraud and Deceit, § 105.131 et seq.* (Matthew Bender)

Publisher's Notes

This instruction replaces BAJI No. 12.57.

LexisNexis Matthew Bender Expert Practice Tip--Use Care When Arguing Benefit of Bargain

Damages: "Benefit of the bargain" is a difficult concept for some judges and attorneys. Imagine then the reaction of jurors. Further, note the split of authority discussed above as to whether "benefit of the bargain" damages are even appropriate. Hence, be careful in explaining and arguing these types of damages. *By Rex Heeseman and Ronald Oster*

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsBusiness TortsFraud & MisrepresentationGeneral OverviewTortsBusiness TortsFraud & MisrepresentationActual FraudGeneral OverviewTortsBusiness TortsFraud & MisrepresentationActual FraudRemedies



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CHAPTER 19 California Judicial Council Fraud or Deceit Instructions

3-19 California Forms of Jury Instruction CACI 1925

CACI 1925 Affirmative Defense--Statute of Limitation--Fraud or Mistake

[Name of defendant] contends that [name of plaintiff]'s lawsuit was not filed within the time set by law. To succeed on this defense, [name of defendant] must prove that [name of plaintiff]'s claimed harm occurred before [insert date three years before date of filing].

[If [name of defendant] proves that [name of plaintiff]'s claimed harm occurred before [insert date three years before date of filing], [name of plaintiff]'s lawsuit was still filed on time if [name of plaintiff] proves that before that date, [he/she/it] did not discover facts constituting the fraud or mistake, and with reasonable diligence could not have discovered those facts.]

New April 2008

Directions for Use

This instruction is for use if the defendant claims that the plaintiff's action was not filed within the applicable three-year period for fraud or mistake. (See *Code Civ. Proc.*, § 338(d).) Include the second paragraph if the plaintiff alleges that the delayed-discovery rule applies to avoid the limitation defense. The plaintiff bears the burden of pleading and proving delayed discovery. (See *E-Fab, Inc. v. Accountants, Inc. Services* (2007) 153 Cal.App.4th 1308, 1319 [64 Cal.Rptr.3d 9] [regardless of which limitation statute applied to case, burden was on plaintiff].)

Sources and Authority

- *Code of Civil Procedure* section 338 provides in part:

3-19 California Forms of Jury Instruction CACI 1925

Within three years:

(d) An action for relief on the ground of fraud or mistake. The cause of action in that case is not deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake.

■ The three-year statute of limitations of *Code of Civil Procedure* section 338, subdivision (d) does not begin to run until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake. (*Sun'n Sand, Inc. v. United California Bank* (1978) 21 Cal.3d 671, 701 [148 Cal.Rptr. 329, 582 P.2d 920] .)

■ "The discovery rule 'may be expressed by the Legislature or implied by the courts.' By statute, the discovery rule applies to fraud actions. (*Code Civ. Proc.*, § 338, subd. (d).) In addition, 'judicial decisions have declared the discovery rule applicable in situations where the plaintiff is unable to see or appreciate a breach has occurred.' " (*E-Fab, Inc.*, *supra*, 153 Cal.App.4th at p. 1318 , internal citations omitted.)

■ "*Code of Civil Procedure* section 338, subdivision (d), effectively codifies the delayed discovery rule in connection with actions for fraud, providing that a cause of action for fraud 'is not to be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake.' In a case such as this, that date is the date the complaining party learns, or at least is put on notice, that a representation was false." (*Brandon G. v. Gray* (2003) 111 Cal.App.4th 29, 35 [3 Cal.Rptr.3d 330] .)

■ "Case law has interpreted this accrual provision to mean that 'a cause of action [under *Code Civ. Proc.*, § 338(d)] accrues, and the limitations period commences to run, when the aggrieved party could have discovered the ... mistake through the exercise of reasonable diligence.' " (*Creditors Collection Serv. v. Castaldi* (1995) 38 Cal.App.4th 1039, 1044 [45 Cal.Rptr. 2d 511] .)

■ "With respect to actions based on fraud, the statute of limitations is tolled whenever plaintiff is able to show the defendant fraudulently concealed facts which would have led him to discover his potential cause of action. ... 'Technical rules as to when a cause of action accrues apply therefore only in those cases which are free from fraud committed by the defendant. Said section 338, subdivision 4, ... recognizes the nonapplicability of those technical rules where the fraud of the defendant may be so concealed that in the absence of circumstances imposing greater diligence on the plaintiff, the cause of action is deemed not to accrue until the fraud is discovered. Otherwise, in such cases, the defendant by concealing his fraud, would effectively block recovery by the plaintiff because of the intervention of the statute of limitations.' " (*Snow v. A. H. Robins Co.* (1985) 165 Cal.App.3d 120, 127-128 [211 Cal.Rptr. 271] , internal citation omitted.)

■ "[C]ourts have relied on the nature of the relationship between defendant and plaintiff to explain application of the delayed accrual rule. The rule is generally applicable to confidential or fiduciary relationships. The fiduciary relationship carries a duty of full disclosure, and application of the discovery rule 'prevents the fiduciary from obtaining immunity for an initial breach of duty by a subsequent breach of the obligation of disclosure.' " (*Parsons v. Tickner* (1995) 31 Cal.App.4th 1513, 1526 [37 Cal.Rptr. 2d 810] , internal citations omitted.)

■ " 'The provision tolling operation of [section 338(d)] until discovery of the fraud has long been treated as an exception and, accordingly, this court has held that if an action is brought more than three years after commission of the fraud, plaintiff has the burden of pleading and proving that he did not make the discovery until within three years prior to the filing of his complaint.' " (*Samuels v. Mix* (1999) 22 Cal.4th 1, 14 [91 Cal.Rptr.2d 273, 989 P.2d 701] , internal citation omitted.)

■ "[T]he section 338, subdivision (d), three-year statute of limitations applies to an unjust enrichment cause of action based on *mistake*." (*Federal Deposit Ins. Corp. v. Dintino* (2008), 167 Cal.App.4th 333, 348 [84 Cal.Rptr.3d 38] ,

original italics.)

Secondary Sources

3 Witkin, *California Procedure* (4th ed. 1996) Actions, §§ 596-606

Brown et al., *California Practice Guide: Civil Procedure Before Trial* (The Rutter Group) PP 6:462-6:462.2

California Civil Procedure Before Trial, Ch. 25, *Answer* (Cont.Ed.Bar 4th ed.) § 25.46

43 *California Forms of Pleading and Practice*, Ch. 489, *Relief From Judgments and Orders*, § 489.261 (Matthew Bender)

17 *California Points and Authorities*, Ch. 70, *Defaults, Default Judgments, and Relief From Judgments and Orders*, §§ 70.502, 70.523, 70.526 (Matthew Bender)

1 *Matthew Bender Practice Guide: California Pretrial Civil Procedure*, Ch. 4, *Limitation of Actions*, 4.42 (Matthew Bender)

Publisher's Notes

There is no BAJI instruction on this subject.



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CHAPTER 19 California Judicial Council Fraud or Deceit Instructions

3-19 California Forms of Jury Instruction CACI 1926-CACI 1999

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CACI 1926Reserved for Future Use



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CHAPTER 19 California Judicial Council Fraud or Deceit Instructions

3-19 California Forms of Jury Instruction CACI VF-1900

CACI VF-1900 Intentional Misrepresentation

We answer the questions submitted to us as follows:

1. Did [*name of defendant*] make a false representation of an important fact to [*name of plaintiff*]?

_____ Yes _____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Did [*name of defendant*] know that the representation was false, or did [he/she] make the representation recklessly and without regard for its truth?

_____ Yes _____ No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Did [*name of defendant*] intend that [*name of plaintiff*] rely on the representation?

_____ Yes _____ No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Did [*name of plaintiff*] reasonably rely on the representation?

_____ Yes _____ No

If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. Was [*name of plaintiff*]'s reliance on [*name of defendant*]'s representation a substantial factor in causing harm to [*name of plaintiff*]?

_____ Yes _____ No

If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. What are [*name of plaintiff*]'s damages?

[a. Past economic loss

[lost earnings..... \$ _____].....

[lost profits..... \$ _____].....

[medical expenses..... \$ _____].....

[other past economic loss..... \$ _____].....

..... Total Past Economic Damages: \$ _____]

[b. Future economic loss

[lost earnings..... \$ _____].....

[lost profits..... \$ _____].....

[medical expenses..... \$ _____].....

[other future economic loss..... \$ _____].....

..... Total Future Economic Damages: \$ _____]

[c. Past noneconomic loss, including [physical pain/mental suffering:]..... \$ _____]

[d. Future noneconomic loss, including [physical pain/mental suffering:]..... \$ _____]

TOTAL \$ _____

Signed: _____
 Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the [clerk/bailiff/judge].

New September 2003; Revised April 2007, December 2009

Directions for Use

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on *CACI No. 1900, Intentional Misrepresentation*.

If specificity is not required, users do not have to itemize all the damages listed in question 6. The breakdown is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form. However, if both intentional misrepresentation and negligent misrepresentation (see *CACI No. 1903*) are to be presented to the jury in the alternative, the preferred practice would seem to be that this verdict form and VF-1903, *Negligent Misrepresentation*, be kept separate and presented in the alternative.

With respect to the same misrepresentation, question 2 above cannot be answered "yes" and question 3 of VF-1903 cannot also be answered "no." The jury may continue to answer the next question from one form or the other, but not both.

If both intentional and negligent misrepresentation are before the jury, it is important to distinguish between a statement made recklessly and without regard for the truth (see question 2 above) and one made without reasonable grounds for believing it is true (see *CACI No. VF-1903*, question 3). Question 2 of VF-1903 should be included to clarify that the difference is that for negligent misrepresentation, the defendant honestly believes that the statement is true. (See *Bily v. Arthur Young & Co. (1992) 3 Cal.4th 370, 407-408 [11 Cal.Rptr.2d 51, 834 P.2d 745]* .)

This form may be modified if the jury is being given the discretion under *Civil Code section 3288* to award prejudgment interest on specific losses that occurred prior to judgment.

Publisher's Notes

This verdict form covers issues presented in BAJI No. 16.50.

LexisNexis Matthew Bender Expert Practice Tip--Use Care When Drafting Special Verdicts: Special verdicts are a complex area of the law, but often important in some cases (especially from a defense perspective). Hence, great care must be exercised in drafting such an instruction unless the judge takes this standard form (which may not be appropriate for your case). *By Rex Heeseman*



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California Forms of Jury Instruction

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CHAPTER 19 California Judicial Council Fraud or Deceit Instructions

3-19 California Forms of Jury Instruction CACI VF-1901

CACI VF-1901 Concealment

We answer the questions submitted to us as follows:

1. Did [*name of defendant*] intentionally fail to disclose an important fact that [*name of plaintiff*] did not know and could not reasonably have discovered?

_____ Yes _____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Did [*name of defendant*] intend to deceive [*name of plaintiff*] by concealing the fact?

_____ Yes _____ No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Did [*name of plaintiff*] rely on [*name of defendant*]'s deception and was such reliance reasonable under the circumstances?

_____ Yes _____ No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Was [name of defendant]'s concealment a substantial factor in causing harm to [name of plaintiff]?

_____ Yes _____ No

If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. What are [name of plaintiff]'s damages?

[a. Past economic loss

[lost earnings..... \$_____].....

[lost profits..... \$_____].....

[medical expenses..... \$_____].....

[other past economic loss..... \$_____].....

..... **Total Past Economic Damages: \$_____]**

[b. Future economic loss

[lost earnings..... \$_____].....

[lost profits..... \$_____].....

[medical expenses..... \$_____].....

[other future economic loss..... \$_____].....

..... **Total Future Economic Damages: \$_____]**

[c. Past noneconomic loss, including [physical pain/mental suffering:]..... \$_____]

[d. Future noneconomic loss, including [physical pain/mental suffering:]..... \$_____]

..... **TOTAL \$_____**

Signed: _____
Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the [clerk/bailiff/judge].

New September 2003; Revised April 2007

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on *CACI No. 1901, Concealment*.

If specificity is not required, users do not have to itemize all the damages listed in question 5. The breakdown is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

This form may be modified if the jury is being given the discretion under *Civil Code section 3288* to award prejudgment interest on specific losses that occurred prior to judgment.

Modify question 1 by referring to one of the other three grounds for concealment listed in element 1 of *CACI No. 1901, Concealment*, depending on which ground is applicable to the facts of the case.

Publisher's Notes

This verdict form covers issues presented in BAJI No. 16.50.1.



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CHAPTER 19 California Judicial Council Fraud or Deceit Instructions

3-19 California Forms of Jury Instruction CACI VF-1902

CACI VF-1902 False Promise

We answer the questions submitted to us as follows:

1. Did [*name of defendant*] make a promise to [*name of plaintiff*] that was important to the transaction?

_____ Yes _____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Did [*name of defendant*] intend to perform this promise when [he/she] made it?

_____ Yes _____ No

If your answer to question 2 is no, then answer question 3. If you answered yes, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Did [*name of defendant*] intend that [*name of plaintiff*] rely on this promise?

_____ Yes _____ No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Did [*name of plaintiff*] reasonably rely on this promise?

_____ Yes _____ No

If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. Did [*name of defendant*] perform the promised act?

_____ Yes _____ No

If your answer to question 5 is no, then answer question 6. If you answered yes, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. Was [*name of plaintiff*]'s reliance on [*name of defendant*]'s promise a substantial factor in causing harm to [*name of plaintiff*]?

_____ Yes _____ No

If your answer to question 6 is yes, then answer question 7. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

7. What are [*name of plaintiff*]'s damages?

[a. Past economic loss

[lost earnings..... \$_____].....

[lost profits..... \$_____].....

[medical expenses..... \$_____].....

[other past economic loss..... \$_____].....

..... Total Past Economic Damages: \$_____]

[b. Future economic loss

[lost earnings..... \$_____].....

[lost profits..... \$_____].....

[medical expenses..... \$_____].....

[other future economic loss..... \$_____].....

..... Total Future Economic Damages: \$_____]

[c. Past noneconomic loss, including [physical pain/mental suffering:]..... \$_____]

[d. Future noneconomic loss, including [physical
pain/mental suffering:]..... \$_____]

..... TOTAL \$_____

Signed: _____
Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the
[clerk/bailiff/judge].

New September 2003; Revised April 2007

Directions for Use

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on *CACI No. 1902, False Promise*.

If specificity is not required, users do not have to itemize all the damages listed in question 7. The breakdown is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

This form may be modified if the jury is being given the discretion under *Civil Code section 3288* to award prejudgment interest on specific losses that occurred prior to judgment.

Publisher's Notes

This verdict form covers issues presented in BAJI No. 16.50.2.



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California Forms of Jury Instruction

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CHAPTER 19 California Judicial Council Fraud or Deceit Instructions

3-19 California Forms of Jury Instruction CACI VF-1903

CACI VF-1903 Negligent Misrepresentation

We answer the questions submitted to us as follows:

1. Did [*name of defendant*] make a false representation of an important fact to [*name of plaintiff*]?

_____ Yes _____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Did [*name of defendant*] honestly believe that the representation was true when [he/she] made it?

_____ Yes _____ No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.]

3. Did [*name of defendant*] have reasonable grounds for believing the representation was true when [he/she] made it?

_____ Yes _____ No

If your answer to question 3 is no, then answer question 4. If you answered yes, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Did [name of defendant] intend that [name of plaintiff] rely on the representation?

_____ Yes _____ No

If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. Did [name of plaintiff] reasonably rely on the representation?

_____ Yes _____ No

If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. Was [name of plaintiff]'s reliance on [name of defendant]'s representation a substantial factor in causing harm to [name of plaintiff]?

_____ Yes _____ No

If your answer to question 6 is yes, then answer question 7. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

7. What are [name of plaintiff]'s damages?

[a. Past economic loss

[lost earnings..... \$_____].....

[lost profits..... \$_____].....

[medical expenses..... \$_____].....

[other past economic loss..... \$_____].....

..... **Total Past Economic Damages: \$_____]**

[b. Future economic loss

[lost earnings..... \$_____].....

[lost profits..... \$_____].....

[medical expenses..... \$_____].....

[other future economic loss..... \$_____].....

..... **Total Future Economic Damages: \$_____]**

[c. Past noneconomic loss, including [physical pain/mental suffering:]..... \$_____]

**[d. Future noneconomic loss, including [physical
pain/mental suffering:]..... \$_____]**

..... **TOTAL \$_____**

Signed: _____
Presiding Juror

Dated: _____

**[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the
[clerk/bailiff/judge].**

New September 2003; Revised April 2007, December 2009

Directions for Use

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on *CACI No. 1903, Negligent Misrepresentation*.

If specificity is not required, users do not have to itemize all the damages listed in question 7. The breakdown is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form. However, if both negligent misrepresentation and intentional misrepresentation (see *CACI No. 1903*) are to be presented to the jury in the alternative, the preferred practice would seem to be that this verdict form and VF-1900, *Intentional Misrepresentation*, be kept separate and presented in the alternative.

With respect to the same misrepresentation, question 3 above cannot be answered "no" and question 2 of VF-1900 cannot also be answered "yes." The jury may continue to answer the next question from one form or the other, but not both.

If both intentional and negligent misrepresentation are before the jury, it is important to distinguish between a statement made without reasonable grounds for believing it is true (see question 3 above) and one made recklessly and without regard for the truth (see *CACI No. VF-1900*, question 2). Include question 2 to clarify that the difference is that for negligent misrepresentation, the defendant honestly believes that the statement is true. (See *Bily v. Arthur Young & Co. (1992) 3 Cal.4th 370, 407-408 [11 Cal.Rptr.2d 51, 834 P.2d 745]* .)

This form may be modified if the jury is being given the discretion under *Civil Code section 3288* to award prejudgment interest on specific losses that occurred prior to judgment.

Publisher's Notes

This verdict form covers issues presented in BAJI No. 16.50.3.



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CHAPTER 19 California Judicial Council Fraud or Deceit Instructions

3-19 California Forms of Jury Instruction CACI VF-1904-CACI VF-1999

Reserved for Future Use

CACI VF-1904Reserved for Future Use



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CHAPTER 19A Matthew Bender Fraud and Deceit Instructions

3-19A California Forms of Jury Instruction 19A.syn

§ 19A.syn Synopsis to Chapter 19A: Matthew Bender Fraud and Deceit Instructions

MB 1900A.01 Introductory Instruction

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 1900A.02 Elements of Fraud by Knowing or Reckless Misrepresentation Made to the Public or to One Person and Acted on by Another--Burden of Proof

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Definition of Fraud

[b] Elements of Cause of Action for Fraud

[c] Elements of Cause of Action for Negligent Misrepresentation

[d] Misrepresentation Made to Another Person

[e] Related Judicial Council Jury Instructions

MB 1900A.03 Elements of Concealment--Burden of Proof

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Fraud or Deceit by Concealment

[b] Related Judicial Council Jury Instructions

MB 1900A.04 Elements of Negligent Misrepresentation--Burden of Proof

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Elements of Cause of Action for Negligent Misrepresentation

[b] Related Judicial Council Jury Instructions

MB 1900A.05 Elements of Constructive Fraud

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 1900A.06-MB 1900A.19 Reserved for Future Use

MB 1900A.20 Intent

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Requirement of Intent Generally

[b] Related Judicial Council Jury Instructions

MB 1900A.21 Time of Plaintiff's Reliance Determines Falsity of Representations

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Time of Reliance on Representation

[b] Related Judicial Council Jury Instructions

MB 1900A.22 Misrepresentation of Law

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Misrepresentations of Law Normally Not Actionable

[b] Related Judicial Council Jury Instructions

MB 1900A.23 Justified Reliance--Failure to Investigate

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Effect of Plaintiff's Failure to Investigate

[b] Related Judicial Council Jury Instructions

MB 1900A.24 Reliance Not Present

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] No Actual Reliance on Representation

[b] No Communication to Plaintiff of Representation

[c] Effect of Plaintiff's Reliance on Investigation, Own Judgment, or Third Parties

[d] Effect of Plaintiff's Discovery of True Facts After Signing Agreement But Before Close of Escrow

[e] Related Judicial Council Jury Instructions

MB 1900A.25 Reliance on Defendant's Opinion--General Rule and Exceptions

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Liability for Statement of Opinion

[b] Related Judicial Council Jury Instructions

MB 1900A.26 Definition of Fiduciary or Confidential Relationship

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 1900A.27-MB 1900A.39 Reserved for Future Use

MB 1900A.40 Principal's Liability for Fraud of Agent

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Principal's Liability for Fraud of Agent

[b] Related Judicial Council Jury Instructions

MB 1900A.41 Liability of Corporate Officer for Acts on Behalf of Corporation

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Officer Liability for Tortious Acts

[b] Related Judicial Council Jury Instructions

MB 1900A.42 Corporate Officer Is Not Liable for Acts in Which They Did Not Participate or Authorize

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Officer Liability for Corporation's Fraudulent Acts

[b] Related Judicial Council Jury Instructions

MB 1900A.43 Liability for Joint Acts

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 1900A.44-MB 1900A.49 Reserved for Future Use

MB 1900A.50 General Damages for Fraud

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] When Instruction Applies

[b] "Benefit-of-the Bargain" Damages in Cases of Fiduciary Fraud

[c] Availability of Interest on Fraud Damages

[d] Nominal Damages and Attorney's Fees Not Recoverable for Fraud Claim

[e] Related Judicial Council Jury Instructions

MB 1900A.51 Damages for Fraud in Sale and Purchase--Plaintiff as Buyer

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] When Civ. Code § 3343 Applies to Fraud Action

[b] Measure of Damages Under Civ. Code § 3343

[c] Related Judicial Council Jury Instructions

MB 1900A.52 Damages for Fraud in Sale and Purchase--Plaintiff as Seller

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] When Civ. Code § 3343 Applies to Fraud Action

[b] Measure of Damages Under Civ. Code § 3343

[c] Related Judicial Council Jury Instructions

MB 1900A.53 Prerequisites for Award of Punitive Damages

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Prerequisites for Punitive Damage Award

[b] Fraud

[c] Plaintiff's Burden of Proof

[d] Bifurcation of Punitive Damage Issues

[e] Purpose of Punitive Damages

[f] Related Judicial Council Jury Instructions

MB 1900A.54 Discretion to Award Punitive Damages if Prerequisites for Award Are Established

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Discretion to Award Punitive Damages

[b] Due Process Considerations With Punitive Damages

[c] Instructions Cannot Invite Jury to Impose Damages Sufficient to Punish and Deter Conduct Not Related to Particular Plaintiff

[d] Instructions on Punitive Damages Cannot Be Vague

[e] Wealth Relevant Only With Respect to Particular Plaintiff

[f] Related Judicial Council Jury Instructions

MB 1900A.55 Liability of Principal for Punitive Damages

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Punitive Damages Based on Fraud of Agent

[b] Punitive Damages Based on Fraud of Employee

[c] Related Judicial Council Jury Instructions



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California Forms of Jury Instruction

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CHAPTER 19A Matthew Bender Fraud and Deceit Instructions

3-19A California Forms of Jury Instruction Scope

Scope

SCOPE

This chapter includes jury instructions relating to causes of action for fraud and deceit. For the California Judicial Council jury instructions on fraud and deceit, see Ch. 19, *California Judicial Council Fraud or Deceit Instructions*. The instructions in this chapter are intended to supplement the Judicial Council instructions [see *Cal. Rules of Ct., Rule 2.1050*].

This chapter covers the following topics:

- Part A includes instructions on the basic elements of a civil action for fraud [see *MB 1900A.01 -MB 1900A.05*].
- Part B includes instructions explaining the key aspects of these basic elements [see *MB 1900A.20 -MB 1900A.26*].
- Part C includes instructions on the liability of third parties for fraud [see *MB 1900A.40 -MB 1900A.43*].
- Part D includes instructions on the nature and amount of fraud damages, and the propriety and amount of punitive damages [see *MB 1900A.50 -MB 1900A.55*].

Coverage of the effect of fraud specifically on the formation or performance of contracts is found in Ch. 3A, *Matthew Bender Formation of Contract Instructions*, and Ch. 3D, *Matthew Bender Performance and Breach of Contract Instructions*.

LexisNexis Matthew Bender Expert Practice Tip--Filling in the Blanks: A number of the CACI Fraud or Deceit instructions, as well as some of the Matthew Bender Fraud and Deceit Instructions in this chapter, include blanks requiring the attorneys to fill in the specific act, transaction, statement, etc. alleged to be the wrongful conduct or action

by the plaintiff. Such an effort might be useful to lawyers who need to focus on and prepare the specific facts they need to prove at trial. However, the jury may be asked to decide whether any number of facts could be found to support different theories of liability. As a practical matter, jury instructions become more and more complicated and confusing as more facts are inserted into the actual instructions. It would be more useful and less confusing to a jury to correctly state the law that applies without attempting to define specifically all the disputed facts that might support a jury verdict.

By Joseph Devine



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CHAPTER 19A Matthew Bender Fraud and Deceit Instructions
Part A. FRAUD CAUSE OF ACTION IN GENERAL

3-19A California Forms of Jury Instruction MB 1900A.01

MB 1900A.01 Introductory Instruction

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Plaintiff claims that Defendant, by an act of fraud, caused Plaintiff to _____ [describe transaction]. Plaintiff also claims that, as a result, [he/she/it] suffered money losses, which the law calls damages. Plaintiff seeks to recover those damages in this proceeding.

Authority: *Civ. Code § 1709.*

[2] Use of Instruction

This instruction should be used to explain the nature of the plaintiff's claim for fraud. It should be given before the instruction outlining the plaintiff's burden of proof [see *MB 1900A.02 -MB 1900A.04*].

For detailed discussion of fraud, see Levy, Golden & Sacks, *California Torts*, Ch. 40, *Fraud and Deceit and Other Business Torts* (Matthew Bender). For related discussion and forms, see *California Forms of Pleading and Practice*, Ch. 269, *Fraud and Deceit* (Matthew Bender).

[3] Comment

Fraud is defined by *Civ. Code § 1572*. Deceit is defined in a similar, but not identical, manner by *Civ. Code § 1710*. *Civ. Code § 1709* provides that a person who willfully deceives another person is liable for that person's damages.

Under the Civil Code, "fraud" and "deceit" are technically two distinct concepts. "Fraud" refers to one of the bases for rescission of a contract, that is, lack of valid consent [see *Civ. Code §§ 1566, 1567(3), 1689(b)(1)*]. "Deceit" refers to

the basis for the tort cause of action for damages [see *Civ. Code* §§ 1709, 1710; *Multifamily Captive Group, LLC v. Assurance Risk Managers, Inc.* (E.D. Cal. 2008) 578 F.Supp.2d 1242, 1249-1250]. Nevertheless, the courts frequently use the terms interchangeably to refer to the common-law tort cause of action for fraud or deceit [see, e.g., *Apollo Capital Fund LLC v. Roth Capital Partners, LLC* (2007) 158 Cal.App.4th 226, 240, 70 Cal.Rptr.3d 199 ; *OCM Principal Opportunities Fund, L.P. v. CIBC World Mkts. Corp.* (2007) 157 Cal.App.4th 835, 845, 68 Cal.Rptr.3d 828]. For further discussion, see Levy, Golden & Sacks, California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, Part A (Matthew Bender).



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CHAPTER 19A Matthew Bender Fraud and Deceit Instructions
Part A. FRAUD CAUSE OF ACTION IN GENERAL

3-19A California Forms of Jury Instruction MB 1900A.02

MB 1900A.02 Elements of Fraud by Knowing or Reckless Misrepresentation Made to the Public or to One Person and Acted on by Another--Burden of Proof

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Defendant is liable to Plaintiff for damages for fraud if Plaintiff proves all of the following:

- 1. Defendant represented to _____ [either the public or name of third person] that _____ [state claimed misrepresentation];**
- 2. The representation was untrue;**
- 3. The representation was material to Plaintiff's decision to _____ [specify act or transaction at issue, e.g., buy the car];**
- 4. Defendant _____ [knew that the representation was false or made the representation without believing it to be true and without knowing whether it was true or false];**
- 5. Defendant made the representation with the intention that it be repeated, or with reason to expect that it would be repeated, to _____ [Plaintiff or a class of persons including Plaintiff] and that it would be relied on by [him/her/it/them];**
- 6. The representation was repeated to Plaintiff, who did actually rely on it in _____ [specify action or transaction at issue, e.g., buying the car];**

7. Plaintiff was justified in relying on the representation; and

8. Plaintiff suffered damages as a result of _____ [specify action or transaction at issue, e.g., buying the car].

Authorities: Civ. Code § 1711; *Mirkin v. Wasserman* (1993) 5 Cal.4th 1082, 1088, 1091-1093, 23 Cal.Rptr.2d 101, 858 P.2d 568 ; *Molko v. Holy Spirit Assn.* (1988) 46 Cal.3d 1092, 1108, 252 Cal.Rptr. 122, 762 P.2d 46 ; *Hobart v. Hobart Estate Co.* (1945) 26 Cal.2d 412, 422, 159 P.2d 958 ; *Pacific Standard Life Ins. Co. v. Tower Indus., Inc.* (1992) 9 Cal.App.4th 1881, 1891, 12 Cal.Rptr.2d 524 ; *Massei v. Lettunich* (1967) 248 Cal.App.2d 68, 73, 56 Cal.Rptr. 232 .

[2] Use of Instruction

This instruction should be used when the fraud at issue is based on an affirmative misrepresentation made to the public or to a third party. If the misrepresentation was negligent rather than knowing or reckless, use the instruction in MB 1900A.04[1]. If the action is one for concealment of material facts, use the instruction in MB 1900A.03[1]. Specific elements of fraud are further explained and defined in MB 1900A.20-MB 1900A.26.

This instruction must be used with an instruction defining the standard of proof [see Ch. 2, *California Judicial Council Evidence Instructions*, CACI No. 200 ("Obligation to Prove--More Likely True Than Not True")].

For related Judicial Council instructions, see [3][d], *below*.

[3] Comment**[a] Definition of Fraud**

Fraud embraces anything that is intended to deceive, including statements, acts [see, e.g., *Thrifty-Tel, Inc. v. Bezenek* (1996) 46 Cal.App.4th 1559, 1567, 54 Cal.Rptr.2d 468 ; *Universal By-Prods., Inc. v. City of Modesto* (1974) 43 Cal.App.3d 145, 151, 117 Cal.Rptr. 525], concealments, and omissions involving a breach of legal or equitable duty, trust, or confidence that results in injury to one who justifiably relies thereon [*Pearson v. Norton* (1964) 230 Cal.App.2d 1, 7, 40 Cal.Rptr. 634 ; see, e.g., *Starbucks Corp. v. Superior Court* (2008) 168 Cal.App.4th 1436, 1447, 86 Cal.Rptr.3d 482 (actual reliance with respect to fraud by omission requires confidence in material completeness of defendant's representations)].

For further discussion, see Levy, Golden & Sacks, *California Torts*, Ch. 40, *Fraud and Deceit and Other Business Torts*, Part A (Matthew Bender).

[b] Elements of Cause of Action for Fraud

The elements of fraud are set forth in *Lazar v. Superior Court* [*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 638, 49 Cal.Rptr.2d 377, 909 P.2d 981 ; see *Lingad v. IndyMac Fed. Bank* (2010) 682 F.Supp.2d 1142, 1152-1153], *Molko v. Holy Spirit Association* [*Molko v. Holy Spirit Assn.* (1988) 46 Cal.3d 1092, 1108, 252 Cal.Rptr. 122, 762 P.2d 46 ; see *Gil v. Bank of Am., Nat'l Ass'n* (2006) 138 Cal.App.4th 1371, 1381, 42 Cal.Rptr.3d 310 ; *Hinesley v. Oakshade Town Ctr.* (2005) 135 Cal.App.4th 289, 294, 37 Cal.Rptr.3d 364 ; *Century Sur. Co. v. Crosby Ins., Inc.* (2004) 124 Cal.App.4th 116, 122, 21 Cal.Rptr.3d 115 ; *Goehring v. Chapman Univ.* (2004) 121 Cal.App.4th 353, 364, 17 Cal.Rptr.3d 39 ; *Home Budget Loans, Inc. v. Jacoby & Meyers Law Offices* (1989) 207 Cal.App.3d 1277, 1285, 255 Cal.Rptr. 483 ; *Suarez v. Life Ins. Co. of N. Am.* (1988) 206 Cal.App.3d 1396, 1408, 254 Cal.Rptr. 377 (elements of fraud)], and *Hobart v. Hobart Estate Co.* [*Hobart v. Hobart Estate Co.* (1945) 26 Cal.2d 412, 422, 159 P.2d 958 ; see also *Aguilera v. Pirelli Armstrong Tire Corp.* (9th Cir. 2000) 223 F.3d 1010, 1016 ; *Williamson v. General Dynamics Corp.* (9th Cir. 2000) 208 F.3d 1144, 1156 n.3 ; *Kelley v. Mortgage Elec. Registration Sys., Inc.* (2009) 642 F.Supp.2d 1048, 1056 ; *Anthony v. Yahoo! Inc.* (N.D. Cal. 2006) 421 F.Supp.2d 1257, 1263 ; *Glen Holly Entm't, Inc. v. Tektronix*,

Inc. (C.D. Cal. 1999) 100 F.Supp.2d 1086, 1093 ; Bains v. Moores (2009) 172 Cal.App.4th 445, 456-457, 91 Cal.Rptr.3d 309 (for individual defendants' stock sale to raise inference of scienter, plaintiffs must provide meaningful trade history for purposes of comparison to stock sales within class period; no inference of scienter in absence of allegation that stock sales are inconsistent); *Mendoza v. Ruesga (2008) 169 Cal.App.4th 270, 284, 86 Cal.Rptr.3d 610 ; Patrick v. Alacer Corp. (2008) 167 Cal.App.4th 995, 1016-1017, 84 Cal.Rptr.3d 642 ; Buckland v. Threshold Enter., Ltd. (2007) 155 Cal.App.4th 798, 806-807, 66 Cal.Rptr.3d 543]:*

- (1) Misrepresentation (false representation, concealment, or nondisclosure);
- (2) Knowledge of falsity (scienter);
- (3) Intent to defraud (i.e., to induce reliance);
- (4) Justifiable reliance; and
- (5) Resulting damage.

Paragraph 3 of this instruction defines materiality as a separate element of fraud. Not all definitions of fraud separate that element [*see Seeger v. Odell (1941) 18 Cal.2d 409, 414, 115 P.2d 977 ; Zinn v. Ex-Cell-O Corp. (1957) 148 Cal.App.2d 56, 306 P.2d 1017*]. Rather, the materiality of the representation is considered an aspect of justifiable reliance [Restatement (Second) of Torts §§ 537, 538]. Other cases include the materiality of the representation as a separate element of the cause of action [*see Thomas v. Hawkins (1950) 96 Cal.App.2d 377, 379, 215 P.2d 495*].

A person who makes representations in a reckless manner without knowing whether they are true or false is liable for fraud if he or she did not believe the representations to be true [*Yellow Creek Logging Corp. v. Dare (1963) 216 Cal.App.2d 50, 57, 30 Cal.Rptr. 629*]. If the person believes the representations to be true but is without reasonable grounds for the belief, he or she is liable only for negligent misrepresentation [*see Yellow Creek Logging Corp. v. Dare (1963) 216 Cal.App.2d 50, 57, 30 Cal.Rptr. 629*].

LexisNexis Matthew Bender Expert Practice Tip--Carefully Establish Each Element of Claim:

Because the most frequent defense in fraud cases is a direct attack on the essential elements of the claim (especially the misrepresentation of a material fact), counsel should be sure to fully establish each of these matters to the jury. Few pleadings are subject to as much motion practice in this regard as fraud pleadings. *By Publisher's Editorial Staff*

[c] Elements of Cause of Action for Negligent Misrepresentation

The elements of negligent misrepresentation are as follows [*Regents of Univ. of Cal. v. Principal Fin. Group (N.D. Cal. 2006) 412 F.Supp.2d 1037, 1044 ; Cedars Sinai Med. v. Mid-W. Nat'l Ins. Co. (C.D. Cal. 2000) 118 F.Supp.2d 1002, 1010 ; Gagne v. Bertran (1954) 43 Cal.2d 481, 487-488, 275 P.2d 15 ; see Pacific Ins. Co. v. Kent (C.D. Cal. 2000) 120 F.Supp.2d 1205* (negligent misrepresentation requires affirmative representation that is false; implied assertion or representation is insufficient)]:

- (1) The defendant made a statement as to a past or existing material fact;
- (2) The statement was untrue;
- (3) The defendant, regardless of his or her actual belief, made the statement without any reasonable grounds for believing it was true;
- (4) The defendant made the statement with the intent to induce the plaintiff to rely on it;

(5) The plaintiff justifiably relied on the statement; and

(6) The plaintiff sustained damages.

A single misrepresentation of a material fact is sufficient to support a judgment for fraud [*Cory v. Villa Props.* (1986) 180 Cal.App.3d 592, 597, 225 Cal.Rptr. 628].

A misrepresentation need not be oral; it may be implied by conduct [see, e.g., *Thrifty-Tel, Inc. v. Bezenek* (1996) 46 Cal.App.4th 1559, 1567, 54 Cal.Rptr.2d 468 ; *Universal By-Prods., Inc. v. City of Modesto* (1974) 43 Cal.App.3d 145, 151, 117 Cal.Rptr. 525]. Therefore, in a computer hacking action, the unauthorized use of a telephone access code may constitute a misrepresentation. Furthermore, a computerized network may constitute the plaintiff company's agent or legal equivalent that depended on the access code to identify the hackers as authorized users of the system. This indirect reliance is detrimental if the access permitted the hackers to steal computer services [*Thrifty-Tel, Inc. v. Bezenek* (1996) 46 Cal.App.4th 1559, 1567-1568, 54 Cal.Rptr.2d 468].

Writing a letter of recommendation about a former employee, which makes a misrepresentation that presents a foreseeable and substantial risk of physical harm to a third person, can subject the writer to liability for fraud to the injured third person, even without reliance by the third person [*Randi W. v. Muroc Joint Unified Sch. Dist.* (1997) 14 Cal.4th 1066, 1075-1081, 60 Cal.Rptr.2d 263, 929 P.2d 582 (student assaulted by former employee of school district, which wrote letter unreservedly recommending former employee for employment without disclosing facts regarding prior charges or complaints of sexual misconduct, could sue school district for fraud)].

For further discussion, see Levy, Golden & Sacks, California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, Part A (Matthew Bender).

[d] Misrepresentation Made to Another Person

Representations made to one person with the intention or with reason to expect that they will be repeated to another person and acted on by that person, and that are repeated and acted on to the injury of that other, give the person so acting the same right to an action for fraud as if the representations had been made to him or her directly [cf. *Mirkin v. Wasserman* (1993) 5 Cal.4th 1082, 1095-1097, 23 Cal.Rptr.2d 101, 858 P.2d 568 ; *Geernaert v. Mitchell* (1995) 31 Cal.App.4th 601, 606-607, 37 Cal.Rptr.2d 483 ; *Pacific Standard Life Ins. Co. v. Tower Indus., Inc.* (1992) 9 Cal.App.4th 1881, 1891, 12 Cal.Rptr.2d 524 ; *Barnhouse v. City of Pinole* (1982) 133 Cal.App.3d 171, 191-192, 183 Cal.Rptr. 881 ; *Massei v. Lettunich* (1967) 248 Cal.App.2d 68, 73, 56 Cal.Rptr. 232 ; Restatement (Second) of Torts § 533; see *The MEGA Life & Health Ins. Co. v. Superior Court* (2009) 172 Cal.App.4th 1522, 1530, 92 Cal.Rptr.3d 399 (inapplicable because plaintiff was not "injured actor-in-reliance")].

Whether a seller of real property had "reason to expect" transmission of the representation to the plaintiff depends on (1) the extent of the seller's knowledge of resale to a particular person or class of persons, and (2) the likelihood that the particular misrepresentation or concealment would be passed on to them [*Geernaert v. Mitchell* (1995) 31 Cal.App.4th 601, 608, 37 Cal.Rptr.2d 483]. Liability may be imposed if the representation was intended to be relied on by the public or by a general class of persons including the plaintiff. The defendant need not have intended that the representation would be relied on by the plaintiff specifically [see *Barnhouse v. City of Pinole* (1982) 133 Cal.App.3d 171, 191-192, 183 Cal.Rptr. 881 ; see also Civ. Code § 1711]. However, there is no liability unless the representation was ultimately communicated to and actually relied on by the plaintiff [see *Mirkin v. Wasserman* (1993) 5 Cal.4th 1082, 1088-1100, 23 Cal.Rptr.2d 101, 858 P.2d 568 ; see also MB 1900A.24].

For further discussion, see Levy, Golden & Sacks, California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, Part A (Matthew Bender).

[e] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 19, *California Judicial Council Fraud or Deceit Instructions*]:

CACI No. 1900, Intentional Misrepresentation

CACI No. 1906, Misrepresentations Made to Persons Other Than the Plaintiff



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California Forms of Jury Instruction

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CHAPTER 19A Matthew Bender Fraud and Deceit Instructions
Part A. FRAUD CAUSE OF ACTION IN GENERAL

3-19A California Forms of Jury Instruction MB 1900A.03

MB 1900A.03 Elements of Concealment--Burden of Proof

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Defendant is liable for damages suffered by Plaintiff because of Plaintiff's decision to _____ [specify act or transaction at issue, e.g., **make the purchase**], if Plaintiff proves all of the following:

[*EITHER (See Use of Instruction)*]

1. Defendant did not disclose a material fact that [he/she/it] should have disclosed because of [his/her/its] special relationship of trust and confidence with Plaintiff;

[*OR*]

1. Defendant gave Plaintiff some facts but concealed other facts that were material, and the facts given by Defendant were likely to mislead Plaintiff in view of the facts that were concealed;

[*OR*]

1. Defendant purposely concealed a material fact that was peculiarly within Defendant's knowledge and not reasonably available to Plaintiff;

[CONTINUE WITH INSTRUCTION]

2. Defendant knew that [he/she/it] _____ [concealed or failed to disclose] the fact;

3. Defendant intended that [his/her/its] _____ [concealment of or failure to disclose] the fact would cause Plaintiff _____ [specify, e.g., to sign the sales agreement] because of Plaintiff's ignorance of that fact;

4. Plaintiff actually relied on the information that [he/she/it] received from Defendant;

5. Plaintiff was justified in relying on this information; and

6. Plaintiff suffered damages as a result of that reliance.

Authorities: *Civ. Code § 1710(3); Williamson v. General Dynamics Corp.* (9th Cir. 2000) 208 F.3d 1144, 1156 n.3 ; *Weiner v. Fleischman* (1991) 54 Cal.3d 476, 481, 483, 286 Cal.Rptr. 40, 816 P.2d 892 ; *Hobart v. Hobart Estate Co.* (1945) 26 Cal.2d 412, 433, 159 P.2d 958 ; *Buckland v. Threshold Enter., Ltd.* (2007) 155 Cal.App.4th 798, 807, 66 Cal.Rptr.3d 543 ; *Lovejoy v. AT&T Corp.* (2001) 92 Cal.App.4th 85, 98, 111 Cal.Rptr.2d 711 ; *Newhall Land & Farming Co. v. Superior Court* (1993) 19 Cal.App.4th 334, 349-350, 23 Cal.Rptr.2d 377 ; *Marketing W., Inc. v. Sanyo Fisher (USA) Corp.* (1992) 6 Cal.App.4th 603, 612-613, 7 Cal.Rptr.2d 859 ; *Continental Airlines, Inc. v. McDonnell Douglas Corp.* (1989) 216 Cal.App.3d 388, 404-406, 264 Cal.Rptr. 779 .

[2] Use of Instruction

This instruction should be used when the fraud or deceit consists of concealing facts rather than affirmatively misrepresenting them.

The first alternative Paragraph 1 should be used when the defendant was in a fiduciary or confidential relationship with the plaintiff and failed to disclose material facts within his or her knowledge. If this alternative is used, the definition of confidential relationship in MB 1900A.26 should be used with this instruction.

The second alternative Paragraph 1 should be used when the defendant disclosed some facts but failed to disclose other material facts.

The third alternative Paragraph 1 should be used when there is an affirmative effort to conceal material facts that the defendant is aware of but that are not reasonably available to the plaintiff [see, e.g., *Johnson v. Mitsubishi Digital Electronics America, Inc.* (C.D. Cal. 2008) 578 F.Supp.2d 1229, 1239].

Definitions of significant terms and elements in this instruction are set forth in MB 1900A.20-MB 1900A.26.

For related Judicial Council instructions, see [3][b], *below*.

[3] Comment

[a] Fraud or Deceit by Concealment

Civ. Code § 1710(3) sets forth the elements of fraud or deceit by concealment as the suppression of a fact by one who is bound to disclose it, or who gives information of other facts that are likely to mislead for want of communication of that fact. Fraudulent concealment is often an issue when the defendant bears a fiduciary responsibility to the plaintiff,

such as a defendant who is a corporate officer with special knowledge of the affairs of the corporation [*Hobart v. Hobart Estate Co.* (1945) 26 Cal.2d 412, 433, 159 P.2d 958 ; see *Weiner v. Fleischman* (1991) 54 Cal.3d 476, 481, 483, 286 Cal.Rptr. 40, 816 P.2d 892 (partner or joint venturer may be liable as fiduciary for nondisclosure)]. A real estate broker may be liable for fraudulent concealment with respect to a client even if the conduct does not violate the statutory disclosure law applicable to that business, because those causes of action involve different elements [*Michel v. Moore & Assoc., Inc.* (2007) 156 Cal.App.4th 756, 762, 67 Cal.Rptr.3d 797 ; see *Civ. Code* § 2079; *Lee v. Escrow Consultants, Inc.* (1989) 210 Cal.App.3d 915, 925, 259 Cal.Rptr. 117 (escrow holder may be liable as fiduciary for nondisclosure)]. A defendant is liable for fraudulent concealment only if it had a legal duty to disclose the concealed fact [*Lincoln Gen. Ins. Co. v. Access Claims Administrators, Inc.* (E.D. Cal. 2009) 596 F.Supp.2d 1351, 1373].

If a defendant discloses certain facts about a transaction, he or she will be liable for failure to disclose other material facts that make the facts disclosed misleading [*Civ. Code* § 1710(3); *Marketing W., Inc. v. Sanyo Fisher (USA) Corp.* (1992) 6 Cal.App.4th 603, 613, 7 Cal.Rptr.2d 859 ; *McCue v. Bruce Enterprises, Inc.* (1964) 228 Cal.App.2d 21, 27, 39 Cal.Rptr. 125 ; see, e.g., *Apollo Capital Fund LLC v. Roth Capital Partners, LLC* (2007) 158 Cal.App.4th 226, 242, 70 Cal.Rptr.3d 199].

If the plaintiff and defendant are not in a fiduciary relationship but the defendant has knowledge of material facts to which the plaintiff has no reasonable access, the failure to disclose those facts may be the basis for liability [*Newhall Land & Farming Co. v. Superior Court* (1993) 19 Cal.App.4th 334, 349-350, 23 Cal.Rptr.2d 377 ; *Marketing W., Inc. v. Sanyo Fisher (USA) Corp.* (1992) 6 Cal.App.4th 603, 613, 7 Cal.Rptr.2d 859 ; *Continental Airlines, Inc. v. McDonnell Douglas Corp.* (1989) 216 Cal.App.3d 388, 404-406, 264 Cal.Rptr. 779 ; *Ballou v. Master Props. No. 6* (1987) 189 Cal.App.3d 65, 75-76, 234 Cal.Rptr. 264 ; *Lingsch v. Savage* (1963) 213 Cal.App.2d 729, 735, 29 Cal.Rptr. 201 ; *Sime v. Malouf* (1949) 95 Cal.App.2d 82, 99, 212 P.2d 946 ; see also *Vega v. Jones, Day, Reavis & Pogue* (2004) 121 Cal.App.4th 282, 291, 17 Cal.Rptr.3d 26 (active concealment or suppression of facts by nonfiduciary is equivalent of false representation and thus actual fraud)]. However, the duty to disclose cannot arise when the material facts are not actually known to the defendant, or when knowledge is "imputed" to the defendant [*San Diego Hospice v. County of San Diego* (1995) 31 Cal.App.4th 1048, 1055-1058, 37 Cal.Rptr.2d 501].

In some instances in which a duty of disclosure would otherwise exist, special legislation may nullify that duty or bar a cause of action based on a failure to disclose [see, e.g., *Civ. Code* § 1710.2 (barring cause of action based on failure to disclose to transferee fact that occupant of property was afflicted with AIDS or facts relating to death of former occupant occurring more than three years before transfer)].

For further discussion, see Levy, Golden & Sacks, California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, Part A (Matthew Bender).

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 19, *California Judicial Council Fraud or Deceit Instructions*]:

CACI No. 1901, Concealment



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CHAPTER 19A Matthew Bender Fraud and Deceit Instructions
Part A. FRAUD CAUSE OF ACTION IN GENERAL

3-19A California Forms of Jury Instruction MB 1900A.04

MB 1900A.04 Elements of Negligent Misrepresentation--Burden of Proof

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Defendant is liable to Plaintiff for damages for negligent misrepresentation if Plaintiff proves all of the following:

1. That Defendant represented to Plaintiff that _____ [*specify positive assertion or assertion of fact that constitutes alleged misrepresentation*];
2. That the representation was untrue;
3. That the representation was material to Plaintiff's decision to act;
4. That, regardless of what Defendant actually believed, [he/she/it] made the representation without any reasonable ground for believing that it was true;
5. That Plaintiff did not know that the representation was untrue;
6. That Defendant made the representation intending that Plaintiff would rely on it;
7. That Plaintiff did rely on the representation;
8. That Plaintiff was justified in relying on the representation; and

9. That, as a result of [his/her/its] reliance on the representation, Plaintiff suffered damages.

Authorities: *Firoozye v. Earthlink Network* (N.D. Cal. 2001) 153 F.Supp.2d 1115, 1128 ; *Conroy v. Regents of Univ. of Cal.* (2009) 45 Cal.4th 1244, 1255, 91 Cal.Rptr.3d 532, 203 P.3d 1127 ; *Clement v. Smith* (1993) 16 Cal.App.4th 39, 44-47, 19 Cal.Rptr.2d 676 ; *Home Budget Loans, Inc. v. Jacoby & Meyers Law Offices* (1989) 207 Cal.App.3d 1277, 1285, 255 Cal.Rptr. 483 ; *Christiansen v. Roddy* (1986) 186 Cal.App.3d 780, 785-786, 231 Cal.Rptr. 72 ; *Walters v. Marler* (1978) 83 Cal.App.3d 1, 17, 147 Cal.Rptr. 655 .

[2] Use of Instruction

This instruction should be used when the defendant has negligently represented a material fact in the course of a transaction.

Definitions of significant terms and elements in this instruction are set forth in MB 1900A.20-MB 1900A.26. This instruction must be used with an instruction defining the standard of proof [see Ch. 2, *California Judicial Council Evidence Instructions*, CACI No. 200, "Obligation to Prove--More Likely True than Not True"]].

The alleged misrepresentation or misrepresentations used to fill in the blank to complete the first numbered element in the instruction must be "positive assertions" [Civ. Code § 1572(2)] or assertions of fact made with no reasonable belief that the facts are true [Civ. Code § 1710(2); *Byrum v. Brand* (1990) 219 Cal.App.3d 926, 940-942, 268 Cal.Rptr. 609 ; see *Feldman v. 1100 Park Lane Assoc.* (2008) 160 Cal.App.4th 1467, 1493, 74 Cal.Rptr.3d 1 ; *OCM Principal Opportunities Fund, L.P. v. CIBC World Mkts. Corp.* (2007) 157 Cal.App.4th 835, 854-855, 68 Cal.Rptr.3d 828 ; *McCulloch v. Ford Dealers Advertising Assn.* (1991) 234 Cal.App.3d 1385, 1389, 1392, 286 Cal.Rptr. 223 (advertising association did not make assertion of truth of promotional materials for race when it placed its logo on those materials)]. An assertion of negligent misrepresentation by omission has been held to be insufficient [*Byrum v. Brand* (1990) 219 Cal.App.3d 926, 940-942, 268 Cal.Rptr. 609 ; see *Randi W. v. Muroc Joint Unified Sch. Dist.* (1997) 14 Cal.4th 1066, 1081-1084, 60 Cal.Rptr.2d 263, 929 P.2d 582 (representations in letter recommending former school district employee for any position without reservation or qualification were misleading half-truths strongly implying employee was fit to interact appropriately and safely with female students, in light of defendants' alleged knowledge of charges of repeated sexual improprieties, invoking exception to general rule excluding liability for negligent misrepresentation for mere nondisclosure)].

For related Judicial Council instructions, see [3][b], *below*.

[3] Comment

[a] Elements of Cause of Action for Negligent Misrepresentation

Each of the elements listed in this instruction is necessary to sustain a claim of negligent misrepresentation [see, e.g., *Telephia, Inc. v. Cuppy* (N.D. Cal. 2006) 411 F.Supp.2d 1178, 1185 (existence of several elements questioned); *National Union Fire Ins. Co. of Pittsburgh, Pa. v. Cambridge Integrated Svcs. Group, Inc.* (2009) 171 Cal.App.4th 35, 50, 89 Cal.Rptr.3d 473 ; *Buckland v. Threshold Enter., Ltd.* (2007) 155 Cal.App.4th 798, 807, 66 Cal.Rptr.3d 543 ; *Melican v. The Regents of the Univ. of Cal.* (2007) 151 Cal.App.4th 168, 181-182, 59 Cal.Rptr.3d 672 (elements of misrepresentation, justifiable reliance and damage questioned); *Century Sur. Co. v. Crosby Ins., Inc.* (2004) 124 Cal.App.4th 116, 129-130, 21 Cal.Rptr.3d 115 ; *Clement v. Smith* (1993) 16 Cal.App.4th 39, 44-47, 19 Cal.Rptr.2d 676 ; *Home Budget Loans, Inc. v. Jacoby & Meyers Law Offices* (1989) 207 Cal.App.3d 1277, 1285, 255 Cal.Rptr. 483 ; *Christiansen v. Roddy* (1986) 186 Cal.App.3d 780, 785-786, 231 Cal.Rptr. 72 ; *Walters v. Marler* (1978) 83 Cal.App.3d 1, 17, 147 Cal.Rptr. 655].

The tort of negligent misrepresentation does not require scienter or intent to defraud. It encompasses the assertion, as a

fact, of something that is not true, by a person who has no reasonable ground for believing it to be true; and the positive assertion, in a manner not warranted by the information of the person making it, of something that is not true, though he or she believes it to be true [*Conroy v. Regents of Univ. of Cal.* (2009) 45 Cal.4th 1244, 1255, 91 Cal.Rptr.3d 532, 203 P.3d 1127 ; *OCM Principal Opportunities Fund, L.P. v. CIBC World Mkts. Corp.* (2007) 157 Cal.App.4th 835, 845, 68 Cal.Rptr.3d 828 ; see *Apollo Capital Fund LLC v. Roth Capital Partners, LLC* (2007) 158 Cal.App.4th 226, 243, 70 Cal.Rptr.3d 199 (in contrast to fraud, negligent misrepresentation does not require knowledge of falsity)].

Negligent misrepresentation is a form of actionable deceit [Civ. Code §§ 1572(2), 1710(2); *Gagne v. Bertran* (1954) 43 Cal.2d 481, 487, 275 P.2d 15 ; *McCulloch v. Ford Dealers Advertising Assn.* (1991) 234 Cal.App.3d 1385, 1388-1389, 286 Cal.Rptr. 223 ; *Hale v. George A. Hormel & Co.* (1975) 48 Cal.App.3d 73, 84, 121 Cal.Rptr. 144]. Civ. Code § 1572(2) describes negligent misrepresentation as a "positive assertion in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true" [see *McClain v. Octagon Plaza, LLC* (2008) 159 Cal.App.4th 784, 792-793, 71 Cal.Rptr.3d 885 ; *Evan F. v. Hughson United Methodist Church* (1992) 8 Cal.App.4th 828, 840 n.2, 10 Cal.Rptr.2d 748 (tort of negligent misrepresentation requires positive misrepresentation and does not apply to implied misrepresentations)]. Civ. Code § 1710(2) defines it as "the assertion, as a fact, of that which is not true, by one who has no reasonable ground for believing it to be true." It is unclear whether the differences in those two sections create any difference in the concept. A history of the development of the tort of negligent misrepresentation can be found in *Hale v. George A. Hormel & Co.* [*Hale v. George A. Hormel & Co.* (1975) 48 Cal.App.3d 73, 82-85, 121 Cal.Rptr. 144].

In one case, before his death, a man executed a donation agreement for his body with a university program that accepted human cadavers for scientific and anatomical studies [see *Conroy v. Regents of Univ. of Cal.* (2009) 45 Cal.4th 1244, 91 Cal.Rptr.3d 532, 203 P.3d 1127]. Following the husband's death, the wife-plaintiff arranged for the delivery of the body as specified in the agreement. Later, she read reports of irregularities in the donation program that alleged the university failed to maintain adequate records and that the donated bodies could not be located. In response to her inquiries, she was told there were no records of the location of her husband's body. In her suit against the university and others, the complaint included causes of action for fraud and negligent misrepresentation. Plaintiff further alleged that she had suffered injuries to her health and emotional distress as a result of defendant's misconduct and sought compensatory and punitive damages [see *Conroy v. Regents of Univ. of Cal.* (2009) 45 Cal.4th 1244, 1248, 91 Cal.Rptr.3d 532, 203 P.3d 1127].

With respect to fraud, the complaint alleged that the program, through its agent, represented that the body would be used for research and teaching purposes (not for gain or profit), and would be handled in a respectful manner. It further alleged that the representations were false, in that the defendants used the body for profit with respect to tutoring classes and the sale of body parts; and that they failed to keep proper records and to return the remains to the plaintiff. It also alleged that the defendant program made the representations to induce the plaintiff to participate in the donation program, and that the plaintiff, who was ignorant of the falsity of the representations, relied on them in electing to participate, suffering consequent emotional distress [see *Conroy v. Regents of Univ. of Cal.* (2009) 45 Cal.4th 1244, 1256, 91 Cal.Rptr.3d 532, 203 P.3d 1127].

The California Supreme Court affirmed summary judgment for the defendants, holding among other things, that the plaintiff failed to show that she actually relied on the alleged misrepresentations, an essential element of both claims of deceit. Actual reliance occurs when a misrepresentation is an immediate cause of a plaintiff's conduct, which alters the plaintiff's legal relations, and when, absent that representation, the plaintiff would not, in all reasonable probability, have entered into the contract or other transaction. It is not necessary that a plaintiff's reliance on the truth of the fraudulent misrepresentation be the sole or even the predominant or decisive factor in influencing the plaintiff's conduct. It is enough that the representation has played a substantial part, and so has been a substantial factor, in influencing the plaintiff's decision. The actual donor was the decedent, who executed the donation agreement. Although the plaintiff did deliver the body in the specified manner to the university, she did not execute her husband's donation agreement, or make any decision regarding disposition of his body, and thus had no legal right to control the disposition of the body.

The right of the plaintiff, as the surviving spouse, to control the disposition of her husband's body was superseded by the terms of the written donation agreement executed by her husband. The plaintiff failed to identify any legal basis for altering her husband's instructions. The Court held that her actions are not cognizable as reliance for purposes of a claim of deceit, inasmuch as her husband's gift was already irrevocable on his death. She did not enter into an agreement with the university regarding her husband's body, nor did the representations of the university's agent cause her to alter her legal relations with the university. The husband's gift as specified in the donation agreement did not require her consent, concurrence, or approval. Hence, her claims for fraud and negligent misrepresentation did not survive a summary judgment motion [*Conroy v. Regents of Univ. of Cal.* (2009) 45 Cal.4th 1244, 1256-1258, 91 Cal.Rptr.3d 532, 203 P.3d 1127].

Writing a letter of recommendation about a former employee making a misrepresentation that presents a foreseeable and substantial risk of physical harm to a third person can subject the writer to liability for negligent misrepresentation to the injured third person, even without reliance by the third person [*Randi W. v. Muroc Joint Unified Sch. Dist.* (1997) 14 Cal.4th 1066, 1075-1081, 60 Cal.Rptr.2d 263, 929 P.2d 582 (student assaulted by former employee of school district, which wrote letter unreservedly recommending former employee for employment without disclosing facts regarding prior charges or complaints of sexual misconduct, could sue school district for negligent misrepresentation)].

The doctrine of comparative negligence is not applicable in cases involving negligent misrepresentation [*Carroll v. Gava* (1979) 98 Cal.App.3d 892, 896-897, 159 Cal.Rptr. 778].

Although negligent misrepresentation may be considered a form of actionable deceit, punitive damages may not be based on a finding of negligent misrepresentation [*Delos v. Farmers Ins. Group* (1979) 93 Cal.App.3d 642, 656, 155 Cal.Rptr. 843].

For further discussion, see Levy, Golden & Sacks, California Torts, Ch. 40, *Fraud, Deceit, and Other Business Torts* (Matthew Bender). For forms of pleading for use in actions for negligent misrepresentation, see California Forms of Pleading and Practice, Ch. 269, *Fraud and Deceit* (Matthew Bender). For memoranda pertaining to negligent misrepresentation, see California Points and Authorities, Ch. 105, *Fraud and Deceit* (Matthew Bender).

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 19, *California Judicial Council Fraud or Deceit Instructions*]:

CACI No. 1903, Negligent Misrepresentation



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CHAPTER 19A Matthew Bender Fraud and Deceit Instructions
Part A. FRAUD CAUSE OF ACTION IN GENERAL

3-19A California Forms of Jury Instruction MB 1900A.05

MB 1900A.05 Elements of Constructive Fraud**[1] Instruction**[PLAINTIFF'S/DEFENDANT/S] **PROPOSED INSTR. NO.** _____

[In addition to seeking damages for actual fraud,] Plaintiff seeks to recover damages from Defendant for what the law calls "constructive fraud." "Constructive fraud" refers to acts, omissions, or concealments that amount to a breach of duty arising from a confidential or fiduciary relationship, such as that which exists between _____ [*specify type of relationship involved in case, e.g., a real estate broker and his or her client*], even though no actual fraud is committed. You must find in Plaintiff's favor if you find both of the following:

1. That Defendant breached [his/her/its] fiduciary duty as Plaintiff's [*specify type of fiduciary or confidential relationship involved in case, e.g., real estate broker*] by _____ [*specify nature of alleged breach of duty, e.g., passing on false or misleading information concerning the size of the real estate parcel that Plaintiff intended to purchase, without disclosing that the information had come from the sellers and that Defendant had not verified its accuracy*]; and
2. That Plaintiff suffered damages as a result of Defendant's breach of duty.

As I previously mentioned, Plaintiff does not need to establish actual fraud to recover for constructive fraud. Therefore, Plaintiff may recover for constructive fraud even though, for example, no actual false statement was made by Defendant and even if Defendant did not intend to mislead Plaintiff.

Authorities: Civ. Code § 1573; *Salahutdin v. Valley of Cal., Inc.* (1994) 24 Cal.App.4th 555, 562-563, 29 Cal.Rptr.2d 463 ; *Byrum v. Brand* (1990) 219 Cal.App.3d 926, 938, 268 Cal.Rptr. 609 ; *Barrett v. Bank of Am.* (1986) 183 Cal.App.3d 1362, 1368-1368, 229 Cal.Rptr. 16 .

[2] Use of Instruction

This instruction should be given when the plaintiff seeks to recover from the defendant on a theory of constructive fraud, as distinguished from actual fraud.

As discussed in [3], *below*, case law defines constructive fraud very generally as breach of a duty arising from a confidential or fiduciary relationship that causes damage to the plaintiff [see, e.g., *Sandy v. McClure* (N.D. Cal. 2009) 676 F.Supp.2d 866, 882 (plaintiff need not establish fraudulent intent, as long as parties are in fiduciary or confidential relationship); *Warren v. Merrill* (2006) 143 Cal.App.4th 96, 109, 49 Cal.Rptr.3d 122 (constructive fraud arises on breach of duty by person in fiduciary relationship who misleads another person to his or her prejudice); *Schauer v. Mandarin Gems of Cal., Inc.* (2005) 125 Cal.App.4th 949, 960, 23 Cal.Rptr.3d 233 (cause of action for constructive fraud was dismissed because plaintiff failed to plead requisite fiduciary or special confidential relationship)]. However, it is recommended that the court provide further guidance for the jury by specifying in the instruction the nature of alleged breaches of duty involved in the particular case.

In many cases the existence of a fiduciary or confidential relationship between the parties may have already been admitted by the defendant or determined by the court as a matter of law. If there is a factual issue concerning whether a confidential or fiduciary relationship existed between the plaintiff and the defendant, the instruction in MB 1900A.26[1] should be given along with this instruction.

[3] Comment

Civ. Code § 1573 defines constructive fraud as one of the following:

- A breach of duty by which a person, without an actually fraudulent intent, gains an advantage by misleading another to his or her prejudice (or to the prejudice of anyone claiming under him or her); or
- Any act or omission that the law specially declares to be fraudulent, without regard to actual fraud.

Cases define constructive fraud generally as acts, omissions, and concealments involving a breach of a legal or equitable duty, trust, or confidence, and resulting in damages to another. Constructive fraud exists when conduct, although not actually fraudulent, ought to be treated as fraudulent [*Barrett v. Bank of Am.* (1986) 183 Cal.App.3d 1362, 1368-1369, 229 Cal.Rptr. 16 ; see *Salahutdin v. Valley of Cal., Inc.* (1994) 24 Cal.App.4th 555, 562, 29 Cal.Rptr.2d 463]. For example, constructive fraud may consist of a failure by a person who owes a fiduciary duty to another to disclose material facts concerning a transaction between them or in which the fiduciary is representing the other [see, e.g., *Salahutdin v. Valley of Cal., Inc.* (1994) 24 Cal.App.4th 555, 561-563, 29 Cal.Rptr.2d 463 ; *Byrum v. Brand* (1990) 219 Cal.App.3d 926, 937-938, 268 Cal.Rptr. 609 ; see also *In re Harmon* (9th Cir. 2001) 250 F.3d 1240, 1248, n.10 (constructive fraud in partnership law); *Alfaro v. Community Housing Improvement System & Planning Assn., Inc.* (2009) 171 Cal.App.4th 1356, 1382-1383, n.19, 89 Cal.Rptr.3d 659 (disclosure duty of seller of real property; constructive fraud not pleaded)]. The failure of a fiduciary to disclose a material fact to its principal that might affect the fiduciary's motives or the principal's decision, which is known (or should be known) to the fiduciary, may constitute constructive fraud [*Michel v. Moore & Assoc., Inc.* (2007) 156 Cal.App.4th 756, 763, 67 Cal.Rptr.3d 797] .

A real estate broker has a fiduciary duty to its client [*Civ. Code* § 2079.24; *Michel v. Moore & Assoc., Inc.* (2007) 156 Cal.App.4th 756, 762, 67 Cal.Rptr.3d 797] . A real estate agent, as a fiduciary, is liable to the principal for constructive fraud even though its conduct is not actually fraudulent. Most acts by an agent in breach of its fiduciary duties constitute constructive fraud [*Michel v. Moore & Assoc., Inc.* (2007) 156 Cal.App.4th 756, 762-763, 67 Cal.Rptr.3d 797] . In an action for constructive fraud based on nondisclosure, plaintiff need not prove that the defendant *intended* to fail to disclose material facts [*Byrum v. Brand* (1990) 219 Cal.App.3d 926, 938, 268 Cal.Rptr. 609] .

For additional discussion, see Levy, Golden & Sacks, California Torts, Ch. 40, *Fraud, Deceit, and Other Business Torts* (Matthew Bender). For forms of pleading for use in actions for constructive fraud, see California Forms of Pleading and Practice, Ch. 269, *Fraud and Deceit* (Matthew Bender).

LexisNexis Matthew Bender Expert Practice Tip--Existence of Fiduciary Relationship: This instruction assumes that a fiduciary relationship has already been admitted or has otherwise been established as a proven fact. In some cases, there will be substantial disputes as to whether a fiduciary relationship exists. *By Ronald Oster*



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CHAPTER 19A Matthew Bender Fraud and Deceit Instructions
Part A. FRAUD CAUSE OF ACTION IN GENERAL

3-19A California Forms of Jury Instruction MB 1900A.06-MB 1900A.19

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MB 1900A.06Reserved for Future Use



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CHAPTER 19A Matthew Bender Fraud and Deceit Instructions
Part B. SPECIFIC ELEMENTS OF FRAUD

3-19A California Forms of Jury Instruction MB 1900A.20

MB 1900A.20 Intent**[1] Instruction**[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

You have been instructed that Plaintiff must prove that any false representations made by Defendant were made with the intent to deceive Plaintiff and that Plaintiff rely on them. This means that any false representations made by Defendant must have been made to cause Plaintiff to _____ [describe transaction, e.g., purchase the property].

Authorities: *Gagne v. Bertran* (1954) 43 Cal.2d 481, 488, 275 P.2d 15 ; *Continental Airlines, Inc. v. McDonnell Douglas Corp.* (1989) 216 Cal.App.3d 388, 405-408, 264 Cal.Rptr. 779 ; *Christiansen v. Roddy* (1986) 186 Cal.App.3d 780, 786-788, 231 Cal.Rptr. 72 .

[2] Use of Instruction

This instruction should be used by the defendant when he or she contends that any misrepresentations, although made, were not intended to induce the plaintiff's ultimate action.

For related Judicial Council instructions, see [3][b], *below*.

[3] Comment**[a] Requirement of Intent Generally**

An intent to deceive is not an essential element of the cause of action for deceit. Instead, what is required is the intent to induce action [*Gagne v. Bertran* (1954) 43 Cal.2d 481, 488 n.5, 275 P.2d 15 ; *Lacher v. Superior Court* (1991) 230

Cal.App.3d 1038, 1046, 281 *Cal.Rptr.* 640 ; *Christiansen v. Roddy* (1986) 186 *Cal.App.3d* 780, 786-788, 231 *Cal.Rptr.* 72 ; see *Apollo Capital Fund LLC v. Roth Capital Partners, LLC* (2007) 158 *Cal.App.4th* 226, 240, 70 *Cal.Rptr.3d* 199]. Such intent is often established by circumstantial evidence and may be inferred from circumstances such as defendant's failure even to attempt performance [see *Tenzer v. Superscope, Inc.* (1985) 39 *Cal.3d* 18, 30, 216 *Cal.Rptr.* 130, 702 *P.2d* 212 ; *Locke v. Warner Brothers, Inc.* (1997) 57 *Cal.App.4th* 354, 368, 66 *Cal.Rptr.2d* 921 (triable issue of material fact on fraudulent intent, precluding summary judgment)].

LexisNexis Matthew Bender Expert Practice Tip --Warning--Failure to Include Intent Instruction Is Grounds for Reversal: Keep in mind that a jury instruction on fraud or deceit that fails to include intent as one of the elements is erroneous and grounds for reversal [*Continental Airlines, Inc. v. McDonnell Douglas Corp.* (1989) 216 *Cal.App.3d* 388, 405-408, 264 *Cal.Rptr.* 779] . By Publisher's Editorial Staff

For further discussion of the intent requirement, see Levy, Golden & Sacks, California Torts, Ch. 40, *Fraud, Deceit, and Other Business Torts*, Part A (Matthew Bender).

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 19, *California Judicial Council Fraud or Deceit Instructions*]:

CACI No. 1900, Intentional Misrepresentation



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CHAPTER 19A Matthew Bender Fraud and Deceit Instructions
Part B. SPECIFIC ELEMENTS OF FRAUD

3-19A California Forms of Jury Instruction MB 1900A.21

MB 1900A.21 Time of Plaintiff's Reliance Determines Falsity of Representations

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

In deciding whether representations were true or false you must look at the situation at the time Plaintiff relied on them.

Authority: *Blickman Turkus, LP v. MF Downtown Sunnyvale, LLC* (2008) 162 Cal.App.4th 858, 877-878, 76 Cal.Rptr.3d 325 ; *United States Nat'l Bank v. Stiller* (1931) 119 Cal.App. 442, 444, 6 P.2d 529 .

[2] Use of Instruction

This instruction should be used with the burden-of-proof instructions that refer to "false" as an element of the instruction. However, depending on the circumstances of the case, it may not always be appropriate. For example, in certain situations, representations may be true when they are made but may later become false through no fault of the defendant. Thus, the instruction should be used with caution.

For related Judicial Council instructions, see [3][b], *below*.

[3] Comment

[a] Time of Reliance on Representation

In general, false representations are required as a basis of an action for fraud [Civ. Code § 1572(1)].

The truth or falsity of facts is measured as of the time they were relied on by the plaintiff [*United States Nat'l Bank v.*

Stiller (1931) 119 Cal.App. 442, 444, 6 P.2d 529 (representations in question were false both when they were made and when they were relied on by plaintiff); see *Blickman Turkus, LP v. MF Downtown Sunnyvale, LLC* (2008) 162 Cal.App.4th 858, 877-878, 76 Cal.Rptr.3d 325].

For further discussion, see Levy, Golden & Sacks, California Torts, Ch. 40, *Fraud, Deceit, and Other Business Torts*, Part A (Matthew Bender).

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 19, *California Judicial Council Fraud or Deceit Instructions*]:

CACI No. 1900, Intentional Misrepresentation

CACI No. 1902, False Promise

CACI No. 1903, Negligent Misrepresentation

CACI No. 1907, Reliance

CACI No. 1908, Reasonable Reliance



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CHAPTER 19A Matthew Bender Fraud and Deceit Instructions
Part B. SPECIFIC ELEMENTS OF FRAUD

3-19A California Forms of Jury Instruction MB 1900A.22

MB 1900A.22 Misrepresentation of Law

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Plaintiff may not recover damages for any loss or harm caused by any false representations made by Defendant about the requirements of the law _____ [if appropriate (see Use of Instruction): unless you find that Plaintiff and Defendant had a special relationship of trust and confidence or unless you find that Defendant also misrepresented the facts that (he/she/it) claimed supported (his/her/its) statement about the requirements of the law or unless you find that Plaintiff reasonably believed that, as compared to (himself/herself), Defendant had special knowledge or skill regarding the subject matter of the representation].

Authorities: *Lynch v. Cruttenden & Co.* (1993) 18 Cal.App.4th 802, 808, 22 Cal.Rptr.2d 636 ; *Bledsoe v. Watson* (1973) 30 Cal.App.3d 105, 110, 106 Cal.Rptr. 197 ; *De Zemplén v. Home Fed. Sav. & Loan Ass'n* (1963) 221 Cal.App.2d 197, 202, 34 Cal.Rptr. 334 ; *Terry v. Bender* (1956) 143 Cal.App.2d 198, 213, 300 P.2d 119 .

[2] Use of Instruction

This instruction should be used when the defendant claims that his or her representations, even though false, were representations of law and not of fact. The first alternative should be given when the plaintiff contends that a misrepresentation of law is actionable because of a confidential or fiduciary relationship between the parties. This alternative should be used with MB 1900A.26 defining confidential relationship. The second alternative should be given when the plaintiff contends that misrepresentations of law are actionable because the defendant misrepresented the facts on which the legal representations were based. The third alternative should be given if the plaintiff contends that the misrepresentation of law is actionable because the plaintiff reasonably believed that, as compared to himself or herself, the defendant had special knowledge or skill regarding the subject matter.

For related Judicial Council instructions, see [3][b], *below*.

[3] Comment

[a] Misrepresentations of Law Normally Not Actionable

Generally, misrepresentations of law do not constitute actionable fraud [*Golden W. Baseball Co. v. Talley* (1991) 232 Cal.App.3d 1294, 1306-1307, 284 Cal.Rptr. 53 ; *Bledsoe v. Watson* (1973) 30 Cal.App.3d 105, 110, 106 Cal.Rptr. 197]. However, there are exceptions to this rule. A misrepresentation of law will be actionable in the following circumstances:

- There is a confidential or fiduciary relationship between the plaintiff and defendant [*Lynch v. Cruttenden & Co.* (1993) 18 Cal.App.4th 802, 808, 22 Cal.Rptr.2d 636 ; *Terry v. Bender* (1956) 143 Cal.App.2d 198, 213, 300 P.2d 119];
- In addition to a misrepresentation of what the law requires, the defendant also misrepresents the facts on which the requirement of law is based [*De Zemplén v. Home Fed. Sav. & Loan Ass'n* (1963) 221 Cal.App.2d 197, 202, 34 Cal.Rptr. 334]; and
- The plaintiff reasonably believed that, as compared to himself or herself, the defendant had special knowledge or skill regarding the subject matter [see *Lynch v. Cruttenden & Co.* (1993) 18 Cal.App.4th 802, 808, 22 Cal.Rptr.2d 636].

For further discussion, see Levy, Golden & Sacks, California Torts, Ch. 40, *Fraud, Deceit, and Other Business Torts*, Part A (Matthew Bender).

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 19, *California Judicial Council Fraud or Deceit Instructions*]:

CACI No. 1900, Intentional Misrepresentation

CACI No. 1903, Negligent Misrepresentation

CACI No. 1906, Misrepresentations Made to Persons Other Than the Plaintiff



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CHAPTER 19A Matthew Bender Fraud and Deceit Instructions
Part B. SPECIFIC ELEMENTS OF FRAUD

3-19A California Forms of Jury Instruction MB 1900A.23

MB 1900A.23 Justified Reliance--Failure to Investigate

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

The general rule is that Plaintiff is permitted to rely on Defendant's representations without investigation, even if an investigation would have shown that the representations were false. However, Plaintiff is not excused from a failure to investigate if you find that [his/her] failure to investigate was irrational in light of [his/her] own information and intelligence.

Authority: *Hartong v. Partake, Inc.* (1968) 266 Cal.App.2d 942, 965, 72 Cal.Rptr. 722 .

[2] Use of Instruction

This instruction should be used as a further definition of adequate justification when the plaintiff has failed to investigate misrepresentations. However, as discussed in [3][a], *below*, this instruction may not be appropriate in actions involving allegedly fraudulent misrepresentations about insurance coverage.

For related Judicial Council instructions, see [3][b], *below*.

[3] Comment

[a] Effect of Plaintiff's Failure to Investigate

A plaintiff is not ordinarily compelled to investigate the representations made by the defendant [*Storage Servs. v. Oosterbaan* (1989) 214 Cal.App.3d 498, 508, 262 Cal.Rptr. 689], unless in the circumstances, including the plaintiff's knowledge and intelligence, the failure to investigate is irrational [*Hartong v. Partake, Inc.* (1968) 266 Cal.App.2d 942,

965, 72 *Cal.Rptr.* 722]. Even when an independent investigation is made, there can be justified reliance when the falsity of the statement is not apparent from investigation, the person making the representation has superior knowledge, or the plaintiff is not competent to judge the facts without expert assistance [*Arthur L. Sachs, Inc. v. Oceanside* (1984) 151 *Cal.App.3d* 315, 323, 198 *Cal.Rptr.* 483].

Although the plaintiff is not ordinarily required to investigate the truth of affirmative misrepresentations, the courts appear to have created an exception to this rule in the case of alleged misrepresentations about insurance coverage, holding that an insured may not justifiably rely on the misrepresentations if he or she could have discovered their falsity by reading the express terms of the insurance policy [see *Hadland v. NN Investors Life Ins. Co.* (1994) 24 *Cal.App.4th* 1578, 1586-1589, 30 *Cal.Rptr.2d* 88 ; *Hackethal v. National Cas. Co.* (1987) 189 *Cal.App.3d* 1102, 1111-1112, 234 *Cal.Rptr.* 853 ; but see, e.g., *Butcher v. Truck Ins. Exch.* (2000) 77 *Cal.App.4th* 1442, 1462, 92 *Cal.Rptr.2d* 521 ("Absent some notice or warning, an insured should be able to rely on an agent's representations of coverage without independently verifying the accuracy of those representations by examining the relevant policy provisions")]. Therefore, the instruction in [1], above, is probably not appropriate in cases involving misrepresentations about insurance coverage, since the language allowing plaintiff to rely on misrepresentations without investigation might mislead the jury into thinking that the plaintiff had no duty to read the insurance policy.

For further discussion of what constitutes justifiable reliance, see Levy, Golden & Sacks, California Torts, Ch. 40, *Fraud, Deceit, and Other Business Torts*, Part A (Matthew Bender).

LexisNexis Matthew Bender Expert Practice Tip--Defense Can Argue Plaintiff Relied on Own

Investigation: If plaintiff conducted its own investigation (even though not required to do so), defendant can always argue that plaintiff relied on its own investigation, and not plaintiff's representations in entering into the transaction. *By Ronald Oster*

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 19, *California Judicial Council Fraud or Deceit Instructions*]:

CACI No. 1900, Intentional Misrepresentation

CACI No. 1903, Negligent Misrepresentation

CACI No. 1907, Reliance

CACI No. 1908, Reasonable Reliance



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CHAPTER 19A Matthew Bender Fraud and Deceit Instructions
Part B. SPECIFIC ELEMENTS OF FRAUD

3-19A California Forms of Jury Instruction MB 1900A.24

MB 1900A.24 Reliance Not Present

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

You may not find that Plaintiff relied on any representations of Defendant if you find any of the following:

- 1. Defendant's representations were never communicated to Plaintiff or Plaintiff had not heard of or seen the representations at the time Plaintiff entered into the transaction _____
[if appropriate, add: unless you find that the representations were communicated to an agent acting on Plaintiff's behalf];**
- 2. Plaintiff investigated the facts and learned the truth;**
- 3. Plaintiff relied on [his/her/its] own judgment and not on any representations by Defendant; or**
- 4. Plaintiff relied on the advice of some third person and not on any representations by Defendant.**

[*OPTIONAL (See Use of Instruction)*]

In this case, Plaintiff claims that [he/she/it] relied on fraudulent misrepresentations made by Defendant before or at the time when Plaintiff signed the purchase agreement. If you find that this is true, then you must find for the Plaintiff on the issue of reliance, even though Plaintiff may have learned the true facts after signing the purchase agreement but before the close of escrow. If Plaintiff was induced by Defendant's false representations to sign a purchase agreement, [he/she/it] is not precluded from suing the Defendant for damages by the fact that

[he/she/it] later learned the true facts and could have chosen to withdraw from the agreement.

Authorities: *Mirkin v. Wasserman* (1993) 5 Cal.4th 1082, 1088, 1091-1100, 23 Cal.Rptr.2d 101, 858 P.2d 568 ; *Fassberg Construction Co. v. Housing Authority of Los Angeles* (2007) 151 Cal.App.4th 267, 300, 60 Cal.Rptr.3d 375 ; *Gawara v. United States Brass Corp.* (1998) 63 Cal.App.4th 1341, 1358-1359, 74 Cal.Rptr.2d 663 ; *Jue v. Smiser* (1994) 23 Cal.App.4th 312, 316-319, 28 Cal.Rptr.2d 242 ; *Podlasky v. Price* (1948) 87 Cal.App.2d 151, 162, 196 P.2d 608 ; *Smith v. Brown* (1943) 59 Cal.App.2d 836, 838, 140 P.2d 86 ; *Hackleman v. Lyman* (1920) 50 Cal.App. 323, 328, 195 P. 263 .

[2] Use of Instruction

This instruction should be used when there is evidence that the plaintiff did not rely on any alleged misrepresentation by the defendant.

The optional paragraph may be used in an action involving a real property sales transaction in which there is evidence that plaintiff learned the true facts after the purchase agreement was signed but before the close of escrow. The purpose of this language, as further discussed in [3][c], *below*, is to clarify for the jury that the plaintiff's discovery of the true facts *after* signing the purchase agreement but before the close of escrow does not preclude a finding of reliance with regard to representations made before the purchase agreement was signed [see *Jue v. Smiser* (1994) 23 Cal.App.4th 312, 316-319, 28 Cal.Rptr.2d 242]. This language may also be potentially applicable in cases involving other types of executory agreements, if the plaintiff signed an agreement in reliance on fraudulent representations and later discovered the true facts before the deal was consummated.

For related Judicial Council instructions, see [3][d], *below*.

[3] Comment

[a] No Actual Reliance on Representation

Actual reliance exists only when the plaintiff acts based on belief in the *truth* of defendant's representations. A plaintiff who suspects that defendant's claims are *false* and acts based on that suspicion with the intent to sue for fraud if plaintiff's suspicions turn out to be true has not actually relied on the truth of defendant's misrepresentations [*Buckland v. Threshold Enterprises, Ltd.* (2007) 155 Cal.App.4th 798, 808, 66 Cal.Rptr.3d 543]. Thus, a consumer who purchases a product with the belief that the manufacturer has falsely represented the product in its advertising cannot show actual reliance when purchasing the product with the specific intent to sue if the advertising does turn out to be false [*Buckland v. Threshold Enterprises, Ltd.* (2007) 155 Cal.App.4th 798, 808-809, 66 Cal.Rptr.3d 543].

In one case, before his death, the plaintiff's husband executed a donation agreement for his body with a university program that accepted human cadavers for scientific and anatomical studies [see *Conroy v. Regents of Univ. of Cal.* (2009) 45 Cal.4th 1244, 91 Cal.Rptr.3d 532, 203 P.3d 1127]. Following his death, the plaintiff arranged for the delivery of his body as specified in the agreement. Some months later, she read newspaper reports of irregularities in the donation program, which alleged that the university failed to maintain adequate records, and that the donated bodies could not be located. In response to her inquiries, she was informed that there were no records concerning the location of her husband's body. In her suit against the university and others, the complaint included causes of action for fraud and negligent misrepresentation. The plaintiff alleged that she, as the holder of the statutory right to control the disposition of her husband's body, had entrusted her husband's body to the defendant donation program for purposes of teaching and research; that she was to receive the remains on completion of the educational and research purposes for which the donation was made; that she discovered that the defendants were using the cadavers for unauthorized purposes, including private for-profit tutoring classes and the transport and dismembering of bodies for profit; that defendant had failed to maintain records to ensure that the cadavers were used only for authorized purposes and to

enable return of the remains to the appropriate family members; and that her husband's body "was misused in that the body was not used for medical research by the university." Plaintiff further alleged that she had suffered injuries to her health and emotional distress as a result of defendant's misconduct, and sought compensatory and punitive damages [see *Conroy v. Regents of Univ. of Cal.* (2009) 45 Cal.4th 1244, 1248, 91 Cal.Rptr.3d 532, 203 P.3d 1127].

With respect to fraud, the complaint alleged that the program, through its agent, represented that the body would be used for research and teaching purposes (not for gain or profit), and would be handled in a respectful manner. It further alleged that the representations were false, in that the defendants used the body for profit with respect to tutoring classes and the sale of body parts; and that they failed to keep proper records and to return the remains to the plaintiff. It also alleged that the defendant program made the representations to induce the plaintiff to participate in the donation program, and that the plaintiff, who was ignorant of the falsity of the representations, relied on them in electing to participate, suffering consequent emotional distress [see *Conroy v. Regents of Univ. of Cal.* (2009) 45 Cal.4th 1244, 1256, 91 Cal.Rptr.3d 532, 203 P.3d 1127].

The California Supreme Court affirmed summary judgment for the defendants, holding among other things, that the plaintiff failed to show that she actually relied on the alleged misrepresentations, which is an essential element of both claims of deceit. Actual reliance occurs when a misrepresentation is an immediate cause of a plaintiff's conduct, which alters the plaintiff's legal relations, and when, absent that representation, the plaintiff would not, in all reasonable probability, have entered into the contract or other transaction. It is not necessary that a plaintiff's reliance on the truth of the fraudulent misrepresentation be the sole or even the predominant or decisive factor in influencing the plaintiff's conduct. It is enough that the representation has played a substantial part, and so has been a substantial factor, in influencing the plaintiff's decision. The actual donor was the decedent, who executed the donation agreement. Although the plaintiff did deliver the body in the specified manner to the university, she did not execute her husband's donation agreement, or make any decision regarding disposition of his body, and thus had no legal right to control the disposition of the body. The right of the plaintiff, as the surviving spouse, to control the disposition of her husband's body was superseded by the terms of the written donation agreement executed by her husband. The plaintiff failed to identify any legal basis for altering her husband's instructions. The Court held that her actions are not cognizable as reliance for purposes of a claim of deceit, inasmuch as her husband's gift was already irrevocable on his death. She did not enter into an agreement with the university regarding her husband's body, nor did the representations of the university's agent cause her to alter her legal relations with the university. The husband's gift as specified in the donation agreement did not require her consent, concurrence, or approval. Hence, her claims for fraud and negligent misrepresentation did not survive a summary judgment motion [*Conroy v. Regents of Univ. of Cal.* (2009) 45 Cal.4th 1244, 1256-1258, 91 Cal.Rptr.3d 532, 203 P.3d 1127].

[b] No Communication to Plaintiff of Representation

It is essential that the person complaining of fraud actually relied on the alleged fraud [*Conroy v. Regents of Univ. of Cal.* (2009) 45 Cal.4th 1244, 1256-1258, 91 Cal.Rptr.3d 532, 203 P.3d 1127 ; *The MEGA Life & Health Ins. Co. v. Superior Court* (2009) 172 Cal.App.4th 1522, 1530, 92 Cal.Rptr.3d 399 ; *Buckland v. Threshold Enter., Ltd.* (2007) 155 Cal.App.4th 798, 807-808, 66 Cal.Rptr.3d 543].

Because the plaintiff must actually have relied on the misrepresentation to state a cause of action for fraud or deceit, there is generally no liability if the plaintiff never heard or read the misrepresentation before entering into the transaction [see *Mirkin v. Wasserman* (1993) 5 Cal.4th 1082, 1088, 1091-1100, 23 Cal.Rptr.2d 101, 858 P.2d 568 ; *Gawara v. United States Brass Corp.* (1998) 63 Cal.App.4th 1341, 1359, 74 Cal.Rptr.2d 663 ; *Suarez v. Life Ins. Co. of N. Am.* (1988) 206 Cal.App.3d 1396, 1408, 254 Cal.Rptr. 377]. An exception exists if the representation was made to a person acting as the plaintiff's agent, even if sometimes that person did not repeat the misrepresentation to the plaintiff [see *Mirkin v. Wasserman* (1993) 5 Cal.4th 1082, 1097-1098, 23 Cal.Rptr.2d 101, 858 P.2d 568 ; *Grinnell v. Charles Pfizer & Co.* (1969) 274 Cal.App.2d 424, 441, 79 Cal.Rptr. 369 (patients could sue pharmaceutical companies on basis of misrepresentations communicated to physicians on theory that physicians had acted as patients' agents); *Toole v.*

Richardson-Merrell, Inc. (1967) 251 Cal.App.2d 689, 707, 60 Cal.Rptr. 398 (same); Roberts v. Salot (1958) 166 Cal.App.2d 294, 301, 333 P.2d 232 (property owner could sue lender for misrepresentations made to owner's agent)].

In *Committee on Children's Television, Inc. v. General Foods, Inc.*, the California Supreme Court permitted a class action by parents suing for alleged false representations contained in television advertisements directed at children, even though it was conceded that many of the parents had not actually heard the misrepresentations, nor had the children literally repeated them to the parents [*Committee on Children's Television, Inc. v. General Foods, Inc. (1983) 35 Cal.3d 197, 219, 197 Cal.Rptr. 783, 673 P.2d 660*]. Later, the Court interpreted its earlier opinion as merely standing for the proposition that "children cannot be expected to convey representations about products with precision," and as not dispensing with the requirement that the representation be communicated to and relied on by the plaintiff [*Mirkin v. Wasserman (1993) 5 Cal.4th 1082, 1098-1099, 23 Cal.Rptr.2d 101, 858 P.2d 568*]. The Court specifically declined to apply the "fraud-on-the-market" doctrine, used in actions under federal and state securities laws, to common-law fraud actions [see *Mirkin v. Wasserman (1993) 5 Cal.4th 1082, 1100-1108, 23 Cal.Rptr.2d 101, 858 P.2d 568*]. The "fraud-on-the-market" doctrine allows persons who buy or sell securities at a price affected by a misrepresentation to sue the person who made the misrepresentation, even if the buyer or seller never actually heard or relied on the misrepresentation [see, e.g., *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc. (2008) 552 U.S. 148, 128 S.Ct. 761, 769, 776, 169 L.Ed.2d 627*] .

There is no showing of reliance if there is no connection between the misrepresentation and the circumstances, such as a delay in construction, alleged to have caused the plaintiff economic damages [*Fassberg Construction Co. v. Housing Authority of Los Angeles (2007) 151 Cal.App.4th 267, 300, 60 Cal.Rptr.3d 375*] .

[c] Effect of Plaintiff's Reliance on Investigation, Own Judgment, or Third Parties

If the plaintiff has investigated the defendant's representations and independently discovered the facts, the plaintiff may not sustain a claim of justifiable reliance [*Smith v. Brown (1943) 59 Cal.App.2d 836, 839-840, 140 P.2d 86* ; *Hackleman v. Lyman (1920) 50 Cal.App. 323, 328, 195 P. 263*]. Also, if the plaintiff relied on his or her own judgment or the advice of someone other than the defendant, there is no justifiable reliance [*Podlasky v. Price (1948) 87 Cal.App.2d 151, 162, 196 P.2d 608*]. For example, a court held that a sophisticated company with its own attorneys could not claim that it justifiably relied on alleged misrepresentations by the other party to a lease about the meaning of an amended lease that was the product of 19 months of negotiations [*Golden W. Baseball Co. v. Talley (1991) 232 Cal.App.3d 1294, 1306-1307, 284 Cal.Rptr. 53*].

[d] Effect of Plaintiff's Discovery of True Facts After Signing Agreement But Before Close of Escrow

In fraud actions involving real property transactions, an issue may arise concerning the effect of the plaintiff's discovery of the true facts after signing a purchase agreement, but before the close of escrow, on the plaintiff's right to claim that he or she relied on the defendant's misrepresentations.

In one case, plaintiffs were induced to sign an agreement to buy a house by defendants' false representations that the house was designed by a famous architect. After signing the agreement, but before close of escrow, the plaintiffs learned that in fact it was impossible to confirm whether or not the architect had designed the house. Nevertheless, instead of canceling the agreement, plaintiffs proceeded with the sale and then sued defendants for fraud. Defendants argued that plaintiffs' discovery of the true facts before the close of escrow, when plaintiffs could still have withdrawn from the deal, precluded a finding of justifiable reliance on the defendants' representations. The court of appeal rejected this argument, holding that the plaintiffs' reliance on the defendants' misrepresentations at the transaction's inception is sufficient to support recovery for fraud, and that the plaintiffs need not establish continuing reliance on the misrepresentation until the contract is fully executed [*Jue v. Smiser (1994) 23 Cal.App.4th 312, 317, 28 Cal.Rptr.2d 242* ; see also *Storage Servs. v. Oosterbaan (1989) 214 Cal.App.3d 498, 511, 262 Cal.Rptr. 689 (party to contract who learns he or she has been defrauded may elect to stand on contract and sue for damages, rather than rescinding)]*.

[e] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 19, *California Judicial Council Fraud or Deceit Instructions*]:

CACI No. 1900, Intentional Misrepresentation

CACI No. 1903, Negligent Misrepresentation

CACI No. 1907, Reliance

CACI No. 1908, Reasonable Reliance



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CHAPTER 19A Matthew Bender Fraud and Deceit Instructions
Part B. SPECIFIC ELEMENTS OF FRAUD

3-19A California Forms of Jury Instruction MB 1900A.25

MB 1900A.25 Reliance on Defendant's Opinion--General Rule and Exceptions

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

As a general rule, a representation that is an opinion cannot support an action for fraud. Therefore, if you find that any of Defendant's representations were Defendant's opinion, you may not hold Defendant liable for fraud on the basis of those representations.

[*OPTIONAL (See Use of Instruction)*]

However, you may hold Defendant liable for fraud on the basis of Defendant's opinion if you find that:

[*EITHER*]

The opinion was not honestly held by Defendant.

[*AND/OR*]

Defendant claimed to have expert knowledge concerning the matter on which the opinion was given.

[*AND/OR*]

Plaintiff and Defendant were in a relationship of confidence and mutual trust at the time the opinion was given.

[AND/OR]

Defendant's opinion misrepresented the facts on which the opinion was based.

[AND/OR]

Defendant claimed or Plaintiff reasonably believed that Defendant based the opinion on superior knowledge or special information concerning the matter on which the opinion was given.

Authorities: *Seeger v. Odell* (1941) 18 Cal.2d 409, 414, 115 P.2d 977 ; *Union Flower Mkt., Ltd. v. Southern Cal. Flower Mkt., Inc.* (1938) 10 Cal.2d 671, 676, 76 P.2d 503 ; *Macdonald v. De Fremery* (1914) 168 Cal. 189, 199-200, 142 P. 73 ; *Neu-Visions Sports, Inc. v. Soren/McAdams/Bartells* (2000) 86 Cal.App.4th 303, 308, 103 Cal.Rptr.2d 159 ; *Lynch v. Cruttenden & Co.* (1993) 18 Cal.App.4th 802, 808, 22 Cal.Rptr.2d 636 ; *Edmunds v. Valley Circle Estates* (1993) 16 Cal.App.4th 1290, 1301, 20 Cal.Rptr.2d 701 ; *Cory v. Villa Props.* (1986) 180 Cal.App.3d 592, 597, 225 Cal.Rptr. 628 ; *Ogier v. Pacific Oil & Gas Dev. Corp.* (1955) 132 Cal.App.2d 496, 506-507, 282 P.2d 574 ; *Williams v. Lowenthal* (1932) 124 Cal.App. 179, 183, 12 P.2d 75 .

[2] Use of Instruction

This instruction should be used when the defendant claims that the plaintiff relied on an opinion expressed by defendant, rather than on an assertion of fact. An "opinion" is defined as "a person's belief that a fact exists, a statement regarding a future event, or a judgment about quality, value, authenticity, or similar matters" [CACI No. 1904 ("Opinions as Statements of Fact")]; *see also* Restatement (Second) of Torts, § 538A].

The alternatives should be used when the plaintiff claims that there were adequate reasons to justify his or her reliance on the defendant's opinion.

Choice of the alternatives in this instruction should be made as the facts warrant. If a confidential relationship is the asserted basis of justifiable reliance, then the instruction in MB 1900A.26[1], defining confidential relationship, also should be used.

For related Judicial Council instructions, see [3][b], *below*.

[3] Comment

[a] Liability for Statement of Opinion

As a general rule there is no liability for a person's expression of an opinion [*Edmunds v. Valley Circle Estates* (1993) 16 Cal.App.4th 1290, 1301, 20 Cal.Rptr.2d 701 ; *Nibbi Brothers, Inc. v. Home Federal Savings & Loan Assn.* (1988) 205 Cal.App.3d 1415, 1423, 253 Cal.Rptr. 289 ; *Ogier v. Pacific Oil & Gas Dev. Corp.* (1955) 132 Cal.App.2d 496, 506-507, 282 P.2d 574 ; *Williams v. Lowenthal* (1932) 124 Cal.App. 179, 183, 12 P.2d 75 ; *see, e.g., Apollo Capital Fund LLC v. Roth Capital Partners, LLC* (2007) 158 Cal.App.4th 226, 241, 70 Cal.Rptr.3d 199 (some misrepresentations were nonactionable opinion; some properly supported fraud claim)]. This includes legal conclusions drawn from a true statement of facts [*see Wilke v. Coinway, Inc.* (1967) 257 Cal.App.2d 126, 136, 64 Cal.Rptr. 845].

The statement of an opinion is actionable if that opinion is not honestly entertained by the person making it [*Macdonald v. De Fremery* (1914) 168 Cal. 189, 199-200, 142 P. 73 ; *Ogier v. Pacific Oil & Gas Dev. Corp.* (1955) 132 Cal.App.2d 496, 506-507, 282 P.2d 574]. Further, a person may justifiably rely on statements of opinion when the person stating the opinion claims to have expert knowledge concerning the matter, occupies a position of trust and confidence with the plaintiff, or misrepresents the facts on which the opinion is based [*Seeger v. Odell* (1941) 18 Cal.2d 409, 414, 115 P.2d 977 ; *Wilke v. Coinway, Inc.* (1967) 257 Cal.App.2d 126, 136-137, 64 Cal.Rptr. 845]. Also, a false statement of opinion fraudulently made may form the basis of an action when the person making it claimed superior knowledge or special information regarding the subject matter of the representation [*Union Flower Mkt., Ltd. v. Southern Cal. Flower Mkt., Inc.* (1938) 10 Cal.2d 671, 676, 76 P.2d 503 ; *Cory v. Villa Props.* (1986) 180 Cal.App.3d 592, 597, 225 Cal.Rptr. 628] or when the recipient of the opinion reasonably believed that, compared to himself or herself, the other person had special knowledge or skill concerning the subject matter [*Lynch v. Cruttenden & Co.* (1993) 18 Cal.App.4th 802, 808, 22 Cal.Rptr.2d 636].

LexisNexis Matthew Bender Expert Practice Tip--No Clear Line Between Fact and Opinion: The line between fact and opinion cannot normally be drawn with precision and varies with the factual circumstance [*Bank of Am. v. Hutchinson* (1963) 212 Cal.App.2d 142, 148, 27 Cal.Rptr. 787]. However, in determining whether or not an opinion is actionable in a particular case, key factors include (1) whether a fiduciary relationship exists between the defendant and the plaintiff, (2) whether the defendant holds himself or herself out as an expert, and (3) whether the opinion is couched in concrete factual language as opposed to generalities or "puffing." *By Publisher's Editorial Staff*

For further discussion, see Levy, Golden & Sacks, California Torts, Ch. 40, *Fraud, Deceit, and Other Business Torts*, Part A (Matthew Bender).

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 19, *California Judicial Council Fraud or Deceit Instructions*]:

CACI No. 1900, Intentional Misrepresentation

CACI No. 1903, Negligent Misrepresentation

CACI No. 1904, Opinions as Statements of Fact

CACI No. 1907, Reliance

CACI No. 1908, Reasonable Reliance



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CHAPTER 19A Matthew Bender Fraud and Deceit Instructions
Part B. SPECIFIC ELEMENTS OF FRAUD

3-19A California Forms of Jury Instruction MB 1900A.26

MB 1900A.26 Definition of Fiduciary or Confidential Relationship

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

A special relationship of trust and confidence exists whenever one person, with justification and good reason, places trust and confidence in the honesty and fairness of another.

Authority: Odorizzi v. Bloomfield Sch. Dist. (1966) 246 Cal.App.2d 123, 129, 54 Cal.Rptr. 533 .

[2] Use of Instruction

This instruction should be used when a fiduciary or confidential relationship is involved. In lieu of "fiduciary" or "confidential," the language "special relationship of trust and confidence" is used to simplify the terminology for the jury.

[3] Comment

Confidential and fiduciary relationships are legally synonymous [*Twomey v. Mitchum, Jones, & Templeton, Inc. (1968) 262 Cal.App.2d 690, 708, 69 Cal.Rptr. 222*]. Such a relationship exists when a person justifiably places trust and confidence in the integrity and fidelity of another person [*Odorizzi v. Bloomfield Sch. Dist. (1966) 246 Cal.App.2d 123, 129, 54 Cal.Rptr. 533* ; see, e.g., *Warren v. Merrill (2006) 143 Cal.App.4th 96, 109-110, 49 Cal.Rptr.3d 122* (real estate agent held fiduciary position of trust toward client, but falsely promised him she would place his name on title to condominium if he agreed to her structured transaction, then put her own name on title and kept deposit)]. It does not require a blood relationship; it exists when the parties are associated so that one must rely on the good faith and integrity of the other [*Pryor v. Bistline (1963) 215 Cal.App.2d 437, 446-447, 30 Cal.Rptr. 376* ; *Stevens v. Marco (1956) 147 Cal.App.2d 357, 372, 305 P.2d 669*].

A real estate broker has a fiduciary duty to its client [Civ. Code § 2079.24; *Michel v. Moore & Assoc., Inc.* (2007) 156 Cal.App.4th 756, 762, 67 Cal.Rptr.3d 797]. A real estate agent, as a fiduciary, is liable to the principal for constructive fraud even though its conduct is not actually fraudulent. Most acts by an agent in breach of its fiduciary duties constitute constructive fraud [*Michel v. Moore & Assoc., Inc.* (2007) 156 Cal.App.4th 756, 762-763, 67 Cal.Rptr.3d 797; see MB 1900A.05].

LexisNexis Matthew Bender Expert Practice Tip--Fiduciary

Relationships: Certain relationships are easily recognized as fiduciary relationships (*e.g.*, attorney-client). For other relationships, defendant should require authority that the law recognizes the relationship as fiduciary in nature before accepting this instruction. *By Ronald Oster*



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CHAPTER 19A Matthew Bender Fraud and Deceit Instructions
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3-19A California Forms of Jury Instruction MB 1900A.27-MB 1900A.39

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CHAPTER 19A Matthew Bender Fraud and Deceit Instructions
Part C. LIABILITY FOR FRAUD OF THIRD PARTY

3-19A California Forms of Jury Instruction MB 1900A.40

MB 1900A.40 Principal's Liability for Fraud of Agent**[1] Instruction**[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

If you find that fraudulent representations were made by _____ [*name of agent*], Defendant may be responsible for those representations if you also find that:

1. _____ [*Name of agent*] was an agent of Defendant; and
2. Defendant permitted _____ [*name of agent*] to be in a position to make the representations while appearing to act within the powers given to [him/her/it] by Defendant.

[*OPTIONAL (See Use of Instruction)*]

In such a case, you may find Defendant liable for the fraud of [his/her/its] agent even though the agent acted solely for [his/her/its] own purposes and Defendant was personally innocent and received no benefit from the transaction.

Authorities: *Rutherford v. Rideout Bank* (1938) 11 Cal.2d 479, 484, 80 P.2d 978 ; *Hartong v. Partake, Inc.* (1968) 266 Cal.App.2d 942, 960, 72 Cal.Rptr. 722 .

[2] Use of Instruction

This instruction should be used when the defendant's agent is alleged to have been responsible for the misrepresentation either in addition to the defendant or on the defendant's behalf.

The optional part of the instruction should be added if there are no facts on which the jury could find a benefit to the defendant as a result of the fraud.

The instruction in Ch. 3C, *Matthew Bender Contract Party Instructions*, MB 300C.50, defining agent, should be given along with this instruction.

For related Judicial Council instructions, see [3][b], *below*.

[3] Comment

[a] Principal's Liability for Fraud of Agent

The rationale for the rule stated by this instruction is that the principal should be liable for the fraud of his or her agent if the agent, acting in the ordinary course of the principal's business, was thereby able to perpetrate the fraud [*Rutherford v. Rideout Bank* (1938) 11 Cal.2d 479, 484, 80 P.2d 978 ; *Hartong v. Partake, Inc.* (1968) 266 Cal.App.2d 942, 960, 72 Cal.Rptr. 722]. The principal's liability may be based on ostensible as well as actual authority [*Rutherford v. Rideout Bank* (1938) 11 Cal.2d 479, 485, 80 P.2d 978].

A corporate principal is liable on this same basis for the fraud of an agent [*Ghiglione v. American Trust Co.* (1942) 49 Cal.App.2d 633, 637-638, 122 P.2d 301].

For related memoranda, see California Points and Authorities, Ch. 105, *Fraud and Deceit* (Matthew Bender).

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 37, *California Judicial Council Vicarious Responsibility Instructions*]:

CACI No. 3701, Tort Liability Asserted Against Principal--Essential Factual Elements



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CHAPTER 19A Matthew Bender Fraud and Deceit Instructions
Part C. LIABILITY FOR FRAUD OF THIRD PARTY

3-19A California Forms of Jury Instruction MB 1900A.41

MB 1900A.41 Liability of Corporate Officer for Acts on Behalf of Corporation

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Defendant, _____ [name of officer defendant] is an officer of _____ [name of corporation], a corporation. [He/She] is liable for any fraudulent acts that you find [he/she] committed on behalf of [his/her] employer, _____ [name of corporation], even if you find that the corporation itself is not liable for those acts.

Authority: *Mayes v. Sturdy N. Sales, Inc. (1979) 91 Cal.App.3d 69, 78, 154 Cal.Rptr. 43 .*

[2] Use of Instruction

This instruction should be used when a corporation and its officer are defendants, or when an officer of a corporation, in his or her corporate capacity, is a defendant and the corporation is not named (or in some cases when the corporation is named but found not liable). It may be used in conjunction with the instruction in MB 1900A.42[1] concerning the limitation of an officer's liability to the fraudulent acts that he or she authorized or participated in.

For related Judicial Council instructions, see [3][b], *below*.

[3] Comment

[a] Officer Liability for Tortious Acts

Officers are liable for their tortious acts committed on the corporation's behalf whether or not the corporation is liable [*Mayes v. Sturdy N. Sales, Inc. (1979) 91 Cal.App.3d 69, 78, 154 Cal.Rptr. 43*].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 37, *California Judicial Council Vicarious Responsibility Instructions*]:

CACI No. 3701, Tort Liability Asserted Against Principal--Essential Factual Elements



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CHAPTER 19A Matthew Bender Fraud and Deceit Instructions
Part C. LIABILITY FOR FRAUD OF THIRD PARTY

3-19A California Forms of Jury Instruction MB 1900A.42

MB 1900A.42 Corporate Officer Is Not Liable for Acts in Which They Did Not Participate or Authorize

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Defendant, _____ [name of officer defendant], is an officer of _____ [name of corporation], a corporation. [He/She] is liable only for any fraudulent acts of the corporation that you find that [he/she] participated in or authorized.

Authority: *United States Liab. Ins. Co. v. Haidinger-Hayes, Inc.* (1970) 1 Cal.3d 586, 595, 83 Cal.Rptr. 418, 463 P.2d 770 .

[2] Use of Instruction

This instruction should be used in a trial against both a corporation and its officers for fraudulent acts, when there is evidence that an individual officer or officers did not authorize or participate in those acts. It may be used in conjunction with the instruction in MB 1900A.41[1] concerning personal liability of officers for fraudulent acts committed on the corporation's behalf.

For related Judicial Council instructions, see [3][b], *below*.

[3] Comment

[a] Officer Liability for Corporation's Fraudulent Acts

Corporate officers are not liable for the corporation's fraudulent acts unless they participate in the fraud or authorize or direct those acts [*United States Liab. Ins. Co. v. Haidinger-Hayes, Inc.* (1970) 1 Cal.3d 586, 595, 83 Cal.Rptr. 418, 463

P.2d 770].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 37, *California Judicial Council Vicarious Responsibility Instructions*]:

CACI No. 3701, Tort Liability Asserted Against Principal--Essential Factual Elements



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CHAPTER 19A Matthew Bender Fraud and Deceit Instructions
Part C. LIABILITY FOR FRAUD OF THIRD PARTY

3-19A California Forms of Jury Instruction MB 1900A.43

MB 1900A.43 Liability for Joint Acts

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

If you find that Defendants agreed to _____ [describe acts on which liability is based, e.g., misrepresent the property's value], and that the misrepresentation was made, each Defendant is liable to Plaintiff for the resulting damages whether or not [he/she/it] personally made the misrepresentation.

Authorities: *Mary Pickford Co. v. Bayly Bros., Inc.* (1939) 12 Cal.2d 501, 515 ; *Tidewater Associated Oil Co. v. Superior Court* (1955) 43 Cal.2d 815, 827, 279 P.2d 35 .

[2] Use of Instruction

This instruction should be used when the defendants have conspired to make the fraudulent representation, but only one of the defendants actually made the representation to the plaintiff.

[3] Comment

When there is a common plan or design to commit a tort, all who participate in it are jointly liable, whether they actually commit the wrongful acts or not [*Tidewater Associated Oil Co. v. Superior Court* (1955) 43 Cal.2d 815, 827, 279 P.2d 35 ; *Mary Pickford Co. v. Bayly Bros., Inc.* (1939) 12 Cal.2d 501, 515, 86 P.2d 102].



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CHAPTER 19A Matthew Bender Fraud and Deceit Instructions
Part C. LIABILITY FOR FRAUD OF THIRD PARTY

3-19A California Forms of Jury Instruction MB 1900A.44-MB 1900A.49

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MB 1900A.44Reserved for Future Use



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CHAPTER 19A Matthew Bender Fraud and Deceit Instructions
Part D. DAMAGES

3-19A California Forms of Jury Instruction MB 1900A.50

MB 1900A.50 General Damages for Fraud

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

If you find that Plaintiff is entitled to recover damages, those damages should be an amount that will reasonably compensate Plaintiff for all of [his/her/its] loss or harm to the extent that the loss or harm was caused by the Defendant's conduct, whether or not the loss or harm could have been anticipated by Defendant.

[*ADD, if case involves fraud by fiduciary (See Use of Instruction)*]

Plaintiff's damages should include the difference between the actual value of the property that plaintiff received and the value it would have had if Defendant's representations had been true. You should calculate these damages as of the date that Plaintiff discovered the fraud.

[*CONTINUE*]

Plaintiff is entitled to recover only for the loss or harm actually suffered because of [his/her/its] reliance on the Defendant's conduct. You may not consider any loss or harm suffered by Plaintiff that was not caused by reliance on that conduct.

Authorities: Civ. Code §§ 1709, 3333; *Salahutdin v. Valley of Cal., Inc.* (1994) 24 Cal.App.4th 555, 565-568, 29 Cal.Rptr.2d 463 ; *Kenly v. Ukegawa* (1993) 16 Cal.App.4th 49, 53-55, 19 Cal.Rptr.2d 771 ; *Walker v. Signal Cos., Inc.* (1978) 84 Cal.App.3d 982, 995, 149 Cal.Rptr. 119 ; *Barclay Kitchen Inc. v. California Bank* (1962) 208 Cal.App.2d

347, 354, 25 Cal.Rptr. 383 .

[2] Use of Instruction

This instruction should be used in fraud actions except those governed by the provisions of *Civ. Code* § 3343, which specifies the measure of damages for fraud in most cases involving the sale, purchase, or exchange of property. In those cases, the instructions in MB 1900A.51 or MB 1900A.52 should be used instead of this instruction.

The optional paragraph may be included in an action involving sale of property in which the defendant owed a fiduciary or confidential duty to the plaintiff, as further discussed in [3][b], *below*.

For related Judicial Council instructions, see [3][c], *below*.

[3] Comment

[a] When Instruction Applies

Civ. Code §§ 3333 and 1709 specify the damages recoverable for fraud not involving the purchase or sale of property as the amount that will compensate for the detriment proximately caused thereby, whether it could have been anticipated or not [see *Gagne v. Bertran* (1954) 43 Cal.2d 481, 490, 275 P.2d 15 ; *Kenly v. Ukegawa* (1993) 16 Cal.App.4th 49, 53-55, 19 Cal.Rptr.2d 771 ; *Walker v. Signal Cos., Inc.* (1978) 84 Cal.App.3d 982, 994, 149 Cal.Rptr. 119]. The more restrictive provisions of *Civ. Code* § 3343 covered in MB 1900A.51 and MB 1900A.52 are applicable to fraud in the sale or purchase of property [see *Liodas v. Sahadi* (1977) 19 Cal.3d 278, 284, 137 Cal.Rptr. 635, 562 P.2d 316], with certain exceptions discussed in the comments to those instructions.

For further discussion, see Levy, Golden & Sacks, California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, Part A (Matthew Bender).

For forms of pleadings pertaining to actions for fraud, see California Forms of Pleading and Practice, Ch. 269, *Fraud and Deceit* (Matthew Bender). For memoranda pertaining to damages in fraud actions, see California Points and Authorities, Ch. 105, *Fraud and Deceit* (Matthew Bender).

[b] "Benefit-of-the Bargain" Damages in Cases of Fiduciary Fraud

Damages for fraud in the sale or purchase of property are normally governed by the more restrictive measure of damages in *Civ. Code* § 3343. That statute provides for recovery of damages based on the difference between the actual value of that which the defrauded party parted and that which he or she received [*Civ. Code* § 3343(a)], which is referred to in the cases as the "out-of-pocket loss" measure of damages. The "out-of-pocket loss" measure is distinguished from the "benefit-of-the-bargain" measure, which is the difference between the actual value of the property received and the value it would have had if the representations had been true [see, e.g., *Salahutdin v. Valley of Cal., Inc.* (1994) 24 Cal.App.4th 555, 563-564, 29 Cal.Rptr.2d 463 ; *Housley v. City of Poway* (1993) 20 Cal.App.4th 801, 812-813 & n.9, 24 Cal.Rptr.2d 554].

Cases have recognized an exception to the applicability of *Civ. Code* § 3343 when fraud in a purchase or sale of property involves a breach of a fiduciary or a confidential duty; in those cases, courts have held that the broader measure of damages under *Civ. Code* §§ 1709 and 3333 applies [*Salahutdin v. Valley of Cal., Inc.* (1994) 24 Cal.App.4th 555, 565-568, 29 Cal.Rptr.2d 463 ; *Pepitone v. Russo* (1976) 64 Cal.App.3d 685, 688-689, 134 Cal.Rptr. 709 ; *Simone v. McKee* (1956) 142 Cal.App.2d 307, 315, 298 P.2d 667]. However, there is a conflict among the courts of appeal concerning whether *Civ. Code* §§ 1709 and 3333 authorize a "benefit-of-the-bargain" measure in cases of fiduciary or a confidential fraud [compare *Salahutdin v. Valley of Cal., Inc.* (1994) 24 Cal.App.4th 555, 565-568, 29 Cal.Rptr.2d 463 (authorizing "benefit-of-bargain" measure) and *Pepitone v. Russo* (1976) 64 Cal.App.3d 685, 688-689,

134 Cal.Rptr. 709 (same) with *Hensley v. McSweeney* (2001) 90 Cal.App.4th 1081, 1086, 109 Cal.Rptr.2d 489 (trial court erred in giving jury instructions for both out-of-pocket and benefit-of-bargain measure of damages in action by buyer against fiduciary; error of giving both was compounded by court's own instruction permitting jury to choose between two methods regarding fiduciary and nonfiduciary tort causes of action) and *Overgaard v. Johnson* (1977) 68 Cal.App.3d 821, 827-828, 137 Cal.Rptr. 412 (Civ. Code § 3333 does not permit "benefit-of-bargain" measure of damages in cases involving fiduciary fraud)]. The optional paragraph in this instruction sets forth a "benefit-of-the-bargain" measure, which appears to be authorized by a majority of the cases.

LexisNexis Matthew Bender Expert Practice Tip--Unusual Measure of Damages: In some cases neither the "benefit-of-the-bargain" nor the "out-of-pocket loss" measures may be appropriate. In one case the plaintiff sold his house in reliance on representations from a broker and seller that the he would be able to close simultaneously on the the seller's house. However, the seller was unable to sell because of previously undisclosed tax liens. The plaintiff searched for suitable replacement property but prices rose so quickly that he was unable to find any. The court of appeal upheld compensatory damages for the plaintiff that included the appreciation in value of the property the plaintiff had sold from when he sold it to trial even though the damages were not measured by either "benefit-of-the-bargain" or "out-of-pocket loss" [*Strebel v. Brenlar Invs., Inc.* (2006) 135 Cal.App.4th 740, 748-750, 37 Cal.Rptr.3d 699]. By
Publisher's Editorial Staff

[c] Availability of Interest on Fraud Damages

Prejudgment interest is proper in a fraud action if damages can be ascertained with certainty [*Greenfield v. Insurance Inc.* (1971) 19 Cal.App.3d 803, 813, 97 Cal.Rptr. 164]. To recover interest for prejudgment amounts due, the plaintiff need not plead or specially pray for interest [*Greenfield v. Insurance Inc.* (1971) 19 Cal.App.3d 803, 813, 97 Cal.Rptr. 164].

In an action for breach of an obligation not arising from contract, and in every case of oppression, fraud, or malice, interest may be awarded in the discretion of the jury [Civ. Code § 3288]. Although the statute uses the word "jury," the trial court, if acting as the trier of fact, can award prejudgment interest under the statute [*Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 n.16, 148 Cal.Rptr. 22, 582 P.2d 109; *Segura v. McBride* (1992) 5 Cal.App.4th 1028, 1040 n.13, 7 Cal.Rptr.2d 436]. In a case tried to a jury, the court may not usurp the discretion conferred on the jury by the statute [*Barry v. Raskov* (1991) 232 Cal.App.3d 447, 457, 283 Cal.Rptr. 463].

Prejudgment interest under Civ. Code § 3288 may be awarded only on a recovery of a specific sum of money or of property subject to specific valuation. It may not be awarded on nonpecuniary damages that are not readily subject to precise calculation, such as the intangible, noneconomic aspects of mental and emotional injury [*Greater Westchester Homeowners Ass'n, Inc. v. City of Los Angeles* (1979) 26 Cal.3d 86, 103, 160 Cal.Rptr. 733, 603 P.2d 1329].

[d] Nominal Damages and Attorney's Fees Not Recoverable for Fraud Claim

Compensatory damages for a fraud claim do not include attorney's fees [*Hynix Semiconductor, Inc. v. Rambus, Inc.* (N.D. Cal. 2007) 527 F.Supp.2d 1084, 1099] . The "American rule" requires each party to bear its own legal fees [Civ. Code § 1021; *Hynix Semiconductor, Inc. v. Rambus, Inc.* (N.D. Cal. 2007) 527 F.Supp.2d 1084, 1099] .

Because damages are essential to a claim for fraud, nominal damages are not awarded in deceit. However, they can be awarded when a plaintiff has proven that actual damage has occurred (and therefore has satisfied fraud's damages element), but cannot prove the amount of the actual damage [*Hynix Semiconductor, Inc. v. Rambus, Inc.* (N.D. Cal. 2007) 527 F.Supp.2d 1084, 1100] .

[e] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 19, *California Judicial Council Fraud or Deceit Instructions*]:

CACI No. 1923, Damages--"Out of Pocket" Rule

CACI No. 1924, Damages--"Benefit of the Bargain" Rule



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CHAPTER 19A Matthew Bender Fraud and Deceit Instructions
Part D. DAMAGES

3-19A California Forms of Jury Instruction MB 1900A.51

MB 1900A.51 Damages for Fraud in Sale and Purchase--Plaintiff as Buyer

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

If you find that Plaintiff is entitled to damages, you must award Plaintiff the difference between what [he/she/it] paid to Defendant and the value of what [he/she/it] received in return. You should calculate these values as of the transaction's date.

[IF APPROPRIATE (See Use of Instruction)]

As additional damages, you must also award Plaintiff:

[CHOOSE FROM THE FOLLOWING (See Use of Instruction)]

- 1. The amount [he/she/it] actually and reasonably spent in reliance on the Defendant's fraud.**
- 2. The amount necessary to compensate Plaintiff for the loss of the property's use and enjoyment, to the extent that Defendant's fraud was a substantial factor in causing that loss of use or enjoyment.**
- 3. The amount necessary to compensate Plaintiff for gains or profits reasonably anticipated from the transaction if the property had been as it was represented to Plaintiff by Defendant. To award damages for anticipated gains or profits, you must also find all of the following:**

(a) That Plaintiff purchased the property for the purpose of using or reselling it for a profit;

(b) That Plaintiff reasonably relied on the Defendant's fraud in purchasing the property and anticipating a profit from its later use or resale; and

(c) That Defendant's fraud and Plaintiff's reliance on that fraud was a substantial factor in causing the loss of profits.

Authorities: *Civ. Code § 3343(a); Cory v. Villa Props. (1986) 180 Cal.App.3d 592, 598-603, 225 Cal.Rptr. 628 ; Carter v. Turner (1928) 90 Cal.App. 193, 200, 265 P. 870 .*

[2] Use of Instruction

This instruction should be used to instruct the jury on determining the appropriate measure of damages awardable to the plaintiff when he or she purchased property in reliance on the defendant's fraud, unless the transaction is a sale of goods subject to *Com. Code § 2721* [see [3][a], *below*]. Paragraph 1 gives the jury the basic rule that the plaintiff is entitled to recover the difference between what he or she paid for the property and the property's actual value. The instruction's remaining portions should be used if the plaintiff is also claiming damages for any additional amounts spent in reliance on the fraud, damages for loss of use, or damages for lost profits.

For an instruction when the plaintiff is seeking damages for property sold by him or her in reliance on the defendant's fraud, see *MB 1900A.52[1]*. An instruction on the general measure of damages for fraud not involving the purchase or sale of property is in *MB 1900A.50[1]*.

This instruction should not be used if the defendant had a fiduciary relationship with the plaintiff. In these cases, the instruction in *MB 1900A.50[1]* should be used.

For related Judicial Council instructions, see [3][c], *below*.

[3] Comment

[a] When Civ. Code § 3343 Applies to Fraud Action

The measure of damages in a fraud action arising from the purchase, sale, or exchange of property is that provided by *Civ. Code § 3343* unless the defendant had a fiduciary relationship with the plaintiff or the transaction was a sale of goods subject to *Com. Code § 2721*. If the defendant had a fiduciary relationship with the plaintiff, the damages are determined under the general provisions of *Civ. Code §§ 1709 and 3333* [*Salahutdin v. Valley of Cal., Inc. (1994) 24 Cal.App.4th 555, 565-568, 29 Cal.Rptr.2d 463 ; Brown v. Critchfield (1980) 100 Cal.App.3d 858, 871, 161 Cal.Rptr. 342 ; Simone v. McKee (1956) 142 Cal.App.2d 307, 315, 298 P.2d 667 ; see MB 1900A.50*].

If the transaction at issue was a sale of goods, then damages are determined under *Com. Code § 2721*, which provides that the remedies for material misrepresentation or fraud include all remedies available under Commercial Code Division 2 for nonfraudulent breach [see *Continental Airlines, Inc. v. McDonnell Douglas Corp. (1989) 216 Cal.App.3d 388, 430-431, 264 Cal.Rptr. 779* (recovery for fraud in sale of aircraft is subject to "benefit-of-the-bargain" measure of damages under *Com. Code § 2721*)]. For jury instructions on the remedies available under Division 2 of the Commercial Code, see Ch. 3H, *Matthew Bender Commercial Code Sales Contract Instructions*.

[b] Measure of Damages Under Civ. Code § 3343

Under *Civ. Code § 3343*, a person who is defrauded in the purchase, sale, or exchange of property is entitled to recover the difference between the actual value of what the defrauded person parted with and the actual value of what he or she

received, together with any additional damage arising from the transaction [*Civ. Code* § 3343]. The value paid and the actual value of the item received must be determined as of the transaction's date [*Carter v. Turner* (1928) 90 *Cal.App.* 193, 200, 265 *P.* 870 ; see *Salahutdin v. Valley of Cal., Inc.* (1994) 24 *Cal.App.4th* 555, 568, 29 *Cal.Rptr.2d* 463].

Additional damages that may be recovered include (1) amounts actually and reasonably expended in reliance on the fraud [*Civ. Code* § 3343(a)(1)]; (2) any amount that will compensate the defrauded party for loss of use and enjoyment of the property, to the extent that such a loss was proximately caused by the fraud [*Civ. Code* § 3343(a)(2)]; and (3) an amount that will compensate plaintiff for any lost profits or other gains that were reasonably anticipated and would have been earned from the property's use or sale if it had been as represented by the party committing the fraud. Lost profits are recoverable only if the loss of profits was proximately caused by the fraud, the defrauded party relied on that fraud, and the defrauded party acquired the property for the purpose of using it or reselling it for a profit and that party reasonably relied on the fraud in entering into the transaction and anticipating profits from the property's subsequent use or sale [*Civ. Code* § 3343(a)(4)].

A plaintiff's failure to establish an out-of-pocket loss (i.e., a loss attributable to the fact that the property's fair market value received was less than the purchase price) does not preclude the plaintiff from recovering the elements of additional damage specified in *Civ. Code* § 3343(a) [*Cory v. Villa Props.* (1986) 180 *Cal.App.3d* 592, 601-602, 225 *Cal.Rptr.* 628].

LexisNexis Matthew Bender Expert Practice Tip--Damages Calculated as of Transaction Date: In calculating damages for fraud, it is important to remember that damages are calculated as of the date of the transaction. This may require some difficult expert testimony. It is surprising how often counsel (and courts) miss this point. *By Ronald Oster*

[c] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 19, *California Judicial Council Fraud or Deceit Instructions*]:

CACI No. 1920, Buyer's Damages for Purchase or Acquisition of Property

CACI No. 1921, Buyer's Damages for Purchase or Acquisition of Property--Lost Profits

CACI No. 1923, Damages--"Out of Pocket" Rule

CACI No. 1924, Damages--"Benefit of the Bargain" Rule



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CHAPTER 19A Matthew Bender Fraud and Deceit Instructions
Part D. DAMAGES

3-19A California Forms of Jury Instruction MB 1900A.52

MB 1900A.52 Damages for Fraud in Sale and Purchase--Plaintiff as Seller

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

If you find that Plaintiff is entitled to damages, you must award Plaintiff the difference between the amount [he/she/it] received from Defendant and the value of what Defendant received in return. You should calculate these values as of the transaction's date.

[IF APPROPRIATE (See Use of Instruction)]

As additional damages, you must award Plaintiff:

[CHOOSE FROM THE FOLLOWING (See Use of Instruction)]

- 1. Any additional amounts [he/she/it] actually and reasonably spent in reliance on Defendant's fraud.**
- 2. The amount necessary to compensate Plaintiff for the loss of the property's use and enjoyment, to the extent that Defendant's fraud was a substantial factor in causing that loss of use or enjoyment.**
- 3. The amount necessary to compensate Plaintiff for any profits or other gains [he/she/it] might reasonably have earned from the property's use if [he/she/it] had retained it.**

Authority: *Civ. Code § 3343(a).*

[2] Use of Instruction

This instruction should be used to instruct the jury on determining the appropriate measure of damages awardable to the plaintiff when he or she sold property to defendant in reliance on the defendant's fraud. Paragraph 1 gives the jury the basic rule that the plaintiff is entitled to recover the difference between the property's actual value and what he or she received in return from the defendant. The remaining parts of the instruction should be used if the plaintiff is also claiming damages for any additional amounts spent in reliance on the fraud, damages for loss of use, or damages for lost profits.

An instruction for when the plaintiff is seeking damages for property purchased by him or her in reliance on the defendant's fraud is in MB 1900A.51[1]. An instruction on the general measure of damages for fraud not involving the purchase or sale of property is in MB 1900A.50[1].

This instruction should not be used in cases in which the defendant occupied a fiduciary or confidential relationship with regard to the plaintiff. In these cases, the instruction in MB 1900A.50 should be used.

For related Judicial Council instructions, see [3][c], *below*.

[3] Comment

[a] When Civ. Code § 3343 Applies to Fraud Action

Unless the defendant occupied a fiduciary or confidential relationship with the plaintiff, the measure of damages in a fraud action arising from the purchase, sale, or exchange of property is that provided by *Civ. Code* § 3343. If the defendant occupied a fiduciary or confidential relationship with regard to the plaintiff, the damages are determined under the general provisions of *Civ. Code* §§ 1709 and 3333 [*Salahutdin v. Valley of Cal., Inc.* (1994) 24 Cal.App.4th 555, 565-568, 29 Cal.Rptr.2d 463 ; *Brown v. Critchfield* (1980) 100 Cal.App.3d 858, 871, 161 Cal.Rptr. 342 ; *Simone v. McKee* (1956) 142 Cal.App.2d 307, 315, 298 P.2d 667 ; see MB 1900A.50].

[b] Measure of Damages Under Civ. Code § 3343

The substance of *Civ. Code* § 3343 as it relates to this instruction is covered in MB 1900A.51[3], with the exception of the additional damages provided for in optional Paragraph 2. As it relates to that provision, *Civ. Code* § 3343(a)(3) provides that when a defrauded party, because of the fraud, has been induced to sell or otherwise part with property, he or she is entitled to an amount that will compensate him or her for profits or other gains that might reasonably have been earned by using the property if it had been retained.

If the seller elects to enforce the contract and recover the sale price to which he or she agreed, the seller may not recover lost profits under *Civ. Code* § 3343(a)(3); however, the seller may recover lost profits if he or she elects to rescind the contract [see *Croeni v. Goldstein* (1994) 21 Cal.App.4th 754, 759-760, 26 Cal.Rptr.2d 412].

Absent a fiduciary or confidential relationship, the "out-of-pocket" loss measure under *Civ. Code* § 3343 is the exclusive measure of damages for a fraudulently induced sale of property [see *Croeni v. Goldstein* (1994) 21 Cal.App.4th 754, 759, 26 Cal.Rptr.2d 412]. Thus, in a case in which a property owner was defrauded into granting a right-of-way easement for road construction, which affected additional property to which an easement had not been granted, the court held that the property owner was not entitled to the "cost of repair" of the additional property affected by construction (i.e., cost of restoring it to its condition before construction). The court held that the owner was entitled only to the difference between the value of that parted with and the value of that received, which in this case was the value of the additional property "taken" for the construction [see *Housley v. City of Poway* (1993) 20 Cal.App.4th 801, 812-813, 24 Cal.Rptr.2d 554].

[c] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 19, *California Judicial Council Fraud or Deceit Instructions*]:

CACI No. 1922, Seller's Damages for Sale or Exchange of Property

CACI No. 1923, Damages--"Out of Pocket" Rule

CACI No. 1924, Damages--"Benefit of the Bargain" Rule



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CHAPTER 19A Matthew Bender Fraud and Deceit Instructions
Part D. DAMAGES

3-19A California Forms of Jury Instruction MB 1900A.53

MB 1900A.53 Prerequisites for Award of Punitive Damages

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

If you find that Plaintiff was harmed or damaged as the result of the Defendant's fraud, you must decide whether punitive damages should be awarded against Defendant. The purpose of punitive damages is to punish wrongdoers and thereby deter the commission of wrongful acts--that is, for retribution and deterrence.

Plaintiff is entitled to recover [his/her/its] actual damages, the damages necessary to compensate [him/her/it] for the loss or harm [he/she/it] suffered, if [he/she/it] proves that Defendant committed fraud by a preponderance of the evidence. However, before punitive damages may be recovered, the law requires proof that the fraud was intentional and requires stronger proof than the proof required for the recovery of actual damages. Punitive damages may be awarded against Defendant only if Plaintiff proves that Defendant was guilty of intentional fraud by clear and convincing evidence. Therefore, you must first determine whether Plaintiff has proven, by clear and convincing evidence, that Defendant was guilty of intentional fraud, as I will now define that term for you.

"Intentional fraud" means an intentional misrepresentation, deceit, or concealment of a material fact known to a defendant with the intention on the defendant's part of thereby depriving a person of property or legal rights or otherwise causing injury.

[CHOOSE ONE OF THE FOLLOWING (See Use of Instruction)]

In this phase of the trial, you will determine only whether Plaintiff has proven, by clear and convincing evidence,

that Defendant was guilty of intentional fraud that harmed or damaged plaintiff. I will have you fill out a special verdict form stating your decision on this question. If necessary, we will hold a second phase of the trial to determine whether punitive damages should be awarded and, if so, the amount that should be awarded as punitive damages.

[or]

If you determine that Plaintiff has failed to prove, by clear and convincing evidence, that Defendant was guilty of intentional fraud that harmed or damaged Plaintiff, then you may not award any punitive damages against Defendant. If you determine that Defendant was guilty of intentional fraud that harmed or damaged plaintiff, then you must determine whether punitive damages should be awarded and, if so, the amount that should be awarded as punitive damages.

Authorities: *Civ. Code* §§ 3294, 3295(d); *State Farm Mut. Auto. Ins. Co. v. Campbell* (2003) 538 U.S. 408, 426, 123 S.Ct. 1513, 155 L.Ed.2d 585 ; *Pacific Mut. Life Ins. Co. v. Haslip* (1991) 499 U.S. 1, 111 S.Ct. 1032, 113 L.Ed.2d 1, 12 n.1, 19-24 ; *Neal v. Farmers Ins. Exch.* (1978) 21 Cal.3d 910, 928, n.13, 148 Cal.Rptr. 389, 582 P.2d 980 ; *Silberg v. California Life Ins. Co.* (1974) 11 Cal.3d 452, 462-463, 113 Cal.Rptr. 711, 521 P.2d 1103 ; *Romo v. Ford Motor Co.* (2003) 113 Cal.App.4th 738, 745, 6 Cal.Rptr.3d 793 ; *Travelers Ins. Co. v. Leshner* (1986) 187 Cal.App.3d 169, 200, 231 Cal.Rptr. 791 ; *Esparza v. Specht* (1976) 55 Cal.App.3d 1, 6, 127 Cal.Rptr. 493 ; *Kuchta v. Allied Builders Corp.* (1971) 21 Cal.App.3d 541, 549, 98 Cal.Rptr. 588 ; *Horn v. Guaranty Chevrolet Motors* (1969) 270 Cal.App.2d 477, 484, 75 Cal.Rptr. 871 .

[2] Use of Instruction

This instruction should be used when the plaintiff is seeking punitive damages in connection with a cause of action for fraud. It assumes that the sole statutory ground relied on by the plaintiff to support the imposition of punitive damages is fraud. If the plaintiff is also asserting that the defendant was guilty of malice or oppression, a modified version of the instruction in Ch. 21A, *Matthew Bender Conversion Instructions*, MB 2100.36, should be used. When the jury is instructed on both fraud claims and breach of contract claims, use this instruction together with the instruction in Ch. 3E, *Matthew Bender Contract Damages Instructions*, MB 300E.13.

When this instruction is used, the general burden of proof instructions given to the jury should include an instruction on the "clear and convincing evidence" standard [*see, e.g.,* Ch. 2, *California Judicial Council Evidence Instructions*, CACI No. 201, ("More Likely True--Clear and Convincing Proof")].

When the plaintiff's claim for punitive damages is based on the conduct of an employee or agent of a defendant, the jury should be instructed on the additional elements that must be established before punitive damages may be awarded against an employer or principal for the actions of an employee or agent [*see Civ. Code* § 3294(b)].

When issues relating to the propriety and amount of punitive damages are not bifurcated under *Civ. Code* § 3295(d), this instruction should be followed by the instruction set forth in MB 1900A.54[1].

This instruction contains alternative concluding paragraphs. The first alternative paragraph should be used when issues relating to the propriety and amount of punitive damages are bifurcated under *Civ. Code* § 3295(d). The second alternative paragraph should be used when the issues relating to the propriety and amount of punitive damages are not bifurcated and the jury therefore will be given the instruction on assessing punitive damages that is set forth in MB 1900A.54.

For related Judicial Council instructions, see [3][f], *below*.

[3] Comment**[a] Prerequisites for Punitive Damage Award**

In an action predicated on the breach of an obligation that does not arise from contract, punitive damages--damages that are awarded to punish and make an example of a defendant--may be awarded against a defendant who is guilty of malice, fraud, or oppression [Civ. Code § 3294(a); *Brewer v. Premier Golf Prop., LP* (2008) 168 Cal.App.4th 1243, 1247-1250, n.5, 1254-1256, 86 Cal.Rptr.3d 225 (unavailability of punitive damages in cause of action under certain Labor Code provisions)].

Notwithstanding the fact that Civ. Code § 3294(a) authorizes punitive damages only in an action "for the breach of an obligation not arising from contract," punitive damages may be awarded in an action predicated on a claim that the defendant fraudulently induced the plaintiff to enter into a contract [*Kuchta v. Allied Builders Corp.* (1971) 21 Cal.App.3d 541, 549, 98 Cal.Rptr. 588]. This is true even if the plaintiff seeks rescission rather than damages [*Horn v. Guaranty Chevrolet Motors* (1969) 270 Cal.App.2d 477, 484, 75 Cal.Rptr. 871].

Punitive damages are not recoverable unless the plaintiff proves that the defendant was guilty of oppression, fraud, or malice [Civ. Code § 3294(a); *Spinks v. Equity Residential Briarwood Apartments* (2009) 171 Cal.App.4th 1004, 1052, 90 Cal.Rptr.3d 453].

Actual damages are an absolute predicate for an award of exemplary or punitive damages [*Estate of Martin v. California VA* (9th Cir. 2009) 560 F.3d 1042, 1051 ; *Fassberg Construction Co. v. Housing Authority of Los Angeles* (2007) 151 Cal.App.4th 267, 301, 60 Cal.Rptr.3d 375]. When a jury explicitly finds \$0 of compensatory damages, the general rule precludes punitive damages. A finding of harm without compensatory damages, or mere restitution when compensatory damages are available, is insufficient [*California v. Altus Fin. S.A.* (9th Cir. 2008) 540 F.3d 992, 1001-1004]. When nominal damages are awarded, punitive damages should generally represent only a single-digit ratio (that is, less than 10) to satisfy due process requirements, although exceptions exist [see *Mendez v. County of San Bernardino* (9th Cir. 2008) 540 F.3d 1109, 1121-1122 ; see also 4 Levy et al., California Torts Ch. 54, *Punitive Damages*, Part B (Matthew Bender)].

[b] Fraud

"Fraud" is defined in Civ. Code § 3294(c)(3) as "an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing" [*Fariba v. Dealer Svcs. Corp.* (2009) 178 Cal.App.4th 156, 175, 100 Cal.Rptr.3d 219]. Because this definition requires an element of intent that may not be essential to establish liability for compensatory damages in an action based on certain types of fraud (e.g., negligent misrepresentation), this instruction uses the term "intentional fraud" to refer to the type of fraud required by Civ. Code § 3294(c)(3) and distinguish it from the fraud that must be proven to recover compensatory damages. Punitive damages may not be recovered for negligent misrepresentation [*Reid v. Moskovitz* (1989) 208 Cal.App.3d 29, 32, 255 Cal.Rptr. 910].

[c] Plaintiff's Burden of Proof

Punitive damages may be awarded only if the plaintiff establishes oppression, fraud, or malice by clear and convincing evidence [Civ. Code § 3294(a); see, e.g., Ch. 2, *California Judicial Council Evidence Instructions*, CACI No. 201 ("More Likely True--Clear and Convincing Proof")].

[d] Bifurcation of Punitive Damage Issues

Civ. Code § 3295(d) requires the trial court, on the defendant's motion, to exclude evidence of the defendant's profits and financial condition until the jury finds that the defendant is liable to the plaintiff and that the defendant is guilty of

oppression, fraud, or malice [*Kizer v. County of San Mateo* (1991) 53 Cal.3d 139, 147, 279 Cal.Rptr. 318, 806 P.2d 1353].

When the defendant avails itself of this right to initially exclude evidence of its financial condition, the practical effect of these provisions is that the punitive damage issues will have to be bifurcated. In the initial phase of the trial, the jury will be limited to determining the defendant's liability for compensatory damages and whether the plaintiff has established the "fraud" required by *Civ. Code* § 3294. If the jury holds the defendant liable and determines that the plaintiff has established the requisite fraud in the initial phase of the trial, the plaintiff will be entitled to present evidence of the defendant's profits and financial condition at a second phase of the trial, after which the jury will determine the issues relating to the proper amount of punitive damages. The issue of punitive damages must be heard by the same jury that found the defendant liable, although this requirement may be waived by a failure to object to the use of separate juries [*Civ. Code* § 3295(d); *Medo v. Superior Court* (1988) 205 Cal.App.3d 64, 66, 69-70, 251 Cal.Rptr. 924]. The substitution of alternate jurors to try the punitive damages phase of a case does not violate the "same jury" requirement [*Rivera v. Sassoon* (1995) 39 Cal.App.4th 1045, 1049, 46 Cal.Rptr.2d 144].

[e] Purpose of Punitive Damages

Punitive damages are imposed for purposes of retribution and deterrence [*State Farm Mut. Auto. Ins. Co. v. Campbell* (2003) 538 U.S. 408, 426, 123 S.Ct. 1513, 155 L.Ed.2d 585 ; *Pacific Mut. Life Ins. Co. v. Haslip* (1991) 499 U.S. 1, 17-23, 111 S.Ct. 1032, 113 L.Ed.2d 1]. That is, the purpose of punitive damages is to punish wrongdoers and thereby deter the commission of wrongful acts [see *Civ. Code* § 3294(a); *Romo v. Ford Motor Co.* (2003) 113 Cal.App.4th 738, 745, 6 Cal.Rptr.3d 793]. Punitive damages are aimed not at compensation but principally at retribution and deterring harmful conduct [*Exxon Shipping Co. v. Baker* (2008) -- U.S. --, 128 S.Ct. 2605, 2621, 171 L.Ed.2d 570].

Punitive damages may properly be imposed to further a state's legitimate interests in punishing unlawful conduct and deterring its repetition [*State Farm Mut. Auto. Ins. Co. v. Campbell* (2003) 538 U.S. 408, 416, 123 S.Ct. 1513, 155 L.Ed.2d 585 ; *BMW of N. Am., Inc. v. Gore* (1996) 517 U.S. 559, 568, 116 S.Ct. 1589, 134 L.Ed.2d 809]. Although individual states possess discretion over the imposition of punitive damages, there are constitutional, procedural and substantive limitations on those awards [*State Farm Mut. Auto. Ins. Co. v. Campbell* (2003) 538 U.S. 408, 416, 123 S.Ct. 1513, 155 L.Ed.2d 585 ; see MB 1900A.54[3][b] -[e]].

A statement as to the purpose of punitive damages should be included in jury instructions on punitive damages to guide the jury's discretion. The United States Supreme Court, in upholding a punitive damages award against a due process challenge, cited such a statement of purpose in an Alabama jury instruction as an important limit on the jury's discretion [see *Pacific Mut. Life Ins. Co. v. Haslip* (1991) 499 U.S. 1, 17-23, 111 S.Ct. 1032, 113 L.Ed.2d 1 ; see also MB 2300A.233[3]].

[f] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 39, *California Judicial Council Damages Instructions*]:

CACI No. 3940, Punitive Damages--Individual Defendant--Trial Not Bifurcated [*but see* MB 1900A.54[3][c]]

CACI No. 3941, Punitive Damages--Individual Defendant--Bifurcated Trial--(First Phase)

CACI No. 3942, Punitive Damages--Individual Defendant--Bifurcated Trial (Second Phase)

CACI No. 3943, Punitive Damages Against Employer or Principal for Conduct of a Specific Agent or Employee--Trial Not Bifurcated

CACI No. 3944, Punitive Damages Against Employer or Principal for Conduct of a Specific Agent or Employee--Bifurcated Trial (First Phase)

CACI No. 3945, Punitive Damages--Entity Defendant--Trial Not Bifurcated

CACI No. 3946, Punitive Damages--First Defendant--Bifurcated Trial (First Phase)

CACI No. 3947, Punitive Damages--Individual and Entity Defendants--Trial Not Bifurcated [but see MB 1900A.54[3][c]]

CACI No. 3948, Punitive Damages--Individual and Corporate Defendants (Corporate Liability Based on Acts of Named Individual--Bifurcated Trial (First Phase)

CACI No. 3949, Punitive Damages--Individual and Corporate Defendants (Corporate Liability Based on Acts of Named Individual--Bifurcated Trial (Second Phase)



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CHAPTER 19A Matthew Bender Fraud and Deceit Instructions
Part D. DAMAGES

3-19A California Forms of Jury Instruction MB 1900A.54

MB 1900A.54 Discretion to Award Punitive Damages if Prerequisites for Award Are Established

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

[*SELECT ONE OF THE FOLLOWING (See Use of Instruction)*]

In the first phase of this trial, you determined that Defendant was guilty of intentional fraud that resulted in harm or damage to Plaintiff. In this phase of the trial you must determine whether punitive damages should be awarded against Defendant and, if so, the amount of punitive damages that should be awarded.

Because this is a case in which Defendant was guilty of intentional fraud,

[*OR*]

If you find that Defendant was guilty of intentional fraud,

[*CONTINUE INSTRUCTION*]

you may, but are not required to, award punitive damages against Defendant. In such a case, it is up to you to decide whether punitive damages should be awarded. If you decide to award punitive damages, it is also up to you to determine the amount of punitive damages that should be awarded.

The law does not provide any fixed standards or formulas for making decisions about the amount of punitive damages. Instead, it leaves them to your good judgment and common sense. However, in making any award of punitive damages, you should consider all of the following:

- 1. The reprehensibility of Defendant's conduct with respect to Plaintiff;**
- 2. Defendant's financial condition and, in view of that financial condition, what amount of punitive damages it will take to punish and deter Defendant, based solely on the harm to Plaintiff; and**
- 3. The actual [damages/harm or injury] that was caused by Defendant's wrongful conduct with respect to Plaintiff, because punitive damages must bear a reasonable relationship to the actual [damages/harm or injury].**

In making decisions about punitive damages, you should act in a calm and deliberate manner and should not allow yourselves to be influenced by passion or prejudice.

Authorities: *Civ. Code* §§ 3294, 3295(d); *State Farm Mut. Auto. Ins. Co. v. Campbell* (2003) 538 U.S. 408, 426, 123 S.Ct. 1513, 155 L.Ed.2d 585 ; *BMW of N. Am., Inc. v. Gore* (1996) 517 U.S. 559, 575, 116 S.Ct. 1589, 134 L.Ed.2d 809 ; *Pacific Mut. Life Ins. Co. v. Haslip* (1991) 499 U.S. 1, 6 n.1, 15-24, 111 S.Ct. 1032, 113 L.Ed.2d 1 ; *Adams v. Murakami* (1991) 54 Cal.3d 105, 111, 114-118, 123, 284 Cal.Rptr. 318, 813 P.2d 1348 ; *Egan v. Mutual of Omaha Ins. Co.* (1979) 24 Cal.3d 809, 819-823, 169 Cal.Rptr. 691, 620 P.2d 141 ; *Neal v. Farmers Ins. Exch.* (1978) 21 Cal.3d 910, 923-928, 148 Cal.Rptr. 389, 582 P.2d 980 ; *Romo v. Ford Motor Co.* (2003) 113 Cal.App.4th 738, 753, n.7, 6 Cal.Rptr.3d 793 ; *Las Palmas Assocs. v. Las Palmas Ctr.* (1991) 235 Cal.App.3d 1220, 1257-1258, 1 Cal.Rptr.2d 301 .

[2] Use of Instruction

This instruction should be used to instruct the jury on its duty to determine the propriety and amount of punitive damages if the statutory prerequisites for a punitive damage award are established. When the punitive damage issues have not been bifurcated under *Civ. Code* § 3295(d) [see Ch. 21A, *Matthew Bender Conversion Instructions*, MB 2100A.36[3][g]], this instruction should be given immediately after the instruction set forth in MB 1900A.53[1]. When the punitive damage issues have been bifurcated, this instruction should not be given in the trial's first phase and should be given in a subsequent phase only if the jury renders a verdict finding the defendant guilty of oppression, fraud, or malice.

This instruction contains two alternative introductory provisions. The first alternative provision should be used when the punitive damage issues have been bifurcated and the issues relating to the propriety and amount of a punitive damage award are presented in a second phase of the trial. The second alternative provision should be used when the punitive damage issues are not bifurcated.

In the list of factors to be considered in making an award of punitive damages, the third factor offers counsel the choice of the word "damages" or the phrase "harm or injury." In *Gagnon v. Continental Casualty Co.* [*Gagnon v. Continental Cas. Co.* (1989) 211 Cal.App.3d 1598, 1603, 260 Cal.Rptr. 305], the appellate court indicated that the latter might be preferable, especially when the plaintiff is not entitled to compensatory damages or only recovers nominal damages.

For related Judicial Council instructions, see [3][f], *below*.

[3] Comment

[a] Discretion to Award Punitive Damages

Even when the statutory prerequisites for a punitive damage award are met, the plaintiff is never entitled to punitive

damages as a matter of right; rather, the decision to award or deny punitive damages is initially within the jury's discretion [*Brewer v. Second Baptist Church* (1948) 32 Cal.2d 791, 800-801, 197 P.2d 713 ; *Thomson v. Catalina* (1928) 205 Cal. 402, 406-407, 271 P. 198 ; *Davis v. Hearst* (1911) 160 Cal. 143, 173-174, 116 P. 530 ; *Hannon Eng'g, Inc. v. Reim* (1981) 126 Cal.App.3d 415, 431, 179 Cal.Rptr. 78].

Similarly, the amount to be awarded as punitive damages is initially within the discretion of the jury [*Kizer v. County of San Mateo* (1991) 53 Cal.3d 139, 147, 279 Cal.Rptr. 318, 806 P.2d 1353 ; *Thomson v. Catalina* (1928) 205 Cal. 402, 406-407, 271 P. 198 ; *Hannon Eng'g, Inc. v. Reim* (1981) 126 Cal.App.3d 415, 431, 179 Cal.Rptr. 78 ; *Ferraro v. Pacific Fin. Corp.* (1970) 8 Cal.App.3d 339, 351, 87 Cal.Rptr. 226]. An instruction that advises the jury that it has discretion to determine these questions but that its discretion should be exercised without passion or prejudice is proper [*Hannon Eng'g, Inc. v. Reim* (1981) 126 Cal.App.3d 415, 429-433, 179 Cal.Rptr. 78 ; see *Las Palmas Assocs. v. Las Palmas Ctr.* (1991) 235 Cal.App.3d 1220, 1257-1258, 1 Cal.Rptr.2d 301].

[b] Due Process Considerations With Punitive Damages

The United States Supreme Court has held that courts must ensure that the measure of punishment of punitive damages is both reasonable and proportionate both to the amount of harm to the plaintiff and also to the general damages recovered. An excessive punitive damages award implicates the Due Process Clause of the U.S. Constitution (U.S. Const. amend. XIV) as an irrational and arbitrary deprivation of the defendant's property [*State Farm Mut. Auto. Ins. Co. v. Campbell* (2003) 538 U.S. 408, 428, 123 S.Ct. 1513, 155 L.Ed.2d 585 ; see *Levy, Golden, Sacks, California Torts*, Ch. 54, *Punitive Damages* (Matthew Bender)].

There are no concrete constitutional limits on the ratio that compares the punitive damages award to the harm, or potential harm, to the plaintiff [*State Farm Mut. Auto. Ins. Co. v. Campbell* (2003) 538 U.S. 408, 424, 123 S.Ct. 1513, 155 L.Ed.2d 585 ; *BMW of N. Am., Inc. v. Gore* (1996) 517 U.S. 559, 575, 116 S.Ct. 1589, 134 L.Ed.2d 809]. However, few awards exceeding a single-digit ratio between punitive and compensatory damages will satisfy due process requirements. An award of more than four times the amount of compensatory damages "might be close to the line of constitutional impropriety" [*State Farm Mut. Auto. Ins. Co. v. Campbell* (2003) 538 U.S. 408, 425, 123 S.Ct. 1513, 155 L.Ed.2d 585 ; *BMW of N. Am., Inc. v. Gore* (1996) 517 U.S. 559, 581, 116 S.Ct. 1589, 134 L.Ed.2d 809 ; *Pacific Mut. Life Ins. Co. v. Haslip* (1991) 499 U.S. 1, 23-24, 111 S.Ct. 1032, 113 L.Ed.2d 1].

In a fraud case, the California Supreme Court held that an award of punitive damages in an amount "just exceeding the largest single-digit ratio amount"--that is, 10 times the amount of the compensatory damages--was the maximum allowable amount under federal constitutional guidelines [*Simon v. San Paolo U.S. Holding Co., Inc.* (2005) 35 Cal.4th 1159, 1189, 29 Cal.Rptr.3d 379, 113 P.3d 63 (\$50,000/\$5,000 reduced from \$1.7 million/\$5,000)].

[c] Instructions Cannot Invite Jury to Impose Damages Sufficient to Punish and Deter Conduct Not Related to Particular Plaintiff

In light of the U.S. Supreme Court's decision in *State Farm Mutual Automobile Insurance Co. v. Campbell* [*State Farm Mut. Auto. Ins. Co. v. Campbell* (2003) 538 U.S. 408, 123 S.Ct. 1513, 155 L.Ed.2d 585], jury instructions must not invite the jury to impose damages sufficient to punish and deter all conduct by defendant of the type directed toward the plaintiff(s) in a particular case [*Romo v. Ford Motor Co.* (2003) 113 Cal.App.4th 738, 753, n.7, 6 Cal.Rptr.3d 793 (rejecting use of BAJI 14.71; now see CACI Nos. 3940, 3947)].

[d] Instructions on Punitive Damages Cannot Be Vague

Vague jury instructions on punitive damages, or those that merely inform the jury to avoid "passion or prejudice," are impermissible, because they do little to aid the jury in its task of assigning appropriate weight to evidence that is relevant and to evidence that is tangential or only inflammatory [*State Farm Mut. Auto. Ins. Co. v. Campbell* (2003)

538 U.S. 408, 418, 123 S.Ct. 1513, 155 L.Ed.2d 585].

[e] Wealth Relevant Only With Respect to Particular Plaintiff

In light of the U.S. Supreme Court's decision in *State Farm Mutual Automobile Insurance Co. v. Campbell* [*State Farm Mut. Auto. Ins. Co. v. Campbell* (2003) 538 U.S. 408, 123 S.Ct. 1513, 155 L.Ed.2d 585], evidence concerning a defendant's financial condition is not unlawful or inappropriate. However, the jury may use a defendant's wealth only to determine the appropriate punishment for the malicious conduct in the particular case, not as a gauge for the imposition of a penalty that will actually deter the entire type or course of conduct that affected the plaintiff(s) in that case [*Romo v. Ford Motor Co.* (2003) 113 Cal.App.4th 738, 753, n.7, 6 Cal.Rptr.3d 793]. The wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award [*State Farm Mut. Auto. Ins. Co. v. Campbell* (2003) 538 U.S. 408, 427, 123 S.Ct. 1513, 155 L.Ed.2d 585 ; see [b], above].

[f] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 39, *California Judicial Council Damages Instructions*]:

CACI No. 3940, Punitive Damages--Individual Defendant--Trial Not Bifurcated [but see MB 1900A.54[3][c]]

CACI No. 3941, Punitive Damages--Individual Defendant--Bifurcated Trial--(First Phase)

CACI No. 3942, Punitive Damages--Individual Defendant--Bifurcated Trial (Second Phase)

CACI No. 3943, Punitive Damages Against Employer or Principal for Conduct of a Specific Agent or Employee--Trial Not Bifurcated

CACI No. 3944, Punitive Damages Against Employer or Principal for Conduct of a Specific Agent or Employee--Bifurcated Trial (First Phase)

CACI No. 3945, Punitive Damages--Entity Defendant--Trial Not Bifurcated

CACI No. 3946, Punitive Damages--First Defendant--Bifurcated Trial (First Phase)

CACI No. 3947, Punitive Damages--Individual and Entity Defendants--Trial Not Bifurcated [but see MB 1900A.54[3][c]]

CACI No. 3948, Punitive Damages--Individual and Corporate Defendants (Corporate Liability Based on Acts of Named Individual--Bifurcated Trial (First Phase)

CACI No. 3949, Punitive Damages--Individual and Corporate Defendants (Corporate Liability Based on Acts of Named Individual--Bifurcated Trial (Second Phase)



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CHAPTER 19A Matthew Bender Fraud and Deceit Instructions
Part D. DAMAGES

3-19A California Forms of Jury Instruction MB 1900A.55

MB 1900A.55 Liability of Principal for Punitive Damages

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Punitive damages may be awarded against Defendant for the fraudulent conduct of [his/her/its] agent if Defendant _____ [directed or authorized or ratified] that conduct.

Authorities: *Civ. Code § 3294(b); Walker v. Signal Cos., Inc. (1978) 84 Cal.App.3d 982, 999, 149 Cal.Rptr. 119 .*

[2] Use of Instruction

This instruction should be used when plaintiff contends that fraud of the defendant's agent is the basis on which punitive damages should be awarded.

The instruction may be modified to request punitive damages from an employer for an employee's fraud if the criteria covered in [3][b], *below*, are met.

For related Judicial Council instructions, see [3][c], *below*.

[3] Comment

[a] Punitive Damages Based on Fraud of Agent

A principal is not liable for punitive damages based on the acts of his or her agent unless the principal directed, authorized, or ratified the acts [*Walker v. Signal Cos., Inc. (1978) 84 Cal.App.3d 982, 999, 149 Cal.Rptr. 119 ; Ebaugh v. Rabkin (1972) 22 Cal.App.3d 891, 895, 99 Cal.Rptr. 706*].

[b] Punitive Damages Based on Fraud of Employee

An employer is not liable for punitive damages based on the fraudulent acts of an employee unless one or more of the following is true:

- The employer had advance knowledge of the employee's unfitness and employed him or her with a conscious disregard of the rights of others;
- The employer authorized or ratified the fraudulent conduct for which the damages are awarded; or
- The employer was personally guilty of fraud.

With regard to a corporate employer, the advance knowledge and conscious disregard, authorization, ratification, or act of fraud must be on the part of an officer, director, or managing agent of the corporation [*Civ. Code* § 3294(b)]. However, *Civ. Code* § 3294 does not require that the employer itself be guilty of fraud, oppression, or malice (*i.e.*, the conduct authorizing liability for punitive damages under *Civ. Code* § 3294(a)) over and above the conduct described in *Civ. Code* § 3294(b) [*Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1153-1154, 74 Cal.Rptr.2d 510].

Imposing punitive damages on an employer for the fraud committed by its employee does not violate the employer's due process rights [*Pacific Mut. Life Ins. Co. v. Haslip* (1991) 499 U.S. 1, 14-15, 111 S.Ct. 1032, 113 L.Ed.2d 1].

For further discussion of the criteria for imposing punitive damage liability on a principal or employer based on tortious conduct of an agent or employee, see Levy, Golden & Sacks, California Torts, Ch. 54, *Punitive Damages* (Matthew Bender).

[c] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 39, *California Judicial Council Damages Instructions*]:

CACI No. 3940, Punitive Damages--Individual Defendant--Trial Not Bifurcated [*but see MB 1900A.54*][3][c]]

CACI No. 3941, Punitive Damages--Individual Defendant--Bifurcated Trial--(First Phase)

CACI No. 3942, Punitive Damages--Individual Defendant--Bifurcated Trial (Second Phase)

CACI No. 3943, Punitive Damages Against Employer or Principal for Conduct of a Specific Agent or Employee--Trial Not Bifurcated

CACI No. 3944, Punitive Damages Against Employer or Principal for Conduct of a Specific Agent or Employee--Bifurcated Trial (First Phase)

CACI No. 3945, Punitive Damages--Entity Defendant--Trial Not Bifurcated

CACI No. 3946, Punitive Damages--First Defendant--Bifurcated Trial (First Phase)

CACI No. 3947, Punitive Damages--Individual and Entity Defendants--Trial Not Bifurcated [*but see MB 1900A.54*][3][c]]

CACI No. 3948, Punitive Damages--Individual and Corporate Defendants (Corporate Liability Based on Acts of Named Individual--Bifurcated Trial (First Phase)

*CACI No. 3949, Punitive Damages--Individual and Corporate Defendants (Corporate Liability
Based on Acts of Named Individual--Bifurcated Trial (Second Phase)*



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CHAPTER 20 California Judicial Council Trespass Instructions

3-20 California Forms of Jury Instruction 20.syn

§ 20.syn Synopsis to Chapter 20: California Judicial Council Trespass Instructions

CACI 2000 Trespass

CACI 2001 Trespass--Extrahazardous Activities

CACI 2002 Trespass to Timber (Civ. Code, § 3346; Code Civ. Proc., § 733)

CACI 2003 Treble Damages--Timber

CACI 2004 Intentional Entry Explained

CACI 2005 Affirmative Defense--Necessity

CACI 2006-CACI 2019 Reserved for Future Use

CACI 2020 Public Nuisance--Essential Factual Elements

CACI 2021 Private Nuisance--Essential Factual Elements

CACI 2022-CACI 2029 Reserved for Future Use

CACI 2030 Affirmative Defense--Statute of Limitations--Trespass or Private Nuisance

CACI 2031-CACI 2099 Reserved for Future Use

CACI VF-2000 Trespass

CACI VF-2001 Trespass--Affirmative Defense--Necessity

CACI VF-2002 Trespass--Extrahazardous Activities

CACI VF-2003 Trespass to Timber (Civ. Code, § 3346; Code Civ. Proc., § 733)

CACI VF-2004 Trespass to Timber (Civ. Code, § 3346; Code Civ. Proc., § 733)--Treble Damages Sought

CACI VF-2005 Public Nuisance

CACI VF-2006 Private Nuisance

CACI VF-2007-CACI VF-2099 Reserved for Future Use



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CHAPTER 20 California Judicial Council Trespass Instructions

3-20 California Forms of Jury Instruction Scope

Scope

SCOPE

This chapter contains the California Judicial Council's "Trespass Series" of jury instructions [*CACI No. 2000* et seq.]. The Judicial Council of California Civil Jury Instructions (CACI) included in this publication are the product of the Judicial Council of California Task Force on Jury Instructions, which are updated by the Judicial Council of California Advisory Committee on Civil Jury Instructions.

This chapter includes instructions on the following topics:

- Trespass generally [*CACI No. 2000*], trespass when an extrahazardous activity is involved [*CACI No. 2001*], and trespass to timber [*CACI No. 2002*; *CACI No. 2003* (treble damages for trespass to timber)].
- Intentional entry [*CACI No. 2004*].
- Defense of necessity [*CACI No. 2005*].
- Essential factual elements for causes of action in public [*CACI No. 2020*] and private [*CACI No. 2021*] nuisances.
- Defense of statute of limitations [*CACI No. 2030*].

The trespass series also includes special verdict forms [*CACI Nos. VF-2000-VF-2006*].



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CHAPTER 20 California Judicial Council Trespass Instructions

3-20 California Forms of Jury Instruction CACI 2000

CACI 2000 Trespass

[*Name of plaintiff*] **claims that** [*name of defendant*] **trespassed on** [his/her/its] **property. To establish this claim, [**
name of plaintiff **] must prove all of the following:**

- 1. That** [*name of plaintiff*] **[owned/leased/occupied/controlled] the property;**
- 2. That** [*name of defendant*] **[intentionally, recklessly, or negligently entered** [*name of plaintiff*]'s **property] [or]**
[intentionally, recklessly, or negligently caused [another person/[*insert name of thing*]] **to enter** [*name of plaintiff*]'s **property];**
- 3. That** [*name of plaintiff*] **did not give permission for the entry [or that** [*name of defendant*] **exceeded** [*name of plaintiff*]'s **permission]; [and]**
- 4. That** [*name of plaintiff*] **was [actually] harmed; and**
- 5. That** [*name of defendant*]'s **[entry/conduct] was a substantial factor in causing** [*name of plaintiff*]'s **harm.**

[Entry can be on, above, or below the surface of the land.]

[Entry may occur indirectly, such as by causing vibrations that damage the land or structures or other improvements on the land.]

New September 2003

If plaintiff is seeking nominal damages as an alternative to actual damages, insert the following paragraph above element 4:

If you find all of the above, then the law assumes that [*name of plaintiff*] has been harmed and [*name of plaintiff*] is entitled to a nominal sum such as one dollar. [*Name of plaintiff*] is entitled to additional damages if [*name of plaintiff*] proves the following:

The last sentence of the above paragraph, along with the final two elements of this instruction, should be omitted if plaintiff is seeking nominal damages only. Read "actually" in the fourth element only if nominal damages are also being sought.

Nominal damages alone are not available in cases involving intangible intrusions such as noise and vibrations; proof of actual damage to the property is required: "[T]he rule is that actionable trespass may not be predicated upon nondamaging noise, odor, or light intrusion. ..." (*San Diego Gas & Electric Co. v. Superior Court* (1996) 13 Cal.4th 893, 936 [55 Cal.Rptr.2d 724, 920 P.2d 669] , internal citation omitted.)

For an instruction on control of property, see CACI No. 1002, *Extent of Control Over Premises Area*, in the Premises Liability series.

Intent to commit the act constituting the trespass is a necessary element, but intent to damage is not necessary. (*Meyer v. Pacific Employers Insurance Co.* (1965) 233 Cal.App.2d 321 [43 Cal.Rptr. 542] .)

- "As a general rule, landowners and tenants have a right to exclude persons from trespassing on private property; the right to exclude persons is a fundamental aspect of private property ownership." (*Allred v. Harris* (1993) 14 Cal.App.4th 1386, 1390 [18 Cal.Rptr.2d 530] , internal citation omitted.)

- "Trespass is an unlawful interference with possession of property. The emission of sound waves which cause actual physical damage to property constitutes a trespass. Liability for trespass may be imposed for conduct which is intentional, reckless, negligent or the result of an extra-hazardous activity." (*Staples v. Hoefke* (1987) 189 Cal.App.3d 1397, 1406 [235 Cal.Rptr. 165] , internal citations omitted.)

- "California's definition of trespass is considerably narrower than its definition of nuisance. 'A trespass is an invasion of the interest in the exclusive possession of land, as by entry upon it A nuisance is an interference with the interest in the private use and enjoyment of the land and does not require interference with the possession.' " California has adhered firmly to the view that '[t]he cause of action for trespass is designed to protect possessory--not necessarily ownership--interests in land from unlawful interference.' " (*Capogeannis v. Superior Court* (1993) 12 Cal.App.4th 668, 674 [15 Cal.Rptr.2d 796] , internal citations omitted.)

- " '[A] trespass may be committed by the continued presence on the land of a structure, chattel, or other thing which the actor has tortiously placed there, whether or not the actor has the ability to remove it.' Under this definition, 'tortious conduct' denotes that conduct, whether of act or omission, which subjects the actor to liability under the principles of the law of torts." (*Newhall Land & Farming Co. v. Superior Court* (1993) 19 Cal.App.4th 334, 345 [23 Cal.Rptr.2d 377] , internal citations omitted.)

■ The common-law distinction between direct and constructive trespass is not followed in California. A trespass may be committed by consequential and indirect injuries as well as by direct and forcible harm. (*Gallin v. Poulou* (1956) 140 Cal.App.2d 638, 641 [295 P.2d 958] .)

■ "An action for trespass may technically be maintained only by one whose right to possession has been violated; however, an out-of-possession property owner may recover for an injury to the land by a trespasser which damages the ownership interest." (*Smith v. Cap Concrete, Inc.* (1982) 133 Cal.App.3d 769, 774 [184 Cal.Rptr. 308] , internal citation omitted.)

■ "Under the forcible entry statutes the fact that a defendant may have title or the right to possession of the land is no defense. The plaintiff's interest in peaceable even if wrongful possession is secured against forcible intrusion by conferring on him the right to restitution of the premises, the primary remedy, and incidentally awarding damages proximately caused by the forcible entry." (*Allen v. McMillion* (1978) 82 Cal.App.3d 211, 218-219 [147 Cal.Rptr. 77] , internal citations omitted.)

■ "Where there is a consensual entry, there is no tort, because lack of consent is an element of the wrong." (*Civic Western Corp. v. Zila Industries, Inc.* (1977) 66 Cal.App.3d 1, 16-17 [135 Cal.Rptr. 915] .)

■ " 'A conditional or restricted consent to enter land creates a privilege to do so only insofar as the condition or restriction is complied with.' " (*Civic Western Corp.*, *supra*, 66 Cal.App.3d at p. 17 , quoting *Rest.2d Torts*, § 168.)

■ "Where one has permission to use land for a particular purpose and proceeds to abuse the privilege, or commits any act hostile to the interests of the lessor, he becomes a trespasser. [P] 'A good faith belief that entry has been authorized or permitted provides no excuse for infringement of property rights if consent was not in fact given by the property owner whose rights are at issue. Accordingly, by showing they gave no authorization, [plaintiffs] established the lack of consent necessary to support their action for injury to their ownership interests.' " (*Cassinovs v. Union Oil Co.* (1993) 14 Cal.App.4th 1770, 1780 [18 Cal.Rptr.2d 574] , internal citations omitted.)

■ " '[T]he intent required as a basis for liability as a trespasser is simply an intent to be at the place on the land where the trespass allegedly occurred The defendant is liable for an intentional entry although he has acted in good faith, under the mistaken belief, however reasonable, that he is committing no wrong.' " (*Miller v. National Broadcasting Corp.* (1986) 187 Cal.App.3d 1463, 1480-1481 [232 Cal.Rptr. 668] , internal citation omitted.)

■ "The general rule is simply that damages may be recovered for annoyance and distress, including mental anguish, proximately caused by a trespass." (*Armitage v. Decker* (1990) 218 Cal.App.3d 887, 905 [267 Cal.Rptr. 399] , internal citations omitted.)

■ "Causes of action for conversion and trespass support an award for exemplary damages." (*Krieger v. Pacific Gas & Electric Co.* (1981) 119 Cal.App.3d 137, 148 [173 Cal.Rptr. 751] , internal citation omitted.)

■ "It is true that an action for trespass will support an award of nominal damages where actual damages are not shown. However, nominal damages need not be awarded where no actual loss has occurred. 'Failure to return a verdict for nominal damages is not in general ground for reversing a judgment or granting a new trial.' " (*Staples*, *supra*, 189 Cal.App.3d at p. 1406 , internal citations omitted.)

■ "Trespass may be ' "by personal intrusion of the wrongdoer or by his failure to leave; by throwing or placing something on the land; or by causing the entry of some other person." ' A trespass may be on the surface of the land, above it, or below it. The migration of pollutants from one property to another may constitute a trespass, a nuisance, or both." (*Martin Marietta Corp. v. Insurance Co. of North America* (1995) 40 Cal.App.4th 1113, 1132 [47 Cal.Rptr.2d 670] , internal citations omitted.)

■ "Respondent's plant was located in a zone which permitted its operation. It comes within the protection of *section 731a of the Code of Civil Procedure* which, subject to certain exceptions, generally provides that where a manufacturing or commercial operation is permitted by local zoning, no private individual can enjoin such an operation. It has been determined, however, that this section does not operate to bar recovery for damages for trespassory invasions of another's property occasioned by the conduct of such manufacturing or commercial use." (*Roberts v. Permanente Corp.* (1961) 188 Cal.App.2d 526, 529 [10 Cal.Rptr. 519] , internal citations omitted.)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 693-695

2 Levy et al., California Torts, Ch. 17, *Nuisance and Trespass*, § 17.20 (Matthew Bender)

48 *California Forms of Pleading and Practice*, Ch. 550, *Trespass*, §§ 550.11, 550.19 (Matthew Bender)

22 *California Points and Authorities*, Ch. 225, *Trespass*, § 225.20 (Matthew Bender)

1 California Civil Practice: Torts (Thomson West) §§ 18:1, 18:4-18:8, 18:10

Publisher's Notes

There is no BAJI instruction on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property LawTortsTrespass to Real PropertyTortsPremises Liability & PropertyTrespassElementsTortsPremises Liability & PropertyTrespassRemediesDamagesGeneral Overview



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California Forms of Jury Instruction

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CHAPTER 20 California Judicial Council Trespass Instructions

3-20 California Forms of Jury Instruction CACI 2001

CACI 2001 Trespass--Extrahazardous Activities

[*Name of plaintiff*] **claims that** [*name of defendant*] **trespassed on** [his/her/its] **property. To establish this claim, [**
name of plaintiff **] must prove all of the following:**

- 1. That** [*name of plaintiff*] **[owned/leased/occupied/controlled] the property;**
- 2. That** [*name of defendant*] **was engaged in** [*insert extrahazardous activity*];
- 3. That** [*insert extrahazardous activity*] **caused** [*insert thing*] **to enter** [*name of plaintiff*]'s **property;**
- 4. That** [*name of plaintiff*] **did not give permission for the entry [or that** [*name of defendant*] **exceeded** [*name of plaintiff*]'s **permission];**
- 5. That** [*name of plaintiff*] **was harmed; and**
- 6. That** [*name of defendant*]'s **conduct was a substantial factor in causing** [*name of plaintiff*]'s **harm.**

[Entry can be on, above, or below the surface of the land.]

[Entry may occur indirectly, such as by causing vibrations that damage the land or property on the land.]

New September 2003

Nominal damages alone are not available in cases involving intangible intrusions such as noise and vibrations; proof of actual damage to the property is required: "[T]he rule is that actionable trespass may not be predicated upon nondamaging noise, odor, or light intrusion... ." (*San Diego Gas & Electric Co. v. Superior Court* (1996) 13 Cal.4th 893, 936 [55 Cal.Rptr.2d 724, 920 P.2d 669] , internal citation omitted.)

"Whether an activity is ultrahazardous is a question of law to be determined by the court." (*Smith v. Lockheed Propulsion Co.* (1967) 247 Cal.App.2d 774, 785 [56 Cal.Rptr. 128] .)

■ "[W]e conclude that the rule of the Restatement is sound, and that in this state there is no liability for a trespass unless the trespass is intentional, the result of recklessness or negligence, or the result of engaging in an extra-hazardous activity." (*Gallin v. Poulou* (1956) 140 Cal.App.2d 638, 645 [295 P.2d 958] .)

■ "Section 520 of the Restatement of Torts defines ultrahazardous activity as follows: 'An activity is ultrahazardous if it (a) necessarily involves a risk of serious harm to the person, land or chattels of others which cannot be eliminated by the exercise of the utmost care, and (b) is not a matter of common usage.' California has apparently accepted the Restatement definition." (*Smith v. Lockheed Propulsion Co.*, *supra*, 247 Cal.App.2d at p. 785 .)

■ "Trespass may be 'by personal intrusion of the wrongdoer or by his failure to leave; by throwing or placing something on the land; or by causing the entry of some other person. ...' ' A trespass may be on the surface of the land, above it, or below it. The migration of pollutants from one property to another may constitute a trespass, a nuisance, or both." (*Martin Marietta Corp. v. Insurance Co. of North America* (1995) 40 Cal.App.4th 1113, 1132 [47 Cal.Rptr.2d 670] , internal citations omitted.)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 693-695

2 Levy et al., California Torts, Ch. 17, *Nuisance and Trespass*, § 17.20 (Matthew Bender)

48 *California Forms of Pleading and Practice*, Ch. 550, *Trespass*, § 550.15 (Matthew Bender)

1 California Civil Practice: Torts (Thomson West) §§ 18:1, 18:4-18:8, 18:10

Publisher's Notes

There is no BAJI instruction on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property LawTortsInherently Dangerous ActivitiesReal Property LawTortsTrespass to Real PropertyTortsPremises Liability & PropertyTrespassGeneral OverviewTortsPremises Liability & PropertyTrespassElementsTortsStrict LiabilityAbnormally Dangerous ActivitiesGeneral Overview



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CHAPTER 20 California Judicial Council Trespass Instructions

3-20 California Forms of Jury Instruction CACI 2002

CACI 2002 Trespass to Timber (Civ. Code, § 3346; Code Civ. Proc., § 733)

[*Name of plaintiff*] claims that [*name of defendant*] trespassed on [his/her/its] property and [cut down or damaged trees/took timber]. To establish this claim, [*name of plaintiff*] must prove all of the following:

- 1. That [*name of plaintiff*] [owned/leased/occupied/controlled] the property;**
- 2. That [*name of defendant*] intentionally, recklessly, or negligently entered [*name of plaintiff*]'s property and [cut down or damaged trees/took timber] located on the property;**
- 3. That [*name of plaintiff*] did not give permission to [cut down or damage the trees/take timber] [or that [*name of defendant*] exceeded [*name of plaintiff*]'s permission];**
- 4. That [*name of plaintiff*] was harmed; and**
- 5. That [*name of defendant*]'s conduct was a substantial factor in causing [*name of plaintiff*]'s harm.**

New September 2003

Note that the affirmative defense of reliance on a survey could be raised by defendant.

■ *Civil Code section 3346* provides, in part: "For wrongful injuries to timber, trees, or underwood upon the land of another, or removal thereof, the measure of damages is three times such sum as would compensate for the actual detriment"

■ *Code of Civil Procedure section 733* provides: "Any person who cuts down or carries off any wood or underwood, tree, or timber ... or otherwise injures any tree or timber on the land of another person ... is liable to the owner of such land ... for treble the amount of damages which may be assessed therefor, in a civil action, in any Court having jurisdiction."

■ "Although an award of double the actual damages is mandatory under section 3346, the court retains discretion whether to triple them under that statute or *Code of Civil Procedure section 733*. [P] 'So, the effect of section 3346 as amended, read together with section 733, is that the Legislature intended, insofar as wilful and malicious trespass is concerned under either section, to leave the imposition of treble damages discretionary with the court, but to place a floor upon that discretion at double damages which must be applied whether the trespass be wilful and malicious or casual and involuntary, etc. There are now three measures of damages applicable to the pertinent types of trespass: (1) for wilful and malicious trespass the court may impose treble damages but must impose double damages; (2) for casual and involuntary trespass, etc., the court must impose double damages; and (3) for trespass under authority actual damages.' " (*Ostling v. Loring* (1994) 27 Cal.App.4th 1731, 1742 [33 Cal.Rptr.2d 391] , internal citation omitted.)

■ The damages provisions in sections 3346 and 733 must be "treated as penal and punitive." (*Baker v. Ramirez* (1987) 190 Cal.App.3d 1123, 1138 [235 Cal.Rptr. 857] , internal citation omitted.)

■ " 'However, due to the penal nature of these provisions, the damages should be neither doubled nor tripled under section 3346 if punitive damages are awarded under section 3294. That would amount to punishing the defendant twice and is not necessary to further the policy behind section 3294 of educating blunderers (persons who mistake location of boundary lines) and discouraging rogues (persons who ignore boundary lines).' " (*Hassoldt v. Patrick Media Group, Inc.* (2000) 84 Cal.App.4th 153, 169 [100 Cal.Rptr.2d 662] , internal citations omitted.)

■ "Treble damages could only be awarded under [section 3346] where the wrongdoer intentionally acted wilfully or maliciously. The required intent is one to vex, harass or annoy, and the existence of such intent is a question of fact for the trial court." (*Sills v. Siller* (1963) 218 Cal.App.2d 735, 743 [32 Cal.Rptr. 621] , internal citation omitted.)

■ "Although neither section [3346 or 733] expressly so provides, it is now settled that to warrant such an award of treble damages it must be established that the wrongful act was willful and malicious." (*Caldwell v. Walker* (1963) 211 Cal.App.2d 758, 762 [27 Cal.Rptr. 675] , internal citations omitted.)

■ "A proper and helpful analogue here is the award of exemplary damages under *section 3294 of the Civil Code* when a defendant has been guilty, inter alia, of 'malice, express or implied.' " (*Caldwell, supra*, 211 Cal.App.2d at pp. 763-764 .)

■ "Diminution in market value ... is not an absolute limitation; several other theories are available to fix appropriate compensation for the plaintiff's loss. ... [P] One alternative measure of damages is the cost of restoring the property to its condition prior to the injury. Courts will normally not award costs of restoration if they exceed the diminution in the value of the property; the plaintiff may be awarded the lesser of the two amounts." (*Heninger v. Dunn* (1980) 101 Cal.App.3d 858, 862 [162 Cal.Rptr. 104] , internal citations omitted.)

■ "The rule precluding recovery of restoration costs in excess of diminution in value is, however, not of invariable application. Restoration costs may be awarded even though they exceed the decrease in

market value if 'there is a reason personal to the owner for restoring the original condition,' or 'where there is reason to believe that the plaintiff will, if fact, make the repairs.' " (*Heninger, supra*, 101 Cal.App.3d at p. 863 , internal citations omitted.)

■ "Courts have stressed that only reasonable costs of replacing destroyed trees with identical or substantially similar trees may be recovered." (*Heninger, supra*, 101 Cal.App.3d at p. 865 .)

Secondary Sources

2 Levy et al., *California Torts*, Ch. 17, *Nuisance and Trespass*, § 17.20 (Matthew Bender)

48 *California Forms of Pleading and Practice*, Ch. 550, *Trespass*, § 550.10 (Matthew Bender)

22 *California Points and Authorities*, Ch. 225, *Trespass*, § 225.161 *et seq.* (Matthew Bender)

Publisher's Notes

There is no BAJI instruction on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsDamagesCompensatory DamagesProperty DamageGeneral OverviewTortsPremises Liability & PropertyTrespassRemediesDamagesCompensatory DamagesTortsPremises Liability & PropertyTrespassRemediesDamagesPunitive Damages



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CHAPTER 20 California Judicial Council Trespass Instructions

3-20 California Forms of Jury Instruction CACI 2003

CACI 2003 Treble Damages--Timber

[*Name of plaintiff*] **also claims that [*name of defendant*]'s conduct in cutting down, damaging, or harvesting [*name of plaintiff*]'s trees was intentional and despicable.**

To establish this claim, [*name of plaintiff*] must prove that [*name of defendant*] intended to harm [him/her/it] and acted willfully or maliciously with the intent to vex, harass, or annoy.

New September 2003

Directions for Use

Read this instruction only if plaintiff is seeking treble damages. The judge should ensure that this finding is noted on the special verdict form.

Sources and Authority

- *Civil Code section 3346(a)* provides: "For wrongful injuries to timber, trees, or underwood upon the land of another, or removal thereof, the measure of damages is three times such sum as would compensate for the actual detriment, except that where the trespass was casual or involuntary, or that the defendant in any action brought under this section had probable cause to believe that the land on which the trespass was committed was his own or the land of the person in whose service or by whose direction the act was done, the measure of damages shall be twice the sum as would compensate for the actual detriment, and excepting further that where the wood was taken by the authority of highway officers for the purpose of repairing a public highway or bridge upon the land or adjoining it, in which case judgment shall only be given in a sum equal to the actual detriment."

■ *Code of Civil Procedure* section 733 provides, in part: "Any person who cuts down or carries off any wood or underwood, tree, or timber ... or otherwise injures any tree or timber on the land of another person ... is liable to the owner of such land ... for treble the amount of damages which may be assessed therefor, in a civil action, in any Court having jurisdiction."

■ The damages provisions in sections 3346 and 733 must be "treated as penal and punitive." (*Baker v. Ramirez* (1987) 190 Cal.App.3d 1123, 1138 [235 Cal.Rptr. 857] , internal citation omitted.)

■ " 'However, due to the penal nature of these provisions, the damages should be neither doubled nor tripled under section 3346 if punitive damages are awarded under section 3294. That would amount to punishing the defendant twice and is not necessary to further the policy behind section 3294 of educating blunderers (persons who mistake location of boundary lines) and discouraging rogues (persons who ignore boundary lines).' " (*Hassoldt v. Patrick Media Group, Inc.* (2000) 84 Cal.App.4th 153, 169 [100 Cal.Rptr.2d 662] , internal citations omitted.)

■ "Although an award of double the actual damages is mandatory under section 3346, the court retains discretion whether to triple them under that statute or *Code of Civil Procedure* section 733. [P] 'So, the effect of section 3346 as amended, read together with section 733, is that the Legislature intended, insofar as wilful and malicious trespass is concerned under either section, to leave the imposition of treble damages discretionary with the court, but to place a floor upon that discretion at double damages which must be applied whether the trespass be wilful and malicious or casual and involuntary, etc. There are now three measures of damages applicable to the pertinent types of trespass: (1) for wilful and malicious trespass the court may impose treble damages but must impose double damages; (2) for casual and involuntary trespass, etc., the court must impose double damages; and (3) for trespass under authority actual damages.' " (*Ostling v. Loring* (1994) 27 Cal.App.4th 1731, 1742 [33 Cal.Rptr.2d 391] , internal citation omitted.)

■ "Treble damages could only be awarded under [section 3346] where the wrongdoer intentionally acted wilfully or maliciously. The required intent is one to vex, harass or annoy, and the existence of such intent is a question of fact for the trial court." (*Sills v. Siller* (1963) 218 Cal.App.2d 735, 743 [32 Cal.Rptr. 621] , internal citation omitted.)

■ "Although neither section [3346 or 733] expressly so provides, it is now settled that to warrant such an award of treble damages it must be established that the wrongful act was willful and malicious." (*Caldwell v. Walker* (1963) 211 Cal.App.2d 758, 762 [27 Cal.Rptr. 675] , internal citations omitted.)

■ "A proper and helpful analogue here is the award of exemplary damages under *section 3294 of the Civil Code* when a defendant has been guilty, inter alia, of 'malice, express or implied.' " (*Caldwell, supra*, 211 Cal.App.2d at pp. 763-764 .)

■ "Under [*Health and Safety Code*] *section 13007*, a tortfeasor generally is liable to the owner of property for damage caused by a negligently set fire. '[T]he statute places no restrictions on the type of property damage that is compensable.' Such damages might include, for example, damage to structures, to movable personal property, to soil, or to undergrowth; damages may even include such elements as the lost profits of a business damaged by fire. If the fire also damages trees--that is, causes 'injuries to ... trees ... upon the land of another'--then the actual damages recoverable under *section 13007* may be doubled (for negligently caused fires) or trebled (for fires intended to spread to the plaintiff's property) pursuant to *section 3346*." (*Kelly v. CB&I Constructors, Inc.* (2009) 179 Cal.App.4th 442, 461 [102 Cal.Rptr.3d 32] , internal citations omitted; but see *Gould v. Madonna* (1970) 5 Cal.App.3d 404,

407-408 [85 Cal.Rptr. 457] [Civ. Code, § 3346 does not apply to fires negligently set; *Health & Saf. Code*, § 13007 provides sole remedy].)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, § 1733

31 *California Forms of Pleading and Practice*, Ch. 350, *Logs and Timber*, § 350.12 (Matthew Bender)

22 *California Points and Authorities*, Ch. 225, *Trespass*, § 225.161 *et seq.* (Matthew Bender)

Publisher's Notes

There is no BAJI instruction on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Remedies Damages Punitive Damages Torts Damages Punitive Damages Conduct Supporting Awards Torts Premises Liability & Property Trespass Remedies Damages Award Calculations Torts Premises Liability & Property Trespass Remedies Damages Punitive Damages



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CHAPTER 20 California Judicial Council Trespass Instructions

3-20 California Forms of Jury Instruction CACI 2004

CACI 2004 Intentional Entry Explained

[An entry is intentional if a person knowingly goes onto the property of another or knowingly causes something to go onto that property.]

[An entry is [also] intentional if a person engages in conduct that is substantially certain to cause something to go onto that property.]

[An entry is [also] intentional even if a person mistakenly thinks he or she has a right to come onto that property.]

New September 2003

Directions for Use

This instruction is not intended for general use in every case. Read a bracketed sentence or sentences only in unusual cases where an issue regarding the entry is raised and further explanation is required.

Sources and Authority

- "The doing of an act which will to a substantial certainty result in the entry of foreign matter upon another's land suffices for an intentional trespass to land upon which liability may be based. It was error to instruct the jury that an 'intent to harm' was required." (*Roberts v. Permanente Corp.* (1961) 188 Cal.App.2d 526, 530-531 [10 Cal.Rptr. 519] , internal citation omitted.)

- An instruction on the definition of intentional trespass is considered a proper statement of law.

Failure to give this instruction on request where appropriate is error. (*Staples v. Hoefke* (1987) 189 Cal.App.3d 1397, 1407 [235 Cal.Rptr. 165] .)

■ "As Prosser and Keeton on Torts ... explained, '[t]he intent required as a basis for liability as a trespasser is simply an intent to be at the place on the land where the trespass allegedly occurred The defendant is liable for an intentional entry although he has acted in good faith, under the mistaken belief, however reasonable, that he is committing no wrong.' " (*Miller v. National Broadcasting Corp.* (1986) 187 Cal.App.3d 1463, 1480-1481 [232 Cal.Rptr. 668] , internal citation omitted.)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 663, 664

2 Levy et al., *California Torts, Ch. 17, Nuisance and Trespass*, § 17.20[3] (Matthew Bender)

48 *California Forms of Pleading and Practice, Ch. 550, Trespass*, § 550.15 (Matthew Bender)

22 *California Points and Authorities, Ch. 225, Trespass*, § 225.40 (Matthew Bender)

1 California Civil Practice: Torts (Thomson West) § 18:4

Publisher's Notes

There is no BAJI instruction on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property LawTortsTrespass to Real PropertyTortsPremises Liability & PropertyTrespassGeneral
OverviewTortsPremises Liability & PropertyTrespassElements



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CHAPTER 20 California Judicial Council Trespass Instructions

3-20 California Forms of Jury Instruction CACI 2005

CACI 2005 Affirmative Defense--Necessity

[Name of defendant] claims that [he/she/it] is not responsible for [name of plaintiff]'s harm, if any, because the entry on to [name of plaintiff]'s property was lawful. To succeed, [name of defendant] must prove that it was necessary, or reasonably appeared to [him/her/it] to be necessary, to enter the land to prevent serious harm to a person or property.

New September 2003; Revised October 2008

Sources and Authority

■ "[I]t has long [been] recognized that '[n]ecessity often justifies an action which would otherwise constitute a trespass, as where the act is prompted by the motive of preserving life or property and reasonably appears to the actor to be necessary for that purpose.' " (*People v. Ray* (1999) 21 Cal.4th 464, 473 [88 Cal.Rptr.2d 1, 981 P.2d 928] , internal citations omitted.)

■ *Restatement Second of Torts, section 197* provides:

(1) One is privileged to enter or remain on land in the possession of another if it is or reasonably appears to be necessary to prevent serious harm to
(a) the actor, or his land or chattels, or

(b) the other or a third person, or the land or chattels of either, unless the actor knows or has reason to know that the one for whose benefit he enters is unwilling that he shall take such action.

(2) Where the entry is for the benefit of the actor or a third person, he is subject to liability for any harm done in the exercise of the privilege stated in Subsection (1) to any legally protected interest of the possessor in the land or connected with it, except where the threat of harm to avert which the entry is made is caused by the tortious conduct or contributory negligence of the possessor.

■ This Restatement section was approved in *People v. Ray, supra*, 21 Cal.4th at p. 474 .

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 663, 664

2 Levy et al., *California Torts, Ch. 17, Nuisance and Trespass*, § 17.22[2] (Matthew Bender)

48 *California Forms of Pleading and Practice, Ch. 550, Trespass*, §§ 550.22, 550.51 (Matthew Bender)

22 California Points and Authorities, Ch. 225, *Trespass*, §§ 225.220, 225.221 (Matthew Bender)

1 California Civil Practice: Torts (Thomson West) § 18:11

Publisher's Notes

There is no BAJI instruction on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property LawTortsTrespass to Real PropertyTortsPremises Liability & PropertyTrespassDefensesPrivilege



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California Forms of Jury Instruction

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CHAPTER 20 California Judicial Council Trespass Instructions

3-20 California Forms of Jury Instruction CACI 2006-CACI 2019

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CACI 2006Reserved for Future Use



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California Forms of Jury Instruction

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CHAPTER 20 California Judicial Council Trespass Instructions

3-20 California Forms of Jury Instruction CACI 2020

CACI 2020 Public Nuisance--Essential Factual Elements

[*Name of plaintiff*] **claims that [he/she] suffered harm because [*name of defendant*] created a nuisance. To establish this claim, [*name of plaintiff*] must prove all of the following:**

1. That [*name of defendant*], by acting or failing to act, created a condition that [*insert one or more of the following:*]

[was harmful to health;] [or]

[was indecent or offensive to the senses;] [or]

[was an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property;] [or]

[unlawfully obstructed the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway;]

2. That the condition affected a substantial number of people at the same time;

3. That an ordinary person would be reasonably annoyed or disturbed by the condition;

4. That the seriousness of the harm outweighs the social utility of [*name of defendant*]'s conduct;

5. That [*name of plaintiff*] did not consent to [*name of defendant*]'s conduct;

6. That [*name of plaintiff*] suffered harm that was different from the type of harm suffered by the

general public; and

7. That [name of defendant]'s conduct was a substantial factor in causing [name of plaintiff]'s harm.

New September 2003; Revised December 2007

Directions for Use

Private nuisance concerns injury to a property interest. Public nuisance is not dependent on an interference with rights of land: "[A] private nuisance is a civil wrong based on disturbance of rights in land while a public nuisance is not dependent upon a disturbance of rights in land but upon an interference with the rights of the community at large." (*Venuto v. Owens-Corning Fiberglas Corp.* (1971) 22 Cal.App.3d 116, 124 [99 Cal.Rptr. 350] , internal citation omitted.)

Sources and Authority

- *Civil Code* section 3479 provides: "Anything which is injurious to health, including, but not limited to, the illegal sale of controlled substances, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway, is a nuisance."

- *Civil Code* section 3480 provides: "A public nuisance is one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal."

- *Civil Code* section 3493 provides: "A private person may maintain an action for a public nuisance, if it is specially injurious to himself, but not otherwise."

- *Civil Code* section 3482 provides: "Nothing which is done or maintained under the express authority of a statute can be deemed a nuisance."

- "[T]he exculpatory effect of *Civil Code* section 3482 has been circumscribed by decisions of this court. ... " "A statutory sanction cannot be pleaded in justification of acts which by the general rules of law constitute a nuisance, unless the acts complained of are authorized by the express terms of the statute under which the justification is made, or by the plainest and most necessary implication from the powers expressly conferred, so that it can be fairly stated that the Legislature contemplated the doing of the very act which occasions the injury." ' ' (*Varjabedian v. City of Madera* (1977) 20 Cal.3d 285, 291 [142 Cal.Rptr. 429, 572 P.2d 43] , internal citation omitted.)

- "Where the nuisance alleged is not also a private nuisance as to a private individual he does not have a cause of action on account of a public nuisance unless he alleges facts showing special injury to himself in person or property of a character different in kind from that suffered by the general public." (*Venuto, supra*, 22 Cal.App.3d at p. 124 , internal citations omitted; but see *Birke v. Oakwood Worldwide* (2009) 169 Cal.App.4th 1540, 1550 [87 Cal.Rptr.3d 602] ["to the extent *Venuto* ... can be read as precluding an action to abate a public nuisance by a private individual who has suffered personal injuries as a result of the challenged condition, we believe it is an incorrect statement of the law"].)

- "Unlike the private nuisance--tied to and designed to vindicate individual ownership interests in land--the 'common' or public nuisance emerged from distinctly different historical origins. The public nuisance doctrine is aimed at the protection and redress of community interests and, at least in theory, embodies a kind of collective ideal of civil life which the courts have vindicated by equitable remedies since the beginning of the 16th century." (*People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1103 [60 Cal.Rptr.2d 277, 929 P.2d 596] .)
- "[W]hen the nuisance is a private as well as a public one, there is no requirement the plaintiff suffer damage different in kind from that suffered by the general public. That is, the plaintiff ' "does not lose his rights as a landowner merely because others suffer damage of the same kind, or even of the same degree ... ' " (*Birke, supra*, 169 Cal.App.4th at p. 1551 , internal citations omitted.)
- "Of course, not every interference with collective social interests constitutes a public nuisance. To qualify ... the interference must be both substantial and unreasonable." (*People ex rel. Gallo, supra*, 14 Cal.4th at p. 1105 .)
- "The fact that the defendants' alleged misconduct consists of omission rather than affirmative actions does not preclude nuisance liability." (*Birke, supra*, 169 Cal.App.4th at p. 1552 [citing this instruction], internal citation omitted.)
- "A nuisance may be either a negligent or an intentional tort." (*Stoiber v. Honeychuck* (1980) 101 Cal.App.3d 903, 920 [162 Cal.Rptr. 194] , internal citation omitted.)
- "An essential element of a cause of action for nuisance is damage or injury." (*Helix Land Co., Inc. v. City of San Diego* (1978) 82 Cal.App.3d 932, 950 [147 Cal.Rptr. 683] .)
- "By analogy to the rules governing tort liability, courts apply the same elements to determine liability for a public nuisance." (*People ex rel. Gallo, supra*, 14 Cal.4th at p. 1105, fn. 3 , internal citation omitted.)
- "The elements 'of a cause of action for public nuisance include the existence of a duty and causation.' Public nuisance liability 'does not hinge on whether the defendant owns, possesses or controls the property, nor on whether he is in a position to abate the nuisance; the critical question is whether the defendant created or assisted in the creation of the nuisance.' " (*Melton v. Boustred* (2010) 183 Cal.App.4th 521, 542 [107 Cal.Rptr.3d 481] , internal citations omitted.)
- " 'Where negligence and nuisance causes of action rely on the same facts about lack of due care, the nuisance claim is a negligence claim.' The nuisance claim 'stands or falls with the determination of the negligence cause of action' in such cases." (*Melton, supra*, 183 Cal.App.4th at p. 542 , internal citations omitted.)

Secondary Sources

13 Witkin, Summary of California Law (10th ed. 2005) Equity, § 133

California Real Property Remedies and Damages (Cont.Ed.Bar 2d ed.) Ch. 11, Remedies for Nuisance and Trespass, § 11.7

2 Levy et al., *California Torts*, Ch. 17, Nuisance and Trespass, §§ 17.01 -17.04, 17.06 (Matthew Bender)

34 *California Forms of Pleading and Practice*, Ch. 391, Nuisance, § 391.12 (Matthew Bender)

16 *California Points and Authorities*, Ch. 167, Nuisance, § 167.20 *et seq.* (Matthew Bender)

1 California Civil Practice: Torts (Thomson West) §§ 17:1-17:3

Publisher's Notes

There is no BAJI instruction on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property LawTortsNuisanceElementsReal Property LawTortsNuisanceTypesPublic Nuisance



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California Forms of Jury Instruction

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CHAPTER 20 California Judicial Council Trespass Instructions

3-20 California Forms of Jury Instruction CACI 2021

CACI 2021 Private Nuisance--Essential Factual Elements

[Name of plaintiff] claims that [name of defendant] interfered with [name of plaintiff]'s use and enjoyment of [his/her] land. To establish this claim, [name of plaintiff] must prove all of the following:

- 1. That [name of plaintiff] [owned/leased/occupied/controlled] the property;**
- 2. That [name of defendant], by acting or failing to act, created a condition that [insert one or more of the following:]**

[was harmful to health;] [or]

[was indecent or offensive to the senses;] [or]

[was an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property;] [or]

[unlawfully obstructed the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway;]
- 3. That this condition interfered with [name of plaintiff]'s use or enjoyment of [his/her] land;**
- 4. That [name of plaintiff] did not consent to [name of defendant]'s conduct;**
- 5. That an ordinary person would be reasonably annoyed or disturbed by [name of defendant]'s conduct;**

6. That [name of plaintiff] was harmed;

7. That [name of defendant]'s conduct was a substantial factor in causing [name of plaintiff]'s harm; and

8. That the seriousness of the harm outweighs the public benefit of [name of defendant]'s conduct.

New September 2003; Revised February 2007

Directions for Use

For instruction on control of property, see *CACI No. 1002, Extent of Control Over Premises Area*, in the Premises Liability series.

Sources and Authority

■ *Civil Code section 3479* provides: "Anything which is injurious to health, including, but not limited to, the illegal sale of controlled substances, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway, is a nuisance."

■ *Civil Code section 3482* provides: "Nothing which is done or maintained under the express authority of a statute can be deemed a nuisance."

■ "[T]he exculpatory effect of *Civil Code section 3482* has been circumscribed by decisions of this court. ... ' "A statutory sanction cannot be pleaded in justification of acts which by the general rules of law constitute a nuisance, unless the acts complained of are authorized by the express terms of the statute under which the justification is made, or by the plainest and most necessary implication from the powers expressly conferred, so that it can be fairly stated that the Legislature contemplated the doing of the very act which occasions the injury." ' " (*Varjabedian v. City of Madera* (1977) 20 Cal.3d 285, 291 [142 Cal.Rptr. 429, 572 P.2d 43] , internal citation omitted.)

■ "In distinction to trespass, liability for nuisance does not require proof of damage to the plaintiff's property; proof of interference with the plaintiff's use and enjoyment of that property is sufficient." (*San Diego Gas & Electric Co. v. Superior Court* (1996) 13 Cal.4th 893, 937 [55 Cal.Rptr.2d 724, 920 P.2d 669] .)

■ "[T]he essence of a private nuisance is its interference with the use and enjoyment of land. The activity in issue must 'disturb or prevent the comfortable enjoyment of property,' such as smoke from an asphalt mixing plant, noise and odors from the operation of a refreshment stand, or the noise and vibration of machinery." (*Oliver v. AT&T Wireless Services* (1999) 76 Cal.App.4th 521, 534 [90 Cal.Rptr.2d 491] , internal citations omitted.)

■ "Unlike public nuisance, which is an interference with the rights of the community at large, private nuisance is a civil wrong based on disturbance of rights in land. A nuisance may be both public and private, but to proceed on a private nuisance theory the plaintiff must prove an injury specifically referable to the use and enjoyment of his or her land. The injury, however, need not be different in kind

from that suffered by the general public." (*Koll-Irvine Center Property Owners Assn. v. County of Orange* (1994) 24 Cal.App.4th 1036, 1041 [29 Cal.Rptr.2d 664] , internal citation omitted.)

■ "Examples of interferences with the use and enjoyment of land actionable under a private nuisance theory are legion. 'So long as the interference is substantial and unreasonable, and such as would be offensive or inconvenient to the normal person, virtually any disturbance of the enjoyment of the property may amount to a nuisance.' " (*Koll-Irvine Center Property Owners Assn., supra*, 24 Cal.App.4th at p. 1041 , internal citation omitted.)

■ "The first additional requirement for recovery of damages on a nuisance theory is proof that the invasion of the plaintiff's interest in the use and enjoyment of the land was substantial, i.e., that it caused the plaintiff to suffer 'substantial actual damage.' The Restatement recognizes the same requirement as the need for proof of 'significant harm,' which it variously defines as 'harm of importance' and a 'real and appreciable invasion of the plaintiff's interests' and an invasion that is 'definitely offensive, seriously annoying or intolerable.' The degree of harm is to be judged by an objective standard, i.e., what effect would the invasion have on persons of normal health and sensibilities living in the same community? 'If normal persons in that locality would not be substantially annoyed or disturbed by the situation, then the invasion is not a significant one, even though the idiosyncrasies of the particular plaintiff may make it unendurable to him.' This is, of course, a question of fact that turns on the circumstances of each case." (*San Diego Gas & Electric Co., supra*, 13 Cal.4th at p. 938 , internal citations omitted.)

■ "The second additional requirement for nuisance is superficially similar but analytically distinct: 'The interference with the protected interest must not only be substantial, but it must also be unreasonable', i.e., it must be 'of such a nature, duration or amount as to constitute unreasonable interference with the use and enjoyment of the land.' The primary test for determining whether the invasion is unreasonable is whether the gravity of the harm outweighs the social utility of the defendant's conduct, taking a number of factors into account. Again the standard is objective: the question is not whether the particular plaintiff found the invasion unreasonable, but 'whether reasonable persons generally, looking at the whole situation impartially and objectively, would consider it unreasonable.' And again this is a question of fact: 'Fundamentally, the unreasonableness of intentional invasions is a problem of relative values to be determined by the trier of fact in each case in the light of all the circumstances of that case.' " (*San Diego Gas & Electric Co., supra*, 13 Cal.4th at pp. 938-939 , internal citations omitted.)

■ "The fact that the defendants' alleged misconduct consists of omission rather than affirmative actions does not preclude nuisance liability." (*Birke v. Oakwood Worldwide* (2009) 169 Cal.App.4th 1540, 1552 [87 Cal.Rptr.3d 602] , internal citations omitted.)

■ "A nuisance may be either a negligent or an intentional tort." (*Stoiber v. Honeychuck* (1980) 101 Cal.App.3d 903, 920 [162 Cal.Rptr. 194] , internal citation omitted.)

■ *Restatement Second of Torts*, section 822 provides:

One is subject to liability for a private nuisance if, but only if, his conduct is a legal cause of an invasion of another's interest in the private use and enjoyment of land, and the invasion is either

(a) intentional and unreasonable, or

(b) unintentional and otherwise actionable under the rules controlling liability for negligent or reckless conduct, or for abnormally dangerous conditions or activities.

■ *Restatement Second of Torts, section 826* provides:

An intentional invasion of another's interest in the use and enjoyment of land is unreasonable if

- (a) the gravity of the harm outweighs the utility of the actor's conduct, or
- (b) the harm caused by the conduct is serious and the financial burden of compensating for this and similar harm to others would not make the continuation of the conduct not feasible.

■ *Restatement Second of Torts, section 827* provides:

In determining the gravity of the harm from an intentional invasion of another's interest in the use and enjoyment of land, the following factors are important:

- (a) the extent of the harm involved;
- (b) the character of the harm involved;
- (c) the social value that the law attaches to the type of use or enjoyment invaded;
- (d) the suitability of the particular use or enjoyment invaded to the character of the locality; and
- (e) the burden on the person harmed of avoiding the harm.

■ *Restatement Second of Torts, section 828* provides:

In determining the utility of conduct that causes an intentional invasion of another's interest in the use and enjoyment of land, the following factors are important:

- (a) the social value that the law attaches to the primary purpose of the conduct;
- (b) the suitability of the conduct to the character of the locality; and
- (c) the impracticability of preventing or avoiding the invasion.

Secondary Sources

2 Levy et al., *California Torts, Ch. 17, Nuisance and Trespass*, §§ 17.01 -17.05 (Matthew Bender)

34 *California Forms of Pleading and Practice, Ch. 391, Nuisance*, § 391.13 (Matthew Bender)

16 *California Points and Authorities, Ch. 167, Nuisance*, § 167.20 (Matthew Bender)

California Civil Practice: Torts (Thomson West) §§ 17:1-17:2, 17:4

Publisher's Notes

This instruction covers issues presented in BAJI No. 8.60.

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property LawTortsNuisanceElementsReal Property LawTortsNuisanceTypesPrivate Nuisance



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CHAPTER 20 California Judicial Council Trespass Instructions

3-20 California Forms of Jury Instruction CACI 2022-CACI 2029

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CHAPTER 20 California Judicial Council Trespass Instructions

3-20 California Forms of Jury Instruction CACI 2030

CACI 2030 Affirmative Defense--Statute of Limitations--Trespass or Private Nuisance

[*Name of defendant*] **contends that** [*name of plaintiff*]'s lawsuit was not filed within the time set by law. To succeed on this defense, [*name of defendant*] **must prove that** [*name of plaintiff*]'s claimed harm occurred before [*insert date three years before date of filing*].

[If [*name of defendant*] **proves that** [*name of plaintiff*]'s claimed harm occurred before [*insert date three years before date of filing*], the lawsuit was still filed on time if [*name of plaintiff*] **proves that the** [trespass/nuisance] **is continuous. A** [trespass/nuisance] **is continuous if it can be discontinued. Among the factors that indicate that the** [trespass/nuisance] **can be discontinued are the following:**

- (a) That the [trespass/nuisance] is currently continuing;
- (b) That the impact of the condition will vary over time;
- (c) That the [trespass/nuisance] can be discontinued at any time, in a reasonable manner, and for reasonable cost, considering the benefits and detriments if it is discontinued.

[You must consider the continuous nature of the damage to the property that a nuisance causes, not the continuous nature of the acts causing the nuisance to occur.]]

New April 2008

Directions for Use

This instruction is for use if the defendant claims that the plaintiff's action was not filed within the applicable three-year period for injury to real property. (See *Code Civ. Proc.*, § 338(b).) This instruction

may be used for a permanent trespass other than an action for damages for wrongful damage to timber, to which a five-year statute applies. (See *Civ. Code*, § 3346(c).) It may also be used for a permanent private nuisance. There is no limitation period for a public nuisance. (See *Civ. Code*, § 3490.) There is also essentially no statute of limitation for a continuing trespass or continuing private nuisance, but damages for future harm are not recoverable. (See *Lyles v. State of California* (2007) 153 Cal.App.4th 281, 291 [62 Cal.Rptr.3d 696] [nuisance]; *Starrh & Starrh Cotton Growers v. Aera Energy LLC* (2007) 153 Cal.App.4th 583, 592 [63 Cal.Rptr.3d 165] [trespass].)

Include the optional second paragraph if there is an issue of fact as to whether the trespass or nuisance is permanent or continuous. If applicable, include the last sentence in the case of a nuisance.

If the plaintiff alleges that the delayed-discovery rule applies to avoid the limitation defense, *CACI No. 455, Statute of Limitations--Delayed Discovery*, may be adapted for use.

See also *CACI No. 3903F, Damage to Real Property (Economic Damage)*, and *CACI No. 3903G, Loss of Use of Real Property (Economic Damage)*.

Sources and Authority

- *Code of Civil Procedure* section 338 provides in part:

Within three years:

- (b) An action for trespass upon or injury to real property.

- *Civil Code* section 3490 provides: "No lapse of time can legalize a public nuisance, amounting to an actual obstruction of public right."

■ "[A] trespass may be continuing or permanent. A permanent trespass is an intrusion on property under circumstances that indicate an intention that the trespass shall be permanent. In these cases, the law considers the wrong to be completed at the time of entry and allows recovery of damages for past, present, and future harm in a single action, generally the diminution in the property's value. The cause of action accrues and the statute of limitations begins to run at the time of entry. ... [P] In contrast, a continuing trespass is an intrusion under circumstances that indicate the trespass may be discontinued or abated. In these circumstances, damages are assessed for present and past damages only; prospective damages are not awarded because the trespass may be discontinued or abated at some time, ending the harm. ... Continuing trespasses are essentially a series of successive injuries, and the statute of limitations begins anew with each injury. In order to recover for all harm inflicted by a continuing trespass, the plaintiff is required to bring periodic successive actions." (*Starrh & Starrh Cotton Growers, supra*, 153 Cal.App.4th at p. 592 .)

■ "Two distinct classifications have emerged in nuisance law which determine the remedies available to injured parties and the applicable statute of limitations. On the one hand, permanent nuisances are of a type where 'by one act a permanent injury is done, [and] damages are assessed once for all.' ... In such cases, plaintiffs ordinarily are required to bring one action for all past, present and future damage within three years after the permanent nuisance is erected. The statutory period is shorter for claims against public entities. (*Gov. Code*, § 911.2.) Damages are not dependent upon any subsequent use of the property but are complete when the nuisance comes into existence. [P] On the other hand, if a nuisance is a use which may be discontinued at any time, it is considered continuing in character and persons harmed by it may bring successive actions for damages until the nuisance is abated. Recovery is limited, however, to actual injury suffered prior to commencement of each action. Prospective damages are unavailable." (*Baker v. Burbank-Glendale-Pasadena Airport Auth.* (1985) 39 Cal.3d 862, 868-869 [218 Cal.Rptr. 293, 705 P.2d 866] , internal citations and footnotes omitted.)

- "Historically, the application of the statute of limitations for trespass has been the same as for nuisance and has depended on whether the trespass has been continuing or permanent." (*Mangini v. Aerojet-General Corp.* (1991) 230 Cal.App.3d 1125, 1148 [281 Cal.Rptr. 827] .)
- "[G]enerally the principles governing the permanent or continuing nature of a trespass or nuisance are the same and the cases discuss the two causes of action without distinction." (*Starrh & Starrh Cotton Growers*, *supra*, 153 Cal.App.4th at p. 594 .)
- "Generally, whether a trespass is continuing or permanent is a question of fact properly submitted to the jury. A trial court may remove the issue of fact from the jury by directed verdict only if there is no evidence tending to prove the case of the party opposing the motion." (*Starrh & Starrh Cotton Growers*, *supra*, 153 Cal.App.4th at p. 597 , internal citations omitted.)
- "[T]he key question [in determining whether a trespass is continuous or permanent] is whether the trespass or nuisance can be discontinued or abated and there are a number of tests used to answer this question. A respected legal treatise summarizes the various tests as follows: '[W]hether (1) the offense activity is currently continuing, which indicates that the nuisance is continuing, (2) the impact of the condition will vary over time, indicating a continuing nuisance, or (3) the nuisance can be abated at any time, in a reasonable manner and for reasonable cost, and is feasible by comparison of the benefits and detriments to be gained by abatement.' " (*Starrh & Starrh Cotton Growers*, *supra*, 153 Cal.App.4th at pp. 593-594 , citing 8 Miller & Starr, Cal. Real Estate (3d ed. 2000) § 22.39, pp. 148-149.)
- "The jury's conclusion that it was unknown whether the soil contamination could be abated by reasonable means at a reasonable cost means that plaintiff had failed to prove her claims of continuing nuisance and trespass." (*McCoy v. Gustafson* (2009) 180 Cal.App.4th 56, 86 [103 Cal.Rptr.3d 37] .)
- "[T]he 'continuing' nature of a nuisance 'refers to the continuing damage caused by the offensive condition, not to the acts causing the offensive condition to occur.' " (*Lyles*, *supra*, 153 Cal.App.4th at p. 291 , internal citation omitted.)
- "[A] cause of action for damage to real property accrues when the defendant's act causes ' *immediate and permanent injury*' to the property or, to put it another way, when there is '[a]ctual and appreciable harm' to the property." (*Siegel v. Anderson Homes, Inc.* (2004) 118 Cal.App.4th 994, 1005 [13 Cal.Rptr.3d 462] , original italics, internal citations omitted.)
- "Property damage cases ... are different from medical malpractice cases in the sense that, when property is damaged, there is ordinarily some wrongful cause. Thus, when one's property is damaged, one should reasonably suspect that someone has done something wrong to him and, accordingly, be charged with knowledge of the information that would have been revealed by an investigation. That particular property damage could result from natural causes does not mean that the same property damage could result only from natural causes." (*Lyles*, *supra*, 153 Cal.App.4th at pp. 287-288 .)
- "The traditional rule in tort cases is that the statute of limitations begins to run upon the *occurrence* of the last fact essential to the cause of action. Although sometimes harsh, the fact that plaintiff is neither aware of his cause of action nor of the identity of a wrongdoer will not toll the statute. [P] The harshness of this rule has been ameliorated in some cases where it is manifestly unjust to deprive plaintiffs of a cause of action before they are aware that they have been injured. This modified rule has been applied to latent defects in real property and improvements. In the case of such latent defects the statute of limitations begins to run only when 'noticeable damage occurs.' " (*Leaf v. City of San Mateo* (1980) 104 Cal.App.3d 398, 406-407 [163 Cal.Rptr. 711] , internal citations omitted, disapproved on another ground in *Trope v. Katz* (1995) 11 Cal.4th 274, 292 [45 Cal.Rptr.2d 241, 902 P.2d 259] , original italics.)

Secondary Sources

2 Levy et al., *California Torts, Ch. 17, Nuisance and Trespass, § 17.09[5]* (Matthew Bender)

Brown et al., *California Practice Guide: Civil Procedure Before Trial* (The Rutter Group) PP 6:462-6:462.2

2 California Real Property Remedies and Damages, Ch. 11, *Remedies for Nuisance and Trespass* (Cont.Ed.Bar 2d ed.) §§ 11.38-11.40

1 *California Forms of Pleading and Practice, Ch. 11, Adjoining Landowners, § 11.24* (Matthew Bender)

22 *California Points and Authorities, Ch. 225, Trespass, §§ 225.240 -225.245* (Matthew Bender)

16 *California Points and Authorities, Ch. 167, Nuisance, § 167.44* (Matthew Bender)

Publisher's Notes

There is no BAJI instruction on this subject.



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California Forms of Jury Instruction

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CHAPTER 20 California Judicial Council Trespass Instructions

3-20 California Forms of Jury Instruction CACI 2031-CACI 2099

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California Forms of Jury Instruction

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CHAPTER 20 California Judicial Council Trespass Instructions

3-20 California Forms of Jury Instruction CACI VF-2000

CACI VF-2000 Trespass

We answer the questions submitted to us as follows:

1. Did [*name of plaintiff*] [own/lease/occupy/control] the property?

_____ Yes _____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Did [*name of defendant*] [intentionally or negligently enter [*name of plaintiff*]'s property] [or] [intentionally or negligently cause [another person/[*insert name of thing*]] to enter [*name of plaintiff*]'s property]?

_____ Yes _____ No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Did [*name of defendant*] enter the property without [*name of plaintiff*]'s permission?

_____ Yes _____ No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Was [name of defendant]'s [entry/conduct] a substantial factor in causing [actual] harm to [name of plaintiff]?

_____ Yes _____ No

If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. What are [name of plaintiff]'s damages?

[a. Past economic loss

[lost earnings..... \$_____].....

[lost profits..... \$_____].....

[medical expenses..... \$_____].....

[other past economic loss..... \$_____].....

..... **Total Past Economic Damages: \$_____]**

[b. Future economic loss

[lost earnings..... \$_____].....

[lost profits..... \$_____].....

[medical expenses..... \$_____].....

[other future economic loss..... \$_____].....

..... **Total Future Economic Damages: \$_____]**

[c. Past noneconomic loss, including [physical pain/mental suffering:]..... \$_____]

[d. Future noneconomic loss, including [physical pain/mental suffering:]..... \$_____]

..... **TOTAL \$_____**

Signed: _____
Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the [clerk/bailiff/judge].

New September 2003; Revised February 2005, April 2007

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on *CACI No. 2000, Trespass*.

If specificity is not required, users do not have to itemize all the damages listed in question 5 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

If there is an issue regarding whether the defendant exceeded the scope of plaintiff's consent, question 3 can be modified, as in element 3 in *CACI No. 2000*.

This form may be modified if the jury is being given the discretion under *Civil Code section 3288* to award prejudgment interest on specific losses that occurred prior to judgment.

Publisher's Notes

There is no BAJI verdict form on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Verdicts Special Verdicts Real Property Law Torts Trespass to Real
Property Torts Premises Liability & Property Trespass Elements Torts Premises Liability &
Property Trespass Remedies Damages General Overview



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CHAPTER 20 California Judicial Council Trespass Instructions

3-20 California Forms of Jury Instruction CACI VF-2001

CACI VF-2001 Trespass--Affirmative Defense--Necessity

We answer the questions submitted to us as follows:

1. Did [name of plaintiff] [own/lease/occupy/control] the property?

_____ Yes _____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Did [name of defendant] [intentionally or negligently enter [name of plaintiff]'s property] [or] [intentionally or negligently cause [another person/[insert name of thing]] to enter [name of plaintiff]'s property]?

_____ Yes _____ No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Did [name of defendant] enter the property without [name of plaintiff]'s permission?

_____ Yes _____ No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Was it necessary, or did it reasonably appear to [name of defendant] to be necessary, to enter the land to prevent serious harm to a person or property?

_____ Yes _____ No

If your answer to question 4 is no, then answer question 5. If you answered yes, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. Was [name of defendant]'s [entry/conduct] a substantial factor in causing [actual] harm to [name of plaintiff]?

_____ Yes _____ No

If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. What are [name of plaintiff]'s damages?

[a. Past economic loss

[lost earnings \$_____].....

[lost profits \$_____].....

[medical expenses \$_____].....

[other past economic loss \$_____].....

..... Total Past Economic Damages: \$_____]

[b. Future economic loss

[lost earnings \$_____].....

[lost profits \$_____].....

[medical expenses \$_____].....

[other future economic loss \$_____].....

..... Total Future Economic Damages: \$_____]

[c. Past noneconomic loss, including [physical pain/mental suffering:] \$_____]

[d. Future noneconomic loss, including [physical pain/mental suffering:] \$_____]

..... TOTAL \$_____

Signed: _____
Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the clerk/bailiff/judge].

New September 2003; Revised February 2005, April 2007, October 2008

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on *CACI No. 2000, Trespass*, and *CACI No. 2005, Affirmative Defense--Necessity*.

If there is an issue regarding whether the defendant exceeded the scope of plaintiff's consent, question 3 can be modified, as in element 3 in *CACI No. 2000*.

If specificity is not required, users do not have to itemize all the damages listed in question 6 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

This form may be modified if the jury is being given the discretion under *Civil Code section 3288* to award prejudgment interest on specific losses that occurred prior to judgment.

Publisher's Notes

There is no BAJI verdict form on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Verdicts Special Verdicts Real Property Law Torts Trespass to Real Property Torts Premises Liability & Property Trespass Defenses Privilege Torts Premises Liability & Property Trespass Elements Torts Premises Liability & Property Trespass Remedies Damages General Overview



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CHAPTER 20 California Judicial Council Trespass Instructions

3-20 California Forms of Jury Instruction CACI VF-2002

CACI VF-2002 Trespass--Extrahazardous Activities

We answer the questions submitted to us as follows:

1. Did [*name of plaintiff*] [own/lease/occupy/control] the property?

_____ Yes _____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Was [*name of defendant*] engaged in [*insert extrahazardous activity*]?

_____ Yes _____ No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Did [*insert extrahazardous activity*] cause [*insert thing*] to enter [*name of plaintiff*]'s property?

_____ Yes _____ No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Did [*name of plaintiff*] give permission for the entry?

_____ Yes _____ No

If your answer to question 4 is no, then answer question 5. If you answered yes, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. Was [*name of defendant*]'s conduct a substantial factor in causing harm to [*name of plaintiff*]?

_____ Yes _____ No

If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. What are [*name of plaintiff*]'s damages?

[a. Past economic loss

[lost earnings \$ _____].....

[lost profits \$ _____].....

[medical expenses \$ _____].....

[other past economic loss \$ _____].....

..... Total Past Economic Damages: \$ _____]

[b. Future economic loss

[lost earnings \$ _____].....

[lost profits \$ _____].....

[medical expenses \$ _____].....

[other future economic loss \$ _____].....

..... Total Future Economic Damages: \$ _____]

[c. Past noneconomic loss, including [physical pain/mental suffering:] \$ _____]

[d. Future noneconomic loss, including [physical pain/mental suffering:] \$ _____]

..... TOTAL \$ _____

Signed: _____

Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the [clerk/bailiff/judge].

New September 2003; Revised April 2007

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on *CACI No. 2001, Trespass--Extrahazardous Activities*.

If specificity is not required, users do not have to itemize all the damages listed in question 6 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

If there is an issue regarding whether the defendant exceeded the scope of plaintiff's consent, question 4 can be modified.

Publisher's Notes

There is no BAJI verdict form on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Verdicts Special Verdicts Real Property Law Torts Inherently Dangerous Activities Real Property Law Torts Trespass to Real Property Torts Premises Liability & Property Trespass Elements Torts Premises Liability & Property Trespass Remedies Damages General Overview Torts Strict Liability Abnormally Dangerous Activities General Overview



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CHAPTER 20 California Judicial Council Trespass Instructions

3-20 California Forms of Jury Instruction CACI VF-2003

CACI VF-2003 Trespass to Timber (Civ. Code, § 3346; Code Civ. Proc., § 733)

We answer the questions submitted to us as follows:

1. Did [name of plaintiff] [own/lease/occupy/control] the property?

_____ Yes _____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Did [name of defendant] intentionally, recklessly, or negligently enter [name of plaintiff]'s property and [cut down or damage trees/take timber] located on the property?

_____ Yes _____ No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Did [name of plaintiff] give permission to [cut down or damage the trees/take timber]?

_____ Yes _____ No

If your answer to question 3 is no, then answer question 4. If you answered yes, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Was [name of defendant]'s conduct a substantial factor in causing harm to [name of plaintiff]?

_____ Yes _____ No

If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. What are [*name of plaintiff*]'s damages?

[a. Past economic loss

[lost earnings \$ _____].....

[lost profits \$ _____].....

[medical expenses \$ _____].....

[other past economic loss \$ _____].....

..... Total Past Economic Damages: \$ _____]

[b. Future economic loss

[lost earnings \$ _____].....

[lost profits \$ _____].....

[medical expenses \$ _____].....

[other future economic loss \$ _____].....

..... Total Future Economic Damages: \$ _____]

[c. Past noneconomic loss, including [physical pain/mental suffering:] \$ _____]

[d. Future noneconomic loss, including [physical pain/mental suffering:] \$ _____]

..... TOTAL \$ _____

Signed: _____

Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the [clerk/bailiff/judge].

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on *CACI No. 2002, Trespass to Timber*.

If specificity is not required, users do not have to itemize all the damages listed in question 5 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

If there is an issue regarding whether the defendant exceeded the scope of plaintiff's consent, question 3 can be modified, as in element 3 in *CACI No. 2002*.

This form may be modified if the jury is being given the discretion under *Civil Code section 3288* to award prejudgment interest on specific losses that occurred prior to judgment.

Publisher's Notes

There is no BAJI verdict form on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Verdicts Special Verdicts Real Property Law Torts Trespass to Real Property Torts Premises Liability & Property Trespass Elements Torts Premises Liability & Property Trespass Remedies Damages General Overview



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CHAPTER 20 California Judicial Council Trespass Instructions

3-20 California Forms of Jury Instruction CACI VF-2004

CACI VF-2004 Trespass to Timber (Civ. Code, § 3346; Code Civ. Proc., § 733)--Treble Damages Sought

We answer the questions submitted to us as follows:

1. Did [name of plaintiff] [own/lease/occupy/control] the property?

_____ Yes _____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Did [name of defendant] intentionally, recklessly, or negligently enter [name of plaintiff]'s property and [cut down or damage trees/take timber] located on the property?

_____ Yes _____ No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Did [name of plaintiff] give permission to [cut down or damage the trees/take timber]?

_____ Yes _____ No

If your answer to question 3 is no, then answer question 4. If you answered yes, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Was [name of defendant]'s conduct a substantial factor in causing harm to [name of plaintiff]?

_____ Yes _____ No

If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. Did [*name of defendant*] intend to harm [*name of plaintiff*]?

_____ Yes _____ No

If your answer to question 5 is no, then answer question 6. If you answered yes, skip question 6 and answer question 7.

6. Did [*name of defendant*] act willfully or maliciously with the intent to vex, harass, or annoy?

_____ Yes _____ No

If your answer to question 6 is yes, then answer question 7. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

7. What are [*name of plaintiff*]'s damages?

[a. Past economic loss

[lost earnings \$_____].....

[lost profits \$_____].....

[medical expenses \$_____].....

[other past economic loss \$_____].....

..... Total Past Economic Damages: \$_____]

[b. Future economic loss

[lost earnings \$_____].....

[lost profits \$_____].....

[medical expenses \$_____].....

[other future economic loss \$_____].....

..... Total Future Economic Damages: \$_____]

[c. Past noneconomic loss, including [physical pain/mental suffering:] \$_____]

[d. Future noneconomic loss, including [physical

pain/mental suffering:] \$_____]

..... TOTAL \$_____

Signed: _____

Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the [clerk/bailiff/judge].

New September 2003; Revised April 2007

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on *CACI No. 2002, Trespass to Timber*, and *CACI No. 2003, Treble Damages--Timber*.

If specificity is not required, users do not have to itemize all the damages listed in question 7 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

If there is an issue regarding whether the defendant exceeded the scope of the plaintiff's consent, question 3 can be modified as in element 3 in *CACI No. 2002*.

This form may be modified if the jury is being given the discretion under *Civil Code section 3288* to award prejudgment interest on specific losses that occurred prior to judgment.

Publisher's Notes

There is no BAJI verdict form on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Verdicts Special Verdicts Real Property Law Torts Trespass to Real Property Torts Premises Liability & Property Trespass Elements Torts Premises Liability & Property Trespass Remedies Damages Punitive Damages



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CHAPTER 20 California Judicial Council Trespass Instructions

3-20 California Forms of Jury Instruction CACI VF-2005

CACI VF-2005 Public Nuisance

We answer the questions submitted to us as follows:

1. Did [*name of defendant*], by acting or failing to act, create a condition that was harmful to health?

_____ Yes _____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Did the condition affect a substantial number of people at the same time?

_____ Yes _____ No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Would an ordinary person have been reasonably annoyed or disturbed by the condition?

_____ Yes _____ No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Did the seriousness of the harm outweigh the social utility of [*name of defendant*]'s conduct?

_____ Yes _____ No

If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. Did [*name of plaintiff*] consent to [*name of defendant*]'s conduct?

_____ Yes _____ No

If your answer to question 5 is no, then answer question 6. If you answered yes, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. Did [*name of plaintiff*] suffer harm that was different from the type of harm suffered by the general public?

_____ Yes _____ No

If your answer to question 6 is yes, then answer question 7. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

7. Was [*name of defendant*]'s conduct a substantial factor in causing [*name of plaintiff*]'s harm?

_____ Yes _____ No

If your answer to question 7 is yes, then answer question 8. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

8. What are [*name of plaintiff*]'s damages?

[a. Past economic loss

[lost earnings \$_____].....

[lost profits \$_____].....

[medical expenses \$_____].....

[other past economic loss \$_____].....

..... Total Past Economic Damages: \$_____]

[b. Future economic loss

[lost earnings \$_____].....

[lost profits \$_____].....

[medical expenses \$_____].....

[other future economic loss \$ _____].....

..... Total Future Economic Damages: \$ _____]

[c. Past noneconomic loss, including [physical
pain/mental suffering:] \$ _____]

[d. Future noneconomic loss, including [physical
pain/mental suffering:] \$ _____]

..... TOTAL \$ _____

Signed: _____
Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the
[clerk/bailiff/judge].

New September 2003; Revised April 2007, December 2007

Directions for Use

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This form is based on *CACI No. 2020, Public Nuisance--Essential Factual Elements*.

Other factual situations may be substituted in question 1 as in element 1 of *CACI No. 2020*.

If specificity is not required, users do not have to itemize all the damages listed in question 8 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

Depending on the facts of the case, question 1 can be modified, as in element 1 of *CACI No. 2020*.

This form may be modified if the jury is being given the discretion under *Civil Code section 3288* to award prejudgment interest on specific losses that occurred prior to judgment.

Publisher's Notes

There is no BAJI verdict form on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsVerdictsSpecial VerdictsReal Property LawTortsNuisanceTypesPublic
NuisanceTortsPremises Liability & PropertyTrespassRemediesDamagesGeneral Overview



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CHAPTER 20 California Judicial Council Trespass Instructions

3-20 California Forms of Jury Instruction CACI VF-2006

CACI VF-2006 Private Nuisance

We answer the questions submitted to us as follows:

1. Did [*name of plaintiff*], [own/lease/occupy/control] the property?

_____ Yes _____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Did [*name of defendant*], by acting or failing to act, create a condition that was harmful to health?

_____ Yes _____ No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Did this condition interfere with [*name of plaintiff*]'s use or enjoyment of [his/her] land?

_____ Yes _____ No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Did [*name of plaintiff*] consent to [*name of defendant*]'s conduct?

_____ Yes _____ No

If your answer to question 4 is no, then answer question 5. If you answered yes, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. Would an ordinary person have been reasonably annoyed or disturbed by [*name of defendant*]'s conduct?

_____ Yes _____ No

If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. Was [*name of defendant*]'s conduct a substantial factor in causing harm to [*name of plaintiff*]?

_____ Yes _____ No

If your answer to question 6 is yes, then answer question 7. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

7. Did the seriousness of the harm outweigh the public benefit of [*name of defendant*]'s conduct?

_____ Yes _____ No

If your answer to question 7 is yes, then answer question 8. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

8. What are [*name of plaintiff*]'s damages?

[a. Past economic loss

[lost earnings \$_____].....

[lost profits \$_____].....

[medical expenses \$_____].....

[other past economic loss \$_____].....

..... Total Past Economic Damages: \$_____]

[b. Future economic loss

[lost earnings \$_____].....

[lost profits \$_____].....

[medical expenses \$_____].....

[other future economic loss \$ _____].....

..... Total Future Economic Damages: \$ _____]

[c. Past noneconomic loss, including [physical
pain/mental suffering:] \$ _____]

[d. Future noneconomic loss, including [physical
pain/mental suffering:] \$ _____]

..... TOTAL \$ _____

Signed: _____
Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the
[clerk/bailiff/judge].

New September 2003; Revised April 2007, December 2007

Directions for Use

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This form is based on *CACI No. 2021, Private Nuisance--Essential Factual Elements*.

Depending on the facts of the case, question 1 can be modified, as in element 1 of *CACI No. 2021*.

If specificity is not required, users do not have to itemize all the damages listed in question 8 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

This form may be modified if the jury is being given the discretion under *Civil Code section 3288* to award prejudgment interest on specific losses that occurred prior to judgment.

Publisher's Notes

There is no BAJI verdict form on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Verdicts Special Verdicts Real Property Law Torts Nuisance Types Private
Nuisance Torts Premises Liability & Property Trespass Remedies Damages General Overview



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California Forms of Jury Instruction

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CHAPTER 20 California Judicial Council Trespass Instructions

3-20 California Forms of Jury Instruction CACI VF-2007-CACI VF-2099

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CACI VF-2007Reserved for Future Use



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CHAPTER 21 California Judicial Council Conversion Instructions

3-21 California Forms of Jury Instruction 21.syn

§ 21.syn Synopsis to Chapter 21: California Judicial Council Conversion Instructions

CACI 2100 Conversion--Essential Factual Elements

CACI 2101 Trespass to Chattels--Essential Factual Elements

CACI 2102 Presumed Measure of Damages for Conversion (Civ. Code, § 3336)

CACI 2103-CACI 2199 Reserved for Future Use

CACI VF-2100 Conversion

CACI VF-2101-CACI VF-2199 Reserved for Future Use



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CHAPTER 21 California Judicial Council Conversion Instructions

3-21 California Forms of Jury Instruction Scope

Scope

SCOPE

This chapter contains the California Judicial Council's "Conversion Series" of civil jury instructions [*CACI No. 2100 et seq.*]. The Judicial Council of California Civil Jury Instructions (CACI) included in this publication are the product of the Judicial Council of California Task Force on Jury Instructions, which are updated by the Judicial Council of California Advisory Committee on Civil Jury Instructions.

This chapter includes instructions on the following topics:

- Essential factual elements for a cause of action in conversion [*CACI No. 2100*].
- Essential factual elements for a cause of action in trespass to chattels [*CACI No. 2101*].
- Presumed measure of damages for conversion [*CACI No. 2102*].

The conversion series also includes special verdict forms for use in conversion actions [*CACI No. VF-2100*].



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CHAPTER 21 California Judicial Council Conversion Instructions

3-21 California Forms of Jury Instruction CACI 2100

CACI 2100 Conversion--Essential Factual Elements

[*Name of plaintiff*] claims that [*name of defendant*] wrongfully exercised control over [his/her/its] personal property. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. That [*name of plaintiff*] [owned/possessed/had a right to possess] [a/an] [*insert item of personal property*];

2. That [*name of defendant*] intentionally [*insert one or more of the following:*]

[took possession of the [*insert item of personal property*] for a significant period of time;] [or]

[prevented [*name of plaintiff*] from having access to the [*insert item of personal property*] for a significant period of time;] [or]

[destroyed the [*insert item of personal property*]];] [or]

[refused to return [*name of plaintiff*]'s [*insert item of personal property*] after [*name of plaintiff*] demanded its return.]

3. That [*name of plaintiff*] did not consent;

4. That [*name of plaintiff*] was harmed; and

5. That [*name of defendant*]'s conduct was a substantial factor in causing [*name of plaintiff*]'s harm.

New September 2003; Revised December 2009

Directions for Use

The last option for element 2 may be used if the defendant's original possession of the property was not tortious. (See *Atwood v. S. Cal. Ice Co. (1923) 63 Cal.App. 343, 345 [218 P. 283]* .)

Sources and Authority

■ "[Cross-complainant] maintains that he alleged the essential elements of a conversion action, which 'are the plaintiff's ownership or right to possession of the property at the time of the conversion; the defendant's conversion by a wrongful act or disposition of property rights; and damages. It is not necessary that there be a manual taking of the property; it is only necessary to show an assumption of control or ownership over the property, or that the alleged converter has applied the property to his own use.' ..." (*Shopoff & Cavallo LLP v. Hyon (2008) 167 Cal.App.4th 1489, 1507 [85 Cal.Rptr.3d 268]* .)

■ "Conversion is a strict liability tort. The foundation of the action rests neither in the knowledge nor the intent of the defendant. Instead, the tort consists in the breach of an absolute duty; the act of conversion itself is tortious. Therefore, questions of the defendant's good faith, lack of knowledge, and motive are ordinarily immaterial." (*Burlesci v. Petersen (1998) 68 Cal.App.4th 1062, 1066 [80 Cal.Rptr.2d 704]* , internal citations omitted.)

■ "[I]t is generally acknowledged that conversion is a tort that may be committed only with relation to personal property and not real property." (*Munger v. Moore (1970) 11 Cal.App.3d 1, 7 [89 Cal.Rptr. 323]* , disagreeing with *Katz v. Enos (1945) 68 Cal.App.2d 266, 269 [156 P.2d 461]* .)

■ "The first element of that cause of action is his ownership or right to possession of the property at the time of the conversion. Once it is determined that [plaintiff] has a right to reinstate the contract, he has a right to possession of the vehicle and standing to bring conversion. Unjustified refusal to turn over possession on demand constitutes conversion even where possession by the withholder was originally obtained lawfully and of course so does an unauthorized sale." (*Cerra v. Blackstone (1985) 172 Cal.App.3d 604, 609 [218 Cal.Rptr. 15]* , internal citations omitted.)

■ " 'To establish a conversion, plaintiff must establish an actual interference with his ownership or right of possession. ... Where plaintiff neither has title to the property alleged to have been converted, nor possession thereof, he cannot maintain an action for conversion.' " (*Moore v. Regents of the Univ. of Cal. (1990) 51 Cal.3d 120, 136 [271 Cal.Rptr. 146, 793 P.2d 479]* , internal citations omitted.)

■ "In a conversion action the plaintiff need show only that he was entitled to possession at the time of conversion; the fact that plaintiff regained possession of the converted property does not prevent him from suing for damages for the conversion." (*Enterprise Leasing Corp. v. Shugart Corp. (1991) 231 Cal.App.3d 737, 748 [282 Cal.Rptr. 620]* , internal citation omitted.)

■ "It is clear that legal title to property is not a requisite to maintain an action for damages in conversion. To mandate a conversion action 'it is not essential that plaintiff shall be the absolute owner of the property converted but she must show that she was entitled to immediate possession at the time of conversion.' " (*Hartford Financial Corp. v. Burns (1979) 96 Cal.App.3d 591, 598 [158 Cal.Rptr. 169]* , internal citation omitted.)

- "[T]he law is well settled that there can be no conversion where an owner either expressly or impliedly assents to or ratifies the taking, use or disposition of his property." (*Farrington v. A. Teichert & Son, Inc.* (1943) 59 Cal.App.2d 468, 474 [139 P.2d 80] , internal citations omitted.)
- "As to intentional invasions of the plaintiff's interests, his consent negatives the wrongful element of the defendant's act, and prevents the existence of a tort. 'The absence of lawful consent,' said Mr. Justice Holmes, 'is part of the definition of an assault.' The same is true of false imprisonment, conversion, and trespass." (*Tavernier v. Maes* (1966) 242 Cal.App.2d 532, 552 [51 Cal.Rptr. 575] , internal citations omitted.)
- " 'Money cannot be the subject of a cause of action for conversion unless there is a specific, identifiable sum involved, such as where an agent accepts a sum of money to be paid to another and fails to make the payment.' A 'generalized claim for money [is] not actionable as conversion.' " (*PCO, Inc. v. Christensen, Miller, Fink, Jacobs, Glaser, Weil & Shapiro, LLP* (2007) 150 Cal.App.4th 384, 395 [58 Cal.Rptr.3d 516] , internal citations omitted.)
- " 'Conversion is any act of dominion wrongfully exerted over another's personal property in denial of or inconsistent with his rights therein.' One who buys property in good faith from a party lacking title and the right to sell may be liable for conversion. The remedies for conversion include specific recovery of the property, damages, and a quieting of title." (*State Farm Mut. Auto. Ins. Co. v. Department of Motor Vehicles* (1997) 53 Cal.App.4th 1076, 1081-1082 [62 Cal.Rptr.2d 178] , internal citations omitted.)
- "Conversion is the wrongful exercise of dominion over the personal property of another. The act must be knowingly or intentionally done, but a wrongful intent is not necessary. Because the act must be knowingly done, 'neither negligence, active or passive, nor a breach of contract, even though it result in injury to, or loss of, specific property, constitutes a conversion.' It follows therefore that mistake, good faith, and due care are ordinarily immaterial, and cannot be set up as defenses in an action for conversion." (*Taylor v. Forte Hotels International* (1991) 235 Cal.App.3d 1119, 1124 [1 Cal.Rptr.2d 189] , internal citations omitted.)
- "In order to establish a conversion, the plaintiff 'must show an intention or purpose to convert the goods and to exercise ownership over them, or to prevent the owner from taking possession of his property.' Thus, a necessary element of the tort is an intent to exercise ownership over property which belongs to another. For this reason, conversion is considered an intentional tort." (*Collin v. American Empire Insurance Co.* (1994) 21 Cal.App.4th 787, 812 [26 Cal.Rptr.2d 391] , internal citations omitted.)
- "A conversion can occur when a willful failure to return property deprives the owner of possession." (*Fearon v. Department of Corrections* (1984) 162 Cal.App.3d 1254, 1257 [209 Cal.Rptr. 309] , internal citation omitted.)
- "A demand for return of the property is not a condition precedent to institution of the action when possession was originally acquired by a tort as it was in this case." (*Igauye v. Howard* (1952) 114 Cal.App.2d 122, 127 [249 P.2d 558] .)
- " 'Negligence in caring for the goods is not an act of dominion over them such as is necessary to make the bailee liable as a converter.' Thus a warehouseman's negligence in causing a fire which destroyed the plaintiffs' goods will not support a conversion claim." (*Gonzales v. Pers. Storage Inc.* (1997) 56 Cal.App.4th 464, 477 [65 Cal.Rptr.2d 473] , internal citations omitted.)

■ "Although damages for conversion are frequently the equivalent to the damages for negligence, i.e., specific recovery of the property or damages based on the value of the property, negligence is no part of an action for conversion." (*Taylor, supra*, 235 Cal.App.3d at p. 1123 , internal citation omitted.)

■ "A person without legal title to property may recover from a converter if the plaintiff is responsible to the true owner, such as in the case of a bailee or pledgee of the property." (*Department of Industrial Relations v. UI Video Stores, Inc.* (1997) 55 Cal.App.4th 1084, 1096 [64 Cal.Rptr.2d 457] , internal citation omitted.)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 699-719

3 Levy et al., *California Torts, Ch. 40, Fraud and Deceit and Other Business Torts*, § 40.40 (Matthew Bender)

13 *California Forms of Pleading and Practice, Ch. 150, Conversion*, §§ 150.10, 150.40 -150.41 (Matthew Bender)

5 *California Points and Authorities, Ch. 51, Conversion*, § 51.21[3][b] (Matthew Bender)

Publisher's Notes

This instruction covers issues presented in BAJI No. 12.99.

LexisNexis Matthew Bender Expert Practice Tip--Conversion Actions Generally: Conversion is an unusual tort, but it may be potentially applicable in a variety of factual contexts. It is a claim that may have a particular "appeal" to some jurors. *By Rex Heeseman*

LexisNexis Matthew Bender Expert Practice Tip--Availability of Punitive Damages for Conversion Cause of Action: The tort of conversion does not require proof of ill will or improper motivation on the defendant's part. However, if those factors are present, the tort becomes an intentional tort, and punitive damages can be awarded [see MB 2100A.36 regarding prerequisites for award of punitive damages in conversion cases]. *By Ronald Oster*

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsIntentional TortsConversionGeneral OverviewTortsIntentional TortsConversionElements



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CHAPTER 21 California Judicial Council Conversion Instructions

3-21 California Forms of Jury Instruction CACI 2101

CACI 2101 Trespass to Chattels--Essential Factual Elements

[*Name of plaintiff*] **claims that** [*name of defendant*] **wrongfully trespassed on** [his/her/its] **personal property. To establish this claim, [*name of plaintiff*] must prove all of the following:**

- 1. That [*name of plaintiff*] [owned/possessed/had a right to possess] a [*insert item of personal property*];**
- 2. That [*name of defendant*] intentionally [*insert one or more of the following:*]**
[interfered with [*name of plaintiff*]'s use or possession of the [*insert item of personal property*];]
[or]
[damaged the [*insert item of personal property*];]
- 3. That [*name of plaintiff*] did not consent;**
- 4. That [*name of plaintiff*] was harmed; and**
- 5. That [*name of defendant*]'s conduct was a substantial factor in causing [*name of plaintiff*]'s harm.**

New September 2003

Sources and Authority

- "Trespass to chattel, although seldom employed as a tort theory in California ... , lies where an intentional interference with the possession of personal property has proximately caused injury. Prosser notes trespass to chattel has evolved considerably from its original common law application--concerning the asportation of another's tangible property--to include even the unauthorized use of personal property: 'Its chief importance now,' according to Prosser, 'is that there may be recovery ... for interferences with the possession of chattels which are not sufficiently important to be classed as conversion, and so to compel the defendant to pay the full value of the thing with which he has interfered. Trespass to chattels survives today, in other words, largely as a little brother of conversion.' " (*Thrifty-Tel, Inc. v. Bezenek* (1996) 46 Cal.App.4th 1559, 1566-1567 [54 Cal.Rptr.2d 468] , footnotes and internal citations omitted.)
- "Where the conduct complained of does not amount to a substantial interference with possession or the right thereto, but consists of intermeddling with or use of or damages to the personal property, the owner has a cause of action for trespass or case, and may recover only the actual damages suffered by reason of the impairment of the property or the loss of its use." (*Zaslow v. Kroenert* (1946) 29 Cal.2d 541, 551 [176 P.2d 1] , internal citations omitted.)
- " "Though not amounting to conversion, the defendant's interference must, to be actionable, have caused some injury to the chattel or to the plaintiff's rights in it. Under California law, trespass to chattels "lies where an intentional interference with the possession of personal property *has proximately caused injury*." In cases of interference with possession of personal property not amounting to conversion, "the owner has a cause of action for trespass or case, and *may recover only the actual damages suffered by reason of the impairment of the property or the loss of its use*." ...' " (*Jamgotchian v. Slender* (2009) 170 Cal.App.4th 1384, 1400-1401 [89 Cal.Rptr.3d 122] , original italics, internal citations omitted.)
- "It is well settled that a person having neither the possession nor the right to the possession of personal chattels, cannot maintain trespass or trover for an injury done to the property." (*Triscony v. Orr* (1875) 49 Cal. 612, 617 , internal citations omitted.)
- "In order to prevail on a claim for trespass based on accessing a computer system, the plaintiff must establish: (1) defendant intentionally and without authorization interfered with plaintiff's possessory interest in the computer system; and (2) defendant's unauthorized use proximately resulted in damage to plaintiff." (*eBay, Inc. v. Bidder's Edge* (N.D. Cal. 2000) 100 F.Supp.2d 1058, 1069-1070 , internal citations omitted.)
- *Restatement Second of Torts, section 218*, provides:
 - One who commits a trespass to a chattel is subject to liability to the possessor of the chattel if, but only if,
 - (a) he dispossesses the other of the chattel, or
 - (b) the chattel is impaired as to its condition, quality, or value, or
 - (c) the possessor is deprived of the use of the chattel for a substantial time, or
 - (d) bodily harm is caused to the possessor, or harm is caused to some person or thing in which the possessor has a legally protected interest.
- *Restatement Second of Torts, section 222, comment (a)*, states: "Normally any dispossession is so clearly a serious interference with the right of control that it amounts to a conversion; and it is frequently said that any dispossession is a

conversion. There may, however, be minor and unimportant disposessions, such as taking another man's hat by mistake and returning it within two minutes upon discovery of the mistake, which do not seriously interfere with the other's right of control, and so do not amount to conversion. In such a case the remedy of the action of trespass remains, and will allow recovery of damages for the interference with the possession."

Secondary Sources

1 Levy et al., *California Torts*, Ch. 16, *Landlord-Tenant Tort Liabilities*, § 16.07 (Matthew Bender)

48 *California Forms of Pleading and Practice*, Ch. 550, *Trespass*, § 550.13 (Matthew Bender)

22 *California Points and Authorities*, Ch. 225, *Trespass*, § 225.262 (Matthew Bender)

Publisher's Notes

This instruction covers issues presented in BAJI No. 12.99.

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsIntentional TortsConversionGeneral OverviewTortsIntentional TortsConversionElements



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CHAPTER 21 California Judicial Council Conversion Instructions

3-21 California Forms of Jury Instruction CACI 2102

CACI 2102 Presumed Measure of Damages for Conversion (Civ. Code, § 3336)

If you decide that [name of plaintiff] has proved [his/her/its] claim against [name of defendant], you also must decide how much money will reasonably compensate [name of plaintiff] for the harm. This compensation is called "damages."

[Name of plaintiff] must prove the amount of [his/her/its] damages. However, [name of plaintiff] does not have to prove the exact amount of damages that will provide reasonable compensation for the harm. You must not speculate or guess in awarding damages.

The following are the specific items of damages claimed by [name of plaintiff]:

1. [The fair market value of the [insert item of personal property] at the time [name of defendant] wrongfully exercised control over it;]

[or]

[Special damages resulting from [name of defendant]'s conduct;] [and]

2. Reasonable compensation for the time and money spent by [name of plaintiff] in attempting to recover the [insert item of personal property]; [and]

3. [Emotional distress suffered by [name of plaintiff] as a result of [name of defendant]'s conduct.]

[In order to recover special damages, [name of plaintiff] must prove:

1. That [describe special circumstances that require a measure of damages other than value];

2. That it was reasonably foreseeable that special injury or harm would result from the conversion; and

3. That reasonable care on [*name of plaintiff*]'s part would not have prevented the loss.]

["Fair market value" is the highest price that a willing buyer would have paid to a willing seller, assuming:

1. That there is no pressure on either one to buy or sell; and

2. That the buyer and seller know all the uses and purposes for which the [*insert item*] is reasonably capable of being used.]

New September 2003

The third element of listed damages, emotional distress, is bracketed because it appears that such damages are recoverable only if the second alternative measure of damages stated in the first paragraph of *Civil Code* section 3336 applies. (See *Gonzales v. Pers. Storage* (1997) 56 Cal.App.4th 464, 477 [65 Cal.Rptr.2d 473].)

See *Commercial Code* section 3420 regarding conversion of negotiable instruments.

■ *Civil Code* section 3336 provides:

The detriment caused by the wrongful conversion of personal property is presumed to be:

First--The value of the property at the time of the conversion, with the interest from that time, or, an amount sufficient to indemnify the party injured for the loss which is the natural, reasonable and proximate result of the wrongful act complained of and which a proper degree of prudence on his part would not have averted; and

Second--A fair compensation for the time and money properly expended in pursuit of the property.

■ *Civil Code* section 3337 provides: "The presumption declared by the last section cannot be repelled, in favor of one whose possession was wrongful from the beginning, by his subsequent application of the property to the benefit of the owner, without his consent."

■ "[W]e are of the opinion that section 3337 can only be held to apply to a situation where the property was voluntarily applied by the party guilty of conversion to the benefit of the injured party, and can have no application to a situation such as here where the application was compelled by a legal duty." (*Goldberg v. List* (1938) 11 Cal.2d 389, 393 [79 P.2d 1087] .)

■ "Although the first part of section 3336 appears to provide for alternative measures of recovery, the first of the two measures, namely the value of the property converted at the time and place of conversion with interest from that time, is generally considered to be the appropriate measure of damages in a conversion action. The determination of damages under the alternative provision is resorted to only where the determination on the basis of value at the time of

conversion would be manifestly unjust." (*Myers v. Stephens* (1965) 233 Cal.App.2d 104, 116 [43 Cal.Rptr. 420] , internal citations omitted.)

■ "As a general rule, the value of the converted property is the appropriate measure of damages, and resort to the alternative occurs only where a determination of damages on the basis of value would be manifestly unjust. Accordingly, a person claiming damages under the alternative provision must plead and prove special circumstances that require a measure of damages other than value, and the jury must determine whether it was reasonably foreseeable that special injury or damage would result from the conversion." (*Lueter v. State of California* (2002) 94 Cal.App.4th 1285, 1302 [115 Cal.Rptr.2d 68] , internal citations omitted.)

■ "The damage measures set forth in the first paragraph of section 3336 are in the alternative. The first alternative is to compensate for the value of the property at the time of conversion with interest from the time of the taking. The second alternative is compensation in a sum equal to the amount of loss legally caused by the conversion and which could have been avoided with a proper degree of prudence. Both of these alternatives are in addition to the damage element for the time spent pursuing the converted property set forth in the second paragraph of section 3336." (*Moreno v. Greenwood Auto Center* (2001) 91 Cal.App.4th 201, 209 [110 Cal.Rptr.2d 177] , internal citations omitted.)

■ "Civil Code section 3336 sets out the presumptive measure of damages in conversion, which is rebuttable, save and except when section 3337 applies. Under Civil Code section 3337, a defendant cannot rebut the presumption by claiming that he applied the converted property to plaintiff's benefit when he took unlawful possession of the property from the beginning. Consequently, the effect of section 3337 is to prevent mitigation when property is stolen from the plaintiff and subsequently applied to his benefit. In this situation, the defendant will not be able to claim that his conversion benefited plaintiff; he will thereby be prevented from claiming an offset derived from his original wrong. In contrast to this situation, if the particular facts of a case indicate, as in the instant case, that the possession was lawful before the conversion occurred ... Civil Code section 3337 is inapplicable, and a converter is not precluded from claiming mitigation of damages." (*Dakota Gardens Apartment Investors "B" v. Pudwill* (1977) 75 Cal.App.3d 346, 351-352 [142 Cal.Rptr. 126].)

■ "[W]e conclude that notwithstanding further developments in the law of negligence, damages for emotional distress growing out of a defendant's conversion of personal property are recoverable." (*Gonzales, supra*, 56 Cal.App.4th at p. 477 , internal citations omitted.)

■ "In the absence of special circumstances the appropriate measure of damages for conversion of personal property is the fair market value of that property plus interest from the date of conversion, the standard first listed in section 3336, Civil Code. However, where proof establishes an injury beyond that which would be adequately compensated by the value of the property and interest, the court may award such amounts as will indemnify for all proximate reasonable loss caused by the wrongful act. Where damages for loss of use exceeds the legal rate of interest, it is appropriate to award the former, but not both." (*Lint v. Chisholm* (1981) 121 Cal.App.3d 615, 624-625 [177 Cal.Rptr. 314] , internal citations omitted.)

■ " 'To entitle a party to such compensation the [evidence] should tend to show that money was properly paid out and time properly lost in pursuit of the property, and how much.' Such evidence should be definite and certain. Expenses 'incurred in preparation for litigation and not in pursuit of property' cannot be allowed as damages under Civil Code section 3336. Additionally, any such compensation must be fair, i.e., reasonable." (*Haines v. Parra* (1987) 193 Cal.App.3d 1553, 1559 [239 Cal.Rptr. 178] , internal citations omitted.)

■ "[A]lthough good faith and mistake are not defenses to an action for conversion, the plaintiff's damages will be reduced if the defendant returns the property or the plaintiff otherwise recovers the property." (*Krusi v. Bear, Stearns & Co.* (1983) 144 Cal.App.3d 664, 673 [192 Cal.Rptr. 793] , internal citations omitted.)

■ "Causes of action for conversion and trespass support an award for exemplary damages." (*Krieger v. Pacific Gas & Electric Co.* (1981) 119 Cal.App.3d 137, 148 [173 Cal.Rptr. 751] , internal citation omitted.)

■ "Ordinarily 'value of the property' at the time of the conversion is determined by its market value at the time. However, '[w]here certain property has a peculiar value to a person recovering damages for deprivation thereof, or injury thereto, that may be deemed to be its value ... against a willful wrongdoer.' " (*In re Brian S.* (1982) 130 Cal.App.3d 523, 530 [181 Cal.Rptr. 778] , internal citations omitted.)

■ "In an action for damages for conversion, it is the rule that the plaintiff, although owning but a limited or qualified interest in the property, may, as against a stranger who has no ownership therein, recover the full value of the property converted." (*Camp v. Ortega* (1962) 209 Cal.App.2d 275, 286 [25 Cal.Rptr. 873] , internal citations omitted.)

■ "A plaintiff seeking recovery under the alternative provision of the statute must therefore plead and prove the existence of 'special circumstances which require a different measure of damages to be applied.' Having done so, the trier of fact must then determine 'whether it was reasonably foreseeable to a prudent person, having regard for the accompanying circumstances, that injury or damage would likely result from his wrongful act.' " (*Krueger v. Bank of America* (1983) 145 Cal.App.3d 204, 215 [193 Cal.Rptr. 322] , internal citations omitted.)

■ "Defendants contend that the anticipated loss of profits is not 'the natural, reasonable and proximate result of the wrongful act complained of,' within the meaning of section 3336. Although no California case which has applied the alternative measure of damages in a conversion case has specifically defined this language, we are satisfied that its meaning is synonymous with the term 'proximate cause' or 'legal cause.' These terms mean, in essence, 'that there be some reasonable connection between the act or omission of the defendant and the damage which the plaintiff has suffered.' In determining whether this connection exists, the question is whether it was reasonably foreseeable to a prudent person, having regard for the accompanying circumstances, that injury or damage would likely result from his wrongful act. This question being one of fact to be determined generally by the trier of fact." (*Myers, supra*, 233 Cal.App.2d at pp. 119-120 , internal citations omitted.)

■ "In exceptional circumstances, to avoid injustice, loss of profits may be the measure." (*Newhart v. Pierce* (1967) 254 Cal.App.2d 783, 794 [62 Cal.Rptr. 553] , internal citation omitted.)

■ *Code of Civil Procedure* section 1263.320(a) provides: "The fair market value of the property taken is the highest price on the date of valuation that would be agreed to by a seller, being willing to sell but under no particular or urgent necessity for so doing, nor obliged to sell, and a buyer, being ready, willing, and able to buy but under no particular necessity for so doing, each dealing with the other with full knowledge of all the uses and purposes for which the property is reasonably adaptable and available."

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, § 1722

4 Levy et al., California Torts, Ch. 50, *Damages*, §§ 50.01-50.03 (Matthew Bender)

13 *California Forms of Pleading and Practice*, Ch. 150, *Conversion*, §§ 150.10, 150.40 -150.41 (Matthew Bender)

5 California Points and Authorities, Ch. 51, *Conversion* (Matthew Bender)

Publisher's Notes

This instruction covers issues presented in BAJI No. 12.99.

LexisNexis Matthew Bender Expert Practice Tip--Proving Value/Damages: If the converted property has been destroyed or lost, it may be difficult to establish its value. In these cases it is important for plaintiff to emphasize that plaintiff is not required to prove "the exact amount" of damages. *By Ronald Oster*

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Remedies Damages Compensatory Damages Torts Damages Compensatory Damages Property Damage Award Calculations Torts Damages Compensatory Damages Property Damage Loss of Use



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California Forms of Jury Instruction

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CHAPTER 21 California Judicial Council Conversion Instructions

3-21 California Forms of Jury Instruction CACI 2103-CACI 2199

Reserved for Future Use

CACI 2103Reserved for Future Use



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California Forms of Jury Instruction

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CHAPTER 21 California Judicial Council Conversion Instructions

3-21 California Forms of Jury Instruction CACI VF-2100

CACI VF-2100 Conversion

We answer the questions submitted to us as follows:

1. Did [name of plaintiff] [own/possess/have a right to possess] a [insert description of personal property]?

_____ Yes _____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Did [name of defendant] intentionally [[take possession of/prevent [name of plaintiff] from having access to] the [insert description of personal property] for a significant period of time]/[destroy the [insert description of personal property]/refuse to return [name of plaintiff]'s [insert description of personal property] after [name of plaintiff] demanded its return]?

_____ Yes _____ No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Did [name of plaintiff] consent?

_____ Yes _____ No

If your answer to question 3 is no, then answer question 4. If you answered yes, stop here, answer

no further questions, and have the presiding juror sign and date this form.

4. Was [*name of plaintiff*] harmed?

_____ Yes _____ No

If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. Was [*name of defendant*]'s conduct a substantial factor in causing [*name of plaintiff*]'s harm?

_____ Yes _____ No

If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. What are [*name of plaintiff*]'s damages?

..... **TOTAL \$** _____

Signed: _____

Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the [clerk/bailiff/judge].

New December 2005; Revised December 2009

Directions for Use

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on *CACI No. 2100, Conversion--Essential Factual Elements*.

If the case involves multiple items of personal property as to which the evidence differs, users may need to modify question 2 to focus the jury on the different items.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

Publisher's Notes

There is no BAJI verdict form on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsVerdictsSpecial VerdictsTortsIntentional TortsConversionGeneral
OverviewTortsIntentional TortsConversionElements



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California Forms of Jury Instruction

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CHAPTER 21 California Judicial Council Conversion Instructions

3-21 California Forms of Jury Instruction CACI VF-2101-CACI VF-2199

Reserved for Future Use

CACI VF-2101Reserved for Future Use



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California Forms of Jury Instruction

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CHAPTER 21A Matthew Bender Conversion Instructions

3-21A California Forms of Jury Instruction 21A.syn

§ 21A.syn Synopsis to Chapter 21A: Matthew Bender Conversion Instructions

MB 2100A.01 Possession or Right to Possession at Time of Conversion

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Requirement of Possession

[b] Related Judicial Council Jury Instructions

MB 2100A.02 Ownership at Time of Conversion

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Ownership at Time of Conversion

[b] Related Judicial Council Jury Instructions

MB 2100A.03 Assignees

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Conversion Action May Be Assigned

[b] Related Judicial Council Jury Instructions

MB 2100A.04 Fixtures

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Conversion of Real Property; Severability

[b] Definition; Three Part Test

[c] Ownership; Right to Remove

[d] Related Judicial Council Jury Instructions

MB 2100A.05 Money

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Money Can Be Converted

[b] Related Judicial Council Jury Instructions

MB 2100A.06 Actual and Substantial Interference

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Actual Interference

[b] Substantial Interference

[c] Related Judicial Council Jury Instructions

MB 2100A.07 Taking as Actual Interference

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Taking as Actual Interference

[b] Related Judicial Council Jury Instructions

MB 2100A.08 Destruction of Property as Actual and Substantial Interference

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Destruction as Conversion

[b] Related Judicial Council Jury Instructions

MB 2100A.09 Changes to Property as Actual Interference

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Change to Property as Interference

[b] Related Judicial Council Jury Instructions

MB 2100A.10 Transfer as Actual and Substantial Interference

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Transfer as Conversion

[b] Related Judicial Council Jury Instructions

MB 2100A.11 Unauthorized Use as Actual Interference

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Unauthorized Use as Conversion

[b] Related Judicial Council Jury Instructions

MB 2100A.12 Refusal to Return on Demand as Actual and Substantial Interference

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Refusal to Return as Interference

[b] Related Judicial Council Jury Instructions

MB 2100A.13 Misdelivery as Actual Interference

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Misdelivery as Actual Interference

[b] Related Judicial Council Jury Instructions

MB 2100A.14 Buying From One Without Title or Right as Actual Interference

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Buying From One Without Right or Title

[b] Related Judicial Council Jury Instructions

MB 2100A.15 False Third Party Claim as Actual Interference

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Filing of False Third Party Claim

[b] Related Judicial Council Jury Instructions

MB 2100A.16 Intent

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Required Intent

[b] Related Judicial Council Jury Instructions

MB 2100A.17 through MB 2100A.29 Reserved for Future Use

MB 2100A.30 Proximate Cause--"Substantial Factor"

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Wrongful Conversion

[b] Alternative Measures of Damages

[c] Related Judicial Council Jury Instructions

MB 2100A.31 Value of Negotiable Instrument

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Value of Negotiable Instrument

[b] Related Judicial Council Jury Instructions

MB 2100A.32 Loss of Profits From Sale of Goods

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Loss of Profit

[b] Related Judicial Council Jury Instructions

MB 2100A.33 Loss of Use

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Loss of Use

[b] Related Judicial Council Jury Instructions

MB 2100A.34 Lien or Other Limited Interest

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Limited Interest in Converted Property as Limit on Damages

[b] Exception to Rule Limiting Damages

[c] Related Judicial Council Jury Instructions

MB 2100A.35 Statute of Limitations and Damages

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 2100A.36 Prerequisites for Award of Punitive Damages

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Prerequisites for Punitive Damage Award

[b] Oppression, Fraud, and Malice

[c] Willful and Conscious Disregard

[d] Plaintiff's Burden of Proof

[e] Bifurcation of Punitive Damage Issues

[f] Purpose of Punitive Damages

[g] Related Judicial Council Jury Instructions

MB 2100A.37 Discretion to Award Punitive Damages When Prerequisites for Award Are Established

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Discretion to Award Punitive Damages

[b] Due Process Considerations

[c] Instructions Must Not Invite Jury to Impose Damages Sufficient to Punish and Deter Conduct Not Related to Particular Plaintiff

[d] Instructions on Punitive Damages Must Not Be Vague

[e] Wealth Is Relevant Regarding Punishment and Deterrence Only With Regard to Particular Plaintiff

[f] Related Judicial Council Jury Instructions

MB 2100A.38--MB 2100A.49 Reserved for Future Use

MB 2100A.50 Consent

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Defense of Consent

[b] Related Judicial Council Jury Instructions

MB 2100A.51 Right to Possession

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Right to Take Possession; Secured Transactions; Unlawful Entry

[b] Right to Keep Possession; Secured Transactions; Excessive Demands

[c] Liability for Torts Other Than Conversion

MB 2100A.52 Public Officers--Privilege of Public Interest

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 2100A.53 Court Order

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 2100A.54 Qualified Refusal Privilege

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Privilege for Qualified Refusal

[b] Good Faith; Reason for Refusal

[c] Time That Privilege to Refuse Lasts

MB 2100A.55 Estoppel--Apparent Title or Authority

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 2100A.56 Innocent Purchaser for Value Without Notice

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Purchase From Fraudulent Transferor

[b] Value

[c] Notice

MB 2100A.57 Waiver

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Waiver Defined; Elements of Waiver; Question of Fact

[b] Waiver as Defense to Conversion

[c] Burden of Proof

MB 2100A.58 Statute of Limitations

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Time for Commencing Action

[b] Running of Statute of Limitations

MB 2100A.59 Privilege of Self-Defense or Defense of Third Person

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 2100A.60 Unclean Hands

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 2100A.61--MB 2100A.69 Reserved for Future Use

MB 2100A.70 Elements of Action for Specific Recovery of Personal Property--Plaintiff's Burden of Proof

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 2100A.71 Plaintiff's Right to Possession at Time of Action

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Right to Immediate and Exclusive Possession

[b] Conditional Right to Possession

MB 2100A.72 Defendant's Wrongful Possession at Time of Action

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 2100A.73 Damages if Property Is Recovered

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 2100A.74 Damages if Property Is Not Recovered

[1] Instruction

[2] Use of Instruction

[3] Comment



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California Forms of Jury Instruction

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CHAPTER 21A Matthew Bender Conversion Instructions

3-21A California Forms of Jury Instruction Scope

Scope

SCOPE

This chapter includes jury instructions on the tort of conversion. For the California Judicial Council jury instructions on conversion, see Ch. 21, *California Judicial Council Conversion Instructions*. Ch. 21 includes Judicial Council instructions on the essential factual elements for an action in conversion [*CACI No. 2100*] and trespass to chattels [*CACI No. 2101*], and an instruction on the presumed measure of damages for conversion [*CACI No. 2102*]. The instructions in this chapter are intended to supplement the Judicial Council instructions [*see Cal. Rules of Ct., Rule 2.1050*].

This chapter covers the following topics:

- Part A includes instructions on the elements of a cause of action for conversion [*see MB 2100A.01 -MB 2100A.16*].
- Part B includes instructions on damages for conversion [*see MB 2100A.30 -MB 2100A.37*].
- Part C includes instructions on defenses and privileges [*see MB 2100A.50 -MB 2100A.60*].
- Part D includes instructions on the alternative remedy of an action for the specific recovery of personal property [*see MB 2100A.70 -MB 2100A.74*].

An injured party may choose to waive the tort of conversion and bring an action in quasi-contract. Quasi-contract actions are covered in Ch. 3A, *Matthew Bender Formation of Contract Instructions*.

For instructions relating to title and possession of goods under Division 2, *Sales*, of the California Commercial Code, see Ch. 3H, *Matthew Bender Commercial Code Sales Contract Instructions*. n

FOOTNOTES:

(n10)Footnote . George C. Finlay contributed to the original chapter for California Forms of Jury Instruction (Matthew Bender). Patrick H. Fabian contributed to the original chapter as a consultant.



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California Forms of Jury Instruction

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CHAPTER 21A Matthew Bender Conversion Instructions
PART A. ELEMENTS OF CONVERSION

3-21A California Forms of Jury Instruction MB 2100A.01

MB 2100A.01 Possession or Right to Possession at Time of Conversion

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

For Plaintiff to recover money damages for conversion of _____ [describe property] by Defendant, Plaintiff must prove either that [he/she/it] was in actual possession of this property or that [he/she/it] had the right to the property's immediate possession at the time of its conversion.

[EITHER (See Use of Instruction)]

In this case, that means that Plaintiff must prove that _____ [specify basis of plaintiff's right to possession, e.g., Mr. Smith was a buyer under a conditional sales contract and that he did not make a required payment or was otherwise in default on his agreement to buy the 2003 Ford automobile. If you find that Mr. Smith was in default, then Plaintiff had a right to immediate possession of the Ford, and [he/she/it] may recover money for its conversion.].

[OR (See Use of Instruction)]

In this case, that means that Plaintiff must prove that [he/she/it] actually possessed _____ [describe property].

[OPTIONAL (See Use of Instruction)]

If Plaintiff has proved either a right to possess the property or the property's actual possession, it does not matter that Plaintiff is not the property's owner. Plaintiff is entitled to sue for the property's entire value regardless of the fact that [he/she/it] owes the owner money for the property or is holding the property in trust.

Authorities: *Enterprise Leasing Corp. v. Shugart Corp.* (1991) 231 Cal.App.3d 737, 748, 282 Cal.Rptr. 620 ; *Messerall v. Fulwider* (1988) 199 Cal.App.3d 1324, 1329-1331, 245 Cal.Rptr. 548 ; *Cerra v. Blackstone* (1985) 172 Cal.App.3d 604, 609, 218 Cal.Rptr. 15 ; *Hartford Fin. Corp. v. Burns* (1979) 96 Cal.App.3d 591, 597-600, 158 Cal.Rptr. 169 ; *Aero Props., Inc. v. Gottlieb* (1962) 206 Cal.App.2d 711, 716, 24 Cal.Rptr. 277 ; *Igaue v. Howard* (1952) 114 Cal.App.2d 122, 127, 249 P.2d 558 ; *Perlick v. Pacific Discount Corp.* (1942) 53 Cal.App.2d 136, 141, 127 P.2d 647 ; *Redwine v. Trowbridge* (1929) 99 Cal.App. 762, 765-766, 279 P. 666 ; *Covington v. Grant* (1927) 82 Cal.App. 749, 751, 256 P. 213 .

[2] Use of Instruction

This instruction should be used when the plaintiff claims the right to bring an action for conversion based on the possession of or the right to immediate possession of the property allegedly converted. If the action is based on the right to possession, the first of the alternative second paragraphs should be completed by filling in the blank with the appropriate facts. For further examples, see [3][a], *below*, and the list of persons who might bring an action for conversion. If the action is based on actual possession, then the second alternative paragraph should be used. The final optional paragraph would be appropriate when the plaintiff is not the property owner and this fact is raised by the defendant to limit plaintiff's recovery. Of course, when the plaintiff's interest is limited and he or she is suing the owner, any reference to damages equaling the property's full value would be inappropriate. For a damage instruction limiting the plaintiff's recovery under these circumstances, see *MB 2100A.32*.

This instruction must be used with the instruction in Ch. 21, *California Judicial Council Conversion Instructions, CACI No. 2100* ("Conversion--Essential Factual Elements").

LexisNexis Matthew Bender Expert Practice Tip--Conversion Actions Generally: Conversion is an effective claim assuming that the prerequisites are satisfied. Thus, be careful that the case's allegations fall within the scope of this tort. *By Rex Heeseman*

[3] Comment

[a] Requirement of Possession

As a rule, one must have possession [*Ortega v. Toyota Motor Sales, USA, Inc.* (S.D. Cal. 2008) 572 F.Supp.2d 1218, 1220 ; *Igaue v. Howard* (1952) 114 Cal.App.2d 122, 127, 249 P.2d 558 ; see Restatement (Second) of Torts § 224A] or the right to immediate possession [*DIRECTV v. Pahnke* (E.D. Cal. 2005) 405 F.Supp.2d 1182, 1189-1190 (direct broadcast satellite television service had conversion claim against person who pirated satellite signals); *Enterprise Leasing Corp. v. Shugart Corp.* (1991) 231 Cal.App.3d 737, 748, 282 Cal.Rptr. 620 ; *Messerall v. Fulwider* (1988) 199 Cal.App.3d 1324, 1329-1331, 245 Cal.Rptr. 548 ; *Cerra v. Blackstone* (1985) 172 Cal.App.3d 604, 609, 218 Cal.Rptr. 15 ; *Aero Props., Inc. v. Gottlieb* (1962) 206 Cal.App.2d 711, 716, 24 Cal.Rptr. 277 ; Restatement (Second) of Torts § 225] of property to bring an action for conversion of that property. Any valuable right or interest in the property plus possession or the right of possession is enough. For example, conversion actions may be brought by any of the following:

- The seller in a conditional sale [*Messerall v. Fulwider* (1988) 199 Cal.App.3d 1324, 1329-1331, 245 Cal.Rptr. 548 ; *Hartford Fin. Corp. v. Burns* (1979) 96 Cal.App.3d 591, 597-600, 158 Cal.Rptr. 169 ; *Redwine v. Trowbridge* (1929) 99 Cal.App. 762, 765-766, 279 P. 666 ; *Covington v. Grant* (1927) 82 Cal.App. 749, 751, 256 P. 213 ; see *MB 2100A.51*[3][a] for further discussion of conditional seller's right to repossess as basis for conversion action];

- A repossessed conditional buyer who tenders the amount owed [*Cerra v. Blackstone* (1985) 172 Cal.App.3d 604, 609, 218 Cal.Rptr. 15];
- A chattel mortgagee [*Mathew v. Mathew* (1903) 138 Cal. 334, 336-337, 71 P. 344 ; *Montgomery v. Grattan* (1958) 156 Cal.App.2d 832, 835, 320 P.2d 106];
- A trustee [*Perlick v. Pacific Discount Corp.* (1942) 53 Cal.App.2d 136, 141, 127 P.2d 647]; or
- A lienholder [*Bastanchury v. Times-Mirror Co.* (1945) 68 Cal.App.2d 217, 236, 156 P.2d 488 ; see *Thomsen v. Culver City Motor Co., Inc.* (1935) 4 Cal.App.2d 639, 646, 41 P.2d 597].

Ownership of the property is not necessary [*Igauye v. Howard* (1952) 114 Cal.App.2d 122, 127, 249 P.2d 558 ; *Hartford Fin. Corp. v. Burns* (1979) 96 Cal.App.3d 591, 598, 158 Cal.Rptr. 169], and may not be sufficient [see MB 2100A.02[3][a] for discussion of mere ownership without possession or right to immediate possession as basis for conversion action].

A plaintiff's having regained possession of the converted property does not prevent the plaintiff from suing for damages for the conversion [*Virtanen v. O'Connell* (2006) 140 Cal.App.4th 688, 707, 44 Cal.Rptr.3d 702].

For related forms, see California Forms of Pleading and Practice, Ch. 150, *Conversion* (Matthew Bender).

LexisNexis Matthew Bender Expert Practice Tip--Recovering Property's Value: A plaintiff with the right to immediate possession (though not the owner) of the property can still recover the property's entire value. The exception to this rule is when the defendant is the owner, and the plaintiff only has a limited interest in the property [see MB 2100A.34 regarding limited interests]. By Ronald Oster

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 21, *California Judicial Council Conversion Instructions*]:

CACI No. 2100, Conversion--Essential Factual Elements

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewTortsIntentional TortsConversionGeneral OverviewTortsIntentional TortsConversionElements



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California Forms of Jury Instruction

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CHAPTER 21A Matthew Bender Conversion Instructions
PART A. ELEMENTS OF CONVERSION

3-21A California Forms of Jury Instruction MB 2100A.02

MB 2100A.02 Ownership at Time of Conversion

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Plaintiff may recover money for the conversion of _____ [describe property] without proof of possession or the right to immediate possession of that property if, and only if, Plaintiff has proved both of the following:

1. That [he/she/it] owned the property at the time Defendant is claimed to have wrongfully interfered with it; and

2. That Defendant either destroyed the property, or permanently deprived Plaintiff of the property's ownership.

Authorities: Snapp & Assocs. Ins. Servs., Inc. v. Robertson (2002) 96 Cal.App.4th 884, 892 n.2, 117 Cal.Rptr.2d 331 ; Reynolds v. Lerman (1956) 138 Cal.App.2d 586, 596, 292 P.2d 559

[2] Use of Instruction

This instruction should be used when the plaintiff contends that his or her action for conversion is justified by ownership of the property in question, without possession or the right to immediate possession. Whenever the terms "that property" or "the property" are used in the instruction, the property at issue could be substituted.

This instruction must be used with the instruction in Ch. 21, *California Judicial Council Conversion Instructions, CACI No. 2100* ("Conversion--Essential Factual Elements").

[3] Comment

[a] Ownership at Time of Conversion

The plaintiff in actions for conversion must prove actual possession or the right to possession [*Ortega v. Toyota Motor Sales, USA, Inc.* (S.D. Cal. 2008) 572 F.Supp.2d 1218, 1220 ; *Aero Props., Inc. v. Gottlieb* (1962) 206 Cal.App.2d 711, 716, 24 Cal.Rptr. 277 ; *Perlick v. Pacific Discount Corp.* (1942) 53 Cal.App.2d 136, 141, 127 P.2d 647]. The right to possession must be a right to immediate possession [see MB 2100A.01]. However, in *Reynolds v. Lerman* [*Reynolds v. Lerman* (1956) 138 Cal.App.2d 586, 292 P.2d 559], the court held that a judgment debtor whose attached property was wrongfully sold could recover for conversion even though he or she was not in actual possession or entitled to possession at the time the property was converted. The court emphasized that when the improper sale "divest[ed] the owner's title entirely, right of immediate possession is not essential to his recovery for conversion" [*Reynolds v. Lerman* (1956) 138 Cal.App.2d 586, 596, 292 P.2d 559 ; see California Forms of Pleading and Practice, Ch. 150, *Conversion* (Matthew Bender)].

It is not clear how this decision should be applied--whether ownership without a right to possession is generally sufficient or is sufficient only in closely similar fact situations. As a general rule either ownership or a right to possession is sufficient [Witkin, Summary of California Law, Vol. 5, *Torts*, § 619 (9th ed. 1988); Witkin, Summary of California Procedure, Vol. 5, *Pleading*, § 653 (3d ed. 1985)] and this view has been cited with approval by the courts [*Swingless Golf Club Corp. v. Taylor* (N.D. Cal. 2009) 679 F.Supp.2d 1060, 1068 (plaintiff must show ownership or right to possession at time of conversion); *Plummer v. Day/Eisenberg, LLP* (2010) 184 Cal.App.4th 38, 45, 108 Cal.Rptr.3d 455 (party need only allege it is entitled to immediate possession at time of conversion); *Baldwin v. Marina City Props., Inc.* (1978) 79 Cal.App.3d 393, 410, 145 Cal.Rptr. 406 ; see also *Hartford Fin. Corp. v. Burns* (1979) 96 Cal.App.3d 591, 598, 158 Cal.Rptr. 169].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 21, *California Judicial Council Conversion Instructions*]:

CACI No. 2100, Conversion--Essential Factual Elements

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewTortsIntentional TortsConversionGeneral OverviewTortsIntentional TortsConversionElements



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CHAPTER 21A Matthew Bender Conversion Instructions
PART A. ELEMENTS OF CONVERSION

3-21A California Forms of Jury Instruction MB 2100A.03

MB 2100A.03 Assignees**[1] Instruction**[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Plaintiff may recover money for the conversion of _____ [describe property] if Plaintiff has been assigned the right to bring an action for the conversion of that property by a person who was entitled to bring an action for its conversion. To prove this assignment, Plaintiff must have proved both of the following:

1. That _____ [name of assignor] intended to transfer [his/her/its] right of action to Plaintiff; and

2. That _____ [name of assignor] owned, was in possession of, or had a right to immediate possession of the property at the time of its conversion.

Authorities: Civ. Code §§ 953, 954; *McCown v. Spencer* (1970) 8 Cal.App.3d 216, 225, 87 Cal.Rptr. 213 ; *Cockerell v. Title Ins. & Trust Co.* (1954) 42 Cal.2d 284, 291-292, 267 P.2d 16 ; *Miller v. Bank of Am.* (1942) 52 Cal.App.2d 512, 515, 126 P.2d 444 ; *Staley v. McClurken* (1939) 35 Cal.App.2d 622, 625, 96 P.2d 805 .

[2] Use of Instruction

This instruction should be used when the plaintiff bases his or her right of action for conversion on the assignment of a chose in action rather than on ownership, possession, or the right of possession. It must be used with the instruction in Ch. 21, *California Judicial Council Conversion Instructions, CACI No. 2100* ("Conversion--Essential Factual Elements").

[3] Comment

[a] Conversion Action May Be Assigned

A thing in action, that is, a right to recover money or personal property by a judicial proceeding [Civ. Code § 953], is transferrable if it arises out of the violation of a right of property [Civ. Code § 954]. Thus, the right to bring a conversion action is transferrable [*Champion Home Builders Co. v. Sipes* (1990) 219 Cal.App.3d 1415, 1425, 269 Cal.Rptr. 75 ; *Miller v. Bank of Am.* (1942) 52 Cal.App.2d 512, 515, 126 P.2d 444 ; *Staley v. McClurken* (1939) 35 Cal.App.2d 622, 625, 96 P.2d 805]. This means that a plaintiff may sue for conversion who never had ownership, possession, or the right to possession, so long as the plaintiff is the assignee of one who did have ownership, possession, or the right to possession at the time of the conversion [*Staley v. McClurken* (1939) 35 Cal.App.2d 622, 625-627, 96 P.2d 805]. The party who claims under an assignment has the burden of proving that assignment [*Cockerell v. Title Ins. & Trust Co.* (1954) 42 Cal.2d 284, 292, 267 P.2d 16]. To prove an assignment, the plaintiff must prove that the owner of the right showed the intent to transfer that right, without the necessity of any further action [*Cockerell v. Title Ins. & Trust Co.* (1954) 42 Cal.2d 284, 291, 267 P.2d 16 ; *McCown v. Spencer* (1970) 8 Cal.App.3d 216, 225, 87 Cal.Rptr. 213].

For related forms, see California Forms of Pleading and Practice, Ch. 150, *Conversion* (Matthew Bender).

LexisNexis Matthew Bender Expert Practice Tip--Examine Assignments to Determine Their

Validity: Assignments are common in conversion actions arising out of conditional sales contracts. In some cases, ownership interests may have been transferred several times, especially if several financial institutions are involved. In such cases it is important to examine each assignment to determine its validity. *By Ronald Oster*

LexisNexis Matthew Bender Expert Practice Tip--Satisfy Required Elements of Assignment: As with any matter involving an assignment, care should be taken to satisfy the proper elements. Thus, a plaintiff's counsel should assure that the elements are met; while a defense counsel should examine how to demonstrate their absence. *By Rex Heeseman*

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 21, *California Judicial Council Conversion Instructions*]:

CACI No. 2100, Conversion--Essential Factual Elements

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Contracts Law Types of Contracts Choses in Action Torts Intentional Torts Conversion General Overview Torts Intentional Torts Conversion Elements



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California Forms of Jury Instruction

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CHAPTER 21A Matthew Bender Conversion Instructions
PART A. ELEMENTS OF CONVERSION

3-21A California Forms of Jury Instruction MB 2100A.04

MB 2100A.04 Fixtures

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Plaintiff may not recover money for the conversion of land. Property that is affixed to land is called a fixture and is considered a part of that land. This means that Plaintiff may not recover for the conversion of _____ [describe property], if it is a fixture. To decide whether the property is a fixture, there are three things that you must consider. First you must consider how the property is physically attached to the land. Property is affixed to land if it meets one of the following requirements:

- 1. It is attached to the land by roots, like a bush or a tree;**
- 2. It is imbedded in the land like a wall;**
- 3. It permanently rests on the land like a building; or**
- 4. It is permanently attached to something that rests permanently on the land. This may be done, for example, by means of cement, bolts, nails, or screws.**

Second, you must consider whether the property has been adapted to the purpose for which the land is used.

Third, you must consider whether the person who attached _____ [describe property] to the land intended for it to become part of the land.

Authorities: Civ. Code §§ 660, 1013; *Simms v. County of Los Angeles* (1950) 35 Cal.2d 303, 217 P.2d 936 ; *Munger v. Moore* (1970) 11 Cal.App.3d 1, 7, 89 Cal.Rptr. 323 ; *Sill Props., Inc. v. CMAG, Inc.*

(1963) 219 Cal.App.2d 42, 48-50, 33 Cal.Rptr. 155 ; *Bedell v. Mashburn* (1948) 87 Cal.App.2d 417, 422-423, 197 P.2d 98 .

[2] Use of Instruction

This instruction should be used when plaintiff's claim is for conversion of property that is or was attached to real property but is severed or severable from that real property. The issue will be whether the property was a fixture and part of the realty or was still personal property. The instruction must be used with the instruction in Ch. 21, *California Judicial Council Conversion Instructions*, CACI No. 2100 ("Conversion--Essential Factual Elements").

LexisNexis Matthew Bender Expert Practice Tip--Using MB 2100A.04[1]: This instruction is most likely to come up in connection with landlord-tenant disputes. *By Ronald Oster*

[3] Comment

[a] Conversion of Real Property; Severability

As a general rule, real property is not the subject of conversion [*Munger v. Moore* (1970) 11 Cal.App.3d 1, 7, 89 Cal.Rptr. 323]. Two California court of appeals cases have allowed damages for the conversion of real property [*Murphy v. Wilson* (1957) 153 Cal.App.2d 132, 135-136, 314 P.2d 507 ; *Katz v. Enos* (1945) 68 Cal.App.2d 266, 269, 156 P.2d 461], but both were subsequently questioned and disagreed with [*Munger v. Moore* (1970) 11 Cal.App.3d 1, 7, 89 Cal.Rptr. 323], and *Murphy v. Wilson* is a poorly reasoned decision. However, property that is attached to realty may be the subject of conversion, if it is severed or severable [*Eistrat v. Western Hardwood Lumber Co.* (1958) 164 Cal.App.2d 374, 379, 330 P.2d 629]. This includes fixtures [*Sill Props., Inc. v. CMAG, Inc.* (1963) 219 Cal.App.2d 42, 48-50, 33 Cal.Rptr. 155 ; *Bedell v. Mashburn* (1948) 87 Cal.App.2d 417, 422-423, 197 P.2d 98].

[b] Definition; Three Part Test

"Affixed" is defined in *Civ. Code* § 660 to mean things attached to land by roots, imbedded in land, permanently resting on land, or permanently attached to things permanently affixed to the land. The courts have expanded on this definition by establishing a test for determining whether property is a fixture. This test considers the following three things [*Simms v. County of Los Angeles* (1950) 35 Cal.2d 303, 217 P.2d 936 ; *Pajaro Valley Bank v. Santa Cruz County* (1962) 207 Cal.App.2d 621, 24 Cal.Rptr. 639]:

- The way in which the property is physically attached to the land;
- Whether the property has been adapted to the purpose for which the realty is used; and
- Whether the person attaching the property to the land intended for it to be a fixture.

[c] Ownership; Right to Remove

Civ. Code § 1013 provides that when property is affixed to the land of another without an agreement permitting its removal, that property generally belongs to the landowner, unless the owner requires the person who placed it there to remove it. (There is also a limited right under *Civ. Code* § 1013.5 to remove property affixed to another's land by a good faith error.) In cases involving lease agreements, the agreement should be examined to determine whether it gives the tenant the right to remove what would otherwise be a fixture. A tenant does have the right to remove from the demised premises, at any time during the lease term, anything affixed to those premises for trade, manufacture, ornament, or domestic use, if it can be removed without injury to the premises. This exception for tenants does not apply if the property has, by the manner in which it is affixed, become an integral part of the premises [*Civ. Code* § 1019].

For a related form, see California Forms of Pleading and Practice, Ch. 150, *Conversion* (Matthew Bender).

[d] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 21, *California Judicial Council Conversion Instructions*]:

CACI No. 2100, Conversion--Essential Factual Elements

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewReal Property LawFixtures & ImprovementsTenant & Trade FixturesTortsIntentional TortsConversionGeneral OverviewTortsIntentional TortsConversionElements



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CHAPTER 21A Matthew Bender Conversion Instructions
PART A. ELEMENTS OF CONVERSION

3-21A California Forms of Jury Instruction MB 2100A.05

MB 2100A.05 Money

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Plaintiff may recover for the conversion of [his/her/its] money, but only if Plaintiff proves that a specific sum capable of being identified was converted. Plaintiff only has to identify the sum of money converted and does not have to identify specific bills or coins.

Authorities: *Haigler v. Donnelly* (1941) 18 Cal.2d 674, 681, 117 P.2d 331 ; *PCO, Inc. v. Christensen, Miller, Fink, Jacobs, Glaser, Weil & Shapiro, LLP* (2007) 150 Cal.App.4th 384, 396, 58 Cal.Rptr.3d 516 ; *Fischer v. Machado* (1996) 50 Cal.App.4th 1069, 1072-1074, 58 Cal.Rptr.2d 213 ; *Weiss v. Marcus* (1975) 51 Cal.App.3d 590, 599, 124 Cal.Rptr. 297 .

[2] Use of Instruction

This instruction should be used when the plaintiff's claim is for the conversion of money. It must be used with the instruction in Ch. 21, *California Judicial Council Conversion Instructions, CACI No. 2100* ("Conversion--Essential Factual Elements").

[3] Comment

[a] Money Can Be Converted

Money can be the subject of conversion [*Watson v. Stockton Morris Plan Co.* (1939) 34 Cal.App.2d 393, 403, 93 P.2d 855] but only when a specific, identifiable sum has been converted [*Ortega v. Toyota Motor Sales, USA, Inc.* (S.D. Cal. 2008) 572 F.Supp.2d 1218, 1220 ; *Haigler v. Donnelly* (1941) 18 Cal.2d 674, 681, 117 P.2d 331 ; *Grodensky v.*

Artichoke Joe's Casino (2009) 171 Cal.App.4th 1399, 1454 n14, 91 Cal.Rptr.3d 732 ; *McKell v. Washington Mutual, Inc.* (2006) 142 Cal.App.4th 1457, 1491, 49 Cal.Rptr.3d 227 ; *Fischer v. Machado* (1996) 50 Cal.App.4th 1069, 1072-1074, 58 Cal.Rptr.2d 213 ; *Weiss v. Marcus* (1975) 51 Cal.App.3d 590, 599, 124 Cal.Rptr. 297 ; see *Miniaze v. Pacific Maritime Ass'n* (2006) 424 F.Supp.2d 1168, 1184 (conversion inapplicable to defendant's creation of authorized director's fee)]. This does not mean that each coin or bill must be earmarked, but only that a specific, identifiable amount of money is involved [*Ortega v. Toyota Motor Sales, USA, Inc.* (S.D. Cal. 2008) 572 F.Supp.2d 1218, 1220 ; *Haigler v. Donnelly* (1941) 18 Cal.2d 674, 681, 117 P.2d 331 ; *Fischer v. Machado* (1996) 50 Cal.App.4th 1069, 1072-1074, 58 Cal.Rptr.2d 213 ; *Weiss v. Marcus* (1975) 51 Cal.App.3d 590, 599, 124 Cal.Rptr. 297].

Most reported cases in which the plaintiff included a count for conversion of money also presented facts supporting a cause of action for money had and received [see, e.g., *Walter v. Hughes Communs., Inc.* (N.D. Cal. 2010) 682 F.Supp.2d 1031, 1047 (foundation for action for conversion on money had and received count is unjust enrichment of wrongdoer); *Weiss v. Marcus* (1975) 51 Cal.App.3d 590, 124 Cal.Rptr. 297]. The amounts of money in those cases were deemed alleged with sufficient specificity for purposes of the conversion cause of action. What the situation might be in the case, for example, of an embezzlement of an amount that cannot be exactly fixed by proof (because, for example, records have been tampered with), is not clear. However, the general rule that wrongdoers must bear the risk of uncertainty created by their own wrongdoing suggests that the right to recovery will not be confused with the difficulty of ascertaining an exact amount [see *Donahue v. United Artists Corp.* (1969) 2 Cal.App.3d 794, 804, 83 Cal.Rptr. 131].

For related forms, see California Forms of Pleading and Practice, Ch. 150, *Conversion* (Matthew Bender).

LexisNexis Matthew Bender Expert Practice Tip--Conversion of Money: Pursuing a conversion claim as to money can often be more challenging unless the "specific, identifiable sum" standard can be easily addressed. By *Rex Heeseman*

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 21, *California Judicial Council Conversion Instructions*]:

CACI No. 2100, Conversion--Essential Factual Elements

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewTortsIntentional TortsConversionGeneral OverviewTortsIntentional TortsConversionElements



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CHAPTER 21A Matthew Bender Conversion Instructions
PART A. ELEMENTS OF CONVERSION

3-21A California Forms of Jury Instruction MB 2100A.06

MB 2100A.06 Actual and Substantial Interference

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Plaintiff may recover money for the conversion of _____ [describe property] only if [he/she/it] has proven both of the following:

1. That Defendant actually interfered with Plaintiff's ownership or possession of _____ [describe property]. This means that Plaintiff must have proved that Defendant did some act that actually interfered with Plaintiff's ownership or possession. It is not enough to prove that Defendant wanted to interfere, planned to interfere, or threatened to interfere, or even that [he/she/it] had agreed with another person to interfere with Plaintiff's ownership or possession of Plaintiff's property.

2. That Defendant's interference with Plaintiff's ownership or possession of _____ [describe property] was substantial. This means that Plaintiff must have proved that what Defendant did showed an assumption by Defendant of ownership or control over Plaintiff's property or that what Defendant did prevented Plaintiff from enjoying [his/her/its] rights of ownership or possession.

Authorities: *Jordan v. Talbot* (1961) 55 Cal.2d 597, 610, 12 Cal.Rptr. 488, 361 P.2d 20 ; *Zaslow v. Kroenert* (1946) 29 Cal.2d 541, 549-551, 176 P.2d 1 ; *Aronson v. Bank of Am. Nat'l Trust & Sav. Ass'n* (1937) 9 Cal.2d 640, 643, 72 P.2d 548 ; *Home v. Kramer* (1936) 7 Cal.2d 361, 363-364, 60 P.2d 854 ; *Kee v. Becker* (1942) 54 Cal.App.2d 466, 471-474, 129 P.2d 159 ; *McCaffey Canning Co., Inc. v. Bank of Am.* (1930) 109 Cal.App. 415, 424, 294 P. 45 .

[2] Use of Instruction

This instruction should be used whenever actual or substantial interference is at issue. It must be used with the

instruction in Ch. 21, *California Judicial Council Conversion Instructions, CACI No. 2100* ("Conversion--Essential Factual Elements").

This instruction must also be used to introduce all of the other instructions in MB 2100A.07-MB 2100A.15 that deal with what constitutes actual and substantial interference.

LexisNexis Matthew Bender Expert Practice Tip--Use Care When Claiming Interference:

"Interference" with another's property may sometimes be a tricky concept to prove. Further, that interference must be "substantial" [see [3][b], below]. Hence, care must often be taken in proving this element of the tort. *By Rex Heeseman*

[3] Comment

[a] Actual Interference

For conversion to have occurred, there must be actual interference with the plaintiff's ownership or possession of personal property [*Home v. Kramer* (1936) 7 Cal.2d 361, 363-364, 60 P.2d 854 ; see, e.g., *Kelley v. Mortgage Elec. Registration Sys.* (N.D. Cal. 2009) 642 F.Supp.2d 1048, 1056-1057 (no elements of conversion alleged)]. Neither a mere claim of dominion over property [*Kee v. Becker* (1942) 54 Cal.App.2d 466, 471-474, 129 P.2d 159], nor an unconsummated purpose to interfere with another's dominion over property is enough to constitute conversion [*Aronson v. Bank of Am. Nat'l Trust & Sav. Ass'n* (1937) 9 Cal.2d 640, 643, 72 P.2d 548 ; *Kee v. Becker* (1942) 54 Cal.App.2d 466, 471-474, 129 P.2d 159].

[b] Substantial Interference

Even actual interference alone is not enough. For example, mere intermeddling, or use of the property, or damage to it is not enough. The actual interference must be a "substantial interference" [*Jordan v. Talbot* (1961) 55 Cal.2d 597, 610, 12 Cal.Rptr. 488, 361 P.2d 20 ; *Zaslow v. Kroenert* (1946) 29 Cal.2d 541, 551, 176 P.2d 1 ; *Heaps v. Heaps* (2004) 124 Cal.App.4th 286, 292, 21 Cal.Rptr.3d 239 ; see Restatement (Second) of Torts § 222A]. For this reason, it is not conversion for the landlord of a bankrupt tenant to make a quitclaim sale of fixtures claimed by the tenant's trustee in bankruptcy, if possession of the fixtures is not disturbed. Sale by quitclaim does not deny the claim of the trustee in bankruptcy [*Home v. Kramer* (1936) 7 Cal.2d 361, 363-364, 60 P.2d 854]. "It is the substantial injury inflicted which constitutes the gravamen of the action" [*McCaffey Canning Co., Inc. v. Bank of Am.* (1930) 109 Cal.App. 415, 424, 294 P. 45].

"Substantial interference" means that the defendant's interference must be an act that shows an assumption of ownership or control by the defendant or an act that prevents the plaintiff from exercising his or her rights of ownership or possession [see *Zaslow v. Kroenert* (1946) 29 Cal.2d 541, 549-551, 176 P.2d 1 ; *Plummer v. Day/Eisenberg, LLP* (2010) 184 Cal.App.4th 38, 50, 108 Cal.Rptr.3d 455]. According to the Restatement, the act must be one that "so seriously interferes with the right of another to control [the property] that the actor may justly be required to pay the other the full value of the chattel" [Restatement (Second) of Torts § 222A].

[c] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 21, *California Judicial Council Conversion Instructions*]:

CACI No. 2100, Conversion--Essential Factual Elements

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewTortsIntentional TortsConversionGeneral
OverviewTortsIntentional TortsConversionElements



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CHAPTER 21A Matthew Bender Conversion Instructions
PART A. ELEMENTS OF CONVERSION

3-21A California Forms of Jury Instruction MB 2100A.07

MB 2100A.07 Taking as Actual Interference

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

If Plaintiff has proved that Defendant took _____ [describe property] from Plaintiff's possession, then Plaintiff has proved an actual interference with [his/her/its] rights to personal property.

De Vries v. Brumback (1960) 53 Cal.2d 643, 647, 650, 2 Cal.Rptr. 764, 349 P.2d 532 ; *Union Oil Co. v. Mutual Oil Co.* (1937) 19 Cal.App.2d 409, 411-415, 65 P.2d 896 .

[2] Use of Instruction

This introduction should be used when the conversion complained of was achieved by an actual taking of property from plaintiff. This instruction must be used with the instruction in MB 2100A.06[1] that explains actual and substantial interference, and with the instruction in Ch. 21, *California Judicial Council Conversion Instructions, CACI No. 2100* ("Conversion--Essential Factual Elements").

[3] Comment

[a] Taking as Actual Interference

Taking property from the plaintiff is an actual interference with his or her property rights that may constitute conversion [*Union Oil Co. v. Mutual Oil Co.* (1937) 19 Cal.App.2d 409, 411-415, 65 P.2d 896 ; Restatement (Second) of Torts §§ 221, 222, 223(a), 225] if the interference is substantial [Restatement (Second) of Torts § 22; see MB 2100A.06]. Thus, disposing of stolen property as part of a conspiracy to commit robbery is a conversion [*De Vries v. Brumback* (1960) 53 Cal.2d 643, 647, 650, 2 Cal.Rptr. 764, 349 P.2d 532].

For related forms, see California Forms of Pleading and Practice, Ch. 150, *Conversion* (Matthew Bender).

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 21, *California Judicial Council Conversion Instructions*]:

CACI No. 2100 Conversion--Essential Factual Elements

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewCriminal Law & ProcedureCriminal
OffensesProperty CrimesReceiving Stolen PropertyElementsTortsIntentional TortsConversionGeneral
OverviewTortsIntentional TortsConversionElements



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CHAPTER 21A Matthew Bender Conversion Instructions
PART A. ELEMENTS OF CONVERSION

3-21A California Forms of Jury Instruction MB 2100A.08

MB 2100A.08 Destruction of Property as Actual and Substantial Interference**[1] Instruction**[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Plaintiff has proved an actual and substantial interference if [he/she/it] proves that Defendant destroyed
_____ [describe property].

Authorities: *Bedell v. Mashburn* (1948) 87 Cal.App.2d 417, 423, 197 P.2d 98 , disapproved on other grounds, *Reynolds v. Bank of Am.* (1959) 53 Cal.2d 49, 51, 345 P.2d 926 (disapproving dicta limiting conversion damages to actual value of property); *Staley v. McClurken* (1939) 35 Cal.App.2d 622, 628, 96 P.2d 805 .

[2] Use of Instruction

This instruction should be used when the plaintiff claims conversion by destruction. It must be used with the instruction in Ch. 21, *California Judicial Council Conversion Instructions, CACI No. 2100* ("Conversion--Essential Factual Elements"), and the instruction in MB 2100A.06[1] on actual and substantial interference.

[3] Comment**[a] Destruction as Conversion**

The destruction of another's personal property is conversion [*Bedell v. Mashburn* (1948) 87 Cal.App.2d 417, 423, 197 P.2d 98 , disapproved on other grounds, *Reynolds v. Bank of Am.* (1959) 53 Cal.2d 49, 51, 345 P.2d 926 (disapproving dicta limiting conversion damages to actual value of property); *Staley v. McClurken* (1939) 35 Cal.App.2d 622, 628, 96 P.2d 805 ; Restatement (Second) of Torts § 226].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 21, *California Judicial Council Conversion Instructions*]:

CACI No. 2100 Conversion--Essential Factual Elements

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewTortsDamagesCompensatory DamagesProperty
DamageGeneral OverviewTortsIntentional TortsConversionGeneral OverviewTortsIntentional
TortsConversionElements



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CHAPTER 21A Matthew Bender Conversion Instructions
PART A. ELEMENTS OF CONVERSION

3-21A California Forms of Jury Instruction MB 2100A.09

MB 2100A.09 Changes to Property as Actual Interference**[1] Instruction**[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Plaintiff has proven Defendant's actual interference if [he/she/it] proves that Defendant damaged or otherwise changed _____ [describe property].

Authorities: *Bedell v. Mashburn* (1948) 87 Cal.App.2d 417, 423, 197 P.2d 98 , disapproved on other grounds, *Reynolds v. Bank of Am.* (1959) 53 Cal.2d 49, 51, 345 P.2d 926 (disapproving dicta limiting conversion damages to actual value of property); *Staley v. McClurken* (1939) 35 Cal.App.2d 622, 628, 96 P.2d 805 .

[2] Use of Instruction

This instruction should be used when the property claimed converted is changed or damaged, but not destroyed. It must be used with the instruction in Ch. 21, *California Judicial Council Conversion Instructions*, CACI No. 2100 ("Conversion--Essential Factual Elements"), and the instruction in MB 2100A.06[1].

[3] Comment**[a] Change to Property as Interference**

Changes to the personal property of another, including damage to that property, constitute interference with that property and may be conversion [*Bedell v. Mashburn* (1948) 87 Cal.App.2d 417, 423, 197 P.2d 98 , disapproved on other grounds, *Reynolds v. Bank of Am.* (1959) 53 Cal.2d 49, 51, 345 P.2d 926 (disapproving dicta limiting conversion damages to actual value of property); *Staley v. McClurken* (1939) 35 Cal.App.2d 622, 628, 96 P.2d 805 ; Restatement (Second) of Torts § 226], if the change or damage is significant enough to be a substantial interference [see MB

2100A.06[3][b]; Restatement (Second) of Torts § 226 (material alteration)].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 21, *California Judicial Council Conversion Instructions*]:

CACI No. 2100 Conversion--Essential Factual Elements

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewTortsDamagesCompensatory DamagesProperty
DamageGeneral OverviewTortsIntentional TortsConversionGeneral OverviewTortsIntentional
TortsConversionElements



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CHAPTER 21A Matthew Bender Conversion Instructions
PART A. ELEMENTS OF CONVERSION

3-21A California Forms of Jury Instruction MB 2100A.10

MB 2100A.10 Transfer as Actual and Substantial Interference

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

If Plaintiff has proven that Defendant sold or otherwise transferred Plaintiff's property without authority to do so, then Plaintiff has proven that Defendant actually and substantially interfered with the property.

Authorities: *Strutt v. Ontario Sav. & Loan Ass'n* (1972) 28 Cal.App.3d 866, 874, 105 Cal.Rptr. 395 ;
Reynolds v. Lerman (1956) 138 Cal.App.2d 586, 592, 292 P.2d 559 ; *Meyer v. Thomas* (1936) 18
Cal.App.2d 299, 302, 63 P.2d 1176 .

[2] Use of Instruction

This instruction should be used when the plaintiff claims a conversion by unauthorized sale or transfer. It must be used with the instruction in Ch. 21, *California Judicial Council Conversion Instructions, CACI No. 2100* ("Conversion--Essential Factual Elements").

See also "LexisNexis Matthew Bender Expert Practice Tip--Use Care When Claiming Interference" in MB 2100A.06[2].

[3] Comment

[a] Transfer as Conversion

The sale or transfer of another person's personal property without authority is conversion [*Reynolds v. Lerman* (1956) 138 Cal.App.2d 586, 592, 292 P.2d 559 ; *Meyer v. Thomas* (1936) 18 Cal.App.2d 299, 302, 63 P.2d 1176]. For example, both of the following constitute conversion:

- The unauthorized release of pledged securities by the person to whom they were pledged [*Meyer v. Thomas* (1936) 18 Cal.App.2d 299, 302, 63 P.2d 1176]; and

- The unauthorized sale of a mental patient's personal property by the Department of Mental Hygiene in compromise of a disputed claim [*Strutt v. Ontario Sav. & Loan Ass'n* (1972) 28 Cal.App.3d 866, 874, 105 Cal.Rptr. 395].

For related forms, see California Forms of Pleading and Practice, Ch. 150, *Conversion* (Matthew Bender).

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 21, *California Judicial Council Conversion Instructions*]:

CACI No. 2100 Conversion--Essential Factual Elements

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewTortsIntentional TortsConversionGeneral OverviewTortsIntentional TortsConversionElements



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CHAPTER 21A Matthew Bender Conversion Instructions
PART A. ELEMENTS OF CONVERSION

3-21A California Forms of Jury Instruction MB 2100A.11

MB 2100A.11 Unauthorized Use as Actual Interference**[1] Instruction**[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Plaintiff has proved an actual interference with [his/her/its] property if [he/she/it] has proved all of the following:

- 1. That _____ [describe property] was delivered to Defendant;**
- 2. That this delivery was part of an agreement between Plaintiff and Defendant to _____ [state purpose of agency or bailment];**
- 3. That under this agreement Defendant was authorized to _____ [state authorized use or uses of property under terms of agency or bailment];** and
- 4. That Defendant used the property in a manner that was not authorized by the agreement.**
Authorities: Hollywood Motion Picture Equip. Co. v. Furer (1940) 16 Cal.2d 184, 189, 105 P.2d 299 ; Dodge v. Meyer (1882) 61 Cal. 405, 421-423 ; Acme Paper Co. v. Goffstein (1954) 125 Cal.App.2d 175, 179-181, 270 P.2d 505 ; National Bank of N.Z. Ltd. v. Finn (1927) 81 Cal.App. 317, 345-347, 253 P. 757 ; Imperial Valley Long Staple Cotton Growers Ass'n v. Davidson (1922) 58 Cal.App. 551, 554-555, 209 P. 58 .

[2] Use of Instruction

This instruction should be used when the plaintiff claims that the defendant made an unauthorized use of the plaintiff's personal property amounting to a conversion. It must be used with the instruction in Ch. 21, *California Judicial Council*

Conversion Instructions, CACI No. 2100 ("Conversion--Essential Factual Elements").

[3] Comment

[a] Unauthorized Use as Conversion

Bailees [*Hollywood Motion Picture Equip. Co. v. Furer* (1940) 16 Cal.2d 184, 189, 105 P.2d 299 ; *Dodge v. Meyer* (1882) 61 Cal. 405, 421-423 ; Restatement (Second) of Torts § 228], employees [*Acme Paper Co. v. Goffstein* (1954) 125 Cal.App.2d 175, 179-181, 270 P.2d 505], or agents [*National Bank of N.Z. Ltd. v. Finn* (1927) 81 Cal.App. 317, 345-347, 253 P. 757 ; *Imperial Valley Long Staple Cotton Growers Ass'n v. Davidson* (1922) 58 Cal.App. 551, 554-555, 209 P. 58 ; Restatement (Second) of Torts §§ 227, 228] may be liable for conversion for the unauthorized use of personal property, if that use amounts to a substantial interference with the plaintiff's rights of ownership or possession [see MB 2100A.06[3][b]; see also Restatement (Second) of Torts §§ 228, 256 (unauthorized use is mere trespass unless use seriously violates plaintiff's right to control property's use)]. An unauthorized use is one that is not authorized by the terms of the agency, the employment, or the bailment.

For a related form, see California Forms of Pleading and Practice, Ch. 150, *Conversion* (Matthew Bender).

LexisNexis Matthew Bender Expert Practice Tip--Plaintiff Must Prove Both Actual and Substantial Interference: Although "unauthorized use" will satisfy the actual interference requirement, the plaintiff must still prove the interference was "substantial," which is a separate requirement [see MB 2100A.06]. By Ronald Oster

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 21, *California Judicial Council Conversion Instructions*]:

CACI No. 2100 Conversion--Essential Factual Elements

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Torts Intentional Torts Conversion General Overview Torts Intentional Torts Conversion Elements Torts Vicarious Liability Bailees



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CHAPTER 21A Matthew Bender Conversion Instructions
PART A. ELEMENTS OF CONVERSION

3-21A California Forms of Jury Instruction MB 2100A.12

MB 2100A.12 Refusal to Return on Demand as Actual and Substantial Interference

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Plaintiff has proved Defendant's actual and substantial interference with _____ [describe property] if Plaintiff has proved all of the following:

- 1. That Plaintiff was entitled to immediate possession of _____ [describe property];**
- 2. That Defendant had possession of that property;**
- 3. That Plaintiff demanded that Defendant return the property; and**
- 4. That Defendant refused to return the property to Plaintiff.**

***Authorities:** Edwards v. Jenkins (1932) 214 Cal. 713, 720-722, 7 P.2d 702 ; Fearon v. Department of Corrections (1984) 162 Cal.App.3d 1254, 1257, 209 Cal.Rptr. 309 ; Wolfe v. Willard H. George, Inc. (1930) 110 Cal.App. 532, 535-536, 294 P. 436 .*

[2] Use of Instruction

This instruction is for use when the plaintiff's claim for conversion is based on the defendant's refusal to return property after a demand. It must be used with the instruction in Ch. 21, *California Judicial Council Conversion Instructions*, CACI No. 2100 ("Conversion--Essential Factual Elements"), and with the instruction in MB 2100A.06[1].

LexisNexis Matthew Bender Expert Practice Tip--Demand on Defendant: Proof of an effective demand on the defendant may be challenging unless there is a clear, written communication to that defendant. *By Rex Heeseman*

[3] Comment**[a] Refusal to Return as Interference**

The refusal by one in possession of a chattel to return that chattel on a demand for its return by one entitled to immediate possession is an actual and substantial interference [*Fearon v. Department of Corrections* (1984) 162 Cal.App.3d 1254, 1257, 209 Cal.Rptr. 309 ; *Wolfe v. Willard H. George, Inc.* (1930) 110 Cal.App. 532, 535-536, 294 P. 436 ; see *Edwards v. Jenkins* (1932) 214 Cal. 713, 720-722, 7 P.2d 702 ; Restatement (Second) of Torts §§ 237-241]. However, a good faith qualified refusal to return for a reasonable period and for a reasonable purpose, such as to inquire into the claimant's right to possession [*Giacomelos v. Bank of Am.* (1965) 237 Cal.App.2d 99, 100-101, 46 Cal.Rptr. 612 ; Restatement (Second) of Torts § 240], is not a conversion [Restatement (Second) of Torts §§ 238-241; see MB 2100A.54].

For related forms, see California Forms of Pleading and Practice, Ch. 150, *Conversion* (Matthew Bender).

LexisNexis Matthew Bender Expert Practice Tip--Reasonableness of Demand: Note the qualified privilege to refuse a demand that arises when the demand is "unreasonable" or when the defendant requires time to investigate the fact [see MB 2100A.54 regarding qualified refusal privilege]. By Ronald Oster

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 21, *California Judicial Council Conversion Instructions*]:

CACI No. 2100 Conversion--Essential Factual Elements

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewTortsIntentional TortsConversionGeneral OverviewTortsIntentional TortsConversionElements



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CHAPTER 21A Matthew Bender Conversion Instructions
PART A. ELEMENTS OF CONVERSION

3-21A California Forms of Jury Instruction MB 2100A.13

MB 2100A.13 Misdelivery as Actual Interference**[1] Instruction**[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

**Plaintiff has proved that Defendant actually interfered with _____ [describe property] if
Plaintiff has proved all of the following:**

- 1. That Defendant delivered the property to _____ [name];**
- 2. That _____ [name recipient of property] was not then entitled to possession of the property;
and**
- 3. That Plaintiff was entitled to possession of the property at the time Defendant delivered it to
_____ [name].**

Authorities: *Byer v. Canadian Bank of Commerce* (1937) 8 Cal.2d 297, 299-301, 65 P.2d 67 ; *Newlove v. Pond* (1900) 130 Cal. 342, 344-345, 62 P. 561 ; *Fisher v. Pickwick Hotel, Inc.* (1940) 42 Cal.App.2d Supp. 823, 825, 108 P.2d 1001 ; *Smith v. Miller* (1935) 5 Cal.App.2d 564, 572, 43 P.2d 347 .

[2] Use of Instruction

This instruction should be used when the plaintiff claims a conversion by misdelivery. It should be used with the instruction in Ch. 21, *California Judicial Council Conversion Instructions*, CACI No. 2100 ("Conversion--Essential Factual Elements"), and with the instruction in MB 2100A.06[1].

[3] Comment

[a] Misdelivery as Actual Interference

Delivery of goods to a person not entitled to possession of them is actual interference [*Byer v. Canadian Bank of Commerce* (1937) 8 Cal.2d 297, 299-301, 65 P.2d 67 ; *Newlove v. Pond* (1900) 130 Cal. 342, 344-345, 62 P. 561 ; *Fisher v. Pickwick Hotel, Inc.* (1940) 42 Cal.App.2d Supp. 823, 825, 108 P.2d 1001 ; *Smith v. Miller* (1935) 5 Cal.App.2d 564, 572, 43 P.2d 347 ; Restatement (Second) of Torts §§ 223(f), 234, 235] for which the person entitled to possession may bring an action. This is true even if the delivery is made in good faith to the apparent owner of the goods [*Byer v. Canadian Bank of Commerce* (1937) 8 Cal.2d 297, 299, 65 P.2d 67].

However, the Restatement provides two exceptions. A bailee, agent, or servant who redelivers the property at issue to his or her bailor, principal, or master is not liable to a person entitled to immediate possession unless that person has made an adverse claim on the bailee, agent, or servant for the property [Restatement (Second) of Torts § 235(2)]. Similarly, a bailee, agent, or servant who delivers the property to someone else on instructions from his or her bailor, principal, or master is not liable to the person entitled to immediate possession unless he or she knew or had reason to know that the bailor, principal, or master lacked authority to order that delivery [Restatement (Second) of Torts § 235(3)].

Note that for a bailee, agent, or servant to be liable to his or her bailor, principal, or master for conversion by misdelivery, the delivery must be unauthorized by the bailor, principal, or master in addition to being a delivery to a person not entitled to immediate possession [Restatement (Second) of Torts § 234].

For a related form, see California Forms of Pleading and Practice, Ch. 150, *Conversion* (Matthew Bender).

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 21, *California Judicial Council Conversion Instructions*]:

CACI No. 2100 Conversion--Essential Factual Elements

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate Law Agency Relationships Duties & Liabilities Negligent Acts of Agents General Overview Civil Procedure Trials Jury Trials Jury Instructions General Overview Torts Intentional Torts Conversion General Overview Torts Intentional Torts Conversion Elements Torts Vicarious Liability Bailees



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CHAPTER 21A Matthew Bender Conversion Instructions
PART A. ELEMENTS OF CONVERSION

3-21A California Forms of Jury Instruction MB 2100A.14

MB 2100A.14 Buying From One Without Title or Right as Actual Interference**[1] Instruction**[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Plaintiff has proved that Defendant actually interfered with _____ [specify property] if Plaintiff has proved all of the following:

1. That Defendant _____ [bought or received] the property from _____ [name of seller, pledgor, or other transferor];

2. That Defendant has kept the property and claimed _____ [specify right, title, or interest claimed by defendant in property]; and

3. That _____ [name of defendant's transferor] had no right, title, or interest in the property.

Authorities: *Swim v. Wilson* (1891) 90 Cal. 126, 129-131, 27 P. 33 ; *Culp v. Signal Van & Storage Co.* (1956) 142 Cal.App.2d Supp. 859, 861, 298 P.2d 162 ; *First Nat'l Bank v. Thompson* (1943) 60 Cal.App.2d 79, 82, 140 P.2d 75 ; *Jackins v. Bacon* (1923) 63 Cal.App. 463, 467, 218 P. 1027 .

[2] Use of Instruction

This instruction should be used when the plaintiff claims that the defendant converted the plaintiff's property by buying or receiving that property from someone without any right or title to the property. It should be used with the instruction in Ch. 21, *California Judicial Council Conversion Instructions*, CACI No. 2100 ("Conversion--Essential Factual Elements"), and with the instruction in MB 2100A.06[1].

LexisNexis Matthew Bender Expert Practice Tip--Bona Fide Purchaser Has Defense to

Conversion: This instruction is correct as far as it goes. However, note that an innocent purchaser for

value without notice (i.e. a bona fide purchaser) still has a defense to conversion [see MB 2100A.56 regarding jury instruction on defendant's claim of being bona fide purchaser]. By *Ronald Oster and Rex Heeseman*

[3] Comment

[a] Buying From One Without Right or Title

One who buys or receives property from another who is without right or title to that property can receive no greater title than his or her transferor or seller has to give, and therefore possession of the property by this buyer or transferor with a claim of right or title amounts to a conversion of the property [see Restatement (Second) of Torts § 229]. The reason for this is because the claim constitutes a wrongful exercise of dominion over another person's property that is inconsistent with the owner's rights in that property [see *Weiss v. Marcus* (1975) 51 Cal.App.3d 590, 599, 124 Cal.Rptr. 297 ; Restatement (Second) of Torts § 222A(1)].

Thus, for example, it is conversion to buy previously converted goods [*Culp v. Signal Van & Storage Co.* (1956) 142 Cal.App.2d Supp. 859, 861, 298 P.2d 162] or to buy personal property at a void execution sale [*Jackins v. Bacon* (1923) 63 Cal.App. 463, 467, 218 P. 1027]. It is also a conversion for an innocent purchaser to buy goods from a defaulting conditional purchaser when the seller has retained title and is entitled to possession under the conditional sales contract [*First Nat'l Bank v. Thompson* (1943) 60 Cal.App.2d 79, 82, 140 P.2d 75].

For a related form, see California Forms of Pleading and Practice, Ch. 150, *Conversion* (Matthew Bender).

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 21, *California Judicial Council Conversion Instructions*]:

CACI No. 2100 Conversion--Essential Factual Elements

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Contracts Law Sales of Goods Title, Creditors & Good Faith Purchasers General Overview Contracts Law Types of Contracts Bona Fide Purchasers Torts Intentional Torts Conversion General Overview Torts Intentional Torts Conversion Elements



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CHAPTER 21A Matthew Bender Conversion Instructions
PART A. ELEMENTS OF CONVERSION

3-21A California Forms of Jury Instruction MB 2100A.15

MB 2100A.15 False Third Party Claim as Actual Interference

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Plaintiff has proved that Defendant actually interfered with _____ [specify property] if Plaintiff has proved all of the following:

- 1. That Plaintiff had executed a writ of attachment and placed a lien on the property;**
- 2. That this was done so that the property could be sold under a writ of execution to satisfy a debt that _____ [name of owner], the actual owner of the property, owed to Plaintiff;**
- 3. That Defendant defeated the writ of execution and prevented the property's sale by filing a third party claim on it with the court; and**
- 4. That this third party claim filed by Defendant was not valid.**

Authorities: *Service v. Trombetta* (1963) 212 Cal.App.2d 313, 316, 28 Cal.Rptr. 68 ; *McCaffey Canning Co., Inc. v. Bank of Am.* (1930) 109 Cal.App. 415, 424, 294 P. 45 .

[2] Use of Instruction

This instruction should be used when the plaintiff claims that the defendant has committed conversion by filing a false third party claim that defeated a writ of execution on property owned by the plaintiff's judgment debtor. Additional instructions may be necessary to clarify execution and sale procedures for the jury. For example, it may prove advisable to define terms such as "levy," "execution," "writ of attachment," and "writ of execution." The instruction should be used with the instruction in Ch. 21, *California Judicial Council Conversion Instructions, CACI No. 2100*

("Conversion--Essential Factual Elements"), and with the instruction in MB 2100A.06[1].

[3] Comment

[a] Filing of False Third Party Claim

When the levy of a writ of execution is defeated, and the judgment creditor's lien lost, by the filing of a false third party claim, then the plaintiff may recover against the third party claimant for conversion, even if the claim was made in good faith [*Service v. Trombetta* (1963) 212 Cal.App.2d 313, 316, 28 Cal.Rptr. 68 ; *McCaffey Canning Co., Inc. v. Bank of Am.* (1930) 109 Cal.App. 415, 422-426, 294 P. 45] . The lien may be lost if, for example, the judgment debtor is discharged in bankruptcy before the third party claim is adjudicated false [*Service v. Trombetta* (1963) 212 Cal.App.2d 313, 316, 320-321, 28 Cal.Rptr. 68].

For a related form, see California Forms of Pleading and Practice, Ch. 150, *Conversion* (Matthew Bender).

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 21, *California Judicial Council Conversion Instructions*]:

CACI No. 2100 Conversion--Essential Factual Elements

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewCivil ProcedureJudgmentsEntry of
JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesJudgment LiensGeneral
OverviewTortsIntentional TortsConversionGeneral OverviewTortsIntentional TortsConversionElements



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CHAPTER 21A Matthew Bender Conversion Instructions
PART A. ELEMENTS OF CONVERSION

3-21A California Forms of Jury Instruction MB 2100A.16

MB 2100A.16 Intent**[1] Instruction**[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Defendant's interference with Plaintiff's property must have been intentional. To prove that Defendant's act of interference was an intentional interference, Plaintiff must have proved that the act itself was intentional. It is not necessary to prove that Defendant had a wrongful motive or that [he/she/it] meant to do any harm to Plaintiff.

[*OPTIONAL (See Use of Instruction)*]

If Defendant had a duty to return or account for _____ [describe property] while that property was in Defendant's possession or control, and Defendant failed to do so, Plaintiff must prove that Defendant's failure to return or account for that property was intentional. It is not necessary to prove that Defendant had a wrongful motive or that [he/she/it] meant to do any harm to Plaintiff.

Authorities: *Schroeder v. Auto Driveaway Co.* (1974) 11 Cal.3d 908, 918, 114 Cal.Rptr. 622, 523 P.2d 662 ; *Poggi v. Scott* (1914) 167 Cal. 372, 375-376, 139 P. 815 ; *Burlesci v. Petersen* (1998) 68 Cal.App.4th 1062, 1066-1067, 80 Cal.Rptr.2d 704 ; *Oakdale Vill. Group v. Fong* (1996) 43 Cal.App.4th 539, 544, 50 Cal.Rptr.2d 810 ; *Varela v. Wells Fargo Bank* (1971) 15 Cal.App.3d 741, 749-750, 93 Cal.Rptr. 428 ; *Beverly Fin. Co. v. American Cas. Co.* (1969) 273 Cal.App.2d 259, 264, 78 Cal.Rptr. 334

[2] Use of Instruction

This instruction should be used to define the intent required by the elements of conversion as outlined in the instruction

in Ch. 21, *California Judicial Council Conversion Instructions*, CACI No. 2100 ("Conversion--Essential Factual Elements"), which must be used with this instruction. Use the optional paragraph when conversion by nonfeasance through failure to return or account for property in the defendant's possession or control is at issue. This option must also be used with the instruction in MB 2100A.12 on refusal to return property on demand.

[3] Comment

[a] Required Intent

To constitute conversion, the wrongful interference with the personal property of another must be an intentional interference [*Schroeder v. Auto Driveaway Co.* (1974) 11 Cal.3d 908, 918, 114 Cal.Rptr. 622, 523 P.2d 662 ; *Taylor v. Forte Hotels International* (1991) 235 Cal.App.3d 1119, 1124, 1 Cal.Rptr.2d 189 ; see Restatement (Second) of Torts §§ 222A, 223, cmt. b]. The intent required is merely the intent to do the act exercising wrongful dominion or control [*Bailey v. County of San Joaquin* (E.D. Cal. 2009) 671 F.Supp.2d 1167, 1178 ; *Oakdale Vill. Group v. Fong* (1996) 43 Cal.App.4th 539, 544, 50 Cal.Rptr.2d 810 ; *Mendoza v. Continental Sales Co.* (2006) 140 Cal.App.4th 1395, 1404-1405, 45 Cal.Rptr.3d 525 ; *Virtanen v. O'Connell* (2006) 140 Cal.App.4th 688, 707, 44 Cal.Rptr.3d 702 ; *Varela v. Wells Fargo Bank* (1971) 15 Cal.App.3d 741, 749-750, 93 Cal.Rptr. 428 ; Restatement (Second) of Torts § 223, cmt. b; but see *Schroeder v. Auto Driveaway Co.* (1974) 11 Cal.3d 908, 918, 114 Cal.Rptr. 622, 523 P.2d 662 , in which Court indicates that as a general rule intent required is intent to affect property]. A wrongful or corrupt intent is not required [*Poggi v. Scott* (1914) 167 Cal. 372, 376, 139 P. 815 ; *Burlesci v. Petersen* (1998) 68 Cal.App.4th 1062, 1066-1067, 80 Cal.Rptr.2d 704 ; *Varela v. Wells Fargo Bank* (1971) 15 Cal.App.3d 741, 749, 93 Cal.Rptr. 428 ; *Beverly Fin. Co. v. American Cas. Co.* (1969) 273 Cal.App.2d 259, 264, 78 Cal.Rptr. 334].

However, negligence alone is not enough to establish intent and conversion [*George v. Bekins Van & Storage Co.* (1949) 33 Cal.2d 834, 837-838, 205 P.2d 1037 ; *Taylor v. Forte Hotels Int'l* (1991) 235 Cal.App.3d 1119, 1124, 1 Cal.Rptr.2d 189 ; Restatement (Second) of Torts § 223, cmt. b]. Thus, good faith [*Poggi v. Scott* (1914) 167 Cal. 372, 376, 139 P. 815 ; *Varela v. Wells Fargo Bank* (1971) 15 Cal.App.3d 741, 750, 93 Cal.Rptr. 428 ; *Beverly Fin. Co. v. American Cas. Co.* (1969) 273 Cal.App.2d 259, 264, 78 Cal.Rptr. 334 ; *Service v. Trombetta* (1963) 212 Cal.App.2d 313, 316, 28 Cal.Rptr. 68], ignorance or mistake [*Byer v. Canadian Bank of Commerce* (1937) 8 Cal.2d 297, 299, 65 P.2d 67 ; *Poggi v. Scott* (1914) 167 Cal. 372, 376, 139 P. 815 ; *Varela v. Wells Fargo Bank* (1971) 15 Cal.App.3d 741, 749-750, 93 Cal.Rptr. 428 ; Restatement (Second) of Torts §§ 223, cmt. b, 244], and due care [*Poggi v. Scott* (1914) 167 Cal. 372, 376, 139 P. 815 ; *Fresno Air Serv. v. Wood* (1965) 232 Cal.App.2d 801, 806, 43 Cal.Rptr. 276] are not defenses and do not negate the required intent.

When conversion is accomplished by nonfeasance, such as the refusal to return on demand plaintiff's property that is in defendant's possession or control [see *Schroeder v. Auto Driveaway Co.* (1974) 11 Cal.3d 908, 918, 114 Cal.Rptr. 622, 523 P.2d 662 ; see also MB 2100A.12[3][a]], the required intent is demonstrated by proving that the failure to return the property was a willful omission [*Schroeder v. Auto Driveaway Co.* (1974) 11 Cal.3d 908, 918, 114 Cal.Rptr. 622, 523 P.2d 662].

LexisNexis Matthew Bender Expert Practice Tip--Proving Intent: Proving intent is often difficult for the plaintiff. That is, some jurors are reluctant to find that a defendant acted intentionally unless the proof is clear or striking. *By Rex Heeseman*

LexisNexis Matthew Bender Expert Practice Tip--Intent to do Act vs. Intent to do Harm: This instruction addresses the difference between the intent to do the act versus the intent to do harm. The instruction is important because proof of ill will or improper motivation is not required (unless punitive damages are being sought). *By Ronald Oster*

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 21, *California Judicial Council Conversion Instructions*]:

CACI No. 2100, Conversion--Essential Factual Elements

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewTortsIntentional TortsConversionGeneral
OverviewTortsIntentional TortsConversionElements



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California Forms of Jury Instruction

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CHAPTER 21A Matthew Bender Conversion Instructions
PART A. ELEMENTS OF CONVERSION

3-21A California Forms of Jury Instruction MB 2100A.17 through MB 2100A.29

Reserved for Future Use

MB 2100A.17Reserved for Future Use



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California Forms of Jury Instruction

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CHAPTER 21A Matthew Bender Conversion Instructions
PART B. DAMAGES FOR CONVERSION

3-21A California Forms of Jury Instruction MB 2100A.30

MB 2100A.30 Proximate Cause--"Substantial Factor"

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Plaintiff's loss was caused by Defendant's acts if those acts were a substantial factor in causing Plaintiff's loss, and, under the circumstances, it was reasonably foreseeable to a prudent person that injury or damage would probably result from this conversion.

Authorities: *Civ. Code § 3336; Myers v. Stephens (1965) 233 Cal.App.2d 104, 119-120, 43 Cal.Rptr. 420 .*

[2] Use of Instruction

This instruction should be used if the alternative measure of damages based on an amount sufficient to indemnify the plaintiff for "the loss which is the natural, reasonable, and proximate result of the wrongful act complained of" [*Civ. Code § 3336*] is at issue in the case. The instruction defines when the plaintiff's loss is the "natural, reasonable, and proximate result" of the defendant's conversion.

For related Judicial Council instructions, see [3][c], *below*.

LexisNexis Matthew Bender Expert Practice Tip --Using MB 2100A . 30; Cases With Several Defendants: This can be an important instruction when several events combine to bring about a loss, or when several defendants are involved. Plaintiff need only prove that a particular defendant's acts were a "substantial factor" and not the only factor that caused the loss. *By Ronald Oster*

LexisNexis Matthew Bender Expert Practice Tip--Special Care Needed for Damages Instructions: Damages may be a challenge to prove and, conversely, to attack. That is why so much effort is spent in litigation on this area. In addition, that is why special care should be given to jury instructions in this

area. *By Rex Heeseman*

[3] Comment

[a] Wrongful Conversion

Civ. Code § 3336 provides that the detriment caused by the wrongful conversion of personal property is presumed to be (1) the property's value at the time of the conversion, with the interest from that time, or, an amount sufficient to indemnify the party injured for the loss which is the natural, reasonable, and proximate result of the wrongful act complained of and which a proper degree of prudence on his or her part would not have averted; and (2) a fair compensation for the time and money properly expended in pursuit of the property [see *Virtanen v. O'Connell* (2006) 140 Cal.App.4th 688, 708, n.8, 44 Cal.Rptr.3d 702 ; *Spates v. Dameron Hospital Assn.* (2003) 114 Cal.App.4th 208, 221, 7 Cal.Rptr.3d 597 ; *Newhart v. Pierce* (1967) 254 Cal.App.2d 783, 794, 62 Cal.Rptr. 553 ; *Myers v. Stephens* (1965) 233 Cal.App.2d 104, 116, 43 Cal.Rptr. 420 ; *Everfresh, Inc. v. Goodman* (1955) 131 Cal.App.2d 818, 820, 281 P.2d 560 ; *Chatterton v. Boone* (1947) 81 Cal.App.2d 943, 947, 185 P.2d 610 ; Restatement (Second) of Torts § 927]. However, attorneys' fees expended in an attempted pursuit of the property are not recoverable as damages [*Haines v. Parra* (1987) 193 Cal.App.3d 1553, 1559, 239 Cal.Rptr. 178].

Generally, litigation-related expenses are excluded from the compensation allowed for time and money spent in trying to recover the property. When legal proceedings are the only way to recover the property, however, efforts with a purpose independent of the litigation should be compensated [*Gladstone v. Hillel* (1988) 203 Cal.App.3d 977, 991-992, 250 Cal.Rptr. 372]. These efforts include preparation of lists of missing property, inspections of inventories, meetings with parties, contacts with law enforcement authorities, and inquiries regarding proper courses of action [*Gladstone v. Hillel* (1988) 203 Cal.App.3d 977, 991-992, 250 Cal.Rptr. 372].

For related forms, see California Forms of Pleading and Practice, Ch. 150, *Conversion* (Matthew Bender).

[b] Alternative Measures of Damages

The first part of *Civ. Code* § 3336 appears to provide for equal and fungible alternative measures of recovery, but the property's value at the time of conversion, with interest, is generally the appropriate measure of damages [*Irving Nelkin & Co. v. South Beverly Hills Wilshire Jewelry & Loan* (2005) 129 Cal.App.4th 692, 698 n.3, 702, 704, 28 Cal.Rptr.3d 815 (plaintiff's right to prejudgment interest ended at summary adjudication in plaintiff's favor); *Myers v. Stephens* (1965) 233 Cal.App.2d 104, 116, 43 Cal.Rptr. 420]. The alternative measure of an amount sufficient to indemnify is used when special circumstances require a different measure of damages [*Krueger v. Bank of America* (1983) 145 Cal.App.3d 204, 215, 193 Cal.Rptr. 322], for example, to prevent manifest injustice [*Myers v. Stephens* (1965) 233 Cal.App.2d 104, 116, 43 Cal.Rptr. 420 ; *Betzer v. Olney* (1936) 14 Cal.App.2d 53, 61, 57 P.2d 1376]. A plaintiff seeking recovery under the alternative measure of damages must plead and prove those special circumstances that justify its application [*Krueger v. Bank of America* (1983) 145 Cal.App.3d 204, 215, 193 Cal.Rptr. 322 ; see *Myers v. Stephens* (1965) 233 Cal.App.2d 104, 117-124, 43 Cal.Rptr. 420].

The alternative measure of damages for conversion that is appropriate when justified by special circumstances is based on an amount sufficient to indemnify the plaintiff for "the loss which is the natural, reasonable, and proximate result of the wrongful act complained of," plus a fair compensation for the time and money spent in trying to get the converted property back [*Civ. Code* § 3336]. The causation requirement of this alternative measure of damages has been held to be equivalent to "proximate cause" or "legal cause" [*Myers v. Stephens* (1965) 233 Cal.App.2d 104, 119, 43 Cal.Rptr. 420]. This means that there must be a reasonable connection between the defendant's conversion and the plaintiff's loss. This reasonable connection exists if it was reasonably foreseeable to a prudent person that under the circumstances injury or damage would probably result from this conversion [*Myers v. Stephens* (1965) 233 Cal.App.2d 104, 119-120, 43 Cal.Rptr. 420].

[c] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 21, *California Judicial Council Conversion Instructions*]:

CACI No. 2102 Presumed Measure of Damages for Conversion (Civ. Code, § 3336)

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewTortsDamagesCompensatory DamagesProperty
DamageAward CalculationsTortsIntentional TortsConversionGeneral OverviewTortsIntentional
TortsConversionRemedies



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California Forms of Jury Instruction

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CHAPTER 21A Matthew Bender Conversion Instructions
PART B. DAMAGES FOR CONVERSION

3-21A California Forms of Jury Instruction MB 2100A.31

MB 2100A.31 Value of Negotiable Instrument

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

If you determine that Plaintiff is entitled to recover damages for the conversion of [his/her/its] _____ [specify negotiable instrument at issue, e.g., check], the measure of damages is presumed to be the amount payable on the _____ [specify negotiable instrument at issue, e.g., check], but Plaintiff's recovery may not exceed the amount of [his/her/its] interest in the _____ [specify negotiable instrument at issue, e.g., check].

If Defendant [offers/has offered] evidence to support a different value for the _____ [specify negotiable instrument at issue, e.g., check], then you must consider all the evidence about its value.

Authorities: *Com. Code § 3420(b).*

[2] Use of Instruction

This instruction should be used when the value of a negotiable instrument (usually a check) is at issue.

For related Judicial Council instructions, see [3][b], *below*.

[3] Comment

[a] Value of Negotiable Instrument

In an action for the conversion of a negotiable instrument, the measure of liability is presumed to be the amount payable

on the instrument, but recovery may not exceed the amount of the plaintiff's interest in the instrument [*Com. Code* § 3420(b); see *Gil v. Bank of Am., Nat'l Ass'n* (2006) 138 Cal.App.4th 1371, 1377-1381, 42 Cal.Rptr.3d 310 (bank customer's only recourse against bank for wrongful acceptance of check was conversion under statute)].

It has been claimed that a different measure of value applies to secured nonrecourse obligations, such as a purchase money note secured by a deed of trust. One court has held that the measure of damages is the value of the *security* as of the conversion's date. This notion was held supported by the fact that (1) the secured party would only receive the security in the event of default, and (2) *Civ. Code* § 3356 states that "for the purpose of estimating damages, the value of an instrument in writing is presumed to be equal to that of the property to which it entitles its owner" [*Knudsen v. Hill* (1964) 227 Cal.App.2d 639, 642, 38 Cal.Rptr. 859 ; see Witkin, Summary of California Law, vol. 6, *Torts*, § 1723 (10th ed. 2005)].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 21, *California Judicial Council Conversion Instructions*]:

CACI No. 2102 Presumed Measure of Damages for Conversion (*Civ. Code*, § 3336)

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewCommercial Law (UCC)Negotiable Instruments (Article 3)Party LiabilitiesConversionContracts LawNegotiable InstrumentsEnforcementDuties & Liabilities of PartiesConversion of InstrumentsTortsIntentional TortsConversionGeneral OverviewTortsIntentional TortsConversionRemedies



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CHAPTER 21A Matthew Bender Conversion Instructions
PART B. DAMAGES FOR CONVERSION

3-21A California Forms of Jury Instruction MB 2100A.32

MB 2100A.32 Loss of Profits From Sale of Goods

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

If Plaintiff has proved that _____ [describe property] would have been sold for a specific price if it had not been converted, then you may consider evidence of the amount that Plaintiff lost because of Defendant's conversion as evidence of Plaintiff's damages. For example, if crops are converted before they are ripe and ready to sell, the owner of those crops is entitled to recover the amount that he or she would have received on the sale of those crops when they were ripe.

Authorities: *Civ. Code § 3336; Newhart v. Pierce (1967) 254 Cal.App.2d 783, 794, 62 Cal.Rptr. 553 ; Carey v. Glenco Citrus Prods. (1965) 235 Cal.App.2d 572, 581, 45 Cal.Rptr. 365 ; Myers v. Stephens (1965) 233 Cal.App.2d 104, 116, 119, 43 Cal.Rptr. 420 ; Crofoot Lumber, Inc. v. Ford (1961) 191 Cal.App.2d 238, 247-249, 12 Cal.Rptr. 639 .*

[2] Use of Instruction

This instruction should be used if the plaintiff makes a claim for the loss of profits on goods held for sale. It should be used with the instruction defining proximate cause [see MB 2100A.30[1]], and with the instruction in Ch. 21, *California Judicial Council Conversion Instructions*, CACI No. 2102 ("Presumed Measure of Damages for Conversion (Civ. Code, § 3336)").

[3] Comment

[a] Loss of Profit

For goods grown [*Carey v. Glenco Citrus Prods. (1965) 235 Cal.App.2d 572, 581, 45 Cal.Rptr. 365 ; Crofoot Lumber,*

Inc. v. Ford (1961) 191 Cal.App.2d 238, 247-249, 12 Cal.Rptr. 639], produced, or purchased [*Myers v. Stephens* (1965) 233 Cal.App.2d 104, 116-118, 43 Cal.Rptr. 420] to be sold for profit, the property's value at the time of conversion does not always accurately reflect the property's real value to the owner. If it does not, then this is a special circumstance justifying the use of the alternative measure of damages discussed in MB 2100A.30[3][b]. This alternative measures the plaintiff's damages by: "the loss which is the natural, reasonable and proximate result of the wrongful act complained of" [Civ. Code § 3336]. Under this standard, loss of gross profit may be the measure of damages [see *Newhart v. Pierce* (1967) 254 Cal.App.2d 783, 794, 62 Cal.Rptr. 553] because the loss naturally, reasonably, and proximately resulting from the conversion of property held to be sold for profit is precisely this profit that is now lost. The courts have upheld lost profits as a proper measure of damages for the conversion of timber that was to be marketed [*Crofoot Lumber, Inc. v. Ford* (1961) 191 Cal.App.2d 238, 247-249, 12 Cal.Rptr. 639], oranges that were to be marketed [*Carey v. Glenco Citrus Prods.* (1965) 235 Cal.App.2d 572, 581, 45 Cal.Rptr. 365], and a moveable house that was to be renovated and sold [*Myers v. Stephens* (1965) 233 Cal.App.2d 104, 116-118, 43 Cal.Rptr. 420].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 21, *California Judicial Council Conversion Instructions*]:

CACI No. 2102 Presumed Measure of Damages for Conversion (Civ. Code § 3336)

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Contracts Law Sales of Goods Damages & Remedies Seller's Damages & Remedies Consequential Damages General Overview Torts Intentional Torts Conversion General Overview Torts Intentional Torts Conversion Remedies



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CHAPTER 21A Matthew Bender Conversion Instructions
PART B. DAMAGES FOR CONVERSION

3-21A California Forms of Jury Instruction MB 2100A.33

MB 2100A.33 Loss of Use

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

As I have already explained to you, if Plaintiff is entitled to recover damages for the conversion of _____ [*specify property*], then those damages include interest on the value of that property at 7 percent from the date of the conversion until now. This recovery by Plaintiff of interest in addition to the property's value is intended to compensate Plaintiff for the loss of the use of [his/her/its] property while it was converted. In this case, however, Plaintiff claims that the true value of this property's use is greater than 7 percent of its value. If you find that Plaintiff has proved that the value of using [his/her/its] property for the time that Defendant kept the property is worth more than the interest on the property's value for that time, then Plaintiff may recover this use value instead of interest. This means that Plaintiff's damages will include either the use value or the interest, whichever is higher, but Plaintiff may not have both.

Authorities: *Gustafson v. Byers* (1930) 105 Cal.App. 584, 587, 288 P. 111 ; Restatement (Second) of Torts § 927, cmt. o.

[2] Use of Instruction

This instruction should be used when the plaintiff claims damages for the loss of the use of the converted goods. The instruction must be used with the instruction in Ch. 21, *California Judicial Council Conversion Instructions, CACI No. 2102* ("Presumed Measure of Damages for Conversion").

[3] Comment

[a] Loss of Use

The general measure of damages for conversion is, as explained in *CACI No. 2102* and MB 2100A.30[3][b], the property's value at the time of conversion, with interest from that time. However, if the property has a "use value" that exceeds the legal interest rate, then the plaintiff is entitled to recover the reasonable value of the use for the period that the defendant kept the property [*Gustafson v. Byers* (1930) 105 Cal.App. 584, 587, 288 P. 111 ; see Restatement (Second) of Torts § 927, cmt. o]. It has been suggested that this recovery for use value is in lieu of interest [see Restatement (Second) of Torts § 927, cmt. o (1977)]. This is apparently true, because one court allowed recovery for the property's value plus use value, with no recovery for interest [*Gustafson v. Byers* (1930) 105 Cal.App. 584, 587, 288 P. 111].

LexisNexis Matthew Bender Expert Practice Tip--"Use" May be Difficult to Understand: The concept of "use value" may be difficult for many jurors (and some judges) to grasp. People generally understand "interest," but "use" is a more amorphous concept. *By Rex Heeseman*

LexisNexis Matthew Bender Expert Practice Tip--Valuing Loss of Use: If converted property has a market rental value, the value of the loss of use can be established. If there is no rental market, the task is more difficult, and expert testimony will probably be required. The fall back position is interest at the rate of 7 percent. *By Ronald Oster*

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 21, *California Judicial Council Conversion Instructions*]:

CACI No. 2102 Presumed Measure of Damages for Conversion (Civ. Code § 3336)

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewTortsDamagesCompensatory DamagesProperty DamageAward CalculationsTortsDamagesCompensatory DamagesProperty DamageLoss of UseTortsIntentional TortsConversionGeneral OverviewTortsIntentional TortsConversionRemedies



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CHAPTER 21A Matthew Bender Conversion Instructions
PART B. DAMAGES FOR CONVERSION

3-21A California Forms of Jury Instruction MB 2100A.34

MB 2100A.34 Lien or Other Limited Interest**[1] Instruction**[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Even if Plaintiff has proved by a preponderance of the evidence that [he/she/it] suffered money damages as a result of Defendant's conversion of Plaintiff's property, Defendant can limit the damages that Plaintiff may recover to less than the property's full value if Defendant can prove both of the following:

1. That Plaintiff owns only _____ [a lien or other limited interest] in the property; and
2. That Defendant _____ [owns or specify other superior right] the property.

If Defendant can prove these two things, then Plaintiff's damages are limited to _____ [specify, e.g., the amount of Plaintiff's lien], plus the time and money reasonably spent trying to recover the property.

Authority: Civ. Code § 3338.

[2] Use of Instruction

This instruction should be used if the defendant claims that the plaintiff's right to damages is limited by the plaintiff's limited interest in the property converted. It should be given with the instruction in Ch. 21, *California Judicial Council Conversion Instructions*, CACI No. 2102 ("Presumed Measure of Damages for Conversion").

[3] Comment**[a] Limited Interest in Converted Property as Limit on Damages**

Civ. Code § 3338 provides that one with a mere lien on personal property may not recover greater damages for its conversion from one having a superior right, after the lien is discharged, than the amount secured by the lien, and the compensation allowed by *Civ. Code* § 3336 for loss of time and expenses [see *Hartford Fin. Corp. v. Burns* (1979) 96 Cal.App.3d 591, 605, 158 Cal.Rptr. 169 ; *Service v. Trombetta* (1963) 212 Cal.App.2d 313, 316, 28 Cal.Rptr. 68 ; *Bastanchury v. Times-Mirror Co.* (1945) 68 Cal.App.2d 217, 236, 156 P.2d 488]. *Civ. Code* § 3336 allows a fair compensation for the time and money properly expended in pursuit of the property [see *CACI No. 2102* and MB 2100A.30[3][a]]. This rule limiting the recovery of one with a limited interest to the amount of that limited interest applies to types of limited interests other than liens, such as the ownership of 2 percent of a prune crop [*California Cured Fruit Ass'n v. Ainsworth* (1901) 134 Cal. 461, 463-464, 66 P. 586], the interest of a mortgagee [*Hopkins v. Anderson* (1933) 218 Cal. 62, 67-68, 21 P.2d 560], and the interest of an assignee in insolvency of a partnership [*Carrie v. Cloverdale Banking & Commercial Co.* (1891) 90 Cal. 84, 86, 88-90, 27 P. 58].

[b] Exception to Rule Limiting Damages

The limit on damages recoverable applies only when the defendant has a superior right to the property [*Civ. Code* § 3338; *Hartford Fin. Corp. v. Burns* (1979) 96 Cal.App.3d 591, 605, 158 Cal.Rptr. 169]. The limit applies, for example, when the lien holder sues the property owner for conversion [*California Cured Fruit Ass'n v. Ainsworth* (1901) 134 Cal. 461, 463-464, 66 P. 586], but it does not apply when the defendant is a stranger to the title [*Hartford Fin. Corp. v. Burns* (1979) 96 Cal.App.3d 591, 605, 158 Cal.Rptr. 169]. Thus, when a plaintiff with a limited interest in property sues a defendant with no interest in that property, the plaintiff may recover the property's full value [*Camp v. Ortega* (1962) 209 Cal.App.2d 275, 286, 25 Cal.Rptr. 873 ; see *Goldberg v. List* (1938) 11 Cal.2d 389, 392-393, 79 P.2d 1087].

[c] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 21, *California Judicial Council Conversion Instructions*]:

CACI No. 2102 Presumed Measure of Damages for Conversion (Civ. Code § 3336)

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewTortsIntentional TortsConversionGeneral OverviewTortsIntentional TortsConversionRemedies



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CHAPTER 21A Matthew Bender Conversion Instructions
PART B. DAMAGES FOR CONVERSION

3-21A California Forms of Jury Instruction MB 2100A.35

MB 2100A.35 Statute of Limitations and Damages

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

The statute of limitations is a law providing that unless a person begins a legal action within a certain period of time he or she loses the right to do so. In this action for conversion, the law requires the Plaintiff to begin the action three years from _____ [the date the act of conversion was committed or such other date as may apply]. This means that Plaintiff may not claim any damages for acts committed more than three years before _____, the date on which Plaintiff began this action. Therefore, in computing the amount of damages, if any, that were suffered by Plaintiff, you must ignore all claims for damages that were alleged to have been suffered before _____ [date].

Authorities: Code Civ. Proc. § 338(c); *Bennett v. Hibernia Bank* (1956) 47 Cal.2d 540, 561, 305 P.2d 20 ; *Hartman Ranch Co. v. Associated Oil Co.* (1937) 10 Cal.2d 232, 251, 73 P.2d 1163 .

[2] Use of Instruction

This instruction should be used if the defendant wants to limit the amount of damages that the plaintiff may recover by arguing that all or part of these damages are barred by the statute of limitations. For certain types of conversion actions, different, specific limitation periods are provided. Substitute the appropriate period in place of the three years given in this instruction when one of these special limitation periods is involved [see MB 2100A.58 for discussion of conversion limitation periods]. Note also that although the limitation period usually runs from the time the act of conversion was committed, other periods may apply, as when a fraud is involved [see MB 2100A.58[3][b] for discussion of when limitation period begins to run from another date].

LexisNexis Matthew Bender Expert Practice Tip --Using MB 2100A . 35: There are several important qualifications to this instruction, including cases involving fraudulent concealment and cases involving fiduciaries [see MB 2100A.58[3][b]]. By Ronald Oster

[3] Comment

For most conversion actions, the limitation period is three years [see *Code Civ. Proc.* § 338(c); see also MB 2100A.58[3][a]] from the date the act of conversion was committed [*Bennett v. Hibernia Bank* (1956) 47 Cal.2d 540, 561, 305 P.2d 20 ; *Barnes v. Witt* (1962) 207 Cal.App.2d 441, 445, 24 Cal.Rptr. 545 ; see MB 2100A.58[3][b] for discussion of when limitation period begins to run from another date]. This means that if more than one tortious act is involved, recovery for the damages caused by some acts may be barred while damages for others are still available [see *Hartman Ranch Co. v. Associated Oil Co.* (1937) 10 Cal.2d 232, 251, 73 P.2d 1163].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewGovernmentsLegislationStatutes of LimitationsTime LimitationsTortsDamagesGeneral OverviewTortsIntentional TortsConversionGeneral OverviewTortsIntentional TortsConversionDefenses



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CHAPTER 21A Matthew Bender Conversion Instructions
PART B. DAMAGES FOR CONVERSION

3-21A California Forms of Jury Instruction MB 2100A.36

MB 2100A.36 Prerequisites for Award of Punitive Damages

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

If you find that Plaintiff was harmed or damaged as the result of a conversion of [his/her/its] property by Defendant, you must decide whether punitive damages should be awarded against Defendant. The purpose of punitive damages is to punish wrongdoers and thereby deter the commission of wrongful acts--that is, for retribution and deterrence.

Punitive damages may be awarded against Defendant only if Defendant was guilty of _____ [describe statutory grounds asserted by plaintiff, e.g., oppression, fraud, or malice] in connection with a conversion of Plaintiff's property. Therefore, you must first determine whether Defendant was guilty of _____ [describe statutory grounds asserted by plaintiff, e.g., oppression, fraud, or malice].

"Oppression" means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights.

"Fraud" means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the defendant's part of thereby depriving a person of property or legal rights or otherwise causing injury.

"Malice" means either conduct that is intended by the defendant to cause injury to the plaintiff or despicable conduct that is carried on by the defendant with a willful and conscious disregard of the rights of others.

A defendant acts with a willful and conscious disregard for the rights of others when [he/she/it] intentionally

engages in particular conduct or intentionally follows a particular course of action even though [he/she/it] knows that it is highly probable that that conduct or that course of action will cause another person to suffer harm or damage.

Plaintiff has the burden of proving, by clear and convincing evidence, that Defendant is guilty of _____ [describe statutory grounds asserted by plaintiff, e.g., oppression, fraud, or malice].

[CHOOSE ONE OF THE FOLLOWING (See Use of Instruction)]

In this phase of the trial, you will only determine whether Defendant was guilty of _____ [describe statutory grounds asserted by plaintiff, e.g., oppression, fraud, or malice] in connection with a conversion of Plaintiff's property. I will have you fill out a special verdict form stating your decision on this question. If necessary, we will hold a second phase of the trial to determine whether punitive damages should be awarded and, if so, the amount that should be awarded as punitive damages.

[OR]

If you determine that Defendant was not guilty of _____ [describe statutory grounds asserted by plaintiff, e.g., oppression, fraud, or malice] in connection with any conversion of Plaintiff's property, then you may not award any punitive damages against Defendant. If you determine that Defendant was guilty of _____ [describe statutory grounds asserted by plaintiff, e.g., oppression, fraud, or malice] in connection with a conversion of Plaintiff's property, then you must determine whether punitive damages should be awarded and, if so, the amount that should be awarded as punitive damages.

Authorities: Civ. Code §§ 3294, 3295(d); *State Farm Mut. Auto. Ins. Co. v. Campbell* (2003) 538 U.S. 408, 425, 123 S.Ct. 1513, 155 L.Ed.2d 585 ; *Pacific Mut. Life Ins. Co. v. Haslip* (1991) 499 U.S. 1, 111 S.Ct. 1032, 113 L.Ed.2d 1, 12 n.1, 18-24 ; *Neal v. Farmers Ins. Exch.* (1978) 21 Cal.3d 910, 928, n.13, 148 Cal.Rptr. 389, 582 P.2d 980 ; *Schroeder v. Auto Driveaway Co.* (1974) 11 Cal.3d 908, 922, 114 Cal.Rptr. 622, 523 P.2d 662 ; *Silberg v. California Life Ins. Co.* (1974) 11 Cal.3d 452, 462-463, 113 Cal.Rptr. 711, 521 P.2d 1103 ; *Haigler v. Donnelly* (1941) 18 Cal.2d 674, 681, 117 P.2d 331 ; *Romo v. Ford Motor Co.* (2003) 113 Cal.App.4th 738, 745, 6 Cal.Rptr.3d 793 ; *Travelers Ins. Co. v. Leshner* (1986) 187 Cal.App.3d 169, 200-201, 231 Cal.Rptr. 791 ; *Ramona Manor Convalescent Hosp. v. Care Enters.* (1986) 177 Cal.App.3d 1120, 1141-1142, 225 Cal.Rptr. 120 ; *Weisman v. Blue Shield of Cal.* (1984) 163 Cal.App.3d 61, 64-67, 209 Cal.Rptr. 169 ; *Ford Motor Co. v. Home Ins. Co.* (1981) 116 Cal.App.3d 374, 381, 172 Cal.Rptr. 59 ; *Esparza v. Specht* (1976) 55 Cal.App.3d 1, 6, 127 Cal.Rptr. 493

[2] Use of Instruction

This instruction should be used when the plaintiff is seeking punitive damages on a cause of action for conversion. When the jury is instructed on a conversion claim and a breach of contract claim, use this instruction together with the instruction in Ch. 3E, *Matthew Bender Contract Damages Instructions*, MB 300E.13.

When this instruction is used, the general burden of proof instructions given to the jury should include an instruction on the "clear and convincing evidence" standard [see Ch. 2, *California Judicial Council Evidence Instructions*, CACI No. 201].

When the plaintiff's claim for punitive damages is based on the conduct of an employee or agent of a defendant, the jury should be instructed on the additional elements that must be established before punitive damages may be awarded

against an employer or principal for the actions of an employee or agent [*see Civ. Code § 3294(b)*].

This instruction contains alternative concluding paragraphs. The first alternative paragraph should be used when issues relating to the propriety and amount of punitive damages are bifurcated under *Civ. Code § 3295(d)*. The second alternative paragraph should be used when the issues relating to the propriety and amount of punitive damages are not bifurcated and the jury will therefore be given the instruction on assessing punitive damages in MB 2100A.37.

For related Judicial Council instructions, see [3][g], *below*.

[3] Comment

[a] Prerequisites for Punitive Damage Award

In an action predicated on the breach of an obligation that does not arise from contract, punitive damages--damages that are awarded to punish and make an example of a defendant--may be awarded against a defendant who has been guilty of malice, fraud, or oppression [*Civ. Code § 3294(a)*].

Because *Civ. Code § 3294(a)* authorizes punitive damages only in an action "for the breach of an obligation not arising from contract," punitive damages may not be awarded in an action in which the only causes of action asserted by the plaintiff are for breach of contract [*Frazier v. Metropolitan Life Ins. Co. (1985) 169 Cal.App.3d 90, 106-107, 214 Cal.Rptr. 883* ; *see Ch. 3E, Matthew Bender Contract Damages Instructions*, MB 300E.12[3]]. However, the limitation imposed by *Civ. Code § 3294(a)* does not preclude an award of punitive damages because a conversion also constitutes a breach of contract [*Schroeder v. Auto Driveaway Co. (1974) 11 Cal.3d 908, 921-922, 114 Cal.Rptr. 622, 523 P.2d 662*]. Even when alternative conversion and breach of contract claims are based on the same alleged acts or omissions and seek damages for the same injuries, the plaintiff--although not permitted to recover on both the conversion and contract claims--is ordinarily entitled to have both claims submitted to the jury [*see Weaver v. Bank of Am. (1963) 59 Cal.2d 428, 432, 30 Cal.Rptr. 4, 380 P.2d 644* ; *Acadia, Cal., Ltd. v. Herbert (1960) 54 Cal.2d 328, 336-337, 5 Cal.Rptr. 686, 353 P.2d 294*].

Punitive damages are not recoverable unless the plaintiff proves that the defendant was guilty of oppression, fraud, or malice [*Civ. Code § 3294(a)*]. Punitive damages are not recoverable in the abstract, and the required oppression, fraud, or malice must lie in the conduct that gave rise to liability in the case *Medo v. Superior Court (1988) 205 Cal.App.3d 64, 68, 251 Cal.Rptr. 924*]. "Oppression," "fraud," and "malice" are defined by *Civ. Code § 3294(c)* [*see [b], below*].

[b] Oppression, Fraud, and Malice

"Oppression" is defined by *Civ. Code § 3294(c)(2)* as "despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights."

"Fraud" is defined by *Civ. Code § 3294(c)(3)* as "an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury."

"Malice" is defined by *Civ. Code § 3294(c)(1)* as "conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others." Because the definition of "malice" is stated in the alternative, punitive damages may be awarded without a finding of despicable conduct [*Courtesy Ambulance Serv. v. Superior Court (1992) 8 Cal.App.4th 1504, 1518, 11 Cal.Rptr.2d 161*].

[c] Willful and Conscious Disregard

The provisions of *Civ. Code* § 3294(c) that permit a finding of oppression or malice to be based on a willful and conscious disregard of the rights or safety of others essentially incorporate preexisting case law that recognized that proof of an actual intent to harm the plaintiff was not essential to a punitive damage claim and allowed the recovery of punitive damages on the basis of proof that the defendant had intentionally pursued a particular course of conduct with the knowledge that there was a substantial likelihood that it would cause injury [*Taylor v. Superior Court* (1979) 24 Cal.3d 890, 894-896, 157 Cal.Rptr. 693, 598 P.2d 854 ; *Schroeder v. Auto Driveaway Co.* (1974) 11 Cal.3d 908, 922, 114 Cal.Rptr. 622, 523 P.2d 662 ; *Weisman v. Blue Shield of Cal.* (1984) 163 Cal.App.3d 61, 64-67, 209 Cal.Rptr. 169 ; *Ford Motor Co. v. Home Ins. Co.* (1981) 116 Cal.App.3d 374, 381, 172 Cal.Rptr. 59]. The definitions used in this instruction are based on an instruction approved in *Weisman v. Blue Shield of California* [*Weisman v. Blue Shield of Cal.* (1984) 163 Cal.App.3d 61, 64-67, 209 Cal.Rptr. 169]. However, this instruction has modified the definition approved in *Weisman* by (1) making it more clearly applicable to cases in which the defendant's conduct consists of affirmative actions rather than omissions; and (2) making it clear that conscious disregard requires not merely knowledge of probable consequences, but knowledge of probable harm or injury.

To establish conscious disregard, the plaintiff is not required to show that the defendant knew the plaintiff's identity or knew that the plaintiff would likely be injured by the conduct at issue; a showing that the defendant knew that someone was likely to be injured is sufficient [*Ramona Manor Convalescent Hosp. v. Care Enters.* (1986) 177 Cal.App.3d 1120, 1141-1142, 225 Cal.Rptr. 120].

[d] Plaintiff's Burden of Proof

Punitive damages may only be awarded if the plaintiff establishes oppression, fraud, or malice by clear and convincing evidence [*Civ. Code* § 3294(a); see Ch. 2, *California Judicial Council Evidence Instructions*, CACI No. 201].

[e] Bifurcation of Punitive Damage Issues

Civ. Code § 3295(d) requires the trial court, on the defendant's motion, to exclude evidence of the defendant's profits and financial condition until the jury finds that the defendant is liable to the plaintiff and that the defendant is guilty of oppression, fraud, or malice [*Kizer v. County of San Mateo* (1991) 53 Cal.3d 139, 147, 279 Cal.Rptr. 318, 806 P.2d 1353]. When the defendant avails itself of this right initially to exclude evidence of its financial condition, the practical effect of these provisions is that the punitive damage issues will have to be bifurcated. In the initial phase of the trial, the jury will be limited to determining the defendant's liability for compensatory damages and whether the plaintiff has established the statutory prerequisites for an award of punitive damages. If the jury holds the defendant liable and determines that the defendant is guilty of malice, fraud, or oppression in the initial phase of the trial, the plaintiff will be entitled to present evidence of the defendant's profits and financial condition at a second phase of the trial, after which the jury will determine the issues relating to the proper amount of punitive damages. The issue of punitive damages must be heard by the same jury that found the defendant liable, although this requirement may be waived by a failure to object to the use of separate juries [*Civ. Code* § 3295(d); *Medo v. Superior Court* (1988) 205 Cal.App.3d 64, 66, 69-70, 251 Cal.Rptr. 924]. The substitution of alternate jurors to try the punitive damages phase of a case does not violate the "same jury" requirement [*Rivera v. Sassoon* (1995) 39 Cal.App.4th 1045, 1049, 46 Cal.Rptr.2d 144].

[f] Purpose of Punitive Damages

Punitive damages are imposed for purposes of retribution and deterrence [*State Farm Mut. Auto. Ins. Co. v. Campbell* (2003) 538 U.S. 408, 425, 123 S.Ct. 1513, 155 L.Ed.2d 585 ; *Pacific Mut. Life Ins. Co. v. Haslip* (1991) 499 U.S. 1, 19, 111 S.Ct. 1032, 113 L.Ed.2d 1]. That is, the purpose of punitive damages is to punish wrongdoers and thereby deter the commission of wrongful acts [see *Civ. Code* § 3294(a); *Romo v. Ford Motor Co.* (2003) 113 Cal.App.4th 738, 745, 6 Cal.Rptr.3d 793].

Punitive damages may properly be imposed to further a state's legitimate interests in punishing unlawful conduct and

detering its repetition [*State Farm Mut. Auto. Ins. Co. v. Campbell* (2003) 538 U.S. 408, 425, 123 S.Ct. 1513, 155 L.Ed.2d 585 ; *BMW of N. Am., Inc. v. Gore* (1996) 517 U.S. 559, 568, 116 S.Ct. 1589, 134 L.Ed.2d 809]. Although states possess discretion over the imposition of punitive damages, there are procedural and substantive constitutional limitations on these awards [*State Farm Mut. Auto. Ins. Co. v. Campbell* (2003) 538 U.S. 408, 425, 123 S.Ct. 1513, 155 L.Ed.2d 585 ; see MB 2100A.37[3]].

It is important to include a statement of the purpose of punitive damages in jury instructions on punitive damages to guide the jury's discretion. The United States Supreme Court, in upholding a punitive damages award against a due process challenge, cited such a statement of purpose in an Alabama jury instruction as an important limit on the jury's discretion [see *Pacific Mut. Life Ins. Co. v. Haslip* (1991) 499 U.S. 1, 19-20, 111 S.Ct. 1032, 113 L.Ed.2d 1 ; see also MB 2100A.37[3]].

[g] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 39, *California Judicial Council Damages Instructions*]:

CACI No. 3940 Punitive Damages--Individual Defendant--Trial Not Bifurcated

CACI No. 3941 Punitive Damages--Individual Defendant--Bifurcated Trial--(First Phase)

CACI No. 3942 Punitive Damages--Individual Defendant--Bifurcated Trial (Second Phase)

CACI No. 3943 Punitive Damages Against Employer or Principal for Conduct of a Specific Agent or Employee--Trial Not Bifurcated

CACI No. 3944 Punitive Damages Against Employer or Principal for Conduct of a Specific Agent or Employee--Bifurcated Trial (First Phase)

CACI No. 3945 Punitive Damages--Entity Defendant--Trial Not Bifurcated

CACI No. 3946 Punitive Damages--First Defendant--Bifurcated Trial (First Phase)

CACI No. 3947 Punitive Damages--Individual and Entity Defendants--Trial Not Bifurcated

CACI No. 3948 Punitive Damages--Individual and Corporate Defendants (Corporate Liability Based on Acts of Named Individual)--Bifurcated Trial (First Phase)

CACI No. 3949 Punitive Damages--Individual and Corporate Defendants (Corporate Liability Based on Acts of Named Individual)--Bifurcated Trial (Second Phase)

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Remedies Damages Punitive Damages Torts Damages Punitive Damages Award Calculations General Overview Torts Damages Punitive Damages Conduct Supporting Awards Torts Intentional Torts Conversion General Overview Torts Intentional Torts Conversion Remedies



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CHAPTER 21A Matthew Bender Conversion Instructions
PART B. DAMAGES FOR CONVERSION

3-21A California Forms of Jury Instruction MB 2100A.37

MB 2100A.37 Discretion to Award Punitive Damages When Prerequisites for Award Are Established

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

[*SELECT ONE OF THE FOLLOWING (See Use of Instruction)*]

In the first phase of this trial, you determined that Defendant was guilty of _____ [describe statutory grounds found by jury, e.g., oppression, fraud, or malice] in connection with a conversion of Plaintiff's property. In this phase of the trial you must determine whether punitive damages should be awarded against Defendant and, if so, the amount of punitive damages that should be awarded.

Because this is a case in which Defendant was guilty of _____ [describe statutory grounds found by jury, e.g., oppression, fraud, or malice],

[OR]

If you find that Defendant was guilty of _____ [describe statutory grounds asserted by plaintiff, e.g., oppression, fraud, or malice],

[*CONTINUE INSTRUCTION*]

you may but are not required to award punitive damages against Defendant. In such a case, it is up to you to

decide whether punitive damages should be awarded. If you decide to award punitive damages, it is also up to you to determine the amount of punitive damages that should be awarded.

The law does not provide any fixed standards or formulas for making decisions about the amount of punitive damages. Instead, it leaves them to your good judgment and common sense. However, in making any award of punitive damages, you should consider all of the following:

- (1) The reprehensibility of Defendant's conduct with respect to Plaintiff;**
- (2) Defendant's financial condition and, in view with respect to Plaintiff of that financial condition, what amount of punitive damages it will take to punish and deter Defendant, based solely on the harm to Plaintiff; and**
- (3) The amount of the actual [damages/harm or injury] caused by Defendant's wrongful conduct with respect to Plaintiff because punitive damages must bear a reasonable relationship to the actual [damages/harm or injury].**

In making decisions about punitive damages, you should act in a calm and deliberate manner and should not allow yourselves to be influenced by passion or prejudice.

Authorities: Civ. Code §§ 3294, 3295(d); *State Farm Mut. Auto. Ins. Co. v. Campbell* (2003) 538 U.S. 408, 425, 123 S.Ct. 1513, 155 L.Ed.2d 585; *BMW of N. Am., Inc. v. Gore* (1996) 517 U.S. 559, 575, 116 S.Ct. 1589, 134 L.Ed.2d 809; *Pacific Mut. Life Ins. Co. v. Haslip* (1991) 499 U.S. 1, 6, 14-24, 111 S.Ct. 1032, 113 L.Ed.2d 1; *Adams v. Murakami* (1991) 54 Cal.3d 105, 111, 114-118, 123, 284 Cal.Rptr. 318, 813 P.2d 1348; *Egan v. Mutual of Omaha Ins. Co.* (1979) 24 Cal.3d 809, 819-823, 169 Cal.Rptr. 691, 620 P.2d 141; *Neal v. Farmers Ins. Exch.* (1978) 21 Cal.3d 910, 923-928, 148 Cal.Rptr. 389, 582 P.2d 980; *Romo v. Ford Motor Co.* (2003) 113 Cal.App.4th 738, 753, n.7, 6 Cal.Rptr.3d 793; *Las Palmas Associates v. Las Palmas Center Associates* (1991) 235 Cal.App.3d 1220, 1257-1258, 1 Cal.Rptr.2d 301

[2] Use of Instruction

This instruction should be used to instruct the jury on its duty to determine the propriety and amount of punitive damages if the statutory prerequisites for a punitive damage award are established. When the punitive damage issues have not been bifurcated under Civ. Code § 3295(d) [see MB 2100A.36[3][e]], this instruction should be given immediately after the instruction in MB 2100A.36[1]. When the punitive damage issues have been bifurcated, this instruction should not be given in the first phase of the trial and should be given in a subsequent phase only if the jury renders a verdict finding the defendant guilty of oppression, fraud, or malice.

This instruction contains two alternative introductory provisions. The first alternative provision should be used when the punitive damage issues have been bifurcated and the issues relating to the propriety and amount of a punitive damage award are presented in a second phase of the trial. The second alternative provision should be used when the punitive damage issues are not bifurcated.

In the list of factors to be considered in making an award of punitive damages, the third factor offers counsel the choice of the word "damages" or the phrase "harm or injury." In *Gagnon v. Continental Casualty Co.* [*Gagnon v. Continental Cas. Co.* (1989) 211 Cal.App.3d 1598, 260 Cal.Rptr. 305], the appellate court indicated that the latter might be preferable, especially when the plaintiff is not entitled to compensatory damages or only recovers nominal damages.

For related Judicial Council instructions, see [3][f], below.

[3] Comment

[a] Discretion to Award Punitive Damages

Even when the statutory prerequisites for a punitive damage award are met, the plaintiff is never entitled to punitive damages as a matter of right; rather, the decision to award or deny punitive damages is initially within the jury's discretion [*Brewer v. Second Baptist Church* (1948) 32 Cal.2d 791, 800-801, 197 P.2d 713 ; *Thomson v. Catalina* (1928) 205 Cal. 402, 406-407, 271 P. 198 ; *Davis v. Hearst* (1911) 160 Cal. 143, 173-174, 116 P. 530 ; *Hannon Eng'g, Inc. v. Reim* (1981) 126 Cal.App.3d 415, 431, 179 Cal.Rptr. 78]. Similarly, the amount to be awarded as punitive damages is initially within the jury's discretion [*Kizer v. County of San Mateo* (1991) 53 Cal.3d 139, 147, 279 Cal.Rptr. 318, 806 P.2d 1353 ; *Thomson v. Catalina* (1928) 205 Cal. 402, 406-407, 271 P. 198 ; *Hannon Eng'g, Inc. v. Reim* (1981) 126 Cal.App.3d 415, 431, 179 Cal.Rptr. 78 ; *Ferraro v. Pacific Fin. Corp.* (1970) 8 Cal.App.3d 339, 351, 87 Cal.Rptr. 226]. An instruction that advises the jury that it has discretion to determine these questions but that its discretion should be exercised without passion or prejudice is proper [*Hannon Eng'g, Inc. v. Reim* (1981) 126 Cal.App.3d 415, 429-433, 179 Cal.Rptr. 78].

[b] Due Process Considerations

The United States Supreme Court has held that courts must ensure that the measure of punishment of punitive damages is both reasonable and proportionate both to the amount of harm to the plaintiff and to the general damages recovered. An excessive punitive damages award implicates the Due Process Clause of the U.S. Constitution [U.S. Const. amend. XIV] as an irrational and arbitrary deprivation of the defendant's property [*State Farm Mut. Auto. Ins. Co. v. Campbell* (2003) 538 U.S. 408, 428, 123 S.Ct. 1513, 155 L.Ed.2d 585 ; see Levy, Golden, Sacks, California Torts, Ch. 54, *Punitive Damages* (Matthew Bender)].

There are no concrete constitutional limits on the ratio between harm, or potential harm, to the plaintiff, and the punitive damages award [*State Farm Mut. Auto. Ins. Co. v. Campbell* (2003) 538 U.S. 408, 423-424, 123 S.Ct. 1513, 155 L.Ed.2d 585 ; *BMW of N. Am., Inc. v. Gore* (1996) 517 U.S. 559, 575, 116 S.Ct. 1589, 134 L.Ed.2d 809]. However, few awards exceeding a single-digit ratio between punitive and compensatory damages will satisfy due process requirements. An award of more than four times the amount of compensatory damages "might be close to the line of constitutional impropriety" [*State Farm Mut. Auto. Ins. Co. v. Campbell* (2003) 538 U.S. 408, 423-424, 123 S.Ct. 1513, 155 L.Ed.2d 585 ; *BMW of N. Am., Inc. v. Gore* (1996) 517 U.S. 559, 581, 116 S.Ct. 1589, 134 L.Ed.2d 809 ; *Pacific Mut. Life Ins. Co. v. Haslip* (1991) 499 U.S. 1, 23-24, 111 S.Ct. 1032, 113 L.Ed.2d 1].

[c] Instructions Must Not Invite Jury to Impose Damages Sufficient to Punish and Deter Conduct Not Related to Particular Plaintiff

In light of the U.S. Supreme Court's decision in *State Farm Mutual Automobile Insurance Co. v. Campbell* [*State Farm Mut. Auto. Ins. Co. v. Campbell* (2003) 538 U.S. 408, 123 S.Ct. 1513, 155 L.Ed.2d 585], jury instructions must not invite the jury to impose damages sufficient to punish and deter all conduct by a defendant of the type directed toward the plaintiff in that particular case [*Romo v. Ford Motor Co.* (2003) 113 Cal.App.4th 738, 753, n.7, 6 Cal.Rptr.3d 793 (rejecting use of BAJI 14.71; now see CACI Nos. 3940, 3947)].

[d] Instructions on Punitive Damages Must Not Be Vague

Vague jury instructions on punitive damages, or those that merely inform the jury to avoid "passion or prejudice," are impermissible, because they do little to aid the jury in its task of assigning appropriate weight to evidence that is relevant and to evidence that is tangential or only inflammatory [*State Farm Mut. Auto. Ins. Co. v. Campbell* (2003) 538 U.S. 408, 417-418, 123 S.Ct. 1513, 155 L.Ed.2d 585].

[e] Wealth Is Relevant Regarding Punishment and Deterrence Only With Regard to Particular Plaintiff

In light of the U.S. Supreme Court's decision in *State Farm Mutual Automobile Insurance Co. v. Campbell* [*State Farm*

Mut. Auto. Ins. Co. v. Campbell (2003) 538 U.S. 408, 123 S.Ct. 1513, 155 L.Ed.2d 585], evidence concerning a defendant's financial condition is not unlawful or inappropriate. However, the jury may only use a defendant's wealth to determine the appropriate punishment for the malicious conduct involved in the particular case, not as a gauge for the imposition of a penalty that will actually deter the entire type or course of conduct that affected the plaintiff in that case [*Romo v. Ford Motor Co.* (2003) 113 Cal.App.4th 738, 753, n.7, 6 Cal.Rptr.3d 793] . The wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award [*State Farm Mut. Auto. Ins. Co. v. Campbell* (2003) 538 U.S. 408, 426-427, 123 S.Ct. 1513, 155 L.Ed.2d 585 ; see [b], above].

[f] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 39, *California Judicial Council Damages Instructions*]:

CACI No. 3940 Punitive Damages--Individual Defendant--Trial Not Bifurcated

CACI No. 3941 Punitive Damages--Individual Defendant--Bifurcated Trial--(First Phase)

CACI No. 3942 Punitive Damages--Individual Defendant--Bifurcated Trial (Second Phase)

CACI No. 3943 Punitive Damages Against Employer or Principal for Conduct of a Specific Agent or Employee--Trial Not Bifurcated

CACI No. 3944 Punitive Damages Against Employer or Principal for Conduct of a Specific Agent or Employee--Bifurcated Trial (First Phase)

CACI No. 3945 Punitive Damages--Entity Defendant--Trial Not Bifurcated

CACI No. 3946 Punitive Damages--First Defendant--Bifurcated Trial (First Phase)

CACI No. 3947 Punitive Damages--Individual and Entity Defendants--Trial Not Bifurcated

CACI No. 3948 Punitive Damages--Individual and Corporate Defendants (Corporate Liability Based on Acts of Named Individual)--Bifurcated Trial (First Phase)

CACI No. 3949 Punitive Damages--Individual and Corporate Defendants (Corporate Liability Based on Acts of Named Individual)--Bifurcated Trial (Second Phase)

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Remedies Damages Punitive Damages Torts Damages Punitive Damages Award Calculations Constitutional Requirements Torts Damages Punitive Damages Award Calculations Factors Torts Damages Punitive Damages Conduct Supporting Awards Torts Intentional Torts Conversion Remedies



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CHAPTER 21A Matthew Bender Conversion Instructions
PART B. DAMAGES FOR CONVERSION

3-21A California Forms of Jury Instruction MB 2100A.38--MB 2100A.49

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CHAPTER 21A Matthew Bender Conversion Instructions
PART C. DEFENSES AND PRIVILEGES

3-21A California Forms of Jury Instruction MB 2100A.50

MB 2100A.50 Consent

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

If Defendant has proved that Plaintiff consented to _____ [describe act of interference by defendant], then Plaintiff may not recover for Defendant's act of interference.

[*OPTIONAL (See Use of Instruction)*]

However, if Plaintiff can prove that Defendant obtained Plaintiff's consent by means of fraud, force, or threats, then Plaintiff's consent is not a defense against [his/her/its] action for conversion. To prove fraud, Plaintiff must prove that _____ [elements of fraud (see Use of Instruction)].

Authorities: *Freedman v. Queen Ins. Co.* (1961) 56 Cal.2d 454, 457, 15 Cal.Rptr. 69, 364 P.2d 245 ;
Klett v. Security Acceptance Co. (1952) 38 Cal.2d 770, 789-790, 242 P.2d 873 ; *Newhart v. Pierce*
(1967) 254 Cal.App.2d 783, 793, 62 Cal.Rptr. 553 ; *General Motors Acceptance Corp. v. Davis* (1931)
151 Okla. 255, 7 P.2d 157, 158-160 .

[2] Use of Instruction

This instruction should be used if the defendant claims that the plaintiff's recovery is barred by the plaintiff's consent to the actions complained of. Use the optional section if the plaintiff claims that the consent given was obtained through fraud or duress. If the option is used, then a definition of "fraud" will be required. For an instruction defining "fraud," see Ch. 19, *California Judicial Council Fraud or Deceit Instructions*, and Ch. 19A, *Matthew Bender Fraud and Deceit Instructions*. In either case, this instruction must be used with the instruction in Ch. 21, *California Judicial Council Conversion Instructions*, CACI No. 2100 ("Conversion--Essential Factual Elements").

[3] Comment**[a] Defense of Consent**

The plaintiff's consent to the act or acts of interference complained of is a defense to an action for conversion [*Klett v. Security Acceptance Co.* (1952) 38 Cal.2d 770, 789-790, 242 P.2d 873 ; *Newhart v. Pierce* (1967) 254 Cal.App.2d 783, 793, 62 Cal.Rptr. 553 ; *Wade v. Southwest Bank* (1962) 211 Cal.App.2d 392, 406, 27 Cal.Rptr. 337 ; Restatement (Second) of Torts § 252]. The only exceptions are when the consent was obtained by fraud [*Freedman v. Queen Ins. Co.* (1961) 56 Cal.2d 454, 457, 15 Cal.Rptr. 69, 364 P.2d 245 ; *Wendling Lumber Co. v. Glenwood Lumber Co.* (1908) 153 Cal. 411, 95 P. 1029 ; *Elliott v. Federated Fruit & Vegetable Growers, Inc.* (1930) 108 Cal.App. 412, 417, 291 P. 681 ; Restatement (Second) of Torts § 252A] or duress [*General Motors Acceptance Corp. v. Davis* (1931) 151 Okla. 255, 7 P.2d 157, 158-160 ; Restatement (Second) of Torts § 252A].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 21, *California Judicial Council Conversion Instructions*]:

CACI No. 2100 Conversion--Essential Factual Elements

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Torts Intentional Torts Conversion General Overview Torts Intentional Torts Conversion Defenses Torts Intentional Torts Conversion Elements



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CHAPTER 21A Matthew Bender Conversion Instructions
PART C. DEFENSES AND PRIVILEGES

3-21A California Forms of Jury Instruction MB 2100A.51

MB 2100A.51 Right to Possession

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

If Defendant has proved that [he/she/it] was entitled to possession of _____ [describe property] when [he/she/it] _____ [took or kept] possession of it, then you must find that Defendant did not commit an act of conversion.

[*OPTIONAL (See Use of Instruction)*]

Defendant sold _____ [describe property] to Plaintiff under a conditional sales contract. One of the conditions of this contract was that if Plaintiff _____ [state condition on which defendant becomes entitled to possession], then Defendant was entitled to immediate possession of _____ [describe property]. If you find that Plaintiff did fail to comply with this condition, then Defendant did have the right to the property's immediate possession, and there was no conversion.

Authorities: *Com. Code § 9609; Silverstin v. Kohler & Chase (1919) 181 Cal. 51, 54, 183 P. 451 ; Hartford Fin. Corp. v. Burns (1979) 96 Cal.App.3d 591, 600, 158 Cal.Rptr. 169 ; Glascock v. Sukumlyn (1955) 131 Cal.App.2d 587, 594-595, 281 P.2d 90 ; Ray v. Mercantile Acceptance Corp. (1941) 44 Cal.App.2d 327, 331, 112 P.2d 295 .*

[2] Use of Instruction

This instruction should be used when the defendant justifies taking or keeping possession of the allegedly converted property on the basis that he or she was entitled to possession of that property. Use the optional paragraph if the defendant claims a right to possession based on the plaintiff's failure to comply with the requirements of a conditional

sales contract.

[3] Comment

[a] Right to Take Possession; Secured Transactions; Unlawful Entry

Taking possession of personal property is not conversion if the defendant had a right to possession of that property [Restatement (Second) of Torts § 272], as when the plaintiff is in default under a conditional sales contract [*Silverstin v. Kohler & Chase* (1919) 181 Cal. 51, 54, 183 P. 451 ; *Ray v. Mercantile Acceptance Corp.* (1941) 44 Cal.App.2d 327, 331, 112 P.2d 295]. The secured party in a secured transaction has the right to possession on the buyer's default unless the parties agree otherwise [Com. Code § 9609]. However, even when a secured party is otherwise entitled to take possession of property on a default on a finance contract, repossession by unlawful entry is a conversion of that property. Liability of the secured party for such an unlawful entry by a reposessor employed on its behalf does not depend on authorization, ratification, knowledge, intent, or bad faith. The gist of conversion, as discussed in MB 2100A.06[3][a], lies in an unwarranted interference with the plaintiff's property resulting in injury. Wrongful motives are not necessary and need not be proved [*Henderson v. Security Nat'l Bank* (1977) 72 Cal.App.3d 764, 770-771, 140 Cal.Rptr. 388 ; see MB 2100A.16[3][a]]. The secured party's inability to take possession without unlawful entry or other breach of the peace does not mean that that party lacks the right to possession. This means only that the secured party must resort to the law rather than to self-help. The right to possession on a default in a secured transaction remains sufficient to support an action for conversion if the secured party is denied possession [*Hartford Fin. Corp. v. Burns* (1979) 96 Cal.App.3d 591, 600, 158 Cal.Rptr. 169].

Sellers of goods must take great care in exercising the right to repossess on default. For example, it is a conversion for a secured party to take rightful possession of an automobile, then fail to return or account for jewelry left in the car's glove compartment [see *Varela v. Wells Fargo Bank* (1971) 15 Cal.App.3d 741, 749-750, 93 Cal.Rptr. 428]. In addition, a seller who does not acquire a security interest in the goods sold is merely an unpaid seller and does not have the special rights of a secured party. A car dealership that sold a car to a used car dealer for a draft without any security agreement was held to be liable for conversion for repossessing the car from a third party who bought the car [*English v. Ralph Williams Ford* (1971) 17 Cal.App.3d 1038, 1047-1049, 95 Cal.Rptr. 501].

[b] Right to Keep Possession; Secured Transactions; Excessive Demands

Keeping possession of property is also not conversion if one has a right to possession of that property. For example, it is not conversion to hold another's stock shares despite a demand for their return, if the shares are held under an option contract that gives the one holding the shares the right to possession [*Glascok v. Sukumlyn* (1955) 131 Cal.App.2d 587, 594-595, 281 P.2d 90]. Further, a secured party lawfully in possession of the collateral on default does not commit a conversion by demanding payment of an amount not covered by the security agreement. The debtor can redeem the collateral by tendering an amount sufficient to meet all obligations secured by the property at issue, plus reasonable expenses and attorney's fees [Com. Code § 9623; see Com. Code § 9615(a)(1) (reasonable expenses and attorney's fees)]. If it does not do so, then the debtor remains in default and the secured party is not liable for conversion, despite its excessive demands [*Clark Equip. Co. v. Mastelotto, Inc.* (1978) 87 Cal.App.3d 88, 93-94, 150 Cal.Rptr. 797].

[c] Liability for Torts Other Than Conversion

Even when the defendant had a right to the property's possession and should not be liable for conversion, the defendant may be otherwise liable if he or she improperly takes possession of the property [Restatement (Second) of Torts § 272, cmts. a, b]. For example, a defendant who uses force may be liable for assault [*Silverstin v. Kohler & Chase* (1919) 181 Cal. 51, 54, 183 P. 451].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewContracts LawSecured
TransactionsDefaultForeclosure & RepossessionEnforcementTortsIntentional TortsConversionGeneral
OverviewTortsIntentional TortsConversionElements



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CHAPTER 21A Matthew Bender Conversion Instructions
PART C. DEFENSES AND PRIVILEGES

3-21A California Forms of Jury Instruction MB 2100A.52

MB 2100A.52 Public Officers--Privilege of Public Interest**[1] Instruction**[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

If Defendant has proved that [he/she/it] is a _____ [police officer or peace officer or public officer] with the duty, authority, or right given by law to seize _____ [describe property] in protection of the public interest, then Defendant is not liable for converting Plaintiff's property.

Authorities: *Bruce v. Sibeck* (1938) 25 Cal.App.2d 691, 696, 78 P.2d 741 ; Restatement (Second) of Torts § 265.

[2] Use of Instruction

This instruction should be used when the defendant claims to be a public officer who acted in the public interest in taking the plaintiff's property. If the defendant claims to have acted under the authority of a specific statute or rule, cite and explain that authority.

[3] Comment

Public officers acting under a duty or authority to protect the public interest are privileged to seize personal property without liability for conversion [Restatement (Second) of Torts § 265]. Thus, for example, a game warden may seize a boat and other equipment used in violation of the law [*Bruce v. Sibeck* (1938) 25 Cal.App.2d 691, 696, 78 P.2d 741].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Governments Local Governments Police

PowerGovernmentsState & Territorial GovernmentsPolice PowerTortsIntentional TortsConversionGeneral
OverviewTortsIntentional TortsConversionDefenses



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PART C. DEFENSES AND PRIVILEGES

3-21A California Forms of Jury Instruction MB 2100A.53

MB 2100A.53 Court Order**[1] Instruction**[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

If Defendant has proved that, acting as a _____ [sheriff or other ministerial officer], [he/she/it] took the Plaintiff's property under a _____ [court order or other process] that was _____ [valid or apparently valid], then Defendant is not liable for converting that property.

A court order is apparently valid if it would appear valid to an ordinarily intelligent and informed person who is not trained in the law.

Authorities: Code Civ. Proc. § 262.1; *Vallindras v. Massachusetts Bonding & Ins. Co.* (1954) 42 Cal.2d 149, 154, 265 P.2d 907 .

[2] Use of Instruction

This instruction should be used if the defendant is a sheriff or other ministerial officer who claims that his or her taking of the plaintiff's property is privileged because the property was taken under a court order or other process.

[3] Comment

A "sheriff or other ministerial officer" is justified in executing and must execute all process and orders regular on their face and issued by competent authority, whatever may be the defects in the proceedings on which they were issued [Code Civ. Proc. § 262.1]. Therefore, a sheriff or other ministerial officer [see *Vallindras v. Massachusetts Bonding & Ins. Co.* (1954) 42 Cal.2d 149, 154, 265 P.2d 907 (sheriff is ministerial or executive, not judicial, officer)] cannot be held liable for taking property under an order or process valid on its face [*Vallindras v. Massachusetts Bonding & Ins. Co.* (1954) 42 Cal.2d 149, 154, 265 P.2d 907 ; Restatement (Second) of Torts § 266]. For a process or an order to be

valid, it is enough if it appears to be valid on its face in the judgment of an ordinarily intelligent and informed layperson [*Vallindras v. Massachusetts Bonding & Ins. Co.* (1954) 42 Cal.2d 149, 154, 265 P.2d 907].

However, acting under a court order is not a complete shield against liability for those who are not public officers. In one case, the owner of personal property mortgaged that property to secure a debt. The mortgage provided that on default in payment of that debt, the mortgagee would be entitled to possession of the property. The owner died, and his executor failed to make the required payment. Subsequently, a court ordered a sale of property for the estate's benefit, including the mortgaged property. Before the sale, the mortgagee demanded possession of the mortgaged property. The executor refused to deliver the property, and sold it. The Court held that the order to sell did not protect the executor, because the court had merely ordered a sale; it did not order the executor to refuse possession to one entitled to possession [*Mathew v. Mathew* (1903) 138 Cal. 334, 336-337, 71 P. 344].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewTortsIntentional TortsConversionGeneral OverviewTortsIntentional TortsConversionDefenses



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CHAPTER 21A Matthew Bender Conversion Instructions
PART C. DEFENSES AND PRIVILEGES

3-21A California Forms of Jury Instruction MB 2100A.54

MB 2100A.54 Qualified Refusal Privilege

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

As I have already explained to you, it is ordinarily a conversion to refuse a demand for the return of property if the demand is made by one entitled to immediate possession of that property. However, if the refusal is a qualified refusal, Defendant may refuse to return the property without being liable for conversion. A qualified refusal is a limited refusal. That is, it is not an absolute refusal to return the property under any circumstances. A qualified refusal is a refusal to return property that is based on a specific reason.

To prove a qualified refusal, Defendant must have proved both of the following:

1. That Defendant's refusal to return the property was a limited refusal given because:

[CHOOSE ONE OR MORE (See Use of Instruction)]

a. Plaintiff's demand for the return of _____ [describe property] was unreasonable under the circumstances. For example, Plaintiff's demand was unreasonable if Plaintiff asked for the property when Defendant could not get to it, or if Plaintiff asked for the property in the middle of the night.

[AND/OR]

b. Defendant wanted time to identify Plaintiff.

[AND/OR]

c. Defendant wanted time to investigate Plaintiff's right to the property, which was in doubt.

[CONTINUE WITH INSTRUCTION]

2. That this reason was communicated to Plaintiff when [he/she/it] demanded the property.

[OPTIONAL (See Use of Instruction)]

If Defendant refused to return the property to _____ [identify Plaintiff or investigate Plaintiff's right to it], then [his/her/its] refusal is a qualified refusal only if the refusal lasts no longer than is reasonably necessary to _____ [identify Plaintiff or investigate Plaintiff's right to the property].

Giacomelos v. Bank of America Nat'l Trust & Sav. Asso. (1965) 237 Cal.App.2d 99, 100-101, 46 Cal.Rptr. 612 ; Restatement (Second) of Torts §§ 238-241.

[2] Use of Instruction

This instruction should be used when the defendant claims that his or her refusal to return the plaintiff's property on demand was not a conversion because the refusal was a qualified refusal. It should be used with the instruction in MB 2100A.12[1], which explains liability for refusal to return property on demand.

The three reasons given as choices for the conclusion of Paragraph 1 are the three permissible reasons for giving a qualified refusal. Counsel may use any one of them, any two of them, or all three, depending on which of them is at issue. Any one of these reasons is sufficient to justify a qualified refusal if the other requirements are met [see [3][a], below].

The optional last paragraph should be used if the plaintiff claims that the defendant's refusal, although initially privileged, lost its privileged character because it lasted for an unreasonable time.

LexisNexis Matthew Bender Expert Practice Tip --Using MB 2100A . 54: This is a complicated instruction. Hence, care should be given in constructing the related argument to the jury. *By Rex Heeseman*

[3] Comment

[a] Privilege for Qualified Refusal

Although it is ordinarily a conversion to refuse a demand for the return of property if the demand is made by one entitled to that property [see MB 2100A.12], a qualified refusal may be privileged under certain circumstances [Restatement (Second) of Torts §§ 238-241]. A qualified refusal is a conditional, limited refusal [Restatement (Second) of Torts § 238, cmt. a].

[b] Good Faith; Reason for Refusal

To be privileged, a qualified refusal must be made in good faith [Restatement (Second) of Torts § 241(a)] for a reasonable purpose [Prosser & Keeton on Torts (5th ed. 1984) § 15, pp. 99-100]. For example, a qualified refusal may be privileged if the refusal is made because the demand for the property's return was unreasonable [Restatement

(Second) of Torts § 238], or to identify the claimant [Restatement (Second) of Torts § 239], or to investigate a doubtful claim [*Giacomelos v. Bank of Am. (1965) 237 Cal.App.2d 99, 100-101, 46 Cal.Rptr. 612* ; Restatement (Second) of Torts § 240]. This reason must be communicated to the one making the demand for the property at that time [Restatement (Second) of Torts § 241(b)], unless the circumstances justify the failure to do so [Restatement (Second) of Torts § 241(b)].

LexisNexis Matthew Bender Expert Practice Tip--Reasonableness of Demand: Whether or not a demand is "unreasonable" will depend on the nature of the property in question. Even if the demand is "unreasonable," the defendant should be prepared to show that he/she was willing to comply with a reasonable demand. Note that this qualified privilege only lasts for a limited amount of time [see [c], below]. By Ronald Oster

[c] Time That Privilege to Refuse Lasts

A qualified refusal is privileged only if it is for a reasonable length of time [*Prosser & Keeton on Torts* (5th ed. 1984) § 15, p. 99]. For example, a qualified refusal to identify a claimant or to investigate a doubtful claim is privileged only for the time reasonably necessary to accomplish these purposes [*Giacomelos v. Bank of Am. (1965) 237 Cal.App.2d 99, 101, 46 Cal.Rptr. 612* ; Restatement (Second) of Torts §§ 239, cmt. c, 240, cmt. a].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Torts Intentional Torts Conversion General Overview Torts Intentional Torts Conversion Defenses



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CHAPTER 21A Matthew Bender Conversion Instructions
PART C. DEFENSES AND PRIVILEGES

3-21A California Forms of Jury Instruction MB 2100A.55

MB 2100A.55 Estoppel--Apparent Title or Authority**[1] Instruction**[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Plaintiff may not claim ownership of _____ [*describe property*], and therefore may not recover for its conversion, if Defendant has proved all of the following:

1. That Plaintiff did something to make it appear that _____ [*name of defendant's transferor*] owned or could rightfully dispose of Plaintiff's property;
2. That Defendant actually believed that _____ [*name of third party*] owned or had the power to dispose of the property; and
3. That because _____ [*name of third party*] appeared to own the property or have the right to dispose of it, Defendant _____ [*e.g., bought*] it.

Authorities: *Chase v. Whitmore* (1886) 68 Cal. 545, 547, 9 P. 942 ; *Eistrat v. Western Hardwood Lumber Co.* (1958) 164 Cal.App.2d 374, 384, 330 P.2d 629 ; *Wendling Lumber Co. v. Glenwood Lumber Co.* (1921) 54 Cal.App. 691, 695, 202 P. 929 .

[2] Use of Instruction

This instruction should be used if the defendant claims to have acquired the allegedly converted property from a third party clothed by the plaintiff with apparent title to that property or apparent authority to dispose of that property.

[3] Comment

A party may be estopped to assert title to property in a conversion action if the party has clothed another with the apparent title to or power of disposition over the property, and an innocent third party is thereby induced to deal with this other person for the property [*Chase v. Whitmore* (1886) 68 Cal. 545, 547, 9 P. 942 ; *Eistrat v. Western Hardwood Lumber Co.* (1958) 164 Cal.App.2d 374, 384, 330 P.2d 629 ; *Wendling Lumber Co. v. Glenwood Lumber Co.* (1921) 54 Cal.App. 691, 695, 202 P. 929]. If the plaintiff cannot assert title in a conversion action when the defendant has acquired the property from a third party with apparent title or power of disposition, then the plaintiff may not recover [see *Wendling Lumber Co. v. Glenwood Lumber Co.* (1921) 54 Cal.App. 691, 695, 202 P. 929].

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate Law Agency Relationships Authority to Act Apparent Authority General Overview Civil
 Procedure Trials Jury Trials Jury Instructions General Overview Torts Intentional Torts Conversion General
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CHAPTER 21A Matthew Bender Conversion Instructions
PART C. DEFENSES AND PRIVILEGES

3-21A California Forms of Jury Instruction MB 2100A.56

MB 2100A.56 Innocent Purchaser for Value Without Notice

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Defendant claims as a defense that _____ [he/she/it] was an innocent purchaser for value without notice of the transferor's conversion. To establish this defense, Defendant must prove both of the following:

1. Defendant purchased the _____ [specify property at issue] for value; and
2. Defendant had no actual or constructive notice that the transferor of that property had obtained the _____ [specify property at issue] fraudulently.

If Defendant proves both of these things, then Plaintiff may not recover damages for conversion against Defendant.

Authorities: *Wendling Lumber Co. v. Glenwood Lumber Co.* (1908) 153 Cal. 411, 414, 95 P. 1029 ;
Bank of Ukiah v. Gibson (1895) 109 Cal. 197, 41 P. 1008 ; *Oakdale Vill. Group v. Fong* (1996) 43
Cal.App.4th 539, 549, 50 Cal.Rptr.2d 810 .

[2] Use of Instruction

This instruction should be used when the defendant claims to be a bona fide purchaser as a defense to plaintiff's action for conversion. For an instruction in which the defendant claims that plaintiff's actions made it appear that the defendant's transferor could rightly dispose of plaintiff's property, see *MB 2100A.55[1]*.

[3] Comment

[a] Purchase From Fraudulent Transferor

Generally, an innocent purchaser for value and without actual or constructive notice that the transferor secured the goods fraudulently is not liable for conversion [*CRS Recovery, Inc. v. Laxton* (9th Cir. 2010) 600 F.3d 1138, 1145 ; *Oakdale Vill. Group v. Fong* (1996) 43 Cal.App.4th 539, 546, 50 Cal.Rptr.2d 810]. However, a person who acquires property from the fraudulent transferor under such circumstances that the acquiring party cannot be held to be a purchaser in good faith and for valuable consideration, is in no better position than the fraudulent transferor, and the defrauded party has the same remedies for conversion against the acquiring party as against the fraudulent transferor [*Wendling Lumber Co. v. Glenwood Lumber Co.* (1908) 153 Cal. 411, 414, 95 P. 1029 ; *Oakdale Vill. Group v. Fong* (1996) 43 Cal.App.4th 539, 549, 50 Cal.Rptr.2d 810].

[b] Value

A party who is free from fraud and bought without notice nonetheless is not a bona fide purchaser if that party did not part with valuable consideration. A promise that is not an exchange for value, by which the purchaser loses nothing by the transaction, is not a payment of value [*Bank of Ukiah v. Gibson* (1895) 109 Cal. 197, 41 P. 1008 ; *Oakdale Vill. Group v. Fong* (1996) 43 Cal.App.4th 539, 548, 50 Cal.Rptr.2d 810].

LexisNexis Matthew Bender Expert Practice Tip--Purchasing "For Value": A key term in this defense instruction is the requirement that the defendant purchased the property "for value." If the defendant paid the fair market value, there should be no problem. However, if the defendant paid below market value, the issue of constructive knowledge on the defendant's part becomes an issue [see also § 2100A.14[2]]. By Ronald Oster

[c] Notice

Absence of notice is an essential requirement for one to be regarded as a bona fide purchaser [*Oakdale Vill. Group v. Fong* (1996) 43 Cal.App.4th 539, 549, 50 Cal.Rptr.2d 810 ; *Gates Rubber Co. v. Ulman* (1989) 214 Cal.App.3d 356, 364, 262 Cal.Rptr. 630]. If the property is taken from the fraudulent transferor with knowledge of the fraud, or with knowledge of facts and circumstances that would put a reasonable person on inquiry, the purchaser is not a bona fide purchaser [*Oakdale Vill. Group v. Fong* (1996) 43 Cal.App.4th 539, 546, 50 Cal.Rptr.2d 810].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Contracts Law Types of Contracts Bona Fide Purchasers Torts Intentional Torts Conversion General Overview Torts Intentional Torts Conversion Defenses



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3-21A California Forms of Jury Instruction MB 2100A.57

MB 2100A.57 Waiver

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Plaintiff may not recover damages for conversion of [his/her/its] property if Defendant has proved that Plaintiff waived [his/her/its] _____ [*either title to or interest in that property or right to bring an action against Defendant for conversion*]. To prove this waiver, Defendant must prove all of the following:

- 1. That Plaintiff had at the time of the waiver _____ [*either title to or interest in the property or a right to bring an action against Defendant for conversion*];**
- 2. That Plaintiff knew that [he/she/it] had this _____ [right or title or interest]; and**
- 3. That Plaintiff either intentionally gave up this _____ [right or title or interest] or acted in a way so inconsistent with the intent to enforce [his/her/its] rights that it was reasonable for Defendant to believe that this _____ [right or title or interest] had been relinquished.**

Defendant bears the burden of proving this waiver by clear and convincing evidence. This means that Defendant must have offered evidence that makes you believe that it is highly probable that each of these three things is true. Defendant must have offered evidence that is so clear as to leave no substantial doubt. Do not measure Defendant's evidence by the number of witnesses or the amount of evidence that [he/she/it] offers. Measure Defendant's evidence by how convincing that evidence is.

Authorities: *Waller v. Truck Ins. Exch., Inc.* (1995) 11 Cal.4th 1, 31-32, 44 Cal.Rptr.2d 370, 900 P.2d 619 ; *City of Ukiah v. Fones* (1966) 64 Cal.2d 104, 107, 48 Cal.Rptr. 865, 410 P.2d 369 ; *Rheem Mfg. Co. v. United States* (1962) 57 Cal.2d 621, 626, 21 Cal.Rptr. 802, 371 P.2d 578 ; *Imperial NH3 v.*

Central Valley Feed Yards, Inc. (1977) 70 Cal.App.3d 513, 518-520, 139 Cal.Rptr. 8 ; Jones v. Brown (1970) 13 Cal.App.3d 513, 519, 89 Cal.Rptr. 651 ; City of Redondo Beach v. Kumnick (1963) 216 Cal.App.2d 830, 838, 31 Cal.Rptr. 367 ; Kay v. Kay (1961) 188 Cal.App.2d 214, 218, 10 Cal.Rptr. 196 ; Eistrat v. Western Hardwood Lumber Co. (1958) 164 Cal.App.2d 374, 381-382, 330 P.2d 629 ; Bastanchury v. Times-Mirror Co. (1945) 68 Cal.App.2d 217, 233-236, 240, 156 P.2d 488 .

[2] Use of Instruction

This instruction should be used if the defendant claims that the plaintiff is barred from recovery for conversion by the waiver of his or her interest in the property at issue or by the waiver of his or her right to bring the action.

[3] Comment

[a] Waiver Defined; Elements of Waiver; Question of Fact

Waiver is generally defined as the intentional relinquishment of a known right or privilege [*Johnson v. Zerbst (1938) 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461 ; Waller v. Truck Ins. Exch., Inc. (1995) 11 Cal.4th 1, 31-32, 44 Cal.Rptr.2d 370, 900 P.2d 619 ; Imperial NH3 v. Central Valley Feed Yards, Inc. (1977) 70 Cal.App.3d 513, 518, 139 Cal.Rptr. 8 ; see Restatement (Second) of Contracts § 84, cmt. b*]. This definition breaks down into the following three elements:

- An existing right or privilege [*City of Redondo Beach v. Kumnick (1963) 216 Cal.App.2d 830, 838, 31 Cal.Rptr. 367*];
- Knowledge of that right or privilege [*Jones v. Brown (1970) 13 Cal.App.3d 513, 519, 89 Cal.Rptr. 651*]; and
- The intent to waive it [*Kay v. Kay (1961) 188 Cal.App.2d 214, 218, 10 Cal.Rptr. 196*] or conduct so inconsistent with an intent to enforce that right or privilege as to induce a reasonable belief that it has been relinquished [*Crest Catering Co. v. Superior Court (1965) 62 Cal.2d 274, 278, 42 Cal.Rptr. 110, 398 P.2d 150 ; Rheem Mfg. Co. v. United States (1962) 57 Cal.2d 621, 626, 21 Cal.Rptr. 802, 371 P.2d 578*].

Whether there has been a waiver is generally a question of fact for the trier of fact [see *Posner v. Grunwald-Marx, Inc. (1961) 56 Cal.2d 169, 189, 14 Cal.Rptr. 297, 363 P.2d 313 ; Hefferan v. Freebairn (1950) 34 Cal.2d 715, 722, 214 P.2d 386*].

[b] Waiver as Defense to Conversion

Waiver is available as a defense in conversion actions [*Imperial NH3 v. Central Valley Feed Yards, Inc. (1977) 70 Cal.App.3d 513, 518-520, 139 Cal.Rptr. 8 ; Eistrat v. Western Hardwood Lumber Co. (1958) 164 Cal.App.2d 374, 381-382, 330 P.2d 629 ; Bastanchury v. Times-Mirror Co. (1945) 68 Cal.App.2d 217, 233-236, 240, 156 P.2d 488*]. For example, one who claimed a crop mortgage lien on certain crops and the proceeds from their sale has been held to have waived those lien rights and to be unable to recover for the taking of the proceeds because of this waiver. A third party with a prior lien claim to the land involved held a pledgee's sale to sell the land to satisfy its security interest. The plaintiff was present and did not protest. The other lien claimant bought the property at that pledgee's sale, then entered onto the land and financed, cultivated, and sold the crops without protest from the plaintiff who had full knowledge of these events. The court found that this was a waiver of any lien rights the plaintiff had and that the plaintiff was not entitled to bring an action for the conversion of the proceeds of the crop sales [*Bastanchury v. Times-Mirror Co. (1945) 68 Cal.App.2d 217, 233-236, 240, 156 P.2d 488*].

[c] Burden of Proof

The party claiming the benefit of the waiver bears the burden of proving it [*Gaunt v. Prudential Ins. Co.* (1967) 255 Cal.App.2d 18, 23, 62 Cal.Rptr. 624 ; *Perini v. Perini* (1964) 225 Cal.App.2d 399, 407, 37 Cal.Rptr. 354 ; *Brewer v. Municipal Court* (1961) 193 Cal.App.2d 510, 515, 14 Cal.Rptr. 391] by "clear and convincing evidence that does not leave the matter to speculation" [*City of Ukiah v. Fones* (1966) 64 Cal.2d 104, 107-108, 48 Cal.Rptr. 865, 410 P.2d 369 ; see also *Waller v. Truck Ins. Exch., Inc.* (1995) 11 Cal.4th 1, 31-32, 44 Cal.Rptr.2d 370, 900 P.2d 619 (burden is on party claiming waiver of right to prove it by clear and convincing evidence that does not leave matter to speculation; doubtful cases will be decided against waiver); *DRG/Beverly Hills, Ltd. v. Chopstix Dim Sum Cafe & Takeout III, Ltd.* (1994) 30 Cal.App.4th 54, 60-61, 35 Cal.Rptr.2d 515 (trial court correctly instructed jury that waiver of known right must be shown by clear and convincing evidence)]. There must be "a clear showing of an intent to relinquish that right" [*Isaacson v. City of Oakland* (1968) 263 Cal.App.2d 414, 419, 69 Cal.Rptr. 379 ; *Caesar's Rest. v. Industrial Accident Comm'n* (1959) 175 Cal.App.2d 850, 856, 1 Cal.Rptr. 97].

"Clear and convincing evidence" has been variously defined as evidence that is (1) clear, explicit, and unequivocal; (2) so clear as to leave no substantial doubt; and (3) strong enough to command the unhesitating assent of every reasonable mind [see *Sheehan v. Sullivan* (1899) 126 Cal. 189, 193, 58 P. 543 ; *United Prof'l Planning, Inc. v. Superior Court* (1970) 9 Cal.App.3d 377, 386, 88 Cal.Rptr. 551]. Clear and convincing evidence must persuade the trier of fact that it is highly probable that the facts asserted are true [Witkin, California Evidence, vol. 1, *Burden of Proof and Presumptions*, § 38 (4th ed., 2000); McBaine, *Burden of Proof: Degrees of Belief*, 32 Cal. L. Rev. 242, 251-254, 262-264 (1944)].

LexisNexis Matthew Bender Expert Practice Tip--Emphasize Higher Burden of Proof: As noted above, the defense of waiver requires proof by "clear and convincing" evidence. A defendant should emphasize this higher burden of proof in closing argument. *By Ronald Oster*

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsWaiver & PreservationCivil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewEvidenceProcedural ConsiderationsBurdens of ProofAllocationTortsIntentional TortsConversionGeneral OverviewTortsIntentional TortsConversionDefenses



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California Forms of Jury Instruction

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CHAPTER 21A Matthew Bender Conversion Instructions
PART C. DEFENSES AND PRIVILEGES

3-21A California Forms of Jury Instruction MB 2100A.58

MB 2100A.58 Statute of Limitations**[1] Instruction**[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

The statute of limitations is a law providing that unless a person begins a legal action within a certain period of time he or she loses the right to do so. In this action for conversion, the law requires the Plaintiff to sue for conversion _____ [three years or other applicable time] from _____ [the date the act of conversion was committed or such other date as may apply]. This means that Plaintiff may not sue in this court if the act or acts of conversion occurred more than _____ [three years or other applicable time] before _____, which is the date on which Plaintiff began this lawsuit. Therefore, if you find that the act or acts of conversion occurred before _____ [date either three years or other applicable date before action begun], then you must find that Plaintiff may not recover for conversion, and you need not and must not consider any other evidence offered once you have made this finding.

Authorities: Code Civ. Proc. § 338(c); Snapp & Assocs. Ins. Servs., Inc. v. Robertson (2002) 96 Cal.App.4th 884, 892 n.2, 117 Cal.Rptr.2d 331 ; Fabrice Prods. v. United Cal. Bank (1968) 264 Cal.App.2d 113, 117, 70 Cal.Rptr. 50 .

[2] Use of Instruction

This instruction should be used if the defendant claims that the plaintiff's action is barred by the running of the statute of limitations. For an instruction defining how damages may be limited by the statute of limitations, see MB 2100A.35[1].

[3] Comment**[a] Time for Commencing Action**

An action for conversion must generally be commenced [see *Code Civ. Proc.* § 335] by filing a complaint [see *Code Civ. Proc.* § 350] within three years [*Code Civ. Proc.* § 338(c); *Fabricon Prods. v. United Cal. Bank* (1968) 264 Cal.App.2d 113, 117, 70 Cal.Rptr. 50]. Certain conversion actions are subject to special limitation periods, for example:

- Three years after discovery of *whereabouts* of any article of historical, interpretive, scientific, or artistic significance [*Code Civ. Proc.* § 338(c)].
- Six months for wrongful levy by tax collector or for stock improperly sold for delinquent assessment [*Code Civ. Proc.* § 341].
- 90 days for trover against hotel, furnished apartment, or furnished bungalow owner [*Code Civ. Proc.* § 341a].
- 180 days for conversion of oil, gas, or other liquid or fluid from drilled well [*Code Civ. Proc.* § 3493/4].
- Six months after claim filed with State Board of Control has been denied if defendant is public entity [*Gov. Code* §§ 905.2, 911.2, 913, 945.6].
- Three years after end of guardianship or conservatorship or three years after removal of any legal disability to sue that existed when cause of action accrued for action against guardian by ward or one claiming under ward to recover property sold [*Prob. Code* § 2548].
- Three years after settlement of executor's or administrator's final account or three years after discovery of fraud for action against executor or administrator by one claiming under decedent to recover property sold [*Prob. Code* § 10382].

[b] Running of Statute of Limitations

Ordinarily, the three-year period begins to run when the conversion is committed, even if the injured party is entirely ignorant of the conversion and of his or her rights [*Eistrat v. Cekada* (1958) 50 Cal.2d 289, 291, 324 P.2d 881 ; *Bennett v. Hibernia Bank* (1956) 47 Cal.2d 540, 561, 305 P.2d 20 ; *Barnes v. Witt* (1962) 207 Cal.App.2d 441, 445, 24 Cal.Rptr. 545]. However, if the tortfeasor conceals the conversion's facts, then the limitation period does not begin to run until the owner discovers or should have discovered these facts [*Barnes v. Witt* (1962) 207 Cal.App.2d 441, 445, 24 Cal.Rptr. 545 ; see *Bennett v. Hibernia Bank* (1956) 47 Cal.2d 540, 561, 305 P.2d 20 (fraudulent concealment)]. Because of the fiduciary's duty of disclosure to the beneficiary, any conversion of trust property amounts to a fraudulent concealment, and therefore the limitation period does not begin to run until the owner learns of the conversion or learns facts sufficient to arouse his or her suspicion [*Bennett v. Hibernia Bank* (1956) 47 Cal.2d 540, 561-562, 305 P.2d 20 ; *Bono v. Clark* (2002) 103 Cal.App.4th 1409, 1433, 128 Cal.Rptr.2d 31 (no concealment; limitations period expired)]. Thus, if one becomes aware of facts that would make a reasonably prudent person suspicious, it is no longer enough to rely on the fiduciary relationship. At that point one has a duty to look further, and one may be charged with all the knowledge such an investigation would have revealed [*Miller v. Bechtel Corp.* (1983) 33 Cal.3d 868, 874-875, 191 Cal.Rptr. 619, 663 P.2d 177]. If the converted property was first taken lawfully under a bailment, then there is no conversion and no running of the statute of limitations until a demand for the property is made and refused or until a repudiation of the owner's title is clearly and unequivocally brought to the owner's attention [*Coy v. County of Los Angeles* (1991) 235 Cal.App.3d 1077, 1088, 1 Cal.Rptr.2d 215 ; *Bufano v. City & County of San Francisco* (1965) 233 Cal.App.2d 61, 70, 43 Cal.Rptr. 223]. However, this rule does not apply to stock lawfully taken then converted by a broker [*Coy v. E.F. Hutton* (1941) 44 Cal.App.2d 386, 390-391, 112 P.2d 639] or a pledgee-bank [*Bell v. Bank of Cal.* (1908) 153 Cal. 234, 242, 94 P. 889]. In addition, the statute does not run during any period in which the plaintiff is

legally restrained from taking action to protect his or her property [*Eistrat v. Cekada* (1958) 50 Cal.2d 289, 290-293, 324 P.2d 881]. During the pendency of bankruptcy proceedings the plaintiff may be so restrained by orders issued to protect the bankrupt's property. Finally, special rules apply to a claim of conspiracy to convert. In an action based on civil conspiracy, the statute of limitations does not begin to run until after the commission of the last overt act in furtherance of the conspiracy [*Maheu v. CBS, Inc.* (1988) 201 Cal.App.3d 662, 673-674, 247 Cal.Rptr. 304].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewGovernmentsLegislationStatutes of LimitationsTime LimitationsTortsIntentional TortsConversionGeneral OverviewTortsIntentional TortsConversionDefenses



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CHAPTER 21A Matthew Bender Conversion Instructions
PART C. DEFENSES AND PRIVILEGES

3-21A California Forms of Jury Instruction MB 2100A.59

MB 2100A.59 Privilege of Self-Defense or Defense of Third Person

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Defendant is not liable for converting Plaintiff's property if Defendant proves the following:

1. Defendant reasonably believed that _____ [(he/she/it) AND/OR _____ (name of third person)] [was/were] in danger of unlawful attack by Defendant.

2. Defendant took Plaintiff's property to defend _____ [(himself/herself/itself) AND/OR _____ (name of third person)] against this attack.

[OPTIONAL (See Use of Instruction)]

3. Defendant reasonably believed that [his/her/its] intervention was necessary for the protection of _____ [name of third person].

[CONTINUE WITH INSTRUCTION]

By an "unlawful attack," I mean any [unprivileged] harmful or offensive contact or other bodily harm.

Authorities: *Church of Scientology v. Armstrong* (1991) 232 Cal.App.3d 1060, 1072-1073, 283 Cal.Rptr. 917 ; Restatement (Second) of Torts § 261.

[2] Use of Instruction

This instruction should be used when the defendant claims that the taking of the plaintiff's property was justified under the privilege of self-defense. The bracketed references to the third person in paragraphs 1 and 2, and the optional paragraph 3, should be used when the defendant's claim of privilege is based on or includes the defense of a third person.

The bracketed word "unprivileged" in the final paragraph of the instruction should not be used unless the plaintiff attempts to defeat the defendant's claim of the privilege of self-defense by arguing that the attack defended against was itself privileged.

[3] Comment

The Restatement (Second) of Torts recognizes that a person is privileged to commit an act that would otherwise be a conversion of property in the possession of another to defend the actor or a third person against the other [Restatement (Second) of Torts § 261; Witkin, Summary of California Law, vol. 5, *Torts*, § 278 (9th ed. 1988)]. The privilege applies under the same conditions that would justify the infliction of a harmful or offensive contact [Restatement (Second) of Torts § 261], that is, when the actor reasonably believes that the other is about to inflict an unprivileged harmful or offensive contact or other bodily harm on the actor [Restatement (Second) of Torts § 63]. The privilege also applies to the defense of a third person if the actor correctly or reasonably believes that (1) the third person has a privilege of self-defense, and (2) the actor's intervention is necessary for the third person's protection [Restatement (Second) of Torts, § 76]. One court of appeal has upheld the application of this defense to conversion [*Church of Scientology v. Armstrong* (1991) 232 Cal.App.3d 1060, 1072-1073, 283 Cal.Rptr. 917 ; see Witkin, Summary of California Law, vol. 5, *Torts*, § 623 (9th ed. Supp. 2002)]. In so holding, the court of appeal noted that the defendant had taken the documents in question because he believed that "his life, his physical and mental well-being, as well as that of his wife," were in danger from the plaintiff and that taking the documents was the only way to defend himself and his wife. The court rejected the plaintiff's argument that the defense only applied in emergencies, holding that it was enough for the defendant to show that he was under a reasonable apprehension of danger when he took the documents [*Church of Scientology v. Armstrong* (1991) 232 Cal.App.3d 1060, 1072 n.6, 1073, 283 Cal.Rptr. 917].

This privilege is a "conditional privilege" [*Church of Scientology v. Armstrong* (1991) 232 Cal.App.3d 1060, 1072-1073, 283 Cal.Rptr. 917]. The privilege of defending oneself or a third person against unlawful attack by another is based on the value of the interest to be protected by the exercise of the privilege. The privilege is therefore conditional in that the act is privileged only if it is done to protect or advance that interest [Restatement (Second) of Torts § 10, cmt. d; Witkin, Summary of California Law, vol. 5, *Torts*, § 278 (9th ed. 1988)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Criminal Law &
 Procedure Defenses Self-Defense Torts Intentional Torts Conversion General Overview Torts Intentional
 Torts Conversion Defenses



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CHAPTER 21A Matthew Bender Conversion Instructions
PART C. DEFENSES AND PRIVILEGES

3-21A California Forms of Jury Instruction MB 2100A.60

MB 2100A.60 Unclean Hands

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Defendant claims as a defense that Plaintiff's misconduct bars Plaintiff from enforcing [his/her/its] claim of conversion. To establish this defense, Defendant must prove both of the following:

- 1. Plaintiff's misconduct was directly connected with Plaintiff's claim that Defendant converted _____ [specify property at issue]; and**
- 2. Plaintiff's misconduct was so prejudicial to Defendant that it would be unfair to allow Plaintiff to recover on [his/her/its] claim of conversion.**

If Defendant proves both of these things, then Plaintiff may not recover damages for conversion.

Authorities: *Unilogic, Inc. v. Burroughs Corp.* (1992) 10 Cal.App.4th 612, 618-623, 12 Cal.Rptr.2d 741 ; *Blain v. Doctor's Co.* (1990) 222 Cal.App.3d 1048, 1059-1063, 272 Cal.Rptr. 250 ; *Soon v. Beckman* (1965) 234 Cal.App.2d 33, 36, 44 Cal.Rptr. 190 ; *Fibreboard Paper Prods. Corp. v. East Bay Union of Machinists* (1964) 227 Cal.App.2d 675, 728-729, 39 Cal.Rptr. 64 .

[2] Use of Instruction

This instruction should be used when the defendant raises the doctrine of unclean hands as a defense to plaintiff's action for conversion. Although unclean hands is an equitable doctrine, it may be raised as a defense in an action at law, and the issue may be decided by the jury [see *Unilogic, Inc. v. Burroughs Corp.* (1992) 10 Cal.App.4th 612, 618-623, 12 Cal.Rptr.2d 741 ; see also [3], below].

[3] Comment

Unclean hands is an equitable doctrine that may be raised as a defense in an action at law [*Unilogic, Inc. v. Burroughs Corp.* (1992) 10 Cal.App.4th 612, 618-623, 12 Cal.Rptr.2d 741 ; *Blain v. Doctor's Co.* (1990) 222 Cal.App.3d 1048, 1059-1063, 272 Cal.Rptr. 250 ; *Fibreboard Paper Prods. Corp. v. East Bay Union of Machinists* (1964) 227 Cal.App.2d 675, 728-729, 39 Cal.Rptr. 64]. Because unclean hands is an affirmative defense, the burden of proof is on the defendant [Evid. Code § 500]. A plaintiff has unclean hands when (1) he or she has engaged in misconduct that is directly related to the matter before the court, and (2) that misconduct is so prejudicial that it would be unfair to allow the plaintiff to prevail in his or her cause of action [*Unilogic, Inc. v. Burroughs Corp.* (1992) 10 Cal.App.4th 612, 620-621, 12 Cal.Rptr.2d 741 ; *Blain v. Doctor's Co.* (1990) 222 Cal.App.3d 1048, 1060, 272 Cal.Rptr. 250 ; *Soon v. Beckman* (1965) 234 Cal.App.2d 33, 36, 44 Cal.Rptr. 190 ; *Fibreboard Paper Prods. Corp. v. East Bay Union of Machinists* (1964) 227 Cal.App.2d 675, 728-729, 39 Cal.Rptr. 64].

The application of the doctrine of unclean hands is primarily a question of fact [*Unilogic, Inc. v. Burroughs Corp.* (1992) 10 Cal.App.4th 612, 620, 12 Cal.Rptr.2d 741 ; *California Satellite Sys., Inc. v. Nichols* (1985) 170 Cal.App.3d 56, 70, 216 Cal.Rptr. 180 ; *Fibreboard Paper Prods. Corp. v. East Bay Union of Machinists* (1964) 227 Cal.App.2d 675, 727, 39 Cal.Rptr. 64], and this question may properly be submitted to a jury in an action at law, such as an action for conversion [*Unilogic, Inc. v. Burroughs Corp.* (1992) 10 Cal.App.4th 612, 621-623, 12 Cal.Rptr.2d 741].

LexisNexis Matthew Bender Expert Practice Tip--Use Care When Arguing "Unclean Hands":

"Unclean hands" is a difficult concept for many jurors. Care must therefore be used when putting together the closing argument related to this instruction. *By Rex Heeseman*

LexisNexis Matthew Bender Expert Practice Tip --MB 2100A . 60[1] Allows Room for Argument:

This is a relatively wide open instruction. The jury is being asked to decide whether plaintiff's misconduct is so prejudicial that it would be "unfair" to allow plaintiff to recover. This instruction allows defense counsel plenty of room to argue the case in closing. *By Ronald Oster*

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureEquityMaximsClean Hands PrincipleCivil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewContracts LawRemediesEquitable ReliefUnclean HandsTortsIntentional TortsConversionGeneral OverviewTortsIntentional TortsConversionDefenses



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CHAPTER 21A Matthew Bender Conversion Instructions
PART C. DEFENSES AND PRIVILEGES

3-21A California Forms of Jury Instruction MB 2100A.61--MB 2100A.69

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MB 2100A.61Reserved for Future Use



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CHAPTER 21A Matthew Bender Conversion Instructions
PART D. SPECIFIC RECOVERY OF PERSONAL PROPERTY

3-21A California Forms of Jury Instruction MB 2100A.70

MB 2100A.70 Elements of Action for Specific Recovery of Personal Property--Plaintiff's Burden of Proof

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Plaintiff may recover possession of _____ [describe property] from Defendant if Plaintiff can prove all of the following:

- 1. That Plaintiff had the right to possess the property at the time [he/she/it] began this lawsuit;**
- 2. That the property is tangible personal property that can be identified and seized; and**
- 3. That Defendant wrongfully possesses the property.**

Authorities: *Commercial & Sav. Bank v. Foster* (1930) 210 Cal. 76, 82, 290 P. 583 ; *Stockton Morris Plan Co. v. Mariposa County* (1950) 99 Cal.App.2d 210, 213, 215, 221 P.2d 232 ; *Lamus v. Engwicht* (1919) 39 Cal.App. 523, 528-529, 179 P. 435 .

[2] Use of Instruction

This instruction should be used to inform the jury of the plaintiff's burden of proof in an action for specific recovery of personal property. For an instruction explaining the burden of proof, see Ch. 2, *California Judicial Council Evidence Instructions*, CACI No. 200 ("More Likely True than Not True"). In addition, use either the instruction in MB 2100A.71 or MB 2100A.72 that is needed to define a particular element of the cause of action more fully. Keep in mind that this instruction may be used with some of the instructions in MB 2100A.01 through MB 2100A.60 on conversion because a plaintiff whose property has been taken is seldom sure of just what happened to that property after the taking or of who has the property at the time of the action. Therefore, the plaintiff's attorney will often be well advised to bring an action for both conversion and specific recovery of personal property. Note too that neither this instruction nor any other part

of this chapter deals with the provisional remedy of claim and delivery provided by *Code Civ. Proc.* §§ 511.010-516.050.

[3] Comment

When property is wrongfully detained, the aggrieved party may bring an action for specific recovery rather than seek damages based on the property's value in a conversion action [see Witkin, Summary of California Law, vol. 6, *Torts*, §§ 1457-1459]. The action for the recovery of specific personal property is the equivalent of the common law writ of replevin [*Berry v. Bank of Bakersfield* (1918) 177 Cal. 206, 209, 170 P. 415]. Specific recovery is equivalent to replevin if the property's original taking was wrongful [see *Commercial & Sav. Bank v. Foster* (1930) 210 Cal. 76, 79, 290 P. 583 ; *Stockton Morris Plan Co. v. Mariposa County* (1950) 99 Cal.App.2d 210, 211, 213, 221 P.2d 232], but is in the nature of detinue if the original taking was lawful [see *Commercial Credit Co. v. Peak* (1924) 195 Cal. 27, 29, 32, 231 P. 340].

This action is sometimes referred to as "claim and delivery," although "claim and delivery" properly refers not to an action of any sort, but to a provisional pretrial remedy [*Faulkner v. First Nat'l Bank* (1900) 130 Cal. 258, 263-264, 62 P. 463] set out in *Code Civ. Proc.* §§ 511.010-516.050.

As explained in the instruction, an action for the recovery of personal property has the following three essential elements:

- (1) The plaintiff must be entitled to immediate possession at the time of the action [*Stockton Morris Plan Co. v. Mariposa County* (1950) 99 Cal.App.2d 210, 213, 221 P.2d 232];
- (2) The property at issue must be tangible personal property capable of identification and seizure [*Lamus v. Engwicht* (1919) 39 Cal.App. 523, 528-529, 179 P. 435 ; but see *CRS Recovery, Inc. v. Laxton* (9th Cir. 2010) 600 F.3d 1138, 1142 (under California law, internet domain names are intangible property subject to conversion claims despite common-law tort law distinction between tangible and intangible property for conversion claims); *Haro v. Ibarra* (2009) 180 Cal.App.4th 823, 835, 103 Cal.Rptr.3d 340 (stock shares are subject to action for conversion); *Fremont Indem. Co. v. Fremont Gen. Corp.* (2007) 148 Cal.App.4th 97, 119-126, 55 Cal.Rptr.3d 621 (conversion lies for misappropriation of net operating losses; sustaining of demurrer reversed)]; and
- (3) The defendant must at the time of the action be in wrongful possession of the property or have the power to return it [*Stockton Morris Plan Co. v. Mariposa County* (1950) 99 Cal.App.2d 210, 215, 221 P.2d 232].

If the defendant obtained possession of the property lawfully, then a demand for possession by plaintiff, followed by a refusal is necessary before the plaintiff has met the third requirement [*Commercial & Sav. Bank v. Foster* (1930) 210 Cal. 76, 82, 290 P. 583 ; see MB 2100A.72].

Although this form concerns the recovery of tangible personal property, and traditionally the tort of conversion has been limited to interference with physical personal property, these limitations have eroded over time, allowing a conversion cause of action for certain types of intangible personal property [see *Hernandez v. Lopez* (2009) 180 Cal.App.4th 932, 940, 103 Cal.Rptr.3d 376 ; see, e.g., *CRS Recovery, Inc. v. Laxton* (9th Cir. 2010) 600 F.3d 1138, 1142, 1144 (California law recognizes property interest in internet domain names; domain names are intangible property subject to conversion claims)].

For related forms, see California Forms of Pleading and Practice, Ch. 119, *Claim and Delivery* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewEvidenceProcedural ConsiderationsBurdens of ProofGeneral OverviewTortsIntentional TortsConversionRemedies



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CHAPTER 21A Matthew Bender Conversion Instructions
PART D. SPECIFIC RECOVERY OF PERSONAL PROPERTY

3-21A California Forms of Jury Instruction MB 2100A.71

MB 2100A.71 Plaintiff's Right to Possession at Time of Action

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

To recover possession of [his/her/its] property, Plaintiff must prove that [he/she/it] is entitled to immediate possession of the property at this time. This does not mean Plaintiff must prove that [he/she/it] is the property's absolute owner. It is enough if Plaintiff proves that [he/she/it] has some interest in the property that entitles [him/her/it] to immediate possession.

[*OPTIONAL (See Use of Instruction)*]

Plaintiff must also prove that this right to immediate possession is exclusive. If Defendant and Plaintiff own the property in common, then Plaintiff does not have the right to take possession of the property from Defendant.

[*OPTIONAL (See Use of Instruction)*]

If there is any act to be performed or condition to be satisfied before Plaintiff is entitled to possession of the property, and that act or that condition has not been performed or occurred, the Plaintiff may not recover the property.

Authorities: *Commercial Disc. Co. v. Cowen* (1941) 18 Cal.2d 610, 613, 116 P.2d 599 ; *Teater v. Good Hope Dev. Corp.* (1939) 14 Cal.2d 196, 208, 93 P.2d 112 ; *Commercial & Sav. Bank v. Foster* (1930) 210 Cal. 76, 79, 290 P. 583 ; *International Airports, Inc. v. Finn* (1955) 132 Cal.App.2d 293, 297, 282 P.2d 102 ; *Estergren v. Sager* (1940) 39 Cal.App.2d 401, 403, 103 P.2d 177 .

[2] Use of Instruction

This instruction should be used to define the right of immediate possession required to bring an action for the specific recovery of personal property. It should be used in conjunction with the introductory instruction in MB 2100A.70[1]. The option concerning exclusive possession and the option concerning preliminary acts and conditions precedent are to be used only if these points are at issue.

[3] Comment**[a] Right to Immediate and Exclusive Possession**

To recover the possession of personal property, the plaintiff must prove that he or she had the right to exclusive and immediate possession of that property at the time that the action was commenced [*Commercial Disc. Co. v. Cowen* (1941) 18 Cal.2d 610, 613, 116 P.2d 599 ; *Teater v. Good Hope Dev. Corp.* (1939) 14 Cal.2d 196, 208, 93 P.2d 112]. The plaintiff does not have to prove absolute ownership of the property that he or she seeks to recover [*Commercial Disc. Co. v. Cowen* (1941) 18 Cal.2d 610, 613, 116 P.2d 599 ; *Commercial & Sav. Bank v. Foster* (1930) 210 Cal. 76, 79, 290 P. 583]. The plaintiff also does not have to prove that he or she ever had actual possession of this property [*Commercial Disc. Co. v. Cowen* (1941) 18 Cal.2d 610, 613, 116 P.2d 599]. It is enough for the plaintiff to prove any right or interest in the property that entitles him or her to immediate and exclusive possession, such as a possessory aircraft lien [*International Airports, Inc. v. Finn* (1955) 132 Cal.App.2d 293, 297, 282 P.2d 102] or the interest of a chattel mortgagee under a mortgage giving the mortgagee the right of possession on default [*Commercial & Sav. Bank v. Foster* (1930) 210 Cal. 76, 78-79, 290 P. 583].

For related forms, see California Forms of Pleading and Practice, Ch. 119, *Claim and Delivery* (Matthew Bender).

[b] Conditional Right to Possession

The plaintiff is not entitled to bring the action if there is some preliminary act to be done or condition to be satisfied before he or she is entitled to possession, because under these conditions, the plaintiff's right to possession is not truly immediate. For example, if a seller of goods fails to declare a forfeiture when the buyer defaults on payment for the goods, the seller is not yet entitled to immediate possession and may not get possession of the goods [*Teater v. Good Hope Dev. Corp.* (1939) 14 Cal.2d 196, 209, 93 P.2d 112]. If some other person is also entitled to possession, the plaintiff may not recover possession from that person. Thus, one owner in common may not recover possession of the common property from the other co-owner [*Estergren v. Sager* (1940) 39 Cal.App.2d 401, 403, 103 P.2d 177].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Torts Intentional Torts Conversion General Overview Torts Intentional Torts Conversion Remedies



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California Forms of Jury Instruction

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CHAPTER 21A Matthew Bender Conversion Instructions
PART D. SPECIFIC RECOVERY OF PERSONAL PROPERTY

3-21A California Forms of Jury Instruction MB 2100A.72

MB 2100A.72 Defendant's Wrongful Possession at Time of Action**[1] Instruction**[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

As I have already told you, Plaintiff must prove that Defendant wrongfully possessed _____ [describe property] at the time that this lawsuit was begun. In addition, Plaintiff must prove either:

1. That the manner in which Defendant originally obtained possession of the property was wrongful; or
2. That Defendant lawfully acquired possession of the property, but after Defendant's right to continued possession ended, [he/she/it] refused to give it to Plaintiff when Plaintiff demanded it.

Authorities: *Commercial & Sav. Bank v. Foster* (1930) 210 Cal. 76, 82, 290 P. 583 ; *Stockton Morris Plan Co. v. Mariposa County* (1950) 99 Cal.App.2d 210, 213, 215, 221 P.2d 232 .

[2] Use of Instruction

This instruction should be used to define the element of wrongful possession necessary to an action for the specific recovery of personal property. It must be used with the instruction in MB 2100A.70[1].

[3] Comment

For the plaintiff to be entitled to bring an action for the specific recovery of personal property, the defendant must at the time of the action be in wrongful possession of that property or must have the power to deliver it [*Stockton Morris Plan Co. v. Mariposa County* (1950) 99 Cal.App.2d 210, 215, 221 P.2d 232]. If the defendant obtained possession of the property lawfully, then a demand for possession by plaintiff, followed by a refusal, is necessary before the plaintiff has met the third requirement [*Commercial & Sav. Bank v. Foster* (1930) 210 Cal. 76, 82, 290 P. 583].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewTortsIntentional TortsConversionGeneral
OverviewTortsIntentional TortsConversionRemedies



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CHAPTER 21A Matthew Bender Conversion Instructions
PART D. SPECIFIC RECOVERY OF PERSONAL PROPERTY

3-21A California Forms of Jury Instruction MB 2100A.73

MB 2100A.73 Damages if Property Is Recovered

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

If you find that Plaintiff is entitled to recover possession of _____ [*describe property*], then Plaintiff is also entitled to money damages to compensate Plaintiff for the harm caused to [him/her/it] by Defendant's wrongful keeping of the property.

These damages may include all of the following:

1. Compensation for Plaintiff's loss of the property's use during the period that Defendant kept it. This loss of use should be measured by whichever of the following is greater: either (1) by the property's rental value for that period of time; or (2) by interest at 7 percent per year on the property's full value for the time that Defendant kept it.

In calculating the rental value that Plaintiff is entitled to recover, you must allow the Defendant a credit for the cost of the property's upkeep, including repairs. You must also remember to allow in your calculations for the decrease in the property's rental value caused by depreciation.

2. Compensation for the loss in value of Plaintiff's property during the time that Defendant had that property.

[*OPTIONAL (See Use of Instruction)*]

3. Compensation for the cost to Plaintiff of renting a substitute for _____ [*describe property*].

Authorities: *Code Civ. Proc.* § 667; *Civ. Code* § 3294; *Guerin v. Kirst* (1949) 33 Cal.2d 402, 414-415, 202 P.2d 10 ; *Spencer Kennelly, Ltd. v. Bank of America Nat'l Trust & Sav. Asso.* (1942) 19 Cal.2d 586, 589, 122 P.2d 552 ; *Allstate Leasing Corp. v. Smith* (1965) 238 Cal.App.2d 128, 132-133, 47 Cal.Rptr. 636 ; *McFaddin v. H.S. Crocker Co.* (1963) 219 Cal.App.2d 585, 589, 33 Cal.Rptr. 389 ; *Ferris v. Cooper* (1932) 125 Cal.App. 234, 237, 13 P.2d 536 ; *Ruzanoff v. Retailers Credit Ass'n* (1929) 97 Cal.App. 682, 686, 276 P. 156 ; *Tucker v. Hagerty* (1918) 37 Cal.App. 789, 795, 174 P. 908 .

[2] Use of Instruction

This instruction should be used to explain the damages available in an action for the specific recovery of personal property. If the property cannot be recovered, as when, for example, it has been lost or destroyed, the measure of damages is different and more closely resembles the damages for conversion. Similarly, a different rule will apply if the court decides that the equities of the situation require that a bona fide purchaser from the plaintiff's conditional purchaser be allowed to keep the property [see MB 2100A.74[3]]. If the plaintiff has rented a substitute to mitigate damages resulting from the property's loss of use (e.g., lost profits) for the period of its wrongful detention, use optional Paragraph 3 instead of Paragraph 1. If the plaintiff claims punitive damages, use the instructions in MB 2100A.36[1] and MB 2100A.37[1].

[3] Comment

In an action to recover specific personal property, a prevailing plaintiff is entitled to recover the property itself, plus damages for its detention [*Code Civ. Proc.* § 667; *Guerin v. Kirst* (1949) 33 Cal.2d 402, 414-415, 202 P.2d 10 ; *Irving Nelkin & Co. v. South Beverly Hills Wilshire Jewelry & Loan* (2005) 129 Cal.App.4th 692, 700, 28 Cal.Rptr.3d 815 ; see MB 2100A.74[3] regarding the measure of recovery when property's return is not available].

The statute does not define "damages for the detention" [see *Code Civ. Proc.* § 667], but these have been found to include interest on the property's value from the time it was taken [see *Guerin v. Kirst* (1949) 33 Cal.2d 402, 414, 202 P.2d 10 ; *Irving Nelkin & Co. v. South Beverly Hills Wilshire Jewelry & Loan* (2005) 129 Cal.App.4th 692, 700, 702, 28 Cal.Rptr.3d 815 (appropriate if type of property at issue is without substantial use value)], or the property's use value, whichever is greater [*Guerin v. Kirst* (1949) 33 Cal.2d 402, 414, 202 P.2d 10 ; *Ferris v. Cooper* (1932) 125 Cal.App. 234, 237, 13 P.2d 536]. An alternative measure is the cost of renting a substitute [Restatement (Second) of Torts § 931]. The property's loss of value and special damages may also be added to the measure of damages [see *Spencer Kennelly, Ltd. v. Bank of America Nat'l Trust & Sav. Asso.* (1942) 19 Cal.2d 586, 589, 122 P.2d 552 ; *Ruzanoff v. Retailers Credit Ass'n* (1929) 97 Cal.App. 682, 686, 276 P. 156 ; Restatement (Second) of Torts § 931].

Use value and interest on the property's value are alternative measures. Both are not available at the same time. Use value, which is virtually synonymous with rental value, is the appropriate measure if it exceeds the amount of interest on the property's value, because, in that circumstance, interest does not furnish adequate compensation for the wrongful detention [*Guerin v. Kirst* (1949) 33 Cal.2d 402, 414, 202 P.2d 10 ; *Helmick v. Ritchie* (1958) 158 Cal.App.2d 776, 779, 323 P.2d 584]. Repair costs and other upkeep costs must be subtracted from the property's rental value, and depreciation must be allowed for in calculating rental value [*Guerin v. Kirst* (1949) 33 Cal.2d 402, 414-415, 202 P.2d 10].

Punitive damages may also be awarded in an action for recovering personal property [*Tucker v. Hagerty* (1918) 37 Cal.App. 789, 795, 174 P. 908], if there is proof of fraud, oppression, or malice [*Civ. Code* § 3294; see MB 2100A.36[3]].

For related forms, see California Forms of Pleading and Practice, Ch. 119, *Claim and Delivery* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewTortsDamagesCompensatory DamagesProperty
DamageGeneral OverviewTortsDamagesPunitive DamagesGeneral OverviewTortsIntentional
TortsConversionRemedies



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CHAPTER 21A Matthew Bender Conversion Instructions
PART D. SPECIFIC RECOVERY OF PERSONAL PROPERTY

3-21A California Forms of Jury Instruction MB 2100A.74

MB 2100A.74 Damages if Property Is Not Recovered

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

I have determined that even if Plaintiff is able to prove [his/her/its] case, the law will not permit [him/her/it] to recover the property. However, if Plaintiff proves each element of the action for the specific recovery of personal property, Plaintiff can recover the value of _____ [describe property] as a substitute for its return. In addition, Plaintiff may recover damages for the property's wrongful keeping and the loss of its use. These damages for wrongful keeping and loss of use are the same as the damages available if the property were returned, which I have already explained to you.

Authorities: *Code Civ. Proc.* §§ 627, 667; *Guerin v. Kirst* (1949) 33 Cal.2d 402, 414-415, 202 P.2d 10 .

[2] Use of Instruction

This instruction should be used to explain the damages available in an action for the specific recovery of personal property if the property cannot be recovered, because, for example, it has been lost or destroyed.

[3] Comment

If the property sought cannot be returned to a prevailing plaintiff in an action for the specific recovery of personal property, then that plaintiff is entitled to recover the property's value plus damages for its detention [*Code Civ. Proc.* §§ 627, 667]. The damages for the wrongful detention include recovery for loss of use [*see Guerin v. Kirst* (1949) 33 Cal.2d 402, 414-415, 202 P.2d 10 ; *Irving Nelkin & Co. v. South Beverly Hills Wilshire Jewelry & Loan* (2005) 129 Cal.App.4th 692, 700, 28 Cal.Rptr.3d 815 (rule applies to property with readily provable use or rental value, such as machinery and automobiles)].

If the defendant is an innocent purchaser for value who has bought the property from the plaintiff's conditional vendee, then the court may find that the defendant is entitled to keep the property if it pays to the plaintiff the balance due under the conditional sales agreement plus interest. This is a matter for the court to decide by balancing the equities of the situation [see *Guerin v. Kirst* (1949) 33 Cal.2d 402, 411, 202 P.2d 10 ; *Martin v. Hollins* (1931) 118 Cal.App. 561, 562-565, 5 P.2d 899].

For related forms, see California Forms of Pleading and Practice, Ch. 119, *Claim and Delivery* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewTortsDamagesCompensatory DamagesProperty
DamageLoss of UseTortsIntentional TortsConversionGeneral OverviewTortsIntentional TortsConversionRemedies



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CHAPTER 22 California Judicial Council Economic Interference Instructions

3-22 California Forms of Jury Instruction 22.syn

§ 22.syn Synopsis to Chapter 22: California Judicial Council Economic Interference Instructions

CACI 2200 Inducing Breach of Contract

CACI 2201 Intentional Interference With Contractual Relations

CACI 2202 Intentional Interference With Prospective Economic Relations

CACI 2203 Intent

CACI 2204 Negligent Interference With Prospective Economic Relations

CACI 2205-CACI 2299 Reserved for Future Use

CACI VF-2200 Inducing Breach of Contract

CACI VF-2201 Intentional Interference With Contractual Relations

CACI VF-2202 Intentional Interference With Prospective Economic Relations

CACI VF-2203 Negligent Interference With Prospective Economic Relations

CACI VF-2204-CACI VF-2299 Reserved for Future Use



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CHAPTER 22 California Judicial Council Economic Interference Instructions

3-22 California Forms of Jury Instruction Scope

Scope

SCOPE

This chapter contains the California Judicial Council's "Economic Interference Series" of jury instructions [*CACI No. 2200 et seq.*]. The Judicial Council of California Civil Jury Instructions (CACI) included in this publication are the product of the Judicial Council of California Task Force on Jury Instructions, which are updated by the Judicial Council of California Advisory Committee on Civil Jury Instructions.

This chapter includes instructions on the following topics:

- Inducing breach of contract [*CACI No. 2200*].
- Intentional interference with contractual relations [*CACI No. 2201*].
- Intentional interference with prospective economic relations [*CACI No. 2202*].
- Intent [*CACI No. 2203*].
- Negligent interference with prospective economic relations [*CACI No. 2204*].

The economic interference series also includes special verdict forms [*CACI Nos. VF-2200-VF-2203*].



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CHAPTER 22 California Judicial Council Economic Interference Instructions

3-22 California Forms of Jury Instruction CACI 2200

CACI 2200 Inducing Breach of Contract

[Name of plaintiff] claims that [name of defendant] intentionally caused [name of third party] to breach [his/her/its] contract with [name of plaintiff]. To establish this claim, [name of plaintiff] must prove all of the following:

- 1. That there was a contract between [name of plaintiff] and [name of third party];**
- 2. That [name of defendant] knew of the contract;**
- 3. That [name of defendant] intended to cause [name of third party] to breach the contract;**
- 4. That [name of defendant]'s conduct caused [name of third party] to breach the contract;**
- 5. That [name of plaintiff] was harmed; and**
- 6. That [name of defendant]'s conduct was a substantial factor in causing [name of plaintiff]'s harm.**

New September 2003

If the validity of a contract is an issue, see the series of contracts instructions (*CACI No. 300 et seq.*).

● *Restatement Second of Torts, section 766A* provides: "One who intentionally and improperly interferes with the performance of a contract (except a contract to marry) between another and a third

person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for the pecuniary loss resulting to the other from the failure of the third person to perform the contract."

■ "The elements which a plaintiff must plead to state the cause of action for intentional interference with contractual relations are (1) a valid contract between plaintiff and a third party; (2) defendant's knowledge of this contract; (3) defendant's intentional acts designed to induce a breach or disruption of the contractual relationship; (4) actual breach or disruption of the contractual relationship; and (5) resulting damage." (*Pacific Gas & Electric Co. v. Bear Stearns & Co.* (1990) 50 Cal.3d 1118, 1126 [270 Cal.Rptr. 1, 791 P.2d 587] , internal citations omitted.)

■ "[C]ases have pointed out that while the tort of inducing breach of contract requires proof of a breach, the cause of action for interference with contractual relations is distinct and requires only proof of interference." (*Pacific Gas & Electric Co.*, *supra*, 50 Cal.3d at p. 1129 , internal citations omitted.)

■ "[A] cause of action for intentional interference with contract requires an underlying enforceable contract. Where there is no existing, enforceable contract, only a claim for interference with prospective advantage may be pleaded." (*PMC, Inc. v. Saban Entertainment, Inc.* (1996) 45 Cal.App.4th 579, 601 [52 Cal.Rptr.2d 877] .)

■ "The act of inducing the breach must be an intentional one. If the actor had no knowledge of the existence of the contract or his actions were not intended to induce a breach, he cannot be held liable though an actual breach results from his lawful and proper acts." (*Imperial Ice Co. v. Rossier* (1941) 18 Cal.2d 33, 37 [112 P.2d 631] , internal citations omitted.)

■ "It is not enough that the actor intended to perform the acts which caused the result--he or she must have intended to cause the result itself." (*Kasparian v. County of Los Angeles* (1995) 38 Cal.App.4th 242, 261 [45 Cal.Rptr.2d 90] .)

■ "[T]he tort cause of action for interference with a contract does not lie against a party to the contract. [Citations.] [P] ... The tort duty not to interfere with the contract falls only on strangers-interlopers who have no legitimate interest in the scope or course of the contract's performance." (*Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, 514 [28 Cal.Rptr.2d 475, 869 P.2d 454] , internal citations omitted.)

■ "[I]nterference with an at-will contract is actionable interference with the contractual relationship, on the theory that a contract 'at the will of the parties, respectively, does not make it one at the will of others. [Citations]' " (*Pacific Gas & Electric Co.*, *supra*, 50 Cal.3d at p. 1127 , internal citations and quotations omitted.)

■ "Because interference with an existing contract receives greater solicitude than does interference with prospective economic advantage, it is not necessary that the defendant's conduct be wrongful apart from the interference with the contract itself." (*Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 55 [77 Cal.Rptr.2d 709, 960 P.2d 513] , internal citations omitted.)

■ "We conclude that a plaintiff seeking to state a claim for intentional interference with contract or prospective economic advantage because defendant induced another to undertake litigation, must allege that the litigation was brought without probable cause and that the litigation concluded in plaintiff's favor." (*Pacific Gas & Electric Co.*, *supra*, 50 Cal.3d at p. 1137 .)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 730-740

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, §§ 40.110-40.117 (Matthew Bender)

49 California Forms of Pleading and Practice, Ch. 565, *Unfair Competition* (Matthew Bender)

12 California Points and Authorities, Ch. 122, *Interference* (Matthew Bender)

Publisher's Notes

This instruction replaces BAJI No. 7.80.

LexisNexis Matthew Bender Expert Practice Tip--Inducing Breach of Contract vs. Intentional Interference with Contractual Relations: *CACI No. 2200* applies when defendant's conduct caused a complete breach of contract. In cases where there was not a complete breach, but performance was made more difficult or expensive, the instruction for intentional interference with contractual relations applies [see *CACI No. 2201*; MB 2200A.03]. If plaintiff's counsel is uncertain as to whether the jury will find a complete breach, both theories should be pursued. *By Ronald Oster*

"[W]hen a manager stood to reap a tangible personal benefit from the principal's breach of contract, so that it is at least reasonably possible that the manager acted out of self-interest rather than in the interest of the principal, the manager should not enjoy the protection of the manager's privilege unless the trier of fact concludes that the manager's *predominant* motive was to benefit the principal." (*Huynh v. Vu* (2003) 111 Cal.App.4th 1183, 1198 [4 Cal.Rptr.3d 595] .)

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Contracts Law Breach General Overview Torts Business Torts Commercial Interference Contracts General Overview Torts Business Torts Commercial Interference Contracts Elements



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CHAPTER 22 California Judicial Council Economic Interference Instructions

3-22 California Forms of Jury Instruction CACI 2201

CACI 2201 Intentional Interference With Contractual Relations

[*Name of plaintiff*] claims that [*name of defendant*] intentionally interfered with the contract between [him/her/it] and [*name of third party*]. To establish this claim, [*name of plaintiff*] must prove all of the following:

- 1. That there was a contract between [*name of plaintiff*] and [*name of third party*];**
- 2. That [*name of defendant*] knew of the contract;**
- 3. That [*name of defendant*] intended to disrupt the performance of this contract;**
- 4. That [*name of defendant*]'s conduct prevented performance or made performance more expensive or difficult;**
- 5. That [*name of plaintiff*] was harmed; and**
- 6. That [*name of defendant*]'s conduct was a substantial factor in causing [*name of plaintiff*]'s harm.**

New September 2003

If the validity of a contract is an issue, see the series of contracts instructions (*CACI No. 300 et seq.*).

- "The elements which a plaintiff must plead to state the cause of action for intentional interference with contractual relations are (1) a valid contract between plaintiff and a third party; (2) defendant's

knowledge of this contract; (3) defendant's intentional acts designed to induce a breach or disruption of the contractual relationship; (4) actual breach or disruption of the contractual relationship; and (5) resulting damage." (*Pacific Gas & Electric Co. v. Bear Stearns & Co.* (1990) 50 Cal.3d 1118, 1126 [270 Cal.Rptr. 1, 791 P.2d 587] , internal citations omitted.)

■ "[A] cause of action for intentional interference with contract requires an underlying enforceable contract. Where there is no existing, enforceable contract, only a claim for interference with prospective advantage may be pleaded." (*PMC, Inc. v. Saban Entertainment, Inc.* (1996) 45 Cal.App.4th 579, 601 [52 Cal.Rptr.2d 877] .)

■ "Because interference with an existing contract receives greater solicitude than does interference with prospective economic advantage, it is not necessary that the defendant's conduct be wrongful apart from the interference with the contract itself." (*Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 55 [77 Cal.Rptr.2d 709, 960 P.2d 513] , internal citations omitted.)

■ "It is not enough that the actor intended to perform the acts which caused the result--he or she must have intended to cause the result itself." (*Kasparian v. County of Los Angeles* (1995) 38 Cal.App.4th 242, 261 [45 Cal.Rptr.2d 90] .)

■ *Restatement Second of Torts*, section 766A provides: "One who intentionally and improperly interferes with the performance of a contract (except a contract to marry) between another and a third person by preventing the other from performing the contract or causing his performance to be more expensive or burdensome, is subject to liability to the other for the pecuniary loss resulting to him."

■ "Plaintiff need not allege an actual or inevitable breach of contract in order to state a claim for disruption of contractual relations. We have recognized that interference with the plaintiff's performance may give rise to a claim for interference with contractual relations if plaintiff's performance is made more costly or more burdensome. Other cases have pointed out that while the tort of inducing breach of contract requires proof of a breach, the cause of action for interference with contractual relations is distinct and requires only proof of interference." (*Pacific Gas & Electric Co.*, *supra*, 50 Cal.3d at p. 1129 , internal citations omitted.)

■ "[I]nterference with an at-will contract is actionable interference with the contractual relationship, on the theory that a contract 'at the will of the parties, respectively, does not make it one at the will of others.'" (*Pacific Gas & Electric Co.*, *supra*, 50 Cal.3d at p. 1127 , internal citations and quotations omitted.)

■ "We conclude that a plaintiff seeking to state a claim for intentional interference with contract or prospective economic advantage because defendant induced another to undertake litigation, must allege that the litigation was brought without probable cause and that the litigation concluded in plaintiff's favor." (*Pacific Gas & Electric Co.*, *supra*, 50 Cal.3d at p. 1137 .)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 741, 742, 759

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, §§ 40.110-40.117 (Matthew Bender)

49 California Forms of Pleading and Practice, Ch. 565, *Unfair Competition* (Matthew Bender)

12 California Points and Authorities, Ch. 122, *Interference* (Matthew Bender)

Publisher's Notes

This instruction replaces BAJI No. 7.81.

LexisNexis Matthew Bender Expert Practice Tip--Be Precise in Closing Argument: The torts addressed in CACI No. 2201 are distinct from each other but there may be real or perceived factual differences. Thus, it is important to be precise in the related closing argument. *By Rex Heeseman*

LexisNexis Matthew Bender Expert Practice Tip--Proving Intentional Interference with Contractual Relations: Recovery under CACI No. 2201 does not require proof that the contract was breached, just that performance was made more costly or burdensome. In cases of doubt, both theories can be pursued. *By Ronald Oster*

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Torts Business Torts Commercial Interference Contracts General Overview Torts Business Torts Commercial Interference Contracts Elements Torts Business Torts Commercial Interference Prospective Advantage General Overview



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CHAPTER 22 California Judicial Council Economic Interference Instructions

3-22 California Forms of Jury Instruction CACI 2202

CACI 2202 Intentional Interference With Prospective Economic Relations

[*Name of plaintiff*] **claims that** [*name of defendant*] **intentionally interfered with an economic relationship between [him/her/it] and [*name of third party*] that probably would have resulted in an economic benefit to [*name of plaintiff*]. To establish this claim, [*name of plaintiff*] must prove all of the following:**

- 1. That [*name of plaintiff*] and [*name of third party*] were in an economic relationship that probably would have resulted in an economic benefit to [*name of plaintiff*];**
- 2. That [*name of defendant*] knew of the relationship;**
- 3. That [*name of defendant*] intended to disrupt the relationship;**
- 4. That [*name of defendant*] engaged in wrongful conduct through [*insert grounds for wrongfulness, e.g., misrepresentation, fraud, violation of statute*];**
- 5. That the relationship was disrupted;**
- 6. That [*name of plaintiff*] was harmed; and**
- 7. That [*name of defendant*]'s wrongful conduct was a substantial factor in causing [*name of plaintiff*]'s harm.**

New September 2003

Directions for Use

Regarding element 4, the court must specifically state for the jury the conduct that the judge has determined as a matter of law would satisfy the "wrongful conduct" standard. This conduct must fall outside the privilege of fair competition. (*PMC, Inc. v. Saban Entertainment, Inc.* (1996) 45 Cal.App.4th 579, 603 [52 Cal.Rptr.2d 877] ; *Della Penna v. Toyota Motor Sales, U.S.A., Inc.* (1995) 11 Cal.4th 376, 393 [45 Cal.Rptr.2d 436, 902 P.2d 740] .) The jury must then decide whether the defendant engaged in the conduct as defined by the judge. If the conduct is tortious, the judge should instruct on the elements of the tort.

Sources and Authority

- "The tort of intentional or negligent interference with prospective economic advantage imposes liability for improper methods of disrupting or diverting the business relationship of another which fall outside the boundaries of fair competition." (*Settimo Associates v. Environ Systems, Inc.* (1993) 14 Cal.App.4th 842, 845 [17 Cal.Rptr.2d 757] , internal citation omitted.)

- "The tort of interference with prospective economic advantage protects the same interest in stable economic relationships as does the tort of interference with contract, though interference with prospective advantage does not require proof of a legally binding contract. The chief practical distinction between interference with contract and interference with prospective economic advantage is that a broader range of privilege to interfere is recognized when the relationship or economic advantage interfered with is only prospective." (*Pacific Gas & Electric Co. v. Bear Stearns & Co.* (1990) 50 Cal.3d 1118, 1126 [270 Cal.Rptr. 1, 791 P.2d 587] , internal citations omitted.)

- The elements are "(1) [a]n economic relationship between the plaintiff and some third party, with the probability of future economic benefit to the plaintiff; (2) the defendant's knowledge of the relationship; (3) intentional acts on the part of the defendant designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) economic harm to the plaintiff proximately caused by the acts of the defendant." (*Youst v. Longo* (1987) 43 Cal.3d 64, 71, fn. 6 [233 Cal.Rptr. 294, 729 P.2d 728] .)

- "With respect to the third element, a plaintiff must show that the defendant engaged in an independently wrongful act. It is not necessary to prove that the defendant acted with the specific intent, or purpose, of disrupting the plaintiff's prospective economic advantage. Instead, 'it is sufficient for the plaintiff to plead that the defendant "[knew] that the interference is certain or substantially certain to occur as a result of his action." ' "[A]n act is independently wrongful if it is unlawful, that is, if it is proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal standard.' "[A]n act must be wrongful by some legal measure, rather than merely a product of an improper, but lawful, purpose or motive.' " (*San Jose Construction, Inc. v. S.B.C.C., Inc.* (2007) 155 Cal.App.4th 1528, 1544-1545 [67 Cal.Rptr.3d 54] , internal citations omitted.)

- *Restatement Second of Torts, section 766B* provides:

One who intentionally and improperly interferes with another's prospective contractual relation (except a contract to marry) is subject to liability to the other for the pecuniary harm resulting from loss of the benefits of the relation, whether the interference consists of:

(a) inducing or otherwise causing a third person not to enter into or continue the prospective relation or

(b) preventing the other from acquiring or continuing the prospective relation.

■ *Restatement Second of Torts, section 767* provides:

In determining whether an actor's conduct in intentionally interfering with a contract or a prospective contractual relation of another is improper or not, consideration is given to the following factors:

- (a) the nature of the actor's conduct,
- (b) the actor's motive,
- (c) the interests of the other with which the actor's conduct interferes,
- (d) the interests sought to be advanced by the actor,
- (e) the social interests in protecting the freedom of action of the actor and the contractual interests of the other,
- (f) the proximity or remoteness of the actor's conduct to the interference and
- (g) the relations between the parties.

■ "[A]n essential element of the tort of intentional interference with prospective business advantage is the existence of a business relationship with which the tortfeasor interfered. Although this need not be a contractual relationship, an existing relationship is required." (*Roth v. Rhodes* (1994) 25 Cal.App.4th 530, 546 [30 Cal.Rptr.2d 706] , internal citations omitted.)

■ As in the tort of interference with contractual relations, a party to the prospective economic relation cannot be made the subject of an action for interference with that prospective relation. (*Kasparian v. County of Los Angeles* (1995) 38 Cal.App.4th 242, 266 [45 Cal.Rptr.2d 90] .)

■ "Although varying language has been used to express this threshold requirement, the cases generally agree it must be reasonably probable that the prospective economic advantage would have been realized but for defendant's interference." (*Youst, supra*, 43 Cal.3d at p. 71 , internal citations omitted.)

■ In *Della Penna, supra*, 11 Cal.4th at p. 393 , the Supreme Court held that "a plaintiff seeking to recover for an alleged interference with prospective contractual or economic relations must plead and prove as part of its case-in-chief that the defendant not only knowingly interfered with the plaintiff's expectancy, but engaged in conduct that was wrongful by some legal measure other than the fact of interference itself."

■ "*Della Penna* did not specify what sort of conduct would qualify as 'wrongful' apart from the interference itself." (*Limandri v. Judkins* (1997) 52 Cal.App.4th 326, 340 [60 Cal.Rptr.2d 539] .)

■ "Justice Mosk's concurring opinion in *Della Penna* advocates that proscribed conduct be limited to means that are independently tortious or a restraint of trade. The Oregon Supreme Court suggests that conduct may be wrongful if it violates 'a statute or other regulation, or a recognized rule of common law, or perhaps an established standard of a trade or profession.' ... Our Supreme Court may later have occasion to clarify the meaning of 'wrongful conduct' or 'wrongfulness,' or it may be that a precise definition proves impossible." (*Arntz Contracting Co. v. St. Paul Fire and Marine Insurance Co.* (1996) 47 Cal.App.4th 464, 477-478 [54 Cal.Rptr.2d 888] , internal citations omitted.)

- "Commonly included among improper means are actions which are independently actionable, violations of federal or state law or unethical business practices, e.g., violence, misrepresentation, unfounded litigation, defamation, trade libel or trade mark infringement." (*PMC, Inc.*, *supra*, 45 Cal.App.4th at p. 603 , internal citation omitted.)
- "It is insufficient to allege the defendant engaged in tortious conduct distinct from or only tangentially related to the conduct constituting the actual interference." (*Limandri*, *supra*, 52 Cal.App.4th at p. 342 .)
- "[O]ur focus for determining the wrongfulness of those intentional acts should be on the defendant's objective conduct, and evidence of motive or other subjective states of mind is relevant only to illuminating the nature of that conduct." (*Arntz Contracting Co.*, *supra*, 47 Cal.App.4th at p. 477 .)
- "Since the crux of the competition privilege is that one can interfere with a competitor's prospective contractual relationship with a third party as long as the interfering conduct is not independently wrongful (i.e., wrongful apart from the fact of the interference itself), *Della Penna's* requirement that a plaintiff plead and prove such wrongful conduct in order to recover for intentional interference with prospective economic advantage has resulted in a shift of burden of proof. It is now the plaintiff's burden to prove, as an element of the cause of action itself, that the defendant's conduct was independently wrongful and, therefore, was not privileged rather than the defendant's burden to prove, as an affirmative defense, that it's [sic] conduct was not independently wrongful and therefore was privileged." (*Bed, Bath & Beyond of La Jolla, Inc. v. La Jolla Village Square Venture Partners* (1997) 52 Cal.App.4th 867, 881 [60 Cal.Rptr.2d 830] .)
- Other courts have stated that "[t]he *Della Penna* court disapproved the view treating justification as an affirmative defense." (*Westside Center Associates v. Safeway Stores 23, Inc.* (1996) 42 Cal.App.4th 507, 521, fn. 16 [49 Cal.Rptr.2d 793] .)
- There are other privileges that a defendant could assert in appropriate cases, such as the "manager's privilege" (see *Halvorsen v. Aramark Uniform Services, Inc.* (1998) 65 Cal.App.4th 1383, 1391-1392 [77 Cal.Rptr.2d 383] .)
- "We conclude that a plaintiff seeking to state a claim for intentional interference with contract or prospective economic advantage because defendant induced another to undertake litigation, must allege that the litigation was brought without probable cause and that the litigation concluded in plaintiff's favor." (*Pacific Gas & Electric Co.*, *supra*, 50 Cal.3d at p. 1137 .)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 741-754, 759

3 Levy et al., *California Torts, Ch. 40, Fraud and Deceit and Other Business Torts*, §§ 40.100 -40.105 (Matthew Bender)

49 *California Forms of Pleading and Practice, Ch. 565, Unfair Competition*, § 565.133 (Matthew Bender)

12 *California Points and Authorities, Ch. 122, Interference*, §§ 122.23, 122.32 (Matthew Bender)

Publisher's Notes

This instruction replaces BAJI No. 7.82, and covers issues presented in BAJI Nos. 7.86 and 7.86.1.

LexisNexis Matthew Bender Expert Practice Tip--Proving This Tort: Interference with prospective economic relations requires proof that defendant's conduct was "wrongful" apart from the interference

itself. This generally requires proof that defendant's conduct amounted to an independent tort or violated a statute. This issue is likely to be the subject of motion practice in advance of trial. *By Ronald Oster*

LexisNexis Matthew Bender Expert Practice Tip--Use Care When Preparing Closing Argument:

Proving a defendant acted "intentionally" is often challenging. Thus, the structure of the related closing argument must often be carefully prepared. *By Rex Heeseman*

After *Della Penna*, "the third element also requires a plaintiff to plead intentional *wrongful* acts on the part of the defendant designed to disrupt the relationship." (*Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1154 [131 Cal.Rptr.2d 29, 63 P.3d 937] .)

"The tort of intentional interference with prospective economic advantage does not require a plaintiff to plead that the defendant acted with the specific intent, or purpose, of disrupting the plaintiff's prospective economic advantage. Instead, to satisfy the intent requirement for this tort, it is sufficient to plead that the defendant knew that the interference was certain or substantially certain to occur as a result of its action." (*Korea Supply Co., supra*, 29 Cal.4th at p. 1154 .)

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewTortsBusiness TortsCommercial InterferenceProspective AdvantageGeneral OverviewTortsBusiness TortsCommercial InterferenceProspective AdvantageElements



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CHAPTER 22 California Judicial Council Economic Interference Instructions

3-22 California Forms of Jury Instruction CACI 2203

CACI 2203 Intent

In deciding whether [name of defendant] acted intentionally, you may consider whether [he/she/it] knew that a [breach/disruption] was substantially certain to result from [his/her/its] conduct.

New September 2003

■ "In this case, the jury was instructed that '[a] defendant is deemed to have acted intentionally if it knew that disruption or interference with an advantageous relationship was substantially certain to result from its conduct.' [P] Intent, of course, may be established by inference as well as by direct proof. Thus, the trial court could properly have instructed the jury that it might infer culpable intent from conduct 'substantially certain' to interfere with the contract. Here, though, the jury was instructed that culpable intent was 'deemed' to exist if Standard knew that its conduct would interfere with the contract. Under the principles outlined above, this instruction was clearly in error." (*Seaman's Direct Buying Service, Inc. v. Standard Oil Co.* (1984) 36 Cal.3d 752, 767 [206 Cal.Rptr. 354, 686 P.2d 1158] , overruled on other grounds in *Freeman & Mills, Inc. v. Belcher Oil Co.* (1995) 11 Cal.4th 85, 98 [44 Cal.Rptr.2d 420, 900 P.2d 669] ; disapproved on other grounds in *Della Penna v. Toyota Motor Sales, U.S.A., Inc.* (1995) 11 Cal.4th 376, 393, fn. 5 [45 Cal.Rptr.2d 436, 902 P.2d 740].)

■ The *Della Penna* court observed that intentional interference torts are only remotely related to, and have a "superficial kinship" with, other intentional torts, such as battery or false imprisonment. (*Della Penna*, *supra*, 11 Cal.4th at p. 383 .)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, § 743

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.104 (Matthew Bender)

49 California Forms of Pleading and Practice, Ch. 565, *Unfair Competition* (Matthew Bender)

12 California Points and Authorities, Ch. 122, *Interference* (Matthew Bender)

Publisher's Notes

This instruction replaces BAJI No. 7.83.

LexisNexis Matthew Bender Expert Practice Tip--Specific Intent Not Needed: In *Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal. 4th 1134, 1154, 131 Cal. Rptr. 2d 29, 63 P.3d 937, the California Supreme Court made clear that the tort of intentional interference with prospective economic relations does not require specific intent. Rather, it is sufficient if defendant knew that interference was substantially certain to occur as set forth in *CACI No. 2203*. By *Ronald Oster and Rex Heeseman*

See also CACI No. 2202.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewTortsBusiness TortsCommercial InterferenceContractsGeneral OverviewTortsBusiness TortsCommercial InterferenceProspective AdvantageGeneral OverviewTortsIntentional TortsGeneral Overview



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CHAPTER 22 California Judicial Council Economic Interference Instructions

3-22 California Forms of Jury Instruction CACI 2204

CACI 2204 Negligent Interference With Prospective Economic Relations

[*Name of plaintiff*] **claims that** [*name of defendant*] **negligently interfered with a relationship between [him/her/it] and [*name of third party*] that probably would have resulted in an economic benefit to [*name of plaintiff*]. To establish this claim, [*name of plaintiff*] must prove all of the following:**

- 1. That [*name of plaintiff*] and [*name of third party*] were in an economic relationship that probably would have resulted in a future economic benefit to [*name of plaintiff*];**
 - 2. That [*name of defendant*] knew or should have known of this relationship;**
 - 3. That [*name of defendant*] knew or should have known that this relationship would be disrupted if [he/she/it] failed to act with reasonable care;**
 - 4. That [*name of defendant*] failed to act with reasonable care;**
 - 5. That [*name of defendant*] engaged in wrongful conduct through [*insert grounds for wrongfulness, e.g., breach of contract with another, misrepresentation, fraud, violation of statute*];**
 - 6. That the relationship was disrupted;**
 - 7. That [*name of plaintiff*] was harmed; and**
 - 8. That [*name of defendant*]'s wrongful conduct was a substantial factor in causing [*name of plaintiff*]'s harm.**
-

New September 2003

Directions for Use

Regarding the fifth element, the judge must specifically state for the jury the conduct that the judge has determined as a matter of law would satisfy the "wrongful conduct" standard. This conduct must fall outside the privilege of fair competition. (*PMC, Inc. v. Saban Entertainment, Inc.* (1996) 45 Cal.App.4th 579, 603 [52 Cal.Rptr.2d 877] ; *Della Penna v. Toyota Motor Sales, U.S.A., Inc.* (1995) 11 Cal.4th 376, 393 [45 Cal.Rptr.2d 436, 902 P.2d 740] .) The jury must then decide whether the defendant engaged in the conduct as defined by the judge. If the conduct is tortious, judge should instruct on the elements of the tort.

Sources and Authority

- "The tort of intentional or negligent interference with prospective economic advantage imposes liability for improper methods of disrupting or diverting the business relationship of another which fall outside the boundaries of fair competition." (*Settimo Associates v. Environ Systems, Inc.* (1993) 14 Cal.App.4th 842, 845 [17 Cal.Rptr.2d 757] , internal citation omitted.)
- "The tort of negligent interference with prospective economic advantage is established where a plaintiff demonstrates that (1) an economic relationship existed between the plaintiff and a third party which contained a reasonably probable future economic benefit or advantage to plaintiff; (2) the defendant knew of the existence of the relationship and was aware or should have been aware that if it did not act with due care its actions would interfere with this relationship and cause plaintiff to lose in whole or in part the probable future economic benefit or advantage of the relationship; (3) the defendant was negligent; and (4) such negligence caused damage to plaintiff in that the relationship was actually interfered with or disrupted and plaintiff lost in whole or in part the economic benefits or advantage reasonably expected from the relationship." (*North American Chemical Co. v. Superior Court* (1997) 59 Cal.App.4th 764, 786 [69 Cal.Rptr.2d 466] .)
- " 'The tort of negligent interference with economic relationship arises only when the defendant owes the plaintiff a duty of care.' " (*Limandri v. Judkins* (1997) 52 Cal.App.4th 326, 348 [60 Cal.Rptr.2d 539] , internal citation omitted.)
- "Where a special relationship exists between the parties, a plaintiff may recover for loss of expected economic advantage through the negligent performance of a contract although the parties were not in contractual privity." (*J'Aire Corp. v. Gregory* (1979) 24 Cal.3d 799, 804 [157 Cal.Rptr. 407, 598 P.2d 60] .)
- The trial court should instruct the jury on the "independently wrongful" element of the tort of negligent interference with prospective economic advantage. (*National Medical Transportation Network v. Deloitte & Touche* (1998) 62 Cal.App.4th 412, 440 [72 Cal.Rptr.2d 720] .)
- "Commonly included among improper means are actions which are independently actionable, violations of federal or state law or unethical business practices, e.g., violence, misrepresentation, unfounded litigation, defamation, trade libel or trade mark infringement." (*PMC, Inc., supra*, 45 Cal.App.4th at p. 603 , internal citation omitted.)
- "While the trial court and [defendant] are correct that a defendant incurs liability for interfering with

another's prospective economic advantage only if the defendant's conduct was independently wrongful, we have been directed to no California authority, and have found none, for the trial court's conclusion that the wrongful conduct must be intentional or willful. The defendant's conduct must 'fall outside the boundaries of fair competition' ... , but negligent misconduct or the violation of a statutory obligation suffice. The approved *CACI No. 2204* does not indicate otherwise and, in fact, indicates that either a misrepresentation or 'violation of statute' is sufficient." (*Venhaus v. Shultz* (2007) 155 Cal.App.4th 1072, 1079-1080 [66 Cal.Rptr.3d 432] , internal citations omitted.)

- Notably, one of "[t]he criteria for establishing [the existence of] a duty of care is the 'blameworthiness' of the defendant's conduct." (*Lange v. TIG Insurance Co.* (1999) 68 Cal.App.4th 1179, 1187 [81 Cal.Rptr.2d 39] .) The *Lange* court stated that in a negligent interference case "a defendant's conduct is blameworthy only if it was independently wrongful apart from the interference itself." (*Ibid.*) Thus, the "independently wrongful" element may, in effect, be decided by the judge in the course of determining whether a duty of care was owed.

- There is currently no cause of action for negligent interference with contractual relations (see *Fifield Manor v. Finston* (1960) 54 Cal.2d 632, 636-637 [7 Cal.Rptr. 377, 354 P.2d 1073]): "Although the continuing validity of the so-called 'Fifield rule' is questionable in light of the California Supreme Court's recognition in *J'Aire* of a cause of action for negligent interference with prospective economic advantage, the Supreme Court has yet to disapprove *Fifield*." (*LiMandri, supra*, 52 Cal.App.4th at p. 349 .)

- "Under the privilege of free competition, a competitor is free to divert business to himself as long as he uses fair and reasonable means. Thus, the plaintiff must present facts indicating the defendant's interference is somehow wrongful--i.e., based on facts that take the defendant's actions out of the realm of legitimate business transactions." (*Tri-Growth Centre City, Ltd. v. Silldorf, Burdman, Duignan & Eisenberg* (1989) 216 Cal.App.3d 1139, 1153-1154 [265 Cal.Rptr. 330] , internal citations omitted.)

- "Since the crux of the competition privilege is that one can interfere with a competitor's prospective contractual relationship with a third party as long as the interfering conduct is not independently wrongful (i.e., wrongful apart from the fact of the interference itself), *Della Penna's* requirement that a plaintiff plead and prove such wrongful conduct in order to recover for intentional interference with prospective economic advantage has resulted in a shift of burden of proof. It is now the plaintiff's burden to prove, as an element of the cause of action itself, that the defendant's conduct was independently wrongful and, therefore, was not privileged rather than the defendant's burden to prove, as an affirmative defense, that it's [sic] conduct was not independently wrongful and therefore was privileged." (*Bed, Bath & Beyond of La Jolla, Inc. v. La Jolla Village Square Venture Partners* (1997) 52 Cal.App.4th 867, 881 [60 Cal.Rptr.2d 830] .)

- There are other privileges that a defendant could assert in appropriate cases, such as the "manager's privilege." (See *Halvorsen v. Aramark Uniform Services, Inc.* (1998) 65 Cal.App.4th 1383, 1391-1392 [77 Cal.Rptr.2d 383] .)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 751-754

3 Levy et al., *California Torts, Ch. 40, Fraud and Deceit and Other Business Torts*, § 40.104 (Matthew Bender)

10 *California Forms of Pleading and Practice, Ch. 103, Brokers*, § 103.33 (Matthew Bender)

49 *California Forms of Pleading and Practice, Ch. 565, Unfair Competition*, § 565.133 (Matthew Bender)

12 *California Points and Authorities*, Ch. 122, *Interference*, § 122.36 (Matthew Bender)

Publisher's Notes

This instruction replaces BAJI No. 7.82.1.

LexisNexis Matthew Bender Expert Practice Tip--CAUTION!: Negligent interference with prospective economic advantage is not a favored tort. That is, *J'Aire Corp. v. Gregory* [see *above*] is not generally looked upon with much favor. *By Rex Heeseman*

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Torts Business Torts Commercial Interference Prospective Advantage General Overview Torts Business Torts Commercial Interference Prospective Advantage Elements Torts Negligence Actions General Overview



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CHAPTER 22 California Judicial Council Economic Interference Instructions

3-22 California Forms of Jury Instruction CACI 2205-CACI 2299

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CACI 2205Reserved for Future Use



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CHAPTER 22 California Judicial Council Economic Interference Instructions

3-22 California Forms of Jury Instruction CACI VF-2200

CACI VF-2200 Inducing Breach of Contract

We answer the questions submitted to us as follows:

1. Was there a contract between [name of plaintiff] and [name of third party]?

_____ Yes _____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Did [name of defendant] know of the contract?

_____ Yes _____ No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Did [name of defendant] intend to cause [name of third party] to breach the contract?

_____ Yes _____ No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Did [name of defendant]'s conduct cause [name of third party] to breach the contract?

_____ Yes _____ No

If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. Was [*name of defendant*]'s conduct a substantial factor in causing harm to [*name of plaintiff*]?

_____ Yes _____ No

If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. What are [*name of plaintiff*]'s damages?

[a. Past economic loss

[lost earnings..... \$ _____].....

[lost profits..... \$ _____].....

[medical expenses..... \$ _____].....

[other past economic loss..... \$ _____].....

..... Total Past Economic Damages: \$ _____]

[b. Future economic loss

[lost earnings..... \$ _____].....

[lost profits..... \$ _____].....

[medical expenses..... \$ _____].....

[other future economic loss..... \$ _____].....

..... Total Future Economic Damages: \$ _____]

[c. Past noneconomic loss, including [physical pain/mental suffering:]..... \$ _____]

[d. Future noneconomic loss, including [physical pain/mental suffering:]..... \$ _____]

..... TOTAL \$ _____

Signed: _____

Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the [clerk/bailiff/judge].

New September 2003; Revised April 2007

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on *CACI No. 2200, Inducing Breach of Contract*.

If specificity is not required, users do not have to itemize all the damages listed in question 6 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

Publisher's Notes

There is no BAJI verdict form on this subject.

LexisNexis Matthew Bender Expert Practice Tip--Use Care When Preparing Special Verdicts:

Special verdicts are case specific. Care should therefore be closely exercised in applying these standards to the facts at issue. Specifically, if special verdict forms are used, counsel should go over each question and answer in closing argument, preferably with enlarged copies of the verdict forms as visual aids. This can be done during closing argument or as a summary at the end. *By Rex Heeseman and Ronald Oster*

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Verdicts Special Verdicts Contracts Law Breach General Overview Torts Business Torts Commercial Interference Contracts Elements Torts Business Torts Commercial Interference Contracts Remedies



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CHAPTER 22 California Judicial Council Economic Interference Instructions

3-22 California Forms of Jury Instruction CACI VF-2201

CACI VF-2201 Intentional Interference With Contractual Relations

We answer the questions submitted to us as follows:

1. Was there a contract between [*name of plaintiff*] and [*name of third party*]?

_____ Yes _____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Did [*name of defendant*] know of the contract?

_____ Yes _____ No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Did [*name of defendant*] intend to disrupt the performance of this contract?

_____ Yes _____ No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Did [*name of defendant*]'s conduct prevent performance or make performance more expensive or difficult?

_____ Yes _____ No

If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. Was [*name of defendant*]'s conduct a substantial factor in causing harm to [*name of plaintiff*]?

_____ Yes _____ No

If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. What are [*name of plaintiff*]'s damages?

[a. Past economic loss

[lost earnings..... \$ _____].....

[lost profits..... \$ _____].....

[medical expenses..... \$ _____].....

[other past economic loss..... \$ _____].....

..... Total Past Economic Damages: \$ _____]

[b. Future economic loss

[lost earnings..... \$ _____].....

[lost profits..... \$ _____].....

[medical expenses..... \$ _____].....

[other future economic loss..... \$ _____].....

..... Total Future Economic Damages: \$ _____]

[c. Past noneconomic loss, including [physical pain/mental suffering:]..... \$ _____]

[d. Future noneconomic loss, including [physical pain/mental suffering:]..... \$ _____]

..... TOTAL \$ _____

Signed: _____
Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the [clerk/bailiff/judge].

New September 2003; Revised April 2007

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on *CACI No. 2201, Intentional Interference With Contractual Relations*.

If specificity is not required, users do not have to itemize all the damages listed in question 6 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

Publisher's Notes

There is no BAJI verdict form on this subject.

See "LexisNexis Matthew Bender Expert Practice Tip--Use Care When Preparing Special Verdicts" in *CACI No. VF-2200*.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Verdicts Special Verdicts Torts Business Torts Commercial Interference Contracts General Overview Torts Business Torts Commercial Interference Contracts Elements Torts Business Torts Commercial Interference Contracts Remedies



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California Forms of Jury Instruction

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CHAPTER 22 California Judicial Council Economic Interference Instructions

3-22 California Forms of Jury Instruction CACI VF-2202

CACI VF-2202 Intentional Interference With Prospective Economic Relations

We answer the questions submitted to us as follows:

1. Did [*name of plaintiff*] and [*name of third party*] have an economic relationship that probably would have resulted in an economic benefit to [*name of plaintiff*]?

_____ Yes _____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Did [*name of defendant*] know of the relationship?

_____ Yes _____ No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Did [*name of defendant*] intend to disrupt the relationship?

_____ Yes _____ No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Did [*name of defendant*] engage in wrongful conduct through [*insert grounds for wrongfulness*]?

_____ Yes _____ No

If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. Was the relationship disrupted?

_____ Yes _____ No

If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. Was [name of defendant]'s wrongful conduct a substantial factor in causing harm to [name of plaintiff]?

_____ Yes _____ No

If your answer to question 6 is yes, then answer question 7. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

7. What are [name of plaintiff]'s damages?

[a. Past economic loss

[lost earnings..... \$_____]

[lost profits..... \$_____]

[medical expenses..... \$_____]

[other past economic loss..... \$_____]

..... **Total Past Economic Damages: \$_____]**

[b. Future economic loss

[lost earnings..... \$_____]

[lost profits..... \$_____]

[medical expenses..... \$_____]

[other future economic loss..... \$_____]

..... **Total Future Economic Damages: \$_____]**

[c. Past noneconomic loss, including [physical pain/mental suffering:]..... \$_____]

[d. Future noneconomic loss, including [physical
pain/mental suffering:]..... \$_____]

..... TOTAL \$_____

Signed: _____

Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the
[clerk/bailiff/judge].

New September 2003; Revised April 2007

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on *CACI No. 2202, Intentional Interference With Prospective Economic Relations*.

If specificity is not required, users do not have to itemize all the damages listed in question 7 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

Publisher's Notes

There is no BAJI verdict form on this subject.

See "LexisNexis Matthew Bender Expert Practice Tip--Use Care When Preparing Special Verdicts" in *CACI No. VF-2200*.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Verdicts Special Verdicts Torts Business Torts Commercial Interference Prospective Advantage General Overview Torts Business Torts Commercial Interference Prospective Advantage Elements Torts Business Torts Commercial Interference Prospective Advantage Remedies



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CHAPTER 22 California Judicial Council Economic Interference Instructions

3-22 California Forms of Jury Instruction CACI VF-2203

CACI VF-2203 Negligent Interference With Prospective Economic Relations

We answer the questions submitted to us as follows:

1. Did [*name of plaintiff*] and [*name of third party*] have an economic relationship that probably would have resulted in an economic benefit to [*name of plaintiff*]?

_____ Yes _____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Did [*name of defendant*] know or should [he/she/it] have known of the relationship?

_____ Yes _____ No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Did [*name of defendant*] know or should [he/she/it] have known that this relationship would be disrupted if [he/she/it] failed to act with reasonable care?

_____ Yes _____ No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Did [name of defendant] fail to act with reasonable care?

_____ Yes _____ No

If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. Did [name of defendant] engage in wrongful conduct through [insert grounds for wrongfulness]?

_____ Yes _____ No

If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. Was the relationship disrupted?

_____ Yes _____ No

If your answer to question 6 is yes, then answer question 7. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

7. Was [name of defendant]'s wrongful conduct a substantial factor in causing harm to [name of plaintiff]?

_____ Yes _____ No

If your answer to question 7 is yes, then answer question 8. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

8. What are [name of plaintiff]'s damages?**[a. Past economic loss**

[lost earnings..... \$_____].....

[lost profits..... \$_____].....

[medical expenses..... \$_____].....

[other past economic loss..... \$_____].....

..... Total Past Economic Damages: \$_____]

[b. Future economic loss

[lost earnings..... \$_____].....

[lost profits..... \$_____].....

[medical expenses..... \$_____].....

[other future economic loss..... \$_____].

..... Total Future Economic Damages: \$_____]

[c. Past noneconomic loss, including [physical
pain/mental suffering:]..... \$_____]

[d. Future noneconomic loss, including [physical
pain/mental suffering:]..... \$_____]

..... TOTAL \$_____

Signed: _____

Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the
[clerk/bailiff/judge].

New September 2003; Revised April 2007

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on *CACI No. 2204, Negligent Interference With Prospective Economic Relations*.

If specificity is not required, users do not have to itemize all the damages listed in question 8 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

Publisher's Notes

There is no BAJI verdict form on this subject.

See "LexisNexis Matthew Bender Expert Practice Tip--Use Care When Preparing Special Verdicts" in *CACI No. VF-2200*.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Verdicts Special Verdicts Torts Business Torts Commercial Interference Prospective
Advantage Elements Torts Business Torts Commercial Interference Prospective
Advantage Remedies Torts Negligence General Overview



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CHAPTER 22 California Judicial Council Economic Interference Instructions

3-22 California Forms of Jury Instruction CACI VF-2204-CACI VF-2299

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CACI VF-2204Reserved for Future Use



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CHAPTER 22A Matthew Bender Interference With Economic Relations Instructions

3-22A California Forms of Jury Instruction 22A.syn

§ 22A.syn Synopsis to Chapter 22A: Matthew Bender Interference With Economic Relations Instructions

MB 2200A.01 Intentional Interference with Prospective Economic Advantage--General Instruction

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Intentional Interference With Prospective Economic Advantage

[b] Related Judicial Council Jury Instructions

MB 2200A.02 Inducing Breach of Contract That Is Terminable at Will

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] "At Will" Contracts

[b] Related Judicial Council Jury Instructions

MB 2200A.03 Burden of Proof in Action for Intentional Interference With Contractual Relations

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Intentional Interference With Contractual Relations

[b] Related Judicial Council Jury Instructions

MB 2200A.04 Burden of Proof in Action for Intentional Interference With Prospective Economic Advantage

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Nature of Tort

[b] Required Elements

[c] Related Judicial Council Jury Instructions

MB 2200A.05 Intent Requirement for Interference With Contractual Relations

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Intent Requirement

[b] Related Judicial Council Jury Instructions

MB 2200A.06 Intent Requirement for Interference With Prospective Economic Advantage

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Intent Requirement

[b] Related Judicial Council Jury Instructions

MB 2200A.07 Intentional Interference by Unlawful Means

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Unlawful Means

[b] Related Judicial Council Jury Instructions

MB 2200A.08 Interference With Contractual Relations That Prevents Plaintiff's Performance or Renders Plaintiff's Performance More Burdensome or Expensive

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Interference That Prevents Performance or Makes Performance More Burdensome or Expensive

[b] Related Judicial Council Jury Instructions

MB 2200A.09 Negligent Interference With Prospective Economic Advantage

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Origin of Tort

[b] Independent Element of Wrongfulness

[c] Burden of Proof

[d] Related Judicial Council Jury Instructions

MB 2200A.10 Justification or Privilege--Balancing of Interests

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Balancing of Interests

[b] "Manager's Privilege"

[c] First Amendment Rights

MB 2200A.11 Efforts to Secure Performance of Contract With Third Party as Justification for Defendant's Conduct

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 2200A.12 Damages

[1] Instruction

[2] Use of Instruction

[3] Comment



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CHAPTER 22A Matthew Bender Interference With Economic Relations Instructions

3-22A California Forms of Jury Instruction Scope

Scope

SCOPE

This chapter includes jury instructions regarding the family of torts known as interference with economic relations. For the California Judicial Council jury instructions on economic interference, see Ch. 22, *California Judicial Council Economic Interference Instructions*. The Judicial Council instructions include general instructions regarding inducing breach of contract [CACI No. 2200], intentional interference with contractual relations [CACI No. 2201] and prospective economic relations [CACI No. 2202], intent [CACI No. 2203], and negligent interference with prospective economic relation [CACI No. 2204]. The Judicial Council instructions also include specific verdict forms relating to inducing breach of contract and intentional and negligent interference causes of action [CACI Nos. VF-2200-VF-2203]. The instructions in this chapter are intended to supplement the Judicial Council instructions [see *Cal. Rules of Ct., Rule 2.1050*].

This chapter covers the following topics:

- A general instruction on the tort of intentional interference with prospective economic advantage [see *MB 2200A.01*].
- An instruction on inducing a breach of contract that is terminable at will [see *MB 2200A.02*].
- Instructions on the burden of proof [see *MB 2200A.03, MB 2200A.04*].
- Instructions on the intent requirement [see *MB 2200A.05, MB 2200A.06*].
- An instruction on intentional interference by unlawful means [see *MB 2200A.07*].
- An instruction on the interference with contractual relations that prevents the plaintiff's performance or renders performance more burdensome or expensive [see *MB 2200A.08*].

3-22A California Forms of Jury Instruction Scope

- An instruction on negligent interference with prospective economic advantage [see *MB 2200A.09*].
- Instructions on the defenses of privilege and justification [see *MB 2200A.10*, *MB 2200A.11*].
- An instruction on damages [see *MB 2200A.12*].

The torts of intentional interference with contract and prospective advantage have much in common with the field of unfair competition, as frequently defendants will be charged with conduct that fits within both areas. For instructions relating to unfair competition, see Ch. 33, *California Judicial Council Unfair Practices Act Instructions*, and Ch. 33A, *Matthew Bender Unfair Competition Instructions*. For detailed instructions pertaining to contracts, see Chs. 3 through 3I. n

FOOTNOTES:

(n12)Footnote . Rocky N. Unruh and David H. Bromfield contributed to the original chapter for California Forms of Jury Instruction (Matthew Bender).



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California Forms of Jury Instruction

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CHAPTER 22A Matthew Bender Interference With Economic Relations Instructions

3-22A California Forms of Jury Instruction MB 2200A.01

MB 2200A.01 Intentional Interference with Prospective Economic Advantage--General Instruction

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

A plaintiff who has suffered harm because of a defendant who intentionally interfered with a prospective contractual or economic relationship between the plaintiff and a third party is entitled to recover damages from the defendant for that interference, if the interference was wrongful by some measure other than the fact of interference itself.

An act is independently wrongful if it is unlawful--that is, if it is proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal standard.

Authorities: *Edwards v. Arthur Andersen LLP* (2008) 44 Cal.4th 937, 944, 81 Cal.Rptr.3d 282, 189 P.3d 285 ; *Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1154, 1159, 131 Cal.Rptr.2d 29, 63 P.3d 937 ; *Della Penna v. Toyota Motor Sales, U.S.A., Inc.* (1995) 11 Cal.4th 376, 392-393, 45 Cal.Rptr.2d 436, 902 P.2d 740 ; *LiMandri v. Judkins* (1997) 52 Cal.App.4th 326, 340, 60 Cal.Rptr.2d 539 ; *Westside Ctr. Assocs. v. Safeway Stores 23, Inc.* (1996) 42 Cal.App.4th 507, 521 n.16, 49 Cal.Rptr.2d 793 ; *Deeter v. Angus* (1986) 179 Cal.App.3d 241, 249-253, 224 Cal.Rptr. 801 .

[2] Use of Instruction

This instruction should be used to give the jury a general background on the cause of action of intentional interference with prospective economic advantage before setting forth the elements to be proved by the plaintiff. The instruction is best used as a preface to the burden of proof instruction in MB 2200A.04.

For discussion, see Levy, Golden, & Sacks, *California Torts*, Ch. 40, *Fraud, Deceit, and Other Business Torts*, § 40.100 et seq. (Matthew Bender). For related discussion and forms, see *California Forms of Pleading and Practice*, Ch. 269, *Fraud and Deceit* (Matthew Bender).

For related Judicial Council instructions, see [3][b], *below*.

[3] Comment

[a] Intentional Interference With Prospective Economic Advantage

In *Korea Supply Co. v. Lockheed Martin Corp.* [*Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1154, 131 Cal.Rptr.2d 29, 63 P.3d 937], the California Supreme Court found that "[t]he tort of intentional interference with prospective economic advantage does not require a plaintiff to plead that the defendant acted with the specific intent, or purpose, of disrupting the plaintiff's prospective economic advantage. Instead, to satisfy the intent requirement for this tort, it is sufficient to plead that the defendant knew that the interference was certain or substantially certain to occur as a result of its action." Practitioners arguing this cause of action should stress the decision in *Korea Supply Co.* [see *San Jose Constr., Inc. v. S.B.C.C., Inc.* (2007) 155 Cal.App.4th 1528, 1544-1545, 67 Cal.Rptr.3d 54]; see also CACI Nos. 2202, 2203.

In *Della Penna v. Toyota Motor Sales, U.S.A., Inc.* [*Della Penna v. Toyota Motor Sales, U.S.A., Inc.* (1995) 11 Cal.4th 376, 391-393, 45 Cal.Rptr.2d 436, 902 P.2d 740], the California Supreme Court recast the elements of the tort of intentional interference with prospective economic advantage and allocated the associated burdens of proof between the parties to the action. The Court emphasized the need to draw and enforce a sharpened distinction between claims for the tortious disruption of an existing contract and claims for tortious interference with a prospective contractual or economic relationship. It stated that courts should endeavor to bring "a greater solicitude to those relationships that have ripened into agreements, while recognizing that relationships short of that subsist in a zone where the rewards and risks of competition are dominant" [*Della Penna v. Toyota Motor Sales, U.S.A., Inc.* (1995) 11 Cal.4th 376, 392, 45 Cal.Rptr.2d 436, 902 P.2d 740]. Thus, the Court held that a plaintiff seeking to recover for alleged interference with prospective economic advantage has the burden of pleading and proving that the defendant's interference was itself "wrongful by some measure beyond the fact of the interference itself" [*Della Penna v. Toyota Motor Sales, U.S.A., Inc.* (1995) 11 Cal.4th 376, 392-393, 45 Cal.Rptr.2d 436, 902 P.2d 740 (quoting *Top Service Body Shop, Inc. v. Allstate Ins. Co.* (1978) 283 Or. 201, 209, 582 P.2d 1365)]; see also *CRST Van Expedited, Inc. v. Werner Enters., Inc.* (9th Cir. 2007) 479 F.3d 1099, 1108-1110 (plaintiff must allege that defendant's acts were unlawful for a reason other than that they interfered with plaintiff's prospective economic advantage); *Visto Corp. v. Sproqit Techs., Inc.* (N.D. Cal. 2005) 360 F.Supp.2d 1064, 1066-1067; *San Jose Constr., Inc. v. S.B.C.C., Inc.* (2007) 155 Cal.App.4th 1528, 1544, 67 Cal.Rptr.3d 54; *Sole Energy Co. v. Petrominerals Corp.* (2005) 128 Cal.App.4th 212, 241, 26 Cal.Rptr.3d 798].

The California Supreme Court subsequently held that an act is independently wrongful if it is unlawful—that is, if it is proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal standard [*Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1159, 131 Cal.Rptr.2d 29, 63 P.3d 937; see *Edwards v. Arthur Andersen LLP* (2008) 44 Cal.4th 937, 944, 81 Cal.Rptr.3d 282, 189 P.3d 285; *San Jose Constr., Inc. v. S.B.C.C., Inc.* (2007) 155 Cal.App.4th 1528, 1545, 67 Cal.Rptr.3d 54; *Stevenson Real Estate Servs., Inc. v. CB Richard Ellis Real Estate Servs., Inc.* (2006) 138 Cal.App.4th 1215, 1220-1224, 42 Cal.Rptr.3d 235 (violation of well defined, established rules or standards of trade, association, or profession may constitute this type of wrongful conduct); *RLH Industries, Inc. v. SBC Communications, Inc.* (2005) 133 Cal.App.4th 1277, 1286-1287, 35 Cal.Rptr.3d 469; *Sole Energy Co. v. Petrominerals Corp.* (2005) 128 Cal.App.4th 212, 242, 26 Cal.Rptr.3d 798].

In a case filed by the defendant's former employee for intentional interference with prospective economic advantage and unfair competition, based on the defendant's requirement that the plaintiff give consideration to be released from a noncompetition agreement, the California Supreme Court held that the noncompetition agreement was invalid under *Bus. & Prof. Code* § 16600 [*Edwards v. Arthur Andersen LLP* (2008) 44 Cal.4th 937, 955, 81 Cal.Rptr.3d 282, 189 P.3d 285]. Hence, the Court reversed the decision of the court of appeal affirming judgment for the defendant with respect to the cause of action for intentional interference with prospective economic advantage, in which the

independent wrong alleged was the requirement to sign the release for consideration, costing the plaintiff an employment opportunity with another firm [*Edwards v. Arthur Andersen LLP* (2008) 44 Cal.4th 937, 944-948, 955, 81 Cal.Rptr.3d 282, 189 P.3d 285].

Wrongfulness independent of the inducement to breach the contract is not an element of the tort of intentional interference with *existing* contractual relations [*Quelimane Co., Inc. v. Stewart Title Guar. Co.* (1998) 19 Cal.4th 26, 55, 77 Cal.Rptr.2d 709, 960 P.2d 513 ; see *Sole Energy Co. v. Petrominerals Corp.* (2005) 128 Cal.App.4th 212, 238, 26 Cal.Rptr.3d 798 ; see also MB 2200A.03[3]]. For an instruction and discussion regarding plaintiff's burden of proof, see MB 2200A.04.

The California Supreme Court has held that a plaintiff may recover damages for intentional interference with an at-will employment relationship under the same California standard applicable to claims for intentional interference with prospective economic advantage. Therefore, to recover for a defendant's interference with an at-will employment relationship, a plaintiff must plead and prove that the defendant engaged in an independently wrongful act--that is, an act proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal standard [*Reeves v. Hanlon* (2004) 33 Cal.4th 1140, 1152-1153, 17 Cal.Rptr.3d 289, 95 P.3d 513 ; see also *Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1159, 131 Cal.Rptr.2d 29, 63 P.3d 937 ; see generally MB 2200A.02].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 22, *California Judicial Council Economic Interference Instructions*]:

CACI No. 2202, Intentional Interference With Prospective Economic Relations

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewTortsBusiness TortsCommercial InterferenceProspective AdvantageGeneral OverviewTortsBusiness TortsCommercial InterferenceProspective AdvantageElements



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California Forms of Jury Instruction

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CHAPTER 22A Matthew Bender Interference With Economic Relations Instructions

3-22A California Forms of Jury Instruction MB 2200A.02

MB 2200A.02 Inducing Breach of Contract That Is Terminable at Will

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

You have heard testimony that the contract between Plaintiff and _____ [name of third party] was terminable at will, which means, in effect, that either Plaintiff or _____ [name of third party] could have terminated the contract for any reason without incurring any liability to one another for that termination. However, the fact that the parties to a contract can terminate the contract at will does not mean that the contract can be terminated at the will of others, such as Defendant. Thus, Defendant can be held liable for intentionally inducing a breach of the contract if you find that [his/her/its] conduct caused _____ [name of third party] to breach the contract with Plaintiff.

[*OPTIONAL (See Use of Instruction)*]

If Defendant is shown to have interfered with an at-will employment relationship between Plaintiff and _____ [name of third party], then for Defendant to be liable, the interference must be in the nature of an independent wrong, other than the interference itself.

An act is independently wrongful if it is unlawful--that is, if it is proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal standard.

Authorities: *Reeves v. Hanlon* (2004) 33 Cal.4th 1140, 1152-1153, 17 Cal.Rptr.3d 289, 95 P.3d 513 ; *Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1159, 131 Cal.Rptr.2d 29, 63 P.3d 937 ; *Speegle v. Board of Fire Underwriters* (1946) 29 Cal.2d 34, 39, 172 P.2d 867 ; *Savage v. Pacific Gas & Elec. Co.* (1993) 21 Cal.App.4th 434, 448, 26 Cal.Rptr.2d 305 ; *Skelly v. Richman* (1970) 10 Cal.App.3d 844, 862, 89 Cal.Rptr. 556 ; *Kozlowsky v.*

Westminster Nat'l Bank (1970) 6 Cal.App.3d 593, 598, 86 Cal.Rptr. 52 .

[2] Use of Instruction

This instruction should be used for those cases in which the contract is terminable at the will of a third party. Even in those cases, counsel may choose not to submit this instruction unless either the defendant has made an issue of the fact that the contract was terminable at will or counsel is concerned that the jury may be confused or prejudiced by the terminable-at-will language in the contract itself.

If an at-will employment contract is the basis for the cause of action, the optional paragraph should be used [*Reeves v. Hanlon* (2004) 33 Cal.4th 1140, 1152-1153, 17 Cal.Rptr.3d 289, 95 P.3d 513].

For related Judicial Council instructions, see [3][b], *below*.

[3] Comment

[a] "At Will" Contracts

As this instruction reflects, courts repeatedly have held that a cause of action will lie for intentionally inducing breach of an "at will" contract [*Speegle v. Board of Fire Underwriters* (1946) 29 Cal.2d 34, 39, 172 P.2d 867 ; *Savage v. Pacific Gas & Elec. Co.* (1993) 21 Cal.App.4th 434, 448, 26 Cal.Rptr.2d 305 ; *Skelly v. Richman* (1970) 10 Cal.App.3d 844, 862, 89 Cal.Rptr. 556 ; *Kozlowsky v. Westminster Nat'l Bank* (1970) 6 Cal.App.3d 593, 598, 86 Cal.Rptr. 52]. As courts frequently note, the fact that a contract exists at the will of the parties to it does not imply that the contract exists at the will of others [*Speegle v. Board of Fire Underwriters* (1946) 29 Cal.2d 34, 39, 172 P.2d 867 ; *Savage v. Pacific Gas & Elec. Co.* (1993) 21 Cal.App.4th 434, 448, 26 Cal.Rptr.2d 305]. For example, a defendant may be held liable for improperly inducing an employer to terminate an employee's employment, even if the employment was terminable at the will of the employer [see *Savage v. Pacific Gas & Elec. Co.* (1993) 21 Cal.App.4th 434, 448, 26 Cal.Rptr.2d 305].

The California Supreme Court has held that a plaintiff may recover damages for intentional interference with an at-will employment relationship under the same California standard applicable to claims for intentional interference with prospective economic advantage [*Reeves v. Hanlon* (2004) 33 Cal.4th 1140, 1152-1153, 17 Cal.Rptr.3d 289, 95 P.3d 513 ; see MB 2200A.01]. To recover for a defendant's interference with an at-will employment relation, a plaintiff must plead and prove that the defendant engaged in an independently wrongful act--that is, an act proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal standard [*Reeves v. Hanlon* (2004) 33 Cal.4th 1140, 1152-1153, 17 Cal.Rptr.3d 289, 95 P.3d 513 ; see also *Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1159, 131 Cal.Rptr.2d 29, 63 P.3d 937 ; compare *CRST Van Expedited, Inc. v. Werner Enters., Inc.* (9th Cir. 2007) 479 F.3d 1099, 1105-1107 (employment was not at-will for relevant first-year period)]. This particular case involved several causes of action by an employer (a law firm) against another employer (a law firm started by former employees) that allegedly induced additional employees to change jobs and committed related torts. The Court stated that because an interference as such is primarily an interference with the future relationship between the former employer and the at-will employee, inducing the termination of an at-will employment relationship may be actionable under the standard applicable to claims for intentional interference with prospective economic advantage [*Reeves v. Hanlon* (2004) 33 Cal.4th 1140, 1144, 17 Cal.Rptr.3d 289, 95 P.3d 513].

In cases involving contracts terminable at will, the defendant will be inclined to stress that the third party was not affected by the defendant's conduct when it terminated its contract with the plaintiff but was merely exercising an absolute right it had under the contract. Plaintiff's counsel may wish to consider, when appropriate, a motion *in limine* to prevent defendant from introducing evidence of the "at will" status of the contract on the ground that the evidence is immaterial and risks jury confusion and prejudice [*Romano v. Wilbur Ellis & Co.* (1947) 82 Cal.App.2d 670, 673, 186 P.2d 1012].

LexisNexis Matthew Bender Expert Practice Tip--At Will Contracts: This is an important instruction in cases involving at will contracts. Some jurors may be surprised that a contract terminable at will can be the subject of a lawsuit. Plaintiff's counsel must explain not only the legal rule but the reason for the rule--the fact that the other contracting party could terminate the contract does not mean that the defendant had the right to do so. *By Ronald Oster*

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 22, *California Judicial Council Economic Interference Instructions*]:

CACI No. 2200 Inducing Breach of Contract

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewTortsBusiness TortsCommercial InterferenceContractsGeneral OverviewTortsBusiness TortsCommercial InterferenceContractsElements



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California Forms of Jury Instruction

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CHAPTER 22A Matthew Bender Interference With Economic Relations Instructions

3-22A California Forms of Jury Instruction MB 2200A.03

MB 2200A.03 Burden of Proof in Action for Intentional Interference With Contractual Relations

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Plaintiff claims that Defendant intentionally interfered with the contract between Plaintiff and _____ [name of third party]. To recover on this claim, Plaintiff must prove all of the following by a preponderance of the evidence:

- 1. There was an existing, enforceable contract between Plaintiff and _____ [name of third party];**
- 2. Defendant knew of the contract's existence;**

[EITHER (See Use Of Instruction)]

3. Defendant intentionally committed acts designed to interfere with or disrupt the contractual relationship between Plaintiff and _____ [name of third party];

4. Defendant's acts disrupted the contractual relationship; and

5. Plaintiff suffered damages caused by the disruption of the contractual relationship.

[or]

3. Defendant intentionally induced _____ [name of third party] to interfere with or disrupt the

contractual relationship by initiating _____ [describe prior lawsuit];

4. _____ [describe prior lawsuit] was resolved or otherwise concluded in Plaintiff's favor;

5. Defendant's acts disrupted the contractual relationship; and

6. Plaintiff suffered damages caused by the disruption of the contractual relationship.

Authorities: *Quelimane Co., Inc. v. Stewart Title Guar. Co.* (1998) 19 Cal.4th 26, 55, 77 Cal.Rptr.2d 709, 960 P.2d 513 ; *Pacific Gas & Elect. Co. v. Bear Stearns & Co.* (1990) 50 Cal.3d 1118, 1126, 1137, 270 Cal.Rptr. 1, 791 P.2d 587 ; *LiMandri v. Judkins* (1997) 52 Cal.App.4th 326, 343-344, 60 Cal.Rptr.2d 539 ; *PMC, Inc. v. Saban Entertainment, Inc.* (1996) 45 Cal.App.4th 579, 595, 52 Cal.Rptr.2d 877 ; *Savage v. Pacific Gas & Elec. Co.* (1993) 21 Cal.App.4th 434, 448, 26 Cal.Rptr.2d 305 ; *SCEcorp. v. Superior Court* (1992) 3 Cal.App.4th 673, 677, 4 Cal.Rptr.2d 372 .

[2] Use of Instruction

This instruction should be used when the defendant interfered with or disrupted contractual relations but did not actually cause a breach of a valid, existing contract. If there was no valid, existing contract with which the defendant could interfere, the instruction in MB 2200A.04 should be used.

A preponderance of the evidence instruction must be used with this instruction [see Ch. 2, *California Judicial Council Evidence Instructions*, CACI No. 200 ("More Likely True Than Not True")]. An instruction defining "cause" must also be used with this instruction [see, e.g., Ch. 3E, *Matthew Bender Contract Damages Instructions*, MB 300E.03 (damages resulting from breach)].

When the plaintiff claims that the defendant disrupted or interfered with a contractual relationship by publishing or disseminating false statements or information, this instruction should be modified to reflect that the plaintiff is required to prove the additional elements necessary to establish that the statements or information were not entitled to First Amendment protection [*Blatty v. New York Times Co.* (1986) 42 Cal.3d 1033, 1044-1045, 232 Cal.Rptr. 542, 728 P.2d 1177 ; *Morningstar, Inc. v. Superior Court* (1994) 23 Cal.App.4th 676, 696, 29 Cal.Rptr.2d 547]. For general discussion of First Amendment restrictions on imposing liability for defamatory statements or other false information, see Levy, Golden & Sacks, *California Torts*, Ch. 45, *Defamation* (Matthew Bender).

The first option in the instruction reflects the more common fact pattern and will be used by most plaintiffs [see, e.g., *Heritage Provider Network, Inc. v. Superior Court* (2008) 158 Cal.App.4th 1146, 1154, 70 Cal.Rptr.3d 645] . The second option applies only when the cause of action is one for an intentional interference based on the defendant's inducing a third party to disrupt the contractual relationship by filing a lawsuit without probable cause. This option rephrases the third element of the cause of action and adds the requirement that the prior lawsuit induced by defendant's acts must have been concluded in the plaintiff's favor [see [3][a], below, for discussion of the requirement of favorable termination].

For related Judicial Council instructions, see [3][b], below.

[3] Comment

[a] Intentional Interference With Contractual Relations

Intentional interference with contractual relations is one of three theories comprising the family of torts known as interference with economic relations. The other two are intentional interference with prospective economic advantage [

see *CACI No. 2202*; MB 2200A.01] and negligent interference with contractual relations [see *CACI No. 2204* (Negligent Interference with Prospective Economic Relations); MB 2200A.09].

The California Supreme Court has characterized the tort of intentional interference with contractual relations as "merely a series of the broader tort of interference with prospective economic advantage" [*Buckaloo v. Johnson* (1975) 14 Cal.3d 815, 823, 122 Cal.Rptr. 745, 537 P.2d 865]. Intentional interference with contractual relations is broader than inducing breach of contract and less inclusive than interference with prospective economic advantage [*Shamblin v. Berge* (1985) 166 Cal.App.3d 118, 122-123, 212 Cal.Rptr. 313]. It may be useful for counsel to view intentional interference with contractual relations as a special case in which the plaintiff's economic relationship with a third party is defined in an existing and enforceable contract. For using instructions related to intentional interference with contractual relations, see *CACI No. 2201* and [2], above.

Inducing breach of contract may be characterized as a species of the tort of intentional interference with contractual relations arising out of conduct by the defendant that induced a third party to breach an existing contract with the plaintiff. To recover, the plaintiff must prove all of the following [*Quelimane Co., Inc. v. Stewart Title Guar. Co.* (1998) 19 Cal.4th 26, 55, 77 Cal.Rptr.2d 709, 960 P.2d 513 ; *Pacific Gas & Elec. Co. v. Bear Stearns & Co.* (1990) 50 Cal.3d 1118, 1126, 270 Cal.Rptr. 1, 791 P.2d 587 ; *Nygard, Inc. v. Uusi-Kerttula* (2008) 159 Cal.App.4th 1027, 1047, 72 Cal.Rptr.3d 210 ; *Sole Energy Co. v. Petrominerals Corp.* (2005) 128 Cal.App.4th 212, 238, 26 Cal.Rptr.3d 798 ; *LiMandri v. Judkins* (1997) 52 Cal.App.4th 326, 343-344, 60 Cal.Rptr.2d 539 ; *PMC, Inc. v. Saban Entertainment, Inc.* (1996) 45 Cal.App.4th 579, 595, 52 Cal.Rptr.2d 877 ; *Savage v. Pacific Gas & Elec. Co.* (1993) 21 Cal.App.4th 434, 448, 26 Cal.Rptr.2d 305 ; *SCEcorp. v. Superior Court* (1992) 3 Cal.App.4th 673, 677, 4 Cal.Rptr.2d 372]:

- That the plaintiff had an existing, enforceable contract with a third party;
- That the defendant knew of the contract;
- That the defendant committed intentional acts designed to interfere with or disrupt the contract;
- That there was actual interference with or disruption of the contractual relationship between the plaintiff and the third party; and
- That there were resulting damages to the plaintiff.

When there is no existing, enforceable contract, the plaintiff should state its claim as one for interference with prospective economic advantage [*Cappiello, Hofmann & Katz v. Boyle* (2001) 87 Cal.App.4th 1064, 1067-1068, 105 Cal.Rptr.2d 147 ; *Bed, Bath & Beyond of La Jolla, Inc. v. La Jolla Vill. Square Venture Partners* (1997) 52 Cal.App.4th 867, 879, 60 Cal.Rptr.2d 830 (alleged lease agreement on which action was based was unenforceable as matter of law under statute of frauds); *PMC, Inc. v. Saban Entertainment, Inc.* (1996) 45 Cal.App.4th 579, 601, 52 Cal.Rptr.2d 877 (distinguishing "enforceable" contracts from both "void" and "voidable" contracts)]. For instructions and discussion of interference with prospective economic advantage, see *CACI No. 2202* and MB 2200A.04.

The California Supreme Court's directive in *Della Penna v. Toyota Motor Sales, U.S.A., Inc.* [*Della Penna v. Toyota Motor Sales, U.S.A., Inc.* (1995) 11 Cal.4th 376, 392-393, 45 Cal.Rptr.2d 436, 902 P. 2d 740 ; see MB 2200A.04] that courts give greater solicitude to existing contractual relationships means that the requirement of wrongfulness apart from the interference itself does not apply to a cause of action for intentional interference with existing contractual relations. It applies only to a cause of action for intentional interference with prospective economic advantage [*Quelimane Co., Inc. v. Stewart Title Guar. Co.* (1998) 19 Cal.4th 26, 55, 77 Cal.Rptr.2d 709, 960 P.2d 513 ; *LiMandri v. Judkins* (1997) 52 Cal.App.4th 326, 343, 60 Cal.Rptr.2d 539 ; see *CACI 2202* and MB 2200A.04]. Moreover, the tort of intentional interference with performance of a contract does not require that the actor's primary purpose be disruption of the contract. Intentional interference, in which the actor does not act for the purpose of interfering with the contract

or desire it but knows that the interference is certain or substantially certain to occur as a result of that action, is sufficient [*Quelimane Co., Inc. v. Stewart Title Guar. Co.* (1998) 19 Cal.4th 26, 56, 77 Cal.Rptr.2d 709, 960 P.2d 513 (quoting from Restatement (Second) of Torts § 766, cmt. j)].

A plaintiff who claims that a defendant disrupted or interfered with a contractual relationship by publishing or disseminating false statements or information must satisfy the same constitutionally-mandated requirements as the plaintiff in a defamation case [*Blatty v. New York Times Co.* (1986) 42 Cal.3d 1033, 1044-1045, 232 Cal.Rptr. 542, 728 P.2d 1177 ; *Morningstar, Inc. v. Superior Court* (1994) 23 Cal.App.4th 676, 696, 29 Cal.Rptr.2d 547]. Thus, for example, one of the essential elements of the plaintiff's case-in-chief is that the statements were made "of and concerning" the plaintiff [*Blatty v. New York Times Co.* (1986) 42 Cal.3d 1033, 1042, 232 Cal.Rptr. 542, 728 P.2d 1177]. Furthermore, expressions of opinion may not form the basis of an action for intentional interference with contract unless they contain false and defamatory statements of fact [see *Morningstar, Inc. v. Superior Court* (1994) 23 Cal.App.4th 676, 696, 29 Cal.Rptr.2d 547 ; *Savage v. Pacific Gas & Elec. Co.* (1993) 21 Cal.App.4th 434, 450, 26 Cal.Rptr.2d 305 ; see also Levy, Golden & Sacks, California Torts, Ch. 45, *Defamation* (Matthew Bender)].

A plaintiff who claims that a defendant disrupted or interfered with a contractual relationship by inducing a third party to file a lawsuit may not recover unless the plaintiff proves that the lawsuit was brought without probable cause and that it was concluded in the plaintiff's favor. No cause of action is stated if the only damage to plaintiff resulting from the defendant's conduct is the burden and expense of defending a potentially meritorious lawsuit [*Pacific Gas & Elec. Co. v. Bear Stearns & Co.* (1990) 50 Cal.3d 1118, 1137, 270 Cal.Rptr. 1, 791 P.2d 587 ("[t]o permit a cause of action for interference with contract or prospective economic advantage to be based on inducing potentially meritorious litigation on the contract would threaten free access to the courts by providing an end run around the limitations on the tort of malicious prosecution")]. The existence of probable cause is an issue of law for the court [*Pacific Gas & Elec. Co. v. Bear Stearns & Co.* (1990) 50 Cal.3d 1118, 1131, 270 Cal.Rptr. 1, 791 P.2d 587].

Likewise, an action for intentional interference with contractual relations may not be brought against a defendant whose conduct induces the plaintiff to institute litigation to determine its rights under a contract with a third party, at least when the plaintiff's position on the contractual dispute is not indisputably correct. When the defendant has a business relationship with a party to a contract that merely brings to a head the contracting parties' good-faith dispute about the interpretation of the contract, the defendant will not be liable for tortious interference [*Golden W. Baseball Co. v. City of Anaheim* (1994) 25 Cal.App.4th 11, 51, 31 Cal.Rptr.2d 378].

For further discussion, see Levy, Golden, & Sacks, California Torts, Ch. 40, *Fraud, Deceit, and Other Business Torts*, § 40.110 et seq. (Matthew Bender).

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 22, *California Judicial Council Economic Interference Instructions*]:

CACI No. 2201 Intentional Interference With Contractual Relations

CACI No. 2202 Intentional Interference With Prospective Economic Relations

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Evidence Procedural Considerations Burdens of Proof Allocation Torts Business Torts Commercial Interference Contracts General Overview Torts Business Torts Commercial Interference Contracts Elements



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CHAPTER 22A Matthew Bender Interference With Economic Relations Instructions

3-22A California Forms of Jury Instruction MB 2200A.04

MB 2200A.04 Burden of Proof in Action for Intentional Interference With Prospective Economic Advantage

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Plaintiff is claiming that Defendant intentionally interfered with prospective economic relations between Plaintiff and _____ [name of third party]. To recover on this claim, Plaintiff has the burden of proving all of the following by a preponderance of the evidence:

- 1. That there was an existing business or economic relationship between Plaintiff and _____ [name of third party] and that this relationship, although not formalized in an existing, enforceable contract, was reasonably certain to produce future economic benefits to Plaintiff;**
- 2. That Defendant knew of that relationship;**
- 3. That Defendant intentionally committed wrongful acts designed to interfere with or disrupt the relationship;**
- 4. That Defendant's wrongful acts caused disruption of the relationship independently; and**
- 5. That Plaintiff suffered damages caused by the disruption of the relationship.**

Authorities: *Sebastian Int'l, Inc. v. Russolillo* (C.D. Cal. 2001) 128 F.Supp.3d 630, 636; *Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1153, 1159, 131 Cal.Rptr.2d 29, 63 P.3d 937 ; *Della Penna v. Toyota Motor Sales, U.S.A., Inc.* (1995) 11 Cal.4th 376, 380, 392-393, 45 Cal.Rptr.2d 436, 902 P.2d 740 ; *Stevenson Real Estate Servs., Inc. v. CB Richard Ellis Real Estate Servs., Inc.* (2006) 138 Cal.App.4th 1215, 1220, 42 Cal.Rptr.3d 235 ; *Gemini Aluminum Corp. v. California Custom Shapes, Inc.* (2002) 95 Cal.App.4th 1249, 1256, 116 Cal.Rptr.2d 358 ; *LiMandri v. Judkins* (1997) 52 Cal.App.4th 326, 339, 60 Cal.Rptr.2d 539 ; *Arntz Contracting Co. v. St. Paul Fire &*

Marine Ins. Co. (1996) 47 Cal.App.4th 464, 475-476, 54 Cal.Rptr.2d 888 ; *Westside Ctr. Assocs. v. Safeway Stores 23, Inc.* (1996) 42 Cal.App.4th 507, 521-522, 49 Cal.Rptr.2d 793 .

[2] Use of Instruction

This instruction should be used if the defendant interfered with a business or economic relationship that was not defined by an enforceable contract. The tort of intentional interference with prospective economic advantage protects nonformalized business or economic relationships in which benefits to the plaintiff, although reasonably certain to occur, are nevertheless prospective [*PMC, Inc. v. Saban Entertainment, Inc.* (1996) 45 Cal.App.4th 579, 601, 52 Cal.Rptr.2d 877]. By using this instruction, plaintiff's counsel can avoid having to prove the existence of a legally recognized contract and can overcome a defense that the contract with which the defendant interfered is void or unenforceable due to some technical defect, such as failure to comply with the statute of frauds, lack of consideration, and uncertainty [see *Shamblin v. Berge* (1985) 166 Cal.App.3d 118, 124, 212 Cal.Rptr. 313]. However, as discussed in [3], below, counsel takes a risk that the defendant may be accorded a broader competitive privilege, as courts pay greater deference to relationships defined by contract than to those that are not [*Della Penna v. Toyota Motor Sales, U.S.A., Inc.* (1995) 11 Cal.4th 376, 392-393, 45 Cal.Rptr.2d 436, 902 P.2d 740 ; cf. *Imperial Ice Co. v. Rossier* (1941) 18 Cal.2d 33, 36, 112 P.2d 631].

A preponderance of the evidence instruction must be used with this instruction [see Ch. 2, *California Judicial Council Evidence Instructions*, CACI No. 200 ("More Likely True Than Not True")]. An instruction defining "cause" must also be used with this instruction [see Ch. 4, *California Judicial Council Negligence Instructions*, CACI No. 430 ("Causation: Substantial Factor")].

For related Judicial Council instructions, see [3][c], below.

[3] Comment

[a] Nature of Tort

In *Della Penna v. Toyota Motor Sales, U.S.A., Inc.* [*Della Penna v. Toyota Motor Sales, U.S.A., Inc.* (1995) 11 Cal.4th 376, 392-393, 45 Cal.Rptr.2d 436, 902 P.2d 740], the California Supreme Court recast the elements of the tort of intentional interference with prospective economic advantage and allocated the associated burdens of proof between the parties to the action. The Court emphasized the need to draw and enforce a sharpened distinction between claims for the tortious disruption of an *existing* contract and claims for tortious interference with a *prospective* contractual or economic relationship. The Court stated that courts should endeavor to bring "a greater solicitude to those relationships that have ripened into agreements, while recognizing that relationships short of that subsist in a zone where the rewards and risks of competition are dominant" [*Della Penna v. Toyota Motor Sales, U.S.A., Inc.* (1995) 11 Cal.4th 376, 392, 45 Cal.Rptr.2d 436, 902 P.2d 740]. The Court held that a plaintiff seeking to recover for alleged intentional interference with prospective economic advantage has the burden of pleading and proving that the defendant's interference was itself "wrongful 'by some measure beyond the fact of the interference itself' " [*Della Penna v. Toyota Motor Sales, U.S.A., Inc.* (1995) 11 Cal.4th 376, 392-393, 45 Cal.Rptr.2d 436, 902 P.2d 740 (quoting *Top Service Body Shop, Inc. v. Allstate Ins. Co.* (1978) 283 Or. 201, 209, 582 P.2d 1365) ; see [b], below].

For further discussion, see Levy, Golden, & Sacks, *California Torts*, Ch. 40, *Fraud, Deceit, and Other Business Torts*, § 40.100 et seq. (Matthew Bender).

[b] Required Elements

To recover on a claim of intentional interference with prospective economic advantage, a plaintiff must prove each of the five elements listed in this instruction [*Della Penna v. Toyota Motor Sales, U.S.A., Inc.* (1995) 11 Cal.4th 376, 392-393, 45 Cal.Rptr.2d 436, 902 P.2d 740 ; *Plummer v. Day/Eisenberg, LLP* (2010) 184 Cal.App.4th 38, 51, 108

Cal.Rptr.3d 455 ; *Morningstar, Inc. v. Superior Court* (1994) 23 *Cal.App.4th* 676, 695-696, 29 *Cal.Rptr.2d* 547 ; *Savage v. Pacific Gas & Elec. Co.* (1993) 21 *Cal.App.4th* 434, 448, 26 *Cal.Rptr.2d* 305 ; *Shamblin v. Berge* (1985) 166 *Cal.App.3d* 118, 123, 212 *Cal.Rptr.* 313 ; see *Tele Atlas N.V. v. NAVTEQ Corp.* (2005) 397 *F.Supp.2d* 1184, 1194 (courts often require plaintiff to identify at least one third party; plaintiff failed to identify third parties with which it had economic relationships)]. In *Della Penna*, the California Supreme Court held that plaintiffs must plead and prove that the defendant engaged in wrongful conduct other than the act of interference itself, but reserved "[t]he question of whether additional refinements to the plaintiff's pleading and proof burdens merit adoption by California courts--questions embracing the precise scope of 'wrongfulness' " [*Della Penna v. Toyota Motor Sales, U.S.A., Inc.* (1995) 11 *Cal.4th* 376, 392-393, 45 *Cal.Rptr.2d* 436, 902 *P.2d* 740].

The California Supreme Court has clarified that an act is independently wrongful if it is unlawful--that is, if it is proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal standard [*Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 *Cal.4th* 1134, 1159, 131 *Cal.Rptr.2d* 29, 63 *P.3d* 937 ; see MB 2200A.01].

The plaintiff may not rely on an "interference with the market" theory to satisfy the first required element of an existing business or economic relationship. Plaintiff must show that the defendant intended to interfere with a specific prospective relationship, and not merely with plaintiff's ability to reap benefits from anticipated dealings with a class of unknown investors or purchasers [*Westside Ctr. Assocs. v. Safeway Stores 23, Inc.* (1996) 42 *Cal.App.4th* 507, 520 *n.15*, 49 *Cal.Rptr.2d* 793]. Without an existing relationship with an identifiable buyer, plaintiff's expectation of future sales is at most a hope for an economic relationship and desire for future benefit [*Westside Ctr. Assocs. v. Safeway Stores 23, Inc.* (1996) 42 *Cal.App.4th* 507, 527-528, 49 *Cal.Rptr.2d* 793], and the defendant's acts of interference are therefore not actionable.

The tort of intentional interference with prospective economic advantage does not require a plaintiff to plead that the defendant acted with the specific intent, or purpose, of disrupting the plaintiff's prospective economic advantage. Instead, to satisfy the intent requirement for this tort, it is sufficient to plead that the defendant knew that the interference was certain or substantially certain to occur as a result of the defendant's action [*Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 *Cal.4th* 1134, 1153, 131 *Cal.Rptr.2d* 29, 63 *P.3d* 937].

With regard to the causation element set forth in paragraph 4 in the instruction in [1], *above*, it is sufficient for the plaintiff to show that were it not for the defendant's acts of disruption or interference, plaintiff would have enjoyed some prospective economic benefit (typically profits) reasonably certain to flow from plaintiff's relationship with the third party [see *Youst v. Longo* (1987) 43 *Cal.3d* 64, 71, 233 *Cal.Rptr.* 294, 729 *P.2d* 728 ; *Westside Ctr. Assocs. v. Safeway Stores 23, Inc.* (1996) 42 *Cal.App.4th* 507, 522, 49 *Cal.Rptr.2d* 793 ; see also *Pardi v. Kaiser Permanente Hosp., Inc.* (9th Cir. 2004) 389 *F.3d* 840, 852 (failure to raise issue of material fact regarding causation requirement sufficient under *Youst* was fatal to cause of action)].

A plaintiff who claims that a defendant disrupted or interfered with an advantageous economic relationship by publishing or disseminating false statements must satisfy the same constitutionally-mandated requirements as the plaintiff in a defamation case [*Blatty v. New York Times Co.* (1986) 42 *Cal.3d* 1033, 1045, 232 *Cal.Rptr.* 542, 728 *P.2d* 1177 ; *Morningstar, Inc. v. Superior Court* (1994) 23 *Cal.App.4th* 676, 696, 29 *Cal.Rptr.2d* 547]. Thus, for example, one of the essential elements of the plaintiff's case-in-chief is that the statements were made "of and concerning" the plaintiff [*Blatty v. New York Times Co.* (1986) 42 *Cal.3d* 1033, 1042, 232 *Cal.Rptr.* 542, 728 *P.2d* 1177]. Furthermore, expressions of opinion may not form the basis of an action for interference with prospective economic advantage unless they contain false and defamatory statements of fact [see *Morningstar, Inc. v. Superior Court* (1994) 23 *Cal.App.4th* 676, 696, 29 *Cal.Rptr.2d* 547 ; *Savage v. Pac. Gas & Elec. Co.* (1993) 21 *Cal.App.4th* 434, 450, 26 *Cal.Rptr.2d* 305 ; see Levy, Golden & Sacks, California Torts, Ch. 45, *Defamation* (Matthew Bender), for detailed discussion of what constitutes defamatory statement].

The fact that a contract is subject to conditions precedent does not render the plaintiff's expectancy of benefits under the contract so uncertain as to relegate the plaintiff to a cause of action for intentional interference with prospective economic advantage [*SCEcorp. v. Superior Court* (1992) 3 Cal.App.4th 673, 682, 4 Cal.Rptr.2d 372]. Stated another way, the existence of conditions precedent does not preclude plaintiff from stating a cause of action for intentional interference with contractual relations.

LexisNexis Matthew Bender Expert Practice Tip--Specific Intent Not Required: This instruction could be confusing to the jury on the issue of the level of intent required. The instruction refers to wrong acts by the defendant that are "designed" to interfere with the relationship. Yet the California Supreme Court has made clear that specific intent is not required. Rather, it is sufficient if defendant knew that interference with the relationship was substantially certain to occur [*Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1154, 131 Cal.Rptr.2d 29, 63 P.3d 937 ; see MB 2200A.06]. By Ronald Oster

[c] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 22, *California Judicial Council Economic Interference Instructions*]:

CACI No. 2201, Intentional Interference With Contractual Relations

CACI No. 2202, Intentional Interference With Prospective Economic Relations

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Evidence Procedural Considerations Burdens of Proof Allocation Torts Business Torts Commercial Interference Prospective Advantage General Overview Torts Business Torts Commercial Interference Prospective Advantage Elements



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CHAPTER 22A Matthew Bender Interference With Economic Relations Instructions

3-22A California Forms of Jury Instruction MB 2200A.05

MB 2200A.05 Intent Requirement for Interference With Contractual Relations

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

As I have instructed you, one of the essential elements that Plaintiff must prove to succeed on [his/her/its] claim for intentional interference with contractual relations is that Defendant intended to [interfere with/disrupt] Plaintiff's contract with _____ [*name of third party*]. To prove this intent, Plaintiff must show that the Defendant's actions were intentional and were done for the purpose of [disrupting the contractual relationship between Plaintiff and _____ (*name of third party*) or inducing _____ (*name of third party*) to breach (his/her/its) contract with Plaintiff.] [*Optional: However, Plaintiff is not required to show that Defendant knew Plaintiff's name or identity; it is sufficient if Plaintiff shows that Defendant knew that _____ (*name of third party*) had entered into a contract with some other person or entity and that Defendant acted with the intent of (interfering with/disrupting the contract or inducing _____ [*name of third party*] to breach the contract with that person or entity).*]

If you find that Defendant was substantially certain that [his/her/its] conduct would [interfere with/disrupt or cause a breach of] the contract, you may infer from that fact that Defendant intended to [interfere with/disrupt the contract or cause the breach].

Authorities: *Savage v. Pacific Gas & Elec. Co.* (1993) 21 Cal.App.4th 434, 449, 450, 26 Cal.Rptr.2d 305 ; *Herrick v. Superior Court* (1987) 188 Cal.App.3d 787, 790-793, 233 Cal.Rptr. 675 ; *Ramona Manor Convalescent Hosp. v. Care Enters.* (1986) 177 Cal.App.3d 1120, 1130-1136, 225 Cal.Rptr. 120 .

[2] Use of Instruction

This instruction should be used when the issue is defendant's intent to cause a breach of contract. When the issue is defendant's intent to interfere with plaintiff's prospective economic advantage, see the instructions in *CACI Nos. 2202*

and 2203, and MB 2200A.06. The optional sentence at the end of the first paragraph should be used in cases when the defendant did not know, or may not have been aware, of plaintiff's name or identity when defendant committed the acts that led to the breach.

For related Judicial Council instructions, see [3][b], *below*.

[3] Comment

[a] Intent Requirement

In *Ramona Manor Convalescent Hospital v. Care Enterprises* [*Ramona Manor Convalescent Hosp. v. Care Enters.* (1986) 177 Cal.App.3d 1120, 1130-1136, 225 Cal.Rptr. 120], the court held that the trial court did not err when it instructed the jury that a party's intent to cause a breach could be inferred from its knowledge that a breach was the natural and probable consequence of its actions. The court also held that the plaintiff was not required to show that the defendant knew plaintiff's name or identity as long as the plaintiff established that the defendant knew that the party induced to breach had in fact entered into the subject contract with some other person or entity [*Ramona Manor Convalescent Hosp. v. Care Enters.* (1986) 177 Cal.App.3d 1120, 1133, 225 Cal.Rptr. 120].

However, in *Herrick v. Superior Court* [*Herrick v. Superior Court* (1987) 188 Cal.App.3d 787, 233 Cal.Rptr. 675], the court held that a drunk driver who injured the plaintiff's employee could not be held liable for interfering with their employment relationship when he was not specifically aware of the relationship and his actions were not calculated to disrupt it [*Herrick v. Superior Court* (1987) 188 Cal.App.3d 787, 790-793, 233 Cal.Rptr. 675]. In reaching its decision, the court impliedly concluded that the trier of fact could not infer the defendant's intent to disrupt the contractual relationship between an employer and an employee solely from the fact that a defendant engaged in conduct that was highly likely to cause an incapacitating physical injury to the employee. However, an action may be stated for intentional interference with contractual relations when the defendant's acts are calculated to disrupt the employer-employee relationship [see *I. J. Weinrot & Son v. Jackson* (1985) 40 Cal.3d 327, 341, 220 Cal.Rptr. 103, 708 P.2d 682].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 22, *California Judicial Council Economic Interference Instructions*]:

CACI No. 2201 Intentional Interference With Contractual Relations

CACI No. 2203 Intent

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewTortsBusiness TortsCommercial InterferenceContractsGeneral OverviewTortsBusiness TortsCommercial InterferenceContractsElements



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CHAPTER 22A Matthew Bender Interference With Economic Relations Instructions

3-22A California Forms of Jury Instruction MB 2200A.06

MB 2200A.06 Intent Requirement for Interference With Prospective Economic Advantage

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

As I have instructed, one of the essential elements that Plaintiff must prove to succeed on [his/her/its] claim for intentional interference with prospective economic advantage is that Defendant intentionally committed wrongful acts that were designed to interfere with or disrupt Plaintiff's business or economic relationship with _____ [name of third party]. To prove this intent, Plaintiff must show that Defendant's wrongful acts were designed to disrupt that relationship. However, if you find that Defendant was substantially certain that [his/her/its] conduct would interfere with Plaintiff's prospective economic advantage, you may infer from that fact that Defendant intended to cause the disruption.

Authorities: *Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1153, 1159, 131 Cal.Rptr.2d 29, 63 P.3d 937 ; *Della Penna v. Toyota Motor Sales, U.S.A., Inc.* (1995) 11 Cal.4th 376, 392-393, 45 Cal.Rptr.2d 436, 902 P.2d 740 ; *Savage v. Pacific Gas & Elec. Co.* (1993) 21 Cal.App.4th 434, 449, 450, 26 Cal.Rptr.2d 305 ; *Ramona Manor Convalescent Hosp. v. Care Enters.* (1986) 177 Cal.App.3d 1120, 1130-1136, 225 Cal.Rptr. 120 .

[2] Use of Instruction

This instruction should be used when defendant's intent to interfere with plaintiff's prospective economic advantage is at issue. If the claim is for intentionally inducing breach of contract, see *CACI No. 2200* and *CACI No. 2203*, and *MB 2200A.05*.

For related Judicial Council instructions, see [3][b], *below*.

[3] Comment

[a] Intent Requirement

To prevail on a cause of action for intentional interference with prospective economic advantage, the plaintiff must prove that defendant intentionally engaged in wrongful acts or conduct designed to interfere with or disrupt the relationship [*Della Penna v. Toyota Motor Sales, U.S.A., Inc.* (1995) 11 Cal.4th 376, 380, 392-393, 45 Cal.Rptr.2d 436, 902 P.2d 740 (adding requirement that interfering conduct be "wrongful"); *Savage v. Pacific Gas & Elec. Co.* (1993) 21 Cal.App.4th 434, 449, 450, 26 Cal.Rptr.2d 305 ; see *Tuck Beckstoffer Wines LLC v. Ultimate Dist., Inc.* (N.D. Cal. 2010) 682 F.Supp.2d 1003, 1021 ; *Monex Deposit Co. v. Gilliam* (C.D. Cal. 2010) 680 F.Supp.2d 1148, 1163 ; *TPS Utilicom Servs. v. AT&T Corp.* (C.D. Cal. 2002) 223 F.Supp. 2d 1089, 1103]. In *Della Penna v. Toyota Motor Sales, U.S.A., Inc.*, the California Supreme Court held that the defendant's interference must be "wrongful 'by some measure beyond the fact of the interference itself,' " but declined in that case to define the scope of "wrongfulness" [*Della Penna v. Toyota Motor Sales, U.S.A., Inc.* (1995) 11 Cal.4th 376, 392-393, 45 Cal.Rptr.2d 436, 902 P.2d 740 ; see also MB 2200A.04].

The California Supreme Court subsequently held that an act is independently wrongful if it is unlawful--that is, if it is proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal standard [*Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1159, 131 Cal.Rptr.2d 29, 63 P.3d 937 ; see *Monex Deposit Co. v. Gilliam* (C.D. Cal. 2010) 680 F.Supp.2d 1148, 1163 ; see also MB 2200A.01].

The tort of intentional interference with prospective economic advantage does not require a plaintiff to plead that the defendant acted with the specific intent, or purpose, of disrupting the plaintiff's prospective economic advantage. Instead, to satisfy the intent requirement for this tort, it is sufficient to plead that the defendant knew that the interference was certain or substantially certain to occur as a result of the defendant's action [*Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1153, 131 Cal.Rptr.2d 29, 63 P.3d 937].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 22, *California Judicial Council Economic Interference Instructions*]:

CACI No. 2202, Intentional Interference With Prospective Economic Relations

CACI No. 2203, Intent

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewTortsBusiness TortsCommercial InterferenceProspective AdvantageGeneral OverviewTortsBusiness TortsCommercial InterferenceProspective AdvantageElements



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CHAPTER 22A Matthew Bender Interference With Economic Relations Instructions

3-22A California Forms of Jury Instruction MB 2200A.07

MB 2200A.07 Intentional Interference by Unlawful Means**[1] Instruction**

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Plaintiff contends that Defendant used the following unlawful means to interfere with the prospective economic advantage between Plaintiff and _____ [name of third party]: _____ [describe unlawful means at issue in case, e.g., fraud, libel, slander, force, illegal detention, coercion, physical violence, or threats thereof].

I will instruct you momentarily on the elements Plaintiff must prove to establish Defendant's unlawful conduct. However, for our purposes here, if you find that Defendant committed the unlawful acts alleged by Plaintiff and that those acts were intended to and did interfere with Plaintiff's prospective economic advantage based on the business or economic relationship between Plaintiff and _____ [name of third party], causing damage to Plaintiff, then you must disregard any evidence Defendant may have introduced in an effort to explain or justify [his/her/its] conduct and rule in favor of Plaintiff on the claim for intentional interference.

Authorities: *Della Penna v. Toyota Motor Sales, U.S.A., Inc.* (1995) 11 Cal.4th 376, 392, 45 Cal.Rptr.2d 436, 902 P.2d 740 ; *Imperial Ice Co. v. Rossier* (1941) 18 Cal.2d 33, 35, 112 P.2d 631 ; *Savage v. Pacific Gas & Elec. Co.* (1993) 21 Cal.App.4th 434, 449, 26 Cal.Rptr.2d 305 ; *Winn v. McCulloch Corp.* (1976) 60 Cal.App.3d 663, 672, 131 Cal.Rptr. 597 ; *Skelly v. Richman* (1970) 10 Cal.App.3d 844, 862, 89 Cal.Rptr. 556 ; *Uptown Enters. v. Strand* (1961) 195 Cal.App.2d 45, 51, 15 Cal.Rptr. 486 .

[2] Use of Instruction

This instruction is drafted in the form of a directed verdict instruction. It should be used when plaintiff contends that the defendant's conduct in interfering with the prospective economic advantage between the plaintiff and the third party was, standing alone, unlawful.

For related Judicial Council instructions, see [3][b], *below*.

[3] Comment

[a] Unlawful Means

A defendant is liable for intentionally interfering with prospective economic advantage if the defendant employs means that are in themselves unlawful [*Della Penna v. Toyota Motor Sales, U.S.A., Inc.* (1995) 11 Cal.4th 376, 392, 45 Cal.Rptr.2d 436, 902 P.2d 740 ; *Imperial Ice Co. v. Rossier* (1941) 18 Cal.2d 33, 35, 112 P.2d 631 ; *Savage v. Pacific Gas & Elec. Co.* (1993) 21 Cal.App.4th 434, 449, 26 Cal.Rptr.2d 305 ; *Skelly v. Richman* (1970) 10 Cal.App.3d 844, 862, 89 Cal.Rptr. 556]. If the means were, in fact, unlawful, a defendant is not permitted to evade liability by presenting evidence explaining or justifying the conduct [*Skelly v. Richman* (1970) 10 Cal.App.3d 844, 862, 89 Cal.Rptr. 556 ; see *Savage v. Pacific Gas & Elec. Co.* (1993) 21 Cal.App.4th 434, 449, 26 Cal.Rptr.2d 305].

The unlawful means that are frequently cited include fraud, libel, slander, force, illegal detention, coercion, and physical violence or threats thereof [*Imperial Ice Co. v. Rossier* (1941) 18 Cal.2d 33, 35, 112 P.2d 631 ; *Skelly v. Richman* (1970) 10 Cal.App.3d 844, 862, 89 Cal.Rptr. 556 ; *Uptown Enters. v. Strand* (1961) 195 Cal.App.2d 45, 51, 15 Cal.Rptr. 486]. Other recognized unlawful means include conduct that has as its objective the violation of state or federal antitrust laws [*Speegle v. Board of Fire Underwriters* (1946) 29 Cal.2d 34, 44, 172 P.2d 867].

Among the most common unlawful means employed by defendants to interfere with or disrupt an economic relationship appear to be libel or slander, or some derivation of libel or slander, such as trade libel or slander of title [see *Lipman v. Brisbane Elementary Sch. Dist.* (1961) 55 Cal.2d 224, 232-233, 11 Cal.Rptr. 97, 359 P.2d 465 (defamation); *Savage v. Pacific Gas & Elec. Co.* (1993) 21 Cal.App.4th 434, 449-450, 26 Cal.Rptr.2d 305 (defamation); *Baker v. Kale* (1947) 83 Cal.App.2d 89, 189 P.2d 57 (slander of title); *Guillory v. Godfrey* (1955) 134 Cal.App.2d 628, 286 P.2d 474 (trade libel in addition to physical intimidation)]. However, when the plaintiff seeks to recover damages for intentional interference based on alleged falsehoods, First Amendment protections apply [*Blatty v. New York Times Co.* (1986) 42 Cal.3d 1033, 1045, 232 Cal.Rptr. 542, 728 P.2d 1177 ; *Morningstar, Inc. v. Superior Court* (1994) 23 Cal.App.4th 676, 696, 29 Cal.Rptr.2d 547]. For general discussion of First Amendment restrictions on the imposition of liability for defamatory statements or other false information, see Levy, Golden & Sacks, California Torts, Ch. 45, *Defamation* (Matthew Bender).

Counsel should keep in mind that it will not be sufficient merely to allege that a defendant used unlawful means; the plaintiff will have to prove that the means were, in fact, unlawful [*Lipman v. Brisbane Elementary Sch. Dist.* (1961) 55 Cal.2d 224, 233, 11 Cal.Rptr. 97, 359 P.2d 465]. As a matter of pleading and proof, this will generally not impose any additional burden on the plaintiff, as the plaintiff will typically be suing the defendant not only on the tortious interference claim but separately on the unlawful means claim as well. Thus, for example, if the defendant defamed the plaintiff for the purpose of interfering with the plaintiff's prospective economic advantage with a third party, the plaintiff would typically sue the defendant not only for intentional interference, but for defamation as well. For specific instructions regarding unlawful means that might arise in an intentional interference case, see Chs. 19, *California Judicial Council Fraud or Deceit Instruction*, 19A, *Matthew Bender Fraud and Deceit Instructions*, 33, *California Judicial Council Unfair Practices Act Instructions*, 33A, *Matthew Bender Unfair Competition Instructions*, and 70A, *Matthew Bender Trade Libel and Disparagement Instructions*.

LexisNexis Matthew Bender Expert Practice Tip--Disregarding Defendant's Evidence: This can be a very useful instruction from plaintiff's point of view because it instructs the jury to disregard any evidence the defendant may have introduced to explain or justify defendant's conduct. In essence, the instruction tells the jury that if defendant committed the underlying wrongful act, then there is no justification. *By Ronald Oster*

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 22, *California Judicial Council Economic Interference Instructions*]:

CACI No. 2202 Intentional Interference With Prospective Economic Relations

CACI No. 2203 Intent

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewTortsBusiness TortsCommercial InterferenceGeneral OverviewTortsBusiness TortsUnfair Business PracticesElements



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CHAPTER 22A Matthew Bender Interference With Economic Relations Instructions

3-22A California Forms of Jury Instruction MB 2200A.08

MB 2200A.08 Interference With Contractual Relations That Prevents Plaintiff's Performance or Renders Plaintiff's Performance More Burdensome or Expensive

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

As I have instructed you, one of the essential elements that Plaintiff must establish to prevail on a claim for intentional interference with contractual relations is that Defendant's actions caused actual disruption of the relationship between Plaintiff and _____ [name of third party]. To establish this element, Plaintiff may prove that Defendant's conduct either prevented Plaintiff from performing under [his/her/its] contract with _____ [name of third party] or made Plaintiff's performance more burdensome or expensive than it would otherwise have been.

Authorities: *Lipman v. Brisbane Elementary Sch. Dist.* (1961) 55 Cal.2d 224, 232, 11 Cal.Rptr. 97, 359 P.2d 465 ; *Fifield Manor v. Finston* (1960) 54 Cal.2d 632, 636, 7 Cal.Rptr. 377, 354 P.2d 1073 .

[2] Use of Instruction

This instruction is for use when a defendant's actions prevented the plaintiff from meeting its obligation under a contractual relationship with a third party or made the plaintiff's performance more burdensome or expensive.

For related Judicial Council instructions, see [3][b], *below*.

[3] Comment

[a] Interference That Prevents Performance or Makes Performance More Burdensome or Expensive

Intentional interference claims typically involve conduct on the defendant's part that induces a third party to breach its contract or sever its economic relationship with the plaintiff. However, the plaintiff can state a cause of action for

intentional interference if the defendant's conduct was not directed at the third party but rather at the plaintiff instead, preventing the plaintiff from performing plaintiff's contractual obligations with the third party or making that performance more burdensome or expensive, thereby diminishing the net benefit the plaintiff would otherwise derive from mutual performance [*Lipman v. Brisbane Elementary Sch. Dist.* (1961) 55 Cal.2d 224, 232, 11 Cal.Rptr. 97, 359 P.2d 465 ; *Fifield Manor v. Finston* (1960) 54 Cal.2d 632, 636, 7 Cal.Rptr. 377, 354 P.2d 1073 ; *Greenberg v. Hollywood Turf Club* (1970) 7 Cal.App.3d 968, 975, 86 Cal.Rptr. 885].

None of the cases cited above elaborate on what is meant by conduct that renders a plaintiff's performance more burdensome or expensive. If this standard is interpreted expansively, plaintiffs may be entitled to get to a jury on a claim for intentional interference even though the defendant is only guilty of a simple breach of contract. For example, if the defendant breaches a supply contract with the plaintiff, that breach could, in turn, make it more difficult or expensive for the plaintiff to perform under contracts that plaintiff may have with customers. Under the authorities cited, the plaintiff could conceivably state a cause of action against the defendant in this situation for intentional interference. As a result, the defendant would face tort damages for his or her breach of contract, and the only defense may be that he or she did not intend, by breaching the contract with the plaintiff, to interfere with the plaintiff's relationship with others. For instructions on the issue of intent, see *CACI No. 2203* and MB 2200A.05.

If the only damage caused to the plaintiff by the defendant's conduct is the burden and expense of defending a potentially meritorious lawsuit, then no cause of action is stated. To state a cause of action for intentional interference with contractual relations based on the allegation that the defendant induced a third party to file a lawsuit, such as a declaratory relief action seeking a judicial determination of whether the third party may terminate the contract with the plaintiff according to its terms, the plaintiff must allege that the lawsuit was brought without probable cause and that it was resolved or otherwise concluded in the plaintiff's favor [*Pacific Gas & Elec. Co. v. Bear Stearns & Co.* (1990) 50 Cal.3d 1118, 1137, 270 Cal.Rptr. 1, 791 P.2d 587 ; see *CACI No. 2201*; MB 2200A.03].

LexisNexis Matthew Bender Expert Practice Tip--Use Care With This Argument: The "more burdensome or expensive" aspect may be difficult to prove and/or rebut, another area that needs a careful jury argument. *By Rex Heeseman*

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 22, *California Judicial Council Economic Interference Instructions*]:

CACI No. 2200 Inducing Breach of Contract

CACI No. 2201 Intentional Interference With Contractual Relations

CACI No. 2203 Intent

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewTortsBusiness TortsCommercial InterferenceContractsGeneral OverviewTortsBusiness TortsCommercial InterferenceContractsElements



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CHAPTER 22A Matthew Bender Interference With Economic Relations Instructions

3-22A California Forms of Jury Instruction MB 2200A.09

MB 2200A.09 Negligent Interference With Prospective Economic Advantage

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Plaintiff has alleged that Defendant negligently interfered with _____ [a business or economic relationship or prospective economic advantage] between Plaintiff and _____ [name of third party]. To recover on this claim, Plaintiff has the burden of proving all of the following by a preponderance of the evidence:

- 1. That there was an existing business or economic relationship between Plaintiff and _____ [name of third party] and that this relationship was reasonably certain to produce future economic benefits to Plaintiff;**
- 2. That Defendant knew of that relationship;**
- 3. That Defendant negligently committed independently wrongful acts that disrupted the relationship;**
- 4. That the relationship was, in fact, disrupted; and**
- 5. That Plaintiff suffered damages caused by the disruption of the relationship.**

To prove that Defendant acted negligently, Plaintiff has the burden of establishing that Defendant owed Plaintiff a duty of care to prevent or minimize foreseeable harm and failed to exercise ordinary care under the circumstances. Ordinary care is that degree of care that would be exercised by a reasonably prudent person under the same or similar circumstances.

Authorities: Civ. Code § 1714; *Hsu v. OZ Optics Ltd.* (N.D. Cal. 2002) 211 F.R.D. 615 ; *J'Aire Corp. v.*

Gregory (1979) 24 Cal.3d 799, 803-805, 157 Cal.Rptr. 407, 598 P.2d 60 ; *Tucker v. Lombardo* (1956) 47 Cal.2d 457, 462, 303 P.2d 1041 ; *National Med. Transp. Network v. Deloitte & Touche* (1998) 62 Cal.App.4th 412, 440, 72 Cal.Rptr.2d 720 ; *North Am. Chem. Co. v. Superior Court* (1997) 59 Cal.App.4th 764, 786-787, 69 Cal.Rptr.2d 466 ; *LiMandri v. Judkins* (1997) 52 Cal.App.4th 326, 348-349, 349 60 Cal.Rptr.2d 539 ; *Chameleon Eng'g Corp. v. Air Dynamics, Inc.* (1980) 101 Cal.App.3d 418, 423, 161 Cal.Rptr. 463 .

[2] Use of Instruction

This instruction should be used when the cause of action is based on negligent, rather than intentional, interference with prospective economic advantage. Because the potential fact situations are so varied, the instruction is general in nature, and some modification may be required to tailor it to the specific fact situation at hand.

A preponderance of the evidence instruction must be used with this instruction [see Ch. 2, *California Judicial Council Evidence Instructions*, CACI No. 200 ("More Likely True than Not True")]. An instruction defining "cause" must also be used with this instruction [see, e.g., Ch. 4, *California Judicial Council Negligence Instructions*, CACI No. 430 ("Causation: Substantial Factor")].

For related Judicial Council instructions, see [3][d], *below*.

LexisNexis Matthew Bender Expert Practice Tip--CAUTION!: Negligent interference with prospective economic advantage is now not a favored tort. That is, *J'Aire* [see [3][a], *below*] is not generally looked upon with much favor. *By Rex Heeseman*

[3] Comment

[a] Origin of Tort

The tort of negligent interference with prospective economic advantage was first recognized in *J'Aire Corp. v. Gregory* [*J'Aire Corp. v. Gregory* (1979) 24 Cal.3d 799, 803-805, 157 Cal.Rptr. 407, 598 P.2d 60]. The complaint alleged that the plaintiff operated a restaurant in leased premises. The landlord entered into a contract with the defendant to make improvements on the premises. Due to the defendant's negligence, the work was not finished on time, which resulted in loss of business and resulting loss of profits. The California Supreme Court held that the allegations stated a cause of action for negligent interference with prospective economic advantage. The Court found that the defendant owed a duty of care to the plaintiff-lessee in this situation and that a plaintiff may recover for loss of expected economic advantage through the negligent performance of a contract even though the parties were not in contractual privity [*J'Aire Corp. v. Gregory* (1979) 24 Cal.3d 799, 804-805, 157 Cal.Rptr. 407, 598 P.2d 60].

The Court noted that recovery in these cases is limited to unusual instances in which all of the following are true [*J'Aire Corp. v. Gregory* (1979) 24 Cal.3d 799, 808, 157 Cal.Rptr. 407, 598 P.2d 60 ; see *Ott v. Alfa-Laval Agri, Inc.* (1995) 31 Cal.App.4th 1439, 1455-1456, 37 Cal.Rptr.2d 790 (denying recovery to dairy farmers for alleged negligence of milking machine manufacturer due to lack of special relationship and foreseeability requirements for imposition of duty under *J'Aire*)]:

- The risk of harm is foreseeable and closely connected with the defendant's conduct;
- Damages are not wholly speculative; and
- The injury is not part of the plaintiff's ordinary business risk.

Accordingly, an award of damages for profits lost by an interrupted business should be confined to the interruption

period and that additional period of time reasonably necessary to return the business to operation at its former capacity [*Blake v. E. Thompson Petroleum Repair Co.* (1985) 170 Cal.App.3d 823, 834, 216 Cal.Rptr. 568].

In a case arising in another context, a cause of action was stated against a subcontractor for negligent failure to supply a second subcontractor, when the failure caused the second subcontractor to breach its contract with the plaintiff, to the plaintiff's damage [*Chameleon Eng'g Corp. v. Air Dynamics Inc.* (1980) 101 Cal.App.3d 418, 423, 161 Cal.Rptr. 463].

[b] Independent Element of Wrongfulness

In one case, the court of appeal held that the trial court erred in giving a jury instruction on negligent interference with prospective economic advantage that omitted the element of "independent wrongfulness," citing *Della Penna v. Toyota Motor Sales, U.S.A., Inc.* [*National Med. Transp. Network v. Deloitte & Touche* (1998) 62 Cal.App.4th 412, 440, 72 Cal.Rptr.2d 720 ; see *Della Penna v. Toyota Motor Sales, U.S.A., Inc.* (1995) 11 Cal.4th 376, 392-393, 45 Cal.Rptr.2d 436, 902 P.2d 740 ; see also *Lange v. TIG Ins. Co.* (1998) 68 Cal.App.4th 1179, 1187-1188, 81 Cal.Rptr.2d 39 (no independently wrongful conduct occurred, appellant owed respondents no duty of care, and trial court erred in instructing jury otherwise)]. The court further concluded that the instructional error prejudiced the defense [*National Med. Transp. Network v. Deloitte & Touche* (1998) 62 Cal.App.4th 412, 440-442, 72 Cal.Rptr.2d 720].

In *Della Penna*, the California Supreme Court held that "a plaintiff seeking to recover for alleged interference with prospective economic relations has the burden of pleading and proving that the defendant's interference was wrongful 'by some measure beyond the fact of the interference itself' " [*Della Penna v. Toyota Motor Sales, U.S.A., Inc.* (1995) 11 Cal.4th 376, 392-393, 45 Cal.Rptr.2d 436, 902 P.2d 740 (quoting *Top Service Body Shop, Inc. v. Allstate Ins. Co.* (1978) 283 Or. 201, 209, 582 P.2d 1365)]. The instruction set forth in [1], above, reflects this element. For further discussion of *Della Penna*, see MB 2200A.04[3].

In another case, the plaintiff alleged that the defendant failed to provide a sufficient statement of the unpaid balance due on a promissory note secured by a deed of trust on real property that the plaintiff was attempting to sell, interfering with prospective sales of the property. The trial court gave a modified instruction based on CACI No. 2204 (Negligent Interference With Prospective Economic Relations). The Directions for Use that accompany CACI No. 2204 state [see *Venhaus v. Shultz* (2007) 155 Cal.App.4th 1072, 1078, 66 Cal.Rptr.3d 432 ; see also CACI No. 2204; Ch. 22, California Judicial Council Economic Interference Instructions]:

Regarding the fifth element [that the defendant engaged in wrongful conduct through a specific act, e.g., breach of contract], the judge must specifically state for the jury the conduct that the judge has determined as a matter of law would satisfy the "wrongful conduct" standard.

The fifth paragraph of the instruction given to the jury read:

That [defendant] engaged in wrongful conduct by [P] a. intentionally misrepresenting the amount owed on the loan, or [P] b. willfully failing to submit a written payoff statement within 21 days after receiving a written demand. Willfully means an intentional failure to comply, without just cause or excuse.

Although the defendant did not object at trial, the appellate court held that the modified instruction was erroneous and prejudicial. The court stated that it had been directed to no California authority, and found none, for the trial court's conclusion that the wrongful conduct must be intentional or willful. Although the defendant's conduct must "fall outside the boundaries of fair competition," negligent misconduct or the violation of a statutory obligation suffice. The approved CACI No. 2204 does not indicate otherwise and, in fact, indicates that either a misrepresentation or "violation of statute" is sufficient [see *Venhaus v. Shultz* (2007) 155 Cal.App.4th 1072, 1078-1080, 66 Cal.Rptr.3d 432 ; see also CACI No. 2204; Ch. 22, California Judicial Council Economic Interference Instructions].

[c] Burden of Proof

The plaintiff's burden of proof on the issue of the defendant's breach of the standard of care is that applicable in a traditional negligence action, i.e., that the defendant failed to exercise ordinary care [*Civ. Code § 1714(a)*], defined as that level of care that would be exercised by a reasonably prudent person under the same or similar circumstances [*Tucker v. Lombardo* (1956) 47 Cal.2d 457, 462, 303 P.2d 1041].

[d] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 22, *California Judicial Council Economic Interference Instructions*]:

CACI No. 2204, Negligent Interference With Prospective Economic Relations

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewEvidenceProcedural ConsiderationsBurdens of ProofGeneral OverviewTortsBusiness TortsCommercial InterferenceProspective AdvantageGeneral OverviewTortsBusiness TortsCommercial InterferenceProspective AdvantageElementsTortsNegligenceProofGeneral Overview



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CHAPTER 22A Matthew Bender Interference With Economic Relations Instructions

3-22A California Forms of Jury Instruction MB 2200A.10

MB 2200A.10 Justification or Privilege--Balancing of Interests

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

If you find that Defendant intentionally interfered with or disrupted Plaintiff's contractual relationship or prospective economic advantage with _____ [name of third party], you must then decide whether Defendant's conduct was justified or privileged. In making this decision you must, as a general matter, balance the importance of the objective that Defendant sought to achieve by [his/her/its] interference against the importance of Plaintiff's interest with which Defendant interfered. You must keep in mind both the nature of Defendant's conduct and the relationship of all the parties involved.

Authorities: *Herron v. State Farm Mut. Ins. Co.* (1961) 56 Cal.2d 202, 206, 14 Cal.Rptr. 294, 363 P.2d 310 ; *Sade Shoe Co. v. Oschin & Snyder* (1984) 162 Cal.App.3d 1174, 1180-1181, 209 Cal.Rptr. 124 ; *Rosenfeld, Meyer & Susman v. Cohen* (1983) 146 Cal.App.3d 200, 230, 194 Cal.Rptr. 180 , overruled on other grounds, *Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, 28 Cal.Rptr.2d 475, 869 P.2d 454 ; *Richardson v. La Rancherita of La Jolla, Inc.* (1979) 98 Cal.App.3d 73, 80, 159 Cal.Rptr. 285 .

[2] Use of Instruction

This instruction should be used when the defendant has introduced evidence to the effect that conduct interfering with plaintiff's contractual relationship or prospective economic advantage was justified or privileged. This instruction is general in nature by necessity, as there is no defined set of elements that a defendant must prove to establish the affirmative defense of justification or privilege. Instead, the cases characterize the defense of justification as a "balancing of interests" [*Herron v. State Farm Mut. Ins. Co.* (1961) 56 Cal.2d 202, 206, 14 Cal.Rptr. 294, 363 P.2d 310 ; *Freed v. Manchester Serv., Inc.* (1958) 165 Cal.App.2d 186, 190, 331 P.2d 689].

None of the authorities following this instruction specifically authorize the use of this instruction. Instead, as with most

of the issues related to the tort of intentional interference, much of the discussion of justification or privilege occurred at the pleading stage, instead of following trial. To make this instruction more understandable to the jury, counsel should consider a specific discussion in the instruction of the objective that the defendant sought to achieve apart from interfering with the plaintiff's relationship. Counsel should also consult the more specific instruction in MB 2200A.12 regarding damages.

This instruction should not be given if the defendant's conduct in interfering with the contractual relationship or prospective economic advantage was, standing alone, unlawful [*Skelly v. Richman* (1970) 10 Cal.App.3d 844, 862, 89 Cal.Rptr. 556 ; see MB 2200A.07]. Moreover, the plaintiff's counsel should argue against the use of this instruction if the plaintiff has shown that the defendant was motivated by a desire to injure the plaintiff. If the defendant has acted in that manner, it could be argued that the defendant's conduct might never be justified [*Bridges v. Cal-Pac. Leasing Co.* (1971) 16 Cal.App.3d 118, 132, 93 Cal.Rptr. 796].

[3] Comment

[a] Balancing of Interests

Whether justification existed for the defendant's conduct is a question of fact that the jury must determine by examining all of the circumstances of the case [*Gianelli Distrib. Co. v. Beck & Co.* (1985) 172 Cal.App.3d 1020, 1054, 219 Cal.Rptr. 203 , *overruled on other grounds*, *Dore v. Arnold Worldwide, Inc.* (2006) 39 Cal.4th 384, 394, 46 Cal.Rptr.3d 668, 139 P.3d 56] . This instruction reflects the fact that the cases have not established any precise formula or standard by which to judge a defendant's conduct to determine if it was justified [*Freed v. Manchester Serv., Inc.* (1958) 165 Cal.App.2d 186, 190, 331 P.2d 689]. Instead, the trier of fact is essentially left to determine, through a balancing of interests, whether the defendant's conduct was "fair and reasonable under the circumstance" [*Herron v. State Farm Mut. Ins. Co.* (1961) 56 Cal.2d 202, 206, 14 Cal.Rptr. 294, 363 P.2d 310 ; *Sade Shoe Co. v. Oschin & Snyder* (1984) 162 Cal.App.3d 1174, 1180-1181, 209 Cal.Rptr. 124 ; *Rosenfeld, Meyer & Susman v. Cohen* (1983) 146 Cal.App.3d 200, 230, 194 Cal.Rptr. 180 , *overruled on other grounds*, *Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, 28 Cal.Rptr.2d 475, 869 P.2d 454]. In this way, this instruction tracks the courts' general pronouncements as to the defense of justification [see *Lowell v. Mother's Cake & Cookie Co.* (1978) 79 Cal.App.3d 13, 20-21, 144 Cal.Rptr. 664 ; *Greenberg v. Hollywood Turf Club* (1970) 7 Cal.App.3d 968, 977, 86 Cal.Rptr. 885 ; *Masoni v. Board of Trade of S.F.* (1953) 119 Cal.App.2d 738, 742, 260 P.2d 205].

This instruction is the simplest statement of the interests to be balanced by the trier of fact in deciding whether the defendant's interference or disruption was justified. Some courts have also cited favorably the more elaborate approach adopted by the Restatement (Second) of Torts. "In determining whether an actor's conduct intentionally interfering with a contract or a prospective contractual relation of another is improper or not, consideration is given to the following factors:

- The nature of the actor's conduct;
- The actor's motive;
- The interests of the other with which the actor's conduct interferes;
- The interests sought to be advanced by the actor;
- The social interests in protecting the freedom of action of the actor and the contractual interests of the other;
- The proximity or remoteness of the actor's conduct to the interference; and

■ The relations between the parties" [Restatement (Second) of Torts § 767; *see*; *Rosenfeld, Meyer & Susman v. Cohen* (1983) 146 Cal.App.3d 200, 230, 194 Cal.Rptr. 180, *overruled on other grounds*, *Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, 28 Cal.Rptr.2d 475, 869 P.2d 454; *Lowell v. Mother's Cake & Cookie Co.* (1978) 79 Cal.App.3d 13, 21, 144 Cal.Rptr. 664; *Masoni v. Board of Trade of S.F.* (1953) 119 Cal.App.2d 738, 742, 260 P.2d 205].

Although courts have occasionally cited the Restatement approach in specific reference to the affirmative defense of privilege or justification, the Restatement itself does not view the issue in terms of justification, but rather in terms of whether a defendant's conduct was "improper" under the circumstances. The Restatement takes this approach because the tort of intentional interference does not have a definitive set of rules as to when a defendant's conduct is justified or privileged, as do other torts such as libel [Restatement (Second) of Torts § 767].

Although there is no definitive set of rules as to when a defendant's conduct is privileged or justified, the cases in California are clear that privilege or justification is an affirmative defense to be pled and proved by the defendant [*see Herron v. State Farm Mut. Ins. Co.* (1961) 56 Cal.2d 202, 207, 14 Cal.Rptr. 294, 363 P.2d 310; *Saunders v. Superior Court* (1994) 27 Cal.App.4th 832, 843, 33 Cal.Rptr.2d 438; *Lowell v. Mother's Cake & Cookie Co.* (1978) 79 Cal.App.3d 13, 18-19, 144 Cal.Rptr. 664]. Thus, under the law's present state the jury must be instructed on this issue when the defendant has claimed that his or her conduct was privileged or justified. The instruction set forth above would seem more understandable than the lengthy and general approach adopted by the Restatement and cited with approval by several courts. At the same time, the instruction clearly advises the jury that the defense of justification or privilege is not a clear cut issue, but one that must be resolved by a balancing of interests.

[b] "Manager's Privilege"

To the extent a plaintiff seeks to impose liability on individual managerial employees for alleged tortious interference with plaintiff's contract with their employer, these individuals may well invoke the so-called "manager's privilege" as an affirmative defense. Under this privilege, a managerial employee or agent may counsel his or her employer or principal to breach a contract with a third party so long as he or she reasonably believes the contract to be harmful to the employer's or principal's best interests and does not act out of any selfish or self-interested motive [*Halvorsen v. Aramark Unif. Servs., Inc.* (1998) 65 Cal.App.4th 1383, 1391-1393, 77 Cal.Rptr.2d 383; *Aalgaard v. Merchants Nat'l Bank* (1990) 224 Cal.App.3d 674, 684, 274 Cal.Rptr. 81]. Whether the privilege is qualified or absolute is the subject of continuing uncertainty [*Aalgaard v. Merchants Nat'l Bank* (1990) 224 Cal.App.3d 674, 685, 274 Cal.Rptr. 81; *see, e.g., Halvorsen v. Aramark Unif. Servs., Inc.* (1998) 65 Cal.App.4th 1383, 1395-1396, 77 Cal.Rptr.2d 383 (when at-will employee is terminated, manager's privilege is absolute)].

[c] First Amendment Rights

If defendant's intentional interference is motivated by political considerations, such as advocating a boycott against a newspaper because of its editorial policies, First Amendment rights may be paramount and tip the balance in favor of defendants [*Environmental Planning & Info. Council v. Superior Court* (1984) 36 Cal.3d 188, 194, 203 Cal.Rptr. 127, 680 P.2d 1086].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Torts Business Torts Commercial Interference Contracts Defenses Torts Business Torts Commercial Interference Employment Relationships Defenses Torts Business Torts Commercial Interference Prospective Advantage Defenses



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CHAPTER 22A Matthew Bender Interference With Economic Relations Instructions

3-22A California Forms of Jury Instruction MB 2200A.11

MB 2200A.11 Efforts to Secure Performance of Contract With Third Party as Justification for Defendant's Conduct**[1] Instruction**

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Plaintiff and Defendant both had contracts with _____ [name of third party]. If you find that Defendant's conduct was lawful and undertaken for the purpose of ensuring that _____ [name of third party] performed [his/her/its] contract with Defendant, then you must find in Defendant's favor even though that conduct _____ [(interfered with or disrupted) the contractual relations between Plaintiff and _____ (name of third party) or caused _____ (name of third party) to breach (his/her/its) contract with Plaintiff].

Authorities: *Pankow Constr. Co. v. Advance Mortgage Corp.* (9th Cir. 1980) 618 F.2d 611, 616 (applying California law); *Imperial Ice Co. v. Rossier* (1941) 18 Cal.2d 33, 37, 112 P.2d 631 ; *Webber v. Inland Empire Invs., Inc.* (1999) 74 Cal.App.4th 884, 906, 88 Cal.Rptr.2d 594 .

[2] Use of Instruction

This instruction should be given in those cases when the conduct being challenged by the plaintiff was undertaken by the defendant to secure performance of a contract that the defendant had with the third party. Whether the defendant's conduct will be considered privileged under the circumstances (e.g., under the privilege to engage in lawful acts of competition), will usually be resolved by the court as a matter of law [*Pankow Constr. Co. v. Advance Mortgage Corp.* (9th Cir. 1980) 618 F.2d 611, 616 (affirming motion to dismiss)]. However, like other privileges [see MB 2200A.10], this privilege depends on the defendant's motive or purpose and also on whether the conduct at issue was lawful [*Imperial Ice Co. v. Rossier* (1941) 18 Cal.2d 33, 35-37, 112 P.2d 631]. Thus, questions of fact may remain for the jury to resolve.

LexisNexis Matthew Bender Expert Practice Tip--Beware!: Proving that one's activity or action should be deemed "justified" or "privileged" is a difficult concept for many jurors and it is often

challenging to make the point in a closing argument. *By Rex Heeseman*

[3] Comment

If two parties have separate contracts with a third, each may resort to any legitimate means at his or her disposal to secure performance of his or her contract even though the necessary result will be to cause a breach or impose added burdens on the performance of the other contract [*Imperial Ice Co. v. Rossier (1941) 18 Cal.2d 33, 37, 112 P.2d 631*].

This privilege was asserted in a case before the Ninth Circuit, in which the plaintiff had a contract with a developer to construct an apartment complex. The developer also had a loan agreement with a mortgage lender to supply funds for the development. The developer defaulted on interest payments under the loan agreement, and the lender ceased disbursements under the loan agreement to plaintiff, which left plaintiff unpaid for certain construction work. The lender and the developer eventually reached a settlement to cure the default, which still left the plaintiff unpaid. The plaintiff claimed that through this settlement the lender had intentionally interfered with the plaintiff's contract with the developer. The District Court dismissed the action and the Ninth Circuit affirmed, based on the lender's right to secure performance of its own contract [*Pankow Constr. Co. v. Advance Mortgage Corp. (9th Cir. 1980) 618 F.2d 611, 616*].

In a case involving this instruction [*Webber v. Inland Empire Invs., Inc. (1999) 74 Cal.App.4th 884, 905-906, 88 Cal.Rptr.2d 594*], a corporation (Hyatt) sold four parcels of real property to a mortgage company, which executed a promissory note in Hyatt's favor, secured by a trust deed on one parcel. In addition, a bank loaned the mortgage company part of the purchase price, secured by a trust deed on all four parcels. That trust deed was recorded first. The title to the property was transferred twice within the next two years; Hyatt assigned its note to an individual. The mortgage company failed to make any payments on the note, and the Hyatt note's assignee commenced foreclosure proceedings. The mortgage company owner, who could have paid off the note, instead did the following:

- Transferred the title to the property to another company he controlled;
- Used another corporation he controlled (Inland) to purchase the note from the bank to the mortgage company;
- Had the mortgage company default on the note; and
- Had Inland foreclose on the property, thus eliminating the security of the assignee of the original Hyatt note, which was secured by one of the parcels.

The trial court characterized these transactions by the mortgage company as a "sham foreclosure" [*Webber v. Inland Empire Invs., Inc. (1999) 74 Cal.App.4th 884, 893, 88 Cal.Rptr.2d 594*]. The assignee of the Hyatt note and holder of the junior lien, which was extinguished by virtue of the foreclosure of the senior lien, sued the owner of the mortgage company and the business entities involved in these transactions, alleging among other causes of action conspiracy to intentionally interfere with a contractual relationship. The defendants proposed a special jury instruction asserting Inland's right of foreclosure to enforce its note, based on the instruction in [1], *above*. The trial court refused to give this and a related instruction because they would have isolated the component parts of the transaction in question to show that each part was proper. The court felt that the pleadings did not authorize the defendants to approach the issue in this manner, although it allowed the defendants to argue to that effect [*Webber v. Inland Empire Invs., Inc. (1999) 74 Cal.App.4th 884, 905, 88 Cal.Rptr.2d 594*].

On appeal, the court noted that this instruction is a correct statement of the law. It stated that even if the trial court erred in failing to give this instruction, the error was nonprejudicial, because the jury was instructed on defendants' justification defense as set forth in Restatement Second of Torts § 767 (factors relating to whether interference is improper), and the defendants argued justification to the jury [*Webber v. Inland Empire Invs., Inc. (1999) 74*

Cal.App.4th 884, 906, 88 Cal.Rptr.2d 594].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewTortsBusiness TortsCommercial
InterferenceContractsGeneral OverviewTortsBusiness TortsCommercial InterferenceContractsDefenses



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CHAPTER 22A Matthew Bender Interference With Economic Relations Instructions

3-22A California Forms of Jury Instruction MB 2200A.12

MB 2200A.12 Damages**[1] Instruction**

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

If you find that Plaintiff is entitled to recover damages from Defendant for interfering with or disrupting the _____ [contractual relationship or prospective economic advantage] between Plaintiff and _____ [name of third party], then Plaintiff is entitled to recover damages in an amount that will compensate [him/her/it] for all of the following:

1. The financial loss resulting from the loss of the benefits of the [contractual relationship or prospective economic advantage];
2. Emotional distress or actual harm to Plaintiff's reputation, if either might reasonably have been expected to result from the interference or disruption; and
3. Any other loss or harm caused by Defendant's interference [optional (See [2] below, Use of Instruction), whether or not the loss or harm could have been anticipated by Defendant].

Authorities: Civ. Code § 3333; *Blank v. Kirwan* (1985) 39 Cal.3d 311, 330, 216 Cal.Rptr. 718, 703 P.2d 58 ; *Duff v. Engelberg* (1965) 237 Cal.App.2d 505, 508-509, 47 Cal.Rptr. 114 ; Restatement (Second) of Torts § 774A.

[2] Use of Instruction

This instruction should be used to describe the damages available for the tort of interference with contractual relations or with prospective economic advantage.

The optional bracketed language in paragraph 3 of the instruction is based on Civ. Code § 3333, which states the general

measure of damages for tort actions. Counsel for the plaintiff may wish to include this language, especially if the action for interference is combined with an action for the breach of the contract. The optional language helps distinguish the damages available for the tort of interference from those available for breach of contract. Damages for breach of contract, unlike tort damages, are limited to those deemed to be foreseeable under the standard established in *Hadley v. Baxendale* [*Hadley v. Baxendale* (1854) 9 Ex. 341]. For an instruction on the availability of consequential damages for a breach of contract for the sale of goods, see Ch. 3H, *Matthew Bender Commercial Code Sales Contract Instructions*, MB 300H.255.

The instruction in Ch. 3E, *Matthew Bender Contract Damages Instructions*, MB 300E.03, which explains the substantial factor test for causation, must be used with this instruction.

If punitive damages are at issue in a claim for libel, the instructions in Ch. 70A, *Matthew Bender Trade Libel or Disparagement Instructions*, MB 7000A.07 and MB 7000A.08, may be adapted for use with this instruction.

[3] Comment

The Restatement (Second) of Torts states that the damages available for interference with a contract or with contractual relations or with prospective economic advantage are as follows [Restatement (Second) of Torts § 774A; see Witkin, Summary of California Law, vol. 6, *Torts*, § 1440 (9th ed. 1988)]:

- The monetary loss resulting from the loss of the benefits of the contract or the prospective economic advantage.
- Emotional distress or actual harm to reputation, if either is reasonably to be expected to result from the interference.
- Consequential losses proximately caused by the interference.

In *Duff v. Engelberg*, the court applied a similar measure of damages [*Duff v. Engelberg* (1965) 237 Cal.App.2d 505, 508-509, 47 Cal.Rptr. 114].

The instruction in [1], *above*, does not use the term "consequential losses" adopted by the Restatement. "Consequential losses" means only that an action for interference "is one in tort and damages are not based on the contract rules," the latter requiring foreseeability [Restatement (Second) of Torts § 774A, comment d]. Damages for the tort of interference with contract or interference with economic advantage are governed by the tort measure of damages set out in *Civ. Code* § 3333, which provides compensation for all detriment proximately caused by the tort, whether or not the detriment could have been anticipated by the defendant [*Duff v. Engelberg* (1965) 237 Cal.App.2d 505, 508-509, 47 Cal.Rptr. 114]. The instruction in [1], *above*, adopts this language.

Punitive damages are also available if the prerequisites imposed by *Civ. Code* § 3294 are met [*Duff v. Engelberg* (1965) 237 Cal.App.2d 505, 509, 47 Cal.Rptr. 114 ; Restatement (Second) of Torts § 774A, comment a; see Ch. 70A, *Matthew Bender Trade Libel or Disparagement Instructions*, MB 7000A.07, MB 7000A.08 (instructions on punitive damages)].

LexisNexis Matthew Bender Expert Practice Tip--Availability of Damages: One of the advantages of recovery in tort is that the damages are not limited to "reasonably foreseeable" damages but extend to all proximately caused damages. Furthermore, punitive damages can be recovered if the plaintiff satisfies the heightened requirements of fraud, malice, or oppression. *By Ronald Oster*

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewCivil ProcedureRemediesDamagesCompensatory
DamagesTortsBusiness TortsCommercial InterferenceBusiness RelationshipsRemediesTortsBusiness TortsCommercial
InterferenceContractsRemediesTortsBusiness TortsCommercial InterferenceProspective AdvantageRemedies



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CHAPTER 23 California Judicial Council Insurance Litigation Instructions

4-23 California Forms of Jury Instruction 23.syn

§ 23.syn Synopsis to Chapter 23: California Judicial Council Insurance Litigation Instructions

CACI 2300 Breach of Contractual Duty to Pay a Covered Claim-- Essential Factual Elements

CACI 2301 Breach of Insurance Binder--Essential Factual Elements

CACI 2302 Breach of Contract for Temporary Life Insurance--Essential Factual Elements

CACI 2303 Affirmative Defense--Insurance Policy Exclusion

CACI 2304 Exception to Insurance Policy Exclusion--Burden of Proof

CACI 2305 Lost or Destroyed Insurance Policy

CACI 2306 Covered and Excluded Risks--Predominant Cause of Loss

CACI 2307 Insurance Agency Relationship Disputed

CACI 2308 Rescission for Misrepresentation or Concealment in Insurance Application--Essential Factual Elements

CACI 2309 Termination of Insurance Policy for Fraudulent Claim

CACI 2310-CACI 2319 Reserved for Future Use

CACI 2320 Affirmative Defense--Failure to Provide Timely Notice

CACI 2321 Affirmative Defense--Insured's Breach of Duty to Cooperate in Defense

CACI 2322 Affirmative Defense--Insured's Voluntary Payment

CACI 2323-CACI 2329 Reserved for Future Use

CACI 2330 Implied Obligation of Good Faith and Fair Dealing Explained

CACI 2331 Breach of the Implied Obligation of Good Faith and Fair Dealing--Failure or Delay in Payment (First Party)--Essential Factual Elements

CACI 2332 Bad Faith (First Party)--Failure to Properly Investigate Claim

CACI 2333 Bad Faith (First Party)--Breach of Duty to Inform Insured of Rights--Essential Factual Elements

CACI 2334 Bad Faith (Third Party)--Refusal to Accept Reasonable Settlement Within Liability Policy Limits--Essential Factual Elements

CACI 2335 Bad Faith--Advice of Counsel

CACI 2336 Bad Faith (Third Party)--Unreasonable Failure to Defend--Essential Factual Elements

CACI 2337 Factors to Consider in Evaluating Insurer's Conduct

CACI 2338-CACI 2349 Reserved for Future Use

CACI 2350 Damages for Bad Faith

CACI 2351-CACI 2359 Reserved for Future Use

CACI 2360 Judgment Creditor's Action Against Insurer--Essential Factual Elements

CACI 2361 Negligent Failure to Obtain Insurance Coverage--Essential Factual Elements

CACI 2362-CACI 2399 Reserved for Future Use

CACI VF-2300 Breach of Contractual Duty to Pay a Covered Claim

CACI VF-2301 Breach of the Implied Obligation of Good Faith and Fair Dealing--Failure or Delay in Payment

CACI VF-2302 Reserved for Future Use

CACI VF-2303 Bad Faith (First Party)--Breach of Duty to Inform Insured of Rights

CACI VF-2304-CACI VF-2399 Reserved for Future Use



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CHAPTER 23 California Judicial Council Insurance Litigation Instructions

4-23 California Forms of Jury Instruction Scope

Scope

SCOPE

This chapter contains the California Judicial Council's "Insurance Litigation Series" of jury instructions [*CACI No. 2300 et seq.*]. The Judicial Council of California Civil Jury Instructions (CACI) included in this publication are the product of the Judicial Council of California Task Force on Jury Instructions, which are updated by the Judicial Council of California Advisory Committee on Civil Jury Instructions.

This chapter includes instructions on the following topics:

- Essential factual elements for causes of action for breach of a contractual duty to pay a covered claim [*CACI No. 2300*], breach of an insurance binder [*CACI No. 2301*], and breach of a contract for temporary life insurance [*CACI No. 2302*].
- Burdens of proof for insurance policy exclusion [*CACI No. 2303*] and exception to insurance policy exclusion [*CACI No. 2304*].
- Lost or destroyed insurance policy [*CACI No. 2305*] and covered and excluded risks [*CACI No. 2306*].
- Insurance agency relationship disputed [*CACI No. 2307*].
- Essential factual elements for a cause of action for rescission for misrepresentation or concealment in an insurance application [*CACI No. 2308*].
- Termination of an insurance policy for fraudulent claim [*CACI No. 2309*].
- Affirmative defenses [*CACI Nos. 2320, 2321*], including a defense based on the insured's voluntary payment [*CACI No. 2322*].

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- Implied obligation of good faith and fair dealing explained [*CACI No. 2330*] and essential factual elements for a cause of action for breach of the implied obligation of good faith and fair dealing [*CACI No. 2331*].
- Bad faith, including essential factual elements for causes of action for bad faith [*CACI Nos. 2332-2334*], bad faith based on the advice of counsel [*CACI No. 2335*] and on the unreasonable failure to defend [*CACI No. 2336*], factors in insurer's conduct [*CACI No. 2337*], and damages for bad faith [*CACI No. 2350*].
- Essential factual elements for causes of action by a judgment creditor against an insurer [*CACI No. 2360*] and for the failure to obtain insurance coverage [*CACI No. 2361*].

The insurance litigation series also includes verdict forms [*CACI Nos. VF-2300-VF-2301, VF-2303*].



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CHAPTER 23 California Judicial Council Insurance Litigation Instructions

4-23 California Forms of Jury Instruction CACI 2300

CACI 2300 Breach of Contractual Duty to Pay a Covered Claim-- Essential Factual Elements

[*Name of plaintiff*] claims that [*name of defendant*] breached its duty to pay [him/her/it] for a loss covered under an insurance policy. To establish this claim, [*name of plaintiff*] must prove all of the following:

- 1. That [*name of plaintiff*] suffered a loss, [all or part of] which was covered under an insurance policy with [*name of defendant*];**
- 2. That [*name of defendant*] was notified of the loss [as required by the policy]; and**
- 3. The amount of the covered loss that [*name of defendant*] failed to pay.**

New September 2003

The instructions in this series assume the plaintiff is the insured and the defendant is the insurer. The party designations may be changed if appropriate to the facts of the case.

This instruction is intended for first party coverage claims. Use the bracketed language in element 2 if the jury is required to resolve a factual dispute over whether the manner in which the insurer received notice conformed to the policy requirements for notice. For a claim arising under an insurance binder rather than an issued policy, see *CACI No. 2301, Breach of Insurance Binder--Essential Factual Elements*. If the policy at issue has been lost or destroyed, read *CACI No. 2305, Lost or Destroyed Insurance Policy*. For instructions on general breach of contract issues, see the Contracts series (*CACI No. 300 et seq.*).

- "Wrongful failure to provide coverage or defend a claim is a breach of contract." (*Isaacson v. California Insurance Guarantee Assn.* (1988) 44 Cal.3d 775, 791 [244 Cal.Rptr. 655, 750 P.2d 297] .)

Secondary Sources

Croskey et al., California Practice Guide: Insurance Litigation (The Rutter Group) PP 15:52, 15:924

2 California Liability Insurance Practice: Claims & Litigation (Cont.Ed.Bar) General Principles of Contract and Bad Faith Actions, §§ 24.2, 24.23

6 Levy et al., California Torts, Ch. 82, *Claims and Disputes Under Insurance Policies*, § 82.50[2][c] (Matthew Bender)

26 California Forms of Pleading and Practice, Ch. 308, *Insurance* (Matthew Bender)

12 *California Points and Authorities*, Ch. 120, *Insurance*, §§ 120.83, 120.90, 120.115 (Matthew Bender)

Publisher's Notes

There is no BAJI instruction on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Contracts Law Breach Causes of Action General Overview Insurance Law Claims & Contracts General Overview Insurance Law Claims & Contracts Notice to Insurers General Overview Insurance Law General Liability Insurance Coverage General Overview



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CHAPTER 23 California Judicial Council Insurance Litigation Instructions

4-23 California Forms of Jury Instruction CACI 2301

CACI 2301 Breach of Insurance Binder--Essential Factual Elements

[*Name of plaintiff*] claims that [*name of defendant*] breached its duty to pay [him/her/it] for a loss or liability covered under a temporary insurance contract called an insurance binder. To establish this claim, [*name of plaintiff*] must prove all of the following:

- 1. That [*name of defendant*] or its authorized agent agreed, orally or in writing, to provide [*name of plaintiff*] with an insurance binder;**
- 2. That [*name of plaintiff*] [paid/was obligated to pay] for the insurance binder [or that payment was waived];**
- 3. That [*name of plaintiff*] suffered a loss during the time the insurance binder was in effect;**
- 4. That [all or part of] the loss was covered under the [insurance binder] [terms of the insurance policy [*name of defendant*] would have issued to [*name of plaintiff*]];**
- 5. That [*name of defendant*] was notified of the loss [as required by the insurance binder]; and**
- 6. The amount of the covered loss or liability that [*name of defendant*] failed to pay.**

New September 2003

The instructions in this series assume the plaintiff is the insured and the defendant is the insurer. The party designations may be changed if appropriate to the facts of the case.

4-23 California Forms of Jury Instruction CACI 2301

This instruction is intended for an alleged breach of a contract of temporary insurance coverage. The court must interpret as a matter of law whether an ordinary person in the applicant's circumstances would conclude, based on the language of the application, that coverage began immediately. Do not use this instruction unless the court has decided this issue.

Use bracketed language in element 5 if the jury is required to resolve a factual dispute over whether the manner in which the insurer received notice conformed to the policy requirements for notice. Element 4 should be modified if there is an issue regarding whether the insurance company's agent made oral statements at variance with the policy language.

Note that the statutory requirements for a "binder" under *Insurance Code section 382.5* do not apply to life or disability insurance, for insurance of any kind in the amount of \$1 million or more, or to an oral binder (see *Ins. Code*, § 382.5(a)).

■ *Insurance Code section 382.5* provides, in part: "A binder which is issued in accordance with this section shall be deemed an insurance policy for the purpose of proving that the insured has the insurance coverage specified in the binder. ... Except as superseded by the clear and express terms of the binder, a binder shall be deemed to include all of the usual terms of the policy as to which the binder was given, together with applicable endorsements as are designated in the binder."

■ *Insurance Code section 481.1* provides:

(a) In the event any conditional receipt, binder, or other evidence of temporary or implied insurance [with specified exceptions] is canceled, rejected, or surrendered by the insurer, the coverage thereby extended shall terminate 10 days after written notice to the named insured is deposited, properly addressed with postage prepaid, with the United States Postal Service.

(b) Any conditional receipt, binder, or other evidence of temporary or implied insurance described in subdivision (a) shall remain in force for a period of at least 30 days from the date of its issuance unless sooner canceled, rejected, or surrendered pursuant to the provisions of subdivision (a).

■ "Under California law, a contract of temporary insurance may arise from completion of an application for insurance and payment of the first premium if the language of the application would lead an ordinary lay person to conclude that coverage was immediate." (*Ahern v. Dillenback* (1991) 1 Cal.App.4th 36, 47 [1 Cal.Rptr.2d 339] .)

■ "[A] binder is an independent contract, separate and distinct from the permanent insurance policy. It is intended to give temporary protection pending the investigation of the risk by the insurer and until issuance of a formal policy or rejection of the insurance application by the insurer." (*Ahern, supra*, 1 Cal.App.4th at p. 48 .)

■ "[P]ractically dictates that a temporary insurance binder issued upon an application for insurance cannot contain all of the details and terms of the proposed insurance contract. ... [I]nsurance binders are adequate if they indicate the subject matter, the coverage period, the rate and the amount of insurance. (*National Emblem Insurance Co. v. Rios* (1969) 275 Cal.App.2d 70, 76 [79 Cal.Rptr. 583] , internal citations omitted.)

■ "Whether or not a valid binder exists is a question of fact insofar as a finding comprehends issues relating to the credibility of witnesses or the weight of the evidence, but a question of law insofar as a finding embraces a conclusion that such factual elements do not constitute a valid oral binder." (*Spott Electrical Co. v. Industrial Indemnity Co.* (1973)

30 *Cal.App.3d* 797, 805 [106 *Cal.Rptr.* 710] , internal citations omitted.)

■ " 'For the sake of convenience, contracts of insurance sometimes exist in two forms: (1) A preliminary contract intended to protect the applicant pending investigation of the risk by the company or until the policy can be properly issued. (2) The final contract or policy itself. ... An agent possessing authority to bind the company by contracts of insurance has authority to bind it by a preliminary or temporary contract of insurance. ...' This preliminary contract is sometimes called 'cover note' or 'binder.' ... 'A valid temporary or preliminary contract of present insurance may be made orally, or it may be partly in parol and partly in writing.' " (*Parlier Fruit Co. v. Fireman's Fund Insurance Co.* (1957) 151 *Cal.App.2d* 6, 19-20 [311 *P.2d* 62] , internal quotation marks and citation omitted.)

Secondary Sources

2 Witkin, Summary of California Law (10th ed. 2005) Insurance, §§ 37, 38

Croskey et al., California Practice Guide: Insurance Litigation (The Rutter Group) PP 2:101-2:137

1 California Liability Insurance Practice: Claims & Litigation (Cont.Ed.Bar) Determining Whether Enforceable Obligation Exists, §§ 5.17-5.20,

2 California Insurance Law & Practice, Ch. 9, *Issuance of Insurance Policies*, § 9.06[1]-[7] (Matthew Bender)

26 California Forms of Pleading and Practice, Ch. 308, *Insurance* (Matthew Bender)

12 *California Points and Authorities*, Ch. 120, *Insurance*, § 120.15 (Matthew Bender)

11 *California Legal Forms: Transaction Guide*, Ch. 26A, *Title Insurance*, §§ 26A.15, 26A.220 (Matthew Bender)

Publisher's Notes

There is no BAJI instruction on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Contracts Law Breach Causes of Action General Overview Insurance Law Claims & Contracts General Overview Insurance Law Claims & Contracts Binders Insurance Law Claims & Contracts Notice to Insurers General Overview Insurance Law Claims & Contracts Policy Interpretation Reasonable Expectations Reasonable Person



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CHAPTER 23 California Judicial Council Insurance Litigation Instructions

4-23 California Forms of Jury Instruction CACI 2302

CACI 2302 Breach of Contract for Temporary Life Insurance--Essential Factual Elements

[*Name of plaintiff*] **claims that** [*name of defendant*] **breached an agreement to pay life insurance benefits. To establish this claim, [*name of plaintiff*] must prove all of the following:**

- 1. That [*name of defendant*] or its authorized agent received [*name of decedent*]'s application for life insurance;**
- 2. That [*name of decedent*] paid the first insurance premium;**
- 3. That [*name of decedent*] died [on/after/before] [*insert relevant date*]; and**
- 4. The amount of the insurance benefits that [*name of defendant*] failed to pay.**

New September 2003

The instructions in this series assume the plaintiff is the insured and the defendant is the insurer. The party designations may be changed if appropriate to the facts of the case.

This instruction is intended for an alleged breach of a contract of temporary life insurance coverage. The court must interpret as a matter of law whether an ordinary person in the applicant's circumstances would conclude, based on the language of the application, that coverage began immediately. Do not use this instruction unless the court has decided this issue.

■ *Insurance Code section 10115* provides, in pertinent part: "When a payment is made equal to the full

first premium at the time an application for life insurance ... is signed by the applicant and ... the insurer ... approves the application ... and the person to be insured dies ... before such policy is issued and delivered, the insurer shall pay such amount as would have been due under the terms of the policy in the same manner and subject to the same rights, conditions and defenses as if such policy had been issued and delivered on the date the application was signed by the applicant. The provisions of this section shall not prohibit an insurer from limiting the maximum amount ... if a statement to this effect is included in the application."

■ "We are of the view that a contract of insurance arose upon defendant's receipt of the completed application and the first premium payment. ... The understanding of an ordinary person is the standard [that] must be used in construing the contract, and such a person upon reading the application would believe that he would secure the benefit of immediate coverage by paying the premium in advance of delivery of the policy." (*Ransom v. The Penn Mutual Life Insurance Co.* (1954) 43 Cal.2d 420, 425 [274 P.2d 633] .)

■ "[A]n insurance company is not precluded from imposing conditions precedent to the effectiveness of insurance coverage despite the advance payment of the first premium. However, ... any such condition must be stated in conspicuous, unambiguous and unequivocal language which an ordinary layman can understand." (*Thompson v. Occidental Life Insurance Co. of California* (1973) 9 Cal.3d 904, 912 [109 Cal.Rptr. 473, 513 P.2d 353] .)

■ Temporary life insurance coverage "is not terminated until the applicant receives from the insurer both a notice of the rejection of his application and a refund of his premium." (*Smith v. Westland Life Insurance Co.* (1975) 15 Cal.3d 111, 120 [123 Cal.Rptr. 649, 539 P.2d 433] .)

■ "Under California law, a contract of temporary insurance may arise from completion of an application for insurance and payment of the first premium if the language of the application would lead an ordinary lay person to conclude that coverage was immediate." (*Ahern v. Dillenback* (1991) 1 Cal.App.4th 36, 47 [1 Cal.Rptr.2d 339] [automobile insurance].)

Secondary Sources

2 Witkin, Summary of California Law (10th ed. 2005) Insurance, §§ 37-39

Croskey et al., California Practice Guide: Insurance Litigation (The Rutter Group) PP 2:134-2:137, 6:428-6:448

2 California Insurance Law & Practice, Ch. 9, *Issuance of Insurance Policies*, § 9.07 (Matthew Bender)

26 California Forms of Pleading and Practice, Ch. 308, *Insurance* (Matthew Bender)

12 *California Points and Authorities*, Ch. 120, *Insurance*, §§ 120.19 -120.20 (Matthew Bender)

Publisher's Notes

There is no BAJI instruction on this subject.

LexisNexis Matthew Bender Expert Practice Tip--Conditional Receipt Cases: A "conditional receipt" case turns usually on the wording of the "receipt" given to the applicant for this insurance [see, e.g., *Thompson v. Occidental Life Insurance Co. of California* (1973) 9 Cal.3d 904, 912, 109 Cal.Rptr. 473, 513 P.2d 353]. By Rex Heeseman

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewContracts LawBreachCauses of ActionGeneral
OverviewInsurance LawClaims & ContractsGeneral OverviewInsurance LawClaims & ContractsDisclosure
ObligationsBurdens of ProofInsurance LawLife InsuranceGeneral OverviewInsurance LawLife InsuranceInsurable
InterestsTime of Insurable Interest



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CHAPTER 23 California Judicial Council Insurance Litigation Instructions

4-23 California Forms of Jury Instruction CACI 2303

CACI 2303 Affirmative Defense--Insurance Policy Exclusion

[Name of defendant] claims that [name of plaintiff]'s [liability/loss] is not covered because it is specifically excluded under the policy. To succeed, [name of defendant] must prove that [name of plaintiff]'s [liability/loss] [arises out of/is based on/occurred because of] [state exclusion under the policy].

New September 2003; Revised October 2008

The instructions in this series assume the plaintiff is the insured and the defendant is the insurer. The party designations may be changed if appropriate to the facts of the case.

This instruction can be used in cases involving either a third party liability or a first party loss policy.

- "The burden of bringing itself within any exculpatory clause contained in the policy is on the insurer." (*Clemmer v. Hartford Insurance Co.* (1978) 22 Cal.3d 865, 880 [151 Cal.Rptr. 285, 587 P.2d 1098] .)

- "The burden is on an insured to establish that the occurrence forming the basis of its claim is within the basic scope of insurance coverage. And, once an insured has made this showing, the burden is on the insurer to prove the claim is specifically excluded." (*Aydin Corp. v. First State Insurance Co.* (1998) 18 Cal.4th 1183, 1188 [77 Cal.Rptr.2d 537, 959 P.2d 1213] .)

- Once the insurer proves that the specific exclusion applies, the insured "should bear the burden of establishing the exception because 'its effect is to reinstate coverage that the exclusionary language otherwise bars.' " (*Aydin Corp.*, *supra*, 18 Cal.4th at p. 1188 .)

Secondary Sources

Croskey et al., California Practice Guide: Insurance Litigation (The Rutter Group) PP 15:911-15:912

1 California Liability Insurance Practice: Claims & Litigation (Cont.Ed.Bar) Analyzing Coverage: Reading and Interpreting Insurance Policies, § 3.63

26 *California Forms of Pleading and Practice*, Ch. 308, *Insurance*, § 308.502 (Matthew Bender)

Publisher's Notes

There is no BAJI instruction on this subject.

LexisNexis Matthew Bender Expert Practice Tip--Burden of Proof: The general rule is that the insurer has the burden of proving that an exclusion to coverage applies. However, sometimes a restriction on coverage is not technically labeled an "exclusion" even though it operates in exactly the same way. Counsel for the insured should argue that the insurer has the burden of proving any significant limitation on coverage regardless of the label. *By Ronald Oster*

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewContracts LawBreachCauses of ActionGeneral OverviewContracts LawContract Conditions & ProvisionsExculpatory ClausesEvidenceProcedural ConsiderationsBurdens of ProofAllocationInsurance LawClaims & ContractsGeneral OverviewInsurance LawClaims & ContractsPolicy InterpretationExclusions



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CHAPTER 23 California Judicial Council Insurance Litigation Instructions

4-23 California Forms of Jury Instruction CACI 2304

CACI 2304 Exception to Insurance Policy Exclusion--Burden of Proof

[Name of plaintiff] claims that [his/her/its] [liability/loss] is covered under an exception to a specific coverage exclusion under the policy. To establish this coverage, [name of plaintiff] must prove that [his/her/its] [liability/loss] [arises out of/is based on/occurred because] [state exception to policy exclusion].

New September 2003

The instructions in this series assume the plaintiff is the insured and the defendant is the insurer. The party designations may be changed if appropriate to the facts of the case.

Use this instruction only if the insurer is asserting that the insured's claim is subject to an exclusion.

- "The burden is on an insured to establish that the occurrence forming the basis of its claim is within the basic scope of insurance coverage. And, once an insured has made this showing, the burden is on the insurer to prove the claim is specifically excluded." (*Aydin Corp. v. First State Insurance Co.* (1998) 18 Cal.4th 1183, 1188 [77 Cal.Rptr.2d 537, 959 P.2d 1213] , internal citations omitted.)

- Once the insurer proves that the specific exclusion applies, the insured "should bear the burden of establishing the exception because 'its effect is to reinstate coverage that the exclusionary language otherwise bars.'" (*Aydin Corp.*, *supra*, 18 Cal.4th at p. 1188 .)

Secondary Sources

Croskey et al., California Practice Guide: Insurance Litigation (The Rutter Group) PP 15:913-15:915.5

1 California Liability Insurance Practice: Claims & Litigation (Cont.Ed.Bar) Analyzing Coverage: Reading and Interpreting Insurance Policies, § 3.63

26 California Forms of Pleading and Practice, Ch. 308, *Insurance* (Matthew Bender)

12 *California Points and Authorities*, Ch. 120, *Insurance*, §§ 120.40, 120.42 (Matthew Bender)

Publisher's Notes

There is no BAJI instruction on this subject.

LexisNexis Matthew Bender Expert Practice Tip--Use Care When Preparing Closing: The concept of an "exception to an exclusion" could be difficult for most jurors. Thus, the closing argument should be carefully prepared. *By Rex Heeseman*

LexisNexis Matthew Bender Expert Practice Tip--Shifting Burdens of Proof: *CACI No. 2304* applies when an exclusion in the policy contains an exception that partially reinstates coverage. For example, some variations of the pollution exclusion contain an exception for pollution that is "sudden and accidental." In general, the insured has the burden of proving that the exception to the exclusion applies. These shifting burdens of proof can be confusing, because the insurer first has to prove the applicability of the exclusion, then the burden shifts to the insured to prove the exception. *By Ronald Oster*

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Contracts Law Breach Causes of Action General Overview Insurance Law Claims & Contracts General Overview Insurance Law Claims & Contracts Disclosure Obligations Burdens of Proof Insurance Law Claims & Contracts Policy Interpretation Exclusions



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CHAPTER 23 California Judicial Council Insurance Litigation Instructions

4-23 California Forms of Jury Instruction CACI 2305

CACI 2305 Lost or Destroyed Insurance Policy

[Name of plaintiff] claims that [he/she/it] was covered under an insurance policy that was lost or destroyed. To establish coverage under a lost policy, [name of plaintiff] must prove all of the following:

- 1. That [name of plaintiff] was insured under the lost policy during the period in question; and**
- 2. That the terms of the policy included the following:**
 - a. [describe each policy provision essential to the claimed coverage].**

[Name of plaintiff] is not required to prove the exact words of the lost policy, but only the substance of the policy's terms essential to [his/her/its] claim for insurance benefits.

New September 2003

The instructions in this series assume the plaintiff is the insured and the defendant is the insurer. The party designations may be changed if appropriate to the facts of the case.

Read this instruction in conjunction with *CACI No. 2300, Breach of Contractual Duty to Pay a Covered Claim--Essential Factual Elements*. Whether the terms of a lost policy must be established by a heightened degree of proof appears to be an open issue. The Supreme Court in *Dart Industries, Inc. v. Commercial Union Insurance Co.* (2002) 28 Cal.4th 1059 [124 Cal.Rptr.2d 142, 52 P.3d 79] , expressly declined to address the issue of the necessary degree of proof. (*Id* at p. 1072, fn. 4 .)

This instruction is intended for use in cases where the plaintiff insured claims coverage for a loss under

an insurance policy that was lost or destroyed without fraudulent intent on the part of the insured. The admission of oral testimony of the contents of a lost document requires the court to determine certain preliminary facts: (1) the proponent does not have possession or control of a copy of the policy; and (2) the policy was lost or destroyed without fraudulent intent on the part of the proponent. (*Evid. Code*, §§ 402(b), 1521, 1523(b).)

■ *Evidence Code* section 402(b) provides, in pertinent part: "The court may hear and determine the question of the admissibility of evidence out of the presence or hearing of the jury."

■ *Evidence Code* section 1521(a) provides:

The content of a writing may be proved by otherwise admissible secondary evidence. The court shall exclude secondary evidence of the content of writing if the court determines either of the following:

(1) A genuine dispute exists concerning material terms of the writing and justice requires the exclusion.

(2) Admission of the secondary evidence would be unfair.

■ *Evidence Code* section 1523(b) provides, in pertinent part: "Oral testimony of the content of a writing is not ... inadmissible ... if the proponent does not have possession or control of a copy of the writing and the original is lost or has been destroyed without fraudulent intent on the part of the proponent of the evidence."

■ "In an action on an insurance policy that has not been lost or destroyed, it is well settled that '[t]he burden is on an insured to establish that the occurrence forming the basis of its claim is within the basic scope of insurance coverage. And, once an insured has made this showing, the burden is on the insurer to prove the claim is specifically excluded.' ... [P] We see no reason not to apply this rule to a policy that has been lost or destroyed without fraudulent intent on the part of the insured. Thus, the claimant has the burden of proving (1) the fact that he or she was insured under the lost policy during the period in issue, and (2) the substance of each policy provision essential to the claim for relief, i.e., essential to the particular coverage that the insured claims. Which provisions those are will vary from case to case; the decisions often refer to them simply as the material terms of the lost policy. In turn, the insurer has the burden of proving the substance of any policy provision 'essential to the ... defense,' i.e., any provision that functions to defeat the insured's claim. Those provisions, too, will be case specific." (*Dart Industries, Inc.*, *supra*, 28 Cal.4th at p. 1068 , internal citations and footnotes omitted.)

■ "A corollary of the rule that the contents of lost documents may be proved by secondary evidence is that the law does not require the contents of such documents be proved verbatim." (*Dart Industries, Inc.*, *supra*, 28 Cal.4th at p. 1069 .)

■ "The rule ... for the admission of secondary evidence of a lost paper, requires 'that a bona fide and diligent search has been unsuccessfully made for it in the place where it was most likely to be found;' and further, 'the party is expected to show that he has in good faith exhausted in a reasonable degree all the sources of information and means of discovery which the nature of the case would naturally suggest, and which were accessible to him.' " (*Dart Industries, Inc.*, *supra*, 28 Cal.4th at p. 1068 , internal citation omitted.)

■ "No fixed rule as to the necessary proof to establish loss [of a written instrument], or what constitutes reasonable search, can be formulated. ... The sole object of such proof is to raise a reasonable presumption merely that the instrument is lost, and this is a preliminary inquiry addressed to the discretion of the judge." (*Kenniff v. Caulfield* (1903) 140 Cal. 34, 41 [73 P. 803] .)

■ "Preliminary proof of the loss or destruction is required and it is committed to the trial court's discretion to determine whether the evidence so offered is or is not sufficient." (*Guardianship of Levy (1955) 137 Cal.App.2d 237, 249 [290 P.2d 320]* .)

Secondary Sources

3 Witkin, California Evidence (4th ed. 2000) Presentation at Trial, §§ 48-50, 59-60, 63, 65, pp. 81-84, 91-97

Croskey et al., California Practice Guide: Insurance Litigation (The Rutter Group) PP 15:978-15:994

1 California Liability Insurance Practice: Claims & Litigation (Cont.Ed.Bar) Identifying Sources of Coverage, § 8.8

26 California Forms of Pleading and Practice, Ch. 308, *Insurance* (Matthew Bender)

12 *California Points and Authorities, Ch. 120, Insurance, § 120.42* (Matthew Bender)

Publisher's Notes

There is no BAJI instruction on this subject.

LexisNexis Matthew Bender Expert Practice Tip--Proving Contents of Lost Policy: If the lost policy is a standard form policy, proof of the contents can take the form of (1) a specimen policy from insurance rating organizations, or (2) a certificate of insurance that identifies the type of policy and the critical terms. If the lost policy is a manuscript (i.e. typewritten) policy, proof is more difficult and will probably consist of oral testimony. Note that *CACI No. 2305* does not include a heightened burden of proof as is required by many states. *By Ronald Oster*

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Contracts Law Breach Causes of Action General Overview Insurance Law Claims & Contracts General Overview Insurance Law Claims & Contracts Disclosure Obligations Burdens of Proof



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CHAPTER 23 California Judicial Council Insurance Litigation Instructions

4-23 California Forms of Jury Instruction CACI 2306

CACI 2306 Covered and Excluded Risks--Predominant Cause of Loss

You have heard evidence that the claimed loss was caused by a combination of covered and excluded risks under the insurance policy. When a loss is caused by a combination of covered and excluded risks under the policy, the loss is covered only if the most important or predominant cause is a covered risk.

[[Name of defendant] claims that [name of plaintiff]'s loss is not covered because the loss was caused by a risk excluded under the policy. To succeed, [name of defendant] must prove that the most important or predominant cause of the loss was [describe excluded peril or event], which is a risk excluded under the policy.]

[or]

[[Name of plaintiff] claims that the loss was caused by a risk covered under the policy. To succeed, [name of plaintiff] must prove that the most important or predominant cause of the loss was [describe covered peril or event], which is a risk covered under the policy.]

New September 2003

Directions for Use

The instructions in this series assume the plaintiff is the insured and the defendant is the insurer. The party designations may be changed if appropriate to the facts of the case.

This instruction is intended for use in first party property insurance cases where there is evidence that a loss was caused by both covered and excluded perils. In most cases the court will determine as a question of law what perils are covered and excluded under the policy.

Depending on the type of insurance at issue, the court must select the bracketed paragraph that presents the correct burden of proof. For all-risk homeowner's policies, for example, once the insured establishes basic coverage, the insurer bears the burden of proving the loss was caused by an excluded peril. In contrast, for "named perils" policies (for example, fire insurance) the insured bears the burden of proving the loss was caused by the specified peril. (See *Strubble v. United Services Automobile Assn.* (1973) 35 Cal.App.3d 498, 504 [110 Cal.Rptr. 828] .)

Sources and Authority

- *Insurance Code section 530* provides: "An insurer is liable for a loss of which a peril insured against was the proximate cause, although a peril not contemplated by the contract may have been a remote cause of the loss; but he is not liable for a loss of which the peril insured against was only a remote cause."

- *Insurance Code section 532* provides: "If a peril is specially excepted in a contract of insurance and there is a loss which would not have occurred but for such peril, such loss is thereby excepted even though the immediate cause of the loss was a peril which was not excepted."

- "[In] determining whether a loss is within an exception in a policy, where there is a concurrence of different causes, the efficient cause--the one that sets others in motion--is the cause to which the loss is to be attributed, though the other causes may follow it, and operate more immediately in producing the disaster." (*Sabella v. Wisler* (1963) 59 Cal.2d 21, 31-32 [27 Cal.Rptr. 689, 377 P.2d 889] , internal quotation marks and citation omitted.)

- "*Sabella* defined 'efficient proximate cause' alternatively as the 'one that sets others in motion,' and as 'the predominating or moving efficient cause.' We use the term 'efficient proximate cause' (meaning predominating cause) when referring to the *Sabella* analysis because we believe the phrase 'moving cause' can be misconstrued to deny coverage erroneously, particularly when it is understood literally to mean the 'triggering' cause." (*Garvey v. State Farm Fire & Casualty Co.* (1989) 48 Cal.3d 395, 403 [257 Cal.Rptr. 292, 770 P.2d 704] , internal citations omitted.)

- "[T]he 'cause' of loss in the context of a property insurance contract is totally different from that in a liability policy. This distinction is critical to the resolution of losses involving multiple causes. Frequently property losses occur which involve more than one peril that might be considered legally significant. ... 'The task becomes one of identifying the most important cause of the loss and attributing the loss to that cause.' [P] On the other hand, the right to coverage in the third party liability insurance context draws on traditional tort concepts of fault, proximate cause and duty." (*Garvey, supra*, 48 Cal.3d at pp. 406-407 , internal quotation marks, italics, and citations omitted.)

- "[I]n an action upon an all-risks policy such as the one before us (unlike a specific peril policy), the insured does not have to prove that the peril proximately causing his loss was covered by the policy. This is because the policy covers all risks save for those risks specifically excluded by the policy. The insurer, though, since it is denying liability upon the policy, must prove the policy's noncoverage of the insured's loss." (*Strubble, supra*, 35 Cal.App.3d at p. 504 .)

- "[T]he scope of coverage under an all-risk homeowner's policy includes all risks except those specifically excluded by the policy. When a loss is caused by a combination of a covered and specifically excluded risks, the loss is covered if the covered risk was the efficient proximate cause of the loss. ... [T]he question of what caused the loss is generally a question of fact, and the loss is not covered if the

covered risk was only a remote cause of the loss, or the excluded risk was the efficient proximate, or predominate, cause." (*State Farm Fire & Casualty Co. v. Von Der Lieth* (1991) 54 Cal.3d 1123, 1131-1132 [2 Cal.Rptr.2d 183, 820 P.2d 285] , internal citation omitted.)

■ "[A]n insurer is not absolutely prohibited from drafting and enforcing policy provisions that provide or leave intact coverage for some, but not all, manifestations of a particular peril. This is, in fact, an everyday practice that normally raises no questions regarding section 530 or the efficient proximate cause doctrine." (*Julian v. Hartford Underwriters Ins. Co.* (2005) 35 Cal.4th 747, 759 [27 Cal.Rptr.3d 648, 110 P.3d 903] .)

Secondary Sources

Croskey et al., California Practice Guide: Insurance Litigation (The Rutter Group) PP 6:134-6:143, 6:253

1 California Liability Insurance Practice: Claims & Litigation (Cont.Ed.Bar) Analyzing Coverage: Reading and Interpreting Insurance Policies, § 3.42

3 California Insurance Law & Practice, Ch. 9, *Homeowners and Related Policies*, § 36.42 (Matthew Bender)

26 *California Forms of Pleading and Practice*, Ch. 308, *Insurance*, § 308.113 (Matthew Bender)

12 *California Points and Authorities*, Ch. 120, *Insurance*, § 120.50 (Matthew Bender)

Publisher's Notes

There is no BAJI instruction on this subject.

LexisNexis Matthew Bender Expert Practice Tip--Concurrent Causes: "Concurrent causation" cases are unusual. However, if the situation presents itself, it may be a complicated point of law to argue, especially to a jury (since the trier of fact must decide the "predominant cause"). *By Rex Heeseman*

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Contracts Law Breach Causes of Action General Overview Insurance Law Claims & Contracts Policy Interpretation Exclusions Insurance Law Property Insurance Coverage General Overview Insurance Law Property Insurance Obligations Losses



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California Forms of Jury Instruction

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CHAPTER 23 California Judicial Council Insurance Litigation Instructions

4-23 California Forms of Jury Instruction CACI 2307

CACI 2307 Insurance Agency Relationship Disputed

[*Name of plaintiff*] **claims that** [*name of agent*] **was** [*name of defendant*]'s **agent and that** [*name of defendant*] **is therefore** [**responsible for/bound by**] [*name of agent*]'s [**conduct/ representations**].

If [*name of plaintiff*] **proves that** [*name of defendant*] **gave** [*name of agent*] **the** [**authority/apparent authority**] **to act on behalf of** [*name of defendant*], **then** [*name of agent*] **was** [*name of defendant*]'s **agent. This authority may be shown by words or may be implied by the parties' conduct. This authority cannot be shown by the words of** [*name of agent*] **alone.**

[In some circumstances, an individual can be the agent of both the insured and the insurance company. [*Name of plaintiff*] claims that [*name of agent*] was [[*name of defendant*]/[*name of plaintiff*]]'s agent for the purpose of [*describe limited agency; e.g., "collecting insurance payments"*] and therefore [*describe dispute; e.g., "the insurer received plaintiff's payment"*]. [*Name of defendant*] claims that [*name of agent*] was [[*name of defendant*]/[*name of plaintiff*]]'s agent for the purpose of [*describe limited agency*] and therefore [*describe dispute*].]

New September 2003

The instructions in this series assume the plaintiff is the insured and the defendant is the insurer. The party designations may be changed if appropriate to the facts of the case.

This instruction must be modified based on the evidence presented and theories of liability in the case. The distinction between an agent and a broker relationship may be crucial in determining, for example, whether an insurance salesperson's representations bind the insurer, or whether the insurance salesperson has assumed a specific duty to the insured.

If ostensible agency is an issue, the court may modify and give *CACI No. 3709, Ostensible Agent*, in the Vicarious Responsibility series.

■ *Insurance Code section 31* provides, in part: " 'Insurance agent' means a person authorized, by and on behalf of an insurer, to transact all classes of insurance other than life insurance." (See also *Ins. Code*, § 1621.)

■ *Insurance Code section 33* provides: " 'Insurance broker' means a person who, for compensation and on behalf of another person, transacts insurance other than life insurance with, but not on behalf of, an insurer." (See also *Ins. Code*, § 1623.)

■ *Civil Code section 2315* provides: "An agent has such authority as the principal, actually or ostensibly, confers upon him."

■ "An individual cannot act as an insurance agent in California without a valid license issued by the commissioner of insurance. In addition to possessing a license, an insurance agent must be authorized by an insurance carrier to transact insurance business on the carrier's behalf. This authorization must be evidenced by a notice of agency appointment on file with the Department of Insurance. An agent is generally not limited in the number of agency appointments that he or she may have; thus, an agent may solicit business on behalf of a variety of different insurance carriers, and still technically be an agent of each of those carriers." (*Loehr v. Great Republic Insurance Co.* (1990) 226 Cal.App.3d 727, 732-733 [276 Cal.Rptr. 667] , internal citations omitted.)

■ "[S]tatutes defining 'broker' are not determinative of the actual relationship in a particular case. The actual relationship is determined by what the parties do and say, not by the name they are called." (*Maloney v. Rhode Island Insurance Co.* (1953) 115 Cal.App.2d 238, 245 [251 P.2d 1027] , internal citations omitted.)

■ "While we note many similarities in the services performed and the monetary functions of agents and brokers, there is a more fundamental legal distinction between insurance agents and brokers. Put quite simply, insurance brokers, with no binding authority, are not agents of insurance companies, but are rather independent contractors" (*Marsh & McLennan of California, Inc. v. City of Los Angeles* (1976) 62 Cal.App.3d 108, 118 [132 Cal.Rptr. 796] .)

■ "Although an insurance broker is ordinarily the agent of the insured and not of the insurer, he may become the agent of the insurer as well as for the insured." (*Fraser-Yamor Agency, Inc. v. County of Del Norte* (1977) 68 Cal.App.3d 201, 213 [137 Cal.Rptr. 118] , internal citations omitted.)

■ "When the broker accepts the policy from the insurer and the premium from the assured, he has elected to act for the insurer to deliver the policy and to collect the premium." (*Maloney, supra*, 115 Cal.App.2d at p. 244 .)

■ "Generally speaking, a person may do by agent any act which he might do himself. An agency is either actual or ostensible. 'An agency is ostensible when the principal intentionally, or by want of ordinary care, causes a third person to believe another to be his agent who is not really employed by him.' To establish ostensible authority in an agent, it must be shown the principal, intentionally or by want of ordinary care has caused or allowed a third person to believe the agent possesses such authority." (*Preis v. American Indemnity Co.* (1990) 220 Cal.App.3d 752, 761 [269 Cal.Rptr. 617] , internal citations omitted.)

■ Sending notice of an automobile accident to the insured's broker did not satisfy the insured's obligation under the policy to provide prompt notice of a claim to the insurer since the broker was the agent of the insured and not of the insurer. (*Arthur v. London Guarantee and Accident Co., Ltd.* (1947) 78 Cal.App.2d 198, 202-203 [177 P.2d 625] .)

Secondary Sources

Croskey et al., California Practice Guide: Insurance Litigation (The Rutter Group) 2:12-2:24, 2:31-2:43

1 California Liability Insurance Practice: Claims & Litigation (Cont.Ed.Bar) Determining Whether Enforceable Obligation Exists, §§ 5.4-5.8

2 California Liability Insurance Practice: Claims & Litigation (Cont.Ed.Bar) Actions Against Agents and Brokers, §§ 29.2-29.5

2 California Insurance Law & Practice, Ch. 9, *Issuance of Insurance Policies*, § 9.02 (Matthew Bender)

5 California Insurance Law & Practice, Ch. 61, *Operating Requirements of Agents and Brokers*, § 61.01[4] (Matthew Bender)

2 California Uninsured Motorist Law, Ch. 24, *Bad Faith in Uninsured Motorist Law*, § 24.40 (Matthew Bender)

26 California Forms of Pleading and Practice, Ch. 308, *Insurance* (Matthew Bender)

12 *California Points and Authorities*, Ch. 120, *Insurance*, §§ 120.18, 120.110, 120.170, 120.383, 120.392, 120.403 (Matthew Bender)

Publisher's Notes

There is no BAJI instruction on this subject.

LexisNexis Matthew Bender Expert Practice Tip--Agent vs. Broker: The distinction between an "agent" and a "broker" may sometimes be difficult to apply and /or to understand. Further, judges are sometimes confused by the differences. *By Rex Heeseman*

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate Law Agency Relationships Duties & Liabilities Authorized Acts of Agents Unauthorized Acts Civil Procedure Trials Jury Trials Jury Instructions General Overview Contracts Law Breach Causes of Action General Overview Insurance Law Claims & Contracts Premiums Agents & Brokers Insurance Law Industry Regulation Insurance Company Operations Representatives Brokers



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California Forms of Jury Instruction

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CHAPTER 23 California Judicial Council Insurance Litigation Instructions

4-23 California Forms of Jury Instruction CACI 2308

CACI 2308 Rescission for Misrepresentation or Concealment in Insurance Application--Essential Factual Elements

[*Name of insurer*] **claims that no insurance contract was created because [*name of insured*] [concealed an important fact/made a false representation] in [his/her/its] application for insurance. To establish this claim, [*name of insurer*] must prove all of the following:**

- 1. That [*name of insured*] submitted an application for insurance with [*name of insurer*];**
- 2. That in the application for insurance [*name of insured*] [intentionally] [failed to state/represented] that [*insert omission or alleged misrepresentation*];**
- 3. [That the application asked for that information;]**
- 4. That [*name of insured*] [*select one of the following:*]**
[knew that [*insert omission*];
[knew that this representation was not true;]
- 5. That [*name of insurer*] would not have issued the insurance policy if [*name of insured*] had stated the true facts in the application;**
- 6. That [*name of insurer*] gave [*name of insured*] notice that it was rescinding the insurance policy; and**
- 7. That [*name of insurer*] [returned/offered to return] the insurance premiums paid by [*name of***

insured].

New September 2003; Revised April 2004, October 2004

Use the bracketed word "intentionally" for cases involving *Insurance Code section 2071*.

Element 3 applies only if plaintiff omitted information, not if he or she misrepresented information. Elements 5 and 6 may be resolved by the language of the complaint, in which case these could be decided as a matter of law. (*Civ. Code, § 1691.*)

If the insured's misrepresentation or concealment in the insurance application is raised as an affirmative defense by the insurer, this instruction may be modified for use. The elements of the defense would be the same as stated above.

If it is alleged that omission occurred in circumstances other than a written application, this instruction should be modified accordingly.

- *Civil Code section 1689(b)(1)* provides that a party may rescind a contract under the following circumstances: "If the consent of the party rescinding, or of any party jointly contracting with him, was given by mistake, or obtained through duress, menace, fraud, or undue influence, exercised by or with the connivance of the party as to whom he rescinds, or of any other party to the contract jointly interested with such party."

- *Insurance Code section 650* provides: "Whenever a right to rescind a contract of insurance is given to the insurer by any provision of this part such right may be exercised at any time previous to the commencement of an action on the contract. The rescission shall apply to all insureds under the contract, including additional insureds, unless the contract provides otherwise."

- *Insurance Code section 330* provides: "Neglect to communicate that which a party knows, and ought to communicate, is concealment."

- *Insurance Code section 331* provides: "Concealment, whether intentional or unintentional, entitles the injured party to rescind insurance."

- *Insurance Code section 332* provides: "Each party to a contract of insurance shall communicate to the other, in good faith, all facts within his knowledge which are or which he believes to be material to the contract and as to which he makes no warranty, and which the other has not the means of ascertaining."

- *Insurance Code section 334* provides: "Materiality is to be determined not by the event, but solely by the probable and reasonable influence of the facts upon the party to whom the communication is due, in forming his estimate of the disadvantages of the proposed contract, or in making his inquiries."

- *Insurance Code section 338* provides: "An intentional and fraudulent omission, on the part of one insured, to communicate information of matters proving or tending to prove the falsity of a warranty, entitles the insurer to rescind."

- *Insurance Code section 359* provides: "If a representation is false in a material point ... the injured

party is entitled to rescind the contract from the time the representation becomes false."

- "When the [automobile] insurer fails ... to conduct ... a reasonable investigation [of insurability] it cannot assert ... a right of rescission" under *section 650 of the Insurance Code* as an affirmative defense to an action by an injured third party. (*Barrera v. State Farm Mutual Automobile Insurance Co.* (1969) 71 Cal.2d 659, 678 [79 Cal.Rptr. 106, 456 P.2d 674] .)

- "[A]n insurer has a right to know all that the applicant for insurance knows regarding the state of his health and medical history. Material misrepresentation or concealment of such facts [is] grounds for rescission of the policy, and an actual intent to deceive need not be shown. Materiality is determined solely by the probable and reasonable effect [that] truthful answers would have had upon the insurer. The fact that the insurer has demanded answers to specific questions in an application for insurance is in itself usually sufficient to establish materiality as a matter of law." (*Thompson v. Occidental Life Insurance Co. of California* (1973) 9 Cal.3d 904, 915-916 [109 Cal.Rptr. 473, 513 P.2d 353] , internal citations omitted.)

- "[I]f the applicant for insurance had no present knowledge of the facts sought, or failed to appreciate the significance of information related to him, his incorrect or incomplete responses would not constitute grounds for rescission. Moreover, '[questions] concerning illness or disease do not relate to minor indispositions but are to be construed as referring to serious ailments which undermine the general health.' Finally, as the misrepresentation must be a material one, 'incorrect answer on an insurance application does not give rise to the defense of fraud where the true facts, if known, would not have made the contract less desirable to the insurer.' And the trier of fact is not required to believe the 'post mortem' testimony of an insurer's agents that insurance would have been refused had the true facts been disclosed." (*Thompson, supra*, 9 Cal.3d at p. 916 , internal citations omitted.)

- "[T]he burden of proving misrepresentation [for purposes of rescission] rests upon the insurer." (*Thompson, supra*, 9 Cal.3d at p. 919 .)

- "The materiality of a representation made in an application for a contract of insurance is determined by a *subjective* standard (i.e., its effect on the *particular* insurer to whom it was made) and rescission will be allowed even though the misrepresentation was the result of negligence or the product of innocence. On the other hand, in order to void a policy based upon the insured's violation of the standard fraud and concealment clause ... , the false statement must have been knowingly and wilfully made with the intent (express or implied) of deceiving the insurer. The materiality of the statement will be determined by the *objective* standard of its effect upon a *reasonable* insurer." (*Cummings v. Fire Insurance Exchange* (1988) 202 Cal.App.3d 1407, 1415, fn.7 [249 Cal.Rptr. 568] , original italics, internal citation omitted.)

- "Cancellation and rescission are not synonymous. One is prospective, while the other is retroactive." (*Fireman's Fund American Insurance Co. v. Escobedo* (1978) 80 Cal.App.3d 610, 619 [145 Cal.Rptr. 785] .)

- "[U]pon a rescission of a policy of insurance, based upon a material concealment or misrepresentation, all rights of the insured thereunder (except the right to recover any consideration paid in the purchase of the policy) are extinguished" (*Imperial Casualty & Indemnity Co. v. Sogomonian* (1988) 198 Cal.App.3d 169, 184 [243 Cal.Rptr. 639] .)

- "The consequence of rescission is not only the termination of further liability, but also the restoration of the parties to their former positions by requiring each to return whatever consideration has been

received. ... [T]his would require the refund by [the insurer] of any premiums and the repayment by the defendants of any proceed advance which they may have received." (*Imperial Casualty & Indemnity Co.*, *supra*, 198 Cal.App.3d at p. 184 , internal citation omitted.)

Secondary Sources

Croskey et al., California Practice Guide: Insurance Litigation (The Rutter Group) PP 5:143-5:146, 5:153-5:159.1, 5:160-5:287, 15:241-15:256

2 California Liability Insurance Practice: Claims & Litigation (Cont.Ed.Bar) Rescission and Reformation, §§ 21.2-21.12, 21.35-21.37

2 California Insurance Law & Practice, Ch. 8, *The Insurance Contract*, § 8.10[1] (Matthew Bender)

2 California Uninsured Motorist Law, Ch. 24, *Bad Faith in Uninsured Motorist Law*, § 24.40 (Matthew Bender)

26 California Forms of Pleading and Practice, Ch. 308, *Insurance* (Matthew Bender)

12 *California Points and Authorities*, Ch. 120, *Insurance*, §§ 120.250 -120.251, 120.260 (Matthew Bender)

Publisher's Notes

There is no BAJI instruction on this subject.

LexisNexis Matthew Bender Expert Practice Tip--Proving Intent: The original version of *CACI No. 2308* stated "intentionally or unintentionally" in the second element. This was subsequently revised to delete reference to the term "unintentionally." Whether an intentional or unintentional standard applies depends on the type of policy and/or its actual provisions. The standard fire policy [see *Ins. Code § 2071*] prescribes that intent be proven [see [2], *above*, "Directions for Use," which provides that the word "intentionally" in the second element of the instruction be used for cases involving *Ins. Code § 2071*]. However, with most policies the insurer does not have to prove intent. *By Rex Heeseman*

LexisNexis Matthew Bender Expert Practice Tip--Rescission Cases: The exact wording of the insurance policy and the insurance application are critical in rescission cases. If the wording of the application is vague or ambiguous, and if the insured provides some of the information, the insurer may have a difficult time proving that the omitted information was material. A failure by the insurer to follow up on information that was provided may also undercut the insurer's case. *By Ronald Oster*

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewContracts LawBreachCauses of ActionGeneral OverviewContracts LawDefensesFraud & MisrepresentationMaterial MisrepresentationInsurance LawClaims & ContractsContract FormationApplicationsInsurance LawClaims & ContractsDisclosure ObligationsHealth ConditionsInsurance LawClaims & ContractsDisclosure ObligationsMateriality



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California Forms of Jury Instruction

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CHAPTER 23 California Judicial Council Insurance Litigation Instructions

4-23 California Forms of Jury Instruction CACI 2309

CACI 2309 Termination of Insurance Policy for Fraudulent Claim

[Name of insurer] claims that [name of insured] [is not entitled to recover under/is not entitled to benefits under] the insurance policy because [he/she] made a false claim. To establish this claim, [name of insurer] must prove all of the following:

- 1. That [name of insured] made a claim for insurance benefits under a policy with [name of insurer];**
- 2. That [name of insured] represented to [name of insurer] that [insert allegedly false representation];**
- 3. That [name of insured]'s representation was not true;**
- 4. That [name of insured] knew that the representation was not true;**
- 5. That [name of insured] intended that [name of insurer] rely on this representation in [investigating/paying] [name of insured]'s claim for insurance benefits; and**
- 6. That the representation that [insert allegedly false representation], if true, would affect a reasonable insurance company's [investigation of/decision to pay] a claim for insurance benefits.**

New September 2003

If the insured's misrepresentation or concealment in the insurance application is raised as an affirmative defense by the insurer, this instruction may be modified for use. The elements of the defense would be

the same as stated above.

■ *Civil Code section 1689(b)(1)* provides that a party may rescind a contract "[i]f the consent of the party rescinding, or of any party jointly contracting with him, was given by mistake, or obtained through duress, menace, fraud, or undue influence, exercised by or with the connivance of the party as to whom he rescinds, or of any other party to the contract jointly interested with such party."

■ *Insurance Code section 338* provides: "An intentional and fraudulent omission, on the part of one insured, to communicate information of matters proving or tending to prove the falsity of a warranty, entitles the insurer to rescind."

■ *Insurance Code section 359* provides: "If a representation is false in a material point ... the injured party is entitled to rescind the contract from the time the representation becomes false."

■ "The materiality of a representation made in an application for a contract of insurance is determined by a *subjective* standard (i.e., its effect on the *particular* insurer to whom it was made) and rescission will be allowed even though the misrepresentation was the result of negligence or the product of innocence. On the other hand, in order to void a policy based upon the insured's violation of the standard fraud and concealment clause ..., the false statement must have been knowingly and wilfully made with the intent (express or implied) of deceiving the insurer. The materiality of the statement will be determined by the *objective* standard of its effect upon a *reasonable* insurer." (*Cummings v. Fire Insurance Exchange* (1988) 202 Cal.App.3d 1407, 1415, fn.7 [249 Cal.Rptr. 568] , original italics, internal citation omitted.)

■ "The consequence of rescission is not only the termination of further liability, but also the restoration of the parties to their former positions by requiring each to return whatever consideration has been received. ... [T]his would require the refund by [the insurer] of any premiums and the repayment by the [insureds] of any proceed advance which they may have received." (*Imperial Casualty & Indemnity Co. v. Sogomonian* (1988) 198 Cal.App.3d 169, 184 [243 Cal.Rptr. 639] , internal citation omitted.)

Secondary Sources

Croskey et al., California Practice Guide: Insurance Litigation (The Rutter Group) PP 5:143-5:146, 5:153-5:159.1, 5:160, 5:249-5:260.5, 15:241-15:256

2 California Liability Insurance Practice: Claims & Litigation (Cont.Ed.Bar) Rescission and Reformation, §§ 21.2-21.4, 21.35-21.37

2 California Insurance Law & Practice, Ch. 8, *The Insurance Contract*, § 8.10[1] (Matthew Bender)

26 California Forms of Pleading and Practice, Ch. 308, *Insurance* (Matthew Bender)

12 *California Points and Authorities*, Ch. 120, *Insurance*, §§ 120.250 -120.251 (Matthew Bender)

Publisher's Notes

There is no BAJI instruction on this subject.

LexisNexis Matthew Bender Expert Practice Tip--Application vs. Claim: As contrasted to an application for insurance [see *CACI No. 2308*], the insurer must prove an intentional misrepresentation

with regard to a claim. *By Rex Heeseman*

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewContracts LawBreachCauses of ActionGeneral
OverviewInsurance LawClaims & ContractsCancellation & NonrenewalMaterial MisrepresentationInsurance
LawClaims & ContractsDisclosure ObligationsFraudulent IntentInsurance LawClaims & ContractsDisclosure
ObligationsMateriality



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CHAPTER 23 California Judicial Council Insurance Litigation Instructions

4-23 California Forms of Jury Instruction CACI 2310-CACI 2319

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CACI 2310Reserved for Future Use



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CHAPTER 23 California Judicial Council Insurance Litigation Instructions

4-23 California Forms of Jury Instruction CACI 2320

CACI 2320 Affirmative Defense--Failure to Provide Timely Notice

[*Name of defendant*] **claims that it does not have to pay the [judgment against/settlement by] [*name of plaintiff*] because it did not receive timely notice of the [lawsuit/[*insert other*]]. To succeed, [*name of defendant*] must prove both of the following:**

- 1. That [*name of plaintiff*] did not give [*name of defendant*] notice [or that [*name of defendant*] did not receive notice by some other means] [within the time specified in the policy/within a reasonable time] of the [lawsuit/[*insert other*]]; and**
- 2. That [*name of defendant*] was prejudiced by [*name of plaintiff*]'s failure to give timely notice.**

To establish prejudice, [*name of defendant*] must show a substantial likelihood that, with timely notice, it would have [taken steps that would have substantially reduced or eliminated [*name of plaintiff*]'s liability] [or] [settled for a substantially smaller amount].

New September 2003

Directions for Use

The instructions in this series assume the plaintiff is the insured and the defendant is the insurer. The party designations may be changed if appropriate to the facts of the case.

This instruction is intended for use by an insurer as a defense to a breach of contract action based on a third party liability policy. The defense does not apply to "claims made" policies (see *Pacific Employers Insurance Co. v. Superior Court* (1990) 221 Cal.App.3d 1348, 1357-1360 [270 Cal.Rptr. 779]). This instruction also may be modified for use as a defense to a judgment creditor's action to recover on a

liability policy.

Sources and Authority

■ "The right of an injured party to sue an insurer on the policy after obtaining judgment against the insured is established by statute. An insurer may assert defenses based upon a breach by the insured of a condition of the policy such as a cooperation clause, but the breach cannot be a valid defense unless the insurer was substantially prejudiced thereby. Similarly, it has been held that prejudice must be shown with respect to breach of a notice clause." (*Campbell v. Allstate Insurance Co.* (1963) 60 Cal.2d 303, 305-306 [32 Cal.Rptr. 827, 384 P.2d 155] , internal citations omitted.)

■ "[P]rejudice is not shown simply by displaying end results; the probability that such result could or would have been avoided absent the claimed default or error must also be explored." (*Clemmer v. Hartford Insurance Co.* (1978) 22 Cal.3d 865, 883, fn. 12 [151 Cal.Rptr. 285, 587 P.2d 1098] .)

■ "If the insurer asserts that the underlying claim is not a covered occurrence or is excluded from basic coverage, then earlier notice would only result in earlier denial of coverage. To establish actual prejudice, the insurer must show a substantial likelihood that, with timely notice, and notwithstanding a denial of coverage or reservation of rights, it would have settled the claim for less or taken steps that would have reduced or eliminated the insured's liability." (*Safeco Ins. Co. of America v. Parks* (2009) 170 Cal.App.4th 992, 1004 [88 Cal.Rptr.3d 730] .)

■ "California's 'notice-prejudice' rule operates to bar insurance companies from disavowing coverage on the basis of lack of timely notice unless the insurance company can show actual prejudice from the delay. The rule was developed in the context of 'occurrence' policies." (*Pacific Employers Insurance Co.*, *supra*, 221 Cal.App.3d at p. 1357 .)

■ "[The notice-prejudice rule] does not apply to every time limit on any insurance policy. [P] Where the policy provides that special coverage for a particular type of claim is conditioned on express compliance with a reporting requirement, the time limit is enforceable without proof of prejudice. Such reporting time limits often are found in provisions for expanded liability coverage that the insurer usually does not cover. The insurer makes an exception and extends special coverage conditioned on compliance with a reporting requirement and other conditions. The reporting requirement becomes 'the written notice necessary to trigger the expanded coverage afforded' by the special policy provision." (*Venoco, Inc. v. Gulf Underwriters Ins. Co.* (2009) 175 Cal.App.4th 750, 760 [96 Cal.Rptr.3d 409], internal citations omitted.)

■ "With respect to notice provisions, one Court of Appeal has explained: '[A]n "occurrence" policy provides coverage for any acts or omissions that arise during the policy period even though the claim is made after the policy has expired.' ... [P] ... [P] Occurrence policies were developed to provide coverage for damage caused by collision, fire, war, and other identifiable events. ... Because the occurrence of these events was relatively easy to ascertain, the insurer was able to 'conduct a prompt investigation of the incident' ... Notice provisions contained in such occurrence policies were 'included to aid the insurer in investigating, settling, and defending claims[.]' ... If an insured breaches a notice provision, resulting in substantial prejudice to the defense, the insurer is relieved of liability." (*Belz v. Clarendon America Ins. Co.* (2007) 158 Cal.App.4th 615, 626 [69 Cal.Rptr.3d 864] , internal citation omitted.)

■ "The 'general rule' is that an insurer is not bound by a judgment unless it had notice of the pendency of the action. ... However, if an insurer denies coverage to the insured, the insured's contractual

obligation to notify the insurer ceases." (*Samson v. Transamerica Insurance Co. (1981) 30 Cal.3d 220, 238 [178 Cal.Rptr. 343, 636 P.2d 32]* , internal citations omitted.)

Secondary Sources

Croskey et al., California Practice Guide: Insurance Litigation (The Rutter Group) PP 15:917-15:920

1 California Liability Insurance Practice: Claims & Litigation (Cont.Ed.Bar) Identifying Sources of Coverage, §§ 8.24-8.26

4 *California Insurance Law & Practice, Ch. 41, Liability Insurance in General, § 41.65[1] -[9]* (Matthew Bender)

26 *California Forms of Pleading and Practice, Ch. 308, Insurance, § 308.500* (Matthew Bender)

Publisher's Notes

There is no BAJI instruction on this subject.

LexisNexis Matthew Bender Expert Practice Tip--Proving Different Result Can Be Difficult: As noted in the "Directions for Use," *CACI No. 2320* does not apply to "claims made" policies. When the instruction applies (e.g., occurrence policies), it can be very difficult for the insurer to show that a different result would have occurred but for the late notice. The insurer not only has to show it would have taken different steps, but that these different steps would have produced a different and better result. Apart from default cases, this standard will be difficult to meet. *By Ronald Oster*

LexisNexis Matthew Bender Expert Practice Tip--Substantial Prejudice: Proving "substantial prejudice" is usually very difficult for the insurer. *By Rex Heeseman*

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Contracts Law Breach Causes of Action General Overview Insurance Law Claims & Contracts Notice to Insurers Actual Knowledge & Notice Insurance Law Claims & Contracts Notice to Insurers Due Diligence Insurance Law Claims & Contracts Notice to Insurers Prejudice to Insurer Insurance Law Claims & Contracts Notice to Insurers Reasonableness



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California Forms of Jury Instruction

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CHAPTER 23 California Judicial Council Insurance Litigation Instructions

4-23 California Forms of Jury Instruction CACI 2321

CACI 2321 Affirmative Defense--Insured's Breach of Duty to Cooperate in Defense

[*Name of defendant*] **claims that it does not have to pay the [judgment against/settlement by] [*name of plaintiff*] because [*name of plaintiff*] failed to cooperate in [his/her/its] defense. To succeed, [*name of defendant*] must prove all of the following:**

- 1. That [*name of plaintiff*] failed to cooperate in the defense of the lawsuit against [him/her/it];**
- 2. That [*name of defendant*] used reasonable efforts to obtain [*name of plaintiff*]'s cooperation;
and**
- 3. That [*name of defendant*] was prejudiced by [*name of plaintiff*]'s failure to cooperate in [his/her/its] defense.**

To establish prejudice, [*name of defendant*] must show a substantial likelihood that, if [*name of plaintiff*] had cooperated, [*name of defendant*] would have [taken steps that would have substantially reduced or eliminated [*name of plaintiff*]'s liability] [or] [settled for a substantially smaller amount].

New September 2003

The instructions in this series assume the plaintiff is the insured and the defendant is the insurer. The party designations may be changed if appropriate to the facts of the case.

This instruction is intended for use by an insurer as a defense to a breach of contract action based on a third party liability policy. This instruction also may be modified for use as a defense to a judgment creditor's action to recover on a liability policy.

Depending on the facts of the case, the second element of this instruction may not always be necessary.

■ "The right of an injured party to sue an insurer on the policy after obtaining judgment against the insured is established by statute. An insurer may assert defenses based upon a breach by the insured of a condition of the policy such as a cooperation clause, but the breach cannot be a valid defense unless the insurer was substantially prejudiced thereby. ... [P] The burden of proving that a breach of a cooperation clause resulted in prejudice is on the insurer." (*Campbell v. Allstate Insurance Co.* (1963) 60 Cal.2d 303, 305-306 [32 Cal.Rptr. 827, 384 P.2d 155] , internal citations omitted.)

■ "[W]e apprehend that *Campbell* stands for these propositions: (1) that breach by an insured of a cooperation ... clause may not be asserted by an insurer unless the insurer was substantially prejudiced thereby; (2) that prejudice is not presumed as a matter of law from such breach; (3) that the burden of proving prejudicial breach is on the insurer; and (4) that, although the issue of prejudice is ordinarily one of fact, it may be established as a matter of law by the facts proved." (*Northwestern Title Security Co. v. Flack* (1970) 6 Cal.App.3d 134, 141 [85 Cal.Rptr. 693] .)

■ "[C]ooperation clauses serve an important purpose. "[A] condition of a policy requiring the cooperation and assistance of the assured in opposing a claim or an action lodged against him by an injured person is material to the risk and of the utmost importance in a practical sense. Without such cooperation and assistance the insurer is severely handicapped and may in some instances be absolutely precluded from advancing any defense." ... "[S]uch provisions 'enable the [insurer] to possess itself of all knowledge, and all information as to other sources and means of knowledge, in regard to facts, material to [its] rights, to enable [it] to decide upon [its] obligations, and to protect [itself] against false claims.' " ... Where an insured violates a cooperation clause, the insurer's performance is excused if its ability to provide a defense has been substantially prejudiced.' " (*Belz v. Clarendon America Ins. Co.* (2007) 158 Cal.App.4th 615, 626 [69 Cal.Rptr.3d 864] .)

■ "[A]n insurer, in order to establish it was prejudiced by the failure of the insured to cooperate in his defense, must establish at the very least that if the cooperation clause had not been breached there was a substantial likelihood the trier of fact would have found in the insured's favor." (*Billington v. Interinsurance Exchange of Southern California* (1969) 71 Cal.2d 728, 737 [79 Cal.Rptr. 326, 456 P.2d 982] .)

■ "[I]f the trial court finds ... that the insurer failed to diligently seek its insured's presence a finding that he breached the cooperation clause would not be justified." (*Billington, supra*, 71 Cal.2d at p. 744 .)

■ "[P]rejudice is not shown simply by displaying end results; the probability that such results could or would have been avoided absent the claimed default or error must also be explored." (*Clemmer v. Hartford Insurance Co.* (1978) 22 Cal.3d 865, 883, fn. 12 [151 Cal.Rptr. 285, 587 P.2d 1098] .)

Secondary Sources

Croskey et al., California Practice Guide: Insurance Litigation (The Rutter Group) PP 15:917-15:919

1 California Liability Insurance Practice: Claims & Litigation (Cont.Ed.Bar) Insured's Role in Defense, §§ 11.2-11.26

4 California Insurance Law & Practice, Ch. 41, *Liability Insurance in General*, § 41.64[1]-[11] (Matthew Bender)

Publisher's Notes

This instruction covers issues presented in BAJI No. 12.98.

LexisNexis Matthew Bender Expert Practice Tip--Duty to Cooperate: Insurers frequently demand all types of coverage information from the insured on the ground that the insured has a "duty to cooperate." However, this duty to cooperate relates to the defense of the insured, not a coverage investigation. As indicated in the instruction, the duty is breached if the insured fails to cooperate in its own defense to such a degree that prejudice results. The insurer must not only prove that it was prevented from taking different steps to defend the insured, but that the different steps would have produced a different and better result. *By Ronald Oster*



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California Forms of Jury Instruction

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CHAPTER 23 California Judicial Council Insurance Litigation Instructions

4-23 California Forms of Jury Instruction CACI 2322

CACI 2322 Affirmative Defense--Insured's Voluntary Payment

[*Name of defendant*] **claims that it does not have to pay** [*specify, e.g., the amount of the settlement*] **because** [*name of plaintiff*] **made a voluntary payment. To succeed on this defense, [*name of defendant*] must prove the following:**

1. [*Select either or both of the following:*]

[*That [*name of plaintiff*] made a payment to [*name of third party claimant*] in [partial/full] settlement of [*name of third party claimant*]'s claim against [*name of plaintiff*]; [or]*]

[*That [*name of plaintiff*] [made a payment/ [or] assumed an obligation/ [or] incurred an expense] to [*name*] with regard to [*name of third party claimant*]'s claim against [*name of plaintiff*];*]

AND

2. **That [*name of defendant*] did not give its consent or approval for the [payment/ [or] obligation/ [or] expense].**

New April 2007

The instructions in this series assume that the plaintiff is the insured and the defendant is the insurer. The party designations may be changed if appropriate to the facts of the case.

This instruction is intended for use by an insurer as a defense to a breach of contract action based on a third party liability policy. This instruction also may be modified for use as a defense to a judgment

creditor's action to recover on a liability policy. This defense is not available if the insurer refused to defend before the voluntary payment was made.

A voluntary-payments clause in an insurance policy typically provides that the insured may not voluntarily make a payment, assume an obligation, or incur an expense without the insurer's consent. (See, e.g., *Truck Ins. Exchange v. Unigard Ins. Co.* (2000) 79 Cal.App.4th 966, 976 [94 Cal.Rptr.2d 516].) In element 1, select the appropriate options depending on the acts alleged. Modify, as necessary, depending on the actual language of the policy. Use the first option if the insured has made a payment in settlement of the claim. Use the second option if the insured has made a payment, assumed an obligation, or incurred an expense for other reasons, such as to an attorney for legal services, or to a creditor of the claimant, such as a provider of medical or repair services.

- "The general validity of no-voluntary-payment provisions in liability insurance policies is well established. ... [S]uch clauses are common 'to prevent collusion as well as to invest the insurer with the complete control and direction of the defense or compromise of suits or claims.' " (*Insua v. Scottsdale Ins. Co.* (2002) 104 Cal.App.4th 737, 742 [129 Cal.Rptr.2d 138] , internal citations omitted.)

- "California law enforces ... no-voluntary-payments provisions in the absence of economic necessity, insurer breach, or other extraordinary circumstances. They are designed to ensure that responsible insurers that promptly accept a defense tendered by their insureds thereby gain control over the defense and settlement of the claim. That means insureds cannot unilaterally settle a claim before the establishment of the claim against them and the insurer's refusal to defend in a lawsuit to establish liability [T]he decision to pay any remediation costs outside the civil action context raises a 'judgment call left solely to the insurer.' In short, the provision protects against coverage by fait accompli." *Low v. Golden Eagle Ins. Co.* (2003) 110 Cal.App.4th 1532, 1544 [2 Cal.Rptr.3d 761] , internal citations omitted.)

- " 'Typically, a breach of that provision occurs, if at all, before the insured has tendered the defense to the insurer.' ... [A voluntary-payments] provision is [also] enforceable posttender until the insurer wrongfully denies tender. '[I]t is only when the insured has requested *and been denied a defense by the insurer* that the insured may ignore the policy's provisions forbidding the incurring of defense costs without the insurer's prior consent and under the compulsion of that refusal undertake his own defense at the insurer's expense' " (*Low, supra*, 110 Cal.App.4th at pp. 1546-1547 , original italics, internal citations omitted.)

- " '[T]he existence or absence of prejudice to [the insurer] is simply irrelevant to [its] duty to indemnify costs incurred *before* notice. The policy plainly provides that notice is a *condition precedent* to the insured's right to be indemnified; a fortiori the right to be indemnified cannot relate back to payments made or obligations incurred before notice.' ... The prejudice requirement ... applies only to the insurer's attempt to assert lack of notice as a *policy defense* against payment even of losses and costs incurred *after* belated notice." (*Jamestown Builders, Inc. v. General Star Indemnity Co.* (1999) 77 Cal.App.4th 341, 350 [91 Cal.Rptr.2d 514] , original italics, internal citations omitted.)

- " 'There may be exceptions to the prohibition on voluntary payments, as where the insured is unaware of the identity of the insurer, the payment is necessary for reasons beyond the insured's control, or the insured faces a situation requiring an immediate response to protect its legal interests.' In a circumstance of that nature, the insured's payment is considered *involuntary*." (*Belz v. Clarendon America Ins. Co.* (2007) 158 Cal.App.4th 615, 628 [69 Cal.Rptr.3d 864] , original italics, internal citation omitted.)

Secondary Sources

2 Witkin, Summary of California Law (10th ed. 2005) Insurance, § 320

Croskey et al., California Practice Guide: Insurance Litigation (The Rutter Group) PP 7:439.5-7:439.10

California Liability Insurance Practice: Claims and Litigation (Cont.Ed.Bar) §§ 2.7, 3.27, 8.32, 11.14, 23.38

25 *California Forms of Pleading and Practice, Ch. 300, Indemnity and Contribution, § 300.73[6]* (Matthew Bender)

26 *California Forms of Pleading and Practice, Ch. 308, Insurance, §§ 308.500, 308.502* (Matthew Bender)

Publisher's Notes

There is no BAJI instruction on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Pleading & Practice Defenses, Demurrers & Objections Affirmative Defenses General Overview Civil Procedure Trials Jury Trials Jury Instructions General Overview Insurance Law Claims & Contracts Notice to Insurers General Overview



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California Forms of Jury Instruction

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CHAPTER 23 California Judicial Council Insurance Litigation Instructions

4-23 California Forms of Jury Instruction CACI 2323-CACI 2329

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CHAPTER 23 California Judicial Council Insurance Litigation Instructions

4-23 California Forms of Jury Instruction CACI 2330

CACI 2330 Implied Obligation of Good Faith and Fair Dealing Explained

In every insurance policy there is an implied obligation of good faith and fair dealing that neither the insurance company nor the insured will do anything to injure the right of the other party to receive the benefits of the agreement.

To fulfill its implied obligation of good faith and fair dealing, an insurance company must give at least as much consideration to the interests of the insured as it gives to its own interests.

To breach the implied obligation of good faith and fair dealing, an insurance company must, unreasonably or without proper cause, act or fail to act in a manner that deprives the insured of the benefits of the policy. It is not a mere failure to exercise reasonable care. However, it is not necessary for the insurer to intend to deprive the insured of the benefits of the policy.

New September 2003; Revised December 2007

Directions for Use

This instruction may be used to introduce a "bad-faith" claim arising from an alleged breach of the implied covenant of good faith and fair dealing.

Sources and Authority

- "There is an implied covenant of good faith and fair dealing in every contract that neither party will do anything which will injure the right of the other to receive the benefits of the agreement." (*Comunale v. Traders & General Ins. Co.* (1958) 50 Cal.2d 654, 658 [328 P.2d 198] .)

■ "For the insurer to fulfill its obligation not to impair the right of the insured to receive the benefits of the agreement, it again must give at least as much consideration to the latter's interests as it does to its own." (*Egan v. Mutual of Omaha Insurance Co.* (1979) 24 Cal.3d 809, 818-819 [169 Cal.Rptr. 691, 620 P.2d 141] .)

■ "[T]o establish the insurer's 'bad faith' liability, the insured must show that the insurer has (1) withheld benefits due under the policy, and (2) that such withholding was 'unreasonable' or 'without proper cause.' The actionable withholding of benefits may consist of the denial of benefits due; paying less than due; and/or unreasonably delaying payments due." (*Major v. Western Home Ins. Co.* (2009) 169 Cal.App.4th 1197, 1209 [87 Cal.Rptr.3d 556] , internal citations omitted.)

■ "[T]he covenant of good faith can be breached for objectively unreasonable conduct, regardless of the actor's motive.' ... [A]n insured plaintiff need only show, for example, that the insurer unreasonably refused to pay benefits or failed to accept a reasonable settlement offer; there is no requirement to establish subjective bad faith." (*Bosetti v. United States Life Ins. Co. in the City of New York* (2009) 175 Cal.App.4th 1208, 1236 [96 Cal.Rptr.3d 744], original italics, internal citations omitted.)

■ "Bad faith may involve negligence, or negligence may be indicative of bad faith, but negligence alone is insufficient to render the insurer liable." *Brown v. Guarantee Ins. Co.* (1957) 155 Cal.App.2d 679, 689 [319 P.2d 69] .)

■ "Thus, a breach of the implied covenant of good faith and fair dealing involves something more than a breach of the contract or mistaken judgment. There must be proof the insurer failed or refused to discharge its contractual duties not because of an honest mistake, bad judgment, or negligence, 'but rather by a conscious and deliberate act, which unfairly frustrates the agreed common purposes and disappoints the reasonable expectations of the other party thereby depriving that party of the benefits of the agreement.' " (*Century Surety Co. v. Polisso* (2006) 139 Cal.App.4th 922, 949 [43 Cal.Rptr.3d 468] , internal citations omitted.)

■ "[I]f the insurer denies benefits unreasonably (i.e., without any reasonable basis for such denial), it may be exposed to the full array of tort remedies, including possible punitive damages." (*Jordan v. Allstate Ins. Co.* (2007) 148 Cal.App.4th 1062, 1073 [56 Cal.Rptr.3d 312] .)

■ "Subterfuges and evasions violate the obligation of good faith in performance even though the actor believes his conduct to be justified. But the obligation goes further: bad faith may be overt or may consist of inaction, and fair dealing may require more than honesty. A complete catalogue of types of bad faith is impossible, but the following types are among those which have been recognized in judicial decisions: evasion of the spirit of the bargain, lack of diligence and slacking off, willful rendering of imperfect performance, abuse of a power to specify terms, and interference with or failure to cooperate in the other party's performance." (*R. J. Kuhl Corp. v. Sullivan* (1993) 13 Cal.App.4th 1589, 1602 [17 Cal.Rptr.2d 425] .)

■ "[A]n insurer is not required to pay every claim presented to it. Besides the duty to deal fairly with the insured, the insurer also has a duty to its other policyholders and to the stockholders (if it is such a company) not to dissipate its reserves through the payment of meritless claims. Such a practice inevitably would prejudice the insurance seeking public because of the necessity to increase rates, and would finally drive the insurer out of business." (*Austero v. National Cas. Co.* (1978) 84 Cal.App.3d 1, 30 [148 Cal.Rptr. 653] , overruled on other grounds in *Egan, supra*, 24 Cal.3d at p. 824 fn. 7 .)

■ "Unique obligations are imposed upon true fiduciaries which are not found in the insurance relationship. For example, a true fiduciary must first consider and always act in the best interests of its trust and not allow self-interest to overpower its duty to act in the trust's best interests. An insurer, however, may give its own interests consideration equal to that it gives the interests of its insured; it is not required to disregard the interests of its shareholders and other policyholders when evaluating claims; and it is not required to pay noncovered claims, even though payment would be in the best interests of its insured." (*Love v. Fire Ins. Exchange* (1990) 221 Cal.App.3d 1136, 1148-1149 [271 Cal.Rptr. 246] , internal citations omitted.)

Secondary Sources

2 Witkin, Summary of California Law (10th ed. 2005) Insurance § 239

Croskey et al., California Practice Guide: Insurance Litigation (The Rutter Group) PP 11:7-11:8, 12:1-12:200

1 California Liability Insurance Practice: Claims and Litigation (Cont.Ed.Bar), Overview of Rights and Obligations of Policy, §§ 2.9-2.15

2 *California Insurance Law & Practice, Ch. 13, Claims Handling and the Duty of Good Faith, § 13.03[1][a] -[c]* (Matthew Bender)

1 California Uninsured Motorist Law, Ch. 13, *Rights, Duties, and Obligations of the Parties*, § 13.23 (Matthew Bender)

2 California Uninsured Motorist Law, Ch. 24, *Bad Faith in Uninsured Motorist Law*, §§ 24.10, 24.20-24.21, 24.40 (Matthew Bender)

26 *California Forms of Pleading and Practice, Ch. 308, Insurance, § 308.24[1]* (Matthew Bender)

11 *California Legal Forms, Ch. 26A, Title Insurance, § 26A.17[a]* (Matthew Bender)

Publisher's Notes

This instruction replaces BAJI Nos. 12.90 and 12.96.

LexisNexis Matthew Bender Expert Practice Tip-- Implied Covenant of Good Faith and Fair Dealing: *Foley v. Interactive Data Corp.* (1988) 47 Cal. 3d 654, 254 Cal. Rptr. 211, 765 P.2d 373 is the leading case on this point. The implied covenant (as a contract remedy) is becoming more common--but probably not a topic here. *By Rex Heeseman*

LexisNexis Matthew Bender Expert Practice Tip--Proving Breach of Duty of Good Faith: CACI No. 2330 presents the classic definition of good faith. The classic method of proving a breach of the duty of good faith is to present evidence that the insurance company placed its own financial interests above the interests of the insured. *By Ronald Oster*

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Insurance Law Claims & Contracts Good Faith & Fair Dealing Agents & Brokers Insurance Law Claims & Contracts Good Faith & Fair Dealing Duty to Defend Insurance Law Claims & Contracts Good Faith & Fair Dealing Payments Insurance Law Claims & Contracts Good Faith & Fair

Dealing Third Party Claimants



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CHAPTER 23 California Judicial Council Insurance Litigation Instructions

4-23 California Forms of Jury Instruction CACI 2331

CACI 2331 Breach of the Implied Obligation of Good Faith and Fair Dealing--Failure or Delay in Payment (First Party)--Essential Factual Elements

[*Name of plaintiff*] **claims that** [*name of defendant*] **breached the obligation of good faith and fair dealing by [failing to pay/delaying payment of] benefits due under the insurance policy. To establish this claim, [*name of plaintiff*] must prove all of the following:**

- 1. That [*name of plaintiff*] suffered a loss covered under an insurance policy with [*name of defendant*];**
- 2. That [*name of defendant*] was notified of the loss;**
- 3. That [*name of defendant*], unreasonably or without proper cause, [failed to pay/delayed payment of] policy benefits;**
- 4. That [*name of plaintiff*] was harmed; and**
- 5. That [*name of defendant*]'s [failure to pay/delay in payment of] policy benefits was a substantial factor in causing [*name of plaintiff*]'s harm.**

In determining whether [*name of defendant*] acted unreasonably or without proper cause, you should consider only the information that [*name of defendant*] knew or reasonably should have known at the time when it [failed to pay/delayed payment of] policy benefits.

New September 2003; Revised December 2007, April 2008, December 2009

Directions for Use

The instructions in this series assume that the plaintiff is the insured and the defendant is the insurer. The party designations may be changed if appropriate to the facts of the case.

If there is a genuine issue as to the insurer's liability under the policy for the claim asserted by the insured, there can be no bad-faith liability imposed on the insurer for advancing its side of that dispute. This is known as the "genuine dispute" doctrine. The genuine-dispute doctrine is subsumed within the test of reasonableness or proper cause (element 3). No specific instruction on the doctrine need be given. (See *McCoy v. Progressive West Ins. Co.* (2009) 171 Cal.App.4th 785, 792-794 [90 Cal.Rptr.3d 74] .)

For instructions regarding general breach of contract issues, refer to the Contracts series (CACI No. 300 et seq.).

Sources and Authority

- If an insurer "fails to deal *fairly and in good faith* with its insured by refusing, without proper cause, to compensate its insured for a loss covered by the policy, such conduct may give rise to a cause of action in tort for breach of an implied covenant of good faith and fair dealing. ... [P] ... [W]hen the insurer unreasonably and in bad faith withholds payment of the claim of its insured, it is subject to liability in tort." (*Gruenberg v. Aetna Insurance Co.* (1973) 9 Cal.3d 566, 574-575 [108 Cal.Rptr. 480, 510 P.2d 1032] , original italics.)

- "An insurer's obligations under the implied covenant of good faith and fair dealing with respect to first party coverage include a duty not to unreasonably withhold benefits due under the policy. An insurer that unreasonably delays, or fails to pay, benefits due under the policy may be held liable in tort for breach of the implied covenant. The withholding of benefits due under the policy may constitute a breach of contract even if the conduct was reasonable, but liability in tort arises only if the conduct was unreasonable, that is, without proper cause. In a first party case, as we have here, the withholding of benefits due under the policy is not unreasonable if there was a genuine dispute between the insurer and the insured as to coverage or the amount of payment due." (*Rappaport-Scott v. Interinsurance Exch. of the Auto. Club* (2007) 146 Cal.App.4th 831, 837 [53 Cal.Rptr.3d 245] , internal citations omitted.)

- "[T]here are at least two separate requirements to establish breach of the implied covenant: (1) benefits due under the policy must have been withheld; and (2) the reason for withholding benefits must have been unreasonable or without proper cause." (*Love v. Fire Insurance Exchange* (1990) 221 Cal.App.3d 1136, 1151 [271 Cal.Rptr. 246] , internal citations omitted.)

- "[A]n insurer's erroneous failure to pay benefits under a policy does not necessarily constitute bad faith entitling the insured to recover tort damages. '[T]he ultimate test of [bad faith] liability in the first party cases is whether the refusal to pay policy benefits was unreasonable.' ... In other words, 'before an [insurer] can be found to have acted tortiously, i.e., in bad faith, in refusing to bestow policy benefits, it must have done so "without proper cause." ' " (*Opsal v. United Servs. Auto. Ass'n* (1991) 2 Cal.App.4th 1197, 1205 [10 Cal.Rptr.2d 352] , citations omitted.)

- "[A]n insurer denying or delaying the payment of policy benefits due to the existence of a genuine dispute with its insured as to the existence of coverage liability or the amount of the insured's coverage claim is not liable in bad faith even though it might be liable for breach of contract." (*Chateau Chamberay Homeowners Assn. v. Associated International Insurance Co.* (2001) 90 Cal.App.4th 335, 347 [108 Cal.Rptr.2d 776] .)

■ "The genuine dispute rule does not relieve an insurer from its obligation to thoroughly and fairly investigate, process and evaluate the insured's claim. A *genuine* dispute exists only where the insurer's position is maintained in good faith and on reasonable grounds. ... 'The genuine issue rule in the context of bad faith claims allows a [trial] court to grant summary judgment when it is undisputed or indisputable that the basis for the insurer's denial of benefits was reasonable--for example, where even under the plaintiff's version of the facts there is a genuine issue as to the insurer's liability under California law. ... On the other hand, an insurer is not entitled to judgment as a matter of law where, viewing the facts in the light most favorable to the plaintiff, a jury could conclude that the insurer acted unreasonably.' " (*Wilson v. 21st Century Ins. Co.* (2007) 42 Cal.4th 713, 724 [68 Cal.Rptr.3d 746, 171 P.3d 1082] , original italics, internal citations omitted.)

■ "We evaluate the reasonableness of the insurer's actions and decision to deny benefits as of the time they were made rather than with the benefit of hindsight." (*Century Surety Co. v. Polisso* (2006) 139 Cal.App.4th 922, 949 [43 Cal.Rptr.3d 468] .)

■ "[I]f the insurer denies benefits unreasonably (i.e., without any reasonable basis for such denial), it may be exposed to the full array of tort remedies, including possible punitive damages." (*Jordan v. Allstate Ins. Co.* (2007) 148 Cal.App.4th 1062, 1073 [56 Cal.Rptr.3d 312] .)

■ "While many, if not most, of the cases finding a genuine dispute over an insurer's coverage liability have involved *legal* rather than *factual* disputes, we see no reason why the genuine dispute doctrine should be limited to legal issues. That does not mean, however, that the genuine dispute doctrine may properly be applied in every case involving purely a factual dispute between an insurer and its insured. This is an issue which should be decided on a case-by-case basis." (*Chateau Chamberay Homeowners Assn.*, *supra*, 90 Cal.App.4th at p. 348 , original italics, footnote and internal citations omitted.)

■ "[I]f the conduct of [the insurer] in defending this case was objectively reasonable, its subjective intent is irrelevant." (*Bosetti v. United States Life Ins. Co. in the City of New York* (2009) 175 Cal.App.4th 1208, 1236 [96 Cal.Rptr.3d 744]; cf. *Carma Developers (Cal.), Inc. v. Marathon Development California, Inc.* (1992) 2 Cal.4th 342, 372 [6 Cal.Rptr.2d 467, 826 P.2d 710] ["[I]t has been suggested the covenant has both a subjective and objective aspect--subjective good faith and objective fair dealing. A party violates the covenant if it subjectively lacks belief in the validity of its act or if its conduct is objectively unreasonable."].)

■ "[W]hile an insurer's subjective bad intentions are not a sufficient basis on which to establish a bad faith cause of action, an insurer's subjective mental state may nonetheless be a circumstance to be considered in the evaluation of the *objective* reasonableness of the insurer's actions." (*Bosetti, supra*, 175 Cal.App.4th at p. 1239, original italics.)

■ "[A]n insured cannot maintain a claim for tortious breach of the implied covenant of good faith and fair dealing absent a covered loss. If the insurer's investigation--adequate or not--results in a correct conclusion of no coverage, no tort liability arises for breach of the implied covenant." (*Benavides v. State Farm General Ins. Co.* (2006) 136 Cal.App.4th 1241, 1250 [39 Cal.Rptr.3d 650] , internal citations omitted; cf. *Brehm v. 21st Century Ins. Co.* (2008) 166 Cal.App.4th 1225, 1236 [83 Cal.Rptr.3d 410] ["[B]reach of a specific provision of the contract is not a necessary prerequisite to a claim for breach of the implied covenant of good faith and fair dealing. ... [E]ven an insurer that pays the full limits of its policy may be liable for breach of the implied covenant, if improper claims handling causes detriment to the insured"].)

■ "An insurance company may not ignore evidence which supports coverage. If it does so, it acts unreasonably towards its insured and breaches the covenant of good faith and fair dealing." (*Mariscal v. Old Republic Life Ins. Co.* (1996) 42 Cal.App.4th 1617, 1624 [50 Cal.Rptr.2d 224] .)

■ "We conclude ... that the duty of good faith and fair dealing on the part of defendant insurance companies is an absolute one. ... [T]he nonperformance by one party of its contractual duties cannot excuse a breach of the duty of good faith and fair dealing by the other party while the contract between them is in effect and not rescinded." (*Gruenberg, supra*, 9 Cal.3d at p. 578 .)

■ "[T]he insurer's duty to process claims fairly and in good faith [is] a nondelegable duty." (*Hughes v. Blue Cross of Northern California* (1989) 215 Cal.App.3d 832, 848 [263 Cal.Rptr. 850] .)

■ "[I]n [a bad-faith action] 'damages for emotional distress are compensable as *incidental damages flowing from the initial breach*, not as a separate cause of action.' Such claims of emotional distress must be incidental to 'a substantial invasion of property interests.' " (*Major v. Western Home Ins. Co.* (2009) 169 Cal.App.4th 1197, 1214 [87 Cal.Rptr.3d 556] , original italics, internal citations omitted.)

Secondary Sources

2 Witkin, Summary of California Law (10th ed. 2005) Insurance, §§ 240-242

Croskey et al., California Practice Guide: Insurance Litigation (The Rutter Group) PP 12:822-12:1016

2 California Liability Insurance Practice: Claims & Litigation (Cont.Ed.Bar) General Principles of Contract and Bad Faith Actions, §§ 24.25-24.45A

2 *California Insurance Law & Practice*, Ch. 13, *Claims Handling and the Duty of Good Faith*, §§ 13.03[2][a] -[c], 13.06 (Matthew Bender)

1 California Uninsured Motorist Law, Ch. 13, *Rights, Duties, and Obligations of the Parties*, § 13.23 (Matthew Bender)

2 California Uninsured Motorist Law, Ch. 24, *Bad Faith in Uninsured Motorist Law*, §§ 24.10, 24.20-24.21, 24.40 (Matthew Bender)

3 Levy et al., *California Torts*, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.140 (Matthew Bender)

6 Levy et al., *California Torts*, Ch. 82, *Claims and Disputes Under Insurance Policies*, §§ 82.21, 82.50 (Matthew Bender)

26 *California Forms of Pleading and Practice*, Ch. 308, *Insurance*, § 308.24 (Matthew Bender)

11 *California Legal Forms*, Ch. 26A, *Title Insurance*, § 26A.17 (Matthew Bender)

12 *California Points and Authorities*, Ch. 120, *Insurance*, § 120.208 (Matthew Bender)

Publisher's Notes

This instruction replaces BAJI No. 12.92, and covers issues presented in BAJI Nos. 12.93 and 12.94.

LexisNexis Matthew Bender Expert Practice Tip--Bad Faith: Note that an unreasonable delay in

payment--as well as an unreasonable denial of payment--will support a bad faith claim. This means that if an insurer pays the claim after the lawsuit is filed, it can still be held liable for the delay. *By Ronald Oster*

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewInsurance LawClaims & ContractsGood Faith & Fair DealingAgents & BrokersInsurance LawClaims & ContractsGood Faith & Fair DealingDuty to DefendInsurance LawClaims & ContractsGood Faith & Fair DealingPaymentsInsurance LawClaims & ContractsGood Faith & Fair DealingThird Party Claimants



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California Forms of Jury Instruction

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CHAPTER 23 California Judicial Council Insurance Litigation Instructions

4-23 California Forms of Jury Instruction CACI 2332

CACI 2332 Bad Faith (First Party)--Failure to Properly Investigate Claim

[Name of defendant] acted unreasonably or without proper cause if it failed to conduct a full, fair, and thorough investigation of all of the bases of the claim. When investigating [name of plaintiff]'s claim, [name of defendant] had a duty to diligently search for and consider evidence that supported coverage of the claimed loss.

New September 2003; Revised December 2005, December 2007, April 2008

Directions for Use

This instruction must be used with *CACI No. 2331, Breach of the Implied Obligation of Good Faith and Fair Dealing--Failure or Delay in Payment (First Party)--Essential Factual Elements*, if it is alleged that the insurer acted unreasonably or without proper cause by failing to properly investigate the claim.

The instructions in this series assume that the plaintiff is the insured and the defendant is the insurer. The party designations may be changed if appropriate to the facts of the case.

For instructions regarding general breach of contract issues, refer to the Contracts series (*CACI No. 300 et seq.*).

Sources and Authority

■ "[A]n insurer may breach the covenant of good faith and fair dealing when it fails to properly investigate its insured's claim." (*Egan v. Mutual of Omaha Insurance Co.* (1979) 24 Cal.3d 809, 817 [169 Cal.Rptr. 691, 620 P.2d 141] .)

4-23 California Forms of Jury Instruction CACI 2332

■ "To fulfill its implied obligation, an insurer must give at least as much consideration to the interests of the insured as it gives to its own interests. When the insurer unreasonably and in bad faith withholds payment of the claim of its insured, it is subject to liability in tort. And an insurer cannot reasonably and in good faith deny payments to its insured without fully investigating the grounds for its denial." (*Frommoethelydo v. Fire Insurance Exchange* (1986) 42 Cal.3d 208, 214-215 [228 Cal.Rptr. 160, 721 P.2d 41] , internal citation omitted.)

■ "To protect [an insured's] interests it is essential that an insurer fully inquire into possible bases that might support the insured's claim. Although we recognize that distinguishing fraudulent from legitimate claims may occasionally be difficult for insurers, ... an insurer cannot reasonably and in good faith deny payments to its insured without thoroughly investigating the foundation for its denial." (*Egan, supra*, 24 Cal.3d at p. 819 .)

■ "When investigating a claim, an insurance company has a duty to diligently search for evidence which supports its insured's claim. If it seeks to discover only the evidence that defeats the claim it holds its own interest above that of the insured." (*Mariscal v. Old Republic Life Ins. Co.* (1996) 42 Cal.App.4th 1617, 1620 [50 Cal.Rptr.2d 224] .)

■ "While we agree with the trial court ... that the insurer's interpretation of the language of its policy which led to its original denial of [the insured]'s claim was reasonable, it does not follow that [the insurer]'s resulting claim denial can be justified in the absence of a full, fair and thorough investigation of *all* of the bases of the claim that was presented." (*Jordan v. Allstate Ins. Co.* (2007) 148 Cal.App.4th 1062, 1066 [56 Cal.Rptr.3d 312] , original italics.)

■ "An unreasonable failure to investigate amounting to ... unfair dealing may be found when an insurer fails to consider, or seek to discover, evidence relevant to the issues of liability and damages. ... [P] The insurer's willingness to reconsider its denial of coverage and to continue an investigation into a claim has been held to weigh in favor of its good faith." (*Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.* (2000) 78 Cal.App.4th 847, 880 [93 Cal.Rptr.2d 364] , internal citation omitted.)

■ "[The insurer], of course, was not obliged to accept [the doctor]'s opinion without scrutiny or investigation. To the extent it had good faith doubts, the insurer would have been within its rights to investigate the basis for [plaintiff]'s claim by asking [the doctor] to reexamine or further explain his findings, having a physician review all the submitted medical records and offer an opinion, or, if necessary, having its insured examined by other physicians (as it later did). What it could not do, consistent with the implied covenant of good faith and fair dealing, was *ignore* [the doctor]'s conclusions without any attempt at adequate investigation, and reach contrary conclusions lacking any discernable medical foundation." (*Wilson v. 21st Century Ins. Co.* (2007) 42 Cal.4th 713, 722 [68 Cal.Rptr.3d 746, 171 P.3d 1082] , original italics.)

■ "[W]hether an insurer breached its duty to investigate [is] a question of fact to be determined by the particular circumstances of each case." (*Paulfrey v. Blue Chip Stamps* (1983) 150 Cal.App.3d 187, 196 [197 Cal.Rptr. 501] .)

■ "[W]ithout actual presentation of a claim by the insured in compliance with claims procedures contained in the policy, there is no duty imposed on the insurer to investigate the claim." (*California Shoppers, Inc. v. Royal Globe Insurance Co.* (1985) 175 Cal.App.3d 1, 57 [221 Cal.Rptr. 171] .)

■ "It would seem reasonable that any responsibility to investigate on an insurer's part would not arise unless and until the threshold issue as to whether a claim was filed, or a good faith effort to comply with

claims procedure was made, has been determined. In no event could an insured fail to keep his/her part of the bargain in the first instance, and thereafter seek recovery for breach of a duty to pay seeking punitive damages based on an insurer's failure to investigate a nonclaim." (*Paulfrey, supra*, 150 *Cal.App.3d* at pp. 199-200 .)

Secondary Sources

2 Witkin, Summary of California Law (10th ed. 2005) Insurance, § 245

Croskey et al., California Practice Guide: Insurance Litigation (The Rutter Group) PP 12:848-12:874

1 California Liability Insurance Practice: Claims & Litigation (Cont.Ed.Bar) Investigating the Claim, §§ 9.2, 9.14-9.22

2 *California Insurance Law & Practice, Ch. 13, Claims Handling and the Duty of Good Faith, § 13.04[1] -[3]* (Matthew Bender)

2 California Uninsured Motorist Law, Ch. 24, *Bad Faith in Uninsured Motorist Law*, § 24.11 (Matthew Bender)

26 *California Forms of Pleading and Practice, Ch. 308, Insurance, § 308.24* (Matthew Bender)

12 California Points and Authorities, Ch. 120, *Insurance*, §§ 120.153, 120.184 (Matthew Bender)

Publisher's Notes

This instruction covers issues presented in BAJI Nos. 12.94, 12.97, and 12.98.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Contracts Law Contract Interpretation Good Faith & Fair Dealing Insurance Law Bad Faith & Extracontractual Liability Elements of Bad Faith Insurance Law Bad Faith & Extracontractual Liability Payment Delays & Denials Insurance Law Bad Faith & Extracontractual Liability Refusals to Defend Insurance Law Claims & Contracts Good Faith & Fair Dealing Duty to Defend Insurance Law Industry Regulation Unfair Business Practices Claims Investigations & Practices



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CHAPTER 23 California Judicial Council Insurance Litigation Instructions

4-23 California Forms of Jury Instruction CACI 2333

CACI 2333 Bad Faith (First Party)--Breach of Duty to Inform Insured of Rights--Essential Factual Elements

[*Name of plaintiff*] claims that [*name of defendant*] breached the obligation of good faith and fair dealing by failing to reasonably inform [him/her/it] of [his/her/its] rights and obligations under an insurance policy. To succeed, [*name of plaintiff*] must prove all of the following:

- 1. That [*name of plaintiff*] suffered a loss covered under an insurance policy with [*name of defendant*];**
- 2. That [*name of defendant*] [denied coverage for/refused to pay] [*name of plaintiff*]'s loss;**
- 3. That under the policy [*name of plaintiff*] had the [right/obligation] to [*describe right or obligation at issue; e.g., "to request arbitration within 180 days"*];**
- 4. That [*name of defendant*] did not reasonably inform [*name of plaintiff*] of [his/her/its] [right/obligation] to [*describe right or obligation*];**
- 5. That [*name of plaintiff*] was harmed; and**
- 6. That [*name of defendant*]'s failure to reasonably inform [*name of plaintiff*] was a substantial factor in causing [his/her/its] harm.**

New September 2003

Directions for Use

The instructions in this series assume that the plaintiff is the insured and the defendant is the insurer. The

party designations may be changed if appropriate to the facts of the case.

This instruction is intended for use in appropriate cases if the insured alleges that the insurer breached the implied covenant of good faith and fair dealing by failing to reasonably inform the insured of his or her remedial rights and obligations under an insurance policy.

For instructions regarding general breach of contract issues, refer to the Contracts series (*CACI No. 300 et seq.*).

Sources and Authority

- The insurer's implied duty of good faith and fair dealing includes "the duty reasonably to inform an insured of the insured's rights and obligations under the insurance policy. In particular, in situations in which an insured's lack of knowledge may potentially result in a loss of benefits or a forfeiture of rights, an insurer [is] required to bring to the insured's attention relevant information so as to enable the insured to take action to secure rights afforded by the policy." (*Davis v. Blue Cross of Northern California* (1979) 25 Cal.3d 418, 428 [158 Cal.Rptr. 828, 600 P.2d 1060] .)

- The trial court in the instant case found that [the insurer] knew that in many instances its insureds would not be aware of the arbitration clause and that, despite this knowledge, [it] deliberately decided not to inform its insureds of the arbitration procedure. In this context, the practical effect of the insurer's practice was to transform its arbitration clause into a unilateral provision, establishing a procedure to which the insurer could require its insureds to resort when [it] deemed it advisable, but one that would not generally provide a speedy, economic or readily accessible remedy for the bulk of [its] uninformed insureds. [P] We think the trial court was fully justified in finding that [the insurer] had breached its duty of good faith and fair dealing in adopting such a course of conduct. (*Davis, supra*, 25 Cal.3d at pp. 430-431 .)

- "When a court is reviewing claims under an insurance policy, it must hold the insured bound by clear and conspicuous provisions in the policy even if evidence suggests that the insured did not read or understand them. Once it becomes clear to the insurer that its insured disputes its denial of coverage, however, the duty of good faith does not permit the insurer passively to assume that its insured is aware of his rights under the policy. The insurer must instead take affirmative steps to make sure that the insured is informed of his remedial rights." (*Sarchett v. Blue Shield of California* (1987) 43 Cal.3d 1, 14-15 [233 Cal.Rptr. 76, 729 P.2d 267] , plurality opinion.)

- But see *Chase v. Blue Cross of California* (1996) 42 Cal.App.4th 1142, 1155 [50 Cal.Rptr.2d 178] [while insurer may not misrepresent facts or fail to clarify an insured's obvious misunderstanding of the policy coverage, it does not have an ongoing duty to keep the insured informed of his or her rights once those rights have been clearly set forth in the policy].)

- "In order to find a forfeiture by the insurer of the right to arbitration, we understand *Davis* and *Sarchett* to require conduct *designed* to mislead policyholders." (*Chase, supra*, 42 Cal.App.4th at p. 1157 , original italics.)

- An insurer owes a duty to an additional insured under an automobile policy to disclose within a reasonable time the existence and amount of any underinsured motorist coverage. (*Ramirez v. USAA Casualty Insurance Co.* (1991) 234 Cal.App.3d 391, 397-402 [285 Cal.Rptr. 757] .)

■ "California courts have imposed a duty on the insurer to advise its insureds of the availability of and procedure for initiating arbitration; to notify him of a 31-day option period in which to convert his group insurance policy into individual coverage after termination; and to notify an assignee of a life insurance policy taken as security for a loan to the insured of previous assignments of the policy known to the insurer." (*Westrick v. State Farm Insurance* (1982) 137 Cal.App.3d 685, 692 [187 Cal.Rptr. 214] , internal citations omitted.)

Secondary Sources

Croskey et al., California Practice Guide: Insurance Litigation (The Rutter Group) PP 11:46-11:47, 12:956-12:961

2 *California Insurance Law & Practice*, Ch. 13, *Claims Handling and the Duty of Good Faith*, § 13.05 (Matthew Bender)

2 *California Uninsured Motorist Law*, Ch. 24, *Bad Faith in Uninsured Motorist Law*, § 24.22 (Matthew Bender)

12 *California Points and Authorities*, Ch. 120, *Insurance*, §§ 120.383 - 120.384, 120.390 (Matthew Bender)

Publisher's Notes

This instruction relates to issues presented in BAJI No. 12.94.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewInsurance LawBad Faith & Extracontractual LiabilityElements of Bad FaithInsurance LawBad Faith & Extracontractual LiabilityRefusals to DefendInsurance LawClaims & ContractsGood Faith & Fair DealingGeneral OverviewInsurance LawClaims & ContractsGood Faith & Fair DealingDuty to DefendInsurance LawClaims & ContractsNotice to InsurersReasonableness



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CHAPTER 23 California Judicial Council Insurance Litigation Instructions

4-23 California Forms of Jury Instruction CACI 2334

CACI 2334 Bad Faith (Third Party)--Refusal to Accept Reasonable Settlement Within Liability Policy Limits--Essential Factual Elements

[*Name of plaintiff*] **claims that [he/she/it] was harmed by [*name of defendant*]'s breach of the obligation of good faith and fair dealing because [*name of defendant*] failed to accept a reasonable settlement demand in a lawsuit against [*name of plaintiff*]. To establish this claim, [*name of plaintiff*] must prove all of the following:**

- 1. That [*name of plaintiff in underlying case*] brought a lawsuit against [*name of plaintiff*] for a claim that [[he/she/it] alleged] was covered by [*name of defendant*]'s insurance policy;**
- 2. That [*name of defendant*] failed to accept a reasonable settlement demand for an amount within policy limits; and**
- 3. That a monetary judgment was entered against [*name of plaintiff*] for a sum greater than the policy limits.**

"Policy limits" means the highest amount available under the policy for the claim against [*name of plaintiff*].

A settlement demand is reasonable if [*name of defendant*] knew or should have known at the time the settlement demand was rejected that the potential judgment was likely to exceed the amount of the settlement demand based on [*name of plaintiff in underlying case*]'s injuries or loss and [*name of plaintiff*]'s probable liability.

New September 2003; Revised December 2007

Directions for Use

The instructions in this series assume that the plaintiff is the insured and the defendant is the insurer. The

party designations may be changed if appropriate to the facts of the case.

This instruction is intended for use if the insurer assumed the duty to defend the insured, but failed to accept a reasonable settlement offer. For instructions regarding general breach of contract issues, refer to the Contracts series (*CACI No. 300 et seq.*).

If it is alleged that a demand was made in excess of limits and there is a claim that the defendant should have contributed the policy limits, then this instruction will need to be modified.

This instruction should be modified if the insurer did not accept the policy-limits demand because of potential remaining exposure to the insured, such as a contractual indemnity claim or exposure to other claimants.

Sources and Authority

- "[T]he implied obligation of good faith and fair dealing requires the insurer to settle in an appropriate case although the express terms of the policy do not impose such a duty. [P] The insurer, in deciding whether a claim should be compromised, must take into account the interest of the insured and give it at least as much consideration as it does to its own interest. When there is great risk of a recovery beyond the policy limits so that the most reasonable manner of disposing of the claim is a settlement which can be made within those limits, a consideration in good faith of the insured's interest requires the insurer to settle the claim." (*Comunale v. Traders & General Ins. Co. (1958) 50 Cal.2d 654, 659 [328 P.2d 198]* , citation omitted.)

- "Liability is imposed not for a bad faith breach of the contract but for failure to meet the duty to accept reasonable settlements, a duty included within the implied covenant of good faith and fair dealing." (*Crisci v. Security Insurance Co. of New Haven, Connecticut (1967) 66 Cal.2d 425, 430 [58 Cal.Rptr. 13, 426 P.2d 173]* .)

- "In determining whether an insurer has given consideration to the interests of the insured, the test is whether a prudent insurer without policy limits would have accepted the settlement offer." (*Crisci, supra*, 66 Cal.2d at p. 429 .)

- "[I]n deciding whether or not to compromise the claim, the insurer must conduct itself as though it alone were liable for the entire amount of the judgment. ... [T]he only permissible consideration in evaluating the reasonableness of the settlement offer becomes whether, in light of the victim's injuries and the probable liability of the insured, the ultimate judgment is likely to exceed the amount of the settlement offer." (*Johansen v. California State Auto. Asso. Inter-Insurance Bureau (1975) 15 Cal.3d 9, 16 [123 Cal.Rptr. 288, 538 P.2d 744]* , internal citation omitted.)

- "The size of the judgment recovered in the personal injury action when it exceeds the policy limits, although not conclusive, furnishes an inference that the value of the claim is the equivalent of the amount of the judgment and that acceptance of an offer within those limits was the most reasonable method of dealing with the claim." (*Crisci, supra*, 66 Cal.2d at p. 431 .)

- "The covenant of good faith and fair dealing implied in every insurance policy obligates the insurer, among other things, to accept a reasonable offer to settle a lawsuit by a third party against the insured within policy limits whenever there is a substantial likelihood of a recovery in excess of those limits. The insurer must evaluate the reasonableness of an offer to settle a lawsuit against the insured by considering

the probable liability of the insured and the amount of that liability, without regard to any coverage defenses. An insurer that fails to accept a reasonable settlement offer within policy limits will be held liable in tort for the entire judgment against the insured, even if that amount exceeds the policy limits. An insurer's duty to accept a reasonable settlement offer in these circumstances is implied in law to protect the insured from exposure to liability in excess of coverage as a result of the insurer's gamble-- on which only the insured might lose." (*Rappaport-Scott v. Interinsurance Exch. of the Auto. Club* (2007) 146 Cal.App.4th 831, 836 [53 Cal.Rptr.3d 245] , internal citations omitted.)

- "Determination of the reasonableness of a settlement offer for purposes of a reimbursement action is based on the information available to [the insurer] at the time of the proposed settlement." (*Isaacson v. California Ins. Guarantee Assn.* (1988) 44 Cal.3d 775, 793 [244 Cal.Rptr. 655, 750 P.2d 297] .)

- "The [workers'] compensation-carrier consent prerequisite of a valid settlement is imposed by law. ... In the absence of reasonable provisions for the legal rights of the [worker's compensation carrier], we conclude that [the insurer] cannot be held liable for bad faith 'rejection of a reasonable settlement offer,' or for failing 'to accept a reasonable settlement offer.'" (*Coe v. State Farm Mutual Automobile Insurance Co.* (1977) 66 Cal.App.3d 981, 993 [136 Cal.Rptr. 331] , internal citations omitted.)

- "Whether [the insurer] 'refused' the 'offer,' and whether it could reasonably have acted otherwise in light of the 11-day deadline imposed by the offer's terms, were questions for the jury." (*Coe, supra*, 66 Cal.App.3d at p. 994 .)

- "A cause of action for bad faith refusal to settle arises only after a judgment has been rendered in excess of the policy limits. ... Until judgment is actually entered, the mere possibility or probability of an excess judgment does not render the refusal to settle actionable." (*Safeco Ins. Co. of Am. v. Superior Court* (1999) 71 Cal.App.4th 782, 788 [84 Cal.Rptr.2d 43] , internal citations omitted.)

- "[A]n insurer's 'good faith,' though erroneous, belief in noncoverage affords no defense to liability flowing from the insurer's refusal to accept a reasonable settlement offer." (*Johansen, supra*, 15 Cal.3d at p. 16 , internal citation omitted.)

- "A good faith belief in noncoverage is not relevant to a determination of the reasonableness of a settlement offer." (*Samson v. Transamerica Insurance Co.* (1981) 30 Cal.3d 220, 243 [178 Cal.Rptr. 343, 636 P.2d 32] , internal citation omitted.)

- "An insurer that breaches its duty of reasonable settlement is liable for all the insured's damages proximately caused by the breach, regardless of policy limits. Where the underlying action has proceeded to trial and a judgment in excess of the policy limits has been entered against the insured, the insurer is ordinarily liable to its insured for the entire amount of that judgment, excluding any punitive damages awarded." (*Hamilton v. Maryland Casualty Co.* (2002) 27 Cal.4th 718, 725 [117 Cal.Rptr.2d 318, 41 P.3d 128] , internal citations omitted.)

Secondary Sources

2 Witkin, Summary of California Law (10th ed. 2005) Insurance, §§ 257-258

Croskey et al., California Practice Guide: Insurance Litigation (The Rutter Group) PP 12:201-12:686

2 California Liability Insurance Practice: Claims and Litigation (Cont.Ed.Bar) Actions for Failure to Settle, §§ 26.1-26.35

2 *California Insurance Law and Practice, Ch. 13, Claims Handling and the Duty of Good Faith, § 13.07[1] -[3]* (Matthew Bender)

26 *California Forms of Pleading and Practice, Ch. 308, Insurance, § 308.24* (Matthew Bender)

12 *California Points and Authorities, Ch. 120, Insurance, §§ 120.195, 120.199, 120.205, 120.207* (Matthew Bender)

Publisher's Notes

This instruction replaces BAJI No. 12.95.

LexisNexis Matthew Bender Expert Practice Tip--Reasonable Settlement Demand: A critical element in a bad faith refusal to settle case is a reasonable settlement demand within policy limits. This demand must be communicated to the insurer. If the settlement demand is above policy limits, the insured (or an excess carrier) must be willing to pay the amount above policy limits in order to trigger the primary carrier's duty to settle. *By Ronald Oster*

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Insurance Law Bad Faith & Extracontractual Liability Elements of Bad Faith Insurance Law Bad Faith & Extracontractual Liability Settlement Obligations Good Faith & Fair Dealing Insurance Law Bad Faith & Extracontractual Liability Settlement Obligations Policy Limits Insurance Law Claims & Contracts Good Faith & Fair Dealing Duty to Defend



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California Forms of Jury Instruction

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CHAPTER 23 California Judicial Council Insurance Litigation Instructions

4-23 California Forms of Jury Instruction CACI 2335

CACI 2335 Bad Faith--Advice of Counsel

[*Name of defendant*] did not breach the obligation of good faith and fair dealing if it reasonably relied on the advice of its lawyer. [*Name of defendant*]'s reliance was reasonable if:

- 1. [*Name of defendant*] acted in reliance on the opinion and advice of its lawyer;**
- 2. The lawyer's advice was based on full disclosure by [*name of defendant*] of all relevant facts that it knew, or could have discovered with reasonable effort;**
- 3. [*Name of defendant*] reasonably believed the advice of the lawyer was correct; [and]**
- 4. In relying on its lawyer's advice, [*name of defendant*] gave at least as much consideration to [*name of plaintiff*]'s interest as it gave its own interest; [and]**
- 5. [*Name of defendant*] was willing to reconsider and act accordingly when it determined that the lawyer's advice was incorrect.**

New September 2003

The instructions in this series assume the plaintiff is the insured and the defendant is the insurer. The party designations may be changed if appropriate to the facts of the case.

The "advice of counsel defense" is not a true affirmative defense, but rather negates an essential element of the insured's cause of action for bad faith. (See *State Farm Mutual Automobile Insurance Co. v. Superior Court* (1991) 228 Cal.App.3d 721, 725-726 [279 Cal.Rptr. 116] .)

Advice of counsel is irrelevant, however, when an insurer denies coverage and for that reason refuses a reasonable settlement offer. (See, e.g., *Johansen v. California State Auto. Asso. Inter-Insurance Bureau* (1975) 15 Cal.3d 9, 16 [123 Cal.Rptr. 288, 538 P.2d 744] ["an insurer's 'good faith,' though erroneous, belief in noncoverage affords no defense to liability flowing from the insurer's refusal to accept a reasonable settlement offer"].)

- "An insurer may defend itself against allegations of bad faith and malice in claims handling with evidence the insurer relied on the advice of competent counsel. The defense of advice of counsel is offered to show the insurer had 'proper cause' for its actions even if the advice it received is ultimately unsound or erroneous." (*State Farm Mutual Automobile Insurance Co.*, *supra*, 228 Cal.App.3d at p. 725 , internal citations omitted.)

- "If the insurer has exercised good faith in all of its dealings under its policy, and if the settlement which it has rejected has been fully and fairly considered and has been based upon an honest belief that the insurer could defeat the action or keep any possible judgment within the limits of the policy, and its judgments are based on a fair review of the evidence after reasonable diligence in ascertaining the facts, and upon sound legal advice, a court should not subject the insurer to further liability if it ultimately turns out that its judgment is a mistaken judgment" (*State Farm Mutual Automobile Insurance Co.*, *supra*, 228 Cal.App.3d at p. 725 , internal citation omitted.)

- "[I]t is a complete defense to a claim of extreme and outrageous conduct when the evidence shows (1) the defendant acted on the opinion and advice of counsel; (2) counsel's advice was based on full disclosure of all the facts by defendant or the advice was initiated by counsel based on counsel's familiarity with the case; and (3) the defendant's reliance on the advice of counsel was in good faith." (*Melovich Builders, Inc. v. Superior Court* (1984) 160 Cal.App.3d 931, 936-937 [207 Cal.Rptr. 47] [intentional infliction of emotional distress action].)

- "Good faith reliance on counsel's advice simply negates allegations of bad faith and malice as it tends to show the insurer had proper cause for its actions. Because advice of counsel is directed to an essential element of a plaintiff's cause of action, it does not constitute new matter and need not be specifically alleged." (*State Farm Mutual Automobile Insurance Co.*, *supra*, 228 Cal.App.3d at pp. 725-726 .)

- "An insurer's receipt of and reliance on [the written opinion of its legal counsel] is a relevant circumstance to be considered on the issue of its alleged bad faith." (*Mock v. Mich. Millers Mut. Ins. Co.* (1992) 4 Cal.App.4th 306, 326, fn. 20 [5 Cal.Rptr.2d 594].)

- "Exemplary damages are not recoverable against a defendant who acts in good faith and under the advice of counsel." (*Fox v. Aced* (1957) 49 Cal.2d 381, 385 [317 P.2d 608] .)

- "A good faith belief in noncoverage is not relevant to a determination of the reasonableness of a settlement offer." (*Samson v. Transamerica Insurance Co.* (1981) 30 Cal.3d 220, 243 [178 Cal.Rptr. 343, 636 P.2d 32] , internal citation omitted.)

Secondary Sources

Croskey et al., California Practice Guide: Insurance Litigation (The Rutter Group) PP 12:1248-12:1260

2 California Liability Insurance Practice: Claims & Litigation (Cont.Ed.Bar) General Principles of Contract and Bad

Faith Actions, §§ 24.52-24.55

2 California Uninsured Motorist Law, Ch. 21, *Defending an Uninsured Motorist Claim*, §§ 21.20, 21.31 (Matthew Bender)

6 Levy et al., California Torts, Ch. 82, *Claims and Disputes Under Insurance Policies*, § 82.55 (Matthew Bender)

Publisher's Notes

This instruction covers issues presented in BAJI No. 12.98.

LexisNexis Matthew Bender Expert Practice Tip--Advice of Counsel Defense Waives

Attorney-Client Privilege: One consequence of relying on advice of counsel as a defense to a bad faith claim is that it waives the attorney-client privilege as to the advice. If the privilege is waived, the insured's counsel will not only scrutinize the advice, but also scrutinize whether there was a "full disclosure" of all relevant facts. For these reasons, insurers rarely rely on this defense. *By Ronald Oster*

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Insurance Law Bad Faith & Extracontractual Liability Elements of Bad Faith Insurance Law Bad Faith & Extracontractual Liability Refusals to Defend Insurance Law Bad Faith & Extracontractual Liability Settlement Obligations Good Faith & Fair Dealing Insurance Law Claims & Contracts Good Faith & Fair Dealing General Overview Insurance Law Claims & Contracts Good Faith & Fair Dealing Duty to Defend



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California Forms of Jury Instruction

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CHAPTER 23 California Judicial Council Insurance Litigation Instructions

4-23 California Forms of Jury Instruction CACI 2336

CACI 2336 Bad Faith (Third Party)--Unreasonable Failure to Defend--Essential Factual Elements

[*Name of plaintiff*] **claims [he/she/it] was harmed by [name of defendant]'s breach of the obligation of good faith and fair dealing because [name of defendant] failed to defend [name of plaintiff] in a lawsuit that was brought against [him/her/it]. To establish this claim, [name of plaintiff] must prove all of the following:**

- 1. That [name of plaintiff] was insured under an insurance policy with [name of defendant];**
- 2. That a lawsuit was brought against [name of plaintiff];**
- 3. That [name of plaintiff] gave [name of defendant] timely notice that [he/she/it] had been sued;**
- 4. That [name of defendant], unreasonably or without proper cause, failed to defend [name of plaintiff] against the lawsuit;**
- 5. That [name of plaintiff] was harmed; and**
- 6. That [name of defendant]'s conduct was a substantial factor in causing [name of plaintiff]'s harm.**

New October 2004; Revised December 2007

Directions for Use

The instructions in this series assume that the plaintiff is an insured and the defendant is the insurer. The party designations may be changed if appropriate to the facts of the case.

This instruction also assumes that the judge will decide the issue of whether the claim was potentially covered by the policy. If there are factual disputes regarding this issue, a special interrogatory could be used.

For instructions regarding general breach of contract issues, refer to the Contracts series (*CACI No. 300 et seq.*).

If it is alleged that a demand was made in excess of limits and there is a claim that the defendant should have contributed the policy limits, then this instruction will need to be modified. Note that an excess insurer generally owes no duty to defend without exhaustion of the primary coverage by judgment or settlement.

Sources and Authority

- "To prevail in an action seeking declaratory relief on the question of the duty to defend, 'the insured must prove the existence of a *potential for coverage*, while the insurer must establish *the absence of any such potential*. In other words, the insured need only show that the underlying claim *may* fall within policy coverage; the insurer must prove it *cannot*.' The duty to defend exists if the insurer 'becomes aware of, or if the third party lawsuit pleads, facts giving rise to the potential for coverage under the insuring agreement.' " (*Delgado v. Interinsurance Exchange of Automobile Club of Southern California* (2009) 47 Cal.4th 302, 308 [97 Cal.Rptr.3d 298, 211 P.3d 1083] , original italics, internal citation omitted.)

- " '[A]n insurer has a duty to defend an insured if it becomes aware of, or if the third party lawsuit pleads, facts giving rise to the potential for coverage under the insuring agreement. ... This duty ... is separate from and broader than the insurer's duty to indemnify. ... ' "[F]or an insurer, the existence of a duty to defend turns not upon the ultimate adjudication of coverage under its policy of insurance, but upon those facts known by the insurer at the inception of a third party lawsuit. ... Hence, the duty 'may exist even where coverage is in doubt and ultimately does not develop.' ..." ' " (*State Farm Fire & Casualty Co. v. Superior Court* (2008) 164 Cal.App.4th 317, 323 [78 Cal.Rptr.3d 828] , internal citations omitted.)

- "If any facts stated or fairly inferable in the complaint, or otherwise known or discovered by the insurer, suggest a claim potentially covered by the policy, the insurer's duty to defend arises and is not extinguished until the insurer negates all facts suggesting potential coverage. On the other hand, if, as a matter of law, neither the complaint nor the known extrinsic facts indicate any basis for potential coverage, the duty to defend does not arise in the first instance." (*GGIS Ins. Services, Inc. v. Superior Court* (2008) 168 Cal.App.4th 1493, 1506 [86 Cal.Rptr.3d 515] .)

- "In determining its duty to defend, the insurer must consider facts from any source--the complaint, the insured, and other sources. An insurer does not have a continuing duty to investigate the potential for coverage if it has made an informed decision on coverage at the time of tender. However, where the information available at the time of tender shows no coverage, but information available later shows otherwise, a duty to defend may then arise." (*American States Ins. Co. v. Progressive Casualty Ins. Co.* (2009) 180 Cal.App.4th 18, 26 [102 Cal.Rptr.3d 591] , internal citations omitted.)

- "The obligation of the insurer to defend is of vital importance to the insured. 'In purchasing his insurance the insured would reasonably expect that he would stand a better chance of vindication if supported by the resources and expertise of his insurer than if compelled to handle and finance the

presentation of his case. He would, moreover, expect to be able to avoid the time, uncertainty and capital outlay in finding and retaining an attorney of his own.' 'The insured's desire to secure the right to call on the insurer's superior resources for the defense of third party claims is, in all likelihood, typically as significant a motive for the purchase of insurance as is the wish to obtain indemnity for possible liability.' " (*Amato v. Mercury Casualty Co. (Amato II)* (1997) 53 Cal.App.4th 825, 831-832 [61 Cal.Rptr.2d 909] , internal citations omitted.)

■ "An anomalous situation would be created if, on the one hand, an insured can sue for the tort of breach of the implied covenant if the insurer accepts the defense and later refuses a reasonable settlement offer, but, on the other hand, an insured is denied tort recovery if the insurer simply refuses to defend. ... This dichotomy could have the effect of encouraging an insurer to stonewall the insured at the outset by simply refusing to defend." (*Campbell v. Superior Court* (1996) 44 Cal.App.4th 1308, 1319-1320 [52 Cal.Rptr.2d 385] .)

■ "[T]he mere existence of a legal dispute does not create a potential for coverage: 'However, we have made clear that where the third party suit never presented any potential for policy coverage, the duty to defend does not arise in the first instance, and the insurer may properly deny a defense. *Moreover, the law governing the insurer's duty to defend need not be settled at the time the insurer makes its decision.*' " (*Griffin Dewatering Corp. v. Northern Ins. Co. of New York* (2009) 176 Cal.App.4th 172, 209 [97 Cal.Rptr.3d 568] , original italics.)

■ "The trial court erroneously thought that because the case law was 'unsettled' when the insurer first turned down the claim, that unsettledness created a potential for a covered claim. ... [I]f an insurance company's denial of coverage is reasonable, as shown by substantial case law in favor of its position, there can be no bad faith even though the insurance company's position is *later* rejected by our state Supreme Court." (*Griffin Dewatering Corp., supra*, 176 Cal.App.4th at p. 179, original italics.)

■ "A breach of the duty to defend in itself constitutes only a breach of contract, but it may also violate the covenant of good faith and fair dealing where it involves unreasonable conduct or an action taken without proper cause. On the other hand, '[i]f the insurer's refusal to defend is reasonable, no liability will result.' " (*Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.* (2000) 78 Cal.App.4th 847, 881 [93 Cal.Rptr.2d 364] , internal citations omitted.)

■ " 'If the insurer is obliged to take up the defense of its insured, it must do so as soon as possible, both to protect the interests of the insured, and to limit its own exposure to loss. ... [T]he duty to defend must be assessed at the outset of the case.' It follows that a belated offer to pay the costs of defense may mitigate damages but will not cure the initial breach of duty." (*Shade Foods, Inc., supra*, 78 Cal.App.4th at p. 881 , internal citations omitted.)

■ "No tender of defense is required if the insurer has already denied coverage of the claim. In such cases, notice of suit and tender of the defense are excused because other insurer has already expressed its unwillingness to undertake the defense." (Croskey et al., Cal. Practice Guide: Insurance Litigation (The Rutter Group) P 7:614.)

Secondary Sources

2 Witkin, Summary of California Law (10th ed. 2005) Insurance, § 297

Croskey et al., California Practice Guide: Insurance Litigation (The Rutter Group) PP 12:598-12:650.5

2 California Liability Insurance Practice: Claims and Litigation (Cont.Ed.Bar) Actions for Failure to Defend, §§

25.1-26.38

2 *California Insurance Law & Practice, Ch. 13, Claims Handling and the Duty of Good Faith, § 13.08* (Matthew Bender)

6 Levy et al., *California Torts, Ch. 82, Claims and Disputes Under Insurance Policies, §§ 82.10 -82.16* (Matthew Bender)

26 *California Forms of Pleading and Practice, Ch. 308, Insurance, § 308.24* (Matthew Bender)

Publisher's Notes

There is no BAJI instruction on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Insurance Law Bad Faith & Extracontractual Liability Elements of Bad Faith Insurance Law Bad Faith & Extracontractual Liability Refusals to Defend Insurance Law Claims & Contracts Good Faith & Fair Dealing General Overview Insurance Law Claims & Contracts Good Faith & Fair Dealing Duty to Defend



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California Forms of Jury Instruction

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CHAPTER 23 California Judicial Council Insurance Litigation Instructions

4-23 California Forms of Jury Instruction CACI 2337

CACI 2337 Factors to Consider in Evaluating Insurer's Conduct

In determining whether [*name of defendant*] acted unreasonably or without proper cause, you may consider whether the defendant did any of the following:

[(a) Misrepresented to [*name of plaintiff*] relevant facts or insurance policy provisions relating to any coverage at issue.]

[(b) Failed to acknowledge and act reasonably promptly after receiving communications about [*name of plaintiff*]'s claim arising under the insurance policy.]

[(c) Failed to adopt and implement reasonable standards for the prompt investigation and processing of claims arising under its insurance policies.]

[(d) Failed to accept or deny coverage of claims within a reasonable time after [*name of plaintiff*] completed and submitted proof-of-loss requirements.]

[(e) Did not attempt in good faith to reach a prompt, fair, and equitable settlement of [*name of plaintiff*]'s claim after liability had become reasonably clear.]

[(f) Required [*name of plaintiff*] to file a lawsuit to recover amounts due under the policy by offering substantially less than the amount that [he/she/it] ultimately recovered in the lawsuit, even though [*name of plaintiff*] had made a claim for an amount reasonably close to the amount ultimately recovered.]

[(g) Attempted to settle [*name of plaintiff*]'s claim for less than the amount to which a reasonable person would have believed he or she was entitled by referring to written or printed advertising

material accompanying or made part of the application.]

[(h) Attempted to settle the claim on the basis of an application that was altered without notice to, or knowledge or consent of, [*name of plaintiff*], [his/her/its] representative, agent, or broker.]

[(i) Failed, after payment of a claim, to inform [*name of plaintiff*] at [his/her/its] request, of the coverage under which payment was made.]

[(j) Informed [*name of plaintiff*] of its practice of appealing from arbitration awards in favor of insureds or claimants for the purpose of forcing them to accept settlements or compromises less than the amount awarded in arbitration.]

[(k) Delayed the investigation or payment of the claim by requiring [*name of plaintiff*], [or [his/her] physician], to submit a preliminary claim report, and then also required the submission of formal proof-of-loss forms, both of which contained substantially the same information.]

[(l) Failed to settle a claim against [*name of plaintiff*] promptly once [his/her/its] liability had become apparent, under one portion of the insurance policy coverage in order to influence settlements under other portions of the insurance policy coverage.]

[(m) Failed to promptly provide a reasonable explanation of its reasons for denying the claim or offering a compromise settlement, based on the provisions of the insurance policy in relation to the facts or applicable law.]

[(n) Directly advised [*name of plaintiff*] not to hire an attorney.]

[(o) Misled [*name of plaintiff*] as to the applicable statute of limitations, that is, the date by which an action against [*name of defendant*] on the claim had to be filed.]

[(p) Delayed the payment or provision of hospital, medical, or surgical benefits for services provided with respect to acquired immune deficiency syndrome (AIDS) or AIDS-related complex for more than 60 days after it had received [*name of plaintiff*]'s claim for those benefits, doing so in order to investigate whether [*name of plaintiff*] had the condition before obtaining the insurance coverage. However, the 60-day period does not include any time during which [*name of defendant*] was waiting for a response for relevant medical information from a healthcare provider.]

The presence or absence of any of these factors alone is not enough to determine whether [*name of defendant*]'s conduct was or was not unreasonable or without proper cause. You must consider [*name of defendant*]'s conduct as a whole in making this determination.

New April 2008

Directions for Use

Although there is no private cause of action under *Insurance Code* section 790.03(h) (see *Moradi-Shalal v. Fireman's Fund Ins. Companies* (1988) 46 Cal.3d 287, 304-305 [250 Cal.Rptr. 116, 758 P.2d 58]), this instruction may be given in an insurance bad-faith action to assist the jury in determining whether the insurer's conduct was unreasonable or without proper cause. (See *Jordan v. Allstate Ins. Co.* (2007) 148 Cal.App.4th 1062, 1078 [56 Cal.Rptr.3d 312] , internal citations omitted.)

Include only the factors that are relevant to the case.

Sources and Authority

- *Insurance Code section 790.03* provides in part:

The following are hereby defined as unfair methods of competition and unfair and deceptive acts or practices in the business of insurance.

(h) Knowingly committing or performing with such frequency as to indicate a general business practice any of the following unfair claims settlement practices:

(1) Misrepresenting to claimants pertinent facts or insurance policy provisions relating to any coverages at issue.

(2) Failing to acknowledge and act reasonably promptly upon communications with respect to claims arising under insurance policies.

(3) Failing to adopt and implement reasonable standards for the prompt investigation and processing of claims arising under insurance policies.

(4) Failing to affirm or deny coverage of claims within a reasonable time after proof of loss requirements have been completed and submitted by the insured.

(5) Not attempting in good faith to effectuate prompt, fair, and equitable settlements of claims in which liability has become reasonably clear.

(6) Compelling insureds to institute litigation to recover amounts due under an insurance policy by offering substantially less than the amounts ultimately recovered in actions brought by the insureds, when the insureds have made claims for amounts reasonably similar to the amounts ultimately recovered.

(7) Attempting to settle a claim by an insured for less than the amount to which a reasonable person would have believed he or she was entitled by reference to written or printed advertising material accompanying or made part of an application.

(8) Attempting to settle claims on the basis of an application which was altered without notice to, or knowledge or consent of, the insured, his or her representative, agent, or broker.

(9) Failing, after payment of a claim, to inform insureds or beneficiaries, upon request by them, of the coverage under which payment has been made.

(10) Making known to insureds or claimants a practice of the insurer of appealing from arbitration awards in favor of insureds or claimants for the purpose of compelling them to accept settlements or compromises less than the amount awarded in arbitration.

(11) Delaying the investigation or payment of claims by requiring an insured, claimant, or the physician of either, to submit a preliminary claim report, and then requiring the

subsequent submission of formal proof of loss forms, both of which submissions contain substantially the same information.

(12) Failing to settle claims promptly, where liability has become apparent, under one portion of the insurance policy coverage in order to influence settlements under other portions of the insurance policy coverage.

(13) Failing to provide promptly a reasonable explanation of the basis relied on in the insurance policy, in relation to the facts or applicable law, for the denial of a claim or for the offer of a compromise settlement.

(14) Directly advising a claimant not to obtain the services of an attorney.

(15) Misleading a claimant as to the applicable statute of limitations.

(16) Delaying the payment or provision of hospital, medical, or surgical benefits for services provided with respect to acquired immune deficiency syndrome or AIDS-related complex for more than 60 days after the insurer has received a claim for those benefits, where the delay in claim payment is for the purpose of investigating whether the condition preexisted the coverage. However, this 60-day period shall not include any time during which the insurer is awaiting a response for relevant medical information from a health care provider.

■ "[Plaintiff] was not seeking to recover on a claim based on a violation of *Insurance Code* section 790.03, subdivision (h). Rather, her claim was based on a claim of common law bad faith arising from [defendant]'s breach of the implied covenant of good faith and fair dealing which she is entitled to pursue. [Plaintiff]'s reliance upon the [expert's] declaration was for the purpose of providing evidence supporting her contention that [defendant] had breached the implied covenant by its actions. This is a *proper* use of evidence of an insurer's violations of the statute and the corresponding regulations." (*Jordan, supra*, 148 Cal.App.4th at p. 1078 , original italics, internal citations omitted.)

Secondary Sources

2 Witkin, Summary of California Law (10th ed. 2005) *Insurance* §§ 252, 253, 255, 321

Croskey et al., California Practice Guide: Insurance Litigation (The Rutter Group) P 14:109 et seq.

1 California Liability Insurance Practice: Claims and Litigation, Ch. 24, *General Principles of Contract and Bad Faith* (Cont.Ed.Bar) § 24.30 et seq.

26 *California Forms of Pleading and Practice*, Ch. 308, *Insurance*, § 308.25 (Matthew Bender)

1 Rushing et al., *Matthew Bender Practice Guide: California Unfair Competition and Business Torts*, Ch. 2, *Unfair Competition*, 2.11 (Matthew Bender)

Publisher's Notes

This instruction covers issues presented in BAJI Nos. 12.94, 12.98.



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California Forms of Jury Instruction

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CHAPTER 23 California Judicial Council Insurance Litigation Instructions

4-23 California Forms of Jury Instruction CACI 2338-CACI 2349

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CHAPTER 23 California Judicial Council Insurance Litigation Instructions

4-23 California Forms of Jury Instruction CACI 2350

CACI 2350 Damages for Bad Faith

If you decide that [name of plaintiff] has proved [his/her/its] claim against [name of defendant], you also must decide how much money will reasonably compensate [name of plaintiff] for the harm. This compensation is called "damages."

The amount of damages must include an award for all harm that was caused by [name of defendant], even if the particular harm could not have been anticipated.

[Name of plaintiff] must prove the amount of [his/her/its] damages. However, [name of plaintiff] does not have to prove the exact amount of damages that will provide reasonable compensation for the harm. You must not speculate or guess in awarding damages.

The following are the specific items of damages claimed by [name of plaintiff]:

- 1. [Mental suffering/anxiety/humiliation/emotional distress;] [and]**
- 2. [The cost of attorney fees to recover the insurance policy benefits;] [and]**
- 3. [Insert other applicable item of damage.]**

[No fixed standard exists for deciding the amount of damages for [insert item of mental or emotional distress]. You must use your judgment to decide a reasonable amount based on the evidence and your common sense.]

[To recover for future [insert item of mental or emotional distress], [name of plaintiff] must prove that [he/she] is reasonably certain to suffer that harm.]

[To recover attorney fees [*name of plaintiff*] must prove that because of [*name of defendant*]'s breach of the obligation of good faith and fair dealing it was reasonably necessary for [him/her/it] to hire an attorney to recover the policy benefits. [*Name of plaintiff*] may recover attorney fees [he/she/it] incurred to obtain policy benefits but not attorney fees [he/she/it] incurred for other purposes.]

New September 2003

Directions for Use

The instructions in this series assume the plaintiff is the insured and the defendant is the insurer. The party designations may be changed if appropriate to the facts of the case.

For instructions on damages for pain and suffering, see CACI No. 3905, *Items of Noneconomic Damage*, and CACI No. 3905A, *Physical Pain, Mental Suffering, and Emotional Distress (Noneconomic Damage)*. For instructions on punitive damages, see other instructions in the Damages series.

Sources and Authority

- "When an insurer's tortious conduct reasonably compels the insured to retain an attorney to obtain the benefits due under a policy, it follows that the insurer should be liable in a tort action for that expense. The attorney's fees are an economic loss--damages--proximately caused by the tort." (*Brandt v. Superior Court* (1985) 37 Cal.3d 813, 817 [210 Cal.Rptr. 211, 693 P.2d 796] .)

- "The fees recoverable ... may not exceed the amount attributable to the attorney's efforts to obtain the rejected payment due on the insurance contract. Fees attributable to obtaining any portion of the plaintiff's award which exceeds the amount due under the policy are not recoverable. [P] Since the attorney's fees are recoverable as damages, the determination of the recoverable fees must be made by the trier of fact unless the parties stipulate otherwise." (*Brandt, supra*, 37 Cal.3d at p. 819 .)

- "If ... the matter is to be presented to the jury, the court should instruct along the following lines: 'If you find (1) that the plaintiff is entitled to recover on his cause of action for breach of the implied covenant of good faith and fair dealing, and (2) that because of such breach it was reasonably necessary for the plaintiff to employ the services of an attorney to collect the benefits due under the policy, then and only then is the plaintiff entitled to an award for attorney's fees incurred to obtain the policy benefits, which award must not include attorney's fees incurred to recover any other portion of the verdict.' " (*Brandt, supra*, 37 Cal.3d at p. 820 .)

Secondary Sources

Croskey et al., California Practice Guide: Insurance Litigation (The Rutter Group) PP 13:120-13:144

2 California Liability Insurance Practice: Claims & Litigation (Cont.Ed.Bar) General Principles of Contract and Bad Faith Actions, §§ 24.70-24.71

2 California Insurance Law & Practice, Ch. 13, *Claims Handling and the Duty of Good Faith*, § 13.03[5][c] (Matthew Bender)

2 California Uninsured Motorist Law, Ch. 25, *Uninsured Motorist Bad Faith Litigation*, §§ 25.40-25.44 (Matthew Bender)

26 California Forms of Pleading and Practice, Ch. 308, *Insurance* (Matthew Bender)

Publisher's Notes

There is no BAJI instruction on this subject.

LexisNexis Matthew Bender Expert Practice Tip--Attorney's Fees and Bad Faith: Attorney's fees are recoverable in bad faith cases, but only the attorney's fees incurred to obtain the policy benefits (as opposed to fees to prove the bad faith). This distinction will require the insured's counsel to show it has allocated its fees when the evidence of damage is presented to the jury. *By Ronald Oster*

LexisNexis Matthew Bender Expert Practice Tip--Damages for Emotional Distress: In litigating bad faith cases, one of the arguments that attorneys for insurance companies want to make is that the plaintiff gets no emotional distress damages unless plaintiff can show that he or she has suffered economic loss [see, e.g., *Cates Construction, Inc. v. Talbot Partners* (1999) 21 Cal. 4th 28, 43, 86 Cal. Rptr. 2d 855, 980 P.2d 407 ; *Waters v. United Services Auto. Assn.* (1996) 41 Cal. App. 4th 1063, 1079, 48 Cal. Rptr. 2d 910] . A plaintiff can frequently show economic loss, although sometimes they will have trouble pointing out what the economic loss actually is, especially if the case involves a "delay in benefits." *By Rex Heeseman*

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewInsurance LawBad Faith & Extracontractual LiabilityRefusals to DefendInsurance LawBad Faith & Extracontractual LiabilityRemediesActual & Consequential DamagesInsurance LawBad Faith & Extracontractual LiabilityRemediesEmotional Distress DamagesInsurance LawBad Faith & Extracontractual LiabilityRemediesPunitive DamagesGeneral Overview



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California Forms of Jury Instruction

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CHAPTER 23 California Judicial Council Insurance Litigation Instructions

4-23 California Forms of Jury Instruction CACI 2351-CACI 2359

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CACI 2351Reserved for Future Use



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California Forms of Jury Instruction

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CHAPTER 23 California Judicial Council Insurance Litigation Instructions

4-23 California Forms of Jury Instruction CACI 2360

CACI 2360 Judgment Creditor's Action Against Insurer--Essential Factual Elements

[*Name of plaintiff*] **claims that** [*name of defendant*] **must pay [all or part of] a judgment against** [*name of insured*]. **To establish this claim, [*name of plaintiff*] must prove all of the following:**

- 1. That [*name of plaintiff*] brought a lawsuit for [personal injury/wrongful death/property damage] against [*name of insured*] and a judgment was entered against [*name of insured*];**
- 2. That [all or part of] [*name of insured*]'s liability under the judgment is covered by an insurance policy with [*name of defendant*]; and**
- 3. The amount of the judgment [covered by the policy].**

New September 2003

The instructions in this series assume the plaintiff is the insured and the defendant is the insurer. The party designations may be changed if appropriate to the facts of the case.

This instruction is intended for a judgment creditor's action against an insurer to collect on an insurance policy pursuant to *Insurance Code section 11580(b)(2)*. This instruction should be used only where there are factual issues on any of the above elements. This instruction may need to be augmented with instructions on specific factual findings.

Note that *Insurance Code section 11580* requires that the policy be "issued or delivered to [a] person in this state." This issue should be added as an element if it is disputed in the case.

■ *Insurance Code section 11580(b)(2)* provides, in pertinent part, that a liability policy must contain, and will be construed as containing if it does not: "[a] provision that whenever judgment is secured against the insured or the executor or administrator of a deceased insured in an action based upon bodily injury, death, or property damage, then an action may be brought against the insurer on the policy and subject to its terms and limitations, by such judgment creditor to recover on the judgment."

■ "A direct action under section 11580 is a contractual action on the policy to satisfy a judgment up to policy limits." (*Wright v. Fireman's Fund Insurance Co.* (1992) 11 Cal.App.4th 998, 1015 [14 Cal.Rptr.2d 588] .)

■ "[I]t is not necessary for property damage to be caused by a vehicle or draught animal in order to bring a direct action against an insurer under section 11580." (*People ex rel. City of Willits v. Certain Underwriters at Lloyd's of London* (2002) 97 Cal.App.4th 1125, 1131-1132] .)

■ "Because the insurer's duties flow to its insured alone, a third party claimant may not bring a direct action against an insurance company. As a general rule, a third party may directly sue an insurer only when there has been an assignment of rights by, or a final judgment against, the insured." (*Shaolian v. Safeco Insurance Co.* (1999) 71 Cal.App.4th 268, 271 [83 Cal.Rptr.2d 702] , internal citations omitted.)

■ "Under section 11580 a third party claimant bringing a direct action against an insurer should ... prove 1) it obtained a judgment for bodily injury, death, or property damage, 2) the judgment was against a person insured under a policy that insures against [the] loss or damage ..., 3) the liability insurance policy was issued by the defendant insurer, 4) the policy covers the relief awarded in the judgment, 5) the policy either contains a clause that authorizes the claimant to bring an action directly against the insurer or the policy was issued or delivered in California and insures against [the] loss or damage" (*Wright, supra*, 11 Cal.App.4th at p. 1015 .)

■ "Under *Insurance Code section 11580*, a third party creditor bringing a direct action against an insurer to recover the proceeds of an insurance policy must *plead and prove* not only that it obtained a judgment for bodily injury, but that 'the judgment was against a person insured under a policy ...' and 'the policy covers the relief awarded in the judgment' " (*Miller v. American Home Assurance Co.* (1996) 47 Cal.App.4th 844, 847-848 [54 Cal.Rptr.2d 765] , original italics, internal citation omitted.)

■ "[*Insurance Code Section 11580(b)(2)*] and the standard policy language permit an action against an insurer only when the underlying judgment is final and 'final,' for this purpose, means an appeal from the underlying judgment has been concluded or the time within which to appeal has passed." (*McKee v. National Union Fire Insurance Co. of Pittsburgh, PA.* (1993) 15 Cal.App.4th 282, 285 [19 Cal.Rptr.2d 286] .)

■ "[W]here the insurer may be subject to a direct action under *Insurance Code section 11580* by a judgment creditor who has or will obtain a default judgment in a third party action against the insured, intervention is appropriate. ... Where an insurer has failed to intervene in the underlying action or to move to set aside the default judgment, the insurer is bound by the default judgment." (*Reliance Insurance Co. v. Superior Court* (2000) 84 Cal.App.4th 383, 386-387 [100 Cal.Rptr.2d 807] , internal citations omitted.)

■ "The [standard] 'no action' clause gives the insurer the right to control the defense of the claim--to decide whether to settle or to adjudicate the claim on its merits. When the insurer provides a defense to its insured, the insured has no right to interfere with the insurer's control of the defense, and a stipulated

judgment between the insured and the injured claimant, without the consent of the insurer, is ineffective to impose liability upon the insurer." (*Safeco Ins. Co. of Am. v. Superior Court* (1999) 71 Cal.App.4th 782, 787 [84 Cal.Rptr.2d 43], internal citations omitted.)

■ A standard "no action" clause in an indemnity insurance policy "provides that [the insurer] may be sued directly if the amount of the insured's obligation to pay was finally determined either by judgment against the insured after actual trial or by 'written agreement of the insured, the claimant and the company.'" (*Rose v. Royal Insurance Co. of America* (1991) 2 Cal.App.4th 709, 716-717 [3 Cal.Rptr.2d 483] .)

■ "[A] trial does not have to be adversarial to be considered an 'actual trial' under the 'no action' clause, or to be considered binding against the insurer in a section 11580 proceeding. ... [W]e conclude that the term 'actual trial' in the standard 'no action' clause has two components: (1) an independent adjudication of facts based on an evidentiary showing; and (2) a process that does not create the potential for abuse, fraud or collusion." (*National Union Fire Insurance Co. v. Lynette C.* (1994) 27 Cal.App.4th 1434, 1449 [33 Cal.Rptr.2d 496] .)

■ "A defending insurer cannot be bound by a settlement made without its participation and without any actual commitment on its insured's part to pay the judgment, even where the settlement has been found to be in good faith for purposes of [Code of Civil Procedure] section 877.6." (*Hamilton v. Maryland Casualty Co.* (2002) 27 Cal.4th 718, 730 [117 Cal.Rptr.2d 318, 41 P.3d 128] .)

■ "[W]hen ... a liability insurer wrongfully denies coverage or refuses to provide a defense, then the insured is free to negotiate the best possible settlement consistent with his or her interests, including a stipulated judgment accompanied by a covenant not to execute. Such a settlement will raise an evidentiary presumption in favor of the insured (or the insured's assignee) with respect to the existence and amount of the insured's liability. The effect of such presumption is to shift the burden of proof to the insurer to prove that the settlement was unreasonable or the product of fraud or collusion. If the insurer is unable to meet that burden of proof then the stipulated judgment will be binding on the insurer and the policy provision proscribing a direct action against an insurer except upon a judgment against the insured after an 'actual trial' will not bar enforcement of the judgment." (*Pruyn v. Agricultural Insurance Co.* (1995) 36 Cal.App.4th 500, 509 [42 Cal.Rptr.2d 295] .)

Secondary Sources

Croskey et al., California Practice Guide: Insurance Litigation (The Rutter Group) PP 15:1028-15:1077, 15:1123-15:1136

2 California Liability Insurance Practice: Claims & Litigation (Cont.Ed.Bar) Claimant's Direct Action for Recovery of Judgment, §§ 27.1-27.7, 27.17-27.27

4 California Insurance Law & Practice, Ch. 41, *Liability Insurance in General*, §§ 41.60-41.63 (Matthew Bender)

26 California Forms of Pleading and Practice, Ch. 308, *Insurance* (Matthew Bender)

12 California Points and Authorities, Ch. 120, *Insurance*, §§ 120.186, 120.198, 120.206 (Matthew Bender)

Publisher's Notes

There is no BAJI instruction on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedurePartiesInterventionGeneral OverviewCivil ProcedureTrialsJury TrialsJury InstructionsGeneral
OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewInsurance
LawClaims & ContractsGeneral Overview



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California Forms of Jury Instruction

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CHAPTER 23 California Judicial Council Insurance Litigation Instructions

4-23 California Forms of Jury Instruction CACI 2361

CACI 2361 Negligent Failure to Obtain Insurance Coverage--Essential Factual Elements

[*Name of plaintiff*] claims that [he/she/it] was harmed by [*name of defendant*]'s negligent failure to obtain insurance requested by [him/her/it]. To establish this claim, [*name of plaintiff*] must prove all of the following:

- 1. That [*name of plaintiff*] requested [*name of defendant*] to obtain [*describe requested insurance*] and [*name of defendant*] promised to obtain that insurance for [him/her/it];**
- 2. That [*name of defendant*] was negligent in failing to obtain the promised insurance;**
- 3. That [*name of plaintiff*] was harmed; and**
- 4. That [*name of defendant*]'s negligence was a substantial factor in causing [*name of plaintiff*]'s harm.**

New September 2003

The instructions in this series assume the plaintiff is the insured and the defendant is the insurer. The party designations may be changed if appropriate to the facts of the case.

For general tort instructions, including the definition of "substantial factor," see the Negligence series (CACI No. 400 et seq.).

● "A 'failure to deliver the agreed-upon coverage' case is actionable An insurance agent has an 'obligation to use reasonable care, diligence, and judgment in procuring insurance requested by an

insured.' A broker's failure to obtain the type of insurance requested by an insured may constitute actionable negligence and the proximate cause of injury." (*Desai v. Farmers Insurance Exchange* (1996) 47 Cal.App.4th 1110, 1119-1120 [55 Cal.Rptr.2d 276] , internal citations omitted.)

■ "Absent some notice or warning, an insured should be able to rely on an agent's representations of coverage without independently verifying the accuracy of those representations by examining the relevant policy provisions." (*Clement v. Smith* (1993) 16 Cal.App.4th 39, 45 [19 Cal.Rptr.2d 676] .)

■ "[W]hile an insurance agent who promises to procure insurance will indeed be liable for his negligent failure to do so, it does not follow that he can avoid liability for foreseeable harm caused by his silence or inaction merely because he has not expressly promised to assume responsibility." (*Westrick v. State Farm Insurance* (1982) 137 Cal.App.3d 685, 691 [187 Cal.Rptr. 214] , internal citations omitted.)

Secondary Sources

Croskey et al., California Practice Guide: Insurance Litigation (The Rutter Group) PP 2:50-2:64.2, 11:246-11:249

2 California Liability Insurance Practice: Claims & Litigation (Cont.Ed.Bar) Actions Against Agents and Brokers, §§ 29.7-29.8

5 California Insurance Law & Practice, Ch. 61, *Operating Requirements of Agents and Brokers*, § 61.04[3][a] (Matthew Bender)

12 *California Points and Authorities*, Ch. 120, *Insurance*, § 120.402 (Matthew Bender)

Publisher's Notes

There is no BAJI instruction on this subject.

LexisNexis Matthew Bender Expert Practice Tip--Trend Is Toward Limiting Exposure: In contrast to *Westrick v. State Farm Insurance* (1982) 137 Cal. App. 3d 685, 691, 187 Cal. Rptr. 214 , cited in the last bulleted item in [3], above, later case law indicates a more limited exposure for an insurance agent [see, e.g., *Butcher v. Truck Ins. Exchange* (2000) 77 Cal. App. 4th 1442, 1462, 92 Cal. Rptr. 2d 521 ; *Fitzpatrick v. Hayes* (1997) 57 Cal. App. 4th 916, 927, 67 Cal. Rptr. 2d 445] . By Rex Heeseman

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Insurance Law Claims & Contracts General Overview Insurance Law Claims & Contracts Good Faith & Fair Dealing General Overview Insurance Law Claims & Contracts Good Faith & Fair Dealing Agents & Brokers Torts Negligence General Overview



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CHAPTER 23 California Judicial Council Insurance Litigation Instructions

4-23 California Forms of Jury Instruction CACI 2362-CACI 2399

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CACI 2362Reserved for Future Use



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CHAPTER 23 California Judicial Council Insurance Litigation Instructions

4-23 California Forms of Jury Instruction CACI VF-2300

CACI VF-2300 Breach of Contractual Duty to Pay a Covered Claim

We answer the questions submitted to us as follows:

1. Did [*name of plaintiff*] suffer a loss, [all or part of] which was covered under an insurance policy with [*name of defendant*]?

_____ Yes _____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Was [*name of defendant*] notified of the loss [as required by the policy]?

_____ Yes _____ No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. What is the amount of the covered loss that [*name of defendant*] failed to pay [*name of plaintiff*]? \$_____

Signed: _____

Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the [clerk/bailiff/judge].

New September 2003

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on *CACI No. 2300, Breach of Contractual Duty to Pay a Covered Claim--Essential Factual Elements*.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

Publisher's Notes

There is no BAJI verdict form on this subject.

LexisNexis Matthew Bender Expert Practice Tip--Use Care With Special Verdicts: A "special verdict" is often difficult to put together (depending on the facts) and/or to argue to the jury. *By Rex Heeseman*

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewCivil ProcedureTrialsJury TrialsVerdictsSpecial VerdictsContracts LawBreachGeneral OverviewInsurance LawClaims & ContractsGeneral OverviewInsurance LawClaims & ContractsGood Faith & Fair DealingGeneral Overview



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CHAPTER 23 California Judicial Council Insurance Litigation Instructions

4-23 California Forms of Jury Instruction CACI VF-2301

CACI VF-2301 Breach of the Implied Obligation of Good Faith and Fair Dealing--Failure or Delay in Payment

We answer the questions submitted to us as follows:

1. Did [*name of plaintiff*] suffer a loss covered under an insurance policy with [*name of defendant*]?

_____ Yes _____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Was [*name of defendant*] notified of the loss?

_____ Yes _____ No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Did [*name of defendant*] [fail to pay/delay payment of] policy benefits?

_____ Yes _____ No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Was [*name of defendant*]'s [failure to pay/delay in payment of] policy benefits, unreasonable or

without proper cause?

_____ Yes _____ No

If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. Was [*name of defendant*]'s [failure to pay/delay in payment of] policy benefits a substantial factor in causing harm to [*name of plaintiff*]?

_____ Yes _____ No

If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. What are [*name of plaintiff*]'s damages?

[a. Past economic loss

[lost earnings \$_____].....

[lost profits \$_____].....

[medical expenses \$_____].....

[other past economic loss \$_____].....

..... Total Past Economic Damages: \$_____]

[b. Future economic loss

[lost earnings \$_____].....

[lost profits \$_____].....

[medical expenses \$_____].....

[other future economic loss \$_____].....

..... Total Future Economic Damages: \$_____]

[c. Past noneconomic loss, including [physical pain/mental suffering:] \$_____]

[d. Future noneconomic loss, including [physical pain/mental suffering:] \$_____]

..... TOTAL \$_____

Signed: _____
Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the [clerk/bailiff/judge].

New September 2003; Revised April 2007, December 2007, April 2008

Directions for Use

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on *CACI No. 2331, Breach of the Implied Obligation of Good Faith and Fair Dealing--Failure or Delay in Payment (First Party)--Essential Factual Elements*.

If specificity is not required, users do not have to itemize all the damages listed in question 6 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If punitive damages are claimed, combine this form with the appropriate verdict form numbering from VF-3900 to VF-3904.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

Publisher's Notes

There is no BAJI verdict form on this subject.

See also "LexisNexis Matthew Bender Expert Practice Tip--Use Care With Special Verdicts" in CACI No. VF-2300.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Civil Procedure Trials Jury Trials Verdicts Special Verdicts Contracts Law Breach General Overview Insurance Law Claims & Contracts Good Faith & Fair Dealing General Overview Insurance Law Claims & Contracts Good Faith & Fair Dealing Payments



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CHAPTER 23 California Judicial Council Insurance Litigation Instructions

4-23 California Forms of Jury Instruction CACI VF-2302

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CACI VF-2302Reserved for Future Use



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CHAPTER 23 California Judicial Council Insurance Litigation Instructions

4-23 California Forms of Jury Instruction CACI VF-2303

CACI VF-2303 Bad Faith (First Party)--Breach of Duty to Inform Insured of Rights

We answer the questions submitted to us as follows:

1. Did [name of plaintiff] suffer a loss covered under an insurance policy with [name of defendant]?

_____ Yes _____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Did [name of defendant] [deny coverage for/refuse to pay] [name of plaintiff]'s loss?

_____ Yes _____ No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Did [name of plaintiff] have the [right/obligation] to [describe right or obligation at issue; e.g., "to request arbitration within 180 days"] under the policy?

_____ Yes _____ No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Did [name of defendant] fail to reasonably inform [name of plaintiff] of [his/her] [right/obligation] to [describe right or obligation]?

_____ Yes _____ No

If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. Was [name of defendant]'s failure to reasonably inform [name of plaintiff] a substantial factor in causing harm to [name of plaintiff]?

_____ Yes _____ No

If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. What are [name of plaintiff]'s damages?

[a. Past economic loss

[lost earnings..... \$_____].....

[lost profits..... \$_____].....

[medical expenses..... \$_____].....

[other past economic loss..... \$_____].....

..... **Total Past Economic Damages: \$_____]**

[b. Future economic loss

[lost earnings..... \$_____].....

[lost profits..... \$_____].....

[medical expenses..... \$_____].....

[other future economic loss..... \$_____].....

..... **Total Future Economic Damages: \$_____]**

[c. Past noneconomic loss, including [physical pain/mental suffering:]..... \$_____]

[d. Future noneconomic loss, including [physical pain/mental suffering:]..... \$_____]

..... **TOTAL \$_____**

Signed: _____
Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the [clerk/bailiff/judge].

New September 2003; Revised April 2007

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on *CACI No. 2333, Bad Faith (First Party)--Breach of Duty to Inform Insured of Rights--Essential Factual Elements*.

If specificity is not required, users do not have to itemize all the damages listed in question 6 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

Publisher's Notes

There is no BAJI verdict form on this subject.

See also "LexisNexis Matthew Bender Expert Practice Tip--Use Care With Special Verdicts" in CACI No. VF-2300.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Civil Procedure Trials Jury Trials Verdicts Special Verdicts Contracts Law Breach General Overview Insurance Law Bad Faith & Extracontractual Liability Elements of Bad Faith Insurance Law Claims & Contracts Good Faith & Fair Dealing General Overview



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CHAPTER 23 California Judicial Council Insurance Litigation Instructions

4-23 California Forms of Jury Instruction CACI VF-2304-CACI VF-2399

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CACI VF-2304Reserved for Future Use



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CHAPTER 23A Matthew Bender Insurance Contract Instructions *

4-23A California Forms of Jury Instruction 23A.syn

§ 23A.syn Synopsis to Chapter 23A: Matthew Bender Insurance Contract Instructions *

MB 2300A.01 Parties

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 2300A.02 Nature of Insurance

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 2300A.03 Object of Insurance

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 2300A.04 Nature of Declaratory Relief Action: General Liability

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 2300A.05 Underlying Claim

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 2300A.06 Equitable Subrogation

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 2300A.07 Role of Jury: Declaratory Judgment or Contract Action

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 2300A.08 Definition of "Primary Insurance"

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 2300A.09 Definition of "Excess Insurance"

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 2300A.10 Layers of Insurance Coverage

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 2300A.11 Definition of "Insurance Broker"

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 2300A.12 Broker Is Agent of Insured

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 2300A.13 Broker Does Not Have Duties of Insurer Toward Insured

[1] Instruction

[2] Use of Instruction

MB 2300A.14-MB 2300A.19 Reserved for Future Use

MB 2300A.20 Insured's Burden of Proof

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 2300A.21 Insurer's Burden of Proof

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 2300A.22 Fortuitous Events

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 2300A.23 Willful Acts

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 2300A.24-MB 2300A.29 Reserved for Future Use

MB 2300A.30 Application for Policy

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 2300A.31 Quotation of Premium

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 2300A.32 Certificate of Insurance

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 2300A.33 Insured's Duty to Read Policy

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 2300A.34 Cancellation

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 2300A.35 Nonrenewal

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 2300A.36-MB 2300A.49 Reserved for Future Use

MB 2300A.50 Effect of Rescission

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Effect of Rescission: Cancellation Distinguished

[b] Procedure for Rescission

[c] Related Judicial Council Jury Instructions

MB 2300A.51 Concealment

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Nature and Effect of Concealment

[b] Materiality of Facts

[c] Related Judicial Council Jury Instructions

MB 2300A.52 Misrepresentation

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Material False Statement

[b] Related Judicial Council Jury Instructions

MB 2300A.53 Mutual Mistake of Fact

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Mutual Mistake of Fact

[b] Related Judicial Council Jury Instructions

MB 2300A.54-MB 2300A.59 Reserved for Future Use

MB 2300A.60 Existence and Terms of Policy

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 2300A.61 Proof of Lost Policy Provisions

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Burden of Proving Essential Policy Terms

[b] Related Judicial Council Jury Instructions

MB 2300A.62-MB 2300A.69 Reserved for Future Use

MB 2300A.70 Damage, Loss, or Claim Within Policy Period

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 2300A.71 Definition of "Accident"

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 2300A.72 Exhaustion of Underlying Insurance

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 2300A.73-MB 2300A.79 Reserved for Future Use

MB 2300A.80 Notice of Loss

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Insured's Duty to Give Notice

[b] Related Judicial Council Jury Instructions

MB 2300A.81 Time for Filing Suit

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 2300A.82 Proof of Loss

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Proof of Loss

[b] Related Judicial Council Jury Instructions

MB 2300A.83 Material Overstatement of Loss

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Overstatement of Loss

[b] Related Judicial Council Jury Instructions

MB 2300A.84 Insured's Examination Under Oath

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Examination of Insured Under Oath

[b] Related Judicial Council Jury Instructions

MB 2300A.85 Examination Under Oath: False Statements

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] False Testimony of Insured

[b] Related Judicial Council Jury Instructions

MB 2300A.86 Insured's Production of Documents

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Duty of Insured to Cooperate

[b] Related Judicial Council Jury Instructions

MB 2300A.87 Inspection and Audit

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Duty of Insured to Cooperate

[b] Related Judicial Council Jury Instructions

MB 2300A.88 When Loss Payable

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 2300A.89 Increase in Hazard

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 2300A.90 Failure to Communicate Material Facts

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Duty to Communicate

[b] Related Judicial Council Jury Instructions

MB 2300A.91 Misrepresentation or Concealment

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Fraud and Concealment

[b] Related Judicial Council Jury Instructions

MB 2300A.92 Intent to Deceive

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Intent to Deceive

[b] Related Judicial Council Jury Instructions

MB 2300A.93 Definition of "False Representation"

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] False Representation

[b] Related Judicial Council Jury Instructions

MB 2300A.94 Definition of "Concealment"

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Concealment

[b] Related Judicial Council Jury Instructions

MB 2300A.95 Definition of "Material Fact"

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Materiality

[b] Related Judicial Council Jury Instructions

MB 2300A.96 Arson: Burden of Proof

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 2300A.97 Arson: Persons Acting on Behalf of Insured

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 2300A.98 Arson: Circumstantial Evidence Allowed

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 2300A.99 Arson: Findings of Officials and Experts

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 2300A.100 Arson: Factors to Consider

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 2300A.101 Arson: Characteristics of Fire

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 2300A.102-MB 2300A.109 Reserved for Future Use

MB 2300A.110 Late Notice

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Substantial Prejudice Required Only for Occurrence-Based Policies

[b] Substantial Prejudice Not Required for "Claims Made" Policies

[c] Burden of Proof

[d] Waiver of Late Notice Defense by Denial of Coverage

[e] Related Judicial Council Jury Instructions

MB 2300A.111-MB 2300A.119 Reserved for Future Use

MB 2300A.120 Right of Insurer to Limit Coverage

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 2300A.121 Efficient Proximate Cause

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Losses Attributable to More Than One Cause

[b] Related Judicial Council Jury Instructions

MB 2300A.122 Insurer's Burden of Proof on Expected or Intended Damage

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 2300A.123 Definitions of "Expected" and "Intended"

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 2300A.124 Business Pursuits

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 2300A.125 Pollution Exclusion: Pre-1986 Policy

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 2300A.126-MB 2300A.139 Reserved for Future Use

MB 2300A.140 Nature of Duty

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Extent and Nature of Implied Duty of Good Faith and Fair Dealing

[b] Limited to Insurance Policies

[c] Breach of Implied Covenant as Either Breach of Contract or Tort

[d] Duty Not Contravening Express Terms of Insurance Agreement

[e] Persons to Whom Duty Owed

[f] No "Reverse Bad Faith" Claim or Comparative Bad Faith Defense

[g] Related Judicial Council Jury Instructions

MB 2300A.141 Test for Breach of Duty

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Test for Breach of Duty

[b] Related Judicial Council Jury Instructions

MB 2300A.142 Industry Practice as Evidence of Reasonableness

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Industry Practice

[b] Related Judicial Council Jury Instructions

MB 2300A.143 Insurer Entitled to Consider Own Interests

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 2300A.144 Insurer Entitled to Assert Its Own Interests

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 2300A.145 Acts That May Constitute Bad Faith

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Examples of Unreasonable Conduct

[b] Related Judicial Council Jury Instructions

MB 2300A.146 Interpleader

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 2300A.147-MB 2300A.159 Reserved for Future Use

MB 2300A.160 Duty to Investigate

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Duty to Investigate

[b] Related Judicial Council Jury Instructions

MB 2300A.161 Improper Acts in Course of Investigation

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Wrongful Investigative Conduct

[b] Related Judicial Council Jury Instructions

MB 2300A.162-MB 2300A.169 Reserved for Future Use

MB 2300A.170 Importance of Duty to Defend

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Duty to Defend

[b] Related Judicial Council Jury Instructions

MB 2300A.171 When Duty to Defend Exists

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Duty to Defend Must Be Clearly and Unambiguously Excluded

[b] Related Judicial Council Jury Instructions

MB 2300A.172 When Insurer Must Evaluate Duty to Defend

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Time to Evaluate Duty to Defend

[b] Related Judicial Council Jury Instructions

MB 2300A.173-MB 2300A.179 Reserved for Future Use

MB 2300A.180 Duty to Settle

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Duty to Settle

[b] Related Judicial Council Jury Instructions

MB 2300A.181 Demand Within Policy Limits (or Above Limits With Insured or Excess Insurer Willing to Pay Excess)

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Offer to Settle Within Policy Limits

[b] Related Judicial Council Jury Instructions

MB 2300A.182 Duty to Settle: Opportunity

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Opportunity to Settle

[b] Related Judicial Council Jury Instructions

MB 2300A.183 Duty to Settle: Unreasonable Refusal

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Unreasonable Refusal

[b] Related Judicial Council Jury Instructions

MB 2300A.184 Insurer Must Give Equal Consideration to Insured's Interests

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Consideration of Insured's Interests

[b] Related Judicial Council Jury Instructions

MB 2300A.185 Unreasonable Refusal: Substantial Likelihood Standard

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Substantial Likelihood of Judgment Exceeding Policy Limits

[b] Related Judicial Council Jury Instructions

MB 2300A.186 Unreasonable Refusal: Factors to Consider

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Factors to Consider in Determining Whether Duty to Settle Was Breached

[b] Related Judicial Council Jury Instructions

MB 2300A.187- MB 2300A.199 Reserved for Future Use

MB 2300A.200 Advice of Counsel

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Advice of Counsel

[b] Related Judicial Council Jury Instructions

MB 2300A.201 Comparative Negligence

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 2300A.202 Comparative Negligence Guidelines

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 2300A.203-MB 2300A.209 Reserved for Future Use

MB 2300A.210 Actual Cash Value

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 2300A.211-MB 2300A.219 Reserved for Future Use

MB 2300A.220 Defense Costs in Underlying Action

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 2300A.221 Amount of Settlement or Judgment in Underlying Action

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 2300A.222-MB 2300A.229 Reserved for Future Use

MB 2300A.230 Consequential Damages

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Tort Damages

[b] Related Judicial Council Jury Instructions

MB 2300A.231 Attorneys' Fees

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 2300A.232 Prerequisites for Award of Punitive Damages in Insurance Bad Faith Case

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Prerequisites for Punitive Damages Award

[b] Oppression, Fraud, and Malice

[c] Insured's Burden of Proof

[d] Bifurcation of Punitive Damages Issues

[e] Purpose of Punitive Damages

[f] Award of Punitive Damages for Insurance Bad Faith

[g] Related Judicial Council Jury Instructions

MB 2300A.233 Discretion to Award Punitive Damages if Prerequisites for Award Are Established in Insurance Bad Faith Case

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Discretion to Award Punitive Damages

[b] Due Process Considerations

[c] Instructions Must Not Invite Jury to Impose Damages Sufficient to Punish and Deter Conduct Not Related to Particular Insured

[d] Instructions on Punitive Damages Must Not Be Vague

[e] Wealth Is Relevant Regarding Punishment and Deterrence Only With Respect to Particular Insured

[f] Related Judicial Council Jury Instructions

MB 2300A.240 Emotional Distress

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Emotional Distress

[b] Related Judicial Council Jury Instructions



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California Forms of Jury Instruction

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CHAPTER 23A Matthew Bender Insurance Contract Instructions *

4-23A California Forms of Jury Instruction Scope

Scope

SCOPE

This chapter includes jury instructions for use in litigation on first-party property insurance policies and third-party general liability policies. For the California Judicial Council jury instructions on insurance litigation, see Ch. 23, *California Judicial Council Insurance Litigation Instructions*. The Judicial Council instructions include, for example, Instructions on breach of an insurance contract [CACI Nos. 2300- 2302], policy exclusions [CACI Nos. 2303, 2304, 2306], disputing the contractual relationship [CACI Nos. 2307- 2309], affirmative defenses [CACI Nos. 2320- 2322], and bad faith [CACI Nos. 2330- 2350]. The Judicial Council instructions also include specific verdict forms relating to breach and bad faith [CACI Nos. VF-2300-VF-2303]. The instructions in this chapter are intended to supplement the Judicial Council instructions see [Cal. Rules of Ct., Rule 2.1050].

This chapter covers the following topics:

- Part A includes preliminary and definitional instructions [see MB 2300A.01 -MB 2300A.13] and instructions surrounding the burden of proof [see MB 2300A.20, MB 2300A.21], fortuitous events [see MB 2300A.22], and willful acts [see MB 2300A.23].
- Part B includes instructions on insurance contract issues, such as the issuance and rescission of a policy, policy conditions, and exclusions [see MB 2300A.30 -MB 2300A.125].
- Part C includes instructions on bad faith issues, such as the implied duty of good faith and fair dealing, unreasonable refusal to settle, and defenses [see MB 2300A.140 -MB 2300A.202].
- Part D includes instructions on contract and tort damages [see MB 2300A.210 -MB 2300A.240].

Many instructions in this chapter are generally based on standard policy form language developed by the Insurance Services Office, Inc. (ISO). ISO was formed by the National Bureau of Casualty Underwriters and the Mutual Insurance Rating Bureau for the purpose of promulgating standard policy language [see California Insurance Law and Practice,

Ch. 49 (Matthew Bender); Long, Law of Liability Insurance, Vol. 3, App. B (Matthew Bender)]. The standard general liability policy is called a Commercial General Liability or Comprehensive General Liability policy, usually abbreviated as "CGL."

Litigation on insurance policies involves cases in which (1) the insured is the plaintiff (typically bad faith cases), (2) the insurer is the plaintiff (typically declaratory relief cases), and (3) the insurer and the insured both make claims against each other (such as declaratory relief cases in which the insured cross-complains for bad faith). For that reason, this chapter generally avoids using the terms "plaintiff" and "defendant," and instead uses "insured" and "insurer." By virtue of this format, throughout these instructions the parties' names may be substituted for references to "[insurer]" and "[insured]" without concern for who is the plaintiff and who is the defendant.



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California Forms of Jury Instruction

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CHAPTER 23A Matthew Bender Insurance Contract Instructions *

Part A. GENERAL INSTRUCTIONS

1. Definitions and Preliminary Instructions

1-23A California Forms of Jury Instruction MB 2300A.01

MB 2300A.01 Parties

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

The plaintiff in this action is _____ [name of insured/insurer].

The defendant in this action is _____ [name of insured/insurer].

Unless otherwise specified, [insured/insurer] will be referred to as _____ [shorthand reference] **or as Plaintiff; [insured/insurer] will be referred to as** _____ [shorthand reference] **or as Defendant.**

[2] Use of Instruction

This is a preliminary instruction that should be used to explain to the jury who the parties are and what they may be called in additional jury instructions.

[3] Comment

These instructions generally avoid use of the terms "plaintiff" and "defendant," although there may be instances when it is more convenient to refer to the parties that way. Generally, however, to personalize the parties, counsel may wish to use their names. Therefore, an insured named Jane Doe might be referred to as "Ms. Doe" instead of as plaintiff, and an insurer named Acme Mutual Inter-Insurance Bureau of the Northwest might be referred to as "Acme."

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewInsurance LawClaims & ContractsGeneral Overview

* Revised by Susan E. Firtch. Ms. Firtch is a partner at Burnham Brown in Oakland, California.



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CHAPTER 23A Matthew Bender Insurance Contract Instructions *

Part A. GENERAL INSTRUCTIONS

1. Definitions and Preliminary Instructions

1-23A California Forms of Jury Instruction MB 2300A.02

MB 2300A.02 Nature of Insurance

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Insurance is a contract in which one person undertakes to indemnify another person against loss, damage, or liability arising from a contingent or unknown event. Any contingent or unknown event, whether past or future, that may create loss or damage to, or liability against, a person may be insured against.

Authorities: *Ins. Code* §§ 22, 250; *Montrose Chem. Corp. v. Admiral Ins. Co.* (1995) 10 Cal.4th 645, 689-690, 692, 42 Cal.Rptr.2d 324, 913 P.2d 878 ; *Cametal Corp. v. National Auto. & Cas. Ins. Co.* (1961) 189 Cal.App.2d Supp. 831, 835-836, 11 Cal.Rptr. 280 .

[2] Use of Instruction

This instruction should be used in cases involving the issue of whether a loss was already certain or known to the insured before the inception of the insurance policy. Although the language of this instruction is taken directly from *Ins. Code* §§ 22 and 250, if the jury is likely to find the word "indemnify" confusing or unclear, counsel may wish to request that the court use a less precise but reasonably synonymous term such as "compensate" or "pay for."

This instruction is applicable to first-party cases. It is unlikely to be applicable in third-party cases, because the California Supreme Court has interpreted "contingent or unknown" in the third-party context merely to require "some contingency" [*Montrose Chem. Corp. v. Admiral Ins. Co.* (1995) 10 Cal.4th 645, 690, 42 Cal.Rptr.2d 324, 913 P.2d 878 (emphasis in original)] and has held that some contingency exists so long as there is "uncertainty about the imposition of liability" [*Montrose Chem. Corp. v. Admiral Ins. Co.* (1995) 10 Cal.4th 645, 692, 42 Cal.Rptr.2d 324, 913 P.2d 878 (emphasis in original)].

[3] Comment

Ins. Code §§ 22 and 250 make clear that certain or known losses may not be insured against [*Cametal Corp. v. National Auto. & Cas. Ins. Co.* (1961) 189 Cal.App.2d Supp. 831, 835-836, 11 Cal.Rptr. 280]. This restriction is particularly important in cases of first-party fraud [see, e.g., *Prudential-LMI Commercial Ins. v. Superior Court* (1990) 51 Cal.3d 674, 274 Cal.Rptr. 387, 798 P.2d 1230 (when first-party loss is no longer contingent)]. This restriction will almost never apply to a third-party loss, which remains "contingent or unknown" so long as the insured's legal obligation to pay for that loss has not been established (for example, by way of final judgment) [*Montrose Chem. Corp. v. Admiral Ins. Co.* (1995) 10 Cal.4th 645, 693, 42 Cal.Rptr.2d 324, 913 P.2d 878].

LexisNexis Matthew Bender Expert Practice Tip--Need For Instruction: This instruction may not be needed, because almost all jurors now have an understanding of insurance. *By Rex Heeseman*

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Insurance Law Claims & Contracts General Overview Insurance Law Claims & Contracts Good Faith & Fair Dealing Indemnification Insurance Law Claims & Contracts Subrogation General Overview

* Revised by Susan E. Firtch. Ms. Firtch is a partner at Burnham Brown in Oakland, California.



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CHAPTER 23A Matthew Bender Insurance Contract Instructions *

Part A. GENERAL INSTRUCTIONS

1. Definitions and Preliminary Instructions

1-23A California Forms of Jury Instruction MB 2300A.03

MB 2300A.03 Object of Insurance

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

The person insured is entitled to receive full, but no more than full, value for the loss suffered. The insured may not be put in a better position than [he/she/it] was in before the loss.

Authorities: *Ins. Code § 22; Davis v. Phoenix Ins. Co. (1896) 111 Cal. 409, 415, 43 P. 1115 .*

[2] Use of Instruction

This instruction should be used to explain the purpose of an insurance contract. It applies if the insurer claims that the insured is seeking to recover more than the amount of its loss.

[3] Comment

The definition of "insurance" in *Ins. Code § 22* makes it clear that the purpose of insurance is only to make the insured whole, and not to give the insured a profit [*Davis v. Phoenix Ins. Co. (1896) 111 Cal. 409, 415, 43 P. 1115*]. For discussion of *Ins. Code § 22* and the definition of "insurance," see *MB 2300A.02*.

LexisNexis Matthew Bender Expert Practice Tip--Excess Amounts: This instruction could be misleading, depending on the type of insurance and type of case. For example, a homeowner policy with "replacement cash value" could provide benefits that exceed the actual cash value of damaged or destroyed property. In that case, the excess amount is not a "profit," but is part of the bargained-for benefit of the policy. In that case, the excess amount is not a "profit" on the insured's loss, but is rather a consequence of the insurer's bad faith. *By Ronald Oster and Susan E. Firtch*

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewInsurance LawClaims & ContractsGeneral
OverviewInsurance LawClaims & ContractsGood Faith & Fair DealingPayments

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CHAPTER 23A Matthew Bender Insurance Contract Instructions *

Part A. GENERAL INSTRUCTIONS

1. Definitions and Preliminary Instructions

1-23A California Forms of Jury Instruction MB 2300A.04

MB 2300A.04 Nature of Declaratory Relief Action: General Liability

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

This case involves a dispute as to whether [insurer] is obligated to provide certain benefits under an insurance policy that it issued to [insured]. [Insured] contends that those benefits are due because a [claim was made/lawsuit was brought] against [him/her/it] by third parties seeking damages covered by the policy. [Insurer] contends that the policy does not cover the damages sought by that [claim/lawsuit].

[2] Use of Instruction

This instruction should be used in a declaratory relief action arising out of a third-party claim or lawsuit against the insured. It is intended to be general in nature, and may be used in conjunction with more specific instructions set forth elsewhere regarding specific benefits that may be due under the policy.

[3] Comment

A declaratory judgment action is a common and appropriate means of resolving insurance coverage issues [*Keene Corp. v. Insurance Co. of N. Am. (D.C. Cir. 1981) 667 F.2d 1034, 1040 n.8* ; see Long, *Law of Liability Insurance*, Vol. 3, § 26.01 (Matthew Bender); see, e.g., *Standard Fire Ins. Co. v. Spectrum Community Assn. (2006) 141 Cal.App.4th 1117, 1120, 46 Cal.Rptr.3d 804* , rev. denied, 2006 Cal. LEXIS 12875].

LexisNexis Matthew Bender Expert Practice Tip--Need For Instruction: This instruction is often unnecessary because the judge invariably decides the cause of action for declaratory relief (see § 2300A.07). By *Rex Heeseman*

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDeclaratory Judgment ActionsGeneral OverviewCivil ProcedureTrialsJury TrialsJury
InstructionsGeneral OverviewInsurance LawClaims & ContractsGeneral OverviewInsurance LawClaims &
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CHAPTER 23A Matthew Bender Insurance Contract Instructions *

Part A. GENERAL INSTRUCTIONS

1. Definitions and Preliminary Instructions

1-23A California Forms of Jury Instruction MB 2300A.05

MB 2300A.05 Underlying Claim

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

This case arises out of a [claim/lawsuit] brought against [insured] by third parties. [Insured] contends that under the terms of the insurance policy that [insurer] issued, [insurer] is obligated to defend and indemnify [insured] against the third party [claim/lawsuit]. When I use the term "underlying claim" or "underlying lawsuit," I mean that [claim/lawsuit] brought against [insured] by the third parties.

Authorities: Shernoff, Gage & Levine, Insurance Bad Faith Litigation, § 3.01 (Matthew Bender); Long, Law of Liability Insurance, Vol. 1, § 1.01 (Matthew Bender).

[2] Use of Instruction

This instruction should be used in cases arising out of third-party claims or lawsuits against the insured to explain the nature of the insurance lawsuit and define the terms "underlying claim" and "underlying lawsuit."

[3] Comment

The liability of an insurance company to an insured depends on the terms of the policy [Long, Law of Liability Insurance, Vol. 1, § 1.01 (Matthew Bender)]. Even as to matters covered by the policy, the insurance company is not liable to the insured under a standard liability policy unless the insured is potentially liable to a third party [Shernoff, Gage & Levine, Insurance Bad Faith Litigation, § 3.01 (Matthew Bender); Long, Law of Liability Insurance, Vol. 3, App. B, § 2 (Matthew Bender)]. This means that there must be a claim or an action against the insured by the third-party on which the insured is or may be liable [see, e.g., *Unified W. Grocers, Inc. v. Twin City Fire Ins. Co.* (9th Cir. 2006)]

457 F.3d 1106, 1110 ; Medill v. Westport Ins. Corp. (2006) 143 Cal. App. 4th 819, 826, 49 Cal. Rptr. 3d 570]. This instruction defines that claim or action against the insured to provide a convenient way of distinguishing it from the dispute between the insured and the insurer. An instruction of this type is probably not necessary in a first-party case, because it is convenient enough to refer to the particular event at issue as, for example, "the fire" or "the theft."

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewInsurance LawClaims & ContractsGeneral Overview

* Revised by Susan E. Firtch. Ms. Firtch is a partner at Burnham Brown in Oakland, California.



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California Forms of Jury Instruction

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CHAPTER 23A Matthew Bender Insurance Contract Instructions *

Part A. GENERAL INSTRUCTIONS

1. Definitions and Preliminary Instructions

1-23A California Forms of Jury Instruction MB 2300A.06

MB 2300A.06 Equitable Subrogation

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

If one insurance company pays a claim for which another person is liable, the insurance company that made the payment is said to stand in the shoes of the insured. It is entitled to assert all of the same claims against the liable person that the insured could assert, and it is subject to all of the same defenses that could be asserted against the insured.

Authorities: *Commercial Union Assurance Cos. v. Safeway Stores, Inc.* (1980) 26 Cal.3d 912, 917-918, 164 Cal.Rptr. 709, 610 P.2d 1038 ; *Fire Ins. Exch. v. Hammond* (2000) 83 Cal.App.4th 313, 317, 99 Cal.Rptr.2d 596 ; *Walbrook Ins. Co. Ltd. v. Liberty Mut. Ins. Co.* (1992) 5 Cal.App.4th 1445, 1454, 7 Cal.Rptr.2d 513 ; *United Pac. Ins. Co. v. Hanover Ins. Co.* (1990) 217 Cal.App.3d 925, 936, 266 Cal.Rptr. 231 .

[2] Use of Instruction

This instruction should be used to explain to the jury that they should regard the insurer the same way that they would regard the insured. It applies if an insurer is seeking recovery from a third party--whether another insurer or a third party tortfeasor--on an equitable subrogation theory.

[3] Comment

Equitable subrogation is one of the theories on which one insurer may seek recovery from another for a loss to their common insured [*Walbrook Ins. Co. Ltd. v. Liberty Mut. Ins. Co.* (1992) 5 Cal.App.4th 1445, 1454, 7 Cal.Rptr.2d 513 ; *United Pac. Ins. Co. v. Hanover Ins. Co.* (1990) 217 Cal.App.3d 925, 936, 266 Cal.Rptr. 231 ; *Employers Mut. Liab.*

Ins. Co. v. Pacific Indem. Co. (1959) 167 Cal.App.2d 369, 376, 334 P.2d 658 ; see, e.g., *Chandler v. State Farm Mutual Auto. Ins. Co.* (9th Cir. 2010) 598 F.3d 1115, 1117 ; *JPI Westcoast Constr., L.P. v. RJS & Assoc., Inc.* (2007) 156 Cal.App.4th 1448, 1463-1464, 68 Cal.Rptr.3d 91 ; see generally California Insurance Law and Practice, Ch. 35, § 35.11 (Matthew Bender)]. Recovery on this theory is not based on any separate duty owed by one insurer to another [*Commercial Union Assurance Cos. v. Safeway Stores, Inc.* (1980) 26 Cal.3d 912, 918, 164 Cal.Rptr. 709, 610 P.2d 1038 ; *Walbrook Ins. Co. Ltd. v. Liberty Mut. Ins. Co.* (1992) 5 Cal.App.4th 1445, 1454, 7 Cal.Rptr.2d 513 ; *Northwestern Mut. Ins. Co. v. Farmers' Ins. Group* (1978) 76 Cal.App.3d 1031, 1050, 143 Cal.Rptr. 415], but rather is based on the principle that the subrogated insurer is enforcing the nonpaying insurer's obligation to the insured [*Northwestern Mut. Ins. Co. v. Farmers' Ins. Group* (1978) 76 Cal.App.3d 1031, 1050, 143 Cal.Rptr. 415].

Enforcement of the insured's rights by the subrogated insurer in no way increases or diminishes the obligation owed by the nonpaying insurer [*Peter v. Travelers Ins. Co.* (C.D. Cal. 1974) 375 F.Supp. 1347, 1350 ; *Northwestern Mut. Ins. Co. v. Farmers' Ins. Group* (1978) 76 Cal.App.3d 1031, 1045, 143 Cal.Rptr. 415]. Because equitable subrogation by an insurer involves the enforcement of the insured's rights and because the subrogee steps into the insured's shoes, the subrogee is bound by all of the insured's actions [*Century Indem. Co. v. London Underwriters* (1993) 12 Cal.App.4th 1701, 1709, 16 Cal.Rptr.2d 393 (in determining priority of subrogation rights, primary insurer bound by insured's agreement with excess insurer that excess insurer would be reimbursed before any amounts paid by any primary insurer would be reimbursed); *Continental Cas. Co. v. Royal Ins. Co.* (1990) 219 Cal.App.3d 111, 120, 268 Cal.Rptr. 193 (in action against primary insurer, excess insurer bound by insured's rejection of settlement offer)]. The insurer may not claim a right that the insured does not have and cannot acquire by subrogation something to which the insured has no rights [*Chandler v. State Farm Mutual Auto. Ins. Co.* (9th Cir. 2010) 598 F.3d 1115, 1117-1118 ; *Great American Ins. Cos. v. Gordon Trucking, Inc.* (2008) 165 Cal.App.4th 445, 451, 81 Cal.Rptr.3d 65 ; *Fire Ins. Exch. v. Hammond* (2000) 83 Cal.App.4th 313, 317, 99 Cal.Rptr.2d 596]. For example, if an insured releases the insured's claims against another party, the insurer, as subrogee, is bound by that release and may not recover [*Fireman's Fund Ins. Co. v. Maryland Cas. Co.* (1994) 21 Cal.App.4th 1586, 1596-1597, 26 Cal.Rptr.2d 762]. A number of cases have noted an exception under which a release will not bar an insurer's subrogation rights if the tortfeasor obtains a release with knowledge that the insured has already been indemnified by the insurer [see, e.g., *Conservatorship of Edwards* (1988) 198 Cal.App.3d 1176, 1184, 244 Cal.Rptr. 330]. However, none of the cases commonly cited as authority for the existence of this exception at common law have actually permitted an insurer's subrogation rights to survive a release executed by a party to the underlying claim [see generally California Insurance Law and Practice, Ch. 35, § 35.11[5] (Matthew Bender)].

Similarly, if the insured has already sued another party, the insurer cannot subsequently sue the same party for damages arising from the same accident [*Allstate Ins. Co. v. Mel Raption, Inc.* (2000) 77 Cal.App.4th 901, 914, 92 Cal.Rptr.2d 151].

A defense to an equitable subrogation claim is that the insurer paid the claim without any obligation to do so. In the context of payment by an insurer to its first-party insured, however, if the loss is covered under the basic grant of coverage without regard to policy exclusions, the insurer is not necessarily a "volunteer" even in the face of authority suggesting that policy exclusions would have precluded coverage [*State Farm Fire & Cas. Co. v. East Bay Mun. Util. Dist.* (1997) 53 Cal.App.4th 769, 778, 62 Cal.Rptr.2d 72].

LexisNexis Matthew Bender Expert Practice Tip--Understanding Subrogation: Subrogation is a difficult legal concept, even for those knowledgeable in insurance matters. *By Rex Heeseman*

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Contracts Law Third Parties Subrogation Insurance Law Claims & Contracts General Overview Insurance Law Claims & Contracts Subrogation Costs & Attorney Fees Insurance Law Claims & Contracts Subrogation Proper Parties

* Revised by Susan E. Firtch. Ms. Firtch is a partner at Burnham Brown in Oakland, California.



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California Forms of Jury Instruction

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CHAPTER 23A Matthew Bender Insurance Contract Instructions *

Part A. GENERAL INSTRUCTIONS

1. Definitions and Preliminary Instructions

1-23A California Forms of Jury Instruction MB 2300A.07

MB 2300A.07 Role of Jury: Declaratory Judgment or Contract Action

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

The insurance policy and the law as set forth in these instructions govern the rights and duties of [insurer] and [insured]. I have already decided the meaning and interpretation of the insurance policy, and I will instruct you shortly on the meaning of certain terms and conditions of the policy. You will then decide certain questions of fact, and your decision on those facts will determine whether the policy applies to the underlying claim.

Authorities: *Fireman's Fund Ins. Co. v. Allstate Ins. Co.* (1991) 234 Cal.App.3d 1154, 1168, 286 Cal.Rptr. 146 ; *San Jose Crane & Rigging, Inc. v. Lexington Ins. Co.* (1991) 227 Cal.App.3d 1314, 1316, 278 Cal.Rptr. 301 .

[2] Use of Instruction

This is a preliminary instruction that should be used in conjunction with the instruction in MB 2300A.05 defining "underlying claim." In cases involving first-party losses, a phrase descriptive of the loss should be substituted for "underlying claim." In cases involving bad faith issues as well as contractual issues, additional Instructions will be required regarding whether the insurer acted in bad faith [see MB 2300A.140 -MB 2300A.202 (instructions on bad faith)].

[3] Comment

The interpretation of a contract is a matter of law, to be decided by the court [*Abifadel v. Cigna Ins. Co.* (1992) 8 Cal.App.4th 145, 159, 9 Cal.Rptr.2d 910 ; *Fireman's Fund Ins. Co. v. Allstate Ins. Co.* (1991) 234 Cal.App.3d 1154, 1168, 286 Cal.Rptr. 146]. However, the determination of the facts on which the application of an insurance contract

depends is a matter for the jury [see *San Jose Crane & Rigging, Inc. v. Lexington Ins. Co.* (1991) 227 Cal.App.3d 1314, 1316, 278 Cal.Rptr. 301 (determination of when appreciable damage occurs, which would trigger running of limitation period contained in policy, is factual matter that should have been submitted to jury)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDeclaratory Judgment ActionsGeneral OverviewCivil ProcedureTrialsJury TrialsJury
InstructionsGeneral OverviewCivil ProcedureTrialsJury TrialsProvince of Court & JuryInsurance LawClaims &
ContractsGeneral Overview

* Revised by Susan E. Firtch. Ms. Firtch is a partner at Burnham Brown in Oakland, California.



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CHAPTER 23A Matthew Bender Insurance Contract Instructions *

Part A. GENERAL INSTRUCTIONS

1. Definitions and Preliminary Instructions

1-23A California Forms of Jury Instruction MB 2300A.08

MB 2300A.08 Definition of "Primary Insurance"

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

"Primary" insurance is insurance that applies immediately on the happening of the event that gives rise to a covered claim or loss.

Authorities: *St. Paul Mercury Ins. Co. v. Frontier Pac. Ins. Co. (2003) 111 Cal.App.4th 1234, 1252-1253, 4 Cal.Rptr.3d 416 ; Century Indem. Co. v. London Underwriters (1993) 12 Cal.App.4th 1701, 1706-1707, 16 Cal.Rptr.2d 393 ; Olympic Ins. Co. v. Employers Surplus Lines Ins. Co. (1981) 126 Cal.App.3d 593, 597, 178 Cal.Rptr. 908 .*

[2] Use of Instruction

This instruction should be used with the instruction in MB 2300A.09 if it is necessary to distinguish between primary and excess insurance policies.

[3] Comment

A primary liability (third-party) insurance policy applies immediately on the happening of the occurrence that gives rise to liability [*St. Paul Mercury Ins. Co. v. Frontier Pac. Ins. Co. (2003) 111 Cal.App.4th 1234, 1252-1253, 4 Cal.Rptr.3d 416*]. The insurer providing such coverage has the primary duty to defend and indemnify, unless specific policy language excuses or excludes that duty [*St. Paul Mercury Ins. Co. v. Frontier Pac. Ins. Co. (2003) 111 Cal.App.4th 1234, 1252-1253, 4 Cal.Rptr.3d 416*].

A primary insurance policy does not specify any threshold amount that must be reached before the insurer's obligations

under the policy are triggered [*Olympic Ins. Co. v. Employers Surplus Lines Ins. Co.* (1981) 126 Cal.App.3d 593, 597-598, 178 Cal.Rptr. 908 ; see *Century Indem. Co. v. London Underwriters* (1993) 12 Cal.App.4th 1701, 1706-1707, 16 Cal.Rptr.2d 393], although there may be a deductible amount that the insured agrees to pay on each loss. Consistent with immediate attachment of obligations, general liability policies typically specify that in resolving claims the insurer may advance the deductible on behalf of the insured, for which the insured must then reimburse the insurer.

If two or more primary policies apply to the same loss, the question of which policy pays first, and which policy or policies pay next (that is, which policies are "excess") is usually resolved by the policies' "other insurance" provisions. In some instances, statutes mandate when one primary policy will be primary and another will be "excess." If so, the statutory provisions override any policy language [see, e.g., *Ins. Code* § 11580.9 (automobile liability insurance if two or more policies apply to same vehicle); *Wilshire Ins. Co., Inc. v. Sentry Select Ins. Co.* (2004) 124 Cal.App.4th 27, 35, 21 Cal.Rptr.3d 60 ; *Travelers Indem. Co. v. Maryland Cas. Co.* (1996) 41 Cal.App.4th 1538, 49 Cal.Rptr.2d 271 ; see generally California Insurance Law and Practice, Ch. 50, § 50.13 (Matthew Bender)].

For further discussion, see California Insurance Law and Practice, Ch. 14 (Matthew Bender).

LexisNexis Matthew Bender Expert Practice Tip--Primary Versus Excess Insurance: The terms "primary" and "excess" can be confusing because they are often used in two different contexts. The first context is with regard to layers of coverage. A true primary policy provides immediate coverage, as already explained. A true excess policy provides an additional layer of coverage on top of the primary policy [see MB 2300A.09]. Additional excess policies can provide further layers of coverage. The second context in which the terms "primary" and "excess" are used involves two policies at the same layer that cover the same loss--for example, if there are two true primary policies, and one is deemed to be "primary" and pay first pursuant to its "other insurance" clause. In that case, the second policy will be referred to as "excess," even though it is a primary policy. *By Susan E. Firtch*

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Insurance Law Claims & Contracts General Overview Insurance Law Claims & Contracts Priority of Coverage Insurance Law Claims & Contracts Secondary Insurance

* Revised by Susan E. Firtch. Ms. Firtch is a partner at Burnham Brown in Oakland, California.



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CHAPTER 23A Matthew Bender Insurance Contract Instructions *

Part A. GENERAL INSTRUCTIONS

1. Definitions and Preliminary Instructions

1-23A California Forms of Jury Instruction MB 2300A.09

MB 2300A.09 Definition of "Excess Insurance"

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

"Excess" insurance is insurance that provides an additional layer of coverage that does not apply until other identified insurance coverage is longer on the risk.

Authorities: *St. Paul Mercury Ins. Co. v. Frontier Pac. Ins. Co.* (2003) 111 Cal.App.4th 1234, 1253, 4 Cal.Rptr.3d 416 ; *Century Indem. Co. v. London Underwriters* (1993) 12 Cal.App.4th 1701, 1707, 16 Cal.Rptr.2d 393 ; *Olympic Ins. Co. v. Employers Surplus Lines Ins. Co.* (1981) 126 Cal.App.3d 593, 598, 178 Cal.Rptr. 908 .

[2] Use of Instruction

This instruction should be used whenever the applicability of an excess insurance policy is at issue. It should be used with the instruction in MB 2300A.08 if it is necessary to distinguish between primary and excess insurance.

[3] Comment

Excess insurance provides coverage after underlying primary insurance is no longer on the risk [*St. Paul Mercury Ins. Co. v. Frontier Pac. Ins. Co.* (2003) 111 Cal.App.4th 1234, 1252-1253, 4 Cal.Rptr.3d 416 ; see *Padilla Constr. Co., Inc. v. Transportation Ins. Co.* (2007) 150 Cal.App.4th 984, 987, 58 Cal.Rptr.3d 807]. An excess policy typically does not apply until a specified amount of losses has been paid [*Century Indem. Co. v. London Underwriters* (1993) 12 Cal.App.4th 1701, 1707, 16 Cal.Rptr.2d 393 ; *Olympic Ins. Co. v. Employers Surplus Lines Ins. Co.* (1981) 126 Cal.App.3d 593, 598, 178 Cal.Rptr. 908 ; see, e.g., *Carmel Dev. Co. v. RLI Ins. Co.* (2005) 126 Cal.App.4th 502, 510, 24 Cal.Rptr.3d 588 (one policy specifically excess); *American Cas. Co. v. General Star Indem. Co.* (2005) 125

Cal.App.4th 1510, 1520-1521, 24 *Cal.Rptr.3d* 34 (umbrella policy provided no liability coverage until exhaustion of all applicable primary policies); *Travelers Cas. & Sur. Co. v. Transcontinental Ins. Co.* (2004) 122 *Cal.App.4th* 949, 959, 19 *Cal.Rptr.3d* 272 (excess policy stated that excess coverage triggered when specified primary insurance is exhausted)], either by the underlying insurer or by the insured. If primary insurance exists, liability under an excess policy does not attach until all primary insurance is exhausted, even if the total amount of primary insurance exceeds the amount contemplated in the excess policy [*Community Redevelopment Agency v. Aetna Cas. & Sur. Co.* (1996) 50 *Cal.App.4th* 329, 339-340, 57 *Cal.Rptr.2d* 755 ; *North River Ins. Co. v. American Home Assurance Co.* (1989) 210 *Cal.App.3d* 108, 114-115, 257 *Cal.Rptr.* 129 ; *Olympic Ins. Co. v. Employers Surplus Lines Ins. Co.* (1981) 126 *Cal.App.3d* 593, 600, 178 *Cal.Rptr.* 908 ; see also *Iolab Corp. v. Seaboard Sur. Co.* (9th Cir. 1994) 15 F.3d 1500, 1504]. If no primary insurance exists, the insured must pay a threshold amount, referred to as a self-insured retention (or an "SIR"). An SIR is a form of self-insurance [*Nabisco, Inc. v. Transport Indem. Co.* (1983) 143 *Cal.App.3d* 831, 835, 192 *Cal.Rptr.* 207 ; see *Forecast Homes, Inc. v. Steadfast Ins. Co.* (2010) 181 *Cal.App.4th* 1466, 1473-1474, 105 *Cal.Rptr.3d* 200 ; *General Star Indem. Co. v. Superior Court* (1996) 47 *Cal.App.4th* 1586, 1593, 55 *Cal.Rptr.2d* 322 ; *United States Elevator Corp. v. Associated Int'l Ins. Co.* (1989) 215 *Cal.App.3d* 636, 646, 263 *Cal.Rptr.* 760]. In some respects, self-insurance retentions are equivalent to primary liability insurance, and policies that are subject to SIRs are "excess policies" that have no duty to indemnify until the SIR is exhausted [see *Forecast Homes, Inc. v. Steadfast Ins. Co.* (2010) 181 *Cal.App.4th* 1466, 1474, 105 *Cal.Rptr.3d* 200]. However, the analogy between "primary" and "excess" insurance should not be carried too far; an SIR is not the same as primary insurance for all purposes [*Forecast Homes, Inc. v. Steadfast Ins. Co.* (2010) 181 *Cal.App.4th* 1466, 1474, 105 *Cal.Rptr.3d* 200], and is not considered when determining whether all primary insurance is exhausted [*Montgomery Ward & Co. v. Imperial Cas. & Indem. Co.* (2000) 81 *Cal.App.4th* 356, 369, 97 *Cal.Rptr.2d* 44].

In some cases, excess policies have applied even though the primary insurer was insolvent and had paid no losses at all [see, e.g., *Reserve Ins. Co. v. Pisciotto* (1982) 30 *Cal.3d* 800, 815, 180 *Cal.Rptr.* 628, 640 P.2d 764 ; *Fageol Truck & Coach Co. v. Pacific Indem. Co.* (1941) 18 *Cal.2d* 748, 751, 117 P.2d 669]. The decisions in those cases have been based on the particular language of the excess policy in question. In any given case, the actual policy language should control [*Reserve Ins. Co. v. Pisciotto* (1982) 30 *Cal.3d* 800, 814, 180 *Cal.Rptr.* 628, 640 P.2d 764].

For further discussion, see California Insurance Law and Practice, Ch. 14, *Excess Insurance and the Primary/Excess Relationship* (Matthew Bender).

LexisNexis Matthew Bender Expert Practice Tip--Primary Versus Excess Insurance: Excess insurance is a complicated issue. Additionally, the terms "primary" and "excess" can be confusing because they are often used in two different contexts. The first context is with regard to layers of coverage. A true primary policy provides immediate coverage [see MB 2300A.08]. A true excess policy provides an additional layer of coverage on top of the primary policy, as already explained. Additional excess policies can provide further layers of coverage. The second context in which the terms "primary" and "excess" are used involves two policies at the same layer that cover the same loss--for example, if there are two true primary policies, and one is deemed to be "primary" and pay first pursuant to its "other insurance" clause. In that case, the second policy will be referred to as "excess," even though it is a primary policy. *By Rex Heeseman and Susan E. Firtch*

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewInsurance LawClaims & ContractsGeneral OverviewInsurance LawExcess InsuranceGeneral OverviewInsurance LawExcess InsuranceSubrogation

* Revised by Susan E. Firtch. Ms. Firtch is a partner at Burnham Brown in Oakland, California.



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CHAPTER 23A Matthew Bender Insurance Contract Instructions *

Part A. GENERAL INSTRUCTIONS

1. Definitions and Preliminary Instructions

1-23A California Forms of Jury Instruction MB 2300A.10

MB 2300A.10 Layers of Insurance Coverage

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

[Insured] bought insurance on a yearly basis, and in layers. In other words, for each year [insured] had several insurance policies, consisting of one primary policy and several excess policies. Each policy must be considered individually to determine whether it would apply to this claim. In other words, you must consider [insured]'s claims for insurance benefits separately for each year of coverage and for each policy.

Authority: *Chamberlin v. Smith* (1977) 72 Cal.App.3d 835, 844, 140 Cal.Rptr. 493 .

[2] Use of Instruction

This instruction should be used with the instructions in MB 2300A.08 and MB 2300A.09 (defining primary and excess insurance), if the dispute involves both primary and excess insurance over more than one policy year. Counsel should also consider the instruction in MB 2300A.72 concerning the exhaustion of underlying insurance. This instruction may be modified to reflect only one layer of coverage, only one year of coverage, or the existence of a self-insured retention or other layer of self-insurance.

[3] Comment

All insurance policies have policy limits, so that the insurer is only obligated within specified amounts. For protection above the amount provided by a given policy, the insured may buy an additional "layer" of insurance. For example, in one case the insured (itself an insurance company) had a primary policy with limits of \$20,000, a first layer excess policy providing coverage from \$20,000 up to \$2 million, and a second layer excess policy providing coverage from \$2

million to \$2.5 million [*Olympic Ins. Co. v. Employers Surplus Lines Ins. Co.* (1981) 126 Cal.App.3d 593, 178 Cal.Rptr. 908].

In determining whether a particular policy provides coverage, the court or the jury must consider that policy alone as if no other insurance is available [*Chamberlin v. Smith* (1977) 72 Cal.App.3d 835, 844, 140 Cal.Rptr. 493].

The existence of a retained limit does not mean that the policyholder has no insurance; instead, it is simply a form of self-insurance [*Nabisco, Inc. v. Transport Indem. Co.* (1983) 143 Cal.App.3d 831, 835, 192 Cal.Rptr. 207 ; *Lovy v. State Farm Ins. Co.* (1981) 117 Cal.App.3d 834, 859, 173 Cal.Rptr. 307].

For further discussion, see California Insurance Law and Practice, Ch. 14, *Excess Insurance and the Primary/Excess Relationship* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewInsurance LawClaims & ContractsGeneral OverviewInsurance LawClaims & ContractsPriority of CoverageInsurance LawExcess InsuranceGeneral OverviewInsurance LawExcess InsuranceUmbrella Policies

* Revised by Susan E. Firtch. Ms. Firtch is a partner at Burnham Brown in Oakland, California.



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CHAPTER 23A Matthew Bender Insurance Contract Instructions *

Part A. GENERAL INSTRUCTIONS

1. Definitions and Preliminary Instructions

1-23A California Forms of Jury Instruction MB 2300A.11

MB 2300A.11 Definition of "Insurance Broker"

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

An "insurance broker" is a person who, for compensation and on behalf of the insured, transacts insurance with, but not on behalf of, an insurer.

Authorities: *Ins. Code § 33; Century Sur. Co. v. Crosby Ins., Inc. (2004) 124 Cal.App.4th 116, 125, 21 Cal.Rptr.3d 115*

[2] Use of Instruction

This instruction should be used to define an insurance broker if a broker's actions are at issue. It should be used with the instruction in MB 2300A.12, which explains that a broker is the agent of the insured.

[3] Comment

The terms "insurance agent" and "insurance broker" are defined by statute [*Ins. Code §§ 31, 33*]. Although the term "insurance agent" is often used colloquially by insureds to refer to a person acting on their behalf [*Loehr v. Great Republic Ins. Co. (1990) 226 Cal.App.3d 727, 733, 276 Cal.Rptr. 667*], and although the common law meaning of "agent" applies to such a person, the Insurance Code specifies that an "insurance agent" acts on behalf of the insurer, and an "insurance broker" acts on behalf of the insured [*Ins. Code §§ 31, 33; Century Sur. Co. v. Crosby Ins., Inc. (2004) 124 Cal.App.4th 116, 125, 21 Cal.Rptr.3d 115*]. An insurance agent may be the agent of several insurers at the same time [*Ins. Code § 1704(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewInsurance LawClaims & ContractsGeneral
OverviewInsurance LawIndustry RegulationInsurance Company OperationsRepresentativesAgentsGeneral
OverviewInsurance LawIndustry RegulationInsurance Company OperationsRepresentativesBrokers

* Revised by Susan E. Firtch. Ms. Firtch is a partner at Burnham Brown in Oakland, California.



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California Forms of Jury Instruction

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CHAPTER 23A Matthew Bender Insurance Contract Instructions *

Part A. GENERAL INSTRUCTIONS

1. Definitions and Preliminary Instructions

1-23A California Forms of Jury Instruction MB 2300A.12

MB 2300A.12 Broker Is Agent of Insured

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

By law, an "insurance broker" is the agent of the insured, and not of the insurer.

Authority: *Marsh & McLennan of Cal., Inc. v. City of Los Angeles* (1976) 62 Cal.App.3d 108, 117-118, 132 Cal.Rptr. 796 .

[2] Use of Instruction

This instruction should be used in conjunction with the instruction in MB 2300A.11 to make clear that a broker works for the insured and that a broker's actions are attributable to the insured, not the insurer. It applies if the actions of an insurance broker are at issue and there is no issue of dual agency. The instruction is not appropriate if there is evidence in the case that supports a finding of dual agency [*Loehr v. Great Republic Ins. Co.* (1990) 226 Cal.App.3d 727, 734, 276 Cal.Rptr. 667].

[3] Comment

An insurance broker is an agent of the insured and not of the insurer [*Marsh & McLennan of Cal., Inc. v. City of Los Angeles* (1976) 62 Cal.App.3d 108, 117-118, 132 Cal.Rptr. 796]. The Insurance Code defines a broker as one who works on behalf of the insured [*Ins. Code* § 33], and an agent as one who works on behalf of the insurer [*Ins. Code* § 31]. However, these roles are not mutually exclusive. The same person may on occasion act on behalf of both the insured and the insurer, and in that case may be the common law agent of both [*Kurtz, Richards, Wilson & Co. v. Insurance Communicators Mktg. Corp.* (1993) 12 Cal.App.4th 1249, 1257-1258, 16 Cal.Rptr.2d 259 ; *Loehr v. Great*

Republic Ins. Co. (1990) 226 Cal.App.3d 727, 734, 276 Cal.Rptr. 667]. If the evidence supports a finding of dual agency, it is error to instruct the jury that only one agency relationship may exist [*Loehr v. Great Republic Ins. Co.* (1990) 226 Cal.App.3d 727, 732-734, 276 Cal.Rptr. 667 ; see *Kurtz, Richards, Wilson & Co. v. Insurance Communicators Mktg. Corp.* (1993) 12 Cal.App.4th 1249, 1257-1258, 16 Cal.Rptr.2d 259 (existence of dual agency is question for trier of fact)].

LexisNexis Matthew Bender Expert Practice Tip--Job Title Not Determinative: In a dual agency situation, the same person can act on behalf of both the insured and the insurer. Accordingly, the person's job title alone does not necessarily dictate whether the person is the agent of the insurer, the insured, or both. *By Ronald Oster*

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate Law Agency Relationships Types Insurance Agent & Insurance Company Civil
 Procedure Trials Jury Trials Jury Instructions General Overview Insurance Law Claims & Contracts General
 Overview Insurance Law Industry Regulation Insurance Company Operations Representatives Agents General
 Overview Insurance Law Industry Regulation Insurance Company Operations Representatives Brokers

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CHAPTER 23A Matthew Bender Insurance Contract Instructions *

Part A. GENERAL INSTRUCTIONS

1. Definitions and Preliminary Instructions

*1-23A California Forms of Jury Instruction MB 2300A.13***MB 2300A.13 Broker Does Not Have Duties of Insurer Toward Insured****[1] Instruction**[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

By law, an "insurance broker" does not have the duties of an insurer.

Authority: *Kotlar v. Hartford Fire Ins. Co. (2000) 83 Cal.App.4th 1116, 1123, 100 Cal.Rptr.2d 246 .*

[2] Use of Instruction

This instruction should be used in conjunction with the instruction in MB 2300A.12 to clarify that a broker's duties to an insured are different than an insurer's duties to an insured. It applies if the actions of an insurance broker towards the insured are at issue. For example, although an insurer is obligated to provide notice of cancellation of the policy [see, e.g., *Ins. Code § 2071*], a broker has no such duty [*Kotlar v. Hartford Fire Ins. Co. (2000) 83 Cal.App.4th 1116, 1123, 100 Cal.Rptr.2d 246*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Insurance Law Claims & Contracts General Overview Insurance Law Industry Regulation Insurance Company Operations Representatives Agents General Overview Insurance Law Industry Regulation Insurance Company Operations Representatives Brokers

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CHAPTER 23A Matthew Bender Insurance Contract Instructions *

Part A. GENERAL INSTRUCTIONS

1. Definitions and Preliminary Instructions

1-23A California Forms of Jury Instruction MB 2300A.14-MB 2300A.19

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CHAPTER 23A Matthew Bender Insurance Contract Instructions *

Part A. GENERAL INSTRUCTIONS

2. Burden of Proof and General Principles

1-23A California Forms of Jury Instruction MB 2300A.20

MB 2300A.20 Insured's Burden of Proof

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

[Insured] contends that [he/she/it] is entitled to benefits under an insurance policy issued by [insurer].

Two of the components of an insurance policy are the coverage grant and the exclusions. I will instruct you shortly on the meaning and operation of the terms of the coverage grant that are in dispute in this case.

[Insured] has the burden of proving by a preponderance of the evidence all of the facts necessary to establish that the [loss/damages claimed in the underlying lawsuit] fall[s] within the terms of the coverage grant.

Authorities: *Whittaker Corp. v. Allianz Underwriters, Inc.* (1992) 11 Cal.App.4th 1236, 1244, 14 Cal.Rptr.2d 659 ; *Central Nat'l Ins. Co. v. Superior Court* (1992) 2 Cal.App.4th 926, 932, 3 Cal.Rptr.2d 622 ; *Dyer v. Northbrook Prop. & Cas. Ins. Co.* (1989) 210 Cal.App.3d 1540, 1547, 259 Cal.Rptr. 298 ; *Royal Globe Ins. Co. v. Whitaker* (1986) 181 Cal.App.3d 532, 537, 226 Cal.Rptr. 435 (third-party); *Giddings v. Industrial Indem. Co.* (1980) 112 Cal.App.3d 213, 218-220, 169 Cal.Rptr. 278 (third-party).

[2] Use of Instruction

This instruction should be used whenever the application of the policy's coverage grant is an issue. It applies to both first-party and third-party disputes. The instruction should be used in conjunction with specific instructions on the facts that the insured must prove to establish that the coverage grant applies.

For an instruction defining the plaintiff's burden of proof, see *CACI No. 200*.

[3] Comment

The insured has the burden of proving that a loss falls within the coverage grant [*Intel Corp. v. Hartford Accident & Indem. Co.* (9th Cir. 1991) 952 F.2d 1551, 1557 ; *Whittaker Corp. v. Allianz Underwriters, Inc.* (1992) 11 Cal.App.4th 1236, 1244, 14 Cal.Rptr.2d 659 ; *Central Nat'l Ins. Co. v. Superior Court* (1992) 2 Cal.App.4th 926, 932, 3 Cal.Rptr.2d 622 ; *Dyer v. Northbrook Prop. & Cas. Ins. Co.* (1989) 210 Cal.App.3d 1540, 1547, 259 Cal.Rptr. 298 ; *Royal Globe Ins. Co. v. Whitaker* (1986) 181 Cal.App.3d 532, 537, 226 Cal.Rptr. 435 (third-party); *Giddings v. Industrial Indem. Co.* (1980) 112 Cal.App.3d 213, 218-220, 169 Cal.Rptr. 278 (third-party)]. Conversely, the insurer has the burden of proving the applicability of any exclusions [*Intel Corp. v. Hartford Accident & Indem. Co.* (9th Cir. 1991) 952 F.2d 1551, 1557, 1561 ; *Royal Globe Ins. Co. v. Whitaker* (1986) 181 Cal.App.3d 532, 537, 226 Cal.Rptr. 435 ; see MB 2300A.21 (insurer's burden of proof on exclusions)]. Once the insurer has proven that an exclusion applies, the burden then shifts back to the insured to prove that the loss falls within any exception to the exclusion, because an exception to an exclusion is in the nature of a coverage grant [*Aydin Corp. v. First State Ins. Co.* (1998) 18 Cal.4th 1183, 1191-1192, 77 Cal.Rptr.2d 537, 959 P.2d 1213 ; *Travelers Cas. & Sur. Co. v. Superior Court* (1998) 63 Cal.App.4th 1440, 1454-1455, 75 Cal.Rptr.2d 54]. However, this rule does not apply to an "all risk" policy or other policy in which losses are covered unless excluded [*Strubble v. United Servs. Auto. Ass'n* (1973) 35 Cal.App.3d 498, 504, 110 Cal.Rptr. 828].

It is not always immediately apparent what is the coverage grant and what is an exclusion, and both a grant of coverage and exclusionary language may be found together. For example, in one case, a federal district court held that under the terms of the policy in question, the term "occurrence," although contained within the coverage grant, was effectively an exclusion and that the insurer therefore had the burden of proving that no "occurrence" had taken place [*Clemco Indus. v. Commercial Union Ins. Co.* (N.D. Cal. 1987) 665 F.Supp. 816, 820 , *aff'd*, 848 F.2d 1242 (9th Cir. 1988)]. Other decisions have placed the burden of proving an occurrence on the insured [see, e.g., *Dyer v. Northbrook Prop. & Cas. Ins. Co.* (1989) 210 Cal.App.3d 1540, 1546-1549, 259 Cal.Rptr. 298].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Evidence Procedural Considerations Burdens of Proof Allocation Insurance Law Claims & Contracts General Overview

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CHAPTER 23A Matthew Bender Insurance Contract Instructions *

Part A. GENERAL INSTRUCTIONS

2. Burden of Proof and General Principles

1-23A California Forms of Jury Instruction MB 2300A.21

MB 2300A.21 Insurer's Burden of Proof

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

[Insurer] has asserted that the policy does not apply to the [loss/underlying lawsuit], based in part on certain exclusions contained in the insurance policy. I will instruct you shortly on the meaning and operation of the exclusions at issue in this case.

[Insurer] has the burden of proving by a preponderance of the evidence all of the facts necessary to establish that an exclusion applies.

Authorities: *Intel Corp. v. Hartford Accident & Indem. Co.* (9th Cir. 1991) 952 F.2d 1551, 1557, 1561 ; *Raychem Corp. v. Federal Ins. Co.* (N.D. Cal. 1994) 853 F.Supp. 1170, 1175 ; *Clemmer v. Hartford Ins. Co.* (1978) 22 Cal.3d 865, 879-880, 151 Cal.Rptr. 285, 587 P.2d 1098 ; *Royal Globe Ins. Co. v. Whitaker* (1986) 181 Cal.App.3d 532, 537, 226 Cal.Rptr. 435 ; *Executive Aviation, Inc. v. National Ins. Underwriters* (1971) 16 Cal.App.3d 799, 806, 94 Cal.Rptr. 347 .

[2] Use of Instruction

This instruction should be used in every case in which the application of an exclusion turns on a disputed issue of fact. This instruction should be used with an instruction that explains the burden of proof generally *see* [CACI No. 200].

[3] Comment

The insurer has the burden of proving the applicability of any exclusions [*Intel Corp. v. Hartford Accident & Indem.*

Co. (9th Cir. 1991) 952 F.2d 1551, 1557, 1561 ; Raychem Corp. v. Federal Ins. Co. (N.D. Cal. 1994) 853 F.Supp. 1170, 1175 ; Clemmer v. Hartford Ins. Co. (1978) 22 Cal.3d 865, 879-880, 151 Cal.Rptr. 285, 587 P.2d 1098 ; Executive Aviation, Inc. v. National Ins. Underwriters (1971) 16 Cal.App.3d 799, 806, 94 Cal.Rptr. 347]. For discussion of the division of the burden of proof between insurer and insured, see MB 2300A.20[3].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Evidence Procedural Considerations Burdens of Proof General Overview Insurance Law Claims & Contracts General Overview

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CHAPTER 23A Matthew Bender Insurance Contract Instructions *

Part A. GENERAL INSTRUCTIONS

2. Burden of Proof and General Principles

1-23A California Forms of Jury Instruction MB 2300A.22

MB 2300A.22 Fortuitous Events

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

[Insurer]'s policy covers only events of a fortuitous nature that do not result from fraud or misconduct.

"Fortuitous" means occurring by accident or chance, without any intention. A loss that is certain to occur is not fortuitous.

If you find that the loss claimed by [insured] was certain to occur, was inevitable, or was intentionally caused by or at the direction of [insured], then the loss was not fortuitous, and it is not covered under the insurance policy.

Authorities: *Ins. Code §§ 22, 250; Hogan v. Midland Nat'l Ins. Co. (1970) 3 Cal.3d 553, 559-561, 91 Cal.Rptr. 153, 476 P.2d 825 ; Chu v. Canadian Indem. Co. (1990) 224 Cal.App.3d 86, 94-96, 274 Cal.Rptr. 20 ; Snapp v. State Farm Fire & Cas. Co. (1962) 206 Cal.App.2d 827, 830, 24 Cal.Rptr. 44 .*

[2] Use of Instruction

This instruction should be used in first-party property cases or in third-party liability cases in which the definition of "occurrence" includes "accident," but does not include "event" [*Insurance Co. of N. Am. v. Sam Harris Constr. Co., Inc. (1978) 22 Cal.3d 409, 412, 149 Cal.Rptr. 292, 583 P.2d 1335 ; United Pac. Ins. Co. v. McGuire Co. (1991) 229 Cal.App.3d 1560, 1565-1566, 281 Cal.Rptr. 375].*

[3] Comment

The concept of fortuity is basic to insurance law [*Hogan v. Midland Nat'l Ins. Co.* (1970) 3 Cal.3d 553, 559-561, 91 Cal.Rptr. 153, 476 P.2d 825 ; *Chu v. Canadian Indem. Co.* (1990) 224 Cal.App.3d 86, 94, 274 Cal.Rptr. 20 ; *Snapp v. State Farm Fire & Cas. Co.* (1962) 206 Cal.App.2d 827, 830, 24 Cal.Rptr. 44]. Insurance protects against the risk of loss, not the certainty of loss [*Hogan v. Midland Nat'l Ins. Co.* (1970) 3 Cal.3d 553, 559-561, 91 Cal.Rptr. 153, 476 P.2d 825 ; *Chatton v. National Union Fire Ins. Co.* (1992) 10 Cal.App.4th 846, 860, 13 Cal.Rptr.2d 318 ; *Chu v. Canadian Indem. Co.* (1990) 224 Cal.App.3d 86, 94, 274 Cal.Rptr. 20].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Insurance Law Claims & Contracts General Overview Insurance Law Claims & Contracts Fortuity Doctrine

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CHAPTER 23A Matthew Bender Insurance Contract Instructions *

Part A. GENERAL INSTRUCTIONS

2. Burden of Proof and General Principles

1-23A California Forms of Jury Instruction MB 2300A.23

MB 2300A.23 Willful Acts

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

An insurer is not liable for a loss caused by the willful act of the insured.

A "willful act" is an act done with intent to cause harm, an act that carries a high probability of harm, or an act that is inherently harmful. [Insurer] has the burden of proving by a preponderance of the evidence that [insured]'s acts were willful.

If you find that [insured] willfully committed any act that caused [the loss to the property/the damage complained of in the underlying lawsuit] then [insured] is not entitled to be indemnified for that [loss/damage] under the policy.

Authorities: *Ins. Code § 533; J.C. Penney Cas. Ins. Co. v. M.K. (1991) 52 Cal.3d 1009, 278 Cal.Rptr. 64, 804 P.2d 689 ; Clemmer v. Hartford Ins. Co. (1978) 22 Cal.3d 865, 879-880, 151 Cal.Rptr. 285, 587 P.2d 1098 ; Downey Venture v. LMI Ins. Co. (1998) 66 Cal.App.4th 478, 500, 78 Cal.Rptr.2d 142 ; Coit Drapery Cleaners, Inc. v. Sequoia Ins. Co. (1993) 14 Cal.App.4th 1595, 1603-1604, 18 Cal.Rptr.2d 692 ; Shell Oil Co. v. Winterthur Swiss Ins. Co. (1993) 12 Cal.App.4th 715, 749, 15 Cal.Rptr.2d 815 ; Fire Ins. Exch. v. Altieri (1991) 235 Cal.App.3d 1352, 1359, 1 Cal.Rptr.2d 360 ; Studley v. Benicia Unified Sch. Dist. (1991) 230 Cal.App.3d 454, 458, 281 Cal.Rptr. 631 ; State Farm Fire & Cas. Co. v. Eddy (1990) 218 Cal.App.3d 958, 969, 267 Cal.Rptr. 379 .*

[2] Use of Instruction

This instruction should be used if the insurer contends that the insured's act was inherently harmful or otherwise rises to

the level of acts for which public policy precludes insurance [see [3], *below*].

LexisNexis Matthew Bender Expert Practice Tip--Caution in Using Instruction: Because "willful acts" is a complicated area of the law, counsel should carefully consider use of this instruction and the related jury argument. *By Rex Heeseman*

[3] Comment

Under *Ins. Code* § 533, an insurer may not insure against willful acts of the insured [*Ins. Code* § 533; see, e.g., *Unified W. Grocers, Inc. v. Twin City Fire Ins. Co.* (9th Cir. 2006) 457 F.3d 1106, 1111]. This statutory prohibition is implied as a part of every insurance policy [*State Farm Fire & Cas. Co. v. Eddy* (1990) 218 Cal.App.3d 958, 969, 267 Cal.Rptr. 379 ; *Evans v. Pacific Indem. Co.* (1975) 49 Cal.App.3d 537, 540, 122 Cal.Rptr. 680]. It is treated as the functional equivalent of a policy exclusion, and the insurer therefore has the burden of proving that the insured's conduct is "willful" within the meaning of Section 533 [*Clemmer v. Hartford Ins. Co.* (1978) 22 Cal.3d 865, 879-880, 151 Cal.Rptr. 285, 587 P.2d 1098 ; see *Unified W. Grocers, Inc. v. Twin City Fire Ins. Co.* (9th Cir. 2006) 457 F.3d 1106, 1111].

If the insured's liability is predicated on a statute that requires willful and knowing conduct, then *Ins. Code* § 533 applies [*California Amplifier, Inc. v. RLI Ins. Co.* (2001) 94 Cal.App.4th 102, 116, 113 Cal.Rptr.2d 915].

Some decisions have interpreted *Ins. Code* § 533 as precluding coverage only if the insured had the specific intent to cause the harm or loss for which coverage is sought [see, e.g., *Clemmer v. Hartford Ins. Co.* (1978) 22 Cal.3d 865, 887, 151 Cal.Rptr. 285, 587 P.2d 1098 ; *Allstate Ins. Co. v. Overton* (1984) 160 Cal.App.3d 843, 849, 206 Cal.Rptr. 823]. However, more recent decisions have applied *Ins. Code* § 533 if: (1) the insured had only a general intent to cause harm [*Fire Ins. Exch. v. Altieri* (1991) 235 Cal.App.3d 1352, 1357-1360, 1 Cal.Rptr.2d 360]; (2) the insured's act was done with wanton disregard for the harm it might cause and carried a high probability of harm [*Studley v. Benicia Unified Sch. Dist.* (1991) 230 Cal.App.3d 454, 459, 281 Cal.Rptr. 631 ; see *20th Century Ins. Co. v. Stewart* (1998) 63 Cal.App.4th 1333, 1338-1340, 74 Cal.Rptr.2d 492 (act taken with such disregard for human life as to qualify as second degree murder fell within criminal acts exclusion of policy, even if not barred from coverage by *Civ. Code* § 2773, because insured did not know act was unlawful)]; or (3) the insured's act was inherently harmful [*J.C. Penney Cas. Ins. Co. v. M.K.* (1991) 52 Cal.3d 1009, 278 Cal.Rptr. 64, 804 P.2d 689]. If the insured's act is intentional and wrongful, and the harm is inherent in the act itself, *Ins. Code* § 533 automatically bars coverage, and the insurer is not required to show either the insured's preconceived design to inflict harm or the insured's subjective intent to harm [*J.C. Penney Cas. Ins. Co. v. M.K.* (1991) 52 Cal.3d 1009, 278 Cal.Rptr. 64, 804 P.2d 689].

Courts first applied the rule that coverage is precluded if the act is "inherently harmful" in cases involving claims arising out of sexual molestation. However, the courts subsequently have expanded its application to other contexts [see, e.g., *Unified W. Grocers, Inc. v. Twin City Fire Ins. Co.* (9th Cir. 2006) 457 F.3d 1106, 1113 (business actions of corporate officers); *Coit Drapery Cleaners, Inc. v. Sequoia Ins. Co.* (1993) 14 Cal.App.4th 1595, 1603-1604, 18 Cal.Rptr.2d 692 (intentional sexual harassment); *B & E Convalescent Ctr. v. State Comp. Ins. Fund* (1992) 8 Cal.App.4th 78, 97-98, 9 Cal.Rptr.2d 894 (wrongful termination); *Fire Ins. Exch. v. Altieri* (1991) 235 Cal.App.3d 1352, 1358, 1 Cal.Rptr.2d 360 (assault and battery); see *California Insurance Law and Practice*, Ch. 41, § 41.41[2][c] (Matthew Bender)]. The insured's volitional incapacity, or an "irresistible impulse," does not negate a willful act under Section 533 if the insured retains cognitive capacity [*Jacobs v. Fire Ins. Exch.* (1995) 36 Cal.App.4th 1258, 42 Cal.Rptr.2d 906]. If the insured is only vicariously liable for the willful act, Section 533 does not bar indemnity for the claim [*Downey Venture v. LMI Ins. Co.* (1998) 66 Cal.App.4th 478, 512, 78 Cal.Rptr.2d 142].

The statutory prohibition against indemnification for willful acts does not automatically preclude a duty to defend claims based on those acts [*Gray v. Zurich Ins. Co.* (1966) 65 Cal.2d 263, 54 Cal.Rptr. 104, 419 P.2d 168 ; *Republic Indem. Co. v. Superior Court* (1990) 224 Cal.App.3d 492, 497, 273 Cal.Rptr. 331 ; *Ohio Cas. Ins. Co. v. Hubbard* (1984) 162 Cal.App.3d 939, 943-944, 208 Cal.Rptr. 806]. The insurer and insured are free to contract for the provision

of a defense to claims that cannot be indemnified. However, if there clearly is no basis for coverage, either under the policy language or because coverage is precluded by the operation of *Ins. Code* § 533, the duty to defend exists only if the policy expressly provides for a defense without regard to indemnification or if the policy terms lead the insured to reasonably expect a defense of the type of claim asserted [*Downey Venture v. LMI Ins. Co.* (1998) 66 Cal.App.4th 478, 78 Cal.Rptr.2d 142 (express promise of coverage for malicious prosecution not illusory because although indemnity for insured's own willful acts is barred, defense of claims alleging such acts is not barred, nor is indemnity for insured's vicarious liability for those acts); *B & E Convalescent Ctr. v. State Comp. Ins. Fund* (1992) 8 Cal.App.4th 78, 100, 9 Cal.Rptr.2d 894 (no duty to defend wrongful termination action for which coverage was precluded under *Ins. Code* § 533); see *Gray v. Zurich Ins. Co.* (1966) 65 Cal.2d 263, 274, 54 Cal.Rptr. 104, 419 P.2d 168 ; compare *Horace Mann Ins. Co. v. Barbara B.* (1993) 4 Cal.4th 1076, 1084, 17 Cal.Rptr.2d 210, 846 P.2d 792 (although *Ins. Code* § 533 barred coverage for sexual molestation committed by teacher, insurer had duty to defend because claim also alleged negligent conduct related to molestation); and *Melugin v. Zurich Can.* (1996) 50 Cal.App.4th 658, 663-666, 57 Cal.Rptr.2d 781 (duty to defend because complaint alleging sexual discrimination in employment disclosed potential liability for discrimination that was not willful, which was neither uninsurable under *Ins. Code* § 533 nor excluded from potential coverage by policy exclusions); with *Coit Drapery Cleaners, Inc. v. Sequoia Ins. Co.* (1993) 14 Cal.App.4th 1595, 1603-1604, 18 Cal.Rptr.2d 692 (no duty to defend sexual harassment suit against insured corporation because complaint contained no allegations of negligent conduct, and acts could not reasonably be characterized as negligent or unintentional)].

For additional discussion of the relationship between *Ins. Code* § 533 and the insurer's duty to defend, see California Insurance Law and Practice, Ch. 41, § 41.41[1][c], [6][a] (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Insurance Law Claims & Contracts General Overview Insurance Law Claims & Contracts Policy Interpretation Exclusions Insurance Law General Liability Insurance Exclusions Criminal Acts

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CHAPTER 23A Matthew Bender Insurance Contract Instructions *

Part A. GENERAL INSTRUCTIONS

2. Burden of Proof and General Principles

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CHAPTER 23A Matthew Bender Insurance Contract Instructions *

Part B. CONTRACT ISSUES

1. Issuance of Policy

1-23A California Forms of Jury Instruction MB 2300A.30

MB 2300A.30 Application for Policy

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

An application for insurance does not constitute an insurance policy.

Authority: *Linnastruth v. Mutual Benefit Health & Accident Ass'n* (1943) 22 Cal.2d 216, 219, 137 P.2d 833 .

[2] Use of Instruction

This instruction should be used if it is alleged that the insured submitted an application, but the insurer never accepted it.

[3] Comment

As a type of contract, an insurance policy is governed by general rules of contract law applicable to the formation of a contract. An application for insurance is simply an offer to purchase insurance that an insurer need not accept [*Linnastruth v. Mutual Benefit Health & Accident Ass'n* (1943) 22 Cal.2d 216, 219, 137 P.2d 833 ; *K.C. Working Chem. Co. v. Eureka-Sec. Fire & Marine Ins. Co.* (1947) 82 Cal.App.2d 120, 131, 185 P.2d 832].

Acceptance is generally evidenced by delivery of a policy of insurance on the same terms on which the application was made [*Linnastruth v. Mutual Benefit Health & Accident Ass'n* (1943) 22 Cal.2d 216, 219, 137 P.2d 833]. A mere intention to accept the application does not create a contract [*K.C. Working Chem. Co. v. Eureka-Sec. Fire & Marine Ins. Co.* (1947) 82 Cal.App.2d 120, 131, 185 P.2d 832].

However, acceptance by delivery may not be necessary if an insurer's unreasonable delay in acting on an application causes the insured reasonably to believe that the application has been accepted, and if the insured is prejudiced by that delay. Under these circumstances, the insurer may be deemed to have impliedly accepted the application, may be estopped to deny that it had not accepted the application, or may be liable in tort [*Barrera v. State Farm Mut. Auto. Ins. Co.* (1969) 71 Cal.2d 659, 673, 79 Cal.Rptr. 106, 456 P.2d 674 ; *Snyder v. Redding Motors* (1955) 131 Cal.App.2d 416, 422, 280 P.2d 811].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Insurance Law Claims & Contracts General Overview Insurance Law Claims & Contracts Contract Formation Applications Insurance Law Claims & Contracts Contract Formation Offer & Acceptance

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CHAPTER 23A Matthew Bender Insurance Contract Instructions *

Part B. CONTRACT ISSUES

1. Issuance of Policy

1-23A California Forms of Jury Instruction MB 2300A.31

MB 2300A.31 Quotation of Premium

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

The mere quotation of a premium for insurance coverage does not constitute a policy of insurance.

Authority: Restatement (Second) of Contracts § 26, cmt. c.

[2] Use of Instruction

This instruction should be used if there is an issue concerning whether an insurer issued a policy or binder of insurance, and if the only evidence is that the insurer provided a premium quotation.

[3] Comment

As a type of contract, an insurance policy is governed by general rules of contract law applicable to the formation of a contract. A premium quotation is generally an invitation for an offer (application) by a prospective insured [see Restatement (Second) of Contracts § 26, cmt. c]. Depending on its wording, the quotation may also constitute an offer [see Restatement (Second) of Contracts § 26, cmt. c; see also *Leo F. Piazza Paving Co. v. Bebek & Brkich* (1956) 141 Cal.App.2d 226, 230, 296 P.2d 368]. However, even if the quotation is so worded that it constitutes an offer, there must be an acceptance of the offer to create a binding insurance contract [*Linnastruth v. Mutual Benefit Health & Accident Ass'n* (1943) 22 Cal.2d 216, 219, 137 P.2d 833].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewInsurance LawClaims & ContractsGeneral
OverviewInsurance LawClaims & ContractsContract FormationApplicationsInsurance LawClaims & ContractsContract
FormationOffer & AcceptanceInsurance LawClaims & ContractsPremiumsGeneral Overview

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CHAPTER 23A Matthew Bender Insurance Contract Instructions *

Part B. CONTRACT ISSUES

1. Issuance of Policy

1-23A California Forms of Jury Instruction MB 2300A.32

MB 2300A.32 Certificate of Insurance

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

A "certificate of insurance" is evidence that a policy of insurance was issued. However, a certificate of insurance is not an insurance policy, and it does not amend, extend, or alter the coverage provided by any policy that it refers to.

Authority: *Ins. Code § 384.*

[2] Use of Instruction

This instruction should be used if there is a dispute over the policy's existence or terms, and if a certificate of insurance has been introduced as evidence of the policy or its terms.

[3] Comment

An insurer often offers a "certificate of insurance" as evidence that the coverage stated in the certificate has been provided to the insured [see *William Boyd Enters. v. Fireman's Fund Ins. Co.* (1991) 7 Cal.App.4th 1567, 1573-1574, 2 Cal.Rptr.2d 548 ; *Merced County Mut. Fire Ins. Co. v. State of California* (1991) 233 Cal.App.3d 765, 769, 284 Cal.Rptr. 680 ; *Stratton v. First Nat'l Life Ins. Co.* (1989) 210 Cal.App.3d 1071, 1084-1085, 258 Cal.Rptr. 721]. This evidence is often required by construction contracts and by contracts with public entities [see *Merced County Mut. Fire Ins. Co. v. State of California* (1991) 233 Cal.App.3d 765, 770-773, 284 Cal.Rptr. 680 ; *Taylor Bus Serv. Inc. v. San Diego Bd. of Educ.* (1987) 195 Cal.App.3d 1331, 1337, 241 Cal.Rptr. 379]. Insurers often use a certificate as evidence of coverage for individuals under a group or master insurance policy [see *California Insurance Law and Practice*, Ch. 8,

§ 8.03[8][d] (Matthew Bender)]. In certain instances, a certificate of insurance is required by law, either from the insurer or the insured [*see, e.g., Ins. Code § 655* (insurer required to file certificate with state when certain motor vehicle policies are issued); *Lab. Code § 3800* (certificate of workers' compensation insurance required to obtain building permit)]. If a certificate of insurance is provided as evidence of coverage rather than a copy of the policy itself, the certificate must include a notice that the certificate is not the policy and that it does not alter the terms of the policy [*Ins. Code § 384*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Insurance Law Claims & Contracts General Overview Insurance Law Claims & Contracts Contract Formation Applications Insurance Law Industry Regulation Insurance Company Operations Conducting Business Certificates of Authority Insurance Law Motor Vehicle Insurance Coverage Compulsory Coverage Certificates of Insurance

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CHAPTER 23A Matthew Bender Insurance Contract Instructions *

Part B. CONTRACT ISSUES

1. Issuance of Policy

1-23A California Forms of Jury Instruction MB 2300A.33

MB 2300A.33 Insured's Duty to Read Policy

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Unless an insured has been misled by some act of the insurer, an insured who accepts and retains possession of an insurance policy is presumed to know its contents. By accepting and retaining the policy without objection, the insured is bound by its terms and conditions and may not claim that [he/she/it] did not read the policy or understand its terms.

Authorities: *Sarchett v. Blue Shield of Cal.* (1987) 43 Cal.3d 1, 15, 233 Cal.Rptr. 76, 729 P.2d 267 ; *Hallmark Ins. Co. v. Superior Court* (1988) 201 Cal.App.3d 1014, 1019, 247 Cal.Rptr. 638 ; *Hackethal v. National Cas. Co.* (1987) 189 Cal.App.3d 1102, 1112, 234 Cal.Rptr. 853 .

[2] Use of Instruction

This instruction should be used if there is a dispute as to the terms of the policy or the enforceability of those terms arising out of the insured's lack of knowledge that the disputed terms were part of the policy.

[3] Comment

A reasonable insured will read the insurance policy to ascertain the scope of the coverage that the policy contains [*Hallmark Ins. Co. v. Superior Court* (1988) 201 Cal.App.3d 1014, 1019, 247 Cal.Rptr. 638]. If the insured accepts the policy without objecting to any of its terms, then the insured, as well as the insurer, is bound by the terms of the policy [*Sarchett v. Blue Shield of Cal.* (1987) 43 Cal.3d 1, 15, 233 Cal.Rptr. 76, 729 P.2d 267 ; *Hackethal v. National Cas. Co.* (1987) 189 Cal.App.3d 1102, 1112, 234 Cal.Rptr. 853]. This is true even if the insured did not read the policy [

Sarchett v. Blue Shield of Cal. (1987) 43 Cal.3d 1, 15, 233 Cal.Rptr. 76, 729 P.2d 267 ; *Hackethal v. National Cas. Co.* (1987) 189 Cal.App.3d 1102, 1112, 234 Cal.Rptr. 853] or did not understand the terms of the policy [*Sarchett v. Blue Shield of Cal.* (1987) 43 Cal.3d 1, 15, 233 Cal.Rptr. 76, 729 P.2d 267].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Insurance Law Claims & Contracts General Overview Insurance Law Claims & Contracts Contract Formation Applications Insurance Law Claims & Contracts Policy Interpretation Reasonable Expectations Reasonable Person

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CHAPTER 23A Matthew Bender Insurance Contract Instructions *

Part B. CONTRACT ISSUES

1. Issuance of Policy

1-23A California Forms of Jury Instruction MB 2300A.34

MB 2300A.34 Cancellation

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Cancellation of an insurance policy operates to terminate the policy, from the date that the cancellation is effective forward. The insured has no protection under the policy for any [claim that is made/harm or damage that takes place/loss that the insured sustains] after the effective date of cancellation, and the insurer has no obligation to the insured with regard to any such [claim/harm or damage/loss].

Authorities: *Barrera v. State Farm Mut. Auto. Ins. Co.* (1969) 71 Cal.2d 659, 663 n.3, 79 Cal.Rptr. 106, 456 P.2d 674 ; *Fireman's Fund Am. Ins. Co. v. Escobedo* (1978) 80 Cal.App.3d 610, 619, 145 Cal.Rptr. 785 ; *Sanborn v. Ballanfonte* (1929) 98 Cal.App. 482, 488, 277 P. 152 .

[2] Use of Instruction

This instruction should be used if there is a dispute as to whether a claim or loss is covered under a policy that was canceled.

[3] Comment

The cancellation of an insurance policy operates only prospectively from the time of cancellation [*Barrera v. State Farm Mut. Auto. Ins. Co.* (1969) 71 Cal.2d 659, 663 n.3, 79 Cal.Rptr. 106, 456 P.2d 674 ; *Fireman's Fund Am. Ins. Co. v. Escobedo* (1978) 80 Cal.App.3d 610, 619, 145 Cal.Rptr. 785], as distinct from rescission, which voids or extinguishes the policy *ab initio* [Civ. Code § 1688]. In the case of cancellation, rights already accrued continue, whereas rescission restores the parties to their pre-contract positions [*Fireman's Fund Am. Ins. Co. v. Escobedo* (1978)]

80 Cal.App.3d 610, 619, 145 Cal.Rptr. 785 ; *Sanborn v. Ballanfonte* (1929) 98 Cal.App. 482, 488, 277 P. 152]. A canceled policy may still afford coverage for claims that arise prior to the cancellation [see *Fraker v. Sentry Life Ins. Co.* (1993) 19 Cal.App.4th 276, 282, 23 Cal.Rptr.2d 372 (existence of post-cancellation coverage depends on examination of precisely what event was insured under policy language; no continuing coverage under language of group health and disability policy)]. After rescission, by definition there is no coverage, and the contract is no longer a basis for an action between the insurer and the insured see [*Oakland Cal. Towel Co. v. Roland* (1949) 93 Cal.App.2d 713, 716-717, 209 P.2d 854].

For many types of insurance, the permissible grounds for cancellation by the insurer are established by statute [see California Insurance Law and Practice, Ch. 8, § 8.10[4] (Matthew Bender)].

An arbitrary cancellation of a policy is a breach of the covenant of good faith and fair dealing [*Helfand v. National Union Fire Ins. Co.* (1992) 10 Cal.App.4th 869, 906, 13 Cal.Rptr.2d 295 ; see MB 2300A.140 (implied duty of good faith and fair dealing)].

For instructions on rescission, see MB 2300A.50 -MB 2300A.53.

LexisNexis Matthew Bender Expert Practice Tip--Limits on Cancellation: Cancellation of a policy can usually be effectuated only if the insurer has followed the applicable policy provision(s). *By Rex Heeseman*

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewInsurance LawClaims & ContractsGeneral OverviewInsurance LawClaims & ContractsCancellation & NonrenewalMaterial MisrepresentationInsurance LawClaims & ContractsCancellation & NonrenewalNonpayment of PremiumsInsurance LawClaims & ContractsCancellation & NonrenewalNotice Requirements

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CHAPTER 23A Matthew Bender Insurance Contract Instructions *

Part B. CONTRACT ISSUES

1. Issuance of Policy

*1-23A California Forms of Jury Instruction MB 2300A.35***MB 2300A.35 Nonrenewal****[1] Instruction**[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

An insurer is not required to renew an insurance policy on the expiration of its term unless the policy provides to the contrary.

[OPTIONAL (See Use of Instruction)]

A policy may be deemed to be extended by operation of law if the insurer failed to provide statutorily required notice of the insurer's intention not to renew. In this case, the insurer issued [a/an] _____ [specify type of policy, e.g., fire] insurance policy. The insurer was required to mail or deliver to the insured or the insured's agent a notice that the insurer intended not to renew the policy at least _____ days before the end of the policy period.

Authorities: *Ins. Code* § 663 (certain automobile policies); *Ins. Code* § 678 (certain property insurance policies); *Ins. Code* § 11580.09 (certain automobile policies); *Schimmel v. NORCAL Mut. Ins. Co.* (1995) 39 Cal.App.4th 1282, 1285-1286, 46 Cal.Rptr.2d 401 ; *Travelers Ins. Co. v. Leshner* (1986) 187 Cal.App.3d 169, 194, 231 Cal.Rptr. 791 ; *Greene v. Safeco Ins. Co. of Am.* (1983) 140 Cal.App.3d 535, 537-538, 189 Cal.Rptr. 616 .

[2] Use of Instruction

This instruction should be used if the insured claims that the policy term has been or should have been extended beyond the period stated in the policy. The optional instruction is for use if the claim of extension is based on the insurer's

alleged failure to provide a statutorily required notice of intent not to renew. These notice requirements apply to certain automobile and general liability insurance policies and differ by line of coverage involved.

[3] Comment

An insurer generally may refuse to renew a policy for any reason permitted by law or for no reason at all [*Schimmel v. NORCAL Mut. Ins. Co.* (1995) 39 Cal.App.4th 1282, 1285-1286, 46 Cal.Rptr.2d 401 ; *Travelers Ins. Co. v. Leshner* (1986) 187 Cal.App.3d 169, 194, 231 Cal.Rptr. 791]. Impermissible reasons may include, but are not necessarily limited to, discrimination based on sex, race, color, religion, ancestry, national origin, disability, medical condition, marital status, or sexual orientation *see* [Civ. Code §§ 51(b), (e), 51.5; *see also* Ins. Code §§ 11628(a), 11628.5 (motor vehicle liability policies)]. If the policy provides that it will be renewed on payment of the premium, the insurer may be obligated to renew the policy when payment has been made.

Certain automobile insurance and general liability insurance policies are subject to special notice requirements. Before such a policy expires, an insurer must provide an offer of renewal or a notice of nonrenewal [Ins. Code § 663 (certain automobile policies); Ins. Code § 678 (certain property insurance policies); Ins. Code § 11580.09 (certain automobile policies)]. The exact requirements vary depending on the type of insurance.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Insurance Law Claims & Contracts General Overview Insurance Law Claims & Contracts Cancellation & Nonrenewal Notice Requirements

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CHAPTER 23A Matthew Bender Insurance Contract Instructions *

Part B. CONTRACT ISSUES

1. Issuance of Policy

1-23A California Forms of Jury Instruction MB 2300A.36-MB 2300A.49

Reserved for Future Use

MB 2300A.36Reserved for Future Use



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CHAPTER 23A Matthew Bender Insurance Contract Instructions *

Part B. CONTRACT ISSUES

2. Rescission

1-23A California Forms of Jury Instruction MB 2300A.50

MB 2300A.50 Effect of Rescission

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

A policy that is rescinded is void from the outset. If a policy is rescinded, the effect is the same as if the policy never existed. The insured has no rights under the policy, and the insurer has no obligations under the policy.

Authority: *Civ. Code § 1688.*

[2] Use of Instruction

This instruction should be used to explain that rescission eliminates all rights and obligations under the policy for any claims, whether arising before or after the date of rescission. This instruction should be used with the appropriate instruction or instructions in MB 2300A.51 (concealment), MB 2300A.52 (misrepresentation), and MB 2300A.53 (mutual mistake of fact).

For related Judicial Council instructions, see [3][c], *below*.

[3] Comment

[a] Effect of Rescission: Cancellation Distinguished

A contract is extinguished by its rescission [*Civ. Code § 1688*]. Rescission is distinct from cancellation in that rescission voids or extinguishes the policy *ab initio*, while cancellation operates only prospectively from the time of cancellation [*Civ. Code § 1688*]. In the case of cancellation, rights already accrued continue, whereas rescission restores the parties

to their pre-contract positions [see *Barrera v. State Farm Mut. Auto. Ins. Co.* (1969) 71 Cal.2d 659, 663, 79 Cal.Rptr. 106, 456 P.2d 674]. After rescission, the contract is no longer a basis for an action for damages [see *Oakland Cal. Towel Co. v. Roland* (1949) 93 Cal.App.2d 713, 716-717, 209 P.2d 854].

For instructions on cancellation and nonrenewal, see MB 2300A.34 and MB 2300A.35.

[b] Procedure for Rescission

Rescission may be accomplished either by notice of rescission [Civ. Code § 1691(a)] or by an action for rescission [Civ. Code §§ 1692, 1693]. No particular form of notice is required. It is sufficient if the notice given clearly shows the intent to rescind [*Hull v. Ray* (1930) 211 Cal. 164, 167-168, 294 P. 700]. However, notice alone is not enough--the party giving the notice must actually be entitled to rescind [*Leland v. Craddock* (1947) 83 Cal.App.2d 84, 87, 187 P.2d 803 ; see Civ. Code § 1689 (grounds for rescission)]. A cautious insurer will therefore both give notice and file suit. Additionally, the rescinding party must restore all consideration received to the other party, or offer to do so on condition that the other party do the same. However, the offer to restore is not necessary if the other party is unable or unwilling to comply [Civ. Code § 1691(b)].

If one party is injured by a breach of contract and lacks the ability or desire to keep the contract alive, that party has two mutually exclusive remedies: (1) treat the contract as rescinded and recover damages resulting from the rescission; or (2) treat the contract as repudiated by the other party and recover damages to which the injured party would have been entitled had the other party not breached the contract or prevented the injured party's performance [*Akin v. Certain Underwriters at Lloyd's London* (2006) 140 Cal.App.4th 291, 296, 44 Cal.Rptr.3d 284]. In the insurance context, an action for damages for breach of contract may entitle the insured to the payment of benefits under the policy. However, an action for rescission only entitles the insured to the return of premiums and whatever else may be required to restore the parties to status quo ante. In an action for rescission, the parties are treated as though the insurance policy never existed [*Akin v. Certain Underwriters at Lloyd's London* (2006) 140 Cal.App.4th 291, 298, 44 Cal.Rptr.3d 284]. Therefore, an insured cannot recover damages under the policy in an action for rescission under Civ. Code § 1692 [*Akin v. Certain Underwriters at Lloyd's London* (2006) 140 Cal.App.4th 291, 295, 299, 44 Cal.Rptr.3d 284].

Ins. Code § 650 precludes an insurer from rescinding unless it does so prior to any action on the policy [Ins. Code § 650]. The phrase "on the policy" appears to include both a contract claim to recover amounts due pursuant to the terms of the policy and a bad faith tort claim to recover damages for the insurer's failure to make the payments due under the policy [*Prieto v. State Farm Fire & Cas. Co.* (1990) 225 Cal.App.3d 1188, 1192-1193, 275 Cal.Rptr. 362 ; *Abari v. State Farm Fire & Cas. Co.* (1988) 205 Cal.App.3d 530, 536, 252 Cal.Rptr. 565 ; *Lawrence v. Western Mut. Ins. Co.* (1988) 204 Cal.App.3d 565, 571, 251 Cal.Rptr. 319]. Each of the cases defining the phrase in this manner involved interpretation of the fire insurance policy form required by Ins. Code § 2071. In another case, the court of appeal held that although the bad faith action arose out of the contractual relationship, it was based on acts that occurred after the policy benefits had been paid and that caused damages not covered by the policy [*Murphy v. Allstate Ins. Co.* (1978) 83 Cal.App.3d 38, 49, 147 Cal.Rptr. 565 ; see also *Frazier v. Metropolitan Life Ins. Co.* (1985) 169 Cal.App.3d 90, 103, 214 Cal.Rptr. 883 (action not "on policy")]. Of course, Ins. Code § 650 does not bar an insurer from suing for rescission, as opposed to simply rescinding without judicial approval [*Resure, Inc. v. Superior Court* (1996) 42 Cal.App.4th 156, 167, 49 Cal.Rptr.2d 354 ; see *Atmel Corp. v. St. Paul Fire & Marine Ins. Co.* (N.D. Cal. 2006) 416 F.Supp.2d 802, 805-807 (although insurer cannot unilaterally rescind once insured has filed suit, insurer may raise same issues by asserting rescission as affirmative defense and counterclaim)].

[c] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 23, *Insurance Litigation*]:

CACI No. 2308 Rescission for Misrepresentation or Concealment in Insurance
Application--Essential Factual Elements

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewContracts LawRemediesRescission &
RedhibitionGeneral OverviewInsurance LawClaims & ContractsGeneral OverviewInsurance LawClaims &
ContractsCancellation & NonrenewalNotice Requirements

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CHAPTER 23A Matthew Bender Insurance Contract Instructions *

Part B. CONTRACT ISSUES

2. Rescission

1-23A California Forms of Jury Instruction MB 2300A.51

MB 2300A.51 Concealment

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

[Insurer] is entitled to rescind the policy if [insured] concealed material facts or neglected to advise [insurer] of material facts when [insured] applied for the policy, even if the concealment was unintentional. "Material facts" are facts that, if known by [insurer], would probably and reasonably have caused [insurer] not to issue the policy or to require that [insured] pay a higher premium for the policy.

Authorities: *Ins. Code* §§ 330-332, 334, 359, 650, 2071; *Holz Rubber Co., Inc. v. American Star Ins. Co.* (1975) 14 Cal.3d 45, 61, 120 Cal.Rptr. 415, 533 P.2d 1055 ; *Thompson v. Occidental Life Ins. Co.* (1973) 9 Cal.3d 904, 915-916, 109 Cal.Rptr. 473, 513 P.2d 353 ; *Mitchell v. United Nat'l Ins. Co.* (2005) 127 Cal.App.4th 457, 463, 25 Cal.Rptr.3d 627 ; *Lunardi v. Great-W. Life Assurance Co.* (1995) 37 Cal.App.4th 807, 825-827, 44 Cal.Rptr.2d 56 .

[2] Use of Instruction

This instruction should be used if the insurer seeks a judgment of rescission based on concealment. The statement that the insurer is entitled to rescission even if the concealment was unintentional should not be used if the policy requires knowing or willful concealment before rescission may be effected, unless the policy involved is the standard fire insurance form policy provide by *Ins. Code* § 2071 [see [3][a], below]. This instruction should be used with the instruction in MB 2300A.50 on the effect of rescission and the instruction in MB 2300A.95 defining concealment.

For related Judicial Council instructions, see [3][c], below.

[3] Comment

[a] Nature and Effect of Concealment

Each party to an insurance contract must communicate to the other all facts known to that party that are material to the contract, or that that party believes to be material, and that the other party has no way of learning [*Ins. Code* § 332; *O'Riordan v. Federal Kemper Life Assurance* (2005) 36 Cal.4th 281, 286, 30 Cal.Rptr.3d 507, 114 P.3d 753]. This requirement does not apply to facts covered by a warranty made by the party who would otherwise be obliged to disclose them [*Ins. Code* § 332]. The concealment or misrepresentation of a material fact entitles the injured party to rescind the insurance agreement [*Ins. Code* §§ 331, 359; *Holz Rubber Co., Inc. v. American Star Ins. Co.* (1975) 14 Cal.3d 45, 61, 120 Cal.Rptr. 415, 533 P.2d 1055 ; *Superior Dispatch, Inc. v. Insurance Corp. of N.Y.* (2010) 181 Cal.App.4th 175, 191, 104 Cal.Rptr.3d 508 ; *Nieto v. Blue Shield of Cal. Life & Health Ins. Co.* (2010) 181 Cal.App.4th 60, 75, 103 Cal.Rptr.3d 906 ; *Lunardi v. Great-W. Life Assurance Co.* (1995) 37 Cal.App.4th 807, 825-827, 44 Cal.Rptr.2d 56 ; *Mirich v. Underwriters at Lloyd's London* (1944) 64 Cal.App.2d 522, 527, 149 P.2d 19]. Concealment is the neglect to communicate something that a party knows and ought to communicate [*Ins. Code* § 330; see MB 2300A.94 (instruction defining concealment)]. Whether material facts have been concealed or misrepresented is ordinarily a question of fact [*CNA Cas. of Cal. v. Seaboard Sur. Co.* (1986) 176 Cal.App.3d 598, 615, 222 Cal.Rptr. 276].

Unless the insurance policy provides otherwise, unintentional misrepresentations or omissions are grounds for rescission, and an intent to deceive is not required [*Thompson v. Occidental Life Ins. Co.* (1973) 9 Cal.3d 904, 915-916, 109 Cal.Rptr. 473, 513 P.2d 353]. However, even if the policy is the standard fire insurance policy provided by *Ins. Code* § 2071, which refers to willful concealment or misrepresentation, an intent to deceive is not required if the misrepresentation or omission occurred in connection with the application for the policy, because *Ins. Code* § 2071 must be harmonized with the provisions of *Ins. Code* § 331 and *Ins. Code* § 339, which allow rescission for merely negligent omissions or misrepresentations [*Mitchell v. United Nat'l Ins. Co.* (2005) 127 Cal.App.4th 457, 463, 25 Cal.Rptr.3d 627].

Rescission applies to all persons insured under the policy, including any additional insureds, unless the terms of the insurance policy provide otherwise [*Ins. Code* § 650].

LexisNexis Matthew Bender Expert Practice Tip--Language of Policy: Be sure to check the language of the specific policy at issue as to whether intentional concealment is required. Although negligent unintentional concealment is usually sufficient for rescission, some policies may contain an intent or willfulness requirement. By *Susan E. Firtch*

[b] Materiality of Facts

Whether a fact is material is determined by the probable and reasonable effect that truthful disclosure of that fact would have had on the insurer in deciding on the advantages of the proposed contract [*Ins. Code* §§ 334, 360; *Unionamerica Ins. Co. v. Fort Miller Group, Inc.* (N.D. Cal. 2008) 590 F.Supp.2d 1254, 1258-1259 ; *O'Riordan v. Federal Kemper Life Assurance* (2005) 36 Cal.4th 281, 286, 30 Cal.Rptr.3d 507, 114 P.3d 753 ; *Holz Rubber Co., Inc. v. American Star Ins. Co.* (1975) 14 Cal.3d 45, 61, 120 Cal.Rptr. 415, 533 P.2d 1055 ; *Superior Dispatch, Inc. v. Insurance Corp. of N.Y.* (2010) 181 Cal.App.4th 175, 191, 104 Cal.Rptr.3d 508 ; see *New Hampshire Ins. Co. v. C'Est Moi, Inc.* (C.D. Cal. 2005) 406 F.Supp.2d 1077, 1082-1083]. A fact is therefore material if the disclosure of that fact would have caused the insurer to charge a higher premium or to decline to issue the policy at all [*Holz Rubber Co., Inc. v. American Star Ins. Co.* (1975) 14 Cal.3d 45, 61, 120 Cal.Rptr. 415, 533 P.2d 1055 ; see *California Insurance Law and Practice*, Ch. 9, § 9.05[3] (Matthew Bender)]. For example, if an applicant for life insurance misrepresents his or her history as a smoker to obtain a nonsmoker rate, the insurer may rescind the policy [*O'Riordan v. Federal Kemper Life Assurance* (2005) 36 Cal.4th 281, 287, 30 Cal.Rptr.3d 507, 114 P.3d 753 (triable issues of material fact existed as to whether applicant concealed or failed to communicate material information to insurer regarding her use of cigarettes in 36 months preceding her application, precluding summary judgment for insurer)].

The standard to be applied in determining whether a fact concerning an application for insurance is material is a subjective standard--namely, what would this insurer have done if it had known the truth [*Imperial Cas. & Indem. Co. v. Sogomonian* (1988) 198 Cal.App.3d 169, 181, 243 Cal.Rptr. 639]. In contrast, an objective "reasonable insurer" standard applies with regard to misrepresentations made in a proof of loss [*Cummings v. Fire Ins. Exch.* (1988) 202 Cal.App.3d 1407, 1414 n.7, 249 Cal.Rptr. 568 ; see MB 2300A.96].

Although an expert may not testify as to whether the undisclosed facts were material to the risk [*Boyer v. United States Fid. & Guar. Co.* (1929) 206 Cal. 273, 276, 274 P. 57], an expert may testify about the custom of various insurance companies regarding insuring risks of the same type covered by the policy, given knowledge of the undisclosed facts [*California-Western States Life Ins. Co. v. Feinstein* (1940) 15 Cal.2d 413, 424, 101 P.2d 696].

[c] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 19, *California Judicial Council Fraud or Deceit Instructions*, and Ch. 23, *California Judicial Council Insurance Litigation Instructions*]:

CACI No. 1905 Definition of Important Fact/Promise

CACI No. 2308 Rescission for Misrepresentation or Concealment in Insurance
Application--Essential Factual Elements

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewInsurance LawClaims & ContractsGeneral OverviewInsurance LawClaims & ContractsCancellation & NonrenewalNotice RequirementsInsurance LawClaims & ContractsDisclosure ObligationsHealth ConditionsInsurance LawClaims & ContractsDisclosure ObligationsMateriality

* Revised by Susan E. Firtch. Ms. Firtch is a partner at Burnham Brown in Oakland, California.



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California Forms of Jury Instruction

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CHAPTER 23A Matthew Bender Insurance Contract Instructions *

Part B. CONTRACT ISSUES

2. Rescission

1-23A California Forms of Jury Instruction MB 2300A.52

MB 2300A.52 Misrepresentation

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

[Insurer] is entitled to rescind the policy if [insured] misrepresented material facts when [insured] applied for the policy. "Material facts" are facts that, if known by [insurer], would probably and reasonably have caused [insurer] not to issue the policy, or would probably and reasonably have caused [insurer] to require that [insured] pay a higher premium for the policy.

Authorities: *Ins. Code §§ 331, 359, 2071; Holz Rubber Co., Inc. v. American Star Ins. Co. (1975) 14 Cal.3d 45, 61, 120 Cal.Rptr. 415, 533 P.2d 1055 ; Mitchell v. United Nat'l Ins. Co. (2005) 127 Cal.App.4th 457, 467-468, 25 Cal.Rptr.3d 627 ; Lunardi v. Great-W. Life Assurance Co. (1995) 37 Cal.App.4th 807, 827-828, 44 Cal.Rptr.2d 56 ; Mirich v. Underwriters at Lloyd's London (1944) 64 Cal.App.2d 522, 527, 149 P.2d 19 .*

[2] Use of Instruction

This instruction should be used if the insurer seeks a judgment of rescission based on misrepresentations in the application for insurance. It should be used with the instruction on the effect of rescission in MB 2300A.50.

For related Judicial Council instructions, see [3][b], *below*.

[3] Comment

[a] Material False Statement

A material false representation entitles the insurer to rescind the policy [*Ins. Code* § 359; *Gates v. General Cas. Co. of Am.* (9th Cir. 1941) 120 F.2d 925, 927 ; *Holz Rubber Co., Inc. v. American Star Ins. Co.* (1975) 14 Cal.3d 45, 61, 120 Cal.Rptr. 415, 533 P.2d 1055 ; *TIG Ins. Co. v. Homestore, Inc.* (2006) 137 Cal.App.4th 749, 755-756, 40 Cal.Rptr.3d 528 ; *Lunardi v. Great-W. Life Assurance Co.* (1995) 37 Cal.App.4th 807, 827-828, 44 Cal.Rptr.2d 56 ; *Kurtz, Richards, Wilson & Co. v. Insurance Communicators Mktg. Corp.* (1993) 12 Cal.App.4th 1249, 1258, 16 Cal.Rptr.2d 259 ; *Mirich v. Underwriters at Lloyd's London* (1944) 64 Cal.App.2d 522, 527, 149 P.2d 19]. Whether a fact is material is determined by the probable and reasonable effect that truthful disclosure of that fact would have had on the insurer in deciding on the advantages of the proposed contract [*Ins. Code* §§ 334, 360; *Holz Rubber Co., Inc. v. American Star Ins. Co.* (1975) 14 Cal.3d 45, 61, 120 Cal.Rptr. 415, 533 P.2d 1055 ; *United States Specialty Ins. Co. v. Bridge Capital Corp.* (C.D. Cal. 2007) 482 F. Supp. 2d 1164, 1167-1168]. The standard to be applied in determining materiality is a subjective one [see *Imperial Cas. & Indem. Co. v. Sogomonian* (1988) 198 Cal.App.3d 169, 181, 243 Cal.Rptr. 639 ; see also MB 2300A.51[3][b]].

Although the standard fire insurance policy provided by *Ins. Code* § 2071 refers to willful concealment or misrepresentation, an intent to deceive is not required if the misrepresentation or omission occurred in connection with the application for the policy, because *Ins. Code* § 2071 must be harmonized with the provisions of *Ins. Code* § 331 and *Ins. Code* § 339, which allow rescission for merely negligent omissions or misrepresentations [*Mitchell v. United Nat'l Ins. Co.* (2005) 127 Cal.App.4th 457, 463, 25 Cal.Rptr.3d 627].

For a discussion of rescission generally, and the distinction between rescission and cancellation, see MB 2300A.50[3]. For further discussion of materiality, see MB 2300A.51[3].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 19, *California Judicial Council Fraud or Deceit Instructions*, and Ch. 23, *California Judicial Council Insurance Litigation Instructions*]:

CACI No. 1905 Definition of Important Fact/Promise

CACI No. 2308 Rescission for Misrepresentation or Concealment in Insurance
Application--Essential Factual Elements

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Insurance Law Claims & Contracts General Overview Insurance Law Claims & Contracts Cancellation & Nonrenewal Material Misrepresentation Insurance Law Claims & Contracts Disclosure Obligations Fraudulent Intent Insurance Law Claims & Contracts Disclosure Obligations Health Conditions Insurance Law Claims & Contracts Disclosure Obligations Materiality

* Revised by Susan E. Firtch. Ms. Firtch is a partner at Burnham Brown in Oakland, California.



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California Forms of Jury Instruction

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CHAPTER 23A Matthew Bender Insurance Contract Instructions *

Part B. CONTRACT ISSUES

2. Rescission

1-23A California Forms of Jury Instruction MB 2300A.53

MB 2300A.53 Mutual Mistake of Fact

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

[Insurer/insured] is entitled to rescind the policy if, at the time the policy was issued, [insurer] and [insured] both held a mistaken belief regarding any material facts. "Material facts" are facts that, if known by [insurer/insured], would probably and reasonably have caused _____ [(insured) not to buy the policy or (insurer) not to issue the policy or (insurer) to require that (insured) pay a higher premium for the policy].

Authorities: *Civ. Code* §§ 1566-1568, 1577, 1689; *Ins. Code* § 334; *Holz Rubber Co., Inc. v. American Star Ins. Co.* (1975) 14 Cal.3d 45, 61, 120 Cal.Rptr. 415, 533 P.2d 1055 .

[2] Use of Instruction

This instruction should be used in an action for rescission based on a mutual mistake of fact at the time the policy was issued. The instruction's wording allows for the somewhat unlikely possibility that an insured might want to rescind on this basis.

This instruction should be used with the instruction on the effect of rescission in MB 2300A.50.

For related Judicial Council instructions, see [3][b], *below*.

[3] Comment

[a] Mutual Mistake of Fact

A contract, including an insurance contract, may be rescinded if the consent to that contract was not a free consent [*Civ. Code* §§ 1566, 1689]. A consent is not free if it was based on a mistake of fact [*Civ. Code* §§ 1567, 1577]. A consent is based on a mistake of fact if it would not have been given if this mistake had not existed [*Civ. Code* § 1568]. That is, the mistake must be a mistake as to a material matter, affecting an essential element of the contract [*Hannah v. Steinman* (1911) 159 Cal. 142, 146-147, 150, 112 P. 1094 ; *Williams v. Puccinelli* (1965) 236 Cal.App.2d 512, 516, 46 Cal.Rptr. 285]. Under the Insurance Code, the materiality of a fact is determined by the probable and reasonable effect that truthful disclosure of that fact would have had on the insurer in deciding on the advantages of the proposed contract [*Ins. Code* § 334; *Holz Rubber Co., Inc. v. American Star Ins. Co.* (1975) 14 Cal.3d 45, 61, 120 Cal.Rptr. 415, 533 P.2d 1055]. The standard to be applied in determining materiality is a subjective one [see *Imperial Cas. & Indem. Co. v. Sogomonian* (1988) 198 Cal.App.3d 169, 181, 243 Cal.Rptr. 639 ; see also MB 3600A.51[3][b]].

For a discussion of rescission generally, and the distinction between rescission and cancellation, see MB 2300A.50[3]. For further discussion of materiality, see MB 2300A.51[3].

LexisNexis Matthew Bender Expert Practice Tip--Unilateral Versus Mutual Mistake of Fact:

Mutual mistake of fact is not a common reason to rescind. Most "mutual" mistakes of fact turn out in practice to be unilateral mistakes--that is, one side did not understand the risk or the cost. A unilateral mistake is not a basis for rescinding the contract. *By Rex Heeseman and Ronald Oster*

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 19, *California Judicial Council Fraud or Deceit Instructions*, and Ch. 23, *California Judicial Council Insurance Litigation Instructions*]:

CACI No. 1905 Definition of Important Fact/Promise

CACI No. 2308 Rescission for Misrepresentation or Concealment in Insurance
Application--Essential Factual Elements

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewContracts LawFormationAmbiguity & MistakeMutual MistakeInsurance LawClaims & ContractsGeneral OverviewInsurance LawClaims & ContractsDisclosure ObligationsMaterialityInsurance LawClaims & ContractsPolicy InterpretationAmbiguous TermsGeneral Overview

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CHAPTER 23A Matthew Bender Insurance Contract Instructions *

Part B. CONTRACT ISSUES

2. Rescission

1-23A California Forms of Jury Instruction MB 2300A.54-MB 2300A.59

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MB 2300A.54Reserved for Future Use



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CHAPTER 23A Matthew Bender Insurance Contract Instructions *
Part B. CONTRACT ISSUES
3. Establishing Policy Terms

1-23A California Forms of Jury Instruction MB 2300A.60

MB 2300A.60 Existence and Terms of Policy

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

To prove that [insured] is entitled to benefits under a [written/oral] insurance policy, [insured] must establish by [a preponderance of the evidence/clear and convincing evidence] that the insurance policy exists, and must establish that all of the following terms of the policy were agreed on:

1. The parties to the insurance policy;
2. The nature and extent of coverage;
3. The policy period;
4. The amount of the premium; and
5. _____ [insert any additional essential terms peculiar to policy] .

Authorities: *Masonite Corp. v. Great Am. Surplus Lines Ins. Co.* (1990) 224 Cal.App.3d 912, 922 n.7, 274 Cal.Rptr. 206 ; *K.C. Working Chem. Co. v. Eureka-Sec. Fire & Marine Ins. Co.* (1947) 82 Cal.App.2d 120, 130, 185 P.2d 832 .

[2] Use of Instruction

This instruction should be used if there is an issue regarding the terms actually contained in the policy--that is, if there is a missing policy or a missing essential policy provision. If the insured is seeking to establish an oral contract of

insurance, the proof must be by clear and convincing evidence [see [3], *below*].

[3] Comment

As part of the insured's proof that a loss falls within the coverage grant, the insured has the burden of proving the essential policy terms [*Masonite Corp. v. Great Am. Surplus Lines Ins. Co.* (1990) 224 Cal.App.3d 912, 922 n.7, 274 Cal.Rptr. 206 ; *Executive Aviation, Inc. v. National Ins. Underwriters* (1971) 16 Cal.App.3d 799, 806, 94 Cal.Rptr. 347]. In the rare instances in which an insured seeks coverage under an oral insurance contract, the proof must be clear and convincing [*K.C. Working Chem. Co. v. Eureka-Sec. Fire & Marine Ins. Co.* (1947) 82 Cal.App.2d 120, 130, 185 P.2d 832].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Insurance Law Claims & Contracts General Overview Insurance Law Claims & Contracts Contract Formation Oral Contracts Insurance Law Claims & Contracts Policy Interpretation General Overview

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CHAPTER 23A Matthew Bender Insurance Contract Instructions *
Part B. CONTRACT ISSUES
3. Establishing Policy Terms

1-23A California Forms of Jury Instruction MB 2300A.61

MB 2300A.61 Proof of Lost Policy Provisions

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

To prove that [insured] is entitled to benefits under a lost or destroyed insurance policy, [insured] may establish [his/her/its] rights under the policy through secondary evidence that proves the substance of the policy, without producing the actual language of the policy.

Authority: Dart Indus., Inc. v. Commercial Union Ins. Co. (2002) 28 Cal.4th 1059, 1074, 124 Cal.Rptr.2d 142, 52 P.3d 79 .

[2] Use of Instruction

This instruction should be used to prove the terms of a lost or destroyed insurance policy if the insured can produce the substance of the policy's terms, but is unable to prove the policy's actual language.

For related Judicial Council instructions, see [3][b], *below*.

[3] Comment

[a] Burden of Proving Essential Policy Terms

The insured has the burden of proving that a loss falls within the coverage grant, and therefore has the burden of proving the essential terms of the policy [see MB 2300A.60]. If the policy is lost or destroyed, the insured is not required to prove the actual language of the policy, but may instead establish the insured's rights under the policy through secondary evidence that attests to the substance of the policy [*Dart Indus., Inc. v. Commercial Union Ins. Co. (2002) 28 Cal.4th 1059, 1074, 124 Cal.Rptr.2d 142, 52 P.3d 79* (insured required to prove contents of policy by preponderance of

evidence)].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 23, *Insurance Litigation*]:

CACI No. 2305 Lost or Destroyed Insurance Policy

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewEvidenceProcedural ConsiderationsBurdens of ProofGeneral OverviewInsurance LawClaims & ContractsGeneral OverviewInsurance LawClaims & ContractsPolicy InterpretationGeneral Overview

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CHAPTER 23A Matthew Bender Insurance Contract Instructions *

Part B. CONTRACT ISSUES

3. Establishing Policy Terms

1-23A California Forms of Jury Instruction MB 2300A.62-MB 2300A.69

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CHAPTER 23A Matthew Bender Insurance Contract Instructions *
Part B. CONTRACT ISSUES
4. Coverage Grant

1-23A California Forms of Jury Instruction MB 2300A.70

MB 2300A.70 Damage, Loss, or Claim Within Policy Period

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

[CHOOSE FROM THE FOLLOWING (See Use of Instruction)]

[Insured] has the burden of proving that the claimant in the underlying action sought damages for harm suffered during the policy period.

[OR]

[Insured] has the burden of proving that the claimant in the underlying action sought damages for an offense committed during the policy period.

[OR]

[Insured] has the burden of proving that the claim in the underlying action was first made against [insured] during the policy period [and the wrongful act complained of was committed during the policy period].

[OR]

[Insured] has the burden of proving that [insured] suffered the loss or harm during the policy period.

Authorities: *Montrose Chem. Corp. v. Admiral Ins. Co.* (1995) 10 Cal.4th 645, 664, 668, 42 Cal.Rptr.2d 324, 913 P.2d 878 ; *San Diego Hous. Comm'n v. Industrial Indem. Co.* (1998) 68 Cal.App.4th 526, 544, 80 Cal.Rptr.2d 393 ; *Whittaker Corp. v. Allianz Underwriters, Inc.* (1992) 11 Cal.App.4th 1236, 1241-1245, 14 Cal.Rptr.2d 659 ; *Home Ins. Co. v. Landmark Ins. Co.* (1988) 205 Cal.App.3d 1388, 1392-1393, 253 Cal.Rptr. 277 ; *Employers Cas. Co. v. Northwestern Nat'l Ins. Group* (1980) 109 Cal.App.3d 462, 469, 167 Cal.Rptr. 296 ; *Maples v. Aetna Cas. & Sur. Co.* (1978) 83 Cal.App.3d 641, 650, 148 Cal.Rptr. 80 .

[2] Use of Instruction

This instruction should be used if the insurer disputes whether the claim falls within the policy period. There are four alternatives in this instruction. The first alternative should be used in third-party cases involving occurrence-based coverage, such as "bodily injury" and "property damage." If only a claim was made and no lawsuit was filed, the wording of this alternative should be modified accordingly. The second alternative should be used in third-party cases involving offense-based coverage, such as "personal injury" and "advertising injury" coverage. The third alternative should be used in third-party cases involving claims-made policies. The optional language in the third alternative is for policies that require both the wrongful act to have been committed and the claim to have been made during the policy period. The fourth alternative should be used in first-party cases.

For an instruction defining the plaintiff's burden of proof generally, see *CACI No. 200*.

[3] Comment

It is not enough that the insured have incurred expenses for repairs to property, even if pursuant to a statutory or contractual obligation. A standard general liability policy is implicated only by potential liability for damages in a lawsuit [*Foster-Gardner, Inc. v. National Union Fire Ins. Co.* (1998) 18 Cal.4th 857, 878-879, 77 Cal.Rptr.2d 107, 959 P.2d 265 ; *San Diego Hous. Comm'n v. Industrial Indem. Co.* (1998) 68 Cal.App.4th 526, 544, 80 Cal.Rptr.2d 393]. The policy language "legally obligated to pay as damages" is not limited to liability pled solely in tort, and does not exclude liability for covered damages pled as contract damages [*Vandenberg v. Superior Court* (1999) 21 Cal.4th 815, 839-841, 88 Cal.Rptr.2d 366, 982 P.2d 229]. However, there must be a claim for damages [*Bullock v. Maryland Cas. Co.* (2001) 85 Cal.App.4th 1435, 1442-1444, 102 Cal.Rptr.2d 804 (no duty to defend if statute on which claim was predicated did not authorize recovery of damages of any kind)].

General liability policies may contain both occurrence-based and offense-based coverages. The occurrence-based coverages (usually "bodily injury" and "property damage") typically contain language such as the following:

Insurer will pay on behalf of the insured sums [that] the insured shall become legally obligated to pay as damages because of bodily injury or property damage caused by an occurrence during the policy period.

Courts have consistently held that this type of language requires that the property damage or bodily injury take place during the policy period. It is not sufficient that the act causing the damage or injury occurred during the policy period [*Montrose Chem. Corp. v. Admiral Ins. Co.* (1995) 10 Cal.4th 645, 664, 668, 42 Cal.Rptr.2d 324, 913 P.2d 878 ; *Buena Vista Mines, Inc. v. Industrial Indem. Co.* (2001) 87 Cal.App.4th 482, 488-489, 104 Cal.Rptr.2d 557 ; *Whittaker Corp. v. Allianz Underwriters, Inc.* (1992) 11 Cal.App.4th 1236, 1241-1245, 14 Cal.Rptr.2d 659 ; *Home Ins. Co. v. Landmark Ins. Co.* (1988) 205 Cal.App.3d 1388, 1392-1393, 253 Cal.Rptr. 277 ; *Employers Cas. Co. v. Northwestern Nat'l Ins. Group* (1980) 109 Cal.App.3d 462, 469, 167 Cal.Rptr. 296 ; *Maples v. Aetna Cas. & Sur. Co.* (1978) 83 Cal.App.3d 641, 642, 650, 148 Cal.Rptr. 80 ; see *Evanston Ins. Co. v. International Mfg. Co.* (D. Wyo. 1986) 641 F.Supp. 733

(criticizing *Employers Cas. Co.* and noting that intermediate California courts of appeal are split on issue of whether insurer is obligated to provide coverage for actions during policy period that result in damage only after policy expires)].

In one case, for example, the insured negligently installed a boiler during the policy period of his insurance, but the fire caused by the negligent installation occurred after the policy period. The court of appeal held that the policy did not cover the resulting claim because the occurrence covered by the policy was the fire, not the negligent installation [*Maples v. Aetna Cas. & Sur. Co.* (1978) 83 Cal.App.3d 641, 642, 650, 148 Cal.Rptr. 80]. In another case, the insured changed one of the components in its sealing compound during the policy period, but its customers did not suffer property damage until after the policy period. The court of appeal held that the customers' claims against the insured were not covered by the policy because the occurrence covered by the policy was the damage to the customers' property, not the decision to change the composition of the sealing compound [*Whittaker Corp. v. Allianz Underwriters, Inc.* (1992) 11 Cal.App.4th 1236, 1241-1245, 14 Cal.Rptr.2d 659].

In situations involving harm that is continuous or progressive, it is sufficient that some of the harm took place during the policy period in question [*Montrose Chem. Corp. v. Admiral Ins. Co.* (1995) 10 Cal.4th 645, 664, 689, 42 Cal.Rptr.2d 324, 913 P.2d 878]. In those situations, it may be appropriate when using the first alternative instruction to include an additional sentence to the effect that continuous and progressive harm is potentially covered by all policies in effect during the time the harm took place. However, there is no duty to defend or indemnify if the complaint alleges that the continuous or progressive loss first began after the policy expired [*Buena Vista Mines, Inc. v. Industrial Indem. Co.* (2001) 87 Cal.App.4th 482, 488-489, 104 Cal.Rptr.2d 557]. Similarly, if the insured did not acquire the property from which the claim arose until after the policy expired, there is no coverage even though the damage occurred during the policy period [*Tosco Corp. v. General Ins. Co. of Am.* (2000) 85 Cal.App.4th 1016, 1018-1019, 1023, 102 Cal.Rptr.2d 657].

The offense-based coverages (usually "personal injury" and "advertising injury") typically contain language such as the following:

Insurer will pay on behalf of the insured all sums that the insured shall become legally obligated to pay as damages because of personal injury or advertising injury.

Typically, personal injury and advertising injury are then defined as injury arising out of any of a number of specified offenses (for example, false arrest or copyright infringement) committed during the policy period [see, e.g., *Hyundai Motor America v. National Union Fire Ins. Co.* (9th Cir. 2010) 600 F.3d 1092, 1096 (advertising injury includes publication that slanders or libels person or organization or disparages goods, products, or services; material that violates right to privacy; misappropriation of advertising idea or style; and infringement of copyright, title, or slogan); *E.piphany, Inc. v. St. Paul Fire & Marine Ins. Co.* (N.D. Cal. 2008) 590 F.Supp.2d 1244, 1251 (advertising injury coverage); *Total Call Int'l, Inc. v. Peerless Ins. Co.* (2010) 181 Cal.App.4th 161, 165, 104 Cal.Rptr.3d 319 (advertising injury includes publication of material that slanders or libels person or organization, or disparages a person's or organization's goods, products, or services)]. Therefore, in contrast to the occurrence-based coverages, these coverages require that the insured's act (and not the harm) take place during the policy period.

As distinct from both occurrence-based and offense-based coverage, "claims made" coverage applies to claims first made against the insured during the policy period. "Claims made" policies may also require that the act complained of have taken place during the policy period or during a specified time period prior to the policy period [see *Gylar v. Mission Ins. Co.* (1973) 10 Cal.3d 216, 218-221, 110 Cal.Rptr. 139, 514 P.2d 1219 ; California Insurance Law and Practice, Ch. 49 (Matthew Bender); Long, Law of Liability Insurance, Vol. 3, App. B (Matthew Bender)].

LexisNexis Matthew Bender Expert Practice Tip--Events Triggering Coverage: Whether a particular event triggers coverage under an insurance policy depends on the type of policy (for example, occurrence versus "claims made"). For instance, if the policy is a "claims made" policy, the claim must

be made during the policy period. Whether coverage is triggered also depends on the type of claim (for example, asbestos-related claims versus automobile accidents). This is an issue for the court to decide.

By Rex Heeseman and Ronald Oster

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewCivil ProcedureTrialsJury TrialsJury
InstructionsStandard InstructionsCivil ProcedureRemediesDamagesGeneral OverviewEvidenceProcedural
ConsiderationsBurden of ProofAllocationInsurance LawClaims & ContractsGeneral Overview

* Revised by Susan E. Firtch. Ms. Firtch is a partner at Burnham Brown in Oakland, California.



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California Forms of Jury Instruction

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CHAPTER 23A Matthew Bender Insurance Contract Instructions *

Part B. CONTRACT ISSUES

4. Coverage Grant

1-23A California Forms of Jury Instruction MB 2300A.71

MB 2300A.71 Definition of "Accident"

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] PROPOSED INSTR. NO. _____

The term "accident" means a casualty: something out of the usual course of events, which happens suddenly and unexpectedly and without design of the person injured. It includes any event that takes place without the foresight or expectation of the person acted on or affected by the event.

Authorities: *Geddes & Smith, Inc. v. St. Paul Mercury Indem. Co.* (1959) 51 Cal.2d 558, 563, 334 P.2d 881 ; *Zuckerman v. Underwriters at Lloyd's, London* (1954) 42 Cal.2d 460, 473, 267 P.2d 777 ; *State Farm Fire & Casualty Co. v. Superior Court* (2008) 164 Cal.App.4th 317, 324, 78 Cal.Rptr.3d 828 .

[2] Use of Instruction

This instruction should be used if the insurer contends that the loss in question was not caused by an "occurrence," under policies defining an "occurrence" as an accident. The ISO CGL policies typically define an "occurrence" as an accident but do not define "accident" [see [3], below].

LexisNexis Matthew Bender Expert Practice Tip--Language of Policy Critical: Counsel must look at the exact wording of the policy in question. Although most liability policies define "occurrence" as an "accident," some are broader, and include an "accident" or "event." This instruction would not apply to those broader policies. Furthermore, some policies may define "accident," and may use language that is broader than the language in this instruction. This instruction is designed only for policies that define "occurrence" as an "accident," but do not define "accident." *By Ronald Oster*

[3] Comment

General liability policies typically define "occurrence" as "an accident" [see California Insurance Law and Practice, Ch. 49, App. B (Matthew Bender)]. If the policy does not define "accident," the term will be subject to interpretation according to other terms in the policy [see, e.g., *State Farm Fire & Casualty Co. v. Superior Court* (2008) 164 Cal.App.4th 317, 320-325, 78 Cal.Rptr.3d 828].

The meaning of the term "accident" in insurance law is not settled [see *State Farm Fire & Casualty Co. v. Superior Court* (2008) 164 Cal.App.4th 317, 324, 78 Cal.Rptr.3d 828]. The California Supreme Court has observed: "No all-inclusive definition of the word 'accident' can be given" [*Hogan v. Midland Nat'l Ins. Co.* (1970) 3 Cal.3d 553, 559, 91 Cal.Rptr. 153, 476 P.2d 825]. Some courts have held that when the conduct is deliberate or volitional, the incident is not "accident" for the purposes of insurance law [see, e.g., *Royal Globe Ins. Co. v. Whitaker* (1986) 181 Cal.App.3d 532, 537, 226 Cal.Rptr. 435 (intentional act is not an accident within plain meaning of word)]. Under this interpretation, the mere fact that the insured claims not to have intended to cause injury is not sufficient to bring a loss within the definition of the term "accident" [*Ray v. Valley Forge Ins. Co.* (2000) 77 Cal.App.4th 1039, 1046, 92 Cal.Rptr.2d 473 ; *Quan v. Truck Ins. Exch.* (1998) 67 Cal.App.4th 583, 596, 79 Cal.Rptr.2d 134 ; *Merced Mut. Ins. Co. v. Mendez* (1989) 213 Cal.App.3d 41, 50, 261 Cal.Rptr. 273]. That is, under California law, the term "accident" refers to the nature of the insured's conduct, not the insured's state of mind [*Ray v. Valley Forge Ins. Co.* (2000) 77 Cal.App.4th 1039, 1046, 92 Cal.Rptr.2d 473 ; *Quan v. Truck Ins. Exch.* (1998) 67 Cal.App.4th 583, 596, 79 Cal.Rptr.2d 134 (sexual misconduct could not be engaged in by accident); *Collin v. American Empire Ins. Co.* (1994) 21 Cal.App.4th 787, 804, 26 Cal.Rptr.2d 391]. Additionally, there is no "accident" if damage is certain to occur [*Downey Venture v. LMI Ins. Co.* (1998) 66 Cal.App.4th 478, 78 Cal.Rptr.2d 142 (Ins. Code § 533 bars coverage for acts intentionally performed with knowledge that damage is highly probably or substantially certain to result); *Shell Oil Co. v. Winterthur Swiss Ins. Co.* (1993) 12 Cal.App.4th 715, 742, 15 Cal.Rptr.2d 815 ; *Cametal Corp. v. National Auto. & Cas. Ins. Co.* (1961) 189 Cal.App.2d Supp. 831, 834, 11 Cal.Rptr. 280, 283].

However, the term "accident" has also been used to refer to the unintended or unexpected *consequence* of the act. These courts have held that when an injury is an unexpected or unintended consequence of the insured's conduct, it may be characterized as an accident for which coverage exists. When the injury suffered is *expected* or *intended*, coverage is denied. When one expects or intends an injury to occur, there is no "accident" [see, e.g., *Interinsurance Exch. v. Flores* (1996) 45 Cal.App.4th 661, 669, 53 Cal.Rptr.2d 18]. That an act that causes an injury is intentional does not take the consequence of that act outside the coverage of a policy that excludes damage unless caused by accident, because if the consequence that is the damage or injury is not intentional and is unexpected it is accidental in character [*Meyer v. Pacific Employers Ins. Co.* (1965) 233 Cal.App.2d 321, 327, 43 Cal.Rptr. 542].

The California Supreme Court has stated that "accident" has been defined as a casualty, something out of the usual course of events and that happens suddenly and unexpectedly and without design of the person injured. It includes any event that takes place without the foresight or expectation of the person acted on or affected by the event [*Geddes & Smith, Inc. v. St. Paul Mercury Indem. Co.* (1959) 51 Cal.2d 558, 563, 334 P.2d 881]. These statements defining the term "accident" employ the words "consequence" and "happen," indicating that an accident can exist when either the cause is unintended or the effect is unanticipated [*State Farm Fire & Casualty Co. v. Superior Court* (2008) 164 Cal.App.4th 317, 323, 78 Cal.Rptr.3d 828]. For example, one case involving a homeowner's policy held that if an insured intends to throw someone into a swimming pool, intending to get the person wet, but mistakenly throws the person onto the pool's concrete steps, causing injury, the incident is an "accident" within the meaning of insurance law. The term "accident" may refer to the unintended or unexpected consequence of the act. When an injury is an unexpected or unintended consequence of the insured's conduct, it may be characterized as an accident for which coverage applies [*State Farm Fire and Casualty Co. v. Superior Court* (2008) 164 Cal.App.4th 317, 324, 329, 78 Cal.Rptr.3d 828 (finding duty to defend)].

In the context of liability insurance, an accident is an unexpected, unforeseen, or undesigned happening or consequence from either a known or an unknown cause. "Accident" in the policy coverage clause refers to the injury-producing acts

of the insured, not those of the injured party. Therefore, an insured's unreasonable belief in the need for self-defense does not turn the resulting purposeful and intentional act of assault and battery into an accident within the policy coverage clause [*Delgado v. Interinsurance Exch. of Auto. Club of So. Cal.* (2009) 47 Cal.4th 302, 308-317, 97 Cal.Rptr.3d 298, 211 P.3d 1083].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewCivil ProcedureTrialsJury TrialsJury InstructionsStandard InstructionsInsurance LawClaims & ContractsPolicy InterpretationGeneral OverviewInsurance LawGeneral Liability InsuranceCoverageAccidentsInsurance LawGeneral Liability InsuranceExclusionsIntentional Acts

* Revised by Susan E. Firtch. Ms. Firtch is a partner at Burnham Brown in Oakland, California.



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CHAPTER 23A Matthew Bender Insurance Contract Instructions *
Part B. CONTRACT ISSUES
4. Coverage Grant

1-23A California Forms of Jury Instruction MB 2300A.72

MB 2300A.72 Exhaustion of Underlying Insurance

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

To establish that [insurer]'s policy of excess insurance applies to the underlying claim, [insured] must prove that all underlying insurance, including any self-insurance, has been exhausted.

Authorities: *McConnell v. Underwriters at Lloyds of London* (1961) 56 Cal.2d 637, 646, 16 Cal.Rptr. 362, 365 P.2d 418 ; *Royal Globe Ins. Co. v. Whitaker* (1986) 181 Cal.App.3d 532, 537, 226 Cal.Rptr. 435 ; *Olympic Ins. Co. v. Employers Surplus Lines Ins. Co.* (1981) 126 Cal.App.3d 593, 598, 178 Cal.Rptr. 908 .

[2] Use of Instruction

This instruction should be used if an excess insurer claims that its obligations have not been triggered because underlying insurance has not been exhausted. It should be used with the instruction in MB 2300A.09 defining excess insurance and the instruction in MB 2300A.20 on the insured's burden of proof. For an instruction explaining burden of proof generally, see *CACI No. 200*.

[3] Comment

The insured has the burden of proving coverage [*Royal Globe Ins. Co. v. Whitaker* (1986) 181 Cal.App.3d 532, 537, 226 Cal.Rptr. 435]. Excess insurance coverage is insurance that, pursuant to the terms of the policy, attaches only after a predetermined amount of underlying coverage has been exhausted [*McConnell v. Underwriters at Lloyds of London* (1961) 56 Cal.2d 637, 646, 16 Cal.Rptr. 362, 365 P.2d 418 ; *Olympic Ins. Co. v. Employers Surplus Lines Ins. Co.* (1981) 126 Cal.App.3d 593, 598, 178 Cal.Rptr. 908]. However, a self-insured retention ("SIR") is not the equivalent of

a primary insurance policy, and it is not considered in determining whether all primary insurance has been exhausted [*Montgomery Ward & Co. v. Imperial Cas. & Indem. Co. (2000) 81 Cal.App.4th 356, 369, 97 Cal.Rptr.2d 44*]. See MB 2300A.08 -MB 2300A.10 for instructions and discussion on primary and excess insurance.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Insurance Law Excess Insurance Apportionment of Liability Insurance Law Excess Insurance Obligations Indemnification Insurance Law Excess Insurance Umbrella Policies

* Revised by Susan E. Firtch. Ms. Firtch is a partner at Burnham Brown in Oakland, California.



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CHAPTER 23A Matthew Bender Insurance Contract Instructions *

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1-23A California Forms of Jury Instruction MB 2300A.73-MB 2300A.79

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MB 2300A.73Reserved for Future Use



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CHAPTER 23A Matthew Bender Insurance Contract Instructions *

Part B. CONTRACT ISSUES

5. Policy Conditions--First Party Property

1-23A California Forms of Jury Instruction MB 2300A.80

MB 2300A.80 Notice of Loss

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

[Insured] claims that _____ [specify loss at issue, e.g., the fire] was covered under the policy issued by [insurer]. The insurance contract requires [insured] to give prompt and accurate notice to [insurer] of any loss that [insured] claims is covered under the policy issued by [insurer].

[Insurer] is not required to provide coverage to [insured] if [insured] violated the part of the insurance contract that required [insured] to give prompt and accurate notice of _____ [specify loss at issue, e.g., the fire].

If you find that [insured] failed to give prompt and accurate notice to [insurer] of the loss, that this failure or delay was unreasonable and without a justifiable explanation, and that this failure or delay in giving notice substantially prejudiced [insurer], then [insurer]'s duties, if any, under the insurance contract are discharged.

***Authorities:** Fidelity Sav. & Loan Ass'n v. Aetna Life & Cas. Co. (9th Cir. 1981) 647 F.2d 933, 938 ; Moe v. Transamerica Title Ins. Co. (1971) 21 Cal.App.3d 289, 302, 98 Cal.Rptr. 547 ; Campbell v. Allstate Ins. Co. (1963) 60 Cal.2d 303, 307, 32 Cal.Rptr. 827, 384 P.2d 155 ; Joyce v. United Ins. Co. (1962) 202 Cal.App.2d 654, 662, 21 Cal.Rptr. 361 .*

[2] Use of Instruction

This instruction should be used if the insurance company raises the defense of late notice of the claim under a first-party policy.

For related Judicial Council instructions, see [3][b], *below*.

For an instruction on late notice under a third-party policy, see *MB 2300A.110*.

LexisNexis Matthew Bender Expert Practice Tip--Proving Prejudice: "Substantial prejudice" is difficult for an insurer to prove. *By Rex Heeseman*

[3] Comment

[a] Insured's Duty to Give Notice

Property insurance policies typically include a section listing the insured's duties after a loss. One of these duties requires the insured to give prompt notice of the claim to the insurance company and to notify the police in the case of loss by theft. Compliance with this notice requirement is a condition to recovery. The courts have interpreted the duty of prompt notice as requiring notice that is prompt and reasonable under the circumstances [*Joyce v. United Ins. Co.* (1962) 202 Cal.App.2d 654, 662, 21 Cal.Rptr. 361]. The reasonableness of the time within which the notice is given depends on the circumstances of the particular case, and an insured can show compliance with the policy requirement by giving a reasonable explanation for the delay [*Campbell v. Allstate Ins. Co.* (1963) 60 Cal.2d 303, 307, 32 Cal.Rptr. 827, 384 P.2d 155 (liability insurance)]. Although there is some authority to the contrary [see *Mt. Hawley Ins. Co. v. Federal Sav. & Loan Ins. Corp.* (C.D. Cal. 1987) 695 F.Supp. 469, 480 ; *Northwestern Title Sec. Co. v. Flack* (1970) 6 Cal.App.3d 134, 143-144, 85 Cal.Rptr. 693], the majority of California courts have held that an insurer need not show prejudice under a "claims made" policy. To require a showing of prejudice under a "claims made" policy would materially alter the insurer's risk and effectively convert the policy into an occurrence-based policy [*Helfand v. National Union Fire Ins. Co.* (1992) 10 Cal.App.4th 869, 888, 13 Cal.Rptr.2d 295 ; *Slater v. Lawyers' Mut. Ins. Co.* (1991) 227 Cal.App.3d 1415, 1422-1424, 278 Cal.Rptr. 479 ; *Industrial Indem. v. Superior Court* (1990) 224 Cal.App.3d 828, 830-832, 275 Cal.Rptr. 218 ; *Pacific Employers Ins. Co. v. Superior Court* (1990) 221 Cal.App.3d 1348, 1358, 270 Cal.Rptr. 779].

The insurer must object promptly to any late notice of a claim. Failure to do so will waive the insurer's right to deny liability for breach of the condition [*Ins. Code* § 554; see *Oakland-Alameda County Coliseum, Inc. v. National Union Fire Ins. Co.* (N.D. Cal. 2007) 480 F.Supp.2d 1182, 1191-1193].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 23, *California Judicial Council Insurance Litigation Instructions*]:

CACI No. 2320 Affirmative Defense--Failure to Provide Timely Notice

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewInsurance LawClaims & ContractsNotice to InsurersDue DiligenceInsurance LawClaims & ContractsNotice to InsurersPrejudice to InsurerInsurance LawClaims & ContractsNotice to InsurersReasonableness

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CHAPTER 23A Matthew Bender Insurance Contract Instructions *

Part B. CONTRACT ISSUES

5. Policy Conditions--First Party Property

1-23A California Forms of Jury Instruction MB 2300A.81

MB 2300A.81 Time for Filing Suit

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

[Insurer]'s policy states that no lawsuit may be brought against it unless the lawsuit is filed within _____ [months/years] after inception of the loss.

"Inception of the loss" means the time when appreciable damage occurred and was known, or should have been known, to [insured].

[OPTIONAL (See Use of Instruction)]

In calculating the number of [months/years] that elapsed between the inception of the loss and the filing of the lawsuit, you must not count the time between the date that [insured] first gave notice of the loss to [insurer] and the date that [insurer] formally advised [insured] that it would not pay for the loss.

[CONTINUE INSTRUCTION]

If you find that [insured] did not file this lawsuit within _____ [months/years] after the inception of the loss, then you must return a verdict in favor of [insurer].

Authorities: *Ins. Code § 2071; Prudential-LMI Commercial Ins. v. Superior Court (1990) 51 Cal.3d 674, 685-687,*

693, 274 Cal.Rptr. 387, 798 P.2d 1230 ; *Fageol Truck & Coach Co. v. Pacific Indem. Co.* (1941) 18 Cal.2d 748, 753, 117 P.2d 669 ; *Nguyen v. 20th Century Ins. Co.* (1998) 67 Cal.App.4th 500, 503-504, 79 Cal.Rptr.2d 115 ; *San Jose Crane & Rigging, Inc. v. Lexington Ins. Co.* (1991) 227 Cal.App.3d 1314, 1317-1320, 278 Cal.Rptr. 301 ; *Prieto v. State Farm Fire & Cas. Co.* (1990) 225 Cal.App.3d 1188, 1195, 275 Cal.Rptr. 362 ; *C & H Foods Co. v. Hartford Ins. Co.* (1984) 163 Cal.App.3d 1055, 1064, 211 Cal.Rptr. 765 .

[2] Use of Instruction

This instruction should be used if the insured has sued the insurer "on the policy" [see [3], *below*], the insurance policy sets forth a contractual period of limitations on lawsuits against the insurer, and the insurer alleges that the insured's lawsuit was not filed within that period. The optional third paragraph should be used if the insured claims that the limitations period was equitably tolled while the insurer was considering the claim.

[3] Comment

Ins. Code § 2071 sets forth a mandatory form for fire insurance policies issued on property in California [*Ins. Code* §§ 2070, 2071]. Among other things, that form states that any lawsuit "on this policy" must be brought against the insurer "within twelve months next after inception of the loss" [*Ins. Code* § 2071]. The courts have held this to be a reasonable and fair period [*Fageol Truck & Coach Co. v. Pacific Indem. Co.* (1941) 18 Cal.2d 748, 753, 117 P.2d 669 ; *C & H Foods Co. v. Hartford Ins. Co.* (1984) 163 Cal.App.3d 1055, 1064, 211 Cal.Rptr. 765], and the courts have upheld both one-year periods and longer periods in other policies as well [see, e.g., *Fageol Truck & Coach Co. v. Pacific Indem. Co.* (1941) 18 Cal.2d 748, 753, 117 P.2d 669 (private limitations period is enforceable if not so unreasonable as to show imposition or undue advantage; upholding one-year period); *C & H Foods Co. v. Hartford Ins. Co.* (1984) 163 Cal.App.3d 1055, 1064, 211 Cal.Rptr. 765 (private limitations period is enforceable if not so unreasonable as to show imposition or undue advantage; upholding one-year period)].

The "inception of the loss" is that point in time when appreciable damage occurs and is or should be known to the insured, so that a reasonable insured would be aware that the notification duty under the policy had been triggered [*Prudential-LMI Commercial Ins. v. Superior Court* (1990) 51 Cal.3d 674, 685-687, 700, 274 Cal.Rptr. 387, 798 P.2d 1230 ; *Nguyen v. 20th Century Ins. Co.* (1998) 67 Cal.App.4th 500, 503-504, 79 Cal.Rptr.2d 115 ; *San Jose Crane & Rigging, Inc. v. Lexington Ins. Co.* (1991) 227 Cal.App.3d 1314, 1317, 278 Cal.Rptr. 301 ; *Prieto v. State Farm Fire & Cas. Co.* (1990) 225 Cal.App.3d 1188, 1195, 275 Cal.Rptr. 362]. Determining when appreciable damage occurs is a question of fact to be decided by the trier of fact [*Prudential-LMI Commercial Ins. v. Superior Court* (1990) 51 Cal.3d 674, 687, 274 Cal.Rptr. 387, 798 P.2d 1230 ; *Nguyen v. 20th Century Ins. Co.* (1998) 67 Cal.App.4th 500, 503-504, 79 Cal.Rptr.2d 115 ; *San Jose Crane & Rigging, Inc. v. Lexington Ins. Co.* (1991) 227 Cal.App.3d 1314, 1317, 278 Cal.Rptr. 301]. However, if an insurer accepts and relies on the insured's assertion of the starting date of the loss, the insured may not renege and make an unsupported claim that there might be an issue as to when the loss was discovered [*Michelson v. Mid-Century Ins. Co.* (2000) 83 Cal.App.4th 450, 455, 99 Cal.Rptr.2d 804]. Although the limitations period begins to run from the inception of the loss, the limitations period is equitably tolled from the time that the insured provides the insurer with timely notice under the policy to the time that the insurer formally denies the claim [*Prudential-LMI Commercial Ins. v. Superior Court* (1990) 51 Cal.3d 674, 693, 274 Cal.Rptr. 387, 798 P.2d 1230 ; *Aliberti v. Allstate Ins. Co.* (1999) 74 Cal.App.4th 138, 149, 87 Cal.Rptr.2d 645 ; *San Jose Crane & Rigging, Inc. v. Lexington Ins. Co.* (1991) 227 Cal.App.3d 1314, 1318-1320, 278 Cal.Rptr. 301 ; *Prieto v. State Farm Fire & Cas. Co.* (1990) 225 Cal.App.3d 1188, 1195, 275 Cal.Rptr. 362].

The insurer must make the formal denial in writing [*Aliberti v. Allstate Ins. Co.* (1999) 74 Cal.App.4th 138, 149, 87 Cal.Rptr.2d 645]. Once the insurer has unequivocally denied the claim in writing, there is no further equitable tolling simply because the insurer reconsiders its position at the insured's request [*Singh v. Allstate Ins. Co.* (1998) 63 Cal.App.4th 135, 141-142, 73 Cal.Rptr.2d 546]. However, the insurer's advice to the insured not to file a claim--for example, because the insurer calculates that damages do not exceed the policy deductible--may estop the insurer from

asserting the limitations period for so long as the insured relies on that advice [*Vu v. Prudential Prop. & Cas. Ins. Co.* (2001) 26 Cal.4th 1142, 113 Cal.Rptr.2d 70, 33 P.3d 487 ; *Nguyen v. 20th Century Ins. Co.* (1998) 67 Cal.App.4th 500, 506, 79 Cal.Rptr.2d 115]. The limitations period can also be tolled by the insurer's failure to notify the insured of the limitations period during ongoing correspondence concerning the claim, as required by 10 Cal. Code Reg. § 2695.4(a) [*Neufeld v. Balboa Ins. Co.* (2000) 84 Cal.App.4th 759, 764, 101 Cal.Rptr.2d 151 ; *Spray, Gould & Bowers v. Associated Int'l Ins. Co.* (1999) 71 Cal.App.4th 1260, 1269, 84 Cal.Rptr.2d 552]. The equitable tolling of *Prudential-LMI* [*Prudential-LMI Commercial Ins. v. Superior Court* (1990) 51 Cal.3d 674, 685-687, 693, 274 Cal.Rptr. 387, 798 P.2d 1230] cannot be extended to allow tolling after the insured received payment on the claim, but did not receive an unequivocal written statement from the insurer that the claim was closed. For example, an insured could not rely on *Prudential-LMI* to reopen a claim, because the insured received and accepted payment of benefits for damage caused by the Loma Prieta earthquake, and only afterwards discovered that claims arising from the Oakland Hills fire had been paid in a higher amount [*Marselis v. Allstate Ins. Co.* (2004) 121 Cal.App.4th 122, 125, 16 Cal.Rptr.3d 668].

Code Civ. Proc. § 340.9 provides a special exception to the one-year suit limitation (and the statute of limitations) for claims for earthquake damage caused by the 1994 Northridge earthquake [*Code Civ. Proc.* § 340.9; see *Mid-Century Ins. Co. v. Superior Court* (2006) 138 Cal.App.4th 769, 776-777, 41 Cal.Rptr.3d 833 (reviving suit that was dismissed without prejudice following sustaining of demurrer without leave to amend solely on statute of limitations grounds)]. In one case, the insurer reopened and reconsidered an insured's Northridge earthquake claim at the insured's request seven years after the claim was settled (because the structure could not be repaired for the settlement sum). This equitably tolled the revived one-year period under *Code Civ. Proc.* § 340.9 [*Ashou v. Liberty Mut. Fire Ins. Co.* (2006) 138 Cal.App.4th 748, 761-764, 41 Cal.Rptr.3d 819 (not deciding whether equitable tolling renders suit timely); see also *Prudential-LMI Commercial Ins. v. Superior Court* (1990) 51 Cal.3d 674, 693, 274 Cal.Rptr. 387, 798 P.2d 1230].

Code Civ. Proc. § 340.9 merely reopens the filing window, for one year, to otherwise viable cases that have become time-barred [*Lincoln Fountain Villas Homeowners Assn. v. State Farm Fire & Cas. Ins. Co.* (2006) 136 Cal.App.4th 999, 1005-1006, 39 Cal.Rptr.3d 345 (statute does not obligate insurer to investigate and adjust new Northridge earthquake damage claims presented in 2001 without regard to actions they may have taken on claims relating to same property originally presented in 1994); 1231 *Euclid Homeowners Assn. v. State Farm Fire & Cas. Co.* (2006) 135 Cal.App.4th 1008, 1020, 37 Cal.Rptr.3d 795]. The statute applies only to insureds that contacted an insurer or an insurer's representative before January 1, 2000, regarding potential Northridge earthquake damage [*Code Civ. Proc.* § 340.9; *Hellinger v. Farmers Group, Inc.* (2001) 91 Cal.App.4th 1049, 1068, 111 Cal.Rptr.2d 268 ; 20th Century Ins. Co. v. Superior Court (2001) 90 Cal.App.4th 1247, 1274-1277, 109 Cal.Rptr.2d 611]. *Civ. Code* § 340.9 does not apply if the insurer and the insured entered into a written settlement agreement, and if the insured was at that time represented by counsel admitted to the California bar who signed the agreement [*Code Civ. Proc.* § 340.9; *Israel-Curley v. California Fair Plan* (2005) 126 Cal.App.4th 123, 128-129, 24 Cal.Rptr.3d 1]. Moreover, *Code Civ. Proc.* § 340.9 does not affect any defenses, other than the limitations period, that an insurer might have to an insured's claim [*Rosenblum v. Safeco Ins. Co.* (2005) 126 Cal.App.4th 847, 859-861, 24 Cal.Rptr.3d 427 (no revival of cause of action on ground that settlement was void due to fraud and duress)]. *Code Civ. Proc.* § 340.9 does not preclude victims of the Northridge earthquake from obtaining equitable relief from the statutory limitation period of *Ins. Code* § 2071. Therefore, an insured may raise the doctrine of equitable estoppel against an insurer's limitations defense following the expiration of the one-year extension period under § 340.9 [*Cordova v. 21st Century Ins. Co.* (2005) 129 Cal.App.4th 89, 108-109, 28 Cal.Rptr.3d 170].

Under the policy set out in *Ins. Code* § 2071, only actions "on this policy" are subject to the limitation period stated in the policy. Not all actions against the insurer are actions on the policy. In one case, for example, the insured sued the insurer for negligence after a contractor hired by the insurer to repair damage to the insured's home caused further damage to the home. The court of appeal held that this was not an action "on the policy" as required by the private limitations provision, and the action was therefore not subject to that limitations provision [*Murphy v. Allstate Ins. Co.* (1978) 83 Cal.App.3d 38, 46, 147 Cal.Rptr. 565].

LexisNexis Matthew Bender Expert Practice Tip--Contractual Time Limits in Policy: Many

property policies contain contractual time limits for bringing suit. This can cause problems if it takes a long period of time to determine the full extent of the loss--for example, because construction bids must be obtained or because the loss is continuing into the future (business interruption losses). In these cases, it is necessary for the insured to get a waiver of the equitable tolling provision (that is, not counting the time while the insured is waiting to hear back from the insurer). *By Ronald Oster*

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Governments Legislation Statutes of Limitations General Overview Insurance Law Claims & Contracts Estoppel & Waiver Delays Insurance Law Claims & Contracts Notice to Insurers Due Diligence

* Revised by Susan E. Firtch. Ms. Firtch is a partner at Burnham Brown in Oakland, California.



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California Forms of Jury Instruction

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CHAPTER 23A Matthew Bender Insurance Contract Instructions *

Part B. CONTRACT ISSUES

5. Policy Conditions--First Party Property

1-23A California Forms of Jury Instruction MB 2300A.82

MB 2300A.82 Proof of Loss

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

[EITHER (See Use of Instruction)]

The insurance policy requires that [insured] fulfill certain duties after a loss and cooperate with and assist [insurer] in its attempts to investigate and resolve the claim.

One of [insured]'s duties under the policy is to provide [insurer] with a signed, sworn proof of loss within 60 days after [insurer]'s request for proof of loss. The proof of loss must include all of the following:

[OR]

Another of [insured]'s duties under the policy is to provide [insurer] with a signed, sworn proof of loss within 60 days after [insurer]'s request for proof of loss. The proof of loss must include all of the following:

[USE AS APPLICABLE (See Use of Instruction)]

1. The time and cause of the loss;

2. [Insured]'s ownership or other interest in the property and the ownership or interest of others in the property;

3. The actual cash value of each item of property damaged or lost, the amount of loss to each item, and the amount of any encumbrance on each item;

4. All other insurance on each item;

5. Any changes in the title use, occupation, location, possession, or exposures of the property since the time the policy was issued; and

6. The persons occupying any building damaged or destroyed and the purpose for which they were occupying the building at the time of the loss, and whether any part of the building was on leased land.

[CONTINUE INSTRUCTION]

If you find that [insured] failed or refused to provide a signed, sworn proof of loss, and that [insurer] made a timely objection to the lack of a proof of loss or to defects in the proof of loss, then [insured] is not entitled to recover under the insurance contract.

Authorities: *Ins. Code §§ 553, 2071; Paulfrey v. Blue Chip Stamps (1983) 150 Cal.App.3d 187, 199-200, 197 Cal.Rptr. 501 ; Beasley v. Pacific Indem. Co. (1962) 200 Cal.App.2d 207, 209, 19 Cal.Rptr. 299 .*

[2] Use of Instruction

This instruction should be used if the insured fails or refuses to provide a proof of loss requested by the insurer or fails to provide all of the information requested in the proof of loss.

The instruction offers a choice of two ways to begin the instruction. If one of the instructions in MB 2300A.84, MB 2300A.86, or MB 2300A.87 has already been given, then the explanatory first paragraph in the first alternative would be redundant, and counsel should use the second alternative. If this is the first or only instruction on the insured's duties after loss, then counsel should use the first alternative.

The items in the numbered list are based on the standard California fire insurance policy in *Ins. Code § 2071*. Counsel should use only those items that are at issue in the case.

For related Judicial Council instructions, see [3][b], *below*.

[3] Comment

[a] Proof of Loss

Insurance contracts legitimately call for the filing of a proof of loss in support of claims [*Paulfrey v. Blue Chip Stamps (1983) 150 Cal.App.3d 187, 199, 197 Cal.Rptr. 501 ; see Ins. Code § 2071*]. In general, failure to file a timely proof of loss is fatal to the insured's claim under the policy [*Beasley v. Pacific Indem. Co. (1962) 200 Cal.App.2d 207, 209, 19 Cal.Rptr. 299*]. An insured cannot fail to perform the insured's own obligations under the policy and then seek to recover under the policy [*Paulfrey v. Blue Chip Stamps (1983) 150 Cal.App.3d 187, 199-200, 197 Cal.Rptr. 501 ; Beasley v. Pacific Indem. Co. (1962) 200 Cal.App.2d 207, 209, 19 Cal.Rptr. 299*].

The insurer must make timely objection to any defects in the proof of loss, or those defects are waived [*Ins. Code* § 553]. Moreover, courts carefully examine evidence of failure to furnish a proof of loss in an attempt to avoid forfeiture of an otherwise legitimate claim [*Elliano v. Assurance Co. of Am.* (1970) 3 *Cal.App.3d* 446, 449, 83 *Cal. Rptr* 509 ; *Beasley v. Pacific Indem. Co.* (1962) 200 *Cal.App.2d* 207, 209, 19 *Cal.Rptr.* 299].

Usually, in disputes over the sufficiency of a proof of loss, the insurer must prove meaningful prejudice to avoid paying, while the insured need only show substantial compliance to prevail [*McCormick v. Sentinel Life Ins. Co.* (1984) 153 *Cal.App.3d*, 1030, 1045-1046 ; *see also Ins. Code* §§ 553, 554 (notice and proof of loss)].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 23, *California Judicial Council Insurance Litigation Instructions*]:

CACI No. 2321 Affirmative Defense--Insured's Breach of Duty to Cooperate in Defense

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Insurance Law Claims & Contracts Notice to Insurers Due Diligence Insurance Law Claims & Contracts Notice to Insurers Reasonableness

* Revised by Susan E. Firtch. Ms. Firtch is a partner at Burnham Brown in Oakland, California.



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California Forms of Jury Instruction

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CHAPTER 23A Matthew Bender Insurance Contract Instructions *

Part B. CONTRACT ISSUES

5. Policy Conditions--First Party Property

1-23A California Forms of Jury Instruction MB 2300A.83

MB 2300A.83 Material Overstatement of Loss

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

If you find that [insured] materially overstated the value of [insured's] loss in the proof of loss, and that this overstatement was made knowingly and willfully, then the entire policy of insurance is void and of no effect, and [insured] is entitled to nothing under the policy.

Authority: *Cummings v. Fire Ins. Exch.* (1988) 202 Cal.App.3d 1407, 1414-1415, 1417, 249 Cal.Rptr. 568 .

[2] Use of Instruction

This instruction should be used if the insurer contends that the insured has materially overstated the amount of the loss or has otherwise attempted to obtain payment for more than the amount of the loss. It should be used with the instruction in MB 2300A.96, which defines a material fact. It should also be used generally in conjunction with the instructions in MB 2300A.91-MB 2300A.95 on fraud and concealment because the insured's overstatement must be shown to be intentional.

For related Judicial Council instructions, see [3][b], *below*.

[3] Comment

[a] Overstatement of Loss

The insured has certain duties after a loss under a property insurance policy. One of the insured's duties is to send the

insurer a signed, sworn proof of loss within 60 days after the loss see [Ins. Code § 2071]. Most property insurance policies state that insurers will not provide coverage to an insured that has intentionally concealed or misrepresented any material fact or circumstance see [Ins. Code § 2071; see also *Mitchell v. United Nat'l Ins. Co.* (2005) 127 Cal.App.4th 457, 463, 25 Cal.Rptr.3d 627 (if misrepresentation occurs in connection with application for standard fire insurance form policy provided by Ins. Code § 2071, no intent necessary; merely negligent or unintentional misrepresentation entitles insurer to rescind policy)]. The mere fact of an overstatement does not invalidate the insured's claim. Under this policy condition and the related "Concealment or Fraud" condition, the policy is voided only if the insured's overstatement was deliberate and made with the intent to deceive [*Baldwin v. Bankers & Shippers Ins. Co. of N.Y.* (9th Cir. 1955) 222 F.2d 953 ; *Hyland v. Millers Nat'l Ins. Co.* (9th Cir. 1937) 91 F.2d 735 ; *Singleton v. Hartford Fire Ins. Co.* (1932) 127 Cal.App. 635, 648-649, 16 P.2d 293]. Whether a misstatement was deliberate and made with intent to deceive is generally a question of fact [*Cummings v. Fire Ins. Exch.* (1988) 202 Cal.App.3d 1407, 1417, 249 Cal.Rptr. 568].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 19, California Judicial Council Fraud or Deceit Instructions, and Ch. 23, *California Judicial Council Insurance Litigation Instructions*]:

CACI No. 1905 Definition of Important Fact/Promise

CACI No. 2321 Affirmative Defense--Insured's Breach of Duty to Cooperate in Defense

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Insurance Law Claims & Contracts Disclosure Obligations Fraudulent Intent Insurance Law Claims & Contracts Disclosure Obligations Materiality Insurance Law Claims & Contracts Estoppel & Waiver Misrepresentations

* Revised by Susan E. Firtch. Ms. Firtch is a partner at Burnham Brown in Oakland, California.



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CHAPTER 23A Matthew Bender Insurance Contract Instructions *

Part B. CONTRACT ISSUES

5. Policy Conditions--First Party Property

1-23A California Forms of Jury Instruction MB 2300A.84

MB 2300A.84 Insured's Examination Under Oath

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

[EITHER (See Use of Instruction)]

The insurance policy requires that [insured] fulfill certain duties after a loss and cooperate with and assist [insurer] in its attempts to investigate and resolve the claim.

One of [insured]'s duties under the policy is to submit to an examination under oath about the circumstances surrounding the loss, and to produce [members of (insured's) household *or* members and employees of (insured's) company] [, (insured's) public adjustor,] and any other of [insured's] agents for examination under oath to the extent that it is within [insured]'s power to do so.

[OR]

Another of [insured]'s duties under the policy is to submit to an examination under oath about the circumstances surrounding the loss, and to provide [members of (insured's) household *or* members and employees of (insured's) company] [, (insured's) public adjustor,] and any other of [insured's] agents for examination under oath to the extent that it is within [insured]'s power to do so.

[CONTINUE INSTRUCTION]

If you find that [insured] refused to submit to an examination under oath, refused to produce someone under [insured's] control, or unreasonably delayed in doing so, then [insurer]'s denial of the claim was proper.

Authorities: *Ins. Code § 2071*; *Beasley v. Pacific Indem. Co. (1962) 200 Cal.App.2d 207, 210, 19 Cal.Rptr. 299*; *Robinson v. National Auto. & Cas. Ins. Co. (1955) 132 Cal.App.2d 709, 713-714, 716, 282 P.2d 930*; *Bergeron v. Employers' Fire Ins. Co. (1931) 115 Cal.App. 672, 675, 2 P.2d 453*.

[2] Use of Instruction

This instruction should be used if the insured refuses to submit to an examination under oath, refuses to complete the examination, or refuses to produce family members, employees, or other witnesses over whom the insured may have control, for an examination.

The instruction offers a choice of two ways to begin. If the instruction in MB 2300A.82, or one of the instructions in MB 2300A.85 or MB 2300A.86, has already been given, then the explanatory first paragraph in the first alternative would be redundant, and counsel should use the second alternative. If this is the first or only instruction on the insured's duties after loss, then counsel should use the first alternative.

For related Judicial Council instructions, see [3][b], *below*.

[3] Comment

[a] Examination of Insured Under Oath

Ins. Code § 2071 sets forth a mandatory form for fire insurance policies issued on property in California [*Ins. Code §§ 2070, 2071*]. That form includes a provision that the insured sit for examination under oath as often as reasonably required by the insurance company in its investigation of a loss and that the insured sign the transcripts of the examination under penalty of perjury [*Abdelhamid v. Fire Ins. Exch. (2010) 182 Cal.App.4th 990, 1004, 106 Cal.Rptr.3d 26*]. Questions are permitted in any area material to the adjustment of the loss [*Hickman v. London Assurance Corp. (1920) 184 Cal. 524, 530, 195 P. 45*]. Failure or refusal to submit to examination under oath may result in forfeiture of any claim under the policy, because the courts have recognized this requirement as a condition precedent to filing suit [*Beasley v. Pacific Indem. Co. (1962) 200 Cal.App.2d 207, 210, 19 Cal.Rptr. 299*; *Robinson v. National Auto. & Cas. Ins. Co. (1955) 132 Cal.App.2d 709, 713-714, 716, 282 P.2d 930*; *Bergeron v. Employers' Fire Ins. Co. (1931) 115 Cal.App. 672, 675, 2 P.2d 453*; *but see Gruenberg v. Aetna Ins. Co. (1973) 9 Cal.3d 566, 577-578, 108 Cal.Rptr. 480, 510 P.2d 1032* (insurer's duty of good faith and fair dealing is unconditional and independent of performance of insured's contractual obligations; failure to appear for examination no bar to claim for insurance bad faith)].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 23, *California Judicial Council Insurance Litigation Instructions*]:

CACI No. 2321, Affirmative Defense--Insured's Breach of Duty to Cooperate in Defense

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewContracts LawContract InterpretationGood Faith &

Fair Dealing Insurance Law Claims & Contracts Disclosure Obligations General Overview Insurance Law Claims & Contracts Notice to Insurers Reasonableness

* Revised by Susan E. Firtch. Ms. Firtch is a partner at Burnham Brown in Oakland, California.



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CHAPTER 23A Matthew Bender Insurance Contract Instructions *

Part B. CONTRACT ISSUES

5. Policy Conditions--First Party Property

1-23A California Forms of Jury Instruction MB 2300A.85

MB 2300A.85 Examination Under Oath: False Statements

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

If you find that [insured] knowingly and willfully made a false statement in [insured's] Examination Under Oath about any material fact or circumstance concerning the policy, the property insured under the policy, or [insured's] interest in that property, then [insured] is barred from any recovery under the insurance contract.

Authorities: *Ins. Code § 2071; Nuffer v. Insurance Co. of N. Am. (1965) 236 Cal.App.2d 349, 359-360, 45 Cal.Rptr. 918 ; Newman v. Firemen's Ins. Co. (1944) 67 Cal.App.2d 386, 399, 154 P.2d 451 ; Singleton v. Hartford Fire Ins. Co. (1932) 127 Cal.App. 635, 648-649, 16 P.2d 293 .*

[2] Use of Instruction

This instruction should be used if the insurer contends that the insured misrepresented material information during the examination under oath. It should be used with the instructions pertaining to the "fraud and concealment" condition in MB 2300A.91-MB 2300A.95.

For related Judicial Council instructions, see [3][b], *below*.

LexisNexis Matthew Bender Expert Practice Tip--Requirement of Examination Under Different Types of Policies: Examination under oath is a specific procedural requirement contained in the standard form fire policy *see [Ins. Code § 2071]*. It is also usually required for theft claims. It is not a requirement under standard form liability (third-party) policies. *By Susan E. Firtch, Rex Heeseman, and Ronald Oster*

[3] Comment

[a] False Testimony of Insured

Ins. Code § 2071 sets forth a mandatory form for fire insurance policies issued on property in California [*Ins. Code §§ 2070, 2071*]. Among other things, that form specifies that the policy "shall be void if, whether before or after a loss, the insured has willfully concealed or misrepresented any material fact or circumstance concerning this insurance or the subject thereof, or the interest of the insured therein, or in case of any fraud or false swearing by the insured relating thereto." The court of appeal has held, for example, that giving false testimony regarding the amount of a loss precludes any recovery under the policy [*Newman v. Firemen's Ins. Co. (1944) 67 Cal.App.2d 386, 399, 154 P.2d 451*]. However, false testimony does not bar recovery if it is not "material" [*Nuffer v. Insurance Co. of N. Am. (1965) 236 Cal.App.2d 349, 359-360, 45 Cal.Rptr. 918* ; see also *Singleton v. Hartford Fire Ins. Co. (1932) 127 Cal.App. 635, 648-649, 16 P.2d 293* (upholding similar instruction)].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 19, California Judicial Council Fraud or Deceit Instructions, and Ch. 23, *California Judicial Council Insurance Litigation Instructions*]:

CACI No. 1905, Definition of Important Fact/Promise

CACI No. 2321, Affirmative Defense--Insured's Breach of Duty to Cooperate in Defense

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Evidence Competency Affirmations & Oaths Insurance Law Claims & Contracts Disclosure Obligations Fraudulent Intent Insurance Law Claims & Contracts Disclosure Obligations Materiality Insurance Law Claims & Contracts Estoppel & Waiver Misrepresentations

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CHAPTER 23A Matthew Bender Insurance Contract Instructions *

Part B. CONTRACT ISSUES

5. Policy Conditions--First Party Property

1-23A California Forms of Jury Instruction MB 2300A.86

MB 2300A.86 Insured's Production of Documents

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

[EITHER (See Use of Instruction)]

The insurance policy requires that [insured] fulfill certain duties after a loss and cooperate with and assist [insurer] in its attempts to investigate and resolve the claim.

One of [insured]'s duties under the policy is to produce for [insur er] any records and documents that [insurer] reasonably requests and to permit [insurer] to make copies. [Insured] must do this as often as [insurer] reasonably requires.

[OR]

Another of [insured]'s duties under the policy is to produce for [insurer] any records and documents that [insurer] requests and to permit [insurer] to make copies. [Insured] must do this as often as [insurer] reasonably requires.

[CONTINUE INSTRUCTION]

If you find that [insured] refused to produce documents for [insurer], or unreasonably delayed in doing so, then [insurer]'s denial of the claim was proper.

Authorities: *Ins. Code § 2071*; *Beasley v. Pacific Indem. Co.* (1962) 200 Cal.App.2d 207, 210, 19 Cal.Rptr. 299 ; *Robinson v. National Auto. & Cas. Ins. Co.* (1955) 132 Cal.App.2d 709, 712-714, 716, 282 P.2d 930 ; *Bergeron v. Employers' Fire Ins. Co.* (1931) 115 Cal.App. 672, 675, 2 P.2d 453 .

[2] Use of Instruction

This instruction should be used if the insured did not provide documents or other items reasonably requested by the insurer that were material to the adjustment of the loss.

The instruction offers a choice of two ways to begin the instruction. If one of the instructions in MB 2300A.82 or MB 2300A.84, or the instruction in MB 2300A.87, has already been given, then the explanatory first paragraph in the first alternative would be redundant, and counsel should use the second alternative. If this is the first or only instruction on the insured's duties after loss, then counsel should use the first alternative.

For related Judicial Council instructions, see [3][b], *below*.

[3] Comment

[a] Duty of Insured to Cooperate

Ins. Code § 2071 sets forth a mandatory form for fire insurance policies issued on property in California [*Ins. Code §§ 2070, 2071*]. That form includes a provision requiring that the insured cooperate with the insurer's investigation of the loss by providing records and documents to the insurer for inspection and copying [*Hickman v. London Assurance Corp.* (1920) 184 Cal. 524, 530, 195 P. 45 ; *Abdelhamid v. Fire Ins. Exch.* (2010) 182 Cal.App.4th 990, 1004, 106 Cal.Rptr.3d 26]. The insured must do so as often as the insurer reasonably requests [*Hickman v. London Assurance Corp.* (1920) 184 Cal. 524, 530, 195 P. 45]. Failure or refusal to provide documents may result in forfeiture of any claim under the policy, as this requirement has been recognized as a condition precedent to filing suit [*Beasley v. Pacific Indem. Co.* (1962) 200 Cal.App.2d 207, 210, 19 Cal.Rptr. 299 ; *Robinson v. National Auto. & Cas. Ins. Co.* (1955) 132 Cal.App.2d 709, 712-714, 716, 282 P.2d 930 ; *Bergeron v. Employers' Fire Ins. Co.* (1931) 115 Cal.App. 672, 675, 2 P.2d 453].

The insurer must inform the insured that tax returns are privileged against disclosure under applicable law, but may be necessary to process or determine the claim [*Ins. Code § 2071*].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 23, *California Judicial Council Insurance Litigation Instructions*]:

CACI No. 2321, Affirmative Defense--Insured's Breach of Duty to Cooperate in Defense

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryMethodsRequests for Production & InspectionCivil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewInsurance LawClaims & ContractsDisclosure ObligationsGeneral Overview

* Revised by Susan E. Firtch. Ms. Firtch is a partner at Burnham Brown in Oakland, California.



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California Forms of Jury Instruction

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CHAPTER 23A Matthew Bender Insurance Contract Instructions *

Part B. CONTRACT ISSUES

5. Policy Conditions--First Party Property

1-23A California Forms of Jury Instruction MB 2300A.87

MB 2300A.87 Inspection and Audit

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

[EITHER (See Use of Instruction)]

The insurance policy requires that [insured] fulfill certain duties after a loss and cooperate with and assist [insurer] in its attempts to investigate and resolve the claim.

One of [insured]'s duties under the policy is to permit [insurer] to inspect [insured]'s property and operations at any time. In addition, [insurer] has the right to examine and audit [insured]'s books and records, insofar as they relate to the subject matter of this insurance, at any time during the policy period and within three years after the final termination of this policy.

[OR]

Another of [insured]'s duties under the policy is to permit [insurer] to inspect [insured]'s property and operations at any time. In addition, [insurer] has the right to examine and audit [insured]'s books and records, insofar as they relate to the subject matter of this insurance, at any time during the policy period and within three years after the final termination of this policy.

[CONTINUE INSTRUCTION]

If you find that [insured] has not permitted [insurer] to inspect its property or operations, or to examine and audit its books and records, or that [insured] unreasonably delayed in allowing insurer to do so, then [insurer]'s denial of the claim was proper.

Authority: *Robinson v. National Auto. & Cas. Ins. Co.* (1955) 132 Cal.App.2d 709, 712, 716, 282 P.2d 930 .

[2] Use of Instruction

This instruction should be used if the policy includes an audit requirement (typically found in commercial first-party coverages) and if the insured refuses reasonable requests by the insurance company either to enter and inspect the premises where the loss occurred or to audit the insured's books.

The instruction offers a choice of two ways to begin the instruction. If one of the instructions in MB 2300A.82, MB 2300A.84, or MB 2300A.86 has already been given, then the explanatory first paragraph in the first alternative would be redundant, and counsel should use the second alternative. If this is the first or only instruction on the insured's duties after loss, then counsel should use the first alternative.

For related Judicial Council instructions, see [3][b], *below*.

[3] Comment

[a] Duty of Insured to Cooperate

Ins. Code § 2071 sets forth a mandatory form for fire insurance policies issued on property in California [*Ins. Code §§ 2070, 2071*]. That form includes a provision requiring that the insured allow the insurer to inspect and audit its books and records insofar as they relate to the subject matter of the insurance [*Ins. Code § 2071; Robinson v. National Auto. & Cas. Ins. Co.* (1955) 132 Cal.App.2d 709, 712, 282 P.2d 930]. This inspection and audit provision is typically found only in commercial policies and not in nonbusiness policies. The insured's failure or refusal to allow the insurance company access to the insured's books and records may result in forfeiture of the claim [see *Beasley v. Pacific Indem. Co.* (1962) 200 Cal.App.2d 207, 210, 19 Cal.Rptr. 299] .

LexisNexis Matthew Bender Expert Practice Tip--Applicability of Inspection/Audit Requirement:

This requirement is another aspect of the standard form fire (first-party) policy imposed by statute [*Ins. Code § 2071*]. Standard form liability (third-party) policies do not contain this requirement. *By Ronald Oster and Susan E. Firtch*

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 23, *California Judicial Council Insurance Litigation Instructions*]:

CACI No. 2321 Affirmative Defense--Insured's Breach of Duty to Cooperate in Defense

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Insurance Law Claims & Contracts Disclosure Obligations General Overview Insurance Law Claims & Contracts Good Faith & Fair Dealing General Overview Insurance Law Property Insurance Obligations Cooperation

* Revised by Susan E. Firtch. Ms. Firtch is a partner at Burnham Brown in Oakland, California.



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CHAPTER 23A Matthew Bender Insurance Contract Instructions *

Part B. CONTRACT ISSUES

5. Policy Conditions--First Party Property

1-23A California Forms of Jury Instruction MB 2300A.88

MB 2300A.88 When Loss Payable

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Under the insurance policy, [insurer] is obligated to pay [insured] for a loss within 60 days after both of the following two conditions have been satisfied:

1. [Insurer] receives [insured]'s proof of loss; and

[CHOOSE ONE OF FOLLOWING (See Use of Instruction)]

2. [Insurer] has reached an agreement with [insured] as to the amount of the loss.

[OR]

2. A final judgment has been entered establishing the amount of the loss.

[OR]

2. An appraisal award has been filed with [insurer].

Authorities: *Ins. Code §§ 2070.1, 2071.*

[2] Use of Instruction

This instruction should be used if the insured contends that the insurance company wrongfully withheld payment for more than 60 days. It should be used in conjunction with appropriate instructions regarding breach of the implied covenant and damages for breach of contract and breach of the implied covenant of good faith and fair dealing. For instructions regarding breach of the implied covenant, see *MB 2300A.140* -*MB 2300A.150*. For instructions on damages, see *MB 2300A.210* -*MB 2300A.240*.

If the policy requires that payment be made to someone other than the insured, such as a mortgagee or judgment creditor, the reference to "[insured]" in the first paragraph of this instruction should be changed to refer to the person or entity to whom payment is to be made.

[3] Comment

The submission of proof of loss by the insured is not, by itself, sufficient to require payment within 60 days. Payment within 60 days is required only if both of the conditions described in the instruction have been satisfied [*Ins. Code §§ 2070.1, 2071*; see *Devonwood Condominium Owners Assn. v. Farmers Ins. Exchange* (2008) 162 Cal.App.4th 1498, 1506-1507, 77 Cal.Rptr.3d 88 (judgment in conformity with appraisal award made pursuant to *Ins. Code § 2071*, on which it is based, violates *Code Civ. Proc. § 1287.4*)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Insurance Law Claims & Contracts Good Faith & Fair Dealing Payments

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CHAPTER 23A Matthew Bender Insurance Contract Instructions *

Part B. CONTRACT ISSUES

5. Policy Conditions--First Party Property

1-23A California Forms of Jury Instruction MB 2300A.89

MB 2300A.89 Increase in Hazard

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Under the policy, [insurer] is not liable for any loss that occurs while the hazard insured against is increased due to means that are within the control or knowledge of [insured]. If you find that the loss did occur while the hazard insured against was increased due to means within [insured]'s control or knowledge, then [insured]'s claim is barred.

Authorities: *Ins. Code § 2071; Holz Rubber Co., Inc. v. American Star Ins. Co. (1975) 14 Cal.3d 45, 62 n.17, 120 Cal.Rptr. 415, 533 P.2d 1055 ; University of Judaism v. Transamerica Ins. Co. (1976) 61 Cal.App.3d 937, 941-942, 132 Cal.Rptr. 907 ; Gillis v. Sun Ins. Office, Ltd. (1965) 238 Cal.App.2d 408, 413, 47 Cal.Rptr. 868 .*

[2] Use of Instruction

This instruction should be used if the insurer contends that the insured acted, or omitted to act, in a way that increased the risk of loss.

[3] Comment

The standard fire insurance policy in *Ins. Code § 2071* provides that the insurer is not liable for loss occurring while the hazard is increased by any means within the control or knowledge of the insured. An unauthorized increase in the hazard insured against renders the policy either void or voidable at the insurer's option. Acts that increase the risk of loss may include allowing a new use of the property or some physical change to the property [see Appleman On Insurance Law and Practice, Ch. 137, § 2941 (Matthew Bender)]. Changes in ownership may, but do not necessarily,

constitute an increase in hazard [*University of Judaism v. Transamerica Ins. Co.* (1976) 61 Cal.App.3d 937, 941-942, 132 Cal.Rptr. 907 ; *Gillis v. Sun Ins. Office, Ltd.* (1965) 238 Cal.App.2d 408, 413, 47 Cal.Rptr. 868].

It is usually not necessary that the loss actually have resulted from the increase in hazard. Whether there has been an increase in the hazard to the insured premises is generally determined by a comparison with the conditions existing at the time the policy was written [see Appleman On Insurance Law and Practice, Ch. 137, § 2941 (Matthew Bender)].

In one case, for example, the jury was instructed to render their verdict in favor of the insurers and against the insured if they found that the insurers had established their defense of increase in hazard, which was based on a clause in the policy similar to the clause set out in *Ins. Code § 2071*. The California Supreme Court held that in finding for the insured, the jury necessarily determined that the insured's conduct did not increase the hazard assumed by the insurers under the policy [*Holz Rubber Co., Inc. v. American Star Ins. Co.* (1975) 14 Cal.3d 45, 62 n.17, 120 Cal.Rptr. 415, 533 P.2d 1055].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Insurance Law Claims & Contracts Policy Interpretation Exclusions

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CHAPTER 23A Matthew Bender Insurance Contract Instructions *

Part B. CONTRACT ISSUES

5. Policy Conditions--First Party Property

1-23A California Forms of Jury Instruction MB 2300A.90

MB 2300A.90 Failure to Communicate Material Facts

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Both [insurer] and [insured] are required to communicate to each other in good faith all the facts within their knowledge that are material to the insurance policy or that they believe to be material to the insurance policy.

If you find that [insured] [willfully] failed to communicate to [insurer] in good faith all the facts within [insured's] knowledge that were material to the insurance policy or that [insured] believed to be material to the policy, then [insurer] was entitled to reasonably deny [insured]'s claim on that basis.

Authorities: *Ins. Code §§ 332, 2071; Imperial Cas. & Indem. Co. v. Sogomonian (1988) 198 Cal.App.3d 169, 179-180, 184, 243 Cal.Rptr. 639 .*

[2] Use of Instruction

This instruction should be used together with the instructions in MB 2300A.51 and MB 2300A.91-MB 2300A.96 if the insurer contends that the insured withheld material information in applying for insurance or in making a claim for a loss. The "willfully" option should be included in cases that involve policies that otherwise require that any concealment has been intentional. However, this option should not be included if the policy is the standard fire insurance policy provided by *Ins. Code § 2071* and if the misrepresentation or omission occurred in connection with the application for the policy, because *Ins. Code § 2071* must be harmonized with the provisions of *Ins. Code § 331* and *Ins. Code § 339*, which allow rescission for merely negligent omissions or misrepresentations [*Mitchell v. United Nat'l Ins. Co. (2005) 127 Cal.App.4th 457, 463, 25 Cal.Rptr.3d 627*].

For related Judicial Council instructions, see [3][b], *below*.

LexisNexis Matthew Bender Expert Practice Tip--Information Available to Insurer: This instruction is based on *Ins. Code* § 332, which contains the additional requirement that the information be that "which the other [party] has not the means of ascertaining" [*Ins. Code* § 332]. In other words, the insurance company cannot simply rely on the insured to provide information if an investigation by the insurance company would yield the information. *By Ronald Oster*

[3] Comment

[a] Duty to Communicate

Each party to an insurance contract must communicate to the other, in good faith, all facts within that party's knowledge that are material to the contract, or that the party believes are material to the contract, and as to which that party makes no warranty, and that the other party has no way of ascertaining [*Ins. Code* § 332; *see Ins. Code* § 334 (definition of materiality); *see also MB 2300A.96*]. The concealment of material facts ordinarily results in a denial of liability, and the insured may not recover on its claim [*Imperial Cas. & Indem. Co. v. Sogomonian* (1988) 198 Cal.App.3d 169, 179-180, 184, 243 Cal.Rptr. 639].

The instruction in [1], *above*, offers the word "willfully" in brackets as an option that may be added when instructing on a policy that prohibits only the intentional failure to communicate material facts. However, this option should not be included if the policy is the standard fire insurance policy provided by *Ins. Code* § 2071 and if the misrepresentation or omission occurred in connection with the application for the policy, because *Ins. Code* § 2071 must be harmonized with the provisions of *Ins. Code* § 331 and *Ins. Code* § 339, which allow rescission for merely negligent omissions or misrepresentations [*Mitchell v. United Nat'l Ins. Co.* (2005) 127 Cal.App.4th 457, 463, 25 Cal.Rptr.3d 627].

For discussion of "fraud and concealment" provisions in property insurance policies, see MB 2300A 92[3].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 19, California Judicial Council Fraud or Deceit Instructions, and Ch. 23, *California Judicial Council Insurance Litigation Instructions*]:

CACI No. 1905 Definition of Important Fact/Promise

CACI No. 2321 Affirmative Defense--Insured's Breach of Duty to Cooperate in Defense

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Insurance Law Claims & Contracts Disclosure Obligations Fraudulent Intent Insurance Law Claims & Contracts Disclosure Obligations Materiality Insurance Law Claims & Contracts Estoppel & Waiver Misrepresentations

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CHAPTER 23A Matthew Bender Insurance Contract Instructions *

Part B. CONTRACT ISSUES

5. Policy Conditions--First Party Property

1-23A California Forms of Jury Instruction MB 2300A.91

MB 2300A.91 Misrepresentation or Concealment

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

If [insured] knowingly and willfully misrepresented or concealed any material fact concerning the policy or the loss, then [insured] is barred from recovery under the policy. This is true whether the concealment or misrepresentation occurred before the loss, concerns the cause of loss, or occurred in the course of pursuing the claim after the loss has occurred.

Authorities: *Ins. Code § 2071; Baldwin v. Bankers & Shippers Ins. Co. of N.Y. (9th Cir. 1955) 222 F.2d 953 ; Mitchell v. United Nat'l Ins. Co. (2005) 127 Cal.App.4th 457, 463, 25 Cal.Rptr.3d 627 ; Newman v. Firemen's Ins. Co. (1944) 67 Cal.App.2d 386, 399, 154 P.2d 451 ; Singleton v. Hartford Fire Ins. Co. (1932) 127 Cal.App. 635, 648-649, 16 P.2d 293 .*

[2] Use of Instruction

This instruction should be used together with the instructions in MB 2300A.50-MB 2300A.53 and MB 2300A.92-MB 2300A.95 if the insurer contends that the insured intentionally concealed or misrepresented material facts in connection with a loss. For an instruction regarding concealment or misrepresentation in the application for the policy, entitling the insurer to rescind, see *MB 2300A.51* and *MB 2300A.52*.

For related Judicial Council instructions, see [3][b], *below*.

[3] Comment

[a] Fraud and Concealment

First-party property insurance policies usually contain a clause that may be referred to as "the fraud and concealment provision" [see *Cummings v. Fire Ins. Exch.* (1988) 202 Cal.App.3d 1407, 1412, 249 Cal.Rptr. 568]. Modern homeowners' insurance forms state that insurers will not provide coverage for an insured who has "intentionally concealed or misrepresented any material fact or circumstance" or who has "made false statements or engaged in fraudulent conduct" that relates to the insurance [see California Insurance Law and Practice, Ch. 36 (Matthew Bender)]. The standard fire insurance form in *Ins. Code § 2071* similarly provides that the policy is void in the event of willful concealment or misrepresentation, fraud, or false swearing that concerns the insurance, the subject of the insurance, or the insured's interest in that insurance. However, the court of appeal has held that an insurer is entitled to rescind this type of policy if the insured negligently or unintentionally misrepresented a material fact in the application for the policy. The court found that *Ins. Code § 2071* must be harmonized with the provisions of *Ins. Code § 331* and *Ins. Code § 339*, which allow rescission for merely negligent omissions or misrepresentations [*Mitchell v. United Nat'l Ins. Co.* (2005) 127 Cal.App.4th 457, 463, 25 Cal.Rptr.3d 627 ; see MB 2300A.51, MB 2300A.52].

If the insured violated a policy provision of this kind by knowingly and willfully misrepresenting or concealing any material fact concerning the policy or the loss, then the insured is barred from recovery under the policy [*Hamilton v. State Farm Fire & Cas. Co.* (9th Cir. 2001) 270 F.3d 778, 780 ; *Imperial Cas. & Indem. Co. v. Sogomonian* (1988) 198 Cal.App.3d 169, 179-180, 184, 243 Cal.Rptr. 639 ; *American Home Assurance Co. v. Essy* (1960) 179 Cal.App.2d 19, 26, 3 Cal.Rptr. 586 ; *Newman v. Firemen's Ins. Co.* (1944) 67 Cal.App.2d 386, 399, 154 P.2d 451 ; *Singleton v. Hartford Fire Ins. Co.* (1932) 127 Cal.App. 635, 648-649, 16 P.2d 293].

The fraud or concealment can occur at any time before the loss, in causing the loss, or in pursuing the claim after the loss [see *Baldwin v. Bankers & Shippers Ins. Co. of N.Y.* (9th Cir. 1955) 222 F.2d 953]. It may take the form of a misstatement about prior loss history in the application for insurance, a phony claim, an intentionally caused loss (such as arson), untruthful statements in the proof of loss or an examination under oath, or willful inflation or overvaluation of a claim [*Hyland v. Millers Nat'l Ins. Co.* (9th Cir. 1937) 91 F.2d 735].

The fraudulent conduct must relate to material matters [*Leasure v. MSI Ins. Co.* (1998) 65 Cal.App.4th 244, 248, 75 Cal.Rptr.2d 900 ; *Olson v. Standard Marine Ins. Co., Ltd.* (1952) 109 Cal.App.2d 130, 137, 240 P.2d 379]. Misrepresentations that do not directly concern the policy, and occur after claims have been approved and paid, are not sufficient to void the policy [*Leasure v. MSI Ins. Co.* (1998) 65 Cal.App.4th 244, 249, 75 Cal.Rptr.2d 900].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 19, California Judicial Council Fraud or Deceit Instructions, and Ch. 23, *California Judicial Council Insurance Litigation Instructions*]:

CACI No. 1900 Intentional Misrepresentation

CACI No. 1901 Concealment

CACI No. 1904 Opinions as Statements of Fact

CACI No. 1905 Definition of Important Fact/Promise

CACI No. 2321 Affirmative Defense--Insured's Breach of Duty to Cooperate in Defense

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewInsurance LawClaims & ContractsCancellation &
NonrenewalMaterial MisrepresentationInsurance LawClaims & ContractsDisclosure ObligationsFraudulent
IntentInsurance LawClaims & ContractsDisclosure ObligationsMaterialityInsurance LawClaims & ContractsEstoppel &
WaiverMisrepresentations

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CHAPTER 23A Matthew Bender Insurance Contract Instructions *

Part B. CONTRACT ISSUES

5. Policy Conditions--First Party Property

1-23A California Forms of Jury Instruction MB 2300A.92

MB 2300A.92 Intent to Deceive

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

If [insured] knowingly and willfully made false statements about material facts, [insured's] intent to deceive is necessarily implied as the natural consequence of that act.

Authority: Singleton v. Hartford Fire Ins. Co. (1932) 127 Cal.App. 635, 648-649, 16 P.2d 293 .

[2] Use of Instruction

This instruction should be used with the instructions in MB 2300A.90 and MB 2300A.91 to explain that a required intent to deceive may be implied from knowing and willful false statements about material facts. For an instruction defining "material facts," see MB 2300A.95.

For related Judicial Council instructions, see [3][b], *below*.

[3] Comment

[a] Intent to Deceive

This instruction is based on an instruction upheld by the court of appeal [*Singleton v. Hartford Fire Ins. Co. (1932) 127 Cal.App. 635, 648-649, 16 P.2d 293*].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 19, California Judicial Council Fraud or Deceit Instructions, and Ch. 23, *California Judicial Council Insurance Litigation Instructions*]:

CACI No. 1900 Intentional Misrepresentation

CACI No. 1901 Concealment

CACI No. 1904 Opinions as Statements of Fact

CACI No. 1905 Definition of Important Fact/Promise

CACI No. 2321 Affirmative Defense--Insured's Breach of Duty to Cooperate in Defense

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Insurance Law Claims & Contracts Disclosure Obligations Fraudulent Intent Insurance Law Claims & Contracts Disclosure Obligations Materiality Insurance Law Claims & Contracts Estoppel & Waiver Misrepresentations

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CHAPTER 23A Matthew Bender Insurance Contract Instructions *

Part B. CONTRACT ISSUES

5. Policy Conditions--First Party Property

1-23A California Forms of Jury Instruction MB 2300A.93

MB 2300A.93 Definition of "False Representation"

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

A representation is false if the facts fail to correspond with its assertions.

Authority: *Ins. Code § 358.*

[2] Use of Instruction

This instruction should be used in conjunction with the instructions in MB 2300A.90 and MB 2300A.91 to define the term "false representation."

For related Judicial Council instructions, see [3][b], *below*.

[3] Comment

[a] False Representation

This instruction is based on the definition of "false representation" in *Ins. Code § 358*. For a discussion of whether intent is required with regard to false statements, see *MB 2300A.51 -MB2300A.52*, concerning the application for the policy, and *MB 2300A.91-MB 2300A.93* concerning claims under the policy.

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 19, *California Judicial Council Fraud or Deceit Instructions*, and Ch. 23, *California Judicial Council Insurance Litigation Instructions*]:

CACI No. 1900 Intentional Misrepresentation

CACI No. 1904 Opinions as Statements of Fact

CACI No. 1905 Definition of Important Fact/Promise

CACI No. 2321 Affirmative Defense--Insured's Breach of Duty to Cooperate in Defense

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewInsurance LawClaims & ContractsDisclosure ObligationsFraudulent IntentInsurance LawClaims & ContractsDisclosure ObligationsMaterialityInsurance LawClaims & ContractsEstoppel & WaiverMisrepresentations

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CHAPTER 23A Matthew Bender Insurance Contract Instructions *

Part B. CONTRACT ISSUES

5. Policy Conditions--First Party Property

1-23A California Forms of Jury Instruction MB 2300A.94

MB 2300A.94 Definition of "Concealment"

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Concealment is the neglect to communicate what a party knows and ought to communicate.

Authority: *Ins. Code § 330.*

[2] Use of Instruction

This instruction should be used to define the term "concealment" in conjunction with the instruction in MB 2300A.51 regarding concealment in the application for the policy, and the instructions in MB 2300A.90 and MB 2300A.91 regarding concealment in pursuing a claim.

For related Judicial Council instructions, see [3][b], *below*.

[3] Comment

[a] Concealment

This instruction is based on the definition of "concealment" in *Ins. Code § 330*.

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [

see Ch. 19, California Judicial Council Fraud or Deceit Instructions, and Ch. 23, *California Judicial Council Insurance Litigation Instructions*];

CACI No. 1901 Concealment

CACI No. 1905 Definition of Important Fact/Promise

CACI No. 2321 Affirmative Defense--Insured's Breach of Duty to Cooperate in Defense

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewInsurance LawClaims & ContractsDisclosure
ObligationsFraudulent IntentInsurance LawClaims & ContractsDisclosure ObligationsMaterialityInsurance LawClaims
& ContractsEstoppel & WaiverMisrepresentations

* Revised by Susan E. Firtch. Ms. Firtch is a partner at Burnham Brown in Oakland, California.



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California Forms of Jury Instruction

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CHAPTER 23A Matthew Bender Insurance Contract Instructions *

Part B. CONTRACT ISSUES

5. Policy Conditions--First Party Property

1-23A California Forms of Jury Instruction MB 2300A.95

MB 2300A.95 Definition of "Material Fact"

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

A fact is material if it concerns a subject reasonably relevant to the insurer's investigation, and if a reasonable insurer company would attach importance to that fact.

Authority: *Cummings v. Fire Ins. Exch.* (1988) 202 Cal.App.3d 1407, 1417, 249 Cal.Rptr. 568 .

[2] Use of Instruction

This instruction should be used in conjunction with the instructions in MB 2300A.90 and MB 2300A.91 to define the term "material fact" with relation to a loss claim. This is not a proper instruction for defining the materiality required in material misstatements on an application for insurance. The materiality of facts relating to a loss is determined by the objective standard of its effect on a reasonable insurer [*Cummings v. Fire Ins. Exch.* (1988) 202 Cal.App.3d 1407, 1414-1415 n.7, 249 Cal.Rptr. 568]. This differs from the subjective standard that applies to misrepresentations in an application for insurance [see MB 2300A.50 -MB 2300A.52].

For related Judicial Council instructions, see [3][b], *below*.

[3] Comment

[a] Materiality

A fact is material if it concerns a subject reasonably relevant to the insurance company's investigation, and if a

reasonable insurance company would attach importance to that fact. Materiality is a mixed question of law and fact that can be decided as a matter of law only if reasonable minds could not disagree on the materiality of a misrepresentation [*Cummings v. Fire Ins. Exch.* (1988) 202 Cal.App.3d 1407, 1417, 249 Cal.Rptr. 568].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 19, California Judicial Council Fraud or Deceit Instructions, and Ch. 23, *California Judicial Council Insurance Litigation Instructions*]:

CACI No. 1900 Intentional Misrepresentation

CACI No. 1901 Concealment

CACI No. 1904 Opinions as Statements of Fact

CACI No. 1905 Definition of Important Fact/Promise

CACI No. 2321 Affirmative Defense--Insured's Breach of Duty to Cooperate in Defense

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewInsurance LawClaims & ContractsDisclosure ObligationsFraudulent IntentInsurance LawClaims & ContractsDisclosure ObligationsMaterialityInsurance LawClaims & ContractsEstoppel & WaiverMisrepresentations

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CHAPTER 23A Matthew Bender Insurance Contract Instructions *

Part B. CONTRACT ISSUES

5. Policy Conditions--First Party Property

1-23A California Forms of Jury Instruction MB 2300A.96

MB 2300A.96 Arson: Burden of Proof

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

[Insurer] contends that the fire that caused [insured]'s loss was not accidental, but was the result of arson by or at the direction of [insured]. To prove arson by or at the direction of [insured], [insurer] must prove both of the following:

- 1. That the fire was an incendiary fire--that is, a fire that was intentionally set; and**
- 2. That the fire was caused by [insured] or by a person or persons acting for, on behalf of, or under the control of [insured].**

If you find that [insurer] has proved these two things, then the fire was the result of arson by [insured], and you must find for [insurer]. However, if you find that [insurer] has not proved these two things, then your verdict must be for the [insured] [optional (see Use of Instruction) on this issue].

***Authorities:** Don Burton, Inc. v. Aetna Life & Cas. Co. (9th Cir. 1978) 575 F.2d 702, 705 ; Federal Ins. Co. v. Wong (S.D. Cal. 1956) 137 F.Supp. 232, 233 .*

[2] Use of Instruction

This instruction should be used in any fire loss case in which the insurer contends that the loss was the result of arson by the insured or someone acting under the insured's direction. It should be used together with all of the instructions on arson in MB 2300A.97-MB 2300A.101. The optional bracketed phrase at the end of this instruction should be used if

there are other issues to be determined in addition to arson.

This instruction should be used with an instruction defining the burden of proof generally [*see, e.g., CACI No. 200*]. In this case, a burden of proof instruction should be used to explain the insurer's burden of proving the arson defense.

[3] Comment

First party property insurance policies generally do not specifically proscribe arson, but the Insurance Code provides that an insurer is not liable for losses caused by intentional acts of the insured [*Ins. Code* § 533]. An exclusion for intentional harm is therefore included as a part of every insurance policy by operation of law [*State Farm Fire & Cas. Co. v. Eddy* (1990) 218 Cal.App.3d 958, 969, 267 Cal.Rptr. 379 ; *Evans v. Pacific Indem. Co.* (1975) 49 Cal.App.3d 537, 540, 122 Cal.Rptr. 680]. To prevail on its affirmative defense of intentional burning (arson), the insurer need not prove the exact method by which the fire started, nor does it need to prove that the insured started the fire personally [*Don Burton, Inc. v. Aetna Life & Cas. Co.* (9th Cir. 1978) 575 F.2d 702, 705 ; *Federal Ins. Co. v. Wong* (S.D. Cal. 1956) 137 F.Supp. 232, 233 ; see MB 2300A.97 (persons acting on behalf of insured)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Insurance Law Claims & Contracts Estoppel & Waiver Burdens of Proof Insurance Law Property Insurance Coverage Arson & Intentional Loss Burdens of Proof Insurance Law Property Insurance Coverage Arson & Intentional Loss Evidence of Arson Insurance Law Property Insurance Coverage Real Property Fire Insurance

* Revised by Susan E. Firtch. Ms. Firtch is a partner at Burnham Brown in Oakland, California.



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CHAPTER 23A Matthew Bender Insurance Contract Instructions *

Part B. CONTRACT ISSUES

5. Policy Conditions--First Party Property

1-23A California Forms of Jury Instruction MB 2300A.97

MB 2300A.97 Arson: Persons Acting on Behalf of Insured

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

To find that [insured] willfully caused or procured the fire, you need not find that [insured] personally set the fire. It is enough that some other person acting with the knowledge and consent of [insured] intentionally or deliberately set fire to the insured structure and its contents.

Authority: *Don Burton, Inc. v. Aetna Life & Cas. Co.* (9th Cir. 1978) 575 F.2d 702, 706 .

[2] Use of Instruction

This instruction should be used if the insurer contends that the insured need not have personally set the fire to be barred from recovery.

[3] Comment

An insured need not set a fire personally to be barred from recovery under an arson defense [*Don Burton, Inc. v. Aetna Life & Cas. Co.* (9th Cir. 1978) 575 F.2d 702, 705 ; *Federal Ins. Co. v. Wong* (S.D. Cal. 1956) 137 F.Supp. 232, 233].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Insurance Law Claims & Contracts Estoppel & Waiver Burdens of Proof Insurance Law Property Insurance Coverage Arson & Intentional Loss Burdens of Proof Insurance

LawProperty InsuranceCoverageArson & Intentional LossEvidence of ArsonInsurance LawProperty
InsuranceCoverageReal PropertyFire Insurance

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CHAPTER 23A Matthew Bender Insurance Contract Instructions *

Part B. CONTRACT ISSUES

5. Policy Conditions--First Party Property

1-23A California Forms of Jury Instruction MB 2300A.98

MB 2300A.98 Arson: Circumstantial Evidence Allowed

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

The intentional act of [insured] in burning or causing or procuring the burning of the insured property may be proven by circumstantial evidence.

[OPTIONAL (See Use of Instruction)]

Proof by "circumstantial evidence" is proof by inferences that may reasonably be deduced from the facts proven.

[CONTINUE INSTRUCTION]

In deciding whether this fire was the result of arson, you should therefore consider all of the circumstances preceding and surrounding the origin of the fire and the aftermath of the fire.

Authority: Don Burton, Inc. v. Aetna Life & Cas. Co. (9th Cir. 1978) 575 F.2d 702, 706-707 .

[2] Use of Instruction

This instruction should be used if an arson defense is at issue to explain that arson may be proved by circumstantial evidence. A separate instruction defining circumstantial evidence may be preferable to the optional definition provided

in this instruction.

[3] Comment

Arson may be proved by circumstantial evidence, and, indeed, direct proof of arson is seldom available [*Don Burton, Inc. v. Aetna Life & Cas. Co.* (9th Cir. 1978) 575 F.2d 702, 706]. There are two stages to this proof. First, there must be proof that the fire was of incendiary origin. The testimony of fire department investigators and private experts may be used to eliminate accidental causes and to establish multiple sites of origin, a sign of arson [*Don Burton, Inc. v. Aetna Life & Cas. Co.* (9th Cir. 1978) 575 F.2d 702, 707 ; *see generally* California Insurance Law and Practice, Ch. 35, § 35.13[7][c] (Matthew Bender)]. Second, there must be evidence that the insured bears responsibility for the fire. Making this connection requires principally proof of motive and of opportunity [*Don Burton, Inc. v. Aetna Life & Cas. Co.* (9th Cir. 1978) 575 F.2d 702, 707 ; *see generally* California Insurance Law and Practice, Ch. 35, § 35.13[7][c] (Matthew Bender)]. The most prevalent motive evidence is evidence of the insured's poor financial condition [see, e.g., *Morris Stulsافت Found. v. Superior Court* (1966) 245 Cal.App.2d 409, 420, 54 Cal.Rptr. 12 ; *Don Burton, Inc. v. Aetna Life & Cas. Co.* (9th Cir. 1978) 575 F.2d 702, 707 ; *Boston Ins. Co. v. Jensen* (9th Cir. 1958) 259 F.2d 482, 484].

For an instruction on the findings of officials and experts as evidence of incendiary origin, see MB 2300A.99. For an instruction on the insured's motive and opportunity as evidence of responsibility for arson, see MB 2300A.100.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewEvidenceProcedural ConsiderationsCircumstantial & Direct EvidenceInsurance LawProperty InsuranceCoverageArson & Intentional LossBurdens of ProofInsurance LawProperty InsuranceCoverageArson & Intentional LossEvidence of ArsonInsurance LawProperty InsuranceCoverageReal PropertyFire Insurance

* Revised by Susan E. Firtch. Ms. Firtch is a partner at Burnham Brown in Oakland, California.



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CHAPTER 23A Matthew Bender Insurance Contract Instructions *

Part B. CONTRACT ISSUES

5. Policy Conditions--First Party Property

1-23A California Forms of Jury Instruction MB 2300A.99

MB 2300A.99 Arson: Findings of Officials and Experts

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

In determining whether the fire was intentionally set, you may consider whether fire officials and experts ruled out any accidental causes for the fire.

Authority: Don Burton, Inc. v. Aetna Life & Cas. Co. (9th Cir. 1978) 575 F.2d 702, 707 .

[2] Use of Instruction

This instruction should be used, if the insurer raises an arson defense, to explain that the jury may consider the testimony of fire officials and other experts in determining the fire's cause.

This instruction should be used with the instructions in MB 2300A.96-MB 2300A.101.

[3] Comment

In a case before the federal courts, the trial court had admitted expert testimony that the fire was of incendiary origin. The witnesses were a fire department investigator and a private fire investigation expert. The Ninth Circuit relied on this evidence in finding that there was a triable issue of fact on the insurer's arson defense and that the failure to properly instruct the jury on this point was therefore not harmless error [*Don Burton, Inc. v. Aetna Life & Cas. Co. (9th Cir. 1978) 575 F.2d 702, 707*].

For further discussion of proof of arson, see *MB 2300A.98[3]*.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewEvidenceTestimonyExpertsAdmissibilityInsurance
LawProperty InsuranceCoverageArson & Intentional LossBurdens of ProofInsurance LawProperty
InsuranceCoverageArson & Intentional LossEvidence of ArsonInsurance LawProperty InsuranceCoverageReal
PropertyFire Insurance

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CHAPTER 23A Matthew Bender Insurance Contract Instructions *

Part B. CONTRACT ISSUES

5. Policy Conditions--First Party Property

1-23A California Forms of Jury Instruction MB 2300A.100

MB 2300A.100 Arson: Factors to Consider

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

In determining whether the fire was caused by or procured by [insured], you may consider whether [insured] had a sufficient motive and opportunity to set the fire or cause it to be set. In making your decision on motive and opportunity, you may consider all of the following factors:

- 1. [Insured]'s financial status;**
- 2. The nature and extent of [insured]'s debts and liabilities;**
- 3. [Insured]'s potential for profit or loss from the fire; and**
- 4. Whether there is sufficient information connecting [insured] with the fire.**

Authorities: *Don Burton, Inc. v. Aetna Life & Cas. Co.* (9th Cir. 1978) 575 F.2d 702, 707 ; *Morris Stulsaf Found. v. Superior Court* (1966) 245 Cal.App.2d 409, 420, 54 Cal.Rptr. 12 .

[2] Use of Instruction

This instruction should be used, if the insurer raises an arson defense, to explain the factors that the jury may consider in determining the insured's motive and opportunity to set the fire.

[3] Comment

In a case before the federal courts, the Ninth Circuit found that there was "ample evidence of motive" on the part of the insured to set the fire at issue. The court noted that the insured was in serious financial trouble, had substantial debts that he could not pay, and had recently signed an agreement to liquidate and terminate his business. There was also evidence that only the insured and his employees and family members had keys to the store that burned and that only the insured and those persons had been at the store before the fire [*Don Burton, Inc. v. Aetna Life & Cas. Co.* (9th Cir. 1978) 575 F.2d 702, 707 ; see *Morris Stulsaft Found. v. Superior Court* (1966) 245 Cal.App.2d 409, 420, 54 Cal.Rptr. 12 (financial condition as evidence of motive for arson)].

For further discussion of proof of arson, see MB 2300A.98[3].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewInsurance LawProperty InsuranceCoverageArson & Intentional LossEvidence of ArsonInsurance LawProperty InsuranceCoverageReal PropertyFire Insurance

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CHAPTER 23A Matthew Bender Insurance Contract Instructions *

Part B. CONTRACT ISSUES

5. Policy Conditions--First Party Property

1-23A California Forms of Jury Instruction MB 2300A.101

MB 2300A.101 Arson: Characteristics of Fire

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

To establish that the fire was deliberately and intentionally set, [insurer] is not required to establish the exact method by which the fire started. In determining whether or not the fire was intentionally or deliberately set, you may consider all of the following factors:

1. The pattern of the burn;
2. The nature and the course of the spread of the fire;
3. The rapidity of the spread of the fire; and
4. The testimony of experts.

Authority: *Don Burton, Inc. v. Aetna Life & Cas. Co.* (9th Cir. 1978) 575 F.2d 702, 705 .

[2] Use of Instruction

This instruction should be used, if the insurer contends that a fire loss was the result of arson by the insured or someone acting under the insured's direction, to explain that the insurer is not required to prove exactly how the fire was started. It should be used with the introductory instruction on arson in MB 2300A.96.

[3] Comment

To establish that a fire was deliberately set, an insurer need not prove exactly how the fire started. In determining whether or not the fire was deliberately set, the jury may consider the factors listed in [1], *above* [*Don Burton, Inc. v. Aetna Life & Cas. Co. (9th Cir. 1978) 575 F.2d 702, 705*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewInsurance LawProperty InsuranceCoverageArson & Intentional LossEvidence of ArsonInsurance LawProperty InsuranceCoverageReal PropertyFire Insurance

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CHAPTER 23A Matthew Bender Insurance Contract Instructions *

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1-23A California Forms of Jury Instruction MB 2300A.102-MB 2300A.109

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MB 2300A.102Reserved for Future Use



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CHAPTER 23A Matthew Bender Insurance Contract Instructions *

Part B. CONTRACT ISSUES

6. Policy Conditions: General Liability

*1-23A California Forms of Jury Instruction MB 2300A.110***MB 2300A.110 Late Notice****[1] Instruction**

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

[Insurer] is not required to provide coverage to [insured] if [insured] violated the part of the insurance contract that required [insured] to give timely notice of any claims against [insured]. To prove this violation, [insurer] has the burden of proving all of the following:

1. [Insured] was late in notifying [insurer] of the underlying claim;
2. [Insurer] promptly and specifically objected that [insured's] notice was untimely; and
3. [Insurer] actually suffered substantial prejudice as a result of this late notification.

"Substantial prejudice" means that the lack of timely notice had an adverse effect on [insurer's] ability to investigate the underlying claim and to prepare a defense to the underlying claim.

Authorities: *Ins. Code* § 554; *Clemmer v. Hartford Ins. Co.* (1978) 22 Cal.3d 865, 881-883, 151 Cal.Rptr. 285, 587 P.2d 1098 ; *Campbell v. Allstate Ins. Co.* (1963) 60 Cal.2d 303, 305-307, 32 Cal.Rptr. 827, 384 P.2d 155 ; *Collin v. American Empire Ins. Co.* (1994) 21 Cal.App.4th 787, 819, 26 Cal.Rptr.2d 391 ; *Xebec Dev. Partners, Ltd. v. National Union Fire Ins. Co.* (1993) 12 Cal.App.4th 501, 532-533, 15 Cal.Rptr.2d 726 ; *Shell Oil Co. v. Winterthur Swiss Ins. Co.* (1993) 12 Cal.App.4th 715, 763, 15 Cal.Rptr.2d 815 ; *Industrial Indem. v. Superior Court* (1990) 224 Cal.App.3d 828, 830-832, 275 Cal.Rptr. 218 ; *Pacific Employers Ins. Co. v. Superior Court* (1990) 221 Cal.App.3d 1348, 1357, 270 Cal.Rptr. 779 ; *Downey Savings & Loan Assn. v. Ohio Casualty Ins. Co.* (1987) 189 Cal.App.3d 1072, 1089, 234

Cal.Rptr. 835 ; Northwestern Title Sec. Co. v. Flack (1970) 6 Cal.App.3d 134, 141, 85 Cal.Rptr. 693 ; Hanover Ins. Co. v. Carroll (1966) 241 Cal.App.2d 558, 566-571, 50 Cal.Rptr. 704 .

[2] Use of Instruction

This instruction should be used if the insurance company raises the defense of the claim's late notice under an occurrence-based third-party liability policy.

If used to instruct on a claim's late notice under a "claims made" policy, this instruction should be modified to omit any reference to prejudice [see [3][a], *below*, regarding "claims made" policies and prejudice requirement].

For a general instruction on the insurer's burden of proof, see *MB 2300A.21*.

For an instruction on late notice under a first-party property policy, see *MB 2300A.80*. For an instruction defining the burden of proof generally, see *CACI No. 200*.

For related Judicial Council instructions, see [3][e], *below*.

[3] Comment

[a] Substantial Prejudice Required Only for Occurrence-Based Policies

Insurance policies typically require that the insured provide prompt notice of any claim against it. By statute, an insurer is precluded from asserting late notice as a defense unless it promptly and specifically objects to the late notice [*Ins. Code § 554*]. With regard to occurrence-based policies, an insurer may not rely on the failure of the insured to give the required notice unless the insurer can show substantial prejudice [*Sequoia Ins. Co. v. Royal Ins. Co. of Am. (9th Cir. 1992) 971 F.2d 1385, 1394 ; Fidelity Sav. & Loan Ass'n v. Aetna Life & Cas. Co. (9th Cir. 1981) 647 F.2d 933, 938 ; Campbell v. Allstate Ins. Co. (1963) 60 Cal.2d 303, 307, 32 Cal.Rptr. 827, 384 P.2d 155 ; Xebec Dev. Partners, Ltd. v. National Union Fire Ins. Co. (1993) 12 Cal.App.4th 501, 532-533, 15 Cal.Rptr.2d 726]*.

Substantial prejudice means that the insurer must show that there was a "substantial likelihood" that it would have settled the claim for less or taken steps that would have reduced or eliminated the insured's liability [*Shell Oil Co. v. Winterthur Swiss Ins. Co. (1993) 12 Cal.App.4th 715, 763, 15 Cal.Rptr.2d 815]*. The existence of substantial prejudice is generally a question of fact for the jury to determine [*Sequoia Ins. Co. v. Royal Ins. Co. of Am. (9th Cir. 1992) 971 F.2d 1385, 1394 ; Xebec Dev. Partners, Ltd. v. National Union Fire Ins. Co. (1993) 12 Cal.App.4th 501, 532-533, 15 Cal.Rptr.2d 726]*. In one case, for example, the jury was given a special findings form, and it found that the insured had failed to give the insurer notice of the claim. After being instructed that the insurer had the burden of showing that it was substantially prejudiced by this lack of notice, the jury explicitly refused to find substantial prejudice [*Xebec Dev. Partners, Ltd. v. National Union Fire Ins. Co. (1993) 12 Cal.App.4th 501, 532-533, 15 Cal.Rptr.2d 726]*.

[b] Substantial Prejudice Not Required for "Claims Made" Policies

Although there is some authority to the contrary [see *Mt. Hawley Ins. v. Federal Sav. & Loan Ins. Corp. (C.D. Cal. 1987) 695 F.Supp. 469, 480 ; Northwestern Title Sec. Co. v. Flack (1970) 6 Cal.App.3d 134, 143-144, 85 Cal.Rptr. 693]*, the majority of California courts have held that no prejudice need be shown under a "claims made" policy. To require a showing of prejudice under a "claims made" policy would materially alter the insurer's risk and effectively convert the policy into an occurrence-based policy [*Helfand v. National Union Fire Ins. Co. (1992) 10 Cal.App.4th 869, 888, 13 Cal.Rptr.2d 295 ; Slater v. Lawyers' Mut. Ins. Co. (1991) 227 Cal.App.3d 1415, 1422-1424, 278 Cal.Rptr. 479 ; Industrial Indem. v. Superior Court (1990) 224 Cal.App.3d 828, 830-832, 275 Cal.Rptr. 218 ; Pacific Employers Ins. Co. v. Superior Court (1990) 221 Cal.App.3d 1348, 1358, 270 Cal.Rptr. 779]*.

"Claims made" policies may be further classified as either "claims made and reported" policies, which require that claims be reported within the policy period, or general "claims made" policies, which contain no such reporting requirement. General "claims made" policies often require notice "as soon as practicable." Some courts have distinguished a "claims made and reported" policy from a general "claims made" policy [see, e.g., *Pension Trust Fund for Operating Eng'rs v. Federal Ins. Co.* (9th Cir. 2002) 307 F.3d 944, 956-957 ; *Xebec Dev. Partners, Ltd. v. Nat'l Union Fire Ins. Co.* (1993) 12 Cal.App.4th 501, 532-533, 15 Cal.Rptr.2d 726 ; *Pacific Employers Ins. Co. v. Superior Court* (1990) 221 Cal.App.3d 1348, 1358, 270 Cal.Rptr. 779]. Although the California Supreme Court has not addressed whether the notice-prejudice rule applies to a "claims made" policy with no reporting requirement, the court of appeal has found the notice-prejudice rule appropriate in cases involving this type of policy [see *Xebec Dev. Partners, Ltd. v. Nat'l Union Fire Ins. Co.* (1993) 12 Cal.App.4th 501, 532-533, 15 Cal.Rptr.2d 726 ; see also *Pension Trust Fund v. Fed. Ins. Co.* (9th Cir. 2002) 307 F.3d 944, 956].

[c] Burden of Proof

The insurance company bears the burden of proof on the issue of prejudice [*Clemmer v. Hartford Ins. Co.* (1978) 22 Cal.3d 865, 881-883, 151 Cal.Rptr. 285, 587 P.2d 1098 ; *Campbell v. Allstate Ins. Co.* (1963) 60 Cal.2d 303, 305-307, 32 Cal.Rptr. 827, 384 P.2d 155 ; *Select Ins. Co. v. Superior Court* (1990) 226 Cal.App.3d 631, 636, 276 Cal.Rptr. 598 ; *Downey Savings & Loan Assn. v. Ohio Casualty Ins. Co.* (1987) 189 Cal.App.3d 1072, 1089, 234 Cal.Rptr. 835 ; *Hanover Ins. Co. v. Carroll* (1966) 241 Cal.App.2d 558, 566-571, 50 Cal.Rptr. 704 ; see generally Long, Law of Liability Insurance, Vol. 2, § 13.05 (Matthew Bender)]. An insurer may meet this burden by proving, for example, that given timely notice, it would have settled the underlying lawsuit for less than the amount of the judgment rendered against the insured [*Select Ins. Co. v. Superior Court* (1990) 226 Cal.App.3d 631, 638, 276 Cal.Rptr. 598]. Substantial prejudice was also shown in a case in which a subsequent default judgment against the insured was for more than the actual value of the insured property, and the holder of the default judgment ultimately conceded that it had no evidence of liability [*Collin v. American Empire Ins. Co.* (1994) 21 Cal.App.4th 787, 819-820, 26 Cal.Rptr.2d 391].

There is no presumption of prejudice from late notice [*Clemmer v. Hartford Ins. Co.* (1978) 22 Cal.3d 865, 881-883, 151 Cal.Rptr. 285, 587 P.2d 1098]. Ordinarily, the existence of prejudice is a question of fact, although in appropriate circumstances it may be established as a matter of law [*Northwestern Title Sec. Co. v. Flack* (1970) 6 Cal.App.3d 134, 141, 85 Cal.Rptr. 693].

[d] Waiver of Late Notice Defense by Denial of Coverage

An insurer generally waives the late notice defense if it denies liability on the ground that there is no coverage under the policy [*Downey Savings & Loan Assn. v. Ohio Casualty Ins. Co.* (1987) 189 Cal.App.3d 1072, 1089, 234 Cal.Rptr. 835 ; *CNA Cas. of Cal. v. Seaboard Sur. Co.* (1986) 176 Cal.App.3d 598, 617, 222 Cal.Rptr. 276 ; *Walters v. American Ins. Co.* (1960) 185 Cal.App.2d 776, 787, 8 Cal.Rptr. 665]. The rationale for this rule is that the insurer has demonstrated, by denying coverage, that compliance with the notice requirement would not have altered its response to the claim. However, if this rationale does not apply, the rule does not apply. In one case, for example, the insured did not notify the insurer of the claim against him until after a substantial judgment on that claim. The insurer responded by simultaneously denying coverage and asserting the failure to provide timely notice. On these facts, the court of appeal vacated the summary judgment for the insured, finding that the insurer might have responded differently if it had received timely notice and that it might be able to show substantial prejudice [*Select Ins. Co. v. Superior Court* (1990) 226 Cal.App.3d 631, 637-639, 276 Cal.Rptr. 598].

[e] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 23, *California Judicial Council Insurance Litigation Instructions*]:

CACI No. 2320 Affirmative Defense--Failure to Provide Timely Notice

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewInsurance LawClaims & ContractsEstoppel & WaiverDelaysInsurance LawClaims & ContractsNotice to InsurersPrejudice to InsurerInsurance LawGeneral Liability InsuranceCoverageGeneral OverviewInsurance LawGeneral Liability InsuranceObligationsNotice

* Revised by Susan E. Firtch. Ms. Firtch is a partner at Burnham Brown in Oakland, California.



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CHAPTER 23A Matthew Bender Insurance Contract Instructions *

Part B. CONTRACT ISSUES

6. Policy Conditions: General Liability

1-23A California Forms of Jury Instruction MB 2300A.111-MB 2300A.119

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MB 2300A.111Reserved for Future Use



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California Forms of Jury Instruction

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CHAPTER 23A Matthew Bender Insurance Contract Instructions *

Part B. CONTRACT ISSUES

7. Exclusions

1-23A California Forms of Jury Instruction MB 2300A.120

MB 2300A.120 Right of Insurer to Limit Coverage

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

An insurer has the right to limit coverage in plain and understandable language, and an insurer is free to limit the character and extent of the risk that it undertakes to assume. The right of an insurer to limit its contract of coverage may not be questioned unless the limitation is prohibited by public policy or by statute.

Authorities: *Hackethal v. National Cas. Co.* (1987) 189 Cal.App.3d 1102, 1109, 234 Cal.Rptr. 853 ; *State Farm Mut. Auto. Ins. Co. v. MacKenzie* (1978) 85 Cal.App.3d 727, 732, 149 Cal.Rptr. 747 .

[2] Use of Instruction

This instruction should be used if the insurer asserts one or more policy exclusions as a defense to coverage. It should be used together with an instruction specific to the particular exclusion or exclusions asserted. For instructions regarding specific exclusions, see *MB 2300A.121 -MB 2300A.125*.

[3] Comment

An insurance policy is a contract. Consistent with the freedom to contract in the first instance, the parties to an insurance contract are generally free to limit the obligations that the insurer assumes, provided that the agreement does not contravene public policy [*Hackethal v. National Cas. Co.* (1987) 189 Cal.App.3d 1102, 1109, 234 Cal.Rptr. 853 ; *State Farm Mut. Auto. Ins. Co. v. MacKenzie* (1978) 85 Cal.App.3d 727, 732, 149 Cal.Rptr. 747 ; see *Uteley v. Allstate Ins. Co.* (1993) 19 Cal.App.4th 815, 823, 24 Cal.Rptr.2d 1 (resident relative exclusion in homeowner's policy did not violate public policy)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewInsurance LawGeneral Liability
InsuranceCoverageGeneral OverviewInsurance LawGeneral Liability InsuranceExclusionsGeneral OverviewInsurance
LawGeneral Liability InsuranceExclusionsBurdens of Proof

* Revised by Susan E. Firtch. Ms. Firtch is a partner at Burnham Brown in Oakland, California.



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CHAPTER 23A Matthew Bender Insurance Contract Instructions *

Part B. CONTRACT ISSUES

7. Exclusions

1-23A California Forms of Jury Instruction MB 2300A.121

MB 2300A.121 Efficient Proximate Cause

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

You have heard evidence in this case that more than one [event/peril] may have [caused/contributed to/aggravated] [insured]'s loss.

The "efficient proximate cause" of a loss is the cause that was the most important event in producing the loss. Under [insurer]'s policy, the loss is covered only if you find that the most important cause of the loss was [an event/a peril] that is covered under the policy.

Authorities: *Ins. Code § 530; Garvey v. State Farm Fire & Cas. Co. (1989) 48 Cal.3d 395, 402-404, 412-413, 257 Cal.Rptr. 292, 770 P.2d 704 ; Sabella v. Wisler (1963) 59 Cal.2d 21, 31-33, 27 Cal.Rptr. 689, 377 P.2d 889 ; Alex R. Thomas & Co. v. Mutual Serv. Cas. Ins. Co. (2002) 98 Cal.App.4th 66, 72, 119 Cal.Rptr.2d 394 ; Pieper v. Commercial Underwriters Ins. Co. (1997) 59 Cal.App.4th 1008, 1013, 69 Cal.Rptr.2d 551 ; Brian Chuchua's Jeep, Inc. v. Farmers Ins. Group (1992) 10 Cal.App.4th 1579, 1581-1583, 13 Cal.Rptr.2d 444 ; Howell v. State Farm Fire & Cas. Co. (1990) 218 Cal.App.3d 1446, 1456-1458, 267 Cal.Rptr. 708 .*

[2] Use of Instruction

This instruction should be used in an action between an insured and the insured's own insurance carrier if more than one cause contributed to a loss and if some causes are excluded from coverage while others are not. For example, this instruction is appropriate in a case in which a fire (nonexcluded peril) destroys vegetation and a landslide later occurs during heavy rains (excluded peril). However, the instruction should be used only in first-party actions and should not be used in actions involving third-party claims [see [3][a], below].

For related Judicial Council instructions, see [3][b], *below*.

[3] Comment

[a] Losses Attributable to More Than One Cause

California law governing coverage for losses attributable to more than one cause has undergone significant changes over the years. In 1973, the California Supreme Court adopted the "concurrent causation" analysis for third-party cases (cases in which a third party sues the insured for injuries or property damage). Under that analysis, the insured's liability policy covered the damages if an insured risk constituted a "concurrent proximate cause" of the injuries, even if other excluded risks also were concurrent proximate causes [*State Farm Mut. Auto. Ins. Co. v. Partridge* (1973) 10 Cal.3d 94, 104-105, 109 Cal.Rptr. 811, 514 P.2d 123].

However, in 1989 the Supreme Court rejected application of the concurrent causation analysis in first-party cases (cases in which an insured sues the insured's own insurer to recover damages under the policy) in favor of the "efficient proximate cause" analysis, sometimes referred to as the "predominant cause" analysis. In this particular case, the insureds claimed that an addition pulled away from the main portion of their house because of the concurrence of negligent construction (covered) and earth movement (excluded). The Court directed the trial court to determine the predominant cause of the loss. The Court held that the mere fact that a cause is concurrent does not by itself provide coverage if the other concurrent cause is excluded. Instead, coverage exists only if the covered concurrent cause is the "efficient proximate cause," or predominant cause, of the loss [*Garvey v. State Farm Fire & Cas. Co.* (1989) 48 Cal.3d 395, 402-404, 412-413, 257 Cal.Rptr. 292, 770 P.2d 704 ; see *Sabella v. Wisler* (1963) 59 Cal.2d 21, 31-33, 27 Cal.Rptr. 689, 377 P.2d 889 ; *Brian Chuchua's Jeep, Inc. v. Farmers Ins. Group* (1992) 10 Cal.App.4th 1579, 1581-1583, 13 Cal.Rptr.2d 444].

In reaching this conclusion, the Court did not wholly abolish the concurrent causation analysis, but rather limited its use to third-party cases [*Garvey v. State Farm Fire & Cas. Co.* (1989) 48 Cal.3d 395, 407-408, 412, 257 Cal.Rptr. 292, 770 P.2d 704]. The Court left the issue of the continuing application of the "concurrent causation" analysis in the liability (third-party) context to future decisions [see *Garvey v. State Farm Fire & Cas. Co.* (1989) 48 Cal.3d 395, 409 n.8, 257 Cal.Rptr. 292, 770 P.2d 704]. Subsequent decisions have continued to apply the concurrent proximate cause analysis in third-party cases [see, e.g., *Gurrola v. Great Sw. Ins. Co.* (1993) 17 Cal.App.4th 65, 69, 21 Cal.Rptr.2d 749]. Therefore, this instruction is appropriate only in first-party actions and should not be used in cases involving third-party claims.

For the efficient proximate cause theory to apply, there must be two separate or distinct perils that could each, under some circumstances, have occurred independently of the other and caused damage [*Roberts v. Assurance Co. of America* (2008) 163 Cal.App.4th 1398, 1409, 78 Cal.Rptr.3d 361 ; *DeBruyn v. Superior Court* (2008) 158 Cal.App.4th 1213, 1223, 70 Cal.Rptr.3d 652]. Therefore, if the damage is caused by a single cause, albeit one susceptible to various characterizations, the efficient proximate cause analysis has no application [*Roberts v. Assurance Co. of America* (2008) 163 Cal.App.4th 1398, 1410, 78 Cal.Rptr.3d 361 ; *Pieper v. Commercial Underwriters Ins. Co.* (1997) 59 Cal.App.4th 1008, 1020-1021, 69 Cal.Rptr.2d 551 ; *Chadwick v. Fire Ins. Exch.* (1993) 17 Cal.App.4th 1112, 1117, 21 Cal.Rptr.2d 871].

Insurers may not contract around the proximate cause doctrine through sweeping language that would have rendered policies' coverage terms virtually illusory [see *Julian v. Hartford Underwriters Ins. Co.* (2005) 35 Cal.4th 747, 756, 27 Cal.Rptr.3d 648, 110 P.3d 903 ; see also *Garvey v. State Farm Fire & Cas. Co.* (1989) 48 Cal.3d 395, 412-413, 257 Cal.Rptr. 292, 770 P.2d 704 ; *Howell v. State Farm Fire & Cas. Co.* (1990) 218 Cal.App.3d 1446, 1454, 1459, 267 Cal.Rptr. 708]. On the other hand, an insurance policy may exclude coverage for particular injuries or damages in certain specified circumstances while providing coverage in other circumstances [*Julian v. Hartford Underwriters Ins.*

*Co. (2005) 35 Cal.4th 747, 759, 27 Cal.Rptr.3d 648, 110 P.3d 903 ; Freedman v. State Farm Ins. Co. (2009) 173 Cal.App.4th 957, 962, 93 Cal.Rptr.3d 296 ; DeBruyn v. Superior Court (2008) 158 Cal.App.4th 1213, 1220, 70 Cal.Rptr.3d 652] . An insurer may limit coverage to some, but not all, manifestations of a given peril, as long as a reasonable insured would readily understand from the policy language which perils are covered and which are not [*Julian v. Hartford Underwriters Ins. Co. (2005) 35 Cal.4th 747, 759, 27 Cal.Rptr.3d 648, 110 P.3d 903 ; DeBruyn v. Superior Court (2008) 158 Cal.App.4th 1213, 1223, 70 Cal.Rptr.3d 652] .**

For further discussion, see Levy et al., *California Torts, Ch. 80, Overview of Insurance Contracts, § 80.13* (Matthew Bender).

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 23, *California Judicial Council Insurance Litigation Instructions*]:

CACI No. 2306, Covered and Excluded Risks--Predominant Cause of Loss

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Insurance Law General Liability
Insurance Coverage General Overview Insurance Law General Liability Insurance Coverage Concurrent Causes
Doctrine Torts Negligence Causation Proximate Cause General Overview

* Revised by Susan E. Firtch. Ms. Firtch is a partner at Burnham Brown in Oakland, California.



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CHAPTER 23A Matthew Bender Insurance Contract Instructions *

Part B. CONTRACT ISSUES

7. Exclusions

1-23A California Forms of Jury Instruction MB 2300A.122

MB 2300A.122 Insurer's Burden of Proof on Expected or Intended Damage

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

The policy does not apply to damage that is expected or intended from the standpoint of the insured.

[CHOOSE FROM THE FOLLOWING (See Use of Instruction)]

[Insured] has the burden of proving by a preponderance of the evidence that the _____ [specify harm or damage at issue] was not expected or intended from [insured]'s standpoint.

[OR]

[Insurer] has the burden of proving by a preponderance of the evidence that the _____ [specify harm or damage at issue] was expected or intended from [insured]'s standpoint.

[THE FOLLOWING APPLIES TO BOTH CHOICES ABOVE]

Injury or damage is expected or intended if:

1. [Insured] knew or believed its conduct was substantially certain or highly likely to harm the claimant in the

underlying lawsuit; or

2. [Insured] intended to harm the claimant in the underlying lawsuit;

It does not matter if the harm that resulted was of a different type or nature than the harm that was intended.

If [insured] did not intend to commit the act that caused the harm, then it cannot be said that [insured] expected or intended the resulting harm. If [insured] did commit that act intentionally, then you must determine whether [insured] expected or intended the resulting harm.

Authorities: *Montrose Chem. Corp. v. Superior Court* (1993) 6 Cal.4th 287, 304-305 ; *Shell Oil Co. v. Winterthur Swiss Ins. Co.* (1993) 12 Cal.App.4th 715, 749, 15 Cal.Rptr.2d 815 ; *United Pac. Ins. Co. v. McGuire Co.* (1991) 229 Cal.App.3d 1560, 1565-1567, 281 Cal.Rptr. 375 ; *United States Fid. & Guar. Co. v. American Employer's Ins. Co.* (1984) 159 Cal.App.3d 277, 281 n.1, 288-291, 205 Cal.Rptr. 460 .

[2] Use of Instruction

This instruction should be used if the insurer raises the issue of "expected or intended" language in a liability policy. The instruction should be used with the instruction in MB 2300A.123 defining "expected" and "intended."

For a general instruction on the insurer's burden of proof, see MB 2300A.21. For an instruction defining the burden of proof generally, see CACI No. 200.

LexisNexis Matthew Bender Expert Practice Tip--Placement of Language May Determine Burden of Proof: The burden of proof depends on whether the "expected or intended" language is included within the definition of "occurrence" (pre-1986 CGL policies) or is contained in an exclusion for expected or intended property damage (post-1986 policies). The portion of the instruction providing that the insurer has the burden of proof should be used if the insurer is asserting that the exclusion for "expected or intended" damage applies. Because there is a split of authority as to whether the insurer or the insured bears the burden of proof if the language is in the insuring agreement [see [3], below], that issue will likely be decided by the trial judge on submission of proposed jury instructions. *By Susan E. Firtch*

[3] Comment

Typically, coverage does not apply to bodily injury or property damage that is expected or intended from the insured's standpoint [see California Insurance Law and Practice, Ch. 49 (Matthew Bender); see also *United States Fid. & Guar. Co. v. American Employer's Ins. Co.* (1984) 159 Cal.App.3d 277, 281 n.1, 205 Cal.Rptr. 460 (language of "expected or intended" exclusion in homeowner's policy)].

Prior to 1986, standard CGL policy forms included the words "property damage neither expected nor intended from the standpoint of the insured" within the definition of "occurrence" see [*Montrose Chem. Corp. v. Admiral Ins. Co.* (1995) 10 Cal.4th 645, 672]. Post-1986 CGL policies no longer contain the "expected or intended" language within the definition of "occurrence," but contain a separate exclusion for "property damage expected or intended from the standpoint of the insured."

There is a split in California law as to which party bears the burden of proof when the "expected or intended" language is part of the definition of "occurrence." Some courts hold that the burden lies with the insured because the definition is part of the insuring agreement, and the insured bears the burden of showing that the claim falls within the scope of that agreement [*FMC Corp. v. Plaisted & Cos.* (1998) 61 Cal.App.4th 1132, 1159, 72 Cal.Rptr.2d 467 ; *Royal Globe Ins. Co. v. Whitaker* (1986) 181 Cal.App.3d 532, 537, 226 Cal.Rptr. 435 ;]. Other courts hold that the use of "expected or

intended" in the definition is exclusionary language, and that the insurer has the burden of proving that the exclusion applies [*United Pac. Ins. Co. v. McGuire Co.* (1991) 229 Cal.App.3d 1560, 1565, 281 Cal.Rptr. 375 ; *Armstrong World Indus., Inc. v. Aetna Cas. & Sur. Co.* (1996) 45 Cal.App.4th 1, 77, 52 Cal.Rptr.2d 690]. Because the insurer bears the burden of proving an exclusion, the burden lies with the insurer under post-1986 policies containing an exclusion for "expected or intended" damage.

The exclusionary effect of the phrase "expected or intended" is somewhat parallel to, but presumably broader than, the statutory exclusion for willful acts of the insured in *Ins. Code* § 533 [*Shell Oil Co. v. Winterthur Swiss Ins. Co.* (1993) 12 Cal.App.4th 715, 749, 15 Cal.Rptr.2d 815 ; *United Pac. Ins. Co. v. McGuire Co.* (1991) 229 Cal.App.3d 1560, 1566-1567, 281 Cal.Rptr. 375].

The exclusion for expected or intended damage does not require that the insured have a specific intent to cause precisely the damage that resulted. If the insured intended or expected injury to result, it is immaterial that the resulting injury is different in character or magnitude from the injury that the insured intended or expected [*United States Fid. & Guar. Co. v. American Employer's Ins. Co.* (1984) 159 Cal.App.3d 277, 288-291, 205 Cal.Rptr. 460]. "Expected and intended" is a subjective standard that focuses on the insured's expectation, rather than a "should have known" or objective standard [*Shell Oil Co. v. Winterthur Swiss Ins. Co.* (1993) 12 Cal.App.4th 715, 749, 15 Cal.Rptr.2d 815]. "Expected" damage is damage that the insured subjectively foresaw as substantially certain or highly likely to result from its conduct [*Montrose Chem. Corp. v. Superior Court* (1993) 6 Cal.4th 287, 304-305, 24 Cal.Rptr.2d 467, 861 P.2d 1153 ; *Shell Oil Co. v. Winterthur Swiss Ins. Co.* (1993) 12 Cal.App.4th 715, 749, 15 Cal.Rptr.2d 815].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Evidence Procedural Considerations Burdens of Proof General Overview Insurance Law Claims & Contracts Disclosure Obligations Burdens of Proof Insurance Law General Liability Insurance Coverage General Overview Insurance Law General Liability Insurance Exclusions Burdens of Proof

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CHAPTER 23A Matthew Bender Insurance Contract Instructions *

Part B. CONTRACT ISSUES

7. Exclusions

1-23A California Forms of Jury Instruction MB 2300A.123

MB 2300A.123 Definitions of "Expected" and "Intended"

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] PROPOSED INSTR. NO. _____

"Expected" is defined as to look forward to the probable occurrence or appearance of; to consider likely or certain; to consider reasonable or due. As used in the policy, the word "expected" means that [insured] subjectively knew or believed that it was substantially certainty or highly likely that certain consequences would result from [insured's] acts or omissions.

"Intended" is defined as to have in mind or to plan. A thing is "intended" if it is deliberate, intentional, or done deliberately. The common and ordinary meaning of the word does not require an element or concept of moral quality. Whether the intent is good or bad, malicious or benign, is not determinative.

Authorities: Webster's New Collegiate Dictionary, pp. 399, 596 (1981); *Montrose Chem. Corp. v. Superior Court* (1993) 6 Cal.4th 287, 304-305, 24 Cal.Rptr.2d 467, 861 P.2d 1153 ; *Shell Oil Co. v. Winterthur Swiss Ins. Co.* (1993) 12 Cal.App.4th 715, 749, 15 Cal.Rptr.2d 815 .

[2] Use of Instruction

This instruction should be used to define "expected" and "intended" if the exclusion for expected or intended damages is at issue. This instruction should be used with the instruction in MB 2300A.122 on the insurer's burden of proving the exclusion for expected or intended damages.

[3] Comment

The words of a contract must be understood in their ordinary and popular sense, unless used by the parties in a technical sense [*Civ. Code* § 1644; see Ch. 3B, *Matthew Bender Interpretation of Contract Instructions*]. The definitions in this instruction are based on the dictionary definitions of "expected" and "intended" [see Webster's New Collegiate Dictionary, pp. 399, 596 (1981)], and on case law interpreting those terms [see *Montrose Chem. Corp. v. Superior Court* (1993) 6 Cal.4th 287, 304-305, 24 Cal.Rptr.2d 467, 861 P.2d 1153 ; *Shell Oil Co. v. Winterthur Swiss Ins. Co.* (1993) 12 Cal.App.4th 715, 749, 15 Cal.Rptr.2d 815].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Contracts Law Contract Interpretation General Overview Insurance Law Claims & Contracts Policy Interpretation Ordinary & Usual Meanings Insurance Law General Liability Insurance Coverage General Overview Insurance Law General Liability Insurance Coverage Damages

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CHAPTER 23A Matthew Bender Insurance Contract Instructions *

Part B. CONTRACT ISSUES

7. Exclusions

1-23A California Forms of Jury Instruction MB 2300A.124

MB 2300A.124 Business Pursuits

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

[Insurer]'s policy contains an exclusion for claims arising out of [insured]'s business pursuits. "Business" is defined in the policy as including a trade, profession, or occupation. A business is a continued, regular activity carried out for financial gain.

If you find that the [underlying claim/underlying lawsuit] arose out of [insured]'s activities related to a business, then [insured] may not recover under the policy. However, if the loss arose out of activities by [insured] that are ordinarily incident to a nonbusiness pursuit, then this exclusion does not apply.

In making your determination, you should consider that the existence of a profit motive is entitled to considerable weight in deciding whether an activity is a business.

[OPTIONAL (See Use of Instruction)]

A business may be either full-time or part-time. The business engaged in need not be [insured's] sole occupation.

Authorities: *Wint v. Fidelity & Cas. Co.* (1973) 9 Cal.3d 257, 264, 107 Cal.Rptr. 175, 507 P.2d 1383 ; *Crane v. State Farm Fire & Cas. Co.* (1971) 5 Cal.3d 112, 114, 95 Cal.Rptr. 513, 485 P.2d 1129 ; *West Am. Ins. Co. v. California Mut. Ins. Co.* (1987) 195 Cal.App.3d 314, 323-325, 240 Cal.Rptr. 540 ; *Fire Ins. Exch. v. Jiminez* (1986) 184 Cal.App.3d 437, 442-443, 229 Cal.Rptr. 83 .

[2] Use of Instruction

This instruction should be used in a case involving a homeowner's policy if there is a dispute as to whether the loss arose out of business or nonbusiness activities. The optional paragraph should be used only if the business at issue is a part-time business.

[3] Comment

LexisNexis Matthew Bender Expert Practice Tip--Breadth of Exclusion: The issue sometimes arises as to whether certain policies (for example, homeowner's policies) do not provide any coverage due to this exclusion. *By Rex Heeseman*

A homeowner's policy typically excludes coverage for business activities, with an exception to that exclusion for "activities [that] are usual to nonbusiness pursuits" or "activities ... [that] are ordinarily incident to nonbusiness pursuits" [see California Insurance Law and Practice, Ch. 36 (Matthew Bender); see also *Wint v. Fidelity & Cas. Co.* (1973) 9 Cal.3d 257, 264, 107 Cal.Rptr. 175, 507 P.2d 1383; *Crane v. State Farm Fire & Cas. Co.* (1971) 5 Cal.3d 112, 116, 95 Cal.Rptr. 513, 485 P.2d 1129]. A homeowner's policy typically defines a "business" as including a "trade, profession or occupation" [see California Insurance Law and Practice, Ch. 36 (Matthew Bender)].

Business activity appears to include any continued, regular activity carried on for financial gain [*West Am. Ins. Co. v. California Mut. Ins. Co.* (1987) 195 Cal.App.3d 314, 324, 240 Cal.Rptr. 540; *Fire Ins. Exch. v. Jiminez* (1986) 184 Cal.App.3d 437, 443, 229 Cal.Rptr. 83; see, e.g., *Wint v. Fidelity & Cas. Co.* (1973) 9 Cal.3d 257, 264, 107 Cal.Rptr. 175, 507 P.2d 1383 (leasing of pasture for horse grazing); *Amex Assurance Co. v. Allstate Ins. Co.* (2003) 112 Cal.App.4th 1246, 1252, 5 Cal.Rptr.3d 744 (plumbing); *California Ins. Guarantee Assn. v. Wood* (1990) 217 Cal.App.3d 944, 949, 266 Cal.Rptr. 250 (termination of ranch hand); *West Am. Ins. Co. v. California Mut. Ins. Co.* (1987) 195 Cal.App.3d 314, 323-325, 240 Cal.Rptr. 540 (recreational activity at employer's home to foster better relations among employees); *Fire Ins. Exch. v. Jiminez* (1986) 184 Cal.App.3d 437, 442, 229 Cal.Rptr. 83 (demolishing structure on business premises to enhance value of property); *Nichols v. Great Am. Ins. Cos.* (1985) 169 Cal.App.3d 766, 770-771, 777, 215 Cal.Rptr. 416 (devices to intercept pay television signals); see generally Long, Law of Liability Insurance, § 10.27], whether full-time or part-time. The business engaged in need not be the insured's sole occupation [*Fire Ins. Exch. v. Jiminez* (1986) 184 Cal.App.3d 437, 442-443, 229 Cal.Rptr. 83; *State Farm Fire & Cas. Co. v. Drasin* (1984) 152 Cal.App.3d 864, 870, 199 Cal.Rptr. 749]. The presence of a profit motive carries considerable weight in making this determination [*West Am. Ins. Co. v. California Mut. Ins. Co.* (1987) 195 Cal.App.3d 314, 324, 240 Cal.Rptr. 540; *Fire Ins. Exch. v. Jiminez* (1986) 184 Cal.App.3d 437, 442-443, 229 Cal.Rptr. 83; *State Farm Fire & Cas. Co. v. Drasin* (1984) 152 Cal.App.3d 864, 870, 199 Cal.Rptr. 749]. Business pursuits involving the insured's employees may include both activities conducted in the course of their employment and activities that are pursuant to the business, but do not arise out of their employment [*West Am. Ins. Co. v. California Mut. Ins. Co.* (1987) 195 Cal.App.3d 314, 324, 240 Cal.Rptr. 540 (business pursuit exclusion broader than employment exclusion, and encompassed social activity at insured's home with employees who were no longer working)]. The fact that the activity involved is not wholly business-related does not bar the applicability of the exclusion [*West Am. Ins. Co. v. California Mut. Ins. Co.* (1987) 195 Cal.App.3d 314, 324, 240 Cal.Rptr. 540]. Even a one-time activity may constitute a business activity if it is in furtherance of a regular activity [*Fire Ins. Exch. v. Jiminez* (1986) 184 Cal.App.3d 437, 443, 229 Cal.Rptr. 83].

If there is no factual dispute about the activities causing the loss, the determination of whether those activities constituted business activities will be a question of law, rather than a question of fact [see, e.g., *Wint v. Fidelity & Cas. Co.* (1973) 9 Cal.3d 257, 107 Cal.Rptr. 175, 507 P.2d 1383; *California Ins. Guarantee Assn. v. Wood* (1990) 217 Cal.App.3d 944, 948-949, 266 Cal.Rptr. 250; *West Am. Ins. Co. v. California Mut. Ins. Co.* (1987) 195 Cal.App.3d 314, 323-325, 240 Cal.Rptr. 540; *Fire Ins. Exch. v. Jiminez* (1986) 184 Cal.App.3d 437, 442-443, 229 Cal.Rptr. 83; *Nichols v. Great Am. Ins. Cos.* (1985) 169 Cal.App.3d 766, 772, 215 Cal.Rptr. 416].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewInsurance LawGeneral Liability
InsuranceCoverageGeneral OverviewInsurance LawGeneral Liability InsuranceCoverageDamagesInsurance
LawProperty InsuranceExclusionsGeneral OverviewInsurance LawProperty InsuranceHomeowners InsuranceBusiness
Activities

* Revised by Susan E. Firtch. Ms. Firtch is a partner at Burnham Brown in Oakland, California.



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California Forms of Jury Instruction

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CHAPTER 23A Matthew Bender Insurance Contract Instructions *

Part B. CONTRACT ISSUES

7. Exclusions

1-23A California Forms of Jury Instruction MB 2300A.125

MB 2300A.125 Pollution Exclusion: Pre-1986 Policy

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

The [policy/policies] contain[s] a pollution exclusion. To prove a defense based on the pollution exclusion, the insurer has the burden of proving by a preponderance of the evidence that the [bodily injury/property damage/bodily injury and property damage] arose out of the discharge, dispersal, release, or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids, or gases, waste materials, or other irritants, contaminants, or pollutants into or on land, the atmosphere, or any water course or body of water. If the insurer meets its burden of proof, the exclusion applies unless the insured proves by a preponderance of the evidence that the discharge, dispersal, release, or escape was both sudden and accidental.

Authority: *Aydin Corp. v. First State Ins. Co. (1998) 18 Cal.4th 1183, 1192-1193, 77 Cal.Rptr.2d 537, 959 P.2d 1213 .*

[2] Use of Instruction

This instruction should be used to explain the insurer's burden of proving a defense based on the pollution exclusion in a pre-1986 CGL policy.

For a general instruction on the insurer's burden of proof, see *MB 2300A.21*. For an instruction defining the burden of proof generally, see *CACI No. 200*.

[3] Comment

The insurer has the burden of proving the applicability of any exclusions [*Aydin Corp. v. First State Ins. Co. (1998) 18*

Cal.4th 1183, 1192-1193, 77 *Cal.Rptr.2d* 537, 959 *P.2d* 1213 ; *Garvey v. State Farm Fire & Cas. Co.* (1989) 48 *Cal.3d* 395, 406, 257 *Cal.Rptr.* 292, 770 *P.2d* 704 ; *Searle v. Allstate Life Ins. Co.* (1985) 38 *Cal.3d* 425, 437-438, 212 *Cal.Rptr.* 466, 696 *P.2d* 1308 ; *Clemmer v. Hartford Ins. Co.* (1978) 22 *Cal.3d* 865, 880, 151 *Cal.Rptr.* 285, 587 *P.2d* 1098 ; *Royal Globe Ins. Co. v. Whitaker* (1986) 181 *Cal.App.3d* 532, 537, 226 *Cal.Rptr.* 435 ; see also *Intel Corp. v. Hartford Accident & Indem. Co.* (9th Cir. 1991) 952 *F.2d* 1551, 1557, 1561]. However, the insured, rather than the insurer, has the burden of proving that a discharge is "sudden and accidental" within the meaning of the exception to the pollution exclusion [*Aydin Corp. v. First State Ins. Co.* (1998) 18 *Cal.4th* 1183, 1192-1193, 77 *Cal.Rptr.2d* 537, 959 *P.2d* 1213 ; *Aeroquip Corp. v. Aetna Cas. & Sur. Co., Inc.* (9th Cir. 1994) 26 *F.3d* 893, 895].

The instruction in [1], above, is based on the language of the pollution exclusion in the 1973 ISO CGL policy [see *Intel Corp. v. Hartford Accident & Indem. Co.* (9th Cir. 1991) 952 *F.2d* 1551, 1561-1562 (pollution exclusion did not apply because insurer failed to meet its burden of proof); see also California Insurance Law and Practice, Ch. 49, § 49.33 (Matthew Bender); Long, Law of Liability Insurance, Vol. 3, App. B (Matthew Bender)]. Later policy forms typically contain an "absolute" pollution exclusion that is significantly more detailed and restrictive [see California Insurance Law and Practice, Ch. 49, § 49.33[3] (Matthew Bender); see also *American Casualty Co. of Reading, Pa. v. Miller* (2008) 159 *Cal.App.4th* 501, 515, 71 *Cal.Rptr.3d* 571 ; *Titan Corp. v. Aetna Cas. & Sur. Co.* (1994) 22 *Cal.App.4th* 457, 27 *Cal.Rptr.2d* 476 (construing policy containing 1986 pollution exclusion)]. The existence of coverage for pollution may turn on the precise language of the exclusion used by the particular insurer [see, e.g., *Maffei v. Northern Ins. Co. of N.Y.* (9th Cir. 1993) 12 *F.3d* 892, 895]. In one case before the federal courts, for example, the policy contained a 1986 pollution exclusion that had been amended to make the exclusion inapplicable to bodily injury or property damage caused by a "hostile fire." The issue was whether the release of harmful vapors from a storage drum resulted from a "hostile fire" or from some other form of chemical reaction. The Ninth Circuit held that it was error to exclude an engineer's declaration concluding that there had been a "fire," and that if a fire did occur within the drum, it was "hostile" within the meaning of the pollution exclusion exception [*Maffei v. Northern Ins. Co. of N.Y.* (9th Cir. 1993) 12 *F.3d* 892, 897-899].

For purposes of the pollution exclusion, the relevant discharge is the initial release of the pollutant into the air, into water, or onto land. Any subsequent discharge or migration of the pollutants from the place of initial discharge to other locations constitutes damage arising out of the initial discharge [*Travelers Cas. & Sur. Co. v. Superior Court* (1998) 63 *Cal.App.4th* 1440, 1458-1459, 1463, 75 *Cal.Rptr.2d* 54 ; *Standun, Inc. v. Fireman's Fund Ins. Co.* (1998) 62 *Cal.App.4th* 882, 890-891, 73 *Cal.Rptr.2d* 116].

Gradual pollution occurring over a long period of time is not "sudden and accidental" for purposes of the exception to the pollution exclusion in the 1973 ISO policy form [*Travelers Cas. & Sur. Co. v. Superior Court* (1998) 63 *Cal.App.4th* 1440, 1455, 75 *Cal.Rptr.2d* 54 ; *Standun, Inc. v. Fireman's Fund Ins. Co.* (1998) 62 *Cal.App.4th* 882, 892, 73 *Cal.Rptr.2d* 116 ; *ACL Techs., Inc. v. Northbrook Prop. & Cas. Ins. Co.* (1993) 17 *Cal.App.4th* 1773, 1784, 22 *Cal.Rptr.2d* 206 ; compare *A-H Plating, Inc. v. American Nat'l Fire Ins. Co.* (1997) 57 *Cal.App.4th* 427, 437, 67 *Cal.Rptr.2d* 113 with *Vann v. Travelers Cos.* (1995) 39 *Cal.App.4th* 1610, 1616-1618, 46 *Cal.Rptr.2d* 617]. The term "sudden" as used in the "sudden and accidental" exception to the pollution exclusion includes a temporal component in addition to its connotation of the unexpected [*Travelers Cas. & Sur. Co. v. Superior Court* (1998) 63 *Cal.App.4th* 1440, 1455, 1458, 75 *Cal.Rptr.2d* 54 ; *FMC Corp. v. Plaisted & Cos.* (1998) 61 *Cal.App.4th* 1132, 1146, 72 *Cal.Rptr.2d* 467 ; *ACL Techs., Inc. v. Northbrook Prop. & Cas. Ins. Co.* (1993) 17 *Cal.App.4th* 1773, 1788, 22 *Cal.Rptr.2d* 206 ; *Shell Oil Co. v. Winterthur Swiss Ins. Co.* (1993) 12 *Cal.App.4th* 715, 754, 15 *Cal.Rptr.2d* 815].

"Sudden" refers to the commencement of the pollution and does not require that the polluting event terminate quickly or have only a brief duration [*Vann v. Travelers Cos.* (1995) 39 *Cal.App.4th* 1610, 1617, 46 *Cal.Rptr.2d* 617 ; *Shell Oil Co. v. Winterthur Swiss Ins. Co.* (1993) 12 *Cal.App.4th* 715, 755-756, 15 *Cal.Rptr.2d* 815]. However, if a sudden and accidental discharge continues for a long time, at some point it ceases to be sudden and accidental [*Vann v. Travelers Cos.* (1995) 39 *Cal.App.4th* 1610, 1616 n.3, 46 *Cal.Rptr.2d* 617 ; *Shell Oil Co. v. Winterthur Swiss Ins. Co.* (1993) 12 *Cal.App.4th* 715, 756, 15 *Cal.Rptr.2d* 815 ; see *Truck Ins. Exch. v. Pozzuoli* (1993) 17 *Cal.App.4th* 856, 860, 21

Cal.Rptr.2d 650 (slow gas leak for at least 60 days was not "sudden"; continuous event, whether for 30 years or 2 months, is not "sudden"). An insured cannot break down its long-term waste disposal practices into temporal components to bring its activities within the exception for "sudden and accidental" activities [*Smith v. Hughes Aircraft Co.* (9th Cir. 1993) 22 F.3d 1432, 1438].

The fact that a chemical is not listed as a pollutant by the federal Environmental Protection Agency until after the discharges in question occur is irrelevant to the determination of whether the chemical is within the pollution exclusion, because the language of the exclusion does not require a listing [*Smith v. Hughes Aircraft Co.* (9th Cir. 1993) 22 F.3d 1432,1438].

The standard pollution exclusion bars actions involving "traditional environmental pollution," but does not extend to all toxic cases involving negligence, such as a wrongful death action arising from the spraying of pesticides to eradicate yellowjackets [*MacKinnon v. Truck Ins. Exch.* (2003) 31 Cal.4th 635, 654-655, 3 Cal.Rptr.3d 228, 73 P.3d 1205].

For further coverage of the pollution exclusion, see California Environmental Law and Land Use Practice, Ch. 59, § 59.05[2] (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewInsurance LawGeneral Liability
InsuranceCoverageGeneral OverviewInsurance LawGeneral Liability InsuranceExclusionsPollutionInsurance
LawProperty InsuranceExclusionsPollutionBurdens of ProofInsurance LawProperty
InsuranceExclusionsPollutionSudden & Accidental Exception

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California Forms of Jury Instruction

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CHAPTER 23A Matthew Bender Insurance Contract Instructions *

Part B. CONTRACT ISSUES

7. Exclusions

1-23A California Forms of Jury Instruction MB 2300A.126-MB 2300A.139

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MB 2300A.126Reserved for Future Use



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California Forms of Jury Instruction

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CHAPTER 23A Matthew Bender Insurance Contract Instructions *

Part C. BAD FAITH ISSUES

1. Implied Duty of Good Faith and Fair Dealing

1-23A California Forms of Jury Instruction MB 2300A.140

MB 2300A.140 Nature of Duty

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

The law implies as part of every insurance contract a duty of good faith and fair dealing. This duty runs both ways, from insurer to insured and from insured to insurer.

This duty requires that neither the insurer nor the insured do anything that would injure the other's right to receive the benefits due under the insurance policy.

In this case [insured] claims that [insurer] breached its duty of good faith and fair dealing--that is, acted in bad faith--because [insurer] _____ [describe conduct alleged].

Authorities: *Frommoethelydo v. Fire Ins. Exch.* (1986) 42 Cal.3d 208, 214, 228 Cal.Rptr. 160, 721 P.2d 41 ; *White v. Western Title Ins. Co.* (1985) 40 Cal.3d 870, 885, 221 Cal.Rptr. 509, 710 P.2d 309 ; *Commercial Union Assurance Cos. v. Safeway Stores, Inc.* (1980) 26 Cal.3d 912, 918, 164 Cal.Rptr. 709, 610 P.2d 1038 ; *Helfand v. National Union Fire Ins. Co.* (1992) 10 Cal.App.4th 869, 903, 906, 13 Cal.Rptr.2d 295 ; *New Plumbing Contractors, Inc. v. Nationwide Mut. Ins. Co.* (1992) 7 Cal.App.4th 1088, 1095-1096, 9 Cal.Rptr.2d 469 .

[2] Use of Instruction

This is a general instruction that should be used in any case involving claims for breach of the implied covenant of good faith and fair dealing [see, e.g., *Hangarter v. Paul Revere Life Ins. Co.* (N.D. Cal. 2002) 236 F.Supp.2d 1069, 1076-1077 (list of jury instructions used in insurance bad faith case)]. This instruction should be used in conjunction with one or more of the more specific instructions in MB 2300A.160-MB 2300A.186 regarding particular conduct that

may constitute breach of the implied covenant.

For related Judicial Council instructions, see [3][g], *below*.

[3] Comment

[a] Extent and Nature of Implied Duty of Good Faith and Fair Dealing

A covenant of good faith and fair dealing is implied by law in every insurance contract [*Volkswagen v. Universal Underwriters Group* (N.D. Cal. 2008) 571 F.Supp.2d 1148, 1156 ; *Cates Constr., Inc. v. Talbot Partners* (1999) 21 Cal.4th 28, 43, 86 Cal.Rptr.2d 855, 980 P.2d 407 ; *Frommoethelydo v. Fire Ins. Exch.* (1986) 42 Cal.3d 208, 214, 228 Cal.Rptr. 160, 721 P.2d 41 ; *White v. Western Title Ins. Co.* (1985) 40 Cal.3d 870, 885, 221 Cal.Rptr. 509, 710 P.2d 309 ; *Commercial Union Assurance Cos. v. Safeway Stores, Inc.* (1980) 26 Cal.3d 912, 918, 164 Cal.Rptr. 709, 610 P.2d 1038 ; *Bosetti v. United States Life Ins. Co.* (2009) 175 Cal.App.4th 1208, 1235, 96 Cal.Rptr.3d 744 ; *McCoy v. Progressive West Ins. Co.* (2009) 171 Cal.App.4th 785, 792, 90 Cal.Rptr.3d 74 ; *Major v. Western Home Ins. Co.* (2009) 169 Cal.App.4th 1197, 1208, 87 Cal.Rptr.3d 556 ; *Archdale v. American Int'l Specialty Lines Ins. Co.* (2007) 154 Cal.App.4th 449, 463, 64 Cal.Rptr.3d 632] . The essence of the implied covenant is that neither party will do anything to injure the right of the other to receive the benefits of the agreement [*Cates Constr., Inc. v. Talbot Partners* (1999) 21 Cal.4th 28, 43, 86 Cal.Rptr.2d 855, 980 P.2d 407 ; *Frommoethelydo v. Fire Ins. Exch.* (1986) 42 Cal.3d 208, 214, 228 Cal.Rptr. 160, 721 P.2d 41 ; *Commercial Union Assurance Cos. v. Safeway Stores, Inc.* (1980) 26 Cal.3d 912, 918, 164 Cal.Rptr. 709, 610 P.2d 1038 ; *Major v. Western Home Ins. Co.* (2009) 169 Cal.App.4th 1197, 1209, 87 Cal.Rptr.3d 556 ; *Archdale v. American Int'l Specialty Lines Ins. Co.* (2007) 154 Cal.App.4th 449, 463, 64 Cal.Rptr.3d 632 ; *Helfand v. National Union Fire Ins. Co.* (1992) 10 Cal.App.4th 869, 903, 13 Cal.Rptr.2d 295 ; *New Plumbing Contractors, Inc. v. Nationwide Mut. Ins. Co.* (1992) 7 Cal.App.4th 1088, 1095, 9 Cal.Rptr.2d 469].

To fulfill its obligation under the covenant, an insurer must give at least as much consideration to the interests of the insured as to its own interests [*Cates Constr., Inc. v. Talbot Partners* (1999) 21 Cal.4th 28, 43, 86 Cal.Rptr.2d 855, 980 P.2d 407 ; *Frommoethelydo v. Fire Ins. Exch.* (1986) 42 Cal.3d 208, 214, 228 Cal.Rptr. 160, 721 P.2d 41 ; *Bosetti v. United States Life Ins. Co.* (2009) 175 Cal.App.4th 1208, 1235, 96 Cal.Rptr.3d 744 ; *McCoy v. Progressive West Ins. Co.* (2009) 171 Cal.App.4th 785, 793, 90 Cal.Rptr.3d 74 ; *New Plumbing Contractors, Inc. v. Nationwide Mut. Ins. Co.* (1992) 7 Cal.App.4th 1088, 1096, 9 Cal.Rptr.2d 469 ; *Walbrook Ins. Co. Ltd. v. Liberty Mut. Ins. Co.* (1992) 5 Cal.App.4th 1445, 1454, 1459, 7 Cal.Rptr.2d 513]. The insurer must also consider the interests of multiple insureds whose claims may exceed the policy limits [*Schwartz v. State Farm Fire & Cas. Co.* (2001) 88 Cal.App.4th 1329, 1338, 106 Cal.Rptr.2d 523 (excess insurer has duty to treat all insureds fairly and may not pay one claimant in full, exhausting policy limits, while ignoring competing claims to same pool of funds)].

One cannot invoke the implied covenant of good faith and fair dealing to prohibit conduct that a contract expressly allows [*21st Century Ins. Co. v. Superior Court* (2009) 47 Cal.4th 511, 526-527, 98 Cal.Rptr.3d 516, 213 P.3d 972 (covenant does not apply to dispute over med-pay reimbursement rights in automobile first-party policy)].

For further discussion on the nature of the implied covenant as it pertains to insurance policies, and the measures of damages in contract and tort, see California Insurance Law and Practice, Ch. 13, §§ 13.03[1], 13.03[5][a]-[c] (Matthew Bender).

[b] Limited to Insurance Policies

The doctrine of "insurance bad faith" is expressly limited to insurance policies, and does not extend to construction performance bonds or other contracts of suretyship [see *Cates Constr., Inc. v. Talbot Partners* (1999) 21 Cal.4th 28, 60, 86 Cal.Rptr.2d 855, 980 P.2d 407 (tort recovery for breach of implied covenant of good faith and fair dealing in context of construction performance bond not appropriate, because construction performance bond is not insurance policy or

other type contract necessitating extracontractual remedy)).

[c] Breach of Implied Covenant as Either Breach of Contract or Tort

The breach of the implied covenant in an insurance policy may be treated as a breach of contract or as a tort [*Gruenberg v. Aetna Ins. Co.* (1973) 9 Cal.3d 566, 578, 108 Cal.Rptr. 480, 510 P.2d 1032]. Accordingly, even though "bad faith" implies wrongful or unreasonable conduct [*Austero v. National Cas. Co.* (1978) 84 Cal.App.3d 1, 26-27, 148 Cal.Rptr. 653], as opposed to the morally neutral failure to do what was called for by a contract, this instruction appears suitable for both tort and contract actions [see *Frazier v. Metropolitan Life Ins. Co.* (1985) 169 Cal.App.3d 90, 105-107, 214 Cal.Rptr. 883 (recovery of damages for emotional distress allowed if insured was proceeding on contract theory, but punitive damages not allowed)]. However, under a contract theory, the insured's damages are somewhat more limited than in tort [see *Frazier v. Metropolitan Life Ins. Co.* (1985) 169 Cal.App.3d 90, 105-107, 214 Cal.Rptr. 883].

In at least two cases, California courts have stated that absent a breach of the insurance contract, there can be no liability for tortious breach of the implied covenant of good faith and fair dealing [*Waller v. Truck Ins. Exch.* (1995) 11 Cal.4th 1, 35-36, 44 Cal.Rptr.2d 370, 900 P.2d 619 ; *San Diego Hous. Comm'n v. Industrial Indem. Co.* (1998) 68 Cal.App.4th 526, 545, 80 Cal.Rptr.2d 393]. Despite extensive evidence in one case that the insurer's claims representatives and executives "were either knaves or fools," the court of appeal found that evidence irrelevant and prejudicial in the absence of any contractual duty [*San Diego Hous. Comm'n v. Industrial Indem. Co.* (1998) 68 Cal.App.4th 526, 545-546, 80 Cal.Rptr.2d 393]. It is unclear whether contractual breaches of implied covenants could support a claim for tortious breach of the implied covenant of good faith and fair dealing.

[d] Duty Not Contravening Express Terms of Insurance Agreement

The implied covenant of good faith and fair dealing cannot be used to create obligations or limit rights contrary to the express terms of the insurance agreement [*New Hampshire Ins. Co. v. Ridout Roofing Co., Inc.* (1998) 68 Cal.App.4th 495, 504-505, 80 Cal.Rptr.2d 286]. The only exception to this rule is if the policy is ambiguous and a literal reading would result in an unenforceable, illusory agreement contrary to the parties' intention [*New Hampshire Ins. Co. v. Ridout Roofing Co., Inc.* (1998) 68 Cal.App.4th 495, 504-505, 80 Cal.Rptr.2d 286].

[e] Persons to Whom Duty Owed

The duty of good faith and fair dealing runs in favor of the named insured and any other persons covered under the policy. All insureds under the same policy must be treated fairly [*Schwartz v. State Farm Fire & Cas. Co.* (2001) 88 Cal.App.4th 1329, 1338, 106 Cal.Rptr.2d 523]. However, this duty is limited to insureds under the policy [*Adelman v. Associated Int'l Ins. Co.* (2001) 90 Cal.App.4th 352, 369-370, 108 Cal.Rptr.2d 788]. For example, individual condominium owners, who were not insureds under their homeowners' association's earthquake policy, could not pursue a bad faith claim for delay in indemnifying the association [*Adelman v. Associated Int'l Ins. Co.* (2001) 90 Cal.App.4th 352, 369-370, 108 Cal.Rptr.2d 788]. Insurance companies or sureties may not sue each other for breach of the implied covenant of good faith under a subrogation theory [*Gulf Ins. Co. v. TIG Ins. Co.* (2001) 86 Cal.App.4th 422, 432-433, 103 Cal.Rptr.2d 305].

Ordinarily, third-party claimants have no direct right of action against an insurer for breach of the covenant of good faith and fair dealing, and must obtain an assignment of the insured's rights against the insurer before they can proceed against the insurer for breach of the covenant [*Murphy v. Allstate Ins. Co.* (1976) 17 Cal.3d 937, 132 Cal.Rptr. 424, 553 P.2d 584 ; see *Moradi-Shalal v. Fireman's Fund Ins. Cos.* (1988) 46 Cal.3d 287, 250 Cal.Rptr. 116, 758 P.2d 58 (abolishing third party's direct statutory cause of action under *Ins. Code* § 790.03(h)); *Adelman v. Associated Int'l Ins. Co.* (2001) 90 Cal.App.4th 352, 369-370, 108 Cal.Rptr.2d 788]. Under a limited exception to this rule, however, judgment creditors of an insured may maintain a direct action for breach of the covenant of good faith and fair dealing

against an insurer that refuses, unreasonably and in bad faith, to pay the entire amount of a judgment after it becomes final [*Hand v. Farmers Ins. Exch.* (1994) 23 Cal.App.4th 1847, 1857, 29 Cal.Rptr.2d 258].

[f] No "Reverse Bad Faith" Claim or Comparative Bad Faith Defense

Although the implied covenant of good faith and fair dealing is reciprocal, an insurer has no claim against its insured in tort for breach of the implied covenant (sometimes referred to as "reverse bad faith"). Breach of the implied covenant is at root a breach of contract, and a relationship involving specialized circumstances of reliance and dependence is necessary to transmute a contractual breach into a tort. Those circumstances do not exist in the context of an insured's responsibilities toward its insurer, or in the reciprocal context of an insurer's legitimate expectations from its insured [*Kransco v. American Empire Surplus Lines Ins. Co.* (2000) 23 Cal.4th 390, 402, 97 Cal.Rptr.2d 151, 2 P.3d 1 ; *Agricultural Ins. Co. v. Superior Court* (1999) 70 Cal.App.4th 385, 389-390, 396, 82 Cal.Rptr.2d 594].

Although one court of appeal decision recognized an insured's comparative bad faith as an affirmative defense [*California Cas. Gen. Ins. Co. v. Superior Court* (1985) 173 Cal.App.3d 274, 280, 283, 218 Cal.Rptr. 817], the California Supreme Court subsequently held that comparative bad faith is not an affirmative defense [*Kransco v. American Empire Surplus Lines Ins. Co.* (2000) 23 Cal.4th 390, 402-408, 97 Cal.Rptr.2d 151, 2 P.3d 1].

[g] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 23, *California Judicial Council Insurance Litigation Instructions*]:

CACI No. 2330, Implied Obligation of Good Faith and Fair Dealing Explained

CACI No. 2331, Breach of the Implied Obligation of Good Faith and Fair Dealing--Essential Factual Elements

CACI No. 2332, Bad Faith (First Party)--Failure to Properly Investigate Claim--Essential Factual Elements

CACI No. 2333, Bad Faith (First Party)--Breach of Duty to Inform Insured of Rights--Essential Factual Elements

CACI No. 2334, Bad Faith--Unreasonable Refusal to Settle Within Liability Policy Limits--Essential Factual Elements

CACI No. 2335, Bad Faith--Advice of Counsel

CACI No. 2336, Bad Faith--Unreasonable Failure to Defend--Essential Factual Elements

CACI No. 2350, Damages for Bad Faith

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Insurance Law Bad Faith & Extracontractual Liability General Overview Insurance Law Bad Faith & Extracontractual Liability Refusals to Defend Insurance Law Bad Faith & Extracontractual Liability Settlement Obligations Policy Coverage Insurance Law Claims & Contracts Good Faith & Fair Dealing General Overview

* Revised by Susan E. Firtch. Ms. Firtch is a partner at Burnham Brown in Oakland, California.



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California Forms of Jury Instruction

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CHAPTER 23A Matthew Bender Insurance Contract Instructions *

Part C. BAD FAITH ISSUES

1. Implied Duty of Good Faith and Fair Dealing

1-23A California Forms of Jury Instruction MB 2300A.141

MB 2300A.141 Test for Breach of Duty

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

The test in determining whether there has been a violation of the covenant of good faith and fair dealing is whether [insurer]'s conduct was unreasonable, taking into account all the circumstances known to [insurer] at the time that [insurer] acted.

Negligence or mistake alone is not enough to hold an insurer liable for bad faith.

Authorities: *Volkswagen v. Universal Underwriters Group* (N.D. Cal. 2008) 571 F.Supp.2d 1148, 1156 ; *Isaacson v. California Ins. Guarantee Assn.* (1988) 44 Cal.3d 775, 793 ; *Austero v. National Cas. Co.* (1978) 84 Cal.App.3d 1, 32, 148 Cal.Rptr. 653 ; *Merritt v. Reserve Ins. Co.* (1973) 34 Cal.App.3d 858, 873, 110 Cal.Rptr. 511 ; *Brown v. Guarantee Ins. Co.* (1957) 155 Cal.App.2d 679, 688-689, 319 P.2d 69 ; cf. *Gruenberg v. Aetna Ins. Co.* (1973) 9 Cal.3d 566, 573-575, 108 Cal.Rptr. 480, 510 P.2d 1032 .

[2] Use of Instruction

This instruction should be used together with one or more of the specific instructions in MB2300A.147-MB 2300A.186 regarding particular acts that may constitute bad faith.

For related Judicial Council instructions, see [3][b], *below*.

[3] Comment

[a] Test for Breach of Duty

The test in determining whether there has been a violation of the covenant of good faith and fair dealing is whether the insurer's conduct was unreasonable, taking into account all the circumstances known to the insurer at the time that it acted [*Isaacson v. California Ins. Guarantee Assn.* (1988) 44 Cal.3d 775, 793, 244 Cal.Rptr. 655, 750 P.2d 297 ; *McCoy v. Progressive West Ins. Co.* (2009) 171 Cal.App.4th 785, 793, 90 Cal.Rptr.3d 74 ; *Austero v. National Cas. Co.* (1978) 84 Cal.App.3d 1, 32, 148 Cal.Rptr. 653 ; cf. *Gruenberg v. Aetna Ins. Co.* (1973) 9 Cal.3d 566, 573-575, 108 Cal.Rptr. 480, 510 P.2d 1032 (duty to act reasonably)]. Mere negligence or mistake is not enough to render the insurer liable for bad faith [*Merritt v. Reserve Ins. Co.* (1973) 34 Cal.App.3d 858, 873, 110 Cal.Rptr. 511 ; *Brown v. Guarantee Ins. Co.* (1957) 155 Cal.App.2d 679, 688-689, 319 P.2d 69].

The mere fact that an insurer has filed suit against the insured is not grounds for a bad faith action or evidence of breach of the covenant of good faith [*Old Republic Ins. Co. v. FSR Brokerage, Inc.* (2000) 80 Cal.App.4th 666, 686-689, 95 Cal.Rptr.2d 583].

Because bad faith connotes wrongful or unreasonable conduct [*Austero v. National Cas. Co.* (1978) 84 Cal.App.3d 1, 26-27, 148 Cal.Rptr. 653], evidence that the insurer acted reasonably and with an open mind may negate any finding of bad faith [*Austero v. National Cas. Co.* (1978) 84 Cal.App.3d 1, 35, 148 Cal.Rptr. 653]. In one case, for example, the court of appeal noted the openness with which the insurer evaluated the claim, the insurer's efforts to seek additional information, and several instances in which the insurer reconsidered the claim [*Austero v. National Cas. Co.* (1978) 84 Cal.App.3d 1, 35, 148 Cal.Rptr. 653]. On that basis, the court held that the insurer's conduct was reasonable as a matter of law [*Austero v. National Cas. Co.* (1978) 84 Cal.App.3d 1, 35-36, 148 Cal.Rptr. 653]. In a subsequent case, the court of appeal held that the insurer's handling of the claim was reasonable as a matter of law because the insurer paid the initial claim promptly after receiving an estimate, reopened the file at the insured's request, and paid the balance of policy limits after receiving an estimate for supplemental damage [*Carlton v. St. Paul Mercury Ins. Co.* (1994) 30 Cal.App.4th 1450, 1458-1459, 36 Cal.Rptr.2d 229].

For a discussion of some of the specific acts that may constitute unreasonable conduct, see California Insurance Law and Practice, Ch. 13, §§ 13.03[2][c], 13.04[3], 13.07[3][c] (Matthew Bender).

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 23, *California Judicial Council Insurance Litigation Instructions*]:

CACI No. 2330, Implied Obligation of Good Faith and Fair Dealing Explained

CACI No. 2331, Breach of the Implied Obligation of Good Faith and Fair Dealing--Failure or Delay in Payment (First Party)--Essential Factual Elements

CACI No. 2332, Bad Faith (First Party)--Failure to Properly Investigate Claim--Essential Factual Elements

CACI No. 2333, Bad Faith (First Party)--Breach of Duty to Inform Insured of Rights--Essential Factual Elements

CACI No. 2334, Bad Faith (Third Party)--Refusal to Accept Reasonable Settlement Within Liability Policy Limits--Essential Factual Elements

CACI No. 2335, Bad Faith--Advice of Counsel

CACI No. 2336, Bad Faith (Third Party)--Unreasonable Failure to Defend--Essential Factual Elements

CACI No. 2337, Factors to Consider in Evaluating Insurer's Conduct

CACI No. 2350, Damages for Bad Faith

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewInsurance LawBad Faith & Extracontractual LiabilityGeneral OverviewInsurance LawBad Faith & Extracontractual LiabilityRefusals to DefendInsurance LawBad Faith & Extracontractual LiabilitySettlement ObligationsGood Faith & Fair DealingInsurance LawBad Faith & Extracontractual LiabilitySettlement ObligationsReasonable Basis

* Revised by Susan E. Firtch. Ms. Firtch is a partner at Burnham Brown in Oakland, California.



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California Forms of Jury Instruction

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CHAPTER 23A Matthew Bender Insurance Contract Instructions *

Part C. BAD FAITH ISSUES

1. Implied Duty of Good Faith and Fair Dealing

1-23A California Forms of Jury Instruction MB 2300A.142

MB 2300A.142 Industry Practice as Evidence of Reasonableness

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Evidence that [insurer]'s handling of [insured]'s claim was or was not consistent with insurance industry practice is relevant in determining whether [insurer]'s conduct was reasonable. However, the nature of the duty of an insurer to an insured is as I have described it to you. That duty is not necessarily described by the customs of the insurance industry. Accordingly, whether [insurer] acted in accordance with industry practice is simply one factor for you to consider in determining whether [insurer] acted in good faith or in bad faith.

Authorities: *Hanson v. Prudential Ins. Co. of Am.* (9th Cir. 1985) 783 F.2d 762, 766-767 ; *Silberg v. California Life Ins. Co.* (1974) 11 Cal.3d 452, 462, 113 Cal.Rptr. 711, 521 P.2d 1103 .

[2] Use of Instruction

This instruction should be used, if there is evidence as to the insurer's compliance or non-compliance with industry custom, to explain that industry custom is not dispositive on the issue of reasonableness, but is merely one piece of evidence to be considered. It should be used in conjunction with instructions regarding the specific duty alleged to have been violated.

For related Judicial Council instructions, see [3][b], *below*.

[3] Comment

[a] Industry Practice

Bad faith is the unreasonable withholding of benefits due [*Austero v. National Cas. Co. (1978) 84 Cal.App.3d 1, 31-32, 148 Cal.Rptr. 653* ; *California Shoppers, Inc. v. Royal Globe Ins. Co. (1985) 175 Cal.App.3d 1, 54, 221 Cal.Rptr. 171*]. It is possible for an insurer to deny benefits incorrectly, yet still act in good faith [*Safeco Ins. Co. of Am. v. Guyton (9th Cir. 1982) 692 F.2d 551, 557* ; see *Hanson v. Prudential Ins. Co. of Am. (9th Cir. 1985) 783 F.2d 762, 766-767* (no bad faith because insurer acted reasonably; case remanded on claim for benefits for determination as to whether insurer was correct)]. Therefore, whether an insurer acts in accord with industry custom is not by itself dispositive on the issue of bad faith. In one case, for example, the insured's failure to establish any industry custom did not prevent a finding that the insurer had acted unreasonably [*Silberg v. California Life Ins. Co. (1974) 11 Cal.3d 452, 462, 113 Cal.Rptr. 711, 521 P.2d 1103*]. In another case, the insurer's compliance with industry custom was noted as simply further evidence to support the holding that it had acted reasonably [*Hanson v. Prudential Ins. Co. of Am. (9th Cir. 1985) 783 F.2d 762, 766-767*].

LexisNexis Matthew Bender Expert Practice Tip--Providing Additional Information: Denial letters from insurers routinely contain a statement to the effect that the insurer is willing to consider additional information. Insureds should therefore continue to provide information to determine whether the insurer has in fact kept an "open mind" on the claim. *By Ronald Oster*

LexisNexis Matthew Bender Expert Practice Tip--Practice Testimony: Use of practice testimony will almost always be required to establish industry practice with respect to claims handling. *By Ronald Oster*

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 23, *California Judicial Council Insurance Litigation Instructions*]:

CACI No. 2330, Implied Obligation of Good Faith and Fair Dealing Explained

CACI No. 2331, Breach of the Implied Obligation of Good Faith and Fair Dealing--Failure or Delay in Payment (First Party)--Essential Factual Elements

CACI No. 2332, Bad Faith (First Party)--Failure to Properly Investigate Claim--Essential Factual Elements

CACI No. 2333, Bad Faith (First Party)--Breach of Duty to Inform Insured of Rights--Essential Factual Elements

CACI No. 2334, Bad Faith (Third Party)--Refusal to Accept Reasonable Settlement Within Liability Policy Limits--Essential Factual Elements

CACI No. 2335, Bad Faith--Advice of Counsel

CACI No. 2336, Bad Faith (Third Party)--Unreasonable Failure to Defend--Essential Factual Elements

CACI No. 2337, Factors to Consider in Evaluating Insurer's Conduct

CACI No. 2350, Damages for Bad Faith

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewInsurance LawBad Faith & Extracontractual
LiabilityGeneral OverviewInsurance LawBad Faith & Extracontractual LiabilityElements of Bad FaithInsurance
LawBad Faith & Extracontractual LiabilityRefusals to DefendInsurance LawBad Faith & Extracontractual
LiabilitySettlement ObligationsGood Faith & Fair DealingInsurance LawBad Faith & Extracontractual
LiabilitySettlement ObligationsReasonable Basis

* Revised by Susan E. Firtch. Ms. Firtch is a partner at Burnham Brown in Oakland, California.



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California Forms of Jury Instruction

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CHAPTER 23A Matthew Bender Insurance Contract Instructions *

Part C. BAD FAITH ISSUES

1. Implied Duty of Good Faith and Fair Dealing

1-23A California Forms of Jury Instruction MB 2300A.143

MB 2300A.143 Insurer Entitled to Consider Own Interests

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

An insurer is not required to pay every claim presented to it. Besides the duty to deal fairly with the insured, the insurer also has a duty to its other policyholders and to its stockholders not to waste its reserves through the payment of meritless claims.

Authorities: *Love v. Fire Ins. Exch.* (1990) 221 Cal.App.3d 1136, 1148-1149, 271 Cal.Rptr. 246 ; *Paulfrey v. Blue Chip Stamps* (1983) 150 Cal.App.3d 187, 199, 197 Cal.Rptr. 501 ; *Austero v. National Cas. Co.* (1978) 84 Cal.App.3d 1, 30, 148 Cal.Rptr. 653 .

[2] Use of Instruction

This instruction should be used if the insurer has refused to pay, due to a coverage dispute. The phrase "meritless claims" has nothing to do with any underlying lawsuit against the insured. It refers instead to the insured's claim for coverage.

[3] Comment

Because only unreasonable withholding of benefits due constitutes bad faith [*California Shoppers, Inc. v. Royal Globe Ins. Co.* (1985) 175 Cal.App.3d 1, 54, 221 Cal.Rptr. 171 ; *Austero v. National Cas. Co.* (1978) 84 Cal.App.3d 1, 31-32, 148 Cal.Rptr. 653], the mere fact that an insurer did not pay in any particular instance does not impose strict liability for breach of the implied covenant. The claim may not have been covered, and an insurer has no obligation to pay non-covered claims, even if payment would have been in the best interests of the insured [*Love v. Fire Ins. Exch.*

(1990) 221 Cal.App.3d 1136, 1149, 271 Cal.Rptr. 246 ; *Native Sun Inv. Group v. Ticor Title Ins. Co.* (1987) 189 Cal.App.3d 1265, 1278, 235 Cal.Rptr. 34]. Moreover, if the insurer were to ignore the interests of its other policyholders and its stockholders, it would quickly dissipate its reserves, insurance rates would rise, and the insurer would eventually go out of business [*Paulfrey v. Blue Chip Stamps* (1983) 150 Cal.App.3d 187, 199, 197 Cal.Rptr. 501 ; *Austero v. National Cas. Co.* (1978) 84 Cal.App.3d 1, 30, 148 Cal.Rptr. 653].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Insurance Law Bad Faith & Extracontractual Liability General Overview Insurance Law Bad Faith & Extracontractual Liability Elements of Bad Faith Insurance Law Bad Faith & Extracontractual Liability Refusals to Defend Insurance Law Bad Faith & Extracontractual Liability Settlement Obligations Good Faith & Fair Dealing

* Revised by Susan E. Firtch. Ms. Firtch is a partner at Burnham Brown in Oakland, California.



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CHAPTER 23A Matthew Bender Insurance Contract Instructions *

Part C. BAD FAITH ISSUES

1. Implied Duty of Good Faith and Fair Dealing

1-23A California Forms of Jury Instruction MB 2300A.144

MB 2300A.144 Insurer Entitled to Assert Its Own Interests

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

An insurance company is privileged, in preserving its own economic interests, to assert in a permissible way its legal rights and to communicate its position in good faith to its insured. It may do so even if it is substantially certain that doing so will cause the insured to suffer emotional distress. The insurer's actions in asserting and communicating its rights must be based on a good faith belief in the existence of the rights asserted.

Authority: *Fletcher v. Western Nat'l Life Ins. Co. (1970) 10 Cal.App.3d 376, 395, 89 Cal.Rptr. 78 .*

[2] Use of Instruction

This instruction should be used if the insurer has taken steps to protect its interests, such as reserving its rights or filing a declaratory relief action, that the insured contends are improper. Although similar to the instruction in MB 2300A.143, this instruction is particularly applicable when the insured contends that the insurer's actions are improper. It should be used in conjunction with the instruction in MB 2300A.143.

[3] Comment

Although an insurer is privileged to assert its rights, that privilege is not absolute [*Fletcher v. Western Nat'l Life Ins. Co. (1970) 10 Cal.App.3d 376, 395, 89 Cal.Rptr. 78*]. The assertion must be based on a good faith belief in the rights asserted [*Fletcher v. Western Nat'l Life Ins. Co. (1970) 10 Cal.App.3d 376, 395, 89 Cal.Rptr. 78*]. Apparently, so long as the assertion is based on a good faith belief, there is no liability for breach of the implied covenant of good faith and fair dealing [see *Fletcher v. Western Nat'l Life Ins. Co. (1970) 10 Cal.App.3d 376, 395, 89 Cal.Rptr. 78*]. However, if

the insurer makes an assertion, even one based on a good faith belief, in an outrageous manner, the insurer may be liable for intentional infliction of emotional distress [*see Fletcher v. Western Nat'l Life Ins. Co. (1970) 10 Cal.App.3d 376, 395, 89 Cal.Rptr. 78*].

For discussion of the insurer's right to consider its own interests, see *MB 2300A.143[3]*.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewInsurance LawBad Faith & Extracontractual LiabilityElements of Bad FaithInsurance LawBad Faith & Extracontractual LiabilityRefusals to DefendInsurance LawBad Faith & Extracontractual LiabilitySettlement ObligationsGood Faith & Fair DealingInsurance LawClaims & ContractsGood Faith & Fair DealingGeneral Overview

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CHAPTER 23A Matthew Bender Insurance Contract Instructions *

Part C. BAD FAITH ISSUES

1. Implied Duty of Good Faith and Fair Dealing

1-23A California Forms of Jury Instruction MB 2300A.145

MB 2300A.145 Acts That May Constitute Bad Faith

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Some of the factors you may consider in determining whether [insurer] acted unreasonably are whether [insurer] did any of the following:

[INCLUDE AS APPLICABLE (See Use of Instruction)]

- 1. Failed to investigate properly the facts surrounding the claim being made against [insured], or failed to evaluate those facts properly;**
- 2. Delayed in responding to [insured]'s requests that it provide defense and indemnity with regard to the underlying claims;**
- 3. Delayed in responding to [insured]'s request that it pay benefits due under the policy;**
- 4. Refused to pay some or all of the benefits due under the policy;**
- 5. Ignored evidence available to it that supported [insured]'s claim for benefits under the policy;**
- 6. Failed to communicate adequately with [insured] regarding [insured]'s claim for benefits under the policy;**

7. Failed to independently evaluate settlement demands, or to obtain the assistance of counsel in making that evaluation;

8. Failed to follow the advice of counsel;

9. Failed, without good cause, to compensate [insured] for the defense costs and settlement amounts incurred in the underlying lawsuit; or

10. Behaved unreasonably during the course of this lawsuit.

Authorities: *White v. Western Title Ins. Co.* (1985) 40 Cal.3d 870, 885-886, 221 Cal.Rptr. 509, 710 P.2d 309 ; *Egan v. Mutual of Omaha Ins. Co.* (1979) 24 Cal.3d 809, 818-820, 169 Cal.Rptr. 691, 620 P.2d 141 ; *Neal v. Farmers Ins. Exch.* (1978) 21 Cal.3d 910, 920, 148 Cal.Rptr. 389, 582 P.2d 980 ; *Delgado v. Heritage Life Ins. Co.* (1984) 157 Cal.App.3d 262, 278, 203 Cal.Rptr. 672 ; *Beck v. State Farm Mut. Auto. Ins. Co.* (1976) 54 Cal.App.3d 347, 126 Cal.Rptr. 602 ; *Garner v. American Mut. Liab. Ins. Co.* (1973) 31 Cal.App.3d 843, 848-849, 107 Cal.Rptr. 604 ; *Kinder v. Western Pioneer Ins. Co.* (1965) 231 Cal.App.2d 894, 901, 42 Cal.Rptr. 394 ; see *McLaughlin v. Connecticut Gen. Life Ins. Co.* (N.D. Cal. 1983) 565 F.Supp. 434, 454 .

[2] Use of Instruction

This instruction should be used to explain the various specific acts (for which evidence has been presented) that may constitute unreasonable conduct on the insurer's part. Counsel should select as many of the listed options as apply to the facts of the case.

For related Judicial Council instructions, see [3][b], *below*.

[3] Comment

[a] Examples of Unreasonable Conduct

Specific examples of conduct by an insurer held to be unreasonable include the following:

- Failing to properly investigate the facts of the claim or failing to evaluate those facts properly [*Egan v. Mutual of Omaha Ins. Co.* (1979) 24 Cal.3d 809, 818-820, 169 Cal.Rptr. 691, 620 P.2d 141 ; see, e.g., *Amerigraphics, Inc. v. Mercury Cas. Co.* (2010) 182 Cal.App.4th 1538, 1556, 107 Cal.Rptr.3d 307 ; but see *McMillin Scripps N. P'ship v. Royal Ins. Co.* (1993) 19 Cal.App.4th 1215, 1222, 23 Cal.Rptr.2d 243 (insurer's failure to investigate first-party claim not actionable if ultimately determined that no coverage existed)];
- Delaying in responding to the insured's requests that it provide defense and indemnity with regard to the underlying claims;
- Delaying in responding to the insured's request that it pay benefits due under the policy [*Beck v. State Farm Mut. Auto. Ins. Co.* (1976) 54 Cal.App.3d 347, 126 Cal.Rptr. 602];
- Refusing to pay some or all of the benefits due under the policy [*Neal v. Farmers Ins. Exch.* (1978) 21 Cal.3d 910, 920, 148 Cal.Rptr. 389, 582 P.2d 980 ; see, e.g., *Align Tech., Inc. v. Federal Ins. Co.* (N.D. Cal. 2009) 673 F.Supp.2d 957, 965 (in denial of coverage context, plaintiff must show that benefits due under policy were withheld, and reason for withholding benefits was unreasonable or without proper cause)];

- Ignoring evidence available to it that supported the insured's claim for benefits under the policy [*McLaughlin v. Connecticut Gen. Life Ins. Co. (N.D. Cal. 1983) 565 F.Supp. 434, 454*];
- Failing to communicate adequately with the insured regarding the insured's claim for benefits under the policy [*Delgado v. Heritage Life Ins. Co. (1984) 157 Cal.App.3d 262, 278, 203 Cal.Rptr. 672* ; see *Schwartz v. State Farm Fire & Cas. Co. (2001) 88 Cal.App.4th 1329, 1338, 106 Cal.Rptr.2d 523*];
- Failing to independently evaluate settlement demands, or to obtain the assistance of counsel in making that evaluation [*Garner v. American Mut. Liab. Ins. Co. (1973) 31 Cal.App.3d 843, 848-849, 107 Cal.Rptr. 604*];
- Failing to follow counsel's advice [*Kinder v. Western Pioneer Ins. Co. (1965) 231 Cal.App.2d 894, 901, 42 Cal.Rptr. 394*];
- Failing, without good cause, to compensate the insured for the defense costs and settlement amounts incurred in the underlying lawsuit; and
- Behaving unreasonably during the course of the lawsuit [*White v. Western Title Ins. Co. (1985) 40 Cal.3d 870, 885-886, 221 Cal.Rptr. 509, 710 P.2d 309*].

For a discussion of specific conduct that may be unreasonable, see California Insurance Law and Practice, Ch. 13, §§ 13.03[2][c], 13.04[3], 13.07[3][c] (Matthew Bender).

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 23, *California Judicial Council Insurance Litigation Instructions*]:

CACI No. 2330, Implied Obligation of Good Faith and Fair Dealing Explained

CACI No. 2331, Breach of the Implied Obligation of Good Faith and Fair Dealing--Failure or Delay in Payment (First Party)--Essential Factual Elements

CACI No. 2332, Bad Faith (First Party)--Failure to Properly Investigate Claim--Essential Factual Elements

CACI No. 2333, Bad Faith (First Party)--Breach of Duty to Inform Insured of Rights--Essential Factual Elements

CACI No. 2334, Bad Faith (Third Party)--Refusal to Accept Reasonable Settlement Within Liability Policy Limits--Essential Factual Elements

CACI No. 2335, Bad Faith--Advice of Counsel

CACI No. 2336, Bad Faith (Third Party)--Unreasonable Failure to Defend--Essential Factual Elements

CACI No. 2337, Factors to Consider in Evaluating Insurer's Conduct

CACI No. 2350, Damages for Bad Faith

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewInsurance LawBad Faith & Extracontractual LiabilityElements of Bad FaithInsurance LawBad Faith & Extracontractual LiabilityRefusals to DefendInsurance LawBad Faith & Extracontractual LiabilitySettlement ObligationsGood Faith & Fair DealingInsurance LawClaims & ContractsGood Faith & Fair DealingGeneral Overview

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CHAPTER 23A Matthew Bender Insurance Contract Instructions *

Part C. BAD FAITH ISSUES

1. Implied Duty of Good Faith and Fair Dealing

1-23A California Forms of Jury Instruction MB 2300A.146

MB 2300A.146 Interpleader

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

An insurer has a statutory right to deposit into court insurance policy proceeds that are the subject of dispute between two adverse claimants.

Authority: Code Civ. Proc. § 386(c).

[2] Use of Instruction

This instruction should be used if the insured claims that the insurer acted in bad faith by paying the policy benefits into the court, rather than to the insured.

[3] Comment

If there is a dispute among claimants over the proceeds of a policy, the insurance company may file a complaint or cross-complaint in interpleader and deposit the proceeds with the court [*Code Civ. Proc. § 386(c)*]. Although a successful interpleader action may result in reduced defense costs for the insurer with regard to a claim against its insured, that fact does not render the insurer's resort to the interpleader procedure an act of bad faith [*Lehto v. Allstate Ins. Co. (1994) 31 Cal.App.4th 60, 71, 36 Cal.Rptr.2d 814*].

For discussion of the insurer's right to consider and assert its own interests, see *MB 2300A.143* and *MB 2300A.144*.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedurePartiesInterpleadersGeneral OverviewCivil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewInsurance LawBad Faith & Extracontractual LiabilityElements of Bad FaithInsurance LawBad Faith & Extracontractual LiabilityRefusals to DefendInsurance LawClaims & ContractsGood Faith & Fair DealingGeneral OverviewInsurance LawClaims & ContractsGood Faith & Fair DealingThird Party Claimants

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CHAPTER 23A Matthew Bender Insurance Contract Instructions *

Part C. BAD FAITH ISSUES

1. Implied Duty of Good Faith and Fair Dealing

1-23A California Forms of Jury Instruction MB 2300A.147-MB 2300A.159

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MB 2300A.147Reserved for Future Use



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California Forms of Jury Instruction

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CHAPTER 23A Matthew Bender Insurance Contract Instructions *

Part C. BAD FAITH ISSUES

2. Investigation

1-23A California Forms of Jury Instruction MB 2300A.160

MB 2300A.160 Duty to Investigate

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

The implied covenant of good faith and fair dealing requires that an insurer conduct a prompt and adequate investigation of claims [by/against] its insured.

Authorities: *Silberg v. California Life Ins. Co.* (1974) 11 Cal.3d 452, 460-461, 113 Cal.Rptr. 711, 521 P.2d 1103 (duty applied equally in first-party and third-party cases); *Eigner v. Worthington* (1997) 57 Cal.App.4th 188, 195-196, 66 Cal.Rptr.2d 808 ; *Mariscal v. Old Republic Life Ins. Co.* (1996) 42 Cal.App.4th 1617, 1623-1624, 50 Cal.Rptr.2d 224 (first-party); *Paulfrey v. Blue Chip Stamps* (1983) 150 Cal.App.3d 187, 194-200, 197 Cal.Rptr. 501 (first-party); *Brown v. Guarantee Ins. Co.* (1957) 155 Cal.App.2d 679, 689, 319 P.2d 69 (third-party).

[2] Use of Instruction

This instruction should be used if the insured claims that the insurer did not properly investigate the claim. It is appropriate in both first-party and third-party cases. If the insurer conducted no investigation at all, this instruction may be sufficient by itself. If the insurer conducted an investigation that the insured contends was inadequate, this instruction can be used in conjunction with the instruction in MB 2300A.161.

For related Judicial Council instructions, see [3][b], *below*.

[3] Comment

[a] Duty to Investigate

The duty to investigate applies to both first-party and third-party claims [*Silberg v. California Life Ins. Co.* (1974) 11 Cal.3d 452, 460-461, 113 Cal.Rptr. 711, 521 P.2d 1103 ; *Gruenberg v. Aetna Ins. Co.* (1973) 9 Cal.3d 566, 573, 108 Cal.Rptr. 480, 510 P.2d 1032 ; *Eigner v. Worthington* (1997) 57 Cal.App.4th 188, 195-196, 66 Cal.Rptr.2d 808 ; *Paulfrey v. Blue Chip Stamps* (1983) 150 Cal.App.3d 187, 194-200, 197 Cal.Rptr. 501 ; see, e.g., *Baron v. Fire Ins. Exchange* (2007) 154 Cal.App.4th 1184, 1190, 65 Cal.Rptr.3d 502 (first-party)]. This duty is governed by a rule of reasonableness [see *Egan v. Mutual of Omaha Ins. Co.* (1979) 24 Cal.3d 809, 819, 169 Cal.Rptr. 691, 620 P.2d 141 ; *Austero v. National Cas. Co.* (1978) 84 Cal.App.3d 1, 30, 35-36, 148 Cal.Rptr. 653], and it requires an honest and intelligent evaluation of the claim, based on a knowledge of the facts and circumstances on which the claim is made and the nature and extent of the loss or injuries [*Brown v. Guarantee Ins. Co.* (1957) 155 Cal.App.2d 679, 685-689, 319 P.2d 69 ; see, e.g., *Jordan v. Allstate Ins. Co.* (2007) 148 Cal.App.4th 1062, 1076-1077, 56 Cal.Rptr.3d 312 (disputed issues of fact regarding whether insurer failed to conduct full, fair, thorough and timely investigation on first-party claim)]. The insurer must fully inquire into any grounds supporting the claim, as well as any grounds for denying the claim [*Egan v. Mutual of Omaha Ins. Co.* (1979) 24 Cal.3d 809, 819, 169 Cal.Rptr. 691, 620 P.2d 141]. However, in some circumstances, the duty to investigate may be fulfilled if the insurer simply compares the terms of the policy and the allegations of the complaint and determines that the claim falls outside the scope of coverage [*American Int'l Bank v. Fidelity & Deposit Co.* (1996) 49 Cal.App.4th 1558, 1571, 57 Cal.Rptr.2d 567 (insurer conducted reasonable investigation by comparing allegations of economic loss and emotional distress with policy provisions concerning "bodily injury" and "property damage," and concluding that claim was not covered)]. Once the insurer has made its decision, there is no continuing duty to investigate [*Safeco Ins. Co. of Am. v. Parks* (2004) 122 Cal.App.4th 779, 794, 19 Cal.Rptr.3d 17].

If there are disputed issues of fact, whether the insurer failed to properly investigate an insured's claim is a question of fact for the jury [*Paulfrey v. Blue Chip Stamps* (1983) 150 Cal.App.3d 187, 195-201, 197 Cal.Rptr. 501].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 23, *California Judicial Council Insurance Litigation Instructions*]:

CACI No. 2330, Implied Obligation of Good Faith and Fair Dealing Explained

CACI No. 2331, Breach of the Implied Obligation of Good Faith and Fair Dealing--Failure or Delay in Payment (First Party)--Essential Factual Elements

CACI No. 2332, Bad Faith (First Party)--Failure to Properly Investigate Claim--Essential Factual Elements

CACI No. 2335, Bad Faith--Advice of Counsel

CACI No. 2337, Factors to Consider in Evaluating Insurer's Conduct

CACI No. 2350, Damages for Bad Faith

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Insurance Law Bad Faith & Extracontractual Liability Elements of Bad Faith Insurance Law Bad Faith & Extracontractual Liability Refusals to Defend Insurance Law Claims & Contracts Good Faith & Fair Dealing General Overview Insurance Law Industry Regulation Unfair Business Practices Claims Investigations & Practices

* Revised by Susan E. Firtch. Ms. Firtch is a partner at Burnham Brown in Oakland, California.



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CHAPTER 23A Matthew Bender Insurance Contract Instructions *
Part C. BAD FAITH ISSUES
2. Investigation

1-23A California Forms of Jury Instruction MB 2300A.161

MB 2300A.161 Improper Acts in Course of Investigation

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

An insurer may not deceive or harass the insured in the course of investigating a claim. If you find that by _____ [describe insurer's conduct during course of investigation], [insurer] deceived or harassed [insured], then [insurer] is liable for bad faith breach of the covenant of good faith and fair dealing.

Authorities: *Gruenberg v. Aetna Ins. Co.* (1973) 9 Cal.3d 566, 575-576, 108 Cal.Rptr. 480, 510 P.2d 1032 ; *Younan v. Equifax Inc.* (1980) 111 Cal.App.3d 498, 511, 169 Cal.Rptr. 478 .

[2] Use of Instruction

This instruction should be used if the insured complains of unreasonable wrongful acts on the part of the insurer or its agents during the course of the investigation of the insured's claim. It should be used in conjunction with the instruction in MB 2300A.160.

For related Judicial Council instructions, see [3][b], *below*.

[3] Comment

[a] Wrongful Investigative Conduct

Investigative conduct that is wrongful includes all of the following:

- Soliciting information from the insured in a way that misleads the insured as to the nature of the information sought and the interpretation the insurer will give it [*Younan v. Equifax Inc. (1980) 111 Cal.App.3d 498, 511, 169 Cal.Rptr. 478*];
- Attempting to implicate the insured in the loss [*Gruenberg v. Aetna Ins. Co. (1973) 9 Cal.3d 566, 575, 108 Cal.Rptr. 480, 510 P.2d 1032*]; and
- Befriending the insured for the purpose of obtaining covert photographs in an attempt to disprove physical injury claims [*Unruh v. Truck Ins. Exch. (1972) 7 Cal.3d 616, 620-621, 102 Cal.Rptr. 815, 498 P.2d 1063* ; *Redner v. Workmen's Comp. Appeals Bd. (1971) 5 Cal.3d 83, 93-95, 95 Cal.Rptr. 447, 485 P.2d 799*].

Because independent adjusters and investigators have no contractual relationship with the insured, only the insurer can be liable for breach of the implied covenant based on the adjusters' and investigators' acts in the course of investigating the claim [*Egan v. Mutual of Omaha Ins. Co. (1979) 24 Cal.3d 809, 824, 169 Cal.Rptr. 691, 620 P.2d 141* ; *Gruenberg v. Aetna Ins. Co. (1973) 9 Cal.3d 566, 575-576, 108 Cal.Rptr. 480, 510 P.2d 1032*].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 23, *California Judicial Council Insurance Litigation Instructions*]:

CACI No. 2330, Implied Obligation of Good Faith and Fair Dealing Explained

CACI No. 2331, Breach of the Implied Obligation of Good Faith and Fair Dealing--Failure or Delay in Payment (First Party)--Essential Factual Elements

CACI No. 2332, Bad Faith (First Party)--Failure to Properly Investigate Claim--Essential Factual Elements

CACI No. 2335, Bad Faith--Advice of Counsel

CACI No. 2337, Factors to Consider in Evaluating Insurer's Conduct

CACI No. 2350, Damages for Bad Faith

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Insurance Law Bad Faith & Extracontractual Liability Elements of Bad Faith Insurance Law Bad Faith & Extracontractual Liability Refusals to Defend Insurance Law Claims & Contracts Good Faith & Fair Dealing General Overview Insurance Law Industry Regulation Unfair Business Practices Claims Investigations & Practices

* Revised by Susan E. Firtch. Ms. Firtch is a partner at Burnham Brown in Oakland, California.



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CHAPTER 23A Matthew Bender Insurance Contract Instructions *

Part C. BAD FAITH ISSUES

2. Investigation

1-23A California Forms of Jury Instruction MB 2300A.162-MB 2300A.169

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CHAPTER 23A Matthew Bender Insurance Contract Instructions *

Part C. BAD FAITH ISSUES

3. Duty to Defend

1-23A California Forms of Jury Instruction MB 2300A.170

MB 2300A.170 Importance of Duty to Defend

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

One of the most important benefits of a primary insurance policy is the assurance that the insurer will provide its insured with a defense against claims for the purpose of protecting the insured from liability.

Authority: *Commercial Union Assurance Cos. v. Safeway Stores, Inc.* (1980) 26 Cal.3d 912, 918, 164 Cal.Rptr. 709, 610 P.2d 1038 .

[2] Use of Instruction

This instruction should be used if the insured contends that the insurer has wrongfully refused to defend. The instruction is not applicable if the policy does not state that the insurer has a duty (as opposed to the right) to defend claims against the insured. The policy in question will usually be a primary policy, but not always. For example, an excess policy may "drop down" and provide a defense. In that instance, counsel should delete the word "primary" from the instruction.

For related Judicial Council instructions, see [3][b], *below*.

[3] Comment

[a] Duty to Defend

General liability policies typically state that the insurer has the right and the duty to defend claims against the insured [see Long, *Law of Liability Insurance*, Ch. 5, *Duty to Defend*, § 5.02 (Matthew Bender)]. Accordingly, the duty to

defend is a contractual duty, and unlike the duties imposed by the implied covenant of good faith and fair dealing, it is not unconditional [see, e.g., *California Shoppers, Inc. v. Royal Globe Ins. Co.* (1985) 175 Cal.App.3d 1, 57-58, 221 Cal.Rptr. 171]. For example, absent actual notice of the claim against the insured, the insurer cannot breach its duty to defend, although it may remain contractually liable for the insured's defense costs [*California Shoppers, Inc. v. Royal Globe Ins. Co.* (1985) 175 Cal.App.3d 1, 58, 221 Cal.Rptr. 171 ; *Paulfrey v. Blue Chip Stamps* (1983) 150 Cal.App.3d 187, 199, 197 Cal.Rptr. 501 ; see, e.g., *Safeco Ins. Co. of America v. Parks* (2009) 170 Cal.App.4th 992, 1003-1004, 88 Cal.Rptr.3d 730].

The California Supreme Court has stated that to defend meaningfully, the insurer must defend immediately, and that to defend immediately, it must defend entirely [*Aerojet-Gen. Corp. v. Transport Indem. Co.* (1997) 17 Cal.4th 38, 60, 70 Cal.Rptr.2d 118, 948 P.2d 909 ; see also *Buss v. Superior Court* (1997) 16 Cal.4th 35, 58-59, 65 Cal.Rptr.2d 366, 939 P.2d 766 ; see generally MB 2300A.171 regarding the scope of duty to defend and possible reimbursement for the cost of defending noncovered claims].

The duty to defend is one of the most important benefits of a primary insurance policy [*Buss v. Superior Court* (1997) 16 Cal.4th 35, 45, 65 Cal.Rptr.2d 366, 939 P.2d 766 ; *Commercial Union Assurance Cos. v. Safeway Stores, Inc.* (1980) 26 Cal.3d 912, 918, 164 Cal.Rptr. 709, 610 P.2d 1038 ; see *Montrose Chem. Corp. v. Superior Court* (1993) 6 Cal.4th 287, 295-296, 24 Cal.Rptr.2d 467, 861 P.2d 1153 (insured's desire to secure right to call on insurer's superior resources for defense of third-party claims is as significant, as motive for purchasing insurance, as is wish to obtain indemnity for possible liability)].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 23, *California Judicial Council Insurance Litigation Instructions*]:

CACI No. 2330, Implied Obligation of Good Faith and Fair Dealing Explained

CACI No. 2331, Breach of the Implied Obligation of Good Faith and Fair Dealing--Failure or Delay in Payment (First Party)--Essential Factual Elements

CACI No. 2335, Bad Faith--Advice of Counsel

CACI No. 2350, Damages for Bad Faith

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Insurance Law Bad Faith & Extracontractual Liability Elements of Bad Faith Insurance Law Bad Faith & Extracontractual Liability Refusals to Defend Insurance Law Claims & Contracts Good Faith & Fair Dealing Duty to Defend

* Revised by Susan E. Firtch. Ms. Firtch is a partner at Burnham Brown in Oakland, California.



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CHAPTER 23A Matthew Bender Insurance Contract Instructions *

Part C. BAD FAITH ISSUES

3. Duty to Defend

1-23A California Forms of Jury Instruction MB 2300A.171

MB 2300A.171 When Duty to Defend Exists

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

An insurer has a duty to defend its insured against a lawsuit when the insurer learns, or should have learned, of facts that give rise to a potential that the insured will be held liable for damages covered by the insurance policy.

The insurer may learn of those facts from the pleadings in the lawsuit itself, from the insured, or from [insurer's] own investigation of the circumstances giving rise to the lawsuit.

The duty to defend is discharged when the action is concluded. It may be extinguished earlier if it is shown that no claim can in fact be covered. In that case, however, it is extinguished only prospectively, and not retroactively.

Authorities: *Aerojet-Gen. Corp. v. Transport Indem. Co.* (1997) 17 Cal.4th 38, 58, 70 Cal.Rptr.2d 118, 948 P.2d 909 ; *Buss v. Superior Court* (1997) 16 Cal.4th 35, 46, 65 Cal.Rptr.2d 366, 939 P.2d 766 ; *Montrose Chem. Corp. v. Superior Court* (1993) 6 Cal.4th 287, 295, 24 Cal.Rptr.2d 467, 861 P.2d 1153 ; *Horace Mann Ins. Co. v. Barbara B.* (1993) 4 Cal.4th 1076, 1081, 17 Cal.Rptr.2d 210, 846 P.2d 792 ; *Gray v. Zurich Ins. Co.* (1966) 65 Cal.2d 263, 276-277, 54 Cal.Rptr. 104, 419 P.2d 168 ; *State Farm Fire & Casualty Co. v. Superior Court* (2008) 164 Cal.App.4th 317, 323, 78 Cal.Rptr.3d 828 ; *Barnett v. Fireman's Fund Ins. Co.* (2001) 90 Cal.App.4th 500, 510 108 Cal.Rptr.2d 657 ; *State Farm Fire & Cas. Co. v. Century Indem. Co.* (1997) 59 Cal.App.4th 648, 657, 69 Cal.Rptr.2d 403 ; *Eigner v. Worthington* (1997) 57 Cal.App.4th 188, 195-196, 66 Cal.Rptr.2d 808 ; *Borg v. Transamerica Ins. Co.* (1996) 47 Cal.App.4th 448, 454-455, 54 Cal.Rptr.2d 811 ; *American Motorists Ins. Co. v. Allied-Sysco Food Servs., Inc.* (1993) 19 Cal.App.4th 1342, 1353, 24 Cal.Rptr.2d 106 ; *Amato v. Mercury Cas. Co.* (1993) 18 Cal.App.4th 1784, 1790, 23 Cal.Rptr.2d 73 ; *Dykstra v. Foremost Ins. Co.* (1993) 14 Cal.App.4th 361, 367-368, 17 Cal.Rptr.2d 543 ; *City of San Buenaventura v.*

Allianz Ins. Co. (1992) 9 Cal.App.4th 402, 406, 11 Cal.Rptr.2d 742 ; *Devin v. United Servs. Auto. Ass'n* (1992) 6 Cal.App.4th 1149, 1157, 8 Cal.Rptr.2d 263 .

[2] Use of Instruction

This instruction should be used in cases involving the issue of whether the insurer should have provided a defense. It may not be appropriate, for example, if the insurer was never notified of the lawsuit against the insured, because there is no duty to defend absent notice of the claim against the insured [see MB 2300A.170[3]].

For related Judicial Council instructions, see [3][b], *below*.

[3] Comment

[a] Duty to Defend Must Be Clearly and Unambiguously Excluded

A liability insurance policy is presumed to include a duty to defend unless that duty is excluded by clear and unambiguous language [Civ. Code § 2778 (defense obligation implied in all indemnity agreements unless contrary intention appears); *Gray v. Zurich Ins. Co.* (1966) 65 Cal.2d 263, 54 Cal.Rptr. 104, 419 P.2d 168 ; *Maryland Cas. Co. v. Nationwide Ins. Co.* (1998) 65 Cal.App.4th 21, 30-31, 76 Cal.Rptr.2d 113]. Absent such an exclusion, once the insurer has actual notice of a lawsuit against the insured [see MB 2300A.170[3]], the duty to defend arises whenever the insurer is or reasonably should be aware of facts giving rise to a potential of covered liability [*Montrose Chem. Corp. v. Superior Court* (1993) 6 Cal.4th 287, 295, 299-300, 24 Cal.Rptr.2d 467, 861 P.2d 1153 (rejecting "reasonable potential" standard advanced by insurer); *Horace Mann Ins. Co. v. Barbara B.* (1993) 4 Cal.4th 1076, 1081, 17 Cal.Rptr.2d 210, 846 P.2d 792 ; *Gray v. Zurich Ins. Co.* (1966) 65 Cal.2d 263, 276-277, 54 Cal.Rptr. 104, 419 P.2d 168 ; *Risely v. Interinsurance Exch.* (2010) 183 Cal.App.4th 196, 207-208, 107 Cal.Rptr.3d 343 ; *Fire Ins. Exch. v. Superior Court* (2010) 181 Cal.App.4th 388, 392-393, 104 Cal.Rptr.3d 534 ; *American States Ins. Co. v. Progressive Casualty Ins. Co.* (2009) 180 Cal.App.4th 18, 25, 102 Cal.Rptr.3d 591 ; *Kim Seng Co. v. Great American Ins. Co. of N.Y.* (2009) 179 Cal.App.4th 186, 193, 101 Cal.Rptr.3d 537 ; *Ortega Rock Quarry v. Golden Eagle Ins. Co.* (2006) 141 Cal. App. 4th 969, 977, 46 Cal. Rptr. 3d 517 ; *Eigner v. Worthington* (1997) 57 Cal.App.4th 188, 195-196, 66 Cal.Rptr.2d 808 ; *Borg v. Transamerica Ins. Co.* (1996) 47 Cal.App.4th 448, 454-455, 54 Cal.Rptr.2d 811 ; *Amato v. Mercury Cas. Co.* (1993) 18 Cal.App.4th 1784, 1790, 23 Cal.Rptr.2d 73 ; *Dykstra v. Foremost Ins. Co.* (1993) 14 Cal.App.4th 361, 367-368, 17 Cal.Rptr.2d 543 ; *City of San Buenaventura v. Allianz Ins. Co. Div. 6* (1992) 9 Cal.App.4th 402, 406, 11 Cal.Rptr.2d 742 ; *Devin v. United Servs. Auto. Ass'n* (1992) 6 Cal.App.4th 1149, 1157, 1162, 8 Cal.Rptr.2d 263].

It does not matter that the insurer ultimately may not be obligated to indemnify the insured. As long as a potential for indemnification exists, a duty to defend exists [*Montrose Chem. Corp. v. Superior Court* (1993) 6 Cal.4th 287, 295, 24 Cal.Rptr.2d 467, 861 P.2d 1153 ; *Horace Mann Ins. Co. v. Barbara B.* (1993) 4 Cal.4th 1076, 1081, 17 Cal.Rptr.2d 210, 846 P.2d 792 ; *Gray v. Zurich Ins. Co.* (1966) 65 Cal.2d 263, 276-277, 54 Cal.Rptr. 104, 419 P.2d 168 ; *Great American Ins. Co. v. Superior Court* (2009) 178 Cal.App.4th 221, 234, 100 Cal.Rptr.3d 258 ; *Food Pro Internat'l, Inc. v. Farmers Ins. Exch.* (2008) 169 Cal.App.4th 976, 985, 89 Cal.Rptr.3d 1 ; *Barnett v. Fireman's Fund Ins. Co.* (2001) 90 Cal.App.4th 500, 510 108 Cal.Rptr.2d 657 ; *State Farm Fire & Cas. Co. v. Century Indem. Co.* (1997) 59 Cal.App.4th 648, 657, 69 Cal.Rptr.2d 403 ; *Lebas Fashion Imps. v. ITT Hartford Ins.* (1996) 50 Cal.App.4th 548, 556, 59 Cal.Rptr.2d 36 ; *Borg v. Transamerica Ins. Co.* (1996) 47 Cal.App.4th 448, 454-455, 54 Cal.Rptr.2d 811 ; see, e.g., *E.iphany, Inc. v. St. Paul Fire & Marine Ins. Co.* (N.D. Cal. 2008) 590 F.Supp.2d 1244, 1251].

Although the duty to defend is broad [*Pension Trust Fund v. Federal Ins. Co.* (9th Cir. 2002) 307 F.3d 944, 949], it does not extend beyond a suit--that is, a civil action prosecuted in a court [*Certain Underwriters at Lloyd's London v. Superior Court (Powerine Oil Co.)* (2001) 24 Cal.4th 945, 959-960, 103 Cal.Rptr.2d 672, 16 P.3d 94 ; *Foster-Gardner, Inc. v. National Union Fire Ins. Co.* (1998) 18 Cal.4th 857, 886-888, 77 Cal.Rptr.2d 107, 959 P.2d 265 ; see *Construction Protective Servs., Inc. v. TIG Specialty Ins. Co.* (2002) 29 Cal.4th 189, 198-199, 126 Cal.Rptr.2d 908, 57

P.3d 372 (mentioning, but not deciding, whether third-party defendant's set-off claim against insured plaintiff, alleging plaintiff's conduct that implicates coverage, may be treated as suit for damages with regard to insurer's obligations to indemnify and defend)]. Furthermore, if the insured is not a party to the lawsuit, there is no duty to defend or indemnify, even if the insurer knows that the insured may be a cause of the plaintiff's injuries [*American Cont'l Ins. Co. v. American Cas. Co.* (2001) 86 Cal.App.4th 929, 938-939, 103 Cal.Rptr.2d 632 (insured not "legally obligated to pay" any sums if not party to action)].

Under standard CGL language, there is no duty to defend a claim that has not yet ripened into a lawsuit [*Foster-Gardner, Inc. v. National Union Fire Ins. Co.* (1998) 18 Cal.4th 857, 878-879, 77 Cal.Rptr.2d 107, 959 P.2d 265]. Standard CGL policies distinguish between "claims" and "suits," and although a claim may ripen into a suit, the terms are not synonymous [*Foster-Gardner, Inc. v. National Union Fire Ins. Co.* (1998) 18 Cal.4th 857, 879, 77 Cal.Rptr.2d 107, 959 P.2d 265]. A suit is a court proceeding initiated by the filing of a complaint (or, presumably, a pleading of equivalent effect) [*Foster-Gardner, Inc. v. National Union Fire Ins. Co.* (1998) 18 Cal.4th 857, 879, 77 Cal.Rptr.2d 107, 959 P.2d 265]. Accordingly, neither an order of the California Environmental Protection Agency requiring the insured to clean up pollution, nor an equivalent order of the United States Environmental Protection Agency is a "suit" that the insurer must defend [*Foster-Gardner, Inc. v. National Union Fire Ins. Co.* (1998) 18 Cal.4th 857, 889, 77 Cal.Rptr.2d 107, 959 P.2d 265 ; see *Ortega Rock Quarry v. Golden Eagle Ins. Co.* (2006) 141 Cal.App.4th 969, 977-978, 46 Cal.Rptr.3d 517 (EPA administrative proceeding not "suit")].

The duty to defend extends beyond allegations that actually are covered to those that are merely potentially so; however, it extends no further [*Aerojet-Gen. Corp. v. Transport Indem. Co.* (1997) 17 Cal.4th 38, 58-59, 70 Cal.Rptr.2d 118, 948 P.2d 909 ; *Buss v. Superior Court* (1997) 16 Cal.4th 35, 46, 65 Cal.Rptr.2d 366, 939 P.2d 766 ; see *Cort v. St. Paul Fire & Marine Ins. Cos.* (9th Cir. 2002) 311 F.3d 979, 983-989]. A refusal to defend may amount to a breach of the implied covenant of good faith and fair dealing [*Campbell v. Superior Court* (1996) 44 Cal.App.4th 1308, 1310, 52 Cal.Rptr.2d 385] .

On the other hand, if there is no potential for liability under the policy, there is no duty to defend [*Aerojet-Gen. Corp. v. Transport Indem. Co.* (1997) 17 Cal.4th 38, 59, 70 Cal.Rptr.2d 118, 948 P.2d 909 ; *Buss v. Superior Court* (1997) 16 Cal.4th 35, 47, 65 Cal.Rptr.2d 366, 939 P.2d 766 ; *GGIS Ins. Svcs. v. Superior Court* (2008) 168 Cal.App.4th 1493, 1506, 86 Cal.Rptr.3d 515 ; *State Farm Fire & Casualty Co. v. Superior Court* (2008) 164 Cal.App.4th 317, 323, 78 Cal.Rptr.3d 828 ; *Medill v. Westport Ins. Corp.* (2006) 143 Cal.App.4th 819, 828, 49 Cal.Rptr.3d 570 ; *Continental Cas. Co. v. Superior Court* (2001) 92 Cal.App.4th 430, 439-444, 111 Cal.Rptr.2d 849 ; 3250 Wilshire Boulevard Bldg. v. Employers Ins. of Wausau (1995) 39 Cal.App.4th 1277, 1279-1280, 46 Cal.Rptr.2d 399 (insurer had no duty to "defend" against defenses asserted in underlying action); *Cutler-Orosi Unified Sch. Dist. v. Tulare County Sch. Dist. Liab./Prop. Self-Ins.-Auth.* (1994) 31 Cal.App.4th 617, 629-631, 634, 37 Cal.Rptr.2d 106 ; *Dykstra v. Foremost Ins. Co.* (1993) 14 Cal.App.4th 361, 367-368, 17 Cal.Rptr.2d 543 ; *City of San Buenaventura v. Allianz Ins. Co. Div. 6* (1992) 9 Cal.App.4th 402, 406, 11 Cal.Rptr.2d 742 ; *Devin v. United Servs. Auto. Ass'n* (1992) 6 Cal.App.4th 1149, 1157, 1162, 8 Cal.Rptr.2d 263 ; *Fire Ins. Exch. v. Jiminez* (1986) 184 Cal.App.3d 437, 441, 229 Cal.Rptr. 83 ; *Hartford Fire Ins. Co. v. Superior Court* (1983) 142 Cal.App.3d 406, 416, 191 Cal.Rptr. 37 ; *Giddings v. Industrial Indem. Co.* (1980) 112 Cal.App.3d 213, 218, 169 Cal.Rptr. 278 ; see, e.g., *Storek v. Fidelity & Guaranty Ins. Underwriters, Inc.* (N.D. Cal. 2007) 504 F.Supp.2d 803, 807-809], unless the policy expressly provides for a defense without regard to indemnification or the policy terms lead the insured to reasonably expect a defense of the type of claim asserted [*Downey Venture v. LMI Ins. Co.* (1998) 66 Cal.App.4th 478, 507-508, 78 Cal.Rptr.2d 142 ; *B & E Convalescent Ctr. v. State Comp. Ins. Fund* (1992) 8 Cal.App.4th 78, 100, 9 Cal.Rptr.2d 894 ; see *Gray v. Zurich Ins. Co.* (1966) 65 Cal.2d 263, 274, 54 Cal.Rptr. 104, 419 P.2d 168]. In a "mixed action" involving both covered and noncovered claims, the insurer has a duty to defend all claims [*Aerojet-Gen. Corp. v. Transport Indem. Co.* (1997) 17 Cal.4th 38, 59-60, 70 Cal.Rptr.2d 118, 948 P.2d 909 ; *Buss v. Superior Court* (1997) 16 Cal.4th 35, 48-49, 65 Cal.Rptr.2d 366, 939 P.2d 766 ; *Presley Homes, Inc. v. American States Ins. Co.* (2001) 90 Cal.App.4th 571, 575, 108 Cal.Rptr.2d 686] .

The duty to provide a complete defense applies to additional insureds as well as named insureds [*Presley Homes, Inc.*

v. American States Ins. Co. (2001) 90 Cal.App.4th 571, 575, 108 Cal.Rptr.2d 686]. This duty arises not out of the policy language itself, but is imposed by law in support of the policy [*Aerojet-Gen. Corp. v. Transport Indem. Co.* (1997) 17 Cal.4th 38, 59-60, 70 Cal.Rptr.2d 118, 948 P.2d 909 ; *Buss v. Superior Court* (1997) 16 Cal.4th 35, 48-49, 65 Cal.Rptr.2d 366, 939 P.2d 766 ; *Charles E. Thomas Co. v. Transamerica Ins. Group* (1998) 62 Cal.App.4th 379, 382, 72 Cal.Rptr.2d 577]. The insurer may later seek reimbursement of defense costs that can be allocated solely to claims that are not even potentially covered [*Buss v. Superior Court* (1997) 16 Cal.4th 35, 49-50, 53, 65 Cal.Rptr.2d 366, 939 P.2d 766 ; *Old Republic Ins. Co. v. FSR Brokerage, Inc.* (2000) 80 Cal.App.4th 666, 677, 95 Cal.Rptr.2d 583]. The insurer has the burden of proof on this issue by a preponderance of the evidence [*Buss v. Superior Court* (1997) 16 Cal.4th 35, 49-50, 53, 65 Cal.Rptr.2d 366, 939 P.2d 766].

Evidence extrinsic to the complaint may defeat as well as trigger an insurer's duty to defend, if the issue of coverage can be determined as a matter of law on undisputed facts [*Montrose Chem. Corp. v. Superior Court* (1993) 6 Cal.4th 287, 296, 24 Cal.Rptr.2d 467, 861 P.2d 1153 ; *Eigner v. Worthington* (1997) 57 Cal.App.4th 188, 195-196, 66 Cal.Rptr.2d 808 ; see, e.g., *Hyundai Motor America v. National Union Fire Ins. Co.* (9th Cir. 2010) 600 F.3d 1092, 1097-1098]. However, if evidence simply creates a dispute as to whether coverage exists, and does not defeat the potential for coverage, the evidence is insufficient to defeat the insurer's duty to defend [*Montrose Chem. Corp. v. Superior Court* (1993) 6 Cal.4th 287, 299-300, 24 Cal.Rptr.2d 467, 861 P.2d 1153 ; *Wausau Underwriters Ins. Co. v. Unigard Sec. Ins. Co.* (1998) 68 Cal.App.4th 1030, 1035-1038, 1047, 80 Cal.Rptr.2d 688 ; *Eigner v. Worthington* (1997) 57 Cal.App.4th 188, 195-196, 66 Cal.Rptr.2d 808].

An insurer may determine that it is strategically advantageous to provide a defense to a party that is not its insured and that otherwise would be unrepresented--for example, if an insured's liability is closely linked to the liability of an unrepresented party. If the insurer offers a defense, and that offer is accepted by the party with whom the insurer previously had no relationship, then the insurer owes that party the same duty to defend as it owes its insured, and breach of that obligation is actionable to the same extent as if that party were an insured [*Mosier v. Southern Cal. Physicians Ins. Exch.* (1998) 63 Cal.App.4th 1022, 74 Cal.Rptr.2d 550].

For further discussion regarding the duty to defend, see California Insurance Law and Practice, Ch. 13, *Claims Handling and the Duty of Good Faith*, § 13.08 (Matthew Bender), and California Environmental Law and Land Use Practice, Ch. 59, *Insurance Coverage for Claims, Losses, and Liabilities*, § 59.07 (Matthew Bender).

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 23, *California Judicial Council Insurance Litigation Instructions*]:

CACI No. 2330, Implied Obligation of Good Faith and Fair Dealing Explained

CACI No. 2331, Breach of the Implied Obligation of Good Faith and Fair Dealing--Failure or Delay in Payment (First Party)--Essential Factual Elements

CACI No. 2335, Bad Faith--Advice of Counsel

CACI No. 2350, Damages for Bad Faith

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Insurance Law Bad Faith & Extracontractual Liability Elements of Bad Faith Insurance Law Bad Faith & Extracontractual Liability Refusals to Defend Insurance Law Claims & Contracts Good Faith & Fair Dealing Duty to Defend

* Revised by Susan E. Firtch. Ms. Firtch is a partner at Burnham Brown in Oakland, California.



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CHAPTER 23A Matthew Bender Insurance Contract Instructions *

Part C. BAD FAITH ISSUES

3. Duty to Defend

1-23A California Forms of Jury Instruction MB 2300A.172

MB 2300A.172 When Insurer Must Evaluate Duty to Defend

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

An insurer must evaluate the duty to defend at the time of tender, and the duty to defend is based on facts available to the insurer at that time. An insurer may not rely on hindsight to justify its refusal to defend.

Authorities: *Montrose Chem. Corp. v. Superior Court* (1986) 6 Cal.4th 287, 295, 24 Cal.Rptr.2d 467, 861 P.2d 1153 ; *Safeco Ins. Co. of Am. v. Parks* (2004) 122 Cal.App.4th 779, 794, 19 Cal.Rptr.3d 17 ; *Valentine v. Membrila Ins. Servs., Inc.* (2004) 118 Cal.App.4th 462, 473, 13 Cal.Rptr.3d 125 ; *Wausau Underwriters Ins. Co. v. Unigard Sec. Ins. Co.* (1998) 68 Cal.App.4th 1030, 1037, 80 Cal.Rptr.2d 688 ; *B & E Convalescent Ctr. v. State Comp. Ins. Fund* (1992) 8 Cal.App.4th 78, 92, 9 Cal.Rptr.2d 894 ; *Devin v. United Servs. Auto. Ass'n* (1992) 6 Cal.App.4th 1149, 1157, 8 Cal.Rptr.2d 263 ; *CNA Cas. of Cal. v. Seaboard Sur. Co.* (1986) 176 Cal.App.3d 598, 605, 222 Cal.Rptr. 276 .

[2] Use of Instruction

This instruction should be used if the insurer failed to defend within a reasonable time after receiving notice of the claim.

For related Judicial Council instructions, see [3][b], *below*.

[3] Comment

[a] Time to Evaluate Duty to Defend

Once the insurer has notice of a claim against the insured, it is obligated to investigate that claim thoroughly [see MB 2300A.160, MB 2300A.161]. If the insurer refuses to defend, it may not rely on information that it learns later to justify its decision in hindsight [*Montrose Chem. Corp. v. Superior Court* (1986) 6 Cal.4th 287, 295, 24 Cal.Rptr.2d 467, 861 P.2d 1153 ; *Safeco Ins. Co. of Am. v. Parks* (2004) 122 Cal.App.4th 779, 794, 19 Cal.Rptr.3d 17 ; *Valentine v. Membrilla Ins. Servs., Inc.* (2004) 118 Cal.App.4th 462, 473, 13 Cal.Rptr.3d 125 ; *Wausau Underwriters Ins. Co. v. Unigard Sec. Ins. Co.* (1998) 68 Cal.App.4th 1030, 1037, 80 Cal.Rptr.2d 688 ; *B & E Convalescent Ctr. v. State Comp. Ins. Fund* (1992) 8 Cal.App.4th 78, 92, 9 Cal.Rptr.2d 894 ; *Devin v. United Servs. Auto. Ass'n* (1992) 6 Cal.App.4th 1149, 1157, 8 Cal.Rptr.2d 263 ; *CNA Cas. of Cal. v. Seaboard Sur. Co.* (1986) 176 Cal.App.3d 598, 605, 222 Cal.Rptr. 276]. The insurer must defend if the suit potentially seeks damages within the coverage of the policy [*Gray v. Zurich Ins. Co.* (1966) 65 Cal.2d 263, 275, 419 P.2d 168 ; *State Farm Fire & Casualty Co. v. Superior Court* (2008) 164 Cal.App.4th 317, 323, 78 Cal.Rptr.3d 828]. Therefore, the insurer may not later rely on the fact that the insured was not held liable to the claimant in the suit [*Tibbs v. Great Am. Ins. Co.* (9th Cir. 1985) 755 F.2d 1370, 1375]. The duty to defend must be evaluated within a reasonable time after the insured's request for a defense.

For further discussion regarding the duty to defend, see California Insurance Law and Practice, Ch. 13, *Claims Handling and the Duty of Good Faith*, § 13.08 (Matthew Bender), and California Environmental Law and Land Use Practice, Ch. 59, *Insurance Coverage for Environmental Claims, Losses, and Liabilities*, § 59.07 (Matthew Bender).

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 23, *California Judicial Council Insurance Litigation Instructions*]:

CACI No. 2330, Implied Obligation of Good Faith and Fair Dealing Explained

CACI No. 2331, Breach of the Implied Obligation of Good Faith and Fair Dealing--Failure or Delay in Payment (First Party)--Essential Factual Elements

CACI No. 2332, Bad Faith (First Party)--Failure to Properly Investigate Claim--Essential Factual Elements

CACI No. 2335, Bad Faith--Advice of Counsel

CACI No. 2350, Damages for Bad Faith

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Insurance Law Bad Faith & Extracontractual Liability Elements of Bad Faith Insurance Law Bad Faith & Extracontractual Liability Refusals to Defend Insurance Law Claims & Contracts Good Faith & Fair Dealing Duty to Defend

* Revised by Susan E. Firtch. Ms. Firtch is a partner at Burnham Brown in Oakland, California.



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CHAPTER 23A Matthew Bender Insurance Contract Instructions *

Part C. BAD FAITH ISSUES

3. Duty to Defend

1-23A California Forms of Jury Instruction MB 2300A.173-MB 2300A.179

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MB 2300A.173Reserved for Future Use



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CHAPTER 23A Matthew Bender Insurance Contract Instructions *

Part C. BAD FAITH ISSUES

4. Unreasonable Refusal to Settle

1-23A California Forms of Jury Instruction MB 2300A.180

MB 2300A.180 Duty to Settle

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

As part of its duty of good faith and fair dealing, [insurer] was obligated not to refuse unreasonably to settle the underlying lawsuit. If you find that [insurer] breached this duty, then [insurer] is liable for the amount of the judgment in the underlying lawsuit that exceeds its policy limit.

I will explain the elements of this duty next.

Authorities: *Johansen v. California State Auto. Ass'n Inter-Ins. Bureau* (1975) 15 Cal.3d 9, 15, 123 Cal.Rptr. 288, 538 P.2d 744 ; *Comunale v. Traders & Gen. Ins. Co.* (1958) 50 Cal.2d 654, 658-661, 328 P.2d 198 ; *Walbrook Ins. Co. Ltd. v. Liberty Mut. Ins. Co.* (1992) 5 Cal.App.4th 1445, 1453-1457, 7 Cal.Rptr.2d 513 .

[2] Use of Instruction

This instruction should be used if the insured contends that an excess judgment against the insured resulted from the insurer's wrongful refusal to settle within policy limits. It should be used in conjunction with the instructions in MB 2300A.181-MB 2300A.183.

For related Judicial Council instructions, see [3][b], *below*.

[3] Comment

[a] Duty to Settle

The duty to settle protects the insured from liability in excess of the policy limits by requiring that the insurer not unreasonably refuse settlement within those limits [*Murphy v. Allstate Ins. Co.* (1976) 17 Cal.3d 937, 941, 132 Cal.Rptr. 424, 553 P.2d 584 ; *Johansen v. California State Auto. Ass'n Inter-Ins. Bureau* (1975) 15 Cal.3d 9, 15, 123 Cal.Rptr. 288, 538 P.2d 744 ; *Comunale v. Traders & Gen. Ins. Co.* (1958) 50 Cal.2d 654, 658-661, 328 P.2d 198 ; *J.B. Aguerre, Inc. v. American Guarantee & Liab. Ins. Co.* (1997) 59 Cal.App.4th 6, 12-13, 68 Cal.Rptr.2d 837 ; *Camelot by the Bay Condominium Owners' Assn. v. Scottsdale Ins. Co.* (1994) 27 Cal.App.4th 33, 45-46, 32 Cal.Rptr.2d 354 ; *Walbrook Ins. Co. Ltd. v. Liberty Mut. Ins. Co.* (1992) 5 Cal.App.4th 1445, 1453-1455, 7 Cal.Rptr.2d 513 ; see *Archdale v. American Int'l Specialty Lines Ins. Co.* (2007) 154 Cal.App.4th 449, 463, 64 Cal.Rptr.3d 632 (only permissible consideration in evaluating reasonableness is whether ultimate judgment will likely exceed settlement offer)]. An insurer is not liable for an excess judgment after refusing to settle, unless all of the following elements are present:

- The claimant in the underlying action offered to settle for an amount within the insurer's policy limits (or for an amount in excess of those limits if the insured or its excess insurer was willing to pay the excess portion) [*Comunale v. Traders & Gen. Ins. Co.* (1958) 50 Cal.2d 654, 658, 328 P.2d 198 ; *J.B. Aguerre, Inc. v. American Guarantee & Liab. Ins. Co.* (1997) 59 Cal.App.4th 6, 12-13, 68 Cal.Rptr.2d 837 ; *Merritt v. Reserve Ins. Co.* (1973) 34 Cal.App.3d 858, 879, 110 Cal.Rptr. 511 ; see MB 2300A.181], although a formal settlement offer is not an absolute prerequisite if the claimant has made a request for policy limits and the insurer has refused to contact the policyholder about the request [*Boicourt v. Amex Assurance Co.* (2000) 78 Cal. App. 4th 1390, 1399, 93 Cal.Rptr.2d 763];
- The insurer had a reasonable opportunity to evaluate the settlement offer [see *Walbrook Ins. Co. Ltd. v. Liberty Mut. Ins. Co.* (1992) 5 Cal.App.4th 1445, 1457-1458, 7 Cal.Rptr.2d 513 ; *Coe v. State Farm Mut. Auto Ins. Co.* (1977) 66 Cal.App.3d 981, 994, 136 Cal.Rptr. 331 ; see also MB 2300A.182];
- The insurer's rejection of that offer was unreasonable [*Coe v. State Farm Mut. Auto. Ins. Co.* (1977) 66 Cal.App.3d 981, 990, 136 Cal.Rptr. 331 ; *Cain v. State Farm Mut. Auto. Ins. Co.* (1975) 47 Cal.App.3d 783, 792, 121 Cal.Rptr. 200 ; *Merritt v. Reserve Ins. Co.* (1973) 34 Cal.App.3d 858, 876, 110 Cal.Rptr. 511 ; see MB 2300A.183].

If there are disputed issues of fact, the reasonableness of the insurer's refusal to settle is a question of fact to be determined by the jury [*Walbrook Ins. Co. Ltd. v. Liberty Mut. Ins. Co.* (1992) 5 Cal.App.4th 1445, 1454-1457, 7 Cal.Rptr.2d 513].

Questions may arise if there is a dispute over coverage, the insurer believes that the settlement is reasonable, but the insured does not want the insurer to make the settlement payment. In that situation, the insurer may settle the claim and seek reimbursement of the settlement from the insured if it is determined that no coverage was owed [*Blue Ridge Ins. Co. v. Jacobsen* (2001) 25 Cal.4th 489, 504, 106 Cal.Rptr.2d 535, 22 P.3d 313].

Although there is no liability for unreasonable refusal to accept an offer to settle within policy limits unless there is a judgment in the underlying action that exceeds those limits [*Safeco Ins. Co. v. Superior Court* (1999) 71 Cal.App.4th 782, 788, 84 Cal.Rptr.2d 43 ; but see *J.B. Aguerre, Inc. v. American Guarantee & Liab. Ins. Co.* (1997) 59 Cal.App.4th 6, 17, 68 Cal.Rptr.2d 837 ; *Dalrymple v. United Servs. Auto. Ass'n* (1995) 40 Cal.App.4th 497, 514, 525, 46 Cal.Rptr.2d 845 ; *Camelot by the Bay Condominium Owners' Assn. v. Scottsdale Ins. Co.* (1994) 27 Cal.App.4th 33, 48-49, 51-54, 32 Cal.Rptr.2d 354 (no breach of implied covenant of good faith and fair dealing if demand and stipulated judgment were both within policy limits)], the existence of a judgment in excess of policy limits is unlikely to be a question of fact. In one case, for example, an insured who paid the difference between the claimant's offer and what the insurer was willing to pay could not recover for the insurer's refusal to accept a settlement offer within policy limits. The trial court granted summary judgment for the insurer because the case was resolved by settlement, and the court of appeal

affirmed, holding that "an insured cannot maintain an action for bad faith exposure to an excess verdict in the absence of such a verdict" [*Finkelstein v. 20th Century Ins. Co. (1992) 11 Cal.App.4th 926, 928, 14 Cal.Rptr.2d 305*]. There was no cause of action when the insurer refused to settle and the insured struck a deal with the claimant to settle the action by adding \$6,700 of his own money to the insurer's \$75,000 [*Finkelstein v. 20th Century Ins. Co. (1992) 11 Cal.App.4th 926, 928-930, 14 Cal.Rptr.2d 305*].

Although an insurer's refusal to settle the underlying action may be a cause in fact of an award of punitive damages, it is not a proximate cause. Therefore, the insured may not shift to the insurer, and ultimately to the public, the payment of punitive damages awarded in a third-party lawsuit against the insured as a result of the insured's intentional, morally blameworthy behavior against the third party. To allow recovery would do all of the following [*PPG Indus., Inc. v. Transamerica Ins. Co. (1999) 20 Cal.4th 310, 319, 84 Cal.Rptr.2d 455, 975 P.2d 652*]:

- Violate the public policy against permitting liability for intentional wrongdoing to be offset or reduced by the negligence of another;
- Defeat the purposes of punitive damages, which are to punish and deter the wrongdoer; and
- Violate the public policy against indemnification for punitive damages.

For further discussion of the duty to settle, see California Insurance Law and Practice, Ch. 13 (Matthew Bender).

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 23, *California Judicial Council Insurance Litigation Instructions*]:

CACI No. 2330, Implied Obligation of Good Faith and Fair Dealing Explained

CACI No. 2331, Breach of the Implied Obligation of Good Faith and Fair Dealing--Failure or Delay in Payment (First Party)--Essential Factual Elements

CACI No. 2334, Bad Faith (Third Party)--Refusal to Accept Reasonable Settlement Within Liability Policy Limits--Essential Factual Elements

CACI No. 2335, Bad Faith--Advice of Counsel

CACI No. 2336, Bad Faith (Third Party)--Unreasonable Failure to Defend--Essential Factual Elements

CACI No. 2350, Damages for Bad Faith

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Insurance Law Bad Faith & Extracontractual Liability Elements of Bad Faith Insurance Law Bad Faith & Extracontractual Liability Refusals to Defend Insurance Law Bad Faith & Extracontractual Liability Settlement Obligations Good Faith & Fair Dealing Insurance Law Claims & Contracts Good Faith & Fair Dealing Duty to Defend

* Revised by Susan E. Firtch. Ms. Firtch is a partner at Burnham Brown in Oakland, California.



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CHAPTER 23A Matthew Bender Insurance Contract Instructions *

Part C. BAD FAITH ISSUES

4. Unreasonable Refusal to Settle

1-23A California Forms of Jury Instruction MB 2300A.181

MB 2300A.181 Demand Within Policy Limits (or Above Limits With Insured or Excess Insurer Willing to Pay Excess)

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

To find [insurer] liable for wrongfully refusing to settle the underlying action you must find that _____ [the claimant in the underlying action offered to settle for an amount less than or equal to (insurer)'s policy limits or (insured) or (insured's) excess insurance company offered to pay the portion of the settlement demand that was in excess of (insurer's) policy limits].

Authority: *Merritt v. Reserve Ins. Co. (1973) 34 Cal.App.3d 858, 879, 110 Cal.Rptr. 511 .*

[2] Use of Instruction

This instruction should be used in conjunction with the instruction in MB 2300A.180 and with the instructions in MB 2300A.182 and MB 2300A.183, which set forth the other elements of a cause of action for wrongful refusal to settle.

The first alternative in this instruction should be used if the demand was within the insurer's policy limits. The second alternative should be used if the demand was in excess of policy limits, but the insured or an excess insurer offered to pay the excess amount.

For related Judicial Council instructions, see [3][b], *below*.

[3] Comment

[a] Offer to Settle Within Policy Limits

There can be no action for wrongful refusal to settle absent an offer to settle for an amount within policy limits (or above those limits with the insured or its excess insurer willing to pay the excess). In the absence of an offer, there is no conflict of interest between the insurer and the insured, and thus no possibility of bad faith [*Merritt v. Reserve Ins. Co.* (1973) 34 Cal.App.3d 858, 879, 110 Cal.Rptr. 511 ; but see *J.B. Aguerre, Inc. v. American Guarantee & Liab. Ins. Co.* (1997) 59 Cal.App.4th 6, 17, 68 Cal.Rptr.2d 837].

For further discussion of the elements of an action for wrongful refusal to settle, see *MB 2300A.180[3]* and *MB 2300A.183[3][a]*.

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 23, *California Judicial Council Insurance Litigation Instructions*]:

CACI No. 2330, Implied Obligation of Good Faith and Fair Dealing Explained

CACI No. 2331, Breach of the Implied Obligation of Good Faith and Fair Dealing--Failure or Delay in Payment (First Party)--Essential Factual Elements

CACI No. 2334, Bad Faith (Third Party)--Refusal to Accept Reasonable Settlement Within Liability Policy Limits--Essential Factual Elements

CACI No. 2335, Bad Faith--Advice of Counsel

CACI No. 2336, Bad Faith (Third Party)--Unreasonable Failure to Defend--Essential Factual Elements

CACI No. 2350, Damages for Bad Faith

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Insurance Law Bad Faith & Extracontractual Liability Elements of Bad Faith Insurance Law Bad Faith & Extracontractual Liability Settlement Obligations Good Faith & Fair Dealing Insurance Law Bad Faith & Extracontractual Liability Settlement Obligations Policy Limits Insurance Law Claims & Contracts Good Faith & Fair Dealing Duty to Defend

* Revised by Susan E. Firtch. Ms. Firtch is a partner at Burnham Brown in Oakland, California.



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CHAPTER 23A Matthew Bender Insurance Contract Instructions *

Part C. BAD FAITH ISSUES

4. Unreasonable Refusal to Settle

1-23A California Forms of Jury Instruction MB 2300A.182

MB 2300A.182 Duty to Settle: Opportunity

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

To find [insurer] liable for wrongfully refusing to settle the underlying action, you must also find that [insurer] had a reasonable opportunity to evaluate and respond to the settlement demand.

Authorities: *Walbrook Ins. Co. Ltd. v. Liberty Mut. Ins. Co.* (1992) 5 Cal.App.4th 1445, 1457, 7 Cal.Rptr.2d 513 ; *Coe v. State Farm Mut. Auto. Ins. Co.* (1977) 66 Cal.App.3d 981, 994, 136 Cal.Rptr. 331 ; *Martin v. Hartford Accident & Indem. Co.* (1964) 228 Cal.App.2d 178, 183, 39 Cal.Rptr. 342 .

[2] Use of Instruction

This instruction should be used if there is an issue as to the insurer's opportunity to settle the claim. It should be used in conjunction with the instructions in MB 2300A.180, MB 2300A.181, and MB 2300A.183.

For related Judicial Council instructions, see [3][b], *below*.

[3] Comment

[a] Opportunity to Settle

There can be no liability for a judgment in excess of the policy limits if "there is no opportunity to compromise the claim" [*Comunale v. Traders & Gen. Ins. Co.* (1958) 50 Cal.2d 654, 659, 328 P.2d 198 ; but see *J.B. Aguerre, Inc. v. American Guarantee & Liab. Ins. Co.* (1997) 59 Cal.App.4th 6, 17, 68 Cal.Rptr.2d 837]. For the insurer to have an

opportunity to settle the claim, there must be a settlement offer that allows the insurer a reasonable period of time to evaluate the claim and respond to the offer [see *Walbrook Ins. Co. Ltd. v. Liberty Mut. Ins. Co.* (1992) 5 Cal.App.4th 1445, 1457-1458, 7 Cal.Rptr.2d 513 (offer made at same time as change of counsel may not be considered in determining bad faith because of defendant's general lack of knowledge about case; scope of inquiry is limited to settlement offers presented after defendant became capable of making informed decision); *Coe v. State Farm Mut. Auto Ins. Co.* (1977) 66 Cal.App.3d 981, 994, 136 Cal.Rptr. 331 (whether insurer's reply to settlement offer asking for more time and information was refusal, and whether it could reasonably have acted otherwise, were questions for jury); *Martin v. Hartford Accident & Indem. Co.* (1964) 228 Cal.App.2d 178, 182-183, 39 Cal.Rptr. 342 (insurer refused offer within policy limits and did not ask for extension even after reminder that offer would soon expire; investigation of claim should have been well advanced and may have indicated probable liability; judgment of dismissal therefore reversed to allow determination of bad faith issue)]. Whether the time allowed is reasonable is a question of fact that depends on the circumstances of the case [see *Coe v. State Farm Mut. Auto Ins. Co.* (1977) 66 Cal.App.3d 981, 994, 136 Cal.Rptr. 331 (whether insurer's reply to settlement offer asking for more time and information was a refusal, and whether it could reasonably have acted otherwise in light of 11-day deadline on offer, were questions for jury); *Critz v. Farmers Ins. Group* (1964) 230 Cal.App.2d 788, 798, 41 Cal.Rptr. 401, disapproved on other grounds, *Crisci v. Security Ins. Co.* (1967) 66 Cal.2d 425, 430, 58 Cal.Rptr. 13, 426 P.2d 173 (one-week limit on settlement offer does not preclude finding of bad faith by insurer)].

For further discussion of the requirement of an opportunity to settle, see California Insurance Law and Practice, Ch. 13 (Matthew Bender). For further discussion of the elements of an action for bad faith refusal to settle, see *MB 2300A.180*[3].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 23, *California Judicial Council Insurance Litigation Instructions*]:

CACI No. 2330, Implied Obligation of Good Faith and Fair Dealing Explained

CACI No. 2331, Breach of the Implied Obligation of Good Faith and Fair Dealing--Failure or Delay in Payment (First Party)--Essential Factual Elements

CACI No. 2334, Bad Faith (Third Party)--Refusal to Accept Reasonable Settlement Within Liability Policy Limits--Essential Factual Elements

CACI No. 2335, Bad Faith--Advice of Counsel

CACI No. 2336, Bad Faith (Third Party)--Unreasonable Failure to Defend--Essential Factual Elements

CACI No. 2350, Damages for Bad Faith

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Insurance Law Bad Faith & Extracontractual Liability Elements of Bad Faith Insurance Law Bad Faith & Extracontractual Liability Settlement Obligations Good Faith & Fair Dealing Insurance Law Bad Faith & Extracontractual Liability Settlement Obligations Policy Coverage Insurance Law Claims & Contracts Good Faith & Fair Dealing Duty to Defend

* Revised by Susan E. Firtch. Ms. Firtch is a partner at Burnham Brown in Oakland, California.



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CHAPTER 23A Matthew Bender Insurance Contract Instructions *

Part C. BAD FAITH ISSUES

4. Unreasonable Refusal to Settle

1-23A California Forms of Jury Instruction MB 2300A.183

MB 2300A.183 Duty to Settle: Unreasonable Refusal

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

If you find that a demand was made to settle the underlying case within [insurer]'s policy limits, and that [insurer] had a reasonable opportunity to respond to that demand, you must then determine whether [insurer] acted unreasonably in rejecting that demand.

Merely because [insurer] incorrectly evaluated the underlying case does not mean that it acted unreasonably.

Instead, you must decide whether a prudent insurer, after making an honest, intelligent, and knowledgeable evaluation of the underlying case on its merits, would have accepted the settlement demand if it had no policy limits.

A judgment in the underlying action that exceeds the policy limits, although not conclusive, justifies an inference that the value of the claim was equal to the amount of the judgment and that acceptance of an offer within policy limits was the most reasonable way to handle the claim.

Authorities: *Crisci v. Security Ins. Co.* (1967) 66 Cal.2d 425, 429, 431, 58 Cal.Rptr. 13, 426 P.2d 173 ; *Walbrook Ins. Co. Ltd. v. Liberty Mut. Ins. Co.* (1992) 5 Cal.App.4th 1445, 1453-1454, 1456, 1459-1461, 7 Cal.Rptr.2d 513 ; *Betts v. Allstate Ins. Co.* (1984) 154 Cal.App.3d 688, 706, 714, 201 Cal.Rptr. 528 ; *Coe v. State Farm Mut. Auto. Ins. Co.* (1977) 66 Cal.App.3d 981, 990, 136 Cal.Rptr. 331 ; *Cain v. State Farm Mut. Auto. Ins. Co.* (1975) 47 Cal.App.3d 783, 796-797, 121 Cal.Rptr. 200 ; *Merritt v. Reserve Ins. Co.* (1973) 34 Cal.App.3d 858, 873, 876, 110 Cal.Rptr. 511 .

[2] Use of Instruction

This instruction should be used in conjunction with the instruction in MB 2300A.180 and with the instructions in MB 2300A.181 and MB 2300A.182, which set forth the other elements of the duty to settle.

For related Judicial Council instructions, see [3][b], *below*.

[3] Comment

[a] Unreasonable Refusal

Unreasonable refusal is one of the three elements of a cause of action for breach of the implied covenant of good faith and fair dealing, based on wrongful refusal to settle [*Walbrook Ins. Co. Ltd. v. Liberty Mut. Ins. Co.* (1992) 5 Cal.App.4th 1445, 1453-1454, 7 Cal.Rptr.2d 513 ; *Betts v. Allstate Ins. Co.* (1984) 154 Cal.App.3d 688, 706, 201 Cal.Rptr. 528 ; *Coe v. State Farm Mut. Auto. Ins. Co.* (1977) 66 Cal.App.3d 981, 990, 136 Cal.Rptr. 331 ; *Merritt v. Reserve Ins. Co.* (1973) 34 Cal.App.3d 858, 876, 110 Cal.Rptr. 511]. For further discussion of the three elements of this cause of action, see MB 2300A.180[3].

A mistake in judgment is not the same thing as bad faith, and an insurer's failure to correctly predict the outcome of the underlying action does not establish that the insurer acted unreasonably in refusing to settle [*Walbrook Ins. Co. Ltd. v. Liberty Mut. Ins. Co.* (1992) 5 Cal.App.4th 1445, 1460, 7 Cal.Rptr.2d 513 ; *Coe v. State Farm Mut. Auto Ins. Co.* (1977) 66 Cal.App.3d 981, 990, 136 Cal.Rptr. 331 ; *Merritt v. Reserve Ins. Co.* (1973) 34 Cal.App.3d 858, 876, 110 Cal.Rptr. 511]. The test is whether a prudent insurer without policy limits would have accepted the settlement offer [*Crisci v. Security Ins. Co.* (1967) 66 Cal.2d 425, 429, 58 Cal.Rptr. 13, 426 P.2d 173 ; *Walbrook Ins. Co. Ltd. v. Liberty Mut. Ins. Co.* (1992) 5 Cal.App.4th 1445, 1456, 7 Cal.Rptr.2d 513 ; *Betts v. Allstate Ins. Co.* (1984) 154 Cal.App.3d 688, 706, 714, 201 Cal.Rptr. 528].

Although mere error in refusing to settle does not establish that the refusal was unreasonable, the judgment's size in the underlying action is relevant. A judgment in the underlying action that exceeds the policy limits, although not conclusive, justifies an inference that the value of the claim was equal to the amount of the judgment and that acceptance of an offer within policy limits was the most reasonable way to handle the claim [*Crisci v. Security Ins. Co.* (1967) 66 Cal.2d 425, 431, 58 Cal.Rptr. 13, 426 P.2d 173 ; *Walbrook Ins. Co. Ltd. v. Liberty Mut. Ins. Co.* (1992) 5 Cal.App.4th 1445, 1461, 7 Cal.Rptr.2d 513]. Some courts have held that refusing to instruct the jury on this inference is error [*Walbrook Ins. Co. Ltd. v. Liberty Mut. Ins. Co.* (1992) 5 Cal.App.4th 1445, 1461, 7 Cal.Rptr.2d 513 (error not prejudicial); see *Cain v. State Farm Mut. Auto. Ins. Co.* (1975) 47 Cal.App.3d 783, 796-797, 121 Cal.Rptr. 200 (use of instruction approved)].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 23, *California Judicial Council Insurance Litigation Instructions*]:

CACI No. 2330, Implied Obligation of Good Faith and Fair Dealing Explained

CACI No. 2331, Breach of the Implied Obligation of Good Faith and Fair Dealing--Failure or Delay in Payment (First Party)--Essential Factual Elements

CACI No. 2334, Bad Faith (Third Party)--Refusal to Accept Reasonable Settlement Within Liability Policy Limits--Essential Factual Elements

CACI No. 2335, Bad Faith--Advice of Counsel

CACI No. 2336, Bad Faith (Third Party)--Unreasonable Failure to Defend--Essential Factual Elements

CACI No. 2350, Damages for Bad Faith

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewInsurance LawBad Faith & Extracontractual LiabilityElements of Bad FaithInsurance LawBad Faith & Extracontractual LiabilitySettlement ObligationsGood Faith & Fair DealingInsurance LawBad Faith & Extracontractual LiabilitySettlement ObligationsPolicy CoverageInsurance LawClaims & ContractsGood Faith & Fair DealingDuty to Defend

* Revised by Susan E. Firtch. Ms. Firtch is a partner at Burnham Brown in Oakland, California.



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CHAPTER 23A Matthew Bender Insurance Contract Instructions *

Part C. BAD FAITH ISSUES

4. Unreasonable Refusal to Settle

1-23A California Forms of Jury Instruction MB 2300A.184

MB 2300A.184 Insurer Must Give Equal Consideration to Insured's Interests

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

In considering whether to accept a settlement demand, an insurer must give fair consideration to the insured's interests, equal to the consideration that the insurer gives its own interests.

Authorities: *Walbrook Ins. Co. Ltd. v. Liberty Mut. Ins. Co.* (1992) 5 Cal.App.4th 1445, 1454, 1459, 7 Cal.Rptr.2d 513 ; *Austero v. National Cas. Co.* (1978) 84 Cal.App.3d 1, 35-36, 148 Cal.Rptr. 653 , partly disapproved on other grounds, *Egan v. Mutual of Omaha Ins. Co.* (1979) 24 Cal.3d 809, 824 n.7, 169 Cal.Rptr. 691, 620 P.2d 141 ; *Merritt v. Reserve Ins. Co.* (1973) 34 Cal.App.3d 858, 873-875, 110 Cal.Rptr. 511 .

[2] Use of Instruction

This instruction should be used in wrongful refusal to settle cases, in conjunction with the general instruction in MB 2300A.180 and the instruction on unreasonable refusal in MB 2300A.183.

For related Judicial Council instructions, see [3][b], *below*.

[3] Comment

[a] Consideration of Insured's Interests

The duty of good faith and fair dealing requires an insurer to give fair consideration to the insured's interests when considering a settlement offer. In deciding whether to settle a claim, the insurer must give the interests of the insured at

least as much consideration as the insurer's own interests [*Walbrook Ins. Co. Ltd. v. Liberty Mut. Ins. Co.* (1992) 5 Cal.App.4th 1445, 1454, 1459, 7 Cal.Rptr.2d 513 ; *Betts v. Allstate Ins. Co.* (1984) 154 Cal.App.3d 688, 706, 201 Cal.Rptr. 528 ; *Austero v. National Cas. Co.* (1978) 84 Cal.App.3d 1, 35-36, 148 Cal.Rptr. 653 , *disapproved in part on other grounds*, *Egan v. Mutual of Omaha Ins. Co.* (1979) 24 Cal.3d 809, 169 Cal.Rptr. 691, 620 P.2d 141 ; *Merritt v. Reserve Ins. Co.* (1973) 34 Cal.App.3d 858, 873-875, 110 Cal.Rptr. 511].

For further discussion of the duty to settle, see California Insurance Law and Practice, Ch. 13 (Matthew Bender).

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 23, *California Judicial Council Insurance Litigation Instructions*]:

CACI No. 2330, Implied Obligation of Good Faith and Fair Dealing Explained

CACI No. 2331, Breach of the Implied Obligation of Good Faith and Fair Dealing--Failure or Delay in Payment (First Party)--Essential Factual Elements

CACI No. 2334, Bad Faith (Third Party)--Refusal to Accept Reasonable Settlement Within Liability Policy Limits--Essential Factual Elements

CACI No. 2335, Bad Faith--Advice of Counsel

CACI No. 2336, Bad Faith (Third Party)--Unreasonable Failure to Defend--Essential Factual Elements

CACI No. 2350, Damages for Bad Faith

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Insurance Law Bad Faith & Extracontractual Liability Elements of Bad Faith Insurance Law Bad Faith & Extracontractual Liability Settlement Obligations Good Faith & Fair Dealing Insurance Law Bad Faith & Extracontractual Liability Settlement Obligations Reasonable Basis Insurance Law Claims & Contracts Good Faith & Fair Dealing Duty to Defend

* Revised by Susan E. Firtch. Ms. Firtch is a partner at Burnham Brown in Oakland, California.



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CHAPTER 23A Matthew Bender Insurance Contract Instructions *

Part C. BAD FAITH ISSUES

4. Unreasonable Refusal to Settle

1-23A California Forms of Jury Instruction MB 2300A.185

MB 2300A.185 Unreasonable Refusal: Substantial Likelihood Standard

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

A reasonable insurer will settle a claim within its policy limits whenever there is a substantial likelihood that the claimant will obtain a judgment in excess of those limits.

[OPTIONAL (See Use of Instruction)]

The term "substantial likelihood" means "a strong probability."

Authorities: *Murphy v. Allstate Ins. Co.* (1976) 17 Cal.3d 937, 941, 132 Cal.Rptr. 424, 553 P.2d 584 ; *Walbrook Ins. Co. Ltd. v. Liberty Mut. Ins. Co.* (1992) 5 Cal.App.4th 1445, 1454, 1460-1461, 7 Cal.Rptr.2d 513 .

[2] Use of Instruction

This instruction should be used in unreasonable refusal to settle cases, in conjunction with the instructions in MB 2300A.180, MB 2300A.183, and MB 2300A.184.

The optional paragraph in this instruction may be used when it is necessary to explain the phrase "substantial likelihood" to the jury.

For related Judicial Council instructions, see [3][b], *below*.

[3] Comment**[a] Substantial Likelihood of Judgment Exceeding Policy Limits**

Although the insurer is obligated to protect the insured against substantial likelihood of a judgment in excess of the policy limits [*Murphy v. Allstate Ins. Co.* (1976) 17 Cal.3d 937, 941, 132 Cal.Rptr. 424, 553 P.2d 584 ; *Walbrook Ins. Co. Ltd. v. Liberty Mut. Ins. Co.* (1992) 5 Cal.App.4th 1445, 1454, 1460-1461, 7 Cal.Rptr.2d 513], it is not obligated to protect the insured against all risk by accepting any offer within policy limits [*Walbrook Ins. Co. Ltd. v. Liberty Mut. Ins. Co.* (1992) 5 Cal.App.4th 1445, 1459, 7 Cal.Rptr.2d 513 ; *Merritt v. Reserve Ins. Co.* (1973) 34 Cal.App.3d 858, 874, 110 Cal.Rptr. 511].

At least one court has upheld an instruction defining "substantial likelihood" to mean "a strong probability" [*Walbrook Ins. Co. Ltd. v. Liberty Mut. Ins. Co.* (1992) 5 Cal.App.4th 1445, 1460-1461, 7 Cal.Rptr.2d 513].

For further discussion of the duty to settle, see California Insurance Law and Practice, Ch. 13 (Matthew Bender).

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 23, *California Judicial Council Insurance Litigation Instructions*]:

CACI No. 2330, Implied Obligation of Good Faith and Fair Dealing Explained

CACI No. 2331, Breach of the Implied Obligation of Good Faith and Fair Dealing--Failure or Delay in Payment (First Party)--Essential Factual Elements

CACI No. 2334, Bad Faith (Third Party)--Refusal to Accept Reasonable Settlement Within Liability Policy Limits--Essential Factual Elements

CACI No. 2335, Bad Faith--Advice of Counsel

CACI No. 2336, Bad Faith (Third Party)--Unreasonable Failure to Defend--Essential Factual Elements

CACI No. 2350, Damages for Bad Faith

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewInsurance LawBad Faith & Extracontractual LiabilityElements of Bad FaithInsurance LawBad Faith & Extracontractual LiabilitySettlement ObligationsGood Faith & Fair DealingInsurance LawBad Faith & Extracontractual LiabilitySettlement ObligationsReasonable BasisInsurance LawClaims & ContractsGood Faith & Fair DealingDuty to Defend

* Revised by Susan E. Firtch. Ms. Firtch is a partner at Burnham Brown in Oakland, California.



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CHAPTER 23A Matthew Bender Insurance Contract Instructions *

Part C. BAD FAITH ISSUES

4. Unreasonable Refusal to Settle

1-23A California Forms of Jury Instruction MB 2300A.186

MB 2300A.186 Unreasonable Refusal: Factors to Consider

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

In determining whether [insurer] reasonably evaluated the settlement demand, factors that you should consider include all of the following:

[INCLUDE AS APPLICABLE (See Use of Instruction)]

- 1. The strength of the claimant's case, both as to liability and damages;**
- 2. Whether [insurer] properly investigated the claim, so that it was aware of the facts bearing on liability and damages;**
- 3. Whether [insured] induced [insurer] to reject the settlement demand by misleading [insurer] as to the facts;**
- 4. Whether [insurer] rejected the advice of its attorneys or agents to settle the case;**
- 5. Whether [insurer] attempted to induce [insured] to contribute to the settlement;**
- 6. Whether [insurer] informed [insured] about the offer to settle; and**
- 7. The relative amount of risk faced by both [insurer] and [insured] if [insurer] refused to settle.**

Authorities: *Allen v. Allstate Ins. Co.* (9th Cir. 1981) 656 F.2d 487, 489 ; *Merritt v. Reserve Ins. Co.* (1973) 34 Cal.App.3d 858, 876, 110 Cal.Rptr. 511 ; *Brown v. Guarantee Ins. Co.* (1957) 155 Cal.App.2d 679, 689, 319 P.2d 69 .

[2] Use of Instruction

This instruction should be used in wrongful refusal to settle cases to explain the factors to be considered in determining the reasonableness of the insurer's refusal to settle. It should be used in conjunction with the instructions in MB 2300A.180 and MB 2300A.183.

For related Judicial Council instructions, see [3][b], *below*.

[3] Comment

[a] Factors to Consider in Determining Whether Duty to Settle Was Breached

In deciding whether the insurer's refusal to settle is a breach of its duty of good faith and fair dealing, the factors listed in this instruction should be considered [*Allen v. Allstate Ins. Co.* (9th Cir. 1981) 656 F.2d 487, 489 ; *Merritt v. Reserve Ins. Co.* (1973) 34 Cal.App.3d 858, 876, 110 Cal.Rptr. 511 ; *Brown v. Guarantee Ins. Co.* (1957) 155 Cal.App.2d 679, 689, 319 P.2d 69].

Specific instances of conduct that have amounted to bad faith refusal to settle include all of the following:

- Placing unreasonable reliance on expert testimony to overcome the underlying plaintiff's claims [*Crisci v. Security Ins. Co.* (1967) 66 Cal.2d 425, 431-432, 58 Cal.Rptr. 13, 426 P.2d 173];
- Ignoring mounting evidence of liability [*Betts v. Allstate Ins. Co.* (1984) 154 Cal.App.3d 688, 707, 201 Cal.Rptr. 528];
- Unreasonable reliance on the advice of counsel appointed to defend the insured [*Allen v. Allstate Ins. Co.* (9th Cir. 1981) 656 F.2d 487, 489]; and
- The insurer's "inflexible refusal" to accept or consider its obligations under first-party coverage as well as third-party coverage [*Shade Foods, Inc. v. Innovative Prods. Sales & Mktg., Inc.* (2000) 78 Cal.App.4th 847, 888, 93 Cal.Rptr.2d 364].

For further discussion of the duty to settle, see California Insurance Law and Practice, Ch. 13 (Matthew Bender).

LexisNexis Matthew Bender Expert Practice Tip--Importance of Advice of Defense Counsel: The advice of defense counsel is particularly important in determining whether an insurer unreasonably rejected a potential settlement because defense counsel is in the best position to evaluate the case. This is true whether the insurer selects defense counsel or whether, in cases in which there is a conflict of interest, the insured selects defense counsel. *By Susan E. Firtch and Ronald Oster*

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 23, *California Judicial Council Insurance Litigation Instructions*]:

CACI No. 2330, Implied Obligation of Good Faith and Fair Dealing Explained

CACI No. 2331, Breach of the Implied Obligation of Good Faith and Fair Dealing--Failure or Delay

in Payment (First Party)--Essential Factual Elements

CACI No. 2334, Bad Faith (Third Party)--Refusal to Accept Reasonable Settlement Within Liability Policy Limits--Essential Factual Elements

CACI No. 2335, Bad Faith--Advice of Counsel

CACI No. 2336, Bad Faith (Third Party)--Unreasonable Failure to Defend--Essential Factual Elements

CACI No. 2350, Damages for Bad Faith

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewInsurance LawBad Faith & Extracontractual LiabilityElements of Bad FaithInsurance LawBad Faith & Extracontractual LiabilitySettlement ObligationsGood Faith & Fair DealingInsurance LawBad Faith & Extracontractual LiabilitySettlement ObligationsReasonable BasisInsurance LawClaims & ContractsGood Faith & Fair DealingDuty to Defend

* Revised by Susan E. Firtch. Ms. Firtch is a partner at Burnham Brown in Oakland, California.



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CHAPTER 23A Matthew Bender Insurance Contract Instructions *

Part C. BAD FAITH ISSUES

4. Unreasonable Refusal to Settle

1-23A California Forms of Jury Instruction MB 2300A.187- MB 2300A.199

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MB 2300A.187Reserved for Future Use



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CHAPTER 23A Matthew Bender Insurance Contract Instructions *

Part C. BAD FAITH ISSUES

5. Defenses

1-23A California Forms of Jury Instruction MB 2300A.200

MB 2300A.200 Advice of Counsel

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

[Insurer] acted reasonably when it acted on the advice of its attorney, even if that advice was wrong, so long as:

- 1. It actually acted on the attorney's advice;**
- 2. It fully disclosed the facts to the attorney in requesting the advice, or the attorney initiated the advice based on familiarity with the case; and**
- 3. It relied on the attorney's advice in good faith.**

Authorities: *Melorich Builders, Inc. v. Superior Court* (1984) 160 Cal.App.3d 931, 936-937, 207 Cal.Rptr. 47 ; *Merritt v. Reserve Ins. Co.* (1973) 34 Cal.App.3d 858, 872, 110 Cal.Rptr. 511 .

[2] Use of Instruction

This instruction should be used whenever the insurer relies on the affirmative defense of advice of counsel.

For related Judicial Council instructions, see [3][b], *below*.

LexisNexis Matthew Bender Expert Practice Tip--Defense Rarely Used: Insurers rarely rely on the "advise of counsel" defense because an insurer that does so must disclose its contacts with that counsel. Relying on advice of counsel as a defense to a bad faith claim waives the attorney-client privilege as to the advice. If the privilege is waived, the insured's counsel will not only scrutinized the advice, but also

scrutinize whether there was a "full disclosure" of all relevant facts. *By Susan E. Firtch, Rex Heeseman, and Ronald Oster*

[3] Comment

[a] Advice of Counsel

Although cases in other contexts hold that good faith reliance on advice of counsel constitutes a complete defense to certain tort claims [*Melrich Builders, Inc. v. Superior Court* (1984) 160 Cal.App.3d 931, 936-937, 207 Cal.Rptr. 47 (intentional infliction of emotional distress); *Brinkley v. Appleby* (1969) 276 Cal.App.2d 244, 247, 80 Cal.Rptr. 734 (malicious prosecution)], there is no authority as to whether it is a complete defense to a claim of bad faith [see *Merritt v. Reserve Ins. Co.* (1973) 34 Cal.App.3d 858, 872, 110 Cal.Rptr. 511 (insurer acts in good faith if it has exercised good faith in all of its dealings under policy, if it fairly and fully considered rejected settlement, and if its judgments were based on fair review of evidence after reasonable diligence in investigation and on sound legal advice); *but see Allen v. Allstate Ins. Co.* (9th Cir. 1981) 656 F.2d 487, 489 (insurer liable for bad faith because insurer's reliance on advice of its attorney was result of wishful thinking rather than good faith balancing of its own and insured's interests)].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 23, *California Judicial Council Insurance Litigation Instructions*]:

CACI No. 2335 Bad Faith--Advice of Counsel

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Insurance Law Bad Faith & Extracontractual Liability Elements of Bad Faith Insurance Law Claims & Contracts Good Faith & Fair Dealing Duty to Defend

* Revised by Susan E. Firtch. Ms. Firtch is a partner at Burnham Brown in Oakland, California.



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California Forms of Jury Instruction

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CHAPTER 23A Matthew Bender Insurance Contract Instructions *

Part C. BAD FAITH ISSUES

5. Defenses

1-23A California Forms of Jury Instruction MB 2300A.201

MB 2300A.201 Comparative Negligence

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Comparative negligence is the [insured]'s failure to exercise ordinary care that, when combined with [insurer]'s breach of its obligations of good faith and fair dealing, contributed to cause [insured]'s injury.

Comparative negligence, if any, on the [insured]'s part does not bar a recovery against [insurer], but the total amount of damages to which the [insured] would otherwise be entitled must be reduced in proportion to the amount of fault attributable to [insured].

Authority: *Patrick v. Maryland Cas. Co.* (1990) 217 Cal.App.3d 1566, 1570-1575, 267 Cal.Rptr. 24 .

[2] Use of Instruction

This instruction should be used if the insured's negligence has contributed to the injuries claimed. The instruction uses "cause" rather than "proximate cause" [see *Mitchell v. Gonzales* (1991) 54 Cal.3d 1041, 1053, 1 Cal.Rptr.2d 913, 819 P.2d 872]. The instruction should be used with one or more instructions that explain the required causation.

However, the insured's comparative bad faith is not an affirmative defense in a third-party insurance bad faith action [see *Kransco v. American Empire Surplus Lines Ins. Co.* (2000) 23 Cal.4th 390, 404-405, 97 Cal.Rptr.2d 151, 2 P.3d 1 ; see generally *Levy, Golden, Sacks, California Torts*, Ch. 82 (Matthew Bender)]. In rejecting the affirmative defense of comparative bad faith, the California Supreme Court distinguished an earlier decision [*Patrick v. Maryland Cas. Co.* (1990) 217 Cal.App.3d 1566, 1570-1575, 267 Cal.Rptr. 24 ; see [3], below] because that earlier case concerned comparative negligence principles in first-party insurance bad faith actions, not third-party insurance bad faith actions [

see *Kransco v. American Empire Surplus Lines Ins. Co.* (2000) 23 Cal.4th 390, 411-412, 97 Cal.Rptr.2d 151, 2 P.3d 1]. Therefore, although the appropriateness of a comparative negligence instruction in a first-party insurance bad faith case has not been disapproved, it may be subject to later challenge in the appropriate case. The discussion in [3], *below*, should be read in this light.

[3] Comment

Only one reported decision has approved the use of an instruction on comparative negligence in an insurance bad faith case [*Patrick v. Maryland Cas. Co.* (1990) 217 Cal.App.3d 1566, 267 Cal.Rptr. 24]. In that case, the insured contended that he was obligated to fix his own roof because of the insurer's delay. He claimed damages for injuries sustained when he fell off the roof. The insurer proposed an instruction on comparative negligence, which the trial court refused. The court of appeal reversed for this error, holding that under comparative fault principles [see *Li v. Yellow Cab Co.* (1975) 13 Cal.3d 804, 808-809, 119 Cal.Rptr. 858, 532 P.2d 1226], the insurer was entitled to present an instruction that the insured's own negligence while working on the roof contributed to his injury [*Patrick v. Maryland Cas. Co.* (1990) 217 Cal.App.3d 1566, 1570-1575, 267 Cal.Rptr. 24].

Although an instruction similar to the instruction in [1], *above*, was proposed in that case, the court did not expressly approve or disapprove of the language of that instruction. There are two principal differences between the instruction in [1], *above*, and the instruction in that case. First, this instruction uses the term "failure to exercise due care," rather than the term "negligence." Second, this instruction uses the term "cause" rather than "proximate cause."

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Insurance Law Bad Faith & Extracontractual Liability Elements of Bad Faith Insurance Law Claims & Contracts Good Faith & Fair Dealing Duty to Defend Torts Negligence Defenses Comparative Negligence Procedure

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CHAPTER 23A Matthew Bender Insurance Contract Instructions *

Part C. BAD FAITH ISSUES

5. Defenses

1-23A California Forms of Jury Instruction MB 2300A.202

MB 2300A.202 Comparative Negligence Guidelines

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

If you find that [insurer] is liable to [insured] for damages and that [insured]'s own conduct contributed to those damages, you must determine the amount of damages to be awarded as follows:

1. You will determine the total amount of damages to which [insured] would be entitled under the court's Instructions if [insured] had not [failed to exercise due care];
2. You will determine the proportion or percentage of the total amount of this damage that is attributable to the [insured]; and
3. You will determine the proportion or percentage of the total amount of damage that is attributable to [insurer].

The total must equal 100 percent. For example, if you determine that [insured] and [insurer] were equally at fault, then you would assign 50 percent of the damages to each party.

In comparing the fault of [insured] and [insurer], you should consider all the surrounding circumstances as shown by the evidence.

A special verdict form, which I will give you shortly, asks you to answer a series of questions that will assist you in making these determinations.

Authority: *Patrick v. Maryland Cas. Co.* (1990) 217 Cal.App.3d 1566, 1570-1575, 267 Cal.Rptr. 24 .

[2] Use of Instruction

This instruction should be used if the instruction in MB 2300A.201 is used to instruct the jury how to apportion fault.

However, the insured's comparative bad faith is not an affirmative defense in a third-party insurance bad faith action [see *Kransco v. American Empire Surplus Lines Ins. Co.* (2000) 23 Cal.4th 390, 404-405, 97 Cal.Rptr.2d 151, 2 P.3d 1 ; see also MB 2300A.201[2]; see generally Levy, Golden, Sacks, California Torts, Ch. 82 (Matthew Bender)].

[3] Comment

If the insured's comparative negligence contributed to cause the insured's injuries, the insurer is entitled to a reduction in the amount of its damages in proportion to the amount of fault attributable to the insured [see *Patrick v. Maryland Cas. Co.* (1990) 217 Cal.App.3d 1566, 1570-1575, 267 Cal.Rptr. 24 (comparative negligence)]. For discussion of comparative negligence, see MB 2300A.201[3].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Insurance Law Bad Faith & Extracontractual Liability Elements of Bad Faith Insurance Law Claims & Contracts Good Faith & Fair Dealing Duty to Defend Torts Negligence Defenses Comparative Negligence Procedure

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CHAPTER 23A Matthew Bender Insurance Contract Instructions *

Part C. BAD FAITH ISSUES

5. Defenses

1-23A California Forms of Jury Instruction MB 2300A.203-MB 2300A.209

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MB 2300A.203Reserved for Future Use



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CHAPTER 23A Matthew Bender Insurance Contract Instructions *

Part D. DAMAGES

1. Contract Damages: First Party Property

1-23A California Forms of Jury Instruction MB 2300A.210

MB 2300A.210 Actual Cash Value

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

[Insurer's] policy states that in the event of a loss, [insurer] will pay the actual cash value of the property, but in no event more than the amount to repair or replace the property. "Actual cash value" means the property's fair market value.

If you find that the loss is covered under the policy and that [insurer] is obligated to indemnify [insured] for the loss, then you must calculate the amount of the loss according to the lesser of the property's fair market value or the amount to repair or replace the property.

Authorities: *Ins. Code § 2071; Jefferson Ins. Co. v. Superior Court (1970) 3 Cal.3d 398, 402, 90 Cal.Rptr. 608, 475 P.2d 880 .*

[2] Use of Instruction

This instruction should be used to explain the measure of damages if the insured's policy contains the standard "actual cash value" amount of payment for loss and damage.

[3] Comment

The standard fire insurance policy in *Ins. Code § 2071* provides that the insured property is "insured to the extent of the actual cash value of the property at the time of loss, but not exceeding the amount [that] it would cost to repair or replace the property." "Actual cash value" is synonymous with fair market value and does not mean replacement cost

less depreciation [*Jefferson Ins. Co. v. Superior Court* (1970) 3 Cal.3d 398, 402, 90 Cal.Rptr. 608, 475 P.2d 880].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewCivil ProcedureRemediesDamagesMonetary
DamagesInsurance LawProperty InsuranceActual Cash Value

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CHAPTER 23A Matthew Bender Insurance Contract Instructions *

Part D. DAMAGES

1. Contract Damages: First Party Property

1-23A California Forms of Jury Instruction MB 2300A.211-MB 2300A.219

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MB 2300A.211Reserved for Future Use



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CHAPTER 23A Matthew Bender Insurance Contract Instructions *

Part D. DAMAGES

2. Contract Damages: General Liability

1-23A California Forms of Jury Instruction MB 2300A.220

MB 2300A.220 Defense Costs in Underlying Action

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

If you find that [insurer] was obligated under its insurance policy to provide [insured] with a defense to the underlying action, then [insured] is entitled to recover the attorneys' fees and costs that [insured] reasonably and actually incurred in defending the underlying action.

Authorities: *Civ. Code § 3300; Henkel v. Pacific Employers Ins. Co. (1956) 140 Cal.App.2d 301, 305-307, 295 P.2d 80*

[2] Use of Instruction

This instruction should be used if the insured seeks to recover defense costs incurred in the underlying action. It should be used in conjunction with the instruction in MB 2300A.221 if indemnity is also owed, and with the instruction in MB 2300A.240 if the insured has presented evidence that he or she suffered emotional distress as a result of the insurer's failure to pay.

[3] Comment

The measure of damages for breach of contract is those damages proximately caused by the breach or those damages that would be likely to result from the breach in the ordinary course of events [*Civ. Code § 3300*]. If the insured sues for failure to defend and proceeds only on a contract theory or is unable to prove tortious conduct, the insured will be limited to recovery of the attorneys' fees and other costs incurred in defending the underlying action [*Henkel v. Pacific Employers Ins. Co. (1956) 140 Cal.App.2d 301, 305-307, 295 P.2d 80*], except that damages for emotional distress may

also be available [see *MB 2300A.240*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewCivil ProcedureRemediesDamagesMonetary
DamagesInsurance LawClaims & ContractsCosts & Attorney FeesGeneral OverviewInsurance LawGeneral Liability
InsuranceCoverageDamagesTortsDamagesCosts & Attorney FeesGeneral Overview

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CHAPTER 23A Matthew Bender Insurance Contract Instructions *

Part D. DAMAGES

2. Contract Damages: General Liability

1-23A California Forms of Jury Instruction MB 2300A.221

MB 2300A.221 Amount of Settlement or Judgment in Underlying Action

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

If you find that [(insured's) loss/the underlying lawsuit] was covered under [insurer]'s insurance policy, then [insured] is entitled to recover the amount of [(insured's) loss/the settlement or judgment in the underlying lawsuit].

Authorities: *Civ. Code § 3300; Arenson v. National Auto. & Cas. Ins. Co. (1955) 45 Cal.2d 81, 84, 286 P.2d 816 ; Henkel v. Pacific Employers Ins. Co. (1956) 140 Cal.App.2d 301, 307, 295 P.2d 80 .*

[2] Use of Instruction

This instruction should be used if the insured seeks to recover the amount of a settlement or judgment in the underlying claim or action. If defense costs are owed, the instruction should be used with the instruction in MB 2300A.220. If the insured has presented evidence that he or she suffered emotional distress as a result of the insurer's failure to pay, then the instruction should also be used with the instruction in MB 2300A.240.

[3] Comment

The measure of damages for the breach of any contract, including an insurance policy, is those damages proximately caused by the breach or those damages that would be likely to result from the breach in the ordinary course of events [*Civ. Code § 3300*]. If an insurer breaches its duty to indemnify the insured for a claim brought against the insured that is covered by the policy, then the insurer is liable for the amount of the settlement or judgment against the insured [*Arenson v. National Auto. & Cas. Ins. Co. (1955) 45 Cal.2d 81, 84, 286 P.2d 816 ; Henkel v. Pacific Employers Ins. Co.*

(1956) 140 Cal.App.2d 301, 307, 295 P.2d 80]. If the insurer also breaches its duty to defend, then the insured is entitled to recover the costs of defending the underlying action [see MB 2300A.220].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewCivil ProcedureRemediesDamagesMonetary DamagesInsurance LawGeneral Liability InsuranceCoverageDamages

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CHAPTER 23A Matthew Bender Insurance Contract Instructions *

Part D. DAMAGES

2. Contract Damages: General Liability

1-23A California Forms of Jury Instruction MB 2300A.222-MB 2300A.229

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CHAPTER 23A Matthew Bender Insurance Contract Instructions *
Part D. DAMAGES
3. Tort Damages

1-23A California Forms of Jury Instruction MB 2300A.230

MB 2300A.230 Consequential Damages

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

If you find that [insurer] breached the implied covenant of good faith and fair dealing, then [insured] is entitled to recover all the damages caused by [insurer]'s wrongful actions.

These damages may include all of the following:

[CHOOSE ONE OR MORE OF THE FOLLOWING (See Use of Instruction)]

- 1. Damages for [insured]'s emotional distress;**
- 2. Damages for any physical impairment suffered by [insured];**
- 3. Damages for economic loss suffered by [insured];**
- 4. Damages for loss of goodwill of [insured]'s business;**
- 5. Damages for injury to [insured]'s financial reputation; and**
- 6. Damages for the value of claims or other intangibles given up by [insured] in settling the underlying case.**

Authorities: *Civ. Code* § 3333; *Larraburu Bros., Inc. v. Royal Indem. Co.* (9th Cir. 1979) 604 F.2d 1208, 1215 (financial reputation); *Silberg v. California Life Ins. Co.* (1974) 11 Cal.3d 452, 460-461, 113 Cal.Rptr. 711, 521 P.2d 1103 (physical impairment); *Gruenberg v. Aetna Ins. Co.* (1973) 9 Cal.3d 566, 578-580, 108 Cal.Rptr. 480, 510 P.2d 1032 (emotional distress); *Crisci v. Security Ins. Co.* (1967) 66 Cal.2d 425, 433, 58 Cal.Rptr. 13, 426 P.2d 173 (economic loss); *Earth Elements, Inc. v. National Am. Ins. Co. of Cal.* (1995) 41 Cal.App.4th 110, 114-116, 48 Cal.Rptr.2d 399 ; *Bodenhamer v. Superior Court* (1987) 192 Cal.App.3d 1472, 1478-1479, 238 Cal.Rptr. 177 (business goodwill).

[2] Use of Instruction

This instruction should be used in every bad faith action in conjunction with an instruction on the meaning of "proximate cause."

For related Judicial Council instructions, see [3][b], *below*.

[3] Comment

[a] Tort Damages

In a tort action, the plaintiff may recover damages for all harm proximately caused by the defendant's conduct [*Civ. Code* § 3333]. In insurance bad faith cases, these damages include the insured's emotional distress resulting from the insurer's actions [*Gruenberg v. Aetna Ins. Co.* (1973) 9 Cal.3d 566, 578-580, 108 Cal.Rptr. 480, 510 P.2d 1032], loss of business goodwill [*Bodenhamer v. Superior Court* (1987) 192 Cal.App.3d 1472, 1478-1479, 238 Cal.Rptr. 177], and injury to financial reputation [*Larraburu Bros., Inc. v. Royal Indem. Co.* (9th Cir. 1979) 604 F.2d 1208, 1211, 1213 n.3]. At least one court has held that if an insurer breaches its duty to defend and indemnify, it must compensate the insured for the value of an intangible given to the third-party claimant in settling that third party's claim. In that particular case, the intangible in question was the value of the insured's counterclaim against the third party, which the insured dismissed as part of the settlement [*Earth Elements, Inc. v. National Am. Ins. Co. of Cal.* (1995) 41 Cal.App.4th 110, 114-116, 48 Cal.Rptr.2d 399].

In one case, for example, the insured was a bakery whose delivery truck struck and severely injured a child. As a result of the insurer's failure to settle, and its subsequent refusal to guarantee payment of the excess portion of the resulting verdict, the insured's lenders became alarmed at the insured's financial position and refused to extend further credit. As a result, the insured was forced into bankruptcy. In the bad faith suit against the insurer, the court held that the insured could recover damages for the harm to its financial reputation caused by the uncertainty surrounding its financial position in the wake of the excess verdict [*Larraburu Bros., Inc. v. Royal Indem. Co.* (9th Cir. 1979) 604 F.2d 1208, 1215].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 39, *California Judicial Council Damages Instructions*]:

CACI No. 3900 Introduction to Tort Damages--Liability Contested

CACI No. 3901 Introduction to Tort Damages--Liability Established

CACI No. 3902 Economic and Noneconomic Damages

CACI No. 3903 Items of Economic Damage

CACI No. 3904 Present Cash Value

*CACI No. 3905 Items of Noneconomic Damage***Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewCivil ProcedureRemediesDamagesMonetary
DamagesInsurance LawGeneral Liability InsuranceCoverageDamagesTortsDamagesGeneral
OverviewTortsDamagesCompensatory DamagesGeneral OverviewTortsDamagesCompensatory DamagesPain &
SufferingEmotional & Mental DistressGeneral Overview

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CHAPTER 23A Matthew Bender Insurance Contract Instructions *
Part D. DAMAGES
3. Tort Damages

1-23A California Forms of Jury Instruction MB 2300A.231

MB 2300A.231 Attorneys' Fees

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

If you find that (1) [insurer] breached the implied covenant of good faith and fair dealing, and (2) because of this breach it was reasonably necessary for [insured] to employ an attorney to collect the benefits due under the policy, then and only then is [insured] entitled to an award for attorneys' fees.

[Insured] is entitled to recover only the attorneys' fees incurred to establish that policy benefits were due. If you award attorneys' fees, your award must not include any fees incurred to prove breach of the implied covenant or any other part of the verdict.

Authorities: *White v. Western Title Ins. Co.* (1985) 40 Cal.3d 870, 890, 221 Cal.Rptr. 509, 710 P.2d 309 ; *Brandt v. Superior Court* (1985) 37 Cal.3d 813, 819-820, 210 Cal.Rptr. 211, 693 P.2d 796 .

[2] Use of Instruction

This instruction should be used in any bad faith action in which the insured seeks to recover attorneys' fees incurred in proving the insured's entitlement to policy benefits.

[3] Comment

The general rule is that attorneys' fees are not recoverable absent specific statutory authorization or contractual agreement [*Code Civ. Proc. § 1021*]. However, certain exceptions to the rule have been recognized, both by statute [*see, e.g., Code Civ. Proc. § 1021.5*] and by the courts [*see Serrano v. Priest* (1977) 20 Cal.3d 25, 35-48, 141 Cal.Rptr. 315,

569 P.2d 1303], including so-called " *Brandt* fees."

The *Brandt* rule is a well settled but narrow exception to the general rule that each party to litigation must pay that party's own attorney fees [*Essex Ins. Co. v. Five Star Dye House, Inc.* (2006) 38 Cal.4th 1252, 1259, 45 Cal.Rptr.3d 362, 137 P.3d 192]. After observing that an insurer's breach of the covenant of good faith and fair dealing is a tortious act, the Supreme Court reasoned in *Brandt* that when such a breach occurs, the insurer is liable for any damages that are the proximate result of that breach. If an insurer's tortious conduct reasonably compels the insured to retain an attorney to obtain the benefits due under a policy, it follows that the insurer should be liable in a tort action for that expense. The attorney's fees are an economic loss--damages--proximately caused by the tort. These fees must be distinguished from recovery of attorney's fees *qua* attorney's fees, such as those attributable to the bringing of the bad faith action itself [*Essex Ins. Co. v. Five Star Dye House, Inc.* (2006) 38 Cal.4th 1252, 1258, 45 Cal.Rptr.3d 362, 137 P.3d 192 ; *Brandt v. Superior Court* (1985) 37 Cal.3d 813, 817, 210 Cal.Rptr. 211, 693 P.2d 796].

In a tort action for wrongful denial of policy benefits, the *Brandt* rule allows the insured to recover as tort damages only the attorney fees incurred to obtain the policy benefits wrongfully denied [*Essex Ins. Co. v. Five Star Dye House, Inc.* (2006) 38 Cal.4th 1252, 1258, 45 Cal.Rptr.3d 362, 137 P.3d 192 ; *Brandt v. Superior Court* (1985) 37 Cal.3d 813, 819, 210 Cal.Rptr. 211, 693 P.2d 796]. Attorney fees expended to obtain damages exceeding the policy limit or to recover other types of damages are not recoverable as *Brandt* fees [*Essex Ins. Co. v. Five Star Dye House, Inc.* (2006) 38 Cal.4th 1252, 1258, 45 Cal.Rptr.3d 362, 137 P.3d 192 ; *Brandt v. Superior Court* (1985) 37 Cal.3d 813, 819, 210 Cal.Rptr. 211, 693 P.2d 796 ; see *Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 811-812, 16 Cal.Rptr.3d 374, 94 P.3d 513]. Moreover, fees for prosecution of the tort cause of action may not be recovered, either at the trial level or on appeal, nor may any fees be recovered at all in the absence of tortious conduct [*White v. Western Title Ins. Co.* (1985) 40 Cal.3d 870, 890, 221 Cal.Rptr. 509, 710 P.2d 309 ; *Brandt v. Superior Court* (1985) 37 Cal.3d 813, 819-820, 210 Cal.Rptr. 211, 693 P.2d 796 ; *Burnaby v. Standard Fire Ins. Co.* (1995) 40 Cal.App.4th 787, 793-796, 47 Cal.Rptr.2d 326 (*Brandt* fees not available on appeal from award of *Brandt* fees); see *Reserve Ins. Co. v. Pisciotto* (1982) 30 Cal.3d 800, 817, 180 Cal.Rptr. 628, 640 P.2d 764 ; *Austero v. Washington Nat'l Ins. Co.* (1982) 132 Cal.App.3d 408, 411-413, 182 Cal.Rptr. 919].

An insured's assignment of a cause of action against an insurance company for tortious breach of the covenant of good faith and fair dealing by wrongfully denying benefits due under an insurance policy carries with it the right to recover *Brandt* fees that the assignee incurs to recover the policy benefits in the lawsuit against the insurance company [*Essex Ins. Co. v. Five Star Dye House, Inc.* (2006) 38 Cal.4th 1252, 1265, 45 Cal.Rptr.3d 362, 137 P.3d 192].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Civil Procedure Remedies Damages Monetary Damages Insurance Law Claims & Contracts Costs & Attorney Fees General Overview Insurance Law General Liability Insurance Coverage Damages Torts Damages Costs & Attorney Fees General Overview

* Revised by Susan E. Firtch. Ms. Firtch is a partner at Burnham Brown in Oakland, California.



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California Forms of Jury Instruction

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CHAPTER 23A Matthew Bender Insurance Contract Instructions *
Part D. DAMAGES
3. Tort Damages

1-23A California Forms of Jury Instruction MB 2300A.232

MB 2300A.232 Prerequisites for Award of Punitive Damages in Insurance Bad Faith Case

[1] Instruction Prerequisites for Award of Punitive Damages in Insurance Bad Faith Case

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

If you find that [insured] was harmed or damaged as the result of the breach by [insurer] of the implied duty of good faith and fair dealing, then you must decide whether punitive damages should be awarded against [insurer]. The purpose of punitive damages is to punish wrongdoers and thereby deter the commission of wrongful acts--that is, for retribution and deterrence.

Punitive damages may be awarded against [insurer] only if [insurer] was guilty of _____ [describe statutory grounds asserted, e.g., oppression, fraud, or malice] in connection with the breach of the implied duty of good faith and fair dealing. Therefore, you must first determine whether [insurer] was guilty of _____ [describe statutory grounds asserted, e.g., oppression, fraud, or malice].

"Oppression" means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights.

"Fraud" means an intentional misrepresentation, deceit, or concealment of a material fact known to [insurer] with the intention on the part of [insurer] of thereby depriving a person of property or legal rights or otherwise causing injury.

"Malice" means conduct that is intended by [insurer] to cause injury to [insured] or despicable conduct that is carried on by [insurer] with a willful and conscious disregard of the rights of others.

[Insured] has the burden of proving, by clear and convincing evidence, that [insurer] was guilty of _____ [describe statutory grounds asserted, e.g., oppression, fraud, or malice].

[CHOOSE ONE OF THE FOLLOWING (See Use of Instruction)]

In this phase of the trial, you will only determine whether [insurer] was guilty of _____ [describe statutory grounds asserted, e.g., oppression, fraud, or malice] in connection with the breach of [insurer's] implied duty of good faith and fair dealing. I will have you fill out a special [verdict or interrogatories] form stating your decision on this question. If necessary, we will hold a second phase of the trial to determine whether punitive damages should be awarded and, if so, the amount that should be awarded as punitive damages.

[OR]

If you determine that [insurer] was not guilty of _____ [describe statutory grounds asserted, e.g., oppression, fraud, or malice] in connection with the breach of [insurer's] implied duty of good faith and fair dealing, then you may not award any punitive damages against [insurer].

If you determine that [insurer] was guilty of _____ [describe statutory grounds asserted, e.g., oppression, fraud, or malice] in connection with the breach of [insurer's] implied duty of good faith and fair dealing, then you must determine whether punitive damages should be awarded and, if so, the amount that should be awarded as punitive damages.

Authorities: *Civ. Code* §§ 3294, 3295(d); *State Farm Mut. Auto. Ins. Co. v. Campbell* (2003) 538 U.S. 408, 425, 123 S.Ct. 1513, 155 L.Ed.2d 585 ; *BMW of N. Am., Inc. v. Gore* (1996) 517 U.S. 559, 575, 116 S.Ct. 1589, 134 L.Ed.2d 809 ; *Pacific Mut. Life Ins. Co. v. Haslip* (1991) 499 U.S. 1, 5-7, 14-24, 111 S.Ct. 1032, 113 L.Ed.2d 1 ; *Egan v. Mutual of Omaha Ins. Co.* (1979) 24 Cal.3d 809, 819-823, 169 Cal.Rptr. 691, 620 P.2d 141 ; *Neal v. Farmers Ins. Exch.* (1978) 21 Cal.3d 910, 923-928, 148 Cal.Rptr. 389, 582 P.2d 980 ; *Romo v. Ford Motor Co.* (2003) 113 Cal.App.4th 738, 745, 6 Cal.Rptr.3d 793 .

[2] Use of Instruction

This instruction should be used if the insured is seeking punitive damages on a cause of action for the insurer's breach of the implied covenant of good faith and fair dealing. If the jury is instructed on this claim and a breach of contract claim, this instruction should be used together with the instruction in MB 300E.13 in Ch. 3E.

If this instruction is used, the general burden of proof instructions given to the jury should include an instruction on the "clear and convincing evidence" standard *see* [CACI No. 201].

This instruction contains alternative concluding paragraphs. The first alternative paragraph should be used if issues relating to the propriety and amount of punitive damages are bifurcated under *Civ. Code* § 3295(d). The second alternative paragraph should be used if the issues relating to the propriety and amount of punitive damages are not bifurcated and the jury will therefore be given the instruction on assessing punitive damages in MB 2300A.233.

For related Judicial Council instructions, see [3][g], *below*.

[3] Comment

[a] Prerequisites for Punitive Damages Award

In an action predicated on the breach of an obligation that does not arise from contract, punitive damages (damages that

are awarded to punish and make an example of a defendant) may be awarded against a defendant that has been guilty of malice, fraud, or oppression [see *Civ. Code* § 3294(a); *Roby v. McKesson Corp.* (2009) 47 Cal.4th 686, 712, 101 Cal.Rptr.3d 773, 219 P.3d 749; *Align Tech., Inc. v. Federal Ins. Co.* (N.D. Cal 2009) 673 F.Supp.2d 957, 965]. Therefore, punitive damages may be awarded in an insurance bad faith case for breach of the implied covenant of good faith and fair dealing, if the insured makes a proper showing of the insurer's oppression, fraud, or malice [see, e.g., *Egan v. Mutual of Omaha Ins. Co.* (1979) 24 Cal.3d 809, 819-823, 169 Cal.Rptr. 691, 620 P.2d 141; *Amerigraphics, Inc. v. Mercury Cas. Co.* (2010) 182 Cal.App.4th 1538, 1556, 107 Cal.Rptr.3d 307].

Because *Civ. Code* § 3294(a) authorizes punitive damages only in an action "for the breach of an obligation not arising from contract," punitive damages may not be awarded in an action in which the only causes of action asserted by the insured are for breach of contract [*Frazier v. Metropolitan Life Ins. Co.* (1985) 169 Cal.App.3d 90, 106-107, 214 Cal.Rptr. 883; see Ch. 3E, *Matthew Bender Contract Damages Instructions*, MB 300E.12[3]].

Punitive damages are not recoverable unless the insured proves that the insurer was guilty of oppression, fraud, or malice [*Civ. Code* § 3294(a); *Silberg v. California Life Ins. Co.* (1974) 11 Cal.3d 452, 462-463, 113 Cal.Rptr. 711, 521 P.2d 1103; *Travelers Ins. Co. v. Leshner* (1986) 187 Cal.App.3d 169, 200, 231 Cal.Rptr. 791; see [b], below].

[b] Oppression, Fraud, and Malice

"Oppression" is defined by *Civ. Code* § 3294(c)(2) as "despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights."

"Fraud" is defined by *Civ. Code* § 3294(c)(3) as "an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury" [see *Fariba v. Dealer Services Corp.* (2009) 178 Cal.App.4th 156, 175, 100 Cal.Rptr.3d 219 (dispute as to right to repossessed vehicle)].

"Malice" is defined by *Civ. Code* § 3294(c)(1) as "conduct [that] is intended by the defendant to cause injury to the plaintiff or despicable conduct [that] is carried on by the defendant with a willful and conscious disregard of the rights or safety of others."

[c] Insured's Burden of Proof

Punitive damages may only be awarded if the insured establishes the insurer's oppression, fraud, or malice by clear and convincing evidence [*Civ. Code* § 3294(a); see *Jordan v. Allstate Ins. Co.* (2007) 148 Cal. App. 4th 1062, 1080, 56 Cal.Rptr.3d 312; see also CACI No. 201].

[d] Bifurcation of Punitive Damages Issues

Civ. Code § 3295(d) requires the trial court, on the insurer's motion, to exclude evidence of the insurer's profits and financial condition until the jury finds that the insurer is liable to the insured and that the insurer is guilty of oppression, fraud, or malice [*Kizer v. County of San Mateo* (1991) 53 Cal.3d 139, 147, 279 Cal.Rptr. 318, 806 P.2d 1353]. If the insurer moves to exclude evidence of its financial condition, the practical effect is that the punitive damage issues must be bifurcated. In the initial phase of the trial, the jury will be limited to determining the insurer's liability for compensatory damages and whether the insured has established the statutory prerequisites for an award of punitive damages. If the jury holds the insurer liable and determines that the insurer is guilty of malice, fraud, or oppression in the initial phase of the trial, the insured will be entitled to present evidence of the insurer's profits and financial condition at a second phase of the trial, after which the jury will determine the issues relating to the proper amount of punitive damages.

[e] Purpose of Punitive Damages

Punitive damages are awarded to punish the insurer and to deter the insurer and others from similar wrongdoing in the future [Civ. Code § 3294(a); *Pacific Mut. Life Ins. Co. v. Haslip* (1991) 499 U.S. 1, 17-23, 111 S.Ct. 1032, 113 L.Ed.2d 1]. It is important to include a statement of this purpose in jury instructions on punitive damages to guide the jury's discretion. In upholding a punitive damages award against a due process challenge, the United States Supreme Court cited such a statement of purpose in an Alabama jury instruction as an important limit on the jury's discretion [see *Pacific Mut. Life Ins. Co. v. Haslip* (1991) 499 U.S. 1, 17-22, 111 S.Ct. 1032, 113 L.Ed.2d 1 ; see also MB 2300A.233[3]].

[f] Award of Punitive Damages for Insurance Bad Faith

The award of punitive damages in insurance bad faith cases, based on the insurer's breach of the implied covenant of good faith and fair dealing, is the subject of numerous published cases and the topic of considerable commentary [see, e.g., Levy, Golden, Sacks, California Torts, Ch. 82, *Claims and Disputes Under Insurance Policies* (Matthew Bender)]. Punitive damages are most frequently awarded in the first-party context [see, e.g., *Egan v. Mutual of Omaha Ins. Co.* (1979) 24 Cal.3d 809, 819-823, 169 Cal.Rptr. 691, 620 P.2d 141]. Punitive damages have also been awarded in the third-party context, based on the insurer's failure to settle a third-party claim to the detriment of the insured [see, e.g., *Crisci v. Security Ins. Co.* (1967) 66 Cal.2d 425, 433-434, 58 Cal.Rptr. 13, 426 P.2d 173]. To a lesser extent, punitive damages have been awarded in third-party cases involving the insurer's breach of its duty to defend the insured against a third-party claim [see, e.g., *Tibbs v. Great Am. Ins. Co.* (9th Cir. 1985) 755 F.2d 1370, 1375].

However, all of these causes of action justifying punitive damages are based on the insurer's tortious breach of the covenant of good faith and fair dealing, and not solely on any express contractual obligation, such as the duty to pay benefits, the duty to defend, or the duty to settle [see, e.g., *Tibbs v. Great Am. Ins. Co.* (9th Cir. 1985) 755 F.2d 1370, 1375 (refusal to defend, without more, does not constitute breach of implied covenant under California law)]. A cause of action for breach of those duties under the policy gives rise to a contract cause of action, under which the insured may seek only contract damages [see, e.g., *Woodliff v. California Ins. Guarantee Assn.* (2003) 110 Cal.App.4th 1690, 1699, 3 Cal.Rptr.3d 1 (failure to defend can constitute breach of contract); see also Levy, Golden, Sacks, California Torts, Ch. 82, *Claims and Disputes Under Insurance Policies* (Matthew Bender)].

[g] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 23, *California Judicial Council Insurance Litigation Instructions*, and Ch. 39, *California Judicial Council Damages Instructions*]:

CACI No. 2330, Insurance Litigation--Implied Obligation of Good Faith and Fair Dealing Explained

CACI No. 2331, Insurance Litigation--Breach of the Implied Obligation of Good Faith and Fair Dealing--Failure or Delay in Payment--Essential Factual Elements

CACI No. 2332, Insurance Litigation--Bad Faith (First Party)--Failure to Properly Investigate Claim--Essential Factual Elements

CACI No. 2333, Insurance Litigation--Bad Faith (First Party)--Breach of Duty to Inform Insured of Rights--Essential Factual Elements

CACI No. 2334, Insurance Litigation--Bad Faith--Unreasonable Refusal to Settle Within Liability Policy Limits--Essential Factual Elements

CACI No. 2335, Insurance Litigation--Bad Faith--Advice of Counsel

CACI No. 2350, Insurance Litigation--Damages for Bad Faith

CACI No. 3940, Punitive Damages--Individual Defendant--Trial Not Bifurcated

CACI No. 3941, Punitive Damages--Individual Defendant--Bifurcated Trial (First Phase)

CACI No. 3942, Punitive Damages--Individual Defendant--Bifurcated Trial (Second Phase)

CACI No. 3945, Punitive Damages--Entity Defendant--Trial Not Bifurcated

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewCivil ProcedureRemediesDamagesMonetary
DamagesInsurance LawBad Faith & Extracontractual LiabilityRemediesPunitive DamagesGeneral OverviewInsurance
LawBad Faith & Extracontractual LiabilityRemediesPunitive DamagesBurdens of ProofInsurance LawBad Faith &
Extracontractual LiabilityRemediesPunitive DamagesLimitations on Damages

* Revised by Susan E. Firtch. Ms. Firtch is a partner at Burnham Brown in Oakland, California.



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CHAPTER 23A Matthew Bender Insurance Contract Instructions *

Part D. DAMAGES

3. Tort Damages

1-23A California Forms of Jury Instruction MB 2300A.233
MB 2300A.233 Discretion to Award Punitive Damages if Prerequisites for Award Are Established in Insurance Bad Faith Case

[1] Instruction Discretion to Award Punitive Damages if Prerequisites for Award Are Established in Insurance Bad Faith Case

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

In the first phase of this trial, you determined that [insurer] was guilty of _____ [describe statutory grounds found by jury, e.g., oppression, fraud, or malice] in connection with [insurer's] breach of the implied covenant of good faith and fair dealing. In this phase of the trial you must determine whether punitive damages should be awarded against [insurer] and, if so, the amount of punitive damages that should be awarded.

[CHOOSE ONE OF THE FOLLOWING (See Use of Instruction)]

Because this is a case in which [insurer] was guilty of _____ [describe statutory grounds found by jury, e.g., oppression, fraud, or malice],

[OR]

If you find that [insurer] was guilty of _____ [describe statutory grounds asserted by insured, e.g., oppression, fraud, or malice],

[CONTINUE INSTRUCTION]

you may, but are not required to, award punitive damages against [insurer]. In such a case, it is up to you to decide whether punitive damages should be awarded. If you decide to award punitive damages, it is also up to you to determine the amount of punitive damages that should be awarded.

The law does not provide any fixed standards or formulas for making decisions about the amount of punitive damages. Instead, it leaves them to your good judgment and common sense. However, in making any award of punitive damages, however, you should consider all the following:

1. The reprehensibility of [insurer's] conduct with respect to [insured];
2. [Insurer's] financial condition and, in view of that financial condition, what amount of punitive damages it will take to punish and deter [insurer], based solely on the harm to [insured]; and
3. The amount of the actual [damages or harm or injury] caused by [insurer's] wrongful conduct with respect to [insured], because punitive damages must bear a reasonable relationship to the actual [damages or harm or injury].

In making decisions about punitive damages, you should act in a calm and deliberate manner and should not allow yourselves to be influenced by passion or prejudice.

Authorities: *Civ. Code* § 3294; *State Farm Mut. Auto. Ins. Co. v. Campbell* (2003) 538 U.S. 408, 425, 123 S.Ct. 1513, 155 L.Ed.2d 585 ; *BMW of N. Am., Inc. v. Gore* (1996) 517 U.S. 559, 575, 116 S.Ct. 1589, 134 L.Ed.2d 809 ; *Pacific Mut. Life Ins. Co. v. Haslip* (1991) 499 U.S. 1, 6 n.1, 14-24, 111 S.Ct. 1032, 113 L.Ed.2d 1 ; *Adams v. Murakami* (1991) 54 Cal.3d 105, 111, 114-118, 123, 284 Cal.Rptr. 318, 813 P.2d 1348 ; *Egan v. Mutual of Omaha Ins. Co.* (1979) 24 Cal.3d 809, 819-823, 169 Cal.Rptr. 691, 620 P.2d 141 ; *Neal v. Farmers Ins. Exch.* (1978) 21 Cal.3d 910, 923-928, 148 Cal.Rptr. 389, 582 P.2d 980 ; *Romo v. Ford Motor Co.* (2003) 113 Cal.App.4th 738, 745, 6 Cal.Rptr.3d 793 .

[2] Use of Instruction

This instruction should be used to instruct the jury on its duty to determine the propriety and amount of punitive damages, if the statutory prerequisites for a punitive damages award are established. If the punitive damages issues have not been bifurcated under *Civ. Code* § 3295(d), this instruction should be given immediately after the instruction set forth in MB 2300A.232. If the punitive damage issues have been bifurcated, this instruction should not be given in the first phase of the trial and should be given in a subsequent phase only if the jury renders a verdict finding the insurer guilty of oppression, fraud, or malice.

This instruction contains two alternative introductory provisions. The first alternative provision should be used if the punitive damages issues have been bifurcated and the issues relating to the propriety and amount of a punitive damage award are presented in a second phase of the trial. The second alternative provision should be used if the punitive damages issues are not bifurcated.

For related Judicial Council instructions, see [3][f], *below*.

[3] Comment

[a] Discretion to Award Punitive Damages

Even if the statutory prerequisites for a punitive damages award are met, the insured is never entitled to punitive damages as a matter of right. Instead, the decision to award or deny punitive damages is wholly within the discretion of the jury [*Brewer v. Second Baptist Church* (1948) 32 Cal.2d 791, 800-801, 197 P.2d 713]. Similarly, the amount to be

awarded as punitive damages is within the discretion of the jury, subject to due process considerations *see* [U.S. *Const. amend. XIV*; *State Farm Mut. Auto. Ins. Co. v. Campbell* (2003) 538 U.S. 408, 428, 123 S.Ct. 1513, 155 L.Ed.2d 585 (due process limitations on punitive damages); *Kizer v. County of San Mateo* (1991) 53 Cal.3d 139, 147, 279 Cal.Rptr. 318, 806 P.2d 1353 (discretion of jury)]. An instruction that advises the jury that it has discretion to determine these questions, but that its discretion should be exercised without passion or prejudice, is proper [*Hannon Eng'g, Inc. v. Reim* (1981) 126 Cal.App.3d 415, 429-433, 179 Cal.Rptr. 78].

Punitive damages are aimed not at compensation but principally at retribution and deterring harmful conduct [*Exxon Shipping Co. v. Baker* (2008) -- U.S. --, 128 S.Ct. 2605, 2621, 171 L.Ed.2d 570].

[b] Due Process Considerations

Courts must ensure that the measure of punishment of punitive damages is both reasonable and proportionate to the amount of harm to the insured, and to the general damages recovered. An excessive punitive damages award implicates the Due Process Clause of the U.S. Constitution [U.S. *Const. amend. XIV*] as an irrational and arbitrary deprivation of the insurer's property [*State Farm Mut. Auto. Ins. Co. v. Campbell* (2003) 538 U.S. 408, 428, 123 S.Ct. 1513, 155 L.Ed.2d 585 ; *see* Levy, Golden, Sacks, California Torts, Ch. 82 (Matthew Bender)].

The United States Supreme Court has provided the following general guidelines for the imposition of punitive damages [*State Farm Mut. Auto. Ins. Co. v. Campbell* (2003) 538 U.S. 408, 417-425, 123 S.Ct. 1513, 155 L.Ed.2d 585 ; *BMW of N. Am., Inc. v. Gore* (1996) 517 U.S. 559, 575, 116 S.Ct. 1589, 134 L.Ed.2d 809 ; *Pacific Mut. Life Ins. Co. v. Haslip* (1991) 499 U.S. 1, 23, 111 S.Ct. 1032, 113 L.Ed.2d 1]:

- The degree of reprehensibility of the defendant's conduct;
- The disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and
- The disparity between a punitive damages award and the civil or criminal penalties authorized or imposed in comparable cases.

In an insurance bad faith case, the degree of reprehensibility of the insurer's conduct may be analyzed only with respect to the conduct that harmed the insured in that particular case. Therefore, a large and disproportionate punitive damages award based on the insurer's questionable claims-handling practices, unrelated to that particular case, is vulnerable to reversal, particularly if the jury considered a great deal of evidence unrelated to that case in deciding to award punitive damages [*see State Farm Mut. Auto. Ins. Co. v. Campbell* (2003) 538 U.S. 408, 417-424, 123 S.Ct. 1513, 155 L.Ed.2d 585].

There are no concrete constitutional limits on the ratio between harm, or potential harm, to the insured and the punitive damages award [*State Farm Mut. Auto. Ins. Co. v. Campbell* (2003) 538 U.S. 408, 423-424, 123 S.Ct. 1513, 155 L.Ed.2d 585 ; *BMW of N. Am., Inc. v. Gore* (1996) 517 U.S. 559, 575, 116 S.Ct. 1589, 134 L.Ed.2d 809]. However, few awards exceeding a single-digit ratio between punitive and compensatory damages will satisfy due process requirements. An award of more than four times the amount of compensatory damages "might be close to the line of constitutional impropriety" [*State Farm Mut. Auto. Ins. Co. v. Campbell* (2003) 538 U.S. 408, 423-424, 123 S.Ct. 1513, 155 L.Ed.2d 585 ; *BMW of N. Am., Inc. v. Gore* (1996) 517 U.S. 559, 581, 116 S.Ct. 1589, 134 L.Ed.2d 809 ; *Pacific Mut. Life Ins. Co. v. Haslip* (1991) 499 U.S. 1, 23-24, 111 S.Ct. 1032, 113 L.Ed.2d 1].

In a fraud case, the California Supreme Court has held that an award of punitive damages in an amount "just exceeding the largest single-digit ratio amount"--that is, 10 times the amount of the compensatory damages--was the maximum allowable amount under federal constitutional guidelines [*Simon v. San Paolo U.S. Holding Co., Inc.* (2005) 35 Cal.4th

1159, 1189, 29 Cal.Rptr.3d 379, 113 P.3d 63 (\$50,000/\$5,000 reduced from \$1.7 million/\$5,000); see *Century Sur. Co. v. Polisso* (2006) 139 Cal.App.4th 922, 966-967, 43 Cal.Rptr.3d 468 (insurance case in which punitive damages (\$2,015,000) were awarded in 3.2:1 ratio to compensatory damages (\$622,911)).

In an insurance bad faith case, a punitive damages award of \$646,000, slightly more than a one-to-one ratio to the tort damages awarded by the jury (\$450,000 in emotional distress damages plus \$189,000 in *Brandt* fees, totalling \$639,000), was held to be a reasonable ratio that does not raise due process concerns [*Major v. Western Home Ins. Co.* (2009) 169 Cal.App.4th 1197, 1224-1225, 87 Cal.Rptr.3d 556].

[c] Instructions Must Not Invite Jury to Impose Damages Sufficient to Punish and Deter Conduct Not Related to Particular Insured

In light of the U.S. Supreme Court's decision in *State Farm Mutual Automobile Insurance Co. v. Campbell* [*State Farm Mut. Auto. Ins. Co. v. Campbell* (2003) 538 U.S. 408, 123 S.Ct. 1513, 155 L.Ed.2d 585], jury instructions must not invite the jury to impose damages sufficient to punish and deter all conduct by an insurer of the type directed toward the insured in that particular case [*Romo v. Ford Motor Co.* (2003) 113 Cal.App.4th 738, 753, n.7, 6 Cal.Rptr.3d 793 (rejecting use of BAJI 14.71; now see CACI Nos. 3940, 3947)].

[d] Instructions on Punitive Damages Must Not Be Vague

Vague jury instructions on punitive damages, or those that merely inform the jury to avoid "passion or prejudice," are impermissible, because they do little to aid the jury in its task of assigning appropriate weight to evidence that is relevant and to evidence that is tangential or merely inflammatory [*State Farm Mut. Auto. Ins. Co. v. Campbell* (2003) 538 U.S. 408, 417-418, 123 S.Ct. 1513, 155 L.Ed.2d 585] .

[e] Wealth Is Relevant Regarding Punishment and Deterrence Only With Respect to Particular Insured

In light of the U.S. Supreme Court's decision in *State Farm Mutual Automobile Insurance Co. v. Campbell* [*State Farm Mut. Auto. Ins. Co. v. Campbell* (2003) 538 U.S. 408, 123 S.Ct. 1513, 155 L.Ed.2d 585], evidence concerning an insurer's financial condition is not unlawful or inappropriate. However, the jury may only use an insurer's wealth to determine the appropriate punishment for the malicious conduct involved in the particular case, not as a gauge for the imposition of a penalty that will actually deter the entire type or course of conduct that affected the insured in that case [*Romo v. Ford Motor Co.* (2003) 113 Cal.App.4th 738, 753, n.7, 6 Cal.Rptr.3d 793]. The wealth of an insurer cannot justify an otherwise unconstitutional punitive damages award [*State Farm Mut. Auto. Ins. Co. v. Campbell* (2003) 538 U.S. 408, 426-427, 123 S.Ct. 1513, 155 L.Ed.2d 585 ; see [b], above].

[f] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 23, *California Judicial Council Insurance Litigation Instructions*, and Ch. 39, *California Judicial Council Damages Instructions*]:

CACI No. 2350, Insurance Litigation--Damages for Bad Faith

CACI No. 3940, Punitive Damages--Individual Defendant--Trial Not Bifurcated

CACI No. 3941, Punitive Damages--Individual Defendant--Bifurcated Trial (First Phase)

CACI No. 3942, Punitive Damages--Individual Defendant--Bifurcated Trial (Second Phase)

CACI No. 3945, Punitive Damages--Entity Defendant--Trial Not Bifurcated

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewInsurance LawBad Faith & Extracontractual
LiabilityRemediesPunitive DamagesGeneral OverviewInsurance LawBad Faith & Extracontractual
LiabilityRemediesPunitive DamagesBurdens of ProofInsurance LawBad Faith & Extracontractual
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* Revised by Susan E. Firtch. Ms. Firtch is a partner at Burnham Brown in Oakland, California.



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CHAPTER 23A Matthew Bender Insurance Contract Instructions *

Part D. DAMAGES

4. Emotional Distress Damages (Tort or Contract)

*1-23A California Forms of Jury Instruction MB 2300A.240***MB 2300A.240 Emotional Distress****[1] Instruction**

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

[Insured] has claimed damages for emotional distress in addition to economic loss. To recover damages for emotional distress, [insured] must prove that [insurer] breached the implied covenant of good faith and fair dealing and that [insurer]'s breach of the implied covenant was a substantial factor in causing [insured]'s emotional distress. In making this determination, you may consider the effect of other factors on [insured]'s emotional distress, such as the following: _____ *[list any applicable facts established by evidence]*.

Authorities: *Gruenberg v. Aetna Ins. Co.* (1973) 9 Cal.3d 566, 579-581, 108 Cal.Rptr. 480, 510 P.2d 1032 ; *Waters v. United Servs. Auto. Ass'n* (1996) 41 Cal.App.4th 1063, 1080-1081, 48 Cal.Rptr.2d 910 ; *Frazier v. Metropolitan Life Ins. Co.* (1985) 169 Cal.App.3d 90, 107-108, 214 Cal.Rptr. 883 .

[2] Use of Instruction

This instruction should be used if the insured is seeking to recover damages for emotional distress, either on a contract theory or a tort theory.

For related Judicial Council instructions, see [3][b], *below*.

[3] Comment**[a] Emotional Distress**

Unlike damages for intentional or negligent infliction of emotional distress, recovery for emotional distress as an element of damages for breach of the implied covenant does not require a showing that the insurer's acts were extreme or outrageous [*Gruenberg v. Aetna Ins. Co.* (1973) 9 Cal.3d 566, 579-581, 108 Cal.Rptr. 480, 510 P.2d 1032 ; *Frazier v. Metropolitan Life Ins. Co.* (1985) 169 Cal.App.3d 90, 102-107, 214 Cal.Rptr. 883]. The insured merely needs to show that the insurer's breach of the implied covenant proximately caused the insured's emotional distress.

Generally, an insured cannot recover damages unless the insured proves economic loss related to the emotional distress [*Gruenberg v. Aetna Ins. Co.* (1973) 9 Cal.3d 566, 579-581, 108 Cal.Rptr. 480, 510 P.2d 1032 ; *Waters v. United Servs. Auto. Ass'n* (1996) 41 Cal.App.4th 1063, 1080-1081, 48 Cal.Rptr.2d 910]. An award of damages in a bad faith case for personal injury (in the general tort sense, not in the sense of "personal injury" coverage in a CGL policy), including emotional distress, is incidental to an award of economic damages. Delay in payment of policy benefits, even an unreasonable delay, is not by itself sufficient to establish economic loss [*Maxwell v. Fire Ins. Exch.* (1998) 60 Cal.App.4th 1446, 70 Cal.Rptr.2d 866].

Damages for emotional distress are not generally available in an action for breach of contract [see Restatement (Second) of Contracts § 353]. However, in one court of appeal case, the insured's action for breach of the covenant of good faith and fair dealing was based solely on a contract theory because a tort claim was time-barred. The court recognized that punitive damages were not available because punitive damages are only available under Civ. Code § 3294 in actions "for breach of an obligation not arising from contract" [*Frazier v. Metropolitan Life Ins. Co.* (1985) 169 Cal.App.3d 90, 107, 214 Cal.Rptr. 883]. The court did, however, allow damages for emotional distress. It acknowledged the apparent anomaly in its holding, but distinguished punitive damages and damages for emotional distress on the basis that punitive damages in a contract action are barred by "the strict statutory prohibition of section 3294" [*Frazier v. Metropolitan Life Ins. Co.* (1985) 169 Cal.App.3d 90, 107-108, 214 Cal.Rptr. 883]. The continued viability of this holding is unclear.

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 39, *California Judicial Council Damages Instructions*]:

CACI No. 3905A, Physical Pain, Mental Suffering, and Emotional Distress (Noneconomic Damages)

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewCivil ProcedureRemediesDamagesGeneral OverviewInsurance LawBad Faith & Extracontractual LiabilityRemediesEmotional Distress DamagesInsurance LawGeneral Liability InsuranceCoverageEmotional InjuriesTortsDamagesCompensatory DamagesPain & SufferingEmotional & Mental DistressGeneral Overview

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CHAPTER 24 California Judicial Council Wrongful Termination Instructions

4-24 California Forms of Jury Instruction 24.syn

§ 24.syn Synopsis to Chapter 24: California Judicial Council Wrongful Termination Instructions

CACI 2400 Breach of Employment Contract--Unspecified Term--"At-Will" Presumption

CACI 2401 Breach of Employment Contract--Unspecified Term-- Essential Factual Elements

CACI 2402 Breach of Employment Contract--Unspecified Term-- Constructive Discharge--Essential Factual Elements

CACI 2403 Breach of Employment Contract--Unspecified Term-- Implied-in-Fact Promise Not to Discharge Without Good Cause

CACI 2404 Breach of Employment Contract--Unspecified Term--"Good Cause" Defined

CACI 2405 Breach of Implied Employment Contract--Unspecified Term "Good Cause" Defined--Misconduct

CACI 2406 Breach of Employment Contract--Unspecified Term-- Damages

CACI 2407 Employee's Duty to Mitigate Damages

CACI 2408-CACI 2419 Reserved for Future Use

CACI 2420 Breach of Employment Contract--Specified Term--Essential Factual Elements

CACI 2421 Breach of Employment Contract--Specified Term--Good-Cause Defense

CACI 2422 Breach of Employment Contract--Specified Term--Damages

CACI 2423 Breach of the Implied Covenant of Good Faith and Fair Dealing--Essential Factual Elements

CACI 2424 Breach of the Implied Covenant of Good Faith and Fair Dealing--Good Faith Mistaken Belief Defense

CACI 2425-CACI 2429 Reserved for Future Use

CACI 2430 Wrongful Discharge/Demotion in Violation of Public Policy--Essential Factual Elements

CACI 2431 Constructive Discharge in Violation of Public Policy--Plaintiff Required to Violate Public Policy

CACI 2432 Constructive Discharge in Violation of Public Policy--Plaintiff Required to Endure Intolerable Conditions for Improper Purpose That Violates Public Policy

CACI 2433 Wrongful Discharge in Violation of Public Policy--Damages

CACI 2434-CACI 2499 Reserved for Future Use

CACI VF-2400 Breach of Employment Contract--Unspecified Term

CACI VF-2401 Breach of Employment Contract--Unspecified Term-- Constructive Discharge

CACI VF-2402 Breach of Employment Contract--Specified Term

CACI VF-2403 Breach of Employment Contract--Specified Term--Good-Cause Defense

CACI VF-2404 Employment--Breach of the Implied Covenant of Good Faith and Fair Dealing

CACI VF-2405 Breach of the Implied Covenant of Good Faith and Fair Dealing--Affirmative Defense--Good Faith Mistaken Belief

CACI VF-2406 Wrongful Discharge/Demotion in Violation of Public Policy

CACI VF-2407 Constructive Discharge in Violation of Public Policy--Plaintiff Required to Violate Public Policy

CACI VF-2408 Constructive Discharge in Violation of Public Policy--Plaintiff Required to Endure Intolerable Conditions for Improper Purpose That Violates Public Policy

CACI VF-2409-CACI VF-2499 Reserved for Future Use



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CHAPTER 24 California Judicial Council Wrongful Termination Instructions

4-24 California Forms of Jury Instruction Scope

Scope

SCOPE

This chapter contains the California Judicial Council's "Wrongful Termination Series" of jury instructions [*CACI No. 2400 et seq.*]. The Judicial Council of California Civil Jury Instructions (CACI) included in this publication are the product of the Judicial Council of California Task Force on Jury Instructions, which are updated by the Judicial Council of California Advisory Committee on Civil Jury Instructions.

This chapter includes instructions on the following topics:

- Breach of an employment contract for an unspecified term [*CACI Nos. 2400-2407*], including instructions on "good cause" and damages.
- Breach of an employment contract for a specified term [*CACI Nos. 2420-2422*], including instructions on "good cause" and damages.
- Breach of the implied covenant of good faith and fair dealing [*CACI Nos. 2423, 2424*], including an instruction on the "good faith" mistaken belief defense.
- Wrongful and constructive discharge in violation of public policy [*CACI Nos. 2430-2433*].

The wrongful termination series also includes special verdict forms [*CACI Nos. VF-2400-VF-2408*].



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CHAPTER 24 California Judicial Council Wrongful Termination Instructions

4-24 California Forms of Jury Instruction CACI 2400

CACI 2400 Breach of Employment Contract--Unspecified Term--"At-Will" Presumption

An employment relationship may be ended by either the employer or the employee, at any time, for any [lawful] reason, or for no reason at all. This is called "at-will employment."

An employment relationship is not "at will" if the employee proves that the parties, by words or conduct, agreed that the employee would be discharged only for good cause.

New September 2003; Revised June 2006

Directions for Use

If the plaintiff has made no claim other than the contract claim, then the word "lawful" may be omitted.

If the plaintiff has made a claim for wrongful termination or violation of the Fair Employment and Housing Act, then the word "lawful" should be included in order to avoid confusing the jury.

Sources and Authority

- *Labor Code section 2922* provides, in pertinent part: "An employment, having no specified term, may be terminated at the will of either party on notice to the other."

- "*Labor Code section 2922* has been recognized as creating a presumption. The statute creates a presumption of at-will employment which may be overcome by evidence that despite the absence of a specified term, the parties agreed that the employer's power to terminate would be limited in some way, e.g., by a requirement that termination be based only on "good cause." ' ' (*Haycock v. Hughes Aircraft Co.* (1994) 22 Cal.App.4th 1473, 1488 [28 Cal.Rptr.2d 248] , internal citations omitted.)

■ *Labor Code section 2750* provides: "The contract of employment is a contract by which one, who is called the employer, engages another, who is called the employee, to do something for the benefit of the employer or a third person."

■ "Where there is no express agreement, the issue is whether other evidence of the parties' conduct has a 'tendency in reason' to demonstrate the existence of an actual mutual understanding on particular terms and conditions of employment. If such evidence logically permits conflicting inferences, a question of fact is presented. But where the undisputed facts negate the existence or the breach of the contract claimed, summary judgment is proper." (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 337 [100 Cal.Rptr.2d 352, 8 P.3d 1089] , internal citations omitted.)

■ "Because the presumption of at-will employment is premised upon public policy considerations, it is one affecting the burden of proof. Therefore, even if no substantial evidence was presented by defendants that plaintiff's employment was at-will, the presumption of *Labor Code section 2922* required the issue to be submitted to the jury." (*Alexander v. Nextel Communications, Inc.* (1997) 52 Cal.App.4th 1376, 1381-1382 [61 Cal.Rptr.2d 293] , internal citations omitted.)

■ "The presumption that an employment relationship of indefinite duration is intended to be terminable at will is therefore 'subject, like any presumption, to contrary evidence. This may take the form of an agreement, express or implied, that ... the employment relationship will continue indefinitely, pending the occurrence of some event such as the employer's dissatisfaction with the employee's services or the existence of some "cause" for termination.' " (*Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 680 [254 Cal.Rptr. 211, 765 P.2d 373] , internal citation omitted.)

Secondary Sources

3 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment, § 231

Chin et al., Cal. Practice Guide: Employment Litigation (The Rutter Group) PP 4:2-4:4, 4:65

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Contract Actions, §§ 8.4-8.14

4 Wilcox, California Employment Law, Ch. 60, *Liability for Wrongful Termination and Discipline*, § 60.02 (Matthew Bender)

21 *California Forms of Pleading and Practice*, Ch. 249, *Employment Law: Termination and Discipline*, §§ 249.10, 249.11, 249.13, 249.21, 249.43 (Matthew Bender)

10 *California Points and Authorities*, Ch. 100, *Wrongful Termination and Discipline*, §§ 100.20 -100.23 (Matthew Bender)

Publisher's Notes

This instruction replaces BAJI No. 10.10, and covers issues presented in BAJI Nos. 10.00 and 10.14.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Labor & Employment Law Employment Relationships At-Will Employment General Overview Labor & Employment Law Wrongful Termination General

Overview



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CHAPTER 24 California Judicial Council Wrongful Termination Instructions

4-24 California Forms of Jury Instruction CACI 2401

CACI 2401 Breach of Employment Contract--Unspecified Term-- Essential Factual Elements

[*Name of plaintiff*] **claims that** [*name of defendant*] **breached their employment contract. To establish this claim, [*name of plaintiff*] must prove all of the following:**

- 1. That [*name of plaintiff*] and [*name of defendant*] entered into an employment relationship. [An employment contract or a provision in an employment contract may be [written or oral/partly written and partly oral/created by the conduct of the parties]];**
- 2. That [*name of defendant*] promised, by words or conduct, to [discharge/demote] [*name of plaintiff*] only for good cause;**
- 3. That [*name of plaintiff*] substantially performed [his/her] job duties [unless [*name of plaintiff*]'s performance was excused [or prevented]];**
- 4. That [*name of defendant*] [discharged/demoted] [*name of plaintiff*] without good cause; and**
- 5. That [*name of plaintiff*] was harmed by the [discharge/demotion].**

New September 2003

In cases where constructive discharge is alleged, use *CACI No. 2402* instead of this one.

The element of substantial performance should not be confused with the "good cause" defense: "The action is primarily for breach of contract. It was therefore incumbent upon plaintiff to prove that he was able and offered to fulfill all obligations imposed upon him by the contract. Plaintiff failed to meet this

requirement; by voluntarily withdrawing from the contract he excused further performance by defendant." (*Kane v. Sklar* (1954) 122 Cal.App.2d 480, 482 [265 P.2d 29] , internal citation omitted.) Element 3 may be deleted if substantial performance is not a disputed issue.

See also CACI No. 304, *Oral or Written Contract Terms*, and CACI No. 305, *Implied-in-Fact Contract*.

The California Supreme Court has extended the implied contract theory to encompass demotions or other similar employment decisions that violate the terms of an implied contract. (See *Scott v. Pac. Gas & Elec. Co.* (1995) 11 Cal.4th 454, 473-474 [46 Cal.Rptr.2d 427, 904 P.2d 834].) As a result, the bracketed language regarding an alleged wrongful demotion may be given, or other appropriate language for other similar employment decisions, depending on the facts of the case.

- *Labor Code section 2922* provides: "An employment, having no specified term, may be terminated at the will of either party on notice to the other. Employment for a specified term means an employment for a period greater than one month."

- *Civil Code section 1439* provides, in part: "Before any party to an obligation can require another party to perform any act under it, he must fulfill all conditions precedent thereto imposed upon himself; and must be able and offer to fulfill all conditions concurrent so imposed upon him on the like fulfillment by the other party"

- "Where there is no express agreement, the issue is whether other evidence of the parties' conduct has a 'tendency in reason' to demonstrate the existence of an actual mutual understanding on particular terms and conditions of employment. If such evidence logically permits conflicting inferences, a question of fact is presented. But where the undisputed facts negate the existence or the breach of the contract claimed, summary judgment is proper." (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 337 [100 Cal.Rptr.2d 352, 8 P.3d 1089] , internal citations omitted.)

- The employee bears the ultimate burden of proving that he or she was wrongfully terminated. (*Pugh v. See's Candies, Inc.* (Pugh I) (1981) 116 Cal.App.3d 311, 330 [171 Cal.Rptr. 917] .)

- "The presumption that an employment relationship of indefinite duration is intended to be terminable at will is therefore 'subject, like any presumption, to contrary evidence. This may take the form of an agreement, express or implied, that ... the employment relationship will continue indefinitely, pending the occurrence of some event such as the employer's dissatisfaction with the employee's services or the existence of some "cause" for termination.' " (*Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 680 [254 Cal.Rptr. 211, 765 P.2d 373] , internal citation omitted.)

- "In *Foley*, we identified several factors, apart from express terms, that may bear upon 'the existence and content of an ... [implied-in-fact] agreement' placing limits on the employer's right to discharge an employee. These factors might include ' "the personnel policies or practices of the employer, the employee's longevity of service, actions or communications by the employer reflecting assurances of continued employment, and the practices of the industry in which the employee is engaged." ' " (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 336-337 [100 Cal.Rptr.2d 352, 8 P.3d 1089] , internal citations omitted.)

- *Civil Code sections 1619-1621* together provide as follows: "A contract is either express or implied. An express contract is one, the terms of which are stated in words. An implied contract is one, the existence and terms of which are manifested by conduct."

■ "'Good cause' or 'just cause' for termination connotes 'a fair and honest cause or reason,' regulated by the good faith of the employer. The term is relative. Whether good cause exists is dependent upon the particular circumstances of each case. In deciding whether good cause exists, there must be a balance between the employer's interest in operating its business efficiently and profitably and the employee's interest in continued employment. Care must be exercised so as not to interfere with the employer's legitimate exercise of managerial discretion. While the scope of such discretion is substantial, it is not unrestricted. Good cause is not properly found where the asserted reasons for discharge are 'trivial, capricious, unrelated to business needs or goals, or pretextual.' Where there is a contract to terminate only for good cause, the employer has no right to terminate for an arbitrary or unreasonable decision." (*Walker v. Blue Cross of California* (1992) 4 Cal.App.4th 985, 994 [6 Cal.Rptr.2d 184] , internal citations omitted, abrogated on another ground in *Guz, supra*, 24 Cal.4th at p. 351 .)

■ "The general rule is that the measure of recovery by a wrongfully discharged employee is the amount of salary agreed upon for the period of service, less the amount which the employer affirmatively proves the employee has earned or with reasonable effort might have earned from other employment." (*Parker v. Twentieth Century-Fox Film Corp.* (1970) 3 Cal.3d 176, 181 [89 Cal.Rptr. 737, 474 P.2d 689], internal citations omitted.)

Secondary Sources

Chin et al., Cal. Practice Guide: Employment Litigation (The Rutter Group) PP 4:2, 4:8, 4:15, 4:65, 4:81, 4:105, 4:270-4:273

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Contract Actions, §§ 8.4-8.20B

4 Wilcox, California Employment Law, Ch. 60, *Liability for Wrongful Termination and Discipline*, §§ 60.05, 60.07 (Matthew Bender)

21 *California Forms of Pleading and Practice*, Ch. 249, *Employment Law: Termination and Discipline*, §§ 249.90, 249.43, Ch. 250, *Employment Law: Wage and Hour Disputes*, § 250.66 (Matthew Bender)

5 *California Points and Authorities*, Ch. 50, *Contracts*, §§ 50.10, 50.11, 50.350 (Matthew Bender)

10 *California Points and Authorities*, Ch. 100, *Employer and Employee: Wrongful Termination and Discipline*, §§ 100.21, 100.22, 100.28, 100.29 (Matthew Bender)

California Civil Practice: Employment Litigation (Thomson West) §§ 6:9-6:11

Publisher's Notes

This instruction covers issues presented in BAJI Nos. 10.03 and 10.14.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Labor & Employment Law Wrongful Termination General Overview Labor & Employment Law Wrongful Termination Breach of Contract Express Contracts Labor & Employment Law Wrongful Termination Breach of Contract Implied Contracts



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CHAPTER 24 California Judicial Council Wrongful Termination Instructions

4-24 California Forms of Jury Instruction CACI 2402

CACI 2402 Breach of Employment Contract--Unspecified Term-- Constructive Discharge--Essential Factual Elements

[*Name of plaintiff*] **claims that** [*name of defendant*] **breached their employment contract by forcing** [*name of plaintiff*] **to resign. To establish this claim, [*name of plaintiff*] must prove all of the following:**

- 1. That [*name of plaintiff*] and [*name of defendant*] entered into an employment relationship. [An employment contract or a provision in an employment contract may be [written or oral/partly written and partly oral/created by the conduct of the parties]];**
- 2. That [*name of defendant*] promised, by words or conduct, to discharge [*name of plaintiff*] only for good cause;**
- 3. That [*name of plaintiff*] substantially performed [his/her] job duties [unless [*name of plaintiff*]'s performance was excused [or prevented]];**
- 4. That [*name of defendant*] intentionally created or knowingly permitted working conditions to exist that were so intolerable that a reasonable person in [*name of plaintiff*]'s position would have had no reasonable alternative except to resign;**
- 5. That [*name of plaintiff*] resigned because of the intolerable conditions; and**
- 6. That [*name of plaintiff*] was harmed by the loss of employment.**

To be intolerable, the adverse working conditions must be unusually or repeatedly offensive to a reasonable person in [*name of plaintiff*]'s position.

New September 2003

The element of substantial performance should not be confused with the "good cause" defense: "The action is primarily for breach of contract. It was therefore incumbent upon plaintiff to prove that he was able and offered to fulfill all obligations imposed upon him by the contract. Plaintiff failed to meet this requirement; by voluntarily withdrawing from the contract he excused further performance by defendant." (*Kane v. Sklar* (1954) 122 Cal.App.2d 480, 482 [265 P.2d 29] , internal citation omitted.) Element 3 may be deleted if substantial performance is not a disputed issue.

- *Labor Code section 2922* provides: "An employment, having no specified term, may be terminated at the will of either party on notice to the other. Employment for a specified term means an employment for a period greater than one month."

- *Civil Code section 1439* provides, in part: "Before any party to an obligation can require another party to perform any act under it, he must fulfill all conditions precedent thereto imposed upon himself; and must be able and offer to fulfill all conditions concurrent so imposed upon him on the like fulfillment by the other party"

- "Where there is no express agreement, the issue is whether other evidence of the parties' conduct has a 'tendency in reason' to demonstrate the existence of an actual mutual understanding on particular terms and conditions of employment. If such evidence logically permits conflicting inferences, a question of fact is presented. But where the undisputed facts negate the existence or the breach of the contract claimed, summary judgment is proper." (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 337 [100 Cal.Rptr.2d 352, 8 P.3d 1089] , internal citations omitted.)

- The employee bears the ultimate burden of proving that he or she was wrongfully terminated. (*Pugh v. See's Candies, Inc.* (Pugh I) (1981) 116 Cal.App.3d 311, 330 [171 Cal.Rptr. 917] .)

- "Standing alone, constructive discharge is neither a tort nor a breach of contract, but a doctrine that transforms what is ostensibly a resignation into a firing. Even after establishing constructive discharge, an employee must independently prove a breach of contract or tort in connection with employment termination in order to obtain damages for wrongful discharge." (*Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal.4th 1238, 1251 [32 Cal.Rptr.2d 223, 876 P.2d 1022] , internal citation omitted.)

- "The presumption that an employment relationship of indefinite duration is intended to be terminable at will is therefore 'subject, like any presumption, to contrary evidence. This may take the form of an agreement, express or implied, that ... the employment relationship will continue indefinitely, pending the occurrence of some event such as the employer's dissatisfaction with the employee's services or the existence of some "cause" for termination.' " (*Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 680 [254 Cal.Rptr. 211, 765 P.2d 373] , internal citation omitted.)

- "In *Foley*, we identified several factors, apart from express terms, that may bear upon 'the existence and content of an ... [implied-in-fact] agreement' placing limits on the employer's right to discharge an employee. These factors might include ' "the personnel policies or practices of the employer, the employee's longevity of service, actions or communications by the employer reflecting assurances of continued employment, and the practices of the industry in which the employee is engaged." ' " (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 336-337 [100 Cal.Rptr.2d 352, 8 P.3d 1089] , internal citations omitted.)

■ *Civil Code sections 1619-1621* together provide as follows: "A contract is either express or implied. An express contract is one, the terms of which are stated in words. An implied contract is one, the existence and terms of which are manifested by conduct."

■ "'Good cause' or 'just cause' for termination connotes 'a fair and honest cause or reason,' regulated by the good faith of the employer. The term is relative. Whether good cause exists is dependent upon the particular circumstances of each case. In deciding whether good cause exists, there must be a balance between the employer's interest in operating its business efficiently and profitably and the employee's interest in continued employment. Care must be exercised so as not to interfere with the employer's legitimate exercise of managerial discretion. While the scope of such discretion is substantial, it is not unrestricted. Good cause is not properly found where the asserted reasons for discharge are 'trivial, capricious, unrelated to business needs or goals, or pretextual.' Where there is a contract to terminate only for good cause, the employer has no right to terminate for an arbitrary or unreasonable decision." (*Walker v. Blue Cross of California* (1992) 4 Cal.App.4th 985, 994 [6 Cal.Rptr.2d 184] , internal citations omitted, abrogated on another ground in *Guz, supra*, 24 Cal.4th at p. 351 .)

■ "Constructive discharge occurs when the employer's conduct effectively forces an employee to resign. Although the employee may say, 'I quit,' the employment relationship is actually severed involuntarily by the employer's acts, against the employee's will. As a result, a constructive discharge is legally regarded as a firing rather than a resignation." (*Turner, supra*, 7 Cal.4th at pp. 1245-1246 , internal citation omitted.)

■ "In order to amount to constructive discharge, adverse working conditions must be unusually 'aggravated' or amount to a 'continuous pattern' before the situation will be deemed intolerable. In general, '[s]ingle, trivial, or isolated acts of [misconduct] are insufficient' to support a constructive discharge claim. Moreover, a poor performance rating or a demotion, even when accompanied by reduction in pay, does not by itself trigger a constructive discharge." (*Turner, supra*, 7 Cal.4th at p. 1247 , internal citation and fns. omitted.)

■ "Whether conditions were so intolerable as to justify a reasonable employee's decision to resign is normally a question of fact." (*Valdez v. City of Los Angeles* (1991) 231 Cal.App.3d 1043, 1056 [282 Cal.Rptr. 726] .)

■ "In some circumstances, a single intolerable incident, such as a crime of violence against an employee by an employer, or an employer's ultimatum that an employee commit a crime, may constitute a constructive discharge. Such misconduct potentially could be found 'aggravated.'" (*Turner, supra*, 7 Cal.4th at p. 1247, fn. 3 .)

■ "[T]he standard by which a constructive discharge is determined is an objective one-the question is 'whether a reasonable person faced with the allegedly intolerable employer actions or conditions of employment would have no reasonable alternative except to quit.'" (*Turner, supra*, 7 Cal.4th at p. 1248 , internal citations omitted.)

■ "In order to establish a constructive discharge, an employee must plead and prove, by the usual preponderance of the evidence standard, that the employer either intentionally created or knowingly permitted working conditions that were so intolerable or aggravated at the time of the employee's resignation that a reasonable employer would realize that a reasonable person in the employee's position would be compelled to resign. [P] For purposes of this standard, the requisite knowledge or intent must exist on the part of either the employer or those persons who effectively represent the employer, i.e., its

officers, directors, managing agents, or supervisory employees." (*Turner, supra*, 7 Cal.4th at p. 1251 .)

■ "The length of time the plaintiff remained on the job may be one relevant factor in determining the intolerability of employment conditions from the standpoint of a reasonable person. Neither logic nor precedent suggests it should always be dispositive." (*Turner, supra*, 7 Cal.4th at p. 1254 .)

■ "The general rule is that the measure of recovery by a wrongfully discharged employee is the amount of salary agreed upon for the period of service, less the amount which the employer affirmatively proves the employee has earned or with reasonable effort might have earned from other employment." (*Parker v. Twentieth Century-Fox Film Corp.* (1970) 3 Cal.3d 176, 181 [89 Cal.Rptr. 737, 474 P.2d 689], internal citations omitted.)

Secondary Sources

3 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment, §§ 223-227

Chin et al., Cal. Practice Guide: Employment Litigation (The Rutter Group) PP 4:2, 4:65, 4:81, 4:105, 4:405-4:407, 4:409-4:410, 4:270-4:273, 4:420, 4:422, 4:440

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Contract Actions, §§ 8.1-8.21

4 Wilcox, California Employment Law, Ch. 60, *Liability for Wrongful Termination and Discipline*, §§ 60.05, 60.07 (Matthew Bender)

21 *California Forms of Pleading and Practice*, Ch. 249, *Employment Law: Termination and Discipline*, § 249.15 (Matthew Bender)

California Civil Practice: Employment Litigation (Thomson West) §§ 6:9-6:11

Publisher's Notes

This instruction covers issues presented in BAJI Nos.10.02 and 10.03.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Labor & Employment Law Wrongful Termination General Overview Labor & Employment Law Wrongful Termination Breach of Contract Express Contracts Labor & Employment Law Wrongful Termination Breach of Contract Implied Contracts Labor & Employment Law Wrongful Termination Constructive Discharge Burdens of Proof



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CHAPTER 24 California Judicial Council Wrongful Termination Instructions

4-24 California Forms of Jury Instruction CACI 2403

CACI 2403 Breach of Employment Contract--Unspecified Term-- Implied-in-Fact Promise Not to Discharge Without Good Cause

An employer promises to [discharge/demote] an employee only for good cause if it is reasonable for an employee to conclude, from the employer's words or conduct, that [he/she] will be [discharged/demoted] only for good cause.

In deciding whether [*name of defendant*] promised to [discharge/demote] [*name of plaintiff*] only for good cause, you may consider, among other factors, the following:

- (a) [*Name of defendant*]'s personnel policies [and/or] practices;**
- (b) [*Name of plaintiff*]'s length of service;**
- (c) Any raises, commendations, positive evaluations, and promotions received by [*name of plaintiff*]; [and]**
- (d) Whether [*name of defendant*] said or did anything to assure [*name of plaintiff*] of continued employment; [and]**
- (e) [*Insert other relevant factor(s).*]**

Length of service, raises, and promotions by themselves are not enough to imply such a promise, although they are factors for you to consider.

Directions for Use

This instruction should be read when an employee is basing his or her claim of wrongful discharge on an implied covenant not to terminate except for good cause. Only those factors that apply to the facts of the particular case should be read.

In certain cases, it may be necessary to instruct the jury that if it finds there is an express at-will agreement, there may not be an implied agreement to the contrary: "[M]ost cases applying California law ... have held that an at-will provision in an *express written agreement*, signed by the employee, *cannot* be overcome by proof of an implied contrary understanding." (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 340 fn. 10 [100 Cal.Rptr.2d 352, 8 P.3d 1089] , original italics.)

Sources and Authority

- *Civil Code sections 1619-1621* together provide as follows: "A contract is either express or implied. An express contract is one, the terms of which are stated in words. An implied contract is one, the existence and terms of which are manifested by conduct."

- "*Labor Code section 2922* establishes a statutory presumption of at-will employment. However, an employer and an employee are free to depart from the statutory presumption and specify that the employee will be terminated only for good cause, either by an express, or an implied, contractual agreement." (*Stillwell v. The Salvation Army* (2008) 167 Cal.App.4th 360, 380 [84 Cal.Rptr.3d 111] , internal citations omitted.)

- "Where there is no express agreement, the issue is whether other evidence of the parties' conduct has a 'tendency in reason' to demonstrate the existence of an actual mutual understanding on particular terms and conditions of employment. If such evidence logically permits conflicting inferences, a question of fact is presented." (*Guz, supra*, 24 Cal.4th at p. 337 , internal citations omitted.)

- "In the employment context, factors apart from consideration and express terms may be used to ascertain the existence and content of an employment agreement, including 'the personnel policies or practices of the employer, the employee's longevity of service, actions or communications by the employer reflecting assurances of continued employment, and the practices of the industry in which the employee is engaged.'" (*Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 680 [254 Cal.Rptr. 211, 765 P.2d 373] , internal citation omitted.)

- "[A]n employee's *mere* passage of time in the employer's service, even where marked with tangible indicia that the employer approves the employee's work, cannot *alone* form an implied-in-fact contract that the employee is no longer at will. Absent other evidence of the employer's intent, longevity, raises and promotions are their own rewards for the employee's continuing valued service; they do not, *in and of themselves*, additionally constitute a contractual guarantee of future employment security." (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 341-342 [100 Cal.Rptr.2d 352, 8 P.3d 1089] , original italics.)

- "We agree that disclaimer language in an employee handbook or policy manual does not necessarily mean an employee is employed at will. But even if a handbook disclaimer is not controlling in every case, neither can such a provision be ignored in determining whether the parties' conduct was intended, and reasonably understood, to create binding limits on an employer's statutory right to terminate the relationship at will. Like any direct expression of employer intent, communicated to employees and

intended to apply to them, such language must be taken into account, along with all other pertinent evidence, in ascertaining the terms on which a worker was employed." (*Guz, supra*, 24 Cal.4th at p. 340 , internal citations omitted.)

■ "Conceptually, there is no rational reason why an employer's policy that its employees will not be demoted except for good cause, like a policy restricting termination or providing for severance pay, cannot become an implied term of an employment contract. In each of these instances, an employer promises to confer a significant benefit on the employee, and it is a question of fact whether that promise was reasonably understood by the employee to create a contractual obligation." (*Scott v. Pac. Gas & Elec. Co.* (1995) 11 Cal.4th 454, 464 [46 Cal.Rptr.2d 427, 904 P.2d 834] .)

Secondary Sources

3 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment, §§ 233, 237, 238

Chin et al., Cal. Practice Guide: Employment Litigation (The Rutter Group) PP 4:81, 4:105, 4:112

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Contract Actions, §§ 8.6-8.16

4 Wilcox, *California Employment Law, Ch. 60, Liability for Wrongful Termination and Discipline*, § 60.05[2][a] -[e] (Matthew Bender)

21 *California Forms of Pleading and Practice, Ch. 249, Employment Law: Termination and Discipline*, §§ 249.01, 249.13, 249.15, 249.50 (Matthew Bender)

10 California Points and Authorities, Ch. 100, *Employer and Employee: Wrongful Termination and Discipline* , §§ 100.21, 100.22, 100.25-100.27, 100.29, 100.34 (Matthew Bender)

California Civil Practice: Employment Litigation (Thomson West) §§ 6:14-6:16

Publisher's Notes

This instruction replaces BAJI No. 10.12.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Labor & Employment Law Wrongful Termination General Overview Labor & Employment Law Wrongful Termination Breach of Contract For Cause Standard Labor & Employment Law Wrongful Termination Breach of Contract Implied Contracts



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CHAPTER 24 California Judicial Council Wrongful Termination Instructions

4-24 California Forms of Jury Instruction CACI 2404

CACI 2404 Breach of Employment Contract--Unspecified Term--"Good Cause" Defined

Good cause exists when an employer's decision to [discharge/demote] an employee is made in good faith and based on a fair and honest reason. Good cause does not exist if the employer's reasons for the [discharge/demotion] are trivial, arbitrary, inconsistent with usual practices, [or] unrelated to business needs or goals [or if the stated reasons conceal the employer's true reasons].

In deciding whether [name of defendant] had good cause to [discharge/demote] [name of plaintiff], you must balance [name of defendant]'s interest in operating the business efficiently and profitably against the interest of [name of plaintiff] in maintaining employment.

[If [name of plaintiff] had a sensitive managerial position, then [name of defendant] had substantial, though not unlimited, discretion in [discharging/demoting] [him/her].]

New September 2003

This instruction may not be appropriate in the context of an implied employment contract where the parties have agreed to a particular meaning of "good cause" (e.g., a written employment agreement specifically defining "good cause" for discharge). If so, the instruction should be modified accordingly.

Only read the last bracketed phrase in the first paragraph in cases where there is an issue involving pretext.

The last optional paragraph should be given when the employee is in such a position that the employer would be allowed greater discretion in its decision to discharge the employee: "[W]here, as here, the employee occupies a sensitive managerial or confidential position, the employer must of necessity be

allowed substantial scope for the exercise of subjective judgment." (*Pugh v. See's Candies, Inc. (Pugh I)* (1981) 116 Cal.App.3d 311, 330 [171 Cal.Rptr. 917] .) Note that the term "confidential position" has not been defined by California case law.

When the reason given for the discharge is misconduct, and there is a factual dispute whether the misconduct occurred, then the court should give *CACI No. 2405, Breach of Implied Employment Contract--Unspecified Term--"Good Cause" Defined--Misconduct*, instead of this instruction. (See *Cotran v. Rollins Hudig Hall International, Inc. (1998) 17 Cal.4th 93, 107 [69 Cal.Rptr.2d 900, 948 P.2d 412]* .)

- Whether good cause exists is usually a matter to be determined by the trier of fact. (*Wallis v. Farmers Group, Inc. (1990) 220 Cal.App.3d 718, 733 [269 Cal.Rptr. 299]* .)

- "'Good cause' or 'just cause' for termination connotes 'a fair and honest cause or reason,' 'regulated by the good faith of the employer. The term is relative. Whether good cause exists is dependent upon the particular circumstances of each case. In deciding whether good cause exists, there must be a balance between the employer's interest in operating its business efficiently and profitably and the employee's interest in continued employment. Care must be exercised so as not to interfere with the employer's legitimate exercise of managerial discretion. While the scope of such discretion is substantial, it is not unrestricted. Good cause is not properly found where the asserted reasons for discharge are 'trivial, capricious, unrelated to business needs or goals, or pretextual.' Where there is a contract to terminate only for good cause, the employer has no right to terminate for an arbitrary or unreasonable decision." (*Walker v. Blue Cross of California (1992) 4 Cal.App.4th 985, 994 [6 Cal.Rptr.2d 184]* , internal citations omitted, abrogated on another ground in *Guz v. Bechtel National, Inc. (2000) 24 Cal.4th 317, 351 [100 Cal.Rptr.2d 352, 8 P.3d 1089]* .)

- The Court of Appeal in *Pugh I* observed that "good cause" in the context of wrongful termination based on an implied contract "is quite different from the standard applicable in determining the propriety of an employee's termination under a contract for a specified term." (*Pugh, supra*, 116 Cal.App.3d at p. 330 .)

- "We have held that appellant has demonstrated a prima facie case of wrongful termination in violation of his contract of employment. The burden of coming forward with evidence as to the reason for appellant's termination now shifts to the employer. Appellant may attack the employer's offered explanation, either on the ground that it is pretextual (and that the real reason is one prohibited by contract or public policy, or on the ground that it is insufficient to meet the employer's obligations under contract or applicable legal principles. Appellant bears, however, the ultimate burden of proving that he was terminated wrongfully." (*Pugh, supra*, 116 Cal.App.3d at pp. 329-330 , internal citation omitted.)

Secondary Sources

3 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment, §§ 208, 209, 231

Chin et al., Cal. Practice Guide: Employment Litigation (The Rutter Group) PP 4:270-4:273, 4:300

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Contract Actions, §§ 8.22-8.25

4 Wilcox, California Employment Law, Ch. 60, *Liability for Wrongful Termination and Discipline*, § 60.09[5][b] (Matthew Bender)

21 *California Forms of Pleading and Practice*, Ch. 249, *Employment Law: Termination and Discipline*, §§ 249.21, 249.63 (Matthew Bender)

10 *California Points and Authorities*, Ch. 100, *Employer and Employee: Wrongful Termination and Discipline*, §§ 100.21, 100.27, 100.29, 100.34 (Matthew Bender)

California Civil Practice: Employment Litigation (Thomson West) § 6:19

Publisher's Notes

This instruction replaces BAJI No. 10.13, and covers issues presented in BAJI No. 10.14.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Labor & Employment Law Wrongful Termination General Overview Labor & Employment Law Wrongful Termination Breach of Contract For Cause Standard Labor & Employment Law Wrongful Termination Breach of Contract Implied Contracts



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CHAPTER 24 California Judicial Council Wrongful Termination Instructions

4-24 California Forms of Jury Instruction CACI 2405

CACI 2405 Breach of Implied Employment Contract--Unspecified Term "Good Cause" Defined--Misconduct

[Name of plaintiff] **claims that** [name of defendant] **did not have good cause to** [discharge/demote] [him/her] **for misconduct.** [Name of defendant] **had good cause to** [discharge/demote] [name of plaintiff] **for misconduct if** [name of defendant], **acting in good faith, conducted an appropriate investigation giving** [him/her/it] **reasonable grounds to believe that** [name of plaintiff] **engaged in misconduct.**

An appropriate investigation is one that is reasonable under the circumstances and includes notice to the employee of the claimed misconduct and an opportunity for the employee to answer the charge of misconduct before the decision to [discharge/demote] **is made. You may find that** [name of defendant] **had good cause to** [discharge/demote] [name of plaintiff] **without deciding if** [name of plaintiff] **actually engaged in misconduct.**

New September 2003

This instruction should be given when there is a dispute as to whether misconduct, in fact, occurred. (*Cotran v. Rollins Hudig Hall International, Inc.* (1998) 17 Cal.4th 93 [69 Cal.Rptr.2d 900, 948 P.2d 412] .)

■ "The proper inquiry for the jury ... is not, 'Did the employee *in fact* commit the act leading to dismissal?' It is 'Was the factual basis on which the employer concluded a dischargeable act had been committed reached honestly, after an appropriate investigation and for reasons that are not arbitrary or pretextual?' The jury conducts a factual inquiry in both cases, but the questions are not the same. In the first, the jury decides the ultimate truth of the employee's alleged misconduct. In the second, it focuses on the *employer's response* to allegations of misconduct." (*Cotran, supra*, 17 Cal.4th at p. 107 .)

■ "We give operative meaning to the term 'good cause' in the context of implied employment contracts by defining it ... as fair and honest reasons, regulated by good faith on the part of the employer, that are not trivial, arbitrary or capricious, unrelated to business needs or goals, or pretextual. A reasoned conclusion, in short, supported by substantial evidence gathered through an adequate investigation that includes notice of the claimed misconduct and a chance for the employee to respond." (*Cotran, supra*, 17 Cal.4th at pp. 107-108 , internal citations omitted.)

■ "Cotran set forth a new standard for good cause in termination decisions. Three factual determinations are relevant to the question of employer liability: (1) did the employer act with good faith in making the decision to terminate; (2) did the decision follow an investigation that was appropriate under the circumstances; and (3) did the employer have reasonable grounds for believing the employee had engaged in the misconduct." (*Silva v. Lucky Stores, Inc.* (1998) 65 Cal.App.4th 256, 264 [76 Cal.Rptr.2d 382] , internal citation omitted.)

■ "We have held that appellant has demonstrated a prima facie case of wrongful termination in violation of his contract of employment. The burden of coming forward with evidence as to the reason for appellant's termination now shifts to the employer. Appellant may attack the employer's offered explanation, either on the ground that it is pretextual and that the real reason is one prohibited by contract or public policy, or on the ground that it is insufficient to meet the employer's obligations under contract or applicable legal principles. Appellant bears, however, the ultimate burden of proving that he was terminated wrongfully." (*Pugh, supra*, 116 Cal.App.3d at pp. 329-330 , internal citation omitted.)

Secondary Sources

3 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment, §§ 208, 209

Chin et al., Cal. Practice Guide: Employment Litigation (The Rutter Group) PP 4:270-4:271, 4:289

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Contract Actions, §§ 8.22-8.26

4 Wilcox, California Employment Law, Ch. 60, *Liability for Wrongful Termination and Discipline*, § 60.09[5][b] (Matthew Bender)

21 *California Forms of Pleading and Practice*, Ch. 249, *Employment Law: Termination and Discipline*, §§ 249.21, 249.43 (Matthew Bender)

10 *California Points and Authorities*, Ch. 100, *Employer and Employee: Wrongful Termination and Discipline*, §§ 100.25, 100.29 (Matthew Bender)

California Civil Practice: Employment Litigation (Thomson West) § 6:19

Publisher's Notes

This instruction replaces BAJI No. 10.13.1, and covers issues presented in BAJI No. 10.17.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Labor & Employment Law Employment Relationships Employment Contracts Breach Labor & Employment Law Wrongful Termination General Overview Labor & Employment Law Wrongful Termination Breach of Contract For Cause Standard Labor & Employment Law Wrongful

TerminationBreach of ContractImplied Contracts



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CHAPTER 24 California Judicial Council Wrongful Termination Instructions

4-24 California Forms of Jury Instruction CACI 2406

CACI 2406 Breach of Employment Contract--Unspecified Term-- Damages

If you find that [name of defendant] [discharged/demoted] [name of plaintiff] in breach of an employment contract, then you must decide the amount of damages, if any, that [name of plaintiff] has proved [he/she] is entitled to recover. To make that decision, you must:

- 1. Decide the amount that [name of plaintiff] would have earned from [name of defendant] up to today, including any benefits and pay increases; [and]**
- 2. Add the present cash value of any future wages and benefits that [he/she] would have earned after today for the length of time the employment with [name of defendant] was reasonably certain to continue; [and]**
- 3. [Describe any other contract damages that were allegedly caused by defendant's conduct.]**

In determining the period that [name of plaintiff]'s employment was reasonably certain to have continued, you should consider, among other factors, the following:

- (a) [Name of plaintiff]'s age, work performance, and intent regarding continuing employment with [name of defendant];**
- (b) [Name of defendant]'s prospects for continuing the operations involving [name of plaintiff]; and**
- (c) Any other factor that bears on how long [name of plaintiff] would have continued to work.**

New September 2003

For an instruction on mitigation, see *CACI No. 2407, Employee's Duty to Mitigate Damages*. This instruction should be given when plaintiff claims loss of employment from a wrongful discharge or demotion or a breach of the covenant of good faith and fair dealing. For an instruction on present cash value, see *CACI No. 3904, Present Cash Value*.

■ "The general rule is that the measure of recovery by a wrongfully discharged employee is the amount of salary agreed upon for the period of service, less the amount which the employer affirmatively proves the employee has earned or with reasonable effort might have earned from other employment. However, before projected earnings from other employment opportunities not sought or accepted by the discharged employee can be applied in mitigation, the employer must show that the other employment was comparable, or substantially similar, to that of which the employee has been deprived; the employee's rejection of or failure to seek other available employment of a different or inferior kind may not be resorted to in order to mitigate damages." (*Parker v. Twentieth Century-Fox Film Corp. (1970) 3 Cal.3d 176, 181-182 [89 Cal.Rptr. 737, 474 P.2d 689]* , internal citations omitted.)

■ *Civil Code section 3300* provides: "For the breach of an obligation arising from contract, the measure of damages, except where otherwise expressly provided by this code, is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom."

■ "[I]t is our view that in an action for wrongful discharge, and pursuant to the present day concept of employer-employee relations, the term 'wages' should be deemed to include not only the periodic monetary earnings of the employee but also the other benefits to which he is entitled as a part of his compensation." (*Wise v. Southern Pac. Co. (1970) 1 Cal.3d 600, 607 [83 Cal.Rptr. 202, 463 P.2d 426]* .)

■ In determining the period that plaintiff's employment was reasonably certain to have continued, the trial court took into consideration plaintiff's " 'physical condition, his age, his propensity for hard work, his expertise in managing defendants' offices, the profit history of his operation, [and] the foreseeability of the continued future demand for tax return service to small taxpayers ... ' " (*Drzewiecki v. H & R Block, Inc. (1972) 24 Cal.App.3d 695, 705 [101 Cal.Rptr. 169]* .)

■ In cases for wrongful demotion, the measure of damages is "the difference in compensation before and after the demotion." (*Scott v. Pac. Gas & Elec. Company (1995) 11 Cal.4th 454, 468 [46 Cal.Rptr.2d 427, 904 P.2d 834]*.)

Secondary Sources

3 Witkin, *Summary of California Law* (10th ed. 2005) Agency and Employment, §§ 267, 268

Chin et al., *Cal. Practice Guide: Employment Litigation* (The Rutter Group) PP 17:81, 17:95, 17:105

4 Wilcox, *California Employment Law*, Ch. 60, *Liability for Wrongful Termination and Discipline*, § 60.08[3] (Matthew Bender)

21 *California Forms of Pleading and Practice*, Ch. 249, *Employment Law: Termination and Discipline*, §§ 249.01, 249.17, 249.50 (Matthew Bender)

Publisher's Notes

This instruction replaces BAJI No. 10.15.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewLabor & Employment LawWrongful
TerminationGeneral OverviewLabor & Employment LawWrongful TerminationBreach of ContractImplied
ContractsLabor & Employment LawWrongful TerminationRemediesBackpayLabor & Employment LawWrongful
TerminationRemediesCompensatory DamagesLabor & Employment LawWrongful TerminationRemediesFrontpay



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CHAPTER 24 California Judicial Council Wrongful Termination Instructions

4-24 California Forms of Jury Instruction CACI 2407

CACI 2407 Employee's Duty to Mitigate Damages

[*Name of defendant*] claims that if [*name of plaintiff*] is entitled to any damages, they should be reduced by the amount that [he/she] could have earned from other employment. To succeed, [*name of defendant*] must prove all of the following:

- 1. That employment substantially similar to [*name of plaintiff*]'s former job was available to [him/her];**
- 2. That [*name of plaintiff*] failed to make reasonable efforts to seek [and retain] this employment; and**
- 3. The amount that [*name of plaintiff*] could have earned from this employment.**

In deciding whether the employment was substantially similar, you should consider, among other factors, whether:

- (a) The nature of the work was different from [*name of plaintiff*]'s employment with [*name of defendant*];**
- (b) The new position was substantially inferior to [*name of plaintiff*]'s former position;**
- (c) The salary, benefits, and hours of the job were similar to [*name of plaintiff*]'s former job;**
- (d) The new position required similar skills, background, and experience;**

(e) The job responsibilities were similar; [and]

(f) The job was in the same locality; [and]

(g) [insert other relevant factor(s)].

[In deciding whether [name of plaintiff] failed to make reasonable efforts to retain comparable employment, you should consider whether [name of plaintiff] quit or was discharged from that employment for a reason within [his/her] control.]

New September 2003; Revised February 2007

This instruction may be given when there is evidence that the employee's damages could have been mitigated. The bracketed language at the end of the instruction regarding plaintiff's failure to retain a new job is based on the holding in *Stanchfield v. Hamer Toyota, Inc.* (1995) 37 Cal.App.4th 1495, 1502-1503 [44 Cal.Rptr.2d 565] .

Read only those factors that have been shown by the evidence.

This instruction should be given in all employment cases, not just in breach of contract cases. See Chin et al., Cal. Practice Guide: Employment Litigation (Rutter Group) P 17:492.

This instruction should not be used for wrongful demotion cases.

■ "The general rule is that the measure of recovery by a wrongfully discharged employee is the amount of salary agreed upon for the period of service, less the amount which the employer affirmatively proves the employee has earned or with reasonable effort might have earned from other employment. However, before projected earnings from other employment opportunities not sought or accepted by the discharged employee can be applied in mitigation, the employer must show that the other employment was comparable, or substantially similar, to that of which the employee has been deprived; the employee's rejection of or failure to seek other available employment of a different or inferior kind may not be resorted to in order to mitigate damages." (*Parker v. Twentieth Century-Fox Film Corp.* (1970) 3 Cal.3d 176, 181-182 [89 Cal.Rptr. 737, 474 P.2d 689] , internal citations omitted.)

■ "The burden is on the employer to prove that substantially similar employment was available which the wrongfully discharged employee could have obtained with reasonable effort." (*Chyten v. Lawrence & Howell Investments* (1993) 23 Cal.App.4th 607, 616 [46 Cal.Rptr.2d 459] .)

■ "[W]e conclude that the trial court should not have deducted from plaintiff's recovery against defendant the amount that the court found she might have earned in employment which was substantially inferior to her position with defendant." (*Rabago-Alvarez v. Dart Industries, Inc.* (1976) 55 Cal.App.3d 91, 99 [127 Cal.Rptr. 222] .)

■ "[I]n those instances where the jury determines the employee was fired from a substantially similar position for cause, any amount the employee with reasonable effort could have earned by retaining that employment should be deducted from the amount of damages which otherwise would have been awarded to the employee under the terms of the original employment agreement." (*Stanchfield, supra*, 37

Cal.App.4th at pp. 1502-1503 .)

■ In deciding whether a school bus driver could have obtained a substantially similar job in other nearby school districts, the court looked at several factors, including salary, benefits, hours of work per day, hours of work per year, locality, and availability of a merit-based system. (*California School Employees Assn. v. Personnel Commission* (1973) 30 *Cal.App.3d* 241, 250-255 [106 *Cal.Rptr.* 283] .)

Secondary Sources

Chin et al., *Cal. Practice Guide: Employment Litigation* (The Rutter Group) PP 17:490, 17:495, 17:497, 17:499-17:501

1 *Wrongful Employment Termination Practice* (Cont.Ed.Bar 2d ed.) Contract Actions, §§ 8.40-8.41

4 Wilcox, *California Employment Law*, Ch. 60, *Liability for Wrongful Termination and Discipline*, § 60.08[4] (Matthew Bender)

21 *California Forms of Pleading and Practice*, Ch. 249, *Employment Law: Termination and Discipline*, §§ 249.18, 249.65 (Matthew Bender)

Publisher's Notes

This instruction covers issues presented in BAJI No. 10.16.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Labor & Employment Law Wrongful Termination General Overview Labor & Employment Law Wrongful Termination Remedies Backpay Labor & Employment Law Wrongful Termination Remedies Compensatory Damages Labor & Employment Law Wrongful Termination Remedies Frontpay



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4-24 California Forms of Jury Instruction CACI 2408-CACI 2419

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CACI 2408Reserved for Future Use



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CHAPTER 24 California Judicial Council Wrongful Termination Instructions

*4-24 California Forms of Jury Instruction CACI 2420***CACI 2420 Breach of Employment Contract--Specified Term--Essential Factual Elements**

[*Name of plaintiff*] **claims that [*name of defendant*] breached an employment contract for a specified term. To establish this claim, [*name of plaintiff*] must prove all of the following:**

- 1. That [*name of plaintiff*] and [*name of defendant*] entered into an employment contract that specified a length of time that [*name of plaintiff*] would remain employed;**
- 2. That [*name of plaintiff*] substantially performed [his/her] job duties [unless [*name of plaintiff*]'s performance was excused [or prevented]];**
- 3. That [*name of defendant*] breached the employment contract by [discharging/demoting] [*name of plaintiff*] before the end of the term of the contract; and**
- 4. That [*name of plaintiff*] was harmed by the [discharge/demotion].**

New September 2003

The element of substantial performance should not be confused with the "good cause" defense: "The action is primarily for breach of contract. It was therefore incumbent upon plaintiff to prove that he was able and offered to fulfill all obligations imposed upon him by the contract. Plaintiff failed to meet this requirement; by voluntarily withdrawing from the contract he excused further performance by defendant." (*Kane v. Sklar* (1954) 122 Cal.App.2d 480, 482 [265 P.2d 29] , internal citation omitted.) Element number 2 may be deleted if substantial performance is not an issue.

See also CACI No. 304, *Oral or Written Contract Terms*, and CACI No. 305, *Implied-in-Fact Contract*.

■ *Labor Code section 2922* provides: "An employment, having no specified term, may be terminated at the will of either party on notice to the other. Employment for a specified term means employment for a period of greater than one month."

■ *Labor Code section 2924* provides: "An employment for a specified term may be terminated at any time by the employer in case of any willful breach of duty by the employee in the course of his employment, or in case of his habitual neglect of his duty or continued incapacity to perform it."

■ *Civil Code section 1439* provides, in part: "Before any party to an obligation can require another party to perform any act under it, he must fulfill all conditions precedent thereto imposed upon himself; and must be able and offer to fulfill all conditions concurrent so imposed upon him on the like fulfillment by the other party"

■ "[L]abor Code section 2924 has traditionally been interpreted to 'inhibit[] the termination of employment for a specified term except in case of a wilful breach of duty, of habitual neglect of, or continued incapacity to perform, a duty.' " (*Khajavi v. Feather River Anesthesia Medical Group* (2000) 84 Cal.App.4th 32, 57 [100 Cal.Rptr.2d 627] , internal citations omitted.)

■ "Stated simply, the contract compensation for the unexpired period of the contract affords a prima facie measure of damages; the actual measured damage, however, is the contract amount reduced by compensation received during the unexpired term; if, however, such other compensation has not been received, the contract amount may still be reduced or eliminated by a showing that the employee, by the exercise of reasonable diligence and effort, could have procured comparable employment and thus mitigated the damages." (*Erler v. Five Points Motors, Inc.* (1967) 249 Cal.App.2d 560, 562 [57 Cal.Rptr. 516] .)

Secondary Sources

Chin et al., Cal. Practice Guide: Employment Litigation (The Rutter Group) PP 4:2, 4:47

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Contract Actions, §§ 8.2-8.20

21 *California Forms of Pleading and Practice*, Ch. 249, *Employment Law: Termination and Discipline*, § 249.21 (Matthew Bender)

Publisher's Notes

This instruction replaces BAJI No. 10.04, and covers issues presented in BAJI No. 10.33.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Labor & Employment Law Employment Relationships At-Will Employment Duration of Employment Labor & Employment Law Wrongful Termination General Overview Labor & Employment Law Wrongful Termination Breach of Contract Express Contracts



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CHAPTER 24 California Judicial Council Wrongful Termination Instructions

4-24 California Forms of Jury Instruction CACI 2421

CACI 2421 Breach of Employment Contract--Specified Term--Good-Cause Defense

[*Name of defendant*] **claims that [he/she/it] did not breach the employment contract because [he/she/it] [discharged/demoted] [*name of plaintiff*] for good cause. To establish good cause, [*name of defendant*] must prove:**

[that [*name of plaintiff*] willfully breached a job duty] [or]

[that [*name of plaintiff*] continually neglected [his/her] job duties] [or]

[that a continued incapacity prevented [*name of plaintiff*] from performing [his/her] job duties.]

New September 2003

This instruction should be given when the employee alleges wrongful discharge in breach of an employment contract for a specified term and the employer defends by asserting plaintiff was justifiably discharged.

This instruction may not be appropriate in the context of an employment contract where the parties have agreed to a particular meaning of "good cause" (e.g., a written employment agreement specifically defining "good cause" for discharge). If so, the instruction should be modified accordingly.

Modification of the third element may be necessary where the plaintiff has a statutory right to be absent for work (for example, for family and medical leave or to accommodate a disability).

4-24 California Forms of Jury Instruction CACI 2421

■ *Labor Code section 2922* provides: "An employment, having no specified term, may be terminated at the will of either party on notice to the other. Employment for a specified term means employment for a period of greater than one month."

■ *Labor Code section 2924* provides: "An employment for a specified term may be terminated at any time by the employer in case of any willful breach of duty by the employee in the course of his employment, or in case of his habitual neglect of his duty or continued incapacity to perform it."

■ "[L]abor Code section 2924 has traditionally been interpreted to 'inhibit[] the termination of employment for a specified term except in case of a wilful breach of duty, of habitual neglect of, or continued incapacity to perform, a duty.' " (*Khajavi v. Feather River Anesthesia Medical Group* (2000) 84 Cal.App.4th 32, 57 [100 Cal.Rptr.2d 627] , internal citations omitted.)

■ *Labor Code section 2924* "does not grant a right to terminate prior to the end of the employee's term on the basis of a mistaken belief of a breach." (*Khajavi, supra*, 84 Cal.App.4th at pp. 58-59 .)

■ Good cause in the context of wrongful termination based on an implied contract " 'is quite different from the standard applicable in determining the propriety of an employee's termination under a contract for a specified term.' " (*Khajavi, supra*, 84 Cal.App.4th at p. 58 , internal citations omitted.)

■ "An employer is justified in discharging his employee, when the latter fails to perform his duty, even though injury does not result to the employer as a result of the employee's failure to do his duty." (*Bank of America National Trust & Savings Ass'n v. Republic Productions, Inc.* (1941) 44 Cal.App.2d 651, 654 [112 P.2d 972] , internal citation omitted.)

■ "It is therefore not every deviation of the employee from the standard of performance sought by his employer that will justify a discharge. There must be some 'wilful act or wilful misconduct ...' when the employee uses his best efforts to serve the interests of his employer." (*Holtzendorff v. Housing Authority of the City of Los Angeles* (1967) 250 Cal.App.2d 596, 610 [58 Cal.Rptr. 886] , internal citation omitted.)

■ " 'Willful' disobedience of a specific, peremptory instruction of the master, if the instruction be reasonable and consistent with the contract, is a breach of duty--a breach of the contract of service; and, like any other breach of the contract, of itself entitles the master to renounce the contract of employment." (*May v. New York Motion Picture Corp.* (1920) 45 Cal.App. 396, 403 [187 P. 785] .)

Secondary Sources

Chin et al., Cal. Practice Guide: Employment Litigation (The Rutter Group) PP 4:2, 4:47, 4:56, 4:57

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Contract Actions, §§ 8.22-8.26

21 *California Forms of Pleading and Practice*, Ch. 249, *Employment Law: Termination and Discipline*, §§ 249.13, 249.21, 249.60 -249.63 (Matthew Bender)

Publisher's Notes

This instruction replaces BAJI No. 10.32, and covers issues presented in BAJI No. 10.31.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewLabor & Employment LawWrongful
TerminationGeneral OverviewLabor & Employment LawWrongful TerminationBreach of ContractExpress
ContractsLabor & Employment LawWrongful TerminationBreach of ContractFor Cause StandardLabor & Employment
LawWrongful TerminationDefensesGeneral Overview



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CHAPTER 24 California Judicial Council Wrongful Termination Instructions

4-24 California Forms of Jury Instruction CACI 2422

CACI 2422 Breach of Employment Contract--Specified Term--Damages

If you find that [name of defendant] [discharged/demoted] [name of plaintiff] in breach of an employment contract for a specified term, then you must decide the damages, if any, that [name of plaintiff] has proved [he/she] is entitled to recover. To make that decision, you must:

- 1. Decide the amount that [name of plaintiff] would have earned up to today, including any benefits and pay increases; [and]**
- 2. Add the present cash value of any future wages and benefits that [he/she] would have earned up to the end of the term of the contract; [and]**
- 3. [Describe any other contract damages that were allegedly caused by defendant's conduct.]**

[If you find that [name of plaintiff] would have exercised [his/her] option to extend the term of the employment contract, then you may consider the total term of [name of plaintiff]'s employment contract to be [specify length of original contract term plus option term].]

New September 2003

Use CACI No. 2407, *Employee's Duty to Mitigate Damages*, if the defendant seeks an offset for wages plaintiff could have earned from similar employment.

• *Civil Code section 3300* provides: "For the breach of an obligation arising from contract, the measure of damages, except where otherwise expressly provided by this code, is the amount which will

compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom."

■ "Stated simply, the contract compensation for the unexpired period of the contract affords a prima facie measure of damages; the actual measured damage, however, is the contract amount reduced by compensation received during the unexpired term; if, however, such other compensation has not been received, the contract amount may still be reduced or eliminated by a showing that the employee, by the exercise of reasonable diligence and effort, could have procured comparable employment and thus mitigated the damages." (*Erler v. Five Points Motors, Inc.* (1967) 249 Cal.App.2d 560, 562 [57 Cal.Rptr. 516] .)

■ In appropriate circumstances, the court may authorize the trier of fact to "consider the probability the employee would exercise the option in determining the length of the unexpired term of employment when applying the applicable measure of damages" (*Oldenkott v. American Electric, Inc.* (1971) 14 Cal.App.3d 198, 204 [92 Cal.Rptr. 127] .)

■ "The trial court correctly found that defendants wrongfully terminated the employment contract and that the measure of damages was the difference between the amount Silva would have received under the contract and that amount which Silva actually received from his other employment." (*Silva v. McCoy* (1968) 259 Cal.App.2d 256, 260 [66 Cal.Rptr. 364] .)

■ "The plaintiff has the burden of proving his damage. The law is settled that he has the duty of minimizing that damage. While the contract wages are prima facie [evidence of] his damage, his actual damage is the amount of money he was out of pocket by reason of the wrongful discharge." (*Erler v. Five Points Motors, Inc.*, *supra*, 249 Cal.App.2d at pp. 567-568 .)

■ "The burden of proof is on the party whose breach caused damage, to establish matters relied on to mitigate damage." (*Steelduct Co. v. Henger-Seltzer Co.* (1945) 26 Cal.2d 634, 654 [160 P.2d 804] , internal citations omitted.)

Secondary Sources

Chin et al., Cal. Practice Guide: Employment Litigation (The Rutter Group) PP 17:81, 17:95, 17:105, 17:495

21 *California Forms of Pleading and Practice*, Ch. 249, *Employment Law: Termination and Discipline*, § 249.21 (Matthew Bender)

Publisher's Notes

This instruction replaces BAJI No. 10.34.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Labor & Employment Law Employment Relationships Employment Contracts Conditions & Terms Duration of Employment General Overview Labor & Employment Law Wrongful Termination General Overview Labor & Employment Law Wrongful Termination Breach of Contract Express Contracts Labor & Employment Law Wrongful Termination Remedies Compensatory Damages



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CHAPTER 24 California Judicial Council Wrongful Termination Instructions

4-24 California Forms of Jury Instruction CACI 2423

CACI 2423 Breach of the Implied Covenant of Good Faith and Fair Dealing--Essential Factual Elements

[Name of plaintiff] claims that [name of defendant] violated the duty to act fairly and in good faith. To establish this claim, [name of plaintiff] must prove all of the following:

- 1. That [name of plaintiff] and [name of defendant] entered into an employment relationship;**
- 2. That [name of plaintiff] substantially performed [his/her] job duties [unless [name of plaintiff]'s performance was excused [or prevented]];**
- 3. That [name of defendant] [specify conduct that plaintiff claims prevented him/her from receiving the benefits that he/she was entitled to have received under the contract];**
- 4. That [name of defendant]'s conduct was a failure to act fairly and in good faith; and**
- 5. That [name of plaintiff] was harmed by [name of defendant]'s conduct.**

Both parties to an employment relationship have a duty not to do anything that prevents the other party from receiving the benefits of their agreement. Good faith means honesty of purpose without any intention to mislead or to take unfair advantage of another. Generally speaking, it means being faithful to one's duty or obligation.

New September 2003

If the existence of a contract is at issue, see instructions on contract formation in the 300 series.

This instruction must be completed by inserting an explanation of the conduct that violated the duty to

act in good faith.

The element of substantial performance should not be confused with the "good cause" defense: "The action is primarily for breach of contract. It was therefore incumbent upon plaintiff to prove that he was able and offered to fulfill all obligations imposed upon him by the contract. Plaintiff failed to meet this requirement; by voluntarily withdrawing from the contract he excused further performance by defendant." (*Kane v. Sklar* (1954) 122 Cal.App.2d 480, 482 [265 P.2d 29] , internal citation omitted.) Element 2 may be deleted if substantial performance is not an issue.

Do not give this instruction if the alleged breach is only the termination of an at-will contract. (See *Eisenberg v. Alameda Newspapers, Inc.* (1999) 74 Cal.App.4th 1359, 1391 [88 Cal.Rptr.2d 802] .)

- *Restatement Second of Contracts*, section 205, provides: "Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement." Comment (a) to this section provides, in part: "The phrase 'good faith' is used in a variety of contexts, and its meaning varies somewhat with the context. Good faith performance or enforcement of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party; it excludes a variety of types of conduct characterized as involving 'bad faith' because they violate community standards of decency, fairness or reasonableness. The appropriate remedy for a breach of the duty of good faith also varies with the circumstances."

- *Civil Code* section 1439 provides, in part: "Before any party to an obligation can require another party to perform any act under it, he must fulfill all conditions precedent thereto imposed upon himself; and must be able and offer to fulfill all conditions concurrent so imposed upon him on the like fulfillment by the other party"

- "We therefore conclude that the employment relationship is not sufficiently similar to that of insurer and insured to warrant judicial extension of the proposed additional tort remedies in view of the countervailing concerns about economic policy and stability, the traditional separation of tort and contract law, and finally, the numerous protections against improper terminations already afforded employees." (*Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 693 [254 Cal.Rptr. 211, 765 P.2d 373] .)

- "The covenant of good faith and fair dealing, implied by law in every contract, exists merely to prevent one contracting party from unfairly frustrating the other party's right to receive the benefits of the agreement actually made. The covenant thus cannot "be endowed with an existence independent of its contractual underpinnings." " It cannot impose substantive duties or limits on the contracting parties beyond those incorporated in the specific terms of their agreement." (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 349-350 [100 Cal.Rptr.2d 352, 8 P.3d 1089] , internal citations omitted.)

- "A breach of the contract may also constitute a breach of the implied covenant of good faith and fair dealing. But insofar as the employer's acts are directly actionable as a breach of an implied-in-fact contract term, a claim that merely realleges that breach as a violation of the covenant is superfluous. This is because, as we explained at length in *Foley*, the remedy for breach of an employment agreement, including the covenant of good faith and fair dealing implied by law therein, is solely contractual. In the employment context, an implied covenant theory affords no separate measure of recovery, such as tort damages." (*Guz, supra*, 24 Cal.4th at p. 352 , internal citation omitted.)

- "Where there is no underlying contract there can be no duty of good faith arising from the implied

covenant." (*Horn v. Cushman & Wakefield Western, Inc.* (1999) 72 Cal.App.4th 798, 819 [85 Cal.Rptr.2d 459] .)

■ "We do not suggest the covenant of good faith and fair dealing has no function whatever in the interpretation and enforcement of employment contracts. As indicated above, the covenant prevents a party from acting in bad faith to frustrate the contract's actual benefits. Thus, for example, the covenant might be violated if termination of an at-will employee was a mere pretext to cheat the worker out of another contract benefit to which the employee was clearly entitled, such as compensation already earned." (*Guz, supra*, 24 Cal.4th at p. 353, fn. 18 .)

■ "The reason for an employee's dismissal and whether that reason constitutes bad faith are evidentiary questions most properly resolved by the trier of fact." (*Luck v. Southern Pacific Transportation Co.* (1990) 218 Cal.App.3d 1, 26 [267 Cal.Rptr. 618] , internal citations omitted.)

Secondary Sources

Chin et al., Cal. Practice Guide: Employment Litigation (The Rutter Group) PP 4:330, 4:331, 4:340, 4:343, 4:346

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Contract Actions, §§ 8.27-8.28

4 Wilcox, California Employment Law, Ch. 60, *Liability for Wrongful Termination and Discipline*, §§ 60.02[2][c], 60.06 (Matthew Bender)

21 *California Forms of Pleading and Practice*, Ch. 249, *Employment Law: Termination and Discipline*, § 249.14 (Matthew Bender)

California Civil Practice: Employment Litigation (Thomson West) §§ 6:21-6:22

Publisher's Notes

This instruction covers issues presented in BAJI Nos. 10.05, 10.14, 10.35, 10.38.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Labor & Employment Law Wrongful Termination General Overview Labor & Employment Law Wrongful Termination Breach of Contract Express & Implied Conditions & Covenants Labor & Employment Law Wrongful Termination Breach of Contract Express Contracts



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CHAPTER 24 California Judicial Council Wrongful Termination Instructions

4-24 California Forms of Jury Instruction CACI 2424

CACI 2424 Breach of the Implied Covenant of Good Faith and Fair Dealing--Good Faith Mistaken Belief Defense

[Name of defendant] claims that [he/she/it] did not breach the duty to act fairly and in good faith because [he/she/it] believed that there was a legitimate and reasonable business purpose for the conduct.

To succeed, [name of defendant] must prove both of the following:

- 1. That [his/her/its] conduct was based on an honest belief that [insert alleged mistake]; and**
- 2. That, if true, [insert alleged mistake] would have been a legitimate and reasonable business purpose for the conduct.**

New September 2003

■ "[B]ecause the implied covenant of good faith and fair dealing requires the employer to act fairly and in good faith, an employer's honest though mistaken belief that legitimate business reasons provided good cause for discharge, will negate a claim it sought in bad faith to deprive the employee of the benefits of the contract." (*Wilkerson v. Wells Fargo Bank* (1989) 212 Cal.App.3d 1217, 1231 [261 Cal.Rptr. 185] , internal citation omitted, disapproved on other grounds in *Cotran v. Rollins Hudig Hall International, Inc.* (1998) 17 Cal.4th 93, 96 [69 Cal.Rptr.2d 900, 948 P.2d 412] .)

■ "The jury was instructed that the neglect or refusal to fulfill a contractual obligation based on an honest, mistaken belief did not constitute a breach of the implied covenant." (*Luck v. Southern Pacific Transportation Co.* (1990) 218 Cal.App.3d 1, 26 [267 Cal.Rptr. 618] .)

■ "[F]oley does not preclude inquiry into an employer's motive for discharging an employee. ..." (*Seubert v. McKesson Corp.* (1990) 223 Cal.App.3d 1514, 1521 [273 Cal.Rptr. 296] , overruled on other grounds, *Dore v. Arnold Worldwide, Inc.* (2006) 39 Cal.4th 384, 389 [46 Cal.Rptr.3d 668, 139 P.3d 56].)

■ "[T]he jury was asked to determine in its special verdict whether appellants had a legitimate reason to terminate [plaintiff]'s employment and whether appellants acted in good faith on an honest but mistaken belief that they had a legitimate business reason to terminate [plaintiff]'s employment." (*Seubert v. McKesson Corp.* (1990) 223 Cal.App.3d 1514, 1521 [273 Cal.Rptr. 296] [upholding jury instruction].)

Secondary Sources

Chin et al., Cal. Practice Guide: Employment Litigation (The Rutter Group) PP 4:5, 4:271

10 *California Points and Authorities*, Ch. 100, *Employer and Employee: Wrongful Termination and Discipline*, § 100.30 (Matthew Bender)

Publisher's Notes

This instruction replaces BAJI No. 10.37.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Labor & Employment Law Wrongful Termination General Overview Labor & Employment Law Wrongful Termination Breach of Contract Express & Implied Conditions & Covenants Labor & Employment Law Wrongful Termination Breach of Contract Express Contracts Labor & Employment Law Wrongful Termination Defenses General Overview



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4-24 California Forms of Jury Instruction CACI 2425-CACI 2429

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CACI 2425Reserved for Future Use



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CHAPTER 24 California Judicial Council Wrongful Termination Instructions

4-24 California Forms of Jury Instruction CACI 2430

CACI 2430 Wrongful Discharge/Demotion in Violation of Public Policy--Essential Factual Elements

[*Name of plaintiff*] **claims [he/she] was [discharged/demoted] from employment for reasons that violate a public policy. To establish this claim, [*name of plaintiff*] must prove all of the following:**

- 1. That [*name of plaintiff*] was employed by [*name of defendant*];**
- 2. That [*name of defendant*] [discharged/demoted] [*name of plaintiff*];**
- 3. That [*insert alleged violation of public policy, e.g., " [*name of plaintiff*]'s refusal to engage in price fixing"] was a motivating reason for [*name of plaintiff*]'s [discharge/demotion]; and***
- 4. That the [discharge/demotion] caused [*name of plaintiff*] harm.**

New September 2003

Directions for Use

The judge should determine whether the purported reason for firing the plaintiff would amount to a violation of public policy.

This instruction must be supplemented with CACI No. 2433, *Wrongful Discharge in Violation of Public Policy--Damages*. If plaintiff alleges he or she was forced or coerced to resign, then CACI No. 2431, *Constructive Discharge in Violation of Public Policy--Plaintiff Required to Violate Public Policy*, or CACI No. 2432, *Constructive Discharge in Violation of Public Policy--Plaintiff Required to Endure Intolerable Conditions for Improper Purpose That Violates Public Policy*, should be given instead.

The California Supreme Court has extended employment claims to encompass demotions or other similar employment decisions. (See *Scott v. Pac. Gas & Elec. Co.* (1995) 11 Cal.4th 454, 473-474 [46 Cal.Rptr.2d 427, 904 P.2d 834] .) The bracketed language regarding an alleged wrongful demotion may be given, depending on the facts of the case, or other appropriate language for other similar employment decisions.

Sources and Authority

- "[W]hile an at-will employee may be terminated for no reason, or for an arbitrary or irrational reason, there can be no right to terminate for an unlawful reason or a purpose that contravenes fundamental public policy. Any other conclusion would sanction lawlessness, which courts by their very nature are bound to oppose." (*Casella v. SouthWest Dealer Services, Inc.* (2007) 157 Cal.App.4th 1127, 1138-1139 [69 Cal.Rptr.3d 445] , internal citations omitted.)

- "[W]hen an employer's discharge of an employee violates fundamental principles of public policy, the discharged employee may maintain a tort action and recover damages traditionally available in such actions." (*Tameny v. Atlantic Richfield Co.* (1980) 27 Cal.3d 167, 170 [164 Cal.Rptr. 839, 610 P.2d 1330] .)

- "[T]his court established a set of requirements that a policy must satisfy to support a tortious discharge claim. First, the policy must be supported by either constitutional or statutory provisions. Second, the policy must be 'public' in the sense that it 'inures to the benefit of the public' rather than serving merely the interests of the individual. Third, the policy must have been articulated at the time of the discharge. Fourth, the policy must be 'fundamental' and 'substantial.' " (*Stevenson v. Superior Court* (1997) 16 Cal.4th 880, 889-890 [66 Cal.Rptr.2d 888, 941 P.2d 1157] , footnote omitted.)

- "[T]he cases in which violations of public policy are found generally fall into four categories: (1) refusing to violate a statute; (2) performing a statutory obligation (3) exercising a statutory right or privilege; and (4) reporting an alleged violation of a statute of public importance." (*Gantt v. Sentry Insurance* (1992) 1 Cal.4th 1083, 1090-1091 [4 Cal.Rptr.2d 874, 824 P.2d 680] , internal citations and footnote omitted, overruled on other grounds in *Green v. Ralee Engineering Co.* (1998) 19 Cal.4th 66, 80, fn. 6 [78 Cal.Rptr.2d 16, 960 P.2d 1046] ; accord *Stevenson, supra*, 16 Cal.4th at p. 889 .)

- "[Discharge because of employee's] [r]efusal to violate a governmental regulation may also be the basis for a tort cause of action where the administrative regulation enunciates a fundamental public policy and is authorized by statute." (*Scott v. Phoenix Schools, Inc.* (2009) 175 Cal.App.4th 702, 708-709 [96 Cal.Rptr.3d 159] .)

- "In the context of a tort claim for wrongful discharge, tethering public policy to specific constitutional or statutory provisions serves not only to avoid judicial interference with the legislative domain, but also to ensure that employers have adequate notice of the conduct that will subject them to tort liability to the employees they discharge ... " (*Stevenson, supra*, 16 Cal.4th at p. 889 .)

- "[A]n employee need not prove an actual violation of law; it suffices if the employer fired him for reporting his 'reasonably based suspicions' of illegal activity." (*Green, supra*, 19 Cal.4th at p. 87 , internal citation omitted.)

- "[A]n employer's authority over its employee does not include the right to demand that the employee commit a criminal act to further its interests, and an employer may not coerce compliance with such

unlawful directions by discharging an employee who refuses to follow such an order. ..." (*Tameny*, *supra*, 27 Cal.3d at p. 178 .)

■ Employees in both the private and public sector may assert this claim. (See *Shoemaker v. Myers* (1992) 2 Cal.App.4th 1407 [4 Cal.Rptr.2d 203] .)

Secondary Sources

Chin et al., Cal. Practice Guide: Employment Litigation (The Rutter Group) PP 5:2, 5:47, 5:50, 5:70, 5:105, 5:115, 5:150, 5:151, 5:170, 5:195, 5:220, 5:235

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Public Policy Violations, § 5.45

4 Wilcox, *California Employment Law*, Ch. 60, *Liability for Wrongful Termination and Discipline*, § 60.04 (Matthew Bender)

21 *California Forms of Pleading and Practice*, Ch. 249, *Employment Law: Termination and Discipline*, §§ 249.12, 249.50 -249.52 (Matthew Bender)

10 California Points and Authorities, Ch. 100, *Employer and Employee: Wrongful Termination and Discipline* , §§ 100.52-100.58 (Matthew Bender)

California Civil Practice: Employment Litigation (Thomson West) §§ 6:23-6:25

Publisher's Notes

This instruction replaces BAJI Nos. 10.06 and 10.42.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewLabor & Employment LawWrongful TerminationGeneral OverviewLabor & Employment LawWrongful TerminationBreach of ContractExpress & Implied Conditions & CovenantsLabor & Employment LawWrongful TerminationPublic Policy



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CHAPTER 24 California Judicial Council Wrongful Termination Instructions

4-24 California Forms of Jury Instruction CACI 2431

CACI 2431 Constructive Discharge in Violation of Public Policy--Plaintiff Required to Violate Public Policy

[*Name of plaintiff*] **claims that [he/she] was forced to resign rather than commit a violation of public policy. To establish this claim, [*name of plaintiff*] must prove all of the following:**

- 1. That [*name of plaintiff*] was employed by [*name of defendant*];**
- 2. That, [*name of defendant*] required [*name of plaintiff*] to [*specify alleged conduct in violation of public policy, e.g., "engage in price fixing"*];**
- 3. That this requirement was so intolerable that a reasonable person in [*name of plaintiff*]'s position would have had no reasonable alternative except to resign;**
- 4. That [*name of plaintiff*] resigned because of this requirement;**
- 5. That [*name of plaintiff*] was harmed; and**
- 6. That the requirement was a substantial factor in causing [*name of plaintiff*]'s harm.**

New September 2003

The judge should determine whether the purported reason for plaintiff's resignation would amount to a violation of public policy.

This instruction should be given when a plaintiff claims his or her constructive termination was wrongful because the defendant required the plaintiff to commit an act in violation of public policy. In cases where

the plaintiff alleges he or she was subjected to working conditions that violate public policy, see *CACI No. 2432, Constructive Discharge in Violation of Public Policy--Plaintiff Required to Endure Intolerable Conditions for Improper Purpose That Violates Public Policy*.

This instruction must be supplemented with *CACI No. 2433, Wrongful Discharge in Violation of Public Policy--Damages*.

- "[W]hen an employer's discharge of an employee violates fundamental principles of public policy, the discharged employee may maintain a tort action and recover damages traditionally available in such actions." (*Tameny v. Atlantic Richfield Co. (1980) 27 Cal.3d 167, 170 [164 Cal.Rptr. 839, 610 P.2d 1330]* .)

- "[A]n employer's authority over its employees does not include the right to demand that the employee commit a criminal act to further its interests, and an employer may not coerce compliance with such unlawful directions by discharging an employee who refuses to follow such an order. An employer engaging in such conduct violates a basic duty imposed by law upon all employers, and thus an employee who has suffered damages as a result of such discharge may maintain a tort action for wrongful discharge against the employer." (*Tameny, supra, 27 Cal.3d at p. 178* .)

- "[T]his court established a set of requirements that a policy must satisfy to support a tortious discharge claim. First, the policy must be supported by either constitutional or statutory provisions. Second, the policy must be 'public' in the sense that it 'inures to the benefit of the public' rather than serving merely the interests of the individual. Third, the policy must have been articulated at the time of the discharge. Fourth, the policy must be 'fundamental' and 'substantial.' " (*Stevenson v. Superior Court (1997) 16 Cal.4th 880, 889-890 [66 Cal.Rptr.2d 888, 941 P.2d 1157]* , footnote omitted.)

- "[T]he cases in which violations of public policy are found generally fall into four categories: (1) refusing to violate a statute; (2) performing a statutory obligation (3) exercising a statutory right or privilege; and (4) reporting an alleged violation of a statute of public importance." (*Gantt v. Sentry Insurance (1992) 1 Cal.4th 1083, 1090-1091 [4 Cal.Rptr.2d 874, 824 P.2d 680]* , internal citations and fn. omitted, overruled on other grounds in *Green v. Ralee Engineering Co. (1998) 19 Cal.4th 66, 80, fn. 6 [78 Cal.Rptr.2d 16, 960 P.2d 1046]* ; accord *Stevenson, supra, 16 Cal.4th at p. 889* .)

- "In addition to statutes and constitutional provisions, valid administrative regulations may also serve as a source of fundamental public policy that impacts on an employer's right to discharge employees when such regulations implement fundamental public policy found in their enabling statutes." (*D'sa v. Playhut, Inc. (2000) 85 Cal.App.4th 927, 933 [102 Cal.Rptr.2d 495]* , internal citation omitted.)

- "Constructive discharge occurs when the employer's conduct effectively forces an employee to resign. Although the employee may say, 'I quit,' the employment relationship is actually severed involuntarily by the employer's acts, against the employee's will. As a result, a constructive discharge is legally regarded as a firing rather than a resignation." (*Turner v. Anheuser-Busch, Inc. (1994) 7 Cal.4th 1238, 1244-1245 [32 Cal.Rptr.2d 223, 876 P.2d 1022]* , internal citation omitted.)

- "Whether conditions were so intolerable as to justify a reasonable employee's decision to resign is normally a question of fact." (*Valdez v. City of Los Angeles (1991) 231 Cal.App.3d 1043, 1056 [282 Cal.Rptr. 726]* , internal citation omitted.)

- "In order to establish a constructive discharge, an employee must plead and prove ... that the

employer either intentionally created or knowingly permitted working conditions that were so intolerable or aggravated at the time of the employee's resignation that a reasonable employer would realize that a reasonable person in the employee's position would be compelled to resign." (*Turner, supra*, 7 Cal.4th at p. 1251 .)

■ "The conditions giving rise to the resignation must be sufficiently extraordinary and egregious to overcome the normal motivation of a competent, diligent, and reasonable employee to remain on the job to earn a livelihood and to serve his or her employer. The proper focus is on whether the resignation was coerced, not whether it was simply one rational option for the employee." (*Turner, supra*, 7 Cal.4th at p. 1246 .)

■ "In some circumstances, a single intolerable incident, such as a crime of violence against an employee by an employer, or an employer's ultimatum that an employee commit a crime, may constitute a constructive discharge. Such misconduct potentially could be found 'aggravated.' " (*Turner, supra*, 7 Cal.4th at p. 1247, fn. 3 .)

■ "The mere existence of illegal conduct in a workplace does not, without more, render employment conditions intolerable to a reasonable employee." (*Turner, supra*, 7 Cal.4th at p. 1254 .)

■ "[T]he standard by which a constructive discharge is determined is an objective one--the question is 'whether a reasonable person faced with the allegedly intolerable employer actions or conditions of employment would have no reasonable alternative except to quit.' " (*Turner, supra*, 7 Cal.4th at p. 1248 , internal citations omitted.)

■ "The length of time the plaintiff remained on the job may be one relevant factor in determining the intolerability of employment conditions from the standpoint of a reasonable person." (*Turner, supra*, 7 Cal.4th at p. 1254 .)

Secondary Sources

Chin et al., Cal. Practice Guide: Employment Litigation (The Rutter Group) PP 4:405-406, 4:409-410, 4:421-422, 5:2, 5:45-47, 5:50, 5:70, 5:105, 5:115, 5:150-151, 5:170, 5:195, 5:220

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Public Policy Violations, §§ 5.45-5.46

4 Wilcox, California Employment Law, Ch. 60, *Liability for Wrongful Termination and Discipline*, § 60.04 (Matthew Bender)

21 *California Forms of Pleading and Practice*, Ch. 249, *Employment Law: Termination and Discipline*, §§ 249.12, 249.15 (Matthew Bender)

10 *California Points and Authorities*, Ch. 100, *Employer and Employee: Wrongful Termination and Discipline*, §§ 100.31, 100.35 -100.38 (Matthew Bender)

California Civil Practice: Employment Litigation (Thomson West) §§ 6:23-6:25

Publisher's Notes

This instruction and CACI 2432 replace BAJI No. 10.42.1.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewLabor & Employment LawWrongful
TerminationGeneral OverviewLabor & Employment LawWrongful TerminationConstructive DischargeGeneral
OverviewLabor & Employment LawWrongful TerminationPublic Policy



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California Forms of Jury Instruction

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CHAPTER 24 California Judicial Council Wrongful Termination Instructions

4-24 California Forms of Jury Instruction CACI 2432

CACI 2432 Constructive Discharge in Violation of Public Policy--Plaintiff Required to Endure Intolerable Conditions for Improper Purpose That Violates Public Policy

[*Name of plaintiff*] **claims that** [*name of defendant*] **forced [him/her] to resign for reasons that violate public policy. To establish this claim, [*name of plaintiff*] must prove all of the following:**

- 1. That [*name of plaintiff*] was employed by [*name of defendant*];**
- 2. That [*name of plaintiff*] was subjected to working conditions that violated public policy, in that [*describe conditions imposed on the employee that constitute the violation, e.g., " [name of plaintiff] was treated intolerably in retaliation for filing a workers' compensation claim"];***
- 3. That [*name of defendant*] intentionally created or knowingly permitted these working conditions;**
- 4. That these working conditions were so intolerable that a reasonable person in [*name of plaintiff*]'s position would have had no reasonable alternative except to resign;**
- 5. That [*name of plaintiff*] resigned because of these working conditions;**
- 6. That [*name of plaintiff*] was harmed; and**
- 7. That the working conditions were a substantial factor in causing [*name of plaintiff*]'s harm.**

To be intolerable, the adverse working conditions must be unusually or repeatedly offensive to a reasonable person in [*name of plaintiff*]'s position.

New September 2003

The judge should determine whether the purported reason for plaintiff's resignation would amount to a violation of public policy.

This instruction should be given when plaintiff claims his or her constructive termination was wrongful because defendant subjected plaintiff to intolerable working conditions in violation of public policy. The instruction must be supplemented with *CACI No. 2433, Wrongful Discharge in Violation of Public Policy--Damages*.

- "[W]hen an employer's discharge of an employee violates fundamental principles of public policy, the discharged employee may maintain a tort action and recover damages traditionally available in such actions." (*Tameny v. Atlantic Richfield Co. (1980) 27 Cal.3d 167, 170 [164 Cal.Rptr. 839, 610 P.2d 1330]* .)

- "[T]his court established a set of requirements that a policy must satisfy to support a tortious discharge claim. First, the policy must be supported by either constitutional or statutory provisions. Second, the policy must be 'public' in the sense that it 'inures to the benefit of the public' rather than serving merely the interests of the individual. Third, the policy must have been articulated at the time of the discharge. Fourth, the policy must be 'fundamental' and 'substantial.' " (*Stevenson v. Superior Court (1997) 16 Cal.4th 880, 889-890 [66 Cal.Rptr.2d 888, 941 P.2d 1157]* , fn. omitted.)

- "In addition to statutes and constitutional provisions, valid administrative regulations may also serve as a source of fundamental public policy that impacts on an employer's right to discharge employees when such regulations implement fundamental public policy found in their enabling statutes." (*D'sa v. Playhut, Inc. (2000) 85 Cal.App.4th 927, 933 [102 Cal.Rptr.2d 495]* , internal citation omitted.)

- In *Rojo v. Kliger (1990) 52 Cal.3d 65, 88-91 [276 Cal.Rptr. 130, 801 P.2d 373]* , the court held that an employee terminated in retaliation for refusing her employer's sexual advances may state a wrongful termination cause of action in tort.

- "Constructive discharge occurs when the employer's conduct effectively forces an employee to resign. Although the employee may say, 'I quit,' the employment relationship is actually severed involuntarily by the employer's acts, against the employee's will. As a result, a constructive discharge is legally regarded as a firing rather than a resignation." (*Turner v. Anheuser-Busch, Inc. (1994) 7 Cal.4th 1238, 1244-1245 [32 Cal.Rptr.2d 223, 876 P.2d 1022]* , internal citation omitted.)

- "Whether conditions were so intolerable as to justify a reasonable employee's decision to resign is normally a question of fact." (*Valdez v. City of Los Angeles (1991) 231 Cal.App.3d 1043, 1056 [282 Cal.Rptr. 726]* , internal citation omitted.)

- "In order to establish a constructive discharge, an employee must plead and prove ... that the employer either intentionally created or knowingly permitted working conditions that were so intolerable or aggravated at the time of the employee's resignation that a reasonable employer would realize that a reasonable person in the employee's position would be compelled to resign." (*Turner, supra* , 7 Cal.4th at p. 1251 .)

- "The conditions giving rise to the resignation must be sufficiently extraordinary and egregious to

overcome the normal motivation of a competent, diligent, and reasonable employee to remain on the job to earn a livelihood and to serve his or her employer. The proper focus is on whether the resignation was coerced, not whether it was simply one rational option for the employee." (*Turner, supra*, 7 Cal.4th at p. 1246 .)

■ "In some circumstances, a single intolerable incident, such as a crime of violence against an employee by an employer, or an employer's ultimatum that an employee commit a crime, may constitute a constructive discharge. Such misconduct potentially could be found 'aggravated.' " (*Turner, supra*, 7 Cal.4th at p. 1247, fn. 3 .)

■ "The mere existence of illegal conduct in a workplace does not, without more, render employment conditions intolerable to a reasonable employee." (*Turner, supra*, 7 Cal.4th at p. 1254 .)

■ "[T]he standard by which a constructive discharge is determined is an objective one--the question is 'whether a reasonable person faced with the allegedly intolerable employer actions or conditions of employment would have no reasonable alternative except to quit.' " (*Turner, supra*, 7 Cal.4th at p. 1248 , internal citations omitted.)

■ "The length of time the plaintiff remained on the job may be one relevant factor in determining the intolerability of employment conditions from the standpoint of a reasonable person." (*Turner, supra*, 7 Cal.4th at p. 1254 .)

Secondary Sources

Chin et al., Cal. Practice Guide: Employment Litigation (The Rutter Group) PP 4:405-4:406, 4:409-4:411, 4:421-4:422, 5:2, 5:45-5:47

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Public Policy Violations, §§ 5.45-5.46

4 Wilcox, California Employment Law, Ch. 60, *Liability for Wrongful Termination and Discipline*, § 60.04 (Matthew Bender)

21 *California Forms of Pleading and Practice*, Ch. 249, *Employment Law: Termination and Discipline*, §§ 249.15, 249.50 (Matthew Bender)

10 *California Points and Authorities*, Ch. 100, *Employer and Employee: Wrongful Termination and Discipline*, §§ 100.31, 100.32, 100.36 -100.38 (Matthew Bender)

California Civil Practice: Employment Litigation (Thomson West) §§ 6:23-6:25

Publisher's Notes

This instruction and CACI 2431 replace BAJI No. 10.42.1.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Labor & Employment Law Wrongful Termination General Overview Labor & Employment Law Wrongful Termination Constructive Discharge General Overview Labor & Employment Law Wrongful Termination Constructive Discharge Burdens of Proof Labor & Employment Law Wrongful Termination Public Policy



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CHAPTER 24 California Judicial Council Wrongful Termination Instructions

4-24 California Forms of Jury Instruction CACI 2433

CACI 2433 Wrongful Discharge in Violation of Public Policy--Damages

If you find that [name of defendant] [discharged/constructively discharged] [name of plaintiff] in violation of public policy, then you must decide the amount of damages that [name of plaintiff] has proven [he/she] is entitled to recover, if any. To make that decision, you must:

- 1. Decide the amount that [name of plaintiff] would have earned up to today, including any benefits and pay increases; [and]**
- 2. Add the present cash value of any future wages and benefits that [he/she] would have earned for the length of time the employment with [name of defendant] was reasonably certain to continue; [and]**
- 3. [Add damages for [describe any other damages that were allegedly caused by defendant's conduct, e.g., "emotional distress"] if you find that [name of defendant]'s conduct was a substantial factor in causing that harm.]**

In determining the period that [name of plaintiff]'s employment was reasonably certain to have continued, you should consider such things as:

- (a) [Name of plaintiff]'s age, work performance, and intent regarding continuing employment with [name of defendant];**
- (b) [Name of defendant]'s prospects for continuing the operations involving [name of plaintiff]; and**
- (c) Any other factor that bears on how long [name of plaintiff] would have**

continued to work.

New September 2003

This instruction should be followed by *CACI No. 2407, Employee's Duty to Mitigate Damages*, in cases where the employee's duty to mitigate damages is at issue.

Other types of tort damages may be available to a plaintiff. For an instruction on emotional distress damages, see *CACI No. 3905A, Physical Pain, Mental Suffering, and Emotional Distress (Noneconomic Damage)*. See punitive damages instructions in the damages section (*CACI No. 3940 et seq.*).

- A tortious termination subjects the employer to "liability for compensatory and punitive damages under normal tort principles." (*Gantt v. Sentry Insurance* (1992) 1 Cal.4th 1083, 1101 [4 Cal.Rptr.2d 874, 824 P.2d 680] , internal citation omitted.)
- "The general rule is that the measure of recovery by a wrongfully discharged employee is the amount of salary agreed upon for the period of service, less the amount which the employer affirmatively proves the employee has earned or with reasonable effort might have earned from other employment." (*Parker v. Twentieth Century-Fox Film Corp.* (1970) 3 Cal.3d 176, 181 [89 Cal.Rptr. 737, 474 P.2d 689], internal citations omitted; see *Smith v. Brown-Forman Distillers Corp.* (1987) 196 Cal.App.3d 503, 518 [241 Cal.Rptr. 916] .)
- "A plaintiff may recover for detriment reasonably certain to result in the future. While there is no clearly established definition of 'reasonable certainty,' evidence of future detriment has been held sufficient based on expert medical opinion which considered the plaintiff's particular circumstances and the expert's experience with similar cases." (*Bihun v. AT&T Information Systems, Inc.* (1993) 13 Cal.App.4th 976, 995 [16 Cal.Rptr.2d 787] , internal citations omitted, disapproved of on another ground in *Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 664 [25 Cal.Rptr.2d 109, 863 P.2d 179] .)
- "[I]t is our view that in an action for wrongful discharge, and pursuant to the present day concept of employer-employee relations, the term 'wages' should be deemed to include not only the periodic monetary earnings of the employee but also the other benefits to which he is entitled as a part of his compensation." (*Wise v. Southern Pac. Co.* (1970) 1 Cal.3d 600, 607 [83 Cal.Rptr. 202, 463 P.2d 426] .)
- In determining the period that plaintiff's employment was reasonably certain to have continued, the trial court took into consideration plaintiff's "physical condition, his age, his propensity for hard work, his expertise in managing defendants' offices, the profit history of his operation, [and] the foreseeability of the continued future demand for tax return service to small taxpayers" (*Drzewiecki v. H & R Block, Inc.* (1972) 24 Cal.App.3d 695, 705 [101 Cal.Rptr. 169] .)
- *Civil Code section 3294(a)* allows a plaintiff to seek punitive damages "for the breach of an obligation not arising from contract" when the plaintiff can show by "clear and convincing evidence" that a defendant "has been guilty of oppression, fraud, or malice."
- *Civil Code section 3294(b)* provides: "An employer shall not be liable for damages pursuant to subdivision (a), based upon acts of an employee of the employer, unless the employer had advance

knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights and safety of others or authorized or ratified the wrongful conduct for which the damages are awarded or was personally guilty of oppression, fraud, or malice. With respect to a corporate employer, the advance knowledge and conscious disregard, authorization, ratification or act of oppression, fraud, or malice must be on the part of an officer, director, or managing agent of the corporation."

■ In adding subdivision (b) to section 3294 in 1980, "[t]he drafters' goals were to avoid imposing punitive damages on employers who were merely negligent or reckless and to distinguish ordinary respondeat superior liability from corporate liability for punitive damages." (*White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 572 [88 Cal.Rptr.2d 19, 981 P.2d 944] , see *Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1150-1151 [74 Cal.Rptr.2d 510] .)

Secondary Sources

Chin et al., Cal. Practice Guide: Employment Litigation (The Rutter Group) PP 17:237, 17:362, 17:365

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Public Policy Violations, §§ 5.64-5.67

4 Wilcox, California Employment Law, Ch. 60, *Liability for Wrongful Termination and Discipline*, § 60.08[2] (Matthew Bender)

21 *California Forms of Pleading and Practice*, Ch. 249, *Employment Law: Termination and Discipline*, §§ 249.18, 249.50 -249.55, 249.80 -249.81, 249.90 (Matthew Bender)

10 *California Points and Authorities*, Ch. 100, *Employer and Employee: Wrongful Termination and Discipline*, §§ 100.41 -100.59 (Matthew Bender)

Publisher's Notes

This instruction replaces BAJI Nos. 10.41 and 10.43.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Labor & Employment Law Wrongful Termination General Overview Labor & Employment Law Wrongful Termination Public Policy Labor & Employment Law Wrongful Termination Remedies Compensatory Damages



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California Forms of Jury Instruction

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CHAPTER 24 California Judicial Council Wrongful Termination Instructions

4-24 California Forms of Jury Instruction CACI 2434-CACI 2499

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CACI 2434Reserved for Future Use



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California Forms of Jury Instruction

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CHAPTER 24 California Judicial Council Wrongful Termination Instructions

4-24 California Forms of Jury Instruction CACI VF-2400

CACI VF-2400 Breach of Employment Contract--Unspecified Term

We answer the questions submitted to us as follows:

1. Did [name of plaintiff] and [name of defendant] enter into an employment relationship?

_____ Yes _____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Did [name of defendant] promise, by words or conduct, not to [discharge/demote] [name of plaintiff] except for good cause?

_____ Yes _____ No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Did [name of plaintiff] substantially perform [his/her] job duties?

_____ Yes _____ No

If your answer to question 3 is yes, skip question 4 and answer question 5. If you answered no, answer question 4.

4. Was [name of plaintiff]'s performance excused or prevented?

_____ Yes _____ No

If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. Did [*name of defendant*] [discharge/demote] [*name of plaintiff*] without good cause?

_____ Yes _____ No

If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. Was [*name of plaintiff*] harmed by the [discharge/demotion]?

_____ Yes _____ No

If your answer to question 6 is yes, then answer question 7. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

7. What are [*name of plaintiff*]'s damages?

[a. Past economic loss:..... \$_____]

[b. Future economic loss:..... \$_____]

..... TOTAL \$_____

Signed: _____

Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the [clerk/bailiff/judge].

New September 2003

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case. This verdict form is based on *CACI No. 2401, Breach of Employment Contract--Unspecified Term--Essential Factual Elements*.

Questions 3 and 4 should be deleted if substantial performance is not at issue.

The breakdown of damages is optional; depending on the circumstances, users may wish to break down the damages even further.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

Publisher's Notes

There is no BAJI verdict form on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsBreachLabor & Employment LawWrongful TerminationGeneral OverviewLabor & Employment LawWrongful TerminationBreach of ContractFor Cause Standard



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CHAPTER 24 California Judicial Council Wrongful Termination Instructions

4-24 California Forms of Jury Instruction CACI VF-2401

CACI VF-2401 Breach of Employment Contract--Unspecified Term-- Constructive Discharge

We answer the questions submitted to us as follows:

1. Did [name of plaintiff] and [name of defendant] enter into an employment relationship?

_____ Yes _____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Did [name of defendant] promise, by words or conduct, not to [discharge/demote] [name of plaintiff] except for good cause?

_____ Yes _____ No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Did [name of plaintiff] substantially perform [his/her] job duties?

_____ Yes _____ No

If your answer to question 3 is yes, skip question 4 and answer question 5. If you answered no, answer question 4.

4. Was [name of plaintiff]'s performance excused or prevented?

_____ Yes _____ No

If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. Did [*name of defendant*] intentionally create or knowingly permit working conditions to exist that were so intolerable that a reasonable person in [*name of plaintiff*]'s position would have had no reasonable alternative except to resign?

_____ Yes _____ No

If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. Did [*name of plaintiff*] resign because of the intolerable conditions?

_____ Yes _____ No

If your answer to question 6 is yes, then answer question 7. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

7. Was [*name of plaintiff*] harmed by the loss of employment?

_____ Yes _____ No

If your answer to question 7 is yes, then answer question 8. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

8. What are [*name of plaintiff*]'s damages?

[a. Past economic loss:..... \$_____]

[b. Future economic loss:..... \$_____]

..... TOTAL \$_____

Signed: _____

Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the [clerk/bailiff/judge].

New September 2003

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of each case.

This verdict form is based on *CACI No. 2402, Breach of Employment Contract--Unspecified Term--Constructive Discharge--Essential Factual Elements*.

Questions 3 and 4 should be deleted if substantial performance is not at issue.

The breakdown of damages is optional; depending on the circumstances, users may wish to break down the damages even further.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

Publisher's Notes

There is no BAJI verdict form on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Labor & Employment Law Employment Relationships Employment Contracts Breach Labor & Employment Law Wrongful Termination General Overview Labor & Employment Law Wrongful Termination Breach of Contract For Cause Standard Labor & Employment Law Wrongful Termination Constructive Discharge Burdens of Proof



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CHAPTER 24 California Judicial Council Wrongful Termination Instructions

4-24 California Forms of Jury Instruction CACI VF-2402

CACI VF-2402 Breach of Employment Contract--Specified Term

We answer the questions submitted to us as follows:

1. Did [*name of plaintiff*] and [*name of defendant*] enter into an employment contract that specified a length of time for which [*name of plaintiff*] would remain employed?

_____ Yes _____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Did [*name of plaintiff*] substantially perform [his/her] job duties?

_____ Yes _____ No

If your answer to question 2 is yes, skip question 3 and answer question 4. If you answered no, answer question 3.

3. Was [*name of plaintiff*]'s performance excused or prevented?

_____ Yes _____ No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Did [*name of defendant*] breach the employment contract by [discharging/demoting] [*name of*

plaintiff] before the end of the term of the contract?

_____ Yes _____ No

If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. Was [*name of plaintiff*] harmed by the [discharge/demotion]?

_____ Yes _____ No

If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. What are [*name of plaintiff*]'s damages?

[a. Past economic loss:..... \$_____]

[b. Future economic loss:..... \$_____]

..... TOTAL \$_____

Signed: _____

Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the [clerk/bailiff/judge].

New September 2003

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of each case.

This verdict form is based on *CACI No. 2420, Breach of Employment Contract --Specified Term-- Essential Factual Elements*.

Questions 2 and 3 should be deleted if substantial performance is not at issue.

The breakdown of damages is optional; depending on the circumstances, users may wish to break down the damages even further.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

Publisher's Notes

There is no BAJI verdict form on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewLabor & Employment LawWrongful
TerminationGeneral OverviewLabor & Employment LawWrongful TerminationBreach of ContractGeneral
OverviewLabor & Employment LawWrongful TerminationBreach of ContractFor Cause Standard



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California Forms of Jury Instruction

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CHAPTER 24 California Judicial Council Wrongful Termination Instructions

4-24 California Forms of Jury Instruction CACI VF-2403

CACI VF-2403 Breach of Employment Contract--Specified Term--Good-Cause Defense

We answer the questions submitted to us as follows:

1. Did [*name of plaintiff*] and [*name of defendant*] enter into an employment contract that specified a length of time for which [*name of plaintiff*] would remain employed?

_____ Yes _____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Did [*name of plaintiff*] substantially perform [his/her] job duties?

_____ Yes _____ No

If your answer to question 2 is yes, skip question 3 and answer question 4. If you answered no, answer question 3.

3. Was [*name of plaintiff*]'s performance excused or prevented?

_____ Yes _____ No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Did [*name of defendant*] [discharge/demote] [*name of plaintiff*] before the end of the term of the

contract?

_____ Yes _____ No

If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. Did [*name of defendant*] have good cause to [discharge/demote] [*name of plaintiff*]?

_____ Yes _____ No

If your answer to question 5 is no, then answer question 6. If you answered yes, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. Was [*name of plaintiff*] harmed by the [discharge/demotion]?

_____ Yes _____ No

If your answer to question 6 is yes, then answer question 7. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

7. What are [*name of plaintiff*]'s damages?

[a. Past economic loss:..... \$_____]

[b. Future economic loss:..... \$_____]

..... TOTAL \$_____

Signed: _____

Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the [clerk/bailiff/judge].

New September 2003

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of each case.

This verdict form is based on CACI No. 2420, *Breach of Employment Contract --Specified Term-- Essential Factual Elements*, and CACI No. 2421, *Breach of Employment Contract --Specified Term-- Good-Cause Defense*.

Questions 2 and 3 should be deleted if substantial performance is not at issue.

The breakdown of damages is optional; depending on the circumstances, users may wish to break down

the damages even further.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

Publisher's Notes

There is no BAJI verdict form on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewLabor & Employment LawWrongful
TerminationGeneral OverviewLabor & Employment LawWrongful TerminationBreach of ContractGeneral
OverviewLabor & Employment LawWrongful TerminationBreach of ContractFor Cause Standard



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CHAPTER 24 California Judicial Council Wrongful Termination Instructions

4-24 California Forms of Jury Instruction CACI VF-2404

CACI VF-2404 Employment--Breach of the Implied Covenant of Good Faith and Fair Dealing

We answer the questions submitted to us as follows:

1. Did [*name of plaintiff*] and [*name of defendant*] enter into an employment relationship?

_____ Yes _____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Did [*name of plaintiff*] substantially perform [his/her] job duties?

_____ Yes _____ No

If your answer to question 2 is yes, skip question 3 and answer question 4. If you answered no, answer question 3.

3. Was [*name of plaintiff*]'s performance excused or prevented?

_____ Yes _____ No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Did [*name of defendant*] [*specify conduct that plaintiff claims prevented him/her from receiving the benefits that he/she was entitled to have received under the contract*]?

_____ Yes _____ No

If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. Did [*name of defendant*] fail to act fairly and in good faith?

_____ Yes _____ No

If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. Was [*name of plaintiff*] harmed by [*name of defendant*]'s failure to act fairly and in good faith?

_____ Yes _____ No

If your answer to question 6 is yes, then answer question 7. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

7. What are [*name of plaintiff*]'s damages?

[a. Past economic loss:..... \$_____]

[b. Future economic loss:..... \$_____]

..... TOTAL \$_____

Signed: _____

Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the [clerk/bailiff/judge].

New September 2003

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on *CACI No. 2423, Breach of the Implied Covenant of Good Faith and Fair Dealing--Essential Factual Elements*.

Questions 2 and 3 should be deleted if substantial performance is not at issue.

The breakdown of damages in question 7 is optional; depending on the circumstances, users may wish to break down the damages even further.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

This form may be modified if the jury is being given the discretion under *Civil Code section 3288* to award prejudgment interest on specific losses that occurred prior to judgment.

Publisher's Notes

There is no BAJI verdict form on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewLabor & Employment LawWrongful TerminationGeneral OverviewLabor & Employment LawWrongful TerminationBreach of ContractGeneral OverviewLabor & Employment LawWrongful TerminationBreach of ContractExpress & Implied Conditions & Covenants



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CHAPTER 24 California Judicial Council Wrongful Termination Instructions

4-24 California Forms of Jury Instruction CACI VF-2405

CACI VF-2405 Breach of the Implied Covenant of Good Faith and Fair Dealing--Affirmative Defense--Good Faith Mistaken Belief

We answer the questions submitted to us as follows:

1. Did [*name of plaintiff*] and [*name of defendant*] enter into an employment agreement?

_____ Yes _____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Did [*name of plaintiff*] substantially perform [his/her] job duties?

_____ Yes _____ No

If your answer to question 2 is yes, skip question 3 and answer question 4. If you answered no, answer question 3.

3. Was [*name of plaintiff*]'s performance excused or prevented?

_____ Yes _____ No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Did [*name of defendant*] [*specify conduct that plaintiff claims prevented him/her from receiving the*

benefits that he/she was entitled to have received under the contract]?

_____ Yes _____ No

If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. Was [*name of defendant*]'s conduct based on an honest belief that [*insert alleged mistake*]?

_____ Yes _____ No

If your answer to question 5 is yes, then answer question 6. If you answered no, skip question 6 and answer question 7.

6. If true, would [*insert alleged mistake*] have been a legitimate and reasonable business purpose for the conduct?

_____ Yes _____ No

If your answer to question 6 is no, then answer question 7. If you answered yes, stop here, answer no further questions, and have the presiding juror sign and date this form.

7. Did [*name of defendant*] fail to act fairly and in good faith?

_____ Yes _____ No

If your answer to question 7 is yes, then answer question 8. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

8. Was [*name of plaintiff*] harmed by [*name of defendant*]'s failure to act in good faith?

_____ Yes _____ No

If your answer to question 8 is yes, then answer question 9. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

9. What are [*name of plaintiff*]'s damages?

[a. Past economic loss:..... \$_____]

[b. Future economic loss:..... \$_____]

..... TOTAL \$_____

Signed: _____
Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the [clerk/bailiff/judge].

New September 2003

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on *CACI No. 2423, Breach of the Implied Covenant of Good Faith and Fair Dealing--Essential Factual Elements*, and *CACI No. 2424, Breach of the Implied Covenant of Good Faith and Fair Dealing--Good Faith Mistaken Belief Defense*.

Questions 2 and 3 should be deleted if substantial performance is not at issue.

The breakdown of damages in question 9 is optional; depending on the circumstances, users may wish to break down the damages even further.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

This form may be modified if the jury is being given the discretion under *Civil Code section 3288* to award prejudgment interest on specific losses that occurred prior to judgment.

Publisher's Notes

There is no BAJI verdict form on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Labor & Employment Law Wrongful Termination General Overview Labor & Employment Law Wrongful Termination Breach of Contract General Overview Labor & Employment Law Wrongful Termination Breach of Contract Express & Implied Conditions & Covenants Labor & Employment Law Wrongful Termination Defenses General Overview



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CHAPTER 24 California Judicial Council Wrongful Termination Instructions

4-24 California Forms of Jury Instruction CACI VF-2406

CACI VF-2406 Wrongful Discharge/Demotion in Violation of Public Policy

We answer the questions submitted to us as follows:

1. Was [name of plaintiff] employed by [name of defendant]?

_____ Yes _____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Was [name of plaintiff] [discharged/demoted]?

_____ Yes _____ No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Was [name of plaintiff]'s [insert alleged activity protected by public policy, e.g., "refusal to engage in price fixing"] a motivating reason for [name of defendant]'s decision to [discharge/demote] [name of plaintiff]?

_____ Yes _____ No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Did the [discharge/demotion] cause [*name of plaintiff*] harm?

_____ Yes _____ No

If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. What are [*name of plaintiff*]'s damages?**[a. Past economic loss**

[lost earnings..... \$_____].....

[lost profits..... \$_____].....

[medical expenses..... \$_____].....

[other past economic loss..... \$_____].....

..... Total Past Economic Damages: \$_____]

[b. Future economic loss

[lost earnings..... \$_____].....

[lost profits..... \$_____].....

[medical expenses..... \$_____].....

[other future economic loss..... \$_____].....

..... Total Future Economic Damages: \$_____]

[c. Past noneconomic loss, including [physical pain/mental suffering:]..... \$_____]

[d. Future noneconomic loss, including [physical pain/mental suffering:] \$_____]

..... TOTAL \$_____

Signed: _____

Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the [clerk/bailiff/judge].

New September 2003; Revised April 2007

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on *CACI No. 2430, Wrongful Discharge/Demotion in Violation of Public Policy--Essential Factual Elements*.

If specificity is not required, users do not have to itemize all the damages listed in question 5 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

This form may be modified if the jury is being given the discretion under *Civil Code section 3288* to award prejudgment interest on specific losses that occurred prior to judgment.

Publisher's Notes

There is no BAJI verdict form on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Labor & Employment Law Wrongful Termination General Overview Labor & Employment Law Wrongful Termination Breach of Contract General Overview Labor & Employment Law Wrongful Termination Public Policy



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California Forms of Jury Instruction

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CHAPTER 24 California Judicial Council Wrongful Termination Instructions

4-24 California Forms of Jury Instruction CACI VF-2407

CACI VF-2407 Constructive Discharge in Violation of Public Policy--Plaintiff Required to Violate Public Policy

We answer the questions submitted to us as follows:

1. Was [*name of plaintiff*] employed by [*name of defendant*]?

_____ Yes _____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Did [*name of defendant*] require [*name of plaintiff*] to [*specify alleged conduct in violation of public policy, e.g., "engage in price fixing"*] as a condition of employment?

_____ Yes _____ No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Was this requirement so intolerable that a reasonable person in [*name of plaintiff*]'s position would have had no reasonable alternative except to resign?

_____ Yes _____ No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Did [name of plaintiff] resign because of this requirement?

_____ Yes _____ No

If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. Was the requirement a substantial factor in causing harm to [name of plaintiff]?

_____ Yes _____ No

If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. What are [name of plaintiff]'s damages?**[a. Past economic loss**

[lost earnings..... \$ _____].....

[lost profits..... \$ _____].....

[medical expenses..... \$ _____].....

[other past economic loss..... \$ _____].....

..... **Total Past Economic Damages: \$ _____]****[b. Future economic loss**

[lost earnings..... \$ _____].....

[lost profits..... \$ _____].....

[medical expenses..... \$ _____].....

[other future economic loss..... \$ _____].....

..... **Total Future Economic Damages: \$ _____]**

[c. Past noneconomic loss, including [physical pain/mental suffering:]..... \$ _____]

[d. Future noneconomic loss, including [physical pain/mental suffering:] \$ _____]

..... **TOTAL \$ _____**

Signed: _____

Presiding Juror**Dated:** _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the [clerk/bailiff/judge].

New September 2003; Revised April 2007

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on *CACI No. 2431, Constructive Discharge in Violation of Public Policy--Plaintiff Required to Violate Public Policy*.

If specificity is not required, users do not have to itemize all the damages listed in question 6 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

This form may be modified if the jury is being given the discretion under *Civil Code section 3288* to award prejudgment interest on specific losses that occurred prior to judgment.

Publisher's Notes

There is no BAJI verdict form on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Labor & Employment Law Wrongful Termination General Overview Labor & Employment Law Wrongful Termination Breach of Contract General Overview Labor & Employment Law Wrongful Termination Constructive Discharge General Overview Labor & Employment Law Wrongful Termination Public Policy



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California Forms of Jury Instruction

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CHAPTER 24 California Judicial Council Wrongful Termination Instructions

4-24 California Forms of Jury Instruction CACI VF-2408

CACI VF-2408 Constructive Discharge in Violation of Public Policy--Plaintiff Required to Endure Intolerable Conditions for Improper Purpose That Violates Public Policy

We answer the questions submitted to us as follows:

1. Was [*name of plaintiff*] employed by [*name of defendant*]?

_____ Yes _____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Was [*name of plaintiff*] subjected to working conditions that violated public policy, in that [*describe conditions imposed on the employee that constitute the violation, e.g., "plaintiff was treated intolerably in retaliation for filing a workers' compensation claim"*]?

_____ Yes _____ No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Did [*name of defendant*] intentionally create or knowingly permit these working conditions?

_____ Yes _____ No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Were these working conditions so intolerable that a reasonable person in [*name of plaintiff*]'s position would have had no reasonable alternative except to resign?

_____ Yes _____ No

If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. Did [*name of plaintiff*] resign because of these working conditions?

_____ Yes _____ No

If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. Were the working conditions a substantial factor in causing harm to [*name of plaintiff*]?

_____ Yes _____ No

If your answer to question 6 is yes, then answer question 7. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

7. What are [*name of plaintiff*]'s damages?

[a. Past economic loss

[lost earnings..... \$_____].....

[lost profits..... \$_____].....

[medical expenses..... \$_____].....

[other past economic loss..... \$_____].....

..... **Total Past Economic Damages: \$_____]**

[b. Future economic loss

[lost earnings..... \$_____].....

[lost profits..... \$_____].....

[medical expenses..... \$_____].....

[other future economic loss..... \$_____].....

..... **Total Future Economic Damages: \$_____]**

[c. Past noneconomic loss, including [physical

pain/mental suffering:]..... \$_____]

[d. Future noneconomic loss, including [physical
pain/mental suffering:] \$_____]

..... TOTAL \$_____

Signed: _____
Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the
[clerk/bailiff/judge].

New September 2003; Revised April 2007

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on *CACI No. 2432, Constructive Discharge in Violation of Public Policy--Plaintiff Required to Endure Intolerable Conditions for Improper Purpose That Violates Public Policy*.

If specificity is not required, users do not have to itemize all the damages listed in question 7 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

This form may be modified if the jury is being given the discretion under *Civil Code section 3288* to award prejudgment interest on specific losses that occurred prior to judgment.

Publisher's Notes

There is no BAJI verdict form on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Labor & Employment Law Wrongful Termination General Overview Labor & Employment Law Wrongful Termination Breach of Contract General Overview Labor & Employment Law Wrongful Termination Constructive Discharge General Overview Labor & Employment Law Wrongful Termination Public Policy



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CHAPTER 24 California Judicial Council Wrongful Termination Instructions

4-24 California Forms of Jury Instruction CACI VF-2409-CACI VF-2499

Reserved for Future Use

CACI VF-2409Reserved for Future Use



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CHAPTER 24A Matthew Bender Employment Contract Instructions

4-24A California Forms of Jury Instruction 24A.syn

§ 24A.syn Synopsis to Chapter 24A: Matthew Bender Employment Contract Instructions

MB 2400A.01 Termination Absent Good Faith Dissatisfaction With Plaintiff's Services--Burden of Proof

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Dissatisfaction as Grounds for Termination

[b] Proof of Contract of Employment

[c] Plaintiff Willing and Able to Perform

[d] Damages Caused by Breach

[e] Related Judicial Council Jury Instructions

MB 2400A.02 Defendant's Breach of Personnel Policies--Burden of Proof

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Personnel Policies

[b] Related Judicial Council Jury Instructions

MB 2400A.03 Fraudulent Inducement of Employment Contract--Introductory Instruction

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Fraudulent Inducement of Employment Contract

[b] Related Judicial Council Jury Instructions

MB 2400A.04 through MB 2400A.09 Reserved for Future Use

MB 2400A.10 Employment Contract

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] "Employment Contract" Defined

[b] Related Judicial Council Jury Instructions

MB 2400A.11 Violation of Public Policy

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Basis for Liability for Wrongful Termination in Violation of Public Policy--In General

[b] Violation of Public Policy

[c] The Public Interest Test

[d] Refusal to Commit Illegal Act

[e] Exercise of Right Protected by Law

[f] Constructive Discharge

[g] Imposition of Liability for Disciplinary or Punitive Action Other Than Termination

[h] Administrative Remedies

[i] Related Judicial Council Jury Instructions

MB 2400A.12 Good Faith and Bad Faith

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Good Faith and Bad Faith

[b] Related Judicial Council Jury Instructions

MB 2400A.13 Reasonable Period of Continued Employment

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Employment to Continue for Reasonable Time

[b] Related Judicial Council Jury Instructions

MB 2400A.14 Good Faith Dissatisfaction With Performance

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Employment Conditioned on Satisfactory Performance

[b] Employer's Good Faith a Jury Question

[c] Related Judicial Council Jury Instructions

MB 2400A.15 Employment Rights Based on Length of Service

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Function of Seniority Rights

[b] Statutory Seniority Rights--Public Employees

[c] Contractual Seniority Rights--Private Sector Employees

[d] Plaintiff's Burden to Prove Origin of Seniority Rights

[e] Seniority Rights Not Inherent in Employment Relationship

MB 2400A.16 Implication of Contract Terms--Limitations

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Implied Contract Terms

[b] Related Judicial Council Jury Instructions

MB 2400A.17 Specified Condition of Definite Duration

[1] Instruction

[2] Use of Instruction

MB 2400A.18 through MB 2400A.29 [Reserved]

MB 2400A.30 Statute of Frauds--Affirmative Defense

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Requirements of Statute of Frauds

[b] Interpretation of When Contract May Be Performed Within One Year

[c] When Defendant Is Estopped From Asserting Statute of Frauds

MB 2400A.31 Termination of Contract in Accordance With Contract's Terms--Burden of Proof

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Option to Terminate

[b] Exercising Option to Terminate

[c] Establishing Valid Exercise of Option

MB 2400A.32 Unilateral Modification/Termination of Unilateral Employment Contract--Burden of Proof

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Modification or Termination of Unilateral Employment Contract

MB 2400A.33 Voluntary Resignation--Burden of Proof

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Defense of Voluntary Termination

[b] Related Judicial Council Jury Instructions

MB 2400A.34 Independent Contractor--Affirmative Defense

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Independent Contractor Distinguished From Employee; Right of Control

[b] Other Factors

[c] Termination Rights as Evidence of Employer-Employee Relationship

[d] Contract Description

[e] Combination of Factors

[f] Question of Law or Fact

[g] Related Judicial Council Jury Instructions

MB 2400A.35 Exclusivity of Workers' Compensation Remedies--Affirmative Defense

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Nature of the Exclusive Remedy

[b] Application of Workers' Compensation Law to Employment Contracts

[c] Discharge of Employee Because of Disability Arising From Work-Related Injury

[d] Claim for Emotional Distress Arising From Discharge

[e] Claim for Physical or Mental Disability Arising From Discharge

[f] Fraudulent Inducement to Enter Into Employment Contract

[g] Complaint Based on Violation of Fair Employment and Housing Act

[h] Related Judicial Council Jury Instructions

MB 2400A.36 Accord and Satisfaction--Affirmative Defense

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Affirmative Defense; Burden of Proof

[b] "Accord and Satisfaction" Defined

[c] Elements of Accord and Satisfaction: Bona Fide Dispute, Notice, and Acceptance

[d] Acceptance of Notated Check or Draft Under Protest or Without Knowledge

[e] Contract Principles Apply

[f] Intent of Parties: Meeting of Minds Required

[g] Question of Fact

[h] Part Performance

MB 2400A.37 Full Performance--Affirmative Defense

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Full Performance

[b] Related Judicial Council Jury Instructions

MB 2400A.38 Reduction in Workforce Is Not Breach of Implied Agreement to Terminate Only for Good Cause

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 2400A.39 Legitimate Alternative Ground for Discharge--Burden of Proof--Affirmative Defense to Retaliatory Discharge Claim by Whistleblower

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Protection of "Whistleblower" Activity by Employee

[b] Affirmative Defense--Burden of Proof

[c] Related Judicial Council Jury Instructions

MB 2400A.40-MB 2400A.49 Reserved for Future Use

MB 2400A.50 Damages for Breach of Employment Contract--General Rule

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Damages for Breach of Contract

[b] Related Judicial Council Jury Instructions

MB 2400A.51 Damages for Wrongful Termination--Lost Share of Anticipated Profits

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Lost Profits to Be Determined With Reasonable Certainty

[b] Proof of Estimated Losses Permissible

[c] Related Judicial Council Jury Instructions

MB 2400A.52 Action for Wrongful Termination--Amounts in Mitigation

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Defendant's Burden of Proving Mitigation of Damages

[b] Extent of Plaintiff's Duty to Mitigate

[c] Earnings From Subsequent Employment

[d] Income From Nonconflicting Employment

[e] Related Judicial Council Instructions

MB 2400A.53 Double Damages for Misrepresentation Concerning Employment

[1] Instruction

[2] Use of Instruction

[3] Comment



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California Forms of Jury Instruction

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CHAPTER 24A Matthew Bender Employment Contract Instructions

4-24A California Forms of Jury Instruction Scope

Scope

SCOPE

This chapter includes jury instructions that address issues that commonly arise in employment contract litigation and wrongful termination litigation under California law. For the California Judicial Council jury instructions on wrongful termination specifically, see Ch. 24, *California Judicial Council Wrongful Termination Instructions*. The Judicial Council also has a number of related series of instructions on the following topics:

- The California Fair Employment and Housing Act (FEHA), including instructions on "disparate treatment," "disparate impact," retaliation, and harassment [Ch. 25, *California Judicial Council Fair Employment and Housing Act Instructions*].
- The California Family Rights Act (CFRA), including instructions on the essential factual elements for violating the CFRA and affirmative defenses [Ch. 26, *California Judicial Council California Family Rights Act Instructions*].
- Labor Code actions, including instructions on nonpayment of wages and overtime compensation [Ch. 27, *California Judicial Council Labor Code Actions Instructions*].
- Workers' compensation, including instructions on the injuries covered by workers' compensation and the employer's defective products [Ch. 28, *California Judicial Council Workers' Compensation Instructions*].
- Vicarious responsibility [Ch. 37, *California Judicial Council Vicarious Responsibility Instructions*], including instructions on the existence of "employee" and "agency" relationships [CACI Nos. 3704, 3705], special employment [CACI Nos. 3706, 3707], and scope of employment [CACI Nos. 3720- 3722 (see in particular CACI No. 3722 Scope of Employment--Unauthorized Acts)].

The instructions in this chapter are intended to supplement the Judicial Council instructions.

This chapter covers the following topics:

- Part A includes instructions on plaintiff's causes of action for wrongful termination of an employment contract, including instructions on the burden of proof [see *MB 2400A.01*, *MB 2400A.02*] and fraudulent inducement of an employment contract [see *MB 2400A.03*].
- Part B includes instructions defining key terms [see *MB 2400A.10 -MB 2400A.17*], such as "employment contract" [see *MB 2400A.10*] and "good faith" and "bad faith" [see *MB 2400A.12*].
- Part C includes instructions on defenses commonly asserted in employment contract cases [see *MB 2400A.30 -MB 2400A.38*], including instructions covering the statute of frauds [see *MB 2400A.30*], voluntary resignation [see *MB 2400A.33*], accord and satisfaction [see *MB 2400A.36*], and full performance of the employment contract [see *MB 2400A.37*]. Part C also includes an instruction on an affirmative defense based on the existence of a legitimate alternative ground for discharge, which may be asserted in a retaliatory-discharge action [see *MB 2400A.39*].
- Part D includes instructions on damages for breach of an employment contract [see *MB 2400A.50 -MB 2400A.53*].

For general contract instructions, see Ch. 3, *California Judicial Council Contracts Instructions*, and Chs. 3A-3G.

Jury instructions for torts other than wrongful termination that may arise in the employment context can be found in the following chapters:

- Ch. 19, *California Judicial Council Fraud or Deceit Instructions*.
- Ch. 19A, *Matthew Bender Fraud and Deceit Instructions*.
- Ch. 21, *California Judicial Council Conversion Instructions*.
- Ch. 21A, *Matthew Bender Conversion Instructions*.
- Ch. 22, *California Judicial Council Economic Interference Instructions*.
- Ch. 22A, *Matthew Bender Interference With Economic Relations Instructions*.
- Ch. 33, *California Judicial Council Unfair Practices Act Instructions*.
- Ch. 33A, *Matthew Bender Unfair Competition Instructions*.
- Ch. 70A, *Matthew Bender Trade Libel or Disparagement Instructions*.



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California Forms of Jury Instruction

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CHAPTER 24A Matthew Bender Employment Contract Instructions
PART A. PLAINTIFF'S CAUSES OF ACTION

4-24A California Forms of Jury Instruction MB 2400A.01

MB 2400A.01 Termination Absent Good Faith Dissatisfaction With Plaintiff's Services--Burden of Proof**[1] Instruction**[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

For Plaintiff to recover money damages on [his/her] claim that _____ [specify claim, e.g., Defendant terminated Plaintiff's employment without, in good faith, being dissatisfied with Plaintiff's work], Plaintiff must prove all of the following:

- 1. That a contract of employment existed between Plaintiff and Defendant that _____ [specify terms of satisfaction contract at issue, e.g., Plaintiff would be employed so long as Defendant was satisfied with Plaintiff's work];**
- 2. That while employed by Defendant, Plaintiff performed all of the duties, terms, and conditions of [his/her] employment contract or was excused from doing so;**
- 3. That Defendant breached the contract by discharging Plaintiff _____ [specify violation, e.g., for reasons that do not constitute good faith dissatisfaction with Plaintiff's work]; and**
- 4. The nature and extent of the loss or harm suffered by Plaintiff that was caused by the termination of [his/her] employment.**

Authorities: Civ. Code §§ 1438-1440, 3300; Lab. Code §§ 2854, 2856-2858, 2920; *Reichert v. General Ins. Co.* (1968) 68 Cal.2d 822, 830, 69 Cal.Rptr. 321, 442 P.2d 377; *Tiffany v. Pacific Sewer Pipe Co.* (1919) 180 Cal. 700, 703, 182 P. 428; *Prevost v. First Western Bank* (1987) 193 Cal.App.3d 1492, 1502-1503, 239 Cal.Rptr. 161; *Nelson v. Specialty Records, Inc.* (1970) 11 Cal.App.3d 126, 138, 89 Cal.Rptr. 540; *Bondi v. Jewels by Edwar, Ltd.* (1968) 267 Cal.App.2d 672, 676, 73 Cal.Rptr. 494; *Wise*

v. Southern Pacific Co. (1963) 223 Cal.App.2d 50, 58, 35 Cal.Rptr. 652 ; Kane v. Sklar (1954) 122 Cal.App.2d 480, 482, 265 P.2d 29 ; Coats v. General Motors Corp. (1934) 3 Cal.App.2d 340, 347-348, 39 P.2d 838 .

[2] Use of Instruction

This instruction should be used to list the issues that a discharged employee must prove to recover damages for breach of an employment contract terminable by the employer only for good faith dissatisfaction with the plaintiff's services.

If any of the issue(s) is/are undisputed, then the pertinent paragraph(s) should be omitted. However, for the sake of clarity, the jury should be instructed as to the established facts.

This instruction is to be used with the instruction in MB 2400A.14 that defines the rules of law applicable to employment contracts that are to continue so long as the employer is satisfied with the employee's services.

Along with this instruction, an instruction defining preponderance of the evidence as the standard of proof must also be given [see, e.g., Ch. 2, *California Judicial Council Evidence Instructions*, CACI No. 200 ("More Likely True than Not True")]. In addition, an instruction on the requirement that damages (here "loss or harm") be proximately caused must also be given [see, e.g., Ch. 3, *California Judicial Council Contracts Instructions*, CACI No. 350 (Introduction to Contract Damages), CACI No. 351 (Special Damages), and Ch. 3E, *Matthew Bender Contract Damages Instructions*, MB 300E.03].

For related Judicial Council instructions, see [3][e], *below*. For general instructions on contract formation, interpretation, and performance, see respectively Ch. 3, *California Judicial Council Contracts Instructions*, Ch. 3A, *Matthew Bender Formation of Contract Instructions*, Ch. 3B, *Matthew Bender Interpretation of Contract Instructions*, and 3D, *Matthew Bender Performance and Breach of Contract Instructions*. For instructions on defenses, see MB 2400A.30 -MB 2400A.37, Ch. 3, *California Judicial Council Contracts Instructions*, CACI No. 330- CACI No. 337, and Ch. 3F, *Matthew Bender Contract Defenses Instructions*. For instructions on damages, see MB 2400A.50 -MB 2400A.53, Ch. 3, *California Judicial Council Contracts Instructions*, CACI No. 350- CACI No. 361, and Ch. 3E, *Matthew Bender Contract Damages Instructions*.

[3] Comment

[a] Dissatisfaction as Grounds for Termination

The rule is well-established that a contract of employment that is to continue for so long as the employer is satisfied with the employee's services may be terminated by the employer when the employer, in good faith, becomes dissatisfied with those services [*Tiffany v. Pacific Sewer Pipe Co. (1919) 180 Cal. 700, 703, 182 P. 428 ; Coats v. General Motors Corp. (1934) 3 Cal.App.2d 340, 348, 39 P.2d 838 ; see MB 2400A.14*].

[b] Proof of Contract of Employment

Employment contracts are governed by the same rules applicable to other kinds of contracts [*Reynolds Elec. etc. Co. v. Workmen's Comp. App. Bd. (1966) 65 Cal.2d 429, 433, 55 Cal.Rptr. 248 ; see Ch. 3, California Judicial Council Contracts Instructions*, and Chs. 3A-3G]. The first of the five elements that the plaintiff must prove is that there is a contract of employment between himself or herself and the defendant employer [*Reichert v. General Ins. Co. (1968) 68 Cal.2d 822, 830, 69 Cal.Rptr. 321, 442 P.2d 377 ; Nelson v. Specialty Records, Inc. (1970) 11 Cal.App.3d 126, 138, 89 Cal.Rptr. 540 ; Wise v. Southern Pacific Co. (1963) 223 Cal.App.2d 50, 59, 35 Cal.Rptr. 652*].

The word "employ" implies the making of a contract of employment [*Holtzendorff v. Housing Authority (1967) 250 Cal.App.2d 596, 605, 58 Cal.Rptr. 886 ; Main v. Claremont Unified School District (1958) 161 Cal.App.2d 189, 195,*

326 P.2d 573 , disapproved on other grounds, *Barthuli v. Board of Trustees* (1977) 19 Cal.3d 717, 720-721, 139 Cal.Rptr. 627, 566 P.2d 261]. The Labor Code defines a contract of employment as "a contract by which one, who is called the employer, engages another, who is called the employee, to do something for the benefit of the employer or a third person" [Lab. Code § 2750]. Under this broad definition, any agreement under which a person provides personal services to another would appear to be an employment contract.

However, the Labor Code distinguishes between persons who provide services as "employees" and those who do so as "independent contractors." Status as an independent contractor is discussed in MB 2400A.34. This instruction assumes that the plaintiff is an employee seeking recovery of damages for breach of an employment contract [see, e.g., *Abrahamson v. NME Hospitals, Inc.* (1987) 195 Cal.App.3d 1325, 1329, 241 Cal.Rptr. 396 (concepts based on employment relationship not applicable to independent contractor's claim of wrongful discharge)].

[c] Plaintiff Willing and Able to Perform

The plaintiff bears the burden of proving that he or she was able to and did perform all of the duties, terms, and conditions of the employment contract that he or she was supposed to perform up until the time that either the employment contract was terminated or the employee was excused from performing [*Reichert v. General Ins. Co.* (1968) 68 Cal.2d 822, 830, 69 Cal.Rptr. 321, 442 P.2d 377 ; *Nelson v. Specialty Records, Inc.* (1970) 11 Cal.App.3d 126, 138, 89 Cal.Rptr. 540 ; *Wise v. Southern Pacific Co.* (1963) 223 Cal.App.2d 50, 59, 35 Cal.Rptr. 652 ; *Kane v. Sklar* (1954) 122 Cal.App.2d 480, 482, 265 P.2d 29]. The Labor Code expressly provides that one who agrees to provide services to another for good consideration "shall perform the service, and shall use ordinary care and diligence therein, so long as [he or she] is thus employed" [Lab. Code § 2854]. The Labor Code also provides that an employee "shall substantially comply with all the directions of [his or her] employer concerning the service on which [he or she] is engaged," unless obedience would be impossible or unlawful or would "impose new and unreasonable burdens upon the employee" [Lab. Code § 2856]. Thus, disobedience of an unreasonable order is not a ground for termination [*Mason v. Lyl Productions* (1968) 69 Cal.2d 79, 84, 69 Cal.Rptr. 769, 443 P.2d 193]. However, an employee must perform his or her duties in conformity with the usual practices of the place of performance and with a reasonable degree of skill, unless the employer knew that the employee lacked such skill before hiring him or her [Lab. Code §§ 2857-2858]. In any case, the employee is required to exercise the skill as he or she possesses if needed to perform his or her duties [Lab. Code § 2859].

[d] Damages Caused by Breach

The plaintiff must prove reasonably foreseeable and clearly ascertainable damages that were proximately caused by the defendant's breach [Civ. Code §§ 3300, 3301, 3358, 3359; *Reichert v. General Ins. Co.* (1968) 68 Cal.2d 822, 830, 69 Cal.Rptr. 321, 442 P.2d 377 ; *Nelson v. Specialty Records, Inc.* (1970) 11 Cal.App.3d 126, 138, 89 Cal.Rptr. 540 ; *Wise v. Southern Pacific Co.* (1963) 223 Cal.App.2d 50, 59, 35 Cal.Rptr. 652].

[e] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 24, *California Judicial Council Wrongful Termination Instructions*]:

CACI No. 2400 Breach of Employment Contract--Unspecified Term "At-Will" Presumption

CACI No. 2401 Breach of Employment Contract--Unspecified Term--Essential Factual Elements

CACI No. 2402 Breach of Employment Contract--Unspecified Term--Constructive Discharge--Essential Factual Elements

CACI No. 2403 Breach of Employment Contract--Unspecified Term--Implied-in-Fact Promise Not

to Discharge Without Good Cause

CACI No. 2404 Breach of Employment Contract--Unspecified Term--"Good Cause" Defined

CACI No. 2505 Breach of Employment Contract--Unspecified Term--"Good Cause"
Defined--Misconduct

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewEvidenceProcedural ConsiderationsBurdens of
ProofGeneral OverviewLabor & Employment LawCollective Bargaining & Labor RelationsDiscipline, Layoff &
TerminationLabor & Employment LawEmployment RelationshipsEmployment ContractsConditions & TermsGeneral
OverviewLabor & Employment LawWrongful TerminationBreach of ContractExpress Contracts

Barbara S. de Oddone contributed to the original chapter for California Forms of Jury Instruction (Matthew Bender).

Stanley E. Tobin and Darrell J. Salomon contributed to the original chapter as consultants.



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CHAPTER 24A Matthew Bender Employment Contract Instructions
PART A. PLAINTIFF'S CAUSES OF ACTION

4-24A California Forms of Jury Instruction MB 2400A.02

MB 2400A.02 Defendant's Breach of Personnel Policies--Burden of Proof

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

For Plaintiff to recover money damages on [his/her] claim that Defendant breached [his/her/its] personnel policies, Plaintiff must prove all of the following:

- 1. That Plaintiff was Defendant's employee;**
- 2. That Defendant _____ [issued or established] personnel policies that provided _____ [specify policy at issue, e.g., that employees would be recalled from layoff in order of longest service];**
- 3. That Plaintiff knew of the policies and relied on them in continuing [his/her] employment;**
- 4. That Plaintiff performed all the duties, terms, and conditions of [his/her] employment or was excused from doing so;**
- 5. That Defendant violated [his/her/its] personnel policies by _____ [specify violation at issue]; and**
- 6. The nature and the extent of the loss or harm suffered by Plaintiff that was caused by Defendant's action.**
Authorities: Pugh v. See's Candies, Inc. (1981) 116 Cal.App.3d 311, 327, 171 Cal.Rptr. 917 ; Hepp v. Lockheed-California Co. (1978) 86 Cal.App.3d 714, 718-720, 150 Cal.Rptr. 408 ; Chapin v. Fairchild Camera etc. Corp. (1973) 31 Cal.App.3d 192, 197, 107 Cal.Rptr. 111 ; Newberger v. Rifkind (1972) 28

Cal.App.3d 1070, 1073-1076, 104 Cal.Rptr. 663 ; Chinn v. China National Aviation Corp. (1955) 138 Cal.App.2d 98, 98-100, 291 P.2d 91 ; see Asmus v. Pacific Bell (2000) 23 Cal.4th 1, 11, 96 Cal.Rptr.2d 179, 999 P.2d 71 ; Foley v. Interactive Data Corp. (1988) 47 Cal.3d 654, 681-682, 254 Cal.Rptr. 211, 765 P.2d 373 .

[2] Use of Instruction

This instruction should be used to list the issues that an employee plaintiff must prove to recover damages for breach of a contractual obligation that is based on personnel policies or procedures promulgated by the employer.

If any of the issues are undisputed, then the pertinent paragraph(s) may be omitted. However, for the sake of clarity, the jury should be instructed as to the established facts.

Along with this instruction, an instruction defining preponderance of the evidence as the standard of proof must also be given [see, e.g., Ch. 2, *California Judicial Council Evidence Instructions, CACI No. 200* ("More Likely True than Not True")]. An instruction on the requirement that damages (here "loss or harm") be proximately caused must also be given [see Ch. 3, *California Judicial Council Contracts Instructions, CACI No. 350* (Introduction to Contract Damages), *CACI No. 351* (Special Damages), and Ch. 3E, *Matthew Bender Contract Damages Instructions, MB 300E.03*].

For related Judicial Council instructions, see [3][b], *below*. For general instructions on contract formation, interpretation, and performance, see respectively Ch. 3, *California Judicial Council Contracts Instructions*, Chs. 3A, *Matthew Bender Formation of Contract Instructions*, 3B, *Matthew Bender Interpretation of Contracts Instructions*, and 3D, *Matthew Bender Performance and Breach of Contract Instructions*. For instructions on defenses, see *MB 2400A.30 -MB 2400A.37*, Ch. 3, *California Judicial Council Contracts Instructions, CACI No. 330- CACI No. 337*, and Ch. 3F, *Matthew Bender Contract Defenses Instructions*. For instructions on damages, see *MB 2400A.50 -MB 2400A.53*, Ch. 3, *California Judicial Council Contracts Instructions, CACI No. 350- CACI No. 361*, and Ch. 3E, *Matthew Bender Contract Damages Instructions*.

[3] Comment

[a] Personnel Policies

The discussion in *MB 2400A.01[3]* applies to this instruction as well. Personnel policies are enforceable by an employee as contractual obligations when (1) the employer issues them, (2) the employee knows of them, (3) the employee relies on them as terms of his or her employment, and (4) the employee continues that employment [*Hepp v. Lockheed-California Co. (1978) 86 Cal.App.3d 714, 718-720, 150 Cal.Rptr. 408 ; see Asmus v. Pacific Bell (2000) 23 Cal.4th 1, 11, 96 Cal.Rptr.2d 179, 999 P.2d 71 ; Chapin v. Fairchild Camera etc. Corp. (1973) 31 Cal.App.3d 192, 196-197, 107 Cal.Rptr. 111*].

The contractual obligation to adhere to the personnel policies has been analyzed as an implied contract [*Foley v. Interactive Data Corp. (1988) 47 Cal.3d 654, 681-682, 254 Cal.Rptr. 211, 765 P.2d 373 ; Pugh v. See's Candies, Inc. (1981) 116 Cal.App.3d 311, 327, 171 Cal.Rptr. 917 ; Newberger v. Rifkind (1972) 28 Cal.App.3d 1070, 1075, 104 Cal.Rptr. 663 ; Brawthen v. H & R Block, Inc. (1972) 28 Cal.App.3d 131, 134, 104 Cal.Rptr. 486*], or a contract created when the employer's unilateral "offer" of the personnel policy is "accepted" by the employee's continuing in employment [*Chinn v. China National Aviation Corp. (1955) 138 Cal.App.2d 98, 98-100, 291 P.2d 91*]. The consideration for the contract is the employee's continuing in employment; the rationale is that the employer obtains benefits such as reduced turnover, a loyal and happier work force, and greater productivity by unilaterally giving something of value to the employees (whether it be a policy providing for a grievance procedure, limitations on the employer's freedom to terminate employment, fringe benefits, a seniority system, or severance pay) and thereby obtaining their continued services.

However, in *Hepp v. Lockheed-California Co.*, the court indicated that an employee seeking damages for breach of personnel policies by the employer would have to show that he or she knew of the policy and relied on it as a term of employment in continuing his or her employment [*Hepp v. Lockheed-California Co. (1978) 86 Cal.App.3d 714, 718-720, 150 Cal.Rptr. 408*].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 24, *California Judicial Council Wrongful Termination Instructions*]:

CACI No. 2400 Breach of Employment Contract--Unspecified Term "At-Will" Presumption

CACI No. 2401 Breach of Employment Contract--Unspecified Term--Essential Factual Elements

CACI No. 2402 Breach of Employment Contract--Unspecified Term--Constructive Discharge--Essential Factual Elements

CACI No. 2403 Breach of Employment Contract--Unspecified Term--Implied-in-Fact Promise Not to Discharge Without Good Cause

CACI No. 2404 Breach of Employment Contract--Unspecified Term--"Good Cause" Defined

CACI No. 2405 Breach of Employment Contract--Unspecified Term--"Good Cause" Defined--Misconduct

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Evidence Procedural Considerations Burdens of Proof General Overview Labor & Employment Law Employment Relationships Employment Contracts Breach Labor & Employment Law Wrongful Termination Breach of Contract Express Contracts

Barbara S. de Oddone contributed to the original chapter for California Forms of Jury Instruction (Matthew Bender). Stanley E. Tobin and Darrell J. Salomon contributed to the original chapter as consultants.



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CHAPTER 24A Matthew Bender Employment Contract Instructions
PART A. PLAINTIFF'S CAUSES OF ACTION

4-24A California Forms of Jury Instruction MB 2400A.03

MB 2400A.03 Fraudulent Inducement of Employment Contract--Introductory Instruction**[1] Instruction**

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Plaintiff claims that Defendant, by an act of fraud, caused Plaintiff to _____ [describe transaction, e.g. , enter into an employment contract]. Plaintiff also claims that as a result [he/she] suffered money losses, which the law calls damages. Plaintiff seeks to recover those damages in this proceeding.

Authorities: Civ. Code § 1709; *Lazar v. Superior Court* (1996) 12 Cal.4th 631, 640-643, 49 Cal.Rptr.2d 377, 909 P.2d 981 .

[2] Use of Instruction

This instruction should be used to generally explain the nature of plaintiff's claim or fraudulent inducement of employment contract. For instructions on damages for fraud, see Ch. 19, *California Judicial Council Fraud or Deceit Instructions*, Ch. 19A, *Matthew Bender Fraud and Deceit Instructions*, and Ch. 3E, *Matthew Bender Contract Damages Instructions*, generally. For an instruction on double damages for misrepresentation concerning employment, see *MB 2400A.53*.

For related Judicial Council instructions, see [3][b], *below*.

[3] Comment**[a] Fraudulent Inducement of Employment Contract**

In *Lazar v. Superior Court* [*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 49 Cal.Rptr.2d 377, 909 P.2d 981], the California Supreme Court held that a terminated employee had stated a cause of action for fraudulent inducement of an

employment contract and could seek both tort and contract remedies. The Court clarified the nature of this type of action following its decisions in *Foley v. Interactive Data Corp.* [*Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 254 Cal.Rptr. 211, 765 P.2d 373] and *Hunter v. Up-Right* [*Hunter v. Up-Right* (1993) 6 Cal.4th 1174, 26 Cal.Rptr.2d 8, 864 P.2d 88]. In *Lazar*, the plaintiff adequately stated all five elements of promissory fraud [*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 638-639, 49 Cal.Rptr.2d 377, 909 P.2d 981]:

- Misrepresentation;
- Knowledge of falsity;
- Intent to defraud;
- Justifiable reliance; and
- Resulting damage.

An action for promissory fraud may lie when the defendant fraudulently induces the plaintiff to enter into a contract [*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 638, 49 Cal.Rptr.2d 377, 909 P.2d 981 ; *Chelini v. Nieri* (1948) 32 Cal.2d 480, 487, 196 P.2d 915]. The fact that the contract arose in the employment context does not preclude tort recovery arising from termination of employment, when the employer's misrepresentations were not made in the course of the termination but were separate from it [*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 640-643, 49 Cal.Rptr.2d 377, 909 P.2d 981 ; see *Hunter v. Up-Right, Inc.* (1993) 6 Cal.4th 1174, 1185-1186, 26 Cal.Rptr.2d 8, 864 P.2d 88]. Furthermore, contract remedies alone do not address the policy objectives underlying the action for fraudulent inducement of contract [*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 643-647, 49 Cal.Rptr.2d 377, 909 P.2d 981 ; cf. *Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 683, 254 Cal.Rptr. 211, 765 P.2d 373]. Thus, on his fraud claim, the plaintiff in *Lazar* could seek damages for the costs of uprooting his family, relocation expenses, and the loss of security and income from his former employment. On his contract claim, he could seek recovery for loss of income caused by the wrongful termination. Any overlap between damages recoverable in tort and in contract would be limited by the rule against double recovery [*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 648-649, 49 Cal.Rptr.2d 377, 909 P.2d 981 ; see *Tavaglione v. Billings* (1993) 4 Cal.4th 1150, 1159, 17 Cal.Rptr.2d 608, 847 P.2d 574].

An action for fraudulent inducement of an employment contract may not be maintained if it is undisputed that the contract provided that the employment was at will and terminable at any time. In such a case, the plaintiff will not, as a matter of law, be able to establish the element of justifiable reliance on the allegedly false representations [*Dore v. Arnold Worldwide, Inc.* (2006) 39 Cal.4th 384, 393, 46 Cal.Rptr.3d 668, 139 P.3d 56].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 19, *California Judicial Council Fraud or Deceit Instructions*, and Ch. 27, *California Judicial Council Labor Code Actions Instructions*]:

CACI No. 1900 Intentional Misrepresentation

CACI No. 1901 Concealment

CACI No. 1902 False Promise

CACI No. 1904 Opinions as Statements of Fact

CACI No. 1905 Definition of Important Fact/Promise

CACI No. 2710 Solicitation of Employee by Misrepresentation--Essential Factual Elements (Lab. Code, § 970)

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsBreachLabor & Employment LawEmployment RelationshipsEmployment ContractsFormationLabor & Employment LawWrongful TerminationBreach of ContractExpress Contracts

Barbara S. de Oddone contributed to the original chapter for California Forms of Jury Instruction (Matthew Bender).

Stanley E. Tobin and Darrell J. Salomon contributed to the original chapter as consultants.



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CHAPTER 24A Matthew Bender Employment Contract Instructions
PART A. PLAINTIFF'S CAUSES OF ACTION

4-24A California Forms of Jury Instruction MB 2400A.04 through MB 2400A.09

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CHAPTER 24A Matthew Bender Employment Contract Instructions
PART B. DEFINITIONS

4-24A California Forms of Jury Instruction MB 2400A.10

MB 2400A.10 Employment Contract

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

An employment contract is a contract when one party, called the employer, engages another party, called the employee, to perform personal services for the employer's benefit.

An employment contract creates an obligation that is legally enforceable.

Authorities: Civ. Code §§ 1427, 1428, 1549; Lab. Code § 2750.

[2] Use of Instruction

This instruction should be used to define "employment contract" following an introductory instruction explaining a plaintiff's cause of action for breach of an employment contract. The definition should be used in conjunction with general contract instructions [see Ch. 3, *California Judicial Council Contract Instructions*, and Chs. 3A-3G], and should follow the instruction in Ch. 3, *California Judicial Council Contracts Instructions*, CACI No. 302 (Contract Formation--Essential Factual Elements), and Ch. 3A, *Matthew Bender Formation of Contract Instructions*, MB 300A.01, defining the term "contract."

For related Judicial Council instructions, see [3][b], *below*.

[3] Comment

[a] "Employment Contract" Defined

The definition of "employment contract" in this instruction is drawn directly from *Civ. Code § 1549* and *Lab. Code §*

2750. The additional paragraph regarding enforceability is based on *Civ. Code* §§ 1427 and 1428 [see *Main v. Claremont Unified School District* (1958) 161 Cal.App.2d 189, 195, 326 P.2d 573, disapproved on other grounds, *Barthuli v. Board of Trustees* (1977) 19 Cal.3d 717, 720-721, 139 Cal.Rptr. 627, 566 P.2d 261].

Instructions regarding the existence of an employment contract are important because the nature of the employer-employee relationship is fundamentally contractual [*Hunter v. Up-Right, Inc.* (1993) 6 Cal.4th 1174, 1180, 26 Cal.Rptr.2d 8, 864 P.2d 88 ; see *Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 677, 254 Cal.Rptr. 211, 765 P.2d 373].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 3, *California Judicial Council Contracts Instructions*]:

CACI No. 302 Contract Formation--Essential Factual Elements

CACI No. 303 Breach of Contract--Essential Factual Elements

CACI No. 304 Oral or Written Contract Terms

CACI No. 305 Implied-in-Fact Contract

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Labor & Employment Law Employment Relationships Employment Contracts Breach Labor & Employment Law Employment Relationships Employment Contracts Formation Labor & Employment Law Wrongful Termination Breach of Contract Express Contracts

Barbara S. de Oddone contributed to the original chapter for California Forms of Jury Instruction (Matthew Bender). Stanley E. Tobin and Darrell J. Salomon contributed to the original chapter as consultants.



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CHAPTER 24A Matthew Bender Employment Contract Instructions
PART B. DEFINITIONS

4-24A California Forms of Jury Instruction MB 2400A.11

MB 2400A.11 Violation of Public Policy**[1] Instruction**[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

The phrase "violation of public policy" refers to the legal principle that no one can lawfully do a thing that tends to harm the public or the public good.

[*OPTIONAL (See Use of Instruction)*]

An employer violates public policy if [he/she/it] terminates an employee because _____ [either: the employee has exercised a right protected by law or the employee has refused to comply with the employer's direction to commit an illegal act].

[*CONTINUE WITH INSTRUCTION*]

The public policy of [the state of California/the United States] is _____ [specify public policy at issue, e.g. , that employees have a right to be free from sexual harassment in the workplace].

Authorities: *Green v. Ralee Engineering Co.* (1998) 19 Cal.4th 66, 90, 78 Cal.Rptr.2d 16, 960 P.2d 1046 ; *City of Moorpark v. Superior Court* (1998) 18 Cal.4th 1143, 1158-1161, 77 Cal.Rptr.2d 445, 959 P.2d 752 ; *Stevenson v. Superior Court* (1997) 16 Cal.4th 880, 888-890, 66 Cal.Rptr.2d 888, 941 P.2d 1157 ; *Tameny v. Atlantic Richfield Co.* (1980) 27 Cal.3d 167, 176, 164 Cal.Rptr. 839, 610 P.2d 1330 ; *Safeway Stores v. Retail Clerks etc. Assn.* (1953) 41 Cal.2d 567, 575, 261 P.2d 721 ; *Dabbs v. Cardiopulmonary Management Services* (1987) 188 Cal.App.3d 1437, 1440-1445, 234 Cal.Rptr. 129 ;

Garcia v. Rockwell Internat. Corp. (1986) 187 Cal.App.3d 1556, 1561, 232 Cal.Rptr. 490 ; *Hentzel v. Singer Co.* (1982) 138 Cal.App.3d 290, 298-300, 188 Cal.Rptr. 159 ; *Becket v. Welton Becket & Associates* (1974) 39 Cal.App.3d 815, 821-822, 114 Cal.Rptr. 531 ; *Montalvo v. Zamora* (1970) 7 Cal.App.3d 69, 77, 86 Cal.Rptr. 401 ; *Petermann v. International Brotherhood of Teamsters* (1959) 174 Cal.App.2d 184, 188-189, 344 P.2d 25 .

[2] Use of Instruction

This instruction should be used to explain to the jury the legal basis for the plaintiff's action to recover damages for wrongful termination in violation of public policy. With appropriate modifications, it may also be used in actions seeking damages for a lesser disciplinary or punitive action that violates public policy. It should be used immediately following an instruction introducing the plaintiff's cause of action.

A wrongful discharge in violation of public policy generally involves a discharge because of the employee's exercise of a protected right or the employee's refusal to commit a crime, but an action for this tort will lie whenever the basis of the discharge contravenes fundamental public policy [*Green v. Ralee Engineering Co.* (1998) 19 Cal.4th 66, 71, 78 Cal.Rptr.2d 16, 960 P.2d 1046 ; *Rojo v. Kliger* (1990) 52 Cal.3d 65, 91, 276 Cal.Rptr. 130, 801 P.2d 373; see [3][b], [c], below]. The optional second paragraph should be used only when the plaintiff was discharged for exercising a protected right or refusing to commit a crime.

For related Judicial Council instructions, see [3][i], below.

[3] Comment

[a] Basis for Liability for Wrongful Termination in Violation of Public Policy--In General

In the leading case of *Tameny v. Atlantic Richfield Co.*, the California Supreme Court held that the wrongful discharge of an employee in violation of public policy is a tort. Specifically, the Court held that an employee fired for refusing to take part in illegal price fixing was entitled to bring a tort action for wrongful discharge [*Tameny v. Atlantic Richfield Co.* (1980) 27 Cal.3d 167, 172-178, 164 Cal.Rptr. 839, 610 P.2d 1330]. The duty to refrain from discharging an employee under circumstances that violate public policy is imposed by law and does not depend on contractual promises [*Tameny v. Atlantic Richfield Co.* (1980) 27 Cal.3d 167, 170, 176 n.11, 164 Cal.Rptr. 839, 610 P.2d 1330 ; *Koehrer v. Superior Court* (1986) 181 Cal.App.3d 1155, 1166, 226 Cal.Rptr. 820 ; *Petermann v. International Brotherhood of Teamsters* (1959) 174 Cal.App.2d 184, 188, 344 P.2d 25 ; see also *Harris v. Atlantic Richfield Co.* (1993) 14 Cal.App.4th 70, 74-77 (*Tameny* cause of action for breach of contract in violation of public policy limited to employment relationships, and not available to other contractual relationships)]. Because of the availability of tort damages, an action for wrongful termination in violation of public policy frequently accompanies an action for breach of an employment contract.

Actions for the tort of wrongful discharge in violation of public policy generally fall into the following categories according to the motive for the discharge [*Gantt v. Sentry Insurance* (1992) 1 Cal.4th 1083, 1090-1091, 4 Cal.Rptr.2d 874, 824 P.2d 680 , overruled on other grounds, *Green v. Ralee Engineering Co.* (1998) 19 Cal.4th 66, 80 n.6, 78 Cal.Rptr.2d 16, 960 P.2d 1046 ; see MB 2400A.35[3][c]; Note, *Protecting Employees at Will Against Wrongful Discharge: the Public Policy Exception*, 96 Harv. L. Rev. 1931, 1937 (1983)]:

- Refusing to commit an illegal act [see, e.g., *Tameny v. Atlantic Richfield Co.* (1980) 27 Cal.3d 167, 172-178, 164 Cal.Rptr. 839, 610 P.2d 1330 ; *Petermann v. International Brotherhood of Teamsters* (1959) 174 Cal.App.2d 184, 188-189, 344 P.2d 25 ; see Lab. Code § 1102.5(c),(d); see also [d], below, for discussion of discharge for refusal to commit a crime].

- Performing a statutory obligation [see, e.g., *Nees v. Hocks* (1975) 272 Or. 210, 536 P.2d 512 (performing jury duty); but see *Mallard v. Boring* (1960) 182 Cal.App.2d 390, 394-395, 6 Cal.Rptr. 171 (pre-*Tameny* case rejecting public policy claim based on retaliatory discharge for engaging in jury service, although *Mallard* was criticized by California Supreme Court in *Gantt v. Sentry Insurance* (1992) 1 Cal.4th 1083, 1090-1091 n.4, 4 Cal.Rptr.2d 874, 824 P.2d 680, overruled on other grounds, *Green v. Ralee Engineering Co.* (1998) 19 Cal.4th 66, 80 n.6, 78 Cal.Rptr.2d 16, 960 P.2d 1046)].

- Exercising a protected right or privilege [see, e.g., *Skillsky v. Lucky Stores, Inc.* (9th Cir. 1990) 893 F.2d 1088, 1092-1094; *Dabbs v. Cardiopulmonary Management Services* (1987) 188 Cal.App.3d 1437, 1440-1445, 234 Cal.Rptr. 129; *Garcia v. Rockwell Internat. Corp.* (1986) 187 Cal.App.3d 1556, 1561, 232 Cal.Rptr. 490; see also [e], below for discussion of discharge for exercise of a protected right].

- Reporting an alleged violation of a statute of public importance [see, e.g., *Gould v. Maryland Sound Industries Inc.* (1995) 31 Cal.App.4th 1137, 1148, 1150, 37 Cal.Rptr.2d 718 (reporting violations of overtime wage law to management); *Collier v. Superior Court* (1991) 228 Cal.App.3d 1117, 1123-1124, 1127, 279 Cal.Rptr. 453 (report of suspicion that other employees currently engaged in illegal conduct on the job, in violation of statutes prohibiting bribery, kickbacks, embezzlement, tax evasion, and possibly other crimes)]. For example, an employee may not be discharged or disciplined for reporting matters such as illegal activity [see, e.g., *Lab. Code* § 1102.5(a),(b),(d) (violation of state or federal law, rule, or regulation); *Gov. Code* § 12940(h) (discriminatory conduct); see *Jie v. Liang Tai Knitwear Co., Ltd.* (2001) 89 Cal.App.4th 654, 661-662, 107 Cal.Rptr.2d 682 (by prohibiting employment of undocumented aliens, Immigration Reform and Control Act of 1986, 8 U.S.C. § 1324a, establishes public policy that protects employee who complains to authorities that employer has hired undocumented aliens); see also *Lab. Code* § 1102.5(e); *Gardenhire v. Housing Auth.* (2000) 85 Cal.App.4th 236, 241-243, 101 Cal.Rptr.2d 893 (protection under *Lab. Code* § 1102.5 extends to employees who report illegal activity to public agency, so public employee who reports illegal activity to employer protected by statute and need not make report to outside agency)] or industrial injuries [*Lab. Code* § 132a].

However the actions are categorized, an action for the tort of wrongful discharge in violation of public policy will lie whenever the discharge violates a fundamental public policy [*City of Moorpark v. Superior Court* (1998) 18 Cal.4th 1143, 1160-1161, 77 Cal.Rptr.2d 445, 959 P.2d 752 (policy against disability discrimination; see MB 2400A.35[3][c]); *Rojo v. Kliger* (1990) 52 Cal.3d 65, 91, 276 Cal.Rptr. 130, 801 P.2d 373; *Collier v. Superior Court* (1991) 228 Cal.App.3d 1117, 1126-1127, 279 Cal.Rptr. 453]. To support a wrongful discharge action, this public policy must be based on a statutory or constitutional provision. Fundamental public policy may be enunciated in administrative regulations that serve the statutory objective [*Green v. Ralee Engineering Co.* (1998) 19 Cal.4th 66, 68, 90, 78 Cal.Rptr.2d 16, 960 P.2d 1046; see [b], below]. The provision need not prohibit the employer's precise act for the public policy exception to apply, but the provision must sufficiently describe the type of prohibited conduct to enable the employer to know the fundamental public policies that are expressed in that law [*Sequoia Ins. Co. v. Superior Court* (1993) 13 Cal.App.4th 1472, 1480, 16 Cal.Rptr.2d 888 (court of appeal rejected claim based on alleged violation of public policy based on or derived from Proposition 103)]. Thus, a wrongful-discharge claim may not be based on a fundamental public policy created by a statute that was enacted after the plaintiff's termination [*Silo v. CHW Med. Found.* (2002) 27 Cal.4th 1097, 1110, 119 Cal.Rptr.2d 698, 45 P.3d 1162 (employer may not be held liable for violating public policy that was not manifest at time alleged tort was committed); *Phillips v. St. Mary Reg'l Med. Ctr.* (2002) 96 Cal.App.4th 218, 229, 116 Cal.Rptr.2d 770 (legislation enacted after plaintiff's termination was obviously not well established at pertinent time)]. However, a long-established general public policy can be sufficient to support a wrongful discharge claim even though a statute enacted after the plaintiff's termination addresses the specific kind of conduct involved in the plaintiff's case [*Casella v. Southwest Dealer Servs., Inc.* (2007) 157 Cal.App.4th 1127, 1138-1143, 69 Cal.Rptr.3d 445 (claim that plaintiff was terminated because he reported employer's participation in car dealers' fraudulent scheme was viable because scheme violated long-established policy of *Penal Code* § 487, which prohibits theft by misrepresentation, even though another statute specifically proscribing car dealers' scheme was

enacted after plaintiff's termination)].

In determining whether discharging an employee for exercising a right violates a fundamental public policy, the focus is not simply on the importance of the right that was exercised. The issue is whether permitting an employer to discharge an employee for exercising that right would undermine a "clearly mandated public policy" embodied in the provision from which that right emanates. Thus, it must be clear from the provision itself or from some other legislative or regulatory enactment that employers are not free to disregard or limit that right. For example, an employer may terminate an at-will employee for refusing to drop a lawsuit against the employer's customer, even though access to courts is guaranteed by the federal and state constitutions, because there is no clearly mandated policy against such a termination [*Jersey v. John Muir Med. Ctr.* (2002) 97 Cal.App.4th 814, 820-829, 118 Cal.Rptr.2d 807].

The California Supreme Court held that a statutory provision cannot establish the existence of a fundamental public policy if an inseparable part of the legislative statement of policy exempts defendant from the statutory provision [*Jennings v. Marralle* (1994) 8 Cal.4th 121, 125, 135, 32 Cal.Rptr.2d 275, 876 P.2d 1074 (employer of fewer than five employees, exempt under Gov. Code § 12926(d) from age discrimination prohibition of Gov. Code § 12921, not liable for wrongful discharge in violation of public policy stated by statute); cf. *Stevenson v. Superior Court* (1997) 16 Cal.4th 880, 885, 66 Cal.Rptr.2d 888, 941 P.2d 1157 (employee may assert common law claim against employer with five or more employees); see [b], below]. Absent some other sufficient basis for the policy alleged to have been contravened by the termination of plaintiff's employment, a cause of action for wrongful discharge in violation of public policy will not lie if the defendant is exempt from the statute [*Jennings v. Marralle* (1994) 8 Cal.4th 121, 135, 32 Cal.Rptr.2d 275, 876 P.2d 1074]. Analogous reasoning applies when the purported source of public policy is a constitutional provision. Thus, because the First Amendment applies only to government actions and expresses no public policy regarding terminations by private employers, the First Amendment's free speech provision fails to establish a public policy against terminations by private employers for speech-related activities [*Grinzi v. San Diego Hospice Corp.* (2004) 120 Cal.App.4th 72, 80-84, 14 Cal.Rptr.3d 893].

Applying this rationale, the California Supreme Court held that if a plaintiff may not sue a supervisor under the California Fair Employment and Housing Act (FEHA), the plaintiff may not sue the supervisor individually for wrongful discharge in violation of public policy. The Court stated that "[i]t would be absurd to forbid a plaintiff to sue a supervisor under the FEHA, then allow essentially the same action under a different rubric" [*Reno v. Baird* (1998) 18 Cal.4th 640, 663-664, 76 Cal.Rptr.2d 499, 957 P.2d 1333 (FEHA at relevant time allowed persons to sue and hold employers, but not individuals, liable for discrimination); see also *Jones v. Lodge at Torrey Pines P'ship* (2008) 42 Cal.4th 1158, 1162-1173, 72 Cal.Rptr. 3d 624, 177 P.3d 232 (reference to "person" in Gov. Code § 12940(h), which prohibits retaliation, does not subject nonemployer individuals to liability for retaliation under FEHA); but see Gov. Code § 12940(j)(3) (FEHA amended effective January 1, 2001, to provide for personal liability of individual employees who perpetrate harassment); *McClung v. Employment Development Dept.* (2004) 34 Cal.4th 467, 475-477, 20 Cal.Rptr.3d 428, 435-436, 99 P.3d 1015 (Gov. Code § 12940(j)(3) does not apply retroactively to impose liability on nonsupervisors for harassment predating its enactment, effective January 1, 2001)].

Similarly, supervisory personnel may not be held individually liable for discrimination under the Americans with Disabilities Act [*Le Bourgeois v. Fireplace Manufacturing, Inc.* (1998) 68 Cal.App.4th 1049, 1054-1056, 80 Cal.Rptr.2d 660 (following rationale in *Reno v. Baird*); see 42 U.S.C. § 12101 et seq. (Americans with Disabilities Act)]. Nor can supervisors be sued as individuals for wrongful discharge in violation of fundamental public policy when the basis for the cause of action is alleged nonharassment-discriminatory conduct under FEHA [*Le Bourgeois v. Fireplace Manufacturing, Inc.* (1998) 68 Cal.App.4th 1049, 1056-1057, 80 Cal.Rptr.2d 660 (following direct holding in *Reno v. Baird*); but see Gov. Code § 12940(j)(3) (FEHA amended effective January 1, 2001, to provide for personal liability of individual employees who perpetrate harassment); *McClung v. Employment Development Dept.* (2004) 34 Cal.4th 467, 475-477, 20 Cal.Rptr.3d 428, 435-436, 99 P.3d 1015 (Gov. Code § 12940(j)(3) does not apply retroactively to impose liability on nonsupervisors for harassment predating its enactment effective January 1, 2001)].

Nevertheless, if a FEHA exemption or limitation prevents the FEHA from serving as the basis for a claim of wrongful discharge in violation of public policy, the plaintiff may rely on alternative sources of fundamental public policy in support of the claim [see, e.g., *Phillips v. St. Mary Reg'l Med. Ctr.* (2002) 96 Cal.App.4th 218, 230-238, 116 Cal.Rptr.2d 770 (although FEHA exemption of religious employers precluded FEHA as basis for public policy claim, plaintiff could base wrongful discharge claim on public policy derived from Cal. Const., art. I, § 8, and Title VII of Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq.)].

In some cases, one fundamental public policy is counterbalanced by another, thereby shielding the employer from liability for discharging the employee. For example, the California Supreme Court has held that the public policy against religious discrimination in employment [see Cal. Const., art. I, § 8] must be qualified by the public policy of permitting religious employers considerable discretion to choose employees who will not interfere with their religious mission or message [see U.S. Const., Amend. I; Cal. Const., art. I, § 4]. Construing the two policies together, along with the FEHA's formerly unqualified general exemption for religious employers [see Gov. Code § 12926(d); now see Gov. Code § 12926.2(c) (effective January, 2000, FEHA exemption for religious employers generally does not apply to persons employed to perform nonreligious duties at health-care facilities that serve non-adherents of religion that established employer)], the Court stated that it could not find a fundamental and substantial public policy prohibiting a religious employer from terminating an employee because of the employee's objectionable religious speech in the workplace [*Silo v. CHW Med. Found.* (2002) 27 Cal.4th 1097, 1108-1109, 119 Cal.Rptr.2d 698, 45 P.3d 1162].

Local building codes enacted pursuant to statutory authority can form the basis for a public policy claim [see *Parada v. City of Colton* (1994) 24 Cal.App.4th 356, 363-365, 29 Cal.Rptr.2d 309]. Statutes requiring the prompt payment of wages and prohibiting unauthorized deductions from pay (setoffs) state a clear public policy and may form the basis of a wrongful discharge action [*Phillips v. Gemini Moving Specialists* (1998) 63 Cal.App.4th 563, 574, 74 Cal.Rptr.2d 29].

Managers are not liable for terminating an employee in violation of public policy, when it is undisputed that the employee was employed by the corporation, not the managers, and the managers acted only in their official capacities in terminating the employee. Fellow employees may not be held accountable for tortious discharge on a conspiracy theory [*Phillips v. Gemini Moving Specialists* (1998) 63 Cal.App.4th 563, 575-576, 74 Cal.Rptr.2d 29 ; *Jacobs v. Universal Development Corp.* (1997) 53 Cal.App.4th 692, 704, 62 Cal.Rptr.2d 446]. Moreover, employees, regardless of their scope of employment or personal motives, may not be individually liable for their acts or words relating to personnel actions unless that liability arises from statute [*Sheppard v. Freeman* (1998) 67 Cal.App.4th 339, 349, 79 Cal.Rptr.2d 13]. Furthermore, independent contractors may not assert *Tameny* claims predicated on race-based terminations [*Sistare-Meyer v. YMCA* (1997) 58 Cal.App.4th 10, 17-18, 67 Cal.Rptr.2d 840].

To prevail on a claim of wrongful termination in violation of public policy, the plaintiff must establish that his or her protected activity was a proximate cause of the termination [*Tameny v. Atlantic Richfield Co.* (1980) 27 Cal.3d 167, 171 n.3, 164 Cal.Rptr. 839, 610 P.2d 1330]. The necessary causal link is not established if the evidence does not support an inference that the individuals who made the termination decision had knowledge that the employee had engaged in the protected activity [see, e.g., *Trop v. Sony Pictures Entm't. Inc.* (2005) 129 Cal.App.4th 1133, 1145-1146, 29 Cal.Rptr.3d 144 (to establish wrongful discharge in violation of public policy against pregnancy discrimination established by FEHA (Gov. Code §§ 12926(p), 12940(a)) if pregnancy was not apparent at time of discharge and plaintiff had not disclosed it to defendant, she must allege defendant's knowledge of pregnancy and must present evidence from which rational jury could infer that defendant knew she was pregnant); *Morgan v. Regents of Univ. of Cal.* (2000) 88 Cal.App.4th 52, 74, 105 Cal.Rptr.2d 652 (without knowledge that employee had previously filed grievance against employer, decision-makers who imposed adverse action "could not have acted in retaliation for [employee's] filing of the grievance")]. Similarly, the employer may defend on the basis that the termination was motivated by the employee's conduct other than that protected by public policy [see, e.g., *Sarka v. Regents of Univ. of Cal.* (2006) 146 Cal.App.4th 261, 271-275, 52 Cal.Rptr.3d 810 (although Bus. & Prof. Code § 2056(c) establishes public policy against termination of physician for advocating for medically appropriate health care, employer may

terminate physician for refusing to comply with employer's directives that are medically appropriate)].

The common-law cause of action for wrongful discharge in violation of public policy is not available against a public entity [*Miklosy v. Regents of Univ. of Cal.* (2008) 44 Cal.4th 876, 899-900, 80 Cal.Rptr.3d 690, 188 P.3d 629 ; see Gov. Code § 815(a) (public entities are subject to liability only as provided by statute)]. Further, because the tort of wrongful discharge in violation of public policy can be committed only by an employer, any defendant who was not the plaintiff's employer is not liable for that tort. Moreover, a public entity is liable for the conduct of its employee within the scope of employment only if that conduct would otherwise subject the employee to liability [Gov. Code § 815.2(a)]. Therefore, the conduct of a public entity's employees--who were not themselves employers of the plaintiff--cannot serve as a basis for imposing liability on the entity for wrongful discharge in violation of public policy [*Miklosy v. Regents of Univ. of Cal.* (2008) 44 Cal.4th 876, 901, 80 Cal.Rptr.3d 690, 188 P.3d 629].

[b] Violation of Public Policy

The duty not to violate public policy is based on the principle that holds that no person may "lawfully do that which has a tendency to be injurious to the public or against the public good" [*Stevenson v. Superior Court* (1997) 16 Cal.4th 880, 888-890, 66 Cal.Rptr.2d 888, 941 P.2d 1157 ; *Gantt v. Sentry Insurance* (1992) 1 Cal.4th 1083, 1094, 4 Cal.Rptr.2d 874, 824 P.2d 680 ; *Safeway Stores v. Retail Clerks etc. Assn.* (1953) 41 Cal.2d 567, 575, 261 P.2d 721 ; *Petermann v. International Brotherhood of Teamsters* (1959) 174 Cal.App.2d 184, 188, 344 P.2d 25 (discharge of employee at will for refusing to commit perjury at direction of employer held violation of public policy)]. Thus, when an employer violates public policy in discharging an employee, the employee has an action in tort for wrongful discharge [*Hunter v. Up-Right, Inc.* (1993) 6 Cal.4th 1174, 1180, 26 Cal.Rptr.2d 8, 864 P.2d 88 ; *Rojo v. Kliger* (1990) 52 Cal.3d 65, 89, 276 Cal.Rptr. 130, 801 P.2d 373; *Tameny v. Atlantic Richfield Co.* (1980) 27 Cal.3d 167, 172-178, 164 Cal.Rptr. 839, 610 P.2d 1330 ; *Dabbs v. Cardiopulmonary Management Services* (1987) 188 Cal.App.3d 1437, 1440-1445, 234 Cal.Rptr. 129 ; *Garcia v. Rockwell Internat. Corp.* (1986) 187 Cal.App.3d 1556, 1561, 232 Cal.Rptr. 490 ; *Hentzel v. Singer Co.* (1982) 138 Cal.App.3d 290, 298-300, 188 Cal.Rptr. 159 ; *Petermann v. International Brotherhood of Teamsters* (1959) 174 Cal.App.2d 184, 188-189, 344 P.2d 25]. The employee may also have a tort action when the employer violates public policy in imposing other disciplinary or punitive action [*Garcia v. Rockwell Internat. Corp.* (1986) 187 Cal.App.3d 1556, 1561, 232 Cal.Rptr. 490]. However, the mere expiration of an employment contract for a fixed term, without the firing, discharge, or termination of the employee, will not support a *Tameny* claim for wrongful termination in violation of public policy [*Daly v. Exxon Corp.* (1997) 55 Cal.App.4th 39, 45-46, 63 Cal.Rptr.2d 727].

An employer violates public policy by discharging an employee because the employee exercised a right protected by law [*Skillsky v. Lucky Stores, Inc.* (9th Cir. 1990) 893 F.2d 1088, 1092-1094 (exercise of right to complain about working conditions, embodied in Lab. Code § 6310); *Jie v. Liang Tai Knitwear Co., Ltd.* (2001) 89 Cal.App.4th 654, 661-662, 107 Cal.Rptr.2d 682 (by prohibiting employment of undocumented aliens, Immigration Reform and Control Act of 1986, 8 U.S.C. § 1324a, establishes public policy that protects employee who complains to authorities that employer has hired undocumented aliens); *Gelini v. Tishgart* (1999) 77 Cal.App.4th 219, 223-228, 91 Cal.Rptr.2d 447 (termination in retaliation for individual employee's designation of attorney to conduct negotiations with employer violates public policy embodied in Lab. Code § 923, which protects workers' right to organize); *Cabesuela v. Browning-Ferris Industries* (1998) 68 Cal.App.4th 101, 108-109, 80 Cal.Rptr.2d 60 (exercise of right to complain about working conditions, embodied in Lab. Code § 6310); *Dabbs v. Cardiopulmonary Management Services* (1987) 188 Cal.App.3d 1437, 1440-1445, 234 Cal.Rptr. 129 (exercise of right to protest inadequate staffing of respiratory care unit, embodied in Bus. & Prof. Code § 3700 et seq.); *Garcia v. Rockwell Internat. Corp.* (1986) 187 Cal.App.3d 1556, 1561, 232 Cal.Rptr. 490 (exercise of right to report employer's violations of law, embodied in Lab. Code § 1102.5(b)); *Hentzel v. Singer Co.* (1982) 138 Cal.App.3d 290, 298-300, 188 Cal.Rptr. 159 (exercise of right to seek to obtain healthful workplace, embodied in Lab. Code § 6310); *Montalvo v. Zamora* (1970) 7 Cal.App.3d 69, 77, 86 Cal.Rptr. 401 (exercise of rights regarding wages, embodied in Lab. Code § 923); *Glenn v. Clearman's Golden Cock Inn* (1961) 192 Cal.App.2d 793, 796-797, 13 Cal.Rptr. 769 (exercise of right to unionize, embodied in Lab. Code § 923)]. For example, it is a violation of public policy to terminate an employee for refusing to sign an employment agreement

containing a noncompetition provision that violates *Bus. & Prof. Code* § 16600, which voids any contract that restrains anyone from engaging in any lawful profession, trade, or business [*D'Sa v. Playhut, Inc.* (2000) 85 Cal.App.4th 927, 929, 931-935, 102 Cal.Rptr.2d 495 ; see *Edwards v. Arthur Andersen LLP* (2008) 44 Cal.4th 937, 945-950, 955, 81 Cal.Rptr.3d 282, 296, 189 P.3d 285 (noncompetition agreement is invalid under *Bus. & Prof. Code* § 16600, even if narrowly drawn, unless it falls within one of statutory exceptions provided by *Bus. & Prof. Code* §§ 16601, 16602, 16602.5)].

An employer likewise violates public policy by discharging an employee because of the employee's refusal to commit an illegal act directed by the employer [*Tameny v. Atlantic Richfield Co.* (1980) 27 Cal.3d 167, 176, 164 Cal.Rptr. 839, 610 P.2d 1330 (refusal to engage in illegal plan to fix gasoline prices); *Petermann v. International Brotherhood of Teamsters* (1959) 174 Cal.App.2d 184, 189, 344 P.2d 25 (refusal to commit perjury)]. However, actions for tortious wrongful discharge in violation of public policy are not limited to these two types of cases [see [a], above, for discussion of general categories into which these wrongful discharge actions usually fall]. An action for wrongful discharge will lie whenever "the basis of the discharge contravenes a fundamental public policy" [*City of Moorpark v. Superior Court* (1998) 18 Cal.4th 1143, 1160-1161, 77 Cal.Rptr.2d 445, 959 P.2d 752 (policy against disability discrimination); *Rojo v. Kliger* (1990) 52 Cal.3d 65, 91, 276 Cal.Rptr. 130, 801 P.2d 373; *Collier v. Superior Court* (1991) 228 Cal.App.3d 1117, 1126-1127, 279 Cal.Rptr. 453]. To support a wrongful discharge action, this public policy must be based on a statutory or constitutional provision. Fundamental public policy may be enunciated in administrative regulations that serve the statutory objective [*Green v. Ralee Engineering Co.* (1998) 19 Cal.4th 66, 80 & n.6, 78 Cal.Rptr.2d 16, 960 P.2d 1046 (Court overruled *Gantt v. Sentry Insurance* (1992) 1 Cal.4th 1083, 1095, 4 Cal.Rptr.2d 874, 824 P.2d 680 to extent that it could be read "to conclude that important administrative regulations implementing fundamental public policies as reflected in their enabling statutes are not 'tethered to' legislative enactments")]. It must affect a duty that exists for the benefit of the public rather than solely to benefit the employer [*Hunter v. Up-Right, Inc.* (1993) 6 Cal.4th 1174, 1180, 26 Cal.Rptr.2d 8, 864 P.2d 88 ; see *Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 665-671, 254 Cal.Rptr. 211, 765 P.2d 373].

In *Green v. Ralee Engineering Co.*, the California Supreme Court held that particular administrative regulations implementing the Federal Aviation Act of 1958 [former 49 U.S.C. app. § 1301 et seq.; now see 49 U.S.C. § 40101 et seq.], a public safety statute that created the Federal Aviation Administration, should be included as a source of fundamental public policy that limits an employer's right to discharge an at-will employee [*Green v. Ralee Engineering Co.* (1998) 19 Cal.4th 66, 90, 78 Cal.Rptr.2d 16, 960 P.2d 1046]. The Court stated it continued to believe that, aside from constitutional policy, the Legislature rather than the courts is vested with the responsibility to declare public policy. However, it could not ignore the fact that statutorily authorized regulations that effectuate the Legislature's purpose to ensure commercial airline safety are "tethered to" statutory provisions [*Green v. Ralee Engineering Co.* (1998) 19 Cal.4th 66, 71-72, 78 Cal.Rptr.2d 16, 960 P.2d 1046]. The Court noted that in finding public policy in regulations enacted under statutory authority, courts recognize a public policy that the Legislature has formulated and the executive branch has implemented [*Green v. Ralee Engineering Co.* (1998) 19 Cal.4th 66, 80, 78 Cal.Rptr.2d 16, 960 P.2d 1046]. It emphasized that only those administrative regulations that implicate substantial public policies can support claims of violation of public policy. In the case of both statutes and regulations based on statutes, courts must distinguish between those that promote a clearly mandated public policy and those that do not [*Green v. Ralee Engineering Co.* (1998) 19 Cal.4th 66, 90, 78 Cal.Rptr.2d 16, 960 P.2d 1046].

In *Stevenson v. Superior Court*, the California Supreme Court established the following set of requirements a public policy must satisfy to support a tortious discharge claim [*Stevenson v. Superior Court* (1997) 16 Cal.4th 880, 888-890, 66 Cal.Rptr.2d 888, 941 P.2d 1157]:

- The policy must be supported by constitutional or statutory provisions;
- The policy must be "public" in the sense that it inures to the benefit of the public rather than merely serving individual interests [see, e.g., *Franklin v. Monadnock Co.* (2007) 151 Cal.App.4th 252, 263, 59

Cal.Rptr.3d 692 (public policy requiring every employer to take reasonable steps to address credible threats of violence in workplace inures to benefit of public, not just employees who are targets of such threats, because policy serves public interest in promoting workplace safety, deterring workplace crime, and protecting innocent coworkers];

- The policy must have been well established at the time of the discharge [*see Silo v. CHW Med. Found.* (2002) 27 *Cal.4th* 1097, 1110, 119 *Cal.Rptr.2d* 698, 45 *P.3d* 1162 (wrongful-discharge claim may not be based on fundamental public policy created by statute enacted after plaintiff's termination); *Phillips v. St. Mary Reg'l Med. Ctr.* (2002) 96 *Cal.App.4th* 218, 229, 116 *Cal.Rptr.2d* 770 (legislation enacted after plaintiff's termination was obviously not well established at pertinent time)]; and

- The policy must be fundamental and substantial [*see Jersey v. John Muir Med. Ctr.* (2002) 97 *Cal.App.4th* 814, 820-829, 118 *Cal.Rptr.2d* 807 (employer may terminate at-will employee for refusing to drop lawsuit against employer's customer, even though access to courts is guaranteed by federal and state constitutions, because there is no clearly mandated fundamental policy against such termination)].

As applied to employers of five or more workers, the policy against age discrimination in employment set forth in the California Fair Employment and Housing Act (FEHA) [*Gov. Code* § 12900 *et seq.*; *see* Ch. 25, *California Judicial Council Fair Employment and Housing Act Instructions*] satisfies each of these requirements [*Stevenson v. Superior Court* (1997) 16 *Cal.4th* 880, 897, 66 *Cal.Rptr.2d* 888, 941 *P.2d* 1157 (FEHA's remedies are not exclusive and do not bar common law tort claim)].

Furthermore, the California Supreme Court held that under these requirements, disability discrimination can form the basis of a common law wrongful discharge claim [*City of Moorpark v. Superior Court* (1998) 18 *Cal.4th* 1143, 1158-1161, 77 *Cal.Rptr.2d* 445, 959 *P.2d* 752 (city employee who suffered work-related knee injury and was terminated based on her disability claimed FEHA violation and wrongful termination in violation of public policy)]. The Court held that *Lab. Code* § 132a does not provide the exclusive remedy for work-related disability discrimination, and that FEHA and common law remedies are available [*City of Moorpark v. Superior Court* (1998) 18 *Cal.4th* 1143, 1158, 77 *Cal.Rptr.2d* 445, 959 *P.2d* 752 ; *see* MB 2400A.35[3]].

Under these criteria, a violation of *Lab. Code* § 1025 (accommodation of employee drug rehabilitation) cannot support a cause of action for tortious wrongful termination because the policies expressed in § 1025 are not "substantial and fundamental" [*Sullivan v. Delta Air Lines Inc.* (1997) 58 *Cal.App.4th* 938, 942, 947, 68 *Cal.Rptr.2d* 584]. Furthermore, the policy stated in *Cal. Const.*, art. I, § 8, which supports *Tameny* claims alleging race-based terminations of the employer-employee relationship, does not extend to those who hire independent contractors [*Sistare-Meyer v. YMCA* (1997) 58 *Cal.App.4th* 10, 14, 17-18, 67 *Cal.Rptr.2d* 840].

Not every legislative statement of public policy creates a substantive right that can be enforced in an action for wrongful discharge. For example, *Lab. Code* § 96(k) authorizes the Labor Commissioner to assert claims for lost wages on behalf of an employee who is discharged "for lawful conduct occurring during nonworking hours away from the employer's premises." The enactment of this provision was accompanied by a legislative statement that "allowing any employer to deprive an employee of any constitutionally guaranteed civil liberties, regardless of the rationale offered, is not in the public interest" [1999 Stats., ch. 692, § 1]. However, *Lab. Code* § 96(k) and the accompanying legislative statement of policy do not create any new substantive public policies or preclude an employer from taking any actions; rather, they establish a procedure for the Labor Commissioner to vindicate already-existing public policies in favor of individual employees. Thus, a wrongful-discharge claim may not be based on *Lab. Code* § 96(k) and the accompanying legislative statement; instead, the employee must establish that he or she was discharged in violation of substantive rights created by other statutory or constitutional provisions [*Barbee v. Household Automotive Fin. Corp.* (2003) 113 *Cal.App.4th* 525, 533-536, 6 *Cal.Rptr.3d* 406].

A statute authorizing school districts to establish programs allowing senior employees to work part-time [see *Educ. Code* § 44922] is another example of a provision that does not create a sufficiently fundamental and substantial public policy. Thus, an employee whose request for a reduced workload under such a program has been denied may not use that denial as the basis of an action for wrongful constructive discharge in violation of public policy [*Sinatra v. Chico Unified Sch. Dist.* (2004) 119 Cal.App.4th 701, 706-708, 14 Cal.Rptr.3d 661 (although *Educ. Code* § 44922 enables school districts to bestow valuable right on select segment of their employees, it does not embody kind of universal and important right recognized as fundamental to public good)].

A statutory provision that is limited in scope to matters outside the employment context ordinarily will not be deemed to establish a fundamental public policy that supports a claim of wrongful termination. For example, the California Supreme Court has held that the Compassionate Use Act of 1996 (Proposition 215) [*Health & Safety Code* § 11362.5] does not establish a public policy against terminating employees who use marijuana for medical purposes. The Act does provide an exemption from criminal liability under two specific California statutes for a person who possesses or cultivates marijuana for medical purposes on the recommendation or approval of a physician [*Health & Safety Code* § 11362.5(d) (providing defense against prosecution under *Health & Safety Code* §§ 11357, 11358 for person who possesses or cultivates marijuana for medical purposes on recommendation or approval of physician)]. However, marijuana possession remains illegal under federal law, even for medical use [21 U.S.C. §§ 812, 844(a); *Gonzales v. Raich* (2005) 545 U.S. 1, 26-29, 125 S.Ct. 2195, 162 L.Ed.2d 1] . Moreover, the Compassionate Use Act is limited in scope: it merely exempts medical users and their primary caregivers from criminal liability under two specified state statutes. Nothing in the Act's text or history indicates that the electorate intended the Act to articulate any policy concerning marijuana in the employment context, let alone a fundamental public policy requiring employers to accommodate marijuana use by employees [*Ross v. RagingWire Telecommunications, Inc.* (2008) 42 Cal.4th 920, 931-933, 70 Cal.Rptr.3d 382, 391-393, 174 P.3d 200] .

Misrepresentation does not give rise to a fraud action separate from a constructive discharge action. If termination is wrongful, either because it breaches the employment contract or because it violates a public policy articulated in a statutory or constitutional provision, then the employee is entitled to recover contract or tort damages. No independent fraud claim arises from a misrepresentation aimed at termination of employment [*Hunter v. Up-Right, Inc.* (1993) 6 Cal.4th 1174, 1184-1185, 26 Cal.Rptr.2d 8, 864 P.2d 88].

[c] The Public Interest Test

A discharge that merely violates the employer's internal rules and policies is not considered to be contrary to public policy [*Gray v. Superior Court* (1986) 181 Cal.App.3d 813, 819, 226 Cal.Rptr. 570]. The discharge must violate a fundamental public policy [*Rojo v. Kliger* (1990) 52 Cal.3d 65, 89, 276 Cal.Rptr. 130, 801 P.2d 373]. This requirement means that, even assuming that an employee has a duty to report to his or her employer information that is relevant to the employer's interests [see *Lab. Code* § 2854 (duty to perform agreed services and to use ordinary care and diligence in doing so); *Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 670, 254 Cal.Rptr. 211, 765 P.2d 373 (referring to "alleged duty," and declining to decide whether duty exists)], no substantial public policy exists that prevents an employer from firing an employee for making such a report [*Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 670, 254 Cal.Rptr. 211, 765 P.2d 373]. For example, in *Foley*, the California Supreme Court held that an employer was not liable to an employee for wrongful termination in violation of public policy when the employee was fired after reporting to the employer that the employee's supervisor was under investigation by the FBI for embezzlement from a former employer [*Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 664-671, 254 Cal.Rptr. 211, 765 P.2d 373]. The discharge must violate a policy or duty that inures to the benefit of the public at large rather than to a particular employer or employee [*Green v. Ralee Engineering Co.* (1998) 19 Cal.4th 66, 75, 84-85, 78 Cal.Rptr.2d 16, 960 P.2d 1046 (FAA regulations that promoted airline safety constituted policy of sufficient public importance); *Rojo v. Kliger* (1990) 52 Cal.3d 65, 89, 276 Cal.Rptr. 130, 801 P.2d 373 ; *Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 669, 254 Cal.Rptr. 211, 765 P.2d 373]. When the employee's duty to disclose information to the employer serves only the employer's private interest, the rationale underlying the right of action for wrongful

termination in violation of public policy is not present [*Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 670-671, 254 Cal.Rptr. 211, 765 P.2d 373 ; *American Computer Corp. v. Superior Court* (1989) 213 Cal.App.3d 664, 667-669, 261 Cal.Rptr. 796].

In *Foley*, the Court suggested a test for determining whether the interest at stake is public or private. If the employer and employee could validly agree to circumvent the interest, then it is private. If, on the other hand, a contract to circumvent the interest would be void as against public policy, then the interest is public, and a discharge in violation of that interest would be a wrongful discharge in violation of public policy. In *Tameny*, for example, the interest was public and the discharge was wrongful because a contract that required the employee to violate the antitrust laws would be void as against public policy. Conversely, because in *Foley* the employer and employee could validly have agreed that the employee had no duty to disclose the information about his supervisor, it cannot be said that firing the employee for this disclosure violated a fundamental duty imposed on all employers for the protection of the public interest [*Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 670 n.12, 254 Cal.Rptr. 211, 765 P.2d 373 ; see also *Luck v. Southern Pacific Transportation Co.* (1990) 218 Cal.App.3d 1, 27-29, 267 Cal.Rptr. 618 (under *Foley* test, California's constitutional right of privacy is private right that will not support action for wrongful termination in violation of public policy)].

[d] Refusal to Commit Illegal Act

In *Tameny v. Atlantic Richfield Co.*, the Court found that the plaintiff had stated a cause of action for wrongful discharge in violation of public policy when the plaintiff alleged all of the following [*Tameny v. Atlantic Richfield Co.* (1980) 27 Cal.3d 167, 170-171 n.3, 179 n.12, 164 Cal.Rptr. 839, 610 P.2d 1330 ; Witkin, California Procedure (4th ed. 1997), vol. 3, Actions, § 144]:

- That plaintiff had been employed by the employer for 15 years in positions of increasing responsibility until being terminated;
- That plaintiff's employer had demanded that plaintiff engage in illegal price fixing;
- That plaintiff had refused; and
- That plaintiff's refusal was the proximate cause of plaintiff's discharge and damages.

In the related context of a claim of retaliation under the Fair Employment and Housing Act (FEHA) [see *Gov. Code § 12940(h)*], the California Supreme Court held that the employee need only have refused to engage in a practice that he or she reasonably and in good faith believed to be illegal, whether or not the practice is ultimately found to be in violation of the law [*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1043, 32 Cal.Rptr.3d 436, 116 P.3d 1123 (employee refused to follow order to terminate subordinate on discriminatory basis that employee believed would violate FEHA)]. Further, the Court held that it is not necessary that the employee *explicitly* informed the employer that he or she believed that the particular practice was illegal, so long as the circumstances are sufficient to establish the employer's knowledge that the employee's refusal to engage in the practice was based on the employee's reasonable belief that the practice was illegal [*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1046, 32 Cal.Rptr.3d 436, 116 P.3d 1123].

[e] Exercise of Right Protected by Law

In *Hentzel v. Singer Co.*, the court concluded that the plaintiff stated a cause of action for wrongful discharge in violation of public policy with the following elements [*Hentzel v. Singer Co.* (1982) 138 Cal.App.3d 290, 293-294, 304, 188 Cal.Rptr. 159 ; but see *Davaris v. Cubaleski* (1993) 12 Cal.App.4th 1583, 1589, 16 Cal.Rptr.2d 330 (termination allegedly caused by plaintiff's taking leave from work to have hysterectomy does not violate public policy

to encourage proper medical care; statutes cited did not support this policy but rather put employer under legal duty to maintain safe and healthful workplace)];

- Plaintiff was employed by the defendant and had performed all the duties of plaintiff's employment in exemplary fashion;
- Plaintiff exercised a right protected at common law, embodied in *Lab. Code* § 6310, in seeking a healthful workplace by protesting to his employer against smoking in his work environment--which plaintiff reasonably believed was unhealthful; and
- Plaintiff's protest was the proximate cause of his termination and the resulting damages.

The public policy requiring every employer to maintain a safe and healthful workplace includes a requirement that the employer take reasonable steps to address credible threats of violence in the workplace. Thus, the policy protects an employee from being terminated for raising concerns about such threats [*Franklin v. Monadnock Co. (2007) 151 Cal.App.4th 252, 259, 265-266, 59 Cal.Rptr.3d 692 (Lab. Code § 6400 et seq. and Code Civ. Proc. § 527.8 establish explicit public policy requiring employer to provide safe and secure workplace, including addressing credible threats of violence in workplace)]].*

For the employee to maintain a cause of action for wrongful discharge in this context, it is not necessary to allege or prove that there was a violation of the Occupational Safety and Health Act [see *Lab. Code* § 6300 et seq.] or that the workplace actually was unsafe. Rather, the employee is protected against discharge or discrimination so long as the complaint was made in good faith about working conditions or practices the employee reasonably believed to be unsafe, whether or not they actually are unsafe [*Cabesuela v. Browning-Ferris Indus. of Cal., Inc. (1998) 68 Cal.App.4th 101, 109, 80 Cal.Rptr.2d 60* (plaintiff had complained to employer about extended working hours, which plaintiff believed posed health and safety hazard)].

The discharge of an employee in retaliation for engaging in a specific type of conduct is contrary to public policy and gives rise to an action in tort if the discharge meets at least one of the following criteria:

- It is expressly prohibited by statute [*Garcia v. Rockwell Internat. Corp. (1986) 187 Cal.App.3d 1556, 1561, 232 Cal.Rptr. 490 ; Hentzel v. Singer Co. (1982) 138 Cal.App.3d 290, 298-300, 188 Cal.Rptr. 159 ; see, e.g., Lab. Code* §§ 230 (prohibiting discharge of employee who takes time off to serve on jury, to make court appearance, or to seek judicial relief for domestic violence or sexual assault), 230.1 (prohibiting employer of 25 or more from discharging employee who takes time off to obtain medical or other services as result of domestic violence or sexual assault), 230.2 (prohibiting discharge of or discrimination against employee for taking time off from work to attend judicial proceedings related to certain felonies, including serious and violent felonies, perpetrated against employee, member of employee's immediate family, employee's domestic partner, or domestic partner's child), 230.4 (prohibiting employer of 50 or more from discharging employee who is volunteer firefighter and takes time off to engage in fire or law enforcement training), and 1102.5 ("whistle-blower" statute prohibiting discharge of or discrimination against employee who has in current or former employment disclosed, or refused to participate in, violation of or noncompliance with state or federal law, rule, or regulation); see also *Gardenhire v. Housing Auth. (2000) 85 Cal.App.4th 236, 241-243, 101 Cal.Rptr.2d 893* (protection under *Lab. Code* § 1102.5 extends to public employee who reports illegal activity to his or her employer)];
- It would undermine the enforcement of a specific statute [*Tameny v. Atlantic Richfield Co. (1980) 27 Cal.3d 167, 172-178, 164 Cal.Rptr. 839, 610 P.2d 1330 ; Petermann v. International Brotherhood of Teamsters (1959) 174 Cal.App.2d 184, 188-189, 344 P.2d 25*]; or

■ It would undermine important goals sought to be advanced by a legislative scheme [*Dabbs v. Cardiopulmonary Management Services* (1987) 188 Cal.App.3d 1437, 1440-1445, 234 Cal.Rptr. 129 ; see, e.g., *Gelini v. Tishgart* (1999) 77 Cal.App.4th 219, 223-228, 91 Cal.Rptr.2d 447 (termination in retaliation for individual employee's designation of attorney to conduct negotiations with employer violates public policy embodied in *Lab. Code* § 923, which protects workers' right to organize)].

Thus, for example, an employer may not discharge an employee for complaining to authorities about the employer's hiring of undocumented aliens in violation of the Immigration Reform and Control Act of 1986 [8 U.S.C. § 1324a]. Even though the Act does not expressly prohibit discharging an employee who reports a violation, the Act does establish a fundamental public policy of protecting documented workers from discrimination and from competition from undocumented workers. Therefore, the reporting of violations is encouraged by the Act, and an employee who is discharged for making such a report has a cause of action for wrongful termination in violation of public policy [*Jie v. Liang Tai Knitwear Co., Ltd.* (2001) 89 Cal.App.4th 654, 660-662, 107 Cal.Rptr.2d 682].

In this context, an employee's good-faith exercise of a statutory right is protected against employer retaliation. For example, the well-established fundamental public policy in favor of an employer's duty to pay overtime wages protects an employee from termination for making a good-faith but mistaken claim to overtime pay [*Barbosa v. IMPCO Techs., Inc.* (2009) 179 Cal.App.4th 1116, 1122-1123, 101 Cal.Rptr.3d 923].

The California Fair Employment and Housing Act (FEHA) [*Gov. Code* § 12900 et seq.; see Ch. 25, *California Judicial Council Fair Employment and Housing Act Instructions*] does not preempt other state laws, including the common law, that prohibit or restrict employment discrimination. Therefore, relief from a discriminatory discharge may be available under common law wrongful termination doctrines [*Stevenson v. Superior Court* (1997) 16 Cal.4th 880, 885, 66 Cal.Rptr.2d 888, 941 P.2d 1157 (discussed in [b], above); see *Rojo v. Kliger* (1990) 52 Cal.3d 65, 73-82, 88-91, 276 Cal.Rptr. 130, 801 P.2d 373 ; see also *Gov. Code* § 12993(a)]. For more detailed discussion, see Wilcox, California Employment Law (Matthew Bender).

Lab. Code § 132a, prohibiting employers from discriminating against employees who are injured in the course and scope of employment, does not provide the exclusive remedy for work-related disability discrimination. Disability discrimination can form the basis of a common law wrongful discharge claim [*City of Moorpark v. Superior Court* (1998) 18 Cal.4th 1143, 1158-1161, 77 Cal.Rptr.2d 445, 959 P.2d 752 ; see MB 2400A.35[3]].

[f] Constructive Discharge

Employment may be terminated by either an actual or a constructive discharge [see *Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal.4th 1238, 1245, 32 Cal.Rptr.2d 223, 876 P.2d 1022]. An employee's resignation will be deemed a constructive discharge only if the employer either intentionally created or knowingly permitted working conditions that became so intolerable that a reasonable person in the employee's position would have felt compelled to resign [*Pennsylvania State Police v. Suders* (2004) 542 U.S. 129, 124 S.Ct. 2342, 159 L.Ed.2d 204, 216-220 ; *Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal.4th 1238, 1251, 32 Cal.Rptr.2d 223, 876 P.2d 1022 ; *Keithley v. Civil Serv. Bd.* (1970) 11 Cal.App.3d 443, 449, 89 Cal.Rptr. 809 (coerced resignation is tantamount to discharge)]. A constructive discharge that violates public policy gives rise to a tort action for wrongful discharge [*Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal.4th 1238, 1252, 32 Cal.Rptr.2d 223, 876 P.2d 1022].

[g] Imposition of Liability for Disciplinary or Punitive Action Other Than Termination

Tort liability may be imposed on an employer for a disciplinary or punitive action other than termination of employment if, under the criteria developed in termination cases, it is contrary to public policy. In *Garcia v. Rockwell International Corp.* [*Garcia v. Rockwell Int'l Corp.* (1986) 187 Cal.App.3d 1556, 232 Cal.Rptr. 490], the plaintiff responded to a

motion for summary judgment by submitting evidence showing that his employer had suspended him for six months without pay because he reported to federal officials instances of fraudulent charges under government contracts. In holding that this evidence was sufficient to establish a prima facie case in tort, the court declared that the rationale of *Tameny v. Atlantic Richfield Company* [*Tameny v. Atlantic Richfield Co.* (1980) 27 Cal.3d 167, 164 Cal.Rptr. 839, 610 P.2d 1330 ; see [d], above] applies to cases involving disciplinary actions other than termination [*Garcia v. Rockwell Int'l Corp.* (1986) 187 Cal.App.3d 1556, 1561, 232 Cal.Rptr. 490].

In the related context of a claim of retaliation under FEHA [see *Gov. Code § 12940(h)*], the California Supreme Court held that to qualify as an "adverse employment action," the employer's retaliatory act must have a material effect on the terms, conditions, or privileges of the plaintiff's employment; it is not sufficient that the act deter the plaintiff or other employees from engaging in protected activities [*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1050-1055, 32 Cal.Rptr.3d 436, 116 P.3d 1123 (expressly rejecting "deterrence standard"); see *Pinero v. Specialty Rests. Corp.* (2005) 130 Cal.App.4th 635, 641-647, 30 Cal.Rptr.3d 348 (employer's repeated criticisms are not sufficient to constitute adverse employment action if employee (1) is not fired, demoted, or transferred; (2) did not lose any benefits, bonuses, or commissions; (3) did not suffer any wage reduction; and (4) did not experience any change in job duties or responsibilities)]. In contrast, the United States Supreme Court has held that a deterrence standard applies in determining whether an adverse employment action has occurred in a Title VII retaliation case [*Burlington N. & Santa Fe Ry. Co. v. White* (2006) 548 U.S. 53, 126 S.Ct. 2405, 2410-2416, 165 L.Ed.2d 345, 354-361 (employer's action will support Title VII retaliation claim under 42 U.S.C. § 2000e-3(a) if it is "materially adverse," that is, if it would likely have dissuaded reasonable worker from engaging in protected activity); see *Ray v. Henderson* (9th Cir. 2000) 217 F.3d 1234, 1243 (applying "deterrence standard" in Title VII retaliation case)].

The mere expiration of an employment contract for a fixed term, without the firing, discharge, or termination of the employee, will not support a *Tameny* claim for wrongful termination in violation of public policy [*Daly v. Exxon Corp.* (1997) 55 Cal.App.4th 39, 45-46, 63 Cal.Rptr.2d 727]. For example, a probationary schoolteacher whose contract has not been renewed has no cause of action for nonrenewal of an employment contract because the law does not recognize a claim of tortious nonrenewal of an employment contract in violation of public policy [*Motevalli v. Los Angeles Unified Sch. Dist.* (2004) 122 Cal.App.4th 97, 112-113, 18 Cal.Rptr.3d 562 (absent termination, there is no cause of action for wrongful termination in violation of public policy)].

[h] Administrative Remedies

An employee bringing a civil action under the California Fair Employment and Housing Act (FEHA) [*Gov. Code § 12900 et seq.*; see Ch. 25, *California Judicial Council Fair Employment and Housing Act Instructions*] must exhaust FEHA administrative remedies before filing suit or seeking any remedies provided by FEHA [*Rojo v. Kliger* (1990) 52 Cal.3d 65, 83, 276 Cal.Rptr. 130, 801 P.2d 373 ; see *Castillo v. City of Los Angeles* (2001) 92 Cal.App.4th 477, 481-486, 111 Cal.Rptr.2d 870 (unless reversed on direct judicial review, administrative findings have issue-preclusive effect in subsequent FEHA litigation)]. However, exhaustion of FEHA administrative remedies is not required before filing a civil action for damages alleging nonstatutory causes of action [*Rojo v. Kliger* (1990) 52 Cal.3d 65, 88, 276 Cal.Rptr. 130, 801 P.2d 373]. Thus, for example, exhaustion of FEHA administrative remedies is not a prerequisite to filing a civil action alleging a tort cause of action for wrongful termination in violation of public policy, which is independent of FEHA [see *Rojo v. Kliger* (1990) 52 Cal.3d 65, 88-91, 276 Cal.Rptr. 130, 801 P.2d 373].

On the other hand, if an employer establishes an *internal* grievance mechanism, a failure to exhaust its remedies precludes a subsequent nonstatutory civil action [*Palmer v. Regents of Univ. of Cal.* (2003) 107 Cal.App.4th 899, 903-906, 132 Cal.Rptr.2d 567]. Similarly, an employer's internal remedy generally must be exhausted before the employee sues under a statutory provision that does not contain its own administrative remedy [see *Campbell v. Regents of Univ. of Cal.* (2005) 35 Cal.4th 311, 326, 25 Cal.Rptr.3d 320 (public employee must exhaust employer's internal remedy before suing for retaliation for statutorily protected "whistleblowing" activity under *Lab. Code § 1102.5*, which is silent on administrative remedy or exhaustion requirement)]. The exhaustion of internal grievance procedures is

required not because of any contractual obligation, but because of compelling policy considerations. If an employer has the opportunity quickly to determine through the operation of its internal procedures that it has committed error, it may be able to minimize, and sometimes eliminate, any monetary injury to the employee by immediately reversing the initial action. An employee should not be permitted to increase damages by forgoing available internal remedies. Moreover, an exhaustion requirement reflects the courts' recognition of the "expertise" of the employer's quasi-judicial tribunal, permitting it to adjudicate the merits of the plaintiffs' claims in the first instance [*Campbell v. Regents of Univ. of Cal.* (2005) 35 Cal.4th 311, 322, 25 Cal.Rptr.3d 320, 322 (requirement that internal remedy be exhausted serves salutary function of mitigating damages, recognizes quasi-judicial tribunal's expertise, and promotes judicial economy by unearthing relevant evidence and providing record should there be judicial review of case); *Palmer v. Regents of Univ. of Cal.* (2003) 107 Cal.App.4th 899, 905, 132 Cal.Rptr.2d 567].

An employer will be equitably estopped from asserting a defense that the employee failed to exhaust the employer's internal administrative remedy if the employer's actions negligently or intentionally led the employee to believe that no administrative recourse was available [*Shuer v. County of San Diego* (2004) 117 Cal.App.4th 476, 486-487, 11 Cal.Rptr.3d 776]. Moreover, a failure to exhaust an employer's internal procedures will not preclude a civil action asserting a claim under the FEHA or another statutory scheme that contains its own exhaustion prerequisite. Thus, an employee who has exhausted the FEHA administrative process and obtained a right-to-sue letter from the Department of Fair Employment and Housing [see Gov. Code § 12965(b)] need not also exhaust internal administrative procedures provided by the employer prior to filing an FEHA claim in superior court [*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081-1092, 6 Cal.Rptr.3d 457, 461-470, 79 P.3d 569]. Similarly, a public employee who asserts both FEHA claims and related nonstatutory claims for wrongful termination in violation of public policy need not exhaust the internal administrative remedy provided by the employer with respect to those nonstatutory claims before filing a civil action, if the resolution of those claims would have a preclusive impact on the FEHA claim [*Williams v. Housing Auth.* (2004) 121 Cal.App.4th 708, 727-731, 17 Cal.Rptr.3d 374]. However, if the employee elects to pursue an employer's internal administrative process to a decision that is of a sufficiently judicial character to support collateral estoppel, the employee must pursue that process to completion, including exhausting any available judicial avenues for reversal of adverse findings. A failure to do so will result in any quasi-judicial administrative findings having binding, preclusive effect in later judicial proceedings [*McDonald v. Antelope Valley Cmty. Coll. Dist.* (2008) 45 Cal.4th 88, 113, 84 Cal.Rptr.3d 734, 194 P.3d 1026].

[i] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 24, *California Judicial Council Wrongful Termination Instructions*]:

CACI No. 2430, Wrongful Discharge/Demotion in Violation of Public Policy--Essential Factual Elements

CACI No. 2431, Constructive Discharge in Violation of Public Policy--Plaintiff Required to Violate Public Policy

CACI No. 2432, Constructive Discharge in Violation of Public Policy--Plaintiff Required to Endure Intolerable Conditions for Improper Purpose That Violates Public Policy

CACI No. 2433, Wrongful Discharge in Violation of Public Policy--Damages

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Labor & Employment Law Employment Relationships Employment Contracts Breach Labor & Employment Law Employment Relationships Employment

ContractsFormationLabor & Employment LawWrongful TerminationBreach of ContractExpress ContractsLabor &
Employment LawWrongful TerminationPublic Policy

Barbara S. de Oddone contributed to the original chapter for California Forms of Jury Instruction (Matthew Bender).
Stanley E. Tobin and Darrell J. Salomon contributed to the original chapter as consultants.



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CHAPTER 24A Matthew Bender Employment Contract Instructions
PART B. DEFINITIONS

4-24A California Forms of Jury Instruction MB 2400A.12

MB 2400A.12 Good Faith and Bad Faith

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

The phrase "good faith" describes a state of mind that is honest of purpose and free from intent to defraud. Generally speaking, it means being faithful to one's duty or obligation.

The phrase "bad faith" means the opposite of good faith. It describes a state of mind that is intent on fraud or that intends to mislead or deceive. It also means a state of mind when the neglect or refusal to fulfill some duty or contractual obligation is not the result of an honest mistake but arises instead out of sinister or evil motive.

Authorities: *People v. Nunn* (1956) 46 Cal.2d 460, 468, 296 P.2d 813 ; *Pugh v. See's Candies, Inc.* (1988) 203 Cal.App.3d 743, 762-765, 250 Cal.Rptr. 195 ; *Mueller v. MacBan* (1976) 62 Cal.App.3d 258, 282, 132 Cal.Rptr. 222 ; *Efron v. Kalmanovitz* (1967) 249 Cal.App.2d 187, 192, 57 Cal.Rptr. 248 .

[2] Use of Instruction

This instruction should be used when an issue of fact exists regarding a party's good faith or bad faith. It should be used in cases involving employment contracts terminable on the employer's good faith dissatisfaction with the employee's performance [see MB 2400A.01, MB 2400A.14 and MB 2400A.16].

For related Judicial Council instructions, see [3][b], *below*.

[3] Comment

[a] Good Faith and Bad Faith

In *People v. Nunn*, the California Supreme Court observed that the phrase "good faith" in common usage has a well-defined and generally well-understood meaning, "being ordinarily used to describe that state of mind denoting honesty of purpose, freedom from intention to defraud, and, generally speaking, ... being faithful to one's duty or obligation" [*People v. Nunn* (1956) 46 Cal.2d 460, 468, 296 P.2d 813]. The instruction in [1], above, defining good faith is based on this definition.

This instruction defining bad faith is taken from a case in which the instruction given was based on the definition of bad faith in Black's Law Dictionary [*Pugh v. See's Candies, Inc.* (1988) 203 Cal.App.3d 743, 762, 764, 250 Cal.Rptr. 195 ; see Black's Law Dictionary (5th ed. 1979) p. 127].

On remand for trial of *Pugh v. See's Candies, Inc.*, a case involving a managerial employee's wrongful termination action against his employer, the trial court instructed the jury on the definitions of good faith and bad faith as follows [*Pugh v. See's Candies, Inc.* (1988) 203 Cal.App.3d 743, 762, 250 Cal.Rptr. 195]:

- The phrase "good faith" of the employer describes the employer's state of mind that is honest of purpose, free from an intention to defraud, and in keeping with one's duty or responsibility.
- The phrase "bad faith" is the opposite of good faith and describes a state of mind of the employer that is fraudulent or designed to mislead or deceive, or one in which the neglect or refusal to fulfill some duty or contractual obligation is not the result of an honest mistake, but arises out of sinister or evil motive.

These definitional instructions were upheld on appeal [*Pugh v. See's Candies, Inc.* (1988) 203 Cal.App.3d 743, 762-765, 250 Cal.Rptr. 195].

In an action alleging breach of the covenant of good faith and fair dealing implied by law in every contract, it is a question for the jury whether the defendant failed to act in good faith or deal fairly with the plaintiff [*Brandt v. Lockheed Missiles & Space Co.* (1984) 154 Cal.App.3d 1124, 1129, 201 Cal.Rptr. 746]. Likewise, in an action alleging wrongful termination in breach of a contract for employment as long as the employee's performance was satisfactory, the jury must decide whether the employer was, in good faith, dissatisfied with the employee's performance [*Bondi v. Jewels by Edwar, Ltd.* (1968) 267 Cal.App.2d 672, 676, 73 Cal.Rptr. 494]. In an action alleging wrongful termination without good cause in breach of an employment contract, it is a question for the jury whether the employer did or did not have good cause to terminate [*Walker v. Northern San Diego County Hospital Dist.* (1982) 135 Cal.App.3d 896, 898-900, 904-905, 185 Cal.Rptr. 617 ; *Pugh v. See's Candies, Inc.* (1981) 116 Cal.App.3d 311, 322-323, 329, 171 Cal.Rptr. 917]. In *R. J. Cardinal Co. v. Ritchie*, the court held that the right to terminate employment for good cause meant to terminate on reasonable grounds "assigned in good faith" [*R. J. Cardinal Co. v. Ritchie* (1963) 218 Cal.App.2d 124, 146-147, 32 Cal.Rptr. 545].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 24, *California Judicial Council Wrongful Termination Instructions*]:

CACI No. 2423 Breach of Implied Covenant of Good Faith and Fair Dealing--Essential Factual Elements

CACI No. 2424 Breach of Implied Covenant of Good Faith and Fair Dealing--Good Faith Mistaken Belief Defense

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsBreachLabor & Employment LawEmployment RelationshipsEmployment ContractsFormationLabor & Employment LawWrongful TerminationBreach of ContractExpress & Implied Conditions & CovenantsLabor & Employment LawWrongful TerminationBreach of ContractExpress Contracts

Barbara S. de Oddone contributed to the original chapter for California Forms of Jury Instruction (Matthew Bender).
Stanley E. Tobin and Darrell J. Salomon contributed to the original chapter as consultants.



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CHAPTER 24A Matthew Bender Employment Contract Instructions
PART B. DEFINITIONS

4-24A California Forms of Jury Instruction MB 2400A.13

MB 2400A.13 Reasonable Period of Continued Employment

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

In determining the period that Plaintiff's employment was reasonably certain to have continued, you should consider all of the following: _____ *[specify pertinent factors in case, e.g., Plaintiff's age; Plaintiff's health; Plaintiff's intent regarding continuing employment with Defendant; Plaintiff's work performance; Defendant's economic situation; Defendant's prospects for continuing the operations involving Plaintiff; Defendant's need for Plaintiff's services; and average length of employment of Defendant's employees in Plaintiff's category and with Plaintiff's length of service].*

Authorities: *Rabago-Alvarez v. Dart Industries, Inc.* (1976) 55 Cal.App.3d 91, 96-97, 127 Cal.Rptr. 222 ; *Drzewiecki v. H & R Block, Inc.* (1972) 24 Cal.App.3d 695, 705, 101 Cal.Rptr. 169 ; *Glassell v. Prentiss* (1959) 175 Cal.App.2d 599, 608, 346 P.2d 895 ; *Bishop v. Kelley* (1950) 100 Cal.App.2d 775, 787, 224 P.2d 814 ; *Thacker v. American Foundry* (1947) 78 Cal.App.2d 76, 84, 177 P.2d 322 ; *Millsap v. National Funding Corp.* (1943) 57 Cal.App.2d 772, 775-776, 135 P.2d 407 .

[2] Use of Instruction

This instruction should be used when employment for an indefinite period is not terminable at will.

For related Judicial Council instructions, see [3][b], *below*.

[3] Comment

[a] Employment to Continue for Reasonable Time

The Labor Code establishes a presumption of at-will employment [*Lab. Code* § 2922]. However, the parties are free to overcome the statutory presumption by express or implied contract [see *Dore v. Arnold Worldwide, Inc.* (2006) 39 Cal.4th 384, 391, 46 Cal.Rptr.3d 668, 139 P.3d 56; *Stillwell v. Salvation Army* (2008) 167 Cal.App.4th 360, 380, 84 Cal.Rptr.3d 111].

If a contract indicates that the employment is not terminable at will but does not specify a definite period of employment, then the law presumes that the employment will continue for a reasonable time [*Rabago-Alvarez v. Dart Industries, Inc.* (1976) 55 Cal.App.3d 91, 96-97, 127 Cal.Rptr. 222; *Glassell v. Prentiss* (1959) 175 Cal.App.2d 599, 608, 346 P.2d 895; *Thacker v. American Foundry* (1947) 78 Cal.App.2d 76, 84, 177 P.2d 322; *Millsap v. National Funding Corp.* (1943) 57 Cal.App.2d 772, 775, 135 P.2d 407; see *Dore v. Arnold Worldwide, Inc.* (2006) 39 Cal.4th 384, 391, 46 Cal.Rptr.3d 668, 139 P.3d 56 (contract stating that employment is "at will" and terminable "at any time" unambiguously creates at-will employment relationship, even if it does not also state that termination may be without cause)].

Corbin on Contracts explains that when parties make a contract of employment without specifying the length of service but indicating it is not terminable at will, the legal effect is that the parties are bound for a reasonable period of time. Corbin observed, however, that while a "reasonable period" is based on implication, it is unclear that it is an implication of fact. He concluded that the "phrase is capable of two meanings: (1) the time that seems reasonable in the light of the circumstances existing when the contract was made; (2) the time that seems reasonable in the light of circumstances as they occur during the course of performance. It is the latter meaning that should nearly always prevail, whether based upon supposed actual intention or not" [*Corbin on Contracts* (1960) § 684, p. 231].

Corbin's second, preferred interpretation of "reasonable period of time" was apparently the rule applied by the court of appeal in *Drzewiecki v. H & R Block, Inc.* That case involved the wrongful termination of an office manager. The appellate court upheld the trial court's finding regarding the period during which the plaintiff's employment was reasonably certain to continue, observing that the trial court "took into consideration [the plaintiff's] physical condition, his age, his propensity for hard work, his expertise in managing defendants' offices, the profit history of his operation, the foreseeability of the continued future demand for tax return service to small taxpayers' and determined that it was reasonably certain that respondent would have competently and profitably performed his managerial services for an additional 10 years after the contract was wrongfully terminated" [*Drzewiecki v. H & R Block, Inc.* (1972) 24 Cal.App.3d 695, 705, 101 Cal.Rptr. 169].

In *Bishop v. Kelley*, the court of appeal concluded that when an architect's employment contract had no specified term, but included a provision for a share in the net profits of the project on which he was employed, the employment would be presumed reasonably to continue until the project was completed, for otherwise the employee would never realize his profits, if there were any to be made [*Bishop v. Kelley* (1950) 100 Cal.App.2d 775, 787, 224 P.2d 814].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 24, *California Judicial Council Wrongful Termination Instructions*]:

CACI No. 2400 Breach of Employment Contract--Unspecified Term "At-Will" Presumption

CACI No. 2401 Breach of Employment Contract--Unspecified Term--Essential Factual Elements

CACI No. 2402 Breach of Employment Contract--Unspecified Term--Constructive Discharge--Essential Factual Elements

CACI No. 2403 Breach of Employment Contract--Unspecified Term--Implied-in-Fact Promise Not

to Discharge Without Good Cause

CACI No. 2404 Breach of Employment Contract--Unspecified Term--"Good Cause" Defined

CACI No. 2405 Breach of Employment Contract--Unspecified Term--"Good Cause"
Defined--Misconduct

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewLabor & Employment LawEmployment RelationshipsAt-Will EmploymentDuration of EmploymentLabor & Employment LawEmployment RelationshipsAt-Will EmploymentExceptionsImplied ContractsLabor & Employment LawEmployment RelationshipsEmployment ContractsBreachLabor & Employment LawEmployment RelationshipsEmployment ContractsFormationLabor & Employment LawWrongful TerminationBreach of ContractExpress Contracts

Barbara S. de Oddone contributed to the original chapter for California Forms of Jury Instruction (Matthew Bender).
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CHAPTER 24A Matthew Bender Employment Contract Instructions
PART B. DEFINITIONS

4-24A California Forms of Jury Instruction MB 2400A.14

MB 2400A.14 Good Faith Dissatisfaction With Performance

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

When an employment contract provides that employment will continue as long as the employee's performance is satisfactory, the employer has the right to discharge the employee if the employer, in good faith, is dissatisfied with the employee's performance.

[*OPTIONAL (See Use of Instruction)*]

You must decide whether Defendant discharged Plaintiff because the Defendant, in good faith, was dissatisfied with Plaintiff's performance. If you find that this was what happened, _____ [either then the discharge did not violate the employment contract or specify that ground for discharge was proper but that jury must then determine whether procedural requirements of contract, such as notice, have been followed]. On the other hand, if you find that Defendant discharged Plaintiff for reasons other than good faith dissatisfaction with Plaintiff's performance, then the discharge was improper.

[*OPTIONAL (See Use of Instruction)*]

You are not to decide whether or not in your own opinion Plaintiff's performance was satisfactory or whether you would have discharged Plaintiff. Defendant is the sole judge of [his/her/its] satisfaction without regard to the reasonableness of [his/her/its] decision.

Authorities: *Tiffany v. Pacific Sewer Pipe Co.* (1919) 180 Cal. 700, 702-703, 182 P. 428 ; *Prevost v.*

First Western Bank (1987) 193 Cal.App.3d 1492, 1502-1503, 239 Cal.Rptr. 161 ; *Bondi v. Jewels by Edwar, Ltd.* (1968) 267 Cal.App.2d 672, 676, 73 Cal.Rptr. 494 ; *Petermann v. International Brotherhood of Teamsters* (1959) 174 Cal.App.2d 184, 189, 344 P.2d 25 ; *Crillo v. Curtola* (1949) 91 Cal.App.2d 263, 271, 204 P.2d 941 ; *Coats v. General Motors Corp.* (1934) 3 Cal.App.2d 340, 347-348, 39 P.2d 838 .

[2] Use of Instruction

This instruction should be used in wrongful discharge cases when there is an employment contract for continued employment so long as the employee's work performance is satisfactory to the employer. It should be used with the plaintiff's burden of proof instruction in MB 2400A.01.

The first paragraph states the rule of law. The second paragraph should be used to instruct the jury as to the decision it must make, assuming that this paragraph accurately describes the issue in the case. If the second paragraph is used, the third paragraph should also be used to clarify to the jury what it must decide. However, the third paragraph would not be appropriate when satisfactory performance is to be determined other than by reference to the employer's sole judgment [see [3][b], *below*]. In those cases, the instruction to the jury will have to be modified to reflect the pertinent standard for determining satisfactory performance at issue in the case.

This instruction may be supplemented with the instruction in MB 2400A.12, defining "good faith" and "bad faith."

For related Judicial Council instructions, see [3][c], *below*.

[3] Comment

[a] Employment Conditioned on Satisfactory Performance

It is a long established rule that a contract for personal services for so long as the services are satisfactory to the employer may be terminated whenever the employer is dissatisfied with those services, provided that the dissatisfaction is in good faith [*Tiffany v. Pacific Sewer Pipe Co.* (1919) 180 Cal. 700, 703, 182 P. 428].

Similarly, when an employer and an employee stipulate that the employee is to perform his or her duties in a manner deemed satisfactory by the employer, then the stipulation is equivalent to an agreement that the employee's continued employment is dependent on the employer's satisfaction with his or her services [*Coats v. General Motors Corp.* (1934) 3 Cal.App.2d 340, 347, 39 P.2d 838]. Nevertheless, the employer's conclusion that the employee's performance is unsatisfactory must be reached in good faith [*Prevost v. First Western Bank* (1987) 193 Cal.App.3d 1492, 1502-1503, 239 Cal.Rptr. 161 ; *Coats v. General Motors Corp.* (1934) 3 Cal.App.2d 340, 348, 39 P.2d 838 ; see *Rabago-Alvarez v. Dart Industries, Inc.* (1976) 55 Cal.App.3d 91, 97, 127 Cal.Rptr. 222 (termination was not because employer was dissatisfied in good faith with employee's performance but was because of employer's personal dislike for employee; therefore, termination was wrongful)].

[b] Employer's Good Faith a Jury Question

It is a question for the jury whether or not the discharge was because of the employer's good faith dissatisfaction with the employee's performance or was for other reasons not permitted by the contract or public policy [*Prevost v. First Western Bank* (1987) 193 Cal.App.3d 1492, 1502-1503, 239 Cal.Rptr. 161 ; *Bondi v. Jewels by Edwar, Ltd.* (1968) 267 Cal.App.2d 672, 676, 73 Cal.Rptr. 494 ; *Petermann v. International Brotherhood of Teamsters* (1959) 174 Cal.App.2d 184, 189, 344 P.2d 25].

The question of the reasonableness of the employer's dissatisfaction is not ordinarily a jury question. However, an exception to this rule could occur when a contract term established a standard by which satisfaction was to be measured other than by the employer's sole judgment. A second exception to this rule might be found when the special

circumstances of a particular case make the reasonableness of the employer's dissatisfaction a question of fact for the jury [*Tiffany v. Pacific Sewer Pipe Co.* (1919) 180 Cal. 700, 702, 705, 182 P. 428 ; *Crillo v. Curtola* (1949) 91 Cal.App.2d 263, 271, 204 P.2d 941 ; *Coats v. General Motors Corp.* (1934) 3 Cal.App.2d 340, 347, 39 P.2d 838].

[c] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 24, *California Judicial Council Wrongful Termination Instructions*]:

CACI No. 2403 Breach of Employment Contract--Unspecified Term--Implied-in-Fact Promise Not to Discharge Without Good Cause

CACI No. 2404 Breach of Employment Contract--Unspecified Term--"Good Cause" Defined

CACI No. 2405 Breach of Employment Contract--Unspecified Term--"Good Cause" Defined--Misconduct

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Labor & Employment Law Employment Relationships Employment Contracts Breach Labor & Employment Law Employment Relationships Employment Contracts Formation Labor & Employment Law Wrongful Termination Breach of Contract For Cause Standard

Barbara S. de Oddone contributed to the original chapter for California Forms of Jury Instruction (Matthew Bender). Stanley E. Tobin and Darrell J. Salomon contributed to the original chapter as consultants.



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CHAPTER 24A Matthew Bender Employment Contract Instructions
PART B. DEFINITIONS

4-24A California Forms of Jury Instruction MB 2400A.15

MB 2400A.15 Employment Rights Based on Length of Service

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

_____ [Employment or Seniority] rights that are based on an employee's length of service are created either by contract or by statute; they are not created merely by the fact of employment. Therefore, to find that Plaintiff had _____ [employment or seniority] rights based on [his/her] length of service, you must first find that Plaintiff and Defendant entered into a contract that created these rights.

Authorities: *Trailmobile Co. v. Whirls* (1946) 331 U.S. 40, 52-53 n. 21, 67 S.Ct. 982, 91 L.Ed. 1328 ; *Colbert v. Brotherhood of Railroad Trainmen* (9th Cir. 1953) 206 F.2d 9, 13 ; *Austin v. Southern Pacific Co.* (1942) 50 Cal.App.2d 292, 295-297, 123 P.2d 39 .

[2] Use of Instruction

This instruction should be used in wrongful termination cases when an issue is whether plaintiff had rights to employment based on his or her length of service. The issue is likely to arise in the context of a reduction in the work force, either with regard to the selection of the plaintiff for layoff or the failure to recall plaintiff to employment when vacancies occurred. However, the issue can also arise with regard to disputes over accrued benefits, such as vacation pay or severance pay, when the benefit is measured by length of service. The instruction presumes that the issue is one of contractual rights based on length of service rather than statutory rights.

This instruction should be used immediately following an instruction on the plaintiff's burden of proof [*see, e.g., MB 2400A.02*]. For instructions defining employment contracts, express and implied, see *MB 2400A.10* and *MB 2400A.16*. For instructions on contract formation and interpretation generally, see Ch. 3, *California Judicial Council Contracts Instructions*, Ch. 3A, *Matthew Bender Formation of Contract Instructions*, and Ch. 3B, *Matthew Bender Interpretation of Contract Instructions*.

This instruction may be followed by an instruction drafted to fit the particular contract terms at issue in the case. It should instruct the jury that if they find that a contract existed between the parties, they must then decide what the terms are and whether the plaintiff has satisfied his or her burden of proof on the particular employment rights claimed.

[3] Comment

[a] Function of Seniority Rights

Employment rights based on length of service are commonly referred to as "seniority rights." These rights may be used to determine the employee's right to certain incidents of employment. Thus, such day-to-day matters as the order in which work shifts or vacation dates are selected may proceed by seniority, with each employee's priority of choice depending on how great his or her length of service is compared to the other employees in the reference group. Similarly, the amount of certain benefits, such as paid vacation, sick leave, and severance pay may depend on how great an employee's length of service is. "A 'seniority system' is a scheme that, alone or in tandem with non-seniority criteria, allots to employees ever-improving employment rights and benefits as their relative lengths of pertinent employment increase" [*California Brewers Ass'n. v. Bryant* (1980) 444 U.S. 598, 605-606, 100 S.Ct. 814, 63 L.Ed.2d 55 (citations omitted)].

[b] Statutory Seniority Rights--Public Employees

In the public sector, seniority rights often are established by statute. For example, certain classified and certificated public school employees in California whose employment is governed by the Education Code have seniority rights created by statute. The statutes govern the order in which those employees may be laid off in the event of a reduction in the work force. Ordinarily, the principle of last hired, first laid off governs, together with a specified period during which seniority rights continue and govern the order of recall to work [*Educ. Code* §§ 44956, 45308].

[c] Contractual Seniority Rights--Private Sector Employees

In the private sector, seniority rights created by contract occur most commonly in the context of collective bargaining between an employer and a union that represents a unit of nonmanagement employees of the employer [*Trailmobile Co. v. Whirls* (1946) 331 U.S. 40, 53 n. 21, 67 S.Ct. 982, 91 L.Ed. 1328 ; *Austin v. Southern Pacific Co.* (1942) 50 Cal.App.2d 292, 296, 123 P.2d 39]. Nevertheless, nonunion employees may work under express employment policies or established employment practices that use seniority for certain purposes. However, unlike the collective bargaining context, in which contracts containing extensive seniority systems are commonly negotiated and nearly always reduced to writing by the employer and the union, the use of seniority in the nonunion setting may not be strict or extensive, and seniority may, in fact, be treated by the employer only as a factor to be considered in certain circumstances and one that may only be determinative in a personnel decision when two employees are otherwise on an equal footing [see, e.g., *Hepp v. Lockheed-California Co.* (1978) 86 Cal.App.3d 714, 718 n. 2, 150 Cal.Rptr. 408 (employer had recall policy applicable to laid off employees providing that "the placement decision [of an employee on layoff] should consider recency of layoff together with seniority date")].

[d] Plaintiff's Burden to Prove Origin of Seniority Rights

In *Austin v. Southern Pacific Company*, the court held that an employee failed to state a cause of action based on a claim of violation of seniority rights when the employee failed to allege when and how his right to a certain seniority status was established, "whether by an express promise made to him or to somebody acting on his behalf; whether by statute, or by a rule, practice, or custom of the employer; its extent or limit; by what terms or to what extent the employer bound itself to respect it, how it might be forfeited, lost or otherwise terminated, and perhaps how it affected [the plaintiff's] contemporaries and juniors in service" [*Austin v. Southern Pacific Co.* (1942) 50 Cal.App.2d 292, 295, 123 P.2d 39].

Similarly, in *California Brewers Association v. Bryant*, the United States Supreme Court concluded as follows [*California Brewers Ass'n v. Bryant* (1980) 444 U.S. 598, 607, 100 S.Ct. 814, 63 L.Ed.2d 55 (footnotes omitted)]:

[E]very seniority system must include rules that delineate how and when the seniority timeclock begins ticking, as well as rules that specify how and when a particular person's seniority may be forfeited. Every seniority system must also have rules that define which passages of time will 'count' toward the accrual of seniority and which will not. Every seniority system must, moreover, contain rules that particularize the types of employment conditions that will be governed or influenced by seniority, and those that will not.

Thus, when a plaintiff claims breach of an employment contract based on entitlement to certain seniority rights, he or she is obligated to show the origin of these rights, their scope, their limits and conditions for loss or forfeiture, and how plaintiff's alleged rights fit in with the rights, if any, of his or her co-workers.

[e] Seniority Rights Not Inherent in Employment Relationship

An important reason for clarifying to the jury that seniority rights are contractual and "not inherent, natural or constitutional" rights [*Colbert v. Brotherhood of Railroad Trainmen* (9th Cir. 1953) 206 F.2d 9, 13], is that the consequences of an erroneous finding can be substantial in cases when there is no express or clearly implied contractual agreement on a seniority system. First, when an erroneous finding of seniority rights is made in favor of one or more employees who are parties to a particular legal action, it can have a negative impact on the employment status of other employees. For example, an erroneous finding that one or more employees have seniority rights not to be laid off before more junior co-workers, or rights to be recalled to work before any co-workers with less seniority, may, as a practical matter, preclude the use of criteria other than length of service--such as merit--with regard to decisions about other employees' employment status even though the other employees were not involved in the particular legal action. Moreover, when an employer is forced to lay off employees due to economic problems, such a finding in error could thwart its attempts to regain economic health by preventing the employer from keeping only the employees judged to be the most qualified, productive, and valuable to the enterprise.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Labor & Employment Law Employment Relationships Employment Contracts Breach Labor & Employment Law Employment Relationships Employment Contracts Formation Labor & Employment Law Wrongful Termination Breach of Contract Express Contracts Labor & Employment Law Wrongful Termination Breach of Contract For Cause Standard

Barbara S. de Oddone contributed to the original chapter for California Forms of Jury Instruction (Matthew Bender). Stanley E. Tobin and Darrell J. Salomon contributed to the original chapter as consultants.



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CHAPTER 24A Matthew Bender Employment Contract Instructions
PART B. DEFINITIONS

4-24A California Forms of Jury Instruction MB 2400A.16

MB 2400A.16 Implication of Contract Terms--Limitations

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

An obligation on the part of one of the parties to an employment contract may not be implied by the surrounding circumstances if the parties have an express understanding as to that obligation.

Likewise, a term of the contract between Plaintiff and Defendant may not be implied if it is inconsistent or in conflict with an express term of the contract, or if the contract can be performed without such an implied term.

[*OPTIONAL (See Use of Instruction)*]

An obligation may not be implied unless it appears from the language used in the contract that the obligation was so clearly within the contemplation of the Plaintiff and the Defendant that they considered it unnecessary to express it.

Authorities: Civ. Code §§ 1655-1656; *Dore v. Arnold Worldwide, Inc.* (2006) 39 Cal.4th 384, 392, 46 Cal.Rptr.3d 668, 139 P.3d 56 ; *Lippman v. Sears, Roebuck & Co.* (1955) 44 Cal.2d 136, 142, 280 P.2d 775 ; *Tanner v. Title Ins. & Trust Co.* (1942) 20 Cal.2d 814, 824, 129 P.2d 383 ; *Harden v. Maybelline Sales Corp.* (1991) 230 Cal.App.3d 1550, 1555, 282 Cal.Rptr. 96 ; *Anderson v. Savin Corp.* (1988) 206 Cal.App.3d 356, 364, 254 Cal.Rptr. 627 ; *Gerdlund v. Electronic Dispensers International* (1987) 190 Cal.App.3d 263, 277-278, 235 Cal.Rptr. 279 ; *Brandt v. Lockheed Missiles & Space Co.* (1984) 154 Cal.App.3d 1124, 1128-1130, 201 Cal.Rptr. 746 ; *Shapiro v. Wells Fargo Realty Advisors* (1984) 152 Cal.App.3d 467, 482, 199 Cal.Rptr. 613 ; *Wal-Noon Corp. v. Hill* (1975) 45 Cal.App.3d 605, 613, 119 Cal.Rptr. 646 ; *Addiego v. Hill* (1965) 238 Cal.App.2d 842, 846-847, 48 Cal.Rptr. 240 ; *Crossen v. Foremost-McKesson, Inc.*

(*N.D. Cal. 1982*) 537 *F.Supp.* 1076, 1077 .

[2] Use of Instruction

This instruction should be used in actions when an implied contractual obligation is at issue; an example is an action for wrongful termination of an implied employment contract terminable only for good cause. The first two paragraphs should be used when evidence of express contractual provisions or agreements exists that would negate some or all of the duties that the jury might otherwise imply under the facts and circumstances shown by the evidence.

For related Judicial Council instructions, see [3][b], *below*.

[3] Comment

[a] Implied Contract Terms

Terms that are needed to make the contract reasonable or conformable to usage are to be implied, provided that the contract manifests no contrary intent [*Civ. Code* § 1655]. Further, all matters considered incidental to the contract or necessary to carry it into effect are implied unless some of the matters are expressly mentioned in the contract, in which case all other things of the same class are to be deemed excluded [*Civ. Code* § 1656]. Consequently, the law will not imply a promise that is contrary to a contract's express terms [*Harden v. Maybelline Sales Corp.* (1991) 230 *Cal.App.3d* 1550, 1555, 282 *Cal.Rptr.* 96 ; *Anderson v. Savin Corp.* (1988) 206 *Cal.App.3d* 356, 364, 254 *Cal.Rptr.* 627 ; *Gerdlund v. Electronic Dispensers International* (1987) 190 *Cal.App.3d* 263, 277-278, 235 *Cal.Rptr.* 279 ; *Shapiro v. Wells Fargo Realty Advisors* (1984) 152 *Cal.App.3d* 467, 482, 199 *Cal.Rptr.* 613 ; see *Guz v. Bechtel Nat., Inc.* (2000) 24 *Cal.4th* 317, 348-353, 100 *Cal.Rptr.2d* 352, 8 *P.3d* 1089 (implied covenant of good faith and fair dealing cannot impose substantive duties or limits on contracting parties beyond those incorporated in specific terms of their agreement); *Agosta v. Astor* (2004) 120 *Cal.App.4th* 596, 603-605, 15 *Cal.Rptr.3d* 565 (express contractual provision that employer "is an 'at will' employer" establishes at-will employment and cannot be overcome by proof of implied contrary understanding); *Starzynski v. Capital Pub. Radio, Inc.* (2001) 88 *Cal.App.4th* 33, 37-39, 105 *Cal.Rptr.2d* 525 (at-will provision in express written agreement, signed by employee, may not be overcome by proof of implied contrary understanding); *Brandt v. Lockheed Missiles & Space Co.* (1984) 154 *Cal.App.3d* 1124, 1128-1130, 201 *Cal.Rptr.* 746].

For example, the California Supreme Court held that an employment contract stating that the employment was "at will" and terminable "at any time" unambiguously created an at-will employment relationship, even though it did not also state that termination could be without cause. Because there was no ambiguity about the at-will nature of the employment, additional contractual provisions regarding a 90-day probationary period and annual reviews did not expressly or impliedly create a right to be terminated only for cause [*Dore v. Arnold Worldwide, Inc.* (2006) 39 *Cal.4th* 384, 393, 46 *Cal.Rptr.3d* 668, 139 *P.3d* 56].

Similarly, a federal district court held that an employment contract containing an obligation not to terminate absent good cause could not be implied when the employer and employee had an agreement that either the employer or the employee could terminate the contract on 60 days' notice and that, should the employee be dismissed for cause, no notice would be given. The court stated: "There cannot be a valid, express contract, and an implied contract each embracing the same subject but requiring different results" [*Crossen v. Foremost-McKesson Inc.* (*N.D. Cal. 1982*) 537 *F.Supp.* 1076, 1077 , citing *Wal-Noon Corp. v. Hill* (1975) 45 *Cal.App.3d* 605, 613, 119 *Cal.Rptr.* 646 ; see *Anderson v. Savin Corp.* (1988) 206 *Cal.App.3d* 356, 364, 254 *Cal.Rptr.* 627 (allegations of implied-in-fact agreement to terminate only for good cause cannot rebut express provision that the contract is terminable at will); see also *Brandt v. Lockheed Missiles & Space Co.* (1984) 154 *Cal.App.3d* 1124, 1130, 201 *Cal.Rptr.* 746 (court held that employer's adherence to terms of its express personnel policy (Special Invention Award policy) could not violate any implied covenant of good faith and fair dealing to employees who claimed amount awarded was too little)]. This accords with the general rules

articulated in *Lippman v. Sears, Roebuck & Co.* [*Lippman v. Sears, Roebuck & Co. (1955) 44 Cal.2d 136, 142, 280 P.2d 775*]:

(1) the implication must arise from the language used or it must be indispensable to effectuate the intention of the parties; (2) it must appear from the language used that it was so clearly within the contemplation of the parties that they deemed it unnecessary to express it; (3) implied covenants can only be justified on the grounds of legal necessity; (4) a promise can be implied only where it can be rightfully assumed that it would have been made if attention had been called to it; (5) there can be no implied covenant where the subject is completely covered by the contract.

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 3, *California Judicial Council Contracts Instructions*, and Ch. 24, *California Judicial Council Wrongful Termination Instructions*]:

CACI No. 305 Implied-in-Fact Contract

CACI No. 2403 Breach of Employment Contract--Unspecified Term--Implied-in-Fact Promise Not to Discharge Without Good Cause

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Contracts Law Contract Interpretation Good Faith & Fair Dealing Labor & Employment Law Employment Relationships Employment Contracts Breach Labor & Employment Law Employment Relationships Employment Contracts Formation Labor & Employment Law Wrongful Termination Breach of Contract For Cause Standard Labor & Employment Law Wrongful Termination Breach of Contract Implied Contracts

Barbara S. de Oddone contributed to the original chapter for California Forms of Jury Instruction (Matthew Bender).

Stanley E. Tobin and Darrell J. Salomon contributed to the original chapter as consultants.



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CHAPTER 24A Matthew Bender Employment Contract Instructions PART B. DEFINITIONS

4-24A California Forms of Jury Instruction MB 2400A.17

MB 2400A.17 Specified Condition of Definite Duration

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Some contracts are written such that they may be terminated only on the occurrence of a specified event. Such a specified condition may be classified as either of definite or indefinite duration. If the specified condition is of indefinite duration, that condition need not occur before the contract is terminated. If the specified condition is of definite duration, that condition must occur before the contract is terminated.

A specified condition is one for a definite duration only when there is an ascertainable event that necessarily implies termination and this event can be measured in any reasonable manner.

Authority: *Asmus v. Pacific Bell* (2000) 23 Cal.4th 1, 16-18, 96 Cal.Rptr.2d 179, 999 P.2d 71 .

[2] Use of Instruction

This instruction should be used when the issue is whether a contract was effectively modified or terminated even though modification or termination could be had only on the occurrence of a specified event and the specified event apparently has not occurred. The instruction should be used in conjunction with the instruction in MB 2400A.32 regarding the unilateral termination or modification of a unilateral employment contract created by an employment policy.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Contracts Law Types of Contracts Unilateral Contracts General Overview Labor & Employment Law Employment Relationships Employment Contracts Breach Labor & Employment Law Wrongful Termination Breach of Contract Express Contracts Labor & Employment Law Wrongful

TerminationBreach of ContractFor Cause StandardLabor & Employment LawWrongful TerminationBreach of
ContractImplied Contracts

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CHAPTER 24A Matthew Bender Employment Contract Instructions
PART B. DEFINITIONS

4-24A California Forms of Jury Instruction MB 2400A.18 through MB 2400A.29

[Reserved]

MB 2400A.18[Reserved]



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CHAPTER 24A Matthew Bender Employment Contract Instructions
PART C. DEFENSES

4-24A California Forms of Jury Instruction MB 2400A.30

MB 2400A.30 Statute of Frauds--Affirmative Defense

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] PROPOSED INSTR. NO. _____

In this case, Defendant claims that the employment agreement between [him/her/it] and Plaintiff cannot be enforced because it was a type of agreement that, under the law, is invalid if it is not in writing. Defendant has the burden of proving, by a preponderance of the evidence, that the agreement between [him/her/it] and Plaintiff was a type of agreement that was required by law to be in writing.

If an employment agreement according to its terms cannot be fully performed or lawfully terminated within one year of the date that it is made, then it must be in writing and signed by the party against whom the agreement is to be enforced. If it is not, then it is invalid and cannot be enforced.

If there is any possibility, at the time an employment agreement is made, that it can be fully performed within one year or that it can be lawfully terminated within one year, then the law does not require that it be in writing or that it be signed to be valid and enforceable. This is so even if the parties do not expect it to be fully performed or lawfully terminated within one year, and it is so even if it is unlikely that it can or will be fully performed or lawfully terminated within one year.

You may not decide whether the employment agreement involved in this case was required to be in writing or signed by looking at what happened after the agreement was made. You must decide that question by determining (1) what the terms of the agreement were; and (2) whether, under the terms of the agreement, there was any possibility of full performance or lawful termination within one year at the time the agreement was made. [*If applicable:* The fact that it ultimately turned out that the agreement was not fully performed or lawfully terminated within one year cannot have any bearing on your decision.]

[CHOOSE ONE OR MORE OF THE FOLLOWING (See Use of Instruction)]

If you find that, under the terms of the employment agreement involved in this case, Defendant had the right to terminate Plaintiff's employment _____ [specify alleged terms relied on by plaintiff, e.g., if (he/she/it) was dissatisfied with Plaintiff's services, by paying Plaintiff a specified sum of money, if (his/her/its) gross sales fell below \$50,000 for three consecutive months], then you must find that the agreement could have been [fully performed/lawfully terminated] within one year and you must therefore find that the agreement was not required to be in writing or to be signed to be valid and enforceable.

[or]

If you find that, under the terms of the employment agreement involved in this case, Plaintiff had the right to leave or terminate [his/her/its] employment _____ [specify alleged terms relied on by plaintiff, e.g., at any time, if (his/her/its) commission income fell below \$5,000 for three consecutive months], then you must find that the agreement could have been [fully performed/lawfully terminated] within one year and you must therefore find that the agreement was not required to be in writing or to be signed to be valid and enforceable.

[or]

If you find that, under the terms of the employment agreement involved in this case, the agreement would have terminated _____ [specify alleged occurrence or event relied on by plaintiff, e.g., if Defendant was acquired by or merged with ABC Co.], then you must find that the agreement could have been [fully performed/lawfully terminated] within one year and you must therefore find that the agreement was not required to be in writing or to be signed to be valid and enforceable.

Authorities: Civ. Code § 1624(a)(1); *Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 672-673, 254 Cal.Rptr. 211, 765 P.2d 373; *White Lighting Co. v. Wolfson* (1968) 68 Cal.2d 336, 342-344, 66 Cal.Rptr. 697, 438 P.2d 345; *San Francisco Brewing Corp. v. Bowman* (1959) 52 Cal.2d 607, 615, 619, 343 P.2d 1; *Abeyta v. Superior Court* (1993) 17 Cal.App.4th 1037, 1042-1043; *Steward v. Mercy Hospital* (1987) 188 Cal.App.3d 1290, 1295-1296, 233 Cal.Rptr. 881; *Munoz v. Kaiser Steel Corp.* (1984) 156 Cal.App.3d 965, 972, 975-979, 203 Cal.Rptr. 345; *Lacy v. Bennett* (1962) 207 Cal.App.2d 796, 800-801, 24 Cal.Rptr. 806; *Connelly v. Venus Foods, Inc.* (1959) 174 Cal.App.2d 582, 586-587, 345 P.2d 117; *El Rio Oils v. Pacific Coast Asphalt Co.* (1949) 95 Cal.App.2d 186, 194, 213 P.2d 1.

[2] Use of Instruction

This instruction should be used in breach of contract actions involving wrongful termination when the statute of frauds is raised as an affirmative defense.

The issue of the applicability of the statute of frauds may arise in the context of a wrongful termination action based on an oral or implied employment contract that the plaintiff claims requires employment for more than one year.

This instruction assumes that the plaintiff is not contending that there is a writing that is sufficient to satisfy the requirements of the statute of frauds. If the plaintiff is making such a contention, the instruction should be modified and supplemented accordingly.

Usually, the only factual issues raised by a statute of frauds defense relate to the terms of the agreement. Once the terms

are ascertained, the question of whether the agreement could have been performed or terminated within a year ordinarily becomes one of law. Therefore, this instruction assumes that the court will determine the legal effect of the terms and conditions that the plaintiff relies on to take the agreement out of the scope of the statute of frauds (i.e., whether they made it possible for the agreement to be performed or terminated within a year) and will instruct the jury accordingly.

Along with this instruction, an instruction defining preponderance of the evidence as the standard of proof must also be given [see, e.g., Ch. 2, *California Judicial Council Evidence Instructions*, CACI No. 200 ("More Likely True than Not True")].

For general instructions on defenses to actions for breach of contract, including instructions related to the statute of frauds, see Ch. 3, *California Judicial Council Contracts Instructions*, CACI No. 330- CACI No. 337, and Ch. 3F, *Matthew Bender Contract Defenses Instructions*.

[3] Comment

[a] Requirements of Statute of Frauds

To be valid and enforceable, an employment contract that by its terms is not to be performed within one year of its making must be evidenced by a writing that is signed by the party to be charged [*Civ. Code* § 1624(a)(1); *San Francisco Brewing Corp. v. Bowman* (1959) 52 Cal.2d 607, 615, 619, 343 P.2d 1 ; *Munoz v. Kaiser Steel Corp.* (1984) 156 Cal.App.3d 965, 971-974, 203 Cal.Rptr. 345].

When an employment contract alleged by the plaintiff is not written, and it appears, either expressly or by necessary implication from its subject matter, that it could not have been performed or lawfully terminated within a year of its making, its enforcement is barred by the statute of frauds [*San Francisco Brewing Corp. v. Bowman* (1959) 52 Cal.2d 607, 619, 343 P.2d 1 ; *Lacy v. Bennett* (1962) 207 Cal.App.2d 796, 800, 24 Cal.Rptr. 806 ; *Tostevin v. Douglas* (1958) 160 Cal.App.2d 321, 327-328, 325 P.2d 130]. In *San Francisco Brewing Corp. v. Bowman*, the court approved the following instruction regarding the jury's duty to determine whether the contract was contemplated to extend beyond one year [*San Francisco Brewing Corp. v. Bowman* (1959) 52 Cal.2d 607, 615, 619, 343 P.2d 1]:

If you find that there was an agreement between the parties which would impose an obligation upon plaintiff to continue for a period of more than one year, then defendant cannot recover unless such agreement was in writing.

If you find that the parties agreed that plaintiff would continue defendant as its distributor for a reasonable time, then you must determine what period would constitute such reasonable time; if, however, such reasonable time would exceed one year, then said agreement would not be binding upon plaintiff unless it was in writing.

[b] Interpretation of When Contract May Be Performed Within One Year

When there are conflicts in the evidence and the inferences to be drawn from the evidence as to whether the parties contemplated a contract that could not be performed within a year or one that would require longer than a year, it is up to the jury to determine the facts [*Connelly v. Venus Foods, Inc.* (1959) 174 Cal.App.2d 582, 586, 345 P.2d 117].

An employment contract is not within the scope of *Civ. Code* § 1624(a)(1), and is thus not required to be in writing, if, at the time it is made, there is any possibility that it can be fully performed or lawfully terminated within one year [*Newman v. Emerson Radio Corp.* (1989) 48 Cal.3d 973, 978, 993, 258 Cal.Rptr. 592, 772 P.2d 1059 ; *Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 673, 254 Cal.Rptr. 211, 765 P.2d 373 (agreement restricting grounds for discharge can be completely performed within one year); *White Lighting Co. v. Wolfson* (1968) 68 Cal.2d 336, 342-344, 66 Cal.Rptr. 697, 438 P.2d 345 ; *Abeyta v. Superior Court* (1993) 17 Cal.App.4th 1037, 1042-1043 ; *Steward v. Mercy*

Hospital (1987) 188 Cal.App.3d 1290, 1295-1296, 233 Cal.Rptr. 881 ; *Gray v. Superior Court* (1986) 181 Cal.App.3d 813, 822, 226 Cal.Rptr. 570 ; *Plumlee v. Poag* (1984) 150 Cal.App.3d 541, 548-551, 198 Cal.Rptr. 66]. This rule applies regardless of whether the parties contemplated performance or termination within a year and regardless of how likely or unlikely it was that the agreement would be performed or terminated within a year [*Lacy v. Bennett* (1962) 207 Cal.App.2d 796, 800-801, 24 Cal.Rptr. 806 ; *El Rio Oils v. Pacific Coast Asphalt Co.* (1949) 95 Cal.App.2d 186, 194, 213 P.2d 1]. Thus, an employment contract is not required to be in writing in any of the following situations:

- The contract allows one or both parties to terminate the employment relationship at will [*White Lighting Co. v. Wolfson* (1968) 68 Cal.2d 336, 342-344, 66 Cal.Rptr. 697, 438 P.2d 345 (statute of frauds inapplicable when oral employment contract did not prohibit employee from terminating employment at will); *Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 672-673, 254 Cal.Rptr. 211, 765 P.2d 373 (following *White Lighting Co.*); *Steward v. Mercy Hospital* (1987) 188 Cal.App.3d 1290, 1295-1296, 233 Cal.Rptr. 881 (in accord)];
- The contract permits one of the parties to terminate the contract on the occurrence of a specified condition, and it is possible the condition may occur within one year [*Newman v. Emerson Radio Corp.* (1989) 48 Cal.3d 973, 976-977, 993, 258 Cal.Rptr. 592, 772 P.2d 1059 ; *Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 675, 254 Cal.Rptr. 211, 765 P.2d 373 (statute of frauds inapplicable when employer had right to terminate employment for cause); accord *Abeyta v. Superior Court* (1993) 17 Cal.App.4th 1037, 1042-1043 ; *Steward v. Mercy Hospital* (1987) 188 Cal.App.3d 1290, 1295-1296, 233 Cal.Rptr. 881 (in accord); *Plumlee v. Poag* (1984) 150 Cal.App.3d 541, 548-551, 198 Cal.Rptr. 66 (statute of frauds inapplicable when 10-year oral employment contract terminable by employer if employee failed to reduce annual shrinkage of supplies to designated level in first year); *Burgermeister Brewing Corp. v. Bowman* (1964) 227 Cal.App.2d 274, 281, 38 Cal.Rptr. 597 (statute of frauds inapplicable when manufacturer had right to terminate oral distributorship contract if distributor failed to exercise best efforts); *Pecarovich v. Becker* (1952) 113 Cal.App.2d 309, 315-316, 248 P.2d 123 (statute of frauds inapplicable when employer had right to terminate three-year employment contract by making specified payment at end of first year)]; or
- By express provision or necessary implication, the contract is to terminate on the occurrence of a specified condition or event, and it is possible that the condition or event may occur within one year [*Mangini v. Wolfschmidt, Ltd.* (1961) 192 Cal.App.2d 64, 75-76, 13 Cal.Rptr. 503 (statute of frauds inapplicable to oral contract employing plaintiff to distribute liquor when laws or regulations prohibiting sale or distribution of liquor could have been enacted within one year); cf. *Leonard v. Rose* (1967) 65 Cal.2d 589, 592, 55 Cal.Rptr. 916, 422 P.2d 604 (statute of frauds inapplicable to oral agreement to support woman for life when she could have died within one year); *Gaskins v. Security-First Nat. Bank* (1939) 30 Cal.App.2d 409, 418-419, 86 P.2d 681 (statute of frauds inapplicable to oral agreement to care for three minor children until they reached majority when they all could have died within one year)].

[c] When Defendant Is Estopped From Asserting Statute of Frauds

"The purpose of the statute of frauds is to prevent enforcement of alleged promises that were never made; it is not and never has been to justify the contractors in repudiating promises that were in fact made" [*Lockwood v. Smigel* (1971) 18 Cal.App.3d 800, 803, 96 Cal.Rptr. 289]. Thus, a plaintiff may enforce the oral contract by proving that the defendant is estopped from asserting the statute either on the ground that the defendant would thereby be unjustly enriched or on the ground that the plaintiff's rights under the alleged contract were so valuable that unconscionable injury would result from refusing to enforce the oral contract [*Ruinello v. Murray* (1951) 36 Cal.2d 687, 689, 227 P.2d 251 ; *Munoz v. Kaiser Steel Corp.* (1984) 156 Cal.App.3d 965, 971-972, 203 Cal.Rptr. 345]. In *Munoz v. Kaiser Steel Corp.*, the court held that the plaintiff, who claimed an oral contract of at least three years employment and sued for breach when he was laid off nearly six months after being hired, could not establish estoppel so as to avoid the statute of frauds. He had been

paid the reasonable value of his services while employed, he had not been induced to give up other employment to work for the defendant, and there had been no promise to reduce the contract to writing so as to justify enforcement of the oral contract to avoid unconscionable injury to the plaintiff [*Munoz v. Kaiser Steel Corp.* (1984) 156 Cal.App.3d 965, 972-974, 203 Cal.Rptr. 345].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Labor & Employment Law Employment Relationships Employment Contracts Breach Labor & Employment Law Employment Relationships Employment Contracts Statutes of Frauds Labor & Employment Law Wrongful Termination Defenses General Overview

Barbara S. de Oddone contributed to the original chapter for California Forms of Jury Instruction (Matthew Bender).

Stanley E. Tobin and Darrell J. Salomon contributed to the original chapter as consultants.



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CHAPTER 24A Matthew Bender Employment Contract Instructions
PART C. DEFENSES

4-24A California Forms of Jury Instruction MB 2400A.31

MB 2400A.31 Termination of Contract in Accordance With Contract's Terms--Burden of Proof**[1] Instruction**

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Defendant must prove that [he/she/it] terminated Plaintiff's employment contract in the manner authorized by the terms of that contract.

Thus, if Defendant establishes that _____ [specify contract provision(s) that authorize termination of plaintiff's contract, e.g., Defendant had an option to terminate the contract on giving 45 days' written notice to Plaintiff by certified mail] and that Defendant in fact acted in accordance with these terms, then you are instructed that the contract was thereby terminated, and Defendant was discharged of all further obligations under the contract.

Authorities: *Wise v. Southern Pac. Co.* (1970) 1 Cal.3d 600, 604-605, 83 Cal.Rptr. 202, 463 P.2d 426 ; *Kuffel v. Seaside Oil Co.* (1970) 11 Cal.App.3d 354, 368, 90 Cal.Rptr. 209 ; *Mutz v. Wallace* (1963) 214 Cal.App.2d 100, 111, 29 Cal.Rptr. 170 ; *Pecarovich v. Becker* (1952) 113 Cal.App.2d 309, 317-318, 248 P.2d 123 ; *Nattini v. Dewey* (1950) 96 Cal.App.2d 545, 549, 216 P.2d 46 ; *Siegel v. Lewis* (1946) 74 Cal.App.2d 86, 91, 168 P.2d 50 .

[2] Use of Instruction

This instruction should be used in a breach of contract case when the defendant has raised the defense that the employment contract with the plaintiff gave the defendant the option to terminate the contract and that defendant had, in fact, exercised its option to do so in accordance with the contract's requirements.

Along with this instruction, an instruction defining preponderance of the evidence as the applicable standard of proof must also be given [see, e.g., Ch. 2, *California Judicial Council Evidence Instructions*, CACI No. 200 ("More Likely

True than Not True")].

[3] Comment

[a] Option to Terminate

A contract of employment may contain a valid option to terminate the contract on specified conditions. Reservation of a right to terminate, for example, for cause, or on written notice or a definite period of notice, or on the happening of some extrinsic event or based on some other objective standard, is valid because these restrictions provide sufficient legal detriment to constitute consideration and, thus, an enforceable obligation [*R. J. Cardinal Co. v. Ritchie* (1963) 218 Cal.App.2d 124, 143, 32 Cal.Rptr. 545 ; *Mutz v. Wallace* (1963) 214 Cal.App.2d 100, 111, 29 Cal.Rptr. 170].

[b] Exercising Option to Terminate

If the defendant has reserved an option to terminate a specific term employment contract before its expiration, the termination clause must be exercised in the manner prescribed by the contract; if it is not, then the employment contract's term is unaffected [*Kuffel v. Seaside Oil Co.* (1970) 11 Cal.App.3d 354, 368, 90 Cal.Rptr. 209 ; *Nattini v. Dewey* (1950) 96 Cal.App.2d 545, 549, 216 P.2d 46]. However, if the parties have agreed to a termination clause that requires the employer to pay money to exercise its option to cancel the contract, then the measure of damages for the employer's breach by nonperformance is the money the employer would have to pay to terminate the contract [*Pecarovich v. Becker* (1952) 113 Cal.App.2d 309, 317-318, 248 P.2d 123].

Once an option to terminate a contract is exercised, the contract is extinguished and the parties are discharged [*Siegel v. Lewis* (1946) 74 Cal.App.2d 86, 91, 168 P.2d 50 ; see *Civ. Code* § 1473 which states: "Full performance of an obligation, by the party whose duty it is to perform it, ... extinguishes it"].

[c] Establishing Valid Exercise of Option

If a "plaintiff charges breach of contract by a defendant who undertook to unilaterally terminate the contractual relationship, ... defendant if it is to prevail must establish in court that the termination was authorized under the terms of the contract" [*Wise v. Southern Pac. Co.* (1970) 1 Cal.3d 600, 605, 83 Cal.Rptr. 202, 463 P.2d 426]. In *Wise*, the employer had terminated the employee pursuant to a specific clause in the employment contract (a collective bargaining contract under the Railway Labor Act). The clause stated as follows [*Wise v. Southern Pac. Co.* (1970) 1 Cal.3d 600, 605, 83 Cal.Rptr. 202, 463 P.2d 426]:

No employee shall be disciplined or dismissed without a fair hearing by the proper officer of the Company. Suspension in proper cases pending a hearing which shall be prompt, shall not be deemed a violation of this rule. At a reasonable time prior to the hearing, such employee shall in writing be apprised of the precise charge against him, be given reasonable opportunity to secure the presence of necessary witnesses, and shall have the right to be represented as provided for in Rule 38. If it is found that an employee has been unjustly suspended or dismissed from the service, such employee shall be reinstated with his seniority rights unimpaired, and compensated for the wage loss, if any, resulting from said suspension or dismissal ...

The Court concluded that the defendant, to establish its defense to the plaintiff's breach of contract action for wrongful discharge, would have to prove that all of the contractual conditions were met, namely, that the plaintiff received notice of the charge, that the plaintiff was guilty as charged, that the acts charged constituted good cause for termination, and that the hearing was fair.

The Court in *Wise* did not discuss in any detail its assignment to the defendant of the burden of proving the contract's termination in accordance with the contract's requirements. To the extent that proper exercise of an option to terminate

the contract unilaterally can be analyzed as a defense of excuse or justification for nonperformance, the Court's assignment of the burden of proof to the defendant is consistent with the observation of the California Supreme Court in *Eucalyptus Growers Association v. Orange County Nursery & Land Co.* [*Eucalyptus G. Assn. v. Orange C. N. & L. Co.* (1917) 174 Cal. 330, 335, 163 P. 45] that defenses that are in the category of excuses for nonperformance, such as the plaintiff's breach or impossibility of performance, must be pleaded and proved by the defendant when they involve matters that are not apparent on the contract's face or embraced within the facts alleged in the complaint.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Evidence Procedural Considerations Burdens of Proof General Overview Labor & Employment Law Employment Relationships Employment Contracts Breach Labor & Employment Law Wrongful Termination Defenses General Overview

Barbara S. de Oddone contributed to the original chapter for California Forms of Jury Instruction (Matthew Bender).

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CHAPTER 24A Matthew Bender Employment Contract Instructions
PART C. DEFENSES

4-24A California Forms of Jury Instruction MB 2400A.32

MB 2400A.32 Unilateral Modification/Termination of Unilateral Employment Contract--Burden of Proof

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

In this case, Defendant claims that the employment agreement between [him/her/it] and Plaintiff was [modified/terminated] by Defendant and, consequently, does not [consist of the terms asserted by plaintiff/exist].

If an employment agreement has been created unilaterally through a written policy of the employer, and the policy's duration is not limited by its terms, the employer may unilaterally [modify/terminate] that agreement after a reasonable time, on reasonable notice and without interfering with the employees' vested benefits.

If you find that the agreement was created by a policy that was of unlimited duration, was [modified/terminated] after it was in place for a reasonable period of time, that Defendant gave reasonable notice that [he/she/it] intended to [modify/terminate] the agreement, and that [modification/termination] of the agreement did not interfere with Plaintiff's vested benefits, you must find that [the/an] employment agreement between Defendant and Plaintiff [consists of the modified terms/does not exist].

Authority: Asmus v. Pacific Bell (2000) 23 Cal.4th 1, 16-18, 96 Cal.Rptr.2d 179, 999 P.2d 71 .

[2] Use of Instruction

This instruction should be used in actions for wrongful termination in breach of contract when the employer asserts that it has unilaterally modified or terminated the employment contract. The instruction should be used in conjunction with the instruction regarding the definition of a specified condition of indefinite duration found in MB 2400A.17.

[3] Comment

[a] Modification or Termination of Unilateral Employment Contract

An employer may unilaterally modify or terminate an employment agreement that was created unilaterally by the employer's policy if the policy by its terms is of indefinite duration. To be an effective modification or termination (1) the policy must have been in effect for a reasonable amount of time, (2) the employer must give reasonable notice to the employees of its intent to change the policy, and (3) the change must not interfere with the employees' vested benefits [*Asmus v. Pacific Bell* (2000) 23 Cal.4th 1, 16-18, 96 Cal.Rptr.2d 179, 999 P.2d 71]. In *Asmus*, plaintiffs argued that the employer needed to give additional consideration to the employees to modify or terminate the contract created by the employment policy. However, the Court found that if the policy was of indefinite duration, additional consideration need not be given if the employer complied with the "reasonable requirements" noted above [*Asmus v. Pacific Bell* (2000) 23 Cal.4th 1, 16-18, 96 Cal.Rptr.2d 179, 999 P.2d 71]. The Court also noted that by continuing to work for the employer after notification of the proposed modification, the employees had accepted the modification [*Asmus v. Pacific Bell* (2000) 23 Cal.4th 1, 18, 96 Cal.Rptr.2d 179, 999 P.2d 71].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Evidence Procedural Considerations Burdens of Proof General Overview Labor & Employment Law Employment Relationships Employment Contracts Breach Labor & Employment Law Employment Relationships Employment Contracts Conditions & Terms Duration of Employment Fixed Term

Barbara S. de Oddone contributed to the original chapter for California Forms of Jury Instruction (Matthew Bender). Stanley E. Tobin and Darrell J. Salomon contributed to the original chapter as consultants.



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CHAPTER 24A Matthew Bender Employment Contract Instructions
PART C. DEFENSES

4-24A California Forms of Jury Instruction MB 2400A.33

MB 2400A.33 Voluntary Resignation--Burden of Proof**[1] Instruction**

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

If an employee voluntarily _____ [resigns or terminates or quits or abandons] [his/her] employment, then the contract of employment is terminated, and, after that time, the employee has no right to resume the employment.

In this case, Defendant must prove that the termination of Plaintiff's employment contract came about because Plaintiff voluntarily _____ [resigned or terminated or quit or abandoned] [his/her] employment.

If you find that Plaintiff did voluntarily _____ [resign or terminate or quit or abandon] [his/her] employment, then Defendant is entitled to your verdict. On the other hand, if you find that Plaintiff did not voluntarily _____ [resign or terminate or quit or abandon] [his/her] employment, then you must decide whether Defendant breached Plaintiff's employment contract.

Eucalyptus Growers Asso. v. Orange C. N. & L. Co. (1917) 174 Cal. 330, 334, 163 P. 45 ; *Rotter v. Stationers Corp.* (1960) 186 Cal.App.2d 170, 171-172, 8 Cal.Rptr. 690 ; *Bene v. La Grande Laundry Co.* (1937) 22 Cal.App.2d 512, 517, 71 P.2d 351 .

[2] Use of Instruction

This instruction should be used in wrongful discharge actions when the defendant contends that the plaintiff voluntarily terminated his or her employment by refusing to work for the defendant any longer. It should be used in conjunction with instructions outlining the plaintiff's burden of proof to establish liability for wrongful discharge [see, e.g., MB 2400A.01].

If the plaintiff contends that his or her resignation was coerced, and therefore amounted to a constructive discharge, which was in violation of public policy, this instruction should be used with the instruction in MB 2400A.11 defining violation of public policy.

Along with this instruction, an instruction defining preponderance of the evidence as the applicable standard of proof must also be given [see, e.g., Ch. 2, *California Judicial Council Evidence Instructions*, CACI No. 200 ("More Likely True than Not True")].

For related Judicial Council instructions, see [3][b], *below*.

[3] Comment

[a] Defense of Voluntary Termination

In *Bene v. La Grande Laundry Co.*, the court of appeal stated that "where a servant refuses to serve or voluntarily abandons the service, whether with or without justifiable cause, the contract of employment is terminated... . The universal rule seems to be that a servant may leave his employment of his own accord, but if he does, his connection with the service ceases and he cannot insist on reemployment. Having left the employment voluntarily, the only way he can return to it is by making a new contract with his employer, who may or may not receive him back, as [the employer] sees fit" [*Bene v. La Grande Laundry Co.* (1937) 22 Cal.App.2d 512, 517, 71 P.2d 351].

The defense of voluntary termination can be analyzed as a claim by the defendant that the plaintiff has breached his or her obligation to perform services by abandoning the employment or refusing to serve further, with the result that the defendant is excused from further performance of the contract [*Rotter v. Stationers Corp.* (1960) 186 Cal.App.2d 170, 171-172, 8 Cal.Rptr. 690 ; *Kane v. Sklar* (1954) 122 Cal.App.2d 480, 482, 265 P.2d 29]. Defenses that are in the category of excuses for nonperformance, such as the plaintiff's breach or impossibility of performance, must be pleaded and proved by the defendant [*Eucalyptus G. Assn. v. Orange C. N. & L. Co.* (1917) 174 Cal. 330, 335, 163 P. 45].

A resignation is not a defense to an action for wrongful discharge if that resignation was compelled. A coerced resignation is tantamount to a discharge [*Keithley v. Civil Service Bd.* (1970) 11 Cal.App.3d 443, 449, 89 Cal.Rptr. 809]. A coerced resignation is called a "constructive discharge" [see, e.g., *Brady v. Elixir Industries* (1987) 196 Cal.App.3d 1299, 1304-1307, 242 Cal.Rptr. 324 , *overruled on other grounds by Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal.4th 1238, 1251, 32 Cal.Rptr.2d 223, 876 P.2d 1022].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 24, *California Judicial Council Wrongful Termination Instructions*]:

CACI No. 2402 Breach of Employment Contract--Unspecified Term--Constructive Discharge--Essential Factual Elements

CACI No. 2431 Constructive Discharge in Violation of Public Policy--Plaintiff Required to Violate Public Policy

CACI No. 2432 Constructive Discharge in Violation of Public Policy--Plaintiff Required to Endure Intolerable Conditions for Improper Purpose That Violates Public Policy

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewEvidenceProcedural ConsiderationsBurdens of
ProofGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsBreachLabor &
Employment LawWrongful TerminationDefensesVoluntary Resignations

Barbara S. de Oddone contributed to the original chapter for California Forms of Jury Instruction (Matthew Bender).
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CHAPTER 24A Matthew Bender Employment Contract Instructions
PART C. DEFENSES

4-24A California Forms of Jury Instruction MB 2400A.34

MB 2400A.34 Independent Contractor--Affirmative Defense

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Defendant claims that Plaintiff is not entitled to bring this action for wrongful discharge because Plaintiff was an independent contractor, and therefore was not Defendant's employee. You must decide whether Plaintiff was Defendant's employee, or whether Defendant has proved by a preponderance of the evidence that Plaintiff was an independent contractor.

Both an independent contractor and an employee perform services for compensation. The main difference between the two is the degree of control that the party hiring the independent contractor or employee exercises over the performance of the services.

An independent contractor receives a specified amount of compensation for getting a specified result, and the party who hires [him/her] has the right to control only the result of the work. The hiring party has no right to control how the independent contractor does the work. The hiring party has no right to control the physical details of the work.

However, an employee performs services subject to the employer's right to control both how the work is to be done and the result of the work. The employer has the right to control the physical details of the work.

Thus, the most important factor you must consider in deciding whether Plaintiff was an employee or an independent contractor is whether Plaintiff or Defendant had the right to control how Plaintiff's work was to be performed.

You must find that Plaintiff was an independent contractor if you determine that [he/she] had the right to control how the work was to be performed. You must find this even if you also determine that Defendant had the right to control the result of the work.

You must find that Plaintiff was Defendant's employee if you determine that Defendant had the authority to control how Plaintiff did [his/her] work, whether or not Defendant in fact exercised this right to control with regard to all of the details of Plaintiff's work.

There are other factors that you may consider in determining whether Plaintiff was an employee or an independent contractor. These other factors should all be considered together. No single one of the factors in the following lists may be considered conclusive.

If you find any of the following factors to be present, then this indicates, but does not conclusively establish, that Plaintiff was an independent contractor:

- 1. Plaintiff was engaged in a distinct occupation or business;**
- 2. _____ [*Specify type of work at issue*] is usually done in this area by a specialist without supervision;**
- 3. The job required a high degree of skill;**
- 4. Plaintiff supplied [his/her] own tools and place of work;**
- 5. Plaintiff [was to work/worked] for Defendant for the length of time it took to _____ [*specify job to be done*]; or**
- 6. Plaintiff was paid by the job.**

If you find any of the following factors to be present, then this indicates, but does not conclusively establish, that Plaintiff was an employee:

- 1. Plaintiff was not engaged in a distinct occupation or business;**
- 2. _____ [*Specify type of work at issue*] is usually done in this area under the hiring party's direction;**
- 3. The job required very little skill;**
- 4. Defendant supplied the tools and place of work for Plaintiff;**
- 5. Plaintiff was employed full time by Defendant over a long period with regular hours;**
- 6. Plaintiff was paid by the month, week, day, or hour;**
- 7. _____ [*Specify work to be done by plaintiff*] is a part of Defendant's regular business; or**
- 8. Defendant had the right to discharge Plaintiff at will without cause.**

You may also consider the terms of the contract entered into by Plaintiff and Defendant in deciding whether

Plaintiff is an independent contractor or an employee. However, the terms of this contract are not conclusive.

Authorities: *Lab. Code* § 3353; *S. G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341, 350-351, 256 Cal.Rptr. 543, 769 P. 2d 399 ; *Societa Per Azioni de Navigazione Italia v. City of Los Angeles* (1982) 31 Cal.3d 446, 457-458, 183 Cal.Rptr. 51, 645 P.2d 102 ; *Tieberg v. Unemployment Ins. App. Bd.* (1970) 2 Cal.3d 943, 948-954, 88 Cal.Rptr. 175, 471 P.2d 975 ; *City of Los Angeles v. Vaughn* (1961) 55 Cal.2d 198, 201, 10 Cal.Rptr. 457, 358 P.2d 913 ; *McDonald v. Shell Oil Co.* (1955) 44 Cal.2d 785, 790, 285 P.2d 902 ; *Villanazul v. City of Los Angeles* (1951) 37 Cal.2d 718, 721, 235 P.2d 16 ; *Burlingham v. Gray* (1943) 22 Cal.2d 87, 99, 137 P.2d 9 ; *Truesdale v. Workers' Comp. Appeals Bd.* (1987) 190 Cal.App.3d 608, 614, 235 Cal.Rptr. 754 ; *Weisman v. Blue Shield of California* (1984) 163 Cal.App.3d 61, 68, 209 Cal.Rptr. 169 ; *White v. Uniroyal, Inc.* (1984) 155 Cal.App.3d 1, 25-27, 202 Cal.Rptr. 141 ; *Muffett v. Royster* (1983) 147 Cal.App.3d 289, 302, 195 Cal.Rptr. 73 ; *Germann v. Workers' Comp. Appeals Bd.* (1981) 123 Cal.App.3d 776, 783, 176 Cal.Rptr. 868 .

[2] Use of Instruction

This instruction should be used when the defendant in an action for wrongful discharge, or other employment contract action, alleges as an affirmative defense that the plaintiff is an independent contractor rather than an employee, and that the plaintiff therefore does not have the rights of an employee with regard to an alleged wrongful discharge.

An instruction defining preponderance of the evidence must be given with this instruction [see, e.g., Ch. 2, *California Judicial Council Evidence Instructions*, CACI No. 200 ("More Likely True than Not True")].

The instruction does not deal with those statutes that provide special presumptions about the employment status of particular occupations [see, e.g., *Lab. Code* §§ 2750.5 (person performing services for which contractor's license is required is rebuttably presumed to be employee), 2750.6 (physician performing health-care services under contract is rebuttably presumed to be independent contractor)].

For related Judicial Council instructions, see [3][g], *below*.

[3] Comment

[a] Independent Contractor Distinguished From Employee; Right of Control

Lab. Code § 3353 defines an "independent contractor" as any person who renders service for a specified recompense for a specified result, under the control of his or her principal as to the result of the work only and not as to the means by which the result is accomplished. This definition is part of the Workers' Compensation Act [*Lab. Code* § 3200 *et seq.*; see Ch. 28, *California Judicial Council Workers' Compensation Instructions*]. Although the policies behind this Act are not entirely congruous with those that gave rise to the common law distinction between an employee and an independent contractor, the common law control of work test is part of the statutory definition [*S. G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341, 349, 256 Cal.Rptr. 543, 769 P. 2d 399].

An employee has been defined as a person who performs services subject to the employer's right to control both what must be done and how it must be done [*Weisman v. Blue Shield of California* (1984) 163 Cal.App.3d 61, 68, 209 Cal.Rptr. 169]. An employer has the right to control the details of an employee's work [*McDonald v. Shell Oil Co.* (1955) 44 Cal.2d 785, 790, 285 P.2d 902 ; see Restatement (Second) of Agency, § 220(2)(a)].

In determining whether a person is an employee or an independent contractor, the primary factor to be considered is the right to control the manner and means by which the work is to be performed [*Societa Per Azioni de Navigazione Italia v. City of Los Angeles* (1982) 31 Cal.3d 446, 457, 183 Cal.Rptr. 51, 645 P.2d 102 ; *Truesdale v. Workers' Comp.*

Appeals Bd. (1987) 190 Cal.App.3d 608, 614, 235 Cal.Rptr. 754 ; *White v. Uniroyal, Inc.* (1984) 155 Cal.App.3d 1, 25, 202 Cal.Rptr. 141 ; *Muffett v. Royster* (1983) 147 Cal.App.3d 289, 302, 195 Cal.Rptr. 73]. An independent contractor relationship is established if control may be exercised as to the result of the work but not as to the means by which it is to be accomplished [*Societa Per Azioni de Navigazione Italia v. City of Los Angeles* (1982) 31 Cal.3d 446, 458, 183 Cal.Rptr. 51, 645 P.2d 102 ; *White v. Uniroyal, Inc.* (1984) 155 Cal.App.3d 1, 25, 202 Cal.Rptr. 141]. An employer-employee relationship exists if the employer has the authority to exercise control, whether or not the employer exercises that right with regard to all details of the employee's work [*Burlingham v. Gray* (1943) 22 Cal.2d 87, 99, 137 P.2d 9].

If an employment relationship exists, the fact that a certain amount of freedom is allowed or is inherent in the nature of the work does not alter the character of the relationship, particularly when the employer maintains general supervision and control [*Grant v. Woods* (1977) 71 Cal.App.3d 647, 653, 139 Cal.Rptr. 533].

[b] Other Factors

Although right of control is the primary factor to be considered in determining the nature of an employment relationship [see [a], above], other factors may be considered, including all of the following [*S. G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341, 350-351, 256 Cal.Rptr. 543, 769 P. 2d 399 ; *Tieberg v. Unemployment Ins. App. Bd.* (1970) 2 Cal.3d 943, 948-954, 88 Cal.Rptr. 175, 471 P.2d 975 ; Restatement (Second) of Agency, § 220(2)]:

- Whether the person performing the services is engaged in a distinct occupation or business [see *Smith v. Department of Employment* (1976) 62 Cal.App.3d 206, 211, 132 Cal.Rptr. 874 (workers were not engaged in distinct occupation or business when they were not required to possess any special training, education, or experience)].
- The kind of occupation with reference to whether, in the locality, the work is usually done under the principal's direction or by a specialist without supervision.
- The skill required in the particular occupation.
- Whether the principal or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work.
- The length of time for which the services are to be performed.
- The method of payment, whether by the time or by the job [see *Fleming v. Foothill-Montrose Ledger* (1977) 71 Cal.App.3d 681, 687, 139 Cal.Rptr. 579 (compensation based on result to be obtained is indication of independent contractor relationship)].
- Whether the work is a part of the principal's regular business.
- Whether the parties believe they are creating an employer-employee relationship. This last bulleted item was not included in the instruction in [1], above, because it is the reality of the relationship, not the belief of the parties, that controls [*Truesdale v. Workers' Comp. Appeals Bd.* (1987) 190 Cal.App.3d 608, 614, 235 Cal.Rptr. 754 ; see Comment m to Restatement (Second) of Agency, § 220(2) (what parties believe or disbelieve is usually "not determinative")].

For example, one court of appeal applied the foregoing factors to conclude that drivers hired by a courier service were employees, despite the employer's lack of control over the manner in which the drivers covered their territories and the

drivers' written acknowledgment of independent-contractor status. The court found that the functions performed by the drivers--pickup and delivery of papers or packages and driving in between--did not require a high degree of skill, and the functions constituted the integral heart of the employer's courier-service business. By obtaining the clients in need of the service and providing the workers to conduct it, the employer retained all *necessary* control over the operation as a whole [*JKH Enters., Inc. v. Department of Indus. Relations* (2006) 142 Cal.App.4th 1046, 1064-1066, 48 Cal.Rptr.3d 563 (noting that employer was corporation formed as subterfuge to avoid effects of previous stop-work order issued against predecessor sole proprietorship that had not secured workers-compensation insurance)]].

On the other hand, if the person performing the services has a distinct occupation that is usually carried on in the locality without supervision, agrees to perform a job for a specified amount for that particular job rather than by a time rate, has an independent business operation, furnishes specialized equipment and skill, and performs work that is not normally a part of the principal's regular business, then the person is an independent contractor [*Johnson v. Workmen's Comp. Appeals Bd.* (1974) 41 Cal.App.3d 318, 321, 115 Cal.Rptr. 871].

[c] Termination Rights as Evidence of Employer-Employee Relationship

An additional factor that may determine whether the relationship is that of an employer-employee or an independent contractor is the employer's right to terminate the employee's services [*Germann v. Workers' Comp. Appeals Bd.* (1981) 123 Cal.App.3d 776, 783, 176 Cal.Rptr. 868]. The employer's right to end the service whenever the employer sees fit to do so is strong evidence of an employment relationship [*City of Los Angeles v. Vaughn* (1961) 55 Cal.2d 198, 201, 10 Cal.Rptr. 457, 358 P.2d 913 ; *Villanazul v. City of Los Angeles* (1951) 37 Cal.2d 718, 721, 235 P.2d 16 ; see *Abrahamson v. NME Hospitals, Inc.* (1987) 195 Cal.App.3d 1325, 241 Cal.Rptr. 396 (independent contractor may also be terminated without cause when contract provides for termination without cause on notice to other party)]. For example, it has been held that when the employer had the right to terminate the employee's services at will on 15 days notice, an employment relationship existed, because this termination provision was inconsistent with the engagement of an independent contractor to complete a particular task [*Truesdale v. Workers' Comp. Appeals Bd.* (1987) 190 Cal.App.3d 608, 616, 235 Cal.Rptr. 754 ; see *Brose v. Union-Tribune Publishing Co.* (1986) 183 Cal.App.3d 1079, 1085-1086, 228 Cal.Rptr. 620].

However, an independent contractor agreement can properly include an at-will clause giving the parties the right to terminate the agreement without cause. Therefore, if all the relevant factors, on balance, establish that the parties entered into an independent contractor agreement, the presence of an at-will clause does not by itself put the parties in an employer-employee relationship [*Varisco v. Gateway Sci. & Eng'g, Inc.* (2008) 166 Cal.App.4th 1099, 1107-1108, 83 Cal.Rptr.3d 393].

[d] Contract Description

The jury may be instructed that the parties' contract is a significant factor to be considered in determining whether they have an independent contractor or an employer-employee relationship, but it must also be instructed that the parties' descriptions of themselves in the contract are not conclusive evidence of their actual relationship [*White v. Uniroyal, Inc.* (1984) 155 Cal.App.3d 1, 27, 202 Cal.Rptr. 141 ; *Muffett v. Royster* (1983) 147 Cal.App.3d 289, 302, 195 Cal.Rptr. 73 ; see *Grant v. Woods* (1977) 71 Cal.App.3d 647, 653, 139 Cal.Rptr. 533 (written agreements are of probative significance, but the trier of fact may look behind them)]. A contract that purports to give independent contractor status to the person who is to perform services under the contract is not necessarily dispositive of the issue, even in the absence of fraud or mistake [*Truesdale v. Workers' Comp. Appeals Bd.* (1987) 190 Cal.App.3d 608, 614, 235 Cal.Rptr. 754]. The contract cannot affect the parties' true relationship, nor can it place an employee in a different position from that which he or she actually held [*Truesdale v. Workers' Comp. Appeals Bd.* (1987) 190 Cal.App.3d 608, 614, 235 Cal.Rptr. 754].

[e] Combination of Factors

The individual factors listed in [b], *above*, may not be applied mechanically in separate tests to determine whether the parties' relationship is that of employer-employee or independent contractor [*Germann v. Workers' Comp. Appeals Bd.* (1981) 123 Cal.App.3d 776, 783, 176 Cal.Rptr. 868]. These factors are intertwined, and their weight depends often on particular combinations [*Germann v. Workers' Comp. Appeals Bd.* (1981) 123 Cal.App.3d 776, 783, 176 Cal.Rptr. 868 ; see, e.g., *Varisco v. Gateway Sci. & Eng'g, Inc.* (2008) 166 Cal.App.4th 1099, 1107-1108, 83 Cal.Rptr.3d 393 (at-will clause giving parties right to terminate their agreement without cause did not, by itself, require finding of employer-employee relationship; court concluded that when all factors were considered and weighed, "we can conclude only that the parties entered into an independent contractor agreement and conducted themselves accordingly")].

[f] Question of Law or Fact

The determination of whether a person is an independent contractor or an employee is a question of fact for the jury if the evidence is in conflict [*S. G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341, 349, 256 Cal.Rptr. 543, 769 P.2d 399 ; *Brose v. Union-Tribune Publishing Co.* (1986) 183 Cal.App.3d 1079, 1081, 228 Cal.Rptr. 620 ; *White v. Uniroyal, Inc.* (1984) 155 Cal.App.3d 1, 25, 202 Cal.Rptr. 141 ; *Fleming v. Foothill-Montrose Ledger* (1977) 71 Cal.App.3d 681, 684, 139 Cal.Rptr. 579]. However, whether a person is an independent contractor or an employee is a question of law when, from all of the facts, only a single inference and one conclusion may be drawn [*Tieberg v. Unemployment Ins. App. Bd.* (1970) 2 Cal.3d 943, 951, 88 Cal.Rptr. 175, 471 P.2d 975 ; *Brose v. Union-Tribune Publishing Co.* (1986) 183 Cal.App.3d 1079, 1081, 228 Cal.Rptr. 620 ; *Fleming v. Foothill-Montrose Ledger* (1977) 71 Cal.App.3d 681, 684, 139 Cal.Rptr. 579].

[g] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 37, *California Judicial Council Vicarious Responsibility Instructions*]:

CACI No. 3704 Existence of "Employee" Status Disputed

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Evidence Procedural Considerations Burdens of Proof General Overview Labor & Employment Law Employment Relationships Employment Contracts Breach Labor & Employment Law Employment Relationships Independent Contractors Labor & Employment Law Wrongful Termination Defenses General Overview

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California Forms of Jury Instruction

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CHAPTER 24A Matthew Bender Employment Contract Instructions
PART C. DEFENSES

4-24A California Forms of Jury Instruction MB 2400A.35

MB 2400A.35 Exclusivity of Workers' Compensation Remedies--Affirmative Defense

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] PROPOSED INSTR. NO. _____

Defendant claims that Plaintiff is not entitled to bring [his/her] claim for _____ [specify nature of claim, e.g., emotional distress or fraudulent inducement to enter into the employment contract or breach of the covenant of good faith and fair dealing] in this court because workers' compensation is Plaintiff's exclusive remedy. Defendant has the burden of proving, by a preponderance of the evidence, that workers' compensation is Plaintiff's exclusive remedy.

Defendant is liable under workers' compensation law for any injury sustained by Plaintiff that arises out of Plaintiff's employment and that occurs in the course of Plaintiff's employment, without regard to whether Defendant was in any way at fault. If Plaintiff is entitled to receive workers' compensation for an injury, then the right to workers' compensation is [his/her] only remedy against Defendant for the injury _____ [add, if appropriate: so long as Defendant's conduct did not violate public policy as embodied in _____ (specify statutory or constitutional provision plaintiff asserts as basis for public policy in particular case, e.g., the California Family Rights Act)]. An employee whose only remedy for an injury is workers' compensation may not bring a civil action against the employer for that injury.

[OPTIONAL (See Use of Instruction)]

If you determine that Plaintiff's emotional distress was caused by Defendant's discharge of Plaintiff, and that this discharge caused Plaintiff to suffer physical injury or disability, then you must find in favor of Defendant on this issue. However, if you determine that Plaintiff has not suffered any physical injury or disability as a result of

[his/her] discharge, then you must find against Defendant on this issue.

[*OPTIONAL (See Use of Instruction)*]

Even if you determine that Defendant persuaded Plaintiff to enter into the employment contract by falsely representing to Plaintiff that Defendant would provide a safe workplace, workers' compensation is still Plaintiff's exclusive remedy for any injury arising out of and occurring in the course of employment. This means that you must find for Defendant unless Defendant acted deliberately with the specific intent to injure Plaintiff.

[*OPTIONAL (See Use of Instruction)*]

If you determine that Defendant persuaded Plaintiff to enter into the employment contract by making false representations to Plaintiff about _____ [matters other than the safety of the workplace or specify, e.g., Defendant's financial stability and future plans and Plaintiff's prospects for promotion], then workers' compensation is not Plaintiff's exclusive remedy for injuries proximately caused by the false representations, and you must find against Defendant on this issue.

Authorities: Lab. Code §§ 132a, 3600(a), 3602(a); *Livitsanos v. Superior Court* (1992) 2 Cal.4th 744, 754, 7 Cal.Rptr.2d 808, 828 P.2d 1195 ; *Cole v. Fair Oaks Fire Protection Dist.* (1987) 43 Cal.3d 148, 160, 233 Cal.Rptr. 308, 729 P.2d 743 ; *Judson Steel Corp. v. Workers' Comp. Appeals Bd.* (1978) 22 Cal.3d 658, 669, 150 Cal.Rptr. 250, 586 P.2d 564 ; *Lenk v. Total-Western, Inc.* (2001) 89 Cal.App.4th 959, 970-973, 108 Cal.Rptr.2d 34 ; *Gibbs v. American Airlines, Inc.* (1999) 74 Cal.App.4th 1, 8-10, 87 Cal.Rptr.2d 554 ; *Potter v. Arizona So. Coach Lines, Inc.* (1988) 202 Cal.App.3d 126, 131-135, 248 Cal.Rptr. 284 ; *Jones v. Los Angeles Community College Dist.* (1988) 198 Cal.App.3d 794, 805-809, 244 Cal.Rptr. 37 ; *Green v. City of Oceanside* (1987) 194 Cal.App.3d 212, 225, 239 Cal.Rptr. 470 ; *Spratley v. Winchell Donut House, Inc.* (1987) 188 Cal.App.3d 1408, 1414, 234 Cal.Rptr. 121 ; *Robards v. Gaylord Bros., Inc.* (9th Cir. 1988) 854 F.2d 1152, 1157-1158 .

[2] Use of Instruction

This instruction should be used when the defendant alleges as an affirmative defense that the plaintiff's exclusive remedy for his or her injuries is under the Workers' Compensation Act [*Lab. Code § 3200 et seq.*].

The first optional paragraph should be used when plaintiff alleges emotional distress resulting from defendant's discharge of the plaintiff. The second optional paragraph should be used if the plaintiff alleges that the defendant fraudulently induced the plaintiff to enter into the employment contract by misrepresenting that the defendant would ensure plaintiff a safe place to work. The third optional paragraph should be used if the plaintiff alleges that the defendant fraudulently induced the plaintiff to enter into the employment contract by making false representations about matters other than workplace safety.

An instruction defining preponderance of the evidence must be given with this instruction [*see, e.g., Ch. 2, California Judicial Council Evidence Instructions, CACI No. 200 ("More Likely True than Not True")*].

For related Judicial Council instructions, see [3][h], *below*.

[3] Comment

[a] Nature of the Exclusive Remedy

An employer is liable under the Workers' Compensation Act [*Lab. Code § 3200 et seq.*; see Ch. 28, *California Judicial Council Workers' Compensation Instructions*] for any injury sustained by his or her employees arising out of and in the course of employment. When an injury is compensable under the Act, recovery under the Act is the employee's sole and exclusive remedy against the employer for that injury [*Lab. Code §§ 3600, 3602(a)*].

In general, a person who suffers a work-related injury must seek relief within the workers' compensation system, and all proceedings must be held before the Workers' Compensation Appeals Board (WCAB) [*Lab. Code §§ 3600-3602, 5300; Potter v. Arizona So. Coach Lines, Inc. (1988) 202 Cal.App.3d 126, 131, 248 Cal.Rptr. 284*]. The mandate of the WCAB is to compensate the worker quickly, and its jurisdiction controls even if the worker might have a better claim against the employer in a civil action brought in superior court [*Potter v. Arizona So. Coach Lines, Inc. (1988) 202 Cal.App.3d 126, 131, 248 Cal.Rptr. 284*]. The workers' compensation system represents a balance between the advantage to the employer of immunity from liability at law and the advantage to the employee of swift and certain compensation [*Jones v. Kaiser Industries Corp. (1987) 43 Cal.3d 552, 562, 237 Cal.Rptr. 568, 737 P.2d 771*]. The Legislature's failure to include in the Workers' Compensation Act an element of damages recoverable at common law cannot be corrected judicially [*Potter v. Arizona So. Coach Lines, Inc. (1988) 202 Cal.App.3d 126, 131, 248 Cal.Rptr. 284*; *Spratley v. Winchell Donut House, Inc. (1987) 188 Cal.App.3d 1408, 1414, 234 Cal.Rptr. 121*].

[b] Application of Workers' Compensation Law to Employment Contracts

Application of the Workers' Compensation Act [*Lab. Code § 3200 et seq.*; see Ch. 28, *California Judicial Council Workers' Compensation Instructions*] has been judicially extended to compensate employees for injuries sustained as a result of a violation of the employment contract. Thus, when the conditions of compensation exist, the exclusive-remedy provision [*Lab. Code § 3602*; see [a], *above*] of the Workers' Compensation Act bars an employee from bringing a civil action against the employer for wrongful discharge. Examples are set forth below of cases in which the exclusive-remedy provision is applied to wrongful discharge claims.

[c] Discharge of Employee Because of Disability Arising From Work-Related Injury

Under the Workers' Compensation Act [*Lab. Code § 3200 et seq.*; see Ch. 28, *California Judicial Council Workers' Compensation Instructions*], an employer may not discharge an employee because he or she is absent from work because of a work-related injury. An employer is specifically prohibited from discharging, threatening to discharge, or in any manner discriminating against an employee who is injured in the course and scope of his or her employment [*Lab. Code § 132a; Judson Steel Corp. v. Workers' Comp. Appeals Bd. (1978) 22 Cal.3d 658, 669, 150 Cal.Rptr. 250, 586 P.2d 564*; *Potter v. Arizona So. Coach Lines, Inc. (1988) 202 Cal.App.3d 126, 133, 248 Cal.Rptr. 284*].

In *City of Moorpark v. Superior Court*, the California Supreme Court held that *Lab. Code § 132a* does not provide an exclusive remedy for work-related disability discrimination and that Fair Employment and Housing Act (FEHA) [*Gov. Code § 12900 et seq.*; see Ch. 25, *California Judicial Council Fair Employment and Housing Act Instructions*] and common law remedies are available [*City of Moorpark v. Superior Court (1998) 18 Cal.4th 1143, 1158, 77 Cal.Rptr.2d 445, 959 P.2d 752* (city employee who suffered work-related knee injury and was terminated based on her disability claimed FEHA violation and wrongful termination in violation of public policy)]. The Court stated that the scope of workers' compensation exclusivity depends on the terms of the exclusive remedy provisions. *Lab. Code § 132a* does not contain an exclusive remedy clause, and the general exclusive remedy provisions of the workers compensation law expressly do not apply to § 132a [*City of Moorpark v. Superior Court (1998) 18 Cal.4th 1143, 1154, 77 Cal.Rptr.2d 445, 959 P.2d 752*]. Furthermore, the broad policy behind FEHA and the fact that it is to be construed liberally to achieve its purposes [*Gov. Code § 12993*] indicate that it was meant to supplement existing anti-discrimination remedies [*City of Moorpark v. Superior Court (1998) 18 Cal.4th 1143, 1156-1157, 77 Cal.Rptr.2d 445, 959 P.2d 752*]. By its holding, the Court disapproved to the extent they suggested otherwise *Portillo v. G.T. Price Products, Inc. (1982) 131 Cal.App.3d 285, 182 Cal.Rptr. 291*, *Pickrel v. General Telephone Co. (1988) 205 Cal.App.3d 1058, 252 Cal.Rptr. 878*, and related cases [*City of Moorpark v. Superior Court (1998) 18 Cal.4th 1143, 1156, 77 Cal.Rptr.2d 445, 959*].

P.2d 752] . The Court in *City of Moorpark* also held that disability discrimination can form the basis for a wrongful discharge claim [*City of Moorpark v. Superior Court* (1998) 18 Cal.4th 1143, 1161, 77 Cal.Rptr.2d 445, 959 P.2d 752 ; see MB 2400A.11[3]].

[d] Claim for Emotional Distress Arising From Discharge

An employee's claim for emotional distress is within the exclusive jurisdiction of the Workers' Compensation Act [*Lab. Code* § 3200 *et seq.*; see Ch. 28, *California Judicial Council Workers' Compensation Instructions*] if the conduct of which the employee complains caused disability compensable by workers' compensation, and if the employer's alleged misconduct consists of actions that are a normal part of the employment relationship, including termination, and does not contravene public policy [*Livitsanos v. Superior Court* (1992) 2 Cal.4th 744, 754, 7 Cal.Rptr.2d 808, 828 P.2d 1195 (exclusivity of workers' compensation extends to intentional infliction of emotional distress caused by employer's work-related conduct, so long as conduct does not contravene public policy); *Cole v. Fair Oaks Fire Protection Dist.* (1987) 43 Cal.3d 148, 160, 233 Cal.Rptr. 308, 729 P.2d 743 ; *Potter v. Arizona So. Coach Lines, Inc.* (1988) 202 Cal.App.3d 126, 133, 248 Cal.Rptr. 284 ; see *Robards v. Gaylord Bros., Inc.* (9th Cir. 1988) 854 F.2d 1152, 1157 (emotional distress caused by termination of employment is within scope and course of employment relationship)]. For example, if an employee asserts a claim of intentional infliction of emotional distress caused by the employer's denial of statutory medical leave, but the jury finds no violation of the relevant statutory medical leave provisions, the employee's exclusive remedy is under the Workers' Compensation Act [*Gibbs v. American Airlines, Inc.* (1999) 74 Cal.App.4th 1, 8-10, 87 Cal.Rptr.2d 554 (workers' compensation was exclusive remedy when jury found that denial of medical leave did not violate California Family Rights Act, *Gov. Code* § 12945.2)].

On the other hand, if the plaintiff's emotional injuries result from discriminatory conduct in violation of an express statutory prohibition, the workers' compensation law does not bar the plaintiff's claim of intentional infliction of emotional distress, since it arises out of conduct that is outside the normal scope of the employment relationship [see *Kovatch v. California Casualty Management Co.* (1998) 65 Cal.App.4th 1256, 1277, 77 Cal.Rptr.2d 217] (claims of intentional infliction of emotional distress and wrongful constructive discharge were founded on harassment based on sexual orientation in violation of former *Lab. Code* § 1102.1(a) now see [*Gov. Code* § 12940(j)(1)]); see also *Murray v. Oceanside Unified Sch. Dist.* (2000) 79 Cal.App.4th 1338, 1362-1363, 95 Cal.Rptr.2d 28 (cause of action for intentional infliction of emotional distress founded on harassment based on sexual orientation not barred by exclusivity provisions of workers' compensation law)].

An employee may not avoid the exclusive-remedy provisions of the Workers' Compensation Act by characterizing the employer's actions as intentionally outrageous, unfair, or harassing, or intended to cause emotional disturbance resulting in disability [*Cole v. Fair Oaks Fire Protection Dist.* (1987) 43 Cal.3d 148, 160, 233 Cal.Rptr. 308, 729 P.2d 743 ; *Potter v. Arizona So. Coach Lines, Inc.* (1988) 202 Cal.App.3d 126, 133, 248 Cal.Rptr. 284]. The basis for workers' compensation and for the application of the exclusive-remedy provision [*Lab. Code* § 3602; see [a], *above*] is an injury sustained in and arising out of the course of employment. When the essence of the wrong complained of in an action is such a personal injury, the action is barred by the exclusive-remedy provision no matter what the name or technical form of the action [*Cole v. Fair Oaks Fire Protection Dist.* (1987) 43 Cal.3d 148, 160, 233 Cal.Rptr. 308, 729 P.2d 743 ; *Potter v. Arizona So. Coach Lines, Inc.* (1988) 202 Cal.App.3d 126, 133, 248 Cal.Rptr. 284]. If characterizing conduct normally occurring in the workplace as unfair or outrageous was all it took to avoid the exclusive-remedy provision, any employee who suffered mental disability could bring a civil action merely by alleging an ulterior purpose to cause injury. Such an exception would be unfair to the employer and contrary to the purpose of the workers' compensation scheme [*Cole v. Fair Oaks Fire Protection Dist.* (1987) 43 Cal.3d 148, 160, 233 Cal.Rptr. 308, 729 P.2d 743].

[e] Claim for Physical or Mental Disability Arising From Discharge

Claims for disabling physical or mental injuries arising from termination of employment are generally within the

coverage of the workers' compensation law and so are subject to the exclusive-remedy provisions of that law [see *Miklosy v. Regents of Univ. of Cal.* (2008) 44 Cal.4th 876, 902-903, 80 Cal.Rptr.3d 690, 188 P.3d 629 (discipline, criticism, and even retaliation against whistleblower employee are risks inherent in employment relationship, and even if such conduct may be characterized as intentional, unfair, or outrageous, it is nevertheless covered by workers' compensation exclusivity provisions); *Hunter v. Up-Right, Inc.* (1993) 6 Cal.4th 1174, 1183, 26 Cal.Rptr.2d 8, 864 P.2d 88 ; *Shoemaker v. Myers* (1990) 52 Cal.3d 1, 276 Cal.Rptr. 303, 801 P.2d 1054 ; see also *Lab. Code § 3602(a)* (exclusive-remedy provision)]. Even allegations of intentional employer misconduct resulting in termination and disability are not, by themselves, sufficient to permit a civil action outside the workers' compensation system [see *Hunter v. Up-Right, Inc.* (1993) 6 Cal.4th 1174, 1183, 26 Cal.Rptr.2d 8, 864 P.2d 88 ; *Cole v. Fair Oaks Fire Protection Dist.* (1987) 43 Cal.3d 148, 233 Cal.Rptr. 308, 729 P.2d 743]. In sum, when an employee's claim is based on conduct normally occurring in the workplace, it is within the WCAB's exclusive jurisdiction [*Cole v. Fair Oaks Fire Protection Dist.* (1987) 43 Cal.3d 148, 151, 233 Cal.Rptr. 308, 729 P.2d 743].

[f] Fraudulent Inducement to Enter Into Employment Contract

The exclusive-remedy provision [*Lab. Code § 3602*; see [a], above] of the Workers' Compensation Act [*Lab. Code § 3200 et seq.*; see Ch. 28, *California Judicial Council Workers' Compensation Instructions*] bars an employee's action against the employer for fraudulent inducement to enter into an employment contract if the employee accepted the employment in reliance on the employer's allegedly fraudulent representations that it would provide a safe workplace, and if the employee was injured on the job allegedly as a result of the employer's failure to provide a safe workplace [*Spratley v. Winchell Donut House, Inc.* (1987) 188 Cal.App.3d 1408, 1412-1413, 234 Cal.Rptr. 121]. The Labor Code imposes a duty on the employer to provide employees a safe place of employment [*Lab. Code § 6400 et seq.*]. The Workers' Compensation Act also compensates employees for injuries arising out of unsafe workplace conditions [see *Lab. Code § 3200 et seq.*], including enhanced compensation in cases involving serious and willful misconduct by the employer [*Lab. Code § 4553*]. Thus, under the exclusive-remedy provision of the Act, workers' compensation is the sole remedy for an employee injured by the employer's failure to provide a safe workplace. An employee may not avoid the exclusivity provisions by alleging that the employer's tort was committed before the employment relationship began, when the employee sustained injury resulting from the alleged fraud and discovered the alleged fraud only during the employment relationship and the injury arose out of and in the course of the employment [*Spratley v. Winchell Donut House, Inc.* (1987) 188 Cal.App.3d 1408, 1412, 234 Cal.Rptr. 121]. Furthermore, an employee may not avoid the exclusivity provisions by alleging that the employer's misrepresentation was intentional, except when the employer acts deliberately with the specific intent to injure the employee. Thus, when an employee did not allege that the employer's misconduct was a deliberate act specifically intended to injure her, but merely alleged that the employer knowingly failed to ensure a safe workplace, the employee's exclusive remedy for the alleged misconduct was workers' compensation [*Spratley v. Winchell Donut House, Inc.* (1987) 188 Cal.App.3d 1408, 1414, 234 Cal.Rptr. 121].

In contrast, an action for fraud in inducing the plaintiff to accept employment is not barred by the workers' compensation exclusivity rule if the defendant employer's misrepresentations were about matters that are not a normal part of the employment relationship or a risk reasonably encompassed within the compensation bargain [*Lenk v. Total-Western, Inc.* (2001) 89 Cal.App.4th 959, 970-973, 108 Cal.Rptr.2d 34]. The exclusivity of the workers' compensation remedy applies only if the conditions for workers' compensation exist [*Lab. Code § 3602(a)*]. Those conditions include a requirement that the injury arise from, or be a normal risk of, the employment relationship [see *Lab. Code § 3600(a)*]. For example, in one case involving a claim of fraudulent inducement to enter into employment, the court of appeal found that the conditions of compensation did not exist because the injury was not part of the normal risk of employment. Specifically, the employer's false statements were not about workplace safety, but rather were about the company's financial stability and future plans, and about the plaintiff's prospects for promotion. Such statements, all designed to induce the plaintiff to accept employment, were not a normal part of the employment relationship or a risk reasonably encompassed within the compensation bargain. Therefore, the plaintiff's fraud cause of action seeking emotional distress damages for such false statements was not barred by the workers' compensation exclusivity rule [*Lenk v. Total-Western, Inc.* (2001) 89 Cal.App.4th 959, 970-973, 108 Cal.Rptr.2d 34].

[g] Complaint Based on Violation of Fair Employment and Housing Act

The exclusive remedy doctrine does not bar a statutory employment discrimination action under the Fair Employment and Housing Act (FEHA) [Gov. Code § 12900 *et seq.*; see Ch. 25, *California Judicial Council Fair Employment and Housing Act Instructions*] by an employee who alleges that he or she suffered physical and emotional injury as a result of discrimination by the employer [*Jones v. Los Angeles Community College Dist.* (1988) 198 Cal.App.3d 794, 807-809, 244 Cal.Rptr. 37 (racial discrimination); see *Delaney v. Superior Fast Freight* (1993) 14 Cal.App.4th 590, 598-600, 18 Cal.Rptr.2d 33 ; see also *City of Moorpark v. Superior Court* (1998) 18 Cal.4th 1143, 77 Cal.Rptr.2d 445, 959 P.2d 752 (city employee who suffered work-related knee injury and was terminated based on her disability claimed FEHA violation and wrongful termination in violation of public policy), discussed in [c], *above*]. For example, a claim of intentional infliction of emotional distress founded on discriminatory conduct prohibited by the FEHA is not barred by the exclusivity provisions of the workers' compensation law, since such conduct is outside the normal scope of the employment relationship [see *Kovatch v. California Casualty Management Co.* (1998) 65 Cal.App.4th 1256, 1277, 77 Cal.Rptr.2d 217] (emotional distress cause of action based on conduct prohibited by former Lab. Code § 1102.1(a) now see [Gov. Code § 12940(j)(1)]); see also *Murray v. Oceanside Unified Sch. Dist.* (2000) 79 Cal.App.4th 1338, 1362-1363, 95 Cal.Rptr.2d 28 (cause of action for intentional infliction of emotional distress founded on sexual-orientation harassment prohibited by FEHA not barred by exclusivity provisions of workers' compensation law). The Workers' Compensation Act [Lab. Code § 3200 *et seq.*; see Ch. 28, *California Judicial Council Workers' Compensation Instructions*] and FEHA are designed to remedy different evils, and the Legislature did not intend that the objectives of FEHA would be defeated by the Workers' Compensation Act's exclusive-remedy provision [*Jones v. Los Angeles Community College Dist.* (1988) 198 Cal.App.3d 794, 807-808, 244 Cal.Rptr. 37]. FEHA is to be construed liberally to achieve its purposes [Gov. Code § 12993], and its purpose is to provide effective remedies to eliminate discriminatory practices [Gov. Code § 12920]. Application of the exclusive-remedy doctrine to bar an action for employment discrimination under FEHA would weaken this policy and encourage discrimination in the workplace [*Jones v. Los Angeles Community College Dist.* (1988) 198 Cal.App.3d 794, 808-809, 244 Cal.Rptr. 37].

Although not barred by the exclusive-remedy doctrine itself, a FEHA claim may be barred if the employee in a workers' compensation proceeding executes a release of all claims based on the injury that gave rise to the workers' compensation claim, if the release expressly includes claims outside the scope of the workers' compensation system. In *Claxton v. Waters*, the California Supreme Court held that the standard language of the mandatory preprinted form used in settling workers' compensation claims (Workers' Compensation Appeals Board Form 15 [see 8 Cal. Code Reg. § 10874]) releases only those claims that are within the scope of the workers' compensation system, and it does not apply to claims asserted in separate civil actions [*Claxton v. Waters* (2004) 34 Cal.4th 367, 376, 18 Cal.Rptr.3d 246, 96 P.3d 496]. Moreover, extrinsic evidence is not admissible to show that the parties intended the language of the preprinted release form to encompass claims outside the scope of the workers' compensation system [*Claxton v. Waters* (2004) 34 Cal.4th 367, 376-377, 18 Cal.Rptr.3d 246, 96 P.3d 496 (Supreme Court's decision to have prospective effect only, so that previously executed preprinted releases may be shown by extrinsic evidence to encompass claims outside scope of workers' compensation)]. After the *Claxton* decision, Workers' Compensation Appeals Board Form 15 was revised to provide expressly that "Execution of this form has no effect on claims that are not within the scope of the workers' compensation law or claims that are not subject to the exclusivity provisions of the workers' compensation law, unless otherwise expressly stated" [Workers' Compensation Appeals Board Form 15, P 2, as revised eff. Oct. 2005].

However, the parties in a workers' compensation proceeding may prepare and execute their own general release that expressly purports to settle claims outside the scope of the workers' compensation system [see *Claxton v. Waters* (2004) 34 Cal.4th 367, 377, 18 Cal.Rptr.3d 246, 96 P.3d 496]. For example, in *Jefferson v. California Dep't of Youth Authority*, the California Supreme Court held that a compromise and release executed in a workers' compensation proceeding that expressly released "all claims and causes of action" relating to an injury, and that included an attachment establishing the parties' intent to include civil claims within the scope of the release, barred a civil action for damages relating to the same events that resulted in the injury. The Court explained that if an employee has knowledge of a potential FEHA claim against the employer at the time of executing this kind of general release in a workers'

compensation proceeding, but has not yet initiated litigation of that claim, the employee has the burden of expressly excepting the claim from the release. In the absence of an express exception of the FEHA claim, and absent contrary extrinsic evidence, the language expressly releasing claims outside the scope of the workers' compensation system will bar the employee from pursuing the FEHA claim [*Jefferson v. California Dep't of Youth Authority* (2002) 28 Cal.4th 299, 303-311, 121 Cal.Rptr.2d 391, 48 P.3d 423].

In the absence of clear language releasing all claims, however, a release of one claim does not ordinarily operate to release other claims. In general, if a release is ambiguous about its scope, extrinsic evidence may be admissible to show whether the parties intended the release to encompass claims not expressly mentioned [*Butler v. Vons Cos.* (2006) 140 Cal.App.4th 943, 947-950, 45 Cal.Rptr.3d 151 (in context of settlement of labor grievance signed by union, employee, and employer, whether waiver of unknown claims was intended as release of employee's personal FEHA claims was question of fact)].

[h] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 28, *California Judicial Council Workers' Compensation Instructions*]:

CACI No. 2800 Employer's Affirmative Defense--Injury Covered by Workers' Compensation

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewEvidenceProcedural ConsiderationsBurdens of ProofGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsBreachLabor & Employment LawWrongful TerminationDefensesGeneral OverviewWorkers' Compensation & SSDIRemedies Under Other LawsExclusivityGeneral Overview

Barbara S. de Oddone contributed to the original chapter for California Forms of Jury Instruction (Matthew Bender). Stanley E. Tobin and Darrell J. Salomon contributed to the original chapter as consultants.



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California Forms of Jury Instruction

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CHAPTER 24A Matthew Bender Employment Contract Instructions
PART C. DEFENSES

4-24A California Forms of Jury Instruction MB 2400A.36

MB 2400A.36 Accord and Satisfaction--Affirmative Defense

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] PROPOSED INSTR. NO. _____

Defendant claims as a defense that Plaintiff accepted the sum of \$ _____ in full satisfaction of Defendant's obligations to Plaintiff under the employment contract. To prove this defense, Defendant must prove all of the following:

1. There was an honest dispute about the amount due;

2. Defendant in good faith offered the _____ [check or draft] to Plaintiff and clearly notified Plaintiff that Defendant was offering the payment of \$ _____ in full satisfaction of Defendant's obligations to Plaintiff under the employment contract; specifically, the _____ [check or draft] contained or was accompanied by a conspicuous written statement to the effect that it was offered in full satisfaction of the claim; and

3. Plaintiff accepted the payment knowing that the _____ [check or draft] was tendered in full satisfaction of the disputed obligation.

The existence of an agreement by Plaintiff to accept \$ _____ in satisfaction of Defendant's obligations to Plaintiff under the employment contract must be determined from all of the surrounding circumstances, including the parties' acts and their words, whether spoken or written. You must find that both parties knew that a final settlement was taking place, and that each knew and understood the terms of the settlement. It must appear from the surrounding circumstances that Defendant offered the \$ _____ to Plaintiff only on the condition that it be accepted as payment in full of all obligations

Defendant might owe to Plaintiff under the employment contract.

[*OPTIONAL (See Use of Instruction)*]

Even if Plaintiff accepted Defendant's _____ [check or draft] in the sum of \$ _____, this does not constitute full satisfaction of Plaintiff's claim if Plaintiff proves that:

[*USE WHICHEVER OF THE FOLLOWING ARE APPROPRIATE (See Use of Instruction)*]

(1) Plaintiff protested against accepting the [check/draft] in full satisfaction of [his/her/its] claim by striking out or otherwise deleting the words _____ ["payment in full" or specify other words of similar import] from the [check/draft].

[*AND/OR*]

(2) The acceptance of the [check/draft] was inadvertent or without knowledge that the words _____ ["payment in full" or specify other words of similar import] were notated on the [check/draft].

[*AND/OR*]

(3) Within 90 days after payment of the [check/draft], plaintiff repaid, or offered to repay, the amount of that [check/draft] to defendant.

[*AND/OR*]

(4) Plaintiff is an organization, and within a reasonable time before defendant offered the [check/draft] in full settlement of the disputed claim, plaintiff gave defendant written instructions to direct all communications concerning (this) disputed claim(s) to _____ [specify designated person, office, or place, e.g., its Personnel Department at 100 North Spring Street, in Los Angeles], but defendant disregarded that instruction and delivered the [check/draft] instead to some other person, office, or place.

Authorities: Civ. Code §§ 1521-1524, 1526; Com. Code § 3311; *Potter v. Pacific Coast Lumber Co.* (1951) 37 Cal.2d 592, 597, 234 P.2d 16; *Zuckerman v. Pacific Savings Bank* (1986) 187 Cal.App.3d 1394, 1405, 232 Cal.Rptr. 458; *Moving Picture Etc. Union v. Glasgow Theaters, Inc.* (1970) 6 Cal.App.3d 395, 402, 86 Cal.Rptr. 33; *Conderback, Inc. v. Standard Oil Co.* (1966) 239 Cal.App.2d 664, 687, 48 Cal.Rptr. 901; *Dietl v. Heisler* (1961) 188 Cal.App.2d 358, 363, 365-366, 10 Cal.Rptr. 587

[2] Use of Instruction

This instruction should be used in actions for wrongful termination in breach of an employment contract when the defendant alleges as an affirmative defense that the obligations under the contract have been extinguished by a fully executed accord and satisfaction.

The final five paragraphs of the instruction are to be used if the defense of accord and satisfaction is based on the tender

of a check or draft notated with "payment in full" or similar words, and the plaintiff claims that there was no accord and satisfaction for the reasons provided in *Civ. Code* § 1526(a) or *Com. Code* § 3311 [see [3][d], *below*]. Any of the numbered alternative paragraphs may be included in the instruction, depending on the facts alleged by the plaintiff to defeat the accord and satisfaction defense. The two statutes governing discharge of disputed obligations by tender of a check or draft "in full satisfaction" have different requirements [see *Civ. Code* § 1526; *Com. Code* § 3311; see also [3][c], [d], *below*]. It is not clear that a creditor any longer has the option, set forth in *Civ. Code* § 1526(a) and subparagraph (1), of negotiating the instrument after striking out the "payment in full" notation [see [3][d], *below*]. Subparagraphs (1) and (2) relate to situations addressed by *Civ. Code* § 1526. Subparagraphs (3) and (4) relate to situations addressed by *Com. Code* § 3311.

This instruction does not address the issues raised by a check or draft tendered pursuant to a composition or extension agreement between a debtor and its creditors [see *Civ. Code* § 1526(b) (check or draft as accord and satisfaction when tendered pursuant to a composition or extension agreement)] or a check or draft tendered pursuant to or in conjunction with a release of a claim [see *Civ. Code* § 1526(c) (check or draft as accord and satisfaction when tendered pursuant to or in connection with a release)]. For an instruction on a release by the acceptance of final payment under a construction contract, see *MB 300I.93*.

An instruction defining preponderance of the evidence must be given with this instruction [see, e.g., Ch. 2, *California Judicial Council Evidence Instructions, CACI No. 200* ("More Likely True than Not True")].

For an instruction on what constitutes acceptance of a check, see Ch. 3F, *Matthew Bender Contract Defenses Instructions*. For instructions on contracts and contract principles, see Ch. 3, *California Judicial Council Contracts Instructions*, and Chs. 3A-3G.

[3] Comment

[a] Affirmative Defense; Burden of Proof

Accord and satisfaction is an affirmative defense [*Ramos v. City of Santa Clara* (1973) 35 Cal.App.3d 93, 95, 110 Cal.Rptr. 485]. The defendant has the burden of establishing an accord and satisfaction [*Higson v. Montgomery Ward & Co.* (1968) 263 Cal.App.2d 333, 343, 69 Cal.Rptr. 497 ; see *Evid. Code* § 500 (party has burden of proof as to each fact that is essential to claim for relief or defense asserted by that party); *Com. Code* § 3311(a),(b),(d) (elements to be proven by defendant); *Com. Code* § 3311(c) (elements to be proven by plaintiff to negate discharge of claim)].

[b] "Accord and Satisfaction" Defined

The phrase "accord and satisfaction" means the substitution of a new agreement for and in satisfaction of a preexisting agreement between the same parties [*Moving Picture etc. Union v. Glasgow Theaters, Inc.* (1970) 6 Cal.App.3d 395, 402, 86 Cal.Rptr. 33]. An "accord" is an agreement to accept, in extinction of an obligation, something different from or less than what the party might have recovered on the original obligation [*Civ. Code* § 1521; *Moving Picture etc. Union v. Glasgow Theaters, Inc.* (1970) 6 Cal.App.3d 395, 402-403, 86 Cal.Rptr. 33]. An accord does not extinguish the original obligation until it is executed [*Civ. Code* § 1522; *Moving Picture etc. Union v. Glasgow Theaters, Inc.* (1970) 6 Cal.App.3d 395, 403, 86 Cal.Rptr. 33]. An accord is executed when the creditor accepts the consideration offered for the accord. This is called "satisfaction," and it extinguishes the obligation [*Civ. Code* § 1523; see [c], *below*].

[c] Elements of Accord and Satisfaction: Bona Fide Dispute, Notice, and Acceptance

For the principle of accord and satisfaction to apply, a bona fide dispute must exist between the parties [*Com. Code* § 3311(a)(2); *Potter v. Pacific Coast Lumber Co.* (1951) 37 Cal.2d 592, 597, 234 P.2d 16 ; *Moving Picture etc. Union v. Glasgow Theaters, Inc.* (1970) 6 Cal.App.3d 395, 403, 86 Cal.Rptr. 33]. Before adoption of *Civ. Code* § 1526, it was held that when a claim is disputed and the tender of a check or draft in settlement of the claim is of such a character as

to give the creditor notice that it must be accepted in full discharge of the claim or not at all, the acceptance of the check or draft constitutes an accord and satisfaction [*Potter v. Pacific Coast Lumber Co. (1951) 37 Cal.2d 592, 597, 234 P.2d 16* ; see *Goad v. Rogers (1951) 103 Cal.App.2d 294, 300, 229 P.2d 791* (no accord and satisfaction exists when plaintiff, who has asked for \$800 in satisfaction of obligation, refuses to accept defendant's check for \$200); see *Civ. Code § 1523* (acceptance of consideration offered for accord is called "satisfaction," and it extinguishes obligation)]. *Civ. Code § 1526(a)* allows the creditor to negotiate the check without the claim being fully discharged if it strikes out the "payment in full" notation before negotiating the check. That option was not carried forward in *Com. Code § 3311*, which was enacted after *Civ. Code § 1526* and became effective January 1, 1993 [Stats. 1992, ch. 914].

Under both provisions, the debtor is required to make it clear that acceptance of what he or she tenders is subject to the condition that it will be in full satisfaction of the obligations owed [*Potter v. Pacific Coast Lumber Co. (1951) 37 Cal.2d 592, 597, 234 P.2d 16* ; *Dietl v. Heisler (1961) 188 Cal.App.2d 358, 365-366, 10 Cal.Rptr. 587*]. To that end, *Com. Code § 3311(b)* requires that the negotiable instrument or an accompanying written communication contain a conspicuous statement to the effect that the check was tendered in full satisfaction of the claim. A term or clause is "conspicuous" within the meaning of the Commercial Code if it is written so that a reasonable person against whom it is to operate ought to have noticed it [*Com. Code § 1201(10)*]. Whether a term is conspicuous or not is for decision by the court [*Com. Code § 1201(10)*]. It would seem that if the notation is conspicuous as required by *Com. Code § 3311(b)*, an inadvertent acceptance of the check, as referred to in *Civ. Code § 1526(a)* would be unlikely.

Under *Civ. Code § 1526* and *Com. Code § 3311*, the rules established by prior case law no longer govern the effect of acceptance when a check or draft is tendered in full discharge of a disputed or unliquidated claim with "payment in full" or the like notated on the check or draft. As discussed in [d], *below*, acceptance of a check or draft so notated need not be an accord and satisfaction.

[d] Acceptance of Notated Check or Draft Under Protest or Without Knowledge

When a check or draft is tendered by a debtor in full discharge of a disputed or unliquidated claim, and "payment in full" or similar words are conspicuously notated on the check or draft, acceptance of the check or draft is not an accord and satisfaction under *Civ. Code § 1526* if the creditor protests against accepting the check or draft in full payment by striking out or otherwise deleting the notation or if the acceptance of the check or draft was inadvertent or without knowledge of the notation [*Civ. Code § 1526(a)*]. Despite this provision, the acceptance of a check or draft may constitute an accord and satisfaction if the check or draft was tendered pursuant to a composition or extension agreement between a debtor and its creditors [see *Civ. Code § 1526(b)* (check or draft as accord and satisfaction when tendered pursuant to composition or extension agreement)] or pursuant to or in conjunction with a release of a claim [see *Civ. Code § 1526(c)* (check or draft as accord and satisfaction when tendered pursuant to or in connection with release); see also *MB 300I.93* for an instruction on release by acceptance of final payment under a construction contract].

The more serious question is whether the later enactment of *Com. Code § 3311* [Stats. 1992, ch. 914], without mention of the creditor's right to negotiate the check after striking out the "payment in full" notation, nullifies the provision in *Civ. Code § 1526* allowing it.

Unless defendant proves that within a reasonable time before collection of the check or draft was initiated, the plaintiff, or an agent of the plaintiff having direct responsibility with regard to disputed obligations, knew that the check or draft was tendered in full satisfaction of the claim [*Com. Code § 3311(d)*], the disputed claim will not be discharged if the plaintiff is an organization and proves that (1) within a reasonable time before the check or draft was tendered, it sent a conspicuous statement to the defendant directing him or her to send communications concerning disputed debts, including an instrument tendered as full satisfaction of the claim, to a designated person, office, or place, and (2) the check, draft, or accompanying communication was not received by that designated person, office, or place [*Com. Code § 3311(c)(1)*].

Whether or not the plaintiff is an organization, if the plaintiff did not notify defendant to direct communications to a designated person, place, or office, or any such notice did not comply with *Com. Code* § 3311(c)(1), the plaintiff can "rescind" the accord and satisfaction within 90 days after payment of the instrument by tendering repayment of the amount of the instrument to the defendant [*Com. Code* § 3311(c)(2)]. Again, however, this option is subject to the qualification that the claim is discharged by negotiation of the "payment in full" check if defendant proves that within a reasonable time before collection of the check or draft was initiated, the plaintiff, or an agent of the plaintiff having direct responsibility with regard to disputed obligations knew that the instrument was tendered in full satisfaction of the claim [*Com. Code* § 3311(d)].

Under *Civ. Code* § 1526, the rule that acceptance constitutes an accord and satisfaction clearly no longer applies to a check or draft tendered in full discharge of a disputed or unliquidated claim when "payment in full" or the like is notated on the check or draft. However, the rule should continue to govern when the statute does not apply, as when the payment alleged as an accord and satisfaction is a cash payment. Similarly, the statute does not apply when there is no notation such as "payment in full" on the check or draft and the notice and acceptance required for an accord and satisfaction are shown by means of the circumstances surrounding the transaction [*see* [f], *below*, for discussion of surrounding circumstances as evidence of parties' intent].

[e] Contract Principles Apply

Since an accord is an agreement between the parties, the primary principles that govern the law of contracts, such as proper subject matter, competent parties, mutual consent, and consideration, apply to an accord [*Zuckerman v. Pacific Savings Bank* (1986) 187 Cal.App.3d 1394, 1405, 232 Cal.Rptr. 458 ; *Moving Picture Etc. Union v. Glasgow Theaters, Inc.* (1970) 6 Cal.App.3d 395, 403, 86 Cal.Rptr. 33 ; *see* Restatement (Second) of Contracts § 281, Comment a]. One of these contract principles is that a consent or a meeting of the minds of the contracting parties must exist [*Zuckerman v. Pacific Savings Bank* (1986) 187 Cal.App.3d 1394, 1405, 232 Cal.Rptr. 458 ; *see* [f], *below*].

For instructions and comments on contracts and contract principles, see Ch. 3, *California Judicial Council Contracts Instructions*, and Chs. 3A-3G.

[f] Intent of Parties: Meeting of Minds Required

Although the specific requirements set forth in *Com. Code* § 3311 obviate the need in many situations to determine what the parties actually intended, generally, the question of whether an agreement constitutes an accord and satisfaction is one of the intention of the parties [*Conderback, Inc. v. Standard Oil Co.* (1966) 239 Cal.App.2d 664, 680, 48 Cal.Rptr. 901 ; *Dunlap v. Bellah* (1960) 184 Cal.App.2d 579, 585, 7 Cal.Rptr. 766]. It must be shown that the parties intend the sum paid to be accepted in extinction of the obligations under the contract [*Zuckerman v. Pacific Savings Bank* (1986) 187 Cal.App.3d 1394, 1405, 232 Cal.Rptr. 458]. The parties' understanding must usually be determined from the circumstances surrounding the transaction, including the parties' statements, declarations, and conduct, and the circumstances must be of such a character as to express in a clear manner an intention to be affected, or an accord is not shown [*Zuckerman v. Pacific Savings Bank* (1986) 187 Cal.App.3d 1394, 1405, 232 Cal.Rptr. 458].

It has been held that a jury instruction on accord and satisfaction correctly stated the law when the jury was required to determine the existence of an accord and satisfaction from all of the surrounding circumstances, both oral and written, to decide whether there was a meeting of the minds between the parties, and to find whether both parties knew and intended a final settlement and whether each knew and understood the settlement terms [*Conderback, Inc. v. Standard Oil Co.* (1966) 239 Cal.App.2d 664, 48 Cal.Rptr. 901 ; *but see* *Com. Code* §§ 1201(10), 3311(b) (court to determine whether "payment in full" notation is conspicuous or not)]. The instruction in [1], *above*, avoids the expressions "meeting of the minds" and "intent" because the law of contracts focuses on objective manifestations of agreement, and these expressions might suggest to the jury that subjective intent is relevant [*see* *Blumenfeld v. R. H. Macy & Co.* (1979)

92 *Cal.App.3d* 38, 46, 154 *Cal.Rptr.* 652 ; *see also Com. Code* §§ 1201(10), 3311(b) (court to determine whether "payment in full" notation is conspicuous or not)].

[g] Question of Fact

If conflicting evidence is offered or the evidence offered is reasonably susceptible to conflicting inferences, then the existence of an accord and satisfaction is a question of fact except to the extent that *Com. Code* § 1201(10) requires the issue of whether or not the "payment in full" notation is conspicuous [*see Com. Code* § 3311(b)], to be determined by the court [*Conderback, Inc. v. Standard Oil Co.* (1966) 239 *Cal.App.2d* 664, 680-683, 48 *Cal.Rptr.* 901 ; *Dietl v. Heisler* (1961) 188 *Cal.App.2d* 358, 363, 10 *Cal.Rptr.* 587].

[h] Part Performance

Part performance of an obligation extinguishes the obligation if the partial performance is expressly accepted by the creditor in writing in satisfaction of the obligation or rendered pursuant to an agreement in writing for that purpose. No new consideration is required, and the partial performance may occur either before or after a breach of the obligation [*Civ. Code* § 1524].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Contracts Law Types of
Contracts Releases Evidence Procedural Considerations Burdens of Proof General Overview Labor & Employment
Law Employment Relationships Employment Contracts Breach Labor & Employment Law Wrongful
Termination Defenses General Overview

Barbara S. de Oddone contributed to the original chapter for California Forms of Jury Instruction (Matthew Bender).
Stanley E. Tobin and Darrell J. Salomon contributed to the original chapter as consultants.



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CHAPTER 24A Matthew Bender Employment Contract Instructions
PART C. DEFENSES

4-24A California Forms of Jury Instruction MB 2400A.37

MB 2400A.37 Full Performance--Affirmative Defense

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Defendant contends that [his/her/its] obligations to Plaintiff under the employment contract have been discharged by full performance of all of Defendant's obligations under that contract.

If you find that Defendant has proved that [he/she/it] has fully performed all of [his/her/its] obligations under the contract, then you must find that the contract has been extinguished.

Authorities: Civ. Code § 1473; *California Teachers Assn. v. Cory* (1984) 155 Cal.App.3d 494, 510, 202 Cal.Rptr. 611 .

[2] Use of Instruction

This instruction should be used in actions arising out of the employment contract when the defendant alleges as an affirmative defense that the obligations owed by defendant to plaintiff under the contract have been extinguished by defendant's full performance of the contract.

An instruction defining preponderance of the evidence must be given with this instruction [see, e.g., Ch. 2, *California Judicial Council Evidence Instructions*, CACI No. 200 ("More Likely True than Not True")]. For instructions on contract performance, see Ch. 3, *California Judicial Council Contracts Instructions*, and Ch. 3D, *Matthew Bender Performance and Breach of Contract Instructions*.

For related Judicial Council instructions, see [3][b], *below*.

[3] Comment

[a] Full Performance

Full performance of an obligation by the party whose duty it is to perform it, or by any other person on that party's behalf and with that party's assent, if accepted by the other party, extinguishes the obligation [*Civ. Code § 1473*]. To extinguish a contractual obligation, it is incumbent on the obligor to fully perform, and whether the obligor has done so is a question of fact [*California Teachers Assn. v. Cory (1984) 155 Cal.App.3d 494, 510, 202 Cal.Rptr. 611*].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 3, *California Judicial Council Contracts Instructions*]:

CACI No. 312 Substantial Performance

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewContracts LawPerformanceGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsBreachLabor & Employment LawWrongful TerminationDefensesGeneral Overview

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CHAPTER 24A Matthew Bender Employment Contract Instructions
PART C. DEFENSES

4-24A California Forms of Jury Instruction MB 2400A.38

MB 2400A.38 Reduction in Workforce Is Not Breach of Implied Agreement to Terminate Only for Good Cause

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INST. NO.** _____

An implied agreement not to discharge an employee except for good cause does not by itself prohibit the employer from legitimately discharging the employee on the basis of the need to eliminate the employee's work unit.

Therefore, if you find an employment contract between Plaintiff and Defendant which contained an implied agreement not to discharge Plaintiff without good cause, that implied agreement was not breached by the discharge of Plaintiff in the course of the elimination of Plaintiff's work unit, unless you also find that Plaintiff and Defendant agreed to restrict Defendant's right to reorganize, reduce, or consolidate its workforce.

Authority: Guz v. Bechtel National Inc. (2000) 24 Cal.4th 317, 338-348 .

[2] Use of Instruction

This instruction should be used when the employer claims that the termination of employment was part of a legitimate reduction in workforce and that, even if there was an implied agreement to terminate only for good cause, there was no agreement to restrict the employer's right to reduce its workforce.

[3] Comment

This instruction is based on the California Supreme Court's holding in *Guz v. Bechtel National, Inc.* [*Guz v. Bechtel Nat., Inc. (2000) 24 Cal.4th 317, 100 Cal.Rptr.2d 352, 8 P.3d 1089*]. In that case, a longtime employee was released at age 49 when his work unit was eliminated and its tasks transferred to another office of the employer. The employee sued the employer, alleging age discrimination, breach of an implied contract to be terminated only for good cause, and

breach of the implied covenant of good faith and fair dealing. The California Supreme Court held that, even though there was evidence in certain written personnel documents of an implied agreement not to terminate except for good cause under certain circumstances, that implied agreement did not prohibit the employer from legitimately terminating the employee on the basis of the need to eliminate his work unit. There was no evidence of an agreed restriction on the employer's right to reorganize, reduce, or consolidate its work force for whatever reasons it wished. This was so, the Court said, even if the employer's decision was influenced by dissatisfaction with the eliminated unit's performance and even if individual employees were entitled to progressive discipline procedures before being fired for poor performance. However, the Court stated that it was not faced with the issue of whether the employer had failed to follow its fair layoff policies when it made individual decisions leading to the employee's termination; the Court left that issue to be addressed by the court of appeal on remand [*Guz v. Bechtel Nat., Inc.* (2000) 24 Cal.4th 317, 338-348, 100 Cal.Rptr.2d 352, 8 P.3d 1089].

When conducting a large-scale reduction in workforce, an employer may be subject to federal and California statutory requirements. The federal Worker Adjustment and Retraining Notification Act (WARN) [29 U.S.C. § 2101 *et seq.*] requires certain large employers to give employees 60 days' advance notice of any plant closing or mass layoff [29 U.S.C. § 2102(a)]. WARN applies to a nongovernmental employer that has 100 or more full-time employees, or that has 100 or more full- and part-time employees who in the aggregate work more than 4,000 hours per week, excluding overtime [29 U.S.C. § 2101(a)(1)]. Under California law, an employer generally may not order a mass layoff, relocation, or termination at a covered establishment unless, 60 days before the order takes effect, the employer gives written notice of the order to the affected employees and the California Employment Development Department [Lab. Code § 1401(a); see Lab. Code §§ 1400(g) (exception for employment that is seasonal or limited in time), 1402.5 (notice not required if it would preclude employer from obtaining capital or business needed to forestall layoffs); see also Lab. Code § 1400(a),(c)-(f) ("mass layoff," "relocation," "termination," and "covered establishment" defined)]. The notice must comply with the federal WARN requirements [Lab. Code § 1401(b)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Labor & Employment Law Employment Relationships Employment Contracts Breach Labor & Employment Law Wrongful Termination Breach of Contract For Cause Standard Labor & Employment Law Wrongful Termination Breach of Contract Implied Contracts Labor & Employment Law Wrongful Termination Defenses General Overview

Barbara S. de Oddone contributed to the original chapter for California Forms of Jury Instruction (Matthew Bender). Stanley E. Tobin and Darrell J. Salomon contributed to the original chapter as consultants.



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CHAPTER 24A Matthew Bender Employment Contract Instructions
PART C. DEFENSES

4-24A California Forms of Jury Instruction MB 2400A.39

MB 2400A.39 Legitimate Alternative Ground for Discharge--Burden of Proof--Affirmative Defense to Retaliatory Discharge Claim by Whistleblower

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Plaintiff's _____ [*specify plaintiff's activity protected under Lab. Code § 1102.5, e.g., refusal to participate in illegal activity*] **was a motivating reason for Defendant's decision to discharge Plaintiff if the evidence shows that it was more likely than not a contributing factor in Defendant's decision, unless Defendant proves by clear and convincing evidence that the discharge would have occurred for legitimate, independent reasons even if Plaintiff had not** _____ [*specify plaintiff's activity protected under Lab. Code § 1102.5, e.g., refused to participate in illegal activity*].

[2] Use of Instruction

This instruction should be used in an action for wrongful discharge in retaliation for the plaintiff's statutorily protected "whistleblowing" activity [see *Lab. Code § 1102.5*], if the defendant alleges as an affirmative defense that the plaintiff would have been discharged even if the plaintiff had not engaged in protected activity. The instruction reflects the defendant's burden of proving this affirmative defense by clear and convincing evidence [see *Lab. Code § 1102.6*]. If the plaintiff alleges an adverse employment action other than discharge, such as a demotion, this form should be modified accordingly.

This instruction should be used in conjunction with instructions defining the elements of the plaintiff's cause of action for retaliation or wrongful termination in violation of public policy [see, e.g., *CACI No. 2430*; *MB 2400A.11*].

An instruction defining clear and convincing evidence must be given with this instruction [see Ch. 2, *California Judicial Council Evidence Instructions, CACI No. 201* ("More Likely True--Clear and Convincing Proof")].

For related Judicial Council instructions, see [3][c], *below*.

[3] Comment

[a] Protection of "Whistleblower" Activity by Employee

The "whistleblower" statute protects employees who report or refuse to participate in illegal activity [*Lab. Code § 1102.5* (covering all employers)]. Specifically, an employer may not retaliate against an employee for (1) refusing to participate in an activity that would result in a violation of or noncompliance with a state or federal statute, rule, or regulation; or (2) disclosing information to a government or law enforcement agency, if the employee has reasonable cause to believe that the information discloses such a violation or noncompliance [*Lab. Code § 1102.5(b),(c)*; see *Lab. Code § 1102.5(a)* (employer may not make, adopt, or enforce any rule preventing employee from reporting such violation or noncompliance); see also *Lab. Code § 1102.5(d)* (in addition to other penalties, employer that is corporation or limited liability company is liable for civil penalty of up to \$10,000 for each violation of *Lab. Code § 1102.5*)]. This prohibition against retaliation applies whether the employee's protected activity occurred in current or former employment [*Lab. Code § 1102.5(d)*]. If the employer is a government agency, a report made by the employee to the employer qualifies as a disclosure of information to a government or law enforcement agency for purposes of the whistleblower statute [*Lab. Code § 1102.5(e)*; see *Gardenhire v. Housing Auth. (2000) 85 Cal.App.4th 236, 241-243, 101 Cal.Rptr.2d 893*].

The Fair Employment and Housing Act (FEHA) contains a similar provision that prohibits retaliation against an employee who has opposed or reported discriminatory practices prohibited by FEHA [see *Gov. Code § 12940(h)*; *Yanowitz v. L'Oreal USA, Inc. (2005) 36 Cal.4th 1028, 1043, 32 Cal.Rptr.3d 436, 116 P.3d 1123* (employee need only have opposed practice that he or she reasonably and in good faith believed to be discriminatory under FEHA, whether or not that practice is ultimately found to be in violation of law); see also Ch. 25, *California Judicial Council Fair Employment and Housing Act Instructions*].

A discharge in retaliation for the employee's engaging in protected activity may be the basis for a claim of wrongful discharge in violation of public policy [*Green v. Ralee Eng'g Co. (1998) 19 Cal.4th 66, 77, 78 Cal.Rptr.2d 16, 960 P.2d 1046* ; *Tameny v. Atlantic Richfield Co. (1980) 27 Cal.3d 167, 176-178, 164 Cal.Rptr. 839, 610 P.2d 1330* ; *Gardenhire v. Housing Auth. (2000) 85 Cal.App.4th 236, 241-243, 101 Cal.Rptr.2d 893* ; *Garcia v. Rockwell Int'l Corp. (1986) 187 Cal.App.3d 1556, 1561-1562, 232 Cal.Rptr. 490*]. For further discussion of wrongful discharge in violation of public policy, see *MB 2400A.11[3]*.

The foregoing whistleblower protections do not apply if the employee's activity violates the confidentiality of the lawyer-client privilege, the physician-patient privilege, or trade-secret information [*Lab. Code § 1102.5(g)*; see *Evid. Code §§ 950 et seq., 990 et seq.*].

An employee's disclosure to the employer of an internal personnel matter, such as forwarding a complaint about another employee's behavior that does not involve a legal violation, does not qualify as protected "whistleblowing" [*Carter v. Escondido Union High Sch. Dist. (2007) 148 Cal.App.4th 922, 933* ; *Patten v. Grant Joint Union High Sch. Dist. (2005) 134 Cal.App.4th 1378, 1384*].

[b] Affirmative Defense--Burden of Proof

In an action for wrongful discharge based on alleged retaliation for an employee's whistleblowing activity, the employer may defend by claiming that the employee would have been discharged anyway. However, to establish this affirmative defense, once it has been demonstrated by a preponderance of the evidence that a protected activity was a contributing factor in the alleged retaliatory discharge, the employer has the burden of proof to demonstrate by clear and convincing evidence that the alleged discharge would have occurred for legitimate, independent reasons even if the employee had

not engaged in protected activities [see *Lab. Code § 1102.6*].

[c] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 24, *California Judicial Council Wrongful Termination Instructions*, Ch. 25, *California Judicial Council Fair Employment and Housing Act Instructions*]:

CACI No. 2430 Wrongful Discharge/Demotion in Violation of Public Policy--Essential Factual Elements

CACI No. 2505 Retaliation

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Labor & Employment Law Discrimination Retaliation General Overview Labor & Employment Law Employment Relationships Employment Contracts Breach Labor & Employment Law Wrongful Termination Defenses General Overview Labor & Employment Law Wrongful Termination Whistleblower Protection Act Burdens of Proof

Barbara S. de Oddone contributed to the original chapter for California Forms of Jury Instruction (Matthew Bender).
Stanley E. Tobin and Darrell J. Salomon contributed to the original chapter as consultants.



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CHAPTER 24A Matthew Bender Employment Contract Instructions
PART C. DEFENSES

4-24A California Forms of Jury Instruction MB 2400A.40-MB 2400A.49

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CHAPTER 24A Matthew Bender Employment Contract Instructions
PART D. DAMAGES

4-24A California Forms of Jury Instruction MB 2400A.50

MB 2400A.50 Damages for Breach of Employment Contract--General Rule

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

If you find that Defendant has breached the terms of an employment contract between Plaintiff and Defendant, then you must determine the amount of any money damages that Plaintiff is entitled to recover as a result of the breach.

Damages are an amount that will compensate Plaintiff for all of the loss or harm caused by the breach that the parties might reasonably have foreseen at the time they entered into their contract.

As much as possible, the damages you award should place Plaintiff in the position that [he/she] would have been in if the contract had been performed and there had been no breach.

***Authorities:** Civ. Code §§ 3300, 3358; Coughlin v. Blair (1953) 41 Cal.2d 587, 603, 262 P.2d 305 ; Hunt Bros. Co. v. San Lorenzo etc. Co. (1906) 150 Cal. 51, 56, 87 P. 1093 ; Lisec v. United Airlines, Inc. (1992) 10 Cal.App.4th 1500, 1503-1504, 11 Cal.Rptr.2d 689 ; Ericson v. Playgirl, Inc. (1977) 73 Cal.App.3d 850, 854, 140 Cal.Rptr. 921 .*

[2] Use of Instruction

This instruction should be used to state the basic rule of damages for breach of contract.

This instruction does not use the phrase "proximately caused," although that term is used in Civ. Code § 3300, the general measure-of-damages provision. For the reasons discussed in Ch. 3E, *Matthew Bender Contract Damages Instructions*, the term "proximate cause" has been abandoned. Therefore, the instruction defining "cause" as "substantial factor" should be given following this instruction [see Ch. 3E, *Matthew Bender Contract Damages Instructions*, MB

300E.03].

For related Judicial Council instructions, see [3][b], *below*.

[3] Comment

[a] Damages for Breach of Contract

Employment contracts are governed by the rules applicable to other kinds of contracts [*Reynolds Elec. etc. Co. v. Workmen's Comp. App. Bd.* (1966) 65 Cal.2d 429, 433, 55 Cal.Rptr. 248]. The general rule of damages for breach of contract is that the party aggrieved by the breach may recover for all losses proximately caused by the breach that were reasonably foreseeable or contemplated by the parties at the time they entered into the contract [*Civ. Code* § 3300; *Hunt Bros. Co. v. San Lorenzo etc. Co.* (1906) 150 Cal. 51, 56, 87 P. 1093 ; *Lisec v. United Airlines, Inc.* (1992) 10 Cal.App.4th 1500, 1504, 11 Cal.Rptr.2d 689 ; *Ericson v. Playgirl, Inc.* (1977) 73 Cal.App.3d 850, 854, 140 Cal.Rptr. 921]. The damages recovered should give the injured party as much as possible of what he or she would have received under the contract had no breach occurred [*Civ. Code* § 3358; *Coughlin v. Blair* (1953) 41 Cal.2d 587, 603, 262 P.2d 305 ; *Lisec v. United Airlines, Inc.* (1992) 10 Cal.App.4th 1500, 1503, 11 Cal.Rptr.2d 689].

The measure of damages for breach of the covenant of good faith and fair dealing is limited to contract damages. Tort damages are not recoverable [*Hunter v. Up-Right, Inc.* (1993) 6 Cal.4th 1174, 1180, 26 Cal.Rptr.2d 8, 864 P.2d 88 ; see *Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 684, 254 Cal.Rptr. 211, 765 P.2d 373].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 24, *California Judicial Council Wrongful Termination Instructions*]:

CACI No. 2406 Breach of Employment Contract--Unspecified Term--Damages

CACI No. 2407 Breach of Employment Contract--Unspecified Term--Employee's Duty to Mitigate Damages

CACI No. 2422 Breach of Employment Contract--Specified Term--Damages

CACI No. 2433 Wrongful Discharge in Violation of Public Policy--Damages

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewCivil ProcedureRemediesDamagesGeneral OverviewCivil ProcedureRemediesDamagesCompensatory DamagesLabor & Employment LawEmployment RelationshipsEmployment ContractsBreachLabor & Employment LawWrongful TerminationRemediesCompensatory Damages

Barbara S. de Oddone contributed to the original chapter for California Forms of Jury Instruction (Matthew Bender). Stanley E. Tobin and Darrell J. Salomon contributed to the original chapter as consultants.



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CHAPTER 24A Matthew Bender Employment Contract Instructions
PART D. DAMAGES

4-24A California Forms of Jury Instruction MB 2400A.51

MB 2400A.51 Damages for Wrongful Termination--Lost Share of Anticipated Profits

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

If you find that Plaintiff's employment was terminated wrongfully by Defendant _____ [either in violation of public policy or in violation of the implied covenant of good faith and fair dealing or in breach of the employment contract], then Plaintiff is entitled to recover any lost share of anticipated profits if [he/she] proves that Defendant's _____ [breach or wrongful act] caused the loss of profits.

[*OPTIONAL (See Use of Instruction)*]

You must not award to Plaintiff more than [he/she] would have received if the employment contract had been fully performed.

[*CONTINUE INSTRUCTION*]

The amount of the share of anticipated profits lost because of Defendant's _____ [breach or wrongful act] may be estimated, but Plaintiff must prove the loss with reasonable certainty.

If you find that Plaintiff has proved the basis for a loss of a share of the anticipated profits with reasonable certainty, then, when you determine the share of lost profits, any uncertainties must be resolved against Defendant.

In making your determination of any lost profits, you should consider all of the evidence presented to you of _____ [specify according to evidence, e.g., net profits earned by the business before the breach of the employment contract with Plaintiff and/or net profits earned by the business after the breach].

You must determine any share of profits that Plaintiff lost based on net profits and not on gross profits.

Authorities: *Grupe v. Glick* (1945) 26 Cal.2d 680, 692-693, 160 P.2d 832 ; *Steelduct Co. v. Henger-Seltzer Co.* (1945) 26 Cal.2d 634, 648-651, 160 P.2d 804 ; *Overstreet v. Merritt* (1921) 186 Cal. 494, 502, 505-506, 200 P. 11 ; *Berge v. International Harvester Co.* (1983) 142 Cal.App.3d 152, 161-163, 190 Cal.Rptr. 815 ; *Brawthen v. H & R Block, Inc.* (1975) 52 Cal.App.3d 139, 147-148, 124 Cal.Rptr. 845 ; *Kuffel v. Seaside Oil Co.* (1970) 11 Cal.App.3d 354, 361, 366, 90 Cal.Rptr. 209 .

[2] Use of Instruction

This instruction should be used in wrongful termination actions when the plaintiff claims as an element of his or her damages the loss of a share of the future profits of the defendant's business. The issue of lost profits may arise whenever the employment contract provides that some or all of the plaintiff's compensation for services is to be in the form of a share of the profits of the defendant's business.

The instruction presumes the existence of an employment contract that measures the plaintiff's compensation, in whole or in part, as some portion of the profits of the business. It will be necessary to draft additional instructions regarding the contractual provision for compensation that the plaintiff must prove to claim lost anticipated profits as an element of damages.

Under this instruction, the plaintiff is required to prove that the defendant's conduct "caused" the loss of profits. For an instruction defining "cause" as "substantial factor," see Ch. 3E, *Matthew Bender Contract Damages Instructions*. This instruction should also be used in conjunction with instructions defining the measure of damages for breach of contract or for a tort. For general instructions on contract damages, see Ch. 3, *California Judicial Council Contracts Instructions*, CACI No. 350- CACI No. 361, and Ch. 3E, *Matthew Bender Contract Damages Instructions*.

The optional paragraph should be used in cases when the term of the contract that will define the period for determination of damages is at issue.

For related Judicial Council instructions, see [3][c], *below*.

[3] Comment

[a] Lost Profits to Be Determined With Reasonable Certainty

The general rule is that anticipated profits may be recovered if their loss was a direct and natural consequence of the wrong and is established by the plaintiff with reasonable certainty. Uncertainties caused by the defendant's breach of contract or tort are to be resolved against the defendant [*Grupe v. Glick* (1945) 26 Cal.2d 680, 692-693, 160 P.2d 832 ; *Steelduct Co. v. Henger-Seltzer Co.* (1945) 26 Cal.2d 634, 651, 160 P.2d 804 ; *Overstreet v. Merritt* (1921) 186 Cal. 494, 505-506, 200 P. 11 ; *Berge v. International Harvester Co.* (1983) 142 Cal.App.3d 152, 161-163, 190 Cal.Rptr. 815 ; *Brawthen v. H & R Block, Inc.* (1975) 52 Cal.App.3d 139, 147-148, 124 Cal.Rptr. 845 ; *Kuffel v. Seaside Oil Co.* (1970) 11 Cal.App.3d 354, 361, 90 Cal.Rptr. 209].

[b] Proof of Estimated Losses Permissible

The loss may be estimated and does not have to be proved with precision [*Berge v. International Harvester Co.* (1983) 142 Cal.App.3d 152, 161, 190 Cal.Rptr. 815 ; *Brawthen v. H & R Block, Inc.* (1975) 52 Cal.App.3d 139, 147-148, 124

Cal.Rptr. 845]. When the uncertainty as to the amount of lost share of profits is due to the defendant's breach or wrongful act, a reasonable estimation of the lost profits based on, for example, past profit levels, or profits made by the business after the breach, or profits made by other businesses that are relevant under the circumstances, constitutes the best and most convincing evidence of damages and is properly accepted as sufficient proof of these damages [*Steelduct Co. v. Henger-Seltzer Co.* (1945) 26 Cal.2d 634, 651, 160 P.2d 804 ; *Berge v. International Harvester Co.* (1983) 142 Cal.App.3d 152, 162, 190 Cal.Rptr. 815].

This jury instruction is adapted in large part from one approved in *Brawthen v. H & R Block, Inc.*, a wrongful termination action. The trial court in that case gave the following instructions to the jury regarding lost anticipated profits [*Brawthen v. H & R Block, Inc.* (1975) 52 Cal.App.3d 139, 147, 124 Cal.Rptr. 845]:

Anticipated profits, if their loss is a direct and natural consequence of the breach, may be recovered for breach of an employment contract. Anticipated profits lost through breach of contract may be estimated, and where the defendant, by its breach of the contract, has given rise to the difficulty of proving the amount of loss of profits, it is proper to require of the plaintiff only that he show the amount of damages with reasonable certainty and to resolve uncertainties as to the amount of anticipated profits against the defendant.

In determining a lost share of the profits, the proper measure of recovery is net profits, not gross profits [*Kuffel v. Seaside Oil Co.* (1970) 11 Cal.App.3d 354, 366, 90 Cal.Rptr. 209].

[c] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 24, *California Judicial Council Wrongful Termination Instructions*]:

CACI No. 2406 Breach of Employment Contract--Unspecified Term--Damages

CACI No. 2407 Breach of Employment Contract--Unspecified Term--Employee's Duty to Mitigate Damages

CACI No. 2422 Breach of Employment Contract--Specified Term--Damages

CACI No. 2433 Wrongful Discharge in Violation of Public Policy--Damages

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewCivil ProcedureRemediesDamagesGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsBreachLabor & Employment LawWrongful TerminationRemediesGeneral OverviewLabor & Employment LawWrongful TerminationRemediesCompensatory Damages

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CHAPTER 24A Matthew Bender Employment Contract Instructions
PART D. DAMAGES

4-24A California Forms of Jury Instruction MB 2400A.52

MB 2400A.52 Action for Wrongful Termination--Amounts in Mitigation

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

You must subtract from Plaintiff's damages any amounts that you find that Plaintiff earned from other employment during _____ [either the unexpired term of [his/her] employment contract with Defendant or the period that Plaintiff's employment with Defendant would have reasonably continued], or that Plaintiff could have earned if [he/she] had made reasonable efforts _____ [to obtain or to obtain and retain] substantially similar employment that was available.

[*OPTIONAL (See Use of Instruction)*]

You must not subtract from Plaintiff's damages any earnings from other employment that [he/she] _____ [either had while employed with Defendant and continued in after being terminated by Defendant or obtained after termination by Defendant, provided that employment would not have interfered with Plaintiff's duties under (his/her) employment contract with Defendant].

[*OPTIONAL (See Use of Instruction)*]

You must subtract from Plaintiff's damages any amounts that you find Plaintiff received from Defendant but that Plaintiff would not have received if [he/she] had continued to work for Defendant. These amounts would include _____ [specify payments at issue, e.g., severance pay and/or cash payment for vacation not taken].

Authorities: *Kern v. Levolor Lorentzen, Inc.* (9th Cir. 1990) 899 F.2d 772, 778, 781 ; *Parker v. Twentieth Century-Fox Film Corp.* (1970) 3 Cal.3d 176, 181, 89 Cal.Rptr. 737, 474 P.2d 689 ; *Wise v. Southern Pac. Co.* (1970) 1 Cal.3d 600, 607, 83 Cal.Rptr. 202, 463 P.2d 426 ; *Seymour v. Oelrichs* (1909) 156 Cal. 782, 800-801, 106 P. 88 , disapproved on other grounds, *Sterling v. Taylor* (2007) 40 Cal.4th 757, 770, 55 Cal.Rptr.3d 116, 152 P.3d 420 ; *Stanchfield v. Hamer Toyota, Inc.* (1995) 37 Cal.App.4th 1495, 1500-1503, 44 Cal.Rptr.2d 565 ; *Currier v. City of Roseville* (1975) 50 Cal.App.3d 499, 506-508, 123 Cal.Rptr. 314 ; *California School Employees Assn. v. Personnel Commission* (1973) 30 Cal.App.3d 241, 248-250, 106 Cal.Rptr. 283 ; *Erler v. Five Points Motors, Inc.* (1967) 249 Cal.App.2d 560, 567-568, 57 Cal.Rptr. 516 ; *Beseman v. Remy* (1958) 160 Cal.App.2d 437, 445, 325 P.2d 578 ; *de la Falaise v. Gaumont-British P. Corp.* (1940) 39 Cal.App.2d 461, 470, 103 P.2d 447 ; *Goudal v. C.B. DeMille Pictures Corp.* (1931) 118 Cal.App. 407, 414-415, 5 P.2d 432 .

[2] Use of Instruction

This instruction should be used in wrongful termination actions when amounts in mitigation are at issue. The choice of alternatives regarding plaintiff's period of employment in the first paragraph will depend on whether the contract of employment was for a definite term or without a specific term. The choice of alternatives in the first paragraph regarding the plaintiff's efforts to both find and retain other employment should be used if the employee's failure to mitigate damages by retaining other employment is at issue [*Stanchfield v. Hamer Toyota, Inc.* (1995) 37 Cal.App.4th 1495, 1500-1503, 44 Cal.Rptr.2d 565 ; see [3][b], below].

The alternatives in the first optional paragraph should be selected according to whether the employee had another job when he or she was working for the defendant, or obtained such a job after termination. In either case the evidence would have to show that the other job did not or would not conflict with the plaintiff's performance of his or her employment with the defendant, for example, night or weekend work.

The second optional paragraph should be used in cases when an issue is the defendant's payment to the plaintiff of certain amounts, such as severance pay, that the plaintiff would not have received if his or her employment had continued. These payments would not fall within the definition of recoverable losses. Such amounts might also become an issue if the plaintiff claims money damages for a certain benefit, such as sick leave, when the employer only gives time off with pay as the benefit and does not pay cash for sick leave not taken. Under these circumstances, an additional payment for sick leave would be a double recovery of wages since the employee would not have received that payment if employment had continued. If these issues arise, an instruction can be drafted to inform the jury that in calculating damages, they must not award a double recovery of the amounts unless they find that the parties agreed to such payments [see *Currier v. City of Roseville* (1975) 50 Cal.App.3d 499, 507-508, 123 Cal.Rptr. 314].

For related Judicial Council instructions, see [3][e], below.

[3] Comment

[a] Defendant's Burden of Proving Mitigation of Damages

Although the plaintiff bears the burden of proving his or her losses under the contract, the defendant bears the burden of proving that the plaintiff's damages were less than the contractual amount (1) because of the plaintiff's earnings in mitigation, (2) because the plaintiff failed to meet his or her duty to mitigate, or (3) because the plaintiff either seeks or has already received amounts from the defendant that the plaintiff would not be entitled to if employment continued, e.g., severance pay [*Kern v. Levolor Lorentzen, Inc.* (9th Cir. 1990) 899 F.2d 772, 778, 781 ; *Parker v. Twentieth Century-Fox Film Corp.* (1970) 3 Cal.3d 176, 181, 89 Cal.Rptr. 737, 474 P.2d 689 ; *Currier v. City of Roseville* (1975) 50 Cal.App.3d 499, 506-508, 123 Cal.Rptr. 314 ; *California School Employees Assn. v. Personnel Commission* (1973) 30 Cal.App.3d 241, 248-250, 106 Cal.Rptr. 283 ; *Erler v. Five Points Motors, Inc.* (1967) 249 Cal.App.2d 560,

567-568, 57 Cal.Rptr. 516 ; *De Angeles v. Roos Bros. Inc.* (1966) 244 Cal.App.2d 434, 442, 52 Cal.Rptr. 783 ; *Goudal v. C.B. DeMille Pictures Corp.* (1931) 118 Cal.App. 407, 414-415, 5 P.2d 432].

[b] Extent of Plaintiff's Duty to Mitigate

Although the plaintiff has a duty to mitigate damages by making reasonable efforts to find other employment, he or she need only seek other employment that is of a character substantially similar to his or her employment with the defendant. The plaintiff need not seek or accept different or inferior employment [*Parker v. Twentieth Century-Fox Film Corp.* (1970) 3 Cal.3d 176, 181, 89 Cal.Rptr. 737, 474 P.2d 689 ; *Currier v. City of Roseville* (1975) 50 Cal.App.3d 499, 506, 123 Cal.Rptr. 314 ; *California School Employees Assn. v. Personnel Commission* (1973) 30 Cal.App.3d 241, 254-255, 106 Cal.Rptr. 283 ; *de la Falaise v. Gaumont-British P. Corp.* (1940) 39 Cal.App.2d 461, 468-470, 103 P.2d 447].

The burden is on the defendant to prove that the plaintiff has failed to exercise reasonable efforts to find other, substantially similar employment that was available [*Parker v. Twentieth Century-Fox Film Corp.* (1970) 3 Cal.3d 176, 181, 89 Cal.Rptr. 737, 474 P.2d 689 ; *Currier v. City of Roseville* (1975) 50 Cal.App.3d 499, 506-507, 123 Cal.Rptr. 314 ; *De Angeles v. Roos Bros., Inc.* (1966) 244 Cal.App.2d 434, 442, 52 Cal.Rptr. 783 ; *Goudal v. C.B. DeMille Pictures Corp.* (1931) 118 Cal.App. 407, 414-415, 5 P.2d 432]. In a case when the plaintiff found and accepted other employment, but then lost the position because of his own conduct, the court found no basis for concluding that he was prejudiced by a jury instruction stating the employee's duty was to make a reasonable effort "to find and retain comparable employment" [*Stanchfield v. Hamer Toyota, Inc.* (1995) 37 Cal.App.4th 1495, 1500-1503, 44 Cal.Rptr.2d 565 ; see MB 2400A.17].

[c] Earnings From Subsequent Employment

One appellate court indicated that the plaintiff's earnings from other employment are not to be deducted from his or her damages if the other employment is inferior. However, if the other employment is not inferior—even though it may be different—earnings from the subsequent employment may be deducted [*de la Falaise v. Gaumont-British P. Corp.* (1940) 39 Cal.App.2d 461, 470, 103 P.2d 447]. *Seymour v. Oelrichs* [*Seymour v. Oelrichs* (1909) 156 Cal. 782, 800-801, 106 P. 88 , disapproved on other grounds, *Sterling v. Taylor* (2007) 40 Cal.4th 757, 770, 55 Cal.Rptr. 3d 116, 152 P.3d 420], and the line of subsequent cases do not make the above distinctions. Under later decisions, all interim earnings appear to be deductible notwithstanding the status of the succeeding employment [see *Rabago-Alvarez v. Dart Industries, Inc.* (1976) 55 Cal.App.3d 91, 98-100, 127 Cal.Rptr. 222].

[d] Income From Nonconflicting Employment

Income from other employment that the plaintiff could perform while employed by the defendant because it would not have been incompatible may not be deducted in mitigation of the plaintiff's damages [*Wise v. Southern Pac. Co.* (1970) 1 Cal.3d 600, 607, 83 Cal.Rptr. 202, 463 P.2d 426 ; *California School Employees Assn. v. Personnel Commission* (1973) 30 Cal.App.3d 241, 255, 106 Cal.Rptr. 283 ; *Beseman v. Remy* (1958) 160 Cal.App.2d 437, 445, 325 P.2d 578].

[e] Related Judicial Council Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 24, *California Judicial Council Wrongful Termination Instructions*]:

CACI No. 2407, Employee's Duty to Mitigate Damages

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewCivil ProcedureRemediesDamagesGeneral
OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsBreachLabor & Employment
LawWrongful TerminationRemediesGeneral OverviewLabor & Employment LawWrongful
TerminationRemediesCompensatory Damages

Barbara S. de Oddone contributed to the original chapter for California Forms of Jury Instruction (Matthew Bender).
Stanley E. Tobin and Darrell J. Salomon contributed to the original chapter as consultants.



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CHAPTER 24A Matthew Bender Employment Contract Instructions
PART D. DAMAGES

4-24A California Forms of Jury Instruction MB 2400A.53

MB 2400A.53 Double Damages for Misrepresentation Concerning Employment

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

As a matter of public policy to protect employees, the state of California allows the recovery of double the actual damages suffered for certain types of misrepresentations about employment. For Plaintiff to recover these double damages, [he/she/it] must prove that Defendant influenced, persuaded, or engaged Plaintiff by means of knowingly false representations to [change from one place to another in California *or* move to California from another state *or* move from California to another state] for the purpose of working in any branch of labor. Plaintiff must also prove that the knowingly false representations concerned any of the following:

[CHOOSE FROM THE FOLLOWING (See Use of Instruction)]

1. The kind of work or the character of the work;
2. The existence of the work;
3. The length of time that the work would last;
4. The compensation to be paid for the work;
5. The sanitary or housing conditions relating to or surrounding the work; or
6. The existence or nonexistence of any strike, lockout, or other labor dispute affecting the work and pending

between the proposed employer and the person then or last engaged in doing the work for which Plaintiff was hired.

Authorities: *Lab. Code §§ 970, 972; Seubert v. McKesson Corp. (1990) 223 Cal.App.3d 1514, 1521-1523, 273 Cal.Rptr. 296, disapproved on other grounds, Dore v. Arnold Worldwide, Inc. (2006) 39 Cal.4th 384, 393, 46 Cal.Rptr.3d 668, 139 P.3d 56.*

[2] Use of Instruction

This instruction should be used when the plaintiff claims that he or she is entitled to receive double damages under *Lab. Code §§ 970 and 972* [see [3], below]. The numbered list of items that may be the subject of false representations should be modified to reflect the facts of the case at hand, and the jury should be instructed only on those items from the list that are at issue in the case.

[3] Comment

It is a violation of the Labor Code for any person (or an officer or agent of that person) to influence, persuade, or engage another person to move from one place to another for the purpose of working in any branch of labor by means of knowingly false representations concerning certain aspects of that work [*Lab. Code § 970; see instruction in [1], above, for list based on aspects of employment enumerated in statute*]. Any person (or agent or officer of that person) who violates this law is liable to the party aggrieved, in a civil action, for double damages resulting from the misrepresentations [*Lab. Code § 972*]. Although these statutes were enacted to protect migrant workers, the courts have construed the statutes to apply to other employees as well [*Seubert v. McKesson Corp. (1990) 223 Cal.App.3d 1514, 1522, 273 Cal.Rptr. 296, disapproved on other grounds, Dore v. Arnold Worldwide, Inc. (2006) 39 Cal.4th 384, 393, 46 Cal.Rptr.3d 668, 139 P.3d 56; Tyco Industries, Inc. v. Superior Court (1985) 164 Cal.App.3d 148, 155, 211 Cal.Rptr. 540; Munoz v. Kaiser Steel Corp. (1984) 156 Cal.App.3d 965, 980, 203 Cal.Rptr. 345*]. One court applied *Lab. Code §§ 970 and 972* to award a sales manager double damages in a wrongful termination action [*Seubert v. McKesson Corp. (1990) 223 Cal.App.3d 1514, 1521-1523, 273 Cal.Rptr. 296, disapproved on other grounds, Dore v. Arnold Worldwide, Inc. (2006) 39 Cal.4th 384, 393, 46 Cal.Rptr.3d 668, 139 P.3d 56*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewCivil ProcedureRemediesDamagesGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsBreachLabor & Employment LawWrongful TerminationRemediesGeneral OverviewLabor & Employment LawWrongful TerminationRemediesCompensatory Damages

Barbara S. de Oddone contributed to the original chapter for California Forms of Jury Instruction (Matthew Bender). Stanley E. Tobin and Darrell J. Salomon contributed to the original chapter as consultants.



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CHAPTER 25 California Judicial Council Fair Employment and Housing Act Instructions

4-25 California Forms of Jury Instruction 25.syn

§ 25.syn Synopsis to Chapter 25: California Judicial Council Fair Employment and Housing Act Instructions

CACI 2500 Disparate Treatment--Essential Factual Elements (Gov. Code, § 12940(a))

CACI 2501 Affirmative Defense--Bona fide Occupational Qualification

CACI 2502 Disparate Impact--Essential Factual Elements (Gov. Code, § 12940(a))

CACI 2503 Affirmative Defense--Business Necessity/Job Relatedness

CACI 2504 Disparate Impact--Rebuttal to Business Necessity/Job Relatedness Defense

CACI 2505 Retaliation (Gov. Code, § 12940(h))

CACI 2506 Affirmative Defense--After-Acquired Evidence

CACI 2507 "Motivating Reason" Explained

CACI 2508 Failure to File Timely Administrative Complaint (Gov. Code, § 12960(d))--Plaintiff Alleges Continuing Violation

CACI 2509-CACI 2519 Reserved for Future Use

CACI 2520 Quid pro quo Sexual Harassment--Essential Factual Elements

CACI 2521A Hostile Work Environment Harassment--Conduct Directed at Plaintiff--Essential Factual Elements--Employer or Entity Defendant (Gov. Code, § 12940(j))

CACI 2521B Hostile Work Environment Harassment--Conduct Directed at Others--Essential Factual Elements--Employer or Entity Defendant (Gov. Code, § 12940(j))

CACI 2521C Hostile Work Environment Harassment--Widespread Sexual Favoritism--Essential Factual

Elements--Employer or Entity Defendant (Gov. Code, § 12940(j))

CACI 2522A Hostile Work Environment Harassment--Conduct Directed at Plaintiff--Essential Factual Elements--Individual Defendant (Gov. Code, § 12940(j))

CACI 2522B Hostile Work Environment Harassment--Conduct Directed at Others--Essential Factual Elements--Individual Defendant (Gov. Code, § 12940(j))

CACI 2522C Hostile Work Environment Harassment--Widespread Sexual Favoritism--Essential Factual Elements--Individual Defendant (Gov. Code, § 12940(j))

CACI 2523 "Harassing Conduct" Explained

CACI 2524 "Severe or Pervasive" Explained

CACI 2525 Harassment--"Supervisor" Defined

CACI 2526 Affirmative Defense--Avoidable Consequences Doctrine (Sexual Harassment by a Supervisor)

CACI 2527 Failure to Prevent Harassment, Discrimination, or Retaliation--Essential Factual Elements--Employer or Entity Defendant (Gov. Code, § 12940(k))

CACI 2528-CACI 2539 Reserved for Future Use

CACI 2540 Disability Discrimination--Disparate Treatment--Essential Factual Elements

CACI 2541 Disability Discrimination--Reasonable Accommodation--Essential Factual Elements (Gov. Code, § 12940(m))

CACI 2542 Disability Discrimination--"Reasonable Accommodation" Explained

CACI 2543 Disability Discrimination--Affirmative Defense--Inability to Perform Essential Job Duties

CACI 2544 Disability Discrimination--Affirmative Defense--Health or Safety Risk

CACI 2545 Disability Discrimination--Affirmative Defense--Undue Hardship

CACI 2546 Disability Discrimination--Reasonable Accommodation--Failure to Engage in Interactive Process (Gov. Code, § 12940(n))

CACI 2547-CACI 2559 Reserved for Future Use

CACI 2560 Religious Creed Discrimination--Failure to Accommodate--Essential Factual Elements (Gov. Code, § 12940(l))

CACI 2561 Religious Creed Discrimination--Reasonable Accommodation--Affirmative Defense--Undue Hardship

CACI 2562-CACI 2599 Reserved for Future Use

CACI VF-2500 Disparate Treatment (Gov. Code, § 12940(a))

CACI VF-2501 Disparate Treatment (Gov. Code, § 12940(a))--Affirmative Defense--Bona fide Occupational Qualification

CACI VF-2502 Disparate Impact (Gov. Code, § 12940(a))

CACI VF-2503 Disparate Impact (Gov. Code, § 12940(a)) Affirmative Defense--Business Necessity/Job Relatedness--Rebuttal to Business Necessity/Job Relatedness Defense

CACI VF-2504 Retaliation (Gov. Code, § 12940(h))

CACI VF-2505 Quid pro quo Sexual Harassment

CACI VF-2506A Hostile Work Environment Harassment--Conduct Directed at Plaintiff--Employer or Entity Defendant (Gov. Code, § 12940(j))

CACI VF-2506B Hostile Work Environment Harassment--Conduct Directed at Others--Employer or Entity Defendant (Gov. Code, § 12940(j))

CACI VF-2506C Hostile Work Environment Harassment--Widespread Sexual Favoritism--Employer or Entity Defendant (Gov. Code, § 12940(j))

CACI VF-2507A Hostile Work Environment Harassment--Conduct Directed at Plaintiff--Individual Defendant (Gov. Code, § 12940(j))

CACI VF-2507B Hostile Work Environment Harassment--Conduct Directed at Others--Individual Defendant (Gov. Code, § 12940(j))

CACI VF-2507C Hostile Work Environment Harassment--Widespread Sexual Favoritism--Individual Defendant (Gov. Code, § 12940(j))

CACI VF-2508 Disability Discrimination--Disparate Treatment

CACI VF-2509 Disability Discrimination--Reasonable Accommodation (Gov. Code, § 12940(m))

CACI VF-2510 Disability Discrimination--Reasonable Accommodation--Affirmative Defense--Undue Hardship (Gov. Code, § 12940(m))

CACI VF-2511 Religious Creed Discrimination--Failure to Accommodate (Gov. Code, § 12940(l))

CACI VF-2512 Religious Creed Discrimination--Failure to Accommodate (Gov. Code, § 12940(l))--Affirmative Defense--Undue Hardship

CACI VF-2513 Disability Discrimination--Reasonable Accommodation--Failure to Engage in Interactive Process (Gov. Code, § 12940(n))

CACI VF-2514 Failure to Prevent Harassment, Discrimination, or Retaliation

CACI VF-2515-CACI VF-2599 Reserved for Future Use



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CHAPTER 25 California Judicial Council Fair Employment and Housing Act Instructions

4-25 California Forms of Jury Instruction Scope

Scope

SCOPE

This chapter contains the California Judicial Council's "Fair Employment and Housing Act Series" of jury instructions [CACI No. 2500 et seq.]. The Judicial Council of California Civil Jury Instructions (CACI) included in this publication are the product of the Judicial Council of California Task Force on Jury Instructions, which are updated by the Judicial Council of California Advisory Committee on Civil Jury Instructions.

This chapter includes instructions on the following topics:

- Essential factual elements for causes of action under FEHA for disparate treatment [CACI No. 2500] and disparate impact [CACI No. 2502].
- Affirmative defenses of bona fide occupational qualification [CACI No. 2501], business necessity/job relatedness [CACI No. 2503], and after-acquired evidence [CACI No. 2506].
- Disparate impact and rebuttal to business necessity/job relatedness [CACI No. 2504].
- Retaliation under FEHA [CACI No. 2505].
- The definition of "motivating reason" [CACI No. 2507].
- Allegations related to continuing violations [CACI No. 2508].
- Essential factual elements for causes of action for quid pro quo sexual harassment and hostile work environment [CACI Nos. 2520- 2522C].
- Explanations of "harassing conduct" [CACI No. 2523] and "hostile work environment" [CACI No. 2524], and a definition of "supervisor" [CACI No. 2525].

4-25 California Forms of Jury Instruction Scope

- The "avoidable consequences" defense for use in a cause of action for sexual harassment by a supervisor [*CACI No. 2526*].
- Essential factual elements for a cause of action against an employer or entity defendant for the failure to prevent harassment or discrimination [*CACI No. 2527*].
- Essential factual elements for causes of action in disability discrimination [*CACI No. 2540* (disparate treatment); *CACI Nos. 2541 and 2542* (reasonable accommodation)].
- Affirmative defenses for disability discrimination actions (i.e. inability to perform, health or safety risk, and undue hardship) [*CACI Nos. 2543-2546*].
- Essential factual elements for a cause of action for religious creed discrimination [*CACI No. 2560*] and an affirmative defense to an action for religious creed discrimination (i.e. undue hardship) [*CACI No. 2561*].

The FEHA series also includes special verdict forms [*CACI No. VF-2500-CACI No. VF-2514*].



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CHAPTER 25 California Judicial Council Fair Employment and Housing Act Instructions

4-25 California Forms of Jury Instruction CACI 2500

CACI 2500 Disparate Treatment--Essential Factual Elements (Gov. Code, § 12940(a))

[*Name of plaintiff*] **claims that** [*name of defendant*] **wrongfully discriminated against** [him/her]. **To establish this claim, [*name of plaintiff*] must prove all of the following:**

1. **That** [*name of defendant*] **was** [an employer/[*other covered entity*]];
2. **That** [*name of plaintiff*] **[was an employee of [*name of defendant*]/applied to [*name of defendant*] for a job/[*describe other covered relationship to defendant*]];**
3. **That** [*name of defendant*] **[discharged/refused to hire/[*other adverse employment action*]]** [*name of plaintiff*];
4. **That** [*name of plaintiff*]'s [*protected status--for example, race, gender, or age*] **was a motivating reason for the** [discharge/refusal to hire/[*other adverse employment action*]];
5. **That** [*name of plaintiff*] **was harmed; and**
6. **That the** [discharge/refusal to hire/[*other adverse employment action*]] **was a substantial factor in causing** [*name of plaintiff*]'s harm.

New September 2003; Revised April 2009

Directions for Use

This instruction is intended for use when a plaintiff alleges disparate treatment discrimination under the FEHA against an employer or other covered entity. Disparate treatment occurs when an employer treats

an individual less favorably than others because of the individual's protected status. In contrast, disparate impact (the other general theory of discrimination) occurs when an employer has an employment practice that appears neutral but has an adverse impact on members of a protected group. For disparate impact claims, see *CACI No. 2502, Disparate Impact--Essential Factual Elements*.

Elements that are uncontested should be deleted from this instruction.

If element 1 is given, the court may need to instruct the jury on the statutory definition of "employer" under the FEHA. Other covered entities under the FEHA include labor organizations, employment agencies, and apprenticeship training programs. (See *Gov. Code, § 12940(a)-(d)*.)

Note that there are two causation elements. There must be a causal link between the discriminatory animus and the adverse action (see element 4), and there must be a causal link between the adverse action and the damage (see element 6). (See *Mamou v. Trendwest Resorts, Inc. (2008) 165 Cal.App.4th 686, 713 [81 Cal.Rptr.3d 406]* .)

For damages instructions, see applicable instructions on tort damages.

Sources and Authority

- *Government Code section 12940(a)* provides that it is an unlawful employment practice "[f]or an employer, because of the race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, or sexual orientation of any person, to refuse to hire or employ the person or to refuse to select the person for a training program leading to employment, or to bar or to discharge the person from employment or from a training program leading to employment, or to discriminate against the person in compensation or in terms, conditions, or privileges of employment."

- *Government Code section 12926(m)* provides: " 'Race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation' includes a perception that the person has any of those characteristics or that the person is associated with a person who has, or is perceived to have, any of those characteristics."

- "[C]onceptually the theory of 'disparate treatment' ... is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex or national origin. " (*Mixon v. Fair Employment and Housing Com. (1987) 192 Cal.App.3d 1306, 1317 [237 Cal.Rptr. 884]* , quoting *Teamsters v. United States (1977) 431 U.S. 324, 335-336, fn. 15 [97 S.Ct. 1843, 52 L.Ed.2d 396]* .)

- "[W]hether or not a plaintiff has met his or her prima facie burden [under *McDonnell Douglas Corp. v. Green (1973) 411 U.S. 792 [93 S.Ct. 1817, 36 L.Ed.2d 668]*] , and whether or not the defendant has rebutted the plaintiff's prima facie showing, are questions of law for the trial court, not questions of fact for the jury." (*Caldwell v. Paramount Unified School Dist. (1995) 41 Cal.App.4th 189, 201 [48 Cal.Rptr.2d 448]* .)

- "[If] the case is submitted to the trier of fact, the intermediate burdens set forth in *McDonnell Douglas* will fall away, and the fact finder will have only to decide the ultimate issue of whether the employer's discriminatory intent was a motivating factor in the adverse employment decision." (*Caldwell, supra*, 41 Cal.App.4th at p. 205 .)

■ "The ultimate burden of persuasion on the issue of actual discrimination remains with the plaintiff." (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 356 [100 Cal.Rptr.2d 352, 8 P.3d 1089] .)

■ "To succeed on a disparate treatment claim at trial, the plaintiff has the initial burden of establishing a prima facie case of discrimination, to wit, a set of circumstances that, if unexplained, permit an inference that it is more likely than not the employer intentionally treated the employee less favorably than others on prohibited grounds. Based on the inherent difficulties of showing intentional discrimination, courts have generally adopted a multifactor test to determine if a plaintiff was subject to disparate treatment. The plaintiff must generally show that: he or she was a member of a protected class; was qualified for the position he sought; suffered an adverse employment action, and there were circumstances suggesting that the employer acted with a discriminatory motive. [P] On a defense motion for summary judgment against a disparate treatment claim, the defendant must show either that one of these elements cannot be established or that there were one or more legitimate, nondiscriminatory reasons underlying the adverse employment action." (*Jones v. Department of Corrections* (2007) 152 Cal.App.4th 1367, 1379 [62 Cal.Rptr.3d 200] , internal citations omitted.)

■ "While a complainant need not prove that [discriminatory] animus was the sole motivation behind a challenged action, he must prove by a preponderance of the evidence that there was a 'causal connection' between the employee's protected status and the adverse employment decision." (*Mixon, supra*, 192 Cal.App.3d at p. 1319 .)

■ "Because of the similarity between state and federal employment discrimination laws, California courts look to pertinent federal precedent when applying our own statutes." (*Guz, supra*, 24 Cal.4th at p. 354 .)

■ "We have held 'that, in a civil action under the FEHA, all relief generally available in noncontractual actions ... may be obtained.' This includes injunctive relief." (*Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 132 [87 Cal.Rptr.2d 132, 980 P.2d 846] , internal citations omitted.)

■ "The FEHA does not itself authorize punitive damages. It is, however, settled that California's punitive damages statute, *Civil Code* section 3294, applies to actions brought under the FEHA" (*Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1147-1148 [74 Cal.Rptr.2d 510] , internal citations omitted.)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, §§ 915, 916, 918

Chin et al., Cal. Practice Guide: Employment Litigation (The Rutter Group) PP 4:25, 5:153, 7:194, 7:200-7:201, 7:356, 7:391-7:392

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, §§ 2.44-2.82

3 Wilcox, *California Employment Law*, Ch. 43, *Civil Actions Under Equal Employment Opportunity Laws*, § 43.01 (Matthew Bender)

11 *California Forms of Pleading and Practice*, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.23[2] (Matthew Bender)

California Civil Practice: Employment Litigation (Thomson West) §§ 2:2, 2:20

Publisher's Notes

This instruction replaces BAJI No. 12.01, and covers issues presented in BAJI No. 12.00.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewLabor & Employment LawDiscriminationDisparate TreatmentGeneral OverviewLabor & Employment LawDiscriminationDisparate TreatmentCoverage & DefinitionsLabor & Employment LawDiscriminationDisparate TreatmentProofBurdens of Proof



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CHAPTER 25 California Judicial Council Fair Employment and Housing Act Instructions

4-25 California Forms of Jury Instruction CACI 2501

CACI 2501 Affirmative Defense--Bona fide Occupational Qualification

[*Name of defendant*] **claims that [his/her/its] decision to [discharge/[*other adverse employment action*]] [*name of plaintiff*] was lawful because [he/she/it] was entitled to consider [*protected status--for example, race, gender, or age*] as a job requirement. To succeed, [*name of defendant*] must prove all of the following:**

- 1. That the job requirement was reasonably necessary for the operation of [*name of defendant*]'s business;**
- 2. That [*name of defendant*] had a reasonable basis for believing that substantially all [*members of protected group*] are unable to safely and efficiently perform that job;**
- 3. That it was impossible or highly impractical to consider whether each [applicant/employee] was able to safely and efficiently perform the job; and**
- 4. That it was impossible or highly impractical for [*name of defendant*] to rearrange job responsibilities to avoid using [*protected status*] as a job requirement.**

New September 2003

Directions for Use

An employer may assert the bona fide occupational qualification (BFOQ) defense where the employer has a practice that on its face excludes an entire group of individuals because of their protected status.

Sources and Authority

- *Government Code section 12940* provides that certain discriminatory employment practices are unlawful "unless based upon a bona fide occupational qualification."

- The Fair Employment and Housing Commission's regulations provide: "Where an employer ... has a practice which on its face excludes an entire group of individuals on a basis enumerated in the [FEHA], ... the employer ... must prove that the practice is justified because all or substantially all of the excluded individuals are unable to safely and efficiently perform the job in question and because the essence of the business operation would otherwise be undermined." (*Cal. Code Regs., tit. 2, § 7286.7(a).*)

- Federal title VII provides that "a bona fide occupational qualification [is] reasonably necessary to the normal operation of [the] particular business or enterprise." (42 U.S.C. § 2000e-2(e)(1).)

- The BFOQ defense is a narrow exception to the general prohibition on discrimination. (*Bohemian Club v. Fair Employment & Housing Com.* (1986) 187 Cal.App.3d 1, 19 [231 Cal.Rptr. 769] ; *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW v. Johnson Controls, Inc.* (1991) 499 U.S. 187, 201 [111 S.Ct. 1196, 113 L.Ed.2d 158] .)

- " '[I]n order to rely on the bona fide occupational qualification exception an employer has the burden of proving that he had reasonable cause to believe, that is, a factual basis for believing, that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved.' " (*Bohemian Club, supra*, 187 Cal.App.3d at p. 19 , quoting *Weeks v. Southern Bell Telephone & Telegraph Co.* (5th Cir. 1969) 408 F.2d 228, 235 .)

- "First, the employer must demonstrate that the occupational qualification is 'reasonably necessary to the normal operation of [the] particular business.' Secondly, the employer must show that the categorical exclusion based on [the] protected class characteristic is justified, i.e., that 'all or substantially all' of the persons with the subject class characteristic fail to satisfy the occupational qualification." (*Johnson Controls, Inc. v. Fair Employment & Housing Com.* (1990) 218 Cal.App.3d 517, 540 [267 Cal.Rptr. 158] , quoting *Weeks, supra*, 408 F.2d at p. 235 .)

- "Even if an employer can demonstrate that certain jobs require members of one sex, the employer must also 'bear the burden of proving that because of the nature of the operation of the business they could not rearrange job responsibilities ...' in order to reduce the BFOQ necessity." (*Johnson Controls, Inc., supra*, 218 Cal.App.3d at p. 541 ; see *Hardin v. Stynchcomb* (11th Cir. 1982) 691 F.2d 1364, 1370-1371 .)

- "Alternatively, the employer could establish that age was a legitimate proxy for the safety-related job qualifications by proving that it is 'impossible or highly impractical' to deal with the older employees on an individualized basis." (*Western Airlines, Inc. v. Criswell* (1985) 472 U.S. 400, 414-415 [105 S.Ct. 2743, 86 L.Ed.2d 321] , internal citation and footnote omitted.)

- "The Fair Employment and Housing Commission has interpreted the BFOQ defense in a manner incorporating all of the federal requirements necessary for its establishment. ... [P] The standards of the Commission are ... in harmony with federal law regarding the availability of a BFOQ defense." (*Bohemian Club, supra*, 187 Cal.App.3d at p. 19 .)

- "By modifying 'qualification' with 'occupational,' Congress narrowed the term to qualifications that affect an employee's ability to do the job." (*International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, supra*, 499 U.S. at p. 201.)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, § 925

Chin et al., Cal. Practice Guide: Employment Litigation (The Rutter Group) PP 9:2380, 9:2382, 9:2400, 9:2430

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Sexual Harassment, §§ 2.91-2.94

2 Wilcox, *California Employment Law*, Ch. 41, *Civil Actions Under Equal Employment Opportunity Laws*, §§ 41.94[3], 41.108 (Matthew Bender)

11 *California Forms of Pleading and Practice*, Ch. 115, *Civil Rights: Employment Discrimination*, §§ 115.54[4], 115.101 (Matthew Bender)

California Civil Practice: Employment Litigation (Thomson West) § 2:84

Publisher's Notes

This instruction replaces BAJI No. 12.02.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Labor & Employment Law Discrimination Disparate Treatment General Overview Labor & Employment Law Discrimination Disparate Treatment Coverage & Definitions Labor & Employment Law Discrimination Disparate Treatment Defenses & Exceptions Bona Fide Occupational Qualifications



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California Forms of Jury Instruction

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CHAPTER 25 California Judicial Council Fair Employment and Housing Act Instructions

4-25 California Forms of Jury Instruction CACI 2502

CACI 2502 Disparate Impact--Essential Factual Elements (Gov. Code, § 12940(a))

[Name of plaintiff] claims that [name of defendant] had [an employment practice/a selection policy] that wrongfully discriminated against [him/her]. To establish this claim, [name of plaintiff] must prove all of the following:

- 1. That [name of defendant] was [an employer/[other covered entity]];**
- 2. That [name of plaintiff] [was an employee of [name of defendant]/applied to [name of defendant] for a job/[other covered relationship to defendant]];**
- 3. That [name of defendant] had [an employment practice of [describe practice]/a selection policy of [describe policy]] that had a disproportionate adverse effect on [describe protected group--for example, persons over the age of 40];**
- 4. That [name of plaintiff] is [protected status];**
- 5. That [name of plaintiff] was harmed; and**
- 6. That [name of defendant]'s [employment practice/selection policy] was a substantial factor in causing [name of plaintiff]'s harm.**

New September 2003

Directions for Use

This instruction is intended for disparate impact employment discrimination claims. Disparate impact

occurs when an employer has an employment practice that appears neutral but has an adverse impact on members of a protected group and cannot be justified by business necessity.

Uncontested elements should be deleted from this instruction.

If element 1 is given, the court may need to instruct the jury on the statutory definition of "employer" under the FEHA. Other covered entities under the FEHA include labor organizations, employment agencies, and apprenticeship training programs. (See *Gov. Code*, § 12940(a)-(d).)

The court should consider instructing the jury on the meaning of "adverse impact," tailored to the facts of the case and the applicable law.

Sources and Authority

- *Government Code* section 12940(a) provides that it is an unlawful employment practice "[f]or an employer, because of the race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, or sexual orientation of any person, to refuse to hire or employ the person or to refuse to select the person for a training program leading to employment, or to bar or to discharge the person from employment or from a training program leading to employment, or to discriminate against the person in compensation or in terms, conditions, or privileges of employment."

- *Government Code* section 12941.1 expresses the Legislature's rejection of the opinion in *Marks v. Loral Corp.* (1997) 57 Cal.App.4th 30 [68 Cal.Rptr.2d 1] and states, in part: "The Legislature declares its intent that the use of salary as the basis for differentiating between employees when terminating employment may be found to constitute age discrimination if use of that criterion adversely impacts older workers as a group, and further declares its intent that the disparate impact theory of proof may be used in claims of age discrimination."

- The California Fair Employment and Housing Commission's regulations state: "Where an employer or other covered entity has a facially neutral practice which has an adverse impact (i.e., is discriminatory in effect), the employer or other covered entity must prove that there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business and that the challenged practice effectively fulfills the business purpose it is supposed to serve. The practice may still be impermissible where it is shown that there exists an alternative practice which would accomplish the business purpose equally well with a lesser discriminatory impact." (*Cal. Code Regs.*, tit. 2, § 7286.7(b).)

- The California Fair Employment and Housing Commission's regulations state: "Any policy or practice of an employer or other covered entity which has an adverse impact on employment opportunities of individuals on a basis enumerated in the Act is unlawful unless the policy or practice is job-related. ... A testing device or other means of selection which is facially neutral, but which has an adverse impact (as described in the Uniform Guidelines on Employee Selection Procedures (29 CFR 1607 (1978)) upon persons on a basis enumerated in the Act, is permissible only upon a showing that the selection practice is sufficiently related to an essential function of the job in question to warrant its use." (*Cal. Code Regs.*, tit. 2, § 7287.4(a), (e).)

- "Prohibited discrimination may ... be found on a theory of disparate impact, i.e., that regardless of motive, a *facially neutral* employer practice or policy, bearing no manifest relationship to job requirements, *in fact* had a disproportionate adverse effect on members of the protected class." (*Guz v.*

Bechtel National, Inc. (2000) 24 Cal.4th 317, 354, fn. 20 [100 Cal.Rptr.2d 352, 8 P.3d 1089] , internal citations omitted.)

■ "A 'disparate impact' plaintiff ... may prevail without proving intentional discrimination ... [However,] a disparate impact plaintiff 'must not merely prove circumstances raising an inference of discriminatory impact; he must prove the discriminatory impact at issue.' " (*Ibarbia v. Regents of the University of California* (1987) 191 Cal.App.3d 1318, 1329-1330 [237 Cal.Rptr. 92] , quoting *Lowe v. City of Monrovia* (9th Cir. 1985) 775 F.2d 998, 1004 .)

■ " 'To establish a prima facie case of discrimination, a plaintiff must show that the facially neutral employment practice had a significantly discriminatory impact. If that showing is made, the employer must then demonstrate that "any given requirement [has] a manifest relationship to the employment in question," in order to avoid a finding of discrimination ... Even in such a case, however, the plaintiff may prevail, if he shows that the employer was using the practice as a mere pretext for discrimination.' " (*City and County of San Francisco v. Fair Employment and Housing Com.* (1987) 191 Cal.App.3d 976, 985 [236 Cal.Rptr. 716] , quoting *Connecticut v. Teal* (1982) 457 U.S. 440, 446-447 [102 S.Ct. 2525, 73 L.Ed.2d 130] , internal citation omitted.)

■ Under federal title VII, a plaintiff may establish an unlawful employment practice based on disparate impact in one of two ways: (1) the plaintiff demonstrates that a defendant uses a particular employment practice that causes a disparate impact on the basis of a protected status, and the defendant "fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity"; or (2) the plaintiff demonstrates that there is an alternative employment practice with less adverse impact, and the defendant "refuses to adopt such alternative employment practice." (42 U.S.C. § 2000e-2(k)(1)(A).)

Secondary Sources

Chin et al., Cal. Practice Guide: Employment Litigation (The Rutter Group) PP 4.25, 5:153, 7:530-7:531, 7:535

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, § 2.65

2 Wilcox, *California Employment Law*, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, § 41.21 (Matthew Bender)

3 Wilcox, *California Employment Law*, Ch. 43, *Civil Actions Under Equal Employment Opportunity Laws*, § 43.01[2][c] (Matthew Bender)

11 *California Forms of Pleading and Practice*, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.23[4] (Matthew Bender)

California Civil Practice: Employment Litigation (Thomson West) § 2:23

Publisher's Notes

This instruction replaces BAJI No. 12.22, and covers issues presented in BAJI No. 12.00.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Labor & Employment Law Discrimination Disparate

ImpactCoverage & DefinitionsLabor & Employment LawDiscriminationDisparate ImpactDefenses &
ExceptionsGeneral OverviewLabor & Employment LawDiscriminationDisparate ImpactProofBurdens of Proof



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CHAPTER 25 California Judicial Council Fair Employment and Housing Act Instructions

4-25 California Forms of Jury Instruction CACI 2503

CACI 2503 Affirmative Defense--Business Necessity/Job Relatedness

[*Name of defendant*] **claims that the [employment practice/selection policy] is lawful because it is necessary to [his/her/its] business. To succeed, [*name of defendant*] must prove both of the following:**

- 1. That the purpose of the [employment practice/selection policy] is to operate the business safely and efficiently; and**
- 2. That the [employment practice/selection policy] substantially accomplishes this business purpose.**

New September 2003

The defense of business necessity is available for disparate impact claims but may not be used as a defense against a claim of intentional discrimination.

CACI No. 2504, Disparate Impact--Rebuttal to Business Necessity/Job Relatedness Defense, must be given if defendant asserts the defense of business necessity to a disparate impact employment discrimination claim.

- The California Fair Employment and Housing Commission's regulations provide: "Where an employer or other covered entity has a facially neutral practice which has an adverse impact (i.e., is discriminatory in effect), the employer or other covered entity must prove that there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business and that the challenged practice effectively fulfills the business purpose it is supposed to serve.

The practice may still be impermissible where it is shown that there exists an alternative practice which would accomplish the business purpose equally well with a lesser discriminatory impact." (*Cal. Code Regs., tit. 2, § 7286.7(b).*)

- The California Fair Employment and Housing Commission's regulations provide: "Any policy or practice of an employer or other covered entity which has an adverse impact on employment opportunities of individuals on a basis enumerated in the Act is unlawful unless the policy or practice is job-related A testing device or other means of selection which is facially neutral, but which has an adverse impact (as described in the Uniform Guidelines on Employee Selection Procedures (29 CFR 1607 (1978)) upon persons on a basis enumerated in the Act, is permissible only upon a showing that the selection practice is sufficiently related to an essential function of the job in question to warrant its use." (*Cal. Code Regs., tit. 2, § 7287.4(a), (e).*)

- "In order to meet its burden the [employer] must demonstrate a business necessity for use of the [discriminatory employment practice] 'The test is whether there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business. Thus, the business purpose must be sufficiently compelling to override any [discriminatory] impact; the challenged practice must effectively carry out the business purpose it is alleged to serve; and there must be available no acceptable alternative policies or practices which would better accomplish the business purpose advanced, or accomplish it equally well with a lesser differential racial impact.' " (*City and County of San Francisco v. Fair Employment and Housing Com. (1987) 191 Cal.App.3d 976, 989-990 [236 Cal.Rptr. 716]* , quoting *Robinson v. Lorillard Corp. (4th Cir. 1971) 444 F.2d 791, 798 .*)

- The federal Civil Rights Act of 1991 states that one of its purposes is "to codify the concepts of 'business necessity' and 'job related' enunciated by the Supreme Court in *Griggs v. Duke Power Co.* *Griggs v. Duke Power Co.*, 401 U.S. 424], and in other Supreme Court decisions prior to *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989) [109 S.Ct. 2115, 104 L.Ed.2d 733] ." (Civil Rights Act of 1991, Pub.L. No. 102-166, § 3(2) (Nov. 21, 1991) 105 Stat. 1071, 1071.)

- Federal title VII provides that while business necessity is a defense to a claim of disparate impact discrimination, "[a] demonstration that an employment practice is required by business necessity may not be used as a defense against a claim of intentional discrimination." (42 U.S.C. § 2000e-2(k)(2).)

- "The touchstone is business necessity. If an employment practice which operates to exclude [a protected group] cannot be shown to be related to job performance, the practice is prohibited ... Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question." (*Griggs, supra*, 401 U.S. at pp. 431-432 .)

- "[T]he employer may defend its policy or practice by proving that it is 'job related for the position in question and consistent with business necessity.' Though the key terms have been used since *Griggs*, their meaning remains unclear." (1 Lindemann and Grossman, *Employment Discrimination Law* (3d ed. 1996) Adverse Impact, p. 106, footnotes omitted.)

- "[T]here is no requirement that the challenged practice be 'essential' or 'indispensable' to the employer's business for it to pass muster: this degree of scrutiny would be almost impossible for most employers to meet" (*Wards Cove Packing Co., Inc., supra*, 490 U.S. at p. 659 .) [Note: This portion of *Wards Cove* may have been superseded by the Civil Rights Act of 1991.]

Secondary Sources

Chin et al., *Cal. Practice Guide: Employment Litigation* (The Rutter Group) PP 7:571, 7:581, 7:915

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, § 2.90

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, §§ 41.21[4], 41.95[1] (Matthew Bender)

3 Wilcox, California Employment Law, Ch. 43, *Civil Actions Under Equal Employment Opportunity Laws*, § 43.01[2][c] (Matthew Bender)

1 Lindemann and Grossman, Employment Discrimination Law (3d ed.) Adverse Impact, pp. 106-110; *id.* (2000 supp.) at pp. 62-64

11 *California Forms of Pleading and Practice*, Ch. 115, *Civil Rights: Employment Discrimination*, §§ 115.23[4][d], 115.54[5], 115.102 -115.103 (Matthew Bender)

California Civil Practice: Employment Litigation (Thomson West) § 2:25

Publisher's Notes

This instruction covers issues presented in BAJI No. 12.23.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewLabor & Employment LawDiscriminationDisparate ImpactCoverage & DefinitionsLabor & Employment LawDiscriminationDisparate ImpactDefenses & ExceptionsBusiness Necessity & Job RelatednessLabor & Employment LawDiscriminationDisparate ImpactProofBurdens of Proof



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CHAPTER 25 California Judicial Council Fair Employment and Housing Act Instructions

4-25 California Forms of Jury Instruction CACI 2504

CACI 2504 Disparate Impact--Rebuttal to Business Necessity/Job Relatedness Defense

If [*name of defendant*] proves that the [employment practice/ selection policy] is necessary to [his/her/its] business, then the [employment practice/selection policy] is lawful unless [*name of plaintiff*] proves both of the following:

- 1. That there was an alternative [employment practice/ selection policy] that would have accomplished the business purpose equally well; and**
- 2. That the alternative [employment practice/selection policy] would have had less adverse impact on [*describe members of protected group--for example, "persons over the age of 40"*].**

New September 2003

Federal title VII requires a plaintiff to demonstrate that the employer refused to adopt the alternative employment practice (see 42 U.S.C. § 2000e-2(K)(1)(A)(ii)). There are no published court opinions determining if a similar requirement exists under California law.

This instruction must be given if defendant asserts the defense of business necessity to a disparate impact employment discrimination claim. (See *CACI No. 2503, Affirmative Defense--Business Necessity/Job Relatedness*.)

- "The test [of the business necessity defense] is whether there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business. Thus, the business purpose must be sufficiently compelling to override any [discriminatory] impact; the

challenged practice must effectively carry out the business purpose it is alleged to serve; and there must be available no acceptable alternative policies or practices which would better accomplish the business purpose advanced, or accomplish it equally well with a lesser differential [discriminatory] impact.' " (*City and County of San Francisco v. Fair Employment and Housing Com. (1987) 191 Cal.App.3d 976, 989-990 [236 Cal.Rptr. 716]* .)

■ The California Fair Employment and Housing Commission's regulations provide: "Where an employer or other covered entity has a facially neutral practice which has an adverse impact (i.e., is discriminatory in effect), the employer or other covered entity must prove that there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business and that the challenged practice effectively fulfills the business purpose it is supposed to serve. The practice may still be impermissible where it is shown that there exists an alternative practice which would accomplish the business purpose equally well with a lesser discriminatory impact." (*Cal. Code Regs., tit. 2, § 7286.7(b)*.)

■ "[T]he standards established by the FEHC for evaluating a facially neutral selection criterion which has a discriminatory impact on a protected group are identical to federal standards under Title VII." (*City and County of San Francisco, supra*, 191 Cal.App.3d at p. 986 .)

■ Under federal title VII, a plaintiff may establish an unlawful employment practice based on disparate impact in one of two ways: (1) the plaintiff demonstrates that a defendant uses a particular employment practice that causes a disparate impact on the basis of a protected status, and the defendant "fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity"; or (2) the plaintiff demonstrates that there is an alternative employment practice with less adverse impact, and the defendant "refuses to adopt such alternative employment practice." (42 U.S.C. § 2000e-2(k)(1)(A).)

■ "If an employer does then meet the burden of proving that its tests are 'job related,' it remains open to the complaining party to show that other tests or selection devices, without a similarly undesirable [discriminatory] effect, would also serve the employer's legitimate interest in 'efficient and trustworthy workmanship.' " (*Albemarle Paper Co. v. Moody (1975) 422 U.S. 405, 425 [95 S.Ct. 2362, 45 L.Ed.2d 280]* , internal citation omitted.)

Secondary Sources

Chin et al., *Cal. Practice Guide: Employment Litigation* (The Rutter Group) PP 7:581, 7:590, 7:591, 7:915

2 Wilcox, *California Employment Law*, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, § 41.21[2] (Matthew Bender)

3 Wilcox, *California Employment Law*, Ch. 43, *Civil Actions Under Equal Employment Opportunity Laws*, § 43.01[2][d] (Matthew Bender)

11 *California Forms of Pleading and Practice*, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.23[2][c] (Matthew Bender)

California Civil Practice: Employment Litigation (Thomson West) § 2:26

Publisher's Notes

This instruction replaces BAJI No. 12.23.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewLabor & Employment LawDiscriminationDisparate
ImpactCoverage & DefinitionsLabor & Employment LawDiscriminationDisparate ImpactDefenses &
ExceptionsBusiness Necessity & Job RelatednessLabor & Employment LawDiscriminationDisparate
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CHAPTER 25 California Judicial Council Fair Employment and Housing Act Instructions

4-25 California Forms of Jury Instruction CACI 2505

CACI 2505 Retaliation (Gov. Code, § 12940(h))

[*Name of plaintiff*] **claims that** [*name of defendant*] **retaliated against [him/her] for** [*describe activity protected by the FEHA*]. **To establish this claim, [*name of plaintiff*] must prove all of the following:**

1. That [*name of plaintiff*] [*describe protected activity*];

2. [That [*name of defendant*] **[discharged/demoted/[*specify other adverse employment action*]]** [*name of plaintiff*];

[or]

[That [*name of defendant*] **engaged in conduct that, taken as a whole, materially and adversely affected the terms and conditions of** [*name of plaintiff*]'s employment;

3. That [*name of plaintiff*]'s [*describe protected activity*] **was a motivating reason for** [*name of defendant*]'s **[decision to [discharge/demote/[*specify other adverse employment action*]]** [*name of plaintiff*]/conduct];

4. That [*name of plaintiff*] **was harmed; and**

5. That [*name of defendant*]'s **conduct was a substantial factor in causing** [*name of plaintiff*]'s **harm.**

New September 2003; Revised August 2007, April 2008, October 2008, April 2009, June 2010

Directions for Use

4-25 California Forms of Jury Instruction CACI 2505

In elements 1 and 3, describe the protected activity in question. *Government Code section 12940(h)* provides that it is unlawful to retaliate against a person "because the person has opposed any practices forbidden under [*Government Code sections 12900 through 12966*] or because the person has filed a complaint, testified, or assisted in any proceeding under [the FEHA]."

Read the first option for element 2 if there is no dispute as to whether the employer's acts constituted an adverse employment action. Read the second option if whether there was an adverse employment action is a question of fact for the jury. For example, the case may involve a pattern of employer harassment consisting of acts that might not individually be sufficient to constitute retaliation, but taken as a whole establish prohibited conduct. (See *Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1052-1056 [32 Cal.Rptr.3d 436, 116 P.3d 1123] .) Or the case may involve acts that, considered alone, would not appear to be adverse, but could be adverse under the particular circumstances of the case. (See *Patten v. Grant Joint Union High School Dist.* (2005) 134 Cal.App.4th 1378, 1389-1390 [37 Cal.Rptr.3d 113] [lateral transfer can be adverse employment action even if wages, benefits, and duties remain the same].) Give both options if the employee presents evidence supporting liability under both a sufficient-single-act theory or a pattern-of-harassment theory. (See, e.g., *Wysinger v. Automobile Club of Southern California* (2007) 157 Cal.App.4th 413, 423-424 [69 Cal.Rptr.3d 1] .) Also select "conduct" in element 3 if the second option or both options are included for element 2.

Retaliation in violation of the FEHA may be established by constructive discharge; that is, that the employer intentionally created or knowingly permitted working conditions to exist that were so intolerable that a reasonable person in the employee's position would have had no reasonable alternative other than to resign. (See *Steele v. Youthful Offender Parole Bd.* (2008) 162 Cal.App.4th 1241, 1253 [76 Cal.Rptr.3d 632] .) If constructive discharge is alleged, replace element 2 with elements 4 and 5 of CACI No. 2402, *Breach of Employment Contract--Unspecified Term--Constructive Discharge--Essential Factual Elements*.

Note that there are two causation elements. There must be a causal link between the retaliatory animus and the adverse action (see element 3), and there must be a causal link between the adverse action and damages (see element 5). (See *Mamou v. Trendwest Resorts, Inc.* (2008) 165 Cal.App.4th 686, 713 [81 Cal.Rptr.3d 406] .)

Sources and Authority

- *Government Code section 12940(h)* provides that it is an unlawful employment practice "[f]or any employer, labor organization, employment agency, or person to discharge, expel, or otherwise discriminate against any person because the person has opposed any practices forbidden under this part or because the person has filed a complaint, testified, or assisted in any proceeding under this part."

- The FEHA defines a "person" as "one or more individuals, partnerships, associations, corporations, limited liability companies, legal representatives, trustees, trustees in bankruptcy, and receivers or other fiduciaries." (*Gov. Code, § 12925(d)*.)

- The Fair Employment and Housing Commission's regulations provide: "It is unlawful for an employer or other covered entity to demote, suspend, reduce, fail to hire or consider for hire, fail to give equal consideration in making employment decisions, fail to treat impartially in the context of any recommendations for subsequent employment which the employer or other covered entity may make, adversely affect working conditions or otherwise deny any employment benefit to an individual because

that individual has opposed practices prohibited by the Act or has filed a complaint, testified, assisted or participated in any manner in an investigation, proceeding, or hearing conducted by the Commission or Department or their staffs." (*Cal. Code Regs., tit. 2, § 7287.8(a).*)

■ "Employees may establish a prima facie case of unlawful retaliation by showing that (1) they engaged in activities protected by the FEHA, (2) their employers subsequently took adverse employment action against them, and (3) there was a causal connection between the protected activity and the adverse employment action." (*Miller v. Department of Corr. (2005) 36 Cal.4th 446, 472 [30 Cal.Rptr.3d 797, 115 P.3d 77] .*)

■ "It is well established that a plaintiff in a retaliation case need only prove that a retaliatory animus was at least a substantial or motivating factor in the adverse employment decision." (*George v. California Unemployment Ins. Appeals Bd. (2009) 179 Cal.App.4th 1475, 1492 [102 Cal.Rptr.3d 431] .*)

■ "Retaliation claims are inherently fact-specific, and the impact of an employer's action in a particular case must be evaluated in context. Accordingly, although an adverse employment action must materially affect the terms, conditions, or privileges of employment to be actionable, the determination of whether a particular action or course of conduct rises to the level of actionable conduct should take into account the unique circumstances of the affected employee as well as the workplace context of the claim." (*Yanowitz, supra, 36 Cal.4th at p. 1052.*)

■ "Appropriately viewed, [section 12940(a)] protects an employee against unlawful discrimination with respect not only to so-called ultimate employment actions such as termination or demotion, but also the entire spectrum of employment actions that are reasonably likely to adversely and materially affect an employee's job performance or opportunity for advancement in his or her career. Although a mere offensive utterance or even a pattern of social slights by either the employer or coemployees cannot properly be viewed as materially affecting the terms, conditions, or privileges of employment for purposes of section 12940(a) (or give rise to a claim under section 12940(h)), the phrase 'terms, conditions, or privileges' of employment must be interpreted liberally and with a reasonable appreciation of the realities of the workplace in order to afford employees the appropriate and generous protection against employment discrimination that the FEHA was intended to provide." (*Yanowitz, supra, 36 Cal.4th at pp. 1053-1054 , footnotes omitted.*)

■ "Contrary to [defendant]'s assertion that it is improper to consider collectively the alleged retaliatory acts, there is no requirement that an employer's retaliatory acts constitute one swift blow, rather than a series of subtle, yet damaging, injuries. Enforcing a requirement that each act separately constitute an adverse employment action would subvert the purpose and intent of the statute." (*Yanowitz, supra, 36 Cal.4th at pp. 1055-1056 , internal citations omitted.*)

■ "Moreover, [defendant]'s actions had a substantial and material impact on the conditions of employment. The refusal to promote [plaintiff] is an adverse employment action under FEHA. There was also a pattern of conduct, the totality of which constitutes an adverse employment action. This includes undeserved negative job reviews, reductions in his staff, ignoring his health concerns and acts which caused him substantial psychological harm." (*Wysinger, supra, 157 Cal.App.4th at p. 424 , internal citations omitted.*)

■ "A long period between an employer's adverse employment action and the employee's earlier protected activity may lead to the inference that the two events are not causally connected. But if between these events the employer engages in a pattern of conduct consistent with a retaliatory intent, there may be a causal connection." (*Wysinger, supra, 157 Cal.App.4th at p. 421 , internal citation*

omitted.)

■ "Both direct and circumstantial evidence can be used to show an employer's intent to retaliate. 'Direct evidence of retaliation may consist of remarks made by decisionmakers displaying a retaliatory motive.' Circumstantial evidence typically relates to such factors as the plaintiff's job performance, the timing of events, and how the plaintiff was treated in comparison to other workers." (*Colarossi v. Coty US Inc.* (2002) 97 Cal.App.4th 1142, 1153 [119 Cal.Rptr.2d 131] , internal citations omitted.)

■ "The employment action must be both detrimental and substantial We must analyze [plaintiff's] complaints of adverse employment actions to determine if they result in a material change in the terms of her employment, impair her employment in some cognizable manner, or show some other employment injury [W]e do not find that [plaintiff's] complaint alleges the necessary material changes in the terms of her employment to cause employment injury. Most of the actions upon which she relies were one time events The other allegations ... are not accompanied by facts which evidence both a substantial and detrimental effect on her employment." (*Thomas v. Department of Corrections* (2000) 77 Cal.App.4th 507, 511-512 [91 Cal.Rptr.2d 770] , internal citations omitted.)

■ "The retaliatory motive is 'proved by showing that plaintiff engaged in protected activities, that his employer was aware of the protected activities, and that the adverse action followed within a relatively short time thereafter.' 'The causal link may be established by an inference derived from circumstantial evidence, "such as the employer's knowledge that the [employee] engaged in protected activities and the proximity in time between the protected action and allegedly retaliatory employment decision." ' " (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 615 [262 Cal.Rptr. 842] , internal citations omitted.)

■ "[A]n employer generally can be held liable for the retaliatory actions of its supervisors." (*Wysinger, supra*, 157 Cal.App.4th at p. 420 .)

■ "[T]he employer is liable for retaliation under section 12940, subdivision (h), but nonemployer individuals are not personally liable for their role in that retaliation." (*Jones v. The Lodge at Torrey Pines Partnership* (2008) 42 Cal.4th 1158, 1173 [72 Cal.Rptr.3d 624, 177 P.3d 232] .)

■ "[U]nder certain circumstances, a retaliation claim may be brought by an employee who has complained of or opposed conduct, even when a court or jury subsequently determines the conduct actually was not prohibited by the FEHA. Indeed, this precept is well settled. An employee is protected against retaliation if the employee reasonably and in good faith believed that what he or she was opposing constituted unlawful employer conduct such as sexual harassment or sexual discrimination." (*Miller, supra*, 36 Cal.4th at pp. 473-474 , internal citations omitted.)

■ " 'The legislative purpose underlying FEHA's prohibition against retaliation is to prevent employers from deterring employees from asserting good faith discrimination complaints' Employer retaliation against employees who are believed to be prospective complainants or witnesses for complainants undermines this legislative purpose just as effectively as retaliation after the filing of a complaint. To limit FEHA in such a way would be to condone 'an absurd result' that is contrary to legislative intent. We agree with the trial court that FEHA protects employees against preemptive retaliation by the employer." (*Steele, supra*, 162 Cal.App.4th at p. 1255 , internal citations omitted.)

Secondary Sources

Chin, et al., California Practice Guide: Employment Litigation (The Rutter Group) PP 7:680-7:841

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, §§ 2.83-2.88

2 Wilcox, *California Employment Law, Ch. 41, Substantive Requirements Under Equal Employment Opportunity Laws, § 41.131* (Matthew Bender)

11 *California Forms of Pleading and Practice, Ch. 115, Civil Rights: Employment Discrimination, §§ 115.37, 115.94* (Matthew Bender)

California Civil Practice: Employment Litigation (Thomson West) §§ 2:74-2:75

Publisher's Notes

This instruction covers issues presented in BAJI No. 12.10.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Labor & Employment Law Discrimination Retaliation Burdens of Proof Labor & Employment Law Discrimination Retaliation Elements General Overview Labor & Employment Law Discrimination Retaliation Elements Causal Link



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California Forms of Jury Instruction

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CHAPTER 25 California Judicial Council Fair Employment and Housing Act Instructions

4-25 California Forms of Jury Instruction CACI 2506

CACI 2506 Affirmative Defense--After-Acquired Evidence

[Name of defendant] **claims that [he/she/it] would have discharged [name of plaintiff] anyway if [he/she/it] had known that [name of plaintiff] [describe misconduct]. You must decide whether [name of defendant] has proved all of the following:**

1. **That [name of plaintiff] [describe misconduct];**
2. **That [name of plaintiff]'s misconduct was sufficiently severe that [name of defendant] would have discharged [him/her] because of that misconduct alone had [name of defendant] known of it; and**
3. **That [name of defendant] would have discharged [name of plaintiff] for [his/her] misconduct as a matter of settled company policy.**

New September 2003

Directions for Use

The after-acquired-evidence doctrine is an equitable defense that is determined by the court based on the facts of the case. This instruction assists the judge where the facts are in dispute. (See, e.g., *Thompson v. Tracor Flight Systems, Inc.* (2001) 86 Cal.App.4th 1156, 1173 [104 Cal.Rptr.2d 95] .)

Sources and Authority

- "In general, the after-acquired-evidence doctrine shields an employer from liability or limits

available relief where, after a termination, the employer learns for the first time about employee wrongdoing that would have led to the discharge in any event. Employee wrongdoing in after-acquired-evidence cases generally falls into one of two categories: (1) misrepresentations on a resume or job application; or (2) posthire, on-the-job misconduct." (*Camp v. Jeffer, Mangels, Butler & Marmaro* (1995) 35 Cal.App.4th 620, 632 [41 Cal.Rptr.2d 329] .)

- "The after-acquired-evidence doctrine serves as a complete or partial defense to an employee's claim of wrongful discharge ... To invoke this doctrine, '... the employer must establish "that the wrongdoing was of such severity that the employee in fact would have been terminated on those grounds alone if the employer had known of it" ... [T]he employer ... must show that such a firing would have taken place as a matter of "settled" company policy.' " (*Murillo v. Rite Stuff Foods, Inc.* (1998) 65 Cal.App.4th 833, 842, 845-846 [77 Cal.Rptr.2d 12] , internal citations omitted.)

- "Where an employer seeks to rely upon after-acquired evidence of wrongdoing, it must first establish that the wrongdoing was of such severity that the employee in fact would have been terminated on those grounds alone if the employer had known of it at the time of the discharge." (*McKennon v. Nashville Banner Publishing Co.* (1995) 513 U.S. 352, 362-363 [115 S.Ct. 879, 130 L.Ed.2d 852] .)

- "Courts must tread carefully in applying the after-acquired-evidence doctrine to discrimination claims Where, as here, the discriminatory conduct was pervasive during the term of employment, therefore, it would not be sound public policy to bar recovery for injuries suffered while employed. In applying the after-acquired-evidence doctrine, the equities between employer and employee can be balanced by barring all portions of the employment discrimination claim tied to the employee's discharge." (*Murillo, supra*, 65 Cal.App.4th at pp. 849-850 .)

- "As the Supreme Court recognized in *McKennon*, the use of after-acquired evidence must 'take due account of the lawful prerogatives of the employer in the usual course of its business and the corresponding equities that it has arising from the employee's wrongdoing.' We appreciate that the facts in *McKennon* ... presented a situation where balancing the equities should permit a finding of employer liability--to reinforce the importance of antidiscrimination laws--while limiting an employee's damages--to take account of an employer's business prerogatives. However, the equities compel a different result where an employee who is disqualified from employment by government-imposed requirements nevertheless obtains a job by misrepresenting the pertinent qualifications. In such a situation, the employee should have no recourse for an alleged wrongful termination of employment." (*Camp, supra*, 35 Cal.App.4th at pp. 637-638 , internal citation omitted.)

- "We decline to adopt a blanket rule that material falsification of an employment application is a complete defense to a claim that the employer, while still unaware of the falsification, terminated the employment in violation of the employee's legal rights." (*Cooper v. Rykoff-Sexton, Inc.* (1994) 24 Cal.App.4th 614, 617 [29 Cal.Rptr.2d 642] .)

- "The doctrine [of after-acquired evidence] is the basis for an equitable defense related to the traditional defense of 'unclean hands' ... [P] In the present case, there were conflicts in the evidence concerning respondent's actions, her motivations, and the possible consequences of her actions within appellant's disciplinary system. The trial court submitted those factual questions to the jury for resolution and then used the resulting special verdict as the basis for concluding appellant was not entitled to equitable reduction of the damages award." (*Thompson, supra*, 86 Cal.App.4th at p. 1173 .)

Secondary Sources

3 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment, § 211

Chin et al., *Cal. Practice Guide: Employment Litigation* (The Rutter Group) PP 7:930-7:932, 16:615-16:616, 16:625, 16:635-16:637, 16:647

1 *Wrongful Employment Termination Practice* (Cont.Ed.Bar 2d ed.) Discrimination Claims, § 2.107

2 Wilcox, *California Employment Law, Ch. 41, Substantive Requirements Under Equal Employment Opportunity Laws*, § 41.92 (Matthew Bender)

11 *California Forms of Pleading and Practice, Ch. 115, Civil Rights: Employment Discrimination*, § 115.54[2] (Matthew Bender)

California Civil Practice: Employment Litigation (Thomson West) § 2:88

Publisher's Notes

There is no BAJI instruction on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Pleading & Practice Defenses, Demurrers & Objections Affirmative Defenses General Overview Civil Procedure Trials Jury Trials Jury Instructions General Overview Labor & Employment Law Discrimination Actionable Discrimination Labor & Employment Law Wrongful Termination Defenses General Overview



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CHAPTER 25 California Judicial Council Fair Employment and Housing Act Instructions

4-25 California Forms of Jury Instruction CACI 2507

CACI 2507 "Motivating Reason" Explained

A "motivating reason" is a reason that contributed to the decision to take certain action, even though other reasons also may have contributed to the decision.

New December 2007

Directions for Use

Read this instruction with *CACI No. 2500, Disparate Treatment--Essential Factual Elements*, *CACI No. 2505, Retaliation*, or *CACI No. 2540, Disability Discrimination --Disparate Treatment-- Essential Factual Elements*.

Sources and Authority

- *Government Code section 12940(a)* provides:

It shall be an unlawful employment practice, unless based upon a bona fide occupational qualification, or, except where based upon applicable security regulations established by the United States or the State of California:

(a) For an employer, because of the race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation of any person, to refuse to hire or employ the person or to refuse to select the person for a training program leading to employment, or to bar or to discharge the person from employment or from a training program leading to employment, or to

discriminate against the person in compensation or in terms, conditions, or privileges of employment.

■ Title 42 *United States Code* section 2000e-2(m) (a provision of the Civil Rights Act of 1991 amending Title VII of the Civil Rights Act of 1964) provides: "Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice."

■ "Because of the similarity between state and federal employment discrimination laws, California courts look to pertinent federal precedent when applying our own statutes." (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 354 [100 Cal.Rptr.2d 352, 8 P.3d 1089] .)

■ "While a complainant need not prove that [discriminatory] animus was the sole motivation behind a challenged action, he must prove by a preponderance of the evidence that there was a 'causal connection' between the employee's protected status and the adverse employment decision." (*Mixon v. Fair Employment and Housing Com.* (1987) 192 Cal.App.3d 1306, 1319 [237 Cal.Rptr. 884] .)

■ "The employee need not show 'he would have in any event been rejected or discharged solely on the basis of his race, without regard to the alleged deficiencies. ... In other words, 'while a complainant need not prove that racial animus was the sole motivation behind the challenged action, he must prove by a preponderance of the evidence that there was a "causal connection" between the employee's protected status and the adverse employment decision.' " (*Clark v. Claremont University Center* (1992) 6 Cal.App.4th 639, 665 [8 Cal.Rptr.2d 151] , citing *McDonald v. Santa Fe Trail Transp. Co.* (1976) 427 U.S. 273, 282, fn. 10 [96 S.Ct. 2574, 49 L.Ed.2d 493, 502] and *Mixon, supra* , 192 Cal.App.3d at p. 1319 .)

■ But see *Horsford v. Board of Trustees* (2005) 132 Cal.App.4th 359, 377 [33 Cal.Rptr.3d 644] ("A plaintiff's burden is ... to produce evidence that, taken as a whole, permits a rational inference that intentional discrimination was a *substantial* motivating factor in the employer's actions toward the plaintiff"), italics added.

Secondary Sources

Chin, et al., California Practice Guide: Employment Litigation (The Rutter Group) PP 7:485-7:508

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, §§ 2.61-2.65, 2.87

2 Wilcox, *California Employment Law*, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, § 41.11[1] (Matthew Bender)

11 *California Forms of Pleading and Practice*, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.23[2] (Matthew Bender)

1 California Civil Practice: Employment Litigation (Thomson West) Discrimination in Employment, §§ 2:20-2:21, 2:75

Publisher's Notes

This instruction covers issues presented in BAJI No. 12.01.1.



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CHAPTER 25 California Judicial Council Fair Employment and Housing Act Instructions

4-25 California Forms of Jury Instruction CACI 2508

CACI 2508 Failure to File Timely Administrative Complaint (Gov. Code, § 12960(d))--Plaintiff Alleges Continuing Violation

[Name of defendant] contends that [name of plaintiff]'s lawsuit may not proceed because [name of plaintiff] did not timely file a complaint with the Department of Fair Employment and Housing. A complaint is timely if it was filed within one year of the date on which [name of defendant]'s alleged unlawful practice occurred.

[Name of defendant]'s alleged unlawful practice is considered as continuing to occur as long as all of the following three conditions continue to exist:

- 1. Conduct occurring within a year of the date on which [name of plaintiff] filed [his/her] complaint with the department was similar or related to the conduct that occurred earlier;**
- 2. The conduct was reasonably frequent; and**
- 3. The conduct had not yet become permanent.**

"Permanent" in this context means that the conduct has stopped, [name of plaintiff] has resigned, or [name of defendant]'s statements and actions would make it clear to a reasonable employee that any further efforts to resolve the issue internally would be futile.

The burden is on [name of plaintiff/name of defendant] to prove that the complaint [was/was not] filed on time with the department.

New June 2010

Directions for Use

Give this instruction if the plaintiff relies on the continuing-violation doctrine in order to avoid the bar of the limitation period of one year within which to file an administrative complaint. (See *Gov. Code*, § 12960(d).) Although the continuing-violation doctrine is labeled an equitable exception to the one-year deadline, it may involve triable issues of fact. (See *Dominguez v. Washington Mutual Bank* (2008) 168 Cal.App.4th 714, 723-724 [85 Cal.Rptr.3d 705] .)

No case directly addresses which party has the burden of proof regarding the continuing-violation doctrine. One view is that because the statute of limitations is an affirmative defense, the defendant bears the burden of proving every aspect of the defense including disproving a continuing violation. Another view is that the continuing-violation doctrine is similar to the delayed-discovery rule, on which the plaintiff bears the burden of proof under most circumstances. (See *CACI No. 455, Statute of Limitations--Delayed Discovery*.) Give the last sentence according to how the court determines that the burden of proof should be allocated.

Sources and Authority

■ *Government Code* section 12960 provides:

(a) The provisions of this article govern the procedure for the prevention and elimination of practices made unlawful pursuant to Article 1 (commencing with Section 12940) of Chapter 6.

(b) Any person claiming to be aggrieved by an alleged unlawful practice may file with the department a verified complaint, in writing, that shall state the name and address of the person, employer, labor organization, or employment agency alleged to have committed the unlawful practice complained of, and that shall set forth the particulars thereof and contain other information as may be required by the department. The director or his or her authorized representative may in like manner, on his or her own motion, make, sign, and file a complaint.

(c) Any employer whose employees, or some of them, refuse or threaten to refuse to cooperate with the provisions of this part may file with the department a verified complaint asking for assistance by conciliation or other remedial action.

(d) No complaint may be filed after the expiration of one year from the date upon which the alleged unlawful practice or refusal to cooperate occurred, except that this period may be extended as follows:

(1) For a period of time not to exceed 90 days following the expiration of that year, if a person allegedly aggrieved by an unlawful practice first obtained knowledge of the facts of the alleged unlawful practice after the expiration of one year from the date of their occurrence.

(2) For a period of time not to exceed one year following a rebutted presumption of the identity of the person's employer under Section 12928, in order to allow a person allegedly aggrieved by an unlawful practice to make a substitute identification of the actual employer.

(3) For a period of time, not to exceed one year from the date the person aggrieved by an

alleged violation of *Section 51.7 of the Civil Code* becomes aware of the identity of a person liable for the alleged violation, but in no case exceeding three years from the date of the alleged violation if during that period the aggrieved person is unaware of the identity of any person liable for the alleged violation.

(4) For a period of time not to exceed one year from the date that a person allegedly aggrieved by an unlawful practice attains the age of majority.

■ "Under the FEHA, the employee must exhaust the administrative remedy provided by the statute by filing a complaint with the Department of Fair Employment and Housing (Department) and must obtain from the Department a notice of right to sue in order to be entitled to file a civil action in court based on violations of the FEHA. The timely filing of an administrative complaint is a prerequisite to the bringing of a civil action for damages under the FEHA. As for the applicable limitation period, the FEHA provides that no complaint for any violation of its provisions may be filed with the Department 'after the expiration of one year from the date upon which the alleged *unlawful practice* or refusal to cooperate *occurred*,' with an exception for delayed discovery not relevant here." (*Morgan v. Regents of University of California* (2000) 88 Cal.App.4th 52, 63 [105 Cal.Rptr.2d 652] , original italics, internal citations omitted.)

■ "[Plaintiff] argued below, as she does on appeal, that her DFEH complaint was timely under an equitable exception to the one-year deadline known as the continuing violation doctrine. Under this doctrine, a FEHA complaint is timely if discriminatory practices occurring outside the limitations period continued into that period. A continuing violation exists if (1) the conduct occurring within the limitations period is similar in kind to the conduct that falls outside the period; (2) the conduct was reasonably frequent; and (3) it had not yet acquired a degree of permanence." (*Dominguez*, *supra*, 168 Cal.App.4th at pp. 720-721 , internal citations omitted.)

■ " '[P]ermanence' in the context of an ongoing process of accommodation of disability, or ongoing disability harassment, should properly be understood to mean the following: that an employer's statements and actions make clear to a reasonable employee that any further efforts at informal conciliation to obtain reasonable accommodation or end harassment will be futile. [P] Thus, when an employer engages in a continuing course of unlawful conduct under the FEHA by refusing reasonable accommodation of a disabled employee or engaging in disability harassment, and this course of conduct does not constitute a constructive discharge, the statute of limitations begins to run, not necessarily when the employee first believes that his or her rights may have been violated, but rather, either when the course of conduct is brought to an end, as by the employer's cessation of such conduct or by the employee's resignation, or when the employee is on notice that further efforts to end the unlawful conduct will be in vain. Accordingly, an employer who is confronted with an employee seeking accommodation of disability or relief from disability harassment may assert control over its legal relationship with the employee either by accommodating the employee's requests, or by making clear to the employee in a definitive manner that it will not be granting any such requests, thereby commencing the running of the statute of limitations." (*Richards v. CH2M Hill, Inc.* (2001) 26 Cal.4th 798, 823-824 [111 Cal.Rptr.2d 87, 29 P.3d 175] , internal citations omitted.)

■ "A continuing violation may be established by demonstrating 'a company wide policy or practice' or 'a series of related acts against a single individual.' 'The continuing violation theory generally has been applied in the context of a continuing policy and practice of discrimination on a company-wide basis; a plaintiff who shows that a policy and practice operated at least in part within the limitation period satisfies the filing requirements. "[A] systematic policy of discrimination is actionable even if some or all of the events evidencing its inception occurred prior to the limitations period. The reason is that the continuing system of discrimination operates against the employee and violates his or her rights up to a point in time that falls within the applicable limitations period. Such continuing violations are most likely to occur in the matter of placements or promotions." ' The plaintiff must demonstrate that at least one act occurred within the filing period and that 'the harassment is "more than the occurrence of isolated or sporadic acts of intentional discrimination." ... The relevant distinction is between the occurrence of isolated, intermittent acts of discrimination and

a persistent, on-going pattern.' " (*Morgan, supra*, 88 Cal.App.4th at p. 64 , internal citations omitted.)

■ "[A] continuing violation claim will likely fail if the plaintiff knew, or through the exercise of reasonable diligence would have known, [he] was being discriminated against at the time the earlier events occurred." (*Morgan, supra*, 88 Cal.App.4th at p. 65 .)

■ "The Supreme Court has extended the continuing violation doctrine to retaliation claims. And the doctrine also applies to racial harassment claims. Indeed, as we observed in *Morgan v. Regents of University of California, supra*, 88 Cal.App.4th 52, 65 : 'Cases alleging a hostile work environment due to racial or sexual harassment are often found to come within the continuing violations framework.' " (*Nazir v. United Airlines, Inc. (2009)* 178 Cal.App.4th 243, 270 [100 Cal.Rptr.3d 296] , internal citations omitted.)

Secondary Sources

7 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, § 948 3 Witkin, California Procedure (5th ed 2008) Actions, § 564 Chin et al., California Practice Guide: Employment Litigation (The Rutter Group) PP 7:561.1, 7:975, 16:85 3 Wilcox, *California Employment Law*, Ch. 43, *Civil Actions Under Equal Employment Opportunity Laws*, § 43.01[4] (Matthew Bender) 11 *California Forms of Pleading and Practice*, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.51[1] (Matthew Bender) 10 *California Points and Authorities*, Ch. 100, *Employer and Employee: Wrongful Termination and Discipline*, § 100.59 (Matthew Bender)

Publisher's Notes

This instruction covers issues presented in BAJI No. 12.12.7.



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CHAPTER 25 California Judicial Council Fair Employment and Housing Act Instructions

4-25 California Forms of Jury Instruction CACI 2509-CACI 2519

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CHAPTER 25 California Judicial Council Fair Employment and Housing Act Instructions

4-25 California Forms of Jury Instruction CACI 2520

CACI 2520 Quid pro quo Sexual Harassment--Essential Factual Elements

[Name of plaintiff] claims that [name of defendant] subjected [him/her] to sexual harassment. To establish this claim, [name of plaintiff] must prove all of the following:

1. That [name of plaintiff] [was an employee of [name of defendant]/applied to [name of defendant] for a job/was a person providing services pursuant to a contract with [name of defendant]];

2. That [name of alleged harasser] made unwanted sexual advances to [name of plaintiff] or engaged in other unwanted verbal or physical conduct of a sexual nature;

3. [That job benefits were conditioned, by words or conduct, on [name of plaintiff]'s acceptance of [name of alleged harasser]'s sexual advances or conduct;]

[or]

[That employment decisions affecting [name of plaintiff] were made based on [his/her] acceptance or rejection of [name of alleged harasser]'s sexual advances or conduct;]

4. That at the time of [his/her] conduct, [name of alleged harasser] was a supervisor or agent for [name of defendant];

5. That [name of plaintiff] was harmed; and

6. That [name of alleged harasser]'s conduct was a substantial factor in causing [name of plaintiff]'s harm.

New September 2003

Employers may be liable for the conduct of certain agents (see *Gov. Code* §§ 12925(d), 12926(d), and 12940(j)(1), and *Reno v. Baird* (1998) 18 Cal.4th 640, 648 [76 Cal.Rptr.2d 499, 957 P.2d 1333] [California Supreme Court declined to express opinion whether "agent" language in the FEHA merely incorporates respondeat superior principles or has some other meaning]).

■ *Government Code section 12940(j)* provides that it is an unlawful employment practice for "an employer ... or any other person, because of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation, to harass an employee, an applicant, or a person providing services pursuant to a contract. Harassment of an employee, an applicant, or a person providing services pursuant to a contract by an employee other than an agent or supervisor shall be unlawful if the entity, or its agents or supervisors, knows or should have known of this conduct and fails to take immediate and appropriate corrective action. An entity shall take all reasonable steps to prevent harassment from occurring. Loss of tangible job benefits shall not be necessary in order to establish harassment."

■ *Government Code section 12940(j)(4)(A)* provides that for purposes of claims of harassment under the FEHA, " 'employer' means any person regularly employing one or more persons or regularly receiving the services of one or more persons providing services pursuant to a contract, or any person acting as an agent of an employer, directly or indirectly, the state, or any political or civil subdivision of the state, and cities." (*Gov. Code*, § 12940(j)(4)(A).)

■ *Government Code section 12940(j)(5)* provides that for purposes of claims of harassment under the FEHA, "a person providing services pursuant to a contract" means a person who meets all of the following criteria:

(A) The person has the right to control the performance of the contract for services and discretion as to the manner of performance.

(B) The person is customarily engaged in an independently established business.

(C) The person has control over the time and place the work is performed, supplies the tools and instruments used in the work, and performs work that requires a particular skill not ordinarily used in the course of the employer's work.

■ The Fair Employment and Housing Commission's regulations provide: "Sexual harassment is unlawful as defined in Section 7287.6(b), and includes verbal, physical, and visual harassment, as well as unwanted sexual advances." (*Cal. Code Regs.*, tit. 1, § 7291.1(f)(1).)

■ "Courts have generally recognized two distinct categories of sexual harassment claims: quid pro quo and hostile work environment. Quid pro quo harassment occurs when submission to sexual conduct is made a condition of concrete employment benefits." (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 607 [262 Cal.Rptr. 842] , internal citation omitted.)

■ "A cause of action for quid pro quo harassment involves the behavior most commonly regarded as sexual harassment, including, e.g., sexual propositions, unwarranted graphic discussion of sexual acts, and commentary on the employee's body and the sexual uses to which it could be put. To state a cause of action on this theory, it is sufficient to

allege that a term of employment was expressly or impliedly conditioned upon acceptance of a supervisor's unwelcome sexual advances." (*Mogilefsky v. Superior Court* (1993) 20 Cal.App.4th 1409, 1414 [26 Cal.Rptr.2d 116] , internal citations omitted.)

■ "Cases based on threats which are carried out are referred to often as quid pro quo cases, as distinct from bothersome attentions or sexual remarks that are sufficiently severe or pervasive to create a hostile work environment. The terms quid pro quo and hostile work environment are helpful, perhaps, in making a rough demarcation between cases in which threats are carried out and those where they are not or are absent altogether, but beyond this are of limited utility ... [P] We do not suggest the terms quid pro quo and hostile work environment are irrelevant to Title VII litigation. To the extent they illustrate the distinction between cases involving a threat which is carried out and offensive conduct in general, the terms are relevant when there is a threshold question whether a plaintiff can prove discrimination in violation of Title VII. When a plaintiff proves that a tangible employment action resulted from a refusal to submit to a supervisor's sexual demands, he or she establishes that the employment decision itself constitutes a change in the terms and conditions of employment that is actionable under Title VII. For any sexual harassment preceding the employment decision to be actionable, however, the conduct must be severe or pervasive." (*Burlington Industries, Inc. v. Ellerth* (1998) 524 U.S. 742, 751, 753-754 [118 S.Ct. 2257, 141 L.Ed.2d 633] .)

Secondary Sources

Chin et al., Cal. Practice Guide: Employment Litigation (The Rutter Group) PP 7:150, 7:166, 7:168-7:169, 7:194, 10:18-10:19, 10:22, 10:31, 10:40, 10:50

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Sexual Harassment, §§ 3.31-3.35

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, § 41.81[1][a], [6] (Matthew Bender)

11 *California Forms of Pleading and Practice*, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.36[5][b] (Matthew Bender)

California Civil Practice: Employment Litigation (Thomson West) § 2:55

Publisher's Notes

This instruction covers issues presented in BAJI Nos. 12.06 and 12.20.

Gov. Code § 12940(j)(1) was amended by Stats. 2003, ch. 671 (AB 76) to make non-substantive changes and to add the following: "An employer may also be responsible for the acts of nonemployees, with respect to sexual harassment of employees, applicants, or persons providing services pursuant to a contract in the workplace, where the employer, or its agents or supervisors, knows or should have known of the conduct and fails to take immediate and appropriate corrective action. In reviewing cases involving the acts of nonemployees, the extent of the employer's control and any other legal responsibility which the employer may have with respect to the conduct of those nonemployees shall be considered."

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Labor & Employment
Law Discrimination Actionable Discrimination Labor & Employment Law Discrimination Harassment Sexual
Harassment Coverage & Definitions Sexual Harassment Labor & Employment Law Discrimination Harassment Sexual

HarassmentQuid Pro Quo



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California Forms of Jury Instruction

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CHAPTER 25 California Judicial Council Fair Employment and Housing Act Instructions

4-25 California Forms of Jury Instruction CACI 2521A

CACI 2521A Hostile Work Environment Harassment--Conduct Directed at Plaintiff--Essential Factual Elements--Employer or Entity Defendant (Gov. Code, § 12940(j))

[*Name of plaintiff*] **claims that [he/she] was subjected to harassment based on [his/her] [*describe protected status, e.g., race, gender, or age*] at [*name of defendant*], causing a hostile or abusive work environment. To establish this claim, [*name of plaintiff*] must prove all of the following:**

- 1. That [*name of plaintiff*] was [an employee of/ a person providing services under a contract with] [*name of defendant*];**
 - 2. That [*name of plaintiff*] was subjected to unwanted harassing conduct because [he/she] [was/was believed to be/was associated with a person who was/was associated with a person who was believed to be] [*protected status*];**
 - 3. That the harassing conduct was severe or pervasive;**
 - 4. That a reasonable [*describe member of protected group, e.g., woman*] in [*name of plaintiff*]'s circumstances would have considered the work environment to be hostile or abusive;**
 - 5. That [*name of plaintiff*] considered the work environment to be hostile or abusive;**
 - 6. [*Select applicable basis of defendant's liability:*]**
- [That a supervisor engaged in the conduct;]**
- [That [*name of defendant*] [or [his/her/its] supervisors or agents] knew or should have known of the conduct and failed to take immediate and appropriate corrective action;]**

7. That [name of plaintiff] was harmed; and

8. That the conduct was a substantial factor in causing [name of plaintiff]'s harm.

Derived from former CACI No. 2521 December 2007

Directions for Use

This instruction is for use in a hostile work environment case when the defendant is an employer or other entity covered by the FEHA. For an individual defendant, such as the alleged harasser or plaintiff's coworker, see CACI No. 2522A, *Hostile Work Environment Harassment--Conduct Directed at Plaintiff--Essential Factual Elements--Individual Defendant*. For a case in which the plaintiff is not the target of the harassment, see CACI No. 2521B, *Hostile Work Environment Harassment--Conduct Directed at Others--Essential Factual Elements--Employer or Entity Defendant*. For an instruction for use if the hostile environment is due to sexual favoritism, see CACI No. 2521C, *Hostile Work Environment Harassment--Widespread Sexual Favoritism--Essential Factual Elements--Employer or Entity Defendant*. Also read CACI No. 2523, *"Harassing Conduct" Explained*, and CACI No. 2524, *"Severe or Pervasive" Explained*.

In element 6, select the applicable basis of employer liability: (a) vicarious liability for a supervisor's harassing conduct, or (b) the employer's ratification of the conduct. For a definition of "supervisor," see CACI No. 2525, *Harassment--"Supervisor" Defined*.

Sources and Authority

- *Government Code section 12940(j)(1)* provides that it is an unlawful employment practice for "an employer ... or any other person, because of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation, to harass an employee, an applicant, or a person providing services pursuant to a contract. Harassment of an employee, an applicant, or a person providing services pursuant to a contract by an employee other than an agent or supervisor shall be unlawful if the entity, or its agents or supervisors, knows or should have known of this conduct and fails to take immediate and appropriate corrective action. An entity shall take all reasonable steps to prevent harassment from occurring. Loss of tangible job benefits shall not be necessary in order to establish harassment."

- *Government Code section 12940(j)(4)(A)* provides: "For purposes of this subdivision only, 'employer' means any person regularly employing one or more persons or regularly receiving the services of one or more persons providing services pursuant to a contract, or any person acting as an agent of an employer, directly or indirectly, the state, or any political or civil subdivision of the state, and cities."

- *Government Code section 12940(j)(5)* provides that for purposes of claims of harassment under the FEHA, "a person providing services pursuant to a contract" means a person who meets all of the following criteria:

- (A) The person has the right to control the performance of the contract for services and discretion as to the manner of performance.

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(B) The person is customarily engaged in an independently established business.

(C) The person has control over the time and place the work is performed, supplies the tools and instruments used in the work, and performs work that requires a particular skill not ordinarily used in the course of the employer's work.

■ *Government Code section 12940(j)(4)(C)* provides, in part: "[H]arassment' because of sex includes sexual harassment, gender harassment, and harassment based on pregnancy, childbirth, or related medical conditions."

■ *Government Code section 12940(i)* provides that it is an unlawful employment practice "[f]or any person to aid, abet, incite, compel, or coerce the doing of any of the acts forbidden under this part, or to attempt to do so."

■ *Government Code section 12926(m)* provides: "'Race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation' includes a perception that the person has any of those characteristics or that the person is associated with a person who has, or is perceived to have, any of those characteristics."

■ Under the FEHA, an employer is strictly liable for all acts of sexual harassment by a supervisor. (*State Dep't of Health Servs. v. Superior Court* (2003) 31 Cal.4th 1026, 1042 [6 Cal.Rptr.3d 441, 79 P.3d 556] .)

■ "[I]n order for the employer to avoid strict liability for the supervisor's actions under the FEHA, the harassment must result from a completely private relationship unconnected with the employment. Otherwise, the employer is strictly liable for the supervisor's actions regardless of whether the supervisor was acting as the employer's agent." (*Myers v. Trendwest Resorts, Inc.* (2007) 148 Cal.App.4th 1403, 1421 [56 Cal.Rptr.3d 501] .)

■ Employers may be liable for the conduct of certain agents. (See *Gov. Code*, §§ 12925(d), 12926(d), and 12940(j)(1) and *Reno v. Baird* (1998) 18 Cal.4th 640, 658 [76 Cal.Rptr.2d 499, 957 P.2d 1333] [California Supreme Court declined to express opinion whether "agent" language in the FEHA merely incorporates respondeat superior principles or has some other meaning].)

■ "The elements [of a prima facie claim of hostile-environment sexual harassment] are: (1) plaintiff belongs to a protected group; (2) plaintiff was subject to unwelcome sexual harassment; (3) the harassment complained of was based on sex; (4) the harassment complained of was sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment; and (5) respondeat superior." (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 608 [262 Cal.Rptr. 842] , footnote omitted.)

■ "[A]lthough no California cases have directly addressed racial harassment in the workplace, the California courts have applied the federal threshold standard to claims of sexual harassment and held that FEHA is violated when the harassment was 'sufficiently severe or pervasive to alter the conditions of the victim's employment.'" (*Etter v. Veriflo Corp.* (1998) 67 Cal.App.4th 457, 464-465 [79 Cal.Rptr.2d 33] , internal citations and footnote omitted.)

■ "When the workplace is permeated with discriminatory intimidation, ridicule and insult that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment,' the law is violated." (*Kelly-Zurian v. Wohl Shoe Co., Inc.* (1994) 22 Cal.App.4th

397, 409 [27 Cal.Rptr.2d 457] , internal citation omitted.)

■ "[N]ot every utterance of a racial slur in the workplace violates the FEHA or Title VII. As the United States Supreme Court has recognized in the context of sexual harassment: '[N]ot all workplace conduct that may be described as "harassment" affects a "term, condition, or privilege" of employment within the meaning of Title VII. For sexual harassment to be actionable, it must be sufficiently severe or pervasive "to alter the conditions of [the victim's] employment and create an abusive working environment." ' ... 'Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment--an environment that a reasonable person would find hostile or abusive--is beyond Title VII's purview. Likewise, if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation.' ... California courts have adopted the same standard in evaluating claims under the FEHA." (*Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 129-130 [87 Cal.Rptr.2d 132, 980 P.2d 846] , internal citations omitted.)

■ "If an employee other than an agent or supervisor commits the harassment, and the employer takes immediate and appropriate corrective action when it becomes or reasonably should become aware of the conduct--for example, when the victim or someone else informs the employer--there simply is no 'unlawful employment practice' that the FEHA governs." (*Carrisales v. Dept. of Corrections* (1999) 21 Cal.4th 1132, 1136 [90 Cal.Rptr.2d 804, 988 P.2d 1083] , called into doubt on other grounds by statute.)

■ Under federal Title VII, an employer's liability may be based on the conduct of an official "within the class of an employer organization's officials who may be treated as the organization's proxy." (*Faragher v. City of Boca Raton* (1998) 524 U.S. 775, 790 [118 S.Ct. 2275, 141 L.Ed.2d 662] .)

■ "To be actionable, 'a sexually objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so.' That means a plaintiff who subjectively perceives the workplace as hostile or abusive will not prevail under the FEHA, if a reasonable person in the plaintiff's position, considering all the circumstances, would not share the same perception. Likewise, a plaintiff who does not perceive the workplace as hostile or abusive will not prevail, even if it objectively is so." (*Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4th 264, 284 [42 Cal.Rptr.3d 2, 132 P.3d 211] , internal citations omitted.)

■ "[A]llegations of a racially hostile work-place must be assessed from the perspective of a reasonable person belonging to the racial or ethnic group of the plaintiff." (*McGinest v. GTE Serv. Corp.* (9th Cir. 2004) 360 F.3d 1103, 1115 .)

Secondary Sources

3 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment, §§ 340, 346

Chin et al., California Practice Guide: Employment Litigation (The Rutter Group) PP 10:40, 10:110-10:260

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, §§ 2.68, 2.75, Sexual and Other Harassment, §§ 3.1, 3.14, 3.17, 3.21, 3.36, 3.45

2 Wilcox, *California Employment Law*, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, §§ 41.80[1][a], 41.81[1][b] (Matthew Bender)

3 Wilcox, *California Employment Law*, Ch. 43, *Civil Actions Under Equal Employment Opportunity Laws*, §

43.01[10][g][i] (Matthew Bender)

11 *California Forms of Pleading and Practice*, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.36 (Matthew Bender)

California Civil Practice: Employment Litigation (Thomson West) § 2:56

Publisher's Notes

This instruction covers issues presented in BAJI Nos. 12.05, 12.20.



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California Forms of Jury Instruction

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CHAPTER 25 California Judicial Council Fair Employment and Housing Act Instructions

4-25 California Forms of Jury Instruction CACI 2521B

CACI 2521B Hostile Work Environment Harassment--Conduct Directed at Others--Essential Factual Elements--Employer or Entity Defendant (Gov. Code, § 12940(j))

[*Name of plaintiff*] **claims that [he/she] was subjected to a hostile or abusive work environment because coworkers at [*name of defendant*] were subjected to harassment based on [*describe protected status, e.g., race, gender, or age*]. To establish this claim, [*name of plaintiff*] must prove all of the following:**

- 1. That [*name of plaintiff*] was [an employee of/a person providing services under a contract with] [*name of defendant*];**
- 2. That [*name of plaintiff*], although not personally subjected to unwanted harassing conduct, personally witnessed harassing conduct that took place in [his/her] immediate work environment;**
- 3. That the harassing conduct was severe or pervasive;**
- 4. That a reasonable [*describe member of protected group, e.g., woman*] in [*name of plaintiff*]'s circumstances would have considered the work environment to be hostile or abusive;**
- 5. That [*name of plaintiff*] considered the work environment to be hostile or abusive;**
- 6. [*Select applicable basis of defendant's liability:*]**

[That a supervisor engaged in the conduct;]

[That [*name of defendant*] [or [his/her/its] supervisors or agents] knew or should have known of the conduct and failed to take immediate and appropriate corrective action;]

7. That [name of plaintiff] was harmed; and

8. That the conduct was a substantial factor in causing [name of plaintiff]'s harm.

Derived from former CACI No. 2521 December 2007

Directions for Use

This instruction is for use in a hostile work environment case if the plaintiff was not the target of the harassing conduct and the defendant is an employer or other entity covered by the FEHA. For an individual defendant, such as the alleged harasser or plaintiff's coworker, see *CACI No. 2522B, Hostile Work Environment Harassment--Conduct Directed at Others--Essential Factual Elements--Individual Defendant*. For a case in which the plaintiff is the target of the harassment, see *CACI No. 2521A, Hostile Work Environment Harassment--Conduct Directed at Plaintiff--Essential Factual Elements--Employer or Entity Defendant*. For an instruction for use if the hostile environment is due to widespread sexual favoritism, see *CACI No. 2521C, Hostile Work Environment Harassment --Widespread Sexual Favoritism-- Essential Factual Elements--Employer or Entity Defendant*. Also read *CACI No. 2523, "Harassing Conduct" Explained*, and *CACI No. 2524, "Severe or Pervasive" Explained*.

In element 6, select the applicable basis of employer liability: (a) vicarious liability for a supervisor's harassing conduct, or (b) the employer's ratification of the conduct. For a definition of "supervisor," see *CACI No. 2525, Harassment--"Supervisor" Defined*.

Sources and Authority

■ *Government Code section 12940(j)(1)* provides that it is an unlawful employment practice for "an employer ... or any other person, because of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation, to harass an employee, an applicant, or a person providing services pursuant to a contract. Harassment of an employee, an applicant, or a person providing services pursuant to a contract by an employee other than an agent or supervisor shall be unlawful if the entity, or its agents or supervisors, knows or should have known of this conduct and fails to take immediate and appropriate corrective action. An entity shall take all reasonable steps to prevent harassment from occurring. Loss of tangible job benefits shall not be necessary in order to establish harassment."

■ *Government Code section 12940(j)(4)(A)* provides: "For purposes of this subdivision only, 'employer' means any person regularly employing one or more persons or regularly receiving the services of one or more persons providing services pursuant to a contract, or any person acting as an agent of an employer, directly or indirectly, the state, or any political or civil subdivision of the state, and cities."

■ *Government Code section 12940(j)(5)* provides that for purposes of claims of harassment under the FEHA, "a person providing services pursuant to a contract" means a person who meets all of the following criteria:

(A) The person has the right to control the performance of the contract for services and discretion as to the manner of performance.

(B) The person is customarily engaged in an independently established business.

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(C) The person has control over the time and place the work is performed, supplies the tools and instruments used in the work, and performs work that requires a particular skill not ordinarily used in the course of the employer's work.

■ *Government Code section 12940(j)(4)(C)* provides, in part: " '[H]arassment' because of sex includes sexual harassment, gender harassment, and harassment based on pregnancy, childbirth, or related medical conditions."

■ *Government Code section 12940(i)* provides that it is an unlawful employment practice "[f]or any person to aid, abet, incite, compel, or coerce the doing of any of the acts forbidden under this part, or to attempt to do so."

■ *Government Code section 12926(m)* provides: " 'Race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation' includes a perception that the person has any of those characteristics or that the person is associated with a person who has, or is perceived to have, any of those characteristics."

■ "The plaintiff's work environment is affected not only by conduct directed at herself but also by the treatment of others. A woman's perception that her work environment is hostile to women will obviously be reinforced if she witnesses the harassment of other female workers." (*Beyda v. City of Los Angeles* (1998) 65 Cal.App.4th 511, 519 [76 Cal.Rptr.2d 547] , internal citations omitted.)

■ "Harassment against others in the workplace is only relevant to the plaintiff's case if she has personal knowledge of it. Unless plaintiff witnesses the conduct against others, or is otherwise aware of it, that conduct cannot alter the conditions of her employment and create an abusive working environment. Stated another way, a reasonable person in plaintiff's position would not find the environment hostile or abusive unless that person had knowledge of the objectionable conduct toward others." (*Beyda, supra*, 65 Cal.App.4th at p. 520 .)

■ "To state that an employee must be the direct victim of the sexually harassing conduct is somewhat misleading as an employee who is subjected to a hostile work environment is a victim of sexual harassment even though no offensive remarks or touchings are directed to or perpetrated upon that employee. Generally, however, sexual conduct that involves or is aimed at persons other than the plaintiff is considered less offensive and severe than conduct that is directed at the plaintiff. A hostile work environment sexual harassment claim by a plaintiff who was not personally subjected to offensive remarks and touchings requires 'an even higher showing' than a claim by one who had been sexually harassed without suffering tangible job detriment: such a plaintiff must 'establish that the sexually harassing conduct permeated [her] direct work environment.' [P] To meet this burden, the plaintiff generally must show that the harassment directed at others was in her immediate work environment, and that she personally witnessed it. The reason for this is obvious: if the plaintiff does not witness the incidents involving others, 'those incidents cannot affect ... her perception of the hostility of the work environment.' " (*Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4th 264, 284-285 [42 Cal.Rptr.3d 2, 132 P.3d 211] , internal citations omitted.)

■ Under the FEHA, an employer is strictly liable for all acts of sexual harassment by a supervisor. (*State Dep't of Health Servs. v. Superior Court* (2003) 31 Cal.4th 1026, 1042 [6 Cal.Rptr.3d 441, 79 P.3d 556] .)

■ "[I]n order for the employer to avoid strict liability for the supervisor's actions under the FEHA, the

harassment must result from a completely private relationship unconnected with the employment. Otherwise, the employer is strictly liable for the supervisor's actions regardless of whether the supervisor was acting as the employer's agent." (*Myers v. Trendwest Resorts, Inc.* (2007) 148 Cal.App.4th 1403, 1421 [56 Cal.Rptr.3d 501] .)

- Employers may be liable for the conduct of certain agents. (See *Gov. Code*, §§ 12925(d), 12926(d), and 12940(j)(1) and *Reno v. Baird* (1998) 18 Cal.4th 640, 658 [76 Cal.Rptr.2d 499, 957 P.2d 1333] [California Supreme Court declined to express opinion whether "agent" language in the FEHA merely incorporates respondeat superior principles or has some other meaning].)

- "The elements [of a prima facie claim of hostile-environment sexual harassment] are: (1) plaintiff belongs to a protected group; (2) plaintiff was subject to unwelcome sexual harassment; (3) the harassment complained of was based on sex; (4) the harassment complained of was sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment; and (5) respondeat superior." (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 608 [262 Cal.Rptr. 842] , footnote omitted.)

- "[A]lthough no California cases have directly addressed racial harassment in the workplace, the California courts have applied the federal threshold standard to claims of sexual harassment and held that FEHA is violated when the harassment was 'sufficiently severe or pervasive to alter the conditions of the victim's employment.' " (*Etter v. Veriflo Corp.* (1998) 67 Cal.App.4th 457, 464-465 [79 Cal.Rptr.2d 33] , internal citations and footnote omitted.)

- "When the workplace is permeated with discriminatory intimidation, ridicule and insult that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment,' the law is violated." (*Kelly-Zurian v. Wohl Shoe Co., Inc.* (1994) 22 Cal.App.4th 397, 409 [27 Cal.Rptr.2d 457] , internal citation omitted.)

- "[N]ot every utterance of a racial slur in the workplace violates the FEHA or Title VII. As the United States Supreme Court has recognized in the context of sexual harassment: '[N]ot all workplace conduct that may be described as "harassment" affects a "term, condition, or privilege" of employment within the meaning of Title VII. For sexual harassment to be actionable, it must be sufficiently severe or pervasive "to alter the conditions of [the victim's] employment and create an abusive working environment." ' ... 'Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment--an environment that a reasonable person would find hostile or abusive--is beyond Title VII's purview. Likewise, if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation.' ... California courts have adopted the same standard in evaluating claims under the FEHA." (*Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 129-130 [87 Cal.Rptr.2d 132, 980 P.2d 846] , internal citations omitted.)

- "If an employee other than an agent or supervisor commits the harassment, and the employer takes immediate and appropriate corrective action when it becomes or reasonably should become aware of the conduct--for example, when the victim or someone else informs the employer--there simply is no 'unlawful employment practice' that the FEHA governs." (*Carrisales v. Dept. of Corrections* (1999) 21 Cal.4th 1132, 1136 [90 Cal.Rptr.2d 804, 988 P.2d 1083] , called into doubt on other grounds by statute.)

- Under federal Title VII, an employer's liability may be based on the conduct of an official "within the class of an employer organization's officials who may be treated as the organization's proxy." (*Faragher v. City of Boca Raton* (1998) 524 U.S. 775, 790 [118 S.Ct. 2275, 141 L.Ed.2d 662] .)

■ "To be actionable, 'a sexually objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so.' That means a plaintiff who subjectively perceives the workplace as hostile or abusive will not prevail under the FEHA, if a reasonable person in the plaintiff's position, considering all the circumstances, would not share the same perception. Likewise, a plaintiff who does not perceive the workplace as hostile or abusive will not prevail, even if it objectively is so." (*Lyle, supra*, 38 Cal.4th at p. 284 , internal citations omitted.)

■ "[A]llegations of a racially hostile work-place must be assessed from the perspective of a reasonable person belonging to the racial or ethnic group of the plaintiff." (*McGinest v. GTE Serv. Corp.* (9th Cir. 2004) 360 F.3d 1103, 1115 .)

Secondary Sources

3 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment, §§ 340, 346

Chin et al., California Practice Guide: Employment Litigation (The Rutter Group) PP 10:40, 10:110-10:260

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, §§ 2.68, 2.75, Sexual and Other Harassment, §§ 3.1, 3.14, 3.17, 3.21, 3.36, 3.45

2 Wilcox, *California Employment Law*, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, §§ 41.80[1][a], 41.81[1][b] (Matthew Bender)

3 Wilcox, *California Employment Law*, Ch. 43, *Civil Actions Under Equal Employment Opportunity Laws*, § 43.01[10][g][i] (Matthew Bender)

11 *California Forms of Pleading and Practice*, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.36 (Matthew Bender)

California Civil Practice: Employment Litigation (Thomson West) § 2:56

Publisher's Notes

This instruction covers issues presented in BAJI Nos. 12.05, 12.20.



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CHAPTER 25 California Judicial Council Fair Employment and Housing Act Instructions

4-25 California Forms of Jury Instruction CACI 2521C

CACI 2521C Hostile Work Environment Harassment--Widespread Sexual Favoritism--Essential Factual Elements--Employer or Entity Defendant (Gov. Code, § 12940(j))

[*Name of plaintiff*] **claims that widespread sexual favoritism at [*name of defendant*] created a hostile or abusive work environment. "Sexual favoritism" means that another employee has received preferential treatment with regard to promotion, work hours, assignments, or other significant employment benefits or opportunities because of a sexual relationship with an individual representative of the employer who was in a position to grant those preferences. To establish this claim, [*name of plaintiff*] must prove all of the following:**

- 1. That [*name of plaintiff*] was [an employee of/a person providing services under a contract with] [*name of defendant*];**
- 2. That there was sexual favoritism in the work environment;**
- 3. That the sexual favoritism was widespread and also severe or pervasive;**
- 4. That a reasonable [*describe member of protected group, e.g., woman*] in [*name of plaintiff*]'s circumstances would have considered the work environment to be hostile or abusive;**
- 5. That [*name of plaintiff*] considered the work environment to be hostile or abusive because of the widespread sexual favoritism;**
- 6. [*Select applicable basis of defendant's liability:*]**

[That a supervisor [engaged in the conduct/created the widespread sexual favoritism];]

[That [*name of defendant*] [or [his/her/its] supervisors or agents] knew or should have known of

the widespread sexual favoritism and failed to take immediate and appropriate corrective action;]

7. That [name of plaintiff] was harmed; and

8. That the conduct was a substantial factor in causing [name of plaintiff]'s harm.

Derived from former CACI No. 2521 December 2007

Directions for Use

This instruction is for use in a hostile work environment case involving widespread sexual favoritism when the defendant is an employer or other entity covered by the FEHA. For an individual defendant, such as the alleged harasser or plaintiff's coworker, see *CACI No. 2522C, Hostile Work Environment Harassment--Widespread Sexual Favoritism-- Essential Factual Elements--Individual Defendant*. For a case in which the plaintiff is the target of harassment based on a protected status such as gender, race, or sexual orientation, see *CACI No. 2521A, Hostile Work Environment Harassment--Conduct Directed at Plaintiff--Essential Factual Elements--Employer or Entity Defendant*. For an instruction for use if the plaintiff is not the target of the harassment, see *CACI No. 2521B, Hostile Work Environment Harassment--Conduct Directed at Others--Essential Factual Elements--Employer or Entity Defendant*. Also read *CACI No. 2523, "Harassing Conduct" Explained*, and *CACI No. 2524, "Severe or Pervasive" Explained*.

In element 6, select the applicable basis of employer liability: (a) vicarious liability for a supervisor's harassing conduct, or (b) the employer's ratification of the conduct. For a definition of "supervisor," see *CACI No. 2525, Harassment--"Supervisor" Defined*.

Sources and Authority

■ *Government Code section 12940(j)(1)* provides that it is an unlawful employment practice for "an employer ... or any other person, because of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation, to harass an employee, an applicant, or a person providing services pursuant to a contract. Harassment of an employee, an applicant, or a person providing services pursuant to a contract by an employee other than an agent or supervisor shall be unlawful if the entity, or its agents or supervisors, knows or should have known of this conduct and fails to take immediate and appropriate corrective action. An entity shall take all reasonable steps to prevent harassment from occurring. Loss of tangible job benefits shall not be necessary in order to establish harassment."

■ *Government Code section 12940(j)(4)(A)* provides: "For purposes of this subdivision only, 'employer' means any person regularly employing one or more persons or regularly receiving the services of one or more persons providing services pursuant to a contract, or any person acting as an agent of an employer, directly or indirectly, the state, or any political or civil subdivision of the state, and cities."

■ *Government Code section 12940(j)(5)* provides that for purposes of claims of harassment under the FEHA, "a person providing services pursuant to a contract" means a person who meets all of the following criteria:

(A) The person has the right to control the performance of the contract for services and

discretion as to the manner of performance.

(B) The person is customarily engaged in an independently established business.

(C) The person has control over the time and place the work is performed, supplies the tools and instruments used in the work, and performs work that requires a particular skill not ordinarily used in the course of the employer's work.

- *Government Code section 12940(j)(4)(C)* provides, in part: " '[H]arassment' because of sex includes sexual harassment, gender harassment, and harassment based on pregnancy, childbirth, or related medical conditions."

- *Government Code section 12940(i)* provides that it is an unlawful employment practice "[f]or any person to aid, abet, incite, compel, or coerce the doing of any of the acts forbidden under this part, or to attempt to do so."

- *Government Code section 12926(m)* provides: " 'Race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation' includes a perception that the person has any of those characteristics or that the person is associated with a person who has, or is perceived to have, any of those characteristics."

- "Following the guidance of the EEOC, and also employing standards adopted in our prior cases, we believe that an employee may establish an actionable claim of sexual harassment under the FEHA by demonstrating that widespread sexual favoritism was severe or pervasive enough to alter his or her working conditions and create a hostile work environment." (*Miller v. Dept. of Corrections* (2005) 36 Cal.4th 446, 466 [30 Cal.Rptr.3d 797, 115 P.3d 77] , internal citations omitted.)

- "[S]exual favoritism by a manager may be actionable when it leads employees to believe that 'they [can] obtain favorable treatment from [the manager] if they became romantically involved with him', the affair is conducted in a manner 'so indiscreet as to create a hostile work environment,' or the manager has engaged in 'other pervasive conduct ... which created a hostile work environment.' " (*Miller, supra*, 36 Cal.4th at p. 465 , internal citations omitted.)

- "[A] romantic relationship between a supervisor and an employee does not, without more, give rise to a sexual discrimination or sexual harassment claim either under the FEHA or the public policy of the state." (*Proksel v. Gattis* (1996) 41 Cal.App.4th 1626, 1631 [49 Cal.Rptr.2d 322] .)

- Under the FEHA, an employer is strictly liable for all acts of sexual harassment by a supervisor. (*State Dep't of Health Servs. v. Superior Court* (2003) 31 Cal.4th 1026, 1042 [6 Cal.Rptr.3d 441, 79 P.3d 556] .)

- "[I]n order for the employer to avoid strict liability for the supervisor's actions under the FEHA, the harassment must result from a completely private relationship unconnected with the employment. Otherwise, the employer is strictly liable for the supervisor's actions regardless of whether the supervisor was acting as the employer's agent." (*Myers v. Trendwest Resorts, Inc.* (2007) 148 Cal.App.4th 1403, 1421 [56 Cal.Rptr.3d 501] .)

- Employers may be liable for the conduct of certain agents. (See *Gov. Code*, §§ 12925(d), 12926(d), and 12940(j)(1) and *Reno v. Baird* (1998) 18 Cal.4th 640, 648 [76 Cal.Rptr.2d 499, 957 P.2d 1333] [California Supreme Court declined to express opinion whether "agent" language in the FEHA merely

incorporates respondeat superior principles or has some other meaning].)

■ "The elements [of a prima facie claim of hostile-environment sexual harassment] are: (1) plaintiff belongs to a protected group; (2) plaintiff was subject to unwelcome sexual harassment; (3) the harassment complained of was based on sex; (4) the harassment complained of was sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment; and (5) respondeat superior." (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 608 [262 Cal.Rptr. 842] , footnote omitted.)

■ " '[N]ot all workplace conduct that may be described as "harassment" affects a "term, condition, or privilege" of employment within the meaning of Title VII. For sexual harassment to be actionable, it must be sufficiently severe or pervasive "to alter the conditions of [the victim's] employment and create an abusive working environment.' " ... 'Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment--an environment that a reasonable person would find hostile or abusive--is beyond Title VII's purview. Likewise, if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation.' ... [P] California courts have adopted the same standard in evaluating claims under the FEHA." (*Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 130 [87 Cal.Rptr.2d 132, 980 P.2d 846] , internal citations omitted.)

■ "If an employee other than an agent or supervisor commits the harassment, and the employer takes immediate and appropriate corrective action when it becomes or reasonably should become aware of the conduct--for example, when the victim or someone else informs the employer--there simply is no 'unlawful employment practice' that the FEHA governs." (*Carrisales v. Dept. of Corrections* (1999) 21 Cal.4th 1132, 1136 [90 Cal.Rptr.2d 804, 988 P.2d 1083] , called into doubt on other grounds by statute.)

■ Under federal Title VII, an employer's liability may be based on the conduct of an official "within the class of an employer organization's officials who may be treated as the organization's proxy." (*Faragher v. City of Boca Raton* (1998) 524 U.S. 775, 789 [118 S.Ct. 2275, 141 L.Ed.2d 662] .)

■ "To be actionable, 'a sexually objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so.' That means a plaintiff who subjectively perceives the workplace as hostile or abusive will not prevail under the FEHA, if a reasonable person in the plaintiff's position, considering all the circumstances, would not share the same perception. Likewise, a plaintiff who does not perceive the workplace as hostile or abusive will not prevail, even if it objectively is so." (*Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4th 264, 284 [42 Cal.Rptr.3d 2, 132 P.3d 211] , internal citations omitted.)

Secondary Sources

3 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment, §§ 340, 346

Chin et al., California Practice Guide: Employment Litigation (The Rutter Group) PP 10:40, 10:110-10:260

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, §§ 2.68, 2.75, Sexual and Other Harassment, §§ 3.1, 3.14, 3.17, 3.21, 3.36, 3.45

2 Wilcox, *California Employment Law, Ch. 41, Substantive Requirements Under Equal Employment Opportunity Laws*, §§ 41.80[1][a], 41.81[1][b] (Matthew Bender)

4-25 California Forms of Jury Instruction CACI 2521C

3 *Wilcox, California Employment Law, Ch. 43, Civil Actions Under Equal Employment Opportunity Laws, § 43.01[10][g][i]* (Matthew Bender)

11 *California Forms of Pleading and Practice, Ch. 115, Civil Rights: Employment Discrimination, § 115.36* (Matthew Bender)

California Civil Practice: Employment Litigation (Thomson West) § 2:56

Publisher's Notes

This instruction covers issues presented in BAJI Nos. 12.05, 12.20.



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California Forms of Jury Instruction

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CHAPTER 25 California Judicial Council Fair Employment and Housing Act Instructions

4-25 California Forms of Jury Instruction CACI 2522A

CACI 2522A Hostile Work Environment Harassment--Conduct Directed at Plaintiff--Essential Factual Elements--Individual Defendant (Gov. Code, § 12940(j))

[*Name of plaintiff*] **claims that** [*name of defendant*] **subjected [him/her] to harassment based on** [*describe protected status, e.g., race, gender, or age*], **causing a hostile or abusive work environment. To establish this claim, [*name of plaintiff*] must prove all of the following:**

- 1. That [*name of plaintiff*] was [an employee of/a person providing services under a contract with] [*name of employer*];**
- 2. That [*name of plaintiff*] was subjected to unwanted harassing conduct because [he/she] [was/was believed to be/was associated with a person who was/was associated with a person who was believed to be] [*protected status*];**
- 3. That the harassing conduct was severe or pervasive;**
- 4. That a reasonable [*describe member of protected group, e.g., woman*] in [*name of plaintiff*]'s circumstances would have considered the work environment to be hostile or abusive;**
- 5. That [*name of plaintiff*] considered the work environment to be hostile or abusive;**
- 6. That [*name of defendant*] [participated in/assisted/ [or] encouraged] the harassing conduct;**
- 7. That [*name of plaintiff*] was harmed; and**
- 8. That the conduct was a substantial factor in causing [*name of plaintiff*]'s harm.**

Derived from former CACI No. 2522 December 2007

Directions for Use

This instruction is for use in a hostile work environment case if the plaintiff was the target of the harassing conduct and the defendant is an individual such as the alleged harasser or plaintiff's coworker. For an employer defendant, see *CACI No. 2521A, Hostile Work Environment Harassment--Conduct Directed at Plaintiff--Essential Factual Elements--Employer or Entity Defendant*. For a case in which the plaintiff is not the target of the harassment, see *CACI No. 2522B, Hostile Work Environment Harassment--Conduct Directed at Plaintiff--Essential Factual Elements--Individual Defendant*. For an instruction for use if the hostile environment is due to sexual favoritism, see *CACI No. 2522C, Hostile Work Environment Harassment --Widespread Sexual Favoritism-- Essential Factual Elements--Individual Defendant*. Also read *CACI No. 2523, "Harassing Conduct" Explained*, and *CACI No. 2524, "Severe or Pervasive" Explained*.

Sources and Authority

- *Government Code section 12940(j)(1)* provides that it is an unlawful employment practice for "an employer ... or any other person, because of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation, to harass an employee, an applicant, or a person providing services pursuant to a contract. Harassment of an employee, an applicant, or a person providing services pursuant to a contract by an employee other than an agent or supervisor shall be unlawful if the entity, or its agents or supervisors, knows or should have known of this conduct and fails to take immediate and appropriate corrective action. An entity shall take all reasonable steps to prevent harassment from occurring. Loss of tangible job benefits shall not be necessary in order to establish harassment."

- *Government Code section 12940(j)(3)* provides: "An employee of an entity ... is personally liable for any harassment prohibited by this section that is perpetrated by the employee, regardless of whether the employer or covered entity knows or should have known of the conduct and fails to take immediate and appropriate corrective action."

- *Government Code section 12940(j)(4)(A)* provides, in part: "For purposes of this subdivision only, 'employer' means any person regularly employing one or more persons or regularly receiving the services of one or more persons providing services pursuant to a contract, or any person acting as an agent of an employer, directly or indirectly, the state, or any political or civil subdivision of the state, and cities."

- *Government Code section 12940(j)(5)* provides that for purposes of claims of harassment under the FEHA, "a person providing services pursuant to a contract" means a person who meets all of the following criteria:

- (A) The person has the right to control the performance of the contract for services and discretion as to the manner of performance.

- (B) The person is customarily engaged in an independently established business.

- (C) The person has control over the time and place the work is performed, supplies the tools and instruments used in the work, and performs work that requires a particular skill

not ordinarily used in the course of the employer's work.

- *Government Code section 12940(i)* provides that it is an unlawful employment practice "[f]or any person to aid, abet, incite, compel, or coerce the doing of any of the acts forbidden under this part, or to attempt to do so."

- *Government Code section 12926(m)* provides: " 'Race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation' includes a perception that the person has any of those characteristics or that the person is associated with a person who has, or is perceived to have, any of those characteristics."

- "The elements [of a prima facie claim of hostile-environment sexual harassment] are: (1) plaintiff belongs to a protected group; (2) plaintiff was subject to unwelcome sexual harassment; (3) the harassment complained of was based on sex; (4) the harassment complained of was sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment; and (5) respondeat superior." (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 608 [262 Cal.Rptr. 842] , footnote omitted.)

- "When the workplace is permeated with discriminatory intimidation, ridicule and insult that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment,' 'the law is violated.'" (*Kelly-Zurian v. Wohl Shoe Co., Inc.* (1994) 22 Cal.App.4th 397, 409 [27 Cal.Rptr.2d 457] , internal citation omitted.)

- "[W]e conclude a nonharassing supervisor, who fails to take action to prevent sexual harassment, is not personally liable for sexual harassment under the Fair Employment and Housing Act (FEHA)." (*Fiol v. Doellstedt* (1996) 50 Cal.App.4th 1318, 1322 [58 Cal.Rptr.2d 308] .)

- "A supervisor who, without more, fails to take action to prevent sexual harassment of an employee is not personally liable as an aider and abettor of the harasser, an aider and abettor of the employer or an agent of the employer." (*Fiol, supra*, 50 Cal.App.4th at p. 1331 .)

- "[A]lthough no California cases have directly addressed racial harassment in the workplace, the California courts have applied the federal threshold standard to claims of sexual harassment and held that FEHA is violated when the harassment was " 'sufficiently severe or pervasive to alter the conditions of the victim's employment.' " (*Etter v. Veriflo Corp.* (1998) 67 Cal.App.4th 457, 464-465 [79 Cal.Rptr.2d 33] , internal citations and footnote omitted.)

- "To be actionable, 'a sexually objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so.' That means a plaintiff who subjectively perceives the workplace as hostile or abusive will not prevail under the FEHA, if a reasonable person in the plaintiff's position, considering all the circumstances, would not share the same perception. Likewise, a plaintiff who does not perceive the workplace as hostile or abusive will not prevail, even if it objectively is so." (*Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4th 264, 284 [42 Cal.Rptr.3d 2, 132 P.3d 211] , internal citations omitted.)

- "[A]llegations of a racially hostile work-place must be assessed from the perspective of a reasonable person belonging to the racial or ethnic group of the plaintiff." (*McGinest v. GTE Serv. Corp.* (9th Cir. 2004) 360 F.3d 1103, 1115 .)

Secondary Sources

3 Witkin, *Summary of California Law* (10th ed. 2005) Agency and Employment, §§ 340, 346

Chin, et al., *California Practice Guide: Employment Litigation* (The Rutter Group) PP 10:40, 10:110-10:260

1 *Wrongful Employment Termination Practice* (Cont.Ed.Bar 2d ed.) Discrimination Claims, §§ 2.68, 2.75, Sexual and Other Harassment, §§ 3.1, 3.14, 3.17, 3.36-3.45

2 Wilcox, *California Employment Law, Ch. 41, Substantive Requirements Under Equal Employment Opportunity Laws*, §§ 41.80[1][a], 41.81[1][b] (Matthew Bender)

3 Wilcox, *California Employment Law, Ch. 43, Civil Actions Under Equal Employment Opportunity Laws*, § 43.01[10][g][i] (Matthew Bender)

11 *California Forms of Pleading and Practice, Ch. 115, Civil Rights: Employment Discrimination*, § 115.36 (Matthew Bender)

California Civil Practice: Employment Litigation (Thomson West) §§ 2:56-2:56.1

Publisher's Notes

This instruction covers issues presented in BAJI Nos. 12.05, 12.20.



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California Forms of Jury Instruction

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CHAPTER 25 California Judicial Council Fair Employment and Housing Act Instructions

4-25 California Forms of Jury Instruction CACI 2522B

CACI 2522B Hostile Work Environment Harassment--Conduct Directed at Others--Essential Factual Elements--Individual Defendant (Gov. Code, § 12940(j))

[*Name of plaintiff*] **claims that [he/she] was subjected to a hostile or abusive work environment because coworkers at [*name of employer*] were subjected to harassment based on [*describe protected status, e.g., race, gender, or age*]. To establish this claim, [*name of plaintiff*] must prove all of the following:**

- 1. That [*name of plaintiff*] was [an employee of/a person providing services under a contract with] [*name of employer*];**
 - 2. That [*name of plaintiff*] although not personally subjected to unwanted harassing conduct, personally witnessed harassing conduct that took place in [his/her] immediate work environment;**
 - 3. That the harassing conduct was severe or pervasive;**
 - 4. That a reasonable [*describe member of protected group, e.g., woman*] in [*name of plaintiff*]'s circumstances would have considered the work environment to be hostile or abusive;**
 - 5. That [*name of plaintiff*] considered the work environment to be hostile or abusive;**
 - 6. That [*name of defendant*] [participated in/assisted/ [or] encouraged] the harassing conduct;**
 - 7. That [*name of plaintiff*] was harmed; and**
 - 8. That the conduct was a substantial factor in causing [*name of plaintiff*]'s harm.**
-

Derived from former CACI No. 2522 December 2007

Directions for Use

This instruction is for use in a hostile work environment case if the plaintiff was not the target of the harassing conduct and the defendant is an individual such as the alleged harasser or plaintiff's coworker. For an employer defendant, see *CACI No. 2521B, Hostile Work Environment Harassment--Conduct Directed at Others--Essential Factual Elements--Employer or Entity Defendant*. For a case in which the plaintiff is the target of the harassment, see *CACI No. 2522A, Hostile Work Environment Harassment--Conduct Directed at Plaintiff--Essential Factual Elements--Individual Defendant*. For an instruction for use if the hostile environment is due to sexual favoritism, see *CACI No. 2522C, Hostile Work Environment Harassment --Widespread Sexual Favoritism-- Essential Factual Elements--Individual Defendant*. Also read *CACI No. 2523, "Harassing Conduct" Explained*, and *CACI No. 2524, "Severe or Pervasive" Explained*.

Sources and Authority

- *Government Code section 12940(j)(1)* provides that it is an unlawful employment practice for "an employer ... or any other person, because of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation, to harass an employee, an applicant, or a person providing services pursuant to a contract. Harassment of an employee, an applicant, or a person providing services pursuant to a contract by an employee other than an agent or supervisor shall be unlawful if the entity, or its agents or supervisors, knows or should have known of this conduct and fails to take immediate and appropriate corrective action. An entity shall take all reasonable steps to prevent harassment from occurring. Loss of tangible job benefits shall not be necessary in order to establish harassment."

- *Government Code section 12940(j)(3)* provides: "An employee of an entity ... is personally liable for any harassment prohibited by this section that is perpetrated by the employee, regardless of whether the employer or covered entity knows or should have known of the conduct and fails to take immediate and appropriate corrective action."

- *Government Code section 12940(j)(4)(A)* provides, in part: "For purposes of this subdivision only, 'employer' means any person regularly employing one or more persons or regularly receiving the services of one or more persons providing services pursuant to a contract, or any person acting as an agent of an employer, directly or indirectly, the state, or any political or civil subdivision of the state, and cities."

- *Government Code section 12940(j)(5)* provides that for purposes of claims of harassment under the FEHA, "a person providing services pursuant to a contract" means a person who meets all of the following criteria:

- (A) The person has the right to control the performance of the contract for services and discretion as to the manner of performance.

- (B) The person is customarily engaged in an independently established business.

- (C) The person has control over the time and place the work is performed, supplies the tools and instruments used in the work, and performs work that requires a particular skill not ordinarily used in the course of the employer's work.

■ *Government Code section 12940(i)* provides that it is an unlawful employment practice "[f]or any person to aid, abet, incite, compel, or coerce the doing of any of the acts forbidden under this part, or to attempt to do so."

■ *Government Code section 12926(m)* provides: " 'Race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation' includes a perception that the person has any of those characteristics or that the person is associated with a person who has, or is perceived to have, any of those characteristics."

■ "The plaintiff's work environment is affected not only by conduct directed at herself but also by the treatment of others. A woman's perception that her work environment is hostile to women will obviously be reinforced if she witnesses the harassment of other female workers." (*Beyda v. City of Los Angeles* (1998) 65 Cal.App.4th 511, 519 [76 Cal.Rptr.2d 547] , internal citations omitted.)

■ "Harassment against others in the workplace is only relevant to the plaintiff's case if she has personal knowledge of it. Unless plaintiff witnesses the conduct against others, or is otherwise aware of it, that conduct cannot alter the conditions of her employment and create an abusive working environment. Stated another way, a reasonable person in plaintiff's position would not find the environment hostile or abusive unless that person had knowledge of the objectionable conduct toward others." (*Beyda, supra*, 65 Cal.App.4th at p. 520 .)

■ "To state that an employee must be the direct victim of the sexually harassing conduct is somewhat misleading as an employee who is subjected to a hostile work environment is a victim of sexual harassment even though no offensive remarks or touchings are directed to or perpetrated upon that employee. Generally, however, sexual conduct that involves or is aimed at persons other than the plaintiff is considered less offensive and severe than conduct that is directed at the plaintiff. A hostile work environment sexual harassment claim by a plaintiff who was not personally subjected to offensive remarks and touchings requires 'an even higher showing' than a claim by one who had been sexually harassed without suffering tangible job detriment: such a plaintiff must 'establish that the sexually harassing conduct permeated [her] direct work environment.' [P] To meet this burden, the plaintiff generally must show that the harassment directed at others was in her immediate work environment, and that she personally witnessed it. The reason for this is obvious: if the plaintiff does not witness the incidents involving others, 'those incidents cannot affect ... her perception of the hostility of the work environment.' " (*Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4th 264, 284-285 [42 Cal.Rptr.3d 2, 132 P.3d 211] , internal citations omitted.)

■ "The elements [of a prima facie claim of hostile-environment sexual harassment] are: (1) plaintiff belongs to a protected group; (2) plaintiff was subject to unwelcome sexual harassment; (3) the harassment complained of was based on sex; (4) the harassment complained of was sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment; and (5) respondeat superior." (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 608 [262 Cal.Rptr. 842] , footnote omitted.)

■ "When the workplace is permeated with discriminatory intimidation, ridicule and insult that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment,' the law is violated." (*Kelly-Zurian v. Wohl Shoe Co., Inc.* (1994) 22 Cal.App.4th 397, 409 [27 Cal.Rptr.2d 457] , internal citation omitted.)

■ "[W]e conclude a nonharassing supervisor, who fails to take action to prevent sexual harassment, is

not personally liable for sexual harassment under the Fair Employment and Housing Act (FEHA)." (*Fiol v. Doellstedt* (1996) 50 Cal.App.4th 1318, 1322 [58 Cal.Rptr.2d 308] .)

■ "A supervisor who, without more, fails to take action to prevent sexual harassment of an employee is not personally liable as an aider and abettor of the harasser, an aider and abettor of the employer or an agent of the employer." (*Fiol, supra*, 50 Cal.App.4th at p. 1331 .)

■ "[A]lthough no California cases have directly addressed racial harassment in the workplace, the California courts have applied the federal threshold standard to claims of sexual harassment and held that FEHA is violated when the harassment was 'sufficiently severe or pervasive to alter the conditions of the victim's employment.' " (*Etter v. Veriflo Corp.* (1998) 67 Cal.App.4th 457, 464-465 [79 Cal.Rptr.2d 33] , internal citations and footnote omitted.)

■ "To be actionable, 'a sexually objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so.' That means a plaintiff who subjectively perceives the workplace as hostile or abusive will not prevail under the FEHA, if a reasonable person in the plaintiff's position, considering all the circumstances, would not share the same perception. Likewise, a plaintiff who does not perceive the workplace as hostile or abusive will not prevail, even if it objectively is so." (*Lyle, supra*, 38 Cal.4th at p. 284 , internal citations omitted.)

■ "[A]llegations of a racially hostile work-place must be assessed from the perspective of a reasonable person belonging to the racial or ethnic group of the plaintiff." (*McGinest v. GTE Serv. Corp.* (9th Cir. 2004) 360 F.3d 1103, 1115 .)

Secondary Sources

3 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment, §§ 340, 346

Chin, et al., California Practice Guide: Employment Litigation (The Rutter Group) PP 10:40, 10:110-10:260

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, §§ 2.68, 2.75, Sexual and Other Harassment, §§ 3.1, 3.14, 3.17, 3.36-3.45

2 Wilcox, *California Employment Law*, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, §§ 41.80[1][a], 41.81[1][b] (Matthew Bender)

3 Wilcox, *California Employment Law*, Ch. 43, *Civil Actions Under Equal Employment Opportunity Laws*, § 43.01[10][g][i] (Matthew Bender)

11 *California Forms of Pleading and Practice*, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.36 (Matthew Bender)

California Civil Practice: Employment Litigation (Thomson West) §§ 2:56-2:56.1

Publisher's Notes

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CHAPTER 25 California Judicial Council Fair Employment and Housing Act Instructions

4-25 California Forms of Jury Instruction CACI 2522C

CACI 2522C Hostile Work Environment Harassment--Widespread Sexual Favoritism--Essential Factual Elements--Individual Defendant (Gov. Code, § 12940(j))

[*Name of plaintiff*] **claims that widespread sexual favoritism by [*name of defendant*] created a hostile or abusive work environment. "Sexual favoritism" means that another employee has received preferential treatment with regard to promotion, work hours, assignments, or other significant employment benefits or opportunities because of a sexual relationship with an individual representative of the employer who was in a position to grant these preferences. To establish this claim, [*name of plaintiff*] must prove all of the following:**

- 1. That [*name of plaintiff*] was [an employee of/a person providing services under a contract with] [*name of employer*];**
- 2. That there was sexual favoritism in the work environment;**
- 3. That the sexual favoritism was widespread and also severe or pervasive;**
- 4. That a reasonable [*describe member of protected group, e.g., woman*] in [*name of plaintiff*]'s circumstances would have considered the work environment to be hostile or abusive because of the widespread sexual favoritism;**
- 5. That [*name of plaintiff*] considered the work environment to be hostile or abusive because of the widespread sexual favoritism;**
- 6. That [*name of defendant*] [participated in/assisted/ [or] encouraged] the sexual favoritism;**
- 7. That [*name of plaintiff*] was harmed; and**

8. That the conduct was a substantial factor in causing [name of plaintiff]'s harm.

Derived from former CACI No. 2522 December 2007

Directions for Use

This instruction is for use in a hostile work environment case involving widespread sexual favoritism when the defendant is an individual such as the alleged harasser or plaintiff's coworker. For an employer defendant, see *CACI No. 2521C, Hostile Work Environment Harassment --Widespread Sexual Favoritism-- Essential Factual Elements--Employer or Entity Defendant*. For a case in which the plaintiff is the target of harassment based on a protected status such as gender, race, or sexual orientation, see *CACI No. 2522A, Hostile Work Environment Harassment--Conduct Directed at Plaintiff--Essential Factual Elements--Individual Defendant*. For an instruction for use if the plaintiff is not the target of the harassment, see *CACI No. 2522B, Hostile Work Environment Harassment--Conduct Directed at Others--Essential Factual Elements--Individual Defendant*. Also read *CACI No. 2523, "Harassing Conduct" Explained*, and *CACI No. 2524, "Severe or Pervasive" Explained*.

Sources and Authority

■ *Government Code section 12940(j)(1)* provides that it is an unlawful employment practice for "an employer ... or any other person, because of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation, to harass an employee, an applicant, or a person providing services pursuant to a contract. Harassment of an employee, an applicant, or a person providing services pursuant to a contract by an employee other than an agent or supervisor shall be unlawful if the entity, or its agents or supervisors, knows or should have known of this conduct and fails to take immediate and appropriate corrective action. An entity shall take all reasonable steps to prevent harassment from occurring. Loss of tangible job benefits shall not be necessary in order to establish harassment."

■ *Government Code section 12940(j)(3)* provides: "An employee of an entity ... is personally liable for any harassment prohibited by this section that is perpetrated by the employee, regardless of whether the employer or covered entity knows or should have known of the conduct and fails to take immediate and appropriate corrective action."

■ *Government Code section 12940(j)(4)(A)* provides, in part: "For purposes of this subdivision only, 'employer' means any person regularly employing one or more persons or regularly receiving the services of one or more persons providing services pursuant to a contract, or any person acting as an agent of an employer, directly or indirectly, the state, or any political or civil subdivision of the state, and cities."

■ *Government Code section 12940(j)(5)* provides that for purposes of claims of harassment under the FEHA, "a person providing services pursuant to a contract" means a person who meets all of the following criteria:

(A) The person has the right to control the performance of the contract for services and discretion as to the manner of performance.

(B) The person is customarily engaged in an independently established business.

(C) The person has control over the time and place the work is performed, supplies the tools and instruments used in the work, and performs work that requires a particular skill not ordinarily used in the course of the employer's work.

■ *Government Code section 12940(i)* provides that it is an unlawful employment practice "[f]or any person to aid, abet, incite, compel, or coerce the doing of any of the acts forbidden under this part, or to attempt to do so."

■ *Government Code section 12926(m)* provides: " 'Race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation' includes a perception that the person has any of those characteristics or that the person is associated with a person who has, or is perceived to have, any of those characteristics."

■ "Following the guidance of the EEOC, and also employing standards adopted in our prior cases, we believe that an employee may establish an actionable claim of sexual harassment under the FEHA by demonstrating that widespread sexual favoritism was severe or pervasive enough to alter his or her working conditions and create a hostile work environment." (*Miller v. Dept. of Corrections* (2005) 36 Cal.4th 446, 466 [30 Cal.Rptr.3d 797, 115 P.3d 77] , internal citations omitted.)

■ "[S]exual favoritism by a manager may be actionable when it leads employees to believe that 'they [can] obtain favorable treatment from [the manager] if they became romantically involved with him', the affair is conducted in a manner 'so indiscreet as to create a hostile work environment,' or the manager has engaged in 'other pervasive conduct ... which created a hostile work environment.' " (*Miller, supra*, 36 Cal. 4th at p. 465 , internal citations omitted.)

■ "[A] romantic relationship between a supervisor and an employee does not, without more, give rise to a sexual discrimination or sexual harassment claim either under the FEHA or the public policy of the state." (*Proksel v. Gattis* (1996) 41 Cal.App.4th 1626, 1631 [49 Cal.Rptr.2d 322] .)

■ "The elements [of a prima facie claim of hostile-environment sexual harassment] are: (1) plaintiff belongs to a protected group; (2) plaintiff was subject to unwelcome sexual harassment; (3) the harassment complained of was based on sex; (4) the harassment complained of was sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment; and (5) respondeat superior." (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 608 [262 Cal.Rptr. 842] , footnote omitted.)

■ "When the workplace is permeated with discriminatory intimidation, ridicule and insult that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment,' the law is violated." (*Kelly-Zurian v. Wohl Shoe Co., Inc.* (1994) 22 Cal.App.4th 397, 409 [27 Cal.Rptr.2d 457] , internal citation omitted.)

■ "[W]e conclude a nonharassing supervisor, who fails to take action to prevent sexual harassment, is not personally liable for sexual harassment under the Fair Employment and Housing Act (FEHA)." (*Fiol v. Doellstedt* (1996) 50 Cal.App.4th 1318, 1322 [58 Cal.Rptr.2d 308] .)

■ "A supervisor who, without more, fails to take action to prevent sexual harassment of an employee is not personally liable as an aider and abettor of the harasser, an aider and abettor of the employer or an agent of the employer." (*Fiol, supra*, 50 Cal.App.4th at p. 1331 .)

■ "[A]lthough no California cases have directly addressed racial harassment in the workplace, the

California courts have applied the federal threshold standard to claims of sexual harassment and held that FEHA is violated when the harassment was 'sufficiently severe or pervasive to alter the conditions of the victim's employment.' " (*Etter v. Veriflo Corp.* (1998) 67 Cal.App.4th 457, 464-465 [79 Cal.Rptr.2d 33] , internal citations and footnote omitted.)

■ "To be actionable, 'a sexually objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so.' That means a plaintiff who subjectively perceives the workplace as hostile or abusive will not prevail under the FEHA, if a reasonable person in the plaintiff's position, considering all the circumstances, would not share the same perception. Likewise, a plaintiff who does not perceive the workplace as hostile or abusive will not prevail, even if it objectively is so." (*Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4th 264, 284 [42 Cal.Rptr.3d 2, 132 P.3d 211] , internal citations omitted.)

Secondary Sources

3 Witkin, *Summary of California Law* (10th ed. 2005) Agency and Employment, §§ 340, 346

Chin, et al., *California Practice Guide: Employment Litigation* (The Rutter Group) PP 10:40, 10:110-10:260

1 *Wrongful Employment Termination Practice* (Cont.Ed.Bar 2d ed.) Discrimination Claims, §§ 2.68, 2.75, Sexual and Other Harassment, §§ 3.1, 3.14, 3.17, 3.36-3.45

2 Wilcox, *California Employment Law, Ch. 41, Substantive Requirements Under Equal Employment Opportunity Laws*, §§ 41.80[1][a], 41.81[1][b] (Matthew Bender)

3 Wilcox, *California Employment Law, Ch. 43, Civil Actions Under Equal Employment Opportunity Laws*, § 43.01[10][g][i] (Matthew Bender)

11 *California Forms of Pleading and Practice, Ch. 115, Civil Rights: Employment Discrimination*, § 115.36 (Matthew Bender)

California Civil Practice: Employment Litigation (Thomson West) §§ 2:56-2:56.1

Publisher's Notes

This instruction covers issues presented in BAJI Nos. 12.05, 12.20.



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California Forms of Jury Instruction

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CHAPTER 25 California Judicial Council Fair Employment and Housing Act Instructions

4-25 California Forms of Jury Instruction CACI 2523

CACI 2523 "Harassing Conduct" Explained

Harassing conduct may include [any of the following:]

[a. Verbal harassment, such as obscene language, demeaning comments, slurs, [or] threats [or] [describe other form of verbal harassment];] [or]

[b. Physical harassment, such as unwanted touching, assault, or physical interference with normal work or movement;] [or]

[c. Visual harassment, such as offensive posters, objects, cartoons, or drawings;] [or]

[d. Unwanted sexual advances;] [or]

[e. [Describe other form of harassment if appropriate].]

New September 2003; Revised December 2007

Directions for Use

Read this instruction with CACI No. 2521A, *Hostile Work Environment Harassment--Conduct Directed at Plaintiff--Essential Factual Elements--Employer or Entity Defendant*; CACI No. 2521B, *Hostile Work Environment Harassment--Conduct Directed at Others--Essential Factual Elements--Employer or Entity Defendant*; CACI No. 2522A, *Hostile Work Environment Harassment--Conduct Directed at Plaintiff--Essential Factual Elements--Individual Defendant*; or CACI No. 2522B, *Hostile Work Environment Harassment--Conduct Directed at Others--Essential Factual Elements--Individual Defendant*. Read also CACI No. 2524, *"Severe or Pervasive" Explained*, if appropriate.

Sources and Authority

■ *Government Code section 12940(j)(1)* provides that it is an unlawful employment practice for "an employer ... or any other person, because of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation, to harass an employee, an applicant, or a person providing services pursuant to a contract."

■ The Fair Employment and Housing Commission's regulations (*Cal. Code Regs., tit. 2, § 7287.6(b)(1)*) provide:

"Harassment" includes but is not limited to:

(A) Verbal harassment, e.g., epithets, derogatory comments or slurs on a basis enumerated in the Act;

(B) Physical harassment, e.g., assault, impeding or blocking movement, or any physical interference with normal work or movement, when directed at an individual on a basis enumerated in the Act;

(C) Visual forms of harassment, e.g., derogatory posters, cartoons, or drawings on a basis enumerated in the Act; or

(D) Sexual favors, e.g., unwanted sexual advances which condition an employment benefit upon an exchange of sexual favors.

■ "[H]arassment consists of a type of conduct not necessary for performance of a supervisory job. Instead, harassment consists of conduct outside the scope of necessary job performance, conduct presumably engaged in for personal gratification, because of meanness or bigotry, or for other personal motives. Harassment is not conduct of a type necessary for management of the employer's business or performance of the supervisory employee's job." (*Reno v. Baird* (1998) 18 Cal.4th 640, 645-646 [76 Cal.Rptr.2d 499, 957 P.2d 1333], internal citations omitted.)

■ "We conclude, therefore, that the Legislature intended that commonly necessary personnel management actions such as hiring and firing, job or project assignments, office or work station assignments, promotion or demotion, performance evaluations, the provision of support, the assignment or nonassignment of supervisory functions, deciding who will and who will not attend meetings, deciding who will be laid off, and the like, do not come within the meaning of harassment. These are actions of a type necessary to carry out the duties of business and personnel management. These actions may retrospectively be found discriminatory if based on improper motives, but in that event the remedies provided by the FEHA are those for discrimination, not harassment. Harassment, by contrast, consists of actions outside the scope of job duties which are not of a type necessary to business and personnel management. This significant distinction underlies the differential treatment of harassment and discrimination in the FEHA." (*Reno, supra*, 18 Cal.4th at pp. 646-647, internal citation omitted.)

■ "[W]e can discern no reason why an employee who is the victim of discrimination based on some official action of the employer cannot also be the victim of harassment by a supervisor for abusive messages that create a hostile working environment, and under the FEHA the employee would have two separate claims of injury." (*Roby v. McKesson Corp.* (2009) 47 Cal.4th 686, 707 [101 Cal.Rptr.3d 773, 219 P.3d 749].)

■ "Here, [plaintiff]'s *discrimination* claim sought compensation for official employment actions that were motivated by improper bias. These discriminatory actions included not only the termination itself but also official employment actions that preceded the termination, such as the progressive disciplinary warnings and the decision to assign [plaintiff]

to answer the office telephones during office parties. [Plaintiff]'s *harassment* claim, by contrast, sought compensation for hostile social interactions in the workplace that affected the workplace environment because of the offensive message they conveyed to [plaintiff]. These harassing actions included [supervisor]'s demeaning comments to [plaintiff] about her body odor and arm sores, [supervisor]'s refusal to respond to [plaintiff]'s greetings, [supervisor]'s demeaning facial expressions and gestures toward [plaintiff], and [supervisor]'s disparate treatment of [plaintiff] in handing out small gifts. None of these events can fairly be characterized as an official employment action. None involved [supervisor]'s exercising the authority that [employer] had delegated to her so as to cause [employer], in its corporate capacity, to take some action with respect to [plaintiff]. Rather, these were events that were unrelated to [supervisor]'s managerial role, engaged in for her own purposes." (*Roby, supra*, 47 Cal.4th at pp. 708-709 , original italics, footnote omitted.)

■ "[S]ome official employment actions done in furtherance of a supervisor's managerial role can also have a secondary effect of communicating a hostile message. This occurs when the actions establish a widespread pattern of bias. Here, some actions that [supervisor] took with respect to [plaintiff] are best characterized as official employment actions rather than hostile social interactions in the workplace, but they may have contributed to the hostile message that [supervisor] was expressing to [plaintiff] in other, more explicit ways. These would include [supervisor]'s shunning of [plaintiff] during staff meetings, [supervisor]'s belittling of [plaintiff]'s job, and [supervisor]'s reprimands of [plaintiff] in front of [plaintiff]'s coworkers. Moreover, acts of discrimination can provide evidentiary support for a harassment claim by establishing discriminatory animus on the part of the manager responsible for the discrimination, thereby permitting the inference that rude comments or behavior by that same manager were similarly motivated by discriminatory animus." (*Roby, supra*, 47 Cal.4th at p. 709 .)

Secondary Sources

Chin, et al., California Practice Guide: Employment Litigation (The Rutter Group) PP 10:125-10:155

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Sexual and Other Harassment, §§ 3.13, 3.36

2 Wilcox, *California Employment Law*, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, § 41.80[1][a][i] (Matthew Bender)

11 *California Forms of Pleading and Practice*, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.36 (Matthew Bender)

California Civil Practice: Employment Litigation (Thomson West) §§ 2:56-2:56.1

Publisher's Notes

This instruction covers issues presented in BAJI Nos. 12.05 and 12.07.

Gov. Code § 12940(j)(1) was amended by Stats. 2003, ch. 671 (AB 76) to make non-substantive changes and to add the following: "An employer may also be responsible for the acts of nonemployees, with respect to sexual harassment of employees, applicants, or persons providing services pursuant to a contract in the workplace, where the employer, or its agents or supervisors, knows or should have known of the conduct and fails to take immediate and appropriate corrective action. In reviewing cases involving the acts of nonemployees, the extent of the employer's control and any other legal responsibility which the employer may have with respect to the conduct of those nonemployees shall be considered."

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewLabor & Employment

LawDiscriminationActionable DiscriminationLabor & Employment LawDiscriminationHarassmentSexual

HarassmentCoverage & DefinitionsSexual HarassmentLabor & Employment LawDiscriminationHarassmentSexual

HarassmentHostile Work Environment



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California Forms of Jury Instruction

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CHAPTER 25 California Judicial Council Fair Employment and Housing Act Instructions

4-25 California Forms of Jury Instruction CACI 2524

CACI 2524 "Severe or Pervasive" Explained

"Severe or pervasive" means conduct that alters the conditions of employment and creates a hostile or abusive work environment.

In determining whether the conduct was severe or pervasive, you should consider all the circumstances. You may consider any or all of the following:

- (a) The nature of the conduct;**
- (b) How often, and over what period of time, the conduct occurred;**
- (c) The circumstances under which the conduct occurred;**
- (d) Whether the conduct was physically threatening or humiliating;**
- (e) The extent to which the conduct unreasonably interfered with an employee's work performance.**

New September 2003; Revised December 2007

Directions for Use

Read this instruction with any of the Hostile Work Environment Harassment instructions (*CACI Nos. 2521A, 2521B, 2521C, 2522A, 2522B, and 2522C*). Read also *CACI No. 2523, "Harassing Conduct" Explained*.

Sources and Authority

■ "We have agreed with the United States Supreme Court that, to prevail, an employee claiming harassment based upon a hostile work environment must demonstrate that the conduct complained of was severe enough or sufficiently pervasive to alter the conditions of employment and create a work environment that qualifies as hostile or abusive to employees because of their sex. The working environment must be evaluated in light of the totality of the circumstances: '[W]hether an environment is "hostile" or "abusive" can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.'" (*Miller v. Dept. of Corrections* (2005) 36 Cal.4th 446, 462 [30 Cal.Rptr.3d 797, 115 P.3d 77] , internal citations omitted.)

■ "For sexual harassment to be actionable, it must be sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.' ... [P] 'Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment--an environment that a reasonable person would find hostile or abusive--is beyond Title VII's purview. Likewise, if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation.' ... California courts have adopted the same standard in evaluating claims under the FEHA." (*Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 129-130 [87 Cal.Rptr.2d 132, 980 P.2d 846] , internal citations omitted.)

■ "Whether the sexual conduct complained of is sufficiently pervasive to create a hostile or offensive work environment must be determined from the totality of the circumstances. The plaintiff must prove that the defendant's conduct would have interfered with a reasonable employee's work performance ... and that she was actually offended The factors that can be considered in evaluating the totality of the circumstances are: (1) the nature of the unwelcome sexual acts or works (generally, physical touching is more offensive than unwelcome verbal abuse); (2) the frequency of the offensive encounters; (3) the total number of days over which all of the offensive conduct occurs; and (4) the context in which the sexually harassing conduct occurred." (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 609-610 [262 Cal.Rptr. 842] , internal citation omitted.)

■ "In determining what constitutes 'sufficiently pervasive' harassment, the courts have held that acts of harassment cannot be occasional, isolated, sporadic, or trivial, rather the plaintiff must show a concerted pattern of harassment of a repeated, routine or a generalized nature." (*Fisher, supra*, 214 Cal.App.3d at p. 610 .)

■ "The United States Supreme Court ... has clarified that conduct need not seriously affect an employee's psychological well-being to be actionable as abusive work environment harassment. So long as the environment reasonably would be perceived, and is perceived, as hostile or abusive, there is no need for it also to be psychologically injurious." (*Kelly-Zurian v. Wohl Shoe Co., Inc.* (1994) 22 Cal.App.4th 397, 412 [27 Cal.Rptr.2d 457] , internal citations omitted.)

■ "As the Supreme Court recently reiterated, in order to be actionable, '... a sexually objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so.' The work environment must be viewed from the perspective of a reasonable person in the plaintiff's position, considering 'all the circumstances.' This determination requires judges and juries to exercise '[c]ommon sense, and an

appropriate sensitivity to social context' in order to evaluate whether a reasonable person in the plaintiff's position would find the conduct severely hostile or abusive." (*Beyda v. City of Los Angeles* (1998) 65 Cal.App.4th 511, 518-519 [76 Cal.Rptr.2d 547] , internal citations omitted.)

■ "The requirement that the conduct be sufficiently severe or pervasive to create a working environment a reasonable person would find hostile or abusive is a crucial limitation that prevents sexual harassment law from being expanded into a 'general civility code.' The conduct must be extreme: 'simple teasing,' ... offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the 'terms and conditions of employment.' " (*Jones v. Department of Corrections* (2007) 152 Cal. App. 4th 1367, 1377 [62 Cal.Rptr. 3d 200] , internal citations omitted.)

■ "[E]mployment law acknowledges that an isolated incident of harassing conduct may qualify as 'severe' when it consists of 'a physical assault or the threat thereof.' " (*Hughes v. Pair* (2009) 46 Cal.4th 1035, 1049 [95 Cal.Rptr.3d 636, 209 P.3d 963] , original italics.)

■ "In the present case, the jury was instructed as follows: 'In order to find in favor of Plaintiff on his claim of race harassment, you must find that Plaintiff has proved by a preponderance of the evidence that the racial conduct complained of was sufficiently severe or pervasive to alter the conditions of employment. In order to find that racial harassment is "sufficiently severe or pervasive," the acts of racial harassment cannot be occasional, isolated, sporadic, or trivial.' ... [W]e find no error in the jury instruction given here [T]he law requires the plaintiff to meet a threshold standard of severity or pervasiveness. We hold that the statement within the instruction that severe or pervasive conduct requires more than 'occasional, isolated, sporadic, or trivial' acts was an accurate statement of that threshold standard." (*Etter v. Veriflo Corp.* (1998) 67 Cal.App.4th 457, 465-467 [79 Cal.Rptr.2d 33] .)

Secondary Sources

3 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment, §§ 340, 346

Chin, et al., California Practice Guide: Employment Litigation (The Rutter Group) PP 10:160-10:249

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, §§ 2.68, 2.75, Sexual and Other Harassment, §§ 3.1, 3.17, 3.36-3.41

2 Wilcox, *California Employment Law*, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, §§ 41.80[1][a], 41.81[1][b] (Matthew Bender)

3 Wilcox, *California Employment Law*, Ch. 43, *Civil Actions Under Equal Employment Opportunity Laws*, § 43.01[10][g][i] (Matthew Bender)

11 *California Forms of Pleading and Practice*, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.36 (Matthew Bender)

California Civil Practice: Employment Litigation (Thomson West) § 2:56

Publisher's Notes

This instruction covers issues presented in BAJI Nos. 12.05 and 12.07.

Legal Topics:

For related research and practice materials, see the following legal topics:

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CHAPTER 25 California Judicial Council Fair Employment and Housing Act Instructions

4-25 California Forms of Jury Instruction CACI 2525

CACI 2525 Harassment--"Supervisor" Defined

[*Name of alleged harasser*] was a supervisor of [*name of defendant*] if [he/she] had the discretion and authority:

[a. To hire, transfer, promote, assign, reward, discipline, [or] discharge [or] [*insert other employment action*] other employees [or effectively to recommend any of these actions];]

[b. To act on the grievances of other employees or effectively to recommend action on grievances;]
[or]

[c. To direct [*name of plaintiff*]'s daily work activities.]

New September 2003; Revised June 2006

Directions for Use

If utilizing this instruction, consider *Chapman v. Enos* (2004) 116 Cal.App.4th 920 [10 Cal.Rptr.3d 852]

Sources and Authority

- *Government Code section 12940(j)* provides that it is an unlawful employment practice for "an employer ... or any other person, because of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation, to harass an employee, an applicant, or a person providing services pursuant to a contract. Harassment of an employee, an applicant, or a person providing services pursuant to a contract by an employee other than

an agent or supervisor shall be unlawful if the entity, or its agents or supervisors, knows or should have known of this conduct and fails to take immediate and appropriate corrective action."

■ *Government Code section 12926(r)* provides: " 'Supervisor' means any individual having the authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or the responsibility to direct them, or to adjust their grievances, or effectively to recommend that action, if, in connection with the foregoing, the exercise of that authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

■ "This section has been interpreted to mean that the employer is strictly liable for the harassing actions of its supervisors and agents, but that the employer is only liable for harassment by a coworker if the employer knew or should have known of the conduct and failed to take immediate corrective action. Thus, characterizing the employment status of the harasser is very significant." (*Doe v. Capital Cities* (1996) 50 Cal.App.4th 1038, 1046 [58 Cal.Rptr.2d 122] , internal citations omitted.)

■ "The case and statutory authority set forth three clear rules. First, ... a supervisor who personally engages in sexually harassing conduct is personally liable under the FEHA. Second, ... if the supervisor participates in the sexual harassment or substantially assists or encourages continued harassment, the supervisor is personally liable under the FEHA as an aider and abettor of the harasser. Third, under the FEHA, the employer is vicariously and strictly liable for sexual harassment by a supervisor." (*Fiol v. Doellstedt* (1996) 50 Cal.App.4th 1318, 1327 [58 Cal.Rptr.2d 308] .)

■ "[W]hile an employer's liability under the [FEHA] for an act of sexual harassment committed by a supervisor or agent is broader than the liability created by the common law principle of respondeat superior, respondeat superior principles are nonetheless relevant in determining liability when, as here, the sexual harassment occurred away from the workplace and not during work hours." (*Doe, supra*, 50 Cal.App.4th at pp. 1048-1049 .)

■ "The FEHA does not define 'agent.' Therefore, it is appropriate to consider general principles of agency law. An agent is one who represents a principal in dealings with third persons. An agent is a person authorized by the principal to conduct one or more transactions with one or more third persons and to exercise a degree of discretion in effecting the purpose of the principal. A supervising employee is an agent of the employer." (*Fiol, supra*, 50 Cal.App.4th at p. 1328 , internal citations omitted.)

■ "A supervisor who, without more, fails to take action to prevent sexual harassment of an employee is not personally liable as an aider and abettor of the harasser, an aider and abettor of the employer or an agent of the employer." (*Fiol, supra*, 50 Cal.App.4th at p. 1331 .)

■ "[W]hile full accountability and responsibility are certainly indicia of supervisory power, they are not *required* elements of ... the FEHA definition of supervisor. Indeed, many supervisors with responsibility to direct others using their independent judgment, and whose supervision of employees is not merely routine or clerical, would not meet these additional criteria though they would otherwise be within the ambit of the FEHA supervisor definition." (*Chapman v. Enos* (2004) 116 Cal.App.4th 920, 930 [10 Cal.Rptr.3d 852] , footnote omitted.)

Secondary Sources

Chin et al., Cal. Practice Guide: Employment Litigation (The Rutter Group) PP 10:17, 10:308, 10:310, 10:315-10:317, 10:320.5, 10:320.6, 10:499

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Sexual and Other Harassment, § 3.21

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, § 41.81 (Matthew Bender)

11 *California Forms of Pleading and Practice*, Ch. 115, *Civil Rights: Employment Discrimination*, §§ 115.20, 115.36, 115.54 (Matthew Bender)

California Civil Practice: Employment Litigation (Thomson West) § 2:56.1

Publisher's Notes

This instruction covers issues presented in BAJI Nos. 12.08 and 12.20.

Gov. Code § 12940(j)(1) was amended by Stats. 2003, ch. 671 (AB 76) to make non-substantive changes and to add the following: "An employer may also be responsible for the acts of nonemployees, with respect to sexual harassment of employees, applicants, or persons providing services pursuant to a contract in the workplace, where the employer, or its agents or supervisors, knows or should have known of the conduct and fails to take immediate and appropriate corrective action. In reviewing cases involving the acts of nonemployees, the extent of the employer's control and any other legal responsibility which the employer may have with respect to the conduct of those nonemployees shall be considered."

"We conclude that an employer is strictly liable under the FEHA for sexual harassment by a supervisor. We further conclude that the avoidable consequences doctrine applies to damage claims under the FEHA, and that under that doctrine a plaintiff's recoverable damages do not include those damages that the plaintiff could have avoided with reasonable effort and without undue risk, expense, or humiliation." (*State Dept. of Health Services v. Superior Court* (2003) 31 Cal.4th 1026, 1034 [6 Cal.Rptr.3d 441, 79 P.3d 556] .)

"We hold ... that in a FEHA action against an employer for hostile environment sexual harassment by a supervisor, an employer may plead and prove a defense based on the avoidable consequences doctrine. In this particular context, the defense has three elements: (1) the employer took reasonable steps to prevent and correct workplace sexual harassment; (2) the employee unreasonably failed to use the preventive and corrective measures that the employer provided; and (3) reasonable use of the employer's procedures would have prevented at least some of the harm that the employee suffered." (*State Dept. of Health Services v. Superior Court* (2003) 31 Cal.4th 1026, 1044 [6 Cal.Rptr.3d 441, 79 P.3d 556] .)

"We emphasize that the defense affects damages, not liability. An employer that has exercised reasonable care nonetheless remains strictly liable for harm a sexually harassed employee could not have avoided through reasonable care." (*State Dept. of Health Services v. Superior Court* (2003) 31 Cal.4th 1026, 1045 [6 Cal.Rptr.3d 441, 79 P.3d 556] .)

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Labor & Employment Law Discrimination Actionable Discrimination Labor & Employment Law Discrimination Harassment Sexual Harassment Coverage & Definitions Sexual Harassment Labor & Employment Law Discrimination Harassment Sexual Harassment Hostile Work Environment



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California Forms of Jury Instruction

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CHAPTER 25 California Judicial Council Fair Employment and Housing Act Instructions

4-25 California Forms of Jury Instruction CACI 2526

CACI 2526 Affirmative Defense--Avoidable Consequences Doctrine (Sexual Harassment by a Supervisor)

[*Name of defendant*] **claims that [*name of plaintiff*] could have avoided some or all of the harm with reasonable effort. To succeed, [*name of defendant*] must prove all of the following:**

- 1. That [*name of defendant*] took reasonable steps to prevent and correct workplace sexual harassment;**
- 2. That [*name of plaintiff*] unreasonably failed to use [*name of defendant*]'s harassment complaint procedures/the preventive and corrective measures that [*name of defendant*] provided]; and**
- 3. That the reasonable use of [*name of defendant*]'s procedures would have prevented some or all of [*name of plaintiff*]'s harm.**

You should consider the reasonableness of [*name of plaintiff*]'s actions in light of the circumstances facing [him/her] at the time, including [his/her] ability to report the conduct without facing undue risk, expense, or humiliation.

If you decide that [*name of defendant*] has proved this claim, you should not include in your award of damages the amount of damages that [*name of plaintiff*] could have avoided.

New April 2004

In the second element, select the alternative language that is most appropriate to the facts of the case.

For an instruction on failure to mitigate damages generally, see *CACI No. 3930, Mitigation of Damages (Personal Injury)*.

■ "[W]e conclude that under the FEHA, an employer is strictly liable for all acts of sexual harassment by a supervisor. But strict liability is not absolute liability in the sense that it precludes all defenses. Even under a strict liability standard, a plaintiff's own conduct may limit the amount of damages recoverable or bar recovery entirely." (*State Dept. of Health Services v. Superior Court* (2003) 31 Cal.4th 1026, 1042 [6 Cal.Rptr.3d 441, 79 P.3d 556] , internal citations omitted.)

■ "Under the avoidable consequences doctrine as recognized in California, a person injured by another's wrongful conduct will not be compensated for damages that the injured person could have avoided by reasonable effort or expenditure. The reasonableness of the injured party's efforts must be judged in light of the situation existing at the time and not with the benefit of hindsight. 'The standard by which the reasonableness of the injured party's efforts is to be measured is not as high as the standard required in other areas of law.' The defendant bears the burden of pleading and proving a defense based on the avoidable consequences doctrine." (*State Dept. of Health Services, supra*, 31 Cal.4th at p. 1043 , internal citations omitted.)

■ "Although courts explaining the avoidable consequences doctrine have sometimes written that a party has a 'duty' to mitigate damages, commentators have criticized the use of the term 'duty' in this context, arguing that it is more accurate to state simply that a plaintiff may not recover damages that the plaintiff could easily have avoided." (*State Dept. of Health Services, supra*, 31 Cal.4th at p. 1043 , internal citations omitted.)

■ "We hold ... that in a FEHA action against an employer for hostile environment sexual harassment by a supervisor, an employer may plead and prove a defense based on the avoidable consequences doctrine. In this particular context, the defense has three elements: (1) the employer took reasonable steps to prevent and correct workplace sexual harassment; (2) the employee unreasonably failed to use the preventive and corrective measures that the employer provided; and (3) reasonable use of the employer's procedures would have prevented at least some of the harm that the employee suffered." (*State Dept. of Health Services, supra*, 31 Cal.4th at p. 1044 .)

■ "This defense will allow the employer to escape liability for those damages, and only those damages, that the employee more likely than not could have prevented with reasonable effort and without undue risk, expense, or humiliation, by taking advantage of the employer's internal complaint procedures appropriately designed to prevent and eliminate sexual harassment." (*State Dept. of Health Services, supra*, 31 Cal.4th at p. 1044 , internal citations omitted.)

■ "If the employer establishes that the employee, by taking reasonable steps to utilize employer-provided complaint procedures, could have caused the harassing conduct to cease, the employer will nonetheless remain liable for any compensable harm the employee suffered before the time at which the harassment would have ceased, and the employer avoids liability only for the harm the employee incurred thereafter." (*State Dept. of Health Services, supra*, 31 Cal.4th at p. 1045 , internal citations omitted.)

■ "We stress also that the holding we adopt does not demand or expect that employees victimized by a supervisor's sexual harassment must always report such conduct immediately to the employer through internal grievance mechanisms. The employer may lack an adequate antiharassment policy or adequate procedures to enforce it, the employer may not have communicated the policy or procedures to the

victimized employee, or the employee may reasonably fear reprisal by the harassing supervisor or other employees. Moreover, in some cases an employee's natural feelings of embarrassment, humiliation, and shame may provide a sufficient excuse for delay in reporting acts of sexual harassment by a supervisor." (*State Dept. of Health Services, supra*, 31 Cal.4th at p. 1045 .)

Secondary Sources

Chin et al., Cal. Practice Guide: Employment Litigation (The Rutter Group) PP 10:360-10:361, 10:365-10:367, 10:371, 10:375

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, §§ 41.81[7][c], 41.92A (Matthew Bender)

11 *California Forms of Pleading and Practice*, Ch. 115, *Civil Rights: Employment Discrimination*, §§ 115.36[2][a], 115.54[3] (Matthew Bender)

Publisher's Notes

This instruction covers issues presented in BAJI No. 12.20.1.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Pleading & Practice Defenses, Demurrers & Objections Affirmative Defenses General Overview Civil Procedure Trials Jury Trials Jury Instructions General Overview Labor & Employment Law Discrimination Harassment Sexual Harassment Burdens of Proof Employee Burdens Labor & Employment Law Discrimination Harassment Sexual Harassment Coverage & Definitions Sexual Harassment Labor & Employment Law Discrimination Harassment Sexual Harassment Defenses & Exceptions General Overview Labor & Employment Law Discrimination Harassment Sexual Harassment Hostile Work Environment



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CHAPTER 25 California Judicial Council Fair Employment and Housing Act Instructions

4-25 California Forms of Jury Instruction CACI 2527

CACI 2527 Failure to Prevent Harassment, Discrimination, or Retaliation--Essential Factual Elements--Employer or Entity Defendant (Gov. Code, § 12940(k))

[Name of plaintiff] claims that [name of defendant] failed to prevent [harassment/discrimination/retaliation] [based on [describe protected status--e.g., race, gender, or age]]. To establish this claim, [name of plaintiff] must prove all of the following:

1. That [name of plaintiff] [was an employee of [name of defendant]/applied to [name of defendant] for a job/was a person providing services under a contract with [name of defendant]];

2. That [name of plaintiff] was subjected to [either:]

[[harassing conduct/discrimination] because [he/she] [was/was believed to be/was associated with a person who was/was associated with a person who was believed to be] [protected status];

[or]

retaliation because [he/she] [opposed [name of defendant]'s unlawful and discriminatory employment practices/ [or] [[filed a complaint with/testified before/ [or] assisted in a proceeding before] the Department of Fair Employment and Housing]];

3. That [name of defendant] failed to take reasonable steps to prevent the [harassment/discrimination/retaliation];

4. That [name of plaintiff] was harmed; and

5. That [name of defendant]'s failure to take reasonable steps to prevent

[harassment/discrimination/retaliation] was a substantial factor in causing [name of plaintiff]'s harm.

New June 2006; Revised April 2007

Directions for Use

If harassment is at issue, this instruction should be read in conjunction with *CACI No. 2523, "Harassing Conduct" Explained*. If retaliation is alleged, read this instruction in conjunction with *CACI No. 2505, Retaliation*.

Read the bracketed language in the opening paragraph beginning with "based on" and the first option for element 2 if the claim is for failure to prevent harassment or discrimination.

Choose the second option in element 2 if the claim is based on failure to prevent retaliation because the plaintiff (1) opposed practices forbidden by the FEHA; (2) filed a complaint with the Department of Fair Employment and Housing (DFEH); (3) testified in a DFEH proceeding; or (4) assisted in a DFEH proceeding. (See *Gov. Code*, § 12940(h).)

Sources and Authority

- *Government Code section 12940(k)* provides that it is an unlawful employment practice for "an employer, labor organization, employment agency, apprenticeship training program, or any training program leading to employment, to fail to take all reasonable steps necessary to prevent discrimination and harassment from occurring."

- *Government Code section 12940(h)* provides that it is an unlawful employment practice "[f]or any employer, labor organization, employment agency, or person to discharge, expel, or otherwise discriminate against any person because the person has opposed any practices forbidden under this part or because the person has filed a complaint, testified, or assisted in any proceeding under this part."

- "The employer's duty to prevent harassment and discrimination is affirmative and mandatory." (*Northrop Grumman Corp. v. Workers' Comp. Appeals Bd. (2002) 103 Cal.App.4th 1021, 1035 [127 Cal.Rptr.2d 285]* .)

- "This section creates a tort that is made actionable by statute. ' "[T]he word "tort" means a civil wrong, other than a breach of contract, for which the law will provide a remedy in the form of an action for damages.' It is well settled the Legislature possesses a broad authority ... to establish ... tort causes of action.' Examples of statutory torts are plentiful in California law." ' Section 12960 et seq. provides procedures for the prevention and elimination of unlawful employment practices. In particular, section 12965, subdivision (a) authorizes the Department of Fair Employment and Housing (DFEH) to bring an accusation of an unlawful employment practice if conciliation efforts are unsuccessful, and section 12965, subdivision (b) creates a private right of action for damages for a complainant whose complaint is not pursued by the DFEH." (*Trujillo v. North County Transit Dist. (1998) 63 Cal.App.4th 280, 286 [73 Cal.Rptr.2d 596]* , internal citations omitted.)

- "With these rules in mind, we examine the section 12940 claim and finding with regard to whether the usual elements of a tort, enforceable by private plaintiffs, have been established: Defendants' legal

duty of care toward plaintiffs, breach of duty (a negligent act or omission), legal causation, and damages to the plaintiff." (*Trujillo, supra*, 63 Cal.App.4th at pp. 286-287 , internal citation omitted.)

■ "Employers should not be held liable to employees for failure to take necessary steps to prevent such conduct, except where the actions took place and were not prevented. Plaintiffs have not shown this duty was owed to them, under these circumstances. Also, there is a significant question of how there could be legal causation of any damages (either compensatory or punitive) from such a statutory violation, where the only jury finding was the failure to prevent actionable harassment or discrimination, which, however, did not occur." (*Trujillo, supra*, 63 Cal.App.4th at p. 289 .)

■ "In accordance with ... the fundamental public policy of eliminating discrimination in the workplace under the FEHA, we conclude that retaliation is a form of discrimination actionable under [Gov. Code] section 12940, subdivision (k)." (*Taylor v. City of Los Angeles Dept. of Water & Power* (2006) 144 Cal.App.4th 1216, 1240 [51 Cal.Rptr.3d 206] , disapproved on other grounds in *Jones v. The Lodge at Torrey Pines Partnership* (2008) 42 Cal. 4th 1158 [72 Cal. Rptr. 3d 624, 177 P.3d 232] .)

Secondary Sources

Chin et al., California Practice Guide: Employment Litigation (The Rutter Group) PP 7:670-7:672

2 Wilcox, *California Employment Law*, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, §§ 41.02[6], 41.80[1], 41.81[7] (Matthew Bender)

3 Wilcox, *California Employment Law*, Ch. 43, *Civil Actions Under Equal Employment Opportunity Laws*, § 43.01[10][g] (Matthew Bender)

Publisher's Notes

This instruction covers issues presented in BAJI No. 12.20.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Pleading & Practice Defenses, Demurrers & Objections Affirmative Defenses General Overview Civil Procedure Trials Jury Trials Jury Instructions General Overview Labor & Employment Law Discrimination Harassment Sexual Harassment Coverage & Definitions Sexual Harassment Labor & Employment Law Discrimination Harassment Sexual Harassment Defenses & Exceptions General Overview Labor & Employment Law Discrimination Harassment Sexual Harassment Defenses & Exceptions Antiharassment Policy



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CHAPTER 25 California Judicial Council Fair Employment and Housing Act Instructions

4-25 California Forms of Jury Instruction CACI 2528-CACI 2539

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CACI 2528Reserved for Future Use



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CHAPTER 25 California Judicial Council Fair Employment and Housing Act Instructions

4-25 California Forms of Jury Instruction CACI 2540

CACI 2540 Disability Discrimination--Disparate Treatment--Essential Factual Elements

[*Name of plaintiff*] **claims that** [*name of defendant*] **wrongfully discriminated against** [him/her] **based on** [his/her] [perceived] [history of [a]] [*select term to describe basis of limitations, e.g., physical condition*]. **To establish this claim, [*name of plaintiff*] must prove all of the following:**

1. **That [*name of defendant*] was [an employer/[*other covered entity*]];**
2. **That [*name of plaintiff*] [was an employee of [*name of defendant*]/applied to [*name of defendant*] for a job/[*describe other covered relationship to defendant*]];**
3. **[That [*name of defendant*] [knew that [*name of plaintiff*] had/treated [*name of plaintiff*] as if [he/she] had] [a] [*e.g., physical condition*] [that limited [*insert major life activity*]];] [or]**

[That [*name of defendant*] [knew that [*name of plaintiff*] had/treated [*name of plaintiff*] as if [he/she] had] a history of having [a] [*e.g., physical condition*] [that limited [*insert major life activity*]];]
4. **That [*name of plaintiff*] was able to perform the essential job duties [with reasonable accommodation for [his/her] [*e.g., physical condition*]];**
5. **That [*name of defendant*] [discharged/refused to hire/[*other adverse employment action*] [*name of plaintiff*]];**
6. **[That [*name of plaintiff*]'s [history of [a]] [*e.g., physical condition*]] was a motivating reason for the [discharge/refusal to hire/[*other adverse employment action*]];] [or]**

[That [*name of defendant*]'s belief that [*name of plaintiff*] had [a history of] [a] [*e.g., physical condition*]] was a motivating reason for the [discharge/refusal to hire/[*other adverse employment action*]];]

7. That [*name of plaintiff*] was harmed; and

8. That [*name of defendant*]'s [decision/conduct] was a substantial factor in causing [*name of plaintiff*]'s harm.

New September 2003; Revised June 2006, December 2007, April 2009, December 2009, June 2010

Directions for Use

Select a term to use throughout to describe the source of the plaintiff's limitations. It may be a statutory term such as "physical disability," "mental disability," or "medical condition." (See *Gov. Code*, § 12940(a).) Or it may be a general term such as "condition," "disease," or "disorder." Or it may be a specific health condition such as "diabetes."

In the introductory paragraph, include "perceived" or "history of" if the claim of discrimination is based on a perceived disability or a history of disability rather than a current actual disability.

For element 1, the court may need to instruct the jury on the statutory definition of "employer" under the FEHA. Other covered entities under the FEHA include labor organizations, employment agencies, and apprenticeship training programs. (See *Gov. Code*, § 12940(a)-(d).)

Under element 3, select the claimed basis of discrimination: an actual disability, a history of a disability, a perceived disability, or a perceived history of a disability. For an actual disability, select "knew that [*name of plaintiff*] had." For a perceived disability, select "treated [*name of plaintiff*] as if [he/she] had." (See *Gov. Code*, § 12926(i)(4), (k)(4) [mental and physical disability include being regarded or treated as disabled by the employer].)

If medical-condition discrimination as defined by statute (see *Gov. Code*, § 12926(h)) is alleged, omit "that limited [*insert major life activity*]" in element 3. (Compare *Gov. Code*, § 12926(h) with *Gov. Code*, § 12926(i), (k) [no requirement that medical condition limit major life activity].)

Regarding element 4, it is now settled that the ability to perform the essential duties of the job is an element of the plaintiff's burden of proof. (See *Green v. State of California* (2007) 42 Cal.4th 254, 257-258 [64 Cal.Rptr.3d 390, 165 P3d 118] .)

If the existence of a qualifying disability is disputed, additional instructions defining "physical disability," "mental disability," and "medical condition" may be required. (See *Gov. Code*, § 12926(h), (i), (k).)

Sources and Authority

- *Government Code* section 12940(a) provides that it is an unlawful employment practice "[f]or an employer, because of the ... physical disability, mental disability, [or] medical condition ... of any person, to refuse to hire or employ the person or to refuse to select the person for a training program leading to

employment, or to bar or to discharge the person from employment or from a training program leading to employment, or to discriminate against the person in compensation or in terms, conditions, or privileges of employment."

- *Government Code section 12940(a)(1)* also provides that the FEHA "does not prohibit an employer from refusing to hire or discharging an employee with a physical or mental disability ... where the employee, because of his or her physical or mental disability, is unable to perform his or her essential duties even with reasonable accommodations, or cannot perform those duties in a manner that would not endanger his or her health or safety or the health or safety of others even with reasonable accommodations."

- For a definition of "medical condition," see *Government Code section 12926(h)*.

- For a definition of "mental disability," see *Government Code section 12926(i)*.

- For a definition of "physical disability," see *Government Code section 12926(k)*.

- *Government Code section 12926.1(c)* provides, in part: "[T]he Legislature has determined that the definitions of 'physical disability' and 'mental disability' under the law of this state require a 'limitation' upon a major life activity, but do not require, as does the Americans with Disabilities Act of 1990, a 'substantial limitation.' This distinction is intended to result in broader coverage under the law of this state than under that federal act. Under the law of this state, whether a condition limits a major life activity shall be determined without respect to any mitigating measures, unless the mitigating measure itself limits a major life activity, regardless of federal law under the Americans with Disabilities Act of 1990. Further, under the law of this state, 'working' is a major life activity, regardless of whether the actual or perceived working limitation implicates a particular employment or a class or broad range of employments."

- "[T]he purpose of the 'regarded-as' prong is to protect individuals rejected from a job because of the 'myths, fears and stereotypes' associated with disabilities. In other words, to find a perceived disability, the perception must stem from a false idea about the existence of or the limiting effect of a disability." (*Diffey v. Riverside County Sheriff's Dept.* (2000) 84 Cal.App.4th 1031, 1037 [101 Cal.Rptr.2d 353] , internal citation omitted.)

- "Summary adjudication of the section 12940(a) claim ... turns on ... whether [plaintiff] could perform the essential functions of the relevant job with or without accommodation. [Plaintiff] does not dispute that she was unable to perform the essential functions of her *former* position as a clothes fitter with or without accommodation. Under federal law, however, when an employee seeks accommodation by being reassigned to a vacant position in the company, the employee satisfies the 'qualified individual with a disability' requirement by showing he or she can perform the essential functions of the *vacant position* with or without accommodation. The position must exist and be vacant, and the employer need not promote the disabled employee. We apply the same rule here. To prevail on summary adjudication of the section 12940(a) claim, [defendant] must show there is no triable issue of fact about [plaintiff]'s ability, with or without accommodation, to perform the essential functions of an available vacant position that would not be a promotion." (*Nadaf-Rahrov v. The Neiman Marcus Group, Inc.* (2008) 166 Cal.App.4th 952, 965 [83 Cal.Rptr.3d 190] , original italics, internal citations omitted.)

- "[Defendant] asserts the statute's 'regarded as' protection is limited to persons who are denied or who lose jobs based on an employer's reliance on the 'myths, fears or stereotypes' frequently associated with disabilities. ... However, the statutory language does not expressly restrict FEHA's protections to the

narrow class to whom [defendant] would limit its coverage. To impose such a restriction would exclude from protection a large group of individuals, like [plaintiff], with more mundane long-term medical conditions, the significance of which is exacerbated by an employer's failure to reasonably accommodate. Both the policy and language of the statute offer protection to a person who is not actually disabled, but is wrongly perceived to be. The statute's plain language leads to the conclusion that the 'regarded as' definition casts a broader net and protects *any* individual 'regarded' or 'treated' by an employer 'as having, or having had, any physical condition that makes achievement of a major life activity difficult' or may do so in the future. We agree most individuals who sue exclusively under this definitional prong likely are and will continue to be victims of an employer's 'mistaken' perception, based on an unfounded fear or stereotypical assumption. Nevertheless, FEHA's protection is nowhere expressly premised on such a factual showing, and we decline the invitation to import such a requirement." (*Gelfo v. Lockheed Martin Corp.* (2006) 140 Cal.App.4th 34, 53 [43 Cal.Rptr.3d 874] , internal citations omitted, original italics.)

■ " 'An adverse employment decision cannot be made "because of" a disability, when the disability is not known to the employer. Thus, in order to prove [a discrimination] claim, a plaintiff must prove the employer had knowledge of the employee's disability when the adverse employment decision was made. ... While knowledge of the disability can be inferred from the circumstances, knowledge will only be imputed to the employer when the fact of disability is the only reasonable interpretation of the known facts. "Vague or conclusory statements revealing an unspecified incapacity are not sufficient to put an employer on notice of its obligations" ... ' " (*Scotch v. Art Institute of California* (2009) 173 Cal.App.4th 986, 1008 [93 Cal.Rptr.3d 338] .)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, §§ 936, 937

Chin et al., California Practice Guide: Employment Litigation (The Rutter Group) PP 9:2160-9:2241

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, §§ 2.78-2.80

2 Wilcox, *California Employment Law, Ch. 41, Substantive Requirements Under Equal Employment Opportunity Laws*, § 41.32[2][c] (Matthew Bender)

11 *California Forms of Pleading and Practice, Ch. 115, Civil Rights: Employment Discrimination*, §§ 115.23, 115.34, 115.77[3][a] (Matthew Bender)

California Civil Practice: Employment Litigation (Thomson West) § 2:46

Publisher's Notes

This instruction covers issues presented in BAJI No. 12.12.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Labor & Employment Law Discrimination Disability Discrimination Coverage & Definitions General Overview Labor & Employment Law Discrimination Disability Discrimination Coverage & Definitions Covered Entities Labor & Employment Law Discrimination Disparate Treatment General Overview



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CHAPTER 25 California Judicial Council Fair Employment and Housing Act Instructions

4-25 California Forms of Jury Instruction CACI 2541

CACI 2541 Disability Discrimination--Reasonable Accommodation--Essential Factual Elements (Gov. Code, § 12940(m))

[Name of plaintiff] **claims that** [name of defendant] **failed to reasonably accommodate [his/her]** [select term to describe basis of limitations, e.g., physical condition]. **To establish this claim, [name of plaintiff] must prove all of the following:**

1. That [name of defendant] **was [an employer/[other covered entity]]**;
2. That [name of plaintiff] **[was an employee of [name of defendant]/applied to [name of defendant] for a job/[describe other covered relationship to defendant]]**;
3. That [[name of plaintiff] **had/[name of defendant] treated [name of plaintiff] as if [he/she] had** [a] [e.g., physical condition] **[that limited [insert major life activity]]**;
4. That [name of defendant] **knew of [name of plaintiff]'s [e.g., physical condition] [that limited [insert major life activity]]**;
5. That [name of plaintiff] **was able to perform the essential job duties with reasonable accommodation for [his/her] [e.g., physical condition]**;
6. That [name of defendant] **failed to provide reasonable accommodation for [name of plaintiff]'s [e.g., physical condition]**;
7. That [name of plaintiff] **was harmed; and**
8. That [name of defendant]'s **failure to provide reasonable accommodation was a substantial**

factor in causing [name of plaintiff]'s harm.

[In determining whether [name of plaintiff]'s [e.g., physical condition] limits [insert major life activity], you must consider the [e.g., physical condition] [in its unmedicated state/without assistive devices/[describe mitigating measures]].]

New September 2003; Revised April 2007, December 2007, April 2009, December 2009, June 2010

Directions for Use

Select a term to use throughout to describe the source of the plaintiff's limitations. It may be a statutory term such as "physical disability," "mental disability," or "medical condition." (See *Gov. Code*, § 12940(a).) Or it may be a general term such as "condition," "disease," or "disorder." Or it may be a specific health condition such as "diabetes."

For element 1, the court may need to instruct the jury on the statutory definition of "employer" under the FEHA. Other covered entities under the FEHA include labor organizations, employment agencies, and apprenticeship training programs. (See *Gov. Code*, § 12940(a)-(d).)

If medical-condition discrimination as defined by statute (see *Gov. Code*, § 12926(h)) is alleged, omit "that limited [insert major life activity]" in elements 3 and 4 and do not include the last paragraph. (Compare *Gov. Code*, § 12926(h) with *Gov. Code*, § 12926(i), (k) [no requirement that medical condition limit major life activity].)

In a case of perceived disability, include "[name of defendant] treated [name of plaintiff] as if [he/she] had" in element 3, and delete optional element 4. (See *Gov. Code*, § 12926(i)(4), (k)(4) [mental and physical disability include being regarded or treated as disabled by the employer].) In a case of actual disability, include "[name of plaintiff] had" in element 3, and give element 4.

If the existence of a qualifying disability is disputed, additional instructions defining "physical disability," "mental disability," and "medical condition" may be required. (See *Gov. Code*, § 12926(h), (i), (k).)

The California Supreme Court has held that under *Government Code* section 12940(a), the plaintiff is required to prove that he or she has the ability to perform the essential duties of the job with or without reasonable accommodation. (See *Green v. State of California* (2007) 42 Cal.4th 254, 260 [64 Cal.Rptr.3d 390, 165 P3d 118] .) There is apparently some divergence of authority as to whether this rule applies to cases under *Government Code* section 12940(m), and if so, which party bears the burden of proof. (See *id.* at p. 265 ; compare *Nadaf-Rahrov v. The Neiman Marcus Group, Inc.* (2008) 166 Cal.App.4th 952, 973-979 [83 Cal.Rptr.3d 190] with *Bagatti v. Department of Rehabilitation* (2002) 97 Cal.App.4th 344, 360-363 [118 Cal.Rptr.2d 443] .) If the court decides that the plaintiff does not bear the burden of proof, omit element 5.

If the plaintiff bears the burden of proof, there may also be an issue of how far the employee must go with regard to whether a reasonable accommodation was possible. The rule has been that the employer has an affirmative duty to make known to the employee other suitable job opportunities and to determine whether the employee is interested in, and qualified for, those positions, if the employer can do so without undue hardship or if the employer offers similar assistance or benefit to other disabled or nondisabled employees or has a policy of offering such assistance or benefit to any other employees. (

Prilliman v. United Air Lines, Inc. (1997) 53 Cal.App.4th 935, 950-951 [62 Cal.Rptr.2d 142] ; see also *Claudio v. Regents of the University of California* (2005) 134 Cal.App.4th 224, 243 [35 Cal.Rptr.3d 837] ; *Hanson v. Lucky Stores* (1999) 74 Cal.App.4th 215, 226 [87 Cal.Rptr.2d 487] .) In contrast, one court has said that it is the employee's burden to prove that a reasonable accommodation could have been made, i.e., that he or she was qualified for a position in light of the potential accommodation. (*Nadaf-Rahrov, supra*, 166 Cal.App.4th at p. 978 .) The question of whether the employee has to present evidence of other suitable job descriptions and prove that a vacancy existed for a position that the employee could do with reasonable accommodation may not be fully resolved.

No element has been included that requires the plaintiff to specifically request reasonable accommodation. Unlike *Government Code section 12940(n)* on the interactive process (see *CACI No. 2546, Disability Discrimination--Reasonable Accommodation--Failure to Engage in Interactive Process*), section 12940(m) does not specifically require that the employee request reasonable accommodation; it requires only that the employer know of the disability. (See *Prilliman, supra*, 53 Cal.App.4th at pp. 950-951 ; but see *Avila v. Continental Airlines, Inc.* (2008) 165 Cal.App.4th 1237, 1252 [82 Cal.Rptr.3d 440] [employee must request an accommodation].)

Sources and Authority

- *Government Code section 12940(m)* provides that it is an unlawful employment practice "[f]or an employer or other entity covered by this part to fail to make reasonable accommodation for the known physical or mental disability of an applicant or employee. Nothing in this subdivision or in ... subdivision (a) shall be construed to require an accommodation that is demonstrated by the employer or other covered entity to produce undue hardship to its operation."

- "Any employer or other covered entity shall make reasonable accommodation to the disability of any individual with a disability if the employer or other covered entity knows of the disability, unless the employer or other covered entity can demonstrate that the accommodation would impose an undue hardship." (*Cal. Code Regs., tit. 2, § 7293.9.*)

- *Government Code section 12926(n)* provides:

"Reasonable accommodation" may include either of the following:

(1) Making existing facilities used by employees readily accessible to, and usable by, individuals with disabilities.

(2) Job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

- *Government Code section 12940(n)* provides that it is an unlawful employment practice "[f]or an employer or other entity covered by this part to fail to engage in a timely, good faith, interactive process with the employee or applicant to determine effective reasonable accommodations, if any, in response to a request for reasonable accommodation by an employee or applicant with a known physical or mental disability or known medical condition."

- For a definition of "medical condition," see *Government Code section 12926(h)*.

- For a definition of "mental disability," see *Government Code section 12926(i)*.

- For a definition of "physical disability," see *Government Code section 12926(k)*.
- *Government Code section 12926.1(c)* provides, in part: "[T]he Legislature has determined that the definitions of 'physical disability' and 'mental disability' under the law of this state require a 'limitation' upon a major life activity, but do not require, as does the Americans with Disabilities Act of 1990, a 'substantial limitation.' This distinction is intended to result in broader coverage under the law of this state than under that federal act. Under the law of this state, whether a condition limits a major life activity shall be determined without respect to any mitigating measures, unless the mitigating measure itself limits a major life activity, regardless of federal law under the Americans with Disabilities Act of 1990. Further, under the law of this state, 'working' is a major life activity, regardless of whether the actual or perceived working limitation implicates a particular employment or a class or broad range of employments."
- "The question now arises whether it is the employees' burden to prove that a reasonable accommodation could have been made, i.e., that they were qualified for a position in light of the potential accommodation, or the employers' burden to prove that no reasonable accommodation was available, i.e., that the employees were not qualified for any position because no reasonable accommodation was available. [PP] Applying *Green's* burden of proof analysis to section 12940(m), we conclude that the burden of proving ability to perform the essential functions of a job with accommodation should be placed on the plaintiff under this statute as well. First, ... an employee's ability to perform the essential functions of a job is a prerequisite to liability under section 12940(m). Second, the Legislature modeled section 12940(m) on the federal reasonable accommodation requirement (adopting almost verbatim the federal statutory definition of 'reasonable accommodation' by way of example). Had the Legislature intended the employer to bear the burden of proving ability to perform the essential functions of the job, contrary to the federal allocation of the burden of proof, ... it could have expressly provided for that result, but it did not. Finally, general evidentiary principles support allocating the burden of proof on this issue to the plaintiff." (*Nadaf-Rahrov, supra*, 166 Cal.App.4th at pp. 977-978 , internal citations omitted.)
- "Although no particular form of request is required, ' [t]he duty of an employer reasonably to accommodate an employee's handicap does not arise until the employer is 'aware of respondent's disability and physical limitations. ...' ' ' "[T]he employee can't expect the employer to read his mind and know he secretly wanted a particular accommodation and sue the employer for not providing it. Nor is an employer ordinarily liable for failing to accommodate a disability of which it had no knowledge. ..." ' " (*Avila, supra*, 165 Cal.App.4th at pp. 1252-1253 , internal citations omitted.)
- "Employers must make reasonable accommodations to the disability of an individual unless the employer can demonstrate that doing so would impose an 'undue hardship.' " (*Prilliman, supra*, 53 Cal.App.4th at p. 947 .)
- " 'Ordinarily the reasonableness of an accommodation is an issue for the jury.' " (*Prilliman, supra*, 53 Cal.App.4th at p. 954 , internal citation omitted.)
- "[T]he duty of an employer to provide reasonable accommodation for an employee with a disability is broader under the FEHA than under the ADA." (*Bagatti, supra*, 97 Cal.App.4th at p. 362 .)
- "Under the FEHA ... an employer is relieved of the duty to reassign a disabled employee whose limitations cannot be reasonably accommodated in his or her current job only if reassignment would impose an 'undue hardship' on its operations or if there is no vacant position for which the employee is qualified." (*Spitzer v. Good Guys, Inc.* (2000) 80 Cal.App.4th 1376, 1389 [96 Cal.Rptr.2d 236] .)
- "On these issues, which are novel to California and on which the federal courts are divided, we conclude that employers must reasonably accommodate individuals falling within any of FEHA's statutorily defined 'disabilities,' including those 'regarded as' disabled, and must engage in an informal, interactive process to determine any effective accommodations." (*Gelfo v. Lockheed Martin Corp.* (2006) 140 Cal.App.4th 34, 55 [43 Cal.Rptr.3d 874] .)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, § 762

Chin et al., California Practice Guide: Employment Litigation (The Rutter Group) PP 9:2250-9:2285, 9:2345-9:2347

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, § 2.79

2 Wilcox, *California Employment Law, Ch. 41, Substantive Requirements Under Equal Employment Opportunity Laws*, §§ 41.32[2][c], 41.51[3] (Matthew Bender)

11 *California Forms of Pleading and Practice, Ch. 115, Civil Rights: Employment Discrimination*, §§ 115.22, 115.35, 115.92 (Matthew Bender)

California Civil Practice: Employment Litigation (Thomson West) § 2:50

Publisher's Notes

This instruction covers issues presented in BAJI Nos. 12.12, 12.12.5, and 12.15.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewLabor & Employment LawDiscriminationDisability
 DiscriminationCoverage & DefinitionsGeneral OverviewLabor & Employment LawDiscriminationDisability
 DiscriminationCoverage & DefinitionsCovered EntitiesLabor & Employment LawDiscriminationDisability
 DiscriminationReasonable AccommodationGeneral OverviewLabor & Employment LawDiscriminationDisability
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CHAPTER 25 California Judicial Council Fair Employment and Housing Act Instructions

4-25 California Forms of Jury Instruction CACI 2542

CACI 2542 Disability Discrimination-- "Reasonable Accommodation" Explained

A reasonable accommodation is a reasonable change to the workplace that [*choose one or more of the following*]

[gives a qualified applicant with a disability an equal opportunity in the job application process;]

[allows an employee with a disability to perform the essential duties of the job;] [or]

[allows an employee with a disability to enjoy the same benefits and privileges of employment that are available to employees without disabilities.]

Reasonable accommodations may include the following:

- a. Making the workplace readily accessible to and usable by employees with disabilities;**
- b. Changing job responsibilities or work schedules;**
- c. Reassigning the employee to a vacant position;**
- d. Modifying or providing equipment or devices;**
- e. Modifying tests or training materials;**
- f. Providing qualified interpreters or readers; or**
- g. Providing other similar accommodations for an individual with a disability.**

If more than one accommodation is reasonable, an employer makes a reasonable accommodation if it selects one of those accommodations in good faith.

New September 2003; Revised April 2009

Directions for Use

Give this instruction to explain "reasonable accommodation" as used in *CACI No. 2541, Disability Discrimination--Reasonable Accommodation--Essential Factual Elements*. Note that there is apparently some divergence of authority as to who bears the burden of proof on reasonable accommodation, and if the plaintiff bears the burden, how extensive that burden is. See the Directions for Use to *CACI No. 2541*.

Sources and Authority

- *Government Code section 12940(m)* provides that it is an unlawful employment practice "[f]or an employer or other entity covered by this part to fail to make reasonable accommodation for the known physical or mental disability of an applicant or employee. Nothing in this subdivision or in ... subdivision (a) shall be construed to require an accommodation that is demonstrated by the employer or other covered entity to produce undue hardship to its operation."

- *Government Code section 12926(n)* provides:

"Reasonable accommodation" may include either of the following:

(1) Making existing facilities used by employees readily accessible to, and usable by, individuals with disabilities.

(2) Job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

- The California Fair Employment and Housing Commission's regulations provide:

Reasonable accommodation may, but does not necessarily, include, nor is it limited to, such measures as:

(1) Accessibility. Making existing facilities used by employees readily accessible to and usable by individuals with disabilities;

(2) Job Restructuring. Job restructuring, reassignment to a vacant position, part-time or modified work schedules, acquisition or modification of equipment or devices, adjustment or modification of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar actions." (*Cal. Code Regs., tit. 2, § 7293.9(a)*.)

- *Government Code section 12926.1(c)* provides, in part: "[T]he Legislature has determined that the definitions of

'physical disability' and 'mental disability' under the law of this state require a 'limitation' upon a major life activity, but do not require, as does the Americans with Disabilities Act of 1990, a 'substantial limitation.' This distinction is intended to result in broader coverage under the law of this state than under that federal act. Under the law of this state, whether a condition limits a major life activity shall be determined without respect to any mitigating measures, unless the mitigating measure itself limits a major life activity, regardless of federal law under the Americans with Disabilities Act of 1990. Further, under the law of this state, 'working' is a major life activity, regardless of whether the actual or perceived working limitation implicates a particular employment or a class or broad range of employments."

■ "[T]he duty of an employer to provide reasonable accommodation for an employee with a disability is broader under the FEHA than under the ADA." (*Bagatti v. Department of Rehabilitation* (2002) 97 Cal.App.4th 344, 362 [118 Cal.Rptr.2d 443] .)

■ "[A]n employer who knows of the disability of an employee has an affirmative duty to make known to the employee other suitable job opportunities with the employer and to determine whether the employee is interested in, and qualified for, those positions, if the employer can do so without undue hardship or if the employer offers similar assistance or benefit to other disabled or nondisabled employees or has a policy of offering such assistance or benefit to any other employees." (*Prilliman v. United Air Lines, Inc.* (1997) 53 Cal.App.4th 935, 950-951 [62 Cal.Rptr.2d 142] .)

■ "The question now arises whether it is the employees' burden to prove that a reasonable accommodation could have been made, i.e., that they were qualified for a position in light of the potential accommodation, or the employers' burden to prove that no reasonable accommodation was available, i.e., that the employees were not qualified for any position because no reasonable accommodation was available. [PP] Applying *Green's* burden of proof analysis to section 12940(m), we conclude that the burden of proving ability to perform the essential functions of a job with accommodation should be placed on the plaintiff under this statute as well." (*Nadaf-Rahrov v. The Neiman Marcus Group, Inc.* (2008) 166 Cal.App.4th 952, 977-978 [83 Cal.Rptr.3d 190] , internal citations omitted.)

■ "Under the FEHA ... an employer is relieved of the duty to reassign a disabled employee whose limitations cannot be reasonably accommodated in his or her current job only if reassignment would impose an 'undue hardship' on its operations or if there is no vacant position for which the employee is qualified." (*Spitzer v. Good Guys, Inc.* (2000) 80 Cal.App.4th 1376, 1389 [96 Cal.Rptr.2d 236] .)

Secondary Sources

Chin et al., Cal. Practice Guide: Employment Litigation (The Rutter Group) PP 7:213, 9:2091, 9:2093-9:2095, 9:2197, 9:2252, 9:2265, 9:2366

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, § 2.79

2 Wilcox, *California Employment Law*, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, § 41.51[3][a], [b] (Matthew Bender)

11 *California Forms of Pleading and Practice*, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.35 (Matthew Bender)

California Civil Practice: Employment Litigation (Thomson West) § 2:50

Publisher's Notes

This instruction covers issues presented in BAJI No. 12.15.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewLabor & Employment LawDiscriminationDisability
DiscriminationCoverage & DefinitionsGeneral OverviewLabor & Employment LawDiscriminationDisability
DiscriminationCoverage & DefinitionsCovered EntitiesLabor & Employment LawDiscriminationDisability
DiscriminationReasonable AccommodationGeneral OverviewLabor & Employment LawDiscriminationDisability
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CHAPTER 25 California Judicial Council Fair Employment and Housing Act Instructions

4-25 California Forms of Jury Instruction CACI 2543

CACI 2543 Disability Discrimination--Affirmative Defense--Inability to Perform Essential Job Duties

[*Name of defendant*] **claims that [his/her/its] conduct was lawful because [*name of plaintiff*] was unable to perform an essential job duty even with reasonable accommodations. To succeed, [*name of defendant*] must prove both of the following:**

- 1. That [*describe job duty*] was an essential job duty; and**
- 2. That [*name of plaintiff*] could not perform it, even with reasonable accommodations.**

In deciding whether a job duty is essential, you may consider, among other factors, the following:

- a. Whether the reason the job exists is to perform that duty;**
- b. The number of employees available who can perform that duty; and**
- c. Whether the job duty is highly specialized.**

New September 2003

■ *Government Code section 12940(a)(1)* provides that the FEHA "does not prohibit an employer from refusing to hire or discharging an employee with a physical or mental disability, or subject an employer to any legal liability resulting from the refusal to employ or the discharge of an employee with a physical or mental disability, where the employee, because of his or her physical or mental disability, is unable to perform his or her essential duties even with reasonable accommodations."

■ *Government Code section 12926(f)* provides, in part, that " 'essential functions' means the fundamental job duties of the employment position the individual with a disability holds or desires. 'Essential functions' does not include the marginal functions of the position."

■ *Government Code section 12926(f)* provides, in part:

(1) A job function may be considered essential for any of several reasons, including, but not limited to, any one or more of the following:

(A) The function may be essential because the reason the position exists is to perform that function.

(B) The function may be essential because of the limited number of employees available among whom the performance of that job function can be distributed.

(C) The function may be highly specialized, so that the incumbent in the position is hired for his or her expertise or ability to perform the particular function.

(2) Evidence of whether a particular function is essential includes, but is not limited to, the following:

(A) The employer's judgment as to which functions are essential.

(B) Written job descriptions prepared before advertising or interviewing applicants for the job.

(C) The amount of time spent on the job performing the function.

(D) The consequences of not requiring the incumbent to perform the function.

(E) The terms of a collective bargaining agreement.

(F) The work experiences of past incumbents in the job.

(G) The current work experience of incumbents in similar jobs.

Secondary Sources

8 Witkin, *Summary of California Law* (10th ed. 2005) Constitutional Law, §§ 936, 937

Chin et al., *Cal. Practice Guide: Employment Litigation* (The Rutter Group) PP 8:744, 9:2298, 9:2402-9:2403, 9:2405, 9:2420

1 *Wrongful Employment Termination Practice* (Cont.Ed.Bar 2d ed.) Discrimination Claims, § 2.79

2 Wilcox, *California Employment Law*, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, § 41.97[1] (Matthew Bender)

11 *California Forms of Pleading and Practice*, Ch. 115, *Civil Rights: Employment Discrimination*, §§ 115.22, 115.54[b], 115.104 (Matthew Bender)

California Civil Practice: Employment Litigation (Thomson West) § 2:86

Publisher's Notes

This instruction covers issues presented in BAJI No. 12.14.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewCivil
ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewLabor & Employment LawDiscriminationDisability
DiscriminationCoverage & DefinitionsGeneral OverviewLabor & Employment LawDiscriminationDisability
DiscriminationDefenses & ExceptionsGeneral Overview



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CHAPTER 25 California Judicial Council Fair Employment and Housing Act Instructions

4-25 California Forms of Jury Instruction CACI 2544

CACI 2544 Disability Discrimination--Affirmative Defense--Health or Safety Risk

[*Name of defendant*] **claims that [his/her/its] conduct was lawful because, even with reasonable accommodations, [*name of plaintiff*] was unable to perform an essential job duty without endangering [[his/her] health or safety] [or] [the health or safety of others]. To succeed, [*name of defendant*] must prove both of the following:**

- 1. That [*describe job duty*] was an essential job duty; and**
- 2. That even with reasonable accommodations, [*name of plaintiff*] could not [*describe job duty*] without endangering [[his/her] health or safety] [or] [the health or safety of others] more than if an individual without a disability performed the job duty.**

[In determining whether [*name of plaintiff*]'s performance of the job duty would endanger [his/her] health or safety, you must decide whether the performance of the job duty presents an immediate and substantial degree of risk to [him/her].]

In deciding whether a job duty is essential, you may consider, among other factors, the following:

- a. Whether the reason the job exists is to perform that duty;**
- b. The number of employees available who can perform that duty; and**
- c. Whether the job duty is highly specialized.**

New September 2003

■ *Government Code section 12940(a)(1)* provides that the FEHA "does not prohibit an employer from refusing to hire or discharging an employee with a physical or mental disability ... where the employee, because of his or her physical or mental disability ... cannot perform those [essential] duties in a manner that would not endanger his or her health or safety or the health or safety of others even with reasonable accommodations."

■ The California Fair Employment and Housing Commission's regulations provide: "It is a permissible defense for an employer ... to demonstrate that after reasonable accommodation the applicant or employee cannot perform the essential functions of the position in question in a manner which would not endanger his or her health or safety because the job imposes an imminent and substantial degree of risk to the applicant or employee ... It is a permissible defense for an employer ... to demonstrate that after reasonable accommodation has been made, the applicant or employee cannot perform the essential functions of the position in question in a manner which would not endanger the health or safety of others to a greater extent than if an individual without a disability performed the job However, it is no defense to assert that an individual with a disability has a condition or a disease with a future risk, so long as the condition or disease does not presently interfere with his or her ability to perform the job in a manner that will not immediately endanger the individual with a disability or others, and the individual is able to safely perform the job over a reasonable length of time." (*Cal. Code Regs., tit. 2, § 7293.8(c)-(e).*)

■ "FEHA's 'danger to self' defense has a narrow scope; an employer must offer more than mere conclusions or speculation in order to prevail on the defense As one court said, '[t]he defense requires that the employee face an "imminent and substantial degree of risk" in performing the essential functions of the job.' An employer may not terminate an employee for harm that is merely potential In addition, in cases in which the employer is able to establish the 'danger to self' defense, it must also show that there are 'no "available reasonable means of accommodation which could, without undue hardship to [the employer], have allowed [the plaintiff] to perform the essential job functions ... without danger to himself." ' ' ' (*Wittkopf v. County of Los Angeles* (2001) 90 Cal.App.4th 1205, 1218-1219 [109 Cal.Rptr.2d 543] , internal citations omitted.)

■ "An employer may refuse to hire persons whose physical handicap prevents them from performing their duties in a manner which does not endanger their health. Unlike the BFOQ defense, this exception must be tailored to the individual characteristics of each applicant ... in relation to specific, legitimate job requirements [Defendant's] evidence, at best, shows a possibility [plaintiff] might endanger his health sometime in the future. In the light of the strong policy for providing equal employment opportunity, such conjecture will not justify a refusal to employ a handicapped person." (*Sterling Transit Co. v. Fair Employment Practice Com.* (1981) 121 Cal.App.3d 791, 798, 799 [175 Cal.Rptr. 548] , internal citations and footnote omitted.)

■ "The employer has the burden of proving the defense of the threat to the health and safety of other workers by a preponderance of the evidence." (*Raytheon Co. v. Fair Employment & Housing Com.* (1989) 212 Cal.App.3d 1242, 1252 [261 Cal.Rptr. 197] .)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, §§ 936, 937

Chin et al., Cal. Practice Guide: Employment Litigation (The Rutter Group) PP 8:744, 9:2298, 9:2402, 9:2445, 9:2447, 9:2450

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, § 2.111

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, § 41.97[1] (Matthew Bender)

11 *California Forms of Pleading and Practice*, Ch. 115, *Civil Rights: Employment Discrimination*, §§ 115.54[b], 115.104 (Matthew Bender)

California Civil Practice: Employment Litigation (Thomson West) § 2:86

Publisher's Notes

This instruction covers issues presented in BAJI Nos. 12.16 and 12.17.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewCivil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewLabor & Employment LawDiscriminationDisability DiscriminationCoverage & DefinitionsGeneral OverviewLabor & Employment LawDiscriminationDisability DiscriminationDefenses & ExceptionsGeneral Overview



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CHAPTER 25 California Judicial Council Fair Employment and Housing Act Instructions

4-25 California Forms of Jury Instruction CACI 2545

CACI 2545 Disability Discrimination--Affirmative Defense--Undue Hardship

[*Name of defendant*] claims that [*name of plaintiff*]'s proposed accommodations would create an undue hardship to the operation of [his/her/its] business. To succeed, [*name of defendant*] must prove that the accommodations would be significantly difficult or expensive to make. In deciding whether an accommodation would create an undue hardship, you may consider the following factors:

- a. The nature and cost of the accommodation;**
- b. [*Name of defendant*]'s ability to pay for the accommodation;**
- c. The type of operations conducted at the facility;**
- d. The impact on the operations of the facility;**
- e. The number of [*name of defendant*]'s employees and the relationship of the employees' duties to one another;**
- f. The number, type, and location of [*name of defendant*]'s facilities; and**
- g. The administrative and financial relationship of the facilities to one another.**

New September 2003

The issue of whether undue hardship is a true affirmative defense or whether the defendant only has the burden of coming forward with the evidence of hardship as a way of negating the element of plaintiff's

case concerning the reasonableness of an accommodation appears to be unclear.

■ *Government Code section 12940(m)* provides that it is an unlawful employment practice "[f]or an employer or other entity covered by this part to fail to make reasonable accommodation for the known physical or mental disability of an applicant or employee. Nothing in this subdivision or in ... subdivision (a) shall be construed to require an accommodation that is demonstrated by the employer or other covered entity to produce undue hardship to its operation."

■ *Government Code section 12926(s)* provides:

"Undue hardship" means an action requiring significant difficulty or expense, when considered in light of the following factors:

(1) the nature and cost of the accommodation needed,

(2) the overall financial resources of the facilities involved in the provision of the reasonable accommodations, the number of persons employed at the facility, and the effect on expenses and resources or the impact otherwise of these accommodations upon the operation of the facility,

(3) the overall financial resources of the covered entity, the overall size of the business of a covered entity with respect to the number of employees, and the number, type, and location of its facilities,

(4) the type of operations, including the composition, structure, and functions of the workforce of the entity, and

(5) the geographic separateness, administrative, or fiscal relationship of the facility or facilities.

Secondary Sources

Chin et al., *Cal. Practice Guide: Employment Litigation* (The Rutter Group) PP 7:213, 9:2250, 9:2345, 9:2366-9:2367

1 *Wrongful Employment Termination Practice* (Cont.Ed.Bar 2d ed.) Discrimination Claims, § 2.80

2 Wilcox, *California Employment Law*, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, § 41.51[4][b] (Matthew Bender)

11 *California Forms of Pleading and Practice*, Ch. 115, *Civil Rights: Employment Discrimination*, §§ 115.35, 115.54, 115.100 (Matthew Bender)

Publisher's Notes

This instruction covers issues presented in BAJI No. 12.15.

Gov. Code § 12926(s) was amended by Stats. 2003, ch. 164 (AB 196) to make non-substantive changes.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewCivil
 ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewLabor & Employment LawDiscriminationDisability
 DiscriminationCoverage & DefinitionsGeneral OverviewLabor & Employment LawDiscriminationDisability
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California Forms of Jury Instruction

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CHAPTER 25 California Judicial Council Fair Employment and Housing Act Instructions

4-25 California Forms of Jury Instruction CACI 2546

CACI 2546 Disability Discrimination--Reasonable Accommodation--Failure to Engage in Interactive Process (Gov. Code, § 12940(n))

[*Name of plaintiff*] contends that [*name of defendant*] failed to engage in a good-faith interactive process with [him/her] to determine whether it would be possible to implement effective reasonable accommodations so that [*name of plaintiff*] [*insert job requirements requiring accommodation*]. In order to establish this claim, [*name of plaintiff*] must prove the following:

1. That [*name of defendant*] was [an employer/[*other covered entity*]];
2. That [*name of plaintiff*] [was an employee of [*name of defendant*]/applied to [*name of defendant*] for a job/[*describe other covered relationship to defendant*]];
3. That [*name of plaintiff*] had [a] [*select term to describe basis of limitations, e.g., physical condition*] that was known to [*name of defendant*];
4. That [*name of plaintiff*] requested that [*name of defendant*] make reasonable accommodation for [him/her] [*e.g., physical condition*] so that [he/she] would be able to perform the essential job requirements;
5. That [*name of plaintiff*] was willing to participate in an interactive process to determine whether reasonable accommodation could be made so that [he/she] would be able to perform the essential job requirements;
6. That [*name of defendant*] failed to participate in a timely good-faith interactive process with [*name of plaintiff*] to determine whether reasonable accommodation could be made;

7. That [name of plaintiff] was harmed; and

8. That [name of defendant]'s failure to engage in a good-faith interactive process was a substantial factor in causing [name of plaintiff]'s harm.

New December 2007; Revised April 2009, December 2009

Directions for Use

In elements 3 and 4, select a term to describe the source of the plaintiff's limitations. It may be a statutory term such as "physical disability," "mental disability," or "medical condition." (See *Gov. Code*, § 12940(a).) Or it may be a general term such as "condition," "disease," or "disorder." Or it may be a specific health condition such as "diabetes."

Modify elements 3 and 4, as necessary, if the employer perceives the employee to have a disability. (See *Gelfo v. Lockheed Martin Corp.* (2006) 140 Cal.App.4th 34, 61, fn. 21 [43 Cal.Rptr.3d 874] .)

In element 4, specify the position at issue and the reason why some reasonable accommodation was needed. In element 5, you may add the specific accommodation requested, though the focus of this cause of action is on the failure to discuss, not the failure to provide.

For an instruction on a cause of action for failure to make reasonable accommodation, see CACI No. 2541, *Disability Discrimination--Reasonable Accommodation--Essential Factual Elements*. For an instruction defining "reasonable accommodation," see CACI No. 2542, *Disability Discrimination--"Reasonable Accommodation" Explained*.

There is a split of authority as to whether the employee must also prove that reasonable accommodation was possible before there is a violation for failure to engage in the interactive process. (Compare *Wysinger v. Automobile Club of Southern California* (2007) 157 Cal.App.4th 413, 424-425 [69 Cal.Rptr.3d 1] [jury's finding that no reasonable accommodation was possible is not inconsistent with its finding of liability for refusing to engage in interactive process] and *Claudio v. Regents of the University of California* (2005) 134 Cal.App.4th 224, 243 [35 Cal.Rptr.3d 837] with *Nadaf-Rahrov v. The Neiman Marcus Group, Inc.* (2008) 166 Cal.App.4th 952, 980-985 [83 Cal.Rptr.3d 190] [employee who brings a section 12940(n) claim bears the burden of proving a reasonable accommodation was available before the employer can be held liable under the statute]; see also *Scotch v. Art Institute of California* (2009) 173 Cal.App.4th 986, 1018-1019 [93 Cal.Rptr.3d 338] [attempting to reconcile conflict].)

Sources and Authority

- *Government Code* section 12940(n) provides that it is an unlawful employment practice, unless based on a bona fide occupational qualification or on applicable security regulations established by the United States or the State of California, "[f]or an employer or other entity covered by [the FEHA] to fail to engage in a timely, good faith, interactive process with the employee or applicant to determine effective reasonable accommodations, if any, in response to a request for reasonable accommodation by an employee or applicant with a known physical or mental disability or known medical condition."

- *Government Code* section 12926.1(e) provides that the Legislature affirms the importance of the interactive process between the applicant or employee and the employer in determining a reasonable

accommodation, as this requirement has been articulated by the Equal Employment Opportunity Commission in its interpretive guidance of the Americans with Disabilities Act of 1990.

■ The Interpretive Guidance on title I of the Americans With Disabilities Act, title 29 Code of Federal Regulations Part 1630 Appendix, provides, in part:

When a qualified individual with a disability has requested a reasonable accommodation to assist in the performance of a job, the employer, using a problem solving approach, should:

(1) Analyze the particular job involved and determine its purpose and essential functions;

(2) Consult with the individual with a disability to ascertain the precise job-related limitations imposed by the individual's disability and how those limitations could be overcome with a reasonable accommodation;

(3) In consultation with the individual to be accommodated, identify potential accommodations and assess the effectiveness each would have in enabling the individual to perform the essential functions of the position; and

(4) Consider the preference of the individual to be accommodated and select and implement the accommodation that is most appropriate for both the employee and the employer.

■ An employee may file a civil action based on the employer's failure to engage in the interactive process. (*Claudio, supra*, 134 Cal.App.4th at p. 243 .)

■ "Two principles underlie a cause of action for failure to provide a reasonable accommodation. First, the employee must request an accommodation. Second, the parties must engage in an interactive process regarding the requested accommodation and, if the process fails, responsibility for the failure rests with the party who failed to participate in good faith. While a claim of failure to accommodate is independent of a cause of action for failure to engage in an interactive dialogue, each necessarily implicates the other." (*Gelfo, supra*, 140 Cal.App.4th at p. 54 , internal citations omitted.)

■ "FEHA's reference to a 'known' disability is read to mean a disability of which the employer has become aware, whether because it is obvious, the employee has brought it to the employer's attention, it is based on the employer's own perception--mistaken or not--of the existence of a disabling condition or, perhaps as here, the employer has come upon information indicating the presence of a disability." (*Gelfo, supra*, 140 Cal.App.4th at p. 61, fn. 21 .)

■ "[Employer] asserts that, if it had a duty to engage in the interactive process, the duty was discharged. 'If anything,' it argues, 'it was [employee] who failed to engage in a good faith interactive process.' [Employee] counters [employer] made up its mind before July 2002 that it would not accommodate [employee]'s limitations, and nothing could cause it to reconsider that decision. Because the evidence is conflicting and the issue of the parties' efforts and good faith is factual, the claim is properly left for the jury's consideration." (*Gelfo, supra*, 140 Cal.App.4th at p. 62, fn. 23 .)

■ "None of the legal authorities that [defendant] cites persuades us that the Legislature intended that after a reasonable accommodation is granted, the interactive process continues to apply in a failure to accommodate context. ... To graft an interactive process intended to apply to the determination of a reasonable accommodation onto a situation in which an employer failed to provide a reasonable, agreed-upon accommodation is contrary to the apparent intent of the FEHA and would not support the public policies behind that provision." (*A.M. v. Albertsons, LLC* (2009) 178 Cal.App.4th 455, 464 [100 Cal.Rptr.3d 449] .)

■ "[T]he verdicts on the reasonable accommodations issue and the interactive process claim are not inconsistent. They involve separate causes of action and proof of different facts. Under FEHA, an employer must engage in a good faith interactive process with the disabled employee to explore the alternatives to accommodate the disability. 'An employee may file a civil action based on the employer's failure to engage in the interactive process.' Failure to engage in this process is a separate FEHA violation independent from an employer's failure to provide a reasonable disability accommodation, which is also a FEHA violation. An employer may claim there were no available reasonable accommodations. But if it did not engage in a good faith interactive process, 'it cannot be known whether an alternative job would have been found.' The interactive process determines which accommodations are required. Indeed, the interactive process could reveal solutions that neither party envisioned." (*Wysinger, supra*, 157 Cal.App.4th at pp. 424-425 , internal citations omitted.)

■ "We disagree ... with *Wysinger*'s construction of section 12940(n). We conclude that the availability of a reasonable accommodation (i.e., a modification or adjustment to the workplace that enables an employee to perform the essential functions of the position held or desired) is necessary to a section 12940(n) claim. [P] Applying the burden of proof analysis in *Green, supra*, 42 Cal.4th 254 , we conclude the burden of proving the availability of a reasonable accommodation rests on the employee." (*Nadaf-Rahrov, supra*, 166 Cal.App.4th at pp. 984-985 .)

■ "We synthesize *Wysinger*, *Nadaf-Rahrov*, and *Claudio* with our analysis of the law as follows: To prevail on a claim under section 12940, subdivision (n) for failure to engage in the interactive process, an employee must identify a reasonable accommodation that would have been available at the time the interactive process should have occurred. An employee cannot necessarily be expected to identify and request all possible accommodations during the interactive process itself because ' "[e]mployees do not have at their disposal the extensive information concerning possible alternative positions or possible accommodations which employers have. ... " ' However, as the *Nadaf-Rahrov* court explained, once the parties have engaged in the litigation process, to prevail, the employee must be able to identify an available accommodation the interactive process should have produced: 'Section 12940[, subdivision](n), which requires proof of failure to engage in the interactive process, is the appropriate cause of action where the employee is unable to identify a specific, available reasonable accommodation while in the workplace and the employer fails to engage in a good faith interactive process to help identify one, but the employee is able to identify a specific, available reasonable accommodation through the litigation process.' " (*Scotch, supra*, 173 Cal.App.4th at pp. 1018-1019 .)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, § 936(2)

Chin, et al., California Practice Guide: Employment Litigation (The Rutter Group) PP 9:2280-9:2285, 9:2345-9:2347

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, § 2.79

2 Wilcox, *California Employment Law*, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, § 41.51[3][b] (Matthew Bender)

11 *California Forms of Pleading and Practice*, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.35[1][a] (Matthew Bender)

1 California Civil Practice: Employment Litigation (Thomson West) Discrimination in Employment, § 2:50

Publisher's Notes

There is no BAJI instruction on this subject.



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CHAPTER 25 California Judicial Council Fair Employment and Housing Act Instructions

4-25 California Forms of Jury Instruction CACI 2547-CACI 2559

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CACI 2547Reserved for Future Use



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CHAPTER 25 California Judicial Council Fair Employment and Housing Act Instructions

4-25 California Forms of Jury Instruction CACI 2560

CACI 2560 Religious Creed Discrimination--Failure to Accommodate--Essential Factual Elements (Gov. Code, § 12940(l))

[Name of plaintiff] claims that [name of defendant] wrongfully discriminated against [him/her] by failing to reasonably accommodate [his/her] religious [belief/observance]. To establish this claim, [name of plaintiff] must prove all of the following:

- 1. That [name of defendant] was [an employer/[other covered entity]];**
- 2. That [name of plaintiff] [was an employee of [name of defendant]/applied to [name of defendant] for a job/[other covered relationship to defendant]];**
- 3. That [name of plaintiff] has a sincerely held religious belief that [describe religious belief, observance, or practice];**
- 4. That [name of plaintiff]'s religious [belief/observance] conflicted with a job requirement;**
- 5. That [name of defendant] knew of the conflict between [name of plaintiff]'s religious [belief/observance] and the job requirement;**
- 6. That [name of defendant] did not reasonably accommodate [name of plaintiff]'s religious [belief/observance];**
- 7. That [name of defendant] [discharged/refused to hire/[other adverse employment action]] [name of plaintiff] for failing to comply with the conflicting job requirement;**
- 8. That [name of plaintiff] was harmed; and**

9. That [name of defendant]'s failure to reasonably accommodate [name of plaintiff]'s religious [belief/observance] was a substantial factor in causing [his/her] harm.

If more than one accommodation is reasonable, an employer satisfies its obligation to make a reasonable accommodation if it selects one of those accommodations in good faith.

New September 2003

Directions for Use

If element 1 is given, the court may need to instruct the jury on the statutory definition of "employer" under the FEHA. Other covered entities under the FEHA include labor organizations, employment agencies, and apprenticeship training programs. (See *Gov. Code*, § 12940(a)-(d).)

Sources and Authority

■ *Government Code section 12940(l)* provides that it is an unlawful employment practice "[f]or an employer ... to refuse to hire or employ a person, ... or to discharge a person from employment, ... or to discriminate against a person in compensation or in terms, conditions, or privileges of employment because of a conflict between the person's religious belief or observance and any employment requirement, unless the employer ... demonstrates that it has explored any available reasonable alternative means of accommodating the religious belief or observance ... but is unable to reasonably accommodate the religious belief or observance without undue hardship on the conduct of the business of the employer Religious belief or observance ... includes, but is not limited to, observance of a Sabbath or other religious holy day or days, and reasonable time necessary for travel prior and subsequent to a religious observance."

■ *Government Code section 12926(o)* provides: "'Religious creed,' 'religion,' 'religious observance,' 'religious belief,' and 'creed' include all aspects of religious belief, observance, and practice."

■ The Fair Employment and Housing Commission's regulations provide: "'Religious creed' includes any traditionally recognized religion as well as beliefs, observances, or practices which an individual sincerely holds and which occupy in his or her life a place of importance parallel to that of traditionally recognized religions. Religious creed discrimination may be established by showing: ... [t]he employer or other covered entity has failed to reasonably accommodate the applicant's or employee's religious creed despite being informed by the applicant or employee or otherwise having become aware of the need for reasonable accommodation." (*Cal. Code Regs.*, tit. 2, § 7293.1(b).)

■ The Fair Employment and Housing Commission's regulations provide: "An employer or other covered entity shall make accommodation to the known religious creed of an applicant or employee unless the employer or other covered entity can demonstrate that the accommodation is unreasonable because it would impose an undue hardship." (*Cal. Code Regs.*, tit. 2, § 7293.3.)

■ "In evaluating an argument the employer failed to accommodate an employee's religious beliefs, the employee must establish a prima facie case that he or she had a bona fide religious belief, of which the employer was aware, that conflicts with an employment requirement Once the employee establishes a prima facie case, then the employer must establish it initiated good faith efforts to accommodate or no

accommodation was possible without producing undue hardship." (*Soldinger v. Northwest Airlines, Inc.* (1996) 51 Cal.App.4th 345, 370 [58 Cal.Rptr.2d 747] , internal citation omitted.)

■ "Any reasonable accommodation is sufficient to meet an employer's obligations. However, the employer need not adopt the most reasonable accommodation nor must the employer accept the remedy preferred by the employee. The reasonableness of the employer's efforts to accommodate is determined on a case by case basis '[O]nce it is determined that the employer has offered a reasonable accommodation, the employer need not show that each of the employee's proposed accommodations would result in undue hardship.' '[W]here the employer has already reasonably accommodated the employee's religious needs, the ... inquiry [ends].'" (*Soldinger, supra*, 51 Cal.App.4th at p. 370 , internal citations omitted.)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, §§ 876, 922, 940, 941

Chin et al., Cal. Practice Guide: Employment Litigation (The Rutter Group) PP 7:151, 7:215, 7:305, 7:610-7:611, 7:631-7:634, 7:641

2 Wilcox, *California Employment Law*, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, § 41.52[3] (Matthew Bender)

11 *California Forms of Pleading and Practice*, Ch. 115, *Civil Rights: Employment Discrimination*, §§ 115.22, 115.35[d], 115.91 (Matthew Bender)

California Civil Practice: Employment Litigation (Thomson West) §§ 2:71-2:73

1 Lindemann and Grossman, *Employment Discrimination Law* (3d ed. 1996) Religion, pp. 219-224, 226-227; *id.* (2000 supp.) at pp. 100-101

Publisher's Notes

There is no BAJI instruction on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Labor & Employment Law Discrimination Religious Discrimination General Overview Labor & Employment Law Discrimination Religious Discrimination Coverage & Definitions General Overview Labor & Employment Law Discrimination Religious Discrimination Defenses & Exceptions Reasonable Accommodation & Undue Hardship



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CHAPTER 25 California Judicial Council Fair Employment and Housing Act Instructions

4-25 California Forms of Jury Instruction CACI 2561

CACI 2561 Religious Creed Discrimination--Reasonable Accommodation--Affirmative Defense--Undue Hardship

[*Name of defendant*] **claims that its failure, if any, to accommodate [*name of plaintiff*]'s religious [belief/observance] was justified because any accommodation would have caused undue hardship. To succeed, [*name of defendant*] must prove both of the following:**

- 1. That [*name of defendant*] explored available ways to accommodate [*name of plaintiff*]'s religious [belief/observance], including excusing [him/her] from duties that conflict with [his/her] religious [belief/observance] or permitting those duties to be performed at another time or by another person; and**
- 2. That [*name of defendant*] was unable to accommodate [*name of plaintiff*]'s religious [belief/observance] without causing undue hardship on the conduct of [*name of defendant*]'s business.**

An accommodation causes an "undue hardship" when it would have more than an insignificant effect on the business.

New September 2003

Note that the terms "reasonable accommodation" and "undue hardship" do not have the same meanings under religious discrimination and disability discrimination laws as interpreted by California and federal courts. Because an employer has a competing duty to avoid religious preferences, the duty to accommodate an employee's religious beliefs presents a lesser burden than the duty to accommodate an employee's disability.

■ *Government Code section 12940(l)* provides that it is an unlawful employment practice "[f]or an employer ... to refuse to hire or employ a person, ... or to discharge a person from employment, ... or to discriminate against a person in compensation or in terms, conditions, or privileges of employment because of a conflict between the person's religious belief or observance and any employment requirement, unless the employer ... demonstrates that it has explored any available reasonable alternative means of accommodating the religious belief or observance ... but is unable to reasonably accommodate the religious belief or observance without undue hardship on the conduct of the business of the employer. Religious belief or observance ... includes, but is not limited to, observance of a Sabbath or other religious holy day or days, and reasonable time necessary for travel prior and subsequent to a religious observance."

■ "If the employee proves a prima facie case and the employer fails to initiate an accommodation for the religious practices, the burden is then on the employer to prove it will incur an undue hardship if it accommodates that belief. '[T]he extent of undue hardship on the employer's business is at issue only where the employer claims that it is unable to offer any reasonable accommodation without such hardship.' ... '[A]n accommodation causes "undue hardship" whenever that accommodation results in "more than a de minimis cost" to the employer.' " (*Soldinger v. Northwest Airlines, Inc.* (1996) 51 Cal.App.4th 345, 371 [58 Cal.Rptr.2d 747] , internal citations omitted.)

■ "It would be anomalous to conclude that by 'reasonable accommodation' Congress meant that an employer must deny the shift and job preference of some employees, as well as deprive them of their contractual rights, in order to accommodate or prefer the religious needs of others, and we conclude that Title VII does not require an employer to go that far Alternatively, the Court of Appeals suggested that [the employer] could have replaced [plaintiff] on his Saturday shift with other employees through the payment of premium wages To require [the employer] to bear more than a de minimus cost ... is an undue hardship. Like abandonment of the seniority system, to require [the employer] to bear additional costs when no such costs are incurred to give other employees the days off that they want would involve unequal treatment of employees on the basis of their religion." (*Trans World Airlines, Inc. v. Hardison* (1977) 432 U.S. 63, 81, 84 [97 S.Ct. 2264, 53 L.Ed.2d 113] , footnote omitted.)

Secondary Sources

Chin et al., Cal. Practice Guide: Employment Litigation (The Rutter Group) PP 7:215, 7:305, 7:610, 7:631, 7:640-7:641

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, § 41.52[4] (Matthew Bender)

11 *California Forms of Pleading and Practice*, Ch. 115, *Civil Rights: Employment Discrimination*, §§ 115.35[2][a]-[c], 115.54, 115.91 (Matthew Bender)

California Civil Practice: Employment Litigation (Thomson West) §§ 2:71-2:73

1 Lindemann and Grossman, *Employment Discrimination Law* (3d ed.) Religion, pp. 227-234; *id.* (2000 supp.) at pp. 100-105

Publisher's Notes

There is no BAJI instruction on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewLabor & Employment LawDiscriminationReligious
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CHAPTER 25 California Judicial Council Fair Employment and Housing Act Instructions

4-25 California Forms of Jury Instruction CACI 2562-CACI 2599

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CACI 2562Reserved for Future Use



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CHAPTER 25 California Judicial Council Fair Employment and Housing Act Instructions

4-25 California Forms of Jury Instruction CACI VF-2500

CACI VF-2500 Disparate Treatment (Gov. Code, § 12940(a))

We answer the questions submitted to us as follows:

1. Was [name of defendant] an [employer/[other covered entity]]?

_____ Yes _____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Was [name of plaintiff] [an employee of [name of defendant]/an applicant to [name of defendant] for a job/[other covered relationship to defendant]]?

_____ Yes _____ No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Did [name of defendant] [discharge/refuse to hire/[other adverse employment action]] [name of plaintiff]?

_____ Yes _____ No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Was [name of plaintiff]'s [protected status] a motivating reason for [name of defendant]'s [discharge/refusal to hire/[other adverse employment action]]?

_____ Yes _____ No

If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. Was [name of defendant]'s [discharge/refusal to hire/[other adverse employment action]] a substantial factor in causing harm to [name of plaintiff]?

_____ Yes _____ No

If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. What are [name of plaintiff]'s damages?

[a. Past economic loss

[lost earnings..... \$_____].....

[lost profits..... \$_____].....

[medical expenses..... \$_____].....

[other past economic loss..... \$_____].....

..... **Total Past Economic Damages: \$_____]**

[b. Future economic loss

[lost earnings..... \$_____].....

[lost profits..... \$_____].....

[medical expenses..... \$_____].....

[other future economic loss..... \$_____].....

..... **Total Future Economic Damages: \$_____]**

[c. Past noneconomic loss, including [physical pain/mental suffering:] \$_____]

[d. Future noneconomic loss, including [physical pain/mental suffering:] \$_____]

..... **TOTAL \$_____**

Signed: _____
Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the [clerk/bailiff/judge].

New September 2003; Revised April 2007

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on *CACI No. 2500, Disparate Treatment--Essential Factual Elements*.

Relationships other than employer/employee can be substituted in question 2, as in element 2 in *CACI No. 2500*.

If specificity is not required, users do not have to itemize all the damages listed in question 6 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

This form may be modified if the jury is being given the discretion under *Civil Code section 3288* to award prejudgment interest on specific losses that occurred prior to judgment.

Publisher's Notes

There is no BAJI verdict form on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Civil Procedure Trials Jury Trials Verdicts Special Verdicts Labor & Employment Law Discrimination Disparate Treatment General Overview Labor & Employment Law Discrimination Religious Discrimination Coverage & Definitions General Overview



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CHAPTER 25 California Judicial Council Fair Employment and Housing Act Instructions

4-25 California Forms of Jury Instruction CACI VF-2501

CACI VF-2501 Disparate Treatment (Gov. Code, § 12940(a))--Affirmative Defense--Bona fide Occupational Qualification

We answer the questions submitted to us as follows:

1. Was [name of defendant] an [employer/[other covered entity]]?

_____ Yes _____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Was [name of plaintiff] [an employee of [name of defendant]/an applicant to [name of defendant] for a job/[other covered relationship to defendant]]?

_____ Yes _____ No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Did [name of defendant] [discharge/refuse to hire/[other adverse employment action]] [name of plaintiff]?

_____ Yes _____ No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Was [name of plaintiff]'s [protected status] a motivating reason for [name of defendant]'s [discharge/refusal to hire/[other adverse employment action]]?

_____ Yes _____ No

If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. Was the job requirement regarding [protected status] reasonably necessary for the operation of [name of defendant]'s business?

_____ Yes _____ No

If your answer to question 5 is yes, then answer question 6. If you answered no, skip questions 6, 7, and 8, and answer question 9.

6. Did [name of defendant] have a reasonable basis for believing that substantially all [members of protected group] are unable to safely and efficiently perform that job?

_____ Yes _____ No

If your answer to question 6 is yes, then answer question 7. If you answered no, skip questions 7 and 8, and answer question 9.

7. Was it impossible or highly impractical for [name of defendant] to consider whether each [applicant/employee] was able to safely and efficiently perform the job?

_____ Yes _____ No

If your answer to question 7 is yes, then answer question 8. If you answered no, skip question 8 and answer question 9.

8. Was it impossible or highly impractical for [name of defendant] to rearrange job responsibilities to avoid using [protected status] as a job requirement?

_____ Yes _____ No

If your answer to question 8 is no, then answer question 9. If you answered yes, stop here, answer no further questions, and have the presiding juror sign and date this form.

9. Was [name of defendant]'s [discharge/refusal to hire/[other adverse employment action]] a substantial factor in causing harm to [name of plaintiff]?

_____ Yes _____ No

If your answer to question 9 is yes, then answer question 10. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

10. What are [name of plaintiff]'s damages?

[a. Past economic loss

[lost earnings..... \$_____]

[lost profits..... \$_____]

[medical expenses..... \$_____]

[other past economic loss..... \$_____]

..... Total Past Economic Damages: \$_____]

[b. Future economic loss

[lost earnings..... \$_____]

[lost profits..... \$_____]

[medical expenses..... \$_____]

[other future economic loss..... \$_____]

..... Total Future Economic Damages: \$_____]

**[c. Past noneconomic loss, including [physical
pain/mental suffering:] \$_____]****[d. Future noneconomic loss, including [physical
pain/mental suffering:] \$_____]**

..... TOTAL \$_____

Signed: _____**Presiding Juror****Dated: _____****[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the
[clerk/bailiff/judge].**

New September 2003; Revised April 2007

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on CACI No. 2500, *Disparate Treatment--Essential Factual Elements*, and CACI No. 2501, *Affirmative Defense--Bona fide Occupational Qualification*.

Relationships other than employer/employee can be substituted in question 2, as in element 2 in *CACI No. 2500*.

If specificity is not required, users do not have to itemize all the damages listed in question 10 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

Publisher's Notes

There is no BAJI verdict form on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewCivil ProcedureTrialsJury TrialsVerdictsSpecial VerdictsLabor & Employment LawDiscriminationDisparate TreatmentGeneral OverviewLabor & Employment LawDiscriminationDisparate TreatmentDefenses & ExceptionsBona Fide Occupational Qualifications



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California Forms of Jury Instruction

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CHAPTER 25 California Judicial Council Fair Employment and Housing Act Instructions

4-25 California Forms of Jury Instruction CACI VF-2502

CACI VF-2502 Disparate Impact (Gov. Code, § 12940(a))

We answer the questions submitted to us as follows:

1. Was [name of defendant] an [employer/[other covered entity]]?

_____ Yes _____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Was [name of plaintiff] [an employee of [name of defendant]/an applicant to [name of defendant] for a job/[other covered relationship to defendant]]?

_____ Yes _____ No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Did [name of defendant] have [an employment practice of [describe practice]/a selection policy of [describe policy]] that had a disproportionate adverse effect on [describe protected group--for example, persons over the age of 40]?

_____ Yes _____ No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Is [*name of plaintiff*] [*protected status*]?

_____ Yes _____ No

If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. Was [*name of defendant*]'s [employment practice/selection policy] a substantial factor in causing harm to [*name of plaintiff*]?

_____ Yes _____ No

If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. What are [*name of plaintiff*]'s damages?

[a. Past economic loss

[lost earnings..... \$ _____].....

[lost profits..... \$ _____].....

[medical expenses..... \$ _____].....

[other past economic loss..... \$ _____].....

..... Total Past Economic Damages: \$ _____]

[b. Future economic loss

[lost earnings..... \$ _____].....

[lost profits..... \$ _____].....

[medical expenses..... \$ _____].....

[other future economic loss..... \$ _____].....

..... Total Future Economic Damages: \$ _____]

[c. Past noneconomic loss, including [physical pain/mental suffering:] \$ _____]

[d. Future noneconomic loss, including [physical pain/mental suffering:] \$ _____]

..... TOTAL \$ _____

Signed: _____
Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the [clerk/bailiff/judge].

New September 2003; Revised April 2007

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on *CACI No. 2502, Disparate Impact--Essential Factual Elements*.

Relationships other than employer/employee can be substituted in question 2, as in element 2 in *CACI No. 2502*.

If specificity is not required, users do not have to itemize all the damages listed in question 6 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

This form may be modified if the jury is being given the discretion under *Civil Code section 3288* to award prejudgment interest on specific losses that occurred prior to judgment.

Publisher's Notes

There is no BAJI verdict form on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Labor & Employment Law Discrimination Disparate Impact General Overview Labor & Employment Law Discrimination Disparate Impact Coverage & Definitions Labor & Employment Law Discrimination Disparate Impact Proof General Overview



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California Forms of Jury Instruction

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CHAPTER 25 California Judicial Council Fair Employment and Housing Act Instructions

4-25 California Forms of Jury Instruction CACI VF-2503

CACI VF-2503 Disparate Impact (Gov. Code, § 12940(a)) Affirmative Defense--Business Necessity/Job Relatedness--Rebuttal to Business Necessity/Job Relatedness Defense

We answer the questions submitted to us as follows:

1. Was [name of defendant] an [employer/[other covered entity]]?

_____ Yes _____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Was [name of plaintiff] [an employee of [name of defendant]/an applicant to [name of defendant] for a job/[other covered relationship to defendant]]?

_____ Yes _____ No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Did [name of defendant] have [an employment practice of [describe practice]/a selection policy of [describe policy]] that had a disproportionate adverse effect on [describe protected group--for example, persons over the age of 40]?

_____ Yes _____ No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer

no further questions, and have the presiding juror sign and date this form.

4. Is [*name of plaintiff*] [*protected status*]?

_____ Yes _____ No

If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. Was the purpose of the [employment practice/selection policy] to operate the business safely and efficiently?

_____ Yes _____ No

If your answer to question 5 is yes, then answer question 6. If you answered no, skip questions 6, 7, and 8, and answer question 9.

6. Did the [employment practice/selection policy] substantially accomplish this business purpose?

_____ Yes _____ No

If your answer to question 6 is yes, then answer question 7. If you answered no, skip questions 7 and 8, and answer question 9.

7. Was there an alternative [employment practice/selection policy] that would have accomplished the business purpose equally well?

_____ Yes _____ No

If your answer to question 7 is yes, then answer question 8. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

8. Would this alternative [employment practice/selection policy] have had less adverse impact on [*describe members of protected group--for example, persons over the age of 40*]?

_____ Yes _____ No

If your answer to question 8 is yes, then answer question 9. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

9. Was [*name of defendant*]'s [employment practice/selection policy] a substantial factor in causing harm to [*name of plaintiff*]?

_____ Yes _____ No

If your answer to question 9 is yes, then answer question 10. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

10. What are [*name of plaintiff*]'s damages?

[a. Past economic loss

[lost earnings..... \$_____]

[lost profits..... \$_____]

[medical expenses..... \$_____]

[other past economic loss..... \$_____]

..... Total Past Economic Damages: \$_____]

[b. Future economic loss

[lost earnings..... \$_____]

[lost profits..... \$_____]

[medical expenses..... \$_____]

[other future economic loss..... \$_____]

..... Total Future Economic Damages: \$_____]

**[c. Past noneconomic loss, including [physical
pain/mental suffering:] \$_____]****[d. Future noneconomic loss, including [physical
pain/mental suffering:] \$_____]**..... **TOTAL \$_____****Signed: _____****Presiding Juror****Dated: _____****[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the
[clerk/bailiff/judge].**

New September 2003; Revised April 2007

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on CACI Nos. 2502, *Disparate Impact--Essential Factual Elements*, 2503, *Affirmative Defense--Business Necessity/Job Relatedness*, and 2504, *Disparate Impact--Rebuttal to Business Necessity/Job Relatedness Defense*.

Relationships other than employer/employee can be substituted in question 2, as in element 2 in *CACI No. 2502*.

If specificity is not required, users do not have to itemize all the damages listed in question 10 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

This form may be modified if the jury is being given the discretion under *Civil Code section 3288* to award prejudgment interest on specific losses that occurred prior to judgment.

Publisher's Notes

There is no BAJI verdict form on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Labor & Employment Law Discrimination Disparate Impact General Overview Labor & Employment Law Discrimination Disparate Impact Coverage & Definitions Labor & Employment Law Discrimination Disparate Impact Defenses & Exceptions Business Necessity & Job Relatedness Labor & Employment Law Discrimination Disparate Impact Proof General Overview



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California Forms of Jury Instruction

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CHAPTER 25 California Judicial Council Fair Employment and Housing Act Instructions

4-25 California Forms of Jury Instruction CACI VF-2504

CACI VF-2504 Retaliation (Gov. Code, § 12940(h))

We answer the questions submitted to us as follows:

1. Did [name of plaintiff] [describe protected activity]?

_____ Yes _____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. [Did [name of defendant] [discharge/demote/[specify other adverse employment action]] [name of plaintiff]?]

[or]

[Did [name of defendant] engage in conduct that, taken as a whole, materially and adversely affected the terms and conditions of [name of plaintiff]'s employment?]

_____ Yes _____ No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Was [name of plaintiff]'s [describe protected activity] a motivating reason for [name of defendant]'s [decision to [discharge/demote/[specify other adverse employment action]] [name of plaintiff]/conduct]?

_____ Yes _____ No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Was [*name of defendant*]'s conduct a substantial factor in causing harm to [*name of plaintiff*]?

_____ Yes _____ No

If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. What are [*name of plaintiff*]'s damages?

[a. Past economic loss

[lost earnings..... \$ _____].....

[lost profits..... \$ _____].....

[medical expenses..... \$ _____].....

[other past economic loss..... \$ _____].....

..... Total Past Economic Damages: \$ _____]

[b. Future economic loss

[lost earnings..... \$ _____].....

[lost profits..... \$ _____].....

[medical expenses..... \$ _____].....

[other future economic loss..... \$ _____].....

..... Total Future Economic Damages: \$ _____]

[c. Past noneconomic loss, including [physical pain/mental suffering:] \$ _____]

[d. Future noneconomic loss, including [physical pain/mental suffering:] \$ _____]

..... TOTAL \$ _____

Signed: _____
Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the [clerk/bailiff/judge].

New September 2003; Revised April 2007, August 2007

Directions for Use

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on *CACI No. 2505, Retaliation*.

Read the second option for question 2 in cases involving a pattern of employer harassment consisting of acts that might not individually be sufficient to constitute retaliation, but taken as a whole establish prohibited conduct. Give both options if the employee presents evidence supporting liability under both a sufficient-single-act theory or a pattern-of-harassment theory. Also select "conduct" in question 3 if the second option or both options are included for question 2.

If specificity is not required, users do not have to itemize all the damages listed in question 5 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

This form may be modified if the jury is being given the discretion under *Civil Code section 3288* to award prejudgment interest on specific losses that occurred prior to judgment.

Publisher's Notes

There is no BAJI verdict form on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewCivil ProcedureTrialsJury TrialsVerdictsSpecial VerdictsLabor & Employment LawDiscriminationRetaliationBurdens of ProofLabor & Employment LawDiscriminationRetaliationElementsGeneral Overview



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California Forms of Jury Instruction

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CHAPTER 25 California Judicial Council Fair Employment and Housing Act Instructions

4-25 California Forms of Jury Instruction CACI VF-2505

CACI VF-2505 Quid pro quo Sexual Harassment

We answer the questions submitted to us as follows:

1. Was [name of plaintiff] an employee of [name of defendant]?

_____ Yes _____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Did [name of alleged harasser] make unwanted sexual advances to [name of plaintiff] or engage in other unwanted verbal or physical conduct of a sexual nature?

_____ Yes _____ No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Were job benefits conditioned on [name of plaintiff]'s acceptance of [name of alleged harasser]'s sexual advances or conduct?

_____ Yes _____ No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. At the time of [his/her] conduct, was [name of alleged harasser] a supervisor or agent for [name of defendant]?

_____ Yes _____ No

If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. Was [name of alleged harasser]'s conduct a substantial factor in causing harm to [name of plaintiff]?

_____ Yes _____ No

If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. What are [name of plaintiff]'s damages?

[a. Past economic loss

[lost earnings..... \$_____].....

[lost profits..... \$_____].....

[medical expenses..... \$_____].....

[other past economic loss..... \$_____].....

..... **Total Past Economic Damages: \$_____]**

[b. Future economic loss

[lost earnings..... \$_____].....

[lost profits..... \$_____].....

[medical expenses..... \$_____].....

[other future economic loss..... \$_____].....

..... **Total Future Economic Damages: \$_____]**

[c. Past noneconomic loss, including [physical pain/mental suffering:] \$_____]

[d. Future noneconomic loss, including [physical pain/mental suffering:] \$_____]

..... **TOTAL \$_____**

Signed: _____
Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the [clerk/bailiff/judge].

New September 2003; Revised April 2007

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on *CACI No. 2520, Quid pro quo Sexual Harassment--Essential Factual Elements*.

Relationships other than employer/employee can be substituted in question number 1, as in element 1 in *CACI No. 2520*.

If specificity is not required, users do not have to itemize all the damages listed in question 6 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

This form may be modified if the jury is being given the discretion under *Civil Code section 3288* to award prejudgment interest on specific losses that occurred prior to judgment.

Publisher's Notes

There is no BAJI verdict form on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Civil Procedure Trials Jury Trials Verdicts Special Verdicts Labor & Employment Law Discrimination Harassment Sexual Harassment Burdens of Proof Employee Burdens Labor & Employment Law Discrimination Harassment Sexual Harassment Quid Pro Quo



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California Forms of Jury Instruction

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CHAPTER 25 California Judicial Council Fair Employment and Housing Act Instructions

4-25 California Forms of Jury Instruction CACI VF-2506A

CACI VF-2506A Hostile Work Environment Harassment--Conduct Directed at Plaintiff--Employer or Entity Defendant (Gov. Code, § 12940(j))

We answer the questions submitted to us as follows:

1. Was [*name of plaintiff*] [an employee of/a person providing services under a contract with] [*name of defendant*]?

_____ Yes _____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Was [*name of plaintiff*] subjected to unwanted harassing conduct because [he/she] [was/was believed to be/was associated with a person who was/was associated with a person who was believed to be] [*protected status*]?

_____ Yes _____ No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Was the harassment severe or pervasive?

_____ Yes _____ No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer

no further questions, and have the presiding juror sign and date this form.

4. Would a reasonable [*describe member of protected group, e.g., woman*] in [*name of plaintiff*]'s circumstances have considered the work environment to be hostile or abusive?

_____ Yes _____ No

If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. Did [*name of plaintiff*] consider the work environment to be hostile or abusive?

_____ Yes _____ No

If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. Did [*name of defendant*] [or [his/her/its] supervisors or agents] know or should [he/she/it/they] have known of the harassing conduct?

_____ Yes _____ No

If your answer to question 6 is yes, then answer question 7. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

7. Did [*name of defendant*] [or [his/her/its] supervisors or agents] fail to take immediate and appropriate corrective action?

_____ Yes _____ No

If your answer to question 7 is yes, then answer question 8. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

8. Was the harassing conduct a substantial factor in causing harm to [*name of plaintiff*]?

_____ Yes _____ No

If your answer to question 8 is yes, then answer question 9. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

9. What are [*name of plaintiff*]'s damages?

[a. Past economic loss

[lost earnings \$ _____]

[lost profits \$ _____]

[medical expenses \$ _____]

[other past economic loss \$ _____]

..... **Total Past Economic Damages: \$ _____**

[b. Future economic loss

[lost earnings \$ _____]

[lost profits \$ _____]

[medical expenses \$ _____]

[other future economic loss \$ _____]

..... **Total Future Economic Damages: \$ _____**

**[c. Past noneconomic loss, including [physical
pain/mental suffering:] \$ _____]**

**[d. Future noneconomic loss, including [physical
pain/mental suffering:] \$ _____]**

..... **TOTAL \$ _____**

Signed: _____

Presiding Juror

Dated: _____

**[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the
[clerk/bailiff/judge].**

Derived from former CACI No. VF-2506 December 2007

Directions for Use

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on *CACI No. 2521A, Hostile Work Environment Harassment--Conduct Directed at Plaintiff--Essential Factual Elements--Employer or Entity Defendant*.

Relationships other than employer/employee can be substituted in question 1, as in element 1 of *CACI No. 2521A*. Depending on the facts of the case, other factual scenarios for employer liability can be substituted in questions 6 and 7, as in element 6 of the instruction.

If specificity is not required, users do not have to itemize all the damages listed in question 9 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

This form may be modified if the jury is being given the discretion under *Civil Code section 3288* to award prejudgment interest on specific losses that occurred before judgment.

Publisher's Notes

There is no BAJI instruction on this subject.



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California Forms of Jury Instruction

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CHAPTER 25 California Judicial Council Fair Employment and Housing Act Instructions

4-25 California Forms of Jury Instruction CACI VF-2506B

CACI VF-2506B Hostile Work Environment Harassment--Conduct Directed at Others--Employer or Entity Defendant (Gov. Code, § 12940(j))

We answer the questions submitted to us as follows:

1. Was [*name of plaintiff*] [an employee of/a person providing services under a contract with] [*name of defendant*]?

_____ Yes _____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Did [*name of plaintiff*] personally witness harassing conduct that took place in [his/her] immediate work environment?

_____ Yes _____ No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Was the harassment severe or pervasive?

_____ Yes _____ No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Would a reasonable [describe member of protected group, e.g., woman] in [name of plaintiff]'s circumstances have considered the work environment to be hostile or abusive?

_____ Yes _____ No

If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. Did [name of plaintiff] consider the work environment to be hostile or abusive?

_____ Yes _____ No

If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. Did [name of defendant] [or [his/her/its] supervisors or agents] know or should [he/she/it/they] have known of the harassing conduct?

_____ Yes _____ No

If your answer to question 6 is yes, then answer question 7. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

7. Did [name of defendant] [or [his/her/its] supervisors or agents] fail to take immediate and appropriate corrective action?

_____ Yes _____ No

If your answer to question 7 is yes, then answer question 8. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

8. Was the harassing conduct a substantial factor in causing harm to [name of plaintiff]?

_____ Yes _____ No

If your answer to question 8 is yes, then answer question 9. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

9. What are [name of plaintiff]'s damages?

[a. Past economic loss

[lost earnings \$ _____]

[lost profits \$ _____]

[medical expenses \$ _____]

[other past economic loss \$ _____]

..... Total Past Economic Damages: \$ _____]

[b. Future economic loss

[lost earnings \$ _____]

[lost profits \$ _____]

[medical expenses \$ _____]

[other future economic loss \$ _____]

..... Total Future Economic Damages: \$ _____]

**[c. Past noneconomic loss, including [physical
pain/mental suffering:] \$ _____]**

**[d. Future noneconomic loss, including [physical
pain/mental suffering:] \$ _____]**

..... TOTAL \$ _____

Signed: _____
Presiding Juror

Dated: _____

**[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the
[clerk/bailiff/judge].**

Derived from former CACI No. VF-2506 December 2007

Directions for Use

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on *CACI No. 2521B, Hostile Work Environment Harassment--Conduct Directed at Others--Essential Factual Elements--Employer or Entity Defendant*.

Relationships other than employer/employee can be substituted in question 1, as in element 1 of *CACI No. 2521B*. Depending on the facts of the case, other factual scenarios for employer liability can be substituted in questions 6 and 7, as in element 6 of the instruction.

If specificity is not required, users do not have to itemize all the damages listed in question 9 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

This form may be modified if the jury is being given the discretion under *Civil Code section 3288* to award prejudgment interest on specific losses that occurred before judgment.

Publisher's Notes

There is no BAJI instruction on this subject.



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California Forms of Jury Instruction

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CHAPTER 25 California Judicial Council Fair Employment and Housing Act Instructions

4-25 California Forms of Jury Instruction CACI VF-2506C

CACI VF-2506C Hostile Work Environment Harassment--Widespread Sexual Favoritism--Employer or Entity Defendant (Gov. Code, § 12940(j))

We answer the questions submitted to us as follows:

1. Was [name of plaintiff] [an employee of/a person providing services under a contract with] [name of defendant]?

_____ Yes _____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Was there sexual favoritism in the work environment?

_____ Yes _____ No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Was the sexual favoritism widespread, and also severe or pervasive?

_____ Yes _____ No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Would a reasonable [describe member of protected group, e.g., woman] in [name of plaintiff]'s circumstances have considered the work environment to be hostile or abusive?

_____ Yes _____ No

If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. Did [name of plaintiff] consider the work environment to be hostile or abusive?

_____ Yes _____ No

If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. Did [name of defendant] [or [his/her/its] supervisors or agents] know or should [he/she/it/they] have known of the sexual favoritism?

_____ Yes _____ No

If your answer to question 6 is yes, then answer question 7. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

7. Did [name of defendant] [or [his/her/its] supervisors or agents] fail to take immediate and appropriate corrective action?

_____ Yes _____ No

If your answer to question 7 is yes, then answer question 8. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

8. Was the sexual favoritism a substantial factor in causing harm to [name of plaintiff]?

_____ Yes _____ No

If your answer to question 8 is yes, then answer question 9. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

9. What are [name of plaintiff]'s damages?

[a. Past economic loss

[lost earnings \$ _____]

[lost profits \$ _____]

[medical expenses \$ _____]

[other past economic loss \$ _____]

..... **Total Past Economic Damages: \$ _____]**

[b. Future economic loss

[lost earnings \$ _____]

[lost profits \$ _____]

[medical expenses \$ _____]

[other future economic loss \$ _____]

..... **Total Future Economic Damages: \$ _____]**

**[c. Past noneconomic loss, including [physical
pain/mental suffering:] \$ _____]**

**[d. Future noneconomic loss, including [physical
pain/mental suffering:] \$ _____]**

..... **TOTAL \$ _____**

Signed: _____

Presiding Juror

Dated: _____

**[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the
[clerk/bailiff/judge].**

Derived from former CACI No. VF-2506 December 2007

Directions for Use

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on *CACI No. 2521C, Hostile Work Environment Harassment --Widespread Sexual Favoritism-- Essential Factual Elements--Employer or Entity Defendant*.

Relationships other than employer/employee can be substituted in question 1, as in element 1 of *CACI No. 2521C*. Depending on the facts of the case, other factual scenarios for employer liability can be substituted in questions 6 and 7, as in element 6 of the instruction.

If specificity is not required, users do not have to itemize all the damages listed in question 9 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

This form may be modified if the jury is being given the discretion under *Civil Code section 3288* to award prejudgment interest on specific losses that occurred before judgment.

Publisher's Notes

There is no BAJI instruction on this subject.



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California Forms of Jury Instruction

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CHAPTER 25 California Judicial Council Fair Employment and Housing Act Instructions

4-25 California Forms of Jury Instruction CACI VF-2507A

CACI VF-2507A Hostile Work Environment Harassment--Conduct Directed at Plaintiff--Individual Defendant (Gov. Code, § 12940(j))

We answer the questions submitted to us as follows:

1. Was [name of plaintiff] [an employee of/a person providing services under a contract with] [name of employer]?

_____ Yes _____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Was [name of plaintiff] subjected to unwanted harassing conduct because [he/she] [was/was believed to be/was associated with a person who was/was associated with a person who was believed to be] [protected status]?

_____ Yes _____ No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Was the harassment severe or pervasive?

_____ Yes _____ No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer

no further questions, and have the presiding juror sign and date this form.

4. Would a reasonable [describe member of protected group, e.g., woman] in [name of plaintiff]'s circumstances have considered the work environment to be hostile or abusive?

_____ Yes _____ No

If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. Did [name of plaintiff] consider the work environment to be hostile or abusive?

_____ Yes _____ No

If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. Did [name of defendant] [participate in/assist/ [or] encourage] the harassing conduct?

_____ Yes _____ No

If your answer to question 6 is yes, then answer question 7. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

7. Was the harassing conduct a substantial factor in causing harm to [name of plaintiff]?

_____ Yes _____ No

If your answer to question 7 is yes, then answer question 8. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

8. What are [name of plaintiff]'s damages?

[a. Past economic loss

[lost earnings \$ _____]

[lost profits \$ _____]

[medical expenses \$ _____]

[other past economic loss \$ _____]

..... **Total Past Economic Damages: \$ _____]**

[b. Future economic loss

[lost earnings \$ _____]

[lost profits \$ _____]

[medical expenses \$ _____]

[other future economic loss \$ _____]

..... Total Future Economic Damages: \$ _____]

[c. Past noneconomic loss, including [physical
pain/mental suffering:] \$ _____]

[d. Future noneconomic loss, including [physical
pain/mental suffering:] \$ _____]

..... TOTAL \$ _____

Signed: _____

Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the
[clerk/bailiff/judge].

Derived from former CACI No. VF-2507 December 2007

Directions for Use

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on *CACI No. 2522A, Hostile Work Environment Harassment--Conduct Directed at Plaintiff--Essential Factual Elements--Individual Defendant*.

Relationships other than employer/employee can be substituted in question 1, as in element 1 of *CACI No. 2522A*.

If specificity is not required, users do not have to itemize all the damages listed in question 8 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

This form may be modified if the jury is being given the discretion under *Civil Code section 3288* to award prejudgment interest on specific losses that occurred before judgment.

Publisher's Notes

There is no BAJI instruction on this subject.



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California Forms of Jury Instruction

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CHAPTER 25 California Judicial Council Fair Employment and Housing Act Instructions

4-25 California Forms of Jury Instruction CACI VF-2507B

CACI VF-2507B Hostile Work Environment Harassment--Conduct Directed at Others--Individual Defendant (Gov. Code, § 12940(j))

We answer the questions submitted to us as follows:

1. Was [*name of plaintiff*] [an employee of/a person providing services under a contract with] [*name of employer*]?

_____ Yes _____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Did [*name of plaintiff*] personally witness harassing conduct that took place in [his/her] immediate work environment?

_____ Yes _____ No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Was the harassment severe or pervasive?

_____ Yes _____ No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Would a reasonable [describe member of protected group, e.g., woman] in [name of plaintiff]'s circumstances have considered the work environment to be hostile or abusive?

_____ Yes _____ No

If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. Did [name of plaintiff] consider the work environment to be hostile or abusive?

_____ Yes _____ No

If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. Did [name of defendant] [participate in/assist/ [or] encourage] the harassing conduct?

_____ Yes _____ No

If your answer to question 6 is yes, then answer question 7. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

7. Was the harassing conduct a substantial factor in causing harm to [name of plaintiff]?

_____ Yes _____ No

If your answer to question 7 is yes, then answer question 8. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

8. What are [name of plaintiff]'s damages?

[a. Past economic loss

[lost earnings \$ _____]

[lost profits \$ _____]

[medical expenses \$ _____]

[other past economic loss \$ _____]

..... **Total Past Economic Damages: \$ _____]**

[b. Future economic loss

[lost earnings \$ _____]

[lost profits \$ _____]

[medical expenses \$ _____]

[other future economic loss \$ _____]

..... Total Future Economic Damages: \$ _____]

[c. Past noneconomic loss, including [physical
pain/mental suffering:] \$ _____]

[d. Future noneconomic loss, including [physical
pain/mental suffering:] \$ _____]

..... TOTAL \$ _____

Signed: _____
Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the
[clerk/bailiff/judge].

Derived from former CACI No. VF-2507 December 2007

Directions for Use

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on *CACI No. 2522B, Hostile Work Environment Harassment--Conduct Directed at Others--Essential Factual Elements--Individual Defendant*.

Relationships other than employer/employee can be substituted in question 1, as in element 1 of *CACI No. 2522B, Hostile Work Environment Harassment --Widespread Sexual Favoritism-- Essential Factual Elements--Employer or Entity Defendant*.

If specificity is not required, users do not have to itemize all the damages listed in question 8 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

This form may be modified if the jury is being given the discretion under *Civil Code section 3288* to award prejudgment interest on specific losses that occurred before judgment.

Publisher's Notes

There is no BAJI instruction on this subject.



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California Forms of Jury Instruction

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CHAPTER 25 California Judicial Council Fair Employment and Housing Act Instructions

4-25 California Forms of Jury Instruction CACI VF-2507C

CACI VF-2507C Hostile Work Environment Harassment--Widespread Sexual Favoritism--Individual Defendant (Gov. Code, § 12940(j))

We answer the questions submitted to us as follows:

1. Was [name of plaintiff] [an employee of/a person providing services under a contract with] [name of employer]?

_____ Yes _____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Was there sexual favoritism in the work environment?

_____ Yes _____ No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Was the sexual favoritism widespread, and also severe or pervasive?

_____ Yes _____ No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Would a reasonable person in [*name of plaintiff*]'s circumstances have considered the work environment to be hostile or abusive?

_____ Yes _____ No

If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. Did [*name of plaintiff*] consider the work environment to be hostile or abusive?

_____ Yes _____ No

If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. Did [*name of defendant*] [participate in/assist/ [or] encourage] the sexual favoritism?

_____ Yes _____ No

If your answer to question 6 is yes, then answer question 7. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

7. Was the sexual favoritism a substantial factor in causing harm to [*name of plaintiff*]?

_____ Yes _____ No

If your answer to question 7 is yes, then answer question 8. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

8. What are [*name of plaintiff*]'s damages?

[a. Past economic loss

[lost earnings \$_____]

[lost profits \$_____]

[medical expenses \$_____]

[other past economic loss \$_____]

..... **Total Past Economic Damages: \$_____]**

[b. Future economic loss

[lost earnings \$_____]

[lost profits \$_____]

[medical expenses \$_____]

[other future economic loss \$_____]

..... Total Future Economic Damages: \$_____]

[c. Past noneconomic loss, including [physical
pain/mental suffering:] \$_____]

[d. Future noneconomic loss, including [physical
pain/mental suffering:] \$_____]

..... TOTAL \$_____

Signed: _____

Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the
[clerk/bailiff/judge].

Derived from former CACI No. VF-2507 December 2007

Directions for Use

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on *CACI No. 2522C, Hostile Work Environment Harassment --Widespread Sexual Favoritism-- Essential Factual Elements--Individual Defendant*.

Relationships other than employer/employee can be substituted in question 1, as in element 1 in *CACI No. 2521C*. Depending on the facts of the case, other factual scenarios for employer liability can be substituted in questions 6 and 7, as in element 6 of the instruction.

If specificity is not required, users do not have to itemize all the damages listed in question 8 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

This form may be modified if the jury is being given the discretion under *Civil Code section 3288* to award prejudgment interest on specific losses that occurred before judgment.

Publisher's Notes

There is no BAJI instruction on this subject.



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California Forms of Jury Instruction

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CHAPTER 25 California Judicial Council Fair Employment and Housing Act Instructions

4-25 California Forms of Jury Instruction CACI VF-2508

CACI VF-2508 Disability Discrimination--Disparate Treatment

We answer the questions submitted to us as follows:

1. Was [name of defendant] [an employer/[other covered entity]]?

_____ Yes _____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Was [name of plaintiff] [an employee of [name of defendant]/an applicant to [name of defendant] for a job/[other covered relationship to defendant]]?

_____ Yes _____ No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Did [name of defendant] [know that [name of plaintiff had/treat [name of plaintiff] as if [he/she] had] [a history of having] [a] [select term to describe basis of limitations, e.g., physical condition] [that limited [insert major life activity]]?

_____ Yes _____ No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Was [name of plaintiff] able to perform the essential job duties [with reasonable accommodation for [his/her] [e.g., physical condition]?

_____ Yes _____ No

If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. Did [name of defendant] [discharge/refuse to hire/[other adverse employment action]] [name of plaintiff]?

_____ Yes _____ No

If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. Was [name of plaintiff]'s [perceived] [history of [a]] [e.g., physical condition] a motivating reason for [name of defendant]'s decision to [discharge/refuse to hire/[other adverse employment action]] [name of plaintiff]?

_____ Yes _____ No

If your answer to question 6 is yes, then answer question 7. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

7. Was [name of defendant]'s [decision/conduct] a substantial factor in causing harm to [name of plaintiff]?

_____ Yes _____ No

If your answer to question 7 is yes, then answer question 8. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

8. What are [name of plaintiff]'s damages?

[a. Past economic loss

[lost earnings..... \$_____].....

[lost profits..... \$_____].....

[medical expenses..... \$_____].....

[other past economic loss..... \$_____].....

..... **Total Past Economic Damages: \$_____]**

[b. Future economic loss

[lost earnings..... \$_____].....

[lost profits..... \$_____].....

[medical expenses..... \$_____].....

[other future economic loss..... \$_____].....

..... Total Future Economic Damages: \$_____]

[c. Past noneconomic loss, including [physical
pain/mental suffering:]\$_____]

[d. Future noneconomic loss, including [physical
pain/mental suffering:] \$_____]

..... TOTAL \$_____

Signed: _____

Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the clerk/bailiff/judge].

New September 2003; Revised April 2007, December 2007, December 2009, June 2010

Directions for Use

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on *CACI No. 2540, Disability Discrimination --Disparate Treatment-- Essential Factual Elements*.

Select a term to use throughout to describe the source of the plaintiff's limitations. It may be a statutory term such as "physical disability," "mental disability," or "medical condition." (See *Gov. Code, § 12940(a)*.) Or it may be a general term such as "condition," "disease," or "disorder." Or it may be a specific health condition such as "diabetes."

Relationships other than employer/employee can be substituted in question 1, as in element 1 of *CACI No. 2540*. Depending on the facts of the case, other factual scenarios can be substituted in questions 3 and 6, as in elements 3 and 6 of the instruction.

For question 3, select the claimed basis of discrimination: an actual disability, a history of a disability, a perceived disability, or a perceived history of a disability. For an actual disability, select "know that [name of plaintiff] had." For a perceived disability, select "treat [name of plaintiff] as if [he/she] had."

If medical-condition discrimination as defined by statute (see *Gov. Code*, § 12926(h)) is alleged, omit "that limited [*insert major life activity*]" in question 3. (Compare *Gov. Code*, § 12926(h) with *Gov. Code*, § 12926(i), (k) [no requirement that medical condition limit major life activity].)

If specificity is not required, users do not have to itemize all the damages listed in question 8 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

This form may be modified if the jury is being given the discretion under *Civil Code* section 3288 to award prejudgment interest on specific losses that occurred prior to judgment.

Publisher's Notes

There is no BAJI verdict form on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Labor & Employment Law Discrimination Disability
Discrimination Coverage & Definitions General Overview Labor & Employment Law Discrimination Disparate
Treatment General Overview



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California Forms of Jury Instruction

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CHAPTER 25 California Judicial Council Fair Employment and Housing Act Instructions

4-25 California Forms of Jury Instruction CACI VF-2509

CACI VF-2509 Disability Discrimination--Reasonable Accommodation (Gov. Code, § 12940(m))

We answer the questions submitted to us as follows:

1. Was [name of defendant] [an employer/[other covered entity]]?

_____ Yes _____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Was [name of plaintiff] [an employee of [name of defendant]/an applicant to [name of defendant] for a job/[other covered relationship to defendant]]?

_____ Yes _____ No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Did [name of plaintiff] have [a] [select term to describe basis of limitations, e.g., physical condition] [that limited [insert major life activity]]?

_____ Yes _____ No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Did [name of defendant] know of [name of plaintiff]'s [e.g., physical condition [that limited [insert major life activity]]]?

_____ Yes _____ No

If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. Was [name of plaintiff] able to perform the essential job duties with reasonable accommodation for [his/her] [e.g., physical condition]?

_____ Yes _____ No

If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. Did [name of defendant] fail to provide reasonable accommodation for [name of plaintiff]'s [e.g., physical condition]?

_____ Yes _____ No

If your answer to question 6 is yes, then answer question 7. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

7. Was [name of defendant]'s failure to provide reasonable accommodation a substantial factor in causing harm to [name of plaintiff]?

_____ Yes _____ No

If your answer to question 7 is yes, then answer question 8. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

8. What are [name of plaintiff]'s damages?

[a. Past economic loss

[lost earnings..... \$_____].....

[lost profits..... \$_____].....

[medical expenses..... \$_____].....

[other past economic loss..... \$_____].....

..... **Total Past Economic Damages: \$_____]**

[b. Future economic loss

[lost earnings..... \$_____].....

[lost profits..... \$_____].

[medical expenses..... \$_____].

[other future economic loss..... \$_____].

..... Total Future Economic Damages: \$_____]

[c. Past noneconomic loss, including [physical
pain/mental suffering:] \$_____]

[d. Future noneconomic loss, including [physical
pain/mental suffering:] \$_____]

..... TOTAL \$_____

Signed: _____

Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the
[clerk/bailiff/judge].

New September 2003; Revised April 2007, April 2009, December 2009

Directions for Use

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on *CACI No. 2541, Disability Discrimination--Reasonable Accommodation--Essential Factual Elements*.

Select a term to use throughout to describe the source of the plaintiff's limitations. It may be a statutory term such as "physical disability," "mental disability," or "medical condition." (See *Gov. Code*, § 12940(a).) Or it may be a general term such as "condition," "disease," or "disorder." Or it may be a specific health condition such as "diabetes."

Relationships other than employer/employee can be substituted in question 1, as in element 1 of *CACI No. 2541*.

If medical-condition discrimination as defined by statute (see *Gov. Code*, § 12926(h)) is alleged, omit "that limited [insert major life activity]" in questions 3 and 4. (Compare *Gov. Code*, § 12926(h) with *Gov. Code*, § 12926(i), (k) [no requirement that medical condition limit major life activity].)

If specificity is not required, users do not have to itemize all the damages listed in question 8 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

This form may be modified if the jury is being given the discretion under *Civil Code section 3288* to award prejudgment interest on specific losses that occurred prior to judgment.

Publisher's Notes

There is no BAJI verdict form on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewLabor & Employment LawDiscriminationDisability
DiscriminationCoverage & DefinitionsGeneral OverviewLabor & Employment LawDiscriminationDisability
DiscriminationReasonable AccommodationGeneral OverviewLabor & Employment LawDiscriminationDisability
DiscriminationReasonable AccommodationUndue HardshipLabor & Employment LawDiscriminationDisparate
TreatmentGeneral Overview



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California Forms of Jury Instruction

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CHAPTER 25 California Judicial Council Fair Employment and Housing Act Instructions

4-25 California Forms of Jury Instruction CACI VF-2510

CACI VF-2510 Disability Discrimination--Reasonable Accommodation--Affirmative Defense--Undue Hardship (Gov. Code, § 12940(m))

We answer the questions submitted to us as follows:

1. Was [name of defendant] [an employer/[other covered entity]]?

_____ Yes _____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Was [name of plaintiff] [an employee of [name of defendant]/an applicant to [name of defendant] for a job/[other covered relationship to defendant]]?

_____ Yes _____ No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Did [name of plaintiff] have [a] [select term to describe basis of limitations, e.g., physical condition] [that limited [insert major life activity]]?

_____ Yes _____ No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Did [name of defendant] know of [name of plaintiff]'s [e.g., physical condition] [that limited [insert major life activity]]?]

_____ Yes _____ No

If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. Was [name of plaintiff] able to perform the essential job duties with reasonable accommodation for [his/her] [e.g., physical condition]?

_____ Yes _____ No

If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. Did [name of defendant] fail to provide reasonable accommodation for [name of plaintiff]'s [e.g., physical condition]?

_____ Yes _____ No

If your answer to question 6 is yes, then answer question 7. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

7. Would [name of plaintiff]'s proposed accommodations have created an undue hardship to the operation of [name of defendant]'s business?

_____ Yes _____ No

If your answer to question 7 is no, then answer question 8. If you answered yes, stop here, answer no further questions, and have the presiding juror sign and date this form.

8. Was [name of defendant]'s failure to provide a reasonable accommodation a substantial factor in causing harm to [name of plaintiff]?

_____ Yes _____ No

If your answer to question 8 is yes, then answer question 9. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

9. What are [name of plaintiff]'s damages?

[a. Past economic loss

[lost earnings..... \$_____].....

[lost profits..... \$_____].....

[medical expenses..... \$_____].....

[other past economic loss..... \$_____].....
 Total Past Economic Damages: \$_____]

[b. Future economic loss

[lost earnings..... \$_____].....
 [lost profits..... \$_____].....
 [medical expenses..... \$_____].....
 [other future economic loss..... \$_____].....
 Total Future Economic Damages: \$_____]

**[c. Past noneconomic loss, including [physical
 pain/mental suffering:] \$_____]**

**[d. Future noneconomic loss, including [physical
 pain/mental suffering:] \$_____]**

..... **TOTAL \$_____**

Signed: _____
Presiding Juror

Dated: _____

**[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the
 [clerk/bailiff/judge].**

New September 2003; Revised April 2007, April 2009, December 2009

Directions for Use

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on *CACI No. 2541, Disability Discrimination--Reasonable Accommodation--Essential Factual Elements*, and *CACI No. 2545, Disability Discrimination--Affirmative Defense--Undue Hardship*. If a different affirmative defense is at issue, this form should be tailored accordingly.

Select a term to use throughout to describe the source of the plaintiff's limitations. It may be a statutory term such as "physical disability," "mental disability," or "medical condition." (See *Gov. Code*, § 12940(a).) Or it may be a general term such as "condition," "disease," or "disorder." Or it may be a specific health condition such as "diabetes."

Relationships other than employer/employee can be substituted in question 1, as in element 1 of *CACI No. 2541*.

If medical-condition discrimination as defined by statute (see *Gov. Code, § 12926(h)*) is alleged, omit "that limited [*insert major life activity*]" in questions 3 and 4. (Compare *Gov. Code, § 12926(h)* with *Gov. Code, § 12926(i), (k)* [no requirement that medical condition limit major life activity].)

If specificity is not required, users do not have to itemize all the damages listed in question 9 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

This form may be modified if the jury is being given the discretion under *Civil Code section 3288* to award prejudgment interest on specific losses that occurred prior to judgment.

Publisher's Notes

There is no BAJI verdict form on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewLabor & Employment LawDiscriminationDisability
DiscriminationCoverage & DefinitionsGeneral OverviewLabor & Employment LawDiscriminationDisability
DiscriminationReasonable AccommodationGeneral OverviewLabor & Employment LawDiscriminationDisability
DiscriminationReasonable AccommodationUndue HardshipLabor & Employment LawDiscriminationDisparate
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California Forms of Jury Instruction

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CHAPTER 25 California Judicial Council Fair Employment and Housing Act Instructions

4-25 California Forms of Jury Instruction CACI VF-2511

CACI VF-2511 Religious Creed Discrimination--Failure to Accommodate (Gov. Code, § 12940(l))

We answer the questions submitted to us as follows:

1. Was [name of defendant] [an employer/[other covered entity]]?

_____ Yes _____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Was [name of plaintiff] [an employee of [name of defendant]/an applicant to [name of defendant] for a job/[other covered relationship to defendant]]?

_____ Yes _____ No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Does [name of plaintiff] have a sincerely held religious belief that [describe religious belief, observance, or practice]?

_____ Yes _____ No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Did [name of plaintiff]'s religious [belief/observance] conflict with a job requirement?

_____ Yes _____ No

If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. Did [name of defendant] know of the conflict between [name of plaintiff]'s religious [belief/observance] and the job requirement?

_____ Yes _____ No

If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. Did [name of defendant] reasonably accommodate [name of plaintiff]'s religious [belief/observance]?

_____ Yes _____ No

If your answer to question 6 is no, then answer question 7. If you answered yes, stop here, answer no further questions, and have the presiding juror sign and date this form.

7. Did [name of defendant] [discharge/refuse to hire/[other adverse employment action]] [name of plaintiff] because [name of plaintiff] failed to comply with the conflicting job requirement?

_____ Yes _____ No

If your answer to question 7 is yes, then answer question 8. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

8. Was [name of defendant]'s failure to reasonably accommodate [name of plaintiff]'s religious [belief/observance] a substantial factor in causing harm to [name of plaintiff]?

_____ Yes _____ No

If your answer to question 8 is yes, then answer question 9. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

9. What are [name of plaintiff]'s damages?

[a. Past economic loss

[lost earnings..... \$ _____].....

[lost profits..... \$ _____].....

[medical expenses..... \$ _____].....

[other past economic loss..... \$ _____].....

..... **Total Past Economic Damages: \$_____]**

[b. Future economic loss

[lost earnings..... \$_____].....

[lost profits..... \$_____].....

[medical expenses..... \$_____].....

[other future economic loss..... \$_____].....

..... **Total Future Economic Damages: \$_____]**

**[c. Past noneconomic loss, including [physical
pain/mental suffering:] \$_____]**

**[d. Future noneconomic loss, including [physical
pain/mental suffering:] \$_____]**

..... **TOTAL \$_____**

Signed: _____
Presiding Juror

Dated: _____

**[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the
[clerk/bailiff/judge].**

New September 2003; Revised April 2007

Directions for Use

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on *CACI No. 2560, Religious Creed Discrimination--Failure to Accommodate--Essential Factual Elements*.

If specificity is not required, users do not have to itemize all the damages listed in question 9 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

This form may be modified if the jury is being given the discretion under *Civil Code section 3288* to award prejudgment interest on specific losses that occurred prior to judgment.

Publisher's Notes

There is no BAJI verdict form on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewLabor & Employment LawDiscriminationReligious
DiscriminationGeneral OverviewLabor & Employment LawDiscriminationReligious DiscriminationCoverage &
DefinitionsGeneral OverviewLabor & Employment LawDiscriminationReligious DiscriminationDefenses &
ExceptionsReasonable Accommodation & Undue Hardship



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California Forms of Jury Instruction

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CHAPTER 25 California Judicial Council Fair Employment and Housing Act Instructions

4-25 California Forms of Jury Instruction CACI VF-2512

CACI VF-2512 Religious Creed Discrimination--Failure to Accommodate (Gov. Code, § 12940(l))--Affirmative Defense--Undue Hardship

We answer the questions submitted to us as follows:

1. Was [name of defendant] [an employer/[other covered entity]]?

_____ Yes _____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Was [name of plaintiff] [an employee of [name of defendant]/an applicant to [name of defendant] for a job/[other covered relationship to defendant]]?

_____ Yes _____ No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Does [name of plaintiff] have a sincerely held religious belief that [describe religious belief, observance, or practice]?

_____ Yes _____ No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Did [name of plaintiff]'s religious [belief/observance] conflict with a job requirement?

_____ Yes _____ No

If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. Did [name of defendant] know of the conflict between [name of plaintiff]'s religious [belief/observance] and the job requirement?

_____ Yes _____ No

If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. Did [name of defendant] reasonably accommodate [name of plaintiff]'s religious [belief/observance]?

_____ Yes _____ No

If your answer to question 6 is no, then answer question 7. If you answered yes, stop here, answer no further questions, and have the presiding juror sign and date this form.

7. Did [name of defendant] explore available ways to accommodate [name of plaintiff]'s religious [belief/observance]?

_____ Yes _____ No

If your answer to question 7 is yes, then answer question 8. If you answered no, skip question 8 and answer question 9.

8. Could [name of defendant] have accommodated [name of plaintiff]'s religious [belief/observance] without causing undue hardship to [name of defendant]'s business?

_____ Yes _____ No

If your answer to question 8 is yes, then answer question 9. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

9. Did [name of defendant] [discharge/refuse to hire/[other adverse employment action]] [name of plaintiff] because [name of plaintiff] failed to comply with the conflicting job requirement?

_____ Yes _____ No

If your answer to question 9 is yes, then answer question 10. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

10. Was [name of defendant]'s failure to reasonably accommodate [name of plaintiff]'s religious [belief/observance] a substantial factor in causing harm to [name of plaintiff]?

_____ Yes _____ No

If your answer to question 10 is yes, then answer question 11. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

11. What are [*name of plaintiff*]'s damages?

[a. Past economic loss

[lost earnings..... \$ _____].....

[lost profits..... \$ _____].....

[medical expenses..... \$ _____].....

[other past economic loss..... \$ _____].....

..... **Total Past Economic Damages: \$ _____]**

[b. Future economic loss

[lost earnings..... \$ _____].....

[lost profits..... \$ _____].....

[medical expenses..... \$ _____].....

[other future economic loss..... \$ _____].....

..... **Total Future Economic Damages: \$ _____]**

[c. Past noneconomic loss, including [physical pain/mental suffering:] \$ _____]

[d. Future noneconomic loss, including [physical pain/mental suffering:] \$ _____]

..... **TOTAL \$ _____**

Signed: _____

Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the [clerk/bailiff/judge].

Directions for Use

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on *CACI No. 2560, Religious Creed Discrimination--Failure to Accommodate--Essential Factual Elements*, and *CACI No. 2561, Religious Creed Discrimination--Reasonable Accommodation--Affirmative Defense--Undue Hardship*.

If specificity is not required, users do not have to itemize all the damages listed in question 11 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

This form may be modified if the jury is being given the discretion under *Civil Code section 3288* to award prejudgment interest on specific losses that occurred prior to judgment.

Publisher's Notes

There is no BAJI verdict form on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Labor & Employment Law Discrimination Religious Discrimination General Overview Labor & Employment Law Discrimination Religious Discrimination Coverage & Definitions General Overview Labor & Employment Law Discrimination Religious Discrimination Defenses & Exceptions Reasonable Accommodation & Undue Hardship



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California Forms of Jury Instruction

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CHAPTER 25 California Judicial Council Fair Employment and Housing Act Instructions

4-25 California Forms of Jury Instruction CACI VF-2513

CACI VF-2513 Disability Discrimination--Reasonable Accommodation--Failure to Engage in Interactive Process (Gov. Code, § 12940(n))

We answer the questions submitted to us as follows:

1. Was [name of defendant] [an employer/[other covered entity]]?

_____ Yes _____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Was [name of plaintiff] [an employee of [name of defendant]/an applicant to [name of defendant] for a job/[other covered relationship to defendant]]?

_____ Yes _____ No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Did [name of plaintiff] have [a] [select term to describe basis of limitations, e.g., physical condition] [that limited [insert major life activity]]?

_____ Yes _____ No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Did [name of plaintiff] request that [name of defendant] make reasonable accommodation for [his/her] [e.g., physical condition] so that [he/she] would be able to perform the essential job requirements?

_____ Yes _____ No

If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. Was [name of plaintiff] willing to participate in an interactive process to determine whether reasonable accommodation could be made so that [he/she] would be able to perform the essential job requirements?

_____ Yes _____ No

If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. Did [name of defendant] fail to participate in a timely, good-faith interactive process with [name of plaintiff] to determine whether reasonable accommodation could be made?

_____ Yes _____ No

If your answer to question 6 is yes, then answer question 7. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

7. Was [name of defendant]'s failure to participate in a good-faith interactive process a substantial factor in causing harm to [name of plaintiff]?

_____ Yes _____ No

[If your answer to question 7 is yes, then answer question 8. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.]

8. What are [name of plaintiff]'s damages?

[a. Past economic loss

[lost earnings..... \$_____]

[lost profits..... \$_____]

[medical expenses..... \$_____]

[other past economic loss..... \$_____]

..... **Total Past Economic Damages: \$_____]**

[b. Future economic loss

[lost earnings..... \$_____]

[lost profits..... \$_____]

[medical expenses..... \$_____]

[other future economic loss..... \$_____].....

..... **Total Future Economic Damages: \$_____]**

[c. Past noneconomic loss, including [physical pain/mental suffering:]..... \$_____]

[d. Future noneconomic loss, including [physical pain/mental suffering:]..... \$_____]

..... **TOTAL \$_____]**

Signed: _____

Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the [clerk/bailiff/judge].

New April 2009; Revised December 2009

Directions for Use

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on *CACI No. 2546, Disability Discrimination--Reasonable Accommodation--Failure to Engage in Interactive Process*.

Select a term to use throughout to describe the source of the plaintiff's limitations. It may be a statutory term such as "physical disability," "mental disability," or "medical condition." (See *Gov. Code, § 12940(a)*.) Or it may be a general term such as "condition," "disease," or "disorder." Or it may be a specific health condition such as "diabetes."

If medical-condition discrimination as defined by statute (see *Gov. Code, § 12926(h)*) is alleged, omit "that limited [insert major life activity]" in question 3. (Compare *Gov. Code, § 12926(h)* with *Gov. Code, § 12926(i), (k)* [no requirement that medical condition limit major life activity].)

Do not include the transitional language following question 7 and question 8 if the only damages claimed are also claimed under *Government Code section 12940(m)* on reasonable accommodation. Use *CACI No. VF-2509, Disability Discrimination--Reasonable Accommodation*, or *CACI No. VF-2510, Disability*

Discrimination--Reasonable Accommodation--Affirmative Defense--Undue Hardship, to claim these damages.

If specificity is not required, users do not have to itemize all the damages listed in question 8 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

This form may be modified if the jury is being given the discretion under *Civil Code section 3288* to award prejudgment interest on specific losses that occurred prior to judgment.

There is a split of authority as to whether the employee must also prove that reasonable accommodation was possible before there is a violation for failure to engage in the interactive process. (Compare *Wysinger v. Automobile Club of Southern California* (2007) 157 Cal.App.4th 413, 424-425 [69 Cal.Rptr.3d 1] [jury's finding that no reasonable accommodation was possible is not inconsistent with its finding of liability for refusing to engage in interactive process] with *Nadaf-Rahrov v. The Neiman Marcus Group, Inc.* (2008) 166 Cal.App.4th 952, 980-985 [83 Cal.Rptr.3d 190] [employee who brings a section 12940(n) claim bears the burden of proving that a reasonable accommodation was available before the employer can be held liable under the statute].)

Publisher's Notes

There is no BAJI verdict form on this subject.



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California Forms of Jury Instruction

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CHAPTER 25 California Judicial Council Fair Employment and Housing Act Instructions

4-25 California Forms of Jury Instruction CACI VF-2514

CACI VF-2514 Failure to Prevent Harassment, Discrimination, or Retaliation

We answer the questions submitted to us as follows:

1. Was [name of defendant] an [employer/[other covered entity]]?

_____ Yes _____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Was [name of plaintiff] [an employee of [name of defendant]/an applicant to [name of defendant] for a job/[other covered relationship to defendant]]?

_____ Yes _____ No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Was [name of plaintiff] subjected to [either]

[[harassing conduct/discrimination] because [he/she] [was/was believed to be/was associated with a person who was/was associated with a person who was believed to be] [protected status]?]

[or]

[retaliation because [he/she] [opposed [name of defendant]'s unlawful and discriminatory

employment practices/ [or] [filed a complaint with/testified before/ [or] assisted in a proceeding before] the Department of Fair Employment and Housing[?]

_____ Yes _____ No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Did [*name of defendant*] fail to take reasonable steps to prevent the [harassment/discrimination/retaliation]?

_____ Yes _____ No

If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. Was [*name of defendant*]'s failure to prevent the [harassment/discrimination/retaliation] a substantial factor in causing harm to [*name of plaintiff*]?

_____ Yes _____ No

If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. What are [*name of plaintiff*]'s damages?

[a. Past economic loss

[lost earnings..... \$ _____].....

[lost profits..... \$ _____].....

[medical expenses..... \$ _____].....

[other past economic loss..... \$ _____].....

..... Total Past Economic Damages: \$ _____]

[b. Future economic loss

[lost earnings..... \$ _____].....

[lost profits..... \$ _____].....

[medical expenses..... \$ _____].....

[other future economic loss..... \$ _____].....

..... Total Future Economic Damages: \$ _____]

[c. Past noneconomic loss, including [physical
pain/mental suffering:]\$_____]

[d. Future noneconomic loss, including [physical
pain/mental suffering:] \$_____]

..... TOTAL \$_____

Signed: _____

Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the
[clerk/bailiff/judge].

New June 2010

Directions for Use

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on *CACI No. 2527, Failure to Prevent Harassment, Discrimination, or Retaliation --Essential Factual Elements--Employer or Entity Defendant*.

If specificity is not required, users do not have to itemize all the damages listed in question 6 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

This form may be modified if the jury is being given the discretion under *Civil Code section 3288* to award prejudgment interest on specific losses that occurred before judgment.

Publisher's Notes

There is no BAJI verdict form on this subject.



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California Forms of Jury Instruction

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CHAPTER 25 California Judicial Council Fair Employment and Housing Act Instructions

4-25 California Forms of Jury Instruction CACI VF-2515-CACI VF-2599

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CACI VF-2515Reserved for Future Use



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California Forms of Jury Instruction

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CHAPTER 26 California Judicial Council California Family Rights Act Instructions

4-26 California Forms of Jury Instruction 26.syn

§ 26.syn Synopsis to Chapter 26: California Judicial Council California Family Rights Act Instructions

CACI 2600 Violation of CFRA Rights--Essential Factual Elements

CACI 2601 Eligibility

CACI 2602 Reasonable Notice of CFRA Leave

CACI 2603 "Comparable Job" Explained

CACI 2604-CACI 2609 Reserved for Future Use

CACI 2610 Affirmative Defense--No Certification From Health-Care Provider

CACI 2611 Affirmative Defense--Fitness for Duty Statement

CACI 2612 Affirmative Defense--Employment Would Have Ceased

CACI 2613 Affirmative Defense--Key Employee

CACI 2614-CACI 2619 Reserved for Future Use

CACI 2620 CFRA Rights Retaliation--Essential Factual Elements

CACI 2621-CACI 2699 Reserved for Future Use

CACI VF-2600 Violation of CFRA Rights

CACI VF-2601 Violation of CFRA Rights--Affirmative Defense--Employment Would Have Ceased

CACI VF-2602 CFRA Rights Retaliation

CACI VF-2603-CACI VF-2699 Reserved for Future Use



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CHAPTER 26 California Judicial Council California Family Rights Act Instructions

4-26 California Forms of Jury Instruction Scope

Scope

SCOPE

This chapter contains the California Judicial Council's "California Family Rights Act Series" of jury instructions [*CACI No. 2600 et seq.*]. The Judicial Council of California Civil Jury Instructions (CACI) included in this publication are the product of the Judicial Council of California Task Force on Jury Instructions, which are updated by the Judicial Council of California Advisory Committee on Civil Jury Instructions.

This chapter includes instructions on the following topics:

- Essential factual elements for a cause of action for violating CFRA rights [*CACI No. 2600*].
- Eligibility under CFRA [*CACI No. 2601*].
- Reasonable notice of CFRA leave [*CACI No. 2602*].
- "Comparable job" explained [*CACI No. 2603*].
- Affirmative defenses for actions brought under CFRA [*CACI Nos. 2610- 2613*].
- Essential factual elements for a cause of action for CFRA rights retaliation [*CACI No. 2620*].

The CFRA series also includes special verdict forms [*CACI Nos. VF-2600-VF-2602*].



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CHAPTER 26 California Judicial Council California Family Rights Act Instructions

4-26 California Forms of Jury Instruction CACI 2600

CACI 2600 Violation of CFRA Rights--Essential Factual Elements

[*Name of plaintiff*] **claims that** [*name of defendant*] **[refused to grant [him/her] [family care/medical] leave] [refused to return [him/her] to the same or a comparable job when [his/her] [family care/medical] leave ended] [other violation of CFRA rights]. To establish this claim, [*name of plaintiff*] must prove all of the following:**

1. That [*name of plaintiff*] was eligible for [family care/medical] leave;

2. That [*name of plaintiff*] [requested/took] leave [*insert one of the following:*]

[for the birth of [*name of plaintiff*]'s child or bonding with the child;]

[for the placement of a child with [*name of plaintiff*] for adoption or foster care;]

[to care for [*name of plaintiff*]'s [child/parent/spouse] who had a serious health condition;]

[for [*name of plaintiff*]'s own serious health condition that made [him/her] unable to perform the functions of [his/her] job with [*name of defendant*];]

3. That [*name of plaintiff*] provided reasonable notice to [*name of defendant*] of [his/her] need for [family care/medical] leave, including its expected timing and length. [If [*name of defendant*] notified [his/her/its] employees that 30 days' advance notice was required before the leave was to begin, then [*name of plaintiff*] must show that [he/she] gave that notice or, if 30 days' notice was not reasonably possible under the circumstances, that [he/she] gave notice as soon as possible];

4. That [*name of defendant*] [refused to grant [*name of plaintiff*]'s request for [family care/medical] leave/refused to return [*name of plaintiff*] to the same or a comparable job when

[his/her] [family care/medical] leave ended/ other violation of CFRA rights];

5. That [name of plaintiff] was harmed; and

6. That [name of defendant]'s [decision/conduct] was a substantial factor in causing [name of plaintiff]'s harm.

New September 2003; Revised October 2008

Directions for Use

This instruction is intended for use when an employee claims violation of the CFRA (*Gov. Code, § 12945.1 et seq.*). In addition to a qualifying employer's refusal to grant CFRA leave, CFRA violations include failure to provide benefits as required by CFRA and loss of seniority.

Give the bracketed sentence under element 3 only if the facts involve an expected birth, placement for adoption, or planned medical treatment, and there is evidence that the employer required 30 days' advance notice of leave. (See *Cal. Code Regs., tit. 2, § 7297.4(a).*)

The last bracketed option in element 2 does not include leave taken for disability on account of pregnancy, childbirth, or related medical conditions. If there is a dispute concerning the existence of a "serious health condition," the court must instruct the jury as to the meaning of this term pursuant to *Government Code section 12945.2(c)(8)*.

Sources and Authority

■ *Government Code section 12945.2(a)* provides, in part, that "it shall be an unlawful employment practice for any employer ... to refuse to grant a request by any employee with more than 12 months of service with the employer, and who has at least 1,250 hours of service with the employer during the previous 12-month period, to take up to a total of 12 workweeks in any 12-month period for family care and medical leave. Family care and medical leave ... shall not be deemed to have been granted unless the employer provides the employee, upon granting the leave request, a guarantee of employment in the same or a comparable position upon the termination of the leave."

■ *Government Code section 12945.2(l)* provides:

It shall be an unlawful employment practice for an employer to refuse to hire, or to discharge, fine, suspend, expel, or discriminate against, any individual because of any of the following:

(1) An individual's exercise of the right to family care and medical leave. ...

(2) An individual's giving information or testimony as to his or her own family care and medical leave, or another person's family care and medical leave, in any inquiry or proceeding related to rights guaranteed under this section.

■ *Government Code section 12945.2(c)(3)* provides:

"Family care and medical leave" means any of the following:

(A) Leave for reason of the birth of a child of the employee, the placement of a child with an employee in connection with the adoption or foster care of the child by the employee, or the serious health condition of a child of the employee.

(B) Leave to care for a parent or a spouse who has a serious health condition.

(C) Leave because of an employee's own serious health condition that makes the employee unable to perform the functions of the position of that employee, except for leave taken for disability on account of pregnancy, childbirth, or related medical conditions.

■ *Government Code section 12945.2(c)(8) provides:*

"Serious health condition" means an illness, injury, impairment, or physical or mental condition that involves either of the following:

(A) Inpatient care in a hospital, hospice, or residential health care facility.

(B) Continuing treatment or continuing supervision by a health care provider.

■ *Government Code section 12945.2(h) provides, in part: "If the employee's need for a leave ... is foreseeable, the employee shall provide the employer with reasonable advance notice of the need for the leave."*

■ *Government Code section 12945.2(i) provides, in part: "If the employee's need for leave ... is foreseeable due to a planned medical treatment or supervision, the employee shall make a reasonable effort to schedule the treatment or supervision to avoid disruption to the operations of the employer, subject to the approval of the health care provider of the individual requiring the treatment or supervision."*

■ "[T]he elements of a cause of action for retaliation in violation of CFRA ... are as follows: (1) the defendant was an employer covered by CFRA; (2) the plaintiff was an employee eligible to take CFRA leave; (3) the plaintiff exercised her right to take leave for a qualifying CFRA purpose; and (4) the plaintiff suffered an adverse employment action, such as termination ... , because of her exercise of her right to CFRA leave." (*Avila v. Continental Airlines, Inc. (2008) 165 Cal.App.4th 1237, 1254 [82 Cal.Rptr.3d 440]* .)

■ "It is not enough that [plaintiff's] mother had a serious health condition. [Plaintiff's] participation to provide care for her mother had to be 'warranted' during a 'period of treatment or supervision' " (*Pang v. Beverly Hospital, Inc. (2000) 79 Cal.App.4th 986, 995 [94 Cal.Rptr.2d 643]* , internal citation and footnote omitted.)

■ "[T]he relevant inquiry is whether a serious health condition made [plaintiff] unable to do her job at defendant's hospital, not her ability to do her essential job functions 'generally'" (*Lonicki v. Sutter Health Central (2008) 43 Cal.App.4th 201, 214 [74 Cal.Rptr.3d 570, 180 P.3d 321]* .)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, §§ 942-944

Chin et al., Cal. Practice Guide: Employment Litigation (The Rutter Group) PP 4:26, 12:32, 12:146, 12:390, 12:421, 12:857, 12:1201, 12:1300

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Other Employee Rights Statutes, §§ 4.18-4.20

1 Wilcox, *California Employment Law, Ch. 8, Leaves of Absence*, §§ 8.25[2], 8.30[1], [2], 8.31[2], 8.32 (Matthew Bender)

11 *California Forms of Pleading and Practice, Ch. 115, Civil Rights: Employment Discrimination*, § 115.32[6][a], [b] (Matthew Bender)

California Civil Practice: Employment Litigation (Thomson West) § 5:40

Publisher's Notes

There is no BAJI instruction on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Family Law Delinquency & Dependency Foster Care Healthcare Law Treatment Patient Consent Right to Refuse Treatment



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California Forms of Jury Instruction

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CHAPTER 26 California Judicial Council California Family Rights Act Instructions

4-26 California Forms of Jury Instruction CACI 2601

CACI 2601 Eligibility

To show that [he/she] was eligible for [family care/medical] leave, [name of plaintiff] must prove all of the following:

- 1. That [name of plaintiff] was an employee of [name of defendant];**
- 2. That [name of defendant] employed 50 or more employees within 75 miles of [name of plaintiff]'s workplace;**
- 3. That at the time [name of plaintiff] [requested/began] leave, [he/she] had more than 12 months of service with [name of defendant] and had worked at least 1,250 hours for [name of defendant] during the previous 12 months; and**
- 4. That at the time [name of plaintiff] [requested/began] leave [name of plaintiff] had taken no more than 12 weeks of family care or medical leave in the 12-month period [define period].**

New September 2003

Uncontested elements may be deleted from this instruction.

■ *Government Code section 12945.2(a)* provides, in part, that "it shall be an unlawful employment practice for any employer ... to refuse to grant a request by any employee with more than 12 months of service with the employer, and who has at least 1,250 hours of service with the employer during the previous 12-month period, to take up to a total of 12 workweeks in any 12-month period for family care

and medical leave. Family care and medical leave ... shall not be deemed to have been granted unless the employer provides the employee, upon granting the leave request, a guarantee of employment in the same or a comparable position upon the termination of the leave."

■ *Government Code section 12945.2(c)(2)* provides, in part:

"Employer" means either of the following:

(A) Any person who directly employs 50 or more persons to perform services for a wage or salary.

(B) The state, and any political or civil subdivision of the state and cities.

■ *Government Code section 12945.2(b)* provides: "It shall not be an unlawful employment practice for an employer to refuse to grant a request for family care and medical leave by an employee if the employer employs less than 50 employees within 75 miles of the worksite where that employee is employed."

Secondary Sources

Chin et al., *Cal. Practice Guide: Employment Litigation* (The Rutter Group) PP 12:32, 12:87, 12:125, 12:390, 12:421, 12:1201, 12:1300

11 *California Forms of Pleading and Practice*, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.32[6][c] (Matthew Bender)

Publisher's Notes

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CHAPTER 26 California Judicial Council California Family Rights Act Instructions

4-26 California Forms of Jury Instruction CACI 2602

CACI 2602 Reasonable Notice of CFRA Leave

For notice of the need for leave to be reasonable, [*name of plaintiff*] must make [*name of defendant*] aware that [he/she] needs [family care/medical] leave, when the leave will begin, and how long it is expected to last. The notice can be verbal or in writing and does not need to mention the law. An employer cannot require disclosure of any medical diagnosis, but should ask for information necessary to decide whether the employee is entitled to leave.

New September 2003

Sources and Authority

- *Government Code section 12945.2(h)* provides: "If the employee's need for a leave ... is foreseeable, the employee shall provide the employer with reasonable advance notice of the need for the leave."

- "An employee 'shall provide the employer with reasonable advance notice of the need for the leave.' 'An employee shall provide at least verbal notice sufficient to make the employer aware that the employee needs CFRA-qualifying leave, and the anticipated timing and duration of the leave. The employee need not expressly assert rights under CFRA ... , or even mention CFRA ... , to meet the notice requirement; however, the employee must state the reason the leave is needed, such as, for example, the expected birth of a child or for medical treatment. The employer should inquire further of the employee if it is necessary to have more information about whether CFRA leave is being sought by the employee and obtain the necessary details of the leave to be taken.' " (*Gibbs v. American Airlines, Inc.* (1999) 74 Cal.App.4th 1, 6-7 [87 Cal.Rptr.2d 554] , quoting Cal. Code Regs., tit. 2, § 7297.4(a)(1).)

- "That plaintiff called in sick was, by itself, insufficient to put [defendant] on notice that he needed

CFRA leave for a serious health condition." (*Avila v. Continental Airlines, Inc.* (2008) 165 Cal.App.4th 1237, 1255 [82 Cal.Rptr.3d 440] .)

Secondary Sources

Chin et al., Cal. Practice Guide: Employment Litigation (The Rutter Group) PP 12:852-12:853, 12:855-12:857

11 *California Forms of Pleading and Practice*, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.32[6][e]
(Matthew Bender)

Publisher's Notes

There is no BAJI instruction on this subject.



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CHAPTER 26 California Judicial Council California Family Rights Act Instructions

4-26 California Forms of Jury Instruction CACI 2603

CACI 2603 "Comparable Job" Explained

"Comparable job" means a job that is the same or close to the employee's former job in responsibilities, duties, pay, benefits, working conditions, and schedule. It must be at the same or a nearby worksite.

New September 2003

Give this instruction only if comparable job is an issue under the plaintiff's CFRA claim.

- *Government Code section 12945.2(c)(4)* provides: " 'Employment in the same or a comparable position' means employment in a position that has the same or similar duties and pay that can be performed at the same or similar geographic location as the position held prior to the leave."

- The Fair Employment and Housing Commission's regulations provide: " 'Employment in a comparable position' means employment in a position which is virtually identical to the employee's original position in terms of pay, benefits, and working conditions, including privileges, perquisites and status. It must involve the same or substantially similar duties and responsibilities, which must entail substantially equivalent skill, effort, responsibility, and authority. It must be performed at the same or geographically proximate worksite from where the employee was previously employed. It ordinarily means the same shift or the same or an equivalent work schedule. It has the same meaning as the term 'equivalent position' in [the Family Medical Leave Act] and its implementing regulations." (*Cal. Code Regs., tit. 2, § 7297.0(g).*)

- "[W]hile we will accord great weight and respect to the [Fair Employment and Housing Commission]'s regulations that apply to the necessity for leave, along with any applicable federal FMLA

regulations that the Commission incorporated by reference, we still retain ultimate responsibility for construing [CFRA]." (*Pang v. Beverly Hospital, Inc.* (2000) 79 Cal.App.4th 986, 994-995 [94 Cal.Rptr.2d 643] .)

Secondary Sources

Chin et al., Cal. Practice Guide: Employment Litigation (The Rutter Group) PP 12:1138-12:1139, 12:1150, 12:1154-12:1156

1 Wilcox, California Employment Law, Ch. 8, *Leaves of Absence*, § 8.30[1]-[2] (Matthew Bender)

11 *California Forms of Pleading and Practice*, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.32[6][h] (Matthew Bender)

Publisher's Notes

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CHAPTER 26 California Judicial Council California Family Rights Act Instructions

4-26 California Forms of Jury Instruction CACI 2604-CACI 2609

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CACI 2604Reserved for Future Use



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CHAPTER 26 California Judicial Council California Family Rights Act Instructions

4-26 California Forms of Jury Instruction CACI 2610

CACI 2610 Affirmative Defense--No Certification From Health-Care Provider

[Name of defendant] claims that [he/she/it] denied [name of plaintiff]'s request for leave because [he/she] did not provide a health-care provider's certification of [his/her] need for leave. To succeed, [name of defendant] must prove both of the following:

- 1. That [name of defendant] told [name of plaintiff] in writing that [he/she/it] required written certification from [name of plaintiff]'s health-care provider to [grant/extend] leave; and**
- 2. That [name of plaintiff] did not provide [name of defendant] with the required certification from a health-care provider [within the time set by [name of defendant] or as soon as reasonably possible].**

New September 2003

The time set by the defendant described in element 2 must be at least 15 days.

- *Government Code section 12945.2(k)* provides, in part:

- (1) An employer may require that an employee's request for leave because of the employee's own serious health condition be supported by a certification issued by his or her health care provider. That certification shall be sufficient if it includes all of the following:
 - (A) The date on which the serious health condition commenced.

(B) The probable duration of the condition.

(C) A statement that, due to the serious health condition, the employee is unable to perform the function of his or her position.

(2) The employer may require that the employee obtain subsequent recertification regarding the employee's serious health condition on a reasonable basis, in accordance with the procedure provided in paragraph (1), if additional leave is required.

■ *Government Code section 12945.2(j)* provides, in part:

(1) An employer may require that an employee's request for leave to care for a child, a spouse, or a parent who has a serious health condition be supported by a certification issued by the health care provider of the individual requiring care. That certification shall be sufficient if it includes all of the following:

(A) The date on which the serious health condition commenced.

(B) The probable duration of the condition.

(C) An estimate of the amount of time that the health care provider believes the employee needs to care for the individual requiring the care.

(D) A statement that the serious health condition warrants the participation of a family member to provide care during a period of the treatment or supervision of the individual requiring care.

(2) Upon expiration of the time estimated by the health care provider in subparagraph (C) of paragraph (1), the employer may require the employee to obtain recertification, in accordance with the procedure provided in paragraph (1), if additional leave is required.

■ *Government Code section 12945.2(k)(4)* provides, in part: "As a condition of an employee's return from leave taken because of the employee's own serious health condition, the employer may have a uniformly applied practice or policy that requires the employee to obtain certification from his or her health care provider that the employee is able to resume work."

■ *Government Code section 12945.2(c)(6)* defines "health care provider" as meaning any of the following:

(A) An individual holding either a physician's and surgeon's certificate issued pursuant to ... the Business and Professions Code, an osteopathic physician's and surgeon's certificate issued pursuant to ... the Business and Professions Code, or an individual duly licensed as a physician, surgeon, or osteopathic physician or surgeon in another state or jurisdiction, who directly treats or supervises the treatment of the serious health condition.

(B) Any other person determined by the United States Secretary of Labor to be capable of providing health care services under the FMLA.

■ The Fair Employment and Housing Commission's regulations provide: "A request to take a CFRA leave is reasonable if it complies with any applicable notice requirements ... and if it is accompanied, where required, by a certification." (*Cal. Code Regs., tit. 2, § 7297.1(b).*)

■ "[S]ubdivision (k)(1) of [*Government Code*] section 12945.2 does not *require* an employer to submit disputes regarding an employee's entitlement to medical leave to a third health care provider." (*Lonicki v. Sutter Health Central* (2008) 43 Cal.4th 201, 211 [74 Cal.Rptr.3d 570, 180 P.3d 321] , original italics.)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, §§ 942-944

Chin et al., Cal. Practice Guide: Employment Litigation (The Rutter Group) PP 12:311, 12:880, 12:883-12:884, 12:905, 12:915

1 Wilcox, California Employment Law, Ch. 8, *Leaves of Absence*, § 8.26 (Matthew Bender)

Publisher's Notes

There is no BAJI instruction on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Healthcare LawActions Against FacilitiesDefensesGeneral OverviewHealthcare LawBusiness Administration & OrganizationGeneral OverviewHealthcare LawBusiness Administration & OrganizationLicensesGeneral OverviewLabor & Employment LawLeaves of AbsenceFamily & Medical Leave ActCoverage & DefinitionsDenials & RequestsLabor & Employment LawLeaves of AbsenceFamily & Medical Leave ActCoverage & DefinitionsSerious Health Conditions



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CHAPTER 26 California Judicial Council California Family Rights Act Instructions

4-26 California Forms of Jury Instruction CACI 2611

CACI 2611 Affirmative Defense--Fitness for Duty Statement

[*Name of defendant*] claims that [he/she/it] refused to return [*name of plaintiff*] to work because [he/she] did not provide a written statement from [his/her] health-care provider that [he/she] was fit to return to work. To succeed, [*name of defendant*] must prove both of the following:

- 1. That [*name of defendant*] has a uniformly applied practice or policy that requires employees on leave because of their own serious health condition to provide a written statement from their health-care provider that they are able to return to work; and**
- 2. That [*name of plaintiff*] did not provide [*name of defendant*] with a written statement from [his/her] health-care provider of [his/her] fitness to return to work.**

New September 2003

■ *Government Code section 12945.2(j)* provides, in part:

- (1) An employer may require that an employee's request for leave to care for a child, a spouse, or a parent who has a serious health condition be supported by a certification issued by the health care provider of the individual requiring care. That certification shall be sufficient if it includes all of the following:
 - (A) The date on which the serious health condition commenced.
 - (B) The probable duration of the condition.

(C) An estimate of the amount of time that the health care provider believes the employee needs to care for the individual requiring the care.

(D) A statement that the serious health condition warrants the participation of a family member to provide care during a period of the treatment or supervision of the individual requiring care.

(2) Upon expiration of the time estimated by the health care provider in subparagraph (C) of paragraph (1), the employer may require the employee to obtain recertification, in accordance with the procedure provided in paragraph (1), if additional leave is required.

■ *Government Code section 12945.2(k)(4)* provides, in part: "As a condition of an employee's return from leave taken because of the employee's own serious health condition, the employer may have a uniformly applied practice or policy that requires the employee to obtain certification from his or her health care provider that the employee is able to resume work."

■ *Government Code section 12945.2(c)(6)* defines "health care provider" as meaning any of the following:

(A) An individual holding either a physician's and surgeon's certificate issued pursuant to ... the Business and Professions Code, an osteopathic physician's and surgeon's certificate issued pursuant to ... the Business and Professions Code, or an individual duly licensed as a physician, surgeon, or osteopathic physician or surgeon in another state or jurisdiction, who directly treats or supervises the treatment of the serious health condition.

(B) Any other person determined by the United States Secretary of Labor to be capable of providing health care services under the FMLA.

■ The Fair Employment and Housing Commission's regulations provide: "A request to take a CFRA leave is reasonable if it complies with any applicable notice requirements ... and if it is accompanied, where required, by a certification." (*Cal. Code Regs., tit. 2, § 7297.1(b).*)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, §§ 942-944

Chin et al., Cal. Practice Guide: Employment Litigation (The Rutter Group) PP 12:311, 12:880, 12:884, 12:915

1 Wilcox, California Employment Law, Ch. 8, *Leaves of Absence*, § 8.26 (Matthew Bender)

Publisher's Notes

There is no BAJI instruction on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Healthcare Law Actions Against Facilities Defenses General Overview Healthcare Law Business Administration & Organization General Overview Healthcare Law Business Administration & Organization Licenses General Overview Labor & Employment Law Leaves of Absence Family & Medical Leave Act Coverage & Definitions Denials &

Requests Labor & Employment Law Leaves of Absence Family & Medical Leave Act Coverage & Definitions Serious
Health Conditions



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CHAPTER 26 California Judicial Council California Family Rights Act Instructions

4-26 California Forms of Jury Instruction CACI 2612

CACI 2612 Affirmative Defense--Employment Would Have Ceased

[*Name of defendant*] **claims that [he/she/it] was not required to allow [*name of plaintiff*] to return to work when [his/her] [family care/medical] leave was over because [his/her] employment would have ended for other reasons. To succeed, [*name of defendant*] must prove both of the following:**

- 1. That [*name of defendant*] would have [discharged/laid off] [*name of plaintiff*] if [he/she] had continued to work during the leave period; and**
- 2. That [*name of plaintiff*]'s [family care/medical] leave was not a reason for [discharging [him/her]/laying [him/her] off].**

An employee on [family care/medical] leave has no greater right to his or her job or to other employment benefits than if he or she had continued working during the leave.

New September 2003

■ The Fair Employment and Housing Commission's regulations provide: "An employee has no greater right to reinstatement or to other benefits and conditions of employment than if the employee had been continuously employed during the CFRA leave period. An employer has the burden of proving, by a preponderance of the evidence, that an employee would not otherwise have been employed at the time reinstatement is requested in order to deny reinstatement. ... [P] ... If an employee is laid off during the course of taking CFRA leave and employment is terminated, the employer's responsibility to continue CFRA leave, maintain group health plan benefits and reinstate the employee ceases at the time the employee is laid off, provided the employer has no continuing obligations under a collective bargaining

agreement or otherwise." (*Cal. Code Regs., tit. 2, § 7297.2(c)(1).*)

Secondary Sources

Chin et al., *Cal. Practice Guide: Employment Litigation* (The Rutter Group) PP 12:1189, 12:1191

1 Wilcox, *California Employment Law*, Ch. 8, *Leaves of Absence*, § 8.30[4] (Matthew Bender)

Publisher's Notes

There is no BAJI instruction on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Labor & Employment Law Collective Bargaining & Labor Relations Discipline, Layoff & Termination



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California Forms of Jury Instruction

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CHAPTER 26 California Judicial Council California Family Rights Act Instructions

4-26 California Forms of Jury Instruction CACI 2613

CACI 2613 Affirmative Defense--Key Employee

[Name of defendant] claims that [he/she/it] was not required to return [name of plaintiff] to work in the same or a comparable job following [family care/medical] leave because [he/she] was employed in a highly paid, essential position. To succeed on this claim, [name of defendant] must prove all of the following:

- 1. That [name of plaintiff] was a salaried employee and among the highest paid 10 percent of [name of defendant]'s employees [employed within 75 miles of [his/her] workplace];**
- 2. That [name of defendant]'s refusal to return [name of plaintiff] to work in the same or a comparable job was necessary to prevent severe economic injury to [name of defendant]'s [business] operations; [and]**
- 3. That when [name of defendant] decided that [name of plaintiff] would not be allowed to return to [his/her] job or a comparable position, [name of defendant] notified [name of plaintiff] of that decision; [and]**
- [4. That [name of defendant] gave [name of plaintiff] a reasonable opportunity to return to work after notifying [name of plaintiff] of [his/her/its] decision.]**

New September 2003

Element 4 is applicable only when the employer notifies the employee of its decision to refuse to reinstate plaintiff after family care or medical leave has commenced.

■ *Government Code section 12945.2(r)* provides, in part:

(1) [A]n employer may refuse to reinstate an employee returning from leave to the same or a comparable position if all of the following apply:

(A) The employee is a salaried employee who is among the highest paid 10 percent of the employer's employees who are employed within 75 miles of the worksite at which that employee is employed.

(B) The refusal is necessary to prevent substantial and grievous economic injury to the operations of the employer.

(C) The employer notifies the employee of the intent to refuse reinstatement at the time the employer determines the refusal is necessary under subparagraph (B).

(2) In any case in which the leave has already commenced, the employer shall give the employee a reasonable opportunity to return to work following the notice prescribed by subparagraph (C).

Secondary Sources

Chin et al., Cal. Practice Guide: Employment Litigation (The Rutter Group) PP 12:1167-12:1169, 12:1171, 12:1174

1 Wilcox, California Employment Law, Ch. 8, *Leaves of Absence*, § 8.30[5] (Matthew Bender)

Publisher's Notes

There is no BAJI instruction on this subject.



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California Forms of Jury Instruction

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CHAPTER 26 California Judicial Council California Family Rights Act Instructions

4-26 California Forms of Jury Instruction CACI 2614-CACI 2619

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CACI 2614Reserved for Future Use



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CHAPTER 26 California Judicial Council California Family Rights Act Instructions

4-26 California Forms of Jury Instruction CACI 2620

CACI 2620 CFRA Rights Retaliation--Essential Factual Elements

[*Name of plaintiff*] **claims that** [*name of defendant*] **retaliated against** [him/her] **for** [[requesting/taking] [family care/medical] leave/[*other protected activity*]]. **To establish this claim, [*name of plaintiff*] must prove all of the following:**

- 1. That [*name of plaintiff*] was eligible for [family care/medical] leave;**
- 2. That [*name of plaintiff*] [[requested/took] [family care/medical] leave/[*other protected activity*]];**
- 3. That [*name of defendant*] [discharged/[*other adverse employment action*]] [*name of plaintiff*];**
- 4. That [*name of plaintiff*]'s [[request for/taking of] [family care/medical] leave/[*other protected activity*]] was a motivating reason for [discharging/[*other adverse employment action*]] [him/her];**
- 5. That [*name of plaintiff*] was harmed; and**
- 6. That [*name of defendant*]'s retaliatory conduct was a substantial factor in causing [*name of plaintiff*]'s harm.**

New September 2003

The instruction assumes that the defendant is plaintiff's present or former employer, and therefore it must be modified if the defendant is a prospective employer or other person.

■ *Government Code section 12945.2(l)* provides:

It shall be an unlawful employment practice for an employer to refuse to hire, or to discharge, fine, suspend, expel, or discriminate against, any individual because of any of the following:

(1) An individual's exercise of the right to family care and medical leave

(2) An individual's giving information or testimony as to his or her own family care and medical leave, or another person's family care and medical leave, in any inquiry or proceeding related to rights guaranteed under this section.

■ *Government Code section 12940(h)* provides that it is an unlawful employment practice "[f]or any employer, labor organization, employment agency, or person to discharge, expel, or otherwise discriminate against any person because the person has opposed any practices forbidden under [*Government Code sections 12900 through 12996*] or because the person has filed a complaint, testified, or assisted in any proceeding under this part."

■ "Guided by ... cases under the analogous federal statute, we conclude the elements of a cause of action for retaliation in violation of CFRA under the circumstances of this case are as follows: (1) the defendant was an employer covered by CFRA; (2) the plaintiff was an employee eligible to take CFRA leave; (3) the plaintiff exercised her right to take leave for a qualifying CFRA purpose; and (4) the plaintiff suffered an adverse employment action, such as termination, fine, or suspension, because of her exercise of her right to CFRA leave." (*Dudley v. Department of Transportation* (2001) 90 Cal.App.4th 255, 261 [108 Cal.Rptr.2d 739] .)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, §§ 943, 944

Chin et al., Cal. Practice Guide: Employment Litigation (The Rutter Group) PP 7:693, 7:702, 7:732, 7:746, 8:757, 12:1300-12:1301

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Other Employee Rights Statutes, §§ 4.18-4.20

1 Wilcox, California Employment Law, Ch. 8, *Leaves of Absence*, § 8.32 (Matthew Bender)

11 *California Forms of Pleading and Practice*, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.37[3][c] (Matthew Bender)

Publisher's Notes

There is no BAJI instruction on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Labor & Employment Law Collective Bargaining & Labor Relations Discipline, Layoff & Termination Labor & Employment Law Collective Bargaining & Labor Relations Unfair Labor Practices Interference With Protected Activities



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CHAPTER 26 California Judicial Council California Family Rights Act Instructions

4-26 California Forms of Jury Instruction CACI 2621-CACI 2699

Reserved for Future Use

CACI 2621Reserved for Future Use



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CHAPTER 26 California Judicial Council California Family Rights Act Instructions

4-26 California Forms of Jury Instruction CACI VF-2600

CACI VF-2600 Violation of CFRA Rights

We answer the questions submitted to us as follows:

1. Was [*name of plaintiff*] eligible for family care or medical leave?

_____ Yes _____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Did [*name of plaintiff*] [request/take] leave for the birth of [his/her] child or bonding with the child?

_____ Yes _____ No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Did [*name of plaintiff*] provide reasonable notice to [*name of defendant*] of [his/her] need for [family care/medical] leave?

_____ Yes _____ No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Did [name of defendant] [refuse to grant [name of plaintiff]'s request for [family care/medical leave] [refuse to return [name of plaintiff] to the same or a comparable job when [his/her] [family care/medical] leave ended] [other violation of CFRA rights]?

_____ Yes _____ No

If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. Was [name of defendant]'s [decision/conduct] a substantial factor in causing harm to [name of plaintiff]?

_____ Yes _____ No

If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. What are [name of plaintiff]'s damages?

[a. Past economic loss

[lost earnings..... \$_____].....

[lost profits..... \$_____].....

[medical expenses..... \$_____].....

[other past economic loss..... \$_____].....

..... **Total Past Economic Damages: \$_____]**

[b. Future economic loss

[lost earnings..... \$_____].....

[lost profits..... \$_____].....

[medical expenses..... \$_____].....

[other future economic loss..... \$_____].....

..... **Total Future Economic Damages: \$_____]**

[c. Past noneconomic loss, including [physical pain/mental suffering:]..... \$_____]

[d. Future noneconomic loss, including [physical pain/mental suffering:]..... \$_____]

..... **TOTAL \$_____**

Signed: _____
Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the [clerk/bailiff/judge].

New September 2003; Revised April 2007

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on *CACI No. 2600, Violation of CFRA Rights--Essential Factual Elements*.

Other factual situations can be substituted in question 2 as in element 2 of *CACI No. 2600*.

If specificity is not required, users do not have to itemize all the damages listed in question 6 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

This form may be modified if the jury is being given the discretion under *Civil Code section 3288* to award prejudgment interest on specific losses that occurred prior to judgment.

Publisher's Notes

There is no BAJI verdict form on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJurorsGeneral OverviewCivil ProcedureTrialsJury TrialsVerdictsGeneral OverviewCivil ProcedureTrialsJury TrialsVerdictsSpecial VerdictsGovernmentsCourtsGeneral OverviewHealthcare LawTreatmentPatient ConsentRight to Refuse TreatmentTortsDamagesCompensatory DamagesPain & SufferingEmotional & Mental DistressGeneral Overview



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CHAPTER 26 California Judicial Council California Family Rights Act Instructions

4-26 California Forms of Jury Instruction CACI VF-2601

CACI VF-2601 Violation of CFRA Rights--Affirmative Defense--Employment Would Have Ceased

We answer the questions submitted to us as follows:

1. Was [*name of plaintiff*] eligible for family care or medical leave?

_____ Yes _____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Did [*name of plaintiff*] [request/take] leave for the birth of [his/her] child or bonding with the child?

_____ Yes _____ No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Did [*name of plaintiff*] provide reasonable notice to [*name of defendant*] of [his/her] need for [family care/medical] leave?

_____ Yes _____ No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Did [name of defendant] refuse to return [name of plaintiff] to the same or to a comparable job when [his/her] [family care/medical] leave ended?

_____ Yes _____ No

If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. Would [name of defendant] have [discharged/laid off] [name of plaintiff] if [he/she] had continued to work during the leave period?

_____ Yes _____ No

If your answer to question 5 is no, then answer question 6. If you answered yes, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. Was [name of defendant]'s [decision/conduct] a substantial factor in causing harm to [name of plaintiff]?

_____ Yes _____ No

If your answer to question 6 is yes, then answer question 7. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

7. What are [name of plaintiff]'s damages?

[a. Past economic loss

[lost earnings..... \$_____].....

[lost profits..... \$_____].....

[medical expenses..... \$_____].....

[other past economic loss..... \$_____].....

..... **Total Past Economic Damages: \$_____]**

[b. Future economic loss

[lost earnings..... \$_____].....

[lost profits..... \$_____].....

[medical expenses..... \$_____].....

[other future economic loss..... \$_____].....

..... **Total Future Economic Damages: \$_____]**

[c. Past noneconomic loss, including [physical pain/mental suffering:]]..... \$_____]

[d. Future noneconomic loss, including [physical pain/mental suffering:]]..... \$_____]

..... **TOTAL \$_____**

Signed: _____
Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the [clerk/bailiff/judge].

New September 2003; Revised April 2007

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on *CACI No. 2600, Violation of CFRA Rights--Essential Factual Elements*, and *CACI No. 2612, Affirmative Defense--Employment Would Have Ceased*. If a different affirmative defense is at issue, this form should be tailored accordingly.

Other factual situations can be substituted in question 2 as in element 2 of *CACI No. 2600*.

If specificity is not required, users do not have to itemize all the damages listed in question 7 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

This form may be modified if the jury is being given the discretion under *Civil Code section 3288* to award prejudgment interest on specific losses that occurred prior to judgment.

Publisher's Notes

There is no BAJI verdict form on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJurorsGeneral OverviewCivil ProcedureTrialsJury TrialsVerdictsGeneral OverviewCivil ProcedureTrialsJury TrialsVerdictsSpecial VerdictsGovernmentsCourtsGeneral OverviewTortsDamagesCompensatory DamagesPain & SufferingEmotional & Mental DistressGeneral Overview



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CHAPTER 26 California Judicial Council California Family Rights Act Instructions

4-26 California Forms of Jury Instruction CACI VF-2602

CACI VF-2602 CFRA Rights Retaliation

We answer the questions submitted to us as follows:

1. Was [name of plaintiff] eligible for family care or medical leave?

_____ Yes _____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Did [name of plaintiff] [[request/take] [family care/medical] leave/[other protected activity]]?

_____ Yes _____ No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Did [name of defendant] [discharge/[other adverse employment action]] [name of plaintiff]?

_____ Yes _____ No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Was [name of plaintiff]'s [[request for/taking] [family care/medical] leave/[other protected activity]] a motivating reason for [name of defendant]'s decision to [discharge/[other adverse

employment action])?

_____ Yes _____ No

If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. Was [*name of defendant*]'s retaliatory conduct a substantial factor in causing harm to [*name of plaintiff*]?

_____ Yes _____ No

If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. What are [*name of plaintiff*]'s damages?

[a. Past economic loss

[lost earnings..... \$ _____].....

[lost profits..... \$ _____].....

[medical expenses..... \$ _____].....

[other past economic loss..... \$ _____].....

..... Total Past Economic Damages: \$ _____]

[b. Future economic loss

[lost earnings..... \$ _____].....

[lost profits..... \$ _____].....

[medical expenses..... \$ _____].....

[other future economic loss..... \$ _____].....

..... Total Future Economic Damages: \$ _____]

[c. Past noneconomic loss, including [physical pain/mental suffering:]..... \$ _____]

[d. Future noneconomic loss, including [physical pain/mental suffering:]..... \$ _____]

..... TOTAL \$ _____

Signed: _____
Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the [clerk/bailiff/judge].

New September 2003; Revised April 2007

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on *CACI No. 2620, CFRA Rights Retaliation--Essential Factual Elements*.

If specificity is not required, users do not have to itemize all the damages listed in question 6 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

This form may be modified if the jury is being given the discretion under *Civil Code section 3288* to award prejudgment interest on specific losses that occurred prior to judgment.

Publisher's Notes

There is no BAJI verdict form on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJurorsGeneral OverviewCivil ProcedureTrialsJury TrialsVerdictsGeneral OverviewCivil ProcedureTrialsJury TrialsVerdictsSpecial VerdictsGovernmentsCourtsGeneral OverviewTortsDamagesCompensatory DamagesPain & SufferingEmotional & Mental DistressGeneral Overview



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CHAPTER 26 California Judicial Council California Family Rights Act Instructions

4-26 California Forms of Jury Instruction CACI VF-2603-CACI VF-2699

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CACI VF-2603Reserved for Future Use



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CHAPTER 27 California Judicial Council Labor Code Actions Instructions

4-27 California Forms of Jury Instruction 27.syn

§ 27.syn Synopsis to Chapter 27: California Judicial Council Labor Code Actions Instructions

CACI 2700 Nonpayment of Wages--Essential Factual Elements (Lab. Code, §§ 201, 202, 218)

CACI 2701 Nonpayment of Minimum Wage--Essential Factual Elements (Lab. Code, § 1194)

CACI 2702 Nonpayment of Overtime Compensation--Essential Factual Elements (Lab. Code, § 1194)

CACI 2703 Nonpayment of Overtime Compensation--Proof of Overtime Hours Worked

CACI 2704 Damages--Waiting-Time Penalty for Nonpayment of Wages (Lab. Code, §§ 203, 218)

CACI 2705-CACI 2709 Reserved for Future Use

CACI 2710 Solicitation of Employee by Misrepresentation--Essential Factual Elements (Lab. Code, § 970)

CACI 2711 Preventing Subsequent Employment by Misrepresentation --Essential Factual Elements (Lab. Code, § 1050)

CACI 2712-CACI 2799 Reserved for Future Use

CACI VF-2700 Nonpayment of Wages (Lab. Code, §§ 201, 202, 218)

CACI VF-2701 Nonpayment of Minimum Wage (Lab. Code, § 1194)

CACI VF-2702 Nonpayment of Overtime Compensation (Lab. Code, § 1194)

CACI VF-2703 Waiting-Time Penalty for Nonpayment of Wages (Lab. Code, §§ 203, 218)

CACI VF-2704 Solicitation of Employee by Misrepresentation (Lab. Code, § 970)

CACI VF-2705 Preventing Subsequent Employment by Misrepresentation (Lab. Code, § 1050)

CACI VF-2706-CACI VF-2799 Reserved for Future Use



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CHAPTER 27 California Judicial Council Labor Code Actions Instructions

4-27 California Forms of Jury Instruction Scope

Scope

SCOPE

This chapter contains the California Judicial Council's "Labor Code Actions Series" of jury instructions [*CACI No. 2700 et seq.*]. The Judicial Council of California Civil Jury Instructions (CACI) included in this publication are the product of the Judicial Council of California Task Force on Jury Instructions, which are updated by the Judicial Council of California Advisory Committee on Civil Jury Instructions.

This chapter includes instructions on the following topics:

- Essential factual elements for causes of action for nonpayment of wages [*CACI No. 2700*], nonpayment of minimum wage [*CACI No. 2701*], and nonpayment of overtime compensation [*CACI No. 2702*].
- Proof of overtime hours worked [*CACI No. 2703*].
- Damages (waiting-time penalty for nonpayment of wages) [*CACI No. 2704*].
- Essential factual elements for causes of action for soliciting an employee by misrepresentation [*CACI No. 2710*] and preventing subsequent employment by misrepresentation [*CACI No. 2711*].

The Labor Code actions series also includes special verdict forms [*CACI Nos. VF-2700-VF-2705*].



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CHAPTER 27 California Judicial Council Labor Code Actions Instructions

4-27 California Forms of Jury Instruction CACI 2700

CACI 2700 Nonpayment of Wages--Essential Factual Elements (Lab. Code, §§ 201, 202, 218)

[*Name of plaintiff*] **claims that** [*name of defendant*] **owes [him/her] unpaid wages. To establish this claim, [*name of plaintiff*] must prove all of the following:**

- 1. That [*name of plaintiff*] performed work for [*name of defendant*];**
- 2. That [*name of defendant*] owes [*name of plaintiff*] wages under the terms of the employment;
and**
- 3. The amount of unpaid wages.**

"Wages" includes all amounts for labor performed by an employee, whether the amount is calculated by time, task, piece, commission, or some other method.

New September 2003; Revised December 2005

Directions for Use

This instruction is intended for use in a civil action for payment of wages. Depending on the allegations in the case, the definition of "wages" may be modified to include additional compensation, such as earned vacation, nondiscretionary bonuses, or severance pay.

The court may modify this instruction or write an appropriate instruction in cases where the defendant employer claims a permissible setoff from the plaintiff employee's unpaid wages. Under California Wage Orders, an employer may deduct from an employee's wages for cash shortage, breakage, or loss of equipment if the employer proves that this was caused by a dishonest or willful act or by the gross

negligence of the employee. (See, e.g., *Cal. Code Regs., tit. 8, § 11010, subd. 8.*)

If the defendant disputes the existence of an employment relationship, the court may consider modifying and giving CACI No. 3704, *Existence of "Employee" Status Disputed*, in the Vicarious Responsibility series.

Sources and Authority

Labor Code section 218 provides, in part: "Nothing in this article shall limit the right of any wage claimant to sue directly or through an assignee for any wages or penalty due"

- *Labor Code section 201* provides, in part: "If an employer discharges an employee, the wages earned and unpaid at the time of discharge are due and payable immediately."

- *Labor Code section 202* provides, in part: "If an employee not having a written contract for a definite period quits his or her employment, his or her wages shall become due and payable not later than 72 hours thereafter, unless the employee has given 72 hours previous notice of his or her intention to quit, in which case the employee is entitled to his or her wages at the time of quitting."

- *Labor Code section 200* defines "wages" as including "all amounts for labor performed by employees of every description, whether the amount is fixed or ascertained by the standard of time, task, piece, commission basis, or other method of calculation. [P] ... 'Labor' includes labor, work, or service whether rendered or performed under contract, subcontract, partnership, station plan, or other agreement if the labor to be paid for is performed personally by the person demanding payment."

- *Labor Code section 206(a)* provides: "In case of a dispute over wages, the employer shall pay, without condition and within the time set by this article, all wages, or parts thereof, conceded by him to be due, leaving to the employee all remedies he might otherwise be entitled to as to any balance claimed."

- *Labor Code section 221* provides: "It shall be unlawful for any employer to collect or receive from an employee any part of wages theretofore paid by said employer to said employee."

- "[*Labor Code*] section 221 has long been held to prohibit deductions from an employee's wages for cash shortages, breakage, loss of equipment, and other business losses that may result from the employee's simple negligence." (*Hudgins v. Neiman Marcus Group, Inc.* (1995) 34 Cal.App.4th 1109, 1118 [41 Cal.Rptr.2d 46] .)

- *Labor Code section 220* provides:

(a) Sections 201.3, 201.5, 201.7, 203.1, 203.5, 204, 204a, 204b, 204c, 204.1, 205, and 205.5 do not apply to the payment of wages of employees directly employed by the State of California. Except as provided in subdivision (b), all other employment is subject to these provisions.

(b) Sections 200 to 211, inclusive, and Sections 215 to 219, inclusive, do not apply to the payment of wages of employees directly employed by any county, incorporated city, or town or other municipal corporation. All other employments are subject to these provisions.

■ California Wage Orders provide: "No employer shall make any deduction from the wage or require any reimbursement from an employee for any cash shortage, breakage, or loss of equipment, unless it can be shown that the shortage, breakage, or loss is caused by a dishonest or willful act, or by the gross negligence of the employee." (*Cal. Code Regs.*, tit. 8, § 11010, subd. 8.)

■ *Labor Code* section 206.5 provides, in part: "An employer shall not require the execution of a release of a claim or right on account of wages due, or to become due, or made as an advance on wages to be earned, unless payment of those wages has been made."

■ *Labor Code* section 219(a) provides, in part: "[N]o provision of [*Labor Code* sections 200 through 243] can in any way be contravened or set aside by a private agreement, whether written, oral, or implied."

■ "[A]n employer is not entitled to a setoff of debts owing it by an employee against any wages due that employee." (*Barnhill v. Robert Saunders & Co.* (1981) 125 Cal.App.3d 1, 6 [177 Cal.Rptr. 803] .)

Secondary Sources

3 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment, §§ 398, 399

Chin et al., California Practice Guide: Employment Litigation (The Rutter Group) PP 1:22, 5:173, 11:121, 11:456, 11:470, 11:470.1, 11:499, 11:513, 11:545, 11:547, 11:955.2, 11:1459

1 Wilcox, *California Employment Law, Ch. 5, Administrative and Judicial Remedies Under Wage and Hour Laws*, § 5.40 (Matthew Bender)

21 *California Forms of Pleading and Practice, Ch. 250, Employment Law: Wage and Hour Disputes*, §§ 250.13[1][a], 250.40[3][a], 250.65 (Matthew Bender)

California Civil Practice: Employment Litigation (Thomson West) §§ 4:67, 4:75

Publisher's Notes

There is no BAJI instruction on this subject.

Labor Code § 230.2(s) was added by Stats. 2003, ch. 630 (SB 478). The new section requires that an employer allow an employee who is a crime victim or certain persons who are related to a crime victim, to be absent from work to attend judicial proceedings related to the crime. The statute also prohibits an employer from discharging or in any manner discriminating against an employee, in compensation or other terms, conditions, or privileges of employment, including, but not limited to, the loss of seniority or precedence, because the employee is absent from work pursuant to the new code section, and authorizes the employee to file a complaint with the Division of Labor Standards Enforcement.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Settlements General Overview Civil Procedure Settlements Releases From Liability General Overview Governments Local Governments Claims By & Against Labor & Employment Law General Overview Labor & Employment Law Collective Bargaining & Labor Relations Discipline, Layoff & Termination Labor & Employment Law Employment Relationships Employment Contracts Conditions & Terms Duration of Employment General Overview Labor & Employment Law Wage & Hour Laws Assignments, Deductions & Garnishments Labor &

Employment Law Wrongful Termination Breach of Contract Express Contracts Labor & Employment Law Wrongful
Termination Breach of Contract Implied Contracts



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California Forms of Jury Instruction

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CHAPTER 27 California Judicial Council Labor Code Actions Instructions

4-27 California Forms of Jury Instruction CACI 2701

CACI 2701 Nonpayment of Minimum Wage--Essential Factual Elements (Lab. Code, § 1194)

[*Name of plaintiff*] **claims that [*name of defendant*] owes [him/her] the difference between the wages paid by [*name of defendant*] and the wages [*name of plaintiff*] should have been paid according to the minimum wage rate required by state law. To establish this claim, [*name of plaintiff*] must prove all of the following:**

- 1. That [*name of plaintiff*] performed work for [*name of defendant*];**
- 2. That [*name of plaintiff*] was paid less than the minimum wage by [*name of defendant*] for some or all hours worked; and**
- 3. The amount of wages owed.**

The minimum wage for labor performed from [*beginning date*] to [*ending date*] was [*minimum wage rate*] per hour.

An employee is entitled to be paid the legal minimum wage rate even if he or she agrees to work for a lower wage.

New September 2003; Revised June 2005

The court must determine the prevailing minimum wage rate from applicable state or federal law. (See, e.g., *Cal. Code Regs., tit. 8, § 11000.*) The jury must be instructed accordingly.

The advisory committee has chosen not to write model instructions for the numerous fact-specific affirmative defenses to minimum wage claims. The California Labor Code and the IWC's wage orders

provide that certain employees are exempt from minimum wage requirements (for example, outside salespersons; see *Lab. Code*, § 1171), and that under certain circumstances employers may claim credits for meals and lodging against minimum wage pay (see *Cal. Code Regs.*, tit. 8, § 11000, subd. 3, § 11010, subd. 10, and § 11150, subd. 10(B)). The assertion of an exemption from wage and hour laws is an affirmative defense. (See generally *Ramirez v. Yosemite Water Co.* (1999) 20 Cal.4th 785, 794 [85 Cal.Rptr.2d 844, 978 P.2d 2] .)

- *Labor Code* section 1194(a) provides: "Notwithstanding any agreement to work for a lesser wage, any employee receiving less than the legal minimum wage or the legal overtime compensation applicable to the employee is entitled to recover in a civil action the unpaid balance of the full amount of this minimum wage or overtime compensation, including interest thereon, reasonable attorney's fees, and costs of suit."

- *Labor Code* section 1194.2 provides, in part:

(a) In any action under ... Section 1194 to recover wages because of the payment of a wage less than the minimum wage, ... an employee shall be entitled to recover liquidated damages in an amount equal to the wages unlawfully unpaid and interest thereon. Nothing in this subdivision shall be construed to authorize the recovery of liquidated damages for failure to pay overtime compensation.

(b) Notwithstanding subdivision (a), if the employer demonstrates to the satisfaction of the court that the act or omission giving rise to the action was in good faith and that the employer had reasonable grounds for believing that the act or omission was not a violation of any provision of the Labor Code relating to minimum wage, or an order of the commission, the court may, in its discretion, refuse to award liquidated damages or award any amount of liquidated damages not exceeding the amount specified in subdivision (a).

- *Labor Code* section 200 defines "wages" as including "all amounts for labor performed by employees of every description, whether the amount is fixed or ascertained by the standard of time, task, piece, commission basis, or other method of calculation. ... [P] 'Labor' includes labor, work, or service whether rendered or performed under contract, subcontract, partnership, station plan, or other agreement if the labor to be paid for is performed personally by the person demanding payment."

- *Labor Code* section 206(a) provides: "In case of a dispute over wages, the employer shall pay, without condition and within the time set by this article, all wages, or parts thereof, conceded by him to be due, leaving to the employee all remedies he might otherwise be entitled to as to any balance claimed."

- *Labor Code* section 1193.6(a) provides, in part: "The department or division may, with or without the consent of the employee or employees affected, commence and prosecute a civil action to recover unpaid minimum wages or unpaid overtime compensation. ... The consent of any employee to the bringing of this action shall constitute a waiver on the part of the employee of his or her cause of action under Section 1194 unless the action is dismissed without prejudice by the department or the division."

- *Labor Code* section 1173 provides, in part: "It is the continuing duty of the Industrial Welfare Commission ... to ascertain the wages paid to all employees in this state, [and] to ascertain the hours and conditions of labor and employment in the various occupations, trades, and industries in which employees are employed in this state. ... [P] The commission shall conduct a full review of the adequacy of the minimum wage at least once every two years."

Secondary Sources

3 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment, §§ 382-384, 398, 399

Chin et al., California Practice Guide: Employment Litigation (The Rutter Group) PP 11:121, 11:456, 11:470.1, 11:499, 11:955.2, 11:1342, 11:1478.5, 17:661, 19:795

1 Wilcox, California Employment Law, Ch. 2, *Minimum Wages*, §§ 2.02[1], 2.03[1], 2.04[1], 2.05[1], 2.20[1], 2.21[1]; Ch. 5, *Administrative and Judicial Remedies Under Wage and Hour Laws*, § 5.72 (Matthew Bender)

21 *California Forms of Pleading and Practice*, Ch. 250, *Employment Law: Wage and Hour Disputes*, §§ 250.13[1][a], 250.14[d] (Matthew Bender)

California Civil Practice: Employment Litigation (Thomson West) §§ 4:67, 4:76

Publisher's Notes

There is no BAJI instruction on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Criminal Law & Procedure Trials Judicial Discretion Criminal Law & Procedure Jury Instructions Requests to Charge Labor & Employment Law Employment Relationships Employment Contracts Conditions & Terms Compensation Labor & Employment Law Wage & Hour Laws General Overview Labor & Employment Law Wage & Hour Laws Coverage & Definitions Overtime & Work Period Labor & Employment Law Wage & Hour Laws Defenses & Exemptions General Overview Labor & Employment Law Wage & Hour Laws Defenses & Exemptions Good Faith Defense Labor & Employment Law Wage & Hour Laws Remedies Costs & Attorney Fees Workers' Compensation & SSDI Coverage Employment Relationships Governmental Employees



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California Forms of Jury Instruction

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CHAPTER 27 California Judicial Council Labor Code Actions Instructions

4-27 California Forms of Jury Instruction CACI 2702

CACI 2702 Nonpayment of Overtime Compensation--Essential Factual Elements (Lab. Code, § 1194)

[*Name of plaintiff*] **claims that** [*name of defendant*] **owes [him/her] overtime pay as required by state law. To establish this claim, [*name of plaintiff*] must prove all of the following:**

- 1. That [*name of plaintiff*] performed work for [*name of defendant*];**
- 2. That [*name of plaintiff*] worked overtime hours;**
- 3. That [*name of plaintiff*] was [not paid/paid less than the overtime rate] for some or all of the overtime hours worked; and**
- 4. The amount of overtime pay owed.**

Overtime hours are the hours worked longer than [*insert applicable definition(s) of overtime hours*].

Overtime pay is [*insert applicable formula*].

An employee is entitled to be paid the legal overtime pay rate even if he or she agrees to work for a lower rate.

New September 2003; Revised June 2005

The court must determine the overtime compensation rate under applicable state or federal law. (See, e.g., *Lab. Code*, §§ 1173, 1182; *Cal. Code Regs.*, tit. 8, § 11000, subd. 2, § 11010, subd. 4(A), and § 11150, subd. 4(A).) The jury must be instructed accordingly. It is possible that the overtime rate will be different over different periods of time.

The assertion of an employee's exemption from overtime laws is an affirmative defense. (*Ramirez v. Yosemite Water Co.* (1999) 20 Cal.4th 785, 794 [85 Cal.Rptr.2d 844, 978 P.2d 2] .) For example, outside salespersons are exempt from overtime requirements (see *Lab. Code*, § 1171). An employee's exemption from overtime laws presents a mixed question of law and fact. (*Id.*) Because of the case-specific nature of exemptions to overtime laws, the advisory committee has chosen not to write model instructions for these affirmative defenses.

- *Labor Code* section 1194(a) provides: "Notwithstanding any agreement to work for a lesser wage, any employee receiving less than the legal minimum wage or the legal overtime compensation applicable to the employee is entitled to recover in a civil action the unpaid balance of the full amount of this minimum wage or overtime compensation, including interest thereon, reasonable attorney's fees, and costs of suit."

- *Labor Code* section 1194.2 provides, in part:

(a) In any action under ... Section 1194 to recover wages because of the payment of a wage less than the minimum wage, ... an employee shall be entitled to recover liquidated damages in an amount equal to the wages unlawfully unpaid and interest thereon. Nothing in this subdivision shall be construed to authorize the recovery of liquidated damages for failure to pay overtime compensation.

(b) Notwithstanding subdivision (a), if the employer demonstrates to the satisfaction of the court that the act or omission giving rise to the action was in good faith and that the employer had reasonable grounds for believing that the act or omission was not a violation of any provision of the Labor Code relating to minimum wage, or an order of the commission, the court may, in its discretion, refuse to award liquidated damages or award any amount of liquidated damages not exceeding the amount specified in subdivision (a).

- *Labor Code* section 200 defines "wages" as including "all amounts for labor performed by employees of every description, whether the amount is fixed or ascertained by the standard of time, task, piece, commission basis, or other method of calculation. ... [P] 'Labor' includes labor, work, or service whether rendered or performed under contract, subcontract, partnership, station plan, or other agreement if the labor to be paid for is performed personally by the person demanding payment."

- "Absent an *explicit, mutual* wage agreement, a fixed salary does not serve to compensate an employee for the number of hours worked under statutory overtime requirements. ... [P] Since there was no evidence of a wage agreement between the parties that appellant's ... per week compensation represented the payment of minimum wage or included remuneration for hours worked in excess of 40 hours per week, ... appellant incurred damages of uncompensated overtime. ..." (*Hernandez v. Mendoza* (1988) 199 Cal.App.3d 721, 725-726 [245 Cal.Rptr. 36] .)

- "[T]he assertion of an exemption from the overtime laws is considered to be an affirmative defense, and therefore the employer bears the burden of proving the employee's exemption." (*Ramirez v. Yosemite Water Co.* (1999) 20 Cal.4th 785, 794-795 [85 Cal.Rptr.2d 844, 978 P.2d 2] .)

- "The question whether [plaintiff] was an outside salesperson within the meaning of applicable statutes and regulations is ... a mixed question of law and fact." (*Ramirez, supra*, 20 Cal.4th at p. 794 .)

- *Labor Code* section 206(a) provides: "In case of a dispute over wages, the employer shall pay, without condition

and within the time set by this article, all wages, or parts thereof, conceded by him to be due, leaving to the employee all remedies he might otherwise be entitled to as to any balance claimed."

■ *Labor Code section 1193.6(a)* provides, in part: "The department or division may, with or without the consent of the employee or employees affected, commence and prosecute a civil action to recover unpaid minimum wages or unpaid overtime compensation. ... The consent of any employee to the bringing of this action shall constitute a waiver on the part of the employee of his or her cause of action under Section 1194 unless the action is dismissed without prejudice by the department or the division."

Secondary Sources

3 Witkin, *Summary of California Law* (10th ed. 2005) Agency and Employment, §§ 382-384, 398, 399

Chin et al., *California Practice Guide: Employment Litigation* (The Rutter Group) PP 11:121, 11:456, 11:470.1, 11:499, 11:730, 11:955.2, 11:1342, 11:1478.5, 17:661, 19:795

1 Wilcox, *California Employment Law*, Ch. 3, *Overtime Compensation and Regulation of Hours Worked*, §§ 3.03[1], 3.04[1], 3.07[1], 3.08[1], 3.09[1]; Ch. 5, *Administrative and Judicial Remedies Under Wage and Hour Laws*, § 5.72 (Matthew Bender)

21 *California Forms of Pleading and Practice*, Ch. 250, *Employment Law: Wage and Hour Disputes* (Matthew Bender)

California Civil Practice: Employment Litigation (Thomson West) §§ 4:67, 4:76

Publisher's Notes

There is no BAJI instruction on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Criminal Law & Procedure
Jury Instructions
Requests to Charge
Labor & Employment Law
Employment Relationships
Employment Contracts
Conditions & Terms
Compensation
Labor & Employment Law
Wage & Hour Laws
Coverage & Definitions
Overtime & Work Period
Labor & Employment Law
Wage & Hour Laws
Defenses & Exemptions
General Overview
Labor & Employment Law
Wage & Hour Laws
Defenses & Exemptions
Good Faith Defense
Labor & Employment Law
Wage & Hour Laws
Remedies
Costs & Attorney Fees



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California Forms of Jury Instruction

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CHAPTER 27 California Judicial Council Labor Code Actions Instructions

4-27 California Forms of Jury Instruction CACI 2703

CACI 2703 Nonpayment of Overtime Compensation--Proof of Overtime Hours Worked

State law requires California employers to keep payroll records showing the hours worked by and wages paid to employees.

If [name of defendant] did not keep accurate records of the hours worked by [name of plaintiff], then [name of plaintiff] may prove the number of overtime hours worked by making a reasonable estimate of those hours.

In determining the amount of overtime hours worked, you may consider [name of plaintiff]'s estimate of the number of overtime hours worked and any evidence presented by [name of defendant] that [name of plaintiff]'s estimate is unreasonable.

New September 2003; Revised June 2005, December 2005

This instruction is intended for use when the plaintiff is unable to provide evidence of the precise number of hours worked because of the employer's failure to keep accurate payroll records. (See *Hernandez v. Mendoza* (1988) 199 Cal.App.3d 721, 727-728 [245 Cal.Rptr. 36] .)

- *Labor Code section 1194(a)* provides: "Notwithstanding any agreement to work for a lesser wage, any employee receiving less than ... the legal overtime compensation applicable to the employee is entitled to recover in a civil action the unpaid balance of the full amount of this ... overtime compensation, including interest thereon, reasonable attorney's fees, and costs of suit."

- "Although the employee has the burden of proving that he performed work for which he was not compensated, public policy prohibits making that burden an impossible hurdle for the employee. ... 'In

such situation ... an employee has carried out his burden if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. The burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence. If the employer fails to produce such evidence, the court may then award damages to the employee, even though the result be only approximate.' " (*Hernandez, supra*, 199 Cal.App.3d at p. 727 , internal citation omitted.)

■ "It is the trier of fact's duty to draw whatever reasonable inferences it can from the employee's evidence where the employer cannot provide accurate information." (*Hernandez, supra*, 199 Cal.App.3d at p. 728 , internal citation omitted.)

■ *Labor Code section 1174(d)* provides: "Every person employing labor in this state shall ... [k]eep ... payroll records showing the hours worked daily by and the wages paid to, and the number of piece-rate units earned by and any applicable piece rate paid to, employees employed at the respective plants or establishments. These records shall be kept in accordance with rules established for this purpose by the commission, but in any case shall be kept on file for not less than two years."

■ "Absent an explicit, mutual wage agreement, a fixed salary does not serve to compensate an employee for the number of hours worked under statutory overtime requirements. ...[P] Since there was no evidence of a wage agreement between the parties that appellant's ... per week compensation represented the payment of minimum wage or included remuneration for hours worked in excess of 40 hours per week, ... appellant incurred damages of uncompensated overtime." (*Hernandez, supra*, 199 Cal.App.3d at pp. 725-726 , internal citations omitted.)

Secondary Sources

Chin et al., California Practice Guide: Employment Litigation (The Rutter Group) PP 11:445, 11:955.2, 11:1478.5, 17:661, 19:795

1 Wilcox, California Employment Law, Ch. 5, *Administrative and Judicial Remedies Under Wage and Hour Laws*, § 5.72[1] (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 250, *Employment Law: Wage and Hour Disputes* (Matthew Bender)

Publisher's Notes

There is no BAJI instruction on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Labor & Employment Law Employment Relationships Employment Contracts Conditions & Terms Compensation Labor & Employment Law Posting & Recordkeeping Labor & Employment Law Wage & Hour Laws Coverage & Definitions Overtime & Work Period Labor & Employment Law Wage & Hour Laws Recordkeeping Requirements



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California Forms of Jury Instruction

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CHAPTER 27 California Judicial Council Labor Code Actions Instructions

4-27 California Forms of Jury Instruction CACI 2704

CACI 2704 Damages--Waiting-Time Penalty for Nonpayment of Wages (Lab. Code, §§ 203, 218)

If you decide that [name of plaintiff] has proved [his/her] claim against [name of defendant] for [unpaid wages/[insert other claim]], then [name of plaintiff] may be entitled to receive an award of a civil penalty based on the number of days [name of defendant] failed to pay [his/her] wages when due.

To recover the civil penalty, [name of plaintiff] must prove all of the following:

- 1. The date on which [name of plaintiff]'s employment ended;**
- 2. [That [name of defendant] failed to pay all wages due by [insert date];]**
- [or]*
- [The date on which [name of defendant] paid [name of plaintiff] all wages due;]**
- 3. [Name of plaintiff]'s daily wage rate at the time [his/her] employment with [name of defendant] ended; and**
- 4. That [name of defendant] willfully failed to pay these wages.**

The term "wages" includes all amounts for labor performed by an employee, whether the amount is calculated by time, task, piece, commission, or some other method.

The term "willfully" means that the employer intentionally failed or refused to pay the wages.

New September 2003; Revised June 2005

Directions for Use

This instruction is intended to instruct the jury on factual determinations required to assist the court in calculating waiting time penalties under *Labor Code section 203*. The court must determine when final wages are due based on the circumstances of the case and applicable law--see *Labor Code sections 201* and *202*. If there is a factual dispute, for example, whether plaintiff gave advance notice of his or her intention to quit, or whether payment of final wages by mail was authorized by plaintiff, the court may be required to give further instruction to the jury. Final wages generally are due on the day an employee is discharged by the employer, but are not due for 72 hours if an employee quits without notice (see *Lab. Code, §§ 201, 201.5, 201.7, 202, 205.5*).

The definition of "wages" may be deleted as redundant if it is redundant with other instructions.

Sources and Authority

- *Labor Code section 203* provides: "If an employer willfully fails to pay, without abatement or reduction, in accordance with Sections 201, 201.3, 201.5, 202, and 205.5, any wages of an employee who is discharged or who quits, the wages of the employee shall continue as a penalty from the due date thereof at the same rate until paid or until an action therefor is commenced; but the wages shall not continue for more than 30 days. An employee who secretes or absents himself or herself to avoid payment to him or her, or who refuses to receive the payment when fully tendered to him or her, including any penalty then accrued under this section, is not entitled to any benefit under this section for the time during which he or she so avoids payment. Suit may be filed for these penalties at any time before the expiration of the statute of limitations on an action for the wages from which the penalties arise."

- *Labor Code section 218* provides, in part: "Nothing in this article shall limit the right of any wage claimant to sue directly or through an assignee for any wages or penalty due him under this article."

- *Labor Code section 201* provides, in part: "If an employer discharges an employee, the wages earned and unpaid at the time of discharge are due and payable immediately."

- *Labor Code section 202* provides: "If an employee not having a written contract for a definite period quits his or her employment, his or her wages shall become due and payable not later than 72 hours thereafter, unless the employee has given 72 hours previous notice of his or her intention to quit, in which case the employee is entitled to his or her wages at the time of quitting. Notwithstanding any other provision of law, an employee who quits without providing a 72-hour notice shall be entitled to receive payment by mail if he or she so requests and designates a mailing address. The date of the mailing shall constitute the date of payment for purposes of the requirement to provide payment within 72 hours of the notice of quitting."

- *Labor Code section 200* defines "wages" as including "all amounts for labor performed by employees of every description, whether the amount is fixed or ascertained by the standard of time, task, piece, commission basis, or other method of calculation [P] 'Labor' includes labor, work, or service whether rendered or performed under contract, subcontract, partnership, station plan, or other agreement if the labor to be paid for is performed personally by the person demanding payment."

■ *Labor Code section 227.3* provides, in part: "Unless otherwise provided by a collective-bargaining agreement, whenever a contract of employment or employer policy provides for paid vacations, and an employee is terminated without having taken off his vested vacation time, all vested vacation shall be paid to him as wages at his final rate in accordance with such contract of employment or employer policy respecting eligibility or time served"

■ *Labor Code section 206(a)* provides: "In case of a dispute over wages, the employer shall pay, without condition and within the time set by this article, all wages, or parts thereof, conceded by him to be due, leaving to the employee all remedies he might otherwise be entitled to as to any balance claimed."

■ "The purpose of section 203 is to compel the prompt payment of earned wages; the section is to be given a reasonable but strict interpretation. [P] ... [T]o be at fault within the meaning of the statute, the employer's refusal to pay need not be based on a deliberate evil purpose to defraud workmen of wages which the employer knows to be due. As used in section 203, 'willful' merely means that the employer intentionally failed or refused to perform an act *which was required to be done*." (*Barnhill v. Robert Saunders & Co. (1981) 125 Cal.App.3d 1, 7 [177 Cal.Rptr. 803]* , original italics.)

■ "A proper reading of section 203 mandates a penalty equivalent to the employee's daily wages for each day he or she remained unpaid up to a total of 30 days. ... [P] [T]he critical computation required by section 203 is the calculation of a daily wage rate, which can then be multiplied by the number of days of nonpayment, up to 30 days." (*Mamika v. Barca (1998) 68 Cal.App.4th 487, 493 [80 Cal.Rptr.2d 175]* .)

■ "'A tender of the wages due at the time of the discharge, if properly made and in the proper amount, terminates the further accumulation of penalty, but it does not preclude the employee from recovering the penalty already accrued.'" (*Oppenheimer v. Sunkist Growers, Inc. (1957) 153 Cal.App.2d Supp. 897, 899 [315 P.2d 116]* , citation omitted.)

Secondary Sources

3 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment, §§ 398, 399

Chin et al., California Practice Guide: Employment Litigation (The Rutter Group) PP 1:22, 5:173, 11:121, 11:456, 11:470.1, 11:499, 11:510, 11:513-11:515, 11:1458-11:1459, 11:1461-11:1461.1, 12:2331-11:2332, 17:148

1 Wilcox, *California Employment Law, Ch. 5, Administrative and Judicial Remedies Under Wage and Hour Laws*, § 5.40 (Matthew Bender)

21 *California Forms of Pleading and Practice, Ch. 250, Employment Law: Wage and Hour Disputes*, § 250.16[2][d] (Matthew Bender)

California Civil Practice: Employment Litigation (Thomson West) §§ 4:67, 4:74

Publisher's Notes

There is no BAJI instruction on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Contracts Law Performance Tender &

Delivery Governments Legislation Statutes of Limitations General Overview Labor & Employment Law Collective Bargaining & Labor Relations Discipline, Layoff & Termination Labor & Employment Law Employment Relationships At-Will Employment Employers Labor & Employment Law Employment Relationships Employment Contracts Conditions & Terms Duration of Employment General Overview Labor & Employment Law Wage & Hour Laws General Overview Labor & Employment Law Wage & Hour Laws Coverage & Definitions Holiday, Sick & Vacation Pay Labor & Employment Law Wrongful Termination Breach of Contract General Overview Labor & Employment Law Wrongful Termination Breach of Contract Employer Handbooks Labor & Employment Law Wrongful Termination Breach of Contract Express Contracts



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California Forms of Jury Instruction

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CHAPTER 27 California Judicial Council Labor Code Actions Instructions

4-27 California Forms of Jury Instruction CACI 2705-CACI 2709

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CACI 2705Reserved for Future Use



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California Forms of Jury Instruction

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CHAPTER 27 California Judicial Council Labor Code Actions Instructions

4-27 California Forms of Jury Instruction CACI 2710

CACI 2710 Solicitation of Employee by Misrepresentation--Essential Factual Elements (Lab. Code, § 970)

[*Name of plaintiff*] claims that [*name of defendant*] made [a] false representation[s] about work to persuade [him/her] to change [his/her] residence. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. That [*name of defendant*] made [a] representation[s] to [*name of plaintiff*] about [*insert one or more of the following:*]

[the kind, character, or existence of work;]

[the length of time work would last;]

[the compensation for work;]

[the sanitary or housing conditions relating to work;]

[the existence or nonexistence of any pending strike, lockout, or other labor dispute affecting work;]

2. That [*name of defendant*]'s representation(s) [was/were] not true;

3. That [*name of defendant*] knew when the representation[s] [was/were] made that [it/they] [was/were] not true;

4. That [*name of defendant*] intended that [*name of plaintiff*] rely on the representation[s];

5. That [name of plaintiff] reasonably relied on [name of defendant]'s representation[s] and changed [his/her] residence for the purpose of working for [name of defendant];

6. That [name of plaintiff] was harmed; and

7. That [name of plaintiff]'s reliance on [name of defendant]'s representation(s) was a substantial factor in causing [his/her] harm.

New September 2003

If the statutory action under *Labor Code section 970* is applicable, do not give the common-law fraud instruction. For other jury instructions regarding opinions as statements of fact, misrepresentations to third parties, reliance, and reasonable reliance, see *CACI Nos. 1904 through 1908* in the Fraud or Deceit series.

■ *Labor Code section 970* provides:

No person, or agent or officer thereof, directly or indirectly, shall influence, persuade, or engage any person to change from one place to another in this State or from any place outside to any place within the State, or from any place within the State to any place outside, for the purpose of working in any branch of labor, through or by means of knowingly false representations, whether spoken, written, or advertised in printed form, concerning either:

(a) The kind, character, or existence of such work;

(b) The length of time such work will last, or the compensation therefor;

(c) The sanitary or housing conditions relating to or surrounding the work;

(d) The existence or nonexistence of any strike, lockout, or other labor dispute affecting it and pending between the proposed employer and the persons then or last engaged in the performance of the labor for which the employee is sought.

■ *Labor Code section 971* provides: "Any person, or agent or officer thereof, who violates Section 970 is guilty of a misdemeanor punishable by a fine of not less than fifty dollars (\$50) nor more than one thousand dollars (\$1,000) or imprisonment for not more than six months or both."

■ *Labor Code section 972* provides, in part: "[A]ny person, or agent or officer thereof who violates any provision of Section 970 is liable to the party aggrieved, in a civil action, for double damages resulting from such misrepresentations. Such civil action may be brought by an aggrieved person or his assigns or successors in interest, without first establishing any criminal liability."

■ "[S]ection 970, although applied ... to other employment situations, was enacted to protect migrant workers from the abuses heaped upon them by unscrupulous employers and potential employers, especially involving false promises made to induce them to move in the first instance." (*Tyco Industries, Inc. v. Superior Court* (1985) 164 Cal.App.3d 148, 155 [211 Cal.Rptr. 540] , internal citation and italics omitted.)

■ "To establish ... a claim [for violation of section 970], [plaintiff] had to prove that defendants made a knowingly

false representation regarding the length of her employment ... with the intent to persuade her to move there from another place to take the position." (*Finch v. Brenda Raceway Corp.* (1994) 22 Cal.App.4th 547, 553 [27 Cal.Rptr.2d 531] .)

■ "[Section 970] requires the employee to demonstrate that his or her employer made 'knowingly false representations' concerning the nature, duration or conditions of employment. ... [P] Moreover, under the statute an employee must establish that the employer induced him or her to relocate or change residences." (*Eisenberg v. Alameda Newspapers.* (1999) 74 Cal.App.4th 1359, 1392 [88 Cal.Rptr.2d 802].)

■ "The words 'to change from one place to another' import temporary as well as permanent relocation of residence, as contrasted with a mere change in the site of employment. The quantitative fact that the change of residence was to be only for two weeks rather than for a longer period would not appear to affect the qualitative misrepresentations, nor does it render the statute inapplicable." (*Collins v. Rocha* (1972) 7 Cal.3d 232, 239-240 [102 Cal.Rptr. 1, 497 P.2d 225] .)

■ "The construction of a statute and whether it is applicable to a factual situation present solely questions of law. Although the trial court erred in determining that the *Labor Code* sections 970 and 972 were not applicable and hence the issue of double damages was not submitted to the jury, the record reflects that the jury specifically found that [defendant] made false representations to induce [plaintiff] to accept the position in California. Given the express findings by the jury, it is unnecessary to remand this case for a retrial on the limited issue of damages. ... We therefore modify the judgment to reflect double damages in accordance with *Labor Code* section 972." (*Seubert v. McKesson Corp.* (1990) 223 Cal.App.3d 1514, 1522-1523 [273 Cal.Rptr. 296] , internal citation omitted, overruled on other grounds, *Dore v. Arnold Worldwide, Inc.* (2006) 39 Cal.4th 384, 389 [46 Cal.Rptr.3d 668, 139 P.3d 56].)

Secondary Sources

3 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment, § 450

Chin et al., California Practice Guide: Employment Litigation (The Rutter Group) PP 4:351, 5:532, 5:540, 5:892.10, 16:493

1 Wrongful Employment Termination Practice (Cont.Ed.Bar) Other Employee Rights Statutes, § 4.51

4 Wilcox, California Employment Law, Ch. 63, *Causes of Action Related to Wrongful Termination*, § 63.06[1] (Matthew Bender)

21 *California Forms of Pleading and Practice*, Ch. 250, *Employment Law: Wage and Hour Disputes*, §§ 249.30, 249.80 (Matthew Bender)

California Civil Practice: Employment Litigation (Thomson West) § 6:27

Publisher's Notes

There is no BAJI instruction on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate Law Agency Relationships Terminations General Overview Criminal Law & Procedure Jury Instructions Particular Instructions General Overview Criminal Law & Procedure Sentencing Fines



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California Forms of Jury Instruction

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CHAPTER 27 California Judicial Council Labor Code Actions Instructions

4-27 California Forms of Jury Instruction CACI 2711

CACI 2711 Preventing Subsequent Employment by Misrepresentation --Essential Factual Elements (Lab. Code, § 1050)

[*Name of plaintiff*] claims that [*name of defendant*] made [a] false representation[s] to prevent [him/her] from obtaining employment. To establish this claim, [*name of plaintiff*] must prove all of the following:

- 1. That after [*name of plaintiff*]'s employment with [*name of defendant*] ended, [*name of defendant*] made [a] representation(s) to [*name of prospective employer*] about [*name of plaintiff*];**
- 2. That [*name of defendant*]'s representation[s] [was/were] not true;**
- 3. That [*name of defendant*] knew the representation[s] [was/were] not true when [he/she/it] made [it/them];**
- 4. That [*name of defendant*] made the representation[s] with the intent of preventing [*name of plaintiff*] from obtaining employment;**
- 5. That [*name of plaintiff*] was harmed; and**
- 6. That [*name of defendant*]'s conduct was a substantial factor in causing [*name of plaintiff*]'s harm.**

New September 2003

For jury instructions regarding opinions as statements of fact and the definition of an important fact, see CACI Nos. 1904 and 1905 in the Fraud or Deceit series. For an instruction on the qualified privilege

pursuant to *Civil Code section 47(c)*, see *CACI No. 1723* in the Defamation series.

It is unclear whether elements 3 and 4 are necessary elements to this cause of action.

- *Labor Code section 1050* provides: "Any person, or agent or officer thereof, who, after having discharged an employee from the service of such person or after an employee has voluntarily left such service, by any misrepresentation prevents or attempts to prevent the former employee from obtaining employment, is guilty of a misdemeanor."

- *Labor Code section 1052* provides: "Any person who knowingly causes, suffers, or permits an agent, superintendent, manager, or employee in his employ to commit a violation of section[] 1050 ... or who fails to take all reasonable steps within his power to prevent such violation is guilty of a misdemeanor."

- *Labor Code section 1054* provides, in part: "[A]ny person or agent or officer thereof, who violates any provision of sections 1050 to 1052, inclusive, is liable to the party aggrieved, in a civil action, for treble damages. Such civil action may be brought by such aggrieved person or his assigns, or successors in interest, without first establishing any criminal liability under this article."

- *Labor Code section 1053* provides: "Nothing in this chapter shall prevent an employer or an agent, employee, superintendent or manager thereof from furnishing, upon special request therefor, a truthful statement concerning the reason for the discharge of an employee or why an employee voluntarily left the service of the employer. If such statement furnishes any mark, sign, or other means conveying information different from that expressed by words therein, such fact, or the fact that such statement or other means of furnishing information was given without a special request therefor is prima facie evidence of a violation of sections 1050 to 1053."

- "Section 1054 provides for a damage remedy for the party aggrieved by a violation of the section 1050 prohibition against an employer blacklisting a former employee. It is patent that the aggrieved party must be the blacklisted employee, not a union, since the latter can neither be fired nor quit." (*Service Employees Internat. Union, Local 193, AFL-CIO v. Hollywood Park, Inc.* (1983) 149 Cal.App.3d 745, 765 [197 Cal.Rptr. 316] .)

- "*Labor Code section 1050* applies only to misrepresentations made to prospective employers other than the defendant. [P] ... [T]he Legislature intended that *Labor Code section 1050* would apply only to misstatements to other potential employers, not to misstatements made internally by employees of the party to be charged." (*Kelly v. General Telephone Co.* (1982) 136 Cal.App.3d 278, 288-289 [186 Cal.Rptr. 184] .)

- A communication without malice solicited by a prospective employer from a former employer would be privileged in accordance with *Civil Code section 47(c)*. (See *O'Shea v. General Telephone Co.* (1987) 193 Cal.App.3d 1040, 1047 [238 Cal.Rptr. 715] .)

- *Civil Code section 47(c)* provides, in part, that a privileged publication is one made "[i]n a communication, without malice, to a person interested therein. ... This ... includes a communication concerning the job performance or qualifications of an applicant for employment, based upon credible evidence, made without malice, by a current or former employer of the applicant to, and upon request of, [the prospective employer]. This subdivision shall not apply to a communication concerning the speech or activities of an applicant for employment if the speech or activities are constitutionally protected, or otherwise protected by *Section 527.3 of the Code of Civil Procedure* or any other provision of law."

■ "We ... recognize that '[t]he primary purpose of punitive damages is to punish the defendant and make an example of him.' Since this purpose is the same as the treble damages authorized by *Labor Code section 1054*, we do not sanction a double recovery for the plaintiff. In the new trial on damages, the jury should be instructed on the subject of punitive damages based on malice or oppression. Any verdict finding compensatory damages must be trebled by the court. Plaintiff may then elect to have judgment entered in an amount which reflects either the statutory trebling, or the compensatory and punitive damages." (*Marshall v. Brown* (1983) 141 Cal.App.3d 408, 419 [190 Cal.Rptr. 392] .)

Secondary Sources

3 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment, §§ 284, 349, 352, 354-359, 381, 413, 417

Chin et al., California Practice Guide: Employment Litigation (The Rutter Group) PP 4:351, 5:532, 5:540, 5:892.10, 16:493

4 Wilcox, California Employment Law, Ch. 63, *Causes of Action Related to Wrongful Termination*, § 63.06[2] (Matthew Bender)

21 *California Forms of Pleading and Practice*, Ch. 250, *Employment Law: Wage and Hour Disputes*, §§ 249.22[3][a], 249.31, 249.81 (Matthew Bender)

California Civil Practice: Employment Litigation (Thomson West) § 6:29

Publisher's Notes

There is no BAJI instruction on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate LawAgency RelationshipsCauses of Action & RemediesGeneral OverviewBusiness & Corporate LawAgency RelationshipsCauses of Action & RemediesCompensatory DamagesBusiness & Corporate LawAgency RelationshipsCauses of Action & RemediesPunitive DamagesCivil ProcedureRemediesDamagesPunitive DamagesCriminal Law & ProcedureJury InstructionsParticular InstructionsGeneral OverviewLabor & Employment LawCollective Bargaining & Labor RelationsDiscipline, Layoff & TerminationLabor & Employment LawWage & Hour LawsCoverage & DefinitionsGeneral OverviewLabor & Employment LawWrongful TerminationDefensesVoluntary ResignationsLabor & Employment LawWrongful TerminationRemediesGeneral OverviewLabor & Employment LawWrongful TerminationRemediesCompensatory DamagesLabor & Employment LawWrongful TerminationRemediesPunitive DamagesPatent LawClaims & SpecificationsDefinitenessGeneral OverviewPatent LawInequitable ConductGeneral OverviewPatent LawInequitable ConductBurdens of ProofPatent LawInequitable ConductEffect, Materiality & ScierterGeneral OverviewPatent LawRemediesGeneral OverviewPatent LawRemediesCollateral AssessmentsGeneral OverviewPatent LawRemediesCollateral AssessmentsIncreased DamagesTortsDamagesGeneral OverviewTortsDamagesPunitive DamagesGeneral OverviewTortsIntentional TortsDefamationDefensesPrivilegesQualified PrivilegesTortsIntentional TortsDefamationDefensesPrivilegesStatutory Privileges



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California Forms of Jury Instruction

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CHAPTER 27 California Judicial Council Labor Code Actions Instructions

4-27 California Forms of Jury Instruction CACI 2712-CACI 2799

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CACI 2712Reserved for Future Use



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CHAPTER 27 California Judicial Council Labor Code Actions Instructions

4-27 California Forms of Jury Instruction CACI VF-2700

CACI VF-2700 Nonpayment of Wages (Lab. Code, §§ 201, 202, 218)

We answer the questions submitted to us as follows:

1. Did [name of plaintiff] perform work for [name of defendant]?

_____ Yes _____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Does [name of defendant] owe [name of plaintiff] wages under the terms of the employment?

_____ Yes _____ No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. What is the amount of unpaid wages? \$_____

Signed: _____
Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the [clerk/bailiff/judge].

New September 2003; Revised December 2005

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on *CACI No. 2700, Nonpayment of Wages--Essential Factual Elements*.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

This form may be modified if the jury is being given the discretion under *Civil Code section 3288* to award prejudgment interest on specific losses that occurred prior to judgment.

Publisher's Notes

There is no BAJI verdict form on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsVerdictsGeneral OverviewCivil ProcedureTrialsJury TrialsVerdictsSpecial
VerdictsGovernmentsCourtsGeneral OverviewLabor & Employment LawWage & Hour LawsRemediesJudgment
InterestLabor & Employment LawWage & Hour LawsRemediesPrivate Suits



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CHAPTER 27 California Judicial Council Labor Code Actions Instructions

4-27 California Forms of Jury Instruction CACI VF-2701

CACI VF-2701 Nonpayment of Minimum Wage (Lab. Code, § 1194)

We answer the questions submitted to us as follows:

1. Did [name of plaintiff] perform work for [name of defendant]?

_____ Yes _____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Was [name of plaintiff] paid less than the minimum wage by [name of defendant] for some or all hours worked?

_____ Yes _____ No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. How many hours was [name of plaintiff] paid less than the minimum wage?

_____ hours

4. What is the amount of wages owed? \$_____

Signed: _____

Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the [clerk/bailiff/judge].

New September 2003; Revised June 2005

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case. This verdict form is based on *CACI No. 2701, Nonpayment of Minimum Wage--Essential Factual Elements*.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

This form may be modified if the jury is being given the discretion under *Civil Code section 3288* to award prejudgment interest on specific losses that occurred prior to judgment.

Publisher's Notes

There is no BAJI verdict form on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsVerdictsGeneral OverviewCivil ProcedureTrialsJury TrialsVerdictsSpecial VerdictsGovernmentsCourtsGeneral OverviewLabor & Employment LawWage & Hour LawsRemediesJudgment InterestLabor & Employment LawWage & Hour LawsRemediesPrivate Suits



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CHAPTER 27 California Judicial Council Labor Code Actions Instructions

4-27 California Forms of Jury Instruction CACI VF-2702

CACI VF-2702 Nonpayment of Overtime Compensation (Lab. Code, § 1194)

We answer the questions submitted to us as follows:

1. Did [name of plaintiff] perform work for [name of defendant]?

_____ Yes _____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Was [name of plaintiff] paid at a rate lower than the legal overtime compensation rate for any overtime hours that [he/she] worked for [name of defendant]?

_____ Yes _____ No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. What is the amount of wages owed? \$_____

Signed: _____

Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the

[clerk/bailiff/judge].

New September 2003

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on *CACI No. 2702, Nonpayment of Overtime Compensation--Essential Factual Elements*.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

This form may be modified if the jury is being given the discretion under *Civil Code section 3288* to award prejudgment interest on specific losses that occurred prior to judgment.

Publisher's Notes

There is no BAJI verdict form on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsVerdictsGeneral OverviewCivil ProcedureTrialsJury TrialsVerdictsSpecial
VerdictsGovernmentsCourtsGeneral OverviewLabor & Employment LawWage & Hour LawsRemediesJudgment
InterestLabor & Employment LawWage & Hour LawsRemediesPrivate Suits



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CHAPTER 27 California Judicial Council Labor Code Actions Instructions

4-27 California Forms of Jury Instruction CACI VF-2703

CACI VF-2703 Waiting-Time Penalty for Nonpayment of Wages (Lab. Code, §§ 203, 218)

We answer the questions submitted to us as follows:

1. Did [*name of plaintiff*] perform work for [*name of defendant*]?

_____ Yes _____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Did [*name of defendant*] discharge [*name of plaintiff*]?

_____ Yes _____ No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Did [*name of defendant*] willfully fail to [pay/tender payment of] the full amount of wages earned by [*name of plaintiff*] on [his/her] last day of employment?

_____ Yes _____ No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. For how many calendar days following [*name of plaintiff*]'s last day of employment did [*name*

of defendant] willfully fail to [pay/tender payment of] the full amount of [name of plaintiff]'s wages? _____ days.

Answer question 5.

5. What was [name of plaintiff]'s daily wage rate at the time [his/her] employment ended? \$_____ per day.

Signed: _____

Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the [clerk/bailiff/judge].

New September 2003; Revised June 2005

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on *CACI No. 2704, Damages--Waiting-Time Penalty for Nonpayment of Wages*. Depending on the facts of the case, other factual scenarios can be substituted in questions 2, 3, and 4, as in elements 2, 3, and 4 in the instruction.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

This form may be modified if the jury is being given the discretion under *Civil Code section 3288* to award prejudgment interest on specific losses that occurred prior to judgment.

Publisher's Notes

There is no BAJI verdict form on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jurors General Overview Civil Procedure Trials Jury Trials Verdicts General Overview Civil Procedure Trials Jury Trials Verdicts Special Verdicts Governments Courts General Overview Labor & Employment Law Wage & Hour Laws Remedies Judgment Interest



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CHAPTER 27 California Judicial Council Labor Code Actions Instructions

4-27 California Forms of Jury Instruction CACI VF-2704

CACI VF-2704 Solicitation of Employee by Misrepresentation (Lab. Code, § 970)

We answer the questions submitted to us as follows:

1. Did [*name of defendant*] make [a] representation(s) to [*name of plaintiff*] about the kind, character, or existence of work?

_____ Yes _____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. [Was/Were] [*name of defendant*]'s representation(s) untrue?

_____ Yes _____ No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Did [*name of defendant*] know the representation(s) [was/were] untrue when made?

_____ Yes _____ No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Did [*name of defendant*] intend that [*name of plaintiff*] rely on the representation(s)?

_____ Yes _____ No

If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. Did [*name of plaintiff*] reasonably rely on [*name of defendant*]'s representation(s) and move or change [his/her] residence for the purpose of working for [name of defendant]?

_____ Yes _____ No

If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. Was [*name of plaintiff*]'s reliance on [*name of defendant*]'s representation(s) a substantial factor in causing harm to [*name of plaintiff*]?

_____ Yes _____ No

If your answer to question 6 is yes, then answer question 7. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

7. What are [*name of plaintiff*]'s damages?

[a. Past economic loss

[lost earnings..... \$_____].....

[lost profits..... \$_____].....

[medical expenses..... \$_____].....

[other past economic loss..... \$_____].....

..... Total Past Economic Damages: \$_____]

[b. Future economic loss

[lost earnings..... \$_____].....

[lost profits..... \$_____].....

[medical expenses..... \$_____].....

[other future economic loss..... \$_____].....

..... Total Future Economic Damages: \$_____]

[c. Past noneconomic loss, including [physical pain/mental suffering:]\$_____]

[d. Future noneconomic loss, including [physical pain/mental suffering:]\$_____]

..... **TOTAL \$_____**

Signed: _____

Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the [clerk/bailiff/judge].

New September 2003; Revised April 2007

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on *CACI No. 2710, Solicitation of Employee by Misrepresentation--Essential Factual Elements*. Depending on the facts of the case, other factual scenarios can be substituted in question 1, as in element 1 in the instruction.

If specificity is not required, users do not have to itemize all the damages listed in question 7 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

This form may be modified if the jury is being given the discretion under *Civil Code section 3288* to award prejudgment interest on specific losses that occurred prior to judgment.

Publisher's Notes

There is no BAJI verdict form on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJurorsGeneral OverviewCivil ProcedureTrialsJury TrialsVerdictsGeneral OverviewCivil ProcedureTrialsJury TrialsVerdictsSpecial VerdictsGovernmentsCourtsGeneral OverviewTortsDamagesCompensatory DamagesPain & SufferingEmotional & Mental DistressGeneral Overview



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California Forms of Jury Instruction

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CHAPTER 27 California Judicial Council Labor Code Actions Instructions

4-27 California Forms of Jury Instruction CACI VF-2705

CACI VF-2705 Preventing Subsequent Employment by Misrepresentation (Lab. Code, § 1050)

We answer the questions submitted to us as follows:

1. After [*name of plaintiff*]'s employment with [*name of defendant*] ended, did [*name of defendant*] make [a] representation(s) to [*name of prospective employer*] about [*name of plaintiff*]?

_____ Yes _____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. [Was/Were] [*name of defendant*]'s representation(s) untrue?

_____ Yes _____ No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Did [*name of defendant*] know the representation(s) [was/were] untrue when [he/she/it] made [it/them]?

_____ Yes _____ No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Did [name of defendant] make the representation(s) with the intent of preventing [name of plaintiff] from obtaining employment?

_____ Yes _____ No

If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. Was [name of defendant]'s conduct a substantial factor in causing harm to [name of plaintiff]?

_____ Yes _____ No

If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. What are [name of plaintiff]'s damages?

[a. Past economic loss

[lost earnings..... \$ _____].....

[lost profits..... \$ _____].....

[medical expenses..... \$ _____].....

[other past economic loss..... \$ _____].....

..... **Total Past Economic Damages: \$ _____]**

[b. Future economic loss

[lost earnings..... \$ _____].....

[lost profits..... \$ _____].....

[medical expenses..... \$ _____].....

[other future economic loss..... \$ _____].....

..... **Total Future Economic Damages: \$ _____]**

[c. Past noneconomic loss, including [physical pain/mental suffering:]\$ _____]

[d. Future noneconomic loss, including [physical pain/mental suffering:]\$ _____]

..... **TOTAL \$ _____**

Signed: _____
Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the [clerk/bailiff/judge].

New September 2003; Revised April 2007

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on *CACI No. 2711, Preventing Subsequent Employment by Misrepresentation--Essential Factual Elements*.

If specificity is not required, users do not have to itemize all the damages listed in question 6 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

This form may be modified if the jury is being given the discretion under *Civil Code section 3288* to award prejudgment interest on specific losses that occurred prior to judgment.

Publisher's Notes

There is no BAJI verdict form on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJurorsGeneral OverviewCivil ProcedureTrialsJury TrialsVerdictsGeneral OverviewCivil ProcedureTrialsJury TrialsVerdictsSpecial VerdictsGovernmentsCourtsGeneral OverviewLabor & Employment LawWage & Hour LawsRemediesJudgment InterestTortsDamagesCompensatory DamagesPain & SufferingEmotional & Mental DistressGeneral Overview



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CHAPTER 27 California Judicial Council Labor Code Actions Instructions

4-27 California Forms of Jury Instruction CACI VF-2706-CACI VF-2799

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CACI VF-2706Reserved for Future Use



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CHAPTER 28 California Judicial Council Workers' Compensation Instructions

4-28 California Forms of Jury Instruction 28.syn

§ 28.syn Synopsis to Chapter 28: California Judicial Council Workers' Compensation Instructions

CACI 2800 Employer's Affirmative Defense--Injury Covered by Workers' Compensation

CACI 2801 Employer's Willful Physical Assault--Essential Factual Elements (Lab. Code, § 3602(b)(1))

CACI 2802 Fraudulent Concealment of Injury--Essential Factual Elements (Lab. Code, § 3602(b)(2))

CACI 2803 Employer's Defective Product--Essential Factual Elements (Lab. Code, § 3602(b)(3))

CACI 2804 Removal or Noninstallation of Power Press Guards--Essential Factual Elements (Lab. Code, § 4558)

CACI 2805-CACI 2809 Reserved for Future Use

CACI 2810 Co-Employee's Affirmative Defense--Injury Covered by Workers' Compensation

CACI 2811 Co-Employee's Willful and Unprovoked Physical Act of Aggression--Essential Factual Elements (Lab. Code, § 3601(a)(1))

CACI 2812 Injury Caused by Co-Employee's Intoxication--Essential Factual Elements (Lab. Code, § 3601(a)(2))

CACI 2813-CACI 2899 Reserved for Future Use

CACI VF-2800 Employer's Willful Physical Assault (Lab. Code, § 3602(b)(1))

CACI VF-2801 Fraudulent Concealment of Injury (Lab. Code, § 3602(b)(2))

CACI VF-2802 Employer's Defective Product (Lab. Code, § 3602(b)(3))

CACI VF-2803 Removal or Noninstallation of Power Press Guards (Lab. Code, § 4558)

CACI VF-2804 Co-Employee's Willful and Unprovoked Physical Act of Aggression (Lab. Code, § 3601(a)(1))

CACI VF-2805 Injury Caused by Co-Employee's Intoxication (Lab. Code, § 3601(a)(2))

CACI VF-2806-CACI VF-2899 Reserved for Future Use



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CHAPTER 28 California Judicial Council Workers' Compensation Instructions

4-28 California Forms of Jury Instruction Scope

Scope

SCOPE

This chapter contains the California Judicial Council's "Workers' Compensation Series" of jury instructions [*CACI No. 2800 et seq.*]. The Judicial Council of California Civil Jury Instructions (CACI) included in this publication are the product of the Judicial Council of California Task Force on Jury Instructions, which are updated by the Judicial Council of California Advisory Committee on Civil Jury Instructions.

This chapter includes instructions on the following topics:

- An employer's affirmative defense that an injury is covered by workers' compensation [*CACI No. 2800*].
- Essential factual elements for causes of action for an employer's willful physical assault [*CACI No. 2801*], fraudulent concealment of an injury [*CACI No. 2802*], an employer's defective product [*CACI No. 2803*], and removal or noninstallation of power press guards [*CACI No. 2804*].
- A co-employee's affirmative defense that an injury is covered by workers' compensation [*CACI No. 2810*].
- Essential factual elements for a cause of action for a co-employee's willful and unprovoked physical act of aggression [*CACI No. 2811*] and an injury caused by a co-employee's intoxication [*CACI No. 2812*].

The workers' compensation series also includes special verdict forms [*CACI Nos. VF-2800-VF-2805*].



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CHAPTER 28 California Judicial Council Workers' Compensation Instructions

4-28 California Forms of Jury Instruction CACI 2800

CACI 2800 Employer's Affirmative Defense--Injury Covered by Workers' Compensation

[Name of defendant] claims that [he/she/it] is not responsible for any harm that [name of plaintiff] may have suffered because [he/she] was [name of defendant]'s employee and therefore can only recover under California's Workers' Compensation Act. To succeed, [name of defendant] must prove all of the following:

- 1. That [name of plaintiff] was [name of defendant]'s employee;**
- 2. That [name of defendant] [had workers' compensation insurance [covering [name of plaintiff] at the time of injury]/was self-insured for workers' compensation claims [at the time of [name of plaintiff]'s injury]]; and**
- 3. That [name of plaintiff]'s injury occurred while [he/she] was performing a task for or related to the work [name of defendant] hired [him/her] to do.**

Any person performing services for another, other than as an independent contractor, is presumed to be an employee.

New September 2003; Revised October 2004

This instruction is intended for cases where the plaintiff is suing a defendant claiming to be the plaintiff's employer. This instruction is not intended for use in cases where the plaintiff is suing under an exception to the workers' compensation exclusivity rule.

For other instructions regarding employment status, such as special employment and independent contractors, see instructions in the Vicarious Responsibility series (CACI Nos. 3700-3726). These

instructions may need to be modified to fit this context. Note that this instruction should not be given if the plaintiff/employee has been determined to fall within a statutory exception. For exceptions to *Labor Code section 3351*, see *Labor Code section 3352*.

If appropriate to the facts of the case, see instructions on the going-and-coming rule in the Vicarious Responsibility series. These instructions may need to be modified to fit this context.

■ *Labor Code section 3602(a)* provides: "Where the conditions of compensation set forth in Section 3600 concur, the right to recover such compensation is, except as specifically provided in this section and Sections 3706 and 4558, the sole and exclusive remedy of the employee or his or her dependents against the employer, and the fact that either the employee or the employer also occupied another or dual capacity prior to, or at the time of, the employee's industrial injury shall not permit the employee or his or her dependents to bring an action at law for damages against the employer."

■ *Labor Code section 3600(a)* provides, in part:

Liability for the compensation provided by this division, in lieu of any other liability whatsoever to any person except as otherwise specifically provided in Sections 3602, 3706, and 4558, shall, without regard to negligence, exist against an employer for any injury sustained by his or her employees arising out of and in the course of the employment and for the death of any employee if the injury proximately causes death, in those cases where the following conditions of compensation concur:

(1) Where, at the time of the injury, both the employer and the employee are subject to the compensation provisions of this division.

(2) Where, at the time of the injury, the employee is performing service growing out of and incidental to his or her employment and is acting within the course of his or her employment.

(3) Where the injury is proximately caused by the employment, either with or without negligence.

■ *Labor Code section 3602(c)* provides: "In all cases where the conditions of compensation set forth in Section 3600 do not concur, the liability of the employer shall be the same as if this division had not been enacted."

■ *Labor Code section 3351* provides, in part: "'Employee' means every person in the service of an employer under any appointment or contract of hire or apprenticeship, express or implied, oral or written, whether lawfully or unlawfully employed."

■ *Labor Code section 3357* provides: "Any person rendering service for another, other than as an independent contractor, or unless expressly excluded herein, is presumed to be an employee."

■ *Labor Code section 3706* provides: "If any employer fails to secure the payment of compensation, any injured employee or his dependents may bring an action at law against such employer for damages, as if this division did not apply."

■ "[T]he basis for the exclusivity rule in workers' compensation law is the 'presumed "compensation bargain," pursuant to which the employer assumes liability for industrial personal injury or death without regard to fault in exchange for limitations on the amount of that liability. The employee is afforded relatively swift and certain payment

of benefits to cure or relieve the effects of industrial injury without having to prove fault but, in exchange, gives up the wider range of damages potentially available in tort.' " (*Fermino v. Fedco, Inc.* (1994) 7 Cal.4th 701, 708 [30 Cal.Rptr.2d 18, 872 P.2d 559] , internal citation omitted.)

■ "Employer conduct is considered outside the scope of the workers' compensation scheme when the employer steps outside of its proper role, or engages in conduct unrelated to the employment relationship, that is not a normal incident of employment, or that violates a fundamental public policy." (*Gomez v. Acquistapace* (1996) 50 Cal.App.4th 740, 751 [57 Cal.Rptr.2d 821] , internal citations omitted.)

■ "Because an employer faced with a civil complaint seeking to enforce a common law remedy which does not state facts indicating coverage by the act bears the burden of pleading and proving 'that the (act) is a bar to the employee's ordinary remedy,' we believe that the burden includes a showing by the employer-defendant, through appropriate pleading and proof, that he had 'secured the payment of compensation' in accordance with the provisions of the act." (*Doney v. Tambouratgis* (1979) 23 Cal.3d 91, 98, fn. 8 [151 Cal.Rptr. 347, 587 P.2d 1160] , internal citations omitted.)

■ "A defendant need not plead and prove that it has purchased workers' compensation insurance where the plaintiff alleges facts that otherwise bring the case within the exclusive province of workers' compensation law, and no facts presented in the pleadings or at trial negate the workers' compensation law's application or the employer's insurance coverage." (*Gibbs v. American Airlines, Inc.* (1999) 74 Cal.App.4th 1, 14 [87 Cal.Rptr.2d 554] , internal citations omitted.)

■ "[T]he fact that an employee has received workers' compensation benefits from some source does not bar the employee's civil action against an uninsured employer. Instead, '[t]he price that must be paid by each employer for immunity from tort liability is the purchase of a workers' compensation policy [and where the employer chooses] not to pay that price ... it should not be immune from liability.' " (*Huffman v. City of Poway* (2000) 84 Cal.App.4th 975, 987 [101 Cal.Rptr.2d 325] , internal citations omitted.)

■ "Under the Workers' Compensation Act, employees are automatically entitled to recover benefits for injuries 'arising out of and in the course of the employment.' 'When the conditions of compensation exist, recovery under the workers' compensation scheme 'is the exclusive remedy against an employer for injury or death of an employee.' " (*Piscitelli v. Friedenber* (2001) 87 Cal.App.4th 953, 986 [105 Cal.Rptr.2d 88] , internal citations omitted.)

■ "Unlike many other states, in California workers' compensation provides the exclusive remedy for at least some intentional torts committed by an employer. *Fermino* described a 'tripartite system for classifying injuries arising in the course of employment. First, there are injuries caused by employer negligence or without employer fault that are compensated at the normal rate under the workers' compensation system. Second, there are injuries caused by ordinary employer conduct that intentionally, knowingly or recklessly harms an employee, for which the employee may be entitled to extra compensation under section 4553. Third, there are certain types of intentional employer conduct which bring the employer beyond the boundaries of the compensation bargain, for which a civil action may be brought.' " (*Gunnell v. Metrocolor Laboratories, Inc.* (2001) 92 Cal.App.4th 710, 723 [112 Cal.Rptr.2d 195] , internal citations omitted.)

■ "It has long been established in this jurisdiction that, generally speaking, a defendant in a civil action who claims to be one of that class of persons protected from an action at law by the provisions of the Workers' Compensation Act bears the burden of pleading and proving, as an affirmative defense to the action, the existence of the conditions of compensation set forth in the statute which are necessary to its application." (*Doney, supra*, 23 Cal.3d at p. 96 , internal citations and footnote omitted.)

■ "California courts have held worker's compensation proceedings to be the exclusive remedy for certain third party claims deemed collateral to or derivative of the employee's injury. Courts have held that the exclusive jurisdiction

provisions bar civil actions against employers by nondependent parents of an employee for the employee's wrongful death, by an employee's spouse for loss of the employee's services or consortium, and for emotional distress suffered by a spouse in witnessing the employee's injuries." (*Snyder v. Michael's Stores, Inc.* (1997) 16 Cal.4th 991, 997 [68 Cal.Rptr.2d 476, 945 P.2d 781] , internal citations omitted.)

■ " 'An employer-employee relationship must exist in order to bring the ... Act into effect. (§ 3600)' However, the coverage of the Act extends beyond those who have entered into 'traditional contract[s] of hire.' '[S]ection 3351 provides broadly that for the purpose of the ... Act, " 'Employee' means every person in the service of an employer under any appointment or contract of hire or apprenticeship, express or implied, oral or written" ' Given this 'section's explicit use of the disjunctive,' a contract of hire is not 'a prerequisite' to the existence of an employment relationship. Moreover, under section 3357, '[a]ny person rendering service for another, other than as an independent contractor, or unless expressly excluded ... , is presumed to be an employee.' " (*Arriaga v. County of Alameda* (1995) 9 Cal.4th 1055, 1060-1061 [40 Cal.Rptr.2d 116, 892 P.2d 150] , internal citations omitted.)

■ "Given these broad statutory contours, we believe that an 'employment' relationship sufficient to bring the act into play cannot be determined simply from technical contractual or common law conceptions of employment but must instead be resolved by reference to the history and fundamental purposes underlying the Workmen's Compensation Act." (*Laeng v. Workmen's Comp. Appeals Bd.* (1972) 6 Cal.3d 771, 777 [100 Cal.Rptr. 377, 494 P.2d 1] , internal citations omitted.)

■ "[C]ourts generally are more exacting in requiring proof of an employment relationship when such a relationship is asserted as a defense by the employer to a common law action." (*Spradlin v. Cox* (1988) 201 Cal.App.3d 799, 808 [247 Cal.Rptr. 347] , internal citation omitted.)

■ "The question of whether a person is an employee may be one of fact, of mixed law and fact, or of law only. Where the facts are undisputed, the question is one of law, and the Court of Appeal may independently review those facts to determine the correct answer." (*Barragan v. Workers' Comp. Appeals Bd.* (1987) 195 Cal.App.3d 637, 642 [240 Cal.Rptr. 811] , internal citations omitted.)

■ "An employee may have more than one employer for purposes of workers' compensation, and, in situations of dual employers, the second or 'special' employer may enjoy the same immunity from a common law negligence action on account of an industrial injury as does the first or 'general' employer. Identifying and analyzing such situations 'is one of the most ancient and complex questions of law in not only compensation but tort law.' " (*Santa Cruz Poultry, Inc. v. Superior Court* (1987) 194 Cal.App.3d 575, 578 [239 Cal.Rptr. 578] , internal citation omitted.)

■ "In determining whether an employee is covered within the compensation system and thus entitled to recover compensation benefits, the 'definitional reach of these covered employment relationships is very broad.' A covered employee is 'every person in the service of an employer under any appointment or contract of hire or apprenticeship, express or implied, oral or written.' 'Any person rendering service for another, other than as an independent contractor, or unless expressly excluded herein, is presumed to be an employee.' ... [T]hese provisions mandate a broad and generous interpretation in favor of inclusion in the system. Necessarily the other side of that coin is a presumption against the availability of a tort action where an employment relation exists. One result cannot exist without the other. Further, this result does not depend upon 'informed consent,' but rather on the parties' legal status. ... [W]here the facts of employment are not disputed, the existence of a covered relationship is a question of law." (*Santa Cruz Poultry, Inc., supra*, 194 Cal.App.3d at pp. 583-584 , internal citations omitted.)

■ "Generally, 'in the course of employment' refers to the time and place of the injury. The phrase 'arise out of employment' refers to a causal connection between the employment and the injury." (*Atascadero Unified School Dist. v. Workers' Compensation Appeals Bd.* (2002) 98 Cal.App.4th 880, 883 [120 Cal.Rptr.2d 239] .)

■ "The concept of 'scope of employment' in tort is more restrictive than the phrase 'arising out of and in the course of employment,' used in workers' compensation." (*Tognazzini v. San Luis Coastal Unified School Dist.* (2001) 86 Cal.App.4th 1053, 1057 [103 Cal.Rptr.2d 790] , internal citations omitted.)

■ "Whether an employee's injury arose out of and in the course of her employment is generally a question of fact to be determined in light of the circumstances of the particular case. However, where the facts are undisputed, resolution of the question becomes a matter of law." (*Wright v. Beverly Fabrics, Inc.* (2002) 95 Cal.App.4th 346, 353 [115 Cal.Rptr.2d 503] , internal citations omitted.)

■ "The requirement of ... section 3600 is twofold. On the one hand, the injury must occur "in the course of the employment." This concept "ordinarily refers to the time, place, and circumstances under which the injury occurs." Thus " [a]n employee is in the "course of his employment" when he does those reasonable things which his contract with his employment expressly or impliedly permits him to do.' " And, ipso facto, an employee acts within the course of his employment when " 'performing a duty imposed upon him by his employer and one necessary to perform before the terms of the contract [are] mutually satisfied.' " ' [P] 'On the other hand, the statute requires that an injury "arise out of" the employment. ... It has long been settled that for an injury to "arise out of the employment" it must "occur by reason of a condition or incident of [the] employment" That is, the employment and the injury must be linked in some causal fashion.' " (*LaTourette v. Workers' Comp. Appeals Bd.* (1998) 17 Cal.4th 644, 651 [72 Cal.Rptr.2d 217, 951 P.2d 1184] , internal citations and footnote omitted.)

■ "Injuries sustained while an employee is performing tasks within his or her employment contract but outside normal work hours are within the course of employment. The rationale is that the employee is still acting in furtherance of the employer's business." (*Wright, supra*, 95 Cal.App.4th at p. 354 .)

Secondary Sources

2 Witkin, Summary of California Law (10th ed. 2005) Workers' Compensation, §§ 20, 24-26, 31, 34, 39-42

Chin et al., California Practice Guide: Employment Litigation (The Rutter Group) PP 3:515, 12:192, 15:507, 15:509, 15:523.2, 15:523.10, 15:526.1, 15:556, 15:573, 15:580, 15:591

1 Hanna, California Law of Employee Injuries and Workers' Compensation (2d ed.) Ch. 4, §§ 4.03-4.06

1 Herlick, California Workers' Compensation Law (6th ed.), Ch. 10, *The Injury*, § 10.09 (Matthew Bender)

1 California Employment Law, Ch. 20, *Liability for Work-Related Injuries*, § 20.10 (Matthew Bender)

1 Levy et al., California Torts, Ch. 10, *Effect of Workers' Compensation Law*, §§ 10.02, 10.03[3], 10.10 (Matthew Bender)

51 *California Forms of Pleading and Practice*, Ch. 577, *Workers' Compensation*, §§ 577.310, 577.530 (Matthew Bender)

23 California Points and Authorities, Ch. 239, *Workers' Compensation Exclusive Remedy Doctrine* (Matthew Bender)

Publisher's Notes

This instruction covers issues presented in BAJI No. 15.12.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureJurisdictionSubject Matter JurisdictionGeneral OverviewCivil ProcedureJurisdictionSubject Matter
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CHAPTER 28 California Judicial Council Workers' Compensation Instructions

4-28 California Forms of Jury Instruction CACI 2801

CACI 2801 Employer's Willful Physical Assault--Essential Factual Elements (Lab. Code, § 3602(b)(1))

[*Name of plaintiff*] **claims that [he/she] was harmed because [*name of defendant*] assaulted [him/her]. To establish this claim, [*name of plaintiff*] must prove all of the following:**

1. That [*name of defendant*] [*insert one of the following:*]

[engaged in physical conduct that a reasonable person would perceive to be a real, present, and apparent threat of bodily harm;]

[touched [*name of plaintiff*] [or caused [*name of plaintiff*] to be touched] in a harmful or offensive manner];

2. That [*name of defendant*] intended to harm [*name of plaintiff*];

3. That [*name of plaintiff*] was harmed; and

4. That [*name of defendant*]'s conduct was a substantial factor in causing [*name of plaintiff*]'s harm.

New September 2003

This instruction is intended for use in cases where the employer is the defendant and the plaintiff alleges the case falls outside of the workers' compensation exclusivity rule. Use the first bracketed option in element 1 for cases involving assault. Use the second bracketed option for cases involving battery.

Do not use instructions on assault and battery (*CACI No. 1300, Battery--Essential Factual Elements*, and *CACI No. 1301, Assault--Essential Factual Elements*). For an instruction on ratification, see *CACI No. 3710, Ratification*.

- *Labor Code section 3602(b)(1)* provides: "An employee, or his or her dependents in the event of his or her death, may bring an action at law for damages against the employer, as if this division did not apply ... [w]here the employee's injury or death is proximately caused by a willful physical assault by the employer."

- *Labor Code section 3602(b)* provides:

An employee, or his or her dependents in the event of his or her death, may bring an action at law for damages against the employer, as if this division did not apply, in the following instances:

(1) Where the employee's injury or death is proximately caused by a willful physical assault by the employer.

(2) Where the employee's injury is aggravated by the employer's fraudulent concealment of the existence of the injury and its connection with the employment, in which case the employer's liability shall be limited to those damages proximately caused by the aggravation. The burden of proof respecting apportionment of damages between the injury and any subsequent aggravation thereof is upon the employer.

(3) Where the employee's injury or death is proximately caused by a defective product manufactured by the employer and sold, leased, or otherwise transferred for valuable consideration to an independent third person, and that product is thereafter provided for the employee's use by a third person.

- "[T]he 1982 amendments were not intended to provide an exhaustive list of exceptions to the exclusivity rule. They did not, for example, foreclose the recognition of an exception for injuries stemming from wrongful discharges that violated public policy, an issue that neither the Legislature nor the judicial system had confronted in 1982. Section 3602 only applies '[w]here the conditions ... set forth in section 3600 concur,' and does not purport to resolve the ambiguities in that latter section discussed above, nor to definitively delineate the scope of the compensation bargain that has been the key to construing the meaning of section 3600. Rather, section 3602 merely confirms the judicial recognition of certain types of employer acts as outside the compensation bargain, even as it reinforces the exclusivity rule by repealing the dual capacity doctrine." (*Fermino v. Fedco, Inc.* (1994) 7 Cal.4th 701, 720 [30 Cal.Rptr.2d 18, 872 P.2d 559] , internal citation omitted.)

- "[In *Magliulo v. Superior Court*,] [t]he employee sued the employer for assault and battery, and the court rejected the employer's argument that workers' compensation benefits were the exclusive remedy. The court noted that section 3601 allowed lawsuits for assaults by coemployees, and reasoned that '[i]f the employee can recover both compensation and damages caused by an intentional assault by a fellow worker, he should have no less right because the fellow worker happens to be his boss.' " (*Soares v. City of Oakland* (1992) 9 Cal.App.4th 1822, 1826 [12 Cal.Rptr.2d 405] , internal citation omitted.)

- "Section 3602(b)(1) was enacted in 1982, 23 years after enactment of section 3601, subdivision (a)(1), to codify the result in *Magliulo v. Superior Court*." (*Soares, supra*, 9 Cal.App.4th at p. 1826 , internal citations omitted.)

- "We conclude ... that 'willful' employer assaults within the meaning of section 3602(b)(1) do not include all

common law batteries, but only those batteries that are specifically intended to injure." (*Soares, supra*, 9 Cal.App.4th at pp. 1828-1829 .)

■ "The modern view respecting actionable intentional misconduct by the employer is that it must be alleged and proved that the employer "acted deliberately with the specific intent to injure" the employee." (*Arendell v. Auto Parts Club, Inc.* (1994) 29 Cal.App.4th 1261, 1265 [35 Cal.Rptr.2d 83] , internal citations omitted.)

■ "[B]odily contact is not necessary for a physical assault." (*Herrick v. Quality Hotels, Inns & Resorts, Inc.* (1993) 19 Cal.App.4th 1608, 1617 [24 Cal.Rptr.2d 203] .)

■ "Herrick explained that bodily contact was not necessary for a 'physical assault,' but that physical assault occurred when someone engaged in physical conduct which a reasonable person would perceive to be a real, present and apparent threat of bodily harm." (*Gunnell v. Metrocolor Laboratories, Inc.* (2001) 92 Cal.App.4th 710, 728 [112 Cal.Rptr.2d 195] , internal citation omitted.)

■ "[W]e conclude that the exception to the exclusivity rule contained in section 3602, subdivision (b)(1), does not authorize a civil action against an employer for injury resulting from the willful assault of a coemployee based on a theory of respondeat superior." (*Fretland v. County of Humboldt* (1999) 69 Cal.App.4th 1478, 1489 [82 Cal.Rptr.2d 359] .)

■ "[C]ourts have also recognized that an employer can be held civilly liable as a joint participant in assaultive conduct committed by its employee pursuant to the doctrine of ratification." (*Fretland, supra*, 69 Cal.App.4th at pp. 1489-1490 .)

Secondary Sources

2 Witkin, Summary of California Law (10th ed. 2005) Workers' Compensation, § 43

Chin et al., California Practice Guide: Employment Litigation (The Rutter Group) PP 5:655, 5:656-5:657, 15:527, 15:566-15:567, 15:570-15:571

1 Herlick, California Workers' Compensation Law (6th ed.), Ch. 12, *Tort Actions--Subrogation*, § 12.20 (Matthew Bender)

1 California Employment Law, Ch. 20, *Liability for Work-Related Injuries*, §§ 20.12[1][b], 20.41 (Matthew Bender)

51 *California Forms of Pleading and Practice*, Ch. 577, *Workers' Compensation*, §§ 577.17, 577.314[2] (Matthew Bender)

23 California Points and Authorities, Ch. 239, *Workers' Compensation Exclusive Remedy Doctrine* (Matthew Bender)

Publisher's Notes

This instruction covers issues presented in BAJI No. 15.13.

Legal Topics:

For related research and practice materials, see the following legal topics:

Labor & Employment Law Employment Relationships At-Will Employment Employers Labor & Employment Law Wrongful Termination Public Policy Labor & Employment Law Wrongful Termination Remedies General Overview Torts Products Liability Manufacturing Defects Workers' Compensation & SSDI General Overview Workers'

Compensation & SSDICompensabilityCourse of EmploymentCausationWorkers' Compensation &
SSDICompensabilityInjuriesGeneral OverviewWorkers' Compensation & SSDIDefensesInjury by Fellow
ServantWorkers' Compensation & SSDIRemedies Under Other LawsExclusivityGeneral OverviewWorkers'
Compensation & SSDIThird Party ActionsSubrogation



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CHAPTER 28 California Judicial Council Workers' Compensation Instructions

4-28 California Forms of Jury Instruction CACI 2802

CACI 2802 Fraudulent Concealment of Injury--Essential Factual Elements (Lab. Code, § 3602(b)(2))

[Name of plaintiff] claims that [he/she/ [name of decedent]] was harmed because [name of defendant] fraudulently concealed the fact that [name of plaintiff/decedent] had been injured on the job. To establish this claim, [name of plaintiff] must prove all of the following:

- 1. That [name of plaintiff/decedent] was injured on the job;**
- 2. That [name of defendant] knew that [name of plaintiff/decedent] had suffered a job-related injury;**
- 3. That [name of defendant] concealed this knowledge from [name of plaintiff/decedent]; and**
- 4. That [name of plaintiff/decedent]'s injury was made worse as a result of this concealment.**

If [name of plaintiff] establishes this claim, [he/she] must prove the total damages caused by the injury. [Name of defendant] must prove the damages that [name of plaintiff/ decedent] would have sustained even if [name of defendant] had not concealed the injury. [Name of plaintiff] is entitled to recover the difference between the two amounts.

New September 2003

This instruction is intended for cases where the employer is the defendant and the plaintiff alleges the case falls outside of the workers' compensation exclusivity rule. This instruction pertains to aggravation of an injury caused by concealment.

■ *Labor Code Section 3602(b)(2)* provides: "An employee, or his or her dependents in the event of his or her death, may bring an action at law for damages against the employer, as if this division did not apply, ... [w]here the employee's injury is aggravated by the employer's fraudulent concealment of the existence of the injury and its connection with the employment, in which case the employer's liability shall be limited to those damages proximately caused by the aggravation. The burden of proof respecting apportionment of damages between the injury and any subsequent aggravation thereof is upon the employer."

■ "[T]he 1982 amendments were not intended to provide an exhaustive list of exceptions to the exclusivity rule. They did not, for example, foreclose the recognition of an exception for injuries stemming from wrongful discharges that violated public policy, an issue that neither the Legislature nor the judicial system had confronted in 1982. Section 3602 only applies '[w]here the conditions ... set forth in section 3600 concur,' and does not purport to resolve the ambiguities in that latter section discussed above, nor to definitively delineate the scope of the compensation bargain that has been the key to construing the meaning of section 3600. Rather, section 3602 merely confirms the judicial recognition of certain types of employer acts as outside the compensation bargain, even as it reinforces the exclusivity rule by repealing the dual capacity doctrine." (*Fermino v. Fedco, Inc. (1994) 7 Cal.4th 701, 720 [30 Cal.Rptr.2d 18, 872 P.2d 559]* , internal citation omitted.)

■ "In general, the Workers' Compensation Act provides an employee with his or her exclusive remedy for a work-related injury. Subject to narrow exceptions, 'where the ... conditions of compensation concur,' an injured employee cannot maintain a civil action against his or her employer or another employee." (*Lopez v. C.G.M. Development, Inc. (2002) 101 Cal.App.4th 430 [124 Cal.Rptr.2d 227]* , internal citation omitted.)

■ "[A]n employee seeking to state a cause of action against an employer under section 3602(b)(2) must 'in general terms' plead facts that if found true by the trier of fact, establish the existence of three essential elements: (1) the employer knew that the plaintiff had suffered a work-related injury; (2) the employer concealed that knowledge from the plaintiff; and (3) the injury was aggravated as a result of such concealment." (*Palestini v. General Dynamics Corp. (2002) 99 Cal.App.4th 80, 89-90 [120 Cal.Rptr.2d 741]* , internal citation omitted.)

■ "While there are no cases defining the term 'fraudulent concealment' as used in the section, its general meaning is not difficult to discern. According to both statute and case law, the failure to disclose facts may constitute fraud if the party with knowledge has a duty to make disclosure. We have no reason to believe that the term 'fraudulent concealment' as used in subdivision (b)(2) was intended to have a meaning other than this." (*Foster v. Xerox Corp. (1985) 40 Cal.3d 306, 309-310 [219 Cal.Rptr. 485, 707 P.2d 858]* , internal citations omitted.)

■ "An employer's actual knowledge of the existence of an employee's injury connected with the employment is a necessary prerequisite to establishing a claim against the employer for fraudulent concealment under section 3602(b)(2). This principle is based on the rationale that an employer cannot be held liable under section 3602(b)(2) for concealing something of which it had no knowledge." (*Palestini, supra*, 99 Cal.App.4th at p. 93 , internal citations omitted.)

■ "In order to succeed in their attempt to remove their case from the workers' compensation law, appellants first had to show an 'injury.' They then had to prove that the injury was aggravated by Firestone's fraudulent concealment of the existence of the injury and its connection with the employment." (*Santiago v. Firestone Tire & Rubber Co. (1990) 224 Cal.App.3d 1318, 1330 [274*

Cal.Rptr. 576] , internal citation omitted.)

■ "The Supreme Court in *Johns-Manville* recognized that the aggravation of an injury that results when an employer fraudulently conceals the injury's cause is a harm distinct from the injury itself. For this reason, aggravation that results when an employer fraudulently conceals an injury's cause remains actionable even though the injured party has recovered worker's compensation benefits for the injury itself." (*Aerojet General Corp. v. Superior Court* (1986) 177 Cal.App.3d 950, 956 [223 Cal.Rptr. 249] , internal citation omitted.)

Secondary Sources

2 Witkin, Summary of California Law (10th ed. 2005) Workers' Compensation, §§ 44, 45

Chin et al., California Practice Guide: Employment Litigation (The Rutter Group) PP 15:526.1, 15:570, 15:570.5-15:570.6, 15:590

1 Herlick, California Workers' Compensation Law (6th ed.), Ch. 12, *Tort Actions--Subrogation*, § 12.20 (Matthew Bender)

1 California Employment Law, Ch. 20, *Liability for Work-Related Injuries*, § 20.12[1][c] (Matthew Bender)

1 Levy et al., California Torts, Ch. 10, *Effect of Workers' Compensation Law*, § 10.11[1][d] (Matthew Bender)

51 *California Forms of Pleading and Practice*, Ch. 577, *Workers' Compensation*, §§ 577.314[3], 577.525 (Matthew Bender)

23 California Points and Authorities, Ch. 239, *Workers' Compensation Exclusive Remedy Doctrine* (Matthew Bender)

Publisher's Notes

This instruction covers issues presented in BAJI No. 15.13.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Remedies Damages General Overview Labor & Employment Law Wrongful Termination Public Policy Labor & Employment Law Wrongful Termination Remedies General Overview Torts Business Torts Fraud & Misrepresentation Nondisclosure General Overview Torts Business Torts Fraud & Misrepresentation Nondisclosure Elements Workers' Compensation & SSDI Compensability Course of Employment Causation Workers' Compensation & SSDI Compensability Injuries General Overview Workers' Compensation & SSDI Coverage Actions Against Employers General Overview Workers' Compensation & SSDI Remedies Under Other Laws Exclusivity General Overview Workers' Compensation & SSDI Remedies Under Other Laws Exclusivity Exceptions Workers' Compensation & SSDI Third Party Actions Subrogation



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CHAPTER 28 California Judicial Council Workers' Compensation Instructions

4-28 California Forms of Jury Instruction CACI 2803

CACI 2803 Employer's Defective Product--Essential Factual Elements (Lab. Code, § 3602(b)(3))

[*Name of plaintiff*] **claims that [he/she] was harmed by a defective product manufactured by [*name of defendant*]. To establish this claim, [*name of plaintiff*] must prove all of the following:**

- 1. That the [*product*] was manufactured by [*name of defendant*];**
- 2. That the [*product*] was [sold/leased/transferred for valuable consideration] to an independent third person;**
- 3. That the third person then provided the [*product*] for [*name of plaintiff*]'s use;**
- 4. That the [*product*] was defective in design or manufacture;**
- 5. That [*name of plaintiff*] was harmed; and**
- 6. That the [*product*] was a substantial factor in causing [*name of plaintiff*]'s harm.**

New September 2003

This instruction is intended for use in cases where the employer is the defendant and the plaintiff alleges that the case falls outside of the workers' compensation exclusivity rule. See the Products Liability series (CACI Nos. 1200-1243) for instructions on product defect.

■ *Labor Code section 3602(b)(3)* provides: "An employee, or his or her dependents in the event of his

or her death, may bring an action at law for damages against the employer, as if this division did not apply ... [w]here the employee's injury or death is proximately caused by a defective product manufactured by the employer and sold, leased, or otherwise transferred for valuable consideration to an independent third person, and that product is thereafter provided for the employee's use by a third person."

■ "[T]he 1982 amendments were not intended to provide an exhaustive list of exceptions to the exclusivity rule. They did not, for example, foreclose the recognition of an exception for injuries stemming from wrongful discharges that violated public policy, an issue that neither the Legislature nor the judicial system had confronted in 1982. Section 3602 only applies '[w]here the conditions ... set forth in section 3600 concur,' and does not purport to resolve the ambiguities in that latter section discussed above, nor to definitively delineate the scope of the compensation bargain that has been the key to construing the meaning of section 3600. Rather, section 3602 merely confirms the judicial recognition of certain types of employer acts as outside the compensation bargain, even as it reinforces the exclusivity rule by repealing the dual capacity doctrine." (*Fermino v. Fedco, Inc.* (1994) 7 Cal.4th 701, 720 [30 Cal.Rptr.2d 18, 872 P.2d 559] , internal citation omitted.)

■ "The language 'provided for the employee's use' indicates the product must be given or furnished to the employee in order for the employee to accomplish some task." (*Behrens v. Fayette Manufacturing Co.* (1992) 4 Cal.App.4th 1567, 1574 [7 Cal.Rptr.2d 264] .)

■ "Our interpretation is in accord with that of commentators who have noted that the exception of subdivision (b)(3) requires the employee to come into contact with the defective product as a consumer." (*Behrens, supra*, 4 Cal.App.4th at p. 1574 , internal citations omitted.)

Secondary Sources

2 Witkin, Summary of California Law (10th ed. 2005) Workers' Compensation, § 63

Chin et al., California Practice Guide: Employment Litigation (The Rutter Group) P 15:571

1 Herlick, California Workers' Compensation Law (6th ed.), Ch. 12, *Tort Actions--Subrogation*, § 12.20 (Matthew Bender)

1 California Employment Law, Ch. 20, *Liability for Work-Related Injuries*, § 20.12[1][d] (Matthew Bender)

1 Levy et al., California Torts, Ch. 10, *Effect of Workers' Compensation Law*, § 10.11[1][e] (Matthew Bender)

51 *California Forms of Pleading and Practice*, Ch. 577, *Workers' Compensation*, § 577.314[4] (Matthew Bender)

23 California Points and Authorities, Ch. 239, *Workers' Compensation Exclusive Remedy Doctrine* (Matthew Bender)

Publisher's Notes

This instruction covers issues presented in BAJI No. 15.13.

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawTypes of ContractsLease AgreementsPersonalty LeasesGeneral OverviewLabor & Employment LawWrongful TerminationPublic PolicyLabor & Employment LawWrongful TerminationRemediesGeneral

OverviewTortsProducts LiabilityDesign DefectsTortsProducts LiabilityManufacturing DefectsWorkers' Compensation
& SSDIRemedies Under Other LawsExclusivityGeneral OverviewWorkers' Compensation & SSDIThird Party
ActionsSubrogation



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CHAPTER 28 California Judicial Council Workers' Compensation Instructions

4-28 California Forms of Jury Instruction CACI 2804

CACI 2804 Removal or Noninstallation of Power Press Guards--Essential Factual Elements (Lab. Code, § 4558)

[*Name of plaintiff*] **claims that [he/she] was harmed because [*name of defendant*] [removed/failed to install] guards on a power press. To establish this claim, [*name of plaintiff*] must prove all of the following:**

1. That [*name of defendant*] **was [*name of plaintiff*]'s [employer/supervisor];**
2. That [*name of plaintiff*] **was injured while operating a power press;**
3. That [*name of defendant*] **[removed/failed to install] [authorized the [removal of/failure to install]] the guards, knowing that this would create a probability of serious injury or death;**
4. That the power press's [designer/fabricator/assembler] **had [designed the press with guards/installed guards on the press/required guards be attached/specified that guards be attached] and had directly or indirectly conveyed this information to [*name of defendant*]; and**
5. That [*name of defendant*]'s **[removal/failure to install] the guards was a substantial factor in causing [*name of plaintiff*]'s harm.**

A "power press" is a machine that forms materials with a die in the manufacture of other products. A "die" is a tool that imparts shape to material by pressing against or through the material. A "guard" is any device that keeps a worker's hands or other parts of the body outside the point of operation.

New September 2003

This instruction is intended for use in cases where the employer is the defendant and the plaintiff alleges

that the case falls outside of the workers' compensation exclusivity rule.

■ *Labor Code section 4558 provides:*

(a) As used in this section:

(1) "Employer" means a named identifiable person who is, prior to the time of the employee's injury or death, an owner or supervisor having managerial authority to direct and control the acts of employees.

(2) "Failure to install" means omitting to attach a point of operation guard either provided or required by the manufacturer, when the attachment is required by the manufacturer and made known by him or her to the employer at the time of acquisition, installation, or manufacturer-required modification of the power press.

(3) "Manufacturer" means the designer, fabricator, or assembler of a power press.

(4) "Power press" means any material-forming machine that utilizes a die which is designed for use in the manufacture of other products.

(5) "Removal" means physical removal of a point of operation guard which is either installed by the manufacturer or installed by the employer pursuant to the requirements or instructions of the manufacturer.

(6) "Specifically authorized" means an affirmative instruction issued by the employer prior to the time of the employee's physical injury or death, but shall not mean any subsequent acquiescence in, or ratification of, removal of a point of operation safety guard.

(b) An employee, or his or her dependents in the event of the employee's death, may bring an action at law for damages against the employer where the employee's injury or death is proximately caused by the employer's knowing removal of, or knowing failure to install, a point of operation guard on a power press, and this removal or failure to install is specifically authorized by the employer under conditions known by the employer to create a probability of serious injury or death.

(c) No liability shall arise under this section absent proof that the manufacturer designed, installed, required, or otherwise provided by specification for the attachment of the guards and conveyed knowledge of the same to the employer. Proof of conveyance of this information to the employer by the manufacturer may come from any source.

(d) No right of action for contribution or indemnity by any defendant shall exist against the employer; however, a defendant may seek contribution after the employee secures a judgment against the employer pursuant to the provisions of this section if the employer fails to discharge his or her comparative share of the judgment.

■ "The obvious legislative intent and purpose in section 4558 is to protect workers from employers who wilfully remove or fail to install appropriate guards on large power tools. Many of these power tools are run by large mechanical motors or hydraulically. These sorts of machines are difficult to stop while they are in their sequence of operation. Without guards, workers are susceptible to extremely serious injuries. For this reason, the Legislature passed section

4558, subdivision (b), which subjects employers to legal liability for removing guards from powerful machinery where the manufacturer has designed the machine to have a protective guard while in operation." (*Ceja v. J.R. Wood, Inc.* (1987) 196 Cal.App.3d 1372, 1377 [242 Cal.Rptr. 531] , internal citation omitted.)

■ "This statutory definition embraces four elements. 'The power press itself is a machine. It is a machine that forms materials. The formation of materials is effectuated with a die. Finally, the materials being formed with the die are being formed in the manufacture of other products.' " (*McCoy v. Zahniser Graphics, Inc.* (1995) 39 Cal.App.4th 107, 110 [45 Cal.Rptr.2d 871] , internal citation omitted.)

■ "In all its pertinent uses, then, the term 'die' refers to a tool that imparts shape to material by pressing or impacting against or through the material, that is, by punching, stamping or extruding; in none of its uses does the term refer to a tool that imparts shape by cutting along the material in the manner of a blade." (*Rosales v. Depuy Ace Medical Co.* (2000) 22 Cal.4th 279, 285 [92 Cal.Rptr.2d 465, 991 P.2d 1256] .)

■ "[U]nder subdivisions (a)(2) and (c), liability for 'failure to install' a point of operation guard under section 4558 must be predicated upon evidence that the 'manufacturer' either provided or required such a device, which was not installed by the employer." (*Flowmaster, Inc. v. Superior Court* (1993) 16 Cal.App.4th 1019, 1027 [20 Cal.Rptr.2d 666] .)

■ "We find that the term guard, as used in section 4558, is meant to include the myriad apparatus which are available to accomplish the purpose of keeping the hands of workers outside the point of operation whenever the ram is capable of descending. Because we find that the term guard is not a specific legal term of art, we hold that the trial court properly provided the jury with a dictionary definition of the term guard to explain its meaning under section 4558." (*Bingham v. CTS Corp.* (1991) 231 Cal.App.3d 56, 65 [282 Cal.Rptr. 161] , internal citation omitted.)

■ "Physical removal, for the purpose of liability under section 4558, means to render a safeguarding apparatus, whether a device or point of operation guard, dysfunctional or unavailable for use by the operator for the particular task assigned." (*Bingham, supra*, 231 Cal.App.3d at p. 68 .)

■ "Nothing in the language, history or objectives underlying section 4558 convinces us that the Legislature intended that section 4558 would immunize employers who design, manufacture and install their own power presses without point of operation guards. A manufacturer is defined broadly in section 4558 as a 'designer, fabricator, or assembler of a power press.' An 'employer' is not excluded from the definition of a manufacturer, nor would doing so promote the objectives of the statute." (*Flowmaster, Inc., supra*, 16 Cal.App.4th at pp. 1029-1030 , internal citation omitted.)

■ "The element of knowledge requires 'actual awareness' by the employer--rather than merely constructive knowledge--that a point of operation guard has either been provided for or is required to prevent the probability of serious injury or death." (*Flowmaster, Inc., supra*, 16 Cal.App.4th at pp. 1031-1032 , internal citation and footnote omitted.)

■ "Liability under section 4558 can only be imposed if the employer fails to use or removes a safety device required by the manufacturer of the press. Essentially, the culpable conduct is the employer's ignoring of the manufacturer's safety directive ... 'From the plain language of section 4558, it is clear that an exception to the exclusivity of workers' compensation only arises for a power press injury where the employer has been expressly informed by the manufacturer that a point of operation guard is required, where the employer then affirmatively removes or fails to install such guard, and where the employer does so under conditions known by the employer to create a probability of serious injury or death.' " (*Aguilera v. Henry Soss & Co.* (1996) 42 Cal.App.4th 1724, 1730 [50 Cal.Rptr.2d 477] , internal citation omitted.)

■ "Specific authorization demands evidence of an affirmative instruction or other wilful acts on the part of the

employer despite actual knowledge of the probability of serious harm." (*Flowmaster, Inc.*, *supra*, 16 Cal.App.4th at p. 1032 , internal citation and footnote omitted.)

■ "[I]mputation solely because of an agency relationship cannot bring an employer within the reach of section 4558. Only an employer who directly authorized by an affirmative instruction the removal or failure to install a guard may be sued at law under section 4558." (*Watters Associates v. Superior Court* (1990) 218 Cal.App.3d 1322, 1325 [267 Cal.Rptr. 696] .)

Secondary Sources

2 Witkin, Summary of California Law (10th ed. 2005) Workers' Compensation, §§ 49-51, 102

Chin et al., California Practice Guide: Employment Litigation (The Rutter Group) PP 13:953, 15:572

1 Herlick, California Workers' Compensation Law (6th ed.), Ch. 12, *Tort Actions--Subrogation*, § 12.20 (Matthew Bender)

1 California Employment Law, Ch. 20, *Liability for Work-Related Injuries*, § 20.12[1][e] (Matthew Bender)

1 Levy et al., California Torts, Ch. 10, *Effect of Workers' Compensation Law*, § 10.11[1][f] (Matthew Bender)

51 *California Forms of Pleading and Practice*, Ch. 577, *Workers' Compensation*, § 577.314[5] (Matthew Bender)

23 California Points and Authorities, Ch. 239, *Workers' Compensation Exclusive Remedy Doctrine* (Matthew Bender)

Publisher's Notes

This instruction covers issues presented in BAJI No. 15.13.

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsVicarious LiabilityEmployersIndemnityWorkers' Compensation & SSDIGeneral OverviewWorkers' Compensation & SSDICompensabilityCourse of EmploymentGeneral OverviewWorkers' Compensation & SSDICompensabilityInjuriesGeneral OverviewWorkers' Compensation & SSDIRemedies Under Other LawsExclusivityGeneral OverviewWorkers' Compensation & SSDIThird Party ActionsSubrogation



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4-28 California Forms of Jury Instruction CACI 2805-CACI 2809

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CHAPTER 28 California Judicial Council Workers' Compensation Instructions

4-28 California Forms of Jury Instruction CACI 2810

CACI 2810 Co-Employee's Affirmative Defense--Injury Covered by Workers' Compensation

[Name of defendant] claims that [he/she] is not responsible for any harm that [name of plaintiff] may have suffered because [he/she] was [name of defendant]'s co-employee and therefore can recover only under California's Workers' Compensation Act. To succeed, [name of defendant] must prove all of the following:

- 1. That [name of plaintiff] and [name of defendant] were [name of employer]'s employees;**
- 2. That [name of employer] [had workers' compensation insurance [covering [name of plaintiff] at the time of injury]/was self-insured for workers' compensation claims [at the time of [name of plaintiff]'s injury]]; and**
- 3. That [name of defendant] was acting in the scope of [his/her] employment at the time [name of plaintiff] claims [he/she] was harmed.**

New September 2003; Revised October 2004

This instruction is intended for use in cases where a co-employee is the defendant and he or she claims that the case falls within the workers' compensation exclusivity rule. For instructions on scope of employment see instructions in the Vicarious Liability series (CACI Nos. 3700-3726). Scope of employment in this instruction is the same as in the context of respondeat superior. (*Hendy v. Losse* (1991) 54 Cal.3d 723, 740 [1 Cal.Rptr.2d 543, 819 P.2d 1] .) See instructions in the Vicarious Responsibility series regarding the definition of "scope of employment."

■ *Labor Code section 3601 provides:*

(a) Where the conditions of compensation set forth in Section 3600 concur, the right to recover such compensation, pursuant to the provisions of this division is, except as specifically provided in this section, the exclusive remedy for injury or death of an employee against any other employee of the employer acting within the scope of his or her employment, except that an employee, or his or her dependents in the event of his or her death, shall, in addition to the right to compensation against the employer, have a right to bring an action at law for damages against the other employee, as if this division did not apply, in either of the following cases:

(1) When the injury or death is proximately caused by the willful and unprovoked physical act of aggression of the other employee.

(2) When the injury or death is proximately caused by the intoxication of the other employee.

(b) In no event, either by legal action or by agreement whether entered into by the other employee or on his or her behalf, shall the employer be held liable, directly or indirectly, for damages awarded against, or for a liability incurred by the other employee under paragraph (1) or (2) of subdivision (a).

(c) No employee shall be held liable, directly or indirectly, to his or her employer, for injury or death of a coemployee except where the injured employee or his or her dependents obtain a recovery under subdivision (a).

■ *Labor Code section 3351* provides, in part: " 'Employee' means every person in the service of an employer under any appointment or contract of hire or apprenticeship, express or implied, oral or written, whether lawfully or unlawfully employed."

■ *Labor Code section 3357* provides: "Any person rendering service for another, other than as an independent contractor, or unless expressly excluded herein, is presumed to be an employee."

■ "[A] coemployee's conduct is within the scope of his or her employment if it could be imputed to the employer under the doctrine of respondeat superior. If the coemployee was not 'engaged in any active service for the employer,' the coemployee was not acting within the scope of employment." (*Hendy, supra*, 54 Cal.3d at p. 740 , internal citation omitted.)

■ "[G]enerally speaking, a defendant in a civil action who claims to be one of that class of persons protected from an action at law by the provisions of the Workers' Compensation Act bears the burden of pleading and proving, as an affirmative defense to the action, the existence of the conditions of compensation set forth in the statute which are necessary to its application." (*Doney v. Tambouratgis* (1979) 23 Cal.3d 91, 96 [151 Cal.Rptr. 347, 587 P.2d 1160] .)

■ "In general, if an employer condones what courts have described as 'horseplay' among its employees, an employee who engages in it is within the scope of employment under section 3601, subdivision (a), and is thus immune from suit, unless exceptions apply." (*Torres v. Parkhouse Tire Service, Inc.* (2001) 26 Cal.4th 995, 1006 [111 Cal.Rptr.2d 564, 30 P.3d 57] , internal citations omitted.)

Secondary Sources

2 Witkin, Summary of California Law (10th ed. 2005) Workers' Compensation, §§ 67, 68

Chin et al., California Practice Guide: Employment Litigation (The Rutter Group) PP 5:624, 12:192, 13:951, 15:546,

15:569, 15:632

1 Herlick, California Workers' Compensation Law (6th ed.), Ch. 12, *Tort Actions--Subrogation*, § 12.22 (Matthew Bender)

1 California Employment Law, Ch. 20, *Liability for Work-Related Injuries*, § 20.43 (Matthew Bender)

1 Levy et al., California Torts, Ch. 10, *Effect of Workers' Compensation Law*, § 10.13 (Matthew Bender)

51 *California Forms of Pleading and Practice*, Ch. 577, *Workers' Compensation*, § 577.316 (Matthew Bender)

23 California Points and Authorities, Ch. 239, *Workers' Compensation Exclusive Remedy Doctrine* (Matthew Bender)

Publisher's Notes

There is no BAJI instruction on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsVicarious LiabilityEmployersScope of EmploymentGeneral OverviewWorkers' Compensation & SSDIGeneral OverviewWorkers' Compensation & SSDIAdministrative ProceedingsBurdens of ProofWorkers' Compensation & SSDICompensabilityCourse of EmploymentCausationWorkers' Compensation & SSDICompensabilityInjuriesGeneral OverviewWorkers' Compensation & SSDICompensabilityInjuriesIntoxicationWorkers' Compensation & SSDICompensabilityInjuriesSelf-Inflicted InjuriesWorkers' Compensation & SSDIDefensesGeneral OverviewWorkers' Compensation & SSDIRemedies Under Other LawsExclusivityGeneral OverviewWorkers' Compensation & SSDIRemedies Under Other LawsExclusivityExceptionsWorkers' Compensation & SSDIThird Party ActionsSubrogation



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California Forms of Jury Instruction

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CHAPTER 28 California Judicial Council Workers' Compensation Instructions

4-28 California Forms of Jury Instruction CACI 2811

CACI 2811 Co-Employee's Willful and Unprovoked Physical Act of Aggression--Essential Factual Elements (Lab. Code, § 3601(a)(1))

[*Name of plaintiff*] **claims that [he/she] was harmed because [*name of defendant*] assaulted [him/her]. To establish this claim, [*name of plaintiff*] must prove all of the following:**

1. That [*name of defendant*] [*insert one of the following:*]

[engaged in physical conduct that a reasonable person would perceive to be a real, present and apparent threat of bodily harm;]

[touched [*name of plaintiff*] [or caused [*name of plaintiff*] to be touched] in a harmful or offensive manner;]

[*insert other act of physical aggression*];

2. That [*name of defendant*]'s conduct was unprovoked;

3. That [*name of defendant*] intended to harm [*name of plaintiff*];

4. That [*name of plaintiff*] was harmed; and

5. That [*name of defendant*]'s conduct was a substantial factor in causing [*name of plaintiff*]'s harm.

This instruction is intended for use in cases where a co-employee is the defendant and the plaintiff alleges that the case falls outside of the workers' compensation exclusivity rule. If this instruction is used, do not use standard tort instructions on assault and battery.

■ *Labor Code section 3601* provides:

(a) Where the conditions of compensation set forth in Section 3600 concur, the right to recover such compensation, pursuant to the provisions of this division is, except as specifically provided in this section, the exclusive remedy for injury or death of an employee against any other employee of the employer acting within the scope of his or her employment, except that an employee, or his or her dependents in the event of his or her death, shall, in addition to the right to compensation against the employer, have a right to bring an action at law for damages against the other employee, as if this division did not apply, in either of the following cases:

(1) When the injury or death is proximately caused by the willful and unprovoked physical act of aggression of the other employee.

(2) When the injury or death is proximately caused by the intoxication of the other employee.

(b) In no event, either by legal action or by agreement whether entered into by the other employee or on his or her behalf, shall the employer be held liable, directly or indirectly, for damages awarded against, or for a liability incurred by the other employee under paragraph (1) or (2) of subdivision (a).

(c) No employee shall be held liable, directly or indirectly, to his or her employer, for injury or death of a coemployee except where the injured employee or his or her dependents obtain a recovery under subdivision (a).

■ "As relevant here, a civil suit is permissible when an employee proximately causes another employee's injury or death by a 'willful and unprovoked physical act of aggression' or by intoxication. If an employee brings a lawsuit against a coemployee based on either of these exceptions, the employer is not 'held liable, directly or indirectly, for damages awarded against, or for a liability incurred by the other employee' This provision is consistent with the view that a coemployee is immune from suit to the extent necessary to prevent an end-run against the employer under the exclusivity rule. 'It is self-evident that *Labor Code section 3601* did not establish or create a new right or cause of action in the employee but severely limited a preexisting right to freely sue a fellow employee for damages.' " (*Torres v. Parkhouse Tire Service, Inc.* (2001) 26 Cal.4th 995, 1002 [111 Cal.Rptr.2d 564, 30 P.3d 57] , internal citations and footnotes omitted.)

■ "[W]e conclude an 'unprovoked physical act of aggression' is unprovoked conduct intended to convey an actual, present, and apparent threat of bodily injury. A 'threat,' of course, is commonly understood as 'an expression of intention to inflict evil, injury, or damage' and as '[a] communicated intent to inflict harm or loss on another' Thus, 'unprovoked physical act of aggression' logically contemplates intended injurious conduct. By adding the term 'willful,' the Legislature has underscored the need for an intent to bring about the consequences of that expression, i.e., an intent to inflict injury or harm." (*Torres, supra*, 26 Cal.4th at p. 1005 , internal citations omitted.)

■ "As with other mental states, plaintiffs may rely on circumstantial evidence to prove the intent to injure." (*Torres, supra*, 26 Cal.4th at p. 1009 .)

■ "[T]o invoke civil liability under section 3601, subdivision (a)(1), a physical act causing a reasonable fear of harm must be pleaded and proved, but the resulting harm need not also be physical." (*Iverson v. Atlas Pacific Engineering* (1983) 143 Cal.App.3d 219, 225 [191 Cal.Rptr. 696] .)

■ "We agree that conduct constituting a common law assault may be actionable under section 3601(a)(1), provided that the conduct was intended to injure" (*Soares v. City of Oakland* (1992) 9 Cal.App.4th 1822, 1829 [12 Cal.Rptr.2d 405] .)

■ "In general, if an employer condones what courts have described as 'horseplay' among its employees, an employee who engages in it is within the scope of employment under section 3601, subdivision (a), and is thus immune from suit, unless exceptions apply." (*Torres, supra*, 26 Cal.4th at p. 1006 , internal citations omitted.)

Secondary Sources

2 Witkin, Summary of California Law (10th ed. 2005) Workers' Compensation, §§ 67, 68

Chin et al., California Practice Guide: Employment Litigation (The Rutter Group) PP 5:624, 13:951, 13:962, 15:546, 15:569, 15:632

1 Herlick, California Workers' Compensation Law (6th ed.), Ch. 12, *Tort Actions--Subrogation*, § 12.22 (Matthew Bender)

1 California Employment Law, Ch. 20, *Liability for Work-Related Injuries*, § 20.43 (Matthew Bender)

1 Levy et al., California Torts, Ch. 10, *Effect of Workers' Compensation Law*, § 10.13 (Matthew Bender)

51 *California Forms of Pleading and Practice*, Ch. 577, *Workers' Compensation*, § 577.316 (Matthew Bender)

23 California Points and Authorities, Ch. 239, *Workers' Compensation Exclusive Remedy Doctrine* (Matthew Bender)

Publisher's Notes

There is no BAJI instruction on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Governments
State & Territorial Governments
Claims By & Against
Torts
Intentional Torts
Assault & Battery
General Overview
Torts
Negligence
Causation
Proximate Cause
General Overview
Torts
Vicarious Liability
Employers
Activities & Conditions
General Overview
Workers' Compensation & SSDI
General Overview
Workers' Compensation & SSDI
Compensability
Course of Employment
General Overview
Workers' Compensation & SSDI
Compensability
Course of Employment
Causation
Workers' Compensation & SSDI
Compensability
Injuries
General Overview
Workers' Compensation & SSDI
Compensability
Injuries
Intoxication
Workers' Compensation & SSDI
Remedies Under Other Laws
Exclusivity
General Overview
Workers' Compensation & SSDI
Remedies Under Other Laws
Exclusivity
Exceptions
Workers' Compensation & SSDI
Third Party Actions
Subrogation



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California Forms of Jury Instruction

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CHAPTER 28 California Judicial Council Workers' Compensation Instructions

4-28 California Forms of Jury Instruction CACI 2812

CACI 2812 Injury Caused by Co-Employee's Intoxication--Essential Factual Elements (Lab. Code, § 3601(a)(2))

[*Name of plaintiff*] **claims that [he/she] was harmed because [*name of defendant*] was intoxicated. To establish this claim, [*name of plaintiff*] must prove all of the following:**

- 1. That [*name of defendant*] [*insert description of injury-producing conduct*];**
- 2. That [*name of defendant*] was intoxicated;**
- 3. That [*name of plaintiff*] was harmed; and**
- 4. That [*name of defendant*]'s intoxication was a substantial factor in causing [*name of plaintiff*]'s harm.**

New September 2003

This instruction is intended for use in cases where a co-employee is the defendant and the plaintiff alleges that the case falls outside of the workers' compensation exclusivity rule.

■ *Labor Code section 3601 provides:*

- (a) Where the conditions of compensation set forth in Section 3600 concur, the right to recover such compensation, pursuant to the provisions of this division is, except as specifically provided in this section, the exclusive remedy for injury or death of an employee against any other employee of the employer acting within the scope of his or

her employment, except that an employee, or his or her dependents in the event of his or her death, shall, in addition to the right to compensation against the employer, have a right to bring an action at law for damages against the other employee, as if this division did not apply, in either of the following cases:

(1) When the injury or death is proximately caused by the willful and unprovoked physical act of aggression of the other employee.

(2) When the injury or death is proximately caused by the intoxication of the other employee.

(b) In no event, either by legal action or by agreement whether entered into by the other employee or on his or her behalf, shall the employer be held liable, directly or indirectly, for damages awarded against, or for a liability incurred by the other employee under paragraph (1) or (2) of subdivision (a).

(c) No employee shall be held liable, directly or indirectly, to his or her employer, for injury or death of a coemployee except where the injured employee or his or her dependents obtain a recovery under subdivision (a).

■ "As relevant here, a civil suit is permissible when an employee proximately causes another employee's injury or death by a 'willful and unprovoked physical act of aggression' or by intoxication. If an employee brings a lawsuit against a coemployee based on either of these exceptions, the employer is not 'held liable, directly or indirectly, for damages awarded against, or for a liability incurred by the other employee' This provision is consistent with the view that a coemployee is immune from suit to the extent necessary to prevent an end-run against the employer under the exclusivity rule. 'It is self-evident that *Labor Code section 3601* did not establish or create a new right or cause of action in the employee but severely limited a preexisting right to freely sue a fellow employee for damages.' " (*Torres v. Parkhouse Tire Service, Inc.* (2001) 26 Cal.4th 995, 1002 [111 Cal.Rptr.2d 564, 30 P.3d 57] , internal citations and footnotes omitted.)

Secondary Sources

2 Witkin, Summary of California Law (10th ed. 2005) Workers' Compensation, §§ 67, 68

Chin et al., California Practice Guide: Employment Litigation (The Rutter Group) PP 5:624, 13:951, 13:962, 15:546, 15:568-15:569, 15:632

1 Herlick, California Workers' Compensation Law (6th ed.), Ch. 12, *Tort Actions--Subrogation*, § 12.22 (Matthew Bender)

1 California Employment Law, Ch. 20, *Liability for Work-Related Injuries*, § 20.43 (Matthew Bender)

1 Levy et al., California Torts, Ch. 10, *Effect of Workers' Compensation Law*, § 10.13 (Matthew Bender)

23 California Points and Authorities, Ch. 239, *Workers' Compensation Exclusive Remedy Doctrine* (Matthew Bender)

Publisher's Notes

There is no BAJI instruction on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsVicarious LiabilityEmployersActivities & ConditionsGeneral OverviewWorkers' Compensation & SSDIGeneral
OverviewWorkers' Compensation & SSDICompensabilityCourse of EmploymentCausationWorkers' Compensation &
SSDICompensabilityInjuriesGeneral OverviewWorkers' Compensation &
SSDICompensabilityInjuriesIntoxicationWorkers' Compensation & SSDIDefensesInjury by Fellow ServantWorkers'
Compensation & SSDIRemedies Under Other LawsExclusivityGeneral OverviewWorkers' Compensation & SSDIThird
Party ActionsSubrogation



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California Forms of Jury Instruction

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CHAPTER 28 California Judicial Council Workers' Compensation Instructions

4-28 California Forms of Jury Instruction CACI 2813-CACI 2899

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CACI 2813Reserved for Future Use



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CHAPTER 28 California Judicial Council Workers' Compensation Instructions

4-28 California Forms of Jury Instruction CACI VF-2800

CACI VF-2800 Employer's Willful Physical Assault (Lab. Code, § 3602(b)(1))

We answer the questions submitted to us as follows:

1. Did [name of defendant] touch [name of plaintiff] in a harmful or offensive manner?

_____ Yes _____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Did [name of defendant] intend to harm [name of plaintiff]?

_____ Yes _____ No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Was [name of defendant]'s conduct a substantial factor in causing harm to [name of plaintiff]?

_____ Yes _____ No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. What are [name of plaintiff]'s damages?

[a. Past economic loss

[lost earnings..... \$_____]

[lost profits..... \$_____]

[medical expenses..... \$_____]

[other past economic loss..... \$_____]

..... **Total Past Economic Damages: \$_____]****[b. Future economic loss**

[lost earnings..... \$_____]

[lost profits..... \$_____]

[medical expenses..... \$_____]

[other future economic loss..... \$_____]

..... **Total Future Economic Damages: \$_____]****[c. Past noneconomic loss, including [physical
pain/mental suffering:]..... \$_____]****[d. Future noneconomic loss, including [physical
pain/mental suffering:] \$_____]**..... **TOTAL \$_____****Signed: _____****Presiding Juror****Dated: _____****[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the
[clerk/bailiff/judge].**

New September 2003; Revised April 2007

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on *CACI No. 2801, Employer's Willful Physical Assault--Essential Factual Elements*.

If the plaintiff alleges that defendant engaged in conduct other than that which is described in question 1,

then the question may be modified by choosing one of the other options stated in element 1 of *CACI No. 2801*.

If specificity is not required, users do not have to itemize all the damages listed in question 4 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

Publisher's Notes

There is no BAJI verdict form on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJurorsGeneral OverviewCivil ProcedureTrialsJury TrialsVerdictsGeneral
OverviewCivil ProcedureTrialsJury TrialsVerdictsSpecial VerdictsGovernmentsCourtsGeneral
OverviewTortsDamagesCompensatory DamagesPain & SufferingEmotional & Mental DistressGeneral
OverviewTortsIntentional TortsAssault & BatteryGeneral Overview



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California Forms of Jury Instruction

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CHAPTER 28 California Judicial Council Workers' Compensation Instructions

4-28 California Forms of Jury Instruction CACI VF-2801

CACI VF-2801 Fraudulent Concealment of Injury (Lab. Code, § 3602(b)(2))

We answer the questions submitted to us as follows:

1. Was [name of plaintiff/decedent] injured on the job?

_____ Yes _____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Did [name of defendant] know [name of plaintiff/decedent] had suffered a job-related injury?

_____ Yes _____ No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Did [name of defendant] conceal this knowledge from [name of plaintiff/decedent]?

_____ Yes _____ No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Was [name of plaintiff/decedent]'s injury made worse as a result of this concealment?

_____ Yes _____ No

If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. What are [*name of plaintiff*]'s total damages?

[a. Past economic loss

[lost earnings..... \$_____].....

[lost profits..... \$_____].....

[medical expenses..... \$_____].....

[other past economic loss..... \$_____].....

..... Total Past Economic Damages: \$_____]

[b. Future economic loss

[lost earnings..... \$_____].....

[lost profits..... \$_____].....

[medical expenses..... \$_____].....

[other future economic loss..... \$_____].....

..... Total Future Economic Damages: \$_____]

[c. Past noneconomic loss, including [physical pain/mental suffering:]..... \$_____]

[d. Future noneconomic loss, including [physical pain/mental suffering:] \$_____]

..... TOTAL \$_____

Answer question 6.

6. What are the damages that [*name of plaintiff / decedent*] would have sustained if [*name of defendant*] had not concealed the injury?

[a. Past economic loss

[lost earnings..... \$_____].....

[lost profits..... \$_____].....

[medical expenses..... \$_____].....

[other past economic loss..... \$_____].....

..... Total Past Economic Damages: \$_____]

[b. Future economic loss

[lost earnings..... \$_____].....

[lost profits..... \$_____].....

[medical expenses..... \$_____].....

[other future economic loss..... \$_____].....

..... Total Future Economic Damages: \$_____]

**[c. Past noneconomic loss, including [physical
pain/mental suffering:]..... \$_____]**

**[d. Future noneconomic loss, including [physical
pain/mental suffering:] \$_____]**

..... TOTAL \$_____

Answer question 7.

7. Subtract the total amount in question 6 from the total amount in question 5. This is the amount [*name of plaintiff*] is entitled to recover. \$_____

Signed: _____

Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the [clerk/bailiff/judge].

New September 2003; April 2007

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on *CACI No. 2802, Fraudulent Concealment of Injury--Essential Factual Elements*.

If specificity is not required, users do not have to itemize all the damages listed in questions 5 and 6, and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition

51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

Publisher's Notes

There is no BAJI verdict form on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJurorsGeneral OverviewCivil ProcedureTrialsJury TrialsVerdictsGeneral
OverviewCivil ProcedureTrialsJury TrialsVerdictsSpecial VerdictsGovernmentsCourtsGeneral
OverviewTortsDamagesCompensatory DamagesPain & SufferingEmotional & Mental DistressGeneral Overview



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CHAPTER 28 California Judicial Council Workers' Compensation Instructions

4-28 California Forms of Jury Instruction CACI VF-2802

CACI VF-2802 Employer's Defective Product (Lab. Code, § 3602(b)(3))

We answer the questions submitted to us as follows:

1. Was the [*product*] manufactured by [*name of defendant*]?

_____ Yes _____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Was the [*product*] [sold/leased/transferred for valuable consideration] to an independent third person?

_____ Yes _____ No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Did the third person then provide the [*product*] for [*name of plaintiff*]'s use?

_____ Yes _____ No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Was the [*product*] defective in design or manufacture?

_____ Yes _____ No

If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. Was the [*product*] a substantial factor in causing harm to [*name of plaintiff*]?

_____ Yes _____ No

If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. What are [*name of plaintiff*]'s damages?

[a. Past economic loss

[lost earnings..... \$ _____].....

[lost profits..... \$ _____].....

[medical expenses..... \$ _____].....

[other past economic loss..... \$ _____].....

..... Total Past Economic Damages: \$ _____]

[b. Future economic loss

[lost earnings..... \$ _____].....

[lost profits..... \$ _____].....

[medical expenses..... \$ _____].....

[other future economic loss..... \$ _____].....

..... Total Future Economic Damages: \$ _____]

[c. Past noneconomic loss, including [physical pain/mental suffering:]..... \$ _____]

[d. Future noneconomic loss, including [physical pain/mental suffering:]..... \$ _____]

..... TOTAL \$ _____

Signed: _____
Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the [clerk/bailiff/judge].

New September 2003; Revised April 2007

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on *CACI No. 2803, Employer's Defective Product--Essential Factual Elements*.

If specificity is not required, users do not have to itemize all the damages listed in question 6 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

Publisher's Notes

There is no BAJI verdict form on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJurorsGeneral OverviewCivil ProcedureTrialsJury TrialsVerdictsGeneral OverviewCivil ProcedureTrialsJury TrialsVerdictsSpecial VerdictsGovernmentsCourtsGeneral OverviewTortsDamagesCompensatory DamagesPain & SufferingEmotional & Mental DistressGeneral Overview



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CHAPTER 28 California Judicial Council Workers' Compensation Instructions

4-28 California Forms of Jury Instruction CACI VF-2803

CACI VF-2803 Removal or Noninstallation of Power Press Guards (Lab. Code, § 4558)

We answer the questions submitted to us as follows:

1. Was [name of defendant] [name of plaintiff]'s [employer/supervisor]?

_____ Yes _____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Was [name of plaintiff] injured while operating a power press?

_____ Yes _____ No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Did [name of defendant] [remove/fail to install] [authorize the [removal of/failure to install]] the guards knowing that this would create a probability of serious injury or death?

_____ Yes _____ No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Did the power press's [designer/fabricator/assembler] [design the press with guards/install

guards on the press/require guards be attached/specify that guards be attached] and directly or indirectly convey this information to [*name of defendant*]?

_____ Yes _____ No

If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. Was [*name of defendant*]'s [removal/failure to install] the guards a substantial factor in causing harm to [*name of plaintiff*]?

_____ Yes _____ No

If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. What are [*name of plaintiff*]'s damages?

[a. Past economic loss

[lost earnings..... \$ _____].....

[lost profits..... \$ _____].....

[medical expenses..... \$ _____].....

[other past economic loss..... \$ _____].....

..... Total Past Economic Damages: \$ _____]

[b. Future economic loss

[lost earnings..... \$ _____].....

[lost profits..... \$ _____].....

[medical expenses..... \$ _____].....

[other future economic loss..... \$ _____].....

..... Total Future Economic Damages: \$ _____]

[c. Past noneconomic loss, including [physical pain/mental suffering:]..... \$ _____]

[d. Future noneconomic loss, including [physical pain/mental suffering:]..... \$ _____]

..... TOTAL \$ _____

Signed: _____
Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the [clerk/bailiff/judge].

New September 2003; Revised April 2007

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on *CACI No. 2804, Removal or Noninstallation of Power Press Guards--Essential Factual Elements*.

If specificity is not required, users do not have to itemize all the damages listed in question 6 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

Publisher's Notes

There is no BAJI verdict form on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJurorsGeneral OverviewCivil ProcedureTrialsJury TrialsJurorsSelectionGeneral OverviewCivil ProcedureTrialsJury TrialsVerdictsGeneral OverviewCivil ProcedureTrialsJury TrialsVerdictsSpecial VerdictsGovernmentsCourtsGeneral OverviewTortsDamagesCompensatory DamagesPain & SufferingEmotional & Mental DistressGeneral Overview



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California Forms of Jury Instruction

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CHAPTER 28 California Judicial Council Workers' Compensation Instructions

4-28 California Forms of Jury Instruction CACI VF-2804

CACI VF-2804 Co-Employee's Willful and Unprovoked Physical Act of Aggression (Lab. Code, § 3601(a)(1))

We answer the questions submitted to us as follows:

1. Did [name of defendant] touch [name of plaintiff] in a harmful or offensive manner?

_____ Yes _____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Was [name of defendant]'s conduct unprovoked?

_____ Yes _____ No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Did [name of defendant] intend to harm [name of plaintiff]?

_____ Yes _____ No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Was [name of defendant]'s conduct a substantial factor in causing harm to [name of plaintiff]?

_____ Yes _____ No

If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. What are [*name of plaintiff*]'s damages?

[a. Past economic loss

[lost earnings..... \$_____].....

[lost profits..... \$_____].....

[medical expenses..... \$_____].....

[other past economic loss..... \$_____].....

..... Total Past Economic Damages: \$_____]

[b. Future economic loss

[lost earnings..... \$_____].....

[lost profits..... \$_____].....

[medical expenses..... \$_____].....

[other future economic loss..... \$_____].....

..... Total Future Economic Damages: \$_____]

[c. Past noneconomic loss, including [physical pain/mental suffering:]..... \$_____]

[d. Future noneconomic loss, including [physical pain/mental suffering:]..... \$_____]

..... TOTAL \$_____

Signed: _____

Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the [clerk/bailiff/judge].

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on *CACI No. 2811, Co-Employee's Willful and Unprovoked Physical Act of Aggression--Essential Factual Elements*.

If the plaintiff alleges that the defendant engaged in conduct other than that described in question 1, then the question may be modified by choosing one of the other options stated in element 1 of *CACI No. 2811*.

If specificity is not required, users do not have to itemize all the damages listed in question 5 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

Publisher's Notes

There is no BAJI verdict form on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJurorsGeneral OverviewCivil ProcedureTrialsJury TrialsVerdictsGeneral OverviewCivil ProcedureTrialsJury TrialsVerdictsSpecial VerdictsGovernmentsCourtsGeneral OverviewTortsDamagesCompensatory DamagesPain & SufferingEmotional & Mental DistressGeneral Overview



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CHAPTER 28 California Judicial Council Workers' Compensation Instructions

4-28 California Forms of Jury Instruction CACI VF-2805

CACI VF-2805 Injury Caused by Co-Employee's Intoxication (Lab. Code, § 3601(a)(2))

We answer the questions submitted to us as follows:

1. Was [*name of plaintiff*] harmed?

_____ Yes _____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Was [*name of defendant*]'s conduct a substantial factor in causing [*name of plaintiff*]'s harm?

_____ Yes _____ No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Was [*name of defendant*] intoxicated?

_____ Yes _____ No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Was [*name of defendant*]'s intoxication a substantial factor in causing [*name of plaintiff*]'s harm?

_____ Yes _____ No

If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. What are [*name of plaintiff*]'s damages?

[a. Past economic loss

[lost earnings..... \$ _____].....

[lost profits..... \$ _____].....

[medical expenses..... \$ _____].....

[other past economic loss..... \$ _____].....

..... **Total Past Economic Damages: \$ _____]**

[b. Future economic loss

[lost earnings..... \$ _____].....

[lost profits..... \$ _____].....

[medical expenses..... \$ _____].....

[other future economic loss..... \$ _____].....

..... **Total Future Economic Damages: \$ _____]**

[c. Past noneconomic loss, including [physical pain/mental suffering:]..... \$ _____]

[d. Future noneconomic loss, including [physical pain/mental suffering:]..... \$ _____]

..... **TOTAL \$ _____**

Signed: _____

Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the [clerk/bailiff/judge].

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on *CACI No. 2812, Injury Caused by Co-Employee's Intoxication--Essential Factual Elements*.

If specificity is not required, users do not have to itemize all the damages listed in question 5 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

Publisher's Notes

There is no BAJI verdict form on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedurePleading & PracticePleadingsAnswersCivil ProcedureTrialsJury TrialsJurorsGeneral OverviewCivil ProcedureTrialsJury TrialsVerdictsGeneral OverviewCivil ProcedureTrialsJury TrialsVerdictsSpecial VerdictsGovernmentsCourtsGeneral OverviewTortsDamagesCompensatory DamagesPain & SufferingEmotional & Mental DistressGeneral Overview



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CHAPTER 28 California Judicial Council Workers' Compensation Instructions

4-28 California Forms of Jury Instruction CACI VF-2806-CACI VF-2899

Reserved for Future Use

CACI VF-2806Reserved for Future Use



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CHAPTER 29 California Judicial Council Federal Employers' Liability Act Instructions

4-29 California Forms of Jury Instruction 29.syn

§ 29.syn Synopsis to Chapter 29: California Judicial Council Federal Employers' Liability Act Instructions

CACI 2900 Essential Factual Elements

CACI 2901 Negligence--Duty of Railroad

CACI 2902 Negligence--Assignment of Employees

CACI 2903 Causation--Negligence

CACI 2904 Comparative Fault

CACI 2905 Compliance With Employer's Requests or Directions

CACI 2906-CACI 2919 Reserved for Future Use

CACI 2920 Essential Factual Elements--Federal Safety Appliance Act or Boiler Inspection Act

CACI 2921 Causation Under FSAA or BIA

CACI 2922 Statute of Limitations--Special Verdict Form or Interrogatory

CACI 2923 Borrowed Servant/Dual Employee

CACI 2924 Status as Defendant's Employee--Subservant Company

CACI 2925 Status of Defendant as Common Carrier

CACI 2926 Scope of Employment

CACI 2927-CACI 2939 Reserved for Future Use

CACI 2940 Income Tax Effects of Award

CACI 2941 Introduction to Damages for Personal Injury

CACI 2942 Damages for Death of Employee

CACI 2943-CACI 2999 Reserved for Future Use

CACI VF-2900 FELA--Negligence--Plaintiff's Negligence at Issue

CACI VF-2901 Federal Safety Appliance Act or Boiler Inspection Act

CACI VF-2902-CACI VF-2999 Reserved for Future Use



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CHAPTER 29 California Judicial Council Federal Employers' Liability Act Instructions

4-29 California Forms of Jury Instruction Scope

Scope

SCOPE

This chapter contains the California Judicial Council's "Federal Employers' Liability Act Series" of jury instructions [CACI No. 2900 et seq.]. The Judicial Council of California Civil Jury Instructions (CACI) included in this publication are the product of the Judicial Council of California Task Force on Jury Instructions, which are updated by the Judicial Council of California Advisory Committee on Civil Jury Instructions.

This chapter includes instructions on the following topics:

- Essential factual elements for a cause of action under FELA [CACI No. 2900].
- Negligence, including a railroad's duty [CACI No. 2901], assignment of employees [CACI No. 2902], causation [CACI No. 2903], and contributory negligence [CACI No. 2904].
- Compliance with an employer's request or directions [CACI No. 2905].
- Essential factual elements for a cause of action under the Federal Safety Appliance Act (FSAA) or Boiler Inspection Act (BIA) [CACI No. 2920], and causation under the FSAA and BIA [CACI No. 2921].
- Statute of limitations [CACI No. 2922].
- Borrowed Servant/Dual Employee generally [CACI No. 2923] and status as defendant's employee (subservant company) [CACI No. 2924] and defendant as a common carrier [CACI No. 2925].
- Scope of employment [CACI No. 2926].
- Income tax effects of award [CACI No. 2940].
- Damages for personal injury [CACI No. 2941] and death of an employee [CACI No. 2942].

The FELA series also includes special verdict forms [*CACI* Nos. *VF-2900*, *VF-2901*].



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CHAPTER 29 California Judicial Council Federal Employers' Liability Act Instructions

4-29 California Forms of Jury Instruction CACI 2900

CACI 2900 Essential Factual Elements

[*Name of plaintiff*] **claims that while [he/she/ *name of decedent*] was employed by [*name of defendant*], [[he/she] was harmed by/[his/her] death was caused by] [*name of defendant*]'s negligence. To establish this claim, [*name of plaintiff*] must prove all of the following:**

1. That [*name of plaintiff/decedent*] **was employed by [*name of defendant*];**
2. That [*name of defendant*] **was a common carrier by railroad;**
3. That [*name of defendant*] **was engaged in interstate commerce;**
4. That [*name of plaintiff/decedent*]'s **job duties furthered, or in any way substantially affected, interstate commerce;**
5. That [*name of plaintiff/decedent*] **was acting within the scope of [his/her] employment at the time of the incident;**
6. That [*name of defendant*] **was negligent;**
7. That [*name of plaintiff*] **was harmed; and**
8. That [*name of defendant*]'s **negligence was a cause of [*name of plaintiff/decedent*]'s [harm/death].**

["Interstate commerce" is commercial activity that crosses more than one country or state, such as the movement of goods from one state to another.]

New September 2003

In many case, some of the elements itemized above may not be contested or may be decided by the judge as a matter of law in advance of trial. Such elements may be deleted from this instruction.

If the plaintiff is bringing a negligence claim under the Federal Employers' Liability Act (FELA) and a claim under the Federal Safety Appliance Act (SAA) or the Boiler Inspection Act (BIA), the court may wish to add an introductory instruction that would alert the jury to the difference between the two claims.

- 45 U.S.C. section 51 provides, in part:

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this [chapter], be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this [chapter].

- The FELA is "liberally construed" to further Congress's remedial goal of protecting railroad workers. (*Consolidated Rail Corp. v. Gottshall* (1994) 512 U.S. 532, 543 [114 S.Ct. 2396, 129 L.Ed.2d 427] .)

- "The elements of a FELA case are: (1) the injury occurred while the plaintiff was working within the scope of his or her employment with the railroad; (2) the employment was in furtherance of the railroad's interstate transportation business; (3) the employer railroad was negligent; and (4) the employer's negligence played some part in causing the injury for which compensation is sought under the Act." (*Monarch v. Southern Pacific Transportation Co.* (1999) 70 Cal.App.4th 1197, 1210, fn. 10 [83 Cal.Rptr.2d 247] , internal citations omitted.)

- "That FELA is to be liberally construed ... does not mean that it is a workers' compensation statute. We have insisted that FELA 'does not make the employer the insurer of the safety of his employees while they are on duty. The basis of his liability is his negligence, not the fact that injuries occur.' " (*Consolidated Rail Corp.*, *supra*, 512 U.S. at p. 543 , internal citations omitted.)

- "We note that under the Federal Employers' Liability Act of 1908 an injured railroad employee may bring a cause of action without proof of negligence based on failure of the SAA-mandated safety appliances to function. When such strict liability does not apply, i.e., the injury does not result from

defective equipment covered by the SAA, the employee must establish common law negligence." (*Carrillo v. ACF Industries, Inc.* (1999) 20 Cal.4th 1158, 1170, fn. 4 [86 Cal.Rptr.2d 832, 980 P.2d 386] , internal citations omitted.)

■ "Under the FELA, liability is established if the employer's negligence played any part in causing the employee's injury." (*McDonald v. Southern Pacific Transportation Co.* (1999) 71 Cal.App.4th 256, 260, fn. 4 [83 Cal.Rptr.2d 734] , internal citation omitted.)

■ "The test for coverage under the amendment is not whether the employee is engaged in transportation, but rather whether what he does in any way furthers or substantially affects transportation." (*Reed v. Pennsylvania Railroad Co.* (1956) 351 U.S. 502, 505 [76 S.Ct. 958, 100 L.Ed. 1366] .)

■ "Where more than one inference can be drawn from the evidence, the question whether an employee was, at the time of receiving the injury sued for, engaged in interstate commerce, is for the jury." (*Sullivan v. Matt* (1955) 130 Cal.App.2d 134, 139 [278 P.2d 499] , internal citations omitted.)

Secondary Sources

Chin et al., Cal. Practice Guide: Employment Litigation (The Rutter Group) PP 15:485-15:488, 15:495

42 *California Forms of Pleading and Practice*, Ch. 485, Railroads, § 485.35 (Matthew Bender)

1 *Matthew Bender Practice Guide: Federal Pretrial Civil Procedure in California*, Ch. 3, Removing a State Court Case to Federal Court, 3.14

Publisher's Notes

This instruction covers issues presented in BAJI Nos. 11.07 and 11.08.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Governments Federal Government Claims By & Against International Trade Law General Overview Torts Negligence General Overview Torts Negligence Proof General Overview Torts Transportation Torts General Overview Torts Transportation Torts Rail Transportation General Overview Torts Transportation Torts Rail Transportation Federal Employers' Liability Act Transportation Law Rail Transportation Maintenance & Safety Workers' Compensation & SSDI Compensability Injuries General Overview Workers' Compensation & SSDI Compensability Injuries Disregard for Safety Orders Workers' Compensation & SSDI Remedies Under Other Laws Common Law Workers' Compensation & SSDI Remedies Under Other Laws Federal Employers' Liability Act



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CHAPTER 29 California Judicial Council Federal Employers' Liability Act Instructions

4-29 California Forms of Jury Instruction CACI 2901

CACI 2901 Negligence--Duty of Railroad

A railroad must use reasonable care under the circumstances to provide its employees with a reasonably safe place to work and with reasonably safe and suitable tools, machinery, and appliances. The reasonableness of care depends on the danger associated with the workplace or the equipment. The failure to use reasonable care is negligence. A railroad is not negligent if, using reasonable care, it could not reasonably have foreseen that the particular condition could cause injury.

[Name of defendant] is responsible for the negligence of any of its officers, agents, or employees.

New September 2003

For a definition of the term "negligence," see *CACI No. 401, Basic Standard of Care*.

■ "The plaintiff must make out a prima facie case of negligence on the part of the employer, including the element of reasonable foreseeability. ... 'To recover, the plaintiff must prove that the railroad, with the exercise of due care, could have reasonably foreseen that a particular condition could cause injury. The defendant's duty is measured by what a reasonably prudent person should or could have reasonably anticipated as occurring under like circumstances.' " (*Albert v. Southern Pacific Transportation Co.* (1994) 30 Cal.App.4th 529, 534 [35 Cal.Rptr.2d 777] , internal citations omitted.)

■ "Absent foreseeability, negligence is not established under FELA and without a showing of negligence, recovery is not permitted." (*Albert, supra*, 30 Cal.App.4th at p. 536 , internal citation omitted.) But note that foreseeability is not required for claims arising from the Federal Safety Appliance Act (49 U.S.C § 20301 et seq.), or the Boiler Inspection Act (49 U.S.C § 20701).

■ "Although a railroad's duty to use reasonable care in furnishing employees a safe place to work is not stated explicitly in the statute, it has become an integral part of the FELA. Under the FELA, that duty becomes 'more imperative' as the risk to an employee increases. The duty is a 'continuing one' and requires a jury to weigh a myriad of factors--including the nature of a task, its hazards and efforts--in determining whether an employer furnished an employee with a reasonably safe place to work. This continuous duty to provide a safe place to work is broader than the general duty to use reasonable care. Other courts in FELA actions have held that failure to instruct a jury regarding an employer's duty to provide a reasonably safe place to work is reversible error. We agree that when the issue is properly raised and an instruction is requested, the FELA requires jury instructions on the duty to provide a reasonably safe place to work." (*Ragsdell v. Southern Pacific Transportation Co.* (9th Cir. 1982) 688 F.2d 1281, 1283 , internal citations omitted.)

■ "The test of negligence in supplying the employee a safe place to work is 'whether reasonable men, examining the circumstances and the likelihood of injury, would have taken those steps necessary to remove the danger.' " (*Mortensen v. Southern Pacific Co.* (1966) 245 Cal.App.2d 241, 244 [53 Cal.Rptr. 851] , internal citations omitted.)

■ The duty to use reasonable care "is a duty which becomes 'more imperative' as the risk increases. 'Reasonable care becomes then a demand of higher supremacy, and yet, in all cases it is a question of the reasonableness of the care--reasonableness depending upon the danger attending the place or the machinery.' " (*Bailey v. Central Vermont Ry., Inc.* (1943) 319 U.S. 350, 353 [63 S.Ct. 1062, 87 L.Ed. 1444] , internal citation omitted.)

■ "The employer is not the insurer of the safety of its employees and the test of the employer's liability to an injured employee is whether ordinary care was used by the employer in regard to the risk." (*Baez v. Southern Pacific Co.* (1962) 210 Cal.App.2d 714, 717 [26 Cal.Rptr. 899] , internal citation omitted.)

■ The U.S. Supreme Court has held that an independent contractor is an "agent" for purposes of establishing an employer's liability under the FELA if the contractor performs "operational activities" of the employer. (*Sinkler v. Missouri Pacific Railroad Co.* (1958) 356 U.S. 326, 331-332 [78 S.Ct. 758, 2 L.Ed.2d 799] .)

Secondary Sources

42 *California Forms of Pleading and Practice*, Ch. 485, *Railroads*, § 485.35 (Matthew Bender)

Publisher's Notes

This instruction covers issues presented in BAJI Nos. 11.09, 11.10, and 11.11.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewCivil ProcedureTrialsJury TrialsJury InstructionsRequests for InstructionsCriminal Law & ProcedureAppealsReversible ErrorsJury InstructionsLabor & Employment LawEmployer LiabilityThird Party InsurersTortsNegligenceGeneral OverviewTortsNegligenceDutyGeneral OverviewTortsNegligenceDutyAffirmative Duty to ActCreators of Foreseeable PerilTortsNegligenceProofGeneral OverviewTortsNegligenceStandards of CareReasonable CareGeneral OverviewTortsNegligenceStandards of CareReasonable CareReasonable PersonTortsTransportation TortsRail TransportationGeneral OverviewTortsTransportation TortsRail TransportationFederal Employers' Liability

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CHAPTER 29 California Judicial Council Federal Employers' Liability Act Instructions

4-29 California Forms of Jury Instruction CACI 2902

CACI 2902 Negligence--Assignment of Employees

[*Name of defendant*] **was negligent if**

[it assigned [*name of plaintiff/decedent*] to a task that it knew or should have known [he/she] was not medically fit to perform.]

[it failed to assign a sufficient number of employees to safely perform the task that [*name of plaintiff/decedent*] was assigned to at the time of the incident.]

New September 2003

Read only the alternative that applies to the facts of the case.

- "The court correctly instructed the jury as to defendant's liability for assigning an employee to a job for which he is medically unfit. In this regard the jury was told that 'Under the Federal Employers' Liability Act, the word "injury" may include sickness, and it is negligence for a railroad company to assign a sick employee, of whose illness it knew or should have known, to tasks for which he is, by reason of his condition, unfitted, and the employee may recover damages from the railroad if such assignment plays any part in proximately worsening or aggravating such condition.' " (*Waller v. Southern Pacific Co.* (1967) 66 Cal.2d 201, 214 [57 Cal.Rptr. 353, 424 P.2d 937] .)

- It is not necessary to include as an element that the defendant must have "forced" the plaintiff to perform the injurious task. (*Waller, supra*, 66 Cal.2d at p. 214 .)

■ "The employer is under the nondelegable obligation of providing sufficient help for the particular task." (*Southern Ry. Co. v. Welch* (6th Cir. 1957) 247 F.2d 340, 341 , internal citation omitted.)

■ "As a corollary to this duty to maintain safe working conditions, the carrier is required to provide its employee with sufficient help in the performance of the work assigned to him. Where the failure to provide sufficient help proximately causes injury to the employee, the carrier is liable for negligence under the provisions of the FELA." (*Yawn v. Southern Ry. Co.* (5th Cir. 1979) 591 F.2d 312, 315 , internal citations omitted.)

Secondary Sources

42 *California Forms of Pleading and Practice*, Ch. 485, *Railroads*, § 485.35 (Matthew Bender)

Publisher's Notes

There is no BAJI instruction on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Governments Federal Government Claims By & Against Torts Transportation Torts General Overview Torts Transportation Torts Rail Transportation Federal Employers' Liability Act



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CHAPTER 29 California Judicial Council Federal Employers' Liability Act Instructions

4-29 California Forms of Jury Instruction CACI 2903

CACI 2903 Causation--Negligence

[Name of defendant]'s negligence, if any, was a cause of [name of plaintiff]'s harm/[name of decedent]'s death] if it played any part, no matter how small, in bringing about the [harm/death], even if other factors also contributed to the [harm/death].

New September 2003

Directions for Use

For an instruction on concurrent cause, see *CACI No. 431, Causation: Multiple Causes*.

Sources and Authority

- "We conclude that FELA does not abrogate the common-law approach, and that the same standard of causation applies to railroad negligence under Section 1 as to plaintiff contributory negligence under Section 3." (*Norfolk Southern Ry. v. Sorrell* (2007) 549 U.S. 158, ___ [127 S.Ct. 799, 166 L.Ed.2d 638, 2007 U.S. LEXIS 1006, *24] .)

- "Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought." (*Rogers v. Missouri Pacific Railroad Co.* (1957) 352 U.S. 500, 506 [77 S.Ct. 443, 1 L.Ed.2d 493] ; but see *Norfolk Southern Ry.*, *supra*, 549 U.S. at pp. ___ [2007 U.S. LEXIS 1006, *26] concurring opn. of Souter, J. [arguing that above language has been misconstrued as holding that proximate cause is not an element under FELA].)

■ "The common law concept of proximate cause ... has not been adopted as the causation test in F.E.L.A. cases. Causation in an F.E.L.A. case exists even if there is a plurality of causes, including the negligence of the defendant or of a third person. The negligence of the employer need not be the sole cause or even a substantial cause of the ensuing injury." (*Parker v. Atchison, Topeka and Santa Fe Ry. Co.* (1968) 263 Cal.App.2d 675, 678 [70 Cal.Rptr. 8] ; but see *Norfolk Southern*, *supra*, 549 U.S. at pp. ____ [2007 U.S. LEXIS 1006, *26] concurring opn. of Souter, J.)

■ "Although the burden upon the plaintiff in proving causation in an F.E.L.A. case can be weighed neither in pounds nor ounces, it is a substantially lighter burden than that imposed upon him by [the common-law jury instruction]." (*Parker*, *supra*, 263 Cal.App.2d at p. 678 .)

Secondary Sources

2 Witkin, Summary of California Law (10th ed. 2005) Workers' Compensation, § 121

42 *California Forms of Pleading and Practice*, Ch. 485, Railroads, § 485.35 (Matthew Bender)

Publisher's Notes

This instruction replaces BAJI No. 11.14, and covers issues presented in BAJI Nos. 11.15 and 11.16.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Torts Negligence General Overview Torts Negligence Causation General Overview Torts Negligence Causation Proximate Cause Concurrent Causation Torts Negligence Defenses Contributory Negligence General Overview Torts Transportation Torts Rail Transportation General Overview Torts Transportation Torts Rail Transportation Federal Employers' Liability Act Workers' Compensation & SSDI Remedies Under Other Laws Federal Employers' Liability Act



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CHAPTER 29 California Judicial Council Federal Employers' Liability Act Instructions

4-29 California Forms of Jury Instruction CACI 2904

CACI 2904 Comparative Fault

[*Name of defendant*] **claims that [*name of plaintiff/decedent*] was negligent and that [his/her] negligence contributed to [his/her] own [harm/death]. To succeed, [*name of defendant*] must prove both of the following:**

- 1. That [*name of plaintiff/decedent*] was negligent; and**
- 2. That [*name of plaintiff/decedent*]'s negligence was a cause of [his/her] [harm/death].**

[*Name of plaintiff/decedent*]'s negligence, if any, was a cause of [his/her] own [harm/death] if it played any part, no matter how small, in bringing about [his/her] [harm/death], even if other factors also contributed to [his/her] [harm/death].

If you decide that [*name of defendant*] was negligent but also decide that [*name of plaintiff/decedent*]'s negligence contributed to the harm, then you must determine the percentage of negligence that you attribute to [*name of plaintiff/decedent*].

New September 2003; Revised December 2009

Directions for Use

This instruction does not apply if the claim is based on a violation of the Federal Safety Appliance Act or the Boiler Inspection Act.

For a definition of the term "negligence," see *CACI No. 401, Basic Standard of Care*.

Sources and Authority

■ Title 45 *United States Code* section 53 provides, in part: "[T]he fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: Provided, that no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

■ "The FELA provides that defense of contributory negligence is not available to an employer to defeat an employee's claim for injury, but only to diminish the amount of damages in proportion to the amount of negligence attributable to the employee. The burden of proving contributory negligence is on the defendant." (*Torres v. Southern Pacific Co.* (1968) 260 Cal.App.2d 757, 763 [67 Cal.Rptr. 428] , internal citations omitted.)

■ "We conclude that FELA does not abrogate the common-law approach, and that the same standard of causation applies to railroad negligence under Section 1 as to plaintiff contributory negligence under Section 3." (*Norfolk Southern Ry. v. Sorrell* (2007) 549 U.S. 158, 171 [127 S.Ct. 799, 166 L.Ed.2d 638] .)

■ "Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought." (*Rogers v. Missouri Pacific Railroad Co.* (1957) 352 U.S. 500, 506 [77 S.Ct. 443, 1 L.Ed.2d 493] ; but see *Norfolk Southern Ry.*, *supra*, 549 U.S. at pp. 172-177 , conc. opn. of Souter, J. [arguing that above language has been misconstrued as holding that proximate cause is not an element under FELA].)

■ "The common law concept of proximate cause ... has not been adopted as the causation test in F.E.L.A. cases. Causation in an F.E.L.A. case exists even if there is a plurality of causes, including the negligence of the defendant or of a third person. The negligence of the employer need not be the sole cause or even a substantial cause of the ensuing injury." (*Parker v. Atchison, Topeka and Santa Fe Ry. Co.* (1968) 263 Cal.App.2d 675, 678 [70 Cal.Rptr. 8] ; but see *Norfolk Southern Ry.*, *supra*, 549 U.S. at pp. 172-177 , conc. opinion of Souter, J.)

Secondary Sources

2 Witkin, Summary of California Law (10th ed. 2005) Workers' Compensation, § 123

42 *California Forms of Pleading and Practice*, Ch. 485, Railroads, § 485.42 (Matthew Bender)

Publisher's Notes

This instruction covers issues presented in BAJI Nos. 11.18 and 11.42.

Legal Topics:

For related research and practice materials, see the following legal topics:

Admiralty Law Personal Injuries Maritime Tort Actions Negligence General Overview Torts Negligence General Overview Torts Negligence Causation General Overview Torts Negligence Defenses Contributory Negligence General Overview Torts Negligence Defenses Contributory Negligence Procedure Burdens of Proof Torts Negligence Proof Burdens of Proof Torts Negligence Proof Violations of Law Standards of Care Torts Negligence Proof Violations of

LawStatutesTortsTransportation TortsRail TransportationGeneral OverviewTortsTransportation TortsRail
TransportationFederal Employers' Liability ActTransportation LawRail TransportationMaintenance & SafetyWorkers'
Compensation & SSDICompensabilityInjuriesGeneral OverviewWorkers' Compensation & SSDIRemedies Under
Other LawsCommon LawWorkers' Compensation & SSDIRemedies Under Other LawsFederal Employers' Liability
Act



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CHAPTER 29 California Judicial Council Federal Employers' Liability Act Instructions

4-29 California Forms of Jury Instruction CACI 2905

CACI 2905 Compliance With Employer's Requests or Directions

[Name of plaintiff/decedent] was not negligent simply because [he/she], at the request or direction of [name of defendant], worked at a dangerous job, or in a dangerous place, or under dangerous conditions.

New September 2003

■ "In *Joyce v. Atlantic Richfield Co.*, 651 F.2d 676, 683 (10th Cir. 1981) , this court held that when the evidence could support either contributory negligence or assumption of the risk, instructions which only define contributory negligence are not sufficient to prevent the jury from applying assumption of the risk. The court held the jury instructions should also include the following admonition: 'You may not find contributory negligence on the part of the plaintiff, however, simply because he acceded to the request or direction of the responsible representatives of his employer that he work at a dangerous job, or in a dangerous place, or under unsafe conditions.' The same instruction has been held sufficient by other circuits." (*Sauer v. Burlington Northern Railroad Co.* (10th Cir. 1996) 106 F.3d 1490, 1493 , internal citation omitted.)

■ "[I]f no evidence of impermissible assumption of risk has reached the jury, a correct instruction on contributory negligence will do. However, if, either because of evidence introduced at trial or because of statements made by counsel in opening or closing arguments, there is a risk that the implied consent theory of assumption of the risk seeped its way into the case, the jury should be instructed that it 'may not find contributory negligence on the part of the plaintiff ... simply because he acceded to the request or direction of the responsible representatives of his employer that he work at a dangerous job, or in a dangerous place, or under unsafe conditions.' " (*Fashauer v. New Jersey Transit Rail Operations, Inc.* (3d Cir. 1995) 57 F.3d 1269, 1280 .)

Secondary Sources

42 *California Forms of Pleading and Practice*, Ch. 485, *Railroads*, § 485.35 (Matthew Bender)

Publisher's Notes

There is no BAJI instruction on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsClosing ArgumentsGeneral OverviewCivil ProcedureTrialsJury TrialsJury InstructionsGeneral
OverviewTortsNegligenceDefensesAssumption of RiskElements & NatureGeneral
OverviewTortsNegligenceDefensesAssumption of RiskElements & NaturePrimary Assumption of
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NegligenceProcedureGeneral Overview



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CHAPTER 29 California Judicial Council Federal Employers' Liability Act Instructions

4-29 California Forms of Jury Instruction CACI 2906-CACI 2919

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CACI 2906Reserved for Future Use



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CHAPTER 29 California Judicial Council Federal Employers' Liability Act Instructions

4-29 California Forms of Jury Instruction CACI 2920

CACI 2920 Essential Factual Elements--Federal Safety Appliance Act or Boiler Inspection Act

[*Name of plaintiff*] [also] **claims that while [he/she/[*name of decedent*]] was employed by [*name of defendant*], [[he/she] was harmed by/[his/her] death was caused by] [*name of defendant*]'s [*describe violation of Federal Safety Appliance Act/Boiler Inspection Act*]. To establish this claim, [*name of plaintiff*] must prove all of the following:**

- 1. That [*name of plaintiff/decedent*] was employed by [*name of defendant*];**
- 2. That [*name of defendant*] was a common carrier by railroad;**
- 3. That [*name of plaintiff/decedent*] was acting within the scope of [his/her] employment at the time of the incident;**
- 4. That [*name of defendant*] was engaged in interstate commerce;**
- 5. That [*name of plaintiff/decedent*]'s job duties furthered, or in any way substantially affected, interstate commerce;**
- 6. That [*name of defendant*] [*describe violation of Federal Safety Appliance Act/Boiler Inspection Act*];**
- 7. That [*name of plaintiff*] was harmed; and**
- 8. That [*name of defendant*]'s conduct was a cause of [[*name of plaintiff*]'s harm/[*name of decedent*]'s death].**

[Interstate commerce is commercial activity that crosses more than one country or state, such as the movement

of goods from one state to another.]

[Name of defendant] is responsible for harm caused by [describe conduct that violated the FSA/BIA] even if it was not negligent. If you find that [name of defendant] is responsible for [name of plaintiff/decedent]'s [harm/death], [name of plaintiff]'s recovery, if any, must not be reduced because of [name of plaintiff/decedent]'s own conduct.

New September 2003; Revised December 2009

Directions for Use

The statutory violation should be paraphrased in this instruction where indicated. Separate instructions may need to be drafted detailing the statutory requirements of the specific violation as alleged and any applicable defenses. (See 49 U.S.C. §§ 20301 *et seq.*, 20501 *et seq.*, and 20701.)

In many case, some of the elements itemized above may not be contested or may be decided by the judge as a matter of law in advance of trial. These elements may be deleted from this instruction.

If the plaintiff is bringing a negligence claim under the Federal Employers' Liability Act (FELA) and a claim under the Federal Safety Appliance Act (SAA) or the Boiler Inspection Act (BIA), the court may wish to add an introductory instruction that would alert the jury to the difference between the two claims.

Do not give a comparative fault instruction if the case is brought under this theory.

Sources and Authority

- Title 45 *United States Code* section 51 provides, in part: "Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this [chapter]."

- Title 45 *United States Code* section 53 provides, in part: "[T]he fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: Provided, that no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

- Title 45 *United States Code* section 54 provides: "In any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier; and no employee shall be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

- Title 45 *United States Code* section 54a provides: "A regulation, standard, or requirement in force, or prescribed by the Secretary of Transportation under chapter 201 of title 49, United States Code [49 USCS

§§ 20101 *et seq.*], or by a State agency that is participating in investigative and surveillance activities under section 20105 of title 49, is deemed to be a statute under sections 3 and 4 of this Act [45 USCS §§ 53, 54]."

■ Title 49 *United States Code* section 20302(a) provides:

(a) General. Except as provided in subsection (c) of this section and section 20303 of this title, a railroad carrier may use or allow to be used on any of its railroad lines--

(1) a vehicle only if it is equipped with--

(A) couplers coupling automatically by impact, and capable of being uncoupled, without the necessity of individuals going between the ends of the vehicles;

(B) secure sill steps and efficient hand brakes; and

(C) secure ladders and running boards when required by the Secretary of Transportation, and, if ladders are required, secure handholds or grab irons on its roof at the top of each ladder;

(2) except as otherwise ordered by the Secretary, a vehicle only if it is equipped with secure grab irons or handholds on its ends and sides for greater security to individuals in coupling and uncoupling vehicles;

(3) a vehicle only if it complies with the standard height of drawbars required by regulations prescribed by the Secretary;

(4) a locomotive only if it is equipped with a power-driving wheel brake and appliances for operating the train-brake system; and

(5) a train only if--

(A) enough of the vehicles in the train are equipped with power or train brakes so that the engineer on the locomotive hauling the train can control the train's speed without the necessity of brake operators using the common hand brakes for that purpose; and

(B) at least 50 percent of the vehicles in the train are equipped with power or train brakes and the engineer is using the power or train brakes on those vehicles and on all other vehicles equipped with them that are associated with those vehicles in the train.

■ Title 49 *United States Code* section 20502(b) provides:

(b) Use. A railroad carrier may allow a signal system to be used on its railroad line only when the system, including its controlling and operating appurtenances--

(1) may be operated safely without unnecessary risk of personal injury; and

(2) has been inspected and can meet any test prescribed under this chapter [49 USCS §§ 20501 *et seq.*].

- Title 49 *United States Code* section 20701 provides:

A railroad carrier may use or allow to be used a locomotive or tender on its railroad line only when the locomotive or tender and its parts and appurtenances--

(1) are in proper condition and safe to operate without unnecessary danger of personal injury;

(2) have been inspected as required under this chapter and regulations prescribed by the Secretary of Transportation under this chapter; and

(3) can withstand every test prescribed by the Secretary under this chapter.

- "We note that under the Federal Employers' Liability Act of 1908 an injured railroad employee may bring a cause of action without proof of negligence based on failure of the SAA-mandated safety appliances to function. When such strict liability does not apply, i.e., the injury does not result from defective equipment covered by the SAA, the employee must establish common law negligence. The Supreme Court has also recognized that the SAA imposes a duty on railroads extending to nonemployee travelers at railway/highway crossings, who must bring a common law tort action in state court (absent diversity) and must prove negligence." (*Carrillo v. ACF Industries, Inc.* (1999) 20 Cal.4th 1158, 1170, fn. 4 [86 Cal.Rptr.2d 832, 980 P.2d 386] , internal citations omitted.)

- "[An] FSAA violation is per se negligence in a FELA suit. In other words, the injured employee has to show only that the railroad violated the FSAA, and the railroad is strictly liable for any injury resulting from the violation." (*Phillips v. CSX Transportation Co.* (4th Cir. 1999) 190 F.3d 285, 288 , original italics.)

- "The BIA and the SAA are regarded as amendments to the FELA. The BIA supplements the FELA to provide additional public protection and facilitate employee recovery. ... [T]he BIA imposes on the carrier an absolute duty to maintain the locomotive, and all its parts and appurtenances, in proper condition, and safe to operate without unnecessary peril to life or limb." (*Fontaine v. National Railroad Passenger Corp.* (1997) 54 Cal.App.4th 1519, 1525 [63 Cal.Rptr.2d 644] , internal citation omitted.)

- "[N]either contributory negligence nor assumption of the risk is a defense to a BIA violation which has contributed to the cause of an injury." (*Fontaine, supra*, 54 Cal.App.4th at p. 1525 .)

- "Where an inefficient brake causes an injury the carrier in interstate commerce under the Safety Appliance Act cannot escape liability, and proof of negligence on the part of the railroad is unnecessary." (*Leet v. Union Pacific Railroad Co.* (1943) 60 Cal.App.2d 814, 817 [142 P.2d 37] .)

- "Proof of a BIA violation is enough to establish negligence as a matter of law, and neither contributory negligence nor assumption of risk can be raised as a defense." (*Law v. General Motors Corp.* (9th Cir. 1997) 114 F.3d 908, 912 , internal citations omitted.)

- "The purpose in enacting the BIA was to protect train service employees and the traveling public from defective locomotive boilers and equipment. '[I]t has been held consistently that the [BIA] supplements the [FELA] by imposing on interstate railroads "an absolute and continuing duty" to provide safe equipment.' In addition to the civil penalty, a person harmed by violation of the BIA is given recourse to sue under FELA, which applies only to railroad employees injured while engaged in interstate commerce. FELA provides the exclusive remedy for recovery of damages against a railroad by its employees. FELA liability is expressly limited to common carriers." (*Viad Corp. v. Superior Court* (1997) 55 Cal.App.4th 330, 335 [64 Cal.Rptr.2d 136] , internal citations omitted, disapproved on other grounds in

Scheiding v. General Motors Corp. (2000) 22 Cal.4th 471, 484, fn. 6 [93 Cal.Rptr.2d 342, 993 P.2d 996] .)

■ "The test for coverage under the amendment is not whether the employee is engaged in transportation, but rather whether what he does in any way furthers or substantially affects transportation." (*Reed v. Pennsylvania Railroad Co.* (1956) 351 U.S. 502, 505 [76 S.Ct. 958, 100 L.Ed. 1366] .)

■ "Where more than one inference can be drawn from the evidence, the question whether an employee was, at the time of receiving the injury sued for, engaged in interstate commerce, is for the jury." (*Sullivan v. Matt* (1955) 130 Cal.App.2d 134, 139 [278 P.2d 499] , internal citations omitted.)

Secondary Sources

42 *California Forms of Pleading and Practice*, Ch. 485, Railroads, § 485.45 (Matthew Bender)

Publisher's Notes

This instruction covers issues presented in BAJI Nos. 11.30, 11.31, 11.32, and 11.33.

Legal Topics:

For related research and practice materials, see the following legal topics:

Admiralty Law Personal Injuries Maritime Tort Actions Negligence General Overview Communications Law Cable Systems Signal Carriage Criminal Law & Procedure Jury Instructions Particular Instructions General Overview Criminal Law & Procedure Jury Instructions Requests to Charge Governments Federal Government General Overview Governments Federal Government Claims By & Against International Trade Law General Overview Torts Negligence General Overview Torts Negligence Defenses Assumption of Risk Procedure Torts Negligence Defenses Contributory Negligence General Overview Torts Negligence Defenses Contributory Negligence Procedure General Overview Torts Transportation Torts General Overview Torts Transportation Torts Rail Transportation General Overview Torts Transportation Torts Rail Transportation Federal Employers' Liability Act Torts Transportation Torts Rail Transportation Railroad Crossings Transportation Law Carrier Duties & Liabilities General Overview Transportation Law Carrier Duties & Liabilities Damages Transportation Law Rail Transportation Maintenance & Safety Workers' Compensation & SSDI Remedies Under Other Laws Common Law



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CHAPTER 29 California Judicial Council Federal Employers' Liability Act Instructions

4-29 California Forms of Jury Instruction CACI 2921

CACI 2921 Causation Under FSAA or BIA

If you decide that [name of defendant] [describe violation of the Federal Safety Appliance Act/Boiler Inspection Act], then this is a cause of harm if it played any part, no matter how small, in bringing about the [harm/death], even if other factors also contributed to the [harm/death].

New September 2003

- "Actions alleging a violation of the BIA are brought under the FELA. The standard of causation required in a BIA case is the same as the standard of causation required in a FELA negligence case." (*Summers v. Missouri Pacific Railroad System* (10th Cir. 1997) 132 F.3d 599, 606 , internal citations omitted.)

- "Proximate cause, as traditionally understood, is not required to establish causation under either the FELA or the BIA. 'Under the FELA [but not the BIA], an employee is entitled to recover damages if the employer's negligence played any part in producing the injury, no matter how slight.' " (*Fontaine v. National Railroad Passenger Corp.* (1997) 54 Cal.App.4th 1519, 1525 [63 Cal.Rptr.2d 644] , internal citations omitted.)

- Liability under the BIA is established if defendant's violation of the BIA "played any part, no matter how small, in bringing about or actually causing, the injury" to the plaintiff ... "without any requirement of a showing of negligence on the part of the defendant." (*Oglesby v. Southern Pacific Transportation Co.* (9th Cir. 1993) 6 F.3d 603, 606-609 .)

Secondary Sources

42 California Forms of Pleading and Practice, Ch. 485, Railroads, § 485.45 (Matthew Bender)

Publisher's Notes

This instruction covers issues presented in BAJI No. 11.32.

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsNegligenceCausationGeneral OverviewTortsTransportation TortsRail TransportationFederal Employers' Liability
ActTransportation LawRail TransportationMaintenance & Safety



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CHAPTER 29 California Judicial Council Federal Employers' Liability Act Instructions

4-29 California Forms of Jury Instruction CACI 2922

CACI 2922 Statute of Limitations--Special Verdict Form or Interrogatory

[*Name of plaintiff*] **must prove that [he/she] did not know, and could not reasonably have known, before [date three years before action was commenced],**

1. That [he/she] had been harmed; and

2. That the harm was potentially caused by [his/her] work with [name of defendant].

You will be asked a question about this on a special [verdict form/interrogatory].

New September 2003

■ 45 U.S.C. section 56 provides: "No action shall be maintained under this [chapter] unless commenced within three years from the day the cause of action accrued."

■ "Compliance with the three-year statute of limitations is a condition precedent for recovery in a FELA action. In cases of latent or progressive injuries ... the 'discovery rule' directs that the cause of action does not commence to run until the plaintiff knew or should have known of the injury and its cause." (*Monarch v. Southern Pacific Transportation Co.* (1999) 70 Cal.App.4th 1197, 1203 [83 Cal.Rptr.2d 247] , internal citations omitted.)

■ "The burden is therefore on the claimant to allege and to prove that his cause of action was commenced within the three-year period." (*Emmons v. Southern Pacific Transportation Co.* (5th Cir. 1983) 701 F.2d 1112, 1118 , internal citations omitted.)

■ "Under the discovery rule, the test is an objective inquiry into whether the plaintiff knew or should have known, in the exercise of reasonable diligence, the essential facts of injury and cause. Constructive rather than actual knowledge of the fact of causation triggers a duty to investigate the possible causes of injury. Thus, in accordance with the objective test, 'definite knowledge' that the injury is work related is not necessary in order for the cause of action to accrue. Once the plaintiff believes or suspects that the 'potential cause of his injury' is work related, an affirmative duty to investigate is imposed." (*Monarch*, *supra*, 70 Cal.App.4th at p. 1203 .)

Secondary Sources

42 *California Forms of Pleading and Practice*, Ch. 485, *Railroads*, § 485.41 (Matthew Bender)

Publisher's Notes

There is no BAJI instruction on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsVerdictsGeneral OverviewCivil ProcedureTrialsJury TrialsVerdictsSpecial VerdictsCriminal Law & ProcedureVerdictsSpecial VerdictsGovernmentsLegislationStatutes of LimitationsGeneral OverviewGovernmentsLegislationStatutes of LimitationsTime LimitationsTortsTransportation TortsRail TransportationFederal Employers' Liability ActWorkers' Compensation & SSDICompensabilityCourse of EmploymentCausationWorkers' Compensation & SSDICompensabilityInjuriesGeneral Overview



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CHAPTER 29 California Judicial Council Federal Employers' Liability Act Instructions

4-29 California Forms of Jury Instruction CACI 2923

CACI 2923 Borrowed Servant/Dual Employee

[[*Name of plaintiff*] claims [he/she/[*name of decedent*]] was [*name of defendant*]'s employee at the time of the incident even though [he/she] was primarily employed by [*name of primary employer*].]

[[*Name of plaintiff*] claims [he/she/[*name of decedent*]] was employed by both [*name of defendant*] and [*name of primary employer*] at the time of the incident.]

In deciding whether [*name of plaintiff/decedent*] was [*name of defendant*]'s employee, you must first decide whether [*name of defendant*] had the right to control the work of [*name of plaintiff/decedent*], rather than just the right to specify the result. It does not matter whether [*name of defendant*] exercised the right to control. Sharing information or coordinating efforts between employees of two companies, by itself, is not enough to establish the right to control.

If you decide that [*name of defendant*] did not have the right of control, then you must consider all the circumstances in deciding whether [*name of plaintiff/decedent*] was [*name of defendant*]'s employee. The following factors, if true, may show that [*name of plaintiff/decedent*] was the employee of [*name of defendant*]:

- (a) [*Name of defendant*] supplied the equipment, tools, and place of work;**
- (b) [*Name of plaintiff/decedent*] was paid by the hour rather than by the job;**
- (c) The work being done by [*name of plaintiff/decedent*] was part of the regular business of [*name of defendant*];**
- (d) [*Name of defendant*] had the right to end its relationship with [*name of plaintiff/decedent*];**

(e) The work being done by [name of plaintiff/decedent] was [his/her] only occupation or business;

(f) The kind of work performed by [name of plaintiff/decedent] is usually done under the direction of a supervisor rather than by a specialist working without supervision;

(g) The kind of work performed by [name of plaintiff/decedent] does not require specialized or professional skill;

(h) The services performed by [name of plaintiff/decedent] were to be performed over a long period of time;

(i) [Name of defendant] and [name of plaintiff/decedent] acted as if they had an employer-employee relationship;

(j) [Name of plaintiff/decedent]'s duties to [name of defendant] were only for its benefit;

(k) [Name of plaintiff/decedent] consented to the employment with [name of defendant].

New September 2003

Read the first bracketed paragraph for cases raising the borrowed-servant theory. Read the second bracketed paragraph for cases involving dual employment.

It may not be necessary to read all of the listed factors. Read only the factors for which evidence exists.

■ "Under common-law principles, there are basically three methods by which a plaintiff can establish his 'employment' with a rail carrier for FELA purposes even while he is nominally employed by another. First, the employee could be serving as the borrowed servant of the railroad at the time of his injury. Second, he could be deemed to be acting for two masters simultaneously. Finally, he could be a subservant of a company that was in turn a servant of the railroad." (*Kelley v. Southern Pacific Co.* (1974) 419 U.S. 318, 324 [95 S.Ct. 472, 42 L.Ed.2d 498] , internal citations omitted.)

■ "[A] finding of agency is not tantamount to a finding of a master-servant relationship." (*Kelley, supra*, 419 U.S. at p. 325 .)

■ "In this case ... the evidence of contacts between Southern Pacific employees and PMT employees may indicate, not direction or control, but rather the passing of information and the accommodation that is obviously required in a large and necessarily coordinated operation. The informal contacts between the two groups must assume a supervisory character before the PMT employees can be deemed *pro hac vice* employees of the railroad." (*Kelley, supra*, 419 U.S. at p. 330 .)

■ " 'Employee' status is established by 'proof of a master-servant relationship' under principles of common law." (*Dixon v. CSX Transportation Co.* (4th Cir. 1993) 990 F.2d 1440 , citing *Kelley, supra*, 419 U.S. at p. 323 .)

■ "The special employment relationship and its consequent imposition of liability upon the special employer flows from the borrower's power to supervise the details of the employee's work. Mere instruction by the borrower on the result to be achieved will not suffice." (*Marsh v. Tilley Steel Co.*

(1980) 26 Cal.3d 486, 492 [162 Cal.Rptr. 320, 606 P.2d 355] .)

■ Contract terms are not conclusive evidence of the existence of the right to control. (*Kowalski v. Shell Oil Co.* (1979) 23 Cal.3d 168, 176 [151 Cal.Rptr. 671, 588 P.2d 811] .)

■ "With respect to the dual servant doctrine, the Second Restatement of Agency [section 226] says: 'A person may be the servant of two masters, not joint employers, at one time as to one act, if the service to one does not involve abandonment of the service to the other.' ... The borrowed servant doctrine states: 'A servant directed or permitted by his master to perform services for another may become the servant of such other in performing such services. He may become the other's servant as to some acts and not as to others.' " (*Williamson v. Consolidated Rail Corp.* (3d Cir. 1991) 926 F.2d 1344, 1349 , internal citations omitted.)

■ Restatement Second of Agency, section 220(1), defines a servant as "a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control." Section 220(2) lists various factors that are helpful in applying this definition:

- (a) the extent of control which, by the agreement, the master may exercise over the details of the work;
- (b) whether or not the one employed is engaged in a distinct occupation or business;
- (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
- (d) the skill required in the particular occupation;
- (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
- (f) the length of time for which the person is employed;
- (g) the method of payment, whether by the time or by the job;
- (h) whether or not the work is a part of the regular business of the employer;
- (i) whether or not the parties believe they are creating the relation of master and servant;
and
- (j) whether the principal is or is not in business.

■ "While [section 220] is directed primarily at determining whether a particular bilateral arrangement is properly characterized as a master-servant or independent contractor relationship, it can also be instructive in analyzing the three-party relationship between two employers and a worker." (*Kelley, supra*, 419 U.S. at p. 324 .)

■ "The Supreme Court has held that a person falls within FELA if that worker can be classified as a joint employee of the railroad even though it is not his formal employer." (*Bradsher v. Missouri Pacific Railroad* (8th Cir. 1982) 679 F.2d 1253, 1257 .)

■ "[U]nder the FELA a worker can be the 'employee' of a railroad even though carried on the employment rolls of another company and paid by that other company. The test of employment is the established test in workers' compensation cases. It is whether the railroad has control of the employee or the right to control the employee. The law does not require that the railroad have full supervisory control. It requires only that the railroad, through its employees, plays 'a significant supervisory role' as to the work of the injured employee. (*Lindsey v. Louisville & Nashville Railroad Co.* (5th Cir. 1985) 775 F.2d 1322, 1324 , internal citation omitted.)

Secondary Sources

42 *California Forms of Pleading and Practice*, Ch. 485, *Railroads*, § 485.33 (Matthew Bender)

Publisher's Notes

There is no BAJI instruction on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate LawAgency RelationshipsAgents DistinguishedGeneral OverviewBusiness & Corporate LawAgency RelationshipsAgents DistinguishedIndependent Contractors, Masters & ServantsGeneral OverviewBusiness & Corporate LawAgency RelationshipsAgents DistinguishedIndependent Contractors, Masters & ServantsMasters & ServantsBusiness & Corporate LawAgency RelationshipsCauses of Action & RemediesBurdens of ProofBusiness & Corporate LawAgency RelationshipsDuties & LiabilitiesDual AgencyBusiness & Corporate LawAgency RelationshipsEstablishmentProof of AgencyGeneral OverviewCivil ProcedureJudicial OfficersGeneral OverviewLabor & Employment LawEmployer LiabilityThird Party InsurersTortsTransportation TortsRail TransportationGeneral OverviewTortsTransportation TortsRail TransportationFederal Employers' Liability ActTransportation LawCarrier Duties & LiabilitiesDuty to Provide ServiceWorkers' Compensation & SSDICoverageEmployment RelationshipsDual EmployeesWorkers' Compensation & SSDIRemedies Under Other LawsFederal Employers' Liability Act



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CHAPTER 29 California Judicial Council Federal Employers' Liability Act Instructions

4-29 California Forms of Jury Instruction CACI 2924

CACI 2924 Status as Defendant's Employee--Subservant Company

[*Name of plaintiff*] **claims [he/she/[*name of decedent*]] was [*name of defendant*]'s employee because [he/she] was employed by [*name of primary employer*], a company that was controlled by [*name of defendant*]. To succeed, [*name of plaintiff*] must prove that [*name of defendant*] controlled or had the right to control the daily operations of [*name of primary employer*]. Sharing information or coordinating efforts between two companies, by itself, is not enough to establish the right to control.**

In deciding whether [*name of defendant*] controlled [*name of primary employer*], you should consider the following:

- (a) Did the two companies share directors or management-level officers?**
- (b) Did the two companies share strategies, policies, sales, administrative, and operating staffs?**
- (c) Did the two companies share payroll and personnel records?**
- (d) Did [*name of defendant*] have a right to participate in the [*name of primary employer*]'s day-to-day operations?**
- (e) Did [*name of defendant*] establish [*name of primary employer*]'s work procedures?**
- (f) [*Insert other applicable factor.*]**

A "yes" answer to one or more of these questions suggests that the right to control exists. "No" answers suggest that the right to control does not exist. You should consider the relative importance of each factor and not simply count the number of "yes" and "no" answers. Remember that the ultimate test is the right to control.

New September 2003

■ "In the *Kelley* case, the Supreme Court recognized that if a second company could be shown to be a conventional common-law servant, the 'control or right to control' test would be met." (*Bradsher v. Missouri Pacific Railroad* (8th Cir. 1982) 679 F.2d 1253, 1257-1258 , internal citation omitted.)

■ "Under the FELA the test of employee status is whether [defendant railroad] had control or the right to control [plaintiff] in the performance of his job. Where the evidence of control is in dispute, the case should go to the jury." (*Vanskike v. ACF Industries, Inc.* (8th Cir. 1981) 665 F.2d 188, 198 , internal citations omitted.)

■ "In this case ... the evidence of contacts between Southern Pacific employees and PMT employees may indicate, not direction or control, but rather the passing of information and the accommodation that is obviously required in a large and necessarily coordinated operation. The informal contacts between the two groups must assume a supervisory character before the PMT employees can be deemed pro hac vice employees of the railroad." (*Kelley v. Southern Pacific Co.* (1974) 419 U.S. 318, 330 [95 S.Ct. 472, 42 L.Ed.2d 498] .)

Secondary Sources

42 *California Forms of Pleading and Practice*, Ch. 485, *Railroads*, § 485.33 (Matthew Bender)

Publisher's Notes

There is no BAJI instruction on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate LawCorporate NamesGeneral OverviewTortsTransportation TortsRail TransportationFederal Employers' Liability Act



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CHAPTER 29 California Judicial Council Federal Employers' Liability Act Instructions

4-29 California Forms of Jury Instruction CACI 2925

CACI 2925 Status of Defendant as Common Carrier

[Name of plaintiff] claims that [name of defendant] was a common carrier by railroad. To prove this, [name of plaintiff] must show that [name of defendant] was in the business of transporting [the property of] the general public by rail.

New September 2003

■ 45 U.S.C. section 57 provides: "The term 'common carrier' as used in this [chapter] shall include the receiver or receivers or other persons or corporations charged with the duty of the management and operation of the business of a common carrier."

■ "A common carrier has been defined generally as one who holds himself out to the public as engaged in the business of transportation of persons or property from place to place for compensation, offering his services to the public generally. The distinctive characteristic of a common carrier is that he undertakes to carry for all people indifferently, and hence is regarded in some respects as a public servant. The dominant and controlling factor in determining the status of one as a common carrier is his public profession as to the service offered or performed." (*Kelly v. General Electric Co. (E.D.Pa. 1953) 110 F.Supp. 4, 6 .*)

■ "According to these cases various considerations are of prime importance in determining whether a particular entity is a common carrier. First--actual performance of rail service, second--the service being performed is part of the total rail service contracted for by a member of the public, third--the entity is performing as part of a system of interstate rail transportation by virtue of common ownership between itself and a railroad or by a contractual relationship with a railroad, and hence such entity is deemed to be

holding itself out to the public, and fourth--remuneration for the services performed is received in some manner, such as a fixed charge from a railroad or by a percent of the profits from a railroad." (*Lone Star Steel Co. v. McGee* (5th Cir. 1967) 380 F.2d 640, 647 .)

Secondary Sources

42 *California Forms of Pleading and Practice*, Ch. 485, *Railroads*, § 485.35 (Matthew Bender)

Publisher's Notes

There is no BAJI instruction on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts Law Performance Tender & Delivery Torts Transportation Torts Rail Transportation General Overview Torts Transportation Torts Rail Transportation Federal Employers' Liability Act Transportation Law Rail Transportation General Overview



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CHAPTER 29 California Judicial Council Federal Employers' Liability Act Instructions

*4-29 California Forms of Jury Instruction CACI 2926***CACI 2926 Scope of Employment**

[*Name of plaintiff*] must prove that [he/she/[*name of decedent*]] was acting within the scope of [his/her] employment at the time of the incident.

Conduct is within the scope of employment if:

(a) It is reasonably related to the kinds of tasks that the employee was hired to perform; or

(b) It is reasonably foreseeable in light of the employer's business or the employee's job responsibilities.

New September 2003

See other instructions that further define the concept of scope of employment in the Vicarious Responsibility instructions (CACI No. 3720 et seq.).

■ "FELA's limitation of a railroad's liability to injuries occurring 'while [the person] is employed by' the railroad means that it must generally be determined whether the employee was injured while she was acting within the scope of her employment. 'Normally, whether an employee is acting within the scope of employment is a question to be resolved by the jury from all the surrounding circumstances,' for 'in negligence actions brought under the FELA, ... the role of the jury is significantly greater ... than in common law negligence actions' Indeed, " 'trial by jury is part of the remedy.' " (*Goldwater v. Metro-North Commuter Railroad* (2d Cir. 1996) 101 F.3d 296, 298 , internal citations omitted.)

■ "The scope of employment under FELA is broadly construed by the federal courts--and has been for more than 80 years. In the seminal FELA case of *Erie Railroad Company v. Winfield* (1917) 244 U.S. 170 [37 S.Ct. 556, 61 L.Ed. 1057] , the Supreme Court held that an employee who leaves the railroad carrier's yard 'at the close of his day's work' is engaged in a 'necessary incident of his day's work,' and thus is 'but discharging a duty of his employment.' " (*Ponce v. Northeast Illinois Regional Commuter Railroad Corp.* (N.D.Ill. 2000) 103 F.Supp.2d 1051, 1056 , internal citations omitted.)

■ "Railroad employment has been broadly interpreted to extend not only to acts required by the employer, but also to those acts necessarily incidental to the employment. [P] This circuit and others have nevertheless held that even 'given its most liberal interpretation, the Act cannot be extended to cover activities not necessarily incidental to or an integral part of employment in interstate commerce. It obviously does not cover activities undertaken by an employee for a private purpose and having no causal relationship with his employment.' " (*Feichko v. Denver & Rio Grande Western Railroad Co.* (10th Cir. 2000) 213 F.3d 586, 592 , internal citations omitted.)

■ Restatement Second of Agency, section 229, provides:

(1) To be within the scope of the employment, conduct must be of the same general nature as that authorized, or incidental to the conduct authorized.

(2) In determining whether or not the conduct, although not authorized, is nevertheless so similar to or incidental to the conduct authorized as to be within the scope of employment, the following matters of fact are to be considered:

(a) whether or not the act is one commonly done by such servants;

(b) the time, place and purpose of the act;

(c) the previous relations between the master and the servant;

(d) the extent to which the business of the master is apportioned between different servants;

(e) whether or not the act is outside the enterprise of the master or, if within the enterprise, has not been entrusted to any servant;

(f) whether or not the master has reason to expect that such an act will be done;

(g) the similarity in quality of the act done to the act authorized;

(h) whether or not the instrumentality by which the harm is done has been furnished by the master to the servant;

(i) the extent of departure from the normal method of accomplishing an authorized result; and

(j) whether or not the act is seriously criminal.

■ "The Restatement at § 229 sets forth intelligent factors for a factfinder to consider in determining whether this has happened. We emphasize that no one factor is dispositive; establishing one or more factors is not equivalent to

establishing scope of employment." (*Wilson v. Chicago, Milwaukee, St. Paul & Pacific Railroad Co.* (7th Cir. 1988) 841 F.2d 1347, 1355 .)

■ "[A]s a general rule, courts have held that an employee injured while commuting to and from work is not covered by FELA." (*Ponce, supra*, 103 F.Supp.2d at p. 1057 .) However, FELA may apply if the injury occurs on the employer's work site "while the employee is attempting to report to or leave the job within a reasonable time of his or her shift, and is exposed to risks not confronted by the public generally." (*Ibid.*)

Secondary Sources

42 *California Forms of Pleading and Practice*, Ch. 485, Railroads, § 485.35 (Matthew Bender)

Publisher's Notes

This instruction covers issues presented in BAJI No. 11.12.

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate Law Agency Relationships Duties & Liabilities Authorized Acts of Agents General Overview Business & Corporate Law Agency Relationships Duties & Liabilities Authorized Acts of Agents Scope of Authority Torts Transportation Torts Rail Transportation General Overview Torts Transportation Torts Rail Transportation Federal Employers' Liability Act Workers' Compensation & SSDI Compensability Course of Employment Going & Coming Rule Workers' Compensation & SSDI Compensability Course of Employment Personal Comfort Workers' Compensation & SSDI Compensability Course of Employment Place & Time Workers' Compensation & SSDI Remedies Under Other Laws Federal Employers' Liability Act



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4-29 California Forms of Jury Instruction CACI 2927-CACI 2939

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CHAPTER 29 California Judicial Council Federal Employers' Liability Act Instructions

4-29 California Forms of Jury Instruction CACI 2940

CACI 2940 Income Tax Effects of Award

[*Name of plaintiff*] **will not be required to pay any federal or state income taxes on any amount that you award.**

[When calculating lost earnings, if any, you should use after-tax earnings.]

New September 2003

The Eighth Circuit Model Jury Instructions state that the bracketed sentence should be given if there is evidence of both gross and net earnings and there is any danger that the jury may be confused as to the proper measure of damages.

■ If requested, the jury must be instructed that the verdict will not be subject to income taxes. (*Norfolk & W. Ry. Co. v. Liepelt* (1980) 444 U.S. 490, 498 [100 S.Ct. 755, 62 L.Ed.2d 689].) Further, the Supreme Court in the *Liepelt* case stated that the jury should base its award on the "after-tax" value of lost earnings in determining lost earnings. (*Id.* at p. 493 .)

Publisher's Notes

This instruction replaces BAJI No. 11.43.1.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewCivil ProcedureTrialsJury TrialsJury InstructionsRequests for InstructionsCriminal Law & ProcedureJury InstructionsRequests to

ChargeTortsDamagesTaxation



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CHAPTER 29 California Judicial Council Federal Employers' Liability Act Instructions

4-29 California Forms of Jury Instruction CACI 2941

CACI 2941 Introduction to Damages for Personal Injury

If you decide that [name of plaintiff] has proved [his/her] claim against [name of defendant], you also must decide how much money will reasonably compensate [name of plaintiff] for the harm. This compensation is called "damages."

[Name of plaintiff] must prove the amount of [his/her] damages. However, [name of plaintiff] does not have to prove the exact amount of damages that will provide reasonable compensation for the harm. You must not speculate or guess in awarding damages.

The following are the specific items of damages claimed by [name of plaintiff]:

New September 2003

See the Damages series (*CACI No. 3900 et seq.*) for instructions on specific items of damages and other topics involving damages, such as the concept of present cash value, mitigation of damages, and the effect of preexisting conditions. Care should be taken to verify that the wording of these instructions is consistent with federal law regarding damages under FELA.

- 45 U.S.C. section 51 provides: "Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and

children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment. [P] Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this [chapter]"

- "[I]t is settled that the propriety of jury instructions concerning the measure of damages in an FELA action is an issue of 'substance' determined by federal law." (*St. Louis Southwestern Railway Co. v. Dickerson* (1985) 470 U.S. 409, 411 [105 S.Ct. 1347, 84 L.Ed.2d 303] , internal citation omitted.)

- "A FELA plaintiff is entitled to recover for all past, present and probable future harm attributable to the defendant's tortious conduct, including pain and suffering and mental anguish." (*Marchica v. Long Island Railroad Co.* (2d Cir. 1994) 31 F.3d 1197, 1207 .)

- "A FELA plaintiff, upon proof of employer liability, may recover damages for loss of earnings, medical expenses and pain and suffering. The burden rests upon the plaintiff to establish by sufficient evidence a factual basis for the amount of damages sought." (*Williams v. Missouri Pacific Railroad Co.* (10th Cir. 1993) 11 F.3d 132, 135 , internal citations omitted.)

- "The Act was not intended to supersede or pre-empt the common law in railroad employee injury cases, but merely to modify it in ... specific particulars. Thus, the Act contains no provisions regulating the measure of damages recoverable in an action to which the FELA applies, and courts have since held that the absence in the Act of specific provisions governing the measure of damages in FELA actions does not affect their availability as before the Act." (*Hall v. Minnesota Transfer Railway Co.* (D.C.Minn. 1971) 322 F.Supp. 92, 94 .)

- "The seaman may thus recover for all of his pecuniary damages including such damages as the cost of employing someone else to perform those domestic services that he would otherwise have been able to render but is now incapable of doing." (*Cruz v. Hendy International Co.* (5th Cir. 1981) 638 F.2d 719, 723 [Jones Act case] , overruled on other grounds in *Miles v. Apex Marine Corp.* (1990) 498 U.S. 19, 32-33 [111 S.Ct. 317, 112 L.Ed.2d 275] .)

- "Although our decision in *Jones & Laughlin* makes clear that no single method for determining present value is mandated by federal law and that the method of calculating present value should take into account inflation and other sources of wage increases as well as the rate of interest, it is equally clear that an utter failure to instruct the jury that present value is the proper measure of a damages award is error." (*St. Louis Southwestern Railway*, *supra*, 470 U.S. at p. 412 .)

- "Damages for the injury of loss of earning capacity may be recovered in a FELA action. 'Earning capacity means the potential for earning money in the future' The appropriate measure is the present value of the total amount of future earnings." (*Bissett v. Burlington Northern Railroad Co.* (8th Cir. 1992) 969 F.2d 727, 731 , internal citations omitted.)

- "[W]e see no reason, and defendant has presented us with no reason, to create in FELA cases an exception to the general rule that the defendant has the burden of proving that the plaintiff could, with reasonable effort, have mitigated his damages." (*Jones v. Consolidated Rail Corp.* (6th Cir. 1986) 800

F.2d 590, 594 .)

- "The federal and state courts have held with virtual unanimity over more than seven decades that prejudgment interest is not available under the FELA." (*Monessen Southwestern Railway Co. v. Morgan* (1988) 486 U.S. 330, 338 [108 S.Ct. 1837, 100 L.Ed.2d 349] .)

- "We therefore reaffirm the conclusion ... that punitive damages are unavailable under the FELA." (*Wildman v. Burlington Northern Railroad Co.* (9th Cir. 1987) 825 F.2d 1392, 1395 , internal citation omitted.)

- "We have held specifically that the spouse of an injured railroad employee may not sue for loss of consortium under FELA." (*Kelsaw v. Union Pacific Railroad Co.* (9th Cir. 1982) 686 F.2d 819, 820 , internal citation omitted.)

- 45 U.S.C. section 55 provides: "Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this [chapter], shall to that extent be void: Provided, That in any action brought against any such common carrier under or by virtue of any of the provisions of this [chapter], such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought."

- "While at first glance the language of this provision seems broad enough to completely abrogate the common law collateral source rule, courts have limited the scope of the provision by focusing on the requirement that the covered payments be made 'on account of the injury.' Thus, the cases draw a distinction between payments emanating from a fringe benefit such as a retirement fund or a general hospital and medical insurance plan, and payments which the employer has undertaken voluntarily to indemnify itself against possible liabilities under the FELA." (*Clark v. Burlington Northern, Inc.* (8th Cir. 1984) 726 F.2d 448, 450 , internal citation omitted.)

- "A benefit may be exempt from setoff under the collateral source rule even though the employer is the sole source of the fund. The important consideration is the character of the benefits received, rather than whether the source is actually independent of the employer. Medical expenses paid for by insurance are exempt from setoff regardless of whether the employer paid one hundred percent of the insurance premiums. Courts have also ruled private disability retirement plans established by a collective bargaining agreement and covering both job-related and non-job-related illness and injury are exempt from setoff." (*Clark, supra*, 726 F.2d at pp. 450-451 , footnote and internal citations omitted.)

- "Generally, a tortfeasor need not pay twice for the damage caused, but he should not be allowed to set off compensation from a 'collateral source' against the amount he owes on account of his tort." (*Russo v. Matson Navigation Co.* (9th Cir. 1973) 486 F.2d 1018, 1020 .)

- "It is well established in this circuit that the purpose and nature of the insurance benefits are controlling. Here, the purpose of the insurance coverage, as expressly described in the collective bargaining agreement, is to indemnify the employer against FELA liability. It follows that setoff should be allowed and that the benefits in this case should not be regarded as a collateral source." (*Folkestad v. Burlington Northern, Inc.* (9th Cir. 1987) 813 F.2d 1377, 1383 .)

- "The mechanics of handling the setoff provided by the plan may be dealt with either by the Court instructing the jury that the amount of benefits provided by the GA-23000 contract must be set off

against any damages awarded or by the Court as a matter of law reducing damages awarded by the jury."
 (*Brice v. National Railroad Passenger Corp.* (D.Md. 1987) 664 F.Supp. 220, 224 .)

Secondary Sources

42 *California Forms of Pleading and Practice*, Ch. 485, Railroads, §§ 485.43, 485.44 (Matthew Bender)

Publisher's Notes

This instruction covers issues presented in BAJI No. 11.40.

Legal Topics:

For related research and practice materials, see the following legal topics:

Admiralty Law Personal Injuries Maritime Tort Actions Multiple Defendants General Overview Admiralty Law Personal Injuries Maritime Tort Actions Negligence General Overview Admiralty Law Personal Injuries Maritime Workers' Claims General Overview Civil Procedure Trials Jury Trials Jury Instructions General Overview Civil Procedure Remedies Judgment Interest General Overview Family Law Marital Duties & Rights Causes of Action Loss of Consortium Governments Courts Common Law Healthcare Law Actions Against Facilities General Overview Healthcare Law Business Administration & Organization Collective Bargaining & Labor Unions Healthcare Law Insurance Reimbursement General Overview Insurance Law Industry Regulation Federal Regulations General Overview International Trade Law General Overview Labor & Employment Law Disability & Unemployment Insurance Disability Benefits Claim Procedures Labor & Employment Law Disability & Unemployment Insurance Disability Benefits Coverage & Definitions General Overview Labor & Employment Law Disability & Unemployment Insurance Disability Benefits Proof General Overview Pensions & Benefits Law Equal Protection Age Torts Business Torts General Overview Torts Damages General Overview Torts Damages Compensatory Damages Lost Income General Overview Torts Damages Compensatory Damages Medical Expenses Torts Damages Compensatory Damages Pain & Suffering Award Calculations Torts Damages Punitive Damages Award Calculations General Overview Torts Procedure Multiple Defendants Indemnity Contractual Indemnity Torts Transportation Torts General Overview Torts Transportation Torts Rail Transportation General Overview Torts Transportation Torts Rail Transportation Federal Employers' Liability Act Torts Vicarious Liability Employers Indemnity Transportation Law Carrier Duties & Liabilities Damages Workers' Compensation & SSDI Remedies Under Other Laws Common Law



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California Forms of Jury Instruction

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CHAPTER 29 California Judicial Council Federal Employers' Liability Act Instructions

4-29 California Forms of Jury Instruction CACI 2942

CACI 2942 Damages for Death of Employee

If you decide that [name of plaintiff] has proved [his/her] claim against [name of defendant] for the death of [name of decedent], you also must decide how much money will reasonably compensate [name of plaintiff] for this loss. This compensation is called "damages."

[Name of plaintiff] must prove the amount of [his/her] damages. However, [name of plaintiff] does not have to prove the exact amount of these damages. You must not speculate or guess in awarding damages.

The following are the specific items of damages claimed by [name of plaintiff]:

- 1. The reasonable value of money, goods, and services that [name of decedent] would have provided [name of plaintiff] during either the life expectancy that [name of decedent] had before [his/her] death or the life expectancy of [name of plaintiff], whichever is shorter;**
- 2. [The monetary value of [name of minor child]'s loss of any care, attention, instruction, training, advice, and guidance from [name of decedent];]**
- 3. Any pain and suffering that [name of decedent] experienced as a result of [his/her] injuries; and**
- 4. The reasonable expense of medical care and supplies reasonably needed by and actually provided to [name of decedent].**

Do not include in your award any compensation for [name of plaintiff]'s grief, sorrow, or mental anguish or the loss of [name of decedent]'s society or companionship.

In deciding a person's life expectancy, consider, among other factors, that person's health, habits, activities,

lifestyle, and occupation. Life expectancy tables are evidence of a person's life expectancy but are not conclusive.

Any award you make for the value of any money and services that you decide [*name of decedent*] would have provided [*name of plaintiff*] in the future should be reduced to present value. Any award you make for the value of any money and services you decide [*name of decedent*] would have provided [*name of plaintiff*] between the date of [his/her] death on [*date of death*] and the present should not be reduced to present value.

[In computing damages, consider the losses suffered by all plaintiffs and return a verdict of a single amount for all plaintiffs. I will divide the amount [among/between] the plaintiffs.]

New September 2003

The list of damages is optional and is intended to include those items of damage for which recovery is commonly sought in the ordinary FELA case. This list is not intended to exclude any item of damages that is supported in evidence and the authorities. There must be evidence to support each item listed.

The items of damage set forth in items number 3 and 4 are recoverable by the personal representative on behalf of the spouse, children, or parents of the decedent, if supported by the evidence.

See also CACI No. 3904, *Present Cash Value*, and CACI No. 3932, *Life Expectancy*.

■ 45 U.S.C. section 51 provides: "Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment. [P] Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this [chapter], be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this [chapter]."

■ 45 U.S.C. section 59 provides: "Any right of action given by this chapter to a person suffering injury shall survive to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee, and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, but in such cases there shall be only one recovery for the same injury."

■ "[I]t is settled that the propriety of jury instructions concerning the measure of damages in an FELA action is an issue of 'substance' determined by federal law." (*St. Louis Southwestern Railway Co. v. Dickerson* (1985) 470 U.S. 409, 411 [105 S.Ct. 1347, 84 L.Ed.2d 303] , internal citation omitted.)

■ "The elements which make up the total damage resulting to a minor child from a parent's death may

be materially different from a parent's examination where the beneficiary is a spouse or collateral dependent relative; but in every instance the award must be based upon money values, the amount of which can be ascertained only upon a view of the peculiar facts presented." (*Norfolk & Western Railroad Co. v. Holbrook* (1915) 235 U.S. 625, 629 [35 S.Ct. 143, 59 L.Ed. 392] , internal citations omitted.)

■ "In the present case there was testimony concerning the personal qualities of the deceased and the interest which he took in his family. It was proper, therefore, to charge that the jury might take into consideration the care, attention, instruction, training, advice, and guidance which the evidence showed he reasonably might have been expected to give his children during their minority, and to include the pecuniary value thereof in the damages assessed." (*Norfolk & Western Railroad Co.*, *supra*, 235 U.S. at p. 629 .)

■ " 'In the absence of evidence that an adult child is either dependent upon or had any reasonable grounds for expecting any pecuniary benefit from a continuance of the decedent's life, a recovery on behalf of such child is excluded.' " (*Kozar v. Chesapeake & Ohio Railway Co.* (6th Cir. 1971) 449 F.2d 1238, 1243 , internal citation omitted.)

■ "[T]he conclusion is unavoidable that the personal representative is to recover on behalf of the designated beneficiaries, not only such damages as will compensate them for their own pecuniary loss, but also such damages as will be reasonably compensatory for the loss and suffering of the injured person while he lived." (*St. Louis, I.M. & S. Railway Co. v. Craft* (1915) 237 U.S. 648, 658 [35 S.Ct. 704, 59 L.Ed. 1160] .)

■ "Funeral expenses ... may not be included in damages awarded in FELA actions." (*Dubose v. Kansas City Southern Railway Co.* (5th Cir. 1984) 729 F.2d 1026, 1033 .)

■ "In a wrongful-death action under the FELA, the measure of recovery is 'the damages ... [that] flow from the deprivation of the pecuniary benefits which the beneficiaries might have reasonably received' The amount of money that a wage earner is able to contribute to the support of his family is unquestionably affected by the amount of the tax he must pay to the Federal Government. It is his after-tax income, rather than his gross income before taxes, that provides the only realistic measure of his ability to support his family. It follows inexorably that the wage earner's income tax is a relevant factor in calculating the monetary loss suffered by his dependents when he dies." (*Norfolk & W. Ry. Co. v. Liepelt* (1980) 444 U.S. 490, 493-494 [100 S.Ct. 755, 62 L.Ed.2d 689], internal citation omitted.)

■ "[T]he damages are such as flow from the deprivation of the pecuniary benefits which the beneficiaries might have reasonably received if the deceased had not died from his injuries." (*Michigan Central Railroad Co. v. Vreeland* (1913) 227 U.S. 59, 70 [33 S.Ct. 192, 57 L.Ed. 417] .)

■ "The seaman may thus recover for all of his pecuniary damages including such damages as the cost of employing someone else to perform those domestic services that he would otherwise have been able to render but is now incapable of doing." (*Cruz v. Hendy International Co.* (5th Cir. 1981) 638 F.2d 719, 723 [Jones Act case] overruled on other grounds in *Miles v. Apex Marine Corp.* (1990) 498 U.S. 19, 32-33 [111 S.Ct. 317, 112 L.Ed.2d 275] .)

■ 45 U.S.C. section 55 provides: "Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by [this chapter], shall to that extent be void: Provided, That in any action brought against any such common carrier under or by virtue of any of the provisions of this [chapter], such common carrier may set off

therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought."

■ "While at first glance the language of this provision seems broad enough to completely abrogate the common law collateral source rule, courts have limited the scope of the provision by focusing on the requirement that the covered payments be made 'on account of the injury.' Thus, the cases draw a distinction between payments emanating from a fringe benefit such as a retirement fund or a general hospital and medical insurance plan, and payments which the employer has undertaken voluntarily to indemnify itself against possible liabilities under the FELA." (*Clark v. Burlington Northern, Inc.* (8th Cir. 1984) 726 F.2d 448, 450 , internal citation omitted.)

■ "A benefit may be exempt from setoff under the collateral source rule even though the employer is the sole source of the fund. The important consideration is the character of the benefits received, rather than whether the source is actually independent of the employer. Medical expenses paid for by insurance are exempt from setoff regardless of whether the employer paid one hundred percent of the insurance premiums. Courts have also ruled private disability retirement plans established by a collective bargaining agreement and covering both job-related and non-job-related illness and injury are exempt from setoff." (*Clark, supra*, 726 F.2d at pp. 450-451 , footnote and internal citations omitted.)

■ "Generally, a tortfeasor need not pay twice for the damage caused, but he should not be allowed to set off compensation from a 'collateral source' against the amount he owes on account of his tort." (*Russo v. Matson Navigation Co.* (9th Cir. 1973) 486 F.2d 1018, 1020 .)

■ "It is well established in this circuit that the purpose and nature of the insurance benefits are controlling. Here, the purpose of the insurance coverage, as expressly described in the collective bargaining agreement, is to indemnify the employer against FELA liability. It follows that setoff should be allowed and that the benefits in this case should not be regarded as a collateral source." (*Folkestad v. Burlington Northern, Inc.* (9th Cir. 1987) 813 F.2d 1377, 1383 .)

■ "The mechanics of handling the setoff provided by the plan may be dealt with either by the Court instructing the jury that the amount of benefits provided by the GA-23000 contract must be set off against any damages awarded or by the Court as a matter of law reducing damages awarded by the jury." (*Brice v. National Railroad Passenger Corp.* (D.Md. 1987) 664 F.Supp. 220, 224 .)

Secondary Sources

42 *California Forms of Pleading and Practice*, Ch. 485, Railroads, §§ 485.36, 485.43, 485.44 (Matthew Bender)

Publisher's Notes

This instruction covers issues presented in BAJI Nos. 11.41, 11.43, 11.44, 11.45, and 11.46.

Legal Topics:

For related research and practice materials, see the following legal topics:

Admiralty Law Personal Injuries Maritime Tort Actions Multiple Defendants General Overview Admiralty Law Personal Injuries Maritime Tort Actions Negligence General Overview Admiralty Law Personal Injuries Maritime Workers' Claims General Overview Civil Procedure Trials Jury Trials Jury Instructions General Overview Civil Procedure Remedies Damages General Overview Communications Law Related Legal Issues Taxation Contracts Law Formation Capacity of Parties Age Contracts Law Sales of Goods Damages & Remedies General Overview Estate, Gift

& Trust Law Probate General Overview Estate, Gift & Trust Law Wills Beneficiaries General
 Overview Governments Courts Common Law Healthcare Law Actions Against Facilities General Overview Healthcare
 Law Business Administration & Organization Collective Bargaining & Labor Unions Healthcare
 Law Insurance Reimbursement General Overview Insurance Law Industry Regulation Insurance Company
 Operations Representatives General Overview International Trade Law General Overview Labor & Employment
 Law Disability & Unemployment Insurance Disability Benefits Claim Procedures Labor & Employment Law Disability &
 Unemployment Insurance Disability Benefits Coverage & Definitions General Overview Labor & Employment
 Law Disability & Unemployment Insurance Disability Benefits Proof General Overview Pensions & Benefits Law Equal
 Protection Age Tax Law Federal Income Tax Computation Compensation & Welfare Benefits Fringe Benefits (IRC secs.
 61, 132) General Overview Torts Business Torts General Overview Torts Damages General
 Overview Torts Damages Compensatory Damages Medical Expenses Torts Damages Compensatory Damages Pain &
 Suffering Emotional & Mental Distress General Overview Torts Damages Consortium Damages General
 Overview Torts Damages Consortium Damages Children & Parents Torts Procedure Multiple
 Defendants Indemnity Contractual Indemnity Torts Transportation Torts General Overview Torts Transportation Torts Rail
 Transportation General Overview Torts Transportation Torts Rail Transportation Federal Employers' Liability
 Act Torts Vicarious Liability Employers Indemnity Torts Wrongful Death & Survival Actions Remedies Award
 Calculations Transportation Law Carrier Duties & Liabilities Damages Workers' Compensation & SSDI Remedies Under
 Other Laws Common Law



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CHAPTER 29 California Judicial Council Federal Employers' Liability Act Instructions

4-29 California Forms of Jury Instruction CACI 2943-CACI 2999

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CACI 2943Reserved for Future Use



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CHAPTER 29 California Judicial Council Federal Employers' Liability Act Instructions

4-29 California Forms of Jury Instruction CACI VF-2900

CACI VF-2900 FELA--Negligence--Plaintiff's Negligence at Issue

We answer the questions submitted to us as follows:

1. Was [name of plaintiff/decedent] employed by [name of defendant]?

_____ Yes _____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Was [name of defendant] a common carrier by railroad?

_____ Yes _____ No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Was [name of defendant] engaged in interstate commerce?

_____ Yes _____ No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Did [name of plaintiff/decedent]'s job duties further, or in any way substantially affect, interstate commerce?

_____ Yes _____ No

If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. Was [*name of plaintiff/decedent*] acting within the scope of [his/her] employment at the time of the incident?

_____ Yes _____ No

If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. Was [*name of defendant*] negligent?

_____ Yes _____ No

If your answer to question 6 is yes, then answer question 7. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

7. Was [*name of plaintiff*] harmed?

_____ Yes _____ No

If your answer to question 7 is yes, then answer question 8. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

8. Was [*name of defendant*]'s negligence a cause of [*name of plaintiff/decedent*]'s [harm/death]?

_____ Yes _____ No

If your answer to question 8 is yes, then answer question 9. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

9. What are [*name of plaintiff*]'s total damages? Do not reduce the damages based on the fault, if any, of [*name of plaintiff/decedent*].

[a. Past economic loss

[lost earnings..... \$_____].....

[lost profits..... \$_____].....

[medical expenses..... \$_____].....

[other past economic loss..... \$_____].....

..... Total Past Economic Damages: \$_____]

[b. Future economic loss

[lost earnings..... \$_____]

[lost profits..... \$_____]

[medical expenses..... \$_____]

[other future economic loss..... \$_____]

..... Total Future Economic Damages: \$_____]

**[c. Past loss, including [physical
pain/mental suffering:]..... \$_____]****[d. Future loss, including [physical
pain/mental suffering:]..... \$_____]**

..... TOTAL \$_____

If [*name of plaintiff*] has proved any damages, then answer question 10. If [*name of plaintiff*] has not proved any damages, then stop here, answer no further questions, and have the presiding juror sign and date this form.

10. Was [*name of plaintiff/decedent*] negligent?

_____ Yes _____ No

If your answer to question 10 is yes, then answer question 11. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

11. Was [*name of plaintiff/decedent*]'s negligence a cause of [his/her] harm?

_____ Yes _____ No

If your answer to question 11 is yes, then answer question 12. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

12. What percentage of responsibility for [*name of plaintiff*]'s harm do you assign to:

..... [*Name of defendant*]: _____%

..... [*Name of plaintiff/decedent*]: _____%

.....

TOTAL: 100 %

Signed: _____

Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the [clerk/bailiff/judge].

New September 2003; Revised April 2007

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This form is based on *CACI No. 2900, Essential Factual Elements*, and *CACI No. 2904, Contributory Negligence*.

The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

Publisher's Notes

This verdict form covers issues presented in BAJI No. 16.20.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedurePleading & PracticePleadingsAnswersCivil ProcedureTrialsJury TrialsGeneral OverviewCivil ProcedureTrialsJury TrialsJurorsGeneral OverviewCivil ProcedureTrialsJury TrialsVerdictsGeneral OverviewCivil ProcedureTrialsJury TrialsVerdictsSpecial VerdictsGovernmentsCourtsGeneral OverviewTortsDamagesGeneral OverviewTortsDamagesCompensatory DamagesLost IncomeGeneral OverviewTortsDamagesCompensatory DamagesMedical ExpensesTortsDamagesCompensatory DamagesPain & SufferingEmotional & Mental DistressGeneral OverviewTortsNegligenceGeneral OverviewTortsNegligenceDefensesContributory NegligenceGeneral OverviewTortsTransportation TortsRail TransportationFederal Employers' Liability Act



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CHAPTER 29 California Judicial Council Federal Employers' Liability Act Instructions

4-29 California Forms of Jury Instruction CACI VF-2901

CACI VF-2901 Federal Safety Appliance Act or Boiler Inspection Act

We answer the questions submitted to us as follows:

1. Was [*name of plaintiff/decedent*] employed by [*name of defendant*]?

_____ Yes _____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Was [*name of defendant*] a common carrier by railroad?

_____ Yes _____ No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Was [*name of defendant*] engaged in interstate commerce?

_____ Yes _____ No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Did [*name of plaintiff/decedent*]'s job duties further, or in any way substantially affect, interstate commerce?

_____ Yes _____ No

If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. Was [*name of plaintiff/decedent*] acting within the scope of [his/her] employment at the time of the incident?

_____ Yes _____ No

If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. Did [*name of defendant*] [*describe violation of Federal Safety Appliance Act/Boiler Inspection Act*]?

_____ Yes _____ No

If your answer to question 6 is yes, then answer question 7. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

7. Was [*name of plaintiff*] harmed?

_____ Yes _____ No

If your answer to question 7 is yes, then answer question 8. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

8. Was [*name of defendant*]'s conduct a cause of [[*name of plaintiff*]'s harm/[*name of decedent*]'s death]?

_____ Yes _____ No

If your answer to question 8 is yes, then answer question 9. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

9. What are [*name of plaintiff*]'s damages?

[a. Past economic loss

[lost earnings..... \$ _____].....

[lost profits..... \$ _____].....

[medical expenses..... \$ _____].....

[other past economic loss..... \$ _____].....

..... Total Past Economic Damages: \$ _____]

[b. Future economic loss

[lost earnings..... \$_____]

[lost profits..... \$_____]

[medical expenses..... \$_____]

[other future economic loss..... \$_____]

..... Total Future Economic Damages: \$_____]

[c. Past loss, including [physical
pain/mental suffering:]..... \$_____][d. Future loss, including [physical
pain/mental suffering:]..... \$_____]

..... TOTAL \$_____

Signed: _____

Presiding Juror

Dated: _____

**[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the
[clerk/bailiff/judge].**

New September 2003; Revised April 2007

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This form is based on *CACI No. 2920, Essential Factual Elements--Federal Safety Appliance Act or Boiler Inspection Act*.

The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

Publisher's Notes

This verdict form covers issues presented in BAJI No. 16.20.1.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Pleading & Practice Pleadings Answers Civil Procedure Trials Jury Trials Jurors General Overview Civil

ProcedureTrialsJury TrialsVerdictsGeneral OverviewCivil ProcedureTrialsJury TrialsVerdictsSpecial
VerdictsGovernmentsCourtsGeneral OverviewTortsDamagesCompensatory DamagesPain & SufferingEmotional &
Mental DistressGeneral OverviewTransportation LawRail TransportationMaintenance & Safety



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4-29 California Forms of Jury Instruction CACI VF-2902-CACI VF-2999

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CACI VF-2902Reserved for Future Use



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CHAPTER 30 California Judicial Council Civil Rights Instructions

5-30 California Forms of Jury Instruction 30.syn

§ 30.syn Synopsis to Chapter 30: California Judicial Council Civil Rights Instructions

CACI 3000 Violation of Federal Civil Rights--In General--Essential Factual Elements (42 U.S.C. § 1983)

CACI 3001 Excessive Use of Force--Unreasonable Arrest or Other Seizure--Essential Factual Elements (42 U.S.C. § 1983)

CACI 3002 Unreasonable Search--Search With a Warrant--Essential Factual Elements (42 U.S.C. § 1983)

CACI 3003 Unreasonable Search--Search Without a Warrant--Essential Factual Elements (42 U.S.C. § 1983)

CACI 3004 Affirmative Defense--Search Incident to Lawful Arrest

CACI 3005 Affirmative Defense--Consent to Search

CACI 3006 Affirmative Defense--Exigent Circumstances

CACI 3007 Municipal Liability (42 U.S.C. § 1983)

CACI 3008 "Official Policy" Explained (42 U.S.C. § 1983)

CACI 3009 Public Entity Liability--Failure to Train--Essential Factual Elements (42 U.S.C. § 1983)

CACI 3010 Violation of Prisoner's Federal Civil Rights--Eighth Amendment--Excessive Force (42 U.S.C. § 1983)

CACI 3011 Violation of Prisoner's Federal Civil Rights--Eighth Amendment--General Conditions of Confinement Claim (42 U.S.C. § 1983)

CACI 3012 Violation of Prisoner's Federal Civil Rights--Eighth Amendment--Medical Care (42 U.S.C. § 1983)

CACI 3013 Supervisor Liability (42 U.S.C. § 1983)

- CACI 3014 Unlawful Arrest by Peace Officer Without a Warrant--Essential Factual Elements (42 U.S.C. § 1983)
- CACI 3015 Arrest by Peace Officer Without a Warrant--Probable Cause to Arrest (42 U.S.C. § 1983)
- CACI 3016 Retaliation--Essential Factual Elements (42 U.S.C. § 1983)
- CACI 3017-CACI 3019 Reserved for Future Use
- CACI 3020 Unruh Civil Rights Act--Essential Factual Elements (Civ. Code, §§ 51, 52)
- CACI 3021 Unruh Civil Rights Act--Boycott, etc. --Essential Factual Elements (Civ. Code, § 51.5)
- CACI 3022 Gender Price Discrimination--Essential Factual Elements (Civ. Code, § 51.6)
- CACI 3023A Acts of Violence--Ralph Act--Essential Factual Elements (Civ. Code, § 51.7)
- CACI 3023B Threats of Violence--Ralph Act--Essential Factual Elements (Civ. Code, § 51.7)
- CACI 3024 Sexual Harassment in Defined Relationship--Essential Factual Elements (Civ. Code, § 51.9)
- CACI 3025 Bane Act--Essential Factual Elements (Civ. Code, § 52.1)
- CACI 3026 Unruh Civil Rights Act--Damages (Civ. Code, §§ 51, 51.5, 51.6)
- CACI 3027 Unruh Civil Rights Act--Civil Penalty (Civ. Code, §§ 51.7, 51.9)
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- CACI VF-3001 Excessive Use of Force--Unreasonable Arrest or Other Seizure (42 U.S.C. § 1983)
- CACI VF-3002 Unreasonable Search--Search With a Warrant (42 U.S.C. § 1983)
- CACI VF-3003 Unreasonable Search--Search Without a Warrant (42 U.S.C. § 1983)
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- CACI VF-3005 Municipal Liability (42 U.S.C. § 1983)
- CACI VF-3006 Public Entity Liability--Failure To Train (42 U.S.C. § 1983)
- CACI VF-3007 Violation of Prisoner's Federal Civil Rights (42 U.S.C. § 1983)--Eighth Amendment--Excessive Force
- CACI VF-3008 Violation of Prisoner's Federal Civil Rights (42 U.S.C. § 1983)--Eighth Amendment--General Conditions of Confinement Claim
- CACI VF-3009 Violation of Prisoner's Federal Civil Rights (42 U.S.C. § 1983)--Eighth Amendment--Medical Care
- CACI VF-3010 Unruh Civil Rights Act (Civ. Code, §§ 51, 52)

CACI VF-3011 Unruh Civil Rights Act--Boycott, etc. (Civ. Code, § 51.5)

CACI VF-3012 Gender Price Discrimination (Civ. Code, § 51.6)

CACI VF-3013 Ralph Act (Civ. Code, § 51.7)

CACI VF-3014 Sexual Harassment in Defined Relationship (Civ. Code, § 51.9)

CACI VF-3015 Bane Act (Civ. Code, § 52.1)

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CHAPTER 30 California Judicial Council Civil Rights Instructions

5-30 California Forms of Jury Instruction Scope

Scope

SCOPE

This chapter contains the California Judicial Council's "Civil Rights Series" of jury instructions [*CACI No. 3000 et seq.*]. The Judicial Council of California Civil Jury Instructions (CACI) included in this publication are the product of the Judicial Council of California Task Force on Jury Instructions, which are updated by the Judicial Council of California Advisory Committee on Civil Jury Instructions.

This chapter includes instructions on the following topics:

- Essential factual elements for causes of action under 42 U.S.C. § 1983 [*CACI Nos. 3000-3003*], including actions for excessive use of force and unreasonable searches.
- Affirmative defenses to civil rights causes of action, including search incident to a lawful arrest [*CACI No. 3004*], consent to a search [*CACI No. 3005*], and exigent circumstances [*CACI No. 3006*].
- Municipal liability [*CACI No. 3007*].
- "Official policy" explained [*CACI No. 3008*].
- Essential factual elements for a public entity's liability for failure to train [*CACI No. 3009*].
- Essential factual elements for causes of action based on the *Eighth Amendment* for violation of prisoners' federal civil rights [*CACI Nos. 3010-3012*], such as use of excessive force.
- Supervisor liability under 42 U.S.C. § 1983 [*CACI No. 3013*].
- Police liability for arrest under 42 U.S.C. § 1983 [*CACI No. 3014*].
- Defense of probable cause for arrest under 42 U.S.C. § 1983 [*CACI No. 3015*].

5-30 California Forms of Jury Instruction Scope

- Essential factual elements for cause of action for retaliation under *42 U.S.C. § 1983* [CACI No. 3016].
- Essential factual elements for causes of action based on California's Unruh Civil Rights Act [CACI Nos. 3020, 3021], gender price discrimination [CACI No. 3022], the Ralph Act [CACI Nos. 3023A, 3023B], sexual harassment in defined relationships [CACI No. 3024], and the Bane Act [CACI No. 3025].
- Damages [CACI No. 3026] and civil penalties [CACI No. 3027] under the Unruh Civil Rights Act.
- Liability for educational harassment under Educ. Code § 220 [CACI No. 3028].

The civil rights series also includes verdict forms [CACI Nos. VF-3000-VF-3015].



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CHAPTER 30 California Judicial Council Civil Rights Instructions

5-30 California Forms of Jury Instruction CACI 3000

CACI 3000 Violation of Federal Civil Rights--In General--Essential Factual Elements (42 U.S.C. § 1983)

[*Name of plaintiff*] **claims that** [*name of defendant*] **violated** [his/her] **civil rights. To establish this claim, [*name of plaintiff*] must prove all of the following:**

- 1. That** [*name of defendant*] **[intentionally/[*other applicable state of mind*]]** [*insert wrongful act*];
- 2. That** [*name of defendant*] **was acting or purporting to act in the performance of** [his/her] **official duties;**
- 3. That** [*name of defendant*]'s **conduct violated** [*name of plaintiff*]'s **right** [*insert right, e.g., "of privacy"*];
- 4. That** [*name of plaintiff*] **was harmed; and**
- 5. That** [*name of defendant*]'s [*insert wrongful act*] **was a substantial factor in causing** [*name of plaintiff*]'s **harm.**

New September 2003

Directions for Use

In element 1, the standard is not always based on intentional conduct. Insert the appropriate level of scienter. For example, *Eighth Amendment* cases involve conduct carried out with "deliberate indifference," and *Fourth Amendment* claims do not necessarily involve intentional conduct. The "official duties" referred to in element 2 must be duties created pursuant to any state, county, or municipal law, ordinance, or regulation. This aspect of color of law most likely will not be a jury issue,

so it has been omitted to shorten the wording of element 2. This instruction is intended for claims not covered by any of the following more specific instructions regarding the elements that the plaintiff must prove.

Sources and Authority

- 42 U.S.C. section 1983 provides, in part: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State ... subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law"

- "As we have said many times, § 1983 'is not itself a source of substantive rights,' but merely provides 'a method for vindicating federal rights elsewhere conferred.' " (*Graham v. Connor* (1989) 490 U.S. 386, 393-394 [109 S.Ct. 1865, 104 L.Ed.2d 443] , internal citation omitted.)

- "42 U.S.C. § 1983 creates a cause of action against a person who, acting under color of state law, deprives another of rights guaranteed under the Constitution. Section 1983 does not create any substantive rights; rather it is the vehicle whereby plaintiffs can challenge actions by governmental officials. To prove a case under section 1983, the plaintiff must demonstrate that (1) the action occurred 'under color of state law' and (2) the action resulted in the deprivation of a constitutional right or federal statutory right." (*Jones v. Williams* (9th Cir. 2002) 286 F.3d 1159, 1162-1163 , internal citations omitted.)

- "By the plain terms of § 1983, two--and only two--allegations are required in order to state a cause of action under that statute. First, the plaintiff must allege that some person has deprived him of a federal right. Second, he must allege that the person who has deprived him of that right acted under color of state or territorial law." (*Catsouras v. Department of California Highway Patrol* (2010) 181 Cal.App.4th 856, 890 [104 Cal.Rptr.3d 352] .)

- "Section 1983 claims may be brought in either state or federal court." (*Pitts v. County of Kern* (1998) 17 Cal.4th 340, 348 [70 Cal.Rptr.2d 823, 949 P.2d 920] .)

- " 'State courts look to federal law to determine what conduct will support an action under section 1983. The first inquiry in any section 1983 suit is to identify the precise constitutional violation with which the defendant is charged.' " (*Weaver v. State of California* (1998) 63 Cal.App.4th 188, 203 [73 Cal.Rptr.2d 571] , internal citations omitted.)

- " 'Qualified immunity is an affirmative defense against section 1983 claims. Its purpose is to shield public officials "from undue interference with their duties and from potentially disabling threats of liability." The defense provides immunity from suit, not merely from liability. Its purpose is to spare defendants the burden of going forward with trial.' Because it is an immunity from suit, not just a mere defense to liability, it is important to resolve immunity questions at the earliest possible stage in litigation. Immunity should ordinarily be resolved by the court, not a jury." (*Martinez v. County of Los Angeles* (1996) 47 Cal.App.4th 334, 342 [54 Cal.Rptr.2d 772] , internal citations omitted.)

- "Constitutional torts employ the same measure of damages as common law torts and are not augmented 'based on the abstract "value" or "importance" of constitutional rights' Plaintiffs have the burden of proving compensatory damages in section 1983 cases, and the amount of damages depends

'largely upon the credibility of the plaintiffs' testimony concerning their injuries.' " (*Choate v. County of Orange* (2000) 86 Cal.App.4th 312, 321 [103 Cal.Rptr.2d 339] , internal citations omitted.)

■ "The Supreme Court has interpreted the phrase 'under "color" of law' to mean 'under "pretense" of law.' A police officer's actions are under pretense of law only if they are 'in some way "related to the performance of his official duties.'" By contrast, an officer who is "pursuing his own goals and is not in any way subject to control by [his public employer]," " does not act under color of law, unless he 'purports or pretends' to do so. Officers who engage in confrontations for personal reasons unrelated to law enforcement, and do not 'purport[] or pretend[]' to be officers, do not act under color of law." (*Huffman v. County of Los Angeles* (9th Cir. 1998) 147 F.3d 1054, 1058 , internal citations omitted.)

■ "[P]rivate parties ordinarily are not subject to suit under section 1983, unless, sifting the circumstances of the particular case, the state has so significantly involved itself in the private conduct that the private parties may fairly be termed state actors. Among the factors considered are whether the state subsidized or heavily regulated the conduct, or compelled or encouraged the particular conduct, whether the private actor was performing a function which normally is performed exclusively by the state, and whether there was a symbiotic relationship rendering the conduct joint state action." (*Robbins v. Hamburger Home for Girls* (1995) 32 Cal.App.4th 671, 683 [38 Cal.Rptr.2d 534] , internal citations omitted.)

■ "Private parties act under color of state law if they willfully participate in joint action with state officials to deprive others of constitutional rights. Private parties involved in such a conspiracy may be liable under section 1983." (*United Steelworkers of America v. Phelps Dodge Corp.* (9th Cir. 1989) 865 F.2d 1539, 1540 , internal citations omitted.)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, §§ 816, 819 et seq.

2 Civil Rights Actions, Ch. 7, *Deprivation of Rights Under Color of State Law--General Principles* (Civil Rights Act of 1871, 42 U.S.C. § 1983), PP 7.05-7.07, Ch. 17, *Deprivation of Rights Under Color of State Law--General Principles* (Civil Rights Act of 1871, 42 U.S.C. § 1983), P 17.02 (Matthew Bender)

11 *California Forms of Pleading and Practice*, Ch. 113, *Civil Rights: The Post-Civil War Civil Rights Statutes*, § 113.14 (Matthew Bender)

1 Matthew Bender Practice Guide: Federal Pretrial Civil Procedure in California, Ch. 8, *Answers and Responsive Motions Under Rule 12* , 8.40

Publisher's Notes

There is no BAJI instruction on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Remedies Damages General Overview Civil Rights Law Section 1983 Actions General Overview Civil Rights Law Section 1983 Actions Elements Color of State Law Joint Ventures Civil Rights Law Section 1983 Actions Elements Color of State Law Participation as State Action Civil Rights Law Section 1983 Actions Elements Color of State Law State Agents Civil Rights Law Section 1983 Actions Elements Color of State Law State-Authorized Actions Civil Rights Law Section 1983 Actions Elements Protected Parties Civil Rights Law Section 1983

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CHAPTER 30 California Judicial Council Civil Rights Instructions

5-30 California Forms of Jury Instruction CACI 3001

CACI 3001 Excessive Use of Force--Unreasonable Arrest or Other Seizure--Essential Factual Elements (42 U.S.C. § 1983)

[Name of plaintiff] claims that [name of defendant] used excessive force in [arresting/detaining] [him/her]. To establish this claim, [name of plaintiff] must prove all of the following:

- 1. That [name of defendant] used force in [arresting/detaining] [name of plaintiff];**
- 2. That the force used by [name of defendant] was excessive;**
- 3. That [name of defendant] was acting or purporting to act in the performance of [his/her] official duties;**
- 4. That [name of plaintiff] was harmed; and**
- 5. That [name of defendant]'s use of excessive force was a substantial factor in causing [name of plaintiff]'s harm.**

Force is not excessive if it is reasonably necessary under the circumstances to [detain/make a lawful arrest]. In deciding whether force is reasonably necessary or excessive, you should determine what force a reasonable law enforcement officer would have used under the same or similar circumstances. You should consider, among other factors, the following:

- (a) The seriousness of the crime at issue;**
- (b) Whether [name of plaintiff] reasonably appeared to pose an immediate threat to the safety of [name of defendant] or others; and**

(c) Whether [name of plaintiff] was actively [resisting [detention/arrest]] [attempting to avoid arrest].

New September 2003

Directions for Use

The "official duties" referred to in element 3 must be duties created pursuant to any state, county, or municipal law, ordinance, or regulation. This aspect of color of law most likely will not be an issue for the jury, so it has been omitted to shorten the wording of element 3.

Sources and Authority

- "In addressing an excessive force claim brought under § 1983, analysis begins by identifying the specific constitutional right allegedly infringed by the challenged application of force. In most instances, that will be either the *Fourth Amendment's* prohibition against unreasonable seizures of the person, or the *Eighth Amendment's* ban on cruel and unusual punishments, which are the two primary sources of constitutional protection against physically abusive governmental conduct." (*Graham v. Connor* (1989) 490 U.S. 386, 395 [109 S.Ct. 1865, 104 L.Ed.2d 443] , internal citations and footnote omitted.)

- "Where, as here, the excessive force claim arises in the context of an arrest or investigatory stop of a free citizen, it is most properly characterized as one invoking the protections of the *Fourth Amendment*, which guarantees citizens the right 'to be secure in their persons ... against unreasonable ... seizures' of the person." (*Graham, supra*, 490 U.S. at p. 394 .)

- "[A]ll claims that law enforcement officers have used excessive force--deadly or not--in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the *Fourth Amendment* and its 'reasonableness' standard, rather than under a 'substantive due process' approach." (*Graham, supra*, 490 U.S. at p. 395 .)

- "The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." (*Graham, supra*, 490 U.S. at p. 396 .)

- "Because '[t]he test of reasonableness under the *Fourth Amendment* is not capable of precise definition or mechanical application,' ... its proper application requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." (*Graham, supra*, 490 U.S. at p. 396 , internal citation omitted.)

- "In *Forrester v. City of San Diego*, we noted that the three factors listed in *Graham* are not the sole considerations a fact finder should entertain in determining whether force is excessive under the *Fourth Amendment*. Instead, 'the [*Graham*] Court instructed that the jury should consider "whether the totality of the circumstance justifies a particular sort of seizure.' " In *Chew v. Gates*, we stated that the three factors listed in *Graham* should be taken into account in excessive force cases, but that they are not the exhaustive criteria for determining excessive force." (*Fikes v. Cleghorn* (9th Cir. 1995) 47 F.3d 1011,

1014 , internal citations omitted.)

■ "The Supreme Court has interpreted the phrase 'under "color" of law' to mean 'under "pretense" of law.' A police officer's actions are under pretense of law only if they are 'in some way "related to the performance of his official duties.' " By contrast, an officer who is ' "pursuing his own goals and is not in any way subject to control by [his public employer], ' " does not act under color of law, unless he 'purports or pretends' to do so. Officers who engage in confrontations for personal reasons unrelated to law enforcement, and do not 'purport[] or pretend[]' to be officers, do not act under color of law." (*Huffman v. County of Los Angeles* (9th Cir. 1998) 147 F.3d 1054, 1058 , internal citations omitted.)

■ "[P]rivate parties ordinarily are not subject to suit under section 1983, unless, sifting the circumstances of the particular case, the state has so significantly involved itself in the private conduct that the private parties may fairly be termed state actors. Among the factors considered are whether the state subsidized or heavily regulated the conduct, or compelled or encouraged the particular conduct, whether the private actor was performing a function which normally is performed exclusively by the state, and whether there was a symbiotic relationship rendering the conduct joint state action." (*Robbins v. Hamburger Home for Girls* (1995) 32 Cal.App.4th 671, 683 [38 Cal.Rptr.2d 534] , internal citations omitted.)

■ "Private parties act under color of state law if they willfully participate in joint action with state officials to deprive others of constitutional rights. Private parties involved in such a conspiracy may be liable under section 1983." (*United Steelworkers of America v. Phelps Dodge Corp.* (9th Cir.1989) 865 F.2d 1539, 1540 , internal citations omitted.)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, §§ 816, 819 et seq.

3 Civil Rights Actions, Ch. 10, *Deprivation of Rights Under Color of State Law--Law Enforcement and Prosecution*, PP 10.00-10.03 (Matthew Bender)

11 *California Forms of Pleading and Practice*, Ch. 113, *Civil Rights: The Post-Civil War Civil Rights Statutes*, § 113.14 (Matthew Bender)

Publisher's Notes

There is no BAJI instruction on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Rights LawSection 1983 ActionsGeneral OverviewCivil Rights LawSection 1983 ActionsElementsColor of State LawJoint VenturesCivil Rights LawSection 1983 ActionsElementsColor of State LawParticipation as State ActionCivil Rights LawSection 1983 ActionsElementsColor of State LawState AgentsCivil Rights LawSection 1983 ActionsElementsColor of State LawState-Authorized ActionsConstitutional LawBill of RightsFundamental RightsSearch & SeizureGeneral OverviewConstitutional LawBill of RightsFundamental RightsSearch & SeizureScope of ProtectionConstitutional LawBill of RightsFundamental RightsCriminal ProcessCruel & Unusual PunishmentCriminal Law & ProcedureArrestsReasonable ForceCriminal Law & ProcedureSearch & SeizureSeizures of PersonsCriminal Law & ProcedureSentencingCruel & Unusual PunishmentGovernmentsLocal GovernmentsClaims By & Against



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CHAPTER 30 California Judicial Council Civil Rights Instructions

5-30 California Forms of Jury Instruction CACI 3002

CACI 3002 Unreasonable Search--Search With a Warrant--Essential Factual Elements (42 U.S.C. § 1983)

[*Name of plaintiff*] **claims that** [*name of defendant*] **carried out an unreasonable search of** [his/her] [person/home/automobile/office/[*insert other*]]. **To establish this claim, [*name of plaintiff*] must prove the following:**

1. **That [*name of defendant*] searched [*name of plaintiff*]'s [person/home/automobile/office/[*insert other*]];**
2. **That [*name of defendant*]'s search was unreasonable;**
3. **That [*name of defendant*] was acting or purporting to act in the performance of [his/her] official duties;**
4. **That [*name of plaintiff*] was harmed; and**
5. **That [*name of defendant*]'s unreasonable search was a substantial factor in causing [*name of plaintiff*]'s harm.**

In deciding whether the search was unreasonable, you should consider, among other factors, the following:

- (a) **The scope of the warrant;**
- (b) **The extent of the particular intrusion;**
- (c) **The place in which the search was conducted; [and]**

(d) The manner in which the search was conducted; [and]**(e) [Insert other applicable factor].**

New September 2003

The "official duties" referred to in element 3 must be duties created pursuant to any state, county, or municipal law, ordinance, or regulation. This aspect of color of law most likely will not be an issue for the jury, so it has been omitted to shorten the wording of element 3.

■ "The *Fourth Amendment to the United States Constitution*, made applicable to the states by the *Fourteenth Amendment*, provides: 'The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.' " (*Conway v. Pasadena Humane Society* (1996) 45 Cal.App.4th 163, 171 [52 Cal.Rptr.2d 777] , internal citation omitted.)

■ "Excessive or unnecessary destruction of property in the course of a search may violate the *Fourth Amendment*, even though the entry itself is lawful and the fruits of the search not subject to suppression." (*U.S. v. Ramirez* (1998) 523 U.S. 65, 71 [118 S.Ct. 992, 140 L.Ed.2d 191] .)

■ " 'The test of reasonableness under the *Fourth Amendment* is not capable of precise definition or mechanical application. In each case it requires a balancing of the need for the particular search against the invasion of personal rights that the search entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted.' " (*Sacramento County Deputy Sheriffs' Assn. v. County of Sacramento* (1996) 51 Cal.App.4th 1468, 1477 [59 Cal.Rptr.2d 834] , internal citation omitted.)

■ "The *Fourth Amendment* proscribes only 'unreasonable' searches and seizures. However, the reasonableness of a search or a seizure depends 'not only on *when* it is made, but also on *how* it is carried out.' In other words, even when supported by probable cause, a search or seizure may be invalid if carried out in an *unreasonable* fashion." (*Franklin v. Foxworth* (9th Cir. 1994) 31 F.3d 873, 875 , internal citation omitted, original italics.)

■ "The Supreme Court has interpreted the phrase 'under "color" of law' to mean 'under "pretense" of law.' A police officer's actions are under pretense of law only if they are 'in some way "related to the performance of his official duties.' " By contrast, an officer who is ' "pursuing his own goals and is not in any way subject to control by [his public employer], ' " does not act under color of law, unless he 'purports or pretends' to do so. Officers who engage in confrontations for personal reasons unrelated to law enforcement, and do not 'purport[] or pretend[]' to be officers, do not act under color of law." (*Huffman v. County of Los Angeles* (9th Cir. 1998) 147 F.3d 1054, 1058 , internal citations omitted.)

■ "[P]rivate parties ordinarily are not subject to suit under section 1983, unless, sifting the circumstances of the particular case, the state has so significantly involved itself in the private conduct that the private parties may fairly be termed state actors. Among the factors considered are whether the state subsidized or heavily regulated the conduct, or compelled or encouraged the particular conduct, whether the private actor was performing a function which normally is performed exclusively by the state, and whether there was a symbiotic relationship rendering the conduct joint state action." (*Robbins*

v. Hamburger Home for Girls (1995) 32 Cal.App.4th 671, 683 [38 Cal.Rptr.2d 534] , internal citations omitted.)

■ "Private parties act under color of state law if they willfully participate in joint action with state officials to deprive others of constitutional rights. Private parties involved in such a conspiracy may be liable under section 1983." (*United Steelworkers of America v. Phelps Dodge Corp. (9th Cir. 1989) 865 F.2d 1539, 1540* , internal citations omitted.)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, §§ 816, 819 et seq.

3 Civil Rights Actions, Ch. 10, *Deprivation of Rights Under Color of State Law--Law Enforcement and Prosecution*, P 10.04 (Matthew Bender)

11 *California Forms of Pleading and Practice*, Ch. 113, *Civil Rights: The Post-Civil War Civil Rights Statutes*, § 113.14 (Matthew Bender)

Publisher's Notes

There is no BAJI instruction on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

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CHAPTER 30 California Judicial Council Civil Rights Instructions

5-30 California Forms of Jury Instruction CACI 3003

CACI 3003 Unreasonable Search--Search Without a Warrant--Essential Factual Elements (42 U.S.C. § 1983)

[*Name of plaintiff*] **claims that** [*name of defendant*] **carried out an unreasonable search of** [his/her] [person/home/automobile/office/[*insert other*]] **because** [he/she] **did not have a warrant. To establish this claim, [** *name of plaintiff*] **must prove all of the following:**

1. **That** [*name of defendant*] **searched** [*name of plaintiff*]'s [person/home/automobile/office/[*insert other*]];
2. **That** [*name of defendant*] **did not have a warrant;**
3. **That** [*name of defendant*] **was acting or purporting to act in the performance of** [his/her] **official duties;**
4. **That** [*name of plaintiff*] **was harmed; and**
5. **That** [*name of defendant*]'s **search was a substantial factor in causing** [*name of plaintiff*]'s **harm.**

New September 2003

The "official duties" referred to in element 3 must be duties created pursuant to any state, county, or municipal law, ordinance, or regulation. This aspect of color of law most likely will not be an issue for the jury, so it has been omitted to shorten the wording of element 3.

- "The Fourth Amendment to the United States Constitution, made applicable to the states by the

Fourteenth Amendment, provides: 'The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.' " (*Conway v. Pasadena Humane Society* (1996) 45 Cal.App.4th 163, 171 [52 Cal.Rptr.2d 777] , internal citation omitted.)

■ " 'The *Fourth Amendment* prohibits only unreasonable searches [P] The test of reasonableness under the *Fourth Amendment* is not capable of precise definition or mechanical application. In each case it requires a balancing of the need for the particular search against the invasion of personal rights that the search entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted.' " (*Sacramento County Deputy Sheriffs' Assn. v. County of Sacramento* (1996) 51 Cal.App.4th 1468, 1477 [59 Cal.Rptr.2d 834] , internal citation omitted.)

■ " 'It is settled doctrine that probable cause for belief that certain articles subject to seizure are in a dwelling cannot of itself justify a search without a warrant.' Thus, a warrantless entry into a residence is presumptively unreasonable and therefore unlawful. Government officials 'bear a heavy burden when attempting to demonstrate an urgent need that might justify warrantless searches or arrests.' " (*Conway, supra*, 45 Cal.App.4th at p. 172 , internal citations omitted.)

■ "The Supreme Court has interpreted the phrase 'under "color" of law' to mean 'under "pretense" of law.' A police officer's actions are under pretense of law only if they are 'in some way "related to the performance of his official duties.' " By contrast, an officer who is ' "pursuing his own goals and is not in any way subject to control by [his public employer], ' " does not act under color of law, unless he 'purports or pretends' to do so. Officers who engage in confrontations for personal reasons unrelated to law enforcement, and do not 'purport[] or pretend[]' to be officers, do not act under color of law.' " (*Huffman v. County of Los Angeles* (9th Cir. 1998) 147 F.3d 1054, 1058 , internal citations omitted.)

■ "[P]rivate parties ordinarily are not subject to suit under section 1983, unless, sifting the circumstances of the particular case, the state has so significantly involved itself in the private conduct that the private parties may fairly be termed state actors. Among the factors considered are whether the state subsidized or heavily regulated the conduct, or compelled or encouraged the particular conduct, whether the private actor was performing a function which normally is performed exclusively by the state, and whether there was a symbiotic relationship rendering the conduct joint state action." (*Robbins v. Hamburger Home for Girls* (1995) 32 Cal.App.4th 671, 683 [38 Cal.Rptr.2d 534] , internal citations omitted.)

■ "Private parties act under color of state law if they willfully participate in joint action with state officials to deprive others of constitutional rights. Private parties involved in such a conspiracy may be liable under section 1983." (*United Steelworkers of America v. Phelps Dodge Corp.* (9th Cir. 1989) 865 F.2d 1539, 1540 , internal citations omitted.)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, §§ 816, 819 et seq.

3 Civil Rights Actions, Ch. 10, *Deprivation of Rights Under Color of State Law--Law Enforcement and Prosecution*, P 10.04 (Matthew Bender)

11 *California Forms of Pleading and Practice*, Ch. 113, *Civil Rights: The Post-Civil War Civil Rights Statutes*, § 113.14 (Matthew Bender)

Publisher's Notes

There is no BAJI instruction on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Rights LawSection 1983 ActionsGeneral OverviewCivil Rights LawSection 1983 ActionsElementsColor of State LawJoint VenturesCivil Rights LawSection 1983 ActionsElementsColor of State LawParticipation as State ActionCivil Rights LawSection 1983 ActionsElementsColor of State LawState AgentsCivil Rights LawSection 1983 ActionsElementsColor of State LawState-Authorized ActionsConstitutional LawBill of RightsFundamental RightsSearch & SeizureGeneral OverviewConstitutional LawBill of RightsFundamental RightsSearch & SeizureScope of ProtectionConstitutional LawBill of RightsState ApplicationCriminal Law & ProcedureSearch & SeizureGeneral OverviewCriminal Law & ProcedureSearch & SeizureSearch WarrantsGeneral OverviewCriminal Law & ProcedureSearch & SeizureSearch WarrantsAffirmations & OathsGeneral OverviewCriminal Law & ProcedureSearch & SeizureSearch WarrantsProbable CauseGeneral OverviewCriminal Law & ProcedureSearch & SeizureSeizures of ThingsCriminal Law & ProcedureSearch & SeizureWarrantless SearchesGeneral OverviewCriminal Law & ProcedureSearch & SeizureWarrantless SearchesVehicle SearchesGeneral OverviewTortsTransportation TortsMotor VehiclesPersonal Vehicles



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CHAPTER 30 California Judicial Council Civil Rights Instructions

5-30 California Forms of Jury Instruction CACI 3004

CACI 3004 Affirmative Defense--Search Incident to Lawful Arrest

[*Name of defendant*] **claims that the search was reasonable and that a search warrant was not required. To succeed, [*name of defendant*] must prove all of the following:**

- 1. That the search was conducted as part of a lawful arrest of [*name of plaintiff*];**
- 2. That [*name of defendant*] searched only [*name of plaintiff*] and the area within which [he/she] might have gained possession of a weapon or might have destroyed or hidden evidence; and**
- 3. That the search was reasonable under the circumstances.**

In deciding whether the search was reasonable, you should consider, among other factors, the following:

- (a) The extent of the particular intrusion;**
- (b) The place in which the search was conducted; [and]**
- (c) The manner in which the search was conducted; [and]**
- (d) [*insert other applicable factor*].**

New September 2003

For instructions regarding whether an arrest is lawful, see instructions in the False Imprisonment series (CACI Nos. 1400-1409).

This instruction is not intended for use in cases involving automobile searches: "[W]e hold that when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile." (*New York v. Belton* (1981) 453 U.S. 454, 460 [101 S.Ct. 2860, 69 L.Ed.2d 768] , footnotes omitted.)

- "Searches incident to lawful arrest constitute a well-established exception to the warrant requirement of the *Fourth Amendment*." (*Hallstrom v. Garden City* (9th Cir. 1993) 991 F.2d 1473, 1477 , internal citations omitted.)

- "Under applicable federal law, a lawful custodial arrest creates a situation which justifies the full contemporaneous search without a warrant of the person arrested and of the immediately surrounding area. Such searches are considered valid because of the need to remove weapons and to prevent the concealment or destruction of evidence." (*People v. Gutierrez* (1984) 163 Cal.App.3d 332, 334-335 [209 Cal.Rptr. 376] , internal citations omitted.)

- "Law enforcement officers are permitted to search the entire passenger compartment of a car, including the inside of containers, during a 'search incident to arrest.' " (*United States v. Tank* (2000) 200 F.3d 627, 631, fn. 6 , internal citations omitted.)

- "In *New York v. Belton*, we determined that the lower courts 'have found no workable definition of 'the area within the immediate control of the arrestee' when that area arguably includes the interior of an automobile and the arrestee is its recent occupant.' In order to provide a 'workable rule,' we held that 'articles inside the relatively narrow compass of the passenger compartment of an automobile are in fact generally, even if not inevitably, within "the area into which an arrestee might reach in order to grab a weapon"' We also held that the police may examine the contents of any open or closed container found within the passenger compartment, 'for if the passenger compartment is within the reach of the arrestee, so will containers in it be within his reach.' " (*Michigan v. Long* (1983) 463 U.S. 1032, 1048-1049 [103 S.Ct. 3469, 77 L.Ed.2d 1201] , internal citations omitted.)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, §§ 816, 819 et seq.

11 *California Forms of Pleading and Practice*, Ch. 113, *Civil Rights: The Post-Civil War Civil Rights Statutes*, § 113.14 (Matthew Bender)

Publisher's Notes

There is no BAJI instruction on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Constitutional Law Bill of Rights Fundamental Rights Search & Seizure Warrants Criminal Law & Procedure Search & Seizure Search Warrants General Overview Criminal Law & Procedure Search & Seizure Warrantless Searches General Overview Criminal Law & Procedure Search & Seizure Warrantless Searches Exigent Circumstances Destruction of Evidence Criminal Law & Procedure Search & Seizure Warrantless Searches Exigent Circumstances Information From Others Criminal Law & Procedure Search & Seizure Warrantless Searches Search Incident to Lawful Arrest General Overview Criminal Law & Procedure Search & Seizure Warrantless Searches Search Incident to Lawful Arrest Extent &

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CHAPTER 30 California Judicial Council Civil Rights Instructions

5-30 California Forms of Jury Instruction CACI 3005

CACI 3005 Affirmative Defense--Consent to Search

[*Name of defendant*] **claims that the search was reasonable and that a search warrant was not required because [*name of plaintiff/third person*] consented to the search. To succeed, [*name of defendant*] must prove both of the following:**

- 1. That [[*name of plaintiff*]/[*name of third person*], who controlled or reasonably appeared to have control of the area,] knowingly and voluntarily consented to the search; and**
- 2. That the search was reasonable under all of the circumstances.**

[[*Name of third person*]'s consent is insufficient if [*name of plaintiff*] was physically present and expressly refused to consent to the search.]

In deciding whether the search was reasonable, you should consider, among other factors, the following:

- (a) The extent of the particular intrusion;**
- (b) The place in which the search was conducted; [and]**
- (c) The manner in which the search was conducted; [and]**
- (d) [*insert other applicable factor(s)*].**

New September 2003; Revised April 2009

Directions for Use

Give the optional paragraph after element 2 if the defendant relied on the consent of someone other than the plaintiff to initiate the search. (See *Georgia v. Randolph* (2006) 547 U.S. 103, 106 [126 S.Ct. 1515, 164 L.Ed.2d 208] .)

Sources and Authority

■ "The *Fourth Amendment* generally prohibits the warrantless entry of a person's home, whether to make an arrest or to search for specific objects. The prohibition does not apply, however, to situations in which voluntary consent has been obtained, either from the individual whose property is searched or from a third party who possesses common authority over the premises." (*Illinois v. Rodriguez* (1990) 497 U.S. 177, 181 [110 S.Ct. 2793, 111 L.Ed.2d 148] , internal citations omitted.)

■ " '[C]ommon authority' rests 'on mutual use of the property by persons generally having joint access or control for most purposes' The burden of establishing that common authority rests upon the State." (*Illinois v. Rodriguez, supra*, 497 U.S. at p. 181 , internal citation omitted.)

■ "The *Fourth Amendment* recognizes a valid warrantless entry and search of premises when police obtain the voluntary consent of an occupant who shares, or is reasonably believed to share, authority over the area in common with a co-occupant who later objects to the use of evidence so obtained. The question here is whether such an evidentiary seizure is likewise lawful with the permission of one occupant when the other, who later seeks to suppress the evidence, is present at the scene and expressly refuses to consent. We hold that, in the circumstances here at issue, a physically present co-occupant's stated refusal to permit entry prevails, rendering the warrantless search unreasonable and invalid as to him." (*Georgia, supra*, 547 U.S. at p. 106 , internal citations omitted.)

■ "Where consent is relied upon to justify the lawfulness of a search, the government 'has the burden of proving that the consent was, in fact, freely and voluntarily given.' 'The issue of whether or not consent to search was freely and voluntarily given is one of fact to be determined on the basis of the totality of the circumstances.' " (*U.S. v. Henry* (9th Cir. 1980) 615 F.2d 1223, 1230 , internal citations omitted.)

■ "Whether consent was voluntarily given 'is to be determined from the totality of all the circumstances.' We consider the following factors to assess whether the consent was voluntary: (1) whether the person was in custody; (2) whether the officers had their guns drawn; (3) whether a Miranda warning had been given; (4) whether the person was told that he had the right not to consent; and (5) whether the person was told that a search warrant could be obtained. Although no one factor is determinative in the equation, 'many of this court's decisions upholding consent as voluntary are supported by at least several of the factors.' " (*U.S. v. Reid* (9th Cir. 2000) 226 F.3d 1020, 1026-1027 , internal citations omitted.)

■ " 'The test of reasonableness under the *Fourth Amendment* is not capable of precise definition or mechanical application. In each case it requires a balancing of the need for the particular search against the invasion of personal rights that the search entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted.' " (*Sacramento County Deputy Sheriffs' Assn. v. County of Sacramento* (1996) 51 Cal.App.4th 1468, 1477 [59 Cal.Rptr.2d 834] , internal citation omitted.)

■ "The *Fourth Amendment* proscribes only 'unreasonable' searches and seizures. However, the reasonableness of a search or a seizure depends 'not only on *when* it is made, but also on *how* it is carried

out.' In other words, even when supported by probable cause, a search or seizure may be invalid if carried out in an *unreasonable* fashion. [P] Whether an otherwise valid search or seizure was carried out in an unreasonable manner is determined under an objective test, on the basis of the facts and circumstances confronting the officers." (*Franklin v. Foxworth* (9th Cir. 1994) 31 F.3d 873, 875 , original italics, internal citation omitted.)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, §§ 816, 819 et seq.

11 *California Forms of Pleading and Practice, Ch. 113, Civil Rights: The Post-Civil War Civil Rights Statutes*, § 113.14 (Matthew Bender)

Publisher's Notes

There is no BAJI instruction on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Criminal Law & Procedure Search & Seizure Search Warrants General Overview Criminal Law & Procedure Search & Seizure Warrantless Searches General Overview Criminal Law & Procedure Search & Seizure Warrantless Searches Consent to Search General Overview Criminal Law & Procedure Search & Seizure Warrantless Searches Consent to Search Sufficiency & Voluntariness Criminal Law & Procedure Search & Seizure Warrantless Searches Exigent Circumstances Information From Others Criminal Law & Procedure Interrogation Miranda Rights Notice & Warning



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CHAPTER 30 California Judicial Council Civil Rights Instructions

5-30 California Forms of Jury Instruction CACI 3006

CACI 3006 Affirmative Defense--Exigent Circumstances

[Name of defendant] claims that a search warrant was not required. To succeed, [name of defendant] must prove both of the following:

1. That a reasonable officer would have believed that, under the circumstances, there was not enough time to get a search warrant because entry or search was necessary to prevent [insert one of the following:]

[physical harm to the officer or other persons;]

[the destruction or concealment of evidence;]

[the escape of a suspect;] and

2. That the search was reasonable under the circumstances.

In deciding whether the search was reasonable, you should consider, among other factors, the following:

(a) The extent of the particular intrusion;

(b) The place in which the search was conducted; [and]

(c) The manner in which the search was conducted; [and]

(d) [Insert other applicable factor].

New September 2003

■ "Absent consent, exigent circumstances must exist for a warrantless entry into a home, despite probable cause to believe that a crime has been committed or that incriminating evidence may be found inside. Such circumstances are 'few in number and carefully delineated.' 'Exigent circumstances' means 'an emergency situation requiring swift action to prevent imminent danger to life or serious damage to property, or to forestall the imminent escape of a suspect or destruction of evidence.' " (*Conway v. Pasadena Humane Society* (1996) 45 Cal.App.4th 163, 172 [52 Cal.Rptr.2d 777] , internal citation omitted.)

■ "There is no litmus test for determining whether exigent circumstances exist, and each case must be decided on the facts known to the officers at the time of the search or seizure. However, two primary considerations in making this determination are the gravity of the underlying offense and whether the delay in seeking a warrant would pose a threat to police or public safety." (*Conway, supra*, 45 Cal.App.4th at p. 172 .)

■ "Finally, even where exigent circumstances exist, '[t]he search must be "strictly circumscribed by the exigencies which justify its initiation".' 'An exigent circumstance may justify a search without a warrant. However, after the emergency has passed, the [homeowner] regains his right to privacy, and ... a second entry [is unlawful].' " (*Conway, supra*, 45 Cal.App.4th at p. 173 , internal citation omitted.)

■ " 'Exigent circumstances are those in which a substantial risk of harm to the persons involved or to the law enforcement process would arise if the police were to delay a search [] until a warrant could be obtained.' Mere speculation is not sufficient to show exigent circumstances. Rather, 'the government bears the burden of showing the existence of exigent circumstances by particularized evidence.' This is a heavy burden and can be satisfied 'only by demonstrating specific and articulable facts to justify the finding of exigent circumstances.' Furthermore, 'the presence of exigent circumstances necessarily implies that there is insufficient time to obtain a warrant; therefore, the government must show that a warrant could not have been obtained in time.' " (*U.S. v. Reid* (9th Cir. 2000) 226 F.3d 1020, 1027-1028 , internal citations omitted.)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, §§ 816, 819 et seq.

11 *California Forms of Pleading and Practice, Ch. 113, Civil Rights: The Post-Civil War Civil Rights Statutes*, § 113.14 (Matthew Bender)

Publisher's Notes

There is no BAJI instruction on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Constitutional Law Bill of Rights Fundamental Rights Search & Seizure Exigent Circumstances Criminal Law & Procedure Search & Seizure Exclusionary Rule Exceptions Exigent Circumstances Criminal Law & Procedure Search & Seizure Search Warrants General Overview Criminal Law & Procedure Search & Seizure Warrantless Searches General Overview Criminal Law & Procedure Search & Seizure Warrantless Searches Exigent Circumstances General

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CHAPTER 30 California Judicial Council Civil Rights Instructions

5-30 California Forms of Jury Instruction CACI 3007

CACI 3007 Municipal Liability (42 U.S.C. § 1983)

[Name of plaintiff] claims that [he/she] was deprived of [his/her] civil rights as a result of the official [policy/custom] of the [name of municipality]. To establish this claim, [name of plaintiff] must prove all of the following:

- 1. That [name of officer, employee, etc.] [intentionally/[insert other applicable state of mind]] [insert conduct allegedly violating plaintiff's civil rights];**
- 2. That [insert conduct allegedly violating plaintiff's civil rights] occurred as a result of the official [policy/custom] of the [name of municipality];**
- 3. That [name of plaintiff] was harmed; and**
- 4. That [name of officer, employee, etc.]'s conduct was a substantial factor in causing [name of plaintiff]'s harm.**

New September 2003

In element 1, the standard is not always based on intentional conduct. Insert the appropriate level of scienter. For example, *Eighth Amendment* cases involve "deliberate indifference," and *Fourth Amendment* claims do not necessarily involve intentional conduct.

- "[I]t is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the

government as an entity is responsible under § 1983." (*Monell v. Dept. of Social Services of New York* (1978) 436 U.S. 658, 694 [98 S.Ct. 2018, 56 L.Ed.2d 611] .)

■ Local governmental entities " 'can be sued directly under § 1983 for monetary, declaratory, or injunctive relief where ... the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted. ...' " Local governmental entities also can be sued " 'for constitutional deprivations visited pursuant to governmental "custom".' " In addition, " '[t]he plaintiff must ... demonstrate that, through its *deliberate* conduct, the municipality was the "moving force" behind the injury alleged. That is, a plaintiff must show that the municipal action was taken with the requisite degree of culpability and must demonstrate a direct causal link between the municipal action and the deprivation of federal rights.' " (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1147 [119 Cal.Rptr.2d 709, 45 P.3d 1171] , internal citations omitted.)

■ "Entity liability may arise in one of two forms. The municipality may itself have directed the deprivation of federal rights through an express government policy. This was the situation in *Monell*, where there was an explicit policy requiring pregnant government employees to take unpaid leaves of absence before such leaves were medically required. ... Alternatively, the municipality may have in place a custom or practice so widespread in usage as to constitute the functional equivalent of an express policy." (*Choate v. County of Orange* (2000) 86 Cal.App.4th 312, 328 [103 Cal.Rptr.2d 339] .)

■ " '[I]n order to successfully maintain an action under 42 *United States Code* section 1983 against governmental defendants for the tortious conduct of employees under federal law, it is necessary to establish that the conduct occurred in execution of a government's policy or custom promulgated either by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy.' " (*Newton v. County of Napa* (1990) 217 Cal.App.3d 1551, 1564 [266 Cal.Rptr. 682] , internal citations omitted.)

■ "At most, *Monell* liability adds an additional defendant, a municipality, to the universe of actors who will be jointly and severally liable for the award." (*Choate, supra*, 86 Cal.App.4th at p. 328 .)

■ "Local governmental bodies such as cities and counties are considered 'persons' subject to suit under section 1983. States and their instrumentalities, on the other hand, are not." (*Kirchmann v. Lake Elsinore Unified School Dist.* (2000) 83 Cal.App.4th 1098, 1101 [100 Cal.Rptr.2d 289] , internal citations omitted.)

■ "A local governmental unit cannot be liable under this section for acts of its employees based solely on a respondeat superior theory. A local governmental unit is liable only if the alleged deprivation of rights 'implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers,' or when the injury is in 'execution of a [local] government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy.' " (*County of Los Angeles v. Superior Court* (1998) 68 Cal.App.4th 1166, 1171 [80 Cal.Rptr.2d 860] , internal citations omitted.)

■ "A municipality's policy or custom resulting in constitutional injury may be actionable even though the individual public servants are shielded by good faith immunity." (*Bach v. County of Butte* (1983) 147 Cal.App.3d 554, 568 [195 Cal.Rptr. 268] , internal citations omitted.)

■ "No punitive damages can be awarded against a public entity." (*Choate, supra*, 86 Cal.App.4th at p. 328 , internal citation omitted.)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, §§ 816, 819 et seq.

11 *California Forms of Pleading and Practice*, Ch. 113, *Civil Rights: The Post-Civil War Civil Rights Statutes*, § 113.14 (Matthew Bender)

Publisher's Notes

There is no BAJI instruction on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Rights LawSection 1983 ActionsGeneral OverviewCivil Rights LawSection 1983 ActionsGovernment
ActionsCriminal Law & ProcedureSentencingCapital PunishmentCruel & Unusual PunishmentCriminal Law &
ProcedureSentencingCruel & Unusual PunishmentGovernmentsLocal GovernmentsGeneral
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CHAPTER 30 California Judicial Council Civil Rights Instructions

5-30 California Forms of Jury Instruction CACI 3008

CACI 3008 "Official Policy" Explained (42 U.S.C. § 1983)

"Official [policy/custom]" means: [*insert one of the following:*]

[A rule or regulation approved by the [city/county]'s legislative body;] [or]

[A policy statement or decision that is officially made by the [city/county]'s lawmaking officer or policymaking official;] [or]

[A custom that is a permanent, widespread, or well-settled practice of the [city/county];] [or]

[An act or omission approved by the [city/county]'s lawmaking officer or policymaking official.]

New September 2003

Directions for Use

These definitions are selected examples of official policy drawn from the cited cases. The instruction may need to be adapted to the facts of a particular case. The court may need to instruct the jury regarding the legal definition of "policymakers."

Sources and Authority

- "The [entity] may not be held liable for acts of [employees] unless 'the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers' or if the constitutional deprivation was 'visited pursuant

to governmental "custom" even though such a custom has not received formal approval through the body's official decisionmaking channels.' " (*Redman v. County of San Diego* (9th Cir. 1991) 942 F.2d 1435, 1443-1444 , internal citation omitted.)

■ "While a rule or regulation promulgated, adopted, or ratified by a local governmental entity's legislative body unquestionably satisfies *Monell's* policy requirement, a 'policy' within the meaning of § 1983 is not limited to official legislative action. Indeed, a decision properly made by a local governmental entity's authorized decisionmaker--i.e., an official who 'possesses final authority to establish [local government] policy with respect to the [challenged] action'--may constitute official policy. 'Authority to make municipal policy may be granted directly by legislative enactment or may be delegated by an official who possesses such authority, and of course whether an official had final policymaking authority is a question of state law.' " (*Thompson v. City of Los Angeles* (9th Cir. 1989) 885 F.2d 1439, 1443 , internal citations and footnote omitted.)

■ "As with other questions of state law relevant to the application of federal law, the identification of those officials whose decisions represent the official policy of the local governmental unit is itself a legal question to be resolved by the trial judge *before* the case is submitted to the jury." (*Jett v. Dallas Independent School Dist.* (1989) 491 U.S. 701, 737 [109 S.Ct. 2702, 105 L.Ed.2d 598] .)

■ "[I]t is settled that whether an official is a policymaker for a county is dependent on an analysis of state law, not fact." (*Pitts v. County of Kern* (1998) 17 Cal.4th 340, 352 [70 Cal.Rptr.2d 823, 949 P.2d 920] , internal citations omitted.)

■ "Once those officials who have the power to make official policy on a particular issue have been identified, it is for the jury to determine whether *their* decisions have caused the deprivation of rights at issue by policies which affirmatively command that it occur, or by acquiescence in a longstanding practice or custom which constitutes the 'standard operating procedure' of the local governmental entity." (*Jett, supra*, 491 U.S. at p. 737 , internal citations omitted.)

■ "Discussing liability of a municipality under the federal Civil Rights Act based on 'custom,' the California Court of Appeal for the Fifth Appellate District recently noted, 'If the plaintiff seeks to show he was injured by governmental "custom," he must show that the governmental entity's "custom" was "made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy."' " (*Bach v. County of Butte* (1983) 147 Cal.App.3d 554, 569, fn. 11 [195 Cal.Rptr. 268] , internal citations omitted.)

■ "The federal courts have recognized that local elected officials and appointed department heads can make official policy or create official custom sufficient to impose liability under section 1983 on their governmental employers." (*Bach, supra*, 147 Cal.App.3d at p. 570 , internal citations omitted.)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, §§ 816, 819 et seq.

11 *California Forms of Pleading and Practice*, Ch. 113, *Civil Rights: The Post-Civil War Civil Rights Statutes*, § 113.14 (Matthew Bender)

1 Matthew Bender Practice Guide: Federal Pretrial Civil Procedure in California, Ch. 8, *Answers and Responsive Motions Under Rule 12* , 8.40

Publisher's Notes

There is no BAJI instruction on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewCivil Rights LawSection 1983 ActionsGovernment
ActionsGovernmentsLocal GovernmentsGeneral OverviewGovernmentsLocal GovernmentsClaims By &
AgainstGovernmentsLocal GovernmentsEmployees & Officials



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CHAPTER 30 California Judicial Council Civil Rights Instructions

5-30 California Forms of Jury Instruction CACI 3009

CACI 3009 Public Entity Liability--Failure to Train--Essential Factual Elements (42 U.S.C. § 1983)

[*Name of plaintiff*] claims that [he/she] was deprived of [his/her] civil rights as a result of [*name of public entity*]'s failure to train its [officers/employees]. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. That [*name of public entity*]'s training program was not adequate to train its [officers/employees] to properly handle usual and recurring situations;
2. That [*name of public entity*] was deliberately indifferent to the need to train its [officers/employees] adequately;
3. That the failure to provide proper training was the cause of the deprivation of [*name of plaintiff*]'s right [*insert right, e.g., "of privacy"*];
4. That [*name of plaintiff*] was harmed; and
5. That [*name of public entity*]'s failure to adequately train its [officers/employees] was a substantial factor in causing [*name of plaintiff*]'s harm.

"Deliberate indifference" is the knowing or reckless disregard of the consequences of one's acts or omissions. To establish deliberate indifference, [*name of plaintiff*] must prove that [*name of public entity*] knew or should have known that its failure to provide reasonable training would likely result in a violation of the right [*e.g., "of privacy"*] of a person in [*name of plaintiff*]'s situation.

Sources and Authority

■ 42 U.S.C. section 1983 provides, in part: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State ... subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law ..."

■ "Section 1983 claims may be brought in either state or federal court." (*Pitts v. County of Kern* (1998) 17 Cal.4th 340, 348 [70 Cal.Rptr.2d 823, 949 P.2d 920] .)

■ "We hold today that the inadequacy of police training may serve as the basis for § 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact. This rule is most consistent with our admonition in *Monell* and *Polk County v. Dodson*, that a municipality can be liable under § 1983 only where its policies are the 'moving force [behind] the constitutional violation.' Only where a municipality's failure to train its employees in a relevant respect evidences a 'deliberate indifference' to the rights of its inhabitants can such a shortcoming be properly thought of as a city 'policy or custom' that is actionable under § 1983." (*City of Canton v. Harris* (1989) 489 U.S. 378, 388-389 [109 S.Ct. 1197, 103 L.Ed.2d 412] , internal citations and footnote omitted.)

■ "It would be hard to describe the *Canton* understanding of deliberate indifference, permitting liability to be premised on obviousness or constructive notice, as anything but objective." (*Farmer v. Brennan* (1994) 511 U.S. 825, 841 [114 S.Ct. 1970, 128 L.Ed.2d 811] .)

■ "To prove deliberate indifference, the plaintiff must show that the municipality was on actual or constructive notice that its omission would likely result in a constitutional violation." (*Gibson v. County of Washoe* (2002) 290 F.3d 1175, 1186 , internal citation omitted.)

■ "The issue in a case like this one ... is whether that training program is adequate; and if it is not, the question becomes whether such inadequate training can justifiably be said to represent 'city policy.' " Furthermore, the inadequacy in the city's training program must be closely related to the 'ultimate injury,' such that the injury would have been avoided had the employee been trained under a program that was not deficient in the identified respect." (*Irwin v. City of Hemet* (1994) 22 Cal.App.4th 507, 526 [27 Cal.Rptr.2d 433] , internal citations omitted.)

Secondary Sources

11 *California Forms of Pleading and Practice*, Ch. 113, *Civil Rights: The Post-Civil War Civil Rights Statutes*, § 113.14 (Matthew Bender)

Publisher's Notes

There is no BAJI instruction on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Rights LawSection 1983 ActionsGeneral OverviewGovernmentsLocal GovernmentsClaims By & Against



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California Forms of Jury Instruction

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CHAPTER 30 California Judicial Council Civil Rights Instructions

5-30 California Forms of Jury Instruction CACI 3010

CACI 3010 Violation of Prisoner's Federal Civil Rights--Eighth Amendment--Excessive Force (42 U.S.C. § 1983)

[*Name of plaintiff*] **claims that** [*name of defendant*] **used excessive force against** [him/her]. **To establish this claim, [*name of plaintiff*] must prove all of the following:**

- 1. That [*name of defendant*] used force against [*name of plaintiff*];**
- 2. That the force used was excessive;**
- 3. That [*name of defendant*] was acting or purporting to act in the performance of [his/her] official duties;**
- 4. That [*name of plaintiff*] was harmed; and**
- 5. That [*name of defendant*]'s use of excessive force was a substantial factor in causing [*name of plaintiff*]'s harm.**

Force is excessive if it is used maliciously and sadistically to cause harm. In deciding whether excessive force was used, you should consider, among other factors, the following:

- (a) The need for the use of force;**
- (b) The relationship between the need and the amount of force that was used;**
- (c) The extent of injury inflicted;**
- (d) The extent of the threat to the safety of staff and inmates, as reasonably perceived by the**

responsible officials on the basis of the facts known to them; [and]

(e) Any efforts made to temper the severity of a forceful response; [and]

(f) [Insert other relevant factor.]

Force is not excessive if it is used in a good-faith effort to protect the safety of inmates, staff, or others, or to maintain or restore discipline.

New September 2003; Revised June 2010

Directions for Use

The "official duties" referred to in element 3 must be duties created pursuant to any state, county, or municipal law, ordinance, or regulation. This aspect of color of law most likely will not be an issue for the jury, so it has been omitted to shorten the wording of element 3.

There is law suggesting that the jury should give deference to prison officials in the adoption and execution of policies and practices that in their judgment are needed to preserve discipline and to maintain internal security in a prison. This principle is covered in the final sentence by the term "good faith."

Sources and Authority

- 42 U.S.C. section 1983 provides, in part: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State ... subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law ..."

- "Section 1983 claims may be brought in either state or federal court." (*Pitts v. County of Kern* (1998) 17 Cal.4th 340, 348 [70 Cal.Rptr.2d 823, 949 P.2d 920] .)

- "The Constitution 'does not mandate comfortable prisons,' but neither does it permit inhumane ones, and it is now settled that 'the treatment a prisoner receives in prison and the conditions under which he is confined are subject to scrutiny under the *Eighth Amendment*.' In its prohibition of 'cruel and unusual punishments,' the *Eighth Amendment* places restraints on prison officials, who may not, for example, use excessive physical force against prisoners. The Amendment also imposes duties on these officials, who must provide humane conditions of confinement; prison officials must ensure that inmates receive adequate food, clothing, shelter, and medical care, and must 'take reasonable measures to guarantee the safety of the inmates.' " (*Farmer v. Brennan* (1994) 511 U.S. 825, 832 [114 S.Ct. 1970, 128 L.Ed.2d 811] , internal citations omitted.)

- "[A]pplication of the deliberate indifference standard is inappropriate when authorities use force to put down a prison disturbance. Instead, 'the question whether the measure taken inflicted unnecessary and wanton pain and suffering ultimately turns on "whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm." ' " (*Hudson v. McMillian* (1992) 503 U.S. 1, 6 [112 S.Ct. 995, 117 L.Ed.2d 156] , internal citations omitted.)

■ "[W]e hold that whenever prison officials stand accused of using excessive physical force in violation of the *Cruel and Unusual Punishments Clause*, the core judicial inquiry is that set out in *Whitley*: whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm." (*Hudson, supra*, 503 U.S. at pp. 6-7 , internal citations omitted.)

■ "Whether the prison disturbance is a riot or a lesser disruption, corrections officers must balance the need 'to maintain or restore discipline' through force against the risk of injury to inmates. Both situations may require prison officials to act quickly and decisively. Likewise, both implicate the principle that 'prison administrators ... should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security.' " (*Hudson, supra*, 503 U.S. at p. 6 , internal citations omitted.)

■ "[T]his Court rejected the notion that 'significant injury' is a threshold requirement for stating an excessive force claim. ... 'When prison officials maliciously and sadistically use force to cause harm,' ... 'contemporary standards of decency always are violated ... whether or not significant injury is evident. Otherwise, the *Eighth Amendment* would permit any physical punishment, no matter how diabolic or inhuman, inflicting less than some arbitrary quantity of injury.' " (*Wilkins v. Gaddy* (2010) ___ U.S. ___ [130 S.Ct. 1175, 175 L.Ed.2d 995, 999] .)

■ "This is not to say that the 'absence of serious injury' is irrelevant to the *Eighth Amendment* inquiry. '[T]he extent of injury suffered by an inmate is one factor that may suggest 'whether the use of force could plausibly have been thought necessary' in a particular situation.' The extent of injury may also provide some indication of the amount of force applied. ... [N]ot 'every malevolent touch by a prison guard gives rise to a federal cause of action.' The *Eighth Amendment's* prohibition of "cruel and unusual" punishments necessarily excludes from constitutional recognition *de minimis* uses of physical force, provided that the use of force is not of a sort repugnant to the conscience of mankind.' An inmate who complains of a 'push or shove' that causes no discernible injury almost certainly fails to state a valid excessive force claim. ... [P] Injury and force, however, are only imperfectly correlated, and it is the latter that ultimately counts." (*Wilkins, supra*, ___ U.S. at p. ___ [175 L.Ed.2d at p. 999], original italics, internal citations omitted.).

■ " '[S]uch factors as the need for the application of force, the relationship between the need and the amount of force that was used, [and] the extent of injury inflicted,' are relevant to that ultimate determination. From such considerations inferences may be drawn as to whether the use of force could plausibly have been thought necessary, or instead evinced such wantonness with respect to the unjustified infliction of harm as is tantamount to a knowing willingness that it occur. But equally relevant are such factors as the extent of the threat to the safety of staff and inmates, as reasonably perceived by the responsible officials on the basis of the facts known to them, and any efforts made to temper the severity of a forceful response." (*Whitley v. Albers* (1986) 475 U.S. 312, 321 [106 S.Ct. 1078, 89 L.Ed.2d 251] , internal citations omitted.)

■ "The Supreme Court has interpreted the phrase 'under "color" of law' to mean 'under "pretense" of law.' A police officer's actions are under pretense of law only if they are 'in some way "related to the performance of his official duties.' " By contrast, an officer who is ' "pursuing his own goals and is not in any way subject to control by [his public employer], " does not act under color of law, unless he 'purports or pretends' to do so. Officers who engage in confrontations for personal reasons unrelated to law enforcement, and do not 'purport[] or pretend[]' to be officers, do not act under color of law." (*Huffman v. County of Los Angeles* (9th Cir. 1998) 147 F.3d 1054, 1058 , internal citations omitted.)

Secondary Sources

3 Civil Rights Actions, Ch. 10, *Deprivation of Rights Under Color of State Law--Law Enforcement and Prosecution*, P 10.01 (Matthew Bender)

11 *California Forms of Pleading and Practice*, Ch. 114, *Civil Rights: Prisoners' Rights*, § 114.70 (Matthew Bender)

Publisher's Notes

There is no BAJI instruction on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Rights Law Practice & Procedure Criminal Penalties Civil Rights Law Prisoner Rights Confinement Conditions Civil Rights Law Prisoner Rights Medical Treatment Civil Rights Law Prisoner Rights Safety Civil Rights Law Prisoner Rights Welfare Civil Rights Law Section 1983 Actions General Overview Constitutional Law Bill of Rights Fundamental Rights Criminal Process Cruel & Unusual Punishment Criminal Law & Procedure Jury Instructions Particular Instructions General Overview Criminal Law & Procedure Sentencing Cruel & Unusual Punishment Criminal Law & Procedure Postconviction Proceedings Imprisonment



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California Forms of Jury Instruction

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CHAPTER 30 California Judicial Council Civil Rights Instructions

5-30 California Forms of Jury Instruction CACI 3011

CACI 3011 Violation of Prisoner's Federal Civil Rights--Eighth Amendment--General Conditions of Confinement Claim (42 U.S.C. § 1983)

[*Name of plaintiff*] claims that [*name of defendant*] subjected [him/her] to prison conditions that violated [his/her] constitutional rights. To establish this claim, [*name of plaintiff*] must prove all of the following:

- 1. That [*name of plaintiff*] was imprisoned under conditions that exposed [him/her] to a substantial risk of serious harm;**
- 2. That [*name of defendant*] knew the conditions created a substantial risk of serious harm and disregarded that risk by failing to take reasonable measures to correct it;**
- 3. That [*name of defendant*] was acting or purporting to act in the performance of [his/her] official duties;**
- 4. That [*name of plaintiff*] was harmed; and**
- 5. That [*name of defendant*]'s conduct was a substantial factor in causing [*name of plaintiff*]'s harm.**

New September 2003

Directions for Use

The "official duties" referred to in element 3 must be duties created pursuant to any state, county, or municipal law, ordinance, or regulation. This aspect of color of law most likely will not be an issue for the jury, so it has been omitted to shorten the wording of element 3.

De minimis harm is insufficient to satisfy the fourth element. (*Hudson v. McMillian* (1992) 503 U.S. 1, 10-11 [112 S.Ct. 995, 117 L.Ed.2d 156] , internal citations omitted.) If there is conflicting evidence on the issue of harm, the court may need to instruct the jury on the severity of the harm that must be proved.

Sources and Authority

- 42 U.S.C. section 1983 provides, in part: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State ... subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law ..."

- "Section 1983 claims may be brought in either state or federal court." (*Pitts v. County of Kern* (1998) 17 Cal.4th 340, 348 [70 Cal.Rptr.2d 823, 949 P.2d 920] .)

- "It is undisputed that the treatment a prisoner receives in prison and the conditions under which he is confined are subject to scrutiny under the *Eighth Amendment*." (*Helling v. McKinney* (1993) 509 U.S. 25, 31 [113 S.Ct. 2475, 125 L.Ed.2d 22] .)

- "Our cases have held that a prison official violates the *Eighth Amendment* only when two requirements are met. First, the deprivation alleged must be, objectively, 'sufficiently serious.' For a claim ... based on a failure to prevent harm, the inmate must show that he is incarcerated under conditions posing a substantial risk of serious harm. The second requirement follows from the principle that 'only the unnecessary and wanton infliction of pain implicates the *Eighth Amendment*.' To violate the *Cruel and Unusual Punishments Clause*, a prison official must have a 'sufficiently culpable state of mind.' In prison-conditions cases that state of mind is one of 'deliberate indifference' to inmate health or safety" (*Farmer v. Brennan* (1994) 511 U.S. 825, 834 [114 S.Ct. 1970, 128 L.Ed.2d 811] , internal citations omitted.)

- "We hold ... that a prison official cannot be found liable under the *Eighth Amendment* for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." (*Farmer, supra*, 511 U.S. at p. 837 .)

- "[E]xtreme deprivations are required to make out a conditions-of-confinement claim. Because routine discomfort is 'part of the penalty that criminal offenders pay for their offenses against society,' 'only those deprivations denying "the minimal civilized measure of life's necessities" are sufficiently grave to form the basis of an *Eighth Amendment* violation.' " (*Hudson, supra*, 503 U.S. at p. 9 , internal citations omitted.)

- "Prison officials have a duty to ensure that prisoners are provided adequate shelter, food, clothing, sanitation, medical care, and personal safety." (*Johnson v. Lewis* (9th Cir. 2000) 217 F.3d 726, 731 , internal citations omitted.)

- "The Supreme Court has interpreted the phrase 'under "color" of law' to mean 'under "pretense" of law.' A police officer's actions are under pretense of law only if they are 'in some way "related to the performance of his official duties.' " By contrast, an officer who is "pursuing his own goals and is not in

any way subject to control by [his public employer], ' " does not act under color of law, unless he 'purports or pretends' to do so. Officers who engage in confrontations for personal reasons unrelated to law enforcement, and do not 'purport[] or pretend[]' to be officers, do not act under color of law." (*Huffman v. County of Los Angeles* (9th Cir. 1998) 147 F.3d 1054, 1058 , internal citations omitted.)

Secondary Sources

3 Civil Rights Actions, Ch. 11, *Deprivation of Rights Under Color of State Law--Prisons*, PP 11.02-11.03 (Matthew Bender)

11 *California Forms of Pleading and Practice*, Ch. 114, *Civil Rights: Prisoners' Rights*, § 114.28 (Matthew Bender)

Publisher's Notes

There is no BAJI instruction on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Rights LawPrisoner RightsGeneral OverviewCivil Rights LawPrisoner RightsConfinement ConditionsCivil Rights LawPrisoner RightsMedical TreatmentCivil Rights LawPrisoner RightsSafetyCivil Rights LawPrisoner RightsWelfareCivil Rights LawSection 1983 ActionsGeneral OverviewConstitutional LawBill of RightsFundamental RightsCriminal ProcessCruel & Unusual PunishmentCriminal Law & ProcedureCriminal OffensesMiscellaneous OffensesAbuse of Public OfficeNeglect of OfficePenaltiesCriminal Law & ProcedureSentencingCruel & Unusual PunishmentCriminal Law & ProcedurePostconviction ProceedingsImprisonmentGovernmentsLocal GovernmentsClaims By & Against



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CHAPTER 30 California Judicial Council Civil Rights Instructions

5-30 California Forms of Jury Instruction CACI 3012

CACI 3012 Violation of Prisoner's Federal Civil Rights--Eighth Amendment--Medical Care (42 U.S.C. § 1983)

[*Name of plaintiff*] claims that [*name of defendant*] provided [him/her] with inadequate medical care in violation of [his/her] constitutional rights. To establish this claim, [*name of plaintiff*] must prove all of the following:

- 1. That [*name of defendant*] acted with deliberate indifference to a serious medical need of [*name of plaintiff*];**
- 2. That [*name of defendant*] was acting or purporting to act in the performance of [his/her] official duties;**
- 3. That [*name of plaintiff*] was harmed; and**
- 4. That [*name of defendant*]'s deliberate indifference was a substantial factor in causing [*name of plaintiff*]'s harm.**

A serious medical need exists if the failure to treat a prisoner's condition could result in further significant injury or the unnecessary and pointless infliction of pain.

To establish "deliberate indifference," [*name of plaintiff*] must prove that [*name of defendant*] knew [*name of plaintiff*] faced a substantial risk of serious harm and that [he/she] disregarded that risk by failing to take reasonable measures to correct it. Negligence is not enough to establish deliberate indifference.

New September 2003

The "official duties" referred to in element 2 must be duties created pursuant to any state, county, or

municipal law, ordinance, or regulation. This aspect of color of law most likely will not be an issue for the jury, so it has been omitted to shorten the wording of element 2.

De minimis harm is insufficient to satisfy the third element. (*Hudson v. McMillian* (1992) 503 U.S. 1, 10-11 [112 S.Ct. 995, 117 L.Ed.2d 156] , internal citations omitted.) If there is conflicting evidence on the issue of harm, the court may need to instruct the jury on the severity of the harm that must be proved.

- 42 U.S.C. section 1983 provides, in part: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State ... subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law"

- "Section 1983 claims may be brought in either state or federal court." (*Pitts v. County of Kern* (1998) 17 Cal.4th 340, 348 [70 Cal.Rptr.2d 823, 949 P.2d 920] .)

- "[D]eliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain,' proscribed by the *Eighth Amendment*. This is true whether the indifference is manifested by prison doctors in their response to the prisoner's needs or by prison guards in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed. Regardless of how evidenced, deliberate indifference to a prisoner's serious illness or injury states a cause of action under section 1983." (*Estelle v. Gamble* (1976) 429 U.S. 97, 104-105 [97 S.Ct. 285, 50 L.Ed.2d 251] , internal citation and footnotes omitted.)

- "Our cases have held that a prison official violates the *Eighth Amendment* only when two requirements are met. First, the deprivation alleged must be, objectively, 'sufficiently serious.' For a claim ... based on a failure to prevent harm, the inmate must show that he is incarcerated under conditions posing a substantial risk of serious harm. The second requirement follows from the principle that 'only the unnecessary and wanton infliction of pain implicates the *Eighth Amendment*.' To violate the *Cruel and Unusual Punishments Clause*, a prison official must have a 'sufficiently culpable state of mind.' In prison-conditions cases that state of mind is one of 'deliberate indifference' to inmate health or safety" (*Farmer v. Brennan* (1994) 511 U.S. 825, 834 [114 S.Ct. 1970, 128 L.Ed.2d 811] , internal citations omitted.)

- "We hold ... that a prison official cannot be found liable under the *Eighth Amendment* for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." (*Farmer*, *supra*, 511 U.S. at p. 837 .)

- "Prison officials are deliberately indifferent to a prisoner's serious medical needs when they 'deny, delay or intentionally interfere with medical treatment.' ..." (*Wood v. Housewright* (9th Cir. 1990) 900 F.2d 1332, 1334 , internal citation omitted.)

- "[A]llegations that a prison official has ignored the instructions of a prisoner's treating physician are sufficient to state a claim for deliberate indifference." (*Wakefield v. Thompson* (9th Cir. 1999) 177 F.3d 1160, 1165 .)

- "[A] complaint that a physician has been negligent in diagnosing or treating a medical condition does

not state a valid claim of medical mistreatment under the *Eighth Amendment*. Medical malpractice does not become a constitutional violation merely because the victim is a prisoner. In order to state a cognizable claim, a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs." (*Estelle, supra*, 429 U.S. at p. 106 .)

■ "While poor medical treatment will at a certain point rise to the level of constitutional violation, mere malpractice, or even gross negligence, does not suffice. Although Wood's treatment was not as prompt or efficient as a free citizen might hope to receive, Wood was given medical care at the prison that addressed his needs." (*Wood, supra*, 900 F.2d at p. 1334 .)

■ "It has been recognized ... that inadequate medical treatment may, in some instances, constitute a violation of 42 *United States Code* section 1983. In *Sturts v. City of Philadelphia*, for example, the plaintiff alleged that defendants acted 'carelessly, recklessly and negligently' when they failed to remove sutures from his eye, neck and face. The court concluded that although plaintiff was alleging inadequate medical treatment, he had stated a cause of action under section 1983: '... where a prisoner has received some medical attention and the dispute is over the adequacy of the treatment, federal courts are generally reluctant to second guess medical judgments. In some cases, however, the medical attention rendered may be so woefully inadequate as to amount to no treatment at all, thereby rising to the level of a § 1983 claim. ...' " (*Ochoa v. Superior Court* (1985) 39 Cal.3d 159, 176-177 [216 Cal.Rptr. 661, 703 P.2d 1] , internal citations omitted.)

■ "Because society does not expect that prisoners will have unqualified access to health care, deliberate indifference to medical needs amounts to an *Eighth Amendment* violation only if those needs are 'serious.' " (*Hudson, supra*, 503 U.S. at p. 9 , internal citation omitted.)

■ "A 'serious' medical need exists if the failure to treat a prisoner's condition could result in further significant injury or the 'unnecessary and wanton infliction of pain.' The 'routine discomfort' that results from incarceration and which is 'part of the penalty that criminal offenders pay for their offenses against society' does not constitute a 'serious' medical need." (*Doty v. County of Lassen* (9th Cir. 1994) 37 F.3d 540, 546 , internal citations and footnote omitted.)

■ "The Supreme Court has interpreted the phrase 'under "color" of law' to mean 'under "pretense" of law.' A police officer's actions are under pretense of law only if they are 'in some way "related to the performance of his official duties." ' By contrast, an officer who is ' "pursuing his own goals and is not in any way subject to control by [his public employer], " ' does not act under color of law, unless he 'purports or pretends' to do so. Officers who engage in confrontations for personal reasons unrelated to law enforcement, and do not 'purport[] or pretend[]' to be officers, do not act under color of law." (*Huffman v. County of Los Angeles* (9th Cir. 1998) 147 F.3d 1054, 1058 , internal citations omitted.)

Secondary Sources

3 Civil Rights Actions, Ch. 11, *Deprivation of Rights Under Color of State Law --Prisons*, P 11.09 (Matthew Bender)

11 *California Forms of Pleading and Practice*, Ch. 114, *Civil Rights: Prisoners' Rights*, § 114.15 (Matthew Bender)

3 *California Points and Authorities*, Ch. 35, *Civil Rights* (Matthew Bender)

Publisher's Notes

There is no BAJI instruction on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Rights LawPrisoner RightsGeneral OverviewCivil Rights LawPrisoner RightsConfinement ConditionsCivil Rights LawPrisoner RightsMedical TreatmentCivil Rights LawPrisoner RightsSafetyCivil Rights LawSection 1983 ActionsGeneral OverviewCivil Rights LawSection 1983 ActionsElementsGeneral OverviewCivil Rights LawSection 1983 ActionsElementsCausal RelationshipConstitutional LawBill of RightsFundamental RightsCriminal ProcessCruel & Unusual PunishmentConstitutional LawEqual ProtectionPovertyCriminal Law & ProcedureSentencingCruel & Unusual PunishmentCriminal Law & ProcedurePostconviction ProceedingsImprisonmentGovernmentsLocal GovernmentsClaims By & AgainstHealthcare LawActions Against FacilitiesFacility LiabilityPrisonsHealthcare LawActions Against Healthcare WorkersGeneral OverviewHealthcare LawActions Against Healthcare WorkersPrison Officials & PhysiciansHealthcare LawTreatmentFailures & Refusals to TreatGeneral OverviewHealthcare LawTreatmentFailures & Refusals to TreatPrisonersTortsMalpractice & Professional LiabilityHealthcare Providers



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CHAPTER 30 California Judicial Council Civil Rights Instructions

5-30 California Forms of Jury Instruction CACI 3013

CACI 3013 Supervisor Liability (42 U.S.C. § 1983)

[*Name of plaintiff*] **claims that [*name of supervisor defendant*] is personally liable for [his/her] harm. In order to establish this claim, [*name of plaintiff*] must prove all of the following:**

- 1. That [*name of supervisor defendant*] knew, or in the exercise of reasonable diligence should have known, of [*name of employee defendant*]'s wrongful conduct;**
- 2. That [*name of supervisor defendant*]'s response was so inadequate that it showed deliberate indifference to, or tacit authorization of, [*name of employee defendant*]'s conduct; and**
- 3. That [*name of supervisor defendant*]'s inaction was a substantial factor in causing [*name of plaintiff*]'s harm.**

New April 2007

Read this instruction in cases in which a supervisor is alleged to be personally liable for the violation of the plaintiff's civil rights under Title 42 *United States Code* section 1983.

■ "A 'supervisory official may be held liable in certain circumstances for the constitutional injuries inflicted by their subordinates. ... [T]hat liability is not premised upon *respondeat superior* but upon "a recognition that supervisory indifference or tacit authorization of subordinates' misconduct may be a causative factor in the constitutional injuries they inflict." ' ' (*Weaver v. State of California* (1998) 63 Cal.App.4th 188, 209 [73 Cal.Rptr.2d 571] , internal citations omitted.)

■ "To establish supervisory liability under section 1983, [plaintiff] was required to prove: (1) the supervisor had actual or constructive knowledge of [defendant's] wrongful conduct; (2) the supervisor's response " 'was so inadequate as to show "deliberate indifference to or tacit authorization of the alleged offensive practices" ' "; and (3) the existence of an 'affirmative causal link' between the supervisor's inaction and [plaintiff's] injuries." (*Grassilli v. Barr* (2006) 142 Cal.App.4th 1260, 1279-1280 [48 Cal.Rptr.3d 715] , internal citations omitted.)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, § 347

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, § 8

11 *California Forms of Pleading and Practice, Ch. 113, Civil Rights: The Post-Civil War Civil Rights Statutes*, § 113.14 (Matthew Bender)

11 *California Forms of Pleading and Practice, Ch. 115, Civil Rights: Employment Discrimination*, § 115.20[4] (Matthew Bender)

Publisher's Notes

There is no BAJI instruction on this subject.



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California Forms of Jury Instruction

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CHAPTER 30 California Judicial Council Civil Rights Instructions

5-30 California Forms of Jury Instruction CACI 3014

CACI 3014 Unlawful Arrest by Peace Officer Without a Warrant--Essential Factual Elements (42 U.S.C. § 1983)

[*Name of plaintiff*] **claims that** [*name of defendant*] **wrongfully arrested** [him/her] **because** [he/she] **did not have a warrant. To establish this claim,** [*name of plaintiff*] **must prove all of the following:**

- 1. That** [*name of defendant*] **arrested** [*name of plaintiff*] **without a warrant and without probable cause;**
- 2. That** [*name of defendant*] **was acting or purporting to act in the performance of** [his/her] **official duties;**
- 3. That** [*name of plaintiff*] **was harmed; and**
- 4. That** [*name of defendant*]'s **conduct was a substantial factor in causing** [*name of plaintiff*]'s **harm.**

New April 2009; Revised December 2009

Directions for Use

Give this instruction in a false arrest case brought under title 42 *United States Code* section 1983. For an instruction for false arrest under California law, see *CACI No. 1401, Essential Factual Elements--False Arrest Without Warrant by Peace Officer*. For an instruction on what constitutes probable cause under section 1983, see *CACI No. 3015, Arrest by Peace Officer Without a Warrant--Probable Cause to Arrest*.

The "official duties" referred to in element 2 must be duties created by a state, county, or municipal law,

ordinance, or regulation. This aspect of color of law most likely will not be an issue for the jury, so it has been omitted to shorten the wording of element 2.

Sources and Authority

■ "The *Fourth Amendment to the United States Constitution*, made applicable to the states by the *Fourteenth Amendment*, provides: 'The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.' " (*Conway v. Pasadena Humane Society* (1996) 45 Cal.App.4th 163, 171 [52 Cal.Rptr.2d 777] , internal citation omitted.)

■ "The Supreme Court has interpreted the phrase 'under "color" of law' to mean 'under "pretense" of law.' A police officer's actions are under pretense of law only if they are 'in some way "related to the performance of his official duties." 'By contrast, an officer who is' "pursuing his own goals and is not in any way subject to control by [his public employer], " ' does not act under color of law, unless he 'purports or pretends' to do so. Officers who engage in confrontations for personal reasons unrelated to law enforcement, and do not 'purport[] or pretend[]' to be officers, do not act under color of law." (*Huffman v. County of Los Angeles* (9th Cir. 1998) 147 F.3d 1054, 1058 , internal citations omitted.)

■ "Although the plaintiff bears the burden of proof on the issue of unlawful arrest, she can make a prima facie case simply by showing that the arrest was conducted without a valid warrant. At that point, the burden shifts to the defendant to provide some evidence that the arresting officers had probable cause for a warrantless arrest. The plaintiff still has the ultimate burden of proof, but the burden of production falls on the defendant." (*Dubner v. City & County of San Francisco* (9th Cir. 2001) 266 F.3d 959, 965 .)

Secondary Sources

Witkin, Summary of California Law (10th ed. 2005) Torts, § 181

Schwarzer et al., California Practice Guide: Federal Civil Procedure Before Trial (The Rutter Group) P 2:1294

5 Levy et al., *California Torts, Ch. 60, Principles of Liability and Immunity of Public Entities and Employees*, § 60.06 (Matthew Bender)

11 *California Forms of Pleading and Practice, Ch. 113, Civil Rights: The Post-Civil War Civil Rights Statutes*, § 113.14 (Matthew Bender)

2 *California Points and Authorities, Ch. 21, Assault and Battery*, § 21.36A (Matthew Bender)

1 *Civil Rights Actions, Ch. 2, Institutional and Individual Immunity*, § 2.05 (Matthew Bender)

Publisher's Notes

There is no BAJI instruction on this subject.



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CHAPTER 30 California Judicial Council Civil Rights Instructions

5-30 California Forms of Jury Instruction CACI 3015

CACI 3015 Arrest by Peace Officer Without a Warrant--Probable Cause to Arrest (42 U.S.C. § 1983)

[*Name of plaintiff*]'s arrest was not wrongful if [*name of defendant*] had probable cause to arrest [*him/her*] without a warrant.

[*Name of defendant*] had probable cause to arrest [*name of plaintiff*] without a warrant if at the time of the arrest, [he/she] knew or had reasonably trustworthy information sufficient to lead a law enforcement officer of reasonable caution to believe that [*name of plaintiff*] had committed or was in the process of committing a crime.

Whether [*name of defendant*] had probable cause for the arrest must be determined by looking at all of the circumstances. Conclusive evidence of guilt is not necessary to establish probable cause. However, mere suspicion or common rumor is not enough. Whether the officer acted in good faith or bad faith is not relevant. There must be some evidence that would allow a reasonable officer to conclude that a particular individual has committed or is in the process of committing a criminal offense.

New April 2009

Directions for Use

Give this instruction in a false arrest case brought under Title 42 *United States Code* section 1983 in which the defendant asserts that there was probable cause to support the warrantless arrest. For an instruction for probable cause under California law, see *CACI No. 1402, False Arrest Without Warrant--Affirmative Defense--Peace Officer--Probable Cause to Arrest*.

There is perhaps some difference between the federal standard and the California standard with regard to the respective roles of judge and jury in determining probable cause to arrest. Under federal law construing section 1983, probable cause is usually a question for the jury. Summary judgment is

appropriate only if no reasonable jury could find that the officers did or did not have probable cause to arrest. (*McKenzie v. Lamb* (9th Cir. 1984) 738 F.2d 1005, 1007-1008 .) Under California law, the court makes the final determination on probable cause as a matter of law. However, the jury may be called on to resolve any disputed facts before the court makes its determination. (See *Levin v. United Air Lines, Inc.* (2008) 158 Cal.App.4th 1002, 1018-1019 [70 Cal.Rptr.3d 535] .)

There appears to be little or no actual difference in the two standards; both call for the jury to resolve disputed facts and for the court to decide the issue if there are none. Presumably, the case would not have made it to trial under either standard if there were no disputed facts and probable cause could be found as a matter of law. The distinction is that under the federal standard, once the case makes it to trial, the jury is told to make the final determination on probable cause. Under the California standard, the jury is told only to find specified particular facts and must leave the conclusion to be drawn from those facts to the court. This is perhaps a distinction without a difference. If the plaintiff alleges counts under both section 1983 and California law, consider combining this instruction with *CACI No. 1402*.

Sources and Authority

- "Although the plaintiff bears the burden of proof on the issue of unlawful arrest, she can make a prima facie case simply by showing that the arrest was conducted without a valid warrant. At that point, the burden shifts to the defendant to provide some evidence that the arresting officers had probable cause for a warrantless arrest. The plaintiff still has the ultimate burden of proof, but the burden of production falls on the defendant." (*Dubner v. City & County of San Francisco* (9th Cir. 2001) 266 F.3d 959, 965 .)

- "Our task in determining whether probable cause to arrest existed as a matter of law in this § 1983 action is slightly different from a similar determination in the context of a direct review of a criminal arrest. In the latter situation, we are called upon to review both law and fact and to draw the line as to what is and is not reasonable behavior. ... By contrast, in a § 1983 action the factual matters underlying the judgment of reasonableness generally mean that probable cause is a question for the jury, ...; and summary judgment is appropriate only if no reasonable jury could find that the officers did or did not have probable cause to arrest." (*McKenzie, supra*, 738 F.2d at pp. 1007-1008 , internal citations omitted.)

- "In reviewing the grant of a motion for judgment as a matter of law, we must determine whether a reasonable jury could have concluded that the detectives lacked probable cause to arrest [plaintiff]." (*Torres v. City of L.A.* (9th Cir. 2008) 548 F.3d 1197, 1208 .)

- "Probable cause existed if 'under the totality of the circumstances known to the arresting officers, a prudent person would have concluded that there was a fair probability that [the defendant] had committed a crime.' " (*United States v. Carranza* (9th Cir. 2002) 289 F.3d 634, 640 .)

- " 'Probable cause to arrest exists when officers have knowledge or reasonably trustworthy information sufficient to lead a person of reasonable caution to believe that an offense has been or is being committed by the person being arrested.' 'While conclusive evidence of guilt is of course not necessary under this standard to establish probable cause, "[m]ere suspicion, common rumor, or even strong reason to suspect are not enough.' " Under the collective knowledge doctrine, in determining whether probable cause exists for arrest, we look to "the collective knowledge of all the officers involved in the criminal investigation[.]' " (*Torres, supra*, 548 F.3d at pp. 1206-1207 , internal citations omitted.)

- "To determine whether an officer had probable cause to arrest an individual, we examine the events

leading up to the arrest, and then decide 'whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to' probable cause" (*Maryland v. Pringle* (2003) 540 U.S. 366, 371 [124 S.Ct. 795, 157 L.Ed.2d 769] , internal citation omitted.)

■ "There must be some objective evidence which would allow a reasonable officer to deduce that a particular individual has committed or is in the process of committing a criminal offense." (*McKenzie*, *supra*, 738 F.2d at p. 1008 .)

■ "The *Fourth Amendment* protects '[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.' In conformity with the rule at common law, a warrantless arrest by a law officer is reasonable under the *Fourth Amendment* where there is probable cause to believe that a criminal offense has been or is being committed. Whether probable cause exists depends upon the reasonable conclusion to be drawn from the facts known to the arresting officer at the time of the arrest." (*Devenpeck v. Alford* (2004) 543 U.S. 146, 152 [125 S.Ct. 588, 160 L.Ed.2d 537] , internal citations omitted.)

■ "[A]n arresting officer's state of mind (except for the facts that he knows) is irrelevant to the existence of probable cause. That is to say, his subjective reason for making the arrest need not be the criminal offense as to which the known facts provide probable cause. As we have repeatedly explained, 'the fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action.' " '[T]he *Fourth Amendment's* concern with "reasonableness" allows certain actions to be taken in certain circumstances, whatever the subjective intent.' "[E]venhanded law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the subjective state of mind of the officer.' " (*Devenpeck*, *supra*, 543 U.S. at p. 153 , internal citations omitted.)

■ "We may assume that the officers acted in good faith in arresting the petitioner. But 'good faith on the part of the arresting officers is not enough.' If subjective good faith alone were the test, the protections of the *Fourth Amendment* would evaporate, and the people would be 'secure in their persons, houses, papers, and effects,' only in the discretion of the police." (*Beck v. Ohio* (1964) 379 U.S. 89, 97 [85 S.Ct. 223, 13 L.Ed.2d 142] , internal citation omitted.)

Secondary Sources

Witkin, Summary of California Law (10th ed. 2005) Torts, § 181

5 Levy et al., *California Torts*, Ch. 60, *Principles of Liability and Immunity of Public Entities and Employees*, § 60.06 (Matthew Bender)

11 *California Forms of Pleading and Practice*, Ch. 113, *Civil Rights: The Post-Civil War Civil Rights Statutes*, § 113.14 (Matthew Bender)

2 *California Points and Authorities*, Ch. 21, *Assault and Battery*, § 21.36A (Matthew Bender)

1 *Civil Rights Actions*, Ch. 2, *Institutional and Individual Immunity*, § 2.05 (Matthew Bender)

Publisher's Notes

There is no BAJI instruction on this subject.



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CHAPTER 30 California Judicial Council Civil Rights Instructions

5-30 California Forms of Jury Instruction CACI 3016

CACI 3016 Retaliation--Essential Factual Elements (42 U.S.C. § 1983)

[*Name of plaintiff*] **claims that** [*name of defendant*] **retaliated against** [him/her] **for exercising a constitutional right. [By** [*specify conduct*], [*name of plaintiff*] **was exercising** [his/her] **constitutionally protected right of** [*insert right, e.g., privacy*].] **To establish retaliation, [** *name of plaintiff*] **must prove all of the following:**

- 1. [That [he/she] was engaged in a constitutionally protected activity;]**
- 2. That [** *name of defendant*] **[** *specify alleged retaliatory conduct*];
- 3. That [** *name of defendant*]'s **acts were motivated, at least in part, by [** *name of plaintiff*]'s **protected activity;**
- 4. That [** *name of defendant*]'s **acts would likely have deterred a person of ordinary firmness from engaging in that protected activity; and**
- 5. That [** *name of plaintiff*] **was harmed as a result of [** *name of defendant*]'s **conduct.**

[The law requires that the trial judge, rather than the jury, decide if [*name of plaintiff*] **has proven element 1 above. But before I can do so, you must decide whether [** *name of plaintiff*] **has proven the following:**

[*List all factual disputes that must be resolved by the jury.*]]

New June 2010

Directions for Use

Give this instruction along with *CACI No. 3000, Violation of Federal Civil Rights--In General--Essential Factual Elements*, if the claimed civil rights violation is retaliation for exercising constitutionally protected rights. The retaliation should be alleged generally in element 1 of *CACI No. 3000*.

The constitutionally protected activity refers back to the right alleged to have been violated in element 3 of *CACI No. 3000*. Whether plaintiff was engaged in a constitutionally protected activity will usually have been resolved by the court as a matter of law. If so, include the optional statement in the opening paragraph and omit element 1. If there is a question of fact that the jury must resolve with regard to the constitutionally protected activity, include element 1 and give the last part of the instruction.

There is perhaps some uncertainty with regard to the requirement in element 3 that the retaliatory act may be motivated, *in part*, by the protected activity. While the element is so stated in *Tichinin v. City of Morgan Hill* (2009) 177 Cal.App.4th 1049, 1062-1063 [99 Cal.Rptr.3d 661], the court also was of the view that the defendant may avoid liability by proving that, notwithstanding a retaliatory motive, it also had legitimate reasons for its actions and would have taken the same steps for those reasons alone. (*Id.* at pp. 1086-1087, finding persuasive *Greenwich Citizens Comm. v. Counties of Warren & Washington Indus. Dev. Agency* (2d Cir. 1996) 77 F.3d 26, 30.) Therefore, the fact that retaliation may have motivated the defendant only in part may not always be sufficient for liability.

Sources and Authority

- "Where, as here, the plaintiff claims retaliation for exercising a constitutional right, the majority of federal courts require the plaintiff to prove that (1) he or she was engaged in constitutionally protected activity, (2) the defendant's retaliatory action caused the plaintiff to suffer an injury that would likely deter a person of ordinary firmness from engaging in that protected activity, and (3) the retaliatory action was motivated, at least in part, by the plaintiff's protected activity." (*Tichinin, supra*, 177 Cal.App.4th at pp. 1062-1063.)

- "[A]ctions that are otherwise proper and lawful may nevertheless be actionable if they are taken in retaliation against a person for exercising his or her constitutional rights." (*Tichinin, supra*, 177 Cal.App.4th at p. 1084.)

- "[T]he evidence of [plaintiff]'s alleged injuries, if believed, is sufficient to support a finding that the retaliatory action against him would deter a person of ordinary firmness from exercising his or her First Amendment rights. [P] [Defendant] argues that plaintiff did not suffer any injury--i.e., [defendant]'s action did not chill [plaintiff]'s exercise of his rights--because he continued to litigate against [defendant]. However, that [plaintiff] persevered despite [defendant]'s action is not determinative. To reiterate, in the context of a claim of retaliation, the question is not whether the plaintiff was actually deterred but whether the defendant's actions would have deterred a person of ordinary firmness." (*Tichinin, supra*, 177 Cal.App.4th at p. 1082.)

- "Intent to inhibit speech, which 'is an element of the [retaliation] claim,' can be demonstrated either through direct or circumstantial evidence." (*Mendocino Env'tl. Ctr. v. Mendocino County* (9th Cir. 1999) 192 F.3d 1283, 1300-1301, internal citation omitted.)

- "While the scope, severity and consequences of [their] actions are belittled by defendants, we have cautioned that 'a government act of retaliation need not be severe ... [nor] be of a certain kind' to qualify as an adverse action." (*Marez v. Bassett* (9th Cir. 2010) 595 F.3d 1068, 1075.)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, §§ 820, 885A 3 Wilcox, *California Employment Law*, Ch. 40, *Overview of Equal Opportunity Laws*, § 40.26 (Matthew Bender) 3 Civil Rights Actions, Ch. 17, *Discrimination in Federally Assisted Programs*, § 17.24B (Matthew Bender) 4 Civil Rights Actions, Ch. 21A, *Employment Discrimination Based on Race, Color, Religion, Sex, or National Origin*, § 21.22[F] (Matthew Bender) 11 *California Forms of Pleading and Practice*, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.37 (Matthew Bender) 10 *California Points and Authorities*, Ch. 100, *Employer and Employee: Wrongful Termination and Discipline*, § 100.42 (Matthew Bender)

Publisher's Notes

There is no BAJI instruction on this subject.



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CHAPTER 30 California Judicial Council Civil Rights Instructions

5-30 California Forms of Jury Instruction CACI 3017-CACI 3019

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CHAPTER 30 California Judicial Council Civil Rights Instructions

5-30 California Forms of Jury Instruction CACI 3020

CACI 3020 Unruh Civil Rights Act--Essential Factual Elements (Civ. Code, §§ 51, 52)

[*Name of plaintiff*] **claims that** [*name of defendant*] **denied [him/her] full and equal [accommodations/advantages/facilities/privileges/ services] because of [his/her] [sex/race/color/religion/ancestry/national origin/disability/medical condition/[insert other actionable characteristic]]. To establish this claim, [*name of plaintiff*] must prove all of the following:**

- 1. That [*name of defendant*] [denied/aided or incited a denial of/discriminated or made a distinction that denied] full and equal [accommodations/advantages/facilities/privileges/ services] to [*name of plaintiff*];**
- 2. [That a motivating reason for [*name of defendant*]'s conduct was [its perception of] [*name of plaintiff*]'s [sex/race/color/religion/ancestry/national origin/disability/ medical condition/[insert other actionable characteristic]];**
- [That the [sex/race/color/religion/ancestry/national origin/disability/medical condition/[insert other actionable characteristic]] of a person whom [*name of plaintiff*] was associated with was a motivating reason for [*name of defendant*]'s conduct;]**
- 3. That [*name of plaintiff*] was harmed; and**
- 4. That [*name of defendant*]'s conduct was a substantial factor in causing [*name of plaintiff*]'s harm.**

New September 2003

Note that this instruction uses the standard of "a motivating reason." The causation standard is still an open issue under this statute.

The judge may decide the issue of whether the defendant is a business establishment as a matter of law. (*Rotary Club of Duarte v. Bd. of Directors* (1986) 178 Cal.App.3d 1035, 1050 [224 Cal.Rptr. 213] .) Special interrogatories may be needed if there are factual issues. This element has been omitted from the instruction because it is unlikely to go to a jury.

"Legitimate business interests" may justify some degree of limitation on consumer access to public accommodations. (*Hankins v. El Torito Restaurants, Inc.* (1998) 63 Cal.App.4th 510, 520 [74 Cal.Rptr.2d 684] .) This will commonly be an issue for the judge to decide. (*Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 1165 [278 Cal.Rptr. 614, 805 P.2d 873] .) If there are contested factual issues, additional instructions may be necessary.

■ *Civil Code section 51 provides:*

(a) This section shall be known, and may be cited, as the Unruh Civil Rights Act.

(b) All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, disability, or medical condition are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.

(c) This section shall not be construed to confer any right or privilege on a person that is conditioned or limited by law or that is applicable alike to persons of every sex, color, race, religion, ancestry, national origin, disability, or medical condition.

(d) Nothing in this section shall be construed to require any construction, alteration, repair, structural or otherwise, or modification of any sort whatsoever, beyond that construction, alteration, repair, or modification that is otherwise required by other provisions of law, to any new or existing establishment, facility, building, improvement, or any other structure, nor shall anything in this section be construed to augment, restrict, or alter in any way the authority of the State Architect to require construction, alteration, repair, or modifications that the State Architect otherwise possesses pursuant to other laws.

(e) For purposes of this section:

(1) "Disability" means any mental or physical disability as defined in *Section 12926 of the Government Code*.

(2) "Medical condition" has the same meaning as defined in *subdivision (h) of Section 12926 of the Government Code*.

(f) A violation of the right of any individual under the Americans with Disabilities Act of 1990 (Public Law 101-336) shall also constitute a violation of this section.

■ *Civil Code section 52 provides:*

(a) Whoever denies, aids or incites a denial, or makes any discrimination or distinction contrary to Section 51, 51.5, or 51.6, is liable for each and every offense for the actual damages, and any amount that may be determined by a jury, or a court sitting without a jury, up to a maximum of three times the amount of actual damage but in no case less than four thousand dollars (\$4,000), and any attorney's fees that may be determined by the court in addition thereto, suffered by any person denied the rights provided in Section 51, 51.5, or 51.6.

(b) Whoever denies the right provided by Section 51.7 or 51.9, or aids, incites, or conspires in that denial, is liable for each and every offense for the actual damages suffered by any person denied that right and, in addition, the following:

(1) An amount to be determined by a jury, or a court sitting without a jury, for exemplary damages.

(2) A civil penalty of twenty-five thousand dollars (\$25,000) to be awarded to the person denied the right provided by Section 51.7 in any action brought by the person denied the right, or by the Attorney General, a district attorney, or a city attorney.

(3) Attorney's fees as may be determined by the court.

(c) Whenever there is reasonable cause to believe that any person or group of persons is engaged in conduct of resistance to the full enjoyment of any of the rights described in this section, and that conduct is of that nature and is intended to deny the full exercise of those rights, the Attorney General, any district attorney or city attorney, or any person aggrieved by the conduct may bring a civil action in the appropriate court by filing with it a complaint. The complaint shall contain the following:

(1) The signature of the officer, or, in his or her absence, the individual acting on behalf of the officer, or the signature of the person aggrieved.

(2) The facts pertaining to the conduct.

(3) A request for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order against the person or persons responsible for the conduct, as the complainant deems necessary to ensure the full enjoyment of the rights described in this section.

(d) Whenever an action has been commenced in any court seeking relief from the denial of equal protection of the laws under the *Fourteenth Amendment to the Constitution of the United States* on account of race, color, religion, sex, national origin, or disability, the Attorney General or any district attorney or city attorney for or in the name of the people of the State of California may intervene in the action upon timely application if the Attorney General or any district attorney or city attorney certifies that the case is of general public importance. In that action, the people of the State of California shall be entitled to the same relief as if it had instituted the action.

(e) Actions brought pursuant to this section are independent of any other actions, remedies, or procedures that may be available to an aggrieved party pursuant to any other law.

(f) Any person claiming to be aggrieved by an alleged unlawful practice in violation of Section 51 or 51.7 may also file a verified complaint with the Department of Fair Employment and Housing pursuant

to Section 12948 of the Government Code.

(g) This section does not require any construction, alteration, repair, structural or otherwise, or modification of any sort whatsoever, beyond that construction, alteration, repair, or modification that is otherwise required by other provisions of law, to any new or existing establishment, facility, building, improvement, or any other structure, nor does this section augment, restrict, or alter in any way the authority of the State Architect to require construction, alteration, repair, or modifications that the State Architect otherwise possesses pursuant to other laws.

(h) For the purposes of this section, "actual damages" means special and general damages. This subdivision is declaratory of existing law.

■ "The Legislature used the words "all" and "of every kind whatsoever" in referring to business establishments covered by the Unruh Act, and the inclusion of these words without any exception and without specification of particular kinds of enterprises, leaves no doubt that the term "business establishments" was used in the broadest sense reasonably possible. The word "business" embraces everything about which one can be employed, and it is often synonymous with "calling, occupation, or trade, engaged in for the purpose of making a livelihood or gain." The word "establishment," as broadly defined, includes not only a fixed location, such as the "place where one is permanently fixed for residence or business," but also a permanent "commercial force or organization" or "a permanent settled position, (as in life or business)." ' ' (*O'Connor v. Village Green Owners Assn.* (1983) 33 Cal.3d 790, 795 [191 Cal.Rptr. 320, 662 P.2d 427] , internal citations omitted.)

■ Whether a defendant is a "business establishment" is decided as an issue of law. (*Rotary Club of Duarte, supra*, 178 Cal.App.3d at p. 1050 .)

■ "In addition to the particular forms of discrimination specifically outlawed by the Act (sex, race, color, etc.), courts have held the Act 'prohibit[s] discrimination based on several classifications which are not specifically enumerated in the statute.' These judicially recognized classifications include unconventional dress or physical appearance, families with children, homosexuality, and persons under 18." (*Hessians Motorcycle Club v. J.C. Flanagan* (2001) 86 Cal.App.4th 833, 836 [103 Cal.Rptr.2d 552] , internal citations omitted.)

■ "Although the Unruh Act proscribes "any form of arbitrary discrimination", certain types of discrimination have been denominated "reasonable" and, therefore, not arbitrary.' Thus, for example, 'legitimate business interests may justify limitations on consumer access to public accommodations.' " (*Hankins v. El Torito Restaurants, Inc.* (1998) 63 Cal.App.4th 510, 520 [74 Cal.Rptr.2d 684] , internal citations omitted.)

■ "Unruh Act issues have often been decided as questions of law on demurrer or summary judgment when the policy or practice of a business establishment is valid on its face because it bears a reasonable relation to commercial objectives appropriate to an enterprise serving the public." (*Harris, supra*, 52 Cal.3d at p. 1165 , internal citations omitted.)

■ "It is thus manifested by section 51 that all persons are entitled to the full and equal privilege of associating with others in any business establishment. And section 52, liberally interpreted, makes clear that discrimination by such a business establishment against one's right of association on account of the associates' color, is violative of the Act. It follows ... that discrimination by a business establishment against persons on account of their association with others of the black race is actionable under the Act." (*Winchell v. English* (1976) 62 Cal.App.3d 125, 129 [133 Cal.Rptr. 20] .)

■ "Section 51 by its express language applies only within California. It cannot (with its companion penalty provisions in § 52) be extended into the Hawaiian jurisdiction. A state cannot regulate or proscribe activities conducted in another

state or supervise the internal affairs of another state in any way, even though the welfare or health of its citizens may be affected when they travel to that state." (*Archibald v. Cinerama Hawaiian Hotels, Inc.* (1977) 73 Cal.App.3d 152, 159 [140 Cal.Rptr. 599] , internal citations omitted, disapproved on other grounds in *Koire v. Metro Car Wash* (1985) 40 Cal.3d 24 [219 Cal.Rptr. 133, 707 P.2d 195] .)

Secondary Sources

11 *California Forms of Pleading and Practice*, Ch. 116, *Civil Rights: Discrimination in Business Establishments*, §§ 116.10 -116.13 (Matthew Bender)

3 *California Points and Authorities*, Ch. 35, *Civil Rights: Unruh Civil Rights Act* (Matthew Bender)

Publisher's Notes

This instruction covers issues presented in BAJI No. 7.92.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedurePartiesInterventionTimelinessCivil ProcedureRemediesDamagesGeneral OverviewCivil ProcedureRemediesInjunctionsPermanent InjunctionsCivil Rights LawPractice & ProcedureGeneral OverviewCivil Rights LawPractice & ProcedureCosts & Attorney FeesStatutory Attorney Fee AwardsCivil Rights LawProtection of Disabled PersonsAmericans With Disabilities ActRemediesConstitutional LawEqual ProtectionDisabilityConstitutional LawEqual ProtectionGender & SexConstitutional LawEqual ProtectionScope of ProtectionCriminal Law & ProcedureCounselRight to CounselGeneral OverviewCriminal Law & ProcedureJury InstructionsGeneral OverviewCriminal Law & ProcedureJury InstructionsParticular InstructionsGeneral OverviewLabor & Employment LawDiscriminationDisability DiscriminationGeneral OverviewLabor & Employment LawDiscriminationGender & Sex DiscriminationCoverage & DefinitionsSexual OrientationPublic Health & Welfare LawSocial ServicesGeneral OverviewReal Property LawConstruction LawGeneral OverviewTortsBusiness TortsGeneral OverviewTortsDamagesPunitive DamagesAward CalculationsGeneral Overview



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CHAPTER 30 California Judicial Council Civil Rights Instructions

5-30 California Forms of Jury Instruction CACI 3021

CACI 3021 Unruh Civil Rights Act--Boycott, etc. --Essential Factual Elements (Civ. Code, § 51.5)

[*Name of plaintiff*] **claims that** [*name of defendant*] **denied** [him/her] **full and equal rights to conduct business because of** [*name of plaintiff*]'s [sex/race/color/religion/ancestry/national origin/disability/medical condition/[*insert other actionable characteristic*]]. **To establish this claim, [*name of plaintiff*] must prove all of the following:**

- 1. That [*name of defendant*] [discriminated against/boycotted/blacklisted/refused to buy from/refused to contract with/refused to sell to/refused to trade with] [*name of plaintiff*];**
- 2. [That a motivating reason for [*name of defendant*]'s conduct was [its perception of] [*name of plaintiff*]'s [sex/race/color/ religion/ancestry/national origin/disability/medical condition/ [*insert other actionable characteristic*]];]**

[That a motivating reason for [*name of defendant*]'s conduct was [its perception of] the [sex/race/color/religion/ancestry/national origin/disability/medical condition/[*insert other actionable characteristic*]] of [*name of plaintiff*]'s [partners/members/stockholders/directors/officers/managers/ superintendents/agents/employees/business associates/ suppliers/customers];]
- [That a motivating reason for [*name of defendant*]'s conduct was [its perception of] the [sex/race/color/religion/ancestry/national origin/disability/medical condition/[*insert other actionable characteristic*]] of a person whom [*name of plaintiff*] was associated with;]**
- 3. That [*name of plaintiff*] was harmed; and**
- 4. That [*name of defendant*]'s conduct was a substantial factor in causing [*name of plaintiff*]'s harm.**

New September 2003

Note that this instruction uses the standard of "motivating a reason." The causation standard is still an open issue under this statute.

The judge may decide the issue of whether the defendant is a business establishment as a matter of law. (*Rotary Club of Duarte v. Bd. of Directors* (1986) 178 Cal.App.3d 1035, 1050 [224 Cal.Rptr. 213] .) Special interrogatories may be needed if there are factual issues. This element has been omitted from the instruction because it is unlikely to go to a jury.

Select the bracketed option from element 2 that is most appropriate to the facts of the case.

Conceptually, this instruction has some overlap with CACI No. 3020. For a discussion of the basis of this instruction, see *Jackson v. Superior Court* (1994) 30 Cal.App.4th 936, 941 [36 Cal.Rptr.2d 207] .

■ *Civil Code section 51.5* provides:

(a) No business establishment of any kind whatsoever shall discriminate against, boycott or blacklist, or refuse to buy from, contract with, sell to, or trade with any person in this state because of the race, creed, religion, color, national origin, sex, disability, or medical condition of the person or of the person's partners, members, stockholders, directors, officers, managers, superintendents, agents, employees, business associates, suppliers, or customers, because the person is perceived to have one or more of those characteristics, or because the person is associated with a person who has, or is perceived to have, any of those characteristics.

(b) As used in this section, "person" includes any person, firm, association, organization, partnership, business trust, corporation, limited liability company, or company.

(c) This section shall not be construed to require any construction, alteration, repair, structural or otherwise, or modification of any sort whatsoever, beyond that construction, alteration, repair, or modification that is otherwise required by other provisions of law, to any new or existing establishment, facility, building, improvement, or any other structure, nor shall this section be construed to augment, restrict, or alter in any way the authority of the State Architect to require construction, alteration, repair, or modifications that the State Architect otherwise possesses pursuant to other laws.

(d) For purposes of this section:

(1) "Disability" means any mental or physical disability as defined in *Section 12926 of the Government Code*.

(2) "Medical condition" has the same meaning as defined in *subdivision (h) of Section 12926 of the Government Code*.

■ "In 1976 the Legislature added *Civil Code section 51.5* to the Unruh Civil Rights Act and amended *Civil Code section 52* (which provides penalties for those who violate the Unruh Civil Rights Act), in order to, inter alia, include section 51.5 in its provisions." (*Pines v. Tomson* (1984) 160 Cal.App.3d 370, 384 [206 Cal.Rptr. 866] , footnote

omitted.)

■ "[I]t is clear from the cases under section 51 that the Legislature did not intend in enacting section 51.5 to limit the broad language of section 51 to include only selling, buying or trading. Both sections 51 and 51.5 have been liberally applied to all types of business activities. Furthermore, section 51.5 forbids a business to 'discriminate against' 'any person' and does not just forbid a business to 'boycott or blacklist, refuse to buy from, sell to, or trade with any person.' " (*Jackson, supra*, 30 Cal.App.4th at p. 941 , internal citation and footnote omitted.)

■ "Although the phrase 'business establishment of every kind whatsoever' has been interpreted by the Supreme Court and the Court of Appeal in the context of section 51, we are aware of no case which interprets that term in the context of section 51.5. We believe, however, that the Legislature meant the identical language in both sections to have the identical meaning." (*Pines, supra*, 160 Cal.App.3d at p. 384 , internal citations omitted.)

■ "[T]he classifications specified in section 51.5, which are identical to those of section 51, are likewise not exclusive and encompass other personal characteristics identified in earlier cases." (*Roth v. Rhodes* (1994) 25 Cal.App.4th 530, 538 [30 Cal.Rptr.2d 706] , internal citations omitted.)

■ "Section 51 by its express language applies only within California. It cannot (with its companion penalty provisions in § 52) be extended into the Hawaiian jurisdiction. A state cannot regulate or proscribe activities conducted in another state or supervise the internal affairs of another state in any way, even though the welfare or health of its citizens may be affected when they travel to that state." (*Archibald v. Cinerama Hawaiian Hotels, Inc.* (1977) 73 Cal.App.3d 152, 159 [140 Cal.Rptr. 599] , internal citations omitted, disapproved on other grounds in *Koire v. Metro Car Wash* (1985) 40 Cal.3d 24 [219 Cal.Rptr. 133, 707 P.2d 195] .)

Secondary Sources

11 *California Forms of Pleading and Practice*, Ch. 116, *Civil Rights: Discrimination in Business Establishments*, §§ 116.10 -116.13 (Matthew Bender)

3 *California Points and Authorities*, Ch. 35, *Civil Rights: Unruh Civil Rights Act* (Matthew Bender)

Publisher's Notes

There is no BAJI instruction on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate Law General Partnerships Management Duties & Liabilities General Overview Commercial Law (UCC) Sales (Article 2) Form, Formation & Readjustment General Overview



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CHAPTER 30 California Judicial Council Civil Rights Instructions

5-30 California Forms of Jury Instruction CACI 3022

CACI 3022 Gender Price Discrimination--Essential Factual Elements (Civ. Code, § 51.6)

[*Name of plaintiff*] **claims that [*name of defendant*] charged [him/her] a higher price for services because of [his/her] gender. To establish this claim, [*name of plaintiff*] must prove all of the following:**

- 1. That [*name of defendant*] charged [*name of plaintiff*] more for services of similar or like kind because of [his/her] gender;**
- 2. That [*name of plaintiff*] was harmed; and**
- 3. That [*name of defendant*]'s conduct was a substantial factor in causing [*name of plaintiff*]'s harm.**

It is not improper to charge a higher price for services if the price difference is based on the amount of time, difficulty, or cost of providing the services.

New September 2003

The judge may decide the issue of whether the defendant is a business establishment as a matter of law. (*Rotary Club of Duarte v. Bd. of Directors* (1986) 178 Cal.App.3d 1035, 1050 [224 Cal.Rptr. 213] .) Special interrogatories may be needed if there are factual issues. This element has been omitted from the instruction because it is unlikely to go to a jury.

- *Civil Code section 51.6 provides:*

(a) This section shall be known, and may be cited, as the Gender Tax Repeal Act of 1995.

(b) No business establishment of any kind whatsoever may discriminate, with respect to the price charged for services of similar or like kind, against a person because of the person's gender.

(c) Nothing in subdivision (b) prohibits price differences based specifically upon the amount of time, difficulty, or cost of providing the services.

(d) Except as provided in subdivision (f), the remedies for a violation of this section are the remedies provided in subdivision (a) of Section 52. However, an action under this section is independent of any other remedy or procedure that may be available to an aggrieved party.

(e) This act does not alter or affect the provisions of the Health and Safety Code, the Insurance Code, or other laws that govern health care service plan or insurer underwriting or rating practices.

(f)(1) The following business establishments shall clearly and conspicuously disclose to the customer in writing the pricing for each standard service provided:

(A) Tailors or businesses providing aftermarket clothing alterations.

(B) Barbers or hair salons.

(C) Dry cleaners and laundries providing services to individuals.

(2) The price list shall be posted in an area conspicuous to customers. Posted price lists shall be in no less than 14-point boldface type and clearly and completely display pricing for every standard service offered by the business under paragraph (1).

(3) The business establishment shall provide the customer with a complete written price list upon request.

(4) The business establishment shall display in a conspicuous place at least one clearly visible sign, printed in no less than 24-point boldface type, which reads: "CALIFORNIA LAW PROHIBITS ANY BUSINESS ESTABLISHMENT FROM DISCRIMINATING, WITH RESPECT TO THE PRICE CHARGED FOR SERVICES OF SIMILAR OR LIKE KIND, AGAINST A PERSON BECAUSE OF THE PERSON'S GENDER. A COMPLETE PRICE LIST IS AVAILABLE UPON REQUEST."

(5) A business establishment that fails to correct a violation of this subdivision within 30 days of receiving written notice of the violation is liable for a civil penalty of one thousand dollars (\$1,000).

(6) For the purposes of this subdivision, "standard service" means the 15 most frequently requested services provided by the business.

■ "Section 51 by its express language applies only within California. It cannot (with its companion penalty provisions in § 52) be extended into the Hawaiian jurisdiction. A state cannot regulate or proscribe activities conducted in another state or supervise the internal affairs of another state in any way, even though the welfare or health of its citizens may be affected when they travel to that state." (*Archibald v. Cinerama Hawaiian Hotels, Inc.* (1977) 73 Cal.App.3d 152, 159)

[140 Cal.Rptr. 599] , internal citations omitted, disapproved on other grounds in *Koire v. Metro Car Wash* (1985) 40 Cal.3d 24 [219 Cal.Rptr. 133, 707 P.2d 195] .)

Secondary Sources

3 *California Points and Authorities*, Ch. 35, *Civil Rights: Unruh Civil Rights Act*, § 35.44 (Matthew Bender)

Publisher's Notes

There is no BAJI instruction on this subject.



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CHAPTER 30 California Judicial Council Civil Rights Instructions

5-30 California Forms of Jury Instruction CACI 3023A

CACI 3023A Acts of Violence--Ralph Act--Essential Factual Elements (Civ. Code, § 51.7)

[*Name of plaintiff*] **claims that** [*name of defendant*] **committed an act of violence against** [him/her] **because of** [his/her] [race/color/religion/ancestry/national origin/political affiliation/sex/sexual orientation/age/disability/position in a labor dispute/[*insert other actionable characteristic*]]. **To establish this claim, [*name of plaintiff*] must prove all of the following:**

- 1. That [*name of defendant*] committed a violent act against [*name of plaintiff*] [or [his/her] property];**
- 2. That a motivating reason for [*name of defendant*]'s conduct was [[his/her] perception of] [*name of plaintiff*]'s [race/color/religion/ancestry/national origin/political affiliation/sex/sexual orientation/age/disability/position in a labor dispute/[*insert other actionable characteristic*]];**
- 3. That [*name of plaintiff*] was harmed; and**
- 4. That [*name of defendant*]'s conduct was a substantial factor in causing [*name of plaintiff*]'s harm.**

Derived from former CACI No. 3023 December 2009

Directions for Use

Use this instruction for a cause of action under the Ralph Act involving actual acts of violence alleged to have been committed by the defendant against the plaintiff. For an instruction involving only threats of violence, see *CACI No. 3023B, Threats of Violence --Ralph Act--Essential Factual Elements*.

Note that this instruction uses the standard of "a motivating reason." The causation standard is still an open issue under this statute.

Liability may also be found if a defendant "aids, incites, or conspires" in the denial of a right protected under *Civil Code* section 51.7. (*Civ. Code*, § 52(b).) This instruction should be modified if aiding, inciting, or conspiring is asserted as theories of liability. See also instructions in the Conspiracy series (*CACI* No. 3600 et seq.).

Sources and Authority

- *Civil Code* section 51.7 provides:

(a) All persons within the jurisdiction of this state have the right to be free from any violence, or intimidation by threat of violence, committed against their persons or property because of their race, color, religion, ancestry, national origin, political affiliation, sex, sexual orientation, age, disability, or position in a labor dispute, or because another person perceives them to have one or more of those characteristics. The identification in this subdivision of particular bases of discrimination is illustrative rather than restrictive. This section does not apply to statements concerning positions in a labor dispute which are made during otherwise lawful labor picketing.

(b) As used in this section, "sexual orientation" means heterosexuality, homosexuality, or bisexuality.

- *Civil Code* section 52(b) provides:

Whoever denies the right provided by Section 51.7 or 51.9, or aids, incites, or conspires in that denial, is liable for each and every offense for the actual damages suffered by any person denied that right and, in addition, the following:

- (1) An amount to be determined by a jury, or a court sitting without a jury, for exemplary damages.
- (2) A civil penalty of twenty-five thousand dollars (\$25,000) to be awarded to the person denied the right provided by Section 51.7 in any action brought by the person denied the right, or by the Attorney General, a district attorney, or a city attorney.
- (3) Attorney's fees as may be determined by the court.

- "The unambiguous language of this section gives rise to a cause of action in favor of a person against whom violence or intimidation has been committed or threatened." (*Coon v. Joseph* (1987) 192 Cal.App.3d 1269, 1277 [237 Cal.Rptr. 873] .)

- "Section 51 by its express language applies only within California. It cannot (with its companion penalty provisions in § 52) be extended into the Hawaiian jurisdiction. A state cannot regulate or proscribe activities conducted in another state or supervise the internal affairs of another state in any way, even though the welfare or health of its citizens may be affected when they travel to that state." (*Archibald v. Cinerama Hawaiian Hotels, Inc.* (1977) 73 Cal.App.3d 152, 159 [140 Cal.Rptr. 599] , internal citations omitted, disapproved on other grounds in *Koire v. Metro Car Wash* (1985) 40

Cal.3d 24 [219 Cal.Rptr. 133, 707 P.2d 195] .)

Secondary Sources

11 *California Forms of Pleading and Practice*, Ch. 116, *Civil Rights: Discrimination in Business Establishments*, § 116.80 (Matthew Bender)

California Civil Practice: Civil Rights Litigation (Thomson West) §§ 3:1-3:15

Publisher's Notes

This instruction covers issues presented in BAJI No. 7.93.

Legal Topics:

For related research and practice materials, see the following legal topics:

Criminal Law & Procedure
Counsel
Right to Counsel
General Overview
Criminal Law & Procedure
Jury Instructions
Particular Instructions
General Overview
Governments
Local Governments
Claims By & Against
Labor & Employment Law
Discrimination
Gender & Sex Discrimination
Coverage & Definitions
Sexual Orientation



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CHAPTER 30 California Judicial Council Civil Rights Instructions

5-30 California Forms of Jury Instruction CACI 3023B

CACI 3023B Threats of Violence--Ralph Act--Essential Factual Elements (Civ. Code, § 51.7)

[*Name of plaintiff*] **claims that** [*name of defendant*] **intimidated [him/her] by threat of violence because of [his/her] [race/color/religion/ancestry/national origin/political affiliation/sex/sexual orientation/age/disability/position in a labor dispute/[insert other actionable characteristic]]. To establish this claim, [*name of plaintiff*] must prove all of the following:**

- 1. That [*name of defendant*] intentionally threatened violence against [*name of plaintiff*] [or [his/her] property], [whether or not [*name of defendant*] actually intended to carry out the threat];**
- 2. That a motivating reason for [*name of defendant*]'s conduct was [[his/her] perception of] [*name of plaintiff*]'s [race/color/religion/ancestry/national origin/political affiliation/sex/sexual orientation/age/disability/position in a labor dispute/[insert other actionable characteristic]];**
- 3. That a reasonable person in [*name of plaintiff*]'s position would have believed that [*name of defendant*] would carry out [his/her] threat;**
- 4. That a reasonable person in [*name of plaintiff*]'s position would have been intimidated by [*name of defendant*]'s conduct;**
- 5. That [*name of plaintiff*] was harmed; and**
- 6. That [*name of defendant*]'s conduct was a substantial factor in causing [*name of plaintiff*]'s harm.**

Derived from former CACI No. 3023 December 2009

Directions for Use

Use this instruction for a cause of action under the Ralph Act involving threats of violence alleged to have been directed by the defendant toward the plaintiff. For an instruction involving actual acts of violence, see *CACI No. 3023A, Acts of Violence --Ralph Act--Essential Factual Elements*.

No published California appellate opinion establishes elements 3 and 4. However the Ninth Circuit Court of Appeals and the California Fair Employment and Housing Commission have held that a reasonable person in the plaintiff's position must have been intimidated by the actions of the defendant and have perceived a threat of violence. (See *Winarto v. Toshiba America Electronics Components, Inc.* (9th Cir. 2001) 274 F.3d 1276, 1289-1290 ; *Dept. Fair Empl. & Hous. v. Lake Co. Dept. of Health Serv.* (July 22, 1998) 1998 CAFEHC LEXIS 16, 55-56.)

Note that this instruction uses the standard of "a motivating reason." The causation standard is still an open issue under this statute.

Liability may also be found if a defendant "aids, incites, or conspires" in the denial of a right protected under *Civil Code section 51.7*. (*Civ. Code, § 52(b)*.) This instruction should be modified if aiding, inciting, or conspiring is asserted as theories of liability. See also instructions in the Conspiracy series (*CACI No. 3600 et seq.*).

Sources and Authority

■ *Civil Code section 51.7* provides:

(a) All persons within the jurisdiction of this state have the right to be free from any violence, or intimidation by threat of violence, committed against their persons or property because of their race, color, religion, ancestry, national origin, political affiliation, sex, sexual orientation, age, disability, or position in a labor dispute, or because another person perceives them to have one or more of those characteristics. The identification in this subdivision of particular bases of discrimination is illustrative rather than restrictive. This section does not apply to statements concerning positions in a labor dispute which are made during otherwise lawful labor picketing.

(b) As used in this section, "sexual orientation" means heterosexuality, homosexuality, or bisexuality.

■ *Civil Code section 52(b)* provides:

Whoever denies the right provided by Section 51.7 or 51.9, or aids, incites, or conspires in that denial, is liable for each and every offense for the actual damages suffered by any person denied that right and, in addition, the following:

- (1) An amount to be determined by a jury, or a court sitting without a jury, for exemplary damages.
- (2) A civil penalty of twenty-five thousand dollars (\$25,000) to be awarded to the person denied the right provided by Section 51.7 in any action brought by the person denied the right, or by the Attorney General, a district attorney, or a city attorney.

(3) Attorney's fees as may be determined by the court.

■ "The unambiguous language of this section gives rise to a cause of action in favor of a person against whom violence or intimidation has been committed or threatened." (*Coon v. Joseph* (1987) 192 Cal.App.3d 1269, 1277 [237 Cal.Rptr. 873] .)

■ "The test is: 'would a reasonable person, standing in the shoes of the plaintiff, have been intimidated by the actions of the defendant and have perceived a threat of violence?' " (*Winarto, supra*, 274 F.3d at pp. 1289-1290 , internal citation omitted.)

■ "When a threat of violence would lead a reasonable person to believe that the threat will be carried out, in light of the 'entire factual context,' including the surrounding circumstances and the listeners' reactions, then the threat does not receive First Amendment protection, and may be actionable under the Ralph Act. The only intent requirement is that respondent 'intentionally or knowingly communicates his [or her] threat, not that he intended or was able to carry out his threat.' A threat exists if the 'target of the speaker reasonably believes that the speaker has the ability to act him or herself or to influence others. ... It is the perception of a reasonable person that is dispositive, not the actual intent of the speaker.' " (*Dept. Fair Empl. & Hous., supra*, 1998 CAFEHC LEXIS at pp. 55-56, internal citations omitted.)

■ "Section 51 by its express language applies only within California. It cannot (with its companion penalty provisions in § 52) be extended into the Hawaiian jurisdiction. A state cannot regulate or proscribe activities conducted in another state or supervise the internal affairs of another state in any way, even though the welfare or health of its citizens may be affected when they travel to that state." (*Archibald v. Cinerama Hawaiian Hotels, Inc.* (1977) 73 Cal.App.3d 152, 159 [140 Cal.Rptr. 599] , internal citations omitted, disapproved on other grounds in *Koire v. Metro Car Wash* (1985) 40 Cal.3d 24 [219 Cal.Rptr. 133, 707 P.2d 195] .)

Secondary Sources

Chin et al., California Practice Guide: Employment Litigation (The Rutter Group) P 5:892.11, PP 7:1528-7:1529

11 *California Forms of Pleading and Practice*, Ch. 116, *Civil Rights: Discrimination in Business Establishments*, § 116.80 (Matthew Bender)

California Civil Practice: Civil Rights Litigation (Thomson West) §§ 3:1-3:15

Publisher's Notes

This instruction covers issues presented in BAJI No. 7.93.

Legal Topics:

For related research and practice materials, see the following legal topics:

Criminal Law & Procedure
Counsel
Right to Counsel
General Overview
Criminal Law & Procedure
Jury Instructions
Particular Instructions
General Overview
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Labor & Employment Law
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CHAPTER 30 California Judicial Council Civil Rights Instructions

5-30 California Forms of Jury Instruction CACI 3024

CACI 3024 Sexual Harassment in Defined Relationship--Essential Factual Elements (Civ. Code, § 51.9)

[*Name of plaintiff*] **claims that** [*name of defendant*] **sexually harassed** [him/her]. **To establish this claim, [*name of plaintiff*] must prove all of the following:**

1. That [*name of plaintiff*] had a business, service, or professional relationship with [*name of defendant*];

2. [That [*name of defendant*] made [sexual advances/ solicitations/sexual requests/demands for sexual compliance/[*insert other actionable conduct*] to [*name of plaintiff*]];

[or]

[That [*name of defendant*] engaged in [verbal/visual/physical] conduct of a [sexual nature/hostile nature based on gender];]

3. That [*name of defendant*]'s conduct was unwelcome and also pervasive or severe;

4. That [*name of plaintiff*] was unable to easily end the relationship with [*name of defendant*]; and

5. That [*name of plaintiff*] has suffered or will suffer [economic loss or disadvantage/personal injury/the violation of a statutory or constitutional right] as a result of [*name of defendant*]'s conduct.

New September 2003; Revised April 2008

Directions for Use

Select either or both options for element 2 depending on the defendant's conduct.

See also *CACI No. 2524, "Severe or Pervasive" Explained*.

Sources and Authority

■ *Civil Code section 51.9* provides:

(a) A person is liable in a cause of action for sexual harassment under this section when the plaintiff proves all of the following elements:

(1) There is a business, service, or professional relationship between the plaintiff and defendant. Such a relationship may exist between a plaintiff and a person, including, but not limited to, any of the following persons:

(A) Physician, psychotherapist, or dentist. For purposes of this section, "psychotherapist" has the same meaning as set forth in paragraph (1) of *subdivision (c) of Section 728 of the Business and Professions Code*.

(B) Attorney, holder of a master's degree in social work, real estate agent, real estate appraiser, accountant, banker, trust officer, financial planner loan officer, collection service, building contractor, or escrow loan officer.

(C) Executor, trustee, or administrator.

(D) Landlord or property manager.

(E) Teacher.

(F) A relationship that is substantially similar to any of the above.

(2) The defendant has made sexual advances, solicitations, sexual requests, demands for sexual compliance by the plaintiff, or engaged in other verbal, visual, or physical conduct of a sexual nature or of a hostile nature based on gender, that were unwelcome and pervasive or severe.

(3) There is an inability by the plaintiff to easily terminate the relationship.

(4) The plaintiff has suffered or will suffer economic loss or disadvantage or personal injury, including, but not limited to, emotional distress or the violation of a statutory or constitutional right, as a result of the conduct described in paragraph (2).

(b) In an action pursuant to this section, damages shall be awarded as provided by subdivision (b) of Section 52.

(c) Nothing in this section shall be construed to limit application of any other remedies or rights provided under the law.

(d) The definition of sexual harassment and the standards for determining liability set forth in this section shall be limited to determining liability only with regard to a cause of action brought under this section.

■ "[The] history of the [1999] amendments to *Civil Code section 51.9* leaves no doubt of the Legislature's intent to conform the requirements governing liability for sexual harassment in professional relationships outside the workplace

to those of the federal law's Title VII and California's FEHA, both of which pertain to liability for sexual harassment in the workplace. Under both laws, an employee plaintiff who cannot prove a demand for sexual favors in return for a job benefit (that is, quid pro quo harassment) must show that the sexually harassing conduct was so pervasive or severe as to alter the conditions of employment. With respect to liability under section 51.9, which covers a wide variety of business relationships outside the workplace, the relevant inquiry is whether the alleged sexually harassing conduct was sufficiently pervasive or severe as to alter the conditions of the business relationship. This inquiry must necessarily take into account the nature and context of the particular business relationship." (*Hughes v. Pair* (2009) 46 Cal.4th 1035, 1048 [95 Cal.Rptr.3d 636, 209 P.3d 963] .)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law § 896

1 California Landlord-Tenant Practice, Ch. 3, *Liability for Sexual Harassment* (Cont.Ed.Bar 2d ed.) § 3.70A

1 Wrongful Employment Termination Practice, Ch. 3, *When Plaintiff is Not Employee, Applicant, or Independent Contractor* (Cont.Ed.Bar 2d ed.) § 3.12

11 *California Forms of Pleading and Practice*, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.36, Ch. 116, *Civil Rights: Discrimination in Business Establishments*, §§ 116.35, 116.90, Ch. 117, *Civil Rights: Housing Discrimination*, § 117.32 (Matthew Bender)

1 Westley et al., *Matthew Bender Practice Guide: California Landlord-Tenant Litigation*, Ch. 2, *Creation of Tenancy*, 2.13 (Matthew Bender)

Publisher's Notes

This instruction replaces BAJI No. 7.91.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Rights Law Contractual Relations & Housing Fair Housing Rights General Overview Civil Rights Law Contractual Relations & Housing Fair Housing Rights Enforcement Civil Rights Law Contractual Relations & Housing Fair Housing Rights Gender & Sex Discrimination Civil Rights Law Contractual Relations & Housing Fair Housing Rights Remedies Criminal Law & Procedure Criminal Offenses Crimes Against Persons Coercion Elements Labor & Employment Law Discrimination Harassment Sexual Harassment General Overview Labor & Employment Law Discrimination Harassment Sexual Harassment Burdens of Proof General Overview Labor & Employment Law Discrimination Harassment Sexual Harassment Coverage & Definitions General Overview Labor & Employment Law Discrimination Harassment Sexual Harassment Coverage & Definitions Sexual Harassment Labor & Employment Law Discrimination Harassment Sexual Harassment Defenses & Exceptions General Overview Labor & Employment Law Discrimination Harassment Sexual Harassment Defenses & Exceptions Consent Labor & Employment Law Discrimination Harassment Sexual Harassment Federal & State Interrelationships Labor & Employment Law Discrimination Harassment Sexual Harassment Quid Pro Quo Real Property Law Brokers Fiduciary Responsibilities Real Property Law Financing Construction Loans Torts Business Torts General Overview



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California Forms of Jury Instruction

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CHAPTER 30 California Judicial Council Civil Rights Instructions

5-30 California Forms of Jury Instruction CACI 3025

CACI 3025 Bane Act--Essential Factual Elements (Civ. Code, § 52.1)

[*Name of plaintiff*] claims that [*name of defendant*] intentionally interfered with [or attempted to interfere with] [his/her] civil rights by threatening or committing violent acts. To establish this claim, [*name of plaintiff*] must prove all of the following:

- 1. That [*name of defendant*] interfered with [or attempted to interfere with] [*name of plaintiff*]'s right [*insert alleged constitutional or statutory right*] by threatening or committing violent acts;**
- 2. [That [*name of plaintiff*] reasonably believed that if [he/she] exercised [his/her] right [*insert right, e.g., "to vote"*] [*name of defendant*] would commit violence against [him/her] or [his/her] property;]**
- [That [*name of defendant*] injured [*name of plaintiff*] or [his/her] property to prevent [him/her] from exercising [his/her] right [*insert right*] or retaliate against [*name of plaintiff*] for having exercised [his/her] right [*insert right*];]**
- 3. That [*name of plaintiff*] was harmed; and**
- 4. That [*name of defendant*]'s conduct was a substantial factor in causing [*name of plaintiff*]'s harm.**

New September 2003

Directions for Use

Unless plaintiff is claiming actual damages, omit elements 3 and 4.

Sources and Authority

- *Civil Code section 52.1* provides, in part:

(a) If a person or persons, whether or not acting under color of law, interferes by threats, intimidation, or coercion, or attempts to interfere by threats, intimidation, or coercion, with the exercise or enjoyment by any individual or individuals of rights secured by the Constitution or laws of the United States, or of the rights secured by the Constitution or laws of this state, the Attorney General, or any district attorney or city attorney may bring a civil action for injunctive and other appropriate equitable relief in the name of the people of the State of California, in order to protect the peaceable exercise or enjoyment of the right or rights secured.

(b) Any individual whose exercise or enjoyment of rights secured by the Constitution or laws of the United States, or of rights secured by the Constitution or laws of this state, has been interfered with, or attempted to be interfered with, as described in subdivision (a), may institute and prosecute in his or her own name and on his or her own behalf a civil action for damages, including, but not limited to, damages under Section 52, injunctive relief, and other appropriate equitable relief to protect the peaceable exercise or enjoyment of the right or rights secured.

- *Civil Code section 52(b)* provides:

Whoever denies the right provided by Section 51.7 or 51.9, or aids, incites, or conspires in that denial, is liable for each and every offense for the actual damages suffered by any person denied that right and, in addition, the following:

(1) An amount to be determined by a jury, or a court sitting without a jury, for exemplary damages.

(2) A civil penalty of twenty-five thousand dollars (\$25,000) to be awarded to the person denied the right provided by Section 51.7 in any action brought by the person denied the right, or by the Attorney General, a district attorney, or a city attorney.

(3) Attorney's fees as may be determined by the court.

- "The Legislature enacted section 52.1 to stem a tide of hate crimes." (*Jones v. Kmart Corp.* (1998) 17 Cal.4th 329, 338 [70 Cal.Rptr.2d 844, 949 P.2d 941] , internal citation omitted.)

- "*Civil Code section 52.1*, the Bane Act civil counterpart of [*Penal Code*] section 422.6, recognizes a private right of action for damages and injunctive relief for interference with civil rights." (*In re M.S.* (1995) 10 Cal.4th 698, 715 [42 Cal.Rptr.2d 355, 896 P.2d 1365] .)

- "[S]ection 52.1 does require an attempted or completed act of interference with a legal right, accompanied by a form of coercion." (*Jones, supra*, 17 Cal.4th at p. 334 .)

- Section 52.1 is not a remedy to be used against private citizens for violations of rights that apply only to the state or its agents. (*Jones, supra*, 17 Cal.4th at p. 337 [right to be free from unreasonable search and seizure].)

■ "[I]t is clear that to state a cause of action under section 52.1 there must first be violence or intimidation by threat of violence." (*Cabesuela v. Browning-Ferris Industries* (1998) 68 Cal.App.4th 101, 111 [80 Cal.Rptr.2d 60] .)

■ Assembly Bill 2719 (Stats. 2000, ch. 98) abrogated the holding of *Boccatto v. City of Hermosa Beach* (1994) 29 Cal.App.4th 1797 [35 Cal.Rptr.2d 282] , which held that a plaintiff was required to be a member of a specified protected class in order to bring an action under section 52.1: "It is the intent of the Legislature in enacting this act to clarify that an action brought pursuant to *Section 52.1 of the Civil Code* does not require the individual whose rights are secured by the Constitution or laws of the United States, or of the rights secured by the Constitution or laws of California, to be a member of a protected class identified by its race, color, religion, or sex, among other things."

■ "Subdivision (j) of *Civil Code* section 52.1 provides that speech alone is insufficient to support such an action, except upon a showing that the speech itself threatens violence against a specific person or group of persons, the person or group of persons against whom the speech is directed 'reasonably fears that, because of the speech, violence will be committed against them or their property and that the person threatening violence has the apparent ability to carry out the threat.' ... The presence of the express 'reasonable fear' element, in addition to the 'apparent ability' element, in *Civil Code* section 52.1, governing civil actions for damages, most likely reflects the Legislature's determination [that] a defendant's civil liability should depend on the harm actually suffered by the victim." (*In re M.S.*, *supra*, 10 Cal.4th at p. 715 , internal citation omitted.)

■ "[Q]ualified immunity of the kind applied to actions brought under section 1983 does not apply to actions brought under *Civil Code* section 52.1." (*Venegas v. County of Los Angeles* (2007) 153 Cal.App.4th 1230, 1246 [63 Cal.Rptr.3d 741] .)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, § 895

11 *California Forms of Pleading and Practice*, Ch. 117A, *Civil Rights: Interference With Civil Rights by Threats, Intimidation, Coercion, or Violence*, § 117A.11 (Matthew Bender)

3 *California Points and Authorities*, Ch. 35, *Civil Rights*, §§ 35.01, 35.27 (Matthew Bender)

Publisher's Notes

This instruction covers issues presented in BAJI No. 7.90.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Actions in Equity Criminal Law & Procedure Criminal Offenses Crimes Against Persons Coercion Elements Criminal Law & Procedure Search & Seizure Requirement of Government Action Criminal Law & Procedure Counsel Right to Counsel General Overview Governments Legislation Statutory Remedies & Rights Torts Damages Punitive Damages Award Calculations General Overview



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CHAPTER 30 California Judicial Council Civil Rights Instructions

5-30 California Forms of Jury Instruction CACI 3026

CACI 3026 Unruh Civil Rights Act--Damages (Civ. Code, §§ 51, 51.5, 51.6)

If you decide that [name of plaintiff] has proved [his/her] claim against [name of defendant], you also must decide how much money will reasonably compensate [him/her] for the harm. This compensation is called "damages."

[Name of plaintiff] must prove the amount of [his/her] damages. However, [name of plaintiff] does not have to prove the exact amount of the harm or the exact amount of damages that will provide reasonable compensation for the harm. You must not speculate or guess in awarding damages.

The following are the specific items of damages claimed by [name of plaintiff]:

[Insert item(s) of claimed harm.]

In addition, you may award [name of plaintiff] up to three times the amount of [his/her] actual damages as a penalty against [name of defendant].

New September 2003

See the instructions in the Damages series (CACI Nos. 3900-3963) for additional instructions on actual damages and punitive damages. Note that the statutory minimum amount of recovery for a plaintiff is \$4,000 in addition to actual damages. If the verdict is for less than that amount, the judge should modify the verdict to reflect the statutory minimum.

● *Civil Code section 52(a)* provides: "Whoever denies, aids or incites a denial, or makes any

discrimination or distinction contrary to Section 51, 51.5, or 51.6, is liable for each and every offense for the actual damages, and any amount that may be determined by a jury, or a court sitting without a jury, up to a maximum of three times the amount of actual damage but in no case less than four thousand dollars (\$4,000), and any attorney's fees that may be determined by the court in addition thereto, suffered by any person denied the rights provided in Section 51, 51.5, or 51.6."

Secondary Sources

11 *California Forms of Pleading and Practice*, Ch. 116, *Civil Rights: Discrimination in Business Establishments*, § 116.15 (Matthew Bender)

3 *California Points and Authorities*, Ch. 35, *Civil Rights* (Matthew Bender)

Publisher's Notes

This instruction covers issues presented in BAJI No. 7.94.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Remedies Damages Punitive Damages Civil Rights Law Practice & Procedure Costs & Attorney Fees Statutory Attorney Fee Awards Criminal Law & Procedure Jury Instructions Particular Instructions General Overview Torts Damages Punitive Damages Award Calculations General Overview



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CHAPTER 30 California Judicial Council Civil Rights Instructions

5-30 California Forms of Jury Instruction CACI 3027

CACI 3027 Unruh Civil Rights Act--Civil Penalty (Civ. Code, §§ 51.7, 51.9)

If you decide that [name of plaintiff] has proved [his/her] claim against [name of defendant], you must award the following:

- 1. Actual damages sufficient to reasonably compensate [name of plaintiff] for the harm;**
- 2. A civil penalty of \$25,000; and**
- 3. Punitive damages.**

[Name of plaintiff] must prove the amount of [his/her] actual damages. However, [name of plaintiff] does not have to prove the exact amount of the harm or the exact amount of damages that will provide reasonable compensation for the harm. You must not speculate or guess in awarding damages.

The following are the specific items of actual damages claimed by [name of plaintiff]:

[Insert item(s) of claimed harm.]

New September 2003

Note that the \$25,000 civil penalty is applicable only to actions brought under *Civil Code* section 51.7. Do not include item 2 in cases brought under *Civil Code* section 51.9.

See the Damages series (CACI Nos. 3900-3963) for additional instructions on actual damages and punitive damages. CACI No. 3942, *Punitive Damages --Individual Defendant-- Bifurcated Trial (Second*

Phase), instructs the jury on how to calculate the amount of punitive damages.

■ *Civil Code section 52(b)* provides:

Whoever denies the right provided by Section 51.7 or 51.9, or aids, incites, or conspires in that denial, is liable for each and every offense for the actual damages suffered by any person denied that right and, in addition, the following:

(1) An amount to be determined by a jury, or a court sitting without a jury, for exemplary damages.

(2) A civil penalty of twenty-five thousand dollars (\$25,000) to be awarded to the person denied the right provided by Section 51.7 in any action brought by the person denied the right, or by the Attorney General, a district attorney, or a city attorney.

(3) Attorney's fees as may be determined by the court.

Secondary Sources

11 *California Forms of Pleading and Practice*, Ch. 116, *Civil Rights: Discrimination in Business Establishments*, § 116.15 (Matthew Bender)

3 *California Points and Authorities*, Ch. 35, *Civil Rights* (Matthew Bender)

Publisher's Notes

This instruction covers issues presented in BAJI No. 7.94.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Remedies Damages General Overview Civil Procedure Remedies Damages Punitive Damages Civil Rights Law Practice & Procedure Costs & Attorney Fees Statutory Attorney Fee Awards Criminal Law & Procedure Counsel Right to Counsel General Overview Criminal Law & Procedure Jury Instructions Particular Instructions General Overview Criminal Law & Procedure Appeals Standards of Review Plain Error Jury Instructions Torts Damages Punitive Damages General Overview Torts Damages Punitive Damages Award Calculations General Overview



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CHAPTER 30 California Judicial Council Civil Rights Instructions

5-30 California Forms of Jury Instruction CACI 3028

CACI 3028 Harassment in Educational Institution (Ed. Code, § 220)

[*Name of plaintiff*] **claims that [he/she] was harmed by being subjected to harassment at school because of [his/her] [specify characteristic, e.g., sexual orientation] and that [name of defendant] is responsible for that harm. To establish this claim, [name of plaintiff] must prove all of the following:**

- 1. That [name of plaintiff] suffered harassment that was so severe, pervasive, and offensive that it effectively deprived [him/her] of the right of equal access to educational benefits and opportunities;**
- 2. That [name of defendant] had actual knowledge of that harassment; and**
- 3. That [name of defendant] acted with deliberate indifference in the face of that knowledge.**

[Name of defendant] acted with deliberate indifference if [his/her/its] response to the harassment was clearly unreasonable in light of all the known circumstances.

New April 2009

Directions for Use

This instruction does not include language that elaborates on what does or does not constitute "deliberate indifference" beyond the broad standard of "clearly unreasonable in light of all the known circumstances." In *Donovan v. Poway Unified School Dist.*, the court noted that "deliberate indifference" will often be a fact-based question for which bright line rules are ill-suited. However, the court noted numerous examples from federal cases in which the standard was applied. The failure of school officials to undertake a timely investigation of a complaint of discrimination may amount to deliberate

indifference. School officials also must take timely and reasonable measures to end known harassment. A response may be clearly unreasonable if a school official ignores a complaint of discrimination or if the initial measures chosen to respond to the harassment are ineffective. (*Donovan v. Poway Unified School Dist.* (2008) 167 Cal.App.4th 567, 611 [84 Cal.Rptr.3d 285] .) Any of these factors that are applicable to the facts of the case may be added at the end of the instruction.

Sources and Authority

■ *Education Code section 201* provides:

- (a) All pupils have the right to participate fully in the educational process, free from discrimination and harassment.
- (b) California's public schools have an affirmative obligation to combat racism, sexism, and other forms of bias, and a responsibility to provide equal educational opportunity.
- (c) Harassment on school grounds directed at an individual on the basis of personal characteristics or status creates a hostile environment and jeopardizes equal educational opportunity as guaranteed by the California Constitution and the United States Constitution.
- (d) There is an urgent need to prevent and respond to acts of hate violence and bias-related incidents that are occurring at an increasing rate in California's public schools.
- (e) There is an urgent need to teach and inform pupils in the public schools about their rights, as guaranteed by the federal and state constitutions, in order to increase pupils' awareness and understanding of their rights and the rights of others, with the intention of promoting tolerance and sensitivity in public schools and in society as a means of responding to potential harassment and hate violence.
- (f) It is the intent of the Legislature that each public school undertake educational activities to counter discriminatory incidents on school grounds and, within constitutional bounds, to minimize and eliminate a hostile environment on school grounds that impairs the access of pupils to equal educational opportunity.
- (g) It is the intent of the Legislature that this chapter shall be interpreted as consistent with Article 9.5 (commencing with Section 11135) of Chapter 1 of Part 1 of Division 3 of Title 2 of the Government Code, Title VI of the federal Civil Rights Act of 1964 (42 U.S.C. Sec. 1981, *et seq.*), Title IX of the Education Amendments of 1972 (20 U.S.C. Sec. 1681, *et seq.*), Section 504 of the federal Rehabilitation Act of 1973 (29 U.S.C. Sec. 794(a)), the federal Individuals with Disabilities Education Act (20 U.S.C. Sec. 1400 *et seq.*), the federal Equal Educational Opportunities Act (20 U.S.C. Sec. 1701, *et seq.*), the Unruh Civil Rights Act (Secs. 51 to 53, incl., Civ. C.), and the Fair Employment and Housing Act (Pt. 2.8 (commencing with Sec. 12900), Div. 3, Gov. C.), except where this chapter may grant more protections or impose additional obligations, and that the remedies provided herein shall not be the exclusive remedies, but may be combined with remedies that may be provided by the above statutes.

■ *Education Code section 220* provides: "No person shall be subjected to discrimination on the basis of disability, gender, nationality, race or ethnicity, religion, sexual orientation, or any other characteristic that is contained in the definition of hate crimes set forth in *Section 422.55 of the Penal Code* in any program or activity conducted by an educational institution that receives, or benefits from, state financial assistance or enrolls pupils who receive state student financial aid."

■ *Education Code section 262.3(b)* provides: "Persons who have filed a complaint, pursuant to this chapter, with an educational institution shall be advised by the educational institution that civil law remedies, including, but not limited to, injunctions, restraining orders, or other remedies or orders may also be available to complainants. The educational institution shall make this information available by publication in appropriate informational materials."

■ "We conclude that to prevail on a claim under section 220 for peer sexual orientation harassment, a plaintiff must show (1) he or she suffered "severe, pervasive and offensive" harassment that effectively deprived the plaintiff of the right of equal access to educational benefits and opportunities; (2) the school district had 'actual knowledge' of that harassment; and (3) the school district acted with 'deliberate indifference' in the face of such knowledge. We further conclude that from the words of section 262.3, subdivision (b), as well as from other markers of legislative intent, money damages are available in a private enforcement action under section 220." (*Donovan, supra*, 167 Cal.App.4th at p. 579 .)

■ "Like Title IX, ... enforcement of the Education Code's antidiscrimination law rests on the assumption of 'actual notice' to the funding recipient. ... [PP] We decline to adopt a liability standard for damages under section 220 based on principles of respondeat superior and/or constructive notice, particularly in light of the circumstances presented here when the claim of discrimination is not, for example, based on an official policy of the District, but is instead the result of peer sexual orientation harassment and the District's response (or lack thereof) to such harassment. ... [N]egligence principles should not apply to impose liability under a statutory scheme when administrative enforcement of that scheme contemplates actual notice to the funding recipient, with an opportunity to take corrective action before a private action may lie. By requiring actual notice, we ensure liability for money damages under section 220 is based on a funding recipient's *own* misconduct, determined by its *own* deliberate indifference to known acts of harassment." (*Donovan, supra*, 167 Cal.App.4th at pp. 604-605 , original italics, internal citations omitted.)

■ "The decisions of federal courts interpreting Title IX provide a meaningful starting point to determine whether the response of defendants here amounted to deliberate indifference under section 220. Under federal law, deliberate indifference is a ' "very high standard." ' Actions that in hindsight are 'unfortunate' or even 'imprudent' will not suffice." (*Donovan, supra*, 167 Cal.App.4th at p. 610 , internal citations omitted.)

Secondary Sources

Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, § 798

11 *California Forms of Pleading and Practice*, Ch. 112, *Civil Rights: Government-Funded Programs and Activities*, §§ 112.11, 112.16 (Matthew Bender)

3 *California Points and Authorities*, Ch. 35A, *Civil Rights: Equal Protection*, § 35A.32A (Matthew Bender)

Publisher's Notes

There is no BAJI verdict form on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Remedies Damages General Overview Civil Procedure Remedies Damages Punitive Damages Civil Rights
Law Practice & Procedure Costs & Attorney Fees Statutory Attorney Fee Awards Criminal Law &
Procedure Counsel Right to Counsel General Overview Criminal Law & Procedure Jury Instructions Particular
Instructions General Overview Criminal Law & Procedure Appeals Standards of Review Plain Error Jury
Instructions Torts Damages Punitive Damages General Overview Torts Damages Punitive Damages Award
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CHAPTER 30 California Judicial Council Civil Rights Instructions

5-30 California Forms of Jury Instruction CACI 3029-CACI 3099

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CACI 3029Reserved for Future Use



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CHAPTER 30 California Judicial Council Civil Rights Instructions

5-30 California Forms of Jury Instruction CACI VF-3000

CACI VF-3000 Violation of Federal Civil Rights--In General (42 U.S.C. § 1983)

We answer the questions submitted to us as follows:

1. Did [name of defendant] [intentionally/[other applicable state of mind]] [insert wrongful act]?

_____ Yes _____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Did [name of defendant] violate [name of plaintiff]'s right [insert right, e.g., "of privacy"] while acting or purporting to act in the performance of [his/her] official duties?

_____ Yes _____ No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Was [name of defendant]'s [insert wrongful act] a substantial factor in causing harm to [name of plaintiff]?

_____ Yes _____ No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. What are [name of plaintiff]'s damages?**[a. Past economic loss**

[lost earnings..... \$_____]

[lost profits..... \$_____]

[medical expenses..... \$_____]

[other past economic loss..... \$_____]

..... **Total Past Economic Damages: \$_____]****[b. Future economic loss**

[lost earnings..... \$_____]

[lost profits..... \$_____]

[medical expenses..... \$_____]

[other future economic loss..... \$_____]

..... **Total Future Economic Damages: \$_____]****[c. Past noneconomic loss, including [physical
pain/mental suffering:].....\$_____]****[d. Future noneconomic loss, including [physical
pain/mental suffering:]..... \$_____]**..... **TOTAL \$_____****Signed: _____****Presiding Juror****Dated: _____****[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the
[clerk/bailiff/judge].**

New September 2003; Revised April 2007

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on *CACI No. 3000, Violation of Federal Civil Rights--In General--Essential Factual Elements*.

If specificity is not required, users do not have to itemize all the damages listed in question 4 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

Publisher's Notes

There is no BAJI verdict form on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJurorsGeneral OverviewCivil ProcedureTrialsJury TrialsVerdictsGeneral
OverviewCivil ProcedureTrialsJury TrialsVerdictsSpecial VerdictsGovernmentsCourtsGeneral
OverviewTortsDamagesGeneral OverviewTortsDamagesCompensatory DamagesPain & SufferingEmotional & Mental
DistressGeneral Overview



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CHAPTER 30 California Judicial Council Civil Rights Instructions

5-30 California Forms of Jury Instruction CACI VF-3001

CACI VF-3001 Excessive Use of Force--Unreasonable Arrest or Other Seizure (42 U.S.C. § 1983)

We answer the questions submitted to us as follows:

1. Did [name of defendant] use excessive force in [arresting/detaining] [name of plaintiff]?

_____ Yes _____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Was [name of defendant] acting or purporting to act in the performance of [his/her] official duties?

_____ Yes _____ No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Was [name of defendant]'s use of excessive force a substantial factor in causing harm to [name of plaintiff]?

_____ Yes _____ No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. What are [name of plaintiff]'s damages?**[a. Past economic loss**

[lost earnings..... \$_____]

[lost profits..... \$_____]

[medical expenses..... \$_____]

[other past economic loss..... \$_____]

..... **Total Past Economic Damages: \$_____]****[b. Future economic loss**

[lost earnings..... \$_____]

[lost profits..... \$_____]

[medical expenses..... \$_____]

[other future economic loss..... \$_____]

..... **Total Future Economic Damages: \$_____]****[c. Past noneconomic loss, including [physical
pain/mental suffering:].....\$_____]****[d. Future noneconomic loss, including [physical
pain/mental suffering:]..... \$_____]**..... **TOTAL \$_____****Signed: _____****Presiding Juror****Dated: _____****[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the
[clerk/bailiff/judge].**

New September 2003; Revised April 2007

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on *CACI No. 3001, Excessive Use of Force-- Unreasonable Arrest or Other Seizure--Essential Factual Elements*.

If specificity is not required, users do not have to itemize all the damages listed in question 4 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

Publisher's Notes

There is no BAJI verdict form on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJurorsGeneral OverviewCivil ProcedureTrialsJury TrialsVerdictsGeneral OverviewCivil ProcedureTrialsJury TrialsVerdictsSpecial VerdictsCriminal Law & ProcedureArrestsReasonable ForceCriminal Law & ProcedureVerdictsGeneral OverviewCriminal Law & ProcedureVerdictsSpecial VerdictsGovernmentsCourtsGeneral OverviewTortsDamagesCompensatory DamagesPain & SufferingEmotional & Mental DistressGeneral Overview



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California Forms of Jury Instruction

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CHAPTER 30 California Judicial Council Civil Rights Instructions

5-30 California Forms of Jury Instruction CACI VF-3002

CACI VF-3002 Unreasonable Search--Search With a Warrant (42 U.S.C. § 1983)

We answer the questions submitted to us as follows:

1. Did [*name of defendant*] conduct an unreasonable search of [*name of plaintiff*]'s [person/home/automobile/office/[*insert other*]?]

_____ Yes _____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Was [*name of defendant*] acting or purporting to act in the performance of [his/her] official duties?

_____ Yes _____ No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Was [*name of defendant*]'s unreasonable search a substantial factor in causing harm to [*name of plaintiff*]?

_____ Yes _____ No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. What are [name of plaintiff]'s damages?**[a. Past economic loss**

[lost earnings..... \$ _____].....

[lost profits..... \$ _____].....

[medical expenses..... \$ _____].....

[other past economic loss..... \$ _____].....

..... **Total Past Economic Damages: \$ _____]****[b. Future economic loss**

[lost earnings..... \$ _____].....

[lost profits..... \$ _____].....

[medical expenses..... \$ _____].....

[other future economic loss..... \$ _____].....

..... **Total Future Economic Damages: \$ _____]****[c. Past noneconomic loss, including [physical
pain/mental suffering:].....\$ _____]****[d. Future noneconomic loss, including [physical
pain/mental suffering:]..... \$ _____]**..... **TOTAL \$ _____****Signed: _____****Presiding Juror****Dated: _____****[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the
[clerk/bailiff/judge].**

New September 2003; Revised April 2007

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on *CACI No. 3002, Unreasonable Search--Search With a Warrant--Essential*

Factual Elements.

If specificity is not required, users do not have to itemize all the damages listed in question 4 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

Publisher's Notes

There is no BAJI verdict form on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJurorsGeneral OverviewCivil ProcedureTrialsJury TrialsVerdictsGeneral OverviewCivil ProcedureTrialsJury TrialsVerdictsSpecial VerdictsCriminal Law & ProcedureSearch & SeizureSearch WarrantsGeneral OverviewGovernmentsCourtsGeneral OverviewTortsDamagesCompensatory DamagesPain & SufferingEmotional & Mental DistressGeneral Overview



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CHAPTER 30 California Judicial Council Civil Rights Instructions

5-30 California Forms of Jury Instruction CACI VF-3003

CACI VF-3003 Unreasonable Search--Search Without a Warrant (42 U.S.C. § 1983)

We answer the questions submitted to us as follows:

1. Did [name of defendant] search [name of plaintiff]'s [person/home/automobile/office/[insert other]] without a warrant?

_____ Yes _____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Was [name of defendant] acting or purporting to act in the performance of [his/her] official duties?

_____ Yes _____ No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Was [name of defendant]'s search a substantial factor in causing harm to [name of plaintiff]?

_____ Yes _____ No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. What are [name of plaintiff]'s damages?**[a. Past economic loss**

[lost earnings..... \$_____]

[lost profits..... \$_____]

[medical expenses..... \$_____]

[other past economic loss..... \$_____]

..... **Total Past Economic Damages: \$_____]****[b. Future economic loss**

[lost earnings..... \$_____]

[lost profits..... \$_____]

[medical expenses..... \$_____]

[other future economic loss..... \$_____]

..... **Total Future Economic Damages: \$_____]****[c. Past noneconomic loss, including [physical
pain/mental suffering:].....\$_____]****[d. Future noneconomic loss, including [physical
pain/mental suffering:]..... \$_____]**..... **TOTAL \$_____****Signed: _____****Presiding Juror****Dated: _____****[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the
[clerk/bailiff/judge].**

New September 2003; Revised April 2007

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on *CACI No. 3003, Unreasonable Search--Search Without a Warrant--Essential Factual Elements*.

If specificity is not required, users do not have to itemize all the damages listed in question 4 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

Publisher's Notes

There is no BAJI verdict form on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

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CHAPTER 30 California Judicial Council Civil Rights Instructions

5-30 California Forms of Jury Instruction CACI VF-3004

CACI VF-3004 Unreasonable Search--Search Without a Warrant (42 U.S.C. § 1983)--Affirmative Defense--Search Incident to Lawful Arrest

We answer the questions submitted to us as follows:

1. Did [name of defendant] search [name of plaintiff]'s [person/home/automobile/office/[insert other]] without a warrant?

_____ Yes _____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Was [name of defendant] acting or purporting to act in the performance of [his/her] official duties;?

_____ Yes _____ No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Was the search conducted as part of a lawful arrest of [name of plaintiff]?

_____ Yes _____ No

If your answer to question 3 is yes, then answer question 4. If you answered no, skip questions 4 and 5 and answer question 6.

4. Did [name of defendant] search only [name of plaintiff] and the area within which [name of plaintiff] might have gained possession of a weapon or might have destroyed or hidden evidence?

_____ Yes _____ No

If your answer to question 4 is yes, then answer question 5. If you answered no, skip question 5 and answer question 6.

5. Was the search reasonable under the circumstances?

_____ Yes _____ No

If your answer to question 5 is no, then answer question 6. If you answered yes, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. Was [name of defendant]'s search a substantial factor in causing harm to [name of plaintiff]?

_____ Yes _____ No

If your answer to question 6 is yes, then answer question 7. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

7. What are [name of plaintiff]'s damages?

[a. Past economic loss

[lost earnings..... \$_____].....

[lost profits..... \$_____].....

[medical expenses..... \$_____].....

[other past economic loss..... \$_____].....

..... **Total Past Economic Damages: \$_____]**

[b. Future economic loss

[lost earnings..... \$_____].....

[lost profits..... \$_____].....

[medical expenses..... \$_____].....

[other future economic loss..... \$_____].....

..... **Total Future Economic Damages: \$_____]**

[c. Past noneconomic loss, including [physical

pain/mental suffering:].....\$ _____]

[d. Future noneconomic loss, including [physical
pain/mental suffering:].....\$ _____]

..... TOTAL \$ _____

Signed: _____

Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the
[clerk/bailiff/judge].

New September 2003; Revised April 2007

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on *CACI No. 3003, Unreasonable Search--Search Without a Warrant--Essential Factual Elements*, and *CACI No. 3004, Affirmative Defense--Search Incident to Lawful Arrest*. This form can be modified if another affirmative defense is at issue (see *CACI No. 3005, Affirmative Defense--Consent to Search*, and *CACI No. 3006, Affirmative Defense--Exigent Circumstances*).

If specificity is not required, users do not have to itemize all the damages listed in question 7 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

Publisher's Notes

There is no BAJI verdict form on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJurorsGeneral OverviewCivil ProcedureTrialsJury TrialsVerdictsGeneral OverviewCivil ProcedureTrialsJury TrialsVerdictsSpecial VerdictsConstitutional LawBill of RightsFundamental RightsSearch & SeizureExigent CircumstancesCriminal Law & ProcedureSearch & SeizureExclusionary RuleExceptionsExigent CircumstancesCriminal Law & ProcedureSearch & SeizureWarrantless SearchesGeneral OverviewCriminal Law & ProcedureSearch & SeizureWarrantless SearchesSearch Incident to Lawful ArrestGeneral OverviewCriminal Law & ProcedureSearch & SeizureWarrantless SearchesSearch Incident to Lawful ArrestExtent & Manner of SearchCriminal Law & ProcedureSearch & SeizureWarrantless SearchesSearch Incident to Lawful ArrestNecessity That Arrest Be ValidCriminal Law & ProcedureSearch & SeizureWarrantless SearchesVehicle SearchesGeneral OverviewCriminal Law & ProcedureVerdictsGeneral OverviewCriminal Law & ProcedureVerdictsSpecial VerdictsGovernmentsCourtsGeneral OverviewTortsDamagesCompensatory DamagesPain &

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CHAPTER 30 California Judicial Council Civil Rights Instructions

5-30 California Forms of Jury Instruction CACI VF-3005

CACI VF-3005 Municipal Liability (42 U.S.C. § 1983)

We answer the questions submitted to us as follows:

1. Did [name of officer, employee, etc.] [intentionally/[insert other applicable state of mind]] [insert conduct allegedly violating plaintiff's civil rights]?

_____ Yes _____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Did [insert conduct allegedly violating plaintiff's civil rights] occur as a result of the official [policy/custom] of the [name of municipality]?

_____ Yes _____ No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Was [name of officer, employee, etc.]'s conduct a substantial factor in causing harm to [name of plaintiff]?

_____ Yes _____ No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. What are [name of plaintiff]'s damages?**[a. Past economic loss**

[lost earnings..... \$ _____].....

[lost profits..... \$ _____].....

[medical expenses..... \$ _____].....

[other past economic loss..... \$ _____].....

..... **Total Past Economic Damages: \$ _____]****[b. Future economic loss**

[lost earnings..... \$ _____].....

[lost profits..... \$ _____].....

[medical expenses..... \$ _____].....

[other future economic loss..... \$ _____].....

..... **Total Future Economic Damages: \$ _____]****[c. Past noneconomic loss, including [physical
pain/mental suffering:].....\$ _____]****[d. Future noneconomic loss, including [physical
pain/mental suffering:]..... \$ _____]**..... **TOTAL \$ _____****Signed: _____****Presiding Juror****Dated: _____****[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the
[clerk/bailiff/judge].**

New September 2003; Revised April 2007

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on *CACI No. 3007, Municipal Liability*.

If specificity is not required, users do not have to itemize all the damages listed in question 4 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

Publisher's Notes

There is no BAJI verdict form on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedurePleading & PracticePleadingsAnswersCivil ProcedureTrialsJury TrialsJurorsGeneral OverviewCivil ProcedureTrialsJury TrialsVerdictsGeneral OverviewCivil ProcedureTrialsJury TrialsVerdictsSpecial VerdictsGovernmentsCourtsGeneral OverviewGovernmentsLocal GovernmentsEmployees & OfficialsTortsDamagesCompensatory DamagesPain & SufferingEmotional & Mental DistressGeneral Overview



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CHAPTER 30 California Judicial Council Civil Rights Instructions

5-30 California Forms of Jury Instruction CACI VF-3006

CACI VF-3006 Public Entity Liability--Failure To Train (42 U.S.C. § 1983)

We answer the questions submitted to us as follows:

1. Was [*name of public entity*]'s training program inadequate to train its [officers/employees] to properly handle usual and recurring situations?

_____ Yes _____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Was [*name of public entity*] deliberately indifferent to the need to train its [officers/employees] adequately?

_____ Yes _____ No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Was the failure to provide proper training the cause of the deprivation of [*name of plaintiff*]'s right [*insert right, e.g., "of privacy"*]?

_____ Yes _____ No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Was [name of public entity]'s failure to adequately train its [officers/employees] a substantial factor in causing harm to [name of plaintiff]?

_____ Yes _____ No

If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. What are [name of plaintiff]'s damages?

[a. Past economic loss

[lost earnings..... \$_____]

[lost profits..... \$_____]

[medical expenses..... \$_____]

[other past economic loss..... \$_____]

..... **Total Past Economic Damages: \$_____]**

[b. Future economic loss

[lost earnings..... \$_____]

[lost profits..... \$_____]

[medical expenses..... \$_____]

[other future economic loss..... \$_____]

..... **Total Future Economic Damages: \$_____]**

[c. Past noneconomic loss, including [physical pain/mental suffering:].....\$_____]

[d. Future noneconomic loss, including [physical pain/mental suffering:]..... \$_____]

..... **TOTAL \$_____**

Signed: _____

Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the

[clerk/bailiff/judge].

New September 2003; Revised April 2007

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on *CACI No. 3009, Public Entity Liability--Failure to Train--Essential Factual Elements*.

If specificity is not required, users do not have to itemize all the damages listed in question 5 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

Publisher's Notes

There is no BAJI verdict form on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Pleading & Practice Pleadings Answers Civil Procedure Trials Jury Trials Jurors General Overview Civil Procedure Trials Jury Trials Verdicts General Overview Civil Procedure Trials Jury Trials Verdicts Special Verdicts Governments Courts General Overview Torts Damages Compensatory Damages Pain & Suffering Emotional & Mental Distress General Overview



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California Forms of Jury Instruction

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CHAPTER 30 California Judicial Council Civil Rights Instructions

5-30 California Forms of Jury Instruction CACI VF-3007

CACI VF-3007 Violation of Prisoner's Federal Civil Rights (42 U.S.C. § 1983)--Eighth Amendment--Excessive Force

We answer the questions submitted to us as follows:

1. Did [name of defendant] use force against [name of plaintiff]?

_____ Yes _____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Was the force excessive?

_____ Yes _____ No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Was [name of defendant] acting or purporting to act in the performance of [his/her] official duties?

_____ Yes _____ No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Was [name of defendant]'s use of excessive force a substantial factor in causing harm to [name of plaintiff]?

_____ Yes _____ No

If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. What are [name of plaintiff]'s damages?

[a. Past economic loss

[lost earnings..... \$_____]

[lost profits..... \$_____]

[medical expenses..... \$_____]

[other past economic loss..... \$_____]

..... **Total Past Economic Damages: \$_____]**

[b. Future economic loss

[lost earnings..... \$_____]

[lost profits..... \$_____]

[medical expenses..... \$_____]

[other future economic loss..... \$_____]

..... **Total Future Economic Damages: \$_____]**

[c. Past noneconomic loss, including [physical pain/mental suffering:]......\$_____]

[d. Future noneconomic loss, including [physical pain/mental suffering:]...... \$_____]

..... **TOTAL \$_____**

Signed: _____
Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the [clerk/bailiff/judge].

New September 2003; Revised April 2007

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on *CACI No. 3010, Violation of Prisoner's Federal Civil Rights--Eighth Amendment--Excessive Force*.

If specificity is not required, users do not have to itemize all the damages listed in question 5 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

Publisher's Notes

There is no BAJI verdict form on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJurorsGeneral OverviewCivil ProcedureTrialsJury TrialsVerdictsGeneral OverviewCivil ProcedureTrialsJury TrialsVerdictsSpecial VerdictsCivil Rights LawPrisoner RightsGeneral OverviewCivil Rights LawPrisoner RightsSafetyCriminal Law & ProcedureVerdictsGeneral OverviewCriminal Law & ProcedureVerdictsSpecial VerdictsCriminal Law & ProcedureSentencingCruel & Unusual PunishmentGovernmentsCourtsGeneral OverviewTortsDamagesCompensatory DamagesPain & SufferingEmotional & Mental DistressGeneral Overview



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CHAPTER 30 California Judicial Council Civil Rights Instructions

5-30 California Forms of Jury Instruction CACI VF-3008

CACI VF-3008 Violation of Prisoner's Federal Civil Rights (42 U.S.C. § 1983)--Eighth Amendment--General Conditions of Confinement Claim

We answer the questions submitted to us as follows:

1. Was [*name of plaintiff*] imprisoned under conditions that exposed [him/her] to a substantial risk of serious harm?

_____ Yes _____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Did [*name of defendant*] know the conditions created a substantial risk of serious harm and disregard that risk by failing to take reasonable measures to correct it?

_____ Yes _____ No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Was [*name of defendant*] acting or purporting to act in the performance of [his/her] official duties?

_____ Yes _____ No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer

no further questions, and have the presiding juror sign and date this form.

4. Was [*name of defendant*]'s conduct a substantial factor in causing harm to [*name of plaintiff*]?

_____ Yes _____ No

If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. What are [*name of plaintiff*]'s damages?

[a. Past economic loss

[lost earnings..... \$_____]

[lost profits..... \$_____]

[medical expenses..... \$_____]

[other past economic loss..... \$_____]

..... Total Past Economic Damages: \$_____]

[b. Future economic loss

[lost earnings..... \$_____]

[lost profits..... \$_____]

[medical expenses..... \$_____]

[other future economic loss..... \$_____]

..... Total Future Economic Damages: \$_____]

[c. Past noneconomic loss, including [physical pain/mental suffering:].....\$_____]

[d. Future noneconomic loss, including [physical pain/mental suffering:]..... \$_____]

..... TOTAL \$_____

Signed: _____

Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the

[clerk/bailiff/judge].

New September 2003; Revised April 2007

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on *CACI No. 3011, Violation of Prisoner's Federal Civil Rights--Eighth Amendment--General Conditions of Confinement Claim*.

If specificity is not required, users do not have to itemize all the damages listed in question 5 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

Publisher's Notes

There is no BAJI verdict form on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJurorsGeneral OverviewCivil ProcedureTrialsJury TrialsVerdictsGeneral OverviewCivil ProcedureTrialsJury TrialsVerdictsSpecial VerdictsCivil Rights LawPrisoner RightsGeneral OverviewCivil Rights LawPrisoner RightsConfinement ConditionsCriminal Law & ProcedureVerdictsGeneral OverviewCriminal Law & ProcedureVerdictsSpecial VerdictsCriminal Law & ProcedureSentencingCruel & Unusual PunishmentCriminal Law & ProcedurePostconviction ProceedingsImprisonmentGovernmentsCourtsGeneral OverviewTortsDamagesCompensatory DamagesPain & SufferingEmotional & Mental DistressGeneral Overview



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CHAPTER 30 California Judicial Council Civil Rights Instructions

5-30 California Forms of Jury Instruction CACI VF-3009

CACI VF-3009 Violation of Prisoner's Federal Civil Rights (42 U.S.C. § 1983)--Eighth Amendment--Medical Care

We answer the questions submitted to us as follows:

1. Did [name of defendant] act with deliberate indifference to a serious medical need of [name of plaintiff]?

_____ Yes _____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Was [name of defendant] acting or purporting to act in the performance of [his/her] official duties?

_____ Yes _____ No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Was [name of defendant]'s deliberate indifference a substantial factor in causing harm to [name of plaintiff]?

_____ Yes _____ No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer

no further questions, and have the presiding juror sign and date this form.

4. What are [name of plaintiff]'s damages?

[a. Past economic loss

[lost earnings..... \$ _____].....

[lost profits..... \$ _____].....

[medical expenses..... \$ _____].....

[other past economic loss..... \$ _____].....

..... **Total Past Economic Damages: \$ _____]**

[b. Future economic loss

[lost earnings..... \$ _____].....

[lost profits..... \$ _____].....

[medical expenses..... \$ _____].....

[other future economic loss..... \$ _____].....

..... **Total Future Economic Damages: \$ _____]**

**[c. Past noneconomic loss, including [physical
pain/mental suffering:].....\$ _____]**

**[d. Future noneconomic loss, including [physical
pain/mental suffering:]..... \$ _____]**

..... **TOTAL \$ _____**

Signed: _____

Presiding Juror

Dated: _____

**[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the
[clerk/bailiff/judge].**

New September 2003; Revised April 2007

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on *CACI No. 3012, Violation of Prisoner's Federal Civil Rights--Eighth Amendment--Medical Care*.

If specificity is not required, users do not have to itemize all the damages listed in question 4 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

Publisher's Notes

There is no BAJI verdict form on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJurorsGeneral OverviewCivil ProcedureTrialsJury TrialsVerdictsGeneral OverviewCivil ProcedureTrialsJury TrialsVerdictsSpecial VerdictsCivil Rights LawPrisoner RightsGeneral OverviewCivil Rights LawPrisoner RightsMedical TreatmentCriminal Law & ProcedureVerdictsGeneral OverviewCriminal Law & ProcedureVerdictsSpecial VerdictsCriminal Law & ProcedureSentencingCruel & Unusual PunishmentCriminal Law & ProcedurePostconviction ProceedingsImprisonmentGovernmentsCourtsGeneral OverviewTortsDamagesCompensatory DamagesPain & SufferingEmotional & Mental DistressGeneral Overview



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California Forms of Jury Instruction

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CHAPTER 30 California Judicial Council Civil Rights Instructions

5-30 California Forms of Jury Instruction CACI VF-3010

CACI VF-3010 Unruh Civil Rights Act (Civ. Code, §§ 51, 52)

We answer the questions submitted to us as follows:

1. Did [*name of defendant*] [deny/aid or incite a denial of/discriminate or make a distinction that denied] full and equal [accommodations/advantages/facilities/privileges/ services] to [*name of plaintiff*]?

_____ Yes _____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Was [[*name of defendant*]'s perception of] [*name of plaintiff*]'s [sex/race/color/religion/ancestry/national origin/disability/medical condition/[*insert other actionable characteristic*]] a motivating reason for [*name of defendant*]'s conduct?

_____ Yes _____ No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Was [*name of defendant*]'s conduct a substantial factor in causing harm to [*name of plaintiff*]?

_____ Yes _____ No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer

no further questions, and have the presiding juror sign and date this form.

4. What are [*name of plaintiff*]'s damages?

[a. Past economic loss

[lost earnings..... \$ _____].....

[lost profits..... \$ _____].....

[medical expenses..... \$ _____].....

[other past economic loss..... \$ _____].....

..... **Total Past Economic Damages: \$ _____]**

[b. Future economic loss

[lost earnings..... \$ _____].....

[lost profits..... \$ _____].....

[medical expenses..... \$ _____].....

[other future economic loss..... \$ _____].....

..... **Total Future Economic Damages: \$ _____]**

**[c. Past noneconomic loss, including [physical
pain/mental suffering:].....\$ _____]**

**[d. Future noneconomic loss, including [physical
pain/mental suffering:]..... \$ _____]**

..... **TOTAL \$ _____**

Answer question 5.

5. What amount, if any, do you award as a penalty against [*name of defendant*]?
.....\$ _____

Signed: _____
Presiding Juror

Dated: _____

**[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the
[clerk/bailiff/judge].**

New September 2003; Revised April 2007

Because the award of a penalty in question 5 can be a maximum of three times the amount of actual damages, the judge should correct the verdict if the jury award goes over that limit. Also, if jury inserts an amount less than \$4,000 in question 5, then the judge should increase that award to \$4,000 to reflect the statutory minimum.

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on *CACI No. 3020, Unruh Civil Rights Act--Essential Factual Elements*.

If the plaintiff's association with another is the basis for the claim, modify question 2 as in element 2 of *CACI No. 3020*.

If specificity is not required, users do not have to itemize all the damages listed in question 4 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

Publisher's Notes

There is no BAJI verdict form on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedurePleading & PracticePleadingsAnswersCivil ProcedureJudicial OfficersGeneral OverviewCivil ProcedureJudicial OfficersJudgesGeneral OverviewCivil ProcedureTrialsJury TrialsJurorsGeneral OverviewCivil ProcedureTrialsJury TrialsVerdictsGeneral OverviewCivil ProcedureTrialsJury TrialsVerdictsSpecial VerdictsGovernmentsCourtsGeneral OverviewTortsDamagesCompensatory DamagesPain & SufferingEmotional & Mental DistressGeneral Overview



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CHAPTER 30 California Judicial Council Civil Rights Instructions

5-30 California Forms of Jury Instruction CACI VF-3011

CACI VF-3011 Unruh Civil Rights Act--Boycott, etc. (Civ. Code, § 51.5)

We answer the questions submitted to us as follows:

1. Did [*name of defendant*] [discriminate against/boycott/blacklist/refuse to buy from/refuse to contract with/refuse to sell to/refuse to trade with] [*name of plaintiff*]?

_____ Yes _____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Was [[*name of defendant*]'s perception of] [*name of plaintiff*]'s [sex/race/color/religion/ancestry/national origin/disability/medical condition/[*insert other actionable characteristic*]] a motivating reason for [*name of defendant*]'s conduct?

_____ Yes _____ No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Was [*name of defendant*]'s conduct a substantial factor in causing harm to [*name of plaintiff*]?

_____ Yes _____ No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. What are [name of plaintiff]'s damages?**[a. Past economic loss**

[lost earnings..... \$ _____].....

[lost profits..... \$ _____].....

[medical expenses..... \$ _____].....

[other past economic loss..... \$ _____].....

..... Total Past Economic Damages: \$ _____]

[b. Future economic loss

[lost earnings..... \$ _____].....

[lost profits..... \$ _____].....

[medical expenses..... \$ _____].....

[other future economic loss..... \$ _____].....

..... Total Future Economic Damages: \$ _____]

**[c. Past noneconomic loss, including [physical
pain/mental suffering:].....\$ _____]****[d. Future noneconomic loss, including [physical
pain/mental suffering:]..... \$ _____]**

..... TOTAL \$ _____

Answer question 5.**5. What amount, if any, do you award as a penalty against [name of defendant]?**

.....\$ _____

Signed: _____**Presiding Juror****Dated: _____****[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the
[clerk/bailiff/judge].**

New September 2003; Revised April 2007

Because the award of a penalty in question 5 can be a maximum of three times the amount of actual damages, the judge should correct the verdict if the jury award goes over that amount. Also, if jury inserts an amount less than \$4,000 in question 5, then the judge should increase that award to \$4,000 to reflect the statutory minimum.

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on *CACI No. 3021, Unruh Civil Rights Act--Boycott, etc.--Essential Factual Elements*.

If an alternative basis for the defendant's alleged motivation is at issue, modify question 2 as in element 2 of *CACI No. 3021*.

If specificity is not required, users do not have to itemize all the damages listed in question 4 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

Publisher's Notes

There is no BAJI verdict form on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureJudicial OfficersGeneral OverviewCivil ProcedureJudicial OfficersJudgesGeneral OverviewCivil ProcedureTrialsJury TrialsJurorsGeneral OverviewCivil ProcedureTrialsJury TrialsVerdictsGeneral OverviewCivil ProcedureTrialsJury TrialsVerdictsSpecial VerdictsGovernmentsCourtsGeneral OverviewTortsDamagesCompensatory DamagesPain & SufferingEmotional & Mental DistressGeneral Overview



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CHAPTER 30 California Judicial Council Civil Rights Instructions

5-30 California Forms of Jury Instruction CACI VF-3012

CACI VF-3012 Gender Price Discrimination (Civ. Code, § 51.6)

We answer the questions submitted to us as follows:

1. Did [name of defendant] charge [name of plaintiff] more for services of similar or like kind because of [his/her] gender?

_____ Yes _____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Was [name of defendant]'s conduct a substantial factor in causing harm to [name of plaintiff]?

_____ Yes _____ No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. What are [name of plaintiff]'s damages?

[a. Past economic loss

[lost earnings..... \$_____].....

[lost profits..... \$_____].....

[medical expenses..... \$_____].....

[other past economic loss..... \$_____].....

..... Total Past Economic Damages: \$_____]

[b. Future economic loss

[lost earnings..... \$_____].....

[lost profits..... \$_____].....

[medical expenses..... \$_____].....

[other future economic loss..... \$_____].....

..... Total Future Economic Damages: \$_____]

**[c. Past noneconomic loss, including [physical
pain/mental suffering:].....\$_____]**

**[d. Future noneconomic loss, including [physical
pain/mental suffering:]..... \$_____]**

..... TOTAL \$_____

Answer question 4.

4. What amount, if any, do you award as a penalty against [name of defendant]?

.....\$_____

Signed: _____

Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the [clerk/bailiff/judge].

New September 2003; Revised April 2007

Because the award of a penalty in question 4 can be a maximum of three times the amount of actual damages, the judge should correct the verdict if the jury award goes over that amount. Also, if jury inserts an amount less than \$4,000 in question 4 then the judge should increase that award to \$4,000 to reflect the statutory minimum.

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on *CACI No. 3022, Gender Price Discrimination--Essential Factual Elements*.

If specificity is not required, users do not have to itemize all the damages listed in question 3 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

Publisher's Notes

There is no BAJI verdict form on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureJudicial OfficersGeneral OverviewCivil ProcedureJudicial OfficersJudgesGeneral OverviewCivil ProcedureTrialsJury TrialsVerdictsGeneral OverviewCivil ProcedureTrialsJury TrialsVerdictsSpecial VerdictsGovernmentsCourtsGeneral OverviewTortsDamagesCompensatory DamagesPain & SufferingEmotional & Mental DistressGeneral Overview



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CHAPTER 30 California Judicial Council Civil Rights Instructions

5-30 California Forms of Jury Instruction CACI VF-3013

CACI VF-3013 Ralph Act (Civ. Code, § 51.7)

We answer the questions submitted to us as follows:

1. Did [name of defendant] [threaten/commit] violent acts against [name of plaintiff] [or [his/her] property]?

_____ Yes _____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Was [[name of defendant]'s perception of] [name of plaintiff]'s [race/color/religion/ancestry/national origin/political affiliation/sex/sexual orientation/age/disability/position in a labor dispute/[insert other actionable characteristic]] a motivating reason for [name of defendant]'s conduct?

_____ Yes _____ No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

[3. Would a reasonable person in [name of plaintiff]'s position have believed that [name of defendant] would carry out [his/her] threats?

_____ Yes _____ No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.]

[4. Would a reasonable person in [*name of plaintiff*]'s position have been intimidated by [*name of defendant*]'s conduct?

_____ Yes _____ No

If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.]

5. Was [*name of defendant*]'s conduct a substantial factor in causing harm to [*name of plaintiff*]?

_____ Yes _____ No

If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. What are [*name of plaintiff*]'s damages?

[a. Past economic loss

[lost earnings..... \$_____].....

[lost profits..... \$_____].....

[medical expenses..... \$_____].....

[other past economic loss..... \$_____].....

..... Total Past Economic Damages: \$_____]

[b. Future economic loss

[lost earnings..... \$_____].....

[lost profits..... \$_____].....

[medical expenses..... \$_____].....

[other future economic loss..... \$_____].....

..... Total Future Economic Damages: \$_____]

[c. Past noneconomic loss, including [physical pain/mental suffering:].....\$_____]

[d. Future noneconomic loss, including [physical pain/mental suffering:]..... \$_____]

..... TOTAL \$_____

7. What amount do you award as punitive damages?

.....\$_____]

Signed: _____

Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the [clerk/bailiff/judge].

New September 2003; Revised April 2007, December 2009

Directions for Use

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on *CACI No. 3023A, Acts of Violence --Ralph Act--Essential Factual Elements*, and *CACI No. 3023B, Threats of Violence --Ralph Act--Essential Factual Elements*. Punitive damages are authorized by *Civil Code section 52(b)(2)*. For instructions on punitive damages, see instructions in the Damages series (*CACI No. 3900 et seq.*).

Include questions 3 and 4 in a case of threats of violence.

If specificity is not required, users do not have to itemize all the damages listed in question 6 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

Publisher's Notes

There is no BAJI verdict form on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJurorsGeneral OverviewCivil ProcedureTrialsJury TrialsVerdictsGeneral OverviewCivil ProcedureTrialsJury TrialsVerdictsSpecial VerdictsCivil ProcedureRemediesDamagesPunitive DamagesGovernmentsCourtsGeneral OverviewTortsDamagesCompensatory DamagesPain & SufferingEmotional & Mental DistressGeneral Overview



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California Forms of Jury Instruction

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CHAPTER 30 California Judicial Council Civil Rights Instructions

5-30 California Forms of Jury Instruction CACI VF-3014

CACI VF-3014 Sexual Harassment in Defined Relationship (Civ. Code, § 51.9)

We answer the questions submitted to us as follows:

1. Did [name of plaintiff] have a business, service, or professional relationship with [name of defendant]?

_____ Yes _____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. [Did [name of defendant] make [sexual advances/sexual solicitations/sexual requests/demands for sexual compliance/[insert other actionable conduct]] to [name of plaintiff]?]

[or]

[Did [name of defendant] engage in [verbal/visual/physical] conduct of a [sexual nature/hostile nature based on gender]?]

_____ Yes _____ No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Was [name of defendant]'s conduct unwelcome and also pervasive or severe?

_____ Yes _____ No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Was [*name of plaintiff*] unable to easily end the relationship with [*name of defendant*]?

_____ Yes _____ No

If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. Has [*name of plaintiff*] suffered or will [he/she] suffer [economic loss or disadvantage/personal injury/the violation of a statutory or constitutional right] as a result of [*name of defendant*]'s conduct?

_____ Yes _____ No

If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. What are [*name of plaintiff*]'s damages?

[a. Past economic loss

[lost earnings \$_____].....

[lost profits \$_____].....

[medical expenses \$_____].....

[other past economic loss \$_____].....

..... Total Past Economic Damages: \$_____]

[b. Future economic loss

[lost earnings \$_____].....

[lost profits \$_____].....

[medical expenses \$_____].....

[other future economic loss \$_____].....

..... Total Future Economic Damages: \$_____]

[c. Past noneconomic loss, including [physical pain/mental suffering:] \$_____]

[d. Future noneconomic loss, including [physical
pain/mental suffering:] \$_____]

..... TOTAL \$_____

[Answer question 7.

7. What amount do you award as punitive damages?
.....\$_____]

Signed: _____
Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the
[clerk/bailiff/judge].

New September 2003; Revised April 2007, April 2008

Directions for Use

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on *CACI No. 3024, Sexual Harassment in Defined Relationship--Essential Factual Elements*.

Select either or both options for question 2 depending on the facts at issue.

If specificity is not required, users do not have to itemize all the damages listed in question 6 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances. For instructions on punitive damages, see instructions in the Damages series (*CACI No. 3900 et seq.*).

If there are multiple causes of action, users may wish to combine the individual forms into one form.

Publisher's Notes

There is no BAJI verdict form on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJurorsGeneral OverviewCivil ProcedureTrialsJury TrialsVerdictsGeneral OverviewCivil ProcedureTrialsJury TrialsVerdictsSpecial VerdictsCivil ProcedureRemediesDamagesPunitive DamagesGovernmentsCourtsGeneral OverviewLabor & Employment LawDiscriminationHarassmentSexual HarassmentRemediesPunitive DamagesTortsDamagesGeneral OverviewTortsDamagesCompensatory DamagesLost

IncomeGeneral OverviewTortsDamagesCompensatory DamagesMedical ExpensesTortsDamagesCompensatory
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CHAPTER 30 California Judicial Council Civil Rights Instructions

5-30 California Forms of Jury Instruction CACI VF-3015

CACI VF-3015 Bane Act (Civ. Code, § 52.1)

We answer the questions submitted to us as follows:

1. Did [name of defendant] interfere with [or attempt to interfere with] [name of plaintiff]'s right [insert alleged constitutional or statutory right] by threatening or committing violent acts?

_____ Yes _____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Did [name of plaintiff] reasonably believe that if [he/she] exercised [his/her] right [insert right, e.g., "to vote"] [name of defendant] would commit violence against [him/her] or [his/her] property?

_____ Yes _____ No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Was [name of defendant]'s conduct a substantial factor in causing harm to [name of plaintiff]?

_____ Yes _____ No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. What are [name of plaintiff]'s damages?**[a. Past economic loss**

[lost earnings..... \$_____]

[lost profits..... \$_____]

[medical expenses..... \$_____]

[other past economic loss..... \$_____]

..... **Total Past Economic Damages: \$_____]****[b. Future economic loss**

[lost earnings..... \$_____]

[lost profits..... \$_____]

[medical expenses..... \$_____]

[other future economic loss..... \$_____]

..... **Total Future Economic Damages: \$_____]****[c. Past noneconomic loss, including [physical
pain/mental suffering:].....\$_____]****[d. Future noneconomic loss, including [physical
pain/mental suffering:]..... \$_____]**..... **TOTAL \$_____****[Answer question 5.****5. What amount, if any, do you award as a penalty against [name of defendant]?**
.....\$_____]**[Answer question 6.****6. What amount do you award as punitive damages?**
.....\$_____]**Signed: _____****Presiding Juror****Dated: _____**

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the [clerk/bailiff/judge].

New September 2003; Revised April 2007

Civil Code section 52.1 references all damages under section 52, but does not specify whether subdivision 52(a) or 52(b), or both, is/are intended. Depending on how this point is decided, select question 5 and/or 6 as appropriate.

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on *CACI No. 3025, Bane Act--Essential Factual Elements*.

If the plaintiff alleges an alternative ground of liability, modify question 2 as in element 2 of *CACI No. 3025*.

If specificity is not required, users do not have to itemize all the damages listed in question 4 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

Publisher's Notes

There is no BAJI verdict form on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedurePleading & PracticePleadingsAnswersCivil ProcedureTrialsJury TrialsJurorsGeneral OverviewCivil ProcedureTrialsJury TrialsVerdictsGeneral OverviewCivil ProcedureTrialsJury TrialsVerdictsSpecial VerdictsCivil ProcedureRemediesDamagesPunitive DamagesGovernmentsCourtsGeneral OverviewTortsDamagesCompensatory DamagesPain & SufferingEmotional & Mental DistressGeneral Overview



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CHAPTER 30 California Judicial Council Civil Rights Instructions

5-30 California Forms of Jury Instruction CACI VF-3016-CACI VF-3099

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CACI VF-3016Reserved for Future Use



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CHAPTER 31 California Judicial Council Elder Abuse and Dependent Adult Civil Protection Act Instructions

5-31 California Forms of Jury Instruction 31.syn

§ 31.syn Synopsis to Chapter 31: California Judicial Council Elder Abuse and Dependent Adult Civil Protection Act Instructions

CACI 3100 Financial Abuse--Essential Factual Elements (Welf. & Inst. Code, § 15610.30)

CACI 3101 Financial Abuse--Decedent's Pain and Suffering (Welf. & Inst. Code, § 15657.5)

CACI 3102A Employer Liability for Enhanced Remedies--Both Individual and Employer Defendants (Welf. & Inst. Code, §§ 15657, 15657.05; Civ. Code, § 3294(b))

CACI 3102B Employer Liability for Enhanced Remedies--Employer Defendant Only (Welf. & Inst. Code, §§ 15657, 15657.05; Civ. Code, § 3294(b))

CACI 3103 Neglect--Essential Factual Elements (Welf. & Inst. Code, § 15610.57)

CACI 3104 Neglect--Enhanced Remedies Sought (Welf. & Inst. Code, § 15657)

CACI 3105 Reserved for Future Use

CACI 3106 Physical Abuse--Essential Factual Elements (Welf. & Inst. Code, § 15610.63)

CACI 3107 Physical Abuse--Enhanced Remedies Sought (Welf. & Inst. Code, § 15657)

CACI 3108 Reserved for Future Use

CACI 3109 Abduction--Essential Factual Elements (Welf. & Inst. Code, § 15610.06)

CACI 3110 Abduction--Enhanced Remedies Sought (Welf. & Inst. Code, § 15657.05)

CACI 3111 Reserved for Future Use

CACI 3112 "Dependent Adult" Explained (Welf. & Inst. Code, § 15610.23)

CACI 3113 "Recklessness" Explained

CACI 3114 "Malice" Explained

CACI 3115 "Oppression" Explained

CACI 3116 "Fraud" Explained

CACI 3117-CACI 3199 Reserved for Future Use

CACI VF-3100 Financial Abuse--Individual or Individual and Employer Defendants (Welf. & Inst. Code, §§ 15610.30, 15657.5(b))

CACI VF-3101 Financial Abuse--Employer Defendant Only (Welf. & Inst. Code, §§ 15610.30, 15657.5(b))

CACI VF-3102 Neglect--Individual or Individual and Employer Defendants (Welf. & Inst. Code, §§ 15610.57, 15657; Civ. Code, § 3294(b))

CACI VF-3103 Neglect--Employer Defendant Only (Welf. & Inst. Code, §§ 15610.57, 15657; Civ. Code, § 3294(b))

CACI VF-3104 Physical Abuse--Individual or Individual and Employer Defendants (Welf. & Inst. Code, §§ 15610.63, 15657; Civ. Code, § 3294(b))

CACI VF-3105 Physical Abuse--Employer Defendant Only (Welf. & Inst. Code, §§ 15610.63, 15657; Civ. Code, § 3294(b))

CACI VF-3106 Abduction--Individual or Individual and Employer Defendants (Welf. & Inst. Code, §§ 15610.06, 15657.05; Civ. Code, § 3294(b))

CACI VF-3107 Abduction--Employer Defendant Only (Welf. & Inst. Code, §§ 15610.06, 15657.05; Civ. Code, § 3294(b))

CACI VF-3108-CACI VF-3199 Reserved for Future Use

Table A. Elder Abuse: Causes of Action, Remedies, and Employer Liability



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California Forms of Jury Instruction

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CHAPTER 31 California Judicial Council Elder Abuse and Dependent Adult Civil Protection Act Instructions

5-31 California Forms of Jury Instruction Scope

Scope

SCOPE

This chapter contains the California Judicial Council's "Elder Abuse and Dependent Adult Civil Protection Act Series" of jury instructions [CACI No. 3100 et seq.]. The Judicial Council of California Civil Jury Instructions (CACI) included in this publication are the product of the Judicial Council of California Task Force on Jury Instructions, which are updated by the Judicial Council of California Advisory Committee on Civil Jury Instructions.

This chapter includes instructions on the following topics:

- Elements of cause of action for financial abuse [CACI No. 3100].
- Pain and suffering and enhanced remedies for financial abuse [CACI Nos. 3100- 3102B].
- Elements of cause of action for neglect [CACI No. 3103].
- Enhanced remedies for neglect [CACI No. 3104].
- Elements of cause of action for physical abuse [CACI No. 3106].
- Enhanced remedies for physical abuse [CACI No. 3107].
- Elements of cause of action for abduction [CACI No. 3109].
- Enhanced remedies for abduction [CACI No. 3110].
- Explanations of "dependent adult" [CACI No. 3112], "recklessness" [CACI No. 3113], "malice" [CACI No. 3114], "oppression" [CACI No. 3115], and "fraud" [CACI No. 3116].

The elder abuse series also includes special verdict forms [*CACI* Nos. *VF-3100*-*VF-3107*].



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California Forms of Jury Instruction

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CHAPTER 31 California Judicial Council Elder Abuse and Dependent Adult Civil Protection Act Instructions

5-31 California Forms of Jury Instruction CACI 3100

CACI 3100 Financial Abuse--Essential Factual Elements (Welf. & Inst. Code, § 15610.30)

[*Name of plaintiff*] **claims that** [*name of individual defendant*]/ **[and]** [*name of employer defendant*] **violated the Elder Abuse and Dependent Adult Civil Protection Act by taking financial advantage of** [him/her/ *name of decedent*]. **To establish this claim, [*name of plaintiff*] must prove that all of the following are more likely to be true than not true:**

1. That [*name of individual defendant*]/ [*name of employer defendant*]'s **employee** [*insert one of the following:*]

[[took/hid/appropriated/obtained/ [or] retained] [*name of plaintiff/decedent*]'s property;

[or]

[[assisted in [taking/hiding/appropriating/obtaining/ [or] retaining] [*name of plaintiff/decedent*]'s property;

2. That [*name of plaintiff/decedent*] was [65 years of age or older/a dependent adult] at the time of the conduct;

3. That [*name of individual defendant*]/ [*name of employer defendant*]'s **employee **[[took/hid/appropriated/obtained [or] retained]/assisted in [taking/hiding/appropriating/obtaining/ [or] retaining]] the property [for a wrongful use/ [or] with the intent to defraud/ [or] by undue influence];****

4. That [*name of plaintiff/decedent*] was harmed; and

5. That [[name of individual defendant]'s/[name of employer defendant]'s employee's] conduct was a substantial factor in causing [name of plaintiff]'s harm.

[One way [name of plaintiff] can prove that [[name of individual defendant]/[name of employer defendant]'s employee] [took/hid/appropriated/obtained/ [or] retained] the property for a wrongful use is by proving that [[name of individual defendant]/[name of employer defendant]'s employee] knew or should have known that [his/her] conduct was likely to be harmful to [name of plaintiff/decedent].

[[[Name of individual defendant]/[Name of employer defendant]'s employee] [took/hid/appropriated/obtained/ [or] retained] the property if [name of plaintiff/decedent] was deprived of the property by an agreement, gift, will, [or] trust[, or] [specify other testamentary instrument] regardless of whether the property was held by [name of plaintiff/decedent] or by [his/her] representative.]

New September 2003; Revised June 2005, October 2008, April 2009, June 2010

Directions for Use

This instruction may be given in cases brought under the Elder Abuse and Dependent Adult Civil Protection Act by the victim of elder financial abuse, or by the survivors of the victim. If the victim is the plaintiff and is seeking damages for pain and suffering, see *CACI No. 3905A, Physical Pain, Mental Suffering, and Emotional Distress (Noneconomic Damage)* in the Damages series. Plaintiffs who are suing for their decedent's pain and suffering should also use *CACI No. 3101, Financial Abuse--Decedent's Pain and Suffering*.

If the individual responsible for the financial abuse is a defendant in the case, use "[name of individual defendant]" throughout. If only the individual's employer is a defendant, use "[name of employer defendant]'s employee" throughout.

If undue influence is alleged in element 3 (See *Welf. & Inst. Code, § 15610.30(a)(3)*), *CACI No. 334, Affirmative Defense--Undue Influence*, may be adapted for a definition.

To recover compensatory damages, attorney fees, and costs against the employer under a theory of vicarious liability, see instructions in the Vicarious Responsibility series (*CACI No. 3700 et seq.*).

If "for a wrongful use" is selected in element 3, give the next-to-last optional paragraph on appropriate facts. This is not the exclusive manner of proving wrongful conduct under the statute. (See *Welf. & Inst. Code, § 15610.30(b)*.)

Include the last optional paragraph if the elder was deprived of a property right by an agreement, donative transfer, or testamentary bequest. (See *Welf. & Inst. Code, § 15610.30(c)*.)

The instructions in this series are not intended to cover every circumstance in which a plaintiff may bring a cause of action under the Elder Abuse and Dependent Adult Civil Protection Act.

Sources and Authority

- *Welfare and Institutions Code section 15610.07* provides:

"Abuse of an elder or a dependent adult" means either of the following:

5-31 California Forms of Jury Instruction CACI 3100

(a) Physical abuse, neglect, financial abuse, abandonment, isolation, abduction, or other treatment with resulting physical harm or pain or mental suffering.

(b) The deprivation by a care custodian of goods or services that are necessary to avoid physical harm or mental suffering.

■ *Welfare and Institutions Code section 15610.23* provides:

(a) "Dependent adult" means any person between the ages of 18 and 64 years who resides in this state and who has physical or mental limitations that restrict his or her ability to carry out normal activities or to protect his or her rights, including, but not limited to, persons who have physical or developmental disabilities, or whose physical or mental abilities have diminished because of age.

(b) "Dependent adult" includes any person between the ages of 18 and 64 years who is admitted as an inpatient to a 24-hour health facility, as defined in *Sections 1250, 1250.2, and 1250.3 of the Health and Safety Code*.

■ *Welfare and Institutions Code section 15610.27* provides: " 'Elder' means any person residing in this state, 65 years of age or older."

■ *Welfare and Institutions Code section 15610.30* provides:

(a) "Financial abuse" of an elder or dependent adult occurs when a person or entity does any of the following:

(1) Takes, secretes, appropriates, obtains, or retains real or personal property of an elder or dependent adult for a wrongful use or with intent to defraud, or both.

(2) Assists in taking, secreting, appropriating, obtaining, or retaining real or personal property of an elder or dependent adult for a wrongful use or with intent to defraud, or both.

(3) Takes, secretes, appropriates, obtains, or retains, or assists in taking, secreting, appropriating, obtaining, or retaining, real or personal property of an elder or dependent adult by undue influence, as defined in *Section 1575 of the Civil Code*.

(b) A person or entity shall be deemed to have taken, secreted, appropriated, obtained, or retained property for a wrongful use if, among other things, the person or entity takes, secretes, appropriates, obtains, or retains the property and the person or entity knew or should have known that this conduct is likely to be harmful to the elder or dependent adult.

(c) For purposes of this section, a person or entity takes, secretes, appropriates, obtains, or retains real or person property when an elder or dependent adult is deprived of any property right, including by means of an agreement, donative transfer, or testamentary bequest, regardless of whether the property is held directly or by a representative of the elder or dependent adult.

(d) For purposes of this section, "representative" means a person or entity that is either of the following

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(1) A conservator, trustee, or other representative of the estate of an elder or dependent adult.

(2) An attorney-in-fact of an elder or dependent adult who acts within the authority of the power of attorney.

■ "The purpose of the [Elder Abuse Act] is essentially to protect a particularly vulnerable portion of the population from gross mistreatment in the form of abuse and custodial neglect." (*Delaney v. Baker* (1999) 20 Cal.4th 23, 33 [82 Cal.Rptr.2d 610, 971 P.2d 986] .)

■ "The Act was expressly designed to protect elders and other dependent adults who 'may be subjected to abuse, neglect, or abandonment' Within the Act, two groups of persons who ordinarily assume responsibility for the 'care and custody' of the elderly are identified and defined: health practitioners and care custodians. A 'health practitioner' is defined in section 15610.37 as a '*physician* and surgeon, psychiatrist, psychologist, dentist, ...' etc., who 'treats an elder ... for any condition.' 'Care custodians,' on the other hand, are administrators and employees of public and private institutions that provide 'care or services for elders or dependent adults,' including nursing homes, clinics, home health agencies, and similar facilities which house the elderly. The Legislature thus recognized that both classes of professionals--health practitioners as well as care custodians--should be charged with responsibility for the health, safety and welfare of elderly and dependent adults." (*Mack v. Soung* (2000) 80 Cal.App.4th 966, 974 [95 Cal.Rptr.2d 830] , original italics, internal citations omitted.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1686-1688

California Elder Law Litigation (Cont.Ed.Bar 2003) §§ 6.23, 6.30-6.34

1 *California Forms of Pleading and Practice*, Ch. 5, *Abuse of Minors and Elders*, § 5.33[4] (Matthew Bender)

Publisher's Notes

This instruction covers issues presented in BAJI Nos. 7.40 and 7.43.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Family Law Family Protection & Welfare Elderly Persons Abuse, Endangerment & Neglect Public Health & Welfare Law Healthcare Services for Disabled & Elderly Persons Protection From Abuse & Neglect



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CHAPTER 31 California Judicial Council Elder Abuse and Dependent Adult Civil Protection Act Instructions

5-31 California Forms of Jury Instruction CACI 3101

CACI 3101 Financial Abuse--Decedent's Pain and Suffering (Welf. & Inst. Code, § 15657.5)

[Name of plaintiff] also seeks to recover damages for [name of decedent]'s pain and suffering. To recover these damages, [name of plaintiff] must also prove by clear and convincing evidence that [name of individual defendant/ [name of employer defendant]'s employee] acted with [recklessness/oppression/fraud/ [or] malice] in committing the financial abuse.

New September 2003; Revised June 2005, October 2008, April 2009

Directions for Use

Give this instruction along with *CACI No. 3100, Financial Abuse--Essential Factual Elements*, if the plaintiff seeks survival damages for pain and suffering in addition to conventional tort damages and attorney fees and costs. (See *Welf. & Inst. Code, § 15657.5*.) Although one would not normally expect that financial abuse alone would lead to a wrongful death action, the Legislature has provided this remedy should the situation arise.

If the individual responsible for the neglect is a defendant in the case, use "[name of individual defendant]." If only the individual's employer is a defendant, use "[name of employer defendant]'s employee."

The instructions in this series are not intended to cover every circumstance in which a plaintiff may bring a cause of action under the Elder Abuse and Dependent Adult Civil Protection Act.

Sources and Authority

■ *Welfare and Institutions Code section 15657.5 provides:*

(a) Where it is proven by a preponderance of the evidence that a defendant is liable for financial abuse, as defined in Section 15610.30, in addition to compensatory damages and all other remedies otherwise provided by law, the court shall award to the plaintiff reasonable attorney's fees and costs. The term "costs" includes, but is not limited to, reasonable fees for the services of a conservator, if any, devoted to the litigation of a claim brought under this article.

(b) Where it is proven by a preponderance of the evidence that a defendant is liable for financial abuse, as defined in Section 15610.30, and where it is proven by clear and convincing evidence that the defendant has been guilty of recklessness, oppression, fraud, or malice in the commission of the abuse, in addition to reasonable attorney's fees and costs set forth in subdivision (a), compensatory damages, and all other remedies otherwise provided by law, the limitations imposed by *Section 377.34 of the Code of Civil Procedure* on the damages recoverable shall not apply.

(c) The standards set forth in *subdivision (b) of Section 3294 of the Civil Code* regarding the imposition of punitive damages on an employer based upon the acts of an employee shall be satisfied before any punitive damages may be imposed against an employer found liable for financial abuse as defined in Section 15610.30. This subdivision shall not apply to the recovery of compensatory damages, or attorney's fees and costs.

(d) Nothing in this section affects the award of punitive damages under *Section 3294 of the Civil Code*.

■ "The purpose of the [Elder Abuse Act] is essentially to protect a particularly vulnerable portion of the population from gross mistreatment in the form of abuse and custodial neglect." (*Delaney v. Baker (1999) 20 Cal.4th 23, 33 [82 Cal.Rptr.2d 610, 971 P.2d 986]* .)

■ "In order to obtain the remedies available in section 15657, a plaintiff must demonstrate by clear and convincing evidence that defendant is guilty of something more than negligence; he or she must show reckless, oppressive, fraudulent, or malicious conduct. The latter three categories involve 'intentional,' 'willful,' or 'conscious' wrongdoing of a 'despicable' or 'injurious' nature. 'Recklessness' refers to a subjective state of culpability greater than simple negligence, which has been described as a 'deliberate disregard' of the 'high degree of probability' that an injury will occur. Recklessness, unlike negligence, involves more than 'inadvertence, incompetence, unskillfulness, or a failure to take precautions' but rather rises to the level of a 'conscious choice of a course of action ... with knowledge of the serious danger to others involved in it.' " (*Delaney, supra, 20 Cal.4th at pp. 31-32* , internal citations omitted.)

■ "As amended in 1991, the Elder Abuse Act was designed to protect elderly and dependent persons from abuse, neglect, or abandonment. In addition to adopting measures designed to encourage reporting of abuse and neglect, the Act authorizes the court to award attorney fees to the prevailing plaintiffs and allows survivors to recover pain and suffering damages in cases of intentional and reckless abuse where the elder has died." (*Mack v. Soung (2000) 80 Cal.App.4th 966, 971-972 [95 Cal.Rptr.2d 830]* , internal citations omitted.)

■ "The effect of the 1991 amendment to the elder abuse law was to ... permit a decedent's personal representative or successor to recover pain and suffering damages when plaintiff can prove by clear and convincing evidence recklessness, oppression, fraud, or malice in the commission of elder abuse. Even then, those damages would be subject to the \$250,000 cap placed by *Civil Code section 3333.2, subdivision (b)* for noneconomic damages against a health care provider. In this limited circumstance, the decedent's right to pain and suffering damages would not die with him or

her; the damages would be recoverable by a survivor." (*ARA Living Centers--Pacific, Inc. v. Superior Court* (1993) 18 Cal.App.4th 1556, 1563 [23 Cal.Rptr.2d 224] .)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1686-1688

California Elder Law Litigation (Cont.Ed.Bar 2003) §§ 6.23, 6.30-6.34, 6.45-6.47

1 *California Forms of Pleading and Practice*, Ch. 5, *Abuse of Minors and Elderly*, § 5.35 (Matthew Bender)

Publisher's Notes

This instruction covers issues presented in BAJI Nos. 7.40, 7.43, and 7.46.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Family Law Family Protection & Welfare Elderly Persons Abuse, Endangerment & Neglect Public Health & Welfare Law Healthcare Services for Disabled & Elderly Persons Protection From Abuse & Neglect Torts Wrongful Death & Survival Actions Remedies Compensatory Damages Pain & Suffering



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CHAPTER 31 California Judicial Council Elder Abuse and Dependent Adult Civil Protection Act Instructions

5-31 California Forms of Jury Instruction CACI 3102A

CACI 3102A Employer Liability for Enhanced Remedies--Both Individual and Employer Defendants (Welf. & Inst. Code, §§ 15657, 15657.05; Civ. Code, § 3294(b))

[Name of plaintiff] **also claims that [name of employer defendant] is responsible for [attorney fees and costs/ [and] [name of decedent]'s pain and suffering before death]. To establish this claim, [name of plaintiff] must prove by clear and convincing evidence [insert one or more of the following four options:]**

1. **[That [name of individual defendant] was an officer, a director, or a managing agent of [name of employer defendant] acting on behalf of [name of defendant];] [or]**
2. **[That an officer, a director, or a managing agent of [name of employer defendant] had advance knowledge of the unfitness of [name of individual defendant] and employed [him/her] with a knowing disregard of the rights or safety of others;] [or]**
3. **[That an officer, a director, or a managing agent of [name of employer defendant] authorized [name of individual defendant]'s conduct;] [or]**
4. **[That an officer, a director, or a managing agent of [name of employer defendant] knew of [name of individual defendant]'s wrongful conduct and adopted or approved the conduct after it occurred.]**

An employee is a "managing agent" if he or she exercises substantial independent authority and judgment in his or her corporate decision-making such that his or her decisions ultimately determine corporate policy.

[If [name of plaintiff] proves the above, I will decide the amount of attorney fees and costs.]

Derived from former CACI No. 3102 October 2008; Revised April 2009

Directions for Use

This instruction should be given with *CACI No. 3104* (neglect), *CACI No. 3107* (physical abuse), or *CACI No. 3110* (abduction) if the plaintiff is seeking the enhanced remedies of attorney fees and costs and/or damages for a decedent's pain and suffering against an employer and the employee is also a defendant. (See *Civ. Code*, § 3294(b) *Welf. & Inst. Code*, §§ 15657(c), 15657.05.) If the employer is the only defendant, give *CACI No. 3102B, Employer Liability for Enhanced Remedies--Employer Defendant Only*. The requirements of *Civil Code* section 3294(b) need not be met in order to obtain enhanced remedies from an employer for financial abuse. (See *Welf. & Inst. Code*, § 15657.5(c).)

The instructions in this series are not intended to cover every circumstance in which a plaintiff may bring a cause of action under the Elder Abuse and Dependent Adult Civil Protection Act.

Sources and Authority

- *Welfare and Institutions Code* section 15657 provides:

Where it is proven by clear and convincing evidence that a defendant is liable for physical abuse as defined in Section 15610.63, or neglect as defined in Section 15610.57, and that the defendant has been guilty of recklessness, oppression, fraud, or malice in the commission of this abuse, the following shall apply, in addition to all other remedies otherwise provided by law:

(a) The court shall award to the plaintiff reasonable attorney's fees and costs. The term "costs" includes, but is not limited to, reasonable fees for the services of a conservator, if any, devoted to the litigation of a claim brought under this article.

(b) The limitations imposed by *Section 377.34 of the Code of Civil Procedure* on the damages recoverable shall not apply. However, the damages recovered shall not exceed the damages permitted to be recovered pursuant to *subdivision (b) of Section 3333.2 of the Civil Code*.

(c) The standards set forth in *subdivision (b) of Section 3294 of the Civil Code* regarding the imposition of punitive damages on an employer based upon the acts of an employee shall be satisfied before any damages or attorney's fees permitted under this section may be imposed against an employer.

- *Welfare and Institutions Code* section 15657.5(c) provides: "The standards set forth in *subdivision (b) of Section 3294 of the Civil Code* regarding the imposition of punitive damages on an employer based upon the acts of an employee shall be satisfied before any punitive damages may be imposed against an employer found to be liable for financial abuse as defined in Section 15610.30. This subdivision shall not apply to the recovery of compensatory damages, or attorney's fees and costs."

- *Welfare and Institutions Code* section 15657.05 provides:

Where it is proven by clear and convincing evidence that an individual is liable for abduction, as defined in Section 15610.06, in addition to all other remedies otherwise provided by law:

(a)

(1) The court shall award to the plaintiff reasonable attorney's fees and costs. The term "costs" shall include, but is not limited to, costs of representing the abductee and his or her family in this state and any other state in any action related to the abduction and returning of the abductee to this state, as well as travel expenses for returning the abductee to this state and reasonable fees for the services of a conservator, if any, devoted to the litigation of a claim brought under this article.

(2) The award of attorney's fees shall be governed by the principles set forth in Section 15657.1.

(b) The limitations imposed by *Section 377.34 of the Code of Civil Procedure* on the damages recoverable shall not apply. However, the damages recovered shall not exceed the damages permitted to be recovered pursuant to *subdivision (b) of Section 3333.2 of the Civil Code*.

(c) The standards set forth in *subdivision (b) of Section 3294 of the Civil Code* regarding the imposition of punitive damages on an employer based upon the acts of an employee shall be satisfied before any damages or attorney's fees permitted under this section may be imposed against an employer.

■ *Civil Code section 3294(b)* provides: "An employer shall not be liable for damages pursuant to subdivision (a), based upon acts of an employee of the employer, unless the employer had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of others or authorized or ratified the wrongful conduct for which the damages are awarded or was personally guilty of oppression, fraud, or malice. With respect to a corporate employer, the advance knowledge and conscious disregard, authorization, ratification or act of oppression, fraud, or malice must be on the part of an officer, director, or managing agent of the corporation."

■ "[A] finding of ratification of [agent's] actions by [employer], and any other findings made under *Civil Code section 3294, subdivision (b)*, must be made by clear and convincing evidence." (*Barton v. Alexander Hamilton Life Ins. Co. of America* (2003) 110 Cal.App.4th 1640, 1644 [3 Cal.Rptr.3d 258] .)

■ "The purpose of the [Elder Abuse Act] is essentially to protect a particularly vulnerable portion of the population from gross mistreatment in the form of abuse and custodial neglect." (*Delaney v. Baker* (1999) 20 Cal.4th 23, 33 [82 Cal.Rptr.2d 610, 971 P.2d 986] .)

■ "In order to obtain the remedies available in section 15657, a plaintiff must demonstrate by clear and convincing evidence that defendant is guilty of something more than negligence; he or she must show reckless, oppressive, fraudulent, or malicious conduct. The latter three categories involve 'intentional,' 'willful,' or 'conscious' wrongdoing of a 'despicable' or 'injurious' nature. 'Recklessness' refers to a subjective state of culpability greater than simple negligence, which has been described as a 'deliberate disregard' of the 'high degree of probability' that an injury will occur. Recklessness, unlike negligence, involves more than 'inadvertence, incompetence, unskillfulness, or a failure to take precautions' but rather rises to the level of a 'conscious choice of a course of action ... with knowledge of the serious danger to others involved in it.' " (*Delaney, supra*, 20 Cal.4th at pp. 31-32 , internal citations omitted.)

■ "As amended in 1991, the Elder Abuse Act was designed to protect elderly and dependent persons from abuse, neglect, or abandonment. In addition to adopting measures designed to encourage reporting of abuse and neglect, the Act authorizes the court to award attorney fees to the prevailing plaintiffs and allows survivors to recover pain and suffering damages in cases of intentional and reckless abuse where the elder has died." (*Mack v. Soung* (2000) 80 Cal.App.4th 966, 971-972 [95 Cal.Rptr.2d 830] , internal citations omitted.)

Secondary Sources

5-31 California Forms of Jury Instruction CACI 3102A

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1686-1688

California Elder Law Litigation (Cont.Ed.Bar 2003) §§ 6.41-6.44

1 *California Forms of Pleading and Practice*, Ch. 5, *Abuse of Minors and Elderly*, § 5.35 (Matthew Bender)

Publisher's Notes

This instruction covers issues presented in BAJI Nos. 7.46, 7.47, and 7.48.



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CHAPTER 31 California Judicial Council Elder Abuse and Dependent Adult Civil Protection Act Instructions

5-31 California Forms of Jury Instruction CACI 3102B

CACI 3102B Employer Liability for Enhanced Remedies--Employer Defendant Only (Welf. & Inst. Code, §§ 15657, 15657.05; Civ. Code, § 3294(b))

[*Name of plaintiff*] also claims that [*name of defendant*] is responsible for [attorney fees and costs/ [and] [*name of decedent*]'s pain and suffering before death]. To establish this claim, [*name of plaintiff*] must prove by clear and convincing evidence [*insert one or more of the following four options:*]

1. [That the employee who committed the acts was an officer, a director, or a managing agent of [*name of defendant*] acting on behalf of [*name of defendant*]]; [or]
2. [That an officer, a director, or a managing agent of [*name of defendant*] had advance knowledge of the unfitness of the employee who committed the acts and employed [him/her/] with a knowing disregard of the rights or safety of others;] [or]
3. [That an officer, a director, or a managing agent of [*name of defendant*] authorized the conduct of the employee who committed the acts;] [or]
4. [That an officer, a director, or a managing agent of [*name of defendant*] knew of the wrongful conduct of the employee who committed the acts and adopted or approved the conduct after it occurred.]

An employee is a "managing agent" if he or she exercises substantial independent authority and judgment in his or her corporate decision-making such that his or her decisions ultimately determine corporate policy.

[If [*name of plaintiff*] proves the above, I will decide the amount of attorney fees and costs.]

Derived from former CACI No. 3102 October 2008; Revised April 2009

Directions for Use

This instruction should be given with *CACI No. 3104* (neglect), *CACI No. 3107* (physical abuse), or *CACI No. 3110* (abduction) if the plaintiff is seeking the enhanced remedies of attorney fees and costs and/or damages for a decedent's pain and suffering against an employer and the employee is not also a defendant. (See *Civ. Code*, § 3294(b); *Welf. & Inst. Code*, §§ 15657(c), 15677.05.) If the employee is also a defendant, give *CACI No. 3102A, Employer Liability for Enhanced Remedies--Both Individual and Employer Defendants*. The requirements of *Civil Code* section 3294(b) need not be met in order to obtain enhanced remedies from an employer for financial abuse. (See *Welf. & Inst. Code*, § 15657.5(c).)

Sources and Authority

- *Welfare and Institutions Code* section 15657 provides:

Where it is proven by clear and convincing evidence that a defendant is liable for physical abuse as defined in Section 15610.63, or neglect as defined in Section 15610.57, and that the defendant has been guilty of recklessness, oppression, fraud, or malice in the commission of this abuse, the following shall apply, in addition to all other remedies otherwise provided by law:

(a) The court shall award to the plaintiff reasonable attorney's fees and costs. The term "costs" includes, but is not limited to, reasonable fees for the services of a conservator, if any, devoted to the litigation of a claim brought under this article.

(b) The limitations imposed by *Section 377.34 of the Code of Civil Procedure* on the damages recoverable shall not apply. However, the damages recovered shall not exceed the damages permitted to be recovered pursuant to *subdivision (b) of Section 3333.2 of the Civil Code*.

(c) The standards set forth in *subdivision (b) of Section 3294 of the Civil Code* regarding the imposition of punitive damages on an employer based upon the acts of an employee shall be satisfied before any damages or attorney's fees permitted under this section may be imposed against an employer.

- *Welfare and Institutions Code* section 15657.5(c) provides: "The standards set forth in *subdivision (b) of Section 3294 of the Civil Code* regarding the imposition of punitive damages on an employer based upon the acts of an employee shall be satisfied before any punitive damages may be imposed against an employer found to be liable for financial abuse as defined in Section 15610.30. This subdivision shall not apply to the recovery of compensatory damages, or attorney's fees and costs."

- *Welfare and Institutions Code* section 15657.05 provides:

Where it is proven by clear and convincing evidence that an individual is liable for abduction, as defined in Section 15610.06, in addition to all other remedies otherwise provided by law:

(a)

(1) The court shall award to the plaintiff reasonable attorney's fees and costs. The term "costs" shall include, but is not limited to, costs of representing the abductee and his or her family in this state and any other state in any action related to the abduction and

returning of the abductee to this state, as well as travel expenses for returning the abductee to this state and reasonable fees for the services of a conservator, if any, devoted to the litigation of a claim brought under this article.

(2) The award of attorney's fees shall be governed by the principles set forth in Section 15657.1.

(b) The limitations imposed by *Section 377.34 of the Code of Civil Procedure* on the damages recoverable shall not apply. However, the damages recovered shall not exceed the damages permitted to be recovered pursuant to *subdivision (b) of Section 3333.2 of the Civil Code*.

(c) The standards set forth in *subdivision (b) of Section 3294 of the Civil Code* regarding the imposition of punitive damages on an employer based upon the acts of an employee shall be satisfied before any damages or attorney's fees permitted under this section may be imposed against an employer.

■ *Civil Code section 3294(b)* provides: "An employer shall not be liable for damages pursuant to subdivision (a), based upon acts of an employee of the employer, unless the employer had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of others or authorized or ratified the wrongful conduct for which the damages are awarded or was personally guilty of oppression, fraud, or malice. With respect to a corporate employer, the advance knowledge and conscious disregard, authorization, ratification or act of oppression, fraud, or malice must be on the part of an officer, director, or managing agent of the corporation."

■ "[A] finding of ratification of [agent's] actions by [employer], and any other findings made under *Civil Code section 3294, subdivision (b)*, must be made by clear and convincing evidence." (*Barton v. Alexander Hamilton Life Ins. Co. of America* (2003) 110 Cal.App.4th 1640, 1644 [3 Cal.Rptr.3d 258] .)

■ "The purpose of the [Elder Abuse Act] is essentially to protect a particularly vulnerable portion of the population from gross mistreatment in the form of abuse and custodial neglect." (*Delaney v. Baker* (1999) 20 Cal.4th 23, 33 [82 Cal.Rptr.2d 610, 971 P.2d 986] .)

■ "As amended in 1991, the Elder Abuse Act was designed to protect elderly and dependent persons from abuse, neglect, or abandonment. In addition to adopting measures designed to encourage reporting of abuse and neglect, the Act authorizes the court to award attorney fees to the prevailing plaintiffs and allows survivors to recover pain and suffering damages in cases of intentional and reckless abuse where the elder has died." (*Mack v. Soung* (2000) 80 Cal.App.4th 966, 971-972 [95 Cal.Rptr.2d 830] , internal citations omitted.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1686-1688

California Elder Law Litigation (Cont.Ed.Bar 2003) §§ 6.41-6.44

1 *California Forms of Pleading and Practice, Ch. 5, Abuse of Minors and Elderly*, § 5.35 (Matthew Bender)

Publisher's Notes

This instruction covers issues presented in BAJI Nos. 7.46, 7.47, and 7.48.



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California Forms of Jury Instruction

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CHAPTER 31 California Judicial Council Elder Abuse and Dependent Adult Civil Protection Act Instructions

5-31 California Forms of Jury Instruction CACI 3103

CACI 3103 Neglect--Essential Factual Elements (Welf. & Inst. Code, § 15610.57)

[Name of plaintiff] **claims that [he/she/[name of decedent]]** **was neglected by [[name of individual defendant]/ [and] [name of employer defendant]]** **in violation of the Elder Abuse and Dependent Adult Civil Protection Act. To establish this claim, [name of plaintiff] must prove all of the following:**

- 1. That [[name of individual defendant]/[name of employer defendant]'s employee] had care or custody of [name of plaintiff/decedent];**
- 2. That [name of plaintiff/decedent] was [65 years of age or older/a dependent adult] while [he/she] was in [[name of defendant]'s/[name of employer defendant]'s employee's] care or custody;**
- 3. That [[name of individual defendant]/[name of employer defendant]'s employee] failed to use the degree of care that a reasonable person in the same situation would have used in [insert one or more of the following:]**
 - [assisting in personal hygiene or in the provision of food, clothing, or shelter;]**
 - [providing medical care for physical and mental health needs;]**
 - [protecting [name of plaintiff/decedent] from health and safety hazards;]**
 - [preventing malnutrition or dehydration;]**
 - [insert other grounds for neglect;]**
- 4. That [name of plaintiff/decedent] was harmed; and**

5. That [[name of individual defendant]'s/[name of employer defendant]'s employee's] conduct was a substantial factor in causing [name of plaintiff/decedent]'s harm.

New September 2003; Revised December 2005, June 2006, October 2008

Directions for Use

This instruction may be given in cases brought under the Elder Abuse and Dependent Adult Civil Protection Act by the victim of elder neglect, or by the survivors of the victim. If the victim is the plaintiff and is seeking damages for pain and suffering, see *CACI No. 3905A, Physical Pain, Mental Suffering, and Emotional Distress (Noneconomic Damage)*, in the Damages series.

If the plaintiff seeks the enhanced remedies of attorney fees and costs, and in the case of a wrongful death, the decedent's pain and suffering, give *CACI No. 3104, Neglect--Enhanced Remedies Sought*, in addition to this instruction. (See *Welf. & Inst. Code*, § 15657.)

If the individual responsible for the financial abuse is a defendant in the case, use "[name of individual defendant]" throughout. If only the individual's employer is a defendant, use "[name of employer defendant]'s employee" throughout.

If the plaintiff is seeking enhanced remedies against the individual's employer, also give either *CACI No. 3102A, Employer Liability for Enhanced Remedies--Both Individual and Employer Defendants*, or *CACI No. 3102B, Employer Liability for Enhanced Remedies--Employer Defendant Only*. To recover damages against the employer under a theory of vicarious liability, see instructions in the Vicarious Responsibility series (*CACI No. 3700 et seq.*).

This instruction is not intended for cases involving professional negligence against health-care providers as defined by the California Medical Injury Compensation Reform Act of 1975 (MICRA) (see *Welf. & Inst. Code*, § 15657.2 and *Civ. Code*, § 3333.2(c)(2)).

The instructions in this series are not intended to cover every circumstance in which a plaintiff may bring a cause of action under the Elder Abuse and Dependent Adult Civil Protection Act.

Sources and Authority

- *Welfare and Institutions Code* section 15610.07 provides:

"Abuse of an elder or a dependent adult" means either of the following:

- (a) Physical abuse, neglect, financial abuse, abandonment, isolation, abduction, or other treatment with resulting physical harm or pain or mental suffering.
- (b) The deprivation by a care custodian of goods or services that are necessary to avoid physical harm or mental suffering.

- *Welfare and Institutions Code* section 15610.23 provides:

- (a) "Dependent adult" means any person residing in this state between the ages of 18 and

5-31 California Forms of Jury Instruction CACI 3103

64 years who has physical or mental limitations that restrict his or her ability to carry out normal activities or to protect his or her rights, including, but not limited to, persons who have physical or developmental disabilities, or whose physical or mental abilities have diminished because of age.

(b) "Dependent adult" includes any person between the ages of 18 and 64 years who is admitted as an inpatient to a 24-hour health facility, as defined in *Sections 1250, 1250.2, and 1250.3 of the Health and Safety Code*.

■ *Welfare and Institutions Code section 15610.27* provides: " 'Elder' means any person residing in this state, 65 years of age or older."

■ *Welfare and Institutions Code section 15610.57* provides:

(a) "Neglect" means either of the following:

(1) The negligent failure of any person having the care or custody of an elder or a dependent adult to exercise that degree of care that a reasonable person in a like position would exercise.

(2) The negligent failure of an elder or dependent adult to exercise that degree of self care that a reasonable person in a like position would exercise.

(b) Neglect includes, but is not limited to, all of the following:

(1) Failure to assist in personal hygiene, or in the provision of food, clothing, or shelter.

(2) Failure to provide medical care for physical and mental health needs. No person shall be deemed neglected or abused for the sole reason that he or she voluntarily relies on treatment by spiritual means through prayer alone in lieu of medical treatment.

(3) Failure to protect from health and safety hazards.

(4) Failure to prevent malnutrition or dehydration.

(5) Failure of an elder or dependent adult to satisfy the needs specified in paragraphs (1) to (4), inclusive, for himself or herself as a result of poor cognitive functioning, mental limitation, substance abuse, or chronic poor health.

■ *Welfare and Institutions Code section 15657.2* provides: "Notwithstanding this article, any cause of action for injury or damage against a health care provider, as defined in *Section 340.5 of the Code of Civil Procedure*, based on the health care provider's alleged professional negligence, shall be governed by those laws which specifically apply to those professional negligence causes of action."

■ "It is true that statutory elder abuse includes 'neglect as defined in *Section 15610.57*,' which in turn includes negligent failure of an elder custodian 'to provide medical care for [the elder's] physical and mental health needs.' ... '[N]eglect' within the meaning of *Welfare and Institutions Code section 15610.57* covers an area of misconduct distinct from 'professional negligence.' As used in the Act, neglect refers not to the substandard performance of medical services but, rather, to the 'failure of those responsible for attending to the basic needs and comforts of elderly or dependent

adults, regardless of their professional standing, to carry out their custodial obligations.' Thus, the statutory definition of 'neglect' speaks not of the *undertaking* of medical services, but of the failure to *provide* medical care." (*Covenant Care, Inc. v. Superior Court* (2004) 32 Cal.4th 771, 783 [11 Cal.Rptr.3d 222, 86 P.3d 290] , original italics, internal citations omitted.)

■ "The purpose of the [Elder Abuse Act] is essentially to protect a particularly vulnerable portion of the population from gross mistreatment in the form of abuse and custodial neglect." (*Delaney v. Baker* (1999) 20 Cal.4th 23, 33 [82 Cal.Rptr.2d 610, 971 P.2d 986] .)

■ "[T]he statutory definition of neglect set forth in the first sentence of *Welfare and Institutions Code* section 15610.57 is substantially the same as the ordinary definition of neglect." (*Conservatorship of Gregory v. Beverly Enterprises, Inc.* (2000) 80 Cal.App.4th 514, 521 [95 Cal.Rptr.2d 336] .)

■ "The Act was expressly designed to protect elders and other dependent adults who 'may be subjected to abuse, neglect, or abandonment' Within the Act, two groups of persons who ordinarily assume responsibility for the 'care and custody' of the elderly are identified and defined: health practitioners and care custodians. A 'health practitioner' is defined in section 15610.37 as a 'physician and surgeon, psychiatrist, psychologist, dentist, ...' etc., who 'treats an elder ... for any condition.' 'Care custodians,' on the other hand, are administrators and employees of public and private institutions that provide 'care or services for elders or dependent adults,' including nursing homes, clinics, home health agencies, and similar facilities which house the elderly. The Legislature thus recognized that both classes of professionals--health practitioners as well as care custodians--should be charged with responsibility for the health, safety and welfare of elderly and dependent adults." (*Mack v. Soung* (2000) 80 Cal.App.4th 966, 974 [95 Cal.Rptr.2d 830] , internal citations omitted.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1686-1688

California Elder Law Litigation (Cont.Ed.Bar 2003) §§ 2.70-2.71

3 Levy et al., *California Torts, Ch. 31 Liability of Physicians and Other Medical Practitioners*, § 31.50[4][d] (Matthew Bender)

1 *California Forms of Pleading and Practice, Ch. 5, Abuse of Minors and Elderly*, § 5.33[3] (Matthew Bender)

Publisher's Notes

This instruction covers issues presented in BAJI Nos. 7.40 and 7.41.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Family Law Family Protection & Welfare Elderly Persons Abuse, Endangerment & Neglect Public Health & Welfare Law Healthcare Services for Disabled & Elderly Persons Protection From Abuse & Neglect



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California Forms of Jury Instruction

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CHAPTER 31 California Judicial Council Elder Abuse and Dependent Adult Civil Protection Act Instructions

5-31 California Forms of Jury Instruction CACI 3104

CACI 3104 Neglect--Enhanced Remedies Sought (Welf. & Inst. Code, § 15657)

[*Name of plaintiff*] **also seeks to recover [attorney fees and costs/ [and] damages for [*name of decedent*]'s pain and suffering]. To recover these remedies, [*name of plaintiff*] must prove all of the requirements for neglect by clear and convincing evidence, and must also prove by clear and convincing evidence that [[*name of individual defendant*]/[*name of employer defendant*]'s employee] acted with [recklessness/oppression/fraud/ [or] malice] in neglecting [*name of plaintiff/decedent*].**

[If [*name of plaintiff*] proves the above, I will decide the amount of attorney fees and costs.]

New September 2003; Revised June 2005, October 2008

Directions for Use

Give this instruction along with *CACI No. 3103, Neglect--Essential Factual Elements*, if the plaintiff seeks the enhanced remedies of attorney fees and costs and damages for the decedent's predeath pain and suffering. (See *Welf. & Inst. Code*, § 15657.)

If the individual responsible for the neglect is a defendant in the case, use "[*name of individual defendant*]." If only the individual's employer is a defendant, use "[*name of employer defendant*]'s employee."

If the plaintiff is seeking enhanced remedies against the individual's employer, also give *CACI No. 3102A, Employer Liability for Enhanced Remedies--Both Individual and Employer Defendants*, or *CACI No. 3102B, Employer Liability for Enhanced Remedies--Employer Defendant Only*.

The instructions in this series are not intended to cover every circumstance in which a plaintiff may bring

a cause of action under the Elder Abuse and Dependent Adult Civil Protection Act.

Sources and Authority

- *Welfare and Institutions Code section 15657* provides:

Where it is proven by clear and convincing evidence that a defendant is liable for physical abuse as defined in Section 15610.63, or neglect as defined in Section 15610.57, and that the defendant has been guilty of recklessness, oppression, fraud, or malice in the commission of this abuse, the following shall apply, in addition to all other remedies otherwise provided by law:

(a) The court shall award to the plaintiff reasonable attorney's fees and costs. The term "costs" includes, but is not limited to, reasonable fees for the services of a conservator, if any, devoted to the litigation of a claim brought under this article.

(b) The limitations imposed by *Section 377.34 of the Code of Civil Procedure* on the damages recoverable shall not apply. However, the damages recovered shall not exceed the damages permitted to be recovered pursuant to *subdivision (b) of Section 3333.2 of the Civil Code*.

(c) The standards set forth in *subdivision (b) of Section 3294 of the Civil Code* regarding the imposition of punitive damages on an employer based upon the acts of an employee shall be satisfied before any damages or attorney's fees permitted under this section may be imposed against an employer.

- "In order to obtain the remedies available in section 15657, a plaintiff must demonstrate by clear and convincing evidence that defendant is guilty of something more than negligence; he or she must show reckless, oppressive, fraudulent, or malicious conduct. The latter three categories involve 'intentional,' 'willful,' or 'conscious' wrongdoing of a 'despicable' or 'injurious' nature. [P] 'Recklessness' refers to a subjective state of culpability greater than simple negligence, which has been described as a 'deliberate disregard' of the 'high degree of probability' that an injury will occur. Recklessness, unlike negligence, involves more than 'inadvertence, incompetence, unskillfulness, or a failure to take precautions' but rather rises to the level of a 'conscious choice of a course of action ... with knowledge of the serious danger to others involved in it.' " (*Delaney v. Baker (1999) 20 Cal.4th 23, 31-32 [82 Cal.Rptr.2d 610, 971 P.2d 986]* , internal citations omitted.)

- "As amended in 1991, the Elder Abuse Act was designed to protect elderly and dependent persons from abuse, neglect, or abandonment. In addition to adopting measures designed to encourage reporting of abuse and neglect, the Act authorizes the court to award attorney fees to the prevailing plaintiffs and allows survivors to recover pain and suffering damages in cases of intentional and reckless abuse where the elder has died." (*Mack v. Soung (2000) 80 Cal.App.4th 966, 971-972 [95 Cal.Rptr.2d 830]* , internal citations omitted.)

- "The effect of the 1991 amendment to the elder abuse law was to ... permit a decedent's personal representative or successor to recover pain and suffering damages when plaintiff can prove by clear and convincing evidence recklessness, oppression, fraud, or malice in the commission of elder abuse. Even then, those damages would be subject to the \$250,000 cap placed by *Civil Code section 3333.2, subdivision (b)* for noneconomic damages against a health care provider. In this limited circumstance, the decedent's right to pain and suffering damages would not die with him or her; the damages would be recoverable by a survivor." (*ARA Living Centers-- Pacific, Inc. v. Superior Court (1993) 18 Cal.App.4th 1556, 1563 [23 Cal.Rptr.2d 224]* .)

■ "[I]f the neglect is 'reckless[],' or done with 'oppression, fraud or malice,' then the action falls within the scope of section 15657 and as such cannot be considered simply 'based on ... professional negligence' within the meaning of section 15657.2. The use of such language in section 15657, and the explicit exclusion of 'professional negligence' in section 15657.2, make clear the Elder Abuse Act's goal was to provide heightened remedies for, as stated in the legislative history, 'acts of egregious abuse' against elder and dependent adults, while allowing acts of negligence in the rendition of medical services to elder and dependent adults to be governed by laws specifically applicable to such negligence. That only these egregious acts were intended to be sanctioned under section 15657 is further underscored by the fact that the statute requires liability to be proved by a heightened 'clear and convincing evidence' standard." (*Delaney, supra*, 20 Cal.4th at p. 35 , internal citation omitted.)

■ " 'Liability' under section 15657 includes as an element 'causation,' which, as all elements of liability, must be proved by clear and convincing evidence for purposes of an award of attorney fees." (*Perlin v. Fountain View Management, Inc.* (2008) 163 Cal.App.4th 657, 664 [77 Cal.Rptr.3d 743] .)

■ "We reject plaintiffs' argument that a violation of the Act does not constitute an independent cause of action. Accordingly, plaintiffs' failure to obtain a verdict establishing causation--one element of liability--by clear and convincing evidence, precludes an award of attorney fees." (*Perlin, supra*, 163 Cal.App.4th at p. 666 .)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1686-1688

California Elder Law Litigation (Cont.Ed.Bar 2003) § 2.72

3 Levy et al., *California Torts, Ch. 31 Liability of Physicians and Other Medical Practitioners*, § 31.50[4][d] (Matthew Bender)

1 *California Forms of Pleading and Practice, Ch. 5, Abuse of Minors and Elderly*, § 5.35 (Matthew Bender)

Publisher's Notes

This instruction covers issues presented in BAJI Nos. 7.41, 7.46, and 7.47.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Family Law Family Protection & Welfare Elderly Persons Abuse, Endangerment & Neglect Public Health & Welfare Law Healthcare Services for Disabled & Elderly Persons Protection From Abuse & Neglect Torts Damages Costs & Attorney Fees General Overview Torts Wrongful Death & Survival Actions Remedies Compensatory Damages Pain & Suffering



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CHAPTER 31 California Judicial Council Elder Abuse and Dependent Adult Civil Protection Act Instructions

5-31 California Forms of Jury Instruction CACI 3105

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CHAPTER 31 California Judicial Council Elder Abuse and Dependent Adult Civil Protection Act Instructions

5-31 California Forms of Jury Instruction CACI 3106

CACI 3106 Physical Abuse--Essential Factual Elements (Welf. & Inst. Code, § 15610.63)

[*Name of plaintiff*] **claims that [he/she/[*name of decedent*]] was physically abused by [[*name of individual defendant*]/ [and] [*name of employer defendant*]] in violation of the Elder Abuse and Dependent Adult Civil Protection Act. To establish this claim, [*name of plaintiff*] must prove all of the following:**

- 1. That [[*name of individual defendant*]/[*name of employer defendant*]'s employee] physically abused [*name of plaintiff/decedent*] by [*insert applicable grounds for abuse*];**
- 2. That [*name of plaintiff/decedent*] was [65 years of age or older/a dependent adult] at the time of the conduct;**
- 3. That [*name of plaintiff/decedent*] was harmed; and**
- 4. That [[*name of individual defendant*]'s/[*name of employer defendant*]'s employee's] conduct was a substantial factor in causing [*name of plaintiff/decedent*]'s harm.**

New September 2003; Revised December 2005, October 2008

Directions for Use

This instruction may be given in cases brought under the Elder Abuse and Dependent Adult Civil Protection Act by the victim of elder physical abuse, or by the survivors of the victim. If the victim is the plaintiff and is seeking damages for pain and suffering, see CACI No. 3905A, *Physical Pain, Mental Suffering, and Emotional Distress (Noneconomic Damage)* in the Damages series.

If the plaintiff seeks the enhanced remedies of attorney fees and costs, and in the case of a wrongful

death, the decedent's pain and suffering, give *CACI No. 3107, Physical Abuse--Enhanced Remedies Sought*, in addition to this instruction. (See *Welf. & Inst. Code*, § 15657.)

If the individual responsible for the neglect is a defendant in the case, use "[name of individual defendant]" throughout. If only the individual's employer is a defendant, use "[name of employer defendant]'s employee" throughout.

If the plaintiff is seeking enhanced remedies against the individual's employer, also give either *CACI No. 3102A, Employer Liability for Enhanced Remedies--Both Individual and Employer Defendants*, or *CACI No. 3102B, Employer Liability for Enhanced Remedies--Employer Defendant Only*. To recover damages against the employer under a theory of vicarious liability, see instructions in the Vicarious Responsibility series (*CACI No. 3700 et seq.*).

The instructions in this series are not intended to cover every circumstance in which a plaintiff may bring a cause of action under the Elder Abuse and Dependent Adult Civil Protection Act.

Sources and Authority

- *Welfare and Institutions Code* section 15610.07 provides:

"Abuse of an elder or a dependent adult" means either of the following:

- (a) Physical abuse, neglect, financial abuse, abandonment, isolation, abduction, or other treatment with resulting physical harm or pain or mental suffering.
- (b) The deprivation by a care custodian of goods or services that are necessary to avoid physical harm or mental suffering.

- *Welfare and Institutions Code* section 15610.23 provides:

(a) "Dependent adult" means any person residing in this state between the ages of 18 and 64 years who has physical or mental limitations that restrict his or her ability to carry out normal activities or to protect his or her rights, including, but not limited to, persons who have physical or developmental disabilities, or whose physical or mental abilities have diminished because of age.

(b) "Dependent adult" includes any person between the ages of 18 and 64 years who is admitted as an inpatient to a 24-hour health facility, as defined in *Sections 1250, 1250.2, and 1250.3 of the Health and Safety Code*.

- *Welfare and Institutions Code* section 15610.27 provides: " 'Elder' means any person residing in this state, 65 years of age or older."

- *Welfare and Institutions Code* section 15610.63 provides:

"Physical abuse" means any of the following:

- (a) Assault, as defined in *Section 240 of the Penal Code*.

(b) Battery, as defined in *Section 242 of the Penal Code*.

(c) Assault with a deadly weapon or force likely to produce great bodily injury, as defined in *Section 245 of the Penal Code*.

(d) Unreasonable physical constraint, or prolonged or continual deprivation of food or water.

(e) Sexual assault, that means any of the following:

(1) Sexual battery, as defined in *Section 243.4 of the Penal Code*.

(2) Rape, as defined in *Section 261 of the Penal Code*.

(3) Rape in concert, as described in *Section 264.1 of the Penal Code*.

(4) Spousal rape, as defined in *Section 262 of the Penal Code*.

(5) Incest, as defined in *Section 285 of the Penal Code*.

(6) Sodomy, as defined in *Section 286 of the Penal Code*.

(7) Oral copulation, as defined in *Section 288a of the Penal Code*.

(8) Sexual penetration, as defined in *Section 289 of the Penal Code*.

(f) Use of a physical or chemical restraint or psychotropic medication under any of the following conditions:

(1) For punishment.

(2) For a period beyond that for which the medication was ordered pursuant to the instructions of a physician and surgeon licensed in the State of California, who is providing medical care to the elder or dependent adult at the time the instructions are given.

(3) For any purpose not authorized by the physician and surgeon.

■ "The purpose of the [Elder Abuse Act] is essentially to protect a particularly vulnerable portion of the population from gross mistreatment in the form of abuse and custodial neglect." (*Delaney v. Baker* (1999) 20 Cal.4th 23, 33 [82 Cal.Rptr.2d 610, 971 P.2d 986] .)

■ "The Act was expressly designed to protect elders and other dependent adults who 'may be subjected to abuse, neglect, or abandonment ... ' Within the Act, two groups of persons who ordinarily assume responsibility for the 'care and custody' of the elderly are identified and defined: health practitioners and care custodians. A 'health practitioner' is defined in section 15610.37 as a '*physician* and surgeon, psychiatrist, psychologist, dentist, ...' etc., who 'treats an elder ... for any condition.' 'Care custodians,' on the other hand, are administrators and employees of public and private institutions that provide 'care or services for elders or dependent adults,' including nursing homes, clinics, home health agencies, and similar facilities which house the elderly. The Legislature thus recognized that both classes of professionals--health practitioners as well as care custodians--should be charged with responsibility for the health,

safety and welfare of elderly and dependent adults." (*Mack v. Soung* (2000) 80 Cal.App.4th 966, 974 [95 Cal.Rptr.2d 830] , original italics, internal citations omitted.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1686-1688

California Elder Law Litigation (Cont.Ed.Bar 2003) §§ 2.69, 2.71

1 *California Forms of Pleading and Practice*, Ch. 5, *Abuse of Minors and Elders*, § 5.33[2] (Matthew Bender)

Publisher's Notes

This instruction covers issues presented in BAJI Nos. 7.40 and 7.42.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Family Law Family Protection & Welfare Elderly Persons Abuse, Endangerment & Neglect Public Health & Welfare Law Healthcare Services for Disabled & Elderly Persons Protection From Abuse & Neglect



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California Forms of Jury Instruction

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CHAPTER 31 California Judicial Council Elder Abuse and Dependent Adult Civil Protection Act Instructions

5-31 California Forms of Jury Instruction CACI 3107

CACI 3107 Physical Abuse--Enhanced Remedies Sought (Welf. & Inst. Code, § 15657)

[*Name of plaintiff*] also seeks to recover [attorney fees and costs/ [and] damages for [*name of decedent*]'s pain and suffering]. To recover these remedies, [*name of plaintiff*] must prove all of the requirements for the physical abuse by clear and convincing evidence, and must also prove by clear and convincing evidence that [[*name of individual defendant*]/[*name of employer defendant*]'s employee] acted with [recklessness/oppression/fraud/ [or] malice] in physically abusing [*name of plaintiff*].

[If [*name of plaintiff*] proves the above, I will decide the amount of attorney fees and costs.]

New September 2003; Revised June 2005, October 2008

Directions for Use

Give this instruction along with CACI No. 3106, *Physical Abuse--Essential Factual Elements*, if the plaintiff seeks the enhanced remedies of attorney fees and costs and damages for the decedent's predeath pain and suffering. (See *Welf. & Inst. Code*, § 15657.)

If the individual responsible for the physical abuse is a defendant in the case, use "[*name of individual defendant*]." If only the individual's employer is a defendant, use "[*name of employer defendant*]'s employee."

If the plaintiff is seeking enhanced remedies against the individual's employer, also give CACI No. 3102A, *Employer Liability for Enhanced Remedies--Both Individual and Employer Defendants*, or CACI No. 3102B, *Employer Liability for Enhanced Remedies--Employer Defendant Only*.

The instructions in this series are not intended to cover every circumstance in which a plaintiff may bring

a cause of action under the Elder Abuse and Dependent Adult Civil Protection Act.

Sources and Authority

- *Welfare and Institutions Code section 15657* provides:

Where it is proven by clear and convincing evidence that a defendant is liable for physical abuse as defined in Section 15610.63, or neglect as defined in Section 15610.57, and that the defendant has been guilty of recklessness, oppression, fraud, or malice in the commission of this abuse, the following shall apply, in addition to all other remedies otherwise provided by law:

(a) The court shall award to the plaintiff reasonable attorney's fees and costs. The term "costs" includes, but is not limited to, reasonable fees for the services of a conservator, if any, devoted to the litigation of a claim brought under this article.

(b) The limitations imposed by *Section 377.34 of the Code of Civil Procedure* on the damages recoverable shall not apply. However, the damages recovered shall not exceed the damages permitted to be recovered pursuant to *subdivision (b) of Section 3333.2 of the Civil Code*.

(c) The standards set forth in *subdivision (b) of Section 3294 of the Civil Code* regarding the imposition of punitive damages on an employer based upon the acts of an employee shall be satisfied before any damages or attorney's fees permitted under this section may be imposed against an employer.

- "In order to obtain the remedies available in section 15657, a plaintiff must demonstrate by clear and convincing evidence that defendant is guilty of something more than negligence; he or she must show reckless, oppressive, fraudulent, or malicious conduct. The latter three categories involve 'intentional,' 'willful,' or 'conscious' wrongdoing of a 'despicable' or 'injurious' nature. [P] 'Recklessness' refers to a subjective state of culpability greater than simple negligence, which has been described as a 'deliberate disregard' of the 'high degree of probability' that an injury will occur. Recklessness, unlike negligence, involves more than 'inadvertence, incompetence, unskillfulness, or a failure to take precautions' but rather rises to the level of a 'conscious choice of a course of action ... with knowledge of the serious danger to others involved in it.' " (*Delaney v. Baker (1999) 20 Cal.4th 23, 31-32 [82 Cal.Rptr.2d 610, 971 P.2d 986]* , internal citations omitted.)

- "As amended in 1991, the Elder Abuse Act was designed to protect elderly and dependent persons from abuse, neglect, or abandonment. In addition to adopting measures designed to encourage reporting of abuse and neglect, the Act authorizes the court to award attorney fees to the prevailing plaintiffs and allows survivors to recover pain and suffering damages in cases of intentional and reckless abuse where the elder has died." (*Mack v. Soung (2000) 80 Cal.App.4th 966, 971-972 [95 Cal.Rptr.2d 830]* , internal citations omitted.)

- "The effect of the 1991 amendment to the elder abuse law was to ... permit a decedent's personal representative or successor to recover pain and suffering damages when plaintiff can prove by clear and convincing evidence recklessness, oppression, fraud, or malice in the commission of elder abuse. Even then, those damages would be subject to the \$250,000 cap placed by *Civil Code section 3333.2, subdivision (b)* for noneconomic damages against a health care provider. In this limited circumstance, the decedent's right to pain and suffering damages would not die with him or her; the damages would be recoverable by a survivor." (*ARA Living Centers-- Pacific, Inc. v. Superior Court (1993) 18 Cal.App.4th 1556, 1563 [23 Cal.Rptr.2d 224]* .)

■ "[I]f the neglect is 'reckless[],' or done with 'oppression, fraud or malice,' then the action falls within the scope of section 15657 and as such cannot be considered simply 'based on ... professional negligence' within the meaning of section 15657.2. The use of such language in section 15657, and the explicit exclusion of 'professional negligence' in section 15657.2, make clear the Elder Abuse Act's goal was to provide heightened remedies for, as stated in the legislative history, 'acts of egregious abuse' against elder and dependent adults, while allowing acts of negligence in the rendition of medical services to elder and dependent adults to be governed by laws specifically applicable to such negligence. That only these egregious acts were intended to be sanctioned under section 15657 is further underscored by the fact that the statute requires liability to be proved by a heightened 'clear and convincing evidence' standard." (*Delaney, supra*, 20 Cal.4th at p. 35 , internal citation omitted.)

■ " 'Liability' under section 15657 includes as an element 'causation,' which, as all elements of liability, must be proved by clear and convincing evidence for purposes of an award of attorney fees." (*Perlin v. Fountain View Management, Inc.* (2008) 163 Cal.App.4th 657, 664 [77 Cal.Rptr.3d 743] .)

■ "We reject plaintiffs' argument that a violation of the Act does not constitute an independent cause of action. Accordingly, plaintiffs' failure to obtain a verdict establishing causation--one element of liability--by clear and convincing evidence, precludes an award of attorney fees." (*Perlin, supra*, 163 Cal.App.4th at p. 666 .)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1686-1688

California Elder Law Litigation (Cont.Ed.Bar 2003) § 2.72

1 *California Forms of Pleading and Practice*, Ch. 5, *Abuse of Minors and Elderly*, § 5.35 (Matthew Bender)

Publisher's Notes

This instruction covers issues presented in BAJI Nos. 7.42, 7.46, and 7.47.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Family Law Family Protection & Welfare Elderly Persons Abuse, Endangerment & Neglect Public Health & Welfare Law Healthcare Services for Disabled & Elderly Persons Protection From Abuse & Neglect Torts Damages Costs & Attorney Fees General Overview Torts Wrongful Death & Survival Actions Remedies Compensatory Damages Pain & Suffering



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California Forms of Jury Instruction

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CHAPTER 31 California Judicial Council Elder Abuse and Dependent Adult Civil Protection Act Instructions

5-31 California Forms of Jury Instruction CACI 3108

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CHAPTER 31 California Judicial Council Elder Abuse and Dependent Adult Civil Protection Act Instructions

5-31 California Forms of Jury Instruction CACI 3109

CACI 3109 Abduction--Essential Factual Elements (Welf. & Inst. Code, § 15610.06)

[*Name of plaintiff*] **claims that** [[*name of individual defendant*]/ **and**] [*name of employer defendant*] **abducted** [*him/her/* [*name of decedent*]] **in violation of the Elder Abuse and Dependent Adult Civil Protection Act. To establish this claim, [*name of plaintiff*] must prove all of the following:**

1. That [[*name of individual defendant*]/ [*name of employer defendant*]'s **employee**] **[removed [*name of plaintiff/decedent*] from California and] restrained** [*him/her/* [*name of decedent*]] **from returning to California;**

2. That [*name of plaintiff/decedent*] **was [65 years of age or older/a dependent adult] at the time of the conduct;**

3. [That [*name of plaintiff/decedent*] did not have the capacity to consent to the [removal and] restraint;]

[*or*]

[That [[*name of plaintiff/decedent*]'s conservator/the court] did not consent to the [removal and] restraint;]

4. That [*name of plaintiff/decedent*] was harmed; and

5. That [[*name of individual defendant*]'s/[*name of employer defendant*]'s **employee's] conduct was a substantial factor in causing [*name of plaintiff/decedent*]'s harm.**

New September 2003; Revised December 2005, October 2008

Directions for Use

This instruction may be given in cases brought under the Elder Abuse and Dependent Adult Civil Protection Act by the victim of elder abduction, or by the survivors of the victim. If the victim is the plaintiff and is seeking damages for pain and suffering, see *CACI No. 3905A, Physical Pain, Mental Suffering, and Emotional Distress (Noneconomic Damage)* in the Damages series.

If the individual responsible for the abduction is a defendant in the case, use "[name of individual defendant]" throughout. If only the individual's employer is a defendant, use "[name of employer defendant]'s employee" throughout.

If the plaintiff seeks the enhanced remedies of attorney fees and costs, and in the case of a wrongful death, the decedent's pain and suffering, give *CACI No. 3110, Abduction--Enhanced Remedies Sought*. (See *Welf. & Inst. Code*, § 15657.05.)

If the plaintiff is seeking enhanced remedies against the individual's employer, also give either *CACI No. 3102A, Employer Liability for Enhanced Remedies--Both Individual and Employer Defendants*, or *CACI No. 3102B, Employer Liability for Enhanced Remedies--Employer Defendant Only*. To recover damages against the employer under a theory of vicarious liability, see instructions in the Vicarious Responsibility series (*CACI No. 3700 et seq.*).

The instructions in this series are not intended to cover every circumstance under which a plaintiff may bring a cause of action under the Elder Abuse and Dependent Adult Civil Protection Act.

Sources and Authority

- *Welfare and Institutions Code section 15610.06* provides: " 'Abduction' means the removal from this state and the restraint from returning to this state, or the restraint from returning to this state, of any elder or dependent adult who does not have the capacity to consent to the removal from this state and the restraint from returning to this state, or the restraint from returning to this state, as well as the removal from this state or the restraint from returning to this state, of any conservatee without the consent of the conservator or the court."

- *Welfare and Institutions Code section 15610.07* provides:

"Abuse of an elder or a dependent adult" means either of the following:

(a) Physical abuse, neglect, financial abuse, abandonment, isolation, abduction, or other treatment with resulting physical harm or pain or mental suffering.

(b) The deprivation by a care custodian of goods or services that are necessary to avoid physical harm or mental suffering.

- *Welfare and Institutions Code section 15610.23* provides:

(a) "Dependent adult" means any person residing in this state between the ages of 18 and 64 years who has physical or mental limitations that restrict his or her ability to carry out

5-31 California Forms of Jury Instruction CACI 3109

normal activities or to protect his or her rights, including, but not limited to, persons who have physical or developmental disabilities, or whose physical or mental abilities have diminished because of age.

(b) "Dependent adult" includes any person between the ages of 18 and 64 years who is admitted as an inpatient to a 24-hour health facility, as defined in *Sections 1250, 1250.2, and 1250.3 of the Health and Safety Code*.

■ *Welfare and Institutions Code section 15610.27* provides: " 'Elder' means any person residing in this state, 65 years of age or older."

■ *Welfare and Institutions Code section 15657.05* provides:

Where it is proven by clear and convincing evidence that an individual is liable for abduction, as defined in Section 15610.06, in addition to all other remedies otherwise provided by law:

(a)

(1) The court shall award to the plaintiff reasonable attorney's fees and costs. The term "costs" shall include, but is not limited to, costs of representing the abductee and his or her family in this state and any other state in any action related to the abduction and returning of the abductee to this state, as well as travel expenses for returning the abductee to this state and reasonable fees for the services of a conservator, if any, devoted to the litigation of a claim brought under this article.

(2) The award of attorney's fees shall be governed by the principles set forth in Section 15657.1.

(b) The limitations imposed by *Section 377.34 of the Code of Civil Procedure* on the damages recoverable shall not apply. However, the damages recovered shall not exceed the damages permitted to be recovered pursuant to *subdivision (b) of Section 3333.2 of the Civil Code*.

(c) The standards set forth in *subdivision (b) of Section 3294 of the Civil Code* regarding the imposition of punitive damages on an employer based upon the acts of an employee shall be satisfied before any damages or attorney's fees permitted under this section may be imposed against an employer.

■ "The purpose of the [Elder Abuse Act] is essentially to protect a particularly vulnerable portion of the population from gross mistreatment in the form of abuse and custodial neglect." (*Delaney v. Baker* (1999) 20 Cal.4th 23, 33 [82 Cal.Rptr.2d 610, 971 P.2d 986] .)

■ "As amended in 1991, the Elder Abuse Act was designed to protect elderly and dependent persons from abuse, neglect, or abandonment. In addition to adopting measures designed to encourage reporting of abuse and neglect, the Act authorizes the court to award attorney fees to the prevailing plaintiffs and allows survivors to recover pain and suffering damages in cases of intentional and reckless abuse where the elder has died." (*Mack v. Soung* (2000) 80 Cal.App.4th 966, 971-972 [95 Cal.Rptr.2d 830] , internal citations omitted.)

■ "The effect of the 1991 amendment to the elder abuse law was to ... permit a decedent's personal representative or successor to recover pain and suffering damages when plaintiff can prove by clear and convincing evidence recklessness, oppression, fraud, or malice in the commission of elder abuse. Even then, those damages would be subject to the \$250,000 cap placed by *Civil Code section 3333.2, subdivision (b)* for noneconomic damages against a health

care provider. In this limited circumstance, the decedent's right to pain and suffering damages would not die with him or her; the damages would be recoverable by a survivor." (*ARA Living Centers-- Pacific, Inc. v. Superior Court* (1993) 18 Cal.App.4th 1556, 1563 [23 Cal.Rptr.2d 224] .)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1686-1688

1 *California Forms of Pleading and Practice*, Ch. 5, *Abuse of Minors and Elders*, § 5.33[5] (Matthew Bender)

Publisher's Notes

This instruction covers issues presented in BAJI No. 7.40.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Family Law Family Protection & Welfare Elderly Persons Abuse, Endangerment & Neglect Public Health & Welfare Law Healthcare Services for Disabled & Elderly Persons Protection From Abuse & Neglect



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CHAPTER 31 California Judicial Council Elder Abuse and Dependent Adult Civil Protection Act Instructions

5-31 California Forms of Jury Instruction CACI 3110

CACI 3110 Abduction--Enhanced Remedies Sought (Welf. & Inst. Code, § 15657.05)

[Name of plaintiff] also seeks to recover [attorney fees and costs/ [and] damages for [name of decedent]'s pain and suffering]. To recover these remedies, [name of plaintiff] must prove all of the requirements for the abduction by clear and convincing evidence.

[If [name of plaintiff] proves the above, I will decide the amount of attorney fees and costs.]

New September 2003; Revised December 2005, April 2008, October 2008

Directions for Use

Give this instruction along with *CACI No. 3109, Abduction--Essential Factual Elements*, if the plaintiff seeks the enhanced remedies of attorney fees and costs and/or damages for the decedent's predeath pain and suffering. (See *Welf. & Inst. Code*, § 15657.05.)

If the plaintiff is seeking enhanced remedies against the individual's employer, also give *CACI No. 3102A, Employer Liability for Enhanced Remedies--Both Individual and Employer Defendants*, or *CACI No. 3102B, Employer Liability for Enhanced Remedies--Employer Defendant Only*.

The instructions in this series are not intended to cover every circumstance in which a plaintiff may bring a cause of action under the Elder Abuse and Dependent Adult Civil Protection Act.

Sources and Authority

- *Welfare and Institutions Code* section 15657.05 provides:

Where it is proven by clear and convincing evidence that an individual is liable for abduction, as defined in Section 15610.06, in addition to all other remedies otherwise provided by law:

(a)

(1) The court shall award to the plaintiff reasonable attorney's fees and costs. The term "costs" shall include, but is not limited to, costs of representing the abductee and his or her family in this state and any other state in any action related to the abduction and returning of the abductee to this state, as well as travel expenses for returning the abductee to this state and reasonable fees for the services of a conservator, if any, devoted to the litigation of a claim brought under this article.

(2) The award of attorney's fees shall be governed by the principles set forth in Section 15657.1.

(b) The limitations imposed by *Section 377.34 of the Code of Civil Procedure* on the damages recoverable shall not apply. However, the damages recovered shall not exceed the damages permitted to be recovered pursuant to *subdivision (b) of Section 3333.2 of the Civil Code*.

(c) The standards set forth in *subdivision (b) of Section 3294 of the Civil Code* regarding the imposition of punitive damages on an employer based upon the acts of an employee shall be satisfied before any damages or attorney's fees permitted under this section may be imposed against an employer.

■ "The purpose of the [Elder Abuse Act] is essentially to protect a particularly vulnerable portion of the population from gross mistreatment in the form of abuse and custodial neglect." (*Delaney v. Baker* (1999) 20 Cal.4th 23, 33 [82 Cal.Rptr.2d 610, 971 P.2d 986] .)

■ "As amended in 1991, the Elder Abuse Act was designed to protect elderly and dependent persons from abuse, neglect, or abandonment. In addition to adopting measures designed to encourage reporting of abuse and neglect, the Act authorizes the court to award attorney fees to the prevailing plaintiffs and allows survivors to recover pain and suffering damages in cases of intentional and reckless abuse where the elder has died." (*Mack v. Soung* (2000) 80 Cal.App.4th 966, 971-972 [95 Cal.Rptr.2d 830] , internal citations omitted.)

■ " 'Liability' under section 15657 includes as an element 'causation,' which, as all elements of liability, must be proved by clear and convincing evidence for purposes of an award of attorney fees." (*Perlin v. Fountain View Management, Inc.* (2008) 163 Cal.App.4th 657, 664 [77 Cal.Rptr.3d 743] .)

■ "We reject plaintiffs' argument that a violation of the Act does not constitute an independent cause of action. Accordingly, plaintiffs' failure to obtain a verdict establishing causation--one element of liability--by clear and convincing evidence, precludes an award of attorney fees." (*Perlin, supra*, 163 Cal.App.4th at p. 666 .)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts §§ 1686-1688

Publisher's Notes

This instruction covers issues presented in BAJI No. 7.47.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsStandard InstructionsFamily LawFamily Protection & WelfareElderly
PersonsAbuse, Endangerment & NeglectPublic Health & Welfare LawHealthcareServices for Disabled & Elderly
PersonsProtection From Abuse & NeglectTortsDamagesCosts & Attorney FeesGeneral OverviewTortsWrongful Death
& Survival ActionsRemediesCompensatory DamagesPain & Suffering



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CHAPTER 31 California Judicial Council Elder Abuse and Dependent Adult Civil Protection Act Instructions

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CHAPTER 31 California Judicial Council Elder Abuse and Dependent Adult Civil Protection Act Instructions

5-31 California Forms of Jury Instruction CACI 3112

CACI 3112 "Dependent Adult" Explained (Welf. & Inst. Code, § 15610.23)

A "dependent adult" is a person between the ages of 18 and 64 years [insert one of the following:]

[who has physical or mental limitations that restrict his or her ability to carry out normal activities or to protect his or her rights. This includes persons who have physical or developmental disabilities or whose physical or mental abilities have diminished because of age.]

[who is admitted as an inpatient to [a/an] [insert 24-hour health facility].]

New September 2003

Directions for Use

Read the alternative that is most appropriate to the facts of the case.

Sources and Authority

- *Welfare and Institutions Code section 15610.23* provides:

(a) "Dependent adult" means any person residing in this state between the ages of 18 and 64 years who has physical or mental limitations that restrict his or her ability to carry out normal activities or to protect his or her rights, including, but not limited to, persons who have physical or developmental disabilities, or whose physical or mental abilities have diminished because of age.

(b) "Dependent adult" includes any person between the ages of 18 and 64 years who is admitted as an inpatient to a 24-hour health facility, as defined in *Sections 1250, 1250.2, and 1250.3 of the Health and Safety Code*.

■ *Welfare and Institutions Code section 15610.25* provides:

" 'Developmentally disabled person' means a person with a developmental disability specified by or as described in subdivision (a) of Section 4512."

Secondary Sources

California Elder Law Litigation (Cont.Ed.Bar) § 6.22

1 *California Forms of Pleading and Practice, Ch. 5, Abuse of Minors and Elderly, § 5.31* (Matthew Bender)

Publisher's Notes

This instruction covers issues presented in BAJI No. 7.40.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Family Law Family Protection & Welfare Dependent & Disabled Adults General Overview Public Health & Welfare Law Healthcare Services for Disabled & Elderly Persons General Overview



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CHAPTER 31 California Judicial Council Elder Abuse and Dependent Adult Civil Protection Act Instructions

5-31 California Forms of Jury Instruction CACI 3113

CACI 3113 "Recklessness" Explained

[[*Name of individual defendant*]/[*Name of employer defendant*]'s employee] acted with "recklessness" if [he/she] knew it was highly probable that [his/her] conduct would cause harm and [he/she] knowingly disregarded this risk.

"Recklessness" is more than just the failure to use reasonable care.

New September 2003; Revised October 2008

Directions for Use

If the individual responsible for the elder abuse is a defendant in the case, use "[*name of individual defendant*]." If only the individual's employer is a defendant, use "[*name of employer defendant*]'s employee."

Sources and Authority

- " 'Recklessness' refers to a subjective state of culpability greater than simple negligence, which has been described as a 'deliberate disregard' of the 'high degree of probability' that an injury will occur. Recklessness, unlike negligence, involves more than 'inadvertence, incompetence, unskillfulness, or a failure to take precautions' but rather rises to the level of a 'conscious choice of a course of action ... with knowledge of the serious danger to others involved in it.' " (*Delaney v. Baker* (1999) 20 Cal.4th 23, 31-32 [82 Cal.Rptr.2d 610, 971 P.2d 986] , internal citations omitted.)

- In *Conservatorship of Gregory v. Beverly Enterprises, Inc.* (2000) 80 Cal.App.4th 514, 521 [95

Cal.Rptr.2d 336] , the court found that the following instruction adequately defined "recklessness": "[T]he term 'recklessness' requires that the defendant have knowledge of a high degree of probability that dangerous consequences will result from his or her conduct and acts with deliberate disregard of that probability or with a conscious disregard of the probable consequences. Recklessness requires conduct more culpable than mere negligence."

■ *Restatement Second of Torts, section 500*, provides: "The actor's conduct is in reckless disregard of the safety of another if he does an act or intentionally fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to realize, not only that his conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent."

Secondary Sources

1 *California Forms of Pleading and Practice, Ch. 5, Abuse of Minors and Elderly, § 5.33[1]* (Matthew Bender)

Publisher's Notes

This instruction covers issues presented in BAJI No. 7.47.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Torts Negligence Standards of Care General Overview



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5-31 California Forms of Jury Instruction CACI 3114

CACI 3114 "Malice" Explained

"Malice" means that [[*name of individual defendant*]/[*name of employer defendant*]'s employee] acted with intent to cause injury or that [his/her] conduct was despicable and was done with a willful and knowing disregard of the rights or safety of another. A person acts with knowing disregard when he or she is aware of the probable dangerous consequences of his or her conduct and deliberately fails to avoid those consequences.

"Despicable conduct" is conduct that is so vile, base, or contemptible that it would be looked down on and despised by reasonable people.

New September 2003; Revised October 2008

Directions for Use

If the individual responsible for the elder abuse is a defendant in the case, use "[*name of individual defendant*]." If only the individual's employer is a defendant, use "[*name of employer defendant*]'s employee."

Sources and Authority

- *Civil Code section 3294(c)(1)* provides: " 'Malice' means conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others."

- "Used in its ordinary sense, the adjective 'despicable' is a powerful term that refers to circumstances that are 'base,' 'vile,' or 'contemptible.' As amended to include this word, the statute plainly indicates that

absent an intent to injure the plaintiff, 'malice' requires more than a 'willful and conscious' disregard of the plaintiffs' interests. The additional component of 'despicable conduct' must be found." (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 725 [34 Cal.Rptr.2d 898, 882 P.2d 894] , internal citations omitted.)

■ "Malice, for purposes of awarding exemplary damages, includes 'despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others.' To establish conscious disregard, the plaintiff must show 'that the defendant was aware of the probable dangerous consequences of his conduct, and that he wilfully and deliberately failed to avoid those consequences.' " (*Hoch v. Allied-Signal, Inc.* (1994) 24 Cal.App.4th 48, 61 [29 Cal.Rptr.2d 615] , internal citations omitted.)

Secondary Sources

1 *California Forms of Pleading and Practice, Ch. 5, Abuse of Minors and Elderly*, § 5.33[1] (Matthew Bender)

Publisher's Notes

This instruction covers issues presented in BAJI No. 7.47.

Legal Topics:

For related research and practice materials, see the following legal topics:

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CHAPTER 31 California Judicial Council Elder Abuse and Dependent Adult Civil Protection Act Instructions

5-31 California Forms of Jury Instruction CACI 3115

CACI 3115 "Oppression" Explained

"Oppression" means that *[[name of individual defendant]'s/[name of employer defendant]'s employee's]* **conduct was despicable and subjected** *[name of plaintiff/decedent]* **to cruel and unjust hardship in knowing disregard of** *[his/her]* **rights.**

"Despicable conduct" is conduct that is so vile, base, or contemptible that it would be looked down on and despised by reasonable people.

New September 2003; Revised October 2008

Directions for Use

If the individual responsible for the elder abuse is a defendant in the case, use "*[name of individual defendant]*'s." If only the individual's employer is a defendant, use "*[name of employer defendant]*'s employee's."

Sources and Authority

- *Civil Code section 3294(c)(2)* provides: " 'Oppression' means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights."

- "Used in its ordinary sense, the adjective 'despicable' is a powerful term that refers to circumstances that are 'base,' 'vile,' or 'contemptible.' As amended to include this word, the statute plainly indicates that absent an intent to injure the plaintiff, 'malice' requires more than a 'willful and conscious' disregard of the plaintiffs' interests. The additional component of 'despicable conduct' must be found." (*College*

Hospital, Inc. v. Superior Court (1994) 8 Cal.4th 704, 725 [34 Cal.Rptr.2d 898, 882 P.2d 894] , internal citations omitted.)

Secondary Sources

1 *California Forms of Pleading and Practice*, Ch. 5, *Abuse of Minors and Elderly*, § 5.33[1] (Matthew Bender)

Publisher's Notes

This instruction covers issues presented in BAJI No. 7.47.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsStandard InstructionsTortsIntentional TortsGeneral Overview



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California Forms of Jury Instruction

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CHAPTER 31 California Judicial Council Elder Abuse and Dependent Adult Civil Protection Act Instructions

5-31 California Forms of Jury Instruction CACI 3116

CACI 3116 "Fraud" Explained

"Fraud" means an intentional misrepresentation, deceit, or concealment of a material fact with the intention of depriving [name of plaintiff/decedent] of property or of a legal right or otherwise to cause [name of plaintiff/decedent] injury.

New September 2003; Revised October 2008

Sources and Authority

■ *Civil Code section 3294(c)(3)* provides: " 'Fraud' means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury."

Secondary Sources

1 *California Forms of Pleading and Practice, Ch. 5, Abuse of Minors and Elderly, § 5.33[4]* (Matthew Bender)

17 *California Forms of Pleading and Practice, Ch. 215, Duress, Menace, Fraud, Undue Influence, and Mistake, § 215.70* (Matthew Bender)

Publisher's Notes

This instruction covers issues presented in BAJI No. 7.47.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsStandard InstructionsTortsBusiness TortsFraud &
MisrepresentationActual FraudElementsTortsBusiness TortsFraud & MisrepresentationNondisclosureElements



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California Forms of Jury Instruction

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CHAPTER 31 California Judicial Council Elder Abuse and Dependent Adult Civil Protection Act Instructions

5-31 California Forms of Jury Instruction CACI 3117-CACI 3199

Reserved for Future Use

CACI 3117Reserved for Future Use



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CHAPTER 31 California Judicial Council Elder Abuse and Dependent Adult Civil Protection Act Instructions

5-31 California Forms of Jury Instruction CACI VF-3100

CACI VF-3100 Financial Abuse--Individual or Individual and Employer Defendants (Welf. & Inst. Code, §§ 15610.30, 15657.5(b))

We answer the questions submitted to us as follows:

1. Was [name of plaintiff/decedent] [65 years of age or older/a dependent adult] at the time of the conduct?

_____ Yes _____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Did [name of employee defendant] [take/hide/appropriate/obtain [or] retain] [name of plaintiff/decedent]'s property [for a wrongful use/ [or] with the intent to defraud [or] by undue influence]?

_____ Yes _____ No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Was [name of employee defendant]'s conduct a substantial factor in causing harm to [name of plaintiff/decedent]?

_____ Yes _____ No

If your answer to question 3 is yes, then answer question[s] 4 [and 5]. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. What are [name of plaintiff/decedent]'s damages?

[a. Past economic loss

[lost earnings \$_____].....

[lost profits \$_____].....

[medical expenses \$_____].....

[other past economic loss \$_____].....

..... **Total Past Economic Damages: \$_____]**

[b. Future economic loss

[lost earnings \$_____].....

[lost profits \$_____].....

[medical expenses \$_____].....

[other future economic loss \$_____]

..... **Total Future Economic Damages: \$_____]**

[c. Past noneconomic loss, including [physical pain/mental suffering:] \$_____]

[d. Future noneconomic loss, including [physical pain/mental suffering:]\$_____]

..... **TOTAL \$_____**

[5. Did [name of plaintiff] prove by clear and convincing evidence that [name of employee defendant] acted with [recklessness/malice/oppression/ [or] fraud]?

_____ Yes _____ No

If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. What were [name of decedent]'s damages for noneconomic loss for pain, suffering, or disfigurement incurred before death?\$_____]

Signed: _____

Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the [clerk/bailiff/judge].

New September 2003; Revised June 2005, April 2007, April 2008, October 2008, April 2009

Directions for Use

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on *CACI No. 3100, Financial Abuse--Essential Factual Elements*, and *CACI No. 3101, Financial Abuse--Decedent's Pain and Suffering*.

If the plaintiff alleges that the defendant assisted in the wrongful conduct, modify question 1 as in element 2 of *CACI No. 3100*.

If specificity is not required, users do not have to itemize all the damages listed in question 4 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If the jury answers "yes" to questions 1, 2, and 3, attorney fees and costs are recoverable from the individual defendant without any additional showing of any kind. (*Welf. & Inst. Code, § 15657.5(a).*) Attorney fees are also recoverable from the employer, assuming that standard vicarious liability is shown. (See *Welf. & Inst. Code, § 15657.5(c).*) Incorporate questions 3 and 4 from *CACI No. VF-3700, Negligence--Vicarious Liability*, to address the liability of the employer for the acts of the employee.

Should the financial abuse in some way have caused the victim's death, the decedent's pain and suffering before death is recoverable on a showing by clear and convincing evidence that the individual defendant acted with recklessness, oppression, fraud, or malice. (See *Welf. & Inst. Code, § 15657.5(b)*; *Code Civ. Proc., § 377.34*.) In such a case, in question 4, include only item 4a for past economic loss. But also include questions 5 and 6.

If punitive damages are sought, incorporate a verdict form for punitive damages. (See *CACI Nos. VF-3900 -VF-3904*.)

If there are multiple causes of action, users may wish to combine the individual forms into one form.

Publisher's Notes

This instruction covers issues presented in BAJI No. 16.25.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Verdicts Special Verdicts Family Law Family Protection & Welfare Elderly Persons Abuse, Endangerment & Neglect Public Health & Welfare Law Healthcare Services for Disabled & Elderly Persons Protection From Abuse & Neglect Torts Damages Compensatory Damages General Overview



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California Forms of Jury Instruction

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CHAPTER 31 California Judicial Council Elder Abuse and Dependent Adult Civil Protection Act Instructions

5-31 California Forms of Jury Instruction CACI VF-3101

CACI VF-3101 Financial Abuse--Employer Defendant Only (Welf. & Inst. Code, §§ 15610.30, 15657.5(b))

We answer the questions submitted to us as follows:

1. Was [name of plaintiff/decedent] [65 years of age or older/a dependent adult] at the time of the conduct?

_____ Yes _____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Did [name of defendant]'s employee [take/hide/appropriate/obtain [or] retain] [name of plaintiff/decedent]'s property [for a wrongful use/ [or] with the intent to defraud [or] by undue influence]?

_____ Yes _____ No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Was the employee's conduct a substantial factor in causing harm to [name of plaintiff/decedent]?

_____ Yes _____ No

If your answer to question 3 is yes, then answer question[s] 4 [and 5]. If you answered no, stop

here, answer no further questions, and have the presiding juror sign and date this form.

4. What are [name of plaintiff/decedent]'s damages?

[a. Past economic loss

[lost earnings \$_____].....

[lost profits \$_____].....

[medical expenses \$_____].....

[other past economic loss \$_____].....

..... **Total Past Economic Damages: \$_____]**

[b. Future economic loss

[lost earnings \$_____].....

[lost profits \$_____].....

[medical expenses \$_____].....

[other future economic loss \$_____]

..... **Total Future Economic Damages: \$_____]**

**[c. Past noneconomic loss, including [physical
pain/mental suffering:] \$_____]**

**[d. Future noneconomic loss, including [physical
pain/mental suffering:] \$_____]**

..... **TOTAL \$_____**

**5. Did [name of plaintiff] prove by clear and convincing evidence that the employee acted with
[recklessness/malice/oppression/ [or] fraud]?**

_____ Yes _____ No

If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. What were [name of decedent]'s damages for noneconomic loss for pain, suffering, or disfigurement incurred before death? \$_____]

Signed: _____

Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the [clerk/bailiff/judge].

New September 2003; Revised June 2005, April 2007, April 2008, October 2008, April 2009

Directions for Use

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on *CACI No. 3100, Financial Abuse--Essential Factual Elements*, and *CACI No. 3101, Financial Abuse--Decedent's Pain and Suffering*.

If the plaintiff alleges that the defendant's employees assisted in the wrongful conduct, modify question 1 as in element 1 of *CACI No. 3100*.

If specificity is not required, users do not have to itemize all the damages listed in question 4 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If the jury answers "yes" to questions 1, 2, and 3, attorney fees and costs will be recoverable from the employer, assuming that standard vicarious liability is shown. (See *Welf. & Inst. Code*, § 15657.5(c).) Incorporate questions 3 and 4 from *CACI No. VF-3700, Negligence--Vicarious Liability*, to address the liability of the employer for the acts of the employee.

Should the financial abuse in some way have caused the victim's death, the decedent's pain and suffering before death is recoverable on a showing by clear and convincing evidence that the employee acted with recklessness, oppression, fraud, or malice. (See *Welf. & Inst. Code*, § 15657.5(b); *Code Civ. Proc.*, § 377.34.) In such a case, in question 4 include only item 4a for past economic loss. But also include questions 5 and 6.

If punitive damages are sought, incorporate language from a verdict form for punitive damages. (See *CACI Nos. VF-3900 -VF-3904*.)

If there are multiple causes of action, users may wish to combine the individual forms into one form.

Publisher's Notes

This instruction covers issues presented in BAJI No. 16.25.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Verdicts Special Verdicts Family Law Family Protection & Welfare Elderly Persons Abuse, Endangerment & Neglect Public Health & Welfare Law Healthcare Services for Disabled & Elderly Persons Protection From Abuse & Neglect Torts Damages Compensatory Damages General Overview



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California Forms of Jury Instruction

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CHAPTER 31 California Judicial Council Elder Abuse and Dependent Adult Civil Protection Act Instructions

5-31 California Forms of Jury Instruction CACI VF-3102

CACI VF-3102 Neglect--Individual or Individual and Employer Defendants (Welf. & Inst. Code, §§ 15610.57, 15657; Civ. Code, § 3294(b))

We answer the questions submitted to us as follows:

1. Was [name of plaintiff/decedent] [65 years of age or older/a dependent adult] while [he/she] was in [name of employee defendant]'s care or custody?

_____ Yes _____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Did [name of employee defendant] have care or custody of [name of plaintiff/decedent]?

_____ Yes _____ No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Did [name of employee defendant] fail to use that degree of care that a reasonable person in the same situation would have used in assisting in personal hygiene or in the provision of food, clothing, or shelter?

_____ Yes _____ No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer

no further questions, and have the presiding juror sign and date this form.

4. Was [name of employee defendant]'s conduct a substantial factor in causing harm to [name of plaintiff/decedent]?

_____ Yes _____ No

If your answer to question 4 is yes, then answer question[s] 5 [and] [select 6, 7 or both]. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. What are [name of plaintiff/decedent]'s damages?

[a. Past economic loss

[lost earnings \$ _____].....

[lost profits \$ _____].....

[medical expenses \$ _____].....

[other past economic loss \$ _____].....

..... **Total Past Economic Damages: \$ _____]**

[b. Future economic loss

[lost earnings \$ _____].....

[lost profits \$ _____].....

[medical expenses \$ _____].....

[other future economic loss \$ _____].....

..... **Total Past Economic Damages: \$ _____]**

[c. Past noneconomic loss, including [physical pain/mental suffering:]\$ _____]

[d. Future noneconomic loss, including [physical pain/mental suffering:] \$ _____]

..... **TOTAL \$ _____**

[6. Did [name of plaintiff] prove by clear and convincing evidence that an officer, a director, or a managing agent of [name of employer defendant] had advance knowledge of the unfitness of [name of employee defendant] and employed [him/her] with a knowing disregard of the rights or safety of others?

_____ Yes _____ No]

[7. Did [name of plaintiff] prove 1 through 4 above by clear and convincing evidence and also prove by clear and convincing evidence that [name of employee defendant] acted with [recklessness/malice/oppression/ [or] fraud]?

_____ Yes _____ No]

[If your answer to question 7 is yes, then answer question 8. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

8. What were [name of decedent]'s damages for noneconomic loss for pain, suffering, or disfigurement incurred before death?

..... \$ _____]

Signed: _____

Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the [clerk/bailiff/judge].

New September 2003; Revised April 2007, April 2008, October 2008

Directions for Use

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on *CACI No. 3103, Neglect--Essential Factual Elements*, *CACI No. 3104, Neglect--Enhanced Remedies Sought*, and *CACI No. 3102A, Employer Liability for Enhanced Remedies--Both Individual and Employer Defendants*.

Question 3 can be modified to correspond to the alleged wrongful conduct as in element 3 of *CACI No. 3103*.

Optional questions 6, 7, and 8 address enhanced remedies. If the neglect is proved by clear and convincing evidence, and it is also proved by clear and convincing evidence that the individual defendant acted with recklessness, malice, oppression, or fraud, attorney fees, costs, and a decedent's predeath pain and suffering may be recovered. (See *Welf. & Inst. Code*, § 15657.) If any of these remedies are sought against the employer, include question 6. (See *Welf. & Inst. Code*, § 15657(c).) Question 6 may be altered to correspond to one of the alternative bracketed options for employer liability in *CACI No. 3102A*.

If any enhanced remedies are sought against either the individual or the employer, include question 7. If the neglect led to the elder's death, in question 5 include only item 5a for past economic loss. But also include the transitional language after question 7 and include question 8.

In the transitional language after question 4, direct the jury to answer questions 6 or 7 or both, depending on which questions are to be included. If question 7 is to be included but question 6 is not, then 7 will be renumbered as 6.

If punitive damages are sought, incorporate language from a verdict form for punitive damages. (See *CACI Nos. VF-3900 -VF-3904.*)

If there are multiple causes of action, users may wish to combine the individual forms into one form.

Publisher's Notes

This instruction covers issues presented in BAJI No. 16.25.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Verdicts Special Verdicts Family Law Family Protection & Welfare Elderly
Persons Abuse, Endangerment & Neglect Public Health & Welfare Law Healthcare Services for Disabled & Elderly
Persons Protection From Abuse & Neglect Torts Damages Compensatory Damages General Overview



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California Forms of Jury Instruction

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CHAPTER 31 California Judicial Council Elder Abuse and Dependent Adult Civil Protection Act Instructions

5-31 California Forms of Jury Instruction CACI VF-3103

CACI VF-3103 Neglect--Employer Defendant Only (Welf. & Inst. Code, §§ 15610.57, 15657; Civ. Code, § 3294(b))

We answer the questions submitted to us as follows:

1. Was [name of plaintiff/decedent] [65 years of age or older/a dependent adult] while [he/she] was in [name of defendant]'s care or custody?

_____ Yes _____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Was [name of plaintiff/decedent] in [name of defendant]'s care or custody?

_____ Yes _____ No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Did one or more of [name of defendant]'s employees fail to use that degree of care that a reasonable person in the same situation would have used in assisting in personal hygiene or in the provision of food, clothing, or shelter?

_____ Yes _____ No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer

no further questions, and have the presiding juror sign and date this form.

4. Was the employee's conduct a substantial factor in causing harm to [*name of plaintiff/decedent*]?

_____ Yes _____ No

If your answer to question 4 is yes, then answer question[s] 5 [and 6]. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. What are [*name of plaintiff/decedent*]'s damages?

[a. Past economic loss

[lost earnings \$ _____].....

[lost profits \$ _____].....

[medical expenses \$ _____].....

[other past economic loss \$ _____].....

..... Total Past Economic Damages: \$ _____]

[b. Future economic loss

[lost earnings \$ _____].....

[lost profits \$ _____].....

[medical expenses \$ _____].....

[other future economic loss \$ _____].....

..... Total Past Economic Damages: \$ _____]

[c. Past noneconomic loss, including [physical pain/mental suffering:] \$ _____]

[d. Future noneconomic loss, including [physical pain/mental suffering:] \$ _____]

..... TOTAL \$ _____

[6. Did [*name of plaintiff*] prove by clear and convincing evidence that an officer, a director, or a managing agent of [*name of defendant*] had advance knowledge of the unfitness of the employee and employed [him/her] with a knowing disregard of the rights or safety of others?

_____ Yes _____ No

If your answer to question 6 is yes, then answer question 7. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

7. Did [name of plaintiff] prove 1 through 4 above by clear and convincing evidence and also prove by clear and convincing evidence that the employee acted with [recklessness/malice/oppression/ [or] fraud]?

_____ Yes _____ No]

[If your answer to question 7 is yes, then answer question 8. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

8. What were [name of decedent]'s damages for noneconomic loss for pain, suffering, or disfigurement incurred before death?

..... \$ _____]

Signed: _____
Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the [clerk/bailiff/judge].

New September 2003; Revised April 2007, April 2008, October 2008

Directions for Use

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on *CACI No. 3103, Neglect--Essential Factual Elements*, *CACI No. 3104, Neglect--Enhanced Remedies Sought*, and *CACI No. 3102B, Employer Liability for Enhanced Remedies--Employer Defendant Only*.

Question 3 can be modified to correspond to the alleged wrongful conduct as in element 3 of *CACI No. 3103*.

If specificity is not required, users do not have to itemize all the damages listed in question 5 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

Questions 6 and 7 are required to obtain employer liability for enhanced remedies, including attorney fees and costs. (See *Welf. & Inst. Code*, § 15657; *Code Civ. Proc.*, § 377.34.) Question 6 may be altered to correspond to one of the alternative bracketed options in *CACI No. 3102B*.

If the neglect led to the elder's death, in question 5 include only item 5a for past economic loss. But also include the transitional language after question 7 and include question 8.

If punitive damages are sought, incorporate language from a verdict form for punitive damages. (See *CACI Nos. VF-3900 -VF-3904*.)

If there are multiple causes of action, users may wish to combine the individual forms into one form.

Publisher's Notes

This instruction covers issues presented in BAJI No. 16.25.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsVerdictsSpecial VerdictsFamily LawFamily Protection & WelfareElderly
PersonsAbuse, Endangerment & NeglectPublic Health & Welfare LawHealthcareServices for Disabled & Elderly
PersonsProtection From Abuse & NeglectTortsDamagesCompensatory DamagesGeneral Overview



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California Forms of Jury Instruction

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CHAPTER 31 California Judicial Council Elder Abuse and Dependent Adult Civil Protection Act Instructions

5-31 California Forms of Jury Instruction CACI VF-3104

CACI VF-3104 Physical Abuse--Individual or Individual and Employer Defendants (Welf. & Inst. Code, §§ 15610.63, 15657; Civ. Code, § 3294(b))

We answer the questions submitted to us as follows:

1. Was [name of plaintiff/decedent] [65 years of age or older/a dependent adult] at the time of the conduct?

_____ Yes _____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Did [name of employee defendant] physically abuse [name of plaintiff/decedent]?

_____ Yes _____ No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Was [name of employee defendant]'s conduct a substantial factor in causing harm to [name of plaintiff/decedent]?

_____ Yes _____ No

If your answer to question 3 is yes, then answer question 4 [and] [select 5, 6, or both]. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date

this form.

4. What are [name of plaintiff/decedent]'s damages?

[a. Past economic loss

[lost earnings \$ _____].....

[lost profits \$ _____].....

[medical expenses \$ _____].....

[other past economic loss \$ _____].....

..... **Total Past Economic Damages: \$ _____]**

[b. Future economic loss

[lost earnings \$ _____].....

[lost profits \$ _____].....

[medical expenses \$ _____].....

[other future economic loss \$ _____].....

..... **Total Past Economic Damages: \$ _____]**

**[c. Past noneconomic loss, including [physical
pain/mental suffering:] \$ _____]**

**[d. Future noneconomic loss, including [physical
pain/mental suffering:] \$ _____]**

..... **TOTAL \$ _____**

[5. Did [name of plaintiff] prove by clear and convincing evidence that an officer, a director, or a managing agent of [name of employer defendant] had advance knowledge of the unfitness of [name of employee defendant] and employed [him/her] with a knowing disregard of the rights or safety of others?

_____ Yes _____ No]

[6. Did [name of plaintiff] prove 1 through 3 above by clear and convincing evidence and also prove by clear and convincing evidence that [name of employee defendant] acted with [recklessness/malice/oppression/ [or] fraud]?

_____ Yes _____ No]

[If your answer to question 6 is yes, then answer question 7. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

7. What were [name of decedent]'s damages for noneconomic loss for pain, suffering, or disfigurement incurred before death?

..... \$ _____]

Signed: _____

Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the [clerk/bailiff/judge].

New September 2003; Revised April 2007, April 2008, October 2008

Directions for Use

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on *CACI No. 3106, Physical Abuse--Essential Factual Elements*, *CACI No. 3107, Physical Abuse--Enhanced Remedies Sought*, and *CACI No. 3102A, Employer Liability for Enhanced Remedies--Both Individual and Employer Defendants*.

If specificity is not required, users do not have to itemize all the damages listed in question 4 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

Optional questions 5, 6, and 7 address enhanced remedies. If the physical abuse is proved by clear and convincing evidence, and it is also proved by clear and convincing evidence that the individual defendant acted with recklessness, malice, oppression, or fraud, attorney fees, costs, and a decedent's predeath pain and suffering may be recovered. (See *Welf. & Inst. Code*, § 15657.) If any of these remedies are sought against the employer, include question 5. (See *Welf. & Inst. Code*, § 15657(c).) Question 5 may be altered to correspond to one of the alternative bracketed options for employer liability in *CACI No. 3102A*.

If any enhanced remedies are sought against either the individual or the employer, include question 6. If the physical abuse led to the neglected elder's death, in question 4 include only item 4a for past economic loss. But also include the transitional language after question 6 and include question 7.

In the transitional language after question 3, direct the jury to answer questions 5 or 6 or both, depending on which questions are to be included. If question 6 is to be included but question 5 is not, then 6 will be renumbered as 5.

If punitive damages are sought, incorporate language from a verdict form for punitive damages. (See *CACI Nos. VF-3900 -VF-3904*.)

If there are multiple causes of action, users may wish to combine the individual forms into one form.

Publisher's Notes

This instruction covers issues presented in BAJI No. 16.25.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Verdicts Special Verdicts Family Law Family Protection & Welfare Elderly
Persons Abuse, Endangerment & Neglect Public Health & Welfare Law Healthcare Services for Disabled & Elderly
Persons Protection From Abuse & Neglect Torts Damages Compensatory Damages General Overview



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California Forms of Jury Instruction

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CHAPTER 31 California Judicial Council Elder Abuse and Dependent Adult Civil Protection Act Instructions

5-31 California Forms of Jury Instruction CACI VF-3105

CACI VF-3105 Physical Abuse--Employer Defendant Only (Welf. & Inst. Code, §§ 15610.63, 15657; Civ. Code, § 3294(b))

We answer the questions submitted to us as follows:

1. Was [name of plaintiff/decedent] [65 years of age or older/a dependent adult] at the time of the conduct?

_____ Yes _____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Did [name of defendant]'s employee physically abuse [name of plaintiff/decedent]?

_____ Yes _____ No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Was the employee's conduct a substantial factor in causing harm to [name of plaintiff/decedent]?

_____ Yes _____ No

If your answer to question 3 is yes, then answer question[s] 4 [and 5]. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. What are [name of plaintiff/decedent]'s damages?**[a. Past economic loss**

[lost earnings \$ _____].....

[lost profits \$ _____].....

[medical expenses \$ _____].....

[other past economic loss \$ _____].....

..... **Total Past Economic Damages: \$ _____]****[b. Future economic loss**

[lost earnings \$ _____].....

[lost profits \$ _____].....

[medical expenses \$ _____].....

[other future economic loss \$ _____].....

..... **Total Past Economic Damages: \$ _____]****[c. Past noneconomic loss, including [physical
pain/mental suffering:] \$ _____]****[d. Future noneconomic loss, including [physical
pain/mental suffering:] \$ _____]**..... **TOTAL \$ _____****[5. Did [name of plaintiff] prove by clear and convincing evidence that an officer, a director, or a managing agent of [name of defendant] had advance knowledge of the unfitness of the employee and employed [him/her/them] with a knowing disregard of the rights or safety of others?**_____ **Yes** _____ **No****If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.****6. Did [name of plaintiff] prove 1 through 3 by clear and convincing evidence and also prove by clear and convincing evidence that the employee acted with [recklessness/malice/oppresion/ [or] fraud]?**_____ **Yes** _____ **No]****[If your answer to question 6 is yes, then answer question 7. If you answered no, stop here, answer no further**

questions, and have the presiding juror sign and date this form.

7. What were [name of decedent]'s damages for noneconomic loss for pain, suffering, or disfigurement incurred before death?

..... \$ _____]

Signed: _____

Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the [clerk/bailiff/judge].

New September 2003; Revised April 2007, April 2008, October 2008

Directions for Use

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on *CACI No. 3106, Physical Abuse--Essential Factual Elements*, *CACI No. 3107, Physical Abuse--Enhanced Remedies Sought*, and *CACI No. 3102B, Employer Liability for Enhanced Remedies--Employer Defendant Only*.

If specificity is not required, users do not have to itemize all the damages listed in question 4 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

Questions 5 and 6 are required to obtain employer liability for enhanced remedies, including attorney fees and costs. (See *Welf. & Inst. Code*, § 15657; *Code Civ. Proc.*, § 377.34.) Question 5 may be altered to correspond to one of the alternative bracketed options in *CACI No. 3102B*.

If the physical abuse led to the elder's death, in question 4 include only item 4a for past economic loss. But also include the transitional language after question 6 and include question 7.

If punitive damages are sought, incorporate language from a verdict form for punitive damages. (See *CACI Nos. VF-3900 -VF-3904*.)

If there are multiple causes of action, users may wish to combine the individual forms into one form.

Publisher's Notes

This instruction covers issues presented in *BAJI No. 16.25*.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsVerdictsSpecial VerdictsFamily LawFamily Protection & WelfareElderly
PersonsAbuse, Endangerment & NeglectPublic Health & Welfare LawHealthcareServices for Disabled & Elderly
PersonsProtection From Abuse & NeglectTortsDamagesCompensatory DamagesGeneral Overview



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CHAPTER 31 California Judicial Council Elder Abuse and Dependent Adult Civil Protection Act Instructions

5-31 California Forms of Jury Instruction CACI VF-3106

CACI VF-3106 Abduction--Individual or Individual and Employer Defendants (Welf. & Inst. Code, §§ 15610.06, 15657.05; Civ. Code, § 3294(b))

We answer the questions submitted to us as follows:

1. Was [name of plaintiff/decedent] [65 years of age or older/a dependent adult] at the time of the conduct?

_____ Yes _____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Did [name of employee defendant] [remove [name of plaintiff/decedent] from California and] restrain [him/her/[name of plaintiff/decedent]] from returning to California?

_____ Yes _____ No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Did [name of plaintiff/decedent] lack the capacity to consent to the [removal and] restraint?

_____ Yes _____ No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Was [name of employee defendant]'s conduct a substantial factor in causing harm to [name of plaintiff/decedent]?

_____ Yes _____ No

If your answer to question 4 is yes, then answer question 5 [and] [select 6, 7, or both]. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. What are [name of plaintiff/decedent]'s damages?

[a. Past economic loss

[lost earnings \$ _____].....

[lost profits \$ _____].....

[medical expenses \$ _____].....

[other past economic loss \$ _____].....

..... **Total Past Economic Damages: \$ _____]**

[b. Future economic loss

[lost earnings \$ _____].....

[lost profits \$ _____].....

[medical expenses \$ _____].....

[other future economic loss \$ _____].....

..... **Total Past Economic Damages: \$ _____]**

[c. Past noneconomic loss, including [physical pain/mental suffering:] \$ _____]

[d. Future noneconomic loss, including [physical pain/mental suffering:] \$ _____]

..... **TOTAL \$ _____**

[6. Did [name of plaintiff] prove by clear and convincing evidence that [name of employee defendant] was an officer, director, or managing agent of [name of employer defendant] acting on behalf of [name of defendant].

_____ Yes _____ No]

[7. Did [name of plaintiff] prove 1 through 4 above by clear and convincing evidence?

_____ Yes _____ No]

[If your answer to question 7 is yes, then answer question 8. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.]

8. What were [*name of decedent*]'s damages for noneconomic loss for pain, suffering, or disfigurement incurred before death?

..... \$ _____]

Signed: _____

Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the [clerk/bailiff/judge].

New September 2003; Revised April 2007, April 2008, October 2008

Directions for Use

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on *CACI No. 3109, Abduction--Essential Factual Elements*, *CACI No. 3110, Abduction--Enhanced Remedies Sought*, and *CACI No. 3102A, Employer Liability for Enhanced Remedies--Both Individual and Employer Defendants*.

Question 3 can be altered to correspond to the alternative bracketed option in element 3 of *CACI No. 3109*.

If specificity is not required, users do not have to itemize all the damages listed in question 5 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

Optional questions 6, 7, and 8 address enhanced remedies. If the abduction is proved by clear and convincing evidence, attorney fees, costs, and a decedent's predeath pain and suffering may be recovered. (See *Welf. & Inst. Code*, § 15657.05.) If any of these remedies are sought against the employer, include question 6. (See *Welf. & Inst. Code*, § 15657.05(c).) Question 6 may be altered to correspond to one of the alternative bracketed options for employer liability in *CACI No. 3102A*.

If any enhanced remedies are sought against either the individual or the employer, include question 7. If the abduction led to the abductee's death, in question 5 include only item 5a for past economic loss. But also include the transitional language after question 7 and include question 8.

In the transitional language after question 4, direct the jury to answer questions 6, 7, or both, depending on which questions are to be included. If question 7 is to be included but question 6 is not, then 7 will be renumbered as 6.

If punitive damages are sought, incorporate language from a verdict form for punitive damages. (See *CACI Nos. VF-3900 -VF-3904.*)

If there are multiple causes of action, users may wish to combine the individual forms into one form.

Publisher's Notes

This instruction covers issues presented in BAJI No. 16.25.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Verdicts Special Verdicts Family Law Family Protection & Welfare Elderly
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California Forms of Jury Instruction

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CHAPTER 31 California Judicial Council Elder Abuse and Dependent Adult Civil Protection Act Instructions

5-31 California Forms of Jury Instruction CACI VF-3107

CACI VF-3107 Abduction--Employer Defendant Only (Welf. & Inst. Code, §§ 15610.06, 15657.05; Civ. Code, § 3294(b))

We answer the questions submitted to us as follows:

1. Was [name of plaintiff/decedent] [65 years of age or older/a dependent adult] at the time of the conduct?

_____ Yes _____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Did [name of defendant]'s employee [remove [name of plaintiff/decedent] from California and] restrain [him/her/[name of plaintiff/decedent]] from returning to California?

_____ Yes _____ No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Did [name of plaintiff/decedent] lack the capacity to consent to the [removal and] restraint?

_____ Yes _____ No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Was the employee's conduct a substantial factor in causing harm to [name of plaintiff/decedent]?

_____ Yes _____ No

If your answer to question 4 is yes, then answer question[s] 5 [and 6]. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. What are [name of plaintiff/decedent]'s damages?

[a. Past economic loss

[lost earnings \$ _____].....

[lost profits \$ _____].....

[medical expenses \$ _____].....

[other past economic loss \$ _____].....

..... **Total Past Economic Damages: \$ _____]**

[b. Future economic loss

[lost earnings \$ _____].....

[lost profits \$ _____].....

[medical expenses \$ _____].....

[other future economic loss \$ _____].....

..... **Total Past Economic Damages: \$ _____]**

[c. Past noneconomic loss, including [physical pain/mental suffering:] \$ _____]

[d. Future noneconomic loss, including [physical pain/mental suffering:] \$ _____]

..... **TOTAL \$ _____**

[6. Did [name of plaintiff] prove by clear and convincing evidence that the employee was an officer, a director, or a managing agent of [name of defendant] acting in on behalf of [name of defendant]?

_____ Yes _____ No

If your answer to question 6 is yes, then answer question 7. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

7. Did [name of plaintiff] prove 1 through 4 by clear and convincing evidence?

_____ Yes _____ No]

[If your answer to question 7 is yes, then answer question 8. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.]

8. What were [name of decedent]'s damages for noneconomic loss for pain, suffering, or disfigurement incurred before death?

..... \$ _____]

Signed: _____

Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the [clerk/bailiff/judge].

New September 2003; Revised April 2007, April 2008, October 2008

Directions for Use

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on *CACI No. 3109, Abduction--Essential Factual Elements*, *CACI No. 3110, Abduction--Enhanced Remedies Sought*, and *CACI No. 3102B, Employer Liability for Enhanced Remedies--Employer Defendant Only*.

Question 3 can be altered to correspond to the alternative bracketed option in element 3 of *CACI No. 3109*.

If specificity is not required, users do not have to itemize all the damages listed in question 5 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

Questions 6 and 7 are required to obtain employer liability for enhanced remedies, including attorney fees and costs. (See *Welf. & Inst. Code*, § 15657.05(b); *Code Civ. Proc.*, § 377.34.) Question 6 may be altered to correspond to one of the alternative bracketed options in *CACI No. 3102B*.

If the abduction led to the abductee's death, in question 5 include only item 5a for past economic loss. But also include the transitional language after question 7 and include question 8.

If punitive damages are sought, incorporate language from a verdict form for punitive damages. (See *CACI Nos. VF-3900 -VF-3904*.)

If there are multiple causes of action, users may wish to combine the individual forms into one form.

Publisher's Notes

This instruction covers issues presented in BAJI No. 16.25.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsVerdictsSpecial VerdictsFamily LawFamily Protection & WelfareElderly
PersonsAbuse, Endangerment & NeglectPublic Health & Welfare LawHealthcareServices for Disabled & Elderly
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California Forms of Jury Instruction

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CHAPTER 31 California Judicial Council Elder Abuse and Dependent Adult Civil Protection Act Instructions

5-31 California Forms of Jury Instruction CACI VF-3108-CACI VF-3199

Reserved for Future Use

CACI VF-3108Reserved for Future Use



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CHAPTER 31 California Judicial Council Elder Abuse and Dependent Adult Civil Protection Act Instructions

5-31 California Forms of Jury Instruction Table A

Table A. Elder Abuse: Causes of Action, Remedies, and Employer Liability

[Click here to view image.](#)



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CHAPTER 32 California Judicial Council Song-Beverly Consumer Warranty Act Instructions

5-32 California Forms of Jury Instruction 32.syn

§ 32.syn Synopsis to Chapter 32: California Judicial Council Song-Beverly Consumer Warranty Act Instructions

CACI 3200 Failure to Purchase or Replace Consumer Good After Reasonable Number of Repair Opportunities--Essential Factual Elements (Civ. Code, § 1793.2(d))

CACI 3201 Failure to Promptly Purchase or Replace New Motor Vehicle After Reasonable Number of Repair Opportunities--Essential Factual Elements (Civ. Code, § 1793.2(d))

CACI 3202 "Repair Opportunities" Explained

CACI 3203 Reasonable Number of Repair Opportunities--Rebuttable Presumption (Civ. Code, § 1793.22(b))

CACI 3204 "Substantially Impaired" Explained

CACI 3205-CACI 3209 Reserved for Future Use

CACI 3210 Breach of Implied Warranty of Merchantability--Essential Factual Elements

CACI 3211 Breach of Implied Warranty of Fitness for a Particular Purpose--Essential Factual Elements

CACI 3212 Duration of Implied Warranty

CACI 3213 Affirmative Defense--Statute of Limitations (U. Com. Code, § 2725)

CACI 3214-CACI 3219 Reserved for Future Use

CACI 3220 Affirmative Defense--Unauthorized or Unreasonable Use

CACI 3221 Affirmative Defense--Disclaimer of Implied Warranties

CACI 3222-CACI 3229 Reserved for Future Use

CACI 3230 Breach of Disclosure Obligations--Essential Factual Elements

CACI 3231-CACI 3239 Reserved for Future Use

CACI 3240 Reimbursement Damages--Consumer Goods

CACI 3241 Restitution From Manufacturer--New Motor Vehicle

CACI 3242 Incidental Damages

CACI 3243 Consequential Damages

CACI 3244 Civil Penalty--Willful Violation (Civ. Code, § 1794(c))

CACI 3245-CACI 3299 Reserved for Future Use

CACI VF-3200 Failure to Purchase or Replace Consumer Good After Reasonable Number of Repair Opportunities (Civ. Code, § 1793.2(d))

CACI VF-3201 Consequential Damages

CACI VF-3202 Failure to Purchase or Replace Consumer Good After Reasonable Number of Repair Opportunities--Affirmative Defense--Unauthorized or Unreasonable Use (Civ. Code, § 1793.2(d))

CACI VF-3203 Breach of Express Warranty--New Motor Vehicle--Civil Penalty Sought

CACI VF-3204 Breach of Implied Warranty of Merchantability

CACI VF-3205 Breach of Implied Warranty of Merchantability --Affirmative Defense--Disclaimer of Implied Warranties

CACI VF-3206 Breach of Disclosure Obligations

CACI VF-3207-CACI VF-3299 Reserved for Future Use



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CHAPTER 32 California Judicial Council Song-Beverly Consumer Warranty Act Instructions

5-32 California Forms of Jury Instruction Scope

Scope

SCOPE

This chapter contains the California Judicial Council's "Song-Beverly Consumer Warranty Act Series" of jury instructions [*CACI No. 3200 et seq.*]. The Judicial Council of California Civil Jury Instructions (CACI) included in this publication are the product of the Judicial Council of California Task Force on Jury Instructions, which are updated by the Judicial Council of California Advisory Committee on Civil Jury Instructions.

This chapter includes instructions on the following topics:

- Essential factual elements for causes of action alleging violation of *Civ. Code* § 1793.2(d), regarding consumer goods [*CACI No. 3200*] and new motor vehicles [*CACI No. 3201*].
- "Repair opportunities" explained [*CACI No. 3202*] and the rebuttable presumption surrounding a reasonable number of repair attempts [*CACI No. 3203*].
- "Substantially impaired" explained [*CACI No. 3204*].
- Essential factual elements for causes of action alleging breach of the implied warranties of merchantability [*CACI No. 3210*] and fitness for a particular purpose [*CACI No. 3211*].
- Duration of implied warranties [*CACI No. 3212*].
- Affirmative defenses of statute of limitations *CACI No. 3213*, unauthorized or unreasonable use [*CACI No. 3220*] and disclaimer of implied warranties [*CACI No. 3221*].
- Essential factual elements for a cause of action for breach of disclosure obligations [*CACI No. 3230*].
- Damages, restitution, and civil penalties [*CACI Nos. 3240-3244*].

The consumer warranty series also includes special verdict forms [*CACI Nos. VF-3200-VF-3206*].



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CHAPTER 32 California Judicial Council Song-Beverly Consumer Warranty Act Instructions

5-32 California Forms of Jury Instruction CACI 3200

CACI 3200 Failure to Purchase or Replace Consumer Good After Reasonable Number of Repair Opportunities--Essential Factual Elements (Civ. Code, § 1793.2(d))

[*Name of plaintiff*] **claims that [he/she] was harmed by [*name of defendant*]'s failure to purchase or replace [a/an] [*consumer good*] after a reasonable number of repair opportunities. To establish this claim, [*name of plaintiff*] must prove all of the following:**

1. That [*name of plaintiff*] bought [a/an] [*consumer good*] [from/distributed by/manufactured by] [*name of defendant*];

2. That [*name of defendant*] gave [*name of plaintiff*] a warranty by [*insert at least one of the following*]

[making a written statement that [*describe alleged express warranty*];] [or]

[showing [him/her] a sample or model of the [*consumer good*] and representing, by words or conduct, that [his/her] [*consumer good*] would match the quality of the sample or model;]

3. That the [*consumer good*] [*insert at least one of the following*]

[did not perform as stated for the time specified;] [or]

[did not match the quality [of the [sample/model]] [or] [as set forth in the written statement];]

4. [That [*name of plaintiff*] delivered the [*consumer good*] to [*name of defendant*] or its authorized repair facilities for repair;]

[or]

[That [name of plaintiff] notified [name of defendant] in writing of the need for repair because [he/she] reasonably could not deliver the [consumer good] to [name of defendant] or its authorized repair facilities because of the [size and weight/method of attachment/method of installation] [or] [the nature of the defect] of the [consumer good]]; [and]

5. That [name of defendant] or its representative failed to repair the [consumer good] to match the [written statement/represented quality] after a reasonable number of opportunities; [and]

6. [That [name of defendant] did not replace the [consumer good] or reimburse [name of plaintiff] an amount of money equal to the purchase price of the [consumer good], less the value of its use by [name of plaintiff] before discovering the defect[s].]

[A written statement need not include the words "warranty" or "guarantee," but if those words are used, a warranty is created. It is also not necessary for [name of defendant] to have specifically intended to create a warranty. A warranty is not created if [name of defendant] simply stated the value of the [consumer good] or gave an opinion about the [consumer good]. General statements concerning customer satisfaction do not create a warranty.]

New September 2003; Revised April 2007, December 2007

Directions for Use

An instruction on the definition of "consumer good" may be necessary if that issue is disputed. *Civil Code section 1791(a)* provides: " 'Consumer goods' means any new product or part thereof that is used, bought, or leased for use primarily for personal, family, or household purposes, except for clothing and consumables. 'Consumer goods' shall include new and used assistive devices sold at retail."

Select the alternative in element 4 that is appropriate to the facts of the case.

Regarding element 4, if the plaintiff claims that the consumer goods could not be delivered for repair, the judge should decide whether written notice of nonconformity is required. The statute, *Civil Code section 1793.2(c)*, is unclear on this point.

Depending on the circumstances of the case, further instruction on element 6 may be needed to clarify how the jury should calculate "the value of its use" during the time before discovery of the defect.

If remedies are sought under the Commercial Code, the plaintiff may be required to prove reasonable notification within a reasonable time. (*Cal. U. Com. Code, § 2607(3)*.) If the court determines that proof is necessary, add the following element to this instruction:

That [name of plaintiff] took reasonable steps to notify [name of defendant] within a reasonable time that the [consumer good] [did not match the quality [of the [sample/model]]/as set forth in the written statement];

See also *CACI No. 1243, Notification/Reasonable Time*.

If appropriate to the facts, add: "It is not necessary for [name of plaintiff] to prove the cause of a defect in the [consumer good]." The Song-Beverly Consumer Warranty Act does not require a consumer to prove the cause of the defect or failure, only that the consumer good "did not conform to the express warranty." (See *Oregel v. American Isuzu Motors, Inc.* (2001) 90 Cal.App.4th 1094, 1102, fn. 8 [109 Cal.Rptr.2d 583] .)

In addition to sales of consumer goods, the Consumer Warranty Act applies to leases. (Civ. Code, §§ 1791(g)-(i), 1795.4.) This instruction may be modified for use in cases involving an express warranty in a lease of consumer goods.

See also CACI No. 3202, "Repair Opportunities" Explained.

Sources and Authority

- *Civil Code section 1794(a)* provides, in part: "Any buyer of consumer goods who is damaged by a failure to comply with any obligation under this [Act] or under an ... express warranty ... may bring an action for the recovery of damages and other legal and equitable relief."

- *Civil Code section 1791.2* provides:

- (a) "Express warranty" means:

- (1) A written statement arising out of a sale to the consumer of a consumer good pursuant to which the manufacturer, distributor, or retailer undertakes to preserve or maintain the utility or performance of the consumer good or provide compensation if there is a failure in utility or performance; or

- (2) In the event of any sample or model, that the whole of the goods conforms to such sample or model.

- (b) It is not necessary to the creation of an express warranty that formal words such as "warranty" or "guarantee" be used, but if such words are used then an express warranty is created. An affirmation merely of the value of the goods or a statement purporting to be merely an opinion or commendation of the goods does not create a warranty.

- (c) Statements or representations such as expressions of general policy concerning customer satisfaction which are not subject to any limitation do not create an express warranty.

- *Civil Code section 1795* provides, in part: "If express warranties are made by persons other than the manufacturer of the goods, the obligation of the person making such warranties shall be the same as that imposed on the manufacturer."

- *Civil Code section 1793.2(d)* provides, in part:

- (1) Except as provided in paragraph (2), if the manufacturer or its representative in this state does not service or repair the goods to conform to the applicable express warranties after a reasonable number of attempts, the manufacturer shall either replace the goods or reimburse the buyer in an amount equal to the purchase price paid by the buyer, less that amount directly attributable to use by the buyer prior to discovery of the nonconformity.

(2) If the manufacturer or its representative in this state is unable to service or repair a new motor vehicle ... to conform to the applicable express warranties after a reasonable number of attempts, the manufacturer shall either promptly replace the new motor vehicle ... or promptly make restitution to the buyer However, the buyer shall be free to elect restitution in lieu of replacement, and in no event shall the buyer be required to accept a replacement vehicle.

■ Under *Civil Code* section 1793.1(a)(2), if the warranty period has been extended, it cannot expire any sooner than 60 days after the last repair of a claimed defect.

■ *Civil Code* section 1793.2(c) provides, in part: "The buyer shall deliver nonconforming goods to the manufacturer's service and repair facility within this state, unless, due to reasons of size and weight, or method of attachment, or method of installation, or nature of the nonconformity, delivery cannot reasonably be accomplished. If the buyer cannot return the nonconforming goods for any of these reasons, he or she shall notify the manufacturer or its nearest service and repair facility within the state. Written notice of nonconformity to the manufacturer or its service and repair facility shall constitute return of the goods for purposes of this section."

■ *Civil Code* section 1795.5 provides, in part: "Notwithstanding the provisions ... defining consumer goods to mean 'new' goods, the obligation of a distributor or retail seller of used consumer goods in a sale in which an express warranty is given shall be the same as that imposed on manufacturers," with limited exceptions provided by statute.

■ *Civil Code* section 1790.3 provides: "The provisions of [the Song-Beverly Consumer Warranty Act] shall not affect the rights and obligations of parties determined by reference to the Commercial Code except that, where the provisions of the Commercial Code conflict with the rights guaranteed to buyers of consumer goods under the provisions of [the act], the provisions of [the act] shall prevail."

■ *Civil Code* section 1793.1(a)(2) provides, in part: "The warranty period will be extended for the number of whole days that the product has been out of the buyer's hands for warranty repairs. If a defect exists within the warranty period, the warranty will not expire until the defect has been fixed. The warranty period will also be extended if the warranty repairs have not been performed due to delays caused by circumstances beyond the control of the buyer, or if the warranty repairs did not remedy the defect and the buyer notifies the manufacturer or seller of the failure of the repairs within 60 days after they were completed."

■ *Civil Code* section 1795.6 provides, in part:

(a) Every warranty period relating to an ... express warranty accompanying a sale or consignment for sale of consumer goods selling for fifty dollars (\$50) or more shall automatically be tolled for the period from the date upon which the buyer either (1) delivers nonconforming goods to the manufacturer or seller for warranty repairs or service or (2), pursuant to [sections 1793.2(c) or 1793.22], notifies the manufacturer or seller of the nonconformity of the goods up to, and including, the date upon which (1) the repaired or serviced goods are delivered to the buyer, (2) the buyer is notified the goods are repaired or serviced and are available for the buyer's possession or (3) the buyer is notified that repairs or service is completed, if repairs or service is made at the buyer's residence.

(b) Notwithstanding the date or conditions set for the expiration of the warranty period, such warranty period shall not be deemed expired if ... : (1) after the buyer has satisfied

the requirements of subdivision (a), the warranty repairs or service has not been performed due to delays caused by circumstances beyond the control of the buyer or (2) the warranty repairs or service performed upon the nonconforming goods did not remedy the nonconformity for which such repairs or service was performed and the buyer notified the manufacturer or seller of this failure within 60 days after the repairs or service was completed. When the warranty repairs or service has been performed so as to remedy the nonconformity, the warranty period shall expire in accordance with its terms, including any extension to the warranty period for warranty repairs or service.

■ Broadly speaking, the Act regulates warranty terms; imposes service and repair obligations on manufacturers, distributors and retailers who make express warranties; requires disclosure of specified information in express warranties; and broadens a buyer's remedies to include costs, attorney fees and civil penalties... [P] [T]he purpose of the Act has been to provide broad relief to purchasers of consumer goods with respect to warranties." (*National R.V., Inc. v. Foreman* (1995) 34 Cal.App.4th 1072, 1080 [40 Cal.Rptr.2d 672] .)

■ "[S]ection 1793.2, subdivision (d)(2), differs from section 1793.2, subdivision (d)(1), in that it gives the new motor vehicle consumer the right to elect restitution in lieu of replacement; provides specific procedures for the motor vehicle manufacturer to follow in the case of replacement and in the case of restitution; and sets forth rules for offsetting the amount attributed to the consumer's use of the motor vehicle. These 'Lemon Law' provisions clearly provide greater consumer protections to those who purchase new motor vehicles than are afforded under the general provisions of the Act to those who purchase other consumer goods under warranty." (*National R.V., Inc., supra*, 34 Cal.App.4th at p.1079 , internal citations and footnotes omitted.)

■ The act does not require a consumer to give a manufacturer, in addition to its local representative, at least one opportunity to fix a problem. Regarding previous repair efforts entitling an automobile buyer to reimbursement, "[t]he legislative history of [Civil Code section 1793.2] demonstrates beyond any question that... a differentiation between manufacturer and local representative is unwarranted." (*Ibrahim v. Ford Motor Co.* (1989) 214 Cal.App.3d 878, 888 [263 Cal.Rptr. 64] .)

Secondary Sources

4 Witkin, Summary of California Law (10th ed. 2005) Sales, §§ 52, 56, 314-324

1 California UCC Sales and Leases (Cont.Ed.Bar) Warranties, §§ 3.4, 3.8, 3.15, 3.87

2 California UCC Sales and Leases (Cont.Ed.Bar) Prelitigation Remedies, § 17.70

2 California UCC Sales and Leases (Cont.Ed.Bar) Litigation Remedies, § 18.25

2 California UCC Sales and Leases (Cont.Ed.Bar) Leasing of Goods, § 19.38

44 *California Forms of Pleading and Practice*, Ch. 502, Sales: Warranties, §§ 502.42, 502.53 (Matthew Bender)

20 *California Points and Authorities*, Ch. 206, Sales, § 206.100 et seq. (Matthew Bender)

5 California Civil Practice: Business Litigation (Thomson West) §§ 53:1, 53:3-53:4, 53:10-53:11, 53:14-53:17, 53:22-53:23, 53:26-53:27

Publisher's Notes

There is no BAJI instruction on this subject.

LexisNexis Matthew Bender Expert Practice Tip--Using CACI No. 3200: This is a lengthy and relatively complicated instruction that sets forth all the required elements for breach of an express warranty. If some of the required elements are not in dispute, it may be possible to stipulate as to those elements and shorten the instruction. If that is not possible, it is essential to go over each element in closing argument, preferably with the use of visual aids (such as a chart or powerpoint), to review the evidence as to each required element. *By Ronald Oster and Rex Heeseman*

Legal Topics:

For related research and practice materials, see the following legal topics:

Antitrust & Trade LawConsumer ProtectionGeneral OverviewAntitrust & Trade LawConsumer ProtectionVehicle WarrantiesLemon LawsCivil ProcedureTrialsJury TrialsJury InstructionsStandard InstructionsCommercial Law (UCC)Sales (Article 2)WarrantiesGeneral Overview



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California Forms of Jury Instruction

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CHAPTER 32 California Judicial Council Song-Beverly Consumer Warranty Act Instructions

5-32 California Forms of Jury Instruction CACI 3201

CACI 3201 Failure to Promptly Purchase or Replace New Motor Vehicle After Reasonable Number of Repair Opportunities--Essential Factual Elements (Civ. Code, § 1793.2(d))

[*Name of plaintiff*] **claims that** [*name of defendant*] **failed to promptly purchase or replace [a/an] [*new motor vehicle*] after a reasonable number of repair opportunities. To establish this claim, [*name of plaintiff*] must prove all of the following:**

- 1. That [*name of plaintiff*] [bought/leased] [a/an] [*new motor vehicle*] [from/distributed by/manufactured by] [*name of defendant*];**
- 2. That [*name of defendant*] gave [*name of plaintiff*] a written warranty that [*describe alleged express warranty*];**
- 3. That the vehicle had [a] defect[s] that [was/were] covered by the warranty and that substantially impaired its use, value, or safety to a reasonable person in [*name of plaintiff*]'s situation;**
- 4. [That [*name of plaintiff*] delivered the vehicle to [*name of defendant*] or its authorized repair facility for repair of the defect[s];]**

[That [*name of plaintiff*] notified [*name of defendant*] in writing of the need for repair of the defect[s] because [he/she] reasonably could not deliver the vehicle to [*name of defendant*] or its authorized repair facility because of the nature of the defect[s];]
- 5. That [*name of defendant*] or its authorized repair facility failed to repair the vehicle to match the written warranty after a reasonable number of opportunities to do so; and**

6. That [name of defendant] did not promptly replace or buy back the vehicle.

[It is not necessary for [name of plaintiff] to prove the cause of a defect in the [new motor vehicle].]

[A written warranty need not include the words "warranty" or "guarantee," but if those words are used, a warranty is created. It is also not necessary for [name of defendant] to have specifically intended to create a warranty. A warranty is not created if [name of defendant] simply stated the value of the vehicle or gave an opinion about the vehicle. General statements concerning customer satisfaction do not create a warranty.]

New September 2003; Revised February 2005, December 2005, April 2007, December 2007

Directions for Use

If remedies are sought under the Commercial Code, the plaintiff may be required to prove reasonable notification within a reasonable time. (*Cal. U. Com. Code*, § 2607(3).) If the court determines that proof is necessary, add the following element to this instruction:

That [name of plaintiff] took reasonable steps to notify [name of defendant] within a reasonable time that the [new motor vehicle] had a defect covered by the warranty;

See also *CACI No. 1243, Notification/Reasonable Time*.

Regarding element 4, if the plaintiff claims that the consumer goods could not be delivered for repair, the judge should decide whether written notice of nonconformity is required. The statute, *Civil Code section 1793.2(c)*, is unclear on this point.

Include the bracketed sentence preceding the final bracketed paragraph if appropriate to the facts. The Song-Beverly Consumer Warranty Act does not require a consumer to prove the cause of the defect or failure, only that the consumer good "did not conform to the express warranty." (See *Oregel v. American Isuzu Motors, Inc.* (2001) 90 Cal.App.4th 1094, 1102, fn. 8 [109 Cal.Rptr.2d 583] .)

In addition to sales of consumer goods, the Consumer Warranty Act applies to leases. (*Civ. Code*, §§ 1791(g)-(i), 1795.4.) This instruction may be modified for use in cases involving an express warranty in a lease of a motor vehicle.

See also *CACI No. 3202, "Repair Opportunities" Explained*, *CACI No. 3203, Reasonable Number of Repair Opportunities--Rebuttable Presumption*, and *CACI No. 3204, "Substantially Impaired" Explained*.

Sources and Authority

- Under *Civil Code section 1793.1(a)(2)*, if the warranty period has been extended, it cannot expire any sooner than 60 days after the last repair of a claimed defect.

- *Civil Code section 1794(a)* provides, in part: "Any buyer of consumer goods who is damaged by a failure to comply with any obligation under this [Act] or under an ... express warranty ... may bring an action for the recovery of damages and other legal and equitable relief."

■ *Civil Code section 1790.3* provides: "The provisions of [the Song-Beverly Consumer Warranty Act] shall not affect the rights and obligations of parties determined by reference to the Commercial Code except that, where the provisions of the Commercial Code conflict with the rights guaranteed to buyers of consumer goods under the provisions of [the act], the provisions of [the act] shall prevail."

■ *Civil Code section 1791.2* provides:

(a) "Express warranty" means:

(1) A written statement arising out of a sale to the consumer of a consumer good pursuant to which the manufacturer, distributor, or retailer undertakes to preserve or maintain the utility or performance of the consumer good or provide compensation if there is a failure in utility or performance; or

(2) In the event of any sample or model, that the whole of the goods conforms to such sample or model.

(b) It is not necessary to the creation of an express warranty that formal words such as "warrant" or "guarantee" be used, but if such words are used then an express warranty is created. An affirmation merely of the value of the goods or a statement purporting to be merely an opinion or commendation of the goods does not create a warranty.

(c) Statements or representations such as expressions of general policy concerning customer satisfaction which are not subject to any limitation do not create an express warranty.

■ *Civil Code section 1795* provides, in part: "If express warranties are made by persons other than the manufacturer of the goods, the obligation of the person making such warranties shall be the same as that imposed on the manufacturer."

■ *Civil Code section 1793.22(e)(2)* provides, in part: "'New motor vehicle' means a new motor vehicle that is bought or used primarily for personal, family, or household purposes. 'New motor vehicle' also means a new motor vehicle ... that is bought or used primarily for business purposes by a person ... or any ... legal entity, to which not more than five motor vehicles are registered in this state. 'New motor vehicle' includes the chassis, chassis cab, and that portion of a motor home devoted to its propulsion ..., a dealer-owned vehicle and a 'demonstrator' or other motor vehicle sold with a manufacturer's new car warranty."

■ *Civil Code section 1793.2(d)(2)* provides, in part: "If the manufacturer or its representative in this state is unable to service or repair a new motor vehicle ... to conform to the applicable express warranties after a reasonable number of attempts, the manufacturer shall either promptly replace the new motor vehicle ... or promptly make restitution to the buyer. ... However, the buyer shall be free to elect restitution in lieu of replacement, and in no event shall the buyer be required to accept a replacement vehicle."

■ *Civil Code section 1793.2(c)* provides, in part: "The buyer shall deliver nonconforming goods to the manufacturer's service and repair facility within this state, unless, due to reasons of size and weight, or method of attachment, or method of installation, or nature of the nonconformity, delivery cannot reasonably be accomplished. If the buyer cannot return the nonconforming goods for any of these reasons, he or she shall notify the manufacturer or its nearest service and repair facility within the state. Written notice of nonconformity to the manufacturer or its service and repair facility shall constitute return of the goods for purposes of this section."

■ *Civil Code section 1793.1(a)(2)* provides, in part: "The warranty period will be extended for the number of whole days that the product has been out of the buyer's hands for warranty repairs. If a defect exists within the warranty

period, the warranty will not expire until the defect has been fixed. The warranty period will also be extended if the warranty repairs have not been performed due to delays caused by circumstances beyond the control of the buyer, or if the warranty repairs did not remedy the defect and the buyer notifies the manufacturer or seller of the failure of the repairs within 60 days after they were completed."

■ *Civil Code section 1795.6* provides, in part:

(a) Every warranty period relating to an ... express warranty accompanying a sale or consignment for sale of consumer goods selling for fifty dollars (\$50) or more shall automatically be tolled for the period from the date upon which the buyer either (1) delivers nonconforming goods to the manufacturer or seller for warranty repairs or service or (2), pursuant to [sections 1793.2(c) or 1793.22], notifies the manufacturer or seller of the nonconformity of the goods up to, and including, the date upon which (1) the repaired or serviced goods are delivered to the buyer, (2) the buyer is notified the goods are repaired or serviced and are available for the buyer's possession or (3) the buyer is notified that repairs or service is completed, if repairs or service is made at the buyer's residence.

(b) Notwithstanding the date or conditions set for the expiration of the warranty period, such warranty period shall not be deemed expired if ... : (1) after the buyer has satisfied the requirements of subdivision (a), the warranty repairs or service has not been performed due to delays caused by circumstances beyond the control of the buyer or (2) the warranty repairs or service performed upon the nonconforming goods did not remedy the nonconformity for which such repairs or service was performed and the buyer notified the manufacturer or seller of this failure within 60 days after the repairs or service was completed. When the warranty repairs or service has been performed so as to remedy the nonconformity, the warranty period shall expire in accordance with its terms, including any extension to the warranty period for warranty repairs or service.

■ "Broadly speaking, the Act regulates warranty terms; imposes service and repair obligations on manufacturers, distributors and retailers who make express warranties; requires disclosure of specified information in express warranties; and broadens a buyer's remedies to include costs, attorney fees and civil penalties. ... [P] [T]he purpose of the Act has been to provide broad relief to purchasers of consumer goods with respect to warranties." (*National R.V., Inc. v. Foreman* (1995) 34 Cal.App.4th 1072, 1080 [40 Cal.Rptr.2d 672] .)

■ "A plaintiff pursuing an action under the Act has the burden to prove that (1) the vehicle had a nonconformity covered by the express warranty that substantially impaired the use, value or safety of the vehicle (the nonconformity element); (2) the vehicle was presented to an authorized representative of the manufacturer of the vehicle for repair (the presentation element); and (3) the manufacturer or his representative did not repair the nonconformity after a reasonable number of repair attempts (the failure to repair element)." (*Oregel, supra*, 90 Cal.App.4th at p. 1101 .)

■ The Song-Beverly Act does not apply unless the vehicle was purchased in California. (*Cummins, Inc. v. Superior Court* (2005) 36 Cal.4th 478, 490 [30 Cal.Rptr.3d 823, 115 P.3d 98] .)

■ "Under well-recognized rules of statutory construction, the more specific definition [of 'new motor vehicle'] found in the current section 1793.22 governs the more general definition [of 'consumer goods'] found in section 1791." (*Jensen v. BMW of North America, Inc.* (1995) 35 Cal.App.4th 112, 126 [41 Cal.Rptr.2d 295] .)

■ " 'Nonconformity' is defined as 'a nonconformity which substantially impairs the use, value, or safety of the new

motor vehicle to the buyer or lessee.' The term is similar to what the average person would understand to be a 'defect.' " (*Schreidel v. American Honda Motor Co.* (1995) 34 Cal.App.4th 1242, 1249 [40 Cal.Rptr.2d 576] , internal citation omitted; see also *Robertson v. Fleetwood Travel Trailers of California, Inc.* (2006) 144 Cal.App.4th 785, 801, fn.11 [50 Cal.Rptr.3d 731] [nonconformity can include entire complex of related conditions].)

■ "The issue of whether the problems constituted substantial impairment is one for the trier of fact." (*Schreidel, supra*, 34 Cal.App.4th at p. 1250 .)

■ "[S]ection 1793.2, subdivision (d)(2), differs from section 1793.2, subdivision (d)(1), in that it gives the new motor vehicle consumer the right to elect restitution in lieu of replacement; provides specific procedures for the motor vehicle manufacturer to follow in the case of replacement and in the case of restitution; and sets forth rules for offsetting the amount attributed to the consumer's use of the motor vehicle. These 'Lemon Law' provisions clearly provide greater consumer protections to those who purchase new motor vehicles than are afforded under the general provisions of the Act to those who purchase other consumer goods under warranty." (*National R.V., Inc., supra*, 34 Cal.App.4th at p. 1079 , internal citations and footnotes omitted.)

■ The act does not require a consumer to give a manufacturer, in addition to its local representative, at least one opportunity to fix a problem. Regarding previous repair efforts entitling an automobile buyer to reimbursement, "[t]he legislative history of [Civil Code section 1793.2] demonstrates beyond any question that... a differentiation between manufacturer and local representative is unwarranted." (*Ibrahim v. Ford Motor Co.* (1989) 214 Cal.App.3d 878, 888 [263 Cal.Rptr. 64] .)

■ "[T]he only affirmative step the Act imposes on consumers is to 'permit[] the manufacturer a reasonable opportunity to repair the vehicle.' " (*Oregel, supra*, 90 Cal.App.4th at p. 1103 , original italics, internal citation omitted.)

■ "[T]he Act does not require consumers to take any affirmative steps to secure relief for the failure of a manufacturer to service or repair a vehicle to conform to applicable warranties--other than, of course, permitting the manufacturer a reasonable opportunity to repair the vehicle. ... In reality, ... , the manufacturer seldom on its own initiative offers the consumer the options available under the Act: a replacement vehicle or restitution. Therefore, as a practical matter, the consumer will likely request replacement or restitution. But the consumer's request is not mandated by any provision in the Act. Rather, the consumer's request for replacement or restitution is often prompted by the manufacturer's unforthright approach and stonewalling of fundamental warranty problems." (*Lukather v. General Motors, LLC* (2010) 181 Cal.App.4th 1041, 1050 [104 Cal.Rptr.3d 853] , original italics.)

Secondary Sources

4 Witkin, Summary of California Law (10th ed. 2005) Sales, §§ 52, 56, 314-324

1 California UCC Sales and Leases (Cont.Ed.Bar) Warranties, §§ 7.4, 7.8, 7.15, 7.87; *id.*, Prelitigation Remedies, § 13.68; *id.*, Litigation Remedies, § 14.25, *id.*, Division 10: Leasing of Goods, § 17.31

44 *California Forms of Pleading and Practice*, Ch. 502, Sales: Warranties, § 502.43[5][b] (Matthew Bender)

20 *California Points and Authorities*, Ch. 206, Sales, § 206.104 (Matthew Bender)

5 California Civil Practice: Business Litigation (Thomson West) §§ 53:1, 53:3-53:4, 53:10-53:11, 53:14-53:17, 53:22-53:23, 53:26-53:27

Publisher's Notes

There is no BAJI instruction on this subject.

LexisNexis Matthew Bender Expert Practice Tip--Using CACI No. 3201: This is a complicated instruction that might be shortened by stipulations as to any undisputed elements. If not, counsel will have to go over each element in closing, preferably with the use of visual aids. *By Ronald Oster*

Legal Topics:

For related research and practice materials, see the following legal topics:

Antitrust & Trade Law Consumer Protection Vehicle Warranties Express Warranties Antitrust & Trade Law Consumer Protection Vehicle Warranties Lemon Laws Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Commercial Law (UCC) Sales (Article 2) Warranties Express Warranties



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California Forms of Jury Instruction

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CHAPTER 32 California Judicial Council Song-Beverly Consumer Warranty Act Instructions

5-32 California Forms of Jury Instruction CACI 3202

CACI 3202 "Repair Opportunities" Explained

Each time the [consumer good/new motor vehicle] was given to [name of defendant] [or its authorized repair facility] for repair counts as an opportunity to repair, even if [it/they] did not do any repair work.

In determining whether [name of defendant] had a reasonable number of opportunities to fix the [consumer good/new motor vehicle], you should consider all the circumstances surrounding each repair visit. [Name of defendant] [or its authorized repair facility] must have been given at least two opportunities to fix the [consumer good/new motor vehicle] [unless only one repair attempt was possible because the [consumer good/new motor vehicle] was later destroyed or because [name of defendant] [or its authorized repair facility] refused to attempt the repair].

New September 2003; Revised February 2005, December 2005, June 2006

Directions for Use

This instruction applies only to claims under *Civil Code* section 1793.2(d) and not to other claims, such as claims for breach of the implied warranty of merchantability. (See *Mocek v. Alfa Leisure, Inc.* (2003) 114 Cal.App.4th 402, 406-407 [7 Cal.Rptr.3d 546] .)

The final bracketed portion of the last sentence of this instruction is intended for use only in cases where the evidence shows that only one repair attempt was possible because of the subsequent malfunction and destruction of the vehicle or where the defendant refused to attempt the repair. (See *Bishop v. Hyundai Motor America* (1996) 44 Cal.App.4th 750 [52 Cal.Rptr.2d 134] ; *Gomez v. Volkswagen of America, Inc.* (1985) 169 Cal.App.3d 921 [215 Cal.Rptr. 507] .)

Sources and Authority

- *Civil Code section 1793.2(d)* provides, in part:

(1) Except as provided in paragraph (2), if the manufacturer or its representative in this state does not service or repair the goods to conform to the applicable express warranties after a reasonable number of attempts, the manufacturer shall either replace the goods or reimburse the buyer. ...

(2) If the manufacturer or its representative in this state is unable to service or repair a new motor vehicle ... to conform to the applicable express warranties after a reasonable number of attempts, the manufacturer shall either promptly replace the new motor vehicle ... or promptly make restitution to the buyer.

- "[T]he only affirmative step the Act imposes on consumers is to 'permit[] the manufacturer a reasonable *opportunity* to repair the vehicle.' Whether or not the manufacturer's agents choose to take advantage of the opportunity, or are unable despite that opportunity to isolate and make an effort to repair the problem, are matters for which the consumer is not responsible." (*Oregel v. American Isuzu Motors, Inc. (2001) 90 Cal.App.4th 1094, 1103-1104 [109 Cal.Rptr.2d 583]* , internal citation omitted.)

- "Section 1793.2(d) requires the manufacturer to afford the specified remedies of restitution or replacement if that manufacturer is unable to repair the vehicle 'after a reasonable number of attempts.' 'Attempts' is plural. The statute does not require the manufacturer to make restitution or replace a vehicle if it has had only one opportunity to repair that vehicle." (*Silvio v. Ford Motor Co. (2003) 109 Cal.App.4th 1205, 1208 [135 Cal.Rptr.2d 846]* .)

Secondary Sources

2 California UCC Sales & Leases (Cont.Ed.Bar) Prelitigation Remedies, § 17.70

44 *California Forms of Pleading and Practice*, Ch. 502, Sales: Warranties, § 502.43 (Matthew Bender)

20 California Points and Authorities, Ch. 206, Sales (Matthew Bender)

Publisher's Notes

There is no BAJI instruction on this subject.

LexisNexis Matthew Bender Expert Practice Tip--Use Care If Proposing CACI No. 3202: This instruction (due to its detailed nature) is one where care should be exercised as to the manner in which to present the closing argument [*see also* Practice Tips for CACI Nos. 3200, 3201]. *By Rex Heeseman*

Legal Topics:

For related research and practice materials, see the following legal topics:

Antitrust & Trade Law Consumer Protection General Overview Antitrust & Trade Law Consumer Protection Vehicle Warranties Lemon Laws Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Commercial Law (UCC) Sales (Article 2) Warranties General Overview



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California Forms of Jury Instruction

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CHAPTER 32 California Judicial Council Song-Beverly Consumer Warranty Act Instructions

5-32 California Forms of Jury Instruction CACI 3203

CACI 3203 Reasonable Number of Repair Opportunities--Rebuttable Presumption (Civ. Code, § 1793.22(b))

The number of opportunities to make repairs is presumed to be reasonable if [name of plaintiff] proves that within [18 months from delivery of the [new motor vehicle] to [him/her/it]] [or] [the first 18,000 miles] [insert option A, B, and/or C:]

[A. 1. The vehicle was made available to [name of defendant] [or its authorized repair facility] for repair of the same substantially impairing defect two or more times; [and]

2. The defect resulted in a condition that was likely to cause death or serious bodily injury if the vehicle were driven; [and]

3. [[Name of plaintiff] directly notified [name of manufacturer] in writing about the need to repair the defect;] [or]]

[B. 1. The vehicle was made available to [name of defendant] [or its authorized repair facility] for repair of the same substantially impairing defect four or more times; [and]

2. [[Name of plaintiff] directly notified [name of manufacturer] in writing about the need to repair the defect;] [or]]

[C. The vehicle was out of service for repair of substantially impairing defects by [name of defendant] [or its authorized repair facility] for more than 30 days.]

If [name of plaintiff] has proved these facts, then the number of opportunities to make repairs was reasonable unless [name of defendant] proves that under all the circumstances [name of defendant] [or its authorized repair facility] was not given a reasonable opportunity to repair the defect.

[The 30-day limit for repairing defects will be lengthened if [name of defendant] proves that repairs could not be made because of conditions beyond the control of [name of defendant] or its authorized repair facility.]

New September 2003; Revised February 2005

Directions for Use

This instruction should not be given if none of the enumerated situations apply to the plaintiff's case. (*Jiagbogu v. Mercedes-Benz USA (2004) 118 Cal.App.4th 1235, 1245 [13 Cal.Rptr.3d 679] .*)

Note that the factfinder's inquiry should be focused on overall reasonableness of the opportunities plaintiff gave defendant to make repairs. Therefore, while satisfying the rebuttable presumption (without having it overcome by defendant) is one way for plaintiff to satisfy the reasonable opportunities requirement, he or she may do so in other ways instead. Likewise, because the statutory presumption is rebuttable, defendant is allowed an opportunity to overcome it.

The rebuttable presumption concerning the number of repair attempts applies only to new motor vehicles--see the Tanner Consumer Protection Act. (*Civ. Code*, § 1793.22(b).)

The bracketed language in the first two optional paragraphs concerning notice made directly to the manufacturer are applicable only if "the manufacturer has clearly and conspicuously disclosed to the buyer, with the warranty or the owner's manual, the provisions of [the Tanner Consumer Protection Act] and that of [*Civil Code* section 1793.2(d)], including the requirement that the buyer must notify the manufacturer directly." (See *Civ. Code*, § 1793.22(b)(3).) This is a matter that the judge should determine ahead of time as an issue of law.

Sources and Authority

- *Civil Code* section 1793.2(d)(2) provides, in part: "If the manufacturer or its representative in this state is unable to service or repair a new motor vehicle ... to conform to the applicable express warranties after a reasonable number of attempts, the manufacturer shall either promptly replace the new motor vehicle ... or promptly make restitution to the buyer."

- "We believe ... that the only affirmative step the Act imposes on consumers is to 'permit[] the manufacturer a reasonable *opportunity* to repair the vehicle.' Whether or not the manufacturer's agents choose to take advantage of the opportunity, or are unable despite that opportunity to isolate and make an effort to repair the problem, are matters for which the consumer is not responsible." (*Oregel v. American Isuzu Motors, Inc. (2001) 90 Cal.App.4th 1094, 1103-1104 [109 Cal.Rptr.2d 583]* , internal citations and footnote omitted.)

- *Civil Code* section 1793.22(b) provides, in part:

It shall be presumed that a reasonable number of attempts have been made to conform a new motor vehicle to the applicable express warranties if, within 18 months from delivery to the buyer or 18,000 miles on the odometer of the vehicle, whichever occurs first, one or more of the following occurs:

(1) The same nonconformity results in a condition that is likely to cause death or serious bodily injury if the vehicle is driven and the nonconformity has been subject to repair two

or more times by the manufacturer or its agents, and the buyer or lessee has at least once directly notified the manufacturer of the need for the repair of the nonconformity.

(2) The same nonconformity has been subject to repair four or more times by the manufacturer or its agents and the buyer has at least once directly notified the manufacturer of the need for the repair of the nonconformity.

(3) The vehicle is out of service by reason of repair of nonconformities by the manufacturer or its agents for a cumulative total of more than 30 calendar days since delivery of the vehicle to the buyer. The 30-day limit shall be extended only if repairs cannot be performed due to conditions beyond the control of the manufacturer or its agents. The buyer shall be required to directly notify the manufacturer pursuant to paragraphs (1) and (2) only if the manufacturer has clearly and conspicuously disclosed to the buyer, with the warranty or the owner's manual, the provisions of this section and that of subdivision (d) of Section 1793.2, including the requirement that the buyer must notify the manufacturer directly pursuant to paragraphs (1) and (2). The notification, if required, shall be sent to the address, if any, specified clearly and conspicuously by the manufacturer in the warranty or owner's manual. This presumption shall be a rebuttable presumption affecting the burden of proof, and it may be asserted by the buyer in any civil action."

Secondary Sources

2 California UCC Sales & Leases (Cont.Ed.Bar) Prelitigation Remedies, § 17.10

44 *California Forms of Pleading and Practice*, Ch. 502, Sales: Warranties, § 502.43[5][b] (Matthew Bender)

20 *California Points and Authorities*, Ch. 206, Sales, § 206.104 (Matthew Bender)

5 California Civil Practice: Business Litigation (Thomson West) § 53:27

Publisher's Notes

This instruction covers issues presented in BAJI No. 9.87.

LexisNexis Matthew Bender Expert Practice Tip--Use Care If Proposing CACI No. 3203: This is another involved instruction. Thus, the closing argument should be accordingly organized. *By Rex Heeseman*

LexisNexis Matthew Bender Expert Practice Tip--"Reasonable" Number of Repairs: CACI No. 3203 sets forth a rebuttal presumption as to what constitutes a "reasonable" number of repair attempts. As a practical matter, this presumption will be difficult if not impossible to rebut. Most jurors will consider four attempts at repair for non-life threatening defects and two attempts for defects likely to cause death or serious bodily injury to be more than sufficient. *By Ronald Oster*

Legal Topics:

For related research and practice materials, see the following legal topics:

Antitrust & Trade Law Consumer Protection General Overview Antitrust & Trade Law Consumer Protection Vehicle Warranties Lemon Laws Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Commercial Law

(UCC)Sales (Article 2)WarrantiesGeneral OverviewEvidenceInferences & PresumptionsExceptionsStatutory
Presumptions



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California Forms of Jury Instruction

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CHAPTER 32 California Judicial Council Song-Beverly Consumer Warranty Act Instructions

5-32 California Forms of Jury Instruction CACI 3204

CACI 3204 "Substantially Impaired" Explained

In deciding whether a reasonable person would believe that the vehicle's defect[s], if any, substantially impaired the vehicle's use, value, or safety, you may consider, among other factors, the following:

- (a) [The nature of the defect[s];]**
- (b) [The cost and length of time required for repair;]**
- (c) [Whether past repair attempts have been successful;]**
- (d) [The degree to which the vehicle could be used while awaiting repair;]**
- (e) [The availability and cost of comparable transportation during the repairs;] [and]**
- (f) [*Insert other appropriate factor.*]**

New February 2005; Revised December 2005

Directions for Use

Some or all of the stated factors may not be necessary in every case. Depending on the facts of the case, other factors may be added as appropriate.

Sources and Authority

■ "Whether the impairment is substantial is determined by an objective test, based on what a reasonable person would understand to be a defect. This test is applied, however, within the specific circumstances of the buyer." (*Lundy v. Ford Motor Co.* (2001) 87 Cal.App.4th 472, 478 [104 Cal.Rptr.2d 545] , internal citations omitted.)

■ "The issue of whether the problems constituted substantial impairment is one for the trier of fact." (*Schreidel v. American Honda Motor Co.* (1995) 34 Cal.App.4th 1242, 1250 [40 Cal.Rptr.2d 576] , internal citations omitted.)

■ "The term ['substantially'] modifies its object, 'impairment.' It injects an element of degree; not every impairment is sufficient to satisfy the statute. The most analogous definition of 'substantially' we have found in a context similar to its usage here is in the Uniform Commercial Code, section 2-608. Like the clause at issue here, this provision requires a determination of whether a defect 'substantially impairs' the value of goods sold to a buyer. Under it, the trier of fact may consider: 'the nature of the defects; the cost and length of time required for repair; whether past repair attempts have been successful; the degree to which the goods can be used while repairs are attempted; [inconvenience to buyer]; and the availability and cost of alternative goods pending repair. ...' It may be that this term, like 'reasonable,' is incapable of precise definition. At the least, the requirement is not satisfied by any impairment, however insignificant, that affects use, value, or safety." (*Lundy, supra*, 87 Cal.App.4th at p. 478 , internal citations omitted.)

Secondary Sources

4 Witkin, Summary of California Law (10th ed. 2005) Sales, §§ 316-320

8 *California Forms of Pleading and Practice*, Ch. 91, *Automobiles: Actions Involving Defects and Repairs*, §§ 91.12[2], 91.64 (Matthew Bender)

44 *California Forms of Pleading and Practice*, Ch. 502, *Sales: Warranties*, § 502.53 (Matthew Bender)

20 *California Points and Authorities*, Ch. 206, *Sales* , §§ 206.104, 206.127 (Matthew Bender)

Publisher's Notes

This instruction covers issues presented in BAJI No. 9.86.

Legal Topics:

For related research and practice materials, see the following legal topics:

Antitrust & Trade Law Consumer Protection Vehicle Warranties Lemon Laws Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Commercial Law (UCC) Sales (Article 2) Warranties General Overview



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CHAPTER 32 California Judicial Council Song-Beverly Consumer Warranty Act Instructions

5-32 California Forms of Jury Instruction CACI 3205-CACI 3209

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CACI 3205Reserved for Future Use



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CHAPTER 32 California Judicial Council Song-Beverly Consumer Warranty Act Instructions

5-32 California Forms of Jury Instruction CACI 3210

CACI 3210 Breach of Implied Warranty of Merchantability--Essential Factual Elements

[*Name of plaintiff*] **claims that the [*consumer good*] did not have the quality that a buyer would reasonably expect. This is known as "breach of an implied warranty." To establish this claim, [*name of plaintiff*] must prove all of the following:**

1. **That [*name of plaintiff*] bought a[n] [*consumer good*] [from/manufactured by] [*name of defendant*];**
2. **That at the time of purchase [*name of defendant*] was in the business of [selling [*consumer goods*] to retail buyers] [manufacturing [*consumer goods*]]; and**
3. **That the [*consumer good*] [*insert one or more of the following:*]**
 - [was not of the same quality as those generally acceptable in the trade;] [or]**
 - [was not fit for the ordinary purposes for which such goods are used;] [or]**
 - [was not adequately contained, packaged, and labeled;] [or]**
 - [did not measure up to the promises or facts stated on the container or label.]**

New September 2003; Revised December 2005

Directions for Use

If remedies are sought under the Commercial Code, the plaintiff may be required to prove reasonable

notification within a reasonable time. (*Cal. U. Com. Code*, § 2607(3).) If the court determines such proof is necessary, add the following element to this instruction:

That [*name of plaintiff*] took reasonable steps to notify [*name of defendant*] within a reasonable time that the [*consumer good*] did not have the quality that a buyer would reasonably expect;

See also *CACI No. 1243, Notification/Reasonable Time*. Instructions on damages and causation may be necessary in actions brought under the Commercial Code.

Delete element 2 if the defendant is the manufacturer of the consumer good in question or if it is uncontested that the defendant was a retail seller within the meaning of the act.

If appropriate to the facts, add: "It is not necessary for [*name of plaintiff*] to prove the cause of a defect of the [*consumer good*]." The Song-Beverly Consumer Warranty Act does not require a consumer to prove the cause of the defect or failure, only that the consumer good "did not conform to the express warranty." (See *Oregel v. American Isuzu Motors, Inc.* (2001) 90 Cal.App.4th 1094, 1102, fn. 8 [109 Cal.Rptr.2d 583] .)

In addition to sales of consumer goods, the Consumer Warranty Act applies to leases. (See *Civ. Code*, §§ 1791(g)-(i), 1795.4.) This instruction may be modified for use in cases involving the implied warranty of merchantability in a lease of consumer goods.

Sources and Authority

- *Civil Code* section 1794(a) provides: "Any buyer of consumer goods who is damaged by a failure to comply with any obligation ... under an implied ... warranty ... may bring an action for the recovery of damages and other legal and equitable relief."

- *Civil Code* section 1794(b) provides in part:

The measure of the buyer's damages in an action under this section shall include ... the following:

(1) Where the buyer has rightfully rejected or justifiably revoked acceptance of the goods or has exercised any right to cancel the sale, *Sections 2711, 2712, and 2713 of the Commercial Code* shall apply.

(2) Where the buyer has accepted the goods, *Sections 2714 and 2715 of the Commercial Code* shall apply, and the measure of damages shall include the cost of repairs necessary to make the goods conform.

- *Civil Code* section 1791.1(a) provides:

"Implied warranty of merchantability" ... means that the consumer goods meet each of the following:

(1) Pass without objection in the trade under the contract description.

(2) Are fit for the ordinary purposes for which such goods are used.

(3) Are adequately contained, packaged, and labeled.

(4) Conform to the promises or affirmations of fact made on the container or label.

■ *Civil Code section 1791.1(c)* provides: "The duration of the implied warranty of merchantability ... shall be coextensive in duration with an express warranty which accompanies the consumer goods, provided the duration of the express warranty is reasonable; but in no event shall such implied warranty have a duration of less than 60 days nor more than one year following the sale of new consumer goods to a retail buyer. Where no duration for an express warranty is stated with respect to consumer goods, or parts thereof, the duration of the implied warranty shall be the maximum period prescribed above."

■ *Civil Code section 1791.1(d)* provides in part: "Any buyer of consumer goods injured by a breach of the implied warranty of merchantability ... has the remedies provided in Chapter 6 (commencing with Section 2601) and Chapter 7 (commencing with Section 2701) of Division 2 of the Commercial Code, and, in any action brought under such provisions, [Civil Code] Section 1794 ... shall apply."

■ *Civil Code section 1792* provides, in part: "Unless disclaimed in the manner prescribed by [the act], every sale of consumer goods that are sold at retail in this state shall be accompanied by the manufacturer's and the retail seller's implied warranty that the goods are merchantable. The retail seller shall have a right of indemnity against the manufacturer in the amount of any liability under this section."

■ *Commercial Code section 2714(1)* provides: "Where the buyer has accepted goods and given notification (subdivision (3) of Section 2607) he or she may recover, as damages for any nonconformity of tender, the loss resulting in the ordinary course of events from the seller's breach as determined in any manner that is reasonable."

■ *Commercial Code section 2714(2)* provides: "The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount."

■ "As defined in the Song-Beverly Consumer Warranty Act, 'an implied warranty of merchantability guarantees that 'consumer goods meet each of the following: [P] (1) Pass without objection in the trade under the contract description. [P] (2) Are fit for the ordinary purposes for which such goods are used. [P] (3) Are adequately contained, packaged, and labeled. [P] (4) Conform to the promises or affirmations of fact made on the container or label.' Unlike an express warranty, 'the implied warranty of merchantability arises by operation of law' and 'provides for a minimum level of quality.' 'The California Uniform Commercial Code separates implied warranties into two categories. An implied warranty that the goods "shall be merchantable" and "fit for the ordinary purpose" is contained in *California Uniform Commercial Code section 2314*. Whereas an implied warranty that the goods shall be fit for a particular purpose is contained in section 2315. [P] Thus, there exists in every contract for the sale of goods by a merchant a warranty that the goods shall be merchantable. The core test of merchantability is fitness for the ordinary purpose for which such goods are used. (§ 2314.)' " (*Isip v. Mercedes-Benz USA, LLC* (2007) 155 Cal.App.4th 19, 26-27 [65 Cal.Rptr.3d 695] , internal citations omitted.)

■ "Unless specific disclaimer methods are followed, an implied warranty of merchantability accompanies every retail sale of consumer goods in the state." (*Music Acceptance Corp. v. Lofing* (1995) 32 Cal.App.4th 610, 619 [39 Cal.Rptr.2d 159] .)

■ The implied warranty of merchantability "does not 'impose a general requirement that goods precisely fulfill the expectation of the buyer. Instead, it provides for a minimum level of quality.' " (*American Suzuki Motor Corp. v. Superior Court* (1995) 37 Cal.App.4th 1291, 1295-1296 [44 Cal.Rptr.2d 526] , internal citation omitted.)

■ "The question of reimbursement or replacement is relevant only under [Civil Code] section 1793.2. ... [T]his section applies only when goods cannot be made to conform to the 'applicable express warranties.' It has no relevance to the implied warranty of merchantability." (*Music Acceptance Corp.*, *supra*, 32 Cal.App.4th at p. 620 .)

■ "The Song-Beverly Act incorporates the provisions of [Commercial Code] sections 2314 and 2315. It 'supplements, rather than supersedes, the provisions of the California Uniform Commercial Code' by broadening a consumer's remedies to include costs, attorney's fees, and civil penalties." (*American Suzuki Motor Corp.*, *supra*, 37 Cal.App.4th at p. 1295, fn. 2 , internal citation omitted.)

■ "The implied warranty of merchantability may be breached by a latent defect undiscoverable at the time of sale. Indeed, '[u]ndisclosed latent defects ... are the very evil that the implied warranty of merchantability was designed to remedy.' In the case of a latent defect, a product is rendered unmerchantable, and the warranty of merchantability is breached, by the existence of the unseen defect, not by its subsequent discovery." (*Mexia v. Rinker Boat Co., Inc.* (2009) 174 Cal.App.4th 1297, 1304-1305 [95 Cal.Rptr.3d 285] , internal citations omitted.)

■ "The notice requirement of [former Civil Code] section 1769 ... is not an appropriate one for the court to adopt in actions by injured consumers against manufacturers with whom they have not dealt. 'As between the immediate parties to the sale [the notice requirement] is a sound commercial rule, designed to protect the seller against unduly delayed claims for damages. As applied to personal injuries, and notice to a remote seller, it becomes a booby-trap for the unwary.' " (*Greenman v. Yuba Power Products, Inc.* (1963) 59 Cal.2d 57, 61 [27 Cal.Rptr. 697, 377 P.2d 897] , internal citations omitted.)

Secondary Sources

4 Witkin, Summary of California Law (10th ed. 2005) Sales, §§ 70, 71

1 California UCC Sales & Leases (Cont.Ed.Bar) Warranties, §§ 3.21-3.23, 3.25-3.26

2 California UCC Sales & Leases (Cont.Ed.Bar) Leasing of Goods, §§ 19.31-19.32

California Products Liability Actions, Ch. 2, Liability for Defective Products, § 2.31[2][a] (Matthew Bender)

44 California Forms of Pleading and Practice, Ch. 502, Sales: *Warranties*, § 502.51 (Matthew Bender)

20 *California Points and Authorities, Ch. 206, Sales, § 206.42* (Matthew Bender)

5 California Civil Practice (Thomson West) Business Litigation, §§ 53:5-53:7

Publisher's Notes

This instruction covers issues presented in BAJI No. 9.60.

Legal Topics:

For related research and practice materials, see the following legal topics:

Antitrust & Trade Law Consumer Protection General Overview Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Commercial Law (UCC) Sales (Article 2) Warranties Merchantability



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CHAPTER 32 California Judicial Council Song-Beverly Consumer Warranty Act Instructions

5-32 California Forms of Jury Instruction CACI 3211

CACI 3211 Breach of Implied Warranty of Fitness for a Particular Purpose--Essential Factual Elements

[*Name of plaintiff*] **claims that [he/she] was harmed because the [*consumer good*] was not suitable for [his/her] intended use. This is known as a "breach of an implied warranty." To establish this claim, [*name of plaintiff*] must prove all of the following:**

- 1. That [*name of plaintiff*] bought a[n] [*consumer good*] [from/manufactured by/distributed by] [*name of defendant*];**
- 2. That, at the time of purchase, [*name of defendant*] knew or had reason to know that [*name of plaintiff*] intended to use the [*consumer good*] for a particular purpose;**
- 3. That, at the time of purchase, [*name of defendant*] knew or had reason to know that [*name of plaintiff*] was relying on [his/her/its] skill and judgment to select or provide a [*consumer good*] that was suitable for that particular purpose;**
- 4. That [*name of plaintiff*] justifiably relied on [*name of defendant*]'s skill and judgment; and**
- 5. That the [*consumer good*] was not suitable for the particular purpose.**

New September 2003

Directions for Use

If remedies are sought under the Commercial Code, the plaintiff may be required to prove reasonable notification within a reasonable time. (*Cal. U. Com. Code*, § 2607(3).) If the court determines such proof is necessary, add the following element to this instruction:

That [name of plaintiff] took reasonable steps to notify [name of defendant] within a reasonable time that the [consumer good] was not suitable for its intended use;

See also CACI No. 1243, *Notification/Reasonable Time*.

If appropriate to the facts, add: "It is not necessary for [name of plaintiff] to prove the cause of a defect of the [consumer good]." The Song-Beverly Consumer Warranty Act does not require a consumer to prove the cause of the defect or failure, only that the consumer good "did not conform to the express warranty." (See *Oregel v. American Isuzu Motors, Inc.* (2001) 90 Cal.App.4th 1094, 1102, fn. 8 [109 Cal.Rptr.2d 583] .)

In addition to sales of consumer goods, the Consumer Warranty Act applies to leases of consumer goods--see *Civil Code* sections 1791(g)-(i) and 1795.4. This instruction may be modified for use in cases involving the implied warranty of fitness in a lease of consumer goods.

Sources and Authority

- *Civil Code* section 1791.1(b) provides, in part: "'Implied warranty of fitness' means ... that when the retailer, distributor, or manufacturer has reason to know any particular purpose for which the consumer goods are required, and further, that the buyer is relying on the skill and judgment of the seller to select and furnish suitable goods, then there is an implied warranty that the goods shall be fit for such purpose."

- *Civil Code* section 1792.1 provides: "Every sale of consumer goods that are sold at retail in this state by a manufacturer who has reason to know at the time of the retail sale that the goods are required for a particular purpose and that the buyer is relying on the manufacturer's skill or judgment to select or furnish suitable goods shall be accompanied by such manufacturer's implied warranty of fitness."

- *Civil Code* section 1792.2(a) provides: "Every sale of consumer goods that are sold at retail in this state by a retailer or distributor who has reason to know at the time of the retail sale that the goods are required for a particular purpose, and that the buyer is relying on the retailer's or distributor's skill or judgment to select or furnish suitable goods shall be accompanied by such retailer's or distributor's implied warranty that the goods are fit for that purpose."

- *Commercial Code* section 2714(2) provides: "The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount."

- "The Consumer Warranty Act makes ... an implied warranty [of fitness for a particular purpose] applicable to retailers, distributors, and manufacturers. ... An implied warranty of fitness for a particular purpose arises only where (1) the purchaser at the time of contracting intends to use the goods for a particular purpose, (2) the seller at the time of contracting has reason to know of this particular purpose, (3) the buyer relies on the seller's skill or judgment to select or furnish goods suitable for the particular purpose, and (4) the seller at the time of contracting has reason to know that the buyer is relying on such skill and judgment." (*Keith v. Buchanan* (1985) 173 Cal.App.3d 13, 25 [220 Cal.Rptr. 392] , internal citations omitted.)

■ "'A "particular purpose" differs from the ordinary purpose for which the goods are used in that it envisages a specific use by the buyer which is peculiar to the nature of his business whereas the ordinary purposes for which goods are used are those envisaged in the concept of merchantability and go to uses which are customarily made of the goods in question.'" (*American Suzuki Motor Corp. v. Superior Court* (1995) 37 Cal.App.4th 1291, 1295, fn. 2 [44 Cal.Rptr.2d 526] , internal citation omitted.)

■ "The reliance elements are important to the consideration of whether an implied warranty of fitness for a particular purpose exists. ... The major question in determining the existence of an implied warranty of fitness for a particular purpose is the reliance by the buyer upon the skill and judgment of the seller to select an article suitable for his needs." (*Keith, supra*, 173 Cal.App.3d at p. 25 , internal citations omitted.)

■ *Civil Code* section 1792.3 provides, in part: "[N]o implied warranty of fitness shall be waived, except in the case of a sale of consumer goods on an 'as is' or 'with all faults' basis where the provisions of this [act] affecting 'as is' or 'with all faults' sales are strictly complied with."

■ "The question of reimbursement or replacement is relevant only under [*Civil Code*] section 1793.2. ... [T]his section applies only when goods cannot be made to conform to the 'applicable express warranties.' It has no relevance to the implied warranty of merchantability." (*Music Acceptance Corp. v. Lofing* (1995) 32 Cal.App.4th 610, 620 [39 Cal.Rptr.2d 159] .)

■ *Civil Code* section 1791.1(d) provides, in part: "Any buyer of consumer goods injured by a breach of ... the implied warranty of fitness has the remedies provided in Chapter 6 (commencing with Section 2601) and Chapter 7 (commencing with Section 2701) of Division 2 of the Commercial Code, and, in any action brought under such provisions, [*Civil Code*] Section 1794 ... shall apply."

■ "The Song-Beverly Act incorporates the provisions of [*Commercial Code*] sections 2314 and 2315. It 'supplements, rather than supersedes, the provisions of the California Uniform Commercial Code' by broadening a consumer's remedies to include costs, attorney's fees, and civil penalties." (*American Suzuki Motor Corp., supra*, 37 Cal.App.4th at p. 1295, fn. 2 , internal citation omitted.)

■ *Civil Code* section 1794(b) provides, in part:

The measure of the buyer's damages in an action under this section shall include the following:

(1) Where the buyer has rightfully rejected or justifiably revoked acceptance of the goods or has exercised any right to cancel the sale, *Sections 2711, 2712, and 2713 of the Commercial Code* shall apply.

(2) Where the buyer has accepted the goods, *Sections 2714 and 2715 of the Commercial Code* shall apply, and the measure of damages shall include the cost of repairs necessary to make the goods conform.

■ *Commercial Code* section 2714(1) provides: "Where the buyer has accepted goods and given notification (subdivision (3) of Section 2607) he or she may recover, as damages for any nonconformity of tender, the loss resulting in the ordinary course of events from the seller's breach as determined in any manner that is reasonable."

■ "The notice requirement of [former *Civil Code*] section 1769 ... is not an appropriate one for the court to adopt in actions by injured consumers against manufacturers with whom they have not dealt. As between the immediate parties to the sale [the notice requirement] is a sound commercial rule, designed to protect the seller against unduly delayed

claims for damages. As applied to personal injuries, and notice to a remote seller, it becomes a booby-trap for the unwary.' " (*Greenman v. Yuba Power Products, Inc.* (1963) 59 Cal.2d 57, 61 [27 Cal.Rptr. 697, 377 P.2d 897] , internal citations omitted.)

Secondary Sources

4 Witkin, Summary of California Law (10th ed. 2005) Sales, §§ 72, 73

1 California UCC Sales & Leases (Cont.Ed.Bar) Warranties, §§ 3.33-3.40

2 California UCC Sales & Leases (Cont.Ed.Bar) Leasing of Goods, §§ 19.31-19.32

California Products Liability Actions, Ch. 2, Liability for Defective Products, § 2.31[2][b] (Matthew Bender)

44 *California Forms of Pleading and Practice, Ch. 502, Sales: Warranties, § 502.51* (Matthew Bender)

20 *California Points and Authorities, Ch. 206, Sales, § 206.64 et seq.* (Matthew Bender)

5 California Civil Practice: Business Litigation (Thomson West) §§ 53:5-53:7

Publisher's Notes

This instruction covers issues presented in BAJI No. 9.55.

LexisNexis Matthew Bender Expert Practice Tip--Defending Implied Warranty Claims Can Be Difficult: Implied warranty claims based on statements by a salesperson as to suitability for a particular purpose can be difficult to defend. The consumer almost always testifies in some detail about the sales transaction and the specific statements made by the salesperson. The salesperson, on the other hand, rarely remembers the transaction and has to fall back on general procedures or habits. *By Ronald Oster*

Legal Topics:

For related research and practice materials, see the following legal topics:

Antitrust & Trade Law Consumer Protection General Overview Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Commercial Law (UCC) Sales (Article 2) Warranties Fitness



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CHAPTER 32 California Judicial Council Song-Beverly Consumer Warranty Act Instructions

5-32 California Forms of Jury Instruction CACI 3212

CACI 3212 Duration of Implied Warranty

An implied warranty is in effect for one year after the sale of the [*consumer good*], unless a shorter period is stated in a writing that comes with the [*consumer good*], provided that the shorter period is reasonable. In no event will an implied warranty be in effect for less than 60 days.

[The time period of an implied warranty is lengthened by the number of days that the [*consumer good*] was made available by [*name of plaintiff*] for repairs under the warranty, including any delays caused by circumstances beyond [*name of plaintiff*]'s control].

New September 2003

Directions for Use

If the consumer goods at issue are not new, the instruction must be modified to reflect the shorter implied warranty period provided in *Civil Code section 1795.5(c)* (i.e., no less than 30 days but no more than three months).

Sources and Authority

- *Civil Code section 1791.1(c)* provides: "The duration of the implied warranty of merchantability and where present the implied warranty of fitness shall be coextensive in duration with an express warranty which accompanies the consumer goods, provided the duration of the express warranty is reasonable; but in no event shall such implied warranty have a duration of less than 60 days nor more than one year following the sale of new consumer goods to a retail buyer. Where no duration for an express warranty is stated with respect to consumer goods, or parts thereof, the duration of the implied warranty shall be the

maximum period prescribed above."

■ *Civil Code section 1795.6* provides, in part:

(a) Every warranty period relating to an implied ... warranty accompanying a sale or consignment for sale of consumer goods selling for fifty dollars (\$50) or more shall automatically be tolled for the period from the date upon which the buyer either (1) delivers nonconforming goods to the manufacturer or seller for warranty repairs or service or (2), pursuant to subdivision (c) of Section 1793.2 or Section 1793.22, notifies the manufacturer or seller of the nonconformity of the goods up to, and including, the date upon which (1) the repaired or serviced goods are delivered to the buyer, (2) the buyer is notified the goods are repaired or serviced and are available for the buyer's possession or (3) the buyer is notified that repairs or service is completed, if repairs or service is made at the buyer's residence.

(b) Notwithstanding the date or conditions set for the expiration of the warranty period, such warranty period shall not be deemed expired if ... : (1) after the buyer has satisfied the requirements of subdivision (a), the warranty repairs or service has not been performed due to delays caused by circumstances beyond the control of the buyer or (2) the warranty repairs or service performed upon the nonconforming goods did not remedy the nonconformity for which such repairs or service was performed and the buyer notified the manufacturer or seller of this failure within 60 days after the repairs or service was completed. When the warranty repairs or service has been performed so as to remedy the nonconformity, the warranty period shall expire in accordance with its terms, including any extension to the warranty period for warranty repairs or service.

■ *Civil Code section 1795.5* provides, in part: "[T]he obligation of a distributor or retail seller of used consumer goods in a sale in which an express warranty is given shall be the same as that imposed on manufacturers under [the act] except: ... [t]he duration of the implied warranty of merchantability and where present the implied warranty of fitness with respect to used consumer goods sold in this state, where the sale is accompanied by an express warranty, shall be coextensive in duration with an express warranty which accompanies the consumer goods, provided the duration of the express warranty is reasonable, but in no event shall such implied warranties have a duration of less than 30 days nor more than three months following the sale of used consumer goods to a retail buyer. Where no duration for an express warranty is stated with respect to such goods, or parts thereof, the duration of the implied warranties shall be the maximum period prescribed above."

■ "On appeal, [defendants] concede that the duration provision is not a statute of limitations and that the applicable statute of limitations is four years. They argue, however, that the judgment can be affirmed on other grounds. Among other arguments, they contend that the duration provision of the Song-Beverly Act should be interpreted as barring an action for breach of the implied warranty of merchantability when the purchaser fails to discover and report the defect to the seller within the time period specified in that provision. We reject this argument because the plain language of the statute, particularly in light of the consumer protection policies supporting the Song-Beverly Act, make clear that the statute merely creates a limited, prospective duration for the implied warranty of merchantability; it does not create a deadline for discovering latent defects or for giving notice to the seller." (*Mexia v. Rinker Boat Co., Inc.* (2009) 174 Cal.App.4th 1297, 1301 [95 Cal.Rptr.3d 285] .)

Secondary Sources

4 Witkin, Summary of California Law (10th ed. 2005) Sales, § 325

1 California UCC Sales & Leases (Cont.Ed.Bar) Warranties, § 3.17

44 *California Forms of Pleading and Practice*, Ch. 502, Sales: Warranties, §§ 502.51 -502.52 (Matthew Bender)

20 *California Points and Authorities*, Ch. 206, Sales, § 206.117 (Matthew Bender)

5 California Civil Practice: Business Litigation (Thomson West) § 53:7

Publisher's Notes

There is no BAJI instruction on this subject.

LexisNexis Matthew Bender Expert Practice Tip--California's Short Duration for Implied Warranties: California has a relatively short duration (one year) for implied warranties [*see Civ. Code § 1791.1(c)*]. If a product breaks down after a year, plaintiff's counsel may have to rely on an extended written warranty, or see if another state's warranty law applies (e.g., transactions that take place in interstate commerce). *By Ronald Oster*

LexisNexis Matthew Bender Expert Practice Tip--Caution! Use Care With Warranty Instructions: CACI No. 3212, as well as other warranty instructions, will be difficult for some jurors to grasp. *By Rex Heeseman*

Legal Topics:

For related research and practice materials, see the following legal topics:

Antitrust & Trade Law Consumer Protection General Overview Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Commercial Law (UCC) Sales (Article 2) Warranties General Overview



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California Forms of Jury Instruction

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CHAPTER 32 California Judicial Council Song-Beverly Consumer Warranty Act Instructions

5-32 California Forms of Jury Instruction CACI 3213

CACI 3213 Affirmative Defense--Statute of Limitations (U. Com. Code, § 2725)

[Name of defendant] contends that [name of plaintiff]'s lawsuit was not filed within the time set by law. To succeed on this defense, [name of defendant] must prove that

[the date of [tender of] delivery occurred before [insert date four years before filing of complaint].]

[or]

[any breach was discovered or should have been discovered before [insert date four years before filing of complaint].]

New June 2010

Directions for Use

Use this instruction to assert a limitation defense based on the four-year period of California's *Uniform Commercial Code* section 2725. (See *Mexia v. Rinker Boat Co., Inc.* (2009) 174 Cal.App.4th 1297, 1305 [95 Cal.Rptr.3d 285] [four-year statute of U. Com. Code, § 2725 applies to warranty claims under Song-Beverly].)

A breach of warranty occurs when tender of delivery is made. (U. Com. Code, § 2725(2).) Include "tender of" if actual delivery was not made or if delivery was made after tender. If whether a proper tender was made is at issue, the jury should be instructed on the meaning of "tender." (See U. Com. Code, § 2503.)

Under the statute, a breach of warranty occurs when tender of delivery is made regardless of the

aggrieved party's knowledge of the breach--that is, there is no delayed-discovery rule. However, if an express warranty explicitly extends to future performance of the goods (for example, a warranty to repair defects for three years or 30,000 miles) and discovery of the breach must await the time of the performance, the cause of action accrues when the breach is or should have been discovered. (*U. Com. Code*, § 2725(2).) In such a case, give the second option in the second sentence. If delayed discovery is alleged, *CACI No. 455, Statute of Limitations--Delayed Discovery*, may be adapted for use. (See *Krieger v. Nick Alexander Imports, Inc.* (1991) 234 Cal.App.3d 205, 215-220 [285 Cal.Rptr. 717] .)

Under the Uniform Commercial Code, by the original agreement the parties may reduce the period of limitation to not less than one year but may not extend it. (*U. Com. Code*, § 2725(1).) Presumably, this provision does not apply to claims under the Song-Beverly Act. (See *Civ. Code*, §§ 1790.1 [buyer's waiver of rights under Song-Beverly Act is unenforceable], 1790.3 [in case of conflict, provisions of Song-Beverly Act control over U. Com. Code].)

Sources and Authority

■ *Uniform Commercial Code section 2725* provides:

(1) An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued. By the original agreement the parties may reduce the period of limitation to not less than one year but may not extend it.

(2) A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered.

(3) Where an action commenced within the time limited by subdivision (1) is so terminated as to leave available a remedy by another action for the same breach such other action may be commenced after the expiration of the time limited and within six months after the termination of the first action unless the termination resulted from voluntary discontinuance or from dismissal for failure or neglect to prosecute.

(4) This section does not alter the law on tolling of the statute of limitations nor does it apply to causes of action which have accrued before this code becomes effective.

■ *Civil Code section 1790.1* provides: "Any waiver by the buyer of consumer goods of the provisions of this chapter, except as expressly provided in this chapter, shall be deemed contrary to public policy and shall be unenforceable and void."

■ *Civil Code section 1790.3* provides: "The provisions of this chapter shall not affect the rights and obligations of parties determined by reference to the Commercial Code except that, where the provisions of the Commercial Code conflict with the rights guaranteed to buyers of consumer goods under the provisions of this chapter, the provisions of this chapter shall prevail."

■ "The [Song Beverly] Act was intended to supplement the provisions of the California Uniform Commercial Code, rather than to supersede the rights and obligations created by that statutory scheme. (See *Civ. Code*, § 1790.3.) *California Uniform Commercial Code section 2725* specifically governs

actions for breach of warranty in a sales context. We conclude that this special statute of limitations controls rather than the general provision of *Code of Civil Procedure section 338, subdivision (a)* for liabilities created by statute." (*Krieger, supra*, 234 Cal.App.3d at p. 215 .)

■ "[Defendants] now concede that the statute of limitations for an action for breach of warranty under the Song-Beverly Act is four years pursuant to *section 2725 of the California Uniform Commercial Code*. Under that statute, a cause of action for breach of warranty accrues, at the earliest, upon tender of delivery. Thus, the earliest date the implied warranty of merchantability regarding [plaintiff]'s boat could have accrued was the date [plaintiff] purchased it Because he filed this action three years seven months after that date, he did so within the four-year limitations period. Therefore, [plaintiff]'s action is not barred by a statute of limitations." (*Mexia, supra*, 174 Cal.App.4th at p. 1306 .)

Secondary Sources

4 Witkin, Summary of California Law (10th ed. 2005) Sales, § 213

3 Witkin, California Procedure (5th ed. 2008) Actions, §§ 474, 519, 962

1 California Products Liability Actions, Ch. 8, *Statute of Limitations* § 8.021 (Matthew Bender)

44 *California Forms of Pleading and Practice*, Ch. 500, *Sales Under the Commercial Code*, § 500.78 (Matthew Bender)

20 *California Points and Authorities*, Ch. 206, *Sales*, §§ 206.38, 206.61, 206.62 (Matthew Bender)

1 *Matthew Bender Practice Guide: California Contract Litigation*, Ch. 4, *Determining Applicable Statute of Limitations and Effect on Potential Action*, 4.05

Publisher's Notes

This instruction covers issues presented in BAJI Nos. 9.55 and 9.86.

Legal Topics:

For related research and practice materials, see the following legal topics:

Antitrust & Trade Law Consumer Protection General Overview Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Commercial Law (UCC) Sales (Article 2) Warranties General Overview



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CHAPTER 32 California Judicial Council Song-Beverly Consumer Warranty Act Instructions

5-32 California Forms of Jury Instruction CACI 3214-CACI 3219

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CHAPTER 32 California Judicial Council Song-Beverly Consumer Warranty Act Instructions

5-32 *California Forms of Jury Instruction CACI 3220*

CACI 3220 Affirmative Defense--Unauthorized or Unreasonable Use

[*Name of defendant*] **is not responsible for any harm to [*name of plaintiff*] if [*name of defendant*] proves that any [defect[s] in the [*consumer good*]] [failure to match any [written/implied] warranty] [was/were] caused by unauthorized or unreasonable use of the [*consumer good*] after it was sold.**

New September 2003; Revised February 2005

Sources and Authority

■ *Civil Code* section 1794.3 provides: "The provisions of this [act] shall not apply to any defect or nonconformity in consumer goods caused by the unauthorized or unreasonable use of the goods following sale."

Secondary Sources

4 Witkin, *Summary of California Law* (10th ed. 2005) Sales, §§ 314, 315

California Products Liability Actions, Ch. 8, *Defenses*, § 8.07[7] (Matthew Bender)

44 *California Forms of Pleading and Practice*, Ch. 502, *Sales: Warranties*, § 502.51 (Matthew Bender)

5 *California Civil Practice: Business Litigation* (Thomson West) § 53:59

Publisher's Notes

This instruction covers issues presented in BAJI No. 9.71.

LexisNexis Matthew Bender Expert Practice Tip--Expert Testimony Needed: "Unauthorized or unreasonable use" can be a difficult defense to prove since the consumer is usually the only one who has first hand knowledge of how the product was used. Expert testimony will probably be required to provide evidence for this defense. *By Ronald Oster*

Legal Topics:

For related research and practice materials, see the following legal topics:

Antitrust & Trade Law Consumer Protection General Overview Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Commercial Law (UCC) Sales (Article 2) Warranties General Overview Torts Products Liability Breach of Warranty



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CHAPTER 32 California Judicial Council Song-Beverly Consumer Warranty Act Instructions

5-32 California Forms of Jury Instruction CACI 3221

CACI 3221 Affirmative Defense--Disclaimer of Implied Warranties

[*Name of defendant*] **claims that it did not breach any implied warranties because the [*consumer good*] was sold on an "as is" or "with all faults" basis. To succeed, [*name of defendant*] must prove both of the following:**

- 1. That at the time of sale a clearly visible written notice was attached to the [*consumer good*]; and**
- 2. That the written notice, in clear and simple language, told the buyer each of the following:**
 - a. That the [*consumer good*] was being sold on an "as is" or "with all faults" basis;**
 - b. That the buyer accepted the entire risk of the quality and performance of the [*consumer good*]; and**
 - c. That if the [*consumer good*] were defective, the buyer would be responsible for the cost of all necessary servicing or repair.**

New September 2003; Revised June 2010

Directions for Use

If the consumer goods in question were sold by means of a mail-order catalog, the instruction must be modified in accordance with *Civil Code* section 1792.4(b).

In addition to sales of consumer goods, the Consumer Warranty Act applies to leases--see *Civil Code* sections 1791(g)-(i) and 1795.4. This instruction may be modified for use in cases involving leases of

consumer goods.

If at the time of sale, or within 90 days thereafter, the defendant sold the plaintiff a service contract that applied to the product, the federal Magnuson-Moss Warranty--Federal Trade Commission Improvement Act preempts use of this defense. (See 15 U.S.C. § 2308.)

Sources and Authority

■ *Civil Code section 1792.3* provides: "No implied warranty of merchantability and, where applicable, no implied warranty of fitness shall be waived, except in the case of a sale of consumer goods on an 'as is' or 'with all faults' basis where the provisions of this chapter affecting 'as is' or 'with all faults' sales are strictly complied with."

■ *Civil Code section 1791.3* provides: "[A] sale 'as is' or 'with all faults' means that the manufacturer, distributor, and retailer disclaim all implied warranties that would otherwise attach to the sale of consumer goods under the provisions of this [act]."

■ *Civil Code section 1792.4* provides:

(a) No sale of goods, governed by the provisions of this [act], on an "as is" or "with all faults" basis, shall be effective to disclaim the implied warranty of merchantability or, where applicable, the implied warranty of fitness, unless a conspicuous writing is attached to the goods which clearly informs the buyer, prior to the sale, in simple and concise language of each of the following:

(1) The goods are being sold on an "as is" or "with all faults" basis.

(2) The entire risk as to the quality and performance of the goods is with the buyer.

(3) Should the goods prove defective following their purchase, the buyer and not the manufacturer, distributor, or retailer assumes the entire cost of all necessary servicing or repair.

(b) In the event of sale of consumer goods by means of a mail order catalog, the catalog offering such goods shall contain the required writing as to each item so offered in lieu of the requirement of notification prior to the sale.

■ *Civil Code section 1793* provides, in part: "[A] manufacturer, distributor, or retailer, in transacting a sale in which express warranties are given, may not limit, modify, or disclaim the implied warranties guaranteed by this chapter to the sale of consumer goods."

■ *Civil Code section 1792.5* provides: "Every sale of goods that are governed by the provisions of this [act], on an 'as is' or 'with all faults' basis, made in compliance with the provisions of this [act], shall constitute a waiver by the buyer of the implied warranty of merchantability and, where applicable, of the implied warranty of fitness."

■ *Civil Code section 1795.4(e)* provides: "A lessor who re-leases goods to a new lessee and does not retake possession of the goods prior to consummation of the re-lease may, notwithstanding the provisions of Section 1793, disclaim as to that lessee any and all warranties created by this chapter by conspicuously disclosing in the lease that these warranties are disclaimed."

■ Title 15 *United States Code* section 2308 provides:

(a) Restrictions on disclaimers or modifications. No supplier may disclaim or modify (except as provided in subsection (b)) any implied warranty to a consumer with respect to such consumer product if (1) such supplier makes any written warranty to the consumer with respect to such consumer product, or (2) at the time of sale, or within 90 days thereafter, such supplier enters into a service contract with the consumer which applies to such consumer product.

(b) Limitation on duration. For purposes of this title [15 USCS §§ 2301 *et seq.*] (other than section 104(a)(2)) [15 USCS § 2304(a)(2)] implied warranties may be limited in duration to the duration of a written warranty of reasonable duration, if such limitation is conscionable and is set forth in clear and unmistakable language and prominently displayed on the face of the warranty.

(c) Effectiveness of disclaimers, modifications, or limitations. A disclaimer, modification, or limitation made in violation of this section shall be ineffective for purposes of this title [15 USCS § 2304(a)] and State law.

■ "Unless specific disclaimer methods are followed, an implied warranty of merchantability accompanies every retail sale of consumer goods in the state." (*Music Acceptance Corp. v. Lofing* (1995) 32 Cal.App.4th 610, 619 [39 Cal.Rptr.2d 159] .)

Secondary Sources

4 Witkin, Summary of California Law (10th ed. 2005) Sales, § 90

1 California UCC Sales & Leases (Cont.Ed.Bar) Warranties, §§ 3.53-3.61

California Products Liability Actions, Ch. 2, Liability for Defective Products, § 2.34[3], Ch. 8, Defenses, § 8.07[5][c] (Matthew Bender)

44 *California Forms of Pleading and Practice, Ch. 502, Sales: Warranties, § 502.51* (Matthew Bender)

20 *California Points and Authorities, Ch. 206, Sales, § 206.72 et seq.* (Matthew Bender)

5 California Civil Practice: Business Litigation (Thomson West) §§ 53:8-53:9, 53:58

Publisher's Notes

This instruction covers issues presented in BAJI No. 9.81.

LexisNexis Matthew Bender Expert Practice Tip--"As Is": Many jurors will understand "as is." Thus, CACI No. 3221 (if applicable) can be effective for the defense. *By Rex Heeseman*

Legal Topics:

For related research and practice materials, see the following legal topics:

Antitrust & Trade Law Consumer Protection General Overview Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Commercial Law (UCC) Sales (Article 2) Warranties Exclusion & Modification Torts Products Liability Breach of Warranty



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CHAPTER 32 California Judicial Council Song-Beverly Consumer Warranty Act Instructions

5-32 California Forms of Jury Instruction CACI 3222-CACI 3229

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CHAPTER 32 California Judicial Council Song-Beverly Consumer Warranty Act Instructions

5-32 *California Forms of Jury Instruction CACI 3230*

CACI 3230 Breach of Disclosure Obligations--Essential Factual Elements

[*Name of plaintiff*] **claims that [*name of defendant*] violated California's motor vehicle warranty laws. To establish this claim, [*name of plaintiff*] must prove all of the following:**

1. That [*name of plaintiff*] **[bought/leased] a [*motor vehicle*] from [*name of defendant*];**
2. **[That the vehicle was returned by a previous [buyer/lessee] to [*name of manufacturer*] under [California/[*name of state*]]'s motor vehicle warranty laws; and]**

[That [*name of defendant*] knew or should have known that the vehicle had been returned to the manufacturer under [California/[*name of state*]]'s motor vehicle warranty laws; and]
3. That before the [sale/leasing], [*name of defendant*] **failed to tell [*name of plaintiff*], in clear and simple language, about the nature of the defect experienced by the original [buyer/lessee] of the vehicle; [or]]**
4. That before the [sale/leasing] to [*name of plaintiff*], **the defect experienced by the vehicle's original [buyer/lessee] was not fixed; [or]]**
5. That [*name of defendant*] **did not provide a written warranty to [*name of plaintiff*] that the vehicle would be free for one year of the defect experienced by the vehicle's original [buyer/lessee].]**

New September 2003

Directions for Use

Use the first bracketed option in element 2 if the defendant is the manufacturer. Otherwise, use the second option.

This instruction is based on the disclosure and warranty obligations set forth in *Civil Code* section 1793.22(f). Uncontested elements should be deleted. The instruction may be modified for use with claims involving the additional disclosure obligations set forth in California's Automotive Consumer Notification Act. (*Civ. Code*, §§ 1793.23, 1793.24.)

Sources and Authority

- *Civil Code* section 1793.22(f)(1) provides, in part: "[N]o person shall sell, either at wholesale or retail, lease, or transfer a motor vehicle transferred by a buyer or lessee to a manufacturer pursuant to paragraph (2) of subdivision (d) of Section 1793.2 or a similar statute of any other state [i.e., a "lemon law" buyback], unless the nature of the nonconformity experienced by the original buyer or lessee is clearly and conspicuously disclosed to the prospective buyer, lessee, or transferee, the nonconformity is corrected, and the manufacturer warrants to the new buyer, lessee, or transferee in writing for a period of one year that the motor vehicle is free of that nonconformity."

- *Civil Code* section 1794(a) provides, in part: "Any buyer of consumer goods who is damaged by a failure to comply with any obligation under this [act] ... may bring an action for the recovery of damages and other legal and equitable relief."

- *Civil Code* section 1793.23 provides, in part:

(b) This section and Section 1793.24 shall be known, and may be cited as, the Automotive Consumer Notification Act.

(c) Any manufacturer who reacquires or assists a dealer or lienholder to reacquire a motor vehicle registered in this state, any other state, or a federally administered district shall, prior to any sale, lease, or transfer of the vehicle in this state, or prior to exporting the vehicle to another state for sale, lease, or transfer if the vehicle was registered in this state and reacquired pursuant to paragraph (2) of subdivision (d) of Section 1793.2, cause the vehicle to be retitled in the name of the manufacturer, request the Department of Motor Vehicles to inscribe the ownership certificate with the notation "Lemon Law Buyback," and affix a decal to the vehicle in accordance with *Section 11713.12 of the Vehicle Code* if the manufacturer knew or should have known that the vehicle is required by law to be replaced, accepted for restitution due to the failure of the manufacturer to conform the vehicle to applicable warranties pursuant to paragraph (2) of subdivision (d) of Section 1793.2, or accepted for restitution by the manufacturer due to the failure of the manufacturer to conform the vehicle to warranties required by any other applicable law of the state, any other state, or federal law.

(d) Any manufacturer who reacquires or assists a dealer or lienholder to reacquire a motor vehicle in response to a request by the buyer or lessee that the vehicle be either replaced or accepted for restitution because the vehicle did not conform to express warranties shall, prior to the sale, lease, or other transfer of the vehicle, execute and deliver to the subsequent transferee a notice and obtain the transferee's written acknowledgment of a notice, as prescribed by Section 1793.24.

(e) Any person, including any dealer, who acquires a motor vehicle for resale and knows or should have known that the vehicle was reacquired by the vehicle's manufacturer in response to a request by the last retail owner or lessee of the vehicle that it be replaced or accepted for restitution because the vehicle did not conform to express warranties shall, prior to the sale, lease, or other transfer, execute and deliver to the subsequent transferee a notice and obtain the transferee's written acknowledgment of a notice, as prescribed by Section 1793.24.

(f) Any person, including any manufacturer or dealer, who sells, leases, or transfers ownership of a motor vehicle when the vehicle's ownership certificate is inscribed with the notation "Lemon Law Buyback" shall, prior to the sale, lease, or ownership transfer of the vehicle, provide the transferee with a disclosure statement signed by the transferee that states:

"THIS VEHICLE WAS REPURCHASED BY ITS MANUFACTURER DUE TO A DEFECT IN THE VEHICLE PURSUANT TO CONSUMER WARRANTY LAWS. THE TITLE TO THIS VEHICLE HAS BEEN PERMANENTLY BRANDED WITH THE NOTATION 'LEMON LAW BUYBACK'."

(g) The disclosure requirements in subdivisions (d), (e), and (f) are cumulative with all other consumer notice requirements and do not relieve any person, including any dealer or manufacturer, from complying with any other applicable law, including any requirement of subdivision (f) of Section 1793.22.

Secondary Sources

20 *California Points and Authorities*, Ch. 206, Sales, § 206.08 et seq. (Matthew Bender)

5 California Civil Practice: Business Litigation (Thomson West) § 53:29

Publisher's Notes

There is no BAJI instruction on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Antitrust & Trade Law Consumer Protection Vehicle Warranties Lemon Laws Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Commercial Law (UCC) Sales (Article 2) Warranties General Overview



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CHAPTER 32 California Judicial Council Song-Beverly Consumer Warranty Act Instructions

5-32 California Forms of Jury Instruction CACI 3231-CACI 3239

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CHAPTER 32 California Judicial Council Song-Beverly Consumer Warranty Act Instructions

5-32 California Forms of Jury Instruction CACI 3240

CACI 3240 Reimbursement Damages--Consumer Goods

If you decide that [name of defendant] or its representative failed to repair or service the [consumer good] to match the [written warranty/represented quality] after a reasonable number of opportunities, then [name of plaintiff] is entitled to be reimbursed for the purchase price of the [consumer good], less the value of its use by [name of plaintiff] before discovering the defect.

[Name of plaintiff] must prove the amount of the purchase price, and [name of defendant] must prove the value of the use of the [consumer good].

New September 2003

Directions for Use

This instruction is intended for use with claims involving consumer goods under the Song-Beverly Consumer Warranty Act. For claims involving new motor vehicles, see *CACI No. 3241, Restitution From Manufacturer--New Motor Vehicle*.

This instruction can be modified if it is being used for claims other than those described in the instruction.

Sources and Authority

- *Civil Code section 1793.2(d)(1)* provides, in part: "[I]f the manufacturer or its representative in this state does not service or repair the goods to conform to the applicable express warranties after a reasonable number of attempts, the manufacturer shall either replace the goods or reimburse the buyer in

an amount equal to the purchase price paid by the buyer, less that amount directly attributable to use by the buyer prior to the discovery of the nonconformity."

■ *Civil Code section 1794(b)* provides:

The measure of the buyer's damages in an action under this section shall include the rights of replacement or reimbursement as set forth in subdivision (d) of Section 1793.2, and the following:

(1) Where the buyer has rightfully rejected or justifiably revoked acceptance of the goods or has exercised any right to cancel the sale, *Sections 2711, 2712, and 2713 of the Commercial Code* shall apply.

(2) Where the buyer has accepted the goods, *Sections 2714 and 2715 of the Commercial Code* shall apply, and the measure of damages shall include the cost of repairs necessary to make the goods conform.

■ "The clear mandate of section 1794 ... is that the compensatory damages recoverable for breach of the [Song-Beverly Consumer Warranty] Act are those available to a buyer for a seller's breach of a sales contract." (*Kwan v. Mercedes-Benz of N. Am.* (1994) 23 Cal.App.4th 174, 188 [28 Cal.Rptr.2d 371] .)

■ *Civil Code section 1791.1(d)* provides: "Any buyer of consumer goods injured by a breach of the implied warranty of merchantability and where applicable by a breach of the implied warranty of fitness has the remedies provided in Chapter 6 (commencing with Section 2601) and Chapter 7 (commencing with Section 2701) of Division 2 of the Commercial Code, and, in any action brought under such provisions, Section 1794 of this chapter shall apply."

■ "[I]n the usual situation, emotional distress damages are *not* recoverable under the Song-Beverly Consumer Warranty Act." (*Music Acceptance Corp. v. Lofing* (1995) 32 Cal.App.4th 610, 625, fn. 15 [39 Cal.Rptr.2d 159]); see also *Kwan, supra*, 23 Cal.App.4th at pp. 187-192 .)

Secondary Sources

4 Witkin, Summary of California Law (10th ed. 2005) Sales, §§ 321-324

1 California UCC Sales & Leases (Cont.Ed.Bar) Warranties, § 3.90

44 *California Forms of Pleading and Practice*, Ch. 502, Sales: Warranties, § 502.43 (Matthew Bender)

20 *California Points and Authorities*, Ch. 206, Sales, § 206.103 (Matthew Bender)

5 California Civil Practice: Business Litigation (Thomson West) § 53:32

Publisher's Notes

There is no BAJI instruction on this subject.

LexisNexis Matthew Bender Expert Practice Tip--"Value of the Use": For motor vehicles, there is a formula for determining the "value of the use" of the product by the consumer [see *Civ. Code* § 1793.2(d)(2)(C)]. For other products, the burden is on the defendant. Many jurors will be skeptical about the "usefulness" of a defective product. *By Ronald Oster*

Legal Topics:

For related research and practice materials, see the following legal topics:

Antitrust & Trade LawConsumer ProtectionGeneral OverviewCivil ProcedureTrialsJury TrialsJury InstructionsStandard
InstructionsCommercial Law (UCC)Sales (Article 2)RemediesBuyer's RemediesDamagesGeneral
OverviewCommercial Law (UCC)Sales (Article 2)WarrantiesGeneral Overview



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California Forms of Jury Instruction

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CHAPTER 32 California Judicial Council Song-Beverly Consumer Warranty Act Instructions

5-32 California Forms of Jury Instruction CACI 3241

CACI 3241 Restitution From Manufacturer--New Motor Vehicle

If you decide that [name of defendant] or its authorized repair facility failed to repair the defect(s) after a reasonable number of opportunities, then [name of plaintiff] is entitled to recover the amounts [he/she] proves [he/she] paid for the car, including:

- 1. The amount paid to date for the vehicle, including finance charges [and any amount still owed by [name of plaintiff]];**
- 2. Charges for transportation and manufacturer-installed options; and**
- 3. Sales tax, license fees, registration fees, and other official fees.**

In determining the purchase price, do not include any charges for items supplied by someone other than [name of defendant].

[[Name of plaintiff]'s recovery must be reduced by the value of the use of the vehicle before it was [brought in/submitted] for repair. [Name of defendant] must prove how many miles the vehicle was driven between the time when [name of plaintiff] took possession of the vehicle and the time when [name of plaintiff] first delivered it to [name of defendant] or its authorized repair facility to fix the defect. [Insert one of the following:]

[Using this mileage number, I will reduce [name of plaintiff]'s recovery based on a formula.]

[Multiply this mileage number by the purchase price, including any charges for transportation and manufacturer-installed options, and divide that amount by 120,000. Deduct the resulting amount from [name of plaintiff]'s recovery.]]

New September 2003; Revised February 2005, June 2005

Directions for Use

This instruction is intended for use with claims involving new motor vehicles under the Song-Beverly Consumer Warranty Act. For claims involving other consumer goods, see *CACI No. 3240, Reimbursement Damages--Consumer Goods*. For claims involving incidental damages, see *CACI No. 3242, Incidental Damages*.

This instruction can be modified if it is being used for claims other than those described in the instructions. In lieu of restitution, plaintiff may request replacement with "a new motor vehicle substantially identical to the vehicle replaced," pursuant to *Civil Code section 1793.2(d)(2)(A)*. If plaintiff so requests, elements 1-3 should be replaced with appropriate language.

Modify element 1 depending on whether plaintiff still has an outstanding obligation on the financing of the vehicle.

The last two bracketed options are intended to be read in the alternative. Use the last bracketed option if the court desires for the jury to make the calculation of the deduction. The "formula" referenced in the last bracketed paragraph can be found at *Civil Code section 1793.2(d)(2)(C)*.

Sources and Authority

- *Civil Code section 1794(b)* provides:

The measure of the buyer's damages in an action under this section shall include the rights of replacement or reimbursement as set forth in subdivision (d) of Section 1793.2, and the following:

(1) Where the buyer has rightfully rejected or justifiably revoked acceptance of the goods or has exercised any right to cancel the sale, *Sections 2711, 2712, and 2713 of the Commercial Code* shall apply.

(2) Where the buyer has accepted the goods, *Sections 2714 and 2715 of the Commercial Code* shall apply, and the measure of damages shall include the cost of repairs necessary to make the goods conform.

- *Civil Code section 1793.2(d)(2)* provides, in part:

If the manufacturer or its representative in this state is unable to service or repair a new motor vehicle ... to conform to the applicable express warranties after a reasonable number of attempts, the manufacturer shall either promptly replace the new motor vehicle in accordance with subparagraph (A) or promptly make restitution to the buyer in accordance with subparagraph (B). However, the buyer shall be free to elect restitution in lieu of replacement, and in no event shall the buyer be required by the manufacturer to accept a replacement vehicle.

(A) In the case of replacement, the manufacturer shall replace the buyer's vehicle with a new motor vehicle substantially identical to the vehicle replaced. The replacement vehicle shall be accompanied by all express and implied warranties that normally accompany new motor vehicles of that specific kind. The manufacturer also shall pay for, or to, the buyer

the amount of any sales or use tax, license fees, registration fees, and other official fees which the buyer is obligated to pay in connection with the replacement, plus any incidental damages to which the buyer is entitled under Section 1794, including, but not limited to, reasonable repair, towing, and rental car costs actually incurred by the buyer.

(B) In the case of restitution, the manufacturer shall make restitution in an amount equal to the actual price paid or payable by the buyer, including any charges for transportation and manufacturer-installed options, but excluding nonmanufacturer items installed by a dealer or the buyer, and including any collateral charges such as sales tax, license fees, registration fees, and other official fees, plus any incidental damages to which the buyer is entitled under Section 1794, including, but not limited to, reasonable repair, towing, and rental car costs actually incurred by the buyer.

(C) When the manufacturer replaces the new motor vehicle pursuant to subparagraph (A), the buyer shall only be liable to pay the manufacturer an amount directly attributable to use by the buyer of the replaced vehicle prior to the time the buyer first delivered the vehicle to the manufacturer or distributor, or its authorized service and repair facility for correction of the problem that gave rise to the nonconformity. When restitution is made pursuant to subparagraph (B), the amount to be paid by the manufacturer to the buyer may be reduced by the manufacturer by that amount directly attributable to use by the buyer prior to the time the buyer first delivered the vehicle to the manufacturer or distributor, or its authorized service and repair facility for correction of the problem that gave rise to the nonconformity. The amount directly attributable to use by the buyer shall be determined by multiplying the actual price of the new motor vehicle paid or payable by the buyer, including any charges for transportation and manufacturer-installed options, by a fraction having as its denominator 120,000 and having as its numerator the number of miles traveled by the new motor vehicle prior to the time the buyer first delivered the vehicle to the manufacturer or distributor, or its authorized service and repair facility for correction of the problem that gave rise to the nonconformity. Nothing in this paragraph shall in any way limit the rights or remedies available to the buyer under any other law.

■ "[A]s the conjunctive language in *Civil Code* section 1794 indicates, the statute itself provides an additional measure of damages beyond replacement or reimbursement and permits, at the option of the buyer, the Commercial Code measure of damages which includes 'the cost of repairs necessary to make the goods conform.' " (*Krotin v. Porsche Cars North America, Inc.* (1995) 38 Cal.App.4th 294, 302 [45 Cal.Rptr.2d 10] , internal citation omitted.)

■ "[I]n the usual situation, emotional distress damages are *not* recoverable under the Song-Beverly Consumer Warranty Act." (*Music Acceptance Corp. v. Lofing* (1995) 32 Cal.App.4th 610, 625, fn. 15 [39 Cal.Rptr.2d 159] , emphasis in original; see also *Kwan v. Mercedes-Benz of N. Am.* (1994) 23 Cal.App.4th 174, 187-192 [28 Cal.Rptr.2d 371] .)

■ "[F]inding an implied prohibition on recovery of finance charges would be contrary to both the Song-Beverly Consumer Warranty Act's remedial purpose and section 1793.2(d)(2)(B)'s description of the refund remedy as restitution. A more reasonable construction is that the Legislature intended to allow a buyer to recover the entire amount actually expended for a new motor vehicle, including paid finance charges, less any of the expenses expressly excluded by the statute." (*Mitchell v. Blue Bird Body Co.* (2000) 80 Cal.App.4th 32, 37 [95 Cal.Rptr.2d 81] .)

■ "[Defendant] argues that [plaintiff] would receive a windfall if he is not required to pay for using the car after his buyback request. But to give [defendant] an offset for that use would reward it for its delay in replacing the car or

refunding [plaintiff]'s money when it had complete control over the length of that delay, and an affirmative statutory duty to replace or refund promptly." (*Jiagbogu v. Mercedes-Benz USA (2004)* 118 Cal.App.4th 1235, 1244 [13 Cal.Rptr.3d 679] .)

■ "[T]he imposition of a requirement that [plaintiff] mitigate his damages so as to avoid rental car expenses--after [defendant] had a duty to respond promptly to [plaintiff]'s demand for restitution--would reward [defendant] for its delay in refunding [plaintiff]'s money." (*Lukather v. General Motors, LLC (2010)* 181 Cal.App.4th 1041, 1053 [104 Cal.Rptr.3d 853] .)

Secondary Sources

4 Witkin, Summary of California Law (10th ed. 2005) Sales, §§ 321-324

1 California UCC Sales & Leases (Cont.Ed.Bar) Warranties, § 3.90

44 *California Forms of Pleading and Practice, Ch. 502, Sales: Warranties, § 502.43* (Matthew Bender)

20 *California Points and Authorities, Ch. 206, Sales, §§ 206.127, 206.128* (Matthew Bender)

5 California Civil Practice: Business Litigation (Thomson West) § 53:26

Publisher's Notes

This instruction covers issues presented in BAJI No. 9.86.

LexisNexis Matthew Bender Expert Practice Tip--Value of Use of Motor Vehicle: Under CACI No. 3241, note that the court will determine the value of use of a motor vehicle after the jury determines the mileage while in the consumer's possession. The formula is set forth in *Civ. Code § 1793.2(d)(2)(C)*. By Ronald Oster

Legal Topics:

For related research and practice materials, see the following legal topics:

Antitrust & Trade Law Consumer Protection Vehicle Warranties Lemon Laws Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Commercial Law (UCC) Sales (Article 2) Remedies Buyer's Remedies Damages General Overview



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California Forms of Jury Instruction

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CHAPTER 32 California Judicial Council Song-Beverly Consumer Warranty Act Instructions

5-32 California Forms of Jury Instruction CACI 3242

CACI 3242 Incidental Damages

[*Name of plaintiff*] **also claims additional reasonable expenses for [*list claimed incidental damages*].**

To recover these expenses, [*name of plaintiff*] must prove all of the following:

- 1. That the expense was actually charged;**
- 2. That the expense was reasonable; and**
- 3. That [*name of defendant*]'s [breach of warranty/[*other violation of Song-Beverly Consumer Warranty Act*]] was a substantial factor in causing the expense.**

New September 2003

Sources and Authority

- *Civil Code section 1794(b)* provides, in part:

The measure of the buyer's damages in an action under this section shall include the rights of replacement or reimbursement as set forth in subdivision (d) of Section 1793.2, and the following:

- (1) Where the buyer has rightfully rejected or justifiably revoked acceptance of the goods or has exercised any right to cancel the sale, *Sections 2711, 2712, and 2713 of the Commercial Code* shall apply.

(2) Where the buyer has accepted the goods, *Sections 2714 and 2715 of the Commercial Code* shall apply.

■ *Civil Code section 1793.2(d)(2)(B)* provides, in part: "In the case of restitution, the manufacturer shall make restitution in an amount equal to the actual price paid or payable by the buyer ... plus any incidental damages to which the buyer is entitled under Section 1794, including, but not limited to, reasonable repair, towing, and rental car costs actually incurred by the buyer."

■ *Commercial Code section 2712(2)* provides, in part: "The buyer may recover from the seller as damages the difference between the cost of cover and the contract price together with any incidental or consequential damages as hereinafter defined (Section 2715), but less expenses saved in consequence of the seller's breach."

■ *Commercial Code section 2715* provides, in part:

(1) Incidental damages resulting from the seller's breach include expenses reasonably incurred in inspection, receipt, transportation and care and custody of goods rightfully rejected, any commercially reasonable charges, expenses or commissions in connection with effecting cover and any other reasonable expense incident to the delay or other breach.

(2) Consequential damages resulting from the seller's breach include

(a) Any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise; and

(b) Injury to person or property proximately resulting from any breach of warranty.

■ "In light of the relevant legislative history and express language in the Act, we conclude *California Uniform Commercial Code section 2715's* reference to losses must be construed and applied in the context of monetary losses *actually incurred.*" (*Bishop v. Hyundai Motor America* (1996) 44 Cal.App.4th 750, 756 [52 Cal.Rptr.2d 134] , emphasis in original.)

Secondary Sources

44 *California Forms of Pleading and Practice*, Ch. 502, Sales: Warranties, § 502.160 (Matthew Bender)

20 *California Points and Authorities*, Ch. 206, Sales, § 206.43 (Matthew Bender)

5 *California Civil Practice: Business Litigation* (Thomson West) § 53:32

Publisher's Notes

There is no BAJI instruction on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Antitrust & Trade Law Consumer Protection General Overview Antitrust & Trade Law Consumer Protection Vehicle Warranties Lemon Laws Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Commercial Law

(UCC)Sales (Article 2)RemediesBuyer's RemediesDamagesIncidental & Consequential Damages



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CHAPTER 32 California Judicial Council Song-Beverly Consumer Warranty Act Instructions

5-32 California Forms of Jury Instruction CACI 3243

CACI 3243 Consequential Damages

[*Name of plaintiff*] **also claims additional amounts for** [*list claimed consequential damages*].

To recover these damages, [*name of plaintiff*] must prove all of the following:

- 1. That [*name of defendant*]'s [*describe violation of Song-Beverly Consumer Warranty Act*] was a substantial factor in causing damages to [*name of plaintiff*];**
- 2. That the damages resulted from [*name of plaintiff*]'s requirements and needs;**
- 3. That [*name of defendant*] had reason to know of those requirements and needs at the time of the [sale/lease] to [*name of plaintiff*];**
- 4. That [*name of plaintiff*] could not reasonably have prevented the damages; and**
- 5. The amount of the damages.**

New September 2003

Directions for Use

This instruction is intended for use where the plaintiff claims consequential damages pursuant to *Commercial Code section 2715(2)(a)* based on the plaintiff's foreseeable needs or requirements.

Sources and Authority

- *Civil Code section 1794(b)* provides, in part:

The measure of the buyer's damages in an action under this section shall include the rights of replacement or reimbursement as set forth in subdivision (d) of Section 1793.2, and the following:

(1) Where the buyer has rightfully rejected or justifiably revoked acceptance of the goods or has exercised any right to cancel the sale, *Sections 2711, 2712, and 2713 of the Commercial Code* shall apply.

(2) Where the buyer has accepted the goods, *Sections 2714 and 2715 of the Commercial Code* shall apply.

- *Commercial Code section 2712(2)* provides, in part: "The buyer may recover from the seller as damages the difference between the cost of cover and the contract price together with any incidental or consequential damages as hereinafter defined (Section 2715), but less expenses saved in consequence of the seller's breach."

- *Commercial Code section 2715* provides, in part:

(2) Consequential damages resulting from the seller's breach include

(a) Any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise; and

(b) Injury to person or property proximately resulting from any breach of warranty.

- "In light of the relevant legislative history and express language in the Act, we conclude *California Uniform Commercial Code section 2715's* reference to losses must be construed and applied in the context of monetary losses *actually incurred.*" (*Bishop v. Hyundai Motor America* (1996) 44 Cal.App.4th 750, 756 [52 Cal.Rptr.2d 134] , emphasis in original.)

Secondary Sources

44 *California Forms of Pleading and Practice*, Ch. 502, *Sales: Warranties*, § 502.160 (Matthew Bender)

20 *California Points and Authorities*, Ch. 206, *Sales*, § 206.43 *et seq.* (Matthew Bender)

5 *California Civil Practice: Business Litigation* (Thomson West) § 53:32

Publisher's Notes

There is no BAJI instruction on this subject.

LexisNexis Matthew Bender Expert Practice Tip--Rental Replacement as Consequential

Damages: Rental replacement products would be one example of consequential damages. However, as with other contract remedies, plaintiff must prove that defendant had reason to know of the need for the replacements. *By Ronald Oster*

Legal Topics:

For related research and practice materials, see the following legal topics:

Antitrust & Trade LawConsumer ProtectionGeneral OverviewAntitrust & Trade LawConsumer ProtectionVehicle
WarrantiesLemon LawsCivil ProcedureTrialsJury TrialsJury InstructionsStandard InstructionsCommercial Law
(UCC)Sales (Article 2)RemediesBuyer's RemediesDamagesIncidental & Consequential Damages



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CHAPTER 32 California Judicial Council Song-Beverly Consumer Warranty Act Instructions

5-32 California Forms of Jury Instruction CACI 3244

CACI 3244 Civil Penalty--Willful Violation (Civ. Code, § 1794(c))

[Name of plaintiff] claims that [name of defendant]'s failure to [describe violation of Song-Beverly Consumer Warranty Act] was willful and therefore asks that you impose a civil penalty against [name of defendant]. A civil penalty is an award of money in addition to a plaintiff's damages. The purpose of this civil penalty is to punish a defendant or discourage [him/her/it] from committing such violations in the future.

If [name of plaintiff] has proved that [name of defendant]'s failure was willful, you may impose a civil penalty against [him/her/it]. "Willful" means that [name of defendant] knew what [he/she/it] was doing and intended to do it. However, you may not impose a civil penalty if you find that [name of defendant] believed reasonably and in good faith that [describe facts negating statutory obligation].

The penalty may be in any amount you find appropriate, up to a maximum of two times the amount of [name of plaintiff]'s actual damages.

New September 2003; Revised February 2005, December 2005

Directions for Use

This instruction is intended for use when the plaintiff requests a civil penalty under *Civil Code* section 1794(c). The parties will need to draft a separate instruction for cases involving a civil penalty based on the defendant's violation of *Civil Code* section 1793.2(d)(2).

If there are multiple causes of action, ensure that the jury knows to which claim this instruction applies.

Sources and Authority

■ *Civil Code section 1794* provides, in part:

(a) Any buyer of consumer goods who is damaged by a failure to comply with any obligation under this chapter or under an implied or express warranty or service contract may bring an action for the recovery of damages and other legal and equitable relief.

... .

(c) If the buyer establishes that the failure to comply was willful, the judgment may include, in addition to the amounts recovered under subdivision (a), a civil penalty which shall not exceed two times the amount of actual damages. This subdivision shall not apply in any class action ... or with respect to a claim based solely on a breach of an implied warranty.

■ "[I]f the trier of fact finds the defendant willfully violated its legal obligations to plaintiff, it has discretion under [*Civil Code section 1794*,] subdivision (c) to award a penalty against the defendant. Subdivision (c) applies to suits concerning any type of 'consumer goods,' as that term is defined in section 1791 of the Act." (*Suman v. Superior Court* (1995) 39 Cal.App.4th 1309, 1315 [46 Cal.Rptr.2d 507] .)

■ " 'In civil cases, the word "willful," as ordinarily used in courts of law, does not necessarily imply anything blamable, or any malice or wrong toward the other party, or perverseness or moral delinquency, but merely that the thing done or omitted to be done was done or omitted intentionally. It amounts to nothing more than this: That the person knows what he is doing, intends to do what he is doing, and is a free agent.' " (*Ibrahim v. Ford Motor Co.* (1989) 214 Cal.App.3d 878, 894 [263 Cal.Rptr. 64] , internal citations omitted.)

■ "[A] violation ... is not willful if the defendant's failure to replace or refund was the result of a good faith and reasonable belief the facts imposing the statutory obligation were not present. This might be the case, for example, if the manufacturer reasonably believed the product did conform to the warranty, or a reasonable number of repair attempts had not been made, or the buyer desired further repair rather than replacement or refund. [P] Our interpretation of section 1794(c) is consistent with the general policy against imposing forfeitures or penalties against parties for their good faith, reasonable actions. Unlike a standard requiring the plaintiff to prove the defendant actually knew of its obligation to refund or replace, which would allow manufacturers to escape the penalty by deliberately remaining ignorant of the facts, the interpretation we espouse will not vitiate the intended deterrent effect of the penalty. And unlike a simple equation of willfulness with volition, which would render 'willful' virtually all cases of refusal to replace or refund, our interpretation preserves the Act's distinction between willful and nonwillful violations. Accordingly, '[a] decision made without the use of reasonably available information germane to that decision is not a reasonable, good faith decision.' " (*Lukather v. General Motors, LLC* (2010) 181 Cal.App.4th 1041, 1051 [104 Cal.Rptr.3d 853] , original italics, internal citation omitted.)

■ "[T]he penalty under section 1794(c), like other civil penalties, is imposed as punishment or deterrence of the defendant, rather than to compensate the plaintiff. In this, it is akin to punitive damages." (*Kwan v. Mercedes Benz of N. Am.* (1994) 23 Cal.App.4th 174, 184 [28 Cal.Rptr.2d 371] .)

Secondary Sources

4 Witkin, Summary of California Law (10th ed. 2005) Sales, §§ 321-324

1 California UCC Sales & Leases (Cont.Ed.Bar) Warranties, § 3.90

California Products Liability Actions, Ch. 2, Liability for Defective Products, § 2.30 (Matthew Bender)

44 *California Forms of Pleading and Practice*, Ch. 502, Sales: Warranties, § 502.53[1][b] (Matthew Bender)

20 *California Points and Authorities*, Ch. 206, Sales, § 206.129 (Matthew Bender)

5 California Civil Practice: Business Litigation (Thomson West) § 53:32

Publisher's Notes

There is no BAJI instruction on this subject.

LexisNexis Matthew Bender Expert Practice Tip--Intentional Violations: The willfulness requirement in *CACI No. 3244* is much lower than that found in punitive damage instructions. As a practical matter, juries routinely find violations to be "intentional" in the consumer products area if for no other reason than the defendant is disputing the claim. Accordingly, defendants should try to substantiate their good faith whenever possible even while resisting the underlying claim. *By Ronald Oster*

Legal Topics:

For related research and practice materials, see the following legal topics:

Antitrust & Trade LawConsumer ProtectionGeneral OverviewAntitrust & Trade LawConsumer ProtectionVehicle WarrantiesLemon LawsCivil ProcedureTrialsJury TrialsVerdictsSpecial VerdictsCommercial Law (UCC)Sales (Article 2)RemediesBuyer's RemediesDamagesGeneral Overview



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5-32 California Forms of Jury Instruction CACI 3245-CACI 3299

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CACI 3245Reserved for Future Use



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CHAPTER 32 California Judicial Council Song-Beverly Consumer Warranty Act Instructions

5-32 California Forms of Jury Instruction CACI VF-3200

CACI VF-3200 Failure to Purchase or Replace Consumer Good After Reasonable Number of Repair Opportunities (Civ. Code, § 1793.2(d))

We answer the questions submitted to us as follows:

1. Did [name of plaintiff] buy a[n] [consumer good] [from/distributed by/manufactured by] [name of defendant]?

_____ Yes _____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Did [name of defendant] give [name of plaintiff] a warranty?

_____ Yes _____ No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Did the [consumer good] fail to perform as represented in the warranty?

_____ Yes _____ No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Did [name of defendant] or its authorized repair facility repair the [consumer good] to conform to the [written statement/represented quality] after a reasonable number of opportunities?

_____ Yes _____ No

If your answer to question 4 is no, then answer question 5. If you answered yes, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. Did [name of defendant] fail to replace the [consumer good] or reimburse [name of plaintiff] the appropriate amount of money?

_____ Yes _____ No

If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. What amount is [name of plaintiff] entitled to receive as reimbursement for the [consumer good]? Calculate as follows:

Determine:	Purchase price of the [consumer good]:	\$_____
Subtract:	Value of use by [name of plaintiff] before [he/she/it] discovered the defect:	\$_____
Subtract:	The amount, if any, that [name of defendant] previously reimbursed [name of plaintiff] for the [consumer good]	\$_____
	TOTAL	\$_____

[7. What amount is plaintiff entitled to recover for [insert item(s) of claimed incidental damages]? _____\$_____]

Signed: _____
Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the [clerk/bailiff/judge].

New September 2003; Revised June 2005, October 2008

Directions for Use

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on CACI No. 3200, *Failure to Purchase or Replace Consumer Good After Reasonable Number of Repair Opportunities--Essential Factual Elements*, and CACI No. 3240, *Reimbursement Damages--Consumer Goods*.

If the plaintiff was unable to deliver the good, modify question 4 as in element 4 of *CACI No. 3200*. See *CACI No. VF-3201* for additional questions in the event the plaintiff is claiming consequential damages. Question 7 can be used to account for claimed incidental damages included under *CACI No. 3242, Incidental Damages*.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

Publisher's Notes

There is no BAJI verdict form on this subject.

LexisNexis Matthew Bender Expert Practice Tip--Using Special Verdict Forms: As with most forms asking for a special verdict, an attorney should thoughtfully ponder the better way to present the key evidence and argument. *By Rex Heeseman*

Legal Topics:

For related research and practice materials, see the following legal topics:

Antitrust & Trade Law Consumer Protection General Overview Civil Procedure Trials Jury Trials Verdicts Special Verdicts Commercial Law (UCC) Sales (Article 2) Remedies Buyer's Remedies Damages General Overview



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California Forms of Jury Instruction

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CHAPTER 32 California Judicial Council Song-Beverly Consumer Warranty Act Instructions

5-32 California Forms of Jury Instruction CACI VF-3201

CACI VF-3201 Consequential Damages

We answer the questions submitted to us as follows:

1. Was [name of defendant]'s conduct a substantial factor in causing damages to [name of plaintiff]?

_____ Yes _____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Did the damages result from [name of plaintiff]'s requirements and needs?

_____ Yes _____ No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Did [name of defendant] have reason to know of those requirements and needs at the time of the [sale/lease] to [name of plaintiff]?

_____ Yes _____ No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Could [name of plaintiff] reasonably have prevented the damages?

_____ Yes _____ No

If your answer to question 4 is no, then answer question 5. If you answered yes, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. What is the amount of [name of plaintiff]'s damages?

\$ _____

Signed: _____**Presiding Juror****Dated:** _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the [clerk/bailiff/judge].

New September 2003

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on *CACI No. 3243, Consequential Damages*.

Normally, this verdict form would be combined with verdict forms containing the underlying cause(s) of action.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

Publisher's Notes

There is no BAJI verdict form on this subject.

See also "LexisNexis Matthew Bender Expert Practice Tip--Using Special Verdict Forms" in *CACI No. VF-3200*.

Legal Topics:

For related research and practice materials, see the following legal topics:

Antitrust & Trade Law Consumer Protection General Overview Civil Procedure Trials Jury Trials Verdicts Special Verdicts Commercial Law (UCC) Sales (Article 2) Remedies Buyer's Remedies Damages Incidental & Consequential Damages



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California Forms of Jury Instruction

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CHAPTER 32 California Judicial Council Song-Beverly Consumer Warranty Act Instructions

5-32 California Forms of Jury Instruction CACI VF-3202

CACI VF-3202 Failure to Purchase or Replace Consumer Good After Reasonable Number of Repair Opportunities--Affirmative Defense--Unauthorized or Unreasonable Use (Civ. Code, § 1793.2(d))

We answer the questions submitted to us as follows:

1. Did [name of plaintiff] buy a[n] [consumer good] [from/distributed by/manufactured by] [name of defendant]?

_____ Yes _____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Did [name of defendant] give [name of plaintiff] a warranty?

_____ Yes _____ No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Did the [consumer good] fail to perform as represented in the warranty?

_____ Yes _____ No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Was the failure to comply with the warranty caused by unauthorized or unreasonable use of the [consumer good] following its sale?

_____ Yes _____ No

If your answer to question 4 is no, then answer question 5. If you answered yes, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. Did [name of defendant] or its authorized repair facility repair the [consumer good] to conform to the [written statement/represented quality] after a reasonable number of opportunities?

_____ Yes _____ No

If your answer to question 5 is no, then answer question 6. If you answered yes, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. Did [name of defendant] fail to replace the [consumer good] or reimburse [name of plaintiff] the appropriate amount of money?

_____ Yes _____ No

If your answer to question 6 is yes, then answer question 7. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

7. What amount is [name of plaintiff] entitled to receive as reimbursement for the [consumer good]? Calculate as follows:

Determine:	Purchase price of the [consumer good]:	\$_____
Subtract:	Value of use by [name of plaintiff] before [he/she/it] discovered the defect:	\$_____
Subtract:	The amount, if any, that [name of defendant] previously reimbursed [name of plaintiff] for the [consumer good]	\$_____
	TOTAL	\$_____

[Answer question 8.]

[8. What amount is [name of plaintiff] entitled to recover for [insert item(s) of claimed incidental damages]?\$_____]

Signed: _____

Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the [clerk/bailiff/judge].

New September 2003; Revised June 2005, October 2008

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on *CACI No. 3200, Failure to Purchase or Replace Consumer Good After Reasonable Number of Repair Opportunities--Essential Factual Elements*, *CACI No. 3220, Affirmative Defense--Unauthorized or Unreasonable Use*, and *CACI No. 3240, Reimbursement Damages--Consumer Goods*.

If the plaintiff was unable to deliver the good, modify question 4 as in element 4 of *CACI No. 3200*. See *CACI No. VF-3201* for additional questions in the event the plaintiff is claiming consequential damages. Question 8 can be used to account for claimed incidental damages included under *CACI No. 3242, Incidental Damages*.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

Publisher's Notes

There is no BAJI verdict form on this subject.

See also "LexisNexis Matthew Bender Expert Practice Tip--Using Special Verdict Forms" in CACI No. VF-3200.

Legal Topics:

For related research and practice materials, see the following legal topics:

Antitrust & Trade Law Consumer Protection General Overview Civil Procedure Trials Jury Trials Verdicts Special Verdicts Commercial Law (UCC) Sales (Article 2) Warranties General Overview Torts Products Liability Breach of Warranty



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California Forms of Jury Instruction

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CHAPTER 32 California Judicial Council Song-Beverly Consumer Warranty Act Instructions

5-32 California Forms of Jury Instruction CACI VF-3203

CACI VF-3203 Breach of Express Warranty--New Motor Vehicle--Civil Penalty Sought

We answer the questions submitted to us as follows:

1. Did [*name of plaintiff*] [buy/lease] [a/an] [*new motor vehicle*] [from/distributed by/manufactured by] [*name of defendant*]?

_____ Yes _____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Did [*name of defendant*] give [*name of plaintiff*] a written warranty?

_____ Yes _____ No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Did the vehicle have a defect covered by the warranty that substantially impaired the vehicle's use, value, or safety to a reasonable [buyer/lessee] in [*name of plaintiff*]'s situation?

_____ Yes _____ No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Did [name of defendant] or its authorized repair facility fail to repair the vehicle to match the written warranty after a reasonable number of opportunities to do so?

_____ Yes _____ No

If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. Did [name of defendant] fail to promptly replace or repurchase the vehicle?

_____ Yes _____ No

If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. What are [name of plaintiff]'s damages? Calculate as follows:

Add the following amounts:

a. The purchase price of the vehicle itself:..... \$_____

**b. Charges for transportation and
manufacturer-installed options:..... \$_____**

**c. Finance charges actually paid by [name
of plaintiff]:..... \$_____**

**d. Sales tax, license fees, registration fees,
and other official fees:..... \$_____**

e. Incidental and consequential damages:..... \$_____

[SUBTOTAL/TOTAL DAMAGES:] \$_____

[Calculate the value of the use of the vehicle before it was [brought in/submitted] for repair as follows:

**1. Add dollar amounts listed in lines a
and b above:..... \$_____**

**2. Multiply the result in step 1 by the
number of miles the vehicle was driven
before it was [brought in/submitted]
for repair:..... \$_____**

**3. Divide the dollar amount in step 2 by
120,000 and insert result in VALUE
OF USE below:**

VALUE OF USE: \$_____

Subtract the VALUE OF USE from the SUBTOTAL above and insert result in TOTAL DAMAGES below:

TOTAL DAMAGES: \$_____]

[What is the number of miles that the vehicle was driven between the time when [*name of plaintiff*] took possession of the vehicle and the time when [he/she/it] first delivered the vehicle to [*name of defendant*] or its authorized repair facility to fix the problem?

Answer: _____ miles]

Answer question 7.

7. Did [*name of defendant*] willfully fail to repurchase or replace the [*new motor vehicle*]?

_____ Yes _____ No

If your answer to question 7 is yes, then answer question 8. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

8. What amount, if any, do you impose as a penalty? [You may not exceed two times the "TOTAL DAMAGES" that you entered in question 6.]..... \$_____

PENALTY: \$_____]

Signed: _____

Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the [clerk/bailiff/judge].

New September 2003; Revised February 2005, June 2005, December 2005, February 2007

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case. Items of damages that do not apply to the facts of the case may be omitted.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

This verdict form is based on CACI No. 3201, *Violation of Civil Code Section 1793.2(d)--New Motor Vehicle--Essential Factual Elements*, CACI No. 3241, *Restitution From Manufacturer--New Motor Vehicle*, and CACI No. 3244, *Civil Penalty--Willful Violation*. See CACI No. VF-3201 for additional questions in the event the plaintiff is claiming consequential damages.

If plaintiff was unable to deliver the vehicle, modify question 4 as in element 4 of *CACI No. 3201*. In question number 6, users have the option of either allowing the jury to calculate the deduction for value of use or asking the jury for the relevant mileage number only. The bracketed sentence in question 8 is intended to be given only if the jury has been asked to calculate the deduction for value of use.

Publisher's Notes

There is no BAJI verdict form on this subject.

See also "LexisNexis Matthew Bender Expert Practice Tip--Using Special Verdict Forms" in *CACI No. VF-3200*.

Legal Topics:

For related research and practice materials, see the following legal topics:

Antitrust & Trade Law Consumer Protection Vehicle Warranties Express Warranties Civil Procedure Trials Jury Trials Verdicts Special Verdicts Commercial Law (UCC) Sales (Article 2) Remedies Buyer's Remedies Damages General Overview Commercial Law (UCC) Sales (Article 2) Warranties Express Warranties



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California Forms of Jury Instruction

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CHAPTER 32 California Judicial Council Song-Beverly Consumer Warranty Act Instructions

5-32 California Forms of Jury Instruction CACI VF-3204

CACI VF-3204 Breach of Implied Warranty of Merchantability

We answer the questions submitted to us as follows:

1. Did [*name of plaintiff*] buy a[n] [*consumer good*] [manufactured by/from] [*name of defendant*]?

_____ Yes _____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. At the time of purchase, was [*name of defendant*] in the business of [selling [*consumer goods*] to retail buyers] [manufacturing [*consumer goods*]]?

_____ Yes _____ No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Was the [*consumer good*] of the same quality as those generally acceptable in the trade?

_____ Yes _____ No

If your answer to question 3 is no, then answer question 4. If you answered yes, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. What amount is [*name of plaintiff*] entitled to receive as restitution to [him/her] for the [

consumer good]?

\$ _____

Signed: _____

Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the [clerk/bailiff/judge].

New September 2003

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on *CACI No. 3210, Breach of Implied Warranty of Merchantability--Essential Factual Elements*. See CACI No. VF-3201 for additional questions in the event the plaintiff is claiming consequential damages.

Depending on the facts, question 3 can be modified to cover other grounds for breach of the warranty, as in element 3 of *CACI No. 3210*. Omit questions 4 if the plaintiff is not seeking consequential damages.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

Publisher's Notes

There is no BAJI verdict form on this subject.

See also "LexisNexis Matthew Bender Expert Practice Tip--Using Special Verdict Forms" in *CACI No. VF-3200*.

Legal Topics:

For related research and practice materials, see the following legal topics:

Antitrust & Trade Law Consumer Protection General Overview Civil Procedure Trials Jury Trials Verdicts Special Verdicts Commercial Law (UCC) Sales (Article 2) Warranties Merchantability



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CHAPTER 32 California Judicial Council Song-Beverly Consumer Warranty Act Instructions

5-32 California Forms of Jury Instruction CACI VF-3205

CACI VF-3205 Breach of Implied Warranty of Merchantability --Affirmative Defense--Disclaimer of Implied Warranties

We answer the questions submitted to us as follows:

1. Did [*name of plaintiff*] buy a[n] [*consumer good*] [manufactured by/from] [*name of defendant*]?

_____ Yes _____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. At the time of purchase, was [*name of defendant*] in the business of [selling [*consumer goods*] to retail buyers] [manufacturing [*consumer goods*]]?

_____ Yes _____ No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Was the [*consumer good*] of the same quality as those generally acceptable in the trade?

_____ Yes _____ No

If your answer to question 3 is no, then answer question 4. If you answered yes, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. At the time of sale, was the [*consumer good*] sold on an "as is" or "with all faults" basis?

_____ Yes _____ No

If your answer to question 4 is no, then answer question 5. If you answered yes, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. What amount is [*name of plaintiff*] entitled to receive as restitution to [him/her] for the [*consumer good*]?

\$ _____

Signed: _____

Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the [clerk/bailiff/judge].

New September 2003

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on *CACI No. 3210, Breach of Implied Warranty of Merchantability--Essential Factual Elements*, and *CACI No. 3221, Affirmative Defense--Disclaimer of Implied Warranties*. See *CACI No. VF-3201* for additional questions in the event the plaintiff is claiming consequential damages.

Depending on the facts, question 3 can be modified to cover other grounds for breach of the warranty, as in element 3 of *CACI No. 3210*.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

Publisher's Notes

There is no BAJI verdict form on this subject.

See also "LexisNexis Matthew Bender Expert Practice Tip--Using Special Verdict Forms" in CACI No. VF-3200.

Legal Topics:

For related research and practice materials, see the following legal topics:

Antitrust & Trade Law Consumer Protection General Overview Civil Procedure Trials Jury Trials Verdicts Special Verdicts Commercial Law (UCC) Sales (Article 2) Warranties Exclusion & Modification Commercial Law (UCC) Sales (Article 2) Warranties Merchantability



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CHAPTER 32 California Judicial Council Song-Beverly Consumer Warranty Act Instructions

5-32 California Forms of Jury Instruction CACI VF-3206

CACI VF-3206 Breach of Disclosure Obligations

We answer the questions submitted to us as follows:

1. Did [name of plaintiff] [buy/lease] a [motor vehicle] from [name of defendant]?

_____ Yes _____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Did [name of defendant] know or should [he/she/it] have known that the vehicle had been returned to the manufacturer under [California's/[name of state]'s] motor vehicle warranty laws?

_____ Yes _____ No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Prior to the [sale/leasing], did [name of defendant] fail to disclose to [name of plaintiff], in clear and simple language, the nature of the defect experienced by the original [buyer/lessee] of the vehicle?

_____ Yes _____ No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Was [name of defendant]'s failure to clearly disclose the defect a substantial factor in causing harm to [name of plaintiff]?

_____ Yes _____ No

If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. What are [name of plaintiff]'s damages? \$_____

Signed: _____

Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the [clerk/bailiff/judge].

New September 2003; Revised June 2005

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

If there are multiple causes of action, users may wish to combine the individual forms into one form. This verdict form is based on *CACI No. 3230, Breach of Disclosure Obligations--Essential Factual Elements*. See *CACI No. VF-3201* for additional questions in the event the plaintiff is claiming consequential damages.

If defendant is a manufacturer, substitute question 2 with a question modeled after the first bracketed option in element 2. Depending on the facts, question 4 can be modified to cover other grounds for breach of the warranty, as in elements 5 and 6 of *CACI No. 3230*. Make sure that the "yes" and "no" directions match appropriately.

Omit question 4 if the plaintiff is not seeking consequential damages.

Publisher's Notes

There is no BAJI verdict form on this subject.

See also "LexisNexis Matthew Bender Expert Practice Tip--Using Special Verdict Forms" in *CACI No. VF-3200*.

Legal Topics:

For related research and practice materials, see the following legal topics:

Antitrust & Trade Law Consumer Protection Vehicle Warranties Lemon Laws Civil Procedure Trials Jury Trials Verdicts Special Verdicts Commercial Law (UCC) Sales (Article 2) Warranties General Overview



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CHAPTER 32 California Judicial Council Song-Beverly Consumer Warranty Act Instructions

5-32 California Forms of Jury Instruction CACI VF-3207-CACI VF-3299

Reserved for Future Use

CACI VF-3207Reserved for Future Use



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CHAPTER 33 California Judicial Council Unfair Practices Act Instructions

5-33 California Forms of Jury Instruction 33.syn

§ 33.syn Synopsis to Chapter 33: California Judicial Council Unfair Practices Act Instructions

CACI 3300 Locality Discrimination--Essential Factual Elements

CACI 3301 Below Cost Sales--Essential Factual Elements

CACI 3302 Loss Leader Sales--Essential Factual Elements

CACI 3303 Definition of "Cost"

CACI 3304 Presumptions Concerning Costs--Manufacturer

CACI 3305 Presumptions Concerning Costs--Distributor

CACI 3306 Methods of Allocating Costs to an Individual Product

CACI 3307-CACI 3319 Reserved for Future Use

CACI 3320 Secret Rebates--Essential Factual Elements

CACI 3321 Secret Rebates--Definition of "Secret"

CACI 3322-CACI 3329 Reserved for Future Use

CACI 3330 Affirmative Defense to Locality Discrimination Claim--Cost Justification

CACI 3331 Affirmative Defense to Locality Discrimination, Below Cost Sales, and Loss Leader Sales Claims--Closed-out, Discontinued, Damaged, or Perishable Items

CACI 3332 Affirmative Defense to Locality Discrimination, Below Cost Sales, Loss Leader Sales, and Secret Rebates--Functional Classifications

CACI 3333 Affirmative Defense to Locality Discrimination, Below Cost Sales, and Loss Leader Sales Claims--Meeting Competition

CACI 3334 Affirmative Defense to Locality Discrimination Claim-- Manufacturer Meeting Downstream Competition

CACI 3335 Affirmative Defense--"Good Faith" Explained

CACI 3336-CACI 3399 Reserved for Future Use

CACI VF-3300 Locality Discrimination

CACI VF-3301 Locality Discrimination Claim--Affirmative Defense--Cost Justification

CACI VF-3302 Below Cost Sales

CACI VF-3303 Below Cost Sales Claim--Affirmative Defense--Closed-out, Discontinued, Damaged, or Perishable Items

CACI VF-3304 Loss Leader Sales

CACI VF-3305 Loss Leader Sales Claim--Affirmative Defense--Meeting Competition

CACI VF-3306 Secret Rebates

CACI VF-3307 Secret Rebates Claim--Affirmative Defense--Functional Classifications

CACI VF-3308-CACI VF-3399 Reserved for Future Use



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CHAPTER 33 California Judicial Council Unfair Practices Act Instructions

5-33 California Forms of Jury Instruction Scope

Scope

SCOPE

This chapter contains the California Judicial Council's "Unfair Practices Act Series" of jury instructions [*CACI No. 3300 et seq.*]. The Judicial Council of California Civil Jury Instructions (CACI) included in this publication are the product of the Judicial Council of California Task Force on Jury Instructions, which are updated by the Judicial Council of California Advisory Committee on Civil Jury Instructions.

This chapter includes instructions on the following topics:

- Essential factual elements for causes of action alleging locality discrimination [*CACI No. 3300*], below cost sales [*CACI No. 3301*], and loss leader sales [*CACI No. 3302*].
- A definition of "cost" [*CACI No. 3303*], presumptions concerning costs [*CACI Nos. 3304, 3305*], and methods of allocating costs to an individual product [*CACI No. 3306*].
- Essential factual elements for a cause of action alleging secret rebates [*CACI No. 3320*], and a definition of "secret rebate" [*CACI No. 3321*].
- Affirmative defenses to claims of locality discrimination [*CACI Nos. 3330-3334*], and the affirmative defense of "good faith" [*CACI No. 3335*].

The unfair practices series also includes special verdict forms [*CACI Nos. VF-3300-VF-3307*].



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CHAPTER 33 California Judicial Council Unfair Practices Act Instructions

5-33 California Forms of Jury Instruction CACI 3300

CACI 3300 Locality Discrimination--Essential Factual Elements

[*Name of plaintiff*] **claims that [*name of defendant*] engaged in unlawful locality discrimination. To establish this claim, [*name of plaintiff*] must prove all of the following:**

- 1. That [*name of defendant*] [offered to sell/sold/furnished] [*product/service*] at a lower price in one [location/section/community/city] in California than in another [location/section/community/city] in California;**
- 2. That [*name of defendant*] intended to destroy competition from an established dealer [or to prevent competition from any person who in good faith intended and attempted to become such a dealer];**
- 3. That [*name of plaintiff*] was harmed; and**
- 4. That [*name of defendant*]'s conduct was a substantial factor in causing [*name of plaintiff*]'s harm.**

New September 2003

The word "price" as used here should be read sufficiently broadly to include "special rebates, collateral contracts, or any device of any nature whereby such discrimination is in substance or fact effected." (*Bus. & Prof. Code*, § 17049.) To the extent the circumstances of the case warrant it, the word "price" in the instruction may be supplemented or supplanted by other price-related terms.

Business and Professions Code sections 17071 and 17071.5 create rebuttable presumptions regarding

the purpose or intent to injure competitors or destroy competition. The Supreme Court has observed: "The obvious and only effect of this provision is to require the defendants to go forward with such proof as would bring them within one of the exceptions or which would negative the prima facie showing of wrongful intent." (*People v. Pay Less Drug Store* (1944) 25 Cal.2d 108, 114 [153 P.2d 9] .)

- *Business and Professions Code* section 17031 provides: "Locality discrimination means a discrimination between different sections, communities or cities or portions thereof, or between different locations in such sections, communities, cities or portions thereof in this State, by selling or furnishing an article or product, at a lower price in one section, community or city, or any portion thereof, or in one location in such section, community, or city or any portion thereof, than in another."

- *Business and Professions Code* section 17040 provides: "It is unlawful for any person engaged in the production, manufacture, distribution or sale of any article or product of general use or consumption, with intent to destroy the competition of any regular established dealer in such article or product, or to prevent the competition of any person who in good faith, intends and attempts to become such dealer, to create locality discriminations. [P] Nothing in this section prohibits the meeting in good faith of a competitive price."

- *Business and Professions Code* section 17024 provides, in part: " 'Article or product' includes any article, product, commodity, thing of value, service or output of a service trade."

- "The purpose of the Unfair Practices Act (UPA) is 'to safeguard the public against the creation or perpetuation of monopolies and to foster and encourage competition, by prohibiting unfair, dishonest, deceptive, destructive, fraudulent and discriminatory practices by which fair and honest competition is destroyed or prevented.' It forbids most locality discriminations, the use of loss leaders, gifts, secret rebates, boycotts, and 'deceptive, untrue or misleading advertising.' It also prohibits the sale of goods and services below cost." (*Pan Asia Venture Capital Corp. v. Hearst Corp.* (1999) 74 Cal.App.4th 424, 431-432 [88 Cal.Rptr.2d 118] , internal citations omitted.)

- "Sections 17031 and 17040 are tailored to address the problem of a distributor, typically a retailer, selling out of many locations, who might use geographical price discrimination as a predatory practice against its own competitors." (*ABC International Traders, Inc. v. Matsushita Electric Corp. of America* (1997) 14 Cal.4th 1247, 1266 [61 Cal.Rptr.2d 112, 931 P.2d 290] .)

- "As section 17031 is presently worded, we conclude that the smallest geographic unit it envisages is the individual store or outlet, not the individual purchaser regardless of location." (*Harris v. Capitol Records Distributing Corp.* (1966) 64 Cal.2d 454, 460 [50 Cal.Rptr. 539, 413 P.2d 139] .)

- "[T]o fall within [the] prohibition a seller must have at least two different places of business and must sell at a lower price in one than in the other." (*Harris, supra*, 64 Cal.2d at p. 460 .)

- *Business and Professions Code* section 17082 provides, in part: "In any action under this chapter, it is not necessary to allege or prove actual damages or the threat thereof, or actual injury or the threat thereof, to the plaintiff. But, in addition to injunctive relief, any plaintiff in any such action shall be entitled to recover three times the amount of the actual damages, if any, sustained by the plaintiff, as well as three times the actual damages, if any, sustained by any person who has assigned to the plaintiff his claim for damages resulting from a violation of this chapter."

- "While, similar to other cases, damages cannot be awarded in antitrust cases upon sheer guesswork

or speculation, the plaintiff seeking damages for loss of profits is required to establish only with reasonable probability the existence of some causal connection between defendant's wrongful act and some loss of the anticipated revenue. Once that has been accomplished, the jury will be permitted to act upon probable and inferential proof and to 'make a just and reasonable estimate of the damage based on relevant data, and render its verdict accordingly.' " (*Suburban Mobile Homes, Inc. v. AMFAC Communities, Inc.* (1980) 101 Cal.App.3d 532, 545 [161 Cal.Rptr. 811] , internal citations omitted.)

■ The federal law most comparable to the Unfair Practices Act is the Robinson-Patman Act (15 U.S.C. § 13 *et seq.*); that act differs substantially from the Unfair Practices Act, however. For a discussion of this subject, see *Turnbull & Turnbull v. ARA Transportation* (1990) 219 Cal.App.3d 811 [268 Cal.Rptr. 856] . One notable difference is that the Robinson-Patman Act requires at least two actual sales. Thus, mere offers to sell cannot violate that act.

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, §§ 609-615

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.153 (Matthew Bender)

49 California Forms of Pleading and Practice, Ch. 565, *Unfair Competition* (Matthew Bender)

23 California Points and Authorities, Ch. 235, *Unfair Competition* (Matthew Bender)

1 *Matthew Bender Practice Guide: California Unfair Competition and Business Torts*, Ch. 5, Antitrust, 5.44, 5.46[2], 5.47[1]

Publisher's Notes

There is no BAJI instruction on this subject.

LexisNexis Matthew Bender Expert Practice Tip--Required Proof: Note that CACI No. 3300 only requires proof of an "offer" to sell at lower prices. Proof of actual sales at lower prices is not required. By *Ronald Oster*

Legal Topics:

For related research and practice materials, see the following legal topics:

Antitrust & Trade Law Price Discrimination General Overview Antitrust & Trade Law Private Actions Injuries & Remedies State Regulation Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Torts Business Torts Unfair Business Practices Elements



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California Forms of Jury Instruction

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CHAPTER 33 California Judicial Council Unfair Practices Act Instructions

5-33 California Forms of Jury Instruction CACI 3301

CACI 3301 Below Cost Sales--Essential Factual Elements

[*Name of plaintiff*] **claims that** [*name of defendant*] **engaged in unlawful sales below cost. To establish this claim, [*name of plaintiff*] must prove all of the following:**

1. **[That [*name of defendant*] [offered to sell/sold] [*product/service*] at a price that is below cost;]**
[That [*name of defendant*] gave away [*product/service*];]
2. **That [*name of defendant*]'s purpose was to injure competitors or destroy competition;**
3. **That [*name of plaintiff*] was harmed; and**
4. **That [*name of defendant*]'s conduct was a substantial factor in causing [*name of plaintiff*]'s harm.**

New September 2003

The word "price" as used here should be read sufficiently broadly to include "special rebates, collateral contracts, or any device of any nature whereby such sale below cost is in substance or fact effected." (*Bus. & Prof. Code, § 17049.*) To the extent the circumstances of the case warrant it, the word "price" in the instruction may be supplemented or supplanted by other such price-related terms.

For instructions on "cost," see *CACI No. 3303, Definition of "Cost"*; *CACI No. 3304, Presumptions Concerning Costs--Manufacturer*; *CACI No. 3305, Presumptions Concerning Costs--Distributor*; and *CACI No. 3306, Methods of Allocating Costs to an Individual Product*.

Business and Professions Code sections 17071 and 17071.5 create rebuttable presumptions of the purpose or intent to injure competitors or destroy competition. The Supreme Court has observed "[t]he obvious and only effect of this provision is to require the defendants to go forward with such proof as would bring them within one of the exceptions or which would negative the prima facie showing of wrongful intent." (*People v. Pay Less Drug Store* (1944) 25 Cal.2d 108, 114 [153 P.2d 9] .)

- *Business and Professions Code section 17043* provides: "It is unlawful for any person engaged in business within this State to sell any article or product at less than the cost thereof to such vendor, or to give away any article or product, for the purpose of injuring competitors or destroying competition."

- *Business and Professions Code section 17024* provides, in part: " 'Article or product' includes any article, product, commodity, thing of value, service or output of a service trade."

- "The purpose of the Unfair Practices Act (UPA) is 'to safeguard the public against the creation or perpetuation of monopolies and to foster and encourage competition, by prohibiting unfair, dishonest, deceptive, destructive, fraudulent and discriminatory practices by which fair and honest competition is destroyed or prevented.' It forbids most locality discriminations, the use of loss leaders, gifts, secret rebates, boycotts, and 'deceptive, untrue or misleading advertising.' It also prohibits the sale of goods and services below cost." (*Pan Asia Venture Capital Corp. v. Hearst Corp.* (1999) 74 Cal.App.4th 424, 431-432 [88 Cal.Rptr.2d 118] , internal citations omitted.)

- "Section 17043 uses the word 'purpose,' not 'intent,' not 'knowledge.' We therefore conclude that to violate section 17043, a company must act with the purpose, i.e., the desire, of injuring competitors or destroying competition." (*Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 174-175 [83 Cal.Rptr.2d 548, 973 P.2d 527] .)

- "Proof that a defendant sold or distributed articles or products below cost will be 'presumptive evidence of the purpose or intent to injure competitors or destroy competition.' " (*Pan Asia Venture Capital Corp.*, *supra*, 74 Cal.App.4th at p. 432 , internal citation omitted.)

- "Determination of the defendant's cost has always been treated as an issue of fact." (*Pan Asia Venture Capital Corp.*, *supra*, 74 Cal.App.4th at p. 432 .)

- *Business and Professions Code section 17082* provides, in part: "In any action under this chapter, it is not necessary to allege or prove actual damages or the threat thereof, or actual injury or the threat thereof, to the plaintiff. But, in addition to injunctive relief, any plaintiff in any such action shall be entitled to recover three times the amount of the actual damages, if any, sustained by the plaintiff, as well as three times the actual damages, if any, sustained by any person who has assigned to the plaintiff his claim for damages resulting from a violation of this chapter."

- "While, similar to other cases, damages cannot be awarded in antitrust cases upon sheer guesswork or speculation, the plaintiff seeking damages for loss of profits is required to establish only with reasonable probability the existence of some causal connection between defendant's wrongful act and some loss of the anticipated revenue. Once that has been accomplished, the jury will be permitted to act upon probable and inferential proof and to 'make a just and reasonable estimate of the damage based on relevant data, and render its verdict accordingly.' " (*Suburban Mobile Homes, Inc. v. AMFAC Communities, Inc.* (1980) 101 Cal.App.3d 532, 545 [161 Cal.Rptr. 811] , internal citations omitted.)

■ The federal law most comparable to the Unfair Practices Act is the Robinson-Patman Act (15 U.S.C. § 13 *et seq.*); that act differs substantially from the Unfair Practices Act, however. For a discussion of this subject, see *Turnbull & Turnbull v. ARA Transportation* (1990) 219 Cal.App.3d 811 [268 Cal.Rptr. 856]. One notable difference is that the Robinson-Patman Act requires at least two actual sales. Thus, mere offers to sell cannot violate that act.

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, §§ 609-615

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.153 (Matthew Bender)

49 California Forms of Pleading and Practice, Ch. 565, *Unfair Competition* (Matthew Bender)

23 California Points and Authorities, Ch. 235, *Unfair Competition* (Matthew Bender)

1 *Matthew Bender Practice Guide: California Unfair Competition and Business Torts*, Ch. 5, *Antitrust*, 5.46[3], 5.47[2]

Publisher's Notes

There is no BAJI instruction on this subject.

LexisNexis Matthew Bender Expert Practice Tip--Determining Costs: In determining costs, California uses the "fully allocated cost" method that takes into account fixed as well as variable costs. From the plaintiff's standpoint, this is considered a more favorable method than the federal standard. *By Ronald Oster*

Legal Topics:

For related research and practice materials, see the following legal topics:

Antitrust & Trade Law Price Fixing & Restraints of Trade General Overview Antitrust & Trade Law Private Actions Injuries & Remedies State Regulation Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Torts Business Torts Unfair Business Practices Elements



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CHAPTER 33 California Judicial Council Unfair Practices Act Instructions

5-33 California Forms of Jury Instruction CACI 3302

CACI 3302 Loss Leader Sales--Essential Factual Elements

[*Name of plaintiff*] **claims that** [*name of defendant*] **[offered to sell/sold/offered the use of] [*product/service*] as an unlawful loss leader. To establish this claim, [*name of plaintiff*] must prove all of the following:**

1. That [*name of defendant*] [offered to sell/sold/offered the use of] [*product/service*] at prices that were below [his/her/its] costs;

2. [*Insert one or more of the following:*]

[That [*name of defendant*]'s purpose was to influence, promote, or encourage the purchase of other merchandise from [him/her/it]; [or]]

[That the [offer/sale] had a tendency or capacity to mislead or deceive purchasers or potential purchasers; [or]]

[That the [offer/sale] took business away from or otherwise injured competitors;]

3. That [*name of defendant*]'s intent was to injure competitors or destroy competition;

4. That [*name of plaintiff*] was harmed; and

5. That [*name of defendant*]'s conduct was a substantial factor in causing [*name of plaintiff*]'s harm.

5-33 California Forms of Jury Instruction CACI 3302

The word "price" as used here should be read sufficiently broadly to include "special rebates, collateral contracts, or any device of any nature whereby such sale below cost is in substance or fact effected." (*Bus. & Prof. Code*, § 17049.) To the extent the circumstances of the case warrant it, the word "price" in the instruction may be supplemented or supplanted by other price-related terms.

For instructions on "cost," see *CACI No. 3303, Definition of "Cost"*; *CACI No. 3304, Presumptions Concerning Costs--Manufacturer*; *CACI No. 3305, Presumptions Concerning Costs--Distributor*; and *CACI No. 3306, Methods of Allocating Costs to an Individual Product*.

Business and Professions Code sections 17071 and 17071.5 create rebuttable presumptions regarding the purpose or intent to injure competitors or destroy competition. The Supreme Court has observed: "The obvious and only effect of this provision is to require the defendants to go forward with such proof as would bring them within one of the exceptions or which would negative the prima facie showing of wrongful intent." (*People v. Pay Less Drug Store* (1944) 25 Cal.2d 108, 114 [153 P.2d 9] .)

■ *Business and Professions Code* section 17044 provides: "It is unlawful for any person engaged in business within this State to sell or use any article or product as a 'loss leader' as defined in Section 17030 of this chapter."

■ *Business and Professions Code* section 17030 provides:

"Loss leader" means any article or product sold at less than cost:

(a) Where the purpose is to induce, promote or encourage the purchase of other merchandise; or

(b) Where the effect is a tendency or capacity to mislead or deceive purchasers or prospective purchasers; or

(c) Where the effect is to divert trade from or otherwise injure competitors.

■ *Business and Professions Code* section 17024 provides, in part: " 'Article or product' includes any article, product, commodity, thing of value, service or output of a service trade."

■ "The purpose of the Unfair Practices Act (UPA) is 'to safeguard the public against the creation or perpetuation of monopolies and to foster and encourage competition, by prohibiting unfair, dishonest, deceptive, destructive, fraudulent and discriminatory practices by which fair and honest competition is destroyed or prevented.' It forbids most locality discriminations, the use of loss leaders, gifts, secret rebates, boycotts, and 'deceptive, untrue or misleading advertising.' It also prohibits the sale of goods and services below cost." (*Pan Asia Venture Capital Corp. v. Hearst Corp.* (1999) 74 Cal.App.4th 424, 431-432 [88 Cal.Rptr.2d 118] , internal citations omitted.)

■ "[N]otwithstanding the absence of any language to this effect in either section 17044 or section 17030, intent to injure competitors or to destroy competition is required for violation of section 17044. In other words, for competition to be unfair under the Act, the person engaging in the challenged practice must possess an intent to injure his competitors or destroy his competition." (*Dooley's Hardware Mart v. Food Giant Markets, Inc.* (1971) 21 Cal.App.3d 513, 517 [98 Cal.Rptr. 543] .)

■ "We conclude that to violate sections 17043 and 17044, part of the Unfair Practices Act, which prohibit below-cost sales and loss leaders, a company must act with the purpose, i.e., the desire, of injuring competitors or destroying

competition." (*Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 169 [83 Cal.Rptr.2d 548, 973 P.2d 527] .)

■ It has been held by one federal district court interpreting California's loss leader statute that it applies only to product sales, not giveaways. (*Co-Opportunities, Inc. v. National Broadcasting Co., Inc.* (N.D. Cal. 1981) 510 F.Supp. 43, 50 .)

■ *Business and Professions Code section 17082* provides, in part: "In any action under this chapter, it is not necessary to allege or prove actual damages or the threat thereof, or actual injury or the threat thereof, to the plaintiff. But, in addition to injunctive relief, any plaintiff in any such action shall be entitled to recover three times the amount of the actual damages, if any, sustained by the plaintiff, as well as three times the actual damages, if any, sustained by any person who has assigned to the plaintiff his claim for damages resulting from a violation of this chapter."

■ "While, similar to other cases, damages cannot be awarded in antitrust cases upon sheer guesswork or speculation, the plaintiff seeking damages for loss of profits is required to establish only with reasonable probability the existence of some causal connection between defendant's wrongful act and some loss of the anticipated revenue. Once that has been accomplished, the jury will be permitted to act upon probable and inferential proof and to 'make a just and reasonable estimate of the damage based on relevant data, and render its verdict accordingly.' " (*Suburban Mobile Homes, Inc. v. AMFAC Communities, Inc.* (1980) 101 Cal.App.3d 532, 545 [161 Cal.Rptr. 811] , internal citations omitted.)

■ The federal law most comparable to the Unfair Practices Act is the Robinson-Patman Act (15 U.S.C. § 13 *et seq.*); that act differs substantially from the Unfair Practices Act, however. For a discussion of this subject, see *Turnbull & Turnbull v. ARA Transportation* (1990) 219 Cal.App.3d 811 [268 Cal.Rptr. 856] . One notable difference is that the Robinson-Patman Act requires at least two actual sales. Thus, mere offers to sell cannot violate that act.

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, § 614

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.153 (Matthew Bender)

49 California Forms of Pleading and Practice, Ch. 565, *Unfair Competition* (Matthew Bender)

23 California Points and Authorities, Ch. 235, *Unfair Competition* (Matthew Bender)

1 *Matthew Bender Practice Guide: California Unfair Competition and Business Torts*, Ch. 5, *Antitrust*, 5.46[4], 5.47[3]

Publisher's Notes

There is no BAJI instruction on this subject.

LexisNexis Matthew Bender Expert Practice Tip--Caution!: Some jurors will struggle with the concept of a "loss leader." Thus, exercise caution in arguing this instruction. *By Rex Heeseman*

LexisNexis Matthew Bender Expert Practice Tip--Loss Leaders vs. Promotional Sales: Many jurors will associate the term "loss leader" with promotional sales. Therefore, it is important to explain that "loss leaders" are unlawful because they are "below cost" and because they injure competition. This is different from promotional sales in which the seller still makes a profit, albeit a reduced profit. *By Ronald Oster*

Legal Topics:

For related research and practice materials, see the following legal topics:

Antitrust & Trade Law Price Fixing & Restraints of Trade General Overview Antitrust & Trade Law Private
Actions Injuries & Remedies State Regulation Civil Procedure Trials Jury Trials Jury Instructions Standard
Instructions Torts Business Torts Unfair Business Practices Elements



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CHAPTER 33 California Judicial Council Unfair Practices Act Instructions

5-33 California Forms of Jury Instruction CACI 3303

CACI 3303 Definition of "Cost"

The term "cost" means all costs of doing business, including fixed costs that do not tend to change with sales, such as heat and light, as well as variable costs that do tend to change with sales, such as sales commissions.

Costs of doing business may include the following:

- 1. Labor, including salaries of executives and officers;**
- 2. Rent and utilities;**
- 3. Interest on loans;**
- 4. Depreciation;**
- 5. Selling cost;**
- 6. Maintenance of equipment;**
- 7. Delivery costs;**
- 8. Credit losses;**
- 9. Advertising costs;**
- 10. Licenses, taxes; [and]**

11. Insurance; [and]**12. [Insert other cost(s).]**

[The term "cost" as applied to warranty service agreements also includes the cost of parts and delivery of the parts.]

[The term "cost" as applied to distribution also includes either the invoice cost or replacement cost of the product, whichever is lower.]

[The term "cost" as applied to services also includes the prevailing wage at the time and place these services were provided if [name of defendant] was paying less than the prevailing wage.]

Any discounts given for cash payments may not be used to lower costs.

New September 2003

The bracketed paragraphs should be inserted as appropriate to the facts.

In cases involving the sale of cellular telephones and cigarettes, *Business and Professions Code sections 17026.1 and 17026.5* measure "cost" somewhat differently.

■ *Business and Professions Code section 17026* provides:

"Cost" as applied to production includes the cost of raw materials, labor and all overhead expenses of the producer.

"Cost" as applied to distribution means the invoice or replacement cost, whichever is lower, of the article or product to the distributor and vendor, plus the cost of doing business by the distributor and vendor and in the absence of proof of cost of doing business a markup of 6 percent on such invoice or replacement cost shall be prima facie proof of such cost of doing business.

"Cost" as applied to warranty service agreements includes the cost of parts, transporting the parts, labor, and all overhead expenses of the service agency.

Discounts granted for cash payments shall not be used to reduce costs.

■ *Business and Professions Code section 17029* provides: " 'Cost of doing business' or 'overhead expense' means all costs of doing business incurred in the conduct of the business and shall include without limitation the following items of expense: labor (including salaries of executives and officers), rent, interest on borrowed capital, depreciation, selling cost, maintenance of equipment, delivery costs, credit losses, all types of licenses, taxes, insurance and advertising."

■ *Business and Professions Code section 17076* provides: "In any action brought under this chapter, where persons are employed or performing services for any person or in the conduct of the business wherein such person is charged with a violation of this chapter, and are so employed or performing such services without compensation or at a wage lower than that prevailing at the time and place of the service for the particular services performed, such services shall be charged as an expense of the business in

which rendered and at the rate of the wage for the services rendered prevailing at the time of the service at the place where rendered."

■ "Determination of the defendant's cost has always been treated as an issue of fact." (*Pan Asia Venture Capital Corp. v. Hearst Corp.* (1999) 74 Cal.App.4th 424, 433 [88 Cal.Rptr.2d 118] .)

■ "These statutes embody California's fully allocated cost standard, that is, a fair allocation of all fixed or variable costs associated with production of the article or product." (*Pan Asia Venture Capital Corp.*, *supra*, 74 Cal.App.4th at p. 432 , footnote omitted.)

■ "Cost is to be measured as 'the fair average cost of production over a reasonable time, rather than the cost of one item on a particular occasion.' " (*Pan Asia Venture Capital Corp.*, *supra*, 74 Cal.App.4th at p. 432, fn. 6 , internal citation omitted.)

■ "Variable costs are costs that vary with changes in output, while fixed costs are those that do not vary with changes in output." (*Turnbull & Turnbull v. ARA Transportation Inc.* (1990) 219 Cal.App.3d 811, 820 [268 Cal.Rptr. 856] .)

■ "California employs a fully allocated cost standard to determine whether a sale has violated section 17043. Under sections 17026 and 17029 ... cost means invoice cost plus the vendor's full cost of doing business or six percent." (*G.H.I.I. v. Mts, Inc.* (1983) 147 Cal.App.3d 256, 275 [195 Cal.Rptr. 211], internal citations omitted.)

■ "We find the use of the fully allocated cost method, when viewed in conjunction with the injurious intent requirement of section 17043, is rationally related to the valid legislative purpose ... as it assists in preventing the creation or perpetuation of monopolies." (*Turnbull & Turnbull*, *supra*, 219 Cal.App.3d at p. 822 .)

■ "To be legally acceptable, the allocation of indirect or fixed overhead costs to a particular product or service must be reasonably related to the burden such product or service imposes on the overall cost of doing business." (*Turnbull & Turnbull*, *supra*, 219 Cal.App.3d at p. 822 .)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, §§ 609-615

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.153 (Matthew Bender)

49 California Forms of Pleading and Practice, Ch. 565, *Unfair Competition* (Matthew Bender)

23 California Points and Authorities, Ch. 235, *Unfair Competition* (Matthew Bender)

Publisher's Notes

There is no BAJI instruction on this subject.

LexisNexis Matthew Bender Expert Practice Tip--Determining Costs: CACI No. 3303 sets forth the "fully allocated cost" method that takes into account both fixed and variable costs. This method is considered favorable from the plaintiff's standpoint because it increases the cost by including overhead items, thus making it easier to establish that defendant was selling "below cost." *By Ronald Oster*

Legal Topics:

For related research and practice materials, see the following legal topics:

Antitrust & Trade Law Price Fixing & Restraints of Trade General Overview Antitrust & Trade Law Private
Actions Injuries & Remedies State Regulation Civil Procedure Trials Jury Trials Jury Instructions Standard
Instructions Torts Business Torts Unfair Business Practices Elements



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CHAPTER 33 California Judicial Council Unfair Practices Act Instructions

5-33 California Forms of Jury Instruction CACI 3304

CACI 3304 Presumptions Concerning Costs--Manufacturer

A manufacturer's costs include the cost of raw materials and the cost of manufacturing.

The cost of manufacturing is the average cost of manufacture over a reasonable time, rather than the cost of one item at a particular time.

[If [name of defendant]'s cost for raw materials cannot be computed, the cost is presumed to be the prevailing price for similar raw materials at the time and place those materials would usually be purchased.]

[If [name of defendant]'s trade or industry has an established cost study or survey for the geographic area in this case, that cost survey may be considered in calculating [name of defendant]'s costs.]

[[Name of defendant]'s delivery costs are presumed to be the tariffs set by the California Public Utilities Commission, but this presumption may be overcome by other evidence.]

New September 2003

The bracketed sentences should be inserted as necessary.

- *Business and Professions Code section 17026* provides, in part: " 'Cost' as applied to production includes the cost of raw materials, labor and all overhead expenses of the producer."

- *Business and Professions Code section 17072* provides: "Where a particular trade or industry, of which a person complained against is a member, has an established cost survey for the locality and

vicinity in which the offense is committed, that cost survey is competent evidence to be used in proving the costs of such person."

■ *Business and Professions Code section 17073* provides: "Proof of average overall cost of doing business for any particular inventory period when added to the cost of production of each article or product, as to a producer, or invoice or replacement cost, whichever is lower, of each article or product, as to a distributor, is presumptive evidence of cost of each such article or product involved in any action brought under this chapter."

■ *Business and Professions Code section 17074* provides: "Proof of transportation tariffs when fixed and approved by the Public Utilities Commission of the State of California is presumptive evidence of delivery cost."

■ *Business and Professions Code section 17077* provides: "In any action or prosecution for sales below cost in violation of this chapter, if the defendant acquires his raw materials for a consideration not wholly or definitely computable in money, the cost of the raw materials shall be presumed to be the prevailing market price for similar raw materials in the ordinary channels of trade in the locality or vicinity in which such raw materials were acquired, at the time of the acquisition."

■ "Determination of the defendant's cost has always been treated as an issue of fact." (*Pan Asia Venture Capital Corp. v. Hearst Corp.* (1999) 74 Cal.App.4th 424, 432 [88 Cal.Rptr.2d 118] .)

■ "California appears to have adopted a very expansive approach to the evidence that may be used to establish cost; no formula has been expressly sustained or denounced." (*Pan Asia Venture Capital Corp.*, *supra*, 74 Cal.App.4th at p. 436 .)

■ "These statutes embody California's fully allocated cost standard, that is, a fair allocation of all fixed or variable costs associated with production of the article or product." (*Pan Asia Venture Capital Corp.*, *supra*, 74 Cal.App.4th at p. 432 , footnote omitted.)

■ "Cost is to be measured as 'the fair average cost of production over a reasonable time, rather than the cost of one item on a particular occasion.'" (*Pan Asia Venture Capital Corp.*, *supra*, 74 Cal.App.4th at p. 432, fn. 6 , internal citation omitted.)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, §§ 609-615

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.153 (Matthew Bender)

49 California Forms of Pleading and Practice, Ch. 565, *Unfair Competition* (Matthew Bender)

23 California Points and Authorities, Ch. 235, *Unfair Competition* (Matthew Bender)

Publisher's Notes

There is no BAJI instruction on this subject.

LexisNexis Matthew Bender Expert Practice Tip--Caution!: Although "cost" is understood by almost all jurors, the concept in CACI No. 3304 may be troublesome for some jurors. *By Rex Heeseman*

LexisNexis Matthew Bender Expert Practice Tip--Experts Needed: Proof of "below cost" sales will almost always require expert testimony. The expert's testimony should track the instructions on "cost" as much as possible. *By Ronald Oster*

Legal Topics:

For related research and practice materials, see the following legal topics:

Antitrust & Trade Law Price Fixing & Restraints of Trade General Overview Antitrust & Trade Law Private
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California Forms of Jury Instruction

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CHAPTER 33 California Judicial Council Unfair Practices Act Instructions

5-33 California Forms of Jury Instruction CACI 3305

CACI 3305 Presumptions Concerning Costs--Distributor

A distributor's costs include the cost of the product being distributed and the cost of doing business as a distributor.

The cost of the product being distributed is the amount [*name of defendant*] paid for the product or [his/her/its] cost of replacing the product, whichever is less.

[*Name of defendant*]'s cost of doing business as a distributor is the average cost of distribution over a reasonable time, rather than the cost of distributing one item at a particular time.

[If [*name of defendant*]'s trade or industry has an established cost study or survey for the geographic area in this case, that cost survey may be considered in calculating [*name of defendant*]'s costs.]

[If there is no other proof of the cost of doing business, a markup of six percent on the invoice or replacement cost of an article or product is presumed to be [*name of defendant*]'s additional cost of doing business.]

[[*Name of defendant*]'s delivery costs are presumed to be the tariffs set by the California Public Utilities Commission, but this presumption may be overcome by other evidence.]

New September 2003

Presumably, this instruction would also apply to sellers that are denominated "retailers."

The bracketed sentences should be inserted as necessary.

There is an additional presumption regarding costs in *Business and Professions Code section 17026* for warranty service providers: " 'Cost' as applied to warranty service agreements includes the cost of parts, transporting the parts, labor, and all overhead expenses of the service agency."

- *Business and Professions Code section 17026* provides, in part: " 'Cost' as applied to distribution means the invoice or replacement cost, whichever is lower, of the article or product to the distributor and vendor, plus the cost of doing business by the distributor and vendor and in the absence of proof of cost of doing business a markup of 6 percent on such invoice or replacement cost shall be prima facie proof of such cost of doing business."

- *Business and Professions Code section 17072* provides: "Where a particular trade or industry, of which a person complained against is a member, has an established cost survey for the locality and vicinity in which the offense is committed, that cost survey is competent evidence to be used in proving the costs of such person."

- *Business and Professions Code section 17073* provides: "Proof of average overall cost of doing business for any particular inventory period when added to the cost of production of each article or product, as to a producer, or invoice or replacement cost, whichever is lower, of each article or product, as to a distributor, is presumptive evidence of cost of each such article or product involved in any action brought under this chapter."

- *Business and Professions Code section 17074* provides: "Proof of transportation tariffs when fixed and approved by the Public Utilities Commission of the State of California is presumptive evidence of delivery cost."

- "Determination of the defendant's cost has always been treated as an issue of fact." (*Pan Asia Venture Capital Corp. v. Hearst Corp.* (1999) 74 Cal.App.4th 424, 432 [88 Cal.Rptr.2d 118] .)

- "California appears to have adopted a very expansive approach to the evidence that may be used to establish cost; no formula has been expressly sustained or denounced." (*Pan Asia Venture Capital Corp.*, *supra*, 74 Cal.App.4th at p. 436 .)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, §§ 609-615

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.153 (Matthew Bender)

49 California Forms of Pleading and Practice, Ch. 565, *Unfair Competition* (Matthew Bender)

23 California Points and Authorities, Ch. 235, *Unfair Competition* (Matthew Bender)

Publisher's Notes

There is no BAJI instruction on this subject.

LexisNexis Matthew Bender Expert Practice Tip--Caution!: Although "cost" is understood by almost all jurors, the concept in *CACI No. 3305* may be troublesome for some jurors. *By Rex Heeseman*

LexisNexis Matthew Bender Expert Practice Tip--Experts Needed: Expert testimony will almost

always be required to prove (or disprove) that sales were made "below cost" [see Practice Tip in *CACI No. 3304*]. The expert's testimony should track the instructions on "cost" as much as possible. *By Ronald Oster*

Legal Topics:

For related research and practice materials, see the following legal topics:

Antitrust & Trade Law Price Fixing & Restraints of Trade General Overview Antitrust & Trade Law Private
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CHAPTER 33 California Judicial Council Unfair Practices Act Instructions

5-33 California Forms of Jury Instruction CACI 3306

CACI 3306 Methods of Allocating Costs to an Individual Product

Although no formula for determining the appropriate cost of a particular [product/service] is set by law, [insert one of the following:]

[the determination of the appropriate cost of [manufacture/distribution] of a particular product must be reasonably related to the burden the product puts on [name of defendant]'s overall cost of doing business.]

[the determination of the cost of providing particular services must be reasonably related to the burden the service puts on [name of defendant]'s overall cost of doing business.]

New September 2003

Regarding the first bracketed sentence, if all of the defendant's products are approximately the same, there is no need to allocate the indirect expense, i.e., overhead, according to the unique "burden" each product generates. In such cases, this paragraph could unnecessarily confuse the jury and should be modified or deleted.

■ "Determination of the defendant's cost has always been treated as an issue of fact." (*Pan Asia Venture Capital Corp. v. Hearst Corp.* (1999) 74 Cal.App.4th 424, 432 [88 Cal.Rptr.2d 118] .)

■ "These statutes embody California's fully allocated cost standard, that is, a fair allocation of all fixed or variable costs associated with production of the article or product." (*Pan Asia Venture Capital Corp.*, *supra*, 74 Cal.App.4th at p. 432 , footnote omitted.)

■ "Cost is to be measured as 'the fair average cost of production over a reasonable time, rather than the cost of one item on a particular occasion.' " (*Pan Asia Venture Capital Corp.*, *supra*, 74 Cal.App.4th at p. 432, fn. 6 , internal citation omitted.)

■ "Variable costs are costs that vary with changes in output, while fixed costs are those that do not vary with changes in output." (*Turnbull & Turnbull v. ARA Transportation Inc.* (1990) 219 Cal.App.3d 811, 820 [268 Cal.Rptr. 856] .)

■ "California employs a fully allocated cost standard to determine whether a sale has violated section 17043. Under sections 17026 and 17029 ... cost means invoice cost plus the vendor's full cost of doing business or six percent." (*G.H.I.I. v. Mts, Inc.* (1983) 147 Cal.App.3d 256, 275 [195 Cal.Rptr. 211], internal citations omitted.)

■ "We find the use of the fully allocated cost method, when viewed in conjunction with the injurious intent requirement of section 17043, is rationally related to the valid legislative purpose ... as it assists in preventing the creation or perpetuation of monopolies." (*Turnbull & Turnbull*, *supra*, 219 Cal.App.3d at p. 822 .)

■ "To be legally acceptable, the allocation of indirect or fixed overhead costs to a particular product or service must be reasonably related to the burden such product or service imposes on the overall cost of doing business." (*Turnbull & Turnbull*, *supra*, 219 Cal.App.3d at p. 822 .)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, §§ 609-615

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.153 (Matthew Bender)

49 California Forms of Pleading and Practice, Ch. 565, *Unfair Competition* (Matthew Bender)

23 California Points and Authorities, Ch. 235, *Unfair Competition* (Matthew Bender)

Publisher's Notes

There is no BAJI instruction on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

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CHAPTER 33 California Judicial Council Unfair Practices Act Instructions

5-33 California Forms of Jury Instruction CACI 3307-CACI 3319

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CACI 3307Reserved for Future Use



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CHAPTER 33 California Judicial Council Unfair Practices Act Instructions

5-33 California Forms of Jury Instruction CACI 3320

CACI 3320 Secret Rebates--Essential Factual Elements

[*Name of plaintiff*] **claims that** [*name of defendant*] [*insert one or both of the following:*]

[secretly [gave/received] [payments/rebates/refunds/ commissions/unearned discounts;]] [or]

[secretly [gave to some buyers/received] services or privileges that were not given to other buyers purchasing on like terms and conditions.]

To establish this claim, [*name of plaintiff*] must prove all of the following:

- 1. That [*name of defendant*] secretly [[gave/received] [payments/rebates/refunds/commissions/unearned discounts]] [or] [[gave to some buyers/received] services or privileges that were not given to other buyers purchasing on like terms and conditions];**
- 2. That a competitor was harmed;**
- 3. That the [payment/allowance] had a tendency to destroy competition;**
- 4. That [*name of plaintiff*] was harmed; and**
- 5. That [*name of defendant*]'s conduct was a substantial factor in causing [*name of plaintiff*]'s harm.**

5-33 California Forms of Jury Instruction CACI 3320

Element 2 should be omitted if the plaintiff is a competitor of the defendant; that issue is covered by element 4.

■ *Business and Professions Code § 17045* provides: "The secret payment or allowance of rebates, refunds, commissions, or unearned discounts, whether in the form of money or otherwise, or secretly extending to certain purchasers special services or privileges not extended to all purchasers purchasing upon like terms and conditions, to the injury of a competitor and where such payment or allowance tends to destroy competition, is unlawful."

■ "The purpose of the Unfair Practices Act (UPA) is 'to safeguard the public against the creation or perpetuation of monopolies and to foster and encourage competition, by prohibiting unfair, dishonest, deceptive, destructive, fraudulent and discriminatory practices by which fair and honest competition is destroyed or prevented.' It forbids most locality discriminations, the use of loss leaders, gifts, secret rebates, boycotts, and 'deceptive, untrue or misleading advertising.' It also prohibits the sale of goods and services below cost." (*Pan Asia Venture Capital Corp. v. Hearst Corp.* (1999) 74 Cal.App.4th 424, 431-432 [88 Cal.Rptr.2d 118] , internal citations omitted.)

■ "[T]here are three elements to a violation of section 17045. First, there must be a 'secret' allowance of an 'unearned' discount. Second, there must be 'injury' to a competitor. Third, the allowance must tend to destroy competition." (*Diesel Elec. Sales & Serv. v. Marco Marine San Diego, Inc.* (1993) 16 Cal.App.4th 202, 212 [20 Cal.Rptr.2d 62].)

■ "By its terms, section 17045 requires the plaintiff to prove not only injury to a competitor, but, *in addition*, a tendency 'to destroy competition.' " (*ABC International Traders, Inc. v. Matsushita Electric Corp. of America* (1997) 14 Cal.4th 1247, 1262 [61 Cal.Rptr.2d 112, 931 P.2d 290] , original italics.)

■ "[P]roof of a knowing or intentional receipt by a buyer of a secret, unearned discount is not required under section 17045." (*Diesel Elec. Sales & Serv.*, *supra*, 16 Cal.App.4th at p. 214, fn. 4.)

■ "[S]ection 17045 does not require a proof of an 'intent' to destroy competition, but only that the secret, unearned discount had a *tendency* to destroy competition." (*Diesel Elec. Sales & Serv.*, *supra*, 16 Cal.App.4th at p. 215, original italics.)

■ Those competing against a seller who provides the secret rebate, on the "primary line," have standing to sue under the statute. Likewise, a customer of the seller who is disfavored by that seller providing a secret rebate to competitors of that customer, creating so-called "secondary line" injury, also has standing to sue. (*ABC International Traders*, *supra*, 14 Cal.4th at p. 1257 .)

■ *Business and Professions Code section 17082* provides, in part: "In any action under this chapter, it is not necessary to allege or prove actual damages or the threat thereof, or actual injury or the threat thereof, to the plaintiff. But, in addition to injunctive relief, any plaintiff in any such action shall be entitled to recover three times the amount of the actual damages, if any, sustained by the plaintiff, as well as three times the actual damages, if any, sustained by any person who has assigned to the plaintiff his claim for damages resulting from a violation of this chapter."

■ "While, similar to other cases, damages cannot be awarded in antitrust cases upon sheer guesswork or speculation, the plaintiff seeking damages for loss of profits is required to establish only with reasonable probability the existence of some causal connection between defendant's wrongful act and some loss of the anticipated revenue. Once that has been accomplished, the jury will be permitted to act

upon probable and inferential proof and to 'make a just and reasonable estimate of the damage based on relevant data, and render its verdict accordingly.' " (*Suburban Mobile Homes, Inc. v. AMFAC Communities, Inc.* (1980) 101 Cal.App.3d 532, 545 [161 Cal.Rptr. 811] , internal citations omitted.)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, §§ 609-615

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.153 (Matthew Bender)

49 California Forms of Pleading and Practice, Ch. 565, *Unfair Competition* (Matthew Bender)

23 California Points and Authorities, Ch. 235, *Unfair Competition* (Matthew Bender)

1 *Matthew Bender Practice Guide: California Unfair Competition and Business Torts, Ch. 5, Antitrust*, 5.46[5], 5.47[4]

Publisher's Notes

There is no BAJI instruction on this subject.

LexisNexis Matthew Bender Expert Practice Tip--Explain "Secret Rebates" to Jury: A "rebate" is a unique concept to most jurors. A "secret rebate" even more so. In addition, jurors will not necessarily understand why "secret rebates" are unlawful. Counsel should explain in closing argument why such rebates injure competition, and that the Legislature has therefore determined they are unlawful. *By Rex Heeseman and Ronald Oster*

Legal Topics:

For related research and practice materials, see the following legal topics:

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CHAPTER 33 California Judicial Council Unfair Practices Act Instructions

5-33 California Forms of Jury Instruction CACI 3321

CACI 3321 Secret Rebates--Definition of "Secret"

[Rebates/Refunds/Commissions/Unearned discounts/Services or privileges] are "secret" if they are concealed from or not disclosed to other buyers.

New September 2003

■ "Viewing the evidence most favorably to [plaintiff], the nondisclosure of [defendant]'s receipt of maximum discounts to which it was not entitled certainly could be construed as a 'secret' allowance." (*Diesel Elec. Sales & Serv. v. Marco Marine San Diego, Inc. (1993) 16 Cal.App.4th 202, 212 [20 Cal.Rptr.2d 62].*)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, §§ 609-615

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.153 (Matthew Bender)

49 California Forms of Pleading and Practice, Ch. 565, *Unfair Competition* (Matthew Bender)

23 California Points and Authorities, Ch. 235, *Unfair Competition* (Matthew Bender)

1 *Matthew Bender Practice Guide: California Unfair Competition and Business Torts, Ch. 5, Antitrust*, 5.46[5], 5.47[4]

Publisher's Notes

There is no BAJI instruction on this subject.

See also "LexisNexis Matthew Bender Expert Practice Tip--Explain 'Secret Rebates' to Jury" in *CACI* No. 3320.

Legal Topics:

For related research and practice materials, see the following legal topics:

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CHAPTER 33 California Judicial Council Unfair Practices Act Instructions

5-33 California Forms of Jury Instruction CACI 3322-CACI 3329

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CHAPTER 33 California Judicial Council Unfair Practices Act Instructions

5-33 California Forms of Jury Instruction CACI 3330

CACI 3330 Affirmative Defense to Locality Discrimination Claim--Cost Justification

[*Name of defendant*] **claims that any locality discrimination proven by [*name of plaintiff*] is within the law. To succeed, [*name of defendant*] must prove that the difference in [his/her/its] price is justified by: [insert one or more of the following:]**

[A difference in the [grade/quality/quantity] of the [*product*] [he/she/it] sold in the different locations;] [or]

[The difference in the cost of the [manufacture/sale/delivery] of [his/her/its] [*product*] in the different locations;] [or]

[A difference in the actual cost of transportation from the place the [*product*] was [produced/manufactured/shipped] to the place where the [*product*] was sold.]

New September 2003

This defense applies to locality discrimination only.

■ *Business and Professions Code section 17041* provides: "Nothing in this chapter prohibits locality discriminations which make allowances for differences, if any, in the grade, quality or quantity when based and justified in the cost of manufacture, sale or delivery, or the actual cost of transportation from the point of production, if a raw product or commodity, or from the point of manufacture if a manufactured product or commodity, or from the point of shipment to the point of destination."

■ "We ... conclude that appellants are not required to negative the exception for differences in grade or

other enumerated factors found in section 17041, and deem the complaint sufficient to withstand demurrer without such allegations." (*G.H.I.I. v. Mts, Inc.* (1983) 147 Cal.App.3d 256, 273 [195 Cal.Rptr. 211], internal citations and footnote omitted.)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, §§ 609-615

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.153 (Matthew Bender)

49 California Forms of Pleading and Practice, Ch. 565, *Unfair Competition* (Matthew Bender)

23 California Points and Authorities, Ch. 235, *Unfair Competition* (Matthew Bender)

1 *Matthew Bender Practice Guide: California Unfair Competition and Business Torts, Ch. 5, Antitrust*, 5.46[2], 5.100[2]

Publisher's Notes

There is no BAJI instruction on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

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CHAPTER 33 California Judicial Council Unfair Practices Act Instructions

5-33 California Forms of Jury Instruction CACI 3331

CACI 3331 Affirmative Defense to Locality Discrimination, Below Cost Sales, and Loss Leader Sales Claims--Closed-out, Discontinued, Damaged, or Perishable Items

[*Name of defendant*] **claims that any [locality discrimination/below cost sales/loss leader sales] proven by [*name of plaintiff*] [is/are] within the law because the [*product*] was being sold as [a close-out/seasonal goods/damaged goods/perishable goods]. To succeed, [*name of defendant*] must prove both of the following:**

1. That [his/her/its] sales were [*insert one or more of the following:*]

[in the course of closing out, in good faith, all or any part of [his/her/its] supply of [*product*], in order to stop trade in [*product*];] [or]

[of seasonal goods to prevent loss by depreciation;] [or]

[of perishable goods to prevent loss by spoilage or depreciation;] [or]

[of goods that were damaged or deteriorated in quality;] and

2. That [*name of defendant*] gave sufficient notice of the sale to the public.

Notice is sufficient only if:

1. The sale goods are kept separate from other goods;

2. The sale goods are clearly marked with the reason[s] for the sales; and

3. Any advertisement of such goods sets forth the reason[s] for the sale and indicates the number

of items to be sold.

New September 2003

This defense applies to locality discrimination, below cost sales, and loss leader sales only.

■ *Business and Professions Code section 17050* provides, in part:

The prohibitions of this chapter against locality discriminations, sales below cost, and loss leaders do not apply to any sale made:

(a) In closing out in good faith the owner's stock or any part thereof for the purpose of discontinuing his trade in any such article or product and in the case of the sale of seasonal goods or to the bona fide sale of perishable goods to prevent loss to the vendor by spoilage or depreciation; provided, notice is given to the public thereof.

(b) When the goods are damaged or deteriorated in quality, and notice is given to the public thereof.

...

The notice required to be given under this section shall not be sufficient unless the subject of such sales is kept separate from other stocks and clearly and legibly marked with the reason for such sales, and any advertisement of such goods must indicate the same facts and the number of items to be sold.

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, §§ 609-615

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.153 (Matthew Bender)

49 California Forms of Pleading and Practice, Ch. 565, *Unfair Competition* (Matthew Bender)

23 California Points and Authorities, Ch. 235, *Unfair Competition* (Matthew Bender)

1 *Matthew Bender Practice Guide: California Unfair Competition and Business Torts, Ch. 5, Antitrust*, 5.100[3]

Publisher's Notes

There is no BAJI instruction on this subject.

LexisNexis Matthew Bender Expert Practice Tip--Availability of Affirmative Defenses: If a defendant's sales are truly "below cost," then these are the classic affirmative defenses. Note the requirement that the goods be kept separate and be identified in the manner indicated in the instruction.
By Ronald Oster

LexisNexis Matthew Bender Expert Practice Tip--Caution!: This is a complicated instruction. Special caution should be exercised in organizing the related argument. *By Rex Heeseman*

Legal Topics:

For related research and practice materials, see the following legal topics:

Antitrust & Trade LawPrice DiscriminationGeneral OverviewAntitrust & Trade LawPrice Fixing & Restraints of
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CHAPTER 33 California Judicial Council Unfair Practices Act Instructions

5-33 California Forms of Jury Instruction CACI 3332

CACI 3332 Affirmative Defense to Locality Discrimination, Below Cost Sales, Loss Leader Sales, and Secret Rebates--Functional Classifications

[*Name of defendant*] **claims that any [locality discrimination/below cost sales/loss leader sales/secret rebates] proven by [*name of plaintiff*] [is/are] within the law because they apply to different classes of customers. To succeed, [*name of defendant*] must prove all of the following:**

- 1. That [*name of defendant*] created different classes of customers, such as [broker/jobber/wholesaler/retailer/[*insert other*]];**
- 2. That customers in the different classes performed different functions and assumed the risk, investment, and costs involved;**
- 3. That the difference in [price/rebate/discount/special services/privileges] for [*product/service*] was given only in those sales where the favored buyer performed the function on which the claim of a different class is based; and**
- 4. That the difference in price was reasonably related to the value of such function.**

New September 2003

This defense applies to locality discrimination, sales below cost, loss leader sales, and secret rebates.

- *Business and Professions Code section 17042* provides:

Nothing in this chapter prohibits any of the following:

(a) A selection of customers.

(b) A functional classification by any person of any customer as broker, jobber, wholesaler or retailer.

(c) A differential in price for any article or product as between any customers in different functional classifications.

■ "[T]he law should tolerate no subterfuge. For instance, where a wholesaler-retailer buys only part of his goods as a wholesaler, he must not claim a functional discount on all. Only to the extent that a buyer actually performs certain functions, assuming all the risk, investment, and costs involved, should he legally qualify for a functional discount. Hence a distributor should be eligible for a discount corresponding to any part of the function he actually performs on that part of the goods for which he performs it." (*Diesel Elec. Sales & Serv. v. Marco Marine San Diego, Inc.* (1993) 16 Cal.App.4th 202, 217 [20 Cal.Rptr.2d 62], internal citations omitted.)

■ "[A] pricing structure in which a distributor sells to a retailer at one discount and to a rack-jobber at another is expressly permitted by section 17042." (*Harris v. Capitol Records Distributing Corp.* (1966) 64 Cal.2d 454, 463 [50 Cal.Rptr. 539, 413 P.2d 139] , footnote omitted.)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, §§ 609-615

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.153 (Matthew Bender)

49 California Forms of Pleading and Practice, Ch. 565, *Unfair Competition* (Matthew Bender)

23 California Points and Authorities, Ch. 235, *Unfair Competition* (Matthew Bender)

1 *Matthew Bender Practice Guide: California Unfair Competition and Business Torts*, Ch. 5, Antitrust, 5.100[4]

Publisher's Notes

There is no BAJI instruction on this subject.

LexisNexis Matthew Bender Expert Practice Tip--Caution!: This is a complicated instruction [see also Practice Tip in CACI No. 3331]. Special caution should be exercised in organizing the related argument. By *Rex Heeseman*

Legal Topics:

For related research and practice materials, see the following legal topics:

Antitrust & Trade Law Price Discrimination General Overview Antitrust & Trade Law Price Fixing & Restraints of Trade General Overview Antitrust & Trade Law Private Actions Injuries & Remedies State Regulation Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Torts Business Torts Unfair Business Practices Defenses



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California Forms of Jury Instruction

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CHAPTER 33 California Judicial Council Unfair Practices Act Instructions

5-33 California Forms of Jury Instruction CACI 3333

CACI 3333 Affirmative Defense to Locality Discrimination, Below Cost Sales, and Loss Leader Sales Claims--Meeting Competition

[*Name of defendant*] **claims that any [locality discrimination/below cost sales/loss leader sales] proven by [*name of plaintiff*] [is/are] justified by the need to meet competition. To succeed, [*name of defendant*] must prove that the sales of [*product/service*] were made in an attempt, in good faith, to meet the legal prices of a competitor selling the same [*product/service*] in the ordinary course of business in the same area.**

To meet legal prices means to lower the price to a point that the seller believes in good faith is at or above the legal price of the competitor it is trying to meet. That is, a seller may attempt to "meet," but not "beat," what in good faith it believes to be that competitor's legal price.

New September 2003

This defense applies to locality discrimination, sales below cost, and loss leader sales only.

- *Business and Professions Code section 17050(e)* provides, in part: "The prohibitions of this chapter against locality discriminations, sales below cost, and loss leaders do not apply to any sale made: ... [i]n an endeavor made in good faith by a manufacturer, selling an article or product of his own manufacture, in a transaction and sale to a wholesaler or retailer for resale to meet the legal prices of a competitor selling the same or a similar or comparable article or product, in the same locality or trade area and in the ordinary channels of trade."

- *Business and Professions Code section 17050(d) and (e)* provides: "The prohibitions of this chapter against locality discriminations, sales below cost, and loss leaders do not apply to any sale made: ... [i]n

an endeavor made in good faith to meet the legal prices of a competitor selling the same article or product, in the same locality or trade area and in the ordinary channels of trade [or] [i]n an endeavor made in good faith by a manufacturer, selling an article or product of his own manufacture, in a transaction and sale to a wholesaler or retailer for resale to meet the legal prices of a competitor selling the same or a similar or comparable article or product, in the same locality or trade area and in the ordinary channels of trade."

■ "It is safe to assume that merchants generally know who are their competitors, and from what locality or trade area they draw their customers." (*People v. Pay Less Drug Store* (1944) 25 Cal.2d 108, 116 [153 P.2d 9] .)

■ "The requirement [to ascertain the 'legal prices' of competitors] is not absolute. It is merely that the defendants shall have endeavored 'in good faith' to meet the legal prices of a competitor." (*Pay Less Drug Store*, *supra*, 25 Cal.2d at p. 117 .)

■ "The operator of a service industry cannot legally reduce its prices to a below-cost figure with intent to injure another or offer free service to prevent further loss of business to a competitor 'who is indiscriminately and deliberately offering free service and below cost prices to such operator's customers.' Each side must obey the law; the fact that one competing party disregards the statute does not give the other side a legal excuse to do so." (*G.B. Page v. Bakersfield Uniform & Towel Supply Co.* (1966) 239 Cal.App.2d 762, 770 [49 Cal.Rptr. 46] .)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, §§ 609-615

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.153 (Matthew Bender)

49 California Forms of Pleading and Practice, Ch. 565, *Unfair Competition* (Matthew Bender)

23 California Points and Authorities, Ch. 235, *Unfair Competition* (Matthew Bender)

1 *Matthew Bender Practice Guide: California Unfair Competition and Business Torts*, Ch. 5, *Antitrust*, 5.100[5]

Publisher's Notes

There is no BAJI instruction on this subject.

LexisNexis Matthew Bender Expert Practice Tip--Illegal vs. Legal Pricing: The "meeting competition" defense does not apply when the competition is also using illegal prices. The defense only applies to meet a competitor's "legal" price. *By Ronald Oster*

Legal Topics:

For related research and practice materials, see the following legal topics:

Antitrust & Trade LawPrice DiscriminationGeneral OverviewAntitrust & Trade LawPrice Fixing & Restraints of TradeGeneral OverviewAntitrust & Trade LawPrivate ActionsInjuries & RemediesState RegulationCivil ProcedureTrialsJury TrialsJury InstructionsStandard InstructionsTortsBusiness TortsUnfair Business PracticesDefenses



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CHAPTER 33 California Judicial Council Unfair Practices Act Instructions

5-33 California Forms of Jury Instruction CACI 3334

CACI 3334 Affirmative Defense to Locality Discrimination Claim-- Manufacturer Meeting Downstream Competition

[Name of defendant] claims that any locality discrimination proven by [name of plaintiff] was justified by the need to meet competition. To succeed, [name of defendant] must prove that [his/her/its] sales of [product/service] to [name of reselling customer] were made in an attempt, in good faith, to meet the legal prices of [name of competitor's reseller] selling in the ordinary course of business in the same locality or trade area.

To meet legal prices means to lower the price to a point that the seller believes in good faith is at or above the legal price of the competitor of the reseller whose price it is trying to meet. That is, a seller may attempt to "meet," but not "beat," what in good faith it believes to be that competitor's legal price.

New September 2003

This defense applies to locality discrimination when the manufacturer is providing a lower price to its reseller, so that the reseller can compete fairly against the lower prices charged by the reseller of another manufacturer.

■ *Business and Professions Code section 17050(d) and (e)* provides: "The prohibitions of this chapter against locality discriminations, sales below cost, and loss leaders do not apply to any sale made ... [i]n an endeavor made in good faith to meet the legal prices of a competitor selling the same article or product, in the same locality or trade area and in the ordinary channels of trade [or] [i]n an endeavor made in good faith by a manufacturer, selling an article or product of his own manufacture, in a transaction and sale to a wholesaler or retailer for resale to meet the legal prices of a competitor selling the same or a similar or comparable article or product, in the same locality or trade area and in the

ordinary channels of trade."

■ "The requirement [to ascertain the 'legal prices' of competitors] is not absolute. It is merely that the defendants shall have endeavored 'in good faith' to meet the legal prices of a competitor." (*People v. Pay Less Drug Store* (1944) 25 Cal.2d 108, 117 [153 P.2d 9] .)

■ "The operator of a service industry cannot legally reduce its prices to a below-cost figure with intent to injure another or offer free service to prevent further loss of business to a competitor 'who is indiscriminately and deliberately offering free service and below cost prices to such operator's customers.' Each side must obey the law; the fact that one competing party disregards the statute does not give the other side a legal excuse to do so." (*G.B. Page v. Bakersfield Uniform & Towel Supply Co.* (1966) 239 Cal.App.2d 762, 770 [49 Cal.Rptr. 46] .)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, §§ 609-615

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.153 (Matthew Bender)

49 California Forms of Pleading and Practice, Ch. 565, *Unfair Competition* (Matthew Bender)

23 California Points and Authorities, Ch. 235, *Unfair Competition* (Matthew Bender)

1 *Matthew Bender Practice Guide: California Unfair Competition and Business Torts*, Ch. 5, Antitrust, 5.100[6]

Publisher's Notes

There is no BAJI instruction on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Antitrust & Trade Law Price Discrimination General Overview Antitrust & Trade Law Private Actions Injuries & Remedies State Regulation Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Torts Business Torts Unfair Business Practices Defenses



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CHAPTER 33 California Judicial Council Unfair Practices Act Instructions

5-33 California Forms of Jury Instruction CACI 3335

CACI 3335 Affirmative Defense--"Good Faith" Explained

In deciding whether [name of defendant] acted in good faith in attempting to meet competition, you must decide whether [his/her/its] belief was based on facts that would lead a reasonable person to believe that the price he or she was offering would meet the legal price of his or her competitor. You must consider all of the facts and circumstances present, including, but not limited to:

- 1. The nature and source of the information on which [name of defendant] relied;**
- 2. [Name of defendant]'s prior experience, if any, with similar information or with persons who provided the information;**
- 3. [Name of defendant]'s prior pricing practices; and**
- 4. [Name of defendant]'s general business practices.**

[Name of defendant] does not have to prove that [his/her/its] price did actually meet the legal price of its competitor; only that [he/she/it] reasonably believed that [he/she/it] was offering a price that would meet the competitor's price.

New September 2003

This instruction provides the jury with a general listing of circumstances against which it might consider evidence in the record to decide whether a defendant's attempts to meet competition were in good faith. The final paragraph eases the defendant's burden of proof with respect to the "meet but don't beat" element because a defendant is required only to prove its reasonable belief that its prices would meet, but

not beat, a competitor's prices.

■ *Business and Professions Code section 17050(d) and (e)* provides, in part: "The prohibitions of this chapter against locality discriminations, sales below cost, and loss leaders do not apply to any sale made ... [i]n an endeavor made in good faith to meet the legal prices of a competitor selling the same article or product, in the same locality or trade area and in the ordinary channels of trade [or] [i]n an endeavor made in good faith by a manufacturer, selling an article or product of his own manufacture, in a transaction and sale to a wholesaler or retailer for resale to meet the legal prices of a competitor selling the same or a similar or comparable article or product, in the same locality or trade area and in the ordinary channels of trade."

■ "The requirement [to ascertain the 'legal prices' of competitors] is not absolute. It is merely that the defendants shall have endeavored 'in good faith' to meet the legal prices of a competitor." (*People v. Pay Less Drug Store* (1944) 25 Cal.2d 108, 117 [153 P.2d 9] .)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, §§ 609-615

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.153 (Matthew Bender)

49 California Forms of Pleading and Practice, Ch. 565, *Unfair Competition* (Matthew Bender)

23 California Points and Authorities, Ch. 235, *Unfair Competition* (Matthew Bender)

1 *Matthew Bender Practice Guide: California Unfair Competition and Business Torts*, Ch. 5, *Antitrust*, 5.46[2], 5.51, 5.100[7]

Publisher's Notes

There is no BAJI instruction on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Antitrust & Trade LawPrice DiscriminationGeneral OverviewAntitrust & Trade LawPrice Fixing & Restraints of TradeGeneral OverviewAntitrust & Trade LawPrivate ActionsInjuries & RemediesState RegulationCivil ProcedureTrialsJury TrialsJury InstructionsStandard InstructionsTortsBusiness TortsUnfair Business PracticesDefenses



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CHAPTER 33 California Judicial Council Unfair Practices Act Instructions

5-33 California Forms of Jury Instruction CACI 3336-CACI 3399

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CHAPTER 33 California Judicial Council Unfair Practices Act Instructions

5-33 California Forms of Jury Instruction CACI VF-3300

CACI VF-3300 Locality Discrimination

We answer the questions submitted to us as follows:

1. Did [name of defendant] [offer to sell/sell/furnish] [product/service] at a lower price in one [location/section/community/city] in California than in another [location/section/ community/city] in California?

_____ Yes _____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Did [name of defendant] intend to destroy competition from an established dealer [or to prevent competition from any person who in good faith intended and attempted to become such a dealer]?

_____ Yes _____ No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Was [name of defendant]'s conduct a substantial factor in causing harm to [name of plaintiff]?

_____ Yes _____ No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. What are [*name of plaintiff*]'s damages? \$_____

Signed: _____

Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the [clerk/bailiff/judge].

New September 2003

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on *CACI No. 3300, Locality Discrimination-- Essential Factual Elements*.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

Publisher's Notes

There is no BAJI verdict form on this subject.

LexisNexis Matthew Bender Expert Practice Tip--Using Special Verdict Forms: Special verdicts are challenging to many jurors. That seems especially true with this and similar instructions involving concepts such as "competition" and "harm" in these types of lawsuits. *By Rex Heeseman*

Legal Topics:

For related research and practice materials, see the following legal topics:

Antitrust & Trade Law Price Discrimination General Overview Antitrust & Trade Law Private Actions Injuries & Remedies State Regulation Civil Procedure Trials Jury Trials Verdicts Special Verdicts Torts Business Torts Unfair Business Practices Elements



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CHAPTER 33 California Judicial Council Unfair Practices Act Instructions

5-33 California Forms of Jury Instruction CACI VF-3301

CACI VF-3301 Locality Discrimination Claim--Affirmative Defense--Cost Justification

We answer the questions submitted to us as follows:

1. Did [name of defendant] [offer to sell/sell/furnish] [product/service] at a lower price in one [location/section/community/city] in California than in another [location/section/ community/city] in California?

_____ Yes _____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Was the locality discrimination within the law?

_____ Yes _____ No

If your answer to question 2 is no, then answer question 3. If you answered yes, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Did [name of defendant] intend to destroy competition from an established dealer [or to prevent competition from any person who in good faith intended and attempted to become such a dealer]?

_____ Yes _____ No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Was [name of defendant]'s conduct a substantial factor in causing harm to [name of plaintiff]?

_____ Yes _____ No

If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. What are [name of plaintiff]'s damages? \$_____

Signed: _____

Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the [clerk/bailiff/judge].

New September 2003

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on *CACI No. 3300, Locality Discrimination--Essential Factual Elements*, and *CACI No. 3330, Affirmative Defense to Locality Discrimination Claim--Cost Justification*.

If other affirmative defenses are asserted, this form can be modified accordingly. See other Unfair Practices Act verdict forms for examples.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

Publisher's Notes

There is no BAJI verdict form on this subject.

See also "LexisNexis Matthew Bender Expert Practice Tip--Using Special Verdict Forms" in CACI No. VF-3300.

Legal Topics:

For related research and practice materials, see the following legal topics:

Antitrust & Trade Law Price Discrimination General Overview Antitrust & Trade Law Private Actions Injuries & Remedies State Regulation Civil Procedure Trials Jury Trials Verdicts Special Verdicts Torts Business Torts Unfair Business Practices Defenses



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CHAPTER 33 California Judicial Council Unfair Practices Act Instructions

5-33 California Forms of Jury Instruction CACI VF-3302

CACI VF-3302 Below Cost Sales

We answer the questions submitted to us as follows:

1. Did [name of defendant] [offer to sell/sell] [product/service] at a price that was below cost?

_____ Yes _____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Was [name of defendant]'s purpose to injure competitors or destroy competition?

_____ Yes _____ No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Was [name of defendant]'s conduct a substantial factor in causing harm to [name of plaintiff]?

_____ Yes _____ No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. What are [name of plaintiff]'s damages? \$_____

Signed: _____
Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the [clerk/bailiff/judge].

New September 2003

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on *CACI No. 3301, Below Cost Sales--Essential Factual Elements*.

If the facts involve a gift rather than a sale, question 1 can be modified according to the second alternative in element 1 of *CACI No. 3301*.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

Publisher's Notes

There is no BAJI verdict form on this subject.

See also "LexisNexis Matthew Bender Expert Practice Tip--Using Special Verdict Forms" in CACI No. VF-3300.

Legal Topics:

For related research and practice materials, see the following legal topics:

Antitrust & Trade Law Price Fixing & Restraints of Trade General Overview Antitrust & Trade Law Private Actions Injuries & Remedies State Regulation Civil Procedure Trials Jury Trials Verdicts Special Verdicts Torts Business Torts Unfair Business Practices Elements



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CHAPTER 33 California Judicial Council Unfair Practices Act Instructions

5-33 California Forms of Jury Instruction CACI VF-3303

CACI VF-3303 Below Cost Sales Claim--Affirmative Defense--Closed-out, Discontinued, Damaged, or Perishable Items

We answer the questions submitted to us as follows:

1. Did [*name of defendant*] [offer to sell/sell] [*product/service*] at a price that was below cost?

_____ Yes _____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Were [his/her/its] sales in the course of closing out, in good faith, all or any part of [his/her/its] supply of [*product*], in order to stop trade in [*product*]?

_____ Yes _____ No

If your answer to question 2 is yes, then answer question 3. If you answered no, skip question 3 and answer question 4.

3. Did [*name of defendant*] give sufficient notice of the sale to the public?

_____ Yes _____ No

If your answer to question 3 is no, then answer question 4. If you answered yes, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Was [name of defendant]'s purpose to injure competitors or destroy competition?

_____ Yes _____ No

If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. Was [name of defendant]'s conduct a substantial factor in causing harm to [name of plaintiff]?

_____ Yes _____ No

If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. What are [name of plaintiff]'s damages? \$_____

Signed: _____

Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the [clerk/bailiff/judge].

New September 2003

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on *CACI No. 3301, Below Cost Sales--Essential Factual Elements*, and *CACI No. 3331, Affirmative Defense to Locality Discrimination, Below Cost Sales, and Loss Leader Sales Claims--Closed-out, Discontinued, Damaged, or Perishable Items*.

If other grounds for this defense are asserted, question 2 should be modified according to question 2 in *CACI No. 3331*. If other affirmative defenses are asserted, this form can be modified accordingly. See other Unfair Practices Act verdict forms for examples.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

Publisher's Notes

There is no BAJI verdict form on this subject.

See also "LexisNexis Matthew Bender Expert Practice Tip--Using Special Verdict Forms" in *CACI No. VF-3300*.

Legal Topics:

For related research and practice materials, see the following legal topics:

Antitrust & Trade LawPrice Fixing & Restraints of TradeGeneral OverviewAntitrust & Trade LawPrivate
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CHAPTER 33 California Judicial Council Unfair Practices Act Instructions

5-33 California Forms of Jury Instruction CACI VF-3304

CACI VF-3304 Loss Leader Sales

We answer the questions submitted to us as follows:

1. Did [*name of defendant*] [offer to sell/sell/offer the use of] [*product/service*] at prices that were below [his/her/its] costs?

_____ Yes _____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Was [*name of defendant*]'s purpose to influence, promote, or encourage the purchase of other merchandise from [*name of defendant*]?

_____ Yes _____ No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Was [*name of defendant*]'s intent to injure competitors or destroy competition?

_____ Yes _____ No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Was [name of defendant]'s conduct a substantial factor in causing harm to [name of plaintiff]?

_____ Yes _____ No

If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. What are [name of plaintiff]'s damages? \$_____

Signed: _____
Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the [clerk/bailiff/judge].

New September 2003

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on *CACI No. 3302, Loss Leader Sales--Essential Factual Elements*.

If other grounds of liability are asserted, question 2 can be modified according to the bracketed alternatives in element 2 of *CACI No. 3302*.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

Publisher's Notes

There is no BAJI verdict form on this subject.

See also "LexisNexis Matthew Bender Expert Practice Tip--Using Special Verdict Forms" in CACI No. VF-3300.

Legal Topics:

For related research and practice materials, see the following legal topics:

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CHAPTER 33 California Judicial Council Unfair Practices Act Instructions

5-33 California Forms of Jury Instruction CACI VF-3305

CACI VF-3305 Loss Leader Sales Claim--Affirmative Defense--Meeting Competition

We answer the questions submitted to us as follows:

1. Did [*name of defendant*] [offer to sell/sell/offer the use of] [*product/service*] at prices that were below [his/her/its] costs?

_____ Yes _____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Were the sales of [*product/service*] made in an attempt, in good faith, to meet the legal prices of a competitor selling the same [*product/service*] in the ordinary course of business in the same area?

_____ Yes _____ No

If your answer to question 2 is no, then answer question 3. If you answered yes, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Was [*name of defendant*]'s purpose to influence, promote, or encourage the purchase of other merchandise from [*name of defendant*]?

_____ Yes _____ No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer

no further questions, and have the presiding juror sign and date this form.

4. Was [name of defendant]'s intent to injure competitors or destroy competition?

_____ Yes _____ No

If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. Was [name of defendant]'s conduct a substantial factor in causing harm to [name of plaintiff]?

_____ Yes _____ No

If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. What are [name of plaintiff]'s damages? \$_____

Signed: _____

Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the [clerk/bailiff/judge].

New September 2003

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on *CACI No. 3302, Loss Leader Sales--Essential Factual Elements*, and *CACI No. 3333, Affirmative Defense to Locality Discrimination, Below Cost Sales, and Loss Leader Sales Claims--Meeting Competition*.

If other grounds of liability are asserted, question 3 can be modified according to the alternative brackets in element 2 of *CACI No. 3302*. If other affirmative defenses are asserted, this form can be modified accordingly. See other Unfair Practices Act verdict forms for examples.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

Publisher's Notes

There is no BAJI verdict form on this subject.

See also "LexisNexis Matthew Bender Expert Practice Tip--Using Special Verdict Forms" in *CACI No. VF-3300*.

Legal Topics:

For related research and practice materials, see the following legal topics:

Antitrust & Trade Law Price Fixing & Restraints of Trade General Overview Antitrust & Trade Law Private
Actions Injuries & Remedies State Regulation Civil Procedure Trials Jury Trials Verdicts Special Verdicts Torts Business
Torts Unfair Business Practices Defenses



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California Forms of Jury Instruction

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CHAPTER 33 California Judicial Council Unfair Practices Act Instructions

5-33 California Forms of Jury Instruction CACI VF-3306

CACI VF-3306 Secret Rebates

We answer the questions submitted to us as follows:

1. Did [name of defendant] secretly [[give/receive] [payments/rebates/refunds/commissions/unearned discounts]] [or] [[give to some buyers/receive] services or privileges that were not given to other buyers purchasing on like terms and conditions]?

_____ Yes _____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Was a competitor harmed?

_____ Yes _____ No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Did the [payment/allowance] have a tendency to destroy competition?

_____ Yes _____ No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Was [name of defendant]'s conduct a substantial factor in causing [name of plaintiff]'s harm?

_____ Yes _____ No

If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. What are [name of plaintiff]'s damages? \$_____

Signed: _____

Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the [clerk/bailiff/judge].

New September 2003

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on *CACI No. 3320, Secret Rebates--Essential Factual Elements*.

Question 2 should be omitted if the plaintiff is a competitor of the defendant, because that issue is covered by question 4.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

Publisher's Notes

There is no BAJI verdict form on this subject.

See also "LexisNexis Matthew Bender Expert Practice Tip--Using Special Verdict Forms" in CACI No. VF-3300.

Legal Topics:

For related research and practice materials, see the following legal topics:

Antitrust & Trade Law Price Discrimination General Overview Antitrust & Trade Law Private Actions Injuries & Remedies State Regulation Civil Procedure Trials Jury Trials Verdicts Special Verdicts Torts Business Torts Unfair Business Practices Elements



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CHAPTER 33 California Judicial Council Unfair Practices Act Instructions

5-33 California Forms of Jury Instruction CACI VF-3307

CACI VF-3307 Secret Rebates Claim--Affirmative Defense--Functional Classifications

We answer the questions submitted to us as follows:

1. Did [*name of defendant*] secretly [[give/receive] [payments/rebates/refunds/commissions unearned discounts] [or] [[give to some buyers/receive] services or privileges that were not given to other buyers purchasing on like terms and conditions]]?

_____ Yes _____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Did [*name of defendant*] create different classes of customers, such as [broker/jobber/wholesaler/retailer/[*insert other*]]]?

_____ Yes _____ No

If your answer to question 2 is yes, then answer question 3. If you answered no, skip questions 3, 4, and 5 and answer question 6.

3. Did customers in the different classes perform different functions and assume the risk, investment, and costs involved?

_____ Yes _____ No

If your answer to question 3 is yes, then answer question 4. If you answered no, skip questions 4

and 5 and answer question 6.

4. Was the difference in [price/rebate/discount/special services/privileges] for [*product/service*] given only in those sales where the favored buyer performed the function on which the claim of a different class is based?

_____ Yes _____ No

If your answer to question 4 is yes, then answer question 5. If you answered no, skip question 5 and answer question 6.

5. Was the difference in price reasonably related to the value of such function?

_____ Yes _____ No

If your answer to question 5 is no, then answer question 6. If you answered yes, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. Was a competitor harmed?

_____ Yes _____ No

If your answer to question 6 is yes, then answer question 7. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

7. Did the [payment/allowance] have a tendency to destroy competition?

_____ Yes _____ No

If your answer to question 7 is yes, then answer question 8. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

8. Was [*name of defendant*]'s conduct a substantial factor in causing harm to [*name of plaintiff*]?

_____ Yes _____ No

If your answer to question 8 is yes, then answer question 9. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

9. What are [*name of plaintiff*]'s damages? \$_____

Signed: _____

Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the [clerk/bailiff/judge].

New September 2003

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on *CACI No. 3320, Secret Rebates--Essential Factual Elements*, and *CACI No. 3332, Affirmative Defense to Locality Discrimination, Below Cost Sales, Loss Leader Sales, and Secret Rebates--Functional Classifications*.

Question 6 should be omitted if the plaintiff is a competitor of the defendant, because that issue is covered by question 8.

If other affirmative defenses are asserted, this form can be modified accordingly. See other Unfair Practices Act verdict forms for examples.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

Publisher's Notes

There is no BAJI verdict form on this subject.

See also "LexisNexis Matthew Bender Expert Practice Tip--Using Special Verdict Forms" in CACI No. VF-3300.

Legal Topics:

For related research and practice materials, see the following legal topics:

Antitrust & Trade Law Price Discrimination General Overview Antitrust & Trade Law Private Actions Injuries & Remedies State Regulation Civil Procedure Trials Jury Trials Verdicts Special Verdicts Torts Business Torts Unfair Business Practices Defenses



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CHAPTER 33 California Judicial Council Unfair Practices Act Instructions

5-33 California Forms of Jury Instruction CACI VF-3308-CACI VF-3399

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CACI VF-3308Reserved for Future Use



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CHAPTER 33A Matthew Bender Unfair Competition Instructions

5-33A California Forms of Jury Instruction 33A.syn

§ 33A.syn Synopsis to Chapter 33A: Matthew Bender Unfair Competition Instructions

MB 3300A.01 Introductory Instruction

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 3300A.02 Persons Liable for Violation of Unfair Practices Act

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 3300A.03 Liability of Agents

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Civil Liability of Directors, Officers, and Agents--Intent

[b] Criminal Intent Requirements Compared

[c] Liability of Joint Participants or Colluders Compared

[d] Requirement That Officer, Director, or Agent Act With Knowledge or Intent

MB 3300A.04 Definition of "Sell"

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Statutory Basis For Broad Definition of "Sale"

[b] Probability That "Sell" Includes Leases and Similar Transactions

[c] Related Judicial Council Jury Instructions

MB 3300A.05 Definition of "Give"

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 3300A.06 Definition of "Article or Product"

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 3300A.07 Liability for Loss Leader Activities--Presumption of Intent Claimed to Arise From Proof of "Injurious Effect"

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Presumption of Injurious Intent

[b] Related Judicial Council Jury Instructions

MB 3300A.08 Liability for Loss Leader Activities--Presumption of Intent Claimed to Arise From Proof of Limited Sales Below Invoice or Replacement Cost

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Presumption Regarding Proof of Retailer's Limitation of Quantity

[b] Related Judicial Council Jury Instructions

MB 3300A.09 Liability for Locality Discrimination--Presumption of Intent Claimed to Arise From Proof of "Injurious Effect"

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Similarity to Loss Leader Claim

[b] No Need to Prove Sales Below Cost

[c] Meaning of "Discriminatory Price"

[d] Type of Intent Required for Locality Discrimination Contrasted With Intent Supplied by Presumption

[e] Related Judicial Council Jury Instructions

MB 3300A.10 Liability for Locality Discrimination--Presumption of Intent Claimed to Arise From Proof of Limited Sales Below Invoice or Replacement Cost

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Presumption Regarding Proof of Retailer's Limitation of Quantity

[b] Related Judicial Council Jury Instructions

MB 3300A.11 Like Grade and Quality

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Like Grade and Quantity

[b] Related Judicial Council Jury Instructions

MB 3300A.12 Liability for Sales Below Cost--Presumption of Intent Claimed to Arise From Proof of "Injurious Effect"

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Below-Cost Selling

[b] Related Judicial Council Jury Instructions

MB 3300A.13 Liability for Sales Below Cost--Presumption of Intent Claimed to Arise From Proof of Limited Sales Below Invoice or Replacement Cost

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Below Cost Selling

[b] Related Judicial Council Jury Instructions

MB 3300A.14 Liability for Secret Rebates or Privileges

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Secret Rebates

[b] Related Judicial Council Jury Instructions

MB 3300A.15 Liability for Effecting Violation of the Unfair Practices Act Through Threats, Intimidation, or Boycotts

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 3300A.16 Liability for Joint Participation in or Collusive Violation of Unfair Practices Act

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 3300A.17-MB 3300A.29 Reserved for Future Use

MB 3300A.30 Defenses for Close-Out Sales, and Sales of Seasonal or Damaged Goods

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Defenses for Close-Out Sales, and Sales of Seasonal or Damaged Goods

[b] Related Judicial Council Jury Instructions

MB 3300A.31 Defense of Meeting Competition

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Nature of Competitor's Products

[b] "Meet Not Beat" and Lawful Price Limitations on Defense

[c] Gaining New Business and Multiple Customer Pricing

[d] Good Faith

[e] Meeting Competition by Manufacturers

[f] Related Judicial Council Jury Instructions

MB 3300A.32 Definition of Good Faith

[1] Instruction

[2] Use of Instruction

[3] Comment

[b] Related Judicial Council Jury Instructions

MB 3300A.33 Lawful Price

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 3300A.34 Cost Justification Defense to Locality Discrimination

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Cost Justification and Locality Discrimination

[b] Quantity Differences

[c] Related Judicial Council Jury Instructions

MB 3300A.35 Determination of Cost

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Determination of Cost

[b] Related Judicial Council Jury Instructions

MB 3300A.36-MB 3300A.49 Reserved for Future Use

MB 3300A.50 Fact of Damage

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 3300A.51 Amount of Damage

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 3300A.52-MB 3300A.59 Reserved for Future Use

MB 3300A.60 Elements of Plaintiff's Cause of Action for Trademark Infringement

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Right to Jury Trial

[b] Test for Infringement

[c] Presumptive Right to Use Trade Name

[d] California Trademark Law and Common Law

[e] Comparison With Federal Protection of "Trade Dress"

MB 3300A.61 Definitions of Trademark, Service Mark, and Trade Name

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 3300A.62 Distinctiveness Requirement

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 3300A.63 Definition of Secondary Meaning

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 3300A.64 Priority of Use

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 3300A.65 Requirement of Actual Use as Trademark, Service Mark, or Trade Name

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 3300A.66 Test of Likelihood of Confusion Between Plaintiff's Mark and Defendant's Mark

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 3300A.67 Damages

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 3300A.68-MB 3300A.79 Reserved for Future Use

MB 3300A.80 Breach of Confidence--Burden of Proof

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Nature of Actionable Breach of Confidence

[b] Elements of Cause of Action

[c] Derivation of Instruction

MB 3300A.81 Damages for Breach of Confidence

[1] Instruction

[2] Use of Instruction

[3] Comment



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California Forms of Jury Instruction

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CHAPTER 33A Matthew Bender Unfair Competition Instructions

5-33A California Forms of Jury Instruction Scope

Scope

SCOPE

This chapter covers the law of unfair competition. For the California Judicial Council jury instructions on the Unfair Practices Act, see Ch. 33, *California Judicial Council Unfair Practices Act Instructions*. Ch. 33 includes Judicial Council instructions on locality discrimination, sales and costs, secret rebates, and affirmative defenses. For California Judicial Council jury instructions on trade secrets, see Ch. 44, *California Judicial Council Trade Secret Instructions*. The instructions in this chapter are intended to supplement the Judicial Council instructions [see *Cal. Rules of Ct.*, Rule 2.1050].

This chapter covers the following topics:

- Part A includes instructions on causes of action based on the Unfair Practices Act [see *MB 3300A.01 -MB 3300A.51*]. These include instructions on the burden of proof, prohibitions under the Act, defenses, and damages.
- Part B includes instructions on the requirements for a protectable mark or name and the elements of an infringement claim [see *MB 3300A.60 -MB 3300A.67*]. An instruction on damages is also included. California law in this area is derived from both the Business and Professions Code and the common law.
- Part C includes instructions on the plaintiff's burden of proof and damages for the emerging cause of action for breach of confidence [see *MB 3300A.80, MB 3300A.81*].

For jury instructions on the right to privacy, see Ch. 18, *California Judicial Council Right of Privacy Instructions*.



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CHAPTER 33A Matthew Bender Unfair Competition Instructions

PART A. UNFAIR PRACTICES ACT

1. Definitional and Burden of Proof Instructions

5-33A California Forms of Jury Instruction MB 3300A.01

MB 3300A.01 Introductory Instruction

[1] Instruction Introductory Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Plaintiff's claim is that Defendant is liable to Plaintiff for money damages for _____ [specify violation of Unfair Practices Act, e.g., selling goods below cost]. The instructions that follow will apply to this claim. Those instructions will use certain terms that the law defines in a particular way. As the need arises, I will instruct you on these definitions so that you may apply them when you consider the Plaintiff's claim.

[2] Use of Instruction

This instruction should be used to introduce the jury to the plaintiff's Unfair Practices Act claim and prepare the jury to hear whatever definitional instructions the court will give later. If desired, this instruction may be combined with the general instruction that informs the jury of the nature of the dispute between the plaintiff and the defendant [see generally Ch. 1, *California Judicial Council Pretrial Instructions*, CACI No. 101].

[3] Comment

Bus. & Prof. Code § 17001 sets forth the legislative purpose of the Unfair Practices Act. It states that the Act's purpose "is to safeguard the public against the creation or perpetuation of monopolies and to foster and encourage competition, by prohibiting unfair, dishonest, destructive, fraudulent and discriminatory practices by which fair and honest competition is destroyed or prevented." Rather than introduce the jury to the Unfair Practices Act with this litany of purpose--and thereby run the risk of prejudicing the jury--this instruction avoids any attempt to characterize the purposes of the Act or the nature of the defendant's conduct. Instead, it simply describes the plaintiff's claim and advises the jury that it may have to apply statutory definitions to the facts.

Legal Topics:

For related research and practice materials, see the following legal topics:

Antitrust & Trade Law Trade Practices & Unfair Competition State Regulation General Overview Civil
Procedure Trials Jury Trials Jury Instructions Standard Instructions Torts Business Torts Unfair Business Practices General
Overview

Robert F. Freitas and Janet L. Boche contributed to the original chapter for California Forms of Jury Instruction
(Matthew Bender). The Honorable Gerald J. Lewis was consultant to the original chapter.



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CHAPTER 33A Matthew Bender Unfair Competition Instructions

PART A. UNFAIR PRACTICES ACT

1. Definitional and Burden of Proof Instructions

5-33A California Forms of Jury Instruction MB 3300A.02

MB 3300A.02 Persons Liable for Violation of Unfair Practices Act

[1] Instruction Persons Liable for Violation of Unfair Practices Act

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

[EITHER (See Use of Instruction)]

For purposes of Plaintiff's claim that Defendant is liable for _____ [type of violation alleged], the word "person" includes any individual, firm, association, organization, partnership, business trust, company, corporation, or municipal or other public corporation.

[OR]

For purposes of Plaintiff's claim that Defendant is liable for _____ [type of violation alleged], Defendant, _____ [specify type of entity, e.g., a corporation], is a "person."

Authority: *Bus. & Prof. Code § 17021.*

[2] Use of Instruction

Either of these alternative instructions should be used when there is a dispute over whether a particular defendant is subject to the Unfair Practices Act, or if counsel seeks a definitional instruction to avoid possible juror confusion on the question of whether a corporation or other business entity is a "person" under the Act. It is appropriate to use this instruction after the first time the term "person" is used in the instructions. Of course, this instruction will not be

necessary if the remaining instructions refer only to the plaintiff and the defendant rather than using the statutory term "person."

Further instructions on the circumstances in which individual employees, agents, or co-conspirators may be liable for violations of the Act will be necessary if the plaintiff seeks recovery from defendants other than the person or entity claimed to have violated the Act [*see MB 3300A.03* (agent), *MB 3300A.16* (colluder)].

[3] Comment

This instruction is a paraphrase of *Bus. & Prof. Code § 17021*, which broadly defines "person" for purposes of the Unfair Practices Act [*Bus. & Prof. Code § 17000 et seq.*]. The broad statutory definition makes it unlikely that disputes over whether a particular defendant is subject to the Act will arise.

Legal Topics:

For related research and practice materials, see the following legal topics:

Antitrust & Trade Law Trade Practices & Unfair Competition State Regulation Claims Antitrust & Trade Law Trade Practices & Unfair Competition State Regulation Coverage Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Torts Business Torts Unfair Business Practices General Overview

Robert F. Freitas and Janet L. Boche contributed to the original chapter for California Forms of Jury Instruction (Matthew Bender). The Honorable Gerald J. Lewis was consultant to the original chapter.



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CHAPTER 33A Matthew Bender Unfair Competition Instructions

PART A. UNFAIR PRACTICES ACT

1. Definitional and Burden of Proof Instructions

5-33A California Forms of Jury Instruction MB 3300A.03

MB 3300A.03 Liability of Agents**[1] Instruction** Liability of Agents[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Plaintiff also claims that _____ **[name of individual defendant] is liable for**
 _____ **[name of corporate or other employer defendant]'s** _____ **[specify violation**
]. To prove that _____ **[name of individual defendant] is liable, Plaintiff must prove that**
 _____ **[name of corporate or other employer defendant]** _____ **[specify violation]**
and that _____ **[name of individual defendant] is a** _____ **[director or officer or**
agent] of _____ **[name of corporate or other employer defendant] and that** _____ **[**
name of individual defendant] directly or indirectly assisted or aided in the violation with knowledge of the
purpose with which _____ **[name of corporate or other employer defendant] acted. Plaintiff is not**
required to prove that _____ **[name of individual defendant] intended to violate the law or that**
 _____ **[name of individual defendant] knew that any act by** _____ **[name of**
corporate or other employer defendant] was unlawful.

Authorities: *Bus. & Prof. Code §§ 17095, 17096.*

[2] Use of Instruction

This instruction should be used when liability is asserted against individuals for Unfair Practices Act violations committed by their employers or other principals for whom they act. The instruction is not needed when an individual is claimed to have violated the Act, but only when individual liability is asserted for a violation committed by another person or entity.

If the plaintiff seeks to impose liability on an individual claimed to be only an agent of the primary actor, and not a director or officer, a further instruction on the subject of agency will be required. If the agency claim is based on the existence of an employer-employee relationship, a simple instruction that an employee is an agent of the employer should suffice. In other cases, specific attention to the question of whether the individual is an agent will be necessary [see Ch. 3C, *Matthew Bender Contract Party Instructions*, MB 300C.50 et seq. for instructions on agency generally].

[3] Comment

[a] Civil Liability of Directors, Officers, and Agents--Intent

Bus. & Prof. Code § 17095 makes a director, officer, or agent of a firm violating the Act who "assists or aids, directly or indirectly" in the commission of a violation of the Unfair Practices Act equally responsible with the violator *see also* [Bus. & Prof. Code § 17048 (liability of nonagent who "colludes" or "participates" in violation); for instructions on responsibility of corporations for acts of officers, agents, and employees, see Ch. 3C, *Matthew Bender Contract Party Instructions*]. Section 17095 does not address the intent requirement applicable to an individual defendant in this situation. However, *Bus. & Prof. Code § 17096* states that in injunction proceedings against an individual acting as an officer, director, or agent, only the employer's intent need be proved. This suggests that some additional intent requirement must be met to establish individual liability for damages under *Bus. & Prof. Code § 17095*. No cases have addressed this issue.

LexisNexis Matthew Bender Expert Practice Tip--Proof of Intent: The instruction in [1], *above*, addresses the level of intent required to hold an individual defendant (usually an officer or director) liable for the unlawful acts of the corporation. The plaintiff is not required to prove that the individual defendant intended to violate the law, or that the individual defendant even knew that the corporation's act was unlawful. All that is required is proof that the individual defendant "directly or indirectly" assisted the corporation "with knowledge of the [corporation's] purpose." This is a relatively low threshold of proof [see also [d], *below*]. By Ronald Oster

[b] Criminal Intent Requirements Compared

The situation is complicated by the criminal liability provisions of the Act. *Bus. & Prof. Code § 17100* makes any person who, acting "for himself, [herself,] or for another person, or for any firm or corporation," guilty of a misdemeanor if he or she "violates" the Act. An agent of a corporation that violates the Act does not literally "violate" the Act himself or herself when the violation is a sale by the corporation. Nonetheless, the use of the term "violate" suggests that the individual must have the intent required to prove a violation. For example, *Bus. & Prof. Code § 17043* prohibits a sale below cost only if it is made "for the purpose of injuring competitors or destroying competition" [see *Wholesale Tobacco Dealers Bureau v. National Candy & Tobacco Co.* (1938) 11 Cal.2d 634, 646-650, 82 P.2d 3; see also *Sybersound Records, Inc. v. UAV Corp.* (9th Cir. 2008) 517 F.3d 1137, 1153; *Cel-Tech Commc'ns Inc. v. Los Angeles Cellular* (1999) 20 Cal.4th 163, 174-175, 83 Cal.Rptr.2d 548, 973 P.2d 527 (to violate Corp. Code § 17043, company must act with purpose, i.e., desire, of injuring competitors or destroying competition)]. *Bus. & Prof. Code § 17100* would therefore seem to require that an agent charged with a criminal violation of the sale below cost prohibition have the proscribed purpose to injure competitors, even though the corporation for which the agent acted could be convicted or held civilly liable on the basis of another's intent.

However, *Bus. & Prof. Code § 17101* contradicts this apparent meaning. Section 17101 states (as does *Bus. & Prof. Code § 17096* in the case of injunction proceedings) that all that need be proved in the criminal prosecution of an agent is the intent of the employer. Although it is difficult to resolve the inconsistency between proof of a "violation" as required by *Bus. & Prof. Code § 17100* and the allowance of proof of corporate intent in *Bus. & Prof. Code § 17101*, it appears that a misdemeanor conviction may be had without proof of individual intent to injure competitors or destroy competition. *A fortiori*, civil liability must also be available without proof of the statutory intent needed to show a violation.

[c] Liability of Joint Participants or Colluders Compared

Further confusion may be created by *Bus. & Prof. Code* § 17048, which makes it unlawful for manufacturers and other sellers and their agents "jointly to participate or collude" with another in violating the Act. In *Harris v. Capitol Records Distributing Corp.*, the California Supreme Court stated that more than "reason to know" of another's unlawful intent is required for liability under § 17048, and that the colluder or participant "must share a common purpose" with the primary actor [*Harris v. Capitol Records Distrib. Corp.* (1966) 64 Cal.2d 454, 462, 50 Cal.Rptr. 539, 413 P.2d 139]. *Harris* shows that an intent standard more rigorous than that suggested by the interplay of *Bus. & Prof. Code* §§ 17095, 17096, 17100, and 17101 must be met when liability is asserted against an outsider. The difference seems understandable. The requirement of § 17048 of joint participation or collusion is suggestive of a greater involvement than mere direct or indirect aid or assistance, as required by § 17095, and a more restrictive limitation on liability thus seems appropriate. As a policy matter, the Legislature might well have thought it appropriate to make proof of liability of corporate insiders--those whose action is necessary to perpetrate violations of the Act--easier than that of other firms who might conspire with a violator. The liability of other firms seems to be governed by principles closely similar to those generally applicable to coconspirator liability, under *Bus. & Prof. Code* § 17048 and *Harris*.

[d] Requirement That Officer, Director, or Agent Act With Knowledge or Intent

Although it is not entirely clear how these issues will be resolved, the differences in the language of *Bus. & Prof. Code* §§ 17048 and 17095 and the differences in the nature of those subjected to liability by §§ 17048 and 17095 suggest that a lesser standard of liability is appropriate under § 17095.

It thus appears unlikely that a plaintiff must prove that an individual agent defendant had the statutorily required intent necessary to establish a violation of the Act to impose damage liability on the agent under *Bus. & Prof. Code* § 17095. However, it seems equally unlikely that mere proof of corporate intent is sufficient, given the limitation of *Bus. & Prof. Code* § 17096 to injunction proceedings. The appropriate resolution of the ambiguities in the statutes thus appears to be a requirement that the individual act with knowledge of an unlawful intent attributable to the employer defendant.

LexisNexis Matthew Bender Expert Practice Tip--Connecting Individual Liability to Corporation

May Be Difficult: It may be difficult to "connect" an individual defendant's liability to that of a corporate defendant. The instruction in [1], *above*, addresses that challenge, especially in light of the "assisted or aided" part of this charge. *By Rex Heeseman*

Legal Topics:

For related research and practice materials, see the following legal topics:

Antitrust & Trade Law Trade Practices & Unfair Competition State Regulation Claims Antitrust & Trade Law Trade Practices & Unfair Competition State Regulation Coverage Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Torts Business Torts Unfair Business Practices General Overview

Robert F. Freitas and Janet L. Boche contributed to the original chapter for California Forms of Jury Instruction (Matthew Bender). The Honorable Gerald J. Lewis was consultant to the original chapter.



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CHAPTER 33A Matthew Bender Unfair Competition Instructions

PART A. UNFAIR PRACTICES ACT

1. Definitional and Burden of Proof Instructions

5-33A California Forms of Jury Instruction MB 3300A.04

MB 3300A.04 Definition of "Sell"**[1] Instruction** Definition of "Sell"[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

[EITHER (See Use of Instruction)]

For purposes of Plaintiff's claim that Defendant unlawfully _____ [specify violation, e.g., sold goods below cost], the word "sell" includes selling, offering for sale, or advertising for sale.

[OR]

For purposes of Plaintiff's claim that Defendant unlawfully _____ [specify violation, e.g., sold goods below cost], the word "sell" includes not only a sale, offer to sell, or an advertisement, but also includes _____ [describe transaction involved, e.g., a lease].

Authorities: *Bus. & Prof. Code* § 17022; *Paramount Gen. Hosp. Co. v. National Med. Enters., Inc.* (1974) 42 Cal.App.3d 496, 501-504, 117 Cal.Rptr. 42 ; *Los Angeles Check Sellers Ass'n v. United States Nat'l Bank* (1969) 275 Cal.App.2d 570, 573, 80 Cal.Rptr. 321 .

[2] Use of Instruction

This instruction should be used to define the term "sell." Various provisions of the Unfair Practices Act prohibit certain types of "sales" [see, e.g., *Bus. & Prof. Code* §§ 17040 (locality discrimination), 17043 (sales below cost), 17044 (loss

leaders)). The first alternative instruction is phrased in the language of *Bus. & Prof. Code § 17022* and should be used when the allegation involves an offered or advertised price, rather than a completed sale. If preferred, the second alternative may be substituted. It emphasizes to the jury that the term "sell" includes not only a sale, offer to sell, or advertisement, but also the particular type of transaction involved in the case. When the case involves undisputed evidence that a sale or sales took place, and no claim involving any other type of transaction, a definitional instruction should not be necessary.

This instruction should be modified in appropriate cases to reflect the particular type of transaction, for example, a lease. When a transaction other than a sale, offer to sell, or advertisement is in issue, the reference to types of transactions identified in the statute may be deleted, and a reference to the type of transaction in issue used instead.

[3] Comment

[a] Statutory Basis For Broad Definition of "Sale"

The definitional language of the Unfair Practices Act is broad, reflecting the nature of the Act's purposes [see *MB 3300A.01[3]*]. Additionally, the Act specifically states that it must be liberally construed [*Bus. & Prof. Code § 17002*], and further extends its prohibitions of locality discrimination and below-cost selling to "any device of any nature whereby such discrimination or sale below cost is in substance or fact effected in violation of the spirit and intent" of the Act [*Bus. & Prof. Code § 17049*]. One court read these directives and the Act's broad definitional language to reflect a legislative effort "to avoid the pitfall of circumscribing the transactions covered by the Act with such precision that its substantive purpose could be evaded by methods of marketing contrary to the spirit but without the literal reach of the Act" [*Paramount Gen. Hosp. Co. v. National Med. Enters., Inc. (1974) 42 Cal.App.3d 496, 501, 117 Cal.Rptr. 42*]. The court noted that every relevant definition in the Act uses the word "includes," and adopted the view that this is a word of enlargement and not of limitation. The court went on to hold that a lease-services arrangement would come within the below cost selling prohibition of *Bus. & Prof. Code § 17043* [*Paramount Gen. Hosp. Co. v. National Med. Enters., Inc. (1974) 42 Cal.App.3d 496, 501-502, 117 Cal.Rptr. 42* ; see *MB 3300A.06* for an instruction on "article or product"]. Similarly, in another court of appeal case, holding that the sale of money orders was subject to the Act, the court noted that the Act covers a great variety of transactions other than the conventional sale of real or personal property [*Los Angeles Check Sellers Ass'n v. United States Nat'l Bank (1969) 275 Cal.App.2d 570, 573, 80 Cal.Rptr. 321*].

[b] Probability That "Sell" Includes Leases and Similar Transactions

For these reasons, although the statutory definition of "sell" does not include a reference to leases, licenses, or other transactions that do not involve a sale, offer to sell, or advertisement [*Bus. & Prof. Code § 17022*], it is likely that courts will read the definition to include leases, licenses, and other transactions not specifically mentioned *cf.* [*Bus. & Prof. Code § 17024* (motion pictures licensed for exhibition excluded from statutory definition of "article or product")]. Although one court has refused to decide whether a "pure" lease--one not involving associated services--would come within the Act [*Paramount Gen. Hosp. Co. v. National Med. Enters., Inc. (1974) 42 Cal.App.3d 496, 503 n. 10, 117 Cal.Rptr. 42*], the same court stated that the statutory terms "sell" and "give" "obviously refer to any method--sale, lease, consignment, and similar methods--of marketing articles or products" [*Paramount Gen. Hosp. Co. v. National Med. Enters., Inc. (1974) 42 Cal.App.3d 496, 504, 117 Cal.Rptr. 42*].

[c] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 33, *California Judicial Council Unfair Practices Act Instructions*]:

CACI No. 3301 Below Cost Sales--Essential Factual Elements

*CACI No. 3302 Loss Leader Sales--Essential Factual Elements***Legal Topics:**

For related research and practice materials, see the following legal topics:

Antitrust & Trade LawTrade Practices & Unfair CompetitionState RegulationClaimsAntitrust & Trade LawTrade Practices & Unfair CompetitionState RegulationCoverageCivil ProcedureTrialsJury TrialsJury InstructionsStandard InstructionsTortsBusiness TortsUnfair Business PracticesElements

Robert F. Freitas and Janet L. Boche contributed to the original chapter for California Forms of Jury Instruction (Matthew Bender). The Honorable Gerald J. Lewis was consultant to the original chapter.



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CHAPTER 33A Matthew Bender Unfair Competition Instructions

PART A. UNFAIR PRACTICES ACT

1. Definitional and Burden of Proof Instructions

5-33A California Forms of Jury Instruction MB 3300A.05

MB 3300A.05 Definition of "Give"

[1] Instruction Definition of "Give"

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

For the purposes of Plaintiff's claim that Defendant unlawfully _____ [specify violation, e.g., sold goods below cost], the word "give" includes giving, offering to give, or advertising the intent to give.

Authorities: *Bus. & Prof. Code § 17023; see Paramount Gen. Hosp. Co. v. National Med. Enters., Inc. (1974) 42 Cal.App.3d 496, 117 Cal.Rptr. 42 .*

[2] Use of Instruction

This instruction should be used when the allegation is that an article or product was given, rather than sold, leased, or licensed, or when a giveaway was offered or advertised. The instruction is phrased in the language of *Bus. & Prof. Code § 17023*,

[3] Comment

The principles supporting broad interpretation of the definitional provisions of the Unfair Practices Act are discussed in *MB 3300A.04[3]*. Although not likely to be necessary to the interpretation of the term "give," those principles should be remembered in the event of any disputes over whether or not a particular transaction involves a giving, offering to give, or advertising the intent to give.

LexisNexis Matthew Bender Expert Practice Tip--Carefully Prepare Argument: Almost all jurors understand "sale." However, "give" is much more amorphous. As a result, the related closing argument should be carefully prepared. *By Rex Heeseman*

Legal Topics:

For related research and practice materials, see the following legal topics:

Antitrust & Trade Law Trade Practices & Unfair Competition State Regulation Claims Antitrust & Trade Law Trade Practices & Unfair Competition State Regulation Coverage Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Torts Business Torts Unfair Business Practices Elements

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CHAPTER 33A Matthew Bender Unfair Competition Instructions

PART A. UNFAIR PRACTICES ACT

1. Definitional and Burden of Proof Instructions

5-33A California Forms of Jury Instruction MB 3300A.06

MB 3300A.06 Definition of "Article or Product"

[1] Instruction Definition of "Article or Product"

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

_____ [*type of article or product*] is an "article or product" that is subject to the provisions of the Unfair Practices Act.

Authorities: *Bus. & Prof. Code* § 17024; *Marin County Bd. of Realtors, Inc. v. Palsson* (1976) 16 Cal.3d 920, 927, 130 Cal.Rptr. 1, 549 P.2d 833 ; *Paramount Gen. Hosp. Co. v. National Med. Enters., Inc.* (1974) 42 Cal.App.3d 496, 502, 117 Cal.Rptr. 42 ; *Los Angeles Check Sellers Ass'n v. United States Nat'l Bank* (1969) 275 Cal.App.2d 570, 573, 80 Cal.Rptr. 321 ; *Page v. Bakersfield Unif. & Towel Supply Co.* (1966) 239 Cal.App.2d 762, 49 Cal.Rptr. 46 ; *Garner v. Journeyman Barbers', Hairdressers', Cosmetologists' & Proprietors' Int'l Union of Am.* (1963) 223 Cal.App.2d 101, 107, 35 Cal.Rptr. 693 .

[2] Use of Instruction

This instruction should be used to inform the jury that the specific product involved is an "article or product" within the meaning of the Unfair Practices Act. In light of the broad statutory definition of article or product, this instruction will be appropriate in virtually all cases.

[3] Comment

Like the other definitional provisions of the Unfair Practices Act, the definition of article or product in *Bus. & Prof. Code* § 17024 is broadly stated. Unlike § 2(a) of the Robinson-Patman Act [15 U.S.C.S. § 13(a)], which applies only to "commodities," the Unfair Practices Act applies to services [*Paramount Gen. Hosp. Co. v. National Med. Enters., Inc.*

(1974) 42 Cal.App.3d 496, 502-504, 117 Cal.Rptr. 42 (office space and associated services); *Los Angeles Check Sellers Ass'n v. United States Nat'l Bank* (1969) 275 Cal.App.2d 570, 571, 80 Cal.Rptr. 321 (money orders); *Page v. Bakersfield Unif. & Towel Supply Co.* (1966) 239 Cal.App.2d 762, 764, 49 Cal.Rptr. 46 (uniform rental and cleaning services); *Garner v. Journeyman Barbers', Hairdressers', Cosmetologists' & Proprietors' Int'l Union of Am.* (1963) 223 Cal.App.2d 101, 107-108, 35 Cal.Rptr. 693 (haircutting); see *Marin County Bd. of Realtors, Inc. v. Palsson* (1976) 16 Cal.3d 920, 927, 130 Cal.Rptr. 1, 549 P.2d 833 (services are "commodities" under Cartwright Act, *Bus. & Prof. Code* § 16700 et seq.); *Cellular Plus, Inc. v. Superior Court* (1993) 14 Cal.App.4th 1224, 1240-1243, 18 Cal.Rptr.2d 308 (cellular telephone services are actionable under Cartwright Act)].

However, the scope of the Unfair Practices Act is not unlimited. *Bus. & Prof. Code* § 17024 excludes motion picture films that are licensed for exhibition to motion picture houses from the broad definition of "article or product," and *Bus. & Prof. Code* § 17024(1) and (2) generally exclude the output of public utilities from the Act [see *Hladek v. City of Merced* (1977) 69 Cal.App.3d 585, 591, 138 Cal.Rptr. 194 ; but see *Cellular Plus, Inc. v. Superior Court* (1993) 14 Cal.App.4th 1224, 1240-1243, 18 Cal.Rptr.2d 308 (regulatory authority of Public Utilities Commission over company's rates does not preclude price-fixing violation of Cartwright Act)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Antitrust & Trade Law Trade Practices & Unfair Competition State Regulation Claims Antitrust & Trade Law Trade Practices & Unfair Competition State Regulation Coverage Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Torts Business Torts Unfair Business Practices Elements

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CHAPTER 33A Matthew Bender Unfair Competition Instructions

PART A. UNFAIR PRACTICES ACT

1. Definitional and Burden of Proof Instructions

5-33A California Forms of Jury Instruction MB 3300A.07

MB 3300A.07 Liability for Loss Leader Activities--Presumption of Intent Claimed to Arise From Proof of "Injurious Effect"

[1] Instruction Liability for Loss Leader Activities--Presumption of Intent Claimed to Arise From Proof of "Injurious Effect"

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Plaintiff claims that Defendant is liable to [him/her/it] for unlawful sales of _____ [specify article or product] as a loss leader. To prove that Defendant has engaged in unlawful loss leader sales, Plaintiff must first prove both of the following:

- 1. Defendant sold the _____ [specify article or product] at less than [his/her/its] cost; and**
- 2. Defendant's sale of _____ [specify article or product] below cost:**

[CHOOSE FROM THE FOLLOWING (See Use of Instruction)]

(a) Was done to promote or encourage the purchase of other merchandise.

(b) Had a tendency or ability to mislead or deceive buyers or potential buyers.

[AND/OR]

(c) Had the effect of diverting trade from or otherwise injuring the Defendant's competitors.

[CONTINUE INSTRUCTION]

If you find that Plaintiff has proved that Defendant sold _____ [specify article or product] as a loss leader, then you must consider whether Defendant acted with an unlawful purpose or intent. For purposes of Plaintiff's claim of unlawful loss leader sales, unlawful purpose or intent means purpose or intent to injure competitors or to destroy competition.

[EITHER (See Use of Instruction)]

If in addition to proving that Defendant sold a loss leader, Plaintiff also proves that Defendant's loss leader sales had an injurious effect, for example by _____ [specify injurious effect (see Use of Instruction)], then Defendant must prove that [he/she/it] did *not* act with the purpose or intent to injure competitors or destroy competition. If, however, you find that Plaintiff has not proved that Defendant's sales produced an injurious effect, then it is Plaintiff who must prove that Defendant sold loss leaders with the purpose or intent to injure competitors or to destroy competition.

[or]

Because Defendant _____ [specify proved or admitted fact that justifies presumption of intent to injure competitors or to destroy competition, e.g., sold _____ (specify product) below cost], Defendant must prove that [he/she/it] did not act with the purpose or intent to injure competitors or to destroy competition.

Authorities: *Bus. & Prof. Code* §§ 17030, 17044, 17071; *Cel-Tech Commc'ns Inc. v. Los Angeles Cellular* (1999) 20 Cal.4th 163, 175-178, 83 Cal.Rptr.2d 548, 973 P.2d 527 ; *Dooley's Hardware Mart v. Food Giant Mkts., Inc.* (1971) 21 Cal.App.3d 513, 517-518, 98 Cal.Rptr. 543 .

[2] Use of Instruction

This instruction should be used when the plaintiff asserting a loss leader claim alleges that the defendant's conduct has produced an "injurious effect" and that the presumption of intent found in *Bus. & Prof. Code* § 17071 is therefore applicable. No attempt has been made to indicate precisely what constitutes an "injurious effect" because, as discussed in [3][a], *below*, the courts have not fleshed out the meaning of this term.

Paragraph 2 of the plaintiff's burden of proof in this instruction offers three alternative subparagraphs. These alternatives are based on those set forth in the *Bus. & Prof. Code* § 17030 definition of "loss leader." Proof of any one of these alternatives is sufficient to meet the statutory definition. Counsel should use as many of these alternatives as are placed at issue by the facts of the case.

This instruction concludes with two alternative paragraphs on the burden of proving unlawful intent. If the facts supporting the presumption of intent under *Bus. & Prof. Code* § 17071 are in dispute, then counsel should use the first alternative paragraph. If the facts underlying the presumption are not disputed, for example if there is no dispute on the question of whether any proved or conceded loss leader activity has produced an "injurious effect," counsel should use the second alternative paragraph, which places the burden on the defendant to prove the absence of unlawful intent.

LexisNexis Matthew Bender Expert Practice Tip--Caution!: "Loss leader" may confuse many jurors.

Hence, be careful of the supporting evidence as well as the related argument to the jury. *By Rex Heeseman*

[3] Comment

[a] Presumption of Injurious Intent

Bus. & Prof. Code § 17044 prohibits "loss leader" activity as that term is defined in *Bus. & Prof. Code § 17030* [see Ch. 33, *California Judicial Council Unfair Practices Act Instructions*, CACI No. 3302]. Loss leader activity is unlawful only when it is done with the purpose of injuring competitors or destroying competition [*Cel-Tech Commc'ns Inc. v. Los Angeles Cellular* (1999) 20 Cal.4th 163, 175-178, 83 Cal.Rptr.2d 548, 973 P.2d 527 (to violate *Bus. & Prof. Code § 17043*, and thus *Bus. & Prof. Code § 17044*, company must act with purpose, i.e., desire, of injuring competitors or destroying competition; see CACI No. 3302); *Dooley's Hardware Mart v. Food Giant Mkts., Inc.* (1971) 21 Cal.App.3d 513, 516, 98 Cal.Rptr. 543].

Bus. & Prof. Code § 17071 provides that, in any case brought under the Unfair Practices Act, proof of one or more sales below cost, or of sales at discriminatory prices, plus proof of "injurious effect" is "presumptive evidence" of the purpose or intent to injure competitors or to destroy competition [see, e.g., *Fisherman's Wharf Bay Cruise Corp. v. Superior Court* (2003) 114 Cal.App.4th 309, 322, 7 Cal.Rptr.3d 628]. Proof of diversion of business from a competitor, one of the alternative definitional elements of a loss leader sale [*Bus. & Prof. Code § 17030(c)*], is apparently sufficient to show injurious effect [*E & H Wholesale, Inc. v. Glaser Bros.* (1984) 158 Cal.App.3d 728, 735, 204 Cal.Rptr. 838 ; see *People v. Pay Less Drug Store* (1944) 25 Cal.2d 108, 113, 153 P.2d 9 (injury to competitor or destruction of competition is injurious effect)]. Thus, if one of the definitional elements of what constitutes a loss leader--as set out in the second element of the plaintiff's burden--is proved, the presumption of unlawful intent may arise. However, the cases have not identified any more expansive meaning for "injurious effect" than diversion of trade.

This instruction is based on the assumption that the presumption established by *Bus. & Prof. Code § 17071* affects the burden of persuasion and not merely the burden of producing evidence. If the burden is one of persuasion, then proof of the underlying facts (sale below cost; injurious effect) [see *Bus. & Prof. Code § 17071*] would have the effect of shifting to the defendant the burden of proving that it did not intend to injure competitors or destroy competition [see *Evid. Code § 606* (effect of presumption affecting burden of persuasion)]. In that case, an instruction informing the jury of the shift of the burden of proof to the defendant would be appropriate. On the other hand, if the presumption only affects the burden of producing evidence, then the defendant is required only to introduce evidence supporting the nonexistence of the presumed fact; and if the defendant introduces this evidence, then the trier of fact must determine the existence or nonexistence of the presumed fact without regard to the presumption [see *Evid. Code § 604* (effect of presumption affecting burden of producing evidence)]. Thus, if the presumption affects the burden of producing evidence, rather than the burden of persuasion, the presumption would effectively "disappear" if the defendant has introduced evidence to rebut the presumption, and the jury should not be instructed on the presumption.

Whether the presumption created by *Bus. & Prof. Code § 17071* affects the burden of persuasion or the burden of producing evidence has not been specifically decided by a California appellate court. One court of appeal held, with little analysis, that the similar presumption in *Bus. & Prof. Code § 17071.5* (discussed in MB 3300A.08[3]) is a presumption affecting the burden of persuasion [see *Dooley's Hardware Mart v. Food Giant Mkts., Inc.* (1971) 21 Cal.App.3d 513, 517-518, 98 Cal.Rptr. 543]. Without expressly addressing the issue, some later cases seem to have treated the presumption of *Bus. & Prof. Code § 17071* as if it were a presumption affecting the burden of persuasion [see *William Inglis & Sons v. Continental Baking* (9th Cir. 1991) 942 F.2d 1332, 1338-1339 ; *E & H Wholesale, Inc. v. Glaser Bros.* (1984) 158 Cal.App.3d 728, 737, 204 Cal.Rptr. 838]. However, another court, again without expressly addressing the issue of the nature of the presumption, appeared to treat the presumption as affecting the burden of presenting evidence. The court stated that the only effect of the presumption created by *Bus. & Prof. Code § 17071* is "to require ... [the defendant] to go forward with proof to negate the presumption of wrongful intent"; once the

defendant has done that, the burden of proof regarding intent shifts back to the plaintiff [*Western Union Fin. Servs., Inc. v. First Data Corp.* (1993) 20 Cal.App.4th 1530, 1540, 25 Cal.Rptr.2d 341 ; see *People v. Pay Less Drug Store* (1944) 25 Cal.2d 108, 114, 153 P.2d 9 (identically worded predecessor statute required that defendant "go forward with evidence to rebut a prima facie showing")]. The language in the latter case appears more consistent with a presumption affecting the burden of producing evidence than a presumption affecting the burden of persuasion.

Assuming that the presumption under *Bus. & Prof. Code § 17071* affects the burden of persuasion, the exact operation of the presumption depends on whether the underlying facts have been established as a matter of law or are subject to dispute. If the facts underlying the presumption (discriminatory or below cost sales and injurious effect) are conceded or have been established by motion for summary adjudication, then these undisputed facts are "presumptive evidence" of the intent to injure competitors or to destroy competition, and the burden is on the defendant to prove that it did not act with unlawful intent [see *Bus. & Prof. Code § 17071* (discriminatory or below cost sales plus injurious effect constitute presumptive evidence of intent to injure competitors or to destroy competition)]. When the underlying facts are in dispute, the ultimate allocation of the burden of persuasion on the intent issue will vary with the proof or lack of proof of the underlying facts, and the jury should be so instructed.

No reference is made in this instruction to one of the underlying facts that may give rise to the *Bus. & Prof. Code § 17071* presumption--discriminatory sales. Since the plaintiff in a loss leader case must prove the alternative basis for the presumption (that is, sales below cost) as a basic element of the plaintiff's case, there is no need for the plaintiff to prove discriminatory sales.

LexisNexis Matthew Bender Expert Practice Tip--Loss Leader vs. Promotional Sale: Many jurors may confuse an unlawful "loss leader" with a promotional sale. Counsel should explain that a "loss leader" is a sale "below cost" that damages competition. With a promotional sale, the seller still makes a profit. Note that if plaintiff can prove that sales were diverted, then the burden shifts to defendant to prove the defendant had no intent to injure competition. *By Ronald Oster*

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 33, *California Judicial Council Unfair Practices Act Instructions*]:

CACI No. 3302 Loss Leader Sales--Essential Factual Elements

CACI No. 3331 Affirmative Defense to Locality Discrimination, Below Cost Sales, and Loss Leader Sales Claims--Closed-out, Discontinued, Damaged, or Perishable Items

CACI No. 3332 Affirmative Defense to Locality Discrimination, Sales Below Cost, Loss Leader Sales, and Secret Rebates--Functional Classifications

CACI No. 3333 Affirmative Defense Locality Discrimination, Sales Below Cost, and Loss Leader Sales Claims--Meeting Competition

Legal Topics:

For related research and practice materials, see the following legal topics:

Antitrust & Trade Law Trade Practices & Unfair Competition State Regulation Claims Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Evidence Inferences & Presumptions Exceptions Statutory Presumptions Torts Business Torts Unfair Business Practices Elements

Robert F. Freitas and Janet L. Boche contributed to the original chapter for California Forms of Jury Instruction (Matthew Bender). The Honorable Gerald J. Lewis was consultant to the original chapter.



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California Forms of Jury Instruction

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CHAPTER 33A Matthew Bender Unfair Competition Instructions

PART A. UNFAIR PRACTICES ACT

1. Definitional and Burden of Proof Instructions

5-33A California Forms of Jury Instruction MB 3300A.08

MB 3300A.08 Liability for Loss Leader Activities--Presumption of Intent Claimed to Arise From Proof of Limited Sales Below Invoice or Replacement Cost

[1] Instruction Liability for Loss Leader Activities--Presumption of Intent Claimed to Arise From Proof of Limited Sales Below Invoice or Replacement Cost

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Plaintiff claims that Defendant is liable to [him/her/it] for unlawful sales of _____ [specify article or product] as a loss leader. To prove that Defendant has engaged in unlawful loss leader sales, Plaintiff must first prove all of the following:

- 1. That Defendant sold the _____ [specify article or product] at less than [his/her/its] cost; and**
- 2. That the sale of Defendant's _____ [specify article or product] below cost:**

[CHOOSE FROM THE FOLLOWING (See Use of Instruction)]

(a) Was done to promote or encourage the purchase of other merchandise.

(b) Had a tendency or ability to mislead or deceive buyers or potential buyers.

[AND/OR]

(c) Had the effect of diverting trade from or otherwise injuring the Defendant's competitors.

[CONTINUE INSTRUCTION]

If you find that Plaintiff has proved that Defendant has sold a loss leader, then you must determine whether or not Plaintiff has proved both of the following:

1. That Defendant sold at a price less than [his/her/its] invoice cost or replacement cost, whichever is lower; and
2. That Defendant limited sales at that price, to any customer, to less than the entire quantity of the _____ [specify article or product] Defendant owned, possessed, or was otherwise authorized to sell at _____ [specify place of sale].

Unless Plaintiff has proved *both* that Defendant sold below invoice or replacement cost, whichever is lower, and that Defendant limited sales at that price, to any one customer, to less than *all* of the _____ [specify article or product] that [he/she/it] owned or possessed or was authorized to sell, Plaintiff must go on to prove that Defendant acted with "unlawful intent." That is, Plaintiff must prove that Defendant had the purpose or intent to either injure competitors or destroy competition. If, however, Plaintiff has proved *both* that Defendant sold below invoice or replacement cost, whichever is lower, and that Defendant did not sell to any one customer *all* of the _____ [specify article or product] that [he/she/it] owned or possessed or was authorized to sell, it is Defendant who must prove that [he/she/it] did *not* sell a loss leader with the purpose or intent to either injure competitors or destroy competition.

Authorities: *Bus. & Prof. Code* §§ 17030, 17044, 17071.5; *Cel-Tech Commc'ns Inc. v. Los Angeles Cellular* (1999) 20 Cal.4th 163, 175-178, 83 Cal.Rptr.2d 548, 973 P.2d 527; *Dooley's Hardware Mart v. Food Giant Mkts., Inc.* (1971) 21 Cal.App.3d 513, 517-518, 98 Cal.Rptr. 543.

[2] Use of Instruction

This instruction should be used when a plaintiff asserting a loss leader claim alleges that a retailer defendant has sold below invoice or replacement cost and has limited the quantity of its sales at the challenged price. Proof of these underlying facts raises a presumption of intent or purpose to injure competitors or to destroy competition under *Bus. & Prof. Code* § 17071.5.

This instruction may be modified if, for example, the underlying facts are not in dispute. In that case the burden of proving the absence of anticompetitive intent would be placed on the defendant and no mention need be made of the facts underlying the presumption.

LexisNexis Matthew Bender Expert Practice Tip--Caution!: This instruction is complicated in many aspects. It should be shortened in some situations. In addition, it should be carefully explained to the jury. *By Rex Heeseman*

[3] Comment

[a] Presumption Regarding Proof of Retailer's Limitation of Quantity

Bus. & Prof. Code § 17071.5 provides a presumption of purpose or intent to injure competitors or to destroy competition that applies only to retailers who sell products other than products they have produced or manufactured themselves. The presumption is a presumption affecting the burden of persuasion [*Dooley's Hardware Mart v. Food Giant Mkts., Inc.* (1971) 21 Cal.App.3d 513, 517-18, 98 Cal.Rptr. 543].

Both of the following underlying facts must be proved for the presumption to arise:

- The plaintiff must prove--in addition to proving that a sale below "cost" [see *Bus. & Prof. Code* §§ 17026, 17029] was made--that a sale below the lesser of the retailer's invoice or replacement cost was made; and
- The plaintiff must prove that the defendant limited the quantity it would sell at that price to any customer [*Bus. & Prof. Code* § 17071.5].

The California Supreme Court held that *Bus. & Prof. Code* § 17044 contains the same mental state requirement as *Bus. & Prof. Code* § 17043 [*Cel-Tech Commc'ns Inc. v. Los Angeles Cellular* (1999) 20 Cal.4th 163, 175-178, 83 Cal.Rptr.2d 548, 973 P.2d 527 (to violate *Bus. & Prof. Code* § 17043, and thus *Bus. & Prof. Code* § 17044, company must act with the purpose, i.e., desire, of injuring competitors or destroying competition)].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 33, *California Judicial Council Unfair Practices Act Instructions*]:

CACI No. 3302 Loss Leader Sales--Essential Factual Elements

CACI No. 3331 Affirmative Defense to Locality Discrimination, Below Cost Sales, and Loss Leader Sales Claims--Closed-out, Discontinued, Damaged, or Perishable Items

CACI No. 3332 Affirmative Defense to Locality Discrimination, Sales Below Cost, Loss Leader Sales, and Secret Rebates--Functional Classifications

CACI No. 3333 Affirmative Defense Locality Discrimination, Sales Below Cost, and Loss Leader Sales Claims--Meeting Competition

Legal Topics:

For related research and practice materials, see the following legal topics:

Antitrust & Trade Law Trade Practices & Unfair Competition State Regulation Claims Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Evidence Inferences & Presumptions Exceptions Statutory Presumptions Torts Business Torts Unfair Business Practices Elements

Robert F. Freitas and Janet L. Boche contributed to the original chapter for California Forms of Jury Instruction (Matthew Bender). The Honorable Gerald J. Lewis was consultant to the original chapter.



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CHAPTER 33A Matthew Bender Unfair Competition Instructions

PART A. UNFAIR PRACTICES ACT

1. Definitional and Burden of Proof Instructions

5-33A California Forms of Jury Instruction MB 3300A.09

MB 3300A.09 Liability for Locality Discrimination--Presumption of Intent Claimed to Arise From Proof of "Injurious Effect"

[1] Instruction Liability for Locality Discrimination--Presumption of Intent Claimed to Arise From Proof of "Injurious Effect"

[PLAINTIFF'S/DEFENDANT'S] PROPOSED INSTR. NO. _____

Plaintiff claims that Defendant is liable to it for unlawful locality discrimination. For purposes of this claim, discrimination means a difference in price and locality means a geographic location such as a section, community, or city, or a location with a section, community, or city. Locality discrimination means selling _____ [either: an article or product or an article or product of like grade and quality] at a different price in one locality than in another.

To prove that Defendant engaged in unlawful locality discrimination, Plaintiff must prove that Defendant sold _____ [specify article or product] at a lower price in _____ [location at which Plaintiff competes with Defendant or would compete with Defendant] than it sold _____ [specify, e.g., the same item or an item of a like grade and quality] in another location.

If you find that Plaintiff has proved that Defendant has engaged in locality discrimination, then you must consider whether Defendant acted with an unlawful intent. For purposes of Plaintiff's claim of unlawful locality discrimination, unlawful intent means intent to _____ [either: destroy the competition of Plaintiff or to prevent Plaintiff from becoming a competitor].

If in addition to proving that Defendant engaged in locality discrimination, Plaintiff has also proved that Defendant's locality discrimination had an injurious effect, then Defendant must prove that [he/she/it] did not act

with the intent to _____ [*either: destroy the competition of Plaintiff or to prevent Plaintiff from becoming a competitor*]. If, however, you find that Plaintiff has not proved an injurious effect from Defendant's locality discrimination, then it is Plaintiff who must prove that Defendant acted with intent to _____ [*either: destroy the competition of Plaintiff or to prevent Plaintiff from becoming a competitor*].

Authorities: *Bus. & Prof. Code §§ 17040, 17071.*

[2] Use of Instruction

This instruction should be used in a locality discrimination case when the plaintiff relies on the presumption of intent found in *Bus. & Prof. Code § 17071*. When the facts underlying the presumption are not in dispute, the instruction should be modified to impose the burden of proof on the question of intent on the defendant. The instruction may also be particularized to indicate what facts specifically constitute the alleged "injurious effect."

LexisNexis Matthew Bender Expert Practice Tip--Caution!: This instruction is complicated and should be shortened in some situations. In addition, it should be carefully explained to the jury. Phrases such as "locality" and "downstream" competition are understood by few. *By Rex Heeseman*

LexisNexis Matthew Bender Expert Practice Tip--Proof of "Injurious Effect" Raises Presumption: As with other sections of the Unfair Practices Act, proof of an "injurious effect" raises the presumption that defendant acted with the intent to destroy or damage competition. *By Ronald Oster*

[3] Comment

[a] Similarity to Loss Leader Claim

This instruction, like the instruction in MB 3300A.07 that addresses loss leader claims, applies the *Bus. & Prof. Code § 17071* presumption of intent. Many of the issues discussed in MB 3300A.07[3] are equally applicable, although there are certain differences between the use of the presumption in a loss leader case and in one involving a claim of locality discrimination.

[b] No Need to Prove Sales Below Cost

One important difference involves the utilization of the underlying fact of sales at "discriminatory prices" that triggers the *Bus. & Prof. Code § 17071* presumption. As noted in MB 3300A.07[3], a loss leader plaintiff seeking to rely on *Bus. & Prof. Code § 17071* will not be likely to attempt to prove that the defendant made sales at discriminatory prices because the plaintiff will be required to establish the existence of the other basic underlying fact--below cost sales--in any loss leader case. The situation is reversed in a locality discrimination case. A plaintiff challenging alleged locality discrimination will most likely not find it necessary to attempt to prove sales below cost to take advantage of *Bus. & Prof. Code § 17071* because proof of discrimination will be required as an element of the cause of action. A plaintiff alleging both below cost selling and locality discrimination may find it helpful to emphasize both underlying facts, but proof of below cost selling for purposes of the locality discrimination claim will be of no help in the absence of proof of discrimination.

[c] Meaning of "Discriminatory Price"

Bus. & Prof. Code § 17071 does not define what is meant by its use of the term "discriminatory prices." It is possible, but unlikely, that the term was meant to include more than the locality discrimination that is the subject of *Bus. & Prof. Code § 17040*. It would be strange for *Bus. & Prof. Code § 17071* to provide for a presumption of unlawful intent to arise on proof of a type of discriminatory pricing that is not even regulated by the Unfair Practices Act. *Bus. & Prof. Code § 17071* should thus be read to refer only to locality discrimination. Under that reading, in any locality

discrimination case when the plaintiff proves the basic elements of the cause of action and proves an injurious effect, the defendant will have the burden of proof on the intent issue. As noted in MB 3300A.07[3], when the plaintiff fails to prove injurious effect, it will usually ultimately fail on its claim for lack of damages.

[d] Type of Intent Required for Locality Discrimination Contrasted With Intent Supplied by Presumption

The application of *Bus. & Prof. Code § 17071* to a locality discrimination case also illustrates another of the examples of confusing drafting that plague the Unfair Practices Act. *Bus. & Prof. Code § 17071* provides a presumption of an "intent to injure competitors or destroy competition" when there is proof of "injurious effect." However, this presumed intent differs from the intent necessary to establish a violation of the locality discrimination prohibition, even though § 17071 is stated to apply in "all actions" brought under the Unfair Practices Act. *Bus. & Prof. Code § 17040* prohibits locality discrimination undertaken "with intent to destroy the competition of any regularly established dealer ... or to prevent the competition of any person who in good faith, intends and attempts to become" a dealer. In this instance, the differences in the statutory language appear to be reconcilable. The "intent to injure competitors" seems to include the "intent to destroy the competition of any regularly established dealer," and, given the nature and purpose of the Unfair Practices Act, may be read to include those who attempt to become dealers as well.

[e] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 33, *California Judicial Council Unfair Practices Act Instructions*]:

CACI No. 3300 Locality Discrimination--Essential Factual Elements

CACI No. 3330 Affirmative Defense to Locality Discrimination Claim--Cost Justification

CACI No. 3331 Affirmative Defense to Locality Discrimination, Below Cost Sales, and Loss Leader Sales Claims--Closed-out, Discontinued, Damaged, or Perishable Items

CACI No. 3332 Affirmative Defense to Locality Discrimination, Sales Below Cost, Loss Leader Sales, and Secret Rebates--Functional Classifications

CACI No. 3333 Affirmative Defense Locality Discrimination, Sales Below Cost, and Loss Leader Sales Claims--Meeting Competition

CACI No. 3334 Affirmative Defense to Locality Discrimination Claim--Manufacturer Meeting Downstream Competition

Legal Topics:

For related research and practice materials, see the following legal topics:

Antitrust & Trade Law Trade Practices & Unfair Competition State Regulation Claims Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Evidence Inferences & Presumptions Exceptions Statutory Presumptions Torts Business Torts Unfair Business Practices Elements

Robert F. Freitas and Janet L. Boche contributed to the original chapter for California Forms of Jury Instruction (Matthew Bender). The Honorable Gerald J. Lewis was consultant to the original chapter.



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California Forms of Jury Instruction

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CHAPTER 33A Matthew Bender Unfair Competition Instructions

PART A. UNFAIR PRACTICES ACT

1. Definitional and Burden of Proof Instructions

5-33A California Forms of Jury Instruction MB 3300A.10

MB 3300A.10 Liability for Locality Discrimination--Presumption of Intent Claimed to Arise From Proof of Limited Sales Below Invoice or Replacement Cost

[1] Instruction Liability for Locality Discrimination--Presumption of Intent Claimed to Arise From Proof of Limited Sales Below Invoice or Replacement Cost

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Plaintiff claims that Defendant is liable to [him/her/it] for unlawful locality discrimination. For purposes of this claim, discrimination means a difference in price, and locality means a geographic location such as a section, community, or city, or a location within a section, community, or city. Locality discrimination means selling _____ [either: an article or product or an article or product of like grade and quality] at a different price in one locality than in another.

To prove that Defendant engaged in unlawful locality discrimination, Plaintiff must prove that Defendant sold _____ [specify article or product] at a lower price in _____ [location at which Plaintiff competes with Defendant or would compete with Defendant] than it sold _____ [specify, e.g., the same item or an item of a like grade and quality] in another location.

If you do find that Plaintiff has proved that Defendant engaged in locality discrimination, then you must determine whether or not Plaintiff has proved both of the following:

- 1. That Defendant sold at a price less than [his/her/its] invoice cost or replacement cost, whichever is lower; and**
- 2. That Defendant limited sales at that price, to any customer, to less than the entire quantity of the _____ [specify article or product] Defendant owned, possessed, or was otherwise authorized to**

sell at _____ [*specify place of sale*].

Unless Plaintiff has proved *both* that Defendant sold below invoice or replacement cost, whichever is lower, and that Defendant limited sales at that price, to any one customer, to less than *all* of the _____ [*specify article or product*] that [he/she/it] owned or possessed or was authorized to sell, Plaintiff must go on to prove that Defendant engaged in locality discrimination with "unlawful intent." That is, Plaintiff must prove that Defendant had the intent to _____ [*either: destroy the competition of Plaintiff or to prevent Plaintiff from becoming a competitor*]. If, however, Plaintiff has proved *both* that Defendant sold below invoice or replacement cost, whichever is lower, and that Defendant limited sales at that price, to any one customer, to less than *all* of the _____ [*specify article or product*] that [he/she/it] owned or possessed or was authorized to sell, it is Defendant who must prove that [he/she/it] did *not* sell with the intent to _____ [*either: destroy the competition of Plaintiff or to prevent Plaintiff from becoming a competitor*].

Authorities: *Bus. & Prof. Code §§ 17040, 17071.5.*

[2] Use of Instruction

This instruction should be used in a locality discrimination case against a retailer when the plaintiff relies on *Bus. & Prof. Code § 17071.5* to raise a presumption of intent. The instruction should be modified to place the burden of proof on intent on the defendant when the facts underlying the *Bus. & Prof. Code § 17071.5* presumption are conceded or established.

[3] Comment

[a] Presumption Regarding Proof of Retailer's Limitation of Quantity

Bus. & Prof. Code § 17071.5 provides a presumption of intent to injure competitors or destroy competition in a case when a retailer defendant makes sales below the lesser of its invoice or replacement cost and limits the quantity sold at that price [see *MB 3300A.08[3]*]. This instruction may be used to address the applicability of this presumption in a locality discrimination case.

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 33, *California Judicial Council Unfair Practices Act Instructions*]:

CACI No. 3300 Locality Discrimination--Essential Factual Elements

CACI No. 3301 Below Cost Sales--Essential Factual Elements

CACI No. 3302 Loss Leader Sales--Essential Factual Elements

CACI No. 3303 Definition of "Cost"

CACI No. 3304 Presumptions Concerning Costs--Manufacturer

CACI No. 3305 Presumptions Concerning Costs--Distributor

CACI No. 3306 Methods of Allocating Costs to an Individual Product

CACI No. 3330 Affirmative Defense to Locality Discrimination Claim--Cost Justification

CACI No. 3331 Affirmative Defense to Locality Discrimination, Below Cost Sales, and Loss Leader Sales Claims--Closed-out, Discontinued, Damaged, or Perishable Items

CACI No. 3332 Affirmative Defense to Locality Discrimination, Sales Below Cost, Loss Leader Sales, and Secret Rebates--Functional Classifications

CACI No. 3333 Affirmative Defense Locality Discrimination, Sales Below Cost, and Loss Leader Sales Claims--Meeting Competition

CACI No. 3334 Affirmative Defense to Locality Discrimination Claim--Manufacturer Meeting Downstream Competition

Legal Topics:

For related research and practice materials, see the following legal topics:

Antitrust & Trade Law Trade Practices & Unfair Competition State Regulation Claims Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Evidence Inferences & Presumptions Exceptions Statutory Presumptions Torts Business Torts Unfair Business Practices Elements

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CHAPTER 33A Matthew Bender Unfair Competition Instructions

PART A. UNFAIR PRACTICES ACT

1. Definitional and Burden of Proof Instructions

5-33A California Forms of Jury Instruction MB 3300A.11

MB 3300A.11 Like Grade and Quality**[1] Instruction** Like Grade and Quality

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

A locality discrimination does not exist unless Defendant sold _____ [specify article or product] at a lower price in one locality than it sold _____ [specify article or product] of like grade and quality in another. Articles or products are not required to be identical to be of like grade and quality. Articles or products are of like grade and quality if they are identical or if they do not have physical differences that would affect a buyer's decision to buy one or the other.

Authorities: *Federal Trade Comm'n v. Borden Co.* (1966) 383 U.S. 637, 641, 86 S.Ct. 1092, 16 L.Ed.2d 153 ; *Atlanta Trading Corp. v. Federal Trade Comm'n* (2d Cir. 1958) 258 F.2d 365, 369 ; *William Inglis & Sons v. ITT Cont'l Baking* (N.D. Cal. 1978) 461 F.Supp. 410, 420 , *aff'd in part, rev'd in part* (9th Cir. 1981) 668 F.2d 1014 ; *Unedus v. California Shoppers, Inc.* (1978) 86 Cal.App.3d 932, 937-938, 150 Cal.Rptr. 596 .

[2] Use of Instruction

This instruction should be used in a locality discrimination case when the defendant resists the claim of discrimination by asserting that the articles or products it sells at different prices in different localities are of a different grade or quality. For coverage of the considerations that affect a determination of comparability, see generally Ch. 33, *California Judicial Council Unfair Practices Act Instructions*, CACI No. 3300.

[3] Comment**[a] Like Grade and Quantity**

A locality discrimination may be claimed even though the seller's products are not identical in all regards. Because of the broad applicability of the Unfair Practices Act to numerous goods and services, a variety of differences between products may be alleged to make them so dissimilar that a claim of discrimination cannot be sustained. In many cases involving intangibles or real property, the uniqueness of the products will preclude a claim of discrimination. This instruction addresses the standard for similarity of tangible goods followed under the Robinson-Patman Act, and likely to be applied to Unfair Practices Act claims involving tangible goods as well [see *Unedus v. California Shoppers, Inc.* (1978) 86 Cal.App.3d 932, 937, 150 Cal.Rptr. 596 (noting "close parallel" between Unfair Practices Act and Robinson-Patman Act and that both state and federal statutes apply to discriminatory sales of goods of like grade and quality)].

The key to the like grade and quality determination under the federal statute, which applies only to "commodities," is physical similarity. Thus, mere differences in labeling, such as that between "premium" and "private label" products do not preclude a claim of discrimination [*Federal Trade Comm'n v. Borden Co.* (1966) 383 U.S. 637, 86 S.Ct. 1092, 16 L.Ed.2d 153 ; *William Inglis & Sons v. ITT Cont'l Baking* (N.D. Cal. 1978) 461 F.Supp. 410, 421 , *aff'd in part, rev'd in part* (9th Cir. 1981) 668 F.2d 1014]. Similarly, insubstantial physical differences, such as merely decorative differences, do not foreclose application of the Act [Report of the Attorney General's Nat'l Comm. to Study the Antitrust Laws (1955) 158]. However, genuine physical differences that affect consumer preference for an item do render articles or products sufficiently distinct to preclude Robinson-Patman Act price discrimination claims [*Atlanta Trading Corp. v. Federal Trade Comm'n* (2d Cir. 1958) 258 F.2d 365, 371].

Even though a defendant may not defeat a discrimination claim by relying on labeling or similar matters to establish a difference in grade or quality, those differences may be relevant to other defensive matters. For example, federal cases recognize that the consumer preference based on differential labeling may prevent a plaintiff from showing a threat to competition or damages [see *Federal Trade Comm'n v. Borden Co.* (1966) 383 U.S. 637, 644-645, 86 S.Ct. 1092, 16 L.Ed.2d 153].

Many of the troubling grade and quality issues that arise under federal law are not likely to be present in Unfair Practices Act cases because of the narrow scope of the locality discrimination prohibition. For example, a seller who sells both premium and private label products may be said to be "discriminating" in price if the products are physically identical. This may be significant under statutes such as the Robinson-Patman Act that prohibit discriminatory sales to different customers. However, if two items separately labeled are sold at different prices, and the price differential is the same at both or all locations, it is difficult to find a locality discrimination.

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 33, *California Judicial Council Unfair Practices Act Instructions*]:

CACI No. 3300 Locality Discrimination--Essential Factual Elements

CACI No. 3330 Affirmative Defense to Locality Discrimination Claim--Cost Justification

CACI No. 3331 Affirmative Defense to Locality Discrimination, Below Cost Sales, and Loss Leader Sales Claims--Closed-out, Discontinued, Damaged, or Perishable Items

CACI No. 3332 Affirmative Defense to Locality Discrimination, Sales Below Cost, Loss Leader Sales, and Secret Rebates--Functional Classifications

CACI No. 3333 Affirmative Defense Locality Discrimination, Sales Below Cost, and Loss Leader Sales Claims--Meeting Competition

CACI No. 3334 Affirmative Defense to Locality Discrimination Claim--Manufacturer Meeting
Downstream Competition

Legal Topics:

For related research and practice materials, see the following legal topics:

Antitrust & Trade LawTrade Practices & Unfair CompetitionState RegulationClaimsAntitrust & Trade LawTrade
Practices & Unfair CompetitionState RegulationCoverageCivil ProcedureTrialsJury TrialsJury InstructionsStandard
InstructionsTortsBusiness TortsUnfair Business PracticesElements

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CHAPTER 33A Matthew Bender Unfair Competition Instructions

PART A. UNFAIR PRACTICES ACT

1. Definitional and Burden of Proof Instructions

5-33A California Forms of Jury Instruction MB 3300A.12

MB 3300A.12 Liability for Sales Below Cost--Presumption of Intent Claimed to Arise From Proof of "Injurious Effect"

[1] Instruction Liability for Sales Below Cost--Presumption of Intent Claimed to Arise From Proof of "Injurious Effect"

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Plaintiff claims that Defendant is liable to it for unlawful sales below cost. To prove that Defendant has unlawfully sold _____ [specify article or product] below cost, Plaintiff must first prove that Defendant sold _____ [specify article or product] at less than [his/her/its] cost.

If you find that Plaintiff has proved that Defendant has sold below cost, then you must consider whether Defendant acted with an unlawful purpose or intent. For purposes of Plaintiff's claim that Defendant has unlawfully sold _____ [specify article or product] below cost, unlawful purpose or intent means the purpose or intent to injure competitors or to destroy competition.

[EITHER (See Use of Instruction)]

If in addition to proving Defendant's sale below cost, Plaintiff has also proved that Defendant's sales below cost had an injurious effect, for example by _____ [specify injurious effect (see Use of Instruction)], then Defendant must prove that [he/she/it] did not act with the purpose or intent to injure competitors or destroy competition. If, however, you find that Plaintiff has not proved that Defendant's sales produced an injurious effect, then it is Plaintiff who must prove that Defendant acted with the purpose or intent to injure competitors or destroy competition.

[OR]

Because Defendant _____ [*specify proved or admitted fact that justifies presumption of intent to injure competitors or to destroy competition, e.g., sold _____ (specify product) below cost*], **Defendant must prove that [he/she/it] did not act with the purpose or intent to injure competitors or to destroy competition.**

Authorities: *Bus. & Prof. Code §§ 17043, 17071; William Inglis & Sons v. Continental Baking (9th Cir. 1991) 942 F.2d 1332, 1338 ; Dooley's Hardware Mart v. Food Giant Mkts., Inc. (1971) 21 Cal.App.3d 513, 98 Cal.Rptr. 543 .*

[2] Use of Instruction

This instruction should be used in a case when the plaintiff alleges that below-cost sales have produced an injurious effect and that the presumption of intent found in *Bus. & Prof. Code § 17071* is therefore applicable. Although the term "injurious effect" is not defined by statute, there is some case authority on the subject. In this instruction, the precise nature of the injurious effect should be described. For further discussion of "injurious effect," see *MB 3300A.07[3]*.

LexisNexis Matthew Bender Expert Practice Tip--Diversion of Business Constitutes Injurious Effect: The "injurious effect" can be the diversion of business from plaintiff to defendant [see *MB 3300A.07[3]*]. Once this is established, there is a presumption that defendant intended to destroy or damage competition. *By Ronald Oster*

This instruction concludes with two alternative paragraphs on the burden of proving unlawful intent. If the facts supporting the presumption of intent under *Bus. & Prof. Code § 17071* are in dispute, counsel should use the first alternative paragraph. If the facts underlying the presumption are not disputed, counsel should use the second alternative paragraph, which places the burden on the defendant to prove that there was no unlawful intent.

LexisNexis Matthew Bender Expert Practice Tip--Spend Time on Your Argument: This instruction will be challenging for some jurors to understand or apply. Consequently, the related closing argument should be as clear as possible. *By Rex Heeseman*

[3] Comment

[a] Below-Cost Selling

This instruction applies the *Bus. & Prof. Code § 17071* presumption of intent to a case involving an allegation of below-cost selling. The questions presented are similar to those raised by application of the presumption to claims of loss leader activity and locality discrimination, particularly in the area of what constitutes an injurious effect [see *MB 3300A.07[3]* (loss leader), *MB 3300A.09[3]* (locality discrimination)]. As is the case with a plaintiff asserting a loss leader claim under *Bus. & Prof. Code § 17044*, a plaintiff attempting to prove below-cost sales will be required to prove that the defendant sold below cost as an element of its case. Sales below cost or sales at discriminatory prices plus an injurious effect are the underlying facts necessary for the application of the *Bus. & Prof. Code § 17071* presumption.

The California Supreme Court held that to violate *Bus. & Prof. Code § 17043*, a company must act with the purpose, i.e., the desire, of injuring competitors or destroying competition [*Cel-Tech Commc'ns Inc. v. Los Angeles Cellular (1999) 20 Cal.4th 163, 174-175, 83 Cal.Rptr.2d 548, 973 P.2d 527 ; see Ch. 33, California Judicial Council Unfair Practices Act Instructions, CACI No. 3302*].

For a more complete discussion of the *Bus. & Prof. Code § 17071* presumption of intent, see *MB 3300A.07[3]*. As discussed in *MB 3300A.07[3]*, no case has expressly decided whether the presumption created by *Bus. & Prof. Code §*

17071 affects the burden of persuasion or affects the burden of producing evidence, although one court of appeal held that the similar presumption in *Bus. & Prof. Code* § 17071.5 (discussed in MB 3300A.08[3], MB 3300A.13[3]) affects the burden of persuasion [see *Dooley's Hardware Mart v. Food Giant Mkts., Inc.* (1971) 21 Cal.App.3d 513, 517-518, 98 Cal.Rptr. 543]. This instruction is based on the assumption that the presumption under *Bus. & Prof. Code* § 17071 affects the burden of persuasion. However, as discussed in MB 3300A.07[3], if the presumption created by *Bus. & Prof. Code* § 17071 affects the burden of producing evidence, as suggested by the language of some cases [see *People v. Pay Less Drug Store* (1944) 25 Cal.2d 108, 114, 153 P.2d 9 ; *Western Union Fin. Servs., Inc. v. First Data Corp.* (1993) 20 Cal.App.4th 1530, 1540, 25 Cal.Rptr.2d 341], then this instruction would not be appropriate.

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 33, *California Judicial Council Unfair Practices Act Instructions*]:

CACI No. 3301 Below Cost Sales--Essential Factual Elements

CACI No. 3302 Loss Leader Sales--Essential Factual Elements

CACI No. 3303 Definition of "Cost"

CACI No. 3304 Presumptions Concerning Costs--Manufacturer

CACI No. 3305 Presumptions Concerning Costs--Distributor

CACI No. 3306 Methods of Allocating Costs to an Individual Product

CACI No. 3331 Affirmative Defense to Locality Discrimination, Below Cost Sales, and Loss Leader Sales Claims--Closed-out, Discontinued, Damaged, or Perishable Items

CACI No. 3332 Affirmative Defense to Locality Discrimination, Sales Below Cost, Loss Leader Sales, and Secret Rebates--Functional Classifications

CACI No. 3333 Affirmative Defense Locality Discrimination, Sales Below Cost, and Loss Leader Sales Claims--Meeting Competition

Legal Topics:

For related research and practice materials, see the following legal topics:

Antitrust & Trade Law Trade Practices & Unfair Competition State Regulation Claims Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Evidence Inferences & Presumptions Exceptions Statutory Presumptions Torts Business Torts Unfair Business Practices Elements

Robert F. Freitas and Janet L. Boche contributed to the original chapter for California Forms of Jury Instruction (Matthew Bender). The Honorable Gerald J. Lewis was consultant to the original chapter.



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CHAPTER 33A Matthew Bender Unfair Competition Instructions

PART A. UNFAIR PRACTICES ACT

1. Definitional and Burden of Proof Instructions

*5-33A California Forms of Jury Instruction MB 3300A.13***MB 3300A.13 Liability for Sales Below Cost--Presumption of Intent Claimed to Arise From Proof of Limited Sales Below Invoice or Replacement Cost**

[1] Instruction Liability for Sales Below Cost--Presumption of Intent Claimed to Arise From Proof of Limited Sales Below Invoice or Replacement Cost

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Plaintiff claims that Defendant is liable to [him/her/it] for unlawful sales below cost. To prove that Defendant has unlawfully sold _____ [specify article or product] below cost, Plaintiff must first prove that Defendant sold _____ [specify article or product] at less than [his/her/its] cost.

If you do find that Plaintiff has proved that Defendant engaged in sales below cost, then you must determine whether Plaintiff has proved both of the following:

- 1. That Defendant sold at a price less than [his/her/its] invoice cost or replacement cost, whichever is lower; and**
- 2. That Defendant limited sales at that price, to any customer, to less than the entire quantity of the _____ [specify article or product] Defendant owned, possessed, or was otherwise authorized to sell at _____ [specify place of sale].**

Unless Plaintiff has proved *both* that Defendant sold below invoice or replacement cost, whichever is lower, and that Defendant limited sales at that price, to any one customer, to less than *all* of the _____ [specify article or product] that [he/she/it] owned or possessed or was authorized to sell, Plaintiff must go on to prove that Defendant sold below cost with "unlawful intent." That is, Plaintiff must prove that Defendant sold below cost with the purpose or intent to injure competitors or destroy competition. If, however, Plaintiff has

proved both that Defendant sold below invoice or replacement cost, whichever is lower, and that Defendant limited sales at that price, to any one customer, to less than all of the _____ [specify article or product] that [he/she/it] owned or possessed or was authorized to sell, it is Defendant who must prove that [he/she/it] did not sell with the purpose or intent to injure competitors or destroy competition.

Authorities: *Bus. & Prof. Code §§ 17043, 17071.5; Dooley's Hardware Mart v. Food Giant Mkts., Inc. (1971) 21 Cal.App.3d 513, 517-518, 98 Cal.Rptr. 543 .*

[2] Use of Instruction

This instruction should be used in a below cost selling case when the plaintiff alleges that a retailer defendant has sold below invoice or replacement cost and has limited the quantity of its sales at the challenged price. These underlying facts give rise to the *Bus. & Prof. Code § 17071.5* presumption of intent to injure competitors or destroy competition.

LexisNexis Matthew Bender Expert Practice Tip--Spend Time on Your Argument: This instruction will be challenging for some jurors to understand or apply. Consequently, the related closing argument should be as clear as possible. *By Rex Heeseman*

[3] Comment

[a] Below Cost Selling

This instruction applies the *Bus. & Prof. Code § 17071.5* presumption of intent to a case involving an allegation of below cost selling. The questions presented are similar to those raised by application of the presumption to claims of loss leader activity and locality discrimination [see *MB 3300A.08* (loss leader), *MB 3300A.10* (locality discrimination)].

The California Supreme Court held that to violate *Bus. & Prof. Code § 17043*, a company must act with the purpose, *i.e.*, the desire, of injuring competitors or destroying competition [*Cel-Tech Commc'ns Inc. v. Los Angeles Cellular* (1999) 20 Cal.4th 163, 174-175, 83 Cal.Rptr.2d 548, 973 P.2d 527 ; see Ch. 33, *California Judicial Council Unfair Practices Act Instructions*, *CACI No. 3302*].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 33, *California Judicial Council Unfair Practices Act Instructions*]:

CACI No. 3301 Below Cost Sales--Essential Factual Elements

CACI No. 3302 Loss Leader Sales--Essential Factual Elements

CACI No. 3303 Definition of "Cost"

CACI No. 3304 Presumptions Concerning Costs--Manufacturer

CACI No. 3306 Methods of Allocating Costs to an Individual Product

CACI No. 3331 Affirmative Defense to Locality Discrimination, Below Cost Sales, and Loss Leader Sales Claims--Closed-out, Discontinued, Damaged, or Perishable Items

CACI No. 3332 Affirmative Defense to Locality Discrimination, Sales Below Cost, Loss Leader Sales, and Secret Rebates--Functional Classifications

CACI No. 3333 Affirmative Defense Locality Discrimination, Sales Below Cost, and Loss Leader

Sales Claims--Meeting Competition

Legal Topics:

For related research and practice materials, see the following legal topics:

Antitrust & Trade Law Trade Practices & Unfair Competition State Regulation Claims Civil Procedure Trials Jury
Trials Jury Instructions Standard Instructions Evidence Inferences & Presumptions Exceptions Statutory
Presumptions Torts Business Torts Unfair Business Practices Elements

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CHAPTER 33A Matthew Bender Unfair Competition Instructions

PART A. UNFAIR PRACTICES ACT

1. Definitional and Burden of Proof Instructions

5-33A California Forms of Jury Instruction MB 3300A.14

MB 3300A.14 Liability for Secret Rebates or Privileges**[1] Instruction** Liability for Secret Rebates or Privileges[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Plaintiff claims that Defendant is liable for unlawful _____ [either: payment of secret rebates or secret extension of special services or privileges]. To prove [his/her/its] claim, Plaintiff must prove all of the following:

- 1. That Defendant _____ [specify, e.g. , made a secret payment or allowance of a rebate] not extended to all of those purchasing under similar terms and conditions;**
- 2. That the _____ [specify, e.g., payment] had a tendency to destroy competition; and**
- 3. That the _____ [specify, e.g., payment] actually injured Plaintiff.**

Authorities: *Bus. & Prof. Code § 17045; ABC Int'l Traders, Inc. v. Matsushita* (1997) 14 Cal.4th 1247, 1256, 61 Cal.Rptr.2d 112, 931 P.2d 290 ; *Harris v. Capitol Records Distrib. Corp.* (1966) 64 Cal.2d 454, 463, 50 Cal.Rptr. 539, 413 P.2d 139 ; *Diesel Elec. Sales & Serv., Inc. v. Marco Marine San Diego, Inc.* (1993) 16 Cal.App.4th 202, 211-212, 20 Cal.Rptr.2d 62 ; *E & H Wholesale, Inc. v. Glaser Bros.* (1984) 158 Cal.App.3d 728, 733-735, 204 Cal.Rptr. 838 ; *G.H.I.I. v. MTS, Inc.* (1983) 147 Cal.App.3d 256, 271-272, 195 Cal.Rptr. 211 .

[2] Use of Instruction

This instruction should be used to provide the standard for liability for payment of secret rebates or other violations of *Bus. & Prof. Code § 17045*. The instruction should be used in conjunction with a general burden of proof instruction [

see Ch. 2, *California Judicial Council Evidence Instructions, CACI No. 200* ("Obligation to Prove--More Likely True Than Not True").

LexisNexis Matthew Bender Expert Practice Tip--Explain Concepts to Jury: The concept of a "rebate" or a "secret" something will be difficult for some jurors. Thus, this is another area where counsel should explain in closing argument why the practice is unlawful (i.e. the damage to competition). Otherwise, some jurors may conclude that rebates are just another way of lowering prices. *By Ronald Oster and Rex Heeseman*

[3] Comment

[a] Secret Rebates

Under existing case law, conduct violative of *Bus. & Prof. Code* § 17045 must be "secret" and satisfy the other elements of § 17045 [*ABC Int'l Traders, Inc. v. Matsushita* (1997) 14 Cal.4th 1247, 1267, 61 Cal.Rptr.2d 112, 931 P.2d 290 ; *Harris v. Capitol Records Distrib. Corp.* (1966) 64 Cal.2d 454, 463, 50 Cal.Rptr. 539, 413 P.2d 139 ; *E & H Wholesale, Inc. v. Glaser Bros.* (1984) 158 Cal.App.3d 728, 738, 204 Cal.Rptr. 838 ; *G.H.I.I. v. MTS, Inc.* (1983) 147 Cal.App.3d 256, 271-72, 195 Cal.Rptr. 211 ; see *Eddins v. Redstone* (2005) 134 Cal.App.4th 290, 331-336, 35 Cal.Rptr.3d 863 ("like terms and conditions" clause and secrecy element)]. *Bus. & Prof. Code* § 17045 also prohibits buyers from receiving special privileges just as it forbids sellers from granting them [*G.H.I.I. v. MTS, Inc.* (1983) 147 Cal.App.3d 256, 271-72, 195 Cal.Rptr. 211 ; see *Diesel Elec. Sales & Serv., Inc. v. Marco Marine San Diego, Inc.* (1993) 16 Cal.App.4th 202, 211-212, 20 Cal.Rptr.2d 62 (*Bus. & Prof. Code* § 17045 applies to competitive buyer who receives volume discount to which it is not entitled)]. Therefore, in an appropriate case the instruction should be modified to reflect a claim of receipt instead of payment of secret rebates or other payments.

The purpose of *Bus. & Prof. Code* § 17045 is to prevent a manufacturer or other supplier from discriminating among its customers [*ABC Int'l Traders, Inc. v. Matsushita* (1997) 14 Cal.4th 1247, 1267, 61 Cal.Rptr.2d 112, 931 P.2d 290 ; *Kunert v. Mission Fin. Servs. Corp.* (2003) 110 Cal.App.4th 242, 260, 1 Cal.Rptr.3d 589]. *Bus. & Prof. Code* § 17045 addresses secret payments from a seller to a purchaser. It therefore was not applicable to a lender's payment to a dealer of a "dealer reserve" on automobile conditional sales contracts (a purportedly secret payment that flowed from purchasers (lenders) to sellers (dealers)) [*Kunert v. Mission Fin. Servs. Corp.* (2003) 110 Cal.App.4th 242, 259-260, 1 Cal.Rptr.3d 589].

The protection of *Bus. & Prof. Code* § 17045 extends to competition in the secondary line of commerce as well as in the primary line. In other words, the destruction of "competition" referred to in the statute includes both competition among sellers of the particular good or service and economic competition among buyers [*ABC Int'l Traders, Inc. v. Matsushita* (1997) 14 Cal.4th 1247, 1268, 61 Cal.Rptr.2d 112, 931 P.2d 290 ; see *American Booksellers Ass'n, Inc. v. Barnes & Noble, Inc.* (N.D. Cal. 2001) 135 F.Supp.2d 1031, 1043 (defendants entitled to summary judgment because no injury to competitor shown); *Eddins v. Redstone* (2005) 134 Cal.App.4th 290, 339, 35 Cal.Rptr.3d 863 (whether secret rebate or discount has tendency to destroy competition is factual question that cannot be decided without regard to evidence of harm to competition in secondary line of commerce)]. In *ABC International Traders, Inc. v. Matsushita*, after examining the language, context, purposes, and history of § 17045, the California Supreme Court concluded that a disfavored buyer adequately pled a cause of action against a seller for violation of § 17045. The buyer alleged that the seller's secret discrimination through an allegedly unearned, secret 5 percent discount to two other buyers injured the buyer and tended to destroy competition among buyers [*ABC Int'l Traders, Inc. v. Matsushita* (1997) 14 Cal.4th 1247, 1254-1268, 61 Cal.Rptr.2d 112, 931 P.2d 290]. For purposes of § 17045, the Unfair Practices Act's price discrimination provision, competition is competition, whether among retailers, wholesalers, or producers [*ABC Int'l Traders, Inc. v. Matsushita* (1997) 14 Cal.4th 1247, 1262, 61 Cal.Rptr.2d 112, 931 P.2d 290].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 33, *California Judicial Council Unfair Practices Act Instructions*]:

CACI No. 3320 Secret Rebates--Essential Factual Elements

CACI No. 3321 Secret Rebates--Definition of "Secret"

CACI No. 3332 Affirmative Defense to Locality Discrimination, Sales Below Cost, Loss Leader Sales, and Secret Rebates--Functional Classifications

Legal Topics:

For related research and practice materials, see the following legal topics:

Antitrust & Trade Law Trade Practices & Unfair Competition State Regulation Claims Antitrust & Trade Law Trade Practices & Unfair Competition State Regulation Coverage Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Torts Business Torts Unfair Business Practices Elements

Robert F. Freitas and Janet L. Boche contributed to the original chapter for California Forms of Jury Instruction (Matthew Bender). The Honorable Gerald J. Lewis was consultant to the original chapter.



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CHAPTER 33A Matthew Bender Unfair Competition Instructions

PART A. UNFAIR PRACTICES ACT

1. Definitional and Burden of Proof Instructions

5-33A California Forms of Jury Instruction MB 3300A.15

MB 3300A.15 Liability for Effecting Violation of the Unfair Practices Act Through Threats, Intimidation, or Boycotts
[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Plaintiff claims that Defendant is liable for unlawful _____ [specify e.g., boycotts] with the intent to carry out unlawful _____ [specify type of violation]. To prove that Defendant is liable for unlawful _____ [specify, e.g., boycotts], Plaintiff must prove that Defendant engaged in a _____ [specify, e.g., boycott] and that Defendant did so for the purpose of carrying out unlawful _____ [specify type of violation].

Authorities: *Bus. & Prof. Code § 17046; Chicago Title Ins. Co. v. Great W. Fin. Corp. (1968) 69 Cal.2d 305, 324-325, 70 Cal.Rptr. 849, 444 P.2d 481 .*

[2] Use of Instruction

This instruction should be used to define the standard of liability in the rare case when damages are sought for threats, intimidations, or boycotts used "to effectuate a violation of" the Unfair Practices Act. The instruction should be used with a general burden of proof instruction [see Ch. 2, *California Judicial Council Evidence Instructions, CACI No. 200* ("Obligation to Prove--More Likely True Than Not True")].

[3] Comment

Bus. & Prof. Code § 17046 is a statute designed to impose liability on those who would assist or collude in violations of the Unfair Practices Act through boycotts or threatening conduct. However, damage liability under *Bus. & Prof.*

Code § 17046 should be rare. Threatening conduct or boycotting is prohibited by the statute only when it is undertaken to effectuate a violation of the Unfair Practices Act [*Chicago Title Ins. Co. v. Great W. Fin. Corp.* (1968) 69 Cal.2d 305, 324-25, 70 Cal.Rptr. 849, 444 P.2d 481 (boycott)]. Although it may be expected that the occurrence of activities of this type designed to effectuate statutory violations of the Act will not be uncommon, the class of cases in which threats, intimidations, or boycotts designed to effectuate Unfair Practices Act violations would cause damage seems not to be large. In most situations, any injury that would occur would be the product of the underlying violation, rather than the threat or intimidation designed to make it possible. When that is the case, liability may still be imposed on one who aids a violation of the Act under *Bus. & Prof. Code § 17048*.

However, it is less difficult to imagine boycotts designed to effectuate violations of the Unfair Practices Act that would cause damage independent of the damage caused by the violation. In many boycott situations, however, a plaintiff will choose to rely on the Cartwright Act [*Bus. & Prof. Code § 16700 et seq.*] or Sherman Act [15 U.S.C.S. § 1 *et seq.*] prohibitions on certain types of boycotts [see *Marin County Bd. of Realtors, Inc. v. Palsson* (1976) 16 Cal.3d 920, 930-937, 130 Cal.Rptr. 1, 549 P.2d 833].

Legal Topics:

For related research and practice materials, see the following legal topics:

Antitrust & Trade Law Trade Practices & Unfair Competition State Regulation Claims Antitrust & Trade Law Trade Practices & Unfair Competition State Regulation Coverage Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Torts Business Torts Unfair Business Practices Elements

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CHAPTER 33A Matthew Bender Unfair Competition Instructions

PART A. UNFAIR PRACTICES ACT

1. Definitional and Burden of Proof Instructions

5-33A California Forms of Jury Instruction MB 3300A.16

MB 3300A.16 Liability for Joint Participation in or Collusive Violation of Unfair Practices Act**[1] Instruction**

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Plaintiff claims that Defendant is liable for participating or colluding in _____ *[name of primary defendant]* **'s alleged unlawful** _____ *[specify, e.g., secret rebates]*. **To prove [his/her/its] claim, Plaintiff must prove that** _____ *[name of primary defendant]* **engaged in unlawful** _____ *[specify, e.g., rebates], and that Defendant knew of* _____ *[name of primary defendant]* **'s purpose in unlawfully** _____ *[specify, e.g., giving secret rebates]* **and [participated or colluded] in** _____ *[name of primary defendant]* **'s conduct and shared [his/her/its] purpose.**

Authorities: *Bus. & Prof. Code § 17048; Harris v. Capitol Records Distrib. Corp. (1966) 64 Cal.2d 454, 462-463, 50 Cal.Rptr. 539, 413 P.2d 139 .*

[2] Use of Instruction

This instruction should be used when co-conspirator liability is asserted against a person or entity other than a director, officer, or agent of the defendant alleged to have violated the Unfair Practices Act. The instruction should be used with a general burden of proof instruction [see Ch. 2, *California Judicial Council Evidence Instructions, CACI No. 200* ("Obligation to Prove--More Likely True Than Not True")].

LexisNexis Matthew Bender Expert Practice Tip --Using MB 3300A . 16: This instruction applies to third parties who are not officers, directors, or agents of the primary defendant. In addition, the term "participated" is better than the term "colluded," which could be confusing. *By Ronald Oster*

LexisNexis Matthew Bender Expert Practice Tip--Spend Time on Your Closing: "Secret rebates" and "collusive practices" are challenging to explain. Thus, the closing argument must carefully address the related facts. *By Rex Heeseman*

[3] Comment

Bus. & Prof. Code § 17048 contains no express intent requirement, and there are no cases directly holding what intent must be shown to render a "participant" or "colluder" liable. However, in *Harris v. Capitol Records Distributing Corp.*, the California Supreme Court stated that more than proof that the defendant "had reason to know" of another's unlawful plans is needed. Instead, the defendant "must share a common purpose" with the other [*Harris v. Capitol Records Distrib. Corp.* (1966) 64 Cal.2d 454, 462, 50 Cal.Rptr. 539, 413 P.2d 139]. This language could be read to require proof that the allegedly colluding party acted with the intent necessary to prove a violation of the Unfair Practices Act of the type in question.

An intent requirement would mean, however, that the statutory standard for liability would be more restrictive than the generally applicable standard for co-conspirator liability. Under that standard all "who concurred in the tortious scheme with knowledge of its unlawful purpose" are liable [*Wyatt v. Union Mortgage Co.* (1979) 24 Cal.3d 773, 784, 157 Cal.Rptr. 392, 598 P.2d 45]. Given the purposes of the Unfair Practices Act, and the statutory requirement of liberal interpretation [see *Bus. & Prof. Code § 17002*], it seems appropriate that the standard for co-conspirator liability be no more restrictive. It therefore seems most likely that the courts will require that a co-conspirator have knowledge of the primary actor's unlawful purpose and expressly or tacitly join in the scheme involving a violation of the Unfair Practices Act.

Legal Topics:

For related research and practice materials, see the following legal topics:

Antitrust & Trade Law Trade Practices & Unfair Competition State Regulation Claims Antitrust & Trade Law Trade Practices & Unfair Competition State Regulation Coverage Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Torts Business Torts Unfair Business Practices Elements

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CHAPTER 33A Matthew Bender Unfair Competition Instructions

PART A. UNFAIR PRACTICES ACT

1. Definitional and Burden of Proof Instructions

5-33A California Forms of Jury Instruction MB 3300A.17-MB 3300A.29

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CHAPTER 33A Matthew Bender Unfair Competition Instructions

PART A. UNFAIR PRACTICES ACT

2. Defenses

5-33A California Forms of Jury Instruction MB 3300A.30

MB 3300A.30 Defenses for Close-Out Sales, and Sales of Seasonal or Damaged Goods**[1] Instruction**

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Defendant claims as one of its defenses to Plaintiff's claim of unlawful _____ [specify, e.g., below cost sales] that it is not liable because its sale was a _____ [specify, e.g., close out sale or sale of seasonal goods or sale to prevent loss by spoilage or sale of damaged goods]. To prove this defense, Defendant must prove:

[CHOOSE FROM THE FOLLOWING (See Use of Instruction)]

That the _____ [specify, e.g., below cost sale] was made by Defendant in closing out its stock of _____ [specify article or product] in good faith for the purpose of discontinuing its business in that item.

[OR]

That the _____ [specify, e.g., sale below cost] was made to prevent a loss because of a change in the season for _____ [specify article or product].

[OR]

That the _____ [*specify, e.g., sale below cost*] was made to prevent loss by spoilage of _____ [*specify article or product*].

[OR]

That the _____ [*specify articles or products*] that Defendant _____ [*sold or gave away*] were damaged or deteriorated.

In addition, Defendant must also prove:

1. That notice of the fact that the sale was a _____ [*close out sale or sale of seasonal goods or sale of perishable goods or sale of damaged goods*] was given to the public, and the _____ [*specify articles or products*] were kept separate from Defendant's other _____ [*specify e.g., stock*] and were clearly and legibly marked with the reason for the sale; and

2. If Defendant advertised the _____ [*specify, e.g., close out sale*], that Defendant's advertisements stated the reason for the sale and the number of items to be sold.

Authority: Bus. & Prof. Code § 17050.

[2] Use of Instruction

This instruction should be used to instruct the jury on the defendant's burden of proof on the various defenses for sales of close outs, seasonal goods, perishable goods, and damaged goods under *Bus. & Prof. Code § 17050*.

[3] Comment

[a] Defenses for Close-Out Sales, and Sales of Seasonal or Damaged Goods

This instruction provides the standards for defenses to the locality discrimination, sales below cost, and loss leader prohibitions of the Unfair Practices Act for close out sales, and sales of seasonable, perishable, or damaged goods. The defenses will often be closely related to the defendant's efforts to negate plaintiff's claim that the defendant acted with the intent required to show a violation of the Unfair Practices Act. It is unlikely that a close out sale, for example, would be made "to injure competitors or destroy competition." Evidence that goods were sold to close out stock would generally negate the existence of an intent to harm competitors or competition and thus preclude establishment of the plaintiff's case.

There is thus a possibility of confusion from the assertion of these defenses. The plaintiff has the burden of proving that the defendant acted with the proscribed intent, while the defendant has the burden of proving its entitlement to one or more of the *Bus. & Prof. Code § 17050* defenses. Often, the plaintiff will be able to shift the burden to the defendant through one or both of the statutory presumptions of intent [*see Bus. & Prof. Code §§ 17070, 17071.5*]. However, when no presumption is available, the parties will have conflicting burdens of proof (the plaintiff to show wrongful intent, the defendant to show entitlement to a defense) on matters often controlled by the same evidence. Counsel, particularly defense counsel, should therefore take care in presenting and arguing their cases to avoid confusion on the burden of proof.

LexisNexis Matthew Bender Expert Practice Tip--Defenses: If plaintiff can establish that sales were made "below cost," then defendant will have to rely on one of these defenses, or the "meeting competition" defense [*see MB 3300A.31*]. Note the requirement in the above instruction that the goods in

question be separated and identified. *By Ronald Oster*

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 33, *California Judicial Council Unfair Practices Act Instructions*]:

CACI No. 3301 Below Cost Sales--Essential Factual Elements

CACI No. 3302 Loss Leader Sales--Essential Factual Elements

CACI No. 3303 Definition of "Cost"

CACI No. 3304 Presumptions Concerning Costs--Manufacturer

CACI No. 3305 Presumptions Concerning Costs--Distributor

CACI No. 3306 Methods of Allocating Costs to an Individual Product

CACI No. 3331 Affirmative Defense to Locality Discrimination, Below Cost Sales, and Loss Leader Sales Claims--Closed-out, Discontinued, Damaged, or Perishable Items

Legal Topics:

For related research and practice materials, see the following legal topics:

Antitrust & Trade Law Trade Practices & Unfair Competition State Regulation Claims Antitrust & Trade Law Trade Practices & Unfair Competition State Regulation Coverage Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Torts Business Torts Unfair Business Practices Defenses

Robert F. Freitas and Janet L. Boche contributed to the original chapter for California Forms of Jury Instruction (Matthew Bender). The Honorable Gerald J. Lewis was consultant to the original chapter.



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California Forms of Jury Instruction

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CHAPTER 33A Matthew Bender Unfair Competition Instructions

PART A. UNFAIR PRACTICES ACT

2. Defenses

5-33A California Forms of Jury Instruction MB 3300A.31

MB 3300A.31 Defense of Meeting Competition**[1] Instruction**

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Defendant claims as one of its defenses that it is not liable for _____ [specify, e.g., sales below cost] because its actions were intended in good faith to meet prices offered by _____ [name(s) of competitor(s)]. This defense is known as the meeting competition defense.

To prove this defense, Defendant must prove that [his/her/its] _____ [specify, e.g., sale] was made in a good faith attempt to meet, but not beat, the lawful price of _____ [name(s) of competitor(s)] in the same area for articles that were the same or similar or comparable, and that were sold in the ordinary channels of trade.

Authorities: *Bus. & Prof. Code* § 17050(d),(e); *Falls City Indus. v. Vanco Beverage* (1983) 460 U.S. 428, 446, 103 S.Ct. 1282, 75 L.Ed.2d 174 ; *United States v. United States Gypsum Co.* (1978) 438 U.S. 422, 453-454, 98 S.Ct. 2864, 57 L.Ed.2d 854 ; *Standard Oil Co. v. Federal Trade Comm'n* (1951) 340 U.S. 231, 241-243, 71 S.Ct. 240, 95 L.Ed. 239 ; *People v. Pay Less Drug Store* (1944) 25 Cal.2d 108, 114, 153 P.2d 9 ; *E & H Wholesale, Inc. v. Glaser Bros.* (1984) 158 Cal.App.3d 728, 736-739, 204 Cal.Rptr. 838 ; *Northern Cal. Food Dealers, Inc. v. Farmers Mkt. of N. Cal., Inc.*, 1956 Tr. Cas. § 68,402 (Super. Ct., Sacramento County 1956).

[2] Use of Instruction

This instruction should be used to define the meeting competition defense available to a seller who acts in good faith to meet the equally low price of a competitor. It must be used in conjunction with the instruction in MB 3300A.32, which defines "good faith."

LexisNexis Matthew Bender Expert Practice Tip--Caution! "Competition" often means different things to different jurors. *By Rex Heeseman*

[3] Comment

[a] Nature of Competitor's Products

Bus. & Prof. Code § 17050(d) provides a meeting competition defense to a seller who attempts in good faith to meet the price of a competitor who sells the "same" article or product *see also* [*Bus. & Prof. Code § 17040* (meeting competition exception to locality discrimination stating "Nothing in this section prohibits the meeting in good faith of a competitive price")]. *Bus. & Prof. Code § 17050(e)* also provides a meeting competition defense to certain defendants when the "same or a similar or comparable" article or product is sold by a competitor. In *Northern California Food Dealers, Inc. v. Farmers Market of Northern California, Inc.*, the court resolved the anomalous difference in the statutory language by interpreting the word "same" in § 17050(d) in a broad fashion that includes "similar" or "comparable." As the court noted, a limitation of the *Bus. & Prof. Code § 17050(d)* defense to cases in which the defendant sought to meet a price offered for the identical brand it sold would render the defense useless in a circumstance when it would commonly be important, i.e., when the seller, particularly a small retailer competing with large chain sellers of private label products, sought to meet prices offered by competitors for brands that were competitive with its brands [*Northern Cal. Food Dealers, Inc. v. Farmers Mkt. of N. Cal., Inc.*, 1956 Tr. Cas. § 68,402, 71,726-27 (Super. Ct., Sacramento County 1956)]. The court declined to conclude that the Legislature intended so to limit the defense. The appellate courts have not addressed the difference in the statutory language.

The question presented by the comparison of the defendant's products with those of its competitors is different from the comparison of the defendant's own products in the context of locality discrimination [*see* Ch. 33, *California Judicial Council Unfair Practices Act Instructions*, CACI No. 3300]. As indicated by the reference in *Bus. & Prof. Code § 17050(e)* to "similar" or "comparable" products, the standard for inter-seller product comparison is less rigorous [*see, e.g., Callaway Mills Co. v. Federal Trade Comm'n* (5th Cir. 1966) 362 F.2d 435, 440-441]. Thus, a defendant seeking to rely on the meeting competition defense need not prove that its products are physically identical to those of the competitors whose prices are met. It is sufficient that the competitors' products and the defendant's products are in a competitive relationship.

[b] "Meet Not Beat" and Lawful Price Limitations on Defense

Federal cases interpreting the meeting competition defense afforded by § 2(b) of the Robinson-Patman Act [15 U.S.C.S. § 13(b)] should be helpful in interpreting the similar defenses provided by the Unfair Practices Act. For example, both federal and California cases seem to agree, in accordance with similar statutory language, that a seller is allowed to "meet not beat" competitive prices [*Falls City Indus. v. Vanco Beverage* (1983) 460 U.S. 428, 446, 103 S.Ct. 1282, 75 L.Ed.2d 174 ; *United States v. United States Gypsum Co.* (1978) 438 U.S. 422, 454, 98 S.Ct. 2864, 57 L.Ed.2d 854 ; *E & H Wholesale, Inc. v. Glaser Bros.* (1984) 158 Cal.App.3d 728, 738-739, 204 Cal.Rptr. 838]. The state and federal statutes also similarly provide a defense only when the price to be met is a "lawful" price [*Bus. & Prof. Code § 17050(d)*; *Standard Oil Co. v. Federal Trade Comm'n* (1951) 340 U.S. 231, 246, 71 S.Ct. 240, 95 L.Ed. 239]. However, a seller is not held to an absolute standard on either of these subjects [*see* [d], *below*, and MB 3300A.33[3]].

Although the Unfair Practices Act closely parallels the Robinson-Patman Act, and is based on the same policy considerations, it is not the same. Because the Unfair Practices Act is not a clone of the Robinson-Patman Act, courts cannot apply a "meeting competition" defense that does not exist under the Unfair Practices Act merely because the Robinson-Patman Act provides that defense [*see Eddins v. Redstone* (2005) 134 Cal.App.4th 290, 340-341, 35 Cal.Rptr.3d 863].

There is no "meeting competition" defense to a *Bus. & Prof. Code § 17045* violation (secret rebates and privileges) [

Eddins v. Redstone (2005) 134 Cal.App.4th 290, 339, 35 Cal.Rptr.3d 863 ; see also *Diesel Elec. Sales & Serv., Inc. v. Marco Marine San Diego, Inc.* (1993) 16 Cal.App.4th 202, 218, 20 Cal.Rptr.2d 62 ; see generally MB 3300A.14]. However, the meeting of a competitor's pricing may disprove the existence of one of the elements of a § 17045 violation--that is, the element of a tendency to destroy competition may not exist if there is merely a legitimate meeting of a competitor's pricing [see *Eddins v. Redstone* (2005) 134 Cal.App.4th 290, 339, 35 Cal.Rptr.3d 863 ; see also *Diesel Elec. Sales & Serv., Inc. v. Marco Marine San Diego, Inc.* (1993) 16 Cal.App.4th 202, 218, 20 Cal.Rptr.2d 62 ; see generally MB 3300A.14].

[c] Gaining New Business and Multiple Customer Pricing

One dispute resolved by the United States Supreme Court under federal law will also probably be resolved in the same manner under the Unfair Practices Act. Before the Supreme Court's decision in *Falls City Industries v. Vanco Beverage* [*Falls City Indus. v. Vanco Beverage* (1983) 460 U.S. 428, 103 S.Ct. 1282, 75 L.Ed.2d 174], there was some disagreement as to whether the meeting competition defense was available to a seller who sought to gain new business, rather than to retain existing customers. *Falls City* held that the defense is available in either situation [*Falls City Indus. v. Vanco Beverage* (1983) 460 U.S. 428, 446, 103 S.Ct. 1282, 75 L.Ed.2d 174].

Another important question resolved in *Falls City* involved a dispute over whether the defense is limited to prices offered to specific customers to whom competitive offers have been made, or whether a seller may take advantage of the defense to justify more general, e.g., state-wide, pricing. The Supreme Court held that a seller may invoke the defense even if its competitive pricing is not customer specific, so long as the pricing it adopts is "a genuine, reasonable response to prevailing competitive circumstances," and otherwise satisfies the statutory requirements for the defense [*Falls City Indus. v. Vanco Beverage* (1983) 460 U.S. 428, 450-451, 103 S.Ct. 1282, 75 L.Ed.2d 174]. In other words, if a reasonable person in the seller's position would believe that a price offered by a competitor to one customer or group of customers was generally available to all buyers in a given area or to other groups of customers, it may adjust its prices accordingly. However, across the board pricing not justified by the reasonably perceived scope of the competitor's offer will not satisfy the good faith test [*Falls City Indus. v. Vanco Beverage* (1983) 460 U.S. 428, 450-451, 103 S.Ct. 1282, 75 L.Ed.2d 174 ; see also *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.* (9th Cir. 1981) 668 F.2d 1014, 1045-1046]. The case for the *Falls City* interpretation may be even stronger under the Unfair Practices Act, in light of a slight variation in the statutory language. The Robinson-Patman Act defense is available to meet "an equally low price of a competitor" [15 U.S.C.S. § 13(b)], while the Unfair Practices Act authorizes the good faith meeting of "the legal prices of a competitor" [Bus. & Prof. Code § 17050(d)].

[d] Good Faith

An additional important feature of the federal defense is also applicable under the Unfair Practices Act. The Robinson-Patman Act defense is available when the seller makes a discriminatory sale "in good faith to meet" a competitive offering [15 U.S.C.S. § 13(b)]. Similarly, the Unfair Practices Act allows "an endeavor made in good faith to meet" a competitor's price [Bus. & Prof. Code § 17050(d)]. The United States Supreme Court made clear that the good faith language does not require that a seller be absolutely certain that a competitor has offered the price to be met, or that its price will not actually beat the competitor's price [*United States v. United States Gypsum Co.* (1978) 438 U.S. 422, 453-454, 98 S.Ct. 2864, 57 L.Ed.2d 854]. The seller must act on the basis of facts that would lead a reasonable person to believe that the challenged price would meet a competitor's price, and must act for the purpose of meeting that price [*Falls City Indus. v. Vanco Beverage* (1983) 460 U.S. 428, 451, 103 S.Ct. 1282, 75 L.Ed.2d 174]. If these requirements are met, the seller has a defense even if it actually exceeds a competitor's price. The California courts appear to follow this same approach [*People v. Pay Less Drug Store* (1944) 25 Cal.2d 108, 117, 153 P.2d 9].

The meeting competition defense may lead to confusion of the type that may result from assertion of the close-out sale defense. Again, the evidence showing that the seller was attempting to meet a competitive price may also negate the existence of an unlawful intent. When the statutory presumptions of intent are not available, the parties will have

conflicting burdens of proof (the plaintiff to show wrongful intent, the defendant to show entitlement to a defense) on matters often controlled by the same evidence. Counsel, particularly defense counsel, should therefore take care in presenting and arguing their cases to avoid confusion on the burden of proof.

[e] Meeting Competition by Manufacturers

No cases have interpreted the separately stated meeting competition defense provided by *Bus. & Prof. Code § 17050(e)*. Section 17050(e) provides a defense to a "manufacturer, selling an article or product of his own manufacture" for sales to wholesalers or retailers for resale. A manufacturer, like any seller, would be entitled to the meeting competition defense under *Bus. & Prof. Code § 17050(d)* if it was competing with another manufacturer or seller for sales to the same customers. *Bus. & Prof. Code § 17050(e)* is thus apparently intended to make it clear that a manufacturer may meet competition in the form of low prices offered by another manufacturer to its dealers even if the manufacturer does not compete for sales to those dealers *compare* [*Federal Trade Comm'n v. Sun Oil Co. (1963) 371 U.S. 505, 83 S.Ct. 358, 9 L.Ed.2d 466* ; with *Bargain Car Wash, Inc. v. Standard Oil Co. (Ind.) (7th Cir. 1972) 466 F.2d 1163*].

[f] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 33, *California Judicial Council Unfair Practices Act Instructions*]:

CACI No. 3333 Affirmative Defense Locality Discrimination, Sales Below Cost, and Loss Leader Sales Claims--Meeting Competition

CACI No. 3334 Affirmative Defense to Locality Discrimination Claim--Manufacturer Meeting Downstream Competition

Legal Topics:

For related research and practice materials, see the following legal topics:

Antitrust & Trade Law Trade Practices & Unfair Competition State Regulation Claims Antitrust & Trade Law Trade Practices & Unfair Competition State Regulation Coverage Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Torts Business Torts Unfair Business Practices Defenses

Robert F. Freitas and Janet L. Boche contributed to the original chapter for California Forms of Jury Instruction (Matthew Bender). The Honorable Gerald J. Lewis was consultant to the original chapter.



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CHAPTER 33A Matthew Bender Unfair Competition Instructions

PART A. UNFAIR PRACTICES ACT

2. Defenses

5-33A California Forms of Jury Instruction MB 3300A.32

MB 3300A.32 Definition of Good Faith

[1] Instruction Definition of Good Faith

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

To prove the meeting competition defense, Defendant must prove that [he/she/it] acted in good faith in attempting to meet the lawful price of _____ [name(s) of competitor(s)]. In determining whether Defendant has acted in good faith, you must consider all of the facts and circumstances present. Among the facts and circumstances you may consider are the nature of the information on which Defendant relied, the source of the information, the Defendant's prior experience, if any, with similar information or with the person who provided the information, and the Defendant's business experience.

To prove that it acted in good faith, Defendant must prove that it believed that the price(s) that [he/she/it] offered would meet, but not beat, the price(s) of _____ [name(s) of competitor(s)], that Defendant formed this belief on the basis of facts that would lead a reasonable and prudent person to believe that the price would meet, but not beat, the price of _____ [name(s) of competitor(s)], and that Defendant acted for the purpose of meeting that price.

Defendant is not required to prove that [his/her/its] price actually met, but did not beat the price of _____ [name(s) of competitor(s)]. If Defendant proves that [he/she/it] believed that Defendant's price would meet, but not beat, the price of _____ [name(s) of competitor(s)], that Defendant formed this belief on the basis of facts that would lead a reasonable and prudent person to believe that the price would meet, but not beat, the price of _____ [name(s) of competitor(s)], and that Defendant acted for the purpose of meeting that price, then Defendant has proved the meeting competition defense even if Defendant's price was actually lower than that of _____ [name(s) of competitor(s)].

Authorities: *Bus. & Prof. Code* § 17050(d),(e); *United States v. United States Gypsum Co.* (1978) 438 U.S. 422, 453-454, 98 S.Ct. 2864, 57 L.Ed.2d 854 ; *People v. Pay Less Drug Store* (1944) 25 Cal.2d 108, 117, 153 P.2d 9 .

[2] Use of Instruction

This instruction should be used to provide the definition of "good faith" when a defendant relies on the meeting competition defense. The instruction may be modified to address the additional issues that may arise when the lawfulness of the price the defendant sought to meet is questioned [see MB 3300A.33[3]].

LexisNexis Matthew Bender Expert Practice Tip--Defining Good Faith: "Good Faith" is a concept that, to many jurors, means one thing in "real life" but maybe something different in a legal sense. *By Rex Heeseman*

LexisNexis Matthew Bender Expert Practice Tip--Establishing Good Faith: This instruction utilizes both a subjective and objective test for establishing "good faith." Defendant must prove (1) that defendant actually believed that defendant's price was necessary to meet competition, and (2) that a reasonable and prudent person would objectively reach the same conclusion. If defendant fails to prove either element, the defense fails. *By Ronald Oster*

[3] Comment

As noted in MB 3300A.31[3][d], good faith and not absolute certainty is the standard a seller must meet in establishing the meeting competition defense [*United States v. United States Gypsum Co.* (1978) 438 U.S. 422, 453, 98 S.Ct. 2864, 57 L.Ed.2d 854 ; *People v. Pay Less Drug Store* (1944) 25 Cal.2d 108, 117, 153 P.2d 9]. This instruction explains that all of the circumstances that would be relevant to a seller in the place of the defendant must be considered in the good faith determination.

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 33, *California Judicial Council Unfair Practices Act Instructions*]:

CACI No. 3335 Affirmative Defenses--"Good Faith" Explained

Legal Topics:

For related research and practice materials, see the following legal topics:

Antitrust & Trade Law Trade Practices & Unfair Competition State Regulation Claims Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Torts Business Torts Unfair Business Practices Defenses

Robert F. Freitas and Janet L. Boche contributed to the original chapter for California Forms of Jury Instruction (Matthew Bender). The Honorable Gerald J. Lewis was consultant to the original chapter.



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CHAPTER 33A Matthew Bender Unfair Competition Instructions

PART A. UNFAIR PRACTICES ACT

2. Defenses

5-33A California Forms of Jury Instruction MB 3300A.33

MB 3300A.33 Lawful Price**[1] Instruction Lawful Price**

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Defendant is not required to prove that the price of _____ [name(s) of competitor(s)] was actually a lawful price. If Defendant proves that [he/she/it] believed the price of _____ [name(s) of competitor(s)] was lawful, that Defendant formed this belief on the basis of facts that would lead a reasonable and prudent person to believe that the price was lawful, and that Defendant acted for the purpose of meeting that price, and Defendant proves the other elements of the meeting competition defense, then Defendant has proved the defense even if the price of _____ [name(s) of competitor(s)] was unlawful.

Authorities: *Bus. & Prof. Code § 17050(d),(e); Falls City Indus. v. Vanco Beverage* (1983) 460 U.S. 428, 442, 103 S.Ct. 1282, 75 L.Ed.2d 174 ; *Cadigan v. Texaco, Inc.* (9th Cir. 1974) 492 F.2d 383, 385-386 ; *National Dairy Prods. Corp. v. Federal Trade Comm'n* (7th Cir. 1968) 395 F.2d 517, 523-524 ; *People v. Pay Less Drug Store* (1944) 25 Cal.2d 108, 153 P.2d 9 ; *People v. Gordon* (1951) 105 Cal.App.2d 711, 724, 234 P.2d 287 .

[2] Use of Instruction

This instruction should be used when the plaintiff claims that the price the defendant attempted to meet was itself unlawful. The instruction is unnecessary, and should not be given, when no such claim is made.

When the competitor's price is claimed to be unlawful, the instruction in MB 3300A.32 may also be modified to reflect the additional factors, such as the defendant's knowledge of industry costs, that may be relevant in determining the good faith of a belief that a competitor's price was lawful.

LexisNexis Matthew Bender Expert Practice Tip--Explaining "Lawful Price": Most jurors

understand the meaning of "price." But "lawful price" may need to be explained more thoroughly. *By Rex Heeseman*

LexisNexis Matthew Bender Expert Practice Tip--Establishing Lawful Price: As with the instruction in MB 3300A.32 (regarding establishing "good faith"), the test set forth in this instruction again uses a subjective and objective test: (1) defendant must prove that the defendant subjectively believed the price was lawful, and (2) defendant must prove that a reasonable and prudent person would objectively come to the same conclusion. Both elements of the test must be satisfied or the defense fails. *By Ronald Oster*

[3] Comment

Bus. & Prof. Code § 17050(d) and (e) allow a seller to justify the meeting of competitors' prices only when the prices met are lawful. Consistent with the general good faith standard of the Unfair Practices Act, a defendant is not required to prove that its competitor's price was lawful or that it was absolutely certain of the lawfulness of the competitor's price [see *People v. Pay Less Drug Store* (1944) 25 Cal.2d 108, 117, 153 P.2d 9].

The Robinson-Patman Act meeting competition defense is not expressly limited to lawful prices, but has been interpreted to be so limited. When the plaintiff claims that the competitive price the defendant attempted to meet is unlawful, the burden is on the plaintiff to prove that this is the case [*Falls City Indus. v. Vanco Beverage* (1983) 460 U.S. 428, 442 n. 9, 103 S.Ct. 1282, 75 L.Ed.2d 174]. The leading case cited with approval lower federal courts that had required a plaintiff either to prove that the defendant knew the competitive price was unlawful, or that the price was "inherently unlawful" [*Falls City Indus. v. Vanco Beverage* (1983) 460 U.S. 428, 442 n. 9, 103 S.Ct. 1282, 75 L.Ed.2d 174 ; see also *Cadigan v. Texaco, Inc.* (9th Cir. 1974) 492 F.2d 383, 387 ; *National Dairy Prods. Corp. v. Federal Trade Comm'n* (7th Cir. 1968) 395 F.2d 517, 524]. The defendant's knowledge of the illegality of the competitive price would obviously preclude a good faith belief that it was lawful. The "inherent unlawfulness" concept, apparently based on such things as known industry cost structures, can be addressed by a reference in the instruction to the factors alleged to establish inherent unlawfulness. Both of these types of issues may be addressed under the general good faith standard.

One California case appears to have required the defendant at least to come forward with evidence that the competitive price was lawful [*People v. Gordon* (1951) 105 Cal.App.2d 711, 724, 234 P.2d 287]. In that case, however, the defendant claimed only to be meeting *actual*, not lawful, competitive prices, in disregard of the express statutory lawfulness requirement. Because the defendant intentionally ignored the statutory language, the court found an absence of good faith. Regardless of whether the defendant has any burden, the general recognition that only good faith and not absolute certainty is required of one seeking to invoke the meeting competition defense will preclude any absolute requirement of legality [see, e.g., *People v. Pay Less Drug Store* (1944) 25 Cal.2d 108, 117, 153 P.2d 9] .

Legal Topics:

For related research and practice materials, see the following legal topics:

Antitrust & Trade Law Trade Practices & Unfair Competition State Regulation Claims Antitrust & Trade Law Trade Practices & Unfair Competition State Regulation Coverage Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Torts Business Torts Unfair Business Practices Defenses

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CHAPTER 33A Matthew Bender Unfair Competition Instructions

PART A. UNFAIR PRACTICES ACT

2. Defenses

5-33A California Forms of Jury Instruction MB 3300A.34

MB 3300A.34 Cost Justification Defense to Locality Discrimination**[1] Instruction**

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Defendant claims as one defense that [he/she/it] is not liable for locality discrimination because the differences in Defendant's prices were based on differences in costs. This defense is known as the cost justification defense. To prove this defense, Defendant must prove that any difference between the price at which Defendant sold _____ [specify article or product] in _____ [location at which Plaintiff competes, or would compete, with Defendant] and the price at which Defendant sold _____ [specify article or product or an article or product of like grade and quality] in another location was based on a difference in Defendant's cost of manufacture, sale, or delivery, or a difference in the actual cost of transportation from the _____ [point of production or manufacture or shipment] to the point of destination.

Authority: *Bus. & Prof. Code § 17041.*

[2] Use of Instruction

This instruction should be used to provide the standard for the cost justification defense to the locality discrimination prohibition of *Bus. & Prof. Code § 17040*.

LexisNexis Matthew Bender Expert Practice Tip--Spend Time on Your Closing: "Cost of doing business" in the sense of this instruction will often require a carefully framed closing argument. *By Rex Heeseman*

[3] Comment

[a] Cost Justification and Locality Discrimination

The Unfair Practices Act prohibition of locality discrimination addresses discrimination between different localities, rather than between different purchasers, and does not apply unless a seller has more than a single sales outlet [*Bus. & Prof. Code* § 17040; *Harris v. Capitol Records Distrib. Corp.* (1966) 64 Cal.2d 454, 460, 50 Cal.Rptr. 539, 413 P.2d 139]. However, the cost justification defense found in *Bus. & Prof. Code* § 17041 appears to be derived from the Robinson-Patman Act defense for discriminatory sales to different buyers. The Robinson-Patman Act provides a defense for discriminations in sales to different purchasers that are justified by differences "in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which [products] are to such purchasers sold or delivered" [15 U.S.C.S. § 13(a)]. *Bus. & Prof. Code* § 17041 provides a cost justification defense for locality discriminations in similar language, but without a reference to individual buyers. Thus, a seller may justify a difference between prices charged in one locality than another by relying on differences "in the cost of manufacture, sale or delivery, or the actual cost of transportation from the point of production, if a raw product or commodity, or from the point of manufacture if a manufactured product or commodity, or from the point of shipment to the point of destination" [*Bus. & Prof. Code* § 17041].

Sellers with the multiple sales outlets necessary to trigger application of *Bus. & Prof. Code* § 17040 [*Harris v. Capitol Records Distrib. Corp.* (1966) 64 Cal.2d 454, 460, 50 Cal.Rptr. 539, 413 P.2d 139], but a central manufacturing or warehouse facility, may justify lower prices in localities closer to the centralized operations through differences in delivery or transportation costs between the local and more remote sales outlets. Similarly, sales made by a manufacturer with multiple production locations may be made at lower prices at sales outlets serviced by plants with lower costs. In these cases, the cost justification defense will mirror the prohibition of locality discrimination.

In other situations, however, the defense will focus more specifically on the costs associated with dealing with a particular buyer or group of buyers. As discussed below, a claim of locality discrimination that is actually based on a claim of discrimination among buyers will often fail. When a locality discrimination claim that is based on favored treatment offered a particular buyer or buyers can overcome the initial hurdle of satisfying the statutory requirement of geographically-based discrimination, the seller should be allowed to defend on the basis of the reduced costs associated with sales to particular buyers. Thus, if a locality discrimination is based on favorable treatment of some buyers and not across the board geographic discrimination, the seller should be allowed to prove that the sales to these buyers are less costly.

[b] Quantity Differences

The role of another of the factors identified in *Bus. & Prof. Code* § 17041, quantity differences, has not been established by the courts. Quantity is listed in § 17041 along with grade and quality which appear not to be matters requiring cost justification. The situation is likely different with regard to quantity differences.

Questions regarding price differences based on quantity differences are most likely to be raised when sellers offer quantity discounts for larger volume purchasers or purchases. When a buyer receives a volume discount, it may be said that there is a discrimination, *i.e.*, difference, between the price the buyer pays and what others who do not buy in the same quantity pay. Under the Robinson-Patman Act, quantity discounts that are not "functionally" available to all buyers may be actionable [see *Federal Trade Comm'n v. Morton Salt Co.* (1948) 334 U.S. 37, 68 S.Ct. 822, 92 L.Ed. 1196]. It is difficult to identify a locality discrimination in a volume discount arrangement. If a particular buyer purchases from a seller at both or all of the seller's sales outlets, there is no locality discrimination if the same discount schedule is applied at each location. If different discount schedules are used in different localities, the situation would be different. However, when the same pricing schedule is used, the favorable treatment afforded larger volume buyers does not create a discrimination between or among different localities. The "functional" discrimination recognized under the Robinson-Patman Act when a discount rate is not practically available to all buyers could not be used to create a violation because the Unfair Practices Act is not concerned with discrimination among buyers. Moreover, those

in a position to be injured by discrimination created by volume discounts, competitors of the large volume buyer, have no standing under *Bus. & Prof. Code § 17040* [see *Harris v. Capitol Records Distrib. Corp.* (1966) 64 Cal.2d 454, 460, 50 Cal.Rptr. 539, 413 P.2d 139].

Even when large volume purchasers do not buy at all of the seller's outlets, no locality discrimination is present so long as the same discount schedule is applied at each location. In this case, too, there would at most be a functional discrimination among buyers, but *Bus. & Prof. Code § 17040* does not apply in the absence of locality discrimination [*Harris v. Capitol Records Distrib. Corp.* (1966) 64 Cal.2d 454, 460, 50 Cal.Rptr. 539, 413 P.2d 139].

In some cases, such as that of a seller who offered lower prices in an area where its total sales volume exceeded its volumes in other areas, the concept of locality discrimination based on quantity might be applicable. It does not seem likely that a seller would be allowed to justify differential pricing in different localities simply by showing greater volume in the locality in which the lower price is offered. The federal courts require "discriminatory," i.e., not functionally available, quantity differences to be cost justified, and it is likely that the California courts would follow the same approach [see *Federal Trade Comm'n v. Morton Salt Co.* (1948) 334 U.S. 37, 68 S.Ct. 822, 92 L.Ed. 1196].

Although a seller asserting a cost justification defense is allowed to rely only on actual differences in costs associated with sales to a particular buyer or buyers, federal cases allow sellers to base cost justification claims on representative cost sampling or cost averaging over a group of buyers if the sampling is "truly representative" of the overall costs [see *United States v. Borden Co.* (1962) 370 U.S. 460, 467, 82 S.Ct. 1309, 8 L.Ed.2d 627]. No cases have addressed the applicability of a similar concept to claims of locality discrimination, but it appears that the cost averaging technique might be useful in measuring differences in a seller's costs of selling at different locations.

[c] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 33, *California Judicial Council Unfair Practices Act Instructions*]:

CACI No. 3300 Locality Discrimination--Essential Factual Elements

CACI No. 3330 Affirmative Defense to Locality Discrimination Claim--Cost Justification

Legal Topics:

For related research and practice materials, see the following legal topics:

Antitrust & Trade Law Trade Practices & Unfair Competition State Regulation Claims Antitrust & Trade Law Trade Practices & Unfair Competition State Regulation Coverage Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Torts Business Torts Unfair Business Practices Defenses

Robert F. Freitas and Janet L. Boche contributed to the original chapter for California Forms of Jury Instruction (Matthew Bender). The Honorable Gerald J. Lewis was consultant to the original chapter.



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CHAPTER 33A Matthew Bender Unfair Competition Instructions

PART A. UNFAIR PRACTICES ACT

2. Defenses

5-33A California Forms of Jury Instruction MB 3300A.35

MB 3300A.35 Determination of Cost**[1] Instruction** Determination of Cost

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

When you consider Defendant's costs, you are to determine the cost to Defendant of making the sale of _____ [specify article or product]. Costs of doing business that are not part of the cost of making the sale are not to be considered, but all costs of doing business that are part of the cost of making the sale must be allocated to the sale to the extent that they fairly represent part of the cost of making the sale.

Authorities: *Tri-Q, Inc. v. Sta-Hi Corp.* (1965) 63 Cal.2d 199, 207-208, 45 Cal.Rptr. 878, 404 P.2d 486 ; *Johnson v. Farmer* (1940) 41 Cal.App.2d 874, 882-883, 107 P.2d 959 ; *People v. Kahn* (1936) 19 Cal.App.2d Supp. 758, 765-766, 60 P.2d 596 .

[2] Use of Instruction

This instruction should be used in conjunction with the instruction on the definition of cost in Ch. 33, *California Judicial Council Unfair Practices Act Instructions*, CACI No. 3303, to provide guidance to the jury on the nature of the cost determination process.

LexisNexis Matthew Bender Expert Practice Tip--Determining Costs: Expert testimony will be required in most cases to determine "costs." The expert's testimony should track the language in the instruction to the extent possible. *By Ronald Oster*

[3] Comment**[a] Determination of Cost**

The Unfair Practices Act provides a broadly-inclusive definition of "cost" [see Ch. 33, *California Judicial Council Unfair Practices Act Instructions*, CACI No. 3303]. The requirement that all of a seller's costs be considered does not call for a simple determination of total average cost in all cases. When a seller sells different products or otherwise has distinct operations, division of total cost by units sold will not provide a fair determination of costs. Allocation of cost to particular transactions or to particular segments of the seller's business in accordance with normal accounting practice will be necessary in many cases [see, e.g., *Turnbull & Turnbull v. ARA Transp., Inc.* (1990) 219 Cal.App.3d 811, 819-822, 268 Cal.Rptr. 856]. However, in one case, the California Supreme Court held that when the defendants had no accurate idea of costs of production based on extended experience in manufacture, testimony that the defendant intended to sell at a profit by following its customary method of price-setting was sufficient to show not only that it was not selling below cost but also that it did not have the requisite intent to injure competition [*Tri-Q, Inc. v. Sta-Hi Corp.* (1965) 63 Cal.2d 199, 207-208, 45 Cal.Rptr. 878, 404 P.2d 486].

The few cases that have addressed the subject of measuring cost recognize that allocation of the portion of the seller's costs attributable to the challenged conduct will be required. The cases establish that an article or product must bear only "its share" of overhead and thus allow either party to present any reasonable case for allocation or nonallocation of particular costs to the matters in issue [see *Johnson v. Farmer* (1940) 41 Cal.App.2d 874, 880-881, 107 P.2d 959 ; *People v. Kahn* (1936) 19 Cal.App.2d Supp. 758, 765-766, 60 P.2d 596]. The plaintiff, as part of its burden of proving that the defendant sold below cost, bears the burden of proving the defendant's cost [*Johnson v. Farmer* (1940) 41 Cal.App.2d 874, 880, 107 P.2d 959], although the Unfair Practices Act contains certain procedural provisions that may lessen the difficult task of proving cost [see, e.g., *Bus. & Prof. Code* §§ 17026 (6 percent markup on invoice or replacement cost, whichever is less, as prima facie proof of distributor's cost in absence of other proof), 17072 (admissibility of industry cost surveys), 17073 (proof of average total cost for particular inventory period as "presumptive evidence" of cost)].

The determination of what costs and revenues are to be considered depends on a proper definition of the relevant "product" (see MB 3300A.06). In one case, a court of appeal permitted the defendant, denying a charge that it sold money transfer services below cost, to show simply that it made a profit on its total sales of that type of service, including transfers made to both domestic and foreign destinations. The plaintiff had alleged that the defendant's promotional sales price for money transfer services for domestic transfers of less than \$300 was below cost. On appeal the plaintiff contended that the trial court erred in considering the revenues and costs for the defendant's entire money transfer operation instead of limiting itself to a consideration of domestic money transfers. The court of appeal concluded that the trial court properly classified all money transfers as one "product" and that the defendant was not required to allocate its costs according to some artificial subproduct standard dictated by its competitor [see *Western Union Fin. Servs., Inc. v. First Data Corp.* (1993) 20 Cal.App.4th 1530, 1536-1538, 25 Cal.Rptr.2d 341].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 33, *California Judicial Council Unfair Practices Act Instructions*]:

CACI No. 3301 Below Cost Sales--Essential Factual Elements

CACI No. 3303 Definition of "Cost"

CACI No. 3304 Presumptions Concerning Costs--Manufacturer

CACI No. 3305 Presumptions Concerning Costs--Distributor

CACI No. 3306 Methods of Allocating Costs to an Individual Product

Legal Topics:

For related research and practice materials, see the following legal topics:

Antitrust & Trade Law Trade Practices & Unfair Competition State Regulation Claims Antitrust & Trade Law Trade Practices & Unfair Competition State Regulation Coverage Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Torts Business Torts Unfair Business Practices Defenses

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CHAPTER 33A Matthew Bender Unfair Competition Instructions

PART A. UNFAIR PRACTICES ACT

2. Defenses

5-33A California Forms of Jury Instruction MB 3300A.36-MB 3300A.49

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CHAPTER 33A Matthew Bender Unfair Competition Instructions
PART A. UNFAIR PRACTICES ACT
3. Damages

5-33A California Forms of Jury Instruction MB 3300A.50

MB 3300A.50 Fact of Damage**[1] Instruction** Fact of Damage

[PLAINTIFF'S/DEFENDANT'S] PROPOSED INSTR. NO. _____

Plaintiff claims that as a result of Defendant's _____ [specify, e.g., loss leader sales], [he/she/it] suffered damages. If you find that Plaintiff has proved [his/her/its] claim, and if you further find that Defendant has failed to prove _____ [specify defense or absence of intent], then you must consider whether Plaintiff is entitled to recover damages.

Plaintiff is required to prove two additional elements to recover damages. Plaintiff must first prove, with reasonable certainty, that Defendant's _____ [specify, e.g., sale of loss leaders] was the cause of some damage to [him/her/it]. Next, Plaintiff must also prove the amount of the damages.

Authorities: *Suburban Mobile Homes, Inc. v. AMFAC Cmtys., Inc.* (1980) 101 Cal.App.3d 532, 545, 161 Cal.Rptr. 811 ; *Page v. Bakersfield Unif. & Towel Supply Co.* (1966) 239 Cal.App.2d 762, 774, 49 Cal.Rptr. 46 .

[2] Use of Instruction

This instruction should be used to provide the standard for proof of the fact of damage. It must be used in conjunction with the instruction in MB 3300A.51 on proof of the amount of damage. In some cases, such as a locality discrimination case involving one who "intends and attempts in good faith to become" a competitor [*Bus. & Prof. Code § 17041*], additional fact-of-damage instructions will be required to reflect the additional facts the plaintiff will be required to prove.

Since this instruction requires the jury to determine that the plaintiff's harm was "caused" by the defendant's conduct, an

instruction defining proximate cause as "substantial factor" must also be used with this instruction [see Ch. 4, *California Judicial Council Negligence Instructions*, CACI No. 430 ("Causation: Substantial Factor")].

[3] Comment

There are few cases decided under the Unfair Practices Act on the subject of damages. Numerous federal antitrust cases discuss damages, however, and California cases decided under the Cartwright Act generally follow the federal cases [see *Suburban Mobile Homes, Inc. v. AMFAC Cmtys., Inc.* (1980) 101 Cal.App.3d 532, 545, 161 Cal.Rptr. 811]. Both the California cases in the antitrust and other areas and the federal antitrust cases call for different standards in assessing the fact and the amount of damage [see *Page v. Bakersfield Unif. & Towel Supply Co.* (1966) 239 Cal.App.2d 762, 773-774, 49 Cal.Rptr. 46 (Unfair Practices Act)]. The cases recognize that a plaintiff will not be held to as demanding a standard in proving the amount of damages as proving the fact of damage [see MB 3300A.51[3]].

Legal Topics:

For related research and practice materials, see the following legal topics:

Antitrust & Trade Law Trade Practices & Unfair Competition State Regulation Claims Antitrust & Trade Law Trade Practices & Unfair Competition State Regulation Coverage Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Torts Business Torts Unfair Business Practices Remedies

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CHAPTER 33A Matthew Bender Unfair Competition Instructions

PART A. UNFAIR PRACTICES ACT

3. Damages

5-33A California Forms of Jury Instruction MB 3300A.51

MB 3300A.51 Amount of Damage

[1] Instruction Amount of Damage

[PLAINTIFF'S/DEFENDANT'S] PROPOSED INSTR. NO. _____

If you find that Plaintiff has proved that [he/she/it] was damaged, then you must consider the amount of the damages, if any, that Plaintiff may recover. Plaintiff is entitled to recover only those damages that Plaintiff proves were caused by Defendant's [specify, e.g., sale of loss leaders] and Plaintiff is required to prove the amount of any damages. Damages may not be recovered on the basis of speculation or guesswork. On the other hand, plaintiff is not required to prove the amount of damages with absolute precision. Damages for which there is a reasonable basis of computation may be recovered, even if the damages awarded are an approximation of the actual damage suffered.

Authorities: *Zenith Radio Corp. v. Hazeltine Research* (1969) 395 U.S. 100, 123-125, 89 S.Ct. 1562, 23 L.Ed.2d 129 ; *Bigelow v. RKO Radio Pictures, Inc.* (1946) 327 U.S. 251, 264-265, 66 S.Ct. 574, 90 L.Ed. 652 ; *Story Parchment Co. v. Paterson Parchment Paper Co.* (1930) 282 U.S. 555, 562-563, 51 S.Ct. 248, 75 L.Ed. 544 ; *Eastman Kodak Co. v. Southern Photo Materials Co.* (1926) 273 U.S. 359, 378-379, 47 S.Ct. 400, 71 L.Ed. 684 ; *Suburban Mobile Homes, Inc. v. AMFAC Cmty's., Inc.* (1980) 101 Cal.App.3d 532, 545, 161 Cal.Rptr. 811 ; *Page v. Bakersfield Unif. & Towel Supply Co.* (1966) 239 Cal.App.2d 762, 774, 49 Cal.Rptr. 46 .

[2] Use of Instruction

This instruction should be used with the instruction in MB 3300A.50 on the fact of damage to provide the standard for determining the amount of damage.

[3] Comment

California cases, in the antitrust and other areas, following a series of United States Supreme Court decisions under the federal antitrust laws, do not require that a plaintiff prove the amount of damages with exactness. If the damages are not based on speculation, and the theories and assumptions on which a damage case is based are supported by the evidence, an award in an approximate amount is appropriate [*Suburban Mobile Homes, Inc. v. AMFAC Cmtys., Inc.* (1980) 101 Cal.App.3d 532, 545, 161 Cal.Rptr. 811 ; *Page v. Bakersfield Unif. & Towel Supply Co.* (1966) 239 Cal.App.2d 762, 774, 49 Cal.Rptr. 46]. There must be a reasonable basis of computation for the damages, but precision is not required [*Zenith Radio Corp. v. Hazeltine Research* (1969) 395 U.S. 100, 123-125, 89 S.Ct. 1562, 23 L.Ed.2d 129 ; *Bigelow v. RKO Radio Pictures, Inc.* (1946) 327 U.S. 251, 264-265, 66 S.Ct. 574, 90 L.Ed. 652 ; *Story Parchment Co. v. Paterson Parchment Paper Co.* (1930) 282 U.S. 555, 562-563, 51 S.Ct. 248, 75 L.Ed. 544 ; *Eastman Kodak Co. v. Southern Photo Materials Co.* (1926) 273 U.S. 359, 378-379, 47 S.Ct. 400, 71 L.Ed. 684].

LexisNexis Matthew Bender Expert Practice Tip--Calculating Damages: This is an important instruction for the plaintiff because damage calculations are frequently based on estimates and assumptions. Plaintiff should emphasize that the law does not require "absolute precision" and that an "approximation" is all that is required. *By Ronald Oster*

Legal Topics:

For related research and practice materials, see the following legal topics:

Antitrust & Trade Law Trade Practices & Unfair Competition State Regulation Claims Antitrust & Trade Law Trade Practices & Unfair Competition State Regulation Coverage Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Torts Business Torts Unfair Business Practices Remedies

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CHAPTER 33A Matthew Bender Unfair Competition Instructions

PART A. UNFAIR PRACTICES ACT

3. Damages

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CHAPTER 33A Matthew Bender Unfair Competition Instructions
PART B. TRADEMARK AND TRADE NAME INFRINGEMENT

5-33A California Forms of Jury Instruction MB 3300A.60

MB 3300A.60 Elements of Plaintiff's Cause of Action for Trademark Infringement

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

In this case, Plaintiff seeks to recover damages from Defendant for Defendant's use of _____ [describe word(s) or symbol(s) comprising the mark or name] on or in connection with _____ [describe goods, services, or business bearing or using the mark or name]. Plaintiff claims that this is an infringement of Plaintiff's [trademark/service mark/trade name], _____ [describe word(s) or symbol(s) comprising the mark], which [he/she/it] uses on or in connection with _____ [describe goods, services, or business bearing or using the mark or name].

To prove an infringement, Plaintiff must prove all of the following:

- 1. That [his/her/its] _____ [describe mark or name] is a protectable [trademark/service mark/trade name];**
- 2. That Plaintiff used [his/her/its] [trademark/service mark/trade name] before the time that Defendant began use of [his/her/its] [trademark/service mark/trade name]; and**
- 3. That use of Plaintiff's [trademark/service mark/trade name] and Defendant's [trademark/service mark/trade name] at the same time is likely to confuse the public.**

Plaintiff must prove each of these elements by a preponderance of the evidence. I will now discuss each of these elements.

Authority: *Cowles Magazines & Broad., Inc. v. Elysium, Inc.* (1967) 255 Cal.App.2d 731, 733, 63 Cal.Rptr. 507 .

[2] Use of Instruction

This instruction should be used as an introduction to the trademark infringement case or cause of action. It sets forth the plaintiff's burden of proof and a general description of the elements the plaintiff must prove. The instructions in MB 3300A.61-MB 3300A.67 discuss each of the elements in greater detail.

Throughout these instructions, a description of the marks or names at issue can be used instead of a designation such as "Plaintiff's mark." However, if both marks are identical it may be necessary to identify each mark by the appropriate party's name to avoid a confusing instruction.

For an instruction on the standard of proof, see Ch. 2, *California Judicial Council Evidence Instructions*, CACI No. 200 ("Obligation to Prove--More Likely True Than Not True").

For further discussion and forms related to trademark infringement, see *California Forms of Pleading and Practice*, Ch. 549, *Trademarks and Trade Names* (Matthew Bender).

LexisNexis Matthew Bender Expert Practice Tip--Technical Topics Require Special Care: A

"trademark" is not commonly encountered by most jurors. As with any technical topic, the evidence and closing argument should be cautiously put together. *By Rex Heeseman*

[3] Comment

[a] Right to Jury Trial

Generally, a jury is proper in a trademark infringement suit if (1) the plaintiff is seeking damages for infringement [*Dairy Queen v. Wood* (1962) 369 U.S. 469, 479, 82 S.Ct. 894, 8 L.Ed.2d 44], or (2) the defendant cross-complains for damages, provided the issues raised in the cross-complaint are related to the plaintiff's allegations and do not involve an entirely different set of facts and theories [Gilson, *Trademark Protection and Practice*, vol. 1, § 8.06[2] (Matthew Bender)]. When both legal relief (damages) and equitable relief (an injunction) are sought, the jury will decide the legal issues, and the trial court will dispose of the equitable issues [*Sheila's Shine Prods., Inc. v. Sheila Shine, Inc.* (5th Cir. 1973) 486 F.2d 114, 122].

[b] Test for Infringement

Although the general test for trademark or trade name infringement is a likelihood of confusion [see, e.g., *Internet Specialties West, Inc. v. Milon-Digiorgio Enters.* (9th Cir. 2009) 559 F.3d 985, 993 (containing Model Instructions for elements of trademark infringement in internet case); *Jada Toys, Inc. v. Mattel, Inc.* (9th Cir. 2008) 518 F.3d 628, 632 ; *Perfumbay.com Inc. v. eBay Inc.* (9th Cir. 2007) 506 F.3d 1165, 1173 ; *Grocery Outlet, Inc. v. Albertson's Inc.* (9th Cir. 2007) 497 F.3d 949, 951 (competitor's use of "LUCKY" mark for retail grocery services was likely to cause consumer confusion; remaining issue involved abandonment of trademark by nonuse); *Jada Toys, Inc. v. Mattel, Inc.* (9th Cir. 2007) 496 F.3d 974, 979 ; *Rearden LLC v. Rearden Commerce, Inc.* (N.D.Cal. 2009) 597 F.Supp.2d 1006, 1015 ; *Nissan Motor Co., Ltd. v. Nissan Computer Corp.* (C.D. Cal. 2000) 89 F.Supp.2d 1154, 1162 , *aff'd*, 246 F.3d 675 (9th Cir. 2000) ; *Cairns v. Franklin Mint Co.* (C.D. Cal. 2000) 107 F.Supp.2d 1212, 1216], a plaintiff, to prevail, must first prove that its mark or name is protectable as a mark or name and that it began commercial use of its name or mark before the defendant commenced use of its name or mark [*Cowles Magazines & Broad., Inc. v. Elysium, Inc.* (1967) 255 Cal.App.2d 731, 733, 63 Cal.Rptr. 507]. Most cases implicitly recognize this, but in most cases all three factors--protectability, priority, and likelihood of confusion--are not at issue. In *Golden Door, Inc. v. Odisho*, for example, the court noted that the plaintiff had used its mark first, reviewed and upheld the district court's determination that plaintiff's mark was strong enough to deserve protection, and then considered the factors necessary to determine whether a likelihood of confusion existed [*Golden Door, Inc. v. Odisho* (9th Cir. 1980) 646 F.2d 347, 349-351 ; see

AMF Inc. v. Sleekcraft Boats (9th Cir. 1979) 599 F.2d 341, 345-346 (district court found plaintiff's mark was valid but not infringed)].

[c] Presumptive Right to Use Trade Name

California law gives a party that has filed a fictitious business name statement, filed articles of incorporation, or obtained a certificate of qualification to do business in California a rebuttable presumption that it has the exclusive right to use its trade name (as reflected in such filing), as well as any confusingly similar name, if the party (1) was the first to file, and (2) actually uses that name in a business in the county or state of filing. That right extends to the county where the fictitious name statement was filed or the entire state if articles of incorporation were filed or a qualification to do business was obtained. Note that by its terms this applies only to trade names and not to trademarks or service marks [*Bus. & Prof. Code §§ 14411-14416*].

The rebuttable presumption affects the burden of producing evidence [*Bus. & Prof. Code §§ 14411, 14415*]. A presumption of this type is established to facilitate the determination of an action [*Evid. Code § 603*]. It requires the trier of fact to assume that the person filing has the exclusive right to use the name until another party to the action offers evidence that could negate the exclusive right. Once the other party offers this evidence, the presumption is lost and the trier of fact must make the necessary factual findings [*Evid. Code § 604*].

Although there are few reported cases applying this presumption, a presumption that a person has the exclusive right to use a trade name must actually presume both that the trade name is a protectable name and that the person has priority of use over other users, thereby meeting two of the requirements of this instruction [*see Golden Door, Inc. v. Odisho* (9th Cir. 1980) 646 F.2d 347 (*Bus. & Prof. Code §§ 14411-14416* described and applied without discussion of breadth of statutory presumption or of defendant's attempts, if any, to rebut it)]. If a defendant in an infringement case does not rebut a plaintiff's presumption, and if the marks at issue are identical and are used on identical goods, the plaintiff prevails and there are no issues of fact for the jury. If the marks or goods are not identical, the only issue for the jury is likelihood of confusion. If, however, the defendant rebuts the presumption, the presumption is lost and the jury must decide the factual issues. Thus, it is not necessary to instruct the jury as to the presumption, although the presumption may affect which issues will be submitted to the jury.

[d] California Trademark Law and Common Law

The instructions that follow in this part are to be used in an infringement action brought under either the California common law or the Model State Trademark Law [*see Bus. & Prof. Code § 14200 et seq.*; *see also Bus. & Prof. Code § 14270* (former *Bus. & Prof. Code § 14200 et seq.*, applicable to suit, proceeding, or appeal pending on January 1, 2008)]. The Model State Trademark Law sets forth a registration procedure for trademarks and service marks [*see Bus. & Prof. Code § 14200 et seq.*] and provides a cause of action for infringement [*see Bus. & Prof. Code § 14245*], but it does not affect the rights or the enforcement of rights in marks acquired in good faith at any time at common law [*see Bus. & Prof. Code § 14259*]. Thus, California registration of a mark is optional. Although the registration certificate is admissible in evidence as competent and sufficient proof of the registration of the mark in any judicial proceeding [*see Bus. & Prof. Code § 14215(b)*], and a registered trademark is prima facie evidence of the ownership of the mark [*see Colvig v. KSFO* (1964) 224 Cal.App.2d 357, 368, 36 Cal.Rptr. 701], registration is not required to establish a protectable, proprietary interest in a mark under the common-law rules [*see Grupo Gigante S.A. de C.V. v. Dallo & Co.* (9th Cir. 2004) 391 F.3d 1088, 1106 n.40; *North Carolina Dairy Found., Inc. v. Foremost-McKesson, Inc.* (1979) 92 Cal.App.3d 98, 106-107, n.5, 154 Cal.Rptr. 794]. Other than the effect of the registration certificate, the California common-law and the statutory law are basically the same, and these instructions can be used in an action based on either.

For additional discussion and forms for use in litigation under California statutory and common law trademark laws, see California Forms of Pleading and Practice, Ch. 549, *Trademarks and Trade Names* (Matthew Bender).

[e] Comparison With Federal Protection of "Trade Dress"

As distinguished from a trademark, "trade dress" refers to the total image of a product or service and may include such features as size, shape, color, color combinations, texture, or graphics [*TrafFix Devices v. Marketing Displays, Inc.* (2001) 532 U.S. 23, 121 S.Ct. 1255, 149 L.Ed.2d 164, 172 ; *E.S.S. Entertainment 2000, Inc. v. Rock Star Videos, Inc.* (9th Cir. 2008) 547 F.3d 1095, 1098 n1 ; *Sybersound Records, Inc. v. UAV Corp.* (9th Cir. 2008) 517 F.3d 1137, 1143 ; *International Jensen v. Metrosound U.S.A.* (9th Cir. 1993) 4 F.3d 819, 822 ; see *Two Pesos, Inc. v. Taco Cabana, Inc.* (1992) 505 U.S. 763, 765 n.1, 112 S.Ct. 2753, 120 L.Ed.2d 615 ; *Ale House Mgmt., Inc. v. Raleigh Ale House* (4th Cir. 2000) 205 F.3d 137, 142 ; *Switchmusic.com, Inc. v. U.S. Music Corp.* (C.D. Cal. 2006) 416 F.Supp.2d 812, 820 ; *Magic Kitchen LLC v. Good Things Int'l, Ltd.* (2007) 153 Cal.App.4th 1144, 1155, 63 Cal.Rptr.3d 713 ; *El-Com Hardware, Inc. v. Fireman's Fund Ins. Co.* (2001) 92 Cal.App.4th 205, 208 n.1, 111 Cal.Rptr.2d 670]. Federal courts have held that a seller's adoption of a trade dress (or an unregistered trademark) [see 15 U.S.C. § 1114 (infringement of federally registered trademark is separately actionable)] that is confusingly similar to a competitor's constitutes a form of unfair competition that is actionable under § 43(a) of the federal Lanham Act (15 U.S.C. § 1125(a)) [see *Two Pesos, Inc. v. Taco Cabana, Inc.* (1992) 505 U.S. 763, 783-784, 112 S.Ct. 2753, 120 L.Ed.2d 615 ; *Sybersound Records, Inc. v. UAV Corp.* (9th Cir. 2008) 517 F.3d 1137, 1143 ; *International Jensen v. Metrosound U.S.A.* (9th Cir. 1993) 4 F.3d 819, 822]. To recover under § 43(a), the plaintiff must establish that its trade dress (1) is non-functional, (2) is either inherently distinctive or has acquired secondary meaning, and (3) is likely to be confused with a competitor's products by members of the consuming public [*Speedplay, Inc. v. Bebob, Inc.* (Fed. Cir. 2000) 211 F.3d 1245, 1258 ; *International Jensen v. Metrosound U.S.A.* (9th Cir. 1993) 4 F.3d 819, 823 ; see *Two Pesos, Inc. v. Taco Cabana, Inc.* (1992) 505 U.S. 763, 767, 112 S.Ct. 2753, 120 L.Ed.2d 615]. A trademark or trade dress is functional if it is essential to the product's use or affects the product's cost or quality [*International Jensen v. Metrosound U.S.A.* (9th Cir. 1993) 4 F.3d 819, 823 ; *HWE, Inc. v. JB Research, Inc.* (9th Cir. 1993) 993 F.2d 694, 696].

In the absence of a protectable trademark, California common law recognizes a cause of action for unfair competition based on a competitor's use of a name, design, or physical appearance in connection with its goods or services that tends to deceive buyers regarding the origin of those goods or services [see *Cytanovich Reading Ctr. v. Reading Game* (1984) 162 Cal.App.3d 107, 113, 208 Cal.Rptr. 412 ; see also *Bus. & Prof. Code* § 14259 (California statutory trademark law does not affect any rights in marks acquired in good faith under common law)]. Arguably, this common law principle would protect "trade dress" as defined by federal cases; however, no reported California appellate decision has expressly applied the federal concept of trade dress. The California common-law unfair competition decisions have generally involved disputes over trade names [see, e.g., *Ball v. American Trial Lawyers Assn.* (1971) 14 Cal.App.3d 289, 300-301, 92 Cal.Rptr. 228 ; see also *Cytanovich Reading Ctr. v. Reading Game* (1984) 162 Cal.App.3d 107, 113-114, 208 Cal.Rptr. 412 (use of confusingly similar telephone number)].

Assuming that California law would recognize a common law cause of action for unfair competition based on infringement of trade dress, similar to that recognized by federal cases under the Lanham Act, these instructions could be modified for use in such an action by substituting the word "trade dress" for the word "trademark" or "service mark" or "mark" throughout the instruction in [1], above, and the instructions in MB 3300A.62-MB 3300A.67. In addition, the jury should be instructed on the definition of "trade dress" and on the requirement of non-functionality, as discussed above.

For further discussion of the protection against unfair competition under the Lanham Act, see Gilson, Trademark Protection and Practice, Ch. 7 (Matthew Bender), and California Forms of Pleading and Practice, Ch. 549, *Trademarks and Trade Names* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsStandard InstructionsTortsBusiness TortsUnfair Business

PracticesElementsTrademark LawInfringement ActionsGeneral OverviewTrademark LawSpecial MarksTrade
NamesInfringement

Robert F. Freitas and Janet L. Boche contributed to the original chapter for California Forms of Jury Instruction
(Matthew Bender). The Honorable Gerald J. Lewis was consultant to the original chapter.



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CHAPTER 33A Matthew Bender Unfair Competition Instructions
PART B. TRADEMARK AND TRADE NAME INFRINGEMENT

5-33A California Forms of Jury Instruction MB 3300A.61

MB 3300A.61 Definitions of Trademark, Service Mark, and Trade Name

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Not every word or symbol is protectable. To be protectable, the word or symbol that Plaintiff claims is a [trademark/service mark/trade name] must actually be a [trademark/service mark/trade name.] You must determine whether Plaintiff's word or symbol falls within one of the following definitions.

[CHOOSE ONE OR MORE OF THE FOLLOWING (See Use of Instruction)]

A trademark is any word, name, symbol, or device, or any combination of those things, used by a person to identify and distinguish the goods of that person, including a unique product, from those manufactured or sold by others, and to indicate the source of the goods, even if that source is unknown.

[OR]

A service mark is any word, name, symbol, or device, or any combination of those things, used by a person to identify and distinguish the services of that person, including a unique service, from the services of others, and to indicate the source of the services, even if that source is unknown. Titles, character names used by a person, and other distinctive features of radio or television programs may be registered as service marks notwithstanding that they, or the programs, may advertise the goods of the sponsor.

[OR]

A trade name is any name used by a person to identify a business or vocation of that person.

[CONTINUE]

The term "person" includes a natural person, and a firm, partnership, corporation, union, association, or other organization capable of suing and being sued in a court of law.

Authorities: *Bus. & Prof. Code § 14202*; *KGB, Inc. v. Giannoulas* (1980) 104 Cal.App.3d 844, 856-857, 164 Cal.Rptr. 571 ; *Balesteri v. Holler* (1978) 87 Cal.App.3d 717, 721, 151 Cal.Rptr. 229 ; *Colvig v. KSFO* (1964) 224 Cal.App.2d 357, 368, 36 Cal.Rptr. 701 .

[2] Use of Instruction

This instruction should be used to define the terms "trademark," "service mark," and "trade name," to help the jury determine whether the word or symbol at issue is a protectable name or mark. Former *Bus. & Prof. Code § 14200 et seq.* (repealed effective January 1, 2008), applies to any suit, proceeding, or appeal pending on January 1, 2008 [see *Bus. & Prof. Code § 14270*].

In many cases, only one type of name or mark is at issue and only one of the definitions in this instruction will be necessary. However, a plaintiff may, for example, sue for infringement of its trademark caused by the defendant's use of its trade name. The definitions of both "trademark" and "trade name" should be used in this case, as the defendant may argue that the different types of uses of the two words mitigates the likelihood of confusion.

LexisNexis Matthew Bender Expert Practice Tip--Technical Topics Require Special Care: A

"trademark," "service mark," or "trade name" is not commonly encountered by most jurors. As with any technical topic, the evidence and closing argument should be cautiously put together. *By Rex Heeseman*

[3] Comment

This instruction is taken from the definitions in the Model State Trademark Law [see *Bus. & Prof. Code § 14202*], which are similar to the definitions used in common law actions [see *Balesteri v. Holler* (1978) 87 Cal.App.3d 717, 721, 151 Cal.Rptr. 229 ; *Colvig v. KSFO* (1964) 224 Cal.App.2d 357, 368, 36 Cal.Rptr. 701]. The definitions are also similar to those in the federal Lanham Act [see 15 U.S.C. § 1127; *Cleary v. News Corp.* (9th Cir. 1994) 30 F.3d 1255, 1262-1263].

KGB, Inc. v. Giannoulas illustrates how these definitions can be applied. In that case, the plaintiff radio station sued the defendant for making personal appearances in a chicken costume, contending that the figure of a person in a chicken suit was the plaintiff's protectable service mark. The court rejected this contention, finding that a person in a chicken suit does not fit the statutory definition of a service mark [see 15 U.S.C. § 1127; former *Bus. & Prof. Code § 14206* (see now *Bus. & Prof. Code § 14202(b)*)] because it is not a symbol used in the sale or advertising of services to identify the source of the services. The court stated that the symbol must be stationary and unchanging to be entitled to protection as a mark [*KGB, Inc. v. Giannoulas* (1980) 104 Cal.App.3d 844, 856-857, 164 Cal.Rptr. 571].

The United States Supreme Court has held that under the Lanham Act, sometimes a color will meet ordinary legal trademark requirements. When it does so, no special legal rule prevents color alone from serving as a trademark [*Qualitex Co. v. Jacobson Prods. Co.* (1995) 514 U.S. 159, 160-162, 170, 115 S. Ct. 1300, 131 L. Ed. 2d 248 ; see *Blockbuster Videos, Inc. v. City of Tempe* (1998) 141 F.3d 1295, 1300 ; *Lebas Fashion Imports of USA, Inc. v. ITT Hartford Ins. Group* (1996) 50 Cal.App.4th 548, 563, n.11, 59 Cal.Rptr.2d 36].

As with other marks, a court can restrict use of a person's full name if it is likely to cause consumer confusion with an established, famous mark [*Paul Frank Indus. v. Sunich* (C.D. Cal. 2007) 502 F.Supp.2d 1094, 1098-1099].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsStandard InstructionsTortsBusiness TortsUnfair Business PracticesGeneral OverviewTrademark LawInfringement ActionsGeneral OverviewTrademark LawSpecial MarksService MarksGeneral OverviewTrademark LawSpecial MarksTrade NamesGeneral Overview

Robert F. Freitas and Janet L. Boche contributed to the original chapter for California Forms of Jury Instruction (Matthew Bender). The Honorable Gerald J. Lewis was consultant to the original chapter.



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CHAPTER 33A Matthew Bender Unfair Competition Instructions
PART B. TRADEMARK AND TRADE NAME INFRINGEMENT

5-33A California Forms of Jury Instruction MB 3300A.62

MB 3300A.62 Distinctiveness Requirement

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

To be protectable, Plaintiff's [name or mark] must be distinctive. This means that it must be capable of distinguishing Plaintiff's [goods or services or business] from [goods made or sold by or the services of or the business of] others.

[CHOOSE ONE OR MORE OF THE FOLLOWING (See Use of Instruction)]

If Plaintiff's [mark or name] is an invented or coined word or symbol, without any meaning of its own, it is inherently distinctive. For example, EXXON is a word that was invented and is now used for an oil company.

[OR]

If Plaintiff's [mark or name] is a fanciful word or symbol, then it is inherently distinctive. A fanciful [mark or name] differs from an invented or coined [mark or name] in that it may bear a relationship to another word. For example, FAB is an abbreviated term for "fabulous," and it is a fanciful mark when used on a detergent.

[OR]

If Plaintiff's [mark or name] is comprised of one or more known words, but the words do not have any meaning

as applied to Plaintiff's [goods or services or business], and the [mark or name] is an arbitrary use of the words, then the [mark or name] is inherently distinctive. For example, OLD CROW is comprised of known words, but it is an arbitrary mark when used on whiskey.

[OR]

If Plaintiff's [mark or name] is suggestive of some quality or characteristic of Plaintiff's [goods or services or business] without actually describing Plaintiff's [goods or services or business], then it is inherently distinctive. For example, STRONGHOLD is suggestive of superior holding power when it is used on nails, but it does not actually describe the goods.

[OR]

If Plaintiff's [mark or name] describes Plaintiff's [goods or services or business] or is a geographic name or designation or is a surname, then it is not inherently distinctive, and Plaintiff must prove that [his/her/its] [mark or name] has acquired secondary meaning, which I will explain later, to prevail in this case. For example, TENDER VITTLES is descriptive of cat food.

[OR]

If Plaintiff's [mark or name] is a generic term whose principal significance is as the common name for _____ [either goods such as those made or services such as those rendered or business such as that conducted] by Plaintiff, then Plaintiff cannot prevail in this case. For example, BUTTER is a generic term for butter and no one person or company can claim the exclusive right to use it on butter.

Authorities: *Two Pesos, Inc. v. Taco Cabana, Inc.* (1992) 505 U.S. 763, 112 S.Ct. 2753, 120 L.Ed.2d 615, 623-625 ; *Grupo Gigante S.A. de C.V. v. Dallo & Co.* (9th Cir. 2004) 391 F.3d 1088, 1096 ; *E. & J. Gallo Winery v. Gallo Cattle Co.* (9th Cir. 1992) 967 F.2d 1280, 1291 ; *Golden Door, Inc. v. Odisho* (9th Cir. 1980) 646 F.2d 347, 350 ; *AMF Inc. v. Sleekcraft Boats* (9th Cir. 1979) 599 F.2d 341, 349-350 ; *Big O Tire Dealers, Inc. v. Goodyear Tire & Rubber (D. Colo. 1976) 408 F.Supp. 1219, 1243 , modified, 561 F.2d 1365 (10th Cir. 1977) ; North Carolina Dairy Found., Inc. v. Foremost-McKesson, Inc.* (1979) 92 Cal.App.3d 98, 106-111, 154 Cal.Rptr. 794 ; *Ball v. American Trial Lawyers Assn.* (1971) 14 Cal.App.3d 289, 302, 92 Cal.Rptr. 228 .

[2] Use of Instruction

This instruction should be used to set forth the basis for deciding whether a mark is distinctive and, therefore, protectable. The descriptions of different kinds of marks and names listed in MB 3300A.61[1] each include distinctiveness as one characteristic of a mark or name, and this instruction is intended to help determine whether this distinctiveness requirement is met. It also describes when the jury needs to consider whether the plaintiff's mark or name has acquired secondary meaning and when the plaintiff has no cause of action because its mark or name is not distinctive and thus not protectable.

The paragraphs that describe types of marks not involved in the case can be omitted. For example, a common dispute in trademark cases is whether the plaintiff's mark is "suggestive" and capable of protection without proof of secondary meaning or is, instead, "descriptive" and capable of protection only if secondary meaning is shown. Another common issue is whether a mark is generic or descriptive, because it can never be protected as a trademark if it is generic.

LexisNexis Matthew Bender Expert Practice Tip--Carefully Consider Your Arguments and Use

Examples: "Distinctiveness" is complicated for judges and attorneys, let alone jurors. In addition, the categories set forth in this instruction are not going to be intuitively obvious to most jurors. Thus, the approach in arguing this topic should be thoughtfully pondered. The use of examples is helpful and should be further explained in closing argument. *By Rex Heeseman and Ronald Oster*

[3] Comment

Generic marks or names are not entitled to protection [*Two Pesos, Inc. v. Taco Cabana, Inc.* (1992) 505 U.S. 763, 112 S.Ct. 2753, 120 L.Ed.2d 615, 624 ; *Golden Door, Inc. v. Odisho* (9th Cir. 1980) 646 F.2d 347, 350 ; *North Carolina Dairy Found., Inc. v. Foremost-McKesson, Inc.* (1979) 92 Cal.App.3d 98, 106-107, 154 Cal.Rptr. 794]. Every competitor must be able to use a generic term to compete. For example, "The Laundry" is a generic name for a laundry, and no one is entitled to exclusive use of that name.

Descriptive words, including geographic terms and surnames, tell something about a product and can be protected only if they have acquired secondary meaning and have come to signify goods or services provided by only one particular producer [*Two Pesos, Inc. v. Taco Cabana, Inc.* (1992) 505 U.S. 763, 112 S.Ct. 2753, 120 L.Ed.2d 615, 624 ; *E. & J. Gallo Winery v. Gallo Cattle Co.* (9th Cir. 1992) 967 F.2d 1280, 1291 ; *AMF Inc. v. Sleekcraft Boats* (9th Cir. 1979) 599 F.2d 341, 349 ; *North Carolina Dairy Found., Inc. v. Foremost-McKesson, Inc.* (1979) 92 Cal.App.3d 98, 107-108, 154 Cal.Rptr. 794 ; *Ball v. American Trial Lawyers Assn.* (1971) 14 Cal.App.3d 289, 302, 92 Cal.Rptr. 228]. Such things as sales and advertising expenses will be considered, as well as surveys of public perceptions, to determine whether the public perceives a descriptive word as indicating a single source [*North Carolina Dairy Found., Inc. v. Foremost-McKesson, Inc.* (1979) 92 Cal.App.3d 98, 109-111, 154 Cal.Rptr. 794 ; see *E. & J. Gallo Winery v. Gallo Cattle Co.* (9th Cir. 1992) 967 F.2d 1280, 1291 (mark strengthened by long, continued use and by extensive and expensive advertising and promotion); *Ocean Garden, Inc. v. Marktrade Co., Inc.* (9th Cir. 1991) 953 F.2d 500, 506 (mark strengthened by use for 30 years and extensive advertising)]. See MB 3300A.63 for further discussion of secondary meaning.

The other types of marks--suggestive, arbitrary, fanciful, and invented or coined marks--can be protected without proof of secondary meaning because they are inherently distinctive [*Two Pesos, Inc. v. Taco Cabana, Inc.* (1992) 505 U.S. 763, 112 S.Ct. 2753, 120 L.Ed.2d 615, 623-624 ; *Ocean Garden, Inc. v. Marktrade Co., Inc.* (9th Cir. 1991) 953 F.2d 500, 506 ; *Golden Door, Inc. v. Odisho* (9th Cir. 1980) 646 F.2d 347, 350 ; *Rearden LLC v. Rearden Commerce, Inc.* (N.D. Cal. 2009) 597 F.Supp.2d 1006, 1019 ; *Big O Tire Dealers, Inc. v. Goodyear Tire & Rubber* (D. Colo. 1976) 408 F.Supp. 1219, 1243 , modified, 561 F.2d 1365 (10th Cir. 1977) ; *North Carolina Dairy Found., Inc. v. Foremost-McKesson, Inc.* (1979) 92 Cal.App.3d 98, 106-107, 154 Cal.Rptr. 794]. The classification of marks (in order of generally increasing distinctiveness, as generic, descriptive, suggestive, arbitrary, or fanciful) follows "the classic formulation set out by Judge Friendly" in *Abercrombie & Fitch Co. v. Hunting World, Inc.* [*Abercrombie & Fitch v. Hunting World, Inc.* (2d Cir. 1976) 537 F.2d 4, 9] and cited with approval by the Supreme Court [*Two Pesos, Inc. v. Taco Cabana, Inc.* (1992) 505 U.S. 763, 112 S.Ct. 2753, 120 L.Ed.2d 615, 623 ; see *E. & J. Gallo Winery v. Gallo Cattle Co.* (9th Cir. 1992) 967 F.2d 1280, 1291 (classification of marks in order of increasing distinctiveness from generic to fanciful)]. The examples of the different types of marks used in this instruction were taken from the jury instructions in *Big O Tire Dealers, Inc. v. Goodyear Tire & Rubber* [*Big O Tire Dealers, Inc. v. Goodyear Tire & Rubber* (D. Colo. 1976) 408 F.Supp. 1219, 1243 , modified, 561 F.2d 1365 (10th Cir. 1977)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Torts Business Torts Unfair Business Practices Elements Trademark Law Subject Matter Distinctiveness General Overview Trademark Law Subject Matter Distinctiveness Determinations

Robert F. Freitas and Janet L. Boche contributed to the original chapter for California Forms of Jury Instruction (Matthew Bender). The Honorable Gerald J. Lewis was consultant to the original chapter.



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CHAPTER 33A Matthew Bender Unfair Competition Instructions
PART B. TRADEMARK AND TRADE NAME INFRINGEMENT

5-33A California Forms of Jury Instruction MB 3300A.63

MB 3300A.63 Definition of Secondary Meaning

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

If you decide that Plaintiff's [trademark/service mark/trade name] is descriptive, geographic, or a surname, then you must decide whether that [trademark/service mark/trade name] has acquired secondary meaning. A [mark or name] has acquired secondary meaning when there is an association in an average buyer's mind between the [mark or name] and a single source of origin for the [product or service or business] bearing the [mark or name]. This does not mean that a buyer must actually know the name of the source, but only that a buyer must directly associate the [mark or name] with only one source, even if it is an anonymous source.

If you decide that Plaintiff's [trademark/service mark/trade name] is descriptive and has not acquired secondary meaning, then Plaintiff cannot prevail in this case.

Authorities: *Two Pesos, Inc. v. Taco Cabana, Inc.* (1992) 505 U.S. 763, 766 n.4, 769, 112 S.Ct. 2753, 120 L.Ed.2d 615 ; *North Carolina Dairy Found., Inc. v. Foremost-McKesson, Inc.* (1979) 92 Cal.App.3d 98, 107-108, 154 Cal.Rptr. 794 .

[2] Use of Instruction

This instruction should be used to define secondary meaning and to give the jury guidelines to use in determining whether a descriptive mark has acquired secondary meaning. It also reiterates that the owner of a descriptive, geographic, or surname mark cannot prevail in an infringement suit if the mark has not acquired secondary meaning. The instruction should be used immediately following the instruction in MB 3300A.62[1], which explains descriptive marks.

This instruction should not be used if the case does not present the issue of whether the plaintiff's mark is descriptive and whether such a mark has acquired secondary meaning.

LexisNexis Matthew Bender Expert Practice Tip--Use Examples in Closing Argument: As with "distinctiveness" [see MB 3300A.62], "secondary meaning" is another challenging topic. Thus, examples in closing argument will be necessary to explain the concept "secondary meaning" to the jury. *By Ronald Oster and Rex Heeseman*

[3] Comment

Competitors must be able to use common, descriptive words to sell and advertise their goods in the marketplace [*Invisible, Inc. v. National Broad. Co., Inc. (C.D. Cal. 1980) 1980 U.S. Dist. LEXIS 17006*], but the doctrine of secondary meaning recognizes that this interest in competition and the unrestricted use of descriptive words must be limited when the use of certain words will mislead or confuse the public. Once the public comes to associate a descriptive word with a single source of products, the trademark and unfair competition laws will protect that word to prevent deception of the public [*Two Pesos, Inc. v. Taco Cabana, Inc. (1992) 505 U.S. 763, 766 n.4, 769, 112 S.Ct. 2753, 120 L.Ed.2d 615* ; *North Carolina Dairy Found., Inc. v. Foremost-McKesson, Inc. (1979) 92 Cal.App.3d 98, 108-109, 154 Cal.Rptr. 794* ; see *Japan Telecom, Inc. v. Japan Telecom Am., Inc. (9th Cir. 2002) 287 F.3d 866, 876* (California courts require plaintiffs suing under California Trade Name Statute to establish secondary meaning if trade names are descriptive)].

Secondary meaning refers to a mark's ability to identify particular goods and services in the minds of consumers [*Grupo Gigante S.A. de C.V. v. Dallo & Co. (9th Cir. 2004) 391 F.3d 1088, 1095* ; see, e.g., *Two Pesos, Inc. v. Taco Cabana, Inc. (1992) 505 U.S. 763, 112 S.Ct. 2753, 2757, 120 L.Ed.2d 615*]. Secondary meaning can be proven directly by surveys showing that the public associates a descriptive term with a single source or indirectly by relevant facts such as the duration and continuity of the use of the mark, the extent of advertising of the name or mark and the amount spent for that purpose, or the volume of sales of goods bearing the mark. These factors can show that a significant segment of the purchasing public has been exposed to the mark [*E. & J. Gallo Winery v. Gallo Cattle Co. (9th Cir. 1992) 967 F.2d 1280, 1291* ; *North Carolina Dairy Found., Inc. v. Foremost-McKesson, Inc. (1979) 92 Cal.App.3d 98, 109-110, 154 Cal.Rptr. 794* ; see also *Cowles Magazines & Broad., Inc. v. Elysium, Inc. (1967) 255 Cal.App.2d 731, 735, 63 Cal.Rptr. 507*].

In addition, secondary meaning can be inferred from the defendant's intent in adopting its mark. If the defendant adopted a mark similar to the plaintiff's mark to trade off the plaintiff's goodwill, a court can presume that the plaintiff's mark must have some goodwill and, therefore, secondary meaning [see *E. & J. Gallo Winery v. Gallo Cattle Co. (9th Cir. 1992) 967 F.2d 1280, 1293*]. Proof of secondary meaning is sufficient if it shows that a substantial segment of the buying population associated the mark with a single source [*North Carolina Dairy Found., Inc. v. Foremost-McKesson, Inc. (1979) 92 Cal.App.3d 98, 110, 154 Cal.Rptr. 794*].

It is not necessary that the buying public actually know the name of the source where the trademarked goods originate. The public need only associate the mark with one source, even if that source is anonymous [*North Carolina Dairy Found., Inc. v. Foremost-McKesson, Inc. (1979) 92 Cal.App.3d 98, 108, 154 Cal.Rptr. 794*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Torts Business Torts Unfair Business Practices Elements Trademark Law Subject Matter Secondary Meaning General Overview Trademark Law Subject Matter Secondary Meaning Direct Evidence

Robert F. Freitas and Janet L. Boche contributed to the original chapter for California Forms of Jury Instruction

(Matthew Bender). The Honorable Gerald J. Lewis was consultant to the original chapter.



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California Forms of Jury Instruction

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CHAPTER 33A Matthew Bender Unfair Competition Instructions
PART B. TRADEMARK AND TRADE NAME INFRINGEMENT

5-33A California Forms of Jury Instruction MB 3300A.64

MB 3300A.64 Priority of Use

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] PROPOSED INSTR. NO. _____

The next element of Plaintiff's case to consider is whether Plaintiff has priority of use.

If you decided that Plaintiff's [trademark/service mark/trade name] is inherently distinctive, then you must decide whether Plaintiff used [his/her/its] [trademark/service mark/trade name] before the time that Defendant began to use [his/her/its] [trademark/service mark/trade name].

If you decided that Plaintiff's [trademark/service mark/trade name] is not inherently distinctive, but has acquired secondary meaning, then you must decide whether Plaintiff's [trademark/service mark/trade name] acquired secondary meaning before the time Defendant began to use [his/her/its] [mark or name].

If Plaintiff did not use [his/her/its] [mark or name] or [his/her/its] [mark or name] had not acquired secondary meaning before the time that Defendant began to use [his/her/its] [mark or name], then Plaintiff cannot prevail in this case.

Authorities: *Saratoga Vichy Spring Co., Inc. v. Lehman* (2d Cir. 1980) 625 F.2d 1037, 1043 ; *Scott Paper Co. v. Scott's Liquid Gold, Inc.* (3d Cir. 1978) 589 F.2d 1225, 1231-1232 ; *Derringer v. Plate* (1865) ; *Gordon v. Warner Bros. Pictures, Inc.* (1969) 269 Cal.App.2d 31, 36-38, 74 Cal.Rptr. 499 ; *Weatherford v. Eytchison* (1949) 90 Cal.App.2d 379, 383-384, 386, 202 P.2d 1040 .

[2] Use of Instruction

This instruction should be used to define whether the plaintiff has used its mark before the defendant's use of its mark. It should be used when either distinctiveness or secondary meaning is at issue. It defines priority of use both for inherently

distinctive marks and for marks which, though not inherently distinctive, have acquired secondary meaning. This instruction should be used after the instructions on distinctiveness (MB 3300A.62) and secondary meaning (MB 3300A.63).

If priority of use is not an issue in the case, this instruction can be omitted. If the distinctiveness of the plaintiff's mark is not at issue in the case, the third paragraph of this instruction can be omitted, as well as the portions of the second and fourth paragraphs that deal with distinctiveness.

LexisNexis Matthew Bender Expert Practice Tip--Caution!: This instruction on "priority" of use must be presented in an explainable manner. *By Rex Heeseman*

[3] Comment

Priority of use is often not at issue in infringement cases, but it is a determinative element of any case. The party that first used a mark or name is its original owner and has the right to use that mark or name [*Derringer v. Plate* (1865) ; *Weatherford v. Eytchison* (1949) 90 Cal.App.2d 379, 383-384, 386, 202 P.2d 1040 ; see *Grupo Gigante S.A. de C.V. v. Dallo & Co.* (9th Cir. 2004) 391 F.3d 1088, 1093]. However, when "use" of a mark began must be determined by reference to when the word became a protectable mark. If a word is inherently distinctive, priority begins from its first use as a mark. If a word is not inherently distinctive, priority cannot attach until it has acquired secondary meaning [see *Allied Artists Pictures Corp. v. Friedman* (1977) 68 Cal.App.3d 127, 135, 137 Cal.Rptr. 94 ; *Gordon v. Warner Bros. Pictures, Inc.* (1969) 269 Cal.App.2d 31, 36-38, 74 Cal.Rptr. 499 ; Gilson, Trademark Protection and Practice, Ch. 3, § 3.03 (Matthew Bender)].

For example, in *Scott Paper Co. v. Scott's Liquid Gold, Inc.*, the court held that priority depends on whether the plaintiff's mark acquired secondary meaning before the time that the defendant adopted its mark. Under this test, the court decided that although the plaintiff had used its SCOTT mark on paper products since 1911 and the defendant began its use of SCOTT on furniture polish in 1925, the plaintiff did not have priority of use on furniture polish because its mark did not acquire secondary meaning in the furniture polish market until at least 1965, if at all [*Scott Paper Co. v. Scott's Liquid Gold, Inc.* (3d Cir. 1978) 589 F.2d 1225, 1231-1232].

The Second Circuit reached a similar decision in *Saratoga Vichy Spring Co. Inc. v. Lehman*, involving use of the geographically descriptive SARATOGA mark on mineral water. The plaintiff began use of its SARATOGA mark in 1876, but by the time the defendant began use of a SARATOGA mark in 1910, the plaintiff's mark had not yet acquired secondary meaning. In these circumstances, the plaintiff did not have priority and the court would not enjoin the defendant's use [*Saratoga Vichy Spring Co., Inc. v. Lehman* (2d Cir. 1980) 625 F.2d 1037, 1043].

The first to use a mark in commerce is deemed the "senior user" of that mark [*Brookfield Communications, Inc. v. West Coast Entertainment Corp.* (9th Cir. 1999) 174 F.3d 1036, 1047 ; *Hana Fin., Inc. v. Hana Bank* (C.D. Cal. 2007) 500 F.Supp.2d 1228, 1235]. The senior user has the right to enjoin "junior users" from using confusingly similar marks in the same industry and market or within the senior user's natural zone of expansion [*Brookfield Communications, Inc. v. West Coast Entertainment Corp.* (9th Cir. 1999) 174 F.3d 1036, 1047].

The Ninth Circuit has adopted a totality of the circumstances test for determining whether a "use" is sufficient to establish rights in the service mark [*Chance v. Pac-Tel Teletrac Inc.* (9th Cir. 2001) 242 F.3d 1151, 1159 ; *Hana Fin., Inc. v. Hana Bank* (C.D. Cal. 2007) 500 F.Supp.2d 1228, 1235]. Factors to consider in making this determination include [*Chance v. Pac-Tel Teletrac Inc.* (9th Cir. 2001) 242 F.3d 1151, 1159 ; *Hana Fin., Inc. v. Hana Bank* (C.D. Cal. 2007) 500 F.Supp.2d 1228, 1235]:

- The genuineness and commercial character of the activity;
- Whether the mark was sufficiently public to identify or distinguish the marked service in an

appropriate segment of the public mind as those of the holder of the mark;

- The scope of the nonsales activity relative to what would be a reasonable attempt to market the service;
- The degree to which the holder conducts ongoing business activity using the mark; and
- The amount of business transacted.

Mere advertising by itself does not necessarily establish prior use [*New West Corp. v. NYM Co. of Cal., Inc.* (9th Cir. 1979) 595 F.2d 1194, 1200 ; *Hana Fin., Inc. v. Hana Bank* (C.D. Cal. 2007) 500 F.Supp.2d 1228, 1235]. However, advertising combined with other nonsales activity is sufficient to establish use in commerce [*Chance v. Pac-Tel Teletrac Inc.* (9th Cir. 2001) 242 F.3d 1151, 1159 ; *Hana Fin., Inc. v. Hana Bank* (C.D. Cal. 2007) 500 F.Supp.2d 1228, 1235].

For related forms, see California Forms of Pleading and Practice, Ch. 549, *Trademarks and Tradenames* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Torts Business Torts Unfair Business Practices Elements Trademark Law Protection of Rights Priority General Overview

Robert F. Freitas and Janet L. Boche contributed to the original chapter for California Forms of Jury Instruction (Matthew Bender). The Honorable Gerald J. Lewis was consultant to the original chapter.



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CHAPTER 33A Matthew Bender Unfair Competition Instructions
PART B. TRADEMARK AND TRADE NAME INFRINGEMENT

5-33A California Forms of Jury Instruction MB 3300A.65

MB 3300A.65 Requirement of Actual Use as Trademark, Service Mark, or Trade Name

[1] Instruction Requirement of Actual Use as Trademark, Service Mark, or Trade Name

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

To prove priority of use, Plaintiff must also prove that [he/she/it] actually used [his/her/its] [trademark/service mark/trade name] as a [trademark/service mark/trade name].

[CHOOSE ONE OR MORE OF THE FOLLOWING (See Use of Instruction)]

1. To prove use of a trademark, Plaintiff must prove that [he/she/it] displayed the mark on the goods, on labels for the goods, on tags affixed to the goods, or on displays, such as in stores, associated with the goods.

[OR]

2. To prove use of a service mark, Plaintiff must prove that [he/she/it] used or displayed the mark in the sale or advertising of [his/her/its] services.

[OR]

3. To prove use of a trade name, Plaintiff must prove that [he/she/it] displayed or used the name in connection with _____ [doing business or describe plaintiff's business activities], and not merely while setting up or planning the business.

It is not enough for Plaintiff to prove that [he/she/it] discovered or selected [his/her/its] [trademark/service mark/trade name] or that [he/she/it] used [his/her/its] [trademark/service mark/trade name] in establishing a business or before actually doing business. Neither of these types of use establishes priority of use.

Authorities: 15 U.S.C. § 1127; Bus. & Prof. Code § 14202(h); *Dynamet Tech., Inc. v. Dynamet Inc.* (C.C.P.A. 1979) 593 F.2d 1007, 1011 ; *Invisible, Inc. v. National Broad. Co., Inc.* (C.D. Cal. 1980) 1980 U.S. Dist. LEXIS 17006; *Gordon Bennett & Assocs., Inc. v. Volkswagen of Am., Inc.* (N.D. Cal. 1975) 1975 U.S. Dist. LEXIS 13398.

[2] Use of Instruction

This instruction should be used to define what the trademark laws consider the "use" necessary to establish priority of use. It sets forth the definitions of "use" that apply to trademarks, service marks, and trade names. It should be used following the instruction in MB 3300A.64[1] to define the type of use required by that instruction.

The three numbered paragraphs define the type of commercial use which establishes priority for trademarks, service marks, and trade names, respectively. Only the paragraph or paragraphs that relate to the type of marks or names at issue should be included in the instruction.

LexisNexis Matthew Bender Expert Practice Tip--Caution!: This instruction on "actual" use must be presented in an explainable manner. *By Rex Heeseman*

[3] Comment

Rights in a mark or name begin to accrue from the time a word or symbol is first used as a mark or name [see *American Petrofina v. Petrofina of Cal., Inc.* (9th Cir. 1979) 596 F.2d 896, 897 ; see also MB 3300A.64[3]]. For trademarks, this requires use on the goods or containers for the goods, and for service marks, this requires use or display in connection with selling or advertising the services [15 U.S.C. § 1127; Bus. & Prof. Code § 14202(h); *KGB, Inc. v. Giannoulas* (1980) 104 Cal.App.3d 844, 856-857, 164 Cal.Rptr. 571 ; see *CreAgri, Inc. v. Usana Health Sciences, Inc.* (9th Cir. 2007) 474 F.3d 626, 630 (former Bus. & Prof. Code § 14209 (see now Bus. & Prof. Code § 14202(h)) mirrors federal law)]. A trademark must serve to distinguish and identify goods. When a trademark is used in advertising, but it has not been used on the goods themselves, it cannot distinguish the goods, and, therefore, the owner's trademark rights have not yet begun [see *Gordon Bennett & Assocs., Inc. v. Volkswagen of Am., Inc.* (N.D. Cal. 1975) 1975 U.S. Dist. LEXIS 13398]. Similarly, preparing to do business by simply filing articles of incorporation or soliciting capital in connection with the name without actual use does not give the business's owners any rights in its trade name [see *Dynamet Tech., Inc. v. Dynamet Inc.* (C.C.P.A. 1979) 593 F.2d 1007, 1011]. A company must actually be engaged in a business for its trade name to become associated with its business [see Gilson, Trademark Protection and Practice, Ch. 3, *Establishing Trademark Rights*, § 3.03 (Matthew Bender)].

The Ninth Circuit has adopted a totality of the circumstances test for determining whether a "use" is sufficient to establish rights in the service mark [*Chance v. Pac-Tel Teletrac Inc.* (9th Cir. 2001) 242 F.3d 1151, 1159 ; *Hana Fin., Inc. v. Hana Bank* (C.D. Cal. 2007) 500 F.Supp.2d 1228, 1235]. Factors to consider in making this determination include [*Chance v. Pac-Tel Teletrac Inc.* (9th Cir. 2001) 242 F.3d 1151, 1159 ; *Hana Fin., Inc. v. Hana Bank* (C.D. Cal. 2007) 500 F.Supp.2d 1228, 1235]:

- The genuineness and commercial character of the activity;
- Whether the mark was sufficiently public to identify or distinguish the marked service in an appropriate segment of the public mind as those of the holder of the mark;
- The scope of the nonsales activity relative to what would be a reasonable attempt to market the

service;

- The degree to which the holder conducts ongoing business activity using the mark; and
- The amount of business transacted.

Mere advertising by itself does not necessarily establish prior use [*New West Corp. v. NYM Co. of Cal., Inc.* (9th Cir. 1979) 595 F.2d 1194, 1200 ; *Hana Fin., Inc. v. Hana Bank* (C.D. Cal. 2007) 500 F.Supp.2d 1228, 1235]. However, advertising combined with other nonsales activity is sufficient to establish use in commerce [*Chance v. Pac-Tel Teletrac Inc.* (9th Cir. 2001) 242 F.3d 1151, 1159 ; *Hana Fin., Inc. v. Hana Bank* (C.D. Cal. 2007) 500 F.Supp.2d 1228, 1235].

In *Invisible, Inc. v. National Broadcasting Co., Inc.*, the plaintiff advertising agency sued the defendant television station for its use of the slogans "WE'RE 4" and "WE'RE 4 YOU." The plaintiff claimed it had created the slogans and sold them in connection with promotional campaigns to three Channel 4 television stations across the country. The defendant used a similar slogan not purchased from the plaintiff. The plaintiff sued for service mark infringement, but was unsuccessful because it did not use the slogans as service marks to identify its own services. Its only use of the slogans was to sell them to others. Without any service mark use, the plaintiff could not have protectable rights [*Invisible, Inc. v. National Broad. Co., Inc.* (C.D. Cal. 1980) 1980 U.S. Dist. LEXIS 17006].

The court reached a similar decision in *Gordon Bennett & Associates, Inc. v. Volkswagen of America, Inc.* There, plaintiff advertising agency invented the trademark, SECURITY BLANKET, for banks to use on checkbook holders. The plaintiff's only use of the mark, however, was in soliciting business from financial institutions. As the conception of the mark and the efforts to sell it were not trademark or service mark uses, the plaintiff did not own any proprietary rights in the mark [*Gordon Bennett & Assocs., Inc. v. Volkswagen of Am., Inc.* (N.D. Cal. 1975) 1975 U.S. Dist. LEXIS 13398].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Torts Business Torts Unfair Business Practices Elements Trademark Law Protection of Rights Priority Actual Use

Robert F. Freitas and Janet L. Boche contributed to the original chapter for California Forms of Jury Instruction (Matthew Bender). The Honorable Gerald J. Lewis was consultant to the original chapter.



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CHAPTER 33A Matthew Bender Unfair Competition Instructions
PART B. TRADEMARK AND TRADE NAME INFRINGEMENT

5-33A California Forms of Jury Instruction MB 3300A.66

MB 3300A.66 Test of Likelihood of Confusion Between Plaintiff's Mark and Defendant's Mark

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Plaintiff must prove that use of both [his/her/its] [trademark/service mark/trade name] and Defendant's [trademark/service mark/trade name] in the marketplace is likely to confuse or deceive a person of ordinary intelligence or is likely to cause mistakes by a person of ordinary intelligence. To determine whether this likelihood of confusion exists, you must consider all of the following:

- 1. The similarity of the [marks or names];**
- 2. The similarity of the goods or services involved;**
- 3. The similarity of or the relationship between the parties' channels of trade, including**
_____ *[list indicia of parties' channels of trade, such as their methods of distribution, retail outlets, and modes of advertising]*;
- 4. The likelihood of expansion of the product lines, services, or business;**
- 5. The types of people who buy each party's goods or services and how careful they are likely to be in selecting those goods or services;**
- 6. Any evidence of actual confusion between the [marks or names];**
- 7. Whether Defendant intended to create confusion or mistakes by adopting [his/her/its] [mark or**

name] or whether Defendant adopted [his/her/its] [mark or name] with an innocent purpose; and

8. No one factor is conclusive. You must consider and weigh all of these factors, but not all of these factors need to be decided in Plaintiff's favor for Plaintiff to win. Instead, you must determine whether, considering all the factors, ordinary consumers who are neither overly careful nor overly careless would be likely to be confused about the source of the parties' goods or services when they encounter both [marks or names]. The test is a likelihood of confusion. Actual confusion is not required.

The distinctiveness of Plaintiff's [trademark/service mark/trade name].

Authorities: *Americana Trading, Inc. v. Russ Berrie & Co.* (9th Cir. 1992) 966 F.2d 1284, 1287 ; *E. & J. Gallo Winery v. Gallo Cattle Co.* (9th Cir. 1992) 955 F.2d 1327, 1338-1341 ; *Century 21 Real Estate Corp. v. Sandlin* (9th Cir. 1988) 846 F.2d 1175, 1178-1180 ; *Lindy Pen Co., Inc. v. Bic Pen Corp.* (9th Cir. 1984) 725 F.2d 1240, 1243 ; *AMF Inc. v. Sleekcraft Boats* (9th Cir. 1979) 599 F.2d 341, 348-354 ; *Big O Tire Dealers, Inc. v. Goodyear Tire & Rubber (D. Colo. 1976)* 408 F.Supp. 1219, 1247 , modified, 561 F.2d 1365 (10th Cir. 1977) ; *Mallard Creek Indus., Inc. v. Morgan* (1997) 56 Cal.App.4th 426, 435, 65 Cal.Rptr.2d 461 ; *Hair v. McGuire* (1961) 188 Cal.App.2d 348, 353, 10 Cal.Rptr. 414 .

[2] Use of Instruction

This instruction should be used to set forth the tests by which the jury is to decide one of the elements of trademark infringement--likelihood of confusion. It lists all of the factors that need to be considered and explains how the factors interrelate by stating that the factors are to be weighed as a whole to determine whether a likelihood of confusion exists.

[3] Comment

Both California law and federal law are intended to protect the public from confusion about the services and products it encounters [*Golden Door, Inc. v. Odisho* (9th Cir. 1980) 646 F.2d 347, 349-351 ; *Mallard Creek Indus., Inc. v. Morgan* (1997) 56 Cal.App.4th 426, 435, 65 Cal.Rptr.2d 461 ; see, e.g., *E.S.S. Entertainment 2000, Inc. v. Rock Star Videos, Inc.* (9th Cir. 2008) 547 F.3d 1095, 1100 ; *Rearden LLC v. Rearden Commerce, Inc.* (N.D. Cal. 2009) 597 F.Supp.2d 1006, 1015-1016]. A trademark can be used by someone other than its owner (with permission) if that use does not confuse the public [*United States v. Able Time, Inc.* (9th Cir. 2008) 545 F.3d 824, 835].

The public is protected against the probability or likelihood of confusion, as well as the actuality of confusion [*Century 21 Real Estate Corp. v. Sandlin* (9th Cir. 1988) 846 F.2d 1175, 1179 ; *Hair v. McGuire* (1961) 188 Cal.App.2d 348, 353, 10 Cal.Rptr. 414]. Thus, once a plaintiff has established that it owns a protectable mark and has priority of use, the essential question in a trademark infringement case is whether a likelihood of confusion exists [*Jada Toys, Inc. v. Mattel, Inc.* (9th Cir. 2008) 518 F.3d 628, 632 ; *Perfumebay.com Inc. v. eBay Inc.* (9th Cir. 2007) 506 F.3d 1165, 1173 ; *Grocery Outlet, Inc. v. Albertson's Inc.* (9th Cir. 2007) 497 F.3d 949, 951 (competitor's use of "LUCKY" mark for retail grocery services was likely to cause consumer confusion; remaining issue involved abandonment of trademark by nonuse); *Jada Toys, Inc. v. Mattel, Inc.* (9th Cir. 2007) 496 F.3d 974, 979 ; *Image Online Design, Inc. v. Core Ass'n* (C.D. Cal. 2000) 120 F.Supp.2d 870, 875 ; *Mallard Creek Indus., Inc. v. Morgan* (1997) 56 Cal.App.4th 426, 435, 65 Cal.Rptr.2d 461 (distributor of trademarked product not entitled to complete defense under Bus. & Prof. Code § 14342, which protects prior users of mark); *Cowles Magazines & Broad., Inc. v. Elysium, Inc.* (1967) 255 Cal.App.2d 731, 733, 63 Cal.Rptr. 507].

The plaintiff has the burden of proving likelihood of confusion [*Americana Trading, Inc. v. Russ Berrie & Co.* (9th Cir. 1992) 966 F.2d 1284, 1287 ; see *Gracie v. Gracie* (9th Cir. 2000) 217 F.3d 1060, 1066-1067 (in federal case for infringement of service marks under California common law, jury instruction that defendant could be found liable for

infringement only if defendant used plaintiff's logo in manner likely to cause confusion, rather than logo similar to plaintiff's, did not warrant new trial, although instruction could have been more detailed and precise)].

Actual confusion is not necessary to a finding of likelihood of confusion [*E. & J. Gallo Winery v. Gallo Cattle Co.* (9th Cir. 1992) 967 F.2d 1280, 1292 ; *Academy of Motion Picture Arts v. Creative House* (9th Cir. 1991) 944 F.2d 1446, 1456 ; *American Int'l Group v. American Int'l Bank* (9th Cir. 1991) 926 F.2d 829, 832 ; see *Perfumbay.com Inc. v. eBay Inc.* (9th Cir. 2007) 506 F.3d 1165, 1175-1176 (difficulties in gathering evidence of actual confusion make its absence generally unnoteworthy)].

A likelihood of confusion exists when simultaneous use of two marks creates a likelihood that the consuming public, when encountering the two marks, would assume that the products or services represented by the marks are associated or emanate from the same source. Without a likelihood of confusion, there is no liability for trademark infringement [*Lindy Pen Co., Inc. v. Bic Pen Corp.* (9th Cir. 1984) 725 F.2d 1240, 1243, 1247 ; see *Bus. & Prof. Code* § 14245 (use of registered mark may be grounds for civil action if use is likely or intended to cause confusion or mistake or to deceive)]. Although the defendant's intent in adopting its mark is relevant to whether a likelihood of confusion exists, the defendant may be liable for infringement even if it acted in good faith, because an intent to infringe is not required [*E. & J. Gallo Winery v. Gallo Cattle Co.* (9th Cir. 1992) 955 F.2d 1327, 1341 ; *Ball v. American Trial Lawyers Assn.* (1971) 14 Cal.App.3d 289, 306, 92 Cal.Rptr. 228].

The infringement test focuses on the confusion likely to be experienced by ordinary consumers, who are neither overly careful nor overly careless [see *Ball v. American Trial Lawyers Assn.* (1971) 14 Cal.App.3d 289, 309, 92 Cal.Rptr. 228]. From that perspective, each of the factors listed above is weighed to determine whether it favors a finding of infringement or a finding of no infringement, but no single factor or consideration is conclusive. The evidence must be considered as a whole [*E. & J. Gallo Winery v. Gallo Cattle Co.* (9th Cir. 1992) 955 F.2d 1327, 1338 ; *Big O Tire Dealers, Inc. v. Goodyear Tire & Rubber* (D. Colo. 1976) 408 F.Supp. 1219, 1247 , modified 561 F.2d 1365 (10th Cir. 1977) ; see *AMF Inc. v. Sleekcraft Boats* (9th Cir. 1979) 599 F.2d 341, 348-354]. The Ninth Circuit has held that dissimilarity alone is insufficient to find no likelihood of confusion [*Jada Toys, Inc. v. Mattel, Inc.* (9th Cir. 2007) 496 F.3d 974, 979].

The eight factors listed in this instruction have been stated by courts in many different ways. For example, "the relationship between the parties' advertising" may be treated as a factor separate from "channels of trade" [see *Pignons S.A. de Mecanique v. Polaroid Corp.* (1st Cir. 1981) 657 F.2d 482, 487-489 ; see also *E. & J. Gallo Winery v. Gallo Cattle Co.* (9th Cir. 1992) 955 F.2d 1327, 1338-1341 (list of eight factors stated in slightly different way)].

LexisNexis Matthew Bender Expert Practice Tip--Defendant's Intent Is Not Dispositive: This instruction lists the factors to be considered on the issue of the "likelihood of confusion." Note that defendant's intent (7th factor) is only one consideration and is not dispositive. Even if defendant acted in good faith, defendant could still be liable for infringement. *By Ronald Oster*

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Torts Business Torts Unfair Business Practices Elements Trademark Law Likelihood of Confusion General Overview

Robert F. Freitas and Janet L. Boche contributed to the original chapter for California Forms of Jury Instruction (Matthew Bender). The Honorable Gerald J. Lewis was consultant to the original chapter.



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CHAPTER 33A Matthew Bender Unfair Competition Instructions
PART B. TRADEMARK AND TRADE NAME INFRINGEMENT

5-33A California Forms of Jury Instruction MB 3300A.67

MB 3300A.67 Damages

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

If you find that Defendant has infringed Plaintiff's [mark or name], then you must decide whether Plaintiff is entitled to recover damages, and, if so, the amount of those damages. There are two kinds of damages intended to compensate Plaintiff that you may consider: (1) special compensatory damages, and (2) general compensatory damages.

Special compensatory damages are the direct economic losses, such as lost sales and out-of-pocket expenses, that Plaintiff suffered as the result of Defendant's actions.

General compensatory damages are the amount of money necessary to compensate Plaintiff for indirect losses. These may include all of the following:

1. Compensation for injury to or the loss of Plaintiff's reputation or goodwill;
2. The expense of preventing customers from being deceived; and
3. The cost of the advertising necessary in the future to erase or repair the effects of the infringement.

Although this type of damage may be difficult to measure, you should use your best judgment in determining the amount of these damages to Plaintiff, if any, based on the relevant evidence.

If you find that Plaintiff is entitled to a verdict of infringement, but you do not believe that Plaintiff has demonstrated any damages, you may return a verdict for Plaintiff and fix compensatory damages in a nominal sum, such as one dollar.

[*OPTIONAL (See Use of Instruction)*]

You must also decide whether Plaintiff should be awarded punitive damages.

Authority: *Big O Tire Dealers, Inc. v. Goodyear Tire & Rubber (D. Colo. 1976) 408 F.Supp. 1219, 1248-1250* , modified (10th Cir. 1977) 561 F.2d 1365 .

[2] Use of Instruction

This instruction should be used to set forth the amount and types of damages the jury can award. It explains the basis for each type of award and describes the purpose of each type of award.

The plaintiff may also be able to recover punitive damages if the defendant acted fraudulently or maliciously [*Civ. Code* § 3294(a)] and if the plaintiff sustained some actual damages [see Witkin, Summary of California Law, vol. 6, *Torts*, §§ 1607-1610 (10th ed. 2005); see generally Ch. 39, *California Judicial Council Damages Instructions*].

[3] Comment

There were few reported cases in which a jury decided issues of trademark infringement. However, since the \$19,600,000 jury verdict in *Big O Tire Dealers, Inc. v. Goodyear Tire & Rubber* [*Big O Tire Dealers, Inc. v. Goodyear Tire & Rubber (D. Colo. 1976) 408 F.Supp. 1219, 1244* , modified, (10th Cir. 1977) 561 F.2d 1365], demands for jury trials in trademark infringement suits seeking monetary damages are more common [see Gilson, Trademark Protection and Practice, Ch. 10, § 10.13 (Matthew Bender)].

The damages awarded for a trademark infringement are intended to make the plaintiff whole through compensation for direct economic losses and compensation for intangible losses, such as the loss of reputation or goodwill [*15 U.S.C. § 1117; Bus. & Prof. Code § 14340; Big O Tire Dealers, Inc. v. Goodyear Tire & Rubber (D. Colo. 1976) 408 F.Supp. 1219, 1248-1250* , modified, (10th Cir. 1977) 561 F.2d 1365 ; see Gilson, Trademark Protection and Practice, Ch. 8, § 8.08 (Matthew Bender)]. In addition, punitive damages may be available if the defendant has acted fraudulently or maliciously [*Civ. Code* § 3294(a)] and if the plaintiff sustained some actual damages [see Witkin, Summary of California Law, vol. 6, *Torts*, §§ 1607-1610 (10th ed. 2005)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Torts Business Torts Unfair Business Practices Remedies Trademark Law Infringement Actions Remedies Damages Compensatory Damages Trademark Law Infringement Actions Remedies Damages Punitive Damages

Robert F. Freitas and Janet L. Boche contributed to the original chapter for California Forms of Jury Instruction (Matthew Bender). The Honorable Gerald J. Lewis was consultant to the original chapter.



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CHAPTER 33A Matthew Bender Unfair Competition Instructions
PART B. TRADEMARK AND TRADE NAME INFRINGEMENT

5-33A California Forms of Jury Instruction MB 3300A.68-MB 3300A.79

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MB 3300A.68Reserved for Future Use



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CHAPTER 33A Matthew Bender Unfair Competition Instructions
PART C. BREACH OF CONFIDENCE

5-33A California Forms of Jury Instruction MB 3300A.80

MB 3300A.80 Breach of Confidence--Burden of Proof

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Plaintiff is seeking to recover damages from Defendant for breach of confidence. To recover on this claim, Plaintiff must prove all of the following:

- 1. That Plaintiff conveyed new and novel information to Defendant in confidence;**
- 2. That Defendant knew that the information was confidential before it was disclosed to [him/her/it] by Plaintiff;**
- 3. That before Plaintiff gave the information to Defendant, Defendant had a chance to reject receipt of the information on a confidential basis;**
- 4. That Defendant accepted the information on the understanding that [he/she/it] would keep the information confidential;**
- 5. That Defendant disclosed the information in breach of confidence;**
- 6. That _____ [name of third party] used the information by _____ [describe use by third party];**
- 7. That use of the information by _____ [name of third party] caused damage to Plaintiff; and**

8. The nature and extent of Plaintiff's damage.

Authorities: *Tele-Count Eng'rs, Inc. v. Pacific Tel. & Tel. Co.* (1985) 168 Cal.App.3d 455, 461-467, 214 Cal.Rptr. 276 ; *Faris v. Enberg* (1979) 97 Cal.App.3d 309, 320-323, 158 Cal.Rptr. 704 .

[2] Use of Instruction

This instruction should be used when there is a cause of action based on breach of confidence.

A preponderance of evidence instruction must be used with this instruction [see Ch. 2, *California Judicial Council Evidence Instructions*, CACI No. 200 ("Obligation to Prove--More Likely True Than Not True")] as must an instruction defining "cause" [see Ch. 3, *California Judicial Council Contracts Instructions*, CACI No. 350 ("Introduction to Contract Damages"), and Ch. 3E, *Matthew Bender Contract Damages Instructions*, MB 300E.04].

LexisNexis Matthew Bender Expert Practice Tip--Definitions: This is a topic where the "practical" definition seems relatively clear, but the "legal" definition is tough for many jurors. *By Rex Heeseman*

[3] Comment

[a] Nature of Actionable Breach of Confidence

The tort of breach of confidence is based on the concept of an implied obligation or contract between the parties [*Tele-Count Eng'rs, Inc. v. PacificTel. & Tel. Co.* (1985) 168 Cal.App.3d 455, 464, 214 Cal.Rptr. 276 ; *Mann v. Columbia Pictures, Inc.* (1982) 128 Cal.App.3d 628, 646, 180 Cal.Rptr. 522]. It is an obligation in law when in fact the parties made no promise. It is not based on apparent intentions of the involved parties; it is an obligation created by law for reasons of justice [*Fink v. Goodson-Todman Enters., Ltd.* (1970) 9 Cal.App.3d 996, 1010, 88 Cal.Rptr. 679].

Appellate decisions have uniformly required that an idea must be confidential and novel to warrant protection [*Faris v. Enberg* (1979) 97 Cal.App.3d 309, 322-323, 158 Cal.Rptr. 704 ; *Fink v. Goodson-Todman Enters., Ltd.* (1970) 9 Cal.App.3d 996, 1009, 88 Cal.Rptr. 679 ; *Ojala v. Bohlin* (1960) 178 Cal.App.2d 292, 300, 2 Cal.Rptr. 919]. The cause of action certainly arises when a trade secret is disclosed without privilege to do so, but under appropriate circumstances, disclosure of information that is not a trade secret but is substantially secret is also actionable [*Tele-Count Eng'rs, Inc. v. Pacific Tel. & Tel. Co.* (1985) 168 Cal.App.3d 455, 462-463, 214 Cal.Rptr. 276 ; *Thompson v. California Brewing Co.* (1957) 150 Cal.App.2d 469, 475-476, 310 P.2d 436]. Similarly, when the action for breach of confidence involves a literary work, the literary work does not have to be copyrighted or protectable to be the subject of a breach of confidence action [*Faris v. Enberg* (1979) 97 Cal.App.3d 309, 320-323, 158 Cal.Rptr. 704].

[b] Elements of Cause of Action

The parameters of the breach of confidence action have not yet been well defined, but the basic elements of the tort have been enumerated. An actionable breach of confidence arises when an idea, whether or not protectable, is (1) offered to another in confidence, (2) voluntarily received by the offeree in confidence with the understanding that it is not to be disclosed to others, and (3) not to be used by the offeree for purposes beyond the limits of the confidence without the offeror's permission. To prevent the unwarranted creation or extension of a monopoly and restraint on progress in art, a confidential relationship will not be created from the mere submission of an idea to another. There must exist evidence of the communication of the confidentiality of the submission or evidence from which a confidential relationship can be inferred [*Tele-Count Eng'rs, Inc. v. Pacific Tel. & Tel. Co.* (1985) 168 Cal.App.3d 455, 462, 214 Cal.Rptr. 276 ; see *Faris v. Enberg* (1979) 97 Cal.App.3d 309, 323, 158 Cal.Rptr. 704].

A cause of action for breach of confidence based on a plaintiff's theory that the defendant used defendant's ideas to its benefit, rather than guarding its confidences or paying the defendant reasonable compensation, requires a showing that

the defendant did use those ideas [*Hollywood Screentest of America, Inc. v. NBC Universal, Inc. (2007) 151 Cal.App.4th 631, 649, 60 Cal.Rptr.3d 279*] .

Although no particular form of notice of confidentiality is required, mere constructive notice is not sufficient. However, knowledge of the confidential nature of the information may be proved by circumstantial evidence [*Tele-Count Eng'rs, Inc. v. Pacific Tel. & Tel. Co. (1985) 168 Cal.App.3d 455, 463-464, 467, 214 Cal.Rptr. 276* ; see Ch. 2, *California Judicial Council Evidence Instructions, CACI No. 202*, for a general instruction on direct and indirect ("circumstantial") evidence].

[c] Derivation of Instruction

This instruction is based on an instruction set forth and approved in *Tele-Count Engineers, Inc. v. Pacific Telephone and Telegraph Co.* [*Tele-Count Eng'rs, Inc. v. Pacific Tel. & Tel. Co. (1985) 168 Cal.App.3d 455, 461-467, 214 Cal.Rptr. 276*]. The court of appeal opinion considered the propriety of the instruction to the jury on breach of confidence when a telephone cable counting contractor sued a telephone company for disclosure of counting forms by the telephone company to a second contractor. The court held that, although the confidential information does not have to be a trade secret, (1) the information must be substantially secret; (2) the defendant must have known it was confidential and have had the opportunity to reject it before receiving it as confidential; and (3) there must have been an understanding that confidentiality would be protected [*Tele-Count Eng'rs, Inc. v. Pacific Tel. & Tel. Co. (1985) 168 Cal.App.3d 455, 461-467, 214 Cal.Rptr. 276*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Torts Business Torts Unfair Business Practices Remedies Trade Secrets Law Breach of Contract Breach of Confidence General Overview

Robert F. Freitas and Janet L. Boche contributed to the original chapter for California Forms of Jury Instruction (Matthew Bender). The Honorable Gerald J. Lewis was consultant to the original chapter.



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CHAPTER 33A Matthew Bender Unfair Competition Instructions
PART C. BREACH OF CONFIDENCE

5-33A California Forms of Jury Instruction MB 3300A.81

MB 3300A.81 Damages for Breach of Confidence

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

If you find that Plaintiff is entitled to recover damages from Defendant for breach of confidence, those damages should be an amount that will reasonably compensate Plaintiff for all of [his/her/its] loss or harm to the extent that the loss or harm was caused by the Defendant's conduct, whether or not the loss or harm could have been anticipated by Defendant.

Plaintiff is entitled to recover only for the loss or harm actually suffered because of any breach of confidence by Defendant. You may not consider any loss or harm suffered by Plaintiff that was not caused by any breach by Defendant.

Authority: *Civ. Code* § 3333.

[2] Use of Instruction

This instruction should be used in actions for breach of confidence. It should be used in conjunction with the instruction in MB 3300A.80 defining the plaintiff's burden of proof.

An instruction defining "cause" as a "substantial factor" should be adapted for use with this instruction [*see* Ch. 4, *California Judicial Council Negligence Instructions, CACI No. 430* ("Causation: Substantial Factor")].

[3] Comment

Civ. Code § 3333 specifies the damages recoverable for the breach of an obligation not arising from contract. The

measure of damages is the amount that will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not. Such damages may not in all cases be limited to the amount of the defendant's gain, which may be more or less than the loss suffered by the injured party. Damages for breach of confidence may include the plaintiff's loss of business or injury to the plaintiff's business reputation [*see Ojala v. Bohlin* (1960) 178 Cal.App.2d 292, 302-303, 2 Cal.Rptr. 919 (action for unfair competition before development of breach of confidence tort)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Torts Business Torts Unfair Business Practices Remedies Trade Secrets Law Breach of Contract Breach of Confidence General Overview Trade Secrets Law Civil Actions Remedies Damages General Overview

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CHAPTER 34 California Judicial Council Cartwright Act Instructions

5-34 California Forms of Jury Instruction 34.syn

§ 34.syn Synopsis to Chapter 34: California Judicial Council Cartwright Act Instructions

CACI 3400 Horizontal and Vertical Restraints (Use for Direct Competitors)--Price Fixing--Essential Factual Elements

CACI 3401 Horizontal Restraints (Use for Direct Competitors)-- Allocation of Trade or Commerce--Essential Factual Elements

CACI 3402 Horizontal Restraints--Dual Distributor Restraints--Essential Factual Elements

CACI 3403 Horizontal Restraints (Use for Direct Competitors)--Group Boycott--Per Se Violation--Essential Factual Elements

CACI 3404 Horizontal Restraints--Group Boycott--Rule of Reasons-- Essential Factual Elements

CACI 3405 Horizontal and Vertical Restraints (Use for Direct Competitors or Supplier/Reseller Relations)--Other Unreasonable Restraint of Trade--Rule of Reason--Essential Factual Elements

CACI 3406 Horizontal and Vertical Restraints--"Agreement" Explained

CACI 3407 Horizontal and Vertical Restraints--Agreement Between Company and Its Employee

CACI 3408 Vertical Restraints--"Coercion" Explained

CACI 3409 Vertical Restraints--Termination of Reseller

CACI 3410 Vertical Restraints--Agreement Between Seller and Reseller's Competitor

CACI 3411 Rule of Reason--Anticompetitive Versus Beneficial Effects

CACI 3412 Rule of Reason--"Market Power" Explained

CACI 3413 Rule of Reason--"Product Market" Explained

CACI 3414 Rule of Reason--"Geographic Market" Explained

CACI 3415-CACI 3419 Reserved for Future Use

CACI 3420 Tying--Real Estate, Products, or Services--Essential Factual Elements (Bus. & Prof. Code, § 16720)

CACI 3421 Tying--Products or Services--Essential Factual Elements (Bus. & Prof. Code, § 16727)

CACI 3422 Tying--"Separate Products" Explained

CACI 3423 Tying--"Economic Power" Explained

CACI 3424-CACI 3429 Reserved for Future Use

CACI 3430 "Noerr-Pennington" Doctrine

CACI 3431 Affirmative Defense-- In Pari Delicto

CACI 3432-CACI 3439 Reserved for Future Use

CACI 3440 Damages

CACI 3441-CACI 3499 Reserved for Future Use

CACI VF-3400 Horizontal and Vertical Restraints (Use for Direct Competitors)--Price Fixing

CACI VF-3401 Horizontal Restraints (Use for Direct Competitors) --Allocation of Trade or Commerce

CACI VF-3402 Horizontal Restraints (Use for Direct Competitors) --Allocation of Trade or Commerce--Affirmative Defense-- In Pari Delicto

CACI VF-3403 Horizontal Restraints--Dual Distributor Restraints

CACI VF-3404 Horizontal Restraints (Use for Direct Competitors) --Group Boycott--Per Se Violation

CACI VF-3405 Horizontal Restraints--Group Boycott--Rule of Reason

CACI VF-3406 Horizontal and Vertical Restraints (Use for Direct Competitors or Supplier/Reseller Relations)--Other Unreasonable Restraint of Trade--Rule of Reason

CACI VF-3407 Horizontal and Vertical Restraints (Use for Direct Competitors or Supplier/Reseller Relations)--Other Unreasonable Restraint of Trade--Rule of Reason Affirmative Defense--"Noerr-Pennington" Doctrine

CACI VF-3408 Tying--Real Estate, Products, or Services (Bus. & Prof. Code, § 16720)

CACI VF-3409 Tying--Products or Services (Bus. & Prof. Code, § 16727)

CACI VF-3410-CACI VF-3499 Reserved for Future Use



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CHAPTER 34 California Judicial Council Cartwright Act Instructions

5-34 California Forms of Jury Instruction Scope

Scope

SCOPE

This chapter contains the California Judicial Council's "Cartwright Act Series" of jury instructions [*CACI* No. 3400 et seq.]. The Judicial Council of California Civil Jury Instructions (CACI) included in this publication are the product of the Judicial Council of California Task Force on Jury Instructions, which are updated by the Judicial Council of California Advisory Committee on Civil Jury Instructions.

This chapter includes instructions on the following topics:

- Essential factual elements for causes of action alleging horizontal and vertical restraints [*CACI* Nos. 3400- 3405], such as price fixing.
- Related issues in horizontal and vertical restraint cases [*CACI* Nos. 3406- 3410], including explanations of terms [*CACI* Nos. 3406 ("agreement" explained), 3408 ("coercion" explained)].
- The rule of reason [*CACI* Nos. 3411- 3414].
- Essential factual elements for causes of action alleging tying [*CACI* Nos. 3420, 3421] and applicable definitions [*CACI* Nos. 3422 ("separate products" explained), 3423 ("economic power" explained)].
- The "Noerr-Pennington" doctrine [*CACI* No. 3430] and the *in pari delicto* affirmative defense [*CACI* No. 3431].
- Damages [*CACI* No. 3440].

The Cartwright Act series also includes special verdict forms [*CACI* Nos. VF-3400-VF-3409].



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CHAPTER 34 California Judicial Council Cartwright Act Instructions

5-34 California Forms of Jury Instruction CACI 3400

CACI 3400 Horizontal and Vertical Restraints (Use for Direct Competitors)--Price Fixing--Essential Factual Elements

[*Name of plaintiff*] **claims** [*name of defendant*] **was involved in price fixing. Price fixing is an agreement to set, raise, lower, maintain, or stabilize the prices or other terms of trade charged or to be charged for a product or service, whether the prices agreed on were high or low, reasonable or unreasonable. To establish this claim, [*name of plaintiff*] must prove all of the following:**

- 1. That [*name of defendant*] [and [*name(s) of alleged coparticipant(s)*]] agreed to fix [or] [set/raise/lower/maintain/stabilize] prices [or other terms of trade] charged or to be charged for [*product/service*];**
- 2. That [*name of plaintiff*] was harmed; and**
- 3. That [*name of defendant*]'s conduct was a substantial factor in causing [*name of plaintiff*]'s harm.**

New September 2003

This instruction is intended to apply to both actual and potential competitors. For cases involving vertical restraints, use this instruction but see additional special vertical restraint instructions contained in this series (CACI Nos. 3409, *Vertical Restraints--Termination of Reseller*, and 3410, *Vertical Restraints--Agreement Between Seller and Reseller's Competitor*).

In addition to price, price fixing includes any combination that "tampers with price structures." Like its federal counterpart, the Cartwright Act would seem to prohibit combinations that fix aspects of price

such as costs, discounts, credits, financing, warranty, and delivery terms. Therefore, if this case concerns the fixing of an aspect of price, other than price itself, this instruction and those that are related to it should be adapted accordingly.

■ *Business and Professions Code section 16726* provides: "Except as provided in this chapter, every trust is unlawful, against public policy and void."

■ *Business and Professions Code section 16720(d) and (e)* provides:

A trust is a combination of capital, skill or acts by two or more persons for any of the following purposes:

(d) To fix at any standard or figure, whereby its price to the public or consumer shall be in any manner controlled or established, any article or commodity of merchandise, produce or commerce intended for sale, barter, use or consumption in this State.

(e) To make or enter into or execute or carry out any contracts, obligations or agreements of any kind or description, by which they do all or any or any combination of any of the following:

(1) Bind themselves not to sell, dispose of or transport any article or any commodity or any article of trade, use, merchandise, commerce or consumption below a common standard figure, or fixed value.

(2) Agree in any manner to keep the price of such article, commodity or transportation at a fixed or graduated figure.

(3) Establish or settle the price of any article, commodity or transportation between them or themselves and others, so as directly or indirectly to preclude a free and unrestricted competition among themselves, or any purchasers or consumers in the sale or transportation of any such article or commodity.

(4) Agree to pool, combine or directly or indirectly unite any interests that they may have connected with the sale or transportation of any such article or commodity, that its price might in any manner be affected.

■ " ' "To state a cause of action for conspiracy, the complaint must allege (1) the formation and operation of the conspiracy, (2) the wrongful act or acts done pursuant thereto, and (3) the damage resulting from such act or acts." ' Thus, the Supreme Court applied the pleading requirements for a civil conspiracy action under common law to a statutory action under the Cartwright Act for antitrust conspiracies." (*Cellular Plus, Inc. v. Superior Court* (1993) 14 Cal.App.4th 1224, 1236 [18 Cal.Rptr.2d 308] , quoting *Chicago Title Insurance Co. v. Great Western Financial Corp.* (1968) 69 Cal.2d 305, 316 [70 Cal.Rptr. 849, 444 P.2d 481] .)

■ "A complaint for unlawful price fixing must allege facts demonstrating that separate entities conspired together. Only separate entities pursuing separate economic interests can conspire within the proscription of the antitrust laws against price fixing combinations." (*Freeman v. San Diego Assn. of Realtors* (1999) 77 Cal.App.4th 171, 188-189 [91 Cal.Rptr.2d 534] , internal citations omitted.)

■ "The Cartwright Act prohibits every trust, defined as 'a combination of capital, skill or acts by two or more persons' for specified anticompetitive purposes. The federal Sherman Act prohibits every 'contract, combination ... or conspiracy,

5-34 California Forms of Jury Instruction CACI 3400

in restraint of trade.' The similar language of the two acts reflects their common objective to protect and promote competition. Since the Cartwright Act and the federal Sherman Act share similar language and objectives, California courts often look to federal precedents under the Sherman Act for guidance." (*Chavez v. Whirlpool Corp.* (2001) 93 Cal.App.4th 363, 369 [113 Cal.Rptr.2d 175] , internal citations omitted.)

- "The Cartwright Act, like the Sherman Act, prohibits 'combinations' for the purpose of restraining trade. '[A] combination means a concert of action by individuals or entities maintaining separate and independent interests.'" (*Roth v. Rhodes* (1994) 25 Cal.App.4th 530, 543 [30 Cal.Rptr.2d 706] , internal citations omitted.)

- "Two forms of conspiracy may be used to establish a violation of the antitrust laws: a horizontal restraint, consisting of a collaboration among competitors; or a vertical restraint, based upon an agreement between business entities occupying different levels of the marketing chain." (*G.H.I.I. v. Mts, Inc.* (1983) 147 Cal.App.3d 256, 267] , internal citations omitted.)

- " 'Horizontal combinations are cartels or agreements among competitors which restrain competition among enterprises at the same level of distribution. They are ordinarily illegal per se. Vertical restraints are imposed by persons or firms further up the chain of distribution of a specific product (or in rare cases, further down the chain) than the enterprise restrained. Vertical non-price restraints are tested under the rule of reason; that is, the plaintiff must prove that the restraint had an anticompetitive effect in the relevant market in order to prevail.' " (*Exxon Corp. v. Superior Court* (1997) 51 Cal.App.4th 1672, 1680-1681 [60 Cal.Rptr.2d 195] , internal citations and footnote omitted.)

- "In general, a Cartwright Act price fixing complaint must allege specific facts in addition to stating the purpose or effect of the price fixing agreement and that the accused was a member of or acted pursuant to the price fixing agreement." (*Cellular Plus, Inc., supra*, 14 Cal.App.4th at p. 1237 .)

- "[A] conspiracy among competitors to restrict output and/or raise prices [is] unlawful per se without regard to any of its effects" (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 851 [107 Cal.Rptr.2d 841, 24 P.3d 493] .)

- " 'Among the practices which the courts have heretofore deemed to be unlawful in and of themselves are price fixing, division of markets, group boycotts, and tying arrangements.' The "per se" doctrine means that a particular practice and the setting in which it occurs is sufficient to compel the conclusion that competition is unreasonably restrained and the practice is consequently illegal.' " (*Oakland-Alameda County Builders' Exchange v. F. P. Lathrop Construction Co.* (1971) 4 Cal.3d 354, 361-362 [93 Cal.Rptr. 602, 482 P.2d 226] , internal citations omitted.)

- "It has long been settled that an agreement to fix prices is unlawful per se. It is no excuse that the prices fixed are themselves reasonable." (*Catalano Inc. v. Target Sales, Inc.* (1980) 446 U.S. 643, 647 [100 S.Ct. 1925, 64 L.Ed.2d 580] .)

- "Under both California and federal law, agreements fixing or tampering with prices are illegal per se." (*Oakland-Alameda County Builders' Exchange, supra*, 4 Cal.3d at p. 363 .)

- "These rules apply whether the price-fixing scheme is horizontal or vertical; that is, whether the price is fixed among competitors or businesses at different economic levels." (*Mailand v. Burckle* (1978) 20 Cal.3d 367, 377 [143 Cal.Rptr. 1, 572 P.2d 1142] , internal citations omitted.)

- "Under the authorities ... the agreement between plaintiffs and defendants and between defendants and Powerine were unlawful per se. It is, therefore, not necessary to inquire whether these arrangements had an actual anticompetitive effect." (*Mailand, supra*, 20 Cal.3d at p. 380 .)

- "The alleged antitrust violation need not be the sole or controlling cause of the injury in order to establish proximate

cause, but only need be a substantial factor in bringing about the injury." (*Saxer v. Philip Morris, Inc.* (1975) 54 Cal.App.3d 7, 23 [126 Cal.Rptr. 327] , internal citation omitted.)

■ "The plaintiff in a Cartwright Act proceeding must show that an antitrust violation was the proximate cause of his injuries. The frequently stated 'standing to sue' requirement is merely a rule that an action for violation of the antitrust laws may be maintained only by a party within the 'target area' of the antitrust violation, and not by one incidentally injured thereby. An 'antitrust injury' must be proved; that is, the type of injury the antitrust laws were intended to prevent, and which flows from the invidious conduct which renders defendants' acts unlawful. Finally, a plaintiff must show an injury within the area of the economy that is endangered by a breakdown of competitive conditions." (*Kolling v. Dow Jones & Co.* (1982) 137 Cal.App.3d 709, 723-724] , internal citations and footnote omitted.)

■ "We acknowledge that a plaintiff ... must often rely on inference rather than evidence since, usually, unlawful conspiracy is conceived in secrecy and lives its life in the shadows. But, when he does so, he must all the same rely on an inference implying unlawful conspiracy *more likely than* permissible competition, either in itself or together with other inferences or evidence." (*Aguilar, supra*, 25 Cal.4th at p. 857 , internal citations omitted.)

■ "The exact parameters of 'antitrust injury' under section 16750 have not yet been established through either court decisions or legislation." (*Cellular Plus, Inc., supra*, 14 Cal.App.4th at p. 1234 .)

■ *Business and Professions Code* section 16750(a) confers a private right of action for treble damages and attorneys fees on "[a]ny person who is injured in his business or property by reason of anything forbidden or declared unlawful by this chapter."

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, §§ 591-607

6 Antitrust Laws & Trade Regulation, Ch. 105, *California*, § 105.02[1] (Matthew Bender)

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.168[2] (Matthew Bender)

49 California Forms of Pleading and Practice, Ch. 565, *Unfair Competition* (Matthew Bender)

1 *Matthew Bender Practice Guide: California Unfair Competition and Business Torts*, Ch. 1, *Elements of Unfair Competition and Business Torts Causes of Action*, 1.05[4][a], Ch. 5, *Antitrust*, 5.04, 5.08, 5.09[1], 5.12

Publisher's Notes

There is no BAJI instruction on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Antitrust & Trade Law Price Fixing & Restraints of Trade Horizontal Restraints Price Fixing Antitrust & Trade Law Price Fixing & Restraints of Trade Vertical Restraints Price Fixing Antitrust & Trade Law Private Actions Injuries & Remedies State Regulation Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Torts Business Torts Unfair Business Practices Elements



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CHAPTER 34 California Judicial Council Cartwright Act Instructions

5-34 California Forms of Jury Instruction CACI 3401

CACI 3401 Horizontal Restraints (Use for Direct Competitors)-- Allocation of Trade or Commerce--Essential Factual Elements

[Name of plaintiff] claims that [name of defendant] agreed to allocate or divide [customers/territories/products]. An agreement to allocate [customers/territories/products] is an agreement between two or more competitors not to compete [for the business of particular customers/with each other in particular territories/in the sale of a particular product]. To establish this claim, [name of plaintiff] must prove all of the following:

- 1. That [name of defendant] and [name of alleged coparticipant] were or are competitors in the same or related markets;**
- 2. That [name of defendant] and [name alleged coparticipant] agreed to allocate or divide [customers/territories/products];**
- 3. That [name of plaintiff] was harmed; and**
- 4. That [name of defendant]'s [and [name of alleged coparticipant]'s] conduct was a substantial factor in causing [name of plaintiff]'s harm.**

New September 2003

The appropriate bracketed option(s) should be selected and the balance deleted, depending on the specific facts.

● *Business and Professions Code section 16726 provides: "Except as provided in this chapter, every*

trust is unlawful, against public policy and void."

- *Business and Professions Code section 16720(a)* provides: "A trust is a combination of capital, skill or acts by two or more persons for any of the following purposes: To create or carry out restrictions in trade or commerce."
- "The Cartwright Act, like the Sherman Act, prohibits 'combinations' for the purpose of restraining trade. '[A] combination means a concert of action by individuals or entities maintaining separate and independent interests.'" (*Roth v. Rhodes* (1994) 25 Cal.App.4th 530, 543 [30 Cal.Rptr.2d 706] , internal citations omitted.)
- "It is settled that distributors cannot lawfully agree to divide territories or customers. Such conduct is sometimes called a 'horizontal restraint,' and is a per se violation of the Sherman Act." (*Guild Wineries & Distilleries v. J. Sosnick and Son* (1980) 102 Cal.App.3d 627, 633 [162 Cal.Rptr. 87] , internal citations omitted.)
- " 'One of the classic examples of a per se violation ... is an agreement between competitors at the same level of the market structure to allocate territories in order to minimize competition... . This Court has reiterated time and time again that "[h]orizontal territorial limitations ... are naked restraints of trade with no purpose except stifling of competition." Such limitations are per se violations of the Sherman Act.' " (*Palmer v. BRG of Georgia, Inc.* (1990) 498 U.S. 46, 49 [111 S.Ct. 401, 112 L.Ed.2d 349] , internal citations omitted.)
- "Two forms of conspiracy may be used to establish a violation of the antitrust laws: a horizontal restraint, consisting of a collaboration among competitors; or a vertical restraint, based upon an agreement between business entities occupying different levels of the marketing chain." (*G.H.I.I. v. Mts, Inc.* (1983) 147 Cal.App.3d 256, 267] , internal citations omitted.)
- " 'Horizontal combinations are cartels or agreements among competitors which restrain competition among enterprises at the same level of distribution. They are ordinarily illegal per se. Vertical restraints are imposed by persons or firms further up the chain of distribution of a specific product (or in rare cases, further down the chain) than the enterprise restrained. Vertical non-price restraints are tested under the rule of reason; that is, the plaintiff must prove that the restraint had an anticompetitive effect in the relevant market in order to prevail.' " (*Exxon Corp. v. Superior Court* (1997) 51 Cal.App.4th 1672, 1680-1681 [60 Cal.Rptr.2d 195] , internal citations and footnote omitted.)
- "The alleged antitrust violation need not be the sole or controlling cause of the injury in order to establish proximate cause, but only need be a substantial factor in bringing about the injury." (*Saxer v. Philip Morris, Inc.* (1975) 54 Cal.App.3d 7, 23 [126 Cal.Rptr. 327] , internal citation omitted.)
- "The plaintiff in a Cartwright Act proceeding must show that an antitrust violation was the proximate cause of his injuries. The frequently stated 'standing to sue' requirement is merely a rule that an action for violation of the antitrust laws may be maintained only by a party within the 'target area' of the antitrust violation, and not by one incidentally injured thereby. An 'antitrust injury' must be proved; that is, the type of injury the antitrust laws were intended to prevent, and which flows from the invidious conduct which renders defendants' acts unlawful. Finally, a plaintiff must show an injury within the area of the economy that is endangered by a breakdown of competitive conditions." (*Kolling v. Dow Jones & Co.* (1982) 137 Cal.App.3d 709, 723-724] , internal citations and footnote omitted.)
- "The exact parameters of 'antitrust injury' under section 16750 have not yet been established through

either court decisions or legislation." (*Cellular Plus, Inc. v. Superior Court* (1993) 14 Cal.App.4th 1224, 1234 [18 Cal.Rptr.2d 308] .)

■ *Business and Professions Code section 16750(a)* confers a private right of action for treble damages and attorneys fees on "[a]ny person who is injured in his business or property by reason of anything forbidden or declared unlawful by this chapter."

■ "The Cartwright Act prohibits every trust, defined as 'a combination of capital, skill or acts by two or more persons' for specified anticompetitive purposes. The federal Sherman Act prohibits every 'contract, combination ... or conspiracy, in restraint of trade.' The similar language of the two acts reflects their common objective to protect and promote competition. Since the Cartwright Act and the federal Sherman Act share similar language and objectives, California courts often look to federal precedents under the Sherman Act for guidance." (*Chavez v. Whirlpool Corp.* (2001) 93 Cal.App.4th 363, 369 [113 Cal.Rptr.2d 175] , internal citations omitted.)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, §§ 591-607

6 Antitrust Laws & Trade Regulation, Ch. 105, *California*, § 105.02[2] (Matthew Bender)

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.168[3] (Matthew Bender)

49 California Forms of Pleading and Practice, Ch. 565, *Unfair Competition* (Matthew Bender)

1 *Matthew Bender Practice Guide: California Unfair Competition and Business Torts, Ch. 1, Elements of Unfair Competition and Business Torts Causes of Action*, 1.05[4][b]

Publisher's Notes

There is no BAJI instruction on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Antitrust & Trade Law Price Fixing & Restraints of Trade Horizontal Market Allocation Antitrust & Trade Law Private Actions Injuries & Remedies State Regulation Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Torts Business Torts Unfair Business Practices Elements



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California Forms of Jury Instruction

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CHAPTER 34 California Judicial Council Cartwright Act Instructions

5-34 California Forms of Jury Instruction CACI 3402

CACI 3402 Horizontal Restraints--Dual Distributor Restraints--Essential Factual Elements

[*Name of plaintiff*] **claims that** [*name of defendant*] **[stopped doing business with/refused to deal with/restrained] [him/her/it]/a reseller]. To establish this claim, [*name of plaintiff*] must prove all of the following:**

- 1. That [*name of defendant*] sold [*products*] directly in competition with [*name of plaintiff*]/a reseller] to a significant portion of [*name of plaintiff*]/the reseller]'s customers or potential customers;**
- 2. That [*name of defendant*] [stopped doing business with/refused to deal with/restrained] [*name of plaintiff*]/the reseller];**
- 3. That a motivating reason for the decision to [end business with/refuse to deal with/restrain] [*name of plaintiff*]/the reseller] was [his/her/its] refusal to agree to [*name of defendant*]'s [*specify the claimed restraint, e.g., territorial or customer restrictions*];**
- 4. That [*name of plaintiff*] was harmed; and**
- 5. That [*name of defendant*]'s conduct was a substantial factor in causing [*name of plaintiff*]'s harm.**

New September 2003

The appropriate bracketed options should be selected and the balance deleted depending on the specific facts. For example, the word "reseller" should be used instead of plaintiff if the plaintiff is not the reseller--such as, when the plaintiff is a government enforcer.

■ *Business and Professions Code section 16726* provides: "Except as provided in this chapter, every trust is unlawful, against public policy and void."

■ *Business and Professions Code section 16720(a)* provides: "A trust is a combination of capital, skill or acts by two or more persons for any of the following purposes: To create or carry out restrictions in trade or commerce."

■ "We hold that it is unlawful for a manufacturer who also distributes its own products in one geographic area to terminate an independent distributor when a substantial factor in bringing about the termination is the distributor's refusal to accept the manufacturer's attempt to enforce or impose territorial or customer restrictions among distributors." (*Guild Wineries & Distilleries v. J. Sosnick and Son* (1980) 102 Cal.App.3d 627, 630 [162 Cal.Rptr. 87] .)

■ "[A] refusal of a manufacturer to deal with a distributor can constitute a 'combination' in restraint of trade within the purview of the Sherman Act. ... We conclude that this case ... is governed by a per se principle." (*Guild Wineries & Distilleries, supra*, 102 Cal.App.3d at p. 633 .)

■ In *Dimidowich v. Bell & Howell* (9th Cir. 1986) 803 F.2d 1473, 1482-1484 , opn. mod. (9th Cir. 1987) 810 F.2d 1517 , the Ninth Circuit Court of Appeals rejected the holding in *Guild Wineries, supra* , that the per se standard applied, and predicted that the California Supreme Court would overrule *Guild Wineries*. This has not yet occurred. In the meantime, the decision in the *Guild* court remains binding on all subordinate state courts. (*Auto Equity Sales v. Superior Court* (1962) 57 Cal.2d 450, 455 [20 Cal.Rptr. 321, 369 P.2d 937] .)

■ "It is settled that distributors cannot lawfully agree to divide territories or customers. Such conduct is sometimes called a 'horizontal restraint,' and is a per se violation of the Sherman Act. ... When Guild became a distributor the same rule became applicable to it. Guild could not lawfully coerce a fellow distributor into allocating customers any more than Sosnick and other distributors could lawfully agree to such an allocation." (*Guild Wineries & Distilleries, supra*, 102 Cal.App.3d at p. 633 .)

■ "The alleged antitrust violation need not be the sole or controlling cause of the injury in order to establish proximate cause, but only need be a substantial factor in bringing about the injury." (*Saxer v. Philip Morris, Inc.* (1975) 54 Cal.App.3d 7, 23 [126 Cal.Rptr. 327] , internal citation omitted.)

■ "The plaintiff in a Cartwright Act proceeding must show that an antitrust violation was the proximate cause of his injuries. The frequently stated 'standing to sue' requirement is merely a rule that an action for violation of the antitrust laws may be maintained only by a party within the 'target area' of the antitrust violation, and not by one incidentally injured thereby. An 'antitrust injury' must be proved; that is, the type of injury the antitrust laws were intended to prevent, and which flows from the invidious conduct which renders defendants' acts unlawful. Finally, a plaintiff must show an injury within the area of the economy that is endangered by a breakdown of competitive conditions." (*Kolling v. Dow Jones & Co.* (1982) 137 Cal.App.3d 709, 723-724 [187 Cal.Rptr. 797] , internal citations and footnote omitted.)

■ "The exact parameters of 'antitrust injury' under section 16750 have not yet been established through either court decisions or legislation." (*Cellular Plus, Inc. v. Superior Court* (1993) 14 Cal.App.4th 1224, 1234 [18 Cal.Rptr.2d 308] .)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, §§ 591-607

6 Antitrust Laws & Trade Regulation, Ch. 105, *California*, § 105.02 (Matthew Bender)

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.168 (Matthew Bender)

49 California Forms of Pleading and Practice, Ch. 565, *Unfair Competition* (Matthew Bender)

Publisher's Notes

There is no BAJI instruction on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Antitrust & Trade Law Price Fixing & Restraints of Trade Horizontal Refusals to Deal General Overview Antitrust & Trade Law Price Fixing & Restraints of Trade Horizontal Restraints General Overview Antitrust & Trade Law Private Actions Injuries & Remedies State Regulation Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Torts Business Torts Unfair Business Practices Elements



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California Forms of Jury Instruction

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CHAPTER 34 California Judicial Council Cartwright Act Instructions

5-34 California Forms of Jury Instruction CACI 3403

CACI 3403 Horizontal Restraints (Use for Direct Competitors)--Group Boycott--Per Se Violation--Essential Factual Elements

[*Name of plaintiff*] **claims that** [*name of defendant*] **agreed not to deal with** [him/her/it] **[or to deal with** [him/her/it] **only on specified terms]. To establish this claim, [name of plaintiff *] must prove all of the following:***

1. **That** [*name of defendant*] **[and [name of alleged coparticipant[s] *]] agreed to [specify claimed refusal to deal, e.g., "refuse to sell to [name of plaintiff]"]***;
2. **That** [*name of plaintiff*] **was harmed; and**
3. **That** [*name of defendant*]'s **conduct was a substantial factor in causing [name of plaintiff *]'s harm.***

New September 2003

This instruction applies to agreements between competitors that are directly intended to affect competition facing them. In determining whether to give this per se instruction or the rule of reason instructions, it is important whether the challenged combination was horizontal (between competitors), vertical (between sellers and buyers), or some combination of the two. Horizontal combinations are subject to per se instructions; vertical combinations to the rule of reason instructions. Those combinations falling in between must be carefully scrutinized to determine whether their principal purpose is to restrain competition between competitors or to downstream resellers by the seller.

● *Business and Professions Code section 16726 provides: "Except as provided in this chapter, every*

trust is unlawful, against public policy and void."

- *Business and Professions Code section 16720(c)* provides: "A trust is a combination of capital, skill or acts by two or more persons for any of the following purposes: To prevent competition in manufacturing, making, transportation, sale or purchase of merchandise, produce or any commodity."

- "The antitrust laws do not preclude a party from unilaterally determining the parties with which, or the terms on which, it will transact business. However, it is a violation of the antitrust laws for a group of competitors with separate and independent economic interests, or a single competitor with sufficient leverage, to force another to boycott a competitor at the same level of distribution." (*Freeman v. San Diego Assn. of Realtors* (1999) 77 Cal.App.4th 171, 195 [91 Cal.Rptr.2d 534] , internal citation omitted.)

- "It is well settled that the antitrust laws do not preclude a trader from unilaterally determining the parties with whom it will deal and the terms on which it will transact business. An antitrust case must be based upon conspiratorial rather than unilateral conduct. Thus, only group boycotts are unlawful under the Sherman and Cartwright Acts." (*G.H.I.I. v. Mts, Inc.* (1983) 147 Cal.App.3d 256, 267-268 [195 Cal.Rptr. 211] , internal citations omitted.)

- "'Group boycotts, or concerted refusals by traders to deal with other traders, have long been held to be in the forbidden category. They have not been saved by allegations that they were reasonable in the specific circumstances, nor by a failure to show that they 'fixed or regulated prices, parcelled out or limited production, or brought about a deterioration in quality.' Even when they operated to lower prices or temporarily to stimulate competition they were banned. For ... such agreements, no less than those to fix minimum prices, cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment.'" (*Oakland-Alameda County Builders' Exchange v. F. P. Lathrop Construction Co.* (1971) 4 Cal.3d 354, 365 [93 Cal.Rptr. 602, 482 P.2d 226] , internal citations omitted.)

- "The Cartwright Act, like the Sherman Act, prohibits 'combinations' for the purpose of restraining trade. '[A] combination means a concert of action by individuals or entities maintaining separate and independent interests.'" (*Roth v. Rhodes* (1994) 25 Cal.App.4th 530, 543 [30 Cal.Rptr.2d 706] , internal citations omitted.)

- "'[T]here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.' Among these per se violations is the concerted refusal to deal with other traders, or, as it is often called, the group boycott." (*Marin County Bd. of Realtors v. Palsson* (1976) 16 Cal.3d 920, 930-931 [130 Cal.Rptr. 1, 549 P.2d 833] , internal citation omitted.)

- In *Marin County Bd. of Realtors, supra* , the Supreme Court explained that there is a distinction between "direct boycotts aimed at coercing parties to adopt noncompetitive practices and indirect boycotts which result in refusals to deal only as a by-product of the agreement." (*Marin County Bd. of Realtors, supra*, 16 Cal.3d at p. 932 .)

- Not all group boycotts are evaluated as per se violations: "This limitation on the per se rule is particularly applicable to trade association agreements not directly aimed at coercing third parties and eliminating competitors. In cases involving such agreements, courts have generally applied the rule of reason test." (*Marin County Bd. of Realtors, supra*, 16 Cal.3d at p. 932 .)

- "The alleged antitrust violation need not be the sole or controlling cause of the injury in order to

establish proximate cause, but only need be a substantial factor in bringing about the injury." (*Saxer v. Philip Morris, Inc.* (1975) 54 Cal.App.3d 7, 23 [126 Cal.Rptr. 327] , internal citation omitted.)

■ "The plaintiff in a Cartwright Act proceeding must show that an antitrust violation was the proximate cause of his injuries. The frequently stated 'standing to sue' requirement is merely a rule that an action for violation of the antitrust laws may be maintained only by a party within the 'target area' of the antitrust violation, and not by one incidentally injured thereby. An 'antitrust injury' must be proved; that is, the type of injury the antitrust laws were intended to prevent, and which flows from the invidious conduct which renders defendants' acts unlawful. Finally, a plaintiff must show an injury within the area of the economy that is endangered by a breakdown of competitive conditions." (*Kolling v. Dow Jones & Co.* (1982) 137 Cal.App.3d 709, 723-724 [187 Cal.Rptr. 797] , internal citations and footnote omitted.)

■ "The exact parameters of 'antitrust injury' under section 16750 have not yet been established through either court decisions or legislation." (*Cellular Plus, Inc. v. Superior Court* (1993) 14 Cal.App.4th 1224, 1234 [18 Cal.Rptr.2d 308] .)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, §§ 591-607

6 Antitrust Laws & Trade Regulation, Ch. 105, *California*, § 105.02[3] (Matthew Bender)

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.168[5] (Matthew Bender)

49 California Forms of Pleading and Practice, Ch. 565, *Unfair Competition* (Matthew Bender)

1 *Matthew Bender Practice Guide: California Unfair Competition and Business Torts*, Ch. 5, *Antitrust*, 5.08, 5.09[3], 5.14

Publisher's Notes

There is no BAJI instruction on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Antitrust & Trade Law Price Fixing & Restraints of Trade Horizontal Refusals to Deal Boycotts Antitrust & Trade Law Private Actions Injuries & Remedies State Regulation Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Torts Business Torts Unfair Business Practices Elements



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CHAPTER 34 California Judicial Council Cartwright Act Instructions

5-34 California Forms of Jury Instruction CACI 3404

CACI 3404 Horizontal Restraints--Group Boycott--Rule of Reasons-- Essential Factual Elements

[*Name of plaintiff*] **claims that** [*name of defendant*] **agreed to** [*describe conduct, e.g., "formulate an arbitrary membership limitation rule with [identify other participant[s]]"*]. **To establish this claim, [*name of plaintiff*] must prove all of the following:**

- 1. That [*name of defendant*] and [*name of alleged coparticipant[s]*] agreed to [*describe conduct, e.g., "formulate an arbitrary membership limitation rule"*];**
- 2. That the purpose or effect of [*name of defendant*]'s conduct was to restrain competition;**
- 3. That the anticompetitive effect of the restraint[s] outweighed any beneficial effect on competition;**
- 4. That [*name of plaintiff*] was harmed; and**
- 5. That [*name of defendant*]'s conduct was a substantial factor in causing [*name of plaintiff*]'s harm.**

New September 2003

Directions for Use

This instruction applies to agreements between competitors that are directly intended to affect competition facing them. In determining whether to give this per se instruction or the rule of reason instructions, it is important whether the challenged combination was horizontal (between competitors), vertical (between sellers and buyers), or some combination of the two. Horizontal combinations are

subject to per se instructions; vertical combinations to the rule of reason instructions. Those combinations falling in between must be carefully scrutinized to determine whether their principal purpose is to restrain competition between competitors or to downstream resellers by the seller.

For additional instructions regarding the rule of reason, see *CACI Nos. 3411 through 3414*.

Sources and Authority

- *Business and Professions Code section 16726* provides: "Except as provided in this chapter, every trust is unlawful, against public policy and void."

- *Business and Professions Code section 16720(c)* provides: "A trust is a combination of capital, skill or acts by two or more persons for any of the following purposes: To prevent competition in manufacturing, making, transportation, sale or purchase of merchandise, produce or any commodity."

- *Business and Professions Code section 16725* provides: "It is not unlawful to enter into agreements or form associations or combinations, the purpose and effect of which is to promote, encourage or increase competition in any trade or industry, or which are in furtherance of trade."

- "A group boycott can involve an agreement that a group of buyers will purchase only from a designated seller. ... [A]n unlawful group boycott requires an express or implicit agreement among competitors to restrict commerce in some manner." (*UAS Management, Inc. v. Mater Misericordiae Hospital* (2008) 169 Cal.App.4th 357, 365-366 [87 Cal.Rptr.3d 81] .)

- "It is well settled that the antitrust laws do not preclude a trader from unilaterally determining the parties with whom it will deal and the terms on which it will transact business. An antitrust case must be based upon conspiratorial rather than unilateral conduct. Thus, only group boycotts are unlawful under the Sherman and Cartwright Acts." (*G.H.I.I. v. Mts, Inc.* (1983) 147 Cal.App.3d 256, 267-268 [195 Cal.Rptr. 211] , internal citations omitted.)

- In *Marin County Bd. of Realtors v. Palsson* (1976) 16 Cal.3d 920, 931 [130 Cal.Rptr. 1, 549 P.2d 833] , the Supreme Court explained that there is a distinction between "direct boycotts aimed at coercing parties to adopt noncompetitive practices and indirect boycotts which result in refusals to deal only as a by-product of the agreement."

- Not all group boycotts are evaluated as per se violations: "This limitation on the per se rule is particularly applicable to trade association agreements not directly aimed at coercing third parties and eliminating competitors. In cases involving such agreements, courts have generally applied the rule of reason test." (*Marin County Bd. of Realtors, supra*, 16 Cal.3d at p. 932 .)

- "Although the Sherman Act and the Cartwright Act by their express terms forbid all restraints on trade, each has been interpreted to permit by implication those restraints found to be reasonable." (*Corwin v. Los Angeles Newspaper Service Bureau, Inc.* (1971) 4 Cal.3d 842, 853 [94 Cal.Rptr. 785, 484 P.2d 953] , internal citation omitted.)

- "To determine whether the restrictions are reasonable, 'the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be obtained,

are all relevant facts.' The court should consider 'the percentage of business controlled, the strength of the remaining competition [and] whether the action springs from business requirements or purpose to monopolize' Whether a restraint of trade is reasonable is a question of fact to be determined at trial." (*Corwin, supra*, 4 Cal.3d at pp. 854-855 , internal citations omitted.)

■ "Generally, in determining whether conduct unreasonably restrains trade, '[a] rule of reason analysis requires a determination of whether ... its anti-competitive effects outweigh its pro-competitive effects.' " (*Bert G. Gianelli Distrib. Co. v. Beck & Co. (1985) 172 Cal.App.3d 1020, 1048 [219 Cal.Rptr. 203]* , internal citation omitted, overruled on other grounds in *Dore v. Arnold Worldwide, Inc. (2006) 39 Cal.4th 384, 389 [46 Cal.Rptr.3d 668, 139 P.3d 56]* .)

■ "The alleged antitrust violation need not be the sole or controlling cause of the injury in order to establish proximate cause, but only need be a substantial factor in bringing about the injury." (*Saxer v. Philip Morris, Inc. (1975) 54 Cal.App.3d 7, 23 [126 Cal.Rptr. 327]* , internal citation omitted.)

■ "The plaintiff in a Cartwright Act proceeding must show that an antitrust violation was the proximate cause of his injuries. The frequently stated 'standing to sue' requirement is merely a rule that an action for violation of the antitrust laws may be maintained only by a party within the 'target area' of the antitrust violation, and not by one incidentally injured thereby. An 'antitrust injury' must be proved; that is, the type of injury the antitrust laws were intended to prevent, and which flows from the invidious conduct which renders defendants' acts unlawful. Finally, a plaintiff must show an injury within the area of the economy that is endangered by a breakdown of competitive conditions." (*Kolling v. Dow Jones Co. (1982) 137 Cal.App.3d 709, 723-724 [187 Cal.Rptr. 797]* , internal citations and footnote omitted.)

■ "The exact parameters of 'antitrust injury' under section 16750 have not yet been established through either court decisions or legislation." (*Cellular Plus, Inc. v. Superior Court (1993) 14 Cal.App.4th 1224, 1234 [18 Cal.Rptr.2d 308]* .)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, §§ 591-607

6 Antitrust Laws & Trade Regulation, Ch. 105, *California*, § 105.02[3] (Matthew Bender)

3 Levy et al., *California Torts, Ch. 40, Fraud and Deceit and Other Business Torts*, § 40.168[5] (Matthew Bender)

49 *California Forms of Pleading and Practice, Ch. 565, Unfair Competition*, § 565.77 (Matthew Bender)

1 *Matthew Bender Practice Guide: California Unfair Competition and Business Torts, Ch. 5, Antitrust*, 5.05, 5.11, 5.17-5.22

Publisher's Notes

There is no BAJI instruction on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Antitrust & Trade Law Price Fixing & Restraints of Trade Horizontal Refusals to Deal Boycotts Antitrust & Trade Law Price Fixing & Restraints of Trade Per Se Rule & Rule of Reason Boycotts Antitrust & Trade Law Private Actions Injuries & Remedies State Regulation Civil Procedure Trials Jury Trials Jury Instructions Standard

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CHAPTER 34 California Judicial Council Cartwright Act Instructions

5-34 California Forms of Jury Instruction CACI 3405

CACI 3405 Horizontal and Vertical Restraints (Use for Direct Competitors or Supplier/Reseller Relations)--Other Unreasonable Restraint of Trade--Rule of Reason--Essential Factual Elements

[Name of plaintiff] **claims that** [name of defendant] **agreed to** [insert unreasonable restraint of trade]. **To establish this claim, [name of plaintiff] must prove all of the following:**

1. **That** [name of defendant] **[and [name of alleged coparticipant[s]]] agreed to** [describe conduct constituting an unreasonable restraint of trade];
2. **That the purpose or effect of** [name of defendant]'s **conduct was to restrain competition;**
3. **That the anticompetitive effect of the restraint[s] outweighed any beneficial effect on competition;**
4. **That** [name of plaintiff] **was harmed; and**
5. **That** [name of defendant]'s **conduct was a substantial factor in causing** [name of plaintiff]'s **harm.**

New September 2003

This instruction is intended for actions that are limited only by the bounds of human ingenuity. Any such conduct, if it does not fit into a per se category, is judged under the rule of reason. Thus, the illegality of a termination that results from a buyer's disobedience with a seller's exclusive "dealing," territorial location, or customer restrictions, unless ancillary to price fixing, should be resolved under the rule of reason. For cases involving vertical restraints, see also the vertical restraint instructions contained in this

series.

It is possible for a complaint to include both per se and rule of reason claims. Also, per se claims alternatively may be tested under the rule of reason if there is reason to believe that proof of the per se claims may fall short. If either is the case, connecting language between the pertinent instructions should be provided, such as: "If you find that [*name of defendant*]'s conduct did not amount to an agreement to [*specify conduct, e.g., "fix resale prices," "boycott," "allocate markets"*], [*name of plaintiff*] may still prove that the conduct otherwise lessened competition."

For additional instructions regarding the rule of reason, see *CACI* Nos. 3411 through 3414.

- *Business and Professions Code* section 16726 provides: "Except as provided in this chapter, every trust is unlawful, against public policy and void."

- *Business and Professions Code* section 16720(a) provides: "A trust is a combination of capital, skill or acts by two or more persons for any of the following purposes: To create or carry out restrictions in trade or commerce."

- *Business and Professions Code* section 16725 provides: "It is not unlawful to enter into agreements or form associations or combinations, the purpose and effect of which is to promote, encourage or increase competition in any trade or industry, or which are in furtherance of trade."

- "The Cartwright Act, like the Sherman Act, prohibits 'combinations' for the purpose of restraining trade. '[A] combination means a concert of action by individuals or entities maintaining separate and independent interests.' " (*Roth v. Rhodes* (1994) 25 Cal.App.4th 530, 543 [30 Cal.Rptr.2d 706] , internal citations omitted.)

- " 'Horizontal combinations are cartels or agreements among competitors which restrain competition among enterprises at the same level of distribution. They are ordinarily illegal per se. Vertical restraints are imposed by persons or firms further up the chain of distribution of a specific product (or in rare cases, further down the chain) than the enterprise restrained. Vertical non-price restraints are tested under the rule of reason; that is, the plaintiff must prove that the restraint had an anticompetitive effect in the relevant market in order to prevail.' " (*Exxon Corp. v. Superior Court* (1997) 51 Cal.App.4th 1672, 1680-1681 [60 Cal.Rptr.2d 195] , internal citations and footnote omitted.)

- "Although the Sherman Act and the Cartwright Act by their express terms forbid all restraints on trade, each has been interpreted to permit by implication those restraints found to be reasonable." (*Corwin v. Los Angeles Newspaper Service Bureau, Inc.* (1971) 4 Cal.3d 842, 853 [94 Cal.Rptr. 785, 484 P.2d 953] , internal citation omitted.)

- "To determine whether the restrictions are reasonable, 'the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be obtained, are all relevant facts.' The court should consider 'the percentage of business controlled, the strength of the remaining competition [and] whether the action springs from business requirements or purpose to monopolize' Whether a restraint of trade is reasonable is a question of fact to be determined at trial." (*Corwin, supra*, 4 Cal.3d at pp. 854-855 , internal citations omitted.)

■ "Generally, in determining whether conduct unreasonably restrains trade, '[a] rule of reason analysis requires a determination of whether ... its anti-competitive effects outweigh its pro-competitive effects.' " (*Bert G. Gianelli Distrib. Co. v. Beck & Co.* (1985) 172 Cal.App.3d 1020, 1048 [219 Cal.Rptr. 203] , internal citation omitted, overruled on other grounds, *Dore v. Arnold Worldwide, Inc.* (2006) 39 Cal.4th 384, 389 [46 Cal.Rptr.3d 668, 139 P.3d 56] .)

■ "The alleged antitrust violation need not be the sole or controlling cause of the injury in order to establish proximate cause, but only need be a substantial factor in bringing about the injury." (*Saxer v. Philip Morris, Inc.* (1975) 54 Cal.App.3d 7, 23 [126 Cal.Rptr. 327] , internal citation omitted.)

■ "The plaintiff in a Cartwright Act proceeding must show that an antitrust violation was the proximate cause of his injuries. The frequently stated 'standing to sue' requirement is merely a rule that an action for violation of the antitrust laws may be maintained only by a party within the 'target area' of the antitrust violation, and not by one incidentally injured thereby. An 'antitrust injury' must be proved; that is, the type of injury the antitrust laws were intended to prevent, and which flows from the invidious conduct which renders defendants' acts unlawful. Finally, a plaintiff must show an injury within the area of the economy that is endangered by a breakdown of competitive conditions." (*Kolling v. Dow Jones & Co.* (1982) 137 Cal.App.3d 709, 723-724 [187 Cal.Rptr. 797] , internal citations and footnote omitted.)

■ "The exact parameters of 'antitrust injury' under section 16750 have not yet been established through either court decisions or legislation." (*Cellular Plus, Inc. v. Superior Court* (1993) 14 Cal.App.4th 1224, 1234 [18 Cal.Rptr.2d 308] .)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, §§ 591-607

1 Antitrust Laws & Trade Regulation, Ch. 12, *The Per Se Rule and the Rule of Reason*, § 12.03 (Matthew Bender)

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.165[2] (Matthew Bender)

49 California Forms of Pleading and Practice, Ch. 565, *Unfair Competition* (Matthew Bender)

1 *Matthew Bender Practice Guide: California Unfair Competition and Business Torts*, Ch. 5, Antitrust, 5.05, 5.11, 5.17-5.22

Publisher's Notes

There is no BAJI instruction on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Antitrust & Trade Law Price Fixing & Restraints of Trade Horizontal Restraints General Overview Antitrust & Trade Law Price Fixing & Restraints of Trade Per Se Rule & Rule of Reason General Overview Antitrust & Trade Law Price Fixing & Restraints of Trade Vertical Restraints General Overview Antitrust & Trade Law Private Actions Injuries & Remedies State Regulation Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions



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CHAPTER 34 California Judicial Council Cartwright Act Instructions

5-34 California Forms of Jury Instruction CACI 3406

CACI 3406 Horizontal and Vertical Restraints--"Agreement" Explained

An agreement exists if two or more persons or companies combine or join together for a common purpose. No written document or specific understanding is necessary for an agreement to exist. For [name of defendant] to be part of an agreement, [he/she/it] must have known [he/she/it] was joining in an agreement, even if [he/she/it] was not aware of all of its aspects.

[An agreement also may exist if a [person/company] unwillingly participates--that is, if another person coerces [him/her/it] to join the agreement against [his/her/its] wishes.]

[To prove the existence of an agreement, [name of plaintiff] must show more than a similarity between [name of defendant]'s conduct and the conduct of others. Independent business judgment in response to market forces sometimes leads competitors to act in a similar way because of their individual self-interests. That conduct alone is not enough to prove an agreement. However, similar behavior, along with other evidence suggesting joint conduct, may be used to decide whether there was an agreement.]

In deciding whether [name of defendant]'s conduct was the result of an agreement, you may consider, among other factors, the following:

- (a) The nature of the acts;**
- (b) The relationship between the parties;**
- (c) Whether the conduct was contrary to the best interests of some of the persons or companies in question;**
- (d) Whether the conduct lacked a legitimate business purpose; and**

(e) Whether the conduct occurred following communications concerning the subject of the conduct.

New September 2003

The third paragraph should be read only where a horizontal agreement is involved.

■ *Business and Professions Code section 16720(a)* provides, in part: "A trust is a combination of capital, skill or acts by two or more persons for any of the following purposes: To create or carry out restrictions in trade or commerce. ..."

■ "The Cartwright Act, like the Sherman Act, requires an illegal 'combination' or 'conspiracy' to restrain trade." (*Kolling v. Dow Jones & Co. (1982) 137 Cal.App.3d 709, 720 [187 Cal.Rptr. 797]* , internal citations omitted.)

■ " '[A] combination means a concert of action by individuals or entities maintaining separate and independent interests.' " (*Roth v. Rhodes (1994) 25 Cal.App.4th 530, 543 [30 Cal.Rptr.2d 706]* , internal citations omitted.)

■ "[A] necessary 'conspiracy' or 'combination' cognizable as an antitrust action is formed where a trader uses coercive tactics to impose restraints upon otherwise uncooperative businesses. If a 'single trader' pressures customers or dealers into pricing arrangements, an unlawful combination is established, irrespective of any monopoly or conspiracy, and despite the recognized right of a trader to determine with whom it will deal." (*G.H.I.I. v. Mts, Inc. (1983) 147 Cal.App.3d 256, 268 [195 Cal.Rptr. 211]* , internal citations omitted.)

■ "In *United States v. International Harvester Co.*, 274 U.S. 693, 47 S.Ct. 748, 71 L.Ed. 1302 (1927) , the Court acknowledged as lawful, competitors' practice of independently, and as a matter of business judgment, following the prices of an industry leader. '[T]he fact that competitors may see proper, in the exercise of their own judgment, to follow the prices of another manufacturer, does not establish any suppression of competition or show any sinister domination.' " (*Wilcox v. First Interstate Bank of Oregon (9th Cir. 1987) 815 F.2d 522, 526 .*)

■ "[P]arallel changes in prices and exchanges of price information by competitors may be motivated by legitimate business concerns." (*City of Long Beach v. Standard Oil Co. (9th Cir. 1989) 872 F.2d 1401, 1406 .*)

■ "Price information published without 'plus factors,' which indicate an agreement, is judged under the rule of reason. If the exchange of price information constitutes reasonable business behavior the exchange is not an illegal agreement. In order to prevail, 'plaintiff must demonstrate that the allegedly parallel acts were against each conspirator's self interest, that is, that the decision to act was not based on a good faith business judgment.' " (*Supermarket of Homes, Inc. v. San Fernando Valley Bd. of Realtors (9th Cir. 1986) 786 F.2d 1400, 1407* , internal citations omitted.)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, §§ 591-607

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.160[2] (Matthew Bender)

49 California Forms of Pleading and Practice, Ch. 565, *Unfair Competition* (Matthew Bender)

Publisher's Notes

There is no BAJI instruction on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Antitrust & Trade Law Price Fixing & Restraints of Trade Horizontal Restraints General Overview Antitrust & Trade Law Price Fixing & Restraints of Trade Vertical Restraints General Overview Antitrust & Trade Law Private Actions Injuries & Remedies State Regulation Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Torts Business Torts Unfair Business Practices Elements



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CHAPTER 34 California Judicial Council Cartwright Act Instructions

5-34 California Forms of Jury Instruction CACI 3407

CACI 3407 Horizontal and Vertical Restraints--Agreement Between Company and Its Employee

[Name of plaintiff] claims that [name of defendant's agent/employee/officer], who is an [agent/employee/officer] of [name of defendant], had an agreement with [name of defendant]. You may find that [name of defendant's agent/employee/officer] and [name of defendant] had the required agreement only if you decide that [he/she] had a separate economic interest from [name of defendant] and acted in [his/her] own separate interest.

New September 2003

This instruction is intended to clarify the circumstances under which an employee, agent, or officer can form an unlawful agreement. The parties may wish to develop an example to illuminate the issue, such as an employee running a side business that may combine with the business of his employer to restrain trade.

- "[T]he Act prohibits the combination of resources of two or more independent interests for the purpose of restraining commerce and preventing market competition in the variety of ways listed in the statute." (*Lowell v. Mother's Cake and Cookie Co.* (1978) 79 Cal.App.3d 13, 23 [144 Cal.Rptr. 664] , internal citation omitted.)
- "[A] corporation cannot conspire with itself or its agents for purposes of the antitrust laws." (*Kolling v. Dow Jones & Co.* (1982) 137 Cal.App.3d 709, 720 [187 Cal.Rptr. 797] , internal citation omitted.)
- "It is also held that an individual acting alone through his agent or a corporation acting alone through its officers is not a combination in restraint of trade proscribed by the statute. The rationale of these decisions is that the acts of the agents or employees in the operation of the business are the acts of the

principal. ... We are of the opinion that the language of *section 16720 of the Business and Professions Code* contemplates concert of action by separate individuals or entities maintaining separate and independent interests" (*Bondi v. Jewels by Edwar, Ltd.* (1968) 267 Cal.App.2d 672, 677-678 [73 Cal.Rptr. 494] , internal citations omitted.)

■ "[I]t is well settled that a complaint for antitrust violations which fails to allege such concerted action by separate entities maintaining separate and independent interests is subject to demurrer." (*G.H.I.I. v. Mts, Inc.* (1983) 147 Cal.App.3d 256, 266 [195 Cal.Rptr. 211] , internal citations omitted.)

■ "[Under the Sherman Act,] [t]he officers of a single firm are not separate economic actors pursuing separate economic interests, so agreements among them do not suddenly bring together economic power that was previously pursuing divergent goals. Coordination within a firm is as likely to result from an effort to compete as from an effort to stifle competition. In the marketplace, such coordination may be necessary if a business enterprise is to compete effectively. For these reasons, officers or employees of the same firm do not provide the plurality of actors imperative for a § 1 conspiracy." (*Copperweld Corp. v. Independence Tube Corp.* (1984) 467 U.S. 752, 769 [104 S.Ct. 2731, 81 L.Ed.2d 628] , footnote omitted.)

■ "[M]any courts have created an exception for corporate officers acting on their own behalf." (*Copperweld Corp.*, *supra*, 467 U.S. at p. 769, fn. 15 .)

■ "We ... need not reach the broader issue extensively argued in the amicus brief, i.e., whether the *Copperweld* rule would apply to the Cartwright Act when the conspiracy or combination in restraint of trade is purely intra-enterprise and there is no coerced or unwitting compliance by the victim in the forbidden activity." (*MacManus v. A. E. Realty Partners* (1987) 195 Cal.App.3d 1106, 1111, fn. 4 [241 Cal.Rptr. 315] .)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, §§ 591-607

Publisher's Notes

There is no BAJI instruction on this subject.

Legal Topics:

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CHAPTER 34 California Judicial Council Cartwright Act Instructions

5-34 California Forms of Jury Instruction CACI 3408

CACI 3408 Vertical Restraints--"Coercion" Explained

Coercion is conduct that interferes with the freedom of a reseller to sell in accordance with his or her own judgment. [It may include a threat by [*name of defendant*] to stop doing business with [*name of plaintiff*]/a reseller] or to hold back any product or service important to [his/her/its] competition in the market.] A unilateral decision to deal or refuse to deal with a particular reseller does not constitute coercion.

Coercion may be proven directly or indirectly. In deciding whether there was coercion, you may consider, among other factors, the following:

- (a) Whether [*name of defendant*] penalized or threatened to penalize [*name of plaintiff*] for not following [his/her/its] suggestions;**
- (b) Whether [*name of defendant*] made or threatened to make an important benefit depend on [*name of plaintiff*] following [his/her/its] suggestions;**
- (c) Whether [*name of defendant*] required [*name of plaintiff*] to get approval before doing something other than what [he/she/it] suggested; and**
- (d) The relative bargaining power of [*name of defendant*] and [*name of plaintiff*].**

New September 2003

In the bracketed portion of the first paragraph, the word "reseller" should be used if the plaintiff is not the reseller.

■ "[T]he 'conspiracy' or 'combination' necessary to support an antitrust action can be found where a supplier or producer, by coercive conduct, imposes restraints to which distributors involuntarily adhere. If a 'single trader' pressures customers or dealers into adhering to resale price maintenance, territorial restrictions, exclusive dealing arrangements or illegal 'tie-ins,' an unlawful combination is established, irrespective of any monopoly or conspiracy, and despite the recognized right of a producer to determine with whom it will deal." (*Kolling v. Dow Jones & Co.* (1982) 137 Cal.App.3d 709, 720 [187 Cal.Rptr. 797] , internal citations omitted.)

■ "If a seller does no more than announce a policy designed to restrain trade, and declines to sell to those who fail to adhere to the policy, no illegal combination is established." (*Kolling, supra*, 137 Cal.App.3d at p. 721 , internal citations omitted.)

■ "A manufacturer may choose those with whom it wishes to deal and unilaterally may refuse to deal with a distributor or customer for business reasons without running afoul of the antitrust laws. It will thus be rare for a court to infer a vertical combination solely from a business's unilateral refusal to deal with distributors or customers who do not comply with certain conditions. Nonetheless, there is a line of cases that supports the proposition that a manufacturer may form a 'conspiracy' or 'combination' under the antitrust laws if it imposes restraints on dealers or customers by coercive conduct and they involuntarily adhere to those restraints." (*Dimidowich v. Bell & Howell* (9th Cir. 1986) 803 F.2d 1473, 1478 , internal citations omitted.)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, §§ 591-607

49 California Forms of Pleading and Practice, Ch. 565, *Unfair Competition* (Matthew Bender)

Publisher's Notes

There is no BAJI instruction on this subject.

Legal Topics:

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CHAPTER 34 California Judicial Council Cartwright Act Instructions

5-34 California Forms of Jury Instruction CACI 3409

CACI 3409 Vertical Restraints--Termination of Reseller

A supplier, acting independently, may choose those resellers to which it wishes to sell or not sell. It may announce to those resellers the terms of resale, including resale prices, in advance. The supplier may terminate those resellers that do not follow these terms as long as the supplier acts independently in doing so.

However, if a supplier coerces a reseller to follow its suggested terms of resale, and the reseller does so, this conduct is an agreement to restrain competition.

New September 2003

There are circumstances where the terminated party that has combined with the supplier, other than as a buyer, may have a claim. For example, a customer that leases the supplier's product and then subleases it may also invoke this law. In such cases, this instruction should be adapted accordingly.

■ "If a seller does no more than announce a policy designed to restrain trade, and declines to sell to those who fail to adhere to the policy, no illegal combination is established. Also, a supplier may suggest policies and use persuasion to obtain adherence. At the same time, an illegal combination may be found where a supplier secures compliance with announced policies in restraint of trade by means which go beyond mere announcement of policy and the refusal to deal. If, for example, the supplier takes 'affirmative action' to bring about the involuntary acquiescence of its dealers, an unlawful combination exists." (*Kolling v. Dow Jones & Co. (1982) 137 Cal.App.3d 709, 721 [187 Cal.Rptr. 797]* , internal citations omitted.)

■ "[A] manufacturer's announcement of a resale price policy and its refusal to deal with dealers who do

not comply coupled with the dealers' voluntary acquiescence in the policy does not constitute an implied agreement or an unlawful combination as a matter of law. An unlawful combination arises, however, if the manufacturer goes beyond those measures by seeking communication of a dealer's acquiescence or agreement to secure the dealer's compliance, such as by means of coercion, and the dealer so communicates." (*Chavez v. Whirlpool Corp.* (2001) 93 Cal.App.4th 363, 372-373 [113 Cal.Rptr.2d 175] , internal citations omitted.)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, §§ 591-607

6 Antitrust Laws & Trade Regulation, Ch. 105, *California*, § 105.02 (Matthew Bender)

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.168[3] (Matthew Bender)

49 California Forms of Pleading and Practice, Ch. 565, *Unfair Competition* (Matthew Bender)

Publisher's Notes

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Legal Topics:

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CHAPTER 34 California Judicial Council Cartwright Act Instructions

5-34 California Forms of Jury Instruction CACI 3410

CACI 3410 Vertical Restraints--Agreement Between Seller and Reseller's Competitor

If a reseller coerces a supplier to refuse to do business with a competing reseller, and the supplier does so, this conduct is an agreement to restrain competition.

Refusing to do business with a reseller after receiving complaints by a competing reseller is not, by itself, an agreement to restrain competition. However, if a supplier receives such complaints and then agrees with the complaining reseller to act on them, that becomes an agreement to restrain competition.

New September 2003

If the complaining competitor is also a named defendant, this instruction must be rewritten to reflect that circumstance.

■ In *Bert G. Gianelli Distrib. Co. v. Beck & Co.* (1985) 172 Cal.App.3d 1020, 1043-1044 [219 Cal.Rptr. 203], overruled on other grounds, *Dore v. Arnold Worldwide, Inc.* (2006) 39 Cal.4th 384, 389 [46 Cal.Rptr.3d 668, 139 P.3d 56], the Court of Appeal held that proof that the reseller competing against the plaintiff complained to the seller about plaintiff's pricing and that the seller then took action against the plaintiff reseller in response to the complaint was sufficient to support a finding of a combination.

■ "[T]he plaintiff must present evidence that tends to exclude, although it need not actually exclude, the possibility that the alleged conspirators acted independently rather than collusively. Insufficient is a mere assertion that a reasonable trier of fact might disbelieve any denial by the defendants of an unlawful conspiracy." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 852 [107 Cal.Rptr.2d 841, 24

P.3d 493] .)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, §§ 591-607

6 Antitrust Laws & Trade Regulation, Ch. 105, *California*, § 105.02 (Matthew Bender)

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.168 (Matthew Bender)

49 California Forms of Pleading and Practice, Ch. 565, *Unfair Competition* (Matthew Bender)

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CHAPTER 34 California Judicial Council Cartwright Act Instructions

5-34 California Forms of Jury Instruction CACI 3411

CACI 3411 Rule of Reason--Anticompetitive Versus Beneficial Effects

In deciding whether [*name of defendant*]'s challenged restraint had an anticompetitive or beneficial purpose or effect on competition, you should consider the results the restraint was intended to achieve or actually did achieve. In balancing these purposes or effects, you also may consider, among other factors, the following:

- (a) The nature of the restraint;**
- (b) The probable effect of the restraint on the business involved;**
- (c) The history of the restraint;**
- (d) The reasonableness of the stated purpose for the restraint;**
- (e) The availability of less restrictive means to accomplish the stated purpose;**
- (f) The portion of the market affected by the restraint; [and]**
- (g) The extent of [*name of defendant*]'s market power; [and]**
- (h) [*Insert other relevant consideration*].**

New September 2003

- "The basic purpose of the antitrust laws is to prevent undue restraints upon trade which have a

significant effect on competition. A contract, combination, or conspiracy is an illegal restraint of trade if it constitutes a per se violation of the statute or has as its *purpose* or *effect* an unreasonable restraint of trade. The determination of the existence of such an illegal restraint of trade turns upon findings of fact and involves 'weigh[ing] all of the circumstances of a case.' " (*Corwin v. Los Angeles Newspaper Service Bur.* (1978) 22 Cal.3d 302, 314-315 [148 Cal.Rptr. 918, 583 P.2d 777] , internal citations omitted and footnotes.)

■ "Under the rule of reason, the court inquires into the nature and history of the restraint, as well as other relevant considerations." (*Reynolds v. California Dental Service* (1988) 200 Cal.App.3d 590, 596-597 [246 Cal.Rptr. 331] , internal citations omitted.)

■ "The 'rule of reason' permits certain restraints upon trade to be found reasonable. In order to determine whether the restrictions are reasonable, 'the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts.' 'Whether a restraint of trade is reasonable is a question of fact to be determined at trial.' " (*Kolling v. Dow Jones & Co.* (1982) 137 Cal.App.3d 709, 727 [187 Cal.Rptr. 797] , internal citations omitted.)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, §§ 591-607

1 Antitrust Laws & Trade Regulation, Ch. 12, *The Per Se Rule and the Rule of Reason*, § 12.03 (Matthew Bender)

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.168 (Matthew Bender)

49 California Forms of Pleading and Practice, Ch. 565, *Unfair Competition* (Matthew Bender)

1 *Matthew Bender Practice Guide: California Unfair Competition and Business Torts*, Ch. 5, Antitrust, 5.05, 5.11, 5.17-5.22

Publisher's Notes

There is no BAJI instruction on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

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CHAPTER 34 California Judicial Council Cartwright Act Instructions

5-34 California Forms of Jury Instruction CACI 3412

CACI 3412 Rule of Reason--"Market Power" Explained

Market power is the ability to increase prices or reduce output without losing market share. The higher a seller's market share, the more likely it has market power.

In deciding whether a seller has market power, you should consider how difficult it is for a potential competitor to successfully enter the market. The more difficult it is to successfully enter a market, the more likely a seller has market power within that market. Market power is less likely to exist if it is not difficult for potential competitors to enter a market successfully.

Each market has two components: a product market and a geographic market.

New September 2003

See instructions that follow explaining the concepts of product market and geographic market: *CACI Nos. 3413, Rule of Reason--"Product Market" Explained*, and *3414, Rule of Reason--"Geographic Market" Explained*.

- "[C]ase law holds that the need to prove market power is a threshold consideration in an antitrust case and is the sine qua non of recovery." (*Exxon Corp. v. Superior Court* (1997) 51 Cal.App.4th 1672, 1681 [60 Cal.Rptr.2d 195] , footnote omitted.)

- " 'To meet his initial burden in establishing that the practice is an unreasonable restraint of trade, plaintiff must show that the activity is the type that restrains trade and that the restraint is likely to be of significant magnitude... . Ordinarily, a plaintiff to do this must delineate a relevant market and show that

the defendant plays enough of a role in that market to impair competition significantly.' " (*Roth v. Rhodes* (1994) 25 Cal.App.4th 530, 542 [30 Cal.Rptr.2d 706] , internal citations omitted.)

■ "As a practical matter, market power is usually equated with market share. 'Since market power can rarely be measured directly by the methods of litigation, it is normally inferred from possession of a substantial percentage of the sales in a market carefully defined in terms of both product and geography.' " (*Redwood Theatres, Inc. v. Festival Enterprises, Inc.* (1988) 200 Cal.App.3d 687, 704 [248 Cal.Rptr. 189] , internal citation omitted.)

■ "By reducing the substitutability of products, a high level of product differentiation results in relative inelasticity of cross-product demand. This inelasticity creates opportunities for suppliers to manipulate the price and quantity of goods sold or to entrench their market position by creating barriers to entry in a market." (*Redwood Theatres, Inc.*, *supra*, 200 Cal.App.3d at pp. 706-707 , footnote omitted.)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, §§ 591-607

1 Antitrust Laws & Trade Regulation, Ch. 12, *The Per Se Rule and the Rule of Reason*, § 12.03 (Matthew Bender)

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.168 (Matthew Bender)

49 California Forms of Pleading and Practice, Ch. 565, *Unfair Competition* (Matthew Bender)

1 *Matthew Bender Practice Guide: California Unfair Competition and Business Torts*, Ch. 5, *Antitrust*, 5.05, 5.11, 5.17-5.22

Publisher's Notes

There is no BAJI instruction on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Antitrust & Trade LawMarket DefinitionGeneral OverviewAntitrust & Trade LawPrice Fixing & Restraints of TradePer Se Rule & Rule of ReasonGeneral OverviewAntitrust & Trade LawPrivate ActionsInjuries & RemediesState RegulationCivil ProcedureTrialsJury TrialsJury InstructionsStandard InstructionsTortsBusiness TortsUnfair Business PracticesElements



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California Forms of Jury Instruction

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CHAPTER 34 California Judicial Council Cartwright Act Instructions

5-34 California Forms of Jury Instruction CACI 3413

CACI 3413 Rule of Reason--"Product Market" Explained

[*Name of plaintiff*] **claims that the product market is** [*insert claimed product market, e.g., "paper clips"*]. [*Name of defendant*] **claims that the product market is** [*insert claimed product market, e.g., "all paper fasteners"*].

To define the product market, you must determine which [products/services] are in the market in which [*name of defendant*] is claimed to have carried out its restraint of trade.

A product market consists of all [products/services] that can reasonably be used for the same purpose. [Products/services] are not in the same product market if users are not likely to substitute one for the other.

In deciding whether products are reasonable substitutes, you may consider whether a small increase in the price of one product would cause a considerable number of customers of that product to switch to a second product. If so, these two products are likely to be in the same market. If a significant increase in the price of one product does not cause a significant number of consumers to switch to a second product, these products are not likely to be in the same market.

New September 2003

Directions for Use

The word "services" should be substituted for "products" wherever that word appears if the case concerns services instead of products.

In some cases, an example may be helpful to illustrate the principle of "reasonable interchangeability," such as the following. Of course, this example may be modified to best suit the facts of the case.

If the price of a loaf of whole wheat bread increases by 10 or 15 cents, a considerable number of customers may decide to purchase white bread instead. Although these products are somewhat different, they may be reasonably interchangeable for purposes of making toast and sandwiches. They are likely then to be in the same relevant product market. However, the relationship between whole wheat bread and other bread products may be different. Thus, customers may not believe hot dog buns as quite so interchangeable. Therefore, a 10, 15, or even 50-cent increase in the price of a loaf of wheat bread is not likely to cause too many customers to buy hot dog buns instead. These two products, then, are not likely to be in the same relevant market.

Sources and Authority

■ "The United States Supreme Court has declared that the relevant market is determined by considering 'commodities reasonably interchangeable by consumers for the same purposes.' Or, in other words, the relevant market is composed of products that have reasonable interchangeability for the purpose for which they are produced." (*Exxon Corp. v. Superior Court* (1997) 51 Cal.App.4th 1672, 1682 [60 Cal.Rptr.2d 195] , internal citations omitted.)

■ "In antitrust law, the interchangeability of products is usually considered in the definition of markets; the boundary of a relevant market is defined by a significant degree of product differentiation." (*Redwood Theatres, Inc. v. Festival Enterprises, Inc.* (1988) 200 Cal.App.3d 687, 705 [248 Cal.Rptr. 189] .)

■ "The definition of the relevant market is a question of fact for the jury." (*Theme Promotions, Inc. v. News Am. Mktg. FSI* (9th Cir. 2008) 546 F.3d 991, 1002 .)

Secondary Sources

1 Antitrust Laws & Trade Regulation, Ch. 12, *The Per Se Rule and the Rule of Reason*, § 12.03 (Matthew Bender)

3 Levy et al., *California Torts*, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.168 (Matthew Bender)

49 *California Forms of Pleading and Practice*, Ch. 565, *Unfair Competition*, § 565.74 (Matthew Bender)

Publisher's Notes

There is no BAJI instruction on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Antitrust & Trade LawMarket DefinitionProduct MarketAntitrust & Trade LawPrice Fixing & Restraints of TradePer Se Rule & Rule of ReasonGeneral OverviewAntitrust & Trade LawPrivate ActionsInjuries & RemediesState RegulationCivil ProcedureTrialsJury TrialsJury InstructionsStandard InstructionsTortsBusiness TortsUnfair Business PracticesElements



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California Forms of Jury Instruction

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CHAPTER 34 California Judicial Council Cartwright Act Instructions

5-34 California Forms of Jury Instruction CACI 3414

CACI 3414 Rule of Reason--"Geographic Market" Explained

[*Name of plaintiff*] **claims that the relevant geographic market is [identify area, e.g., "the city of Los Angeles"].** [*Name of defendant*] **claims that the relevant geographic market is [identify area, e.g., "the state of California"].**

A geographic market is the area where buyers turn for alternate sources of supply or where sellers normally sell. The geographic market may or may not be the same as the area where the parties in this case currently compete or do business. It may be smaller or larger than that area.

A geographic market may be limited to the area where a product can be shipped and sold profitably. You may consider whether purchasing patterns are so different in the two areas that products sold in one area tend not to be sold in another. For example, this might occur if the cost of transporting a product into or out of the claimed geographic market is large compared to the value of the product.

In deciding whether products are in the same geographic market, you may consider whether a small increase in the price of the product in one area would cause a considerable number of customers in that area to buy the product in another area. If so, these two areas are likely to be in the same geographic market. If a significant increase in the price in one area does not cause a significant number of consumers to buy the product in another area, these areas are not likely to be in the same geographic market.

New September 2003

The word "service" should be substituted for "product" wherever that word appears if the case concerns services rather than products.

In some cases an example may be helpful to illustrate the terms used. Regarding the significance of price

increases, an example like that given in the Directions for Use in *CACI No. 3413, Rule of Reason--"Product Market" Explained*, may be adapted. Regarding the significance of customer purchasing patterns, the following example may suffice:

Retail customers are not likely to travel too far to buy shoes. So, a product market defined as "shoe stores" is not likely to include shoe stores in two towns that are 25 miles from each other. However, if the product market is for an inventory of shoes purchased by shoe stores at wholesale, the geographic market is likely to be nationwide, since shoe stores are likely to purchase shoes no matter where companies distributing shoes are located.

Regarding the significance of transporting costs, the following example may suffice:

Gravel, which is relatively cheap but heavy, and therefore relatively costly to ship, is likely to compete in a narrower geographic market than computer software, which, if valued by weight, is more costly per pound than gravel but also much less costly to ship per unit. Accordingly, a geographic market defined as a city or a region may be appropriate for assessing gravel competition, while a nationwide, or even worldwide, geographic market may be more appropriate for assessing the competition between software sellers.

■ The "area of effective competition in the known line of commerce must be charted by careful selection of the market area in which the seller operates, and to which the purchaser can practicably turn for supplies." (*U.S. v. Philadelphia National Bank* (1963) 374 U.S. 321, 359 [83 S.Ct. 1715, 10 L.Ed.2d 915] .)

■ "The term 'relevant market' encompasses notions of geography as well as product use, quality, and description. The geographic market extends to the ' " 'area of effective' " competition ... where buyers can turn for alternate sources of supply.' " (*Oltz v. St. Peter's Community Hospital* (9th Cir. 1988) 861 F.2d 1440, 1446 , internal citations omitted.)

Secondary Sources

1 Antitrust Laws & Trade Regulation, Ch. 12, *The Per Se Rule and the Rule of Reason*, § 12.03 (Matthew Bender)

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.168 (Matthew Bender)

49 California Forms of Pleading and Practice, Ch. 565, *Unfair Competition* (Matthew Bender)

Publisher's Notes

There is no BAJI instruction on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Antitrust & Trade LawMarket DefinitionGeographic MarketAntitrust & Trade LawPrice Fixing & Restraints of TradePer Se Rule & Rule of ReasonGeneral OverviewAntitrust & Trade LawPrivate ActionsInjuries & RemediesState RegulationCivil ProcedureTrialsJury TrialsJury InstructionsStandard InstructionsTortsBusiness TortsUnfair Business PracticesElements



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CHAPTER 34 California Judicial Council Cartwright Act Instructions

5-34 California Forms of Jury Instruction CACI 3415-CACI 3419

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CACI 3415Reserved for Future Use



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CHAPTER 34 California Judicial Council Cartwright Act Instructions

5-34 California Forms of Jury Instruction CACI 3420

CACI 3420 Tying--Real Estate, Products, or Services--Essential Factual Elements (Bus. & Prof. Code, § 16720)

[*Name of plaintiff*] **claims that there is an unlawful tying arrangement in which [*specify the particular real estate, product, or services*] is the tying product and [*specify the particular real estate, product, or services*] is the tied product. A "tying arrangement" is the sale of one product, called the "tying product," in which the buyer is required or coerced to also purchase a different, separate product, called the "tied product." For example, if a supermarket sells flour only if its customers also buy sugar, that supermarket would be engaged in tying. Flour would be the tying product and sugar the tied product.**

To establish this claim against [*name of defendant*], [*name of plaintiff*] must prove all of the following:

- 1. That [*tying item*] and [*tied item*] are separate and distinct;**
- 2. That [*name of defendant*] will sell [*tying item*] only if the buyer also purchases [*tied item*], or that [*name of defendant*] sold [*tying item*] and required or otherwise coerced buyers to [also purchase [*tied item*]] [agree not to purchase [*tied item*] from any other supplier];**
- 3. That [*name of defendant*] has sufficient economic power in the market for [*tying item*] to coerce at least some buyers of [*tying item*] into [purchasing [*tied item*]] [agreeing not to purchase [*tied item*] from a competitor of [*name of defendant*]];**
- 4. That the conduct involves a substantial amount of sales, in terms of the total dollar value of [*tied item*];**
- 5. That [*name of plaintiff*] was harmed; and**
- 6. That [*name of defendant*]'s conduct was a substantial factor in causing [*name of plaintiff*]'s**

harm.

New September 2003; Revised October 2008

Directions for Use

This instruction is written for claims brought under *Business and Professions Code section 16720*. A claim under this section may involve products, land, or services as the tying item and products, land, or services as the tied item. Section 16720 applies a stricter test for unlawful tying than does *Business and Professions Code section 16727*. (See CACI No. 3421, *Tying--Products or Services--Essential Factual Elements*.) Therefore, if products are the tying item and products or services the tied item, CACI No. 3421 should be used instead.

The example given in the instruction involving flour and sugar was used in two federal cases, *Northern Pacific Railway Co. v. United States* (1958) 356 U.S. 1, 5-6 [78 S.Ct. 514, 2 L.Ed.2d 545] and *Jefferson Parish Hospital District No. 2 v. Hyde* (1984) 466 U.S. 2, 12 [104 S.Ct. 1551, 80 L.Ed.2d 2], but also can help explain the Cartwright Act. The terms "product," "sell," and "purchase" used in this instruction may need to be modified to reflect the facts of the particular case, since tying arrangements challenged under *Business and Professions Code section 16720* may involve services, real property, intangibles, leases, licenses, and the like.

An unlawful tying arrangement may also be shown if the buyer agrees not to purchase the tied product or service from any other supplier as a condition of obtaining the tying product. If the tying claim involves such a "tie-out" agreement, select the appropriate options in elements 2 and 3.

If the "tying product" is land and the "tied product" is a service or a commodity, logic suggests that the first element, i.e., their distinctness, is beyond dispute and that including this element may create confusion. In such a case, the court may recite this element and then advise the jury that it has been established by the plaintiff or is undisputed by the defendant. The word "parcels," "lots," or similar terms should be used if both items are land, as in these cases the separateness of the tying and tied land could be in dispute.

Sources and Authority

- *Business and Professions Code section 16720* provides:

A trust is a combination of capital, skill or acts by two or more persons for any of the following purposes:

- (a) To create or carry out restrictions in trade or commerce.
- (b) To limit or reduce the production, or increase the price of merchandise or of any commodity.
- (c) To prevent competition in manufacturing, making, transportation, sale or purchase of merchandise, produce or any commodity.
- (d) To fix at any standard or figure, whereby its price to the public or consumer shall be in any manner controlled or established, any article or commodity of merchandise, produce or commerce intended for sale, barter, use or consumption in this State.

(e) To make or enter into or execute or carry out any contracts, obligations or agreements of any kind or description, by which they do all or any or any combination of any of the following:

(1) Bind themselves not to sell, dispose of or transport any article or any commodity or any article of trade, use, merchandise, commerce or consumption below a common standard figure, or fixed value.

(2) Agree in any manner to keep the price of such article, commodity or transportation at a fixed or graduated figure.

(3) Establish or settle the price of any article, commodity or transportation between them or themselves and others, so as directly or indirectly to preclude a free and unrestricted competition among themselves, or any purchasers or consumers in the sale or transportation of any such article or commodity.

(4) Agree to pool, combine or directly or indirectly unite any interests that they may have connected with the sale or transportation of any such article or commodity, that its price might in any manner be affected.

■ "It is unlawful under California's Cartwright Act, as relevant here, for a seller to use its market power in one market to force or coerce a buyer to purchase its product or service in a distinct market in which the seller does not have such market power or to refrain from buying from the seller's competitor. The result of such coercion is called a tying arrangement, in which the market controlled by the seller consists of sales of the 'tying' product or service, and the market over which derivative power is exercised consists of sales of the 'tied' product or service. Where such an arrangement is found, it is illegal per se; that is, the seller's justifications for the arrangement are not measured by a rule of reasonableness." (*UAS Management, Inc. v. Mater Misericordiae Hospital* (2008) 169 Cal.App.4th 357, 368-369 [87 Cal.Rptr.3d 81] .)

■ "Antitrust laws against tying arrangements seek to eradicate the evils that (1) competitors are denied free access to the market for the tied product not because the seller imposing the tying requirement has a better or less expensive tied product, but because of the seller's power or leverage in the market for the tying product; and (2) buyers are forced to forego their free choice between competing tied products. Tying arrangements are illegal per se 'whenever a party has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product' and when 'a total amount of business, substantial enough in terms of dollar-volume so as not to be merely de minimis, is foreclosed to competitors by the tie.' " (*Freeman v. San Diego Assn. of Realtors* (1999) 77 Cal.App.4th 171, 184 [91 Cal.Rptr.2d 534] , internal citations omitted.)

■ "Even when not per se illegal, a tying arrangement violates the Cartwright Act if it unreasonably restrains trade." (*Morrison v. Viacom, Inc.* (1997) 52 Cal.App.4th 1514, 1524 [61 Cal.Rptr.2d 544] , internal citations omitted.)

■ "The threshold element for a tying claim is the existence of separate products or services in separate markets. Absent separate products in separate markets, the alleged tying and tied products are in reality a single product." (*Freeman, supra*, 77 Cal.App.4th at p. 184 , internal citations omitted.)

■ "Plaintiff alleged the conspiratorial agreement among defendants constituted an illegal tying arrangement per se pursuant to *Business and Professions Code section 16720*. 'The elements of a per se tying arrangement violative of section 16720 are: "(1) a tying agreement, arrangement or condition existed whereby the sale of the tying product was linked to the sale of the tied product or service; (2) the party had sufficient economic power in the tying market to

coerce the purchase of the tied product; (3) a substantial amount of sale was affected in the tied product; and (4) the complaining party sustained pecuniary loss as a consequence of the unlawful act." ' ' (*SC Manufactured Homes, Inc. v. Liebert* (2008) 162 Cal.App.4th 68, 86 [76 Cal.Rptr.3d 73] , footnotes and internal citations omitted.)

■ " ' "[T]ying agreements serve hardly any purpose beyond the suppression of competition." They deny competitors free access to the market for the tied product, not because the party imposing the tying requirements has a better product or a lower price but because of his power or leverage in another market. At the same time buyers are forced to forego their free choice between competing products. For these reasons "tying agreements fare harshly under the laws forbidding restraints of trade." ' ' (*Suburban Mobile Homes v. AMFAC Communities* (1980) 101 Cal.App.3d 532, 542 [161 Cal.Rptr. 811] , internal citations omitted.)

■ "[T]he burden of proving an illegal tying arrangement differs somewhat under section 16720 and section 16727. Under section 16727 the plaintiff must establish that the tie-in substantially lessens competition. This standard is met if either the seller enjoys sufficient economic power in the tying product to appreciably restrain competition in the tied product or if a not insubstantial volume of commerce in the tied product is restrained. Under section 16720 standard, both conditions must be met." (*Suburban Mobile Homes, supra*, 101 Cal.App.3d at p. 549 , internal citation omitted.)

■ "The alleged antitrust violation need not be the sole or controlling cause of the injury in order to establish proximate cause, but only need be a substantial factor in bringing about the injury." (*Saxer v. Philip Morris, Inc.* (1975) 54 Cal.App.3d 7, 23 [126 Cal.Rptr. 327] , internal citation omitted.)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, §§ 591-607

6 Antitrust Laws & Trade Regulation, Ch. 105, *California*, § 105.04 (Matthew Bender)

3 Levy et al., *California Torts, Ch. 40, Fraud and Deceit and Other Business Torts*, § 40.168[4] (Matthew Bender)

49 *California Forms of Pleading and Practice, Ch. 565, Unfair Competition*, § 565.77 (Matthew Bender)

1 *Matthew Bender Practice Guide: California Unfair Competition and Business Torts, Ch. 5, Antitrust*, 5.09[4], 5.15, 5.81, 5.82

Publisher's Notes

There is no BAJI instruction on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Antitrust & Trade Law Price Fixing & Restraints of Trade Tying Arrangements General Overview Antitrust & Trade Law Private Actions Injuries & Remedies State Regulation Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Torts Business Torts Unfair Business Practices Elements



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CHAPTER 34 California Judicial Council Cartwright Act Instructions

5-34 California Forms of Jury Instruction CACI 3421

CACI 3421 Tying--Products or Services--Essential Factual Elements (Bus. & Prof. Code, § 16727)

[*Name of plaintiff*] **claims that there is an unlawful tying arrangement in which [*specify the particular product*] is the tying product and [*specify the particular product or services*] is the tied product. A "tying arrangement" is the sale of one product, called the "tying product," where the buyer is required or coerced to also purchase a different, separate product, called the "tied product." For example, if a supermarket sells flour only if its customers also buy sugar, that supermarket would be engaged in tying. Flour would be the tying product and sugar the tied product.**

To establish this claim, [*name of plaintiff*] must prove all of the following:

- 1. That [*tying product*] and [*tied product or service*] are separate and distinct;**
- 2. That [*name of defendant*] will sell [*tying product*] only if the buyer also purchases [*tied product or service*], or that [*name of defendant*] sold [*tying product*] and required or otherwise coerced buyers to [also purchase [*tied product or service*]] [agree not to purchase [*tied product or service*] from any other supplier];**
- 3. That [*insert one or both of the following*]:**

[[*name of defendant*] has sufficient economic power in the market for [*tying product*] to coerce at least some consumers into purchasing [*tied product or service*];] [or]

[the claimed tying arrangement has restrained competition for a substantial amount of sales, in terms of total dollar volume of [*tied product or service*]];
- 4. That [*name of plaintiff*] was harmed; and**

5. That [name of defendant]'s conduct was a substantial factor in causing [name of plaintiff]'s harm.

New September 2003

Directions for Use

This instruction applies to claims under *Business and Professions Code section 16727*, which applies only where the tying product consists of "goods, merchandise, machinery, supplies, [or] commodities" and the tied product consists of "goods, merchandise, supplies, commodities, or services." Section 16727 does not apply if the tying product is land or services, nor does it apply if the tied product is land.

The example given was used in two federal cases, *Northern Pacific Railway Co. v. United States* (1958) 356 U.S. 1, 5-6 [78 S.Ct. 514, 2 L.Ed.2d 545] and *Jefferson Parish Hospital District No. 2 v. Hyde* (1984) 466 U.S. 2, 12 [104 S.Ct. 1551, 80 L.Ed.2d 2], but also can help explain the Cartwright Act. The terms "product," "sell," and "purchase" used in this instruction may need to be modified to reflect the facts of the particular case, since tying arrangements challenged under *Business and Professions Code section 16720* may involve services, real property, intangibles, leases, licenses, and the like.

Also, an unlawful tying arrangement may be shown where the buyer agrees not to purchase the tied product or service from any other supplier as a condition of obtaining the tying product. If the tying claim involves such a "tie-out" agreement, this instruction must be modified accordingly.

Sources and Authority

- *Business and Professions Code section 16727* provides: "It shall be unlawful for any person to lease or make a sale or contract for the sale of goods, merchandise, machinery, supplies, commodities for use within the State, or to fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods, merchandise, machinery, supplies, commodities, or services of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of trade or commerce in any section of the State."

- "It is unlawful under California's Cartwright Act, as relevant here, for a seller to use its market power in one market to force or coerce a buyer to purchase its product or service in a distinct market in which the seller does not have such market power or to refrain from buying from the seller's competitor. The result of such coercion is called a tying arrangement, in which the market controlled by the seller consists of sales of the 'tying' product or service, and the market over which derivative power is exercised consists of sales of the 'tied' product or service. Where such an arrangement is found, it is illegal per se; that is, the seller's justifications for the arrangement are not measured by a rule of reasonableness." (*UAS Management, Inc. v. Mater Misericordiae Hospital* (2008) 169 Cal.App.4th 357, 368-369 [87 Cal.Rptr.3d 81] .)

- "[T]he specific elements of an unlawful tying cause of action have been stated as follows: '(1) a tying agreement, arrangement or condition ... whereby the sale of the tying product [or service] was linked to the sale of the tied product or service; (2) the party had sufficient economic power in the tying market to

coerce the purchase of the tied product; (3) a substantial amount of sale was effected in the tied product; and (4) the complaining party sustained pecuniary loss as a consequence of the unlawful act.' " (*UAS Management, Inc.*, *supra*, 169 Cal.App.4th at p. 369 , internal citation omitted.)

■ "[T]he burden of proving an illegal tying arrangement differs somewhat under section 16720 and section 16727. Under section 16727 the plaintiff must establish that the tie-in substantially lessens competition. This standard is met if either the seller enjoys sufficient economic power in the tying product to appreciably restrain competition in the tied product or if a not insubstantial volume of commerce in the tied product is restrained. Under the section 16720 standard, both conditions must be met." (*Suburban Mobile Homes v. AMFAC Communities* (1980) 101 Cal.App.3d 532, 549 [161 Cal.Rptr. 811] , internal citation omitted.)

■ "Case law construing *Business and Professions Code* section 16727 defines a tying arrangement as 'an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier.' Tying arrangements are illegal per se if the party has sufficient economic power and substantially forecloses competition in the relevant market. Even when not per se illegal, a tying arrangement violates the Cartwright Act if it unreasonably restrains trade." (*Morrison v. Viacom, Inc.* (1997) 52 Cal.App.4th 1514, 1524 [61 Cal.Rptr.2d 544] , internal citations omitted.)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, §§ 591-607

6 Antitrust Laws & Trade Regulation, Ch. 105, *California*, § 105.04 (Matthew Bender)

3 Levy et al., *California Torts*, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.168[4] (Matthew Bender)

49 *California Forms of Pleading and Practice*, Ch. 565, *Unfair Competition*, § 565.77 (Matthew Bender)

1 *Matthew Bender Practice Guide: California Unfair Competition and Business Torts*, Ch. 5, *Antitrust*, 5.09[4], 5.15, 5.81, 5.82

Publisher's Notes

There is no BAJI instruction on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Antitrust & Trade Law Price Fixing & Restraints of Trade Tying Arrangements General Overview Antitrust & Trade Law Private Actions Injuries & Remedies State Regulation Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Torts Business Torts Unfair Business Practices Elements



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CHAPTER 34 California Judicial Council Cartwright Act Instructions

5-34 California Forms of Jury Instruction CACI 3422

CACI 3422 Tying--"Separate Products" Explained

In deciding whether [*tying product or service*] and [*tied product or service*] are separate and distinct, you should consider, among other factors, the following:

- (a) Whether competitors offer to sell [*tied product or service*] separately from [*tying product or service*] or only as a unit;**
- (b) Whether the combined product is composed of varying assortments of component parts;**
- (c) Whether buyers are or can be charged separately for the [products/services]; and**
- (d) Whether [*name of defendant*] ever sells or offers to sell [*tied product or service*] separate from [*tying product or service*].**

Not all of these factors need be present in order for you to conclude that [*tying product or service*] and [*tied product or service*] are separate and distinct [*products or services, etc.*].

New September 2003

Directions for Use

If an example is thought to be in order, users may wish to consider the following:

For example, even though belt buckles are sometimes sold separately from belts, a belt buckle is normally considered a component of a belt. Therefore, a belt and buckle would normally be considered

one product under the law in this case. On the other hand, while belts and wallets are sometimes packaged and sold together, they are not normally considered components of a single product and are normally purchased separately. Therefore, belts and wallets would normally be considered two separate products under the law in this case.

Sources and Authority

■ "Although we have not found ... any definitive test for the determination of this question, the following factors should be taken into account: (1) Whether competitors offer to sell the products or services separately or only as a unit. (2) Whether the combined product or service is composed of varying assortments of component parts. (3) Whether buyers are or can be charged separately for the allegedly separate products or services. (4) Whether the defendant ever sells or offers to sell the products or services separately." (*Corwin v. Los Angeles Newspaper Services Bur.* (1971) 4 Cal.3d 842, 858-859 [94 Cal.Rptr. 785, 484 P.2d 953] , internal citations omitted.)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, §§ 591-607

6 Antitrust Laws & Trade Regulation, Ch. 105, *California*, § 105.04 (Matthew Bender)

3 Levy et al., *California Torts*, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.168[4] (Matthew Bender)

49 *California Forms of Pleading and Practice*, Ch. 565, *Unfair Competition*, § 565.77 (Matthew Bender)

1 *Matthew Bender Practice Guide: California Unfair Competition and Business Torts*, Ch. 5, *Antitrust*, 5.09[4], 5.15, 5.81, 5.82

Publisher's Notes

There is no BAJI instruction on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Antitrust & Trade Law Price Fixing & Restraints of Trade Tying Arrangements General Overview Antitrust & Trade Law Private Actions Injuries & Remedies State Regulation Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Torts Business Torts Unfair Business Practices Elements



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California Forms of Jury Instruction

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CHAPTER 34 California Judicial Council Cartwright Act Instructions

5-34 California Forms of Jury Instruction CACI 3423

CACI 3423 Tying--"Economic Power" Explained

In determining whether [name of defendant] has sufficient economic power in the market for [tying item], you may consider whether [name of defendant] has such a large share of the market for [tying item] that buyers do not have alternate sources of [tying item] or a reasonably available substitute. If [name of defendant] has economic power, it may be established even though it exists with respect to some, but not all, buyers.

You may also consider whether a buyer would be unable to easily locate a similar or equally desirable product in the marketplace. If buyers do not generally consider other products to be substitutes, this fact may give [name of defendant] economic power over its [tied item]. The fact that [name of defendant] can produce [tying item] in an efficient manner or at a high level of quality does not, by itself, mean that competitors do not offer a similar product.

New September 2003

Directions for Use

This instruction assumes that the plaintiff is seeking relief under *Business and Professions Code* section 16720. If the plaintiff is instead seeking relief under *Business and Professions Code* section 16727, this element is not required, so long as the plaintiff proves that the claimed tie-in affected a "not insubstantial amount" of sales of the tied product. If that proof is not summarily established or agreed to, then this instruction also must be read in such cases.

Sources and Authority

- "[W]e emphasize that the power over the tying product ... can be sufficient even though the power

falls short of dominance and even though the power exists only with respect to some buyers in the market. As the cases unanimously underline, such crucial economic power may be inferred from the tying product's desirability to consumers or from uniqueness in its attributes." (*Suburban Mobile Homes v. AMFAC Communities* (1980) 101 Cal.App.3d 532, 544 [161 Cal.Rptr. 811] , internal citations omitted.)

■ "Decisions of the United States Supreme Court 'have made unmistakably clear that the economic power over the tying product can be sufficient even though the power falls far short of dominance and even though the power exists only with respect to some of the buyers in the market.' " (*Corwin v. Los Angeles Newspaper Services Bur.* (1971) 4 Cal.3d 842, 858 [94 Cal.Rptr. 785, 484 P.2d 953] , internal citation omitted.)

■ "Tying arrangements are illegal per se 'whenever a party has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product' and when 'a total amount of business, substantial enough in terms of dollar-volume so as not to be merely de minimis, is foreclosed to competitors by the tie.' " (*Freeman v. San Diego Assn. of Realtors* (1999) 77 Cal.App.4th 171, 184 [91 Cal.Rptr.2d 534] , internal citations omitted.)

■ "To plead this element, appellants must allege facts to show that 'a total amount of business, substantial enough in terms of dollar-volume so as not to be merely de minimis, is foreclosed to competitors by the tie.' " (*Morrison v. Viacom, Inc.* (1998) 66 Cal.App.4th 534, 542 [78 Cal.Rptr.2d 133] , internal citation omitted.)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, §§ 591-607

6 Antitrust Laws & Trade Regulation, Ch. 105, *California*, § 105.04 (Matthew Bender)

3 Levy et al., *California Torts, Ch. 40, Fraud and Deceit and Other Business Torts*, § 40.168[4] (Matthew Bender)

49 *California Forms of Pleading and Practice, Ch. 565, Unfair Competition*, § 565.77 (Matthew Bender)

1 *Matthew Bender Practice Guide: California Unfair Competition and Business Torts, Ch. 5, Antitrust*, 5.09[4], 5.15, 5.81, 5.82

Publisher's Notes

There is no BAJI instruction on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Antitrust & Trade Law Price Fixing & Restraints of Trade Tying Arrangements General Overview Antitrust & Trade Law Private Actions Injuries & Remedies State Regulation Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Torts Business Torts Unfair Business Practices Elements



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CHAPTER 34 California Judicial Council Cartwright Act Instructions

5-34 California Forms of Jury Instruction CACI 3424-CACI 3429

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CACI 3424Reserved for Future Use



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CHAPTER 34 California Judicial Council Cartwright Act Instructions

5-34 California Forms of Jury Instruction CACI 3430

CACI 3430 "Noerr-Pennington" Doctrine

[*Name of defendant*] **claims that [his/her/its] agreement with [*name of alleged coparticipant*] did not violate the law because [he/she/it] was trying in good faith to influence government action. [*Name of plaintiff*] claims that this action was a sham or a pretext to restrain competition.**

To establish [his/her/its] claim, [*name of plaintiff*] must prove both of the following:

- 1. That [*name of defendant*]'s actions before [*name of governmental body*] were undertaken without regard to the merits; and**
- 2. That the reason [*name of defendant*] engaged in [*specify the petitioning activity, e.g., "filing an objection to an environmental impact report"*] was to use the [*specify the claimed process, e.g., "environmental agency approval"*] process to harm [*name of plaintiff*] by [*specify the manner of harm, e.g., "delaying [name of plaintiff]'s entry into the market"*], rather than to obtain a successful outcome from that process.**

New September 2003

Sources and Authority

- "The *Noerr-Pennington* doctrine provides that there is no antitrust liability under the Sherman Act for efforts to influence government which are protected by the First Amendment right to petition for redress of grievances, even if the motive behind the efforts is anticompetitive. An exception to the doctrine arises when efforts to influence government are merely a sham; such efforts are not protected by the *Noerr-Pennington* doctrine and are subject to antitrust liability." (*Hi-Top Steel Corp. v. Lehrer*

(1994) 24 Cal.App.4th 570, 574-575 [29 Cal.Rptr.2d 646] , internal citations omitted.)

- "Stated most generally, the *Noerr-Pennington* doctrine declares that efforts to influence government action are not within the scope of the Sherman Act, regardless of anticompetitive purpose or effect." (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 320 [216 Cal.Rptr. 718, 703 P.2d 58] , internal citations omitted.)

- " 'The right of the people to inform their representatives in government of their desires with respect to the passage or enforcement of laws cannot properly be made to depend upon their intent in doing so. It is neither unusual nor illegal for people to seek action on laws in the hope that they may bring about an advantage to themselves and a disadvantage to their competitors.' " (*Hi-Top Steel Corp.*, *supra*, 24 Cal.App.4th at p. 576 , internal citations omitted.)

- "[B]ecause *Noerr-Pennington* protects federal constitutional rights, it applies in all contexts, even where a state law doctrine advances a similar goal." (*Theme Promotions, Inc. v. News Am. Mktg. FSI* (9th Cir. 2008) 546 F.3d 991, 1007 .)

- "An entity loses *Noerr-Pennington* immunity from antitrust liability if its conduct falls within the 'sham' exception to the doctrine. That is, '[t]here may be situations in which a publicity campaign, ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor and the application of the Sherman Act would be justified.' " (*Kaiser Found. Health Plan, Inc. v. Abbott Labs, Inc.* (9th Cir. 2009) 552 F.3d 1033, 1044 , internal citation omitted.)

- "[T]he sham exception 'encompasses situations in which persons use the governmental process--as opposed to the outcome of that process--as an anticompetitive weapon.' It 'involves a defendant whose activities are "not genuinely aimed at procuring favorable government action" at all, not one "who 'genuinely seeks to achieve his governmental result, but does so through improper means.' " ' " (*Hi-Top Steel Corp.*, *supra*, 24 Cal.App.4th at p. 577 , internal citations omitted.)

- "[W]e hold the sham exception to the *Noerr-Pennington* doctrine is applicable in California." (*Hi-Top Steel Corp.*, *supra*, 24 Cal.App.4th at p. 579 .)

- "[W]e identified three circumstances in which the sham litigation exception might apply: first, where the lawsuit is objectively baseless and the defendant's motive in bringing it was unlawful; second, where the conduct involves a series of lawsuits 'brought pursuant to a policy of starting legal proceedings without regard to the merits' and for an unlawful purpose; and third, if the allegedly unlawful conduct 'consists of making intentional misrepresentations to the court, litigation can be deemed a sham if 'a party's knowing fraud upon, or its intentional misrepresentations to, the court deprive the litigation of its legitimacy.' " (*Sosa v. DIRECTV, Inc.* (9th Cir. 2006) 437 F.3d 923, 938 , internal citations omitted.)

- "The Supreme Court has endorsed a two-part test for sham litigation. First, the lawsuit must be objectively baseless in the sense that no reasonable litigant could reasonably expect success on the merits. Only if the challenged litigation is objectively baseless may we consider the litigant's subjective motivation. The question then is 'whether the baseless lawsuit conceals an attempt to interfere directly with the business relationships of a competitor, through the use of the governmental process--as opposed to the outcome of that process--as an anticompetitive weapon.' " (*Theme Promotions, Inc.*, *supra*, 546 F.3d at p. 1007 , internal citations omitted.)

- "Even though [plaintiff] must ultimately prove the existence of a 'sham' by clear and convincing

evidence, it need only show that there is a genuine issue of material fact to avoid summary judgment." (*Kaiser Found. Health Plan, Inc., supra*, 552 F.3d at p. 1044.)

■ "While the *Noerr-Pennington* doctrine was formulated in the context of antitrust cases, it has been applied or discussed in cases involving other types of civil liability, including liability for interference with contractual relations or prospective economic advantage or unfair competition." (*Hi-Top Steel Corp., supra*, 24 Cal.App.4th at pp. 577-578 , internal citations omitted.)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, § 594

6 Antitrust Laws & Trade Regulation, Ch. 105, *California*, § 105.10[1][h] (Matthew Bender)

3 Levy et al., *California Torts*, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.164[5][a] (Matthew Bender)

49 California Forms of Pleading and Practice, Ch. 565, *Unfair Competition* , § 565.73 (Matthew Bender)

1 *Matthew Bender Practice Guide: California Unfair Competition and Business Torts*, Ch. 5, *Antitrust*, 5.41

Publisher's Notes

There is no BAJI instruction on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Antitrust & Trade Law Exemptions & Immunities Noerr-Pennington Doctrine General Overview Antitrust & Trade Law Exemptions & Immunities Noerr-Pennington Doctrine Coverage Antitrust & Trade Law Exemptions & Immunities Noerr-Pennington Doctrine Sham Exception Antitrust & Trade Law Private Actions Injuries & Remedies State Regulation Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions



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CHAPTER 34 California Judicial Council Cartwright Act Instructions

5-34 California Forms of Jury Instruction CACI 3431

CACI 3431 Affirmative Defense-- *In Pari Delicto*

[*Name of defendant*] **claims that [*name of plaintiff*] may not recover because [*name of plaintiff*] is equally responsible for the harmful conduct. To succeed, [*name of defendant*] must prove all of the following:**

- 1. That [*name of plaintiff*] and [*name of defendant*] have substantially equal economic strength;**
- 2. That [*name of plaintiff*] is at least equally responsible for the harmful conduct as [*name of defendant*]; and**
- 3. That [*name of plaintiff*] was not compelled by economic pressure to engage in the harmful conduct.**

New September 2003

Sources and Authority

- "Cases ... have declared that if a plaintiff does not bear equal responsibility for establishing the illegal scheme, or if he is compelled by economic pressures to accept such an agreement, he cannot be barred from recovering because he participated therein." (*Mailand v. Burckle* (1978) 20 Cal.3d 367, 381 [143 Cal.Rptr. 1, 572 P.2d 1142] , internal citations omitted.)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, §§ 591-607

8 Antitrust Laws & Trade Regulation, Ch. 164, *Pleadings in Antitrust Actions*, § 164.05[2][b] (Matthew Bender)

1 *Matthew Bender Practice Guide: California Unfair Competition and Business Torts, Ch. 5, Antitrust, 5.91*

Publisher's Notes

There is no BAJI instruction on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Antitrust & Trade Law Private Actions Injuries & Remedies State Regulation Civil Procedure Trials Jury Trials Jury
Instructions Standard Instructions Torts Business Torts Unfair Business Practices Defenses



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CHAPTER 34 California Judicial Council Cartwright Act Instructions

5-34 California Forms of Jury Instruction CACI 3432-CACI 3439

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CACI 3432Reserved for Future Use



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CHAPTER 34 California Judicial Council Cartwright Act Instructions

5-34 California Forms of Jury Instruction CACI 3440

CACI 3440 Damages

If you decide that [name of plaintiff] has proved [his/her/its] claim against [name of defendant], you also must decide how much money will reasonably compensate [name of plaintiff] for the harm. This compensation is called "damages."

The amount of damages must include an award for all harm that was caused by [name of defendant], even if the particular harm could not have been anticipated.

[Name of plaintiff] must prove the amount of [his/her/its] damages. However, [name of plaintiff] does not have to prove the exact amount of damages that will provide reasonable compensation for the harm. You must not speculate or guess in awarding damages.

The following are the specific items of damages claimed by [name of plaintiff]:

- 1. [Loss of reasonably anticipated sales and profits];**
- 2. [An increase in [name of plaintiff]'s expenses];**
- 3. [Insert other applicable item of damage].**

New September 2003

● *Business and Professions Code section 16750(a) confers a private right of action for treble damages and attorneys fees on "[a]ny person who is injured in his business or property by reason of anything*

forbidden or declared unlawful by this chapter."

■ "The plaintiff in a Cartwright Act proceeding must show that an antitrust violation was the proximate cause of his injuries. The frequently stated 'standing to sue' requirement is merely a rule that an action for violation of the antitrust laws may be maintained only by a party within the 'target area' of the antitrust violation, and not by one incidentally injured thereby. An 'antitrust injury' must be proved; that is, the type of injury the antitrust laws were intended to prevent, and which flows from the invidious conduct which renders defendants' acts unlawful. Finally, a plaintiff must show an injury within the area of the economy that is endangered by a breakdown of competitive conditions." (*Kolling v. Dow Jones & Co.* (1982) 137 Cal.App.3d 709, 723-724 [187 Cal.Rptr. 797] , internal citations and footnote omitted.)

■ "[D]amage issues in these cases are rarely susceptible of the kind of concrete, detailed proof of injury which is available in other contexts. ... [I]n the absence of more precise proof, the factfinder may "conclude as a matter of just and reasonable inference from the proof of defendants' wrongful acts and their tendency to injure plaintiffs' business, and from the evidence of the decline in prices, profits and values, not shown to be attributable to other causes, that defendants' wrongful acts had caused damage to the plaintiffs." " (*Diesel Elec. Sales and Serv., Inc. v. Marco Marine San Diego* (1993) 16 Cal.App.4th 202, 219-220] , internal citations omitted.)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, § 602

6 Antitrust Laws & Trade Regulation, Ch. 105, *California*, § 105.09 (Matthew Bender)

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.172 (Matthew Bender)

49 California Forms of Pleading and Practice, Ch. 565, *Unfair Competition* (Matthew Bender)

1 *Matthew Bender Practice Guide: California Unfair Competition and Business Torts*, Ch. 5, Antitrust, 5.45, 5.48-5.50, 5.66[5], 5.67-5.75

Publisher's Notes

There is no BAJI instruction on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Antitrust & Trade Law Private Actions Costs & Attorney Fees State Regulation Antitrust & Trade Law Private Actions Injuries & Remedies State Regulation Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Torts Business Torts Unfair Business Practices Remedies



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CHAPTER 34 California Judicial Council Cartwright Act Instructions

5-34 California Forms of Jury Instruction CACI 3441-CACI 3499

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CHAPTER 34 California Judicial Council Cartwright Act Instructions

5-34 California Forms of Jury Instruction CACI VF-3400

CACI VF-3400 Horizontal and Vertical Restraints (Use for Direct Competitors)--Price Fixing

We answer the questions submitted to us as follows:

1. Did [name of defendant] [and [name(s) of alleged coparticipant(s)]] agree to fix [or] [set/raise/lower/maintain/stabilize] prices [or other terms of trade] charged or to be charged for [product/service]?

_____ Yes _____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Was [name of defendant]'s conduct a substantial factor in causing harm to [name of plaintiff]?

_____ Yes _____ No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. What are [name of plaintiff]'s damages? \$_____

Signed: _____

Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the [clerk/bailiff/judge].

New September 2003

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on *CACI No. 3400, Horizontal and Vertical Restraints (Use for Direct Competitors) --Price Fixing-- Essential Factual Elements*.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

Publisher's Notes

There is no BAJI verdict form on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Antitrust & Trade Law Price Fixing & Restraints of Trade Horizontal Restraints Price Fixing Antitrust & Trade Law Price Fixing & Restraints of Trade Vertical Restraints Price Fixing Antitrust & Trade Law Private Actions Injuries & Remedies State Regulation Civil Procedure Trials Jury Trials Verdicts Special Verdicts Torts Business Torts Unfair Business Practices Elements



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CHAPTER 34 California Judicial Council Cartwright Act Instructions

5-34 California Forms of Jury Instruction CACI VF-3401

CACI VF-3401 Horizontal Restraints (Use for Direct Competitors) --Allocation of Trade or Commerce

We answer the questions submitted to us as follows:

1. Were or are [name of defendant] and [name of alleged coparticipant] competitors in the same or related markets?

_____ Yes _____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Did [name of defendant] and [name of alleged coparticipant] agree to allocate or divide [customers/territories/products]?

_____ Yes _____ No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Was [name of defendant]'s and [name of alleged coparticipant]'s conduct a substantial factor in causing harm to [name of plaintiff]?

_____ Yes _____ No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. What are [name of plaintiff]'s damages? \$_____

Signed: _____

Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the [clerk/bailiff/judge].

New September 2003

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on *CACI No. 3401, Horizontal Restraints (Use for Direct Competitors)--Allocation of Trade or Commerce--Essential Factual Elements*.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

Publisher's Notes

There is no BAJI verdict form on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Antitrust & Trade Law Price Fixing & Restraints of Trade Horizontal Market Allocation Antitrust & Trade Law Private Actions Injuries & Remedies State Regulation Civil Procedure Trials Jury Trials Verdicts Special Verdicts Torts Business Torts Unfair Business Practices Elements



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CHAPTER 34 California Judicial Council Cartwright Act Instructions

5-34 California Forms of Jury Instruction CACI VF-3402

CACI VF-3402 Horizontal Restraints (Use for Direct Competitors) --Allocation of Trade or Commerce--Affirmative Defense-- *In Pari Delicto*

We answer the questions submitted to us as follows:

1. Were or are [name of defendant] and [name of alleged coparticipant] competitors in the same or related markets?

_____ Yes _____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Did [name of defendant] and [name of alleged coparticipant] agree to allocate or divide [customers/territories/products]?

_____ Yes _____ No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Did [name of plaintiff] and [name of defendant] have substantially equal economic strength?

_____ Yes _____ No

If your answer to question 3 is yes, then answer question 4. If you answered no, skip questions 4 and 5 and answer question 6.

4. Was [name of plaintiff] at least equally responsible for the harmful conduct as [name of defendant]?

_____ Yes _____ No

If your answer to question 4 is yes, then answer question 5. If you answered no, skip question 5 and answer question 6.

5. Was [name of plaintiff] compelled by economic pressure to enter into the agreement?

_____ Yes _____ No

If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. Was [name of defendant]'s conduct a substantial factor in causing harm to [name of plaintiff]?

_____ Yes _____ No

If your answer to question 6 is yes, then answer question 7. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

7. What are [name of plaintiff]'s damages? \$_____

Signed: _____

Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the [clerk/bailiff/judge].

New September 2003

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on *CACI No. 3401, Horizontal Restraints (Use for Direct Competitors)--Allocation of Trade or Commerce--Essential Factual Elements*, and *CACI No. 3431, Affirmative Defense--In Pari Delicto*.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

Publisher's Notes

There is no BAJI verdict form on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Antitrust & Trade Law Price Fixing & Restraints of Trade Horizontal Market Allocation Antitrust & Trade Law Private
Actions Injuries & Remedies State Regulation Civil Procedure Trials Jury Trials Verdicts Special Verdicts Torts Business
Torts Unfair Business Practices Defenses



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CHAPTER 34 California Judicial Council Cartwright Act Instructions

5-34 California Forms of Jury Instruction CACI VF-3403

CACI VF-3403 Horizontal Restraints--Dual Distributor Restraints

We answer the questions submitted to us as follows:

1. Did [name of defendant] sell [products] directly in competition with [name of plaintiff] to a significant portion of [name of plaintiff]'s customers or potential customers?

_____ Yes _____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Did [name of defendant] [stop doing business with/refuse to deal with/restrain] [name of plaintiff]?

_____ Yes _____ No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Was [name of plaintiff]'s refusal to agree to [name of defendant]'s [specify the claimed restraint, e.g., territorial or customer restrictions] a motivating reason for the decision to [end business with/refuse to deal with/restrain] [name of plaintiff]?

_____ Yes _____ No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer

no further questions, and have the presiding juror sign and date this form.

4. Was [name of defendant]'s conduct a substantial factor in causing harm to [name of plaintiff]?

_____ Yes _____ No

If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. What are [name of plaintiff]'s damages? \$_____

Signed: _____

Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the [clerk/bailiff/judge].

New September 2003

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on *CACI No. 3402, Horizontal Restraints--Dual Distributor Restraints--Essential Factual Elements*.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

Publisher's Notes

There is no BAJI verdict form on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Antitrust & Trade Law Price Fixing & Restraints of Trade Horizontal Restraints General Overview Antitrust & Trade Law Private Actions Injuries & Remedies State Regulation Civil Procedure Trials Jury Trials Verdicts Special Verdicts Torts Business Torts Unfair Business Practices Elements



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CHAPTER 34 California Judicial Council Cartwright Act Instructions

5-34 California Forms of Jury Instruction CACI VF-3404

CACI VF-3404 Horizontal Restraints (Use for Direct Competitors) --Group Boycott--Per Se Violation

We answer the questions submitted to us as follows:

1. Did [name of defendant] [and [name of alleged coparticipant]] agree to [specify claimed refusal to deal, e.g., "refuse to sell to [name of plaintiff]"]?

_____ Yes _____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Was [name of defendant]'s conduct a substantial factor in causing harm to [name of plaintiff]?

_____ Yes _____ No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. What are [name of plaintiff]'s damages? \$_____

Signed: _____

Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the

[clerk/bailiff/judge].

New September 2003

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on *CACI No. 3403, Horizontal Restraints (Use for Direct Competitors)*
 --Group Boycott-- *Per Se Violation--Essential Factual Elements.*

If there are multiple causes of action, users may wish to combine the individual forms into one form.

Publisher's Notes

There is no BAJI verdict form on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Antitrust & Trade Law Price Fixing & Restraints of Trade Horizontal Refusals to Deal Boycotts Antitrust & Trade
 Law Private Actions Injuries & Remedies State Regulation Civil Procedure Trials Jury Trials Verdicts Special
 Verdicts Torts Business Torts Unfair Business Practices Elements



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CHAPTER 34 California Judicial Council Cartwright Act Instructions

5-34 California Forms of Jury Instruction CACI VF-3405

CACI VF-3405 Horizontal Restraints--Group Boycott--Rule of Reason

We answer the questions submitted to us as follows:

1. Did [name of defendant] [and [name of alleged coparticipant]] agree to [describe conduct, e.g., "formulate an arbitrary membership limitation rule with [identify other participant[s]]"]?

_____ Yes _____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Was the purpose or effect of [name of defendant]'s conduct to restrain competition?

_____ Yes _____ No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Did the anticompetitive effect of the restraint[s] outweigh any beneficial effect on competition?

_____ Yes _____ No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Was [name of defendant]'s conduct a substantial factor in causing harm to [name of plaintiff]?

_____ Yes _____ No

If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. What are [name of plaintiff]'s damages? \$_____

Signed: _____

Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the [clerk/bailiff/judge].

New September 2003

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on *CACI No. 3404, Horizontal Restraints --Group Boycott-- Rule of Reason--Essential Factual Elements*.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

Publisher's Notes

There is no BAJI verdict form on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Antitrust & Trade Law Price Fixing & Restraints of Trade Horizontal Refusals to Deal Boycotts Antitrust & Trade Law Price Fixing & Restraints of Trade Per Se Rule & Rule of Reason General Overview Antitrust & Trade Law Private Actions Injuries & Remedies State Regulation Civil Procedure Trials Jury Trials Verdicts Special Verdicts Torts Business Torts Unfair Business Practices Elements



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CHAPTER 34 California Judicial Council Cartwright Act Instructions

5-34 California Forms of Jury Instruction CACI VF-3406

CACI VF-3406 Horizontal and Vertical Restraints (Use for Direct Competitors or Supplier/Reseller Relations)--Other Unreasonable Restraint of Trade--Rule of Reason

We answer the questions submitted to us as follows:

1. Did [name of defendant] [and [name of alleged coparticipant[s]]] agree to [describe conduct constituting an unreasonable restraint of trade]?

_____ Yes _____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Was the purpose or effect of [name of defendant]'s conduct to restrain competition?

_____ Yes _____ No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Did the anticompetitive effect of the restraint[s] outweigh any beneficial effect on competition?

_____ Yes _____ No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Was [name of defendant]'s conduct a substantial factor in causing harm to [name of plaintiff]?

_____ Yes _____ No

If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. What are [name of plaintiff]'s damages? \$_____

Signed: _____

Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the [clerk/bailiff/judge].

New September 2003

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on *CACI No. 3405, Horizontal and Vertical Restraints (Use for Direct Competitors or Supplier/Reseller Relations)--Other Unreasonable Restraint of Trade--Rule of Reason--Essential Factual Elements*.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

Publisher's Notes

There is no BAJI verdict form on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Antitrust & Trade Law Price Fixing & Restraints of Trade Horizontal Restraints General Overview Antitrust & Trade Law Price Fixing & Restraints of Trade Vertical Restraints General Overview Antitrust & Trade Law Private Actions Injuries & Remedies State Regulation Civil Procedure Trials Jury Trials Verdicts Special Verdicts Torts Business Torts Unfair Business Practices Elements



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CHAPTER 34 California Judicial Council Cartwright Act Instructions

5-34 California Forms of Jury Instruction CACI VF-3407

CACI VF-3407 Horizontal and Vertical Restraints (Use for Direct Competitors or Supplier/Reseller Relations)--Other Unreasonable Restraint of Trade--Rule of Reason Affirmative Defense--"Noerr-Pennington" Doctrine

We answer the questions submitted to us as follows:

1. Did [name of defendant] [and [name of alleged coparticipant] agree to [describe conduct constituting an unreasonable restraint of trade]?

_____ Yes _____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Were [name of defendant]'s actions before [name of governmental body] undertaken without regard to the merits?

_____ Yes _____ No

If your answer to question 2 is yes, then skip question 3 and answer question 4. If you answered no, answer question 3.

3. Was the reason [name of defendant] engaged in [specify the petitioning activity, e.g., "filing an objection to an environmental impact report"] to use the [specify the claimed process, e.g., "environmental agency approval"] process to harm [name of plaintiff] by [specify the manner of harm, e.g., "delaying [name of plaintiff]'s entry into the market"], rather than to obtain a successful outcome from that process?

_____ Yes _____ No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Was the purpose or effect of [name of defendant]'s conduct to restrain competition?

_____ Yes _____ No

If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. Did the anticompetitive effect of the restraint[s] outweigh any beneficial effect on competition?

_____ Yes _____ No

If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. Was [name of defendant]'s conduct a substantial factor in causing harm to [name of plaintiff]?

_____ Yes _____ No

If your answer to question 6 is yes, then answer question 7. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

7. What are [name of plaintiff]'s damages? \$_____

Signed: _____

Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the [clerk/bailiff/judge].

New September 2003

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on *CACI No. 3405, Horizontal and Vertical Restraints (Use for Direct Competitors or Supplier/Reseller Relations)--Other Unreasonable Restraint of Trade--Rule of Reason--Essential Factual Elements*, and *CACI No. 3430, "Noerr-Pennington" Doctrine*.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

Publisher's Notes

There is no BAJI verdict form on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Antitrust & Trade Law Exemptions & Immunities Noerr-Pennington Doctrine General Overview Antitrust & Trade Law Price Fixing & Restraints of Trade Per Se Rule & Rule of Reason General Overview Antitrust & Trade Law Private Actions Injuries & Remedies State Regulation Civil Procedure Trials Jury Trials Verdicts Special Verdicts Torts Business Torts Unfair Business Practices Defenses



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CHAPTER 34 California Judicial Council Cartwright Act Instructions

5-34 California Forms of Jury Instruction CACI VF-3408

CACI VF-3408 Tying--Real Estate, Products, or Services (Bus. & Prof. Code, § 16720)

We answer the questions submitted to us as follows:

1. Are [*tying item*] and [*tied item*] separate and distinct?

_____ Yes _____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Did [*name of defendant*] sell [*tying item*] only if the buyer also purchased [*tied item*], or did [*name of defendant*] sell [*tying item*] and require or otherwise coerce buyers to [also purchase [*tied item*]] [agree not to purchase [*tied item*] from any other supplier]?

_____ Yes _____ No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Did [*name of defendant*] have sufficient economic power in the market for [*tying item*] to coerce at least some buyers of [*tying item*] into [purchasing [*tied item*]] [agreeing not to purchase [*tied item*] from a competitor of [*name of defendant*]]?

_____ Yes _____ No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer

no further questions, and have the presiding juror sign and date this form.

4. Did the conduct involve a substantial amount of sales, in terms of the total dollar value of [*tied product or service*]?

_____ Yes _____ No

If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. Was [*name of defendant*]'s conduct a substantial factor in causing harm to [*name of plaintiff*]?

_____ Yes _____ No

If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. What are [*name of plaintiff*]'s damages? \$ _____

Signed: _____

Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the [clerk/bailiff/judge].

New September 2003

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on *CACI No. 3420, Tying--Real Estate, Products, or Services--Essential Factual Elements*.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

Publisher's Notes

There is no BAJI verdict form on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Antitrust & Trade Law Price Fixing & Restraints of Trade Tying Arrangements General Overview Antitrust & Trade Law Private Actions Injuries & Remedies State Regulation Civil Procedure Trials Jury Trials Verdicts Special Verdicts Torts Business Torts Unfair Business Practices Elements



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CHAPTER 34 California Judicial Council Cartwright Act Instructions

5-34 California Forms of Jury Instruction CACI VF-3409

CACI VF-3409 Tying--Products or Services (Bus. & Prof. Code, § 16727)

We answer the questions submitted to us as follows:

1. Are [*tying item*] and [*tied product or service*] separate and distinct?

_____ Yes _____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Did [*name of defendant*] sell [*tying product*] only if the buyer also purchased [*tied product or service*], or did [*name of defendant*] sell [*tying product*] and require or otherwise coerce buyers [to also purchase [*tied product or service*]] [to agree not to purchase [*tied product or service*] from any other supplier]?

_____ Yes _____ No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Does [*name of defendant*] have sufficient economic power in the market for [*tying product*] to coerce at least some consumers into purchasing [*tied product or service*]?

_____ Yes _____ No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer

no further questions, and have the presiding juror sign and date this form.

4. Was [name of defendant]'s conduct a substantial factor in causing harm to [name of plaintiff]?

_____ Yes _____ No

If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. What are [name of plaintiff]'s damages? \$_____

Signed: _____

Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the [clerk/bailiff/judge].

New September 2003

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on *CACI No. 3421, Tying--Products or Services--Essential Factual Elements*.

If alternative grounds are asserted regarding question 3, this question can be modified according to element 3 of *CACI No. 3421*.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

Publisher's Notes

There is no BAJI verdict form on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Antitrust & Trade Law Price Fixing & Restraints of Trade Tying Arrangements General Overview Antitrust & Trade Law Private Actions Injuries & Remedies State Regulation Civil Procedure Trials Jury Trials Verdicts Special Verdicts Torts Business Torts Unfair Business Practices Elements



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CHAPTER 34 California Judicial Council Cartwright Act Instructions

5-34 California Forms of Jury Instruction CACI VF-3410-CACI VF-3499

Reserved for Future Use

CACI VF-3410Reserved for Future Use



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CHAPTER 35 California Judicial Council Eminent Domain Instructions *

5-35 California Forms of Jury Instruction 35.syn

§ 35.syn Synopsis to Chapter 35: California Judicial Council Eminent Domain Instructions *

CACI 3500 Introductory Instruction

CACI 3501 "Fair Market Value" Explained

CACI 3502 "Highest and Best Use" Explained

CACI 3503 Change in Zoning or Land Use Restriction

CACI 3504 Project Enhanced Value

CACI 3505 Information Discovered after Date of Valuation

CACI 3506 Effect of Improvements

CACI 3507 Personal Property and Inventory

CACI 3508 Bonus Value of Leasehold Interest

CACI 3509 Precondemnation Damages (Klopping Damages)

CACI 3510 Value of Easement

CACI 3511 Severance Damages

CACI 3512 Severance Damages--Offset for Benefits

CACI 3513 Goodwill

CACI 3514 Burden of Proof

CACI 3515 Valuation Testimony

CACI 3516 View

CACI 3517-CACI 3599 Reserved for Future Use

CACI VF-3500 Fair Market Value Plus Goodwill

CACI VF-3501 Fair Market Value Plus Severance Damages

CACI VF-3502 Fair Market Value Plus Loss of Inventory/Personal

CACI VF-3503-CACI VF-3599 Reserved for Future Use



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CHAPTER 35 California Judicial Council Eminent Domain Instructions *

5-35 California Forms of Jury Instruction Scope

Scope

SCOPE

This chapter contains the California Judicial Council's "Eminent Domain Series" of jury instructions [*CACI No. 3500 et seq.*]. The Judicial Council of California Civil Jury Instructions (CACI) included in this publication are the product of the Judicial Council of California Task Force on Jury Instructions, which are updated by the Judicial Council of California Advisory Committee on Civil Jury Instructions.

This chapter includes instructions on the following topics:

- An introduction to the law of eminent domain [*CACI No. 3500*].
- Explanations of "fair market value" [*CACI No. 3501*] and "highest and best use" of property [*CACI No. 3502*].
- The effect of a change in zoning or land use restrictions [*CACI No. 3503*].
- Project enhanced value [*CACI No. 3504*] and information discovered after date of valuation [*CACI No. 3505*].
- Effect of improvements on property [*CACI No. 3506*].
- Personal property and inventory [*CACI No. 3507*].
- Bonus value of a leasehold interest [*CACI No. 3508*] and value of an easement [*CACI No. 3510*].
- Damages, including precondemnation damages (*Klopping* damages) [*CACI No. 3509*] and severance damages [*CACI Nos. 3511, 3512*].
- The burden of proof in eminent domain cases [*CACI No. 3514*], goodwill [*CACI No. 3513*],

valuation testimony [*CACI No. 3515*], and view [*CACI No. 3516*].

The eminent domain series also includes special verdict forms on fair market value [*CACI Nos. VF-3500-VF-3502*].



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CHAPTER 35 California Judicial Council Eminent Domain Instructions *

5-35 California Forms of Jury Instruction CACI 3500

CACI 3500 Introductory Instruction

Public agencies such as the [*name of condemnor*] have the right to take private property for public use if they pay the owner just compensation.

New September 2003

- *Article I, section 19, of the California Constitution* provides: "Private property may be taken or damaged for public use only when just compensation, ascertained by a jury unless waived, has first been paid to, or into court for, the owner. The Legislature may provide for possession by the condemnor following commencement of eminent domain proceedings upon deposit in court and prompt release to the owner of money determined by the court to be the probable amount of just compensation."
- *The Fifth Amendment of the U.S. Constitution* provides, in part: "[N]or shall private property be taken for public use, without just compensation."
- *Code of Civil Procedure section 1240.010* provides: "The power of eminent domain may be exercised to acquire property only for a public use. Where the Legislature provides by statute that a use, purpose, object, or function is one for which the power of eminent domain may be exercised, such action is deemed to be a declaration by the Legislature that such use, purpose, object, or function is a public use."
- "The power of eminent domain arises as an inherent attribute of sovereignty that is necessary for government to exist. Properly exercised, the eminent domain power effects a compromise between the public good for which private land is taken, and the protection and indemnification of private citizens

whose property is taken to advance that public good. The *Fifth Amendment of the United States Constitution*, made applicable to the states by the *Fourteenth Amendment*, and *California Constitution, article I, section 19* require this protection of private citizens' property." (*Burbank-Glendale-Pasadena Airport Authority v. Hensler* (2000) 83 Cal.App.4th 556, 561 [99 Cal.Rptr.2d 729] , internal citation omitted.)

■ " 'An inverse condemnation action is an eminent domain proceeding initiated by the property owner rather than the condemner. The principles which affect the parties' rights in an inverse condemnation suit are the same as those in an eminent domain action.' " (*Customer Co. v. City of Sacramento* (1995) 10 Cal.4th 368, 377, fn. 4 [41 Cal.Rptr.2d 658, 895 P.2d 900] , internal citations omitted.)

■ "The principle sought to be achieved by this concept 'is to reimburse the owner for the property interest taken and to place the owner in as good a position pecuniarily as if the property had not been taken.' " (*Redevelopment Agency of the City of Long Beach v. First Christian Church of Long Beach* (1983) 140 Cal.App.3d 690, 705 [189 Cal.Rptr. 749] , internal citation omitted, disapproved on other grounds in *Los Angeles County Metropolitan Transportation Authority v. Continental Development Corp.* (1997) 16 Cal.4th 694, 720-721 [66 Cal.Rptr.2d 630, 941 P.2d 809] .)

■ The only issue for the jury is valuation; all others are tried by the court. (*People v. Ricciardi* (1943) 23 Cal.2d 390, 402 [144 P.2d 799] .)

■ "While article I, section 14 [now 19], of the California Constitution guarantees a jury trial in condemnation cases on the issue of the defendant's damages, this is the only issue to be decided by the jury; all other issues of law or fact must be decided by the court." (*Pacific Gas & Electric Co. v. Peterson* (1969) 270 Cal.App.2d 434, 438 [75 Cal.Rptr. 673] , internal citations omitted.)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, §§ 1223, 1229

1 Condemnation Practice in California (Cont.Ed.Bar 3d ed.) § 4.1

1 Nichols on Eminent Domain, Ch. 1, *The Nature, Origin, Evolution and Characteristics of the Power*, §§ 1.1, 1.11 (Matthew Bender)

20 California Forms of Pleading and Practice, Ch. 247, *Eminent Domain and Inverse Condemnation* (Matthew Bender)

Publisher's Notes

This instruction covers issues presented in BAJI No. 11.70.

LexisNexis Matthew Bender Expert Practice Tip--Parties' Roles: Eminent domain cases can initially be confusing to a jury due to the reversed roles of plaintiff and defendant. It would be helpful to explain to the jury that in eminent domain cases, the public entity "takes" the property by filing a condemnation complaint. Hence, unlike in most cases, the defendant (property owner) seeks money damages (in the form of just compensation) from the plaintiff (public entity). *By Susan S. Azad, Esq.*

LexisNexis Matthew Bender Expert Practice Tip--Property Owner's Right to Compensation: Explain to jurors that the defendant has a constitutional right to receive just compensation from a governmental entity that takes the defendant's private property for public use. The only issue for the jury

to decide is how much compensation the defendant is entitled to receive as a result of the taking of the property. *By Susan S. Azad, Esq.*

* Practice Tips by Susan S. Azad, Esq., a litigation partner in the Los Angeles office of Latham & Watkins, LLP. She is a member of the firm's Distressed Credit Markets Advisory group and has litigated in a wide variety of substantive areas, including complex business litigation, securities litigation, intellectual property litigation, bankruptcy, health care and zoning litigation, and has extensive trial and appellate experience. Ms. Azad has deep expertise in takings law, and in particular, inverse condemnation and temporary regulatory takings. She was trial counsel in the *Cienega Gardens v. United States* cases, which set new federal law standards for temporary regulatory takings of income-producing property [see *Independence Park v. United States*, 62 Fed.Cl. 684 (Fed.Cl. 2004); *Cienega Gardens v. United States*, 38 Fed.Cl. 64 (Fed.Cl. 1997); *Cienega Gardens v. United States*, 331 F.3d 1319 (Fed.Cir. 2003); *Cienega Gardens v. United States*, (Fed.Cl. 2005); *Claremont Village Commons v. United States* (Fed. Cl. 2007)].



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CHAPTER 35 California Judicial Council Eminent Domain Instructions *

5-35 California Forms of Jury Instruction CACI 3501

CACI 3501 "Fair Market Value" Explained

Just compensation includes the fair market value of the property as of [*insert date of valuation*]. Fair market value is the highest price for the property that a willing buyer would have paid in cash to a willing seller, assuming that:

- 1. There is no pressure on either one to buy or sell; and**
- 2. The buyer and seller know all the uses and purposes for which the property is reasonably capable of being used.**

New September 2003

Do not give this instruction in cases where there is no relevant market for the property. Instead, instruct on the appropriate alternative method of valuation.

■ *Code of Civil Procedure section 1263.320 provides:*

(a) The fair market value of the property taken is the highest price on the date of valuation that would be agreed to by a seller, being willing to sell but under no particular or urgent necessity for so doing, nor obliged to sell, and a buyer, being ready, willing, and able to buy but under no particular necessity for so doing, each dealing with the other with full knowledge of all the uses and purposes for which the property is reasonably adaptable and available.

(b) The fair market value of property taken for which there is no relevant, comparable market is its value on the date of valuation as determined by any method of valuation that is just and equitable.

■ " 'Market value,' in turn, traditionally has been defined as 'the highest price estimated in terms of money which the land would bring if exposed for sale in the open market, with reasonable time allowed in which to find a purchaser, buying with knowledge of all of the uses and purposes to which it was adapted and for which it was capable.' " (*Klopping v. City of Whittier* (1972) 8 Cal.3d 39, 43 [104 Cal.Rptr. 1, 500 P.2d 1345] , internal citation omitted.)

■ "Recognized alternatives to the market data approach to valuation are reproduction or replacement costs less depreciation or obsolescence." (*Redevelopment Agency of the City of Long Beach v. First Christian Church of Long Beach* (1983) 140 Cal.App.3d 690, 698 [189 Cal.Rptr. 749] , internal citation omitted, disapproved on other grounds in *Los Angeles County Metropolitan Transportation Authority v. Continental Development Corp.* (1997) 16 Cal.4th 694, 720-721 [66 Cal.Rptr.2d 630, 941 P.2d 809] .)

■ Alternative methods of valuation particularly apply to properties such as schools, churches, cemeteries, parks, and utilities for which there is no relevant market; therefore these properties may be valued on any basis that is just and equitable. (*County of San Diego v. Rancho Vista Del Mar, Inc.* (1993) 16 Cal.App.4th 1046, 1060 [20 Cal.Rptr.2d 675] .)

■ "[T]he fair market value of property taken has not been limited to the value of the property as used at the time of the taking, but has long taken into account the 'highest and most profitable use to which the property might be put in the reasonable near future, to the extent that the probability of such a prospective use affects the market value.' " (*City of San Diego v. Neumann* (1993) 6 Cal.4th 738, 744 [25 Cal.Rptr.2d 480, 863 P.2d 725] , internal citations omitted.)

■ "In condemnation actions, California courts have long recognized what has been referred to as the 'appraisal trinity.' This term encompasses three methods or approaches used by appraisers to determine the fair market value of real estate: (1) the current cost of reproducing (or replacing) the property less depreciation from all sources; (2) the 'market data' value as indicated by recent sale of comparable properties; and (3) the 'income approach,' or the value of which the property's net earning power will support based upon the capitalization of net income. In 1965, the state Legislature codified these three approaches in *Evidence Code* section 815-820. A qualified appraiser in an eminent domain proceeding may use one or more of these valuation techniques to ascertain the fair market value of the condemned property." (*Redevelopment Agency of the City of Long Beach, supra*, 140 Cal.App.3d at p. 705 , internal citations omitted.)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, § 1230

1 Condemnation Practice in California (Cont.Ed.Bar 3d ed.) §§ 4.1-4.2

4 Nichols on Eminent Domain, Ch. 12, *Valuation Generally*, §§ 12.01-12.05, Ch. 13, *Fair Market Value--Physical Character*, § 13.01 (Matthew Bender)

20 California Forms of Pleading and Practice, Ch. 247, *Eminent Domain and Inverse Condemnation* (Matthew Bender)

Publisher's Notes

This instruction replaces BAJI No. 11.73, and covers issues presented in BAJI No. 11.72.

LexisNexis Matthew Bender Expert Practice Tip--Define "Just Compensation": Consider preceding this instruction with an instruction on the definition of "just compensation," which has a special meaning under the California and United States Constitutions. It means that the property owner must be made whole financially, as if the taking had never occurred. The principle behind the concept of just compensation is to put the owner in as good a position pecuniarily as he or she would have occupied if his/her property had not been taken. (*City of San Diego v. Rancho Penasquitos Partnership* (2003) 105 Cal.App.4th 1013, 1027-1028 [130 Cal.Rptr.2d 108].) "The just compensation required by the constitution to be made to the [property] owner is to be measured by the loss caused to him by the appropriation. He is entitled to receive the value of what he has been deprived of, and no more. To award him less would be unjust to him; to award him more would be unjust to the public." (*Los Angeles Metropolitan Transportation Authority v. Continental Development Corp.* (1997) 16 Cal.4th 694, 715 [66 Cal.Rptr.2d 630, 941 P.2d 809].) For such an instruction, see Ch. 35A, *Matthew Bender Inverse Condemnation Instructions*, MB 3500A.02. By Susan S. Azad, Esq.

LexisNexis Matthew Bender Expert Practice Tip--Experts Testimony of Fair Market Value: The determination of fair market value is the most critical aspect of the jury's charge. This will largely come down to expert credibility. A savvy practitioner will direct conservative assumptions by his or her experts so that they withstand cross-examination and convey to the jury that they have not taken liberties with the valuation analysis. This will help shore up other areas where the expert may be weak. The practitioner should anticipate weaknesses in the expert valuation and deal with them early. By Susan S. Azad, Esq.

LexisNexis Matthew Bender Expert Practice Tip--Explain Valuation Method to Jury: "Fair market value" encompasses valuation methodologies such as the comparable sale value, cost of replacement and value, and the capitalized income approach. Depending on the facts of the case, one or more of these approaches may be preferable. If the expert will rely primarily on one of these approaches, it is important to explain to the jury why a particular valuation methodology is being used and why it is preferable to other approaches. By Susan S. Azad, Esq.

LexisNexis Matthew Bender Expert Practice Tip--Determining Valuation Date: The valuation date is typically the date of the taking, which in eminent domain cases will be the date the lawsuit is filed and estimated just compensation is deposited and credited to the owner. By Susan S. Azad, Esq.

* Practice Tips by Susan S. Azad, Esq., a litigation partner in the Los Angeles office of Latham & Watkins, LLP. She is a member of the firm's Distressed Credit Markets Advisory group and has litigated in a wide variety of substantive areas, including complex business litigation, securities litigation, intellectual property litigation, bankruptcy, health care and zoning litigation, and has extensive trial and appellate experience. Ms. Azad has deep expertise in takings law, and in particular, inverse condemnation and temporary regulatory takings. She was trial counsel in the *Cienega Gardens v. United States* cases, which set new federal law standards for temporary regulatory takings of income-producing property [see *Independence Park v. United States*, 62 Fed.Cl. 684 (Fed.Cl. 2004); *Cienega Gardens v. United States*, 38 Fed.Cl. 64 (Fed.Cl. 1997); *Cienega Gardens v. United States*, 331 F.3d 1319 (Fed.Cir. 2003); *Cienega Gardens v. United States*, (Fed.Cl. 2005); *Claremont Village Commons v. United States* (Fed. Cl. 2007)].



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CHAPTER 35 California Judicial Council Eminent Domain Instructions *

5-35 California Forms of Jury Instruction CACI 3502

CACI 3502 "Highest and Best Use" Explained

You must determine fair market value based on the property's highest and best use. The highest and best use is the most profitable legally permissible use for which the property is physically, geographically, and economically adaptable.

Do not consider any personal value of the property to [name of property owner] or [his/her/its] need for the property. Also, do not consider the particular need of [name of condemnor] for the property.

New September 2003

- "The property taken is valued based on the highest and best use for which it is geographically and economically adaptable." (*County of San Diego v. Rancho Vista Del Mar, Inc.* (1993) 16 Cal.App.4th 1046, 1058 [20 Cal.Rptr.2d 675] , internal citation omitted.)

- "It is long settled that the condemned property may not be valued based on its special value to the property owner. ... Thus, the cases have generally held that a property owner may not value his property based upon its use for a projected special purpose or for a hypothetical business." (*County of San Diego, supra*, 16 Cal.App.4th at pp. 1058-1059 .)

- "Just as the property may not be valued based on its special value to the owner, the property may not be valued on the basis of its special value to the government." (*County of San Diego, supra*, 16 Cal.App.4th at p. 1061 , internal citation omitted.)

- "Simply stated, purchasers of property that is known to be condemned are prevented from inflating

the value of the property by conjecturing what the condemner will actually pay for the property." (*People ex rel. Dept. of Water Resources v. Andresen* (1987) 193 Cal.App.3d 1144, 1156 [238 Cal.Rptr. 826] , internal citation omitted.)

■ "In condemnation cases it is a firmly established principle that the compensation payable is to be based upon the loss to the owner rather than upon the benefit received by the taker. The California Supreme Court early stated that 'it seems monstrous to say that the benefit arising from the proposed improvement is to be taken into consideration as an element of the value of the land.' This has been construed to mean that '[the] beneficial purpose to be derived by the condemnor's use of the property is not to be taken into consideration in determining market values, for it is wholly irrelevant.' This rule, however, does not mean that evidence of the highest and best use of the property must be excluded simply because that is the use that the condemner intends to make of the property. ... [I]n *City of Los Angeles v. Decker*, the court reiterated that it is improper to award compensation based upon the value to the condemner, but held that it was proper in that case to consider the value of the property for parking purposes (the highest and best use) despite the fact that the city intended to use it for such purposes." (*Pacific Gas & Electric Co. v. Zuckerman* (1987) 189 Cal.App.3d 1113, 1127 [234 Cal.Rptr. 630] , internal citations omitted.)

■ "Once the highest and best use of the property is determined, one of several approaches to valuation must be selected. *Evidence Code* sections 815-820 set forth various methodologies sanctioned for use by valuation experts, including considering sales contracts of comparable properties and capitalizing income from the subject land and its existing improvements." (*San Diego Metropolitan Transit Development Bd. v. Cushman* (1997) 53 Cal.App.4th 918, 926 [62 Cal.Rptr.2d 121] , internal citations omitted.)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, § 1230

1 Condemnation Practice in California (Cont.Ed.Bar 3d ed.) §§ 4.9-4.21

Publisher's Notes

This instruction covers issues presented in BAJI Nos. 11.74, 11.75, and 11.86.

"[I]n determining fair market value, including its highest and best use and the reasonable probability of a zoning change, any increase or decrease in the property's value caused by the project itself may not be considered. ..." (*City of San Diego v. Rancho Penasquitos Partnership* (2003) 105 Cal.App.4th 1013, 1028 [130 Cal.Rptr.2d 108] .)

LexisNexis Matthew Bender Expert Practice Tip--Determining Highest and Best Use: Highest and best use may include uses to which the property is not currently subjected. For example, a parking lot located and zoned such that it could be marketed as a parcel to be developed into commercial office space could have a highest and best use as a commercial development parcel. Highest and best use does not include speculative uses, such as those that would require a change in zoning, unless the change in zoning is reasonably probable separate and apart from the project for which the property is condemned. By Susan S. Azad, Esq.

LexisNexis Matthew Bender Expert Practice Tip--Compensation Is Based on Evidence, Not Speculation: Explain to the jury that just compensation must be based on evidence of fair market value, not on the special or subjective needs of the parties. By Susan S. Azad, Esq.

* Practice Tips by Susan S. Azad, Esq., a litigation partner in the Los Angeles office of Latham & Watkins, LLP. She is a member of the firm's Distressed Credit Markets Advisory group and has litigated in a wide variety of substantive areas, including complex business litigation, securities litigation, intellectual property litigation, bankruptcy, health care and zoning litigation, and has extensive trial and appellate experience. Ms. Azad has deep expertise in takings law, and in particular, inverse condemnation and temporary regulatory takings. She was trial counsel in the *Cienega Gardens v.*

United States cases, which set new federal law standards for temporary regulatory takings of income-producing property [see *Independence Park v. United States*, 62 Fed.Cl. 684 (Fed.Cl. 2004); *Cienega Gardens v. United States*, 38 Fed.Cl. 64 (Fed.Cl. 1997); *Cienega Gardens v. United States*, 331 F.3d 1319 (Fed.Cir. 2003); *Cienega Gardens v. United States*, (Fed.Cl. 2005); *Claremont Village Commons v. United States* (Fed. Cl. 2007)].



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CHAPTER 35 California Judicial Council Eminent Domain Instructions *

5-35 California Forms of Jury Instruction CACI 3503

CACI 3503 Change in Zoning or Land Use Restriction

A determination of the property's highest and best use is not necessarily limited by current zoning or land use restrictions. If you decide that as of [insert date of valuation] there was a reasonable probability of a change in zoning or other use restrictions in the near future, then you must determine the highest and best use of the property based on that change.

New September 2003

Sources and Authority

■ "Where due to zoning restrictions the condemned property is not presently available for use to which it is otherwise geographically and economically adaptable, the condemnee is entitled to show a reasonable probability of a zoning change in the near future and thus to establish such use as the highest and best use of the property. ... 'The general rule is that present market value must be determined only by uses for which land is adaptable and available. However, where land sought to be condemned is not presently available for a particular use by reason of a zoning ordinance or other restriction imposed by law, but the evidence tends to show a "reasonable probability" of a change in the near future, the effect of such probability on the minds of purchasers generally may be taken into consideration in fixing present market value' " (*City of Los Angeles v. Decker* (1977) 18 Cal.3d 860, 867-868 [135 Cal.Rptr. 647, 558 P.2d 545] , internal citations omitted.)

■ "A determination of the property's highest and best use is not necessarily limited to the current zoning or land use restrictions imposed on the property; the property owner 'is entitled to show a reasonable probability of a zoning [or other change] in the near future and thus to establish such use as the highest and best use of the property.' " (*County of San Diego v. Rancho Vista Del Mar, Inc.* (1993)

16 Cal.App.4th 1046, 1058 [20 Cal.Rptr.2d 675] , internal citations omitted.)

■ "[T]he determination as to whether or not there is a reasonable probability of a [use] change is ordinarily a question of fact for the jury." (*Metropolitan Water Dist. of So. California v. Campus Crusade for Christ, Inc.* (2007) 41 Cal.4th 954, 967 [62 Cal.Rptr.3d 623, 161 P.3d 1175] .)

■ "Before such evidence may be presented to the jury, however, the trial court must first determine whether there is sufficient evidence that would permit a jury to conclude there is a reasonable probability of rezoning in the near future. Evidence of a reasonable probability of a zoning change in the near future 'must at least be in accordance with the usual minimum evidentiary requirements, and that which is purely speculative, wholly guess work and conjectural, is inadmissible.' The evidence, if credited, must also be sufficient to establish that rezoning is reasonably probable. If the trial court determines that no fact finder could find a reasonable probability of rezoning on the record presented, it may exclude all evidence and opinions of value based on a use other than that authorized by the existing zoning. If, on the other hand, the trial court determines that there is sufficient evidence of a reasonable probability of rezoning to warrant submitting the issue to the jury, it is for the jury, in considering the weight to be given valuation testimony based upon a reasonable probability of rezoning, to determine whether there was a reasonable probability of rezoning and, if so, its effect on the market value of the property. Thus, before a jury may even reach the question whether a use which was unauthorized by the existing zoning otherwise meets the criteria of a highest and best use, the jury must first find that there was a reasonable probability of rezoning to permit that use. Once that has been established, neither party bears the burden to persuade the fact finder of the effect of this probability on the valuation of the property." (*Metropolitan Water Dist. of So. California, supra*, 41 Cal.4th at p. 968 , internal citations omitted.)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, § 1231

1 Condemnation Practice in California (Cont.Ed.Bar 3d ed.) §§ 4.12-4.17

14 *California Real Estate Law and Practice*, Ch. 508, *Evidence: General*, § 508.13; Ch. 512, *Compensation*, § 512.10 et seq. (Matthew Bender)

4 Nichols on Eminent Domain, Ch. 12C, *Absence of Market Value and Effect of Restrictions*, §§ 12C.01-12C.03, Ch. 13, *Fair Market Value--Physical Character*, §§ 13.04, 13.29 (Matthew Bender)

Publisher's Notes

This instruction covers issues presented in BAJI No. 11.74.

LexisNexis Matthew Bender Expert Practice Tip--Effect of Probable Re-Zoning: This instruction reflects the concept that speculative damages are not permitted. However, probable future events unrelated to the development project itself can be considered if they would be material to a purchaser. For example, if, as of the date of the taking, there was a reasonable probability that a favorable re-zoning would occur in the near future, a purchaser would consider the present value impact of the zone change on the property by weighing (1) the likelihood of the zone change, (2) the probable timing of the zone change, and (3) the impact the change would have on the value of the property. These impacts would be discounted to present value (the date of the taking) and factored into the total fair market valuation. For a probable zoning or land use change scenario, this (or a similar) analysis should be included in the expert witness presentation. *By Susan S. Azad, Esq.*

* Practice Tips by Susan S. Azad, Esq., a litigation partner in the Los Angeles office of Latham & Watkins, LLP. She is a member of the firm's Distressed Credit Markets Advisory group and has litigated in a wide variety of substantive areas, including complex business litigation, securities litigation, intellectual property litigation, bankruptcy, health care and zoning litigation, and has extensive trial and appellate experience. Ms. Azad has deep expertise in takings law, and in particular, inverse condemnation and temporary regulatory takings. She was trial counsel in the *Cienega Gardens v.*

United States cases, which set new federal law standards for temporary regulatory takings of income-producing property [see *Independence Park v. United States*, 62 Fed.Cl. 684 (Fed.Cl. 2004); *Cienega Gardens v. United States*, 38 Fed.Cl. 64 (Fed.Cl. 1997); *Cienega Gardens v. United States*, 331 F.3d 1319 (Fed.Cir. 2003); *Cienega Gardens v. United States*, (Fed.Cl. 2005); *Claremont Village Commons v. United States* (Fed. Cl. 2007)].



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CHAPTER 35 California Judicial Council Eminent Domain Instructions *

5-35 California Forms of Jury Instruction CACI 3504

CACI 3504 Project Enhanced Value

You must consider any increase or decrease in the property's fair market value caused by public knowledge of [insert entity's purpose for condemning the property] until [insert date of property's probable inclusion]. You may not consider any change in value caused by [insert entity's purpose for condemning the property] after that date. You may, however, consider other factors that changed the property's value after [insert date of property's probable inclusion], but before [insert date of valuation].

New September 2003

- *Code of Civil Procedure section 1263.330 provides:*

The fair market value of the property taken shall not include any increase or decrease in the value of the property that is attributable to any of the following:

- (a) The project for which the property is taken.
- (b) The eminent domain proceeding in which the property is taken.
- (c) Any preliminary actions of the plaintiff relating to the taking of the property.

- "A legitimate element of just compensation lies in the increase in value resulting from a reasonable expectation that a particular piece of property will be outside a proposed public improvement, and thus will reap the benefits of that improvement." (*Merced Irrigation Dist. v. Woolstenhulme* (1971) 4 Cal.3d 478, 488 [93 Cal.Rptr. 833, 483 P.2d 1] .)

- "The 'market value' of a given piece of property, of course, reflects a great variety of factors independent of the size, nature, or condition of the property itself. The general character of the neighborhood, the quality of the public and

private services, and the availability of public facilities all play important roles in establishing market value. Thus, widespread knowledge of a proposed public improvement, planned for an indefinite location within a given region or neighborhood, will frequently cause the market value of land in the region or neighborhood to rise." (*Merced Irrigation Dist.*, *supra*, 4 Cal.3d at p. 488 .)

■ "[W]e now hold that increases in value, attributable to a project but reflecting a reasonable expectation that property will not be taken for the improvement, should properly be considered in determining 'just compensation.'" (*Merced Irrigation Dist.*, *supra*, 4 Cal.3d at p. 495 .)

■ "[I]n computing 'just compensation' in such a case, a jury should only consider the increase in value attributable to the project up until the time when it became probable that the land would be needed for the improvement." (*Merced Irrigation Dist.*, *supra*, 4 Cal.3d at p. 498 .)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, § 1234

1 Condemnation Practice in California (Cont.Ed.Bar 3d ed.) §§ 4.3-4.8

3 Nichols on Eminent Domain, Ch. 8A, *Enhancement*, §§ 8A.01-8A.02 (Matthew Bender)

4 Nichols on Eminent Domain, Ch. 12B, *Valuation of the Fee Interest*, § 12B.17 (Matthew Bender)

Publisher's Notes

This instruction and CACI 3505 replace BAJI No. 11.77.

LexisNexis Matthew Bender Expert Practice Tip--Increase in Surrounding Values: Use this instruction when publicity concerning a large public project causes land values surrounding the proposed project (but not those anticipated to be condemned as part of the project) increase in value. Once it is reasonably probable that a parcel will be condemned as part of the project, enhanced value is not recoverable. This instruction reflects the fact that any increase in value attributable to the project may only be included during the period of time it was not anticipated the parcel would be condemned. Once it becomes probable that the land at issue will be condemned as part of the project, any enhanced value attributable to the project itself is not recoverable. *By Susan S. Azad, Esq.*

LexisNexis Matthew Bender Expert Practice Tip--Difficulty of Enhanced Value Concept: This instruction is nuanced and may be difficult for the jury to follow. The concept behind the instruction should be carefully explained. *By Susan S. Azad, Esq.*

* Practice Tips by Susan S. Azad, Esq., a litigation partner in the Los Angeles office of Latham & Watkins, LLP. She is a member of the firm's Distressed Credit Markets Advisory group and has litigated in a wide variety of substantive areas, including complex business litigation, securities litigation, intellectual property litigation, bankruptcy, health care and zoning litigation, and has extensive trial and appellate experience. Ms. Azad has deep expertise in takings law, and in particular, inverse condemnation and temporary regulatory takings. She was trial counsel in the *Cienega Gardens v. United States* cases, which set new federal law standards for temporary regulatory takings of income-producing property [see *Independence Park v. United States*, 62 Fed.Cl. 684 (Fed.Cl. 2004); *Cienega Gardens v. United States*, 38 Fed.Cl. 64 (Fed.Cl. 1997); *Cienega Gardens v. United States*, 331 F.3d 1319 (Fed.Cir. 2003); *Cienega Gardens v. United States*, (Fed.Cl. 2005); *Claremont Village Commons v. United States* (Fed. Cl. 2007)].



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CHAPTER 35 California Judicial Council Eminent Domain Instructions *

5-35 California Forms of Jury Instruction CACI 3505

CACI 3505 Information Discovered after Date of Valuation

In determining fair market value you must consider any condition that affects the value of the property if the condition existed on [*insert date of valuation*] but was discovered after that date.

New September 2003

■ "[W]hile evidence of a change in the condition of the property after the date of valuation may not be admissible ... , information about the condition of the property on the date of valuation which happens to be discovered after that date must be considered. In effect, the parties are presumed to know all relevant information available at the time of trial, even if it could not reasonably have been discovered until after the date of valuation." (*San Diego Water Authority v. Mireiter* (1993) 18 Cal.App.4th 1808, 1814 [23 Cal.Rptr.2d 455] .)

■ "The California statutory scheme and the overwhelming weight of authority supports the conclusion that relevant factual discoveries up to and including the date of trial must be taken into account, regardless of whether they inflate or deflate the value of the property. Accordingly, the trial court erred in failing to instruct the jury it was required to consider the newly discovered information in determining the compensation due defendants, and reversal is therefore required." (*San Diego County Water Authority, supra*, 18 Cal.App.4th at pp. 1817-1818 .)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, § 1231

1 Condemnation Practice in California (Cont.Ed.Bar 3d ed.) § 4.23

4 Nichols on Eminent Domain, Ch. 12A, *Market Value--Time of Valuation*, § 12A.01[7] (Matthew Bender)

Publisher's Notes

This instruction and *CACI 3504* replace BAJI No. 11.77. This instruction covers issues presented in 11.72.9.

LexisNexis Matthew Bender Expert Practice Tip--Consider All Conditions Whether or Not Owner Knew of Them: Use this instruction in cases where conditions existed on the property that affected its value as of the date of valuation, and that information was unknown to the owner until after the taking occurred. The instruction reflects the concept that all factors existing on the date of the taking affecting the property's fair market value should be taken into account, regardless of whether those facts were known to the owner at that time or not. *By Susan S. Azad, Esq.*

* Practice Tips by Susan S. Azad, Esq., a litigation partner in the Los Angeles office of Latham & Watkins, LLP. She is a member of the firm's Distressed Credit Markets Advisory group and has litigated in a wide variety of substantive areas, including complex business litigation, securities litigation, intellectual property litigation, bankruptcy, health care and zoning litigation, and has extensive trial and appellate experience. Ms. Azad has deep expertise in takings law, and in particular, inverse condemnation and temporary regulatory takings. She was trial counsel in the *Cienega Gardens v. United States* cases, which set new federal law standards for temporary regulatory takings of income-producing property [see *Independence Park v. United States*, 62 *Fed.Cl.* 684 (*Fed.Cl.* 2004); *Cienega Gardens v. United States*, 38 *Fed.Cl.* 64 (*Fed.Cl.* 1997); *Cienega Gardens v. United States*, 331 *F.3d* 1319 (*Fed.Cir.* 2003); *Cienega Gardens v. United States*, (Fed.Cl. 2005); *Claremont Village Commons v. United States* (Fed. Cl. 2007)].



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CHAPTER 35 California Judicial Council Eminent Domain Instructions *

5-35 California Forms of Jury Instruction CACI 3506

CACI 3506 Effect of Improvements

In determining the fair market value of the property you must consider both the value of the land and whether any buildings, machinery, or other equipment attached to the property increase or decrease the value of the property.

New September 2003

The court decides as a legal issue whether an improvement is a fixture "pertaining to the realty." (*Code Civ. Proc.*, § 1260.030.)

- *Code of Civil Procedure section 1263.210(a)* provides: "Except as otherwise provided by statute, all improvements pertaining to the realty shall be taken into account in determining compensation."
- *Code of Civil Procedure section 1263.205(a)* defines "improvements pertaining to the realty" as including "any machinery or equipment installed for use on property taken by eminent domain, or on the remainder if such property is part of a larger parcel, that cannot be removed without a substantial economic loss or without substantial damage to the property on which it is installed, regardless of the method of installation."
- *Code of Civil Procedure section 1263.205(b)* provides: "In determining whether particular property can be removed 'without a substantial economic loss' within the meaning of this section, the value of the property in place considered as a part of the realty should be compared with its value if it were removed and sold."

■ "[T]he market value of land and the improvements thereon is the market value thereof viewed as a whole and not separately." (*South Bay Irrigation Dist. v. California-American Water Co.* (1976) 61 Cal.App.3d 944, 986 [133 Cal.Rptr. 166] , internal citation omitted.)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, § 1225

1 Condemnation Practice in California (Cont.Ed.Bar 3d ed.) § 4.55

4 Nichols on Eminent Domain, Ch. 13, *Fair Market Value--Physical Character*, §§ 13.02, 13.12 (Matthew Bender)

20 California Forms of Pleading and Practice, Ch. 247, *Eminent Domain and Inverse Condemnation* (Matthew Bender)

Publisher's Notes

This instruction covers issues presented in BAJI Nos. 11.72.3 and 11.72.7.

LexisNexis Matthew Bender Expert Practice Tip--Value of Improvement Can Vary: Use this instruction when there are structures or equipment on the property that cannot be removed without substantial damage to the property. In that case, explain to the jury that the property must be valued a whole and not as a sum of the individual pieces. Another circumstance where this instruction should be used is when structures on the property have no remaining useful life, are in need of significant uninsured repair, or would have no value to a third-party purchaser. In that case, the cost of repair and/or demolition and removal should be factored into the value of the land. However, certain types of improvements may have specialized value to a narrow range of purchaser, but hold little value to an ordinary purchaser. In that case, the jury should be reminded that they must consider the value of the land assuming its highest and best use--which would include a sale to a purchaser who could make use of the specialized value of the improvements. The prudent practitioner will have expert valuations that take these factors into consideration. *By Susan S. Azad, Esq.*

LexisNexis Matthew Bender Expert Practice Tip--Determining Whether Improvement Is Fixture: The issue of whether an improvement is a fixture is an issue of law for the court. The jury should be instructed that the court has already determined that the improvement at issue must be valued as part of the land, and that the jury's charge is solely to determine to what extent the improvement increases or decreases the value of the land. *By Susan S. Azad, Esq.*

* Practice Tips by Susan S. Azad, Esq., a litigation partner in the Los Angeles office of Latham & Watkins, LLP. She is a member of the firm's Distressed Credit Markets Advisory group and has litigated in a wide variety of substantive areas, including complex business litigation, securities litigation, intellectual property litigation, bankruptcy, health care and zoning litigation, and has extensive trial and appellate experience. Ms. Azad has deep expertise in takings law, and in particular, inverse condemnation and temporary regulatory takings. She was trial counsel in the *Cienega Gardens v. United States* cases, which set new federal law standards for temporary regulatory takings of income-producing property [see *Independence Park v. United States*, 62 Fed.Cl. 684 (Fed.Cl. 2004); *Cienega Gardens v. United States*, 38 Fed.Cl. 64 (Fed.Cl. 1997); *Cienega Gardens v. United States*, 331 F.3d 1319 (Fed.Cir. 2003); *Cienega Gardens v. United States*, (Fed.Cl. 2005); *Claremont Village Commons v. United States* (Fed. Cl. 2007)].



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CHAPTER 35 California Judicial Council Eminent Domain Instructions *

5-35 California Forms of Jury Instruction CACI 3507

CACI 3507 Personal Property and Inventory

Just compensation also includes the loss of any inventory or personal property caused by the taking. [*Name of property owner*] may be entitled to the retail value of the inventory or personal property if the property is unique and not readily replaceable. Otherwise, [*name of property owner*] is entitled to wholesale value.

New September 2003

Sources and Authority

- "The *Fifth Amendment of the United States Constitution*, as applied to the states by the *Fourteenth Amendment*, conditions the power of eminent domain upon the payment of 'just compensation.' That constitutional requirement makes no distinction between real property and personal property. If personal property is taken by the government in the exercise of its eminent domain power, it must compensate the owner." (*City of Needles v. Griswold* (1992) 6 Cal.App.4th 1881, 1891 [8 Cal.Rptr.2d 753] .)

- "We further acknowledge that where a condemner takes certain real property and the removal or relocation of either tangible or intangible personal property is impossible due to the condemnatory act, the owner is entitled to be justly compensated for the loss of property, regardless of its nature." (*San Diego Metropolitan Transit Development Bd. v. Handlery Hotel, Inc.* (1999) 73 Cal.App.4th 517, 533 [86 Cal.Rptr.2d 473] , internal citations omitted.)

- "The general rule is that the Constitution does not require compensation for personal property not affixed to the condemned realty. Movable items of personal property are not 'taken' by the public entity when it condemns real property or a business; instead, under the Relocation Assistance Act, the public entity compensates the owner for the cost of moving the personal property to a new site." (*County of San*

Diego v. Cabrillo Lanes, Inc. (1992) 10 Cal.App.4th 576, 583 [12 Cal.Rptr.2d 613] .)

■ "Business inventory may be compensable under limited circumstances, i.e., where the loss results from the condemnatory act itself (e.g., the inventory cannot be relocated) rather than the personal circumstances of the condemnee (e.g., the owner has decided that he will not relocate)." (*Chhour v. Community Redevelopment Agency of Buena Park (1996) 46 Cal.App.4th 273, 283 [53 Cal.Rptr.2d 585]* .)

■ "The goal of the eminent domain trial [is] 'to determine just compensation,' to wit, to put [condemnee] in 'as good a position' as if its business inventory had 'not been taken.' However, [condemnee] was only 'entitled to be reimbursed for the actual value of what [it] lost--no more and no less.'" (*People ex rel. Dept. of Transportation v. Clauser/Wells Partnership (2002) 95 Cal.App.4th 1066, 1072-1073 [116 Cal.Rptr.2d 240]* , internal citations omitted.)

■ "To award [condemnee] retail value instead of wholesale value would result in a windfall to [condemnee]--an award in excess of just compensation sufficient to make [condemnee] whole. Here, the proper standard of fair market value is the wholesale value. This is what a retailer, whose inventory of nonunique, fungible, and readily replaceable goods is damaged as a result of an act of inverse condemnation, should receive." (*McMahan's of Santa Monica v. City of Santa Monica (1983) 146 Cal.App.3d 683, 700 [194 Cal.Rptr. 582]* .)

■ In *People ex rel. Dept. of Transportation, supra* , the court held that a jury should have been allowed to consider expert witnesses' testimony on valuation of inventory based both on retail and wholesale value: "[A]lthough any 'just and equitable' method could be proper, the jury would remain 'free to accept or reject' [an expert's] valuation." (*People ex rel. Dept. of Transportation, supra* , 95 Cal.App.4th at p. 1083 , internal citation omitted.)

■ "[T]he general rule in eminent domain actions is that 'the right to a jury trial ... goes *only* to the *amount* of compensation. All other questions of fact, or mixed fact and law, are to be tried ... without reference to a jury.'" (*Emeryville Redevelopment v. Harcros Pigments (2002) 101 Cal.App.4th 1083, 1116 [125 Cal.Rptr.2d 12]* , original italics, internal citations omitted.)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, § 1247

1 Condemnation Practice in California (Cont.Ed.Bar 3d ed.) § 4.56

4 Nichols on Eminent Domain, Ch. 13, *Fair Market Value--Physical Character*, §§ 13.11, 13.18[8] (Matthew Bender)

20 *California Forms of Pleading and Practice*, Ch. 247, *Eminent Domain and Inverse Condemnation*, § 247.136 (Matthew Bender)

Publisher's Notes

This instruction covers issues presented in BAJI No. 11.72.5.

LexisNexis Matthew Bender Expert Practice Tip--When to Compensate for Damage to Personal Property: Use this instruction only when the taking results in unavoidable damage or destruction of tangible or intangible personal property. If personal property can be relocated, the owner is not entitled to compensation for its loss if the owner chooses not to do so. *By Susan S. Azad, Esq.*

LexisNexis Matthew Bender Expert Practice Tip--Determining Value of Personal Property: In determining the value of lost inventory or personal property caused by a taking, remind the jury that their duty is to determine compensation that will restore the owner to the same position he or she would have occupied had the taking not occurred. Hence, the jury must consider the actual replacement cost to the owner. Each case must be evaluated according to its own unique circumstances. For example, a consumer who did not have access to wholesale prices would be entitled to retail value, whereas a merchant who ordinarily purchased items wholesale would be entitled to wholesale value. The jury must not consider sentimental or other uniquely personal value the items may have had to the owner. *By Susan S. Azad, Esq.*

LexisNexis Matthew Bender Expert Practice Tip--Presenting Evidence to Jury: The jury has latitude to determine the value of property taken under any just and equitable method. Hence, it is critical to have competent and credible expert testimony supporting the valuation method (wholesale, retail, or other) presented. Emphasize the cost to the owner and advance a valuation methodology that will make the owner whole but will not result in a windfall to either side. *By Susan S. Azad, Esq.*

* Practice Tips by Susan S. Azad, Esq., a litigation partner in the Los Angeles office of Latham & Watkins, LLP. She is a member of the firm's Distressed Credit Markets Advisory group and has litigated in a wide variety of substantive areas, including complex business litigation, securities litigation, intellectual property litigation, bankruptcy, health care and zoning litigation, and has extensive trial and appellate experience. Ms. Azad has deep expertise in takings law, and in particular, inverse condemnation and temporary regulatory takings. She was trial counsel in the *Cienega Gardens v. United States* cases, which set new federal law standards for temporary regulatory takings of income-producing property [see *Independence Park v. United States*, 62 Fed.Cl. 684 (Fed.Cl. 2004); *Cienega Gardens v. United States*, 38 Fed.Cl. 64 (Fed.Cl. 1997); *Cienega Gardens v. United States*, 331 F.3d 1319 (Fed.Cir. 2003); *Cienega Gardens v. United States*, (Fed.Cl. 2005); *Claremont Village Commons v. United States* (Fed. Cl. 2007)].



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CHAPTER 35 California Judicial Council Eminent Domain Instructions *

5-35 California Forms of Jury Instruction CACI 3508

CACI 3508 Bonus Value of Leasehold Interest

[Some/All] of the property taken was leased to [name of lessee]. You must determine the amount of compensation that [name of lessee] can recover.

To do this, you must determine the difference between:

- 1. The present value of the total rent that [name of lessee] agreed to pay during the time remaining on the lease after [insert date of possession when lessee no longer occupied the premises]; and**
- 2. The present value of the total fair market rent for the leased property from [date of valuation] for the time remaining on the lease.**

If the present value of the total agreed rent is less than the present value of the total fair market rent, then [name of lessee] is entitled to the difference.

New September 2003

Do not give this instruction if bonus value is allocated under the lease to the owner.

This instruction may not be appropriate in every case involving a lessee.

This instruction would be applicable to the apportionment phase of the case under *Code of Civil Procedure* section 1260.220(b).

■ *Code of Civil Procedure section 1265.150* provides: "Nothing in this article affects or impairs any right a lessee may have to compensation for the taking of his lease in whole or in part or for the taking of any other property in which he has an interest."

■ *Code of Civil Procedure section 1265.160* provides: "Nothing in this article affects or impairs the rights and obligations of the parties to a lease to the extent that the lease provides for such rights and obligations in the event of the acquisition of all or a portion of the property for public use."

■ "Under the Eminent Domain Law, a provision of a lease that declares that the lease terminates if all the property subject thereto is acquired for public use does *not* deprive the lessee of any right he may have to compensation for the taking of his leasehold or other property. The Eminent Domain Law itself declares the generally applicable rules that the lease terminates if all the property subject thereto is acquired for public use, and that such termination does not affect any right of the lessee to compensation related thereto." (*City of Vista v. W.O. Fielder* (1996) 13 Cal.4th 612, 618 [54 Cal.Rptr.2d 861, 919 P.2d 151] , original italics.)

■ "Usually the rental value of the property is measured in terms of existing tenancies. Tenants, like owners in fee, are also entitled to compensation in condemnation." (*People ex rel. Dept. of Water Resources v. Andresen* (1987) 193 Cal.App.3d 1144, 1163 [238 Cal.Rptr. 826] .)

■ "The bonus value can be more precisely defined as the present value of the difference between economic rent, i.e., the value of market rental, and the contract rent through the remaining lease term. The bonus value usually assumes importance only in long-term commercial leases." (*New Haven Unified School Dist. v. Taco Bell Corp.* (1994) 24 Cal.App.4th 1473, 1478-1479 [30 Cal.Rptr.2d 469] , internal citations omitted.)

■ "Whether or not the lessor and lessee are joined in a single proceeding, these rules will ordinarily result in an aggregate award to both lessor and lessee equal to market value of the property. Where the lease rental falls below market value, the lessor will have a claim to less than the full market value of the property, since he is restricted to the present value of actual contract rental; but the lessee will have a right to recover the balance of the market value, above that recovered by the lessor, as lease bonus value." (*New Haven, supra*, 24 Cal.App.4th at p. 1479 , internal citation omitted.)

■ "Although generally a tenant is entitled to all compensation attributable to the tenant's interest in a lease, it is well recognized that the parties to a lease may contractually agree to allocate a condemnation award to the landlord rather than the tenant." (*City of South San Francisco v. Mayer* (1998) 67 Cal.App.4th 1350, 1354 [79 Cal.Rptr.2d 704] , internal citations omitted.)

■ "A lessee's option to renew a lease should be considered to the extent that the option enhances the value of the leasehold." (*San Francisco Bay Area Rapid Transit Dist. v. McKeegan* (1968) 265 Cal.App.2d 263, 272 [71 Cal.Rptr. 204] .)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, § 1250

1 Condemnation Practice in California (Cont.Ed.Bar 3d ed.) §§ 4.57-4.63

4 Nichols on Eminent Domain, Ch. 12D, *Valuation of Interests Other Than Fee Interests*, § 12D.01[3] (Matthew Bender)

20 California Forms of Pleading and Practice, Ch. 247, *Eminent Domain and Inverse Condemnation* (Matthew Bender)

Publisher's Notes

There is no BAJI instruction on this subject.

LexisNexis Matthew Bender Expert Practice Tip--Calculating Value of Leasehold: This instruction is to be used when a leaseholder of condemned property claims a right to just compensation for the taking of its leasehold interest (when the lease does not, for example, provide for automatic termination on condemnation). To receive compensation, the holder of the leasehold interest must demonstrate an absolute right to continue to lease the condemned property (or a part of it) into the future at below market rent. The jury must determine, at today's dollars, the difference between market rent for the leasehold interest and the below market rent contained in the lease. Put another way, the jury is to calculate how much additional money the lessee will have to pay because it is no longer entitled to take advantage of the below-market rental rates contained in its lease. *By Susan S. Azad, Esq.*

LexisNexis Matthew Bender Expert Practice Tip--Absolute Certainty Not Required: Remind the jury that, with respect to projections of losses into the future, the parties do not need to prove that events will occur with absolute certainty but the experts must have a reasonable factual basis (or make reasonable assumptions based on facts) on which to base future projections. *By Susan S. Azad, Esq.*

LexisNexis Matthew Bender Expert Practice Tip--Proving Lease Value Through Expert Testimony: The only way to credibly prove the present value of a below-market lease is through expert testimony, preferably a real estate economist. There are several issues that are central to this analysis. First, is the calculation of "market rents," both in the present and into the future. The longer the remaining term of the lease, the more scrutiny will be applied to assumptions concerning future rent projections. Another important issue is the appropriate discount rate to be applied to the future stream of market and lease rental payments, including whether the discount rates for market and below market should be the same. Typically, the riskier the venture, the greater the discount rate and the lower the present value. Finally, prepare the experts to respond to cross-examination on the impact, if any, of current market conditions and how those conditions affect future market projections. *By Susan S. Azad, Esq.*

* Practice Tips by Susan S. Azad, Esq., a litigation partner in the Los Angeles office of Latham & Watkins, LLP. She is a member of the firm's Distressed Credit Markets Advisory group and has litigated in a wide variety of substantive areas, including complex business litigation, securities litigation, intellectual property litigation, bankruptcy, health care and zoning litigation, and has extensive trial and appellate experience. Ms. Azad has deep expertise in takings law, and in particular, inverse condemnation and temporary regulatory takings. She was trial counsel in the *Cienega Gardens v. United States* cases, which set new federal law standards for temporary regulatory takings of income-producing property [see *Independence Park v. United States*, 62 Fed.Cl. 684 (Fed.Cl. 2004); *Cienega Gardens v. United States*, 38 Fed.Cl. 64 (Fed.Cl. 1997); *Cienega Gardens v. United States*, 331 F.3d 1319 (Fed.Cir. 2003); *Cienega Gardens v. United States*, (Fed.Cl. 2005); *Claremont Village Commons v. United States* (Fed. Cl. 2007)].



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CHAPTER 35 California Judicial Council Eminent Domain Instructions *

5-35 California Forms of Jury Instruction CACI 3509

CACI 3509 Precondemnation Damages (Klopping Damages)

I have determined that [insert one or both of the following:]

[there was an unreasonable delay between [date of announcement of intent to condemn], when the [name of condemnor] announced its intent to condemn [name of property owner]'s property, and [date of filing], when this case was filed] [and]

[insert description of unreasonable conduct].

In determining just compensation you must award damages that [name of property owner] has suffered as a result of the [name of condemnor]'s [delay/[describe unreasonable conduct]]. Such damages may include [insert damages appropriate to the facts, e.g., the cost of repairs, the loss of use of the property, loss of rent, loss of profits, or increased operating expenses pending repairs, and diminution of market value].

New September 2003

This instruction will need to be modified in cases where the entity does not ultimately proceed with the condemnation, or where there has been another type of unreasonable conduct other than "unreasonable delay."

■ The Supreme Court in *Klopping v. City of Whittier* (1972) 8 Cal.3d 39, 52 [104 Cal.Rptr. 1, 500 P.2d 1345], held that "a condemnee must be provided with an opportunity to demonstrate that (1) the public authority acted improperly either by unreasonably delaying eminent domain action following an announcement of intent to condemn or by other unreasonable conduct prior to condemnation; and (2) as

a result of such action the property in question suffered a diminution in market value."

- "The measure of damages may be the cost of repairs, the loss of use of the property, loss of rent, loss of profits, or increased operating expenses pending repairs." (*City of Los Angeles v. Tilem* (1983) 142 Cal.App.3d 694, 703 [191 Cal.Rptr. 229] , internal citations omitted.)

- "[A]bsent a formal resolution of condemnation, recovery under *Klopping* requires that the public entity's conduct 'directly and specially affect the landowner to his injury.' This requirement mandates that the plaintiff demonstrate conduct on the part of the public entity 'which significantly invaded or appropriated the use or enjoyment' of the property." (*Barthelemy v. Orange County Flood Control Dist.* (1998) 65 Cal.App.4th 558, 570 [76 Cal.Rptr.2d 575] , internal citations omitted, original italics.)

- "[S]ince *Klopping* damages compensate a landowner for a public entity's unreasonable *precondemnation* conduct, their recovery 'is permitted irrespective of whether condemnation proceedings are abandoned or whether they are instituted at all.' " (*Barthelemy, supra*, 65 Cal.App.4th at p. 569 , internal citation omitted.)

- "Whether there has been unreasonable delay by the condemner and whether the condemner has engaged in unreasonable conduct are both questions of fact. What constitutes a direct and substantial impairment of property rights for purposes of compensation is also a factual question. In deciding factual matters on conflicting testimony and inferences, it is for the trier of fact to determine which evidence and inferences it finds more reasonable." (*Contra Costa County Water Dist. v. Vaquero Farms, Inc.* (1997) 58 Cal.App.4th 883, 897 [68 Cal.Rptr.2d 272] , internal citations omitted.)

- "Whether the public entity has acted unreasonably is a question of fact. 'However, the threshold question of liability for unreasonable precondemnation conduct is to be determined by the court, with the issue of the *amount* of damages to be thereafter submitted to the jury only upon a sufficient showing of liability by the condemnee.' Because inverse condemnation damages for precondemnation conduct must be claimed in a pending eminent domain action, the appropriate procedure is to bifurcate the trial of the action so that the question of the liability of the public entity is first adjudicated by the court without a jury." (*City of Ripon v. Sweetin* (2002) 100 Cal.App.4th 887, 897 [122 Cal.Rptr.2d 802] , internal citations omitted.)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, § 1235

1 Condemnation Practice in California (Cont.Ed.Bar 3d ed.) § 4.8

6 Nichols on Eminent Domain, Ch. 26D, *Abandonment, Dismissal of Action and Assessment of Damages*, § 26D.01 (Matthew Bender)

20 California Forms of Pleading and Practice, Ch. 247, *Eminent Domain and Inverse Condemnation* (Matthew Bender)

Publisher's Notes

This instruction replaces BAJI No. 11.79, and covers issues presented in BAJI No. 11.96.

LexisNexis Matthew Bender Expert Practice Tip--Unreasonable Delay Damages Are in Addition to Compensation for Taking: Explain to the jury that compensation for unreasonable delay damages is

over and above compensation for the taking itself. Hence, when income-generating property has been specially damaged due to improper or unreasonable precondemnation conduct, the measure of the compensable precondemnation loss may be calculated by lost rents or lost income over the delay period. Likewise, non-income-producing property may suffer a decrease in market value due to precondemnation conduct. The valuation of the property for purposes of just compensation (a separate measure of compensation) would not include these precondemnation damages. Hence, the jurors should calculate both the special losses directly caused by improper or unreasonable precondemnation conduct as well as any loss cause by the taking itself. *By Susan S. Azad, Esq.*

LexisNexis Matthew Bender Expert Practice Tip--Choosing Valuation Method: In determining appropriate measures of damages for precondemnation conduct, use "lost rental income" or "lost profits" damage measures when the unreasonable delay affects income-generating property. Use "diminution in market value" when the property does not generate income. *By Susan S. Azad, Esq.*

LexisNexis Matthew Bender Expert Practice Tip--Methodology for Awarding Klopping Damages: There may be circumstances where a business was forced to relocate (and incurred damages to mitigate the loss of goodwill) as a result of improper precondemnation conduct by the condemning agency. Mitigation of lost goodwill damages is potentially recoverable in the precondemnation context (though no California court has yet done so). The defendant must first show that the probable condemner (1) acted affirmatively to lower the value of the owner's property, (2) physically burdened the property, or (3) decreased the income the property produced. Second, the owner must show that it could not continue to operate its business unaffected by the possible condemnation. Once both of these are satisfied, the owner must show that its mitigation to avoid loss of business goodwill was reasonable. (*Barthelemy v. Orange County Flood Control Dist.* (1998) 65 Cal.App.4th 558, 565, 571 [76 Cal.Rptr.2d 575].) If all of these parameters are met, *Klopping* damages (See *Klopping v. Whittier* (1972) 8 Cal.3d 39 104 Cal.Rptr. 1, 500 P.2d 1345] .) for mitigation of precondemnation loss of business goodwill could conceivably be awarded under *Barthelemy*. *By Susan S. Azad, Esq.*

* Practice Tips by Susan S. Azad, Esq., a litigation partner in the Los Angeles office of Latham & Watkins, LLP. She is a member of the firm's Distressed Credit Markets Advisory group and has litigated in a wide variety of substantive areas, including complex business litigation, securities litigation, intellectual property litigation, bankruptcy, health care and zoning litigation, and has extensive trial and appellate experience. Ms. Azad has deep expertise in takings law, and in particular, inverse condemnation and temporary regulatory takings. She was trial counsel in the *Cienega Gardens v. United States* cases, which set new federal law standards for temporary regulatory takings of income-producing property [see *Independence Park v. United States*, 62 Fed.Cl. 684 (Fed.Cl. 2004); *Cienega Gardens v. United States*, 38 Fed.Cl. 64 (Fed.Cl. 1997); *Cienega Gardens v. United States*, 331 F.3d 1319 (Fed.Cir. 2003); *Cienega Gardens v. United States*, (Fed.Cl. 2005); *Claremont Village Commons v. United States* (Fed. Cl. 2007)].



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CHAPTER 35 California Judicial Council Eminent Domain Instructions *

5-35 California Forms of Jury Instruction CACI 3510

CACI 3510 Value of Easement

The [name of condemnor] has taken the right to use a portion of [name of property owner]'s land for a specific purpose. That right is called an "easement." After an easement has been taken, the property owner has the right to use the land for any purpose that does not conflict with the easement.

You must determine the fair market value of the easement on [insert date of valuation]. The fair market value of the easement is determined by subtracting the fair market value of the land after the easement was taken from the fair market value of the land before the easement was taken.

New September 2003

■ "The holder of an easement is entitled to damages when the easement is taken or damaged for public use." (*County Sanitation Dist. No. 8 of Los Angeles County v. Watson Land Co.* (1993) 17 Cal.App.4th 1268, 1279 [22 Cal.Rptr.2d 117] , internal citation omitted.)

■ "The value of an easement in gross ... is the difference in the before and after value of the strip of land taken, and not what has been gained by the public agency." (*County Sanitation Dist.*, *supra*, 17 Cal.App.4th at p. 1279 , internal citations omitted.)

■ "Ordinarily, the value of an easement is the diminution in market value of the dominant tenement caused by its loss. When a second easement is sought on land already burdened, the owner of the servient land is entitled to the difference in value of the land before and after the imposition of the second easement; and, if no substantial difference in value is shown, only nominal damages will be awarded." (8 Witkin, Summary of Cal. Law (9th ed. 1988) Constitutional Law, § 1019, p. 582, internal citations

omitted.)

■ " 'An easement is an incorporeal interest in the land of another that gives its owner the right to use the land of another or to prevent the property owner from using his land.' " (*County Sanitation Dist.*, *supra*, 17 Cal.App.4th at p. 1278 , internal citations omitted.)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, § 1233

1 Condemnation Practice in California (Cont.Ed.Bar 3d ed.) §§ 4.79-4.81

4 Nichols on Eminent Domain, Ch. 12D, *Valuation of Interests Other Than Fee Interests*, § 12D.01[1][a] (Matthew Bender)

20 California Forms of Pleading and Practice, Ch. 247, *Eminent Domain and Inverse Condemnation* (Matthew Bender)

Publisher's Notes

This instruction replaces BAJI Nos. 11.72, 11.78.

LexisNexis Matthew Bender Expert Practice Tip--Easement Value Is Part of Parcel Value:

Remind the jurors that the value of the easement is reflected in the reduction in value of the parcel as a whole and not in the value of the easement to the condemning authority. *By Susan S. Azad, Esq.*

* Practice Tips by Susan S. Azad, Esq., a litigation partner in the Los Angeles office of Latham & Watkins, LLP. She is a member of the firm's Distressed Credit Markets Advisory group and has litigated in a wide variety of substantive areas, including complex business litigation, securities litigation, intellectual property litigation, bankruptcy, health care and zoning litigation, and has extensive trial and appellate experience. Ms. Azad has deep expertise in takings law, and in particular, inverse condemnation and temporary regulatory takings. She was trial counsel in the *Cienega Gardens v. United States* cases, which set new federal law standards for temporary regulatory takings of income-producing property [see *Independence Park v. United States*, 62 Fed.Cl. 684 (Fed.Cl. 2004); *Cienega Gardens v. United States*, 38 Fed.Cl. 64 (Fed.Cl. 1997); *Cienega Gardens v. United States*, 331 F.3d 1319 (Fed.Cir. 2003); *Cienega Gardens v. United States*, (Fed.Cl. 2005); *Claremont Village Commons v. United States* (Fed. Cl. 2007)].



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CHAPTER 35 California Judicial Council Eminent Domain Instructions *

5-35 California Forms of Jury Instruction CACI 3511

CACI 3511 Severance Damages

The [name of condemnor] has taken only a part of [name of property owner]'s property. [Name of property owner] claims that [his/her/its] remaining property has lost value as a result of the taking. This loss in value is called "severance damages" and must be included in determining just compensation.

Severance damages are the damages to [name of property owner]'s remaining property caused by the taking, or by the construction and use of the [name of condemnor]'s proposed project, or by both.

Severance damages are determined as follows:

- 1. Determine the fair market value of the remaining property on [date of valuation] by subtracting the fair market value of the part taken from the fair market value of the entire property;**
- 2. Determine the fair market value of the remaining property after the [name of condemnor]'s proposed project is completed; and**
- 3. Subtract the fair market value of the remaining property after the [name of condemnor]'s proposed project is completed from the fair market value of the remaining property on [date of valuation].**

New September 2003

Directions for Use

Read CACI No. 3512, *Severance Damages--Offset for Benefits*, if benefits are at issue.

Sources and Authority

- *Code of Civil Procedure section 1263.410* provides:

(a) Where the property acquired is part of a larger parcel, in addition to the compensation awarded pursuant to Article 4 (commencing with Section 1263.310) for the part taken, compensation shall be awarded for the injury, if any, to the remainder.

(b) Compensation for injury to the remainder is the amount of the damage to the remainder reduced by the amount of the benefit to the remainder. If the amount of the benefit to the remainder equals or exceeds the amount of the damage to the remainder, no compensation shall be awarded under this article. If the amount of the benefit to the remainder exceeds the amount of damage to the remainder, such excess shall be deducted from the compensation provided in Section 1263.510, if any, but shall not be deducted from the compensation required to be awarded for the property taken or from the other compensation required by this chapter.

- *Code of Civil Procedure section 1263.420* provides:

Damage to the remainder is the damage, if any, caused to the remainder by either or both of the following:

(a) The severance of the remainder from the part taken.

(b) The construction and use of the project for which the property is taken in the manner proposed by the plaintiff whether or not the damage is caused by a portion of the project located on the part taken.

- *Code of Civil Procedure section 1263.430* provides: "Benefit to the remainder is the benefit, if any, caused by the construction and use of the project for which the property is taken in the manner proposed by the plaintiff whether or not the benefit is caused by a portion of the project located on the part taken."

- "When property acquired by eminent domain is part of a larger parcel, compensation must be awarded for the injury, if any, to the remainder. Such compensation is commonly called severance damages. When the property taken is but part of a single legal parcel, the property owner need only demonstrate injury to the portion that remains to recover severance damages." (*City of San Diego v. Neumann* (1993) 6 Cal.4th 738, 741 [25 Cal.Rptr.2d 480, 863 P.2d 725] , internal citations omitted.)

- "Severance damages must be based upon real physical disturbance of a property right and a decrease in market value of the property rather than upon remote possibilities which are highly speculative and conjectural." (*County Sanitation Dist. No. 8 of Los Angeles County v. Watson Land Co.* (1993) 17 Cal.App.4th 1268, 1282 [22 Cal.Rptr.2d 117] , internal citation omitted.)

- The court determines as a matter of law what constitutes the "larger parcel" for which severance damages may be obtained: "The Legislature has framed the question of whether property should be viewed as an integrated whole in terms of whether the land remaining after the taking forms part of a 'larger parcel'." (*City of San Diego, supra*, 6 Cal.4th at p. 745 , internal citations omitted.)

■ "As we said in *Pierpont Inn*, 'Where the property taken constitutes only a part of a larger parcel, the owner is entitled to recover, inter alia, the difference in the fair market value of his property in its "before" condition and the fair market value of the remaining portion thereof after the construction of the improvement on the portion taken. Items such as view, access to beach property, freedom from noise, etc. are unquestionably matters which a willing buyer in the open market would consider in determining the price he would pay for any given piece of real property.' Severance damages are not limited to special and direct damages, but can be based on any factor, resulting from the project, that causes a decline in the fair market value of the property." (*Los Angeles County Metropolitan Transportation Authority v. Continental Development Corp.* (1997) 16 Cal.4th 694, 712 [66 Cal.Rptr.2d 630, 941 P.2d 809] , internal citations omitted.)

■ "Both sides here thus agree that the court, not the jury, must make certain determinations that are a predicate to the award of severance damages. But [condemnor] is on weaker ground when it attempts to derive ... a general rule that 'as a matter of constitutional and decisional law, *all* issues having to do with the existence of, or entitlement to, severance damages are entrusted to the trial judge,' such that '[o]nly after the trial judge has determined that severance damages exist does the jury consider the amount of those severance damages.' [Condemnor]'s proposed rule assumes that questions relating to the measurement of severance damages can be readily distinguished from questions relating to the entitlement to them in the first place but, as we have previously cautioned, the two concepts are not necessarily 'so easily separable.' " (*Metropolitan Water Dist. of So. California v. Campus Crusade for Christ, Inc.* (2007) 41 Cal.4th 954, 972 [62 Cal.Rptr.3d 623, 161 P.3d 1175] , original italics, internal citations omitted.)

■ "[W]here the property owner produces evidence tending to show that some other aspect of the taking ... 'naturally tends to and actually does decrease the market value' of the remaining property, it is for the jury to weigh its effect on the value of the property, as long as the effect is not speculative, conjectural, or remote." (*Metropolitan Water Dist. of So. California, supra*, 41 Cal.4th at p. 973 .)

■ "In determining severance damage, the jury must assume 'the most serious damage' which will be caused to the remainder by the taking of the easement and construction of the property. The value of the remainder after the condemnation has occurred is referred to as the 'after' value of the property. The diminution in fair market value is determined by comparing the before and after values. This is the amount of the severance damage." (*San Diego Gas & Electric Co. v. Daley* (1988) 205 Cal.App.3d 1334, 1345 [253 Cal.Rptr. 144] , internal citations omitted, disapproved on other grounds in *Los Angeles County Metropolitan Transportation Authority, supra*, 16 Cal.4th at p. 720 .)

■ "[S]everance damages are not limited to specific direct damages but can be based on any indirect factors that cause a decline in the market value of the property. California decisions have indicated the following are compensable as direct damages under section 1263.410: (1) impairment of view, (2) restriction of access, (3) increased noise, (4) invasion of privacy, (5) unsightliness of the project, (6) lack of maintenance of the easement and (7) nuisances in general such as trespassers and safety risks. Several courts have recognized that the condemnee should be compensated for any characteristic of the project which causes 'an adverse impact on the fair market value of the remainder.' " (*San Diego Gas & Electric Co., supra*, 205 Cal.App.3d at p. 1345 .)

■ "When 'the property acquired [by eminent domain] is part of a larger parcel,' in addition to compensation for the property actually taken, the property owner must be compensated for the injury, if any, to the land that he retains. Once it is determined that the owner is entitled to severance damages, they, too, normally are measured by comparing the fair market value of the remainder before and after the taking." (*City of San Diego, supra*, 6 Cal.4th at p. 745 , internal citations and footnote omitted.)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, §§ 1236-1244

1 Condemnation Practice in California (Cont.Ed.Bar 3d ed.) Ch. 5

14 *California Real Estate Law and Practice*, Ch. 508, *Evidence: General*, §§ 508.24, 508.25 (Matthew Bender)

4A Nichols on Eminent Domain, Ch. 14, *Damages for Partial Takings*, §§ 14.01-14.03 (Matthew Bender)

5 Nichols on Eminent Domain, Ch. 16, *Consequential Damages as a Result of Proposed Use*, §§ 16.01-16.05 (Matthew Bender)

20 *California Forms of Pleading and Practice*, Ch. 247, *Eminent Domain and Inverse Condemnation*, § 247.140 (Matthew Bender)

Publisher's Notes

This instruction replaces BAJI No. 11.85, and covers issues presented in BAJI Nos. 11.85.3, 11.86, and 11.96.

LexisNexis Matthew Bender Expert Practice Tip--Helping Jury Understand Severance: Jurors may have trouble with the concept of severance damages. They should be instructed (and shown visually, if possible) that the property taken was part of a larger parcel. Severance damages are damages to the remaining parts of the property (parcel) that were not taken but that nevertheless suffered injury as a direct result of the taking. The injury is calculated by comparing the value of the remaining part of the property before the condemnation with the value of the remainder after the construction of the project is completed. If the remainder is worth less as a result of the taking (including factors such as impaired view, unsightliness of the project, increased noise, trespassers, safety risks, loss of access, invasion of privacy, or loss of business or goodwill) the owner is entitled to compensation for the loss in value of the remainder of the parcel. If the value of the remaining parcel is worth more as a result of the taking, no severance damages should be awarded. *By Susan S. Azad, Esq.*

LexisNexis Matthew Bender Expert Practice Tip--Explaining Enhanced Value: Best practice dictates that the practitioner offer specific expert valuation testimony addressing the value of the remainder before and after the taking, particularly if the remainder derived enhanced value from being part of the larger parcel (which enhanced value was lost as a result of the taking). The concept of enhanced value will likely not be apparent to jurors without specific testimony addressing this point. *By Susan S. Azad, Esq.*

LexisNexis Matthew Bender Expert Practice Tip--Have Jury Specify Items in Special Verdict: *CACI No. 3511* is intended to calculate the damage to the remainder as a result of the taking, whereas *CACI No. 3512* is intended to calculate the benefit to the remainder as a result of the taking. However, *CACI No. 3511* element 3 (which addresses the fair market value of the remainder after the project is complete) includes within its scope potential benefits to the remainder. If the case involves a contention that the remainder received a benefit, it is prudent to have the jury set out in a special verdict form their determination of the value of the remainder before the taking and after the taking (after the project is complete). It is also prudent to offer expert testimony that itemizes each item of damage and benefit to the remainder. *By Susan S. Azad, Esq.*

* Practice Tips by Susan S. Azad, Esq., a litigation partner in the Los Angeles office of Latham & Watkins, LLP. She is a member of the firm's Distressed Credit Markets Advisory group and has litigated in a wide variety of substantive areas, including complex business litigation, securities litigation, intellectual property litigation, bankruptcy, health care and zoning litigation, and has extensive trial and appellate experience. Ms. Azad has deep expertise in takings law, and in particular, inverse condemnation and temporary regulatory takings. She was trial counsel in the *Cienega Gardens v.*

United States cases, which set new federal law standards for temporary regulatory takings of income-producing property [see *Independence Park v. United States*, 62 *Fed.Cl.* 684 (*Fed.Cl.* 2004); *Cienega Gardens v. United States*, 38 *Fed.Cl.* 64 (*Fed.Cl.* 1997); *Cienega Gardens v. United States*, 331 *F.3d* 1319 (*Fed.Cir.* 2003); *Cienega Gardens v. United States*, (Fed.Cl. 2005); *Claremont Village Commons v. United States* (Fed. Cl. 2007)].



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CHAPTER 35 California Judicial Council Eminent Domain Instructions *

5-35 California Forms of Jury Instruction CACI 3512

CACI 3512 Severance Damages--Offset for Benefits

The [name of condemnor] claims that the remainder of [name of property owner]'s property has received a benefit from the project as proposed.

You must determine the amount of benefit by determining any reasonably certain increase in the fair market value of the remaining property caused by the project.

[You must then subtract that amount from the severance damages. If the project's benefit to the remaining property is equal to or greater than the loss caused by the taking, then you must award zero severance damages. Any benefits to the remaining property should not be subtracted from the value of the property that [name of condemnor] has taken.]

New September 2003

A special verdict form may be used to have the jury set forth separately the determination of severance damages and benefits. Use the bracketed paragraph if the judge will not be calculating the offset to severance damages for the benefit to the remaining property.

■ *Code of Civil Procedure section 1263.410 provides:*

(a) Where the property acquired is part of a larger parcel, in addition to the compensation awarded pursuant to Article 4 (commencing with Section 1263.310) for the part taken, compensation shall be awarded for the injury, if any, to the remainder.

(b) Compensation for injury to the remainder is the amount of the damage to the remainder reduced by the amount of the benefit to the remainder. If the amount of the benefit to the remainder equals or exceeds the amount of the damage to the remainder, no compensation shall be awarded under this article. If the amount of the benefit to the remainder exceeds the amount of damage to the remainder, such excess shall be deducted from the compensation provided in Section 1263.510, if any, but shall not be deducted from the compensation required to be awarded for the property taken or from the other compensation required by this chapter.

■ *Code of Civil Procedure section 1263.430* provides: "Benefit to the remainder is the benefit, if any, caused by the construction and use of the project for which the property is taken in the manner proposed by the plaintiff whether or not the benefit is caused by a portion of the project located on the part taken."

■ *Code of Civil Procedure section 1260.230* provides:

As far as practicable, the trier of fact shall assess separately each of the following:

(a) Compensation for the property taken as required by Article 4 (commencing with Section 1263.310) of Chapter 9.

(b) Where the property acquired is part of a larger parcel:

(1) The amount of the damage, if any, to the remainder as required by Article 5 (commencing with Section 1263.410) of Chapter 9.

(2) The amount of the benefit, if any, to the remainder as required by Article 5 (commencing with Section 1263.410) of Chapter 9.

(c) Compensation for loss of goodwill, if any, as required by Article 6 (commencing with Section 1263.510) of Chapter 9.

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, §§ 1236-1244

1 Condemnation Practice in California (Cont.Ed.Bar 3d ed.) §§ 5.33-5.40

5 Nichols on Eminent Domain, Ch. 16, *Consequential Damages as a Result of Proposed Use*, §§ 16.01-16.05 (Matthew Bender)

20 California Forms of Pleading and Practice, Ch. 247, *Eminent Domain and Inverse Condemnation* (Matthew Bender)

Publisher's Notes

This instruction covers issues presented in BAJI Nos. 11.95 and 11.96.

LexisNexis Matthew Bender Expert Practice Tip--Use of CACI No. 3512: CACI No. 3512 is intended to calculate the benefit to the remainder as a result of the project. *By Susan S. Azad, Esq.*

LexisNexis Matthew Bender Expert Practice Tip--Severance Damages Are Separate From

Compensation for Taking: Inform the jurors that their calculation of severance damages is separate from their calculation of compensation for the property taken. Thus, if the remaining property obtains an overall benefit from the project, this benefit is not considered in the calculation of compensation for the part of the parcel that was taken. *By Susan S. Azad, Esq.*

* Practice Tips by Susan S. Azad, Esq., a litigation partner in the Los Angeles office of Latham & Watkins, LLP. She is a member of the firm's Distressed Credit Markets Advisory group and has litigated in a wide variety of substantive areas, including complex business litigation, securities litigation, intellectual property litigation, bankruptcy, health care and zoning litigation, and has extensive trial and appellate experience. Ms. Azad has deep expertise in takings law, and in particular, inverse condemnation and temporary regulatory takings. She was trial counsel in the *Cienega Gardens v. United States* cases, which set new federal law standards for temporary regulatory takings of income-producing property [see *Independence Park v. United States*, 62 Fed.Cl. 684 (Fed.Cl. 2004); *Cienega Gardens v. United States*, 38 Fed.Cl. 64 (Fed.Cl. 1997); *Cienega Gardens v. United States*, 331 F.3d 1319 (Fed.Cir. 2003); *Cienega Gardens v. United States*, (Fed.Cl. 2005); *Claremont Village Commons v. United States* (Fed. Cl. 2007)].



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CHAPTER 35 California Judicial Council Eminent Domain Instructions *

5-35 California Forms of Jury Instruction CACI 3513

CACI 3513 Goodwill

In this case, [*name of business owner*] is entitled to compensation for any loss of goodwill as a part of just compensation. "Goodwill" is the benefit that a business gains as a result of its location, reputation for dependability, skill or quality, and any other circumstances that cause a business to keep old customers or gain new customers. You must include the amount of any loss of goodwill as an item in your award for just compensation.

New September 2003; Revised February 2007

Sources and Authority

■ *Code of Civil Procedure section 1263.510* provides:

(a) The owner of a business conducted on the property taken, or on the remainder if the property is part of a larger parcel, shall be compensated for loss of goodwill if the owner proves all of the following:

(1) The loss is caused by the taking of the property or the injury to the remainder.

(2) The loss cannot reasonably be prevented by a relocation of the business or by taking steps and adopting procedures that a reasonably prudent person would take and adopt in preserving the goodwill.

(3) Compensation for the loss will not be included in payments under *Section 7262 of the Government Code*.

5-35 California Forms of Jury Instruction CACI 3513

(4) Compensation for the loss will not be duplicated in the compensation otherwise awarded to the owner.

(b) Within the meaning of this article, "goodwill" consists of the benefits that accrue to a business as a result of its location, reputation for dependability, skill or quality, and any other circumstances resulting in probable retention of old or acquisition of new patronage.

(c) If the public entity and the owner enter into a leaseback agreement pursuant to Section 1263.615, the following shall apply:

(1) No additional goodwill shall accrue during the lease.

(2) The entering of a leaseback agreement shall not be a factor in determining goodwill. Any liability for goodwill shall be established and paid at the time of acquisition of the property by eminent domain or subsequent to notice that the property may be taken by eminent domain.

■ "Historically, lost business goodwill was not recoverable under eminent domain law. However, in 1975 the Legislature enacted section 1263.510 'in response to widespread criticism of the injustice wrought by the Legislature's historic refusal to compensate condemnees whose ongoing businesses were diminished in value by a forced relocation. [Citations.] The purpose of the statute was unquestionably to provide monetary compensation for the kind of losses which typically occur when an ongoing small business is forced to move and give up the benefits of its former location.' Thus, a business owner's right to compensation for loss of goodwill is a statutory right, not a constitutional right." (*City and County of San Francisco v. Coyne* (2008) 168 Cal.App.4th 1515, 1522 [86 Cal.Rptr.3d 255] , internal citations omitted.)

■ "Compensation for loss of goodwill in eminent domain proceedings 'involves a two-step process. Whether the qualifying conditions for such compensation [citation] have been met is a matter for the trial court to resolve. Only if the court finds these conditions exist does the remaining issue of the value of the goodwill loss, if any, go to the jury. [Citations.] 'Under section 1263.510, subdivision (a), the business owner has the initial burden of showing entitlement to compensation for lost goodwill.' " (*City and County of San Francisco, supra*, 168 Cal.App.4th at pp. 1522-1523 , internal citations omitted.)

■ "After entitlement to goodwill is shown (which includes a showing that compensation for the loss will not be duplicated) neither party has the burden of proof with regard to valuation." (*Redevelopment Agency of the City of Pomona v. Thrifty Oil Co.* (1992) 4 Cal.App.4th 469, 475 [5 Cal.Rptr.2d 687] , internal citations omitted.)

■ "Only an owner of a business conducted on the real property taken may claim compensation for loss of goodwill." (*San Diego Metropolitan Transit Development Bd. v. Handlery Hotel, Inc.* (1999) 73 Cal.App.4th 517, 537 [86 Cal.Rptr.2d 473] , internal citation omitted.)

■ "[W]hile there are no explicit statutory requirements regarding an expert's use of a particular methodology for valuing lost goodwill, the expert's methodology must provide a fair estimate of *actual value* and cannot be based on hypothetical or speculative uses of a condemned business" (*City and County of San Francisco, supra*, 168 Cal.App.4th at p. 1523 , original italics.)

■ "The underlying purpose of this statute is to provide compensation for the kind of losses which typically occur when an ongoing business is forced to move and give up the benefits of its former location. It includes not only compensation for lost patronage itself, but also for expenses reasonably incurred in an effort to prevent a loss of

patronage." (*San Diego Metropolitan Transit Development Bd.*, *supra*, 73 Cal.App.4th at p. 537 , internal citations omitted.)

■ "Goodwill must, of course, be measured by a method which excludes the value of tangible assets or the normal return on those assets. However, the courts have wisely maintained that there is no single acceptable method of valuing goodwill. Valuation methods will differ with the nature of the business or practice and with the purpose for which the evaluation is conducted." (*People ex rel. Dept. of Transportation v. Muller* (1984) 36 Cal.3d 263, 271, fn. 7 [203 Cal.Rptr. 772, 681 P.2d 1340] , internal citations omitted.)

■ "Although the statutory scheme applies only to eminent domain proceedings, the right to recover lost goodwill has been extended to the indirect condemnee. Thus, 'goodwill is compensable in an inverse condemnation action to the same extent and with the same limitations on recovery found in ... section 1263.510.' " (*San Diego Metropolitan Transit Development Bd.*, *supra*, 73 Cal.App.4th at p. 537 , internal citations omitted.)

■ "Goodwill may be measured by the capitalized value of the net income or profits of a business or some similar method of calculating present value of anticipated profits. Valuation methods differ with the nature of the business and the purpose for which the evaluation is conducted. There is no single method to evaluate goodwill." (*People ex rel. Dept. of Transportation v. Leslie* (1997) 55 Cal.App.4th 918, 922-923 [64 Cal.Rptr.2d 252] , internal citations omitted.)

■ "[A] 'cost to create' approach is a permissible means by which to value goodwill under [Code of Civil Procedure] section 1263.510 where, as here, a nascent business has not yet experienced excess profits but clearly has goodwill within the meaning of the statute and experiences a total loss of goodwill due to condemnation of the property on which the business is operated." (*Inglewood Redevelopment Agency v. Aklilu* (2007) 153 Cal.App.4th 1095, 1102 [64 Cal.Rptr.3d 519] .)

■ "A business which is required to move because of the taking of the property on which it operates has suffered a loss from the taking. This is true whether the tenancy is for a fixed term, or is a periodic tenancy as in this case. The value of the lost goodwill is affected by the probable remaining term of the tenancy. Evidence of the remaining length of a lease and the existence of an option to renew a lease are, of course, relevant for determining the amount of compensation, if any, to be paid for loss of goodwill. Similarly, evidence of the pre-condemnation duration of a periodic tenancy and the quality and mutual satisfaction in the landlord and tenant relationship are probative for determination of compensation for loss of goodwill." (*Los Angeles Unified Sch. Dist. v. Pulgarin* (2009) 175 Cal.App.4th 101, 107 [95 Cal.Rptr.3d 527] , internal citation omitted.)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, §§ 1245, 1246

1 Condemnation Practice in California (Cont.Ed.Bar 3d ed.) §§ 4.64-4.78

14 *California Real Estate Law and Practice*, Ch. 508, *Evidence: General*, § 508.19; Ch. 512, *Compensation*, § 512.13 (Matthew Bender)

4 Nichols on Eminent Domain, Ch. 13, *Loss of Business Goodwill*, § 13.18[5] (Matthew Bender)

6A Nichols on Eminent Domain, Ch. 29, *Loss of Business Goodwill*, §§ 29.01-29.08 (Matthew Bender)

20 *California Forms of Pleading and Practice*, Ch. 247, *Eminent Domain and Inverse Condemnation*, § 247.136 (Matthew Bender)

Publisher's Notes

This instruction covers issues presented in BAJI Nos. 11.91 and 11.96.

LexisNexis Matthew Bender Expert Practice Tip--Purpose of Goodwill Damages: Inform the jurors that the purpose behind awarding damages for lost goodwill is to compensate the owner of an ongoing business for the loss of old and new customers (as well as reasonable efforts to minimize this loss) caused by being forced out of its current location. Hence, the purpose is to put the business owner in the same position with respect to business generation as it would have occupied had the taking not occurred. *By Susan S. Azad, Esq.*

LexisNexis Matthew Bender Expert Practice Tip--Add Instruction on Speculative Damages: For businesses with no track record, consider supplementing with MB 3500A.18 on speculative damages in Ch. 35A, *Matthew Bender Inverse Condemnation Instructions*. *By Susan S. Azad, Esq.*

* Practice Tips by Susan S. Azad, Esq., a litigation partner in the Los Angeles office of Latham & Watkins, LLP. She is a member of the firm's Distressed Credit Markets Advisory group and has litigated in a wide variety of substantive areas, including complex business litigation, securities litigation, intellectual property litigation, bankruptcy, health care and zoning litigation, and has extensive trial and appellate experience. Ms. Azad has deep expertise in takings law, and in particular, inverse condemnation and temporary regulatory takings. She was trial counsel in the *Cienega Gardens v. United States* cases, which set new federal law standards for temporary regulatory takings of income-producing property [see *Independence Park v. United States*, 62 Fed.Cl. 684 (Fed.Cl. 2004); *Cienega Gardens v. United States*, 38 Fed.Cl. 64 (Fed.Cl. 1997); *Cienega Gardens v. United States*, 331 F.3d 1319 (Fed.Cir. 2003); *Cienega Gardens v. United States*, (Fed.Cl. 2005); *Claremont Village Commons v. United States* (Fed. Cl. 2007)].



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CHAPTER 35 California Judicial Council Eminent Domain Instructions *

5-35 California Forms of Jury Instruction CACI 3514

CACI 3514 Burden of Proof

Neither the [*name of condemnor*] nor [*name of property owner*] has the burden of proving the amount of just compensation.

New September 2003

■ *Code of Civil Procedure section 1260.210 provides:*

(a) The defendant shall present his evidence on the issue of compensation first and shall commence and conclude the argument.

(b) Except as otherwise provided by statute, neither the plaintiff nor the defendant has the burden of proof on the issue of compensation.

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, § 1221

1 Condemnation Practice in California (Cont.Ed.Bar 3d ed.) § 9.14

5 Nichols on Eminent Domain, Ch. 18, *Evidence in Condemnation Proceedings*, § 18.02 (Matthew Bender)

Publisher's Notes

This instruction replaces BAJI No. 11.98.

LexisNexis Matthew Bender Expert Practice Tip--Explaining Lack of Burden of Proof to Jurors:

The fact that no party carries the burden of proof may seem unusual to jurors. Inform the jurors that they must award compensation based on the evidence presented. The fact that neither party carries the burden of proof simply means that both parties share an equal burden to present evidence to support their valuations. *By Susan S. Azad, Esq.*

* Practice Tips by Susan S. Azad, Esq., a litigation partner in the Los Angeles office of Latham & Watkins, LLP. She is a member of the firm's Distressed Credit Markets Advisory group and has litigated in a wide variety of substantive areas, including complex business litigation, securities litigation, intellectual property litigation, bankruptcy, health care and zoning litigation, and has extensive trial and appellate experience. Ms. Azad has deep expertise in takings law, and in particular, inverse condemnation and temporary regulatory takings. She was trial counsel in the *Cienega Gardens v. United States* cases, which set new federal law standards for temporary regulatory takings of income-producing property [see *Independence Park v. United States*, 62 *Fed.Cl.* 684 (*Fed.Cl.* 2004); *Cienega Gardens v. United States*, 38 *Fed.Cl.* 64 (*Fed.Cl.* 1997); *Cienega Gardens v. United States*, 331 *F.3d* 1319 (*Fed.Cir.* 2003); *Cienega Gardens v. United States*, (Fed.Cl. 2005); *Claremont Village Commons v. United States* (Fed. Cl. 2007)].



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CHAPTER 35 California Judicial Council Eminent Domain Instructions *

5-35 California Forms of Jury Instruction CACI 3515

CACI 3515 Valuation Testimony

You must decide the value of property based solely on the testimony of the witnesses who have given their opinion of fair market value. You may consider other evidence only to help you understand and weigh the testimony of those witnesses.

You may find the same fair market value testified to by a witness, or you may find a value anywhere between the highest and lowest values stated by the witnesses.

If the witnesses disagreed with one another, you should weigh each opinion against the others based on the reasons given for each opinion, the facts or other matters that each witness relied on, and the witnesses' qualifications.

New September 2003

■ *Evidence Code section 813(a) provides:*

The value of property may be shown only by the opinions of any of the following:

- (1) Witnesses qualified to express such opinions.
- (2) The owner or the spouse of the owner of the property or property interest being valued.
- (3) An officer, regular employee, or partner designated by a corporation, partnership, or unincorporated association that is the owner of the property or property interest being valued, if the designee is knowledgeable as to the value of the property or property

interest.

■ "The only type of evidence which can be used to establish value in eminent domain cases is the opinion of qualified experts and the property owners." (*Aetna Life and Casualty Co. v. City of Los Angeles* (1985) 170 Cal.App.3d 865, 877 [216 Cal.Rptr. 831] , internal citations omitted.)

■ "A jury hearing a condemnation action may not disregard the evidence as to value and render a verdict which either exceeds or falls below the limits established by the testimony of the witnesses. The trier of fact in an eminent domain action is not an appraiser, and does not make a determination of market value based on its opinion thereof. Instead it determines the market value of the property, based on the opinions of the valuation witnesses." (*Aetna Life and Casualty Co.*, *supra*, 170 Cal.App.3d at p. 877 , internal citations omitted.)

■ " 'The trier of fact may accept the evidence of any one expert or choose a figure between them based on all of the evidence.' There is insufficient evidence to support a verdict 'only when "no reasonable interpretation of the record" supports the figure ... ' " (*San Diego Metropolitan Transit Development Bd. v. Cushman* (1997) 53 Cal.App.4th 918, 931 [62 Cal.Rptr.2d 121] , internal citations omitted.)

Secondary Sources

1 Witkin, California Evidence (4th ed. 2000) Opinion Evidence, § 102

1 Condemnation Practice in California (Cont.Ed.Bar 3d ed.) §§ 9.62-9.64

5 Nichols on Eminent Domain, Ch. 23, *Expert and Opinion Evidence*, §§ 23.01-23.11 (Matthew Bender)

20 California Forms of Pleading and Practice, Ch. 247, *Eminent Domain and Inverse Condemnation* (Matthew Bender)

Publisher's Notes

This instruction replaces BAJI No. 11.80, and covers issues presented in BAJI No. 11.82.

LexisNexis Matthew Bender Expert Practice Tip--Jurors' Conclusions Based Solely on Evidence at Trial: Inform the jurors that they must base their conclusions of value solely on the opinions of the owners and/or experts at trial (including the credibility and competence of those witnesses) and not on any other factor. Jurors may not make their own independent valuations. *By Susan S. Azad, Esq.*

LexisNexis Matthew Bender Expert Practice Tip--Credibility of Experts Is Key: In eminent domain cases, credibility of the expert witnesses is paramount. The savvy practitioner will avoid overreaching, which invariably leads to a loss of credibility and hence, less influence on the jury. In particular, among other things, jurors will look for inconsistencies between expert and percipient witnesses to determine credibility. *By Susan S. Azad, Esq.*

* Practice Tips by Susan S. Azad, Esq., a litigation partner in the Los Angeles office of Latham & Watkins, LLP. She is a member of the firm's Distressed Credit Markets Advisory group and has litigated in a wide variety of substantive areas, including complex business litigation, securities litigation, intellectual property litigation, bankruptcy, health care and zoning litigation, and has extensive trial and appellate experience. Ms. Azad has deep expertise in takings law, and in particular, inverse condemnation and temporary regulatory takings. She was trial counsel in the *Cienega Gardens v. United States* cases, which set new federal law standards for temporary regulatory takings of income-producing property [see *Independence Park v. United States*, 62 Fed.Cl. 684 (Fed.Cl. 2004); *Cienega Gardens v. United States*, 38 Fed.Cl. 64 (Fed.Cl. 1997); *Cienega Gardens v. United States*, 331 F.3d 1319 (Fed.Cir. 2003); *Cienega Gardens v.*

United States, (Fed.Cl. 2005); Claremont Village Commons v. United States (Fed. Cl. 2007)].



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CHAPTER 35 California Judicial Council Eminent Domain Instructions *

*5-35 California Forms of Jury Instruction CACI 3516***CACI 3516 View**

You have viewed the property and its surrounding area. The purpose of this view was to help you understand and weigh the testimony of the witnesses.

New September 2003

■ *Evidence Code section 813(b)* provides: "Nothing in this section prohibits a view of the property being valued or the admission of any other admissible evidence (including but not limited to evidence as to the nature and condition of the property and, in an eminent domain proceeding, the character of the improvement proposed to be constructed by the plaintiff) for the limited purpose of enabling the court, jury, or referee to understand and weigh the testimony ... and such evidence, except evidence of the character of the improvement proposed to be constructed by the plaintiff in an eminent domain proceeding, is subject to impeachment and rebuttal."

Secondary Sources

2 Witkin, California Evidence (4th ed. 2000) Demonstrative, Experimental, and Scientific Evidence, § 31

1 Condemnation Practice in California (Cont.Ed.Bar 3d ed.) § 9.95

Publisher's Notes

There is no BAJI instruction on this subject.

LexisNexis Matthew Bender Expert Practice Tip--Ensure Experts View Property: Jurors will use the information gathered at a viewing of the property to assess the credibility of the experts and owners

on opinions of value. Inaccuracies and/or exaggerations about the condition of the property or neighborhood will lead to a loss of credibility with the jury. The prudent practitioner will ensure his or her experts have viewed the property at least once (before forming their opinion) and are able to speak knowledgeably and from firsthand experience about the property and surrounding neighborhood. By *Susan S. Azad, Esq.*

LexisNexis Matthew Bender Expert Practice Tip--Effect on Jury of Views and Photographs of Property: For well-kept, attractive property, a view of the site will enhance the jurors' perceptions of the property. On the other hand, an unattractive, poorly maintained property risks a negative impression on the jury, and in that case, the owner's experts should be prepared to deal proactively (preferably before the view) with any negative visual impression that might be created. The view can be reinforced through photographs of the site that can be blown up and color copies of which can be circulated to the jury. A view at the end of testimony is especially helpful if the opponent has based its valuation on potentially misleading characterizations of the property that can be countered by a view of the property itself. By *Susan S. Azad, Esq.*

* Practice Tips by Susan S. Azad, Esq., a litigation partner in the Los Angeles office of Latham & Watkins, LLP. She is a member of the firm's Distressed Credit Markets Advisory group and has litigated in a wide variety of substantive areas, including complex business litigation, securities litigation, intellectual property litigation, bankruptcy, health care and zoning litigation, and has extensive trial and appellate experience. Ms. Azad has deep expertise in takings law, and in particular, inverse condemnation and temporary regulatory takings. She was trial counsel in the *Cienega Gardens v. United States* cases, which set new federal law standards for temporary regulatory takings of income-producing property [see *Independence Park v. United States*, 62 Fed.Cl. 684 (Fed.Cl. 2004); *Cienega Gardens v. United States*, 38 Fed.Cl. 64 (Fed.Cl. 1997); *Cienega Gardens v. United States*, 331 F.3d 1319 (Fed.Cir. 2003); *Cienega Gardens v. United States*, (Fed.Cl. 2005); *Claremont Village Commons v. United States* (Fed. Cl. 2007)].



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CHAPTER 35 California Judicial Council Eminent Domain Instructions *

5-35 California Forms of Jury Instruction CACI 3517-CACI 3599

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CACI 3517Reserved for Future Use



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CHAPTER 35 California Judicial Council Eminent Domain Instructions *

5-35 California Forms of Jury Instruction CACI VF-3500

CACI VF-3500 Fair Market Value Plus Goodwill

We answer the questions submitted to us as follows:

1. What was the fair market value of the property on [insert date of valuation]?

.....\$_____

Answer question 2.

2. What was the value of the loss of goodwill on [insert date of valuation]?\$_____

Signed: _____

Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the [clerk/bailiff/judge].

New September 2003; Revised December 2007

Directions for Use

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on *CACI No. 3501, "Fair Market Value" Explained*, and *CACI No. 3513, Goodwill*.

Publisher's Notes

There is no BAJI verdict form on this subject.

* Practice Tips by Susan S. Azad, Esq., a litigation partner in the Los Angeles office of Latham & Watkins, LLP. She is a member of the firm's Distressed Credit Markets Advisory group and has litigated in a wide variety of substantive areas, including complex business litigation, securities litigation, intellectual property litigation, bankruptcy, health care and zoning litigation, and has extensive trial and appellate experience. Ms. Azad has deep expertise in takings law, and in particular, inverse condemnation and temporary regulatory takings. She was trial counsel in the *Cienega Gardens v. United States* cases, which set new federal law standards for temporary regulatory takings of income-producing property [see *Independence Park v. United States*, 62 *Fed.Cl.* 684 (*Fed.Cl.* 2004); *Cienega Gardens v. United States*, 38 *Fed.Cl.* 64 (*Fed.Cl.* 1997); *Cienega Gardens v. United States*, 331 *F.3d* 1319 (*Fed.Cir.* 2003); *Cienega Gardens v. United States*, (Fed.Cl. 2005); *Claremont Village Commons v. United States* (Fed. Cl. 2007)].



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CHAPTER 35 California Judicial Council Eminent Domain Instructions *

5-35 California Forms of Jury Instruction CACI VF-3501

CACI VF-3501 Fair Market Value Plus Severance Damages

We answer the questions submitted to us as follows:

1. What was the fair market value of the property taken on [date of valuation]?
\$_____

Answer question 2.

2. What was the fair market value of the remaining property on [date of valuation]?
\$_____

Answer question 3.

3. What will the fair market value of the remaining property be after the [name of public entity]'s proposed project is completed?\$_____

Signed: _____
Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the [clerk/bailiff/judge].

New September 2003

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on *CACI No. 3501, "Fair Market Value" Explained*, and *CACI No. 3511, Severance Damages*.

Publisher's Notes

There is no BAJI verdict form on this subject.

* Practice Tips by Susan S. Azad, Esq., a litigation partner in the Los Angeles office of Latham & Watkins, LLP. She is a member of the firm's Distressed Credit Markets Advisory group and has litigated in a wide variety of substantive areas, including complex business litigation, securities litigation, intellectual property litigation, bankruptcy, health care and zoning litigation, and has extensive trial and appellate experience. Ms. Azad has deep expertise in takings law, and in particular, inverse condemnation and temporary regulatory takings. She was trial counsel in the *Cienega Gardens v. United States* cases, which set new federal law standards for temporary regulatory takings of income-producing property [see *Independence Park v. United States*, 62 *Fed.Cl.* 684 (*Fed.Cl.* 2004); *Cienega Gardens v. United States*, 38 *Fed.Cl.* 64 (*Fed.Cl.* 1997); *Cienega Gardens v. United States*, 331 *F.3d* 1319 (*Fed.Cir.* 2003); *Cienega Gardens v. United States*, (Fed.Cl. 2005); *Claremont Village Commons v. United States* (Fed. Cl. 2007)].



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CHAPTER 35 California Judicial Council Eminent Domain Instructions *

5-35 California Forms of Jury Instruction CACI VF-3502

CACI VF-3502 Fair Market Value Plus Loss of Inventory/Personal

We answer the questions submitted to us as follows:

1. What was the fair market value of the property taken on [*insert date of valuation*]?
\$_____

[Answer question 2.

2. What was the retail value on [*insert date of valuation*] of the portion of the lost inventory or personal property that was unique and not readily replaceable?\$_____]

[Answer question 3.

3. What was the wholesale value on [*insert date of valuation*] of the portion of the lost inventory or personal property that was readily replaceable and not unique?\$_____]

Signed: _____
 Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the [clerk/bailiff/judge].

Directions for Use

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on *CACI No. 3501, "Fair Market Value" Explained*, and *CACI No. 3507, Personal Property and Inventory*.

In an eminent domain action, the jury finds only the amount of compensation. (*Emeryville Redevelopment v. Harcros Pigments* (2002) 101 Cal.App.4th 1083, 1116 [125 Cal.Rptr.2d 12] .) The court should determine whether there is inventory or personal property that is unique and not readily replaceable. The jury should then determine the value of that property.

Publisher's Notes

There is no BAJI verdict form on this subject.

* Practice Tips by Susan S. Azad, Esq., a litigation partner in the Los Angeles office of Latham & Watkins, LLP. She is a member of the firm's Distressed Credit Markets Advisory group and has litigated in a wide variety of substantive areas, including complex business litigation, securities litigation, intellectual property litigation, bankruptcy, health care and zoning litigation, and has extensive trial and appellate experience. Ms. Azad has deep expertise in takings law, and in particular, inverse condemnation and temporary regulatory takings. She was trial counsel in the *Cienega Gardens v. United States* cases, which set new federal law standards for temporary regulatory takings of income-producing property [see *Independence Park v. United States*, 62 Fed.Cl. 684 (Fed.Cl. 2004); *Cienega Gardens v. United States*, 38 Fed.Cl. 64 (Fed.Cl. 1997); *Cienega Gardens v. United States*, 331 F.3d 1319 (Fed.Cir. 2003); *Cienega Gardens v. United States*, (Fed.Cl. 2005); *Claremont Village Commons v. United States* (Fed. Cl. 2007)].



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CHAPTER 35 California Judicial Council Eminent Domain Instructions *

5-35 California Forms of Jury Instruction CACI VF-3503-CACI VF-3599

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CACI VF-3503Reserved for Future Use



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CHAPTER 35A Matthew Bender Inverse Condemnation Instructions *

5-35A California Forms of Jury Instruction 35A.syn

§ 35A.syn Synopsis to Chapter 35A: Matthew Bender Inverse Condemnation Instructions *

MB 3500A.01 Definition of Inverse Condemnation

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 3500A.02 Definition of Just Compensation

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 3500A.03 Date of Valuation

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 3500A.04 Overview of Damage Claims

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Analogy to Eminent Domain Instructions

[b] Loss of Goodwill

MB 3500A.05-MB 3500A.09 [Reserved]

MB 3500A.10 Basic Measure--Complete Taking

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 3500A.11 Basic Measure--Partial Taking or Damaging

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 3500A.12 Definition of Fair Market Value

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Fair Market Value

[b] Related Judicial Council Jury Instructions

MB 3500A.13 Land With Improvements

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Compensation for Improvements

[b] Related Judicial Council Jury Instructions

MB 3500A.14 Alternative Measures of Damage

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 3500A.15 Unreasonable Delay/Loss of Use

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Damages for Excessive Delay

[b] Mitigating Anticipated Loss of Goodwill

[c] Related Judicial Council Jury Instructions

MB 3500A.16 Loss of Access

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Easement of Access

[b] Related Judicial Council Jury Instructions

MB 3500A.17 Loss of Personal Property

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Right to Compensation for Personal Property

[b] Related Judicial Council Jury Instructions

MB 3500A.18 Speculative Damages Not Permitted

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 3500A.19 Duty to Mitigate; Expenses of Mitigation

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 3500A.20-MB 3500A.29 [Reserved]

MB 3500A.30 Admissibility and Weight of Opinions on Value

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Opinion Testimony

[b] Related Judicial Council Jury Instructions

MB 3500A.31 Substantial Cause

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Substantial Cause Instruction

[b] Other Stipulated Instructions

MB 3500A.32 Superseding Cause

[1] Instruction

[2] Use of Instruction

[3] Comment



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CHAPTER 35A Matthew Bender Inverse Condemnation Instructions *

5-35A California Forms of Jury Instruction Scope

Scope

SCOPE

This chapter includes jury instructions for use in an inverse condemnation action. For the California Judicial Council eminent domain instructions, see Ch. 35, *California Judicial Council Eminent Domain Instructions*. The Judicial Council instructions include, for example, instructions on "fair market value" [CACI No. 3501], compensation for improvements [CACI No. 3506], pre-condemnation damages (*Klopping* damages) [CACI No. 3509], severance damages [CACI Nos. 3511, 3512], goodwill [CACI No. 3513], burden of proof [CACI No. 3514], valuation testimony [CACI No. 3515], and view [CACI No. 3516]. The Judicial Council instructions also include specific verdict forms relating to fair market value [CACI Nos. VF-3500-VF-3502]. The instructions in this chapter are intended to supplement the Judicial Council instructions [see *Cal. Rules of Ct.*, Rule 2.1050].

This chapter covers the following topics:

- Part A includes introductory and definitional instructions [see MB 3500A.01-MB 3500A.04].
- Part B includes instructions on damages [see MB 3500A.10 -MB 3500A.19].
- Part C includes an instruction on the admissibility of and weight of opinions on the value of property [see MB 3500A.30] and instructions on substantial [see MB 3500A.31] and superseding [see MB 3500A.32] causes, an issue that may be submitted to the jury if the parties and the court agree to do so.

Most of the instructions in this chapter are on damages [see MB 3500A.10-MB 3500A.19] because the right to a jury trial in inverse condemnation cases is limited to the issue of just compensation [see MB 3500A.01[3] for discussion of scope of right to jury trial in inverse condemnation actions].



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CHAPTER 35A Matthew Bender Inverse Condemnation Instructions *
PART A. INTRODUCTION

5-35A California Forms of Jury Instruction MB 3500A.01

MB 3500A.01 Definition of Inverse Condemnation

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

The California Constitution requires a governmental, public entity to pay "just compensation" to a person who owns or holds a valuable interest in [real or personal] property, if that interest is taken or damaged as a result of a public use.

If the public entity takes the property, suing the property owner for it, the suit is called an "eminent domain" action. If the property owner believes the public entity has taken or damaged its property and sues the public entity for compensation, the suit is called an "inverse condemnation" action.

In this case, _____ [*insert name of action*], Plaintiff claims that Defendant has constructed, maintained, operated, or otherwise engaged in a public use and in so doing has taken or damaged a valuable property interest belonging to Plaintiff. Plaintiff claims that Defendant must pay Plaintiff monetary damages in the form of just compensation under the theory of inverse condemnation. I have concluded [*Optional (See Use of Instruction): in an earlier phase of this trial*] that the Defendant is liable under this theory. It is now your duty as jurors to decide--according to these instructions--the amount of "just compensation" to be awarded to Plaintiff.

Authorities: *Cal. Const.*, art. I, § 19; *Arreola v. County of Monterey* (2002) 99 Cal.App.4th 722, 737, 122 Cal.Rptr.2d 38 ; *Downen's, Inc. v. City of Hawaiian Gardens Redevelopment Agency* (2001) 86 Cal.App.4th 856, 861, 103 Cal.Rptr.2d 644 ; *McMahan's of Santa Monica v. City of Santa Monica* (1983) 146 Cal.App.3d 683, 700, 194 Cal.Rptr. 582 .

[2] Use of Instruction

This instruction should be given in most inverse condemnation actions. Owners as well as leaseholders may bring inverse condemnation actions. Thus, a subtenant could maintain such an action [*Kong v. City of Hawaiian Gardens Redevelopment Agency* (2002) 108 Cal.App.4th 1028, 1041, 134 Cal.Rptr.2d 260]. The only exception when this instruction should not be used is if the property owner waives the right to a jury trial on the issue of damages.

LexisNexis Matthew Bender Expert Practice Tip--Putting the Instruction in Perspective: To put the jury's charge in perspective, it is useful to explain that in eminent domain cases, the public entity condemns private property for public use and pays the owner "just compensation" on the date the taking occurs. In an inverse condemnation case, the public entity does not condemn the property and does not pay just compensation on the date the taking occurred. Rather, the public entity disputes that there was any taking of private property for public use. Thus, to be entitled to just compensation, the plaintiff must first prove that its private property was taken for public use (in effect, condemned). Once the plaintiff proves the taking, the plaintiff is entitled to just compensation. Here, the court has already found that the public entity is liable for a taking. The jury's sole job is to determine how much the plaintiff is entitled to be compensated for that taking. *By Susan S. Azad, Esq.*

This instruction should be modified if other theories of liability are simultaneously being tried to the jury (e.g., dangerous condition or nuisance) or if the parties stipulate to having the jury decide issues other than just compensation [see, e.g., *Blau v. City of Los Angeles* (1973) 32 Cal.App.3d 77, 83-87, 107 Cal.Rptr. 727 (issue of causation submitted to jury); see also MB 3500A.31]. An additional instruction explaining the difference between real and personal property may be helpful if both types of property are at issue [see MB 3500A.17 for instruction on damages for loss of personal property].

The optional material in the last paragraph of the instruction ("in an earlier phase of this trial") may be added if the liability and damages phases of the trial are bifurcated, as they frequently are in inverse condemnation cases.

[3] Comment

This instruction reflects the narrow scope of the jury's duty in most inverse condemnation cases. The right to a jury trial in inverse condemnation cases is generally limited to the issue of just compensation [see California Real Estate Law and Practice, Ch. 513, *Inverse Condemnation* (Matthew Bender)], but other issues may be presented to the jury if the court and the parties agree to that procedure [*Los Osos Valley Associates v. City of San Luis Obispo* (1994) 30 Cal.App.4th 1670, 1683, 36 Cal.Rptr.2d 758 (issue of plaintiff's negligence as superseding cause submitted to jury); *Marshall v. Department of Water & Power* (1990) 219 Cal.App.3d 1124, 1139-1140, 268 Cal.Rptr. 559 (plaintiff does not have unilateral right to have liability issues submitted to jury); *Blau v. City of Los Angeles* (1973) 32 Cal.App.3d 77, 83-87, 107 Cal.Rptr. 727 (issue of substantial cause submitted to jury); see MB 3500A.31 (substantial cause), MB 3500A.32 (superseding cause)].

With one or two exceptions, the Eminent Domain Law [Code Civ. Proc. §§ 1230.010-1273.050] does not apply to inverse condemnation, which is governed by case law [see Cal. Law Rev. Com. Comment to Code Civ. Proc. § 1263.010 (compensation provisions of Eminent Domain Law are "intended to provide rules of compensation for eminent domain proceedings; the law of inverse condemnation is left for determination by judicial development"); see also Code Civ. Proc. § 1245.260 (Eminent Domain Law section providing inverse condemnation action as remedy for unreasonable delay in beginning eminent domain action)].

When a plaintiff alleges that a continuous or repeated course of conduct by a governmental entity has damaged its property, the determination of when a cause of action for inverse condemnation accrues is a proper subject for the jury when the facts are in dispute. The cause of action does not accrue until the situation has stabilized [*Lee v. Los Angeles Metropolitan Transportation Authority* (2003) 107 Cal.App.4th 848, 857-859, 132 Cal.Rptr.2d 444].

The right to just compensation applies to the taking or damaging of both real and personal property [*People ex rel.*

Dept. of Transportation v. Clauser/Wells Partnership (2002) 95 Cal.App.4th 1066, 1069, 116 Cal.Rptr.2d 240 ; *Griswold v. City of Needles* (1992) 6 Cal.App.4th 1881, 1888, 1891, 8 Cal.Rptr.2d 753 ; *McMahan's of Santa Monica v. City of Santa Monica* (1983) 146 Cal.App.3d 683, 700, 194 Cal.Rptr. 582 ; see MB 3500A.17 (instruction on damages for loss of personal property)]. However, an action for inverse condemnation does not lie to recover damages to property caused by efforts of law enforcement officers to enforce the criminal laws [*Customer Co. v. City of Sacramento* (1995) 10 Cal.4th 368, 41 Cal.Rptr.2d 658, 895 P.2d 900 (store owner brought inverse condemnation action against public agencies employing law enforcement officers)].

LexisNexis Matthew Bender Expert Practice Tip--Effect of Trial Delay: When income-generating property is at issue in an inverse condemnation case, any delay in trial will likely work to the greater disadvantage the plaintiff, because prejudgment interest is unlikely to compensate the plaintiff for the full value of the lost opportunity costs associated with loss of use of the income stream from the property. By Susan S. Azad, Esq.

Legal Topics:

For related research and practice materials, see the following legal topics:

Environmental Law Zoning & Land Use Eminent Domain Proceedings Real Property Law Eminent Domain Proceedings Valuation Real Property Law Inverse Condemnation General Overview Real Property Law Inverse Condemnation Constitutional Violations Real Property Law Inverse Condemnation Remedies

* Practice Tips and revised instructions by Susan S. Azad, Esq., a litigation partner in the Los Angeles office of Latham & Watkins, LLP. She is a member of the firm's Distressed Credit Markets Advisory group and has litigated in a wide variety of substantive areas, including complex business litigation, securities litigation, intellectual property litigation, bankruptcy, health care and zoning litigation, and has extensive trial and appellate experience. Ms. Azad has deep expertise in takings law, and in particular, inverse condemnation and temporary regulatory takings. She was trial counsel in the *Cienega Gardens v. United States* cases, which set new federal law standards for temporary regulatory takings of income-producing property [see *Independence Park v. United States*, 62 Fed.Cl. 684 (Fed.Cl. 2004); *Cienega Gardens v. United States*, 38 Fed.Cl. 64 (Fed.Cl. 1997); *Cienega Gardens v. United States*, 331 F.3d 1319 (Fed.Cir. 2003); *Cienega Gardens v. United States*, (Fed.Cl. 2005); *Claremont Village Commons v. United States* (Fed. Cl. 2007)].



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California Forms of Jury Instruction

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CHAPTER 35A Matthew Bender Inverse Condemnation Instructions *
PART A. INTRODUCTION

5-35A California Forms of Jury Instruction MB 3500A.02

MB 3500A.02 Definition of Just Compensation

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

"Just compensation" means the Plaintiff must be made whole. This means the Plaintiff is to be awarded the full and fair value of the property taken on the date the taking occurred such that the Plaintiff is put in the same position financially as if the taking had not occurred. This value must be determined in accordance with the instructions that follow.

Authorities: *Regency Outdoor Advertising, Inc. v. City of Los Angeles* (2006) 39 Cal.4th 507, 46 Cal.Rptr.3d 742, 139 P.3d 119 ; *San Diego Gas and Electric Co. v. Superior Court* (1996) 13 Cal.4th 893, 939-940, 55 Cal.Rptr. 2d 724, 920 P.2d 669 ; *Baker v. Burbank-Glendale-Pasadena Airport Authority* (1985) 39 Cal.3d 862, 866, 218 Cal.Rptr. 293, 705 P.2d 866 ; *Beaty v. Imperial Irrigation Dist.* (1986) 186 Cal.App.3d 897, 903, 231 Cal.Rptr. 128 .

[2] Use of Instruction

This instruction should be used to define "just compensation" for the jury in an inverse condemnation case. This instruction is chiefly an introduction to later instructions, which contain more specific directions to the jury on how it should perform its duties [see, e.g., MB 3500A.30 (amount of award is limited by testimony as to value)].

[3] Comment

Inverse condemnation is one of the two procedural devices for ensuring that the constitutional proscription that private property not be taken or damaged for public use without just compensation having first been made to the owner is not violated [Cal. Const., art. I, § 19]. The other is eminent domain [see *Klopping v. City of Whittier* (1972) 8 Cal.3d 39, 43, 104 Cal.Rptr. 1, 500 P.2d 1345]. The starting point for a determination of compensation is fair market value [see

Code Civ. Proc. § 1263.310; see *MB 3500A.12* (definition of fair market value)].

A key difference between them is that in eminent domain litigation, the focus is usually limited to the amount of compensation owed the property owner; in an inverse condemnation action, before the compensation issue is even reached, the property owner must establish that the public entity has, in fact, taken or damaged his or her property [*San Diego Gas and Electric Co. v. Superior Court* (1996) 13 Cal.4th 893, 939-940, 55 Cal.Rptr.2d 724, 920 P.2d 669; *Beaty v. Imperial Irrigation Dist.* (1986) 186 Cal.App.3d 897, 903, 231 Cal.Rptr. 128]. The United States Supreme Court has stated that "inverse condemnation" seems to have been coined merely as a shorthand description of the manner in which a landowner recovers just compensation for a taking of property when condemnation proceedings have not been instituted [*United States v. Clarke* (1980) 445 U.S. 253, 100 S.Ct. 1127, 63 L.Ed.2d 373, 377].

LexisNexis Matthew Bender Expert Practice Tip--Special Meaning of "Just Compensation": In an inverse condemnation case, the court has already rendered the judgment that the plaintiff has suffered compensable injury (special injury to the plaintiff's valuable property interest that should, in fairness, be borne by the public at large). It is important to instruct the jurors that "just compensation" has a special meaning under the California Constitution. It means that the property owner must be made whole financially, as if the taking had never occurred. *By Susan S. Azad, Esq.*

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Civil Procedure Eminent Domain Proceedings General Overview Real Property Law Eminent Domain Proceedings Constitutional Limits & Rights Just Compensation Real Property Law Inverse Condemnation Remedies

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California Forms of Jury Instruction

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CHAPTER 35A Matthew Bender Inverse Condemnation Instructions *
PART A. INTRODUCTION

5-35A California Forms of Jury Instruction MB 3500A.03

MB 3500A.03 Date of Valuation

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

[*EITHER (See Use of Instruction)*]

You must determine the dollar amount of Plaintiff's just compensation as of the date that [his/her/its] property was taken or damaged. I have determined that the date of taking or damaging is _____ [date determined by court].

[*OR*]

You must determine the dollar amount of Plaintiff's just compensation as of _____ [date of trial].

Authorities: *McDougald v. Southern Pacific P.R. Co.* (1912) 162 Cal. 1, 3, 120 P. 766 ; *Mt. San Jacinto Community College Dist. v. Superior Court* (2004) 117 Cal.App.4th 98, 105, 11 Cal.Rptr.3d 465 ; *Los Osos Valley Associates v. City of San Luis Obispo* (1994) 30 Cal.App.4th 1670, 1683, 36 Cal.Rptr.2d 758 ; *Leaf v. City of San Mateo* (1984) 150 Cal.App.3d 1184, 1191, 198 Cal.Rptr. 447 .

[2] Use of Instruction

This instruction should be used to determine the date of the property's value. The instruction offers two alternatives. The first reflects the general rule in inverse condemnation, which is valuation as of the date of the taking. The second

alternative should be given when this general rule is not followed. Thus, the property may sometimes be valued as of the time of the trial if valuation at the earlier date would impose a hardship [see [3], below].

[3] Comment

In inverse condemnation actions, the plaintiff's damages are usually determined as of the date of the taking [*McDougald v. Southern P. R. Co.* (1912) 162 Cal. 1, 3, 120 P. 766 ; *Mt. San Jacinto Community College Dist. v. Superior Court* (2004) 117 Cal.App.4th 98, 105, 11 Cal.Rptr.3d 465 ; *Los Osos Valley Associates v. City of San Luis Obispo* (1994) 30 Cal.App.4th 1670, 1683, 36 Cal.Rptr.2d 758 ; *Leaf v. City of San Mateo* (1984) 150 Cal.App.3d 1184, 1191, 198 Cal.Rptr. 447]. However, valuation at the time of trial is permissible if the plaintiff has been diligent and if valuation at an earlier date would impose a hardship [*Mehl v. People* (1975) 13 Cal.3d 710, 719-720, 119 Cal.Rptr. 625, 532 P.2d 489 P.2d 489; *Los Osos Valley Associates v. City of San Luis Obispo* (1994) 30 Cal.App.4th 1670, 1683, 36 Cal.Rptr.2d 758 ; *Leaf v. City of San Mateo* (1984) 150 Cal.App.3d 1184, 1191, 198 Cal.Rptr. 447] .

LexisNexis Matthew Bender Expert Practice Tip--Importance of Date of Valuation: The date of valuation may have a significant impact on the amount of the just compensation award. This is an issue that will be determined by the court before the jury trial. Most cases will use the date of the alleged taking. However, when equity demands that an alternate valuation date be used, instruction MB 3500A.02 should be modified to omit the reference to the date the taking occurred. *By Susan S. Azad, Esq.*

Depending on the measure of damages, valuation at a later date may be helpful when a substantial period of time has elapsed between the date of the taking and the trial date. For example, the cost of repair may have increased substantially between the date of the damage and the date of trial, or the property value may have increased over time [*Los Osos Valley Associates v. City of San Luis Obispo* (1994) 30 Cal.App.4th 1670, 1683, 36 Cal.Rptr.2d 758 ; *Leaf v. City of San Mateo* (1984) 150 Cal.App.3d 1184, 1190-1191, 198 Cal.Rptr. 447].

LexisNexis Matthew Bender Expert Practice Tip--Valuation Date in Temporary Taking: The date of valuation in a temporary taking case may span a period of time--hence in such a case the jury should be instructed to determine the losses to the plaintiff over a specific window of time. *By Susan S. Azad, Esq.*

The rules governing valuation dates in inverse condemnation actions are not the same as those in eminent domain proceedings, which are set forth in *Code Civ. Proc.* §§ 1263.110-1263.150 [*Leaf v. City of San Mateo* (1984) 150 Cal.App.3d 1184, 1190-1191, 198 Cal.Rptr. 447].

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property LawEminent Domain ProceedingsValuationReal Property LawInverse CondemnationGeneral OverviewReal Property LawInverse CondemnationRemedies

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CHAPTER 35A Matthew Bender Inverse Condemnation Instructions *
PART A. INTRODUCTION

5-35A California Forms of Jury Instruction MB 3500A.04

MB 3500A.04 Overview of Damage Claims

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

The total compensation being sought by Plaintiff in this case is made up of claims for all of the following types of damages:

1. Just compensation for the property taken or damaged;

[CHOOSE ONE OR MORE OF FOLLOWING (See Use of Instruction)]

2. Severance damages minus special benefits for any parcel remaining after the taking;

[AND/OR]

3. Damages, if any, for excessive delay in commencing an eminent domain action or buying the property;

[AND/OR]

4. Damages, if any, for the loss of access to Plaintiff's property;

[AND/OR]

5. Damages, if any, for the loss of inventory or other items of personal property; and

[AND/OR]

6. Damages, if any, for loss of goodwill.

[AND/OR]

7. _____ [Describe any other damages that will be covered by instructions].

Authority: *Code Civ. Proc. § 1260.230* (eminent domain statute).**[2] Use of Instruction**

This instruction should be given to prevent juror confusion. Eminent domain proceedings often involve cases where the plaintiff is requesting more than one type of damages. Counsel should choose from the listed types of damages only those types that are at issue, so that the instruction accurately summarizes the damage instructions that will follow.

LexisNexis Matthew Bender Expert Practice Tip--Organizing Expert Presentation: Organize your expert presentations at trial to coincide with the roadmap on damages provided by this instruction so that jurors can more easily understand and follow the damages presentation, particularly in complex cases. *By Susan S. Azad, Esq.*

[3] Comment**[a] Analogy to Eminent Domain Instructions**

This instruction is analogous to, and suggested by, *Code Civ. Proc. § 1260.230*. Although § 1260.230 technically only applies to eminent domain cases, sound trial practice and common sense suggest the efficacy of an instruction providing a "road map" to subsequent instructions.

[b] Loss of Goodwill

Although loss of goodwill has been recoverable in eminent domain actions since 1976 [*Code Civ. Proc. § 1263.510*; see, e.g., *City of San Diego v. Sobke* (1998) 65 Cal.App.4th 379, 387-391, 76 Cal.Rptr.2d 9 (reviewing law governing compensation for loss of business goodwill)], inverse condemnation case law traditionally has not permitted recovery for loss of goodwill [see *Breidert v. Southern Pac. Co.* (1964) 61 Cal.2d 659, 667, 39 Cal.Rptr. 903, 394 P.2d 719]. However, in *Chhour v. Community Redevelopment Agency*, the court concluded that as a matter of judicial development of the law, goodwill is compensable in an inverse condemnation action to the same extent and with the same limitations on recovery found in *Code Civ. Proc. § 1263.510*, applicable to eminent domain actions [*Chhour v. Community Redevelopment Agency* (1996) 46 Cal.App.4th 273, 282, 53 Cal.Rptr.2d 585].

Code Civ. Proc. § 1263.510 is a remedial statute, which should be construed liberally [see *People ex rel. Dept. of Transportation v. Leslie* (1997) 55 Cal.App.4th 918, 922-923, 64 Cal.Rptr.2d 252 (trial court erred in excluding evidence of goodwill valuation of businesses)]. However, before evidence of loss of goodwill may be admitted, the property owner must demonstrate all of the following four threshold conditions [*Code Civ. Proc. § 1263.510(a)*; *Emeryville Redevelopment Agency v. Harcros Pigments, Inc.* (2002) 101 Cal.App.3d 1083, 1116, 125 Cal.Rptr.2d 12]:

- That the loss is caused by the taking of the property or the injury to the remainder;
- That the loss cannot reasonably be prevented by a relocation of the business or by taking steps and adopting procedures that a reasonably prudent person would take and adopt in preserving the goodwill;
- That compensation for the loss will not be included in payments under *Gov. Code* § 7262 (pertaining to relocation assistance); and
- That compensation for the loss will not be duplicated in the compensation otherwise awarded to the owner.

Under *Code Civ. Proc.* § 1263.510, the costs of acquiring and maintaining a replacement property in anticipation of eventual loss of the existing location, *i.e.*, mitigating loss of business goodwill, would not be recoverable if there was no direct or indirect taking of the property and *Klopping* damages [see *Klopping v. City of Whittier* (1972) 8 Cal.3d 39, 51-53, 104 Cal.Rptr. 1, 500 P.2d 1345 ; see also MB 3500A.17] were sought for pre-condemnation delay [*Barthelemy v. Orange County Flood Control District* (1998) 65 Cal.App.4th 558, 568-569, 76 Cal.Rptr.2d 575 ; see MB 3500A.15; see also *Langer v. Redevelopment Agency of City of Santa Cruz* (1999) 71 Cal.App.4th 998, 1008-1010, 84 Cal.Rptr.2d 19 (*Code Civ. Proc.* § 1263.510 inapplicable when alleged losses were consequence of landlord's termination of month-to-month tenancies, with no taking or substantial equivalent by redevelopment agency)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Environmental Law Zoning & Land Use Eminent Domain Proceedings Real Property Law Eminent Domain Proceedings Constitutional Limits & Rights Just Compensation Real Property Law Eminent Domain Proceedings Valuation Real Property Law Inverse Condemnation General Overview Real Property Law Inverse Condemnation Remedies

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CHAPTER 35A Matthew Bender Inverse Condemnation Instructions *
PART A. INTRODUCTION

5-35A California Forms of Jury Instruction MB 3500A.05-MB 3500A.09

[Reserved]

MB 3500A.05[Reserved]



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CHAPTER 35A Matthew Bender Inverse Condemnation Instructions *
PART B. DAMAGES

5-35A California Forms of Jury Instruction MB 3500A.10

MB 3500A.10 Basic Measure--Complete Taking

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

This case involves a complete deprivation or taking of property. The just compensation to which Plaintiff is entitled in such a case is the fair market value of the property taken.

[*OPTIONAL (See Use of Instruction)*]

Because the property taken is part of a larger parcel, Plaintiff is also entitled to compensation for the severance damages, if any, to the remaining parcel.

Authorities: *Albers v. County of Los Angeles* (1965) 62 Cal.2d 250, 268-269, 42 Cal.Rptr. 89, 398 P.2d 129 ; *City of Carlsbad v. Rudvalis* (2003) 109 Cal.App.4th 667, 678, 135 Cal.Rptr.2d 194 ; *City of San Diego v. Rancho Penasquitos Partnership* (2003) 105 Cal.App.4th 1013, 1028, 130 Cal.Rptr.2d 108 ; *Saratoga Fire Protection Dist. v. Hackett* (2002) 97 Cal.App.4th 895, 902, 118 Cal.Rptr.2d 696 ; *County of San Diego v. Rancho Vista Del Mar, Inc.* (1993) 16 Cal.App.4th 1046, 1058, 20 Cal.Rptr.2d 675 ; *Tilem v. City of Los Angeles* (1983) 142 Cal.App.3d 694, 707, 191 Cal.Rptr. 229 .

[2] Use of Instruction

This instruction should be used to instruct the jury on the basic measure of damages when the property owner's entire interest has been taken. If there has been only a partial taking, *i.e.*, damage to only a portion of the plaintiff's interest, the instruction in MB 3500A.11 should be used.

The optional paragraph is for use when severance damages are recoverable [see Ch. 35, *California Judicial Council Eminent Domain Instructions*, CACI 3511, for an instruction on severance damages]. Severance damages are recoverable in inverse condemnation cases, as well as in eminent domain cases [*Albers v. County of Los Angeles* (1965) 62 Cal.2d 250, 268-269, 42 Cal.Rptr. 89, 398 P.2d 129].

[3] Comment

In most instances, the measure of damages in an inverse condemnation case is fair market value [*County of San Diego v. Rancho Vista Del Mar, Inc.* (1993) 16 Cal.App.4th 1046, 1058, 20 Cal.Rptr.2d 675 ; see MB 3500A.14 for discussion of measures of damages other than market value]. The fair market value measure of damages is conceptually the same whether there is a complete or partial taking. In both cases, damages are measured by the difference between the fair market value of the property before and after the taking [*Albers v. County of Los Angeles* (1965) 62 Cal.2d 250, 268-269, 42 Cal.Rptr. 89, 398 P.2d 129 ; *Tilem v. City of Los Angeles* (1983) 142 Cal.App.3d 694, 707, 191 Cal.Rptr. 229]. As a practical matter, however, separate instructions for complete and partial takings are helpful to avoid jury confusion. This is because a complete taking causes the "after" value to be zero, and it is generally simpler and clearer to instruct the jury that the owner is entitled to recover the property's fair market value.

LexisNexis Matthew Bender Expert Practice Tip--Presenting Evidence of Fair Market Value: The determination of fair market value is the most critical aspect of the jury's charge. This will largely come down to expert credibility. A savvy practitioner will direct conservative assumptions by his/her experts so that they withstand cross-examination and convey to the jury that they have not taken liberties with the valuation analysis. This will help shore up other areas where the expert may be weak. The practitioner should anticipate weaknesses in his/her expert valuation and deal with them early. *By Susan S. Azad, Esq.*

LexisNexis Matthew Bender Expert Practice Tip--Severance Damages: Jurors may have trouble with the concept of severance damages. They should be instructed (and shown visually, if possible) that the property taken was part of a larger parcel. Severance damages are damages to the remaining portions of the property (parcel) that were not taken but which nevertheless suffered injury as a direct result of the taking. *By Susan S. Azad, Esq.*

Even when the physical taking is only partial, the economic loss may sometimes be complete [see, e.g., *Tilem v. City of Los Angeles* (1983) 142 Cal.App.3d 694, 704, 191 Cal.Rptr. 229 (loss of 10-foot strip rendered remaining lot too small to build on)]. In these circumstances, this instruction should be given instead of the instruction on partial taking or damaging in MB 3500A.11.

Legal Topics:

For related research and practice materials, see the following legal topics:

Environmental Law Zoning & Land Use Eminent Domain Proceedings Real Property Law Eminent Domain Proceedings Valuation Real Property Law Inverse Condemnation General Overview Real Property Law Inverse Condemnation Remedies

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2003); *Cienega Gardens v. United States*, (Fed.Cl. 2005); *Claremont Village Commons v. United States* (Fed. Cl. 2007)].



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CHAPTER 35A Matthew Bender Inverse Condemnation Instructions *
PART B. DAMAGES

5-35A California Forms of Jury Instruction MB 3500A.11

MB 3500A.11 Basic Measure--Partial Taking or Damaging

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

This case involves a partial taking of or damaging to property. The just compensation to which Plaintiff is entitled in such a case is the difference between the fair market value of the property immediately before the damage occurred and the fair market value of the property immediately after the damage occurred.

[*OPTIONAL (See Use of Instruction)*]

Because the property taken is part of a larger parcel, Plaintiff is also entitled to compensation for the severance damages, if any, to the remaining parcel.

Authority: *Albers v. County of Los Angeles* (1965) 62 Cal.2d 250, 268-269, 42 Cal.Rptr. 89, 398 P.2d 129 .

[2] Use of Instruction

Because most inverse condemnation cases involve only damage to property, rather than taking or total destruction, this instruction will be used more often than the instruction set forth in MB 3500A.10. The optional paragraph should be used when severance damages are recoverable [see Ch. 35, *California Judicial Council Eminent Domain Instructions*, CACI 3511, for an instruction on severance damages].

[3] Comment

The leading case on the analysis of liability issues in inverse condemnation actions is *Albers v. County of Los Angeles* [

Albers v. County of Los Angeles (1965) 62 Cal.2d 250, 42 Cal.Rptr. 89, 398 P.2d 129]. In *Albers*, the California Supreme Court approved a measure of damages like that set out in this instruction [*Albers v. County of Los Angeles* (1965) 62 Cal.2d 250, 268-269, 42 Cal.Rptr. 89, 398 P.2d 129 (property was damaged by landslide caused by construction of road, and trial court awarded plaintiffs difference between fair market value before landslide and fair market value after landslide, plus severance damages to adjoining property)]. This measure of damages has been applied in a wide variety of circumstances [see, e.g., *Rose v. State of California* (1942) 19 Cal.2d 713, 123 P.2d 505 (loss of street access); *Parker v. City of Los Angeles* (1974) 44 Cal.App.3d 556, 118 Cal.Rptr. 687 (airport noise and vibration)]. However, counsel should not assume that diminution of market value will be the measure of damages in all circumstances. As one court has stated, this measure should not be applied "inflexibly" [*Amador Valley Investors v. City of Livermore* (1974) 43 Cal.App.3d 483, 494, 117 Cal.Rptr. 749]. Alternative measures of damage are discussed in MB 3500A.14.

LexisNexis Matthew Bender Expert Practice Tip--Methodology of Valuation: There are various methodologies that may be used by experts to value property before and after the taking. While partially taken non-income producing real property would typically be valued by real estate appraisals to determine change in fair market value, if an ongoing business venture is partially taken, the proper measure of injury caused by the taking may best be measured by capitalizing net lost income or lost profits. In such a case, this instruction should be modified to reflect the particular methodologies that will be presented to the jurors. *By Susan S. Azad, Esq.*

Legal Topics:

For related research and practice materials, see the following legal topics:

Environmental Law Zoning & Land Use Eminent Domain Proceedings Real Property Law Eminent Domain Proceedings Valuation Real Property Law Inverse Condemnation General Overview Real Property Law Inverse Condemnation Remedies

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CHAPTER 35A Matthew Bender Inverse Condemnation Instructions *
PART B. DAMAGES

5-35A California Forms of Jury Instruction MB 3500A.12

MB 3500A.12 Definition of Fair Market Value

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

The fair market value of the property taken or damaged is the highest price that would be agreed to on the date of valuation by a seller who is willing to sell but who has no particular or urgent need to sell and who is not obliged to sell, and a buyer who is ready, willing, and able to buy but who has no particular need to buy, each dealing with the other with full knowledge of all the uses and purposes for which the property is reasonably adaptable and available.

[*OPTIONAL (See Use of Instruction)*]

The fair market value of property taken or damaged for which there is no relevant, comparable market is its value on the date of valuation as determined by any method of valuation that is just and equitable.

Authorities: *Code Civ. Proc. § 1263.320* (eminent domain statute); *City of Carlsbad v. Rudvalis* (2003) 109 Cal.App.4th 667, 678, 135 Cal.Rptr.2d 194 ; *City of San Diego v. Rancho Penasquitos Partnership* (2003) 105 Cal.App.4th 1013, 1028, 130 Cal.Rptr.2d 108 ; *Saratoga Fire Protection Dist. v. Hackett* (2002) 97 Cal.App.4th 895, 902, 118 Cal.Rptr.2d 696 ; *McMahan's of Santa Monica v. City of Santa Monica* (1983) 146 Cal.App.3d 683, 699-700, 194 Cal.Rptr. 582 .

[2] Use of Instruction

This instruction should be used in any case seeking a "market value" measure of damages. The first paragraph is based on *Code Civ. Proc. § 1263.320(a)*. The optional paragraph is based on *Code Civ. Proc. § 1263.320(b)* and should be

used when there is no relevant, comparable market. Note that although *Code Civ. Proc.* § 1263.320 is part of the Eminent Domain Law, inverse condemnation cases use the same test for fair market value [see *McMahan's of Santa Monica v. City of Santa Monica* (1983) 146 Cal.App.3d 683, 699-700, 194 Cal.Rptr. 582 ; *Federal Oil Co. v. City of Culver City* (1960) 179 Cal.App.2d 93, 98, 3 Cal.Rptr. 519].

Counsel may want to augment this instruction with additional instructions explaining the valuation methods to be used at trial. At least three methods for determining fair market value have been approved by statute [see [3][a], below].

For related Judicial Council instructions, see [3][b], below.

[3] Comment

[a] Fair Market Value

This instruction applies to both real and personal property damage cases. In inverse condemnation cases, courts have used the definition of fair market value from *Code Civ. Proc.* § 1263.320(a), an eminent domain statute [*Saratoga Fire Protection Dist. v. Hackett* (2002) 97 Cal.App.4th 895, 902, 118 Cal.Rptr.2d 696 ; *McMahan's of Santa Monica v. City of Santa Monica* (1983) 146 Cal.App.3d 683, 700, 194 Cal.Rptr. 582 ; see *Code Civ. Proc.* § 1263.320(b) (fair market value when no relevant, comparable market exists); see also *Code Civ. Proc.* § 1263.321 (value of nonprofit, special use property to be determined as provided in *Evid. Code* § 824 when no relevant, comparable market exists); *Evid. Code* § 824 (determining value of nonprofit, special use property when no relevant, comparable market exists)].

LexisNexis Matthew Bender Expert Practice Tip--Standard Valuation Method: This is a standard instruction in cases where takings damages can be accurately measured by the change in fair market value before and after the taking. Jurors should also be instructed that the fair market value determination must be supported by competent expert or other witness testimony. *By Susan S. Azad, Esq.*

Evid. Code §§ 810-824 govern the admissibility of evidence concerning the market value of property. Under these statutes, the following indicia may be used to establish the property's market value:

- The sale price of comparable property [*Evid. Code* § 816];
- The capitalized value of the property's reasonable net rental value [*Evid. Code* § 819]; and
- The property's value plus the cost of replacing or reproducing the existing improvements, less any depreciation or obsolescence suffered by the improvements [*Evid. Code* § 820].

The decision as to which of these three methods to use at trial is beyond the scope of this chapter. In brief, the comparable cost approach is commonly used in cases involving residential property, while the capitalization of rental income is most applicable to cases involving income property [*Parker v. City of Los Angeles* (1974) 44 Cal.App.3d 556, 562-563, 118 Cal.Rptr. 687 ; contra *De Freitas v. Suisun City* (1915) 170 Cal. 263, 266, 149 P. 553 (disapproving "mere capitalization" of net revenues)].

LexisNexis Matthew Bender Expert Practice Tip--Valuation Must be Comparable: One of the issues addressed by this instruction is that the valuation must not be at "fire sale" prices. An expert's use of comparable properties in a comparable sales valuation should be closely scrutinized to determine whether distressed sales are included. *By Susan S. Azad, Esq.*

LexisNexis Matthew Bender Expert Practice Tip--Valuation for Fluctuating Market: A particular market for an asset may be subject to unusual temporary fluctuations (a short-term crash in the real estate market, for example, occurring just before the date of the taking). If that is the case with the property to be valued, this instruction should be augmented to include an explanation of the specific valuation

method used if it is something other than the "comparable sales value" methodology. *By Susan S. Azad, Esq.*

Evid. Code § 822 identifies matters on which an opinion as to market value cannot be based, and should be read in conjunction with *Evid. Code* §§ 814-821.

In eminent domain cases, the property's fair market value does not include any increase or decrease in the property's value that is attributable to any of the following [*Code Civ. Proc.* § 1263.330]:

- The project for which the property is taken;
- The eminent domain proceedings in which the property is taken; or
- Any preliminary actions of the governmental entity relating to the taking of the property.

Thus, the probability of rezoning or even an actual change in zoning that results from the fact that the project that is the basis for the taking was impending may not be taken into account in valuing the property in a condemnation proceeding when the condemning agency and the zoning authority are the same [*City of San Diego v. Rancho Penasquitos Partnership* (2003) 105 Cal.App.4th 1013, 1029, 130 Cal.Rptr.2d 108]. In *City of San Diego v. Rancho Penasquitos Partnership*, the court of appeal held that the trial court properly excluded evidence of zoning restrictions affecting the taken property that the city imposed in connection with the planning of the freeway project that necessitated the taking [*City of San Diego v. Rancho Penasquitos Partnership* (2003) 105 Cal.App.4th 1013, 1029-1034, 130 Cal.Rptr.2d 108].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 35, *California Judicial Council Eminent Domain Instructions*]:

CACI 3501, "Fair Market Value" Explained

Legal Topics:

For related research and practice materials, see the following legal topics:

Energy & Utilities Law Transportation & Pipelines Eminent Domain Proceedings Real Property Law Eminent Domain Proceedings Valuation Real Property Law Inverse Condemnation General Overview Real Property Law Inverse Condemnation Remedies

* Practice Tips and revised instructions by Susan S. Azad, Esq., a litigation partner in the Los Angeles office of Latham & Watkins, LLP. She is a member of the firm's Distressed Credit Markets Advisory group and has litigated in a wide variety of substantive areas, including complex business litigation, securities litigation, intellectual property litigation, bankruptcy, health care and zoning litigation, and has extensive trial and appellate experience. Ms. Azad has deep expertise in takings law, and in particular, inverse condemnation and temporary regulatory takings. She was trial counsel in the *Cienega Gardens v. United States* cases, which set new federal law standards for temporary regulatory takings of income-producing property [see *Independence Park v. United States*, 62 Fed.Cl. 684 (Fed.Cl. 2004); *Cienega Gardens v. United States*, 38 Fed.Cl. 64 (Fed.Cl. 1997); *Cienega Gardens v. United States*, 331 F.3d 1319 (Fed.Cir. 2003); *Cienega Gardens v. United States*, (Fed.Cl. 2005); *Claremont Village Commons v. United States* (Fed. Cl. 2007)].



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California Forms of Jury Instruction

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CHAPTER 35A Matthew Bender Inverse Condemnation Instructions *
PART B. DAMAGES

5-35A California Forms of Jury Instruction MB 3500A.13

MB 3500A.13 Land With Improvements

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

If there are improvements on land that have been taken or damaged, you must determine the fair market value of the land and the improvements on it as a whole. You must not add the separate value of the improvements to the separate value of the land.

Authority: *Code Civ. Proc. § 1263.210* (eminent domain statute).

[2] Use of Instruction

This instruction should be given if the case involves land with improvements and a request for fair market value damages. If an alternative measure of damages is requested [see *MB 3500A.14* for instruction on alternative measures of damages], this instruction should not be given.

For related Judicial Council instructions, see [3][b], *below*.

[3] Comment

[a] Compensation for Improvements

This instruction is based on the rule that governs takings of land with improvements in eminent domain cases as stated in *Code Civ. Proc. § 1263.210(a)*, but should be equally applicable to inverse condemnation cases [see *City of Oakland v. Oakland Raiders* (1982) 32 Cal.3d 60, 67, 183 Cal.Rptr. 673, 646 P.2d 835 (eminent domain and inverse condemnation merely different manifestations of same governmental power, with correlative duties imposed on public

entities by same constitutional provisions); *Breidert v. Southern Pac. Co.* (1964) 61 Cal.2d 659, 663 n.1, 39 Cal.Rptr. 903, 394 P.2d 719 (principles affecting parties' rights in inverse condemnation action are generally same as in eminent domain); *Marshall v. Department of Water & Power* (1990) 219 Cal.App.3d 1124, 1138, 268 Cal.Rptr. 559 (quoting *Breidert*)). Its primary purpose is to prevent juror confusion in determining the correct measure of damages.

LexisNexis Matthew Bender Expert Practice Tip--Condition of Improvements: If improvements on the land have been damaged, but the damage is not reflected in a commensurate decline in fair market value of the parcel as a whole, use of the "fair market value" damages methodology will not optimize the plaintiff's recovery. Plaintiffs' counsel should consider using an alternative valuation methodology (such as cost of repair). Alternatively, if the plaintiff is proceeding under a fair market value damages theory, use of this instruction by defense counsel is necessary to prevent juror confusion as to the proper application of the decline in fair market value test. *By Susan S. Azad, Esq.*

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 35, *California Judicial Council Eminent Domain Instructions*]:

CACI 3506, Effect of Improvements

Legal Topics:

For related research and practice materials, see the following legal topics:

Constitutional Law Bill of Rights Fundamental Rights Eminent Domain & Takings Real Property Law Eminent Domain Proceedings Constitutional Limits & Rights Just Compensation Real Property Law Eminent Domain Proceedings Valuation Real Property Law Inverse Condemnation General Overview Real Property Law Inverse Condemnation Remedies

* Practice Tips and revised instructions by Susan S. Azad, Esq., a litigation partner in the Los Angeles office of Latham & Watkins, LLP. She is a member of the firm's Distressed Credit Markets Advisory group and has litigated in a wide variety of substantive areas, including complex business litigation, securities litigation, intellectual property litigation, bankruptcy, health care and zoning litigation, and has extensive trial and appellate experience. Ms. Azad has deep expertise in takings law, and in particular, inverse condemnation and temporary regulatory takings. She was trial counsel in the *Cienega Gardens v. United States* cases, which set new federal law standards for temporary regulatory takings of income-producing property [see *Independence Park v. United States*, 62 Fed.Cl. 684 (Fed.Cl. 2004); *Cienega Gardens v. United States*, 38 Fed.Cl. 64 (Fed.Cl. 1997); *Cienega Gardens v. United States*, 331 F.3d 1319 (Fed.Cir. 2003); *Cienega Gardens v. United States*, (Fed.Cl. 2005); *Claremont Village Commons v. United States* (Fed. Cl. 2007)].



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CHAPTER 35A Matthew Bender Inverse Condemnation Instructions *
PART B. DAMAGES

5-35A California Forms of Jury Instruction MB 3500A.14

MB 3500A.14 Alternative Measures of Damage

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

[CHOOSE FROM THE FOLLOWING (See Use of Instruction)]

The just compensation to which the property owner is entitled in this case is the cost to repair, replace, or restore Plaintiff's property.

[OR]

The just compensation to which the property owner is entitled in this case is the cost to relocate.

[OR]

The just compensation to which the property owner is entitled in this case is _____ [state other measure of damages].

Authorities: *Orme v. State of California ex rel. Dept. Water Resources* (1978) 83 Cal.App.3d 178, 182-184, 147 Cal.Rptr. 735 ; *Pacific Gas & Elec. Co. v. County of Ventura* (1965) 233 Cal.App.2d 268, 274, 43 Cal.Rptr. 450 ; *Frustuck v. Fairfax* (1963) 212 Cal.App.2d 345, 365-367, 28 Cal.Rptr. 357 .

[2] Use of Instruction

This instruction should be used whenever the other instructions in this chapter do not apply or do not provide a logical or equitable measure of damages. Counsel should select the desired theory of damages from the alternatives offered in the instruction.

[3] Comment

Several cases have used a measure of damages other than fair market value in inverse condemnation actions. The leading case is *Frustruck v. City of Fairfax*, where the plaintiff sought recovery in inverse condemnation from the City of Fairfax for property damage caused by an alleged increase in drainage water discharged on her property. Both the trial court and the appellate court found that the City's construction of a larger culvert and its enlargement of a surface ditch constituted a compensable taking, but they disagreed on the sufficiency of the evidence and the applicable measure of damages. The appellate court reversed the trial court's \$5,000 award on the ground that the plaintiff did not offer evidence proving that her property values had been decreased, and on the ground that there was no evidence to support an award for future works allegedly needed to control the increased flows [*Frustruck v. Fairfax* (1963) 212 Cal.App.2d 345, 365-367, 28 Cal.Rptr. 357].

In reaching its conclusion, the appellate court restated the rules regarding alternative, that is, nonmarket-value, measures of damages in inverse condemnation cases. "Ordinarily, the recognized measure of damages in cases such as this is the difference in the value of the real property immediately before and after the injury. This method, however, is not exclusive." The court accordingly recognized that, "where appropriate to a particular situation," the measure of damages may be based on the following: the cost of making repairs; the loss of use of the property; lost profits; loss of prospective profits; increased operating expenses pending repairs; all of the detriment proximately caused by the injury "as in other tort actions"; and "present and prospective damages that are the natural, necessary or reasonable incident of the taking of property" [*Frustruck v. Fairfax* (1963) 212 Cal.App.2d 345, 28 Cal.Rptr. 357].

LexisNexis Matthew Bender Expert Practice Tip--Income-Producing Property: This instruction should be used when there has been injury to income-producing property such as the temporary disruption of an on-going business--an injury that would cause significant pecuniary damage but would not be reflected in a change in market value of the property. By Susan S. Azad, Esq.

A close reading of the cases cited by the court in *Frustruck* in support of these alternative measures of damages reveals the court's confusion of tort and inverse condemnation principles in its analysis of damages rules in inverse condemnation cases [see, e.g., *Natural Soda Prod. Co. v. City of L.A.* (1943) 23 Cal.2d 193, 199-201, 143 P.2d 12] . In *Natural Soda*, the court was unclear as to whether the action was one for inverse condemnation or tort. More often than not, the court refers to the underlying action as one in tort. In any case, the court in *Natural Soda* frequently relied on tort cases in its analysis of potential remedies [see, e.g., *Linforth v. S.F. Gas & Electric Co.* (1909) 156 Cal. 58, 103 P. 320 ; *Higgins v. L.A. Gas & Electric Co.* (1911) 159 Cal. 651, 115 P. 313]. Similar confusion of tort and inverse condemnation damage rules appears in other cases cited in *Frustruck* [see, e.g., *Inyo Chemical Co. v. City of Los Angeles* (1936) 5 Cal.2d 525, 55 P.2d 850].

However, despite its melding of tort and inverse condemnation damages rules, *Frustruck* has been cited by numerous subsequent inverse condemnation cases to support the use of non-market-value measures of damage [see, e.g., *Pacific Gas & Elec. Co. v. County of Ventura* (1965) 233 Cal.App.2d 268, 274, 43 Cal.Rptr. 450 (cost to relocate pipeline was proper measure of damages, citing *Frustruck*)]. Other cases have approved nonmarket-value measures of damage without citing *Frustruck* [see, e.g., *Kong v. City of Hawaiian Gardens Redevelopment Agency* (2002) 108 Cal.App.4th 1028, 1043, 134 Cal.Rptr.2d 260 (subtenant who was required to move his business to location with substantially higher rent could be compensated for loss of old location with cheaper rent); *Orme v. State of California ex rel. Dept. Water Resources* (1978) 83 Cal.App.3d 178, 182-184, 147 Cal.Rptr. 735 (plaintiff sought lost profits on crops, loss of rents, and cost of restoring damaged farm land) (dictum); *Sacramento & San Joaquin Drainage Dist. v. Goehring* (1970) 13 Cal.App.3d 58, 66-68, 91 Cal.Rptr. 375 (cost to repair roadway awarded as separate item of damages unrelated to

diminution in fair market value)]. The use of nonmarket-value measures of damages is consistent with *Albers v. County of Los Angeles* [*Albers v. County of Los Angeles* (1965) 62 Cal.2d 250, 42 Cal.Rptr. 89, 398 P.2d 129 ; see also *CUNA Mutual Life Insurance Co. v. Los Angeles County Metropolitan Transportation Authority* (2003) 108 Cal.App.4th 382, 393, 133 Cal.Rptr.2d 470], which held that mitigation expenses were a recoverable item of damages [see MB 3500A.19 for instruction on mitigation]. In reaching its conclusion, the California Supreme Court stated that the concept of "just compensation" is broad and necessarily serves "primarily as a point of departure for a case-by-case development of the law governing recovery for direct and inverse condemnation" [*Albers v. County of Los Angeles* (1965) 62 Cal.2d 250, 269, 42 Cal.Rptr. 89, 398 P.2d 129].

On the other hand, a court of appeal rejected the notion that inverse condemnation damages may properly be measured by the cost of repair. The court held that an instruction on the cost of repair was erroneous and that the error was prejudicial [*Housley v. City of Poway* (1993) 20 Cal.App.4th 801, 807-811, 24 Cal.Rptr.2d 554].

Legal Topics:

For related research and practice materials, see the following legal topics:

Energy & Utilities Law Transportation & Pipelines Eminent Domain Proceedings Real Property Law Eminent Domain Proceedings Valuation Real Property Law Inverse Condemnation General Overview Real Property Law Inverse Condemnation Remedies

* Practice Tips and revised instructions by Susan S. Azad, Esq., a litigation partner in the Los Angeles office of Latham & Watkins, LLP. She is a member of the firm's Distressed Credit Markets Advisory group and has litigated in a wide variety of substantive areas, including complex business litigation, securities litigation, intellectual property litigation, bankruptcy, health care and zoning litigation, and has extensive trial and appellate experience. Ms. Azad has deep expertise in takings law, and in particular, inverse condemnation and temporary regulatory takings. She was trial counsel in the *Cienega Gardens v. United States* cases, which set new federal law standards for temporary regulatory takings of income-producing property [see *Independence Park v. United States*, 62 Fed.Cl. 684 (Fed.Cl. 2004); *Cienega Gardens v. United States*, 38 Fed.Cl. 64 (Fed.Cl. 1997); *Cienega Gardens v. United States*, 331 F.3d 1319 (Fed.Cir. 2003); *Cienega Gardens v. United States*, (Fed.Cl. 2005); *Claremont Village Commons v. United States* (Fed. Cl. 2007)].



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CHAPTER 35A Matthew Bender Inverse Condemnation Instructions *
PART B. DAMAGES

5-35A California Forms of Jury Instruction MB 3500A.15

MB 3500A.15 Unreasonable Delay/Loss of Use

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Plaintiff is entitled to just compensation if Defendant _____ [unreasonably delays in the commencement of an eminent domain action to acquire property that it has announced an intention to condemn or specify other improper action]. I have determined that Defendant is liable to Plaintiff for _____ [unreasonably delaying the direct condemnation of the property or describe other improper action]. Plaintiff is therefore entitled to just compensation for the harm suffered by _____ [specify property at issue] during the period of _____ [unreasonable delay or describe other improper action], which I have determined is from _____ to _____ [insert dates as determined by court].

[EITHER (See Use of Instruction)]

To determine the amount of this just compensation, you must include in your verdict the amount of Plaintiff's loss of rental income from the property, if any, due to the _____ [unreasonable delay or specify other improper action].

[OR]

To determine the amount of this just compensation, you must include in your verdict the additional amount, if any, that the property would have been worth on the date of valuation but for the _____ [unreasonable delay or specify other improper action].

[OPTIONAL (See Use of Instruction)]

To determine the amount of this just compensation, you may not include in your verdict the additional expenses, if any, that plaintiff incurred in purchasing and maintaining a new location for plaintiff's ongoing business, in order to reduce an expected loss of goodwill when the existing location is condemned.

Authorities: *Klopping v. City of Whittier* (1972) 8 Cal.3d 39, 51-53, 104 Cal.Rptr. 1, 500 P.2d 1345 ; *Barthelemy v. Orange County Flood Control District* (1998) 65 Cal.App.4th 558, 561, 76 Cal.Rptr.2d 575 ; *Taper v. City of Long Beach* (1982) 129 Cal.App.3d 590, 610, 181 Cal.Rptr. 169 ; *Stone v. City of Los Angeles* (1975) 51 Cal.App.3d 987, 990-994, 124 Cal.Rptr. 822 .

[2] Use of Instruction

This instruction should be used whenever there is a claim for unreasonable precondemnation delay or other unreasonable or improper condemnation conduct. It is based on the holding in *Klopping v. City of Whittier* [*Klopping v. City of Whittier* (1972) 8 Cal.3d 39, 51-53, 104 Cal.Rptr. 1, 500 P.2d 1345 ; see [3][a], below]. The issue of the amount of damages is submitted to the jury only if the court finds that the public entity acted unreasonably or improperly [*City of Ripon v. Sweetin* (2002) 100 Cal.App.4th 887, 897, 122 Cal.Rptr.2d 802].

The instruction offers two options for stating the measure of damages. This is because there is some ambiguity in *Klopping* as to whether lost rents is intended as a separate item of damages or is merely to be used as a measure of the diminution of the property's market value [see [3][a], below].

LexisNexis Matthew Bender Expert Practice Tip--Use of Alternatives: Use the first alternative "lost rental income" when the unreasonable delay affects income-generating property. Use the second alternative "pre-condemnation reduction in market value" when the property does not generate income. By Susan S. Azad, Esq.

The instruction contains an optional provision based on the holding in *Barthelemy v. Orange County Flood Control District* that expenses incurred in purchasing and maintaining a new location for an ongoing business for the purpose of mitigating an anticipated loss of goodwill when the existing business is condemned, are not recoverable *Klopping* damages if the public entity's conduct did not go beyond designation of the property for possible acquisition [*Barthelemy v. Orange County Flood Control District* (1998) 65 Cal.App.4th 558, 570-572, 76 Cal.Rptr.2d 575].

LexisNexis Matthew Bender Expert Practice Tip--Loss of Goodwill: The optional part of this instruction should be used when a plaintiff seeks mitigation damages for loss of goodwill if there is evidence the affected business could have continued to operate at the site unaffected by the condemnation. However, there may be circumstances in which mitigation for loss of business goodwill is recoverable in the pre-condemnation context. In such circumstances, the plaintiff must show that the probable condemner (1) acted affirmatively to lower the value of the landowner's property; (2) physically burdened the property; or (3) decreased the income the property produced [*Barthelemy v. Orange County Flood Control Dist.* (1998) 65 Cal.App.4th 558, 565, 76 Cal.Rptr.2d 575]. Second, the party must show that it cannot continue to operate its business unaffected by the possible condemnation. Once both of these factors are satisfied, it must also show that its mitigation to avoid loss of business goodwill is reasonable [*Barthelemy v. Orange County Flood Control Dist.* (1998) 65 Cal.App.4th 558, 571-573, 76 Cal.Rptr.2d 575]. If all of these parameters are met, *Klopping* damages for mitigation of pre-condemnation loss of business goodwill could likely be awarded under *Barthelemy*. By Susan S. Azad, Esq.

The number of cases involving *Klopping* awards has diminished since the subsequent enactment of the Eminent Domain

Law [*Code Civ. Proc.* §§ 1230.010-1273.050; see Stats. 1975, ch. 1275 (enactment of Eminent Domain Law)], because of *Code Civ. Proc.* § 1245.260. If an eminent domain proceeding is not filed within six months after the adoption of a resolution of necessity, *Code Civ. Proc.* § 1245.260 provides that the property owner may bring an action in inverse condemnation to force the public entity to take the property and pay compensation for it, to recover damages for interference with possession or use, or both.

For related Judicial Council instructions, see [3][c], *below*.

[3] Comment

[a] Damages for Excessive Delay

In *Klopping v. City of Whittier* [*Klopping v. City of Whittier* (1972) 8 Cal.3d 39, 51-52, 104 Cal.Rptr. 1, 500 P.2d 1345], the California Supreme Court held that a property owner is entitled to just compensation for the harm to property when a public entity is guilty of unreasonable precondemnation conduct "either by excessively delaying eminent domain action or by other oppressive conduct." It is not entirely clear from the opinion in *Klopping* whether lost rents are recoverable in themselves or are to be used merely as a measure of the loss in fair market value [*Klopping v. City of Whittier* (1972) 8 Cal.3d 39, 53, 104 Cal.Rptr. 1, 500 P.2d 1345]:

On the date on which an announcement of future intent to condemn is made, the market value may properly be measured by the anticipated rental income to be received throughout the lifetime of the property. If as a result of precondemnation statements rental income is lost, the anticipated rental income would be diminished and a decline in the fair market value would follow.

LexisNexis Matthew Bender Expert Practice Tip--Damages for Unreasonable Delay Are in Addition to Other Damages: The compensation due for unreasonable delay is in addition to compensation for the taking itself. Hence, when income-generating property has been specially damaged due to improper or unreasonable pre-condemnation conduct, the measure of the compensable pre-condemnation loss may be calculated by lost rents or lost income over the delay period. The valuation of the property for purposes of just compensation (a separate measure of compensation) would not include pre-condemnation damages. *By Susan S. Azad, Esq.*

According to one case, loss rental was the measure of damages in *Klopping* because, in that instance, it was "an improved method of measuring a *decline in market value*" [*City of Ripon v. Sweetin* (2002) 100 Cal.App.4th 887, 896, 122 Cal.Rptr.2d 802 (emphasis in original)].

The above passage suggests that any finding regarding lost rents must be tied to testimony concerning diminution in fair market value and that the way to establish this tie is through opinion testimony on locally accepted capitalization rates and the anticipated lifespan of the property.

In *Taper v. City of Long Beach* [*Taper v. City of Long Beach* (1982) 129 Cal.App.3d 590, 610, 181 Cal.Rptr. 169], the court of appeal stated that for a taking or damaging that resulted from the city's "unreasonable delay and other oppressive precondemnation conduct," the plaintiffs were "entitled to recover damages for any diminution in the market value of the property attributable to City's unreasonable conduct, which diminution in value may, of course, be measured by the loss of the reasonable value of the use of the property." However, in *Stone v. City of Los Angeles* [*Stone v. City of Los Angeles* (1975) 51 Cal.App.3d 987, 990-994, 124 Cal.Rptr. 822], the plaintiff was awarded \$150,000 for "loss of use based upon claimed lost rental value" on its inverse condemnation claim, while also receiving over \$2,000,000 for the fair market value of its property as the cross-defendant on the city's eminent domain cross-complaint.

LexisNexis Matthew Bender Expert Practice Tip--Jurors Must Calculate Both Kinds of Damages:

Explain to the jurors that pre-condemnation damages are in addition to the just compensation damages calculated on the date of the taking. Hence, the jurors should calculate both the special losses directly caused by improper or unreasonable pre-condemnation conduct as well as any loss cause by the taking itself (if a condemnation occurred) on the date of the taking. *By Susan S. Azad, Esq.*

However, a delay in a governmental process other than an eminent domain action will not necessarily constitute a taking of property. For example, a legally erroneous decision of a government agency during the development approval process that results in delay does not by itself amount to a taking of property, even if the error diminishes the property's value, as long as there is an objective, sufficient connection between the land use regulation in question and a legitimate governmental purpose [see, e.g., *Landgate, Inc. v. California Coastal Com. (1998) 17 Cal.4th 1006, 1010, 1022, 73 Cal.Rptr.2d 841, 953 P.2d 1188* (inverse condemnation proceeding brought against Coastal Commission due to two-year delay in issuance of building permit); see also *Buckley v. California Coastal Commission (1998) 68 Cal.App.4th 178, 201, 80 Cal.Rptr.2d 562* (following *Landgate* and finding Commission's issuance of stop-work orders did not constitute permanent or temporary taking)].

[b] Mitigating Anticipated Loss of Goodwill

In *Barthelemy v. Orange County Flood Control District*, the court of appeal held in a matter of first impression that precondemnation damages recoverable under *Klopping* do not include expenses incurred in purchasing and maintaining a new location for an ongoing business for the purpose of mitigating an anticipated loss of goodwill when the existing business is condemned, if the public entity did nothing to interfere with plaintiff's profitable use of the property [*Barthelemy v. Orange County Flood Control Dist. (1998) 65 Cal.App.4th 558, 561, 76 Cal.Rptr.2d 575*]. The court stated that actionable injury under *Klopping* must go beyond the unavoidable consequences of an agency's designation of property for possible acquisition [*Barthelemy v. Orange County Flood Control Dist. (1998) 65 Cal.App.4th 558, 570-571, 76 Cal.Rptr.2d 575*]. Otherwise, a landowner would be entitled to take whatever actions it deemed necessary to relocate its operations at public expense, without any assurance that the public entity would actually acquire the original property [*Barthelemy v. Orange County Flood Control Dist. (1998) 65 Cal.App.4th 558, 571-572, 76 Cal.Rptr.2d 575*]. Furthermore, those relocation expenses are not compensable as loss of goodwill under *Code Civ. Proc. § 1263.510* [see *MB 3500A.04*], because § 1263.510 does not authorize recovery without an actual taking of property [*Barthelemy v. Orange County Flood Control Dist. (1998) 65 Cal.App.4th 558, 569, 76 Cal.Rptr.2d 575* ; see *Langer v. Redevelopment Agency of City of Santa Cruz (1999) 71 Cal.App.4th 998, 1008-1010, 84 Cal.Rptr.2d 19* (*Code Civ. Proc. § 1263.510* inapplicable when alleged losses were consequence of landlord's termination of month-to-month tenancies, with no taking or substantial equivalent by redevelopment agency)].

[c] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 35, *California Judicial Council Eminent Domain Instructions*]:

CACI 3509, Precondemnation Damages (Klopping Damages)

Legal Topics:

For related research and practice materials, see the following legal topics:

Environmental Law
Zoning & Land Use
Eminent Domain Proceedings
Real Property Law
Eminent Domain Proceedings
Constitutional Limits & Rights
Just Compensation
Real Property Law
Eminent Domain Proceedings
Valuation
Real Property Law
Inverse Condemnation
General Overview

* Practice Tips and revised instructions by Susan S. Azad, Esq., a litigation partner in the Los Angeles office of Latham & Watkins, LLP. She is a member of the firm's Distressed Credit Markets Advisory group and has litigated in a wide variety of substantive areas, including complex business litigation, securities litigation, intellectual property litigation,

bankruptcy, health care and zoning litigation, and has extensive trial and appellate experience. Ms. Azad has deep expertise in takings law, and in particular, inverse condemnation and temporary regulatory takings. She was trial counsel in the *Cienega Gardens v. United States* cases, which set new federal law standards for temporary regulatory takings of income-producing property [see *Independence Park v. United States*, 62 *Fed.Cl.* 684 (*Fed.Cl.* 2004); *Cienega Gardens v. United States*, 38 *Fed.Cl.* 64 (*Fed.Cl.* 1997); *Cienega Gardens v. United States*, 331 *F.3d* 1319 (*Fed.Cir.* 2003); *Cienega Gardens v. United States*, (Fed.Cl. 2005); *Claremont Village Commons v. United States* (Fed. Cl. 2007)].



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CHAPTER 35A Matthew Bender Inverse Condemnation Instructions *
PART B. DAMAGES

5-35A California Forms of Jury Instruction MB 3500A.16

MB 3500A.16 Loss of Access

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Plaintiff has a right to reasonable access to [his/her/its] property. This includes the right to enter and leave the property by foot or by vehicle and the right to receive air and light from the adjacent street.

I have determined that Plaintiff's right of access has been impaired by _____ [specify improvement at issue] and that Defendant must pay just compensation for this impairment of access. The just compensation to which Plaintiff is entitled is the difference, if any, between the property's fair market value immediately before the loss of access and the property's fair market value immediately after the loss of access.

[OPTIONAL (See Use of Instruction)]

This impairment of access should be considered in determining the amount of severance damages, if any.

Authorities: *City of Los Angeles v. Ricards* (1973) 10 Cal.3d 385, 387-388, 110 Cal.Rptr. 489, 515 P.2d 585 ; *Breidert v. Southern Pac. Co.* (1964) 61 Cal.2d 659, 663-664, 667, 39 Cal.Rptr. 903, 394 P.2d 719 ; *Bacich v. Board of Control* (1943) 23 Cal.2d 343, 349-350, 144 P.2d 818 ; *Rose v. State of California* (1942) 19 Cal.2d 713, 727-728, 740-743, 123 P.2d 505 .

[2] Use of Instruction

This instruction should be used to explain the landowner's right to compensation for loss of access to his or her property. During periods of rapid construction of freeways, loss of access cases were quite common. Although the

number of these cases has diminished, loss of access remains a potential issue in inverse condemnation actions.

LexisNexis Matthew Bender Expert Practice Tip--Use in Cases of Complete Loss of Access: This instruction is limited to cases of impairment to real property access rights caused by public improvements. For example, if a public works project eliminates all reasonable means of ingress and egress to the property, this instruction should be used. *By Susan S. Azad, Esq.*

If severance damages are at issue, the optional paragraph should be added, and this instruction should be given with the instruction in Ch. 35, *California Judicial Council Eminent Domain Instructions, CACI 3511*.

[3] Comment

[a] Easement of Access

The rights of a landowner include an easement of access in the adjoining public streets. This includes the right of ingress and egress to and from the owner's land and the right to light and air [*Breidert v. Southern Pac. Co.* (1964) 61 Cal.2d 659, 663-664, 39 Cal.Rptr. 903, 394 P.2d 719 ; *Bacich v. Board of Control* (1943) 23 Cal.2d 343, 349-350, 144 P.2d 818 ; *Rose v. State of California* (1942) 19 Cal.2d 713, 727-728, 123 P.2d 505 ; see California Real Estate Law and Practice, Ch. 512, *Compensation*, § 512.32 (Matthew Bender)]. If this right of access is substantially impaired by a government entity, the landowner is entitled to compensation for that impairment [*City of Los Angeles v. Ricards* (1973) 10 Cal.3d 385, 388, 110 Cal.Rptr. 489, 515 P.2d 585 ; *Breidert v. Southern Pac. Co.* (1964) 61 Cal.2d 659, 663-664, 39 Cal.Rptr. 903, 394 P.2d 719]. Whether the right of access has been substantially impaired is a question of law for the court. If there is substantial impairment, the degree of impairment and the amount of damages, if any, are questions for the trier of fact [*Breidert v. Southern Pac. Co.* (1964) 61 Cal.2d 659, 664, 39 Cal.Rptr. 903, 394 P.2d 719 ; see California Real Estate Law and Practice, Ch. 512, *Compensation*, § 512.32[1] (Matthew Bender)].

LexisNexis Matthew Bender Expert Practice Tip--Calculating Loss in Expected Income Stream:

Although a property owner is not entitled to just compensation for lost profits or business goodwill caused by the ordinary effects of a public project not uniquely burdensome to one particular parcel (the rerouting of street traffic, for example), it is conceivable that access to a parcel could be impaired to such a degree that a business operated on the property can no longer operate (or is substantially diminished). If the business cannot be relocated, to be made whole, the capitalized loss in the expected income stream over the life of the business (which reflects the loss in the market value of the business) should be included as part of the diminution in market value computation. *By Susan S. Azad, Esq.*

The landowner is entitled to be compensated for the resulting depreciation in value of the property rendered inaccessible [*City of Los Angeles v. Ricards* (1973) 10 Cal.3d 385, 388, 110 Cal.Rptr. 489, 515 P.2d 585]. Evidence of lost business profits, loss of goodwill, and decreased value due to changes in traffic patterns generally is not permitted [*Breidert v. Southern Pac. Co.* (1964) 61 Cal.2d 659, 667, 39 Cal.Rptr. 903, 394 P.2d 719 ; *Rose v. State of California* (1942) 19 Cal.2d 713, 740-743, 123 P.2d 505].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 35, *California Judicial Council Eminent Domain Instructions*]:

CACI 3511, Severance Damages

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property Law Eminent Domain Proceedings Valuation Real Property Law Inverse Condemnation Remedies Real Property Law Limited Use Rights Easements General Overview Real Property Law Limited Use Rights Easements Public

Easements

* Practice Tips and revised instructions by Susan S. Azad, Esq., a litigation partner in the Los Angeles office of Latham & Watkins, LLP. She is a member of the firm's Distressed Credit Markets Advisory group and has litigated in a wide variety of substantive areas, including complex business litigation, securities litigation, intellectual property litigation, bankruptcy, health care and zoning litigation, and has extensive trial and appellate experience. Ms. Azad has deep expertise in takings law, and in particular, inverse condemnation and temporary regulatory takings. She was trial counsel in the *Cienega Gardens v. United States* cases, which set new federal law standards for temporary regulatory takings of income-producing property [see *Independence Park v. United States*, 62 Fed.Cl. 684 (Fed.Cl. 2004); *Cienega Gardens v. United States*, 38 Fed.Cl. 64 (Fed.Cl. 1997); *Cienega Gardens v. United States*, 331 F.3d 1319 (Fed.Cir. 2003); *Cienega Gardens v. United States*, (Fed.Cl. 2005); *Claremont Village Commons v. United States* (Fed. Cl. 2007)].



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CHAPTER 35A Matthew Bender Inverse Condemnation Instructions *
PART B. DAMAGES

5-35A California Forms of Jury Instruction MB 3500A.17

MB 3500A.17 Loss of Personal Property

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Personal property that is taken or damaged as a result of a public use may be the subject of an inverse condemnation action. In this case I have determined that Defendant is liable under this theory for damage done to Plaintiff's personal property. The just compensation to which Plaintiff is entitled is measured by the market to which the Plaintiff would have to resort to replace the damaged or destroyed goods.

[CHOOSE ONE OF THE FOLLOWING (See Use of Instruction)]

Thus, Plaintiff, as a consumer, can recover the retail price.

[OR]

Thus, Plaintiff, as a [distributor/retailer], can recover the wholesale price.

[OR]

Thus, Plaintiff, as a manufacturer, can recover the selling price.

Authorities: *People ex rel. Dept. of Transportation v. Clauser/Wells Partnership* (2002) 95 Cal.App.4th 1066, 1082,

116 Cal.Rptr.2d 240 ; *McMahan's of Santa Monica v. City of Santa Monica* (1983) 146 Cal.App.3d 683, 700-701, 194 Cal.Rptr. 582 .

[2] Use of Instruction

This instruction should be used to instruct the jury on the just compensation available for the taking or damaging of personal property. This instruction should conclude with one of the alternative final paragraphs, to be chosen according to whether the plaintiff is a consumer, a retailer or distributor, or a seller. If the plaintiff is a retailer or distributor, it may be helpful to add an instruction defining "wholesale" price as being the same as replacement cost [see *McMahan's of Santa Monica v. City of Santa Monica* (1983) 146 Cal.App.3d 683, 701, 194 Cal.Rptr. 582]. However, when there is no single price throughout the particular industry, other methodologies may be used to determine the "wholesale" price [*People ex rel. Dept. of Transportation v. Clauser/Wells Partnership* (2002) 95 Cal.App.4th 1066, 1082, 116 Cal.Rptr.2d 240].

LexisNexis Matthew Bender Expert Practice Tip--Measuring Compensation for Personal

Property: Personal property may also include contractual rights taken by governmental regulation. In such a case, the measure of just compensation is the difference between the value to the owner of the contractual right before and after the taking. Such a measure might include lost income or profits. *By Susan S. Azad, Esq.*

For related Judicial Council instructions, see [3][b], *below*.

[3] Comment

[a] Right to Compensation for Personal Property

The right to just compensation applies to personal as well as real property [*People ex rel. Dept. of Transportation v. Clauser/Wells Partnership* (2002) 95 Cal.App.4th 1066, 1069, 116 Cal.Rptr.2d 240 ; *Griswold v. City of Needles* (1992) 6 Cal.App.4th 1881, 1888, 1891, 8 Cal.Rptr.2d 753 ; *McMahan's of Santa Monica v. City of Santa Monica* (1983) 146 Cal.App.3d 683, 700, 194 Cal.Rptr. 582 ; *Sutfin v. State of California* (1968) 261 Cal.App.2d 50, 67 Cal.Rptr. 665]. This instruction is based on the language of the Restatement of Torts, § 911, comment d, which the court adopted in *McMahan's of Santa Monica v. City of Santa Monica* [*McMahan's of Santa Monica v. City of Santa Monica* (1983) 146 Cal.App.3d 683, 700-701, 194 Cal.Rptr. 582].

LexisNexis Matthew Bender Expert Practice Tip--Each Case Is Different: Because the *Just Compensation Clause* of the California Constitution requires that the property owner be "made whole," the same item may warrant more or less "just compensation" depending on the plaintiff's circumstances. In this regard, it is important to keep in mind that each case will be decided on its own unique facts. Your instructions to the jury should reflect the unique facts and circumstances of your case using the underlying legal principles as a guide. *By Susan S. Azad, Esq.*

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 35, *California Judicial Council Eminent Domain Instructions*]:

CACI 3507, Personal Property and Inventory

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Eminent Domain Proceedings General Overview Real Property Law Eminent Domain Proceedings Procedure Real Property Law Inverse Condemnation Remedies

* Practice Tips and revised instructions by Susan S. Azad, Esq., a litigation partner in the Los Angeles office of Latham & Watkins, LLP. She is a member of the firm's Distressed Credit Markets Advisory group and has litigated in a wide variety of substantive areas, including complex business litigation, securities litigation, intellectual property litigation, bankruptcy, health care and zoning litigation, and has extensive trial and appellate experience. Ms. Azad has deep expertise in takings law, and in particular, inverse condemnation and temporary regulatory takings. She was trial counsel in the *Cienega Gardens v. United States* cases, which set new federal law standards for temporary regulatory takings of income-producing property [see *Independence Park v. United States*, 62 *Fed.Cl.* 684 (*Fed.Cl.* 2004); *Cienega Gardens v. United States*, 38 *Fed.Cl.* 64 (*Fed.Cl.* 1997); *Cienega Gardens v. United States*, 331 *F.3d* 1319 (*Fed.Cir.* 2003); *Cienega Gardens v. United States*, (Fed.Cl. 2005); *Claremont Village Commons v. United States* (Fed. Cl. 2007)].



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CHAPTER 35A Matthew Bender Inverse Condemnation Instructions *
PART B. DAMAGES

5-35A California Forms of Jury Instruction MB 3500A.18

MB 3500A.18 Speculative Damages Not Permitted

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Whatever damages you award, if any, must not be speculative, remote, imaginary, contingent, or merely possible.

[*OPTIONAL (See Use of Instruction)*]

With regard to any damages you may award for future loss or harm, they must be based on your determination that such damages are reasonably certain to occur as a result of the taking or damaging in this action and not due to some contingent or extraneous force.

Authority: *Frustuck v. City of Fairfax* (1963) 212 Cal.App.2d 345, 367-368, 28 Cal.Rptr. 357.

[2] Use of Instruction

This instruction should be used to explain that the jury is not to award speculative damages. The optional second paragraph should be used if there are allegations of future harm.

LexisNexis Matthew Bender Expert Practice Tip--General Prohibition on Speculative Damages:

This instruction is reflective of the contract damages rule prohibiting speculative damages and the concept of proximate cause in the tort context. As a general rule, ordinary contract and tort damages principles will guide damages analyses under inverse condemnation law, although the applications of those principles may be different in some instances. *By Susan S. Azad, Esq.*

LexisNexis Matthew Bender Expert Practice Tip--Use for Lost Profits or Lost Goodwill: This instruction should be used when a plaintiff is seeking lost profits or lost goodwill from a business venture that may not have an adequate track record to support future revenue projections. *By Susan S. Azad, Esq.*

[3] Comment

This instruction is based on the language of *Frustruck v. City of Fairfax*. In that case, the plaintiff claimed that her property was damaged by an increase in water flow caused by an improvement built by the city. The court of appeal reversed the trial court's award of damages on the grounds that there was no proper evidence of probable future harm due to the increased water flow, thus leaving the matter of damages, if any, to speculation and conjecture [*Frustruck v. Fairfax* (1963) 212 Cal.App.2d 345, 367-368, 28 Cal.Rptr. 357].

LexisNexis Matthew Bender Expert Practice Tip--Claims of Lost Future Income: Plaintiffs seeking lost future income (or loss in market value of a business based on capitalized income projections) are advised to make the most conservative income projections feasible, otherwise, the plaintiff risks a finding that future damages are too remote and speculative to be included as just compensation. *By Susan S. Azad, Esq.*

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions General Overview Civil Procedure Eminent Domain Proceedings General Overview Real Property Law Inverse Condemnation Remedies

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CHAPTER 35A Matthew Bender Inverse Condemnation Instructions *
PART B. DAMAGES

5-35A California Forms of Jury Instruction MB 3500A.19

MB 3500A.19 Duty to Mitigate; Expenses of Mitigation

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

An owner whose property is being taken or damaged by a public use is under a duty to take all reasonable steps available to minimize [his/her/its] loss. Expenses that the owner reasonably and in good faith incurs in an effort to minimize [his/her/its] loss are to be taken into account in computing the just compensation awarded to the owner.

Therefore, you may award to Plaintiff not only _____ [specify applicable measure of damages, e.g., the fair market value of the property] but also any mitigation expenses reasonably and in good faith incurred by Plaintiff in [his/her/its] efforts to prevent or lessen the damage to the property. The fact that Plaintiff's efforts to prevent further damage failed is irrelevant--the mitigation expenses are still recoverable if incurred reasonably and in good faith.

Authorities: *Albers v. County of Los Angeles* (1965) 62 Cal.2d 250, 269-272, 42 Cal.Rptr. 89, 398 P.2d 129 ; *CUNA Mutual Life Ins. Co. v. Los Angeles County Metropolitan Transportation Authority* (2003) 108 Cal.App.4th 382, 392, 133 Cal.Rptr.2d 470 .

[2] Use of Instruction

This instruction should be used to explain the landowner's duty to mitigate damages and the landowner's right to recover reasonable mitigation expenses. Because there is a dispute as to whether mitigation expenses are a separate item of damages or merely an item to be placed on the debit side in computing the fair market value of the property after the taking [see [3], below], it may be advisable to combine this instruction with a special verdict form specifically addressing mitigation expenses.

[3] Comment

This instruction is based on the holding in *Albers v. County of Los Angeles*, an inverse condemnation case. In *Albers*, the California Supreme Court held that, in addition to compensation for the diminution in market value of the property, the plaintiffs had a right to recover mitigation expenses: "Where expenses have been so incurred, an instruction declaring the difference in market value to be the measure of damages, but omitting any reference to such expenses as a part of the damages, is properly refused" [*Albers v. County of Los Angeles* (1965) 62 Cal.2d 250, 269-270, 42 Cal.Rptr. 89, 398 P.2d 129 , quoting *Kane v. City of Chicago* (1945) 392 Ill. 172, 64 N.E.2d 506]. The recoverable mitigation expenses in *Albers* included fees spent on geologists, soils analysts, and foundation engineers, as well as money spent on drilling test holes and constructing temporary stabilizing caissons [*Albers v. County of Los Angeles* (1965) 62 Cal.2d 250, 268, 42 Cal.Rptr. 89, 398 P.2d 129]. Whether the mitigation efforts are successful is irrelevant as long as the expenditures are made in good faith and are reasonable in amount [*Albers v. County of Los Angeles* (1965) 62 Cal.2d 250, 272, 42 Cal.Rptr. 89, 398 P.2d 129]. A landowner is not required to show that "but for" the mitigation efforts, the property in fact would have been damaged [*CUNA Mutual Life Ins. Co. v. Los Angeles County Metropolitan Transportation Authority* (2003) 108 Cal.App.4th 382, 393-396, 133 Cal.Rptr.2d 470].

LexisNexis Matthew Bender Expert Practice Tip--Plaintiff Must Make Reasonable Attempt at

Mitigation: Emphasize to the jury that the question before them is whether the attempt at mitigation was reasonable under the circumstances and not whether the mitigation was successful. The plaintiff has a duty to take reasonable steps to attempt to mitigate its losses. There will be circumstances in which reasonable mitigation attempts actually cause an increase in the total loss incurred by the plaintiff. As long as plaintiff's actions to mitigate the loss were reasonable, plaintiff is entitled to recover the cost of the mitigation. By Susan S. Azad, Esq.

According to dictum in the *Albers* decision, mitigation expenses may be calculated as a separate item of damages or placed on the debit side in computing the fair market value of the property after the taking [*Albers v. County of Los Angeles* (1965) 62 Cal.2d 250, 273, 42 Cal.Rptr. 89, 398 P.2d 129]. Treating mitigation expenses as a separate item of damages, as in [1], above, probably minimizes juror confusion.

According to one case, mitigation expenses must be distinguished from non-recoverable expenses incurred to prevent or lessen the taking at the outset. The court therefore held that legal and expert expenses incurred trying to compel adherence to an environmental impact report were not recoverable. The court reasoned that these expenses were incurred to prevent or alter the nature of the taking and that they were therefore not expenses incurred to mitigate the damage caused by the taking [*Placer County Water Agency v. Hofman* (1985) 165 Cal.App.3d 890, 897, 211 Cal.Rptr. 894].

Legal Topics:

For related research and practice materials, see the following legal topics:

Environmental Law Zoning & Land Use Eminent Domain Proceedings Real Property Law Inverse Condemnation General Overview Real Property Law Inverse Condemnation Remedies

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CHAPTER 35A Matthew Bender Inverse Condemnation Instructions *
PART B. DAMAGES

5-35A California Forms of Jury Instruction MB 3500A.20-MB 3500A.29

[Reserved]

MB 3500A.20[Reserved]



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CHAPTER 35A Matthew Bender Inverse Condemnation Instructions *
PART C. OTHER INSTRUCTIONS

5-35A California Forms of Jury Instruction MB 3500A.30

MB 3500A.30 Admissibility and Weight of Opinions on Value

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

You must determine the fair market value of _____ [*specify property at issue*] only from the opinions of the witnesses who have testified.

You may not find the market value of _____ [*specify property at issue*] to be any less than the lowest value testified to by any witness or any more than the highest value testified to by any witness. You may not disregard the evidence on the issue of value and render a verdict based on your own beliefs or opinions.

Although owners of property and expert witnesses may express opinions on the issue of value, those opinions are worth no more than the reasons and factual data on which they are based.

Evidence that has been received from witnesses for the reasons underlying their opinions, and all other evidence concerning the property, is to be considered only for the limited purpose of enabling you to understand and weigh the opinions of the witnesses regarding the market value, if any, of _____ [*specify property at issue*]. You must resolve any conflict in the testimony of the witnesses by weighing each opinion against the other opinions, the reasons given for each, the facts relied on, and the credibility and qualifications of each witness.

Authority: *Marshall v. Department of Water & Power* (1990) 219 Cal.App.3d 1124, 1147, 268 Cal.Rptr. 559 .

[2] Use of Instruction

This instruction should be used to instruct the jury on the admissibility and weight of opinions on the value of property.

It must be modified if used in a case involving any measure of damages other than market value. It should be given in conjunction with other general instructions on weighing evidence and the credibility of witnesses.

LexisNexis Matthew Bender Expert Practice Tip--Use Instruction in All Inverse Condemnation

Cases: This instruction (or a modified version of it) should be used in every inverse condemnation case.

By Susan S. Azad, Esq.

For related Judicial Council instructions, see [3][b], *below*.

[3] Comment

[a] Opinion Testimony

This instruction is based on an instruction that has been used in similar form in inverse condemnation cases [*Marshall v. Department of Water & Power* (1990) 219 Cal.App.3d 1124, 1147, 268 Cal.Rptr. 559 ; *Aetna Life & Casualty Co. v. City of Los Angeles* (1985) 170 Cal.App.3d 865, 876-878, 216 Cal.Rptr. 831]. In *Contra Costa Water District v. Vaquero Farms, Inc.*, an eminent domain case in which the court instructed the jury on determining severance damages under Code Civ. Proc. § 1263.410 [see Ch. 35, *California Judicial Council Eminent Domain Instructions*, CACI No. 3511], the court upheld the jury's award of severance damages, which fell between the ranges stated by the parties' experts [*Contra Costa Water Dist. v. Vaquero Farms, Inc.* (1997) 58 Cal.App.4th 883, 903-905, 68 Cal.Rptr.2d 272]. The court followed case law holding that it is within the province of the trier of fact to reconcile conflicting testimony in the estimates of value and damage by witnesses for each side. The trier of fact may reasonably deem unrealistic various factors on which witnesses base their respective valuations [*Contra Costa Water Dist. v. Vaquero Farms, Inc.* (1997) 58 Cal.App.4th 883, 905, 68 Cal.Rptr.2d 272].

In addition to qualified experts, a property owner or property owner's spouse, a corporation's officer or regular employee, or a partner in a partnership, may testify on the issue of property value [*Evid. Code* § 813 (individuals qualified to testify on issue of value)].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 35, *California Judicial Council Eminent Domain Instructions*]:

CACI No. 3515, Valuation Testimony

Legal Topics:

For related research and practice materials, see the following legal topics:

EvidenceTestimonyGeneral OverviewReal Property LawEminent Domain ProceedingsProcedureReal Property LawEminent Domain ProceedingsValuationReal Property LawInverse CondemnationRemedies

* Practice Tips and revised instructions by Susan S. Azad, Esq., a litigation partner in the Los Angeles office of Latham & Watkins, LLP. She is a member of the firm's Distressed Credit Markets Advisory group and has litigated in a wide variety of substantive areas, including complex business litigation, securities litigation, intellectual property litigation, bankruptcy, health care and zoning litigation, and has extensive trial and appellate experience. Ms. Azad has deep expertise in takings law, and in particular, inverse condemnation and temporary regulatory takings. She was trial counsel in the *Cienega Gardens v. United States* cases, which set new federal law standards for temporary regulatory takings of income-producing property [see *Independence Park v. United States*, 62 Fed.Cl. 684 (Fed.Cl. 2004); *Cienega Gardens v. United States*, 38 Fed.Cl. 64 (Fed.Cl. 1997); *Cienega Gardens v. United States*, 331 F.3d 1319 (Fed.Cir. 2003); *Cienega Gardens v. United States*, (Fed.Cl. 2005); *Claremont Village Commons v. United States* (Fed. Cl. 2007)].



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CHAPTER 35A Matthew Bender Inverse Condemnation Instructions *
PART C. OTHER INSTRUCTIONS

5-35A California Forms of Jury Instruction MB 3500A.31

MB 3500A.31 Substantial Cause

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

To recover in this action, Plaintiff must show that Defendant's creation, maintenance, or operation of a public improvement was a substantial cause of the Plaintiff's damages. The _____ [describe public entity's conduct or omissions] need not be the sole cause of the Plaintiff's damages as long as it was a substantial cause. Thus, the public entity may be liable if its acts or omissions were only one of several concurring substantial causes.

If there are several concurring substantial causes, Plaintiff must show a substantial cause-and-effect relationship between Defendant's public use and the claimed damages. The fact that other substantial concurring causes exist does not preclude Plaintiff from recovering as long as Plaintiff makes a showing that excludes the possibility that other forces acting alone produced the damages.

Authorities: *Belair v. Riverside County Flood Control Dist.* (1988) 47 Cal.3d 550, 558-560, 562, 253 Cal.Rptr. 693, 764 P.2d 1070 ; *Blau v. City of Los Angeles* (1973) 32 Cal.App.3d 77, 83-88, 107 Cal.Rptr. 727 .

[2] Use of Instruction

This instruction should be used if the parties agree to submit the issue of proximate cause to the jury [see [3][a], below].

LexisNexis Matthew Bender Expert Practice Tip--Deciding Whether to Submit Issue of Liability to Jurors: Use caution in submitting the issue of liability (that is, whether there was a taking in the first place) to the jury. There is a potential for juror confusion if they believe damages must be apportioned between several concurring substantial causes. Jurors should be carefully admonished in this regard. *By Susan S. Azad, Esq.*

[3] Comment**[a] Substantial Cause Instruction**

A jury may decide the issue of causation in an inverse condemnation case if the parties agree to submit it [*Blau v. City of Los Angeles* (1973) 32 Cal.App.3d 77, 83-88, 107 Cal.Rptr. 727]. Although earlier decisions refer to this element of the inverse condemnation cause of action as "proximate cause" [*Albers v. County of Los Angeles* (1965) 62 Cal.2d 250, 269-272, 42 Cal.Rptr. 89, 398 P.2d 129], later cases describe it as "substantial cause" [*Blau v. City of Los Angeles* (1973) 32 Cal.App.3d 77, 83-88, 107 Cal.Rptr. 727]. The latter view is more accurate because there is no foreseeability aspect to the causation element in inverse condemnation, at least in cases involving physical damage to real property [*Belair v. Riverside County Flood Control Dist.* (1988) 47 Cal.3d 550, 558-560, 562, 253 Cal.Rptr. 693, 764 P.2d 1070].

In one case, the court would not award severance damages when a city's road project did not directly impact the owners' planned uses of its property as a nursery. Rather, the owners' damage claims arose from development of the surrounding area that began well before the road construction [*City of Carlsbad v. Rudvalis* (2003) 109 Cal.App.4th 667, 681, 135 Cal.Rptr.2d 194]. In addition, the owners were not entitled to compensation for unaffixed personal property (such as equipment used in the business) because the condemnation in and of itself did not destroy its value [*City of Carlsbad v. Rudvalis* (2003) 109 Cal.App.4th 667, 689-690, 135 Cal.Rptr.2d 194].

[b] Other Stipulated Instructions

Issues other than proximate cause are theoretically amenable to resolution by the jury. These include, but are not limited to, all of the following:

- Whether noise or other environmental disturbances (*e.g.*, fumes or dust) are sufficiently severe to constitute a taking [see, *e.g.*, *Aaron v. City of Los Angeles* (1974) 40 Cal.App.3d 471, 115 Cal.Rptr. 162] ;
- Whether there has been unreasonable delay in commencing an eminent domain proceeding [see, *e.g.*, *Klopping v. City of Whittier* (1972) 8 Cal.3d 39, 104 Cal.Rptr. 1, 500 P.2d 1345] ;
- Whether a sufficient "emergency" exists to render a taking non-compensable [see, *e.g.*, *Rose v. City of Coalinga* (1987) 190 Cal.App.3d 1627, 236 Cal.Rptr. 124 ; see also *Odello Brothers v. County of Monterey* (1998) 63 Cal.App.4th 778, 785, 792, 73 Cal.Rptr.2d 903 (triable issues of fact existed with regard to inverse condemnation claim based on county's decision to flood property during "emergency")]; and
- Whether plaintiff's negligence was a superseding cause relieving the public entity of liability [see, *e.g.*, *Los Osos Valley Associates v. City of San Luis Obispo* (1994) 30 Cal.App.4th 1670, 1682, 36 Cal.Rptr.2d 758 ; see also MB 3500A.32].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Eminent Domain Proceedings General Overview Real Property Law Eminent Domain Proceedings General Overview Real Property Law Eminent Domain Proceedings Constitutional Limits & Rights General Overview Real Property Law Eminent Domain Proceedings Valuation Real Property Law Inverse Condemnation General Overview

* Practice Tips and revised instructions by Susan S. Azad, Esq., a litigation partner in the Los Angeles office of Latham

& Watkins, LLP. She is a member of the firm's Distressed Credit Markets Advisory group and has litigated in a wide variety of substantive areas, including complex business litigation, securities litigation, intellectual property litigation, bankruptcy, health care and zoning litigation, and has extensive trial and appellate experience. Ms. Azad has deep expertise in takings law, and in particular, inverse condemnation and temporary regulatory takings. She was trial counsel in the *Cienega Gardens v. United States* cases, which set new federal law standards for temporary regulatory takings of income-producing property [see *Independence Park v. United States*, 62 *Fed.Cl.* 684 (*Fed.Cl.* 2004); *Cienega Gardens v. United States*, 38 *Fed.Cl.* 64 (*Fed.Cl.* 1997); *Cienega Gardens v. United States*, 331 *F.3d* 1319 (*Fed.Cir.* 2003); *Cienega Gardens v. United States*, (Fed.Cl. 2005); *Claremont Village Commons v. United States* (Fed. Cl. 2007)].



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CHAPTER 35A Matthew Bender Inverse Condemnation Instructions *
PART C. OTHER INSTRUCTIONS

5-35A California Forms of Jury Instruction MB 3500A.32

MB 3500A.32 Superseding Cause

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

If you find that there was any negligence on the Plaintiff's part, you must determine whether Defendant's _____ [describe public entity's conduct or omissions] was a "superseding cause" of the damage to Plaintiff. A "superseding cause" exists when, after a negligent act, an independent non-concurring act operates to solely produce an injury. The subsequent act breaks the chain of causation.

Whether the Defendant's _____ [describe public entity's conduct or omissions] is a superseding cause is determined under the test of foreseeability. If the risk of injury might have been reasonably foreseen by Plaintiff, Plaintiff is responsible. However, if Defendant's action was highly unusual or extraordinary, not reasonably likely to happen, or the risk of harm was not foreseeable, it is a superseding cause, and any negligence of Plaintiff does not reduce any recovery.

Authority: *Los Osos Valley Associates v. City of San Luis Obispo* (1994) 30 Cal.App.4th 1670, 1682, 36 Cal.Rptr.2d 758 .

[2] Use of Instruction

This instruction should be used if the defendant asserts that plaintiff was negligent, and the parties agree to submit to the jury the issue of whether that negligence was a superseding cause relieving the public entity of liability [see [3], below].

LexisNexis Matthew Bender Expert Practice Tip--Deciding Whether to Submit Issue of Liability to Jurors: This instruction has the potential to be confusing to the jury. The jury should be advised that this instruction addresses liability, not damages. The point of this instruction to determine whether the public entity is liable at all for a taking. If the plaintiff, through its own negligence, prompted the

governmental action that caused the injury at issue, and that governmental action was a reasonably foreseeable response to plaintiff's negligent act, the public entity is not liable. On the other hand, if the governmental action had no relationship to the plaintiff's negligent act (it was not a foreseeable consequence of plaintiff's negligence), the public entity is liable for a taking. *By Susan S. Azad, Esq.*

[3] Comment

A jury may decide the issue of causation in an inverse condemnation case if the parties agree to submit it [*Blau v. City of Los Angeles* (1973) 32 Cal.App.3d 77, 83-88, 107 Cal.Rptr. 727 ; see *Los Osos Valley Associates v. City of San Luis Obispo* (1994) 30 Cal.App.4th 1670, 1682, 36 Cal.Rptr.2d 758 ; see also MB 3500A.31[3][a]]. This instruction states the law of superseding cause [see Witkin, Summary of California Law, vol. 6, *Torts*, § 1197 (10th ed. 2005)] as applicable in an inverse condemnation case when the public entity asserts that the plaintiff was negligent [*Los Osos Valley Associates v. City of San Luis Obispo* (1994) 30 Cal.App.4th 1670, 1682, 36 Cal.Rptr.2d 758].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewCivil ProcedureEminent Domain
ProceedingsGeneral OverviewCivil ProcedureEminent Domain ProceedingsJury Trials

* Practice Tips and revised instructions by Susan S. Azad, Esq., a litigation partner in the Los Angeles office of Latham & Watkins, LLP. She is a member of the firm's Distressed Credit Markets Advisory group and has litigated in a wide variety of substantive areas, including complex business litigation, securities litigation, intellectual property litigation, bankruptcy, health care and zoning litigation, and has extensive trial and appellate experience. Ms. Azad has deep expertise in takings law, and in particular, inverse condemnation and temporary regulatory takings. She was trial counsel in the *Cienega Gardens v. United States* cases, which set new federal law standards for temporary regulatory takings of income-producing property [see *Independence Park v. United States*, 62 Fed.Cl. 684 (Fed.Cl. 2004); *Cienega Gardens v. United States*, 38 Fed.Cl. 64 (Fed.Cl. 1997); *Cienega Gardens v. United States*, 331 F.3d 1319 (Fed.Cir. 2003); *Cienega Gardens v. United States*, (Fed.Cl. 2005); *Claremont Village Commons v. United States* (Fed. Cl. 2007)].



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CHAPTER 36 California Judicial Council Conspiracy Instructions

5-36 California Forms of Jury Instruction 36.syn

§ 36.syn Synopsis to Chapter 36: California Judicial Council Conspiracy Instructions

CACI 3600 Conspiracy--Essential Factual Elements

CACI 3601 Ongoing Conspiracy

CACI 3602 Affirmative Defense--Agent and Employee Immunity Rule

CACI 3603-CACI 3609 Reserved for Future Use

CACI 3610 Aiding and Abetting Tort--Essential Factual Elements

CACI 3611-CACI 3699 Reserved for Future Use



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CHAPTER 36 California Judicial Council Conspiracy Instructions

5-36 California Forms of Jury Instruction Scope

Scope

SCOPE

This chapter contains the California Judicial Council's "Conspiracy Series" of jury instructions [*CACI No. 3600 et seq.*]. The Judicial Council of California Civil Jury Instructions (CACI) included in this publication are the product of the Judicial Council of California Task Force on Jury Instructions, which are updated by the Judicial Council of California Advisory Committee on Civil Jury Instructions.

This chapter includes instructions on the following topics:

- Essential factual elements for alleging a conspiracy cause of action [*CACI No. 3600*].
- An ongoing conspiracy [*CACI No. 3601*].
- The affirmative defense of the agent and employee immunity rule [*CACI No. 3602*].
- Essential factual elements for aiding and abetting [*CACI No. 3610*].



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CHAPTER 36 California Judicial Council Conspiracy Instructions

5-36 California Forms of Jury Instruction CACI 3600

CACI 3600 Conspiracy--Essential Factual Elements

[*Name of plaintiff*] **claims that [he/she] was harmed by [*name of coconspirator*]'s [*insert tort theory*] and that [*name of defendant*] is responsible for the harm because [he/she] was part of a conspiracy to commit [*insert tort theory*]. A conspiracy is an agreement by two or more persons to commit a wrongful act. Such an agreement may be made orally or in writing or may be implied by the conduct of the parties.**

If you find that [*name of coconspirator*] committed a [*insert tort theory*] that harmed [*name of plaintiff*], then you must determine whether [*name of defendant*] is also responsible for the harm. [*Name of defendant*] is responsible if [*name of plaintiff*] proves both of the following:

- 1. That [*name of defendant*] was aware that [*name of coconspirator*] [and others] planned to [*insert wrongful act*]; and**
- 2. That [*name of defendant*] agreed with [*name of coconspirator*] [and others] and intended that the [*insert wrongful act*] be committed.**

Mere knowledge of a wrongful act without cooperation or an agreement to cooperate is insufficient to make [*name of defendant*] responsible for the harm.

A conspiracy may be inferred from circumstances, including the nature of the acts done, the relationships between the parties, and the interests of the alleged coconspirators. [*Name of plaintiff*] is not required to prove that [*name of defendant*] personally committed a wrongful act or that [he/she] knew all the details of the agreement or the identities of all the other participants.

■ "Conspiracy is not a cause of action, but a legal doctrine that imposes liability on persons who, although not actually committing a tort themselves, share with the immediate tortfeasors a common plan or design in its perpetration. By participation in a civil conspiracy, a coconspirator effectively adopts as his or her own the torts of other coconspirators within the ambit of the conspiracy. In this way, a coconspirator incurs tort liability co-equal with the immediate tortfeasors." (*Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, 510-511 [28 Cal.Rptr.2d 475, 869 P.2d 454] , internal citations omitted.)

■ "While criminal conspiracies involve distinct substantive wrongs, civil conspiracies do not involve separate torts. The doctrine provides a remedial measure for affixing liability to all persons who have 'agreed to a common design to commit a wrong.' " (*Choate v. County of Orange* (2000) 86 Cal.App.4th 312, 333 [103 Cal.Rptr.2d 339] , internal citation omitted.)

■ "As long as two or more persons agree to perform a wrongful act, the law places civil liability for the resulting damages on all of them, regardless of whether they actually commit the tort themselves. 'The effect of charging ... conspiratorial conduct is to implicate all ... who agree to the plan to commit the wrong as well as those who actually carry it out.' " (*Wyatt v. Union Mortgage Co.* (1979) 24 Cal.3d 773, 784 [157 Cal.Rptr. 392, 598 P.2d 45] , internal citations omitted.)

■ "The elements of a civil conspiracy are '(1) the formation and operation of the conspiracy; (2) the wrongful act or acts done pursuant thereto; and (3) the damage resulting.' " (*Mosier v. Southern California Physicians Insurance Exchange* (1998) 63 Cal.App.4th 1022, 1048 [74 Cal.Rptr.2d 550] , internal citations omitted.)

■ " '[T]he major significance of the conspiracy lies in the fact that it renders each participant in the wrongful act responsible as a joint tortfeasor for all damages ensuing from the wrong, irrespective of whether or not he was a direct actor and regardless of the degree of his activity.' " (*Applied Equipment Corp.*, *supra*, 7 Cal.4th at p. 511 , internal citations omitted.)

■ "A complaint for civil conspiracy states a cause of action only when it alleges the commission of a civil wrong that causes damage. Though conspiracy may render additional parties liable for the wrong, the conspiracy itself is not actionable without a wrong." (*Okun v. Superior Court* (1981) 29 Cal.3d 442, 454 [175 Cal.Rptr. 157, 629 P.2d 1369] .)

■ "Because civil conspiracy is so easy to allege, plaintiffs have a weighty burden to prove it. They must show that each member of the conspiracy acted in concert and came to a mutual understanding to accomplish a common and unlawful plan, and that one or more of them committed an overt act to further it. It is not enough that the conspiring officers knew of an intended wrongful act, they had to agree--expressly or tacitly--to achieve it. Unless there is such a meeting of the minds, 'the independent acts of two or more wrongdoers do not amount to a conspiracy.' " (*Choate, supra*, 86 Cal.App.4th at p. 333 , internal citations omitted.)

■ "A cause of action for civil conspiracy may not arise ... if the alleged conspirator, though a participant in the agreement underlying the injury, was not personally bound by the duty violated by the wrongdoing" (*Doctors' Co. v. Superior Court* (1989) 49 Cal.3d 39, 44 [260 Cal.Rptr. 183, 775 P.2d 508] , internal citation omitted.)

■ "Conspiracy is not an independent tort; it cannot create a duty or abrogate an immunity. It allows tort

recovery only against a party who already owes the duty and is not immune from liability based on applicable substantive tort law principles." (*Applied Equipment Corp.*, *supra*, 7 Cal.4th at p. 514 , internal citations omitted.)

■ "A conspiracy cannot be alleged as a tort separate from the underlying wrong it is organized to achieve. As long as the underlying wrongs are subject to privilege, defendants cannot be held liable for a conspiracy to commit those wrongs. Acting in concert with others does not destroy the immunity of defendants." (*McMartin v. Children's Institute International* (1989) 212 Cal.App.3d 1393, 1406 [261 Cal.Rptr. 437] , internal citations omitted.)

■ "We agree ... that the general rule is that a party who is not personally bound by the duty violated may not be held liable for civil conspiracy even though it may have participated in the agreement underlying the injury. However, an exception to this rule exists when the participant acts in furtherance of its own financial gain." (*Mosier*, *supra*, 63 Cal.App.4th at p. 1048 , internal citations omitted.)

■ "Conspiracy liability may properly be imposed on nonfiduciary agents or attorneys for conduct which they carry out not simply as agents or employees of fiduciary defendants, but in furtherance of their own financial gain." (*Skarbrevik v. Cohen, England & Whitfield* (1991) 231 Cal.App.3d 692, 709 [282 Cal.Rptr. 627] , internal citations omitted.)

■ " 'The basis of a civil conspiracy is the formation of a group of two or more persons who have agreed to a common plan or design to commit a tortious act.' The conspiring defendants must also have actual knowledge that a tort is planned and concur in the tortious scheme with knowledge of its unlawful purpose." (*Kidron v. Movie Acquisition Corp.* (1995) 40 Cal.App.4th 1571, 1582 [47 Cal.Rptr.2d 752] , internal citations omitted.)

■ "Liability as a co-conspirator depends upon projected joint action. 'The mere knowledge, acquiescence, or approval of the act, without co-operation or agreement to cooperate is not enough' But once the plan for joint action is shown, 'a defendant may be held liable who in fact committed no overt act and gained no benefit therefrom.' " (*Wetherton v. Growers Farm Labor Assn.* (1969) 275 Cal.App.2d 168, 176 [79 Cal.Rptr. 543] , internal citations omitted, disapproved on another ground in *Applied Equipment Corp.*, *supra*, 7 Cal.4th at p. 521, fn. 10 .)

■ "Furthermore, the requisite concurrence and knowledge 'may be inferred from the nature of the acts done, the relation of the parties, the interests of the alleged conspirators, and other circumstances.' Tacit consent as well as express approval will suffice to hold a person liable as a coconspirator." (*Wyatt*, *supra*, 24 Cal.3d at p. 785 , internal citations omitted.)

■ "It is a legal commonplace that the existence of a conspiracy may be inferred from circumstances, and that the conspiracy need not be the result of an express agreement but may rest upon tacit assent and acquiescence." (*Holder v. Home Savings & Loan Assn. of Los Angeles* (1968) 267 Cal.App.2d 91, 108 [72 Cal.Rptr. 704] , internal citations omitted.)

■ "Of course, the agreement between conspirators need not be proved by direct evidence, but may be shown by circumstantial evidence that tends to show a common intent. In fact, in the absence of a confession by one of the conspirators, it is usually very difficult to secure direct evidence of a conspiracy, so that in the usual case the ultimate fact of a conspiracy must be determined from those inferences naturally and properly to be drawn from those matters directly proved." (*Peterson v. Cruickshank* (1956) 144 Cal.App.2d 148, 163 [300 P.2d 915] , internal citations omitted.)

■ "[A]ctual knowledge of the planned tort, without more, is insufficient to serve as the basis for a conspiracy claim. Knowledge of the planned tort must be combined with intent to aid in its commission. 'The sine qua non of a conspiratorial agreement is the knowledge on the part of the alleged conspirators of its unlawful objective and their intent to aid in achieving that objective.' 'This rule derives from the principle that a person is generally under no duty to take affirmative action to aid or protect others.' " (*Kidron, supra*, 40 Cal.App.4th at p. 1583 , internal citations omitted.)

■ "While knowledge and intent 'may be inferred from the nature of the acts done, the relation of the parties, the interest of the alleged conspirators, and other circumstances,' '[c]onspiracies cannot be established by suspicions. There must be some evidence. Mere association does not make a conspiracy. There must be evidence of some participation or interest in the commission of the offense.' An inference must flow logically from other facts established in the action." (*Kidron, supra*, 40 Cal.App.4th at p. 1583 , internal citations omitted.)

Secondary Sources

1 Levy et al., California Torts, Ch. 9, *Civil Conspiracy, Concerted Action, and Related Theories of Joint Liability*, § 9.03 (Matthew Bender)

13 *California Forms of Pleading and Practice*, Ch. 126, *Conspiracy*, § 126.11 (Matthew Bender)

4 *California Points and Authorities*, Ch. 46, *Conspiracy*, 46.20 et seq. (Matthew Bender)

Publisher's Notes

This instruction covers issues presented in BAJI Nos. 13.85, 13.86, 13.87, and 13.89.

LexisNexis Matthew Bender Expert Practice Tip--Conspiracy Claim Is Difficult But Worthwhile If Evidence Exists: It is not an easy task to obtain sufficient evidence to support a claim of conspiracy. Significant discovery is usually required as well as a tenacious attitude. However, if an attorney does find evidence of a conspiracy, it is powerful and can make the defendant liable for all actions of the tort, even ones that occurred before the conspirator's involvement. *By Dona Cohn-Payne*

"[A] civil conspiracy to commit tortious acts can, as a matter of law, *only* be formed by parties who are already under a duty to the plaintiff, the breach of which will support a cause of action against them--individually and not as conspirators--in tort." ... "[W]here the plaintiff alleges the existence of a civil conspiracy among the defendants to commit tortious acts, the source of substantive liability arises out of a preexisting legal duty and its breach; liability *cannot* arise out of participation in the conspiracy alone." (*Chavers v. Gatke Corp. (2003)* 107 Cal.App.4th 606, 614 [132 Cal.Rptr.2d 198] .)

Legal Topics:

For related research and practice materials, see the following legal topics:

Criminal Law & ProcedureCriminal OffensesInchoate CrimesConspiracyGeneral OverviewCriminal Law & ProcedureCriminal OffensesInchoate CrimesConspiracyElements



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CHAPTER 36 California Judicial Council Conspiracy Instructions

5-36 California Forms of Jury Instruction CACI 3601

CACI 3601 Ongoing Conspiracy

If you decide that [name of defendant] joined the conspiracy to commit [insert tort theory], then [he/she] is responsible for all acts done as part of the conspiracy, whether the acts occurred before or after [he/she] joined the conspiracy.

New September 2003

- "It is the settled rule that 'to render a person civilly liable for injuries resulting from a conspiracy of which he was a member, it is not necessary that he should have joined the conspiracy at the time of its inception; everyone who enters into such a common design is in law a party to every act previously or subsequently done by any of the others in pursuance of it.' Having been found to have joined and actively participated in the continuing conspiracy to convert, appellant became liable for the previous acts of his coconspirators under the rules relating to civil liability, and the fact that some of the missing goods may never have come into his possession would not absolve him from liability." (*De Vries v. Brumback* (1960) 53 Cal.2d 643, 648 [2 Cal.Rptr. 764, 349 P.2d 532] , internal citations omitted.)

- "It is well settled that a conspirator is liable for all the acts done in furtherance of a common scheme or plan even though he is not a direct actor. It is equally well settled that a party may be liable even if the intentional tort is commenced before he participates, if he, knowing the facts, then participates therein." (*Peterson v. Cruickshank* (1956) 144 Cal.App.2d 148, 168-169 [300 P.2d 915] , internal citations omitted.)

- "[Defendant] could not join in a conspiracy that had been completed." (*Kidron v. Movie Acquisition Corp.* (1995) 40 Cal.App.4th 1571, 1595 [47 Cal.Rptr.2d 752] , internal citations omitted.)

Secondary Sources

1 Levy et al., California Torts, Ch. 9, *Civil Conspiracy, Concerted Action, and Related Theories of Joint Liability*, § 9.03 (Matthew Bender)

13 California Forms of Pleading and Practice, Ch. 126, *Conspiracy* (Matthew Bender)

4 California Points and Authorities, Ch. 46, *Conspiracy* (Matthew Bender)

Publisher's Notes

This instruction covers issues presented in BAJI Nos. 13.86 and 13.93.



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CHAPTER 36 California Judicial Council Conspiracy Instructions

5-36 California Forms of Jury Instruction CACI 3602

CACI 3602 Affirmative Defense--Agent and Employee Immunity Rule

[Name of defendant] claims that [he/she] was not part of a conspiracy because [he/she] was acting as an [agent/employee] of [name of defendant entity]. To succeed, [name of defendant] must prove both of the following:

- 1. That [he/she] was acting in [his/her] official capacity on behalf of [name of defendant entity]; and**
- 2. That [he/she] was not acting to advance [his/her] own personal interests.**

New September 2003

This instruction is intended for situations where an individual defendant is alleged to have conspired with an entity. This instruction is not intended to apply in cases where an individual defendant is alleged to have conspired with a third party and there is no agency relationship between them.

- "[A]gents or employees of a corporation cannot conspire with the corporation while acting in their official capacities on behalf of the corporation rather than as individuals acting for their individual advantage." (*Zumbrun v. University of Southern California* (1972) 25 Cal.App.3d 1, 12 [101 Cal.Rptr. 499] , internal citations omitted.)
- "The rule 'derives from the principle that ordinarily corporate agents and employees acting for or on behalf of the corporation cannot be held liable for inducing a breach of the corporation's contract since being in a confidential relationship to the corporation their action in this respect is privileged.'" (*Applied*

Equipment Corp. v. Litton Saudi Arabia Ltd. (1994) 7 Cal.4th 503, 512, fn. 4 [28 Cal.Rptr.2d 475, 869 P.2d 454] , internal citations omitted.)

■ "A corporation is, of course, a legal fiction that cannot act at all except through its employees and agents. When a corporate employee acts in the course of his or her employment, on behalf of the corporation, there is no entity apart from the employee with whom the employee can conspire. '[I]t is basic in the law of conspiracy that you must have two persons or entities to have a conspiracy. A corporation cannot conspire with itself any more than a private individual can, and it is the general rule that the acts of the agent are the acts of the corporation' To hold that a subordinate employee of a corporation can be liable for conspiring with the corporate principal would destroy what has heretofore been the settled rule that a corporation cannot conspire with itself." (*Black v. Bank of America N.T. & S.A.* (1994) 30 Cal.App.4th 1, 6 [35 Cal.Rptr.2d 725] , internal citations and footnote omitted.)

Secondary Sources

1 Levy et al., California Torts, Ch. 9, *Civil Conspiracy, Concerted Action, and Related Theories of Joint Liability*, § 9.03[3][b] (Matthew Bender)

13 California Forms of Pleading and Practice, Ch. 126, *Conspiracy* (Matthew Bender)

4 California Points and Authorities, Ch. 46, *Conspiracy* (Matthew Bender)

Publisher's Notes

There is no BAJI instruction on this subject.

LexisNexis Matthew Bender Expert Practice Tip--Defeating Agent and Employee Immunity

Defense: To defeat this affirmative defense, an attorney must provide evidence that the actions taken by the defendant were outside the scope of his/her duties. Note that the advancement of a defendant's own personal interests need not be confined to monetary enumeration. *By Dona Cohn-Payne*

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate Law Agency Relationships Duties & Liabilities General Overview Criminal Law & Procedure Criminal Offenses Inchoate Crimes Conspiracy General Overview Criminal Law & Procedure Criminal Offenses Inchoate Crimes Conspiracy Elements



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California Forms of Jury Instruction

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CHAPTER 36 California Judicial Council Conspiracy Instructions

5-36 California Forms of Jury Instruction CACI 3603-CACI 3609

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CACI 3603Reserved for Future Use



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CHAPTER 36 California Judicial Council Conspiracy Instructions

5-36 California Forms of Jury Instruction CACI 3610

CACI 3610 Aiding and Abetting Tort--Essential Factual Elements

[*Name of plaintiff*] **claims that [he/she] was harmed by [*name of actor*]'s [*insert tort theory, e.g., assault and battery*] and that [*name of defendant*] is responsible for the harm because [he/she] aided and abetted [*name of actor*] in committing the [*e.g., assault and battery*].**

If you find that [*name of actor*] committed [a/an] [*e.g., assault and battery*] that harmed [*name of plaintiff*], then you must determine whether [*name of defendant*] is also responsible for the harm. [*Name of defendant*] is responsible as an aider and abetter if [*name of plaintiff*] proves all of the following:

- 1. That [*name of defendant*] knew that [a/an] [*e.g., assault and battery*] was [being/going to be] committed by [*name of actor*] against [*name of plaintiff*];**
- 2. That [*name of defendant*] gave substantial assistance or encouragement to [*name of actor*]; and**
- 3. That [*name of defendant*]'s conduct was a substantial factor in causing harm to [*name of plaintiff*].**

Mere knowledge that [a/an] [*e.g., assault and battery*] was [being/going to be] committed and the failure to prevent it do not constitute aiding and abetting.

New April 2008

Directions for Use

Give this instruction if the plaintiff seeks to hold a defendant responsible for the tort of another on a theory of aiding and abetting, whether or not the active tortfeasor is also a defendant.

Some cases seem to hold that in addition to the elements of knowledge and substantial assistance, a complaint must allege the aider and abettor had the specific intent to facilitate the wrongful conduct. (See *Schulz v. Neovi Data Corp.* (2007) 152 Cal.App.4th 86, 95 [60 Cal.Rptr.3d 810] .)

Sources and Authority

■ "The jury was also instructed on aiding and abetting, as follows: 'A person aids and abets the commission of a crime when he or she: [P] (1) With knowledge of the unlawful purpose of the perpetrator, and [P] (2) With the intent or purpose of committing or encouraging or facilitating the commission of the crime, and [P] (3) By act or advice aids, promotes, encourages or instigates the commission of the crime. [P] A person who aids and abets the commission of a crime need not be present at the scene of the crime. [P] Mere presence at the scene of a crime which does not itself assist the commission of the crime does not amount to aiding and abetting. [P] Mere knowledge that a crime is being committed and the failure to prevent it does not amount to aiding and abetting.'" (*Casella v. SouthWest Dealer Services, Inc.* (2007) 157 Cal.App.4th 1127, 1140-1141 [69 Cal.Rptr.3d 445] .)

■ "[W]e consider whether the complaint states a claim based upon 'concert of action' among defendants. The elements of this doctrine are prescribed in *section 876 of the Restatement Second of Torts*. The section provides, 'For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he (a) does a tortious act in concert with the other or pursuant to a common design with him, or (b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself, or (c) gives substantial assistance to the other in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person.' With respect to this doctrine, Prosser states that 'those who, in pursuance of a common plan or design to commit a tortious act, actively take part in it, or further it by cooperation or request, or who lend aid or encouragement to the wrongdoer, or ratify and adopt his acts done for their benefit, are equally liable with him. [para.] Express agreement is not necessary, and all that is required is that there be a tacit understanding' " (*Sindell v. Abbott Laboratories* (1980) 26 Cal.3d 588, 604 [163 Cal.Rptr. 132, 607 P.2d 924] , internal citations omitted.)

■ " ' "Liability may ... be imposed on one who aids and abets the commission of an intentional tort if the person ... knows the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other to so act" [Citations.]' This is consistent with Restatement Second of Torts, which recognizes a cause of action for aiding and abetting in a civil action when it provides: 'For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he [P] ... [P] (b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself' 'Advice or encouragement to act operates as a moral support to a tortfeasor and if the act encouraged is known to be tortious it has the same effect upon the liability of the adviser as participation or physical assistance. ... It likewise applies to a person who knowingly gives substantial aid to another who, as he knows, intends to do a tortious act.' " (*Schulz, supra*, 152 Cal.App.4th at pp. 93-94 , internal citations omitted.)

■ "California courts have long held that liability for aiding and abetting depends on proof the defendant had actual knowledge of the specific primary wrong the defendant substantially assisted. ... 'The words "aid and abet" as thus used have a well understood meaning, and may fairly be construed to imply an intentional participation *with knowledge of the object to be attained.*' " (*Casey v. U.S. Bank Nat. Assn.* (2005) 127 Cal.App.4th 1138, 1145-1146 [26 Cal.Rptr.3d 401] , original italics, internal citations omitted.)

■ " 'Mere knowledge that a tort is being committed and the failure to prevent it does not constitute aiding and abetting. "As a general rule, one owes no duty to control the conduct of another" More specifically, a supervisor is not liable to third parties for the acts of his or her subordinates.' " (*Austin B. v. Escondido Union School Dist.* (2007) 149 Cal.App.4th 860, 879 [57 Cal.Rptr.3d 454] , internal citations omitted.)

■ " 'In the civil arena, an aider and abettor is called a cotortfeasor. To be held liable as a cotortfeasor, a defendant must have knowledge and intent. ... A defendant can be held liable as a cotortfeasor on the basis of acting in concert only if he or she knew that a tort had been, or was to be, committed, and acted *with the intent of facilitating the commission of that tort.*' Of course, a defendant can only aid and abet another's tort if the defendant knows what 'that tort' is. ... [T]he defendant must have acted to aid the primary tortfeasor 'with knowledge of the object to be attained.' " (*Casey, supra*, 27 Cal.App.4th at p. 1146, original italics, internal citations omitted.)

■ It appears that one may be liable as an aider and abetter of a negligent act. (See *Orser v. George* (1967) 252 Cal.App.2d 660, 668 [60 Cal.Rptr. 708] ["James too must be held as a defendant because, although he did not fire the fatal bullet, there is evidence (*which may or may not be sufficient to prove him liable at the trial*) creating a question for the trier of fact. This evidence indicates he was firing alternately with Vierra at the same mudhen, in the same line of fire and possibly tortiously. In other words (to paraphrase the Restatement ...), the record permits a possibility James knew Vierra's conduct constituted a breach of duty owed Orser and that James was giving Vierra substantial 'assistance or encouragement'; also that this was substantial assistance to Vierra in a tortious result with James' own conduct, 'separately considered, constituting a breach of duty to' Orser."], original italics; see also Rest. 2d Torts, § 876, Com. on Clause (b), Illustration 6.)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, § 44

1 Levy et al., *California Torts, Ch. 9, Civil Conspiracy, Concerted Action, and Related Theories of Joint Liability*, §§ 9.01, 9.02 (Matthew Bender)

13 *California Forms of Pleading and Practice, Ch. 126, Conspiracy*, §§ 126.10, 126.11 (Matthew Bender)

4 *California Points and Authorities, Ch. 46, Conspiracy*, § 46.04 (Matthew Bender)

Publisher's Notes

This instruction covers issues presented in BAJI No. 12.21.



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CHAPTER 36 California Judicial Council Conspiracy Instructions

5-36 California Forms of Jury Instruction CACI 3611-CACI 3699

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CACI 3611Reserved for Future Use



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CHAPTER 37 California Judicial Council Vicarious Responsibility Instructions

5-37 California Forms of Jury Instruction 37.syn

§ 37.syn Synopsis to Chapter 37: California Judicial Council Vicarious Responsibility Instructions

CACI 3700 Introduction

CACI 3701 Tort Liability Asserted Against Principal--Essential Factual Elements

CACI 3702 Affirmative Defense--Comparative Fault of Plaintiff's Agent

CACI 3703 Legal Relationship Not Disputed

CACI 3704 Existence of "Employee" Status Disputed

CACI 3705 Existence of "Agency" Relationship Disputed

CACI 3706 Special Employment--General Employer and/or Special Employer Denies Responsibility

CACI 3707 Special Employment--Joint Responsibility

CACI 3708 Peculiar-Risk Doctrine

CACI 3709 Ostensible Agent

CACI 3710 Ratification

CACI 3711 Partnerships

CACI 3712 Joint Ventures

CACI 3713 Nondelegable Duty

CACI 3714-CACI 3719 Reserved for Future Use

CACI 3720 Scope of Employment

CACI 3721 Scope of Employment--Peace Officer's Misuse of Authority

CACI 3722 Scope of Employment--Unauthorized Acts

CACI 3723 Substantial Deviation

CACI 3724 Going-and-Coming Rule

CACI 3725 Vehicle-Use Exception

CACI 3726 Social or Recreational Activities

CACI 3727-CACI 3799 Reserved for Future Use

CACI VF-3700 Negligence--Vicarious Liability

CACI VF-3701-CACI VF-3799 Reserved for Future Use



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CHAPTER 37 California Judicial Council Vicarious Responsibility Instructions

5-37 California Forms of Jury Instruction Scope

Scope

SCOPE

This chapter contains the California Judicial Council's "Vicarious Responsibility Series" of jury instructions [*CACI No. 3700 et seq.*]. The Judicial Council of California Civil Jury Instructions (CACI) included in this publication are the product of the Judicial Council of California Task Force on Jury Instructions, which are updated by the Judicial Council of California Advisory Committee on Civil Jury Instructions.

This chapter includes instructions on the following topics:

- An introductory instruction to vicarious responsibility [*CACI No. 3700*].
- Essential factual elements for a cause of action alleging tort liability against a principal [*CACI No. 3701*] and the affirmative defense of the plaintiff's agent's contributory negligence [*CACI No. 3702*].
- Legal relationship not disputed [*CACI No. 3703*].
- The disputing of the existence of employee "status" [*CACI No. 3704*] and "agency" relationship [*CACI No. 3705*].
- Responsibility in special employment cases [*CACI Nos. 3706, 3707*].
- Other related issues, including the peculiar-risk doctrine [*CACI No. 3708*], ostensible agents [*CACI No. 3709*], ratification [*CACI No. 3710*], partnerships [*CACI No. 3711*], joint ventures [*CACI No. 3712*], nondelegable duties [*CACI No. 3713*], scope of employment (e.g., unauthorized acts) [*CACI Nos. 3720-3722*], substantial deviation [*CACI No. 3723*], the going-and-coming rule [*CACI No. 3724*], the vehicle-use exception to vicarious responsibility [*CACI No. 3725*], and liability in social or recreational activities [*CACI No. 3726*].

The vicarious responsibility series also includes a special verdict form on liability for negligence [*CACI No. VF-3700*].



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CHAPTER 37 California Judicial Council Vicarious Responsibility Instructions

5-37 California Forms of Jury Instruction CACI 3700

CACI 3700 Introduction

A [person/partnership/corporation] is responsible for harm caused by the wrongful conduct of [his/her/its] [employees/agents/[insert other relationship, e.g., "partners"]] while acting within the scope of their [employment/authority].

New September 2003

- Under the theory of respondeat superior, a principal/employer is vicariously liable for an agent/employee's torts committed within the scope of agency/employment. (*Perez v. Van Groningen & Sons, Inc.* (1986) 41 Cal.3d 962, 967 [227 Cal.Rptr. 106, 719 P.2d 676] .)
- If a principal's potential liability is based solely on the acts of his or her agent, then the principal cannot be held liable if the agent is exonerated. (2 Witkin, Summary of Cal. Law (10th ed. 2005) Agency and Employment, § 167.)
- Liability may result from a principal's authorization or direction to perform a tortious act, resulting in direct liability of the principal for his or her wrongful conduct. (2 Witkin, *supra*, § 167.) Such authorization may be found in ratification of the agent's conduct and in delegation of a nondelegable duty.

Secondary Sources

3 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment, §§ 163-168

1 Levy et al., California Torts, Ch. 8, *Vicarious Liability*, §§ 8.03-8.04 (Matthew Bender)

2 California Employment Law, Ch. 30, *Employers' Tort Liability to Third Parties for Conduct of Employees*, § 30.01 (Matthew Bender)

21 *California Forms of Pleading and Practice*, Ch. 248, *Employer's Liability for Employee's Torts*, § 248.11 (Matthew Bender)

37 California Forms of Pleading and Practice, Ch. 427, *Principal and Agent* (Matthew Bender)

10 California Points and Authorities, Ch. 100A, *Employer and Employee: Respondeat Superior* (Matthew Bender)

1 California Civil Practice: Torts (Thomson West) §§ 3:1-3:4

Publisher's Notes

There is no BAJI instruction on this subject.

LexisNexis Matthew Bender Expert Practice Tip--Look for Respondeat Superior: Always look for a theory of respondeat superior in your cases. If you are able to prove vicarious liability, there is the probability of more funds available to collect a judgment or have available for settlement negotiations. A simple example of respondeat superior is when a negligent driver in an automobile accident is in the course and scope of his/her employment at the time of the collision. The employer of the negligent driver would then be vicariously liable and would be responsible for plaintiff's damages. *By Dona Cohn-Payne*

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate Law Agency Relationships Duties & Liabilities Authorized Acts of Agents Liability of Principal Business & Corporate Law Agency Relationships Duties & Liabilities Negligent Acts of Agents Liability of Principals Business & Corporate Law Agency Relationships Types Employee & Employer Torts Vicarious Liability Agents General Overview Torts Vicarious Liability Employers General Overview Torts Vicarious Liability Employers Scope of Employment General Overview



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CHAPTER 37 California Judicial Council Vicarious Responsibility Instructions

5-37 California Forms of Jury Instruction CACI 3701

CACI 3701 Tort Liability Asserted Against Principal--Essential Factual Elements

[*Name of plaintiff*] **claims that [he/she] was harmed by [name of agent]'s [insert tort theory, e.g., "negligence"].**

[*Name of plaintiff*] **also claims that [name of defendant] is responsible for the harm because [name of agent] was acting as [his/her/its] [agent/employee/[insert other relationship, e.g., "partner"]] when the incident occurred.**

If you find that [name of agent]'s [insert tort theory] harmed [name of plaintiff], then you must decide whether [name of defendant] is responsible for the harm. [Name of defendant] is responsible if [name of plaintiff] proves both of the following:

1. That [name of agent] was [name of defendant]'s [agent/employee/[insert other relationship]]; and

2. That [name of agent] was acting within the scope of [his/her] [agency/employment/[insert other relationship]] when [he/she] harmed [name of plaintiff].

New September 2003

Directions for Use

The term "name of agent," in brackets, is intended in the general sense, to denote the person or entity whose wrongful conduct is alleged to have created the principal's liability.

Under other principles of law, a principal may be directly liable for authorizing or directing an agent's wrongful acts. (See 2 Witkin, Summary of Cal. Law (10th ed. 2005) Agency and Employment, § 163.)

One of the two bracketed first sentences would be used, depending on whether the plaintiff is suing both the principal and the agent or the principal alone.

If there is no issue regarding whether a principal-agent exists, see *CACI No. 3703, Legal Relationship Not Disputed*.

This instruction may not apply where employer liability is statutory, such as under the Fair Employment and Housing Act.

Sources and Authority

- *Civil Code* section 2295 provides: "An agent is one who represents another, called the principal, in dealings with third persons. Such representation is called agency."

- "The rule of respondeat superior is familiar and simply stated: an employer is vicariously liable for the torts of its employees committed within the scope of the employment. Equally well established, if somewhat surprising on first encounter, is the principle that an employee's willful, malicious and even criminal torts may fall within the scope of his or her employment for purposes of respondeat superior, even though the employer has not authorized the employee to commit crimes or intentional torts." (*Lisa M. v. Henry Mayo Newhall Memorial Hospital* (1995) 12 Cal.4th 291, 296-297 [48 Cal.Rptr.2d 510, 907 P.2d 358] , internal citations and footnote omitted.)

- "The employer is liable not because the employer has control over the employee or is in some way at fault, but because the employer's enterprise creates inevitable risks as a part of doing business." (*Bailey v. Filco, Inc.* (1996) 48 Cal.App.4th 1552, 1559 [56 Cal.Rptr.2d 333] , internal citations omitted.)

- "Respondeat superior is based on a 'deeply rooted sentiment' that it would be unjust for an enterprise to disclaim responsibility for injuries occurring in the course of its characteristic activities." (*Mary M. v. City of Los Angeles* (1991) 54 Cal.3d 202, 208 [285 Cal.Rptr. 99, 814 P.2d 1341] , internal citation omitted.)

- The Supreme Court has articulated three reasons for applying the doctrine of respondeat superior: "(1) to prevent recurrence of the tortious conduct; (2) to give greater assurance of compensation for the victim; and (3) to ensure that the victim's losses will be equitably borne by those who benefit from the enterprise that gave rise to the injury." (*Mary M., supra*, 54 Cal.3d at p. 209 .)

- "[W]here recovery of damages is sought against a principal and an agent, and the negligence of the agent is the cause of the injury, a verdict releasing the agent from liability releases the principal." (*Lehmuth v. Long Beach Unified School Dist.* (1960) 53 Cal.2d 544, 550 [2 Cal.Rptr. 279, 348 P.2d 887] .)

- The doctrine of respondeat superior applies equally to public and private employers. (*Mary M., supra*, 54 Cal.3d at p. 209 .)

Secondary Sources

3 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment, §§ 163-168

1 Levy et al., *California Torts, Ch. 8, Vicarious Liability*, §§ 8.03 -8.04 (Matthew Bender)

2 *California Employment Law, Ch. 30, Employers' Tort Liability to Third Parties for Conduct of Employees, § 30.01* (Matthew Bender)

21 *California Forms of Pleading and Practice, Ch. 248, Employer's Liability for Employee's Torts, § 248.14* (Matthew Bender)

37 *California Forms of Pleading and Practice, Ch. 427, Principal and Agent* (Matthew Bender)

10 *California Points and Authorities, Ch. 100A, Employer and Employee: Respondeat Superior* (Matthew Bender)

1 *California Civil Practice: Torts* (Thomson West) §§ 3:1-3:4

Publisher's Notes

This instruction covers issues presented in BAJI Nos. 11.51, 13.00 and 13.01.

LexisNexis Matthew Bender Expert Practice Tip--Employers' Usual Defense: To escape vicarious liability, employers usually attempt to prove that the employee's conduct was outside the scope of their employment and therefore the employer is not responsible. Research regarding independent contractor status is also advisable. *By Dona Cohn-Payne*

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate Law Agency Relationships Duties & Liabilities Authorized Acts of Agents Liability of Principal Business & Corporate Law Agency Relationships Duties & Liabilities Negligent Acts of Agents General Overview Business & Corporate Law Agency Relationships Duties & Liabilities Negligent Acts of Agents Liability of Principals Torts Vicarious Liability Agents General Overview Torts Vicarious Liability Employers General Overview Torts Vicarious Liability Employers Activities & Conditions Criminal Acts Torts Vicarious Liability Employers Scope of Employment General Overview Torts Vicarious Liability Independent Contractors General Overview



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CHAPTER 37 California Judicial Council Vicarious Responsibility Instructions

5-37 California Forms of Jury Instruction CACI 3702

CACI 3702 Affirmative Defense--Comparative Fault of Plaintiff's Agent

[*Name of defendant*] **claims that the negligence of [*name of plaintiff's agent*] contributed to [*name of plaintiff principal*]'s harm. To succeed on this claim, [*name of defendant*] must prove all of the following:**

- 1. That [*name of plaintiff's agent*] was acting as [*name of plaintiff principal*]'s [agent/employee/[*insert other relationship, e.g., "partner"*]];**
- 2. That [*name of plaintiff's agent*] was acting within the scope of [his/her] [agency/employment/[*insert other relationship*]] when the incident occurred; and**
- 3. That the negligence of [*name of plaintiff's agent*] was a substantial factor in causing [*name of plaintiff principal*]'s harm.**

If [*name of defendant*] proves the above, [*name of plaintiff principal*]'s claim is reduced by your determination of the percentage of [*name of plaintiff's agent*]'s responsibility. I will calculate the actual reduction.

New September 2003; Revised December 2009

Directions for Use

This instruction may be used by a defendant against a principal/employer to assert the comparative fault of an agent/employee. For example, in an automobile accident lawsuit brought by a corporate plaintiff, the defendant may use this instruction to assert that the negligence of the plaintiff's employee/driver contributed to causing the accident.

Sources and Authority

- The doctrine of respondeat superior is not limited to the principal's responsibility for injuries to third parties. A defendant also can use the doctrine to support a claim of contributory negligence against a plaintiff principal if the plaintiff's agent was contributorily negligent. (See 6 Witkin, Summary of Cal. Law (10th ed. 2005) Torts, § 1324.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, § 1324

2 *California Employment Law*, Ch. 30, *Employers' Tort Liability to Third Parties for Conduct of Employees*, § 30.08 (Matthew Bender)

21 *California Forms of Pleading and Practice*, Ch. 248, *Employer's Liability for Employee's Torts*, § 248.19 (Matthew Bender)

37 *California Forms of Pleading and Practice*, Ch. 427, *Principal and Agent*, § 427.23 (Matthew Bender)

10 *California Points and Authorities*, Ch. 100A, *Employer and Employee: Respondeat Superior*, § 100A.43 (Matthew Bender)

Publisher's Notes

This instruction replaces BAJI No. 13.05, and covers issues presented in BAJI No. 13.61.

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate Law Agency Relationships Duties & Liabilities Negligent Acts of Agents General Overview Business & Corporate Law Agency Relationships Duties & Liabilities Negligent Acts of Agents Liability of Agents Business & Corporate Law Agency Relationships Duties & Liabilities Negligent Acts of Agents Liability of Principals Torts Negligence Defenses Contributory Negligence General Overview Torts Negligence Defenses Contributory Negligence Procedure General Overview



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CHAPTER 37 California Judicial Council Vicarious Responsibility Instructions

5-37 California Forms of Jury Instruction CACI 3703

CACI 3703 Legal Relationship Not Disputed

In this case [name of agent] was the [employee/agent/[insert other relationship, e.g., "partner"]] of [name of defendant].

If you find that [name of agent] was acting within the scope of [his/her] [employment/agency/[insert other relationship]] when the incident occurred, then [name of defendant] is responsible for any harm caused by [name of agent]'s [insert applicable tort theory, e.g., "negligence"].

New September 2003

The term "name of agent," in brackets, is intended in the general sense, to denote the person or entity whose wrongful conduct is alleged to have created the principal's liability.

Under other principles of law, a principal may be directly liable for authorizing or directing an agent's wrongful acts. (See 2 Witkin, Summary of Cal. Law (10th ed. 2005) Agency and Employment, § 163.)

This instruction may not apply where employer liability is statutory, such as under the Fair Employment and Housing Act.

- Ordinarily, the question of agency is one of fact; however, where the evidence is undisputed the issue becomes one of law. (*Mantonya v. Bratlie* (1948) 33 Cal.2d 120, 128-129 [199 P.2d 677] .)

- This instruction may be appropriate in cases where vicarious liability is asserted in the context of employment, since agency and employment are often viewed as synonymous. Witkin observes: "There is

seldom any reason to distinguish between the service of an agent and that of an employee. ... However, the two relationships are not considered identical. It is said that a servant or employee works for his employer, while an agent also acts for and in the place of the principal for the purpose of bringing him into legal relations with third persons." (2 Witkin, Summary of Cal. Law (10th ed. 2005), Agency and Employment, § 4.)

■ "It is settled that for purposes of liability to third parties for torts, a real estate salesperson is the agent of the broker who employs him or her. The broker is liable as a matter of law for all damages caused to third persons by the tortious acts of the salesperson committed within the course and scope of employment." (*California Real Estate Loans, Inc. v. Wallace* (1993) 18 Cal.App.4th 1575, 1581 [23 Cal.Rptr.2d 462] , internal citations omitted.)

Secondary Sources

3 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment, §§ 2-4

1 Levy et al., California Torts, Ch. 8, *Vicarious Liability*, §§ 8.01-8.03 (Matthew Bender)

2 California Employment Law, Ch. 30, *Employers' Tort Liability to Third Parties for Conduct of Employees*, § 30.04 (Matthew Bender)

21 *California Forms of Pleading and Practice*, Ch. 248, *Employer's Liability for Employee's Torts*, § 248.16 (Matthew Bender)

37 California Forms of Pleading and Practice, Ch. 427, *Principal and Agent* (Matthew Bender)

10 California Points and Authorities, Ch. 100A, *Employer and Employee: Respondeat Superior* (Matthew Bender)

1 California Civil Practice: Torts (Thomson West) § 3:1

Publisher's Notes

This instruction covers issues presented in BAJI Nos. 13.00, 13.01, 13.04, and 13.06.

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate LawAgency RelationshipsDuties & LiabilitiesGeneral OverviewBusiness & Corporate LawAgency RelationshipsDuties & LiabilitiesNegligent Acts of AgentsGeneral OverviewBusiness & Corporate LawAgency RelationshipsDuties & LiabilitiesNegligent Acts of AgentsLiability of PrincipalsTortsVicarious LiabilityAgentsGeneral OverviewTortsVicarious LiabilityEmployersGeneral OverviewTortsVicarious LiabilityEmployersScope of EmploymentGeneral Overview



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California Forms of Jury Instruction

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CHAPTER 37 California Judicial Council Vicarious Responsibility Instructions

5-37 California Forms of Jury Instruction CACI 3704

CACI 3704 Existence of "Employee" Status Disputed

[*Name of plaintiff*] **claims that** [*name of agent*] **was** [*name of defendant*]'s **employee.**

In deciding whether [*name of agent*] **was** [*name of defendant*]'s **employee, you must first decide whether** [*name of defendant*] **had the right to control how** [*name of agent*] **performed the work, rather than just the right to specify the result. It does not matter whether** [*name of defendant*] **exercised the right to control. If you decide that the right to control existed, then** [*name of agent*] **was** [*name of defendant*]'s **employee.**

If you decide that [*name of defendant*] **did not have the right of control, then you must consider all the circumstances in deciding whether** [*name of agent*] **was** [*name of defendant*]'s **employee. The following factors, if true, may show that** [*name of agent*] **was the employee of** [*name of defendant*]:

- (a) [*Name of defendant*] **supplied the equipment, tools, and place of work;**
- (b) [*Name of agent*] **was paid by the hour rather than by the job;**
- (c) **The work being done by** [*name of agent*] **was part of the regular business of** [*name of defendant*];
- (d) [*Name of defendant*] **had an unlimited right to end the relationship with** [*name of agent*];
- (e) **The work being done by** [*name of agent*] **was the only occupation or business of** [*name of agent*];
- (f) **The kind of work performed by** [*name of agent*] **is usually done under the direction of a supervisor rather than by a specialist working without supervision;**

(g) The kind of work performed by [name of agent] does not require specialized or professional skill;

(h) The services performed by [name of agent] were to be performed over a long period of time; and

(i) [Name of defendant] and [name of agent] acted as if they had an employer-employee relationship.

New September 2003

Not all of the secondary factors need to be given. Give only those factors that are supported by admissible evidence.

This instruction is primarily intended for employer-employee relationships. Most of the factors are less appropriate for analyzing other types of agency relationships, such as franchisor/franchisee. For an instruction more appropriate to these kinds of relationships, see *CACI No. 3705, Existence of "Agency" Relationship Disputed*.

- *Civil Code section 2295* provides: "An agent is one who represents another, called the principal, in dealings with third persons. Such representation is called agency."

- "The existence of an agency is a factual question within the province of the trier of fact whose determination may not be disturbed on appeal if supported by substantial evidence." (*L. Byron Culver & Associates v. Jaoudi Industrial & Trading Corp.* (1991) 1 Cal.App.4th 300, 305 [1 Cal.Rptr.2d 680] , internal citation omitted.)

- The burden of proving the existence of an agency rests on the one affirming its existence. (*Burbank v. National Casualty Co.* (1941) 43 Cal.App.2d 773, 781 [111 P.2d 740] .)

- One who performs a mere favor for another without being subject to any legal duty of service and without assenting to right of control is not an agent, because the agency relationship rests upon mutual consent. (*Hanks v. Carter & Higgins of Cal., Inc.* (1967) 250 Cal.App.2d 156, 161 [58 Cal.Rptr. 190] .)

- An agency must rest upon an agreement. (*D'Acquisto v. Evola* (1949) 90 Cal.App.2d 210, 213 [202 P.2d 596] .) "Agency may be implied from the circumstances and conduct of the parties." (*Michelson v. Hamada* (1994) 29 Cal.App.4th 1566, 1579 [36 Cal.Rptr.2d 343] , internal citations omitted.)

- "Whether a person performing work for another is an agent or an independent contractor depends primarily upon whether the one for whom the work is done has the legal right to control the activities of the alleged agent. ... It is not essential that the right of control be exercised or that there be actual supervision of the work of the agent. The existence of the right of control and supervision establishes the existence of an agency relationship." (*Malloy v. Fong* (1951) 37 Cal.2d 356, 370 [232 P.2d 241] , internal citations omitted.)

- When the principal controls only the results of the work and not the means by which it is accomplished, an independent contractor relationship is established. (*White v. Uniroyal, Inc.* (1984) 155

Cal.App.3d 1, 25 [202 Cal.Rptr. 141] , overruled on other grounds in *Soule v. GM Corp. (1994) 8 Cal.4th 548 [34 Cal.Rptr.2d 607, 882 P.2d 298].*)

■ "Agency and independent contractorship are not necessarily mutually exclusive legal categories as independent contractor and servant or employee are. ... One who contracts to act on behalf of another and subject to the other's control, except with respect to his physical conduct, is both an agent and an independent contractor." (*City of Los Angeles v. Meyers Brothers Parking System (1975) 54 Cal.App.3d 135, 138 [126 Cal.Rptr. 545]* , internal citations omitted; accord *Mottola v. R. L. Kautz & Co. (1988) 199 Cal.App.3d 98, 108 [244 Cal.Rptr. 737]* .)

■ The factors that may be considered in determining whether an agency exists are drawn from the Restatement Second of Agency, section 220, and are phrased therein as follows:

- (a) the extent of control which, by the agreement, the master may exercise over the details of the work;
- (b) whether or not the one employed is engaged in a distinct occupation or business;
- (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
- (d) the skill required in the particular occupation;
- (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
- (f) the length of time for which the person is employed;
- (g) the method of payment, whether by the time or by the job;
- (h) whether or not the work is a part of the regular business of the employer;
- (i) whether or not the parties believe they are creating the relation of master and servant;
and
- (j) whether the principal is or is not in business.

■ These factors have been cited with approval by the Supreme Court. (*Malloy, supra*, 37 Cal.2d at pp. 370-371 .) As phrased in the Restatement, they do not indicate in whose favor each factor weighs. The draft instruction states the factors in a way to suggest whether or not they point toward an employment relationship.

Secondary Sources

3 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment, §§ 2-42

1 Levy et al., California Torts, Ch. 8, *Vicarious Liability*, § 8.03[2] (Matthew Bender)

2 California Employment Law, Ch. 30, *Employers' Tort Liability to Third Parties for Conduct of Employees*, § 30.04 (Matthew Bender)

21 *California Forms of Pleading and Practice*, Ch. 248, *Employer's Liability for Employee's Torts*, §§ 248.15, 248.51

(Matthew Bender)

37 California Forms of Pleading and Practice, Ch. 427, *Principal and Agent* (Matthew Bender)

10 California Points and Authorities, Ch. 100A, *Employer and Employee: Respondeat Superior* (Matthew Bender)

1 California Civil Practice: Torts (Thomson West) §§ 3:5-3:6

Publisher's Notes

This instruction replaces BAJI No. 13.20, and covers issues presented in BAJI No. 13.06 and 15.12.

"The difference between an agent and an independent contractor is primarily the degree of retained control." (*Park v. Burlington Northern Santa Fe Railway Co.* (2003) 108 Cal.App.4th 595, 613 [133 Cal.Rptr.2d 757] .)

LexisNexis Matthew Bender Expert Practice Tip--CACI No. 3704 vs. BAJI No. 13.20: This instruction deals with the issues raised in BAJI No. 13.20, which sets forth criteria for the jury to consider in deciding if a defendant is an agent or independent contractor. Although BAJI No. 13.20 sets forth "factors to be taken into consideration," CACI No. 3704 presents factors which "if true, may show that _____ was the employee of _____." The language changes appear to favor the plaintiff who is trying to prove the agency relationship. This bias is recognized in the last bulleted item of the Sources and Authorities: "As phrased in the Restatement, they do not indicate in whose favor each factor weighs. The draft instruction states the factors in a way to suggest whether or not they point toward an employment relationship." Thus, if you represent a defendant contending there was no agency relationship, consider offering a modified instruction. Ask the judge to replace "the following factors, if true, may show that [agent] was the employee of [defendant]" with the following: "The following factors may be considered in your determination of this issue. The factors you may consider include, but are not limited to, whether or not: _____ [list factors as set forth in CACI No. 3704]." By Joseph Devine

LexisNexis Matthew Bender Expert Practice Tip--Start to Establish Relationship Early: It is important in the early stages of discovery to begin collecting the facts necessary to prove an employer/employee relationship so that a jury can find vicarious liability. Continue throughout the discovery process to develop the facts pursuant to this jury instruction. By Dona Cohn-Payne

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate LawAgency RelationshipsDuties & LiabilitiesNegligent Acts of AgentsGeneral OverviewBusiness & Corporate LawAgency RelationshipsDuties & LiabilitiesNegligent Acts of AgentsLiability of PrincipalsBusiness & Corporate LawAgency RelationshipsTypesEmployee & Employer



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California Forms of Jury Instruction

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CHAPTER 37 California Judicial Council Vicarious Responsibility Instructions

5-37 California Forms of Jury Instruction CACI 3705

CACI 3705 Existence of "Agency" Relationship Disputed

[Name of plaintiff] claims that [name of agent] was [name of defendant]'s agent and that [name of defendant] is therefore responsible for [name of agent]'s conduct.

If [name of plaintiff] proves that [name of defendant] gave [name of agent] authority to act on [his/her/its] behalf, then [name of agent] was [name of defendant]'s agent. This authority may be shown by words or may be implied by the parties' conduct. This authority cannot be shown by the words of [name of agent] alone.

New September 2003

This instruction should be used when the factual setting involves relationships such as homeowner-real estate agent or franchisor-franchisee.

- *Civil Code section 2295* provides: "An agent is one who represents another, called the principal, in dealings with third persons. Such representation is called agency."
- "The existence of an agency is a factual question within the province of the trier of fact whose determination may not be disturbed on appeal if supported by substantial evidence." (*L. Byron Culver & Associates v. Jaoudi Industrial & Trading Corp.* (1991) 1 Cal.App.4th 300, 305 [1 Cal.Rptr.2d 680] , internal citation omitted.)
- The burden of proving the existence of an agency rests on the one affirming its existence. (*Burbank v. National Casualty Co.* (1941) 43 Cal.App.2d 773, 781 [111 P.2d 740] .)

■ One who performs a mere favor for another without being subject to any legal duty of service and without assenting to right of control is not an agent, because the agency relationship rests upon mutual consent. (*Hanks v. Carter & Higgins of Cal., Inc.* (1967) 250 Cal.App.2d 156, 161 [58 Cal.Rptr. 190] .)

■ An agency must rest upon an agreement. (*D'Acquisto v. Evola* (1949) 90 Cal.App.2d 210, 213 [202 P.2d 596] .) "Agency may be implied from the circumstances and conduct of the parties." (*Michelson v. Hamada* (1994) 29 Cal.App.4th 1566, 1579 [36 Cal.Rptr.2d 343] , internal citations omitted.)

■ "Whether a person performing work for another is an agent or an independent contractor depends primarily upon whether the one for whom the work is done has the legal right to control the activities of the alleged agent. ... It is not essential that the right of control be exercised or that there be actual supervision of the work of the agent. The existence of the right of control and supervision establishes the existence of an agency relationship." (*Malloy v. Fong* (1951) 37 Cal.2d 356, 370 [232 P.2d 241] , internal citations omitted.)

■ When the principal controls only the results of the work and not the means by which it is accomplished, an independent contractor relationship is established. (*White v. Uniroyal, Inc.* (1984) 155 Cal.App.3d 1, 25 [202 Cal.Rptr. 141] , overruled on other grounds in *Soule v. GM Corp.* (1994) 8 Cal.4th 548 [34 Cal.Rptr.2d 607, 882 P.2d 298] .)

■ "Agency and independent contractorship are not necessarily mutually exclusive legal categories as independent contractor and servant or employee are. ... One who contracts to act on behalf of another and subject to the other's control, except with respect to his physical conduct, is both an agent and an independent contractor." (*City of Los Angeles v. Meyers Brothers Parking System* (1975) 54 Cal.App.3d 135, 138 [126 Cal.Rptr. 545] , internal citations omitted; accord *Mottola v. R. L. Kautz & Co.* (1988) 199 Cal.App.3d 98, 108 [244 Cal.Rptr. 737] .)

Secondary Sources

3 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment, §§ 92-96

1 Levy et al., California Torts, Ch. 8, *Vicarious Liability*, § 8.04 (Matthew Bender)

2 California Employment Law, Ch. 30, *Employers' Tort Liability to Third Parties for Conduct of Employees*, § 30.04 (Matthew Bender)

21 *California Forms of Pleading and Practice*, Ch. 248, *Employer's Liability for Employee's Torts*, § 248.51 (Matthew Bender)

37 *California Forms of Pleading and Practice*, Ch. 427, *Principal and Agent* (Matthew Bender)

10 *California Points and Authorities*, Ch. 100A, *Employer and Employee: Respondeat Superior* (Matthew Bender)

1 *California Civil Practice: Torts* (Thomson West) §§ 3:26-3:27

Publisher's Notes

This instruction covers issues presented in BAJI Nos. 13.00, 13.01, 13.06, and 13.07.

LexisNexis Matthew Bender Expert Practice Tip--Agent's Authority: CACI No. 3705 advises the jury on the disputed existence of the "agency" relationship which directly replaces BAJI No. 13.00's

definition of "agency." The last sentence of the new instruction is troubling: "This authority cannot be shown by the words of [*name of agent*] alone." No authority is cited for this proposition and it appears to be contrary to law. As noted in the Sources and Authority:

- "Agency may be implied from the circumstances and conduct of the parties." (Citation omitted).
- "The existence of an agency is a factual question ..." (Citation omitted).

Thus, if this instruction is relevant to your case, and it is in the best interest of your client (i.e., the plaintiff or the agent), ask the judge to refuse to read the last sentence of this instruction because it might create prejudicial error on review. *By Joseph Devine*

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate LawAgency RelationshipsGeneral OverviewBusiness & Corporate LawAgency RelationshipsDuties & LiabilitiesNegligent Acts of AgentsGeneral OverviewBusiness & Corporate LawAgency RelationshipsDuties & LiabilitiesNegligent Acts of AgentsLiability of PrincipalsTortsVicarious LiabilityAgentsGeneral Overview



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California Forms of Jury Instruction

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CHAPTER 37 California Judicial Council Vicarious Responsibility Instructions

5-37 California Forms of Jury Instruction CACI 3706

CACI 3706 Special Employment--General Employer and/or Special Employer Denies Responsibility

[Name of plaintiff] **claims that [name of worker] was the employee of [name of defendant first employer] when the incident occurred, and that [name of defendant first employer] is therefore responsible for [name of worker]'s conduct. [Name of defendant first employer] claims that [name of worker] was the temporary employee of [name of defendant second employer] and therefore [name of defendant second employer] is solely responsible for [name of worker]'s conduct.**

In deciding whether [name of worker] was [name of defendant second employer]'s temporary employee, you must first decide whether [name of defendant second employer] had the right to fully control the activities of [name of worker], rather than just the right to specify the result.

It does not matter whether [name of defendant second employer] exercised the right to control. If [name of defendant first employer] gave [name of defendant second employer] full authority to supervise the details of [name of worker]'s work, then [he/she] was the temporary employee of [name of defendant second employer], and [he/she/it] is responsible for [name of worker]'s conduct.

If you decide that [name of defendant second employer] did not have the right of control, then you must consider all the circumstances in deciding whether [name of worker] was [name of defendant second employer]'s employee. The following factors, if true, may show that [name of agent] was the temporary employee of [name of defendant second employer]:

- (a) [Name of defendant second employer] supplied the equipment, tools, and place of work;**
- (b) [Name of worker] was paid by the hour rather than by the job;**
- (c) The work being done by [name of worker] was part of the regular business of [name of**

defendant second employer];

(d) [Name of defendant second employer] had an unlimited right to end the relationship with [name of worker];

(e) The work being done by [name of worker] was the only occupation or business of [name of worker];

(f) The kind of work performed by [name of worker] is usually done under the direction of a supervisor rather than by a specialist working without supervision;

(g) The kind of work performed by [name of worker] does not require specialized or professional skill;

(h) The services performed by [name of worker] were to be performed over a long period of time;

(i) [Name of defendant second employer] and [name of worker] acted as if they had an employer-employee relationship;

(j) [Name of worker]'s duties to [name of defendant second employer] were only for the benefit of [name of defendant second employer];

(k) [Name of worker] consented to the temporary employment with [name of defendant second employer]; and

(l) [Name of worker] and [name of defendant second employer] acted as if they had a temporary employment relationship.

New September 2003

Not all of the secondary factors need to be given. Give only those factors that are supported by admissible evidence.

The terms "first and second employer" have been substituted for "special and general employer" to make the concept more straightforward. Also, the term "temporary employee" has been substituted for the term "special employee" for the same reason.

In addition to the alleged special employer's control over the employee, there are a number of other relevant factors to use in deciding whether a special employment relationship existed. They are similar, but not identical, to the factors to be used in an independent contractor analysis.

- "[W]here the servants of two employers are jointly engaged in a project of mutual interest, each employee ordinarily remains the servant of his own master and does not thereby become the special employee of the other." (*Marsh v. Tilley Steel Co.* (1980) 26 Cal.3d 486, 493 [162 Cal.Rptr. 320, 606 P.2d 355] .)

- "The law of agency has long recognized that a person generally the servant of one master can become the borrowed servant of another. If the borrowed servant commits a tort while carrying out the

bidding of the borrower, vicarious liability attaches to the borrower and not to the general master." (*Societa per Azioni de Navigazione Italia v. City of Los Angeles* (1982) 31 Cal.3d 446, 455-456 [183 Cal.Rptr. 51, 645 P.2d 102] , internal citations omitted.)

■ "Liability in borrowed servant cases involves the exact public policy considerations found in sole employer cases. Liability should be on the persons or firms which can best insure against the risk, which can best guard against the risk, which can most accurately predict the cost of the risk and allocate the cost directly to the consumers, thus reflecting in its prices the enterprise's true cost of doing business." (*Strait v. Hale Construction Co.* (1972) 26 Cal.App.3d 941, 949 [103 Cal.Rptr. 487] .)

■ "In determining whether a special employment relationship exists, the primary consideration is whether the special employer has ' "[t]he right to control and direct the activities of the alleged employee or the manner and method in which the work is performed, whether exercised or not. ... " ' However, '[whether] the right to control existed or was exercised is generally a question of fact to be resolved from the reasonable inferences to be drawn from the circumstances shown.' " (*Kowalski v. Shell Oil Co.* (1979) 23 Cal.3d 168, 175 [151 Cal.Rptr. 671, 588 P.2d 811] , citations omitted.)

■ "[S]pecial employment is most often resolved on the basis of 'reasonable inferences to be drawn from the circumstances shown.' Where the evidence, though not in conflict, permits conflicting inferences, ... ' "the existence or nonexistence of the special employment relationship barring the injured employee's action at law is generally a question reserved for the trier of fact." ' " (*Marsh, supra*, 26 Cal.3d at p. 493 .)

■ "[I]f neither the evidence nor inferences are in conflict, then the question of whether an employment relationship exists becomes a question of law which may be resolved by summary judgment." (*Riley v. Southwest Marine, Inc.* (1988) 203 Cal.App.3d 1242, 1248-1249 [250 Cal.Rptr. 718] , internal citations omitted.)

■ "The special employment relationship and its consequent imposition of liability upon the special employer flows from the borrower's power to supervise the details of the employee's work. Mere instruction by the borrower on the result to be achieved will not suffice." (*Marsh, supra*, 26 Cal.3d at p. 492 .)

■ Contract terms are not conclusive evidence of the existence of the right to control. (*Kowalski, supra*, 23 Cal.3d at p. 176 .)

■ The "secondary" factors may be more important in the special employment analysis than in the independent contractor analysis: "[S]pecial employment is most often resolved on the basis of 'reasonable inferences to be drawn from the circumstances shown.' " (*Marsh, supra*, 26 Cal.3d at p. 492 .)

■ The existence of a special employment relationship may be supported by evidence that: (1) the alleged special employer paid wages to the employee, (2) the alleged special employer had the power to discharge the employee, (3) the work performed by the employee was unskilled, (4) the work tools were provided by the alleged special employer, (5) the work was part of the alleged special employer's regular business, (6) the employee expressly or impliedly consented to a special employment relationship, (7) the parties believed they were creating a special employment relationship, and (8) the alleged special employment period was lengthy. (*Kowalski, supra*, 23 Cal.3d at pp. 176-177 .)

Secondary Sources

3 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment, §§ 169-172

1 Levy et al., California Torts, Ch. 8, *Vicarious Liability*, § 8.03[2][e] (Matthew Bender)

10 California Points and Authorities, Ch. 100A, *Employer and Employee: Respondeat Superior* (Matthew Bender)

1 California Civil Practice: Torts (Thomson West) §§ 3:26-3:27

Publisher's Notes

There is no BAJI instruction on this subject.

LexisNexis Matthew Bender Expert Practice Tip--Carefully Consider This Instruction Before Offering it to Jury: The agency issue is complicated by this new "special employment" instruction. This confusing effort attempts to instruct when the alleged agent has two employers. Notes in the Sources and Authority for CACI No. 3706 demonstrate that the courts have used the phrase "special employment." However, it appears that the law is no different if two, three, four, five, six, or more possible employers could be liable for the wrongful acts of their agents. The factors for a jury to consider are similar.

The instruction provides, in part, as follows: "[Y]ou must first decide whether [*name of defendant second employer*] had the right to *fully* control the activities of [*name of worker*], rather than just the right to specify the result." (Emphasis added.) "Right to *fully* control" is confusing and inconsistent with CACI No. 3704 which refers to the "right to control." (As CACI No. 3704 reflects a plaintiff bias, CACI No. 3706 reflects a defense bias.)

In light of the above, it is this practitioner's "Tip" that CACI No. 3706 is so confusing that it should be carefully considered before ever being offered to a jury. If CACI No. 3706 is not helpful to your case, ask the judge to refuse this instruction as confusing, prejudicial, and likely to confuse the issues based on *Evid. Code* § 352. By Joseph Devine

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate Law Agency Relationships Agents Distinguished Independent Contractors, Masters & Servants Independent Contractors Business & Corporate Law Agency Relationships Duties & Liabilities Negligent Acts of Agents General Overview Business & Corporate Law Agency Relationships Establishment Elements General Overview Labor & Employment Law Employment Relationships General Overview Torts Vicarious Liability Agents General Overview Torts Vicarious Liability Employers General Overview



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CHAPTER 37 California Judicial Council Vicarious Responsibility Instructions

5-37 California Forms of Jury Instruction CACI 3707

CACI 3707 Special Employment--Joint Responsibility

If you decide that [name of worker] was the temporary employee of [name of defendant second employer], but that [name of defendant first employer] partially controlled [name of worker]'s activities along with [name of defendant second employer], then you must conclude that both [name of defendant first employer] and [name of defendant second employer] are responsible for the conduct of [name of worker].

New September 2003

■ "Facts demonstrating the existence of a special employment relationship do not necessarily preclude a finding that a particular employee also remained under the partial control of the original employer. Where general and special employers share control of an employee's work, a 'dual employment' arises, and the general employer remains concurrently and simultaneously, jointly and severally liable for the employee's torts." (*Marsh v. Tilley Steel Co. (1980) 26 Cal.3d 486, 494-495 [162 Cal.Rptr. 320, 606 P.2d 355]* , internal citations omitted.)

■ "This is especially true where the loaned employee performs work of interest to both the general and special employers." (*Societa per Azioni de Navigazione Italia v. City of Los Angeles (1982) 31 Cal.3d 446, 460 [183 Cal.Rptr. 51, 645 P.2d 102]* , internal citation omitted.) If the loaned employee performs work of interest to both the general and special employers, "there is a presumption that the [employee] remained in his general employment. (*Ibid.*) The [general employer] can avoid liability only if it can [prove] that it gave up ... 'authoritative direction and control' [over the employee]." (*Ibid.*)

■ " 'Authoritative direction and control' is more than the power to suggest details or the necessary cooperation." (*Societa per Azioni de Navigazione Italia, supra* , 31 Cal.3d at p. 460 , internal citations

omitted.)

Secondary Sources

3 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment, §§ 169-172

1 Levy et al., California Torts, Ch. 8, *Vicarious Liability*, § 8.03[2][e] (Matthew Bender)

10 California Points and Authorities, Ch. 100A, *Employer and Employee: Respondeat Superior* (Matthew Bender)

1 California Civil Practice: Torts (Thomson West) §§ 3:26-3:27

Publisher's Notes

There is no BAJI instruction on this subject.

LexisNexis Matthew Bender Expert Practice Tip--Carefully Consider This Instruction Before Offering it to Jury: How can you ask a jury to conclude that a second employer is liable as a principal for an agent if they had the right to *fully* control the activities [*see CACI No. 3706*], while asking the same jury to find the first employer liable if he/she merely *partially* controlled the same person? Thus, as noted in my Practice Tip for *CACI No. 3706*, ask the court to refuse to give *CACI No. 3707* (and *CACI No. 3706*) as unnecessary, confusing, prejudicial, and inconsistent under *Evid. Code* § 352. By Joseph Devine

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsProcedureMultiple DefendantsJoint & Several LiabilityTortsVicarious LiabilityGeneral OverviewTortsVicarious LiabilityEmployersGeneral Overview



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California Forms of Jury Instruction

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CHAPTER 37 California Judicial Council Vicarious Responsibility Instructions

5-37 California Forms of Jury Instruction CACI 3708

CACI 3708 Peculiar-Risk Doctrine

[Name of plaintiff] claims that even if [name of independent contractor] was not an employee, [name of defendant] is responsible for [name of independent contractor]'s conduct because the work involved a special risk of harm.

A special risk of harm is a recognizable danger that arises out of the nature of the work or the place where it is done and requires specific safety measures appropriate to the danger. A special risk of harm may also arise out of a planned but unsafe method of doing the work. A special risk of harm does not include a risk that is unusual, abnormal, or not related to the normal or expected risks associated with the work.

To establish this claim, [name of plaintiff] must prove each of the following:

- 1. That the work was likely to involve a special risk of harm to others;**
- 2. That [name of defendant] knew or should have known that the work was likely to involve this risk;**
- 3. That [name of independent contractor] failed to use reasonable care to take specific safety measures appropriate to the danger to avoid this risk; and**
- 4. That [name of independent contractor]'s failure was a cause of harm to [name of plaintiff].**

[In deciding whether [name of defendant] should have known the risk, you should consider [his/her/its] knowledge and experience in the field of work to be done.]

- In determining the applicability of the doctrine of peculiar risk, a critical inquiry "is whether the work for which the contractor was hired involves a risk that is 'peculiar to the work to be done,' arising either from the nature or the location of the work and ' "against which a reasonable person would recognize the necessity of taking special precautions." ' " (*Privette v. Superior Court* (1993) 5 Cal.4th 689, 695 [21 Cal.Rptr.2d 72, 854 P.2d 721] , internal citations omitted.)
- "Whether the particular work which the independent contractor has been hired to perform is likely to create a peculiar risk of harm to others unless special precautions are taken is ordinarily a question of fact." (*Castro v. State of California* (1981) 114 Cal.App.3d 503, 511 [170 Cal.Rptr. 734] , internal citations omitted.)
- The doctrine ensures that an injured person will have a source of recovery even if the independent contractor is insolvent. (*Toland v. Sunland Housing Group, Inc.* (1998) 18 Cal.4th 253, 258 [74 Cal.Rptr.2d 878, 955 P.2d 504] .)
- "The analysis of the applicability of the peculiar risk doctrine to a particular fact situation can be broken down into two elements: (1) whether the work is likely to create a peculiar risk of harm unless special precautions are taken; and (2) whether the employer should have recognized that the work was likely to create such a risk." (*Jimenez v. Pacific Western Construction Co.* (1986) 185 Cal.App.3d 102, 110 [229 Cal.Rptr. 575] .)
- *Restatement Second of Torts, section 413*, states: "One who employs an independent contractor to do work which the employer should recognize as likely to create, during its progress, a peculiar unreasonable risk of physical harm to others unless special precautions are taken, is subject to liability for physical harm caused to them by the absence of such precautions if the employer (a) fails to provide in the contract that the contractor shall take such precautions, or (b) fails to exercise reasonable care to provide in some other manner for the taking of such precautions."
- *Restatement Second of Torts, section 416*, states: "One who employs an independent contractor to do work which the employer should recognize as necessarily likely to create during its progress a peculiar risk of physical harm to others unless special precautions are taken, is subject to liability for physical harm caused to them by the failure of the contractor to exercise reasonable care to take such precautions, even though the employer has provided for such precautions in the contract or otherwise."
- California courts have adopted the doctrine as expressed in these Restatement sections. (*Castro, supra*, 114 Cal.App.3d at p. 510 .)
- *Restatement Second of Torts, section 413*, has been referred to as "direct" liability, while section 416 has been referred to as "vicarious." However, the Supreme Court has observed that "this distinction is misleading." The court also observed that these two sections overlap and are somewhat redundant because, under either section, the hiring person is subject to liability for injuries to others resulting from the contractor's negligence. (*Toland, supra*, 18 Cal.4th at pp. 264-265 .)
- "A peculiar risk may arise out of a contemplated and unsafe method of work adopted by the independent contractor." (*Mackey v. Campbell Construction Co.* (1980) 101 Cal.App.3d 774, 785-786 [162 Cal.Rptr. 64] .)
- "The term 'peculiar risk' means neither a risk that is abnormal to the type of work done, nor a risk

that is abnormally great; it simply means 'a special, recognizable danger arising out of the work itself.' For that reason, as this court has pointed out, the term 'special risk' is probably a more accurate description than 'peculiar risk,' which is the terminology used in the Restatement." (*Privette*, *supra*, 5 Cal.4th at p. 695 , internal citations omitted.)

■ "Even when work performed by an independent contractor poses a special or peculiar risk of harm, ... the person who hired the contractor will not be liable for injury to others if the injury results from the contractor's 'collateral' or 'casual' negligence." (*Privette*, *supra*, 5 Cal.4th at p. 696 .)

■ Whether or not a risk is a "peculiar risk" may be decided as a matter of law. (*Jimenez*, *supra*, 185 Cal.App.3d at p. 111 .) In that case, the jury would decide only whether the independent contractor "failed to exercise reasonable care to take the necessary special precautions." (*Id.* at p. 108 .)

■ The Supreme Court has described "collateral" or "casual" negligence as follows: " 'Casual' or 'collateral' negligence has sometimes been described as negligence in the operative detail of the work, as distinguished from the general plan or method to be followed. Although this distinction can frequently be made, since negligence in the operative details will often not be within the contemplation of the employer when the contract is made, the distinction is not essentially one between operative detail and general method. 'It is rather one of negligence which is unusual or abnormal, or foreign to the normal or contemplated risks of doing the work, as distinguished from negligence which creates only the normal or contemplated risk.' " (*Aceves v. Regal Pale Brewing Co.* (1979) 24 Cal.3d 502, 510 [156 Cal.Rptr. 41, 595 P.2d 619] , overruled on other grounds in *Privette*, *supra*, 5 Cal.4th at p. 702, fn. 4 .)

■ The question of whether the harm resulted from collateral or casual negligence is to be resolved by the trier of fact. (*Caudel v. East Bay Municipal Utility Dist.* (1985) 165 Cal.App.3d 1, 7-9 [211 Cal.Rptr. 222] .)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1242-1244

1 Levy et al., California Torts, Ch. 8, *Vicarious Liability*, § 8.05[3][b] (Matthew Bender)

2 California Employment Law, Ch. 30, *Employers' Tort Liability to Third Parties for Conduct of Employees*, § 30.10[2][b] (Matthew Bender)

21 *California Forms of Pleading and Practice*, Ch. 248, *Employer's Liability for Employee's Torts*, § 248.22 (Matthew Bender)

37 *California Forms of Pleading and Practice*, Ch. 427, *Principal and Agent* (Matthew Bender)

10 *California Points and Authorities*, Ch. 100A, *Employer and Employee: Respondeat Superior* (Matthew Bender)

1 *California Civil Practice: Torts* (Thomson West) § 3:22

Publisher's Notes

This instruction covers issues presented in BAJI Nos. 13.21 and 13.21.4.

LexisNexis Matthew Bender Expert Practice Tip--Develop Peculiar Risk, If Supported By Facts:

The peculiar risk doctrine is useful to develop if the facts support the theory since it permits vicarious

responsibility against a defendant who has an independent contractor. Case law research and fact-based discovery into the status of an employee/agent/independent contractor is required. *By Dona Cohn-Payne*

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate Law Agency Relationships Types Employee & Employer Torts Vicarious Liability General Overview Torts Vicarious Liability Independent Contractors Peculiar Risk



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California Forms of Jury Instruction

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CHAPTER 37 California Judicial Council Vicarious Responsibility Instructions

5-37 California Forms of Jury Instruction CACI 3709

CACI 3709 Ostensible Agent

[Name of plaintiff] claims that [name of defendant] is responsible for [name of agent]'s conduct because [he/she] was [name of defendant]'s apparent [employee/agent]. To establish this claim, [name of plaintiff] must prove all of the following:

- 1. That [name of defendant] intentionally or carelessly created the impression that [name of agent] was [name of defendant]'s [employee/agent];**
- 2. That [name of plaintiff] reasonably believed that [name of agent] was [name of defendant]'s [employee/agent]; and**
- 3. That [name of plaintiff] was harmed because [he/she] reasonably relied on [his/her] belief.**

New September 2003

- *Civil Code section 2298* provides: "An agency is either actual or ostensible."
- *Civil Code section 2300* provides: "An agency is ostensible when the principal intentionally, or by want of ordinary care, causes a third person to believe another to be his agent who is not really employed by him."
- *Civil Code section 2317* provides: "Ostensible authority is such as a principal, intentionally or by want of ordinary care, causes or allows a third person to believe the agent to possess."

■ "Whether ostensible agency exist[s] is a question of fact and may be implied from [the] circumstances." (*Yanchor v. Kagan* (1971) 22 Cal.App.3d 544, 550 [99 Cal.Rptr. 367] .)

■ " 'It is elementary that there are three requirements necessary before recovery may be had against a principal for the act of an ostensible agent. The person dealing with the agent must do so with belief in the agent's authority and this belief must be a reasonable one; such belief must be generated by some act or neglect of the principal sought to be charged; and the third person in relying on the agent's apparent authority must not be guilty of negligence.' " (*Associated Creditors' Agency v. Davis* (1975) 13 Cal.3d 374, 399 [118 Cal.Rptr. 772, 530 P.2d 1084] , internal citations omitted.)

■ "Ostensible authority of an agent cannot be based on the agent's conduct alone; there must be evidence of conduct by the principal which causes a third party reasonably to believe the agent has authority." (*Lindsay-Field v. Friendly* (1995) 36 Cal.App.4th 1728, 1734 [43 Cal.Rptr.2d 71] .)

■ "Liability of the principal for the acts of an ostensible agent rests on the doctrine of 'estoppel,' the essential elements of which are representations made by the principal, justifiable reliance by a third party, and a change of position from such reliance resulting in injury." (*Preis v. American Indemnity Co.* (1990) 220 Cal.App.3d 752, 761 [269 Cal.Rptr. 617] , internal citation omitted.)

Secondary Sources

3 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment, §§ 144-149

1 Levy et al., California Torts, Ch. 8, *Vicarious Liability*, § 8.04[6] (Matthew Bender)

37 California Forms of Pleading and Practice, Ch. 427, *Principal and Agent* (Matthew Bender)

10 California Points and Authorities, Ch. 100A, *Employer and Employee: Respondeat Superior* (Matthew Bender)

1 California Civil Practice: Torts (Thomson West) § 3:29

Publisher's Notes

This instruction replaces BAJI No. 13.20.5.



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CHAPTER 37 California Judicial Council Vicarious Responsibility Instructions

5-37 California Forms of Jury Instruction CACI 3710

CACI 3710 Ratification

[*Name of plaintiff*] **claims that [*name of defendant*] is responsible for the harm caused by [*name of agent*]'s conduct because [he/she/it] approved that conduct after it occurred. If you find that [*name of agent*] harmed [*name of plaintiff*], you must decide whether [*name of defendant*] approved that conduct. To establish [his/her] claim, [*name of plaintiff*] must prove all of the following:**

1. That [*name of agent*] **intended to act on behalf of [*name of defendant*];**
2. That [*name of defendant*] **learned of [*name of agent*]'s conduct after it occurred; and**
3. That [*name of defendant*] **approved [*name of agent*]'s conduct.**

Approval can be shown through words, or it can be inferred from a person's conduct. [Approval can be inferred if a person voluntarily keeps the benefits of [his/her/its] [representative/employee]'s unauthorized conduct after [he/she/it] learns of the unauthorized conduct.]

New September 2003

Directions for Use

The last bracketed sentence should be read only if it is appropriate to the facts of the case.

Sources and Authority

- "An agency may be created, and an authority may be conferred, by a ... subsequent ratification." (

Civ. Code, § 2307.) "A ratification can be made ... by accepting or retaining the benefit of the act, with notice thereof." (*Civ. Code*, § 2310.) "Ratification of part of an indivisible transaction is a ratification of the whole." (*Civ. Code*, § 2311.) "A principal is responsible for ... wrongs committed by his agent [if] ... he has ... ratified them" (*Civ. Code*, § 2339.)

■ The concept of ratification is more commonly associated with contract law than tort law. Nevertheless, "[r]atification has, in fact, been a basis for imputed tort liability under the common law for centuries." (Kraus, *Ratification of Torts: An Overview and Critique of the Traditional Doctrine and Its Recent Extension to Claims of Workplace Harassment* (1997) 32 *Tort & Ins. L.J.* 807.)

■ "Ratification is the voluntary election by a person to adopt in some manner as his own an act which was purportedly done on his behalf by another person, the effect of which, as to some or all persons, is to treat the act as if originally authorized by him. A purported agent's act may be adopted expressly or it may be adopted by implication based on conduct of the purported principal from which an intention to consent to or adopt the act may be fairly inferred, including conduct which is 'inconsistent with any reasonable intention on his part, other than that he intended approving and adopting it.' " (*Rakestraw v. Rodrigues* (1972) 8 *Cal.3d* 67, 73 [104 *Cal.Rptr.* 57, 500 *P.2d* 1401] .)

■ "A principal is liable when it ratifies an originally unauthorized tort. The failure to discharge an agent or employee may be evidence of ratification. As noted in *McChristian v. Popkin* (1946) 75 *Cal.App.2d* 249, 256 [171 *P.2d* 85] , 'If the employer, after knowledge of or opportunity to learn of the agent's misconduct, continues the wrongdoer in service, the employer may become an abettor and may make himself liable in punitive damages.' " (*Murillo v. Rite Stuff Foods, Inc.* (1998) 65 *Cal.App.4th* 833, 852 [77 *Cal.Rptr.2d* 12] .)

Secondary Sources

3 Witkin, *Summary of California Law* (10th ed. 2005) Agency and Employment, §§ 139-143

1 Levy et al., *California Torts*, Ch. 8, *Vicarious Liability*, § 8.04[7] (Matthew Bender)

2 *California Employment Law*, Ch. 30, *Employers' Tort Liability to Third Parties for Conduct of Employees*, §§ 30.02, 30.07 (Matthew Bender)

21 *California Forms of Pleading and Practice*, Ch. 248, *Employer's Liability for Employee's Torts*, § 248.13 (Matthew Bender)

37 *California Forms of Pleading and Practice*, Ch. 427, *Principal and Agent* (Matthew Bender)

10 *California Points and Authorities*, Ch. 100A, *Employer and Employee: Respondeat Superior* (Matthew Bender)

1 *California Civil Practice: Torts* (Thomson West) § 3:4

Publisher's Notes

There is no BAJI instruction on this subject.

LexisNexis Matthew Bender Expert Practice Tip--Use of Ratification: Ratification has been used in cases that involve harassment and/or discrimination causes of action. It is a way to hold a company liable for the acts of its agents. *By Dona Cohn-Payne*

LexisNexis Matthew Bender Expert Practice Tip--Ratification of Agent's Conduct By Principal:

CACI No. 3710 is a new instruction regarding ratification of an agent's conduct by the principal. Ratification is different than Respondeat Superior liability. It can subject an employer/principal to punitive damages as an abettor who authorized the wrongful conduct of its employee/agent. Retaining the employee in service, or failure to discharge after knowledge of the wrongful conduct, may subject the employer/principal to punitive damages [*Murillo v. Rite Stuff Foods, Inc.* (1998) 65 Cal. App. 4th 833, 852, 77 Cal. Rptr. 2d 12] . Therefore, if you represent an employer/principal alleged to have "ratified" malicious, oppressive, or fraudulent conduct of its employee/agent, ask the court to refuse to give this instruction unless there is "clear and convincing" evidence of ratification required by *Civ. Code* § 3294.
By Joseph Devine

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate LawAgency RelationshipsDuties & LiabilitiesNegligent Acts of AgentsGeneral OverviewBusiness & Corporate LawAgency RelationshipsRatificationGeneral OverviewBusiness & Corporate LawAgency RelationshipsRatificationIllegal ActsBusiness & Corporate LawAgency RelationshipsRatificationLiabilitiesTortsVicarious LiabilityAgentsRatification



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CHAPTER 37 California Judicial Council Vicarious Responsibility Instructions

5-37 California Forms of Jury Instruction CACI 3711

CACI 3711 Partnerships

A partnership and each of its partners are responsible for the wrongful conduct of a partner acting within the scope of his or her authority.

You must decide whether a partnership existed in this case. A partnership is a group of two or more persons who own a business in which all the partners agree to share the profits and losses. A partnership can be formed by a written or oral agreement or by an agreement implied by the parties' conduct.

New September 2003

Directions for Use

This instruction is not intended for cases involving limited liability partnerships.

Sources and Authority

■ *Corporations Code* section 16202 provides, in part: "[T]he association of two or more persons to carry on as coowners a business for profit forms a partnership, whether or not the persons intend to form a partnership."

■ *Corporations Code* section 16305(a) provides: "A partnership is liable for loss or injury caused to a person, or for a penalty incurred, as a result of a wrongful act or omission, or other actionable conduct, of a partner acting in the ordinary course of business of the partnership or with authority of the partnership."

■ "Under traditional legal concepts the partnership is regarded as an aggregate of individuals with each

partner acting as agent for all other partners in the transaction of partnership business, and the agents of the partnership act as agents for all of the partners." (*Marshall v. International Longshoremen's and Warehousemen's Union* (1962) 57 Cal.2d 781, 783 [22 Cal.Rptr. 211, 371 P.2d 987] .)

■ "[T]he partners of a partnership are jointly and severally liable for the conduct and torts injuring a third party committed by one of the partners." (*Black v. Sullivan* (1975) 48 Cal.App.3d 557, 569 [122 Cal.Rptr. 119] , internal citations omitted.)

■ "In determining whether a relationship such as that of partners has been created, the courts are guided not only by the spoken or written words of the contracting parties, but also by their acts." (*Singleton v. Fuller* (1953) 118 Cal.App.2d 733, 740-741 [259 P.2d 687] , internal citation omitted.)

■ "It is essential, however, to the existence of a partnership that there be a community of interest and an agreement to share jointly in the profits and losses resulting from the enterprise." (*Sandberg v. Jacobson* (1967) 253 Cal.App.2d 663, 668 [61 Cal.Rptr. 436] , internal citation omitted.)

Secondary Sources

9 Witkin, Summary of California Law (10th ed. 2005) Partnership, § 39

1 Levy et al., *California Torts*, Ch. 8, *Vicarious Liability*, § 8.06 (Matthew Bender)

37 California Forms of Pleading and Practice, Ch. 427, *Principal and Agent* (Matthew Bender)

10 California Points and Authorities, Ch. 100A, *Employer and Employee: Respondeat Superior* (Matthew Bender)

1 California Civil Practice: Torts (Thomson West) §§ 3:36-3:37

Publisher's Notes

This instruction covers issues presented in BAJI No. 13.35.



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CHAPTER 37 California Judicial Council Vicarious Responsibility Instructions

5-37 California Forms of Jury Instruction CACI 3712

CACI 3712 Joint Ventures

A joint venture and each of its members are responsible for the wrongful conduct of a member acting within the scope of his or her authority.

You must decide whether a joint venture existed in this case. A joint venture exists when two or more persons combine their property, skill, or knowledge to carry out a single business undertaking and agree to share the control, profits, and losses. A joint venture can be formed by a written or oral agreement or by an agreement implied by the parties' conduct.

New September 2003

Directions for Use

This instruction can be modified for cases involving unincorporated associations by substituting the term "unincorporated association" for "joint venture."

Sources and Authority

- "A joint venture is 'an undertaking by two or more persons jointly to carry out a single business enterprise for profit.' " (*Weiner v. Fleischman* (1991) 54 Cal.3d 476, 482 [286 Cal.Rptr. 40, 816 P.2d 892] , internal citations omitted.)

- "A joint venture has been defined in various ways, but most frequently perhaps as an association of two or more persons who combine their property, skill or knowledge to carry out a single business enterprise for profit." (*Holtz v. United Plumbing and Heating Co.* (1957) 49 Cal.2d 501, 506 [319 P.2d

617] .)

■ Joint ventures are similar to partnerships, but the term "joint venture" commonly applies to temporary business arrangements involving a single transaction: "From a legal standpoint, both relationships are virtually the same. Accordingly, the courts freely apply partnership law to joint ventures when appropriate." (*Weiner, supra*, 54 Cal.3d at p. 482 .)

■ "It has generally been recognized that in order to create a joint venture there must be an agreement between the parties under which they have a community of interest, that is, a joint interest, in a common business undertaking, an understanding as to the sharing of profits and losses, and a right of joint control." (*Holtz, supra*, 49 Cal.2d at pp. 506-507 .)

■ "The joint enterprise theory, while rarely invoked outside the automobile accident context, is well established and recognized in this state as an exception to the general rule that imputed liability for the negligence of another will not be recognized." (*Christensen v. Superior Court* (1991) 54 Cal.3d 868, 893 [2 Cal.Rptr.2d 79, 820 P.2d 181] , internal citation omitted.)

■ " 'There are three basic elements of a joint venture: the members must have joint control over the venture (even though they may delegate it), they must share the profits of the undertaking, and the members must each have an ownership interest in the enterprise. [Citation].' 'Whether a joint venture actually exists depends on the intention of the parties. [Citations.] [P] ... [P] [W]here evidence is in dispute the existence or nonexistence of a joint venture is a question of fact to be determined by the jury. [Citation.]' " (*Unruh-Haxton v. Regents of University of California* (2008) 162 Cal.App.4th 343, 370 [76 Cal.Rptr.3d 146] , internal citations omitted.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, § 1235

1 Levy et al., *California Torts*, Ch. 8, *Vicarious Liability*, § 8.07 (Matthew Bender)

37 California Forms of Pleading and Practice, Ch. 427, *Principal and Agent* (Matthew Bender)

10 California Points and Authorities, Ch. 100A, *Employer and Employee: Respondeat Superior* (Matthew Bender)

1 California Civil Practice: Torts (Thomson West) §§ 3:38-3:39

Publisher's Notes

This instruction covers issues presented in BAJI Nos. 13.40 and 13.41.

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate Law Agency Relationships Agents Distinguished Joint Venturers Business & Corporate Law Joint Ventures General Overview Torts Vicarious Liability General Overview Torts Vicarious Liability Joint Ventures



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CHAPTER 37 California Judicial Council Vicarious Responsibility Instructions

5-37 California Forms of Jury Instruction CACI 3713

CACI 3713 Nondelegable Duty

[*Name of defendant*] **has a duty that cannot be delegated to another person arising from** [*insert name, popular name, or number of regulation, statute, or ordinance / a contract between the parties/ other, e.g., the landlord-tenant relationship*]. **Under this duty,**

[*insert requirements of regulation, statute, or ordinance or otherwise describe duty*].

[*Name of plaintiff*] **claims that [he/she] was harmed by the conduct of** [*name of independent contractor*] **and that** [*name of defendant*] **is responsible for this harm. To establish this claim, [name of plaintiff] must prove all of the following:**

1. **That** [*name of defendant*] **hired** [*name of independent contractor*] **to** [*describe job involving nondelegable duty, e.g., repair the roof*];
2. **That** [*name of independent contractor*] [*specify wrongful conduct in breach of duty, e.g., did not comply with this law*];
3. **That** [*name of plaintiff*] **was harmed; and**
4. **That** [*name of independent contractor*]'s **conduct was a substantial factor in causing** [*name of plaintiff*]'s **harm.**

New October 2004; Revised June 2010

Directions for Use

Use this instruction with regard to the liability of the hirer for the torts of an independent contractor if a nondelegable duty is imposed on the hirer by statute, regulation, ordinance, contract, or common law. (See *Barry v. Raskov* (1991) 232 Cal.App.3d 447, 455 [283 Cal.Rptr. 463] .)

Sources and Authority

- *Restatement Second of Torts, section 424*, provides: "One who by statute or by administrative regulation is under a duty to provide specified safeguards or precautions for the safety of others is subject to liability to the others for whose protection the duty is imposed for harm caused by the failure of a contractor employed by him to provide such safeguards or precautions."

- "As a general rule, a hirer of an independent contractor is not liable for physical harm caused to others by the act or omission of the independent contractor. There are multiple exceptions to the rule, however, one being the doctrine of nondelegable duties. ... ' "A nondelegable duty is a definite affirmative duty the law imposes on one by reason of his or her relationship with others. One cannot escape this duty by entrusting it to an independent contractor." A nondelegable duty may arise when a statute or regulation requires specific safeguards or precautions to ensure others' safety. [Citation.] ... ' " (*J.L. v. Children's Institute, Inc.* (2009) 177 Cal.App.4th 388, 400 [99 Cal.Rptr.3d 5] , internal citations omitted.)

- "The rationale of the nondelegable duty rule is 'to assure that when a negligently caused harm occurs, the injured party will be compensated by the person whose activity caused the harm[.]' The 'recognition of nondelegable duties tends to insure that there will be a financially responsible defendant available to compensate for the negligent harms caused by that defendant's activity[.]' Thus, the nondelegable duty rule advances the same purposes as other forms of vicarious liability." (*Srithong v. Total Investment Co.* (1994) 23 Cal.App.4th 721, 727 [28 Cal.Rptr.2d 672] , internal citations and footnote omitted.)

- "Simply stated, ' "[t]he duty which a possessor of land owes to others to put and maintain it in reasonably safe condition is nondelegable. If an independent contractor, no matter how carefully selected, is employed to perform it, the possessor is answerable for harm caused by the negligent failure of his contractor to put or maintain the buildings and structures in reasonably safe condition[.]" ' " (*Srithong, supra*, 23 Cal.App.4th at p. 726 .)

- "Nondelegable duties may arise when a statute provides specific safeguards or precautions to insure the safety of others." (*Felmler v. Falcon Cable Co.* (1995) 36 Cal.App.4th 1032, 1039 [43 Cal.Rptr.2d 158] .)

- "Unlike strict liability, a nondelegable duty operates, not as a substitute for liability based on negligence, but to assure that when a negligently caused harm occurs, the injured party will be compensated by the person whose activity caused the harm and who may therefore properly be held liable for the negligence of his agent, whether his agent was an employee or an independent contractor." (*Maloney v. Rath* (1968) 69 Cal. 2d 442, 446 [71 Cal.Rptr. 897, 445 P.2d 513] .)

- A California public agency is subject to the imposition of a nondelegable duty in the same manner as any private individual. (*Gov. Code, § 815.4*; *Jordy v. County of Humboldt* (1992) 11 Cal.App.4th 735, 742 [14 Cal.Rptr.2d 553] .)

- "It is undisputable that '[t]he question of duty is ... a legal question to be determined by the court.' " (*Summers v. A.L. Gilbert Co.* (1999) 69 Cal.App.4th 1155, 1184 [82 Cal.Rptr.2d 162] internal citation

omitted.) "When a court finds that a defendant has a nondelegable duty as a matter of law, the instruction given by the court should specifically inform the jurors of that fact and not leave them to speculate on the subject." (*Id.* at p. 1187, fn. 5 .)

■ " 'Where the law imposes a definite, affirmative duty upon one by reason of his relationship with others, whether as an owner or proprietor of land or chattels or in some other capacity, such persons can not escape liability for a failure to perform the duty thus imposed by entrusting it to an independent contractor. ... It is immaterial whether the duty thus regarded as "nondelegable" be imposed by statute, charter or by common law.' " (*Snyder v. Southern California Edison Co.* (1955) 44 Cal.2d 793, 800 [285 P.2d 912] , internal citation omitted.)

■ "[T]o establish a defense to liability for damages caused by a brake failure, the owner and operator must establish not only that 'he did what might reasonably be expected of a person of ordinary prudence, acting under similar circumstances, who desired to comply with the law' ' but also that the failure was not owing to the negligence of any agent, whether employee or independent contractor, employed by him to inspect or repair the brakes." (*Clark v. Dziabas* (1968) 69 Cal.2d 449, 451 [71 Cal.Rptr. 901, 445 P.2d 517] , internal citation omitted.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, § 1247

1 Levy et al., *California Torts*, Ch. 8, *Vicarious Liability*, § 8.05[3][d] (Matthew Bender)

2 *California Employment Law*, Ch. 30, *Employers' Tort Liability to Third Parties for Conduct of Employees*, § 30.10[2][d] (Matthew Bender)

21 *California Forms of Pleading and Practice*, Ch. 248, *Employer's Liability for Employee's Torts*, § 248.22[2][c] (Matthew Bender)

10 *California Points and Authorities*, Ch. 100A, *Employer and Employee: Respondeat Superior*, § 100A.42 (Matthew Bender)

Publisher's Notes

This instruction covers issues presented in BAJI No. 13.22.



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California Forms of Jury Instruction

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CHAPTER 37 California Judicial Council Vicarious Responsibility Instructions

5-37 California Forms of Jury Instruction CACI 3714-CACI 3719

Reserved for Future Use

CACI 3714Reserved for Future Use



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CHAPTER 37 California Judicial Council Vicarious Responsibility Instructions

5-37 California Forms of Jury Instruction CACI 3720

CACI 3720 Scope of Employment

[Name of plaintiff] must prove that [name of agent] was acting within the scope of [his/her] [employment/authorization] when [name of plaintiff] was harmed.

Conduct is within the scope of [employment/authorization] if:

- (a) It is reasonably related to the kinds of tasks that the [employee/agent] was employed to perform; or**
- (b) It is reasonably foreseeable in light of the employer's business or the [agent's/employee's job] responsibilities.**

New September 2003

Directions for Use

For an instruction on the scope of employment in cases involving on-duty peace officers, see *CACI No. 3721, Scope of Employment--Peace Officer's Misuse of Authority*.

This instruction is closely related to *CACI No. 3723, Substantial Deviation*, which focuses on when an act is not within the scope of employment.

Sources and Authority

- "The question of scope of employment is ordinarily one of fact for the jury to determine." (*Mary M.*

v. *City of Los Angeles* (1991) 54 Cal.3d 202, 221 [285 Cal.Rptr. 99, 814 P.2d 1341] .) However, it becomes a question of law when the facts are undisputed and no conflicting inferences are possible. (*Hinman v. Westinghouse Electric Co.* (1970) 2 Cal.3d 956, 963 [88 Cal.Rptr. 188, 471 P.2d 988] .)

- Plaintiff bears the burden of proof to show that the employee's tortious act was committed within the scope of his employment. (*Ducey v. Argo Sales Co.* (1979) 25 Cal.3d 707, 721 [159 Cal.Rptr. 835, 602 P.2d 755] .)

- "That the employment brought the tortfeasor and victim together in time and place is not enough. ... [T]he incident leading to injury must be an 'outgrowth' of the employment [or] the risk of tortious injury must be 'inherent in the working environment' or 'typical of or broadly incidental to the enterprise [the employer] has undertaken.' " (*Lisa M. v. Henry Mayo Newhall Memorial Hospital* (1995) 12 Cal.4th 291, 298 [48 Cal.Rptr.2d 510, 907 P.2d 358] , internal citations omitted.)

- "In California, the scope of employment has been interpreted broadly under the respondeat superior doctrine." (*Farmers Insurance Group v. County of Santa Clara* (1995) 11 Cal.4th 992, 1004 [47 Cal.Rptr.2d 478, 906 P.2d 440] .)

- "Tortious conduct that violates an employee's official duties or disregards the employer's express orders may nonetheless be within the scope of employment. So may acts that do not benefit the employer, or are willful or malicious in nature." (*Mary M.*, *supra*, 54 Cal.3d at p. 209 , internal citations omitted.)

- In *Perez v. Van Groningen & Sons, Inc.* (1986) 41 Cal.3d 962, 968 [227 Cal.Rptr. 106, 719 P.2d 676] , the Supreme Court adopted the following analysis on scope of employment: "A risk arises out of the employment when 'in the context of the particular enterprise an employee's conduct is not so unusual or startling that it would seem unfair to include the loss resulting from it among other costs of the employer's business. In other words, where the question is one of vicarious liability, the inquiry should be whether the risk was one 'that may fairly be regarded as typical of or broadly incidental' to the enterprise undertaken by the employer.' Accordingly, the employer's liability extends beyond his actual or possible control of the employee to include risks inherent in or created by the enterprise."

- California does not follow the traditional rule that an employee's actions are within the scope of employment only if motivated, in whole or part, by a desire to serve the employer's interests. (*Lisa M.*, *supra*, 12 Cal.4th at p. 297 .) However, the employee's motivation is a relevant factor in the scope of employment analysis. (*Id* at p. 298 .)

- In *Farmers*, *supra* , and later in *Lisa M.*, *supra* , the Supreme Court adopted and employed the following "foreseeability test" from *Rodgers v. Kemper Construction Co.* (1975) 50 Cal.App.3d 608, 618-619 [124 Cal.Rptr. 143] : "One way to determine whether a risk is inherent in, or created by, an enterprise is to ask whether the actual occurrence was a generally foreseeable consequence of the activity. However, 'foreseeability' in this context must be distinguished from 'foreseeability' as a test for negligence. In the latter sense 'foreseeable' means a level of probability which would lead a prudent person to take effective precautions whereas 'foreseeability' as a test for respondeat superior merely means that in the context of the particular enterprise an employee's conduct is not so unusual or startling that it would seem unfair to include the loss resulting from it among other costs of the employer's business."

- In *Lisa M.*, *supra* , the court first analyzed whether the wrongful conduct was "engendered by" or was an "outgrowth" of the perpetrator's employment. (*Lisa M.*, *supra* at p. 300 .) The court then applied

the *Rodgers* foreseeability test: "The employment ... must be such as predictably to create the risk employees will commit [torts] of the type for which liability is sought." (*Id.* at p. 299 .) The court reached the same result under both analyses [ultrasound technician who sexually assaulted a patient was not acting within the scope of employment].

■ Some courts have developed a two-prong test for determining whether an act is within the scope of employment. An act is within the scope of employment if it either (1) is required or incident to his duties, or (2) could be reasonably foreseen by the employer in any event. If the employee's act satisfies either part of this two-prong test, then the employer is liable. (*Bailey v. Filco, Inc.* (1996) 48 Cal.App.4th 1552, 1559 [56 Cal.Rptr.2d 333] .) It has been noted that "the foreseeability-based test and the two-prong test are not so much different tests, but different ways of articulating the same test for scope of employment." (*Id.* at p. 1561 .)

Secondary Sources

3 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment, §§ 176-194

1 Levy et al., *California Torts*, Ch. 8, *Vicarious Liability*, § 8.03[3] (Matthew Bender)

2 *California Employment Law*, Ch. 30, *Employers' Tort Liability to Third Parties for Conduct of Employees*, § 30.05 (Matthew Bender)

21 *California Forms of Pleading and Practice*, Ch. 248, *Employer's Liability for Employee's Torts*, § 248.16 (Matthew Bender)

37 *California Forms of Pleading and Practice*, Ch. 427, *Principal and Agent* (Matthew Bender)

10 *California Points and Authorities*, Ch. 100A, *Employer and Employee: Respondeat Superior* (Matthew Bender)

1 *California Civil Practice: Torts* (Thomson West) § 3:8

Publisher's Notes

This instruction replaces BAJI No. 13.01, and covers issues presented in BAJI No. 15.12.

A court, in determining whether an employee has acted outside the scope of employment, must also "consider whether the following three policy objectives underlying respondeat superior liability would be achieved: (1) imposing liability on the employer to prevent recurrence of the tortious conduct by creating a strong incentive for vigilance by those in a position to guard against the evil to be prevented; (2) giving greater assurance of compensation to the victim; and (3) spreading the risk of loss among the beneficiaries of the enterprise." (*K. G. v. County of Riverside* (2003) 106 Cal.App.4th 1374, 1382-1383 [131 Cal.Rptr.2d 762] ; *Yamaguchi v. Harnsmut* (2003) 106 Cal.App.4th 472, 485-486 [130 Cal.Rptr.2d 706] , both citing *Mary M.*, *supra* .)

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsVicarious LiabilityAgentsGeneral OverviewTortsVicarious LiabilityEmployersScope of EmploymentGeneral OverviewTortsVicarious LiabilityEmployersScope of EmploymentApplication of State LawTortsVicarious LiabilityEmployersScope of EmploymentFactorsTortsVicarious LiabilityEmployersScope of EmploymentPlace & Time



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CHAPTER 37 California Judicial Council Vicarious Responsibility Instructions

5-37 California Forms of Jury Instruction CACI 3721

CACI 3721 Scope of Employment--Peace Officer's Misuse of Authority

[Name of plaintiff] must prove that [name of agent] was acting within the scope of [his/her] [employment/authorization] when [name of plaintiff] was harmed.

The conduct of a peace officer is within the scope of [his/her] employment as a peace officer if all of the following are true:

- (a) The conduct occurs while the peace officer is on duty as a peace officer;**
- (b) The conduct occurs while the peace officer is exercising [his/her] authority as a peace officer;**
and
- (c) The conduct results from the use of [his/her] authority as a peace officer.**

New September 2003

Sources and Authority

- "[W]e hold that when, as in this case, a police officer on duty misuses his official authority by raping a woman whom he has detained, the public entity that employs him can be held vicariously liable. This does not mean that, as a matter of law, the public employer is vicariously liable whenever an on-duty officer commits a sexual assault. Rather, this is a question of fact for the jury." (*Mary M. v. City of Los Angeles* (1991) 54 Cal.3d 202, 221 [285 Cal.Rptr. 99, 814 P.2d 1341] .)

- "The use of authority is incidental to the duties of a police officer. The County enjoys tremendous

benefits from the public's respect for that authority. Therefore, it must suffer the consequences when the authority is abused." (*White v. County of Orange* (1985) 166 Cal.App.3d 566, 572 [212 Cal.Rptr. 493] .)

■ "It is questionable whether the holding in *Mary M.* is still viable. Indeed, the Chief Justice of California has described it as an 'aberrant holding' that was 'wrongly decided' and should be 'overrule[d].' Nonetheless, it remains the rule of law unless a majority of the California Supreme Court decides otherwise." (*M.P. v. City of Sacramento* (2009) 177 Cal.App.4th 121, 124 [98 Cal.Rptr.3d 812] , internal citations omitted.)

■ "We reject plaintiff's effort to apply *Mary M.* to the facts of this case. For reasons that follow, we conclude the *Mary M.* holding that a public employer of a police officer may be vicariously liable for a sex crime committed by the officer against a person detained by the officer while on duty is, at best, limited to such acts by an on-duty police officer and does not extend to any other form of employment, including firefighting. Thus, as a matter of law, the alleged sexual assault by firefighters in this case was not conduct within in the scope of their employment and cannot support a finding that their employer ... is vicariously liable for the harm." (*M.P.*, *supra*, 177 Cal.App.4th at p. 124 .)

Secondary Sources

3 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment, §§ 170, 180, 185, 190

1 Levy et al., *California Torts*, Ch. 8, *Vicarious Liability*, § 8.03[3][f][ii] (Matthew Bender)

10 *California Points and Authorities*, Ch. 100A, *Employer and Employee: Respondeat Superior*, § 100A.26 et seq. (Matthew Bender)

1 California Civil Practice: Torts (Thomson West) § 3:8

Publisher's Notes

There is no BAJI instruction on this subject.

Under the facts of the case, it was "undisputed that the sexual misconduct was personal in nature, and therefore did not give rise to respondeat superior liability as a matter of law, regardless of whether or not he committed such acts in his patrol car, in uniform, or by threatening to use his officer status." (*K. G. v. County of Riverside* (2003) 106 Cal.App.4th 1374, 1385 [131 Cal.Rptr.2d 762] .)

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsVicarious LiabilityGeneral OverviewTortsVicarious LiabilityEmployersGeneral OverviewTortsVicarious LiabilityEmployersActivities & ConditionsGeneral Overview



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CHAPTER 37 California Judicial Council Vicarious Responsibility Instructions

5-37 California Forms of Jury Instruction CACI 3722

CACI 3722 Scope of Employment--Unauthorized Acts

An employee's unauthorized conduct may be within the scope of [employment/authorization] if [the conduct was committed in the course of a series of acts authorized by the employer] [or] [the conduct arose from a risk inherent in or created by the enterprise].

[An employee's wrongful or criminal conduct may be within the scope of employment even if it breaks a company rule or does not benefit the employer.]

New September 2003

■ An "employer's liability extends beyond his actual or possible control of the employee to include risks inherent in or created by the enterprise." (*Perez v. Van Groningen & Sons, Inc. (1986) 41 Cal.3d 962, 968 [227 Cal.Rptr. 106, 719 P.2d 676]* .)

■ "The fact that an employee is not engaged in the ultimate object of his employment at the time of his wrongful act does not preclude attribution of liability to an employer. ... [T]he proper inquiry is not whether the wrongful act itself was authorized but whether it was committed in the course of a series of acts of the agent which were authorized by the principal." (*Mary M. v. City of Los Angeles (1991) 54 Cal.3d 202, 219 [285 Cal.Rptr. 99, 814 P.2d 1341]* , internal citations omitted.)

■ "Tortious conduct that violates an employee's official duties or disregards the employer's express orders may nonetheless be within the scope of employment. So may acts that do not benefit the employer, or are willful or malicious in nature." (*Mary M., supra, 54 Cal.3d at p. 209* , internal citations omitted.)

■ It is "well established, if somewhat surprising on first encounter, ... that an employee's willful, malicious and even criminal torts may fall within the scope of his or her employment for purposes of respondeat superior, even though the employer has not authorized the employee to commit crimes or intentional torts." (*Lisa M. v. Henry Mayo Newhall Memorial Hospital* (1995) 12 Cal.4th 291, 296-297 [48 Cal.Rptr.2d 510, 907 P.2d 358] , internal citations omitted.)

■ "California no longer follows the traditional rule that an employee's actions are within the scope of employment only if motivated, in whole or part, by a desire to serve the employer's interests. ... [P] *'It is sufficient ... if the injury resulted from a dispute arising out of the employment. ... 'It is not necessary that the assault should have been made 'as a means, or for the purpose of performing the work he (the employee) was employed to do.' ' ' ' (Lisa M., supra, 12 Cal.4th at p. 297, original italics, internal citations omitted.)*

■ "The question, then, is whether an employee's physical eruption, stemming from his interaction with a customer, is a predictable risk of retail employment. Our Supreme Court has suggested it may well be: 'Flare-ups, frustrations, and disagreements among employees are commonplace in the workplace and may lead to "physical act[s] of aggression." In bringing [people] together, work brings [personal] qualities together, causes frictions between them, creates occasions for lapses into carelessness, and for fun-making and emotional flareup. ... These expressions of human nature are incidents inseparable from working together. They involve risks of injury and these risks are inherent in the working environment.' " (*Flores v. AutoZone West, Inc.* (2008) 161 Cal.App.4th 373, 381 [74 Cal.Rptr.3d 178] , internal citations omitted.)

Secondary Sources

3 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment, §§ 185-190

1 Levy et al., California Torts, Ch. 8, *Vicarious Liability*, § 8.03[3][d], [f] (Matthew Bender)

2 California Employment Law, Ch. 30, *Employers' Tort Liability to Third Parties for Conduct of Employees*, § 30.05 (Matthew Bender)

21 *California Forms of Pleading and Practice*, Ch. 248, *Employer's Liability for Employee's Torts*, § 248.16 (Matthew Bender)

37 *California Forms of Pleading and Practice*, Ch. 427, *Principal and Agent*, § 427.22 (Matthew Bender)

1 California Civil Practice: Torts (Thomson West) §§ 3:11-3:12

Publisher's Notes

This instruction covers issues presented in BAJI Nos. 13.01 and 13.02.

LexisNexis Matthew Bender Expert Practice Tip--Countering Defense Argument: CACI No. 3722 and supporting case law is extremely important to counter a defense argument that the employee's *specific* negligent or criminal act was not within the scope of employment. *By Dona Cohn-Payne*

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate LawAgency RelationshipsDuties & LiabilitiesAuthorized Acts of AgentsUnauthorized
ActsBusiness & Corporate LawAgency RelationshipsDuties & LiabilitiesNegligent Acts of AgentsGeneral
OverviewTortsVicarious LiabilityEmployersScope of EmploymentGeneral Overview



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CHAPTER 37 California Judicial Council Vicarious Responsibility Instructions

5-37 California Forms of Jury Instruction CACI 3723

CACI 3723 Substantial Deviation

If [an employee/a representative] combines his or her personal business with the employer's business, then the employee's conduct is within the scope of [employment/authorization] unless the [employee/representative] substantially deviates from the employer's business.

Deviations that do not amount to abandoning the employer's business, such as incidental personal acts, minor delays, or deviations from the most direct route, are reasonably expected and within the scope of employment.

[Acts that are necessary for [an employee/a representative]'s comfort, health, and convenience while at work are within the scope of employment.]

New September 2003; Revised June 2006, April 2008

Directions for Use

This instruction is closely related to *CACI No. 3720, Scope of Employment*. It focuses on when an act is not within the scope of employment. Give the optional third paragraph if the employee was at the work site when the act giving rise to liability occurred, but was not directly involved in performing job duties at the time (for example, at lunch or on break).

Sources and Authority

- "[C]ases that have considered recovery against an employer for injuries occurring within the scope and during the period of employment have established a general rule of liability 'with a few exceptions' in instances where the employee has 'substantially deviated from his duties for personal purposes.' " (

5-37 California Forms of Jury Instruction CACI 3723

Mary M. v. City of Los Angeles (1991) 54 Cal.3d 202, 218 [285 Cal.Rptr. 99, 814 P.2d 1341] , internal citation omitted.)

■ "In some cases, the relationship between an employee's work and wrongful conduct is so attenuated that a jury could not reasonably conclude that the act was within the scope of employment." (*Mary M.*, *supra*, 54 Cal.3d at p. 213 , internal citations omitted.)

■ "[A]n employer cannot deny responsibility for a tort that occurs when an employee engages in an act necessary to his or her comfort and convenience while at work." (*Bailey v. Filco, Inc.* (1996) 48 Cal.App.4th 1552, 1563 [56 Cal.Rptr.2d 333] .)

■ "The fact that an employee is not engaged in the ultimate object of his employment at the time of his wrongful act does not preclude attribution of liability to an employer." (*Alma W. v. Oakland Unified School Dist.* (1981) 123 Cal.App.3d 133, 139 [176 Cal.Rptr. 287] , internal citation omitted.)

■ "[D]eviations which do not amount to a turning aside completely from the employer's business, so as to be inconsistent with its pursuit, are often reasonably expected In order to release an employer from liability, the deviation must be so material or substantial as to amount to an entire departure." (*DeMirjian v. Ideal Heating Corp.* (1954) 129 Cal.App.2d 758, 766 [278 P.2d 114] , internal citation omitted.)

■ Where the employee combines personal business with that of the employer or attends "to both at substantially the same time, no nice inquiry will be made" into which business the employee was engaged in at the time of injury unless it is readily apparent that the employee could not have been serving the employer, either directly or indirectly. (*Farmers Insurance Group v. County of Santa Clara* (1995) 11 Cal.4th 992, 1004 [47 Cal.Rptr.2d 478, 906 P.2d 440] .)

■ The fact that the employee is on the same route of return that would be used for both his employer's errand and his own tends to show a combination of missions. (*Trejo v. Maciel* (1966) 239 Cal.App.2d 487, 496 [48 Cal.Rptr. 765] .)

■ But if the employee deviates substantially from employment duties for personal purposes, or "if the misconduct is not an 'outgrowth' of the employment," the scope-of-employment test is not met. (*Farmers Insurance Group*, *supra*, 11 Cal.4th at p. 1005 .) Thus, " 'if the tort is personal in nature, the employee's mere presence at the worksite and attendance to job duties prior to or subsequent to the tort, will not call into play the principles of respondeat superior.' " (*Ibid.*, internal citations omitted.)

■ " '[A]cts necessary to the comfort, convenience, health and welfare of the employee while at work, though strictly personal to himself and not acts of service, do not take him outside the scope of his employment.' " (*Bailey*, *supra*, 48 Cal.App.4th at p. 1560 , internal citations omitted.)

■ "We envision the link between respondeat superior and most work-related cell phone calls while driving as falling along a continuum. Sometimes the link between the job and the accident will be clear, as when an employee is on the phone for work at the moment of the accident. Oftentimes, the link will fall into a gray zone, as when an employee devotes some portion of his time and attention to work calls during the car trip so that the journey cannot be fairly called entirely personal. But sometimes, as here, the link is de minimis--one call of less than one minute eight or nine minutes before an accident while traveling on a personal errand of several miles' duration heading neither to nor from a worksite. When that happens, we find no respondeat superior as a matter of law." (*Miller v. American Greetings Corp.* (2008) 161 Cal.App.4th 1055, 1063 [74 Cal.Rptr.3d 776] .)

■ "While the question of whether an employee has departed from his special errand is normally one of fact for the jury, where the evidence clearly shows a complete abandonment, the court may make the determination that the employee is outside the scope of his employment as a matter of law." (*Felix v. Asai* (1987) 192 Cal.App.3d 926, 933 [237 Cal.Rptr. 718] , internal citations omitted.)

Secondary Sources

3 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment, §§ 178-180

Chin et al., California Practice Guide: Employment Litigation (The Rutter Group) PP 5:670-5:680

1 Levy et al., *California Torts*, Ch. 8, *Vicarious Liability*, § 8.03[3] (Matthew Bender)

2 *California Employment Law*, Ch. 30, *Employers' Tort Liability to Third Parties for Conduct of Employees*, § 30.05 (Matthew Bender)

21 *California Forms of Pleading and Practice*, Ch. 248, *Employer's Liability for Employee's Torts*, § 248.16 (Matthew Bender)

10 *California Points and Authorities*, Ch. 100A, *Employer and Employee: Respondeat Superior*, §§ 100A.28, 100A.35 (Matthew Bender)

California Civil Practice: Torts (Thomson West) § 3:8

Publisher's Notes

This instruction covers issues presented in BAJI Nos. 13.01 and 13.02.

LexisNexis Matthew Bender Expert Practice Tip--Thorough Discovery of Duties Necessary: A thorough discovery of an employee's duties, usual errands, and responsibilities is required to determine if the employee's acts are still within the scope of employment. *By Dona Cohn-Payne*



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CHAPTER 37 California Judicial Council Vicarious Responsibility Instructions

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CACI 3724 Going-and-Coming Rule

In general, an employee is not acting within the scope of employment while traveling to and from the workplace. But if the employee, while commuting, is on an errand for the employer, then the employee's conduct is within the scope of his or her employment from the time the employee starts on the errand until he or she returns from the errand or until he or she completely abandons the errand for personal reasons.

New September 2003

Sources and Authority

- " 'An offshoot of the doctrine of respondeat superior is the so-called "going and coming rule." Under this rule, an employee is not regarded as acting within the scope of employment while going to or coming from the workplace. ... This is based on the concept that the employment relationship is suspended from the time the employee leaves work until he or she returns, since the employee is not ordinarily rendering services to the employer while traveling. ...' " (*Jeewarat v. Warner Brothers Entertainment, Inc.* (2009) 177 Cal.App.4th 427, 435 [98 Cal.Rptr.3d 837].)

- "Generally, an exception to the going-and-coming rule will be found when the employer derives some incidental benefit from the employee's trip." (*Anderson v. Pacific Gas & Electric Co.* (1993) 14 Cal.App.4th 254, 258 [17 Cal.Rptr.2d 534] , internal citations omitted.)

- "When an employee is engaged in a 'special errand' or a 'special mission' for the employer it will negate the 'going and coming rule.' An employee 'coming from his home or returning to it on a special errand either as part of his regular duties or at a specific order or request of his employer ... is considered to be in the scope of his employment from the time that he starts on the errand until he has returned or

until he deviates therefrom for personal reasons." 'The employer is 'liable for torts committed by its employee while traveling to accomplish a special errand because the errand benefits the employer. ...' " (*Jeewarat, supra*, 177 Cal.App.4th at p. 436, internal citations omitted.)

■ One specific exception to the going-and-coming rule is when the employer compensates the employee for travel time to and from work. (See *Hinman v. Westinghouse Electric Co.* (1970) 2 Cal.3d 956, 962 [88 Cal.Rptr. 188, 471 P.2d 988] .)

■ Some examples of the special-errand exception include: (1) where an employee goes on a business errand for his employer, leaving from his workplace and returning to his workplace; (2) where an employee is called to work to perform a special task for the employer at an irregular time; and (3) where the employer asks an employee to perform a special errand after the employee leaves work but before going home. (*Felix v. Asai* (1987) 192 Cal.App.3d 926, 931-932 [237 Cal.Rptr. 718] .)

■ "Plaintiffs contend an employee's attendance at an out-of-town business conference authorized and paid for by the employer may be a special errand for the benefit of the employer under the special errand doctrine. [Defendant] asserts that the special errand doctrine does not apply to commercial travel. We conclude that a special errand may include commercial travel such as the business trip in this case." (*Jeewarat, supra*, 177 Cal.App.4th at p. 436.)

■ The employee is still within the scope of employment after the errand is completed. (*Trejo v. Maciel* (1966) 239 Cal.App.2d 487, 495 [48 Cal.Rptr. 765] .)

Secondary Sources

3 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment, §§ 181-184

2 Levy et al., *California Torts*, Ch. 20, *Motor Vehicles*, § 20.42[3] (Matthew Bender)

2 *California Employment Law*, Ch. 30, *Employers' Tort Liability to Third Parties for Conduct of Employees*, § 30.05 (Matthew Bender)

21 *California Forms of Pleading and Practice*, Ch. 248, *Employer's Liability for Employee's Torts*, §§ 248.11, 248.16 (Matthew Bender)

37 *California Forms of Pleading and Practice*, Ch. 427, *Principal and Agent* , § 427.22 (Matthew Bender)

10 *California Points and Authorities*, Ch. 100A, *Employer and Employee: Respondeat Superior* , § 100A.28 et seq. (Matthew Bender)

1 *California Civil Practice: Torts* (Thomson West) § 3:10

Publisher's Notes

This instruction covers issues presented in BAJI No. 13.02.1.



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CHAPTER 37 California Judicial Council Vicarious Responsibility Instructions

5-37 California Forms of Jury Instruction CACI 3725

CACI 3725 Vehicle-Use Exception

If an employer requires an employee to drive to and from the workplace so that the vehicle is available for the employer's business, then the drive to and from work is within the scope of employment.

New September 2003

- "If an employer requires an employee to furnish a vehicle as an express or implied condition of employment, the employee will be in the scope of his employment while commuting to and from the place of his employment." (*Felix v. Asai* (1987) 192 Cal.App.3d 926, 932 [237 Cal.Rptr. 718] , internal citations omitted.)
- "The cases invoking the required-vehicle exception all involve employees whose jobs entail the regular use of a vehicle to accomplish the job in contrast to employees who use a vehicle to commute to a definite place of business." (*Tryer v. Ojai Valley School Dist.* (1992) 9 Cal.App.4th 1476, 1481 [12 Cal.Rptr.2d 114] .)
- While workers' compensation cases have recognized an exception to the going-and-coming rule when the employer defrays travel expenses, this exception does not apply to the respondeat superior doctrine. Payment of a travel allowance, in and of itself is insufficient to impose liability on the employer. (*Caldwell v. A.R.B., Inc.* (1986) 176 Cal.App.3d 1028, 1041 [222 Cal.Rptr. 494] .) Respondeat superior does apply where the employer pays wages for travel time. (*Hinman v. Westinghouse Electric Co.* (1970) 2 Cal.3d 956, 962 [88 Cal.Rptr. 188, 471 P.2d 988] .)
- The fact that an employee is on call does not automatically put their actions in the scope of

employment. (*Le Elder v. Rice* (1994) 21 Cal.App.4th 1604, 1610 [26 Cal.Rptr.2d 749]).

Secondary Sources

3 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment, § 184

2 Levy et al., California Torts, Ch. 20, *Motor Vehicles*, § 20.42[3][d] (Matthew Bender)

2 California Employment Law, Ch. 30, *Employers' Tort Liability to Third Parties for Conduct of Employees*, § 30.05 (Matthew Bender)

21 *California Forms of Pleading and Practice*, Ch. 248, *Employer's Liability for Employee's Torts*, § 248.16 (Matthew Bender)

37 *California Forms of Pleading and Practice*, Ch. 427, *Principal and Agent* (Matthew Bender)

10 *California Points and Authorities*, Ch. 100A, *Employer and Employee: Respondeat Superior* (Matthew Bender)

1 *California Civil Practice: Torts* (Thomson West) § 3:10

Publisher's Notes

There is no BAJI instruction on this subject.



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CHAPTER 37 California Judicial Council Vicarious Responsibility Instructions

5-37 California Forms of Jury Instruction CACI 3726

CACI 3726 Social or Recreational Activities

Social or recreational activities that occur after work hours are within the scope of employment if:

- (a) They are carried out with the employer's stated or implied permission; and**
- (b) They either provide a benefit to the employer or have become customary.**

New September 2003

- This aspect of the scope-of-employment analysis was expressly adopted for use in respondeat superior cases in *Rodgers v. Kemper Construction Co.* (1975) 50 Cal.App.3d 608, 620 [124 Cal.Rptr. 143], and reiterated in *Childers v. Shasta Livestock Auction Yard, Inc.* (1987) 190 Cal.App.3d 792, 804 [235 Cal.Rptr. 641]. It is derived from the workers' compensation case of *McCarty v. Workmen's Compensation Appeals Bd.* (1974) 12 Cal.3d 677, 681-683 [117 Cal.Rptr. 65, 527 P.2d 617].

- "[W]here social or recreational pursuits on the employer's premises after hours are endorsed by the express or implied permission of the employer and are 'conceivably' of some benefit to the employer or, even in the absence of proof of benefit, if such activities have become 'a customary incident of the employment relationship,' an employee engaged in such pursuits after hours is still acting within the scope of his employment." (*Rodgers, supra*, 50 Cal.App.3d at 620.)

- *McCarty* has been overruled by statute in the context of workers' compensation (see *Lab. Code*, § 3600(a)(9)). However, courts have acknowledged that "it has been adopted as a test in establishing liability under respondeat superior." (*West American Insurance Co. v. California Mutual Insurance Co.*

(1987) 195 Cal.App.3d 314, 322 [240 Cal.Rptr. 540] .)

Secondary Sources

3 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment, §§ 182, 185, 190

1 Levy et al., California Torts, Ch. 8, *Vicarious Liability*, § 8.03[3][c] (Matthew Bender)

2 California Employment Law, Ch. 30, *Employers' Tort Liability to Third Parties for Conduct of Employees*, § 30.05 (Matthew Bender)

21 *California Forms of Pleading and Practice*, Ch. 248, *Employer's Liability for Employee's Torts*, § 248.16 (Matthew Bender)

37 *California Forms of Pleading and Practice*, Ch. 427, *Principal and Agent* (Matthew Bender)

10 *California Points and Authorities*, Ch. 100A, *Employer and Employee: Respondeat Superior* (Matthew Bender)

Publisher's Notes

There is no BAJI instruction on this subject.



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CHAPTER 37 California Judicial Council Vicarious Responsibility Instructions

5-37 California Forms of Jury Instruction CACI 3727-CACI 3799

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CACI 3727Reserved for Future Use



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CHAPTER 37 California Judicial Council Vicarious Responsibility Instructions

5-37 California Forms of Jury Instruction CACI VF-3700

CACI VF-3700 Negligence--Vicarious Liability

We answer the questions submitted to us as follows:

1. Was [name of agent] negligent?

_____ Yes _____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Was [name of agent]'s negligence a substantial factor in causing harm to [name of plaintiff]?

_____ Yes _____ No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Was [name of agent] [name of defendant]'s [agent/employee/[insert other relationship]]?

_____ Yes _____ No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Was [name of agent] acting within the scope of [his/her] [agency/employment/[insert other relationship]] when [he/she] harmed [name of plaintiff]?

_____ Yes _____ No

If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. What are [*name of plaintiff*]'s damages?

[a. Past economic loss

[lost earnings..... \$ _____].....

[lost profits..... \$ _____].....

[medical expenses..... \$ _____].....

[other past economic loss..... \$ _____].....

..... **Total Past Economic Damages: \$ _____]**

[b. Future economic loss

[lost earnings..... \$ _____].....

[lost profits..... \$ _____].....

[medical expenses..... \$ _____].....

[other future economic loss..... \$ _____].....

..... **Total Future Economic Damages: \$ _____]**

[c. Past noneconomic loss, including [physical pain/mental suffering:]..... \$ _____]

[d. Future noneconomic loss, including [physical pain/mental suffering:]..... \$ _____]

..... **TOTAL \$ _____**

Signed: _____

Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the [clerk/bailiff/judge].

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on *CACI No. 3701, Tort Liability Asserted Against Principal--Essential Factual Elements*.

If specificity is not required, users do not have to itemize all the damages listed in question 5. The breakdown is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

This form may be modified if the jury is being given the discretion under *Civil Code section 3288* to award prejudgment interest on specific losses that occurred prior to judgment.

Publisher's Notes

This instruction covers issues presented in BAJI Nos. 16.00, 16.60, and 16.72.

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsVicarious LiabilityAgentsNegligence



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CHAPTER 37 California Judicial Council Vicarious Responsibility Instructions

5-37 California Forms of Jury Instruction CACI VF-3701-CACI VF-3799

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CHAPTER 38 California Judicial Council Equitable Indemnity Instructions

5-38 California Forms of Jury Instruction 38.syn

§ 38.syn Synopsis to Chapter 38: California Judicial Council Equitable Indemnity Instructions

CACI 3800 Comparative Fault Between and Among Tortfeasors

CACI 3801 Implied Contractual Indemnity

CACI 3802-CACI 3899 Reserved for Future Use



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CHAPTER 38 California Judicial Council Equitable Indemnity Instructions

5-38 California Forms of Jury Instruction Scope

Scope

SCOPE

This chapter contains the California Judicial Council's "Equitable Indemnity Series" of jury instructions [*CACI No. 3800 et seq.*]. The Judicial Council of California Civil Jury Instructions (CACI) included in this publication are the product of the Judicial Council of California Task Force on Jury Instructions, which are updated by the Judicial Council of California Advisory Committee on Civil Jury Instructions.

This chapter includes instructions on the following topics:

- Comparative fault between tortfeasors [*CACI No. 3800*].
- Implied contractual indemnity [*CACI No. 3801*].



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CHAPTER 38 California Judicial Council Equitable Indemnity Instructions

5-38 California Forms of Jury Instruction CACI 3800

CACI 3800 Comparative Fault Between and Among Tortfeasors

[Name of indemnitee] **claims that [he/she] [is/was] required to pay [describe liability, e.g., "a court judgment in favor of [name of plaintiff]"] and that [name of indemnitor] must reimburse [name of indemnitee] based on [name of indemnitor]'s share of responsibility. In order for [name of indemnitee] to recover from [name of indemnitor], [name of indemnitee] must prove both of the following:**

- 1. That [name of indemnitor] [was negligent/[describe underlying tort]]; and**
- 2. That [name of indemnitor]'s [negligence/[describe tortious conduct]] contributed as a substantial factor in causing [name of plaintiff]'s harm.**

[[Name of indemnitor] claims that [name of indemnitee] [and] [insert identification of others] contributed as [a] substantial factor[s] in causing [name of plaintiff]'s harm. To succeed, [name of indemnitor] must prove both of the following:

- 1. That [name of indemnitee] [and] [insert identification of others] [[was/were] negligent/[other basis of responsibility]]; and**
- 2. That [name of indemnitee] [and] [insert identification of others] contributed as [a] substantial factor[s] in causing [name of plaintiff]'s harm.**

You will be asked to determine the percentages of responsibility of [name of indemnitee], [name of indemnitor] [, and all other persons responsible] for [name of plaintiff]'s harm.]

Read the last bracketed portion when the indemnitor claims he or she was not the sole cause.

This instruction is intended for use in cases where the plaintiff seeks equitable indemnity from another responsible tortfeasor who was not a party to the original action or proceeding from which the liability in question arose. For cases in which the indemnitee seeks equitable indemnity against a co-defendant or cross-defendant as part of the original tort action, see *CACI No. 406, Apportionment of Responsibility*.

■ "In order to attain ... a system ... in which liability for an indivisible injury caused by concurrent tortfeasors will be borne by each individual tortfeasor 'in direct proportion to [his] respective fault,' we conclude that the current equitable indemnity rule should be modified to permit a concurrent tortfeasor to obtain partial indemnity from other concurrent tortfeasors on a comparative fault basis." (*American Motorcycle Assn. v. Superior Court* (1978) 20 Cal.3d 578, 598 [146 Cal.Rptr. 182, 578 P.2d 899] , internal citation omitted.)

■ "[C]omparative equitable indemnity includes the entire range of possible apportionments, from no right to any indemnity to a right of complete indemnity. Total indemnification is just one end of the spectrum of comparative equitable indemnification." (*Far West Financial Corp. v. D & S Co., Inc.* (1988) 46 Cal.3d 796, 808 [251 Cal.Rptr. 202, 760 P.2d 399] , internal quotation marks and citation omitted.)

■ "[W]e conclude that a cause of action for equitable indemnity is a legal action seeking legal relief. As such, the [defendant] was entitled to a jury trial." (*Martin v. County of Los Angeles* (1996) 51 Cal.App.4th 688, 698 [59 Cal.Rptr.2d 303] .)

■ "[W]e hold that ... the comparative indemnity doctrine may be utilized to allocate liability between a negligent and a strictly liable defendant." (*Safeway Stores, Inc. v. Nest-Kart* (1978) 21 Cal.3d 322, 332 [146 Cal.Rptr. 550, 579 P.2d 441] .)

■ For purposes of equitable indemnity, "it matters not whether the tortfeasors acted in concert to create a single injury, or successively, in creating distinct and divisible injury." (*Blecker v. Wolbart* (1985) 167 Cal.App.3d 1195, 1203 [213 Cal.Rptr. 781] .)

■ "[W]e conclude comparative fault principles should be applied to intentional torts, at least to the extent that comparative equitable indemnification can be applied between concurrent intentional tortfeasors." (*Baird v. Jones* (1993) 21 Cal.App.4th 684, 690 [27 Cal.Rptr.2d 232] .)

■ Where there is a fault-free plaintiff, "[a]n insolvent defendant's shortfall [in payment of the judgment] should be shared proportionately by the solvent defendants as though the insolvent or absent person had originally not participated." (*Paradise Valley Hospital v. Schlossman* (1983) 143 Cal.App.3d 87, 93 [191 Cal.Rptr. 531] .)

■ Statutes may limit one's right to recover comparative indemnity. (See, e.g., *E.W. Bliss Co. v. Superior Court* (1989) 210 Cal.App.3d 1254, 1259 [258 Cal.Rptr. 783] (*Labor Code* section 4558(d) provides that there is no right of action for comparative indemnity against an employer for injuries resulting from the removal of an operation guard from a punch press).)

Secondary Sources

California Tort Guide (Cont.Ed.Bar 3d ed.) General Principles, §§ 1.52-1.59

5 Levy et al., *California Torts*, Ch. 74, *Comparative Negligence*, §§ 74.01 -74.13 (Matthew Bender)

25 *California Forms of Pleading and Practice*, Ch. 300, *Indemnity and Contribution*, § 300.61 (Matthew Bender)

11 *California Points and Authorities*, Ch. 115, *Indemnity and Contribution*, § 115.60 et seq. (Matthew Bender)

1 California Civil Practice: Torts (Thomson West) §§ 4:14-4:18

Publisher's Notes

This instruction covers issues presented in BAJI Nos. 12.60 and 12.69.

LexisNexis Matthew Bender Expert Practice Tip--"Empty Chair" Defense: Note that CACI No. 3800 permits the indemnitor to introduce evidence and argue that other parties (including non-parties to the action) contributed to plaintiff's injury thereby reducing the indemnitor's overall share of responsibility. This is the "empty chair" defense. *By Ronald Oster*

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsNegligenceCausationProximate CauseConcurrent CausationTortsNegligenceDefensesComparative NegligenceGeneral OverviewTortsNegligenceDefensesComparative NegligenceIntentional & Reckless ConductTortsNegligenceDefensesComparative NegligenceMultiple PartiesContributionTortsNegligenceDefensesComparative NegligenceMultiple PartiesIndemnityTortsProcedureMultiple DefendantsDistinct & Divisible Harms



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CHAPTER 38 California Judicial Council Equitable Indemnity Instructions

5-38 California Forms of Jury Instruction CACI 3801

CACI 3801 Implied Contractual Indemnity

[*Name of indemnitee*] **claims that [he/she] [is/was/may be] required to pay [describe liability, e.g., "a court judgment in favor of plaintiff John Jones"] because [name of indemnitor] [failed to use reasonable care in performing work under an agreement with [name of indemnitee]/[specify other basis of responsibility]]. In order for [name of indemnitee] to recover from [name of indemnitor], [name of indemnitee] must prove both of the following:**

1. That [name of indemnitor] [failed to use reasonable care in [performing the work/[describe work or services] under an agreement with [name of indemnitee]/[specify other basis of responsibility]]; and

2. That [name of indemnitor]'s conduct was a substantial factor in causing [name of plaintiff]'s harm.

[[*Name of indemnitor*] claims that [[*name of indemnitee*] [and] [insert identification of others]] contributed as [a] substantial factor[s] in causing [name of plaintiff]'s harm. To succeed, [name of indemnitor] must prove both of the following:

1. That [[*name of indemnitee*] [and] [insert identification of others]] [was/were] [negligent/[specify other basis of responsibility]]; and

2. That [[*name of indemnitee*] [and] [insert identification of others]] contributed as [a] substantial factor[s] in causing [name of plaintiff]'s harm.

You will be asked to determine the percentages of responsibility of [name of indemnitor] [and] [[*name of indemnitee*] [, [and] all other persons responsible] for [name of plaintiff]'s harm.]

New September 2003; Revised December 2007

Directions for Use

The party identifications in this instruction assume a cross-complaint between indemnitor and indemnitee defendants. In a direct action by the indemnitee against the indemnitor, "*name of plaintiff*" will refer to the person to whom the indemnitee has incurred liability.

Implied contractual indemnity may arise for reasons other than the indemnitor's negligent performance under the contract. If the basis of the claim is other than negligence, specify the conduct involved. (See *Garlock Sealing Technologies, LLC v. NAK Sealing Technologies Corp.* (2007) 148 Cal.App.4th 937, 974 [56 Cal.Rptr.3d 177] [breach of warranty].)

Read the last bracketed portion if the indemnitor claims that he or she was not the sole cause of the indemnitee's liability or loss. Select options depending on whether the indemnitor alleges contributory conduct of the indemnitee, of others, or of both. Element 1 will have to be modified if there are different contributing acts alleged against the indemnitee and others; for example, if the indemnitee is alleged to have been negligent and another party is alleged to be strictly liable.

A special finding that an agreement existed may create a need for instructions, but it is a question of law whether an agreement implies a duty to indemnify.

Sources and Authority

- "In general, indemnity refers to 'the obligation resting on one party to make good a loss or damage another party has incurred.' Historically, the obligation of indemnity took three forms: (1) indemnity expressly provided for by contract (express indemnity); (2) indemnity implied from a contract not specifically mentioning indemnity (implied contractual indemnity); and (3) indemnity arising from the equities of particular circumstances (traditional equitable indemnity). [P] Although the foregoing categories of indemnity were once regarded as distinct, we now recognize there are only two basic types of indemnity: express indemnity and equitable indemnity. Though not extinguished, implied contractual indemnity is now viewed simply as 'a form of equitable indemnity.' " (*Prince v. Pacific Gas & Electric Co.* (2009) 45 Cal.4th 1151, 1157 [90 Cal.Rptr.3d 732, 202 P.3d 1115] , internal citations omitted.)

- "The right to implied contractual indemnity is predicated upon the indemnitor's breach of contract, 'the rationale ... being that a contract under which the indemnitor undertook to do work or perform services necessarily implied an obligation to do the work involved in a proper manner and to discharge foreseeable damages resulting from improper performance absent any participation by the indemnitee in the wrongful act precluding recovery.' ... 'An action for implied contractual indemnity is not a claim for contribution from a joint tortfeasor; it is not founded upon a tort or upon any duty which the indemnitor owes to the injured third party. It is grounded upon the indemnitor's breach of duty *owing to the indemnitee* to properly perform its contractual duties.' " (*West v. Superior Court* (1994) 27 Cal.App.4th 1625, 1633 [34 Cal.Rptr.2d 409] , internal citations omitted, original italics.)

- "[A]n implied contractual indemnity claim, like a traditional equitable indemnity claim, is subject to the *American Motorcycle* rule that a party's liability for equitable indemnity is based on its *proportional share of responsibility* for the damages to the injured party." (*Prince, supra*, 45 Cal.4th at p. 1165 , original italics.)

■ "[O]ur recognition that 'a claim for implied contractual indemnity is a form of equitable indemnity subject to the rules governing equitable indemnity claims' corrects any misimpression that joint liability is not a component." (*Prince, supra*, 45 Cal.4th at p. 1166 , internal citation omitted.)

■ "[U]nder [Code of Civil Procedure] section 877.6, subsection (c), ... an [implied contractual] indemnity claim, like other equitable indemnity claims, may not be pursued against a party who has entered into a good faith settlement." (*Bay Development, Ltd. v. Superior Court* (1990) 50 Cal.3d 1012, 1031 [269 Cal.Rptr. 720, 791 P.2d 290] .)

■ "We conclude the trial court erred in denying [the indemnitee's] implied contractual indemnity based on [indemnitee's] failure to prove [the indemnitor's] breach of warranty was the product of [indemnitor's] failure to use reasonable care in performing its contractual duties. [Indemnitee] does not need to prove a negligent breach of contract to be entitled to implied contractual indemnity." (*Garlock Sealing Technologies, supra*, 148 Cal.App.4th at p. 974 , internal citations omitted.)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 118, 178

Flahavan et al., California Practice Guide: Personal Injury (The Rutter Group) P 4:189.6a

5 Levy et al., *California Torts, Ch. 74, Resolving Multiparty Tort Litigation*, § 74.03[6] (Matthew Bender)

25 *California Forms of Pleading and Practice, Ch. 300, Contribution and Indemnity*, § 300.61[5] (Matthew Bender)

11 *California Points and Authorities, Ch. 115, Indemnity and Contribution*, § 115.91[3][a] (Matthew Bender)

1 California Civil Practice: Torts (Thomson West) § 4:13

Publisher's Notes

This instruction covers issues presented in BAJI Nos. 12.60, 12.61, 12.62, 12.63, and 12.64.

LexisNexis Matthew Bender Expert Practice Tip--"Empty Chair" Defense: Note that the indemnitor can reduce its overall percentage of responsibility by attacking other parties (including non-parties to the action) [see also Practice Tip in CACI No. 3800]. By Ronald Oster

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts Law Contract Conditions & Provisions Indemnity Torts Negligence Defenses Comparative Negligence General Overview Torts Procedure Multiple Defendants Indemnity General Overview Torts Procedure Multiple Defendants Indemnity Contractual Indemnity



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CHAPTER 38 California Judicial Council Equitable Indemnity Instructions

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CHAPTER 39 California Judicial Council Damages Instructions

5-39 California Forms of Jury Instruction 39.syn

§ 39.syn Synopsis to Chapter 39: California Judicial Council Damages Instructions

CACI 3900 Introduction to Tort Damages--Liability Contested

CACI 3901 Introduction to Tort Damages--Liability Established

CACI 3902 Economic and Noneconomic Damages

CACI 3903 Items of Economic Damage

CACI 3903A Medical Expenses--Past and Future (Economic Damage)

CACI 3903B Medical Monitoring--Toxic Exposure (Economic Damage)

CACI 3903C Past and Future Lost Earnings (Economic Damage)

CACI 3903D Lost Earning Capacity (Economic Damage)

CACI 3903E Loss of Ability to Provide Household Services (Economic Damage)

CACI 3903F Damage to Real Property (Economic Damage)

CACI 3903G Loss of Use of Real Property (Economic Damage)

CACI 3903H Damage to Annual Crop (Economic Damage)

CACI 3903I Damage to Perennial Crop (Economic Damage)

CACI 3903J Damage to Personal Property (Economic Damage)

CACI 3903K Loss or Destruction of Personal Property (Economic Damage)

- CACI 3903L Damage to Personal Property Having Special Value (Civ. Code, § 3355) (Economic Damage)
- CACI 3903M Loss of Use of Personal Property (Economic Damage)
- CACI 3903N Lost Profits (Economic Damage)
- CACI 3904 Present Cash Value
- CACI 3905 Items of Noneconomic Damage
- CACI 3905A Physical Pain, Mental Suffering, and Emotional Distress (Noneconomic Damage)
- CACI 3906-CACI 3919 Reserved for Future Use
- CACI 3920 Loss of Consortium (Noneconomic Damage)
- CACI 3921 Wrongful Death (Death of an Adult)
- CACI 3922 Wrongful Death (Parents' Recovery for Death of a Minor Child)
- CACI 3923 Public Entities--Collateral Source Payments (Gov. Code, § 985)
- CACI 3924 No Punitive Damages
- CACI 3925 Arguments of Counsel Not Evidence of Damages
- CACI 3926 Settlement Deduction
- CACI 3927 Aggravation of Preexisting Condition or Disability
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- CACI 3930 Mitigation of Damages (Personal Injury)
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- CACI 3932 Life Expectancy
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- CACI 3940 Punitive Damages--Individual Defendant--Trial Not Bifurcated
- CACI 3941 Punitive Damages--Individual Defendant--Bifurcated Trial (First Phase)
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- CACI 3943 Punitive Damages Against Employer or Principal for Conduct of a Specific Agent or Employee--Trial Not Bifurcated
- CACI 3944 Punitive Damages Against Employer or Principal for Conduct of a Specific Agent or Employee--Bifurcated Trial (First Phase)
- CACI 3945 Punitive Damages--Entity Defendant--Trial Not Bifurcated

CACI 3946 Punitive Damages--Entity Defendant--Bifurcated Trial (First Phase)

CACI 3947 Punitive Damages--Individual and Entity Defendants--Trial Not Bifurcated

CACI 3948 Punitive Damages--Individual and Corporate Defendants (Corporate Liability Based on Acts of Named Individual)--Bifurcated Trial (First Phase)

CACI 3949 Punitive Damages--Individual and Corporate Defendants (Corporate Liability Based on Acts of Named Individual)--Bifurcated Trial (Second Phase)

CACI 3950-CACI 3959 Reserved for Future Use

CACI 3960 Comparative Fault of Plaintiff--General Verdict

CACI 3961 Duty to Mitigate Damages for Past Lost Earnings

CACI 3962 Duty to Mitigate Damages for Future Lost Earnings

CACI 3963 No Deduction for Workers' Compensation Benefits Paid

CACI 3964 Jurors Not to Consider Attorney Fees and Court Costs

CACI 3965-CACI 3999 Reserved for Future Use

CACI VF-3900 Punitive Damages

CACI VF-3901 Punitive Damages Against Employer or Principal for Conduct of a Specific Agent or Employee

CACI VF-3902 Punitive Damages--Entity Defendant

CACI VF-3903 Punitive Damages--Entity Defendant--Ratification

CACI VF-3904 Punitive Damages--Entity Defendant--Authorization

CACI VF-3905 Damages for Wrongful Death (Death of an Adult)

CACI VF-3906 Damages for Wrongful Death (Parents' Recovery for Death of a Minor Child)

CACI VF-3907 Damages for Loss of Consortium (Noneconomic Damage)

CACI VF-3908-CACI VF-3999 Reserved for Future Use

Table A Life Expectancy Table--Male

Table B Life Expectancy Table--Female



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CHAPTER 39 California Judicial Council Damages Instructions

5-39 California Forms of Jury Instruction Scope

Scope

SCOPE

This chapter contains the California Judicial Council's "Damages Series" of jury instructions [*CACI No. 3900 et seq.*]. The Judicial Council of California Civil Jury Instructions (CACI) included in this publication are the product of the Judicial Council of California Task Force on Jury Instructions, which are updated by the Judicial Council of California Advisory Committee on Civil Jury Instructions.

This chapter includes instructions on the following topics:

- Introductions to tort damages when liability is contested [*CACI No. 3900*] and established [*CACI No. 3901*].
- A general instruction explaining economic and noneconomic damages [*CACI No. 3902*].
- Items of economic damage [*CACI Nos. 3903- 3903N*], such as medical expenses [*CACI No. 3903A*], lost earnings [*CACI No. 3903C*] and lost earning capacity [*CACI No. 3903D*], damage to real and personal property, including crops [*CACI Nos. 3903F- 3903M*], and lost profits [*CACI No. 3903N*].
- Present cash value [*CACI No. 3904*].
- Items of noneconomic damage [*CACI Nos. 3905, 3905A*], such as physical pain and emotional distress.
- Loss of consortium [*CACI No. 3920*] and wrongful death [*CACI Nos. 3921, 3922*].
- Payment of damages by public entities under *Gov. Code § 985* [*CACI No. 3923*].
- A variety of miscellaneous damages issues [*CACI Nos. 3924- 3932*], including instructions on the nonavailability of punitive damages in certain cases [*CACI No. 3924*], arguments of counsel as not

evidence of damages [*CACI No. 3925*], the effect of an aggravation of a preexisting injury on determining damages [*CACI No. 3927*], unusually susceptible plaintiffs [*CACI No. 3928*], mitigation of damage [*CACI No. 3930* (personal injury), *CACI No. 3931* (property damage)], and life expectancy [*CACI No. 3932*].

- Punitive damages available in both bifurcated (first and second phases) and non-bifurcated trials [*CACI Nos. 3940- 3949*].

- A general verdict on contributory negligence [*CACI No. 3960*].

- The duty to mitigate for past lost earnings [*CACI No. 3961*] and future lost earnings [*CACI No. 3962*].

- The rule that when determining damages the jury should not consider a deduction for workers' compensation benefits paid [*CACI No. 3963*].

- That jurors are not to consider attorney's fees and court costs when assessing damages [*CACI No. 3964*].

The damages series also includes special verdict forms on the awarding of punitive damages [*CACI No. VF-3900-CACI No. VF-3904*] and damages for wrongful death [*CACI No. VF-3905, CACI No. VF-3906*] and loss of consortium [*CACI No. VF-3907*].



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CHAPTER 39 California Judicial Council Damages Instructions

5-39 California Forms of Jury Instruction CACI 3900

CACI 3900 Introduction to Tort Damages--Liability Contested

If you decide that [name of plaintiff] has proved [his/her] claim against [name of defendant], you also must decide how much money will reasonably compensate [name of plaintiff] for the harm. This compensation is called "damages."

The amount of damages must include an award for each item of harm that was caused by [name of defendant]'s wrongful conduct, even if the particular harm could not have been anticipated.

[Name of plaintiff] does not have to prove the exact amount of damages that will provide reasonable compensation for the harm. However, you must not speculate or guess in awarding damages.

[The following are the specific items of damages claimed by [name of plaintiff]:]

[Insert applicable instructions on items of damage.]

New September 2003

Read last bracketed sentence and insert instructions on items of damages here only if *CACI No. 3902, Economic and Noneconomic Damages*, is not being read. If *CACI No. 3902* is not used, this instruction should be followed by applicable instructions (see *CACI Nos. 3903A through 3903N*, and *3905A*) concerning the items of damage claimed by the plaintiff. These instructions should be inserted into this instruction as sequentially numbered items.

● *Civil Code section 3333* provides: "For the breach of an obligation not arising from contract, the

measure of damages, except where otherwise expressly provided by this code, is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not."

- *Civil Code section 3281* provides: "Every person who suffers detriment from the unlawful act or omission of another, may recover from the person in fault a compensation in money, which is called damages."

- *Civil Code section 3283* provides: "Damages may be awarded, in a judicial proceeding, for detriment resulting after the commencement thereof, or certain to result in the future."

- *Civil Code section 3359* provides: "Damages must, in all cases, be reasonable, and where an obligation of any kind appears to create a right to unconscionable and grossly oppressive damages, contrary to substantial justice, no more than reasonable damages can be recovered."

- Under *Civil Code section 3333* "[t]ort damages are awarded to compensate a plaintiff for all of the damages suffered as a legal result of the defendant's wrongful conduct." (*North American Chemical Co. v. Superior Court* (1997) 59 Cal.App.4th 764, 786 [69 Cal.Rptr.2d 466] , italics omitted.)

- "Whatever its measure in a given case, it is fundamental that 'damages which are speculative, remote, imaginary, contingent, or merely possible cannot serve as a legal basis for recovery.' However, recovery is allowed if claimed benefits are reasonably certain to have been realized but for the wrongful act of the opposing party." (*Piscitelli v. Friedenbergl* (2001) 87 Cal.App.4th 953, 989 [105 Cal.Rptr.2d 88] , internal citations omitted.)

- "In general, one who has been tortiously injured is entitled to be compensated for the harm and the injured party must establish 'by proof the extent of the harm and the amount of money representing adequate compensation with as much certainty as the nature of the tort and the circumstances permit.' However, '[t]here is no general requirement that the injured person should prove with like definiteness the extent of the harm that he has suffered as a result of the tortfeasor's conduct. It is desirable that responsibility for harm should not be imposed until it has been proved with reasonable certainty that the harm resulted from the wrongful conduct of the person charged. It is desirable, also, that there be definiteness of proof of the amount of damage as far as is reasonably possible. It is even more desirable, however, that an injured person not be deprived of substantial compensation merely because he cannot prove with complete certainty the extent of harm he has suffered.' " (*Clemente v. State of California* (1985) 40 Cal.3d 202, 219 [219 Cal.Rptr. 445, 707 P.2d 818] , internal citations omitted.)

- "If plaintiff's inability to prove his damages with certainty is due to defendant's actions, the law does not generally require such proof." (*Clemente, supra*, 40 Cal.3d at p. 219 , internal citations omitted.)

- "While a defendant is liable for all the damage that his tortuous act proximately causes to the plaintiff, regardless of whether or not it could have been anticipated, nevertheless a proximate causal connection must still exist between the damage sustained by the plaintiff and the defendant's wrongful act or omission, and the detriment inflicted on the plaintiff must still be the natural and probable result of the defendant's conduct." (*Chaparkas v. Webb* (1960) 178 Cal.App.2d 257, 260 [2 Cal.Rptr. 879] , internal citations omitted.)

California Tort Damages (Cont.Ed.Bar) Bodily Injury, §§ 1.2-1.6

4 Levy et al., California Torts, Ch. 50, *Damages*, § 50.02 (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages* (Matthew Bender)

6 California Points and Authorities, Ch. 65, *Damages* (Matthew Bender)

1 California Civil Practice: Torts (Thomson West) § 5:1

Publisher's Notes

This instruction replaces BAJI No. 14.00, and covers issues presented in BAJI No. 14.02.

LexisNexis Matthew Bender Expert Practice Tip--Availability of Damages: One of the major advantages of a tort recovery is that plaintiff can recover damages caused by defendant's tortious conduct, whether or not the damages were reasonably foreseeable. Additionally, with regard to intentional torts, plaintiff has the possibility of recovering punitive damages. Contract damages do not include these options. *By Ronald Oster and Rex Heeseman*

LexisNexis Matthew Bender Expert Practice Tip--Monetary Damages in Torts: Exploring the issue of monetary damages in a tort case is extremely important during voir dire. *By Dona Cohn-Payne*

LexisNexis Matthew Bender Expert Practice Tip--Consider Asking Court to Modify CACI No. 3900: CACI No. 3900 is the introductory instruction for damages. It replaces BAJI No. 14.00. In addition, *CACI No. 3901* replaces BAJI 14.01. These new instructions incorporate changes that make it more likely that a jury will award damages to the plaintiff. The first sentence of CACI No. 3900 provides as follows: "If you decide that [plaintiff] has proved [his/her] claim against [defendant], you also must decide how much money will reasonably compensate [plaintiff] for the harm." This language infers that a jury *must* award damages if they find liability. BAJI No. 14.00 included the phrase "provided that you find that such harm or loss was suffered by the plaintiff and was caused by the act or omission upon which you base your finding of liability." Thus, CACI No. 3900 puts far less emphasis on the requirement that the jury find that the harm was caused by the wrongful conduct. "The amount of damages must include an award for each item of harm that was caused by [defendant]'s wrongful conduct."

In light of the above, if you represent a defendant in a case involving contested issues of causation, suggest that the court revise CACI No. 3900 to ensure that the jury is not misled and will be accurately instructed on the law of damages. Here is a suggested modification of CACI No. 3900: "If you decide that [plaintiff] has proved [his/her] claim against [defendant], you must also decide how much money will reasonably compensate [plaintiff] for the harm, *provided that you find that such harm was suffered by the plaintiff and was caused by the wrongful conduct of the defendant.* (Emphasis added; emphasis should be deleted if proposing modification.) *By Joseph Devine*

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Remedies Damages Punitive Damages Torts Damages General Overview Torts Damages Punitive Damages Award Calculations General Overview Torts Negligence Causation Proximate Cause General Overview



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CHAPTER 39 California Judicial Council Damages Instructions

5-39 California Forms of Jury Instruction CACI 3901

CACI 3901 Introduction to Tort Damages--Liability Established

If you decide that [name of plaintiff] was harmed and that [name of defendant]'s [insert description of cause of action, e.g., "negligence"] was a substantial factor in causing the harm, you also must decide how much money will reasonably compensate [name of plaintiff] for the harm. This compensation is called "damages."

The amount of damages must include an award for each item of harm that was caused by [name of defendant]'s wrongful conduct, even if the particular harm could not have been anticipated.

[Name of plaintiff] does not have to prove the exact amount of damages that will provide reasonable compensation for the harm. However, you must not speculate or guess in awarding damages.

[The following are the specific items of damages claimed by [name of plaintiff]:]

[Insert applicable instructions on items of damage.]

New September 2003; Revised October 2004, June 2005

This instruction is intended for cases in which the defendant "admits" liability, but contests causation and damages. See *CACI No. 424, Negligence Not Contested--Essential Factual Elements*.

Read last bracketed sentence and insert instructions on items of damage here only if *CACI No. 3902, Economic and Noneconomic Damages*, is not being read. If *CACI No. 3902* is not used, this instruction should be followed by applicable instructions (see *CACI Nos. 3903A through 3903N*, and *CACI No. 3905A*) concerning the items of damage claimed by the plaintiff. These instructions should be inserted into this instruction as sequentially numbered items.

Read *CACI No. 430, Causation: Substantial Factor*, as the definition of "substantial factor."

■ *Civil Code section 3333* provides: "For the breach of an obligation not arising from contract, the measure of damages, except where otherwise expressly provided by this code, is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not."

■ *Civil Code section 3281* provides: "Every person who suffers detriment from the unlawful act or omission of another, may recover from the person in fault a compensation therefor in money, which is called damages."

■ *Civil Code section 3283* provides: "Damages may be awarded, in a judicial proceeding, for detriment resulting after the commencement thereof, or certain to result in the future."

■ *Civil Code section 3359* provides: "Damages must, in all cases, be reasonable, and where an obligation of any kind appears to create a right to unconscionable and grossly oppressive damages, contrary to substantial justice, no more than reasonable damages can be recovered."

■ Under *Civil Code section 3333* "[t]ort damages are awarded to compensate a plaintiff for *all* of the damages suffered as a legal result of the defendant's wrongful conduct." (*North American Chemical Co. v. Superior Court* (1997) 59 Cal.App.4th 764, 786 [69 Cal.Rptr.2d 466] , italics omitted.)

■ "Whatever its measure in a given case, it is fundamental that 'damages which are speculative, remote, imaginary, contingent, or merely possible cannot serve as a legal basis for recovery.' However, recovery is allowed if claimed benefits are reasonably certain to have been realized but for the wrongful act of the opposing party." (*Piscitelli v. Friedenber* (2001) 87 Cal.App.4th 953, 989 [105 Cal.Rptr.2d 88] , internal citations omitted.)

■ "In general, one who has been tortiously injured is entitled to be compensated for the harm and the injured party must establish 'by proof the extent of the harm and the amount of money representing adequate compensation with as much certainty as the nature of the tort and the circumstances permit.' However, '[there] is no general requirement that the injured person should prove with like definiteness the extent of the harm that he has suffered as a result of the tortfeasor's conduct. It is desirable that responsibility for harm should not be imposed until it has been proved with reasonable certainty that the harm resulted from the wrongful conduct of the person charged. It is desirable, also, that there be definiteness of proof of the amount of damage as far as is reasonably possible. It is even more desirable, however, that an injured person not be deprived of substantial compensation merely because he cannot prove with complete certainty the extent of harm he has suffered.' " (*Clemente v. State of California* (1985) 40 Cal.3d 202, 219 [219 Cal.Rptr. 445, 707 P.2d 818] , internal citations omitted.)

■ "If plaintiff's inability to prove his damages with certainty is due to defendant's actions, the law does not generally require such proof." (*Clemente, supra*, 40 Cal.3d at p. 219 .)

■ "While a defendant is liable for all the damage that his tortuous act proximately causes to the plaintiff, regardless of whether or not it could have been anticipated, nevertheless a proximate causal connection must still exist between the damage sustained by the plaintiff and the defendant's wrongful act or omission, and the detriment inflicted on the plaintiff must still be the natural and probable result of the defendant's conduct." (*Chaparkas v. Webb* (1960) 178 Cal.App.2d 257, 260 [2 Cal.Rptr. 879] .)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1548-1552, 1555-1558

California Tort Damages (Cont.Ed.Bar) Bodily Injury, §§ 1.2-1.6

4 Levy et al., California Torts, Ch. 50, *Damages*, § 50.02 (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages* (Matthew Bender)

6 California Points and Authorities, Ch. 65, *Damages* (Matthew Bender)

1 California Civil Practice: Torts (Thomson West) § 5:1

Publisher's Notes

This instruction replaces BAJI No. 14.01, and covers issues presented in BAJI No. 14.02.

LexisNexis Matthew Bender Expert Practice Tip--Directed Verdict on Liability: Discovery should always include a request for admissions on the issue of liability and at trial an attorney should attempt to get the judge to direct a verdict on the issue of liability. Even if it seems very clear that a jury would find 100 percent liability against a defendant, the plaintiff's counsel should still get a directed verdict and then use *CACI No. 3901* for the jury. *By Dona Cohn-Payne*

LexisNexis Matthew Bender Expert Practice Tip--Emphasis Depends on Which Party You Represent: Plaintiff's counsel may want to emphasize that *CACI No. 3901* states that the jury "must" include an award for "each item" of harm. This includes items when proof of the "exact amount" is not possible. Defendant's counsel may wish to emphasize that portion of the instruction that states the jury "must not" speculate or guess. *By Ronald Oster*

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Remedies Damages Monetary Damages Torts Damages General Overview



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CHAPTER 39 California Judicial Council Damages Instructions

5-39 California Forms of Jury Instruction CACI 3902

CACI 3902 Economic and Noneconomic Damages

The damages claimed by [*name of plaintiff*] for the harm caused by [*name of defendant*] fall into two categories called economic damages and noneconomic damages. You will be asked on the verdict form to state the two categories of damages separately.

New September 2003

This instruction may not be necessary in every case.

■ *Civil Code section 1431.2 (Prop. 51) provides:*

(a) In any action for personal injury, property damage, or wrongful death, based upon principles of comparative fault, the liability of each defendant for non-economic damages shall be several only and shall not be joint. Each defendant shall be liable only for the amount of non-economic damages allocated to that defendant in direct proportion to that defendant's percentage of fault, and a separate judgment shall be rendered against that defendant for that amount.

(b)(1) For purposes of this section, the term "economic damages" means objectively verifiable monetary losses including medical expenses, loss of earnings, burial costs, loss of use of property, costs of repair or replacement, costs of obtaining substitute domestic services, loss of employment and loss of business or employment opportunities.

(2) For the purposes of this section, the term "non-economic damages" means subjective, non-monetary losses including, but not limited to, pain, suffering, inconvenience, mental

suffering, emotional distress, loss of society and companionship, loss of consortium, injury to reputation and humiliation.

■ *Civil Code* section 3333.2 provides, in part: "In any action for injury against a health care provider based on professional negligence, the injured plaintiff shall be entitled to recover noneconomic losses to compensate for pain, suffering, inconvenience, physical impairment, disfigurement and other nonpecuniary damage." The statute sets the limit for such damages at \$250,000.

■ The Supreme Court has noted that section 1431.2 "carefully" defines the "important distinction" between economic and noneconomic damages. (*DaFonte v. Up-Right, Inc.* (1992) 2 Cal.4th 593, 600 [7 Cal.Rptr.2d 238, 828 P.2d 140] .) The court stated: "Proposition 51 ... retains the joint liability of all tortfeasors, regardless of their respective shares of fault, with respect to all objectively provable expenses and monetary losses. On the other hand, the more intangible and subjective categories of damages were limited by Proposition 51 to a rule of strict proportionate liability. With respect to these noneconomic damages, the plaintiff alone now assumes the risk that a proportionate contribution cannot be obtained from each person responsible for the injury." (*Ibid.*, internal citation omitted.)

■ "Proposition 51 ... allows an injured plaintiff to recover the full amount of economic damages suffered, regardless of which tortfeasor or tortfeasors are named as defendants. The tortfeasors are left to sort out payment in proportion to fault amongst themselves, and they must bear the risk of nonrecovery from impecunious tortfeasors. As to noneconomic damages, however, the plaintiff must sue all the tortfeasors to enable a full recovery. Failure to name a defendant will preclude recovery of that defendant's proportional share of damages, and the plaintiff will bear the risk of nonrecovery from an impecunious tortfeasor." (*Aetna Health Plans of California, Inc. v. Yucaipa-Calimesa Joint Unified School Dist.* (1999) 72 Cal.App.4th 1175, 1190 [85 Cal.Rptr.2d 672] .)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 53, 61, 62

California Tort Damages (Cont.Ed.Bar) Bodily Injury, § 1.5

4 Levy et al., California Torts, Ch. 74, *Resolving Multiparty Tort Litigation*, § 74.04 (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages* (Matthew Bender)

6 California Points and Authorities, Ch. 65, *Damages* (Matthew Bender)

1 California Civil Practice: Torts (Thomson West) § 5:4

Publisher's Notes

This instruction covers issues presented in BAJI Nos. 14.02 and 14.76.

LexisNexis Matthew Bender Expert Practice Tip--When Not to Use CACI No. 3902: In a case involving only property damage, CACI No. 3902 would be inappropriate. It may also not be needed if you are using a general verdict form, or if general damages are not authorized under *Civ. Code* § 3333.4. In addition, if the verdict form does not set forth the two categories of damages separately, the last sentence should be removed. *By Joseph Devine*

LexisNexis Matthew Bender Expert Practice Tip--Economic vs. Noneconomic Damages: There are a number of ways in which economic damages are treated more favorably than noneconomic damages,

including joint and several liability among defendants. If the case includes a significant amount of noneconomic damages (e.g., pain and suffering), it is important for plaintiff to have all potentially responsible parties included as defendants, or plaintiff cannot obtain full recovery. Moreover, plaintiff's argument to the jury should explain why each defendant should be held liable. *By Ronald Oster and Rex Heeseman*

LexisNexis Matthew Bender Expert Practice Tip--Illustration of Verdict Form Is Helpful: Using a blown-up illustration of the verdict form during your closing argument and filling in the amounts you are requesting for economic and noneconomic damages is helpful to the jury and gives them a look at the verdict form before deliberations while they are hearing counsel's argument. *By Dona Cohn-Payne*

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsDamagesGeneral OverviewTortsDamagesCompensatory DamagesLost IncomeGeneral
OverviewTortsDamagesCompensatory DamagesMedical ExpensesTortsDamagesCompensatory DamagesPain &
SufferingGeneral OverviewTortsDamagesConsortium DamagesGeneral
OverviewTortsNegligenceDefensesComparative NegligenceMultiple PartiesGeneral OverviewTortsProcedureMultiple
DefendantsJoint & Several Liability



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CHAPTER 39 California Judicial Council Damages Instructions

5-39 California Forms of Jury Instruction CACI 3903

CACI 3903 Items of Economic Damage

The following are the specific items of economic damages claimed by [*name of plaintiff*]:

[*Insert applicable instructions on items of economic damage.*]

New September 2003

This instruction may not be necessary in every case. For example, if the plaintiff is not claiming any noneconomic damages, there would be no need to define the claimed damages as "economic." If this instruction is used, it should be followed by applicable instructions (see *CACI Nos. 3903A through 3903N*) concerning the items of economic damage claimed by the plaintiff. These instructions should be inserted into this instruction as sequentially numbered items.

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 53, 61, 62

California Tort Damages (Cont.Ed.Bar) Bodily Injury, § 1.5

15 California Forms of Pleading and Practice, Ch. 177, *Damages* (Matthew Bender)

6 California Points and Authorities, Ch. 65, *Damages* (Matthew Bender)

1 California Civil Practice: Torts (Thomson West) § 5:4

Publisher's Notes

This instruction covers issues presented in BAJI Nos. 14.02 and 14.76.

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsDamagesGeneral Overview



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CHAPTER 39 California Judicial Council Damages Instructions

5-39 California Forms of Jury Instruction CACI 3903A

CACI 3903A Medical Expenses--Past and Future (Economic Damage)

[*Insert number, e.g., "1."*] **[Past] [and] [future] medical expenses.**

[To recover damages for past medical expenses, [*name of plaintiff*] must prove the reasonable cost of reasonably necessary medical care that [he/she] has received.]

[To recover damages for future medical expenses, [*name of plaintiff*] must prove the reasonable cost of reasonably necessary medical care that [he/she] is reasonably certain to need in the future.]

New September 2003

Sources and Authority

■ "[A] person injured by another's tortious conduct is entitled to recover the reasonable value of medical care and services reasonably required and attributable to the tort." (*Hanif v. Housing Authority of Yolo County* (1988) 200 Cal.App.3d 635, 640 [246 Cal.Rptr. 192] , internal citations omitted.); see also *Helfend v. Southern Cal Rapid Transit Dist.* (1970) 2 Cal.3d 1, 6 [84 Cal.Rptr. 173, 465 P.2d 61] [collateral source rule].)

■ "It is established that 'the reasonable value of nursing services required by the defendant's tortious conduct may be recovered from the defendant even though the services were rendered by members of the injured person's family and without an agreement or expectation of payment. Where services in the way of attendance and nursing are rendered by a member of the plaintiff's family, the amount for which the defendant is liable is the amount for which reasonably competent nursing and attendance by others could have been obtained. The fact that the injured party had a legal right to the nursing services (as in the case

of a spouse) does not, as a general rule, prevent recovery of their value" (*Hanif, supra*, 200 Cal.App.3d at pp. 644-645 , internal citations omitted.)

■ "Nor is it necessary that the amount of the award equal the alleged medical expenses for it has long been the rule that the costs alone of medical treatment and hospitalization do not govern the recovery of such expenses. It must be shown additionally that the services were attributable to the accident, that they were necessary, and that the charges for such services were reasonable." (*Dimmick v. Alvarez* (1961) 196 Cal.App.2d 211, 216 [16 Cal.Rptr. 308] .)

■ "Nishihama (*Nishihama v. City and County of San Francisco* (2001) 93 Cal.App.4th 298 [112 Cal.Rptr.2d 861]) and *Hanif* (*supra*) stand for the principle that it is error for the plaintiff to recover medical expenses in excess of the amount paid or incurred. Neither case, however, holds that evidence of the reasonable cost of medical care may not be admitted. Indeed, *Nishihama* suggests just the opposite: Such evidence gives the jury a more complete picture of the extent of a plaintiff's injuries. Thus, the trial court did not abuse its discretion in allowing evidence of the reasonable cost of plaintiff's care while reserving the propriety of a *Hanif/Nishihama* reduction until after the verdict." (*Greer v. Buzgheia* (2006) 141 Cal.App.4th 1150, 1157 [46 Cal.Rptr.3d 780] , original italics.)

■ "The intervention of a third party in purchasing a medical lien does not prevent a plaintiff from recovering the amounts billed by the medical provider for care and treatment, as long as the plaintiff legitimately incurs those expenses and remains liable for their payment. Nor does the rule [that a plaintiff in a tort action cannot recover more than the amount of medical expenses he or she paid or incurred, even if the reasonable value of those services might be a greater sum] forbid the jury from considering the amounts billed by the provider as evidence of the reasonable value of the services." (*Katiuzhinsky v. Perry* (2007) 152 Cal.App.4th 1288, 1291 [62 Cal.Rptr.3d 309] .)

■ "Because the provider may no longer assert a lien for the full cost of its services, the Medicaid beneficiary may only recover the amount payable under Medicaid as his or her medical expenses in an action against a third party tortfeasor." (*Olszewski v. Scripps Health* (2003) 30 Cal.4th 798, 827 [135 Cal.Rptr.2d 1, 69 P.3d 927] , internal citation omitted.)

■ "To entitle a plaintiff to recover present damages for apprehended future consequences, there must be evidence to show such a degree of probability of their occurring as amounts to a reasonable certainty that they will result from the original injury." (*Bellman v. San Francisco High School Dist.* (1938) 11 Cal.2d 576, 588 [81 P.2d 894] , internal citation omitted.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, § 1670

California Tort Damages (Cont.Ed.Bar) Bodily Injury, §§ 1.19-1.31

4 Levy et al., *California Torts*, Ch. 52, *Medical Expenses and Economic Loss*, §§ 52.01, 52.03 (Matthew Bender)

15 *California Forms of Pleading and Practice*, Ch. 177, *Damages*, § 177.45 (Matthew Bender)

6 *California Points and Authorities*, Ch. 64, *Damages: Tort*, § 64.192 (Matthew Bender)

1 *California Civil Practice: Torts* (Thomson West) § 5:12

Publisher's Notes

This instruction replaces BAJI No. 14.10, and covers issues presented in BAJI No. 14.60.

LexisNexis Matthew Bender Expert Practice Tip--Nursing Services Qualify as Economic Losses:

Note that nursing services qualify as economic losses even if provided by family members without expectation of payment. Plaintiff's counsel should therefore introduce evidence, as a comparison if nothing else, of the cost of such services from outside service providers. *By Ronald Oster and Rex Heeseman*

LexisNexis Matthew Bender Expert Practice Tip--Necessity of Medical Expert: An attorney will need a medical expert witness to establish that medical expenses are reasonable. During direct examination, question the expert if he/she is familiar with the cost of the type of treatment provided to the plaintiff in the community that he/she practices. Then you will need to establish that the actual bills incurred by the plaintiff are reasonable and necessary. Future medical expenses cannot be speculative so establish during the expert's testimony that the plaintiff will require future medical care and the reasonable cost. If the medical treatment will be for the plaintiff's life, an expert economist may be required to adjust the cost for inflation and reduce the cost to present value. *By Dona Cohn-Payne*

LexisNexis Matthew Bender Expert Practice Tip--Using CACI No. 3903A: CACI No. 3903A regarding medical expenses puts less emphasis on the requirement that the plaintiff prove the expenses were reasonable and necessary. It states that "To recover damages for past medical expenses, [plaintiff] must prove the reasonable cost of reasonably necessary medical care that [he/she] has received." The emphasis is on proving the reasonableness of the cost. Compare this to BAJI No. 14.10, which emphasized that three things must be proven, including (1) the reasonable value (cost); (2) that the care given was reasonably required; and (3) that the care was actually given. As noted in the Sources and Authority to CACI No. 3903A, "It must be shown additionally that the services were attributable to the accident, that they were necessary, and that the charges for such services were reasonable. (*Dimmick v. Alvarez* (1961) 196 Cal.App.2d 211, 216, 16 Cal.Rptr. 308)."

Most Judges prefer to use the approved jury instructions and it is unlikely that they would allow substantial alterations to the CACI instructions. An important issue in many cases is whether or not the medical treatment given was "reasonable and necessary." In such a case, consider requesting that the court give a special instruction in addition to CACI No. 3903A as follows: "In addition to proving the reasonable cost of the medical care, the plaintiff must also prove that the medical care was reasonably required and actually given as a result of the defendant's wrongful conduct." *By Joseph Devine*

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsDamagesGeneral OverviewTortsDamagesCompensatory DamagesMedical Expenses



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CHAPTER 39 California Judicial Council Damages Instructions

5-39 California Forms of Jury Instruction CACI 3903B

CACI 3903B Medical Monitoring--Toxic Exposure (Economic Damage)

[*Insert number, e.g., "2."*] **The cost of future medical monitoring. To recover damages for this item, [*name of plaintiff*] must prove both of the following:**

- 1. That as a result of the toxic exposure, the need for future monitoring is reasonably certain; and**
- 2. That the monitoring is reasonable.**

In deciding these issues, you should consider the following:

- (a) The significance and extent of [*name of plaintiff*]'s exposure to the chemical(s);**
- (b) The toxicity of the chemical(s);**
- (c) The relative increase in [*name of plaintiff*]'s chance of getting the disease as a result of the exposure, when compared to:**
 - (i) [his/her] chances of developing the disease had [he/she] not been exposed, and**
 - (ii) the chances that members of the public at large will develop the disease;**
- (d) The seriousness of the disease that may result from the exposure; [and]**
- (e) The medical benefit of early detection and diagnosis; [and]**
- (f) [*Insert other relevant factor(s).*]**

[[Name of defendant] is not required to pay for medical monitoring that is required for reasons other than [name of plaintiff]'s exposure to toxic chemicals.]

[[Name of defendant] is only required to pay for additional or different monitoring that is required because of the toxic exposure.]

New September 2003

Sources and Authority

■ "In the context of a toxic exposure action, a claim for medical monitoring seeks to recover the cost of future periodic medical examinations intended to facilitate early detection and treatment of disease caused by a plaintiff's exposure to toxic substances." (*Potter v. Firestone Tire and Rubber Co.* (1993) 6 Cal.4th 965, 1004-1005 [25 Cal.Rptr.2d 550, 863 P.2d 795] , internal citation omitted.)

■ "[W]e hold that the cost of medical monitoring is a compensable item of damages where the proofs demonstrate, through reliable medical expert testimony, that the need for future monitoring is a reasonably certain consequence of a plaintiff's toxic exposure and that the recommended monitoring is reasonable. In determining the reasonableness and necessity of monitoring, the following factors are relevant: (1) the significance and extent of the plaintiff's exposure to chemicals; (2) the toxicity of the chemicals; (3) the relative increase in the chance of onset of disease in the exposed plaintiff as a result of the exposure, when compared to (a) the plaintiff's chances of developing the disease had he or she not been exposed, and (b) the chances of the members of the public at large of developing the disease; (4) the seriousness of the disease for which the plaintiff is at risk; and (5) the clinical value of early detection and diagnosis. Under this holding, it is for the trier of fact to decide, on the basis of competent medical testimony, whether and to what extent the particular plaintiff's exposure to toxic chemicals in a given situation justifies future periodic medical monitoring." (*Potter, supra*, 6 Cal.4th at p. 1009 .)

■ "The crucial distinction, in other words, is in the nature of the monitoring, not the nature of the harm. '[E]ven if a defendant negligently exposes a smoker to toxins that significantly increase the smoker's risk of cancer, that defendant is not liable for reasonably certain future medical monitoring costs unless the recommended monitoring calls for tests or examinations that are in addition to or different from the type of monitoring that the smoker should prudently undertake regardless of the subsequent toxic exposure.' This accords with the policy concern being addressed in that part of [*Potter*], which was to avoid 'open[ing] the floodgates of litigation.' If 'the plaintiff already remains responsible for any monitoring that is shown to be medically advisable due solely to his or her smoking or other preexisting condition,' he or she will have no incentive to sue for contribution from a subsequent tortfeasor who has caused no need for additional or different monitoring." (*Gutierrez v. Cassiar Mining Corp.* (1998) 64 Cal.App.4th 148, 156 [75 Cal.Rptr.2d 132] , internal citations omitted.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, § 1670

California Tort Damages (Cont.Ed.Bar) Bodily Injury, § 1.20A

4 Levy et al., *California Torts*, Ch. 52, *Medical Expenses and Economic Loss*, § 52.01[3][b] (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages* (Matthew Bender)

6 California Points and Authorities, Ch. 65, *Damages* (Matthew Bender)

Publisher's Notes

This instruction replaces BAJI No. 14.10.1.

LexisNexis Matthew Bender Expert Practice Tip--Medical Monitoring Expenses: Defense counsel may want to emphasize the last portion of *CACI No. 3903B* that limits medical monitoring expenses to those expenses that would not otherwise be incurred. Thus, a smoker exposed to asbestos materials may not require "additional or different" monitoring. Still, this may be a difficult concept for some jurors--so, be careful in presenting such an argument. *By Ronald Oster and Rex Heeseman*

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsDamagesCompensatory DamagesMedical ExpensesTortsProcedureMultiple DefendantsContributionGeneral Overview



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CHAPTER 39 California Judicial Council Damages Instructions

5-39 California Forms of Jury Instruction CACI 3903C

CACI 3903C Past and Future Lost Earnings (Economic Damage)

[Insert number, e.g., "3."] **[Past] [and] [future] lost earnings.**

[To recover damages for past lost earnings, [name of plaintiff] must prove the amount of [insert one or more of the following: income/earnings/salary/wages] that [he/she] has lost to date.]

[To recover damages for future lost earnings, [name of plaintiff] must prove the amount of [insert one or more of the following: income/earnings/salary/wages] [he/she] will be reasonably certain to lose in the future as a result of the injury.]

New September 2003

Directions for Use

This instruction is not intended for use in employment cases.

Sources and Authority

- "We know of no rule of law that requires that a plaintiff establish the amount of his actual earnings at the time of the injury in order to obtain recovery for loss of wages although, obviously, the amount of such earnings would be helpful to the jury in particular situations." (*Rodriguez v. McDonnell Douglas Corp.* (1978) 87 Cal.App.3d 626, 656 [151 Cal.Rptr. 399] .)

- "To entitle a plaintiff to recover present damages for apprehended future consequences, there must be evidence to show such a degree of probability of their occurring as amounts to a reasonable certainty

that they will result from the original injury.' " (*Bellman v. San Francisco High School Dist.* (1938) 11 Cal.2d 576, 588 [81 P.2d 894] , internal citation omitted.)

■ The Supreme Court has stated: " 'Under the prevailing American rule, a tort victim suing for damages for permanent injuries is permitted to base his recovery "on his prospective earnings for the balance of his life expectancy at the time of his injury undiminished by any shortening of that expectancy as a result of the injury." ' " (*Fein v. Permanente Medical Group* (1985) 38 Cal.3d 137, 153 [211 Cal.Rptr. 368, 695 P.2d 665] , internal citations omitted.)

■ "[T]he majority view is that no deduction is made for the injured party's expected living expenses during the lost years." (*Overly v. Ingalls Shipbuilding, Inc.* (1999) 74 Cal.App.4th 164, 171 [87 Cal.Rptr.2d 626] , internal citations omitted.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1666, 1667

California Tort Damages (Cont.Ed.Bar) Bodily Injury, §§ 1.39-1.41

4 Levy et al., *California Torts*, Ch. 52, *Medical Expenses and Economic Loss*, §§ 52.10 -52.11 (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages* (Matthew Bender)

6 California Points and Authorities, Ch. 65, *Damages* (Matthew Bender)

1 California Civil Practice: Torts (Thomson West) § 5:15

Publisher's Notes

This instruction covers issues presented in BAJI Nos. 14.11, 14.12, and 14.60.

LexisNexis Matthew Bender Expert Practice Tip--CACI Improves Upon BAJI: *CACI No. 3903C* is a vast improvement over BAJI No. 14.11, which instructed that damages may be awarded for "The reasonable value of working time lost to date." *CACI No. 3903C* requires the plaintiff to "prove the amount of [income] that [he/she] has lost to date." The jury is clearly informed that the plaintiff must prove the element of economic damage that he/she lost "income" rather than "working time." *By Joseph Devine*

LexisNexis Matthew Bender Expert Practice Tip--Use of Experts, Generally: Many plaintiff's counsel use experts to provide evidence of future lost earnings, especially since present value calculations are required [see *CACI No. 3904*]. Having the "right" expert is especially key in this area. *By Ronald Oster and Rex Heeseman*

LexisNexis Matthew Bender Expert Practice Tip--Use of Experts to Determine Past and Future Lost Earnings: An economist will be required for future lost earnings so that the amount of damages can be adjusted for inflation, cost of living increases, raises and then reduced to present value. These figures must be presented via an expert. Past lost earnings can be established through the plaintiff directly, but it may be helpful to have someone from the plaintiff's past employment testify independently as to the past earnings of the plaintiff. Remember that a plaintiff's attorney should put in the gross earnings, not net after taxes. *By Dona Cohn-Payne*

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsDamagesGeneral OverviewTortsDamagesCompensatory DamagesLost IncomeGeneral Overview



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CHAPTER 39 California Judicial Council Damages Instructions

5-39 California Forms of Jury Instruction CACI 3903D

CACI 3903D Lost Earning Capacity (Economic Damage)

[*Insert number, e.g., "4."*] **The loss of [*name of plaintiff*]'s ability to earn money.**

To recover damages for the loss of the ability to earn money as a result of the injury, [*name of plaintiff*] must prove the reasonable value of that loss to [him/her]. It is not necessary that [he/she] have a work history.

New September 2003; Revised April 2004, April 2008

Directions for Use

This instruction is not intended for use in employment cases.

If lost profits are asserted as an element of damages, see *CACI No. 3903N, Lost Profits (Economic Damage)*.

If there is a claim for both lost future earnings and lost earning capacity, give also *CACI No. 3903C*. The verdict form should ensure that the same loss is not computed under both standards.

Sources and Authority

- "Damages may be awarded for lost earning capacity without any proof of actual loss of earnings." (*Heiner v. Kmart Corp.* (2000) 84 Cal.App.4th 335, 348, fn. 6 [100 Cal.Rptr.2d 854] , internal citations omitted.)

- "Loss of earning power is an element of general damages which can be inferred from the nature of

the injury, without proof of actual earnings or income either before or after the injury, and damages in this respect are awarded for the loss of ability thereafter to earn money." (*Connolly v. Pre-Mixed Concrete Co.* (1957) 49 Cal.2d 483, 489 [319 P.2d 343] .)

■ "The test [for lost earning capacity] is not what the plaintiff would have earned in the future but what she could have earned. ... Such damages are '... awarded for the purpose of *compensating* the plaintiff for injury suffered, i.e., restoring ... [her] as nearly as possible to ... [her] former position, or giving ... [her] some pecuniary equivalent.' Impairment of the capacity or power to work is an injury separate from the actual loss of earnings." (*Hilliard v. A. H. Robins Co.* (1983) 148 Cal.App.3d 374, 412 [196 Cal.Rptr. 117] , original italics, internal citations omitted.)

■ "[I]t is not necessary for a party to produce expert testimony on future earning ability although some plaintiff's attorneys may choose as a matter of trial tactics to present such evidence." (*Gargir v. B'Nei Akiva* (1998) 66 Cal.App.4th 1269, 1282 [78 Cal.Rptr.2d 557] , internal citations omitted.)

■ The Supreme Court has stated: " 'Under the prevailing American rule, a tort victim suing for damages for permanent injuries is permitted to base his recovery "on his prospective earnings for the balance of his life expectancy at the time of his injury undiminished by any shortening of that expectancy as a result of the injury." ' " (*Fein v. Permanente Medical Group* (1985) 38 Cal.3d 137, 153 [211 Cal.Rptr. 368, 695 P.2d 665] , internal citations omitted.)

■ "[T]he majority view is that no deduction is made for the injured party's expected living expenses during the lost years." (*Overly v. Ingalls Shipbuilding, Inc.* (1999) 74 Cal.App.4th 164, 175 [87 Cal.Rptr.2d 626] , internal citations omitted.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1666, 1667

California Tort Damages (Cont.Ed.Bar) Bodily Injury, § 1.42

4 Levy et al., *California Torts*, Ch. 52, *Medical Expenses and Economic Loss*, §§ 52.10 -52.11 (Matthew Bender)

15 *California Forms of Pleading and Practice*, Ch. 177, *Damages*, § 177.46 (Matthew Bender)

6 *California Points and Authorities*, Ch. 65, *Damages*, § 65.41 (Matthew Bender)

1 California Civil Practice: Torts (Thomson West) § 5:15

Publisher's Notes

This instruction covers issues presented in BAJI No. 14.12.

LexisNexis Matthew Bender Expert Practice Tip--Need for Expert Testimony: If a plaintiff has no work history (because plaintiff is very young, a student, etc.), plaintiff's counsel will probably need to introduce expert testimony to establish a basis for damages for the loss of ability to earn money in the future. An argument related to a child (e.g., going to school for future success) may be easier for some jurors to understand. *By Ronald Oster and Rex Heeseman*

LexisNexis Matthew Bender Expert Practice Tip--Using CACI No. 3903D: CACI No. 3903D concerning lost earning capacity adds a sentence not present in BAJI 14.12. "It is not necessary that

[he/she] have a work history." At first glance, this addition would appear to be favorable to the ambitious plaintiff without work history. However, the instruction retains the admonition that the plaintiff must prove what he/she "would have been reasonably certain to earn if the injury had not occurred." A plaintiff without work history may find it difficult to prove that he/she was reasonably certain to earn income, but for his/her injury. Thus, if you are defending a claim of lost earning capacity by a plaintiff without work history, be sure to argue that the plaintiff must prove that he/she was reasonably certain to earn income if the injury had not occurred. The mere fact that the plaintiff has no previous work history suggests that he/she was not reasonably certain to earn income in the future. Remind the jury that speculative damages may not be awarded as they were instructed in *CACI No. 3900*. By *Joseph Devine*

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Remedies Damages General Overview Torts Damages Compensatory Damages Award Calculations Torts Damages Compensatory Damages Lost Income Earning Capacity



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CHAPTER 39 California Judicial Council Damages Instructions

5-39 California Forms of Jury Instruction CACI 3903E

CACI 3903E Loss of Ability to Provide Household Services (Economic Damage)

[*Insert number, e.g., "5."*] **The loss of [*name of plaintiff*]'s ability to provide household services.**

To recover damages for the loss of the ability to provide household services, [*name of plaintiff*] must prove the reasonable value of the services [he/she] would have been reasonably certain to provide to [his/her] household if the injury had not occurred.

New September 2003

Sources and Authority

- "Although the parties do not distinguish between the different types of lost years damages that were awarded, we note that lost household services damages are different than the other types of future earnings included in this category. Generally, household services damages represent the detriment suffered when injury prevents a person from contributing some or all of his or her customary services to the family unit. The justification for awarding this type of damage as part of the loss of future earnings award is that the plaintiff should be compensated for the value of the services he would have performed during the lost years which, because of the injury, will now have to be performed by someone else." (*Overly v. Ingalls Shipbuilding, Inc.* (1999) 74 Cal.App.4th 164, 171, fn. 5 [87 Cal.Rptr.2d 626] , internal citation omitted.)

- " 'To entitle a plaintiff to recover present damages for apprehended future consequences, there must be evidence to show such a degree of probability of their occurring as amounts to a reasonable certainty that they will result from the original injury.' " (*Bellman v. San Francisco High School Dist.* (1938) 11 Cal.2d 576, 588 [81 P.2d 894] , internal citation omitted.)

Secondary Sources

California Tort Damages (Cont.Ed.Bar) Bodily Injury, §§ 1.64-1.66

15 California Forms of Pleading and Practice, Ch. 177, *Damages* (Matthew Bender)

6 California Points and Authorities, Ch. 65, *Damages* (Matthew Bender)

Publisher's Notes

There is no BAJI instruction on this subject.

LexisNexis Matthew Bender Expert Practice Tip--Wrongful Death Cases: Evidence of an economic loss to provide household services is required when you have a wrongful death action of a parent or a significantly injured person who had to hire or have someone else do the household chores. This loss can be both past and future. A forensic economist or vocational expert can provide this type of testimony. *By Dona Cohn-Payne*

LexisNexis Matthew Bender Expert Practice Tip--Application of These Damages: This category of damages primarily applies to spouses who do not have outside jobs and who provide all or substantially all of the household services for the family. Some jurors (e.g., younger ones) may need some explanation because of their background (e.g., both of their parents worked). *By Ronald Oster and Rex Heeseman*

LexisNexis Matthew Bender Expert Practice Tip--Caution!: *CACI No. 3903E* seems to allow a tort victim the right to claim as his/her own "economic" damages for household services that he/she cannot provide to others. The authority cited for this instruction is *Overly v. Ingalls Shipbuilding, Inc. (1999) 74 Cal.App.4th 164, 171, fn. 5, 87 Cal.Rptr.2d 626*. However, practitioners should note that the *Overly* court did not decide the issue: "That specific issue is not presented to us here" [*Overly v. Ingalls Shipbuilding, Inc. (1999) 74 Cal.App.4th 164, 173, 87 Cal.Rptr.2d 626*]. The only case cited by the *Overly* court specifically dealing with the issue was *Monias v. Endal (1993) 330 Md. 274*. The *Overly* court acknowledged that *Monias* specifically held that a tort victim plaintiff could not recover economic damages for loss of his/her inability to provide household services. "The tort victim's family, not the tort victim himself was the injured party."

Any defendant confronted with the offer of this instruction should carefully review the case law including the authorities cited in the instruction's use notes. A written motion in limine should be prepared and the defense attorney should vigorously argue that it would be prejudicial error to give this instruction. If given, it invites appeal. *By Joseph Devine*

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsDamagesGeneral OverviewTortsWrongful Death & Survival ActionsRemediesCompensatory DamagesLoss of Services



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CHAPTER 39 California Judicial Council Damages Instructions

5-39 California Forms of Jury Instruction CACI 3903F

CACI 3903F Damage to Real Property (Economic Damage)

[*Insert number, e.g., "6."*] **The harm to [*name of plaintiff*]'s property.**

To recover damages for harm to property, [*name of plaintiff*] must prove [the reduction in the property's value/ [or] the reasonable cost of repairing the harm]. [If there is evidence of both, [*name of plaintiff*] is entitled to the lesser of the two amounts. [However, if [*name of plaintiff*] has a genuine desire to repair the property for personal reasons, and if the costs of repair are reasonable given the damage to the property and the value after repair, then the costs of repair may be awarded even if they exceed the property's loss of value.]]

[To determine the reduction in value, you must determine the fair market value of the property before the harm occurred and then subtract the fair market value of the property immediately after the harm occurred. The difference is the reduction of value.

"Fair market value" is the highest price for the property that a willing buyer would have paid to a willing seller, assuming:

- 1. That there is no pressure on either one to buy or sell; and**
- 2. That the buyer and seller know all the uses and purposes for which the property is reasonably capable of being used.]**

[To determine whether the cost of repairing the harm is reasonable, you must decide if there is a reasonable relationship between the cost of repair and the harm caused by [*name of defendant*]'s conduct. You must consider the expense and time involved to restore the property to its original condition compared to the value of the property [and [*insert other applicable factors.*]].

If you find that the cost of repairing the harm is not reasonable, then you may award any reduction in the property's value.]

New September 2003; Revised April 2008, April 2009

Directions for Use

Give this instruction for damages to real property caused by trespass, permanent nuisance, or other tortious conduct. See also *CACI No. 3903G, Loss of Use of Real Property (Economic Damage)*.

If there is evidence of both diminution in value and cost of repair, include all optional paragraphs. However, include the last bracketed sentence in the first paragraph only if the judge has determined that the claimed personal reasons are legally sufficient to justify the costs of repair.

If only the cost of repair is at issue, give just the first paragraph. However, if the reasonableness of the cost of repair is at issue, then the value of the property must be considered, and all paragraphs must be included. If only diminution of value is at issue, omit the last two optional paragraphs.

Sources and Authority

■ *Civil Code section 3334(a)* provides: "The detriment caused by the wrongful occupation of real property, in cases not embraced in Section 3335 of this code, the Eminent Domain Law (Title 7 (commencing with Section 1230.010) of Part 3 of the Code of Civil Procedure), or *Section 1174 of the Code of Civil Procedure*, is deemed to include the value of the use of the property for the time of that wrongful occupation, not exceeding five years next preceding the commencement of the action or proceeding to enforce the right to damages, the reasonable cost of repair or restoration of the property to its original condition, and the costs, if any, of recovering the possession."

■ "For tortious injury to real property, the general rule is that the plaintiff may recover the lesser of (1) the diminution in the property's fair market value, as measured immediately before and immediately after the damage; or (2) the cost to repair the damage and restore the property to its pretrespass condition, plus the value of any lost use. The practical effect of this rule is to limit damages to property to the fair market value of the property prior to the damage." (*Kelly v. CB&I Constructors, Inc. (2009) 179 Cal.App.4th 442, 450 [102 Cal.Rptr.3d 32]* .)

■ "Diminution in market value ... is not an absolute limitation; several other theories are available to fix appropriate compensation for the plaintiff's loss. 'There is no fixed, inflexible rule for determining the measure of damages for injury to, or destruction of, property; whatever formula is most appropriate to compensate the injured party for the loss sustained in the particular case will be adopted.' " (*Heninger v. Dunn (1980) 101 Cal.App.3d 858, 862 [162 Cal.Rptr. 104]* .)

■ "Defendant ... contends that the trial court awarded excessive damages, on the ground that when the cost of restoration is less than the depreciation in value, the former is the measure of damages. This contention cannot be sustained. Plaintiffs established their damages by showing the depreciation in value. It was then incumbent upon defendants to come forward with proof that the cost of restoration would be less." (*Herzog v. Grosso (1953) 41 Cal.2d 219, 226 [259 P.2d 429]* , internal citations omitted.)

■ "Where a plaintiff establishes damages by showing depreciation in the value of real property, courts have held defendants to the burden of coming forward with proof that cost of restoration would be less. It follows that when a plaintiff proves damages by showing the cost of repairs it should be incumbent on the defendant to introduce evidence that the repair costs exceed the value of the property." (*Armitage v. Decker* (1990) 218 Cal.App.3d 887, 905 [267 Cal.Rptr. 399] , internal citations omitted.)

■ "The 'fair market value' of real property is 'the best price obtainable from a purchaser on a cash sale.' It is measured by the highest price the property would command if offered for sale in the open market with a reasonable time allowed to the seller to find a purchaser who will buy with a knowledge of all the uses to which it may be put." (*CMSH Co. v. Antelope Development, Inc.* (1990) 223 Cal.App.3d 174, 182 [272 Cal.Rptr. 605] , internal citations omitted.)

■ "Civil Code section 3334 requires that restoration costs be *reasonable*. In addition, general principles of damages in trespass cases require that the damages bear a *reasonable* relationship to the harm caused by the trespass. *Mangini* explains that whether abatement costs are *reasonable* requires an evaluation of a number of fundamental considerations, including the expense and time required to perform the abatement, along with other legitimate competing interests. (*Mangini, supra*, 12 Cal.4th at p. 1100 ; see also *Beck, supra*, 44 Cal.App.4th at pp. 1221-1222 [reasonableness includes consideration of monetary expense, burden on public, and costs of remediation versus value of land].)" (*Starrh & Starrh Cotton Growers v. Aera Energy LLC* (2007) 153 Cal.App.4th 583, 601 [63 Cal.Rptr.3d 165] , original italics.)

■ "The trial court must instruct the jury on how to determine whether the statutory requirement that any restoration costs be reasonable was met. It must also advise the jury what to do if the jury concludes the evidence shows the proposed restoration project to be unreasonable." (*Starrh & Starrh Cotton Growers, supra*, 153 Cal.App.4th at pp. 600-601 .)

■ "Whether the restoration costs are reasonable is a question for the trier of fact in the first instance, but an award of such costs may be unreasonable as a matter of law if it is grossly disproportionate to the value of the property or the harm caused by the defendant." (*Kelly, supra*, 179 Cal.App.4th at p. 451 .)

■ "Trial courts in trespass actions have historically been given great flexibility to award damages that fit the particular facts of the case." (*Starrh & Starrh Cotton Growers, supra*, 153 Cal.App.4th at p. 604 .)

■ "[I]f a plaintiff has a personal reason to restore the property to its former condition, he or she may recover the restoration costs even if such costs exceed the diminution in value. This rule is sometimes referred to as the 'personal reason' exception.' Even when this exception applies, however, restoration costs 'are allowed only if they are reasonable in light of the value of the real property before the injury and the actual damage sustained.' " (*Kelly, supra*, 179 Cal.App.4th at pp. 450-451 , internal citations omitted.)

■ "Contrary to the defendants' argument, the 'personal reason' exception does not require that the [plaintiffs] own a 'unique' home. Rather, all that is required is some personal use by them and a bona fide desire to repair or restore." (*Orndorff v. Christiana Community Builders* (1990) 217 Cal.App.3d 683, 688 [266 Cal.Rptr. 193] .)

■ "Under California law, damages for diminution in value may only be recovered for permanent, not continuing, nuisances." (*Gehr v. Baker Hughes Oil Field Operations, Inc.* (2008) 165 Cal.App.4th 660, 663 [81 Cal.Rptr.3d 219] .)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1727, 1728

California Real Property Remedies Practice (Cont.Ed.Bar) Damages for Injury to Real Property, § 11.5

4 Levy et al., *California Torts*, Ch. 52, *Medical Expenses and Economic Loss*, § 52.35 (Matthew Bender)

15 *California Forms of Pleading and Practice*, Ch. 177, *Damages*, § 177.44 (Matthew Bender)

22 *California Points and Authorities*, Ch. 225, *Trespass*, § 225.147 (Matthew Bender)

1 California Civil Practice: Torts (Thomson West) § 5:19

Publisher's Notes

There is no BAJI instruction on this subject.

LexisNexis Matthew Bender Expert Practice Tip--Justifying Higher Repair Cost: If there is not a large disparity between market value loss and cost to repair, plaintiff should not have a difficult time establishing the "personal reasons" needed to justify the higher repair cost. *By Ronald Oster*

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsDamagesGeneral OverviewTortsDamagesCompensatory DamagesProperty DamageGeneral Overview



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CHAPTER 39 California Judicial Council Damages Instructions

5-39 California Forms of Jury Instruction CACI 3903G

CACI 3903G Loss of Use of Real Property (Economic Damage)

[Insert number, e.g., "7."] **The loss of use of [name of plaintiff]'s [insert identification of real property].**

To recover damages for the loss of use, [name of plaintiff] must prove [the reasonable cost to rent similar property for the time when [he/she/it] could not use [his/her/its] own property/ [or] the benefits obtained by [name of defendant] because of [his/her/its] wrongful occupation]. [If there is evidence of both, [name of plaintiff] is entitled to the greater of the two amounts.]

[Benefits obtained may include [name of defendant]'s profits if they are directly linked to the wrongful occupation.]

New September 2003; Revised April 2008

Directions for Use

Use this instruction along with *CACI No. 3903F, Damage to Real Property (Economic Damage)*. Include the optional last paragraph if plaintiff claims that the measure of damages is the benefits obtained by the defendant and that these include the defendant's profits obtained because of the tortious conduct.

This instruction may be used if the general measure of damages under *CACI No. 3903F* will be the cost of repair rather than diminution in value. (See *Erlich v. Menezes* (1999) 21 Cal.4th 543, 555 [87 Cal.Rptr.2d 886, 981 P.2d 978] .)

If the jury determines that the cost of repair is not reasonable, it is not clear whether loss-of-use damages are recoverable. The rule has been that when real property has been damaged so that it cannot be restored, damages for loss of use may not be recovered. (*Ferraro v. Southern California Gas Co.* (1980)

102 Cal.App.3d 33, 50-51 [162 Cal.Rptr. 238] .) But in 1992, the Legislature amended *Civil Code* section 3334 to allow for "benefits obtained" as an alternative to rental value as a measure of damages for loss of use. The legislative intent was to deter polluters from dumping toxic material on land of little value. (See *Starrh & Starrh Cotton Growers v. Aera Energy LLC* (2007) 153 Cal.App.4th 583, 603 [63 Cal.Rptr.3d 165] .) In *Starrh & Starrh Cotton Growers*, the court indicated that it was extremely unlikely in that case that the cost of repair could be considered to be reasonable, but also allowed the jury to consider awarding the defendant's profits as "benefits obtained." (*Id.* at pp. 598-606 .) The court did not limit the jury's right to award profits as damages only if it found the cost of repair to be reasonable. And it seems that if the court believed there was such a limitation, it would have expressly said so. The legislative objective would not be achieved if one could pollute land to the point that it could not reasonably be restored and also not be required to pay for the benefits obtained. Therefore, it seems most likely that this limitation on loss-of-use damages no longer applies in light of the 1992 amendment and its legislative history.

This instruction is not intended for cases in which the plaintiff is a landlord seeking to recover compensation for lost rents. A more appropriate instruction for that situation is *CACI No. 3903N, Lost Profits (Economic Damage)*.

Sources and Authority

■ *Civil Code* section 3334 provides:

(a) The detriment caused by the wrongful occupation of real property, in cases not embraced in Section 3335 of this code, the Eminent Domain Law (Title 7 (commencing with Section 1230.010) of Part 3 of the Code of Civil Procedure), or *Section 1174 of the Code of Civil Procedure*, is deemed to include the value of the use of the property for the time of that wrongful occupation, not exceeding five years next preceding the commencement of the action or proceeding to enforce the right to damages, the reasonable cost of repair or restoration of the property to its original condition, and the costs, if any, of recovering the possession.

(b)(1) Except as provided in paragraph (2), for purposes of subdivision (a), the value of the use of the property shall be the greater of the reasonable rental value of that property or the benefits obtained by the person wrongfully occupying the property by reason of that wrongful occupation.

(2) If a wrongful occupation of real property subject to this section is the result of a mistake of fact of the wrongful occupier, the value of the use of the property, for purposes of subdivision (a), shall be the reasonable rental value of the property.

■ "[T]he general measure of damages where injury to property is capable of being repaired is the reasonable cost of repair together with the value of lost use during the period of injury." (*Erlich, supra*, 21 Cal.4th at p.555 , internal citation omitted.)

■ "There is no question that when cost of restoration is the correct measure of damages for injury to real property, compensation for loss of use ... would be appropriate." (*Ferraro, supra*, 102 Cal.App.3d at p 51 .)

■ "There is nothing in *Civil Code* section 3334 or its legislative history to suggest that the phrase 'benefits obtained' should be read narrowly. To the contrary, the intent of the Legislature was to eliminate *any* economic incentive to trespass as a means of waste disposal. (Sen. Com. on Judiciary, com. on Assem. Bill No. 2663 (1991-1992 Reg. Sess.)

for June 23, 1992, hearing, p. 2.) If the Legislature had wanted to limit the phrase 'benefits obtained' to costs avoided, it could easily have done so. [P] Further, this interpretation is consistent with the fundamental rule that the prime consideration in interpreting a statute is to achieve the objective of the statute. As we have indicated, the evil to be prevented by the 1992 amendments is identified in the legislative history--to prevent any economic advantage for polluters resulting from the wrongful dumping on another's land." (*Starrh & Starrh Cotton Growers, supra*, 153 Cal.App.4th at p. 604 , original italics, internal citation omitted.)

■ "Trial courts in trespass actions have historically been given great flexibility to award damages that fit the particular facts of the case. [Defendant] has admitted that it chose the challenged method for disposing of produced water because it was the least expensive alternative and maximized its profits. In light of these factors, we conclude that the term 'benefits obtained' may include profits enjoyed by [defendant] that are directly linked to the wrongful trespass." (*Starrh & Starrh Cotton Growers, supra*, 153 Cal.App.4th at p. 604 , internal citations omitted.)

■ *Restatement Second of Torts section 931* provides:

If one is entitled to a judgment for the detention of, or for preventing the use of, land or chattels, the damages include compensation for

(a) the value of the use during the period of detention or prevention or the value of the use of or the amount paid for a substitute, and

(b) harm to the subject matter or other harm of which the detention is the legal cause.

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, § 1728

California Real Property Remedies Practice (Cont.Ed.Bar) Damages for Injury to Real Property, § 11.5

4 Levy et al., *California Torts, Ch. 52, Medical Expenses and Economic Loss*, § 52.36 (Matthew Bender)

15 *California Forms of Pleading and Practice, Ch. 177, Damages*, § 177.44 (Matthew Bender)

6 *California Points and Authorities, Ch. 65, Damages*, § 65.40 et seq. (Matthew Bender)

1 California Civil Practice: Torts (Thomson West) § 5:19

Publisher's Notes

There is no BAJI instruction on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsDamagesGeneral OverviewTortsDamagesCompensatory DamagesProperty DamageAward
CalculationsTortsDamagesCompensatory DamagesProperty DamageLoss of Use



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CHAPTER 39 California Judicial Council Damages Instructions

5-39 California Forms of Jury Instruction CACI 3903H

CACI 3903H Damage to Annual Crop (Economic Damage)

[*Insert number, e.g., "8."*] **The harm to [*name of plaintiff*]'s crop.**

[Damages for the destruction of an entire annual crop are determined as follows:

- 1. Determine the expected market value of the crop before the harm occurred; and**
- 2. Subtract from this amount the estimated costs of producing and marketing the crop, excluding costs that have already been paid by [*name of plaintiff*].]**

[Damages for the destruction of part of an annual crop are determined as follows:

- 1. Determine the expected market value of the crop before the harm occurred;**
- 2. Subtract from this amount the estimated costs of producing and marketing the crop. This is the expected net profit.**
- 3. Next, subtract the actual cost of producing and marketing the surviving crop from the actual receipts. This is actual net profit.**
- 4. Subtract number 3 from number 2. This amount is [*name of plaintiff*]'s damages for this loss.]**

New September 2003

Select one of the bracketed options depending on whether the plaintiff is seeking damages for the

destruction of all or part of a crop.

■ "They rely on the distinction drawn between the wrongful destruction of perennial crops, such as volunteer grass for grazing purposes, and annually planted crops. Thus, in the former case the proper measure of damages is the difference in the rental value of the property with and without the crops, while in the latter case the proper measure of damages is the market value of the estimated product at the time of destruction, less the cost of producing and marketing the same." (*Wolfsen v. Hathaway* (1948) 32 Cal.2d 632, 644 [198 P.2d 1] , internal citations omitted, overruled on other grounds in *Flores v. Arroyo* (1961) 56 Cal.2d 492 [15 Cal.Rptr. 87, 364 P.2d 263] .)

■ "We concede that the proper method is to show what the crop would have been and to deduct the probable cost of producing and selling such crop with the difference between market value and costs constituting the amount of damages. We have so held in [cited cases]. The rule is clearly set forth also in other California cases and authorities." (*Spinelli v. Tallcott* (1969) 272 Cal.App.2d 589, 592 [77 Cal.Rptr. 481] , internal citations omitted.)

■ "The proper measure of damages is the market value of the estimated product at the time of destruction, less the cost of producing and marketing the same." (*Parks v. Atwood Crop Dusters, Inc.* (1953) 118 Cal.App.2d 368, 373 [257 P.2d 653] , internal citation omitted.)

■ "The correct rule for the measurement of damages for the partial destruction of a growing crop was discussed in *Rystrom v. Sutter Butte Canal Co.* (1925) 72 Cal.App. 518, 522-523 [249 P. 53] . In that case a growing crop of rice had been damaged. The court pointed out that estimated costs of production must first be deducted from expected gross receipts to arrive at the expected net profit. Next, the court said, actual cost of production must be deducted from actual receipts to arrive at actual net profit. Finally, deducting actual net profit from expected net profit fixes the actual damage." (*Solis v. County of Contra Costa* (1967) 251 Cal.App.2d 844, 847-848 [60 Cal.Rptr. 99] .)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, § 1735

California Real Property Remedies Practice (Cont.Ed.Bar) Damages for Injury to Real Property, § 11.14

4 Levy et al., California Torts, Ch. 52, *Medical Expenses and Economic Loss*, § 52.34[1] (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages* (Matthew Bender)

6 California Points and Authorities, Ch. 65, *Damages* (Matthew Bender)

1 California Civil Practice: Torts (Thomson West) § 5:19

Publisher's Notes

There is no BAJI instruction on this subject.



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CHAPTER 39 California Judicial Council Damages Instructions

5-39 California Forms of Jury Instruction CACI 3903I

CACI 3903I Damage to Perennial Crop (Economic Damage)

[*Insert number, e.g., "9."*] **The harm to [*name of plaintiff*]'s crop.**

[Damages for destruction of [*describe perennial crop*] are determined as follows. For the time period from the destruction of the crop until the crop can be restored you must:

- 1. Determine the rental value of the land with the crop; and**
- 2. Subtract from this amount the rental value of the land without the crop.]**

[Damages for destruction of [*describe perennial crop*], which can be harvested and sold, are determined as follows:

- 1. Determine the expected market value of the crop before the harm occurred; and**
- 2. Subtract from this amount the estimated costs of producing and marketing the crop, excluding costs that have already been paid by [*name of plaintiff*].]**

[If the [plants/roots/seeds] responsible for producing the crop are destroyed, the measure of damages may also include the costs of [reseeding/replanting].]

New September 2003

If the plaintiff claims damages for multiple crops, damages must be calculated for each crop that would have been produced until the land was restored.

■ "They rely on the distinction drawn between the wrongful destruction of perennial crops, such as volunteer grass for grazing purposes, and annually planted crops. Thus, in the former case the proper measure of damages is the difference in the rental value of the property with and without the crops, while in the latter case the proper measure of damages is the market value of the estimated product at the time of destruction, less the cost of producing and marketing the same." (*Wolfsen v. Hathaway* (1948) 32 Cal.2d 632, 644 [198 P.2d 1] , overruled on other grounds in *Flores v. Arroyo* (1961) 56 Cal.2d 492, 497 [15 Cal.Rptr. 87, 364 P.2d 263] .)

■ "Where the roots of the grass in a pasture have been destroyed by water or fire so as to prevent the matured stocks from automatically reseeding the field, the measure of damages includes not only the rental value of the pasture, but also the additional cost of reseeding the field." (*Miller & Lux, Inc. v. Pinelli* (1927) 84 Cal.App. 42, 49 [257 P. 573] .)

■ "Upon the foregoing authorities, and upon good reason, we conclude that the measure of damages for the appropriation or destruction of pasturage, which is used for grazing purposes, where the grass cannot be reasonably severed and marketed separate from the land, is the reasonable rental value thereof in that vicinity for pasture purposes." (*Miller & Lux, Inc., supra*, 84 Cal.App. at p. 51 .)

■ "The measure of damages for the destruction of or injury to fruit, nut, or other productive trees is generally the difference in the value of the land before and after the destruction or injury. Damages may be additionally measured by the value of the trees on the premises in their growing state. Some courts have also awarded damages for the resulting crop loss. Where annual crops are damaged each year for several years, a grower may recover for loss of the crops during those years, the increased labor in the care of the land, and damages for injury to the trees themselves. [P] More recently, the measure of damages for the destruction of fruit trees has included the costs of replacing the trees or restoring the property to its condition prior to the injury. In *Baker v. Ramirez*, the court held that the cost of restoring an orange grove was the most appropriate measure of damages, where there was no impediment to replacing the orange trees and it was reasonable to replace the trees because only a small portion of the grove was damaged. The court noted that the difference between the value of the property before and after the injury was only one possible measure of damages." (*Santa Barbara Pistachio Ranch v. Chowchilla Water Dist.* (2001) 88 Cal.App.4th 439, 447 [105 Cal.Rptr.2d 856, 861] , internal citations omitted.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, § 1735

California Real Property Remedies Practice (Cont.Ed.Bar) Damages for Injury to Real Property, § 11.14

4 Levy et al., California Torts, Ch. 52, *Medical Expenses and Economic Loss*, § 52.34[1] (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages* (Matthew Bender)

6 California Points and Authorities, Ch. 65, *Damages* (Matthew Bender)

1 California Civil Practice: Torts (Thomson West) § 5:19

Publisher's Notes

There is no BAJI instruction on this subject.



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CHAPTER 39 California Judicial Council Damages Instructions

5-39 California Forms of Jury Instruction CACI 3903J

CACI 3903J Damage to Personal Property (Economic Damage)

[Insert number, e.g., "10."] **The harm to [name of plaintiff]'s [item of personal property].**

To recover damages for harm to personal property, [name of plaintiff] must prove the reduction in the [item of personal property]'s value or the reasonable cost of repairing it, whichever is less. [If there is evidence of both, [name of plaintiff] is entitled to the lesser of the two amounts.]

To determine the reduction in value, you must determine the fair market value of the [item of personal property] before the harm occurred and then subtract the fair market value of the [item of personal property] immediately after the harm occurred.

"Fair market value" is the highest price that a willing buyer would have paid to a willing seller, assuming:

- 1. That there is no pressure on either one to buy or sell; and**
- 2. That the buyer and seller are fully informed of the condition and quality of the [item of personal property].**

[If you find that [name of plaintiff]'s [item of personal property] cannot be completely repaired, the damages are the difference between its value before the harm and its value after the repairs have been made, plus the reasonable cost of making the repairs. The total amount awarded must not exceed the [item of personal property]'s value before the harm occurred.]

New September 2003

■ "The general rule is that the measure of damages for tortious injury to personal property is the difference between the market value of the property immediately before and immediately after the injury, or the reasonable cost of repair if that cost be less than the diminution in value. This rule stems from the basic code section fixing the measure of tort damage as 'the amount which will compensate for all the detriment proximately caused thereby.' [citations]" (*Pacific Gas & Electric Co. v. Mounteer* (1977) 66 Cal.App.3d 809, 812 [136 Cal.Rptr. 280] .)

■ "It has also been held that the price at which a thing can be sold at public sale, or in the open market, is some evidence of its market value. In *San Diego Water Co. v. San Diego*, the rule is announced that the judicial test of market value depends upon the fact that the property in question is marketable at a given price, which in turn depends upon the fact that sales of similar property have been, and are being, made at ascertainable prices. In *Quint v. Dimond*, it was held competent to prove market value in the nearest market." (*Tatone v. Chin Bing* (1936) 12 Cal.App.2d 543, 545-546 [55 P.2d 933] , internal citations omitted.)

■ " 'Where personal property is injured but not wholly destroyed, one rule is that the plaintiff may recover the depreciation in value (the measure being the difference between the value immediately before and after the injury), and compensation for the loss of use.' In the alternative, the plaintiff may recover the reasonable cost of repairs as well as compensation for the loss of use while the repairs are being accomplished. If the cost of repairs exceeds the depreciation in value, the plaintiff may only recover the lesser sum. Similarly, if depreciation is greater than the cost of repairs, the plaintiff may only recover the reasonable cost of repairs. If the property is wholly destroyed, the usual measure of damages is the market value of the property." (*Hand Electronics, Inc. v. Snowline Joint Unified School Dist.* (1994) 21 Cal.App.4th 862, 870 [26 Cal.Rptr.2d 446] , internal citations omitted.)

■ The cost of replacement is not a proper measure of damages for injury to personal property. (*Hand Electronics, supra*, 21 Cal.App.4th at p. 871 .)

■ "When conduct complained of consists of intermeddling with personal property 'the owner has a cause of action for trespass or case, and may recover only the actual damages suffered by reason of the impairment of the property or the loss of its use.' " (*Itano v. Colonial Yacht Anchorage* (1968) 267 Cal.App.2d 84, 90 [72 Cal.Rptr. 823] , internal citations omitted.)

■ "The measure of damage for wrongful injury to personal property is that difference between the market value of the property immediately before and immediately after the injury, or the reasonable cost of repair if such cost be less than the depreciation in value." (*Smith v. Hill* (1965) 237 Cal.App.2d 374, 388 [47 Cal.Rptr. 49] , internal citations omitted.)

■ "[I]t is said ... that 'if the damaged property cannot be completely repaired, the measure of damages is the difference between its value before the injury and its value after the repairs have been made, plus the reasonable cost of making the repairs. The foregoing rule gives the plaintiff the difference between the value of the machine before the injury and its value after such injury, the amount thereof being made up of the cost of repairs and the depreciation notwithstanding such repairs.' The rule urged by defendant, which limits the recovery to the cost of repairs, is applicable only in those cases in which the injured property 'can be entirely repaired.' This latter rule presupposes that the damaged property can be restored to its former state with no depreciation in its former value." (*Merchant Shippers Association v. Kellogg Express and Draying Co.* (1946) 28 Cal.2d 594, 600 [170 P.2d 923] , internal citations omitted.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1718, 1719

California Tort Damages (Cont.Ed.Bar) Vehicles and Other Personal Property, §§ 13.8-13.11

4 Levy et al., California Torts, Ch. 52, *Medical Expenses and Economic Loss*, § 52.31 (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages* (Matthew Bender)

6 California Points and Authorities, Ch. 65, *Damages* (Matthew Bender)

1 California Civil Practice: Torts (Thomson West) § 5:16

Publisher's Notes

This instruction covers issues presented in BAJI No. 14.20.

LexisNexis Matthew Bender Expert Practice Tip--Calculating Damages: *CACI No. 3903J* gives plaintiff several options for calculating damages, including market value loss, repair, or a combination of the two. The overall limitation is that the total award cannot exceed the property's original value. By *Ronald Oster*



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CHAPTER 39 California Judicial Council Damages Instructions

5-39 California Forms of Jury Instruction CACI 3903K

CACI 3903K Loss or Destruction of Personal Property (Economic Damage)

[*Insert number, e.g., "11."*] **The [loss/destruction] of [name of plaintiff]'s [item of personal property].**

To recover damages for the [loss/destruction], [name of plaintiff] must prove the fair market value of the [item of personal property] just before the harm occurred.

"Fair market value" is the highest price that a willing buyer would have paid to a willing seller, assuming:

- 1. That there is no pressure on either one to buy or sell; and**
- 2. That the buyer and seller are fully informed of the condition and quality of the [item of personal property].**

New September 2003

■ "'As a general rule the measure of damage for the loss or destruction of personal property is the value of the property at the time of such loss or destruction.'" (*Hand Electronics, Inc. v. Snowline Joint Unified School Dist.* (1994) 21 Cal.App.4th 862, 870 [26 Cal.Rptr.2d 446] , internal citation omitted.)

■ "It is well established that under [Civil Code] section 3333, the measure of damages for the loss or destruction of personal property is generally determined by the value of the property at the time of such loss or destruction." (*Pelletier v. Eisenberg* (1986) 177 Cal.App.3d 558, 567 [223 Cal.Rptr. 84] .)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, § 1720

California Tort Damages (Cont.Ed.Bar) Vehicles & Other Personal Property, § 13.6

4 Levy et al., California Torts, Ch. 52, *Medical Expenses and Economic Loss*, § 52.32 (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages* (Matthew Bender)

6 California Points and Authorities, Ch. 65, *Damages* (Matthew Bender)

1 California Civil Practice: Torts (Thomson West) § 5:17

Publisher's Notes

This instruction covers issues presented in BAJI No. 14.21.



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California Forms of Jury Instruction

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CHAPTER 39 California Judicial Council Damages Instructions

5-39 California Forms of Jury Instruction CACI 3903L

CACI 3903L Damage to Personal Property Having Special Value (Civ. Code, § 3355) (Economic Damage)

[Insert number, e.g., "12."] **The unique value of [name of plaintiff]'s [item of personal property].**

To recover damages for the unique value, [name of plaintiff] must prove all of the following:

- 1. That the [item of personal property] had some market value;**
- 2. That the [item of personal property] had unique value to [name of plaintiff]; and**
- 3. [That [name of defendant] had notice of this unique value before the harm;]**

[or]

[That [name of defendant]'s conduct was intentional and wrongful.]

No fixed standard exists for deciding the amount of this value. You must use your judgment to decide a reasonable amount based on the evidence and your common sense.

New September 2003

Directions for Use

The judge should determine whether the peculiar value claimed by the plaintiff is legally sufficient. While the subcommittee been unable to locate cases that state this rule explicitly, cases have upheld the giving of this type of instruction where there is substantial evidence of peculiar value.

Sources and Authority

■ *Civil Code* section 3355 provides: "Where certain property has a peculiar value to a person recovering damages for deprivation thereof, or injury thereto, that may be deemed to be its value against one who had notice thereof before incurring a liability to damages in respect thereof, or against a willful wrongdoer."

■ "[T]his section deals with property which has a market value and also a peculiar value to the owner, and not with property having no market value." (*Zvolanek v. Bodger Seeds, Ltd.* (1935) 5 Cal.App.2d 106, 110 [42 P.2d 92] .)

■ "Peculiar value under *Civil Code* section 3355 refers to a property's unique economic value, not its sentimental or emotional value." (*McMahon v. Craig* (2009) 176 Cal.App.4th 222, 237 [97 Cal.Rptr.3d 555] ["peculiar value" refers to special characteristics that increase an animal's monetary value, not its abstract value as a companion to its owner].)

■ "[T]he question of whether plaintiff proved 'peculiar value' was a factual question for the determination of the jury and that question was properly submitted to it for decision." (*King v. Karpe* (1959) 170 Cal.App.2d 344, 349 [338 P.2d 979] .)

Secondary Sources

California Tort Damages (Cont.Ed.Bar) Vehicles and Other Personal Property, § 13.7

4 Levy et al., *California Torts*, Ch. 52, *Medical Expenses and Economic Loss*, § 52.33 (Matthew Bender)

15 *California Forms of Pleading and Practice*, Ch. 177, *Damages*, § 177.47 (Matthew Bender)

1 California Civil Practice: Torts (Thomson West) § 5:17

Publisher's Notes

There is no BAJI instruction on this subject.

LexisNexis Matthew Bender Expert Practice Tip--Application of CACI No. 3903L: This instruction applies to a limited category of unique items (e.g., family heirlooms, wedding pictures, artistic creations). Most commercial vendors who deal with these items have contractual limitations in their agreements. Accordingly, *CACI No. 3903L* is usually limited to intentional tortfeasors. *By Ronald Oster and Rex Heeseman*

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsDamagesGeneral OverviewTortsDamagesCompensatory DamagesProperty DamageGeneral OverviewTortsDamagesCompensatory DamagesProperty DamageAward Calculations



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California Forms of Jury Instruction

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CHAPTER 39 California Judicial Council Damages Instructions

5-39 California Forms of Jury Instruction CACI 3903M

CACI 3903M Loss of Use of Personal Property (Economic Damage)

[Insert number, e.g., "13."] **The loss of use of [name of plaintiff]'s [item of personal property].**

To recover damages for loss of use, [name of plaintiff] must prove the reasonable cost to rent a similar [item of personal property] for the amount of time reasonably necessary to repair or replace the [item of personal property].

New September 2003

- "[A]n owner's recovery for being deprived of the use of a damaged vehicle is generally to be determined with reference to the period of time reasonably required for the making of repairs." (*Valencia v. Shell Oil Co.* (1944) 23 Cal.2d 840, 844 [147 P.2d 558] .)

- "There appears to be no logical or practical reason why a distinction should be drawn between cases in which the property is totally destroyed and those in which it has been injured but is repairable, and we have concluded that when the owner of a negligently destroyed commercial vehicle has suffered injury by being deprived of the use of the vehicle during the period required for replacement, he is entitled, upon proper pleading and proof, to recover for loss of use in order to 'compensate for all the detriment proximately caused' by the wrongful destruction." (*Reynolds v. Bank of America National Trust & Savings Assn.* (1959) 53 Cal.2d 49, 50-51 [345 P.2d 926] .)

- " 'Loss of use' of property is different from 'loss' of property. To take a simple example, assume that an automobile is stolen from its owner. The value of the 'loss of use' of the car is the rental value of a substitute vehicle; the value of the 'loss' of the car is its replacement cost. The nature of 'loss of use'

damages is described in California Jurisprudence Third as: 'The measure of damages for the loss of use of personal property may be determined with reference to the rental value of similar property which the plaintiff can hire for use during the period when he is deprived of the use of his own property.' " (*Collin v. American Empire Insurance Co.* (1994) 21 Cal.App.4th 787, 818 [26 Cal.Rptr.2d 391] , internal citations omitted.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, § 1721

California Tort Damages (Cont.Ed.Bar) Vehicles and Other Personal Property, § 13.6

4 Levy et al., California Torts, Ch. 52, *Medical Expenses and Economic Loss*, § 52.32 (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages* (Matthew Bender)

6 California Points and Authorities, Ch. 65, *Damages* (Matthew Bender)

1 California Civil Practice: Torts (Thomson West) § 5:17

Publisher's Notes

This instruction replaces BAJI No. 14.22.

LexisNexis Matthew Bender Expert Practice Tip--Loss of Use of Automobile: When property damage exists to an automobile and the plaintiff does not have use of it, he/she may obtain damages for loss of use of property. It is not necessary that the plaintiff actually rent another vehicle to obtain damages for loss of use. *By Dona Cohn-Payne*



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CHAPTER 39 California Judicial Council Damages Instructions

5-39 California Forms of Jury Instruction CACI 3903N

CACI 3903N Lost Profits (Economic Damage)

[*Insert number, e.g., "13."*] **Lost profits.**

To recover damages for lost profits, [*name of plaintiff*] must prove it is reasonably certain [he/she/it] would have earned profits but for [*name of defendant*]'s conduct.

To decide the amount of damages for lost profits, you must determine the gross amount [*name of plaintiff*] would have received but for [*name of defendant*]'s conduct and then subtract from that amount the expenses [including the value of the [*specify categories of evidence, such as labor/materials/rents/all expenses/interest of the capital employed*]] [*name of plaintiff*] would have had if [*name of defendant*]'s conduct had not occurred.

The amount of the lost profits need not be calculated with mathematical precision, but there must be a reasonable basis for computing the loss.

New September 2003

This instruction is not intended for personal injury cases. Instead, use CACI No. 3903C, *Past and Future Lost Earnings (Economic Damage)*. (See *Pretzer v. California Transit Co.* (1930) 211 Cal. 202, 207-208 [294 P. 382] .)

Insertion of specified types of costs to be deducted from gross earnings is optional, depending on the facts of the case. Other types of costs may be inserted as appropriate.

- "The measure of damages in this state for the commission of a tort, as provided by statute, is that

amount which will compensate the plaintiff for all detriment sustained by him as the proximate result of the defendant's wrong, regardless of whether or not such detriment could have been anticipated by the defendant. It is well established in California, moreover, that such damages may include loss of anticipated profits where an established business has been injured." (*Fibreboard Paper Products Corp. v. East Bay Union of Machinists, Local 1304, United Steelworkers of America, AFL-CIO* (1964) 227 Cal.App.2d 675, 702 [39 Cal.Rptr. 64] , internal citations omitted.)

■ "[E]vidence of lost profits must be unspeculative and in order to support a lost profits award the evidence must show 'with reasonable certainty both their occurrence and the extent thereof.' " (*Sanchez-Corea v. Bank of America* (1985) 38 Cal.3d 892, 907 [215 Cal.Rptr. 679, 701 P.2d 826] , internal citation omitted.)

■ "It is enough to demonstrate a reasonable probability that profits would have been earned except for the defendant's conduct. The plaintiff has the burden to produce the best evidence available in the circumstances to attempt to establish a claim for loss of profits." (*S. C. Anderson, Inc. v. Bank of America N.T. & S.A.* (1994) 24 Cal.App.4th 529, 536 [30 Cal.Rptr.2d 286] , internal citations omitted.)

■ "Damages for loss of profits may be denied to an 'unestablished' or new business as being too uncertain and speculative if they cannot be calculated with reasonable certainty. 'The ultimate test is whether there has been "operating experience sufficient to permit a reasonable estimate of probable income and expense" ... or, ... "anticipated profits dependent upon future events are allowed where their nature and occurrence can be shown by evidence of reasonable reliability." ' " (*Maggio, Inc. v. United Farm Workers of America, AFL-CIO* (1991) 227 Cal.App.3d 847, 870 [278 Cal.Rptr. 250] , internal citations omitted.)

■ The rule denying profits to an unestablished business "is, however, 'not a hard and fast one.' The issue is, rather, whether the damages can be calculated with reasonable certainty." (*S. Jon Kreedman & Co. v. Meyers Bros. Parking-Western Corp.* (1976) 58 Cal.App.3d 173, 184-185 [130 Cal.Rptr. 41] , internal citations omitted.)

■ "Lost profits to an established business may be recovered if their extent and occurrence can be ascertained with reasonable certainty; once their existence has been so established, recovery will not be denied because the amount cannot be shown with mathematical precision. Historical data, such as past business volume, supply an acceptable basis for ascertaining lost future profits. In some instances, lost profits may be recovered where plaintiff introduces evidence of the profits lost by similar businesses operating under similar conditions. In either case, recovery is limited to net profits." (*Berge v. International Harvester Co.* (1983) 142 Cal.App.3d 152, 161-162 [190 Cal.Rptr. 815] , internal citations omitted.)

■ "If the occurrence and extent of anticipated profits is shown by evidence of reasonable reliability damages are recoverable; uncertainty as to the amount of damages is not fatal; uncertainties are to be resolved against [defendant]." (*Aronowicz v. Nalley's, Inc.* (1972) 30 Cal.App.3d 27, 40, fn. 11 [106 Cal.Rptr. 424] , internal citations omitted.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, § 1729

4 Levy et al., California Torts, Ch. 52, *Medical Expenses and Economic Loss*, §§ 52.12, 52.37 (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages* (Matthew Bender)

6 California Points and Authorities, Ch. 65, *Damages* (Matthew Bender)

Publisher's Notes

There is no BAJI instruction on this subject.

LexisNexis Matthew Bender Expert Practice Tip--Emphasis Depends on Which Party You Represent: As with all future calculations, plaintiff will want to emphasize that lost profits need not be determined with mathematical precision. The argument is that defendant's conduct prevented (or will prevent) the profits from being obtained, and defendant should not benefit from the uncertainty that the defendant's conduct created. On the other side, the defendant will want to emphasize any evidence of overreaching by plaintiff, and defendant will want to stress that the jury must not speculate or guess about damages. This area is particularly applicable for oral argument. *By Ronald Oster and Rex Heeseman*

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsBusiness TortsGeneral OverviewTortsDamagesCompensatory DamagesGeneral Overview



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California Forms of Jury Instruction

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CHAPTER 39 California Judicial Council Damages Instructions

5-39 California Forms of Jury Instruction CACI 3904

CACI 3904 Present Cash Value

If you decide that [name of plaintiff]'s harm includes future [economic] damages for [loss of earnings/future medical expenses/lost profits/[insert other economic damages]], then the amount of those future damages must be reduced to their present cash value. This is necessary because money received now will, through investment, grow to a larger amount in the future.

To find present cash value, you must determine the amount of money that, if reasonably invested today, will provide [name of plaintiff] with the amount of [his/her/its] future damages.

[You may consider expert testimony in determining the present cash value of future [economic] damages.]

[You will be provided with a table to help you calculate the present cash value.]

New September 2003; Revised April 2008

Directions for Use

Give this instruction if future economic damages are sought. Include "economic" if future noneconomic damages are also sought. Future noneconomic damages are not reduced to present cash value because the amount that the jury is to award should already encompass the idea of today's dollars for tomorrow's loss. (See *Salgado v. County of L.A.* (1998) 19 Cal.4th 629, 646-647 [80 Cal.Rptr.2d 46, 967 P.2d 585] ; CACI No. 3905A, *Physical Pain, Mental Suffering, and Emotional Distress (Noneconomic Damage)*.)

Give the optional last sentence if the parties have stipulated to a discount rate or if evidence from which the jury can determine an appropriate discount rate has been presented. A table appropriate to this calculation should be provided. (See *Schiernbeck v. Haight* (1992) 7 Cal.App.4th 869, 877 [9

Cal.Rptr.2d 716] .)

Expert testimony will usually be required to accurately establish present values for future economic losses. However, tables may be helpful to the jury in many cases.

Sources and Authority

■ "The present value of a gross award of future damages is that sum of money prudently invested at the time of judgment which will return, over the period the future damages are incurred, the gross amount of the award. 'The concept of present value recognizes that money received after a given period is worth less than the same amount received today. This is the case in part because money received today can be used to generate additional value in the interim.' The present value of an award of future damages will vary depending on the gross amount of the award, and the timing and amount of the individual payments." (*Holt v. Regents of the University of California* (1999) 73 *Cal.App.4th* 871, 878 [86 *Cal.Rptr.2d* 752] , internal citations omitted.)

■ "Exact actuarial computation should result in a lump-sum, present-value award which if prudently invested will provide the beneficiaries with an investment return allowing them to regularly withdraw matching support money so that, by reinvesting the surplus earnings during the earlier years of the expected support period, they may maintain the anticipated future support level throughout the period and, upon the last withdrawal, have depleted both principal and interest." (*Canavin v. Pacific Southwest Airlines* (1983) 148 *Cal.App.3d* 512, 521 [196 *Cal.Rptr.* 82] .)

■ The Supreme Court has held that "it is not a violation of the plaintiff's jury trial right for the court to submit only the issue of the gross amount of future economic damages to the jury, with the timing of periodic payments--and hence their present value--to be set by the court in the exercise of its sound discretion." (*Salgado, supra*, 19 *Cal.4th* at p. 649 , internal citation omitted.)

■ "Neither party introduced any evidence of compounding or discounting factors, including how to calculate an appropriate rate of return throughout the relevant years. Under such circumstances, the 'jury would have been put to sheer speculation in determining ... "the present sum of money which ... will pay to the plaintiff ... the equivalent of his [future economic] loss" ' " (*Schiernbeck, supra*, 7 *Cal.App.4th* at p. 877, internal citations omitted.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, § 1552

California Tort Damages (Cont.Ed.Bar) Bodily Injury, § 1.96

4 Levy et al., *California Torts*, Ch. 52, *Medical Expenses and Economic Loss*, §§ 52.21 -52.22 (Matthew Bender)

15 *California Forms of Pleading and Practice*, Ch. 177, *Damages*, § 177.46 (Matthew Bender)

6 *California Points and Authorities*, Ch. 65, *Damages*, § 65.40 et seq. (Matthew Bender)

1 California Civil Practice: Torts (Thomson West) § 5:22

Publisher's Notes

This instruction replaces BAJI No. 14.70.

LexisNexis Matthew Bender Expert Practice Tip--Use Expert for Present Cash Value: Always use an expert for present cash value. Use of an expert will provide you with not only present cash value so that the jury does not have to get bogged down with the tables but your expert will also give figures that are adjusted for inflation, cost of living, etc. *By Dona Cohn-Payne*

LexisNexis Matthew Bender Expert Practice Tip--Again, Expert Testimony Needed for Calculating Present Values: Unless the case is very simple and the numbers are small, not many lawyers would be content to have the jury calculate present values from a table. This is usually the subject of expert testimony. *By Ronald Oster*

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Remedies Damages Monetary Damages Torts Damages General
Overview Torts Procedure Settlements Structured Settlements General Overview



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CHAPTER 39 California Judicial Council Damages Instructions

5-39 California Forms of Jury Instruction CACI 3905

CACI 3905 Items of Noneconomic Damage

The following are the specific items of noneconomic damages claimed by [*name of plaintiff*]:

[*Insert applicable instructions on items of noneconomic damage.*]

New September 2003

This instruction may not be needed in every case. For example, if the plaintiff is not claiming any economic damages, there is no need to define the claimed damages as "noneconomic." If this instruction is used, it should be followed by applicable instructions concerning the items of noneconomic damage claimed by the plaintiff. These instructions should be inserted into this instruction as sequentially numbered items.

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 53, 61, 62

California Tort Damages (Cont.Ed.Bar) Bodily Injury, § 1.5

4 Levy et al., California Torts, Ch. 74, *Resolving Multiparty Tort Litigation*, § 74.04 (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages* (Matthew Bender)

6 California Points and Authorities, Ch. 65, *Damages* (Matthew Bender)

1 California Civil Practice: Torts (Thomson West) § 5:4

Publisher's Notes

This instruction covers issues presented in BAJI No. 14.02.

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsDamagesGeneral Overview



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CHAPTER 39 California Judicial Council Damages Instructions

5-39 California Forms of Jury Instruction CACI 3905A

CACI 3905A Physical Pain, Mental Suffering, and Emotional Distress (Noneconomic Damage)

[*Insert number, e.g., "1."*] **[Past] [and] [future] [physical pain/mental suffering/loss of enjoyment of life/disfigurement/physical impairment/inconvenience/grief/anxiety/humiliation/emotional distress [*insert other damages*]].**

No fixed standard exists for deciding the amount of these noneconomic damages. You must use your judgment to decide a reasonable amount based on the evidence and your common sense.

[To recover for future [*insert item of pain and suffering*], [*name of plaintiff*] must prove that [he/she] is reasonably certain to suffer that harm.

For future [*insert item of pain and suffering*], determine the amount in current dollars paid at the time of judgment that will compensate [*name of plaintiff*] for future [*insert item of pain and suffering*]. [This amount of noneconomic damages should not be further reduced to present cash value because that reduction should only be performed with respect to economic damages.]]

New September 2003; Revised April 2008, December 2009

Directions for Use

Insert the bracketed terms that best describe the damages claimed by the plaintiff.

If future noneconomic damages are sought, include the last two paragraphs. Do not instruct the jury to further reduce the award to present cash value. (See *CACI No. 3904, Present Cash Value.*) The amount that the jury is to award should already encompass the idea of today's dollars for tomorrow's loss. (See *Salgado v. County of L.A. (1998) 19 Cal.4th 629, 646-647 [80 Cal.Rptr.2d 46, 967 P.2d 585]* .) Include

the last sentence only if the plaintiff is claiming both future economic and noneconomic damages.

Sources and Authority

■ "In general, courts have not attempted to draw distinctions between the elements of 'pain' on the one hand, and 'suffering' on the other; rather, the unitary concept of 'pain and suffering' has served as a convenient label under which a plaintiff may recover not only for physical pain but for fright, nervousness, grief, anxiety, worry, mortification, shock, humiliation, indignity, embarrassment, apprehension, terror or ordeal. Admittedly these terms refer to subjective states, representing a detriment which can be translated into monetary loss only with great difficulty. But the detriment, nevertheless, is a genuine one that requires compensation, and the issue generally must be resolved by the 'impartial conscience and judgment of jurors who may be expected to act reasonably, intelligently and in harmony with the evidence.' " (*Capelouto v. Kaiser Foundation Hospitals* (1972) 7 Cal.3d 889, 892-893 [103 Cal.Rptr. 856, 500 P.2d 880] , internal citations and footnote omitted.)

■ "Compensatory damages may be awarded for bodily harm without proof of pecuniary loss. The fact that there is no market price calculus available to measure the amount of appropriate compensation does not render such a tortious injury noncompensable. 'For harm to body, feelings or reputation, compensatory damages reasonably proportioned to the intensity and duration of the harm can be awarded without proof of amount other than evidence of the nature of the harm. There is no direct correspondence between money and harm to the body, feelings or reputation. There is no market price for a scar or for loss of hearing since the damages are not measured by the amount for which one would be willing to suffer the harm. The discretion of the judge or jury determines the amount of recovery, the only standard being such an amount as a reasonable person would estimate as fair compensation.' " (*Duarte v. Zachariah* (1994) 22 Cal.App.4th 1652, 1664-1665 [28 Cal.Rptr.2d 88] , internal citations omitted.)

■ "The general rule of damages in tort is that the injured party may recover for all detriment caused whether it could have been anticipated or not. In accordance with the general rule, it is settled in this state that mental suffering constitutes an aggravation of damages when it naturally ensues from the act complained of, and in this connection mental suffering includes nervousness, grief, anxiety, worry, shock, humiliation and indignity as well as physical pain." (*Crisci v. The Security Insurance Co. of New Haven, Connecticut* (1967) 66 Cal.2d 425, 433 [58 Cal.Rptr. 13, 426 P.2d 173] , internal citations omitted.)

■ "[W]here a plaintiff has undergone surgery in which a herniated disc is removed and a metallic plate inserted, and the jury has expressly found that defendant's negligence was a cause of plaintiff's injury, the failure to award any damages for pain and suffering results in a damage award that is inadequate as a matter of law." (*Dodson v. J. Pacific, Inc.* (2007) 154 Cal.App.4th 931, 933 [64 Cal.Rptr.3d 920] .)

■ " 'To entitle a plaintiff to recover present damages for apprehended future consequences, there must be evidence to show such a degree of probability of their occurring as amounts to a reasonable certainty that they will result from the original injury.' " (*Bellman v. San Francisco High School Dist.* (1938) 11 Cal.2d 576, 588 [81 P.2d 894] , internal citation omitted.)

■ "To avoid confusion regarding the jury's task in future cases, we conclude that when future noneconomic damages are sought, the jury should be instructed expressly that they are to assume that an award of future damages is a present value sum, i.e., they are to determine the amount in current dollars paid at the time of judgment that will compensate a plaintiff for future pain and suffering. In the absence of such instruction, unless the record clearly establishes otherwise, awards of future damages will be

considered to be stated in terms of their present or current value." (*Salgado, supra*, 19 Cal.4th at pp. 646-647 .)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1671-1675

California Tort Damages (Cont.Ed.Bar) Bodily Injury, §§ 1.68-1.74

4 Levy et al., *California Torts*, Ch. 51, *Pain and Suffering*, §§ 51.01 -51.14 (Matthew Bender)

15 *California Forms of Pleading and Practice*, Ch. 177, *Damages*, § 177.44 (Matthew Bender)

6 *California Points and Authorities*, Ch. 65, *Damages*, § 65.40 *et seq.* (Matthew Bender)

1 California Civil Practice: Torts (Thomson West) § 5:10

Publisher's Notes

This instruction covers issues presented in BAJI Nos. 12.88, 14.02, and 14.13.

LexisNexis Matthew Bender Expert Practice Tip--Awards for Noneconomic Damages Can Vary Widely: Because there are "no fixed standards," awards for noneconomic damages such as pain and suffering can vary widely. Note that the award for noneconomic damages are not reduced to present cash value. Here, though, the argument of counsel can be especially effective (or not) on many jurors. *By Ronald Oster and Rex Heeseman*

LexisNexis Matthew Bender Expert Practice Tip--Suggest Figure for Noneconomic Damages: The attorney should always suggest a figure to the jury for noneconomic damages. Exploration of a juror's feelings regarding damages for pain, suffering, and distress should be done in the voir dire process. *By Dona Cohn-Payne*

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Remedies Damages General Overview Torts Damages Compensatory Damages Pain & Suffering General Overview Torts Damages Compensatory Damages Pain & Suffering Emotional & Mental Distress General Overview Torts Damages Compensatory Damages Pain & Suffering Future Pain & Suffering Torts Damages Compensatory Damages Pain & Suffering Loss of Enjoyment



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CHAPTER 39 California Judicial Council Damages Instructions

5-39 California Forms of Jury Instruction CACI 3906-CACI 3919

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CACI 3906Reserved for Future Use



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CHAPTER 39 California Judicial Council Damages Instructions

5-39 California Forms of Jury Instruction CACI 3920

CACI 3920 Loss of Consortium (Noneconomic Damage)

[*Name of plaintiff*] claims that [he/she] has been harmed by the injury to [his/her] [husband/wife]. If you decide that [*name of injured spouse*] has proved [his/her] claim against [*name of defendant*], you also must decide how much money, if any, will reasonably compensate [*name of plaintiff*] for loss of [his/her] [husband/wife]'s companionship and services, including:

1. The loss of love, companionship, comfort, care, assistance, protection, affection, society, moral support; and
2. The loss of the enjoyment of sexual relations [or the ability to have children].

[*Name of plaintiff*] may recover for harm [he/she] proves [he/she] has suffered to date and for harm [he/she] is reasonably certain to suffer in the future. No fixed standard exists for deciding the amount of these damages. You must use your judgment to decide a reasonable amount based on the evidence and your common sense.

Do not include in your award any compensation for the following:

1. The loss of financial support from [*name of injured spouse*];
 2. Personal services, such as nursing, that [*name of plaintiff*] has provided or will provide to [*name of injured spouse*]; or
 3. Any loss of earnings that [*name of plaintiff*] has suffered by giving up employment to take care of [*name of injured spouse*].
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New September 2003

Depending on the circumstances of the case, it may be appropriate to add after "to be suffered in the future" either "during the period of [name of injured spouse]'s disability" or "as measured by the life expectancy that [name of injured spouse] had before [his/her] injury or by the life expectancy of [name of plaintiff], whichever is shorter."

Insofar as this instruction addresses the loss of a spouse's assistance in operating the household, it is not intended to include the cost of obtaining household services. (See *Kellogg v. Asbestos Corp. Ltd.* (1996) 41 Cal.App.4th 1397, 1408 [49 Cal.Rptr.2d 256] : "Although the trial court labeled the damages awarded Mrs. Kellogg as being for 'loss of consortium' (a noneconomic damages item under Proposition 51), much of the testimony at trial actually involved the 'costs of obtaining substitute domestic services' on her behalf (an economic damage item in the statute). (See *Civ. Code*, § 1431.2, subd. (b)(1), (2).)")

■ *Civil Code* section 1431.2(b)(2) provides, in part: "For purposes of this section, the term 'non-economic damages' means subjective, non-monetary losses including ... loss of consortium"

■ "We ... declare that in California each spouse has a cause of action for loss of consortium, as defined herein, caused by a negligent or intentional injury to the other spouse by a third party. (*Rodriguez v. Bethlehem Steel Corp.* (1974) 12 Cal.3d 382, 408 [115 Cal.Rptr. 765, 525 P.2d 669] .)

■ "The concept of consortium includes not only loss of support or services; it also embraces such elements as love, companionship, comfort, affection, society, sexual relations, the moral support each spouse gives the other through the triumph and despair of life, and the deprivation of a spouse's physical assistance in operating and maintaining the family home." (*Ledger v. Tippitt* (1985) 164 Cal.App.3d 625, 633 [210 Cal.Rptr. 814] , disapproved of on other grounds in *Elden v. Sheldon* (1988) 46 Cal.3d 267, 277 [250 Cal.Rptr. 254, 758 P.2d 582] .)

■ "Since he has no cause of action in tort his spouse has no cause of action for loss of consortium." (*Blain v. Doctor's Co.* (1990) 222 Cal.App.3d 1048, 1067 [272 Cal.Rptr. 250] .)

■ "*Rodriguez* never mentions the concept of a complete loss of consortium. To the contrary, the opinion speaks of 'loss or impairment of her rights of consortium.' This dichotomy suggests that a diminution of a wife's rights are compensable, and we so hold." (*Carlson v. Wald* (1984) 151 Cal.App.3d 598, 602 [199 Cal.Rptr. 10] , internal citation omitted.)

■ "[S]hould [husband] prevail in his own cause of action against these defendants, he will be entitled to recover, among his medical expenses, the full cost of whatever home nursing is necessary. To allow [wife] also to recover the value of her nursing services, however personalized, would therefore constitute double recovery." (*Rodriguez, supra*, 12 Cal.3d at p. 409 , internal citations omitted.)

■ "For the same reason, [wife] cannot recover for the loss of her earnings and earning capacity assertedly incurred when she quit her job in order to furnish [husband] these same nursing services. To do so would be to allow her to accomplish indirectly that which we have just held she cannot do directly." (*Rodriguez, supra*, 12 Cal.3d at p. 409 .)

■ "The deprivation of a husband's physical assistance in operating and maintaining the home is a compensable item of loss of consortium." (*Rodriguez, supra*, 12 Cal.3d at p. 409, fn. 31 , internal citations omitted.)

■ "Whether the degree of harm suffered by the plaintiff's spouse is sufficiently severe to give rise to a cause of action for loss of consortium is a matter of proof. When the injury is emotional rather than physical, the plaintiff may have a more difficult task in proving negligence, causation, and the requisite degree of harm; but these are questions for the jury, as in all litigation for loss of consortium. In *Rodriguez* we acknowledged that the loss is 'principally a form of mental suffering,' but nevertheless declared our faith in the ability of the jury to exercise sound judgment in fixing compensation. We reaffirm that faith today." (*Molien v. Kaiser Foundation Hospitals* (1980) 27 Cal.3d 916, 933 [167 Cal.Rptr. 831, 616 P.2d 813] , internal citations omitted.)

■ "We ... conclude that we should not recognize a cause of action by a child for loss of parental consortium." (*Borer v. American Airlines, Inc.* (1977) 19 Cal.3d 441, 451 [138 Cal.Rptr. 302, 563 P.2d 858] .)

■ A parent may not recover loss of consortium damages for injury to his or her child. (*Baxter v. Superior Court* (1977) 19 Cal.3d 461 [138 Cal.Rptr. 315, 563 P.2d 871] .)

■ Unmarried cohabitants may not recover damages for loss of consortium. (*Elden, supra*, 46 Cal.3d at p. 277 .)

■ Under Proposition 51, damages for loss of consortium may be reduced by the negligence of the injured spouse. (*Craddock v. Kmart Corp.* (2001) 89 Cal.App.4th 1300, 1309-1310 [107 Cal.Rptr.2d 881] ; *Hernandez v. Badger Construction Equipment Co.* (1994) 28 Cal.App.4th 1791, 1810-1811 [34 Cal.Rptr.2d 732] .)

■ " 'To entitle a plaintiff to recover present damages for apprehended future consequences, there must be evidence to show such a degree of probability of their occurring as amounts to a reasonable certainty that they will result from the original injury.' " (*Bellman v. San Francisco High School Dist.* (1938) 11 Cal.2d 576, 588 [81 P.2d 894] , internal citation omitted.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1678-1685

California Tort Damages (Cont.Ed.Bar) Loss of Consortium, §§ 2.6-2.7

4 Levy et al., California Torts, Ch. 56, *Loss of Consortium*, § 56.08 (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages* (Matthew Bender)

6 California Points and Authorities, Ch. 65, *Damages* (Matthew Bender)

1 California Civil Practice: Torts (Thomson West) §§ 10:10-10:16

Publisher's Notes

This instruction replaces BAJI No. 14.40.

LexisNexis Matthew Bender Expert Practice Tip--Basis for Exclusions: CACI No. 3920 is a fairly detailed instruction. The reason for the exclusions at the end of the instruction is that these excluded items qualify as economic damages for which defendants are jointly and severally liable. *By Ronald*

Oster

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsDamagesConsortium DamagesGeneral OverviewTortsDamagesConsortium DamagesChildren &
ParentsTortsDamagesConsortium DamagesSpousesTortsDamagesConsortium DamagesUnmarried Cohabitants



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California Forms of Jury Instruction

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CHAPTER 39 California Judicial Council Damages Instructions

5-39 California Forms of Jury Instruction CACI 3921

CACI 3921 Wrongful Death (Death of an Adult)

If you decide that [name of plaintiff] has proved [his/her] claim against [name of defendant] for the death of [name of decedent], you also must decide how much money will reasonably compensate [name of plaintiff] for the death of [name of decedent]. This compensation is called "damages."

[Name of plaintiff] does not have to prove the exact amount of these damages. However, you must not speculate or guess in awarding damages.

The damages claimed by [name of plaintiff] fall into two categories called economic damages and noneconomic damages. You will be asked to state the two categories of damages separately on the verdict form.

[Name of plaintiff] claims the following economic damages:

- 1. The financial support, if any, that [name of decedent] would have contributed to the family during either the life expectancy that [name of decedent] had before [his/her] death or the life expectancy of [name of plaintiff], whichever is shorter;**
- 2. The loss of gifts or benefits that [name of plaintiff] would have expected to receive from [name of decedent];**
- 3. Funeral and burial expenses; and**
- 4. The reasonable value of household services that [name of decedent] would have provided.**

Your award of any future economic damages must be reduced to present cash value.

[*Name of plaintiff*] also claims the following noneconomic damages:

1. The loss of [*name of decedent*]'s love, companionship, comfort, care, assistance, protection, affection, society, moral support; [and]

[2. The loss of the enjoyment of sexual relations.]

[2. The loss of [*name of decedent*]'s training and guidance.]

No fixed standard exists for deciding the amount of noneconomic damages. You must use your judgment to decide a reasonable amount based on the evidence and your common sense.

[For noneconomic damages, determine the amount in current dollars paid at the time of judgment that will compensate [*name of plaintiff*] for those damages. [This amount of noneconomic damages should not be further reduced to present cash value because that reduction should only be performed with respect to economic damages.]]

In determining [*name of plaintiff*]'s loss, do not consider:

1. [*Name of plaintiff*]'s grief, sorrow, or mental anguish;

2. [*Name of decedent*]'s pain and suffering; or

3. The poverty or wealth of [*name of plaintiff*].

In deciding a person's life expectancy, you may consider, among other factors, the average life expectancy of a person of that age, as well as that person's health, habits, activities, lifestyle, and occupation. According to [*insert source of information*], the average life expectancy of a [*insert number*]-year-old [male/female] is [*insert number*] years, and the average life expectancy of a [*insert number*]-year-old [male/female] is [*insert number*] years. This published information is evidence of how long a person is likely to live but is not conclusive. Some people live longer and others die sooner.

[In computing these damages, consider the losses suffered by all plaintiffs and return a verdict of a single amount for all plaintiffs. I will divide the amount [among/between] the plaintiffs.]

New September 2003; Revised December 2005, February 2007, April 2008, December 2009

Directions for Use

One of the life-expectancy subjects in the second sentence of the second-to-last paragraph should be the decedent, and the other should be the plaintiff. This definition is intended to apply to the element of damages pertaining to the financial support that the decedent would have provided to the plaintiff.

Use of the life tables in *Vital Statistics of the United States*, published by the National Center for Health Statistics, is recommended. (See Life Expectancy Table--Male and Life Expectancy Table--Female, following the Damages series.) The first column shows the age interval between the two exact ages indicated. For example, 50-51 means the one-year interval between the fiftieth and fifty-first birthdays.

The paragraph concerning not reducing noneconomic damages to present cash value is bracketed because

the law is not clear. It has been held that all damages, pecuniary and nonpecuniary, must be reduced to present value. (See *Fox v. Pacific Southwest Airlines* (1982) 133 Cal.App.3d 565, 569 [184 Cal.Rptr. 87] ; cf. *Restat 2d of Torts*, § 913A [future pecuniary losses must be reduced to present value].) The view of the court in *Fox* was that damages for lost value of society, comfort, care, protection and companionship must be monetarily quantified, and thus become pecuniary and subject to reduction to present value. However, the California Supreme Court subsequently held that with regard to future pain and suffering, the amount that the jury is to award should already encompass the idea of today's dollars for tomorrow's loss (See *Salgado v. County of L.A.* (1998) 19 Cal.4th 629, 646-647 [80 Cal.Rptr.2d 46, 967 P.2d 585]), so there is no further reduction to present value. (See CACI No. 3904, *Present Cash Value*.) While it seems reasonable that *Salgado* should apply to wrongful death actions, no court has expressly so held. Include the last sentence only if both future economic and noneconomic damages are sought. Note that if only economic damages are to be reduced to present value, the jury must find separate amounts for economic and noneconomic damages. (See CACI No. VF-3905, *Damages for Wrongful Death (Death of an Adult)*.)

Sources and Authority

- *Code of Civil Procedure* section 377.60 provides:

A cause of action for the death of a person caused by the wrongful act or neglect of another may be asserted by any of the following persons or by the decedent's personal representative on their behalf:

(a) The decedent's surviving spouse, domestic partner, children, and issue of deceased children, or, if there is no surviving issue of the decedent, the persons, including the surviving spouse or domestic partner, who would be entitled to the property of the decedent by intestate succession.

(b) Whether or not qualified under subdivision (a), if they were dependent on the decedent, the putative spouse, children of the putative spouse, stepchildren, or parents. As used in this subdivision, "putative spouse" means the surviving spouse of a void or voidable marriage who is found by the court to have believed in good faith that the marriage to the decedent was valid.

(c) A minor, whether or not qualified under subdivision (a) or (b), if, at the time of the decedent's death, the minor resided for the previous 180 days in the decedent's household and was dependent on the decedent for one-half or more of the minor's support.

(d) This section applies to any cause of action arising on or after January 1, 1993.

(e) The addition of this section by Chapter 178 of the Statutes of 1992 was not intended to adversely affect the standing of any party having standing under prior law, and the standing of parties governed by that version of this section as added by Chapter 178 of the Statutes of 1992 shall be the same as specified herein as amended by Chapter 563 of the Statutes of 1996.

(f) For the purpose of this section, "domestic partner" has the meaning provided in *Section 297 of the Family Code*.

- *Code of Civil Procedure* section 377.61 provides: "In an action under this article, damages may be awarded that,

under all the circumstances of the case, may be just, but may not include damages recoverable under Section 377.34. The court shall determine the respective rights in an award of the persons entitled to assert the cause of action."

■ "A cause of action for wrongful death is purely statutory in nature, and therefore 'exists only so far and in favor of such person as the legislative power may declare.' " (*Barrett v. Superior Court* (1990) 222 Cal.App.3d 1176, 1184 [272 Cal.Rptr. 304] , internal citations omitted.)

■ "There are three distinct public policy considerations involved in the legislative creation of a cause of action for wrongful death: '(1) compensation for survivors, (2) deterrence of conduct and (3) limitation, or lack thereof, upon the damages recoverable.' " (*Barrett, supra*, 222 Cal.App.3d at p. 1185 , internal citation omitted.)

■ "We therefore conclude, on this basis as well, that 'wrongful act' as used in section 377 means any kind of tortious act, including the tortious act of placing defective products into the stream of commerce." (*Barrett, supra*, 222 Cal.App.3d at p. 1191 .)

■ "In any action for wrongful death resulting from negligence, the complaint must contain allegations as to all the elements of actionable negligence." (*Jacoves v. United Merchandising Corp.* (1992) 9 Cal.App.4th 88, 105 [11 Cal.Rptr.2d 468] , internal citation omitted.)

■ "Damages for wrongful death are not limited to compensation for losses with 'ascertainable economic value.' Rather, the measure of damages is the value of the benefits the heirs could reasonably expect to receive from the deceased if she had lived." (*Allen v. Toledo* (1980) 109 Cal.App.3d 415, 423 [167 Cal.Rptr. 270] , internal citations omitted.)

■ "The death of a father may also cause a special loss to the children." (*Syah v. Johnson* (1966) 247 Cal.App.2d 534, 547 [55 Cal.Rptr. 741] , internal citation omitted.)

■ "These benefits include the personal services, advice, and training the heirs would have received from the deceased, and the value of her society and companionship. 'The services of children, elderly parents, or nonworking spouses often do not result in measurable net income to the family unit, yet unquestionably the death of such a person represents a substantial "injury" to the family for which just compensation should be paid.' " (*Allen, supra*, 109 Cal.App.3d at p. 423 , internal citations omitted.)

■ The wrongful death statute "has long allowed the recovery of funeral expenses in California wrongful death actions." (*Vander Lind v. Superior Court* (1983) 146 Cal.App.3d 358, 364 [194 Cal.Rptr. 209] .)

■ "Where, as here, decedent was a husband and father, a significant element of damages is the loss of financial benefits he was contributing to his family by way of support at the time of his death and that support reasonably expected in the future. The total future lost support must be reduced by appropriate formula to a present lump sum which, when invested to yield the highest rate of return consistent with reasonable security, will pay the equivalent of lost future benefits at the times, in the amounts and for the period such future benefits would have been received." (*Canavin v. Pacific Southwest Airlines* (1983) 148 Cal.App.3d 512, 520-521 [196 Cal.Rptr. 82] , internal citations omitted.)

■ "To avoid confusion regarding the jury's task in future cases, we conclude that when future noneconomic damages are sought, the jury should be instructed expressly that they are to assume that an award of future damages is a present value sum, i.e., they are to determine the amount *in current dollars paid at the time of judgment* that will compensate a plaintiff for future pain and suffering. In the absence of such instruction, unless the record clearly establishes otherwise, awards of future damages will be considered to be stated in terms of their present or current value." (*Salgado, supra*, 19 Cal.4th at pp. 646-647 , original italics.)

■ "The California statutes and decisions ... have been interpreted to bar the recovery of punitive damages in a wrongful death action." (*Tarasoff v. Regents of Univ. of Cal.* (1976) 17 Cal.3d 425, 450 [131 Cal.Rptr. 14, 551 P.2d 334] , internal citation omitted.) There is an exception to this rule for death by felony homicide for which the defendant has been convicted. (*Civ. Code*, § 3294(d).)

■ "Punitive damages are awardable to the decedent's estate in an action by the estate representative based on the cause of action the decedent would have had if he or she had survived." (*Rufo v. Simpson* (2001) 86 Cal.App.4th 573, 616 [103 Cal.Rptr.2d 492] , internal citation omitted.)

■ "California cases have uniformly held that damages for mental and emotional distress, including grief and sorrow, are not recoverable in a wrongful death action." (*Krouse v. Graham* (1977) 19 Cal.3d 59, 72 [137 Cal.Rptr. 863, 562 P.2d 1022] , internal citations omitted.)

■ "[A] simple instruction excluding considerations of grief and sorrow in wrongful death actions will normally suffice." (*Krouse, supra*, 19 Cal.3d at p. 69 .)

■ "[T]he competing and conflicting interests of the respective heirs, the difficulty in ascertaining individual shares of lost economic support when dealing with minors, the lack of any reason under most circumstances to apportion the lump-sum award attributable to loss of monetary support where minors are involved, the irrelevance of the heirs' respective interests in that portion of the award pertaining to lost economic support in determining the aggregate award, and the more efficient nature of court proceedings without a jury, cumulatively establish apportionment by the court, rather than the jury, is consistent with the efficient administration of justice." (*Canavin, supra*, 148 Cal.App.3d at pp. 535-536 .)

■ "[W]here all statutory plaintiffs properly represented by legal counsel waive judicial apportionment, the trial court should instruct the jury to return separate verdicts unless the remaining considerations enumerated above mandate refusal." (*Canavin, supra*, 148 Cal.App.3d at p. 536 .)

■ "We note that the court instructed the jury that in determining pecuniary loss they should consider inter alia the age, state of health and respective life expectancies of the deceased and each plaintiff but should be concerned only with 'the shorter of the life expectancies, that of one of the plaintiffs or that of the deceased. ...' This was a correct statement of the law." (*Francis v. Sauve* (1963) 222 Cal.App.2d 102, 120-121 [34 Cal.Rptr. 754] , internal citation omitted.)

■ "It is the shorter expectancy of life that is to be taken into consideration; for example, if, as in the case here, the expectancy of life of the parents is shorter than that of the son, the benefits to be considered are those only which might accrue during the life of the surviving parents." (*Parsons v. Easton* (1921) 184 Cal. 764, 770-771 [195 P. 419] , internal citation omitted.)

■ "The life expectancy of the deceased is a question of fact for the jury to decide, considering all relevant factors including the deceased's health, lifestyle and occupation. Life expectancy figures from mortality tables are admissible but are not conclusive." (*Allen, supra*, 109 Cal.App.3d at p. 424 , internal citations omitted.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1690-1697

California Tort Damages (Cont.Ed.Bar 2d ed.) Wrongful Death, §§ 3.1-3.58

4 Levy et al., *California Torts*, Ch. 55, *Death and Survival Actions*, §§ 55.10 -55.13 (Matthew Bender)

15 *California Forms of Pleading and Practice*, Ch. 177, *Damages*, §§ 177.162-177.167 (Matthew Bender)

6 *California Points and Authorities*, Ch. 64, *Damages: Tort*, § 64.25 (Matthew Bender)

California Civil Practice: Torts (Thomson West) §§ 23:8-23:8.2

Publisher's Notes

This instruction covers issues presented in BAJI Nos. 14.50, 14.51, and 14.69.

LexisNexis Matthew Bender Expert Practice Tip--Using CACI No. 3921: This is a comprehensive instruction that combines in one form many of the instructions set forth earlier in the Judicial Council's Damages Series. Plaintiff's counsel will need to go over each part of *CACI No. 3921* in closing argument, preferably with the use of audio-visual aids (e.g., a chart or Powerpoint presentation). It is frequently helpful to use graphics that include spaces where counsel can write in the "suggested" numbers applicable to each item in the instruction. *By Ronald Oster and Rex Heeseman*

"While evidence of grief and sorrow is not relevant, evidence of loss of love, companionship, comfort, affection, society, solace or moral support is relevant." (*Hiser v. Bell Helicopter Textron, Inc.* (2003) 111 Cal.App.4th 640, 658 [4 Cal.Rptr.3d 249] , citing *Krause*.)

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsWrongful Death & Survival ActionsGeneral OverviewTortsWrongful Death & Survival ActionsRemediesGeneral OverviewTortsWrongful Death & Survival ActionsRemediesAward CalculationsTortsWrongful Death & Survival ActionsRemediesCompensatory DamagesFuneral ExpensesTortsWrongful Death & Survival ActionsRemediesCompensatory DamagesPain & SufferingTortsWrongful Death & Survival ActionsRemediesPunitive DamagesTortsWrongful Death & Survival ActionsSurvival Actions



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California Forms of Jury Instruction

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CHAPTER 39 California Judicial Council Damages Instructions

5-39 California Forms of Jury Instruction CACI 3922

CACI 3922 Wrongful Death (Parents' Recovery for Death of a Minor Child)

If you decide that [name of plaintiff] has proved [his/her] claim against [name of defendant] for the death of [name of minor], you also must decide how much money will reasonably compensate [name of plaintiff] for the death of [name of minor]. This compensation is called "damages."

[Name of plaintiff] does not have to prove the exact amount of these damages. However, you must not speculate or guess in awarding damages.

The damages claimed by [name of plaintiff] fall into two categories called economic damages and noneconomic damages. You will be asked to state the two categories of damages separately on the verdict form.

[Name of plaintiff] claims the following economic damages:

- 1. The value of the financial support, if any, that [name of minor] would have contributed to the family during either the life expectancy that [name of minor] had before [his/her] death or the life expectancy of [name of plaintiff], whichever is shorter;**
- 2. The loss of gifts or benefits that [name of plaintiff] could have expected to receive from [name of minor];**
- 3. Funeral and burial expenses; and**
- 4. The reasonable value of household services that [name of minor] would have provided.**

Your award of any future economic damages must be reduced to present cash value.

[*Name of plaintiff*] **also claims the following noneconomic damages: The loss of [*name of minor*]'s love, companionship, comfort, care, assistance, protection, affection, society, and moral support.**

No fixed standard exists for deciding the amount of noneconomic damages. You must use your judgment to decide a reasonable amount based on the evidence and your common sense.

[For noneconomic damages, determine the amount in current dollars paid at the time of judgment that will compensate [*name of plaintiff*] for those damages. [This amount of noneconomic damages should not be further reduced to present cash value because that reduction should only be performed with respect to economic damages.]]

Do not include in your award any compensation for the following:

1. [*Name of plaintiff*]'s **grief, sorrow, or mental anguish; or**
2. [*Name of minor*]'s **pain and suffering.**

In computing these damages, you should deduct the present cash value of the probable costs of [*name of minor*]'s support and education.

In deciding a person's life expectancy, consider, among other factors, that person's health, habits, activities, lifestyle, and occupation. Life expectancy tables are evidence of a person's life expectancy but are not conclusive.

[In computing these damages, consider the losses suffered by all plaintiffs and return a verdict of a single amount for all plaintiffs. I will divide the amount [among/between] the plaintiffs.]

New September 2003; Revised December 2005, April 2008, December 2009

Directions for Use

Use of the life tables in *Vital Statistics of the United States*, published by the National Center for Health Statistics, is recommended. (See Life Expectancy Table--Male and Life Expectancy Table--Female, following the Damages series.) The first column shows the age interval between the two exact ages indicated. For example, 50-51 means the one-year interval between the fiftieth and fifty-first birthdays.

The paragraph concerning not reducing noneconomic damages to present cash value is bracketed because the law is not clear. It has been held that all damages, pecuniary and nonpecuniary, must be reduced to present value. (See *Fox v. Pacific Southwest Airlines* (1982) 133 Cal.App.3d 565, 569 [184 Cal.Rptr. 87] ; cf. *Restat 2d of Torts*, § 913A [future pecuniary losses must be reduced to present value].) The view of the court in *Fox* was that damages for lost value of society, comfort, care, protection and companionship must be monetarily quantified, and thus become pecuniary and subject to reduction to present value. However, the California Supreme Court subsequently held that with regard to future pain and suffering, the amount that the jury is to award should already encompass the idea of today's dollars for tomorrow's loss (See *Salgado v. County of L.A.* (1998) 19 Cal.4th 629, 646-647 [80 Cal.Rptr.2d 46, 967 P.2d 585]), so there is no further reduction to present value. (See CACI No. 3904, *Present Cash Value*.) While it seems reasonable that *Salgado* should apply to wrongful death actions, no court has expressly so held. Include the last sentence only if both future economic and noneconomic damages are sought. Note that if only economic damages are to be reduced to present value, the jury must find separate amounts for economic and noneconomic damages. (See CACI No. VF-3906, *Damages for Wrongful Death (Parents'*

Recovery for Death of a Minor Child).)

Sources and Authority

- *Code of Civil Procedure section 377.60* provides:

A cause of action for the death of a person caused by the wrongful act or neglect of another may be asserted by any of the following persons or by the decedent's personal representative on their behalf:

(a) The decedent's surviving spouse, domestic partner, children, and issue of deceased children, or, if there is no surviving issue of the decedent, the persons, including the surviving spouse or domestic partner, who would be entitled to the property of the decedent by intestate succession.

(b) Whether or not qualified under subdivision (a), if they were dependent on the decedent, the putative spouse, children of the putative spouse, stepchildren, or parents. As used in this subdivision, 'putative spouse' means the surviving spouse of a void or voidable marriage who is found by the court to have believed in good faith that the marriage to the decedent was valid.

(c) A minor, whether or not qualified under subdivision (a) or (b), if, at the time of the decedent's death, the minor resided for the previous 180 days in the decedent's household and was dependent on the decedent for one-half or more of the minor's support.

(d) This section applies to any cause of action arising on or after January 1, 1993.

(e) The addition of this section by Chapter 178 of the Statutes of 1992 was not intended to adversely affect the standing of any party having standing under prior law, and the standing of parties governed by that version of this section as added by Chapter 178 of the Statutes of 1992 shall be the same as specified herein as amended by Chapter 563 of the Statutes of 1996.

(f) For the purpose of this section, "domestic partner" has the meaning provided in *Section 297 of the Family Code*.

- *Code of Civil Procedure section 377.61* provides: "In an action under this article, damages may be awarded that, under all the circumstances of the case, may be just, but may not include damages recoverable under Section 377.34. The court shall determine the respective rights in an award of the persons entitled to assert the cause of action."

- "A cause of action for wrongful death is purely statutory in nature, and therefore 'exists only so far and in favor of such person as the legislative power may declare.'" (*Barrett v. Superior Court* (1990) 222 Cal.App.3d 1176, 1184 [272 Cal.Rptr. 304] , internal citations omitted.)

- "Where the deceased was a minor child, recovery is based on the present value of reasonably probable future services and contributions, deducting the probable cost of rearing the child." (6 Witkin, Summary of Cal. Law (10th ed. 2005) Torts, § 1695.)

- "There is authority in such cases for deducting from the loss factors--including the pecuniary loss a parent suffers by being deprived of the comfort, protection and society of a child--the prospective cost to the parent of the child's

support and education. [P] Although neither the loss factors nor such offsets are readily measurable in a particular case--nor need they be measured in precise terms of dollars and cents--in the case at bench the jury had before it for consideration a court order subject to mathematical computation which required plaintiff to pay support for his child in the sum of \$125 monthly. The jury was entitled and required to take into consideration the prospective cost to plaintiff of the boy's maintenance and rearing, and they may well have offset their reasonable appraisal of such costs, under the general verdict, against any pecuniary loss which they found that plaintiff suffered." (*Fields v. Riley* (1969) 1 Cal.App.3d 308, 315 [81 Cal.Rptr. 671] , internal citations omitted.)

■ "There are three distinct public policy considerations involved in the legislative creation of a cause of action for wrongful death: (1) compensation for survivors, (2) deterrence of conduct and (3) limitation, or lack thereof, upon the damages recoverable." (*Barrett, supra*, 222 Cal.App.3d at p. 1185 , internal citation omitted.)

■ "We therefore conclude, on this basis as well, that 'wrongful act' as used in section 377 means any kind of tortious act, including the tortious act of placing defective products into the stream of commerce." (*Barrett, supra*, 222 Cal.App.3d at p. 1191 .)

■ "In any action for wrongful death resulting from negligence, the complaint must contain allegations as to all the elements of actionable negligence." (*Jacoves v. United Merchandising Corp.* (1992) 9 Cal.App.4th 88, 105 [11 Cal.Rptr.2d 468] , internal citation omitted.)

■ "Damages for wrongful death are not limited to compensation for losses with 'ascertainable economic value.' Rather, the measure of damages is the value of the benefits the heirs could reasonably expect to receive from the deceased if she had lived." (*Allen v. Toledo* (1980) 109 Cal.App.3d 415, 423 [167 Cal.Rptr. 270] , internal citations omitted.)

■ The wrongful death statute "has long allowed the recovery of funeral expenses in California wrongful death actions." (*Vander Lind v. Superior Court* (1983) 146 Cal.App.3d 358, 364 [194 Cal.Rptr. 209] .)

■ "The California statutes and decisions ... have been interpreted to bar the recovery of punitive damages in a wrongful death action." (*Tarasoff v. Regents of Univ. of Cal.* (1976) 17 Cal.3d 425, 450 [131 Cal.Rptr. 14, 551 P.2d 334] , internal citation omitted.) There is an exception to this rule for death by felony homicide for which the defendant has been convicted. (Civ. Code, § 3294(d).)

■ "Punitive damages are awardable to the decedent's estate in an action by the estate representative based on the cause of action the decedent would have had if he or she had survived." (*Rufo v. Simpson* (2001) 86 Cal.App.4th 573, 616 [103 Cal.Rptr.2d 492] , internal citation omitted.)

■ "California cases have uniformly held that damages for mental and emotional distress, including grief and sorrow, are not recoverable in a wrongful death action." (*Krouse v. Graham* (1977) 19 Cal.3d 59, 72 [137 Cal.Rptr. 863, 562 P.2d 1022] , internal citations omitted.)

■ "[A] simple instruction excluding considerations of grief and sorrow in wrongful death actions will normally suffice." (*Krouse, supra*, 19 Cal.3d at p. 69 .)

■ "To avoid confusion regarding the jury's task in future cases, we conclude that when future noneconomic damages are sought, the jury should be instructed expressly that they are to assume that an award of future damages is a present value sum, i.e., they are to determine the amount *in current dollars paid at the time of judgment* that will compensate a plaintiff for future pain and suffering. In the absence of such instruction, unless the record clearly establishes otherwise, awards of future damages will be considered to be stated in terms of their present or current value." (*Salgado, supra*, 19 Cal.4th at pp. 646-647 , original italics.)

■ "[T]he competing and conflicting interests of the respective heirs, the difficulty in ascertaining individual shares of lost economic support when dealing with minors, the lack of any reason under most circumstances to apportion the lump-sum award attributable to loss of monetary support where minors are involved, the irrelevance of the heirs' respective interests in that portion of the award pertaining to lost economic support in determining the aggregate award, and the more efficient nature of court proceedings without a jury, cumulatively establish [that] apportionment by the court, rather than the jury, is consistent with the efficient administration of justice." (*Canavin v. Pacific Southwest Airlines* (1983) 148 Cal.App.3d 512, 535-536 [196 Cal.Rptr. 82] .)

■ "[W]here all statutory plaintiffs properly represented by legal counsel waive judicial apportionment, the trial court should instruct the jury to return separate verdicts unless the remaining considerations enumerated above mandate refusal." (*Canavin, supra*, 148 Cal.App.3d at p. 536 .)

■ "We note that the court instructed the jury that in determining pecuniary loss they should consider inter alia the age, state of health and respective life expectancies of the deceased and each plaintiff but should be concerned only with 'the shorter of the life expectancies, that of one of the plaintiffs or that of the deceased. ...' This was a correct statement of the law." (*Francis v. Saue* (1963) 222 Cal.App.2d 102, 120-121 [34 Cal.Rptr. 754] , internal citation omitted.)

■ "It is the shorter expectancy of life that is to be taken into consideration; for example, if, as in the case here, the expectancy of life of the parents is shorter than that of the son, the benefits to be considered are those only which might accrue during the life of the surviving parents." (*Parsons v. Easton* (1921) 184 Cal. 764, 770-771 [195 P. 419] , internal citation omitted.)

■ "The life expectancy of the deceased is a question of fact for the jury to decide, considering all relevant factors including the deceased's health, lifestyle and occupation. Life expectancy figures from mortality tables are admissible but are not conclusive." (*Allen, supra*, 109 Cal.App.3d at p. 424 , internal citations omitted.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, § 1695

California Tort Damages (Cont.Ed.Bar) Wrongful Death, §§ 3.1-3.52

4 Levy et al., *California Torts*, Ch. 55, *Death and Survival Actions*, §§ 55.10 -55.13 (Matthew Bender)

15 *California Forms of Pleading and Practice*, Ch. 177, *Damages*, §§ 177.162-177.167 (Matthew Bender)

6 *California Points and Authorities*, Ch. 64, *Damages: Tort*, § 64.25 (Matthew Bender)

2 *California Civil Practice: Torts* (Thomson West) §§ 23:8-23:8.2

Publisher's Notes

This instruction covers issues presented in BAJI Nos. 14.32, 14.52, and 14.69.

LexisNexis Matthew Bender Expert Practice Tip--Using CACI No. 3922: This is a comprehensive instruction that combines in one form many of the instructions set forth earlier in the Judicial Council's Damages Series. Plaintiff's counsel will need to go over each part of CACI No. 3922 in closing argument, preferably with the use of audio-visual aids. It is frequently helpful to use graphics that include spaces where counsel can write in the numbers applicable to each item in the instruction. *By Ronald Oster*

LexisNexis Matthew Bender Expert Practice Tip--List Damage Elements: *CACI No. 3922* can be used during an attorney's closing argument and it is sometimes helpful to actually list the damage elements on a board for the jury to see during your argument. *By Dona Cohn-Payne*

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawFamily Relationships & TortsWrongful Death & SurvivalParentsTortsWrongful Death & Survival
ActionsGeneral OverviewTortsWrongful Death & Survival ActionsRemediesGeneral OverviewTortsWrongful Death &
Survival ActionsRemediesAward CalculationsTortsWrongful Death & Survival ActionsRemediesCompensatory
DamagesFuneral Expenses



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CHAPTER 39 California Judicial Council Damages Instructions

5-39 California Forms of Jury Instruction CACI 3923

CACI 3923 Public Entities--Collateral Source Payments (Gov. Code, § 985)

You shall award damages in an amount that fully compensates plaintiff for damages in accordance with instructions from the court. You shall not speculate or consider any other possible sources of benefit the plaintiff may have received. After you have returned your verdict the court will make whatever adjustments are necessary in this regard.

New September 2003

Per *Government Code* section 985, this language is mandatory.

■ *Government Code* section 985(b) provides, in part: "Any collateral source payment paid or owed to or on behalf of a plaintiff shall be inadmissible in any action for personal injuries or wrongful death where a public entity is a defendant."

■ *Government Code* section 985(j) provides: "In all actions affected by this section, the court shall instruct the jury with the following language: 'You shall award damages in an amount that fully compensates plaintiff for damages in accordance with instructions from the court. You shall not speculate or consider any other possible sources of benefit the plaintiff may have received. After you have returned your verdict the court will make whatever adjustments are necessary in this regard.' "

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, § 1637

California Tort Damages (Cont.Ed.Bar) Restrictions on Recovery, § 15.21

15 California Forms of Pleading and Practice, Ch. 177, *Damages* (Matthew Bender)

6 California Points and Authorities, Ch. 65, *Damages* (Matthew Bender)

2 California Civil Practice: Torts (Thomson West) § 31:47

Publisher's Notes

This instruction replaces BAJI No. 14.60.5.



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CHAPTER 39 California Judicial Council Damages Instructions

5-39 California Forms of Jury Instruction CACI 3924

CACI 3924 No Punitive Damages

You must not include in your award any damages to punish or make an example of [*name of defendant*]. Such damages would be punitive damages, and they cannot be a part of your verdict. You must award only the damages that fairly compensate [*name of plaintiff*] for [his/her/its] loss.

New September 2003

Do not use this instruction if punitive damages are being sought in the phase of the trial in which these instructions are given.

- "Punitive damages are not permitted in wrongful death actions." (*Cortez v. Macias* (1980) 110 Cal.App.3d 640, 657 [167 Cal.Rptr. 905] .)

- "The punitive damages theory cannot be predicated on the breach of contract cause of action without an underlying tort." (*Palmer v. Ted Stevens Honda, Inc.* (1987) 193 Cal.App.3d 530, 536 [238 Cal.Rptr. 363] , internal citations omitted.)

- "An award of punitive damages is not supported by a verdict based on breach of contract, even where the defendant's conduct in breaching the contract was wilful, fraudulent, or malicious. Even in those cases in which a separate tort action is alleged, if there is 'but one verdict based upon contract' a punitive damage award is improper." (*Myers Building Industries, Ltd. v. Interface Technology, Inc.* (1993) 13 Cal.App.4th 949, 960 [17 Cal.Rptr.2d 242] , internal citations omitted.)

- *Government Code section 818* provides: "Notwithstanding any other provision of law, a public entity

is not liable for damages awarded under *Section 3294 of the Civil Code* or other damages imposed primarily for the sake of example and by way of punishing the defendant."

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, § 1580

California Tort Damages (Cont.Ed.Bar) Punitive Damages, § 14.3

4 Levy et al., California Torts, Ch. 54, *Punitive Damages*, §§ 54.05, 54.08 (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages* (Matthew Bender)

6 California Points and Authorities, Ch. 65, *Damages* (Matthew Bender)

Publisher's Notes

This instruction replaces BAJI No. 14.61.



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CHAPTER 39 California Judicial Council Damages Instructions

5-39 California Forms of Jury Instruction CACI 3925

CACI 3925 Arguments of Counsel Not Evidence of Damages

The arguments of the attorneys are not evidence of damages. Your award must be based on your reasoned judgment applied to the testimony of the witnesses and the other evidence that has been admitted during trial.

New September 2003

If a pleading is admitted into evidence, the following may be added: "The amount of damages that [*name of plaintiff*] has claimed in [his/her] written pleadings is not evidence of [*name of plaintiff*]'s damages."

- "[T]he trial court can and should instruct the jury that the argument of counsel as to the amount of damages claimed by the plaintiff is not evidence and that its duty is only to award such damages as will reasonably compensate the plaintiff for his pain and suffering." (*Beagle v. Vasold* (1966) 65 Cal.2d 166, 180-181 [53 Cal.Rptr. 129, 417 P.2d 673] , internal citation omitted.)

- Courts have held that "attempts to suggest matters of an evidentiary nature to a jury other than by the legitimate introduction into evidence is misconduct whether by questions on cross-examination, argument or other means." (*Smith v. Covell* (1980) 100 Cal.App.3d 947, 960 [161 Cal.Rptr. 377] .)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, § 1675

California Tort Damages (Cont.Ed.Bar) Bodily Injury, § 1.74

4 Levy et al., California Torts, Ch. 51, *Pain and Suffering*, §§ 51.50-51.51 (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages* (Matthew Bender)

6 California Points and Authorities, Ch. 65, *Damages* (Matthew Bender)

Publisher's Notes

This instruction replaces BAJI No. 14.62.

LexisNexis Matthew Bender Expert Practice Tip--Give Jurors Monetary Figure: Although the court gives this instruction, jurors want to hear what the attorneys believe would reasonably compensate the client. Don't disappoint them; give them a monetary damage amount. *By Dona Cohn-Payne*

LexisNexis Matthew Bender Expert Practice Tip--Defense May Want to Emphasize CACI No. 3925: Defense counsel may wish to emphasize this instruction, especially in cases where there are gaps in plaintiff's damage case. *CACI No. 3925* also complements the instruction that the jury must not speculate or guess about damages [see *CACI No. 3901*]. *By Ronald Oster*

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsDamagesGeneral Overview



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CHAPTER 39 California Judicial Council Damages Instructions

5-39 California Forms of Jury Instruction CACI 3926

CACI 3926 Settlement Deduction

You have heard evidence that [*name of plaintiff*] has settled [his/her/its] claim against [*name of defendant*]. Your award of damages to [*name of plaintiff*] should be made without considering any amount that [he/she/it] may have received under this settlement. After you have returned your verdict, I will make the proper deduction from your award of damages.

New September 2003

Sources and Authority

- *Code of Civil Procedure section 877* provides, in pertinent part: "Where a release, dismissal with or without prejudice, or a covenant not to sue or not to enforce judgment is given in good faith before verdict or judgment to one or more of a number of tortfeasors claimed to be liable for the same tort ... it shall have the following effect: ... It shall not discharge any other such party from liability unless its terms so provide, but it shall reduce the claims against the others in the amount stipulated by the release, the dismissal or the covenant, or in the amount of the consideration paid for it whichever is the greater."

- "When the plaintiff stipulates to the fact and amount of settlement before the court, an approved procedure is for the court to reduce the verdict award by the amount paid in settlement before entering judgment on the verdict." (*Syverson v. Heitmann* (1985) 171 Cal.App.3d 106, 111 [214 Cal.Rptr. 581] , internal citations omitted.)

- Courts have held that it is "proper to exclude evidence of the pretrial settlement by one joint tortfeasor from the jury's consideration, leaving it to the court to apply *Code of Civil Procedure section 877* to reduce the verdict." (*Knox v. County of Los Angeles* (1980) 109 Cal.App.3d 825, 834-835 [167

Cal.Rptr. 463 , internal citation omitted.)

■ "[W]here there is an admission 'that a settlement has been made with one or more joint tortfeasors in a certain amount there is no factual question to be resolved by the jury respecting the settlement.' " (*Albrecht v. Broughton* (1970) 6 *Cal.App.3d* 173, 177 [85 *Cal.Rptr.* 659] , internal citation omitted.)

■ "Where the purpose of introducing evidence of a settlement is to reduce any recovery that might be awarded pro tanto, this result can be achieved by a simple calculation made by the court after the verdict has been rendered." (*Shepherd v. Walley* (1972) 28 *Cal.App.3d* 1079, 1082 [105 *Cal.Rptr.* 387] , footnote omitted.)

■ "The presentation of evidence concerning the amount or fact of settlement to the jury ... is not only confusing, but also can lead to abuse in argument as it did here." (*Shepherd, supra*, 28 *Cal.App.3d* at p. 1083 .)

■ "[E]vidence of the fact and amount of settlement made by [plaintiff] with [settling witness] might be admissible under proper limiting instructions for the purpose of showing bias since he was a witness." (*Shepherd, supra*, 28 *Cal.App.3d* at p. 1082, fn. 2 , internal citation omitted.)

■ "Under *Civil Code* section 1431.2, a defendant is only responsible for its share of noneconomic damages as that share has been determined by the jury. 'Therefore, a nonsettling defendant may not receive any setoff under [*Code of Civil Procedure*] section 877 for the portion of a settlement by another defendant that is attributable to noneconomic damages.' After application of *Civil Code* section 1431.2, '... there is no amount that represents a common claim for noneconomic damages against the settling and nonsettling defendants' and thus *Code of Civil Procedure* section 877 has no applicability to noneconomic damages." (*Ehret v. Congoleum Corp.* (1999) 73 *Cal.App.4th* 1308, 1319 [87 *Cal.Rptr.2d* 363] , internal citations omitted.)

■ "[A]n undifferentiated settlement must be apportioned between economic and noneconomic damages so that the setoff applies only to economic damages." (*Ehret, supra*, 73 *Cal.App.4th* at p. 1320 , internal citation omitted.)

■ It has been held that, "[i]n the absence of any other allocation ... the percentage of economic damages reflected in the jury verdict [should] be applied to determine the percentage of the settlements to be offset." (*Ehret, supra*, 73 *Cal.App.4th* at p. 1320 , internal citation omitted.)

■ "Where there is a complete dismissal of a defendant, and a plaintiff seeks an allocation of the settlement with that defendant for purposes of limiting the setoff against another defendant's liability, the burden is on the plaintiff to establish facts to justify the allocation." (*Ehret, supra*, 73 *Cal.App.4th* at p. 1322 , internal citation omitted.)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 95, 98

California Tort Damages (Cont.Ed.Bar) Restrictions on Recovery, § 15.12

4 Levy et al., *California Torts*, Ch. 74, *Resolving Multiparty Tort Litigation*, §§ 74.20 -74.28 (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages* (Matthew Bender)

6 California Points and Authorities, Ch. 65, *Damages* (Matthew Bender)

Publisher's Notes

This instruction replaces BAJI No. 14.64.

LexisNexis Matthew Bender Expert Practice Tip--Evidence of Settlement: Defense counsel will usually want to keep out all evidence that another party has settled with plaintiff, because the usual inference is that plaintiff has a meritorious case. If the fact that another party has settled cannot be kept out, then defense counsel will have to rely on *CACI No. 3926*. Still, there might be an "offset" point as to other compensatory recoveries. *By Ronald Oster and Rex Heeseman*

LexisNexis Matthew Bender Expert Practice Tip--Plaintiff's Counsel Should Avoid "Empty Chair": Plaintiff's attorneys should beware of having an "empty chair" at trial. Avoid it, if possible. *By Dona Cohn-Payne*

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsProcedureSettlementsGeneral OverviewTortsProcedureSettlementsMultipartiesGeneral Overview



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CHAPTER 39 California Judicial Council Damages Instructions

5-39 California Forms of Jury Instruction CACI 3927

CACI 3927 Aggravation of Preexisting Condition or Disability

[Name of plaintiff] is not entitled to damages for any physical or emotional condition that [he/she] had before [name of defendant]'s conduct occurred. However, if [name of plaintiff] had a physical or emotional condition that was made worse by [name of defendant]'s wrongful conduct, you must award damages that will reasonably and fairly compensate [him/her] for the effect on that condition.

New September 2003

Sources and Authority

- "A tortfeasor may be held responsible where the effect of his negligence is to aggravate a preexisting condition or disease." (*Hastie v. Handeland* (1969) 274 Cal.App.2d 599, 604 [79 Cal.Rptr. 268] , internal citations omitted.)

- "Plaintiff may recover to the full extent that his condition has worsened as a result of defendant's tortious act." (*Ng v. Hudson* (1977) 75 Cal.App.3d 250, 255 [142 Cal.Rptr. 69] , internal citations omitted, overruled on another ground in *Soule v. GM Corp.* (1994) 8 Cal.4th 548, 574 [34 Cal.Rptr.2d 607, 882 P.2d 298] .)

- "It is by no means self-evident that an act which precipitates a flare-up of a preexisting condition should be considered a 'cause which, in natural and continuous sequence, produces the injury.' Thus, general instructions on proximate cause were not sufficient to inform the jury on the more specific issue of aggravation of preexisting conditions." (*Ng, supra*, 75 Cal.App.3d at p. 256 .)

- "[An instruction on preexisting condition] is proper only where the injured is the claimant seeking

compensation for his injuries. That is not the case here in a wrongful death action." (*Vecchione v. Carlin* (1980) 111 Cal.App.3d 351, 358 [168 Cal.Rptr. 571] .)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, § 1676

California Tort Damages (Cont.Ed.Bar) Bodily Injury, § 1.86

4 Levy et al., *California Torts*, Ch. 51, *Pain and Suffering*, § 51.23[3] (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages* (Matthew Bender)

6 California Points and Authorities, Ch. 65, *Damages* (Matthew Bender)

2 California Civil Practice: Torts (Thomson West) § 5:11

Publisher's Notes

This instruction covers issues presented in BAJI No. 14.65.

LexisNexis Matthew Bender Expert Practice Tip--Use Caution With Preexisting Conditions and Disabilities: Notwithstanding *CACI No. 3927*, many jurors are skeptical about preexisting conditions and disabilities. This is an area where plaintiffs can appear to be overreaching. Therefore, plaintiff's counsel should construct a careful argument to the jury. *By Ronald Oster and Rex Heeseman*



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CHAPTER 39 California Judicial Council Damages Instructions

5-39 California Forms of Jury Instruction CACI 3928

CACI 3928 Unusually Susceptible Plaintiff

You must decide the full amount of money that will reasonably and fairly compensate [name of plaintiff] for all damages caused by the wrongful conduct of [name of defendant], even if [name of plaintiff] was more susceptible to injury than a normally healthy person would have been, and even if a normally healthy person would not have suffered similar injury.

New September 2003

Sources and Authority

■ "That a plaintiff without such a [preexisting] condition would probably have suffered less injury or no injury does not exonerate a defendant from liability." (*Ng v. Hudson* (1977) 75 Cal.App.3d 250, 255 [142 Cal.Rptr. 69] , internal citations omitted, overruled on another ground in *Soule v. G.M. Corp.* (1994) 8 Cal.4th 548, 574 [34 Cal.Rptr.2d 607, 882 P.2d 298] .)

■ "The tortfeasor takes the person he injures as he finds him. If, by reason of some preexisting condition, his victim is more susceptible to injury, the tortfeasor is not thereby exonerated from liability." (*Rideau v. Los Angeles Transit Lines* (1954) 124 Cal.App.2d 466, 471 [268 P.2d 772] , internal citations omitted.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, § 1676

California Tort Damages (Cont.Ed.Bar) Bodily Injury, § 1.86

4 Levy et al., *California Torts*, Ch. 51, *Pain and Suffering*, § 51.23[3] (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages* (Matthew Bender)

6 California Points and Authorities, Ch. 65, *Damages* (Matthew Bender)

2 California Civil Practice: Torts (Thomson West) § 5:11

Publisher's Notes

This instruction covers issues presented in BAJI No. 14.65.

LexisNexis Matthew Bender Expert Practice Tip-- CACI No. 3928 Improves Upon BAJI No. 14.65: This instruction has been greatly improved and is clearly written. This is for your "eggshell" plaintiff. *By Dona Cohn-Payne*

LexisNexis Matthew Bender Expert Practice Tip--Explain Reasons for "Usually Susceptible Plaintiffs" Rule: Some jurors may have difficulty accepting this concept. Plaintiff's counsel should explain the reasons for the rule and emphasize that this is what the law requires. However, this still may be an opportunity for defense counsel. *By Ronald Oster and Rex Heeseman*



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CHAPTER 39 California Judicial Council Damages Instructions

5-39 California Forms of Jury Instruction CACI 3929

CACI 3929 Subsequent Medical Treatment or Aid

If you decide that [name of defendant] is legally responsible for [name of plaintiff]'s harm, [he/she/it] is also responsible for any additional harm resulting from the acts of others in providing medical treatment or other aid that [name of plaintiff]'s injury reasonably required, even if those acts were negligently performed.

New September 2003; Revised December 2007, October 2008

Directions for Use

Under Proposition 51 (*Civ. Code* § 1431.2), the original tortfeasor is entitled to have the jury allocate fault to any subsequent tortfeasors with regard to the subsequent aggravation of the injury. Each is responsible only for a comparative share of the noneconomic damages attributable to the aggravated injury. (*Henry v. Superior Court* (2008) 160 Cal.App.4th 440, 455 [72 Cal.Rptr.3d 808] ; see also *Marina Emergency Medical Group v. Superior Court* (2000) 84 Cal.App.4th 435 [100 Cal.Rptr.2d 866] .)

Sources and Authority

• "It has long been the rule that a tortfeasor responsible for the original accident is also liable for injuries or death occurring during the course of medical treatment to treat injuries suffered in that accident. In *Ash v. Mortensen* (1944) 24 Cal.2d 654 [150 P.2d 876] , the Supreme Court stated: 'It is settled that where one who has suffered personal injuries by reason of the tortious act of another exercises due care in securing the services of a doctor and his injuries are aggravated by the negligence of such doctor, the law regards the act of the original wrongdoer as a proximate cause of the damages flowing from the subsequent negligent medical treatment and holds him liable therefor.' " (*Anaya v.*

Superior Court (2000) 78 Cal.App.4th 971, 974 [93 Cal.Rptr.2d 228] .)

■ "Obviously, if the original tortfeasor is liable for injuries or death suffered during the course of the treatment of injuries suffered in the accident, the original tortfeasor is liable for injuries or death suffered during transportation of the victim to a medical facility for treatment of the injuries resulting from the accident." (*Anaya, supra*, 78 Cal.App.4th at p. 975 .)

■ "To the extent damages for [plaintiff]'s injured shoulder can in fact be divided by causation into distinct component parts--the original injury that resulted from the fall at the [defendants]' property and the aggravation of that injury caused by [plaintiff]'s negligent treatment by ... physicians--liability for each indivisible component part should be considered separately. The [defendants], if they were negligent, are solely responsible for the initial injury; liability for the indivisible enhanced or aggravated injury, however, is properly apportioned between the [defendants] and the ... physicians in accordance with the rules of comparative fault and section 1431.2." (*Henry, supra*, 160 Cal.App.4th at p. 455 .)

■ "While it is true the original tortfeasor is liable for additional harm (even death) resulting from the negligent care and treatment of the original injury by physicians and hospitals, such liability is not limited to negligently caused additional harm or that caused by malpractice." (*Hastie v. Handeland* (1969) 274 Cal.App.2d 599, 604-605 [79 Cal.Rptr. 268] , internal citations and footnote omitted.)

■ This rule applies to the first doctor who treats a patient who subsequently is treated by other doctors. (*Maxwell v. Powers* (1994) 22 Cal.App.4th 1596, 1607-1608 [28 Cal.Rptr.2d 62] .)

■ *Restatement Second of Torts* section 457, states: "If the negligent actor is liable for another's bodily injury, he is also subject to liability for any additional bodily harm resulting from normal efforts of third persons in rendering aid which the other's injury reasonably requires, irrespective of whether such acts are done in a proper or a negligent manner."

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, § 1676

Flahavan et al., California Practice Guide: Personal Injury (The Rutter Group) P 4:189.6a

California Tort Damages (Cont.Ed.Bar) Bodily Injury, § 1.85

5 Levy et al., *California Torts*, Ch. 74, *Resolving Multiparty Tort Litigation*, § 74.04[3], [4] (Matthew Bender)

25 *California Forms of Pleading and Practice*, Ch. 300, *Contribution and Indemnity*, § 300.63[2] (Matthew Bender)

33 *California Forms of Pleading and Practice*, Ch. 380, *Negligence*, § 380.74[3][a] (Matthew Bender)

11 *California Points and Authorities*, Ch. 115, *Indemnity and Contribution*, § 115.61 (Matthew Bender)

Publisher's Notes

This instruction replaces BAJI No. 14.66.

LexisNexis Matthew Bender Expert Practice Tip--Explain Reasons for Subsequent Medical Treatment Rule: This is another concept that some jurors will find counter-intuitive [*see also* CACI No. 3928]. Some explanation of the reason for the rule may be required. Again, this is a "two-edged sword."

By Ronald Oster and Rex Heeseman



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California Forms of Jury Instruction

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CHAPTER 39 California Judicial Council Damages Instructions

5-39 California Forms of Jury Instruction CACI 3930

CACI 3930 Mitigation of Damages (Personal Injury)

If you decide [*name of defendant*] is responsible for the original harm, [*name of plaintiff*] is not entitled to recover damages for harm that [*name of defendant*] proves [*name of plaintiff*] could have avoided with reasonable efforts or expenditures.

You should consider the reasonableness of [*name of plaintiff*]'s efforts in light of the circumstances facing [him/her] at the time, including [his/her] ability to make the efforts or expenditures without undue risk or hardship.

If [*name of plaintiff*] made reasonable efforts to avoid harm, then your award should include reasonable amounts that [he/she] spent for this purpose.

New September 2003

Sources and Authority

- "It has been the policy of the courts to promote the mitigation of damages. The doctrine applies in tort, wilful as well as negligent. A plaintiff cannot be compensated for damages which he could have avoided by reasonable effort or expenditures." (*Green v. Smith* (1968) 261 Cal.App.2d 392, 396 [67 Cal.Rptr. 796] , internal citations omitted.)

- "The frequent statement of the principle in the terms of a 'duty' imposed on the injured party has been criticized on the theory that a breach of the 'duty' does not give rise to a correlative right of action. It is perhaps more accurate to say that the wrongdoer is not required to compensate the injured party for damages which are avoidable by reasonable effort on the latter's part." (*Green, supra*, 261 Cal.App.2d at

p. 396 , internal citations omitted.)

■ "The reasonableness of the efforts of the injured party must be judged in the light of the situation confronting him at the time the loss was threatened and not by the judgment of hindsight. The fact that reasonable measures other than the one taken would have avoided damage is not, in and of itself, proof of the fact that the one taken, though unsuccessful, was unreasonable. 'If a choice of two reasonable courses presents itself, the person whose wrong forced the choice cannot complain that one rather than the other is chosen.' The standard by which the reasonableness of the injured party's efforts is to be measured is not as high as the standard required in other areas of law. It is sufficient if he acts reasonably and with due diligence, in good faith." (*Green, supra*, 261 *Cal.App.2d* at pp. 396-397 , internal citations omitted.)

■ "The correct rule is that an injured person must use reasonable diligence in caring for his injuries. What is reasonable diligence depends upon all the facts and circumstances of each case. There is no hard and fast rule that the injured person must seek medical care of a particular type. Self-care may be reasonable under the circumstances, and the jury should be so instructed where that factor is relevant." (*Christiansen v. Hollings* (1941) 44 *Cal.App.2d* 332, 346 [112 *P.2d* 723] , internal citations omitted.)

■ " 'The rule of mitigation of damages has no application where its effect would be to require the innocent party to sacrifice and surrender important and valuable rights.' " (*Valle de Oro Bank v. Gamboa* (1994) 26 *Cal.App.4th* 1686, 1691 [32 *Cal.Rptr.2d* 329] , internal citations omitted.)

■ "The duty to minimize damages does not require an injured person to do what is unreasonable or impracticable, and, consequently, when expenditures are necessary for minimization of damages, the duty does not run to a person who is financially unable to make such expenditures." (*Valencia v. Shell Oil Co.* (1944) 23 *Cal.2d* 840, 846 [147 *P.2d* 558] , internal citations omitted.)

■ "Contributory negligence was closely allied and easily confused with the rule of mitigation of damages, on which the jury was also instructed. Both doctrines involved the plaintiff's duty to act reasonably. Contributory negligence was concerned with the plaintiff's negligence before being injured, while the mitigation rule was concerned with a lack of due care after the injury. The effect of contributory negligence was to bar all recovery by the plaintiff. In contrast, a plaintiff's failure to mitigate barred recovery of only the portion of damages which could have been avoided by ordinary care after the injury." (*LeMons v. Regents of University of California* (1978) 21 *Cal.3d* 869, 874-875 [148 *Cal.Rptr.* 355, 582 *P.2d* 946] , internal citations omitted.)

■ " 'The rule of [mitigation of damages] comes into play after a legal wrong has occurred, but while some damages may still be averted ... ' " (*Pool v. City of Oakland* (1986) 42 *Cal.3d* 1051, 1066 [232 *Cal.Rptr.* 528, 728 *P.2d* 1163] , internal citations omitted.)

■ "[W]hile the burden of proving the extent of injury ... actually incurred as a result of a defendant's tortious conduct lies with the plaintiff, the burden of proving the plaintiff failed to act reasonably in limiting his or her consequential damages--that is, failed to mitigate damages--is on the defendant" (*Jackson v. Yarbray* (2009) 179 *Cal.App.4th* 75, 97 [101 *Cal.Rptr.3d* 303] .)

■ "One who contributes to damage cannot escape liability because the proportionate contribution may not be accurately measured. It is incumbent upon the party alleging injury to prove the amount of damages. Respondent sustained that burden in this case. If the damages proven could be reduced proportionately, that burden rested upon appellant." (*Oakland v. Pacific Gas & Electric Co.* (1941) 47 *Cal.App.2d* 444, 450 [118 *P.2d* 328] , internal citations omitted.)

■ "It is true that plaintiff is in duty bound to minimize his damage in any way that he reasonably can, and if he negligently refuses to do so he cannot recover for that which he might have prevented. It is for appellant to establish that the steps taken by plaintiff to so minimize his loss or damage falls short of the obligation so fixed. In other words, the burden is on defendant to establish matters asserted by him in mitigation or reduction of the amount of plaintiff's damage, and defendant here has not met that burden." (*McNary v. Hanley* (1933) 131 Cal.App. 188, 190 [20 P.2d 966] .)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1624-1627

California Tort Damages (Cont.Ed.Bar) Restrictions on Recovery, §§ 15.22-15.23

4 Levy et al., *California Torts*, Ch. 53, *Mitigation and Collateral Source Rule*, §§ 53.01 -53.04 (Matthew Bender)

15 *California Forms of Pleading and Practice*, Ch. 177, *Damages*, § 177.48 (Matthew Bender)

6 California Points and Authorities, Ch. 64, *Damages: Tort* , § 64.171 et seq. (Matthew Bender)

1 California Civil Practice: Torts (Thomson West) §§ 6:1-6:6

Publisher's Notes

This instruction replaces BAJI No. 14.67.

LexisNexis Matthew Bender Expert Practice Tip--"Reasonableness" Is Key to Mitigation:

Although plaintiff cannot recover damages that can reasonably be avoided, there are limitations. The key word is "reasonable," which is used four times in *CACI No. 3930*. However, "reasonable" has different meanings to different jurors. *By Ronald Oster and Rex Heeseman*

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsDamagesGeneral OverviewTortsDamagesMitigation



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CHAPTER 39 California Judicial Council Damages Instructions

5-39 California Forms of Jury Instruction CACI 3931

CACI 3931 Mitigation of Damages (Property Damage)

If you decide [*name of defendant*] is responsible for the original harm, [*name of plaintiff*] is not entitled to recover damages for harm to [his/her] property that [*name of defendant*] proves [*name of plaintiff*] could have avoided with reasonable efforts or expenditures.

You should consider the reasonableness of [*name of plaintiff*]'s efforts in light of the circumstances facing [him/her] at the time, including [his/her] ability to make the efforts or expenditures without undue risk or hardship.

If [*name of plaintiff*] made reasonable efforts to avoid harm, then your award should include reasonable amounts that [he/she] spent for this purpose.

New September 2003

Sources and Authority

- "It has been the policy of the courts to promote the mitigation of damages. The doctrine applies in tort, wilful as well as negligent. A plaintiff cannot be compensated for damages which he could have avoided by reasonable effort or expenditures." (*Green v. Smith* (1968) 261 Cal.App.2d 392, 396 [67 Cal.Rptr. 796] , internal citations omitted.)

- "The frequent statement of the principle in the terms of a 'duty' imposed on the injured party has been criticized on the theory that a breach of the 'duty' does not give rise to a correlative right of action. It is perhaps more accurate to say that the wrongdoer is not required to compensate the injured party for damages which are avoidable by reasonable effort on the latter's part." (*Green, supra*, 261 Cal.App.2d at

p. 396 , internal citations omitted.)

- "The reasonableness of the efforts of the injured party must be judged in the light of the situation confronting him at the time the loss was threatened and not by the judgment of hindsight. The fact that reasonable measures other than the one taken would have avoided damage is not, in and of itself, proof of the fact that the one taken, though unsuccessful, was unreasonable. 'If a choice of two reasonable courses presents itself, the person whose wrong forced the choice cannot complain that one rather than the other is chosen.' The standard by which the reasonableness of the injured party's efforts is to be measured is not as high as the standard required in other areas of law. It is sufficient if he acts reasonably and with due diligence, in good faith." (*Green, supra*, 261 *Cal.App.2d* at pp. 396-397 , internal citations omitted.)

- "A plaintiff who suffers damage as a result of either a breach of contract or a tort has a duty to take reasonable steps to mitigate those damages and will not be able to recover for any losses which could have been thus avoided. Here the jury determined that 25 percent of the 'property damage to the house' could have been avoided. That damage was measured by the cost of repair, i.e., \$130,000. The court was obligated to give effect to the jury's finding and reduce this aspect of the award to \$97,500." (*Shaffer v. Debbas* (1993) 17 *Cal.App.4th* 33, 41 [21 *Cal.Rptr.2d* 110] , internal citations omitted.)

- "A plaintiff has a duty to mitigate damages and cannot recover losses it could have avoided through reasonable efforts. Thrifty-Tel's only response is that mitigation does not 'require a complex series of doubtful acts and expenditures.' 'Picking up the telephone to reach out and touch the Bezeneks or sending them a letter was complex, doubtful, or expensive? Based on Myron Bezenek's unchallenged testimony, we must presume that simple expedient would have averted the second hacking episode. Accordingly, Thrifty-Tel is not entitled to recover damages for the February 1992 event." (*Thrifty-Tel, Inc. v. Bezenek* (1996) 46 *Cal.App.4th* 1559, 1568-1569 [54 *Cal.Rptr.2d* 468] , internal citations omitted.)

- "Contributory negligence was closely allied and easily confused with the rule of mitigation of damages, on which the jury was also instructed. Both doctrines involved the plaintiff's duty to act reasonably. Contributory negligence was concerned with the plaintiff's negligence before being injured, while the mitigation rule was concerned with a lack of due care after the injury. The effect of contributory negligence was to bar all recovery by the plaintiff. In contrast, a plaintiff's failure to mitigate barred recovery of only the portion of damages which could have been avoided by ordinary care after the injury." (*LeMons v. Regents of University of California* (1978) 21 *Cal.3d* 869, 874-875 [148 *Cal.Rptr.* 355, 582 *P.2d* 946] , internal citations omitted.)

- "The rule of [mitigation of damages] comes into play after a legal wrong has occurred, but while some damages may still be averted ... ' " (*Pool v. City of Oakland* (1986) 42 *Cal.3d* 1051, 1066 [232 *Cal.Rptr.* 528, 728 *P.2d* 1163] , internal citations omitted.)

- "Generally, '[a] person injured by the wrongful act of another is bound ... to exercise reasonable care and diligence to avoid loss or minimize the resulting damages and cannot recover for losses which might have been prevented by reasonable efforts and expenditures on his part.' The burden of proving facts in mitigation of damages rests upon the defendant." (*Hunter v. Croysdill* (1959) 169 *Cal.App.2d* 307, 318 [337 *P.2d* 174] , internal citations omitted.)

- "One who contributes to damage cannot escape liability because the proportionate contribution may not be accurately measured. It is incumbent upon the party alleging injury to prove the amount of damages. Respondent sustained that burden in this case. If the damages proven could be reduced

proportionately, that burden rested upon appellant." (*Oakland v. Pacific Gas & Electric Co. (1941)* 47 Cal.App.2d 444, 450 [118 P.2d 328] , internal citations omitted.)

■ *Restatement Second of Torts section 918* provides:

(1) Except as stated in Subsection (2), one injured by the tort of another is not entitled to recover damages for any harm that he could have avoided by the use of reasonable effort or expenditure after the commission of the tort.

(2) One is not prevented from recovering damages for a particular harm resulting from a tort if the tortfeasor intended the harm or was aware of it and was recklessly disregarding of it, unless the injured person with knowledge of the danger of the harm intentionally or heedlessly failed to protect his own interests.

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1624-1627

California Tort Damages (Cont.Ed.Bar) Restrictions on Recovery, §§ 15.22-15.23

4 Levy et al., *California Torts*, Ch. 53, *Mitigation and Collateral Source Rule*, §§ 53.01 -53.04 (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages* (Matthew Bender)

6 California Points and Authorities, Ch. 65, *Damages* (Matthew Bender)

1 California Civil Practice: Torts (Thomson West) §§ 6:1-6:6

Publisher's Notes

This instruction replaces BAJI No. 14.68.

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsDamagesGeneral OverviewTortsDamagesMitigation



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CHAPTER 39 California Judicial Council Damages Instructions

5-39 California Forms of Jury Instruction CACI 3932

CACI 3932 Life Expectancy

If you decide [*name of plaintiff*] has suffered damages that will continue for the rest of [his/her] life, you must determine how long [he/she] will probably live. According to [*insert source of information*], a [*insert number*]-year-old [male/female] is expected to live another [*insert number*] years. This is the average life expectancy. Some people live longer and others die sooner.

This published information is evidence of how long a person is likely to live but is not conclusive. In deciding a person's life expectancy, you should also consider, among other factors, that person's health, habits, activities, lifestyle, and occupation.

New September 2003; Revised February 2005, February 2007

Directions for Use

Use of the life tables in *Vital Statistics of the United States*, published by the National Center for Health Statistics, is recommended. (See Life Expectancy Table--Male and Life Expectancy Table--Female, following the Damages series.) The first column shows the age interval between the two exact ages indicated. For example, 50-51 means the one-year interval between the fiftieth and fifty-first birthdays.

Sources and Authority

- "The life expectancy of the deceased is a question of fact for the jury to decide, considering all relevant factors including the deceased's health, lifestyle and occupation. Life expectancy figures from mortality tables are admissible but are not conclusive. Here the jury was correctly told the figure given was not conclusive evidence of Charlene's life expectancy. It was merely 'a factor which you may

consider,' along with the evidence of Charlene's health, habits, occupation and activities." (*Allen v. Toledo* (1980) 109 Cal.App.3d 415, 424 [167 Cal.Rptr. 270] , internal citations omitted.)

■ "Mortality tables are admissible to assist the jury but they are not indispensable. It has been held, for example, that, absent mortality tables, the trier of fact may still approximate the life expectancy of a statutory beneficiary who appeared in court." (*Francis v. Sauve* (1963) 222 Cal.App.2d 102, 121 [34 Cal.Rptr. 754] , internal citations omitted.)

■ "It is a matter of common knowledge that many persons live beyond the period of life allotted them by the mortality tables." (*Temple v. De Mirjian* (1942) 51 Cal.App.2d 559, 566 [125 P.2d 544] , internal citation omitted.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, § 1667

4 Levy et al., *California Torts*, Ch. 51, *Pain and Suffering*, § 51.42[2][c], Ch. 52, *Medical Expenses and Economic Loss*, § 52.20 (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages* (Matthew Bender)

6 California Points and Authorities, Ch. 65, *Damages* (Matthew Bender)

Publisher's Notes

This instruction replaces BAJI No. 14.69.

LexisNexis Matthew Bender Expert Practice Tip--Use Life Expectancy Tables: The life expectancy tables are very good to use during your closing argument when you have future pain, suffering, and disability and/or if your client needs permanent medical care. You can always take the number of years of plaintiff's life expectancy, an amount of compensation per year for the harm, and get a figure for non-economic damages. In some cases, this approach has been successful. *By Dona Cohn-Payne*

LexisNexis Matthew Bender Expert Practice Tip--Use of Standard Tables: If either side wants to argue that a different life expectancy should be used than the one shown in standard tables, it will probably be necessary to introduce specific evidence and possibly expert testimony on this issue. Most jurors will just accept the standard tables. *By Ronald Oster*



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CHAPTER 39 California Judicial Council Damages Instructions

5-39 California Forms of Jury Instruction CACI 3933-CACI 3939

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CACI 3933Reserved for Future Use



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CHAPTER 39 California Judicial Council Damages Instructions

5-39 California Forms of Jury Instruction CACI 3940

CACI 3940 Punitive Damages--Individual Defendant--Trial Not Bifurcated

If you decide that [*name of defendant*]'s conduct caused [*name of plaintiff*] harm, you must decide whether that conduct justifies an award of punitive damages. The purposes of punitive damages are to punish a wrongdoer for the conduct that harmed the plaintiff and to discourage similar conduct in the future.

You may award punitive damages only if [*name of plaintiff*] proves by clear and convincing evidence that [*name of defendant*] engaged in that conduct with malice, oppression, or fraud.

"Malice" means that [*name of defendant*] acted with intent to cause injury or that [*name of defendant*]'s conduct was despicable and was done with a willful and knowing disregard of the rights or safety of another. A person acts with knowing disregard when he or she is aware of the probable dangerous consequences of his or her conduct and deliberately fails to avoid those consequences.

"Oppression" means that [*name of defendant*]'s conduct was despicable and subjected [*name of plaintiff*] to cruel and unjust hardship in knowing disregard of [his/her] rights.

"Despicable conduct" is conduct that is so vile, base, or contemptible that it would be looked down on and despised by reasonable people.

"Fraud" means that [*name of defendant*] intentionally misrepresented or concealed a material fact and did so intending to harm [*name of plaintiff*].

There is no fixed formula for determining the amount of punitive damages, and you are not required to award any punitive damages. If you decide to award punitive damages, you should consider all of the following factors in determining the amount:

(a) How reprehensible was [name of defendant]'s conduct? In deciding how reprehensible [name of defendant]'s conduct was, you may consider, among other factors:

- 1. Whether the conduct caused physical harm;**
- 2. Whether [name of defendant] disregarded the health or safety of others;**
- 3. Whether [name of plaintiff] was financially weak or vulnerable and [name of defendant] knew [name of plaintiff] was financially weak or vulnerable and took advantage of [him/her/it];**
- 4. Whether [name of defendant]'s conduct involved a pattern or practice; and**
- 5. Whether [name of defendant] acted with trickery or deceit.**

(b) Is there a reasonable relationship between the amount of punitive damages and [name of plaintiff]'s harm [or between the amount of punitive damages and potential harm to [name of plaintiff] that [name of defendant] knew was likely to occur because of [his/her/its] conduct]?

(c) In view of [name of defendant]'s financial condition, what amount is necessary to punish [him/her/it] and discourage future wrongful conduct? You may not increase the punitive award above an amount that is otherwise appropriate merely because [name of defendant] has substantial financial resources. [Any award you impose may not exceed [name of defendant]'s ability to pay.]

[Punitive damages may not be used to punish [name of defendant] for the impact of [his/her/its] alleged misconduct on persons other than [name of plaintiff].]

New September 2003; Revised April 2004, October 2004, December 2005, June 2006, April 2007, August 2007, October 2008

Directions for Use

This instruction is intended to apply to individual persons only. When the plaintiff is seeking punitive damages against corporate defendants, use CACI No. 3943, *Punitive Damages Against Employer or Principal for Conduct of a Specific Agent or Employee--Trial Not Bifurcated*, or CACI No. 3945, *Punitive Damages --Entity Defendant-- Trial Not Bifurcated*. When plaintiff is seeking punitive damages against both an individual person and a corporate defendant, use CACI No. 3947, *Punitive Damages--Individual and Entity Defendants--Trial Not Bifurcated*.

For an instruction explaining "clear and convincing evidence," see CACI No. 201, *More Likely True--Clear and Convincing Proof*.

Read the bracketed language at the end of the first sentence of factor (b) only if there is evidence that the conduct of defendant that allegedly gives rise to liability and punitive damages either caused or foreseeably threatened to cause harm to plaintiff that would not be included in an award of compensatory damages. (*Simon v. San Paolo U.S. Holding Co., Inc.* (2005) 35 Cal.4th 1159 [29 Cal.Rptr.3d 379, 113 P.3d 63] .) The bracketed phrase concerning "potential harm" might be appropriate, for example, if damages actually caused by the defendant's acts are not recoverable because they are barred by statute (*id.* at p. 1176 , citing *Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 929 [148 Cal.Rptr. 389, 582

P.2d 980] [in a bad faith insurance case, plaintiff died before judgment, precluding her estate's recovery of emotional distress damages]), or if the harm caused by defendant's acts could have been great but by chance only slight harm was inflicted. (*Simon, supra*, 35 *Cal.4th* at p. 1177, citing *TXO Production Corp. v. Alliance Resources Corp.* (1993) 509 U.S. 443, 459 [113 S.Ct. 2711, 125 L.Ed.2d 366] [considering the hypothetical of a person wildly firing a gun into a crowd but by chance only damaging a pair of glasses].) The bracketed phrase should not be given where an award of compensatory damages is the "true measure" of the harm or potential harm caused by defendant's wrongful acts. (*Simon, supra*, 35 *Cal.4th* at pp. 1178-1179 [rejecting consideration for purposes of assessing punitive damages of the plaintiff's loss of the benefit of the bargain if the jury had found that there was no binding contract].)

Read the optional final sentence of factor (c) only if the defendant has presented relevant evidence regarding that issue.

Read the optional final sentence if there is a possibility that in arriving at an amount of punitive damages, the jury might consider harm that the defendant's conduct may have caused to nonparties. (See *Philip Morris USA v. Williams* (2007) 549 U.S. 346, 353-354 [127 S.Ct. 1057, 166 L.Ed.2d 940] .) Harm to others may be relevant to determining reprehensibility based on factors (a)(2) (disregard of health or safety of others) and (a)(4) (pattern or practice). (See *State Farm Mutual Automobile Insurance Co. v. Campbell* (2003) 538 U.S. 408, 419 [123 S.Ct. 1513, 155 L.Ed.2d 585] .)

"A jury must be instructed ... that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred." (*State Farm Mutual Automobile Insurance Co., supra*, 538 U.S. at p. 422 .) An instruction on this point should be included within this instruction if appropriate to the facts.

In an appropriate case, the jury may be instructed that a false promise or a suggestion of a fact known to be false may constitute a misrepresentation as the word "misrepresentation" is used in the instruction's definition of "fraud."

Courts have stated that "[p]unitive damages previously imposed for the same conduct are relevant in determining the amount of punitive damages required to sufficiently punish and deter. The likelihood of future punitive damage awards may also be considered, although it is entitled to considerably less weight." (*Stevens v. Owens-Corning Fiberglas Corp.* (1996) 49 *Cal.App.4th* 1645, 1661 [57 *Cal.Rptr.2d* 525] , internal citations omitted.) The court in *Stevens* suggested that the following instruction be given if evidence of other punitive damage awards is introduced into evidence:

If you determine that a defendant has already been assessed with punitive damages based on the same conduct for which punitive damages are requested in this case, you may consider whether punitive damages awarded in other cases have sufficiently punished and made an example of the defendant. You must not use the amount of punitive damages awarded in other cases to determine the amount of the punitive damage award in this case, except to the extent you determine that a lesser award, or no award at all, is justified in light of the penalties already imposed. (*Stevens, supra*, 49 *Cal.App.4th* at p. 1663, fn. 7 .)

Sources and Authority

- *Civil Code* section 3294 provides, in part:

(a) In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant.

(b) An employer shall not be liable for damages pursuant to subdivision (a), based upon acts of an employee of the employer, unless the employer had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of others or authorized or ratified the wrongful conduct for which the damages are awarded or was personally guilty of oppression, fraud, or malice. With respect to a corporate employer, the advance knowledge and conscious disregard, authorization, ratification or act of oppression, fraud, or malice must be on the part of an officer, director, or managing agent of the corporation.

(c) As used in this section, the following definitions shall apply:

(1) "Malice" means conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others.

(2) "Oppression" means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights.

(3) "Fraud" means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury.

■ "An award of punitive damages is not supported by a verdict based on breach of contract, even where the defendant's conduct in breaching the contract was wilful, fraudulent, or malicious. Even in those cases in which a separate tort action is alleged, if there is 'but one verdict based upon contract' a punitive damage award is improper." (*Myers Building Industries, Ltd. v. Interface Technology, Inc.* (1993) 13 Cal.App.4th 949, 960 [17 Cal.Rptr.2d 242] , internal citations omitted.)

■ "The purpose of punitive damages is to punish wrongdoers and thereby deter the commission of wrongful acts." (*Neal, supra*, 21 Cal.3d at p. 928, fn. 13 .)

■ "Punitive damages are to be assessed in an amount which, depending upon the defendant's financial worth and other factors, will deter him and others from committing similar misdeeds. Because compensatory damages are designed to make the plaintiff 'whole,' punitive damages are a 'windfall' form of recovery." (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 712 [34 Cal.Rptr.2d 898, 882 P.2d 894] , internal citations omitted.)

■ "It follows that the wealthier the wrongdoing defendant, the larger the award of exemplary damages need be in order to accomplish the statutory objective." (*Bertero v. National General Corp.* (1974) 13 Cal.3d 43, 65 [118 Cal.Rptr. 184, 529 P.2d 608] .)

■ " 'A plaintiff, upon establishing his case, is always entitled of right to compensatory damages. But even after establishing a case where punitive damages are permissible, he is never entitled to them. The granting or withholding of the award of punitive damages is wholly within the control of the jury, and may not legally be influenced by any direction of the court that in any case a plaintiff is entitled to them. Upon the clearest proof of malice in fact, it is still the exclusive province of the jury to say whether or not punitive damages shall be awarded. A plaintiff is entitled to

such damages only after the jury, in the exercise of its untrammelled discretion, has made the award.' " (*Brewer v. Second Baptist Church of Los Angeles* (1948) 32 Cal.2d 791, 801 [197 P.2d 713] , internal citation omitted.)

■ "In light of our holding that evidence of a defendant's financial condition is essential to support an award of punitive damages, *Evidence Code* section 500 mandates that the plaintiff bear the burden of proof on the issue. A plaintiff seeking punitive damages is not seeking a mere declaration by the jury that he is entitled to punitive damages in the abstract. The plaintiff is seeking an award of real money in a specific amount to be set by the jury. Because the award, whatever its amount, cannot be sustained absent evidence of the defendant's financial condition, such evidence is 'essential to the claim for relief.' " (*Adams v. Murakami* (1991) 54 Cal.3d 105, 119 [284 Cal.Rptr. 318, 813 P.2d 1348] , internal citation omitted.)

■ "[W]e are afforded guidance by certain established principles, all of which are grounded in the purpose and function of punitive damages. One factor is the particular nature of the defendant's acts in light of the whole record; clearly, different acts may be of varying degrees of reprehensibility, and the more reprehensible the act, the greater the appropriate punishment, assuming all other factors are equal. Another relevant yardstick is the amount of compensatory damages awarded; in general, even an act of considerable reprehensibility will not be seen to justify a proportionally high amount of punitive damages if the actual harm suffered thereby is small. Also to be considered is the wealth of the particular defendant; obviously, the function of deterrence will not be served if the wealth of the defendant allows him to absorb the award with little or no discomfort. By the same token, of course, the function of punitive damages is not served by an award which, in light of the defendant's wealth and the gravity of the particular act, exceeds the level necessary to properly punish and deter." (*Neal, supra*, 21 Cal.3d at p. 928 , internal citations and footnote omitted.)

■ "[T]he Constitution's Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent, i.e., injury that it inflicts upon those who are, essentially, strangers to the litigation." (*Philip Morris USA, supra*, 549 U.S. at p. 353 .)

■ "Evidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible--although counsel may argue in a particular case that conduct resulting in no harm to others nonetheless posed a grave risk to the public, or the converse. Yet for the reasons given above, a jury may not go further than this and use a punitive damages verdict to punish a defendant directly on account of harms it is alleged to have visited on nonparties." (*Philip Morris USA, supra*, 549 U.S. at p. 355 .)

■ "[A] specific instruction encompassing both the permitted and prohibited uses of evidence of harm caused to others would be appropriate in the new trial if requested by the parties. We believe that an instruction on these issues should clearly distinguish between the permitted and prohibited uses of such evidence and thus make clear to the jury the purposes for which it can and cannot consider that evidence. A jury may consider evidence of harm caused to others for the purpose of determining the degree of reprehensibility of a defendant's conduct toward the plaintiff in deciding the amount of punitive damages, but it may not consider that evidence for the purpose of punishing the defendant directly for harm caused to others. In our view, Judicial Council of California Civil Jury Instructions (Aug. 2007 rev.) CACI Nos. 3940, 3942, 3943, 3945, 3947, and 3949 could convey this distinction better by stating more explicitly that evidence of harm caused to others may be considered for the one purpose but not for the other, and by providing that explanation together with the reprehensibility factors rather than in connection with the reasonable relationship issue." (*Bullock v. Philip Morris USA, Inc.* (2008) 159 Cal.App.4th 655, 695, fn. 21 [71 Cal.Rptr.3d 775] , internal citation omitted.)

■ " '[T]he most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct.' We have instructed courts to determine the reprehensibility of a defendant by considering whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial

vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident. The existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect." (*State Farm Mutual Automobile Insurance Co.*, *supra*, 538 U.S. at p. 419 , internal citation omitted.)

■ "[W]e have been reluctant to identify concrete constitutional limits on the ratio between harm, or potential harm, to the plaintiff and the punitive damages award. We decline again to impose a bright-line ratio which a punitive damages award cannot exceed. Our jurisprudence and the principles it has now established demonstrate, however, that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process. ... [A]n award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety. ... While these ratios are not binding, they are instructive. They demonstrate what should be obvious: Single-digit multipliers are more likely to comport with due process, while still achieving the State's goals of deterrence and retribution, than awards with ratios in range of 500 to 1" (*State Farm Mutual Automobile Insurance Co.*, *supra*, 538 U.S. at pp. 424-425 , internal citation omitted.)

■ "Nonetheless, because there are no rigid benchmarks that a punitive damages award may not surpass, ratios greater than those we have previously upheld may comport with due process where 'a particularly egregious act has resulted in only a small amount of economic damages.' The converse is also true, however. When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee. The precise award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff." (*State Farm Mutual Automobile Insurance Co.*, *supra*, 538 U.S. at p. 425 , internal citation omitted.)

■ "The decision to award punitive damages is exclusively the function of the trier of fact. So too is the amount of any punitive damage award. The relevant considerations are the nature of the defendant's conduct, the defendant's wealth, and the plaintiff's actual damages." (*Gagnon v. Continental Casualty Co.* (1989) 211 Cal.App.3d 1598, 1602 [260 Cal.Rptr. 305] , internal citations omitted.)

■ "The wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award." (*State Farm Mutual Automobile Insurance Co.*, *supra*, 538 U.S. at p. 427 , internal citation omitted.)

■ "[T]he purpose of punitive damages is not served by financially destroying a defendant. The purpose is to deter, not to destroy." (*Adams*, *supra*, 54 Cal.3d at p. 112 .)

■ "[A] punitive damages award is excessive if it is disproportionate to the defendant's ability to pay." (*Adams*, *supra*, 54 Cal.3d at p. 112 , internal citations omitted.)

■ "It has been recognized that punitive damages awards generally are not permitted to exceed 10 percent of the defendant's net worth." (*Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1166 [74 Cal.Rptr.2d 510] .)

■ "In light of our discussion, we conclude that even where, as here, punitive but not compensatory damages are available to the plaintiff, the defendant is entitled to an instruction that punitive damages must bear a reasonable relation to the injury, harm, or damage actually suffered by the plaintiff and proved at trial. Consequently, the trial court erred in failing to so instruct the jury." (*Gagnon*, *supra*, 211 Cal.App.3d at p. 1605 .)

■ "Malice, for purposes of awarding exemplary damages, includes 'despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others.' To establish conscious disregard, the plaintiff must show 'that the defendant was aware of the probable dangerous consequences of his conduct, and that he wilfully and deliberately failed to avoid those consequences.' " (*Hoch v. Allied-Signal, Inc.* (1994) 24 Cal.App.4th 48, 61 [29 Cal.Rptr.2d 615] , internal citations omitted.)

■ "Used in its ordinary sense, the adjective 'despicable' is a powerful term that refers to circumstances that are 'base,' 'vile,' or 'contemptible.' As amended to include this word, the statute plainly indicates that absent an intent to injure the plaintiff, 'malice' requires more than a 'willful and conscious' disregard of the plaintiffs' interests. The additional component of 'despicable conduct' must be found." (*College Hospital, Inc.*, *supra*, 8 Cal.4th at p. 725 , internal citations omitted.)

■ "We conclude that the rule ... that an award of exemplary damages must be accompanied by an award of compensatory damages [or its equivalent] is still sound. That rule cannot be deemed satisfied where the jury has made an express determination not to award compensatory damages." (*Cheung v. Daley* (1995) 35 Cal.App.4th 1673, 1677 [42 Cal.Rptr.2d 164] , footnote omitted.)

■ "With the focus on the plaintiff's injury rather than the amount of compensatory damages, the ["reasonable relation"] rule can be applied even in cases where only equitable relief is obtained or where nominal damages are awarded or, as here, where compensatory damages are unavailable." (*Gagnon*, *supra*, 211 Cal.App.3d at p. 1605 .)

■ "The high court in *TXO* [*TXO Production Corp.*, *supra*] and *BMW* [*BMW of North America, Inc. v. Gore* (1996) 517 U.S. 559 [116 S.Ct. 1589, 134 L.Ed.2d 809]] has refined the disparity analysis to take into account the *potential* loss to plaintiffs, as where a scheme worthy of punitive damages does not fully succeed. In such cases, the proper ratio would be the ratio of punitive damages to the potential harm to plaintiff." (*Sierra Club Found. v. Graham* (1999) 72 Cal.App.4th 1135, 1162, fn. 15 [85 Cal.Rptr.2d 726] , original italics.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1559, 1562, 1572-1577, 1607-1623

California Tort Damages (Cont.Ed.Bar 2d ed.) Punitive Damages, §§ 14.1-14.12, 14.39

4 Levy et al., *California Torts*, Ch. 54, *Punitive Damages*, §§ 54.01 -54.06, 54.20 -54.25 (Matthew Bender)

15 *California Forms of Pleading and Practice*, Ch. 177, *Damages*, § 177.51 (Matthew Bender)

6 *California Points and Authorities*, Ch. 64, *Damages: Torts*, §§ 64.141 et seq., 64.174 et seq. (Matthew Bender)

Publisher's Notes

This instruction replaces BAJI No. 14.71, and covers issues presented in BAJI No. 14.71.2.

LexisNexis Matthew Bender Expert Practice Tip--Use *State Farm* Guideposts: In *State Farm Mutual Automobile Ins. Co. v. Campbell* (2003) 538 U.S. 408, 123 S. Ct. 1513, 155 L. Ed. 2d 585 , the U.S. Supreme Court provided new guideposts for courts to review punitive damages awards, including a discussion of specific permissible ratios between punitive and compensatory damages.

Note that defendants almost always request bifurcation of the punitive damage phase, such that this instruction is usually divided into two parts corresponding to the two bifurcated portions of the trial. *By Ronald Oster*

In *Diamond Woodworks, Inc. v. Argonaut Ins. Co.* (2003) 109 Cal.App.4th 1020 [135 Cal.Rptr.2d 736] , the court looked to *State Farm Mutual Automobile Insurance Co. v. Campbell* (2003) 538 U.S. 408 [123 S.Ct. 1513, 155 L.Ed.2d 585] , stating: "Further explicating guidelines for due process proportionality, the [*Campbell*] court noted facts and circumstances may call for a ratio either exceeding or falling below

the norm. It suggested a ratio perhaps only equal to compensatory damages might reach the outermost limit of the due process guarantee when compensatory damages are substantial. Additionally observing the wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award, the *Campbell* court cautioned the courts of the need to ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered." (*Diamond Woodworks, Inc. v. Argonaut Ins. Co. (2003) 109 Cal.App.4th 1020, 1055-1056 [135 Cal.Rptr.2d 736] .*)

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsDamagesPunitive DamagesAward CalculationsGeneral OverviewTortsDamagesPunitive DamagesAward CalculationsFactorsTortsDamagesPunitive DamagesConduct Supporting Awards



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California Forms of Jury Instruction

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CHAPTER 39 California Judicial Council Damages Instructions

5-39 California Forms of Jury Instruction CACI 3941

CACI 3941 Punitive Damages--Individual Defendant--Bifurcated Trial (First Phase)

If you decide that [name of defendant]'s conduct caused [name of plaintiff] harm, you must decide whether that conduct justifies an award of punitive damages. At this time, you must decide whether [name of plaintiff] has proved by clear and convincing evidence that [name of defendant] engaged in that conduct with malice, oppression, or fraud. The amount of punitive damages, if any, will be decided later.

"Malice" means that [name of defendant] acted with intent to cause injury or that [name of defendant]'s conduct was despicable and was done with a willful and knowing disregard of the rights or safety of another. A person acts with knowing disregard when he or she is aware of the probable dangerous consequences of his or her conduct and deliberately fails to avoid those consequences.

"Oppression" means that [name of defendant]'s conduct was despicable and subjected [name of plaintiff] to cruel and unjust hardship in knowing disregard of [his/her] rights.

"Despicable conduct" is conduct that is so vile, base, or contemptible that it would be looked down on and despised by reasonable people.

"Fraud" means that [name of defendant] intentionally misrepresented or concealed a material fact and did so intending to harm [name of plaintiff].

New September 2003; Revised April 2004, December 2005

For an instruction explaining "clear and convincing evidence," see *CACI No. 201, More Likely True--Clear and Convincing Proof*.

In an appropriate case, the jury may be instructed that a false promise or a suggestion of a fact known to be false may constitute a misrepresentation as the word "misrepresentation" is used in the instruction's definition of "fraud."

■ *Civil Code section 3294* provides, in part:

(a) In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant. ...

(c) As used in this section, the following definitions shall apply:

(1) "Malice" means conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others.

(2) "Oppression" means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights.

(3) "Fraud" means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury.

■ *Civil Code section 3295(d)* provides: "The court shall, on application of any defendant, preclude the admission of evidence of that defendant's profits or financial condition until after the trier of fact returns a verdict for plaintiff awarding actual damages and finds that a defendant is guilty of malice, oppression, or fraud in accordance with Section 3294. Evidence of profit and financial condition shall be admissible only as to the defendant or defendants found to be liable to the plaintiff and to be guilty of malice, oppression, or fraud. Evidence of profit and financial condition shall be presented to the same trier of fact that found for the plaintiff and found one or more defendants guilty of malice, oppression, or fraud."

■ "[Section 3295(d)] affects the order of proof at trial, precluding the admission of evidence of defendants' financial condition until after the jury has returned a verdict for plaintiffs awarding actual damages and found that one or more defendants were guilty of 'oppression, fraud or malice,' in accordance with *Civil Code section 3294*." (*City of El Monte v. Superior Court* (1994) 29 Cal.App.4th 272, 274-275 [34 Cal.Rptr.2d 490] , internal citations omitted.)

■ "Evidence of the defendant's financial condition is a prerequisite to an award of punitive damages. In order to protect defendants from the premature disclosure of their financial position when punitive damages are sought, the Legislature enacted *Civil Code section 3295*." (*City of El Monte, supra*, 29 Cal.App.4th at p. 276 , internal citations omitted.)

■ "[C]ourts have held it is reversible error to try the punitive damages issue to a new jury after the jury which found liability has been excused." (*Rivera v. Sassoon* (1995) 39 Cal.App.4th 1045, 1048 [46 Cal.Rptr.2d 144] , internal citations omitted.)

■ "Malice, for purposes of awarding exemplary damages, includes 'despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others.' To establish conscious disregard, the plaintiff must show 'that the defendant was aware of the probable dangerous consequences of his conduct, and that he

wilfully and deliberately failed to avoid those consequences.' " (*Hoch v. Allied-Signal, Inc.* (1994) 24 Cal.App.4th 48, 61 [29 Cal.Rptr.2d 615] , internal citations omitted.)

■ "Used in its ordinary sense, the adjective 'despicable' is a powerful term that refers to circumstances that are 'base,' 'vile,' or 'contemptible.' As amended to include this word, the statute plainly indicates that absent an intent to injure the plaintiff, 'malice' requires more than a 'willful and conscious' disregard of the plaintiffs' interests. The additional component of 'despicable conduct' must be found." (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 725 [34 Cal.Rptr.2d 898, 882 P.2d 894] , internal citations omitted.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1559, 1562, 1572-1577, 1607-1623

California Tort Damages (Cont.Ed.Bar) Punitive Damages, §§ 14.1-14.8, 14.15-14.18, 14.23

4 Levy et al., California Torts, Ch. 54, *Punitive Damages*, §§ 54.01-54.06, 54.24[4][d] (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages* (Matthew Bender)

6 California Points and Authorities, Ch. 65, *Damages* (Matthew Bender)

Publisher's Notes

This instruction replaces BAJI No. 14.72.1.

LexisNexis Matthew Bender Expert Practice Tip--Seeking Punitive Damages: In the absence of fraud, malice is a common way for seeking punitive damages, specifically conduct done "with a willful and knowing disregard of the rights" of another. Note also that the awarding of punitive damages requires a higher standard of proof--clear and convincing evidence--but some jurors will ignore that standard. *By Ronald Oster and Rex Heeseman*

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsDamagesPunitive DamagesConduct Supporting Awards



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California Forms of Jury Instruction

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CHAPTER 39 California Judicial Council Damages Instructions

5-39 California Forms of Jury Instruction CACI 3942

CACI 3942 Punitive Damages--Individual Defendant--Bifurcated Trial (Second Phase)

You must now decide the amount, if any, that you should award [*name of plaintiff*] in punitive damages. The purposes of punitive damages are to punish a wrongdoer for the conduct that harmed the plaintiff and to discourage similar conduct in the future.

There is no fixed formula for determining the amount of punitive damages, and you are not required to award any punitive damages. If you decide to award punitive damages, you should consider all of the following factors in determining the amount:

(a) How reprehensible was [*name of defendant*]'s conduct? In deciding how reprehensible [*name of defendant*]'s conduct was, you may consider, among other factors:

- 1. Whether the conduct caused physical harm;**
- 2. Whether [*name of defendant*] disregarded the health or safety of others;**
- 3. Whether [*name of plaintiff*] was financially weak or vulnerable and [*name of defendant*] knew [*name of plaintiff*] was financially weak or vulnerable and took advantage of [him/her/it];**
- 4. Whether [*name of defendant*]'s conduct involved a pattern or practice; and**
- 5. Whether [*name of defendant*] acted with trickery or deceit.**

(b) Is there a reasonable relationship between the amount of punitive damages and [*name of plaintiff*]'s harm [or between the amount of punitive damages and potential harm to [*name of*

plaintiff] that [name of defendant] knew was likely to occur because of [his/her/its] conduct]?

(c) In view of [name of defendant]'s financial condition, what amount is necessary to punish [him/her/it] and discourage future wrongful conduct? You may not increase the punitive award above an amount that is otherwise appropriate merely because [name of defendant] has substantial financial resources. [Any award you impose may not exceed [name of defendant]'s ability to pay.]

[Punitive damages may not be used to punish [name of defendant] for the impact of [his/her/its] alleged misconduct on persons other than [name of plaintiff].]

New September 2003; Revised April 2004, October 2004, June 2006, April 2007, August 2007, October 2008

Directions for Use

Read the bracketed language at the end of the first sentence of factor (b) only if there is evidence that the conduct of defendant that allegedly gives rise to liability and punitive damages either caused or foreseeably threatened to cause harm to plaintiff that would not be included in an award of compensatory damages. (*Simon v. San Paolo U.S. Holding Co., Inc.* (2005) 35 Cal.4th 1159 [29 Cal.Rptr.3d 379, 113 P.3d 63] .) The bracketed phrase concerning "potential harm" might be appropriate, for example, if damages actually caused by the defendant's acts are not recoverable because they are barred by statute (*id.* at p. 1176 , citing *Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 929 [148 Cal.Rptr. 389, 582 P.2d 980] [in a bad faith insurance case, plaintiff died before judgment, precluding her estate's recovery of emotional distress damages]), or if the harm caused by defendant's acts could have been great but by chance only slight harm was inflicted. (*Simon, supra*, 35 Cal.4th at p. 1177 , citing *TXO Production Corp. v. Alliance Resources Corp.* (1993) 509 U.S. 443 [113 S.Ct. 2711, 125 L.Ed.2d 366] [considering the hypothetical of a person wildly firing a gun into a crowd but by chance only damaging a pair of glasses]). The bracketed phrase should not be given if an award of compensatory damages is the "true measure" of the harm or potential harm caused by defendant's wrongful acts. (*Simon, supra*, 35 Cal.4th at pp. 1178-1179 [rejecting consideration for purposes of assessing punitive damages of the plaintiff's loss of the benefit of the bargain if the jury had found that there was no binding contract]).

Read the optional final sentence of factor (c) only if the defendant has presented relevant evidence regarding that issue.

Read the optional final sentence if there is a possibility that in arriving at an amount of punitive damages, the jury might consider harm that the defendant's conduct may have caused to nonparties. (See *Philip Morris USA v. Williams* (2007) 549 U.S. 346, ___ [127 S.Ct. 1057, 166 L.Ed.2d 940, 2007 U.S. LEXIS 1332, *13] .) Harm to others may be relevant to determining reprehensibility based on factors (a)(2) (disregard of health or safety of others) and (a)(4) (pattern or practice). (See *State Farm Mutual Automobile Insurance Co. v. Campbell* (2003) 538 U.S. 408, 419 [123 S.Ct. 1513, 155 L.Ed.2d 585] .)

"A jury must be instructed ... that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred." (*State Farm Mutual Automobile Insurance Co., supra*, 538 U.S. at p. 422 .) An instruction on this point should be included within this instruction if appropriate to the facts.

Courts have stated that "[p]unitive damages previously imposed for the same conduct are relevant in determining the amount of punitive damages required to sufficiently punish and deter. The likelihood of

future punitive damage awards may also be considered, although it is entitled to considerably less weight." (*Stevens v. Owens-Corning Fiberglas Corp.* (1996) 49 Cal.App.4th 1645, 1661 [57 Cal.Rptr.2d 525] , internal citations omitted.) The court in *Stevens* suggested that the following instruction be given if evidence of other punitive damage awards is introduced into evidence:

If you determine that a defendant has already been assessed with punitive damages based on the same conduct for which punitive damages are requested in this case, you may consider whether punitive damages awarded in other cases have sufficiently punished and made an example of the defendant. You must not use the amount of punitive damages awarded in other cases to determine the amount of the punitive damage award in this case, except to the extent you determine that a lesser award, or no award at all, is justified in light of the penalties already imposed. (*Stevens, supra*, 49 Cal.App.4th at p. 1663, fn. 7 .)

Sources and Authority

- *Civil Code* section 3294 provides, in part: "In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant."

- *Civil Code* section 3295(d) provides: "The court shall, on application of any defendant, preclude the admission of evidence of that defendant's profits or financial condition until after the trier of fact returns a verdict for plaintiff awarding actual damages and finds that a defendant is guilty of malice, oppression, or fraud in accordance with Section 3294. Evidence of profit and financial condition shall be admissible only as to the defendant or defendants found to be liable to the plaintiff and to be guilty of malice, oppression, or fraud. Evidence of profit and financial condition shall be presented to the same trier of fact that found for the plaintiff and found one or more defendants guilty of malice, oppression, or fraud."

- "[Section 3295(d)] affects the order of proof at trial, precluding the admission of evidence of defendants' financial condition until after the jury has returned a verdict for plaintiffs awarding actual damages and found that one or more defendants were guilty of 'oppression, fraud or malice,' in accordance with *Civil Code* section 3294." (*City of El Monte v. Superior Court* (1994) 29 Cal.App.4th 272, 274-275 [34 Cal.Rptr.2d 490] , internal citations omitted.)

- "Evidence of the defendant's financial condition is a prerequisite to an award of punitive damages. In order to protect defendants from the premature disclosure of their financial position when punitive damages are sought, the Legislature enacted *Civil Code* section 3295." (*City of El Monte, supra*, 29 Cal.App.4th at p. 276 , internal citations omitted.)

- "[C]ourts have held it is reversible error to try the punitive damages issue to a new jury after the jury which found liability has been excused." (*Rivera v. Sassoon* (1995) 39 Cal.App.4th 1045, 1048 [46 Cal.Rptr.2d 144] , internal citations omitted.)

- "The purpose of punitive damages is to punish wrongdoers and thereby deter the commission of wrongful acts." (*Neal, supra*, 21 Cal.3d at p. 928, fn. 13 .)

- "Punitive damages are to be assessed in an amount which, depending upon the defendant's financial worth and other factors, will deter him and others from committing similar misdeeds. Because

compensatory damages are designed to make the plaintiff 'whole,' punitive damages are a 'windfall' form of recovery." (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 712 [34 Cal.Rptr.2d 898, 882 P.2d 894] , internal citations omitted.)

■ "It follows that the wealthier the wrongdoing defendant, the larger the award of exemplary damages need be in order to accomplish the statutory objective." (*Bertero v. National General Corp.* (1974) 13 Cal.3d 43, 65 [118 Cal.Rptr. 184, 529 P.2d 608] .)

■ "'A plaintiff, upon establishing his case, is always entitled of right to compensatory damages. But even after establishing a case where punitive damages are permissible, he is never entitled to them. The granting or withholding of the award of punitive damages is wholly within the control of the jury, and may not legally be influenced by any direction of the court that in any case a plaintiff is entitled to them. Upon the clearest proof of malice in fact, it is still the exclusive province of the jury to say whether or not punitive damages shall be awarded. A plaintiff is entitled to such damages only after the jury, in the exercise of its untrammelled discretion, has made the award.'" (*Brewer v. Second Baptist Church of Los Angeles* (1948) 32 Cal.2d 791, 801 [197 P.2d 713] , internal citation omitted.)

■ "In light of our holding that evidence of a defendant's financial condition is essential to support an award of punitive damages, *Evidence Code* section 500 mandates that the plaintiff bear the burden of proof on the issue. A plaintiff seeking punitive damages is not seeking a mere declaration by the jury that he is entitled to punitive damages in the abstract. The plaintiff is seeking an award of real money in a specific amount to be set by the jury. Because the award, whatever its amount, cannot be sustained absent evidence of the defendant's financial condition, such evidence is 'essential to the claim for relief.'" (*Adams v. Murakami* (1991) 54 Cal.3d 105, 119 [284 Cal.Rptr. 318, 813 P.2d 1348] , internal citation omitted.)

■ "[W]e are afforded guidance by certain established principles, all of which are grounded in the purpose and function of punitive damages. One factor is the particular nature of the defendant's acts in light of the whole record; clearly, different acts may be of varying degrees of reprehensibility, and the more reprehensible the act, the greater the appropriate punishment, assuming all other factors are equal. Another relevant yardstick is the amount of compensatory damages awarded; in general, even an act of considerable reprehensibility will not be seen to justify a proportionally high amount of punitive damages if the actual harm suffered thereby is small. Also to be considered is the wealth of the particular defendant; obviously, the function of deterrence will not be served if the wealth of the defendant allows him to absorb the award with little or no discomfort. By the same token, of course, the function of punitive damages is not served by an award which, in light of the defendant's wealth and the gravity of the particular act, exceeds the level necessary to properly punish and deter." (*Neal, supra*, 21 Cal.3d at p. 928 , internal citations and footnote omitted.)

■ "[T]he Constitution's Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent, i.e., injury that it inflicts upon those who are, essentially, strangers to the litigation." (*Philip Morris USA, supra*, 549 U.S. at p. ____ [2007 U.S. LEXIS 1332, *13] .)

■ "Evidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible--although counsel may argue in a particular case that conduct resulting in no harm to others nonetheless posed a grave risk to the public, or the converse. Yet for the reasons given above, a jury may not go further than this and use a punitive damages verdict to punish a defendant directly on account of harms it is alleged to have visited on nonparties." (*Philip Morris USA, supra*, 549 U.S. at p.

___ [2007 U.S. LEXIS 1332, *16] .)

■ "[A] specific instruction encompassing both the permitted and prohibited uses of evidence of harm caused to others would be appropriate in the new trial if requested by the parties. We believe that an instruction on these issues should clearly distinguish between the permitted and prohibited uses of such evidence and thus make clear to the jury the purposes for which it can and cannot consider that evidence. A jury may consider evidence of harm caused to others for the purpose of determining the degree of reprehensibility of a defendant's conduct toward the plaintiff in deciding the amount of punitive damages, but it may not consider that evidence for the purpose of punishing the defendant directly for harm caused to others. In our view, Judicial Council of California Civil Jury Instructions (Aug. 2007 rev.) CACI Nos. 3940, 3942, 3943, 3945, 3947, and 3949 could convey this distinction better by stating more explicitly that evidence of harm caused to others may be considered for the one purpose but not for the other, and by providing that explanation together with the reprehensibility factors rather than in connection with the reasonable relationship issue." (*Bullock v. Philip Morris USA, Inc.* (2008) 159 Cal.App.4th 655, 695, fn. 21 [71 Cal.Rptr.3d 775] , internal citation omitted.)

■ " '[T]he most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct.' We have instructed courts to determine the reprehensibility of a defendant by considering whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident. The existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect." (*State Farm Mutual Automobile Insurance Co.*, *supra*, 538 U.S. at p. 419 , internal citation omitted.)

■ "[W]e have been reluctant to identify concrete constitutional limits on the ratio between harm, or potential harm, to the plaintiff and the punitive damages award. We decline again to impose a bright-line ratio which a punitive damages award cannot exceed. Our jurisprudence and the principles it has now established demonstrate, however, that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process. ... [A]n award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety. ... While these ratios are not binding, they are instructive. They demonstrate what should be obvious: Single-digit multipliers are more likely to comport with due process, while still achieving the State's goals of deterrence and retribution, than awards with ratios in range of 500 to 1" (*State Farm Mutual Automobile Insurance Co.*, *supra*, 538 U.S. at pp. 424-425 , internal citation omitted.)

■ "Nonetheless, because there are no rigid benchmarks that a punitive damages award may not surpass, ratios greater than those we have previously upheld may comport with due process where 'a particularly egregious act has resulted in only a small amount of economic damages.' The converse is also true, however. When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee. The precise award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff." (*State Farm Mutual Automobile Insurance Co.*, *supra*, 538 U.S. at p. 425 , internal citation omitted.)

■ "The decision to award punitive damages is exclusively the function of the trier of fact. So too is the amount of any punitive damage award. The relevant considerations are the nature of the defendant's conduct, the defendant's wealth, and the plaintiff's actual damages." (*Gagnon v. Continental Casualty Co.* (1989) 211 Cal.App.3d 1598, 1602 [260 Cal.Rptr. 305] , internal citations omitted.)

- "The wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award." (*State Farm Mutual Automobile Insurance Co.*, *supra*, 538 U.S. at p. 427 , internal citation omitted.)
- "[T]he purpose of punitive damages is not served by financially destroying a defendant. The purpose is to deter, not to destroy." (*Adams*, *supra*, 54 Cal.3d at p. 112 .)
- "[A] punitive damages award is excessive if it is disproportionate to the defendant's ability to pay." (*Adams*, *supra*, 54 Cal.3d at p. 112 , internal citations omitted.)
- "It has been recognized that punitive damages awards generally are not permitted to exceed 10 percent of the defendant's net worth." (*Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1166 [74 Cal.Rptr.2d 510] .)
- "In light of our discussion, we conclude that even where, as here, punitive but not compensatory damages are available to the plaintiff, the defendant is entitled to an instruction that punitive damages must bear a reasonable relation to the injury, harm, or damage actually suffered by the plaintiff and proved at trial. Consequently, the trial court erred in failing to so instruct the jury." (*Gagnon*, *supra*, 211 Cal.App.3d at p. 1605 .)
- "We conclude that the rule ... that an award of exemplary damages must be accompanied by an award of compensatory damages [or its equivalent] is still sound. That rule cannot be deemed satisfied where the jury has made an express determination not to award compensatory damages." (*Cheung v. Daley* (1995) 35 Cal.App.4th 1673, 1677 [42 Cal.Rptr.2d 164] , footnote omitted.)
- "With the focus on the plaintiff's injury rather than the amount of compensatory damages, the ['reasonable relation'] rule can be applied even in cases where only equitable relief is obtained or where nominal damages are awarded or, as here, where compensatory damages are unavailable." (*Gagnon*, *supra*, 211 Cal.App.3d at p. 1605 .)
- "The high court in *TXO* [*TXO Production Corp.*, *supra*] and *BMW* [*BMW of North America, Inc. v. Gore* (1996) 517 U.S. 559 [116 S.Ct. 1589, 134 L.Ed.2d 809]] has refined the disparity analysis to take into account the *potential* loss to plaintiffs, as where a scheme worthy of punitive damages does not fully succeed. In such cases, the proper ratio would be the ratio of punitive damages to the potential harm to plaintiff." (*Sierra Club Found. v. Graham* (1999) 72 Cal.App.4th 1135, 1162, *fn. 15* [85 Cal.Rptr.2d 726] , original italics.)

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6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1559, 1562, 1572-1577, 1607-1623

California Tort Damages (Cont.Ed.Bar 2d ed.) Punitive Damages, §§ 14.1-14.12, 14.37-14.39

4 Levy et al., *California Torts*, Ch. 54, *Punitive Damages*, §§ 54.20 -54.25 (Matthew Bender)

15 *California Forms of Pleading and Practice*, Ch. 177, *Damages*, § 177.51 (Matthew Bender)

6 *California Points and Authorities*, Ch. 64, *Damages: Torts*, §§ 64.141 et seq., 64.174 et seq. (Matthew Bender)

Publisher's Notes

This instruction replaces BAJI No. 14.72.2, and covers issues presented in BAJI No. 14.71.2.

LexisNexis Matthew Bender Expert Practice Tip--Use *State Farm* Guideposts: In *State Farm Mutual Automobile Ins. Co. v. Campbell* (2003) 538 U.S. 408 [123 S. Ct. 1513, 155 L. Ed. 2d 585], the U.S. Supreme Court provided new guideposts for courts to review punitive damages awards, including a discussion of specific permissible ratios between punitive and compensatory damages. *By Ronald Oster*

In *Diamond Woodworks, Inc. v. Argonaut Ins. Co.* (2003) 109 Cal.App.4th 1020 [135 Cal.Rptr.2d 736], the court looked to *State Farm Mutual Automobile Insurance Co. v. Campbell* (2003) 538 U.S. 408 [123 S.Ct. 1513, 155 L.Ed.2d 585], stating: "Further explicating guidelines for due process proportionality, the [*Campbell*] court noted facts and circumstances may call for a ratio either exceeding or falling below the norm. It suggested a ratio perhaps only equal to compensatory damages might reach the outermost limit of the due process guarantee when compensatory damages are substantial. Additionally observing the wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award, the *Campbell* court cautioned the courts of the need to ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered." (*Diamond Woodworks, Inc. v. Argonaut Ins. Co.* (2003) 109 Cal.App.4th 1020, 1055-1056 [135 Cal.Rptr.2d 736] .)

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsDamagesPunitive DamagesGeneral OverviewTortsDamagesPunitive DamagesAward CalculationsGeneral OverviewTortsDamagesPunitive DamagesAward CalculationsFactorsTortsDamagesPunitive DamagesConduct Supporting Awards



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California Forms of Jury Instruction

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CHAPTER 39 California Judicial Council Damages Instructions

5-39 California Forms of Jury Instruction CACI 3943

CACI 3943 Punitive Damages Against Employer or Principal for Conduct of a Specific Agent or Employee--Trial Not Bifurcated

If you decide that [name of employee/agent]'s conduct caused [name of plaintiff] harm, you must decide whether that conduct justifies an award of punitive damages against [name of defendant] for [name of employee/agent]'s conduct. The purposes of punitive damages are to punish a wrongdoer for the conduct that harmed the plaintiff and to discourage similar conduct in the future.

You may award punitive damages against [name of defendant] for [name of employee/agent]'s conduct only if [name of plaintiff] proves by clear and convincing evidence that [name of employee/agent] engaged in that conduct with malice, oppression, or fraud.

"Malice" means that [name of employee/agent] acted with intent to cause injury or that [name of employee/agent]'s conduct was despicable and was done with a willful and knowing disregard of the rights or safety of another. A person acts with knowing disregard when he or she is aware of the probable dangerous consequences of his or her conduct and deliberately fails to avoid those consequences.

"Oppression" means that [name of employee/agent]'s conduct was despicable and subjected [name of plaintiff] to cruel and unjust hardship in knowing disregard of [his/her] rights.

"Despicable conduct" is conduct that is so vile, base, or contemptible that it would be looked down on and despised by reasonable people.

"Fraud" means that [name of employee/agent] intentionally misrepresented or concealed a material fact and did so intending to harm [name of plaintiff].

[Name of plaintiff] must also prove [one of] the following by clear and convincing evidence:

1. [That [*name of employee/agent*] was an officer, a director, or a managing agent of [*name of defendant*], who was acting on behalf of [*name of defendant*]; [or]]
2. [That an officer, a director, or a managing agent of [*name of defendant*] had advance knowledge of the unfitness of [*name of employee/agent*] and employed [him/her] with a knowing disregard of the rights or safety of others; [or]]
3. [That an officer, a director, or a managing agent of [*name of defendant*] authorized [*name of employee/agent*]'s conduct; [or]]
4. [That an officer, a director, or a managing agent of [*name of defendant*] knew of [*name of employee/agent*]'s wrongful conduct and adopted or approved the conduct after it occurred.]

An employee is a "managing agent" if he or she exercises substantial independent authority and judgment in his or her corporate decisionmaking such that his or her decisions ultimately determine corporate policy.

There is no fixed formula for determining the amount of punitive damages, and you are not required to award any punitive damages. If you decide to award punitive damages, you should consider all of the following factors in determining the amount:

(a) How reprehensible was [*name of defendant*]'s conduct? In deciding how reprehensible [*name of defendant*]'s conduct was, you may consider, among other factors:

1. Whether the conduct caused physical harm;
2. Whether [*name of defendant*] disregarded the health or safety of others;
3. Whether [name of plaintiff] was financially weak or vulnerable and [*name of defendant*] knew [*name of plaintiff*] was financially weak or vulnerable and took advantage of [him/her/it];
4. Whether [*name of defendant*]'s conduct involved a pattern or practice; and
5. Whether [*name of defendant*] acted with trickery or deceit.

(b) Is there a reasonable relationship between the amount of punitive damages and [*name of plaintiff*]'s harm [or between the amount of punitive damages and potential harm to [*name of plaintiff*] that [*name of defendant*] knew was likely to occur because of [his/her/its] conduct]?

(c) In view of [*name of defendant*]'s financial condition, what amount is necessary to punish [him/her/it] and discourage future wrongful conduct? You may not increase the punitive award above an amount that is otherwise appropriate merely because [*name of defendant*] has substantial financial resources. [Any award you impose may not exceed [*name of defendant*]'s ability to pay.]

[Punitive damages may not be used to punish [*name of defendant*] for the impact of [his/her/its] alleged misconduct on persons other than [*name of plaintiff*].]

August 2007, October 2008

Directions for Use

This instruction is intended for use when the plaintiff is seeking to hold only an employer or principal liable for punitive damages based on the conduct of a specific employee or agent. When the plaintiff is seeking punitive damages from both the employer/principal and the employee/agent, use *CACI No. 3947, Punitive Damages--Individual and Entity Defendants--Trial Not Bifurcated*. When punitive damages are sought against a corporation or other entity for the conduct of its directors, officers, or managing agents, use *CACI No. 3945, Punitive Damages --Entity Defendant-- Trial Not Bifurcated*.

For an instruction explaining "clear and convincing evidence," see *CACI No. 201, More Likely True--Clear and Convincing Proof*.

Read the bracketed language at the end of the first sentence of factor (b) only if there is evidence that the conduct of defendant that allegedly gives rise to liability and punitive damages either caused or foreseeably threatened to cause harm to plaintiff that would not be included in an award of compensatory damages. (*Simon v. San Paolo U.S. Holding Co., Inc.* (2005) 35 Cal.4th 1159 [29 Cal.Rptr.3d 379, 113 P.3d 63] .) The bracketed phrase concerning "potential harm" might be appropriate, for example, if damages actually caused by the defendant's acts are not recoverable because they are barred by statute (*id.* at p. 1176 , citing *Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 929 [148 Cal.Rptr. 389, 582 P.2d 980] [in a bad faith insurance case, plaintiff died before judgment, precluding her estate's recovery of emotional distress damages]), or if the harm caused by defendant's acts could have been great but by chance only slight harm was inflicted. (*Simon, supra*, 35 Cal.4th at p. 1177 , citing *TXO Production Corp. v. Alliance Resources Corp.* (1993) 509 U.S. 443, 459 [113 S.Ct. 2711, 125 L.Ed.2d 366] [considering the hypothetical of a person wildly firing a gun into a crowd but by chance only damaging a pair of glasses].) The bracketed phrase should not be given if an award of compensatory damages is the "true measure" of the harm or potential harm caused by defendant's wrongful acts. (*Simon, supra*, 35 Cal.4th at pp. 1178-1179 [rejecting consideration for purposes of assessing punitive damages of the plaintiff's loss of the benefit of the bargain if the jury had found that there was no binding contract].)

Read the optional final sentence of factor (c) only if the defendant has presented relevant evidence regarding that issue.

Read the optional final sentence if there is a possibility that in arriving at an amount of punitive damages, the jury might consider harm that the defendant's conduct may have caused to nonparties. (See *Philip Morris USA v. Williams* (2007) 549 U.S. 346, ___ [127 S.Ct. 1057, 166 L.Ed.2d 940, 2007 U.S. LEXIS 1332, *13] .) Harm to others may be relevant to determining reprehensibility based on factors (a)(2) (disregard of health or safety of others) and (a)(4) (pattern or practice). (See *State Farm Mutual Automobile Insurance Co. v. Campbell* (2003) 538 U.S. 408, 419 [123 S.Ct. 1513, 155 L.Ed.2d 585] .)

If any of the alternative grounds for seeking punitive damages are inapplicable to the facts of the case, they may be omitted.

"A jury must be instructed ... that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred." (*State Farm Mutual Automobile Insurance Co., supra*, 538 U.S. at p. 422 .) An instruction on this point should be included within this instruction if appropriate to the facts.

In an appropriate case, the jury may be instructed that a false promise or a suggestion of a fact known to

be false may constitute a misrepresentation as the word "misrepresentation" is used in the instruction's definition of "fraud."

See CACI No. 3940, *Punitive Damages --Individual Defendant-- Trial Not Bifurcated*, for additional sources and authority.

Courts have stated that "[p]unitive damages previously imposed for the same conduct are relevant in determining the amount of punitive damages required to sufficiently punish and deter. The likelihood of future punitive damage awards may also be considered, although it is entitled to considerably less weight." (*Stevens v. Owens-Corning Fiberglas Corp.* (1996) 49 Cal.App.4th 1645, 1661 [57 Cal.Rptr.2d 525] , internal citations omitted.) The court in *Stevens* suggested that the following instruction be given if evidence of other punitive damage awards is introduced into evidence:

If you determine that a defendant has already been assessed with punitive damages based on the same conduct for which punitive damages are requested in this case, you may consider whether punitive damages awarded in other cases have sufficiently punished and made an example of the defendant. You must not use the amount of punitive damages awarded in other cases to determine the amount of the punitive damage award in this case, except to the extent you determine that a lesser award, or no award at all, is justified in light of the penalties already imposed. (*Stevens, supra*, 49 Cal.App.4th at p. 1663, fn. 7 .)

Sources and Authority

■ *Civil Code section 3294* provides, in part:

(a) In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant.

(b) An employer shall not be liable for damages pursuant to subdivision (a), based upon acts of an employee of the employer, unless the employer had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of others or authorized or ratified the wrongful conduct for which the damages are awarded or was personally guilty of oppression, fraud, or malice. With respect to a corporate employer, the advance knowledge and conscious disregard, authorization, ratification or act of oppression, fraud, or malice must be on the part of an officer, director, or managing agent of the corporation.

(c) As used in this section, the following definitions shall apply:

(1) "Malice" means conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others.

(2) "Oppression" means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights.

(3) "Fraud" means an intentional misrepresentation, deceit, or concealment of a material

fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury.

■ "[E]vidence of ratification of [agent's] actions by Hamilton, and any other findings made under *Civil Code* section 3294, subdivision (b), must be made by clear and convincing evidence." (*Barton v. Alexander Hamilton Life Ins. Co. of America* (2003) 110 Cal.App.4th 1640, 1644 [3 Cal.Rptr.3d 258] .)

■ "Subdivision (b) is not a model of clarity, but in light of California's history of employer liability for punitive damages and of the Legislature's reasons for enacting subdivision (b), we have no doubt that it does no more than codify and refine existing law. Subdivision (b) thus authorizes the imposition of punitive damages on an employer in three situations: (1) when an employee was guilty of oppression, fraud or malice, and the employer with advance knowledge of the unfitness of the employee employed him or her with a conscious disregard of the rights or safety of others, (2) when an employee was guilty of oppression, fraud or malice, and the employer authorized or ratified the wrongful conduct, or (3) when the employer was itself guilty of the oppression, fraud or malice." (*Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1151 [74 Cal.Rptr.2d 510] .)

■ "'California has traditionally allowed punitive damages to be assessed against an employer (or principal) for the acts of an employee (or agent) only where the circumstances indicate that the employer himself was guilty of fraud, oppression, or malice. Thus, even before section 3294, subdivision (b) was added to the Civil Code in 1980, the courts required evidence that the employer authorized or ratified a malicious act, personally committed such an act, or wrongfully hired or retained an unfit employee.' The 'additional' burden on a plaintiff seeking punitive damages from an employer is to show not only that an employee acted with oppression, fraud or malice, but that the employer engaged in conduct defined in subdivision (b).'" (*Weeks, supra*, 63 Cal.App.4th at p. 1154 , internal citation omitted.)

■ "*Civil Code* section 3294, subdivision (b) does not authorize an award of punitive damages against an employer for the employee's wrongful conduct. It authorizes an award of punitive damages against an employer for the employer's own wrongful conduct. Liability under subdivision (b) is vicarious only to the extent that the employer is liable for the actions of its officer, director or managing agent in hiring or controlling the offending employee, in ratifying the offense or in acting with oppression, fraud or malice. It is not vicarious in the sense that the employer is liable for the wrongful conduct of the offending employee." (*Weeks, supra*, 63 Cal.App.4th at pp. 1154-1155 .)

■ "An award of punitive damages is not supported by a verdict based on breach of contract, even where the defendant's conduct in breaching the contract was wilful, fraudulent, or malicious. Even in those cases in which a separate tort action is alleged, if there is 'but one verdict based upon contract' a punitive damage award is improper." (*Myers Building Industries, Ltd. v. Interface Technology, Inc.* (1993) 13 Cal.App.4th 949, 960 [17 Cal.Rptr.2d 242] , internal citations omitted.)

■ "'[T]he most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct.' We have instructed courts to determine the reprehensibility of a defendant by considering whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident. The existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect." (*State Farm Mutual Automobile Insurance Co., supra*, 538 U.S. at p. 419 , internal citation omitted.)

■ "[W]e have been reluctant to identify concrete constitutional limits on the ratio between harm, or potential harm, to the plaintiff and the punitive damages award. We decline again to impose a bright-line ratio which a punitive damages award cannot exceed. Our jurisprudence and the principles it has now established demonstrate, however, that, in

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practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process. ... [A]n award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety. ... While these ratios are not binding, they are instructive. They demonstrate what should be obvious: Single-digit multipliers are more likely to comport with due process, while still achieving the State's goals of deterrence and retribution, than awards with ratios in range of 500 to 1" (*State Farm Mutual Automobile Insurance Co.*, *supra*, 538 U.S. at pp. 424-425 , internal citation omitted.)

■ "Nonetheless, because there are no rigid benchmarks that a punitive damages award may not surpass, ratios greater than those we have previously upheld may comport with due process where 'a particularly egregious act has resulted in only a small amount of economic damages.' The converse is also true, however. When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee. The precise award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff." (*State Farm Mutual Automobile Insurance Co.*, *supra*, 538 U.S. at p. 425 , internal citation omitted.)

■ "[T]he Constitution's Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent, i.e., injury that it inflicts upon those who are, essentially, strangers to the litigation." (*Philip Morris USA*, *supra*, 549 U.S. at p. ____ [2007 U.S. LEXIS 1332, *13] .)

■ "Evidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible--although counsel may argue in a particular case that conduct resulting in no harm to others nonetheless posed a grave risk to the public, or the converse. Yet for the reasons given above, a jury may not go further than this and use a punitive damages verdict to punish a defendant directly on account of harms it is alleged to have visited on nonparties." (*Philip Morris USA*, *supra*, 549 U.S. at p. ____ [2007 U.S. LEXIS 1332, *16] .)

■ "[A] specific instruction encompassing both the permitted and prohibited uses of evidence of harm caused to others would be appropriate in the new trial if requested by the parties. We believe that an instruction on these issues should clearly distinguish between the permitted and prohibited uses of such evidence and thus make clear to the jury the purposes for which it can and cannot consider that evidence. A jury may consider evidence of harm caused to others for the purpose of determining the degree of reprehensibility of a defendant's conduct toward the plaintiff in deciding the amount of punitive damages, but it may not consider that evidence for the purpose of punishing the defendant directly for harm caused to others. In our view, Judicial Council of California Civil Jury Instructions (Aug. 2007 rev.) CACI Nos. 3940, 3942, 3943, 3945, 3947, and 3949 could convey this distinction better by stating more explicitly that evidence of harm caused to others may be considered for the one purpose but not for the other, and by providing that explanation together with the reprehensibility factors rather than in connection with the reasonable relationship issue." (*Bullock v. Philip Morris USA, Inc.* (2008) 159 Cal.App.4th 655, 695, fn. 21 [71 Cal.Rptr.3d 775] , internal citation omitted.)

■ "[P]unitive damages are not assessed against employers on a pure respondeat superior basis. Some evidence of fault by the employer itself is also required." (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 724, fn. 11 [34 Cal.Rptr.2d 898, 882 P.2d 894] .)

■ "Subdivision (b) ... governs awards of punitive damages against employers, and permits an award for the conduct described there without an additional finding that the employer engaged in oppression, fraud or malice." (*Weeks*, *supra*, 63 Cal.App.4th at p. 1137 .)

■ "Section 3294 is no longer silent on who may be responsible for imputing punitive damages to a corporate employer. For corporate punitive damages liability, section 3294, subdivision (b), requires that the wrongful act giving

rise to the exemplary damages be committed by an 'officer, director, or managing agent.' " (*White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 572 [88 Cal.Rptr.2d 19, 981 P.2d 944] .)

■ "[I]n performing, ratifying, or approving the malicious conduct, the agent must be acting as the organization's representative, not in some other capacity." (*College Hospital, Inc., supra*, 8 Cal.4th at p. 723 .)

■ The concept of "managing agent" "assumes that such individual was acting in a corporate or employment capacity when the conduct giving rise to the punitive damages claim against the employer occurred." (*College Hospital, Inc., supra*, 8 Cal.4th at p. 723 .)

■ "No purpose would be served by punishing the employer for an employee's conduct that is wholly unrelated to its business or to the employee's duties therein." (*College Hospital, Inc., supra*, 8 Cal.4th at pp. 723-724 .)

■ " 'The determination whether employees act in a managerial capacity [i.e., are managing agents] does not necessarily hinge on their "level" in the corporate hierarchy. Rather, the critical inquiry is the degree of discretion the employees possess in making decisions that will ultimately determine corporate policy.' " (*Kelly-Zurian v. Wohl Shoe Co., Inc.* (1994) 22 Cal.App.4th 397, 421 [27 Cal.Rptr.2d 457] , internal citation omitted.)

■ "[W]e conclude the Legislature intended the term 'managing agent' to include only those corporate employees who exercise substantial independent authority and judgment in their corporate decisionmaking so that their decisions ultimately determine corporate policy. The scope of a corporate employee's discretion and authority under our test is therefore a question of fact for decision on a case-by-case basis." (*White, supra*, 21 Cal.4th at pp. 566-567 .)

■ "In order to demonstrate that an employee is a true managing agent under section 3294, subdivision (b), a plaintiff seeking punitive damages would have to show that the employee exercised substantial discretionary authority over significant aspects of a corporation's business." (*White, supra*, 21 Cal.4th at p. 577 .)

■ " '[C]orporate policy' is the general principles which guide a corporation, or rules intended to be followed consistently over time in corporate operations. A 'managing agent' is one with substantial authority over decisions that set these general principles and rules." (*Cruz v. Homebase* (2000) 83 Cal.App.4th 160, 167-168 [99 Cal.Rptr.2d 435] .)

■ " '[R]atification' is the '[c]onfirmation and acceptance of a previous act.' A corporation cannot confirm and accept that which it does not actually know about." (*Cruz, supra*, 83 Cal.App.4th at p. 168 , internal citations omitted.)

■ "For purposes of determining an employer's liability for punitive damages, ratification generally occurs where, under the particular circumstances, the employer demonstrates an intent to adopt or approve oppressive, fraudulent, or malicious behavior by an employee in the performance of his job duties." (*College Hospital, Inc., supra*, 8 Cal.4th at p. 726 .)

■ "Corporate ratification in the punitive damages context requires actual knowledge of the conduct and its outrageous nature." (*College Hospital, Inc., supra*, 8 Cal.4th at p. 726 .)

■ "The high court in *TXO* [*TXO Production Corp., supra*] and *BMW* [*BMW of North America, Inc. v. Gore* (1996) 517 U.S. 559 [116 S.Ct. 1589, 134 L.Ed.2d 809]] has refined the disparity analysis to take into account the *potential* loss to plaintiffs, as where a scheme worthy of punitive damages does not fully succeed. In such cases, the proper ratio would be the ratio of punitive damages to the potential harm to plaintiff." (*Sierra Club Found. v. Graham* (1999) 72 Cal.App.4th 1135, 1162, fn. 15 [85 Cal.Rptr.2d 726] , original italics.)

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6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1581-1585

California Tort Damages (Cont.Ed.Bar 2d ed.) Punitive Damages, §§ 14.1-14.12, 14.20-14.23, 14.39

4 Levy et al., *California Torts*, Ch. 54, *Punitive Damages*, § 54.07 (Matthew Bender)

15 *California Forms of Pleading and Practice*, Ch. 177, *Damages*, § 177.51 (Matthew Bender)

6 *California Points and Authorities*, Ch. 64, *Damages: Torts*, §§ 64.141 et seq., 64.174 et seq. (Matthew Bender)

Publisher's Notes

This instruction covers issues presented in BAJI Nos. 14.71.2, 14.73.

LexisNexis Matthew Bender Expert Practice Tip--Corporate Liability for Punitive Damages/Use *State Farm* Guideposts: This complicated instruction combines several legal concepts. Note that defendants almost always request a bifurcated trial on punitive damages (so that financial information will not be introduced unless and until the jury finds fraud, malice, or oppression).

In most commercial cases, the liability of a corporation is predicated on the fact that the conduct in question was committed by an officer, director, or managing agent, or alternatively, that the conduct was ratified or approved by the corporation after it occurred. Plaintiff's counsel must be careful to introduce evidence on these points to pursue a punitive claim (e.g., evidence that the corporation accepted the benefits of the conduct or refused to reverse the decision would support ratification).

In *Diamond Woodworks, Inc. v. Argonaut Ins. Co.* (2003) 109 Cal.App.4th 1020 [135 Cal.Rptr.2d 736] , the court looked to *State Farm Mutual Automobile Insurance Co. v. Campbell* (2003) 538 U.S. 408 [123 S.Ct. 1513, 155 L.Ed.2d 585] , stating: "Further explicating guidelines for due process proportionality, the [*Campbell*] court noted facts and circumstances may call for a ratio either exceeding or falling below the norm. It suggested a ratio perhaps only equal to compensatory damages might reach the outermost limit of the due process guarantee when compensatory damages are substantial. Additionally observing the wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award, the *Campbell* court cautioned the courts of the need to ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered." (*Diamond Woodworks, Inc. v. Argonaut Ins. Co.* (2003) 109 Cal.App.4th 1020, 1055-1056 [135 Cal.Rptr.2d 736] .)

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate Law Agency Relationships Causes of Action & Remedies Punitive Damages Torts Damages Punitive Damages Availability Corporations Torts Damages Punitive Damages Availability Employers Torts Damages Punitive Damages Award Calculations Factors Torts Damages Punitive Damages Conduct Supporting Awards



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California Forms of Jury Instruction

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CHAPTER 39 California Judicial Council Damages Instructions

5-39 California Forms of Jury Instruction CACI 3944

CACI 3944 Punitive Damages Against Employer or Principal for Conduct of a Specific Agent or Employee--Bifurcated Trial (First Phase)

If you decide that [name of employee/agent]'s conduct caused [name of plaintiff] harm, you must decide whether that conduct justifies an award of punitive damages against [name of defendant] for [name of employee/agent]'s conduct. At this time, you must decide whether [name of plaintiff] has proved by clear and convincing evidence that [name of employee/agent] engaged in that conduct with malice, oppression, or fraud. The amount of punitive damages, if any, will be decided later.

"Malice" means that [name of employee/agent] acted with intent to cause injury or that [name of employee/agent]'s conduct was despicable and was done with a willful and knowing disregard of the rights or safety of another. A person acts with knowing disregard when he or she is aware of the probable dangerous consequences of his or her conduct and deliberately fails to avoid those consequences.

"Oppression" means that [name of employee/agent]'s conduct was despicable and subjected [name of plaintiff] to cruel and unjust hardship in knowing disregard of [his/her] rights.

"Despicable conduct" is conduct that is so vile, base, or contemptible that it would be looked down on and despised by reasonable people.

"Fraud" means that [name of employee/agent] intentionally misrepresented or concealed a material fact and did so intending to harm [name of plaintiff].

[Name of plaintiff] must also prove [one of] the following by clear and convincing evidence:

- 1. [That [name of employee/agent] was an officer, a director, or a managing agent of [name of defendant] who was acting on behalf of [name of defendant]; [or]]**

2. [That an officer, a director, or a managing agent of [name of defendant] had advance knowledge of the unfitness of [name of employee/agent] and employed [him/her] with a knowing disregard of the rights or safety of others; [or]]

3. [That an officer, a director, or a managing agent of [name of defendant] authorized [name of employee/agent]'s conduct; [or]]

4. [That an officer, a director, or a managing agent of [name of defendant] knew of [name of employee/agent]'s wrongful conduct and adopted or approved the conduct after it occurred.]

An employee is a "managing agent" if he or she exercises substantial independent authority and judgment in his or her corporate decision making such that his or her decisions ultimately determine corporate policy.

New September 2003; Revised April 2004, December 2005

CACI No. 3942, Punitive Damages --Individual Defendant-- Bifurcated Trial (Second Phase) may be used for the second phase of a bifurcated trial.

This instruction is intended for use when the plaintiff is seeking to hold only an employer or principal liable for punitive damages based on the conduct of a specific employee or agent. When the plaintiff is seeking punitive damages from both the employer/principal and the employee/agent, use *CACI No. 3948, Punitive Damages--Individual and Corporate Defendants (Corporate Liability Based on Acts of Named Individual)--Bifurcated Trial (First Phase)*. When punitive damages are sought against a corporation or other entity for the conduct of its directors, officers, and managing agents, use *CACI No. 3946, Punitive Damages --Entity Defendant-- Bifurcated Trial (First Phase)*.

For an instruction explaining "clear and convincing evidence," see *CACI No. 201, More Likely True--Clear and Convincing Proof*.

If any of the alternative grounds for seeking punitive damages are inapplicable to the facts of the case, they may be omitted.

In an appropriate case, the jury may be instructed that a false promise or a suggestion of a fact known to be false may constitute a misrepresentation as the word "misrepresentation" is used in the instruction's definition of "fraud."

■ *Civil Code section 3294 provides, in part:*

(a) In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant.

(b) An employer shall not be liable for damages pursuant to subdivision (a), based upon acts of an employee of the employer, unless the employer had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of others or authorized or ratified the wrongful conduct for which the

damages are awarded or was personally guilty of oppression, fraud, or malice. With respect to a corporate employer, the advance knowledge and conscious disregard, authorization, ratification or act of oppression, fraud, or malice must be on the part of an officer, director, or managing agent of the corporation.

(c) As used in this section, the following definitions shall apply:

(1) "Malice" means conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others.

(2) "Oppression" means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights.

(3) "Fraud" means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury.

■ "[E]vidence of ratification of [agent's] actions by Hamilton, and any other findings made under *Civil Code* section 3294, subdivision (b), must be made by clear and convincing evidence." (*Barton v. Alexander Hamilton Life Ins. Co. of America* (2003) 110 Cal.App.4th 1640, 1644 [3 Cal.Rptr.3d 258] .)

■ *Civil Code* section 3295(d) provides: "The court shall, on application of any defendant, preclude the admission of evidence of that defendant's profits or financial condition until after the trier of fact returns a verdict for plaintiff awarding actual damages and finds that a defendant is guilty of malice, oppression, or fraud in accordance with Section 3294. Evidence of profit and financial condition shall be admissible only as to the defendant or defendants found to be liable to the plaintiff and to be guilty of malice, oppression, or fraud. Evidence of profit and financial condition shall be presented to the same trier of fact that found for the plaintiff and found one or more defendants guilty of malice, oppression, or fraud."

■ "[Section 3295(d)] affects the order of proof at trial, precluding the admission of evidence of defendants' financial condition until after the jury has returned a verdict for plaintiffs awarding actual damages and found that one or more defendants were guilty of 'oppression, fraud or malice,' in accordance with *Civil Code* section 3294." (*City of El Monte v. Superior Court* (1994) 29 Cal.App.4th 272, 274-275 [34 Cal.Rptr.2d 490] .)

■ "Evidence of the defendant's financial condition is a prerequisite to an award of punitive damages. In order to protect defendants from the premature disclosure of their financial position when punitive damages are sought, the Legislature enacted *Civil Code* section 3295." (*City of El Monte, supra*, 29 Cal.App.4th at p. 276 .)

■ "[C]ourts have held it is reversible error to try the punitive damages issue to a new jury after the jury which found liability has been excused." (*Rivera v. Sassoon* (1995) 39 Cal.App.4th 1045, 1048 [46 Cal.Rptr.2d 144] .)

■ "Malice, for purposes of awarding exemplary damages, includes 'despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others.' To establish conscious disregard, the plaintiff must show 'that the defendant was aware of the probable dangerous consequences of his conduct, and that he wilfully and deliberately failed to avoid those consequences.' " (*Hoch v. Allied-Signal, Inc.* (1994) 24 Cal.App.4th 48, 61 [29 Cal.Rptr.2d 615] , internal citations omitted.)

■ "Used in its ordinary sense, the adjective 'despicable' is a powerful term that refers to circumstances that are 'base,' 'vile,' or 'contemptible.' As amended to include this word, the statute plainly indicates that absent an intent to injure the

plaintiff, 'malice' requires more than a 'willful and conscious' disregard of the plaintiffs' interests. The additional component of 'despicable conduct' must be found." (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 725 [34 Cal.Rptr.2d 898, 882 P.2d 894] , internal citations omitted.)

■ "Section 3294 is no longer silent on who may be responsible for imputing punitive damages to a corporate employer. For corporate punitive damages liability, section 3294, subdivision (b), requires that the wrongful act giving rise to the exemplary damages be committed by an 'officer, director, or managing agent.' " (*White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 572 [88 Cal.Rptr.2d 19, 981 P.2d 944] .)

■ "[I]n performing, ratifying, or approving the malicious conduct, the agent must be acting as the organization's representative, not in some other capacity." (*College Hospital, Inc., supra*, 8 Cal.4th at p. 723 .)

■ "[T]he concept [of managing agent] assumes that such individual was acting in a corporate or employment capacity when the conduct giving rise to the punitive damages claim against the employer occurred." (*College Hospital, Inc., supra*, 8 Cal.4th at p. 723 .)

■ "No purpose would be served by punishing the employer for an employee's conduct that is wholly unrelated to its business or to the employee's duties therein." (*College Hospital, Inc., supra*, 8 Cal.4th at pp. 723-724 .)

■ "The determination whether employees act in a managerial capacity [i.e., are managing agents] does not necessarily hinge on their "level" in the corporate hierarchy. Rather, the critical inquiry is the degree of discretion the employees possess in making decisions that will ultimately determine corporate policy.' " (*Kelly-Zurian v. Wohl Shoe Co., Inc.* (1994) 22 Cal.App.4th 397, 421 [27 Cal.Rptr.2d 457] , internal citation omitted.)

■ "[W]e conclude the Legislature intended the term 'managing agent' to include only those corporate employees who exercise substantial independent authority and judgment in their corporate decisionmaking so that their decisions ultimately determine corporate policy. The scope of a corporate employee's discretion and authority under our test is therefore a question of fact for decision on a case-by-case basis." (*White, supra*, 21 Cal.4th at pp. 566-567 .)

■ "In order to demonstrate that an employee is a true managing agent under section 3294, subdivision (b), a plaintiff seeking punitive damages would have to show that the employee exercised substantial discretionary authority over significant aspects of a corporation's business." (*White, supra*, 21 Cal.4th at p. 577 .)

■ "'[C]orporate policy' is the general principles which guide a corporation, or rules intended to be followed consistently over time in corporate operations. A 'managing agent' is one with substantial authority over decisions that set these general principles and rules." (*Cruz v. Homebase* (2000) 83 Cal.App.4th 160, 167-168 [99 Cal.Rptr.2d 435] .)

■ "'[R]atification' is the '[c]onfirmation and acceptance of a previous act.' A corporation cannot confirm and accept that which it does not actually know about." (*Cruz, supra*, 83 Cal.App.4th at p. 168 .)

■ "For purposes of determining an employer's liability for punitive damages, ratification generally occurs where, under the particular circumstances, the employer demonstrates an intent to adopt or approve oppressive, fraudulent, or malicious behavior by an employee in the performance of his job duties." (*College Hospital, Inc., supra*, 8 Cal.4th at p. 726 .)

■ "Corporate ratification in the punitive damages context requires actual knowledge of the conduct and its outrageous nature." (*College Hospital, Inc., supra*, 8 Cal.4th at p. 726 .)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1581-1585

California Tort Damages (Cont.Ed.Bar) Punitive Damages, §§ 14.13-14.14, 14.23

4 Levy et al., California Torts, Ch. 54, *Punitive Damages*, §§ 54.07, 54.24[4][d] (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages* (Matthew Bender)

6 California Points and Authorities, Ch. 65, *Damages* (Matthew Bender)

Publisher's Notes

This instruction covers issues presented in BAJI No. 14.73.1.

LexisNexis Matthew Bender Expert Practice Tip--Corporate Liability for Punitive Damages: In most business cases, the liability of a corporation for punitive damages is predicated on the fact that the conduct in question was committed by an officer, director, or managing agent, or alternatively, that the conduct was ratified or approved by the corporation after it occurred. Plaintiff's counsel must be careful to introduce evidence on these points to preserve a punitive claim (e.g., evidence that the corporation accepted the benefits of the conduct or refused to reverse the decision would support ratification). *By Ronald Oster*

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate Law Agency Relationships Causes of Action & Remedies Punitive Damages Civil Procedure Remedies Damages Punitive Damages Torts Damages Punitive Damages General Overview Torts Damages Punitive Damages Availability Corporations Torts Damages Punitive Damages Availability Employers Torts Damages Punitive Damages Award Calculations General Overview Torts Damages Punitive Damages Conduct Supporting Awards



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CHAPTER 39 California Judicial Council Damages Instructions

5-39 California Forms of Jury Instruction CACI 3945

CACI 3945 Punitive Damages--Entity Defendant--Trial Not Bifurcated

If you decide that [name of defendant]'s conduct caused [name of plaintiff] harm, you must decide whether that conduct justifies an award of punitive damages. The purposes of punitive damages are to punish a wrongdoer for the conduct that harmed the plaintiff and to discourage similar conduct in the future.

You may award punitive damages against [name of defendant] only if [name of plaintiff] proves that [name of defendant] engaged in that conduct with malice, oppression, or fraud. To do this, [name of plaintiff] must prove [one of] the following by clear and convincing evidence:

- 1. [That the conduct constituting malice, oppression, or fraud was committed by one or more officers, directors, or managing agents of [name of defendant], who acted on behalf of [name of defendant]; [or]]**
- 2. [That the conduct constituting malice, oppression, or fraud was authorized by one or more officers, directors, or managing agents of [name of defendant]; [or]]**
- 3. [That one or more officers, directors, or managing agents of [name of defendant] knew of the conduct constituting malice, oppression, or fraud and adopted or approved that conduct after it occurred.]**

"Malice" means that [name of defendant] acted with intent to cause injury or that [name of defendant]'s conduct was despicable and was done with a willful and knowing disregard of the rights or safety of another. A person acts with knowing disregard when he or she is aware of the probable dangerous consequences of his or her conduct and deliberately fails to avoid those consequences.

"Oppression" means that [name of defendant]'s conduct was despicable and subjected [name of plaintiff] to

cruel and unjust hardship in knowing disregard of [his/her] rights.

"Despicable conduct" is conduct that is so vile, base, or contemptible that it would be looked down on and despised by reasonable people.

"Fraud" means that [name of defendant] intentionally misrepresented or concealed a material fact and did so intending to harm [name of plaintiff].

An employee is a "managing agent" if he or she exercises substantial independent authority and judgment in his or her corporate decisionmaking such that his or her decisions ultimately determine corporate policy.

There is no fixed formula for determining the amount of punitive damages, and you are not required to award any punitive damages. If you decide to award punitive damages, you should consider all of the following factors in determining the amount:

(a) How reprehensible was [name of defendant]'s conduct? In deciding how reprehensible [name of defendant]'s conduct was, you may consider, among other factors:

1. Whether the conduct caused physical harm;
2. Whether [name of defendant] disregarded the health or safety of others;
3. Whether [name of plaintiff] was financially weak or vulnerable and [name of defendant] knew [name of plaintiff] was financially weak or vulnerable and took advantage of [him/her/it];
4. Whether [name of defendant]'s conduct involved a pattern or practice; and
5. Whether [name of defendant] acted with trickery or deceit.

(b) Is there a reasonable relationship between the amount of punitive damages and [name of plaintiff]'s harm [or between the amount of punitive damages and potential harm to [name of plaintiff] that [name of defendant] knew was likely to occur because of [his/her/its] conduct]?

(c) In view of [name of defendant]'s financial condition, what amount is necessary to punish [him/her/it] and discourage future wrongful conduct? You may not increase the punitive award above an amount that is otherwise appropriate merely because [name of defendant] has substantial financial resources. [Any award you impose may not exceed [name of defendant]'s ability to pay.]

[Punitive damages may not be used to punish [name of defendant] for the impact of [his/her/its] alleged misconduct on persons other than [name of plaintiff].]

New September 2003; Revised April 2004, October 2004, December 2005, June 2006, April 2007, August 2007, October 2008

Directions for Use

This instruction is intended for use when the plaintiff is seeking punitive damages against a corporation or other entity for the conduct of its directors, officers, or managing agents. When the plaintiff seeks to

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hold an employer or principal liable for the conduct of a specific employee or agent, use *CACI No. 3943, Punitive Damages Against Employer or Principal for Conduct of a Specific Agent or Employee--Trial Not Bifurcated*. When the plaintiff is seeking punitive damages from both the employer/principal and the employee/agent, use *CACI No. 3947, Punitive Damages--Individual and Entity Defendants--Trial Not Bifurcated*.

For an instruction explaining "clear and convincing evidence," see *CACI No. 201, More Likely True--Clear and Convincing Proof*.

Read the bracketed language at the end of the first sentence of factor (b) only if there is evidence that the conduct of defendant that allegedly gives rise to liability and punitive damages either caused or foreseeably threatened to cause harm to plaintiff that would not be included in an award of compensatory damages. (*Simon v. San Paolo U.S. Holding Co., Inc.* (2005) 35 Cal.4th 1159 [29 Cal.Rptr.3d 379, 113 P.3d 63] .) The bracketed phrase concerning "potential harm" might be appropriate, for example, if damages actually caused by the defendant's acts are not recoverable because they are barred by statute (*id.* at p. 1176 , citing *Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 929 [148 Cal.Rptr. 389, 582 P.2d 980] [in a bad faith insurance case, plaintiff died before judgment, precluding her estate's recovery of emotional distress damages]), or if the harm caused by defendant's acts could have been great but by chance only slight harm was inflicted. (*Simon, supra*, 35 Cal.4th at p. 1177 , citing *TXO Production Corp. v. Alliance Resources Corp.* (1993) 509 U.S. 443, 459 [113 S.Ct. 2711, 125 L.Ed.2d 366] [considering the hypothetical of a person wildly firing a gun into a crowd but by chance only damaging a pair of glasses].) The bracketed phrase should not be given if an award of compensatory damages is the "true measure" of the harm or potential harm caused by defendant's wrongful acts. (*Simon, supra*, 35 Cal.4th at pp. 1178-1179 [rejecting consideration for purposes of assessing punitive damages of the plaintiff's loss of the benefit of the bargain if the jury had found that there was no binding contract].)

Read the optional final sentence of factor (c) only if the defendant has presented relevant evidence regarding that issue.

Read the optional final sentence if there is a possibility that in arriving at an amount of punitive damages, the jury might consider harm that the defendant's conduct may have caused to nonparties. (See *Philip Morris USA v. Williams* (2007) 549 U.S. 346, ___ [127 S.Ct. 1057, 166 L.Ed.2d 940, 2007 U.S. LEXIS 1332, *13] .) Harm to others may be relevant to determining reprehensibility based on factors (a)(2) (disregard of health or safety of others) and (a)(4) (pattern or practice). (See *State Farm Mutual Automobile Insurance Co. v. Campbell* (2003) 538 U.S. 408, 419 [123 S.Ct. 1513, 155 L.Ed.2d 585] .)

If any of the alternative grounds for seeking punitive damages are inapplicable to the facts of the case, they may be omitted.

See *CACI No. 3940, Punitive Damages --Individual Defendant-- Trial Not Bifurcated*, for additional sources and authority.

"A jury must be instructed ... that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred." (*State Farm Mutual Automobile Insurance Co., supra*, 538 U.S. at p. 422.) An instruction on this point should be included within this instruction if appropriate to the facts.

In an appropriate case, the jury may be instructed that a false promise or a suggestion of a fact known to be false may constitute a misrepresentation as the word "misrepresentation" is used in the instruction's definition of "fraud."

Courts have stated that "[p]unitive damages previously imposed for the same conduct are relevant in determining the amount of punitive damages required to sufficiently punish and deter. The likelihood of future punitive damage awards may also be considered, although it is entitled to considerably less weight." (*Stevens v. Owens-Corning Fiberglas Corp.* (1996) 49 Cal.App.4th 1645, 1661 [57 Cal.Rptr.2d 525] .) The court in *Stevens* suggested that the following instruction be given if evidence of other punitive damage awards is introduced into evidence:

If you determine that a defendant has already been assessed with punitive damages based on the same conduct for which punitive damages are requested in this case, you may consider whether punitive damages awarded in other cases have sufficiently punished and made an example of the defendant. You must not use the amount of punitive damages awarded in other cases to determine the amount of the punitive damage award in this case, except to the extent you determine that a lesser award, or no award at all, is justified in light of the penalties already imposed. (*Stevens, supra*, 49 Cal.App.4th at p. 1663, fn. 7 .)

Sources and Authority

- Civil Code section 3294 provides, in part:

(a) In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant.

(b) An employer shall not be liable for damages pursuant to subdivision (a), based upon acts of an employee of the employer, unless the employer had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of others or authorized or ratified the wrongful conduct for which the damages are awarded or was personally guilty of oppression, fraud, or malice. With respect to a corporate employer, the advance knowledge and conscious disregard, authorization, ratification or act of oppression, fraud, or malice must be on the part of an officer, director, or managing agent of the corporation.

(c) As used in this section, the following definitions shall apply:

(1) "Malice" means conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others.

(2) "Oppression" means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights.

(3) "Fraud" means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury.

- "Section 3294 is no longer silent on who may be responsible for imputing punitive damages to a corporate

employer. For corporate punitive damages liability, section 3294, subdivision (b), requires that the wrongful act giving rise to the exemplary damages be committed by an 'officer, director, or managing agent.' " (*White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 572 [88 Cal.Rptr.2d 19, 981 P.2d 944] .)

■ "[E]vidence of ratification of [agent's] actions by Hamilton, and any other findings made under *Civil Code* section 3294, subdivision (b), must be made by clear and convincing evidence." (*Barton v. Alexander Hamilton Life Ins. Co. of America* (2003) 110 Cal.App.4th 1640, 1644 [3 Cal.Rptr.3d 258] .)

■ "An award of punitive damages is not supported by a verdict based on breach of contract, even where the defendant's conduct in breaching the contract was wilful, fraudulent, or malicious. Even in those cases in which a separate tort action is alleged, if there is 'but one verdict based upon contract' a punitive damage award is improper." (*Myers Building Industries, Ltd. v. Interface Technology, Inc.* (1993) 13 Cal.App.4th 949, 960 [17 Cal.Rptr.2d 242] , internal citations omitted.)

■ " '[T]he most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct.' We have instructed courts to determine the reprehensibility of a defendant by considering whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident. The existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect." (*State Farm Mutual Automobile Insurance Co.*, *supra*, 538 U.S. at p. 419 , internal citation omitted.)

■ "[W]e have been reluctant to identify concrete constitutional limits on the ratio between harm, or potential harm, to the plaintiff and the punitive damages award. We decline again to impose a bright-line ratio which a punitive damages award cannot exceed. Our jurisprudence and the principles it has now established demonstrate, however, that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process. ... [A]n award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety. ... While these ratios are not binding, they are instructive. They demonstrate what should be obvious: Single-digit multipliers are more likely to comport with due process, while still achieving the State's goals of deterrence and retribution, than awards with ratios in range of 500 to 1" (*State Farm Mutual Automobile Insurance Co.*, *supra*, 538 U.S. at pp. 424-425 , internal citation omitted.)

■ "Nonetheless, because there are no rigid benchmarks that a punitive damages award may not surpass, ratios greater than those we have previously upheld may comport with due process where 'a particularly egregious act has resulted in only a small amount of economic damages.' The converse is also true, however. When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee. The precise award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff." (*State Farm Mutual Automobile Insurance Co.*, *supra*, 538 U.S. at p. 425 , internal citation omitted.)

■ "[T]he Constitution's Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent, i.e., injury that it inflicts upon those who are, essentially, strangers to the litigation." (*Philip Morris USA*, *supra*, 549 U.S. at p. ____ [2007 U.S. LEXIS 1332, *13] .)

■ "Evidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible--although counsel may argue in a particular case that conduct resulting in no harm to others nonetheless posed a grave risk to the public, or the converse. Yet for the reasons given above, a jury may not go further than this and use a punitive damages verdict to punish a

defendant directly on account of harms it is alleged to have visited on nonparties." (*Philip Morris USA, supra*, 549 U.S. at p. ____ [2007 U.S. LEXIS 1332, *16] .)

■ "[A] specific instruction encompassing both the permitted and prohibited uses of evidence of harm caused to others would be appropriate in the new trial if requested by the parties. We believe that an instruction on these issues should clearly distinguish between the permitted and prohibited uses of such evidence and thus make clear to the jury the purposes for which it can and cannot consider that evidence. A jury may consider evidence of harm caused to others for the purpose of determining the degree of reprehensibility of a defendant's conduct toward the plaintiff in deciding the amount of punitive damages, but it may not consider that evidence for the purpose of punishing the defendant directly for harm caused to others. In our view, Judicial Council of California Civil Jury Instructions (Aug. 2007 rev.) CACI Nos. 3940, 3942, 3943, 3945, 3947, and 3949 could convey this distinction better by stating more explicitly that evidence of harm caused to others may be considered for the one purpose but not for the other, and by providing that explanation together with the reprehensibility factors rather than in connection with the reasonable relationship issue." (*Bullock v. Philip Morris USA, Inc.* (2008) 159 Cal.App.4th 655, 695, fn. 21 [71 Cal.Rptr.3d 775] , internal citation omitted.)

■ "[I]n performing, ratifying, or approving the malicious conduct, the agent must be acting as the organization's representative, not in some other capacity." (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 723 [34 Cal.Rptr.2d 898, 882 P.2d 894] .)

■ "[T]he concept [of managing agent] assumes that such individual was acting in a corporate or employment capacity when the conduct giving rise to the punitive damages claim against the employer occurred." (*College Hospital, Inc.*, *supra*, 8 Cal.4th at p. 723 .)

■ "No purpose would be served by punishing the employer for an employee's conduct that is wholly unrelated to its business or to the employee's duties therein." (*College Hospital, Inc.*, *supra*, 8 Cal.4th at pp. 723-724 .)

■ " 'The determination whether employees act in a managerial capacity [i.e., are managing agents] does not necessarily hinge on their "level" in the corporate hierarchy. Rather, the critical inquiry is the degree of discretion the employees possess in making decisions that will ultimately determine corporate policy.' " (*Kelly-Zurian v. Wohl Shoe Co., Inc.* (1994) 22 Cal.App.4th 397, 421 [27 Cal.Rptr.2d 457] , internal citation omitted.)

■ "[W]e conclude the Legislature intended the term 'managing agent' to include only those corporate employees who exercise substantial independent authority and judgment in their corporate decisionmaking so that their decisions ultimately determine corporate policy. The scope of a corporate employee's discretion and authority under our test is therefore a question of fact for decision on a case-by-case basis." (*White, supra*, 21 Cal.4th at pp. 566-567 .)

■ "The high court in *TXO* [*TXO Production Corp.*, *supra*] and *BMW* [*BMW of North America, Inc. v. Gore* (1996) 517 U.S. 559 [116 S.Ct. 1589, 134 L.Ed.2d 809]] has refined the disparity analysis to take into account the *potential* loss to plaintiffs, as where a scheme worthy of punitive damages does not fully succeed. In such cases, the proper ratio would be the ratio of punitive damages to the potential harm to plaintiff." (*Sierra Club Found. v. Graham* (1999) 72 Cal.App.4th 1135, 1162, fn. 15 [85 Cal.Rptr.2d 726] , original italics.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1581-1585

California Tort Damages (Cont.Ed.Bar 2d ed.) Punitive Damages, §§ 14.1-14.12, 14.18-14.31, 14.39

4 Levy et al., *California Torts*, Ch. 54, *Punitive Damages*, § 54.07 (Matthew Bender)

15 *California Forms of Pleading and Practice*, Ch. 177, *Damages*, § 177.51 (Matthew Bender)

6 *California Points and Authorities*, Ch. 64, *Damages: Torts*, §§ 64.141 *et seq.*, 64.174 *et seq.* (Matthew Bender)

Publisher's Notes

This instruction covers issues presented in BAJI Nos. 14.71.2 and 14.74.

LexisNexis Matthew Bender Expert Practice Tip--Corporate Liability for Punitive Damages/Use *State Farm* Guideposts: This complicated instruction combines several legal concepts. Note that defendants almost always request a bifurcated trial on punitive damages (so that financial information will not be introduced unless and until the jury finds fraud, malice, or oppression).

In most commercial cases, the liability of a corporation is predicated on the fact that the conduct in question was committed by an officer, director, or managing agent, or alternatively, that the conduct was ratified or approved by the corporation after it occurred. Plaintiff's counsel must be careful to introduce evidence on these points to pursue a punitive claim (e.g., evidence that the corporation accepted the benefits of the conduct or refused to reverse the decision would support ratification).

With regard to the amount of punitive damages, the U.S. Supreme Court in *State Farm Mutual Automobile Ins. Co. v. Campbell* (2003) 538 U.S. 408 [123 S. Ct. 1513, 155 L. Ed. 2d 585] provided new guideposts for courts to review punitive damage awards, including a discussion of specific permissible ratios between punitive and compensatory damages. *By Ronald Oster*

LexisNexis Matthew Bender Expert Practice Tip-- *Diamond Woodworks* Is Helpful for Defense: *Diamond Woodworks, Inc., v. Argonaut Ins. Co.* (2003) 109 Cal.App.4th 1020 [135 Cal.Rptr.2d 736] is a very helpful opinion for defense counsel in punitive damages cases. *By Rex Heeseman*

In *Diamond Woodworks, Inc. v. Argonaut Ins. Co.* (2003) 109 Cal.App.4th 1020 [135 Cal.Rptr.2d 736], the court looked to *State Farm Mutual Automobile Insurance Co. v. Campbell* (2003) 538 U.S. 408 [123 S.Ct. 1513, 155 L.Ed.2d 585], stating: "Further explicating guidelines for due process proportionality, the [*Campbell*] court noted facts and circumstances may call for a ratio either exceeding or falling below the norm. It suggested a ratio perhaps only equal to compensatory damages might reach the outermost limit of the due process guarantee when compensatory damages are substantial. Additionally observing the wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award, the *Campbell* court cautioned the courts of the need to ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered." (*Diamond Woodworks, Inc. v. Argonaut Ins. Co.* (2003) 109 Cal.App.4th 1020, 1055-1056 [135 Cal.Rptr.2d 736] .)

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsDamagesPunitive DamagesAward CalculationsGeneral OverviewTortsDamagesPunitive DamagesAward CalculationsFactorsTortsDamagesPunitive DamagesConduct Supporting Awards



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California Forms of Jury Instruction

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CHAPTER 39 California Judicial Council Damages Instructions

5-39 California Forms of Jury Instruction CACI 3946

CACI 3946 Punitive Damages--Entity Defendant--Bifurcated Trial (First Phase)

If you decide that [name of defendant]'s conduct caused [name of plaintiff] harm, you must decide whether that conduct justifies an award of punitive damages. The amount, if any, of punitive damages will be an issue decided later.

At this time, you must decide whether [name of plaintiff] has proved that [name of defendant] engaged in that conduct with malice, oppression, or fraud. To do this, [name of plaintiff] must prove [one of] the following by clear and convincing evidence:

- 1. [That the conduct constituting malice, oppression, or fraud was committed by one or more officers, directors, or managing agents of [name of defendant] who acted on behalf of [name of defendant]; [or]]**
- 2. [That the conduct constituting malice, oppression, or fraud was authorized by one or more officers, directors, or managing agents of [name of defendant]; [or]]**
- 3. [That one or more officers, directors, or managing agents of [name of defendant] knew of the conduct constituting malice, oppression, or fraud and adopted or approved that conduct after it occurred.]**

"Malice" means that [name of defendant] acted with intent to cause injury or that [name of defendant]'s conduct was despicable and was done with a willful and knowing disregard of the rights or safety of another. A person acts with knowing disregard when he or she is aware of the probable dangerous consequences of his or her conduct and deliberately fails to avoid those consequences.

"Oppression" means that [name of defendant]'s conduct was despicable and subjected [name of plaintiff] to

cruel and unjust hardship in knowing disregard of [his/her] rights.

"Despicable conduct" is conduct that is so vile, base, or contemptible that it would be looked down on and despised by reasonable people.

"Fraud" means that [name of defendant] intentionally misrepresented or concealed a material fact and did so intending to harm [name of plaintiff].

An employee is a "managing agent" if he or she exercises substantial independent authority and judgment in his or her corporate decision making such that his or her decisions ultimately determine corporate policy.

New September 2003; Revised April 2004, December 2005

CACI No. 3942, Punitive Damages --Individual Defendant-- Bifurcated Trial (Second Phase) may be used for the second phase of a bifurcated trial.

This instruction is intended for use when the plaintiff is seeking punitive damages against a corporation or other entity for the conduct of its directors, officers, and managing agents. When the plaintiff is seeking to hold an employer or principal liable for the conduct of a specific employee or agent, use *CACI No. 3944, Punitive Damages Against Employer or Principal For Conduct of a Specific Agent or Employee--Bifurcated Trial (First Phase)*. When the plaintiff is seeking punitive damages from both the employer/principal and the employee/agent, use *CACI No. 3948, Punitive Damages--Individual and Corporate Defendants (Corporate Liability Based on Acts of Named Individual)--Bifurcated Trial (First Phase)*.

For an instruction explaining "clear and convincing evidence," see *CACI No. 201, More Likely True--Clear and Convincing Proof*.

If any of the alternative grounds for seeking punitive damages are inapplicable to the facts of the case, they may be omitted.

In an appropriate case, the jury may be instructed that a false promise or a suggestion of a fact known to be false may constitute a misrepresentation as the word "misrepresentation" is used in the instruction's definition of "fraud."

■ *Civil Code section 3294* provides, in part:

(a) In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant.

(b) An employer shall not be liable for damages pursuant to subdivision (a), based upon acts of an employee of the employer, unless the employer had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of others or authorized or ratified the wrongful conduct for which the damages are awarded or was personally guilty of oppression, fraud, or malice. With respect to a corporate employer, the advance knowledge and conscious disregard,

authorization, ratification or act of oppression, fraud, or malice must be on the part of an officer, director, or managing agent of the corporation.

(c) As used in this section, the following definitions shall apply

(1) "Malice" means conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others.

(2) "Oppression" means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights.

(3) "Fraud" means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury.

■ "[E]vidence of ratification of [agent's] actions by Hamilton, and any other findings made under *Civil Code* section 3294, subdivision (b), must be made by clear and convincing evidence." (*Barton v. Alexander Hamilton Life Ins. Co. of America* (2003) 110 Cal.App.4th 1640, 1644 [3 Cal.Rptr.3d 258] .)

■ *Civil Code* section 3295(d) provides: "The court shall, on application of any defendant, preclude the admission of evidence of that defendant's profits or financial condition until after the trier of fact returns a verdict for plaintiff awarding actual damages and finds that a defendant is guilty of malice, oppression, or fraud in accordance with Section 3294. Evidence of profit and financial condition shall be admissible only as to the defendant or defendants found to be liable to the plaintiff and to be guilty of malice, oppression, or fraud. Evidence of profit and financial condition shall be presented to the same trier of fact that found for the plaintiff and found one or more defendants guilty of malice, oppression, or fraud."

■ "[Section 3295(d)] affects the order of proof at trial, precluding the admission of evidence of defendants' financial condition until after the jury has returned a verdict for plaintiffs awarding actual damages and found that one or more defendants were guilty of 'oppression, fraud or malice,' in accordance with *Civil Code* section 3294." (*City of El Monte v. Superior Court* (1994) 29 Cal.App.4th 272, 274-275 [34 Cal.Rptr.2d 490] , internal citations omitted.)

■ "Evidence of the defendant's financial condition is a prerequisite to an award of punitive damages. In order to protect defendants from the premature disclosure of their financial position when punitive damages are sought, the Legislature enacted *Civil Code* section 3295." (*City of El Monte, supra*, 29 Cal.App.4th at p. 276 , internal citations omitted.)

■ "[C]ourts have held it is reversible error to try the punitive damages issue to a new jury after the jury which found liability has been excused." (*Rivera v. Sassoon* (1995) 39 Cal.App.4th 1045, 1048 [46 Cal.Rptr.2d 144] , internal citations omitted.)

■ "Malice, for purposes of awarding exemplary damages, includes 'despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others.' To establish conscious disregard, the plaintiff must show 'that the defendant was aware of the probable dangerous consequences of his conduct, and that he wilfully and deliberately failed to avoid those consequences.' " (*Hoch v. Allied-Signal, Inc.* (1994) 24 Cal.App.4th 48, 61 [29 Cal.Rptr.2d 615] , internal citations omitted.)

■ "Used in its ordinary sense, the adjective 'despicable' is a powerful term that refers to circumstances that are 'base,' 'vile,' or 'contemptible.' As amended to include this word, the statute plainly indicates that absent an intent to injure the

plaintiff, 'malice' requires more than a 'willful and conscious' disregard of the plaintiffs' interests. The additional component of 'despicable conduct' must be found." (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 725 [34 Cal.Rptr.2d 898, 882 P.2d 894] , internal citations omitted.)

■ "Section 3294 is no longer silent on who may be responsible for imputing punitive damages to a corporate employer. For corporate punitive damages liability, section 3294, subdivision (b), requires that the wrongful act giving rise to the exemplary damages be committed by an 'officer, director, or managing agent.' " (*White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 572 [88 Cal.Rptr.2d 19, 981 P.2d 944] .)

■ "[I]n performing, ratifying, or approving the malicious conduct, the agent must be acting as the organization's representative, not in some other capacity." (*College Hospital, Inc., supra*, 8 Cal.4th at p. 723 .)

■ "[T]he concept [of managing agent] assumes that such individual was acting in a corporate or employment capacity when the conduct giving rise to the punitive damages claim against the employer occurred." (*College Hospital, Inc., supra*, 8 Cal.4th at p. 723 .)

■ "No purpose would be served by punishing the employer for an employee's conduct that is wholly unrelated to its business or to the employee's duties therein." (*College Hospital, Inc., supra*, 8 Cal.4th at pp. 723-724 .)

■ "The determination whether employees act in a managerial capacity [i.e., are managing agents] does not necessarily hinge on their "level" in the corporate hierarchy. Rather, the critical inquiry is the degree of discretion the employees possess in making decisions that will ultimately determine corporate policy.' " (*Kelly-Zurian v. Wohl Shoe Co., Inc.* (1994) 22 Cal.App.4th 397, 421 [27 Cal.Rptr.2d 457] , internal citation omitted.)

■ "[W]e conclude the Legislature intended the term 'managing agent' to include only those corporate employees who exercise substantial independent authority and judgment in their corporate decisionmaking so that their decisions ultimately determine corporate policy. The scope of a corporate employee's discretion and authority under our test is therefore a question of fact for decision on a case-by-case basis." (*White, supra*, 21 Cal.4th at pp. 566-567 .)

■ "In order to demonstrate that an employee is a true managing agent under section 3294, subdivision (b), a plaintiff seeking punitive damages would have to show that the employee exercised substantial discretionary authority over significant aspects of a corporation's business." (*White, supra*, 21 Cal.4th at p. 577 .)

■ "'[C]orporate policy' is the general principles which guide a corporation, or rules intended to be followed consistently over time in corporate operations. A 'managing agent' is one with substantial authority over decisions that set these general principles and rules." (*Cruz v. Homebase* (2000) 83 Cal.App.4th 160, 167-168 [99 Cal.Rptr.2d 435] .)

■ "'[R]atification' is the '[c]onfirmation and acceptance of a previous act.' A corporation cannot confirm and accept that which it does not actually know about." (*Cruz, supra*, 83 Cal.App.4th at p. 168 .)

■ "For purposes of determining an employer's liability for punitive damages, ratification generally occurs where, under the particular circumstances, the employer demonstrates an intent to adopt or approve oppressive, fraudulent, or malicious behavior by an employee in the performance of his job duties." (*College Hospital, Inc., supra*, 8 Cal.4th at p. 726 .)

■ "Corporate ratification in the punitive damages context requires actual knowledge of the conduct and its outrageous nature." (*College Hospital, Inc., supra*, 8 Cal.4th at p. 726 .)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1581-1585

California Tort Damages (Cont.Ed.Bar) Punitive Damages, §§ 14.13-14.14, 14.23

4 Levy et al., California Torts, Ch. 54, *Punitive Damages*, §§ 54.07, 54.24[4][d] (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages* (Matthew Bender)

6 California Points and Authorities, Ch. 65, *Damages* (Matthew Bender)

Publisher's Notes

This instruction covers issues presented in BAJI No. 14.74.

LexisNexis Matthew Bender Expert Practice Tip--Corporate Liability for Punitive Damages: In most business cases, the liability of a corporation for punitive damages is predicated on the fact that the conduct in question was committed by an officer, director, or managing agent, or alternatively, that the conduct was ratified or approved by the corporation after it occurred. Plaintiff's counsel must be careful to introduce evidence on these points to preserve a punitive claim (e.g., evidence that the corporation accepted the benefits of the conduct or refused to reverse the decision would support ratification). *By Ronald Oster*

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsDamagesPunitive DamagesGeneral OverviewTortsDamagesPunitive DamagesAward CalculationsGeneral OverviewTortsDamagesPunitive DamagesConduct Supporting Awards



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CHAPTER 39 California Judicial Council Damages Instructions

5-39 California Forms of Jury Instruction CACI 3947

CACI 3947 Punitive Damages--Individual and Entity Defendants--Trial Not Bifurcated

If you decide that [name of individual defendant]'s or [name of entity defendant]'s conduct caused [name of plaintiff] harm, you must decide whether that conduct justifies an award of punitive damages. The purposes of punitive damages are to punish a wrongdoer for the conduct that harmed the plaintiff and to discourage similar conduct in the future.

You may award punitive damages against [name of individual defendant] only if [name of plaintiff] proves by clear and convincing evidence that [name of individual defendant] engaged in that conduct with malice, oppression, or fraud.

You may award punitive damages against [name of entity defendant] only if [name of plaintiff] proves that [name of entity defendant] acted with malice, oppression, or fraud. To do this, [name of plaintiff] must prove [one of] the following by clear and convincing evidence:

- 1. [That the malice, oppression, or fraud was conduct of one or more officers, directors, or managing agents of [name of entity defendant], who acted on behalf of [name of entity defendant]; [or]]**
- 2. [That an officer, a director, or a managing agent of [name of entity defendant] had advance knowledge of the unfitness of [name of individual defendant] and employed [him/her] with a knowing disregard of the rights or safety of others; [or]]**
- 3. [That the conduct constituting malice, oppression, or fraud was authorized by one or more officers, directors, or managing agents of [name of entity defendant]; [or]]**
- 4. [That one or more officers, directors, or managing agents of [name of entity defendant] knew of**

the conduct constituting malice, oppression, or fraud and adopted or approved that conduct after it occurred.]

"Malice" means that a defendant acted with intent to cause injury or that a defendant's conduct was despicable and was done with a willful and knowing disregard of the rights or safety of another. A defendant acts with knowing disregard when the defendant is aware of the probable dangerous consequences of [his/her/its] conduct and deliberately fails to avoid those consequences.

"Oppression" means that a defendant's conduct was despicable and subjected [*name of plaintiff*] to cruel and unjust hardship in knowing disregard of [his/her] rights.

"Despicable conduct" is conduct that is so vile, base, or contemptible that it would be looked down on and despised by reasonable people.

"Fraud" means that a defendant intentionally misrepresented or concealed a material fact and did so intending to harm [*name of plaintiff*].

An employee is a "managing agent" if he or she exercises substantial independent authority and judgment in his or her corporate decisionmaking such that his or her decisions ultimately determine corporate policy.

There is no fixed formula for determining the amount of punitive damages, and you are not required to award any punitive damages. If you decide to award punitive damages, you should consider all of the following factors separately for each defendant in determining the amount:

(a) How reprehensible was that defendant's conduct? In deciding how reprehensible a defendant's conduct was, you may consider, among other factors:

- 1. Whether the conduct caused physical harm;**
- 2. Whether the defendant disregarded the health or safety of others;**
- 3. Whether [*name of plaintiff*] was financially weak or vulnerable and the defendant knew [*name of plaintiff*] was financially weak or vulnerable and took advantage of [him/her];**
- 4. Whether the defendant's conduct involved a pattern or practice; and**
- 5. Whether the defendant acted with trickery or deceit.**

(b) Is there a reasonable relationship between the amount of punitive damages and [*name of plaintiff*]'s harm [or between the amount of punitive damages and potential harm to [*name of plaintiff*] that the defendant knew was likely to occur because of [his/her/its] conduct]?

(c) In view of that defendant's financial condition, what amount is necessary to punish [him/her/it] and discourage future wrongful conduct? You may not increase the punitive award above an amount that is otherwise appropriate merely because a defendant has substantial financial resources. [Any award you impose may not exceed that defendant's ability to pay.]

[Punitive damages may not be used to punish a defendant for the impact of [his/her/its] alleged misconduct on persons other than [*name of plaintiff*].]

New September 2003; Revised April 2004, October 2004, December 2005, June 2006, April 2007, August 2007, October 2008

Directions for Use

This instruction is intended to apply if punitive damages are sought against both an individual person and a corporate defendant. When punitive damages are sought only against corporate defendants, use CACI No. 3943, *Punitive Damages Against Employer or Principal for Conduct of a Specific Agent or Employee--Trial Not Bifurcated*, or CACI No. 3945, *Punitive Damages --Entity Defendant-- Trial Not Bifurcated*. When punitive damages are sought against an individual defendant, use CACI No. 3940, *Punitive Damages --Individual Defendant-- Trial Not Bifurcated*.

For an instruction explaining "clear and convincing evidence," see CACI No. 201, *More Likely True--Clear and Convincing Proof*.

Read the bracketed language at the end of the first sentence of factor (b) only if there is evidence that the conduct of defendant that allegedly gives rise to liability and punitive damages either caused or foreseeably threatened to cause harm to plaintiff that would not be included in an award of compensatory damages. (*Simon v. San Paolo U.S. Holding Co., Inc.* (2005) 35 Cal.4th 1159 [29 Cal.Rptr.3d 379, 113 P.3d 63] .) The bracketed phrase concerning "potential harm" might be appropriate, for example, if damages actually caused by the defendant's acts are not recoverable because they are barred by statute (*id.* at p. 1176 , citing *Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 929 [148 Cal.Rptr. 389, 582 P.2d 980] [in a bad faith insurance case, plaintiff died before judgment, precluding her estate's recovery of emotional distress damages]), or if the harm caused by defendant's acts could have been great but by chance only slight harm was inflicted. (*Simon, supra*, 35 Cal.4th at p. 1177 , citing *TXO Production Corp. v. Alliance Resources Corp.* (1993) 509 U.S. 443, 459 [113 S.Ct. 2711, 125 L.Ed.2d 366] [considering the hypothetical of a person wildly firing a gun into a crowd but by chance only damaging a pair of glasses].) The bracketed phrase should not be given if an award of compensatory damages is the "true measure" of the harm or potential harm caused by defendant's wrongful acts. (*Simon, supra*, 35 Cal.4th at pp. 1178-1179 [rejecting consideration for purposes of assessing punitive damages of the plaintiff's loss of the benefit of the bargain if the jury had found that there was no binding contract].)

Read the optional final sentence of factor (c) only if the defendant has presented relevant evidence regarding that issue.

Read the optional final sentence if there is a possibility that in arriving at an amount of punitive damages, the jury might consider harm that the defendant's conduct may have caused to nonparties. (See *Philip Morris USA v. Williams* (2007) 549 U.S. 346, ___ [127 S.Ct. 1057, 166 L.Ed.2d 940, 2007 U.S. LEXIS 1332, *13] .) Harm to others may be relevant to determining reprehensibility based on factors (a)(2) (disregard of health or safety of others) and (a)(4) (pattern or practice). (See *State Farm Mutual Automobile Insurance Co. v. Campbell* (2003) 538 U.S. 408, 419 [123 S.Ct. 1513, 155 L.Ed.2d 585] .)

If any of the alternative grounds for seeking punitive damages are inapplicable to the facts of the case, they may be omitted.

See CACI No. 3940, *Punitive Damages --Individual Defendant-- Trial Not Bifurcated*, for additional sources and authority.

"A jury must be instructed ... that it may not use evidence of out-of-state conduct to punish a defendant

for action that was lawful in the jurisdiction where it occurred." (*State Farm Mutual Automobile Insurance Co.*, *supra*, 538 U.S. at p. 422 .) An instruction on this point should be included within this instruction if appropriate to the facts.

In an appropriate case, the jury may be instructed that a false promise or a suggestion of a fact known to be false may constitute a misrepresentation as the word "misrepresentation" is used in the instruction's definition of "fraud."

Courts have stated that "[p]unitive damages previously imposed for the same conduct are relevant in determining the amount of punitive damages required to sufficiently punish and deter. The likelihood of future punitive damage awards may also be considered, although it is entitled to considerably less weight." (*Stevens v. Owens-Corning Fiberglas Corp.* (1996) 49 Cal.App.4th 1645, 1661 [57 Cal.Rptr.2d 525] , internal citations omitted.) The court in *Stevens* suggested that the following instruction be given if evidence of other punitive damage awards is introduced into evidence:

If you determine that a defendant has already been assessed with punitive damages based on the same conduct for which punitive damages are requested in this case, you may consider whether punitive damages awarded in other cases have sufficiently punished and made an example of the defendant. You must not use the amount of punitive damages awarded in other cases to determine the amount of the punitive damage award in this case, except to the extent you determine that a lesser award, or no award at all, is justified in light of the penalties already imposed. (*Stevens, supra*, 49 Cal.App.4th at p. 1663, fn. 7 .)

Sources and Authority

- *Civil Code section 3294* provides, in part:

(a) In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant.

(b) An employer shall not be liable for damages pursuant to subdivision (a), based upon acts of an employee of the employer, unless the employer had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of others or authorized or ratified the wrongful conduct for which the damages are awarded or was personally guilty of oppression, fraud, or malice. With respect to a corporate employer, the advance knowledge and conscious disregard, authorization, ratification or act of oppression, fraud, or malice must be on the part of an officer, director, or managing agent of the corporation.

(c) As used in this section, the following definitions shall apply:

(1) "Malice" means conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others.

(2) "Oppression" means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights.

(3) "Fraud" means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury.

■ "[E]vidence of ratification of [agent's] actions by Hamilton, and any other findings made under *Civil Code* section 3294, subdivision (b), must be made by clear and convincing evidence." (*Barton v. Alexander Hamilton Life Ins. Co. of America* (2003) 110 Cal.App.4th 1640, 1644 [3 Cal.Rptr.3d 258] .)

■ "Subdivision (b) is not a model of clarity, but in light of California's history of employer liability for punitive damages and of the Legislature's reasons for enacting subdivision (b), we have no doubt that it does no more than codify and refine existing law. Subdivision (b) thus authorizes the imposition of punitive damages on an employer in three situations: (1) when an employee was guilty of oppression, fraud or malice, and the employer with advance knowledge of the unfitness of the employee employed him or her with a conscious disregard of the rights or safety of others, (2) when an employee was guilty of oppression, fraud or malice, and the employer authorized or ratified the wrongful conduct, or (3) when the employer was itself guilty of the oppression, fraud or malice." (*Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1151 [74 Cal.Rptr.2d 510] .)

■ "'California has traditionally allowed punitive damages to be assessed against an employer (or principal) for the acts of an employee (or agent) only where the circumstances indicate that the employer himself was guilty of fraud, oppression, or malice. Thus, even before section 3294, subdivision (b) was added to the Civil Code in 1980, the courts required evidence that the employer authorized or ratified a malicious act, personally committed such an act, or wrongfully hired or retained an unfit employee.' The 'additional' burden on a plaintiff seeking punitive damages from an employer is to show not only that an employee acted with oppression, fraud or malice, but that the employer engaged in conduct defined in subdivision (b)." (*Weeks, supra*, 63 Cal.App.4th at p. 1154 , internal citation omitted.)

■ "*Civil Code* section 3294, subdivision (b) does not authorize an award of punitive damages against an employer for the employee's wrongful conduct. It authorizes an award of punitive damages against an employer for the employer's own wrongful conduct. Liability under subdivision (b) is vicarious only to the extent that the employer is liable for the actions of its officer, director or managing agent in hiring or controlling the offending employee, in ratifying the offense or in acting with oppression, fraud or malice. It is not vicarious in the sense that the employer is liable for the wrongful conduct of the offending employee." (*Weeks, supra*, 63 Cal.App.4th at pp. 1154-1155 .)

■ "'[T]he most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct.' We have instructed courts to determine the reprehensibility of a defendant by considering whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident. The existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect." (*State Farm Mutual Automobile Insurance Co., supra*, 538 U.S. at p. 419 , internal citation omitted.)

■ "[W]e have been reluctant to identify concrete constitutional limits on the ratio between harm, or potential harm, to the plaintiff and the punitive damages award. We decline again to impose a bright-line ratio which a punitive damages award cannot exceed. Our jurisprudence and the principles it has now established demonstrate, however, that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process. ... [A]n award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety. ... While these ratios are not binding, they are instructive. They demonstrate what should be obvious: Single-digit multipliers are more likely to comport with due process, while still achieving the State's

goals of deterrence and retribution, than awards with ratios in range of 500 to 1" (*State Farm Mutual Automobile Insurance Co.*, *supra*, 538 U.S. at pp. 424-425 , internal citation omitted.)

■ "Nonetheless, because there are no rigid benchmarks that a punitive damages award may not surpass, ratios greater than those we have previously upheld may comport with due process where 'a particularly egregious act has resulted in only a small amount of economic damages.' The converse is also true, however. When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee. The precise award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff." (*State Farm Mutual Automobile Insurance Co.*, *supra*, 538 U.S. at p. 425 , internal citation omitted.)

■ "[T]he Constitution's Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent, i.e., injury that it inflicts upon those who are, essentially, strangers to the litigation." (*Philip Morris USA*, *supra*, 549 U.S. at p. ____ [2007 U.S. LEXIS 1332, *13] .)

■ "Evidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible--although counsel may argue in a particular case that conduct resulting in no harm to others nonetheless posed a grave risk to the public, or the converse. Yet for the reasons given above, a jury may not go further than this and use a punitive damages verdict to punish a defendant directly on account of harms it is alleged to have visited on nonparties." (*Philip Morris USA*, *supra*, 549 U.S. at p. ____ [2007 U.S. LEXIS 1332, *16] .)

■ "[A] specific instruction encompassing both the permitted and prohibited uses of evidence of harm caused to others would be appropriate in the new trial if requested by the parties. We believe that an instruction on these issues should clearly distinguish between the permitted and prohibited uses of such evidence and thus make clear to the jury the purposes for which it can and cannot consider that evidence. A jury may consider evidence of harm caused to others for the purpose of determining the degree of reprehensibility of a defendant's conduct toward the plaintiff in deciding the amount of punitive damages, but it may not consider that evidence for the purpose of punishing the defendant directly for harm caused to others. In our view, Judicial Council of California Civil Jury Instructions (Aug. 2007 rev.) CACI Nos. 3940, 3942, 3943, 3945, 3947, and 3949 could convey this distinction better by stating more explicitly that evidence of harm caused to others may be considered for the one purpose but not for the other, and by providing that explanation together with the reprehensibility factors rather than in connection with the reasonable relationship issue." (*Bullock v. Philip Morris USA, Inc.* (2008) 159 Cal.App.4th 655, 695, fn. 21 [71 Cal.Rptr.3d 775] , internal citation omitted.)

■ "An award of punitive damages is not supported by a verdict based on breach of contract, even where the defendant's conduct in breaching the contract was wilful, fraudulent, or malicious. Even in those cases in which a separate tort action is alleged, if there is 'but one verdict based upon contract' a punitive damage award is improper." (*Myers Building Industries, Ltd. v. Interface Technology, Inc.* (1993) 13 Cal.App.4th 949, 960 [17 Cal.Rptr.2d 242] , internal citations omitted.)

■ "[P]unitive damages are not assessed against employers on a pure respondeat superior basis. Some evidence of fault by the employer itself is also required." (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 724, fn. 11 [34 Cal.Rptr.2d 898, 882 P.2d 894] .)

■ "Subdivision (b) ... governs awards of punitive damages against employers, and permits an award for the conduct described there without an additional finding that the employer engaged in oppression, fraud or malice." (*Weeks*, *supra*, 63 Cal.App.4th at p. 1137 .)

5-39 California Forms of Jury Instruction CACI 3947

■ "Section 3294 is no longer silent on who may be responsible for imputing punitive damages to a corporate employer. For corporate punitive damages liability, section 3294, subdivision (b), requires that the wrongful act giving rise to the exemplary damages be committed by an 'officer, director, or managing agent.' " (*White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 572 [88 Cal.Rptr.2d 19, 981 P.2d 944] .)

■ "[I]n performing, ratifying, or approving the malicious conduct, the agent must be acting as the organization's representative, not in some other capacity." (*College Hospital, Inc.*, *supra*, 8 Cal.4th at p. 723 .)

■ "[T]he concept [of managing agent] assumes that such individual was acting in a corporate or employment capacity when the conduct giving rise to the punitive damages claim against the employer occurred." (*College Hospital, Inc.*, *supra*, 8 Cal.4th at p. 723 .)

■ "No purpose would be served by punishing the employer for an employee's conduct that is wholly unrelated to its business or to the employee's duties therein." (*College Hospital, Inc.*, *supra*, 8 Cal.4th at pp. 723-724 .)

■ " 'The determination whether employees act in a managerial capacity [i.e., are managing agents] does not necessarily hinge on their "level" in the corporate hierarchy. Rather, the critical inquiry is the degree of discretion the employees possess in making decisions that will ultimately determine corporate policy.' " (*Kelly-Zurian v. Wohl Shoe Co., Inc.* (1994) 22 Cal.App.4th 397, 421 [27 Cal.Rptr.2d 457] , internal citation omitted.)

■ "[W]e conclude the Legislature intended the term 'managing agent' to include only those corporate employees who exercise substantial independent authority and judgment in their corporate decisionmaking so that their decisions ultimately determine corporate policy. The scope of a corporate employee's discretion and authority under our test is therefore a question of fact for decision on a case-by-case basis." (*White, supra*, 21 Cal.4th at pp. 566-567 .)

■ "In order to demonstrate that an employee is a true managing agent under section 3294, subdivision (b), a plaintiff seeking punitive damages would have to show that the employee exercised substantial discretionary authority over significant aspects of a corporation's business." (*White, supra*, 21 Cal.4th at p. 577 .)

■ " '[C]orporate policy' is the general principles which guide a corporation, or rules intended to be followed consistently over time in corporate operations. A 'managing agent' is one with substantial authority over decisions that set these general principles and rules." (*Cruz v. Homebase* (2000) 83 Cal.App.4th 160, 167-168 [99 Cal.Rptr.2d 435] .)

■ " '[R]atification' is the '[c]onfirmation and acceptance of a previous act.' A corporation cannot confirm and accept that which it does not actually know about." (*Cruz, supra*, 83 Cal.App.4th at p. 168 .)

■ "For purposes of determining an employer's liability for punitive damages, ratification generally occurs where, under the particular circumstances, the employer demonstrates an intent to adopt or approve oppressive, fraudulent, or malicious behavior by an employee in the performance of his job duties." (*College Hospital, Inc.*, *supra*, 8 Cal.4th at p. 726 .)

■ "Corporate ratification in the punitive damages context requires actual knowledge of the conduct and its outrageous nature." (*College Hospital, Inc.*, *supra*, 8 Cal.4th at p. 726 .)

■ "The high court in *TXO* [*TXO Production Corp.*, *supra*] and *BMW* [*BMW of North America, Inc. v. Gore* (1996) 517 U.S. 559 [116 S.Ct. 1589, 134 L.Ed.2d 809]] has refined the disparity analysis to take into account the *potential* loss to plaintiffs, as where a scheme worthy of punitive damages does not fully succeed. In such cases, the proper ratio would be the ratio of punitive damages to the potential harm to plaintiff." (*Sierra Club Found. v. Graham* (1999) 72 Cal.App.4th 1135, 1162, *fn. 15* [85 Cal.Rptr.2d 726] , original italics.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1581-1585

California Tort Damages (Cont.Ed.Bar 2d ed.) Punitive Damages, §§ 14.1-14.12, 14.18-14.31, 14.39

4 Levy et al., *California Torts*, Ch. 54, *Punitive Damages*, § 54.07 (Matthew Bender)

15 *California Forms of Pleading and Practice*, Ch. 177, *Damages*, § 177.51 (Matthew Bender)

6 *California Points and Authorities*, Ch. 64, *Damages: Torts*, §§ 64.141 et seq., 64.174 et seq. (Matthew Bender)

Publisher's Notes

This instruction covers issues presented in BAJI Nos. 14.71, 14.71.2, and 14.74.

LexisNexis Matthew Bender Expert Practice Tip--Corporate Liability for Punitive Damages/Use *State Farm* Guideposts: This complicated instruction combines several legal concepts. Note that defendants almost always request a bifurcated trial on punitive damages (so that financial information will not be introduced unless and until the jury finds fraud, malice, or oppression).

In most commercial cases, the liability of a corporation is predicated on the fact that the conduct in question was committed by an officer, director, or managing agent, or alternatively, that the conduct was ratified or approved by the corporation after it occurred. Plaintiff's counsel must be careful to introduce evidence on these points to pursue a punitive claim (e.g., evidence that the corporation accepted the benefits of the conduct or refused to reverse the decision would support ratification).

With regard to the amount of punitive damages, the U.S. Supreme Court in *State Farm Mutual Automobile Ins. Co. v. Campbell* (2003) 538 U.S. 408, 123 S. Ct. 1513, 155 L. Ed. 2d 585 provided new guideposts for courts to review punitive damage awards, including a discussion of specific permissible ratios between punitive and compensatory damages. *By Ronald Oster*

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsDamagesPunitive DamagesAward CalculationsGeneral OverviewTortsDamagesPunitive DamagesAward CalculationsFactorsTortsDamagesPunitive DamagesConduct Supporting Awards



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California Forms of Jury Instruction

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CHAPTER 39 California Judicial Council Damages Instructions

5-39 California Forms of Jury Instruction CACI 3948

CACI 3948 Punitive Damages--Individual and Corporate Defendants (Corporate Liability Based on Acts of Named Individual)--Bifurcated Trial (First Phase)

If you decide that [name of individual defendant]'s conduct caused [name of plaintiff] harm, you must decide whether that conduct justifies an award of punitive damages against [name of individual defendant] and, if so, against [name of corporate defendant]. The amount, if any, of punitive damages will be an issue decided later.

You may award punitive damages against [name of individual defendant] only if [name of plaintiff] proves by clear and convincing evidence that [name of individual defendant] engaged in that conduct with malice, oppression, or fraud.

"Malice" means that a defendant acted with intent to cause injury or that a defendant's conduct was despicable and was done with a willful and knowing disregard of the rights or safety of another. A defendant acts with knowing disregard when the defendant is aware of the probable dangerous consequences of his, her, or its conduct and deliberately fails to avoid those consequences.

"Oppression" means that a defendant's conduct was despicable and subjected [name of plaintiff] to cruel and unjust hardship in knowing disregard of [his/her] rights.

"Despicable conduct" is conduct that is so vile, base, or contemptible that it would be looked down on and despised by reasonable people.

"Fraud" means that a defendant intentionally misrepresented or concealed a material fact and did so intending to harm [name of plaintiff].

You may also award punitive damages against [name of corporate defendant] based on [name of individual]'s conduct if [name of plaintiff] proves [one of] the following by clear and convincing evidence:

1. [That [*name of individual defendant*] was an officer, a director, or a managing agent of [*name of corporate defendant*] who was acting on behalf of [*name of corporate defendant*] at the time of the conduct constituting malice oppression or fraud; [or]]

2. [That an officer, a director, or a managing agent of [*name of corporate defendant*] had advance knowledge of the unfitness of [*name of individual defendant*] and employed [him/her] with a knowing disregard of the rights or safety of others; [or]]

3. [That [*name of individual defendant*]'s conduct constituting malice, oppression, or fraud was authorized by an officer, a director, or a managing agent of [*name of corporate defendant*]; [or]]

4. [That an officer, a director, or a managing agent of [*name of corporate defendant*] knew of [*name of individual defendant*]'s conduct constituting malice, oppression, or fraud and adopted or approved that conduct after it occurred.]

An employee is a "managing agent" if he or she exercises substantial independent authority and judgment in his or her corporate decision making such that his or her decisions ultimately determine corporate policy.

New September 2003; Revised April 2004, December 2005

Use CACI No. 3949, *Punitive Damages--Individual and Corporate Defendants (Corporate Liability Based on Acts of Named Individual)--Bifurcated Trial (Second Phase)*, for the second phase of a bifurcated trial.

This instruction is intended to apply to cases where punitive damages are sought against both an individual person and a corporate defendant. When damages are sought only against a corporate defendant, use CACI No. 3944, *Punitive Damages Against Employer or Principal for Conduct of a Specific Agent or Employee--Bifurcated Trial (First Phase)*, or CACI No. 3946, *Punitive Damages --Entity Defendant-- Bifurcated Trial (First Phase)*. When damages are sought against individual defendants, use CACI No. 3941, *Punitive Damages --Individual Defendant-- Bifurcated Trial (First Phase)*.

For an instruction explaining "clear and convincing evidence," see CACI No. 201, *More Likely True--Clear and Convincing Proof*.

If any of the alternative grounds for seeking punitive damages are inapplicable to the facts of the case, they may be omitted.

See CACI No. 3940, *Punitive Damages --Individual Defendant-- Trial Not Bifurcated*, for additional sources and authority.

In an appropriate case, the jury may be instructed that a false promise or a suggestion of a fact known to be false may constitute a misrepresentation as the word "misrepresentation" is used in the instruction's definition of "fraud."

- *Civil Code section 3294* provides, in part:

(a) In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant. ...

(c) As used in this section, the following definitions shall apply:

(1) "Malice" means conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others.

(2) "Oppression" means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights.

(3) "Fraud" means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury.

■ "[E]vidence of ratification of [agent's] actions by Hamilton, and any other findings made under *Civil Code* section 3294, subdivision (b), must be made by clear and convincing evidence." (*Barton v. Alexander Hamilton Life Ins. Co. of America* (2003) 110 Cal.App.4th 1640, 1644 [3 Cal.Rptr.3d 258] .)

■ *Civil Code* section 3295(d) provides: "The court shall, on application of any defendant, preclude the admission of evidence of that defendant's profits or financial condition until after the trier of fact returns a verdict for plaintiff awarding actual damages and finds that a defendant is guilty of malice, oppression, or fraud in accordance with Section 3294. Evidence of profit and financial condition shall be admissible only as to the defendant or defendants found to be liable to the plaintiff and to be guilty of malice, oppression, or fraud. Evidence of profit and financial condition shall be presented to the same trier of fact that found for the plaintiff and found one or more defendants guilty of malice, oppression, or fraud."

■ "[Section 3295(d)] affects the order of proof at trial, precluding the admission of evidence of defendants' financial condition until after the jury has returned a verdict for plaintiffs awarding actual damages and found that one or more defendants were guilty of 'oppression, fraud or malice,' in accordance with *Civil Code* section 3294." (*City of El Monte v. Superior Court* (1994) 29 Cal.App.4th 272, 274-275 [34 Cal.Rptr.2d 490] , internal citations omitted.)

■ "Evidence of the defendant's financial condition is a prerequisite to an award of punitive damages. In order to protect defendants from the premature disclosure of their financial position when punitive damages are sought, the Legislature enacted *Civil Code* section 3295." (*City of El Monte, supra*, 29 Cal.App.4th at p. 276 , internal citations omitted.)

■ "[C]ourts have held it is reversible error to try the punitive damages issue to a new jury after the jury which found liability has been excused." (*Rivera v. Sassoon* (1995) 39 Cal.App.4th 1045, 1048 [46 Cal.Rptr.2d 144] , internal citations omitted.)

■ "Malice, for purposes of awarding exemplary damages, includes 'despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others.' To establish conscious disregard, the plaintiff must show 'that the defendant was aware of the probable dangerous consequences of his conduct, and that he wilfully and deliberately failed to avoid those consequences.' " (*Hoch v. Allied-Signal, Inc.* (1994) 24 Cal.App.4th 48, 61 [29 Cal.Rptr.2d 615] , internal citations omitted.)

■ "Used in its ordinary sense, the adjective 'despicable' is a powerful term that refers to circumstances that are 'base,' 'vile,' or 'contemptible.' As amended to include this word, the statute plainly indicates that absent an intent to injure the plaintiff, 'malice' requires more than a 'willful and conscious' disregard of the plaintiffs' interests. The additional component of 'despicable conduct' must be found." (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 725 [34 Cal.Rptr.2d 898, 882 P.2d 894] , internal citations omitted.)

■ "Section 3294 is no longer silent on who may be responsible for imputing punitive damages to a corporate employer. For corporate punitive damages liability, section 3294, subdivision (b), requires that the wrongful act giving rise to the exemplary damages be committed by an 'officer, director, or managing agent.' " (*White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 572 [88 Cal.Rptr.2d 19, 981 P.2d 944] .)

■ "[I]n performing, ratifying, or approving the malicious conduct, the agent must be acting as the organization's representative, not in some other capacity." (*College Hospital, Inc., supra*, 8 Cal.4th at p. 723 .)

■ "[T]he concept [of managing agent] assumes that such individual was acting in a corporate or employment capacity when the conduct giving rise to the punitive damages claim against the employer occurred." (*College Hospital, Inc., supra*, 8 Cal.4th at p. 723 .)

■ "No purpose would be served by punishing the employer for an employee's conduct that is wholly unrelated to its business or to the employee's duties therein." (*College Hospital, Inc., supra*, 8 Cal.4th at pp. 723-724 .)

■ "The determination whether employees act in a managerial capacity [i.e., are managing agents] does not necessarily hinge on their "level" in the corporate hierarchy. Rather, the critical inquiry is the degree of discretion the employees possess in making decisions that will ultimately determine corporate policy.' " (*Kelly-Zurian v. Wohl Shoe Co., Inc.* (1994) 22 Cal.App.4th 397, 421 [27 Cal.Rptr.2d 457] , internal citation omitted.)

■ "[W]e conclude the Legislature intended the term 'managing agent' to include only those corporate employees who exercise substantial independent authority and judgment in their corporate decision making so that their decisions ultimately determine corporate policy. The scope of a corporate employee's discretion and authority under our test is therefore a question of fact for decision on a case-by-case basis." (*White, supra*, 21 Cal.4th at pp. 566-567 .)

■ "In order to demonstrate that an employee is a true managing agent under section 3294, subdivision (b), a plaintiff seeking punitive damages would have to show that the employee exercised substantial discretionary authority over significant aspects of a corporation's business." (*White, supra*, 21 Cal.4th at p. 577 .)

■ "'[C]orporate policy' is the general principles which guide a corporation, or rules intended to be followed consistently over time in corporate operations. A 'managing agent' is one with substantial authority over decisions that set these general principles and rules." (*Cruz v. Homebase* (2000) 83 Cal.App.4th 160, 167-168 [99 Cal.Rptr.2d 435] .)

■ "'[R]atification' is the '[c]onfirmation and acceptance of a previous act.' A corporation cannot confirm and accept that which it does not actually know about." (*Cruz, supra*, 83 Cal.App.4th at p. 168 .)

■ "For purposes of determining an employer's liability for punitive damages, ratification generally occurs where, under the particular circumstances, the employer demonstrates an intent to adopt or approve oppressive, fraudulent, or malicious behavior by an employee in the performance of his job duties." (*College Hospital, Inc., supra*, 8 Cal.4th at p. 726 .)

■ "Corporate ratification in the punitive damages context requires actual knowledge of the conduct and its outrageous nature." (*College Hospital, Inc., supra*, 8 Cal.4th at p. 726 .)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1581-1585

California Tort Damages (Cont.Ed.Bar) Punitive Damages, §§ 14.13-14.14, 14.23

4 Levy et al., California Torts, Ch. 54, *Punitive Damages*, §§ 54.07, 54.24[4][d] (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages* (Matthew Bender)

6 California Points and Authorities, Ch. 65, *Damages* (Matthew Bender)

Publisher's Notes

This instruction covers issues presented in BAJI Nos. 14.72.1 and 14.74.

LexisNexis Matthew Bender Expert Practice Tip--Corporate Liability for Punitive Damages: In most business cases, the liability of a corporation for punitive damages is predicated on the fact that the conduct in question was committed by an officer, director, or managing agent, or alternatively, that the conduct was ratified or approved by the corporation after it occurred. Plaintiff's counsel must be careful to introduce evidence on these points to preserve a punitive claim (e.g., evidence that the corporation accepted the benefits of the conduct or refused to reverse the decision would support ratification). *By Ronald Oster*

LexisNexis Matthew Bender Expert Practice Tip--Case Law Research Required: There is a lot of new case law regarding the amount of punitive damages allowed. Case law research is required since this area is being litigated through the appellate courts. *By Dona Cohn-Payne*

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsDamagesPunitive DamagesGeneral OverviewTortsDamagesPunitive DamagesAward CalculationsGeneral OverviewTortsDamagesPunitive DamagesConduct Supporting Awards



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CHAPTER 39 California Judicial Council Damages Instructions

5-39 California Forms of Jury Instruction CACI 3949

CACI 3949 Punitive Damages--Individual and Corporate Defendants (Corporate Liability Based on Acts of Named Individual)--Bifurcated Trial (Second Phase)

You must now decide the amount, if any, that you should award [*name of plaintiff*] in punitive damages. The purposes of punitive damages are to punish a wrongdoer for the conduct that harmed the plaintiff and to discourage similar conduct in the future.

There is no fixed formula for determining the amount of punitive damages and you are not required to award any punitive damages. If you decide to award punitive damages, you should consider all of the following factors separately for each defendant in determining the amount:

(a) How reprehensible was that defendant's conduct? In deciding how reprehensible a defendant's conduct was, you may consider, among other factors:

- 1. Whether the conduct caused physical harm;**
- 2. Whether the defendant disregarded the health or safety of others;**
- 3. Whether [*name of plaintiff*] was financially weak or vulnerable and the defendant knew [*name of plaintiff*] was financially weak or vulnerable and took advantage of [him/her/it];**
- 4. Whether the defendant's conduct involved a pattern or practice; and**
- 5. Whether the defendant acted with trickery or deceit.**

(b) Is there a reasonable relationship between the amount of punitive damages and [*name of*

plaintiff]'s harm [or between the amount of punitive damages and potential harm to [*name of plaintiff*] that the defendant knew was likely to occur because of [his/her/its] conduct]?

(c) In view of that defendant's financial condition, what amount is necessary to punish [him/her/it] and discourage future wrongful conduct? You may not increase the punitive award above an amount that is otherwise appropriate merely because a defendant has substantial financial resources. [Any award you impose may not exceed that defendant's ability to pay.]

[Punitive damages may not be used to punish a defendant for the impact of [his/her/its] alleged misconduct on persons other than [*name of plaintiff*].]

New September 2003; Revised April 2004, October 2004, June 2006, April 2007, August 2007, October 2008

Directions for Use

Read the bracketed language at the end of the first sentence of factor (b) only if there is evidence that the conduct of defendant that allegedly gives rise to liability and punitive damages either caused or foreseeably threatened to cause harm to plaintiff that would not be included in an award of compensatory damages. (*Simon v. San Paolo U.S. Holding Co., Inc.* (2005) 35 Cal.4th 1159 [29 Cal.Rptr.3d 379, 113 P.3d 63] .) The bracketed phrase concerning "potential harm" might be appropriate, for example, if damages actually caused by the defendant's acts are not recoverable because they are barred by statute (*id.* at p. 1176 , citing *Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 929 [148 Cal.Rptr. 389, 582 P.2d 980] [in a bad faith insurance case, plaintiff died before judgment, precluding her estate's recovery of emotional distress damages]), or if the harm caused by defendant's acts could have been great but by chance only slight harm was inflicted. (*Simon, supra*, 35 Cal.4th at p. 1177 , citing *TXO Production Corp. v. Alliance Resources Corp.* (1993) 509 U.S. 443, 459 [113 S.Ct. 2711, 125 L.Ed.2d 366] [considering the hypothetical of a person wildly firing a gun into a crowd but by chance only damaging a pair of glasses].) The bracketed phrase should not be given if an award of compensatory damages is the "true measure" of the harm or potential harm caused by defendant's wrongful acts. (*Simon, supra*, 35 Cal.4th at pp. 1178-1179 [rejecting consideration for purposes of assessing punitive damages of the plaintiff's loss of the benefit of the bargain if the jury had found that there was no binding contract].)

Read the optional final sentence of factor (c) only if the defendant has presented relevant evidence regarding that issue.

Read the optional final sentence if there is a possibility that in arriving at an amount of punitive damages, the jury might consider harm that the defendant's conduct may have caused to nonparties. (See *Philip Morris USA v. Williams* (2007) 549 U.S. 346, ___ [127 S.Ct. 1057, 166 L.Ed.2d 940, 2007 U.S. LEXIS 1332, *13] .) Harm to others may be relevant to determining reprehensibility based on factors (a)(2) (disregard of health or safety of others) and (a)(4) (pattern or practice). (See *State Farm Mutual Automobile Insurance Co. v. Campbell* (2003) 538 U.S. 408, 419 [123 S.Ct. 1513, 155 L.Ed.2d 585] .)

"A jury must be instructed ... that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred." (*State Farm Mutual Automobile Insurance Co., supra*, 538 U.S. at p. 422). An instruction on this point should be included within this instruction if appropriate to the facts.

Courts have stated that "[p]unitive damages previously imposed for the same conduct are relevant in

determining the amount of punitive damages required to sufficiently punish and deter. The likelihood of future punitive damage awards may also be considered, although it is entitled to considerably less weight." (*Stevens v. Owens-Corning Fiberglas Corp.* (1996) 49 Cal.App.4th 1645, 1661 [57 Cal.Rptr.2d 525] , internal citations omitted.) The court in *Stevens* suggested that the following instruction be given if evidence of other punitive damage awards is introduced into evidence:

If you determine that a defendant has already been assessed with punitive damages based on the same conduct for which punitive damages are requested in this case, you may consider whether punitive damages awarded in other cases have sufficiently punished and made an example of the defendant. You must not use the amount of punitive damages awarded in other cases to determine the amount of the punitive damage award in this case, except to the extent you determine that a lesser award, or no award at all, is justified in light of the penalties already imposed. (*Stevens, supra*, 49 Cal.App.4th at p. 1663, fn. 7 .)

Sources and Authority

- *Civil Code* section 3294 provides, in part: "In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant."

- *Civil Code* section 3295(d) provides: "The court shall, on application of any defendant, preclude the admission of evidence of that defendant's profits or financial condition until after the trier of fact returns a verdict for plaintiff awarding actual damages and finds that a defendant is guilty of malice, oppression, or fraud in accordance with Section 3294. Evidence of profit and financial condition shall be admissible only as to the defendant or defendants found to be liable to the plaintiff and to be guilty of malice, oppression, or fraud. Evidence of profit and financial condition shall be presented to the same trier of fact that found for the plaintiff and found one or more defendants guilty of malice, oppression, or fraud."

- "[Section 3295(d)] affects the order of proof at trial, precluding the admission of evidence of defendants' financial condition until after the jury has returned a verdict for plaintiffs awarding actual damages and found that one or more defendants were guilty of 'oppression, fraud or malice,' in accordance with *Civil Code* section 3294." (*City of El Monte v. Superior Court* (1994) 29 Cal.App.4th 272, 274-275 [34 Cal.Rptr.2d 490] , internal citations omitted.)

- "Evidence of the defendant's financial condition is a prerequisite to an award of punitive damages. In order to protect defendants from the premature disclosure of their financial position when punitive damages are sought, the Legislature enacted *Civil Code* section 3295." (*City of El Monte, supra*, 29 Cal.App.4th at p. 276 , internal citations omitted.)

- "[C]ourts have held it is reversible error to try the punitive damages issue to a new jury after the jury which found liability has been excused." (*Rivera v. Sassoon* (1995) 39 Cal.App.4th 1045, 1048 [46 Cal.Rptr.2d 144] , internal citations omitted.)

- "The purpose of punitive damages is to punish wrongdoers and thereby deter the commission of wrongful acts." (*Neal, supra*, 21 Cal.3d at p. 928, fn. 13 .)

- "Punitive damages are to be assessed in an amount which, depending upon the defendant's financial

worth and other factors, will deter him and others from committing similar misdeeds. Because compensatory damages are designed to make the plaintiff 'whole,' punitive damages are a 'windfall' form of recovery." (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 712 [34 Cal.Rptr.2d 898, 882 P.2d 894] , internal citations omitted.)

■ "It follows that the wealthier the wrongdoing defendant, the larger the award of exemplary damages need be in order to accomplish the statutory objective." (*Bertero v. National General Corp.* (1974) 13 Cal.3d 43, 65 [118 Cal.Rptr. 184, 529 P.2d 608] .)

■ " 'A plaintiff, upon establishing his case, is always entitled of right to compensatory damages. But even after establishing a case where punitive damages are permissible, he is never entitled to them. The granting or withholding of the award of punitive damages is wholly within the control of the jury, and may not legally be influenced by any direction of the court that in any case a plaintiff is entitled to them. Upon the clearest proof of malice in fact, it is still the exclusive province of the jury to say whether or not punitive damages shall be awarded. A plaintiff is entitled to such damages only after the jury, in the exercise of its untrammelled discretion, has made the award.' " (*Brewer v. Second Baptist Church of Los Angeles* (1948) 32 Cal.2d 791, 801 [197 P.2d 713] , internal citations omitted.)

■ "In light of our holding that evidence of a defendant's financial condition is essential to support an award of punitive damages, *Evidence Code* section 500 mandates that the plaintiff bear the burden of proof on the issue. A plaintiff seeking punitive damages is not seeking a mere declaration by the jury that he is entitled to punitive damages in the abstract. The plaintiff is seeking an award of real money in a specific amount to be set by the jury. Because the award, whatever its amount, cannot be sustained absent evidence of the defendant's financial condition, such evidence is 'essential to the claim for relief.' " (*Adams v. Murakami* (1991) 54 Cal.3d 105, 119 [284 Cal.Rptr. 318, 813 P.2d 1348] , internal citation omitted.)

■ "[W]e are afforded guidance by certain established principles, all of which are grounded in the purpose and function of punitive damages. One factor is the particular nature of the defendant's acts in light of the whole record; clearly, different acts may be of varying degrees of reprehensibility, and the more reprehensible the act, the greater the appropriate punishment, assuming all other factors are equal. Another relevant yardstick is the amount of compensatory damages awarded; in general, even an act of considerable reprehensibility will not be seen to justify a proportionally high amount of punitive damages if the actual harm suffered thereby is small. Also to be considered is the wealth of the particular defendant; obviously, the function of deterrence will not be served if the wealth of the defendant allows him to absorb the award with little or no discomfort. By the same token, of course, the function of punitive damages is not served by an award which, in light of the defendant's wealth and the gravity of the particular act, exceeds the level necessary to properly punish and deter." (*Neal, supra*, 21 Cal.3d at p. 928 , internal citations and footnote omitted.)

■ "[T]he Constitution's Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent, i.e., injury that it inflicts upon those who are, essentially, strangers to the litigation." (*Philip Morris USA, supra*, 549 U.S. at p. ____ [2007 U.S. LEXIS 1332, *13] .)

■ "Evidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible--although counsel may argue in a particular case that conduct resulting in no harm to others nonetheless posed a grave risk to the public, or the converse. Yet for the reasons given above, a jury may not go further than this and use a punitive damages verdict to punish a defendant directly on

account of harms it is alleged to have visited on nonparties." (*Philip Morris USA, supra*, 549 U.S. at p. ____ [2007 U.S. LEXIS 1332, *16] .)

■ "[A] specific instruction encompassing both the permitted and prohibited uses of evidence of harm caused to others would be appropriate in the new trial if requested by the parties. We believe that an instruction on these issues should clearly distinguish between the permitted and prohibited uses of such evidence and thus make clear to the jury the purposes for which it can and cannot consider that evidence. A jury may consider evidence of harm caused to others for the purpose of determining the degree of reprehensibility of a defendant's conduct toward the plaintiff in deciding the amount of punitive damages, but it may not consider that evidence for the purpose of punishing the defendant directly for harm caused to others. In our view, Judicial Council of California Civil Jury Instructions (Aug. 2007 rev.) CACI Nos. 3940, 3942, 3943, 3945, 3947, and 3949 could convey this distinction better by stating more explicitly that evidence of harm caused to others may be considered for the one purpose but not for the other, and by providing that explanation together with the reprehensibility factors rather than in connection with the reasonable relationship issue." (*Bullock v. Philip Morris USA, Inc.* (2008) 159 Cal.App.4th 655, 695, fn. 21 [71 Cal.Rptr.3d 775] , internal citation omitted.)

■ "'[T]he most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct.' We have instructed courts to determine the reprehensibility of a defendant by considering whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident. The existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect." (*State Farm Mutual Automobile Insurance Co.*, *supra*, 538 U.S. at p. 419 , internal citation omitted.)

■ "[W]e have been reluctant to identify concrete constitutional limits on the ratio between harm, or potential harm, to the plaintiff and the punitive damages award. We decline again to impose a bright-line ratio which a punitive damages award cannot exceed. Our jurisprudence and the principles it has now established demonstrate, however, that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process. ... [A]n award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety. ... While these ratios are not binding, they are instructive. They demonstrate what should be obvious: Single-digit multipliers are more likely to comport with due process, while still achieving the State's goals of deterrence and retribution, than awards with ratios in range of 500 to 1" (*State Farm Mutual Automobile Insurance Co.*, *supra*, 538 U.S. at pp. 424-425 , internal citation omitted.)

■ "Nonetheless, because there are no rigid benchmarks that a punitive damages award may not surpass, ratios greater than those we have previously upheld may comport with due process where 'a particularly egregious act has resulted in only a small amount of economic damages.' The converse is also true, however. When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee. The precise award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff." (*State Farm Mutual Automobile Insurance Co.*, *supra*, 538 U.S. at p. 425 , internal citation omitted.)

■ "The decision to award punitive damages is exclusively the function of the trier of fact. So too is the amount of any punitive damage award. The relevant considerations are the nature of the defendant's conduct, the defendant's wealth, and the plaintiff's actual damages." (*Gagnon v. Continental Casualty*

Co. (1989) 211 Cal.App.3d 1598, 1602 [260 Cal.Rptr. 305] , internal citations omitted.)

■ "The wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award." (*State Farm Mutual Automobile Insurance Co.*, *supra*, 538 U.S. at p. 427 , internal citation omitted.)

■ "[T]he purpose of punitive damages is not served by financially destroying a defendant. The purpose is to deter, not to destroy." (*Adams*, *supra*, 54 Cal.3d at p. 112 .)

■ "[A] punitive damages award is excessive if it is disproportionate to the defendant's ability to pay." (*Adams*, *supra*, 54 Cal.3d at p. 112 , internal citations omitted.)

■ "It has been recognized that punitive damages awards generally are not permitted to exceed 10 percent of the defendant's net worth." (*Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1166 [74 Cal.Rptr.2d 510] .)

■ "In light of our discussion, we conclude that even where, as here, punitive but not compensatory damages are available to the plaintiff, the defendant is entitled to an instruction that punitive damages must bear a reasonable relation to the injury, harm, or damage actually suffered by the plaintiff and proved at trial. Consequently, the trial court erred in failing to so instruct the jury." (*Gagnon*, *supra*, 211 Cal.App.3d at p. 1605 .)

■ "We conclude that the rule ... that an award of exemplary damages must be accompanied by an award of compensatory damages [or its equivalent] is still sound. That rule cannot be deemed satisfied where the jury has made an express determination not to award compensatory damages." (*Cheung v. Daley* (1995) 35 Cal.App.4th 1673, 1677 [42 Cal.Rptr.2d 164] , footnote omitted.)

■ "With the focus on the plaintiff's injury rather than the amount of compensatory damages, the ['reasonable relation'] rule can be applied even in cases where only equitable relief is obtained or where nominal damages are awarded or, as here, where compensatory damages are unavailable." (*Gagnon*, *supra*, 211 Cal.App.3d at p. 1605 .)

■ "The high court in *TXO* [*TXO Production Corp.*, *supra*] and *BMW* [*BMW of North America, Inc. v. Gore* (1996) 517 U.S. 559 [116 S.Ct. 1589, 134 L.Ed.2d 809]] has refined the disparity analysis to take into account the *potential* loss to plaintiffs, as where a scheme worthy of punitive damages does not fully succeed. In such cases, the proper ratio would be the ratio of punitive damages to the potential harm to plaintiff." (*Sierra Club Found. v. Graham* (1999) 72 Cal.App.4th 1135, 1162, *fn. 15* [85 Cal.Rptr.2d 726] , original italics.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1581-1585

California Tort Damages (Cont.Ed.Bar 2d ed.) Punitive Damages, §§ 14.1-14.12, 14.21, 14.39

4 Levy et al., *California Torts*, Ch. 54, *Punitive Damages*, §§ 54.07, 54.24[4][d] (Matthew Bender)

15 *California Forms of Pleading and Practice*, Ch. 177, *Damages*, § 177.51 (Matthew Bender)

6 *California Points and Authorities*, Ch. 64, *Damages: Torts*, §§ 64.141 et seq., 64.174 et seq. (Matthew Bender)

Publisher's Notes

This instruction replaces BAJI No. 14.72.2, and covers issues presented in BAJI No. 14.71.2.

LexisNexis Matthew Bender Expert Practice Tip--Use *State Farm* Guideposts: In *State Farm Mutual Automobile Ins. Co. v. Campbell* (2003) 538 U.S. 408, 123 S. Ct. 1513, 155 L. Ed. 2d 585, the U.S. Supreme Court provided new guideposts for courts to review punitive damages awards, including a discussion of specific permissible ratios between punitive and compensatory damages. *By Ronald Oster*

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsDamagesPunitive DamagesGeneral OverviewTortsDamagesPunitive DamagesAward CalculationsGeneral OverviewTortsDamagesPunitive DamagesAward CalculationsFactorsTortsDamagesPunitive DamagesConduct Supporting Awards



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California Forms of Jury Instruction

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CHAPTER 39 California Judicial Council Damages Instructions

5-39 California Forms of Jury Instruction CACI 3950-CACI 3959

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CACI 3950Reserved for Future Use



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CHAPTER 39 California Judicial Council Damages Instructions

5-39 California Forms of Jury Instruction CACI 3960

CACI 3960 Comparative Fault of Plaintiff--General Verdict

If you decide that [name of plaintiff]'s negligence combined with [name of defendant]'s [negligence/conduct/product] in causing [name of plaintiff]'s harm, then you must decide the percentage of responsibility for the harm that you attribute to each of them.

First, decide the total amount of [name of plaintiff]'s damages. Then decide the percentage of responsibility that [name of plaintiff] and [name of defendant] have for the damages. Then reduce the total damages by the percentage of responsibility that you attribute to [name of plaintiff].

After you make these calculations, state the reduced damage award in your verdict.

New September 2003; Revised December 2009

Sources and Authority

- "In determining to what degree the injury was due to the fault of the plaintiff, it is logically essential that the plaintiff's negligence be weighed against the combined total of all other causative negligence; moreover, inasmuch as a plaintiff's actual damages do not vary by virtue of the particular defendants who happen to be before the court, we do not think that the damages which a plaintiff may recover against defendants who are joint and severally liable should fluctuate in such a manner." (*American Motorcycle Assn. v. Superior Court* (1978) 20 Cal.3d 578, 590, fn. 2 [146 Cal.Rptr. 182, 578 P.2d 899] .)

- "Proposition 51 ... retains the joint liability of all tortfeasors, regardless of their respective shares of fault, with respect to all objectively provable expenses and monetary losses. On the other hand, the more intangible and subjective categories of damage were limited by Proposition 51 to a rule of strict

proportionate liability. With respect to these noneconomic damages, the plaintiff alone now assumes the risk that a proportionate contribution cannot be obtained from each person responsible for the injury." (*DaFonte v. Up-Right, Inc.* (1992) 2 Cal.4th 593, 600 [7 Cal.Rptr.2d 238, 828 P.2d 140] .)

Secondary Sources

15 *California Forms of Pleading and Practice*, Ch. 177, *Damages*, § 177.45 (Matthew Bender)

33 *California Points and Authorities*, Ch. 380, *Negligence*, § 380.170 (Matthew Bender)

16 *California Points and Authorities*, Ch. 165, *Negligence*, § 165.380 (Matthew Bender)

Publisher's Notes

This instruction covers issues presented in BAJI Nos. 9.04 and 14.90.

LexisNexis Matthew Bender Expert Practice Tip--Go Over Verdict Forms: Counsel should go over the verdict form in closing argument, preferably with the use of audio-visual aids (e.g., a chart or a Powerpoint presentation). *By Ronald Oster and Rex Heeseman*

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsNegligenceDefensesContributory NegligenceGeneral Overview



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CHAPTER 39 California Judicial Council Damages Instructions

5-39 California Forms of Jury Instruction CACI 3961

CACI 3961 Duty to Mitigate Damages for Past Lost Earnings

[*Name of plaintiff*] is not entitled to recover damages for economic losses that [*name of defendant*] proves [*name of plaintiff*] could have avoided by returning to gainful employment as soon as it was reasonable for [him/her] to do so.

To calculate the amount of damages you must:

1. Determine the amount [*name of plaintiff*] would have earned from the job [he/she] held at the time [he/she] was injured; and
2. Subtract the amount [*name of plaintiff*] earned or could have earned by returning to gainful employment.

The resulting amount is [*name of plaintiff*]'s damages for lost earnings.

New September 2003

For an instruction on mitigation of damages involving personal injury, see *CACI No. 3930, Mitigation of Damages (Personal Injury)*.

■ "A plaintiff has a duty to mitigate damages and cannot recover losses it could have avoided through reasonable efforts." (*Thrifty-Tel, Inc. v. Bezenek* (1996) 46 Cal.App.4th 1559, 1568 [54 Cal.Rptr.2d 468] .)

■ "The doctrine of mitigation of damages holds that '[a] plaintiff who suffers damage as a result of either a breach of contract or a tort has a duty to take reasonable steps to mitigate those damages and will not be able to recover for any losses which could have been thus avoided.' A plaintiff may not recover for damages avoidable through ordinary care and reasonable exertion. The duty to mitigate damages does not require an injured party to do what is unreasonable or impracticable. 'The rule of mitigation of damages has no application where its effect would be to require the innocent party to sacrifice and surrender important and valuable rights.' " (*Valle de Oro Bank v. Gamboa* (1994) 26 Cal.App.4th 1686, 1691 [32 Cal.Rptr.2d 329] , internal citations omitted.)

■ "We also acknowledge the well-established rule that an injured plaintiff has a duty to mitigate his damages. However, once it is established that a duty to mitigate is present, the burden nevertheless falls on the wrongdoer to show that the damages were lessened or might have been lessened by the plaintiff." (*Jones v. Consolidated Rail Corp.* (6th Cir. 1986) 800 F.2d 590, 593 .)

■ "Normally, in a FELA action a plaintiff is entitled to recover the difference between what he was able to earn before injury and what he earned or could have earned thereafter." (*Trejo v. Denver & Rio Grande Western Railroad Co.* (10th Cir. 1977) 568 F.2d 181, 184 .)

■ "An unemployed plaintiff who is able to look for work does not satisfy his duty to mitigate by waiting passively for employment to be offered. The opportunity to mitigate is not merely the opportunity to accept a job, but the opportunity to seek appropriate work when one is able to do so. If that opportunity is shown to have existed, the issue of mitigation should not normally be prevented from reaching a properly instructed jury." (*Wilson v. Union Pacific Railroad Co.* (10th Cir. 1995) 56 F.3d 1226, 1232 .)

Secondary Sources

15 California Forms of Pleading and Practice, Ch. 177, *Damages* (Matthew Bender)

6 California Points and Authorities, Ch. 65, *Damages* (Matthew Bender)

Publisher's Notes

There is no BAJI instruction on this subject.



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CHAPTER 39 California Judicial Council Damages Instructions

5-39 California Forms of Jury Instruction CACI 3962

CACI 3962 Duty to Mitigate Damages for Future Lost Earnings

[Name of plaintiff] is not entitled to recover damages for future economic losses that [name of defendant] proves [name of plaintiff] will be able to avoid by returning to gainful employment as soon as it is reasonable for [him/her] to do so.

If you decide that [name of plaintiff] will be able to return to work, then you must not award [him/her] any damages for the amount [he/she] will be able to earn from future gainful employment. To calculate the amount of damages you must:

- 1. Determine the amount [name of plaintiff] would have earned from the job [he/she] held at the time [he/she] was injured; and**
- 2. Subtract the amount [name of plaintiff] is reasonably able to earn from alternate employment.**

The resulting amount is [name of plaintiff]'s damages for future lost earnings.

New September 2003

For an instruction on mitigation of damages involving personal injury, see *CACI No. 3930, Mitigation of Damages (Personal Injury)*.

■ "A plaintiff has a duty to mitigate damages and cannot recover losses it could have avoided through reasonable efforts." (*Thrifty-Tel, Inc. v. Bezenek* (1996) 46 Cal.App.4th 1559, 1568 [54 Cal.Rptr.2d 468] .)

■ "The doctrine of mitigation of damages holds that '[a] plaintiff who suffers damage as a result of either a breach of contract or a tort has a duty to take reasonable steps to mitigate those damages and will not be able to recover for any losses which could have been thus avoided.' A plaintiff may not recover for damages avoidable through ordinary care and reasonable exertion. The duty to mitigate damages does not require an injured party to do what is unreasonable or impracticable. 'The rule of mitigation of damages has no application where its effect would be to require the innocent party to sacrifice and surrender important and valuable rights.'" (*Valle de Oro Bank v. Gamboa* (1994) 26 Cal.App.4th 1686, 1691 [32 Cal.Rptr.2d 329] , internal citations omitted.)

■ "We also acknowledge the well-established rule that an injured plaintiff has a duty to mitigate his damages. However, once it is established that a duty to mitigate is present, the burden nevertheless falls on the wrongdoer to show that the damages were lessened or might have been lessened by the plaintiff." (*Jones v. Consolidated Rail Corp.* (6th Cir. 1986) 800 F.2d 590, 593 .)

■ "Normally, in a FELA action a plaintiff is entitled to recover the difference between what he was able to earn before injury and what he earned or could have earned thereafter." (*Trejo v. Denver & Rio Grande Western Railroad Co.* (10th Cir. 1977) 568 F.2d 181, 184 .)

■ "An unemployed plaintiff who is able to look for work does not satisfy his duty to mitigate by waiting passively for employment to be offered. The opportunity to mitigate is not merely the opportunity to accept a job, but the opportunity to seek appropriate work when one is able to do so. If that opportunity is shown to have existed, the issue of mitigation should not normally be prevented from reaching a properly instructed jury." (*Wilson v. Union Pacific Railroad Co.* (10th Cir. 1995) 56 F.3d 1226, 1232 .)

Secondary Sources

15 California Forms of Pleading and Practice, Ch. 177, *Damages* (Matthew Bender)

6 California Points and Authorities, Ch. 65, *Damages* (Matthew Bender)

Publisher's Notes

There is no BAJI instruction on this subject.



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CHAPTER 39 California Judicial Council Damages Instructions

5-39 California Forms of Jury Instruction CACI 3963

CACI 3963 No Deduction for Workers' Compensation Benefits Paid

Do not consider whether or not [name of plaintiff] received workers' compensation benefits for [his/her] injuries. If you decide in favor of [name of plaintiff], you should determine the amount of your verdict according to my instructions concerning damages.

New September 2003; Revised December 2009

Directions for Use

This instruction is intended for use in conjunction with a special verdict form, in which case the judge can make any necessary deductions if double recovery is an issue. It may also be read in cases in which there are no allegations regarding the employer's comparative fault.

Sources and Authority

- If the employer has not been negligent, the workers' compensation benefits do "not constitute an impermissible double recovery but rather a payment from a source wholly independent of the wrongdoer." (*Curtis v. State of California ex rel. Department of Transportation* (1982) 128 Cal.App.3d 668, 682 [180 Cal.Rptr. 843] .)

- " 'The average reasonably well-informed person who may be called to serve upon a jury knows that a workman injured in his employment receives compensation. It is a delusion to think that this aspect of the case can be kept from the minds of the jurors simply by not alluding to it in the course of the trial.' " (*Berryman v. Bayshore Construction Co.* (1962) 207 Cal.App.2d 331, 336 [24 Cal.Rptr. 380] , internal citations omitted.)

■ "To prevent a double recovery, the court may instruct the jury to segregate types of damage as between the employee and employer, awarding to the employee only those tort damages not recoverable by the employer." (*Demkowski v. Lee* (1991) 233 Cal.App.3d 1251, 1259 [284 Cal.Rptr. 919] , footnote omitted.)

■ "Alternatively, the jury may generally be instructed on the types of tort damages to which the employee may be entitled and then given a special verdict form that requires the jury to find whether the defendant was negligent, whether the negligence was the proximate cause of the employee's injuries, what the employee's total tort damages are, without taking into account his or her receipt of workers' compensation benefits, and what the reasonable amount of benefits paid by the employer were. Thereafter, the court enters individual judgments on the special verdict for the amounts to which the employee and employer are entitled." (*Demkowski, supra*, 233 Cal.App.3d at p. 1259 , footnote omitted.)

■ "Prior to Proposition 51, a negligent third party was allowed an offset for the workers' compensation benefits paid to the plaintiff. This prevented double recovery under the then-existing joint and several liability rule. Proposition 51, however, limited joint and several liability to plaintiff's economic damages." (*Rosales v. Thermex-Thermatron, Inc.* (1998) 67 Cal.App.4th 187, 197 [78 Cal.Rptr.2d 861] .)

■ "The *Espinoza* approach has provided an effective solution for pre-verdict settlements, and we believe that it is also the most suitable means of dealing with workers' compensation benefits." (*Torres v. Xomox Corp.* (1996) 49 Cal.App.4th 1, 37 [56 Cal.Rptr.2d 455] .)

Secondary Sources

2 Witkin, Summary of California Law (10th ed. 2005) Workers' Compensation, §§ 20, 24-26, 31, 34, 39-42

1 Levy et al., *California Torts*, Ch. 10, *Effect of Workers' Compensation Law*, § 10.10 (Matthew Bender)

51 *California Forms of Pleading and Practice*, Ch. 577, *Workers' Compensation*, § 577.319 (Matthew Bender)

Publisher's Notes

This instruction covers issues presented in BAJI No. 15.10.

Legal Topics:

For related research and practice materials, see the following legal topics:

Torts Procedure Multiple Defendants Joint & Several Liability Workers' Compensation & SSDI Administrative Proceedings Awards Credits Workers' Compensation & SSDI Benefit Determinations General Overview



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CHAPTER 39 California Judicial Council Damages Instructions

5-39 California Forms of Jury Instruction CACI 3964

CACI 3964 Jurors Not to Consider Attorney Fees and Court Costs

You must not consider, or include as part of any award, attorney fees or expenses that the parties incurred in bringing or defending this lawsuit.

New June 2006

Directions for Use

This instruction is intended to prevent jurors from improperly factoring attorney fees into their damage awards. Do not use this instruction in cases in which attorney fees are a jury issue.

Secondary Sources

15 California Forms of Pleading and Practice, Ch. 174, *Costs and Attorney's Fees* (Matthew Bender)

Publisher's Notes

There is no BAJI instruction on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsJury InstructionsGeneral Overview



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CHAPTER 39 California Judicial Council Damages Instructions

5-39 California Forms of Jury Instruction CACI 3965-CACI 3999

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CACI 3965Reserved for Future Use



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CHAPTER 39 California Judicial Council Damages Instructions

5-39 California Forms of Jury Instruction CACI VF-3900

CACI VF-3900 Punitive Damages

We answer the questions submitted to us as follows:

1. Did [*name of defendant*] engage in the conduct with malice, oppression, or fraud?

_____ Yes _____ No

[If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.]

2. What amount of punitive damages, if any, do you award [*name of plaintiff*]? \$_____]

Signed: _____

Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the [clerk/bailiff/judge].

New September 2003; Revised October 2008

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

Normally, this form should be combined with the verdict form(s) on the underlying cause(s) of action. Include question 2 if the trial is not bifurcated.

This form is based on *CACI No. 3940, Punitive Damages --Individual Defendant-- Trial Not Bifurcated* and *CACI No. 3941, Punitive Damages --Individual Defendant-- Bifurcated Trial (First Phase)*.

Publisher's Notes

There is no BAJI verdict form on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Torts Damages Punitive Damages Conduct Supporting Awards



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CHAPTER 39 California Judicial Council Damages Instructions

5-39 California Forms of Jury Instruction CACI VF-3901

CACI VF-3901 Punitive Damages Against Employer or Principal for Conduct of a Specific Agent or Employee

We answer the questions submitted to us as follows:

1. Did [*name of agent/employee*] engage in the conduct with malice, oppression, or fraud?

_____ Yes _____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Was [*name of employee/agent*] an officer, director, or managing agent of [*name of defendant*] acting on behalf of [*name of defendant*]?

_____ Yes _____ No

[If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.]

3. What amount of punitive damages, if any, do you award [*name of plaintiff*]? \$_____]

Signed: _____

Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the

[clerk/bailiff/judge].

New September 2003; Revised October 2008

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

Normally, this verdict form should be combined with the verdict form(s) on the underlying cause(s) of action. Include question 3 if the trial is not bifurcated.

This form is based on *CACI No. 3943, Punitive Damages Against Employer or Principal for Conduct of a Specific Agent or Employee--Trial Not Bifurcated*, and *CACI No. 3944, Punitive Damages Against Employer or Principal for Conduct of a Specific Agent or Employee--Bifurcated Trial (First Phase)*.

Depending on the facts of the case, alternative grounds for liability may be substituted in question 2, as in *CACI No. 3943*.

Publisher's Notes

There is no BAJI verdict form on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate Law Agency Relationships Causes of Action & Remedies Punitive Damages Civil
Procedure Remedies Damages Punitive Damages Torts Damages Punitive Damages Conduct Supporting Awards



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CHAPTER 39 California Judicial Council Damages Instructions

5-39 California Forms of Jury Instruction CACI VF-3902

CACI VF-3902 Punitive Damages--Entity Defendant

We answer the questions submitted to us as follows:

1. Was the conduct constituting malice, oppression, or fraud committed by one or more officers, directors, or managing agents of [name of defendant] acting on behalf of [name of defendant]?

_____ Yes _____ No

[If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.]

2. What amount of punitive damages, if any, do you award [name of plaintiff]? \$_____]

Signed: _____

Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the [clerk/bailiff/judge].

New September 2003; Revised October 2008

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

Normally, this verdict form should be combined with the verdict form(s) on the underlying cause(s) of action. Include question 2 if the trial is not bifurcated.

This form is based on *CACI No. 3945, Punitive Damages --Entity Defendant-- Trial Not Bifurcated*, and *CACI No. 3946, Punitive Damages --Entity Defendant-- Bifurcated Trial (First Phase)*. This form is intended to address the first bracketed option in *CACI Nos. 3945 and 3946*.

Publisher's Notes

There is no BAJI verdict form on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsDamagesPunitive DamagesConduct Supporting Awards



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CHAPTER 39 California Judicial Council Damages Instructions

5-39 California Forms of Jury Instruction CACI VF-3903

CACI VF-3903 Punitive Damages--Entity Defendant--Ratification

We answer the questions submitted to us as follows:

1. Did an agent or employee of [*name of defendant*] engage in the conduct with malice, oppression, or fraud?

_____ Yes _____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Did one or more officers, directors, or managing agents of [*name of defendant*] know of this conduct and adopt or approve it after it occurred?

_____ Yes _____ No

[If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.]

3. What amount of punitive damages, if any, do you award [*name of plaintiff*]? \$_____]

Signed: _____

Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the [clerk/bailiff/judge].

New September 2003; Revised October 2008

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

Normally, this verdict form should be combined with the verdict form(s) on the underlying cause(s) of action. Include question 3 if the trial is not bifurcated.

This form is based on *CACI No. 3945, Punitive Damages --Entity Defendant-- Trial Not Bifurcated*, and *CACI No. 3946, Punitive Damages --Entity Defendant-- Bifurcated Trial (First Phase)*. This form is intended to address the third bracketed option in *CACI Nos. 3945 and 3946*.

Publisher's Notes

There is no BAJI verdict form on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Remedies Damages Punitive Damages Torts Damages Punitive Damages Conduct Supporting Awards



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CHAPTER 39 California Judicial Council Damages Instructions

5-39 California Forms of Jury Instruction CACI VF-3904

CACI VF-3904 Punitive Damages--Entity Defendant--Authorization

We answer the questions submitted to us as follows:

1. Did an agent or employee of [name of defendant] engage in the conduct with malice, oppression, or fraud?

_____ Yes _____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Did one or more officers, directors, or managing agents of [name of defendant] authorize this conduct?

_____ Yes _____ No

[If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.]

3. What amount of punitive damages, if any, do you award [name of plaintiff]? \$_____]

Signed: _____

Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the [clerk/bailiff/judge].

New September 2003; Revised October 2008

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

Normally, this form should be combined with the verdict form(s) on the underlying cause(s) of action. Include question 3 if the trial is not bifurcated.

This form is based on *CACI No. 3945, Punitive Damages --Entity Defendant-- Trial Not Bifurcated*, and *CACI No. 3946, Punitive Damages --Entity Defendant-- Bifurcated Trial (First Phase)*. This form is intended to address the second bracketed option in *CACI Nos. 3945 and 3946*.

Publisher's Notes

There is no BAJI verdict form on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Remedies Damages Punitive Damages Torts Damages Punitive Damages Conduct Supporting Awards



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CHAPTER 39 California Judicial Council Damages Instructions

5-39 California Forms of Jury Instruction CACI VF-3905

CACI VF-3905 Damages for Wrongful Death (Death of an Adult)

We answer the questions submitted to us as follows:

1. What are [name of plaintiff]'s economic damages?

**[a. Past financial support that [name of decedent]
would have contributed to the family:..... \$_____]**

**[b. Future financial support that [name of
decedent] would have contributed to the
family:..... \$_____]**

**[c. Past losses of gifts or benefits that [name of
plaintiff] would have expected to receive
from [name of decedent]:..... \$_____]**

**[d. Future losses of gifts or benefits that [name
of plaintiff] would have expected to receive
from [name of decedent]:..... \$_____]**

**[e. [Name of decedent]'s funeral and burial
expenses:..... \$_____]**

**[f. Past household services that [name of
decedent] would have provided:..... \$_____]**

[g. Future household services that [*name of decedent*] would have provided:..... \$_____]

2. What are [*name of plaintiff*]'s noneconomic damages?

[a. The loss of [*name of decedent*]'s love, companionship, comfort, care, assistance, protection, affection, society, and moral support, [and] [the enjoyment of sexual relations/[*name of decedent*]'s training and guidance] from [*insert date of death*] to the present:..... \$_____]

[b. The loss of [*name of decedent*]'s love, companionship, comfort, care, assistance, protection, affection, society, and moral support, [and] [the enjoyment of sexual relations/[*name of decedent*]'s training and guidance] from today forward:..... \$_____]

Signed: _____
Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the [clerk/bailiff/judge].

New April 2004

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

Delete any questions that do not apply to the facts of the case. Normally, this form should be combined with the verdict form(s) on the underlying cause(s) of action.

This form is based on *CACI No. 3921, Wrongful Death (Death of an Adult)*.

Publisher's Notes

There is no BAJI verdict form on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsWrongful Death & Survival ActionsRemediesGeneral OverviewTortsWrongful Death & Survival ActionsRemediesCompensatory DamagesFinancial Contributions



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CHAPTER 39 California Judicial Council Damages Instructions

5-39 California Forms of Jury Instruction CACI VF-3906

CACI VF-3906 Damages for Wrongful Death (Parents' Recovery for Death of a Minor Child)

We answer the questions submitted to us as follows:

1. What are [name of plaintiff]'s economic damages?

[a. Past financial support that [name of decedent] would have contributed to the family:..... \$_____]

[b. Future financial support that [name of decedent] would have contributed to the family:..... \$_____]

[c. Past losses of gifts or benefits that [name of plaintiff] would have expected to receive from [name of decedent]:..... \$_____]

[d. Future losses of gifts or benefits that [name of plaintiff] would have expected to receive from [name of decedent]:..... \$_____]

[e. [Name of decedent]'s funeral and burial expenses:..... \$_____]

[f. Past household services that [name of decedent] would have provided:..... \$_____]

[g. Future household services that [name of decedent] would have provided:..... \$_____]

2. What are [name of plaintiff]'s noneconomic damages?

[a. The loss of [name of decedent]'s love, companionship, comfort, care, assistance, protection, affection, society, and moral support from [insert date of death] to the present:..... \$_____]

[b. The loss of [name of decedent]'s love, companionship, comfort, care, assistance, protection, affection, society, and moral support from today forward:..... \$_____]

Signed: _____

Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the [clerk/bailiff/judge].

New April 2004

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

Delete any questions that do not apply to the facts of the case. Normally, this form should be combined with the verdict form(s) on the underlying cause(s) of action.

This form is based on *CACI No. 3922, Wrongful Death (Parents' Recovery for Death of a Minor Child)*.

Publisher's Notes

There is no BAJI verdict form on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawFamily Relationships & TortsWrongful Death & SurvivalGeneral OverviewFamily LawFamily Relationships & TortsWrongful Death & SurvivalChildrenFamily LawFamily Relationships & TortsWrongful Death & SurvivalParentsTortsWrongful Death & Survival ActionsGeneral OverviewTortsWrongful Death & Survival ActionsRemediesGeneral Overview



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CHAPTER 39 California Judicial Council Damages Instructions

*5-39 California Forms of Jury Instruction CACI VF-3907***CACI VF-3907 Damages for Loss of Consortium (Noneconomic Damage)**

We answer the question submitted to us as follows:

1. What are [name of plaintiff]'s damages for loss of [his/her] [husband/wife]'s love, companionship, comfort, care, assistance, protection, affection, society, moral support, and enjoyment of sexual relations [or the ability to have children]? \$_____

Signed: _____

Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the [clerk/bailiff/judge].

New April 2004

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

Normally, this form should be combined with the verdict form(s) on the underlying cause(s) of action. Insert the name of the spouse of the injured party as "name of plaintiff."

This form is based on *CACI No. 3920, Loss of Consortium (Noneconomic Damage)*.

Publisher's Notes

There is no BAJI verdict form on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Family Law Marital Duties & Rights Causes of Action Loss of Consortium Torts Damages Consortium Damages General Overview



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CHAPTER 39 California Judicial Council Damages Instructions

5-39 California Forms of Jury Instruction CACI VF-3908-CACI VF-3999

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CACI VF-3908Reserved for Future Use



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CHAPTER 39 California Judicial Council Damages Instructions

5-39 California Forms of Jury Instruction Table A

Table A Life Expectancy Table--Male

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CHAPTER 39 California Judicial Council Damages Instructions

5-39 California Forms of Jury Instruction Table B

Table B Life Expectancy Table--Female

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CHAPTER 40 California Judicial Council Lanterman-Petris-Short Act Instructions

5-40 California Forms of Jury Instruction 40.syn

§ 40.syn Synopsis to Chapter 40: California Judicial Council Lanterman-Petris-Short Act Instructions

CACI 4000 Conservatorship--Essential Factual Elements

CACI 4001 "Mental Disorder" Explained

CACI 4002 "Gravely Disabled" Explained

CACI 4003 "Gravely Disabled" Minor Explained

CACI 4004 Issues Not to Be Considered

CACI 4005 Obligation to Prove--Reasonable Doubt

CACI 4006 Sufficiency of Indirect Circumstantial Evidence

CACI 4007 Third Party Assistance

CACI 4008 Third Party Assistance to Minor

CACI 4009 Physical Restraint

CACI 4010 Limiting Instruction--Expert Testimony

CACI 4011 History of Disorder Relevant to the Determination of Grave Disability

CACI 4012 Concluding Instruction

CACI 4013 Affidavit of Voter Registration

CACI 4014-4099 Reserved for Future Use

CACI VF-4000 Conservatorship--Verdict Form

CACI VF-4001-VF-4099 Reserved for Future Use



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CHAPTER 40 California Judicial Council Lanterman-Petris-Short Act Instructions

5-40 California Forms of Jury Instruction Scope

Scope

SCOPE

This chapter contains the California Judicial Council's "Lanterman-Petris-Short Act Series" of jury instructions [*CACI No. 4000 et seq.*]. The Judicial Council of California Civil Jury Instructions (CACI) included in this publication are the product of the Judicial Council of California Task Force on Jury Instructions, which are updated by the Judicial Council of California Advisory Committee on Civil Jury Instructions.

This chapter includes instructions on the following topics:

- Essential factual elements for placing a "gravely disabled" individual in a conservatorship [*CACI No. 4000*].
- "Mental disorder" [*CACI No. 4001*] and "gravely disabled" [*CACI Nos. 4002, 4003*] explained.
- Issues a jury should not consider in determining whether a respondent is "gravely disabled" [*CACI No. 4004*].
- The "reasonable doubt" standard of proof in conservatorship proceedings [*CACI No. 4005*].
- Sufficiency of indirect circumstantial evidence [*CACI No. 4006*].
- "Third party assistance" issues in conservatorship cases involving adults [*CACI No. 4007*] and minors [*CACI No. 4008*].
- The fact that a respondent is in front of the jury in "physical restraints" as not being evidence of a grave disability [*CACI No. 4009*].
- The limited nature of using expert testimony in conservatorship proceedings [*CACI No. 4010*].

- The consideration of information about the history of the respondent's disorder relevant to the determination of grave disability [*CACI No. 4011*].
- Concluding instruction in conservatorship proceedings [*CACI No. 4012*].
- Completion of an affidavit of voter registration for a respondent that has been found to be gravely disabled [*CACI No. 4013*].

The LPS Act series also includes a conservatorship verdict form for use in setting forth whether the respondent is gravely disabled and whether all 12 jurors find that respondent is not capable of completing an affidavit of voter registration [*CACI No. VF-4000*].



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CHAPTER 40 California Judicial Council Lanterman-Petris-Short Act Instructions

5-40 California Forms of Jury Instruction CACI 4000

CACI 4000 Conservatorship--Essential Factual Elements

[Name of petitioner] claims that [name of respondent] is gravely disabled due to [a mental disorder/impairment by chronic alcoholism] and therefore should be placed in a conservatorship. In a conservatorship, a conservator is appointed to oversee, under the direction of the court, the care of persons who are gravely disabled due to a mental disorder or chronic alcoholism. To succeed on this claim, [name of petitioner] must prove beyond a reasonable doubt all of the following:

- 1. That [name of respondent] [has a mental disorder/is impaired by chronic alcoholism];**
- 2. That [name of respondent] is gravely disabled as a result of the [mental disorder/chronic alcoholism]; and**
- 3. That [name of respondent] is unwilling or unable voluntarily to accept meaningful treatment.**

New June 2005

Element 3 may not be necessary in every case (see *Conservatorship of Symington* (1989) 209 Cal.App.3d 1464, 1467 [257 Cal.Rptr. 860] ["[M]any gravely disabled individuals are simply beyond treatment."]).

- *Welfare and Institutions Code* section 5350(d) provides, in part: "The person for whom conservatorship is sought shall have the right to demand a court or jury trial on the issue whether he or she is gravely disabled."

- *Welfare and Institutions Code* section 5008(h)(1)(A) provides, in part: " '[G]ravely disabled' ...

[means a] condition in which a person, as a result of a mental disorder, is unable to provide for his or her basic personal needs for food, clothing, or shelter."

■ *Welfare and Institutions Code section 5008(h)(2)* provides, in part: " '[G]ravely disabled' means a condition in which a person, as a result of impairment by chronic alcoholism, is unable to provide for his or her basic personal needs for food, clothing, or shelter."

■ "The Lanterman-Petris-Short Act (the act) governs the involuntary treatment of the mentally ill in California. Enacted by the Legislature in 1967, the act includes among its goals ending the inappropriate and indefinite commitment of the mentally ill, providing prompt evaluation and treatment of persons with serious mental disorders, guaranteeing and protecting public safety, safeguarding the rights of the involuntarily committed through judicial review, and providing individualized treatment, supervision and placement services for the gravely disabled by means of a conservatorship program." (*Conservatorship of Susan T.* (1994) 8 Cal.4th 1005, 1008-1009 [36 Cal.Rptr.2d 40, 884 P.2d 988] .)

■ "The right to a jury trial upon the establishment of conservatorship is fundamental to the protections afforded by the LPS. As related, that right is expressly extended to the reestablishment of an LPS conservatorship." (*Conservatorship of Benvenuto* (1986) 180 Cal.App.3d 1030, 1037 [226 Cal.Rptr. 33] , internal citations omitted.)

■ "Noting that a finding of grave disability may result in serious deprivation of personal liberty, the [Supreme Court] held that the due process clause of the California Constitution requires that proof beyond a reasonable doubt and jury unanimity be applied to conservatorship proceedings under the LPS Act." (*Conservatorship of Benvenuto*, *supra*, 180 Cal.App.3d at p. 1038 , internal citations omitted.)

■ "We ... hold that a person sought to be made an LPS conservatee subject to involuntary confinement in a mental institution, is entitled to have a unanimous jury determination of all of the questions involved in the imposition of such a conservatorship, and not just on the issue of grave disability in the narrow sense of whether he or she can safely survive in freedom and provide food, clothing or shelter unaided by willing, responsible relatives, friends or appropriate third persons." (*Conservatorship of Davis* (1981) 124 Cal.App.3d 313, 328 [177 Cal.Rptr. 369] .)

■ "The jury should determine if the person voluntarily accepts meaningful treatment, in which case no conservatorship is necessary. If the jury finds the person will not accept treatment, then it must determine if the person can meet his basic needs on his own or with help, in which case a conservatorship is not justified." (*Conservatorship of Walker* (1987) 196 Cal.App.3d 1082, 1092-1093 [242 Cal.Rptr. 289] .)

■ "Our research has failed to reveal any authority for the proposition [that] without a finding that the proposed conservatee is unable or unwilling to voluntarily accept treatment, the court must reject a conservatorship in the face of grave disability. ... Some persons with grave disabilities are beyond treatment. Taken to its logical conclusion, they would be beyond the LPS Act's reach, according to the argument presented in this appeal." (*Conservatorship of Symington*, *supra*, 209 Cal.App.3d at p. 1469 .)

■ "The party seeking imposition of the conservatorship must prove the proposed conservatee's grave disability beyond a reasonable doubt and the verdict must be issued by a unanimous jury." (*Conservatorship of Susan T.*, *supra*, 8 Cal.4th at p. 1009 , internal citation omitted.)

Secondary Sources

24 California Forms of Pleading and Practice, Ch. 281, *Guardianship and Conservatorship: Appointment of Conservators* (Matthew Bender)

26 California Forms of Pleading and Practice, Ch. 304, *Insane and Other Incompetent Persons* (Matthew Bender)

Publisher's Notes

There is no BAJI instruction on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Estate, Gift & Trust Law Conservators & Guardians Conservators General Overview Estate, Gift & Trust Law Conservators & Guardians Conservators Appointment



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California Forms of Jury Instruction

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CHAPTER 40 California Judicial Council Lanterman-Petris-Short Act Instructions

5-40 California Forms of Jury Instruction CACI 4001

CACI 4001 "Mental Disorder" Explained

The term "mental disorder" is limited to those disorders described in the Diagnostic and Statistical Manual of Mental Disorders of the American Psychiatric Association. This book is sometimes referred to as "the DSM [current edition, e.g., "IV"]."

New June 2005

This instruction is not intended for cases proceeding on a theory of impairment by chronic alcoholism only.

"The term 'mental disorder' is limited to those disorders listed by the American Psychiatric Association in its Diagnostic and Statistical Manual of Mental Disorders (Cal. Admin. Code, tit. 9, § 813)." (*Conservatorship of Chambers (1977) 71 Cal.App.3d 277, 282, fn. 5 [139 Cal.Rptr. 357] .*) "Although this [administrative] regulation has since been repealed, the practice has been to continue using the same definition." (California Conservatorship Practice (Cont.Ed.Bar) § 23.11.)

Secondary Sources

2 California Conservatorship Practice (Cont.Ed.Bar) § 23.11

26 California Forms of Pleading and Practice, Ch. 304, *Insane and Other Incompetent Persons* (Matthew Bender)

Publisher's Notes

There is no BAJI instruction on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsStandard InstructionsEstate, Gift & Trust LawConservators & GuardiansConservatorsGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansConservatorsAppointment



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CHAPTER 40 California Judicial Council Lanterman-Petris-Short Act Instructions

5-40 California Forms of Jury Instruction CACI 4002

CACI 4002 "Gravely Disabled" Explained

The term "gravely disabled" means that a person is presently unable to provide for his or her basic needs for food, clothing, or shelter because of [a mental disorder/impairment by chronic alcoholism]. [The term "gravely disabled" does not include mentally retarded persons by reason of being mentally retarded alone.]

[[Insert one or more of the following:] [psychosis/bizarre or eccentric behavior/delusions/hallucinations/[insert other]] [is/are] not enough, by [itself/themselves], to find that [name of respondent] is gravely disabled. [He/She] must be unable to provide for the basic needs of food, clothing, or shelter because of [a mental disorder/impairment by chronic alcoholism].]

[If you find [name of respondent] will not take [his/her] prescribed medication without supervision and that a mental disorder makes [him/her] unable to provide for [his/her] basic needs for food, clothing, or shelter without such medication, then you may conclude [name of respondent] is presently gravely disabled.]

In determining whether [name of respondent] is presently gravely disabled, you may consider evidence that [he/she] did not take prescribed medication in the past. You may also consider evidence of [his/her] lack of insight into [his/her] mental condition.]

In considering whether [name of respondent] is presently gravely disabled, you may not consider the likelihood of future deterioration or relapse of a condition.

New June 2005

Read the bracketed sentence at the end of the first paragraph if appropriate to the facts of the case.

The principle regarding the likelihood of future deterioration may not apply in cases where the respondent has no insight into his or her mental disorder. (*Conservatorship of Walker* (1989) 206 Cal.App.3d 1572, 1576-1577 [254 Cal.Rptr. 552] .)

If there is evidence concerning the availability of third parties that are willing to provide assistance to the proposed conservatee, see CACI No. 4007, *Third Party Assistance*.

- *Welfare & Institutions Code* section 5008(h)(1)(A) provides, in part: "[G]ravely disabled" ... [means] a condition in which a person, as a result of a mental disorder, is unable to provide for his or her basic personal needs for food, clothing, or shelter."

- *Welfare & Institutions Code* section 5008(h)(2) provides, in part: "[G]ravely disabled" means a condition in which a person, as a result of impairment by chronic alcoholism, is unable to provide for his or her basic personal needs for food, clothing, or shelter."

- *Welfare & Institutions Code* section 5008(h)(3) provides: "The term 'gravely disabled' does not include mentally retarded persons by reason of being mentally retarded alone."

- "The enactment of the LPS and with it the substitution of 'gravely disabled' for 'in need of treatment' as the basis for commitment of individuals not dangerous to themselves or others reflects a legislative determination to meet the constitutional requirements of precision. The term 'gravely disabled' is sufficiently precise to exclude unusual or nonconformist lifestyles. It connotes an inability or refusal on the part of the proposed conservatee to care for basic personal needs of food, clothing and shelter." (*Conservatorship of Chambers* (1977) 71 Cal.App.3d 277, 284 [139 Cal.Rptr. 357] , footnotes omitted.)

- "The public guardian must prove the proposed conservatee was 'gravely disabled' beyond a reasonable doubt. The stricter criminal standard is used because the threat to the conservatee's individual liberty and personal reputation is no different than the burdens associated with criminal prosecutions." (*Conservatorship of Smith* (1986) 187 Cal.App.3d 903, 909 [232 Cal.Rptr. 277] internal citations omitted.)

- "Bizarre or eccentric behavior, even if it interferes with a person's normal intercourse with society, does not rise to a level warranting conservatorship except where such behavior renders the individual helpless to fend for herself or destroys her ability to meet those basic needs for survival." (*Conservatorship of Smith, supra*, 187 Cal.App.3d at p. 909 .)

- "We ... hold that a person sought to be made an LPS conservatee subject to involuntary confinement in a mental institution, is entitled to have a unanimous jury determination of all of the questions involved in the imposition of such a conservatorship, and not just on the issue of grave disability in the narrow sense of whether he or she can safely survive in freedom and provide food, clothing or shelter unaided by willing, responsible relatives, friends or appropriate third persons." (*Conservatorship of Davis* (1981) 124 Cal.App.3d 313, 328 [177 Cal.Rptr. 369] .)

- "[A]n individual who will not voluntarily accept mental health treatment is not for that reason alone gravely disabled." (*Conservatorship of Symington* (1989) 209 Cal.App.3d 1464, 1468 [257 Cal.Rptr. 860] .)

- "[T]he pivotal issue is whether [respondent] was 'presently' gravely disabled and the evidence demonstrates that he was not. Accordingly, the order granting the petition must be overturned." (

Conservatorship of Benvenuto (1986) 180 Cal.App.3d 1030, 1034 [226 Cal.Rptr. 33] , fn. omitted, citing to *Conservatorship of Murphy* (1982) 134 Cal.App.3d 15, 18 [184 Cal.Rptr. 363] .)

■ "[A] conservatorship cannot be established because of a perceived likelihood of future relapse. To do so could deprive the liberty of persons who will not suffer such a relapse solely because of the pessimistic statistical odds. Because of the promptness with which a conservatorship proceeding can be invoked the cost in economic and liberty terms is unwarranted." (*Conservatorship of Neal* (1987) 190 Cal.App.3d 685, 689 [235 Cal.Rptr. 577] .)

■ "A perceived likelihood of future relapse, without more, is not enough to justify establishing a conservatorship. Neither can such a likelihood justify keeping a conservatorship in place if its subject is not presently gravely disabled, in light of the statutory provisions allowing rehearings to evaluate a conservatee's current status." (*Conservatorship of Jones* (1989) 208 Cal.App.3d 292, 302 [256 Cal.Rptr. 415] , internal citation omitted.)

Secondary Sources

2 California Conservatorship Practice (Cont.Ed.Bar) §§ 23.3, 23.5

26 California Forms of Pleading and Practice, Ch. 304, *Insane and Other Incompetent Persons* (Matthew Bender)

Publisher's Notes

There is no BAJI instruction on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Estate, Gift & Trust Law Conservators & Guardians Conservators General Overview Estate, Gift & Trust Law Conservators & Guardians Conservators Appointment



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CHAPTER 40 California Judicial Council Lanterman-Petris-Short Act Instructions

5-40 California Forms of Jury Instruction CACI 4003

CACI 4003 "Gravely Disabled" Minor Explained

The term "gravely disabled" means that a minor is presently unable to use those things that are essential to health, safety, and development, including food, clothing, and shelter, even if they are provided to the minor by others, because of a mental disorder. [The term "gravely disabled" does not include mentally retarded persons by reason of being mentally retarded alone.]

[[Insert one or more of the following:] [physical or mental immaturity/developmental disabilities/epilepsy/alcoholism/drug abuse/repeated antisocial behavior/psychosis/bizarre or eccentric behavior/delusions/hallucinations/[insert other]] [is/are] not enough, by [itself/ themselves], to find that [name of respondent] is gravely disabled. [He/She] must be unable to use those things that are essential to health, safety, or development because of a mental disorder.]

[If you find [name of respondent] will not take [his/her] medication without supervision and that a mental disorder makes [him/her] unable to use those things that are essential to health, safety, or development without such medication, then you may conclude [name of respondent] is presently gravely disabled.

In determining whether [name of respondent] is presently gravely disabled, you may consider evidence that [he/she] did not take prescribed medication in the past. You may consider evidence of [his/her] lack of insight into [his/her] mental condition.]

In considering whether [name of respondent] is presently gravely disabled, you may not consider the likelihood of future deterioration relapse of a condition.

New June 2005

Read the bracketed sentence at the end of the first paragraph if appropriate to the facts of the case.

The principle regarding the likelihood of future deterioration may not apply in cases where the respondent has no insight into his or her mental disorder. (*Conservatorship of Walker* (1989) 206 Cal.App.3d 1572, 1576-1577 [254 Cal.Rptr. 552] .)

If there is evidence concerning the availability of third parties that are willing to provide assistance to the proposed conservatee, see CACI No. 4008, *Third Party Assistance to Minor*.

- *Welfare and Institutions Code* section 5585.25 provides: " 'Gravely disabled minor' means a minor who, as a result of a mental disorder, is unable to use the elements of life which are essential to health, safety, and development, including food, clothing, and shelter, even though provided to the minor by others. Mental retardation, epilepsy, or other developmental disabilities, alcoholism, other drug abuse, or repeated antisocial behavior do not, by themselves, constitute a mental disorder."

- "[T]he actual commitment of a mentally disordered minor who is also a ward of the juvenile court can be accomplished *only* in accordance with the LPS Act." (*In re Michael E.* (1975) 15 Cal.3d 183, 189 [123 Cal.Rptr. 103, 538 P.2d 231] .)

- "The actual commitment of a minor ward of a juvenile court to a state hospital can be lawfully accomplished only through the appointment of a conservator who is vested with authority to place the minor in such a hospital. Such conservator may be appointed only for a 'gravely disabled' minor who is entitled to a jury trial on the issue whether he is in fact 'gravely disabled.' Conservatorship shall be recommended to the court only if, on investigation, no suitable alternatives are available. The conservator's proposed powers and duties are to be recommended to the court. A conservator may commit the minor to a medical facility, including a state hospital, only when specifically authorized by the court. Conservatorships automatically terminate at the end of one year, and every six months a conservatee may petition for a rehearing as to his status. Finally, the entertainment of a petition for conservatorship is a function of the superior and not the juvenile court." (*In re Michael E.*, *supra*, 15 Cal.3d at pp. 192-193 , internal citations and footnotes omitted.)

- "Although a minor may not be legally responsible to provide for his basic personal needs, or may suffer disabilities other than a mental disorder which preclude him from so providing, the [statutory] definition is nevertheless applicable. A minor is 'gravely disabled' within the meaning of section 5008, subdivision (h)(1), when the trier of fact, on expert and other testimony, finds that disregarding other disabilities, if any, the minor, because of the further disability of a mental disorder, would be unable to provide for his basic personal needs. Immaturity, either physical or mental when not brought about by a mental disorder, is not a disability which would render a minor 'gravely disabled' within the meaning of section 5008." (*In re Michael E.*, *supra*, 15 Cal.3d at p. 192, fn. 12.)

Secondary Sources

2 California Conservatorship Practice (Cont.Ed.Bar) § 23.16

26 California Forms of Pleading and Practice, Ch. 304, *Insane and Other Incompetent Persons* (Matthew Bender)

Publisher's Notes

There is no BAJI instruction on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsStandard InstructionsEstate, Gift & Trust LawConservators & GuardiansConservatorsGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansConservatorsAppointment



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CHAPTER 40 California Judicial Council Lanterman-Petris-Short Act Instructions

5-40 California Forms of Jury Instruction CACI 4004

CACI 4004 Issues Not to Be Considered

In determining whether [*name of respondent*] is gravely disabled, you must not consider or discuss the type of treatment, care, or supervision that may be ordered if a conservatorship is established.

New June 2005

■ An instruction on this point "should be given." (*Conservatorship of Baber* (1984) 153 Cal.App.3d 542, 553 [200 Cal.Rptr. 262] .)

Secondary Sources

2 California Conservatorship Practice (Cont.Ed.Bar) § 23.89

Publisher's Notes

There is no BAJI instruction on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

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CHAPTER 40 California Judicial Council Lanterman-Petris-Short Act Instructions

5-40 California Forms of Jury Instruction CACI 4005

CACI 4005 Obligation to Prove--Reasonable Doubt

[*Name of respondent*] is presumed not to be gravely disabled. [*Name of petitioner*] has the burden of proving beyond a reasonable doubt that [*name of respondent*] is gravely disabled. The fact that a petition has been filed claiming [*name of respondent*] is gravely disabled is not evidence that this claim is true.

Proof beyond a reasonable doubt is proof that leaves you with an abiding conviction that [*name of respondent*] is gravely disabled as a result of [a mental disorder/impairment by chronic alcoholism]. The evidence need not eliminate all possible doubt because everything in life is open to some possible or imaginary doubt.

In deciding whether [*name of respondent*] is gravely disabled, you must impartially compare and consider all the evidence that was received throughout the entire trial.

Unless the evidence proves that [*name of respondent*] is gravely disabled because of [a mental disorder/impairment by chronic alcoholism] beyond a reasonable doubt, you must find that [he/she] is not gravely disabled.

Although a conservatorship is a civil proceeding, the burden of proof is the same as in criminal trials.

New June 2005

■ "The due process clause of the California Constitution requires that proof beyond a reasonable doubt and a unanimous jury verdict be applied to conservatorship proceedings under the LPS Act." (*Conservatorship of Roulet* (1979) 23 Cal.3d 219, 235 [152 Cal.Rptr. 425, 590 P.2d 1] .)

■ "A proposed conservatee has a constitutional right to a finding based on proof beyond a reasonable doubt. Without deciding whether the court has a sua sponte duty to so instruct, we are satisfied that, on request, a court is required to instruct in language emphasizing a proposed conservatee is presumed to not be gravely disabled until the state carries its burden of proof." (*Conservatorship of Walker* (1987) 196 Cal.App.3d 1082, 1099 [242 Cal.Rptr. 289] , internal citation omitted.)

■ "[I]f requested, a court is required to instruct that a proposed conservatee is presumed not to be gravely disabled until the state carries its burden of proof." (*Conservatorship of Law* (1988) 202 Cal.App.3d 1336, 1340 [249 Cal.Rptr. 415] .)

■ But see *People v. Beeson* (2002) 99 Cal.App.4th 1393, 1409 [122 Cal.Rptr.2d 384] : "Even if we view the presumption in a more general sense as a warning against the consideration of extraneous factors, we cannot conclude that the federal and state Constitutions require a presumption-of-innocence-like instruction outside the context of a criminal case. Particularly, we conclude that, based on the civil and nonpunitive nature of involuntary commitment proceedings, a mentally ill or disordered person would not be deprived of a fair trial without such an instruction."

■ "Neither mental disorder nor grave disability is a crime." (*Conservatorship of Davis* (1981) 124 Cal.App.3d 313, 330 [177 Cal.Rptr. 369] .)

■ "In *Roulet*, the California Supreme Court held that due process requires proof beyond a reasonable doubt and jury unanimity in conservatorship proceedings. However, subsequent appellate court decisions have not extended the application of criminal law concepts in this area." (*Conservatorship of Maldonado* (1985) 173 Cal.App.3d 144, 147 [218 Cal.Rptr. 796] .)

Secondary Sources

2 California Conservatorship Practice (Cont.Ed.Bar) § 23.81

26 California Forms of Pleading and Practice, Ch. 304, *Insane and Other Incompetent Persons* (Matthew Bender)

Publisher's Notes

There is no BAJI instruction on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

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CHAPTER 40 California Judicial Council Lanterman-Petris-Short Act Instructions

5-40 California Forms of Jury Instruction CACI 4006

CACI 4006 Sufficiency of Indirect Circumstantial Evidence

You may not decide that [*name of respondent*] is gravely disabled based substantially on indirect evidence unless this evidence:

- 1. Is consistent with the conclusion that [*name of respondent*] is gravely disabled due to [a mental disorder/impairment by chronic alcoholism]; and**
- 2. Cannot be explained by any other reasonable conclusion.**

If the indirect evidence suggests two reasonable interpretations, one of which suggests the existence of a grave disability and the other its nonexistence, then you must accept the interpretation that suggests [*name of respondent*] is not gravely disabled.

If, on the other hand, one interpretation of this evidence appears to you to be reasonable and the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable one.

If you base your verdict on indirect evidence, [*name of petitioner*] must prove beyond a reasonable doubt each fact essential to your conclusion that [*name of respondent*] is gravely disabled.

New June 2005

Read this instruction immediately after *CACI No. 202, Direct and Indirect Evidence*.

■ "[W]here proof to establish a conservatorship for a person alleged to be gravely disabled is based upon substantially circumstantial evidence, the proposed conservatee is entitled, on request in an appropriate case, to have the jurors instructed as to the principles relevant when applying circumstantial evidence to the beyond a reasonable doubt burden of proof." (*Conservatorship of Walker* (1987) 196 Cal.App.3d 1082, 1088 [242 Cal.Rptr. 289] .)

■ "A proposed conservatee is entitled to procedural due process protections similar to a criminal defendant since fundamental liberty rights are at stake. The trial court had a sua sponte duty to correctly instruct on the general principles of law necessary for the jury's understanding of the case." (*Conservatorship of Walker, supra*, 196 Cal.App.3d at p. 1092, fn. 5 , internal citations omitted.)

■ "The court has no duty to give the [circumstantial evidence jury instructions applicable to criminal cases] in a case where the circumstantial evidence necessary to prove a certain mental state is not subject to any inference except that pointing to the existence of that mental state." (*Conservatorship of Walker, supra*, 196 Cal.App.3d at p. 1098 ; *Conservatorship of Law* (1988) 202 Cal.App.3d 1336, 1342 [249 Cal.Rptr. 415] .)

■ "Where a noncriminal case is to be evaluated by a reasonable doubt standard, it follows that a party on a proper state of the evidence is entitled on request to have jurors informed of the manner in which that standard must be established when the evidence consists substantially of circumstantial evidence." (*Conservatorship of Walker, supra*, 196 Cal.App.3d at p. 1098 .)

Secondary Sources

2 California Conservatorship Practice (Cont.Ed.Bar) § 23.90

26 California Forms of Pleading and Practice, Ch. 304, *Insane and Other Incompetent Persons* (Matthew Bender)

Publisher's Notes

There is no BAJI instruction on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Estate, Gift & Trust Law Conservators & Guardians Conservators General Overview Estate, Gift & Trust Law Conservators & Guardians Conservators Appointment Evidence Relevance Circumstantial & Direct Evidence



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CHAPTER 40 California Judicial Council Lanterman-Petris-Short Act Instructions

5-40 California Forms of Jury Instruction CACI 4007

CACI 4007 Third Party Assistance

A person is not "gravely disabled" if [he/she] can survive safely with the help of third party assistance. Third party assistance is the aid of family, friends, or others who are responsible, willing, and able to help provide for the person's basic needs for food, clothing, or shelter.

You must not consider offers by family, friends, or others unless they [have testified to/stated specifically in writing] their willingness and ability to help provide [*name of respondent*] with food, clothing, or shelter. Well-intended offers of assistance are not sufficient unless they will ensure the person can survive safely.

[Assistance provided by a correctional facility does not constitute third party assistance.]

New June 2005

■ *Welfare and Institutions Code section 5350(e) provides:*

(1) Notwithstanding subparagraph (A) of paragraph (1) of subdivision (h) of Section 5008, a person is not "gravely disabled" if that person can survive safely without involuntary detention with the help of responsible family, friends, or others who are both willing and able to help provide for the person's basic personal needs for food, clothing, or shelter.

(2) However, unless they specifically indicate in writing their willingness and ability to help, family, friends, or others shall not be considered willing or able to provide this help.

(3) The purpose of this subdivision is to avoid the necessity for, and the harmful effects of, requiring family, friends, and others to publicly state, and requiring the court to publicly find, that no one is willing or able to assist the mentally disordered person in providing for the person's basic needs for food, clothing, or shelter.

■ "[A] person is not 'gravely disabled' within the meaning of section 5008, subdivision (h)(1) if he or she is capable of surviving safely in freedom with the help of willing and responsible family members, friends or third parties." (*Conservatorship of Davis* (1981) 124 Cal.App.3d 313, 321 [177 Cal.Rptr. 369] .)

■ "As we view the broad purpose of the LPS Act, imposition of a conservatorship should be made only in situations where it is truly necessary. To accomplish this purpose evidence of the availability of third party assistance must be considered." (*Conservatorship of Early* (1983) 35 Cal.3d 244, 253 [197 Cal.Rptr. 539, 673 P.2d 209] .)

■ "The California Supreme Court in *Conservatorship of Early* ... concluded although a person might be gravely disabled if left to his or her own devices, he or she may be able to function successfully in freedom with the support and assistance of family and friends. The court recognized almost everyone depends to a greater or lesser extent upon others in order to survive in our complex society." (*Conservatorship of Jones* (1989) 208 Cal.App.3d 292, 299 [256 Cal.Rptr. 415] .)

■ "In *Conservatorship of Early* ... the Supreme Court held that it was error for the trial court to refuse to admit evidence of and to fail to instruct on the 'availability of assistance of others to meet the basic needs of a person afflicted with a mental disorder.'" (*Conservatorship of Baber* (1984) 153 Cal.App.3d 542, 552-553 [200 Cal.Rptr. 262] , citation omitted.)

■ "Corrections custody does not qualify as third party assistance under the LPS Act as interpreted by case law." (*Conservatorship of Jones, supra*, 208 Cal.App.3d at p. 303 .)

■ "Under section 5350, subdivision (e)(1), a person is not gravely disabled only if he or she can *survive safely* with the assistance of a third party. There is substantial evidence that the assistance offered by [respondent's mother], while well-intended, would not meet this requirement." (*Conservatorship of Johnson* (1991) 235 Cal.App.3d 693, 699 [1 Cal.Rptr. 2d 46] , original italics, footnote omitted.)

■ "The parties have raised the issue of whether section 5350, subdivision (e)(2), precluded the trial court from considering [petitioner's mother's] testimony on the issue of third party assistance. This section provides that third parties shall not be considered willing or able to provide assistance unless they so indicate in writing. This section has no application in this case. The purpose of section 5350, subdivision (e), 'is to avoid the necessity for, and the harmful effects of, requiring family, friends, and others to publicly state, and requiring the court to publicly find, that no one is willing or able to assist the mentally disordered person in providing for the person's basic needs for food, clothing, or shelter.' This was not the case here; [petitioner's mother] took the stand at trial and testified as to her willingness to provide assistance to her daughter. No purpose of section 5350, subdivision (e), would be served by requiring her to also execute a writing to this effect." (*Conservatorship of Johnson, supra*, 235 Cal.App.3d at p. 699, n. 5 .)

Secondary Sources

2 California Conservatorship Practice (Cont.Ed.Bar) § 23.4

26 California Forms of Pleading and Practice, Ch. 304, *Insane and Other Incompetent Persons* (Matthew Bender)

Publisher's Notes

There is no BAJI instruction on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

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CHAPTER 40 California Judicial Council Lanterman-Petris-Short Act Instructions

5-40 California Forms of Jury Instruction CACI 4008

CACI 4008 Third Party Assistance to Minor

A minor is not "gravely disabled" if [he/she] can survive safely with the help of third party assistance. Third party assistance is the aid of family, friends, or others who are responsible, willing, and able to help provide for the minor's health, safety, and development, including food, shelter, and clothing.

You must not consider offers by family, friends, or others unless they [have testified to/stated specifically in writing] their willingness and ability to help provide for [*name of respondent*]'s health, safety, and development. Well-intended offers of assistance are not sufficient unless they will ensure the person can survive safely.

[Assistance provided by a correctional facility does not constitute third party assistance.]

New June 2005

■ *Welfare and Institutions Code section 5350(e) provides:*

(1) Notwithstanding subparagraph (A) of paragraph (1) of subdivision (h) of Section 5008, a person is not "gravely disabled" if that person can survive safely without involuntary detention with the help of responsible family, friends, or others who are both willing and able to help provide for the person's basic personal needs for food, clothing, or shelter.

(2) However, unless they specifically indicate in writing their willingness and ability to help, family, friends, or others shall not be considered willing or able to provide this help.

(3) The purpose of this subdivision is to avoid the necessity for, and the harmful effects of, requiring family, friends, and others to publicly state, and requiring the court to publicly find, that no one is willing or able to assist the mentally disordered person in providing for the person's basic needs for food, clothing, or shelter.

■ "[A] person is not 'gravely disabled' within the meaning of section 5008, subdivision (h)(1) if he or she is capable of surviving safely in freedom with the help of willing and responsible family members, friends or third parties." (*Conservatorship of Davis* (1981) 124 Cal.App.3d 313, 321 [177 Cal.Rptr. 369] .)

■ "Although a minor may not be legally responsible to provide for his basic personal needs, or may suffer disabilities other than a mental disorder which preclude him from so providing, the [statutory] definition is nevertheless applicable. A minor is 'gravely disabled' within the meaning of section 5008, subdivision (h)(1), when the trier of fact, on expert and other testimony, finds that disregarding other disabilities, if any, the minor, because of the further disability of a mental disorder, would be unable to provide for his basic personal needs. Immaturity, either physical or mental when not brought about by a mental disorder, is not a disability which would render a minor 'gravely disabled' within the meaning of section 5008." (*In re Michael E.* (1975) 15 Cal.3d 183, 192, fn. 12 [123 Cal.Rptr. 103, 538 P.2d 231] .)

■ "As we view the broad purpose of the LPS Act, imposition of a conservatorship should be made only in situations where it is truly necessary. To accomplish this purpose evidence of the availability of third party assistance must be considered." (*Conservatorship of Early* (1983) 35 Cal.3d 244, 253 [197 Cal.Rptr. 539, 673 P.2d 209] .)

■ "The California Supreme Court in *Conservatorship of Early* ... concluded although a person might be gravely disabled if left to his or her own devices, he or she may be able to function successfully in freedom with the support and assistance of family and friends. The court recognized almost everyone depends to a greater or lesser extent upon others in order to survive in our complex society." (*Conservatorship of Jones* (1989) 208 Cal.App.3d 292, 299 [256 Cal.Rptr. 415] .)

■ "Corrections custody does not qualify as third party assistance under the LPS Act as interpreted by case law." (*Conservatorship of Jones, supra*, 208 Cal.App.3d at p. 303 .)

■ "Under section 5350, subdivision (e)(1), a person is not gravely disabled only if he or she can *survive safely* with the assistance of a third party. There is substantial evidence that the assistance offered by [respondent's mother], while well-intended, would not meet this requirement." (*Conservatorship of Johnson* (1991) 235 Cal.App.3d 693, 699 [1 Cal.Rptr. 2d 46] , original italics, footnote omitted.)

■ "The parties have raised the issue of whether section 5350, subdivision (e)(2), precluded the trial court from considering [petitioner's mother's] testimony on the issue of third party assistance. This section provides that third parties shall not be considered willing or able to provide assistance unless they so indicate in writing. This section has no application in this case. The purpose of section 5350, subdivision (e), 'is to avoid the necessity for, and the harmful effects of, requiring family, friends, and others to publicly state, and requiring the court to publicly find, that no one is willing or able to assist the mentally disordered person in providing for the person's basic needs for food, clothing, or shelter.' This was not the case here; [petitioner's mother] took the stand at trial and testified as to her willingness to provide assistance to her daughter. No purpose of section 5350, subdivision (e), would be served by requiring her to also execute a writing to this effect." (*Conservatorship of Johnson, supra*, 235 Cal.App.3d at p. 699, n. 5 .)

Secondary Sources

2 California Conservatorship Practice (Cont.Ed.Bar) § 23.4

26 California Forms of Pleading and Practice, Ch. 304, *Insane and Other Incompetent Persons* (Matthew Bender)

Publisher's Notes

There is no BAJI instruction on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsStandard InstructionsEstate, Gift & Trust LawConservators & GuardiansConservatorsGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansConservatorsAppointment



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CHAPTER 40 California Judicial Council Lanterman-Petris-Short Act Instructions

5-40 California Forms of Jury Instruction CACI 4009

CACI 4009 Physical Restraint

The fact that respondent has been brought before the court in physical restraints is not evidence of grave disability. You must not speculate on the reasons for such restraints.

New June 2005

When the restraints are concealed from the jury's view, this instruction should not be given unless requested by the conservatee since it might invite initial attention to the restraints and, thus, create prejudice, which would otherwise be avoided. (*People v. Duran* (1976) 16 Cal.3d 282, 292 [127 Cal.Rptr. 618, 545 P.2d 1322] .)

In *Conservatorship of Warrack* (1992) 11 Cal.App.4th 641, 647 [14 Cal.Rptr. 2d 99] , the court held that a proposed conservatee in a jury trial under the LPS Act may not be physically restrained unless the trial court follows the procedures outlined in *People v. Duran*, *supra*, 16 Cal.3d at pp. 288-290 .

■ "The court in *People v. Duran*, held that where physical restraints are visible to the jury the trial court must give a cautionary instruction advising the jurors such restraints are not evidence of the defendant's guilt (disability) and that the jury should not speculate as to the reasons for such restraints. The court erred in failing to so instruct in this case." (*Conservatorship of Warrack*, *supra*, 11 Cal.App.4th at p. 648 , internal citation omitted.)

Secondary Sources

2 California Conservatorship Practice (Cont.Ed.Bar) § 23.88

Publisher's Notes

There is no BAJI instruction on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsStandard InstructionsEstate, Gift & Trust LawConservators & GuardiansConservatorsGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansConservatorsAppointment



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CHAPTER 40 California Judicial Council Lanterman-Petris-Short Act Instructions

5-40 California Forms of Jury Instruction CACI 4010

CACI 4010 Limiting Instruction--Expert Testimony

You have heard testimony by an expert witness regarding reports and statements from hospital staff and other persons who have come into contact with [name of respondent]. This testimony was admitted for the limited purpose of establishing the basis for the opinion expressed by the testifying expert. You may consider those reports and statements to help you examine the basis of the expert's opinion. You may not use the reports and statements as independent proof of respondent's mental condition or [his/her] ability to provide for food, clothing, or shelter.

New June 2005

■ *Evidence Code section 355 provides: "When evidence is admissible as to one party or for one purpose and is inadmissible as to another party or for another purpose, the court upon request shall restrict the evidence to its proper scope and instruct the jury accordingly."*

■ "A psychiatrist is permitted to testify on a person's mental capacities and can rely on hearsay including statements made by the patient or by third persons." (*Conservatorship of Torres (1986) 180 Cal.App.3d 1159, 1163 [226 Cal.Rptr. 142]* .)

■ "When records are admitted ... a limiting instruction need not be given, *sua sponte*, but must be given upon request of counsel." (*Conservatorship of Buchanan (1978) 78 Cal.App.3d 281, 288 [144 Cal.Rptr. 241]* , internal citation omitted, disapproved on other grounds in *Conservatorship of Early (1983) 35 Cal.3d 244, 255 [197 Cal.Rptr. 539, 673 P.2d 209]* .)

Publisher's Notes

There is no BAJI instruction on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsStandard InstructionsEstate, Gift & Trust LawConservators &
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AdmissibilityEvidenceTestimonyExpertsGeneral Overview



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CHAPTER 40 California Judicial Council Lanterman-Petris-Short Act Instructions

5-40 California Forms of Jury Instruction CACI 4011

CACI 4011 History of Disorder Relevant to the Determination of Grave Disability

You must consider information about the history of [*name of respondent*]'s alleged mental disorder if you believe this information has a direct bearing on whether [he/she] is presently gravely disabled as a result of a mental disorder. Such information may include testimony from persons who have provided, or are providing, mental health or related support services to [*name of respondent*], [his/her] medical records, including psychiatric records, or testimony from family members, [*name of respondent*], or any other person designated by [*name of respondent*].

You must not consider any evidence that you believe is irrelevant because it occurred either too long ago or under circumstances that are not similar to those involved in this case.

New June 2005

■ *Welfare and Institutions Code section 5008.2(a)* provides: "When applying the definition of mental disorder ... , the historical course of the person's mental disorder, as determined by available relevant information about the course of the person's mental disorder, shall be considered when it has a direct bearing on the determination of whether the person is a danger to others, or to himself or herself, or is gravely disabled, as a result of a mental disorder. The historical course shall include, but is not limited to, evidence presented by persons who have provided, or are providing, mental health or related support services to the patient, the patient's medical records as presented to the court, including psychiatric records, or evidence voluntarily presented by family members, the patient, or any other person designated by the patient. Facilities shall make every reasonable effort to make information provided by the patient's family available to the court. The hearing officer, court, or jury shall exclude from consideration evidence it determines to be irrelevant because of remoteness of time or dissimilarity of

circumstances."

Secondary Sources

2 California Conservatorship Practice (Cont.Ed.Bar) § 23.84

26 California Forms of Pleading and Practice, Ch. 304, *Insane and Other Incompetent Persons* (Matthew Bender)

Publisher's Notes

There is no BAJI instruction on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Estate, Gift & Trust Law Conservators & Guardians Conservators General Overview Estate, Gift & Trust Law Conservators & Guardians Conservators Appointment Evidence Relevance General Overview



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CHAPTER 40 California Judicial Council Lanterman-Petris-Short Act Instructions

5-40 California Forms of Jury Instruction CACI 4012

CACI 4012 Concluding Instruction

To find that [name of respondent] is gravely disabled, all twelve jurors must agree on the verdict. To find that [name of respondent] is not gravely disabled, only nine jurors must agree on the verdict. As soon as you have agreed on a verdict, the presiding juror must date and sign the form and notify the [clerk/bailiff].

New June 2005

Read this instruction immediately after *CACI No. 5009, Predeliberation Instructions*.

- "The due process clause of the California Constitution requires that proof beyond a reasonable doubt and a unanimous jury verdict be applied to conservatorship proceedings under the LPS Act." (*Conservatorship of Roulet* (1979) 23 Cal.3d 219, 235 [152 Cal.Rptr. 425, 590 P.2d 1] .)
- "The Legislature's determination that a three-fourths majority vote applies in LPS conservatorship proceedings is eminently sound in the context of finding a proposed conservatee is not gravely disabled." (*Conservatorship of Rodney M.* (1996) 50 Cal.App.4th 1266, 1271-1272 [58 Cal.Rptr.2d 513] .)
- "Permitting a finding of no grave disability to be based on a three-fourths majority coincides with *Roulet's* goal of minimizing the risk of unjustified and needless conservatorships. It also avoids unnecessary confinement of the proposed conservatee while renewal proceedings are completed." (*Conservatorship of Rodney M.*, *supra*, 50 Cal.App.4th at p. 1270 .)

Secondary Sources

2 California Conservatorship Practice (Cont.Ed.Bar) § 23.89

26 California Forms of Pleading and Practice, Ch. 304, *Insane and Other Incompetent Persons* (Matthew Bender)

Publisher's Notes

There is no BAJI instruction on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsStandard InstructionsEstate, Gift & Trust LawConservators & GuardiansConservatorsGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansConservatorsAppointment



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CHAPTER 40 California Judicial Council Lanterman-Petris-Short Act Instructions

5-40 California Forms of Jury Instruction CACI 4013

CACI 4013 Affidavit of Voter Registration

If you find that [*name of respondent*], as a result of [a mental disorder/impairment by chronic alcoholism], is gravely disabled, then you must also decide whether [he/she] is capable of completing an affidavit of voter registration. To reach a verdict that [*name of respondent*] is not capable of completing an affidavit of voter registration, all 12 jurors must agree to that decision.

To complete an affidavit of voter registration, [*name of respondent*] must be able to state: the facts necessary to establish the [*name of respondent*] as a voter; [his/her] full name, residential address, and telephone number; [his/her] mailing address, if different from the residential address; [his/her] date of birth; the state or county of birth; [his/her] occupation; [his/her] political party affiliation; that [he/she] is not currently imprisoned or on parole for the conviction of a felony; and whether [he/she] has been registered at another address, under another name, or is intending to affiliate with another party, and if so the prior address, name, or party.

New June 2005

This instruction should be given if the petition prays for this relief.

■ *Elections Code section 2208* provides, in part:

(a) A person shall be deemed mentally incompetent, and therefore disqualified from voting, if, during the course of any of the proceedings set forth below, the court finds that the person is not capable of completing an affidavit of voter registration in accordance with Section 2150 and any of the following apply:

(2) A conservator for the person or the person and estate is appointed pursuant to Chapter 3 (commencing with Section 5350) of Part 1 of Division 5 of the Welfare and Institutions Code.

(b) If the proceeding under the Welfare and Institutions Code is heard by a jury, the jury shall unanimously find that the person is not capable of completing an affidavit of voter registration before the person shall be disqualified from voting.

■ *Elections Code section 2150* provides, in part:

(a) The affidavit of registration shall show:

(1) The facts necessary to establish the affiant as an elector.

(2) The affiant's name at length, including his or her given name, and a middle name or initial, or if the initial of the given name is customarily used, then the initial and middle name.

(3) The affiant's place of residence, residence telephone number, if furnished, and e-mail address, if furnished.

(4) The affiant's mailing address, if different from the place of residence.

(5) The affiant's date of birth to establish that he or she will be at least 18 years of age on or before the date of the next election.

(6) The state or country of the affiant's birth.

(7) The affiant's California driver's license number, California identification card number, or other identification number as specified by the Secretary of State.

(8) The affiant's political party affiliation.

(9) That the affiant is currently not imprisoned or on parole for the conviction of a felony.

(10) A prior registration portion indicating whether the affiant has been registered at another address, under another name, or as intending to affiliate with another party. If the affiant has been so registered, he or she shall give an additional statement giving that address, name, or party.

(b) The affiant shall certify the content of the affidavit as to its truth and correctness, under penalty of perjury, with the signature of his or her name and the date of signing. If the affiant is unable to write he or she shall sign with a mark or cross.

(c) The affidavit of registration shall also contain a space that would enable the affiant to state his or her

ethnicity or race, or both. An affiant may not be denied the ability to register because he or she declines to state his or her ethnicity or race.

(d) If any person, including a deputy registrar, assists the affiant in completing the affidavit, that person shall sign and date the affidavit below the signature of the affiant.

Secondary Sources

2 California Conservatorship Practice (Cont.Ed.Bar) § 11.34

24 *California Forms of Pleading and Practice*, Ch. 285, *Guardianship and Conservatorship: Care of Ward or Conservatee*, § 285.26 (Matthew Bender)

Publisher's Notes

There is no BAJI instruction on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Estate, Gift & Trust Law Conservators & Guardians Conservators General Overview Estate, Gift & Trust Law Conservators & Guardians Conservators Appointment



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CHAPTER 40 California Judicial Council Lanterman-Petris-Short Act Instructions

5-40 California Forms of Jury Instruction CACI 4014-4099

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CACI 4014Reserved for Future Use



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CHAPTER 40 California Judicial Council Lanterman-Petris-Short Act Instructions

5-40 California Forms of Jury Instruction CACI VF-4000

CACI VF-4000 Conservatorship--Verdict Form

Select one of the following two options:

_____ 12 jurors find that [*name of respondent*] is presently gravely disabled due to [a mental disorder/impairment by chronic alcoholism].

_____ 9 or more jurors find that [*name of respondent*] is not presently gravely disabled due to [a mental disorder/impairment by chronic alcoholism].

[If you have concluded that [*name of respondent*] is gravely disabled due to [a mental disorder/impairment by chronic alcoholism] then answer the following:

Do all 12 jurors find [*name of respondent*] is not capable of completing an affidavit of voter registration?

_____ Yes _____ No]

Signed: _____

Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the [clerk/bailiff/judge].

New June 2005

The question regarding voter registration is bracketed. The judge must decide whether this question is appropriate in a given case.

Publisher's Notes

There is no BAJI verdict form on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law
Conservators & Guardians
Conservators General Overview
Estate, Gift & Trust Law
Conservators & Guardians
Conservators Appointment



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CHAPTER 40 California Judicial Council Lanterman-Petris-Short Act Instructions

5-40 California Forms of Jury Instruction CACI VF-4001-VF-4099

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CACI VF-4001Reserved for Future Use



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CHAPTER 41 California Judicial Council Breach of Fiduciary Duty Instructions *

5-41 California Forms of Jury Instruction 41.syn

§ 41.syn Synopsis to Chapter 41: California Judicial Council Breach of Fiduciary Duty Instructions *

CACI 4100 "Fiduciary Duty" Explained

CACI 4101 Failure to Use Reasonable Care--Essential Factual Elements

CACI 4102 Duty of Undivided Loyalty--Essential Factual Elements

CACI 4103 Duty of Confidentiality--Essential Factual Elements

CACI 4104 Duties of Escrow Holder

CACI 4105 Duties of Stockbroker--Speculative Securities

CACI 4106 Breach of Fiduciary Duty by Attorney--Essential Factual Elements

CACI 4107 Duty of Disclosure by Real Estate Broker

CACI 4108-CACI 4119 Reserved for Future Use

CACI 4120 Affirmative Defense--Statute of Limitations

CACI 4121-CACI 4199 Reserved for Future Use



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CHAPTER 41 California Judicial Council Breach of Fiduciary Duty Instructions *

5-41 California Forms of Jury Instruction Scope

Scope

SCOPE

This chapter contains the California Judicial Council's "Breach of Fiduciary Duty Series" of jury instructions [*CACI No. 4100 et seq.*]. The Judicial Council of California Civil Jury Instructions (CACI) included in this publication are the product of the Judicial Council of California Task Force on Jury Instructions, which are updated by the Judicial Council of California Advisory Committee on Civil Jury Instructions.

This chapter includes instructions on the following topics:

- An explanation of "fiduciary duty" [*CACI No. 4100*].
- Essential factual elements when claiming the failure to use reasonable care [*CACI No. 4101*].
- Essential factual elements when claiming breach of the fiduciary duty of loyalty [*CACI No. 4102*].
- Essential factual elements when claiming breach of the fiduciary duty of confidentiality [*CACI No. 4103*].
- Duties of escrow holders [*CACI No. 4104*].
- Duties of stockbrokers trading in "speculative securities" [*CACI No. 4105*].
- Essential factual elements of breach of fiduciary duty by attorney [*CACI No. 4106*].
- Duty of disclosure of real estate broker [*CACI No. 4107*].
- Statute of limitations defense in cause of action for breach of fiduciary duty [*CACI No. 4120*].



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CHAPTER 41 California Judicial Council Breach of Fiduciary Duty Instructions *

5-41 California Forms of Jury Instruction CACI 4100

CACI 4100 "Fiduciary Duty" Explained

[A/An] [agent/stockbroker/real estate agent/real estate broker/corporate officer/partner/[insert other fiduciary relationship]] owes what is known as a fiduciary duty to [his/her/its] [principal/client/corporation/partner/[insert other fiduciary relationship]]. A fiduciary duty imposes on [a/an] [agent/stockbroker/real estate agent/real estate broker/corporate officer/partner/[insert other fiduciary relationship]] a duty to act with the utmost good faith in the best interests of [his/her/its] [principal/client/corporation/ partner/[insert other fiduciary relationship]].

New June 2006

Directions for Use

This instruction may be modified if other concepts involving fiduciary duty are relevant to the jury's understanding of the case.

Sources and Authority

■ "A fiduciary relationship is ' 'any relation existing between parties to a transaction wherein one of the parties is in duty bound to act with the utmost good faith for the benefit of the other party. Such a relation ordinarily arises where a confidence is reposed by one person in the integrity of another, and in such a relation the party in whom the confidence is reposed, if he voluntarily accepts or assumes to accept the confidence, can take no advantage from his acts relating to the interest of the other party without the latter's knowledge or consent. ...' " ' " (*Wolf v. Superior Court* (2003) 107 Cal.App.4th 25, 29 [130 Cal.Rptr.2d 860] , internal citations omitted.)

Secondary Sources

10 *California Forms of Pleading and Practice*, Ch. 103, *Brokers*, § 103.31[1] (Matthew Bender)

14 *California Forms of Pleading and Practice*, Ch. 160, *Corporations* (Matthew Bender)

37 *California Forms of Pleading and Practice*, Ch. 427, *Principal and Agent* (Matthew Bender)

Publisher's Notes

There is no BAJI instruction on this subject.

LexisNexis Matthew Bender Expert Practice Tip--Overlapping Claims: A breach of fiduciary claim often overlaps with a fraud or "constructive fraud" claim, the major difference being that constructive fraud does not require intent [see *Salahutdin v. Valley of Cal., Inc.* (1994) 24 Cal.App.4th 555, 563, 29 Cal.Rptr.2d 463 ("[T]here is no clear line establishing when a fiduciary's breach of the duty of care will be merely negligent and when it may be characterized as constructive fraud. However, a breach of fiduciary duty usually constitutes constructive fraud."); see also *Michel v. Moore & Assocs.* (2007) 156 Cal.App.4th 756, 763-764, 67 Cal.Rptr.3d 797 (trial court improperly failed to "instruct on constructive fraud's connection to fiduciary relationships" and erroneously "impos[ed] the tougher evidentiary challenge of proving actual fraudulent intent")].

Therefore, in misstatement- or omission-based cases, plaintiffs' practitioners should consider including a jury instruction for constructive fraud [see MB 1900A.05 (setting forth constructive fraud instruction, which specifically refers to duties of real estate broker to client), MB 7400A.113 ("Any violation by an escrow holder of [his/her] fiduciary duties that is without actual fraudulent intent, but that gains an advantage to the escrow holder and that causes prejudice to the principal, is a constructive fraud against the principal")]. By Susan S. Azad, Esq.

LexisNexis Matthew Bender Expert Practice Tip--When Fiduciary Duty Arises: The definition in CACI No. 4100 pertains to situations where a fiduciary duty arises by operation of law. However, fiduciary duties can also arise based on the conduct of the parties [see *City of Hope Nat. Med. Center v. Genentech, Inc.* (2008) 43 Cal.4th 375, 386, 75 Cal.Rptr.3d 333 ("[B]efore a person can be charged with a fiduciary obligation, he must either [1] knowingly undertake to act on behalf of and for the benefit of another, or [2] must enter into a relationship which imposes that undertaking as a matter of law")]. Plaintiffs may include a fiduciary duty claim even when the parties have an arm's-length contractual relationship. By doing this, they seek to recover punitive damages (which are generally not available in contract), or to benefit from the broader scope of a fiduciary duty claim.

In *City of Hope*, the California Supreme Court dealt with the question of when a contract can result in the creation of a fiduciary duty. The Court disclaimed a bright-line test for the existence of a fiduciary duty in the contractual context, indicating the existence of a fiduciary duty may be a question of fact for the jury to decide. [see *City of Hope Nat. Med. Center v. Genentech, Inc.* (2008) 43 Cal.4th 375, 391, 75 Cal.Rptr.3d 333 ("The secrecy of information provided by one party to another--here [a] scientific discovery by City of Hope [and shared with Genentech for commercial exploitation]--may be considered by the trier of fact in deciding whether a fiduciary relationship exists, but it does not compel the imposition of fiduciary duties by operation of law"); see also *Tri-Growth Ctr. City, Ltd. v. Silldorf, Burdman, Duignan & Eisenberg* (1989) 216 Cal.App.3d 1139, 1151, 265 Cal.Rptr. 330 (denying summary judgment and holding that "[i]n the unique context of the transaction involved here, there is a factual question as to the existence of a fiduciary relationship, and whether defendants breached it")].

This presents a potential issue in cases when summary judgment is denied because there is a disputed

factual issue as to the existence of a fiduciary duty (particularly when a contract is involved). *City of Hope* has been cited in California federal court as setting forth the factors that should be considered in determining whether a fiduciary duty exists. For instance, in *Think Village-Kiwi, LLC v. Adobe Systems, Inc.* [(N.D. Cal. Nov. 16, 2009) 2009 U.S. Dist. LEXIS 106687], the District Court for the Northern District of California, relying on *City of Hope*, stated: "Factors relevant to determining whether a contract has resulted in the creation of a fiduciary relationship are: (1) whether the contract was between 'two sophisticated parties of substantial bargaining power'; (2) whether the parties were represented by counsel during contract negotiations; (3) whether the contract specified that the parties' relationship is not of a type in which fiduciary obligations are imposed by law; (4) whether one party's reliance on the other is 'so substantial as to give rise to equitable concerns'; and (5) whether the information exchanged by contract was secret" [*Think Village-Kiwi, LLC v. Adobe Systems, Inc.* (N.D. Cal. Nov. 16, 2009) 2009 U.S. Dist. LEXIS 106687, at *17; see also *Portney v. CIBA Vision Corp.* (C.D. Cal. July 17, 2008) 2008 U.S. Dist. LEXIS 106677, at **10-11].

In sum, when there are disputed facts relevant to a *City of Hope* analysis, a jury could be called on to apply the internal contractual and external equitable factors set forth in that case. Practitioners should keep this in mind, and should consider whether a special instruction to the jury on the *City of Hope* factors is appropriate. By *Susan S. Azad, Esq.*

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts Law Contract Interpretation Fiduciary Responsibilities Governments Fiduciary Responsibilities Insurance Law Claims & Contracts Fiduciary Responsibilities Real Property Law Brokers Fiduciary Responsibilities Securities Law Investment Advisers Fiduciary Responsibilities

* Practice Tips by Susan S. Azad, Esq., a litigation partner in the Los Angeles office of Latham & Watkins, LLP. Ms. Azad is a member of the firm's Litigation Practice and Distressed Credit Markets Advisory group and has extensive trial and appellate experience in complex business litigation including securities litigation, intellectual property litigation, bankruptcy litigation, health care litigation, real estate, and environmental litigation.



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California Forms of Jury Instruction

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CHAPTER 41 California Judicial Council Breach of Fiduciary Duty Instructions *

5-41 California Forms of Jury Instruction CACI 4101

CACI 4101 Failure to Use Reasonable Care--Essential Factual Elements

[*Name of plaintiff*] **claims that [he/she/it] was harmed by [*name of defendant*]'s breach of the fiduciary duty to use reasonable care. To establish this claim, [*name of plaintiff*] must prove all of the following:**

- 1. That [*name of defendant*] was [*name of plaintiff*]'s [agent/stockbroker/real estate agent/real estate broker/corporate officer/partner/[*insert other fiduciary relationship*]];**
- 2. That [*name of defendant*] acted on [*name of plaintiff*]'s behalf for purposes of [*insert description of transaction, e.g., "purchasing a residential property"*];**
- 3. That [*name of defendant*] failed to act as a reasonably careful [agent/stockbroker/real estate agent/real estate broker/corporate officer/partner/[*insert other fiduciary relationship*]] would have acted under the same or similar circumstances;**
- 4. That [*name of plaintiff*] was harmed; and**
- 5. That [*name of defendant*]'s conduct was a substantial factor in causing [*name of plaintiff*]'s harm.**

New June 2006

Directions for Use

The instructions in this series are intended for lawsuits brought by or on behalf of the principal. They also assume that the plaintiff is bringing a legal cause of action, not an action in equity. (See *Van de Kamp v. Bank of America* (1988) 204 Cal.App.3d 819 [251 Cal.Rptr. 530] .) This instruction is not

intended for cases involving insurance brokers or agents.

In appropriate cases, element 3 may be tailored to reflect the particular fiduciary duty at issue.

For a breach of fiduciary duty instruction in cases involving attorney defendants, see *CACI No. 4106, Breach of Fiduciary Duty by Attorney--Essential Factual Elements*.

While the advisory committee has not included "employee" as an option for identifying the defendant agent in element 1, there may be cases in which certain employees qualify as "agents," thereby subjecting them to liability for breach of fiduciary duty.

Sources and Authority

■ "A fiduciary relationship is 'any relation existing between parties to a transaction wherein one of the parties is in duty bound to act with the utmost good faith for the benefit of the other party. Such a relation ordinarily arises where a confidence is reposed by one person in the integrity of another, and in such a relation the party in whom the confidence is reposed, if he voluntarily accepts or assumes to accept the confidence, can take no advantage from his acts relating to the interest of the other party without the latter's knowledge or consent. ...' " (*Wolf v. Superior Court* (2003) 107 Cal.App.4th 25, 29 [130 Cal.Rptr.2d 860] , internal citations omitted.)

■ "An act such as breach of fiduciary duty may be both a breach of contract and a tort." (*Kangarlou v. Progressive Title Co., Inc.* (2005) 128 Cal.App.4th 1174, 1178 [27 Cal.Rptr.3d 754] , internal citation omitted.)

■ "Breach of a real estate agent's fiduciary duty to his or her client may constitute negligence or fraud, depending on the circumstances of the case." (*Salahutdin v. Valley of California, Inc.* (1994) 24 Cal.App.4th 555, 563 [29 Cal.Rptr.2d 463] .)

■ "Breach of fiduciary duty is a tort that by definition may be committed by only a limited class of persons." (*1- 800 Contacts, Inc. v. Steinberg* (2003) 107 Cal.App.4th 568, 592 [132 Cal.Rptr.2d 789] .)

■ "Traditional examples of fiduciary relationships in the commercial context include trustee/beneficiary, directors and majority shareholders of a corporation, business partners, joint adventurers, and agent/principal." (*Wolf, supra*, 107 Cal.App.4th at p. 30 , internal citations omitted.)

■ "The relationship between a broker and principal is fiduciary in nature and imposes on the broker the duty of acting in the highest good faith toward the principal." (*Twomey v. Mitchum, Jones & Templeton, Inc.* (1968) 262 Cal.App.2d 690, 709 [69 Cal.Rptr. 222] , internal citations omitted.)

■ "A stockbroker's fiduciary duty requires more than merely carrying out the stated objectives of the customer; at least where there is evidence, as there certainly was here, that the stockbroker's recommendations were invariably followed, the stockbroker must 'determine the customer's actual financial situation and needs.' If it would be improper and unsuitable to carry out the speculative objectives expressed by the customer, there is a further obligation on the part of the stockbroker 'to make this known to [the customer], and [to] refrain from acting except upon [the customer's] express orders.' Under such circumstances, although the stockbroker can advise the customer about the speculative options available, he or she should not solicit the customer's purchase of any such speculative securities that would be beyond the customer's 'risk threshold.' " (*Duffy v. Cavalier* (1989) 215 Cal.App.3d 1517,

1538 [264 Cal.Rptr. 740] , internal citations omitted.)

■ "Real estate brokers are subject to two sets of duties: those imposed by regulatory statutes, and those arising from the general law of agency. ... 'The existence and extent of the duties of the agent to the principal are determined by the terms of the agreement between the parties, interpreted in light of the circumstances under which it is made, except to the extent that fraud, duress, illegality, or the incapacity of one or both of the parties to the agreement modifies it or deprives it of legal effect.' " (*Carleton v. Tortosa* (1993) 14 Cal.App.4th 745, 755 [17 Cal. Rptr. 2d 734] , internal citations omitted.)

■ "In order to plead a cause of action for breach of fiduciary duty against a trustee, the plaintiff must show the existence of a fiduciary relationship, its breach, and damage proximately caused by that breach; the absence of any one of these elements is fatal to the cause of action. The beneficiary of the trust has the initial burden of proving the existence of a fiduciary duty and the trustee's failure to perform it; the burden then shifts to the trustee to justify its actions." (*LaMonte v. Sanwa Bank California* (1996) 45 Cal.App.4th 509, 517 [52 Cal.Rptr.2d 861] , internal citations omitted.)

■ "Recovery for damages based upon breach of fiduciary duty is controlled by *Civil Code* section 3333, the traditional tort recovery. This is actually broader in some instances than damages which may be recovered for fraud. Also, punitive damages are appropriate for a breach of fiduciary duty." (*Michelson v. Hamada* (1994) 29 Cal.App.4th 1566, 1582 [36 Cal.Rptr.2d 343] , internal citations omitted.)

■ "While breach of fiduciary duty is a question of fact, the existence of legal duty in the first instance and its scope are questions of law." (*Kirschner Brothers Oil, Inc. v. Natomas Co.* (1986) 185 Cal.App.3d 784, 790 [229 Cal.Rptr. 899] , internal citation omitted.)

■ "[I]n actions against fiduciaries, a plaintiff may have the option of pursuing either legal or equitable remedies." (*Van de Kamp v. Bank of America* (1988) 204 Cal.App.3d 819, 863 [251 Cal.Rptr. 530] .)

■ "A minority shareholder's action for damages for the breach of fiduciary duties of the majority shareholder is one in equity, with no right to a jury trial." (*Nelson v. Anderson* (1999) 72 Cal.App.4th 111, 122 [84 Cal.Rptr.2d 753] , internal citations omitted.)

Secondary Sources

3 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment, § 63

10 *California Forms of Pleading and Practice*, Ch. 103, *Brokers*, § 103.31[2] (Matthew Bender)

37 *California Forms of Pleading and Practice*, Ch. 427, *Principal and Agent* (Matthew Bender)

2 Miller & Starr, California Real Estate (Thomson West 3d ed.) § 3:26

Publisher's Notes

There is no BAJI instruction on this subject.

LexisNexis Matthew Bender Expert Practice Tip--Duty Imposed by Statute: The directions to *CACI No. 4101* state that "[i]n appropriate cases, element 3 may be tailored to reflect the particular fiduciary duty at issue." This reflects that fact that certain duties of care are restricted by statute (or common law). For instance, "[a] partner's duty of care to the partnership and the other partners in the conduct and

winding up of the partnership business is limited to refraining from engaging in grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of law" [*Corp. Code* § 16404(c); see *Enea v. Superior Court* (2005) 132 Cal.App.4th 1559, 1564-1565, 34 Cal.Rptr.3d 513 (explaining that partner's duty of care is limited by statute, but that "California [leaves] the articulation of the duty of loyalty to traditional common law processes")]. Limited partnerships are another example where the duty of care is limited by statute [see *Corp. Code* § 15904.08(c) ("A general partner's duty of care to the limited partnership and the other partners in the conduct and winding up of the limited partnership's activities is limited to refraining from engaging in grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of law." This statute was enacted in 2006 as part of the Re-Revised Uniform Limited Partnership Act ("Re-RULPA"), became effective as to limited partnerships formed on or after January 1, 2008, and is effective as to all limited partnerships as of January 1, 2010]. In addition, although a "limited partner does not have any fiduciary duty to the limited partnership or to any other partner solely by reason of being a limited partner" [*Corp. Code* § 15903.05(a)], he or she does owe an "obligation of good faith and fair dealing" [*Corp. Code* § 15903.05(b)]. A general partner likewise owes an "obligation of good faith and fair dealing" [*Corp. Code* § 15904.08(d)] ("A general partner shall discharge the duties to the partnership and the other partners under this chapter or under the partnership agreement and exercise any rights consistently with the obligation of good faith and fair dealing"). Practitioners should consider carefully the correct articulation of the scope of the fiduciary duty involved in their particular matters and ensure that any limitations are set forth clearly in element 3 of this jury instruction. *By Susan S. Azad, Esq.*

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate Law Agency Relationships Causes of Action & Remedies Breach of Fiduciary
Duty Elements Business & Corporate Law Agency Relationships Duties & Liabilities Care, Good Faith & Reasonable
Skill Duty of Care & Reasonable Skill Contracts Law Contract Interpretation Fiduciary
Responsibilities Governments Fiduciary Responsibilities Securities Law Investment Advisers Fiduciary Responsibilities

* Practice Tips by Susan S. Azad, Esq., a litigation partner in the Los Angeles office of Latham & Watkins, LLP. Ms. Azad is a member of the firm's Litigation Practice and Distressed Credit Markets Advisory group and has extensive trial and appellate experience in complex business litigation including securities litigation, intellectual property litigation, bankruptcy litigation, health care litigation, real estate, and environmental litigation.



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California Forms of Jury Instruction

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CHAPTER 41 California Judicial Council Breach of Fiduciary Duty Instructions *

5-41 California Forms of Jury Instruction CACI 4102

CACI 4102 Duty of Undivided Loyalty--Essential Factual Elements

[*Name of plaintiff*] **claims that [he/she/it] was harmed by [*name of defendant*]'s breach of the fiduciary duty of loyalty. [A/An] [agent/stockbroker/real estate agent/real estate broker/corporate officer/partner/[*insert other fiduciary relationship*]] owes [his/her/its] [principal/client/corporation/partner/[*insert other fiduciary relationship*]] undivided loyalty. To establish this claim, [*name of plaintiff*] must prove all of the following:**

1. That [*name of defendant*] was [*name of plaintiff*]'s [agent/stockbroker/real estate agent/real estate broker/corporate officer/partner/[*insert other fiduciary relationship*]];

2. That [*name of defendant*] [*insert one of the following:*]

[knowingly acted against [*name of plaintiff*]'s interests in connection with [*insert description of transaction, e.g., "purchasing a residential property"*]];

[acted on behalf of a party whose interests were adverse to [*name of plaintiff*] in connection with [*insert description of transaction, e.g., "purchasing a residential property"*]];

3. That [*name of plaintiff*] did not give informed consent to [*name of defendant*]'s conduct;

4. That [*name of plaintiff*] was harmed; and

5. That [*name of defendant*]'s conduct was a substantial factor in causing [*name of plaintiff*]'s harm.

New June 2006; Revised June 2010

Directions for Use

The instructions in this series are intended for lawsuits brought by or on behalf of the principal. They also assume that the plaintiff is bringing a legal cause of action, not an action in equity. (See *Van de Kamp v. Bank of America* (1988) 204 Cal.App.3d 819 [251 Cal.Rptr. 530] .)

For a breach of fiduciary duty instruction in cases involving attorney defendants, see CACI No. 4106, *Breach of Fiduciary Duty by Attorney--Essential Factual Elements*.

While the advisory committee has not included "employee" as an option for identifying the defendant agent in element 1, there may be cases in which certain employees qualify as "agents," thereby subjecting them to liability for breach of fiduciary duty.

If the parties dispute whether the plaintiff gave informed consent (element 3), the court may wish to add explanatory language or a separate instruction on what constitutes informed consent. (See, e.g., *Rest. 3d Agency*, § 8.06(1).)

Sources and Authority

■ *Restatement Third of Agency*, section 8.01, states: "An agent has a fiduciary duty to act loyally for the principal's benefit in all matters connected with the agency relationship."

■ *Restatement Third of Agency*, section 8.02, states: "An agent has a duty not to acquire a material benefit from a third party in connection with transactions conducted or other actions taken on behalf of the principal or otherwise through the agent's use of the agent's position."

■ *Restatement Third of Agency*, section 8.03, states: "An agent has a duty not to deal with the principal as or on behalf of an adverse party in a transaction connected with the agency relationship."

■ *Restatement Third of Agency*, section 8.04, states: "Throughout the duration of an agency relationship, an agent has a duty to refrain from competing with the principal and from taking action on behalf of or otherwise assisting the principal's competitors. During that time, an agent may take action, not otherwise wrongful, to prepare for competition following termination of the agency relationship."

■ *Restatement Third of Agency*, section 8.05, states:

An agent has a duty

(1) not to use property of the principal for the agent's own purposes or those of a third party; and

(2) not to use or communicate confidential information of the principal for the agent's own purposes or those of a third party.

■ *Restatement Third of Agency*, section 8.06, states:

(1) Conduct by an agent that would otherwise constitute a breach of duty as stated in §§ 8.01, 8.02, 8.03, 8.04, and 8.05 does not constitute a breach of duty if the principal consents to the conduct, provided that

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(a) in obtaining the principal's consent, the agent

(i) acts in good faith,

(ii) discloses all material facts that the agent knows, has reason to know, or should know would reasonably affect the principal's judgment unless the principal has manifested that such facts are already known by the principal or that the principal does not wish to know them, and

(iii) otherwise deals fairly with the principal; and

(b) the principal's consent concerns either a specific act or transaction, or acts or transactions of a specified type that could reasonably be expected to occur in the ordinary course of the agency relationship.

(2) An agent who acts for more than one principal in a transaction between or among them has a duty

(a) to deal in good faith with each principal,

(b) to disclose to each principal

(i) the fact that the agent acts for the other principal or principals, and

(ii) all other facts that the agent knows, has reason to know, or should know would reasonably affect the principal's judgment unless the principal has manifested that such facts are already known by the principal or that the principal does not wish to know them, and

(c) otherwise to deal fairly with each principal.

■ "Every agent owes his principal the duty of undivided loyalty. During the course of his agency, he may not undertake or participate in activities adverse to the interests of his principal. In the absence of an agreement to the contrary, an agent is free to engage in competition with his principal after termination of his employment but he may plan and develop his competitive enterprise during the course of his agency only where the particular activity engaged in is not against the best interests of his principal." (*Sequoia Vacuum Systems v. Stransky* (1964) 229 Cal.App.2d 281, 287 [40 Cal.Rptr. 203] .)

■ "The determination of the particular factual circumstances and the application of the ethical standards of fairness and good faith required of a fiduciary in a given situation are for the trier of facts." (*Sequoia Vacuum Systems, supra*, 229 Cal.App.2d at p. 288 , internal citation omitted.)

■ "[T]he protection of the principal's interest requires a full disclosure of acts undertaken in preparation of entering into competition." (*Sequoia Vacuum Systems, supra*, 229 Cal.App.2d at p. 287 , internal citation omitted.)

■ "It is settled that a director or officer of a corporation may not enter into a competing enterprise which cripples or injures the business of the corporation of which he is an officer or director. An officer or director may not seize for himself, to the detriment of his company, business opportunities in the company's line of activities which his company has an interest and prior claim to obtain. In the event that he does seize such opportunities in violation of his fiduciary duty, the corporation may claim for itself all benefits so obtained." (*Xum Speegle, Inc. v. Fields* (1963) 216 Cal.App.2d 546, 554 [31 Cal.Rptr. 104] , internal citations omitted.)

■ "A fiduciary relationship is 'any relation existing between parties to a transaction wherein one of the parties is ... duty bound to act with the utmost good faith for the benefit of the other party. Such a relation ordinarily arises where a confidence is reposed by one person in the integrity of another, and in such a relation the party in whom the confidence is reposed, if he voluntarily accepts or assumes to accept the confidence, can take no advantage from his acts relating to the interest of the other party without the latter's knowledge or consent.'" (*Wolf v. Superior Court* (2003) 107 Cal.App.4th 25, 29 [130 Cal.Rptr.2d 860] .)

■ "Inherent in each of these relationships is the duty of undivided loyalty the fiduciary owes to its beneficiary, imposing on the fiduciary obligations far more stringent than those required of ordinary contractors. As Justice Cardozo observed, 'Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive is then the standard of behavior.'" (*Wolf, supra*, 107 Cal.App.4th at p. 30 , internal citation omitted.)

Secondary Sources

3 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment, §§ 65-84

35 California Forms of Pleading and Practice, Ch. 401, *Partnerships: Actions Between General Partners and Partnership*, § 401.20 (Matthew Bender)

37 California Forms of Pleading and Practice, Ch. 427, *Principal and Agent*, § 427.23 (Matthew Bender)

Publisher's Notes

There is no BAJI instruction on this subject.

LexisNexis Matthew Bender Expert Practice Tip--Concepts to Include: Element number 2 leaves substantial discretion as to how to describe the alleged breach of the fiduciary duty of loyalty. When drafting this part of the instruction, practitioners may wish to incorporate, if appropriate, the following concepts: "[t]he duty of loyalty embraces several subsidiary obligations, including the duty 'to refrain from competing with the principal and from taking action on behalf of or otherwise assisting the principal's competitors,' the duty 'not to acquire a material benefit from a third party in connection with ... actions taken ... through the agent's use of the agent's position,' and the duty 'not to use or communicate confidential information of the principal for the agent's own purposes or those of a third party'" [*Huong Que, Inc. v. Luu* (2007) 150 Cal.App.4th 400, 416, 58 Cal.Rptr.3d 527] . By Susan S. Azad, Esq.

LexisNexis Matthew Bender Expert Practice Tip--Scope of Duty of Care: As with the duty of care, the duty of loyalty may be limited by statute, and diligent practitioners should ensure any such limitations are reflected in this jury instruction. For instance, in the context of a limited partnership, the Re-RULPA limits a general partner's duty of loyalty to the limited partnership and the other partners as follows [*Corp. Code § 15904.08(b)*]:

(1) To account to the limited partnership and hold as trustee for it any property, profit, or benefit derived by the general partner in the conduct and winding up of the limited partnership's activities or derived from a use by the general partner of limited partnership property, including the appropriation of a limited partnership opportunity;

(2) To refrain from dealing with the limited partnership in the conduct or winding up of the limited

partnership's activities as or on behalf of a party having an interest adverse to the limited partnership; and

(3) To refrain from competing with the limited partnership in the conduct or winding up of the limited partnership's activities.

By Susan S. Azad, Esq.

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate Law Agency Relationships Causes of Action & Remedies Breach of Fiduciary
Duty Elements Business & Corporate Law Agency Relationships Duties & Liabilities Care, Good Faith & Reasonable
Skill Duty of Loyalty, Good Faith & Fair Dealing Contracts Law Contract Interpretation Fiduciary
Responsibilities Governments Fiduciary Responsibilities Real Property Law Brokers Fiduciary Responsibilities

* Practice Tips by Susan S. Azad, Esq., a litigation partner in the Los Angeles office of Latham & Watkins, LLP. Ms. Azad is a member of the firm's Litigation Practice and Distressed Credit Markets Advisory group and has extensive trial and appellate experience in complex business litigation including securities litigation, intellectual property litigation, bankruptcy litigation, health care litigation, real estate, and environmental litigation.



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CHAPTER 41 California Judicial Council Breach of Fiduciary Duty Instructions *

5-41 California Forms of Jury Instruction CACI 4103

CACI 4103 Duty of Confidentiality--Essential Factual Elements

[Name of plaintiff] claims that [he/she/it] was harmed by [name of defendant]'s breach of the fiduciary duty of confidentiality. To establish this claim, [name of plaintiff] must prove all of the following:

- 1. That [name of defendant] was [name of plaintiff]'s [agent/stockbroker/real estate agent/real estate broker/corporate officer/partner/[insert other fiduciary relationship]];**
 - 2. That [name of defendant] had information relating to [name of plaintiff] that [he/she/it] knew or should have known was confidential;**
 - 3. That [name of defendant] [insert one of the following:]**
[used [name of plaintiff]'s confidential information for [his/her/its] own benefit;]
[communicated [name of plaintiff]'s confidential information to third parties;]
 - 4. That [name of plaintiff] did not give informed consent to [name of defendant]'s conduct;**
 - 5. That the confidential information was not a matter of general knowledge;**
 - 6. That [name of plaintiff] was harmed; and**
 - 7. That [name of defendant]'s conduct was a substantial factor in causing [name of plaintiff]'s harm.**
-

New June 2006

Directions for Use

The instructions in this series are intended for lawsuits brought by or on behalf of the principal. They also assume that the plaintiff is bringing a legal cause of action, not an action in equity. (See *Van de Kamp v. Bank of America* (1988) 204 Cal.App.3d 819 [251 Cal.Rptr. 530] .)

For a breach of fiduciary duty instruction in cases involving attorney defendants, see CACI No. 4106, *Breach of Fiduciary Duty by Attorney--Essential Factual Elements*.

While the advisory committee has not included "employee" as an option for identifying the defendant agent in element 1, there may be cases in which certain employees qualify as "agents," thereby subjecting them to liability for breach of fiduciary duty.

A cause of action relating to the misuse of confidential information may also be brought, in certain circumstances, against non-fiduciaries. This instruction may be modified to apply to such cases.

Sources and Authority

- Restatement Second of Agency, section 395, states: "Unless otherwise agreed, an agent is subject to a duty to the principal not to use or to communicate information confidentially given him by the principal or acquired by him during the course of or on account of his agency or in violation of his duties as agent, in competition with or to the injury of the principal, on his own account or on behalf of another, although such information does not relate to the transaction in which he is then employed, unless the information is a matter of general knowledge."

- " "The law of confidential relationships governs duties of trust that one is not obligated to assume. Once a person commits himself to a confidential relationship, the law requires him to fulfill the duties attendant to the relationship. Confidential relations protect the *trust* that is implicit in relationships between employers and employees, between masters and servants, and between principals and agents, rather than the *information* that may pass between these parties.' " (*Balboa Ins. Co. v. Trans Global Equities* (1990) 218 Cal.App.3d 1327, 1350-1351 [267 Cal.Rptr. 787] , original italics, internal citation omitted.)

Secondary Sources

37 *California Forms of Pleading and Practice*, Ch. 427, *Principal and Agent*, § 427.12[3] (Matthew Bender)

Publisher's Notes

There is no BAJI instruction on this subject.

LexisNexis Matthew Bender Expert Practice Tip--Defense of Agent's Superior Interest: This instruction does not reference a potentially important defense concerning the duties of an agent: "[A]n agent is privileged to protect interests of his own which are superior to those of the principal, even though he does so at the expense of the principal's interests or in disobedience to his orders" [*Church of Scientology v. Armstrong* (1991) 232 Cal.App.3d 1060, 1072, 283 Cal.Rptr. 917 (quoting Restatement (Second) of Agency § 418)]. In appropriate circumstances, an instruction reflecting this defense may be prudent. By *Susan S. Azad, Esq.*

LexisNexis Matthew Bender Expert Practice Tip--Fiduciary and Confidential Relationships Not

Synonymous: The directions for *CACI No. 4103* state: "A cause of action relating to the misuse of confidential information may also be brought, in certain circumstances, against non-fiduciaries. This instruction may be modified to apply to such cases." This comment refers to the concept that fiduciary and confidential relationships are not synonymous [*Richelle L. v. Roman Catholic Archbishop of San Francisco* (2003) 106 Cal.App.4th 257, 271, 130 Cal.Rptr.2d 601 (explaining differences between confidential and fiduciary relationships); *Persson v. Smart Inventions, Inc.* (2005) 125 Cal.App.4th 1141, 1160, 23 Cal.Rptr.3d 335 (setting forth "essential elements" of confidential relationship). In *Persson*, the court set out a four-part test for the existence of a confidential relationship [*Persson v. Smart Inventions, Inc.* (2005) 125 Cal.App.4th 1141, 1161, 23 Cal.Rptr.3d 335] :

" '1) The vulnerability of one party to the other which 2) results in the empowerment of the stronger party by the weaker which 3) empowerment has been solicited or accepted by the stronger party and 4) prevents the weaker party from effectively protecting itself.' " In short, vulnerability "is the necessary predicate of a confidential relation," and "the law treats [it] as 'absolutely essential'."

Hence, in actions for breach of a duty of confidentiality brought against a non-fiduciary, *CACI No. 4103* may be modified by inserting the four-part test from *Persson* in element 1 of the instruction. As noted in *Persson*, the element of vulnerability is essential to a confidential relationship. *By Susan S. Azad, Esq.*

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate Law Agency Relationships Causes of Action & Remedies Breach of Fiduciary Duty Elements Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Contracts Law Contract Interpretation Fiduciary Responsibilities Governments Fiduciary Responsibilities Real Property Law Brokers Fiduciary Responsibilities

* Practice Tips by Susan S. Azad, Esq., a litigation partner in the Los Angeles office of Latham & Watkins, LLP. Ms. Azad is a member of the firm's Litigation Practice and Distressed Credit Markets Advisory group and has extensive trial and appellate experience in complex business litigation including securities litigation, intellectual property litigation, bankruptcy litigation, health care litigation, real estate, and environmental litigation.



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California Forms of Jury Instruction

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CHAPTER 41 California Judicial Council Breach of Fiduciary Duty Instructions *

5-41 California Forms of Jury Instruction CACI 4104

CACI 4104 Duties of Escrow Holder

Escrow holders have a fiduciary duty to the parties in escrow:

- 1. To comply strictly with the parties' written instructions; [and]**
- 2. To exercise reasonable skill and diligence in carrying out the escrow instructions; [and]**
- 3. [To obtain reliable evidence that a real estate broker was regularly licensed before paying [his/her/its] commission;] [and]**
- 4. [Insert other applicable duty].**

New June 2006

Directions for Use

Element 3 is intended only for cases involving real estate escrow.

Sources and Authority

■ "The duty of an escrow holder to obtain evidence that a real estate broker was regularly licensed before delivering compensation arises from *Business and Professions Code section 10138*. Respondent assumed this duty only by entering the contract to execute the escrow for appellant and the seller. Accordingly, the duty arose out of and is not outside the contract." (*Kangarlou v. Progressive Title Co., Inc.* (2005) 128 Cal.App.4th 1174, 1179 [27 Cal.Rptr.3d 754] .)

■ "The duty to communicate any facts learned about the broker's licenses arises only because of the duty to obtain such evidence. Since the duty to obtain such evidence is not outside the contract, the duty to communicate those findings also is not outside the contract." (*Kangarlou, supra*, 128 Cal.App.4th at p. 1179 .)

■ "An escrow holder has a fiduciary duty to the escrow parties to comply strictly with the parties' instructions. The holder only assumes this duty by agreeing to execute the escrow. The obligation to exercise reasonable skill and diligence in carrying out the escrow instructions, and to comply strictly with the depositor's written instructions are within the duties undertaken in the contract." (*Kangarlou, supra*, 128 Cal.App.4th at p. 1179 , internal citation omitted.)

Secondary Sources

21 *California Forms of Pleading and Practice*, Ch. 253, Escrows, § 253.17[4] (Matthew Bender)

Publisher's Notes

There is no BAJI instruction on this subject.

LexisNexis Matthew Bender Expert Practice Tip--Narrow Scope of Duty for Escrow Holder: The California Supreme Court has explained that the fiduciary duty of an escrow holder is quite narrow [*Summit Fin. Holdings, Ltd. v. Cont'l Lawyers Title Co.* (2002) 27 Cal.4th 705, 711, 117 Cal.Rptr.2d 541, 41 P.3d 548]; see also *Paul v. Schoellkopf* (2005) 128 Cal.App.4th 147, 154, 26 Cal.Rptr.3d 766 ("An escrow agent's role ends once he or she has successfully exchanged payments and instruments, and he or she 'has no general duty to police the affairs of depositors' "); *Claussen v. First Am. Title Guarantee Co.* (1986) 186 Cal.App.3d 429, 436, 230 Cal.Rptr. 749 (same)];

In delimiting the scope of an escrow holder's fiduciary duties, then, we start from the principle that an escrow holder must comply strictly with the instructions of the parties. On the other hand, an escrow holder has no general duty to police the affairs of its depositors; rather, an escrow holder's obligations are limited to faithful compliance with [the depositors'] instructions. Absent clear evidence of fraud, an escrow holder's obligations are limited to compliance with the parties' instructions.

When applicable, defense attorneys should accordingly ask for an additional instruction emphasizing that an escrow holder's fiduciary duty is limited to faithful compliance with the parties' instructions [see MB 7400A.76 ("An escrow holder is not liable for [his/her/its] failure to do something not required by the terms of the escrow or for a loss incurred while obediently following the escrow instructions"), MB 7400A.75 ("The escrow instructions constitute the full measure of the obligations assumed by _____ as an escrow holder and owing to Plaintiff. _____ is not required to give Plaintiff information that [he/she/it] has if that information is not [related to/subject to disclosure under/ [his/her/its] specific escrow instructions")]. By *Susan S. Azad, Esq.*

LexisNexis Matthew Bender Expert Practice Tip--Written and Oral Escrow Instructions: CACI No. 4104 states that an escrow holder must "comply strictly with the parties' *written* instructions," appearing to imply that there is no duty to comply with oral instructions. However, the Court of Appeal has held that " '[e]scrow instructions may be oral, even when some are in writing [citations] and [] some escrow instructions may be implicit in the express instructions given' " [*Kirk Corp. v. First Am. Title Co.* (1990) 220 Cal.App.3d 785, 807, 270 Cal.Rptr. 24 ; *Zang v. Nw. Title Co.* (1982) 135 Cal.App.3d 159, 167-168, 185 Cal.Rptr. 176] (explaining that escrow agents may be liable for breach of

oral instructions); *see also* MB 7400A.70 ("Escrow instructions may be either written or oral"). Of course, if the instructions themselves state that any further changes must be written, there is likely no duty to follow subsequent oral instructions [*see Brantley v. Boyd (N.D. Cal. Nov. 19, 2009) 2009 U.S. Dist. LEXIS 108214*, at **16, 19 (granting summary judgment to plaintiff for breach of fiduciary claim because escrow agent failed to comply with instructions that "clearly provided that any changes to the instructions had to be given in writing by all the parties affected thereby")]. *By Susan S. Azad, Esq.*

LexisNexis Matthew Bender Expert Practice Tip--Including Other Duties: CACI No. 4104 contains a blank space for other applicable duties. There are number of other duties that may be relevant. For example, "[i]n the event of a conflict or apparent error in instructions, the escrow holder is obliged to take corrective steps before obeying questionable instructions" [*Kirk Corp. v. First. Am. Title Co. (1990) 220 Cal.App.3d 785, 807, 270 Cal.Rptr. 24*] .

There are several other potential duties, all of which are reflected in this publication's suggested jury instructions:

- The duty to take corrective action [*see* MB 7400A.74 ("If there is a conflict or an apparent error in an escrow instruction, the escrow holder has a duty to take corrective steps to clear up the conflict or apparent error")].
- The duty to remain impartial [*see* MB 7400A.90 ("An escrow agent is bound above all things not to take sides between the parties to the escrow")].
- The duty to accept only complete instructions, i.e., those with no blanks to be filled in. [*see* MB 7400A.93; *see also* *Fin. Code* § 17403.2 ("No person ... shall solicit or accept an escrow instruction ... containing any blank to be filled in")].
- The duty to deliver a copy of instructions to all parties [*see* MB 7400A.94; *see also* *Fin. Code* § 17403.3 ("[E]ach escrow instruction ... shall be delivered to all persons executing the same")].
- The duty to disclose information concerning the escrow instructions [*see* MB 7400A.85 ("An escrow agent has the duty to exercise ordinary care to communicate to [his/her/its] principal, knowledge acquired in the course of carrying out [his/her/its] escrow instructions, if the knowledge acquired concerns those instructions")].

This publication also supplies an instruction regarding the dual nature of an escrow holder's fiduciary duty, as well as the timing of the duty [*see* MB 7400A.110]:

As an agent, _____ [name of escrow holder] owes a fiduciary duty to the parties to the escrow. As soon as the escrow is opened, this duty begins, and it is a dual duty, because _____ [name of escrow holder] is the agent of both _____ [name of seller or grantor] and _____ [name of buyer or grantee]. After _____ [the escrow's conditions have been fully performed or _____ (name of seller or grantor) has _____ (describe escrow conditions to be performed by seller or grantor) and _____ (name of buyer or grantee) has _____ (describe escrow conditions to be performed by buyer or grantee)], _____ [name of escrow holder] is the agent not of both parties, but of each party separately, with regard to those things placed in escrow to which each is now entitled. This means that _____ [name of escrow holder] is the

fiduciary of _____ [*name of seller or grantor*] with regard to the money and of
_____ [*name of buyer or grantee*] with regard to the deed to the property.

By Susan S. Azad, Esq.

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate Law Agency Relationships Causes of Action & Remedies Breach of Fiduciary Duty Elements Civil
Procedure Trials Jury Trials Jury Instructions Standard Instructions Governments Fiduciary Responsibilities Real Property
Law Brokers Fiduciary Responsibilities Real Property Law Purchase & Sale Escrow

* Practice Tips by Susan S. Azad, Esq., a litigation partner in the Los Angeles office of Latham & Watkins, LLP. Ms. Azad is a member of the firm's Litigation Practice and Distressed Credit Markets Advisory group and has extensive trial and appellate experience in complex business litigation including securities litigation, intellectual property litigation, bankruptcy litigation, health care litigation, real estate, and environmental litigation.



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CHAPTER 41 California Judicial Council Breach of Fiduciary Duty Instructions *

5-41 California Forms of Jury Instruction CACI 4105

CACI 4105 Duties of Stockbroker--Speculative Securities

Stockbrokers who trade in speculative securities and advise clients have a fiduciary duty to those clients:

- 1. To make sure that the client understands the investment risks in light of his or her financial situation;**
- 2. To inform the client that speculative investments are not suitable if the stockbroker believes that the client is unable to bear the financial risks involved; and**
- 3. Not to solicit the client's purchase of speculative securities that the stockbroker considers to be beyond the client's risk threshold.**

If these duties are met and the client still insists on purchasing speculative securities, the stockbroker may advise the client about various speculative securities and purchase speculative securities that the client selects.

New June 2006

Directions for Use

This instruction should be read after *CACI No. 4101, Failure to Use Reasonable Care--Essential Factual Elements*.

Sources and Authority

- "[T]he stockbroker has a fiduciary duty (1) to ascertain that the investor understands the investment

risks in the light of his or her actual financial situation; (2) to inform the customer that no speculative investments are suitable if the customer persists in wanting to engage in such speculative transactions without the stockbroker's being persuaded that the customer is able to bear the financial risks involved; and (3) to refrain completely from soliciting the customer's purchase of any speculative securities which the stockbroker considers to be beyond the customer's risk threshold. As long as these duties are met, if the customer nevertheless insists on purchasing speculative securities, the stockbroker is not barred from advising the customer about various speculative securities and purchasing for the customer those securities which the customer selects." (*Duffy v. Cavalier* (1989) 215 Cal.App.3d 1517, 1532 [264 Cal.Rptr. 740] , internal citations and footnote omitted.)

■ "[T]he relationship between any stockbroker and his or her customer is fiduciary in nature, imposing on the former the duty to act in the highest good faith toward the customer." (*Duffy, supra*, 215 Cal.App.3d at p. 1534 , internal citations omitted.)

■ "A stockbroker's fiduciary duty requires more than merely carrying out the stated objectives of the customer; at least where there is evidence, as there certainly was here, that the stockbroker's recommendations were invariably followed, the stockbroker must 'determine the customer's actual financial situation and needs.' If it would be improper and unsuitable to carry out the speculative objectives expressed by the customer, there is a further obligation on the part of the stockbroker 'to make this known to [the customer], and [to] refrain from acting except upon [the customer's] express orders.' Under such circumstances, although the stockbroker can advise the customer about the speculative options available, he or she should not solicit the customer's purchase of any such speculative securities that would be beyond the customer's 'risk threshold.' " (*Duffy, supra*, 215 Cal.App.3d at p. 1538 , internal citations omitted.)

Secondary Sources

45 California Forms of Pleading and Practice, Ch. 515, Securities and Franchise Regulation, § 515.15[3] (Matthew Bender)

Publisher's Notes

There is no BAJI instruction on this subject.

LexisNexis Matthew Bender Expert Practice Tip--Stockbroker's Duties: The CACI instruction for stockbroker's duties is drawn almost directly from *Duffy v. Cavalier* [(1989) 215 Cal. App. 3d 1517, 1532, 264 Cal.Rptr. 740] . Although the *Duffy* court held that "there is in all cases a fiduciary duty owed by a stockbroker to his or her customers," it also held that "the scope of this duty depends on the specific facts and circumstances presented in a given case" [*Duffy v. Cavalier* (1989) 215 Cal. App. 3d 1517, 1536 n.10, 264 Cal.Rptr. 740] . "These [facts and circumstances] include the relative sophistication and experience of the customer; the customer's ability to evaluate the broker's recommendations and exercise an independent judgment thereon; the nature of the account, whether discretionary or nondiscretionary; and the actual financial situation and needs of the customer" [*Duffy v. Cavalier* (1989) 215 Cal. App. 3d 1517, 1536 n.10, 264 Cal.Rptr. 740 ; see *Brown v. Wells Fargo Bank, N.A.* (2008) 168 Cal.App.4th 938, 961, 85 Cal.Rptr.3d 817 ("The scope of a fiduciary's obligations depends on the specific facts of the case. Such factors may include, for example, the relative sophistication and experience of the vulnerable party.")]. When the scope of the duty is disputed, it may be appropriate to add a jury instruction including this language. The *Duffy* court also approved the following language [*Duffy v. Cavalier* (1989) 215 Cal. App. 3d 1517, 1536, 264 Cal.Rptr. 740] :

If the broker, for all practical purposes, controls the account, whether by use of his [or her] discretionary power or by making recommendations which are regularly followed, there is an obligation to determine the customer's financial situation and needs.

So long as the customer is of sufficient intelligence and understanding to make the ultimate investment decision and does so, the customer controls that trade for that account. When a person invests in securities he [or she] assumes the risks inherent in the market and must bear the losses therefrom.

A stockbroker is not a guarantee [sic] of market performance

By Susan S. Azad, Esq.

LexisNexis Matthew Bender Expert Practice Tip--When Stockbroker's Duties Begin: Another potential issue concerns when a stockbroker's fiduciary duty commences. In *Rosenthal v. Great W. Fin. Sec. Corp.* [(1996) 14 Cal.4th 394, 425, 58 Cal.Rptr.2d 875], the California Supreme Court found that a broker had no obligation to explain the terms of a contract (in particular, an arbitration clause) because there was no preexisting relationship between the parties. But at the same time, "when the facts establish that an investment professional has previously *voluntarily induced* a vulnerable individual to repose trust and confidence in the professional, that professional has a fiduciary duty toward that individual, and may be required by that duty to fully disclose, in a manner the individual understands, the material terms of a contract between them" [*Brown v. Wells Fargo Bank, N.A.* (2008) 168 Cal.App.4th 938, 961-962, 85 Cal.Rptr.3d 817]. Thus, a fiduciary duty may exist even before the client signs a contract with the broker. Depending on the facts of a particular matter, an additional instruction concerning the date the fiduciary duty commenced may be warranted. *By Susan S. Azad, Esq.*

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate Law Agency Relationships Causes of Action & Remedies Breach of Fiduciary Duty Elements Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Contracts Law Contract Interpretation Fiduciary Responsibilities Governments Fiduciary Responsibilities Securities Law Investment Advisers Fiduciary Responsibilities

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CHAPTER 41 California Judicial Council Breach of Fiduciary Duty Instructions *

5-41 California Forms of Jury Instruction CACI 4106

CACI 4106 Breach of Fiduciary Duty by Attorney--Essential Factual Elements

[*Name of plaintiff*] **claims that [he/she/it] was harmed because [*name of defendant*] breached an attorney's duty [*describe duty, e.g., "not to represent clients with conflicting interests"*]. To establish this claim, [*name of plaintiff*] must prove all of the following:**

- 1. That [*name of defendant*] breached the duty of an attorney [*describe duty*];**
- 2. That [*name of plaintiff*] was harmed; and**
- 3. That [*name of defendant*]'s conduct was a substantial factor in causing [*name of plaintiff*]'s harm.**

New September 2003; Revised April 2004; Renumbered from CACI No. 605 December 2007

Directions for Use

The existence of a fiduciary relationship is a question of law. Whether an attorney has breached that fiduciary duty is a question of fact. (*David Welch Co. v. Erskine & Tulley* (1988) 203 Cal.App.3d 884, 890 [250 Cal.Rptr. 339] .)

Sources and Authority

- "To establish a cause of action for breach of fiduciary duty, a plaintiff must demonstrate the existence of a fiduciary relationship, breach of that duty and damages." (*Shoppoff & Cavallo LLP v. Hyon* (2008) 167 Cal.App.4th 1489, 1509 [85 Cal.Rptr.3d 268] .)

■ " 'The relation between attorney and client is a fiduciary relation of the very highest character.' " (*Neel v. Magana, Olney, Levy, Cathcart & Gelfand* (1971) 6 Cal.3d 176, 189 [98 Cal.Rptr. 837, 491 P.2d 421] .)

■ "[A] breach of fiduciary duty is a species of tort distinct from a cause of action for professional negligence." (*Stanley v. Richmond* (1995) 35 Cal.App.4th 1070, 1086 [41 Cal.Rptr.2d 768] .)

■ "Expert testimony is not required, but is admissible to establish the duty and breach elements of a cause of action for breach of fiduciary duty where the attorney conduct is a matter beyond common knowledge." (*Stanley, supra*, 35 Cal.App.4th at p. 1087 , internal citations omitted.)

■ "The scope of an attorney's fiduciary duty may be determined as a matter of law based on the Rules of Professional Conduct which, 'together with statutes and general principles relating to other fiduciary relationships, all help define the duty component of the fiduciary duty which an attorney owes to his [or her] client.' " (*Stanley, supra*, 35 Cal.App.4th at p. 1087 , quoting *Mirabito v. Liccardo* (1992) 4 Cal.App.4th 41, 45 [5 Cal.Rptr.2d 571] ; *David Welch Co., supra*, 203 Cal.App.3d at p. 890 .)

Secondary Sources

1 Witkin, California Procedure (4th ed. 1996) Attorneys, § 118

Vapnek et al., California Practice Guide: Professional Responsibility (The Rutter Group) P 6:425

3 Levy et al., *California Torts, Ch. 32, Liability of Attorneys*, § 32.02 (Matthew Bender)

7 *California Forms of Pleading and Practice, Ch. 76, Attorney Professional Liability*, § 76.150 (Matthew Bender)

2A *California Points and Authorities, Ch. 24A, Attorneys at Law: Malpractice*, §§ 24A.27[3][d], 24A.29[3][j] (Matthew Bender)

Publisher's Notes

There is no BAJI instruction on this subject.

LexisNexis Matthew Bender Practice Tip--Attorney Misconduct as Basis of Claim: Violations of applicable rules of professional conduct are used to disqualify and discipline lawyers, but they can also form the basis of breach of fiduciary duty claims. An attorney breaches his or her fiduciary duty by failing to "comply with obligations concerning the client's confidences and property, avoid impermissible conflicting interests, deal honestly with the client, and not employ advantages arising from the client-lawyer relationship in a manner adverse to the client" [Restatement (Third) of Law Governing Lawyers § 16(c)]. A breach of the duty of loyalty can be a breach of fiduciary duty [see *Benasra v. Mitchell Silberberg & Knupp LLP* (2004) 123 Cal.App.4th 1179, 1186, 20 Cal.Rptr.3d 621 (attorney breaches fiduciary duty by "accept[ing] a representation in which confidences disclosed by a former client may benefit the new client due to the relationship between the new matter and the old")]. Charging improper fees can also serve as a basis for a breach of fiduciary duty action [see *Charnay v. Cobert* (2006) 145 Cal.App.4th 170, 185, 51 Cal.Rptr.3d 471 (claim for breach of fiduciary duty was stated when plaintiff alleged that attorney billed for unperformed tasks and billed at inflated rate)]. By *Susan S. Azad, Esq.*

LexisNexis Matthew Bender Practice Tip--One-Year Statute of Limitations: Practitioners pursuing

a breach of fiduciary duty claims against an attorney should assume that the one-year statute of limitations set forth in *Code Civ. Proc.* § 340.6(a) applies. *By Susan S. Azad, Esq.*

LexisNexis Matthew Bender Practice Tip--Affirmative Defense: If appropriate under the circumstances, defense practitioners should include an affirmative defense jury instruction as follows: "a lawyer is not liable [for breach of fiduciary duty] for any action or inaction the lawyer reasonably believed to be required by law, including a professional rule." In addition, any "defenses available under generally applicable principles of law governing ... actions for ... breach of fiduciary duty" may also be employed [Restatement (Third) of Law Governing Lawyers § 54(1)]. *By Susan S. Azad, Esq.*

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Pleading & Practice Defenses, Demurrers & Objections Affirmative Defenses General Overview Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Governments Legislation Statutes of Limitations General Overview

* Practice Tips by Susan S. Azad, Esq., a litigation partner in the Los Angeles office of Latham & Watkins, LLP. Ms. Azad is a member of the firm's Litigation Practice and Distressed Credit Markets Advisory group and has extensive trial and appellate experience in complex business litigation including securities litigation, intellectual property litigation, bankruptcy litigation, health care litigation, real estate, and environmental litigation.



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CHAPTER 41 California Judicial Council Breach of Fiduciary Duty Instructions *

5-41 California Forms of Jury Instruction CACI 4107

CACI 4107 Duty of Disclosure by Real Estate Broker

As a fiduciary, a real estate broker must disclose to his or her client all material information that the broker knows or could reasonably obtain regarding the property or relating to the transaction.

The facts that a broker must learn, and the advice and counsel required of the broker, depend on the facts of the transaction, the knowledge and experience of the client, the questions asked by the client, the nature of the property, and the terms of sale. The broker must place himself or herself in the position of the client and consider the type of information required for the client to make a well-informed decision.

New April 2008

Directions for Use

This instruction may be read after *CACI No. 4101, Failure to Use Reasonable Care--Essential Factual Elements*, if a real estate broker's duty of disclosure is at issue.

Sources and Authority

• "Under the common law, ... a broker's fiduciary duty to his client requires the highest good faith and undivided service and loyalty. 'The broker as a fiduciary has a duty to learn the material facts that may affect the principal's decision. He is hired for his professional knowledge and skill; he is expected to perform the necessary research and investigation in order to know those important matters that will affect the principal's decision, and he has a duty to counsel and advise the principal regarding the propriety and ramifications of the decision. The agent's duty to disclose material information to the principal includes the duty to disclose reasonably obtainable material information. [P] ... [P] The facts that a broker must

learn, and the advice and counsel required of the broker, depend on the facts of each transaction, the knowledge and the experience of the principal, the questions asked by the principal, and the nature of the property and the terms of sale. The broker must place himself in the position of the principal and ask himself the type of information required for the principal to make a well-informed decision. This obligation requires investigation of facts not known to the agent and disclosure of all material facts that might reasonably be discovered.' " (*Field v. Century 21 Klowden-Forness Realty* (1998) 63 Cal.App.4th 18, 25-26 [73 Cal.Rptr.2d 784] , internal citations omitted.)

■ "A fiduciary must tell its principal of all information it possesses that is material to the principal's interests. A fiduciary's failure to share material information with the principal is constructive fraud, a term of art obviating actual fraudulent intent. (*Michel v. Moore & Associates, Inc.* (2007) 156 Cal.App.4th 756, 762 [67 Cal.Rptr.3d 797] , internal citations omitted.)

■ " 'A broker who is merely an innocent conduit of the seller's fraud may be innocent of actual fraud [citations], but in this situation the broker may be liable for negligence on a constructive fraud theory if he or she passes on the misstatements as true without personally investigating them.' " (*Salahutdin v. Valley of Cal.* (1994) 24 Cal.App.4th 555, 562 [29 Cal.Rptr.2d 463] .)

■ "[T]he fiduciary duty owed by brokers to their own clients is substantially more extensive than the *nonfiduciary* duty codified in [Civil Code] section 2079 [duty to visually inspect and disclose material facts]." (*Michel, supra*, 156 Cal.App.4th at p. 763 , original italics.)

■ "[Fiduciary] duties require full and complete disclosure of all material facts respecting the property or relating to the transaction in question." (*Padgett v. Phariss* (1997) 54 Cal.App.4th 1270, 1286 [63 Cal.Rptr.2d 373] .)

■ "Real estate brokers are subject to two sets of duties: those imposed by regulatory statutes, and those arising from the general law of agency." (*Coldwell Banker Residential Brokerage Co. v. Superior Court* (2004) 117 Cal.App.4th 158, 164 [11 Cal.Rptr.3d 564] .)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, § 794

California Real Property Sales Transactions (Cont.Ed.Bar 4th ed.) §§ 2.132-2.136

3 *California Real Estate Law and Practice*, Ch. 61, *Employment and Authority of Brokers*, § 61.05, Ch. 63, *Duties and Liabilities of Brokers*, §§ 63.20 -63.22 (Matthew Bender)

Publisher's Notes

There is no BAJI instruction on this subject.

LexisNexis Matthew Bender Practice Tip--Duty Regarded Unverified Information: This instruction accurately reflects the law, inasmuch as real estate brokers generally must personally investigate relevant information before passing it to clients. However, a broker does not breach this duty by passing on inaccurate information from a third party (such as the seller) as long as he or she tells the client that he or she did not verify the information [*Salahutdin v. Valley of California, Inc.* (1994) 24 Cal.App.4th 555, 563, 29 Cal. Rptr.2d 463 (finding that broker "breached his fiduciary duty to plaintiffs by making affirmative statements as to the size, boundaries, and subdivi[s]ability of the property, knowing these facts to be material to plaintiffs and by failing to disclose that he had not confirmed their accuracy")]. In

appropriate circumstances, a defense practitioner should include an instruction to this effect. *By Susan S. Azad, Esq.*

* Practice Tips by Susan S. Azad, Esq., a litigation partner in the Los Angeles office of Latham & Watkins, LLP. Ms. Azad is a member of the firm's Litigation Practice and Distressed Credit Markets Advisory group and has extensive trial and appellate experience in complex business litigation including securities litigation, intellectual property litigation, bankruptcy litigation, health care litigation, real estate, and environmental litigation.



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CHAPTER 41 California Judicial Council Breach of Fiduciary Duty Instructions *

5-41 California Forms of Jury Instruction CACI 4108-CACI 4119

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CHAPTER 41 California Judicial Council Breach of Fiduciary Duty Instructions *

5-41 California Forms of Jury Instruction CACI 4120

CACI 4120 Affirmative Defense--Statute of Limitations

[Name of defendant] contends that [name of plaintiff]'s lawsuit was not filed within the time set by law. To succeed on this defense, [name of defendant] must prove that [name of plaintiff]'s claimed harm occurred before [insert date four years before complaint was filed] unless [name of plaintiff] proves that before [insert date four years before complaint was filed], [he/she/it] did not discover, and did not know of facts that would have caused a reasonable person to suspect, [name of defendant]'s wrongful act or omission.

New April 2007; Renumbered from CACI No. 4106 December 2007

Directions for Use

Read this instruction only for a cause of action for breach of fiduciary duty. For a statute-of-limitations defense to a cause of action for personal injury or wrongful death due to wrongful or negligent conduct, see *CACI No. 454, Affirmative Defense--Statute of Limitations*, and *CACI No. 455, Statute of Limitations--Delayed Discovery*.

Do not use this instruction in an action against an attorney. For a statute-of-limitations defense to a cause of action, other than actual fraud, against an attorney acting in the capacity of an attorney, see *CACI No. 610, Affirmative Defense--Statute of Limitations--Attorney Malpractice--One-Year Limit*, and *CACI No. 611, Affirmative Defense--Statute of Limitations--Attorney Malpractice--Four-Year Limit*. One cannot avoid a shorter limitation period for attorney malpractice (see *Code Civ. Proc.*, § 340.6) by pleading the facts as a breach of fiduciary duty. (*Stoll v. Superior Court* (1992) 9 Cal.App.4th 1362, 1368 [12 Cal.Rptr.2d 354] .)

Sources and Authority

■ *Code of Civil Procedure* section 343 provides: "An action for relief not hereinbefore provided for must be commenced within four years after the cause of action shall have accrued."

■ "The statute of limitations for breach of fiduciary duty is four years. (§ 343.)" (*Stalberg v. Western Title Ins. Co.* (1991) 230 Cal.App.3d 1223, 1230 [282 Cal.Rptr. 43] , internal citation omitted.)

■ "A breach of fiduciary duty claim is based on concealment of facts, and the statute begins to run when plaintiffs discovered, or in the exercise of reasonable diligence could have discovered, that facts had been concealed." (*Stalberg, supra*, 230 Cal.App.3d at p. 1230 , internal citation omitted.)

■ "Where a fiduciary relationship exists, facts which ordinarily require investigation may not incite suspicion and do not give rise to a duty of inquiry. Where there is a fiduciary relationship, the usual duty of diligence to discover facts does not exist." (*Hobbs v. Bateman Eichler, Hill Richards, Inc.* (1985) 164 Cal.App.3d 174, 202 [210 Cal.Rptr. 387] , internal citations omitted.)

■ "[A] plaintiff need not establish that she exercised due diligence to discover the facts within the limitations period unless she is under a duty to inquire and the circumstances are such that failure to inquire would be negligent. Where the plaintiff is not under such duty to inquire, the limitations period does not begin to run until she *actually* discovers the facts constituting the cause of action, even though the means for obtaining the information are available." (*Hobbs, supra*, 164 Cal.App.3d at p. 202 , original italics, internal citations omitted.)

■ "The distinction between the rules excusing a late discovery of fraud and those allowing late discovery in cases in the confidential relationship category is that in the latter situation, the duty to investigate may arise later because the plaintiff is entitled to rely upon the assumption that his fiduciary is acting on his behalf. However, once a plaintiff becomes *aware* of facts which would make a reasonably prudent person suspicious, the duty to investigate arises and the plaintiff may then be charged with knowledge of the facts which would have been discovered by such an investigation." (*Hobbs, supra*, 164 Cal.App.3d at p. 202 , original italics, internal citations omitted.)

■ "'[R]esolution of the statute of limitations issue is normally a question of fact' " (*Romano v. Rockwell Internat., Inc.* (1996) 14 Cal.4th 479, 487 [59 Cal.Rptr.2d 20, 926 P.2d 1114] .)

Secondary Sources

3 Witkin, *California Procedure* (4th ed. 1996) Actions, §§ 617-619

Vapnek et al., *California Practice Guide: Professional Responsibility* (The Rutter Group) P 6:425.4

3 Levy et al., *California Torts, Ch. 32, Liability of Attorneys*, § 32.60 (Matthew Bender)

7 *California Forms of Pleading and Practice, Ch. 76, Attorney Professional Liability*, § 76.170 (Matthew Bender)

30 *California Forms of Pleading and Practice, Ch. 345, Limitation of Actions* , § 345.19[4] (Matthew Bender)

2A *California Points and Authorities, Ch. 24A, Attorneys at Law: Malpractice*, § 24A.29 (Matthew Bender)

Publisher's Notes

There is no BAJI instruction on this subject.

LexisNexis Matthew Bender Practice Tip--CACI No. 4120 Not Applicable to Attorneys: The directions for this instruction warn practitioners not to use the instruction in breach of fiduciary duty claims against attorneys. *Code Civ. Proc.* § 340.6 provides that "[a]n action against an attorney for a wrongful act or omission, other than for actual fraud, arising in the performance of professional services shall be commenced within one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the facts constituting the wrongful act or omission, or four years from the date of the wrongful act or omission, whichever occurs first" [*Code Civ. Proc.* § 340.6(a)]. Although one reported decision holds that Section 340.6 does not apply to claims for breach of fiduciary duty against an attorney [see *David Welch Co. v. Erskine & Tulley* (1988) 203 Cal.App.3d 884, 893, 250 Cal.Rptr. 339 ("Defendants first argue that this case was governed by the one-year statute of limitations relating to attorney malpractice actions. But where a cause of action is based on a defendant's breach of its fiduciary duties, the four-year catchall statute set forth in *Code of Civil Procedure* Section 343 applies.")], most California cases hold to the contrary [see *Stoll v. Superior Court* (1992) 9 Cal.App.4th 1362, 1369, 12 Cal.Rptr.2d 354] (criticizing *David Welch* and reversing the trial court's determination that the four-year catch-all limitations period applied rather than Section 340.6); see also *Quintilliani v. Mannerino* (1998) 62 Cal.App.4th 54, 68, 72 Cal.Rptr.2d 359 (same)]. By Susan S. Azad, Esq.

* Practice Tips by Susan S. Azad, Esq., a litigation partner in the Los Angeles office of Latham & Watkins, LLP. Ms. Azad is a member of the firm's Litigation Practice and Distressed Credit Markets Advisory group and has extensive trial and appellate experience in complex business litigation including securities litigation, intellectual property litigation, bankruptcy litigation, health care litigation, real estate, and environmental litigation.



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California Forms of Jury Instruction

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CHAPTER 41 California Judicial Council Breach of Fiduciary Duty Instructions *

5-41 California Forms of Jury Instruction CACI 4121-CACI 4199

Reserved for Future Use

CACI 4121Reserved for Future Use



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CHAPTER 42 California Judicial Council Uniform Fraudulent Transfer Act Instructions

5-42 California Forms of Jury Instruction 42.syn

§ 42.syn Synopsis to Chapter 42: California Judicial Council Uniform Fraudulent Transfer Act Instructions

CACI 4200 Actual Intent to Defraud a Creditor (Civ. Code, § 3439.04(a)(1))--Essential Factual Elements

CACI 4201 Factors to Consider in Determining Actual Intent to Defraud (Civ. Code, § 3439.04(b))

CACI 4202 Constructive Fraudulent Transfer (Civ. Code, § 3439.04(a)(2))--Essential Factual Elements

CACI 4203 Constructive Fraudulent Transfer (Insolvency) (Civ. Code, § 3439.05)--Essential Factual Elements

CACI 4204 "Transfer" Explained

CACI 4205 Insolvency Explained

CACI 4206 Presumption of Insolvency

CACI 4207 Affirmative Defense--Good Faith (Civ. Code, § 3439.08)

CACI 4208 Affirmative Defense--Statute of Limitations--Actual and Constructive Fraud (Civ. Code, § 3439.09)

CACI 4209-CACI 4999 Reserved for Future Use



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CHAPTER 42 California Judicial Council Uniform Fraudulent Transfer Act Instructions

5-42 California Forms of Jury Instruction Scope

Scope

SCOPE

This chapter contains the California Judicial Council's "Uniform Fraudulent Transfer Act Series" of jury instructions [CACI No. 4200 et seq.]. The Judicial Council of California Civil Jury Instructions (CACI) included in this publication are the product of the Judicial Council of California Task Force on Jury Instructions, which are updated by the Judicial Council of California Advisory Committee on Civil Jury Instructions.

This chapter includes instructions on the following topics:

- Essential factual elements for proving the actual intent to defraud a creditor [CACI No. 4200].
- Factors to consider in determining an actual intent to defraud [CACI No. 4201].
- Essential factual elements for establishing a constructive fraudulent transfer [CACI No. 4202].
- Essential factual elements for establishing a constructive fraudulent transfer in cases of insolvency [CACI No. 4203].
- "Transfer" [CACI No. 4204] and "insolvency" explained [CACI No. 4205].
- The presumption of insolvency [CACI No. 4206].
- The defenses of good faith [CACI No. 4207] and the running of the statute of limitations [CACI No. 4208].



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CHAPTER 42 California Judicial Council Uniform Fraudulent Transfer Act Instructions

5-42 California Forms of Jury Instruction CACI 4200

**CACI 4200 Actual Intent to Defraud a Creditor (Civ. Code,
§ 3439.04(a)(1))--Essential Factual Elements**

[*Name of plaintiff*] **claims [he/she/it] was harmed because [*name of debtor*] fraudulently [transferred property/incurred an obligation] to [*name of defendant*] in order to avoid paying a debt to [*name of plaintiff*]. [This is called "actual fraud."] To establish this claim against [*name of defendant*], [*name of plaintiff*] must prove all of the following:**

- 1. That [*name of plaintiff*] has a right to payment from [*name of debtor*] for [*insert amount of claim*];**
- 2. That [*name of debtor*] [transferred property/incurred an obligation] to [*name of defendant*];**
- 3. That [*name of debtor*] [transferred the property/incurred the obligation] with the intent to hinder, delay, or defraud one or more of [his/her/its] creditors;**
- 4. That [*name of plaintiff*] was harmed; and**
- 5. That [*name of debtor*]'s conduct was a substantial factor in causing [*name of plaintiff*]'s harm.**

To prove intent to hinder, delay, or defraud creditors, it is not necessary to show that [*name of debtor*] had a desire to harm [his/her/its] creditors. [*Name of plaintiff*] need only show that [*name of debtor*] intended to remove or conceal assets to make it more difficult for [his/her/its] creditors to collect payment.

[It does not matter whether [*name of plaintiff*]'s right to payment arose before or after [*name of debtor*] [transferred property/incurred an obligation].]

New June 2006

Directions for Use

This instruction assumes the defendant is a transferee of the original debtor. Read the bracketed second sentence in cases in which the plaintiff is asserting causes of action for both actual and constructive fraud. Read the last bracketed sentence in cases in which the plaintiff's alleged claim arose after the defendant's property was transferred or the obligation was incurred.

If the case concerns a fraudulently incurred obligation, users may wish to insert a brief description of the obligation in this instruction, e.g., "a lien on the property."

Courts have held that there is a right to a jury trial whenever the remedy sought is monetary relief, including even the return of a "determinate sum of money." (*Wisden v. Superior Court* (2004) 124 Cal.App.4th 750, 757 [21 Cal.Rptr.3d 523] , internal citation omitted.) If the only remedy sought is the return of a particular nonmonetary asset, the action is an equitable action. However, even where a specific nonmonetary asset is involved, a conspiracy claim or an action against any party other than the transferee who possesses the asset (e.g., "the person for whose benefit the transfer was made" (Civ. Code, § 3439.08(b)(1)) necessarily would seek monetary relief and give rise to a right to a jury trial.

Note that there may be a split of authority regarding the appropriate standard of proof of fraudulent intent. The Sixth District Court of Appeal has stated: "Actual intent to defraud must be shown by clear and convincing evidence. (*Hansford v. Lassar* (1975) 53 Cal.App.3d 364, 377 [125 Cal.Rptr. 804] .)" (*Reddy v. Gonzalez* (1992) 8 Cal.App.4th 118, 123 [10 Cal.Rptr.2d 58] .) Note that the case relied on by the *Hansford* court (*Aggregates Assoc., Inc. v. Packwood* (1962) 58 Cal.2d 580 [25 Cal.Rptr. 545, 375 P.2d 425]) was disapproved by the Supreme Court in *Liodas v. Sahadi* (1977) 19 Cal.3d 278, 291-292 [137 Cal.Rptr. 635, 562 P.2d 316] . The Fourth District Court of Appeal, Division Two, disagreed with *Reddy*: "In determining whether transfers occurred with fraudulent intent, we apply the preponderance of the evidence test, even though we recognize that some courts believe that the test requires clear and convincing evidence." (*Gagan v. Gouyd* (1999) 73 Cal.App.4th 835, 839 [86 Cal.Rptr.2d 733] , internal citations omitted, disapproved on other grounds in *Mejia v. Reed* (2003) 31 Cal.4th 657, 669, fn. 2 [3 Cal.Rptr.3d 390, 74 P.3d 166] .)

Sources and Authority

● *Civil Code* section 3439.04 provides:

(a) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation as follows:

(1) With actual intent to hinder, delay, or defraud any creditor of the debtor.

(2) Without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor either:

(A) Was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction.

(B) Intended to incur, or believed or reasonably should have believed that he or she would incur, debts beyond his or her ability to pay as they became due.

(b) In determining actual intent under paragraph (1) of subdivision (a), consideration may be given, among other factors, to any or all of the following:

- (1) Whether the transfer or obligation was to an insider.
- (2) Whether the debtor retained possession or control of the property transferred after the transfer.
- (3) Whether the transfer or obligation was disclosed or concealed.
- (4) Whether before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit.
- (5) Whether the transfer was of substantially all the debtor's assets.
- (6) Whether the debtor absconded.
- (7) Whether the debtor removed or concealed assets.
- (8) Whether the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred.
- (9) Whether the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred.
- (10) Whether the transfer occurred shortly before or shortly after a substantial debt was incurred.
- (11) Whether the debtor transferred the essential assets of the business to a lienholder who transferred the assets to an insider of the debtor.

(c) The amendment to this section made during the 2004 portion of the 2003-04 Regular Session of the Legislature, set forth in subdivision (b), does not constitute a change in, but is declaratory of, existing law, and is not intended to affect any judicial decisions that have interpreted this chapter.

■ *Civil Code section 3439.01(b)* provides: " 'Claim' means a right to payment, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured."

■ *Civil Code section 3439.07* provides, in part:

(a) In an action for relief against a transfer or obligation ... a creditor ... may obtain:

(1) Avoidance of the transfer or obligation to the extent necessary to satisfy the creditor's claim.

(2) An attachment or other provisional remedy against the asset transferred or its proceeds
... .

(3) Subject to applicable principles of equity and in accordance with applicable rules of civil procedure, the following:

(A) An injunction against further disposition by the debtor ... of the asset transferred or its proceeds.

(B) Appointment of a receiver

(C) Any other relief the circumstances may require.

(b) If a creditor has commenced an action on a claim against the debtor, the creditor may attach the asset transferred or its proceeds

(c) If a creditor has obtained a judgment on a claim against the debtor, the creditor may levy execution on the asset transferred or its proceeds.

■ "The UFTA permits defrauded creditors to reach property in the hands of a transferee." (*Mejia v. Reed* (2003) 31 Cal.4th 657, 663 [3 Cal.Rptr.3d 390, 74 P.3d 166] .)

■ "A fraudulent conveyance under the UFTA involves 'a transfer by the debtor of property to a third person undertaken with the intent to prevent a creditor from reaching that interest to satisfy its claim.' 'A transfer made ... by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made, if the debtor made the transfer as follows: [P] (1) With actual intent to hinder, delay, or defraud any creditor of the debtor.' " (*Filip v. Bucurenciu* (2005) 129 Cal.App.4th 825, 829 [28 Cal.Rptr.3d 884] , internal citations omitted.)

■ "[A] conveyance will not be considered fraudulent if the debtor merely transfers property which is otherwise exempt from liability for debts. That is, because the theory of the law is that it is fraudulent for a judgment debtor to divest himself of assets against which the creditor could execute, if execution by the creditor would be barred while the property is in the possession of the debtor, then the debtor's conveyance of that exempt property to a third person is not fraudulent." (*Yaesu Electronics Corp. v. Tamura* (1994) 28 Cal.App.4th 8, 13 [33 Cal.Rptr.2d 283] .)

■ "A transfer is not voidable against a person 'who took in good faith and for a reasonably equivalent value or against any subsequent transferee.' " (*Filip, supra*, 129 Cal.App.4th at p. 830 , internal citations omitted.)

■ " '[T]he UFTA is not the exclusive remedy by which fraudulent conveyances and transfers may be attacked'; they 'may also be attacked by, as it were, a common law action.' " (*Wisden v. Superior Court* (2004) 124 Cal.App.4th 750, 758 [21 Cal.Rptr.3d 523] , internal citation omitted.)

■ "[E]ven if the Legislature intended that all fraudulent conveyance claims be brought under the UFTA, the Legislature could not thereby dispense with a right to jury trial that existed at common law when the California Constitution was adopted." (*Wisden, supra*, 124 Cal.App.4th at p. 758 , internal citation omitted.)

■ "Whether a conveyance was made with fraudulent intent is a question of fact, and proof often consists of inferences from the circumstances surrounding the transfer." (*Filip, supra*, 129 Cal.App.4th at p. 834 , internal citations omitted.)

■ "In order to constitute intent to defraud, it is not necessary that the transferor act maliciously with the desire of causing harm to one or more creditors." (*Economy Refining & Service Co. v. Royal Nat'l Bank* (1971) 20 Cal.App.3d 434, 441 [97 Cal.Rptr. 706] .)

■ "There is no minimum number of factors that must be present before the scales tip in favor of finding of actual intent to defraud. This list of factors is meant to provide guidance to the trial court, not compel a finding one way or the

other." (*Filip, supra*, 129 Cal.App.4th at p. 834 .)

■ "A well-established principle of the law of fraudulent transfers is, 'A transfer in fraud of creditors may be attacked only by one who is injured thereby. Mere intent to delay or defraud is not sufficient; injury to the creditor must be shown affirmatively. In other words, prejudice to the plaintiff is essential. It cannot be said that a creditor has been injured unless the transfer puts beyond [her] reach property [she] otherwise would be able to subject to the payment of [her] debt.' " (*Mehrtash v. Mehrtash* (2001) 93 Cal.App.4th 75, 80 [112 Cal.Rptr.2d 802] , internal citations omitted.)

Secondary Sources

9 *California Forms of Pleading and Practice*, Ch. 94, *Bankruptcy*, § 94.55[4][b] (Matthew Bender)

23 *California Forms of Pleading and Practice*, Ch. 270, *Fraudulent Conveyances*, § 270.40 (Matthew Bender)

Publisher's Notes

There is no BAJI instruction on this subject.

LexisNexis Matthew Bender Expert Practice Tip--Guide for Testimony: This instruction is a guide to follow for the presentation of testimony in an actual fraud case. These elements should be woven into both the opening and closing statements. *By Susan Vaage*

LexisNexis Matthew Bender Expert Practice Tip--Modification to Add Definitions: This instruction covers a substantial area of law and many new terms for most juries. It would be more helpful to a jury if some basic definitional instructions were used first, such as the definition of "debtor" and "right to payment." Furthermore, this instruction does not go into detail about a debt that was not owed at the time of transfer (although this is covered somewhat in *CACI No. 4201*), and if that situation exists, the instruction should probably be modified to cover that issue. *By Susan Vaage*

LexisNexis Matthew Bender Expert Practice Tip--Amplification to Aid Jury's Understanding: This instruction uses the statutory language "hinder, delay, or defraud" without further definition. Consider adding language that defines "defraud" and more specific language defining "hinder and delay," in light of the potential to collect from a creditor's standpoint, so that a jury understands what a creditor's potential remedies are for collecting on a debt, and how the actions of the defendant/transferee have made that impossible. *By Susan Vaage*

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Civil Procedure Judgments Entry of Judgments Enforcement & Execution Fraudulent Transfers Real Property Law Purchase & Sale Fraudulent Transfers Torts Business Torts Fraud & Misrepresentation Actual Fraud General Overview Torts Business Torts Fraud & Misrepresentation Actual Fraud Elements



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CHAPTER 42 California Judicial Council Uniform Fraudulent Transfer Act Instructions

5-42 California Forms of Jury Instruction CACI 4201

CACI 4201 Factors to Consider in Determining Actual Intent to Defraud (Civ. Code, § 3439.04(b))

In determining whether [*name of debtor*] intended to hinder, delay, or defraud any creditors by [transferring property/incurred an obligation] to [*name of defendant*], you may consider, among other factors, the following:

[(a) Whether the [transfer/obligation] was to [a/an] [*insert relevant description of insider, e.g., "relative," "business partner," etc.*];]

[(b) Whether [*name of debtor*] retained possession or control of the property after it was transferred;]

[(c) Whether the [transfer/obligation] was disclosed or concealed;]

[(d) Whether before the [transfer was made/obligation was incurred] [*name of debtor*] had been sued or threatened with suit;]

[(e) Whether the transfer was of substantially all of [*name of debtor*]'s assets;]

[(f) Whether [*name of debtor*] fled;]

[(g) Whether [*name of debtor*] removed or concealed assets;]

[(h) Whether the value received by [*name of debtor*] was not reasonably equivalent to the value of the [asset transferred/amount of the obligation incurred];]

[(i) Whether [*name of debtor*] was insolvent or became insolvent shortly after the [transfer was made/obligation was incurred];]

[(j) Whether the transfer occurred shortly before or shortly after a substantial debt was incurred;]

[(k) Whether [name of debtor] transferred the essential assets of the business to a lienholder who transferred the assets to an insider of [name of defendant];] [and]

[(l) [insert other appropriate factor].]

Evidence of one or more factors does not automatically require a finding that [name of defendant] acted with the intent to hinder, delay, or defraud creditors. The presence of one or more of these factors is evidence that may suggest the intent to delay, hinder, or defraud.

New June 2006

Directions for Use

Some or all of the stated factors may not be necessary in every case. Other factors may be added as appropriate depending on the facts of the case.

Sources and Authority

■ *Civil Code section 3439.04(b)* provides:

* *

(b) In determining actual intent under paragraph (1) of subdivision (a), consideration may be given, among other factors, to any or all of the following:

- (1) Whether the transfer or obligation was to an insider.
- (2) Whether the debtor retained possession or control of the property transferred after the transfer.
- (3) Whether the transfer or obligation was disclosed or concealed.
- (4) Whether before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit.
- (5) Whether the transfer was of substantially all the debtor's assets.
- (6) Whether the debtor absconded.
- (7) Whether the debtor removed or concealed assets.
- (8) Whether the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred.
- (9) Whether the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred.

(10) Whether the transfer occurred shortly before or shortly after a substantial debt was incurred.

(11) Whether the debtor transferred the essential assets of the business to a lienholder who transferred the assets to an insider of the debtor.

* *

■ "Over the years, courts have considered a number of factors, the 'badges of fraud' described in a Legislative Committee comment to section 3439.04, in determining actual intent. Effective January 1, 2005, those factors are now codified as section 3439.04, subdivision (b) and include considerations such as whether the transfer was made to an insider, whether the transferee retained possession or control after the property was transferred, whether the transfer was disclosed, whether the debtor had been sued or threatened with suit before the transfer was made, whether the value received by the debtor was reasonably equivalent to the value of the transferred asset, and similar concerns. According to section 3439.04, subdivision (c), this amendment 'does not constitute a change in, but is declaratory of, existing law.' " (*Filip v. Bucurenciu* (2005) 129 Cal.App.4th 825, 834 [28 Cal.Rptr.3d 884] , internal citations omitted.)

■ "[The factors in *Civil Code* section 3439.04(b)] do not create a mathematical formula to establish actual intent. There is no minimum number of factors that must be present before the scales tip in favor of finding of actual intent to defraud. This list of factors is meant to provide guidance to the trial court, not compel a finding one way or the other." (*Filip, supra*, 129 Cal.App.4th at p. 834 .)

■ "Even the existence of several 'badges of fraud' may be insufficient to raise a triable issue of material fact." (*Annod Corp. v. Hamilton & Samuels* (2002) 100 Cal.App.4th 1286, 1299 [123 Cal.Rptr.2d 924] , internal citation omitted.)

■ "Whether a conveyance was made with fraudulent intent is a question of fact, and proof often consists of inferences from the circumstances surrounding the transfer." (*Filip, supra*, 129 Cal.App.4th at p. 834 , internal citation omitted.)

Secondary Sources

9 *California Forms of Pleading and Practice*, Ch. 94, *Bankruptcy*, § 94.55[4][b] (Matthew Bender)

23 *California Forms of Pleading and Practice*, Ch. 270, *Fraudulent Conveyances*, § 270.40 (Matthew Bender)

Publisher's Notes

There is no BAJI instruction on this subject.

LexisNexis Matthew Bender Expert Practice Tip--Striking Out and Adding Badges of Fraud: The factors (badges of fraud) listed are not exclusive and may be surplusage to the facts in a particular case. If so, strike out those that will not be an issue, and add others that may be indicia of fraud in your case.
By Susan Vaage

LexisNexis Matthew Bender Expert Practice Tip--Single Instance Sufficient to Show Intent: Plaintiffs should consider modifying the instruction to point out that the presence of more than one factor is not necessary to show fraudulent intent, but that a single instance may be sufficient. As stated in *Filip v. Bucurenciu*, the presence of any of those factors are guides and not a hard and fast formula. *By Susan Vaage*

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsStandard InstructionsCivil ProcedureJudgmentsEntry of
JudgmentsEnforcement & ExecutionFraudulent TransfersReal Property LawPurchase & SaleFraudulent
TransfersTortsBusiness TortsFraud & MisrepresentationActual FraudGeneral OverviewTortsBusiness TortsFraud &
MisrepresentationActual FraudElements



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CHAPTER 42 California Judicial Council Uniform Fraudulent Transfer Act Instructions

5-42 California Forms of Jury Instruction CACI 4202

**CACI 4202 Constructive Fraudulent Transfer (Civ. Code,
§ 3439.04(a)(2))--Essential Factual Elements**

[*Name of plaintiff*] **claims [he/she/it] was harmed because [*name of debtor*] [transferred property/incurred an obligation] to [*name of defendant*] and, as a result, was unable to pay [*name of plaintiff*] money that was owed. [This is called "constructive fraud."] To establish this claim against [*name of defendant*], [*name of plaintiff*] must prove all of the following:**

1. **That [*name of plaintiff*] has a right to payment from [*name of debtor*] for [*insert amount of claim*];**
2. **That [*name of debtor*] [transferred property/incurred an obligation] to [*name of defendant*];**
3. **That [*name of debtor*] did not receive a reasonably equivalent value in exchange for the [transfer/obligation];**
4. **[That [*name of debtor*] was in business or about to start a business or enter a transaction when [his/her/its] remaining assets were unreasonably small for the business or transaction;] [or]**

[That [*name of debtor*] intended to incur debts beyond [his/her/its] ability to pay as they became due;] [or]

[That [*name of debtor*] believed or reasonably should have believed that [he/she/it] would incur debts beyond [his/her/its] ability to pay as they became due;]
5. **That [*name of plaintiff*] was harmed; and**

6. That [name of debtor]'s conduct was a substantial factor in causing [name of plaintiff]'s harm.

If you decide that [name of plaintiff] has proved all of the above, [he/she/it] does not have to prove that [name of debtor] intended to defraud any creditors.

[It does not matter whether [name of plaintiff]'s right to payment arose before or after [name of debtor] [transferred property/incurred an obligation].]

New June 2006

Directions for Use

This instruction assumes the defendant is a transferee of the original debtor. Read the bracketed second sentence in cases in which the plaintiff is asserting causes of action for both actual and constructive fraud. Read the last bracketed sentence in cases where the plaintiff's alleged claim arose after the defendant's property was transferred or the obligation was incurred.

Courts have held that there is a right to a jury trial whenever the remedy sought is monetary relief, including even the return of a "determinate sum of money." (*Wisden v. Superior Court* (2004) 124 Cal.App.4th 750, 757 [21 Cal.Rptr.3d 523] , internal citation omitted.) If the only remedy sought is the return of a particular nonmonetary asset, the action is an equitable action. However, even where a specific nonmonetary asset is involved, a conspiracy claim or an action against any party other than the transferee who possesses the asset (e.g., "the person for whose benefit the transfer was made" (*Civ. Code*, § 3439.08(b)(1)) necessarily would seek monetary relief and give rise to a right to a jury trial.

Sources and Authority

- *Civil Code* section 3439.04(a)(2) provides:

A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation as follows:

Without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor either:

(A) Was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction.

(B) Intended to incur, or believed or reasonably should have believed that he or she would incur, debts beyond his or her ability to pay as they became due.

- *Civil Code* section 3439.03 provides: "Value is given for a transfer or an obligation if, in exchange for the transfer or obligation, property is transferred or an antecedent debt is secured or satisfied, but value does not include an unperformed promise made otherwise than in the ordinary course of the promisor's business to furnish support to the debtor or another person."

- "There are two forms of constructive fraud under the UFTA. *Civil Code* section 3439.04 ... provides that a transfer

is fraudulent if the debtor did not receive reasonably equivalent consideration and either '(1) Was engaged or about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or (2) Intended to incur, or believed or reasonably should have believed that he or she would incur, debts beyond his or her ability to pay as they became due.' *Civil Code section 3439.05* provides that a transfer is fraudulent as to an existing creditor if the debtor does not receive reasonably equivalent value and 'was insolvent at that time or ... became insolvent as a result of the transfer' " (*Mejia v. Reed* (2003) 31 Cal.4th 657, 669-670 [3 Cal.Rptr.3d 390, 74 P.3d 166] .)

■ "A well-established principle of the law of fraudulent transfers is, 'A transfer in fraud of creditors may be attacked only by one who is injured thereby. Mere intent to delay or defraud is not sufficient; injury to the creditor must be shown affirmatively. In other words, prejudice to the plaintiff is essential. It cannot be said that a creditor has been injured unless the transfer puts beyond [her] reach property [she] otherwise would be able to subject to the payment of [her] debt.' " (*Mehrtash v. Mehrtash* (2001) 93 Cal.App.4th 75, 80 [112 Cal.Rptr.2d 802] , internal citations omitted.)

Secondary Sources

17 *California Forms of Pleading and Practice*, Ch. 215, *Duress, Menace, Fraud, Undue Influence, and Mistake*, §§ 215.70[5], 215.111[2][c] (Matthew Bender) 23 *California Forms of Pleading and Practice*, Ch. 270, *Fraudulent Conveyances*, §§ 270.42, 270.193, 270.194 (Matthew Bender)

Publisher's Notes

There is no BAJI instruction on this subject.

LexisNexis Matthew Bender Expert Practice Tip--Definition of "Reasonably Equivalent Value"

Needed: This instruction does not include a definition of "reasonably equivalent value," a term not readily understood by most non-attorneys. Supplement this instruction with a definitional instruction of "reasonably equivalent value," particularly if that is a strong element or defense in your case. *By Susan Vaage*

LexisNexis Matthew Bender Expert Practice Tip--Definition of "Harm" May Be Needed: Consider including a definitional instruction of "harm" to the plaintiff--that is, the property that the plaintiff relied on for collection was encumbered or transferred, or the cash flow of the new business was not as promised because of undisclosed debts or transfers to insiders. Similarly, a defense to this claim is that the plaintiff was not harmed, so the definition should work both ways and for both sides. *By Susan Vaage*

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsStandard InstructionsCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionFraudulent TransfersReal Property LawPurchase & SaleFraudulent TransfersTortsBusiness TortsFraud & MisrepresentationConstructive FraudGeneral OverviewTortsBusiness TortsFraud & MisrepresentationConstructive FraudElements



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California Forms of Jury Instruction

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CHAPTER 42 California Judicial Council Uniform Fraudulent Transfer Act Instructions

5-42 California Forms of Jury Instruction CACI 4203

CACI 4203 Constructive Fraudulent Transfer (Insolvency) (Civ. Code, § 3439.05)--Essential Factual Elements

[*Name of plaintiff*] **claims [he/she/it] was harmed because [*name of debtor*] [transferred property/incurred an obligation] to [*name of defendant*] and was unable to pay [*name of plaintiff*] money that was owed. [This is called "constructive fraud."] To establish this claim against [*name of defendant*], [*name of plaintiff*] must prove all of the following:**

- 1. That [*name of plaintiff*] has a right to payment from [*name of debtor*] for [*insert amount of claim*];**
- 2. That [*name of debtor*] [transferred property/incurred an obligation] to [*name of defendant*];**
- 3. That [*name of debtor*] did not receive a reasonably equivalent value in exchange for the [transfer/obligation];**
- 4. That [*name of plaintiff*]'s right to payment from [*name of debtor*] arose before [*name of debtor*] [transferred property/incurred an obligation];**
- 5. That [*name of debtor*] was insolvent at that time or became insolvent as a result of the transfer or obligation;**
- 6. That [*name of plaintiff*] was harmed; and**
- 7. That [*name of debtor*]'s conduct was a substantial factor in causing [*name of plaintiff*]'s harm.**

If you decide that [*name of plaintiff*] has proved all of the above, [he/she/it] does not have to prove that [*name of debtor*] intended to defraud creditors.

New June 2006

Directions for Use

This instruction assumes the defendant is a transferee of the debtor. This instruction may be used along with CACI No. 4202, *Constructive Fraudulent Transfer--Essential Factual Elements*, in cases where it is alleged that the plaintiff became a creditor before the transfer was made or the obligation was incurred. Read the bracketed second sentence in cases in which the plaintiff is asserting causes of action for both actual and constructive fraud.

Courts have held that there is a right to a jury trial whenever the remedy sought is monetary relief, including even the return of a "determinate sum of money." (*Wisden v. Superior Court* (2004) 124 Cal.App.4th 750, 757 [21 Cal.Rptr.3d 523], internal citation omitted.) If the only remedy sought is the return of a particular nonmonetary asset, the action is an equitable action. However, even where a specific nonmonetary asset is involved, a conspiracy claim or an action against any party other than the transferee who possesses the asset (e.g., "the person for whose benefit the transfer was made" (Civ. Code, § 3439.08(b)(1))) necessarily would seek monetary relief and give rise to a right to a jury trial.

Sources and Authority

- *Civil Code* section 3439.05 provides: "A transfer made or obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation."

- *Civil Code* section 3439.03 provides: "Value is given for a transfer or an obligation if, in exchange for the transfer or obligation, property is transferred or an antecedent debt is secured or satisfied, but value does not include an unperformed promise made otherwise than in the ordinary course of the promisor's business to furnish support to the debtor or another person."

- "There are two forms of constructive fraud under the UFTA. *Civil Code* section 3439.04 ... provides that a transfer is fraudulent if the debtor did not receive reasonably equivalent consideration and either '(1) Was engaged or about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or (2) Intended to incur, or believed or reasonably should have believed that he or she would incur, debts beyond his or her ability to pay as they became due.' *Civil Code* section 3439.05 provides that a transfer is fraudulent as to an existing creditor if the debtor does not receive reasonably equivalent value and 'was insolvent at that time or ... became insolvent as a result of the transfer' " (*Mejia v. Reed* (2003) 31 Cal.4th 657, 669-670 [3 Cal.Rptr.3d 390, 74 P.3d 166] .)

- "A well-established principle of the law of fraudulent transfers is, 'A transfer in fraud of creditors may be attacked only by one who is injured thereby. Mere intent to delay or defraud is not sufficient; injury to the creditor must be shown affirmatively. In other words, prejudice to the plaintiff is essential. It cannot be said that a creditor has been injured unless the transfer puts beyond [her] reach property [she] otherwise would be able to subject to the payment of [her] debt.' " (*Mehrtash v. Mehrtash* (2001) 93 Cal.App.4th 75, 80 [112 Cal.Rptr.2d 802], internal citations omitted.)

Secondary Sources

17 *California Forms of Pleading and Practice*, Ch. 215, *Duress, Menace, Fraud, Undue Influence, and Mistake*, §§ 215.70[5], 215.111[2][c] (Matthew Bender)

23 *California Forms of Pleading and Practice*, Ch. 270, *Fraudulent Conveyances*, §§ 270.42, 270.191, 270.192 (Matthew Bender)

Publisher's Notes

There is no BAJI instruction on this subject.

LexisNexis Matthew Bender Expert Practice Tip--Definition of "Reasonably Equivalent Value"

Needed: This instruction does not include a definition of "reasonably equivalent value," a term not readily understood by most non-attorneys. Supplement this instruction with a definitional instruction of "reasonably equivalent value," particularly if that is a strong element or defense in your case. *By Susan Vaage*

LexisNexis Matthew Bender Expert Practice Tip--Definition of "Harm" May Be Needed: Consider including a definitional instruction of "harm" to the plaintiff--that is, the property that the plaintiff relied on for collection was encumbered or transferred, or the cash flow of the new business was not as promised because of undisclosed debts or transfers to insiders. Similarly, a defense to this claim is that the plaintiff was not harmed, so the definition should work both ways and for both sides. *By Susan Vaage*

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsStandard InstructionsCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionFraudulent TransfersReal Property LawPurchase & SaleFraudulent TransfersTortsBusiness TortsFraud & MisrepresentationConstructive FraudGeneral OverviewTortsBusiness TortsFraud & MisrepresentationConstructive FraudElements



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CHAPTER 42 California Judicial Council Uniform Fraudulent Transfer Act Instructions

5-42 California Forms of Jury Instruction CACI 4204

CACI 4204 "Transfer" Explained

"Transfer" means every method of parting with a debtor's property or an interest in a debtor's property.

[*Read one of the following options:*]

[A transfer may be direct or indirect, absolute or conditional, or voluntary or involuntary. A transfer includes payment of money/release/lease/the creation of a lien or other encumbrance].

[In this case, [*describe transaction*] is a transfer.]

New June 2006

Directions for Use

Include only the bracketed terms at the end of the third sentence that are at issue in the case. Read the second bracketed sentence if the transaction has been stipulated to or determined as a matter of law. Otherwise, read the first bracketed option.

Sources and Authority

- *Civil Code section 3439.01(i)* provides: " 'Transfer' means every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with an asset or an interest in an asset, and includes payment of money, release, lease, and creation of a lien or other encumbrance."

- *Civil Code section 3439.08(e)* provides:

A transfer is not voidable under paragraph (2) of subdivision (a) of Section 3439.04 or Section 3439.05 if the transfer results from the following:

(1) Termination of a lease upon default by the debtor when the termination is pursuant to the lease and applicable law.

(2) Enforcement of a lien in a noncollusive manner and in compliance with applicable law, including Division 9 (commencing with Section 9101) of the Commercial Code, other than a retention of collateral under *Sections 9620 and 9621 of the Commercial Code* and other than a voluntary transfer of the collateral by the debtor to the lienor in satisfaction of all or part of the secured obligation.

■ "On its face, the UFTA applies to all transfers. Civil Code, section § 3439.01, subdivision (i) defines '[t]ransfer' as 'every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with an asset or an interest in an asset' The UFTA excepts only certain transfers resulting from lease terminations or lien enforcement." (*Mejia v. Reed* (2003) 31 Cal.4th 657, 664 [3 Cal.Rptr.3d 390, 74 P.3d 166] , internal citations omitted.)

Secondary Sources

23 *California Forms of Pleading and Practice*, Ch. 270, *Fraudulent Conveyances*, §§ 270.35[1], 270.37 (Matthew Bender)

Publisher's Notes

There is no BAJI instruction on this subject.

LexisNexis Matthew Bender Expert Practice Tip--Supplement Instruction to Include Bona Fide Exceptions to UFTA: Although this is a definitional instruction, it is not complete because it does not include bona fide exceptions to UFTA. If there is a defense to the transfer--for example, the termination of a bona fide lease or the repossession of collateral legitimately pledged on another loan--consider supplementing this instruction to include that language. Left by itself, it might be confusing or misleading to a jury. *By Susan Vaage*

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsStandard InstructionsCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionFraudulent TransfersReal Property LawPurchase & SaleFraudulent Transfers



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CHAPTER 42 California Judicial Council Uniform Fraudulent Transfer Act Instructions

5-42 California Forms of Jury Instruction CACI 4205

CACI 4205 Insolvency Explained

[[*Name of debtor*] was insolvent [at the time/as a result] of the transaction if, at fair valuations, the total amount of [his/her/its] debts was greater than the total amount of [his/her/its] assets.]

In determining [*name of debtor*]'s assets, do not include property that has been transferred, concealed, or removed with intent to hinder, delay, or defraud creditors. [In determining [*name of debtor*]'s debts, do not include a debt to the extent it is secured by a valid lien on [his/her/its] property that is not included as an asset.]

New June 2006

Directions for Use

If the debtor is a partnership, refer to *Civil Code* section 3439.02(b). If there are issues regarding specific assets, see *Civil Code* sections 3439.02(e) and 3439.01(a).

Read the bracketed last sentence if appropriate to the facts.

Sources and Authority

- *Civil Code* section 3439.02 provides:

- (a) A debtor is insolvent if, at fair valuations, the sum of the debtor's debts is greater than all of the debtor's assets.

- (b) A debtor which is a partnership is insolvent if, at fair valuations, the sum of the

partnership's debts is greater than the aggregate of all of the partnership's assets and the sum of the excess of the value of each general partner's nonpartnership assets over the partner's nonpartnership debts.

(c) A debtor who is generally not paying his or her debts as they become due is presumed to be insolvent.

(d) Assets under this section do not include property that has been transferred, concealed, or removed with intent to hinder, delay, or defraud creditors or that has been transferred in a manner making the transfer voidable under this chapter.

(e) Debts under this section do not include an obligation to the extent it is secured by a valid lien on property of the debtor not included as an asset.

■ *Civil Code section 3439.01(a)* provides:

"Asset" means property of a debtor, but the term does not include, the following:

- (1) Property to the extent it is encumbered by a valid lien.
- (2) Property to the extent it is generally exempt under nonbankruptcy law.
- (3) An interest in property held in tenancy by the entireties to the extent it is not subject to process by a creditor holding a claim against only one tenant.

■ "To determine solvency, the value of a debtor's assets and debts are compared. By statutory definition, a debtor's assets exclude property that is exempt from judgment enforcement. Retirement accounts are generally exempt." (*Mejia v. Reed* (2003) 31 Cal.4th 657, 670 [3 Cal.Rptr.3d 390, 74 P.3d 166] , internal citations omitted.)

■ "We conclude ... that future child support payments should not be viewed as a debt under the UFTA." (*Mejia, supra*, 31 Cal.4th at p. 671 .)

Secondary Sources

23 *California Forms of Pleading and Practice*, Ch. 270, *Fraudulent Conveyances*, §§ 270.42[3], 270.192 (Matthew Bender) 26 *California Forms of Pleading and Practice*, Ch. 307, *Insolvency* (Matthew Bender)

Publisher's Notes

There is no BAJI instruction on this subject.

LexisNexis Matthew Bender Expert Practice Tip--Use Charts and Graphs to Keep Track of Numbers: Remember that the definition of insolvency is very formulaic, and gear your presentation of evidence accordingly. In other words, make certain that you keep track of numbers as the evidence is presented to show that the debts exceed the assets. This should be presented to the jury as simple math. The use of a chart or graph, either created beforehand or prepared as the testimony progresses, is a key method of presenting this evidence. *By Susan Vaage*

LexisNexis Matthew Bender Expert Practice Tip--Testimony Crucial to Jury's Understanding: The term "fair valuation" and the issues pertaining to not including validly liened or fraudulently

transferred property may be confusing in a vacuum. However, if these issues are important to your prosecution or defense of the action, have your witnesses testify about the issues and explain them so that the jury will know what you are referring them to when they receive this instruction. This should also be covered clearly and concisely in your closing argument, and potentially in the opening statement. *By Susan Vaage*

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsStandard InstructionsCivil ProcedureJudgmentsEntry of
JudgmentsEnforcement & ExecutionFraudulent TransfersReal Property LawPurchase & SaleFraudulent Transfers



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CHAPTER 42 California Judicial Council Uniform Fraudulent Transfer Act Instructions

5-42 California Forms of Jury Instruction CACI 4206

CACI 4206 Presumption of Insolvency

A debtor who is generally not paying [his/her/its] debts as they become due is presumed to be insolvent.

In determining whether [name of debtor] was generally not paying [his/her/its] debts as they became due, you may consider all of the following:

- (a) The number of [name of debtor]'s debts;**
- (b) The percentage of debts that were not being paid;**
- (c) How long those debts remained unpaid;**
- (d) Whether legitimate disputes or other special circumstances explain any failure to pay the debts; and**
- (e) [Name of debtor]'s payment practices before the period of alleged nonpayment [and the payment practices of [name of debtor]'s [trade/industry]].**

If [name of plaintiff] proves that [name of debtor] was generally not paying debts as they became due, then you should find that [name of debtor] was insolvent unless [name of defendant] proves that [name of debtor] was solvent.

New June 2006

Directions for Use

This instruction should be read in conjunction with *CACI No. 4205, Insolvency Explained*.

Sources and Authority

■ *Civil Code section 3439.02(c)* provides: "A debtor who is generally not paying his or her debts as they become due is presumed to be insolvent."

■ The Legislative Committee Comment to *Civil Code section 3439.02* states: "Subdivision (c) establishes a rebuttable presumption of insolvency from the fact of general nonpayment of debts as they become due. ... The presumption imposes on the party against whom the presumption is directed the burden of proving that the nonexistence of insolvency as defined in subdivision (a) is more probable than its existence."

■ The Legislative Committee Comment to *Civil Code section 3439.02* states: "In determining whether a debtor is paying its debts generally as they become due, the court should look at more than the amount and due dates of the indebtedness. The court should also take into account such factors as the number of the debtor's debts, the proportion of those debts not being paid, the duration of the nonpayment, and the existence of bona fide disputes or other special circumstances alleged to constitute an explanation for the stoppage of payments. The court's determination may be affected by a consideration of the debtor's payment practices prior to the period of alleged nonpayment and the payment practices of the trade or industry in which the debtor is engaged."

Secondary Sources

23 *California Forms of Pleading and Practice*, Ch. 270, *Fraudulent Conveyances*, § 270.42[3][e], [4] (Matthew Bender) 26 *California Forms of Pleading and Practice*, Ch. 307, *Insolvency* (Matthew Bender)

Publisher's Notes

There is no BAJI instruction on this subject.

LexisNexis Matthew Bender Expert Practice Tip--Itemize Elements in Chart: This instruction gives a road map for proof of nonpayment of debts. Each of these elements, if relevant, should figure prominently in the presentation of testimony and the closing statement, and should be itemized in a chart to clarify and emphasize that element to the jury. *By Susan Vaage*

LexisNexis Matthew Bender Expert Practice Tip--Defense Must Attack Each Element: If you are defending against this issue, be prepared to attack each element of the evidence. For example, show that: the percentage of debt payment is high, either in numbers or amounts of debts; the standard in the industry is being met; there are bona fide disputes regarding each debt listed and, if those are excluded, the debts are being paid. Ask for a stronger and more definitive instruction of any exceptions that apply, such as percentages and exclusion of disputed debts. *By Susan Vaage*

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Civil Procedure Judgments Entry of Judgments Enforcement & Execution Fraudulent Transfers Evidence Inferences & Presumptions Presumptions Real Property Law Purchase & Sale Fraudulent Transfers



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CHAPTER 42 California Judicial Council Uniform Fraudulent Transfer Act Instructions

5-42 California Forms of Jury Instruction CACI 4207

CACI 4207 Affirmative Defense--Good Faith (Civ. Code, § 3439.08)

[*Name of defendant*] **claims [he/she/it] is not liable to [*name of plaintiff*] [on the claim for actual fraud] because [*name of defendant*] [insert one of the following:]**

[took the property from [*name of debtor*] in good faith and for a reasonably equivalent value.]

[or]

[received the property from someone who had taken the property from [*name of debtor*] in good faith and for a reasonably equivalent value.]

To succeed on this defense, [*name of defendant*] must prove both of the following:

[Use one of the following two sets of elements:]

[1. That [*name of defendant*] took the property from [*name of debtor*] in good faith; and

2. That [he/she/it] took the property for a reasonably equivalent value.]

[or]

[1. That [*name of defendant*] received the property from [*name of third party*], who had taken the property from [*name of debtor*] in good faith; and

2. That [*name of third party*] had taken the property for a reasonably equivalent value.]

"Good faith" means that [name of defendant/third party] acted without actual fraudulent intent and that [he/she/it] did not conspire with [name of debtor] or otherwise actively participate in any fraudulent scheme. If you decide that [name of debtor] had fraudulent intent and that [name of defendant/third party] knew it, then you may consider [his/her/its] knowledge in combination with other facts in deciding the question of [name of defendant/third party]'s good faith.

New June 2006

Directions for Use

This instruction is appropriate in cases involving allegations of actual fraud under the Uniform Fraudulent Transfer Act. The bracketed language in the first sentence is not necessary if the plaintiff is bringing a claim for actual fraud only.

Sources and Authority

■ *Civil Code section 3439.08* provides:

(a) A transfer or an obligation is not voidable under paragraph (1) of subdivision (a) of Section 3439.04, against a person who took in good faith and for a reasonably equivalent value or against any subsequent transferee or obligee.

(b) Except as otherwise provided in this section, to the extent a transfer is voidable in an action by a creditor under paragraph (1) of subdivision (a) of Section 3439.07, the creditor may recover judgment for the value of the asset transferred, as adjusted under subdivision (c), or the amount necessary to satisfy the creditor's claim, whichever is less. The judgment may be entered against the following:

(1) The first transferee of the asset or the person for whose benefit the transfer was made.

(2) Any subsequent transferee other than a good faith transferee who took for value or from any subsequent transferee.

(c) If the judgment under subdivision (b) is based upon the value of the asset transferred, the judgment shall be for an amount equal to the value of the asset at the time of the transfer, subject to adjustment as the equities may require.

(d) Notwithstanding voidability of a transfer or an obligation under this chapter, a good faith transferee or obligee is entitled, to the extent of the value given the debtor for the transfer or obligation, to the following:

(1) A lien on or a right to retain any interest in the asset transferred.

(2) Enforcement of any obligation incurred.

(3) A reduction in the amount of the liability on the judgment.

(e) A transfer is not voidable under paragraph (2) of subdivision (a) of Section 3439.04 or Section

3439.05 if the transfer results from the following:

(1) Termination of a lease upon default by the debtor when the termination is pursuant to the lease and applicable law.

(2) Enforcement of a lien in a noncollusive manner and in compliance with applicable law, including Division 9 (commencing with Section 9101) of the Commercial Code, other than a retention of collateral under *Sections 9620 and 9621 of the Commercial Code* and other than a voluntary transfer of the collateral by the debtor to the lienor in satisfaction of all or part of the secured obligation.

■ *Civil Code section 3439.03* provides: "Value is given for a transfer or an obligation if, in exchange for the transfer or obligation, property is transferred or an antecedent debt is secured or satisfied, but value does not include an unperformed promise made otherwise than in the ordinary course of the promisor's business to furnish support to the debtor or another person."

■ "The Legislative Committee comment to *Civil Code section 3439.08, subdivision (a)*, provides that 'good faith,' within the meaning of the provision, 'means that the transferee acted without actual fraudulent intent and that he or she did not collude with the debtor or otherwise actively participate in the fraudulent scheme of the debtor. The transferee's knowledge of the transferor's fraudulent intent may, in combination with other facts, be relevant on the issue of the transferee's good faith' " (*Annod Corp. v. Hamilton & Samuels* (2002) 100 Cal.App.4th 1286, 1299 [123 Cal.Rptr.2d 924] , internal citations omitted.)

Secondary Sources

23 *California Forms of Pleading and Practice*, Ch. 270, *Fraudulent Conveyances*, §§ 270.35[2], 270.44[1], 270.47[2], [3] (Matthew Bender)

Publisher's Notes

There is no BAJI instruction on this subject.

LexisNexis Matthew Bender Expert Practice Tip--Definition of "Reasonably Equivalent Value"

Needed: This instruction does not include a definition of "reasonably equivalent value," a term not readily understood by most non-attorneys. Supplement this instruction with a definitional instruction of "reasonably equivalent value," particularly if that is a strong element or defense in your case. *By Susan Vaage*

LexisNexis Matthew Bender Expert Practice Tip--Interweaving Elements: If you anticipate this as your primary defense, interweave these elements into your opening and closing statement. Make it your case "mantra." *By Susan Vaage*

LexisNexis Matthew Bender Expert Practice Tip--Consider Adding Non-Collusive Enforcement of Lien to Instruction: An element of "good faith" that is not defined in this instruction pertains to the non-collusive enforcement of a lien. Consider adding this element to the definitional instruction if it is an issue in your case. Remember that in California the preference of one debtor over another, if bona fide and in compliance with the law, is not actionable. *By Susan Vaage*

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsStandard InstructionsCivil ProcedureJudgmentsEntry of
JudgmentsEnforcement & ExecutionFraudulent TransfersReal Property LawPurchase & SaleFraudulent Transfers



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California Forms of Jury Instruction

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CHAPTER 42 California Judicial Council Uniform Fraudulent Transfer Act Instructions

5-42 California Forms of Jury Instruction CACI 4208

CACI 4208 Affirmative Defense--Statute of Limitations--Actual and Constructive Fraud (Civ. Code, § 3439.09)

[*Name of defendant*] contends that [*name of plaintiff*]'s lawsuit was not filed within the time set by law.

[[With respect to [*name of plaintiff*]'s claim of actual fraud,] to succeed on this defense, [*name of defendant*] must prove that [*name of plaintiff*] did not file [his/her/its] lawsuit within four years after the [transfer was made/obligation was incurred] [or, if later than four years, within one year after the [transfer/obligation] was or could reasonably have been discovered by [*name of plaintiff*]]. But in any event, the lawsuit must have been filed within seven years after the [transfer was made/obligation was incurred].]

[[With respect to [*name of plaintiff*]'s claim of constructive fraud,] to succeed on this defense, [*name of defendant*] must prove that [*name of plaintiff*] did not file [his/her/its] lawsuit within four years after the [transfer was made/obligation was incurred].]

New June 2006; Revised December 2007

Directions for Use

Read the first bracketed paragraph regarding delayed discovery in cases involving actual fraud, and the second in cases involving constructive fraud. Do not read the first bracketed phrases in those paragraphs unless the plaintiff has brought both actual and constructive fraud claims. This instruction applies only to claims brought under the UFTA.

Sources and Authority

- *Civil Code section 3439.09* provides:

A cause of action with respect to a fraudulent transfer or obligation under this chapter is extinguished unless action is brought pursuant to subdivision (a) of Section 3439.07 or levy made as provided in subdivision (b) or (c) of Section 3439.07:

(a) Under paragraph (1) of subdivision (a) of Section 3439.04, within four years after the transfer was made or the obligation was incurred or, if later, within one year after the transfer or obligation was or could reasonably have been discovered by the claimant.

(b) Under paragraph (2) of subdivision (a) of Section 3439.04 or Section 3439.05, within four years after the transfer was made or the obligation was incurred.

(c) Notwithstanding any other provision of law, a cause of action with respect to a fraudulent transfer or obligation is extinguished if no action is brought or levy made within seven years after the transfer was made or the obligation was incurred.

■ "[T]he UFTA is not the exclusive remedy by which fraudulent conveyances and transfers may be attacked. They may also be attacked by, as it were, a common law action. If and as such an action is brought, the applicable statute of limitations is section 338 (d) and, more importantly, the cause of action accrues not when the fraudulent transfer occurs but when the judgment against the debtor is secured (or maybe even later, depending upon the belated discovery issue)." (*Macedo v. Bosio* (2001) 86 Cal.App.4th 1044, 1051 [104 Cal.Rptr.2d 1] .)

■ "In the context of the scheme of law of which section 3934.09 is a part, where an alleged fraudulent transfer occurs while an action seeking to establish the underlying liability is pending, and where a judgment establishing the liability later becomes final, we construe the four-year limitation period, i.e., the language, 'four years after the transfer was made or the obligation was incurred,' to accommodate a tolling until the underlying liability becomes fixed by a final judgment." (*Cortez v. Vogt* (1997) 52 Cal.App.4th 917, 920 [60 Cal.Rptr.2d 841] .)

Secondary Sources

23 *California Forms of Pleading and Practice*, Ch. 270, *Fraudulent Conveyances*, §§ 270.49, 270.50 (Matthew Bender)

Publisher's Notes

There is no BAJI instruction on this subject.

LexisNexis Matthew Bender Expert Practice Tip--Emphasize Defense Throughout Case: If you were not successful with this defense at summary judgment or a motion for directed verdict, the most important issue is the definition of "could reasonably have been discovered." If this is your defense, emphasize it as much as possible throughout the case. Consider an instruction that gives some definition to "reasonable" discovery, using language from case law. *By Susan Vaage*

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Civil Procedure Judgments Entry of Judgments Enforcement & Execution Fraudulent Transfers Real Property Law Purchase & Sale Fraudulent Transfers Torts Business Torts Fraud & Misrepresentation Actual Fraud Defenses Torts Business Torts Fraud & Misrepresentation Constructive Fraud Defenses



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CHAPTER 42 California Judicial Council Uniform Fraudulent Transfer Act Instructions

5-42 California Forms of Jury Instruction CACI 4209-CACI 4999

Reserved for Future Use

CACI 4209Reserved for Future Use



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CHAPTER 42A Matthew Bender Fraudulent Transfer Instructions

3-42A California Forms of Jury Instruction 42A.syn

§ 42A.syn Synopsis to Chapter 42A: Matthew Bender Fraudulent Transfer Instructions

MB 4200A.01 Definitions of Claim and Debt

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Definitions

[b] Related Judicial Council Jury Instructions

MB 4200A.02 Definitions of Creditor and Debtor

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Definitions

[b] Related Judicial Council Jury Instructions

MB 4200A.03 Definitions of Asset and Property

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Definitions

[b] Related Judicial Council Jury Instructions

MB 4200A.04 Definition of Lien

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 4200A.05 Definition of Valid Lien

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 4200A.06 Future Creditors

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] All Creditors Affected

[b] Related Judicial Council Jury Instructions

MB 4200A.07-MB 4200A.19 Reserved for Future Use

MB 4200A.20 Actual Intent to Defraud

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Proof and Effect of Actual Intent

[b] Related Judicial Council Jury Instructions

MB 4200A.21 Malicious Intent Not Necessary

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Economy Refining and Uniform Fraudulent Transfer Act

[b] Related Judicial Council Jury Instructions

MB 4200A.22 Badges of Fraud

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Proving Intent to Defraud

[b] Related Judicial Council Jury Instructions

MB 4200A.23 Transfer With Secret Reservation

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Retention of Rights

[b] Related Judicial Council Jury Instructions

MB 4200A.24 Transfer Pursuant to Marital Dissolution Settlement or to Family Trust

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Application of Uniform Fraudulent Transfer Act to Dissolutions

[b] Related Judicial Council Jury Instructions

MB 4200A.25-MB 4200A.39 Reserved for Future Use

MB 4200A.40 Definition of Value

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Definitions and Exceptions

[b] Related Judicial Council Jury Instructions

MB 4200A.41 Value--Fair Consideration

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Determining Whether Consideration Is Fair

[b] Related Judicial Council Jury Instructions

MB 4200A.42-MB 4200A.49 Reserved for Future Use

MB 4200A.50 Definition of Insolvency--Partnership

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Partnership's Insolvency

[b] Related Judicial Council Jury Instructions

MB 4200A.51 Insolvency--Secured Obligation on Property Not Included as Asset Is Not Defined as Debt

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Treatment of Secured Debt

[b] Related Judicial Council Jury Instructions

MB 4200A.52 Insolvency--Future Child Support Payments Are Not Defined as Debt

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Treatment of Future Child Support Payments

[b] Related Judicial Council Jury Instructions

MB 4200A.53-MB 4200A.59 Reserved for Future Use

MB 4200A.60 Constructive Fraud--Relation of Parties

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Confidential and Fiduciary Relationships

[b] Related Judicial Council Jury Instructions

MB 4200A.61-MB 4200A.69 Reserved for Future Use

MB 4200A.70 Right to Sell Property in Absence of Fraud

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Constitutional Right to Dispose of Property

[b] Related Judicial Council Jury Instructions

MB 4200A.71 Right of Debtor to Prefer Creditor

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Preferring Creditor

[b] Related Judicial Council Jury Instructions

MB 4200A.72 Definition of Good Faith

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Definition

[b] Related Judicial Council Jury Instructions

MB 4200A.73 Definition of Reasonably Equivalent Value

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Definition

[b] Related Judicial Council Jury Instructions

MB 4200A.74 Transferee's or Obligee's Knowledge

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Knowledge

[b] Related Judicial Council Jury Instructions

MB 4200A.75 Knowledge of Transferee or Obligee Who Is Insider

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Insiders

[b] Related Judicial Council Jury Instructions

MB 4200A.76 Defense of Laches

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Laches

[b] Related Judicial Council Jury Instructions



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California Forms of Jury Instruction

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CHAPTER 42A Matthew Bender Fraudulent Transfer Instructions

3-42A California Forms of Jury Instruction Scope

Scope

SCOPE

This chapter includes jury instructions for use in litigation under California's Uniform Fraudulent Transfer Act [Civ. Code §§ 3439-3439.12]. For the California Judicial Council jury instructions on fraudulent transfers and the Act, see Ch. 42, *California Judicial Council Uniform Fraudulent Transfer Act Instructions*. For the California Judicial Council jury instructions on fraud and deceit, generally, see Ch. 19, *California Judicial Council Fraud or Deceit Instructions*. The instructions in this chapter are intended to supplement the Judicial Council instructions [see *Cal. Rules of Ct.*, Rule 2.1050].

This chapter includes instructions for use during litigation brought to void a transaction because of actual or constructive fraud, including several instructions defining applicable terms. The chapter covers the following topics:

- Part A includes instructions defining applicable terms and on the burden of proof [see *MB 4200A.01 -MB 4200A.06*].
- Part B includes instructions on actual fraud--that is, when a debtor made a transfer or incurred an obligation with the intent to defraud creditors [see *MB 4200A.20 -MB 4200A.24*].
- Part C includes instructions on constructive fraud, including instructions on value and the debtor's insolvency as a result of a transfer or obligation [see *MB 4200A.40 -MB 4200A.60*].
- Part D includes instructions on defenses, including the right to sell property and to prefer creditors, the rights of good transferees and obligees, and time limitations in bringing an action under the Uniform Fraudulent Transfer Act [see *MB 4200A.70 -MB 4200A.76*].

The California Uniform Fraudulent Transfer Act expressly provides that its provisions are supplemented by general principles of law, including the law relating to fraud, misrepresentation, estoppel, mistake, duress, and agency [Civ. Code § 3439.10]. Ch. 19A, *Matthew Bender Fraud and Deceit Instructions*, covers fraud and misrepresentation

generally. Ch. 3F, *Matthew Bender Contract Defenses Instructions*, contains instructions on estoppel. Instructions on mistake and duress are set forth in Ch. 3G, *Matthew Bender Rescission of Contract Instructions*. Ch. 3C, *Matthew Bender Contract Party Instructions*, includes instructions on agency. n

FOOTNOTES:

(n20)Footnote . This chapter was revised and updated by Susan L. Vaage, Graham Vaage & Cisneros, in Glendale, California.



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CHAPTER 42A Matthew Bender Fraudulent Transfer Instructions
PART A. DEFINITIONS, BURDEN OF PROOF, AND FUTURE CREDITORS

3-42A California Forms of Jury Instruction MB 4200A.01

MB 4200A.01 Definitions of Claim and Debt

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

A "claim" is a right to payment.

"Debt" means liability on a claim.

Authority: Civ. Code § 3439.01(b), (d).

[2] Use of Instruction

This is a preliminary instruction that should be used to define for the jury terms that will be used in future instructions.

The definition of "claim" omits the part of the statutory definition that explains that a right to payment may be a claim without being reduced to judgment and that it may be secured or unsecured, and so on [*see Civ. Code § 3439.01(b); see also MB 4200A.01[3]*]. This barrage of legal terms seems more likely to confuse than to enlighten the jury. The jury does not need to hear this part of the definition unless there is some contention that, for example, the right to payment is unsecured. In any case, that a claim exists even though the right to payment is unsecured is a point of law on which the jury need not be instructed. The court would not allow the debtor to defend against the claim on the grounds that the right to payment was unsecured, so presumably the jury has not heard any evidence on this point.

If the status of a particular right to payment as, for example, secured or unsecured is somehow at issue, or if the creditor wants to be sure that the jury knows that an unsecured debt qualifies as a claim, then of course the jury may be so instructed.

For an instruction explaining that certain obligations are not debts for the purpose of determining insolvency, see *MB 4200A.51*.

For related Judicial Council instructions, see *MB 4200A.01[3][b]*.

[3] Comment

[a] Definitions

The term "claim" is defined in *Civ. Code § 3439.01(b)* as a right to payment, whether liquidated or unliquidated, fixed or contingent, matured or unmatured, disputed or undisputed, legal or equitable, secured or unsecured. A claim exists whether or not the right is reduced to judgment [*Civ. Code § 3439.01(b)*].

The term "debt" is defined in *Civ. Code § 3439.01(d)* as a liability on a claim.

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 42, *California Judicial Council Uniform Fraudulent Transfer Act Instructions*]:

CACI No. 4200 Actual Intent to Defraud a Creditor (Civ. Code § 3439.04(a)(1))--Essential Factual Elements

Legal Topics:

For related research and practice materials, see the following legal topics:

Bankruptcy LawState Insolvency LawsCivil ProcedureTrialsJury TrialsJury InstructionsStandard InstructionsCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionFraudulent TransfersReal Property LawPurchase & SaleFraudulent Transfers



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California Forms of Jury Instruction

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CHAPTER 42A Matthew Bender Fraudulent Transfer Instructions
PART A. DEFINITIONS, BURDEN OF PROOF, AND FUTURE CREDITORS

3-42A California Forms of Jury Instruction MB 4200A.02

MB 4200A.02 Definitions of Creditor and Debtor

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

A "creditor" is a person who has a claim.

A "debtor" is a person who is liable on a claim.

Authorities: *Civ. Code* § 3439.01(c), (e); *Weisenburg v. Cragholm* (1971) 5 Cal.3d 892, 896-897, 97 Cal.Rptr. 862, 489 P.2d 1126 ; *Hennessey's Tavern, Inc. v. American Air Filter Co.* (1988) 204 Cal.App.3d 1351, 1360, 251 Cal.Rptr. 859 ; *Estate of Blanco* (1978) 86 Cal.App.3d 826, 831, 150 Cal.Rptr. 645 .

[2] Use of Instruction

This is a preliminary instruction that should be used to define for the jury terms that will be used in future instructions. This instruction may be used in conjunction with MB 4200A.10 if the claim has not yet been reduced to judgment or otherwise finalized.

LexisNexis Matthew Bender Expert Practice Tip: --Transfers Before Judgment: It may be necessary to insert into the definitions the fact that the "creditor" is a person who "may become entitled to" a claim, and that a "debtor" is a person who "may become liable" on a claim, in keeping with the definitions in *Civ. Code* § 3429. For example, a "claim" can arise before a judgment is final [*see Estate of Blanco* (1978) 86 Cal.App.3d 826, 831, 150 Cal.Rptr. 645 (claim arises when tort occurs and before action is commenced); *Freeman v. LaMorte* (1957) 148 Cal.App.2d 670, 675, 307 P.2d 734 (claim arises moment that fraud cause of action accrues)]. This is especially important in cases in which the transfer occurs before a judgment is entered, but after the debtor becomes "alerted" to the potential exposure [*see* MB 4200A.10]. By *Susan Vaage*

For related Judicial Council instructions, see *MB 4200A.02[3][b]*.

[3] Comment

[a] Definitions

A "creditor" is a person who has a claim [*Civ. Code* § 3439.01(c)]. The term includes an assignee of a general assignment for the benefit of creditors [*Civ. Code* § 3439.01(c); see *Code Civ. Proc.* § 493.010 ("general assignment for the benefit of creditors" defined)]. A person with a contingent claim for damages is a creditor within the meaning of this definition [*Hennessey's Tavern, Inc. v. American Air Filter Co. (1988) 204 Cal.App.3d 1351, 1360, 251 Cal.Rptr. 859*]. However, if a person's contingent claim is litigated and denied, then that person is not entitled to the remedy of setting aside a fraudulent transfer, because the litigant was never a creditor under this Act [*Weisenburg v. Cragholm (1971) 5 Cal.3d 892, 896-897, 97 Cal.Rptr. 862, 489 P.2d 1126* ; *Estate of Blanco (1978) 86 Cal.App.3d 826, 838, 150 Cal.Rptr. 645* ; see *Allard v. De Lorean (9th Cir. 1989) 884 F.2d 464, 466* (person no longer creditor after claim's settlement); *Ataka Am., Inc. v. Crateo, Inc. (1973) 30 Cal.App.3d 315, 318-319, 106 Cal.Rptr. 280* (creditor is not required to prove claim against debtor in third-party proceeding)].

The term "debtor" is defined in *Civ. Code* § 3439.01(e) as a person who is liable on a claim.

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 42, *California Judicial Council Uniform Fraudulent Transfer Act Instructions*]:

CACI No. 4200 Actual Intent to Defraud a Creditor (Civ. Code § 3439.04(a)(1))--Essential Factual Elements

Legal Topics:

For related research and practice materials, see the following legal topics:

Bankruptcy Law State Insolvency Laws Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Civil Procedure Judgments Entry of Judgments Enforcement & Execution Fraudulent Transfers Real Property Law Purchase & Sale Fraudulent Transfers



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CHAPTER 42A Matthew Bender Fraudulent Transfer Instructions
PART A. DEFINITIONS, BURDEN OF PROOF, AND FUTURE CREDITORS

3-42A California Forms of Jury Instruction MB 4200A.03

MB 4200A.03 Definitions of Asset and Property

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

"Asset" means property of a debtor.

"Property" is anything that may be owned.

[*OPTIONAL (See Use of Instruction)*]

"Asset" does not include property to the extent it is encumbered by a valid lien.

Authorities: *Civ. Code § 3439.01(a), (h).*

[2] Use of Instruction

This is a preliminary instruction that should be used to define the term "asset" for the jury. The optional paragraph of the instruction should be used when a party contends that property at issue is encumbered by a valid lien. This paragraph should be used with *CACI No. 4200* and with the instructions in MB 4200A.04 and MB 4200A.05, which define "lien" and "valid lien," respectively.

This instruction does not instruct the jury on the exceptions for property that is generally exempt under nonbankruptcy law and property interests held in tenancy by the entireties [see *Civ. Code § 3439.01(a)(2), (3)*; see also *MB 4200A.03[3][a]*]. In the unlikely event of a factual issue involving either exception, an appropriate instruction based on *Civ. Code § 3439.01(a)* must be added to this instruction.

For related Judicial Council instructions, see *MB 4200A.03[3][b]*.

[3] Comment

[a] Definitions

An "asset" is property of a debtor, but assets do not include any of the following [*Civ. Code* § 3439.01(a) ; see, e.g., *Cabral v. Martins* (2009) 177 *Cal.App.4th* 471, 483-484, 99 *Cal.Rptr.3d* 394 (while his mother still lived, son had no right to her property; home and other property owned by mother while alive was not "property of a debtor")]:

- Property that is encumbered by a valid lien [*see Fidelity Nat'l Title Ins. Co. v. Schroeder* (2009) 179 *Cal.App.4th* 834, 841-850, 101 *Cal.Rptr.3d* 854 (no relief under UFTA because creditor could not have obtained any net recovery if transfer were set aside and forced sale of property was sought, taking into account encumbrances and automatic homestead exemption; creditor has possible cause of action for resulting trust); *Filip v. Bucurenciu* (2005) 129 *Cal.App.4th* 825, 835, 28 *Cal.Rptr.3d* 884 (because encumbrance transaction not "above-board," property therefore considered asset)];
- Property that is generally exempt beyond any bankruptcy rule; or
- An interest in property held in tenancy by the entireties to the extent it is not subject to process by a creditor holding a claim against only one of the tenants.

The listed provisions exclude property that cannot generally be reached by a creditor through judicial proceedings to collect a debt [*see Code Civ. Proc.* § 704.210 (property that is not subject to enforcement of money judgment is exempt without making claim)].

The term "property" is defined in *Civ. Code* § 3439.01(h) as anything that may be the subject of ownership.

LexisNexis Matthew Bender Expert Practice Tip:--Encumbered Property: If property is encumbered by a lien, the property is not included as an asset "to the extent" of the encumbrance (i.e. only net equity is included). This is important for measuring solvency. *By Ronald Oster*

LexisNexis Matthew Bender Expert Practice Tip:--Example of Effect of Valid Lien: It may be helpful to add an example to the instruction to show what effect a valid lien has on determining if an asset exists. For example, "if you find that the property owned by the debtor had a value of \$500,000, and that there was a valid lien of \$200,000 on the property, then the equity in the property of up to \$300,000 is an asset for the purposes of this action" [*see MB 4200A.40*]. *By Susan Vaage*

LexisNexis Matthew Bender Expert Practice Tip:--Unencumbered Property: Depending on the evidence to be presented at trial, it might also be helpful to consider the converse of this instruction--that is, that the term "asset" includes property to the extent that it is not encumbered by a valid lien. This may be particularly important if the parties are disputing the value of the property and the potential amount of an existing lien. Similarly, it may be necessary to explain the amount and value of a homestead exemption or other statutory exemption in determining value [*see Code Civ. Proc.* § 703.010 et seq.]. *By Susan Vaage*

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [*see Ch. 42, California Judicial Council Uniform Fraudulent Transfer Act Instructions*]:

CACI No. 4200, Actual Intent to Defraud a Creditor (*Civ. Code* § 3439.04(a)(1))--Essential Factual Elements

CACI No. 4206, Presumption of Insolvency

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsStandard InstructionsCivil ProcedureJudgmentsEntry of
JudgmentsEnforcement & ExecutionFraudulent TransfersReal Property LawPurchase & SaleFraudulent Transfers



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CHAPTER 42A Matthew Bender Fraudulent Transfer Instructions
PART A. DEFINITIONS, BURDEN OF PROOF, AND FUTURE CREDITORS

3-42A California Forms of Jury Instruction MB 4200A.04

MB 4200A.04 Definition of Lien

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

A "lien" is a charge against or an interest in property to secure payment of a debt or performance of an obligation.

[*OPTIONAL (See Use of Instruction)*]

It includes a security interest created by agreement.

[*OPTIONAL (See Use of Instruction)*]

It includes a judicial lien.

[*OPTIONAL (See Use of Instruction)*]

It includes a common law lien and a statutory lien.

Authority: *Civ. Code § 3439.01(f).*

[2] Use of Instruction

This is a preliminary instruction that should be used to define "lien" for the jury. The three optional paragraphs should be used when a party contends that property at issue has a specific type of lien or liens against it. Any or all of the optional paragraphs may be included in the instruction as they are relevant to the facts alleged by the parties.

[3] Comment

The term "lien" is defined in *Civ. Code* § 3439.01(f) as it is defined in MB 4200A.04[1]. This definition was derived from the Bankruptcy Code [Legislative Comment to *Civ. Code* § 3439.01, Paragraph (6); see 11 U.S.C.S. § 101(37)]. The Bankruptcy Code also defines "judicial lien," "security interest," and "statutory lien" [11 U.S.C.S. § 101(36), (51), (53)]. These sections of the Bankruptcy Code should be used for instructions on these terms as needed.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsStandard InstructionsCivil ProcedureJudgmentsEntry of
JudgmentsEnforcement & ExecutionFraudulent TransfersReal Property LawNonmortgage LiensGeneral OverviewReal
Property LawPurchase & SaleFraudulent Transfers



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California Forms of Jury Instruction

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CHAPTER 42A Matthew Bender Fraudulent Transfer Instructions
PART A. DEFINITIONS, BURDEN OF PROOF, AND FUTURE CREDITORS

3-42A California Forms of Jury Instruction MB 4200A.05

MB 4200A.05 Definition of Valid Lien

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

A "valid lien" is a lien that is effective against the holder of a judicial lien.

Authorities: *Civ. Code § 3439.01(j)*; *Pearlman v. Reliance Ins. Co.* (1962) 371 U.S. 132, 141, 83 S.Ct. 232, 9 L.Ed.2d 190 .

[2] Use of Instruction

This is a preliminary instruction that should be used to define the term "valid lien" for the jury. It should be used when a party maintains that property at issue is encumbered by a valid lien. The instruction should be used with the optional paragraph of the instruction in MB 4200A.03[1].

[3] Comment

The term "valid lien" is defined in *Civ. Code § 3439.01(j)* as it is defined in MB 4200A.05[1]. Under this definition, an equitable lien that may not be defeated by a judicial lien creditor is a valid lien [see *Pearlman v. Reliance Ins. Co.* (1962) 371 U.S. 132, 141, 83 S.Ct. 232, 9 L.Ed.2d 190 (upholding surety's equitable lien against fund owed to bankrupt contractor)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Bankruptcy Law State Insolvency Laws Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Civil

ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionFraudulent TransfersReal Property LawNonmortgage
LiensGeneral OverviewReal Property LawPurchase & SaleFraudulent Transfers



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CHAPTER 42A Matthew Bender Fraudulent Transfer Instructions
PART A. DEFINITIONS, BURDEN OF PROOF, AND FUTURE CREDITORS

3-42A California Forms of Jury Instruction MB 4200A.06

MB 4200A.06 Future Creditors

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

In determining whether a [transfer/obligation] is fraudulent, it does not matter whether the creditor's claim arose before or after [the transfer was made/the obligation was incurred].

To recover, it is not necessary for Plaintiff to show that [he/she/it] was a creditor of _____ [name of debtor] when [he/she/it] [made the transfer/incurred the obligation]. Plaintiff need only show that [he/she/it] is now a creditor of _____ [name of debtor].

Authority: *Civ. Code § 3439.04(a).*

[2] Use of Instruction

This instruction should be used when the plaintiff was not a creditor of the debtor at the time of the alleged fraudulent transaction. It should be used as a supplemental instruction with the instructions in *CACI No. 4201* and *CACI No. 4202* on actual and constructive fraud under *Civ. Code § 3439.04(a)* and *(b)*. This instruction must not be used with the instruction in *CACI No. 4203* on constructive fraud under *Civ. Code § 3439.05*, because constructive fraud under *Civ. Code § 3439.05* only applies to creditors whose claims arose before the transfer was made or the obligation was incurred.

For related Judicial Council instructions, see *MB 4200A.06[3][b]*.

LexisNexis Matthew Bender Expert Practice Tip --Actual Fraud vs. Constructive Fraud: This instruction only applies to actual fraud and certain constructive frauds. The limitations in *MB 4200A.10[2]*, must be followed. *By Ronald Oster*

LexisNexis Matthew Bender Expert Practice Tip--Importance of Timing: This is a critical instruction in cases in which the debtor transferred before a final judgment, and it covers one of the elements that is most important to be explained to a jury. It also ties in to one of the badges of fraud--specifically, when the debtor became aware of his/her/its potential liability and exposure. By *Susan Vaage*

[3] Comment

[a] All Creditors Affected

When a debtor transfers property or incurs an obligation with the intent to defraud any creditor, then that transaction is fraudulent as to all of the debtor's creditors, whether their claims arose before or after the transaction [*Civ. Code* § 3439.04(a); see *Fidelity Nat'l Title Ins. Co. v. Schroeder* (2009) 179 Cal.App.4th 834, 841, 101 Cal.Rptr.3d 854 ; *Kalway v. City of Berkeley* (2007) 151 Cal.App.4th 827, 837, 60 Cal.Rptr.3d 477 (statute inapplicable)]. The same rule applies to a constructively fraudulent transfer or obligation that was made or incurred without receiving reasonably equivalent value in exchange [*Civ. Code* § 3439.04(b)].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 42, *California Judicial Council Uniform Fraudulent Transfer Act Instructions*]:

CACI No. 4200, Actual Intent to Defraud a Creditor (*Civ. Code*, § 3439.04(a)(1))--Essential Factual Elements

CACI No. 4201, Factors to Consider in Determining Actual Intent to Defraud (*Civ. Code*, §§ 3439.04(b)

CACI No. 4202, Constructive Fraudulent Transfer (*Civ. Code*, § 3439.04(a)(2))--Essential Factual Elements

CACI No. 4203, Constructive Fraudulent Transfer (Insolvency) (*Civ. Code*, § 3439.05)--Essential Factual Elements

Legal Topics:

For related research and practice materials, see the following legal topics:

Bankruptcy Law State Insolvency Laws Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Civil Procedure Judgments Entry of Judgments Enforcement & Execution Fraudulent Transfers Real Property Law Purchase & Sale Fraudulent Transfers



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CHAPTER 42A Matthew Bender Fraudulent Transfer Instructions

PART A. DEFINITIONS, BURDEN OF PROOF, AND FUTURE CREDITORS

3-42A California Forms of Jury Instruction MB 4200A.07-MB 4200A.19

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MB 4200A.07Reserved for Future Use



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CHAPTER 42A Matthew Bender Fraudulent Transfer Instructions
PART B. ACTUAL FRAUD

3-42A California Forms of Jury Instruction MB 4200A.20

MB 4200A.20 Actual Intent to Defraud

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

If the debtor [made the transfer/incurred the obligation] with actual intent to hinder, delay, or defraud any of the debtor's creditors, then [the transfer/the obligation] is fraudulent towards all the debtor's creditors.

Authorities: *Civ. Code § 3439.04(a)*; *Kirkeby v. Superior Court* (2004) 33 Cal.4th 642, 650, 15 Cal.Rptr.3d 805, 93 P.3d 395 ; *Reddy v. Gonzalez* (1992) 8 Cal.App.4th 118, 122-123, 10 Cal.Rptr.2d 55 .

[2] Use of Instruction

This instruction should be used when fraudulent intent towards creditors is an issue. It should be used with the instruction in *CACI No. 4200* stating the plaintiff's burden of proof in an action based on actual fraud and the instruction in MB 4200A.21 concerning malicious intent. This instruction may also be used with the instruction in MB 4200A.22 on the badges of fraud and the instruction in *CACI No. 4201* which lists specific facts that give rise to an inference of fraudulent intent.

For related Judicial Council instructions, see *MB 4200A.20[3][b]*.

LexisNexis Matthew Bender Expert Practice Tip: --Application of Instruction: This instruction applies to existing and future creditors. *By Ronald Oster*

LexisNexis Matthew Bender Expert Practice Tip: --Application of Instruction: This is a useful instruction if the evidence shows that a transfer was made to avoid the potential debt of a creditor other than the plaintiff. *By Susan Vaage*

[3] Comment**[a] Proof and Effect of Actual Intent**

A transfer or obligation made or incurred by a debtor is fraudulent as to a creditor if the debtor acted with actual intent to hinder, defraud, or delay any creditor [*Civ. Code* § 3439.04(a); *Fidelity Nat'l Title Ins. Co. v. Schroeder* (2009) 179 Cal.App.4th 834, 841, 101 Cal.Rptr.3d 854 ; *Filip v. Bucurenciu* (2005) 129 Cal.App.4th 825, 829, 834, 28 Cal.Rptr.3d 884]. Proof of actual fraud under *Civ. Code* § 3439.04(a) is in itself sufficient to establish that a transfer or an obligation is fraudulent. There is no need to show that the transfer or obligation also violates *Civ. Code* § 3439.04(b) [*Reddy v. Gonzalez* (1992) 8 Cal.App.4th 118, 122-123, 10 Cal.Rptr.2d 55]. When a transfer is made or an obligation is incurred with actual intent to hinder, defraud, or delay even one creditor, then that transfer or obligation is fraudulent as to all creditors' claims whether the claim arose before or after the fraudulent transaction [*Civ. Code* § 3439.04(a); see *MB 4200A.06* regarding future creditors].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 42, *California Judicial Council Uniform Fraudulent Transfer Act Instructions*]:

CACI No. 4201, Factors to Consider in Determining Actual Intent to Defraud (Civ. Code § 3439.04(b))

Legal Topics:

For related research and practice materials, see the following legal topics:

Bankruptcy Law State Insolvency Laws Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Civil Procedure Judgments Entry of Judgments Enforcement & Execution Fraudulent Transfers Real Property Law Purchase & Sale Fraudulent Transfers Torts Business Torts Fraud & Misrepresentation Actual Fraud Elements



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CHAPTER 42A Matthew Bender Fraudulent Transfer Instructions
PART B. ACTUAL FRAUD

3-42A California Forms of Jury Instruction MB 4200A.21

MB 4200A.21 Malicious Intent Not Necessary

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

To prove intent to hinder, delay, or defraud creditors, it is not necessary to show that the debtor acted maliciously with the desire of causing harm to one or more creditors.

Authorities: *Kemp v. Lynch* (1937) 8 Cal.2d 457, 462, 65 P.2d 1316 ; *Economy Refining & Serv. Co. v. Royal Nat'l Bank of N.Y.* (1971) 20 Cal.App.3d 434, 441-442, 97 Cal.Rptr. 706 ; Legislative Committee Comment to Civ. Code § 3439.04.

[2] Use of Instruction

This instruction should be used when actual intent to defraud creditors is an issue and as a supplement to *CACI No. 4201*. It explains that malicious intent is not required. The instruction should be given with the instruction in MB 4200A.20.

For related Judicial Council instructions, see *MB 4200A.21[3][b]*.

[3] Comment

[a] *Economy Refining* and Uniform Fraudulent Transfer Act

In *Economy Refining & Service Co. v. Royal National Bank of New York* [*Economy Refining & Serv. Co. v. Royal Nat'l Bank of N.Y.* (1971) 20 Cal.App.3d 434, 441-442, 97 Cal.Rptr. 706] , the court of appeal held that it is not necessary to show that the debtor acted maliciously to prove that he or she intended to defraud creditors. It is sufficient to prove an

intent to remove assets and thus make impossible the collection or satisfaction of a creditor's judgment [*Economy Refining & Serv. Co. v. Royal Nat'l Bank of N.Y.* (1971) 20 Cal.App.3d 434, 441-442, 97 Cal.Rptr. 706].

Although *Economy Refining* was decided before the adoption of the Uniform Fraudulent Transfer Act [*Civ. Code* §§ 3439-3439.12], that court's rejection of a malicious intent requirement is supported by the failure of both *Civ. Code* § 3439.04(a) and the Legislative Committee Comment to mention any such requirement.

Civ. Code § 3439.04(a) does not explain what constitutes actual intent to hinder, defraud, or delay a creditor, but the Legislative Committee Comment explains that the courts, in making this determination, consider those factors called "badges of fraud" [see Legislative Committee Comment to *Civ. Code* § 3439.04, Paragraphs (5) listing "badges of fraud" and (8) describing fraudulent activities similar to those found in *Economy Refining & Serv. Co. v. Royal Nat'l Bank of N.Y.* (1971) 20 Cal.App.3d 434, 441-442, 97 Cal.Rptr. 706] . In all instances, the badges of fraud are objective and verifiable circumstances, for example, the debtor's transfer to an insider or the debtor's insolvency at the time of the transfer. Proof of the debtor's "real" intent is not required, as the debtor's real intent and the facts of the transaction are peculiarly within the knowledge of the person being charged with fraud. Intent to defraud may be proved instead by inference from the circumstances [*Kemp v. Lynch* (1937) 8 Cal.2d 457, 462, 65 P.2d 1316].

For further discussion of intent to defraud, see MB 4200A.20[3][a]. For an instruction on and discussion of the badges of fraud, see MB 4200A.22.

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 42, *California Judicial Council Uniform Fraudulent Transfer Act Instructions*]:

CACI No. 4201 Factors to Consider in Determining Actual Intent to Defraud (*Civ. Code* § 3439.04(b))

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsStandard InstructionsCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionFraudulent TransfersReal Property LawPurchase & SaleFraudulent TransfersTortsBusiness TortsFraud & MisrepresentationGeneral Overview



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CHAPTER 42A Matthew Bender Fraudulent Transfer Instructions
PART B. ACTUAL FRAUD

3-42A California Forms of Jury Instruction MB 4200A.22

MB 4200A.22 Badges of Fraud

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

The real intent of a person and the facts of a fraudulent transaction are peculiarly within the knowledge of the one being charged with fraud. Direct proof of fraudulent intent is often difficult and sometimes impossible. Proof of fraud may then come from circumstances surrounding the transaction.

In determining whether _____ [name of debtor] intended to hinder, delay, or defraud Plaintiff, there are certain circumstances that you may consider. These circumstances suggest that there may be fraud, but they do not prove fraud. The presence of one or more of these circumstances is merely evidence from which you may infer an intent to defraud.

Authorities: *Civ. Code § 3439.04(b)*; *Kemp v. Lynch* (1937) 8 Cal.2d 457, 462, 65 P.2d 1316 ; *Fross v. Wotton* (1935) 3 Cal.2d 384, 393, 44 P.2d 350 ; *Johnson v. Drew* (1963) 218 Cal.App.2d 614, 621, 32 Cal.Rptr. 540 ; *Wood v. Kaplan* (1960) 178 Cal.App.2d 227, 231, 2 Cal.Rptr. 917 ; *Menick v. Goldy* (1955) 131 Cal.App.2d 542, 548, 280 P.2d 844 ; Legislative Committee Comment to *Civ. Code § 3439.04*, Paragraphs (5) and (6); see *Heath v. Helmick* (9th Cir. 1949) 173 F.2d 157, 161 .

[2] Use of Instruction

This instruction should be used as a general introduction to *CACI No. 4201*, which describes the specific factors that must be considered in determining actual intent to defraud. This instruction may also be used with *CACI No. 4200*, which provides the essential factual elements of actual intent to defraud.

For related Judicial Council instructions, see *MB 4200A.22[3][b]*.

[3] Comment**[a] Proving Intent to Defraud**

From the very nature of the action, direct proof of fraudulent intent is difficult and sometimes an impossibility, as the debtor's real intent and the facts of the transaction are peculiarly within the knowledge of the person being charged with fraud [*Kemp v. Lynch* (1937) 8 Cal.2d 457, 462, 65 P.2d 1316]. For this reason, proof of fraudulent intent must usually come by inference from circumstances surrounding the transfer [*Fross v. Wotton* (1935) 3 Cal.2d 384, 393, 44 P.2d 350 ; *Wood v. Kaplan* (1960) 178 Cal.App.2d 227, 231, 2 Cal.Rptr. 917]. Sometimes, though, there may be a document, letter, memo, or some other written proof of fraudulent intent. The courts and the Legislative Committee Comment to Civ. Code § 3439.04, codified in Civ. Code § 3439.04(b), have recognized certain factors, known as "badges of fraud," as significant in determining the existence of actual intent to hinder, defraud, or delay [see Civ. Code § 3439.04(b); Legislative Committee Comment to Civ. Code § 3439.04, Paragraphs (5) and (6); *Heath v. Helmick* (9th Cir. 1949) 173 F.2d 157, 161 ; *Filip v. Bucurenciu* (2005) 129 Cal.App.4th 825, 834, 28 Cal.Rptr.3d 884].

The existence of one or more badges of fraud does not prove intent to defraud, nor does it create a presumption of fraud. The presence of one or more of these factors is merely evidence from which the trier of fact may infer an intent to defraud [*United States v. Real Prop. Located at 5208 Los Franciscos Way* (E.D. Cal. 2003) 252 F.Supp.2d 1060, 1064 ; *Johnson v. Drew* (1963) 218 Cal.App.2d 614, 621, 32 Cal.Rptr. 540 ; Legislative Committee Comment to Civ. Code § 3439.04, Paragraphs (5) and (6)]. These factors are meant to provide guidance to the trial court, not compel a finding one way or the other [*Filip v. Bucurenciu* (2005) 129 Cal.App.4th 825, 829, 834, 28 Cal.Rptr.3d 884].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 42, *California Judicial Council Uniform Fraudulent Transfer Act Instructions*]:

CACI No. 4200 Actual Intent to Defraud a Creditor (Civ. Code § 3439.04(a)(1))--Essential Factual Elements

CACI No. 4201 Factors to Consider in Determining Actual Intent to Defraud (Civ. Code § 3439.04(b))

Legal Topics:

For related research and practice materials, see the following legal topics:

Bankruptcy Law State Insolvency Laws Civil Procedure Trials Jury Instructions Standard Instructions Civil Procedure Judgments Entry of Judgments Enforcement & Execution Fraudulent Transfers Real Property Law Purchase & Sale Fraudulent Transfers Torts Business Torts Fraud & Misrepresentation General Overview



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CHAPTER 42A Matthew Bender Fraudulent Transfer Instructions
PART B. ACTUAL FRAUD

3-42A California Forms of Jury Instruction MB 4200A.23

MB 4200A.23 Transfer With Secret Reservation

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

If you find that there was an agreement between the debtor and _____ [name of transferee] when the property was transferred that the debtor would retain a secret interest in the property transferred, then this agreement would be a circumstance tending to show that the transfer was made with the intent to defraud creditors.

Authorities: *Heath v. Helmick* (9th Cir. 1949) 173 F.2d 157, 161 ; *Bank of Cal. v. Virtue & Scheck, Inc.* (1983) 140 Cal.App.3d 1026, 1038, 190 Cal.Rptr. 54 .

[2] Use of Instruction

This instruction should be used when there is an issue concerning whether the debtor secretly retained rights in the transferred property. This instruction should be used with *CACI No. 4200*, which provides the essential factual elements of actual intent to defraud, *CACI No. 4201*, which describes the specific factors that must be considered in determining actual intent to defraud, and *CACI No. 4202*, which provides the essential factual elements of constructive intent to defraud.

For related Judicial Council instructions, see *MB 4200A.23[3][b]*.

[3] Comment

[a] Retention of Rights

When a debtor transfers property in deed absolute but retains rights, such as the rights to profits and income or the right to manage or repurchase the property, then there is an inference that the property was transferred with intent to defraud creditors [*Heath v. Helmick* (9th Cir. 1949) 173 F.2d 157, 161 ; *Bank of Cal. v. Virtue & Scheck, Inc.* (1983) 140 Cal.App.3d 1026, 1038, 190 Cal.Rptr. 54].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 42, *California Judicial Council Uniform Fraudulent Transfer Act Instructions*]:

CACI No. 4200 Actual Intent to Defraud a Creditor (*Civ. Code* § 3439.04(a)(1))--Essential Factual Elements

CACI No. 4201 Factors to Consider in Determining Actual Intent to Defraud (*Civ. Code* § 3439.04(b))

CACI No. 4202 Constructive Fraudulent Transfer (*Civ. Code* § 3439.04(a)(2))--Essential Factual Elements

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsStandard InstructionsCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionFraudulent TransfersReal Property LawPurchase & SaleFraudulent TransfersTortsBusiness TortsFraud & MisrepresentationGeneral Overview



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CHAPTER 42A Matthew Bender Fraudulent Transfer Instructions
PART B. ACTUAL FRAUD

3-42A California Forms of Jury Instruction MB 4200A.24

MB 4200A.24 Transfer Pursuant to Marital Dissolution Settlement or to Family Trust

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

A transfer pursuant to a marital dissolution settlement or a transfer to a family trust may be set aside as a fraudulent transfer and is subject to scrutiny under the Uniform Fraudulent Transfer Act.

Authorities: *Filip v. Bucurenciu* (2005) 129 Cal.App.4th 825, 838, 28 Cal.Rptr.3d 884 .

[2] Use of Instruction

This is a preliminary instruction that should be used if the case involves a marital dissolution and distribution of property that may be considered to be fraudulent.

For related Judicial Council instructions, see *MB 4200A.24[3][b]*.

[3] Comment

[a] Application of Uniform Fraudulent Transfer Act to Dissolutions

The Uniform Fraudulent Transfer Act can be applied to a property settlement agreement. [*Mejia v. Reed* (2003) 31 Cal.4th 657, 669, 3 Cal.Rptr.3d 390, 74 P.3d 166]. A transfer before dissolution can be set aside as a fraudulent conveyance, as can a transfer after dissolution. If a court divides the marital property in the absence of an agreement by the parties, it must divide the property equally [*Filip v. Bucurenciu* (2005) 129 Cal.App.4th 825, 838, 28 Cal.Rptr.3d 884], which provides some protection for a creditor of one spouse only. In view of the overall policy of protecting creditors, it is unlikely that the legislature intended to grant married couples a one-time-only opportunity to defraud

creditors by including the fraudulent transfer in a property settlement agreement [*Filip v. Bucurenciu* (2005) 129 Cal.App.4th 825, 839, 28 Cal.Rptr.3d 884].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 42, *California Judicial Council Uniform Fraudulent Transfer Act Instructions*]:

CACI No. 4200 Actual Intent to Defraud a Creditor (*Civ. Code* § 3439.04(a)(1))--Essential Factual Elements

CACI No. 4201 Factors to Consider in Determining Actual Intent to Defraud (*Civ. Code* § 3439.04(b))

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsStandard InstructionsCivil ProcedureJudgmentsEntry of
JudgmentsEnforcement & ExecutionFraudulent TransfersFamily LawMarital Duties & RightsProperty
RightsPostnuptial & Separation AgreementsGeneral OverviewFamily LawMarital Termination & Spousal
SupportDissolution & DivorceProperty DistributionGeneral OverviewReal Property LawPurchase & SaleFraudulent
Transfers



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CHAPTER 42A Matthew Bender Fraudulent Transfer Instructions
PART B. ACTUAL FRAUD

3-42A California Forms of Jury Instruction MB 4200A.25-MB 4200A.39

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CHAPTER 42A Matthew Bender Fraudulent Transfer Instructions
PART C. CONSTRUCTIVE FRAUD
1. Reasonably Equivalent Value

3-42A California Forms of Jury Instruction MB 4200A.40

MB 4200A.40 Definition of Value

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Value is given for a transfer or an obligation if, in exchange for the transfer or obligation, property is transferred or a pre-existing debt is secured or satisfied.

[*OPTIONAL (See Use of Instruction)*]

Value does not include an unperformed promise to furnish support to the debtor or another person [*OPTIONAL (See Use of Instruction)* unless that promise was made in the ordinary course of the promisor's business].

Authorities: *In re United Energy Corp.* (9th Cir. 1991) 944 F.2d 589, 595-596 ; *Mayors v. Commissioner* (9th Cir. 1986) 785 F.2d 757, 761 ; *Civ. Code* § 3439.03; *Bank of Cal. v. Virtue & Scheck, Inc.* (1983) 140 Cal.App.3d 1026, 1040-1041, 190 Cal.Rptr. 54 ; Legislative Committee Comment to *Civ. Code* § 3439.03, Paragraph (4).

[2] Use of Instruction

This instruction should be used to define "value" when there is an issue concerning whether the debtor received reasonably equivalent value for the transferred property or the obligation incurred. The Uniform Fraudulent Transfer Act does not define "reasonably equivalent value" [*Legislative Committee Comment to Civ. Code* § 3439.03; *see MB 4200A.40[3][a]*]. The second paragraph of the instruction is optional and should be used when there is evidence that an unperformed promise to support was given in exchange for the property transferred or the obligation incurred. The optional phrase in the second paragraph should be used if there is evidence that this unperformed promise to support

was given in the regular course of the promisor's business. This instruction should be used with *CACI No. 4202* and *CACI No. 4203*, and with the instruction in MB 4200A.41 on fair consideration.

For related Judicial Council instructions, see MB 4200A.40[3][b].

LexisNexis Matthew Bender Expert Practice Tip: --Property Transferred for Amount of Liens

Only: This instruction (perhaps with appropriate modifications) can be used if the property is transferred for the amount of liens only and the argument is that the property is worth only that amount [*see Filip v. Bucurenciu* (2005) 129 Cal.App.4th 825, 835, 28 Cal.Rptr.3d 884 (property transferred for new note in amount of pre-existing lien, but court found that property had value over and above lien)]. By Susan Vaage

[3] Comment

[a] Definitions and Exceptions

Proof of a constructively fraudulent transfer under the Uniform Fraudulent Transfer Act requires proof of a transfer made or obligation incurred without receiving reasonably equivalent value in exchange [*see Civ. Code* §§ 3439.04(b), 3439.05; *see also CACI No. 4200*]. Unfortunately, the Act does not define "reasonably equivalent value" [Legislative Committee Comment to *Civ. Code* § 3439.03, Paragraph (3)]. However, the Act does provide that "value" is given for a transfer or obligation if, in exchange for the transfer or obligation, property is transferred or an antecedent debt is secured or satisfied [*Civ. Code* § 3439.03]. Value includes the satisfaction of a right that the parties believe in good faith to be binding, whether or not the right is legally enforceable [*Mayors v. Commissioner* (9th Cir. 1986) 785 F.2d 757, 761 ; *Bank of Cal. v. Virtue & Scheck, Inc.* (1983) 140 Cal.App.3d 1026, 1040-1041, 190 Cal.Rptr. 54]. Value also includes payments to reduce a restitution claim against the debtor because the claim is an antecedent debt (a liability on a "right to payment") [*Civ. Code* § 3439.01(b), (d)] of the debtor [*In re United Energy Corp.* (9th Cir. 1991) 944 F.2d 589, 595-596 (applying California as well as federal fraudulent transfer law)].

In some circumstances, a promise that has not been performed may constitute value [Legislative Committee Comment to *Civ. Code* § 3439.03, Paragraph (4); *see, e.g., Harper v. Lloyd's Factors* (2d Cir. 1954) 214 F.2d 662, 663 (transfer of money for promise of factor to discount transferor's purchase-money notes given to fur dealer); *Schlecht v. Schlecht* (1926) 168 Minn. 168, 176-177, 209 N.W. 883 (transfer for promise to make repairs and improvements on transferor's home)]. A transfer in consideration of a negotiable note discountable at a commercial bank, or the purchase from an established, solvent institution of an insurance policy, annuity, or contract to provide care is also for value [Legislative Committee Comment to *Civ. Code* § 3439.03, Paragraph (4)]. However, value does not include a promise that has not been performed (made otherwise than in the ordinary course of the promisor's business) to furnish support to the debtor or another person [*Civ. Code* § 3439.03; *see Springfield Ins. Co. v. Fry* (N.D. Okla. 1967) 267 F.Supp. 693, 696 (transfer of property from husband to wife in return for promise of future support held invalid as to existing creditors); *Warwick Mun. Employees Credit Union v. Higham* (1969) 106 R.I. 363, 259 A.2d 852, 854 (transfer of property from parents to son in return for promise of future support not consideration); Legislative Committee Comment to *Civ. Code* § 3439.03, Paragraph (4)].

For discussion of "fair consideration" and further discussion of "reasonably equivalent value," see MB 4200A.41[3][a].

LexisNexis Matthew Bender Expert Practice Tip: --Promises and Consideration: An unperformed promise is not consideration unless made in the ordinary course of the promisor's business. A promise that has already been performed never constitutes new consideration. By Ronald Oster

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [*see Ch. 42, California Judicial Council Uniform Fraudulent Transfer Act Instructions*]:

CACI No. 4200 Actual Intent to Defraud a Creditor (Civ. Code § 3439.04(a)(1))--Essential Factual Elements

CACI No. 4202 Constructive Fraudulent Transfer (Civ. Code § 3439.04(a)(2))--Essential Factual Elements

CACI No. 4203 Constructive Fraudulent Transfer (Insolvency) (Civ. Code § 3439.05)--Essential Factual Elements

Legal Topics:

For related research and practice materials, see the following legal topics:

Bankruptcy LawState Insolvency LawsCivil ProcedureTrialsJury TrialsJury InstructionsStandard InstructionsCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionFraudulent TransfersReal Property LawPurchase & SaleFraudulent TransfersTortsBusiness TortsFraud & MisrepresentationConstructive FraudGeneral Overview



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CHAPTER 42A Matthew Bender Fraudulent Transfer Instructions
PART C. CONSTRUCTIVE FRAUD
1. Reasonably Equivalent Value

3-42A California Forms of Jury Instruction MB 4200A.41

MB 4200A.41 Value--Fair Consideration

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Fairness of consideration must be determined from the creditor's standpoint.

Authorities: *United States v. May* (S.D. Cal. 1984) 600 F.Supp. 339, 341 ; *Hansen v. Cramer* (1952) 39 Cal.2d 321, 324, 245 P.2d 1059 ; *Kirkland v. Risso* (1979) 98 Cal.App.3d 971, 977, 159 Cal.Rptr. 798 ; *Patterson v. Missler* (1965) 238 Cal.App.2d 759, 766, 48 Cal.Rptr. 215 ; Legislative Committee Comment to Civ. Code § 3439.03, Paragraph (2).

[2] Use of Instruction

This instruction should be used when the fairness of the consideration given or received in the transaction is at issue. It should be used with the instruction in MB 4200A.40 defining "value."

For related Judicial Council instructions, see *MB 4200A.41*[3][b].

LexisNexis Matthew Bender Expert Practice Tip: --Importance of Timing: Timing can be an important consideration in determining value. A creditor wants to be paid now, not after a six month marketing effort. This instruction requires that fairness be determined from the creditor's standpoint. *By Ronald Oster*

LexisNexis Matthew Bender Expert Practice Tip: --Increases in Value: This instruction is particularly important if the property has substantially increased in value from the time the debtor acquired it. Timing is critical in viewing valuation, and the creditor should get the benefit of any increase. *By Susan Vaage*

[3] Comment**[a] Determining Whether Consideration Is Fair**

The Uniform Fraudulent Transfer Act does not indicate what is "reasonably equivalent value" for a transfer or obligation [Legislative Committee Comment to *Civ. Code* § 3439.03, Paragraph (3)]. However, California cases decided before the Act's adoption have consistently held that the fairness of consideration is to be determined from the viewpoint of the debtor's creditors and that it is a question of fact [*Hansen v. Cramer* (1952) 39 Cal.2d 321, 324, 245 P.2d 1059 ; *Kirkland v. Risso* (1979) 98 Cal.App.3d 971, 977, 159 Cal.Rptr. 798 *Patterson v. Missler* (1965) 238 Cal.App.2d 759, 766, 48 Cal.Rptr. 215]. The Act's definition of "value" [see MB 4200A.40] is in accord with the holding in these cases [Legislative Committee Comment to *Civ. Code* § 3439.03, Paragraph (2)].

In an action to quiet title case, the defendant alleged as an affirmative defense that the property's conveyance to the plaintiff was invalid as a transfer to defraud creditors. The court of appeal affirmed a summary judgment for the plaintiff, holding that he had negated this fraudulent transfer defense by proving that the debtor who transferred the property had received a reasonably equivalent value. The debtor owed the plaintiff \$21,000 (as evidenced by a promissory note) when he delivered the quitclaim deed to the plaintiff in lieu of foreclosure on that debt. When the property was sold three and a half years later, the selling price was \$30,000. The court of appeal stated that "[t]his showing negates defendant's affirmative defense" [*Barisich v. Lewis* (1990) 226 Cal.App.3d 12, 20, 275 Cal.Rptr. 331].

The Legislative Committee Comment to *Civ. Code* § 3439.03, Paragraph (3), provides that a transfer for security is generally a transfer for a reasonably equivalent value unless (1) the transfer purports to secure more than the debt actually incurred or to be incurred, or (2) the debt to be secured is a fraudulent obligation under the Act.

When the debtor receives no consideration, then, as a matter of law, the transfer was made without fair consideration [*United States v. May* (S.D. Cal. 1984) 600 F.Supp. 339, 341].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 42, *California Judicial Council Uniform Fraudulent Transfer Act Instructions*]:

CACI No. 4202 Constructive Fraudulent Transfer (*Civ. Code* § 3439.04(a)(2))--Essential Factual Elements

CACI No. 4203 Constructive Fraudulent Transfer (Insolvency) (*Civ. Code* § 3439.05)--Essential Factual Elements

Legal Topics:

For related research and practice materials, see the following legal topics:

Bankruptcy Law State Insolvency Laws Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Civil Procedure Judgments Entry of Judgments Enforcement & Execution Fraudulent Transfers Real Property Law Purchase & Sale Fraudulent Transfers



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CHAPTER 42A Matthew Bender Fraudulent Transfer Instructions

PART C. CONSTRUCTIVE FRAUD

1. Reasonably Equivalent Value

3-42A California Forms of Jury Instruction MB 4200A.42-MB 4200A.49

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MB 4200A.42Reserved for Future Use



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CHAPTER 42A Matthew Bender Fraudulent Transfer Instructions
PART C. CONSTRUCTIVE FRAUD
2. Insolvency

3-42A California Forms of Jury Instruction MB 4200A.50

MB 4200A.50 Definition of Insolvency--Partnership

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

A debtor that is a partnership is insolvent if, at a fair valuation, the sum of the partnership's debts is greater than the sum of both (1) the partnership's assets, and (2) the excess value of each general partner's nonpartnership assets over the partner's nonpartnership debts.

Authority: *Civ. Code § 3439.02(b).*

[2] Use of Instruction

This instruction should be used if the defendant is a partnership and the defendant's solvency is at issue. This instruction should be given with the instruction in MB 4200A.53, which defines "assets" and "debts." It should also be given as a supplemental instruction to *CACI No. 4205*, which explains insolvency, and *CACI No. 4206*, which concerns the presumption of insolvency.

For related Judicial Council instructions, see *MB 4200A.50[3][b]*.

[3] Comment

[a] Partnership's Insolvency

A debtor that is a partnership is insolvent if, at a fair valuation, the sum of the partnership's debts is greater than the sum of both the partnership's assets and the excess value of each general partner's nonpartnership assets over the partner's

nonpartnership debts [*Civ. Code* § 3439.02(b)]. Certain property is excluded from the computation of the value of the debtor's assets and debts [*Civ. Code* § 3439.02(d), (e); see *Civ. Code* § 3439.01(a)].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 42, *California Judicial Council Uniform Fraudulent Transfer Act Instructions*]:

CACI No. 4205 Insolvency Explained

CACI No. 4206 Presumption of Insolvency

Legal Topics:

For related research and practice materials, see the following legal topics:

Bankruptcy LawState Insolvency LawsBusiness & Corporate LawGeneral PartnershipsDissolution & Winding UpGeneral OverviewCivil ProcedureTrialsJury TrialsJury InstructionsStandard Instructions



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CHAPTER 42A Matthew Bender Fraudulent Transfer Instructions
PART C. CONSTRUCTIVE FRAUD
2. Insolvency

3-42A California Forms of Jury Instruction MB 4200A.51

MB 4200A.51 Insolvency--Secured Obligation on Property Not Included as Asset Is Not Defined as Debt

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

In determining the debtor's solvency or insolvency, do not include as a debt any obligation to the extent that it is secured by a valid lien on the debtor's property not included as an asset.

Authorities: *Civ. Code* § 3439.02(e); Legislative Committee Comment to *Civ. Code* § 3439.02, Paragraph (1).

[2] Use of Instruction

This instruction should be used when the debtor's solvency is at issue and there is a debt secured by a valid lien on the debtor's property that is not included as an asset. The instruction should be used with the instruction in MB 4200A.01 defining "debt." It should be given with *CACI No. 4205*, which explains insolvency, and with the instructions in MB 4200A.04 and MB 4200A.05, which define "lien" and "valid lien."

For related Judicial Council instructions, see *MB 4200A.51*[3][b].

[3] Comment

[a] Treatment of Secured Debt

A debt, to the extent that it is secured by a valid lien on the debtor's property not included as an asset, is not included as a liability in determining the debtor's solvency [*Civ. Code* § 3439.02(e)]. Because a claim by an unsecured creditor cannot be collected from the encumbered interest in a debtor's property, both the encumbered interest and the debt

secured by that interest are excluded from the determination of insolvency [Legislative Committee Comment to *Civ. Code* § 3439.02, Paragraph (1); see *In re Curry & Sorensen, Inc.* (9th Cir. 1990) 112 B.R. 324, 327 (debtor's obligations under contracts that were unenforceable for lack of consideration were not counted as liabilities for purposes of determining whether debtor was insolvent)].

LexisNexis Matthew Bender Expert Practice Tip: --Assets Excluded from Definition: Assets are excluded "to the extent" that there is a valid lien on a debtor's property (that is, only net equity should be included). *By Ronald Oster*

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 42, *California Judicial Council Uniform Fraudulent Transfer Act Instructions*]:

CACI No. 4205 Insolvency Explained

Legal Topics:

For related research and practice materials, see the following legal topics:

Bankruptcy Law State Insolvency Laws Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions



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CHAPTER 42A Matthew Bender Fraudulent Transfer Instructions
PART C. CONSTRUCTIVE FRAUD
2. Insolvency

3-42A California Forms of Jury Instruction MB 4200A.52

MB 4200A.52 Insolvency--Future Child Support Payments Are Not Defined as Debt

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

In determining the debtor's solvency or insolvency, do not include as a debt any future child support payments of the debtor.

Authority: *Mejia v. Reed* (2003) 31 Cal.4th 657, 671-672, 3 Cal.Rptr.3d 390, 74 P.3d 166 .

[2] Use of Instruction

This instruction should be used when the debtor's solvency is at issue and the debtor is obligated to pay future child support payments. The instruction should be used with the instruction in MB 4200A.01 defining "debt." It should be given with *CACI No. 4205*, which explains insolvency.

For related Judicial Council instructions, see *MB 4200A.52[3][b]*.

[3] Comment

[a] Treatment of Future Child Support Payments

Future child support payments should not be viewed as a debt under the Uniform Fraudulent Transfer Act (UFTA) [*Mejia v. Reed* (2003) 31 Cal.4th 657, 669-672, 3 Cal.Rptr.3d 390, 74 P.3d 166]. Treating future child support payments as a debt, while not viewing the earning capacity from which they will probably be paid as an asset, would yield an absurd result. Relatively few parents of young children have current assets sufficient to pay the present discounted value of years and years of future support obligations. Therefore, treating future child support as a current

debt would label many persons with child support obligations as insolvent under the UFTA even though they are current on their child support obligations and will be able to pay future obligations as they become due. This insolvency, moreover, is of a wholly artificial character, because the debtor cannot be compelled to convert future child support obligations into a present cash payment, and in fact generally cannot even voluntarily terminate liability for future support by paying the custodial parent the present value of future payments [*Mejia v. Reed* (2003) 31 Cal.4th 657, 669-672, 3 Cal.Rptr.3d 390, 74 P.3d 166 (applying provisions of UFTA to transfer under marital settlement agreement)].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 42, *California Judicial Council Uniform Fraudulent Transfer Act Instructions*]:

CACI No. 4205 Insolvency Explained

Legal Topics:

For related research and practice materials, see the following legal topics:

Bankruptcy Law State Insolvency Laws Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Family Law Child Support Obligations General Overview



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CHAPTER 42A Matthew Bender Fraudulent Transfer Instructions

PART C. CONSTRUCTIVE FRAUD

2. Insolvency

3-42A California Forms of Jury Instruction MB 4200A.53-MB 4200A.59

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MB 4200A.53Reserved for Future Use



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CHAPTER 42A Matthew Bender Fraudulent Transfer Instructions

PART C. CONSTRUCTIVE FRAUD

3. Proof

3-42A California Forms of Jury Instruction MB 4200A.60

MB 4200A.60 Constructive Fraud--Relation of Parties

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Whenever there is a confidential relationship between the parties to a transaction, the parties are held to a fuller and stricter proof of the consideration and of the transaction's fairness.

Authorities: *Kirkland v. Risso* (1979) 98 Cal.App.3d 971, 978-979, 159 Cal.Rptr. 798 ; *Wood v. Kaplan* (1960) 178 Cal.App.2d 227, 231, 2 Cal.Rptr. 917 .

[2] Use of Instruction

This instruction should be used when there is a familial or other close relationship between the transferor and the transferee. It should be given with *CACI No. 4202*, which provides the essential factual elements of constructive fraudulent transfer. If the cause of action is based on actual fraud, *CACI No. 4200*, which provides the essential factual elements of actual intent to defraud, and *CACI No. 4201*, which describes the specific factors to consider in determining actual intent to defraud, should be used.

For related Judicial Council instructions, see *MB 4200A.60[3][b]*.

[3] Comment

[a] Confidential and Fiduciary Relationships

Confidential and fiduciary relations are synonymous, and exist whenever trust and confidence is reposed by one person

in the integrity and fidelity of another. "The very existence of such a relation precludes the party in whom the trust and confidence is reposed from participating in profit or advantage resulting from the dealings of the parties to the relation" [*In re Estate of Aaron Cover* (1922) 188 Cal. 133, 143, 204 P. 583 ; *Eisenbaum v. Western Energy Res., Inc.* (1990) 218 Cal.App.3d 314, 322, 267 Cal.Rptr. 5].

Transactions between family members or other close confidants are scrutinized very closely for fraud [*Kirkland v. Risso* (1979) 98 Cal.App.3d 971, 978-979, 159 Cal.Rptr. 798 ; *Johnson v. Drew* (1963) 218 Cal.App.2d 614, 621, 32 Cal.Rptr. 540 ; *Wood v. Kaplan* (1960) 178 Cal.App.2d 227, 231, 2 Cal.Rptr. 917 ; *Burrows v. Jorgensen* (1958) 158 Cal.App.2d 644, 648, 323 P.2d 150]. When actual fraud is alleged, a transfer to an insider is considered a "badge of fraud," and it is evidence from which an inference of fraudulent intent may be drawn [*Johnson v. Drew* (1963) 218 Cal.App.2d 614, 621, 32 Cal.Rptr. 540 ; *Burrows v. Jorgensen* (1958) 158 Cal.App.2d 644, 648, 323 P.2d 150 ; Legislative Committee Comment to Civ. Code § 3439.04, Paragraph (5)(a); see MB 4200A.23]. When constructive fraud is alleged and there has been a transfer to a family member or confidant of the debtor, then there must be stricter proof that reasonably equivalent value was received and stricter proof of the overall fairness of the transaction [*Kirkland v. Risso* (1979) 98 Cal.App.3d 971, 978-979, 159 Cal.Rptr. 798 ; *Wood v. Kaplan* (1960) 178 Cal.App.2d 227, 231, 2 Cal.Rptr. 917].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 42, *California Judicial Council Uniform Fraudulent Transfer Act Instructions*]:

CACI No. 4200 Actual Intent to Defraud a Creditor (Civ. Code § 3439.04(a)(1))--Essential Factual Elements

CACI No. 4201 Factors to Consider in Determining Actual Intent to Defraud (Civ. Code § 3439.04(b))

CACI No. 4202 Constructive Fraudulent Transfer (Civ. Code § 3439.04(a)(2))--Essential Factual Elements

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsStandard InstructionsCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionFraudulent TransfersReal Property LawPurchase & SaleFraudulent TransfersTortsBusiness TortsFraud & MisrepresentationConstructive FraudGeneral Overview



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CHAPTER 42A Matthew Bender Fraudulent Transfer Instructions

PART C. CONSTRUCTIVE FRAUD

3. Proof

3-42A California Forms of Jury Instruction MB 4200A.61-MB 4200A.69

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MB 4200A.61Reserved for Future Use



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CHAPTER 42A Matthew Bender Fraudulent Transfer Instructions PART D. DEFENSES

3-42A California Forms of Jury Instruction MB 4200A.70

MB 4200A.70 Right to Sell Property in Absence of Fraud

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

A debtor has the right to sell, encumber, or transfer property to any person unless there is fraud.

Authorities: *Cal. Const. art. I, § 1*; *Civ. Code § 671*; *Tennant v. John Tennant Mem'l Home* (1914) 167 Cal. 570, 575, 140 P. 242 ; *Gregory v. City of San Juan Capistrano* (1983) 142 Cal.App.3d 72, 88, 191 Cal.Rptr. 47 , disapproved on other grounds, *Fisher v. City of Berkeley* (1984) 37 Cal.3d 644, 686 n.43, 209 Cal.Rptr. 682, 693 P.2d 261 .

[2] Use of Instruction

This instruction should be used, as a supplement to *CACI* No. 4207, to inform the jury that a debtor has a right to transfer property absent fraud.

For related Judicial Council instructions, see *MB 4200A.70*[3][b].

[3] Comment

[a] Constitutional Right to Dispose of Property

The California Constitution guarantees every person the inalienable right to acquire, possess, and protect property [*Cal. Const. art. I, § 1*]. Because the ability to sell and transfer property is a fundamental aspect of property ownership [*United States v. General Motors Corp.* (1945) 323 U.S. 373, 378, 65 S.Ct. 357, 89 L.Ed. 311 ; *Gregory v. City of San Juan Capistrano* (1983) 142 Cal.App.3d 72, 88, 191 Cal.Rptr. 47 , disapproved on other grounds, *Fisher v. City of Berkeley* (1984) 37 Cal.3d 644, 686 n.43, 209 Cal.Rptr. 682, 693 P.2d 261], the constitutional guarantee includes the

right to dispose of property [*Tennant v. John Tennant Mem'l Home* (1914) 167 Cal. 570, 575, 140 P. 242 ; *Gregory v. City of San Juan Capistrano* (1983) 142 Cal.App.3d 72, 88, 191 Cal.Rptr. 47 , *disapproved on other grounds*, *Fisher v. City of Berkeley* (1984) 37 Cal.3d 644, 686 n.43, 209 Cal.Rptr. 682, 693 P.2d 261]. This right of disposition has been confirmed by statute [Civ. Code § 671].

The right of disposition applies only in the absence of fraud [*Bank of Cal. v. Virtue & Scheck, Inc.* (1983) 140 Cal.App.3d 1026, 1035, 190 Cal.Rptr. 54 ; *see Gregory v. City of San Juan Capistrano* (1983) 142 Cal.App.3d 72, 88, 191 Cal.Rptr. 47 (recognizing right to sell and transfer property "absent an illegal purpose"; constitutional guaranty includes right to dispose of property "in such innocent manner" as owner pleases)].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 42, *California Judicial Council Uniform Fraudulent Transfer Act Instructions*]:

CACI No. 4207 Affirmative Defense of Good Faith (Civ. Code § 3439.08)

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsStandard InstructionsCivil ProcedureJudgmentsEntry of
JudgmentsEnforcement & ExecutionFraudulent TransfersReal Property LawPurchase & SaleFraudulent
TransfersTortsBusiness TortsFraud & MisrepresentationActual FraudDefensesTortsBusiness TortsFraud &
MisrepresentationConstructive FraudDefenses



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CHAPTER 42A Matthew Bender Fraudulent Transfer Instructions
PART D. DEFENSES

3-42A California Forms of Jury Instruction MB 4200A.71

MB 4200A.71 Right of Debtor to Prefer Creditor

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

In the absence of fraud, and even though insolvent, a debtor may pay one creditor in preference to another, or may give to one creditor security for the payment of [his/her/its] demand in preference to another.

Authorities: *Kemp v. Lynch* (1937) 8 Cal.2d 457, 460, 65 P.2d 1316 ; *Bank of Cal. v. Virtue & Scheck, Inc.* (1983) 140 Cal.App.3d 1026, 1035, 190 Cal.Rptr. 54 ; *Pope v. National Aero Fin. Co.* (1965) 236 Cal.App.2d 722, 729, 46 Cal.Rptr. 233 .

[2] Use of Instruction

This instruction should be used, as a supplement to *CACI* No. 4207, when there is evidence that the debtor paid or transferred property to a creditor other than the plaintiff.

For related Judicial Council instructions, see *MB 4200A.71*[3][b].

[3] Comment

[a] Preferring Creditor

A debtor, even an insolvent debtor, may prefer one creditor to another in the absence of fraud [*Kemp v. Lynch* (1937) 8 Cal.2d 457, 460, 65 P.2d 1316 ; *Bank of Cal. v. Virtue & Scheck, Inc.* (1983) 140 Cal.App.3d 1026, 1035, 190 Cal.Rptr. 54 ; *Pope v. National Aero Fin. Co.* (1965) 236 Cal.App.2d 722, 729, 46 Cal.Rptr. 233]. When there is fraud, then the transaction between the debtor and creditor may be challenged and found voidable under the Uniform Fraudulent

Transfer Act [Civ. Code §§ 3439.04(a), (b), 3439.05, 3439.07(a)(1); see *Kalway v. City of Berkeley* (2007) 151 Cal.App.4th 827, 837, 60 Cal.Rptr.3d 477 (statute inapplicable)].

LexisNexis Matthew Bender Expert Practice Tip--Preference Can Be Set Aside: A debtor can still end up in bankruptcy, and a preference to one creditor over another can be set aside in the bankruptcy court. By *Ronald Oster*

Lexis/Nexis Matthew Bender Expert Practice Tip--Potential Conspiracy: Preferring one creditor can be used as an element of fraud as well, if there is a potential conspiracy between the third party creditor and the debtor to shield the debtor's assets [see *Kemp v. Lynch* (1937) 8 Cal.2d 457, 460-461, 65 P.2d 1316]. By *Susan Vaage*

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 42, *California Judicial Council Uniform Fraudulent Transfer Act Instructions*]:

CACI No. 4201 Factors to Consider in Determining Actual Intent to Defraud (Civ. Code § 3439.04(b))

CACI No. 4202 Constructive Fraudulent Transfer (Civ. Code § 3439.04(a)(2))--Essential Factual Elements

CACI No. 4203 Constructive Fraudulent Transfer (Insolvency) (Civ. Code § 3439.05)--Essential Factual Elements

CACI No. 4207 Affirmative Defense of Good Faith (Civ. Code § 3439.08)

Legal Topics:

For related research and practice materials, see the following legal topics:

Bankruptcy Law State Insolvency Laws Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Civil Procedure Judgments Entry of Judgments Enforcement & Execution Fraudulent Transfers Real Property Law Purchase & Sale Fraudulent Transfers



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California Forms of Jury Instruction

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CHAPTER 42A Matthew Bender Fraudulent Transfer Instructions
PART D. DEFENSES

3-42A California Forms of Jury Instruction MB 4200A.72

MB 4200A.72 Definition of Good Faith**[1] Instruction**[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

"Good faith" means that _____ [*name of transferee*] acted without fraudulent intent and that [he/she/it] did not collude with the debtor or otherwise actively participate in the debtor's fraudulent scheme. In other words, "good faith" means that _____ [*name of transferee*] did not engage in deliberate wrongful conduct.

Authorities: *In re SLF News Distributors, Inc.* (8th Cir. 1981) 649 F.2d 613, 616 ; *Chorost v. Grand Rapids Factory Showrooms* (D.N.J. 1948) 77 F.Supp. 276, 281 , *aff'd*, (3d Cir. 1949) 172 F.2d 327, 329 ; *Annod Corp. v. Hamilton & Samuels* (2002) 100 Cal.App.4th 1286, 1295, 1299, 123 Cal.Rptr.2d 924 ; *Lewis v. Superior Court* (1994) 30 Cal.App.4th 1850, 1858-1859, 37 Cal.Rptr.2d 63 ; Legislative Committee Comment to Civ. Code § 3439.08, Paragraph (1).

[2] Use of Instruction

This instruction should be used to define "good faith" for the jury. It should be used when a person who purchased property from the debtor or released the debtor from an obligation alleges that he or she is a good faith purchaser. The instruction should be given with *CACI No. 4207*.

For related Judicial Council instructions, see *MB 4200A.72[3][b]*.

[3] Comment**[a] Definition**

The term "good faith" is defined in the Legislative Committee Comment to *Civ. Code* § 3439.08 as it is defined in the first sentence of this instruction. The terms "fraudulent intent," "collude," and "actively participate" in the definition are the language of deliberate wrongful conduct. The definition thus belies any notion that a transferee can become a fraudulent transferee by accident or even negligently [*Lewis v. Superior Court* (1994) 30 Cal.App.4th 1850, 1858-1859, 37 Cal.Rptr.2d 63]. Under this definition, the third party transferee is not required to prove that he or she did not know of the debtor's intent to defraud or of the debtor's insolvency [Legislative Committee Comment to *Civ. Code* § 3439.08, Paragraph (1)]. However, knowledge of the fraud, or even knowledge of facts that would put a reasonably prudent person on inquiry about possible fraud, would defeat this good faith requirement [*In re SLF News Distributors, Inc.* (8th Cir. 1981) 649 F.2d 613, 616 ; *Chorost v. Grand Rapids Factory Showrooms* (D.N.J. 1948) 77 F.Supp. 276, 281 , *aff'd*, (3d Cir. 1949) 172 F.2d 327, 329].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 42, *California Judicial Council Uniform Fraudulent Transfer Act Instructions*]:

CACI No. 4207 Affirmative Defense of Good Faith (Civ. Code § 3439.08)

Legal Topics:

For related research and practice materials, see the following legal topics:

Bankruptcy Law State Insolvency Laws Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Civil Procedure Judgments Entry of Judgments Enforcement & Execution Fraudulent Transfers Real Property Law Purchase & Sale Fraudulent Transfers



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CHAPTER 42A Matthew Bender Fraudulent Transfer Instructions
PART D. DEFENSES

3-42A California Forms of Jury Instruction MB 4200A.73

MB 4200A.73 Definition of Reasonably Equivalent Value

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

"Reasonably equivalent value" means an amount that is reasonably equal to the value of the property transferred. Full payment in cash may constitute the "reasonably equivalent value." However, cash payment is not required. Cash plus a legal obligation to pay the balance of the purchase price also may represent the "reasonably equivalent value."

Authorities: *Civ. Code § 3439.08(a); Lewis v. Superior Court (1994) 30 Cal.App.4th 1850, 1874, 1877, 37 Cal.Rptr.2d 63.*

[2] Use of Instruction

This instruction should be used to define "reasonably equivalent value" for the jury. It should be used when a person who purchased property from the debtor or released the debtor from an obligation alleged that he or she is a good faith purchaser. The instruction should be given with *CACI No. 4207*.

For related Judicial Council instructions, see *MB 4200A.73[3][b]*.

[3] Comment

[a] Definition

The term "reasonably equivalent value" is not defined in *Civ. Code § 3439.04(a)* or the Legislative Committee Comment to that section. However, one case clarified that the concept of value necessarily includes debt as well as cash

payment, and that the timing of actual payment is irrelevant [*Lewis v. Superior Court* (1994) 30 Cal.App.4th 1850, 1874, 1877, 37 Cal.Rptr.2d 63].

LexisNexis Matthew Bender Expert Practice Tip: --Reasonably Equivalent: "Reasonably equivalent" does not mean "exact." *By Ronald Oster*

LexisNexis Matthew Bender Expert Practice Tip: --"Reasonably Equivalent Value": "Reasonably equivalent value" is a question for the trier of fact. *By Susan Vaage*

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 42, *California Judicial Council Uniform Fraudulent Transfer Act Instructions*]:

CACI No. 4200 Actual Intent to Defraud a Creditor (*Civ. Code § 3439.04(a)(1)*)--Essential Factual Elements

CACI No. 4202 Constructive Fraudulent Transfer (*Civ. Code § 3439.04(a)(2)*)--Essential Factual Elements

CACI No. 4203 Constructive Fraudulent Transfer (Insolvency) (*Civ. Code § 3439.05*)--Essential Factual Elements

CACI No. 4207 Affirmative Defense of Good Faith (*Civ. Code § 3439.08*)

Legal Topics:

For related research and practice materials, see the following legal topics:

Bankruptcy Law State Insolvency Laws Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Civil Procedure Judgments Entry of Judgments Enforcement & Execution Fraudulent Transfers Real Property Law Purchase & Sale Fraudulent Transfers



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CHAPTER 42A Matthew Bender Fraudulent Transfer Instructions
PART D. DEFENSES

3-42A California Forms of Jury Instruction MB 4200A.74

MB 4200A.74 Transferee's or Obligee's Knowledge

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Evidence of _____ [the (transferee/obligee) or insert name of transferee or obligee]'s knowledge of the debtor's insolvency at the time that the [property was transferred/obligation was incurred] is not relevant on the issue of _____ [the (transferee/obligee) or insert name of transferee or obligee]'s good faith. Therefore, you may not consider any evidence of this knowledge in making your determination on the issue of good faith.

Authority: Legislative Committee Comment to *Civ. Code* § 3439.08, Paragraph (1).

[2] Use of Instruction

This instruction should be used when there is evidence that the transferee may have known that the debtor was insolvent at the time of the transaction. If the transferee was an insider, then the instruction in MB 4200A.75 should be used. This instruction should be given with *CACI No. 4207*.

For related Judicial Council instructions, see *MB 4200A.74*[3][b].

[3] Comment

[a] Knowledge

Whether the transferee or obligee knew of the debtor's insolvency at the time of the transaction is not relevant to the issue of the transferee's or obligee's good faith [Legislative Committee Comment to *Civ. Code* § 3439.08, Paragraph (1);

but see MB 4200A.76[3] for discussion on transferee/obligee-insider's knowledge of debtor's insolvency]. However, the transferee's or obligee's knowledge of fraud, or even knowledge of facts that would put a reasonably prudent person on inquiry about possible fraud, would defeat the good faith requirement [*In re SLF News Distributors, Inc.* (8th Cir. 1981) 649 F.2d 613, 616 ; *Chorost v. Grand Rapids Factory Showrooms* (D.N.J. 1948) 77 F.Supp. 276, 281 , *aff'd*, (3d Cir. 1949) 172 F.2d 327, 329].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 42, *California Judicial Council Uniform Fraudulent Transfer Act Instructions*]:

CACI No. 4207 Affirmative Defense of Good Faith (*Civ. Code* § 3439.08)

Legal Topics:

For related research and practice materials, see the following legal topics:

Bankruptcy Law State Insolvency Laws Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Civil Procedure Judgments Entry of Judgments Enforcement & Execution Fraudulent Transfers Real Property Law Purchase & Sale Fraudulent Transfers



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CHAPTER 42A Matthew Bender Fraudulent Transfer Instructions
PART D. DEFENSES

3-42A California Forms of Jury Instruction MB 4200A.75

MB 4200A.75 Knowledge of Transferee or Obligee Who Is Insider

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

If you find that _____ [*name of transferee or obligee*] was an insider who received [property/an obligation] from an insolvent debtor, and that [he/she/it] had reasonable cause to believe that the debtor was insolvent at the time of the transaction, then _____ [*name of transferee or obligee*] was not a good faith [transferee/obligee].

Authorities: *Dean v. Davis* (1917) 242 U.S. 438, 444-445, 37 S.Ct. 130, 61 L.Ed. 419 ; *In re Candor Diamond Corp.* (Bankr. S.D.N.Y. 1987) 76 B.R. 342, 351-352 ; Legislative Committee Comment to Civ. Code § 3439.08, Paragraph (4).

[2] Use of Instruction

This instruction should be used when the debtor transferred property to or incurred an obligation from an insider who had reason to know of the debtor's insolvency at the time of the transaction. This instruction should be given with *CACI No. 4207*.

For related Judicial Council instructions, see *MB 4200A.75[3][b]*.

[3] Comment

[a] Insiders

The term "insider" should be defined for the jury. *Corp. Code* § 25402 provides that "[i]t is unlawful for an issuer or any person who is an officer, director or controlling person of an issuer or any other person whose relationship to the issuer

gives him access, directly or indirectly, to material information about the issuer not generally available to the public, to purchase or sell any security of the issuer in this state at a time when he knows material information about the issuer gained from such relationship which would significantly affect the market price of that security and which is not generally available to the public, and which he knows is not intended to be so available, unless he has reason to believe that the person selling to or buying from him is also in possession of the information." Damages are available for violation of this provision [*see Corp. Code §§ 25502, 25502.5; see also 15 U.S.C.S. § 78a et seq. (Securities Exchange Act of 1934)*].

An insider who acquires property or an obligation from a debtor that the insider knows or has reasonable cause to believe was insolvent at the time of the transaction is not a good faith transferee [Legislative Committee Comment to *Civ. Code § 3439.08*, Paragraph (4); *see Dean v. Davis* (1917) 242 U.S. 438, 444-445, 37 S.Ct. 130, 61 L.Ed. 419 ; *In re Candor Diamond Corp.* (Bankr. S.D.N.Y. 1987) 76 B.R. 342, 351-352] .

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [*see Ch. 42, California Judicial Council Uniform Fraudulent Transfer Act Instructions*]:

CACI No. 4207 Affirmative Defense of Good Faith (Civ. Code § 3439.08)

Legal Topics:

For related research and practice materials, see the following legal topics:

Bankruptcy Law State Insolvency Laws Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Civil Procedure Judgments Entry of Judgments Enforcement & Execution Fraudulent Transfers Real Property Law Purchase & Sale Fraudulent Transfers



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CHAPTER 42A Matthew Bender Fraudulent Transfer Instructions
PART D. DEFENSES

3-42A California Forms of Jury Instruction MB 4200A.76

MB 4200A.76 Defense of Laches

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Defendant alleges that this lawsuit was not filed within a reasonable time. To prevail on this defense, Defendant must prove both of the following:

- 1. That Plaintiff unreasonably delayed in bringing this lawsuit; and**
- 2. That Plaintiff acquiesced in the transaction at issue or Defendant was prejudiced by Plaintiff's delay in bringing this action.**

Authorities: *Civ. Code* § 3439.10; *Miller v. Eisenhower Med. Ctr.* (1980) 27 Cal.3d 614, 624, 166 Cal.Rptr. 826, 614 P.2d 258 ; *Conti v. Board of Civil Serv. Comm'rs* (1969) 1 Cal.3d 351, 359, 82 Cal.Rptr. 337, 461 P.2d 617 ; *Adams v. Bell* (1936) 5 Cal.2d 697, 703, 56 P.2d 208 ; *Richardson v. Michel* (1941) 45 Cal.App.2d 188, 200, 113 P.2d 916 .

[2] Use of Instruction

This instruction should be used if the defendant raises the defense of laches.

For related Judicial Council instructions, see *MB 4200A.76[3][b]*.

[3] Comment

[a] Laches

Laches should be used as a defense to a fraudulent transfer action [Civ. Code § 3439.10; *Adams v. Bell* (1936) 5 Cal.2d 697, 703, 56 P.2d 208 ; *Richardson v. Michel* (1941) 45 Cal.App.2d 188, 200, 113 P.2d 916]. It is specifically included in the Uniform Fraudulent Transfer Act as an appropriate defense to an untimely action under the Act [Civ. Code § 3439.10; Legislative Committee Comment to Civ. Code § 3439.10]. To establish this defense, the defendant must prove that the plaintiff unreasonably delayed in bringing the lawsuit and that the plaintiff acquiesced in the transaction at issue or the defendant was prejudiced by plaintiff's delay in bringing the action [*Miller v. Eisenhower Med. Ctr.* (1980) 27 Cal.3d 614, 624, 166 Cal.Rptr. 826, 614 P.2d 258 ; *Conti v. Board of Civil Serv. Comm'rs* (1969) 1 Cal.3d 351, 359, 82 Cal.Rptr. 337, 461 P.2d 617]. The defense of laches may be successfully invoked even when the elapsed period is less than the period allowed under the applicable statute of limitations [*Holt v. County of Monterey* (1982) 128 Cal.App.3d 797, 801, 180 Cal.Rptr. 514].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 42, *California Judicial Council Uniform Fraudulent Transfer Act Instructions*]:

CACI No. 4208 Statute of Limitations Defense--Actual and Constructive Fraud (Civ. Code § 3439.09)

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsStandard InstructionsCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionFraudulent TransfersReal Property LawPurchase & SaleFraudulent TransfersTortsBusiness TortsFraud & MisrepresentationActual FraudDefensesTortsBusiness TortsFraud & MisrepresentationConstructive FraudDefenses



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CHAPTER 43 California Judicial Council Unlawful Detainer Instructions *

5-43 California Forms of Jury Instruction 43.syn

§ 43.syn Synopsis to Chapter 43: California Judicial Council Unlawful Detainer Instructions *

CACI 4300 Introductory Instruction

CACI 4301 Expiration of Fixed-Term Tenancy--Essential Factual Elements

CACI 4302 Termination for Failure to Pay Rent--Essential Factual Elements

CACI 4303 Sufficiency and Service of Notice of Termination for Failure to Pay Rent

CACI 4304 Termination for Violation of Terms of Lease/Agreement--Essential Factual Elements

CACI 4305 Sufficiency and Service of Notice of Termination for Violation of Terms of Agreement

CACI 4306 Termination of Month-to-Month Tenancy--Essential Factual Elements

CACI 4307 Sufficiency and Service of Notice of Termination of Month-to-Month Tenancy

CACI 4308-CACI 4319 Reserved for Future Use

CACI 4320 Affirmative Defense--Implied Warranty of Habitability

CACI 4321 Affirmative Defense--Retaliatory Eviction--Tenant's Complaint (Civ. Code, § 1942.5)

CACI 4322 Affirmative Defense--Retaliatory Eviction--Engaging in Legally Protected Activity (Civ. Code, § 1942.5(c))

CACI 4323 Affirmative Defense--Discriminatory Eviction (Unruh Act)

CACI 4324 Affirmative Defense--Waiver by Acceptance of Rent

CACI 4325 Affirmative Defense--Failure to Comply With Rent Control Ordinance

CACI 4326 Affirmative Defense--Repair and Deduct

CACI 4327 Affirmative Defense--Landlord's Refusal of Rent

CACI 4328-CACI 4339 Reserved for Future Use

CACI 4340 Damages for Reasonable Rental Value

CACI 4341 Statutory Damages on Showing of Malice (Code Civ. Proc., § 1174(b))

CACI 4342-CACI 4999 Reserved for Future Use

CACI VF-4300 Termination Due to Failure to Pay Rent

CACI VF-4301 Termination Due to Failure to Pay Rent--Affirmative Defense--Breach of Implied Warranty of Habitability

CACI VF-4302 Termination Due to Violation of Terms of Lease/Agreement

CACI VF-4303-CACI VF-4399 Reserved for Future Use



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CHAPTER 43 California Judicial Council Unlawful Detainer Instructions *

5-43 California Forms of Jury Instruction Scope

Scope

SCOPE

This chapter contains the California Judicial Council's "Unlawful Detainer Series" of jury instructions [CACI No. 4300 et seq.]. The Judicial Council of California Civil Jury Instructions (CACI) included in this publication are the product of the Judicial Council of California Task Force on Jury Instructions, which are updated by the Judicial Council of California Advisory Committee on Civil Jury Instructions.

This chapter includes instructions on the following topics:

- Introductory instruction for unlawful detainer proceeding [CACI No. 4300].
- Elements to establish fixed-term tenancy [CACI No. 4301].
- Elements to establish termination of tenancy for failure to pay rent [CACI No. 4302].
- Whether notice of termination for failure to pay rent was sufficient [CACI No. 4303].
- Elements to establish termination of tenancy for tenant's violation of lease [CACI No. 4304].
- Whether notice of termination for violation of lease was sufficient [CACI No. 4305].
- Elements to establish termination of month-to-month tenancy [CACI No. 4306].
- Whether notice of termination of month-to-month tenancy was sufficient [CACI No. 4307].
- Tenant's defense of implied warranty of habitability to termination of tenancy [CACI No. 4320].
- Tenant's defense of landlord's retaliatory eviction because of complaint to termination of tenancy [CACI No. 4321].

- Tenant's defense of landlord's retaliatory eviction because of protected activity to termination of tenancy [*CACI No. 4322*].
- Tenant's defense of landlord's discriminatory eviction to termination of tenancy [*CACI No. 4323*].
- Tenant's defense of landlord's waiver by acceptance of rent to termination of tenancy [*CACI No. 4324*].
- Tenant's defense of landlord's failure to comply with rent control ordinance to termination of tenancy [*CACI No. 4325*].
- Tenant's defense of repair and deduct [*CACI No. 4326*].
- Tenant's defense of landlord's refusal of rent [*CACI No. 4327*].
- Reasonable rental value damages in eviction case [*CACI No. 4340*].
- Statutory damages due to landlord's malice in eviction case [*CACI No. 4341*].

This chapter also includes special verdict forms [*CACI No. VF-4300- CACI No. VF-4302*].



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CHAPTER 43 California Judicial Council Unlawful Detainer Instructions *

5-43 California Forms of Jury Instruction CACI 4300

CACI 4300 Introductory Instruction

This is an action for what is called unlawful detainer. [Name of plaintiff], the [landlord/tenant], claims that [name of defendant] is [his/her/its] [tenant/subtenant] under a [lease/rental agreement/sublease] and that [name of defendant] no longer has the right to occupy the property [by subleasing to [name of subtenant]]. [Name of plaintiff] seeks to recover possession of the property from [name of defendant]. [Name of defendant] claims that [he/she/it] still has the right to occupy the property because [insert defenses at issue].

The property involved in this case is [describe property: e.g., "an apartment," "a house," "space in a commercial building"] located in [city or area] at [address].

New August 2007

Directions for Use

If the plaintiff is the landlord or owner and the defendant is the tenant, select "landlord" and "tenant," in the first sentence. If the plaintiff is a tenant seeking to recover possession from a subtenant, select "tenant" and "subtenant." (*Code Civ. Proc.*, § 1161(3).)

If the plaintiff is the landlord or owner, select either "lease" or "rental agreement" in the first sentence. Commercial documents are usually called "leases" while residential documents are often called "rental agreements." Select the term that is used on the written document. If the plaintiff is a tenant seeking to recover possession from a subtenant, select "sublease."

If the defendant is a tenant who has subleased the premises to someone else, add the bracketed language in the first paragraph referring to subleasing.

Sources and Authority

■ *Code of Civil Procedure section 1171* provides: "Whenever an issue of fact is presented by the pleadings, it must be tried by a jury, unless such jury be waived as in other cases. The jury shall be formed in the same manner as other trial juries in an action of the same jurisdictional classification in the Court in which the action is pending."

■ *Code of Civil Procedure section 1161(3)* provides, in part: "A tenant may take proceedings, similar to those prescribed in this chapter, to obtain possession of the premises let to a subtenant or held by a servant, employee, agent, or licensee, in case of his or her unlawful detention of the premises underlet to him or her or held by him or her."

■ "The remedy of unlawful detainer is designed to provide means by which the timely possession of premises which are wrongfully withheld may be secured to the person entitled thereto." (*Knowles v. Robinson* (1963) 60 Cal.2d 620, 625 [36 Cal.Rptr. 33, 387 P.2d 833] .)

■ "Chapter 4 of title 3 of part 3 of the Code of Civil Procedure is commonly known as the Unlawful Detainer Act (hereafter, the Act). The Act is broad in scope and available to both lessors and lessees who have suffered certain wrongs committed by the other. Procedures and proceedings in unlawful detainer were not known at common law and are entirely creatures of statute. As such, they are governed solely by the statutes which created them. Thus, where the Act 'deals with matters of practice, its provisions supersede the rules of practice contained in other portions of the code.' " (*Losornio v. Motta* (1998) 67 Cal.App.4th 110, 113 [78 Cal.Rptr.2d 799] , internal citations omitted.)

Secondary Sources

12 Witkin, Summary of California Law (10th ed. 2006) Real Property, § 703

2 California Landlord-Tenant Practice (Cont.Ed.Bar 2d ed.) §§ 9.5, 9.34-9.36

1 California Eviction Defense Manual (Cont.Ed.Bar 2d ed.) §§ 1.4-1.5

7 *California Real Estate Law and Practice, Ch. 210, Unlawful Detainer, § 210.01* (Matthew Bender)

Matthew Bender Practice Guide: California Landlord-Tenant Litigation, Ch. 5, Unlawful Detainer, 5.02

29 *California Forms of Pleading and Practice, Ch. 333, Landlord and Tenant: Eviction Actions, § 333.12* (Matthew Bender)

Miller & Starr, California Real Estate (Thomson West) Ch. 19, *Landlord-Tenant*, § 19:214

Publisher's Notes

There is no BAJI instruction on this subject.

LexisNexis Matthew Bender Expert Practice Tip--Unlawful Detainer Not Just for Landlords and Tenants: Actions in unlawful detainer may involve other than landlords and tenants. For example, the action may be filed by lenders foreclosing on a former owner, or an owner evicting an employee (such as a property manager). In either case, no true landlord-tenant relationship exists. It may be necessary in such cases to insert the proper titles in place of landlord or tenant in the instruction. *By Steven R.*

Kellman

LexisNexis Matthew Bender Expert Practice Tip--Properly Describe Address of Property: There may be property addresses that are not typical, like a separately-rented room in a house, a garage, or a part of a home (e.g., studio or in-law unit). These must be described in detail (e.g., master bedroom in the house located at [address of house]). If the address is ambiguous or inaccurate, a writ of possession obtained after a judgment for plaintiff may be difficult to execute and enforce. *By Steven R. Kellman*

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Real Property Law Landlord & Tenant Landlord's Remedies & Rights Eviction Actions Forcible Entry & Detainer Real Property Law Title Quality Adverse Claim Actions Unlawful Detainer

* Steven R. Kellman, who wrote the Practice Tips in this chapter, has been in private practice since 1982, practicing landlord-tenant law with an emphasis on representing tenants. In 1993 he founded the Tenants Legal Center, located in San Diego. He has lectured for the CEB and professional and community groups on this subject. He has authored and contributed to several legal publications. Mr. Kellman has written an informational newspaper series feature on landlord-tenant law appearing in the *San Diego Union-Tribune*, *Los Angeles Times*, and *San Francisco Chronicle*. He has served as a judge pro tem, and on legislative committees for proposed landlord-tenant legislation.



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California Forms of Jury Instruction

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CHAPTER 43 California Judicial Council Unlawful Detainer Instructions *

5-43 California Forms of Jury Instruction CACI 4301

CACI 4301 Expiration of Fixed-Term Tenancy--Essential Factual Elements

[*Name of plaintiff*] **claims that** [*name of defendant*] **[and [*name of subtenant*], a subtenant of [*name of defendant*],] no longer [has/have] the right to occupy the property because the [lease/rental agreement/sublease] has ended. To establish this claim, [*name of plaintiff*] must prove all of the following:**

- 1. That [*name of plaintiff*] [owns/leases] the property;**
- 2. That [*name of plaintiff*] [leased/subleased] the property to [*name of defendant*] until [*insert end date*];**
- 3. That [*name of plaintiff*] did not give [*name of defendant*] permission to continue occupying the property after the [lease/rental agreement/sublease] ended; and**
- 4. That [*name of defendant*] [or subtenant [*name of subtenant*]] is still occupying the property.**

New August 2007

Directions for Use

Uncontested elements may be deleted from this instruction.

If the plaintiff is the landlord or owner, select "lease" or "rental agreement" in the first sentence and in element 3 as appropriate, "owns" in element 1, and "leased" in element 2. Commercial documents are usually called "leases" while residential documents are often called "rental agreements." Select the term that is used on the written document.

If the plaintiff is a tenant seeking to recover possession from a subtenant, select "sublease" in the first paragraph and in element 3, "leases" in element 1, and "subleased" in element 2. (*Code Civ. Proc.*, § 1161(3).)

If persons other than the tenant-defendant are occupying the premises, include the bracketed language in the first paragraph and in element 4.

Sources and Authority

- *Code of Civil Procedure* section 1161 provides, in part:

A tenant of real property ... is guilty of unlawful detainer:

1. When he or she continues in possession, in person or by subtenant ... after the expiration of the term for which it is let to him or her; provided the expiration is of a nondefault nature however brought about without the permission of his or her landlord, or the successor in estate of his or her landlord, if applicable; including the case where the person to be removed became the occupant of the premises as a servant, employee, agent, or licensee and the relation of master and servant, or employer and employee, or principal and agent, or licensor and licensee, has been lawfully terminated or the time fixed for occupancy by the agreement between the parties has expired; but nothing in this subdivision shall be construed as preventing the removal of the occupant in any other lawful manner; but in case of a tenancy at will, it must first be terminated by notice, as prescribed in the Civil Code.

...

3. A tenant may take proceedings, similar to those prescribed in this chapter, to obtain possession of the premises let to a subtenant or held by a servant, employee, agent, or licensee, in case of his or her unlawful detention of the premises underlet to him or her or held by him or her.

- *Civil Code* section 1952.3(a) provides, in part: "[I]f the lessor brings an unlawful detainer proceeding and possession of the property is no longer in issue because possession of the property has been delivered to the lessor before trial or, if there is no trial, before judgment is entered, the case becomes an ordinary civil action"

- " 'In order that such an action may be maintained the conventional relation of landlord and tenant must be shown to exist. In other words, the action is limited to those cases in which the tenant is estopped to deny the landlord's title.' " (*Fredericksen v. McCosker* (1956) 143 Cal.App.2d 114, 116 [299 P.2d 908] , internal citations omitted.)

- "The most important difference between a periodic tenancy and a tenancy for a fixed term--such as six months--is that the latter terminates at the end of such term, without any requirement of notice as in the former. In order to create an estate for a definite period, the duration must be capable of exact computation when it becomes possessory, otherwise no such estate is created." (*Camp v. Matich* (1948) 87 Cal.App.2d 660, 665-666 [197 P.2d 345] , internal citations omitted.)

- "It is well established that it is the duty of the tenant as soon as his tenancy expires by its own limitations, to surrender the possession of the premises and that no notice of termination is necessary, the lease itself terminating the tenancy; and if he continues in possession beyond that period without the permission of the landlord, he is guilty of unlawful detainer, and an action may be commenced against him at once, under the provisions of subdivision 1 of

section 1161 of the Code of Civil Procedure, without the service upon him of any notice." (*Ryland v. Appelbaum* (1924) 70 Cal.App. 268, 270 [233 P. 356] , internal citations omitted.)

■ "If the tenant gives up possession of the property after the commencement of an unlawful detainer proceeding, the action becomes an ordinary one for damages." (*Fish Construction Co. v. Moselle Coach Works, Inc.* (1983) 148 Cal.App.3d 654, 658 [196 Cal.Rptr. 174] .)

Secondary Sources

12 Witkin, Summary of California Law (10th ed. 2006) Real Property, §§ 664, 678, 721

1 California Landlord-Tenant Practice (Cont.Ed.Bar 2d ed.) § 8.82

1 California Eviction Defense Manual (Cont.Ed.Bar 2d ed.) §§ 5.4, 7.8

23 California Points and Authorities, Ch. 236, Unlawful Detainer, § 236.42 (Matthew Bender)

7 California Real Estate Law and Practice, Ch. 210, Unlawful Detainer, §§ 210.21, 210.27 (Matthew Bender)

Matthew Bender Practice Guide: California Landlord-Tenant Litigation, Ch. 5, Unlawful Detainer, 5.07

29 California Forms of Pleading and Practice, Ch. 333, Landlord and Tenant: Eviction Actions, § 333.10 (Matthew Bender)

Miller & Starr, California Real Estate (Thomson West) Ch. 19, Landlord-Tenant, § 19:43

Publisher's Notes

There is no BAJI instruction on this subject.

LexisNexis Matthew Bender Expert Practice Tip--Plaintiff Must Have Authority to Lease: The plaintiff must be the owner or an agent of the owner acting with authority, unless the plaintiff is a tenant and subleasing to a subtenant. Modify element 1 to reflect any issues about whether this is the proper plaintiff to sue for the lease termination. *By Steven R. Kellman*

LexisNexis Matthew Bender Expert Practice Tip--Lease May Include Extension or Option to Extend: Some leases include extension provisions. For example, a lease may automatically renew unless a specific notice is given. Other leases have an option to extend that a tenant may believe was exercised. Modify this instruction to raise any issues regarding the true termination date of the lease if this is in dispute. *By Steven R. Kellman*

LexisNexis Matthew Bender Expert Practice Tip--Express or Implied Permission to Continue Occupying Property: Permission for a tenant to remain in the property may be given by document or action. Modify this instruction to reflect this if permission to remain in possession is in issue. *By Steven R. Kellman*

LexisNexis Matthew Bender Expert Practice Tip--Only One Defendant Need be in Possession: If there are multiple cotenant defendants, only one defendant must remain in possession of the property for the case to be heard as an unlawful detainer. *Civ. Code § 1952.3(a)* converts the matter to an ordinary civil action only when all cotenants have vacated. *By Steven R. Kellman*

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Real Property Law Landlord & Tenant Landlord's Remedies & Rights Eviction Actions Forcible Entry & Detainer Real Property Law Landlord & Tenant Tenancies Term Tenancies

* Steven R. Kellman, who wrote the Practice Tips in this chapter, has been in private practice since 1982, practicing landlord-tenant law with an emphasis on representing tenants. In 1993 he founded the Tenants Legal Center, located in San Diego. He has lectured for the CEB and professional and community groups on this subject. He has authored and contributed to several legal publications. Mr. Kellman has written an informational newspaper series feature on landlord-tenant law appearing in the *San Diego Union-Tribune*, *Los Angeles Times*, and *San Francisco Chronicle*. He has served as a judge pro tem, and on legislative committees for proposed landlord-tenant legislation.



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California Forms of Jury Instruction

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CHAPTER 43 California Judicial Council Unlawful Detainer Instructions *

5-43 California Forms of Jury Instruction CACI 4302

CACI 4302 Termination for Failure to Pay Rent--Essential Factual Elements

[*Name of plaintiff*] **claims that** [*name of defendant*] **[and** [*name of subtenant*], **a subtenant of** [*name of defendant*],] **no longer [has/have] the right to occupy the property because** [*name of defendant*] **has failed to pay the rent. To establish this claim, [*name of plaintiff*] must prove all of the following:**

1. That [*name of plaintiff*] **[owns/leases] the property;**
2. That [*name of plaintiff*] **[rented/subleased] the property to [*name of defendant*];**
3. That **under the [lease/rental agreement/sublease], [*name of defendant*] was required to pay rent in the amount of \$[*specify amount*] per [*specify period, e.g., month*];**
4. That [*name of plaintiff*] **properly gave [*name of defendant*] three days' written notice to pay the rent or vacate the property[, or that [*name of defendant*] actually received this notice at least three days before [*date on which action was filed*]];**
5. That **as of [*date of three-day notice*], at least the amount stated in the three-day notice was due;**
6. That [*name of defendant*] **did not pay [or attempt to pay] the amount stated in the notice within three days after [service/receipt] of the notice; and**
7. That [*name of defendant*] **[or subtenant [*name of subtenant*]] is still occupying the property.**

New August 2007

Directions for Use

Uncontested elements may be deleted from this instruction.

Include the bracketed references to a subtenancy in the opening paragraph and in element 7 if persons other than the tenant-defendant are occupying the premises.

If the plaintiff is the landlord or owner, select "owns" in element 1, "rented" in element 2, and either "lease" or "rental agreement" in element 3. Commercial documents are usually called "leases" while residential documents are often called "rental agreements." Select the term that is used on the written document. If the plaintiff is a tenant seeking to recover possession from a subtenant, select "leases" in element 1, "subleased" in element 2, and "sublease" in element 3. (*Code Civ. Proc.*, § 1161(3).)

If service of notice may have been defective, but there is evidence that the defendant actually did receive it, include the bracketed language at the end of element 4. Defective service is waived if defendant admits receipt of notice. (*Lehr v. Crosby* (1981) 123 Cal.App.3d Supp. 1, 6, fn. 3 [177 Cal.Rptr. 96] .)

If the lease specifies a time period for notice other than the three-day period, substitute that time period in elements 4, 5, and 6, provided that it is not less than three days.

There is a conflict in the case law with respect to when the three-day period begins if substituted service is used. Compare *Davidson v. Quinn* (1982) 138 Cal.App.3d Supp. 9, 14 [188 Cal.Rptr. 421] [tenant must be given three days to pay, so period does not begin until actual notice is received] with *Walters v. Meyers* (1990) 226 Cal.App.3d Supp. 15, 19-20 [277 Cal.Rptr. 316] [notice is effective when posted and mailed]. This conflict is accounted for in element 6.

See CACI No. 4303, *Sufficiency and Service of Notice of Termination for Failure to Pay Rent*, for an instruction regarding proper notice.

Sources and Authority

- *Code of Civil Procedure* section 1161 provides, in part:

A tenant of real property ... is guilty of unlawful detainer:

2. When he or she continues in possession, in person or by subtenant, without the permission of his or her landlord ... after default in the payment of rent, pursuant to the lease or agreement under which the property is held, and three days' notice, in writing, requiring its payment ... shall have been served upon him or her and if there is a subtenant in actual occupation of the premises, also upon the subtenant."

- *Civil Code* section 1952.3(a) provides, in part: "[I]f the lessor brings an unlawful detainer proceeding and possession of the property is no longer in issue because possession of the property has been delivered to the lessor before trial or, if there is no trial, before judgment is entered, the case becomes an ordinary civil action"

- "[M]ere failure of a tenant to quit the premises during the three-day notice period does not necessarily justify an unlawful detainer action. If a tenant vacates the premises and surrenders possession to the landlord prior to the complaint being filed, then no action for unlawful detainer will lie even though the premises were not surrendered during the notice period. This is true because the purpose of an unlawful detainer action is to recover possession of the premises for the landlord. Since an action in unlawful detainer involves a forfeiture of the tenant's right to possession,

one of the matters that must be pleaded and proved for unlawful detainer is that the tenant remains in possession of the premises. Obviously this cannot be established where the tenant has surrendered the premises to landlord prior to the filing of the complaint. In such a situation the landlord's remedy is an action for damages and rent." (*Briggs v. Electronic Memories & Magnetics Corp.* (1975) 53 Cal.App.3d 900, 905-906 [126 Cal.Rptr. 34] , footnote and internal citations omitted.)

■ "Proper service on the lessee of a valid three-day notice to pay rent or quit is an essential prerequisite to a judgment declaring a lessor's right to possession under section 1161, subdivision 2. A lessor must allege and prove proper service of the requisite notice. Absent evidence the requisite notice was properly served pursuant to section 1162, no judgment for possession can be obtained." (*Liebovich v. Shahrokhkhany* (1997) 56 Cal.App.4th 511, 513 [65 Cal.Rptr.2d 457] internal citations omitted.)

■ "Section 1162 does not authorize service of a three-day notice to pay rent or quit by mail delivery alone, certified or otherwise. It provides for service by: personal delivery; leaving a copy with a person of suitable age and discretion at the renter's residence or usual place of business *and* sending a copy through the mail to the tenant's *residence*; or posting *and* delivery of a copy to a person there residing, if one can be found, *and* sending a copy through the mail. Strict compliance with the statute is required." (*Liebovich, supra*, 56 Cal.App.4th at p. 516 , original italics, internal citations omitted.)

■ "If the tenant gives up possession of the property after the commencement of an unlawful detainer proceeding, the action becomes an ordinary one for damages." (*Fish Construction Co. v. Moselle Coach Works, Inc.* (1983) 148 Cal.App.3d 654, 658 [196 Cal.Rptr. 174] .)

Secondary Sources

12 Witkin, Summary of California Law (10th ed. 2006) Real Property, §§ 720, 723

1 California Landlord-Tenant Practice (Cont.Ed.Bar 2d ed.) §§ 8.35-8.45

1 California Eviction Defense Manual (Cont.Ed.Bar 2d ed.) §§ 5.2, 6.17-6.37

7 *California Real Estate Law and Practice*, Ch. 210, *Unlawful Detainer*, §§ 210.21, 210.22 (Matthew Bender)

Matthew Bender Practice Guide: California Landlord-Tenant Litigation, Ch. 5, *Unlawful Detainer*, 5.07

29 *California Forms of Pleading and Practice*, Ch. 333, *Landlord and Tenant: Eviction Actions*, § 333.10 (Matthew Bender)

Miller & Starr, California Real Estate (Thomson West) Ch. 19, *Landlord-Tenant*, § 19:200

Publisher's Notes

There is no BAJI instruction on this subject.

LexisNexis Matthew Bender Expert Practice Tip--Plaintiff Must Have Authority to Lease: The plaintiff must be the owner or an agent of the owner acting with authority, unless the plaintiff is a tenant and subleasing to a subtenant. Modify element 1 to reflect any issues about whether this is the proper plaintiff to sue for the lease termination. *By Steven R. Kellman*

LexisNexis Matthew Bender Expert Practice Tip--Lease May Include Extension or Option to Extend: Some leases include extension provisions. For example, a lease may automatically renew unless

a specific notice is given. Other leases have an option to extend the lease that a tenant may feel was exercised. Modify this instruction to raise any issues regarding the true termination date of the lease if this is in dispute. *By Steven R. Kellman*

LexisNexis Matthew Bender Expert Practice Tip--Specify Rent Due Date: Rent is not always due on the first of the month. Modify element 3 if needed to indicate when rent was due as per the lease/rental agreement. Unless the contract provides otherwise, rent is paid at the end of the periodic rental period. This would, for example, be at the end of the month in a lease where rent is paid monthly [*Civ. Code § 1947*]. Most leases specify that rent is payable in advance, but if it does not, this could be a critical point if it is alleged that rent was not paid timely or a tender was refused. *By Steven R. Kellman*

LexisNexis Matthew Bender Expert Practice Tip--Three-Day Notice to Pay Rent or Quit Must be Valid and Properly Served: For a three-day notice to pay rent or quit to be valid, it must be properly served as per *Code Civ. Proc. § 1162*. Service is more completely covered in *CACI No. 4303*, Sufficiency and Service of Notice of Termination for Failure to Pay Rent. *By Steven R. Kellman*

LexisNexis Matthew Bender Expert Practice Tip--Notice to Cure or Quit May Give More Than Three Days: Some leases provide more than three days (10 days is common) to cure a default in the payment of rent. In that case, the defendant is entitled to the full time allowed by the lease to pay the rent due before an unlawful detainer may be filed. Modify this instruction accordingly if the lease provides for a greater time to pay the rent than three days. *By Steven R. Kellman*

LexisNexis Matthew Bender Expert Practice Tip--Payment or Accepted Tender of Rent: The plaintiff has a duty to return any late or improper payment that the plaintiff does not intend to accept promptly. Failure to do so promptly may constitute an acceptance of the payment even if the negotiable instrument is retained and not cashed [*Code Civ. Proc. § 2076*; see *Sheldon Builders, Inc. v. Trojan Towers* (1967) 255 Cal.App.2d 781, 788, 63 Cal.Rptr. 425]. *By Steven R. Kellman*

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Real Property Law Landlord & Tenant Landlord's Remedies & Rights Eviction Actions Forcible Entry & Detainer

* Steven R. Kellman, who wrote the Practice Tips in this chapter, has been in private practice since 1982, practicing landlord-tenant law with an emphasis on representing tenants. In 1993 he founded the Tenants Legal Center, located in San Diego. He has lectured for the CEB and professional and community groups on this subject. He has authored and contributed to several legal publications. Mr. Kellman has written an informational newspaper series feature on landlord-tenant law appearing in the *San Diego Union-Tribune*, *Los Angeles Times*, and *San Francisco Chronicle*. He has served as a judge pro tem, and on legislative committees for proposed landlord-tenant legislation.



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CHAPTER 43 California Judicial Council Unlawful Detainer Instructions *

5-43 California Forms of Jury Instruction CACI 4303

CACI 4303 Sufficiency and Service of Notice of Termination for Failure to Pay Rent

[*Name of plaintiff*] contends that [he/she/it] properly gave [*name of defendant*] three days' notice to pay the rent or vacate the property. To prove that the notice contained the required information and was properly given, [*name of plaintiff*] must prove all of the following:

1. That the notice informed [*name of defendant*] in writing that [he/she/it] must pay the amount due within three days or vacate the property;

2. That the notice stated [no more than/a reasonable estimate of] the amount due, and the name, telephone number, and address of the person to whom the amount should be paid, and

[*Use if payment was to be made personally .*

the usual days and hours that the person would be available to receive the payment;]

[*or: Use if payment was to be made into a bank account.*

the number of an account in a bank located within five miles of the rental property into which the payment could be made, and the name and street address of the bank;]

[*or: Use if an electronic funds transfer procedure had been previously established.*

that payment could be made by electronic funds transfer;]

3. That the notice was given to [*name of defendant*] at least three days before [*insert date on which action was filed*].

Notice was properly given if [select one of the following manners of service:]

[the notice was delivered to [name of defendant] personally.]

[or:

[name of defendant] was not at home or work, and the notice was left with a responsible person at [name of defendant]'s residence or place of work, and a copy was also mailed to the address of the rented property in an envelope addressed to [name of defendant]. In this case, notice is considered given on the date the second notice was [received by [name of defendant]/placed in the mail].]

[or:

a responsible person was not present at [name of defendant]'s residence or work, and the notice was posted on the property in a place where it would easily be noticed, and a copy was also mailed to the address of the rented property in an envelope addressed to [name of defendant]. In this case, notice is considered given on the date the second notice was [received by [name of defendant]/placed in the mail].]

[The three-day notice period begins the day after the notice was given to [name of defendant]. If the last day of the notice period falls on a Saturday, Sunday, or holiday, [name of defendant]'s time to pay the rent or vacate the property is extended to include the first day after the Saturday, Sunday, or holiday that is not also a Saturday, Sunday, or holiday.]

[If [name of plaintiff] did not properly give [name of defendant] the required written notice, the notice is still effective if [name of defendant] actually received it at least three days before [insert date on which action was filed].]

[A notice stating a reasonable estimate of the amount of rent due that is within 20 percent of the amount actually due is reasonable unless [name of defendant] proves that it was not reasonable. In determining the reasonableness of the estimate, you may consider whether calculating the amount of rent required information primarily within the knowledge of [name of defendant] and whether [name of defendant] accurately furnished that information to [name of plaintiff].]

New August 2007

Directions for Use

Use the reasonable-estimate option in the first sentence of element 2 and include the final paragraph only in cases involving commercial leases. (*Code Civ. Proc.*, § 1161.1(a); see also *Code Civ. Proc.*, § 1161.1(e) [presumption that if amount found to be due is within 20 percent of amount stated in notice, then estimate was reasonable].)

In element 2, select the applicable manner in which the notice specifies that payment is to be made; directly to the landlord, into a bank account, or by electronic funds transfer. (*Code Civ. Proc.*, § 1161(2).)

Select the manner of service used; personal service, substituted service by leaving the notice at the

defendant's home or place of work, or substituted service by posting on the property. (*Code Civ. Proc.*, § 1162.) There is a conflict in the case law with respect to when the three-day period begins if substituted service is used. Compare *Davidson v. Quinn* (1982) 138 Cal.App.3d Supp. 9, 14 [188 Cal.Rptr. 421] [tenant must be given three days to pay, so period does not begin until actual notice is received] with *Walters v. Meyers* (1990) 226 Cal.App.3d Supp. 15, 19-20 [277 Cal.Rptr. 316] [notice is effective when posted and mailed]. This conflict is accounted for in the second and third bracketed options for the manner of service.

Read the third-to-last paragraph if the last day of the notice period fell on a Saturday, Sunday, or holiday.

If a lease specifies a time period for giving notice other than the three-day period, substitute that time period for three days throughout, provided that it is not less than three days.

If service of notice may have been defective, but there is evidence that the defendant actually did receive it, include the next-to-last paragraph. Defective service is waived if defendant admits receipt of notice. (*Lehr v. Crosby* (1981) 123 Cal.App.3d Supp. 1, 6, fn. 3 [177 Cal.Rptr. 96] .)

Local ordinances may impose additional notice requirements for the termination of a rental agreement. This instruction should be modified accordingly.

Sources and Authority

■ *Code Civil Procedure* section 1161(2) provides, in part: "When he or she continues in possession ... without the permission of his or her landlord ... after default in the payment of rent ... and three days' notice, in writing, requiring its payment, stating the amount which is due, the name, telephone number, and address of the person to whom the rent payment shall be made, and, if payment may be made personally, the usual days and hours that person will be available to receive the payment (provided that, if the address does not allow for personal delivery, then it shall be conclusively presumed that upon the mailing of any rent or notice to the owner by the tenant to the name and address provided, the notice or rent is deemed received by the owner on the date posted, if the tenant can show proof of mailing to the name and address provided by the owner), or the number of an account in a financial institution into which the rental payment may be made, and the name and street address of the institution (provided that the institution is located within five miles of the rental property), or if an electronic funds transfer procedure has been previously established, that payment may be made pursuant to that procedure, or possession of the property, shall have been served upon him or her and if there is a subtenant in actual occupation of the premises, also upon the subtenant."

■ *Code of Civil Procedure* 1161.1 provides, in part:

With respect to application of Section 1161 in cases of possession of commercial real property after default in the payment of rent:

(a) If the amount stated in the notice provided to the tenant pursuant to subdivision (2) of Section 1161 is clearly identified by the notice as an estimate and the amount claimed is not in fact correct, but it is determined upon the trial or other judicial determination that rent was owing, and the amount claimed in the notice was reasonably estimated, the tenant shall be subject to judgment for possession and the actual amount of rent and other sums found to be due. However, if (1) upon receipt of such a notice claiming an amount identified by the notice as an estimate, the tenant tenders to the

landlord within the time for payment required by the notice, the amount which the tenant has reasonably estimated to be due and (2) if at trial it is determined that the amount of rent then due was the amount tendered by the tenant or a lesser amount, the tenant shall be deemed the prevailing party for all purposes. If the court determines that the amount so tendered by the tenant was less than the amount due, but was reasonably estimated, the tenant shall retain the right to possession if the tenant pays to the landlord within five days of the effective date of the judgment (1) the amount previously tendered if it had not been previously accepted, (2) the difference between the amount tendered and the amount determined by the court to be due, and (3) any other sums as ordered by the court.

...

(e) For the purposes of this section, there is a presumption affecting the burden of proof that the amount of rent claimed or tendered is reasonably estimated if, in relation to the amount determined to be due upon the trial or other judicial determination of that issue, the amount claimed or tendered was no more than 20 percent more or less than the amount determined to be due. However, if the rent due is contingent upon information primarily within the knowledge of the one party to the lease and that information has not been furnished to, or has not accurately been furnished to, the other party, the court shall consider that fact in determining the reasonableness of the amount of rent claimed or tendered pursuant to subdivision (a).

■ *Code of Civil Procedure section 1162* provides:

The notices required by Sections 1161 and 1161a may be served, either:

1. By delivering a copy to the tenant personally; or,
2. If he or she is absent from his or her place of residence, and from his or her usual place of business, by leaving a copy with some person of suitable age and discretion at either place, and sending a copy through the mail addressed to the tenant at his or her place of residence; or,
3. If such place of residence and business can not be ascertained, or a person of suitable age or discretion there can not be found, then by affixing a copy in a conspicuous place on the property, and also delivering a copy to a person there residing, if such person can be found; and also sending a copy through the mail addressed to the tenant at the place where the property is situated. Service upon a subtenant may be made in the same manner.

■ "A valid three-day pay rent or quit notice is a prerequisite to an unlawful detainer action. Because of the summary nature of an unlawful detainer action, a notice is valid only if the lessor strictly complies with the statutorily mandated notice requirements. [P] A three-day notice must contain 'the amount which is due.' A notice which demands rent in excess of the amount due does not satisfy this requirement. This rule ensures that a landlord will not be entitled to regain possession in an unlawful detainer action unless the tenant has had the opportunity to pay the delinquent rent." (*Bevill v. Zoura* (1994) 27 Cal.App.4th 694, 697 [32 Cal.Rptr.2d 635] , internal citations and footnote omitted.)

■ "[W]e do not agree that a proper notice may not include anything other than technical rent. It is true that subdivision 2 of *Code of Civil Procedure section 1161* relates to a default in the payment of rent. However, the subdivision refers to the 'lease or agreement under which the property is held' and requires the notice state 'the amount which is due.' The language is not 'the amount of rent which is due' or 'the rent which is due.' We think the statutory language is sufficiently broad to encompass any sums due under the lease or agreement under which the property is held." (

Canal-Randolph Anaheim, Inc. v. Wilkoski (1978) 78 Cal.App.3d 477, 492 [144 Cal.Rptr. 474] .)

■ "[T]he service and notice provisions in the unlawful detainer statutes and [Code of Civil Procedure] section 1013 are mutually exclusive, and thus, section 1013 does not extend the notice periods that are a prerequisite to filing an unlawful detainer action." (*Losornio v. Motta* (1998) 67 Cal.App.4th 110, 112 [78 Cal.Rptr.2d 799] .)

■ "Section 1162 does not authorize service of a three-day notice to pay rent or quit by mail delivery alone, certified or otherwise. It provides for service by: personal delivery; leaving a copy with a person of suitable age and discretion at the renter's residence or usual place of business and sending a copy through the mail to the tenant's *residence*; or posting *and* delivery of a copy to a person there residing, if one can be found, *and* sending a copy through the mail. Strict compliance with the statute is required." (*Liebovich v. Shahrokhkhany* (1997) 56 Cal.App.4th 511, 516 [65 Cal.Rptr.2d 457] , original italics, internal citation omitted.)

■ "We ... hold that service made in accordance with section 1162, subdivision 3, as applied to section 1161, subdivision 2, must be effected in such a manner as will give a tenant the three days of written notice required by the Legislature in which he may cure his default in the payment of rent." (*Davidson, supra*, 138 Cal.App.3d Supp. at p. 14 .)

■ "We ... hold that service of the three-day notice by posting and mailing is effective on the date the notice is posted and mailed." (*Walters, supra*, 226 Cal.App.3d Supp. at p. 20 .)

■ "An unlawful detainer action based on failure to pay rent must be preceded by a three-day notice to the tenant to pay rent or quit the premises. Failure to state the exact amount of rent due in the notice is fatal to the subsequent unlawful detainer action." (*Lynch & Freytag v. Cooper* (1990) 218 Cal.App.3d 603, 606, fn. 2 [267 Cal.Rptr. 189] , internal citations omitted.)

Secondary Sources

12 Witkin, Summary of California Law (10th ed. 2006) Real Property, §§ 720, 722-725, 727

1 California Landlord-Tenant Practice (Cont.Ed.Bar 2d ed.) §§ 8.26-8.68

1 California Eviction Defense Manual (Cont.Ed.Bar 2d ed.) §§ 5.2, 6.10-6.30, Ch. 8

7 *California Real Estate Law and Practice*, Ch. 210, *Unlawful Detainer*, §§ 210.21, 210.22 (Matthew Bender)

Matthew Bender Practice Guide: California Landlord-Tenant Litigation, Ch. 5, *Unlawful Detainer*, 5.11, 5.12

29 *California Forms of Pleading and Practice*, Ch. 333, *Landlord and Tenant: Eviction Actions*, § 333.11 (Matthew Bender)

23 *California Points and Authorities*, Ch. 236, *Unlawful Detainer*, §§ 236.13, 236.13A (Matthew Bender)

Miller & Starr, California Real Estate (Thomson West) Ch. 19, *Landlord-Tenant*, §§ 19:202-19:204

Publisher's Notes

There is no BAJI instruction on this subject.

LexisNexis Matthew Bender Expert Practice Tip--Three-Day Notice to Pay Rent or Quit Must Not Overstate Rent Due: In a residential tenancy, no more than the actual amount of rent due may be

claimed in a three-day notice to pay rent or quit. In a commercial tenancy, if the three-day notice to pay rent or quit claims an estimated amount of rent [*see Code Civ. Proc. § 1161.1(e)*], it may overestimate the actual rent due by up to 20 percent. An overstatement of rent (residential or commercial) will void the notice. *By Steven R. Kellman*

LexisNexis Matthew Bender Expert Practice Tip--Only Rent May be Claimed in Three-Day

Notice to Pay Rent or Quit: In a residential tenancy, charges that are not rent (such as late fees and utilities) may not be included in a three-day notice to pay rent or quit. Therefore, modify this instruction to limit the amount due to pure rent if there were other charges included in the notice that are in dispute. In commercial tenancies, other charges such as late fees and utilities may be included as rent as long as the lease provides that they be deemed additional rent. *By Steven R. Kellman*

LexisNexis Matthew Bender Expert Practice Tip--Make Usual Days and Hours of Payment

Realistic: A plaintiff landlord may attempt to restrict payment to minimal hours on minimal days as the "usual days and hours" for payment. This type of action frustrates the intent of the code in allowing defendants ample opportunity to pay the rent. If this is in dispute, modify the instruction to include a reasonable ability to pay during the provided days and hours to pay. *By Steven R. Kellman*

LexisNexis Matthew Bender Expert Practice Tip--Service of Notice for Unlawful Detainer Must

Follow Procedural Order: *Code Civ. Proc. § 1162* requires personal service of notices for unlawful detainer [*Code Civ. Proc. § 1162(1)*] if the defendant is at the property at the time of service. If the defendant is not then at the property, service can be effected by leaving a copy of the notice with a responsible person and mailing defendant a copy. If no one is at the property, and the defendant's place of business/employment is known, a copy can be left there, plus mail a copy to the defendant [*Code Civ. Proc. § 1162(2)*]. If no one is available at the property and the defendant's place of business/employment is not known, a copy should be posted at the property and mailed to the defendant [*Code Civ. Proc. § 1162(3)*]. *By Steven R. Kellman*

LexisNexis Matthew Bender Expert Practice Tip--Three-Day Notice to Pay Rent or Quit Must be

Valid and Properly Served: For an unlawful detainer notice (including a three-day notice to pay rent or quit) to be valid, it must be properly served as per *Code Civ. Proc. § 1162*, as well as contain the appropriate information. *By Steven R. Kellman*

LexisNexis Matthew Bender Expert Practice Tip--Defective Service of Notice Not Necessarily

Cured by Receipt of Notice: Defective service of an unlawful detainer notice may be cured by an express admission of its receipt, but evidence of actual receipt without an admission will not cure the defect. If a defective service of a notice is claimed to be cured by its receipt, modify this instruction to reflect the necessity of an admission [*see Valov v. Tank (1985) 168 Cal.App.3d 867, 876, 214 Cal.Rptr. 546*]. *By Steven R. Kellman*

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Real Property Law Landlord & Tenant Landlord's Remedies & Rights Eviction Actions Forcible Entry & Detainer Real Property Law Landlord & Tenant Landlord's Remedies & Rights Termination Notice

* Steven R. Kellman, who wrote the Practice Tips in this chapter, has been in private practice since 1982, practicing landlord-tenant law with an emphasis on representing tenants. In 1993 he founded the Tenants Legal Center, located in San Diego. He has lectured for the CEB and professional and community groups on this subject. He has authored and

contributed to several legal publications. Mr. Kellman has written an informational newspaper series feature on landlord-tenant law appearing in the *San Diego Union-Tribune*, *Los Angeles Times*, and *San Francisco Chronicle*. He has served as a judge pro tem, and on legislative committees for proposed landlord-tenant legislation.



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California Forms of Jury Instruction

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CHAPTER 43 California Judicial Council Unlawful Detainer Instructions *

5-43 California Forms of Jury Instruction CACI 4304

CACI 4304 Termination for Violation of Terms of Lease/Agreement--Essential Factual Elements

[*Name of plaintiff*] **claims that** [*name of defendant*] **[and [*name of subtenant*], a subtenant of [*name of defendant*],] no longer [has/have] the right to occupy the property because [*name of defendant*] has failed to perform [a] requirement(s) under [his/her/its] [lease/rental agreement/sublease]. To establish this claim, [*name of plaintiff*] must prove all of the following:**

- 1. That [*name of plaintiff*] [owns/leases] the property;**
- 2. That [*name of plaintiff*] [rented/subleased] the property to [*name of defendant*];**
- 3. That under the [lease/rental agreement/sublease], [*name of defendant*] agreed [*insert required condition(s) that were not performed*];**
- 4. That [*name of defendant*] failed to perform [that/those] requirement(s) by [*insert description of alleged failure to perform*];**
- 5. That [*name of plaintiff*] properly gave [*name of defendant*] [and [*name of subtenant*]] three days' written notice to [either [*describe action to correct failure to perform*] or] vacate the property[, or that [*name of defendant*] actually received this notice at least three days before [*date on which action was filed*]]; [and]**
- [6. That [*name of defendant*] did not [*describe action to correct failure to perform*]]; and]**
- 7. That [*name of defendant*] [or subtenant [*name of subtenant*]] is still occupying the property.**

[[*Name of defendant*]'s failure to perform the requirement(s) of the [lease/rental agreement/sublease] must not

be trivial, but must be a substantial violation of [an] important obligation(s).]

New August 2007; Revised June 2010

Directions for Use

Uncontested elements may be deleted from this instruction.

Include the bracketed references to a subtenancy in the opening paragraph, in element 5, and in the last element if persons other than the tenant-defendant are in occupancy of the premises.

If the plaintiff is the landlord or owner, select either "lease" or "rental agreement" in the opening paragraph and in element 3, "owns" in element 1, and "rented" in element 2. Commercial documents are usually called "leases" while residential documents are often called "rental agreements." Select the term that is used on the written document.

If the plaintiff is a tenant seeking to recover possession from a subtenant, select "sublease" in the opening paragraph and in element 3, "leases" in element 1, and "subleased" in element 2. (*Code Civ. Proc.*, § 1161(3).)

If service of notice may have been defective, but there is evidence that the defendant actually did receive it, include the bracketed language at the end of element 5. Defective service is waived if defendant admits timely receipt of notice. (*Lehr v. Crosby* (1981) 123 Cal.App.3d Supp. 1, 6, fn. 3 [177 Cal.Rptr. 96] .)

If the lease specifies a time period for notice other than the three-day period, substitute that time period in element 5.

If the violation of the condition or covenant involves waste, nuisance, or illegal activity and cannot be cured (see *Code Civ. Proc.*, § 1161(4)), omit the bracketed language in element 5 and element 6. If a covenant in a lease has been breached and the breach cannot be cured, a demand for performance is not a condition precedent to an unlawful detainer action. (*Salton Community Services Dist. v. Southard* (1967) 256 Cal.App.2d 526, 529 [64 Cal.Rptr. 246] , internal citation omitted.)

Include the last paragraph if the tenant alleges that the violation was trivial. It is not settled whether the landlord must prove the violation was substantial or the tenant must prove triviality as an affirmative defense. (See *Superior Motels, Inc. v. Rinn Motor Hotels, Inc.* (1987) 195 Cal.App.3d 1032, 1051 [241 Cal.Rptr. 487] ; *Keating v. Preston* (1940) 42 Cal.App.2d 110, 118 [108 P.2d 479] .)

Local or federal law may impose additional requirements for the termination of a rental agreement based on breach of a condition. This instruction should be modified accordingly.

See CACI No. 4305, *Sufficiency and Service of Notice of Termination for Violation of Terms of Agreement*, for an instruction on proper written notice.

See also CACI No. 312, *Substantial Performance*.

Sources and Authority

- *Code of Civil Procedure section 1161* provides, in part:

A tenant of real property ... is guilty of unlawful detainer:

3. When he or she continues in possession, in person or by subtenant, after a neglect or failure to perform other conditions or covenants of the lease or agreement under which the property is held, including any covenant not to assign or sublet, than the one for the payment of rent, and three days' notice, in writing, requiring the performance of such conditions or covenants, or the possession of the property, shall have been served upon him or her, and if there is a subtenant in actual occupation of the premises, also, upon the subtenant. Within three days after the service of the notice, the tenant, or any subtenant in actual occupation of the premises, or any mortgagee of the term, or other person interested in its continuance, may perform the conditions or covenants of the lease or pay the stipulated rent, as the case may be, and thereby save the lease from forfeiture; provided, if the conditions and covenants of the lease, violated by the lessee, cannot afterward be performed, then no notice, as last prescribed herein, need be given to the lessee or his or her subtenant, demanding the performance of the violated conditions or covenants of the lease.

- *Civil Code section 1952.3(a)* provides, in part: "[I]f the lessor brings an unlawful detainer proceeding and possession of the property is no longer in issue because possession of the property has been delivered to the lessor before trial or, if there is no trial, before judgment is entered, the case becomes an ordinary civil action"

- "[*Code of Civil Procedure section 1161(3)*] provides, that where the conditions or covenants of a lease can be performed, a lessee may within three days after the service of the notice perform them, and so save a forfeiture of his lease. By performing, the tenant may defeat the landlord's claim for possession. Where, however, the covenants cannot be performed, the law recognizes that it would be an idle and useless ceremony to demand their performance, and so dispenses with the demand to do so. And this is all that it does dispense with. It does not dispense with the demand for the possession of the premises. It requires that in any event. If the covenants can be performed, the notice is in the alternative, either to perform them or deliver possession. When the covenants are beyond performance an alternative notice would be useless, and demand for possession alone is necessary. Bearing in mind that the object of this statute is to speedily permit a landlord to obtain possession of his premises where the tenant has violated the covenants of the lease, the only reasonable interpretation of the statute is, that before bringing suit he shall take that means which should be most effectual for the purpose of obtaining possession, which is to demand it. If upon demand the tenant surrenders possession, the necessity for any summary proceeding is at an end, and by the demand is accomplished what the law otherwise would accord him under the proceeding." (*Schnittger v. Rose* (1903) 139 Cal. 656, 662 [73 P. 449] .)

- "The law sensibly recognizes that although every instance of noncompliance with a contract's terms constitutes a breach, not every breach justifies treating the contract as terminated. Following the lead of the Restatements of Contracts, California courts allow termination only if the breach can be classified as 'material,' 'substantial,' or 'total.' " (*Superior Motels, Inc.*, *supra*, 195 Cal.App.3d at p. 1051 , internal citations omitted.)

- "California too accepts that '[whether] a breach is so material as to constitute cause for the injured party to terminate a contract is ordinarily a question for the trier of fact.' " (*Superior Motels, Inc.*, *supra*, 195 Cal.App.3d at pp. 1051-1052 , internal citations omitted.)

- "As to the substantiality of the violation, the evidence shows that the violation was wilful. Therefore, the court will not measure the extent of the violation." (*Hignell v. Gebala* (1949) 90 Cal.App.2d 61, 66 [202 P.2d 378] .)

■ "If the tenant gives up possession of the property after the commencement of an unlawful detainer proceeding, the action becomes an ordinary one for damages." (*Fish Construction Co. v. Moselle Coach Works, Inc.* (1983) 148 Cal.App.3d 654, 658 [196 Cal.Rptr. 174] .)

Secondary Sources

12 Witkin, Summary of California Law (10th ed. 2006) Real Property, §§ 720, 723

1 California Landlord-Tenant Practice (Cont.Ed.Bar 2d ed.) §§ 8.50-8.54

1 California Eviction Defense Manual (Cont.Ed.Bar 2d ed.) §§ 5.2, 6.38-6.49

7 *California Real Estate Law and Practice*, Ch. 210, *Unlawful Detainer*, §§ 210.21, 210.23, 210.24 (Matthew Bender)

Matthew Bender Practice Guide: California Landlord-Tenant Litigation, Ch. 5, *Unlawful Detainer*, 5.07

29 *California Forms of Pleading and Practice*, Ch. 333, *Landlord and Tenant: Eviction Actions*, § 333.10 (Matthew Bender)

23 *California Points and Authorities*, Ch. 236, *Unlawful Detainer*, §§ 236.11, 236.20 (Matthew Bender)

Miller & Starr, California Real Estate (Thomson West) Ch. 19, *Landlord-Tenant*, § 19:201

Publisher's Notes

There is no BAJI instruction on this subject.

LexisNexis Matthew Bender Expert Practice Tip--Plaintiff Must Have Authority to Lease: The plaintiff must be the owner or an agent of the owner acting with authority, unless the plaintiff is a tenant and subleasing to a subtenant. Modify this instruction to reflect any issues about whether this is the proper plaintiff to sue for the lease termination. *By Steven R. Kellman*

LexisNexis Matthew Bender Expert Practice Tip--Be Specific as to Conditions to Be Performed: If the specific condition violated is not well defined, it can be difficult to interpret what was expected, as well as to analyze a failure to perform an act. Integrate excerpts from the actual lease to set forth the condition in issue. *By Steven R. Kellman*

LexisNexis Matthew Bender Expert Practice Tip--Properly Serve Three-Day Notice to Cure Breach or Quit: For a three-day notice to cure breach (perform covenant) or quit to be valid, it must be properly served as per *Code of Civ. Proc. § 1162*. Service is more completely covered in *CACI No. 4305*, Sufficiency and Service of Notice of Termination for Violation of Terms of Agreement. *By Steven R. Kellman*

LexisNexis Matthew Bender Expert Practice Tip--Notice to Cure or Quit May Give More Than Three Days: Some leases provide more than three days (10 days is common) to cure a default in the payment of rent. In that case, the defendant is entitled to the full time allowed by the lease to pay the rent due before an unlawful detainer may be filed. Modify this instruction accordingly if the lease provides for a greater time to pay the rent than three days. *By Steven R. Kellman*

LexisNexis Matthew Bender Expert Practice Tip--Substantial Compliance of Act Required by Lease May be Sufficient Performance: Action or inaction to correct the failure to perform a condition

within the notice period may be subject to interpretation as to required degrees of action. This is especially true if the lease is unclear as to the specific performance required by the defendant. If that is an issue, modify this instruction to reflect the failure to substantially perform a condition or covenant in the lease. *By Steven R. Kellman*

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Real Property Law Landlord & Tenant Landlord's Remedies & Rights Eviction Actions Forcible Entry & Detainer

* Steven R. Kellman, who wrote the Practice Tips in this chapter, has been in private practice since 1982, practicing landlord-tenant law with an emphasis on representing tenants. In 1993 he founded the Tenants Legal Center, located in San Diego. He has lectured for the CEB and professional and community groups on this subject. He has authored and contributed to several legal publications. Mr. Kellman has written an informational newspaper series feature on landlord-tenant law appearing in the *San Diego Union-Tribune*, *Los Angeles Times*, and *San Francisco Chronicle*. He has served as a judge pro tem, and on legislative committees for proposed landlord-tenant legislation.



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California Forms of Jury Instruction

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CHAPTER 43 California Judicial Council Unlawful Detainer Instructions *

5-43 California Forms of Jury Instruction CACI 4305

CACI 4305 Sufficiency and Service of Notice of Termination for Violation of Terms of Agreement

[Name of plaintiff] contends that [he/she/it] properly gave [name of defendant] three days' notice to [either comply with the requirements of the [lease/rental agreement/sublease] or] vacate the property. To prove that the notice contained the required information and was properly given, [name of plaintiff] must prove all of the following:

- 1. That the notice informed [name of defendant] in writing that [he/she/it] must, within three days, [either comply with the requirements of the [lease/rental agreement/sublease] or] vacate the property;**
- 2. That the notice described how [name of defendant] failed to comply with the requirements of the [lease/rental agreement/sublease] [and how to correct the failure];**
- 3. That the notice was given to [name of defendant] at least three days before [insert date on which action was filed];**

Notice was properly given if [select one of the following manners of service:]

[the notice was delivered to [name of defendant] personally.]

[or:

[name of defendant] was not at home or work, and the notice was left with a responsible person at [name of defendant]'s residence or place of work, and a copy was also mailed to the address of the rented property in an envelope addressed to [name of defendant]. In this case, notice is considered given on the date the second notice was [received by [name of defendant]/placed in the mail].]

[or:

a responsible person was not present at [name of defendant]'s residence or work, and the notice was posted on the property in a place where it would easily be noticed, and a copy was also mailed to the address of the rented property in an envelope addressed to [name of defendant]. In this case, notice is considered given on the date the second notice was [received by [name of defendant]/placed in the mail].]

[The three-day notice period begins on the day after the notice was given to [name of defendant]. If the last day of the notice period falls on a Saturday, Sunday, or holiday, [name of defendant]'s time to correct the failure or to vacate the property is extended to include the first day after the Saturday, Sunday, or holiday that is not also a Saturday, Sunday, or holiday.]

[If [name of plaintiff] did not properly give [name of defendant] the required written notice, the notice is still effective if [name of defendant] actually received it at least three days before [insert date on which action was filed].]

New August 2007

Directions for Use

If the violation of the condition or covenant cannot be cured, omit the bracketed language in the first paragraph and in elements 1 and 2. If a covenant in a lease has been breached and the breach cannot be cured, a demand for performance is not a condition precedent to an unlawful detainer action. (*Salton Community Services Dist. v. Southard* (1967) 256 Cal.App.2d 526, 529 64 Cal.Rptr. 246] , internal citation omitted.)

If the plaintiff is the landlord or owner, select either "lease" or "rental agreement" in the optional language in the opening paragraph and in elements 1 and 2. Commercial documents are usually called "leases" while residential documents are often called "rental agreements." Select the term that is used on the written document. If the plaintiff is a tenant seeking to recover possession from a subtenant, select "sublease." (*Code Civ. Proc.*, § 1161(3).)

Select the manner of service used; personal service, substituted service by leaving the notice at the defendant's home or place of work, or substituted service by posting on the property. (*Code Civ. Proc.*, § 1162.) There is a conflict in the case law with respect to when the three-day period begins if substituted service is used. Compare *Davidson v. Quinn* (1982) 138 Cal.App.3d Supp. 9, 14 [188 Cal.Rptr. 421] [tenant must be given three days to pay, so period does not begin until actual notice is received] with *Walters v. Meyers* (1990) 226 Cal.App.3d Supp. 15, 19-20 [277 Cal.Rptr. 316] [notice is effective when posted and mailed]. This conflict is accounted for in the second and third bracketed options for the manner of service.

Read the next-to-last paragraph if the last day of the notice period fell on a Saturday, Sunday, or holiday.

If a lease specifies a time period for giving notice other than the three-day period, substitute that time period for three days throughout the instruction, provided that it is not less than three days.

If service of notice may have been defective, but there is evidence that the defendant actually did receive

it, include the last paragraph. Defective service is waived if defendant admits timely receipt of notice. (*Lehr v. Crosby* (1981) 123 Cal.App.3d Supp. 1, 6, fn. 3 [177 Cal.Rptr. 96] .)

Local ordinances may impose additional notice requirements for the termination of a rental agreement. This instruction should be modified accordingly.

Sources and Authority

- *Code of Civil Procedure* section 1161 provides, in part:

A tenant of real property ... is guilty of unlawful detainer:

3. When he or she continues in possession, in person or by subtenant, after a neglect or failure to perform other conditions or covenants of the lease or agreement under which the property is held, including any covenant not to assign or sublet, than the one for the payment of rent, and three days' notice, in writing, requiring the performance of such conditions or covenants, or the possession of the property, shall have been served upon him or her, and if there is a subtenant in actual occupation of the premises, also, upon the subtenant. Within three days after the service of the notice, the tenant, or any subtenant in actual occupation of the premises, or any mortgagee of the term, or other person interested in its continuance, may perform the conditions or covenants of the lease or pay the stipulated rent, as the case may be, and thereby save the lease from forfeiture; provided, if the conditions and covenants of the lease, violated by the lessee, cannot afterward be performed, then no notice, as last prescribed herein, need be given to the lessee or his or her subtenant, demanding the performance of the violated conditions or covenants of the lease.

- *Code of Civil Procedure* section 1162 provides:

The notices required by Sections 1161 and 1161a may be served, either:

1. By delivering a copy to the tenant personally; or,
2. If he or she is absent from his or her place of residence, and from his or her usual place of business, by leaving a copy with some person of suitable age and discretion at either place, and sending a copy through the mail addressed to the tenant at his or her place of residence; or,
3. If such place of residence and business can not be ascertained, or a person of suitable age or discretion there can not be found, then by affixing a copy in a conspicuous place on the property, and also delivering a copy to a person there residing, if such person can be found; and also sending a copy through the mail addressed to the tenant at the place where the property is situated. Service upon a subtenant may be made in the same manner.

- "[T]he service and notice provisions in the unlawful detainer statutes and [*Code of Civil Procedure*] section 1013 are mutually exclusive, and thus, section 1013 does not extend the notice periods that are a prerequisite to filing an unlawful detainer action." (*Losornio v. Motta* (1998) 67 Cal.App.4th 110, 112 [78 Cal.Rptr.2d 799] .)

- "We ... hold that service made in accordance with section 1162, subdivision 3, as applied to section 1161, subdivision 2, must be effected in such a manner as will give a tenant the three days of written notice required by the

Legislature in which he may cure his default in the payment of rent." (*Davidson, supra*, 138 Cal.App.3d Supp. at p. 14 .)

■ "We ... hold that service of the three-day notice by posting and mailing is effective on the date the notice is posted and mailed." (*Walters, supra*, 226 Cal.App.3d Supp. at p. 20 .)

Secondary Sources

12 Witkin, Summary of California Law (10th ed. 2006) Real Property, §§ 720, 723, 727

1 California Landlord-Tenant Practice (Cont.Ed.Bar 2d ed.) §§ 8.26-8.68

1 California Eviction Defense Manual (Cont.Ed.Bar 2d ed.) §§ 5.2, 6.10-6.16, 6.25-6.29, 6.38-6.49, Ch. 8

7 *California Real Estate Law and Practice*, Ch. 210, *Unlawful Detainer*, §§ 210.21, 210.23, 210.24 (Matthew Bender)

Matthew Bender Practice Guide: California Landlord-Tenant Litigation, Ch. 5, *Unlawful Detainer*, 5.11, 5.12

29 *California Forms of Pleading and Practice*, Ch. 333, *Landlord and Tenant: Eviction Actions*, § 333.11 (Matthew Bender)

23 *California Points and Authorities*, Ch. 236, *Unlawful Detainer*, §§ 236.11, 236.12 (Matthew Bender)

Miller & Starr, California Real Estate (Thomson West) Ch. 19, *Landlord-Tenant*, §§ 19:202-19:204

Publisher's Notes

There is no BAJI instruction on this subject.

LexisNexis Matthew Bender Expert Practice Tip--Notice to Cure or Quit May Give More Than Three Days: Some leases provide more than three days (10 days is common) to cure a default in the payment of rent. In that case, the defendant is entitled to the full time allowed by the lease to pay the rent due before an unlawful detainer may be filed. Modify this instruction accordingly if the lease provides for a greater time to pay the rent than three days. *By Steven R. Kellman*

LexisNexis Matthew Bender Expert Practice Tip--Service of Notice for Unlawful Detainer Must Follow Procedural Order: *Code Civ. Proc. § 1162* requires personal service of notices for unlawful detainer [*Code Civ. Proc. § 1162(1)*] if the defendant is at the property at the time of service. If the defendant is not then at the property, service can be effected by leaving a copy of the notice with a responsible person and mailing defendant a copy. If no one is at the property, and the defendant's place of business/employment is known, a copy can be left there, plus mail a copy to the defendant [*Code Civ. Proc. § 1162(2)*]. If no one is available at the property and the defendant's place of business/employment is not known, a copy should be posted at the property and mailed to the defendant [*Code Civ. Proc. § 1162(3)*]. *By Steven R. Kellman*

LexisNexis Matthew Bender Expert Practice Tip--Three-Day Notice to Pay Rent or Quit Must be Valid and Properly Served: For an unlawful detainer notice (including a three-day notice to pay rent or quit) to be valid, it must be properly served as per *Code Civ. Proc. § 1162*, as well as contain the appropriate information. *By Steven R. Kellman*

LexisNexis Matthew Bender Expert Practice Tip--Defective Service of Notice Not Necessarily

Cured by Receipt of Notice: Defective service of an unlawful detainer notice may be cured by an express admission of its receipt, but evidence of actual receipt without an admission will not cure the defect. If a defective service of a notice is claimed to be cured by its receipt, modify this instruction to reflect the necessity of an admission [*see Valov v. Tank* (1985) 168 Cal.App.3d 867, 876, 214 Cal.Rptr. 546] . By Steven R. Kellman

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsStandard InstructionsReal Property LawLandlord & TenantLandlord's Remedies & RightsEviction ActionsForcible Entry & DetainerReal Property LawLandlord & TenantLandlord's Remedies & RightsTermination Notice

* Steven R. Kellman, who wrote the Practice Tips in this chapter, has been in private practice since 1982, practicing landlord-tenant law with an emphasis on representing tenants. In 1993 he founded the Tenants Legal Center, located in San Diego. He has lectured for the CEB and professional and community groups on this subject. He has authored and contributed to several legal publications. Mr. Kellman has written an informational newspaper series feature on landlord-tenant law appearing in the *San Diego Union-Tribune*, *Los Angeles Times*, and *San Francisco Chronicle*. He has served as a judge pro tem, and on legislative committees for proposed landlord-tenant legislation.



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California Forms of Jury Instruction

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CHAPTER 43 California Judicial Council Unlawful Detainer Instructions *

5-43 California Forms of Jury Instruction CACI 4306

CACI 4306 Termination of Month-to-Month Tenancy--Essential Factual Elements

[*Name of plaintiff*] **claims that** [*name of defendant*] **[and** [*name of subtenant*], **a subtenant of** [*name of defendant*],] **no longer [has/have] the right to occupy the property because the tenancy has ended. To establish this claim, [**
name of plaintiff] **must prove all of the following:**

- 1. That [*name of plaintiff*] [owns/leases] the property;**
- 2. That [*name of plaintiff*] [rented/subleased] the property to [*name of defendant*] under a month-to-month [lease/rental agreement/sublease];**
- 3. That [*name of plaintiff*] gave [*name of defendant*] proper [30/60] days' written notice that the tenancy was ending[, or that [*name of defendant*] actually received this notice at least [30/60] days before [*date on which action was filed*]]; and**
- 4. That [*name of defendant*] [or subtenant [*name of subtenant*]] is still occupying the property.**

New August 2007

Directions for Use

Uncontested elements may be deleted from this instruction.

Include the bracketed references to a subtenancy in the opening paragraph and in element 4 if persons other than the tenant-defendant are in occupancy of the premises.

If the plaintiff is the landlord or owner, select "owns" in element 1 and "rented" and either "lease" or

"rental agreement" in element 2. Commercial documents are usually called "leases" while residential documents are often called "rental agreements." Select the term that is used on the written document.

If the plaintiff is a tenant seeking to recover possession from a subtenant, select "leases" in element 1 and "subleased" and "sublease" in element 2. (*Code Civ. Proc.*, § 1161(3).)

In element 3, select the applicable number of days' notice required by statute. Thirty days is sufficient for commercial tenancies, residential tenancies of less than a year's duration, and certain transfers of the ownership interest to a bona fide purchaser. For residential tenancies of a year or more's duration, 60 days' notice is generally required. (*Civ. Code*, §§ 1946, 1946.1(b)-(d).)

If service of notice may have been defective, but there is evidence that the defendant actually did receive it, include the bracketed language at the end of element 3. Defective service is waived if defendant admits timely receipt of notice. (*Lehr v. Crosby* (1981) 123 Cal.App.3d Supp. 1, 6, fn. 3 [177 Cal.Rptr. 96] .)

Do not give this instruction to terminate a tenancy if the tenant is receiving federal financial assistance through the Section 8 program. (See *Wasatch Property Management v. Degrate* (2005) 35 Cal.4th 1111, 1115 [29 Cal.Rptr.3d 262, 112 P.3d 647] ; *Civ. Code*, § 1954.535 (90 days' notice required).) Specific grounds for terminating a federally subsidized low-income housing tenancy are required and must be set forth in the notice. (See, e.g., 24 C.F.R. § 982.310.)

See CACI No. 4307, *Sufficiency and Service of Notice of Termination of Month-to-Month Tenancy*, for an instruction on proper advanced written notice.

Sources and Authority

- *Code of Civil Procedure* section 1161 provides, in part:

A tenant of real property ... is guilty of unlawful detainer:

1. When he or she continues in possession, in person or by subtenant ... after the expiration of the term for which it is let to him or her; provided the expiration is of a nondefault nature however brought about without the permission of his or her landlord ... including the case where the person to be removed became the occupant of the premises as a servant, employee, agent, or licensee and the relation of master and servant, or employer and employee, or principal and agent, or licensor and licensee, has been lawfully terminated or the time fixed for occupancy by the agreement between the parties has expired; but nothing in this subdivision shall be construed as preventing the removal of the occupant in any other lawful manner; but in case of a tenancy at will, it must first be terminated by notice, as prescribed in the Civil Code.

- *Civil Code* section 1946 provides: "A hiring of real property, for a term not specified by the parties, is deemed to be renewed as stated in Section 1945, at the end of the term implied by law unless one of the parties gives written notice to the other of his intention to terminate the same, at least as long before the expiration thereof as the term of the hiring itself, not exceeding 30 days; provided, however, that as to tenancies from month to month either of the parties may terminate the same by giving at least 30 days' written notice thereof at any time and the rent shall be due and payable to and including the date of termination. It shall be competent for the parties to provide by an agreement at the time such tenancy is created that a notice of the intention to terminate the same may be given at any time not less than seven days

before the expiration of the term thereof. The notice herein required shall be given in the manner prescribed in *Section 1162 of the Code of Civil Procedure* or by sending a copy by certified or registered mail addressed to the other party. In addition, the lessee may give such notice by sending a copy by certified or registered mail addressed to the agent of the lessor to whom the lessee has paid the rent for the month prior to the date of such notice or by delivering a copy to the agent personally."

■ *Civil Code section 1946.1* provides, in part:

(a) Notwithstanding Section 1946, a hiring of residential real property for a term not specified by the parties, is deemed to be renewed as stated in Section 1945, at the end of the term implied by law unless one of the parties gives written notice to the other of his or her intention to terminate the tenancy, as provided in this section.

(b) An owner of a residential dwelling giving notice pursuant to this section shall give notice at least 60 days prior to the proposed date of termination. A tenant giving notice pursuant to this section shall give notice for a period at least as long as the term of the periodic tenancy prior to the proposed date of termination.

(c) Notwithstanding subdivision (b), an owner of a residential dwelling giving notice pursuant to this section shall give notice at least 30 days prior to the proposed date of termination if any tenant or resident has resided in the dwelling for less than one year.

(d) Notwithstanding subdivision (b), an owner of a residential dwelling giving notice pursuant to this section shall give notice at least 30 days prior to the proposed date of termination if all of the following apply:

(1) The dwelling or unit is alienable separate from the title to any other dwelling unit.

(2) The owner has contracted to sell the dwelling or unit to a bona fide purchaser for value, and has established an escrow with a licensed escrow agent, as defined in *Sections 17004 and 17200 of the Financial Code*, or a licensed real estate broker, as defined in *Section 10131 of the Business and Professions Code*.

(3) The purchaser is a natural person or persons.

(4) The notice is given no more than 120 days after the escrow has been established.

(5) Notice was not previously given to the tenant pursuant to this section.

(6) The purchaser in good faith intends to reside in the property for at least one full year after the termination of the tenancy.

...

(f) The notices required by this section shall be given in the manner prescribed in *Section 1162 of the Code of Civil Procedure* or by sending a copy by certified or registered mail.

■ *Civil Code section 1944* provides: "A hiring of lodgings or a dwelling-house for an unspecified term is presumed to have been made for such length of time as the parties adopt for the estimation of the rent. Thus a hiring at a monthly rate of rent is presumed to be for one month. In the absence of any agreement respecting the length of time or the rent,

the hiring is presumed to be monthly."

■ *Civil Code section 1952.3(a)* provides, in part: "[I]f the lessor brings an unlawful detainer proceeding and possession of the property is no longer in issue because possession of the property has been delivered to the lessor before trial or, if there is no trial, before judgment is entered, the case becomes an ordinary civil action"

■ " 'In order that such an action may be maintained the conventional relation of landlord and tenant must be shown to exist. In other words, the action is limited to those cases in which the tenant is estopped to deny the landlord's title.' " (*Fredericksen v. McCosker* (1956) 143 Cal.App.2d 114, 116 [299 P.2d 908] , internal citations omitted.)

■ "If the tenant gives up possession of the property after the commencement of an unlawful detainer proceeding, the action becomes an ordinary one for damages." (*Fish Construction Co. v. Moselle Coach Works, Inc.* (1983) 148 Cal.App.3d 654, 658 [196 Cal.Rptr. 174] .)

■ "The Act provides that as a prerequisite to filing an unlawful detainer action based on a terminated month-to-month tenancy, the landlord must serve the tenant with a 30-day written notice of termination." (*Losornio v. Motta* (1998) 67 Cal.App.4th 110, 113 [78 Cal.Rptr.2d 799] , internal citations omitted.)

Secondary Sources

12 Witkin, Summary of California Law (10th ed. 2006) Real Property, § 680

1 California Landlord-Tenant Practice (Cont.Ed.Bar 2d ed.) §§ 8.69-8.80

1 California Eviction Defense Manual (Cont.Ed.Bar 2d ed.) §§ 5.3, 7.5, 7.11

7 *California Real Estate Law and Practice*, Ch. 210, *Unlawful Detainer*, §§ 210.21, 210.27 (Matthew Bender)

Matthew Bender Practice Guide: California Landlord-Tenant Litigation, Ch. 5, *Unlawful Detainer*, 5.07

29 *California Forms of Pleading and Practice*, Ch. 333, *Landlord and Tenant: Eviction Actions*, § 333.10 (Matthew Bender)

23 *California Points and Authorities*, Ch. 236, *Unlawful Detainer*, §§ 236.11, 236.40 (Matthew Bender)

Miller & Starr, California Real Estate (Thomson West) Ch. 19, *Landlord-Tenant*, § 19:188

Publisher's Notes

There is no BAJI instruction on this subject.

LexisNexis Matthew Bender Expert Practice Tip--Plaintiff Must Have Authority to Lease: The plaintiff must be the owner or an agent of the owner acting with authority, unless the plaintiff is a tenant and subleasing to a subtenant. This instruction may be amended to reflect any issues about whether this is the proper plaintiff to sue for lease termination. *By Steven R. Kellman*

LexisNexis Matthew Bender Expert Practice Tip--Month-to-Month Tenancy May be Express, Implied, or by Operation of Law: A month-to-month tenancy may be created in other ways other than by a written rental agreement. This type of tenancy may be created by an oral agreement (for a term not to exceed one year) or by the mere payment and acceptance of monthly rent. The acceptance of rent after an expired lease for a term may also create a month-to-month tenancy. Modify this instruction

accordingly if the type of tenancy is in dispute. *By Steven R. Kellman*

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Real Property Law Landlord & Tenant Landlord's Remedies & Rights Eviction Actions Forcible Entry & Detainer Real Property Law Landlord & Tenant Tenancies Periodic Tenancies

* Steven R. Kellman, who wrote the Practice Tips in this chapter, has been in private practice since 1982, practicing landlord-tenant law with an emphasis on representing tenants. In 1993 he founded the Tenants Legal Center, located in San Diego. He has lectured for the CEB and professional and community groups on this subject. He has authored and contributed to several legal publications. Mr. Kellman has written an informational newspaper series feature on landlord-tenant law appearing in the *San Diego Union-Tribune*, *Los Angeles Times*, and *San Francisco Chronicle*. He has served as a judge pro tem, and on legislative committees for proposed landlord-tenant legislation.



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California Forms of Jury Instruction

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CHAPTER 43 California Judicial Council Unlawful Detainer Instructions *

5-43 California Forms of Jury Instruction CACI 4307

CACI 4307 Sufficiency and Service of Notice of Termination of Month-to-Month Tenancy

[*Name of plaintiff*] contends that [he/she/it] properly gave [*name of defendant*] written notice that the tenancy was ending. To prove that the notice contained the required information and was properly given, [*name of plaintiff*] must prove all of the following:

1. That the notice informed [*name of defendant*] in writing that the tenancy would end on a date at least [30/60] days after notice was given to [him/her/it];
2. That the notice was given to [*name of defendant*] at least [30/60] days before the date that the tenancy was to end; and
3. That the notice was given to [*name of defendant*] at least [30/60] days before [*insert date on which action was filed*];

Notice was properly given if [*select one or more of the following manners of service:*]

[the notice was delivered to [*name of defendant*] personally][./; or]

[the notice was sent by certified or registered mail in an envelope addressed to [*name of defendant*], in which case notice is considered given on the date the notice was placed in the mail][./; or]

[[*name of defendant*] was not at home or work, and the notice was left with a responsible person at [*name of defendant*]'s home or place of work, and a copy was also mailed to the address of the rented property in an envelope addressed to [*name of defendant*]. In this case, notice is considered given on the date the second notice was placed in the mail][./; or]

[a responsible person was not present at [name of defendant]'s home or work, and the notice was posted on the property in a place where it would easily be noticed, and a copy was also mailed to the property in an envelope addressed to [name of defendant]. In this case, notice is considered given on the date the second notice was placed in the mail].

[The [30/60]-day notice period begins on the day after the notice was given to [name of defendant]. If the last day of the notice period falls on a Saturday, Sunday, or holiday, [name of defendant]'s time to vacate the property is extended to include the first day after the Saturday, Sunday, or holiday that is not also a Saturday, Sunday, or holiday.]

[If [name of plaintiff] did not properly give [name of defendant] the required written notice, the notice is still effective if [name of defendant] actually received it at least [30/60] days before [insert date on which action was filed].]

New August 2007

Directions for Use

Select the applicable number of days' notice required by statute. Thirty days is sufficient for commercial tenancies, residential tenancies of less than a year's duration, and certain transfers of the ownership interest to a bona fide purchaser. For residential tenancies of a year or more's duration, 60 days is generally required. (*Civ. Code*, §§ 1946, 1946.1(b)-(d).)

If 30 days' notice is sufficient and the lease provided for a notice period other than the statutory 30-day period (but not less than 7), insert that number instead of "30" or "60" throughout the instruction. (*Civ. Code*, § 1946.)

Select all manners of service used, including personal service, certified or registered mail, substituted service by leaving the notice at the defendant's home or place of work, and substituted service by posting on the property. (*Civ. Code*, §§ 1946, 1946.1(f); *Code Civ. Proc.*, § 1162.)

Read the next-to-last paragraph if the last day of the notice period fell on a Saturday, Sunday, or holiday.

If service of notice may have been defective, but there is evidence that the defendant actually did receive it, include the last paragraph. Defective service is waived if defendant admits timely receipt of notice. (*Lehr v. Crosby* (1981) 123 Cal.App.3d Supp. 1, 6, fn. 3 [177 Cal.Rptr. 96] .)

Local ordinances may impose additional notice requirements for the termination of a rental agreement. This instruction should be modified accordingly.

Sources and Authority

- *Civil Code* section 1946 provides: "A hiring of real property, for a term not specified by the parties, is deemed to be renewed as stated in Section 1945, at the end of the term implied by law unless one of the parties gives written notice to the other of his intention to terminate the same, at least as long before the expiration thereof as the term of the hiring itself, not exceeding 30 days; provided, however, that as to tenancies from month to month either of the parties may terminate the same by giving at least 30 days' written notice thereof at any time and the rent shall be due and payable to and including the date of

termination. It shall be competent for the parties to provide by an agreement at the time such tenancy is created that a notice of the intention to terminate the same may be given at any time not less than seven days before the expiration of the term thereof. The notice herein required shall be given in the manner prescribed in *Section 1162 of the Code of Civil Procedure* or by sending a copy by certified or registered mail addressed to the other party. In addition, the lessee may give such notice by sending a copy by certified or registered mail addressed to the agent of the lessor to whom the lessee has paid the rent for the month prior to the date of such notice or by delivering a copy to the agent personally."

■ *Civil Code section 1946.1* provides, in part:

(a) Notwithstanding Section 1946, a hiring of residential real property for a term not specified by the parties, is deemed to be renewed as stated in Section 1945, at the end of the term implied by law unless one of the parties gives written notice to the other of his or her intention to terminate the tenancy, as provided in this section.

(b) An owner of a residential dwelling giving notice pursuant to this section shall give notice at least 60 days prior to the proposed date of termination. A tenant giving notice pursuant to this section shall give notice for a period at least as long as the term of the periodic tenancy prior to the proposed date of termination.

(c) Notwithstanding subdivision (b), an owner of a residential dwelling giving notice pursuant to this section shall give notice at least 30 days prior to the proposed date of termination if any tenant or resident has resided in the dwelling for less than one year.

(d) Notwithstanding subdivision (b), an owner of a residential dwelling giving notice pursuant to this section shall give notice at least 30 days prior to the proposed date of termination if all of the following apply:

(1) The dwelling or unit is alienable separate from the title to any other dwelling unit.

(2) The owner has contracted to sell the dwelling or unit to a bona fide purchaser for value, and has established an escrow with a licensed escrow agent, as defined in *Sections 17004 and 17200 of the Financial Code*, or a licensed real estate broker, as defined in *Section 10131 of the Business and Professions Code*.

(3) The purchaser is a natural person or persons.

(4) The notice is given no more than 120 days after the escrow has been established.

(5) Notice was not previously given to the tenant pursuant to this section.

(6) The purchaser in good faith intends to reside in the property for at least one full year after the termination of the tenancy.

...

(f) The notices required by this section shall be given in the manner prescribed in *Section 1162 of the Code of Civil Procedure* or by sending a copy by certified or registered mail.

■ *Code of Civil Procedure section 1162* provides, in part:

The notices required ... may be served, either:

1. By delivering a copy to the tenant personally; or,
2. If he or she is absent from his or her place of residence, and from his or her usual place of business, by leaving a copy with some person of suitable age and discretion at either place, and sending a copy through the mail addressed to the tenant at his or her place of residence; or,
3. If such place of residence and business can not be ascertained, or a person of suitable age or discretion there can not be found, then by affixing a copy in a conspicuous place on the property, and also delivering a copy to a person there residing, if such person can be found; and also sending a copy through the mail addressed to the tenant at the place where the property is situated. Service upon a subtenant may be made in the same manner.

■ "[T]he service and notice provisions in the unlawful detainer statutes and [Code of Civil Procedure] section 1013 are mutually exclusive, and thus, section 1013 does not extend the notice periods that are a prerequisite to filing an unlawful detainer action." (*Losornio v. Motta* (1998) 67 Cal.App.4th 110, 112 [78 Cal.Rptr.2d 799] .)

Secondary Sources

12 Witkin, Summary of California Law (10th ed. 2006) Real Property, § 680

1 California Landlord-Tenant Practice (Cont.Ed.Bar 2d ed.) §§ 8.69-8.80

1 California Eviction Defense Manual (Cont.Ed.Bar 2d ed.) § 5.3, Ch. 7

7 *California Real Estate Law and Practice*, Ch. 210, *Unlawful Detainer*, §§ 210.21, 210.27 (Matthew Bender)

Matthew Bender Practice Guide: California Landlord-Tenant Litigation, Ch. 5, *Unlawful Detainer*, 5.11, 5.12

29 *California Forms of Pleading and Practice*, Ch. 333, *Landlord and Tenant: Eviction Actions*, § 333.11 (Matthew Bender)

23 *California Points and Authorities*, Ch. 236, *Unlawful Detainer*, §§ 236.10 -236.12 (Matthew Bender)

Miller & Starr, California Real Estate (Thomson West) Ch. 19, *Landlord-Tenant*, §§ 19:188, 19:192

Publisher's Notes

There is no BAJI instruction on this subject.

LexisNexis Matthew Bender Expert Practice Tip--Notice to Quit in Month-to-Month Tenancy Must be Unequivocal Demand for Possession: Modify this instruction if there is an issue as to the sufficiency of the notice because the defendant may not have interpreted it to be a notice of termination (i.e., a negotiation or offer to renegotiate the agreement). *By Steven R. Kellman*

LexisNexis Matthew Bender Expert Practice Tip--Service of Notice for Unlawful Detainer Must Follow Procedural Order: *Code Civ. Proc. § 1162* requires personal service of notices for unlawful detainer [*Code Civ. Proc. § 1162(1)*] if the defendant is at the property at the time of service. If the defendant is not then at the property, service can be effected by leaving a copy of the notice with a responsible person and mailing defendant a copy. If no one is at the property, and the defendant's place

of business/employment is known, a copy can be left there, plus mail a copy to the defendant [*Code Civ. Proc.* § 1162(2)]. If no one is available at the property and the defendant's place of business/employment is not known, a copy should be posted at the property and mailed to the defendant [*Code Civ. Proc.* § 1162(3)]. *By Steven R. Kellman*

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Real Property Law Landlord & Tenant Landlord's Remedies & Rights Eviction Actions Forcible Entry & Detainer Real Property Law Landlord & Tenant Landlord's Remedies & Rights Termination Notice Real Property Law Landlord & Tenant Tenancies Periodic Tenancies

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California Forms of Jury Instruction

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CHAPTER 43 California Judicial Council Unlawful Detainer Instructions *

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CHAPTER 43 California Judicial Council Unlawful Detainer Instructions *

5-43 California Forms of Jury Instruction CACI 4320

CACI 4320 Affirmative Defense--Implied Warranty of Habitability

[*Name of defendant*] claims that [he/she] does not owe [any/the full amount of] rent because [*name of plaintiff*] did not maintain the property in a habitable condition. To succeed on this defense, [*name of defendant*] must prove that [*name of plaintiff*] failed to provide one or more of the following:

- a. [effective waterproofing and weather protection of roof and exterior walls, including unbroken windows and doors[./; or]**
- b. [plumbing or gas facilities that complied with applicable law in effect at the time of installation and that were maintained in good working order][./; or]**
- c. [a water supply capable of producing hot and cold running water furnished to appropriate fixtures, and connected to a sewage disposal system][./; or]**
- d. [heating facilities that complied with applicable law in effect at the time of installation and that were maintained in good working order][./; or]**
- e. [electrical lighting with wiring and electrical equipment that complied with applicable law in effect at the time of installation and that were maintained in good working order][./; or]**
- f. [building, grounds, and all areas of the landlord's control, kept in every part clean, sanitary, and free from all accumulations of debris, filth, rubbish, garbage, rodents, and vermin][./; or]**
- g. [an adequate number of containers for garbage and rubbish, in clean condition and good repair][./; or]**

h. [floors, stairways, and railings maintained in good repair][./; or]

i. [Insert other applicable standard relating to habitability .]

[Name of plaintiff]'s failure to meet these requirements does not necessarily mean that the property was not habitable. The failure must be substantial. A condition that occurred only after [name of defendant] failed or refused to pay rent and was served with a notice to pay rent or quit cannot be a defense to the previous nonpayment.

[Even if [name of defendant] proves that [name of plaintiff] substantially failed to meet any of these requirements, [name of defendant]'s defense fails if [name of plaintiff] proves that [name of defendant] has done any of the following that contributed substantially to the condition or interfered substantially with [name of plaintiff]'s ability to make the necessary repairs:

[substantially failed to keep [his/her] living area as clean and sanitary as the condition of the property permitted][./; or]

[substantially failed to dispose of all rubbish, garbage, and other waste in a clean and sanitary manner][./; or]

[substantially failed to properly use and operate all electrical, gas, and plumbing fixtures and keep them as clean and sanitary as their condition permitted][./; or]

[intentionally destroyed, defaced, damaged, impaired, or removed any part of the property, equipment, or accessories, or allowed others to do so][./; or]

[substantially failed to use the property for living, sleeping, cooking, or dining purposes only as appropriate based on the design of the property.]]

The fact that [name of defendant] has continued to occupy the property does not necessarily mean that the property is habitable.

New August 2007; Revised June 2010

Directions for Use

This instruction applies only to residential tenancies. (See *Code Civ. Proc.*, § 1174.2(a).)

The habitability standards included are those set forth in *Civil Code* section 1941.1. Use only those relevant to the case. Or insert other applicable standards as appropriate, for example, other statutory or regulatory requirements (*Knight v. Hallsthammar* (1981) 29 Cal.3d 46, 59, fn.10 [171 Cal.Rptr. 707, 623 P.2d 268] ; see *Health & Saf. Code*, §§ 17920.3, 17920.10) or security measures. (See *Secretary of Housing & Urban Dev. v. Layfield* (1978) 88 Cal.App.3d Supp. 28, 30 [152 Cal.Rptr. 342] .)

If the landlord alleges that the implied warranty of habitability does not apply because of the tenant's affirmative misconduct, select the applicable reasons. The first two reasons do not apply if the landlord has expressly agreed in writing to perform those acts. (*Civ. Code*, § 1941.2(b).)

There is no requirement that the tenant give notice of the condition to the landlord (See *Knight, supra*, 29 Cal.3d at p. 54). In a case not involving unlawful detainer and the failure to pay rent, the California Supreme Court has stated that the warranty of habitability extends only to conditions of which the landlord knew or should have discovered through reasonable inspections. (See *Peterson v. Superior Court* (1995) 10 Cal.4th 1185, 1206 [43 Cal.Rptr.2d 836, 899 P.2d 905] .)

Sources and Authority

■ *Civil Code section 1941* provides: "The lessor of a building intended for the occupation of human beings must, in the absence of an agreement to the contrary, put it into a condition fit for such occupation, and repair all subsequent dilapidations thereof, which render it untenable, except such as are mentioned in section nineteen hundred and twenty-nine."

■ *Code of Civil Procedure section 1174.2* provides:

(a) In an unlawful detainer proceeding involving residential premises after default in payment of rent and in which the tenant has raised as an affirmative defense a breach of the landlord's obligations under *Section 1941 of the Civil Code* or of any warranty of habitability, the court shall determine whether a substantial breach of these obligations has occurred. If the court finds that a substantial breach has occurred, the court (1) shall determine the reasonable rental value of the premises in its untenable state to the date of trial, (2) shall deny possession to the landlord and adjudge the tenant to be the prevailing party, conditioned upon the payment by the tenant of the rent that has accrued to the date of the trial as adjusted pursuant to this subdivision within a reasonable period of time not exceeding five days, from the date of the court's judgment or, if service of the court's judgment is made by mail, the payment shall be made within the time set forth in Section 1013, (3) may order the landlord to make repairs and correct the conditions which constitute a breach of the landlord's obligations, (4) shall order that the monthly rent be limited to the reasonable rental value of the premises as determined pursuant to this subdivision until repairs are completed, and (5) except as otherwise provided in subdivision (b), shall award the tenant costs and attorneys' fees if provided by, and pursuant to, any statute or the contract of the parties. If the court orders repairs or corrections, or both, pursuant to paragraph (3), the court's jurisdiction continues over the matter for the purpose of ensuring compliance. The court shall, however, award possession of the premises to the landlord if the tenant fails to pay all rent accrued to the date of trial, as determined due in the judgment, within the period prescribed by the court pursuant to this subdivision. The tenant shall, however, retain any rights conferred by Section 1174.

(b) If the court determines that there has been no substantial breach of *Section 1941 of the Civil Code* or of any warranty of habitability by the landlord or if the tenant fails to pay all rent accrued to the date of trial, as required by the court pursuant to subdivision (a), then judgment shall be entered in favor of the landlord, and the landlord shall be the prevailing party for the purposes of awarding costs or attorneys' fees pursuant to any statute or the contract of the parties.

(c) As used in this section, "substantial breach" means the failure of the landlord to comply with applicable building and housing code standards which materially affect health and safety.

(d) Nothing in this section is intended to deny the tenant the right to a trial by jury. Nothing in this section shall limit or supersede any provision of Chapter 12.75 (commencing with Section 7060) of Division 7 of Title 1 of the Government Code.

■ *Civil Code section 1941.1* provides:

A dwelling shall be deemed untenantable for purposes of Section 1941 if it substantially lacks any of the following affirmative standard characteristics or is a residential unit described in *Section 17920.3* or *17920.10 of the Health and Safety Code*:

(a) Effective waterproofing and weather protection of roof and exterior walls, including unbroken windows and doors.

(b) Plumbing or gas facilities that conformed to applicable law in effect at the time of installation, maintained in good working order.

(c) A water supply approved under applicable law that is under the control of the tenant, capable of producing hot and cold running water, or a system that is under the control of the landlord, that produces hot and cold running water, furnished to appropriate fixtures, and connected to a sewage disposal system approved under applicable law.

(d) Heating facilities that conformed with applicable law at the time of installation, maintained in good working order.

(e) Electrical lighting, with wiring and electrical equipment that conformed with applicable law at the time of installation, maintained in good working order.

(f) Building, grounds, and appurtenances at the time of the commencement of the lease or rental agreement, and all areas under control of the landlord, kept in every part clean, sanitary, and free from all accumulations of debris, filth, rubbish, garbage, rodents, and vermin.

(g) An adequate number of appropriate receptacles for garbage and rubbish, in clean condition and good repair at the time of the commencement of the lease or rental agreement, with the landlord providing appropriate serviceable receptacles thereafter and being responsible for the clean condition and good repair of the receptacles under his or her control.

(h) Floors, stairways, and railings maintained in good repair.

■ *Civil Code section 1941.2* provides:

(a) No duty on the part of the landlord to repair a dilapidation shall arise under Section 1941 or 1942 if the tenant is in substantial violation of any of the following affirmative obligations, provided the tenant's violation contributes substantially to the existence of the dilapidation or interferes substantially with the landlord's obligation under Section 1941 to effect the necessary repairs:

(1) To keep that part of the premises which he occupies and uses clean and sanitary as the condition of the premises permits.

(2) To dispose from his dwelling unit of all rubbish, garbage and other waste, in a clean and sanitary manner.

(3) To properly use and operate all electrical, gas and plumbing fixtures and keep them as clean and sanitary as their condition permits.

(4) Not to permit any person on the premises, with his permission, to willfully or wantonly destroy, deface, damage, impair or remove any part of the structure or dwelling unit or the facilities, equipment, or appurtenances thereto, nor himself do any such thing.

(5) To occupy the premises as his abode, utilizing portions thereof for living, sleeping, cooking or dining purposes only which were respectively designed or intended to be used for such occupancies.

(b) Paragraphs (1) and (2) of subdivision (a) shall not apply if the landlord has expressly agreed in writing to perform the act or acts mentioned therein.

■ *Civil Code section 1942.4(a)* provides:

(a) A landlord of a dwelling may not demand rent, collect rent, issue a notice of a rent increase, or issue a three-day notice to pay rent or quit pursuant to *subdivision (2) of Section 1161 of the Code of Civil Procedure*, if all of the following conditions exist prior to the landlord's demand or notice:

(1) The dwelling substantially lacks any of the affirmative standard characteristics listed in Section 1941.1 or violates *Section 17920.10 of the Health and Safety Code*, or is deemed and declared substandard as set forth in *Section 17920.3 of the Health and Safety Code* because conditions listed in that section exist to an extent that endangers the life, limb, health, property, safety, or welfare of the public or the occupants of the dwelling.

(2) A public officer or employee who is responsible for the enforcement of any housing law, after inspecting the premises, has notified the landlord or the landlord's agent in writing of his or her obligations to abate the nuisance or repair the substandard conditions.

(3) The conditions have existed and have not been abated 35 days beyond the date of service of the notice specified in paragraph (2) and the delay is without good cause. For purposes of this subdivision, service shall be complete at the time of deposit in the United States mail.

(4) The conditions were not caused by an act or omission of the tenant or lessee in violation of Section 1929 or 1941.2.

■ "Once we recognize that the tenant's obligation to pay rent and the landlord's warranty of habitability are mutually dependent, it becomes clear that the landlord's breach of such warranty may be directly relevant to the issue of possession. If the tenant can prove such a breach by the landlord, he may demonstrate that his nonpayment of rent was justified and that no rent is in fact 'due and owing' to the landlord. Under such circumstances, of course, the landlord would not be entitled to possession of the premises." (*Green v. Superior Court* (1974) 10 Cal.3d 616, 635 [111 Cal.Rptr. 704, 517 P.2d 1168] .)

■ "We have concluded that a warranty of habitability is implied by law in residential leases in this state and that the

breach of such a warranty may be raised as a defense in an unlawful detainer action. Under the implied warranty which we recognize, a residential landlord covenants that premises he leases for living quarters will be maintained in a habitable state for the duration of the lease. This implied warranty of habitability does not require that a landlord ensure that leased premises are in perfect, aesthetically pleasing condition, but it does mean that 'bare living requirements' must be maintained. In most cases substantial compliance with those applicable building and housing code standards which materially affect health and safety will suffice to meet the landlord's obligations under the common law implied warranty of habitability we now recognize." (*Green, supra*, 10 Cal.3d at p. 637 , footnotes omitted.)

■ "[U]nder *Green*, a tenant may assert the habitability warranty as a defense in an unlawful detainer action. The plaintiff, of course, is not required to plead negative facts to anticipate a defense." (*De La Vara v. Municipal Court* (1979) 98 Cal.App.3d 638, 641 [159 Cal.Rptr. 648] , internal citations omitted.)

■ "[T]he fact that a tenant was or was not aware of specific defects is not determinative of the duty of a landlord to maintain premises which are habitable. The same reasons which imply the existence of the warranty of habitability--the inequality of bargaining power, the shortage of housing, and the impracticability of imposing upon tenants a duty of inspection--also compel the conclusion that a tenant's lack of knowledge of defects is not a prerequisite to the landlord's breach of the warranty." (*Knight, supra*, 29 Cal.3d at p. 54 .)

■ "The implied warranty of habitability recognized in *Green* gives a tenant a reasonable expectation that the landlord has inspected the rental dwelling and corrected any defects disclosed by that inspection that would render the dwelling uninhabitable. The tenant further reasonably can expect that the landlord will maintain the property in a habitable condition by repairing promptly any conditions, of which the landlord has actual or constructive notice, that arise during the tenancy and render the dwelling uninhabitable. A tenant injured by a defect in the premises, therefore, may bring a negligence action if the landlord breached its duty to exercise reasonable care. But a tenant cannot reasonably expect that the landlord will have eliminated defects in a rented dwelling of which the landlord was unaware and which would not have been disclosed by a reasonable inspection." (*Peterson, supra*, 10 Cal.4th at pp. 1205-1206 , footnotes omitted.)

■ "At least in a situation where, as here, a landlord has notice of alleged uninhabitable conditions not caused by the tenants themselves, a landlord's breach of the implied warranty of habitability exists whether or not he has had a 'reasonable' time to repair. Otherwise, the mutual dependence of a landlord's obligation to maintain habitable premises, and of a tenant's duty to pay rent, would make no sense." (*Knight, supra*, 29 Cal.3d at p. 55 , footnote omitted.)

■ "[A] tenant may defend an unlawful detainer action against a current owner, at least with respect to rent currently being claimed due, despite the fact that the uninhabitable conditions first existed under a former owner." (*Knight, supra*, 29 Cal.3d at p. 57 .)

■ "Without evaluating the propriety of instructing the jury on each item included in the defendants' requested instruction, it is clear that, where appropriate under the facts of a given case, tenants are entitled to instructions based upon relevant standards set forth in *Civil Code section 1941.1* whether or not the 'repair and deduct' remedy has been used." (*Knight, supra*, 29 Cal.3d at p. 58 .)

■ "The defense of implied warranty of habitability is not applicable to unlawful detainer actions involving commercial tenancies." (*Fish Construction Co. v. Moselle Coach Works, Inc.* (1983) 148 Cal.App.3d 654, 658 [196 Cal.Rptr. 174] , internal citation omitted.)

■ "In defending against a 30-day notice, the sole purpose of the [breach of the warranty of habitability] defense is to reduce the amount of daily damages for the period of time after the notice expires." (*N. 7th St. Assocs. v. Constante* (2001) 92 Cal.App.4th Supp. 7, 11, fn. 1 [111 Cal.Rptr.2d 815] .)

Secondary Sources

12 Witkin, Summary of California Law (10th ed. 2006) Real Property, § 625

1 California Landlord-Tenant Practice (Cont.Ed.Bar 2d ed.) §§ 8.109-8.112

2 California Landlord-Tenant Practice (Cont.Ed.Bar 2d ed.) §§ 10.64, 12.36-12.37

1 California Eviction Defense Manual (Cont.Ed.Bar 2d ed.) Ch. 15

7 *California Real Estate Law and Practice*, Ch. 210, *Unlawful Detainer*, §§ 210.64, 210.95A (Matthew Bender)

Matthew Bender Practice Guide: California Landlord-Tenant Litigation, Ch. 5, *Unlawful Detainer*, 5.21

29 *California Forms of Pleading and Practice*, Ch. 333, *Landlord and Tenant: Eviction Actions*, § 333.28 (Matthew Bender)

23 *California Points and Authorities*, Ch. 236, *Unlawful Detainer*, § 236.61 (Matthew Bender)

Miller & Starr, California Real Estate (Thomson West) Ch. 19, *Landlord-Tenant*, § 19:224

Publisher's Notes

There is no BAJI instruction on this subject.

LexisNexis Matthew Bender Expert Practice Tip--Use Caution if Defendant Claims Not to Owe

Any Rent: A jury is generally unlikely to find that a residential rental had no value at all because of habitability defects. Unless the rental unit was absolutely uninhabitable and the defendant could not occupy the unit, use the alternative in this instruction that the defendant does not owe the full rent, rather than the alternative that the defendant does not owe any rent at all. *By Steven R. Kellman*

LexisNexis Matthew Bender Expert Practice Tip--Show Substantial Breach by Defects That Affect

Part of Rental Unit: Use of the term "substantial" in this instruction may be modified to better reflect the concept that the defects need to be significant, not minimal, although they need not impact the entire dwelling [see *Hyatt v. Tedesco* (2002) 96 Cal.App.4th Supp. 62, 68, 117 Cal.Rptr.2d 921 (\$200 reduction in monthly rent for leaking roof deemed "substantial")]. *By Steven R. Kellman*

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Real Property Law Landlord & Tenant Landlord's Remedies & Rights Eviction Actions Forcible Entry & Detainer Real Property Law Landlord & Tenant Tenant's Remedies & Rights Warranty of Habitability

* Steven R. Kellman, who wrote the Practice Tips in this chapter, has been in private practice since 1982, practicing landlord-tenant law with an emphasis on representing tenants. In 1993 he founded the Tenants Legal Center, located in San Diego. He has lectured for the CEB and professional and community groups on this subject. He has authored and contributed to several legal publications. Mr. Kellman has written an informational newspaper series feature on landlord-tenant law appearing in the *San Diego Union-Tribune*, *Los Angeles Times*, and *San Francisco Chronicle*. He has served as a judge pro tem, and on legislative committees for proposed landlord-tenant legislation.



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California Forms of Jury Instruction

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CHAPTER 43 California Judicial Council Unlawful Detainer Instructions *

5-43 California Forms of Jury Instruction CACI 4321

CACI 4321 Affirmative Defense--Retaliatory Eviction--Tenant's Complaint (Civ. Code, § 1942.5)

[Name of defendant] claims that [name of plaintiff] is not entitled to evict [him/her/it] because [name of plaintiff] filed this lawsuit in retaliation for [name of defendant]'s having exercised [his/her/its] rights as a tenant. To succeed on this defense, [name of defendant] must prove all of the following:

1. That [name of defendant] was not in default in the payment of [his/her/its] rent;

2. That [name of plaintiff] filed this lawsuit in retaliation because [name of defendant] had complained about the condition of the property to [[name of plaintiff]/[name of appropriate agency]]; and

3. That [name of plaintiff] filed this lawsuit within 180 days after

[Select the applicable date(s) or event(s):]

[the date on which [name of defendant], in good faith, gave notice to [name of plaintiff] or made an oral complaint to [name of plaintiff] regarding the conditions of the property][./; or]

[the date on which [name of defendant], in good faith, filed a written complaint, or an oral complaint that was registered or otherwise recorded in writing, with [name of appropriate agency], of which [name of plaintiff] had notice, for the purpose of obtaining correction of a condition of the property][./; or]

[the date of an inspection or a citation, resulting from a complaint to [name of appropriate agency] of which [name of plaintiff] did not have notice][./; or]

[the filing of appropriate documents to begin a judicial or an arbitration proceeding involving the conditions of the property[./; or]

[entry of judgment or the signing of an arbitration award that determined the issue of the conditions of the property against [name of plaintiff].]

[Even if [name of defendant] has proved that [name of plaintiff] filed this lawsuit with a retaliatory motive, [name of plaintiff] is still entitled to possession of the premises if [he/she/it] proves that [he/she/it] also filed the lawsuit in good faith for a reason stated in the [3/30/60]-day notice.]

New August 2007; Revised June 2010

Directions for Use

This instruction is based solely on *Civil Code* section 1942.5(a), which has the 180-day limitation. The remedies provided by this statute are in addition to any other remedies provided by statutory or decisional law. (*Civ. Code*, § 1942.5(h).) Thus, there are two parallel and independent sources for the doctrine of retaliatory eviction: the statute and the common law. (*Barela v. Superior Court* (1981) 30 Cal.3d 244, 251 [178 Cal.Rptr. 618, 636 P.2d 582] .) Whether the common law provides additional protection against retaliation beyond the 180-day period has not been decided. (See *Glaser v. Meyers* (1982) 137 Cal.App.3d 770, 776 [187 Cal.Rptr. 242] [statute not a limit in tort action for wrongful eviction; availability of the common law retaliatory eviction defense, unlike that authorized by section 1942.5, is apparently not subject to time limitations].)

Include element 1 only if the landlord's asserted ground for eviction is something other than nonpayment of rent. If nonpayment is the ground, the landlord has the burden to prove that the tenant is in default. (See CACI No. 4302, *Termination for Failure to Pay Rent--Essential Factual Elements*.)

If element 1 is included, there may be additional issues of fact that the jury must resolve in order to decide whether the tenant is in default in the payment of rent. If necessary, instruct that the tenant is not in default if he or she has exercised any legally protected right not to pay the contractual amount of rent, such as a habitability defense, a "repair and deduct" remedy, or a rent increase that is alleged to be retaliatory.

For element 3, select the appropriate date or event that triggered the 180-day period within which a landlord may not file an unlawful detainer. (*Civ. Code*, § 1942.5(a).)

Include the last paragraph if the landlord alleges that there was also a lawful cause for the eviction (see *Civ. Code*, § 1942.5(d) [landlord may proceed "for any lawful cause"]), and that this cause was both asserted in good faith and set forth in the notice terminating the tenancy. (See *Civ. Code*, § 1942.5(e); *Drouet v. Superior Court* (2003) 31 Cal.4th 583, 595-596 [3 Cal.Rptr.3d 205, 73 P.3d 1185] [landlord asserting lawful cause under 1942.5(d) must also establish good faith under 1942.5(e), but need not establish total absence of retaliatory motive].)

Sources and Authority

- *Civil Code* section 1942.5(a) provides:

If the lessor retaliates against the lessee because of the exercise by the lessee of his rights under this chapter or because of his complaint to an appropriate agency as to tenantability of a dwelling, and if the lessee of a dwelling is not in default as to the payment of his rent, the lessor may not recover possession of a dwelling in any action or proceeding, cause the lessee to quit involuntarily, increase the rent, or decrease any services within 180 days of any of the following:

(1) After the date upon which the lessee, in good faith, has given notice pursuant to Section 1942, or has made an oral complaint to the lessor regarding tenantability.

(2) After the date upon which the lessee, in good faith, has filed a written complaint, or an oral complaint which is registered or otherwise recorded in writing, with an appropriate agency, of which the lessor has notice, for the purpose of obtaining correction of a condition relating to tenantability.

(3) After the date of an inspection or issuance of a citation, resulting from a complaint described in paragraph (2) of which the lessor did not have notice.

(4) After the filing of appropriate documents commencing a judicial or arbitration proceeding involving the issue of tenantability.

(5) After entry of judgment or the signing of an arbitration award, if any, when in the judicial proceeding or arbitration the issue of tenantability is determined adversely to the lessor.

■ *Civil Code section 1942.5(d)* provides: "Nothing in this section shall be construed as limiting in any way the exercise by the lessor of his or her rights under any lease or agreement or any law pertaining to the hiring of property or his or her right to do any of the acts described in subdivision (a) or (c) for any lawful cause. Any waiver by a lessee of his or her rights under this section is void as contrary to public policy."

■ *Civil Code section 1942.5(e)* provides: "Notwithstanding subdivisions (a) to (d), inclusive, a lessor may recover possession of a dwelling and do any of the other acts described in subdivision (a) within the period or periods prescribed therein, or within subdivision (c), if the notice of termination, rent increase, or other act, and any pleading or statement of issues in an arbitration, if any, states the ground upon which the lessor, in good faith, seeks to recover possession, increase rent, or do any of the other acts described in subdivision (a) or (c). If the statement is controverted, the lessor shall establish its truth at the trial or other hearing."

■ "The defense of 'retaliatory eviction' has been firmly ensconced in this state's statutory law and judicial decisions for many years. 'It is settled that a landlord may be precluded from evicting a tenant in retaliation for certain kinds of lawful activities of the tenant. As a landlord has no right to possession when he seeks it for such an invalid reason, a tenant may raise the defense of retaliatory eviction in an unlawful detainer proceeding.' The retaliatory eviction doctrine is founded on the premise that '[a] landlord may normally evict a tenant for any reason or for no reason at all, but he may not evict for an improper reason ...' " (*Barela, supra*, 30 Cal.3d at p. 249 , internal citations omitted.)

■ "Thus, California has two parallel and independent sources for the doctrine of retaliatory eviction. This court must decide whether petitioner raised a legally cognizable defense of retaliatory eviction under the statutory scheme and/or the common law doctrine." (*Barela, supra*, 30 Cal.3d at p. 251 .)

■ "Retaliatory eviction occurs, as Witkin observes, '[When] a landlord exercises his legal right to terminate a residential tenancy in an authorized manner, but with the motive of retaliating against a tenant who is not in default but has exercised his legal right to obtain compliance with requirements of habitability.' It is recognized as an affirmative defense in California; and as appellant correctly argues, it extends beyond warranties of habitability into the area of First Amendment rights." (*Four Seas Inv. Corp. v. International Hotel Tenants' Assn.* (1978) 81 Cal.App.3d 604, 610 [146 Cal.Rptr. 531] , internal citations omitted.)

■ "If a tenant factually establishes the retaliatory motive of his landlord in instituting a rent increase and/or eviction action, such proof should bar eviction. Of course, we do not imply that a tenant who proves a retaliatory purpose is entitled to remain in possession in perpetuity. ... 'If this illegal purpose is dissipated, the landlord can, in the absence of legislation or a binding contract, evict his tenants or raise their rents for economic or other legitimate reasons, or even for no reason at all.' " (*Schweiger v. Superior Court of Alameda County* (1970) 3 Cal.3d 507, 517 [90 Cal.Rptr. 729, 476 P.2d 97] , internal citations omitted.)

■ "The existence or nonexistence of a landlord's retaliatory motive is ordinarily a question of fact." (*W. Land Office v. Cervantes* (1985) 175 Cal.App.3d 724, 731 [220 Cal.Rptr. 784] .)

■ "[T]he proper way to construe the statute when a landlord seeks to evict a tenant under the Ellis Act, and the tenant answers by invoking the retaliatory eviction defense under section 1942.5, is to hold that the landlord may nonetheless prevail by asserting a good faith--i.e., a bona fide--intent to withdraw the property from the rental market. If the tenant controverts the landlord's good faith, the landlord must establish the existence of the bona fide intent at a trial or hearing by a preponderance of the evidence." (*Drouet, supra*, 31 Cal.4th at p. 596 .)

Secondary Sources

12 Witkin, Summary of California Law (10th ed. 2006) Real Property, §§ 706, 709, 712

1 California Landlord-Tenant Practice (Cont.Ed.Bar 2d ed.) §§ 8.113-8.117

2 California Landlord-Tenant Practice (Cont.Ed.Bar 2d ed.) §§ 10.65, 12.38

1 California Eviction Defense Manual (Cont.Ed.Bar 2d ed.) Ch. 16

7 *California Real Estate Law and Practice*, Ch. 210, *Unlawful Detainer*, § 210.64 (Matthew Bender)

Matthew Bender Practice Guide: California Landlord-Tenant Litigation, Ch. 5, *Unlawful Detainer*, 5.21

29 *California Forms of Pleading and Practice*, Ch. 333, *Landlord and Tenant: Eviction Actions*, § 333.28 (Matthew Bender)

23 *California Points and Authorities*, Ch. 236, *Unlawful Detainer*, § 236.62 (Matthew Bender)

Miller & Starr, California Real Estate (Thomson West) Ch. 19, *Landlord-Tenant*, § 19:225

Publisher's Notes

There is no BAJI instruction on this subject.

LexisNexis Matthew Bender Expert Practice Tip--Tenant May Not be in Default of Rent if No Unpaid Rent Was Owed: If the defendant owed a reduced amount of rent due to habitability defects, a partial payment of rent may have been sufficient, and the defendant would not be in default. Modify this instruction to allow a finding of no default in the payment of rent if all rent that was owed, was paid or tendered. *By Steven R. Kellman*

LexisNexis Matthew Bender Expert Practice Tip--Complaint May be About Problems Other Than Habitability: *Civ. Code § 1942.5(a)* provides that the defendant is protected from retaliation for complaints about the "tenantability" of a dwelling. This may include problems with the use of the property beyond traditional habitability issues (such as restricted access to specific areas and interference with quiet enjoyment). Modify this instruction to include complaints about tenantability problems, if any were in issue, that are beyond habitability defective conditions. *By Steven R. Kellman*

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Real Property Law Landlord & Tenant Landlord's Remedies & Rights Eviction Actions Forcible Entry & Detainer Real Property Law Landlord & Tenant Tenant's Remedies & Rights Termination & Retaliatory Eviction

* Steven R. Kellman, who wrote the Practice Tips in this chapter, has been in private practice since 1982, practicing landlord-tenant law with an emphasis on representing tenants. In 1993 he founded the Tenants Legal Center, located in San Diego. He has lectured for the CEB and professional and community groups on this subject. He has authored and contributed to several legal publications. Mr. Kellman has written an informational newspaper series feature on landlord-tenant law appearing in the *San Diego Union-Tribune*, *Los Angeles Times*, and *San Francisco Chronicle*. He has served as a judge pro tem, and on legislative committees for proposed landlord-tenant legislation.



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California Forms of Jury Instruction

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CHAPTER 43 California Judicial Council Unlawful Detainer Instructions *

5-43 California Forms of Jury Instruction CACI 4322

CACI 4322 Affirmative Defense--Retaliatory Eviction--Engaging in Legally Protected Activity (Civ. Code, § 1942.5(c))

[Name of defendant] claims that [name of plaintiff] is not entitled to evict [him/her/it] because [name of plaintiff] filed this lawsuit in retaliation for [name of defendant]'s having exercised [his/her/its] rights as a tenant. To succeed on this defense, [name of defendant] must prove all of the following:

1. That [name of defendant] was not in default in the payment of [his/her/its] rent;]

2. That [name of plaintiff] filed this lawsuit in retaliation because [name of defendant] had complained about the condition of the property to [[name of plaintiff]/[name of appropriate agency]]; and

3. That [name of plaintiff] filed this lawsuit within 180 days after

[Select the applicable date(s) or event(s):]

[the date on which [name of defendant], in good faith, gave notice to [name of plaintiff] or made an oral complaint to [name of plaintiff] regarding the conditions of the property][./; or]

[the date on which [name of defendant], in good faith, filed a written complaint, or an oral complaint that was registered or otherwise recorded in writing, with [name of appropriate agency], of which [name of plaintiff] had notice, for the purpose of obtaining correction of a condition of the property][./; or]

[the date of an inspection or a citation, resulting from a complaint to [name of appropriate agency] of which [name of plaintiff] did not have notice][./; or]

[the filing of appropriate documents to begin a judicial or an arbitration proceeding involving the conditions of the property[./; or]

[entry of judgment or the signing of an arbitration award that determined the issue of the conditions of the property against [name of plaintiff].]

[Even if [name of defendant] has proved that [name of plaintiff] filed this lawsuit with a retaliatory motive, [name of plaintiff] is still entitled to possession of the premises if [he/she/it] proves that [he/she/it] also filed the lawsuit in good faith for a reason stated in the [3/30/60]-day notice.]

New August 2007; Revised June 2010

Directions for Use

This instruction is based solely on *Civil Code* section 1942.5(a), which has the 180-day limitation. The remedies provided by this statute are in addition to any other remedies provided by statutory or decisional law. (*Civ. Code*, § 1942.5(h).) Thus, there are two parallel and independent sources for the doctrine of retaliatory eviction: the statute and the common law. (*Barela v. Superior Court* (1981) 30 Cal.3d 244, 251 [178 Cal.Rptr. 618, 636 P.2d 582] .) Whether the common law provides additional protection against retaliation beyond the 180-day period has not been decided. (See *Glaser v. Meyers* (1982) 137 Cal.App.3d 770, 776 [187 Cal.Rptr. 242] [statute not a limit in tort action for wrongful eviction; availability of the common law retaliatory eviction defense, unlike that authorized by section 1942.5, is apparently not subject to time limitations].)

Include element 1 only if the landlord's asserted ground for eviction is something other than nonpayment of rent. If nonpayment is the ground, the landlord has the burden to prove that the tenant is in default. (See CACI No. 4302, *Termination for Failure to Pay Rent--Essential Factual Elements*.)

If element 1 is included, there may be additional issues of fact that the jury must resolve in order to decide whether the tenant is in default in the payment of rent. If necessary, instruct that the tenant is not in default if he or she has exercised any legally protected right not to pay the contractual amount of rent, such as a habitability defense, a "repair and deduct" remedy, or a rent increase that is alleged to be retaliatory.

For element 3, select the appropriate date or event that triggered the 180-day period within which a landlord may not file an unlawful detainer. (*Civ. Code*, § 1942.5(a).)

Include the last paragraph if the landlord alleges that there was also a lawful cause for the eviction (see *Civ. Code*, § 1942.5(d) [landlord may proceed "for any lawful cause"]), and that this cause was both asserted in good faith and set forth in the notice terminating the tenancy. (See *Civ. Code*, § 1942.5(e); *Drouet v. Superior Court* (2003) 31 Cal.4th 583, 595-596 [3 Cal.Rptr.3d 205, 73 P.3d 1185] [landlord asserting lawful cause under 1942.5(d) must also establish good faith under 1942.5(e), but need not establish total absence of retaliatory motive].)

Sources and Authority

- *Civil Code* section 1942.5(a) provides:

If the lessor retaliates against the lessee because of the exercise by the lessee of his rights under this chapter or because of his complaint to an appropriate agency as to tenantability of a dwelling, and if the lessee of a dwelling is not in default as to the payment of his rent, the lessor may not recover possession of a dwelling in any action or proceeding, cause the lessee to quit involuntarily, increase the rent, or decrease any services within 180 days of any of the following:

(1) After the date upon which the lessee, in good faith, has given notice pursuant to Section 1942, or has made an oral complaint to the lessor regarding tenantability.

(2) After the date upon which the lessee, in good faith, has filed a written complaint, or an oral complaint which is registered or otherwise recorded in writing, with an appropriate agency, of which the lessor has notice, for the purpose of obtaining correction of a condition relating to tenantability.

(3) After the date of an inspection or issuance of a citation, resulting from a complaint described in paragraph (2) of which the lessor did not have notice.

(4) After the filing of appropriate documents commencing a judicial or arbitration proceeding involving the issue of tenantability.

(5) After entry of judgment or the signing of an arbitration award, if any, when in the judicial proceeding or arbitration the issue of tenantability is determined adversely to the lessor.

■ *Civil Code section 1942.5(d)* provides: "Nothing in this section shall be construed as limiting in any way the exercise by the lessor of his or her rights under any lease or agreement or any law pertaining to the hiring of property or his or her right to do any of the acts described in subdivision (a) or (c) for any lawful cause. Any waiver by a lessee of his or her rights under this section is void as contrary to public policy."

■ *Civil Code section 1942.5(e)* provides: "Notwithstanding subdivisions (a) to (d), inclusive, a lessor may recover possession of a dwelling and do any of the other acts described in subdivision (a) within the period or periods prescribed therein, or within subdivision (c), if the notice of termination, rent increase, or other act, and any pleading or statement of issues in an arbitration, if any, states the ground upon which the lessor, in good faith, seeks to recover possession, increase rent, or do any of the other acts described in subdivision (a) or (c). If the statement is controverted, the lessor shall establish its truth at the trial or other hearing."

■ "The defense of 'retaliatory eviction' has been firmly ensconced in this state's statutory law and judicial decisions for many years. 'It is settled that a landlord may be precluded from evicting a tenant in retaliation for certain kinds of lawful activities of the tenant. As a landlord has no right to possession when he seeks it for such an invalid reason, a tenant may raise the defense of retaliatory eviction in an unlawful detainer proceeding.' The retaliatory eviction doctrine is founded on the premise that '[a] landlord may normally evict a tenant for any reason or for no reason at all, but he may not evict for an improper reason' " (*Barela, supra*, 30 Cal.3d at p. 249 , internal citations omitted.)

■ "Thus, California has two parallel and independent sources for the doctrine of retaliatory eviction. This court must decide whether petitioner raised a legally cognizable defense of retaliatory eviction under the statutory scheme and/or the common law doctrine." (*Barela, supra*, 30 Cal.3d at p. 251 .)

■ "Retaliatory eviction occurs, as Witkin observes, '[When] a landlord exercises his legal right to terminate a residential tenancy in an authorized manner, but with the motive of retaliating against a tenant who is not in default but has exercised his legal right to obtain compliance with requirements of habitability.' It is recognized as an affirmative defense in California; and as appellant correctly argues, it extends beyond warranties of habitability into the area of First Amendment rights." (*Four Seas Inv. Corp. v. International Hotel Tenants' Assn.* (1978) 81 Cal.App.3d 604, 610 [146 Cal.Rptr. 531] , internal citations omitted.)

■ "If a tenant factually establishes the retaliatory motive of his landlord in instituting a rent increase and/or eviction action, such proof should bar eviction. Of course, we do not imply that a tenant who proves a retaliatory purpose is entitled to remain in possession in perpetuity. ... 'If this illegal purpose is dissipated, the landlord can, in the absence of legislation or a binding contract, evict his tenants or raise their rents for economic or other legitimate reasons, or even for no reason at all.' " (*Schweiger v. Superior Court of Alameda County* (1970) 3 Cal.3d 507, 517 [90 Cal.Rptr. 729, 476 P.2d 97] , internal citations omitted.)

■ "The existence or nonexistence of a landlord's retaliatory motive is ordinarily a question of fact." (*W. Land Office v. Cervantes* (1985) 175 Cal.App.3d 724, 731 [220 Cal.Rptr. 784] .)

■ "[T]he proper way to construe the statute when a landlord seeks to evict a tenant under the Ellis Act, and the tenant answers by invoking the retaliatory eviction defense under section 1942.5, is to hold that the landlord may nonetheless prevail by asserting a good faith--i.e., a bona fide--intent to withdraw the property from the rental market. If the tenant controverts the landlord's good faith, the landlord must establish the existence of the bona fide intent at a trial or hearing by a preponderance of the evidence." (*Drouet, supra*, 31 Cal.4th at p. 596 .)

Secondary Sources

12 Witkin, Summary of California Law (10th ed. 2006) Real Property, §§ 706, 709, 712

1 California Landlord-Tenant Practice (Cont.Ed.Bar 2d ed.) §§ 8.113-8.117

2 California Landlord-Tenant Practice (Cont.Ed.Bar 2d ed.) §§ 10.65, 12.38

1 California Eviction Defense Manual (Cont.Ed.Bar 2d ed.) Ch. 16

7 *California Real Estate Law and Practice*, Ch. 210, *Unlawful Detainer*, § 210.64 (Matthew Bender)

Matthew Bender Practice Guide: California Landlord-Tenant Litigation, Ch. 5, *Unlawful Detainer*, 5.21

29 *California Forms of Pleading and Practice*, Ch. 333, *Landlord and Tenant: Eviction Actions*, § 333.28 (Matthew Bender)

23 *California Points and Authorities*, Ch. 236, *Unlawful Detainer*, § 236.62 (Matthew Bender)

Miller & Starr, California Real Estate (Thomson West) Ch. 19, *Landlord-Tenant*, § 19:225

Publisher's Notes

There is no BAJI instruction on this subject.

LexisNexis Matthew Bender Expert Practice Tip--Tenant Association Need Not be Formal Entity:

A tenant association may simply be two or more tenants uniting as a tenants group with a common, shared function and purpose. Use this instruction for any such group and modify it to describe the group if it is an informal association and not an officially recognized formal entity. *By Steven R. Kellman*

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Real Property Law Landlord & Tenant Landlord's Remedies & Rights Eviction Actions Forcible Entry & Detainer Real Property Law Landlord & Tenant Tenant's Remedies & Rights Termination & Retaliatory Eviction

* Steven R. Kellman, who wrote the Practice Tips in this chapter, has been in private practice since 1982, practicing landlord-tenant law with an emphasis on representing tenants. In 1993 he founded the Tenants Legal Center, located in San Diego. He has lectured for the CEB and professional and community groups on this subject. He has authored and contributed to several legal publications. Mr. Kellman has written an informational newspaper series feature on landlord-tenant law appearing in the *San Diego Union-Tribune*, *Los Angeles Times*, and *San Francisco Chronicle*. He has served as a judge pro tem, and on legislative committees for proposed landlord-tenant legislation.



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CHAPTER 43 California Judicial Council Unlawful Detainer Instructions *

5-43 California Forms of Jury Instruction CACI 4323

CACI 4323 Affirmative Defense--Discriminatory Eviction (Unruh Act)

[*Name of defendant*] **claims that** [*name of plaintiff*] **is not entitled to evict [him/her] because** [*name of defendant*] **is discriminating against [him/her] because of** [*insert protected class, e.g., her national origin, or other characteristic protected from arbitrary discrimination*]. **To succeed on this defense, [name of defendant] must prove both of the following:**

1. That [*name of defendant*] **is [perceived as/associated with someone who is [perceived as]]** [*insert protected class, e.g., Hispanic, or other characteristic*]; **and**

2. That [*name of plaintiff*] **filed this lawsuit because of** [*insert one of the following:*]

[[his/her/its] perception of] [*name of defendant*]'s [*insert protected class, e.g., national origin, or other characteristic*].]

[[name of defendant]'s association with someone who is [perceived as] [*insert protected class, e.g., Hispanic, or other characteristic*].]

New August 2007

Directions for Use

Throughout the instruction, insert either the defendant's protected status under the Unruh Act (see *Civ. Code*, § 52(b)) or other characteristic on the basis of which the defendant alleges that he or she has been arbitrarily discriminated against. (See *Marina Point, Ltd. v. Wolfson* (1982) 30 Cal.3d 721, 725-726 [180 Cal.Rptr. 496, 640 P.2d 115] [excluding all tenants with children is arbitrary illegal discrimination].)

In element 1, select the appropriate language based on whether the defendant (1) is a member of the protected class, (2) is perceived as a member of the protected class, (3) is associated with someone who is a member of the protected class, or (4) is associated with someone who is perceived as a member of the protected class.

In element 2, include the bracketed language regarding perception if the defendant is not actually a member of the protected class, but the allegation is that the plaintiff believes that the defendant is a member.

See also the Sources and Authority section under *CACI No. 3020, Unruh Civil Rights Act--Essential Factual Elements*.

Sources and Authority

- *Civil Code section 51* (Unruh Act) provides, in part: "(b) All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, disability, medical condition, marital status, or sexual orientation are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever."

- "In evaluating the legality of the challenged exclusionary policy in this case, we must recognize at the outset that in California, unlike many other jurisdictions, the Legislature has sharply circumscribed an apartment owner's traditional discretion to accept and reject tenants on the basis of the landlord's own likes or dislikes. California has brought such landlords within the embrace of the broad statutory provisions of the Unruh Act, *Civil Code section 51*. Emanating from and modeled upon traditional 'public accommodations' legislation, the Unruh Act expanded the reach of such statutes from common carriers and places of public accommodation and recreation, e.g., railroads, hotels, restaurants, theaters and the like, to include 'all business establishments of every kind whatsoever.' " (*Marina Point, supra*, 30 Cal.3d at pp. 730-731 , footnote omitted.)

- "[T]he 'identification of particular bases of discrimination--color, race, religion, ancestry, and national origin-- is illustrative rather than restrictive. Although the legislation has been invoked primarily by persons alleging discrimination on racial grounds, its language and its history compel the conclusion that the Legislature intended to prohibit *all arbitrary discrimination by business establishments*.' " (*Marina Point, supra*, 30 Cal.3d at p. 732 , original italics.)

- "We hold that defendant should have been permitted to produce proof of the allegations of his special defenses of discrimination, which if proven would bar the court from ordering his eviction because such 'state action' would be violative of both federal and state Constitutions." (*Abstract Inv. Co. v. Hutchinson* (1962) 204 Cal.App.2d 242, 255 [22 Cal.Rptr. 309] .)

- Evictions that contravene statutory or constitutional strictures provide a valid defense to unlawful detainer actions. (*Marina Point, supra*, 30 Cal.3d at p. 727 .)

Secondary Sources

12 Witkin, Summary of California Law (10th ed. 2006) Real Property, §§ 682-683

1 California Landlord-Tenant Practice (Cont.Ed.Bar 2d ed.) §§ 8.118-8.128

2 California Landlord-Tenant Practice (Cont.Ed.Bar 2d ed.) §§ 10.53, 10.67, 10.68

7 *California Real Estate Law and Practice, Ch. 214, Government Regulation and Enforcement, § 214.10* (Matthew Bender)

Matthew Bender Practice Guide: California Landlord-Tenant Litigation, Ch. 5, Unlawful Detainer, 5.21

11 *California Forms of Pleading and Practice, Ch. 117, Civil Rights: Housing Discrimination, § 117.31* (Matthew Bender)

3 *California Points and Authorities, Ch. 35, Unlawful Detainer, § 35.45* (Matthew Bender)

Miller & Starr, California Real Estate (Thomson West) Ch. 19, *Landlord-Tenant*, § 19:223

Publisher's Notes

There is no BAJI instruction on this subject.

LexisNexis Matthew Bender Expert Practice Tip--Pre-Suit Notice and Filing of Suite May Both Violate Unruh Act: The defendant may wish to expand this instruction to include the alleged violations of law by the service of each pre-suit notice as well as the filing of the suit itself. This allows the jury to focus on the intent and effect of each notice as well as the filing of the suit. *By Steven R. Kellman*

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Real Property Law Landlord & Tenant Landlord's Remedies & Rights Eviction Actions Forcible Entry & Detainer Real Property Law Landlord & Tenant Tenant's Remedies & Rights General Overview Real Property Law Landlord & Tenant Tenant's Remedies & Rights Termination & Retaliatory Eviction

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CHAPTER 43 California Judicial Council Unlawful Detainer Instructions *

5-43 California Forms of Jury Instruction CACI 4324

CACI 4324 Affirmative Defense--Waiver by Acceptance of Rent

[*Name of defendant*] **claims that [*name of plaintiff*] is not entitled to evict [him/her/it] because [*name of plaintiff*] accepted payment of rent [after the three-day notice period had expired/[*name of defendant*] had violated the [lease/rental agreement]]. To succeed on this defense, [*name of defendant*] must prove:**

[1]. That [*name of plaintiff*] accepted a [partial] payment of rent after [the three-day notice period had expired/[*name of plaintiff*] knew that [*name of defendant*] had violated the [lease/rental agreement]] [./; and]

[2. That [*name of plaintiff*] failed to provide actual notice to [*name of defendant*] that partial payment would be insufficient to avoid eviction.]

If [*name of defendant*] has proven that [he/she/it] paid rent, then [he/she/it] has the right to continue occupying the property unless [*name of plaintiff*] proves [one of the following:]

[1. That even though [*name of plaintiff*] received [*name of defendant*]'s [*specify noncash form of payment, e.g., check*], [he/she/it] rejected the rent payment because [*e.g., it never cashed the check*]][./; or]

[2. That the lease contained a provision stating that acceptance of [late rent/rent after knowing of a violation of the [lease/rental agreement]] would not affect [his/her/its] right to evict [*name of defendant*]][./; or]

[3. That [*name of plaintiff*] clearly and continuously objected to the violation of the [lease/rental agreement].]

New August 2007; Revised April 2008, June 2010

Directions for Use

The affirmative defense in this instruction applies to an unlawful detainer for nonpayment of rent or breach of another condition of the lease if either the landlord accepts a rent payment after the three-day period to cure or quit has expired or the landlord waived a breach of a condition by accepting rent after the breach and then subsequently served a notice of forfeiture and filed an unlawful detainer. This defense is available for breach of a covenant prohibiting a sublease or assignment only if the landlord received written notice of the sublease or assignment from the tenant and accepted rent thereafter. (See *Civ. Code*, § 1954.53(d)(4).)

With regard to the tenant-defendant's burden, include the word "partial" in element 1 and read element 2 only in cases involving commercial tenancies and partial payment. (*Code Civ. Proc.*, § 1161.1(c).)

With regard to the landlord plaintiff's burden, give option 3 if there is evidence that the landlord at all times made it clear that acceptance of rent was not a waiver of the breach. (See *Thriftmart, Inc. v. Me & Tex* (1981) 123 Cal.App.3d 751, 754 [177 Cal.Rptr. 24] [accepting rent for five years was not a waiver].)

Sources and Authority

- *Code Civil Procedure section 1161.1(c)*, applicable only to commercial real property, provides: "If the landlord accepts a partial payment of rent after filing the complaint pursuant to Section 1166, the landlord's acceptance of the partial payment is evidence only of that payment, without waiver of any rights or defenses of any of the parties. The landlord shall be entitled to amend the complaint to reflect the partial payment without creating a necessity for the filing of an additional answer or other responsive pleading by the tenant, and without prior leave of court, and such an amendment shall not delay the matter from proceeding. However, this subdivision shall apply only if the landlord provides actual notice to the tenant that acceptance of the partial rent payment does not constitute a waiver of any rights, including any right the landlord may have to recover possession of the property."

- *Civil Code section 1954.53(d)(4)* provides: "Acceptance of rent by the owner does not operate as a waiver or otherwise prevent enforcement of a covenant prohibiting sublease or assignment or as a waiver of an owner's rights to establish the initial rental rate, unless the owner has received written notice from the tenant that is party to the agreement and thereafter accepted rent."

- "It is a general rule that the right of a lessor to declare a forfeiture of the lease arising from some breach by the lessee is waived when the lessor, with knowledge of the breach, accepts the rent specified in the lease. While waiver is a question of intent, the cases have required some positive evidence of rejection on the landlord's part or a specific reservation of rights in the lease to overcome the presumption that tender and acceptance of rent creates." (*EDC Assocs. v. Gutierrez* (1984) 153 Cal.App.3d 167, 170 [200 Cal.Rptr. 333], internal citations omitted.)

- "The acceptance of rent by the landlord from the tenant, after the breach of a condition of the lease, with full knowledge of all the facts, is a waiver of the breach and precludes the landlord from declaring a forfeiture of the lease by reason of said breach. This is the general rule and is supported by ample authority. ... 'The most familiar instance of the waiver of the forfeiture of a lease arises from the acceptance of rent by the landlord after condition broken, and it is a universal rule that if the landlord

accepts rent from his tenant after full notice or knowledge of a breach of a covenant or condition in his lease for which a forfeiture might have been demanded, this constitutes a waiver of forfeiture which cannot afterward be asserted for that particular breach or any other breach which occurred prior to the acceptance of the rent. In other words, the acceptance by a landlord of the rents, with full knowledge of a breach in the conditions of the lease, and of all of the circumstances, is an affirmation by him that the contract of lease is still in force, and he is thereby estopped from setting up a breach in any of the conditions of the lease, and demanding a forfeiture thereof.' " (*Kern Sunset Oil Co. v. Good Roads Oil Co.* (1931) 214 Cal. 435, 440-441 [6 P.2d 71] , internal citations omitted.)

■ "Here the lessor not only relied upon the express agreement in the contract of the lease against waiver of its right to assert a forfeiture for the acceptance of rent after knowledge of the breach of covenant prohibiting assignment of the lease without its written consent first obtained, but it also gave notice that its acceptance of the rent after the breach of covenant became known was not to be construed as a consent to the assignment of the lease or a waiver of its right to assert a forfeiture." (*Karbelnig v. Brothwell* (1966) 244 Cal.App.2d 333, 342 [53 Cal.Rptr. 335] .)

■ "The landlord had the obligation of going forward with the evidence in order to prove that the money orders were not negotiated or that it took other action to insure that there was no waiver. 'Although a plaintiff ordinarily has the burden of proving every allegation of the complaint and a defendant of proving any affirmative defense, fairness and policy may sometimes require a different allocation. Where the evidence necessary to establish a fact essential to a claim lies peculiarly within the knowledge and competence of one of the parties, that party has the burden of going forward with the evidence on the issue although it is not the party asserting the claim.' " (*EDC Assocs.*, *supra*, 153 Cal.App.3d at p. 171 , internal citations omitted.)

■ "Waiver is a matter of intent. Here plaintiff, from the start, evidenced, not a willingness to waive--which would have kept the original lease in force at the contractual rent--but a willingness to lease the land encroached upon and, if that extended lease were arrived at, to continue the lease on the original parcel. We cannot impose on plaintiff a penalty for a reasonable effort to achieve an amicable adjustment of the breach." (*Thriftmart, Inc.*, *supra*, 123 Cal.App.3d at p. 754 .)

Secondary Sources

12 Witkin, Summary of California Law (10th ed. 2006) Real Property, § 669

2 California Landlord-Tenant Practice (Cont.Ed.Bar 2d ed.) § 10.60

1 California Eviction Defense Manual (Cont.Ed.Bar 2d ed.) §§ 6.31-6.37, 6.41, 6.42

7 *California Real Estate Law and Practice*, Ch. 210, *Unlawful Detainer*, § 210.64 (Matthew Bender)

Matthew Bender Practice Guide: California Landlord-Tenant Litigation, Ch. 5, *Unlawful Detainer*, 5.21

29 *California Forms of Pleading and Practice*, Ch. 333, *Landlord and Tenant: Eviction Actions*, § 333.10 (Matthew Bender)

23 *California Points and Authorities*, Ch. 236, *Unlawful Detainer*, § 236.65 (Matthew Bender)

Miller & Starr, California Real Estate (Thomson West) Ch. 19, *Landlord-Tenant*, § 19:205

Publisher's Notes

There is no BAJI instruction on this subject.

LexisNexis Matthew Bender Expert Practice Tip--Payment or Accepted Tender of Rent May be Made by Accepting Check Even if Not Cashed: The plaintiff is under a duty to promptly return any late, improper, or partial payment that the plaintiff does not intend to accept. Failure to do so may constitute an acceptance of the payment even if the negotiable instrument is retained and not cashed [Code Civ. Proc. § 2076; see *Sheldon Builders, Inc. v. Trojan Towers* (1967) 255 Cal.App.2d 781, 788, 63 Cal.Rptr. 425] . Modify this instruction to clarify the payment if there is an issue as to the payment and acceptance of rent. *Steven R. Kellman*

LexisNexis Matthew Bender Expert Practice Tip--Include Lease Provision: If the plaintiff is relying on an "anti-waiver" type of provision in the lease, the defendant should integrate this language in the instruction. *Steven R. Kellman*

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Real Property Law Landlord & Tenant Landlord's Remedies & Rights Eviction Actions Forcible Entry & Detainer Real Property Law Landlord & Tenant Landlord's Remedies & Rights Termination Notice

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CHAPTER 43 California Judicial Council Unlawful Detainer Instructions *

5-43 California Forms of Jury Instruction CACI 4325

CACI 4325 Affirmative Defense--Failure to Comply With Rent Control Ordinance

[Name of defendant] **claims that** [name of plaintiff] **is not entitled to evict [him/her] because** [name of plaintiff] **violated** [insert name of local governmental entity]'s rent control law. **To succeed on this defense, [name of defendant] must prove the following:**

[Insert elements of rent control defense.]

New August 2007

Directions for Use

Insert the elements of the relevant local rent control law into this instruction.

Sources and Authority

■ "[T]he statutory remedies for recovery of possession and of unpaid rent do not preclude a defense based on municipal rent control legislation enacted pursuant to the police power imposing rent ceilings and limiting the grounds for eviction for the purpose of enforcing those rent ceilings." (*Birkenfeld v. Berkeley* (1976) 17 Cal.3d 129, 149 [130 Cal.Rptr. 465, 550 P.2d 1001] , internal citations and footnote omitted.)

■ "Although municipalities have power to enact ordinances creating substantive defenses to eviction, such legislation is invalid to the extent it conflicts with general state law." (*Fisher v. City of Berkeley* (1984) 37 Cal.3d 644, 697 [209 Cal.Rptr. 682, 693 P.2d 261] , affd. (1986) 475 U.S. 260 [106 S.Ct. 1045, 89 L.Ed.2d 206] , internal citations omitted.)

Secondary Sources

12 Witkin, Summary of California Law (10th ed. 2006) Real Property, § 594

1 California Landlord-Tenant Practice (Cont.Ed.Bar 2d ed.) §§ 7.53-7.76

2 California Eviction Defense Manual (Cont.Ed.Bar 2d ed.) Ch. 17

7 *California Real Estate Law and Practice*, Ch. 210, *Unlawful Detainer*, § 210.64 (Matthew Bender)

Matthew Bender Practice Guide: California Landlord-Tenant Litigation, Ch. 5, *Unlawful Detainer*, 5.21

29 *California Forms of Pleading and Practice*, Ch. 333, *Landlord and Tenant: Eviction Actions*, § 333.10 (Matthew Bender)

23 *California Points and Authorities*, Ch. 236, *Unlawful Detainer*, § 236.74 (Matthew Bender)

Miller & Starr, California Real Estate (Thomson West) Ch. 19, *Landlord-Tenant*, § 19:102

Publisher's Notes

There is no BAJI instruction on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Real Property Law Landlord & Tenant Landlord's Remedies & Rights Eviction Actions Forcible Entry & Detainer Real Property Law Landlord & Tenant Rent Regulation General Overview Real Property Law Landlord & Tenant Rent Regulation Rent Control Statutes

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CHAPTER 43 California Judicial Council Unlawful Detainer Instructions *

5-43 California Forms of Jury Instruction CACI 4326

CACI 4326 Affirmative Defense--Repair and Deduct

[Name of defendant] claims that [he/she] does not owe [any/the full amount of] rent because [he/she] was not given credit against the rent for repairs performed during the period for which rent was not paid. To succeed on this defense, [name of defendant] must prove the following:

- 1. [Name of defendant] gave notice to [name of plaintiff]['s agent] of one or more conditions on the premises in need of repair;**
- 2. [Name of plaintiff] did not make the requested repairs within a reasonable time after receiving notice;**
- 3. [Name of defendant] spent \$_____ to make the repairs and gave [name of plaintiff] notice of this expenditure;**
- 4. [Name of plaintiff] did not give [name of defendant] credit for this amount against the rent that was due; and**
- 5. [Name of defendant] had not exercised the right to repair and deduct more than once within the 12 months before the month for which the cost of repairs was deducted from the rent.**

If [name of defendant] acts to repair and deduct more than 30 days after the notice, [he/she] is presumed to have waited a reasonable time. This presumption may be overcome by evidence showing that a [shorter/ [or] longer] period is more reasonable. [[Name of defendant] may repair and deduct after a shorter notice if all the circumstances require shorter notice.]

[Even if [name of defendant] proves all of the above requirements, [name of defendant] was not entitled to repair

and deduct if [name of plaintiff] proves that [name of defendant] has done any of the following that contributed substantially to the need for repair or interfered substantially with [name of plaintiff]'s ability to make the necessary repairs:

[Failed to keep [his/her] living area as clean and sanitary as the condition of the property permits][./; or]

[Failed to dispose of all rubbish, garbage, and other waste in a clean and sanitary manner][./; or]

[Failed to properly use and operate all electrical, gas, and plumbing fixtures and keep them as clean and sanitary as their condition permits][./; or]

[Intentionally destroyed, defaced, damaged, impaired, or removed any part of the property, equipment, or accessories, or allowed others to do so][./; or]

[Failed to use the property for living, sleeping, cooking, or dining purposes only as appropriate based on the design of the property][./;or]

[Otherwise failed to exercise reasonable care.]

New April 2008

Directions for Use

Give this instruction if the tenant alleges the affirmative defense of having exercised the right to make repairs and deduct their cost from the rent. (See *Civ. Code*, § 1942.) If the landlord alleges that repair and deduct is not available because of the tenant's affirmative misconduct, select the applicable reasons. The first two reasons do not apply if the landlord has expressly agreed in writing to perform those acts. (*Civ. Code*, § 1941.2(b).)

Sources and Authority

■ *Civil Code section 1942* provides:

(a) If within a reasonable time after written or oral notice to the landlord or his agent, as defined in subdivision (a) of Section 1962, of dilapidations rendering the premises untenable which the landlord ought to repair, the landlord neglects to do so, the tenant may repair the same himself where the cost of such repairs does not require an expenditure more than one month's rent of the premises and deduct the expenses of such repairs from the rent when due, or the tenant may vacate the premises, in which case the tenant shall be discharged from further payment of rent, or performance of other conditions as of the date of vacating the premises. This remedy shall not be available to the tenant more than twice in any 12-month period.

(b) For the purposes of this section, if a tenant acts to repair and deduct after the 30th day following notice, he is presumed to have acted after a reasonable time. The presumption established by this subdivision is a rebuttable presumption affecting the burden of producing evidence and shall not be construed to prevent a tenant from repairing and

deducting after a shorter notice if all the circumstances require shorter notice.

(c) The tenant's remedy under subdivision (a) shall not be available if the condition was caused by the violation of Section 1929 or 1941.2.

(d) The remedy provided by this section is in addition to any other remedy provided by this chapter, the rental agreement, or other applicable statutory or common law.

■ *Civil Code section 1929* provides: "The hirer of a thing must repair all deteriorations or injuries thereto occasioned by his want of ordinary care."

■ *Civil Code section 1941.2* provides:

(a) No duty on the part of the landlord to repair a dilapidation shall arise under Section 1941 or 1942 if the tenant is in substantial violation of any of the following affirmative obligations, provided the tenant's violation contributes substantially to the existence of the dilapidation or interferes substantially with the landlord's obligation under Section 1941 to effect the necessary repairs:

(1) To keep that part of the premises which he occupies and uses clean and sanitary as the condition of the premises permits.

(2) To dispose from his dwelling unit of all rubbish, garbage and other waste, in a clean and sanitary manner.

(3) To properly use and operate all electrical, gas and plumbing fixtures and keep them as clean and sanitary as their condition permits.

(4) Not to permit any person on the premises, with his permission, to willfully or wantonly destroy, deface, damage, impair or remove any part of the structure or dwelling unit or the facilities, equipment, or appurtenances thereto, nor himself do any such thing.

(5) To occupy the premises as his abode, utilizing portions thereof for living, sleeping, cooking or dining purposes only which were respectively designed or intended to be used for such occupancies.

(b) Paragraphs (1) and (2) of subdivision (a) shall not apply if the landlord has expressly agreed in writing to perform the act or acts mentioned therein.

■ "[T]he limited nature of the 'repair and deduct' remedy, in itself, suggests that it was not designed to serve as an exclusive remedy for tenants in this area. As noted above, section 1942 only permits a tenant to expend up to one month's rent in making repairs, and now also provides that this self-help remedy can be invoked only once in any 12-month period. These limitations demonstrate that the Legislature framed the section only to encompass relatively minor dilapidations in leased premises. As the facts of the instant case reveal, in the most serious instances of deterioration, when the costs of repair are at all significant, section 1942 does not provide, and could not have been designed as, a viable solution." (*Green v. Superior Court of San Francisco* (1974) 10 Cal.3d 616, 630-631 [111 Cal.Rptr. 704, 517 P.2d 1168] , internal citations omitted.)

■ "Clearly, sections 1941 and 1942 express the policy of this state that landlords in the interest of public health and

safety have the duty to maintain leased premises in habitable condition and that tenants have the right, after notice to the landlord, to repair dilapidations and deduct the cost of the repairs from the rent. The policy expressed in these sections cannot be effectuated if landlords may evict tenants who invoke the provisions of the statute. Courts would be withholding with one hand what the Legislature has granted with the other if they order evictions instituted in retaliation against the exercise of statutory rights." (*Schweiger v. Superior Court of Alameda County* (1970) 3 Cal.3d 507, 516 [90 Cal.Rptr. 729, 476 P.2d 97] .)

■ "[T]he statutory remedies provided a tenant under *Civil Code* section 1941 *et seq.* were not intended by the Legislature as the tenant's exclusive remedy for the landlord's failure to repair. 'Although past cases have held that the Legislature intended the remedies afforded by section 1942 to be the sole procedure for enforcing the statutory duty on landlords imposed by section 1941 [citations], no decision has suggested that the Legislature designed these statutory provisions to displace the common law in fixing the respective rights of landlord and tenant. On the contrary, the statutory remedies of section 1942 have traditionally been viewed as additional to, and complementary of, the tenant's common law rights.' Thus, '*... the statutory framework of section 1941 et seq. has never been viewed as a curtailment of the growth of the common law in this field.*' " (*Stoiber v. Honeychuck* (1980) 101 Cal.App.3d 903, 914-915 [162 Cal.Rptr. 194] , original italics, internal citations and footnote omitted.)

Secondary Sources

1 California Landlord-Tenant Practice, Ch. 3, *Rights and Duties During Tenancy* (Cont.Ed.Bar 2d ed.) § 3.12 *et seq.*

6 *California Real Estate Law and Practice*, Ch. 170, *The Premises: Duties and Liabilities*, § 170.42[3] (Matthew Bender)

7 *California Real Estate Law and Practice*, Ch. 210, *Unlawful Detainer*, § 210.64[10] (Matthew Bender)

29 *California Forms of Pleading and Practice*, Ch. 334, *Landlord and Tenant: Claims for Damage*, § 334.117 (Matthew Bender)

23 *California Points and Authorities*, Ch. 236, *Unlawful Detainer*, § 236.62 (Matthew Bender)

Matthew Bender Practice Guide: California Landlord-Tenant Litigation, Ch. 5, *Unlawful Detainer*, 5.30 (Matthew Bender)

Publisher's Notes

There is no BAJI instruction on this subject.

* Steven R. Kellman, who wrote the Practice Tips in this chapter, has been in private practice since 1982, practicing landlord-tenant law with an emphasis on representing tenants. In 1993 he founded the Tenants Legal Center, located in San Diego. He has lectured for the CEB and professional and community groups on this subject. He has authored and contributed to several legal publications. Mr. Kellman has written an informational newspaper series feature on landlord-tenant law appearing in the *San Diego Union-Tribune*, *Los Angeles Times*, and *San Francisco Chronicle*. He has served as a judge pro tem, and on legislative committees for proposed landlord-tenant legislation.



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California Forms of Jury Instruction

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CHAPTER 43 California Judicial Council Unlawful Detainer Instructions *

5-43 California Forms of Jury Instruction CACI 4327

CACI 4327 Affirmative Defense--Landlord's Refusal of Rent

[*Name of defendant*] **claims that [*name of plaintiff*] is not entitled to evict [him/her/it] because [*name of plaintiff*] refused to accept [*name of defendant*]'s payment of the rent. To succeed on this defense, [*name of defendant*] must prove:**

- 1. That after service of the three-day notice but before the three-day period had expired, [*name of defendant*] presented the full amount of rent that was due to [*name of plaintiff*]; and**
- 2. That [*name of plaintiff*] refused to accept the payment.**

[Giving a check constitutes payment if [*name of plaintiff*]'s practice was to accept payment by check unless [*name of plaintiff*] had previously notified [*name of defendant*] that payment by check was no longer acceptable.]

New October 2008

Directions for Use

Give the last bracketed paragraph if the tender was by check and there is an issue as to the landlord's motive in refusing the check.

Sources and Authority

- *Civil Code section 1500* provides: "An obligation for the payment of money is extinguished by a due offer of payment, if the amount is immediately deposited in the name of the creditor, with some bank or savings and loan association within this state, of good repute, and notice thereof is given to the creditor."

■ "The mere giving of a check or checks does not constitute payment." (*Mau v. Hollywood Commercial Bldgs., Inc.* (1961) 194 Cal.App.2d 459, 470 [15 Cal.Rptr. 181] , internal citation omitted.)

■ "On this appeal appellants do not discuss or mention the above finding of their bad faith, but argue that respondent was in default because its rental debt was not extinguished within the three-day period as respondent tendered checks instead of money, sent the checks by mail without checking delivery instead of making personal tender and did not keep the tender alive by deposit in a bank as provided by *section 1500 of the Civil Code* within the three-day period. However, we think that the finding of bad faith, which is supported by the evidence showing the facts, as stated hereinbefore, is of primary importance where appellants try to enforce a forfeiture." (*Strom v. Union Oil Co.* (1948) 88 Cal.App.2d 78, 81 [198 P.2d 347] .)

■ "With respect to appellants there is no doubt that they could have had timely payment if they had so desired, but that they were intentionally evasive and uncooperative, hoping thereby to induce some technical shortcoming on which to terminate a lease which they thought disadvantageous." (*Strom, supra*, 88 Cal.App.2d at pp. 83-84 .)

■ "Appellants complain that respondent mailed checks for the rent instead of tendering money in person. The lease does not contain any place or mode of payment of rent. Payment of rent to the original lessor had been made by mailing of checks to his assignee. Appellant was entitled to continue payment by mailing of checks so long as he had not been notified that this form of payment was no longer acceptable. ... If the payment by mailing of check, a normal mode of payment though not a legal tender, was not acceptable to appellants, as it had been to their predecessors, they should have notified respondent to that effect. Neither was respondent after the mailing under duty to take special measures to check timely receipt of the checks. 'The ordinary principles of reason, common sense, and justice should govern in questions of this kind. The lessee, in law, had a right to assume that the Postoffice Department would do its duty and deliver the envelop containing the rent in due time, and that the lessor would, in justice, accept such rent; and if for any reason it was not received or delivered the lessee should, as a matter of ordinary fairness and justice, be advised of such fact and have a chance to remedy the same.' This principle was held applicable even where the letter containing the rent was lost in the mail. It must govern a fortiori here, where the mail functioned correctly and the fact that the checks did not reach appellants was solely attributable to circumstances for which they were responsible. No further action of any kind could be expected from respondent until it was informed, by the return of the unclaimed letter, of the fact that the payment had not been effectuated. If respondent's action is open to any criticism it would be that the deposit of the rent in a bank ... did not follow soon enough after the checks were returned However the delay did not cause any prejudice or make any difference to appellants as they had then already launched the action in unlawful detainer at which they had been aiming ever since respondent refused increase of rent. The shortcoming of respondent is trivial compared to appellants' bad faith." (*Strom, supra*, 88 Cal.App.2d at p. 84 .)

■ "Nor does the rejection of the 'tender' that appellants made by letter, unaccompanied by payment, and conditioned upon dismissal of the action, after the action was brought, compel a finding of bad faith. It did not extinguish the debt, since the procedure prescribed by *Civil Code, section 1500*, was not followed. Nor was there a showing of continuous readiness to pay after the tender." (*Budaeff v. Huber* (1961) 194 Cal.App.2d 12, 21 [14 Cal.Rptr. 729] .)

Secondary Sources

12 Witkin, Summary of California Law (10th ed. 2006) Real Property, § 759

1 California Landlord-Tenant Practice (Cont.Ed.Bar 2d ed.) §§ 7.53-7.56

1 California Eviction Defense Manual (Cont.Ed.Bar 2d ed.) § 17.21

3 *California Real Estate Law and Practice, Ch. 210, Unlawful Detainer, § 210.22* (Matthew Bender)

Matthew Bender Practice Guide: California Landlord-Tenant Litigation, Ch. 5, Unlawful Detainer, 5.21

Publisher's Notes

There is no BAJI instruction on this subject.

* Steven R. Kellman, who wrote the Practice Tips in this chapter, has been in private practice since 1982, practicing landlord-tenant law with an emphasis on representing tenants. In 1993 he founded the Tenants Legal Center, located in San Diego. He has lectured for the CEB and professional and community groups on this subject. He has authored and contributed to several legal publications. Mr. Kellman has written an informational newspaper series feature on landlord-tenant law appearing in the *San Diego Union-Tribune*, *Los Angeles Times*, and *San Francisco Chronicle*. He has served as a judge pro tem, and on legislative committees for proposed landlord-tenant legislation.



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California Forms of Jury Instruction

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CHAPTER 43 California Judicial Council Unlawful Detainer Instructions *

5-43 California Forms of Jury Instruction CACI 4328-CACI 4339

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CACI 4328Reserved for Future Use



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CHAPTER 43 California Judicial Council Unlawful Detainer Instructions *

5-43 California Forms of Jury Instruction CACI 4340

CACI 4340 Damages for Reasonable Rental Value

[Name of plaintiff] also claims that [he/she/it] was harmed by [name of defendant]'s wrongful occupancy of the property. If you decide that [name of defendant] wrongfully occupied the property, you must also decide how much money will reasonably compensate [name of plaintiff] for the harm. This compensation is called "damages."

The amount of damages is the reasonable rental value of the premises during the time [name of defendant] occupied the property after the [____]-day notice period expired. The amount agreed between the parties as rent is evidence of the reasonable rental value of the property, but you may award a greater or lesser amount based on all the evidence presented during the trial.

[In determining the reasonable rental value of the premises, do not consider any limitations on the amount of rent that can be charged because of a local rent control ordinance.]

New August 2007

Directions for Use

In the second paragraph, insert the applicable number of days' notice required, whether 3, 30, 60, or some other number provided for in the lease. (*Civ. Code*, §§ 1946, 1946.1; *Code Civ. Proc.*, § 1161.)

Include the optional last paragraph if the property is subject to rent control.

Sources and Authority

■ *Code of Civil Procedure section 1174(b)* provides: "The jury or the court, if the proceedings be tried without a jury, shall also assess the damages occasioned to the plaintiff by any forcible entry, or by any forcible or unlawful detainer, alleged in the complaint and proved on the trial, and find the amount of any rent due, if the alleged unlawful detainer be after default in the payment of rent. If the defendant is found guilty of forcible entry, or forcible or unlawful detainer, and malice is shown, the plaintiff may be awarded statutory damages of up to six hundred dollars (\$600), in addition to actual damages, including rent found due. The trier of fact shall determine whether actual damages, statutory damages, or both, shall be awarded, and judgment shall be entered accordingly."

■ "It is well established that losses sustained after termination of a tenancy may be recovered, and that 'damages awarded ... in an unlawful detainer action for withholding possession of the property are not "rent" but are in fact damages.' Thus, a landlord is entitled to recover as damages the reasonable value of the use of the premises during the time of the unlawful detainer either on a tort theory or a theory of implied-in-law contract. It is also settled that rent control regulations have no application to an award of damages for unlawfully withholding property." (*Adler v. Elphick* (1986) 184 Cal.App.3d 642, 649-650 [229 Cal.Rptr. 254] , internal citations omitted.)

■ "In unlawful detainer, recovery of possession is the main object and recovery of rent a mere incident." (*Harris v. Bissell* (1921) 54 Cal.App. 307, 313 [202 P. 453] .)

■ "It is well established that unlawful detainer actions are wholly created and strictly controlled by statute in California. The 'mode and measure of plaintiff's recovery' are limited by these statutes. The statutes prevail over inconsistent general principles of law and procedure because of the special function of unlawful detainer actions to restore immediate possession of real property." (*Balassy v. Superior Court* (1986) 181 Cal.App.3d 1148, 1151 [226 Cal.Rptr. 817] , internal citations omitted.)

■ "It is well settled that damages allowed in unlawful detainer proceedings are only those which *result from* the unlawful detention and accrue during that time. Although a lessee guilty of unlawful detention may have also breached the terms of the lease contract, damages resulting therefrom are not necessarily damages resulting from the unlawful detention. As such, he is precluded from litigating a cause of action for these breaches in unlawful detainer proceedings." (*Vasey v. California Dance Co.* (1977) 70 Cal.App.3d 742, 748 [139 Cal.Rptr. 72] , original italics, internal citations omitted.)

■ "[W]hen a 30-day notice is used to terminate a month-to-month tenancy, and any default in the payment of rents to that time are not claimed in a 3-day notice to pay rent or quit, the unlawful detainer proceeding thereon is not founded on a default in the payment of rent within the meaning of section 1174, subdivision (b); damages for the detention of the premises commencing with the end of the tenancy may be recovered, but rents accrued and unpaid prior to the end of the tenancy may not be recovered in that unlawful detainer proceeding." (*Castle Park No. 5 v. Katherine* (1979) 91 Cal.App.3d Supp. 6, 12 [154 Cal.Rptr. 498] .)

■ " 'If a tenant unlawfully detains possession after the termination of a lease, the landlord is entitled to recover as damages the reasonable value of the use of the premises during the time of such unlawful detainer. He is not entitled to recover rent for the premises because the leasehold interest has ended.' [P] The amount agreed between the parties as rent is evidence of the rental value of the property. But, '[since] the action is not upon contract, but for recovery of possession and, incidentally, for the damages occasioned by the unlawful detainer, such rental value may be greater or less than the rent provided for in the lease.' " (*Lehr v. Crosby* (1981) 123 Cal.App.3d Supp. 1, 9 [177 Cal.Rptr. 96] , internal citations and footnote omitted.)

Secondary Sources

12 Witkin, *Summary of California Law* (10th ed. 2006) Real Property, § 738

2 California Landlord-Tenant Practice (Cont.Ed.Bar 2d ed.) §§ 12.27-12.30, 13.19

2 California Eviction Defense Manual (Cont.Ed.Bar 2d ed.) §§ 26.5-26.12

7 *California Real Estate Law and Practice*, Ch. 210, *Unlawful Detainer*, § 210.94 (Matthew Bender)

Matthew Bender Practice Guide: California Landlord-Tenant Litigation, Ch. 5, *Unlawful Detainer*, 5.27

29 *California Forms of Pleading and Practice*, Ch. 333, *Landlord and Tenant: Eviction Actions*, § 333.13 (Matthew Bender)

23 *California Points and Authorities*, Ch. 236, *Unlawful Detainer*, § 236.22 (Matthew Bender)

Miller & Starr, *California Real Estate* (Thomson West) Ch. 19, *Landlord-Tenant*, § 19:208

Publisher's Notes

There is no BAJI instruction on this subject.

LexisNexis Matthew Bender Expert Practice Tip--Damages for Wrongful Holdover Should be Near Rental Rate: In a case where habitability defects are claimed to have lowered the fair rent owing, this instruction may yield a finding of reduced rent, which would impact the finding of habitability. A finding of no habitability defects would conflict with a finding of a lower daily damages than the daily rental rate. If this could be an issue, modify this instruction to clarify the jury's ability to reduce the daily damage amount without finding that the cause was habitability defects. *By Steven R. Kellman*

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Real Property Law Landlord & Tenant Landlord's Remedies & Rights Eviction Actions Forcible Entry & Detainer Real Property Law Landlord & Tenant Landlord's Remedies & Rights Rent Recovery Real Property Law Title Quality Adverse Claim Actions Unlawful Detainer

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CHAPTER 43 California Judicial Council Unlawful Detainer Instructions *

5-43 California Forms of Jury Instruction CACI 4341

CACI 4341 Statutory Damages on Showing of Malice (Code Civ. Proc., § 1174(b))

[Name of plaintiff] claims that [he/she/it] is entitled to statutory damages in addition to actual damages. To recover statutory damages, [name of plaintiff] must prove that [name of defendant] acted with malice.

A tenant acts with malice if he or she willfully continues to occupy the property with knowledge that he or she no longer has the right to do so.

You must determine how much, if any, statutory damages should be, up to a maximum of \$600. You should not award any statutory damages if you find that [name of defendant] had a good-faith and a reasonable belief in [his/her/its] right to continue to occupy the premises.

New August 2007

Sources and Authority

- *Code of Civil Procedure section 1174(b)* provides: "The jury or the court, if the proceedings be tried without a jury, shall also assess the damages occasioned to the plaintiff by any forcible entry, or by any forcible or unlawful detainer, alleged in the complaint and proved on the trial, and find the amount of any rent due, if the alleged unlawful detainer be after default in the payment of rent. If the defendant is found guilty of forcible entry, or forcible or unlawful detainer, and malice is shown, the plaintiff may be statutory damages of up to six hundred dollars (\$600), in addition to actual damages, including rent found due. The trier of fact shall determine whether actual damages, statutory damages, or both, shall be, and judgment shall be entered accordingly."

- "The rule appears to be well established in California that a lessee of real property who wilfully,

deliberately, intentionally and obstinately withholds possession of the property, with knowledge of the termination of his lease and against the will of the landlord, is liable for [statutory] damages." (*Erbe Corp. v. W & B Realty Co.* (1967) 255 Cal.App.2d 773, 780 [63 Cal.Rptr. 462] .)

■ "Authorities ... do not hold that the [penalty should be imposed] where the conduct of the tenant is characterized by good faith and a reasonable belief in his right to remain" (*Board of Public Service Comm'rs v. Spear* (1924) 65 Cal.App. 214, 217-218 [223 P.423] , internal citations omitted, overruled, other grounds, *Richard v. Degen & Brody, Inc.* (1960) 181 Cal.App.2d 289, 302-304, 5 Cal.Rptr. 263 .)

Secondary Sources

12 Witkin, Summary of California Law (10th ed. 2006) Real Property, § 738

2 California Landlord-Tenant Practice (Cont.Ed.Bar 2d ed.) §§ 12.32-12.34

2 California Eviction Defense Manual (Cont.Ed.Bar 2d ed.) § 26.13

7 California Real Estate Law and Practice, Ch. 210, Unlawful Detainer, § 210.95 (Matthew Bender)

Matthew Bender Practice Guide: California Landlord-Tenant Litigation, Ch. 5, Unlawful Detainer, 5.27

29 California Forms of Pleading and Practice, Ch. 333, Landlord and Tenant: Eviction Actions, § 333.13 (Matthew Bender)

23 California Points and Authorities, Ch. 236, Unlawful Detainer, § 236.22 (Matthew Bender)

Miller & Starr, California Real Estate (Thomson West) Ch. 19, Landlord-Tenant, § 19:208

Publisher's Notes

There is no BAJI instruction on this subject.

LexisNexis Matthew Bender Expert Practice Tip--Malice Is Not Presumed Just Because Defendant Remained in Possession After Demand to Vacate: The defendant's intentional holdover of possession of a rental property may be found to be wrongful, but this does not always mean it was malicious. The failure to return possession of a rental property is not malicious as long as the defendant believed he or she had a good faith claim or defense to the unlawful detainer action. Even knowledge that the defendant had no right of occupancy (possession) may not be determinative, since that knowledge may only be based on the plaintiff's notice and demand, which could later prove invalid. By *Steven R. Kellman*

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Real Property Law Landlord & Tenant Landlord's Remedies & Rights Eviction Actions Forcible Entry & Detainer Real Property Law Landlord & Tenant Landlord's Remedies & Rights Rent Recovery

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CHAPTER 43 California Judicial Council Unlawful Detainer Instructions *

5-43 California Forms of Jury Instruction CACI 4342-CACI 4999

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CHAPTER 43 California Judicial Council Unlawful Detainer Instructions *

5-43 California Forms of Jury Instruction CACI VF-4300

CACI VF-4300 Termination Due to Failure to Pay Rent

We answer the questions submitted to us as follows:

1. Did [name of defendant] fail to make rental payments to [name of plaintiff] as required by the [lease/rental agreement/sublease]?

_____ Yes _____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Did [name of plaintiff] properly give [name of defendant] a three-day written notice to pay the rent or vacate the property?

_____ Yes _____ No

If your answer to question 2 is no, then answer question 3. If you answered yes, skip to question 4.

3. Did [name of defendant] actually receive the notice at least three days before [date on which action was filed]?

_____ Yes _____ No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Was the amount due stated in the notice no more than the amount that [name of defendant] actually owed?

_____ Yes _____ No

If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. Did [name of defendant] pay [or attempt to pay] the amount stated in the notice within three days after service or receipt of the notice?

_____ Yes _____ No

Signed: _____
Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the [clerk/bailiff/judge].

New December 2007

Directions for Use

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on *CACI No. 4302, Termination for Failure to Pay Rent--Essential Factual Elements*. See also the Directions for Use for that instruction. Questions 2 and 3 incorporate the notice requirements set forth in *CACI No. 4303, Sufficiency and Service of Notice of Termination for Failure to Pay Rent*.

If actual receipt is at issue and three days after the alleged date of receipt falls on a Saturday, Sunday, or holiday, modify question 3 to allow the tenant until the next day that is not a Saturday, Sunday, or holiday to cure the default.

Publisher's Notes

There is no BAJI verdict form on this subject.

* Steven R. Kellman, who wrote the Practice Tips in this chapter, has been in private practice since 1982, practicing landlord-tenant law with an emphasis on representing tenants. In 1993 he founded the Tenants Legal Center, located in San Diego. He has lectured for the CEB and professional and community groups on this subject. He has authored and contributed to several legal publications. Mr. Kellman has written an informational newspaper series feature on landlord-tenant law appearing in the *San Diego Union-Tribune*, *Los Angeles Times*, and *San Francisco Chronicle*. He has served as a judge pro tem, and on legislative committees for proposed landlord-tenant legislation.



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California Forms of Jury Instruction

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CHAPTER 43 California Judicial Council Unlawful Detainer Instructions *

5-43 California Forms of Jury Instruction CACI VF-4301

CACI VF-4301 Termination Due to Failure to Pay Rent--Affirmative Defense--Breach of Implied Warranty of Habitability

We answer the questions submitted to us as follows:

1. Did [*name of defendant*] fail to make rental payments to [*name of plaintiff*] as required by the [lease/rental agreement/sublease]?

_____ Yes _____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Did [*name of plaintiff*] maintain the property in a habitable condition during the period for which rent was not paid?

_____ Yes _____ No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Did [*name of plaintiff*] properly give [*name of defendant*] a three-day written notice to pay the rent or vacate the property?

_____ Yes _____ No

If your answer to question 3 is no, then answer question 4. If you answered yes, skip to question 5.

4. Did [name of defendant] actually receive the notice at least three days before [date on which action was filed]?

_____ Yes _____ No

If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. Was the amount due stated in the notice no more than the amount that [name of defendant] actually owed?

_____ Yes _____ No

If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. Did [name of defendant] pay [or attempt to pay] the amount stated in the notice within three days after service or receipt of the notice?

_____ Yes _____ No

Signed: _____

Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the [clerk/bailiff/judge].

New December 2007

Directions for Use

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on *CACI No. 4302, Termination for Failure to Pay Rent--Essential Factual Elements*, and *CACI No. 4320, Affirmative Defense--Implied Warranty of Habitability*. See also the Directions for Use for those instructions. Questions 3 and 4 incorporate the notice requirements set forth in *CACI No. 4303, Sufficiency and Service of Notice of Termination for Failure to Pay Rent*.

If actual receipt is at issue and three days after the alleged date of receipt falls on a Saturday, Sunday, or holiday, modify question 4 to allow the tenant until the next day that is not a Saturday, Sunday, or holiday to cure the default.

Publisher's Notes

There is no BAJI verdict form on this subject.

* Steven R. Kellman, who wrote the Practice Tips in this chapter, has been in private practice since 1982, practicing landlord-tenant law with an emphasis on representing tenants. In 1993 he founded the Tenants Legal Center, located in San Diego. He has lectured for the CEB and professional and community groups on this subject. He has authored and contributed to several legal publications. Mr. Kellman has written an informational newspaper series feature on landlord-tenant law appearing in the *San Diego Union-Tribune*, *Los Angeles Times*, and *San Francisco Chronicle*. He has served as a judge pro tem, and on legislative committees for proposed landlord-tenant legislation.



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CHAPTER 43 California Judicial Council Unlawful Detainer Instructions *

5-43 California Forms of Jury Instruction CACI VF-4302

CACI VF-4302 Termination Due to Violation of Terms of Lease/Agreement

We answer the questions submitted to us as follows:

1. Did [name of defendant] fail to [insert description of alleged failure to perform] as required by the [lease/rental agreement/sublease]?

_____ Yes _____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Was [name of defendant]'s failure to [insert description of alleged failure to perform] a substantial breach of [an] important obligation[s] under the [lease/rental agreement/sublease]?

_____ Yes _____ No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Did [name of plaintiff] properly give [name of defendant] a three-day written notice to [either [describe action to correct failure to perform] or] vacate the property?

_____ Yes _____ No

If your answer to question 3 is no, then answer question 4. [If you answered yes, skip to question 5.]

4. Did [name of defendant] actually receive the notice at least three days before [date on which action was filed]?

_____ Yes _____ No

[If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.]

[5. Did [name of defendant] [describe action to correct failure to perform] within three days after service or receipt of the notice?]

_____ Yes _____ No

Signed: _____
Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the [clerk/bailiff/judge].

New December 2007

Directions for Use

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on *CACI No. 4304, Termination for Violation of Terms of Lease/Agreement--Essential Factual Elements*. See also the Directions for Use for that instruction. Questions 3 and 4 incorporate the notice requirements set forth in *CACI No. 4305, Sufficiency and Service of Notice of Termination for Violation of Terms of Agreement*.

Include question 5, and the bracketed reference to corrective action in question 3, if the breach can be cured.

If actual receipt is at issue and three days after the alleged date of receipt falls on a Saturday, Sunday, or holiday, modify question 4 to allow the tenant until the next day that is not a Saturday, Sunday, or holiday to cure the default.

Publisher's Notes

There is no BAJI verdict form on this subject.

* Steven R. Kellman, who wrote the Practice Tips in this chapter, has been in private practice since 1982, practicing landlord-tenant law with an emphasis on representing tenants. In 1993 he founded the Tenants Legal Center, located in San Diego. He has lectured for the CEB and professional and community groups on this subject. He has authored and contributed to several legal publications. Mr. Kellman has written an informational newspaper series feature on

landlord-tenant law appearing in the *San Diego Union-Tribune*, *Los Angeles Times*, and *San Francisco Chronicle*. He has served as a judge pro tem, and on legislative committees for proposed landlord-tenant legislation.



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CHAPTER 43 California Judicial Council Unlawful Detainer Instructions *

5-43 California Forms of Jury Instruction CACI VF-4303-CACI VF-4399

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CACI VF-4303Reserved for Future Use



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CHAPTER 43A Matthew Bender Unlawful Detainer Instructions

5-43A California Forms of Jury Instruction 43A.syn

§ 43A.syn Synopsis to Chapter 43A: Matthew Bender Unlawful Detainer Instructions

MB 4300A.01 Definitions of Claim and Debt

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] What Constitutes Rent

[b] Related Judicial Council Jury Instructions

MB 4300A.02-MB 4300A.09 Reserved for Future Use

MB 4300A.10 Elements--Plaintiff's Burden of Proof

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Claim to Possession Under Code Civ. Proc. § 1161(5)

[b] Tenant Must Give Written Notice

[c] Prerequisites: Landlord-Tenant Relationship; Tenant in Possession

[d] Termination by Co-Tenant

[e] Application to Transients and Mobilehome Tenancies

[f] Effect of Rent Control Ordinances and Government Programs

[g] Related Judicial Council Jury Instructions

MB 4300A.11 Sufficiency and Effect of Tenant's 30-Day Notice

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Timing and Form of Notice Under Civil Code Section 1946

[b] Timing and Form of Notice Under Civil Code Section 1946.1

[c] Necessity of Authorized Method of Service

[d] Manner of Service of Notice

[e] Related Judicial Council Jury Instructions

MB 4300A.12-MB 4300A.19 Reserved for Future Use

MB 4300A.20 Elements--Plaintiff's Burden of Proof

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Agreement to Surrender

[b] Effect on Co-Tenants

[c] Prerequisites: Landlord-Tenant Relationship; Tenant in Possession

[d] Application to Transients and Mobilehome Tenancies

[e] Effect of Rent Control Ordinances and Government Programs

[f] Related Judicial Council Jury Instructions

MB 4300A.21-MB 4300A.29 Reserved for Future Use

MB 4300A.30 Reduced Award Due to Breach of Implied Warranty of Habitability

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Legislative Intent; Measure of Defendant's Obligation, Generally

[b] Methods for Determining Damages

[c] Related Judicial Council Jury Instructions



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CHAPTER 43A Matthew Bender Unlawful Detainer Instructions

5-43A California Forms of Jury Instruction Scope

Scope

SCOPE

This chapter includes jury instructions on the basic rules governing unlawful detainer proceedings under *Code Civ. Proc. § 1161*. These instructions may be used to supplement the CACI instructions in Ch. 43, *California Judicial Council Unlawful Detainer Instructions*.

This chapter includes instructions on the following topics:

- Part A includes instructions on elements of a plaintiff's causes of action, including:
 - Introductory instructions [*see MB 4300A.01*].
 - Actions based on service of tenant's 30-day notice [*see MB 4300A.10, MB 4300A.11*].
 - Actions based on landlord's acceptance of tenant's surrender [*see MB 4300A.20*].
- Part B includes instructions on damages [*see MB 4300A.30*].

Suggestions are made on integrating these instructions and on special rules of law that may apply to a particular case.

General rules of contract law relating to the formation, validity, interpretation, performance, and breach of contracts (e.g., leases or rental agreements) are covered in Ch. 3, *California Judicial Council Contracts Instructions*, and Chs. 3A-3G.



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CHAPTER 43A Matthew Bender Unlawful Detainer Instructions
PART A. INTRODUCTION; PLAINTIFF'S CAUSES OF ACTION
1. Introductory Instructions

3-43A California Forms of Jury Instruction MB 4300A.01

MB 4300A.01 Definitions of Claim and Debt

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

As used in the instructions that I give you, "rent" means the amount of money that a tenant has agreed to pay or is required to pay the landlord for the right to use and occupy real property under a lease or rental agreement between them.

Authority: *Atlantic Oil Co. v. County of Los Angeles* (1968) 69 Cal.2d 585, 600, 72 Cal.Rptr. 886, 446 P.2d 1006 ; *Silveira v. Ohm* (1949) 33 Cal.2d 272, 276, 201 P.2d 387 ; *Petroleum Collections, Inc. v. Swords* (1975) 48 Cal.App.3d 841, 846, 122 Cal.Rptr. 114 ; *Haig v. Hogan* (1947) 82 Cal.App.2d 876, 878, 187 P.2d 426 ; *Glouberman v. Coffey* (1955) 138 Cal.App.2d Supp. 906, 907-908, 292 P.2d 681 .

[2] Use of Instruction

This instruction should be used to define the term "rent." It is used in an action under *Code Civ. Proc. § 1161(2)*. These actions require the jury to determine whether and to what extent there has been a default in the payment of rent and to distinguish "rent" from "reasonable rental value" damages. Essentially, this instruction tells the jury that rent is the amount that has been fixed or agreed on under a lease or rental agreement as the compensation for the property's use. It should usually be given immediately after the instruction defining the elements and the plaintiff's burden of proof in an action based on a default in the payment of rent [see Ch. 43, *California Judicial Council Unlawful Detainer Instructions*, CACI No. 4302 ("Termination for Failure to Pay Rent--Essential Factual Elements")].

This instruction assumes that the rent at issue is sought under an express agreement. If the obligation to pay rent arises under an implied agreement, the definition should be expanded to include compensation fixed by the terms of an

implied agreement and the jury should be instructed on rental agreements that are implied by law. If an oral agreement is involved, the instruction should be modified to include a specific reference to oral agreements. In this case, counsel should submit additional instructions on the effect of oral rental agreements [*see, e.g.*, Ch. 3, *California Judicial Council Contracts Instructions*, CACI No. 304 ("Oral or Written Contract Terms")].

Rent is alternatively defined as compensation the tenant has agreed to pay or is required to pay so the definition will be broad enough to be consistent with the instructions on the effect of a breach of the implied warranty of habitability on the tenant's obligation to pay rent [*see* Ch. 43, *California Judicial Council Unlawful Detainer Instructions*, CACI No. 4320 ("Affirmative Defense--Implied Warranty of Habitability")].

This instruction also assumes that the rent at issue is monetary compensation. If the plaintiff claims that the tenant defaulted in the payment of some other type of consideration constituting the agreed-on rent, the instruction should be modified accordingly [*see* [3], *below*].

[3] Comment

[a] What Constitutes Rent

Rent is the consideration given in return for the right to the possession, use, and enjoyment of property [*Atlantic Oil Co. v. County of Los Angeles* (1968) 69 Cal.2d 585, 600, 72 Cal.Rptr. 886, 446 P.2d 1006 ; *Silveira v. Ohm* (1949) 33 Cal.2d 272, 276, 201 P.2d 387 ; *Petroleum Collections, Inc. v. Swords* (1975) 48 Cal.App.3d 841, 846, 122 Cal.Rptr. 114] . Rent is not limited to monetary compensation; it includes any consideration the tenant has agreed to give the landlord for the right to use and occupy the property [*Atlantic Oil Co. v. County of Los Angeles* (1968) 69 Cal.2d 585, 600, 72 Cal.Rptr. 886 (title to oil and gas); *Silveira v. Ohm* (1949) 33 Cal.2d 272, 276, 201 P.2d 387 (crops); *Sanders Construction Co. v. San Joaquin First Fed. Sav. & Loan Assn.* (1982) 136 Cal.App.3d 387, 399 n.4, 186 Cal.Rptr. 218 (construction of building)]. However, because unlawful detainer actions are rarely based on an agreement to pay rent consisting of nonmonetary consideration, this instruction assumes that the rent at issue will be an amount of money.

The most significant characteristic of rent, as opposed to damages, is that it is compensation that is fixed or determined by the terms of the express or implied lease or agreement under which the property is held [*see Haig v. Hogan* (1947) 82 Cal.App.2d 876, 878, 187 P.2d 426 ; *Glouberman v. Coffey* (1955) 138 Cal.App.2d Supp. 906, 907-908, 292 P.2d 681] . Consequently, this instruction defines rent as agreed-on compensation or compensation required under the terms of an agreement.

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [*see also* Ch. 43, *California Judicial Council Unlawful Detainer Instructions*]:

CACI No. 302, Contract Formation--Essential Factual Elements

CACI No. 4300, Introductory Instruction

CACI No. 4320, Affirmative Defense--Implied Warranty of Habitability

CACI No. 4340, Damages for Reasonable Rental Value



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California Forms of Jury Instruction

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CHAPTER 43A Matthew Bender Unlawful Detainer Instructions
PART A. INTRODUCTION; PLAINTIFF'S CAUSES OF ACTION
1. Introductory Instructions

5-43A California Forms of Jury Instruction MB 4300A.02-MB 4300A.09

Reserved for Future Use

MB 4300A.02Reserved for Future Use



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CHAPTER 43A Matthew Bender Unlawful Detainer Instructions
PART A. INTRODUCTION; PLAINTIFF'S CAUSES OF ACTION

2. Actions Based on Tenant's Service of 30-Day Notice (Code Civ. Proc. § 1161(5))

3-43A California Forms of Jury Instruction MB 4300A.10

MB 4300A.10 Elements--Plaintiff's Burden of Proof

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] PROPOSED INSTR. NO. _____

A tenant may terminate a month-to-month tenancy by properly giving the landlord 30 days' written notice of the termination. Once the tenant properly gives the landlord notice of termination, the landlord is entitled to rely on that notice and the tenant may not revoke, change, or cancel it without the landlord's consent. The tenant's notice of termination will therefore operate to terminate the tenancy and give the landlord the right to possession of the property 30 days after the notice is given.

If the landlord is required to sue the tenant to recover possession of the property after the 30-day period expires, [he/she/it] is also entitled to recover damages for being deprived of possession during the time the tenant wrongfully occupied the property. If the tenant has acted with malice, the landlord may also be awarded statutory damages of up to \$600, in addition to actual damages, including rent found due.

In this case, Plaintiff claims that [he/she/it] is entitled to possession of the property and damages because Defendant has wrongfully continued to occupy the property after Defendant terminated [his/her/ its] month-to-month tenancy by giving Plaintiff 30 days' written notice of the termination. Plaintiff also claims that Defendant has acted with malice and is requesting statutory damages.

[OPTIONAL (See Use of Instruction)]

It has been established by _____ [stipulation of the parties or evidence that is not disputed] that

_____ [*list elements established as matter of law*].

[*CONTINUE INSTRUCTION*]

To be awarded possession of the property, Plaintiff has the burden of proving each of the following elements of [his/her/its] claim for possession:

[*CHOOSE FROM THE FOLLOWING (See Use of Instruction)*]

- 1. That Defendant occupied the property as a tenant of Plaintiff's--that is, as a result of a [lease/rental agreement] under which Plaintiff [leased/rented] the subject property to [him/her/it];**
- 2. That Defendant had a month-to-month tenancy under the terms of the [lease/rental agreement] between Plaintiff and Defendant;**
- 3. That Defendant properly gave Plaintiff 30 days' written notice of the termination of [his/her/its] tenancy;**
- 4. That Defendant continued to occupy the property for more than 30 days after the written notice of termination was properly given;**
- 5. That Defendant was still occupying the property on _____ [*insert date action was commenced*], when this lawsuit began; and**
- 6. That Plaintiff did not give Defendant permission to continue to occupy the property after Defendant's tenancy was terminated. Plaintiff may be awarded damages only if [he/she/it] is awarded possession of the property.**

Authority: *Code Civ. Proc.* §§ 1161(5), 1174(b); *Civ. Code* §§ 1946, 1946.1; *Markham v. Fralick* (1934) 2 Cal.2d 221, 225-227, 39 P.2d 804 ; *Francis v. West Virginia Oil Co.* (1917) 174 Cal. 168, 169-171, 162 P. 394 ; *Fifth & Broadway Partnership v. Kimmy, Inc.* (1980) 102 Cal.App.3d 195, 204-205, 162 Cal.Rptr. 271 ; *Cyrus v. Haveson* (1976) 65 Cal.App.3d 306, 316-317, 135 Cal.Rptr. 246 ; *Briggs v. Electronic Memories & Magnetics Corp.* (1975) 53 Cal.App.3d 900, 905-907, 126 Cal.Rptr. 34 ; *Greene v. Municipal Court* (1975) 51 Cal.App.3d 446, 450-451, 124 Cal.Rptr. 139 ; *Avina v. Spurlock* (1972) 28 Cal.App.3d 1086, 1088, 105 Cal.Rptr. 198 .

[2] Use of Instruction

This instruction should be used to set forth the elements of the plaintiff's claim and the plaintiff's burden of proof in an action under *Code Civ. Proc.* § 1161(5). It is based on allegations that the defendant has terminated a month-to-month or other periodic tenancy by giving notice of termination in accordance with *Civ. Code* § 1946 or 1946.1.

Frequently, the evidence will support both a claim that the defendant terminated the tenancy under *Civ. Code* § 1946 or 1946.1 and a claim that the plaintiff accepted the defendant's offer of surrender. In such a case, the jury should be instructed on both theories [see MB 4300A.20]. This instruction may also be inapplicable, or may require modification, in actions involving hotel or motel rooms, mobilehomes, property subject to local rent control ordinances, or property owned, financed, or subsidized by governmental entities [see [3][e], [f], *below*].

This instruction should be given immediately after the introductory instruction in Ch. 43, *California Judicial Council Unlawful Detainer Instructions*, CACI No. 4300 ("Introductory Instruction"), and should be followed by a general instruction defining preponderance of the evidence as the burden of proof [see, e.g., Ch. 2, *California Judicial Council*

Evidence Instructions, CACI No. 200 ("Obligation to Prove--More Likely True Than Not True")].

This instruction construes *Code Civ. Proc. § 1161(5)* to require the plaintiff to show that the tenant used one of the methods of service authorized by *Civ. Code § 1946* or *1946.1*. However, there is no case law on this point and an argument can be made that this should not be an element of the plaintiff's cause of action.

This instruction assumes that the action is based on the termination of a month-to-month tenancy. If the action is based on the termination of some other type of periodic tenancy (*e.g.*, a year-to-year tenancy), the references to the type of tenancy involved should be substituted for the references to a month-to-month tenancy and this instruction should be modified to reflect the different notice requirements that *Civ. Code §§ 1946* and *1946.1* impose in the case of a periodic tenancy.

In addition, the instruction assumes that the action is based on giving 30 days' written notice. If the plaintiff is relying on a contention that the lease or rental agreement authorized a shorter notice period, modify the instruction accordingly.

This instruction also assumes that the action is based on the existence of a landlord-tenant relationship between the plaintiff and the defendant. When a subtenant is a defendant, it should be modified accordingly and the jury should be separately instructed on the rights and liabilities of a subtenant [*see Civ. Code § 822; Fifth & Broadway Partnership v. Kimmy, Inc. (1980) 102 Cal.App.3d 195, 201, 162 Cal.Rptr. 271 ; Four Seas Inv. Corp. v. International Hotel Tenants' Assn. (1978) 81 Cal.App.3d 604, 611-612, 146 Cal.Rptr. 531*]. If the plaintiff is a successor in interest of the original landlord, the instruction should be modified accordingly and a separate instruction on the rights of a landlord's successor should be given [*see Civ. Code §§ 821, 823, 1111*].

This instruction assumes that the action is based on a claim that the defendant is in actual possession of the property. If it is claimed that the defendant is in possession through a subtenant, it should be modified to reflect that fact and the fact that a tenant may be considered to be in possession of property when it is occupied by a subtenant.

This instruction provides for the landlord's recovery of possession of the premises, plus recovery of damages, including statutory damages if the tenant acted with malice [*see Code Civ. Proc. § 1174(b)*].

[3] Comment

[a] Claim to Possession Under Code Civ. Proc. § 1161(5)

Code Civ. Proc. § 1161(5) states that a tenant is guilty of unlawful detainer "[w]hen he gives written notice as provided in *Section 1946 of the Civil Code* of his intention to terminate the hiring of the real property . . . but fails to deliver up possession at the time specified in said written notice, without the permission of his landlord. . . ." No apparent cases have interpreted this section's provisions. Conclusions about its purpose and effect must necessarily be drawn by considering its language and history in the context of related statutes and rules.

[b] Tenant Must Give Written Notice

Code Civ. Proc. § 1161(5) requires the landlord to show that the tenant has given written notice "as provided in *Section 1946 of the Civil Code*." This provision is treated here as imposing a requirement that the notice given by the tenant must comply with all of the requirements of *Civ. Code § 1946*, including the requirements relating to service of the notice. However, counsel should make his or her own evaluation to determine whether the landlord is required to prove that the tenant used one of the methods of service authorized by *Civ. Code § 1946*.

[c] Prerequisites: Landlord-Tenant Relationship; Tenant in Possession

In an action under *Code Civ. Proc. § 1161(5)*, the plaintiff must establish the essential elements that are common to all

of the actions authorized by *Code Civ. Proc.* § 1161. The plaintiff must show both of the following:

- The defendant's claim to possession is based on a landlord-tenant relationship and the defendant is, or claims under, a tenant of the plaintiff or a predecessor in interest of the plaintiff [*Francis v. West Virginia Oil Co.* (1917) 174 Cal. 168, 169-171, 162 P. 394 ; *Greene v. Municipal Court* (1975) 51 Cal.App.3d 446, 450-451, 124 Cal.Rptr. 139] ; and
- The defendant remained in possession following the tenancy's termination and the defendant was still in possession when the action was commenced [*Markham v. Fralick* (1934) 2 Cal.2d 221, 225-227, 39 P.2d 804 ; *Briggs v. Electronic Memories & Magnetics Corp.* (1975) 53 Cal.App.3d 900, 905-907, 126 Cal.Rptr. 34] .

However, the plaintiff is not required to establish that the tenancy was terminated before the action's commencement. The fact that an action may have been prematurely commenced is not a defense, but merely a ground for abatement of the action. Once the tenancy has terminated and the cause of action has accrued, any premature commencement of the action will be disregarded and cannot have any bearing on the determination of the action [see *Moore v. Fellner* (1958) 50 Cal.2d 330, 343, 325 P.2d 857] .

[d] Termination by Co-Tenant

When there are two or more co-tenants, a co-tenant may terminate a month-to-month or other periodic tenancy as to himself or herself only without affecting the tenancy of the other co-tenants [*Schmitt v. Felix* (1958) 157 Cal.App.2d 642, 648-649, 321 P.2d 473] . This rule has two implications when a co-tenant gives notice solely on his or her own behalf. First, a co-tenant who gives notice on his or her behalf and vacates the property will not be guilty of unlawful detainer because other co-tenants have remained in possession after the expiration of the notice period [*Schmitt v. Felix* (1958) 157 Cal.App.2d 642, 648-649, 321 P.2d 473] . Second, a notice given solely on behalf of an individual co-tenant may not be the basis for an unlawful detainer action against the other co-tenants who remain in possession after the expiration of the notice period. When there is a claim that a co-tenant has acted on behalf of the other co-tenants in giving a notice of termination, the rule that a co-tenant may terminate a month-to-month or periodic tenancy as to himself or herself alone potentially gives rise to disputed factual issues concerning the notice's interpretation (that is, whether it was the intent of the notice to terminate the tenancy as to all of the co-tenants or only as to the co-tenant giving the notice) and the authority of the co-tenant giving notice to bind the other co-tenants.

[e] Application to Transients and Mobilehome Tenancies

Because *Code Civ. Proc.* § 1161 expressly exempts transient occupants of a hotel or motel and other hotel or motel residents from its definition of tenants, *Code Civ. Proc.* § 1161(5) is not applicable to those people, whose occupancy meets the criteria set forth in *Civ. Code* § 1940(b). It is probably inapplicable to mobilehome tenancies, the termination of which appears to be exclusively governed by the special provisions of *Civ. Code* §§ 798.55-798.61 [see *Palmer v. Agee* (1978) 87 Cal.App.3d 377, 381-386, 150 Cal.Rptr. 841] .

[f] Effect of Rent Control Ordinances and Government Programs

Notwithstanding the provisions of *Code Civ. Proc.* § 1161, municipal rent control ordinances may limit or restrict the use of substantive grounds for termination of tenancies as long as the limitations or restrictions are reasonably related to the enforcement of rent restrictions [*Fisher v. City of Berkeley* (1984) 37 Cal.3d 644, 680-713, 209 Cal.Rptr. 682, 693 P.2d 261 ; *Birkenfeld v. City of Berkeley* (1976) 17 Cal.3d 129, 147-153, 130 Cal.Rptr. 465, 550 P.2d 1001] . If the property at issue is subject to a local rent control ordinance, counsel should carefully study its provisions to determine whether it precludes the tenancy's termination or imposes additional requirements on the landlord. If the property is government-owned or is financed or subsidized under a government program, the landlord's right to terminate the

tenancy may also be limited or restricted [see, e.g., *People ex rel. Dept. of Transportation v. Lucero* (1980) 114 Cal.App.3d 166, 171-176, 170 Cal.Rptr. 554] .

[g] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see also Ch. 43, *California Judicial Council Unlawful Detainer Instructions*]:

CACI No. 200, Obligation to Prove--More Likely True Than Not True

CACI No. 4300, Introductory Instruction

CACI No. 4301, Expiration of Fixed-Term Tenancy--Essential Factual Elements

CACI No. 4325, Affirmative Defense--Failure to Comply With Rent Control Ordinance

CACI No. 4341, Statutory Damages on Showing of Malice (*Code Civ. Proc.*, § 1174(b))



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California Forms of Jury Instruction

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CHAPTER 43A Matthew Bender Unlawful Detainer Instructions
PART A. INTRODUCTION; PLAINTIFF'S CAUSES OF ACTION

2. Actions Based on Tenant's Service of 30-Day Notice (Code Civ. Proc. § 1161(5))

3-43A California Forms of Jury Instruction MB 4300A.11

MB 4300A.11 Sufficiency and Effect of Tenant's 30-Day Notice

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

A tenant may terminate a month-to-month tenancy by giving the landlord [at least] 30 days' advance written notice that [he/she/it] is terminating the tenancy. The notice need not be in any particular form, but it must inform the landlord that the tenant intends to terminate the tenancy.

When the tenant properly gives the landlord a sufficient written notice of [his/her/its] intention to terminate a month-to-month tenancy, the tenancy is terminated and the landlord is entitled to possession of the property [30 days after the notice is given or on the termination date stated in the notice]. Once the notice is properly given, the landlord is entitled to rely on the notice and the tenant may not revoke or cancel it without the landlord's consent. However, a written notice of a tenant's intention to terminate a month-to-month tenancy that is not properly given is not effective and may not operate to terminate the tenancy or entitle the landlord to possession of the property.

A proper written notice of a tenant's intention to terminate a month-to-month tenancy is effective if it is given in [any of] the following way[s]:

[CHOOSE FROM THE FOLLOWING (See Use of Instruction)]

1. The notice may be given by delivering a copy of the written notice to the landlord; when the landlord actually receives a copy of the written notice, it is considered to have been delivered to [him/her/it], and therefore to have

been properly given, even if it has not actually been handed or offered to the landlord by another person;

2. If the tenant paid the rent for the month before the date of the notice to an agent or employee of the landlord, the notice may be given by delivering a copy of the notice to that agent or employee; if the agent or employee actually receives a copy of the notice, it is considered to have been delivered to [him/her/it], and therefore to have been properly given, even if it has not actually been handed or offered to [him/her/it] by another person;

3. The notice may be given by sending a copy of the notice to the landlord by certified or registered mail in an envelope addressed to the landlord;

4. If the tenant paid the rent for the month before the date of the notice to an agent or employee of the landlord, the notice may be given by sending a copy of the notice to that agent or employee by certified or registered mail in an envelope addressed to the agent or employee;

5. If the landlord is not at home and not at [his/her/its] usual place of work, the notice may be given by leaving one copy of the notice with a responsible person at the landlord's home or usual place of work and mailing a second copy to the landlord's home in an envelope addressed to the landlord; or

6. If the landlord's home and the landlord's usual place of work cannot be located or if no responsible persons are found at the landlord's home or usual place of work, the notice may be given by posting a copy of the notice on the property that the tenant is [renting/leasing] from the landlord in a place where it can be easily noticed and mailing a second copy to the property that the tenant is [renting/leasing] from the landlord in an envelope addressed to the landlord.

[CONTINUE INSTRUCTION]

If you find that Defendant properly gave Plaintiff sufficient written notice that [he/she/it] was terminating [his/her/its] tenancy, then you must find that Defendant's tenancy was terminated and that Plaintiff was entitled to possession of the property _____ [30 days after the notice was given or on the termination date stated in the notice]. If you find that Defendant did not properly give Plaintiff sufficient written notice that [he/she/it] was terminating Defendant's tenancy, then you must find that Defendant's tenancy was not terminated and that Defendant continued to be entitled to possession of the property.

Authority: *Civ. Code § 1946; Code Civ. Proc. § 1162; Renner v. Huntington etc. Oil & Gas Co. (1952) 39 Cal.2d 93, 102, 244 P.2d 895 ; Colyear v. Tobriner (1936) 7 Cal.2d 735, 743, 62 P.2d 741 ; Four Seas Inv. Corp. v. International Hotel Tenants' Assn. (1978) 81 Cal.App.3d 604, 611-612, 146 Cal.Rptr. 531 .*

[2] Use of Instruction

This instruction should be used to inform the jury when a notice of termination given by the tenant is sufficient to effect a termination of a month-to-month tenancy or other periodic tenancy. It should be used, with appropriate modifications, when an action under *Code Civ. Proc. § 1161(5)* is based on the alleged termination of a month-to-month or other periodic tenancy by the defendant and the defendant contends that the notice relied on did not operate to terminate the tenancy under *Civ. Code § 1946*.

When a claim under *Code Civ. Proc. § 1161(5)* is predicated on the landlord's written acceptance of an offer of surrender rather a termination by means of a notice complying with the requirements of *Civ. Code § 1946*, this instruction is not appropriate and the instruction in MB 4300A.20 should be used instead. Frequently, the evidence will support both a claim that the defendant terminated the tenancy under *Civ. Code § 1946* and a claim that the plaintiff

accepted the defendant's offer of surrender. In such a case, the jury should be instructed on both theories and the second and final paragraphs of this instruction should be modified to indicate that the tenancy would not have been terminated in the absence of a notice complying with *Civ. Code* § 1946--unless there was a written offer of surrender accepted in writing by the landlord.

This instruction may not be applicable, or may require modification, in actions involving hotel or motel rooms, mobilehomes, property subject to local rent control ordinances, or property owned, financed, or subsidized by governmental entities [*see MB 4300A.10*][*e*], [*f*]].

Because a co-tenant may terminate a month-to-month tenancy as to himself or herself alone without affecting the tenancy of the other co-tenants, a claim that a notice was given solely on behalf of an individual co-tenant presents problems that are not addressed in this instruction and may require modification of the instruction [*see MB 4300A.10*][*d*]].

This instruction is based on a construction of *Code Civ. Proc.* § 1161(5) that requires the plaintiff to prove that the defendant served the subject notice of termination in one of the ways authorized by statute. The law is not entirely clear on this point [*see* [3][*b*], [*c*], *below*] and counsel are advised to make their own evaluations if the method of service is an issue.

This instruction assumes that the action is based on the termination of a month-to-month tenancy. If the action is based on the termination of some other type of periodic tenancy (*e.g.*, a year-to-year tenancy), the references to the type of tenancy involved should be substituted for the references to a month-to-month tenancy and this instruction should be modified to reflect the fact that *Civ. Code* § 1946 imposes different requirements with regard to the notice needed to terminate a periodic tenancy other than a month-to-month tenancy [*see* [3][*a*], *below*].

This instruction also assumes that the parties are in agreement that at least 30 days' notice was required to terminate the tenancy. If the plaintiff is relying on a contention that the lease or rental agreement authorized a shorter notice period, it should be modified to reflect the plaintiff's contentions and the fact that the parties may agree to termination of a periodic tenancy on not less than seven days' notice. If there is a contention that the parties agreed that more than 30 days' notice would be required, it should also be modified accordingly.

If the written notice relied on by the plaintiff specified that the tenancy would terminate at the end of a period that was more than 30 days or if it specified a termination date that was more than 30 days after it was given, the first sentence of the first paragraph should include the bracketed phrase "at least" and the third sentence of the first paragraph and the first sentence of the final paragraph should include the bracketed choice that the tenancy terminated at the expiration of the period specified in the notice. If not, they should state that the tenancy terminated 30 days after it was given.

This instruction assumes that the action is based on the existence of a landlord-tenant relationship between the plaintiff and the defendant. When a subtenant is a defendant, it should be modified accordingly and the jury should be separately instructed on the rights and liabilities of a subtenant [*see Civ. Code* § 822; *Fifth & Broadway Partnership v. Kimny, Inc.* (1980) 102 Cal.App.3d 195, 201, 162 Cal.Rptr. 271 ; *Four Seas Inv. Corp. v. International Hotel Tenants' Assn.* (1978) 81 Cal.App.3d 604, 611-612, 146 Cal.Rptr. 531] . If the plaintiff is a successor in interest of the original landlord, it should be modified accordingly and a separate instruction on the rights of a landlord's successor should be given [*see Civ. Code* §§ 821, 823, 1111].

Counsel should choose only the descriptions of the methods of service on which the plaintiff is relying, and omit the methods not at issue.

[3] Comment

[a] Timing and Form of Notice Under Civil Code Section 1946

Civ. Code § 1946 provides that in the absence of an agreement to the contrary "either of the parties" may terminate a month-to-month tenancy by giving "at least 30 days written notice" of the termination. The 30 days' written notice required to terminate a month-to-month tenancy may be given "at any time" [*Civ. Code § 1946*].

Because the statute requires "at least" 30 days' notice, a notice given under *Civ. Code § 1946* may specify a period or a termination date that is more than 30 days after the notice is given; in that case, the tenancy will not be terminated until the expiration of the period specified in the notice [*see Kriz v. Taylor (1979) 92 Cal.App.3d 302, 312, 154 Cal.Rptr. 824 ; Highland Plastics, Inc. v. Enders (1980) 109 Cal.App.3d Supp. 1, 7, 167 Cal.Rptr. 353*]. On the other hand, it has been held that when a notice specifies a termination date that is less than 30 days after it is given, it operates to terminate the tenancy on the expiration of the minimum 30-day statutory period [*Kingston v. Colburn (1956) 139 Cal.App.2d 623, 625, 293 P.2d 805*].

Civ. Code § 1946 authorizes the parties to provide by agreement "*at the time such tenancy is created*" (emphasis added) that a month-to-month tenancy may be terminated by giving not less than seven days' notice. However, when shortened notice is given the statute requires that it be given "not less than seven days *before the expiration of the term*" (emphasis added) while 30 days' notice may be given "at any time." Thus, although the courts have not construed this provision, it appears to require that notice be given at least seven days *before the end of a monthly rental period* and therefore, by necessary implication, to provide that a termination on shortened notice cannot be made effective earlier than the end of the rental period in which it is given.

In a case of a periodic tenancy other than a month-to-month tenancy, different requirements are imposed. If the tenancy's term is greater than one month, the notice must be given at least 30 days before the term's expiration. If the tenancy's term is less than one month, the notice must be at least as long before the term's expiration as the length of the term itself [*Civ. Code § 1946*]. These provisions necessarily imply that the termination of a periodic tenancy other than a month-to-month tenancy (which, unlike other periodic tenancies, may be terminated by notice given "at any time") can only be made effective as of the end of a term.

Other than to require that the tenant give "written notice of his intention to terminate [the tenancy]," *Civ. Code § 1946* does not impose any specific requirements as to the form of the notice. Unlike *Civ. Code § 789*, it does not require that the notice specify the termination date [*see Kingston v. Colburn (1956) 139 Cal.App.2d 623, 625, 293 P.2d 805*].

The parties may provide in the lease or rental agreement that more than 30 days' notice is required to terminate the tenancy and, if they do, the provisions of the lease or rental agreement control [*Watkins v. McCartney (1922) 57 Cal.App. 643, 644-645, 207 P. 909*]. In the case of a commercial lease or rental agreement, contractual provisions that supersede statutory requirements as to the form, timing, or service of the notice will also control [*Folberg v. Clara G. R. Kinney Co. (1980) 104 Cal.App.3d 136, 140-141, 163 Cal.Rptr. 426 ; see Civ. Code § 1953* (residential leases or rental agreements)].

[b] Timing and Form of Notice Under Civil Code Section 1946.1

Notwithstanding *Civ. Code § 1946*, until January 1, 2010, a landlord must give notice at least 60 days before the proposed date of termination of a periodic tenancy [*Civ. Code § 1946.1(b), (h)*] unless the tenant has resided on the premises for less than one year or the property is being sold, in which case 30 days' notice is required [*Civ. Code § 1946.1(c), (d)*]. However, *Civ. Code § 1946.1* provides that a tenant is required to give notice only for a period at least as long as the term of the periodic tenancy before the proposed date of termination [*Civ. Code § 1946.1(b), (e)*]. In either case, notice must be given in the same manner as notice under *Civ. Code § 1946* [*Civ. Code § 1946.1(f); see [d], below*].

[c] Necessity of Authorized Method of Service

Code Civ. Proc. § 1161(5) states that a tenant is guilty of unlawful detainer "[w]hen he or she gives written notice as provided in *Section 1946 of the Civil Code* of his or her intention to terminate the hiring of real property . . . but fails to deliver possession." This instruction and the instruction on the elements of a claim under *Code Civ. Proc. § 1161(5)* [see *MB 4300A.10*] construe this language as imposing a requirement that the landlord prove that the notice was served in accordance with the statutory requirements. There is no case law on this point and the contrary position (that the tenant should not be permitted to defeat the landlord's claim to possession by asserting that the method of service that he or she used was defective) is not wholly unreasonable. However, although it may create the appearance that the tenant is being permitted to benefit from his or her own mistake (or, in some cases, calculated tactical decision), a number of considerations compel the conclusion that proper service of the notice is an element of the landlord's cause of action.

First, *Code Civ. Proc. § 1161(5)* states that a tenant is guilty of unlawful detainer "when he or she gives written notice [of termination] as provided in *Section 1946 of the Civil Code*." *Civ. Code § 1946* specifies that the notice of termination of tenancy for which it provides "shall be given" in the manner prescribed in *Code Civ. Proc. § 1162* or by one of the other methods it authorizes. Because these statutes provide a method of effecting a forfeiture of valuable rights, they must be strictly construed [*Woods-Drury, Inc. v. Superior Court* (1936) 18 Cal.App.2d 340, 344, 63 P.2d 1184 ; see *Magan Medical Clinic v. Cal. State Bd. of Medical Examiners* (1967) 249 Cal.App.2d 124, 138, 57 Cal.Rptr. 256] . Both the statutory language and the rule requiring strict construction indicate that *Code Civ. Proc. § 1161(5)* applies to the *manner* of giving notice as well as the *form and timing* of the notice. If the statute does mandate compliance with the service requirements imposed by *Civ. Code § 1946*, then compliance is an essential element of the landlord's claim for relief under the unlawful detainer statutes [cf. *Baugh v. Consumers Associates, Ltd.* (1966) 241 Cal.App.2d 672, 674, 50 Cal.Rptr. 822] .

Second, a construction of the statutory language that dispensed with a requirement of proper service might give a landlord who becomes aware of an attempted but defective service by a tenant an unwarranted option to treat the tenancy as remaining in effect due to the tenant's failure to comply with *Civ. Code § 1946* or to bring an action under *Code Civ. Proc. § 1161(5)* on the basis of the tenant's notice. The tenant, who could be subjected to an unlawful detainer action by remaining in possession or to a claim for damages by moving, might not even be aware of the defect in service and, in any event, would have no effective way of compelling the landlord to elect a course of action.

Third, a number of rules prevent the landlord from being injured by reliance on a notice of termination that is not properly served. If the landlord actually receives the notice, this receipt, in and of itself, is sufficient to establish delivery of the notice in compliance with the statutory requirement [*Hunstock v. Estate Development Corp.* (1943) 22 Cal.2d 205, 211, 138 P.2d 1 ; *University of So. Cal. v. Weiss* (1962) 208 Cal.App.2d 759, 769-770, 25 Cal.Rptr. 475] . Therefore, in virtually all cases, the landlord will be able to cure any possible defects in an initial service and establish the fact of proper service with certainty by receipt of the notice. Moreover, if there is any question about the validity of service of a written notice of termination, the landlord may treat it as a written offer of surrender, accept it in writing, and proceed under those provisions of *Code Civ. Proc. § 1161(5)* that authorize an action based on the written acceptance of a written offer of surrender. Finally, if the landlord does, in fact, rely to his or her detriment on service that has purportedly been effected under *Civ. Code § 1946*, the doctrine of estoppel can be applied to preclude the tenant from asserting that the service was invalid [see *Evid. Code § 623* (elements of estoppel); *City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, 488-489, 91 Cal.Rptr. 23 ; see *Abstract Investment Co. v. Hutchinson* (1962) 204 Cal.App.2d 242, 249, 22 Cal.Rptr. 309 (although estoppel is equitable doctrine, it is well settled that rules of equity apply in unlawful detainer action)].

[d] Manner of Service of Notice

Civ. Code § 1946 provides that the written notice of termination "shall be given in the manner prescribed in *Section 1162 of the Code of Civil Procedure* or by sending a copy by certified or registered mail addressed to the other party."

Thus, the tenant can effect service by mailing a copy of the notice to the landlord by certified or registered mail. Note that in contrast to the provisions of *Code Civ. Proc. § 1162*, which authorize service by mail, the provisions of *Civ. Code § 1946* authorizing service on a party by certified or registered mail do not require that the notice be mailed to the party at a particular location.

Civ. Code § 1946 also provides that "the lessee may give such notice by sending a copy by certified or registered mail addressed to the agent of the lessor to whom the lessee has paid the rent for the month prior to the date of such notice or by delivering a copy to the agent personally." From the specific statutory language restricting service on an agent to "the agent to whom the lessee has paid the rent for the month prior to the date of such notice," it is clear that service on an agent of the landlord is not authorized unless the tenant has, in fact, made the previous month's rental payment to an agent. As in the case of service on the landlord by certified or registered mail, there is no requirement that a notice served on an agent by certified or registered mail be mailed to any particular location.

The tenant may also use any of the methods authorized by *Code Civ. Proc. § 1162*, which provides for three methods of service.

The first method is service by "delivering a copy to the [landlord] personally" [*Code Civ. Proc. § 1162(1)*].

The second method is (1) service by leaving a copy at the landlord's residence or usual place of business, and (2) mailing a copy to the landlord at the landlord's residence [*Code Civ. Proc. § 1162(2)*]. This method can only be used if the landlord is "absent from his place of residence, and from his usual place of business" [*Code Civ. Proc. § 1162(2)*; *Jordan v. Talbot* (1961) 55 Cal.2d 597, 608, 12 Cal.Rptr. 488, 361 P.2d 20] .

A copy of the notice must be left with "some person of suitable age and discretion" at either the landlord's residence or usual place of business [*Kwok v. Bergren* (1982) 130 Cal.App.3d 596, 598-600, 181 Cal.Rptr. 795] . The requirement embodied in the term "suitable age and discretion" has been said to be a "flexible" one intended to give the trier of fact broad latitude in passing on the notice's sufficiency [*Lehr v. Crosby* (1981) 123 Cal.App.3d Supp. 1, 6, 177 Cal.Rptr. 96] . Essentially, the question is whether the notice's recipient was sufficiently mature, competent, responsible, and interested that it would have been reasonable to assume that it was likely that he or she would apprise the tenant of the notice [see *Kwok v. Bergren* (1982) 130 Cal.App.3d 596, 598-600, 181 Cal.Rptr. 795] .

The third method of service is authorized if the landlord's place of residence and the landlord's usual place of business cannot be ascertained or if the server does not find a person of suitable age or discretion at the landlord's residence or usual place of business. In this case, service may be made by (1) affixing a copy of the written notice in a conspicuous place on the property that has been rented or leased to the tenant; and (2) delivering a copy to a person residing on that property, if one can be found [*Highland Plastics, Inc. v. Enders* (1980) 109 Cal.App.3d Supp. 1, 6-7, 167 Cal.Rptr. 353 (if no resident is found on property when server attempts service, requirement of delivery of copy to resident is excused)]; and (3) sending a copy to the landlord at that property through the mail [*Code Civ. Proc. § 1162(3)*; *Highland Plastics, Inc. v. Enders* (1980) 109 Cal.App.3d Supp. 1, 6-7, 167 Cal.Rptr. 353] .

Code Civ. Proc. § 1013, which provides a five-day extension of the notice period for service by mail, does not extend the notice periods that are a prerequisite to filing an unlawful detainer action [*Losornio v. Motta* (1998) 67 Cal.App.4th 110, 114-115, 78 Cal.Rptr.2d 799 (reversing municipal court's determination that extension for service by mail under *Code Civ. Proc. § 1013(a)* applied to notices served by "post and mail" procedure under *Code Civ. Proc. § 1162(3)*)].

[e] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see also Ch. 43, *California Judicial Council Unlawful Detainer Instructions*]:

CACI No. 4303, Sufficiency and Service of Notice of Termination for Failure to Pay Rent

CACI No. 4305, Sufficiency and Service of Notice of Termination for for Violation of Terms of Agreement

CACI No. 4307, Sufficiency and Service of Notice of Termination for of Month-to-Month Tenancy



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CHAPTER 43A Matthew Bender Unlawful Detainer Instructions

PART A. INTRODUCTION; PLAINTIFF'S CAUSES OF ACTION

2. Actions Based on Tenant's Service of 30-Day Notice (Code Civ. Proc. § 1161(5))

5-43A California Forms of Jury Instruction MB 4300A.12-MB 4300A.19

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MB 4300A.12Reserved for Future Use



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CHAPTER 43A Matthew Bender Unlawful Detainer Instructions
PART A. INTRODUCTION; PLAINTIFF'S CAUSES OF ACTION

3. Actions Based on Landlord's Acceptance of Tenant's Offer of Surrender (Code Civ. Proc. § 1161(5))

3-43A California Forms of Jury Instruction MB 4300A.20

MB 4300A.20 Elements--Plaintiff's Burden of Proof

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] PROPOSED INSTR. NO. _____

When a tenant makes a written offer to surrender [his/her/its] interest in the property to the landlord and the landlord accepts that offer in writing, there is an agreement in writing for the surrender of the tenant's interest. The tenancy will terminate and the landlord will be entitled to possession of the property at the time specified in the tenant's offer. Once the landlord has accepted the tenant's written offer of surrender in writing, the tenant may not revoke, change, or cancel the offer or the terms of the agreement for surrender without the landlord's consent.

If the landlord is required to sue the tenant to recover possession of the property after the specified time for surrender has passed, [he/she/it] is also entitled to recover damages for being deprived of possession during the time the tenant wrongfully occupied the property. If the tenant has acted with malice, the landlord may also be awarded statutory damages of up to \$600, in addition to actual damages, including rent found due.

In this case, Plaintiff claims that [he/she/it] is entitled to possession of the property and damages because Defendant has wrongfully continued to occupy the property after the time specified in a written offer of surrender that was made by Defendant and accepted in writing by Plaintiff. Plaintiff also claims that Defendant acted with malice and is requesting statutory damages.

[OPTIONAL (See Use of Instruction)]

It has been established by _____ [the stipulation of the parties or evidence that is not disputed] that _____ [list elements established as matter of law].

To be awarded possession of the property, Plaintiff has the burden of proving each of the following elements:

[CHOOSE FROM THE FOLLOWING (See Use of Instruction)]

1. That Defendant occupied the property as a tenant of Plaintiff's--that is, as a result of a [lease/rental agreement] under which Plaintiff [leased/rented] the property to [him/her/it];
2. That Defendant made a written offer to surrender [his/her/its] interest in the property to Plaintiff;
3. That Plaintiff accepted Defendant's offer of surrender in writing;
4. That Defendant failed to surrender possession of the property to Plaintiff and continued to occupy it after the time for surrender that was specified in Defendant's offer had passed;
5. That Defendant was still occupying the property on _____ [date action was commenced], when this lawsuit began; and
6. That Plaintiff did not give Defendant permission to continue to occupy the property after the time for surrender specified in Defendant's offer had passed.

Plaintiff may be awarded damages only if [he/she/it] is awarded possession of the property.

Authorities: *Code Civ. Proc.* §§ 1161(5), 1174(b); *Markham v. Fralick* (1934) 2 Cal.2d 221, 225-227, 39 P.2d 804 ; *Francis v. West Virginia Oil Co.* (1917) 174 Cal. 168, 169-171, 162 P. 394 ; *Fifth & Broadway Partnership v. Kimny, Inc.* (1980) 102 Cal.App.3d 195, 204-205, 162 Cal.Rptr. 271 ; *Cyrus v. Haveson* (1976) 65 Cal.App.3d 306, 316-317, 135 Cal.Rptr. 246 ; *Briggs v. Electronic Memories & Magnetics Corp.* (1975) 53 Cal.App.3d 900, 905-907, 126 Cal.Rptr. 34 .

[2] Use of Instruction

This instruction should be used to set forth the elements of the plaintiff's claim and the plaintiff's burden of proof in an action brought under *Code Civ. Proc.* § 1161(5). It is based on allegations that the plaintiff accepted in writing the defendant's written offer of surrender.

When a claim under *Code Civ. Proc.* § 1161(5) is predicated on termination by means of a notice complying with the requirements of *Civ. Code* § 1946 rather than the landlord's written acceptance of an offer of surrender, this instruction is not appropriate and the instruction in MB 4300A.10 should be used instead. Frequently, the evidence will support both a claim that the plaintiff accepted the defendant's offer of surrender and a claim that the defendant terminated the tenancy under *Civ. Code* § 1946. In such a case, the jury should be instructed on both theories.

This instruction may not apply, or may require modification, in actions involving hotel or motel rooms, mobilehomes, property subject to local rent control ordinances, or property owned, financed, or subsidized by governmental entities [see [3][d], [e], below].

This instruction should be given immediately after the introductory instruction in Ch. 43, *California Judicial Council Unlawful Detainer Instructions, CACI 4300* ("Introductory Instruction"), and should be followed by a general

instruction defining preponderance of the evidence as the burden of proof [see, e.g., Ch. 2, *California Judicial Council Evidence Instructions*, CACI 200 ("Obligation to Prove--More Likely True Than Not True")].

Because it appears that a co-tenant may surrender property and terminate a tenancy as to himself or herself alone without affecting the tenancy of the other co-tenants, a claim that an offer of surrender was made solely on behalf of an individual co-tenant presents problems not addressed in this instruction which may require modifications in such a situation [see [3][b], *below*].

This instruction assumes that the action is based on the existence of a landlord-tenant relationship between the plaintiff and the defendant. When a subtenant is a defendant, the instruction should be modified accordingly and the jury should be separately instructed on the rights and liabilities of a subtenant [see *Civ. Code* § 822; *Fifth & Broadway Partnership v. Kimny, Inc.* (1980) 102 Cal.App.3d 195, 201, 162 Cal.Rptr. 271 ; *Four Seas Inv. Corp. v. International Hotel Tenants' Assn.* (1978) 81 Cal.App.3d 604, 611-612, 146 Cal.Rptr. 531] . If the plaintiff is a successor in interest of the original landlord, the instruction should be modified accordingly and a separate instruction on the rights of a landlord's successor should be given [see *Civ. Code* §§ 821, 823, 1111].

This instruction also assumes that the action is based on a claim that the defendant is in actual possession of the property. If it is claimed that the defendant is in possession through a subtenant, the instruction should be modified to reflect that fact and the fact that a tenant may be considered to be in possession of property when it is occupied by a subtenant.

This instruction provides for the landlord's recovery of possession of the premises, plus recovery of damages, including statutory damages if the tenant acted with malice [see *Code Civ. Proc.* § 1174(b)].

For related Judicial Council Instructions, see [3][f], *below*.

[3] Comment

[a] Agreement to Surrender

Code Civ. Proc. § 1161(5) states that a tenant is guilty of unlawful detainer "[w]hen he . . . makes a written offer to surrender which is accepted in writing by the landlord, but fails to deliver up possession at the time specified in said written notice, without the permission of his landlord."

Surrender is the consensual transfer or release of a tenant's interest in real property to his or her landlord [*Scott v. Mullins* (1962) 211 Cal.App.2d 51, 55, 27 Cal.Rptr. 269] . It can take place only with the consent, express or implied, of both the landlord and the tenant [*Boral v. Caldwell* (1963) 223 Cal.App.2d 157, 162, 35 Cal.Rptr. 689] .

Surrender can be effected by an express agreement or by an agreement that is implied in law from conduct that is inconsistent with the continuance of a landlord-tenant relationship [*Boral v. Caldwell* (1963) 223 Cal.App.2d 157, 162, 35 Cal.Rptr. 689 ; *Scott v. Mullins* (1962) 211 Cal.App.2d 51, 55, 27 Cal.Rptr. 269] . When there is a surrender, the landlord-tenant relationship and the lease or rental agreement between the parties is terminated and the parties are relieved of any further obligations [*People v. Urfer* (1969) 274 Cal.App.2d 307, 310, 79 Cal.Rptr. 60 ; *Kreling v. Walsh* (1947) 77 Cal.App.2d 821, 832, 176 P.2d 965] . A surrender also operates to terminate any interest that may have been acquired by subtenants claiming under the tenant [*Scott v. Mullins* (1962) 211 Cal.App.2d 51, 55, 27 Cal.Rptr. 269] .

Whether there has been a surrender is generally regarded as a question of fact to be determined by examining all of the relevant facts and circumstances to ascertain the intent of the parties [*People v. Urfer* (1969) 274 Cal.App.2d 307, 310, 79 Cal.Rptr. 60] .

Although there are no cases interpreting its provisions, it is apparent from the language of *Code Civ. Proc. § 1161(5)* that it is intended to authorize the recovery of possession by the landlord only when the landlord's written acceptance of the tenant's written offer of surrender has resulted in an express agreement for the surrender of the tenant's interest. Thus, it appears that a determination of whether an agreement for surrender resulting from the making and acceptance of an offer should be governed by general principles of contract law [see *Kelley v. R. F. Jones Co. (1969) 272 Cal.App.2d 113, 115-119, 77 Cal.Rptr. 170*]. However, the case law is silent on this point and counsel should give careful consideration to the applicability of the legal rules governing the formation or termination of contracts [see Ch. 3, *California Judicial Council Contracts Instructions*, and Ch. 3A, *Matthew Bender Formation of Contract Instructions*, for instructions on potentially relevant rules of contract law relating to offer and acceptance and the formation and termination of contracts].

[b] Effect on Co-Tenants

A co-tenant may surrender his or her interest in property without affecting the tenancy of the other co-tenants [*Schmitt v. Felix (1958) 157 Cal.App.2d 642, 648-649, 321 P.2d 473*]. This rule has two implications when there is a surrender of the individual interest of a co-tenant. First, a co-tenant who surrenders his or her individual interest and vacates the property will not be guilty of unlawful detainer because other co-tenants have remained in possession after the date of surrender [*Schmitt v. Felix (1958) 157 Cal.App.2d 642, 648-649, 321 P.2d 473*]. Second, the acceptance of an offer of surrender made on behalf of one individual co-tenant cannot be the basis for an unlawful detainer action against the other co-tenants who remain in possession after the expiration of the date of surrender. When there is a claim that a co-tenant has acted on behalf of the other co-tenants in making an offer of surrender, the rule that a co-tenant may surrender his or her individual interest potentially gives rise to disputed factual issues concerning the notice's interpretation (*i.e.*, whether it was the offer's intent to surrender the collective interest of all of the co-tenants or only the interest of the co-tenant making the offer) and the authority of the co-tenant making the offer to bind the other co-tenants.

[c] Prerequisites: Landlord-Tenant Relationship; Tenant in Possession

In an action under *Code Civ. Proc. § 1161(5)*, the plaintiff must establish the essential elements common to all actions authorized by *Code Civ. Proc. § 1161*. The plaintiff must show both of the following:

- The defendant's claim to possession is based on a landlord-tenant relationship and the defendant is or claims under a tenant of the plaintiff or a predecessor in interest of the plaintiff [*Francis v. West Virginia Oil Co. (1917) 174 Cal. 168, 169-171, 162 P. 394* ; *Greene v. Municipal Court (1975) 51 Cal.App.3d 446, 450-451, 124 Cal.Rptr. 139*] ; and
- The defendant remained in possession following the tenancy's termination and the defendant was still in possession when the action was commenced [*Markham v. Fralick (1934) 2 Cal.2d 221, 225-227, 39 P.2d 804* ; *Briggs v. Electronic Memories & Magnetics Corp. (1975) 53 Cal.App.3d 900, 905-907, 126 Cal.Rptr. 34*] .

However, the plaintiff is not required to establish that the tenancy was terminated before the action's commencement. The fact that an action may have been prematurely commenced is not a defense but merely a ground for abatement of the action; once the tenancy has terminated and the cause of action has accrued, any premature commencement of the action will be disregarded and cannot have any bearing on the determination of the action [see *Moore v. Fellner (1958) 50 Cal.2d 330, 343, 325 P.2d 857* ; *Miller v. Mountain View Sav. & Loan Asso. (1965) 238 Cal.App.2d 644, 654-655, 48 Cal.Rptr. 278*] .

[d] Application to Transients and Mobilehome Tenancies

Code Civ. Proc. § 1161(5) is not applicable to transient occupants of a hotel or motel and other hotel or motel residents whose occupancy meets the criteria set forth in *Civ. Code § 1940(b)*. It is probably inapplicable to mobilehome tenancies, the termination of which appears to be governed exclusively by the special provisions of *Civ. Code §§ 798.55-798.61* [see *Palmer v. Agee* (1978) 87 Cal.App.3d 377, 381-386, 150 Cal.Rptr. 841] .

[e] Effect of Rent Control Ordinances and Government Programs

Notwithstanding the provisions of *Code Civ. Proc. § 1161*, municipal rent control ordinances may limit or restrict the use of substantive grounds for termination of tenancies as long as the limitations or restrictions are reasonably related to the enforcement of rent restrictions [*Fisher v. City of Berkeley* (1984) 37 Cal.3d 644, 680-713, 209 Cal.Rptr. 682, 693 P.2d 261] . If the property is government-owned or is financed or subsidized under a government program, the landlord's right to terminate the tenancy may also be limited or restricted [see *People ex rel. Dept. of Transportation v. Lucero* (1980) 114 Cal.App.3d 166, 171-176, 170 Cal.Rptr. 554] .

[f] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see also Ch. 3, *California Judicial Council Contracts Instructions*]:

CACI No. 200, Obligation to Prove--More Likely True Than Not True

CACI No. 307, Contract Formation--Offer

CACI No. 308, Contract Formation--Revocation of Offer

CACI No. 309, Contract Formation--Acceptance

CACI No. 310, Contract Formation--Acceptance by Silence

CACI No. 311, Contract Formation--Rejection of Offer

CACI No. 4300, Introductory Instruction

CACI No. 4325, Affirmative Defense--Failure to Comply With Rent Control Ordinance

CACI No. 4341, Statutory Damages on Showing of Malice (*Code Civ. Proc.*, § 1174(b))



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CHAPTER 43A Matthew Bender Unlawful Detainer Instructions

PART A. INTRODUCTION; PLAINTIFF'S CAUSES OF ACTION

3. Actions Based on Landlord's Acceptance of Tenant's Offer of Surrender (Code Civ. Proc. § 1161(5))

5-43A California Forms of Jury Instruction MB 4300A.21-MB 4300A.29

Reserved for Future Use

MB 4300A.21Reserved for Future Use



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CHAPTER 43A Matthew Bender Unlawful Detainer Instructions
PART B. DAMAGES

3-43A California Forms of Jury Instruction MB 4300A.30

MB 4300A.30 Reduced Award Due to Breach of Implied Warranty of Habitability

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

If you find that Plaintiff breached [his/her/its] implied agreement to keep the property in habitable condition, you will determine the rent that Defendant owes to Plaintiff for [his/her/its] use and occupancy of the property during the period from _____ [*beginning date of period for which landlord claims tenant is in default*] to the date on which you render your verdict by subtracting an amount that represents reasonable compensation for the loss that Defendant has suffered during this period as a result of Plaintiff's breach of the implied agreement from the rent specified in the [lease/rental agreement].

There are two methods that may be used to determine how much Defendant's rent should be reduced because of Plaintiff's breach of [his/her/its] implied agreement to maintain the property in a habitable condition:

1. The first method assumes that the best way to determine the amount of Defendant's loss is to find the difference between what the property would have been worth if Plaintiff had kept it in habitable condition and what it was actually worth in the substandard condition it was in. Under this method, the amount of the reduction is determined by finding the reasonable rental value the property would have had if Plaintiff had performed [his/her/its] agreement to keep it in habitable condition and finding and subtracting the reasonable rental value it actually had in the condition that it was in.
2. The second method assumes that the specified rent represents the value of the property's full use and enjoyment and that the reduction in rent should be the same as the reduction in use and enjoyment that was caused by Plaintiff's breach. Under this method, the amount of the reduction is determined by finding the percentage of the full use and enjoyment that Defendant lost because of the breach and reducing the specified

rent by the same percentage.

In determining the reduction that should be made in the specified rent to compensate Defendant for the loss caused by Plaintiff's breach, you should use the method that you find produces the more accurate and certain result.

You will determine the rent that is owed to Plaintiff for the period from _____ [beginning date of period for which landlord claims tenant is in default] to the date on which you render your verdict by subtracting from the amount of rent specified in the [lease/rental agreement] (1) the reduction that you find should be made as a result of Plaintiff's failure to perform [his/her/its] agreement to keep the property in habitable condition, and (2) any amounts that Defendant paid Plaintiff for rent for that period.

Authorities: *Code Civ. Proc. § 1174.2*; *Green v. Superior Court* (1974) 10 Cal.3d 616, 638-639, 111 Cal.Rptr. 704, 517 P.2d 1168 ; *Smith v. David* (1981) 120 Cal.App.3d 101, 111-112, 176 Cal.Rptr. 112 ; *A. A. Baxter Corp. v. Colt Industries, Inc.* (1970) 10 Cal.App.3d 144, 160, 88 Cal.Rptr. 842 .

[2] Use of Instruction

This instruction should be used to determine the reduced amount of rent owed by a residential tenant when there has been a breach of the implied warranty of habitability. The instruction is based on the rules established by the California Supreme Court in *Green v. Superior Court* [*Green v. Superior Court* (1974) 10 Cal.3d 616, 639, 111 Cal.Rptr. 704, 517 P.2d 1168] . It assumes that the Legislature did not intend to change the substantive law governing the tenant's liability for rent when it enacted *Code Civ. Proc. § 1174.2* in 1986 [see [3][a], below]. The warranty of habitability is not applicable to unlawful detainer actions involving commercial tenancies [*Fish Construction Co. v. Moselle Coach Works, Inc.* (1983) 148 Cal.App.3d 654, 658, 196 Cal.Rptr. 174] .

If appropriate, this instruction should be used when the defendant has asserted a defense based on the plaintiff's breach of the implied warranty of habitability and should be given after the general instruction on the nature and elements of the defense [see Ch. 43, *California Judicial Council Unlawful Detainer Instructions*, CACI No. 4320 ("Affirmative Defense--Implied Warranty of Habitability")].

Because one of the methods of determining the reduced rent requires the jury to find the difference between the property's reasonable rental value "as warranted" and "as is," the jury should also be instructed on the definition and determination of the property's reasonable rental value. The instruction on reasonable rental value in Ch. 43, *California Judicial Council Unlawful Detainer Instructions*, CACI No. 4340 ("Damages for Reasonable Rental Value"), may be modified and used for this purpose.

The optional bracketed language at the end of the last paragraph should be included if the defendant claims that he or she made payments to the plaintiff for rent for the period for which the reasonable rental value will be determined and awarded.

[3] Comment

[a] Legislative Intent; Measure of Defendant's Obligation, Generally

Code Civ. Proc. § 1174.2 provides that in an unlawful detainer action when the tenant has raised a defense based on an asserted breach of the implied warranty of habitability and the court has found that a substantial breach has occurred, "the court shall . . . determine the reasonable rental value of the premises in its untenable state to the date of trial." Although this provision appears to imply that habitability and the rental value of the premises are no longer jury issues, the legislature clarified its intentions with a 1988 amendment [see Stats. 1988, ch. 1405, § 3], which stated that nothing

in *Code Civ. Proc.* § 1174.2 is intended to deny the tenant the right to a trial by jury [*Code Civ. Proc.* § 1174.2(d)].

If the jury finds that the plaintiff has breached an implied warranty of habitability, the decision in *Green v. Superior Court* [*Green v. Superior Court* (1974) 10 Cal.3d 616, 111 Cal.Rptr. 704, 517 P.2d 1168] requires the jury to proceed to determine the amount the defendant owes to the plaintiff for the use and occupancy of the property during the period at issue. Under *Green*, the measure of the defendant's obligation is not the reasonable value of the use and occupancy of the property but a reduced rent that is determined by offsetting the damages resulting from the plaintiff's breach against the rent provided for in the lease or rental agreement [*Green v. Superior Court* (1974) 10 Cal.3d 616, 638-639, 111 Cal.Rptr. 704, 517 P.2d 1168] . The purpose of the habitability defense is to reduce the amount of daily damages for periods during which rent was not paid [*N. 7th St. Assocs. v. Constante* (2001) 92 Cal.App.4th Supp. 7, 11 n.1, 111 Cal.Rptr.2d 815] .

In cases when there is a substantial breach of the implied warranty of habitability, *Code Civ. Proc.* § 1174.2 requires the determination of "the reasonable rental value of the premises in its untenable state to the date of trial." It is not clear whether the Legislature intended, in enacting § 1174.2, to change the substantive law governing the tenant's liability for rent or merely to codify *Green*. If it is the intent of *Code Civ. Proc.* § 1174.2 to replace the "reduced rent" approach established by *Green* with the "reasonable rental value" used to determine damages arising from the tenant's continued occupation of the property in other types of cases [see Ch. 43, *California Judicial Council Unlawful Detainer Instructions*, CACI No. 4340 ("Damages for Reasonable Rental Value")], this instruction is improper, and a modified version of the instruction in Ch. 43, *California Judicial Council Unlawful Detainer Instructions*, CACI No. 4340 ("Damages for Reasonable Rental Value"), should be used.

[b] Methods for Determining Damages

Green suggests two methods for determining the reduction that should be made in the contract rent to reflect the damages occasioned by the breach. The first method is to determine, for the period at issue, the difference between the property's reasonable rental value "as warranted" (i.e., in the condition it would have been in had the plaintiff complied with the implied warranty) and "as is" (i.e., in the substandard or defective condition it was actually in) [*Green v. Superior Court* (1974) 10 Cal.3d 616, 639, 111 Cal.Rptr. 704, 517 P.2d 1168] .

The second method is to reduce the rent specified in the lease or rental agreement by a percentage that corresponds to the percentage of the full use and enjoyment of the property that the defendant has been deprived of as a result of the plaintiff's breach. This method, although subsequently adopted, has been criticized as inherently uncertain and speculative [*Cazares v. Ortiz* (1980) 109 Cal.App.3d Supp. 23, 29, 168 Cal.Rptr. 108] .

The *Green* decision does not indicate a preference for one method. It recognizes the difficulty of precisely determining the tenant's damages and concludes that the courts must do the best they can to approximate the recovery that is fair and reasonable under all of the circumstances [*Green v. Superior Court* (1974) 10 Cal.3d 616, 638-639, 111 Cal.Rptr. 704, 517 P.2d 1168] . Accordingly, this instruction assumes that the selection of the most appropriate method of determining damages is to be made by the jury and is to be governed by the well-established rule that when there is more than one permissible method of determining damages, the one that will yield the more accurate and certain result should be used [*A. A. Baxter Corp. v. Colt Industries, Inc.* (1970) 10 Cal.App.3d 144, 160, 88 Cal.Rptr. 842] .

[c] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see also Ch. 43, *California Judicial Council Unlawful Detainer Instructions*]:

CACI No. 4320, Affirmative Defense--Implied Warranty of Habitability

CACI No. 4340, Damages for Reasonable Rental Value



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CHAPTER 44 California Judicial Council Trade Secrets Instructions *

5-44 California Forms of Jury Instruction 44.syn

§ 44.syn Synopsis to Chapter 44: California Judicial Council Trade Secrets Instructions *

CACI 4400 Misappropriation of Trade Secrets--Introduction

CACI 4401 Misappropriation of Trade Secrets--Essential Factual Elements

CACI 4402 "Trade Secret" Defined

CACI 4403 Secrecy Requirement

CACI 4404 Reasonable Efforts to Protect Secrecy

CACI 4405 Misappropriation by Acquisition

CACI 4406 Misappropriation by Disclosure

CACI 4407 Misappropriation by Use

CACI 4408 Improper Means of Acquiring Trade Secret

CACI 4409 Remedies for Misappropriation of Trade Secret

CACI 4410 Unjust Enrichment

CACI 4411 Punitive Damages for Willful and Malicious Misappropriation

CACI 4412 "Independent Economic Value" Explained

CACI 4413-CACI 4419 Reserved for Future Use

CACI 4420 Affirmative Defense--Information Was Readily Ascertainable by Proper Means

CACI 4421 Affirmative Defense--Statute of Limitations--Three-Year Limit (Civ. Code, § 3426.6)

CACI 4422-CACI 4499 Reserved for Future Use



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CHAPTER 44 California Judicial Council Trade Secrets Instructions *

5-44 California Forms of Jury Instruction Scope

Scope

SCOPE

This chapter contains the California Judicial Council's "Trade Secrets Series" of jury instructions [*CACI No. 4400 et seq.*]. The Judicial Council of California Civil Jury Instructions (CACI) included in this publication are the product of the Judicial Council of California Task Force on Jury Instructions, which are updated by the Judicial Council of California Advisory Committee on Civil Jury Instructions.

This chapter includes instructions on the following topics:

- Introductory instruction for misappropriation of trade secrets [*CACI No. 4400*].
- Elements to establish misappropriation of trade secret [*CACI No. 4401*].
- Definition of "trade secret" [*CACI No. 4402*].
- Secrecy requirement for trade secret [*CACI No. 4403*].
- Efforts to protect secrecy of trade secret [*CACI No. 4404*].
- Misappropriation of trade secret by acquisition, disclosure, and use [*CACI Nos. 4405-4407*].
- Improper means of acquiring trade secret [*CACI No. 4408*].
- Remedies for misappropriation of trade secret [*CACI No. 4409*].
- Unjust enrichment from misappropriation of trade secret [*CACI No. 4410*].
- Punitive damages for misappropriation of trade secret [*CACI No. 4411*].

- Definition of "independent economic value" [*CACI No. 4412*].
- Defense to misappropriation because information was properly ascertainable [*CACI No. 4420*].
- Statute of limitations defense to claim for misappropriation of trade secret [*CACI No. 4421*].



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CHAPTER 44 California Judicial Council Trade Secrets Instructions *

4-44 California Forms of Jury Instruction CACI 4400

CACI 4400 Misappropriation of Trade Secrets--Introduction

[*Name of plaintiff*] **claims that [he/she/it] is the [owner/licensee] of [insert general description of alleged trade secret[s]].**

[*Name of plaintiff*] **claims that [this/these] [select short term to describe, e.g., information] [is/are] [a] trade secret[s] and that [name of defendant] misappropriated [it/them]. "Misappropriation" means the improper [acquisition/use/ [or] disclosure] of the trade secret[s].**

[*Name of plaintiff*] **also claims that [name of defendant]'s misappropriation caused [[him/her/it] harm/ [or] [name of defendant] to be unjustly enriched].**

[*Name of defendant*] **denies [insert denial of any of the above claims].**

[[*Name of defendant*] **also claims [insert affirmative defenses].]**

New December 2007

Directions for Use

This instruction is designed to introduce the jury to the issues involved in a case involving the misappropriation of trade secrets under the California Uniform Trade Secrets Act. (See *Civ. Code*, § 3426.1 *et seq.*) It should be read before the instructions on the substantive law.

In the first sentence, provide only a general description of the alleged trade secrets. Then in the second sentence, select a short term to identify the items, such as "information," "customer lists," or "computer code." The items that are alleged to be trade secrets will be described with more specificity in *CACI No.*

4401, Misappropriation of Trade Secrets--Essential Factual Elements.

Select the appropriate term, "owner" or "licensee," to indicate the plaintiff's interest in the alleged trade secrets. No reported California state court decision has addressed whether a licensee has a sufficient interest to assert a claim of trade secret misappropriation. These instructions take no position on the standing issue. The court should make a determination whether the plaintiff has standing if that issue is disputed.

Civil Code section 3426.1(b)(1) defines "misappropriation" as improper "[a]cquisition" of a trade secret, and subsection (b)(2) defines it as improper "[d]isclosure or use" of a trade secret. In some cases, the mere acquisition of a trade secret, as distinguished from a related disclosure or use, will not result in damages and will only be relevant to injunctive relief. Because generally the jury should be instructed only on matters relevant to damage claims, do not select "acquiring" in the second paragraph unless there is evidence that the acquisition resulted in damages, other than damages from related disclosure or use.

To avoid confusion, instruct the jury only on the particular theory of misappropriation applicable under the facts of the case. For example, the jury should not be instructed on misappropriation through "use" if the plaintiff does not assert that the defendant improperly used the trade secrets. Nor should the jury be instructed on a particular type of "use" if that type of "use" is not asserted and supported by the evidence.

In the third paragraph, select the nature of the recovery sought, either damages for harm to the plaintiff or for the defendant's unjust enrichment, or both.

Include the last paragraph if the defendant asserts any affirmative defenses.

Sources and Authority

- *Civil Code section 3426.1* provides:

As used in this title, unless the context requires otherwise:

(a) "Improper means" includes theft, bribery, misrepresentation, breach or inducement of a breach of a duty to maintain secrecy, or espionage through electronic or other means. Reverse engineering or independent derivation alone shall not be considered improper means.

(b) "Misappropriation" means:

(1) Acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means; or

(2) Disclosure or use of a trade secret of another without express or implied consent by a person who:

(A) Used improper means to acquire knowledge of the trade secret; or

(B) At the time of disclosure or use, knew or had reason to know that his or her knowledge of the trade secret was:

(i) Derived from or through a person who had utilized improper means to acquire it;

(ii) Acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use; or

(iii) Derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use; or

(C) Before a material change of his or her position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake.

(c) "Person" means a natural person, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government, governmental subdivision or agency, or any other legal or commercial entity.

(d) "Trade secret" means information, including a formula, pattern, compilation, program, device, method, technique, or process, that:

(1) Derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use; and

(2) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

■ "[W]e agree with the federal cases applying California law, which hold that section 3426.7, subdivision (b), preempts common law claims that are 'based on the same nucleus of facts as the misappropriation of trade secrets claim for relief.' Depending on the particular facts pleaded, the statute can operate to preempt the specific common claims asserted here: breach of confidence, interference with contract, and unfair competition." (*K.C. Multimedia, Inc. v. Bank of America Technology & Operations, Inc.* (2009) 171 Cal.App.4th 939, 958-959 [90 Cal.Rptr.3d 247] , internal citation omitted.)

Secondary Sources

13 Witkin, Summary of California Law (10th ed. 2005) Equity, § 81

1 *Milgrim on Trade Secrets, Ch. 1, Definitional Aspects, § 1.01* (Matthew Bender)

3 Levy et al., *California Torts, Ch. 40, Fraud and Deceit and Other Business Torts, § 40.50 et seq.* (Matthew Bender)

49 *California Forms of Pleading and Practice, Ch. 565, Unfair Competition, § 565.103* (Matthew Bender)

1 Zamore, *Business Torts, Ch. 17, Trade Secrets, § 17.05 et seq.* (Matthew Bender)

Edelson & Kay, eds., *Trade Secret Litigation and Protection in California* (State Bar of California 2005) Chs. 1, 2, 6, 12

Publisher's Notes

There is no BAJI instruction on this subject.

LexisNexis Matthew Bender Expert Practice Tip--Alternative Order of Instructions: On certain occasions, such as when the nature of the trade secret is complex or difficult to understand, it may make sense for counsel to consider giving this introductory instruction after the instruction defining trade secrets (*CACI No. 4402*). This may better facilitate the jury's understanding of *CACI No. 4400* when it is subsequently provided. *By Kelly O. Scott and Karina B. Sterman*

LexisNexis Matthew Bender Expert Practice Tip--Refrain From General Denials: As a defendant, do not generally deny each essential element of the claim unless you have disputed it. Unsupported denials may have a negative impact on the defendant's credibility in the eyes of jurors. *By Kelly O. Scott and Karina B. Sterman*

LexisNexis Matthew Bender Expert Practice Tip--Careful Use of CACI 4400: Counsel should take care to tailor this instruction to the specific allegations of the case. This will not only avoid confusion, but serve to focus jurors and facilitate both opening and closing arguments. *By Kelly O. Scott and Karina B. Sterman*

* The practice tips in this chapter were written by Kelly O. Scott and Karina B. Sterman.

Kelly O. Scott has been in private practice since 1987, focusing on the representation of employers through preventive counseling, strategic planning, and administrative and litigation representation. Mr. Scott is a partner with Ervin, Cohen & Jessup LLP and the head of its Employment Law Department. He is a lecturer for various prestigious organizations, including Professionals in Human Resources Association and the California Employer Advisory Counsel, and also provides private trainings and employment investigations. Mr. Scott is the editor of his firm's monthly "Employment Law Reporter" and is a frequent contributor to various business and employment publications. He is on the Board of Directors for the Beverly Hills Chamber of Commerce and has been named a "Super Lawyer" by *Los Angeles* magazine.

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California Forms of Jury Instruction

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CHAPTER 44 California Judicial Council Trade Secrets Instructions *

5-44 California Forms of Jury Instruction CACI 4401

CACI 4401 Misappropriation of Trade Secrets--Essential Factual Elements

[*Name of plaintiff*] **claims that** [*name of defendant*] **has misappropriated a trade secret. To succeed on this claim, [*name of plaintiff*] must prove all of the following:**

1. **That** [*name of plaintiff*] **[owned/was a licensee of] [the following:]**[*describe each item claimed to be a trade secret that is subject to the misappropriation claim*];
2. **That [this/these] [select short term to describe, e.g., information] [was/were] [a] trade secret[s] at the time of the misappropriation;**
3. **That** [*name of defendant*] **improperly [acquired/used/ [or] disclosed] the trade secret[s];**
4. **That** [[*name of plaintiff*] **was harmed/ [or] [*name of defendant*] was unjustly enriched]; and**
5. **That** [*name of defendant*]'s **[acquisition/use/ [or] disclosure] was a substantial factor in causing** [[*name of plaintiff*]'s **harm/ [or] [*name of defendant*] to be unjustly enriched].**

New December 2007

Directions for Use

In element 1, specifically describe all items that are alleged to be the trade secrets that were misappropriated. If more than one item is alleged, include "the following" and present the items as a list. Then in element 2, select a short term to identify the items, such as "information," "customer lists," or "computer code."

In element 1, select the appropriate term, "owned" or "was a licensee of," to indicate the plaintiff's interest in the alleged trade secrets. No reported California state court decision has addressed whether a licensee has a sufficient interest to assert a claim of trade secret misappropriation. These instructions take no position on the standing issue. The court should make a determination whether the plaintiff has standing if that issue is disputed.

Read also *CACI No. 4402, "Trade Secret" Defined*, to give the jury guidance on element 2.

Civil Code section 3426.1(b)(1) defines "misappropriation" as improper "[a]cquisition" of a trade secret, and subsection (b)(2) defines it as improper "[d]isclosure or use" of a trade secret. In some cases, the mere acquisition of a trade secret, as distinguished from a related disclosure or use, will not result in damages and will only be relevant to injunctive relief. Because generally the jury should be instructed only on matters relevant to damage claims, do not select "acquired" in element 3 or "acquisition" in element 5 unless there is evidence that the acquisition resulted in damages, other than damages from related disclosure or use.

To avoid confusion, instruct the jury only on the particular theory of misappropriation applicable under the facts of the case. For example, the jury should not be instructed on misappropriation through "use" if the plaintiff does not assert that the defendant improperly used the trade secrets. Nor should the jury be instructed on a particular type of "use" if that type of "use" is not asserted and supported by the evidence.

Give also *CACI No. 4409, Remedies for Misappropriation of Trade Secret*.

Sources and Authority

- *Civil Code section 3426.1* provides:

As used in this title, unless the context requires otherwise:

(a) "Improper means" includes theft, bribery, misrepresentation, breach or inducement of a breach of a duty to maintain secrecy, or espionage through electronic or other means. Reverse engineering or independent derivation alone shall not be considered improper means.

(b) "Misappropriation" means:

(1) Acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means; or

(2) Disclosure or use of a trade secret of another without express or implied consent by a person who:

(A) Used improper means to acquire knowledge of the trade secret; or

(B) At the time of disclosure or use, knew or had reason to know that his or her knowledge of the trade secret was:

(i) Derived from or through a person who had utilized improper means to acquire it;

(ii) Acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use; or

(iii) Derived from or through a person who owed a duty to the person seeking relief to

maintain its secrecy or limit its use; or

(C) Before a material change of his or her position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake.

(c) "Person" means a natural person, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government, governmental subdivision or agency, or any other legal or commercial entity.

(d) "Trade secret" means information, including a formula, pattern, compilation, program, device, method, technique, or process, that:

(1) Derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use; and

(2) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

■ "A trade secret is misappropriated if a person (1) acquires a trade secret knowing or having reason to know that the trade secret has been acquired by 'improper means,' (2) discloses or uses a trade secret the person has acquired by 'improper means' or in violation of a nondisclosure obligation, (3) discloses or uses a trade secret the person knew or should have known was derived from another who had acquired it by improper means or who had a nondisclosure obligation or (4) discloses or uses a trade secret after learning that it is a trade secret but before a material change of position." (*Ajaxo Inc. v. E*Trade Group Inc.* (2005) 135 Cal.App.4th 21, 66] .)

■ "We find the trade secret situation more analogous to employment discrimination cases. In those cases, as we have seen, information of the employer's intent is in the hands of the employer, but discovery affords the employee the means to present sufficient evidence to raise an inference of discriminatory intent. The burden of proof remains with the plaintiff, but the defendant must then bear the burden of producing evidence once a prima facie case for the plaintiff is made. [P] We conclude that the trial court correctly refused the proposed instruction that would have shifted the burden of proof." (*Sargent Fletcher, Inc. v. Able Corp.* (2003) 110 Cal.App.4th 1658, 1674 [3 Cal.Rptr.3d 279] , internal citation omitted.)

Secondary Sources

1 *Milgrim on Trade Secrets, Ch. 1, Definitional Aspects, § 1.01* (Matthew Bender)

Zamore, *Business Torts, Ch. 17, Trade Secrets, § 17.05 et seq.* (Matthew Bender)

3 Levy et al., *California Torts, Ch. 40, Fraud and Deceit and Other Business Torts, § 40.51* (Matthew Bender)

49 *California Forms of Pleading and Practice, Ch. 565, Unfair Competition, § 565.103[4]* (Matthew Bender)

Edelson & Kay, eds., *Trade Secret Litigation and Protection in California* (State Bar of California 2005) Chs. 1, 2, 6, 10, 11, 12

Publisher's Notes

There is no BAJI instruction on this subject.

LexisNexis Matthew Bender Expert Practice Tip--Careful Use of CACI 4401: Counsel should take

care to tailor this instruction to the specific allegations of the case. This will not only avoid confusion, but serve to focus jurors and facilitate both opening and closing arguments. *By Kelly O. Scott and Karina B. Sterman*

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California Forms of Jury Instruction

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CHAPTER 44 California Judicial Council Trade Secrets Instructions *

5-44 California Forms of Jury Instruction CACI 4402

CACI 4402 "Trade Secret" Defined

To prove that the [*select short term to describe, e.g., information*] [was/were] [a] trade secret[s], [*name of plaintiff*] must prove all of the following:

- 1. That the [*e.g., information*] [was/were] secret;**
- 2. That the [*e.g., information*] had actual or potential independent economic value because [it was/they were] secret; and**
- 3. That [*name of plaintiff*] made reasonable efforts to keep the [*e.g., information*] secret.**

New December 2007; Revised April 2008

Directions for Use

Give also CACI No. 4403, *Secrecy Requirement*, if more explanation of element 1 is needed. Give CACI No. 4412, *"Independent Economic Value" Explained*, if more explanation of element 2 is needed. Give CACI No. 4404, *Reasonable Efforts to Protect Secrecy*, if more explanation of element 3 is needed.

Sources and Authority

- *Civil Code section 3426.1(d)* provides:

"Trade secret" means information, including a formula, pattern, compilation, program, device, method, technique, or process, that:

(1) Derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use; and

(2) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

■ " 'Trade secrets are a peculiar kind of property. Their only value consists in their being kept private.' Thus, 'the right to exclude others is central to the very definition of the property interest. Once the data that constitute a trade secret are disclosed to others, or others are allowed to use those data, the holder of the trade secret has lost his property interest in the data.' " (*DVD Copy Control Ass'n v. Bunner* (2003) 31 Cal.4th 864, 881 [4 Cal.Rptr.3d 69, 75 P.3d 1] , internal citations omitted.)

■ "[T]he test for a trade secret is whether the matter sought to be protected is information (1) that is valuable because it is unknown to others and (2) that the owner has attempted to keep secret. ... [I]n order to qualify as a trade secret, the information 'must be secret, and must not be of public knowledge or of a general knowledge in the trade or business.' " (*DVD Copy Control Ass'n v. Bunner* (2004) 116 Cal.App.4th 241, 251 [10 Cal.Rptr.3d 185] , internal citations omitted.)

■ "[A]ny information (such as price concessions, trade discounts and rebate incentives) disclosed to [cross-complainant's] customers cannot be considered trade secret or confidential." (*Whyte v. Schlage Lock Co.* (2002) 101 Cal.App.4th 1443, 1455 [125 Cal.Rptr.2d 277] .)

■ " '[A] trade secret ... has an intrinsic value which is based upon, or at least preserved by, being safeguarded from disclosure.' Public disclosure, that is the absence of secrecy, is fatal to the existence of a trade secret. 'If an individual discloses his trade secret to others who are under no obligation to protect the confidentiality of the information, or otherwise publicly discloses the secret, his property right is extinguished.' A person or entity claiming a trade secret is also required to make 'efforts that are reasonable under the circumstances to maintain its secrecy.' " (*In re Providian Credit Card Cases* (2002) 96 Cal.App.4th 292, 304 [116 Cal.Rptr.2d 833] , internal citations omitted.)

■ "The requirement that a customer list must have economic value to qualify as a trade secret has been interpreted to mean that the secrecy of this information provides a business with a 'substantial business advantage.' In this respect, a customer list can be found to have economic value because its disclosure would allow a competitor to direct its sales efforts to those customers who have already shown a willingness to use a unique type of service or product as opposed to a list of people who only might be interested." (*Morlife, Inc. v. Perry* (1997) 56 Cal.App.4th 1514, 1522 [66 Cal.Rptr.2d 731] , internal citations omitted.)

Secondary Sources

13 Witkin, Summary of California Law (10th ed. 2005) Equity, § 87(4)

Trade Secrets Practice in California (Cont.Ed.Bar 2d ed.) §§ 4.8-4.10

1 *Milgrim on Trade Secrets*, Ch. 1, *Definitional Aspects*, § 1.01 (Matthew Bender)

3 Levy et al., *California Torts*, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.52 (Matthew Bender)

49 *California Forms of Pleading and Practice*, Ch. 565, *Unfair Competition*, § 565.103 (Matthew Bender)

Edelson & Kay, eds., *Trade Secret Litigation and Protection in California* (State Bar of California 2005) Ch. 1

Publisher's Notes

There is no BAJI instruction on this subject.

LexisNexis Matthew Bender Expert Practice Tip--Alternative Order of Instructions: When this instruction is used to introduce the jury to the concept of a trade secret, it may be helpful to modify it by including an introductory sentence such as the first sentence of *CACI No. 4401. By Kelly O. Scott and Karina B. Sterman*

LexisNexis Matthew Bender Expert Practice Tip--Trade Secret Not in Dispute: This instruction should be used only if there is a dispute that the information at issue is indeed a trade secret. If it is undisputed, do not waste the jury's time with *CACI No. 4402. By Kelly O. Scott and Karina B. Sterman*

* The practice tips in this chapter were written by Kelly O. Scott and Karina B. Sterman.

Kelly O. Scott has been in private practice since 1987, focusing on the representation of employers through preventive counseling, strategic planning, and administrative and litigation representation. Mr. Scott is a partner with Ervin, Cohen & Jessup LLP and the head of its Employment Law Department. He is a lecturer for various prestigious organizations, including Professionals in Human Resources Association and the California Employer Advisory Counsel, and also provides private trainings and employment investigations. Mr. Scott is the editor of his firm's monthly "Employment Law Reporter" and is a frequent contributor to various business and employment publications. He is on the Board of Directors for the Beverly Hills Chamber of Commerce and has been named a "Super Lawyer" by *Los Angeles* magazine.

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CHAPTER 44 California Judicial Council Trade Secrets Instructions *

5-44 California Forms of Jury Instruction CACI 4403

CACI 4403 Secrecy Requirement

The secrecy required to prove that something is a trade secret does not have to be absolute in the sense that no one else in the world possesses the information. It may be disclosed to employees involved in [name of plaintiff]'s use of the trade secret as long as they are instructed to keep the information secret. It may also be disclosed to nonemployees if they are obligated to keep the information secret. However, it must not have been generally known to the public or to people who could obtain value from knowing it.

New December 2007

Directions for Use

Read this instruction with *CACI No. 4402, "Trade Secret" Defined*, to give the jury additional guidance on the secrecy requirement of element 1 of that instruction.

Sources and Authority

- " 'Trade secrets are a peculiar kind of property. Their only value consists in their being kept private.' Thus, 'the right to exclude others is central to the very definition of the property interest. Once the data that constitute a trade secret are disclosed to others, or others are allowed to use those data, the holder of the trade secret has lost his property interest in the data.' " (*DVD Copy Control Ass'n v. Bunner* (2003) 31 Cal.4th 864, 881 [4 Cal.Rptr.3d 69, 75 P.3d 1] , internal citations omitted.)
- "[T]he test for a trade secret is whether the matter sought to be protected is information (1) that is valuable because it is unknown to others and (2) that the owner has attempted to keep secret. ... [I]n order to qualify as a trade secret, the information 'must be secret, and must not be of public knowledge or of a

general knowledge in the trade or business.' " (*DVD Copy Control Ass'n v. Bunner* (2004) 116 Cal.App.4th 241, 251 [10 Cal.Rptr.3d 185] , internal citations omitted.)

■ "The secrecy requirement is generally treated as a relative concept and requires a fact-intensive analysis. Widespread, anonymous publication of the information over the Internet may destroy its status as a trade secret. The concern is whether the information has retained its value to the creator in spite of the publication." (*DVD Copy Control Ass'n, supra*, 116 Cal.App.4th at p. 251 , internal citations omitted.)

■ "[A]ny information (such as price concessions, trade discounts and rebate incentives) disclosed to [cross-complainant's] customers cannot be considered trade secret or confidential." (*Whyte v. Schlage Lock Co.* (2002) 101 Cal.App.4th 1443, 1455 [125 Cal.Rptr.2d 277] .)

■ " '[A] trade secret ... has an intrinsic value which is based upon, or at least preserved by, being safeguarded from disclosure.' Public disclosure, that is the absence of secrecy, is fatal to the existence of a trade secret. 'If an individual discloses his trade secret to others who are under no obligation to protect the confidentiality of the information, or otherwise publicly discloses the secret, his property right is extinguished.' A person or entity claiming a trade secret is also required to make 'efforts that are reasonable under the circumstances to maintain its secrecy.' " (*In re Providian Credit Card Cases* (2002) 96 Cal.App.4th 292, 304 [116 Cal.Rptr.2d 833] , internal citations omitted.)

■ " '[R]easonable efforts to maintain secrecy have been held to include advising employees of the existence of a trade secret, limiting access to a trade secret on 'need to know basis,' and controlling plant access.' " (*Courtesy Temporary Service, Inc. v. Camacho* (1990) 222 Cal.App.3d 1278, 1288 [272 Cal.Rptr. 352] .)

Secondary Sources

13 Witkin, Summary of California Law (10th ed. 2005) Equity, § 87(4)

Trade Secrets Practice in California (Cont.Ed.Bar 2d ed.) §§ 4.2-4.10

1 *Milgrim on Trade Secrets, Ch. 1, Definitional Aspects, § 1.03* (Matthew Bender)

3 Levy et al., *California Torts, Ch. 40, Fraud and Deceit and Other Business Torts, § 40.52* (Matthew Bender)

49 *California Forms of Pleading and Practice, Ch. 565, Unfair Competition, § 565.103[4]* (Matthew Bender)

Edelson & Kay, eds., Trade Secret Litigation and Protection in California (State Bar of California 2005) §§ 1.03(3), (4)

Publisher's Notes

There is no BAJI instruction on this subject.

LexisNexis Matthew Bender Expert Practice Tip--Trade Secret Within Particular Trade or Industry: When the trade secret is specific to a particular trade or industry, an appropriate modification to this instruction is to add language in the last sentence that it must also not be generally known within the trade or business. This modification may serve to further clarify the existing language in the instruction that it is not merely the public that must be unaware of the trade secret, but also those conducting competitive businesses that would benefit from its use. This clarification will also aid counsel in explaining the significance of this element in closing argument, especially if the effort and cost of

monitoring and maintaining the secrecy are significant issues as outlined in *CACI No. 4404*. (*DVD Copy Control Ass'n v. Bunner (2004) 116 Cal.App.4th 241, 251 [10 Cal.Rptr.3d 185]* .) By *Kelly O. Scott and Karina B. Sterman*

LexisNexis Matthew Bender Expert Practice Tip--Secrecy Not in Dispute: To avoid unnecessary confusion, this instruction, as well as *CACI No. 4404*, should not be used when the parties do not dispute that the information was adequately protected as a secret. By *Kelly O. Scott and Karina B. Sterman*

* The practice tips in this chapter were written by Kelly O. Scott and Karina B. Sterman.

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California Forms of Jury Instruction

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CHAPTER 44 California Judicial Council Trade Secrets Instructions *

5-44 California Forms of Jury Instruction CACI 4404

CACI 4404 Reasonable Efforts to Protect Secrecy

To establish that the [*select short term to describe, e.g., information*] [is/are] [a] trade secret[s], [*name of plaintiff*] must prove that [he/she/it] made reasonable efforts under the circumstances to keep it secret. "Reasonable efforts" are the efforts that would be made by a reasonable [person/business] in the same situation and having the same knowledge and resources as [*name of plaintiff*], exercising due care to protect important information of the same kind. [This requirement applies separately to each item that [*name of plaintiff*] claims to be a trade secret.]

In determining whether or not [*name of plaintiff*] made reasonable efforts to keep the [*e.g., information*] secret, you should consider all of the facts and circumstances. Among the factors you may consider are the following:

[a. Whether documents or computer files containing the [*e.g., information*] were marked with confidentiality warnings;]

[b. Whether [*name of plaintiff*] instructed [his/her/its] employees to treat the [*e.g., information*] as confidential;]

[c. Whether [*name of plaintiff*] restricted access to the [*e.g., information*] to persons who had a business reason to know the information;]

[d. Whether [*name of plaintiff*] kept the [*e.g., information*] in a restricted or secured area;]

[e. Whether [*name of plaintiff*] required employees or others with access to the [*e.g., information*] to sign confidentiality or nondisclosure agreements;]

[f. Whether [*name of plaintiff*] took any action to protect the specific [*e.g., information*], or

whether it relied on general measures taken to protect its business information or assets;]

[g. The extent to which any general measures taken by [name of plaintiff] would prevent the unauthorized disclosure of the [e.g., information];]

[h. Whether there were other reasonable measures available to [name of plaintiff] that [he/she/it] did not take;]

[i. Specify other factor(s).]

The presence or absence of any one or more of these factors is not necessarily determinative.

New December 2007

Directions for Use

Give this instruction with CACI No. 4402, "Trade Secret" Defined, to guide the jury with regard to element 3 of that instruction, that the plaintiff made reasonable efforts to keep the information secret. Read only the factors supported by the evidence in the case. Use factor i to present additional factors.

Sources and Authority

■ "Reasonable efforts to maintain secrecy have been held to include advising employees of the existence of a trade secret, limiting access to a trade secret on 'need to know basis,' and controlling plant access. [P] ... Requiring employees to sign confidentiality agreements is a reasonable step to ensure secrecy." (*Whyte v. Schlage Lock Co. (2002) 101 Cal.App.4th 1443, 1454 [125 Cal.Rptr.2d 277* , internal citations omitted.)

■ "A person or entity claiming a trade secret is also required to make 'efforts that are reasonable under the circumstances to maintain its secrecy.' A leading treatise has collected the cases of successful and unsuccessful claims of secrecy protection; among the factors repeatedly noted are restricting access and physical segregation of the information, confidentiality agreements with employees, and marking documents with warnings or reminders of confidentiality." (*In re Providian Credit Card Cases (2002) 96 Cal.App.4th 292, 304 [116 Cal.Rptr.2d 833]* , referring to Trade Secrets Practice in California (Cont.Ed.Bar 2d ed.) §§ 4.9-4.10.)

■ "In addition to possessing actual or potential economic value, the other part of the definition of a trade secret is that the information must have been protected by 'efforts that are reasonable under the circumstances to maintain its secrecy.' [W]hether a party claiming a trade secret undertook reasonable efforts to maintain secrecy is a question of fact, and it may be implicit in a determination that the information does not qualify as a trade secret, also a question of fact." (*In re Providian Credit Card Cases, supra*, 96 Cal.App.4th at p. 306 , internal citations omitted.)

Secondary Sources

Advising California Employers and Employees (Cont.Ed.Bar) Ch. 11, Reasonable Effort to Maintain Secrecy, § 11.6

Trade Secrets Practice in California (Cont.Ed.Bar 2d ed.) §§ 4.9-4.10

1 *Milgrim on Trade Secrets, Ch. 1, Definitional Aspects, §§ 1.03-1.05* (Matthew Bender)

3 Levy et al., *California Torts, Ch. 40, Fraud and Deceit and Other Business Torts, § 40.52* (Matthew Bender)

Edelson & Kay, eds., *Trade Secret Litigation and Protection in California* (State Bar of California 2005) § 1.03(4)

Publisher's Notes

There is no BAJI instruction on this subject.

LexisNexis Matthew Bender Expert Practice Tip--Additional Protection or Lack Thereof: Factor i should be used by defense counsel to highlight any obvious efforts the plaintiff did not make to protect the trade secret. Conversely, factor i should be used by plaintiff's counsel to enumerate any specific additional steps that were taken to protect the alleged trade secret information. *By Kelly O. Scott and Karina B. Sterman*

LexisNexis Matthew Bender Expert Practice Tip--Discovery Tool: The list in this instruction is also a useful tool for counsel in the discovery stage of litigation to determine the various specific ways in which plaintiff did (and did not) protect its alleged trade secrets. *By Kelly O. Scott and Karina B. Sterman*

LexisNexis Matthew Bender Expert Practice Tip--Secrecy Not in Dispute: To avoid unnecessary confusion, this instruction, as well as *CACI No. 4403*, should not be used when the secrecy of the trade secret is not in dispute. *By Kelly O. Scott and Karina B. Sterman*

* The practice tips in this chapter were written by Kelly O. Scott and Karina B. Sterman.

Kelly O. Scott has been in private practice since 1987, focusing on the representation of employers through preventive counseling, strategic planning, and administrative and litigation representation. Mr. Scott is a partner with Ervin, Cohen & Jessup LLP and the head of its Employment Law Department. He is a lecturer for various prestigious organizations, including Professionals in Human Resources Association and the California Employer Advisory Counsel, and also provides private trainings and employment investigations. Mr. Scott is the editor of his firm's monthly "Employment Law Reporter" and is a frequent contributor to various business and employment publications. He is on the Board of Directors for the Beverly Hills Chamber of Commerce and has been named a "Super Lawyer" by *Los Angeles* magazine.

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California Forms of Jury Instruction

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CHAPTER 44 California Judicial Council Trade Secrets Instructions *

5-44 California Forms of Jury Instruction CACI 4405

CACI 4405 Misappropriation by Acquisition

[Name of defendant] **misappropriated** [name of plaintiff]'s trade secret[s] by acquisition if [name of defendant] **acquired the trade secret[s] and knew or had reason to know that [he/she/it/[name of third party]]** used improper means to acquire [it/them].

New December 2007

Directions for Use

Read this instruction with *CACI No. 4401, Misappropriation of Trade Secrets--Essential Factual Elements*, if the plaintiff claims that the defendant's acquisition of the information alleged to be a trade secret is a misappropriation. Give also *CACI No. 4408, Improper Means of Acquiring Trade Secret*.

Civil Code section 3426.1(b)(1) defines "misappropriation" as improper "[a]cquisition" of a trade secret, and subsection (b)(2) defines it as improper "[d]isclosure or use" of a trade secret. In some cases, the mere acquisition of a trade secret, as distinguished from a related disclosure or use, will not result in damages and will only be relevant to injunctive relief. Because generally the jury should only be instructed on matters relevant to damage claims, this instruction should not be given unless there is evidence that the acquisition resulted in damages, other than damages from related disclosure or use.

Sources and Authority

- *Civil Code section 3426.1(b)(1)* provides:

(b) "Misappropriation" means:

(1) Acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means.

■ "Defendants ... obtained these secrets improperly. Their tortious acts resulted from a breach of confidence by Van Den Berg in copying or stealing plans, designs and other documents related to [plaintiff]'s products which defendants themselves wanted to produce in competition with [plaintiff]. The protection which is extended to trade secrets fundamentally rests upon the theory that they are improperly acquired by a defendant, usually through theft or a breach of confidence." (*Vacco Indus. v. Van Den Berg* (1992) 5 Cal.App.4th 34, 50 [6 Cal.Rptr.2d 602] .)

Secondary Sources

3 Levy et al., *California Torts, Ch. 40, Fraud and Deceit and Other Business Torts*, § 40.53[1][a] (Matthew Bender)

49 *California Forms of Pleading and Practice, Ch. 565, Unfair Competition*, § 565.103[4][c] (Matthew Bender)

Edelson & Kay, eds., *Trade Secret Litigation and Protection in California* (State Bar of California 2005) Chs. 2, 6, 12

Publisher's Notes

There is no BAJI instruction on this subject.

LexisNexis Matthew Bender Expert Practice Tip--Misappropriation Through Improper

Retention: Counsel may wish to modify this instruction for the purposes of clarity when it is alleged that the misappropriation by acquisition occurred through the improper retention of information by someone previously authorized to possess it. *By Kelly O. Scott and Karina B. Sterman*

* The practice tips in this chapter were written by Kelly O. Scott and Karina B. Sterman.

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CHAPTER 44 California Judicial Council Trade Secrets Instructions *

5-44 California Forms of Jury Instruction CACI 4406

CACI 4406 Misappropriation by Disclosure

[*Name of defendant*] **misappropriated** [*name of plaintiff*]'s trade secret[s] by disclosure if [*name of defendant*]

1. Disclosed [it/them] without [*name of plaintiff*]'s consent; and

2. [Did any of the following:]

[*insert one or more of the following:*]

[Acquired knowledge of the trade secret[s] by improper means[./; or]

[At the time of disclosure, knew or had reason to know that [his/her/its] knowledge of [*name of plaintiff*]'s trade secret[s] came from or through [*name of third party*], and that [*name of third party*] had previously acquired the trade secret[s] by improper means[./; or]

[At the time of disclosure, knew or had reason to know that [his/her/its] knowledge of [*name of plaintiff*]'s trade secret[s] was acquired [*insert circumstances giving rise to duty to maintain secrecy*], which created a duty to keep the [*select short term to describe, e.g., information*] secret[./; or]

[At the time of disclosure, knew or had reason to know that [his/her/its] knowledge of [*name of plaintiff*]'s trade secret[s] came from or through [*name of third party*], and that [*name of third party*] had a duty to [*name of plaintiff*] to keep the [*e.g., information*] secret[./; or]

[Before a material change of [his/her/its] position, knew or had reason to know that [it was/they were] [a] trade secret[s] and that knowledge of [it/them] had been acquired by accident or mistake.]

New December 2007

Directions for Use

Read this instruction with *CACI No. 4401, Misappropriation of Trade Secrets--Essential Factual Elements*, if the plaintiff claims that the defendant's disclosure of the information alleged to be a trade secret is a misappropriation.

If consent is at issue, *CACI No. 1302, Consent Explained*, and *CACI No. 1303, Invalid Consent*, may also be given.

In element 2, select the applicable statutory act(s) alleged to constitute misappropriation by disclosure. (See *Civ. Code*, § 3624.1(b)(2).) If only one act is selected, omit the words "did any of the following."

If either of the first two acts constituting misappropriation by disclosure is alleged, give also *CACI No. 4408, Improper Means of Acquiring Trade Secret*.

Each act of misappropriation based on improper disclosure requires that the defendant have "knowledge of the trade secret." (See *Civ. Code*, § 3426.1(b)(2).) No reported California state court decision has interpreted the meaning of "knowledge of the trade secret."

Sources and Authority

- *Civil Code* section 3426.1(b)(2) provides:

(b) "Misappropriation" means:

(2) Disclosure or use of a trade secret of another without express or implied consent by a person who:

(A) Used improper means to acquire knowledge of the trade secret; or

(B) At the time of disclosure or use, knew or had reason to know that his or her knowledge of the trade secret was:

(i) Derived from or through a person who had utilized improper means to acquire it;

(ii) Acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use; or

(iii) Derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use; or

(C) Before a material change of his or her position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake.

- *Civil Code* section 19 provides: "Every person who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact, has constructive notice of the fact itself in all cases in which, by prosecuting such inquiry, he might have learned such fact."

■ "The fact that [defendant]'s postings were not of the 'entire secret,' and included only portions of courses, does not mean that [defendant]'s disclosures are not misappropriations. While previous partial disclosures arguably made public only those parts disclosed, [defendant]'s partial disclosures of non-public portions of the secrets may themselves be actionable because they constitute 'disclosure ... without ... consent by a person who ... knew or had reason to know that his ... knowledge of the trade secret was ... [either] derived from or through a person who had utilized improper means to acquire it [or] acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use.' " (*Religious Tech. Ctr. v. Netcom On-Line Commun. Servs.* (N.D.Cal. 1995) 923 F.Supp. 1231, 1257, fn. 31 .)

■ "Under the UTSA, simple disclosure or use may suffice to create liability. It is no longer necessary, if it ever was, to prove that the purpose to which the acquired information is put is outweighed by the interests of the trade secret holder or that use of a trade secret cannot be prohibited if it is infeasible to do so." (*Morlife, Inc. v. Perry* (1997) 56 Cal.App.4th 1514, 1527 [66 Cal.Rptr.2d 731] .)

■ "[N]othing in the UTSA requires that the defendant gain any advantage from the disclosure; it is sufficient to show 'use' by disclosure of a trade secret with actual or constructive knowledge that the secret was acquired under circumstances giving rise to a duty to maintain its secrecy." (*Religious Tech. Ctr., supra*, 923 F.Supp. at p. 1257, fn. 31 .)

■ "When a competitor hires a former employee of plaintiff who is likely to disclose trade secrets, '[i]t is a question of fact whether the competitor had constructive notice of the plaintiff's right in the secret.' " (*Ralph Andrews Productions, Inc. v. Paramount Pictures Corp.* (1990) 222 Cal.App.3d 676, 682-683 [271 Cal.Rptr. 797] , internal citation omitted.)

Secondary Sources

3 Levy et al., *California Torts, Ch. 40, Fraud and Deceit and Other Business Torts*, § 40.53[1][b] (Matthew Bender)

49 *California Forms of Pleading and Practice, Ch. 565, Unfair Competition*, § 565.103[4][c] (Matthew Bender)

Edelson & Kay, eds., *Trade Secret Litigation and Protection in California* (State Bar of California 2005) Chs. 2, 6, 12

Publisher's Notes

There is no BAJI instruction on this subject.

LexisNexis Matthew Bender Expert Practice Tip--When Defendant's Knowledge is an Issue: When defendant's knowledge of the trade secret is an issue, counsel should consider adding an additional instruction based on *Civ. Code*, § 19 as to constructive notice. *By Kelly O. Scott and Karina B. Sterman*

* The practice tips in this chapter were written by Kelly O. Scott and Karina B. Sterman.

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CHAPTER 44 California Judicial Council Trade Secrets Instructions *

5-44 California Forms of Jury Instruction CACI 4407

CACI 4407 Misappropriation by Use

[*Name of defendant*] **misappropriated** [*name of plaintiff*]'s trade secret[s] by use if [*name of defendant*]

1. Used [it/them] without [*name of plaintiff*]'s consent; and

2. [Did any of the following:]

[*insert one or more of the following:*]

[Acquired knowledge of the trade secret[s] by improper means[./; or]

[At the time of use, knew or had reason to know that [his/her/its] knowledge of [*name of plaintiff*]'s trade secret[s] came from or through [*name of third party*], and that [*name of third party*] had previously acquired the trade secret[s] by improper means[./; or]

[At the time of use, knew or had reason to know that [his/her/its] knowledge of [*name of plaintiff*]'s trade secret[s] was acquired under circumstances creating a legal obligation to limit use of the [*select short term to describe, e.g., information*] [./; or]

[At the time of use, knew or had reason to know that [his/her/its] knowledge of [*name of plaintiff*]'s trade secret[s] came from or through [*name of third party*], and that [*name of third party*] had a duty to [*name of plaintiff*] to limit use of the [*e.g., information*] [./; or]

[Before a material change of [his/her/its] position, knew or had reason to know that [it was/they were] [a] trade secret[s] and that knowledge of [it/them] had been acquired by accident or mistake.]

New December 2007

Directions for Use

Read this instruction with *CACI No. 4401, Misappropriation of Trade Secrets--Essential Factual Elements*, if the plaintiff claims that the defendant's use of the information alleged to be a trade secret is a misappropriation.

If consent is at issue, *CACI No. 1302, Consent Explained*, and *CACI No. 1303, Invalid Consent*, may also be given.

In element 2, select the applicable statutory act(s) alleged to constitute misappropriation by use. (See Civ. Code, § 3624.1(b)(2).) If only one act is selected, omit the words "did any of the following."

If either of the first two acts constituting misappropriation by disclosure is alleged, give also *CACI No. 4408, Improper Means of Acquiring Trade Secret*.

Each act of misappropriation based on improper use requires that the defendant have "knowledge of the trade secret." (See Civ. Code, § 3426.1(b)(2).) No reported California state court decision has interpreted the meaning of "knowledge of the trade secret."

Sources and Authority

- *Civil Code section 3426.1(b)(2)* provides:

(b) "Misappropriation" means:

(2) Disclosure or use of a trade secret of another without express or implied consent by a person who:

(A) Used improper means to acquire knowledge of the trade secret; or

(B) At the time of disclosure or use, knew or had reason to know that his or her knowledge of the trade secret was:

(i) Derived from or through a person who had utilized improper means to acquire it;

(ii) Acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use; or

(iii) Derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use; or

(C) Before a material change of his or her position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake.

- *Civil Code section 19* provides: "Every person who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact, has constructive notice of the fact itself in all cases in which, by prosecuting such inquiry, he might have learned such fact."

■ "Under the plain terms of the Uniform Trade Secrets Act, defendants may be personally liable if: they used, through the corporation, [plaintiff]'s trade secrets; at the time of the use of the confidential information they knew or had reason to know that knowledge of the trade secrets was derived from or through a person who had improperly acquired the knowledge, or the secrets were obtained by a person who owed a duty to plaintiffs to maintain the secrecy. Employing the confidential information in manufacturing, production, research or development, marketing goods that embody the trade secret, or soliciting customers through the use of trade secret information, all constitute use. Use of a trade secret without knowledge it was acquired by improper means does not subject a person to liability unless the person receives notice that its use of the information is wrongful." (*PMC, Inc. v. Kadisha* (2000) 78 Cal.App.4th 1368, 1383 [93 Cal.Rptr.2d 663] , internal citations omitted.)

■ "Under the UTSA, simple disclosure or use may suffice to create liability. It is no longer necessary, if it ever was, to prove that the purpose to which the acquired information is put is outweighed by the interests of the trade secret holder or that use of a trade secret cannot be prohibited if it is infeasible to do so." (*Morlife, Inc. v. Perry* (1997) 56 Cal.App.4th 1514, 1527 [66 Cal.Rptr.2d 731] .)

■ "When a competitor hires a former employee of plaintiff who is likely to disclose trade secrets, '[i]t is a question of fact whether the competitor had constructive notice of the plaintiff's right in the secret.' " (*Ralph Andrews Productions, Inc. v. Paramount Pictures Corp.* (1990) 222 Cal.App.3d 676, 682-683 [271 Cal.Rptr. 797] , internal citation omitted.)

■ "Our Supreme Court has previously distinguished solicitation--which is actionable--from announcing a job change--which is not: 'Merely informing customers of one's former employer of a change of employment, without more, is not solicitation. Neither does the willingness to discuss business upon invitation of another party constitute solicitation on the part of the invitee. Equity will not enjoin a former employee from receiving business from the customers of his former employer, even though the circumstances be such that he should be prohibited from soliciting such business.' " (*Hilb v. Robb* (1995) 33 Cal.App.4th 1812, 1821 [39 Cal.Rptr. 2d 887] , internal citation omitted; but see *Morlife, Inc., supra*, 56 Cal.App.4th at p. 1527, fn. 8 ["we need not decide whether the 'professional announcement' exception ... has continued vitality in light of the expansive definition of misappropriation under the UTSA"].)

■ "[T]o prove misappropriation of a trade secret under the UTSA, a plaintiff must establish (among other things) that the defendant improperly 'used' the plaintiff's trade secret. Thus, under *Evidence Code* sections 500 and 520, the plaintiff bears the burden of proof on that issue, both at the outset and during trial." (*Sargent Fletcher, Inc. v. Able Corp.* (2003) 110 Cal.App.4th 1658, 1668 [3 Cal.Rptr.3d 279] , internal citation omitted.)

■ "[I]nformation relative to customers (e.g., their identities, locations, and individual preferences), obtained by a former employee in his contacts with them during his employment, may amount to 'trade secrets' which will warrant his being enjoined from exploitation or disclosure after leaving the employment. [P] It is equally clear, however, that the proscriptions inhibiting the ex-employee reach only his use of such information, not to his mere possession or knowledge of it." (*Golden State Linen Service, Inc. v. Vidalin* (1977) 69 Cal.App.3d 1, 7-8 [137 Cal.Rptr. 807] , internal citations omitted.)

■ "Since these 'Marks' likely encompass any trade secrets, it is reasonable to conclude that one party's use of the trade secrets that affects the other party's rights in the mark would constitute the misappropriation of the trade secrets 'of another.' " (*Morton v. Rank Am., Inc.* (C.D. Cal. 1993), 812 F.Supp. 1062, 1074 [one can misappropriate trade secret jointly owned with another].)

Secondary Sources

3 Levy et al., *California Torts, Ch. 40, Fraud and Deceit and Other Business Torts*, § 40.53[1][b] (Matthew Bender)

49 *California Forms of Pleading and Practice, Ch. 565, Unfair Competition*, § 565.103[4][c] (Matthew Bender)

Edelson & Kay, eds., Trade Secret Litigation and Protection in California (State Bar of California 2005) Chs. 2, 6, 12

Publisher's Notes

There is no BAJI instruction on this subject.

LexisNexis Matthew Bender Expert Practice Tip--When Defendant's Knowledge is an Issue: When defendant's knowledge of the trade secret is an issue, an additional instruction based upon *Civ. Code*, § 19 as to constructive notice is appropriate. *By Kelly O. Scott and Karina B. Sterman*

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CHAPTER 44 California Judicial Council Trade Secrets Instructions *

5-44 California Forms of Jury Instruction CACI 4408

CACI 4408 Improper Means of Acquiring Trade Secret

Improper means of acquiring a trade secret or knowledge of a trade secret include, but are not limited to, [theft/bribery/misrepresentation/breach or inducing a breach of a duty to maintain secrecy/ [or] wiretapping, electronic eavesdropping, [or] [*insert other means of espionage*]].

[However, it is not improper to acquire a trade secret or knowledge of the trade secret by [any of the following]:

- [1. Independent efforts to invent or discover the information;]**
- [2. Reverse engineering; that is, examining or testing a product to determine how it works, by a person who has a right to possess the product;]**
- [3. Obtaining the information as a result of a license agreement with the owner of the information;]**
- [4. Observing the information in public use or on public display;] [or]**
- [5. Obtaining the information from published literature, such as trade journals, reference books, the Internet, or other publicly available sources.]]**

New December 2007

Directions for Use

In the first paragraph, include only those statutory examples of "improper means" supported by the evidence. (See *Civ. Code*, § 3426.1(a).) The option for "wiretapping, eavesdropping, [or] [*insert other*"

means of espionage]" expresses the statutory term "espionage."

Include the optional last paragraph if any of those methods of obtaining the information are supported by the evidence. Omit any methods that are not at issue. If only one is at issue, omit "any of the following."

Sources and Authority

■ *Civil Code section 3426.1(a)* provides that " 'Improper means' includes theft, bribery, misrepresentation, breach or inducement of a breach of a duty to maintain secrecy, or espionage through electronic or other means. Reverse engineering or independent derivation alone shall not be considered improper means."

■ "The Restatement of Torts, Section 757, Comment (f), notes: 'A complete catalogue of improper means is not possible,' but Section 1(1) includes a partial listing. Proper means include: 1. Discovery by independent invention; 2. Discovery by "reverse engineering," that is, by starting with the known product and working backward to find the method by which it was developed. The acquisition of the known product must of course, also be by a fair and honest means, such as purchase of the item on the open market for reverse engineering to be lawful; 3. Discovery under a license from the owner of the trade secret; 4. Observation of the item in public use or on public display; 5. Obtaining the trade secret from published literature. ... [T]he assertion that a matter is readily ascertainable by proper means remains available as a defense to a claim of misappropriation. Information is readily ascertainable if it is available in trade journals, reference books, or published materials." (*Civ. Code*, § 3426.1, Legis. Comm. Comment (Senate), 1984 Addition.)

■ *Penal Code section 630* provides in part: The Legislature hereby declares that advances in science and technology have led to the development of new devices and techniques for the purpose of eavesdropping upon private communications and that the invasion of privacy resulting from the continual and increasing use of such devices and techniques has created a serious threat to the free exercise of personal liberties and cannot be tolerated in a free and civilized society.

The Legislature by this chapter intends to protect the right of privacy of the people of this state.

Secondary Sources

13 Witkin, *Summary of California Law* (10th ed. 2005) *Equity*, § 81(1)

3 Levy et al., *California Torts, Ch. 40, Fraud and Deceit and Other Business Torts*, § 40.53[1][b] (Matthew Bender)

49 *California Forms of Pleading and Practice, Ch. 565, Unfair Competition*, § 565.103[4][b] (Matthew Bender)

Edelson & Kay, eds., *Trade Secret Litigation and Protection in California* (State Bar of California 2005) § 2.01(D)

Publisher's Notes

There is no BAJI instruction on this subject.

LexisNexis Matthew Bender Expert Practice Tip--Use of CACI No. 4408: Counsel should limit this instruction strictly to the facts of the case as shown in trial to highlight the evidence, or lack thereof. This will assist counsel in closing argument and avoid confusing the jury. *By Kelly O. Scott and Karina B. Serman*

LexisNexis Matthew Bender Expert Practice Tip--Inadvertent Use: If applicable, defense counsel should consider modifying this instruction to include in the second paragraph the accidental or mistaken acquisition of knowledge of the alleged trade secret before learning that it was a trade secret. (See *Civ. Code*, § 3426.1(b)(2)(C).) *By Kelly O. Scott and Karina B. Sterman*

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CHAPTER 44 California Judicial Council Trade Secrets Instructions *

5-44 California Forms of Jury Instruction CACI 4409

CACI 4409 Remedies for Misappropriation of Trade Secret

If [name of plaintiff] proves that [name of defendant] misappropriated [his/her/its] trade secret[s], then [name of plaintiff] is entitled to recover damages if the misappropriation caused [[name of plaintiff] to suffer an actual loss/ [or] [name of defendant] to be unjustly enriched].

[If [name of defendant]'s misappropriation did not cause [[name of plaintiff] to suffer an actual loss/ [or] [name of defendant] to be unjustly enriched], [name of plaintiff] may still be entitled to a reasonable royalty for no longer than the period of time the use could have been prohibited. However, I will calculate the amount of any royalty.]

New December 2007

Directions for Use

Give this instruction with CACI No. 4401, *Misappropriation of Trade Secrets--Essential Factual Elements*, in all cases.

Select the nature of the recovery sought; either for the plaintiff's actual loss or for the defendant's unjust enrichment, or both. If the plaintiff's claim of actual injury or loss is based on lost profits, give CACI No. 3903N, *Lost Profits (Economic Damage)*. If unjust enrichment is alleged, give CACI No. 4410, *Unjust Enrichment*.

If neither actual loss nor unjust enrichment is provable, *Civil Code section 3426.3(b)* provides for a third, alternate remedy: a reasonable royalty for no longer than the period of time the use could have been prohibited. Both the statute and case law indicate that the question of a reasonable royalty should not be presented to the jury. (See *Civ. Code*, § 3426.3(b) [*the court may order the payment of a reasonable*

royalty]; *Unilogic, Inc. v. Burroughs Corp.* (1992) 10 Cal.App.4th 612, 628 [12 Cal.Rptr.2d 741] ; see also Civ. Code, § 3426.2(b) [court may issue an injunction that conditions future of a trade secret on payment of a reasonable royalty].) However, no reported California state court case has directly held that "reasonable royalty" issues should not be presented to the jury. (But see *Unilogic, Inc.*, *supra*, 10 Cal.App.4th at p. 627 .) Include the optional second paragraph if the court wants to advise the jury that even if it finds that the plaintiff suffered no actual loss and that the defendant was not unjustly enriched, the plaintiff may still be entitled to some recovery.

For simplicity, this instruction uses the term "damages" to refer to both actual loss and unjust enrichment, even though, strictly speaking, unjust enrichment may be considered a form of restitution rather than damages.

Sources and Authority

- Civil Code section 3426.3 provides:

(a) A complainant may recover damages for the actual loss caused by misappropriation. A complainant also may recover for the unjust enrichment caused by misappropriation that is not taken into account in computing damages for actual loss.

(b) If neither damages nor unjust enrichment caused by misappropriation are provable, the court may order payment of a reasonable royalty for no longer than the period of time the use could have been prohibited.

(c) If willful and malicious misappropriation exists, the court may award exemplary damages in an amount not exceeding twice any award made under subdivision (a) or (b).

- "Under subdivision (a), a complainant may recover damages for the actual loss caused by misappropriation, as well as for any unjust enrichment not taken into account in computing actual loss damages. Subdivision (b) provides for an alternative remedy of the payment of royalties from future profits where 'neither damages nor unjust enrichment caused by misappropriation [is] provable.' " (*Ajaxo Inc. v. E*Trade Group Inc.* (2005) 135 Cal.App.4th 21, 61] .)

- "[B]ased on the plain language of the statute, the Court--not the jury--determines if and in what amount a royalty should be awarded. See Cal. Civ. Code section 3416.3(b) ('the Court may order payment of a reasonable royalty')." (*FAS Techs. v. Dainippon Screen Mfg.* (N.D. Cal. 2001) 2001 U.S. Dist. LEXIS 15444, **9-10 .)

- "Nor was it necessary to submit the liability issue to the jury in order to allow the trial court thereafter to determine a reasonable royalty or to impose an injunction. Just as [cross complainant] presented no evidence of the degree of [cross defendant]'s enrichment, [cross complainant] likewise presented no evidence that would allow the court to determine what royalty, if any, would be reasonable under the circumstances." (*Unilogic, Inc.* *supra*, 10 Cal.App.4th at p. 628 .)

- "[T]he imposition of a reasonable royalty is reserved for those instances where the court finds that neither actual damages to the holder of the trade secret nor unjust enrichment to the user is provable." (*Morlife, Inc. v. Perry* (1997) 56 Cal.App.4th 1514, 1529 [66 Cal.Rptr.2d 731] .)

- "California law is clear, however. [Plaintiff] is entitled to a reasonable royalty only if neither actual damages nor unjust enrichment are provable. ... [P] ... California law differs on this point from both the UTSA and Federal patent law, neither of which require actual damages and unjust enrichment to be unprovable before a reasonable royalty may

be imposed." (*Cacique, Inc. v. Robert Reiser & Co.* (9th Cir. 1999) 169 F.3d 619, 623 .)

Secondary Sources

13 Witkin, Summary of California Law (10th ed. 2005) Equity, §§ 83, 89-90

1 *Milgrim on Trade Secrets, Ch. 15, Trial Considerations, § 15.02* (Matthew Bender)

3 Levy et al., *California Torts, Ch. 40, Fraud and Deceit and Other Business Torts, § 40.54* (Matthew Bender)

49 *California Forms of Pleading and Practice, Ch. 565, Unfair Competition, § 565.103[6], [7]* (Matthew Bender)

Edelson & Kay, eds., Trade Secret Litigation and Protection in California (State Bar of California 2005) Ch. 11

Publisher's Notes

There is no BAJI instruction on this subject.

LexisNexis Matthew Bender Expert Practice Tip--Damage Calculations: Counsel should creatively assess potential damages. Costs of remedial efforts, development costs associated with the trade secret, and reduction in value of the trade secret owner's business or investment are recoverable. (See *Southern California Disinfecting Co. v. Lomkin* (1960) 183 Cal.App.2d 431, 449 [7 Cal.Rptr. 43] ; *Reid v. Mass Co.* (1957) 155 Cal.App.2d 293, 300-301 [318 P.2d 54] ; *De Vries v. Starr* (10th Cir. 1968) 393 F.2d 9, 20-21 .) Thus, plaintiff's counsel should use this instruction to claim damages even if the only actual loss suffered was the cost of modifying or creating a new system for protecting the trade secret. (*Dozor Agency, Inc. v. Rosenberg* (Pa. 1966) 218 A.2d 583, 585-586 .) By Kelly O. Scott and Karina B. Sterman

LexisNexis Matthew Bender Expert Practice Tip--Discovery Tool: Counsel should use this instruction as a guide in discovery. In the absence of evidence of actual loss and unjust enrichment the rate of a reasonable royalty should be ascertained and proven at trial. (See *Civ. Code, § 3426.3(b)*; *Unilogic, Inc. v. Burroughs Corp.* (1992) 10 Cal.App.4th 612, 625-626 [12 Cal.Rptr.2d 741] .) Early consultation with an expert may also be advisable. By Kelly O. Scott and Karina B. Sterman

* The practice tips in this chapter were written by Kelly O. Scott and Karina B. Sterman.

Kelly O. Scott has been in private practice since 1987, focusing on the representation of employers through preventive counseling, strategic planning, and administrative and litigation representation. Mr. Scott is a partner with Ervin, Cohen & Jessup LLP and the head of its Employment Law Department. He is a lecturer for various prestigious organizations, including Professionals in Human Resources Association and the California Employer Advisory Counsel, and also provides private trainings and employment investigations. Mr. Scott is the editor of his firm's monthly "Employment Law Reporter" and is a frequent contributor to various business and employment publications. He is on the Board of Directors for the Beverly Hills Chamber of Commerce and has been named a "Super Lawyer" by *Los Angeles* magazine.

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CHAPTER 44 California Judicial Council Trade Secrets Instructions *

5-44 California Forms of Jury Instruction CACI 4410

CACI 4410 Unjust Enrichment

[Name of defendant] was unjustly enriched if [his/her/its] misappropriation of [name of plaintiff]'s trade secret[s] caused [name of defendant] to receive a benefit that [he/she/it] otherwise would not have achieved.

To decide the amount of any unjust enrichment, first determine the value of [name of defendant]'s benefit that would not have been achieved except for [his/her/its] misappropriation. Then subtract from that amount [name of defendant]'s reasonable expenses[, including the value of the [specify categories of expenses in evidence, such as labor, materials, rents, interest on invested capital]]. [In calculating the amount of any unjust enrichment, do not take into account any amount that you included in determining any amount of damages for [name of plaintiff]'s actual loss.]

New December 2007

Directions for Use

Give this instruction with CACI No. 4409, *Remedies for Misappropriation of Trade Secrets*, if unjust enrichment is alleged and supported by the evidence. If it would be helpful to the jury, specify the categories of expenses to be allowed to the defendant. Include the last sentence if both actual loss and unjust enrichment are alleged.

Sources and Authority

- *Civil Code section 3426.3* provides:

(a) A complainant may recover damages for the actual loss caused by misappropriation. A

complainant also may recover for the unjust enrichment caused by misappropriation that is not taken into account in computing damages for actual loss.

(b) If neither damages nor unjust enrichment caused by misappropriation are provable, the court may order payment of a reasonable royalty for no longer than the period of time the use could have been prohibited.

(c) If willful and malicious misappropriation exists, the court may award exemplary damages in an amount not exceeding twice any award made under subdivision (a) or (b).

■ "In general, '[a] person who has been unjustly enriched at the expense of another is required to make restitution to the other.' (*Rest., Restitution, § 1.*) 'Ordinarily the benefit to the one and the loss to the other are co-extensive, and the result ... is to compel the one to surrender the benefit which he has received and thereby to make restitution to the other for the loss which he has suffered.' [P] 'In other situations, a benefit has been received by the defendant but the plaintiff has not suffered a corresponding loss or, in some cases, any loss, but nevertheless the enrichment of the defendant would be unjust. In such cases, the defendant may be under a duty to give to the plaintiff the amount by which he has been enriched.' " (*Unilogic, Inc. v. Burroughs Corp. (1992) 10 Cal.App.4th 612, 627-628 [12 Cal.Rptr.2d 741]*)

■ *Restatement of Restitution, section 1, comment a*, states: "A person is enriched if he has received a benefit (see Comment b). A person is unjustly enriched if the retention of the benefit would be unjust (see Comment c)."

■ *Restatement of Restitution, section 1, comment b*, states: "*What constitutes a benefit.* A person confers a benefit upon another if he gives to the other possession of or some other interest in money, land, chattels, or choses in action, performs services beneficial to or at the request of the other, satisfies a debt or a duty of the other, or in any way adds to the other's security or advantage. He confers a benefit not only where he adds to the property of another, but also where he saves the other from expense or loss. The word 'benefit,' therefore, denotes any form of advantage. The advantage for which a person ordinarily must pay is pecuniary advantage; it is not, however, necessarily so limited, as where a physician attends an insensible person who is saved subsequent pain or who receives thereby a greater chance of living."

■ *Restatement of Restitution, section 1, comment c*, states: "*Unjust retention of benefit.* Even where a person has received a benefit from another, he is liable to pay therefor only if the circumstances of its receipt or retention are such that, as between the two persons, it is unjust for him to retain it. The mere fact that a person benefits another is not of itself sufficient to require the other to make restitution therefor. Thus, one who improves his own land ordinarily benefits his neighbors to some extent, and one who makes a gift or voluntarily pays money which he knows he does not owe confers a benefit; in neither case is he entitled to restitution. The Restatement of this Subject states the rules by which it is determined whether or not it is considered to be just to require restitution."

Secondary Sources

13 Witkin, Summary of California Law (10th ed. 2005) Equity, § 90(1)(a)

1 *Milgrim on Trade Secrets, Ch. 13, Issues Prior to Commencement of Action, § 13.03[2][a]* (Matthew Bender)

3 Levy et al., *California Torts, Ch. 40, Fraud and Deceit and Other Business Torts, § 40.54[4]* (Matthew Bender)

49 *California Forms of Pleading and Practice, Ch. 565, Unfair Competition, § 565.103[7][b]* (Matthew Bender)

Edelson & Kay, eds., *Trade Secret Litigation and Protection in California* (State Bar of California 2005) § 11.03

Publisher's Notes

There is no BAJI instruction on this subject.

LexisNexis Matthew Bender Expert Practice Tip--Proving Damages: Counsel should carefully consider defendant's expenses in calculating the amount of any unjust enrichment and modify this instruction as appropriate. Allowable deductions from defendant's gross sales will vary from case to case, but may include advertising and marketing expenses, returns, taxes, and other expenditures associated with the sale of the goods or services. (See, e.g., *Oakland California Towel Co. v. Sivils* (1942) 52 Cal.App.2d 517, 520 [126 P.2d 651] .) By Kelly O. Scott and Karina B. Sterman

* The practice tips in this chapter were written by Kelly O. Scott and Karina B. Sterman.

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CHAPTER 44 California Judicial Council Trade Secrets Instructions *

5-44 California Forms of Jury Instruction CACI 4411

CACI 4411 Punitive Damages for Willful and Malicious Misappropriation

If you decide that [name of defendant]'s misappropriation caused [name of plaintiff] harm, you must decide whether that conduct justifies an award of punitive damages. The purposes of punitive damages are to punish a wrongdoer for the conduct that harmed [name of plaintiff] and to discourage similar conduct in the future.

In order to recover punitive damages, [name of plaintiff] must prove [by clear and convincing evidence] that [name of defendant] acted willfully and maliciously. You must determine whether [name of defendant] acted willfully and maliciously, but you will not be asked to determine the amount of any punitive damages. I will calculate the amount later.

"Willfully" means that [name of defendant] acted with a purpose or willingness to commit the act or engage in the conduct in question, and the conduct was not reasonable under the circumstances at the time and was not undertaken in good faith.

"Maliciously" means that [name of defendant] acted with an intent to cause injury, or that [name of defendant]'s conduct was despicable and was done with a willful and knowing disregard for the rights of others. "Despicable conduct" is conduct so vile, base, or wretched that it would be looked down on and despised by ordinary decent people. [Name of defendant] acted with knowing disregard if [he/she/it] was aware of the probable consequences of [his/her/its] conduct and deliberately failed to avoid those consequences.

New December 2007

Directions for Use

Give this instruction if there is evidence that the defendant acted willfully and maliciously, so as to support an award of punitive damages. (See *Civ. Code*, § 3426.3(c).)

No reported California state court case has addressed whether the jury or the court should decide whether any misappropriation was "willful and malicious," and if so, whether the finding must be made by clear and convincing evidence rather than a preponderance of the evidence. In *Ajaxo Inc. v. E*Trade Group Inc.* (2005) 135 Cal.App.4th 21, 66], the court affirmed a jury's finding by clear and convincing evidence that the defendant's misappropriation was willful and malicious. If the court decides to require the "clear and convincing" standard, include the bracketed language in the first paragraph and also give CACI No. 201, *More Likely True--Clear and Convincing Proof*.

Once the jury finds "willful and malicious" conduct, it appears that the court should decide the amount of punitive damages. (See *Robert L. Cloud & Assocs. v. Mikesell* (1999), 69 Cal.App.4th 1141, 1151, fn. 8 [82 Cal.Rptr.2d 143]). This would be consistent with the Uniform Trade Secrets Act, on which the California Uniform Trade Secrets Act is based. (See Uniform Trade Secrets Act § 3, 2005 com. ["This provision follows federal patent law in leaving discretionary trebling to the judge even though there may be a jury, compare 35 U.S.C. Section 284 (1976)"].)

Sources and Authority

- *Civil Code section 3426.3(c)* provides: "If willful and malicious misappropriation exists, the court may award exemplary damages in an amount not exceeding twice any award made under subdivision (a) or (b)."

- *Civil Code section 3426.4* provides: "If a claim of misappropriation is made in bad faith, a motion to terminate an injunction is made or resisted in bad faith, or willful and malicious misappropriation exists, the court may award reasonable attorney's fees and costs to the prevailing party."

- "The court instructed the jury that 'willful' means 'a purpose or willingness to commit the act or engage in the conduct in question, and the conduct was not reasonable under the circumstances then present and was not undertaken in good faith.' Further, the court instructed the jury that 'malice' means 'conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard for the rights of others when the defendant is aware [of] the probable consequences of its conduct and willfully and deliberately fails to avoid those consequences. Despicable conduct is conduct which is so vile and wretched that it would be looked down upon and despised by ordinary decent people.' In addition, the court instructed the jury that a finding of willful and malicious misappropriation must be supported by clear and convincing evidence. [P] Our Supreme Court has recognized that malice may be proven either expressly by direct evidence probative of the existence of hatred or ill will, or by implication from indirect evidence from which the jury may draw inferences." (*Ajaxo Inc.*, *supra*, 135 Cal.App.4th at pp. 66-67, internal citations and footnote omitted.)

- "The limitation on punitive damages under the UTSA to twice the compensatory damages does not create an equivalency between an award of punitive damages under the UTSA and an award of treble damages under another statutory scheme. ... While an award of treble damages is equally punitive in its effect, the computation of the penalty is strictly mechanical. In contrast, an award of punitive damages under the UTSA is subject to no fixed standard; the statute merely sets a cap on the amount of the award. The trial court retains wide discretion to set the amount anywhere between zero and two times the actual loss. (§ 3426.3, subd. (c).) Thus, evidence of the defendant's financial condition remains essential for evaluating whether the amount of punitive damages actually awarded is appropriate." (*Robert L. Cloud & Assocs. supra*, 69 Cal.App.4th at p. 1151, fn. 8.)

■ "In order to justify [attorney] fees under *Civil Code* section 3426.4, the court must find that a 'willful and malicious misappropriation' occurred. That requirement is satisfied, in our view, by the jury's determination, upon clear and convincing evidence, that defendants' acts of misappropriation were done with malice. This finding was necessary to the award of punitive damages which was made by the jury." (*Vacco Industries, Inc. v. Van Den Berg* (1992) 5 Cal.App.4th 34, 54 [6 Cal.Rptr.2d 602] .)

Secondary Sources

13 Witkin, Summary of California Law (10th ed. 2005) Equity, § 90(1)(c)

1 *Milgrim on Trade Secrets*, Ch. 15, *Trial Considerations*, § 15.02[3][i] (Matthew Bender)

3 Levy et al., *California Torts*, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.54[5] (Matthew Bender)

49 *California Forms of Pleading and Practice*, Ch. 565, *Unfair Competition*, § 565.103[7][c] (Matthew Bender)

Edelson & Kay, eds., *Trade Secret Litigation and Protection in California* (State Bar of California 2005) § 11.05

Publisher's Notes

There is no BAJI instruction on this subject.

LexisNexis Matthew Bender Expert Practice Tip--Evidence of Punitive Damages: In order to prove punitive damages, plaintiff's counsel should develop and produce evidence that defendant acted (or did not act) willfully and maliciously. Such evidence can include efforts to conceal the misappropriation, intentional excessive publication of the information, or continued use of information after learning it is a trade secret. (See *Vacco Indus. v. Van Den Berg* (1992) 5 Cal.App.4th 34, 52-54 [6 Cal.Rptr.2d 602] ; see, e.g., *Trandes Corp. v. Guy F. Atkinson Co.* (4th Cir. 1993) 996 F.2d 655, 665 .) By Kelly O. Scott and Karina B. Sterman

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CHAPTER 44 California Judicial Council Trade Secrets Instructions *

5-44 California Forms of Jury Instruction CACI 4412

CACI 4412 "Independent Economic Value" Explained

[*Select short term to describe, e.g., Information*] **has independent economic value if it gives the owner an actual or potential business advantage over others who do not know the [*e.g., information*] and who could obtain economic value from its disclosure or use.**

In determining whether [*e.g., information*] had actual or potential independent economic value because it was secret, you may consider the following:

(a) The extent to which [*name of plaintiff*] obtained or could obtain economic value from the [*e.g., information*] in keeping [it/them] secret;

(b) The extent to which others could obtain economic value from the [*e.g., information*] if [it were/they were] not secret;

(c) The amount of time, money, or labor that [*name of plaintiff*] expended in developing the [*e.g., information*];

(d) The amount of time, money, or labor that [would be/was] saved by a competitor who used the [*e.g., information*];

[(e) [*Insert other applicable factors* .]

The presence or absence of any one or more of these factors is not necessarily determinative.

Directions for Use

Give this instruction to further explain element 2 of *CACI No. 4402, "Trade Secret" Defined*.
Inapplicable factors may be omitted.

Sources and Authority

- *Civil Code section 3426.1(d)* provides:

"Trade secret" means information, including a formula, pattern, compilation, program, device, method, technique, or process, that:

(1) Derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use; and

(2) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

■ "[I]t is not true that evidence of 'some' helpfulness or usefulness, if credited, would compel a finding of independent economic value. The Restatement defines trade secret as business or technical information 'that is sufficiently valuable and secret to afford an actual or potential economic advantage over others.' (*Rest.3d, Unfair Competition*, § 39.) The advantage 'need not be great,' but must be 'more than trivial.' (*Rest.3d, Unfair Competition*, § 39, *com. e*, p. 430.) Merely stating that information was helpful or useful to another person in carrying out a specific activity, or that information of that type may save someone time, does not compel a factfinder to conclude that the particular information at issue was 'sufficiently valuable ... to afford an ... economic advantage over others.' (*Rest.3d, Unfair Competition*, § 39.) The factfinder is entitled to expect evidence from which it can form some solid sense of *how* useful the information is, e.g., *how much* time, money, or labor it would save, or at least that these savings would be 'more than trivial.' (*Rest.3d, Unfair Competition*, § 39, *com. e*.)" (*Yield Dynamics, Inc. v. TEA Systems Corp.* (2007) 154 Cal.App.4th 547, 564-565 [66 Cal.Rptr.3d 1] , original italics.)

■ "Moreover, it seems inherent in the requirement of value, as codified, that it is relevant to ask to *whom* the information may be valuable. The statute does not speak of value in the abstract, but of the value that is '[d]eriv[ed] ... from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use' In other words, the core inquiry is the value to the owner in *keeping the information secret* from persons who could *exploit it to the relative disadvantage of the original owner*." (*Yield Dynamics, Inc.*, *supra*, 154 Cal.App.4th at p. 568 , original italics, internal citation omitted.)

■ " '[C]ourts are reluctant to protect customer lists to the extent they embody information which is "readily ascertainable" through public sources, such as business directories. On the other hand, where the employer has expended time and effort identifying customers with particular needs or characteristics, courts will prohibit former employees from using this information to capture a share of the market. Such lists are to be distinguished from mere identities and locations of customers where anyone could easily identify the entities as potential customers. As a general principle, the more difficult information is to obtain, and the more time and resources expended by an employer in gathering it, the more likely a court will find such information constitutes a trade secret.' " (*San Jose Construction, Inc. v. S.B.C.C., Inc.* (2007) 155 Cal.App.4th 1528, 1539-1540 [67 Cal.Rptr.3d 54] , internal citation omitted.)

■ "The requirement that a customer list must have economic value to qualify as a trade secret has been interpreted to mean that the secrecy of this information provides a business with a 'substantial business advantage.' In this respect, a customer list can be found to have economic value because its disclosure would allow a competitor to direct its sales

efforts to those customers who have already shown a willingness to use a unique type of service or product as opposed to a list of people who only might be interested." (*Morlife, Inc. v. Perry* (1997) 56 Cal.App.4th 1514, 1522 [66 Cal.Rptr. 2d 731] , internal citations omitted.)

Secondary Sources

1 *Milgrim on Trade Secrets, Ch. 1, Definitional Aspects, § 1.01* (Matthew Bender)

49 *California Forms of Pleading and Practice, Ch. 565, Unfair Competition, §§ 565.103 -565.105* (Matthew Bender)

Edelson & Kay, eds., *Trade Secret Litigation and Protection in California* (State Bar of California 2005) Ch. 1

Publisher's Notes

There is no BAJI instruction on this subject.

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California Forms of Jury Instruction

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CHAPTER 44 California Judicial Council Trade Secrets Instructions *

5-44 California Forms of Jury Instruction CACI 4413-CACI 4419

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CACI 4413Reserved for Future Use



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CHAPTER 44 California Judicial Council Trade Secrets Instructions *

5-44 California Forms of Jury Instruction CACI 4420

CACI 4420 Affirmative Defense--Information Was Readily Ascertainable by Proper Means

[*Name of defendant*] **did not misappropriate** [*name of plaintiff*]'s **trade secret[s]** if [*name of defendant*] **proves that the** [*select short term to describe, e.g., information*] **[was/were] readily ascertainable by proper means at the time of the alleged [acquisition/use/ [or] disclosure].**

There is no fixed standard for determining what is "readily ascertainable by proper means." In general, information is readily ascertainable if it can be obtained, discovered, developed, or compiled without significant difficulty, effort, or expense. For example, information is readily ascertainable if it is available in trade journals, reference books, or published materials. On the other hand, the more difficult information is to obtain, and the more time and resources that must be expended in gathering it, the less likely it is that the information is readily ascertainable by proper means.

New December 2007; Revised December 2009

Directions for Use

Give also CACI No. 4408, *Improper Means of Acquiring Trade Secret*.

One case has suggested in a footnote that in order for the defense to apply, the defendant must have actually obtained plaintiff's secrets through readily ascertainable means rather than improperly. (See *ABBA Rubber Co. v. Seaquist* (1991) 235 Cal.App.3d 1, 21-22, fn. 9 [286 Cal.Rptr. 518] .) Such a requirement would not constitute an affirmative defense but rather would be a denial of the improper-means element of the plaintiff's claim. (See 5 Witkin, California Procedure (4th ed. 1996) Pleadings, § 1081 [affirmative defense admits the truth of the essential allegations of the complaint].) Because the advisory committee believes that this is an affirmative defense, no such requirement has been included in this instruction. (See *San Jose Construction, Inc. v. S.B.C.C., Inc.* (2007) 155

Cal.App.4th 1528, 1542-1543 [67 Cal.Rptr.3d 54] [triable issue of fact as to whether information was readily ascertainable, that is, whether defendant *could have* replicated it within short period of time].)

Sources and Authority

- *Civil Code* section 3426.1(d)(1) provides:

(d) "Trade secret" means information, including a formula, pattern, compilation, program, device, method, technique, or process, that:

(1) Derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use;

- "The Legislative Committee Comment [to *Civ. Code*, § 3426.1] further explains the original draft defined a trade secret in part as 'not being readily ascertainable by proper means' and that 'the assertion that a matter is readily ascertainable by proper means remains available as a defense to a claim of misappropriation. Information is readily ascertainable if it is available in trade journals, reference books, or published materials.' " (*DVD Copy Control Assn., Inc. v. Bunner* (2003) 31 *Cal.4th* 864, 899] , conc. opn. of Werdegarr, J.; see Legis. Comm. Comment (Senate), 1984 Addition.)

- "The focus of the first part of the statutory definition is on whether the information is generally known to or readily ascertainable by business competitors or others to whom the information would have some economic value. Information that is readily ascertainable by a business competitor derives no independent value from not being generally known." (*Syngenta Crop Protection, Inc. v. Helliker* (2006) 138 *Cal.App.4th* 1135, 1172 [42 *Cal.Rptr.3d* 191] , internal citations omitted.)

- "With respect to the general availability of customer information, courts are reluctant to protect customer lists to the extent they embody information which is 'readily ascertainable' through public sources, such as business directories. On the other hand, where the employer has expended time and effort identifying customers with particular needs or characteristics, courts will prohibit former employees from using this information to capture a share of the market. Such lists are to be distinguished from mere identities and locations of customers where anyone could easily identify the entities as potential customers. As a general principle, the more difficult information is to obtain, and the more time and resources expended by an employer in gathering it, the more likely a court will find such information constitutes a trade secret." (*Morlife, Inc. v. Perry* (1997) 56 *Cal.App.4th* 1514, 1521-1522 [66 *Cal.Rptr.2d* 731] , internal citations omitted.)

- "[Defendant] argues that even if reverse engineering ... did not actually occur, the binder contents were not trade secrets because they could have been reverse engineered--that is, they were readily ascertainable. ... Considering the length of time that each proposal took to create and finalize and the urgency with which four of the project owners impressed upon the prospective contractors to begin the work, we cannot overlook the possibility that the information was not readily ascertainable in the circumstances presented. ... Thus, a triable issue of fact exists as to whether the entire proposal for each project was indeed readily ascertainable--that is, whether [defendant] could have replicated each offer within the short period it claimed to have needed." (*San Jose Construction, Inc., supra*, 155 *Cal.App.4th* at pp. 1542-1543 , footnote omitted.)

- "While ease of ascertainability is irrelevant to the definition of a trade secret, 'the assertion that a matter is readily ascertainable by proper means remains available as a defense to a claim of misappropriation.' Therefore, if the defendants can convince the finder of fact at trial (1) that 'it is a virtual certainty that anyone who manufactures' certain

types of products uses rubber rollers, (2) that the manufacturers of those products are easily identifiable, and (3) that the defendants' knowledge of the plaintiff's customers resulted from that identification process and not from the plaintiff's records, then the defendants may establish a defense to the misappropriation claim. That defense, however, will be based upon an absence of misappropriation, rather than the absence of a trade secret." (*ABBA Rubber Co.*, *supra*, 235 *Cal.App.3d* at pp. 21-22, fn. 9 , internal citations omitted.)

■ "[T]he evidence established that [plaintiff]'s customer list and related information was the product of a substantial amount of time, expense and effort on the part of [plaintiff]. Moreover, the nature and character of the subject customer information, i.e., billing rates, key contacts, specialized requirements and markup rates, is sophisticated information and irrefutably of commercial value and not readily ascertainable to other competitors. Thus, [plaintiff's] customer list and related proprietary information satisfy the first prong of the definition of 'trade secret' under section 3426.1." (*Courtesy Temporary Serv., Inc. v. Camacho* (1990) 222 *Cal.App.3d* 1278, 1288 [272 *Cal.Rptr.* 352] .)

■ "In viewing the evidence presented in the light most favorable to the prevailing party, it is difficult to find a protectable trade secret as that term exists under *Civil Code* section 3426.1, subdivision (d). While the information sought to be protected here, that is lists of customers who operate manufacturing concerns and who need shipping supplies to ship their products to market, may not be generally known to the public, they certainly would be known or readily ascertainable to other persons in the shipping business. The compilation process in this case is neither sophisticated nor difficult nor particularly time consuming. The evidence presented shows that the shipping business is very competitive and that manufacturers will often deal with more than one company at a time. There is no evidence that all of appellant's competition comes from respondents' new employer. Obviously, all the competitors have secured the same information that appellant claims and, in all likelihood, did so in the same manner as appellant--a process described herein by respondents." (*American Paper & Packaging Prods., Inc. v. Kirgan* (1986) 183 *Cal.App.3d* 1318, 1326 [228 *Cal.Rptr.* 713] .)

Secondary Sources

1 *Milgrim on Trade Secrets, Ch. 1, Definitional Aspects, § 1.07[1]* (Matthew Bender)

3 *Levy et al., California Torts, Ch. 40, Fraud and Deceit and Other Business Torts, §§ 40.52[1], 40.53[1][b]* (Matthew Bender)

49 *California Forms of Pleading and Practice, Ch. 565, Unfair Competition, § 565.103[4][a]* (Matthew Bender)

Publisher's Notes

There is no BAJI instruction on this subject.

LexisNexis Matthew Bender Expert Practice Tip--Importance of CACI No. 4420: This instruction should be used when defendant can demonstrate a legitimate source for the alleged trade secret other than from plaintiff. This instruction can be used by defense counsel to defend the misappropriation claim based on two similar but distinct defenses: (1) the defense that the trade secret information was legitimately acquired (*CACI No. 4408*), and (2) the defense that the information does not qualify as a trade secret under *Civ. Code, § 3426.1(d)*. Accordingly, defense counsel submitting this instruction should consider doing so along with *CACI No. 4402* and, as appropriate *CACI Nos. 4403* and *4404*. Conversely, plaintiff's counsel can use this instruction to underscore the difficulty of creating the trade secret in terms of the time, expense, and effort expended, thereby demonstrating the need for protection.
By Kelly O. Scott and Karina B. Sterman

* The practice tips in this chapter were written by Kelly O. Scott and Karina B. Sterman.

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CHAPTER 44 California Judicial Council Trade Secrets Instructions *

5-44 California Forms of Jury Instruction CACI 4421

CACI 4421 Affirmative Defense--Statute of Limitations--Three-Year Limit (Civ. Code, § 3426.6)

[Name of defendant] claims that [name of plaintiff]'s lawsuit was not filed within the time set by law. To succeed on this defense, [name of defendant] must prove that the claimed misappropriation of [name of plaintiff]'s trade secrets occurred before [insert date three years before date of filing].

However, the lawsuit was still filed on time if [name of plaintiff] proves that before [insert date three years before date of filing], [he/she/it] did not discover, nor with reasonable diligence should have discovered, facts that would have caused a reasonable person to suspect that [name of defendant] had misappropriated [name of plaintiff]'s [select short term to describe, e.g., information].

New April 2009

Directions for Use

Give this instruction if the California Uniform Trade Secrets Act statute of limitations is at issue. (See Civ. Code, § 3426.6.) In an action in which the defendant is or was a customer of the initial misappropriator, modifications may be required. (See *Cypress Semiconductor Corp. v. Superior Court* (2008) 163 Cal.App.4th 575 [77 Cal.Rptr.3d 685] .)

It is not necessary that the plaintiff know the identity of the defendant in order to trigger the duty to discover. (*Cypress Semiconductor Corp., supra*, 163 Cal.App.4th at p. 587 .) Therefore, "[name of defendant]" in the last sentence will need to be modified if inquiry notice may have been triggered against an actual, but unidentified, misappropriator. (See *Cypress Semiconductor Corp., supra*, 163 Cal.App.4th at p. 585 .)

This instruction places the burden on the plaintiff to prove that it did not know nor have any reason to

suspect the misappropriation earlier than three years before filing. (See *Civ. Code*, § 3426.6.) This is the rule for the burden of proof under the nonstatutory delayed-discovery rule. (See *Glue-Fold, Inc. v. Slautterback Corp.* (2000) 82 Cal.App.4th 1018, 1030 [98 Cal.Rptr.2d 661] ; CACI No. 455, *Statute of Limitations--Delayed Discovery*.) Certain statutes that have their own delayed discovery language (as does *Civil Code* section 3426.6) have been construed to place the burden on the defendant to prove that the plaintiff knew or should have suspected the facts giving rise to the cause of action earlier than the limitation date. (See, e.g., *Samuels v. Mix* (1999) 22 Cal.4th 1, 8-10 [91 Cal.Rptr.2d 273, 989 P.2d 701] [construing *Code Civ. Proc.*, § 340.6 on legal malpractice]; CACI No. 610, *Affirmative Defense--Statute of Limitations--Attorney Malpractice--One-Year Limit*.) No court has construed *Civil Code* section 3426.6 to transfer the burden of proof on delayed discovery to the defendant, so presumably the burden of proof remains with the plaintiff under the nonstatutory rule.

Sources and Authority

- *Civil Code* Section 3426.6 provides:

An action for misappropriation must be brought within three years after the misappropriation is discovered or by the exercise of reasonable diligence should have been discovered. For the purposes of this section, a continuing misappropriation constitutes a single claim.

- "The unanimous conclusion of courts considering the issue--i.e., from federal courts construing section 3426.6--is that it is the first discovered (or discoverable) misappropriation of a trade secret which commences the limitation period." (*Glue-Fold, Inc.*, *supra*, 82 Cal.App.4th at p. 1026 .)
- "The statute is triggered when the plaintiff knows or has reason to know the third party has knowingly acquired, used, or disclosed its trade secrets." (*Cypress Semiconductor Corp.*, *supra*, 163 Cal.App.4th 585 .)
- "[T]he misappropriation that triggers the running of the statute is that which the plaintiff suspects, not that which may or may not actually exist." (*Cypress Semiconductor Corp.*, *supra*, 163 Cal.App.4th at p. 587 .)
- "[A] plaintiff may have more than one *claim* for misappropriation, each with its own statute of limitations, when more than one defendant is involved. This is different from saying that each *misappropriation* gives rise to a separate claim, which is what section 3426.6 precludes." (*Cypress Semiconductor Corp.*, *supra*, 163 Cal.App.4th at p. 583 , original italics.)
- "A *misappropriation* within the meaning of the UTSA occurs not only at the time of the initial acquisition of the trade secret by wrongful means, but also with each misuse or wrongful disclosure of the secret. But a *claim* for misappropriation of a trade secret arises for a given plaintiff against a given defendant only once, at the time of the initial misappropriation, subject to the discovery rule provided in section 3426.6. Each new misuse or wrongful disclosure is viewed as augmenting a single claim of continuing misappropriation rather than as giving rise to a separate claim." (*Cadence Design Systems, Inc. v. Avant! Corp.* (2002) 29 Cal.4th 215, 223 [127 Cal.Rptr.2d 169, 57 P.3d 647] , original italics.)
- "It [is appropriate] to construe section 3426.6 as meaning that a cause of action for misappropriation against a third party defendant accrues with the plaintiff's discovery of that defendant's misappropriation. Any continuing misappropriation by that defendant constitutes a single claim." (*Cypress Semiconductor*

Corp., supra, 163 Cal.App.4th at p. 583 .)

■ "If someone steals a trade secret and then sells it to a third party, when does the statute of limitations begin to run on any misappropriation claim the trade secret owner might have against the third party? ... We conclude that with respect to the element of knowledge, the statute of limitations on a cause of action for misappropriation begins to run when the *plaintiff* has any reason to suspect that the third party knows or reasonably should know that the information is a trade secret. The third party's actual state of mind does not affect the running of the statute." (*Cypress Semiconductor Corp., supra, 163 Cal.App.4th at p. 579* , original italics.)

■ "We conclude that the trial court erred in ruling, under the stipulated facts, that the statute of limitations did not begin to run until August 2003, when [defendant] actually learned that the DynaSpice program contained [plaintiff]'s trade secrets. Rather, the question is: When did [plaintiff] first have any reason to suspect that a ... customer [of the initial misappropriator] had obtained or used DynaSpice knowing, *or with reason to know*, that the software contained [plaintiff]'s trade secrets?" (*Cypress Semiconductor Corp., supra, 163 Cal.App.4th at p. 588* , original italics.)

■ "[I]t is not necessary that the plaintiff be able to identify the person or persons causing the harm. Since the identity of the defendant is not an element of a cause of action, the failure to discover the identity of the defendant does not postpone accrual of the cause of action. ' "Although never fully articulated, the rationale for distinguishing between ignorance" of the defendant and "ignorance" of the cause of action itself "appears to be premised on the commonsense assumption that once the plaintiff is aware of" the latter, he "normally" has "sufficient opportunity," within the "applicable limitations period," "to discover the identity" of the former.' In this case, therefore, the statute began to run when [plaintiff] had any reason to suspect that the CSI customers knew or should have known that they had acquired [plaintiff]'s trade secrets." (*Cypress Semiconductor Corp., supra, 163 Cal.App.4th at p. 587* , internal citations omitted.)

Secondary Sources

Witkin, Summary of California Law (10th ed. 2005) Equity, § 88

3 Levy et al., *California Torts, Ch. 40, Fraud and Deceit and Other Business Torts*, § 40.55 (Matthew Bender)

49 *California Forms of Pleading and Practice, Ch. 565, Unfair Competition*, § 565.274 (Matthew Bender)

Matthew Bender Practice Guide: California Unfair Competition and Business Torts, Ch. 8, Trade Secrets, 8.28

Publisher's Notes

There is no BAJI instruction on this subject.

* The practice tips in this chapter were written by Kelly O. Scott and Karina B. Sterman.

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CHAPTER 44 California Judicial Council Trade Secrets Instructions *

5-44 California Forms of Jury Instruction CACI 4422-CACI 4499

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CHAPTER 50 California Judicial Council Concluding Instructions

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§ 50.syn Synopsis to Chapter 50: California Judicial Council Concluding Instructions

CACI 5000 Duties of the Judge and Jury

CACI 5001 Insurance

CACI 5002 Evidence

CACI 5003 Witnesses

CACI 5004 Service Provider for Juror With Disability

CACI 5005 Multiple Parties

CACI 5006 Nonperson Party

CACI 5007 Removal of Claims or Parties

CACI 5008 Duty to Abide by Translation Provided in Court

CACI 5009 Predeliberation Instructions

CACI 5010 Taking Notes During the Trial

CACI 5011 Reading Back of Trial Testimony in Jury Room

CACI 5012 Introduction to Special Verdict Form

CACI 5013 Deadlocked Jury Admonition

CACI 5014 Substitution of Alternate Juror

CACI 5015 Instruction to Alternate Jurors

CACI 5016 Judge's Commenting on Evidence

CACI 5017 Polling the Jury

CACI 5018-CACI 5099 Reserved for Future Use

CACI VF-5000 General Verdict Form--Single Plaintiff--Single Defendant--Single Cause of Action

CACI VF-5001 General Verdict Form--Single Plaintiff--Single Defendant--Multiple Causes of Action

CACI VF-5002-CACI VF-5099 Reserved for Future Use



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CHAPTER 50 California Judicial Council Concluding Instructions

5-50 California Forms of Jury Instruction Scope

Scope

SCOPE

This chapter contains the California Judicial Council's "Concluding Series" of jury instructions [*CACI No. 5000 et seq.*]. The Judicial Council of California Civil Jury Instructions (CACI) included in this publication are the product of the Judicial Council of California Task Force on Jury Instructions, which are updated by the Judicial Council of California Advisory Committee on Civil Jury Instructions.

This chapter includes instructions on the following topics:

- Duties of the judge and jury [*CACI No. 5000*].
- Insurance [*CACI No. 5001*].
- Evidence [*CACI No. 5002*] and witnesses [*CACI No. 5003*].
- Service provider for juror with disability [*CACI No. 5004*].
- Multiple parties [*CACI No. 5005*] and nonperson party [*CACI No. 5006*].
- Removal of claims or parties [*CACI No. 5007*].
- Duty to abide by translation provided in court [*CACI No. 5008*].
- Predeliberation instructions [*CACI No. 5009*].
- Taking notes during the trial [*CACI No. 5010*].
- Reading back of trial testimony in jury room [*CACI No. 5011*].

- Introduction to special-verdict form [*CACI No. 5012*].
- Deadlocked jury admonition [*CACI No. 5013*].
- Substitution of alternate juror [*CACI No. 5014*].
- Instruction to alternate jurors [*CACI No. 5015*].
- Judge's commenting on the evidence [*CACI No. 5016*].
- Polling the jury [*CACI No. 5017*].

The concluding series also includes two general verdict forms [*CACI Nos. VF-5000, VF-5001*].

Several of the instructions in the Concluding Series mirror instructions in the Pretrial Series [*compare, e.g., CACI No. 107 with CACI No. 5003* (two instructions on witnesses)]. This was done to accommodate those judges that prefer to give these general instructions at the end of the booklet of instructions rather than at the beginning. An attorney need not request the giving of both the same introductory and concluding instructions. As the Advisory Committee recommends in the Directions for Use of the Concluding instructions, if the Concluding instructions are used they should be read to the jury before the reading of instructions on the substantive law.



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CHAPTER 50 California Judicial Council Concluding Instructions

5-50 California Forms of Jury Instruction CACI 5000

CACI 5000 Duties of the Judge and Jury

Members of the jury, you have now heard all the evidence [and the closing arguments of the attorneys]. [The attorneys will have one last chance to talk to you in closing argument. But before they do, it] [It] is my duty to instruct you on the law that applies to this case. You must follow these instructions [as well as those that I previously gave you]. You will have a copy of my instructions with you when you go to the jury room to deliberate. [I have provided each of you with your own copy of the instructions.] [I will display each instruction on the screen.]

You must decide what the facts are. You must consider all the evidence and then decide what you think happened. You must decide the facts based on the evidence admitted in this trial. Do not do any research on your own or as a group. Do not use dictionaries, the Internet, or other reference materials. Do not investigate the case or conduct any experiments. Do not contact anyone to assist you, such as a family accountant, doctor, or lawyer. Do not visit or view the scene of any event involved in this case. If you happen to pass by the scene, do not stop or investigate. All jurors must see or hear the same evidence at the same time. [Do not read, listen to, or watch any news accounts of this trial.] You must not let bias, sympathy, prejudice, or public opinion influence your decision.

I will now tell you the law that you must follow to reach your verdict. You must follow the law exactly as I give it to you, even if you disagree with it. If the attorneys [have said/say] anything different about what the law means, you must follow what I say.

In reaching your verdict, do not guess what I think your verdict should be from something I may have said or done.

Pay careful attention to all the instructions that I give you. All the instructions are important because together they state the law that you will use in this case. You must consider all of the instructions together.

After you have decided what the facts are, you may find that some instructions do not apply. In that case, follow the instructions that do apply and use them together with the facts to reach your verdict.

If I repeat any ideas or rules of law during my instructions, that does not mean that these ideas or rules are more important than the others. In addition, the order in which the instructions are given does not make any difference.

[Most of the instructions are typed. However, some handwritten or typewritten words may have been added, and some words may have been deleted. Do not discuss or consider why words may have been added or deleted. Please treat all the words the same, no matter what their format. Simply accept the instruction in its final form.]

New September 2003; Revised April 2004, October 2004, February 2005, December 2009

Directions for Use

As indicated by the brackets in the first paragraph, this instruction can be read either before or after closing arguments. The advisory committee recommends that this instruction be read to the jury before reading instructions on the substantive law.

Sources and Authority

- *Code of Civil Procedure* section 608 provides that "[i]n charging the jury the court may state to them all matters of law which it thinks necessary for their information in giving their verdict." It also provides that the court "must inform the jury that they are the exclusive judges of all questions of fact." (See also *Code Civ. Proc.*, § 592.)

- *Evidence Code* section 312(a) provides that "[e]xcept as otherwise provided by law, where the trial is by jury [a]ll questions of fact are to be decided by the jury."

- An instruction to disregard any appearance of bias on the part of the judge is proper. (*Gist v. French* (1955) 136 Cal.App.2d 247, 257-259 [288 P.2d 1003] , disapproved on other grounds in *Deshotel v. Atchinson, Topeka & Santa Fe Ry. Co.* (1958) 50 Cal.2d 664, 667 [328 P.2d 449] and *West v. City of San Diego* (1960) 54 Cal.2d 469, 478-479 [6 Cal.Rptr. 289, 353 P.2d 929] .)

- Jurors must avoid bias: "The right to unbiased and unprejudiced jurors is an inseparable and inalienable part of the right to trial by jury guaranteed by the constitution." (*Weathers v. Kaiser Foundation Hospitals* (1971) 5 Cal.3d 98, 110 [95 Cal.Rptr. 516, 485 P.2d 1132] , internal citations omitted.) Evidence of racial prejudice and bias on the part of jurors amounts to misconduct and may constitute grounds for ordering a new trial. (*Ibid.*)

- An instruction to consider all the instructions together can help avoid instructional errors of conflict, omission, and undue emphasis. (*Escamilla v. Marshburn Brothers* (1975) 48 Cal.App.3d 472, 484 [121 Cal.Rptr. 891] .)

- Providing an instruction stating that, depending on what the jury finds to be the facts, some of the instructions may not apply can help avoid reversal on the grounds of misleading jury instructions. (See *Rodgers v. Kemper Construction Co.* (1975) 50 Cal.App.3d 608, 629-630 [124 Cal.Rptr. 143] .)

■ In *Bertero v. National General Corp.* (1974) 13 Cal.3d 43, 57-59 [118 Cal.Rptr. 184, 529 P.2d 608], the Supreme Court held that the giving of cautionary instructions stating that no undue emphasis was intended by repetition and that the judge did not intend to imply how any issue should be decided, ought to be considered in weighing the net effect of the instructions on the jury.

Secondary Sources

7 Witkin, *California Procedure* (4th ed. 1997) Trial, § 268

4 *California Trial Guide, Unit 91, Jury Deliberations and Rendition of Verdict, § 91.20* (Matthew Bender)

28 *California Forms of Pleading and Practice, Ch. 326, Jury Instructions, § 326.21* (Matthew Bender)

Publisher's Notes

This instruction covers issues presented in BAJI Nos. 1.00, 15.20, 15.21, and 15.22.

LexisNexis Matthew Bender Expert Practice Tip--Giving Instructions Before Closing Has

Advantages: Instructions can be given before or after closing argument. Many trial lawyers prefer to have the instructions read to the jury before closing argument. This enables the lawyer to use the instructions in the closing argument. Important instructions can also be displayed to the jury through enlargements or power point presentations if the instructions are given before the closing. Some judges, however, will always give the instructions at the end of trial. *By Ronald Oster and Rex Heeseman*

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Civil Procedure Trials Jury Trials Province of Court & Jury



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CHAPTER 50 California Judicial Council Concluding Instructions

5-50 California Forms of Jury Instruction CACI 5001

CACI 5001 Insurance

You must not consider whether any of the parties in this case has insurance. The presence or absence of insurance is totally irrelevant. You must decide this case based only on the law and the evidence.

New September 2003; Revised April 2004

If this instruction is used, the advisory committee recommends that it be read to the jury before reading instructions on the substantive law.

- *Evidence Code section 1155* provides: "Evidence that a person was, at the time a harm was suffered by another, insured wholly or partially against loss arising from liability for that harm is inadmissible to prove negligence or other wrongdoing."

- As a rule, evidence that the defendant has insurance is both irrelevant and prejudicial to the defendant. (*Neumann v. Bishop* (1976) 59 Cal.App.3d 451, 469 [130 Cal.Rptr. 786] .)

- Generally, evidence that the plaintiff was insured is not admissible under the "collateral source rule." (*Helfend v. Southern California Rapid Transit Dist.* (1970) 2 Cal.3d 1, 16-18 [84 Cal.Rptr. 173, 465 P.2d 61] ; *Acosta v. Southern California Rapid Transit Dist.* (1970) 2 Cal.3d 19, 25-26 [84 Cal.Rptr. 184, 465 P.2d 72] .)

- Evidence of insurance coverage may be admissible where it is coupled with other relevant evidence, provided that the probative value of the other evidence outweighs the prejudicial effect of the mention of insurance. (*Blake v. E. Thompson Petroleum Repair Co., Inc.* (1985) 170 Cal.App.3d 823, 831 [216

Cal.Rptr. 568] .)

■ An instruction to disregard whether a party has insurance may, in some cases, cure the effect of counsel's improper reference to insurance. (*Sally v. Pacific Gas & Electric Co. (1972) 23 Cal.App.3d 806, 814 [100 Cal.Rptr. 501] .)*

Secondary Sources

7 Witkin, California Procedure (4th ed. 1997) Trial, §§ 230-233

Jefferson, California Evidence Benchbook (3d ed. 1997) §§ 34.32-34.36

California Practice Guide: Civil Trials and Evidence, § 5:371

Publisher's Notes

This instruction covers issues presented in BAJI No. 1.04.

LexisNexis Matthew Bender Expert Practice Tip--Using CACI No. 5001: This instruction is usually not given unless the subject of insurance has already come up during the trial. There is no point in raising the subject of insurance for the first time and then telling the jury to disregard it. Most judges will be diligent in "keeping out" evidence related to insurance. *By Ronald Oster and Rex Heeseman*

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Evidence Relevance Liability Insurance



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CHAPTER 50 California Judicial Council Concluding Instructions

5-50 California Forms of Jury Instruction CACI 5002

CACI 5002 Evidence

Sworn testimony, documents, or anything else may be admitted into evidence. You must decide what the facts are in this case from the evidence you have seen or heard during the trial, including any exhibits that I admit into evidence. You may not consider as evidence anything that you saw or heard when court was not in session, even something done or said by one of the parties, attorneys, or witnesses.

What the attorneys say during the trial is not evidence. In their opening statements and closing arguments, the attorneys talk to you about the law and the evidence. What the lawyers say may help you understand the law and the evidence, but their statements and arguments are not evidence.

The attorneys' questions are not evidence. Only the witnesses' answers are evidence. You should not think that something is true just because an attorney's question suggested that it was true. [However, the attorneys for both sides have agreed that certain facts are true. This agreement is called a stipulation. No other proof is needed and you must accept those facts as true in this trial.]

Each side had the right to object to evidence offered by the other side. If I sustained an objection to a question, you must ignore the question. If the witness did not answer, you must not guess what he or she might have said or why I sustained the objection. If the witness already answered, you must ignore the answer.

[During the trial I granted a motion to strike testimony that you heard. You must totally disregard that testimony. You must treat it as though it did not exist.]

New September 2003; Revised April 2004, February 2007

The advisory committee recommends that this instruction be read to the jury before reading instructions

on the substantive law. For a similar instruction to be given before trial, see *CACI No. 106, Evidence*.

Include the bracketed language in the third paragraph if the parties have entered into any stipulations of fact.

Read the last bracketed paragraph if a motion to strike testimony was granted during the trial.

■ *Evidence Code section 140* defines "evidence" as "testimony, writings, material objects, or other things presented to the senses that are offered to prove the existence or nonexistence of a fact."

■ *Evidence Code section 312* provides:

Except as otherwise provided by law, where the trial is by jury:

(a) All questions of fact are to be decided by the jury.

(b) Subject to the control of the court, the jury is to determine the effect and value of the evidence addressed to it, including the credibility of witnesses and hearsay declarants.

■ *Evidence Code section 353* provides:

A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed by reason of the erroneous admission of evidence unless:

(a) There appears of record an objection to or a motion to exclude or to strike the evidence that was timely made and so stated as to make clear the specific ground of the objection or motion; and

(b) The court which passes upon the effect of the error or errors is of the opinion that the admitted evidence should have been excluded on the ground stated and that the error or errors complained of resulted in a miscarriage of justice.

■ A stipulation in proper form is binding on the parties if it is within the authority of the attorney. Properly stipulated facts may not be contradicted. (*Palmer v. City of Long Beach* (1948) 33 Cal.2d 134, 141-142 [199 P.2d 952] .)

■ Courts have held that "attempts to suggest matters of an evidentiary nature to a jury other than by the legitimate introduction into evidence is misconduct whether by questions on cross-examination, argument or other means." (*Smith v. Covell* (1980) 100 Cal.App.3d 947, 960 [161 Cal.Rptr. 377] .)

■ Courts have stated that "[t]he right to object on appeal to misconduct or improper argument, even when prejudicial, is generally waived in the absence of a proper objection and request the jury be admonished." (*Atkins v. Bisigier* (1971) 16 Cal.App.3d 414, 427 [94 Cal.Rptr. 49] ; *Horn v. Atchison, Topeka & Santa Fe Ry. Co.* (1964) 61 Cal.2d 602, 610 [39 Cal.Rptr. 721, 394 P.2d 561] .)

Secondary Sources

3 Witkin, California Evidence (4th ed. 1997) Trial

Publisher's Notes

This instruction covers issues presented in BAJI No. 0.50.

LexisNexis Matthew Bender Expert Practice Tip--Giving CACI No. 5002 Twice: This instruction is sometimes given at the beginning of the trial and repeated at the end. *By Ronald Oster*

In *Joyce v. Simi Valley Unified School Dist.* (2003) 110 Cal.App.4th 292, 305-306 [1 Cal.Rptr.3d 712], the plaintiff's attorney at trial remarked about an off-site incident in final argument. The trial court sustained an objection and directed the jury to ignore the remarks. The trial court instructed the jury that the statements of counsel were not evidence and to decide all questions of fact from the evidence received at trial and not from any other source. The admonishment cured any prejudice and a motion for a new trial was denied.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Evidence Procedural Considerations General Overview



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CHAPTER 50 California Judicial Council Concluding Instructions

5-50 California Forms of Jury Instruction CACI 5003

CACI 5003 Witnesses

A witness is a person who has knowledge related to this case. You will have to decide whether you believe each witness and how important each witness's testimony is to the case. You may believe all, part, or none of a witness's testimony.

In deciding whether to believe a witness's testimony, you may consider, among other factors, the following:

- (a) How well did the witness see, hear, or otherwise sense what he or she described in court?**
- (b) How well did the witness remember and describe what happened?**
- (c) How did the witness look, act, and speak while testifying?**
- (d) Did the witness have any reason to say something that was not true? Did the witness show any bias or prejudice? Did the witness have a personal relationship with any of the parties involved in the case? Does the witness have a personal stake in how this case is decided?**
- (e) What was the witness's attitude toward this case or about giving testimony?**

Sometimes a witness may say something that is not consistent with something else he or she said. Sometimes different witnesses will give different versions of what happened. People often forget things or make mistakes in what they remember. Also, two people may see the same event but remember it differently. You may consider these differences, but do not decide that testimony is untrue just because it differs from other testimony.

However, if you decide that a witness deliberately testified untruthfully about something important, you may choose not to believe anything that witness said. On the other hand, if you think the witness testified untruthfully

about some things but told the truth about others, you may accept the part you think is true and ignore the rest.

Do not make any decision simply because there were more witnesses on one side than on the other. If you believe it is true, the testimony of a single witness is enough to prove a fact.

You must not be biased in favor of or against any witness because of his or her disability, gender, race, religion, ethnicity, sexual orientation, age, national origin, [or] socioeconomic status[, or [*insert any other impermissible form of bias*]].

New September 2003; Revised April 2004, April 2007

This instruction may be given as either an introductory instruction before trial (see *CACI No. 107*) or as a concluding instruction.

The advisory committee recommends that this instruction be read to the jury before reading instructions on the substantive law.

In the last paragraph, the court may delete inapplicable categories of potential jury bias.

■ *Evidence Code section 312 provides:*

Except as otherwise provided by law, where the trial is by jury:

- (a) All questions of fact are to be decided by the jury.
- (b) Subject to the control of the court, the jury is to determine the effect and value of the evidence addressed to it, including the credibility of witnesses and hearsay declarants.

■ Considerations for evaluating the credibility of witnesses are contained in *Evidence Code section 780*:

Except as otherwise provided by statute, the court or jury may consider in determining the credibility of a witness any matter that has any tendency in reason to prove or disprove the truthfulness of his testimony at the hearing, including but not limited to any of the following:

- (a) His demeanor while testifying and the manner in which he testifies.
- (b) The character of his testimony.
- (c) The extent of his capacity to perceive, to recollect, or to communicate any matter about which he testifies.
- (d) The extent of his opportunity to perceive any matter about which he testifies.
- (e) His character for honesty or veracity or their opposites.
- (f) The existence or nonexistence of a bias, interest, or other motive.
- (g) A statement previously made by him that is consistent with his testimony at the hearing.

- (h) A statement made by him that is inconsistent with any part of his testimony at the hearing.
- (i) The existence or nonexistence of any fact testified to by him.
- (j) His attitude toward the action in which he testifies or toward the giving of testimony.
- (k) His admission of untruthfulness.

■ *Evidence Code section 411* provides that "[e]xcept where additional evidence is required by statute, the direct evidence of one witness who is entitled to full credit is sufficient proof of any fact." According to former *Code of Civil Procedure section 2061*, the jury should be instructed that "they are not bound to decide in conformity with the declarations of any number of witnesses, which do not produce conviction in their minds, against a less number or against a presumption or other evidence satisfying their minds."

■ The willfully false witness instruction was formerly codified at *Code of Civil Procedure section 2061*. This statute was repealed in 1965 to avoid giving undue emphasis to this rule compared to other common-law rules. Refusal to give an instruction on this point is not error: "It should certainly not be deemed of vital importance to tell the ordinary man of the world that he should distrust the statements of a witness whom he believes to be a liar." (*Wallace v. Pacific Electric Ry. Co. (1930) 105 Cal.App. 664, 671 [288 P. 834]* .)

■ Standard 10.20(a)(2) of the Standards for Judicial Administration provides: "In all courtroom proceedings, refrain from engaging in conduct and prohibit others from engaging in conduct that exhibits bias, including but not limited to bias based on disability, gender, race, religion, ethnicity, and sexual orientation, whether that bias is directed toward counsel, court personnel, witnesses, parties, jurors, or any other participants."

■ Canon 3(b)(5) of the Code of Judicial Ethics provides: "A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, engage in speech, gestures, or other conduct that would reasonably be perceived as (1) bias or prejudice, including but not limited to bias or prejudice based on race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status, or (2) sexual harassment." Canon 3(b)(6) requires the judge to impose these standards on attorneys also.

Secondary Sources

14 California Forms of Pleading and Practice, Ch. 160, *Corporations* (Matthew Bender)

5 California Points and Authorities, Ch. 52, *Corporations* (Matthew Bender)

Publisher's Notes

This instruction covers issues presented in BAJI No. 2.20.

LexisNexis Matthew Bender Expert Practice Tip--Keep Factors Handy: During the trial, the attorney should keep the list of factors handy and make notes and observations as to each witness. At the time of closing arguments, the attorney can then choose which witnesses to discuss with *CACI No. 5003* in mind. *By Dona Cohn-Payne*

LexisNexis Matthew Bender Expert Practice Tip--Witness Credibility: This is the standard instruction on witness credibility. If your case contains some inconsistencies in testimony or documents,

you may want to emphasize the statement in the instruction that inconsistencies are not uncommon. On the other hand, if there is evidence that your witness deliberately testified untruthfully, the impact on your case can be devastating, particularly if the witness is a party to the action. However, that scenario will aid you if the other side's witnesses have this problem. *By Ronald Oster and Rex Heeseman*

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Evidence Testimony General Overview



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CHAPTER 50 California Judicial Council Concluding Instructions

5-50 California Forms of Jury Instruction CACI 5004

CACI 5004 Service Provider for Juror With Disability

[Name of juror] has been assisted by [a/an] [insert type of service provider] to communicate and receive information. The [service provider] will be with you during your deliberations. You may not discuss the case with the [service provider] or in any way involve the [service provider] in your deliberations. The [service provider] is not a member of the jury and is not to participate in the deliberations in any way other than as necessary to provide the service to [name of juror].

New September 2003; Revised April 2004

If this instruction is used, the advisory committee recommends that it be read to the jury before reading instructions on the substantive law.

- *Code of Civil Procedure section 203(a)(6)* provides: "All persons are eligible and qualified to be prospective trial jurors, except the following: ... Persons who are not possessed of sufficient knowledge of the English language, provided that no person shall be deemed incompetent solely because of the loss of sight or hearing in any degree or other disability which impedes the person's ability to communicate or which impairs or interferes with the person's mobility."

- *Code of Civil Procedure section 224* provides:

- (a) If a party does not cause the removal by challenge of an individual juror who is deaf, hearing impaired, blind, visually impaired, or speech impaired and who requires auxiliary services to facilitate communication, the party shall (1) stipulate to the presence of a service provider in the jury room during jury deliberations, and (2) prepare and deliver to

the court proposed jury instructions to the service provider.

(b) As used in this section, "service provider" includes, but is not limited to, a person who is a sign language interpreter, oral interpreter, deaf-blind interpreter, reader, or speech interpreter. If auxiliary services are required during the course of jury deliberations, the court shall instruct the jury and the service provider that the service provider for the juror with a disability is not to participate in the jury's deliberations in any manner except to facilitate communication between the juror with a disability and other jurors.

(c) The court shall appoint a service provider whose services are needed by a juror with a disability to facilitate communication or participation. A sign language interpreter, oral interpreter, or deaf-blind interpreter appointed pursuant to this section shall be a qualified interpreter, as defined in *subdivision (f) of Section 754 of the Evidence Code*. Service providers appointed by the court under this subdivision shall be compensated in the same manner as provided in *subdivision (i) of Section 754 of the Evidence Code*.

Secondary Sources

7 Witkin, *California Procedure* (4th ed. 1997) Trial, §§ 331, 340

27 *California Forms of Pleading and Practice*, Ch. 322, *Juries and Jury Selection*, § 322.32 (Matthew Bender)

Publisher's Notes

This instruction covers issues presented in BAJI No. 1.25.

LexisNexis Matthew Bender Expert Practice Tip--Use of Service Provider Is Rare: If a prospective juror cannot participate without the assistance of a third party, the juror may be excused on the ground of hardship (if requested by the prospective juror) or a party may exercise a peremptory challenge. Accordingly, the situation addressed by this instruction rarely occurs. *By Ronald Oster*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsJury InstructionsStandard Instructions



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CHAPTER 50 California Judicial Council Concluding Instructions

5-50 California Forms of Jury Instruction CACI 5005

CACI 5005 Multiple Parties

[There are [*number*] plaintiffs in this trial. You should decide the case of each plaintiff separately as if it were a separate lawsuit. Each plaintiff is entitled to separate consideration of his or her own claim(s).]

[There are [*number*] defendants in this trial. You should decide the case against each defendant separately as if it were a separate lawsuit. Each defendant is entitled to separate consideration of his or her own defenses.]

[Different aspects of this case involve different parties (plaintiffs and defendants). Each instruction will identify the parties to whom it applies. Pay particular attention to the parties named in each instruction.]

[or]

[Unless I tell you otherwise, all instructions apply to each plaintiff and defendant.]

New April 2004; Revised April 2009

Directions for Use

If this instruction is used, the advisory committee recommends that it be read to the jury before reading instructions on the substantive law.

The CACI instructions require the use of party names rather than party-status words like "plaintiff" and "defendant." In multiparty cases, it is important to name only the parties in each instruction to whom the instruction applies. For example, an instruction on loss of consortium (see *CACI No. 3920*) will not apply to all plaintiffs. Instructions on vicarious liability (see *CACI No. 3700 et seq.*) will not apply to all defendants. Unless all or nearly all of the instructions will apply to all of the parties, give the first option

for the last paragraph.

Sources and Authority

■ "We realize, of course, that multiple defendants are involved and that each defendant is entitled to instructions on, and separate consideration of, every defense available and applicable to it. The purpose of this rule is to insure that the jury will distinguish and evaluate the separate facts relevant to each defendant." (*Campbell v. Southern Pacific Co.* (1978) 22 Cal.3d 51, 58 [148 Cal.Rptr. 596, 583 P.2d 121] , internal citations omitted.)

Secondary Sources

4 Witkin, California Procedure (4th ed. 1997) Pleading, § 67 et seq.

27 *California Forms of Pleading and Practice*, Ch. 318, *Judgments*, § 318.15 (Matthew Bender)

1 *Matthew Bender Practice Guide: California Pretrial Civil Procedure*, Ch. 5, *Parties*, 5.30 et seq.

Publisher's Notes

This instruction covers issues presented in BAJI Nos. 1.22, 15.00, and 15.02.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions



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CHAPTER 50 California Judicial Council Concluding Instructions

5-50 California Forms of Jury Instruction CACI 5006

CACI 5006 Nonperson Party

A [corporation/partnership/city/county/[other entity]], [name of entity], is a party in this lawsuit. [Name of entity] is entitled to the same fair and impartial treatment that you would give to an individual. You must decide this case with the same fairness that you would use if you were deciding the case between individuals.

When I use words like "person" or "he" or "she" in these instructions to refer to a party, those instructions also apply to [name of entity].

New April 2004

This instruction should be given if one of the parties is an entity. Select the type of entity and insert the name of the entity where indicated in the instruction. If this instruction is used, the advisory committee recommends that it be read to the jury before reading instructions on the substantive law.

- *Corporations Code section 207* provides that a corporation "shall have all of the powers of a natural person in carrying out its business activities." *Civil Code section 14* defines the word "person," for purposes of that code, to include corporations as well as natural persons.

- As a general rule, a corporation is considered to be a legal entity that has an existence separate from that of its shareholders. (*Erkenbrecher v. Grant* (1921) 187 Cal. 7, 9 [200 P. 641] .)

- "In general, any person or entity has capacity to sue or defend a civil action in the California courts. This includes artificial 'persons' such as corporations, partnerships and associations." (*American Alternative Energy Partners II, 1985 v. Windridge, Inc.* (1996) 42 Cal.App.4th 551, 559 [49 Cal.Rptr.2d

686] , internal citations omitted.)

Secondary Sources

9 Witkin, Summary of California Law (10th ed. 2005) Corporations, § 1

Publisher's Notes

This instruction covers issues presented in BAJI Nos. 1.03, 1.10, and 11.50.

LexisNexis Matthew Bender Expert Practice Tip--Using CACI No. 5006: This can be an important instruction if you are representing a corporation. However, remember that a corporation should be personalized, if at all possible. *By Ronald Oster and Rex Heeseman*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsJury InstructionsStandard Instructions



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CHAPTER 50 California Judicial Council Concluding Instructions

5-50 California Forms of Jury Instruction CACI 5007

CACI 5007 Removal of Claims or Parties

[[*Name of plaintiff*]'s claim for [*insert claim*] is no longer an issue in this case.]

[[*Name of party*] is no longer a party to this case.]

Do not speculate as to why this [claim/person] is no longer involved in this case. You should not consider this during your deliberations.

New April 2004

This instruction may be read as appropriate. If this instruction is used, the advisory committee recommends that it be read to the jury before reading instructions on the substantive law.

Publisher's Notes

This instruction covers issues presented in BAJI No. 1.24.

LexisNexis Matthew Bender Expert Practice Tip--Using CACI No. 5007: This could be an important instruction if a party is no longer in the case, such as a party who has settled or a party who has prevailed on a motion for directed verdict. Be careful of the "empty chair" argument. *By Ronald Oster and Rex Heeseman*

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions



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CHAPTER 50 California Judicial Council Concluding Instructions

5-50 California Forms of Jury Instruction CACI 5008

CACI 5008 Duty to Abide by Translation Provided in Court

Some testimony was given in [insert language other than English]. An interpreter provided translation for you at the time that the testimony was given. You must rely solely on the translation provided by the interpreter, even if you understood the language spoken by the witness. Do not retranslate any testimony for other jurors.

New April 2004

If this instruction is used, the advisory committee recommends that it be read to the jury before reading instructions on the substantive law.

- It is misconduct for a juror to retranslate for other jurors testimony that has been translated by the court-appointed interpreter. (*People v. Cabrera* (1991) 230 Cal.App.3d 300, 303 [281 Cal.Rptr. 238] .)

- "It is well-settled a juror may not conduct an independent investigation into the facts of the case or gather evidence from outside sources and bring it into the jury room. It is also misconduct for a juror to inject his or her own expertise into the jury's deliberation." (*People v. Cabrera*, *supra*, 230 Cal.App.3d at p. 303 .)

- "If [the juror] believed the court interpreter was translating incorrectly, the proper action would have been to call the matter to the trial court's attention, not take it upon herself to provide her fellow jurors with the 'correct' translation." (*People v. Cabrera*, *supra*, 230 Cal.App.3d at p. 304 .)

Secondary Sources

1 *California Trial Guide, Unit 3, Other Non-Evidentiary Motions*, § 3.32 (Matthew Bender)

1A *California Trial Guide, Unit 20, Procedural Rules for Presentation of Evidence, § 20.13* (Matthew Bender)

4 *California Trial Guide, Unit 91, Jury Deliberations and Rendition of Verdict, §§ 91.10, 91.12* (Matthew Bender)

Publisher's Notes

There is no BAJI instruction on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Evidence Documentary
Evidence Writings Transcripts & Translations Translations



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CHAPTER 50 California Judicial Council Concluding Instructions

5-50 California Forms of Jury Instruction CACI 5009

CACI 5009 Predeliberation Instructions

When you go to the jury room, the first thing you should do is choose a presiding juror. The presiding juror should see to it that your discussions are orderly and that everyone has a fair chance to be heard.

It is your duty to talk with one another in the jury room and to consider the views of all the jurors. Each of you must decide the case for yourself, but only after you have considered the evidence with the other members of the jury. Feel free to change your mind if you are convinced that your position should be different. You should all try to agree. But do not give up your honest beliefs just because the others think differently.

Please do not state your opinions too strongly at the beginning of your deliberations or immediately announce how you plan to vote as it may interfere with an open discussion. Keep an open mind so that you and your fellow jurors can easily share ideas about the case.

You should use your common sense, but do not use or consider any special training or unique personal experience that any of you have in matters involved in this case. Your training or experience is not a part of the evidence received in this case.

Sometimes jurors disagree or have questions about the evidence or about what the witnesses said in their testimony. If that happens, you may ask to have testimony read back to you [or ask to see any exhibits admitted into evidence that have not already been provided to you]. Also, jurors may need further explanation about the laws that apply to the case. If this happens during your discussions, write down your questions and give them to the [clerk/bailiff/court attendant]. I will talk with the attorneys before I answer so it may take some time. You should continue your deliberations while you wait for my answer. I will do my best to answer them. When you write me a note, do not tell me how you voted on an issue until I ask for this information in open court.

[At least nine jurors must agree on a verdict. When you have finished filling out the form, your presiding juror

must write the date and sign it at the bottom and then notify the [bailiff/clerk/court attendant] that you are ready to present your verdict in the courtroom.]

Your decision must be based on your personal evaluation of the evidence presented in the case. Each of you may be asked in open court how you voted on each question.

While I know you would not do this, I am required to advise you that you must not base your decision on chance, such as a flip of a coin. If you decide to award damages, you may not agree in advance to simply add up the amounts each juror thinks is right and then make the average your verdict.

You may take breaks, but do not discuss this case with anyone, including each other, until all of you are back in the jury room.

New September 2003; Revised April 2004, October 2004, February 2007, December 2009

Directions for Use

The advisory committee recommends that this instruction be read to the jury after closing arguments and after reading instructions on the substantive law.

Read the sixth paragraph if a general verdict form is to be used. If a special verdict will be used, give *CACI No. 5012, Introduction to Special Verdict Form*.

Judges may want to provide each juror with a copy of the verdict form so that the jurors can use it to keep track of how they vote. Jurors can be instructed that this copy is for their personal use only and that the presiding juror will be given the official verdict form to record the jury's decision. Judges may also want to advise jurors that they may be polled in open court regarding their individual verdicts.

Delete the reference to reading back testimony if the proceedings are not being recorded.

Sources and Authority

■ *Code of Civil Procedure section 613* provides, in part: "When the case is finally submitted to the jury, they may decide in court or retire for deliberation; if they retire, they must be kept together, in some convenient place, under charge of an officer, until at least three-fourths of them agree upon a verdict or are discharged by the court."

■ *Code of Civil Procedure section 614* provides: "After the jury have retired for deliberation, if there be a disagreement between them as to any part of the testimony, or if they desire to be informed of any point of law arising in the cause, they may require the officer to conduct them into court. Upon their being brought into court, the information required must be given in the presence of, or after notice to, the parties or counsel."

■ *Code of Civil Procedure section 618* and *article I, section 16, of the California Constitution* provide that three-fourths of the jurors must agree to a verdict in a civil case.

■ The prohibition on chance or quotient verdict is stated in *Code of Civil Procedure section 657*, which provides that a verdict may be vacated and a new trial ordered "whenever any one or more of the jurors

have been induced to assent to any general or special verdict, or to a finding on any question submitted to them by the court, by a resort to the determination of chance." (See also *Chronakis v. Windsor* (1993) 14 Cal.App.4th 1058, 1064-1065 [18 Cal.Rptr.2d 106] .)

■ Jurors should be encouraged to deliberate on the case. (*Vomaska v. City of San Diego* (1997) 55 Cal.App.4th 905, 911 [64 Cal.Rptr.2d 492] .)

■ The jurors may properly be advised of the duty to hear and consider each other's arguments with open minds, rather than preventing agreement by stubbornly sticking to their first impressions. (*Cook v. Los Angeles Ry. Corp.* (1939) 13 Cal.2d 591, 594 [91 P.2d 118] .)

■ "The trial court properly denied the motion for new trial on the ground that [the plaintiff] did not demonstrate the jury reached a chance or quotient verdict. The jury agreed on a high and a low figure and, before calculating an average, they further agreed to adjust downward the high figure and to adjust upward the low figure. There is no evidence that this average was adopted without further consideration or that the jury agreed at any time to adopt an average and abide by the agreement without further discussion or deliberation." (*Lara v. Nevitt* (2004) 123 Cal.App.4th 454, 462-463 [19 Cal.Rptr.3d 865] .)

Secondary Sources

7 Witkin, California Procedure (4th ed. 1997) Trial, §§ 330, 336

4 *California Trial Guide, Unit 91, Jury Deliberations and Rendition of Verdict*, § 91.01 (Matthew Bender)

28 *California Forms of Pleading and Practice*, Ch. 326, *Jury Instructions*, § 326.32, Ch. 326A, *Jury Verdicts*, § 326A.14 (Matthew Bender)

Publisher's Notes

This instruction covers issues presented in BAJI Nos. 15.30, 15.31, 15.33, 15.40, 15.50, and 15.51.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Deliberations Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions



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California Forms of Jury Instruction

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CHAPTER 50 California Judicial Council Concluding Instructions

5-50 California Forms of Jury Instruction CACI 5010

CACI 5010 Taking Notes During the Trial

If you have taken notes during the trial, you may take your notebooks with you into the jury room.

You may use your notes only to help you remember what happened during the trial. Your independent recollection of the evidence should govern your verdict. You should not allow yourself to be influenced by the notes of other jurors if those notes differ from what you remember.

At the end of the trial, your notes will be [collected and destroyed/collected and retained by the court but not as a part of the case record/ [specify other disposition]].

New April 2004; Revised February 2005, April 2007, December 2007

Directions for Use

If *CACI No. 102, Taking Notes During the Trial*, is given as a pretrial instruction, the court may also give this instruction as a concluding instruction.

In the last paragraph, specify the court's disposition of the notes after trial. No statute or rule of court requires any particular disposition.

Sources and Authority

- *Rule 2.1031 of the California Rules of Court* provides: "Jurors must be permitted to take written notes in all civil and criminal trials. At the beginning of a trial, a trial judge must inform jurors that they may take written notes during the trial. The court must provide materials suitable for this purpose."

■ "Because of [the risks of note-taking], a number of courts have held that a cautionary instruction is required. For example, [one court] held that the instruction should include 'an explanation ... that [jurors] should not permit their note-taking to distract them from the ongoing proceedings; that their notes are only an aid to their memory and should not take precedence over their independent recollection; that those jurors who do not take notes should rely on their independent recollection of the evidence and not be influenced by the fact that another juror has taken notes; and that the notes are for the note taker's own personal use in refreshing his recollection of the evidence. The jury must be reminded that should any discrepancy exist between their recollection of the evidence and their notes, they should request that the record of the proceedings be read back and that it is the transcript that must prevail over their notes.' " (*People v. Whitt* (1984) 36 Cal.3d 724, 747 [205 Cal.Rptr. 810, 685 P.2d 1161] , internal citations and footnote omitted.)

■ "In *People v. Whitt*, we recognized the risks inherent in juror note-taking and observed that it is 'the better practice' for courts to give, sua sponte, a cautionary instruction on note-taking. Although the ideal instruction would advert specifically to all the dangers of note-taking, we found the less complete instruction given in *Whitt* to be adequate: 'Be careful as to the amount of notes that you take. I'd rather that you observe the witness, observe the demeanor of that witness, listen to how that person testifies rather than taking copious notes [I]f you do not recall exactly as to what a witness might have said or you disagree, for instance, during the deliberation [sic] as to what a witness may have said, we can reread that transcript back ' " (*People v. Silbertson* (1985) 41 Cal.3d 296, 303 [221 Cal.Rptr. 152, 709 P.2d 1321] , internal citations and footnote omitted.)

Secondary Sources

Deskbook on the Management of Complex Civil Litigation, Ch. 2, *Case Management*, § 2.81[5] (Matthew Bender)

28 California Forms of Pleading and Practice, Ch. 326, *Jury Instructions*, § 326.32 (Matthew Bender)

Publisher's Notes

This instruction covers issues presented in BAJI No. 0.50.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsStandard InstructionsCivil ProcedureTrialsJury TrialsNotes



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CHAPTER 50 California Judicial Council Concluding Instructions

5-50 California Forms of Jury Instruction CACI 5011

CACI 5011 Reading Back of Trial Testimony in Jury Room

You may request in writing that trial testimony be read to you. I will have the court reporter read the testimony to you. You may request that all or a part of a witness's testimony be read.

Your request should be as specific as possible. It will be helpful if you can state:

- 1. The name of the witness;**
- 2. The subject of the testimony you would like to have read; and**
- 3. The name of the attorney or attorneys asking the questions when the testimony was given.**

The court reporter is not permitted to talk with you when she or he is reading the testimony you have requested.

While the court reporter is reading the testimony, you may not deliberate or discuss the case.

You may not ask the court reporter to read testimony that was not specifically mentioned in a written request. If your notes differ from the testimony, you must accept the court reporter's record as accurate.

New April 2004; Revised February 2005

The read-back should not be conducted in the jury room unless the attorneys stipulate to that location.

● *Code of Civil Procedure section 614* provides: "After the jury have retired for deliberation, if there

be a disagreement between them as to any part of the testimony, or if they desire to be informed of any point of law arising in the cause, they may require the officer to conduct them into court. Upon their being brought into court, the information required must be given in the presence of, or after notice to, the parties or counsel."

■ "Section 614 of the Code of Civil Procedure provides that if there is a disagreement among jurors during their deliberations as to any part of the testimony which they have heard they may return into court and secure from the court in the presence of counsel for all parties the desired information as to the record. If they ask for testimony relating to a specified subject, they are entitled to hear all of it. However, it is equally clear that the trial judge does not have to order read any part of the record which is not thus requested by the jury foreman." (*McGuire v. W. A. Thompson Distributing Co.* (1963) 215 Cal.App.2d 356, 365-366 [30 Cal.Rptr. 113] , internal citations omitted.)

■ "When the jury requests a repetition of certain testimony, the trial court is not required to furnish the jury with testimony not requested." (*Allen v. Toledo* (1980) 109 Cal.App.3d 415, 422 [167 Cal.Rptr. 270] , internal citations omitted.)

■ "Appellants assign as error the court's refusal to comply with their counsel's request for testimony reading. It was not. It is not the party to whom the law gives the right to *select* testimony to be read. And the law does not make the party or his attorney the arbiter to determine the jury's wishes." (*Asplund v. Driskell* (1964) 225 Cal.App.2d 705, 714 [37 Cal.Rptr. 652] , original italics.)

Secondary Sources

28 *California Forms of Pleading and Practice*, Ch. 326, *Jury Instructions*, § 326.32 (Matthew Bender)

4 *California Trial Guide*, Unit 91, *Jury Deliberations and Rendition of Verdict*, § 91.01 (Matthew Bender)

Publisher's Notes

This instruction covers issues presented in BAJI No. 15.53.2.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury DeliberationsCivil ProcedureTrialsJury TrialsJury InstructionsStandard Instructions



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CHAPTER 50 California Judicial Council Concluding Instructions

5-50 California Forms of Jury Instruction CACI 5012

CACI 5012 Introduction to Special Verdict Form

I will give you [a] verdict form[s] with questions you must answer. I have already instructed you on the law that you are to use in answering these questions. You must follow my instructions and the form[s] carefully. You must consider each question separately. Although you may discuss the evidence and the issues to be decided in any order, you must answer the questions on the verdict form[s] in the order they appear. After you answer a question, the form tells you what to do next. All 12 of you must deliberate on and answer each question. At least 9 of you must agree on an answer before all of you can move on to the next question. However, the same 9 or more people do not have to agree on each answer.

When you have finished filling out the form[s], your presiding juror must write the date and sign it at the bottom [of the last page] and then notify the [bailiff/clerk/court attendant] that you are ready to present your verdict in the courtroom.

New September 2003; Revised April 2004, October 2008, December 2009

Directions for Use

If this instruction is read, do not read the sixth paragraph of *CACI No. 5009, Predeliberation Instructions*.

Sources and Authority

- *Code of Civil Procedure* section 624 provides: "The verdict of a jury is either general or special. A general verdict is that by which they pronounce generally upon all or any of the issues, either in favor of the plaintiff or defendant; a special verdict is that by which the jury find the facts only, leaving the

judgment to the Court. The special verdict must present the conclusions of fact as established by the evidence, and not the evidence to prove them; and those conclusions of fact must be so presented as that nothing shall remain to the Court but to draw from them conclusions of law."

■ *Code of Civil Procedure section 625* provides: "In all cases the court may direct the jury to find a special verdict in writing, upon all, or any of the issues, and in all cases may instruct them, if they render a general verdict, to find upon particular questions of fact, to be stated in writing, and may direct a written finding thereon. In all cases in which the issue of punitive damages is presented to the jury the court shall direct the jury to find a special verdict in writing separating punitive damages from compensatory damages. The special verdict or finding must be filed with the clerk and entered upon the minutes. Where a special finding of facts is inconsistent with the general verdict, the former controls the latter, and the court must give judgment accordingly."

■ "A special verdict presents to the jury each ultimate fact in the case, so that 'nothing shall remain to the Court but to draw from them conclusions of law.' This procedure presents certain problems: 'The requirement that the jury must resolve every controverted issue is one of the recognized pitfalls of special verdicts. '[T]he possibility of a defective or incomplete special verdict, or possibly no verdict at all, is much greater than with a general verdict that is tested by special findings ... ' ' ' With a special verdict, we do not imply findings on all issues in favor of the prevailing party, as with a general verdict. The verdict's correctness must be analyzed as a matter of law." (*Trujillo v. North County Transit Dist.* (1998) 63 Cal.App.4th 280, 285 [73 Cal.Rptr.2d 596] , internal citations omitted.)

■ "When a jury is composed of 12 persons, it is sufficient if *any* nine jurors arrive at each special verdict, regardless of the jurors' votes on other special verdict questions." (*Keener v. Jeld-Wen, Inc.* (2009) 46 Cal.4th 247, 255 [92 Cal.Rptr.3d 862, 206 P.3d 403] , original italics.)

■ "Appellate courts differ concerning the use of special verdicts. In one case the court said, 'we should utilize opportunities to force counsel into requesting special verdicts.' In contrast, a more recent decision included the negative view: 'Toward this end we advise that special findings be requested of juries only when there is a compelling need to do so. Absent strong reason to the contrary their use should be discouraged.' Obviously, it is easier to tell after the fact, rather than before, whether the special verdict is helpful in disclosing the jury conclusions leading to the end result." (*All-West Design, Inc. v. Boozer* (1986) 183 Cal.App.3d 1212, 1221 [228 Cal.Rptr. 736] , internal citations omitted.)

■ "[W]e begin with the requirement that at least nine of twelve jurors agree that each element of a cause of action has been proved by a preponderance of the evidence. The elements of a cause of action constitute the essential or ultimate facts in a civil case comparable to the elements of a single, discrete criminal offense in a criminal case. Analogizing a civil 'cause of action' to a single, discrete criminal offense, and applying the criminal law jury agreement principles to civil law, we conclude that jurors need not agree from among a number of alternative acts which act is proved, so long as the jurors agree that each element of the cause of action is proved." (*Stoner v. Williams* (1996) 46 Cal.App.4th 986, 1002 [54 Cal.Rptr.2d 243] , footnote omitted.)

■ "In civil cases in which there exist multiple causes of action for which multiple or alternative acts could support elements of more than one cause of action, possible jury confusion could result as to whether a specific cause of action is proved. In those cases, ... we presume that jury instructions may be appropriate to inform the jury that it must agree on specific elements of each specific cause of action. Yet, this still does not require that the jurors agree on exactly how each particular element of a particular cause of action is proved." (*Stoner, supra*, 46 Cal.App.4th at p. 1002 .)

■ "[A] juror who dissented from a special verdict finding negligence should not be disqualified from fully participating in the jury's further deliberations, including the determination of proximate cause. The jury is to determine all questions submitted to it, and when the jury is composed of twelve persons, each should participate as to each verdict submitted to it. To hold that a juror may be disqualified by a special verdict on negligence from participation in the next special verdict would deny the parties of 'the right to a jury of 12 persons deliberating on all issues.' Permitting any nine jurors to arrive at each special verdict best serves the purpose of less-than-unanimous verdicts, overcoming minor disagreements and avoiding costly mistrials. Once nine jurors have found a party negligent, dissenting jurors can accept the finding and participate in determining proximate cause just as they may participate in apportioning liability, and we may not assume that the dissenting jurors will violate their oaths to deliberate honestly and conscientiously on the proximate cause issue." (*Resch v. Volkswagen of America, Inc.* (1984) 36 Cal.3d 676, 682 [205 Cal.Rptr. 827, 685 P.2d 1178] , internal citations omitted.)

Secondary Sources

7 Witkin, *California Procedure* (4th ed. 1997) Trial, §§ 352-355

4 *California Trial Guide, Unit 91, Jury Deliberations and Rendition of Verdict*, § 91.21 (Matthew Bender)

27 *California Forms of Pleading and Practice, Ch. 318, Judgments*, § 318.49 (Matthew Bender)

28 *California Forms of Pleading and Practice, Ch. 326A, Jury Verdicts*, § 326A.11 *et seq.* (Matthew Bender)

1 *Matthew Bender Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 18, Jury Verdicts*, 18.11 *et seq.*

Publisher's Notes

This instruction covers issues presented in BAJI Nos. 15.51 and 15.52.

LexisNexis Matthew Bender Expert Practice Tip--Pay Attention to Potential Inconsistencies in Special Verdict Form: If a special verdict form is used, counsel should give special attention to the possibility of inconsistencies. Many times counsel simply assume that the jury will answer the special verdict form in the manner requested by one side or the other. However, a jury may come up with its own unique combination of answers that produces an inconsistency. If the inconsistency cannot be reconciled, the verdict can be set aside. Accordingly, counsel should examine the special verdict form with an eye to potential inconsistencies. Do not underestimate the potential confusion. *By Ronald Oster and Rex Heeseman*

LexisNexis Matthew Bender Expert Practice Tip--Use Large Illustration of Special Verdict Form: Try to use a blown-up version of the special verdict form during your closing argument and address each question with the jury at that time. When it comes time to deliberate, the jury will be more at ease with the verdict form since they have already seen it and you will have given them a clear and concise idea of what your client is requesting. *By Dona Cohn-Payne*

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Civil Procedure Trials Jury Trials Verdicts Special Verdicts



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CHAPTER 50 California Judicial Council Concluding Instructions

5-50 California Forms of Jury Instruction CACI 5013

CACI 5013 Deadlocked Jury Admonition

You should reach a verdict if you reasonably can. You have spent time trying to reach a verdict and this case is important to the parties.

Please carefully consider the opinions of all the jurors, including those with whom you disagree. Keep an open mind and feel free to change your opinion if you become convinced that it is wrong.

You should not, however, surrender your beliefs concerning the truth and the weight of the evidence. Each of you must decide the case for yourself and not merely go along with the conclusions of your fellow jurors.

New September 2003; Revised April 2004

- *Rule 2.1036 of the California Rules of Court provides:*

(a) Determination

After a jury reports that it has reached an impasse in its deliberations, the trial judge may, in the presence of counsel, advise the jury of its duty to decide the case based on the evidence while keeping an open mind and talking about the evidence with each other. The judge should ask the jury if it has specific concerns which, if resolved, might assist the jury in reaching a verdict.

(b) Possible further action

If the trial judge determines that further action might assist the jury in reaching a

verdict, the judge may:

- (1) Give additional instructions;
- (2) Clarify previous instructions;
- (3) Permit attorneys to make additional closing arguments; or
- (4) Employ any combination of these measures.

■ "The court told the jury they should reach a verdict if they reasonably could; they should not surrender their conscious convictions of the truth and the weight of the evidence; each juror must decide the case for himself and not merely acquiesce in the conclusion of his fellows; the verdict should represent the opinion of each individual juror; and in reaching a verdict each juror should not violate his individual judgment and conscience. These remarks clearly outweighed any offensive portions of the charge. The court did not err in giving the challenged instruction." (*Inouye v. Pacific Southwest Airlines* (1981) 126 Cal.App.3d 648, 652 [179 Cal.Rptr. 13] .)

■ "A trial court may properly advise a jury of the importance of arriving at a verdict and of the duty of individual jurors to hear and consider each other's arguments with open minds, rather than to prevent agreement by obstinate adherence to first impressions. But, as the exclusive right to agree or not to agree rests with the jury, the judge may not tell them that they must agree nor may he harry their deliberations by coercive threats or disparaging remarks." (*Cook v. Los Angeles Ry. Corp.* (1939) 13 Cal.2d 591, 594 [91 P.2d 118] , internal citations omitted.)

■ "Only when the instruction has coerced the jurors into surrendering their conscientious convictions in order to reach agreement should the verdict be overturned." (*Inouye v. Pacific Southwest Airlines, supra*, 126 Cal.App.3d at p. 651 .)

■ "The instruction says if the jury did not reach a verdict, the case would have to be retried. It also says the jurors should listen with deference to the arguments and distrust their own judgment if they find a large majority taking a different view of the case. In a criminal case the mere presence of these remarks in a jury instruction is error. However, civil cases are subject to different considerations; the special protections given criminal defendants are absent." (*Inouye v. Pacific Southwest Airlines, supra*, 126 Cal.App.3d at p. 651 , internal citation omitted.)

Publisher's Notes

This instruction covers issues presented in BAJI No. 15.60.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Deliberations Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions



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CHAPTER 50 California Judicial Council Concluding Instructions

5-50 California Forms of Jury Instruction CACI 5014

CACI 5014 Substitution of Alternate Juror

One of your fellow jurors has been excused and an alternate juror has been selected to take [his/her] place. The alternate juror must be given the opportunity to participate fully in your deliberations. Therefore, you must set aside and disregard all past deliberations and begin your deliberations all over again.

New September 2003; Revised April 2004

■ "Deliberations provide the jury with the opportunity to review the evidence in light of the perception and memory of each member. Equally important in shaping a member's viewpoint are the personal reactions and interactions as any individual juror attempts to persuade others to accept his or her viewpoint. The result is a balance easily upset if a new juror enters the decision-making process after the 11 others have commenced deliberations." (*People v. Collins* (1976) 17 Cal.3d 687, 693 [131 Cal.Rptr. 782, 552 P.2d 742] .)

■ "We agree with plaintiff that the principles set forth in *Collins* apply to civil as well as criminal cases. The right to a jury trial in civil cases is also guaranteed by *article I, section 16 of the California Constitution*, and the provisions of the statute governing the substitution of jurors in civil cases are the same as the ones governing criminal cases. The same considerations require that each juror engage in all of the jury's deliberations in both criminal and civil cases. The requirement that at least nine persons reach a verdict is not met unless those nine reach their consensus through deliberations which are the common experience of all of them. Accordingly, we construe section 605 [now 234] of the Code of Civil Procedure to require that the court instruct the jury to disregard all past deliberations and begin deliberating anew when an alternate juror is substituted after jury deliberations have begun." (*Griesel v. Dart Industries, Inc.* (1979) 23 Cal.3d 578, 584-585 [153 Cal.Rptr. 213, 591 P.2d 503] , overruled on

other grounds in *Privette v. Superior Court* (1993) 5 Cal.4th 689, 702, fn. 4 [21 Cal.Rptr.2d 72, 854 P.2d 721] , internal citations and footnote omitted.)

Secondary Sources

7 Witkin, California Procedure (4th ed. 1997) Trial, § 160

Publisher's Notes

This instruction replaces BAJI No. 15.56.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJurorsRemovalsCivil ProcedureTrialsJury TrialsJury InstructionsStandard Instructions



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CHAPTER 50 California Judicial Council Concluding Instructions

5-50 California Forms of Jury Instruction CACI 5015

CACI 5015 Instruction to Alternate Jurors

As alternate jurors, you are bound by the same rules that govern the conduct of the jurors who are sitting on the panel. You should not form or express any opinion about this case until after you have been substituted in for one of the deliberating jurors on the panel or until the jury has been discharged.

New February 2005

If an alternate juror is substituted, see *CACI No. 5014, Substitution of Alternate Juror*.

- "Alternate jurors are members of the jury panel which tries the case. They are selected at the same time as the regular jurors. They take the same oath and are subject to the same qualifications as the regular jurors. Alternate jurors hear the same evidence and are subject to the same admonitions as the regular jurors and, unless excused by the court, are available to participate as regular jurors." (*Rivera v. Sassoon* (1995) 39 Cal.App.4th 1045, 1048 [46 Cal.Rptr.2d 144] , internal citations omitted.)

- *Code of Civil Procedure* section 234 provides:

Whenever, in the opinion of a judge of a superior court about to try a civil or criminal action or proceeding, the trial is likely to be a protracted one, or upon stipulation of the parties, the court may cause an entry to that effect to be made in the minutes of the court and thereupon, immediately after the jury is impaneled and sworn, the court may direct the calling of one or more additional jurors, in its discretion, to be known as "alternate jurors."

These alternate jurors shall be drawn from the same source, and in the same manner,

and have the same qualifications, as the jurors already sworn, and shall be subject to the same examination and challenges. However, each side, or each defendant, as provided in Section 231, shall be entitled to as many peremptory challenges to the alternate jurors as there are alternate jurors called.

The alternate jurors shall be seated so as to have equal power and facilities for seeing and hearing the proceedings in the case, and shall take the same oath as the jurors already selected, and shall, unless excused by the court, attend at all times upon the trial of the cause in company with the other jurors, but shall not participate in deliberation unless ordered by the court, and for a failure to do so are liable to be punished for contempt.

They shall obey the orders of and be bound by the admonition of the court, upon each adjournment of the court; but if the regular jurors are ordered to be kept in the custody of the sheriff or marshal during the trial of the cause, the alternate jurors shall also be kept in confinement with the other jurors; and upon final submission of the case to the jury, the alternate jurors shall be kept in the custody of the sheriff or marshal who shall not suffer any communication to be made to them except by order of the court, and shall not be discharged until the original jurors are discharged, except as provided in this section.

If at any time, whether before or after the final submission of the case to the jury, a juror dies or becomes ill, or upon other good cause shown to the court is found to be unable to perform his or her duty, or if a juror requests a discharge and good cause appears therefor, the court may order the juror to be discharged and draw the name of an alternate, who shall then take his or her place in the jury box, and be subject to the same rules and regulations as though he or she has been selected as one of the original jurors.

All laws relative to fees, expenses, and mileage or transportation of jurors shall be applicable to alternate jurors, except that in civil cases the sums for fees and mileage or transportation need not be deposited until the judge directs alternate jurors to be impaneled.

Secondary Sources

27 *California Forms of Pleading and Practice*, Ch. 322, *Juries and Jury Selection*, §§ 322.44, 322.52, 322.101 (Matthew Bender)

1 *California Trial Guide*, Unit 10, *Voir Dire Examinations* (Matthew Bender)

Publisher's Notes

This instruction covers issues presented in BAJI No. 0.50.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jurors General Overview Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions



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CHAPTER 50 California Judicial Council Concluding Instructions

5-50 California Forms of Jury Instruction CACI 5016

CACI 5016 Judge's Commenting on Evidence

In this case, I have exercised my right to comment on the evidence. However, you the jury are the exclusive judges of all questions of fact and of the credibility of the witnesses. You are free to completely ignore my comments on the evidence and to reach whatever verdict you believe to be correct, even if it is contrary to any or all of those comments.

New April 2007

Read this instruction before deliberations if the judge has exercised the right under *article VI, section 10 of the California Constitution* to comment on the evidence. This instruction should also be given if after deliberations have begun, the jury asks for additional guidance and the judge then comments on the evidence. (See *People v. Rodriguez* (1986) 42 Cal.3d 730 [230 Cal.Rptr. 667, 726 P.2d 113] .)

- *Article VI, section 10 of the California Constitution* permits the court to "make any comment on the evidence and the testimony and credibility of any witness as in its opinion is necessary for the proper determination of the cause."

- "[T]he decisions admonish that judicial comment on the evidence must be accurate, temperate, nonargumentative, and scrupulously fair. The trial court may not, in the guise of privileged comment, withdraw material evidence from the jury's consideration, distort the record, expressly or impliedly direct a verdict, or otherwise usurp the jury's ultimate factfinding power." (*People v. Rodriguez*, *supra*, 42 Cal.3d at p. 766 , internal citations omitted.)

- "[A] trial court has 'broad latitude in fair commentary, so long as it does not effectively control the

verdict. For example, it is settled that the court need not confine itself to neutral, bland, and colorless summaries, but *may focus critically on particular evidence*, expressing views about its persuasiveness.' ... '[A] judge may restrict his comments to portions of the evidence or to the *credibility of a single witness* and need not sum up all the testimony, both favorable and unfavorable.' " (*People v. Proctor* (1992) 4 Cal.4th 499, 542 [15 Cal.Rptr.2d 340, 842 P.2d 1100] , original italics.)

■ "[A] judge's power to comment on the evidence is not unlimited. He cannot withdraw material evidence from the jury or distort the testimony, and he must inform the jurors that they are the exclusive judges of all questions of fact and of the credibility of the witnesses. In civil cases, the court's powers of comment are less limited than in criminal cases, but they still must be kept within certain bounds. The court may express an opinion on negligence, but the court's remarks must be appropriate and fair." (*Lewis v. Bill Robertson & Sons Inc.* (1984) 162 Cal.App.3d 650, 654 [208 Cal.Rptr. 699] , internal citation omitted.)

Secondary Sources

7 Witkin, California Procedure (4th ed. 1997) Trial, § 265

California Trial Objections (Cont.Ed.Bar 10th ed.) §§ 29.21, 29.23

28 *California Forms of Pleading and Practice*, Ch. 326, *Jury Instructions*, § 326.20 (Matthew Bender)

Publisher's Notes

This instruction covers issues presented in BAJI No. 15.21.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Evidence Procedural Considerations Judicial Intervention in Trials Comments by Judges General Overview



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CHAPTER 50 California Judicial Council Concluding Instructions

5-50 California Forms of Jury Instruction CACI 5017

CACI 5017 Polling the Jury

After your verdict is read in open court, you may be asked individually to indicate whether the verdict expresses your personal vote. This is referred to as "polling" the jury and is done to ensure that at least nine jurors have agreed to each decision.

The verdict form[s] that you will receive ask[s] you to answer several questions. You must vote separately on each question. Although nine or more jurors must agree on each answer, it does not have to be the same nine for each answer. Therefore, it is important for each of you to remember how you have voted on each question so that if the jury is polled, each of you will be able to answer accurately about how you voted.

[Each of you will be provided a draft copy of the verdict form[s] for your use in keeping track of your votes.]

New October 2008

Directions for Use

Use this instruction to explain the process of polling the jury, particularly if a long special verdict form will be used to assess the liability of multiple parties and the damages awarded to each plaintiff from each defendant.

Sources and Authority

- *Article I, section 16 of the California Constitutions* provides in part: "Trial by jury is an inviolate right and shall be secured to all, but in a civil cause three-fourths of the jury may render a verdict."

■ *Code of Civil Procedure section 618* provides: "When the jury, or three-fourths of them, have agreed upon a verdict, they must be conducted into court and the verdict rendered by their foreperson. The verdict must be in writing, signed by the foreperson, and must be read to the jury by the clerk, and the inquiry made whether it is their verdict. Either party may require the jury to be polled, which is done by the court or clerk, asking each juror if it is the juror's verdict. If upon inquiry or polling, more than one-fourth of the jurors disagree thereto, the jury must be sent out again, but if no disagreement is expressed, the verdict is complete and the jury discharged from the case."

■ "The polling process is designed to reveal mistakes in the written verdict, or to show 'that one or more jurors acceded to a verdict in the jury room but was unwilling to stand by it in open court.' " (*Keener v. Jeld-Wen, Inc.* (2009) 46 Cal.4th 247, 256 [92 Cal.Rptr.3d 862, 206 P.3d 403] .)

■ "[A] juror may change his or her vote at the time of polling." (*Keener, supra*, 46 Cal.4th at p. 256 .)

■ "[I]t is quite apparent that when a poll discloses that more than one-quarter of the members of the jury disagree with the verdict, the trial judge retains control of the proceedings, and may properly order the jury to retire and again consider the case." (*Van Cise v. Lencioni* (1951) 106 Cal.App.2d 341, 348 [235 P.2d 236] .)

■ "[W]e begin with the requirement that at least nine of twelve jurors agree that each element of a cause of action has been proved by a preponderance of the evidence. The elements of a cause of action constitute the essential or ultimate facts in a civil case comparable to the elements of a single, discrete criminal offense in a criminal case. Analogizing a civil 'cause of action' to a single, discrete criminal offense, and applying the criminal law jury agreement principles to civil law, we conclude that jurors need not agree from among a number of alternative acts which act is proved, so long as the jurors agree that each element of the cause of action is proved." (*Stoner v. Williams* (1996) 46 Cal.App.4th 986, 1002 [54 Cal.Rptr.2d 243] , footnote omitted.)

■ "In civil cases in which there exist multiple causes of action for which multiple or alternative acts could support elements of more than one cause of action, possible jury confusion could result as to whether a specific cause of action is proved. In those cases, ... we presume that jury instructions may be appropriate to inform the jury that it must agree on specific elements of each specific cause of action. Yet, this still does not require that the jurors agree on exactly how each particular element of a particular cause of action is proved." (*Stoner, supra*, 46 Cal.App.4th at p. 1002 .)

■ "[I]f nine identical jurors agree that a party is negligent and that such negligence is the proximate cause of the other party's injuries, special verdicts apportioning damages are valid so long as they command the votes of any nine jurors. To hold otherwise would be to prohibit jurors who dissent on the question of a party's liability from participation in the important remaining issue of allocating responsibility among the parties, a result that would deny all parties the right to a jury of 12 persons deliberating on all issues." (*Juarez v. Superior Court* (1982) 31 Cal.3d 759, 768 [183 Cal.Rptr. 852, 647 P.2d 128] .)

Secondary Sources

7 Witkin, California Procedure (4th ed. 1997) Trial, §§ 349, 359

4 California Trial Guide, Unit 91, Jury Deliberations and Rendition of Verdict, § 91.30[3][b] (Matthew Bender)

28 California Forms of Pleading and Practice, Ch. 326A, Jury Verdicts, § 326A.14 (Matthew Bender)

1 *Matthew Bender Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 18, Jury Verdicts, 18.43*

Publisher's Notes

There is no BAJI instruction on this subject.



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CHAPTER 50 California Judicial Council Concluding Instructions

5-50 California Forms of Jury Instruction CACI 5018-CACI 5099

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CACI 5018Reserved for Future Use



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CHAPTER 50 California Judicial Council Concluding Instructions

5-50 California Forms of Jury Instruction CACI VF-5000

CACI VF-5000 General Verdict Form--Single Plaintiff--Single Defendant--Single Cause of Action

Select one of the following two options:

_____ **We find in favor of [name of plaintiff] and against [name of defendant] and award damages to [name of plaintiff] in the amount of \$_____ .**

_____ **We find in favor of [name of defendant] and against [name of plaintiff].**

Signed: _____

Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the [clerk/bailiff/judge].

New September 2003

Publisher's Notes

There is no BAJI verdict form on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsStandard InstructionsCivil ProcedureTrialsJury TrialsVerdictsGeneral

Verdicts



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CHAPTER 50 California Judicial Council Concluding Instructions

5-50 California Forms of Jury Instruction CACI VF-5001

CACI VF-5001 General Verdict Form--Single Plaintiff--Single Defendant--Multiple Causes of Action

For each claim, select one of the two options listed.

On [name of plaintiff]'s claim for [insert first cause of action]

_____ **we find in favor of [name of plaintiff] and against [name of defendant].**

_____ **we find in favor of [name of defendant] and against [name of plaintiff].**

On [name of plaintiff]'s claim for [insert second cause of action]

_____ **we find in favor of [name of plaintiff] and against [name of defendant].**

_____ **we find in favor of [name of defendant] and against [name of plaintiff].**

Complete the section below only if you find in favor of [name of plaintiff] on at least one of [his/her/its] claims.

We award [name of plaintiff] the following damages: \$_____ .

Signed: _____

Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the [clerk/bailiff/judge].

New September 2003

Use of a special verdict form is recommended when there are different measures of damages for the different causes of action.

Publisher's Notes

There is no BAJI verdict form on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsStandard InstructionsCivil ProcedureTrialsJury TrialsVerdictsGeneral Verdicts



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CHAPTER 50 California Judicial Council Concluding Instructions

5-50 California Forms of Jury Instruction CACI VF-5002-CACI VF-5099

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CACI VF-5002Reserved for Future Use



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CHAPTER 70A Matthew Bender Trade Libel or Disparagement Instructions

6-70A California Forms of Jury Instruction 70A.syn

§ 70A.syn Synopsis to Chapter 70A: Matthew Bender Trade Libel or Disparagement Instructions

MB 7000A.01 Elements of Trade Libel Cause of Action

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Elements of Trade Libel

[b] Defamation as Related Tort

[c] Slander of Title Distinguished

[d] Communication of Trade Libel

[e] Related Judicial Council Jury Instructions

MB 7000A.02 Publication

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Defamation Cases as Authority for Trade Libel Publication Rules

[b] Publication to Third Person; Publication by Defendant

[c] Written Publication; Publication by Conduct

MB 7000A.03 Disparagement of Quality of Product or Service

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 7000A.04 Falsity

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Statement Must Be False

[b] Related Judicial Council Jury Instructions

MB 7000A.05 Malice

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 7000A.06 Proof of Special Damages

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Pleading and Proving Special Damages

[b] Avoiding Special Damages Requirement

[c] Consequences of Omissions in Pleading or Proof When Special Damages Must Otherwise Be Proved

[d] Related Judicial Council Jury Instructions

MB 7000A.07 Prerequisites for Award of Punitive Damages

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Requirements Under Civ. Code § 3294

[b] Constitutional Requirements Regarding Public Officials and Public Figures

[c] Requirements Under Civ. Code § 48a(2)

[d] Bifurcation of Punitive Damage Issues

[e] Purpose of Punitive Damages

[f] Related Judicial Council Jury Instructions

MB 7000A.08 Discretion to Award Punitive Damages When Prerequisites for Award Are Established

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Discretion to Award Punitive Damages

[b] Due Process Considerations

[c] Instructions Must Not Invite Jury to Impose Damages Sufficient to Punish and Deter Conduct Not Related to Particular Plaintiff

[d] Instructions on Punitive Damages Must Not Be Vague

[e] Wealth Is Relevant Regarding Punishment and Deterrence Only With Regard to Particular Plaintiff

[f] Related Judicial Council Jury Instructions

MB 7000A.09 Qualifications on Damages--Unauthorized and Authorized Republications

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 7000A.10 Disparagement Constituting Libel or Slander Per Se

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Libel Per Se Defined; Libel on Its Face Distinguished

[b] Slander Per Se

[c] Avoiding Special Damages Requirement

[d] Constitutional Malice Requirement

MB 7000A.11 Disparagement Constituting Libel or Slander Per Se--Prior Finding

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Court Determination of Libel Per Se

[b] Presumption of General Damages

MB 7000A.12 Damages--Disparagement Constituting Libel or Slander Per Se

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 7000A.13 Sufficiency of Correction: Availability of General Damages

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Demand for Correction

[b] Related Judicial Council Jury Instructions

MB 7000A.14 Statements of Opinion

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Fact Versus Opinion

[b] Related Judicial Council Jury Instructions

MB 7000A.15-MB 7000A.19 [Reserved]

MB 7000A.20 Privileged Communications--Official Duties or Proceedings

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 7000A.21 Statement by Interested Person

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Conditional Privilege for Communications to Interested Persons--Application to Trade Libel

[b] When "Interested Person" Privilege Applies

[c] Defeating Privilege; Actual Malice

[d] Burden of Proof

[e] The Constitutional Privilege to Defame

[f] Related Judicial Council Jury Instructions

MB 7000A.22 Conditional Privilege--Unfavorable Comparison

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 7000A.23 Public Figure Standard--Prior Finding

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Public Figure; "Actual Malice"

[b] Application to Trade Libel Actions

[c] Clear and Convincing Evidence

[d] "Public Figure" Issue a Matter of Law

MB 7000A.24--MB 7000A.29 [Reserved]

MB 7000A.30 Definition of Slander of Title

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Similarity of Slander of Title and Trade Libel

[b] Protection of Marketability; Adverse Possession

[c] Restrictions or Limits on Property's Use

[d] Personal Property; Timber Rights; Easements

MB 7000A.31 Plaintiff's Burden of Proof

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Elements of Slander of Title

[b] Privilege

[c] Trade Libel Distinguished

[d] Malice

MB 7000A.32 Damages Requirement

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Measure of Damages in General

[b] Lost Sales or Leases

[c] Attorneys' Fees and Costs

[d] Punitive Damages

MB 7000A.33 Conditional Privilege--Rival Claimant

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Requirements for Exercise of Privilege

[b] Conditional Nature of Privilege



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CHAPTER 70A Matthew Bender Trade Libel or Disparagement Instructions

6-70A California Forms of Jury Instruction Scope

Scope

SCOPE

This chapter includes jury instructions on the business tort of trade libel or disparagement and the related tort of slander of title, also known as disparagement of title. Many of the trade libel instructions can be modified for use in disparagement of title actions. Because of the frequency with which trade libel is coupled with a defamation cause of action for libel per se of a business or businessperson, separate instructions for these occasions are also included. Damages instructions are provided for each type of action. For the Judicial Council instructions on defamation generally, see Ch. 17, *California Judicial Council Defamation Instructions*. Judicial Council instructions on damages are set forth in Ch. 39, *California Judicial Council Damages Instructions*. The instructions in this chapter are intended to supplement the Judicial Council instructions [see *Cal. Rules of Ct., Rule 2.1050*].

This chapter covers the following topics:

- Part A includes instructions on plaintiff's prima facie case [MB 7000A.01-MB 7000A.14], including the essential elements of trade libel [MB 7000A.01, MB 7000A.02], falsity and malice [MB 7000A.04, MB 7000A.05], special and punitive damages [MB 7000A.06-MB 7000A.09], and disparagement constituting libel or slander per se [MB 7000A.10-MB 7000A.12].
- Part B includes instructions on defenses, including privileged communications [MB 7000A.20], a statement by an interested person [MB 7000A.21], conditional privilege [MB 7000A.22], and the public figure standard [MB 7000A.23].
- Part C includes instructions on slander of title and provides a definition of the tort [MB 7000A.30], plaintiff's burden of proof [MB 7000A.31], damages [MB 7000A.32], and conditional privilege [MB 7000A.33].

It is important to note the overlap between disparagement and other torts:

■ When the publisher of a disparagement is a competitor of the object of the trade libel, the publisher might be guilty of unfair competition, which is covered in Ch. 33, *California Judicial Council Unfair Practices Act Instructions*, and Ch. 33A, *Matthew Bender Unfair Competition Instructions*.

■ Another related tort is that of interference with contract and/or prospective economic advantage, which may occur when the publisher intends to interfere with relationships between the object of the trade libel and its clients or customers. Instructions for interference with economic relations are set forth in Ch. 22, *California Judicial Council Economic Interference Instructions*, and Ch. 22A, *Matthew Bender Interference With Economic Relations Instructions*.

■ Finally, an act of trade libel, either alone or in combination with other acts, may, in rare instances, constitute an attempt to monopolize in violation of the Cartwright Act, *Bus. & Prof. Code § 16700 et seq.*, or the Sherman Antitrust Act, *15 U.S.C. § 2*. For instructions on the Cartwright Act, see Ch. 34, *California Judicial Council Cartwright Act Instructions*.

For detailed coverage of trade libel, slander of title, and defamation, see Levy, Golden & Sacks, *California Torts*, Chs. 40, *Fraud and Deceit and Other Business Torts*, Part C, and 45, *Defamation* (Matthew Bender).



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CHAPTER 70A Matthew Bender Trade Libel or Disparagement Instructions
PART A. TRADE LIBEL: PLAINTIFF'S PRIMA FACIE CASE

6-70A California Forms of Jury Instruction MB 7000A.01

MB 7000A.01 Elements of Trade Libel Cause of Action

[1] Instruction Elements of Trade Libel Cause of Action

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Plaintiff is seeking to recover damages for harm that [he/she/it] claims was caused by Defendant's trade libel. To prevail, Plaintiff must prove each of the following:

- 1. That Defendant published a statement disparaging Plaintiff's _____ [describe goods or services];**
- 2. That the statement was reasonably understood by one or more of the persons to whom it was published to be a statement of fact of and concerning _____ [either Plaintiff or goods or services offered by plaintiff] in the course of [his/her/its] business;**
- 3. That the statement was false;**
- 4. That Defendant published the statement with malice, express or implied; and**
- 5. That the publication of the statement caused Plaintiff to suffer financial loss.**

Authorities: *Milkovich v. Lorain Journal Co.* (1990) 497 U.S. 1, 110 S.Ct. 2695, 111 L.Ed.2d 1, 17-19 ; *System Operations v. Scientific Games Dev. Corp.* (3d Cir. 1977) 555 F.2d 1131, 1140 ; *OptInRealBig.com, LLC v. Ironport Sys., Inc.* (N.D. Cal. 2004) 323 F.Supp.2d 1037, 1048 ; *Zerpol Corp. v. DMP Corp.* (E.D. Pa. 1983) 561 F.Supp. 404, 408-409 ; *Blatty v. New York Times Co.* (1986) 42 Cal.3d 1033, 1042-1049, 232 Cal.Rptr. 542, 728 P.2d 1177 ; *Weller v. American Broadcasting Companies, Inc.* (1991) 232 Cal.App.3d 991, 999-1001, 283 Cal.Rptr. 644 ; *Barnes-Hind,*

Inc. v. Superior Court (1986) 181 Cal.App.3d 377, 381, 226 Cal.Rptr. 354 ; *Nichols v. Great American Ins. Companies* (1985) 169 Cal.App.3d 766, 773, 215 Cal.Rptr. 416 ; *Triton Ins. Underwriters v. National Chiropractic Ins. Co.* (1965) 232 Cal.App.2d 829, 832-833, 835, 43 Cal.Rptr. 504 (by analogy--unfair competition); *Erlich v. Etner* (1964) 224 Cal.App.2d 69, 73-74, 36 Cal.Rptr. 256 ; *Di Giorgio Fruit Corp. v. AFL-CIO* (1963) 215 Cal.App.2d 560, 570-572, 30 Cal.Rptr. 350 (by analogy--defamation); *Shores v. Chip Steak Co.* (1955) 130 Cal.App.2d 627, 630, 279 P.2d 595 .

[2] Use of Instruction

This instruction should be used in conjunction with the instructions in MB 7000A.02-MB 7000A.06, which elaborate on the prima facie elements plaintiff has the burden of establishing by a preponderance of the evidence. For an instruction regarding the preponderance of the evidence standard generally, see Ch. 2, *California Judicial Council Evidence Instructions*, CACI No. 200 ("Obligation to Prove--More Likely True than Not True").

For related Judicial Council instructions, see [3][e], *below*.

LexisNexis Matthew Bender Expert Practice Tip--Explain Terms to Jury: There are several important concepts in this instruction, including the terms "publish," "malice," and "disparaging." These concepts, which are further defined in subsequent instructions in this chapter, will have to be carefully explained in closing argument. *By Ronald Oster*

[3] Comment

[a] Elements of Trade Libel

The elements of a cause of action for trade libel are [*OptInRealBig.com, LLC v. Ironport Sys., Inc.* (N.D. Cal. 2004) 323 F.Supp.2d 1037, 1048 ; *Guess, Inc. v. Superior Court* (1986) 176 Cal.App.3d 473, 479, 222 Cal.Rptr. 79 ; see *Tuck Beckstoffer Wines LLC v. Ultimate Dist., Inc.* (N.D. Cal. 2010) 682 F.Supp.2d 1003, 1021 (elements consisted of defendant's published statement; statement tended to disparage plaintiff's product; statement was provably false; defendant acted with knowledge of falsity or reckless disregard; and statement caused specific damage)]:

- (1) The defendant made a statement that disparaged the quality of the plaintiff's product;
- (2) The offending statement was couched as fact, not opinion;
- (3) The statement was false;
- (4) The statement was made with malice; and
- (5) The statement resulted in monetary loss.

Some California courts have stated that the plaintiff must prove in all cases that the publication has played a material and substantial part inducing others not to deal with the plaintiff, and that as a result the plaintiff has suffered special damages [see, e.g., *Atlantic Mutual Ins. Co. v. J. Lamb, Inc.* (2002) 100 Cal.App.4th 1017, 1035, 123 Cal.Rptr.2d 256 ; see also *Erlich v. Etner* (1964) 224 Cal.App.2d 69, 73, 36 Cal.Rptr. 256].

When the gravamen of a claim asserted by a plaintiff is the publication of an injurious falsehood, the plaintiff must satisfy the same constitutionally mandated requirements as the plaintiff in a defamation case. Consequently, one of the essential elements of the plaintiff's case-in-chief is that the statements were made "of and concerning" the plaintiff [*Blatty v. New York Times Co.* (1986) 42 Cal.3d 1033, 1042-1049, 232 Cal.Rptr. 542, 728 P.2d 1177]. The United States Supreme Court and the California Supreme Court have both held that there is no constitutional privilege that protects all statements of opinion from defamation actions. However, a statement may not be the basis for a defamation

action unless both of the following are true [*Milkovich v. Lorain Journal Co.* (1990) 497 U.S. 1, 19-20, 110 S.Ct. 2695, 111 L.Ed.2d 1 ; *Weller v. American Broadcasting Companies, Inc.* (1991) 232 Cal.App.3d 991, 999-1001, 283 Cal.Rptr. 644]:

(1) The statement is provable as false; and

(2) The statement can reasonably be interpreted as stating actual facts about the party defamed.

In a 1999 California case, the court of appeal applied the "actual malice" standard to statements made about a product manufactured by a company that was not a public figure, when the statements addressed a matter of public concern and were directed toward the company's products but not its reputation [*Melaleuca, Inc. v. Clark* (1998) 66 Cal.App.4th 1344, 1363-1365, 78 Cal.Rptr.2d 627 ; see MB 7000A.23].

For discussion and authorities more precisely defining under California law the malice required as the fourth element of trade libel, see MB 7000A.05. For a related form, see California Forms of Pleading and Practice, Ch. 340, *Libel and Slander* (Matthew Bender). For general coverage of trade libel, see Levy, Golden & Sacks, California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, Part C (Matthew Bender).

[b] Defamation as Related Tort

Disparagement may be referred to as "trade libel," "product disparagement," or "slander of goods." Some authorities emphasize the independent common-law genesis of the law of trade libel [see, e.g., *Polygram Records, Inc. v. Superior Court* (1985) 170 Cal.App.3d 543, 548-549, 216 Cal.Rptr. 252 ; *Erlach v. Etner* (1964) 224 Cal.App.2d 69, 72-74, 36 Cal.Rptr. 256]. More commonly, however, both trade libel and defamation are pleaded, frequently resulting in avoidance of the more stringent elements required for a trade libel cause of action. Thus, appellate cases are more apt to involve defamation, even when they involve facts that conceptually fall into the trade libel area [see, e.g., *Tuck Beckstoffer Wines LLC v. Ultimate Dist., Inc.* (N.D. Cal. 2010) 682 F.Supp.2d 1003, 1021-1022 (contrary to defendant's appellate argument, it failed to plead specifically counterclaim for trade libel or defamation); *Triton Ins. Underwriters v. National Chiropractic Ins. Co.* (1965) 232 Cal.App.2d 829, 835, 43 Cal.Rptr. 504 ; *Di Giorgio Fruit Corp. v. AFL-CIO* (1963) 215 Cal.App.2d 560, 570-572, 30 Cal.Rptr. 350 ; see also Civ. Code § 45].

It is occasionally difficult to distinguish between disparagement and defamation. "The distinction between libel and trade libel is that the former concerns the person or reputation of plaintiff and the latter relates to his goods" [*Shores v. Chip Steak Co.* (1955) 130 Cal.App.2d 627, 630, 279 P.2d 595 ; see *Barnes-Hind, Inc. v. Superior Court* (1986) 181 Cal.App.3d 377, 381, 226 Cal.Rptr. 354]. Despite the fact that what has been come to be known as trade libel is similar to defamation in that both involve the imposition of liability for injuries sustained through publication to third parties of a false statement affecting the plaintiff, the two torts are distinct. Trade libel is not true libel and is not actionable as defamation [*Polygram Records, Inc. v. Superior Court* (1985) 170 Cal.App.3d 543, 549-550, 216 Cal.Rptr. 252].

However, the California Supreme Court held that a plaintiff who asserts any cause of action that has as its gravamen the publication or dissemination of an injurious falsehood must meet the constitutionally-mandated requirements that apply in defamation cases [*Blatty v. New York Times Co.* (1986) 42 Cal.3d 1033, 1041-1045, 232 Cal.Rptr. 542, 728 P.2d 1177]. The same statement may attack a person's character as well as disparage a property interest, and the injured party may file a defamation action for injury to his or her personal character or the reputation of his or her business, or a disparagement action for injury to a property or business interest, or both [*Polygram Records, Inc. v. Superior Court* (1985) 170 Cal.App.3d 543, 550 n.7, 216 Cal.Rptr. 252 ; see *Barnes-Hind, Inc. v. Superior Court* (1986) 181 Cal.App.3d 377, 381, 226 Cal.Rptr. 354]. It is good strategy to combine trade libel actions with actions for libel per se when possible, because this avoids the need to plead and prove special damages [see MB 7000A.10[3]]. Because of this close similarity, defamation cases are often applied to trade libel by analogy.

For coverage of trade libel and defamation, see Levy, Golden & Sacks, California Torts, Chs. 40, *Fraud and Deceit and Other Business Torts*, Part C, and 45, *Defamation* (Matthew Bender).

[c] Slander of Title Distinguished

Confusion occasionally exists between trade libel and the related but distinct tort of slander of title, or disparagement of title, which constitutes a false communication that impugns the plaintiff's title to goods or to real property. The two torts have pronounced similarities. For example, both impair the vendability of the object the plaintiff is attempting to sell, the latter by impugning title to the object and the former by casting aspersions on the product's quality. Most courts frequently rely on rules in one area in cases involving the other [*see, e.g., System Operations v. Scientific Games Dev. Corp.* (3d Cir. 1977) 555 F.2d 1131, 1140 ("[o]ur partial reliance on the slander of title cases is justified by the similarity between that tort and product disparagement"); *see also* Restatement (Second) of Torts § 623A, Comment a, §§ 624, 626].

Product disparagement and slander of title are grouped together in the Restatement (Second) of Torts § 623A under the general heading "injurious falsehood," which is defined as a false communication that results in harm to interests of the other having pecuniary value. Because other authorities may use the term injurious falsehood either more broadly or more narrowly [*see, e.g., Note, Corporate Defamation and Product Disparagement: Narrowing the Analogy to Personal Defamation*, 75 Colum. L. Rev. 963 n.3, 968 n. 28 (1975); *see also Beane v. McMullen* (1972) 265 Md. 585, 291 A.2d 37, 49 (broadly defining tort of injurious falsehood to include disparagement and slander of title)], the terms "trade libel" or "disparagement" are preferred. Authorities frequently cite product disparagement and disparagement of title cases interchangeably. When trade libel instructions in this chapter are based on disparagement of title or defamation cases, the "Authorities" following the instruction indicate this by parenthetical signals.

[d] Communication of Trade Libel

Although use of the term trade "libel" seems to connote, by analogy to the law of defamation, a written communication, trade libel or disparagement embraces not only written communications, but spoken communications as well [*Polygram Records, Inc. v. Superior Court* (1985) 170 Cal.App.3d 543, 548, 216 Cal.Rptr. 252]. On occasion, however, courts do use the term "trade slander" to refer to spoken communications [*see, e.g., Kilgore Ace Hardware, Inc. v. Newsome* (Fla. App. 1977) 352 So.2d 918, 920]. Disparagement may also involve conduct without words, such as subjecting a product to abnormal stress to falsely communicate a lack of durability [*Astro Music, Inc. v. Eastham* (9th Cir. 1977) 564 F.2d 1236, 1238-1239].

[e] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [*see* Ch. 17, *California Judicial Council Defamation Instructions*]:

CACI No. 1706, Definition of Statement

CACI No. 1707, Fact Versus Opinion

CACI No. 1720, Affirmative Defense--Truth

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Torts Business Torts Trade Libel General Overview Torts Business Torts Trade Libel Defenses Torts Business Torts Trade Libel Elements

Gordon P. Erspamer and Richard G. Seeborg contributed to the original chapter for California Forms of Jury Instruction (Matthew Bender). Eliot S. Jubelirer contributed to the original chapter as a consultant.



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CHAPTER 70A Matthew Bender Trade Libel or Disparagement Instructions
PART A. TRADE LIBEL: PLAINTIFF'S PRIMA FACIE CASE

6-70A California Forms of Jury Instruction MB 7000A.02

MB 7000A.02 Publication

[1] Instruction Publication

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Defendant is not liable for making a false statement concerning the quality of Plaintiff's _____ [describe goods or services] unless that statement is "published." A false statement concerning the quality of Plaintiff's _____ [describe goods or services] must be "published." This means that the statement must be (1) communicated by Defendant to someone other than the Plaintiff, (2) actually heard or seen, and (3) understood by the person or persons to whom it is communicated.

There are three ways to communicate a false statement that make the communication a publication if it is heard or seen and understood:

- 1. The statement may be spoken to someone other than Plaintiff.**
- 2. The statement may be written. For example, it may be written in a brochure, a newspaper, a book, or even a letter. Any writing may be a communication if it is read and understood by someone other than Plaintiff.**
- 3. The statement may be published by conduct. For example, if a product is deliberately broken or is broken by putting that product to an abnormal use, then it is the publication of a false statement to show the broken product to someone as if it had broken during normal use.**

The false statement may be published by any combination of these three ways of communicating.

Authorities: *Astro Music, Inc. v. Eastham* (9th Cir. 1977) 564 F.2d 1236, 1238 ; *System Operations v. Scientific Games*

Dev. Corp. (3d Cir. 1977) 555 F.2d 1131, 1140 ; *Cunningham v. Simpson* (1969) 1 Cal.3d 301, 306-307, 81 Cal.Rptr. 855, 461 P.2d 39 (by analogy--defamation); *Burkett v. Griffith* (1891) 90 Cal. 532, 535, 27 P. 527 , *overruled on other grounds*, *Gudger v. Manton* (1943) 21 Cal.2d 537, 556, 134 P.2d 217 (by analogy--slander of title); *Erllich v. Etner* (1964) 224 Cal.App.2d 69, 74, 36 Cal.Rptr. 256 ; *Di Giorgio Fruit Corp. v. AFL-CIO* (1963) 215 Cal.App.2d 560, 569, 30 Cal.Rptr. 350 (by analogy--defamation).

[2] Use of Instruction

This instruction should be used in conjunction with the instructions in MB 7000A.01 and MB 7000A.03-MB 7000A.06. It should be modified depending on whether the plaintiff is seeking to recover based on a verbal statement, written statement, or conduct, or a combination of two or more of these things.

LexisNexis Matthew Bender Expert Practice Tip--If Applicable, Further Explain "Publication By Conduct" to Jury: The first two definitions of the term "publish" are fairly straightforward (i.e. speaking and writing). The third definition (to publish by conduct) is not self-evident and, if applicable to your case, will require further explanation in closing argument. *By Ronald Oster*

[3] Comment

[a] Defamation Cases as Authority for Trade Libel Publication Rules

Publication is one of the fundamental elements common to all types of defamation and disparagement cases [*System Operations v. Scientific Games Dev. Corp.* (3d Cir. 1977) 555 F.2d 1131, 1140]. Accordingly, reference can be made by analogy to defamation cases [see *Di Giorgio Fruit Corp. v. AFL-CIO* (1963) 215 Cal.App.2d 560, 569, 30 Cal.Rptr. 350]. Resort to defamation authorities is almost compulsory because of the paucity of disparagement authority specifically addressing the question of publication.

[b] Publication to Third Person; Publication by Defendant

Communication of a disparaging statement to a single third person is generally deemed adequate to constitute "publication" [*Cunningham v. Simpson* (1969) 1 Cal.3d 301, 306-307, 81 Cal.Rptr. 855, 461 P.2d 39 (by analogy--defamation)]. Of course, the disparaging communication, to be actionable, must be made by the defendant. If the slanderous words or statements or the written libel is sent to the one defamed, who then publishes it, the defendant is not responsible [*Burkett v. Griffith* (1891) 90 Cal. 532, 535, 27 P. 527 , *overruled on other grounds*, *Gudger v. Manton* (1943) 21 Cal.2d 537, 556, 134 P.2d 217 ; Restatement (Second) of Torts § 577 (by analogy--slander of title)].

[c] Written Publication; Publication by Conduct

The most common form of publication is by a writing. For example, a Los Angeles poultry producer and distributor sued for trade libel for the publication of several written statements by defendants that plaintiff was distributing non-kosher chicken to various Jewish enterprises [*Erllich v. Etner* (1964) 224 Cal.App.2d 69, 70-71, 36 Cal.Rptr. 256].

Instances of disparagement by conduct are relatively rare. One example is a case in which defendant broke one of plaintiff's cranks by applying more pressure than would be imposed during normal use, and then displayed the broken crank to plaintiff's customers [see *Astro Music, Inc. v. Eastham* (9th Cir. 1977) 564 F.2d 1236, 1238-1239].

For a related form, see California Forms of Pleading and Practice, Ch. 340, *Libel and Slander* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Torts Business Torts Trade Libel General

OverviewTortsBusiness TortsTrade LibelElements

Gordon P. Erspamer and Richard G. Seeborg contributed to the original chapter for California Forms of Jury Instruction (Matthew Bender). Eliot S. Jubelirer contributed to the original chapter as a consultant.



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CHAPTER 70A Matthew Bender Trade Libel or Disparagement Instructions
PART A. TRADE LIBEL: PLAINTIFF'S PRIMA FACIE CASE

6-70A California Forms of Jury Instruction MB 7000A.03

MB 7000A.03 Disparagement of Quality of Product or Service**[1] Instruction** Disparagement of Quality of Product or Service[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

To be awarded damages for trade libel, Plaintiff must prove that Defendant published a false statement that disparaged Plaintiff's _____ [describe goods or services]. This means that Plaintiff must prove that the false statement published by Defendant was reasonably understood by one or more of the persons to whom it was published as a derogatory statement about Plaintiff's _____ [describe goods or services] or as a statement that criticized the quality of Plaintiff's _____ [describe goods or services].

Authorities: *Blatty v. New York Times Co.* (1986) 42 Cal.3d 1033, 1042-1049, 232 Cal.Rptr. 542, 728 P.2d 1177 ; *Barnes-Hind, Inc. v. Superior Court* (1986) 181 Cal.App.3d 377, 381, 226 Cal.Rptr. 354 ; *Nichols v. Great American Ins. Companies* (1985) 169 Cal.App.3d 766, 773, 215 Cal.Rptr. 416 ; *Erllich v. Etner* (1964) 224 Cal.App.2d 69, 72-74, 36 Cal.Rptr. 256 .

[2] Use of Instruction

This instruction should be used to explain disparagement and what the plaintiff must prove. It should be used in conjunction with the instructions in MB 7000A.01, MB 7000A.02, and MB 7000A.04-MB 7000A.06. Disparagement is a prima facie element of an action for trade libel, and the plaintiff must prove it by a preponderance of the evidence. For an instruction regarding the preponderance of the evidence standard generally, see Ch. 2, *California Judicial Council Evidence Instructions*, CACI No. 200 ("More Likely True than Not True").

LexisNexis Matthew Bender Expert Practice Tip--Defining Disparaging Statement: To define a disparaging statement as a "derogatory" statement does not provide much additional assistance to the jury. The phrase "criticized the quality of plaintiff's [goods]" (the second option in this instruction) will

be easier for some jurors to understand. Remember that some jurors have a limited vocabulary. By
Ronald Oster and Rex Heeseman

[3] Comment

One of the distinguishing characteristics of a trade libel action, setting it apart from other types of defamation claims, is that the actionable statements must pertain to another's products or goods [*Barnes-Hind, Inc. v. Superior Court* (1986) 181 Cal.App.3d 377, 381, 226 Cal.Rptr. 354 ; *Shores v. Chip Steak Co.* (1955) 130 Cal.App.2d 627, 630, 279 P.2d 595]. Specifically, an actionable statement is one that disparages the quality of the products or goods [*Barnes-Hind, Inc. v. Superior Court* (1986) 181 Cal.App.3d 377, 381, 226 Cal.Rptr. 354 ; *Erllich v. Etner* (1964) 224 Cal.App.2d 69, 73, 36 Cal.Rptr. 256]. A statement is "disparaging" if it is understood in its disparaging sense and if the understanding is a reasonable construction of the language used or the acts done by the publisher. It is not material that the publisher did not intend the disparaging statement to be so understood [*Nichols v. Great American Ins. Companies* (1985) 169 Cal.App.3d 766, 773, 215 Cal.Rptr. 416 , citing Restatement (Second) of Torts § 629; *see also* Restatement (Second) of Torts §§ 623A, 626].

When the gravamen of a claim asserted by a plaintiff is the publication of an injurious falsehood, the plaintiff must satisfy the same constitutionally-mandated requirements as the plaintiff in a defamation case. Consequently, one of the essential elements of the plaintiff's case-in-chief is that the statements were made "of and concerning" the plaintiff [*Blatty v. New York Times Co.* (1986) 42 Cal.3d 1033, 1042-1049, 232 Cal.Rptr. 542, 728 P.2d 1177 ; *E.piphany, Inc. v. St. Paul Fire & Marine Ins. Co.* (N.D. Cal. 2008) 590 F.Supp.2d 1244, 1252].

For a related form, see California Forms of Pleading and Practice, Ch. 340, *Libel and Slander* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Torts Business Torts Trade Libel General Overview Torts Business Torts Trade Libel Elements

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CHAPTER 70A Matthew Bender Trade Libel or Disparagement Instructions
PART A. TRADE LIBEL: PLAINTIFF'S PRIMA FACIE CASE

6-70A California Forms of Jury Instruction MB 7000A.04

MB 7000A.04 Falsity

[1] Instruction Falsity

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

An essential element of disparagement or trade libel is that the published statement is false. If you find that the statement published by Defendant is true, then Plaintiff may not recover even if you believe that Defendant had a malicious or improper purpose in publishing the statement.

Authorities: *System Operations v. Scientific Games Dev. Corp.* (3d Cir. 1977) 555 F.2d 1131, 1140 ; *Zerpol Corp. v. DMP Corp.* (E.D. Pa. 1983) 561 F.Supp. 404, 409 ; *Bose Corp. v. Consumers U. of U.S., Inc.* (D. Mass. 1981) 508 F.Supp. 1249, 1259 , rev'd on other grounds (1st Cir. 1982) 692 F.2d 189 , aff'd, 466 U.S. 485 (1984) ; *Erllich v. Etner* (1964) 224 Cal.App.2d 69, 73, 36 Cal.Rptr. 256 .

[2] Use of Instruction

This instruction should be used in conjunction with the instructions in MB 7000A.01-MB 7000A.03 and MB 7000A.05-MB 7000A.06. As to whether the false statement need be of fact or opinion, see *MB 7000A.14*.

For related Judicial Council instructions, see [3][b], *below*.

[3] Comment

[a] Statement Must Be False

In a disparagement or trade libel case, the statement on which the action is based must be false [see *Erllich v. Etner* (1964) 224 Cal.App.2d 69, 73-74, 36 Cal.Rptr. 256 (court, in holding special damages must be proved, implies

necessity of proving falsehood); Witkin, Summary of California Law, vol. 5, *Torts*, § 573 (9th ed. 1988)]. To be actionable as a product disparagement, a false statement must contain allegations about plaintiff's property or product [*System Operations v. Scientific Games Dev. Corp.* (3d Cir. 1977) 555 F.2d 1131, 1140].

Despite the general rule that in a defamation action falsity is presumed and truth is a defense to be proven by the defendant [*Lipman v. Brisbane Elementary Sch. Dist.* (1961) 55 Cal.2d 224, 233, 11 Cal.Rptr. 97, 359 P.2d 465 ; *Draper v. Hellman Com. T. & S. Bank* (1928) 203 Cal. 26, 40-41, 263 P. 240 ; Restatement (Second) of Torts § 581A, Comment b; see *Milkovich v. Lorain Journal Co.* (1990) 497 U.S. 1, 16, 110 S.Ct. 2695, 111 L.Ed.2d 1 and *Philadelphia Newspapers, Inc. v. Hepps* (1986) 475 U.S. 767, 777, 106 S.Ct. 1558, 89 L.Ed.2d 783 (even in defamation actions, common-law presumption of falsity cannot stand when plaintiff seeks damages against media defendant for speech of public concern)], in trade libel the falsity of the statement published is an element of the tort [*System Operations v. Scientific Games Dev. Corp.* (3d Cir. 1977) 555 F.2d 1131, 1142 ; *Bose Corp. v. Consumers U. of U.S. Inc.* (D. Mass. 1981) 508 F.Supp. 1249, 1259 , *rev'd on other grounds*, (1st Cir. 1982) 692 F.2d 189 , *aff'd*, 466 U.S. 485 (1984)] that the plaintiff bears the burden of proving [*Zerpol Corp. v. DMP Corp.* (E.D. Pa. 1983) 561 F.Supp. 404, 409 n. 1].

For a related form, see California Forms of Pleading and Practice, Ch. 340, *Libel and Slander* (Matthew Bender).

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 17, *California Judicial Council Defamation Instructions*]:

CACI No. 1706, Definition of Statement

CACI No. 1707, Fact Versus Opinion

CACI No. 1720, Affirmative Defense--Truth

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Torts Business Torts Trade Libel General Overview Torts Business Torts Trade Libel Elements

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CHAPTER 70A Matthew Bender Trade Libel or Disparagement Instructions
PART A. TRADE LIBEL: PLAINTIFF'S PRIMA FACIE CASE

6-70A California Forms of Jury Instruction MB 7000A.05

MB 7000A.05 Malice

[1] Instruction Malice

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

For Plaintiff to prove [his/her/its] case, [he/she/it] must prove that Defendant published the false statement with malice. The malice requirement is satisfied if you find any one of the following to be true:

- 1. That Defendant's state of mind was characterized by actual hatred, spite, or ill will;**
- 2. That Defendant published a false statement despite lacking reasonable grounds to believe it to be true or displayed a reckless disregard for the truth or falsity of the statement; or**
- 3. That malice may be implied from Defendant's wrongful activities. For example, if you conclude that Defendant knew that the statement was false at the time [he/she/it] published it, that Defendant made the statement with the intent to deceive, or that other facts and circumstances demonstrate a malicious state of mind, no further evidence of malice is necessary.**

Authorities: *System Operations v. Scientific Games Dev. Corp.* (3d Cir. 1977) 555 F.2d 1131, 1140 ; *Bose Corp. v. Consumers U. of U.S., Inc.* (D. Mass. 1981) 508 F.Supp. 1249, 1270-1271 , rev'd on other grounds, (1st Cir. 1982) 692 F.2d 189 , aff'd, 466 U.S. 485 (1984) ; *Fearon v. Fodera* (1915) 169 Cal. 370, 379-380, 148 P. 200 (by analogy--slander of title); *Contra Costa County Title Co. v. Waloff* (1960) 184 Cal.App.2d 59, 66-67, 7 Cal.Rptr. 358 (by analogy--slander of title).

[2] Use of Instruction

This instruction should be used to set forth the requirement of malice. The attorney should consider whether this

instruction should be used in conjunction with the instruction in MB 7000A.21 dealing with qualified privilege. In general, if a qualified privilege applies, a showing of actual malice, as distinguished from malice implied in the act itself, is required to prevail on a disparagement or trade libel claim [see *Kelly v. General Telephone Co.* (1982) 136 Cal.App.3d 278, 285, 186 Cal.Rptr. 184 (by analogy--defamation case)].

This instruction should not be used in cases when the plaintiff's claim is subject to the requirements of *New York Times Co. v. Sullivan* [*New York Times Co., Inc. v. Sullivan* (1964) 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686], because the plaintiff is a public official or a public figure or because the statements in issue relate to a matter of substantial public concern. For example, in a 1998 case in which plaintiff was not a public figure but the statements made addressed a matter of public concern and were directed towards plaintiff's products rather than its reputation, the court held that the jury was required to find that defendant acted with actual malice [*Melaleuca, Inc. v. Clark* (1998) 66 Cal.App.4th 1344, 1365, 78 Cal.Rptr.2d 627 (trial court erred in giving instruction that permitted jury to find actual malice on objective, rather than subjective, basis); see MB 7000A.23]. In these instances, the instruction in MB 7000A.23 should be used.

LexisNexis Matthew Bender Expert Practice Tip--Explain "Malice" to Jury: "Malice" is a term of art that must be carefully explained to the jury. It is important for plaintiff's counsel to explain that malice does not necessarily mean hatred or ill will (although that would certainly be sufficient to prove malice). In many cases, the second definition in this instruction will be the relevant test--did the defendant lack reasonable grounds or display reckless indifference to the truth? Note the higher standards applicable to public figures as explained in the comments in [3], below. By Ronald Oster

[3] Comment

Malice constitutes one of the essential elements of a product disparagement action [*System Operations v. Scientific Games Dev. Corp.* (3d Cir. 1977) 555 F.2d 1131, 1140]. The degree of malice plaintiff must prove is not entirely clear, but malice may be express or implied [*System Operations v. Scientific Games Dev. Corp.* (3d Cir. 1977) 555 F.2d 1131, 1140]. In a 1998 California case, the court of appeal applied the "actual malice" standard to statements made about a product manufactured by a company that was not a public figure, when the statements addressed a matter of public concern and were directed towards plaintiff's products rather than its reputation [*Melaleuca, Inc. v. Clark* (1998) 66 Cal.App.4th 1344, 1363-1365, 78 Cal.Rptr.2d 627 (statements in book about presence of benzene in plaintiff's pharmaceutical consumer goods found to be matter of public concern)].

When no matters of public concern are involved, a showing of actual malice is not required [*Dun & Bradstreet v. Greenmoss Builders, Inc.* (1985) 472 U.S. 749, 763, 105 S.Ct. 2939, 86 L.Ed.2d 593]. One commentator takes the position that generally only a showing of implied malice is necessary under California law [Witkin, Summary of California Law, vol. 5, *Torts*, § 642 (10th ed. 2005)].

Although either actual or implied malice appears to be sufficient for purposes of building a prima facie case of disparagement, evidence of actual malice may be crucial to other aspects of plaintiff's action. There has been considerable confusion flowing from the use of the term malice, chiefly from the failure to clearly distinguish between malice implied in law and actual malice. The former is a mere legal fiction, while the latter denotes ill will or the desire to do harm for the satisfaction of doing it, or conduct that in effect amounts to the same thing. Actual malice is important on the question of punitive damages or the availability of certain conditional privileges [*Gudger v. Manton* (1943) 21 Cal.2d 537, 543, 134 P.2d 217].

When the plaintiff's claim is subject to the requirements of *New York Times Co. v. Sullivan* [*New York Times Co., Inc. v. Sullivan* (1964) 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686] because the plaintiff is a public official or a public figure or because the statements at issue relate to a matter of substantial public concern, the plaintiff must prove, by clear and convincing evidence, that the statements were made with actual malice [*Masson v. New Yorker Magazine, Inc.* (1991) 501 U.S. 496, 510, 111 S.Ct. 2419, 115 L.Ed.2d 447 ; *McCoy v. Hearst Corp.* (1986) 42 Cal.3d 835, 860, 231 Cal.Rptr. 518, 727 P.2d 711]. Proof of actual malice requires a showing on the defendant's state of mind; the

plaintiff must show that at the time of publishing the statements the defendant knew they were false or, in fact, entertained serious doubts as to their truthfulness [*Masson v. New Yorker Magazine, Inc.* (1991) 501 U.S. 496, 510, 111 S.Ct. 2419, 115 L.Ed.2d 447 ; *McCoy v. Hearst Corp.* (1986) 42 Cal.3d 835, 860, 231 Cal.Rptr. 518, 727 P.2d 711 ; see *Melaleuca, Inc. v. Clark* (1998) 66 Cal.App.4th 1344, 1350, 78 Cal.Rptr.2d 627 ; see also MB 7000A.23].

In slander of title cases, California courts have held that the malice necessary to establish a prima facie case is implied malice [*Fearon v. Fodera* (1915) 169 Cal. 370, 380-381, 148 P. 200 ; *Contra Costa County Title Co. v. Waloff* (1960) 184 Cal.App.2d 59, 66-67, 7 Cal.Rptr. 358].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Torts Business Torts Trade Libel General Overview Torts Business Torts Trade Libel Elements Torts Intentional Torts Defamation Defenses Privileges Constitutional Privileges

Gordon P. Erspamer and Richard G. Seeborg contributed to the original chapter for California Forms of Jury Instruction (Matthew Bender). Eliot S. Jubelirer contributed to the original chapter as a consultant.



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CHAPTER 70A Matthew Bender Trade Libel or Disparagement Instructions
PART A. TRADE LIBEL: PLAINTIFF'S PRIMA FACIE CASE

6-70A California Forms of Jury Instruction MB 7000A.06

MB 7000A.06 Proof of Special Damages

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Plaintiff must prove that Defendant's false statements concerning the quality of _____ [describe goods or services] caused financial loss. This loss must be shown by proof of both of the following:

- 1. That Defendant's publication has played a material and substantial part in inducing others not to deal with [him/her/it]; and**
- 2. That Plaintiff has suffered special damages.**

To prove special damages, Plaintiff must prove a specific financial loss in [his/her/its] business that [he/she/it] suffered because of Defendant's false statement. It is not enough for Plaintiff to show merely a general business decline. Plaintiff must specifically identify the _____ [purchasers or clients or customers] that [he/she/it] has lost and the business transactions, such as sales or orders, that [he/she/it] has lost.

Plaintiff must also prove that Defendant's false statement was a substantial factor in the decision of the _____ [purchaser(s) or client(s) or customer(s)] not to do business with Plaintiff. Plaintiff does not have to prove that the false statement was the only factor in this decision or that it was the most important factor. Plaintiff only has to prove that the false statement was one substantial factor in the _____ [purchaser's or client's or customer's] decision not to deal with [him/her/it].

Authorities: *Astros Music, Inc. v. Eastham* (9th Cir. 1977) 564 F.2d 1236, 1238-1239 ; *Testing Systems, Inc. v. Magnaflux Corporation* (E.D. Pa. 1966) 251 F.Supp. 286, 290 ; *Atlantic Mutual Ins. Co. v. J. Lamb, Inc.* (2002)

100 Cal.App.4th 1017, 1035, 123 Cal.Rptr.2d 256 ; *Nichols v. Great American Ins. Companies* (1985) 169 Cal.App.3d 766, 773, 215 Cal.Rptr. 416 ; *Triton Ins. Underwriters v. National Chiropractic Ins. Co.* (1965) 232 Cal.App.2d 829, 833-836, 43 Cal.Rptr. 504 (by analogy--unfair competition); *Erllich v. Etner* (1964) 224 Cal.App.2d 69, 73, 36 Cal.Rptr. 256 .

[2] Use of Instruction

This instruction should be used in conjunction with the instructions in MB 7000A.01-MB 7000A.05.

In any action for recovery premised strictly on trade libel or disparagement, a special damages instruction is mandatory. A potentially more confusing situation is presented when the plaintiff seeks relief based on both disparagement and defamation theories, in which event care must be taken to articulate the differences in damages requirements. In these circumstances, counsel should seriously consider using a special verdict form.

For related Judicial Council instructions, see [3][d], *below*.

[3] Comment

[a] Pleading and Proving Special Damages

The special damages requirement in disparagement actions is nearly universally accepted [*Astro Music, Inc. v. Eastham* (9th Cir. 1977) 564 F.2d 1236, 1238-1239 ; *Nichols v. Great American Ins. Companies* (1985) 169 Cal.App.3d 766, 773, 215 Cal.Rptr. 416 ; *Erllich v. Etner* (1964) 224 Cal.App.2d 69, 73, 36 Cal.Rptr. 256]. The special damages element of disparagement actions requires plaintiff to connect loss of a specific transaction with knowledge of the disparaging communication [*Burkett v. Griffith* (1891) 90 Cal. 532, 537, 27 P. 527 , *overruled on other grounds*, *Gudger v. Manton* (1943) 21 Cal.2d 537, 554-556, 134 P.2d 217 (by analogy--slander of title); *but see Wright v. Coules* (1906) 4 Cal.App. 343, 347, 87 P. 809 (allegation by hotel that it lost unidentified guests as result of disparaging article stated cause of action)]. The necessity of pleading and proving special damages has been an integral part of the action of disparagement of property since it first developed as an extension of slander of title [*Testing Systems, Inc. v. Magnaflux Corporation* (E.D. Pa. 1966) 251 F.Supp. 286, 290]. The damages claimed usually consist of loss of prospective contracts with the plaintiff's customers [see, e.g., *Atlantic Mutual Ins. Co. v. J. Lamb, Inc.* (2002) 100 Cal.App.4th 1017, 1035, 123 Cal.Rptr.2d 256 ; *see also Erllich v. Etner* (1964) 224 Cal.App.2d 69, 73, 36 Cal.Rptr. 256].

LexisNexis Matthew Bender Expert Practice Tip--Proving Special Damages Can Be Difficult:

Proceeding on a customer-by-customer basis to prove special damages can be difficult. This is why plaintiff's counsel frequently include other causes of action that do not have this requirement (e.g., defamation). *By Ronald Oster*

[b] Avoiding Special Damages Requirement

Although the strict requirement of proof of special damages has on occasion resulted in reversals of judgments for plaintiffs [see, e.g., *Erllich v. Etner* (1964) 224 Cal.App.2d 69, 36 Cal.Rptr. 256], the requirement can be avoided if one is able to plead libel per se in a defamation cause of action joined with the trade libel action [see, e.g., *Triton Ins. Underwriters, v. National Chiropractic Ins. Co.* (1965) 232 Cal.App.2d 829, 833, 43 Cal.Rptr. 504] or by joining a trade libel cause of action with causes of action for unfair competition, interference with prospective economic advantage, or other related torts [see *Royer v. Stoddy Co.* (W.D. Okla. 1961) 192 F.Supp. 949, 953 ; *see also Note, Trade Libel and its Special Damage Requirement*, 17 *Hastings L.J.* 394 (1965)].

[c] Consequences of Omissions in Pleading or Proof When Special Damages Must Otherwise Be Proved

Because of the difficulty of satisfying the special damages requirement, special care must be taken in the pleading and the proof of other causes of action, such as libel per se or unfair competition, that would obviate the need to show

special damages. Appellate courts have not been flexible in recognizing causes of action for the first time on appeal. For example, in an action originally brought on a trade libel theory, the Third Circuit refused to consider whether a preliminary injunction could be sustained on an unfair competition theory that had not been pleaded or otherwise raised below. The court dissolved the preliminary injunction because the record did not support the existence of special damages on plaintiff's trade libel claim [*System Operations v. Scientific Games Dev. Corp.* (3d Cir. 1977) 555 F.2d 1131, 1144 (applying New Jersey law)].

For a related form, see California Forms of Pleading and Practice, Ch. 340, *Libel and Slander* .

[d] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 3, *California Judicial Council Contracts Instructions*]:

CACI No. 351 Special Damages

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedurePleading & PracticePleadingsHeightened Pleading RequirementsSpecial DamagesCivil
ProcedureTrialsJury TrialsJury InstructionsStandard InstructionsCivil ProcedureRemediesDamagesSpecial
DamagesTortsBusiness TortsTrade LibelGeneral OverviewTortsBusiness TortsTrade LibelRemedies

Gordon P. Erspamer and Richard G. Seeborg contributed to the original chapter for California Forms of Jury Instruction (Matthew Bender). Eliot S. Jubelirer contributed to the original chapter as a consultant.



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CHAPTER 70A Matthew Bender Trade Libel or Disparagement Instructions
PART A. TRADE LIBEL: PLAINTIFF'S PRIMA FACIE CASE

6-70A California Forms of Jury Instruction MB 7000A.07

MB 7000A.07 Prerequisites for Award of Punitive Damages

[1] Instruction Prerequisites for Award of Punitive Damages

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

If you find that Plaintiff was harmed or damaged as the result of a false statement concerning Plaintiff's _____ [*describe goods or services*] that was published by Defendant, then you must decide whether punitive damages should be awarded against Defendant. The purpose of punitive damages is to punish wrongdoers and thereby deter the commission of wrongful acts--that is, for retribution and deterrence.

[*SELECT ONE OF THE FOLLOWING (See Use of Instruction)*]

Punitive damages may be awarded against Defendant only if Defendant was guilty of _____ [*describe statutory grounds asserted by plaintiff, e.g., oppression, fraud, or malice*] in publishing the statement concerning Plaintiff's _____ [*describe goods or services*]. Therefore, you must first determine whether Defendant was guilty of _____ [*describe statutory grounds asserted by plaintiff, e.g., oppression, fraud, or malice*].

"Oppression" means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights.

"Malice" means either conduct that is intended by the defendant to cause injury to the plaintiff or despicable conduct that is carried on by the defendant with a willful and conscious disregard of the rights of others.

A defendant acts with a willful and conscious disregard for the rights of others when [he/she/it] intentionally

engages in particular conduct or intentionally follows a particular course of action even though [he/she/it] knows that it is highly probable that that conduct or that course of action will cause another person to suffer harm or damage.

[OR]

Punitive damages may be awarded against Defendant only if Defendant was guilty of actual malice in publishing the statement concerning Plaintiff's _____ [describe goods or services].

A defendant is guilty of actual malice in publishing a statement if, at the time of publication, the defendant knows the statement is false or, in fact, entertains serious doubts as to its truthfulness, and if the defendant's conduct, under the circumstances, is despicable.

[CONTINUE INSTRUCTION]

Plaintiff has the burden of proving, by clear and convincing evidence, that Defendant is guilty of _____ [describe statutory grounds asserted by plaintiff, e.g., oppression, fraud, or malice].

[OPTIONAL (See Use of Instruction)]

Additionally, punitive damages may be awarded against Defendant only if, in publishing the statement concerning Plaintiff's _____ [describe goods or services], Defendant acted with a state of mind arising from hatred or ill will toward Plaintiff that was based on something other than Defendant's good faith belief in the truth of the statements that Defendant made about _____ [either Plaintiff or goods and services offered by plaintiff].

[CHOOSE ONE OF THE FOLLOWING (See Use of Instruction)]

In this phase of the trial, you will only determine whether _____ [describe prerequisites to award of punitive damages] in publishing the statement concerning Plaintiff's _____ [describe goods or services]. I will have you fill out a special verdict form stating your decision on this question. If necessary, we will hold a second phase of the trial to determine whether punitive damages should be awarded and, if so, the amount that should be awarded as punitive damages.

[OR]

Unless you determine that _____ [describe prerequisites to award of punitive damages] in publishing the statement concerning Plaintiff's _____ [describe goods or services], you may not award any punitive damages against Defendant. If you determine that _____ [describe prerequisites to award of punitive damages] in publishing the statement concerning Plaintiff's _____ [describe goods or services], then you must determine whether punitive damages should be awarded and, if so, the amount that should be awarded as punitive damages.

Authorities: Civ. Code §§ 48a(2), 3294, 3295(d); *State Farm Mutual Automobile Ins. Co. v. Campbell* (2003) 538 U.S. 408, 425, 123 S.Ct. 1513, 155 L.Ed.2d 585 ; *Pacific Mut. Life Ins. Co. v. Haslip* (1991) 499 U.S. 1, 111 S.Ct. 1032, 113

L.Ed.2d 1, 12 n.1, 18-24 ; *McCoy v. Hearst Corp.* (1986) 42 Cal.3d 835, 871-873, 231 Cal.Rptr. 518, 727 P.2d 711 ; *Neal v. Farmers Ins. Exch.* (1978) 21 Cal.3d 910, 928, n.13, 148 Cal.Rptr. 389, 582 P.2d 980 ; *Schroeder v. Auto Driveaway Co.* (1974) 11 Cal.3d 908, 922, 114 Cal.Rptr. 622, 523 P.2d 662 ; *Silberg v. California Life Ins. Co.* (1974) 11 Cal.3d 452, 462-463, 113 Cal.Rptr. 711, 521 P.2d 1103 ; *Romo v. Ford Motor Co.* (2003) 113 Cal.App.4th 738, 745, 6 Cal.Rptr.3d 793 ; *Travelers Ins. Co. v. Leshner* (1986) 187 Cal.App.3d 169, 200-202, 231 Cal.Rptr. 791 ; *Ramona Manor Convalescent Hospital v. Care Enterprises* (1986) 177 Cal.App.3d 1120, 1140-1142, 225 Cal.Rptr. 120 ; *Weisman v. Blue Shield of California* (1984) 163 Cal.App.3d 61, 64-67, 209 Cal.Rptr. 169 ; *Ford Motor Co. v. Home Ins. Co.* (1981) 116 Cal.App.3d 374, 380-383, 172 Cal.Rptr. 59 ; *Esparza v. Specht* (1976) 55 Cal.App.3d 1, 6-9, 127 Cal.Rptr. 493 ; *Roemer v. Retail Credit Co.* (1975) 44 Cal.App.3d 926, 931-936, 119 Cal.Rptr. 82 .

[2] Use of Instruction

This instruction should be used when the plaintiff is seeking punitive damages on a cause of action for trade libel or disparagement.

When this instruction is used, the general burden of proof instructions given to the jury should include the instruction on the "clear and convincing proof" standard [see Ch. 2, *California Judicial Council Evidence Instructions, CACI No. 201*].

When the plaintiff's claim for punitive damages is based on the conduct of an employee or agent of a defendant, the jury should be instructed on the additional elements that must be established before punitive damages may be awarded against an employer or principal for the actions of an employee or agent [see *Civ. Code* § 3294(b)].

In actions governed only by *Civ. Code* § 3294, this instruction should be modified to reflect the fact that the applicable definitions of "malice" and "oppression" do not include any requirement of "despicable conduct."

The first set of alternative provisions in this instruction inform the jury of (1) the requirements imposed in a case governed solely by *Civ. Code* § 3294 and (2) the stricter requirements imposed when the plaintiff is required to prove "actual malice" in accordance with *New York Times Co. v. Sullivan* [*New York Times Co., Inc. v. Sullivan* (1964) 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686] to establish liability. In actions subject to the *New York Times* rule, the references to despicable conduct should not be used.

The optional provision is for use in cases governed by *Civ. Code* § 48a(2). In cases in which this section applies, the provisions of the instructions that are inconsistent with the standard it requires should be deleted. When the sufficiency of a correction demanded under *Civ. Code* § 48a is at issue, the instruction in MB 7000A.13 should be given with this instruction.

When issues relating to the propriety and amount of punitive damages are not bifurcated under *Civ. Code* § 3295(d), this instruction should be followed by the instruction in MB 7000A.08.

This instruction contains alternative concluding paragraphs. The first alternative paragraph should be used when issues relating to the propriety and amount of punitive damages are bifurcated under *Civ. Code* § 3295(d). The second alternative paragraph should be used when the issues relating to the propriety and amount of punitive damages are not bifurcated and the jury will therefore be given the instruction on assessing punitive damages in MB 7000A.08.

For related Judicial Council instructions, see [3][f], *below*.

LexisNexis Matthew Bender Expert Practice Tip--Make Sure to Use Correct Options: This is a complicated instruction that contains a number of alternatives and options. Be sure you are using the correct options as indicated above. This is especially true with regard to the term "malice," which has different legal requirements depending on the type of case involved. Also, "malice" is not a commonly used word, at least with many jurors. *By Ronald Oster and Rex Heeseman*

[3] Comment**[a] Requirements Under Civ. Code § 3294**

Civ. Code § 3294 provides that in an action predicated on the breach of an obligation that does not arise from contract, punitive damages--damages that are awarded to punish and make an example of a defendant--may be awarded against a defendant who has been guilty of malice, fraud, or oppression [*Civ. Code § 3294(a)*].

Punitive damages are not recoverable unless the plaintiff proves that the defendant was guilty of oppression, fraud, or malice [*Civ. Code § 3294(a)*]. Punitive damages are not recoverable in the abstract, and the required oppression, fraud, or malice must lie in the conduct that gave rise to liability in the case [*Medo v. Superior Court (1988) 205 Cal.App.3d 64, 68, 251 Cal.Rptr. 924*]. "Oppression," "fraud," and "malice" are defined in *Civ. Code § 3294(c)*. "Oppression" is defined by *Civ. Code § 3294(c)(2)* as "despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights." "Malice" is defined by *Civ. Code § 3294(c)(1)* as "conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others." Because the definition of "malice" is stated in the alternative, punitive damages may be awarded without a finding of despicable conduct [*Courtesy Ambulance Service v. Superior Court (1992) 8 Cal.App.4th 1504, 1518, 11 Cal.Rptr.2d 161*].

The provisions of *Civ. Code § 3294(c)* that permit a finding of oppression or malice to be based on a willful and conscious disregard of the rights or safety of others essentially incorporate preexisting case law that recognized that proof of an actual intent to harm the plaintiff was not essential to a punitive damage claim and allowed the recovery of punitive damages on the basis of proof that the defendant had intentionally pursued a particular course of conduct with the knowledge that there was a substantial likelihood that it would cause injury [*Taylor v. Superior Court (1979) 24 Cal.3d 890, 894-896, 157 Cal.Rptr. 693, 598 P.2d 854* ; *Schroeder v. Auto Driveaway Co. (1974) 11 Cal.3d 908, 922, 114 Cal.Rptr. 622, 523 P.2d 662* ; *Weisman v. Blue Shield of California (1984) 163 Cal.App.3d 61, 64-67, 209 Cal.Rptr. 169* ; *Ford Motor Co. v. Home Ins. Co. (1981) 116 Cal.App.3d 374, 381, 172 Cal.Rptr. 59*]. The definitions used in this instruction are based on an instruction approved in *Weisman v. Blue Shield of California (1984) 163 Cal.App.3d 61, 64-67, 209 Cal.Rptr. 169*]. However, this instruction has modified the definition approved in *Weisman* in the following ways:

- It makes the definition more clearly applicable to cases when the defendant's conduct consists of affirmative actions rather than omissions; and
- It makes it clear that conscious disregard requires not merely knowledge of probable consequences, but knowledge of probable harm or injury.

To establish conscious disregard, the plaintiff is not required to show that the defendant knew the plaintiff's identity or knew that the plaintiff would likely be injured by the conduct at issue; a showing that the defendant knew that someone was likely to be injured is sufficient [*Ramona Manor Convalescent Hospital v. Care Enterprises (1986) 177 Cal.App.3d 1120, 1141-1142, 225 Cal.Rptr. 120*].

Under *Civ. Code § 3294(a)*, punitive damages may only be awarded if the plaintiff establishes oppression, fraud, or malice by clear and convincing evidence [see Ch. 2, *California Judicial Council Evidence Instructions, CACI No. 201* ("Clear and Convincing Proof")].

[b] Constitutional Requirements Regarding Public Officials and Public Figures

When the plaintiff is a public official or a public figure or when the statements at issue relate to a matter of substantial public concern, the plaintiff must comply with the requirements of *New York Times Co. v. Sullivan* [*New York Times*

Co., Inc. v. Sullivan (1964) 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686] to establish liability [*Wolston v. Reader's Digest Ass'n* (1979) 443 U.S. 157, 163-164, 99 S.Ct. 2701, 61 L.Ed.2d 450 ; *Rosenbloom v. Metromedia* (1971) 403 U.S. 29, 43-44, 91 S.Ct. 1811, 29 L.Ed.2d 296 ; *Curtis Publishing Co. v. Butts* (1967) 388 U.S. 130, 155, 87 S.Ct. 1975, 18 L.Ed.2d 1094 ; *Brown v. Kelly Broadcasting Co.* (1989) 48 Cal.3d 711, 747, 257 Cal.Rptr. 708, 771 P.2d 406]. For example, a court held that a newsletter published by Santa Cruz Women Against Rape involved a matter of public concern, and that it was therefore reversible error for the trial court to allow an award of punitive damages without an instruction under *New York Times* requiring proof of actual malice [*Carney v. Santa Cruz Women Against Rape* (1990) 221 Cal.App.3d 1009, 1019-1022, 271 Cal.Rptr. 30]. The *New York Times* rule requires the plaintiff to prove, by clear and convincing evidence, that the allegedly libelous statements were made with actual malice [*Masson v. New Yorker Magazine, Inc.* (1991) 501 U.S. 496, 111 S.Ct. 2419, 115 L.Ed.2d 447, 468 ; *McCoy v. Hearst Corp.* (1986) 42 Cal.3d 835 (1987), 860, 231 Cal.Rptr. 518, 727 P.2d 711]. Proof of actual malice requires a showing as to the defendant's state of mind; the plaintiff must show that, at the time of publishing the statements, the defendant knew they were false or, in fact, entertained serious doubts as to their truthfulness [*Masson v. New Yorker Magazine, Inc.* (1991) 501 U.S. 496, 111 S.Ct. 2419, 115 L.Ed.2d 447, 468 ; *McCoy v. Hearst Corp.* (1986) 42 Cal.3d 835 (1987), 860, 231 Cal.Rptr. 518, 727 P.2d 711 ; see *Melaleuca, Inc. v. Clark* (1998) 66 Cal.App.4th 1344, 1350, 78 Cal.Rptr.2d 627 (trial court erred in giving instruction that permitted jury to find actual malice on objective, rather than subjective, basis); see also MB 7000A.23].

The showing required by the *New York Times* rule to establish "actual malice" is, in certain respects, stricter than the showing required to establish "malice" or "oppression" under *Civ. Code* § 3294 [*McCoy v. Hearst Corp.* (1986) 42 Cal.3d 835 (1987), 871-873, 231 Cal.Rptr. 518, 727 P.2d 711]. Accordingly, when the jury is instructed that the plaintiff must prove "actual malice" (as defined in *New York Times*) to establish liability, it is unnecessary, and potentially confusing, to instruct on those aspects of the definition contained in *Civ. Code* § 3294 that are inconsistent with the "actual malice" required by the *New York Times* rule.

[c] Requirements Under Civ. Code § 48a(2)

When a libel is published in a newspaper or a slander is broadcast on radio or television, *Civ. Code* § 48a provides that only special damages are available, unless a correction is demanded and the alleged tortfeasor either refuses to make this correction or does not publish or broadcast a correction that is substantially as conspicuous as the statements complained of [see MB 7000A.13[3]]. Even when no correction or an insufficient correction is offered, *Civ. Code* § 48a(2) provides that punitive damages may not be recovered unless the plaintiff proves that the defendant made the publication with actual malice and further provides that actual malice may not be inferred from the publication. *Civ. Code* § 48a(4)(d) defines "actual malice" as "that state of mind arising from hatred or ill will toward the plaintiff; provided, however, that such a state of mind occasioned by a good faith belief on the part of the defendant in the truth of the libelous publication ... at the time it is published ... shall not constitute actual malice." In cases in which *Civ. Code* § 48a(2) applies, the jury should not be instructed on those elements of the standard contained in *Civ. Code* § 3294 that are inconsistent with its provisions [*McCoy v. Hearst Corp.* (1986) 42 Cal.3d 835, 871-873, 231 Cal.Rptr. 518, 727 P.2d 711].

The applicable standard of proof under *Civ. Code* § 48a(2) still appears to be the preponderance of the evidence [see *Evid. Code* § 115; *Liodas v. Sahadi* (1977) 19 Cal.3d 278, 286-293, 137 Cal.Rptr. 635, 562 P.2d 316].

[d] Bifurcation of Punitive Damage Issues

Civ. Code § 3295(d) requires the trial court, on the defendant's motion, to exclude evidence of the defendant's profits and financial condition until the jury finds that the defendant is liable to the plaintiff and that the defendant is guilty of oppression, fraud, or malice [*Kizer v. County of San Mateo* (1991) 53 Cal.3d 139, 147, 279 Cal.Rptr. 318, 806 P.2d 1353]. When the defendant avails itself of this right to initially exclude evidence of its financial condition, the practical effect of these provisions is that the punitive damage issues will have to be bifurcated.

In the initial phase of the trial, the jury will be limited to determining the defendant's liability for compensatory damages and whether the plaintiff has established the statutory prerequisites for an award of punitive damages. If the jury holds the defendant liable and determines that the defendant is guilty of malice, fraud, or oppression in the initial phase of the trial, the plaintiff will be entitled to present evidence of the defendant's profits and financial condition at a second phase of the trial, after which the jury will determine the issues relating to the proper amount of punitive damages. The issue of punitive damages must be heard by the same jury that found the defendant liable, although this requirement may be waived by a failure to object to the use of separate juries [*Civ. Code* § 3295(d); *Medo v. Superior Court* (1988) 205 Cal.App.3d 64, 66, 68-70, 251 Cal.Rptr. 924]. The substitution of alternate jurors to try the punitive damages phase of a case does not violate the "same jury" requirement [*Rivera v. Sassoon* (1995) 39 Cal.App.4th 1045, 1049, 46 Cal.Rptr.2d 144].

[e] Purpose of Punitive Damages

Punitive damages are imposed for purposes of retribution and deterrence [*State Farm Mutual Automobile Ins. Co. v. Campbell* (2003) 538 U.S. 408, 425, 123 S.Ct. 1513, 155 L.Ed.2d 585 ; *Pac. Mut. Life Ins. Co. v. Haslip* (1991) 499 U.S. 1, 19, 111 S.Ct. 1032, 113 L.Ed.2d 1]. That is, the purpose of punitive damages is to punish wrongdoers and thereby deter the commission of wrongful acts [see *Civ. Code* § 3294(a); *Romo v. Ford Motor Co.* (2003) 113 Cal.App.4th 738, 745, 6 Cal.Rptr.3d 793].

Punitive damages may properly be imposed to further a state's legitimate interests in punishing unlawful conduct and deterring its repetition [*State Farm Mutual Automobile Ins. Co. v. Campbell* (2003) 538 U.S. 408, 425, 123 S.Ct. 1513, 155 L.Ed.2d 585 ; *BMW of N. Am., Inc. v. Gore* (1996) 517 U.S. 559, 568, 116 S.Ct. 1589, 134 L.Ed.2d 809]. Although states possess discretion over the imposition of punitive damages, there are procedural and substantive constitutional limitations on these awards [*State Farm Mutual Automobile Ins. Co. v. Campbell* (2003) 538 U.S. 408, 425, 123 S.Ct. 1513, 155 L.Ed.2d 585 ; see MB 2100A.37[3]].

It is important to include a statement of the purpose of punitive damages in jury instructions on punitive damages to guide the jury's discretion. The United States Supreme Court, in upholding a punitive damages award against a due process challenge, cited such a statement of purpose in an Alabama jury instruction as an important limit on the jury's discretion [see *Pac. Mut. Life Ins. Co. v. Haslip* (1991) 499 U.S. 1, 19-20, 111 S.Ct. 1032, 113 L.Ed.2d 1 ; see also MB 2100A.37[3]].

[f] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 39, *California Judicial Council Damages Instructions*]:

CACI No. 3940 Punitive Damages--Individual Defendant--Trial Not Bifurcated

CACI No. 3941 Punitive Damages--Individual Defendant--Bifurcated Trial--(First Phase)

CACI No. 3942 Punitive Damages--Individual Defendant--Bifurcated Trial (Second Phase)

CACI No. 3943 Punitive Damages Against Employer or Principal for Conduct of a Specific Agent or Employee--Trial Not Bifurcated

CACI No. 3944 Punitive Damages Against Employer or Principal for Conduct of a Specific Agent or Employee--Bifurcated Trial (First Phase)

CACI No. 3945 Punitive Damages--Entity Defendant--Trial Not Bifurcated

CACI No. 3946 Punitive Damages--Entity Defendant--Bifurcated Trial (First Phase)

CACI No. 3947 Punitive Damages--Individual and Entity Defendants--Trial Not Bifurcated

CACI No. 3948 Punitive Damages--Individual and Corporate Defendants (Corporate Liability Based on Acts of Named Individual)--Bifurcated Trial (First Phase)

CACI No. 3949 Punitive Damages--Individual and Corporate Defendants (Corporate Liability Based on Acts of Named Individual)--Bifurcated Trial (Second Phase)

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Civil Procedure Remedies Damages Punitive Damages Torts Business Torts Trade Libel General Overview Torts Business Torts Trade Libel Remedies Torts Damages Punitive Damages General Overview

Gordon P. Erspamer and Richard G. Seeborg contributed to the original chapter for California Forms of Jury Instruction (Matthew Bender). Eliot S. Jubelirer contributed to the original chapter as a consultant.



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California Forms of Jury Instruction

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CHAPTER 70A Matthew Bender Trade Libel or Disparagement Instructions
PART A. TRADE LIBEL: PLAINTIFF'S PRIMA FACIE CASE

6-70A California Forms of Jury Instruction MB 7000A.08

MB 7000A.08 Discretion to Award Punitive Damages When Prerequisites for Award Are Established

[1] Instruction Discretion to Award Punitive Damages When Prerequisites for Award Are Established

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

[SELECT ONE OF THE FOLLOWING (See Use of Instruction)]

In the first phase of this trial, you determined that _____ [describe prerequisites to award of punitive damages] in publishing the statement concerning Plaintiff's _____ [describe goods or services]. In this phase of the trial you must determine whether punitive damages should be awarded against Defendant and, if so, the amount of punitive damages that should be awarded.

Because this is a case in which _____ [describe prerequisites to award of punitive damages] in publishing the statement concerning Plaintiff's _____ [describe goods or services],

[OR]

If you find that _____ [describe prerequisites to award of punitive damages] in publishing the statement concerning Plaintiff's _____ [describe goods or services],

[CONTINUE INSTRUCTION]

you may, but are not required to, award punitive damages against Defendant. In such a case, it is up to you to

decide whether punitive damages should be awarded. If you decide to award punitive damages, it is also up to you to determine the amount of punitive damages that should be awarded.

The law does not provide any fixed standards or formulas for making decisions about the amount of punitive damages. Instead, it leaves them to your good judgment and common sense. However, in making any award of punitive damages, you should consider all of the following:

- 1. The reprehensibility of Defendant's conduct with respect to Plaintiff;**
- 2. Defendant's financial condition and, in view of that financial condition, what amount of punitive damages it will take to punish and deter Defendant, based solely on the harm to Plaintiff; and**
- 3. The amount of the actual [damages/harm or injury] caused by Defendant's wrongful conduct with respect to Plaintiff, because punitive damages must bear a reasonable relationship to the actual [damages/harm or injury].**

In making decisions about punitive damages, you should act in a calm and deliberate manner and should not allow yourselves to be influenced by passion or prejudice.

Authorities: *Civ. Code* §§ 3294, 3295(d); *State Farm Mutual Automobile Ins. Co. v. Campbell* (2003) 538 U.S. 408, 425, 123 S.Ct. 1513, 155 L.Ed.2d 585 ; *BMW of N. Am., Inc. v. Gore* (1996) 517 U.S. 559, 575, 116 S.Ct. 1589, 134 L.Ed.2d 809 ; *Pacific Mut. Life Ins. Co. v. Haslip* (1991) 499 U.S. 1, 6, 14-24, 111 S.Ct. 1032, 113 L.Ed.2d 1 ; *Adams v. Murakami* (1991) 54 Cal.3d 105, 111, 114-118, 123, 284 Cal.Rptr. 318, 813 P.2d 1348 ; *Egan v. Mut. of Omaha Ins. Co.* (1979) 24 Cal.3d 809, 819-823, 169 Cal.Rptr. 691, 620 P.2d 141 ; *Neal v. Farmers Ins. Exch.* (1978) 21 Cal.3d 910, 923-928, 148 Cal.Rptr. 389, 582 P.2d 980 ; *Romo v. Ford Motor Co.* (2003) 113 Cal.App.4th 738, 753, n.7, 6 Cal.Rptr.3d 793 ; *Las Palmas Associates v. Las Palmas Center Associates* (1991) 235 Cal.App.3d 1220, 1257-1258, 1 Cal.Rptr.2d 301 .

[2] Use of Instruction

This instruction should be used to instruct the jury on its duty to determine the propriety and amount of punitive damages if the statutory prerequisites for a punitive damage award are established. When the punitive damage issues have not been bifurcated under *Civ. Code* § 3295(d) [see MB 7000A.07[3][d]], this instruction should be given immediately after the instruction in MB 7000A.07. When the punitive damage issues have been bifurcated, this instruction should not be given in the first phase of the trial and should be given in a subsequent phase only if the jury renders a verdict finding that the plaintiff has established the prerequisites to an award of punitive damages.

This instruction contains two alternative introductory provisions. The first alternative provision should be used when the punitive damage issues have been bifurcated and the issues relating to the propriety and amount of a punitive damage award are presented in a second phase of the trial. The second alternative provision should be used when the punitive damage issues are not bifurcated.

In the list of factors to be considered in making an award of punitive damages, the third factor offers counsel the choice of the word "damages" or the phrase "harm or injury." In *Gagnon v. Continental Casualty Co.* [*Gagnon v. Continental Casualty Co.* (1989) 211 Cal.App.3d 1598, 260 Cal.Rptr. 305], the appellate court indicated that the latter might be preferable, especially when the plaintiff is not entitled to compensatory damages or only recovers nominal damages [*Gagnon v. Continental Casualty Co.* (1989) 211 Cal.App.3d 1598, 1603-1604, 260 Cal.Rptr. 305].

For related Judicial Council instructions, see [3][f], *below*.

LexisNexis Matthew Bender Expert Practice Tip--Use *State Farm* Guideposts: In *State Farm Mutual Automobile Ins. Co. v. Campbell* (2003) 538 U.S. 408, 123 S.Ct. 1513, 155 L.Ed.2d 585 , the U.S.

Supreme Court provided new guideposts for courts to review punitive damages awards, including a discussion of specific permissible ratios between punitive and compensatory damages. These guideposts have not been incorporated into this instruction, and the Advisory Committee has elected not to include them in the CACI instructions on punitive damages [see Ch. 39, CACI Nos. 3940- 3949], because of the rapidly developing law on these issues. Nevertheless, counsel should be familiar with the *State Farm* guideposts when arguing the case to the jury because they will undoubtedly be addressed in post-trial motions or subsequent appeals of a punitive damage award. *By Ronald Oster*

[3] Comment

[a] Discretion to Award Punitive Damages

Even when the statutory prerequisites for a punitive damage award are met, the plaintiff is never entitled to punitive damages as a matter of right; rather, the decision to award or deny punitive damages is initially within the jury's discretion [*Brewer v. Second Baptist Church* (1948) 32 Cal.2d 791, 800-801, 197 P.2d 713 ; *Thomson v. Catalina* (1928) 205 Cal. 402, 406-407, 271 P. 198 ; *Davis v. Hearst* (1911) 160 Cal. 143, 173-174, 116 P. 530 ; *Hannon Engineering, Inc. v. Reim* (1981) 126 Cal.App.3d 415, 431, 179 Cal.Rptr. 78]. Similarly, the amount to be awarded as punitive damages is initially within the jury's discretion [*Kizer v. County of San Mateo* (1991) 53 Cal.3d 139, 147, 279 Cal.Rptr. 318, 806 P.2d 1353 ; *Thomson v. Catalina* (1928) 205 Cal. 402, 406-407, 271 P. 198 ; *Hannon Engineering, Inc. v. Reim* (1981) 126 Cal.App.3d 415, 431, 179 Cal.Rptr. 78 ; *Ferraro v. Pacific Fin. Corp.* (1970) 8 Cal.App.3d 339, 351, 87 Cal.Rptr. 226]. An instruction that advises the jury that it has discretion to determine these questions but that its discretion should be exercised without passion or prejudice is proper [see *Hannon Engineering, Inc. v. Reim* (1981) 126 Cal.App.3d 415, 429-433, 179 Cal.Rptr. 78].

[b] Due Process Considerations

The United States Supreme Court has held that courts must ensure that the measure of punishment of punitive damages is both reasonable and proportionate both to the amount of harm to the plaintiff and to the general damages recovered. An excessive punitive damages award implicates the Due Process Clause of the U.S. Constitution [U.S. Const. amend. XIV] as an irrational and arbitrary deprivation of the defendant's property [*State Farm Mutual Automobile Ins. Co. v. Campbell* (2003) 538 U.S. 408, 428, 123 S.Ct. 1513, 155 L.Ed.2d 585 ; see Levy, Golden, Sacks, California Torts, Ch. 54, *Punitive Damages* (Matthew Bender)].

There are no concrete constitutional limits on the ratio between harm, or potential harm, to the plaintiff, and the punitive damages award [*State Farm Mutual Automobile Ins. Co. v. Campbell* (2003) 538 U.S. 408, 423-424, 123 S.Ct. 1513, 155 L.Ed.2d 585 ; *BMW of N. Am., Inc. v. Gore* (1996) 517 U.S. 559, 575, 116 S.Ct. 1589, 134 L.Ed.2d 809]. However, few awards exceeding a single-digit ratio between punitive and compensatory damages will satisfy due process requirements. An award of more than four times the amount of compensatory damages "might be close to the line of constitutional impropriety" [*State Farm Mutual Automobile Ins. Co. v. Campbell* (2003) 538 U.S. 408, 423-424, 123 S.Ct. 1513, 155 L.Ed.2d 585 ; *BMW of N. Am., Inc. v. Gore* (1996) 517 U.S. 559, 581, 116 S.Ct. 1589, 134 L.Ed.2d 809 ; *Pac. Mut. Life Ins. Co. v. Haslip* (1991) 499 U.S. 1, 23-24, 111 S.Ct. 1032, 113 L.Ed.2d 1].

[c] Instructions Must Not Invite Jury to Impose Damages Sufficient to Punish and Deter Conduct Not Related to Particular Plaintiff

In light of the U.S. Supreme Court's decision in *State Farm* [*State Farm Mutual Automobile Ins. Co. v. Campbell* (2003) 538 U.S. 408, 123 S.Ct. 1513, 155 L.Ed.2d 585], jury instructions must not invite the jury to impose damages sufficient to punish and deter all conduct by a defendant of the type directed toward the plaintiff in that particular case [*Romo v. Ford Motor Co.* (2003) 113 Cal.App.4th 738, 753, n.7, 6 Cal.Rptr.3d 793 (rejecting use of BAJI No. 14.71; now see CACI Nos. 3940, 3947)].

[d] Instructions on Punitive Damages Must Not Be Vague

Vague jury instructions on punitive damages, or those that merely inform the jury to avoid "passion or prejudice," are impermissible, because they do little to aid the jury in its task of assigning appropriate weight to evidence that is relevant and to evidence that is tangential or only inflammatory [*State Farm Mutual Automobile Ins. Co. v. Campbell* (2003) 538 U.S. 408, 417-418, 123 S.Ct. 1513, 155 L.Ed.2d 585].

[e] Wealth Is Relevant Regarding Punishment and Deterrence Only With Regard to Particular Plaintiff

In light of the U.S. Supreme Court's decision in *State Farm* [*State Farm Mutual Automobile Ins. Co. v. Campbell* (2003) 538 U.S. 408, 123 S.Ct. 1513, 155 L.Ed.2d 585], evidence concerning a defendant's financial condition is not unlawful or inappropriate. However, the jury may only use a defendant's wealth to determine the appropriate punishment for the malicious conduct involved in the particular case, not as a gauge for the imposition of a penalty that will actually deter the entire type or course of conduct that affected the plaintiff in that case [*Romo v. Ford Motor Co.* (2003) 113 Cal.App.4th 738, 753, n.7, 6 Cal.Rptr.3d 793]. The wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award [*State Farm Mutual Automobile Ins. Co. v. Campbell* (2003) 538 U.S. 408, 426-427, 123 S.Ct. 1513, 155 L.Ed.2d 585 ; see [b], above].

[f] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 39, *California Judicial Council Damages Instructions*]:

CACI No. 3940 Punitive Damages--Individual Defendant--Trial Not Bifurcated

CACI No. 3941 Punitive Damages--Individual Defendant--Bifurcated Trial--(First Phase)

CACI No. 3942 Punitive Damages--Individual Defendant--Bifurcated Trial (Second Phase)

CACI No. 3943 Punitive Damages Against Employer or Principal for Conduct of a Specific Agent or Employee--Trial Not Bifurcated

CACI No. 3944 Punitive Damages Against Employer or Principal for Conduct of a Specific Agent or Employee--Bifurcated Trial (First Phase)

CACI No. 3945 Punitive Damages--Entity Defendant--Trial Not Bifurcated

CACI No. 3946 Punitive Damages--Entity Defendant--Bifurcated Trial (First Phase)

CACI No. 3947 Punitive Damages--Individual and Entity Defendants--Trial Not Bifurcated

CACI No. 3948 Punitive Damages--Individual and Corporate Defendants (Corporate Liability Based on Acts of Named Individual)--Bifurcated Trial (First Phase)

CACI No. 3949 Punitive Damages--Individual and Corporate Defendants (Corporate Liability Based on Acts of Named Individual)--Bifurcated Trial (Second Phase)

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Civil Procedure Trials Jury Trials Province of Court & Jury Civil Procedure Remedies Damages Punitive Damages Torts Business Torts Trade Libel General

OverviewTortsDamagesPunitive DamagesGeneral Overview

Gordon P. Erspamer and Richard G. Seeborg contributed to the original chapter for California Forms of Jury Instruction (Matthew Bender). Eliot S. Jubelirer contributed to the original chapter as a consultant.



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CHAPTER 70A Matthew Bender Trade Libel or Disparagement Instructions
PART A. TRADE LIBEL: PLAINTIFF'S PRIMA FACIE CASE

6-70A California Forms of Jury Instruction MB 7000A.09

MB 7000A.09 Qualifications on Damages--Unauthorized and Authorized Republications

[1] Instruction Qualifications on Damages--Unauthorized and Authorized Republications

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

If you find that Defendant has published a false statement with malice concerning the quality of Plaintiff's _____ [describe goods or services], you must go on to determine Plaintiff's damages that were caused by Defendant's false statement. Keep in mind that Defendant is not liable for damage caused by someone else's later repetition of the disparaging statement unless the Defendant directed or authorized the repetition or unless it was reasonably foreseeable that the statement would be repeated at the time Defendant made it.

If, on the other hand, you find either that Defendant authorized or directed the statement to be repeated, or that repetition of Defendant's statement was reasonably foreseeable at the time that it was first published, then Defendant is liable not only for the damage caused by [his/her/its] original publication, but the additional damage caused by later repetition(s).

Authorities: *Albertson v. Raboff* (1956) 46 Cal.2d 375, 295 P.2d 405 (by analogy--slander of title); *Burkett v. Griffith* (1891) 90 Cal. 532, 542, 27 P. 527, overruled on other grounds, *Gudger v. Manton* (1943) 21 Cal.2d 537, 134 P.2d 217; *Di Giorgio Corp. v. Valley Labor Citizen* (1968) 260 Cal.App.2d 268, 273, 67 Cal.Rptr. 82 (by analogy--defamation); *Curley v. Vick* (1963) 211 Cal.App.2d 670, 673, 27 Cal.Rptr. 501 (by analogy--defamation).

[2] Use of Instruction

This instruction should be used only when the plaintiff seeks to rely on subsequent republications of the defendant's false statement by another.

[3] Comment

By analogy to a general rule of defamation law, a defendant in a trade libel action is not liable for damage caused by any subsequent repetition of a disparaging statement by another unless that person is acting under the defendant's direction or authority [*Burkett v. Griffith* (1891) 90 Cal. 532, 542, 27 P. 527 , *overruled on other grounds*, *Gudger v. Manton* (1943) 21 Cal.2d 537, 134 P.2d 217 (by analogy--slander of title)]. The exception to that general rule occurs when the republication is reasonably foreseeable [*Di Giorgio Corp. v. Valley Labor Citizen* (1968) 260 Cal.App.2d 268, 273, 67 Cal.Rptr. 82 (by analogy--defamation); *Curley v. Vick* (1963) 211 Cal.App.2d 670, 673, 27 Cal.Rptr. 501 (by analogy--defamation)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Torts Business Torts Trade Libel General Overview Torts Business Torts Trade Libel Elements

Gordon P. Erspamer and Richard G. Seeborg contributed to the original chapter for California Forms of Jury Instruction (Matthew Bender). Eliot S. Jubelirer contributed to the original chapter as a consultant.



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CHAPTER 70A Matthew Bender Trade Libel or Disparagement Instructions
PART A. TRADE LIBEL: PLAINTIFF'S PRIMA FACIE CASE

6-70A California Forms of Jury Instruction MB 7000A.10

MB 7000A.10 Disparagement Constituting Libel or Slander Per Se

[1] Instruction Disparagement Constituting Libel or Slander Per Se

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Plaintiff claims that Defendant's false communication about the quality of Plaintiff's _____ [describe goods or services] is a libel as well as a trade libel. Libel is a kind of defamation. Defamation is an injury to a person's reputation. Libel is a defamation communicated by printing, writing, pictures, or any similarly permanent marks or symbols meant to be seen with the eyes.

Plaintiff has proved that [his/her/its] reputation was injured if [he/she/it] has proved that Defendant's publication exposed Plaintiff to hatred, contempt, or ridicule, or caused Plaintiff to be shunned or avoided, or injured Plaintiff in [his/her/its] business, and that any of these injuries to Plaintiff's reputation would be caused by what appeared on the face of the publication itself without any reference to explanations or outside facts.

The Plaintiff is entitled to recover money damages for that injury unless Defendant proves that the publication was true or that it was privileged.

[*OPTIONAL (See Use of Instruction)*]

Plaintiff claims that Defendant's false communication about the quality of Plaintiff's _____ [describe goods or services] is a slander as well as a trade libel. Slander is one kind of defamation. Defamation is an injury to a person's reputation. Slander is spoken defamation or defamation that is communicated by radio or television or any other machine.

Plaintiff has proved that [his/her/its] reputation was injured if [he/she/it] has proved that Defendant's spoken communication either:

- 1. Charged Plaintiff with a crime or with having been indicted, convicted, or punished for a crime; or**
- 2. Tended to directly injure Plaintiff in [his/her/its] office, profession, trade, or business.**

Plaintiff is entitled to recover money damages for that injury unless Defendant proves that [his/her/its] statement was true or that it was privileged.

Authorities: Civ. Code §§ 45a, 46; *Finney v. Lockhart* (1950) 35 Cal.2d 161, 163, 217 P.2d 19; *Schomer v. Smidt* (1980) 113 Cal.App.3d 828, 834, 170 Cal.Rptr. 662; *Albertini v. Schaefer* (1979) 97 Cal.App.3d 822, 829, 159 Cal.Rptr. 98; *Contento v. Mitchell* (1972) 28 Cal.App.3d 356, 358, 104 Cal.Rptr. 591; *Douglas v. Janis* (1974) 43 Cal.App.3d 931, 940, 118 Cal.Rptr. 280.

[2] Use of Instruction

This instruction should be used if the plaintiff claims that the defendant's communication was both a trade libel and libel or slander per se. If the court has already determined that the statement was libel or slander per se, use the instruction in MB 7000A.11[1].

If libel is at issue, this instruction should not be used with the option. If slander is at issue, the option should be used. If both are alleged, the whole instruction including the option should be used, with revisions to the instruction's first paragraph and the first paragraph of the option to avoid redundancy.

[3] Comment

[a] Libel Per Se Defined; Libel on Its Face Distinguished

Libel per se and libel on its face are two completely different concepts. Libel per se means a statement that is actionable in and of itself without any need for the pleading and proof of special damages. Libel on its face means a statement that carries a defamatory meaning on its face without the need to prove explanations or extrinsic facts [see Prosser & Keeton on Torts (5th ed. 1984), § 111, p. 782, § 112, pp. 795-796; *McCormick on Damages* (1935), § 113, pp. 417-419]. However, courts in California and elsewhere confused the two by holding that libel, always actionable per se at common law [see Prosser & Keeton on Torts (5th ed. 1984), § 112, pp. 795-796], required pleading and proof of special damages unless the statement at issue was libelous on its face [see *Tonini v. Cevasco* (1896) 114 Cal. 266, 270-271, 46 P. 103; *Schomberg v. Walker* (1901) 132 Cal. 224, 227, 64 P. 290]. This holding, criticized as without merit or logical foundation by numerous scholars [see Eldredge, *The Spurious Rule of Libel Per Quod*, 79 Harv. L. Rev. 733, 740 (1966); Carpenter, *Libel Per Se in California and Some Other States*, 17 So. Cal. L. Rev. 347 (1944); Comment, *Libel and Slander*, 19 So. Cal. L. Rev. 119, 120-121 (1945); *McCormick on Damages* (1935), § 113, pp. 417-418; Comment, *Libel Per Se: Necessity of Alleging and Proving Special Damages in Libel Suits*, 14 Cal. L. Rev. 61, 64-66 (1925)], has been codified in Civ. Code § 45a, which provides that a libel which is defamatory without the necessity of explanatory matter or extrinsic facts is a libel on its face, and that a defamatory statement not libelous on its face is not actionable unless the plaintiff alleges and proves that he or she has suffered special damage as a proximate result of that statement. Thus, under California law a statement that is libelous on its face is, as a result, libelous per se.

If a statement is libelous per se, then actual harm to the plaintiff's reputation is presumed, and he or she may recover general damages for that harm, if the statement is unprivileged and false [see MB 7000A.11[3]].

[b] Slander Per Se

Slander is defined in *Civ. Code* § 46. *Civ. Code* § 46(1)-(4) corresponds to the four types of slander per se generally accepted at common law as exceptions to the rule that an action for slander requires proof of special damages [see Prosser & Keeton on Torts (5th ed. 1984), § 112, pp. 788-793. It has been held that a slanderous statement falling within *Civ. Code* § 46] is slanderous per se and that slander per se is actionable without proof of special damages [*Schomer v. Smidt* (1980) 113 Cal.App.3d 828, 834, 170 Cal.Rptr. 662 ; *Albertini v. Schaefer* (1979) 97 Cal.App.3d 822, 829, 159 Cal.Rptr. 98 ; *Contento v. Mitchell* (1972) 28 Cal.App.3d 356, 358, 104 Cal.Rptr. 591], because damage to the plaintiff's reputation is conclusively presumed [*Contento v. Mitchell* (1972) 28 Cal.App.3d 356, 358, 104 Cal.Rptr. 591].

Only the first two definitions in *Civ. Code* § 46 are likely to apply in cases of trade libel. These definitions provide that a spoken statement or a communication by radio or other machine is slander if it charges a person with crime, or with having been indicted, convicted, or punished for crime, or if it tends to directly injure any person in that person's office, profession, trade, or business [*Civ. Code* § 46(1), (2)].

[c] Avoiding Special Damages Requirement

If a statement is libelous or slanderous per se, then special damages need not be pleaded or proved, because actual damage to the plaintiff is presumed as a matter of law [*Finney v. Lockhart* (1950) 35 Cal.2d 161, 163, 217 P.2d 19 ; *Clark v. McClurg* (1932) 215 Cal. 279, 283-284, 9 P.2d 505 ; *Douglas v. Janis* (1974) 43 Cal.App.3d 931, 940, 118 Cal.Rptr. 280 ; *Contento v. Mitchell* (1972) 28 Cal.App.3d 356, 358, 104 Cal.Rptr. 591 ; *Clay v. Lagiss* (1956) 143 Cal.App.2d 441, 448, 299 P.2d 1025]. This means that an action for defamation per se may enable the plaintiff to avoid the special damages requirement of trade libel [see MB 7000A.06], and most trade libels can be interpreted to include some personal criticism of the tradesperson [*Zerpol Corp. v. DMP Corp.* (E.D. Pa. 1983) 561 F.Supp. 404, 409 ; *Testing Systems, Inc. v. Magnaflux Corporation* (E.D. Pa. 1966) 251 F.Supp. 286, 291].

Because of the desirability of avoiding the special damages requirement, it is always advisable to consider whether a trade libel action includes the elements of an action for libel or slander per se. In fact, the trend toward importation of defamation concepts, which concern injury to a person's reputation, into the area of disparagement, which conceptually involves injury to purely economic interests, can in part be explained as an outgrowth of the harshness of the special damages requirement: "Thus to avoid the near impossible burden of proving special damages, plaintiffs have frequently attempted to frame their complaints to sound in defamation rather than disparagement. Needless to say, the results of their efforts have been mixed and few bright line distinctions exist" [*Zerpol Corp. v. DMP Corp.* (E.D. Pa. 1983) 561 F.Supp. 404, 409].

LexisNexis Matthew Bender Expert Practice Tip--Claim for Defamation Avoids Need to Prove

Special Damages: As indicated in the comments above, the advantage of including a claim for defamation (libel or slander regarding a person's reputation) is that it avoids the need to prove special damages. Whether or not a statement is defamatory is generally a question for the court. Any factual disputes, such as whether the statement was made, or whether the statement was false, are questions for the jury. This is a complicated area, so carefully think through your argument to the judge and to the jury. By Ronald Oster and Rex Heeseman

[d] Constitutional Malice Requirement

If the action involves public concerns, presumed damages for defamation may not be awarded unless "actual malice" is shown under federal constitutional standards [*Gertz v. Welch* (1974) 418 U.S. 323, 330-332, 94 S.Ct. 2997, 41 L.Ed.2d 789 ; *Brown v. Kelly Broadcasting Co.* (1989) 48 Cal.3d 711, 747, 257 Cal.Rptr. 708, 771 P.2d 406 ; *Carney v. Santa Cruz Women Against Rape* (1990) 221 Cal.App.3d 1009, 1019, 271 Cal.Rptr. 30]. Actual malice is defined in *New York Times Co. v. Sullivan* [*New York Times Co., Inc. v. Sullivan* (1964) 376 U.S. 254, 279-280, 84 S.Ct. 710, 11 L.Ed.2d 686] as knowledge of falsity or reckless disregard for the truth. Proof of actual malice requires a showing as to the defendant's state of mind; the plaintiff must show, by clear and convincing evidence, that at the time of publishing

the statements at issue the defendant knew they were false or, in fact, entertained serious doubts as to their truthfulness [*Masson v. New Yorker Magazine, Inc.* (1991) 501 U.S. 496, 510, 111 S.Ct. 2419, 115 L.Ed.2d 447 ; *McCoy v. Hearst Corp.* (1986) 42 Cal.3d 835, 860, 231 Cal.Rptr. 518, 727 P.2d 711 ; see *Melaleuca, Inc. v. Clark* (1998) 66 Cal.App.4th 1344, 1350, 78 Cal.Rptr.2d 627 (trial court erred in giving instruction that permitted jury to find actual malice on objective, rather than subjective, basis); see also MB 7000A.23].

However, if a defamation does not involve matters of public concern, as will be the case in most trade libel cases, presumed damages can be awarded without a finding of actual malice under state law rules described in [a] and [b], above [*Dun & Bradstreet v. Greenmoss Builders* (1985) 472 U.S. 749, 762, 105 S.Ct. 2939, 86 L.Ed.2d 593]. For example, a false report of bankruptcy by a credit reporting company only to its customers who had agreed not to further disseminate the information is not a matter of public concern, and a finding of actual malice is not required by the First Amendment for an award of presumed and punitive damages [*Dun & Bradstreet v. Greenmoss Builders* (1985) 472 U.S. 749, 762-763, 105 S.Ct. 2939, 86 L.Ed.2d 593].

For further discussion of the scope of the First Amendment limitations on defamation under California defamation and trade libel law, see MB 7000A.21[3][e].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Torts Business Torts Trade Libel General Overview Torts Business Torts Trade Libel Elements Torts Intentional Torts Defamation Defamation Per Se

Gordon P. Erspamer and Richard G. Seeborg contributed to the original chapter for California Forms of Jury Instruction (Matthew Bender). Eliot S. Jubelirer contributed to the original chapter as a consultant.



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CHAPTER 70A Matthew Bender Trade Libel or Disparagement Instructions
PART A. TRADE LIBEL: PLAINTIFF'S PRIMA FACIE CASE

6-70A California Forms of Jury Instruction MB 7000A.11

MB 7000A.11 Disparagement Constituting Libel or Slander Per Se--Prior Finding

[1] Instruction Disparagement Constituting Libel or Slander Per Se--Prior Finding

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

If you find that Defendant published a false statement concerning the quality of Plaintiff's
_____ *[describe goods or services]*, **then I have determined that you must also find that Plaintiff's reputation was injured as well, and [he/she/it] is entitled to general damages. This means that if you find that Defendant did publish this statement and that this statement was false, Plaintiff is entitled to recover for loss of reputation, shame, humiliation, and hurt feelings. The amount that Plaintiff is entitled to receive is for you to determine. In making this determination, calculate what amount seems just and reasonable to you, and consider the extent to which you believe the statement injured Plaintiff's reputation and feelings. Although Plaintiff need not offer any evidence of the injury to [his/her/its] reputation or feelings to recover, you should consider any evidence that is offered, unless I instruct you that the evidence is to be disregarded.**

Authorities: *Clark v. McClurg* (1932) 215 Cal. 279, 283-284, 9 P.2d 505 ; *Triton Ins. Underwriters v. National Chiropractic Ins. Co.* (1965) 232 Cal.App.2d 829, 833, 43 Cal.Rptr. 504 ; *Di Giorgio Fruit Corp. v. AFL-CIO* (1963) 215 Cal.App.2d 560, 577, 30 Cal.Rptr. 350 .

[2] Use of Instruction

This instruction should be used when a cause of action for disparagement or trade libel is coupled with a defamation cause of action for libel per se. This particular instruction is an alternative to the instruction in MB 7000A.10[1], and should be used when the court has determined as a matter of law that the defendant's false statement concerning the quality of the plaintiff's goods or services constitutes libel per se. However, if the content of the statement published by the defendant is disputed, a special verdict should be submitted to the jury, and the court can defer its legal determination as to whether the statement is actionable as libel per se.

[3] Comment**[a] Court Determination of Libel Per Se**

In defamation cases, the court generally determines whether a statement is libelous on its face and therefore actionable per se [*MacLeod v. Tribune Publishing Co.* (1959) 52 Cal.2d 536, 546, 343 P.2d 36 ; see *Mercado v. Hoefler* (1961) 190 Cal.App.2d 12, 21, 11 Cal.Rptr. 787]. Presumably, the court would make the same determination in a trade libel case in which the plaintiff also alleged that the statements harmed his or her reputation and constituted libel per se.

[b] Presumption of General Damages

It is well established that actual injury is presumed, and that the plaintiff is entitled to general damages, when a defendant has published a statement that is libelous or slanderous per se [*Schomer v. Smidt* (1980) 113 Cal.App.3d 828, 833-834, 170 Cal.Rptr. 662 ; *Douglas v. Janis* (1974) 43 Cal.App.3d 931, 940, 118 Cal.Rptr. 280 ; *Contento v. Mitchell* (1972) 28 Cal.App.3d 356, 358, 104 Cal.Rptr. 591 ; *Clay v. Lagiss* (1956) 143 Cal.App.2d 441, 448, 299 P.2d 1025]. The amount of these damages is for the jury to determine [*Lewis v. Hayes* (1918) 177 Cal. 587, 590, 171 P. 293 ; *Mercado v. Hoefler* (1961) 190 Cal.App.2d 12, 20 n. 1, 11 Cal.Rptr. 787]. These presumed damages are sufficient to support the award of punitive damages even if no actual or nominal damages are awarded, because the law conclusively presumes actual harm to the plaintiff [*Clark v. McClurg* (1932) 215 Cal. 279, 283-285, 9 P.2d 505 ; *Contento v. Mitchell* (1972) 28 Cal.App.3d 356, 358-359, 104 Cal.Rptr. 591], but the jury's discretion as to the amount of damages includes the discretion to award no general damages at all [see *Contento v. Mitchell* (1972) 28 Cal.App.3d 356, 358-359, 104 Cal.Rptr. 591 (punitive damages awarded without award of actual damages)]. In fact, some cases that speak of the effect of libel per se, rather than saying that the law presumes actual injury or that it presumes general damages, say that the law presumes that the plaintiff is entitled to at least nominal damages [*Clark v. McClurg* (1932) 215 Cal. 279, 283-285, 9 P.2d 505 ; *Triton Ins. Underwriters v. National Chiropractic Ins. Co.* (1965) 232 Cal.App.2d 829, 833, 43 Cal.Rptr. 504 (jury award of \$1.00 and costs of suit); *Di Giorgio Fruit Corp. v. AFL-CIO* (1963) 215 Cal.App.2d 560, 577, 30 Cal.Rptr. 350]. It is unquestionably true that the jury need not award more than a nominal amount of general damages, but this is not the same thing as "nominal damages" [*McCormick on Damages* (1935), § 21, p. 87]. As Prosser points out, an award of nominal damages is inconsistent with the idea of assumed damages [see Prosser & Keeton on Torts (5th ed. 1984), § 112, p. 795]. However, an instruction that the plaintiff is entitled to "at least nominal damages" has been used without disapproval [*Lewis v. Hayes* (1918) 177 Cal. 587, 590, 171 P. 293], and defense attorneys should definitely ask for something in the instruction that makes it clear that the jury's discretion includes the discretion to award damages in a minimal amount [see *Clark v. McClurg* (1932) 215 Cal. 279, 283-285, 9 P.2d 505 ; *Triton Ins. Underwriters v. National Chiropractic Ins. Co.* (1965) 232 Cal.App.2d 829, 833, 43 Cal.Rptr. 504 (jury award of \$1.00 and costs of suit); *Di Giorgio Fruit Corp. v. AFL-CIO* (1963) 215 Cal.App.2d 560, 577, 30 Cal.Rptr. 350 ; see also *Contento v. Mitchell* (1972) 28 Cal.App.3d 356, 359, 104 Cal.Rptr. 591 (when statement is found to be defamatory per se, award of punitive damages can be sustained despite jury's failure to award actual or nominal damages)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Torts Business Torts Trade Libel General Overview Torts Business Torts Trade Libel Elements Torts Business Torts Trade Libel Remedies Torts Intentional Torts Defamation Defamation Per Se

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CHAPTER 70A Matthew Bender Trade Libel or Disparagement Instructions
PART A. TRADE LIBEL: PLAINTIFF'S PRIMA FACIE CASE

6-70A California Forms of Jury Instruction MB 7000A.12

MB 7000A.12 Damages--Disparagement Constituting Libel or Slander Per Se

[1] Instruction Damages--Disparagement Constituting Libel or Slander Per Se

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

I have already described to you the special damages that Plaintiff may recover based on [his/her/its] claim that Defendant published a false statement about the quality of Plaintiff's _____ [*describe goods or services*]. Because Plaintiff also alleges a separate claim for defamation based on [his/her/its] claim that this statement was _____ [libelous or slanderous], you must separately consider the question of damages as it relates to this second claim for defamation.

The first kind of damages Plaintiff may recover for defamation is called compensatory damages. It includes all damages that Plaintiff proves that [he/she/it] has suffered or will in the future suffer to [his/her/its] property, business, trade, profession, or occupation as a result of Defendant's statement. You should also include in your deliberations the amount of money Plaintiff has proved that [he/she/it] has spent, except for attorneys' fees, as a result of Defendant's statement.

In addition to compensatory damages, which I have just described to you, there is another kind of damages that Plaintiff may recover when Defendant's false statement is _____ [libelous or slanderous]. They are called general damages and are intended to compensate Plaintiff for the loss of reputation, shame, mortification, and hurt feelings that Plaintiff has experienced as a result of Defendant's false statement. Among the factors you may consider in computing general damages are the following:

1. The extent to which Defendant has published or circulated the false statement;
2. The shame, mortification, and hurt feelings that Plaintiff has suffered as a result of the publication of

Defendant's false statement;

3. Plaintiff's reputation, prominence, or good name in the community in which [he/she] lives before publication of Defendant's false statement, and the effect of the publication on Plaintiff's reputation, prominence, or good name; and

4. Plaintiff's professional or business standing in the community where [he/she/it] conducts business before and after publication of the false statement.

Although Plaintiff has brought two claims against Defendant, one for disparagement of [his/her/its] goods or services and one for _____ [libel or slander], you may not award Plaintiff damages for the same loss under each claim. In other words, if Plaintiff has proved special damages under its claim for disparagement, then you may not base any award of compensatory damages for _____ [libel or slander] on those same items of loss. Plaintiff is not permitted to recover twice for the same loss or harm.

Authorities: *Civ. Code* §§ 45a, 46(5), 48a(4); *Albertini v. Schaefer* (1979) 97 Cal.App.3d 822, 829-830, 159 Cal.Rptr. 98 ; *Di Giorgio Corp. v. Valley Labor Citizen* (1968) 260 Cal.App.2d 268, 277, 67 Cal.Rptr. 82 ; *Fairfield v. American Photocopy Etc. Co.* (1955) 138 Cal.App.2d 82, 88-90, 291 P.2d 194 (by analogy--right to privacy).

[2] Use of Instruction

This instruction should be used when a cause of action for trade libel is coupled with a defamation cause of action alleging defamation per se. If the defendant has made a retraction, the third paragraph of this instruction, which deals with general damages, should be omitted, unless there is an issue as to the retraction's sufficiency. General damages may still be available if the correction was not substantially as conspicuous as the statements complained of [*Civ. Code* § 48a(2)]. If the retraction's sufficiency is at issue, the instruction in MB 7000A.13 should be used, because the jury must be instructed that the general damages discussed above are available when a retraction has been published only if the retraction is not substantially as conspicuous as the statements complained of [*Civ. Code* § 48a(2); see MB 7000A.13]. In addition, the punitive damages instruction [see MB 7000A.07] should be modified and utilized in connection with the defamation cause of action if punitive damages are sought.

[3] Comment

Presumably, when a disparagement also constitutes libel per se and a demand for a retraction was not honored, general damages may be awarded under *Civ. Code* § 48a(4)(a), which defines general damages as "damages for loss of reputation, shame, mortification and hurt feelings" [see *Di Giorgio Corp. v. Valley Labor Citizen* (1968) 260 Cal.App.2d 268, 277, 67 Cal.Rptr. 82 ; see also MB 7000A.13[3] for discussion of requirement that correction be substantially as conspicuous as statements complained of]. The court of appeal elaborated the type of damages recoverable for libel as follows: "One of the elements entering into damages for a libel is injury to the feelings of the person libeled. That injury may be inferred by the trier of fact from the testimony with relation to the social status of the person libeled. This inference may be supplemented by the direct statement of the plaintiff to the effect that his feelings were injured" [*Fairfield v. American Photocopy Etc. Co.* (1955) 138 Cal.App.2d 82, 90, 291 P.2d 194 ; see *Kerby v. Hal Roach Studios* (1942) 53 Cal.App.2d 207, 213, 127 P.2d 577 ; Restatement (Second) of Torts § 652H, Comment c].

A showing of special damages is required when a libelous statement is not libel per se [*Civ. Code* § 45a]. Libel per se is defined in *Civ. Code* § 45a [see MB 7000A.10]. Slander per se is defined in *Civ. Code* § 46(1)-(4) [see *Albertini v. Schaefer* (1979) 97 Cal.App.3d 822, 829-830, 159 Cal.Rptr. 98 ; see also MB 7000A.10]. Special damages, defined in *Civ. Code* § 48a(4)(b), are awardable without regard to the existence of a retraction, and consist of "all damages which plaintiff alleges and proves that he has suffered in respect to his property, business, trade, profession or occupation, including such amounts of money as the plaintiff alleges and proves he has expended as a result of the alleged libel and

no other" [see *Di Giorgio Corp. v. Valley Labor Citizen* (1968) 260 Cal.App.2d 268, 277, 67 Cal.Rptr. 82]. Attorneys' fees are not recoverable [see *Code Civ. Proc.* § 1021].

Note carefully that the statutory "special damages" recoverable in a defamation action are broader in scope than the special damages allowed in a disparagement action [see *MB 7000A.06*]. Obviously, divergent "special" damages instructions in combined disparagement/defamation actions would cause confusion. To avoid this confusion, these instructions use the word "compensatory" to refer to the statutory special damages recoverable in a defamation action.

LexisNexis Matthew Bender Expert Practice Tip--Awarding of General Damages for Defamation

***Per Se*:** The court generally determines whether a statement constitutes defamation *per se*. If so, actual injury is presumed, and plaintiff can obtain general damages without need of further proof. The factors to be considered by the jury in awarding general damages are set forth in this instruction. *By Ronald Oster*

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsStandard InstructionsTortsBusiness TortsTrade

LibelElementsTortsBusiness TortsTrade LibelRemediesTortsIntentional TortsDefamationDefamation Per

SeTortsIntentional TortsDefamationRemediesDamages

Gordon P. Erspamer and Richard G. Seeborg contributed to the original chapter for California Forms of Jury Instruction (Matthew Bender). Eliot S. Jubelirer contributed to the original chapter as a consultant.



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CHAPTER 70A Matthew Bender Trade Libel or Disparagement Instructions
PART A. TRADE LIBEL: PLAINTIFF'S PRIMA FACIE CASE

6-70A California Forms of Jury Instruction MB 7000A.13

MB 7000A.13 Sufficiency of Correction: Availability of General Damages

[1] Instruction Sufficiency of Correction: Availability of General Damages

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

On _____ [*date*], Plaintiff served on Defendant a notice specifying the [allegedly] [libelous/slanderous] statements, and demanding that these statements be corrected. In its regular [issues/broadcasts] of _____ [*specify date or dates of publication or broadcast of alleged corrections*], Defendant [published/broadcast] a statement that it claims is a correction. The law requires a correction to be [published/broadcast] in substantially as conspicuous a manner as the [allegedly] [libelous/slanderous] statements. Plaintiff may not recover general [or punitive] damages unless [he/she/it] proves that the statement published by Defendant did not qualify as a correction.

The [allegedly] [libelous/slanderous] statements [published/broadcast] by Defendant on _____ [*date*], and the statement [published/broadcast] by Defendant on _____ [*specify date or dates of publication or broadcast of alleged corrections*] have been presented to you in evidence. You are to determine from this evidence whether the statement [published/broadcast] by Defendant on _____ [*specify date or dates of publication or broadcast of alleged corrections*] is a correction of the [allegedly] [libelous/slanderous] statements [published/broadcast] by Defendant on _____ [*date*] in substantially as conspicuous a manner as the statements complained of.

Authorities: Civ. Code § 48a; *Pierce v. San Jose Mercury News* (1989) 214 Cal.App.3d 1626, 1631-1633, 263 Cal.Rptr. 410 ; *Twin Coast Newspapers, Inc. v. Superior Court* (1989) 208 Cal.App.3d 656, 660-662, 256 Cal.Rptr. 310 ; *Behrendt v. Times-Mirror Co.* (1938) 30 Cal.App.2d 77, 87-89, 85 P.2d 949 .

[2] Use of Instruction

This instruction should be used when the trade libel complained of is also a libel or slander per se [see MB 7000A.10 -MB 7000A.12] and a dispute exists over the sufficiency of a correction published pursuant to the plaintiff's demand under *Civ. Code* § 48a. The instruction assumes that the only issue regarding the correction is whether it was published or broadcast in substantially as conspicuous a manner as the statements complained of [see *Civ. Code* § 48a(2); see also [3][a], below]. If other points are at issue, such as whether the plaintiff served a notice and demand at all, or whether the service was timely [see *Civ. Code* § 48a(1); see also [3][a], below], the jury will need to be instructed on these points.

Whether the bracketed "allegedly" should be inserted before "libelous" or "slanderous" depends on whether there has been a prior finding that the statements complained of were libelous or slanderous per se [see MB 7000A.11].

The bracketed "or punitive" should be inserted before "damages" if the plaintiff is seeking punitive damages.

For related Judicial Council instructions, see [3][b], below.

[3] Comment

[a] Demand for Correction

If a trade libel in a newspaper or on a radio or television broadcast is also a libel or slander per se, and a demand for a correction was not honored, it would appear that general damages may be awarded [see *Civ. Code* §§ 48a, 48.5(4) ("radio" and "radio broadcast" defined to include television); see also MB 7000A.12[3] for discussion of this point and of what constitutes "general damages" under *Civ. Code* § 48a(4)(a)]. Even when the requested correction is published, general damages are available if the correction is not sufficient [*Civ. Code* § 48a(2)]. To recover more than special damages for a libel in a newspaper or a slander in a radio or television broadcast, a plaintiff must serve a written notice identifying the statements complained of and demanding that the statements be corrected. This notice and demand must be served on the publisher at the place of publication or on the broadcaster at the place of broadcast within 20 days after knowledge of the publication or broadcast complained of [*Civ. Code* § 48a(1)].

If a correction is demanded in the required manner, and a correction is not published in the newspaper or broadcast on the radio or television station "in substantially as conspicuous a manner" as the statements complained of, then the plaintiff may recover general and exemplary damages as well as special damages. The correction must be in a regular issue that is published or broadcast within three weeks after service of the notice and demand for correction [*Civ. Code* § 48a(2)]. Whether the retraction was published or broadcast "in substantially as conspicuous a manner" as the statements complained of is a question of fact for the jury [*Pierce v. San Jose Mercury News* (1989) 214 Cal.App.3d 1626, 1631-1633, 263 Cal.Rptr. 410 ; *Twin Coast Newspapers, Inc. v. Superior Court* (1989) 208 Cal.App.3d 656, 660-662, 256 Cal.Rptr. 310 ; *Behrendt v. Times-Mirror Co.* (1938) 30 Cal.App.2d 77, 87-89, 85 P.2d 949] .

The plaintiff has the burden of pleading and proving notice, demand, and failure to correct [*Civ. Code* § 48a(2)].

LexisNexis Matthew Bender Expert Practice Tip--Notice and Demand Requirement: The instruction in [1], above, addresses additional requirements that apply to defamation claims based on newspaper articles or slander claims based on radio or television broadcasts. Within 20 days after plaintiff learns of the defamatory statements, plaintiff must serve a notice specifying the defamatory statements and must demand a correction [*Civ. Code* § 48a(1)]. This instruction assumes that a proper notice and demand was timely served. However, if there are factual disputes regarding the notice and demand, the jury will have to be instructed on those issues as well. *By Ronald Oster*

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [

see Ch. 17, *California Judicial Council Defamation Instructions*];

CACI No. 1722 Retraction--Newspaper or Broadcast (Civ. Code, § 48a)

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Torts Business Torts Trade
Libel Elements Torts Business Torts Trade Libel Remedies

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CHAPTER 70A Matthew Bender Trade Libel or Disparagement Instructions
PART A. TRADE LIBEL: PLAINTIFF'S PRIMA FACIE CASE

6-70A California Forms of Jury Instruction MB 7000A.14

MB 7000A.14 Statements of Opinion

[1] Instruction Statements of Opinion

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Defendant can be liable only if a false statement that [he/she/it] made about Plaintiff's _____ [describe goods or services] was reasonably understood as a statement of fact; Defendant may not be held liable for a statement that was merely a statement of opinion.

Authorities: *Baker v. Los Angeles Herald Examiner* (1986) 42 Cal.3d 254, 259-260, 228 Cal.Rptr. 226, 721 P.2d 87 ; *Gregory v. McDonnell Douglas Corp.* (1976) 17 Cal.3d 596, 600-601, 131 Cal.Rptr. 641, 552 P.2d 425 ; *Jensen v. Hewlett-Packard Co.* (1993) 14 Cal.App.4th 958, 970-971, 18 Cal.Rptr.2d 83 .

[2] Use of Instruction

This instruction should be used with the instruction in MB 7000A.01. In addition, consider using this instruction with the instruction in MB 7000A.22 regarding conditional privilege.

For related Judicial Council instructions, see [3][b], *below*.

[3] Comment

[a] Fact Versus Opinion

Statements of opinion are constitutionally protected; consequently, an essential element of any claim that is based on the publication of an allegedly false statement is that the statement was reasonably understood to be a statement of fact [*Baker v. Los Angeles Herald Examiner* (1986) 42 Cal.3d 254, 259-260, 228 Cal.Rptr. 206, 721 P.2d 87 ; *Gregory v.*

McDonnell Douglas Corp. (1976) 17 Cal.3d 596, 600-601, 131 Cal.Rptr. 641, 552 P.2d 425 ; *Jensen v. Hewlett-Packard Co.* (1993) 14 Cal.App.4th 958, 970-971, 18 Cal.Rptr.2d 83].

LexisNexis Matthew Bender Expert Practice Tip--Fact vs. Opinion: There can be a thin or murky line between statements of fact and statements of opinion. Defense counsel will usually address this issue in a demurrer or by way of summary judgment. If the issue is not decided by the court and is submitted to the jury, this instruction does not provide much guidance. A little fuller explanation can be found in *CACI No. 1707. By Ronald Oster and Rex Heeseman*

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 17, *California Judicial Council Defamation Instructions*]:

CACI No. 1707 Fact Versus Opinion

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Torts Business Torts Trade Libel Elements Torts Business Torts Trade Libel Remedies Torts Intentional Torts Defamation Defenses Privileges Constitutional Privileges

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CHAPTER 70A Matthew Bender Trade Libel or Disparagement Instructions
PART A. TRADE LIBEL: PLAINTIFF'S PRIMA FACIE CASE

6-70A California Forms of Jury Instruction MB 7000A.15-MB 7000A.19

[Reserved]

MB 7000A.15[Reserved]



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CHAPTER 70A Matthew Bender Trade Libel or Disparagement Instructions
PART B. DEFENSES

6-70A California Forms of Jury Instruction MB 7000A.20

MB 7000A.20 Privileged Communications--Official Duties or Proceedings

[1] Instruction Privileged Communications--Official Duties or Proceedings

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Publication of a statement that would otherwise be trade libel is absolutely privileged--meaning that Plaintiff may not recover for the statement--if the statement was made in either of the following circumstances:

- 1. The proper discharge of an official duty; or**
- 2. Any legislative, judicial, or other official proceeding.**

Publication of a statement is also absolutely privileged when the statement is:

[*Select any of following that are applicable*]

- 1. A fair and true report contained in, or a communication to, a public journal of a judicial, legislative, or other official proceeding, or of anything said in the course of such a proceeding.**
- 2. A fair and true report contained in a public journal of a verified charge or complaint made by any person to a public official, which led to the issuance of a warrant.**
- 3. A fair and true report [not necessarily contained in a public journal] of the proceedings of a lawful public meeting.**

[*OPTIONAL (See Use of Instruction)*]

However, a statement made by a report contained in, or a communication to, a public journal is not privileged if the statement does any of the following:

- (1) Violates Rule 5-120 of the State Bar Rules of Professional Conduct concerning trial publicity;**
- (2) Breaches a court order; or**
- (3) Violates any requirement of confidentiality imposed by law.**

[*OPTIONAL (See Use of Instruction)*]

However, statements made concerning a third party in any pleading or affidavit filed in an action to dissolve a marriage are not privileged unless all of the following additional requirements are satisfied:

- 1. Defendant verified the pleading or swore to the truth of the affidavit under penalty of perjury;**
- 2. Defendant made the statement without actual malice, meaning without hatred, spite, or ill will;**
- 3. Defendant had reasonable or probable cause to believe the statement was true; and**
- 4. Defendant's statement was material and relevant to the issues in the divorce action.**

Authorities: *Civ. Code* § 47(a), (b), (d), (e); *Silberg v. Anderson* (1990) 50 Cal.3d 205, 215-216, 266 Cal.Rptr. 638, 786 P.2d 365 ; *Smith v. Commonwealth Land Title Ins. Co.* (1986) 177 Cal.App.3d 625, 630, 223 Cal.Rptr. 339 ; *Block v. Sacramento Clinical Labs, Inc.* (1982) 131 Cal.App.3d 386, 389-390, 182 Cal.Rptr. 438 ; *117 Sales Corp. v. Olsen* (1978) 80 Cal.App.3d 645, 651, 145 Cal.Rptr. 778 .

[2] Use of Instruction

This instruction should be used when the defendant claims that the alleged disparaging statement was privileged because it was made (1) in discharge of an official duty, (2) in the course of official proceedings, or (3) in reports of official proceedings or public meetings.

The instruction's first optional paragraph should be used only if a defendant has made a statement that (1) violates Rule 5-120 of the State Bar Rules of Professional Conduct (concerning trial publicity), (2) breaches a court order, or (3) violates any requirement of confidentiality imposed by law [see *Civ. Code* § 47(d)(2)].

The second optional paragraph of the instruction should be used only in the rare circumstance in which a defendant has published disparaging statements concerning a third party or its products as part of a divorce proceeding.

LexisNexis Matthew Bender Expert Practice Tip--Use of "Litigation Privilege": Of the various privileges covered by this instruction, the one that comes up the most is the privilege applicable to judicial proceedings [*Civ. Code* § 47(b)]. The so-called "litigation privilege" extends beyond statements made in a pleading and has been given a relatively wide application (e.g., press releases announcing the filing of a lawsuit). Note that the privilege is absolute, regardless of the degree of malice involved. However, the "litigation privilege" is a complicated area; be careful in these situations. *By Ronald Oster and Rex Heeseman*

[3] Comment

The privileges contained in *Civ. Code* § 47 are fully applicable to torts based on an injurious falsehood [*Albertson v. Raboff* (1956) 46 Cal.2d 375, 378-379, 295 P.2d 405 ; *Block v. Sacramento Clinical Labs, Inc.* (1982) 131 Cal.App.3d 386, 389-390, 182 Cal.Rptr. 438], including disparagement or trade libel actions [117 *Sales Corp. v. Olsen* (1978) 80 Cal.App.3d 645, 651, 145 Cal.Rptr. 778].

Communications that are made in the proper discharge of an official duty or that occur in the course of any official proceeding such as a court trial or legislative hearing are absolutely privileged, and provide a complete defense to a trade libel action [*Civ. Code* § 47(a), (b); see *Silberg v. Anderson* (1990) 50 Cal.3d 205, 215-216, 218, 266 Cal.Rptr. 638, 786 P.2d 365 (holding *Civ. Code* § 47(b) privilege to be absolute); *Rosenthal v. Vogt* (1991) 229 Cal.App.3d 69, 73-74, 280 Cal.Rptr. 1 (*Civ. Code* § 47(b) privilege for communications in official proceedings is absolute)]. There are four narrowly drawn exceptions to this privilege, one of which applies only to certain statements made in proceedings for marital dissolution or legal separation [see *Civ. Code* § 47(b)(1)]. The other three exceptions, none of which are likely to apply in a trade libel action, are the following:

- The privilege does not apply to a communication made to further an act of intentional destruction or alteration of physical evidence that is undertaken for the purpose of depriving a party to litigation of the use of that evidence, whether or not the content of the communication is the subject of a subsequent publication or broadcast that is privileged under *Civ. Code* § 47 [*Civ. Code* § 47(b)(2)];
- A communication made in a judicial proceeding that knowingly conceals the existence of an insurance policy is not privileged under *Civ. Code* § 47(b) [*Civ. Code* § 47(b)(3)]; and
- A recorded lis pendens is not a privileged communication unless it identifies an action previously filed with a court of competent jurisdiction that affects the title or right of possession of real property, as authorized or required by law [*Civ. Code* § 47(b)(4)]. Although this exception is not likely to be relevant to a trade libel action, it may in some cases be relevant to an action for slander of title [see MB 7000A.30 -MB 7000A.33].

A fair and true report of communications made in official proceedings is likewise privileged [*Civ. Code* § 47(d), (e)]. The law makes privileged both a fair and true report in, and any communication to, a public journal of a legislative, judicial, or other official proceeding, or of anything said in the course of such proceeding, or of a verified charge or complaint made by any person to a public official on which complaint a warrant has been issued [*Civ. Code* § 47(d)(1)]. However, a communication to a public journal is not privileged if it (1) violates Rule 5-120 of the State Bar Rules of Professional Conduct (concerning trial publicity), (2) breaches a court order, or (3) violates any requirement of confidentiality imposed by law [*Civ. Code* § 47(d)(2)]. Although the fair and true report privileges contained in *Civ. Code* § 47(d) and (e) are not expressly denoted as absolute, the omission of the "without malice" requirement from those statutory provisions renders the privilege essentially absolute [Witkin, Summary of California Law, vol. 5, *Torts*, § 648 (10th ed. 2005)].

For further discussion, see Levy, Golden & Sacks, *California Torts*, Chs. 40, *Fraud and Deceit and Other Business Torts*, Part C, and 45, *Defamation*, Part B (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Torts Business Torts Trade Libel Elements Torts Business Torts Trade Libel Remedies Torts Intentional Torts Defamation Defenses Privileges Absolute Privileges

Gordon P. Erspamer and Richard G. Seeborg contributed to the original chapter for California Forms of Jury Instruction (Matthew Bender). Eliot S. Jubelirer contributed to the original chapter as a consultant.



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California Forms of Jury Instruction

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CHAPTER 70A Matthew Bender Trade Libel or Disparagement Instructions
PART B. DEFENSES

6-70A California Forms of Jury Instruction MB 7000A.21

MB 7000A.21 Statement by Interested Person

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

A spoken or written statement that would otherwise be a trade libel may be "privileged." If Defendant's statement is privileged, then Plaintiff may not recover damages for that statement. Statements made to interested persons are privileged. An "interested person" is simply one who has a legitimate interest in the subject matter of the statement. This interest can be financial. For example, a bank loan officer is financially interested in the contents of a credit report on a person who wishes to borrow money from that officer's bank. There are other types of interest. Church members, for example, share a common interest in the affairs of their church.

[*EITHER, if court has already determined that third party is an "interested person"]*

In this case, the court has already determined, as a matter of law, that the person to whom Defendant made [some of] the statements at issue in this case, _____ [*name of interested person*], is an "interested person." Therefore, you must determine whether or not the statements Defendant made to _____ [*name of interested person*] were privileged under the instructions I am now about to give you.

[*OR, if jury is to determine whether third party is an "interested person"]*

You must first determine whether or not the person to whom Defendant made [some of] the statements at issue in this case, _____ [*name of interested person*], was an "interested person" under the

instructions I just gave you. If you find that _____ [*name of interested person*] was not an interested person, then the statements made by Defendant to _____ [*name of interested person*] are not privileged, and the Defendant may be held liable for those statements if you find that Plaintiff is otherwise entitled to recover for trade libel under the instructions I have previously given you. If you find that _____ [*name of interested person*] was an interested person, then you must determine whether the statements Defendant made to _____ [*name of interested person*] were privileged under the instructions I am now about to give you.

[*CONTINUE INSTRUCTION*]

A statement made by Defendant to an interested person is privileged if Defendant proves that:

[*CHOOSE ONE OR MORE OF THE FOLLOWING (See Use of Instruction)*]

The interested person shares a common interest with Defendant, and the statement is of a kind reasonably calculated to protect or further that interest.

[*OR*]

Defendant stands in such relation to the interested person that it is reasonable to suppose that the motive for the statement is innocent.

[*OR*]

Defendant was requested by the interested person to give the information.

[*CONTINUE INSTRUCTION*]

However, even if you find that Defendant has proved that one or more of the statements [he/she/it] made to _____ [*name of interested person*] were privileged under the instructions I have just given you, the privilege does not apply to a statement if you find that Plaintiff has proved any one of the following facts concerning that statement:

1. Defendant made the statement out of hatred, spite, or ill will.
2. Defendant knew that the statement was false.
3. Defendant lacked any reasonable basis for believing the statement to be true. The privilege is not defeated merely because Defendant was careless in checking the statement's truth. To lose the benefit of the privilege, Defendant must have been so careless that [his/her/its] conduct showed a wanton and reckless disregard of the consequences and of the rights and the feelings of others.
4. Part of Defendant's statement was not related to the interest that the privilege was meant to protect.
5. Defendant published the statement to someone who did not need to see or hear it for Defendant's interest to be

protected. This does not mean that the privilege is always defeated if any person sees or hears the statement who did not need to see or hear it for the protection of Defendant's interest. To preserve the privilege, Defendant is only required to choose a reasonable and appropriate way of communicating [his/her/its] statement.

6. Defendant's chief motive in making the statement was any motive other than the protection of [his/her/its] interest.

Authorities: *Civ. Code* §§ 47(c), 48; *Kemart Corp. v. Printing Arts Research Lab, Inc.* (9th Cir. 1959) 269 F.2d 375, 393; *Agarwal v. Johnson* (1979) 25 Cal.3d 932, 944-945, 160 Cal.Rptr. 141, 603 P.2d 58 (by analogy); *Brewer v. Second Baptist Church* (1948) 32 Cal.2d 791, 796-800, 197 P.2d 713; *Block v. Sacramento Clinical Labs, Inc.* (1982) 131 Cal.App.3d 386, 389-390, 182 Cal.Rptr. 438; *Williams v. Taylor* (1982) 129 Cal.App.3d 745, 751, 181 Cal.Rptr. 423 (by analogy); *Roemer v. Retail Credit Co.* (1975) 44 Cal.App.3d 926, 931-937, 119 Cal.Rptr. 82; *Deaile v. General Telephone Co. of California* (1974) 40 Cal.App.3d 841, 847-848, 115 Cal.Rptr. 582; *Roemer v. Retail Credit Co.* (1970) 3 Cal.App.3d 368, 371-372, 83 Cal.Rptr. 540; *Fairfield v. Hagan* (1967) 248 Cal.App.2d 194, 204-205, 56 Cal.Rptr. 402; Restatement (Second) of Torts, § 600.

[2] Use of Instruction

This instruction may be of limited utility in trade libel cases because malice is one of the elements of the tort [see MB 7000A.05]. Proof that a statement was made with actual malice defeats the qualified privilege of *Civ. Code* § 47(c). Yet, some showing of malice must be made as part of the prima facie case of trade libel before a claim of privilege would be necessary to defeat the action. Therefore, only in the limited circumstances when malice is inferred from the statement at issue (an adequate showing to establish the prima facie case but specifically inadequate pursuant to *Civ. Code* § 48 to defeat the qualified privilege of *Civ. Code* § 47(c)) will the "interested person" privilege arise. In that sense, the "interested person" privilege contrasts with the absolute privilege for statements in, or concerning, official proceedings [*Civ. Code* § 47(b); see MB 7000A.20], which operates as a defense regardless of the degree of malice with which the communication was made.

If the facts of the case at issue bear too close a resemblance to the examples of interested persons given in Paragraph 1 of the instruction, counsel should change or delete those examples. Counsel should consider making the instructions more specific by substituting the name of the interested person to whom the statement was made for the term "interested person."

Counsel should also choose as many of the listed methods of defeating this conditional privilege from the options given in the instruction as are at issue in the case.

For related Judicial Council instructions, see [3][f], *below*.

LexisNexis Matthew Bender Expert Practice Tip--"Interested Person" Privilege: The categories defining an "interested person" are relatively broad. Accordingly, the critical dispute usually involves the existence of one or more facts identified at the end of the instruction that overcome the privilege. *By Ronald Oster*

[3] Comment

[a] Conditional Privilege for Communications to Interested Persons--Application to Trade Libel

The Ninth Circuit Court of Appeals, applying California law, has held that the conditional privilege of *Civ. Code* § 47(c) for communications to interested persons applies to actions premised on trade libel [*Kemart Corp. v. Printing Arts Research Lab, Inc.* (9th Cir. 1959) 269 F.2d 375, 393]. In addition, California courts have held that the privileges contained in *Civ. Code* § 47 are applicable to trade libel actions [see *Albertson v. Raboff* (1956) 46 Cal.2d 375, 378-379,

295 P.2d 405 ; *Block v. Sacramento Clinical Labs, Inc.* (1982) 131 Cal.App.3d 386, 389-390, 182 Cal.Rptr. 438 (specific holding of both cases limited to Civ. Code § 47(b)). Thus, for example, otherwise libelous statements by a seller to a prospective customer concerning a competitor's products are conditionally privileged and not actionable unless the privilege is defeated. Conduct that would otherwise be actionable as a tort is not actionable if that conduct is privileged [Restatement (Second) of Torts § 10; see *Earp v. Nobmann* (1981) 122 Cal.App.3d 270, 277, 281-282, 175 Cal.Rptr. 767] .

The California Supreme Court has suggested that "the characterization of the privilege as qualified or conditional is incorrect to the extent that it suggests the privilege is defeasible." The Court described the use of the terms "qualified" or "conditional" as "somewhat misleading" [*Brown v. Kelly Broadcasting Co.* (1989) 48 Cal.3d 711, 723 n.7, 257 Cal.Rptr. 708, 771 P.2d 406]. Civ. Code § 47(c) defines a privileged communication as one made, without malice, to an interested person. "Thus, if malice is shown, the privilege is not merely overcome; it never arises in the first instance" [*Brown v. Kelly Broadcasting Co.* (1989) 48 Cal.3d 711, 723 n.7, 257 Cal.Rptr. 708, 771 P.2d 406]. The Supreme Court added that it "is the occasion giving rise to the publication that is conditionally privileged, i.e., under specified conditions the occasion gives rise to a privilege" [*Brown v. Kelly Broadcasting Co.* (1989) 48 Cal.3d 711, 723 n.7, 257 Cal.Rptr. 708, 771 P.2d 406]. Although this is a correct analysis of the statute, describing the interested person privilege as a conditional privilege that may be defeated by malice is nonetheless a useful shorthand, aptly suggesting the process usually required by the burden of proof. The burden of proof on the issue of the Civ. Code § 47(c) privilege requires the defendant to establish the privilege by proving that the communication was made to an interested person, and the plaintiff, to recover, must then prove that the communication was made with malice [see [d], below, for discussion of burden of proof].

[b] When "Interested Person" Privilege Applies

The conditional privilege of Civ. Code § 47(c) for communications to an "interested person" may be invoked in the following three different situations:

- The privilege applies when a communication is between two people who share a common interest and the communication is of a kind reasonably calculated to protect or further that interest [Civ. Code § 47(c); *Williams v. Taylor* (1982) 129 Cal.App.3d 745, 751, 181 Cal.Rptr. 423 (by analogy)].
- The privilege also applies when the interested person has requested the information from the defendant [Civ. Code § 47(c)] and when the relationship between the defendant and the interested person gives reasonable grounds for believing that the defendant's motive for the statement was an innocent one [Civ. Code § 47(c)]. Reference to defamation cases in which the Civ. Code § 47(c) privilege has arisen provides examples of privileged "interested person" communications [see, e.g., *Mason v. Western Union Telegraph Co.* (1975) 52 Cal.App.3d 429, 438, 125 Cal.Rptr. 53 (telegraph company may presume that addressee and sender of telegram are "interested persons"); *Deaile v. General Telephone Co. of California* (1974) 40 Cal.App.3d 841, 846-847, 115 Cal.Rptr. 582 (plaintiff's fellow employees were "interested persons" in connection with statements concerning plaintiff's forced retirement); *Neal v. Gatlin* (1973) 35 Cal.App.3d 871, 877, 111 Cal.Rptr. 117 (potential employer and former employer are "interested persons" in connection with communications concerning potential employee)].
- The privilege specifically applies to certain communications regarding job performance or qualifications of an applicant for employment made by a current or former employer to a prospective employer [see Civ. Code § 47(c)]. However, this application of the privilege is more likely to be relevant to an action for personal defamation than to a trade libel action.

The California Supreme Court has ruled that the interested person privilege of Civ. Code § 47(c) does not create a public-interest privilege for the news media to publish or broadcast defamatory statements about a private person. A

defamatory statement about a private person is not privileged because it is about a matter of public interest [*Brown v. Kelly Broadcasting Co. (1989) 48 Cal.3d 711, 738, 257 Cal.Rptr. 708, 771 P.2d 406*]. The word "interested" in Civ. Code § 47(c) means something narrower and more specific than the interest that readers and viewers have in the news of the day [*Brown v. Kelly Broadcasting Co. (1989) 48 Cal.3d 711, 738, 257 Cal.Rptr. 708, 771 P.2d 406*]. The United States Supreme Court has similarly declined to extend the constitutional privilege to defame to cover all matters of public interest [see [e], below].

[c] Defeating Privilege; Actual Malice

A plaintiff faced with the potential applicability of conditional privilege must overcome it to recover. This can be done by the proof of actual malice, defined as hatred, spite, or ill will [*Kemart Corp. v. Printing Arts Research Lab., Inc. (9th Cir. 1959) 269 F.2d 375, 393* ; *Agarwal v. Johnson (1979) 25 Cal.3d 932, 944-945, 160 Cal.Rptr. 141, 603 P.2d 58* (by analogy)]. The plaintiff can also defeat the privilege by proving any of the following:

- That the defendant knew the statement was false [Restatement (Second) of Torts § 600];
- That the statement included irrelevant defamatory matter not related to the interest to be protected [*Deaile v. General Telephone Co. of California (1974) 40 Cal.App.3d 841, 847, 115 Cal.Rptr. 582* ; Restatement (Second) of Torts, § 605A]; or
- That the defendant's primary motive in making the statement was not the protection of that interest which is the source of the privilege [*Agarwal v. Johnson (1979) 25 Cal.3d 932, 944-945, 160 Cal.Rptr. 141, 603 P.2d 58* (by analogy); *Brewer v. Second Baptist Church (1948) 32 Cal.2d 791, 797, 197 P.2d 713*].

The privilege can also be defeated by proof of (1) excessive publication [*Deaile v. General Telephone Co. of California (1974) 40 Cal.App.3d 841, 847, 115 Cal.Rptr. 582*], or (2) the defendant's lack of a reasonable belief in the statement's truth [*Rollenhagen v. City of Orange (1981) 116 Cal.App.3d 414, 424, 172 Cal.Rptr. 49* , partially disapproved on other grounds, *Brown v. Kelly Broadcasting Co. (1989) 48 Cal.3d 711, 738, 257 Cal.Rptr. 708, 771 P.2d 406* ; *Roemer v. Retail Credit Co. (1970) 3 Cal.App.3d 368, 371-372, 83 Cal.Rptr. 540*]. However, these defenses against a claim of privilege are somewhat more complex than the others. Excessive publication means publication to any person who does not need to hear the statement for the defendant's interest to be protected, although it is not necessary to insure that the statement is not seen or heard by any such person to retain the privilege. All that is necessary is that the defendant choose a means of communication that is reasonable and appropriate [Restatement (Second) of Torts § 604]. As for the defendant's lack of a reasonable belief that the statement was true, the privilege is not defeated merely because the plaintiff proves that the defendant was negligent in checking the statement's truth. To lose the benefit of the privilege, the defendant must have been so careless that his or her conduct showed a wanton and reckless disregard of the consequences and of the rights and the feelings of others [*Rollenhagen v. City of Orange (1981) 116 Cal.App.3d 414, 424, 172 Cal.Rptr. 49* , partially disapproved on other grounds, *Brown v. Kelly Broadcasting Co. (1989) 48 Cal.3d 711, 738, 257 Cal.Rptr. 708, 771 P.2d 406* ; *Roemer v. Retail Credit Co. (1970) 3 Cal.App.3d 368, 371-372, 83 Cal.Rptr. 540*].

When a newspaper report attributes charges of official impropriety to a third person, the mere absence of belief in those charges does not give rise to an inference of malice. A newspaper need not determine the truth or falsity of charges against a public official, because the publication of charges of official misconduct serves the purpose behind the interested person privilege, that of informing the public, which has an interest in learning of possible official misconduct. The report must, nonetheless, be substantially accurate, and the privilege may be lost if the report of the charges is exaggerated, overdrawn, or colored to the plaintiff's detriment [*Stockton Newspapers, Inc. v. Superior Court (1988) 206 Cal.App.3d 966, 980-985, 254 Cal.Rptr. 389*].

[d] Burden of Proof

The burden of proving a conditional privilege's existence is on the defendant [*Fairfield v. Hagan* (1967) 248 Cal.App.2d 194, 204, 56 Cal.Rptr. 402 (by analogy)]. However, once that defense is established, the burden of overcoming the privilege is on the plaintiff [*Deaile v. General Telephone Co. of California* (1974) 40 Cal.App.3d 841, 848, 115 Cal.Rptr. 582 (by analogy); see Witkin, Summary of California Law, vol. 5, Torts, § 702 (10th ed. 2005)]. If the communication's privileged nature appears on the face of the complaint, the burden is on the plaintiff to plead and prove facts that overcome the privilege [*Felton v. Schaeffer* (1991) 229 Cal.App.3d 229, 238 n.7, 279 Cal.Rptr. 713 ; *Freeman v. Mills* (1950) 97 Cal.App.2d 161, 167, 217 P.2d 687].

[e] The Constitutional Privilege to Defame

The First Amendment restrictions on defamation set by the United States Supreme Court in *New York Times Co. v. Sullivan* [*New York Times Co., Inc. v. Sullivan* (1964) 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686] and its progeny do constitute a conditional constitutional privilege to defame [see Prosser and Keeton on Torts, § 112, pp. 796-797, § 113, pp. 805-808 (West 5th ed. 1984)] that operates very like the privilege in Civ. Code § 47(c).

The *New York Times* case held that before a public official could sue the *New York Times* newspaper for libel, the First Amendment required that official to prove actual malice, defined as knowing or reckless falsity [*New York Times Co. v. Sullivan* (1964) 376 U.S. 254, 279-280, 84 S.Ct. 710, 11 L.Ed.2d 686]. The result was that a statement clearly libelous at common law was not a libel, that in effect it was privileged, unless actual malice, as defined by the Supreme Court, was established. This rule was later extended to public figures [*Curtis Publishing Co. v. Butts* (1967) 388 U.S. 130, 155, 87 S.Ct. 1975, 18 L.Ed.2d 1094], but the Supreme Court rejected the extension of the rule to all matters of public interest [*Gertz v. Welch* (1974) 418 U.S. 323, 346, 94 S.Ct. 2997, 41 L.Ed.2d 789 ; see also *Brown v. Kelly Broadcasting Co.* (1989) 48 Cal.3d 711, 738, 257 Cal.Rptr. 708, 771 P.2d 406 , discussed in [b], above, which held that Civ. Code § 47(c) does not create a public-interest privilege for the news media]. *Gertz* also held that states could set whatever standards for liability for defamation they chose in cases involving private plaintiffs so long as they did not impose liability without fault [*Gertz v. Welch* (1974) 418 U.S. 323, 347, 94 S.Ct. 2997, 41 L.Ed.2d 789] and required proof of knowing or reckless falsity before damages could be presumed or punitive damages imposed [*Gertz v. Welch* (1974) 418 U.S. 323, 349, 94 S.Ct. 2997, 41 L.Ed.2d 789].

In cases in which the plaintiff's claim is subject to the requirements of *New York Times Co. v. Sullivan*, the plaintiff must prove actual malice by clear and convincing evidence [*Masson v. New Yorker Magazine, Inc.* (1991) 501 U.S. 496, 510, 111 S.Ct. 2419, 115 L.Ed.2d 447 ; *McCoy v. Hearst Corp.* (1986) 42 Cal.3d 835, 860, 231 Cal.Rptr. 518, 727 P.2d 711]. Proof of actual malice requires a showing as to the defendant's state of mind; the plaintiff must show that at the time of publishing the statements the defendant knew they were false or, in fact, entertained serious doubts as to their truthfulness [*Masson v. New Yorker Magazine, Inc.* (1991) 501 U.S. 496, 510, 111 S.Ct. 2419, 115 L.Ed.2d 447 ; *McCoy v. Hearst Corp.* (1986) 42 Cal.3d 835, 860, 231 Cal.Rptr. 518, 727 P.2d 711 ; see *Melaleuca, Inc. v. Clark* (1998) 66 Cal.App.4th 1344, 1350, 78 Cal.Rptr.2d 627 (trial court erred in giving instruction that permitted jury to find actual malice on objective, rather than subjective, basis); see also MB 7000A.23].

The holding in *Gertz* on presumed and punitive damages has been limited to cases involving matters of public concern [*Dun & Bradstreet v. Greenmoss Builders* (1985) 472 U.S. 749, 757-761, 105 S.Ct. 2939, 86 L.Ed.2d 593]. Therefore, in most trade libel cases the state law conditional privilege will be applicable because these cases do not usually involve matters of public concern. For instance, a false report of bankruptcy by a credit reporting company only to its customers who had agreed not to further disseminate the information is not a matter of public concern [*Dun & Bradstreet v. Greenmoss Builders* (1985) 472 U.S. 749, 761-763, 105 S.Ct. 2939, 86 L.Ed.2d 593]. However, if matters of public concern are involved, actual malice must be established before presumed or punitive damages can be awarded.

[f] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 17, *California Judicial Council Defamation Instructions*]:

CACI No. 1723 Qualified Privilege (Civ. Code, § 47(c))

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Torts Business Torts Trade Libel Elements Torts Business Torts Trade Libel Remedies Torts Intentional Torts Defamation Defenses Privileges Qualified Privileges

Gordon P. Erspamer and Richard G. Seeborg contributed to the original chapter for California Forms of Jury Instruction (Matthew Bender). Eliot S. Jubelirer contributed to the original chapter as a consultant.



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California Forms of Jury Instruction

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CHAPTER 70A Matthew Bender Trade Libel or Disparagement Instructions
PART B. DEFENSES

6-70A California Forms of Jury Instruction MB 7000A.22

MB 7000A.22 Conditional Privilege--Unfavorable Comparison

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Even if you find that Defendant wrote or spoke statements that make false and unfavorable comparisons of a general nature between Defendant's product and Plaintiff's product, Plaintiff may not recover damages for the statements if Defendant proves both of the following:

- 1. That Plaintiff and Defendant are competitors; and**
- 2. That Defendant did not know the statements were false and did not publish the statements with a reckless disregard for their truth or falsity.**

The law says that Defendant is privileged to make false and unfavorable comparisons if [he/she/it] can prove the facts I have just described. However, this privilege does not apply if you find that Defendant made the statements in a way that suggested [he/she/it] had the necessary facts in hand to support the statements; that is, that the statements were based on such things as independent studies.

Authorities: *Sims v. Mack Truck Corp.* (E.D. Pa. 1980) 488 F.Supp. 592, 605 ; *Testing Systems, Inc. v. Magnaflux Corporation* (E.D. Pa. 1966) 251 F.Supp. 286, 288-289 .

[2] Use of Instruction

This instruction should be used in situations limited to when the plaintiff and defendant are competitors and the defendant's statements at least arguably are descriptive of differences between the plaintiff's and the defendant's products or services.

The fact situations that will warrant the use of this instruction will in most cases also warrant the use of the statutory "interested person" privilege of *Civ. Code* § 47(c) [see MB 7000A.21].

[3] Comment

This common law privilege covers general untruthful and unfavorable comparisons by one competitor about the product of another [*Sims v. Mack Truck Corp.* (E.D. Pa. 1980) 488 F.Supp. 592, 605]. The type of statements contemplated by the privilege include traditional sales puffing, such as, "my product consistently outperforms my competitor's product." The privilege is conditional [Restatement (Second) of Torts § 649], and, accordingly, will be forfeited if a statement is made with knowledge of its falsity or with reckless disregard for its truth [*New York Times Co., Inc. v. Sullivan* (1964) 376 U.S. 254, 279-283, 84 S.Ct. 710, 11 L.Ed.2d 686]. Moreover, the privilege does not cover statements implying that the party making the statement has the necessary facts to support it [*Testing Systems, Inc. v. Magnaflux Corporation* (E.D. Pa. 1966) 251 F.Supp. 286, 289].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Torts Business Torts Trade Libel Elements Torts Business Torts Trade Libel Remedies Torts Intentional Torts Defamation Defenses Privileges Qualified Privileges

Gordon P. Erspamer and Richard G. Seeborg contributed to the original chapter for California Forms of Jury Instruction (Matthew Bender). Eliot S. Jubelirer contributed to the original chapter as a consultant.



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California Forms of Jury Instruction

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CHAPTER 70A Matthew Bender Trade Libel or Disparagement Instructions
PART B. DEFENSES

6-70A California Forms of Jury Instruction MB 7000A.23

MB 7000A.23 Public Figure Standard--Prior Finding**[1] Instruction**[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

The law provides that Defendant is not liable for a false communication concerning the Plaintiff's _____ [describe goods or services] unless the communication was made by Defendant either with knowledge of its falsity, or with a reckless disregard of whether it was true or false. To show that Defendant made the communication with reckless disregard of whether it was true or false, the plaintiff must prove that the Defendant, in fact, had serious doubts about the truthfulness of the communication when it was made.

Plaintiff must prove this knowledge of falsity or reckless disregard for the truth by clear and convincing evidence. "Clear and convincing evidence" means evidence that makes you believe that it is highly probable that Defendant made this communication with knowledge of its falsity or with reckless disregard of whether it was true or false. Plaintiff must have offered evidence that is so clear as to leave no substantial doubt. Do not measure Plaintiff's evidence by the number of witnesses or the amount of evidence that [he/she/it] offers. Measure Plaintiff's evidence by how convincing that evidence is.

Authorities: *Masson v. New Yorker Magazine, Inc.* (1991) 501 U.S. 496, 510, 111 S.Ct. 2419, 115 L.Ed.2d 447 (by analogy); *Curtis Publishing Co. v. Butts* (1967) 388 U.S. 130, 162-165, 87 S.Ct. 1975, 18 L.Ed.2d 1094 (by analogy); *New York Times Co., Inc. v. Sullivan* (1964) 376 U.S. 254, 279-280, 84 S.Ct. 710, 11 L.Ed.2d 686 (by analogy); *Bose Corp. v. Consumers U. of U.S., Inc.* (D. Mass. 1981) 508 F.Supp. 1249, 1271, rev'd on other grounds, (1st Cir. 1982) 692 F.2d 189, 194, aff'd, 466 U.S. 485 (1984); *McCoy v. Hearst Corp.* (1986) 42 Cal.3d 835, 860, 231 Cal.Rptr. 518, 727 P.2d 711 (by analogy); *Melaleuca, Inc. v. Clark* (1998) 66 Cal.App.4th 1344, 1365-1367, 78 Cal.Rptr.2d 627; *Rancho La Costa, Inc. v. Superior Court* (1980) 106 Cal.App.3d 646, 659, 165 Cal.Rptr. 347 (by analogy).

[2] Use of Instruction

This instruction should be used in the unusual case in which the plaintiff has become a public figure as a result of voluntarily and actively seeking, in a matter of public interest, to influence the resolution of any issues concerning the quality of its product or service [see *Franklin v. Benevolent etc. Order of Elks* (1979) 97 Cal.App.3d 915, 929, 159 Cal.Rptr. 131 (defining "public figure")]. The instruction presumes that the court has found that plaintiff is a "public figure" with regard to the goods or services alleged to be disparaged. However, as discussed in [3][b], below, one court applied the "actual malice" standard to a factual situation in which the plaintiff was not a public figure when the statements made addressed a matter of public concern and were directed toward plaintiff's products rather than its reputation [see *Melaleuca, Inc. v. Clark* (1998) 66 Cal.App.4th 1344, 78 Cal.Rptr.2d 627].

Attorneys defending against trade libel actions should consider requesting this instruction because of the added burden of proof (clear and convincing evidence) it places on the plaintiff, particularly when the plaintiff relies exclusively or principally on implied malice to establish the element of malice required in a trade libel action. Otherwise, the actual malice shown in plaintiff's prima facie case might be adequate to meet the constitutional malice required by the "public figure" standard.

[3] Comment

[a] Public Figure; "Actual Malice"

The First Amendment as interpreted by the United States Supreme Court in *New York Times Co. v. Sullivan* [*New York Times Co., Inc. v. Sullivan* (1964) 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686] and its progeny limits California libel law. Under this limitation, a plaintiff who is a "public figure" must prove "actual malice" by clear and convincing evidence as set forth in *New York Times* to recover [*Masson v. New Yorker Magazine, Inc.* (1991) 501 U.S. 496, 510, 111 S.Ct. 2419, 115 L.Ed.2d 447 ; *Curtis Publishing Co. v. Butts* (1967) 388 U.S. 130, 162-165, 87 S.Ct. 1975, 18 L.Ed.2d 1094 ; *New York Times Co., Inc. v. Sullivan* (1964) 376 U.S. 254, 279-280, 285-286, 84 S.Ct. 710, 11 L.Ed.2d 686 ; *Thomas v. L.A. Times Communications, LLC* (C.D. Cal. 2002) 189 F.Supp.2d 1005, 1010-1011 ; *McCoy v. Hearst Corp.* (1986) 42 Cal.3d 835, 860, 231 Cal.Rptr. 518, 727 P.2d 711 ; see [c], below, regarding what constitutes clear and convincing evidence]. A business or corporation as well as a natural person may be a "public figure" [*Rancho La Costa, Inc. v. Superior Court* (1980) 106 Cal.App.3d 646, 659, 165 Cal.Rptr. 347].

In First Amendment law, "actual malice" is "a term of art denoting deliberate or reckless falsification" [*Masson v. New Yorker Magazine, Inc.* (1991) 501 U.S. 496, 499, 111 S.Ct. 2419, 115 L.Ed.2d 447]. "Actual malice" should not be confused with evil intent, spite, or ill will. A defamatory statement is made with actual malice when made with actual knowledge that it is false or with reckless disregard as to whether it is false or not [*Masson v. New Yorker Magazine, Inc.* (1991) 501 U.S. 496, 510-511, 111 S.Ct. 2419, 115 L.Ed.2d 447 ; *New York Times Co., Inc. v. Sullivan* (1964) 376 U.S. 254, 279-280, 84 S.Ct. 710, 11 L.Ed.2d 686]. The United States Supreme Court conceded that "actual malice" is an "unfortunate" phrase, as likely to confuse as to enlighten [*Masson v. New Yorker Magazine, Inc.* (1991) 501 U.S. 496, 511, 111 S.Ct. 2419, 115 L.Ed.2d 447]. For this reason, the Court recommends that "[i]n place of the term actual malice, it is better practice that jury instructions refer to publication of a statement with knowledge of falsity or reckless disregard as to truth or falsity" [*Masson v. New Yorker Magazine, Inc.* (1991) 501 U.S. 496, 511, 111 S.Ct. 2419, 115 L.Ed.2d 447]. The instruction in [1], above, complies with this recommendation.

[b] Application to Trade Libel Actions

The applicability of the "public figure" standard to actions grounded solely in trade libel or product disparagement remains an open question. In a 1998 decision, a California court of appeal applied the "actual malice" standard in a case in which the statements made about a product involved a matter of public concern [see *Melaleuca, Inc. v. Clark* (1998) 66 Cal.App.4th 1344, 78 Cal.Rptr.2d 627]. In another context, the California Supreme Court held that a plaintiff who asserts a cause of action that has as its gravamen the publication or dissemination of an injurious falsehood must meet

the constitutionally-mandated requirements that apply in defamation cases [*Blatty v. New York Times Co.* (1986) 42 Cal.3d 1033, 1042-1049, 232 Cal.Rptr. 542, 728 P.2d 1177]. A United States District Court in Massachusetts concluded that the standard does fully apply to product disparagement cases when the plaintiff has conducted a vigorous promotional campaign on behalf of a product and this campaign preceded the defendant's alleged disparagement. The court reasoned that the application of the "public figure" doctrine was even more appropriate in the commercial context because the individual's interest in reputation was not at stake and because the manufacturer always has access to the means to refute disparaging comments [*Bose Corp. v. Consumers U. of U.S., Inc.* (D. Mass. 1981) 508 F.Supp. 1249, 1270-1274 , *rev'd on other grounds*, (1st Cir. 1982) 692 F.2d 189, 194 , *aff'd*, 466 U.S. 485 (1984)].

In 1985, the United States Supreme Court indicated that the issue may be whether the libel action involves matters of public concern, rather than a public figure. The Court held that federal constitutional standards were only applicable to libel actions that involved matters of public concern in holding that a finding of actual malice was not necessary to award presumed and punitive damages if the action did not involve a matter of public concern [*Dun & Bradstreet v. Greenmoss Builders* (1985) 472 U.S. 749, 763, 105 S.Ct. 2939, 86 L.Ed.2d 593]. Therefore, if the action involves public concerns, attorneys for defendants should consider requesting this instruction.

In a 1998 California case, a court of appeal applied the "actual malice" standard to a factual situation in which the plaintiff was not a public figure, the statements made addressed a matter of public concern, and the statements were directed toward plaintiff's products rather than its reputation [*Melaleuca, Inc. v. Clark* (1998) 66 Cal.App.4th 1344, 1363-1365, 78 Cal.Rptr.2d 627 (statements in book about presence of benzene in plaintiff's pharmaceutical consumer goods found to be matter of public concern)]. The trial court instructed the jury that they could find actual malice if the person making the statements "must have had" serious doubts about the truth of those statements. The court found that the recklessness or doubt that gives rise to actual malice is *subjective* recklessness or doubt, and held that the trial court erred in giving an instruction which permitted the jury to find actual malice on an *objective* basis [*Melaleuca, Inc. v. Clark* (1998) 66 Cal.App.4th 1344, 1365-1366, 78 Cal.Rptr.2d 627]. For further discussion of the scope of limitations on defamation under California defamation and trade libel law, see MB 7000A.21[3][e].

In practice, the "public figure" standard may be of relatively little concern in trade libel or product disparagement cases under California law, because malice, though differently defined, is included as part of the prima facie case. If plaintiff introduces sufficient evidence of actual malice to meet the constitutional standard for malice, defendant will gain nothing by seeking to establish that plaintiff is a "public figure." However, the constitutional malice standard does require proof of malice by clear and convincing evidence, a higher burden than the traditional preponderance of the evidence standard under California law [*Masson v. New Yorker Magazine, Inc.* (1991) 501 U.S. 496, 510, 111 S.Ct. 2419, 115 L.Ed.2d 447 ; *New York Times Co., Inc. v. Sullivan* (1964) 376 U.S. 254, 279-280, 285-286, 84 S.Ct. 710, 11 L.Ed.2d 686 ; *McCoy v. Hearst Corp.* (1986) 42 Cal.3d 835, 860, 231 Cal.Rptr. 518, 727 P.2d 711 ; *see Evid. Code* § 115 (burden of proof requires proof by preponderance of evidence except as otherwise provided by law)]. The constitutional standard requires a higher degree of culpability [*McCoy v. Hearst Corp.* (1986) 42 Cal.3d 835, 871-872, 231 Cal.Rptr. 518, 727 P.2d 711]. Accordingly, defendants should always consider requesting a public figure determination, thereby requiring plaintiff to prove constitutional malice by clear and convincing evidence.

[c] Clear and Convincing Evidence

Proof of constitutional malice must be by evidence that is clear and convincing [*Masson v. New Yorker Magazine, Inc.* (1991) 501 U.S. 496, 510, 111 S.Ct. 2419, 115 L.Ed.2d 447 ; *New York Times Co., Inc. v. Sullivan* (1964) 376 U.S. 254, 285-286, 84 S.Ct. 710, 11 L.Ed.2d 686 ; Restatement (Second) of Torts § 580A, Comment f.]. "Clear and convincing evidence" has been variously defined as evidence that is (1) clear, explicit, and unequivocal; (2) so clear as to leave no substantial doubt; and (3) strong enough to command the unhesitating assent of every reasonable mind [*see Sheehan v. Sullivan* (1899) 126 Cal. 189, 193, 58 P. 543 ; *United Professional Planning, Inc. v. Superior Court* (1970) 9 Cal.App.3d 377, 386, 88 Cal.Rptr. 551]. Clear and convincing evidence must persuade the trier of fact that it is highly probable that the facts asserted are true [Witkin, California Evidence, vol. 1, *Burden of Proof and Presumptions*, § 38

(4th ed. 2000); McBaine, *Burden of Proof: Degrees of Belief*, 32 *Calif. L. Rev.* 242, 251-254, 262-264 (1944)].

LexisNexis Matthew Bender Expert Practice Tip--Burden of Proof Increases When Plaintiff Is

Public Figure: If the court finds that plaintiff is a public figure, the burden of proof dramatically increases. Plaintiff must prove actual malice [see [a], *above*], which is a subjective test, and must prove actual malice by clear and convincing evidence. Defense counsel will emphasize both of these points in closing argument. *By Ronald Oster*

[d] "Public Figure" Issue a Matter of Law

A question of constitutional law as to whether the plaintiff is a public figure is a question for the court and may not be submitted to the jury [*Harris v. Tomczak* (E.D. Cal. 1982) 94 F.R.D. 687, 696 ; see *Weingarten v. Block* (1980) 102 Cal.App.3d 129, 134-135, 162 Cal.Rptr. 701].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Constitutional Law Bill of Rights Fundamental Freedoms Freedom of Speech Defamation Public Figures Evidence Procedural Considerations Burdens of Proof Clear & Convincing Proof Torts Business Torts Trade Libel Elements Torts Business Torts Trade Libel Remedies

Gordon P. Erspamer and Richard G. Seeborg contributed to the original chapter for California Forms of Jury Instruction (Matthew Bender). Eliot S. Jubelirer contributed to the original chapter as a consultant.



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CHAPTER 70A Matthew Bender Trade Libel or Disparagement Instructions
PART B. DEFENSES

6-70A California Forms of Jury Instruction MB 7000A.24--MB 7000A.29

[Reserved]

MB 7000A.24[Reserved]



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CHAPTER 70A Matthew Bender Trade Libel or Disparagement Instructions PART C. SLANDER OF TITLE

6-70A California Forms of Jury Instruction MB 7000A.30

MB 7000A.30 Definition of Slander of Title

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Slander of title is a false statement that is spoken, written, or communicated by conduct, and that disparages or casts doubt on Plaintiff's title to _____ [personal property or land], resulting in financial loss to Plaintiff.

Authorities: *System Operations v. Scientific Games Dev. Corp.* (3d Cir. 1977) 555 F.2d 1131, 1138 n. 6 ; *Smith v. Commonwealth Land Title Ins. Co.* (1986) 177 Cal.App.3d 625, 630, 223 Cal.Rptr. 339 ; *Appel v. Burman* (1984) 159 Cal.App.3d 1209, 1214-1215, 206 Cal.Rptr. 259 ; *Howard v. Schaniel* (1980) 113 Cal.App.3d 256, 262-263, 169 Cal.Rptr. 678 ; *Glass v. Gulf Oil Corp.* (1970) 12 Cal.App.3d 412, 419-420, 89 Cal.Rptr. 514 ; *Hill v. Allan* (1968) 259 Cal.App.2d 470, 489, 66 Cal.Rptr. 676 ; *Kalajian v. Nash* (1957) 148 Cal.App.2d 495, 499, 306 P.2d 921 ; *Broadway Fed. etc. Loan Assn. v. Howard* (1955) 133 Cal.App.2d 382, 400, 285 P.2d 61 .

[2] Use of Instruction

This instruction should be used as a brief definition of slander of title and should serve as an introduction to the instruction in MB 7000A.31[1] which gives the elements of the cause of action and the plaintiff's burden of proof.

It is important to remember that slander of title claims are related to the broader concept of trade libel or product disparagement. Accordingly, whenever a slander of title instruction is appropriate, a cause of action for trade libel may exist as well, and the instructions in Part A may also be appropriate.

For coverage of trade libel and slander of title, see Levy, Golden & Sacks, California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, Part C.

[3] Comment**[a] Similarity of Slander of Title and Trade Libel**

Slander of title and trade libel, while distinct torts, are often combined in case law and other authority [Witkin, Summary of California Law, vol. 5, *Torts*, § 640 (10th ed. 2005)]. Like trade libel, slander of title can occur without regard to the manner of publication [see *System Operations v. Scientific Games Dev. Corp.* (3d Cir. 1977) 555 F.2d 1131, 1138 n.6].

[b] Protection of Marketability; Adverse Possession

Slander of title can occur through the filing or recording of documents which, by asserting an interest in a piece of property, call into question another's title to that property [*Castaic Clay Manufacturing Co. v. Dedes* (1987) 195 Cal.App.3d 444, 447, 240 Cal.Rptr. 652 ; see Witkin, Summary of California Law, vol. 5, *Torts*, § 642 (10th ed. 2005)]. However, because the slander of title tort is designed specifically to protect the marketability of property from injury [*Howard v. Schaniel* (1980) 113 Cal.App.3d 256, 264, 169 Cal.Rptr. 678 ; *Broadway Fed. etc. Loan Assn. v. Howard* (1955) 133 Cal.App.2d 382, 400, 285 P.2d 61], title acquired by adverse possession cannot provide the basis for a slander of title action. This title is not deemed to be marketable until it is judicially established against the record owner [*Howard v. Schaniel* (1980) 113 Cal.App.3d 256, 264, 169 Cal.Rptr. 678].

[c] Restrictions or Limits on Property's Use

Although the defendant's disparagement of title does not affect the vendability of the plaintiff's property per se, it may result in a reduction in the property's value by preventing its improvement or restricting its use. For example, a false boundary claim by the owner of an adjoining lot may result in the plaintiff being denied the opportunity to improve his or her lot. In such a case the plaintiff would be entitled to damages equaling the difference in the cost of the improvements between the time they were to be constructed and the time of trial [*Appel v. Burman* (1984) 159 Cal.App.3d 1209, 1215, 206 Cal.Rptr. 259].

[d] Personal Property; Timber Rights; Easements

Personal property can be the subject of a slander of title action. For example, trademark disparagement involves the malicious publishing of a false statement to the plaintiff's customers or potential customers that could be understood as casting doubt or confusion about the validity of the plaintiff's trademark rights, resulting in damages to the plaintiff's business [*Big O Tire Dealers, Inc. v. Goodyear Tire & Rubber* (D. Colo. 1976) 408 F.Supp. 1219, 1234-1235, 1245, modified, (10th Cir. 1977) 561 F.2d 1365]. In addition, disparaging communications concerning resources affixed to real property, such as timber rights, can provide a basis for a slander of title action [*Kalajian v. Nash* (1957) 148 Cal.App.2d 495, 498-499, 306 P.2d 921], as well as disparaging communications concerning easements to property [see *Hill v. Allan* (1968) 259 Cal.App.2d 470, 489, 66 Cal.Rptr. 676].

For related forms, see California Forms of Pleading and Practice, Ch. 340, *Libel and Slander* (Matthew Bender). For a discussion of slander of title, see California Real Estate Law & Practice, Ch. 372, *Slander of Title* (Matthew Bender), and Levy, Golden & Sacks, California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, Part C.

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property Law Adverse Possession General Overview Real Property Law Limited Use Rights Easements Timber Easements Torts Business Torts Slander of Title General Overview Torts Business Torts Slander of Title Elements

Gordon P. Erspamer and Richard G. Seeborg contributed to the original chapter for California Forms of Jury

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CHAPTER 70A Matthew Bender Trade Libel or Disparagement Instructions
PART C. SLANDER OF TITLE

6-70A California Forms of Jury Instruction MB 7000A.31

MB 7000A.31 Plaintiff's Burden of Proof

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

To recover for a slander of title, Plaintiff must prove all of the following:

1. That Defendant, without a privilege to do so, published a false statement that cast doubt on Plaintiff's title to _____ *[describe land, chattels, or intangibles]*;

2. That the statement was reasonably understood by one or more of the persons to whom it was published to be a statement of fact;

[*EITHER (See Use of Instruction)*

3. That Defendant should have foreseen that a potential buyer or renter of this property might be influenced by this statement not to _____ *[e.g., buy the property or rent the property]*;

[*OR*]

3. That Defendant should have foreseen the statement would cause a reduction of the value of Plaintiff's property because _____ *[specify, e.g., Plaintiff was unable to construct improvements on [his/her/its] property]*;

[CONTINUE INSTRUCTION]

4. That Defendant knew that the statement was false or published the statement in reckless disregard of whether it was true or false; and

5. That Defendant's conduct has caused Plaintiff to suffer financial loss.

Authorities: *Baker v. Los Angeles Herald Examiner* (1986) 42 Cal.3d 254, 259-260, 228 Cal.Rptr. 206, 721 P.2d 87 ; *Gregory v. McDonnell Douglas Corp.* (1976) 17 Cal.3d 596, 600-601, 131 Cal.Rptr. 641, 552 P.2d 425 ; *Albertson v. Raboff* (1956) 46 Cal.2d 375, 378, 295 P.2d 405 ; *Seeley v. Seymour* (1987) 190 Cal.App.3d 844, 856-859, 237 Cal.Rptr. 282 ; *Appel v. Burman* (1984) 159 Cal.App.3d 1209, 1214-1215, 206 Cal.Rptr. 259 ; *Howard v. Schaniel* (1980) 113 Cal.App.3d 256, 262-264, 169 Cal.Rptr. 678 ; *Glass v. Gulf Oil Corp.* (1970) 12 Cal.App.3d 412, 419, 89 Cal.Rptr. 514 ; *Hill v. Allan* (1968) 259 Cal.App.2d 470, 489-490, 66 Cal.Rptr. 676 ; *Pavlovsky v. Board of Trade* (1959) 171 Cal.App.2d 110, 114, 340 P.2d 63 .

[2] Use of Instruction

This instruction should be used with the instructions in MB 7000A.30 and MB 7000A.32, and the instruction in MB 7000A.02 defining publication. An instruction defining "preponderance of the evidence" should also be used in conjunction with this and all other instructions designating which party bears the burden of proof [see Ch. 2, *California Judicial Council Evidence Instructions*, CACI No. 200 ("More Likely True than Not True")]. If the defendant asserts the disparagement was privileged, the instruction in MB 7000A.33 should also be used.

The first alternative paragraph 3 should be used if the disparagement affected the vendability of the plaintiff's title. The second alternative is for use when the statement had the effect of reducing the value of the plaintiff's property, as, for example, by preventing the construction of improvements or restricting use.

[3] Comment

[a] Elements of Slander of Title

The necessary elements of a slander of title claim are (1) a publication, (2) without privilege, (3) of a false communication, (4) either made knowingly or without regard for its truth, that is disparaging to another's property in land, chattels, or intangible things, and (5) that causes direct and immediate pecuniary loss [*Seeley v. Seymour* (1987) 190 Cal.App.3d 844, 856-859, 237 Cal.Rptr. 282 ; *Appel v. Burman* (1984) 159 Cal.App.3d 1209, 1214-1215, 206 Cal.Rptr. 259 ; *Howard v. Schaniel* (1980) 113 Cal.App.3d 256, 262-264, 169 Cal.Rptr. 678 ; *Glass v. Gulf Oil Corp.* (1970) 12 Cal.App.3d 412, 419, 89 Cal.Rptr. 514 ; see Restatement (Second) of Torts § 624]. A disparaging statement is one that is intended to cast doubt or is reasonably understood to cast doubt on a person's title to property, if the statement is actually understood to cast doubt by its recipient [*Seeley v. Seymour* (1987) 190 Cal.App.3d 844, 856-859, 237 Cal.Rptr. 282 ; see *Glass v. Gulf Oil Corp.* (1970) 12 Cal.App.3d 412, 423, 89 Cal.Rptr. 514 ; Restatement (Second) of Torts § 629]. Statements of opinion are constitutionally protected; consequently, an essential element of any claim that is based on the publication of an allegedly false statement is that the statement was reasonably understood to be a statement of fact [*Baker v. Los Angeles Herald Examiner* (1986) 42 Cal.3d 254, 259-260, 228 Cal.Rptr. 206, 721 P.2d 87 ; *Gregory v. McDonnell Douglas Corp.* (1976) 17 Cal.3d 596, 600-601, 131 Cal.Rptr. 641, 552 P.2d 425].

[b] Privilege

Generally, the privileges available in defamation and trade libel actions are likewise available to defendants in slander of title cases [*Albertson v. Raboff* (1956) 46 Cal.2d 375, 378, 295 P.2d 405 ; *Smith v. Commonwealth Land Title Ins. Co.* (1986) 177 Cal.App.3d 625, 630, n. 1, 223 Cal.Rptr. 339 ; *Pavlovsky v. Board of Trade* (1959) 171 Cal.App.2d 110,

114, 340 P.2d 63]. In addition to those privileges, slander of title actions recognize a conditional "rival claimant" privilege [see MB 7000A.33], which is sometimes viewed as a variant of the conditional privilege contained in Civ. Code § 47(c) [*Hill v. Allan* (1968) 259 Cal.App.2d 470, 490, 66 Cal.Rptr. 676]. The absence of a privilege is an element of a cause of action for slander of title in the sense that there is no right of recovery if the facts on which the Plaintiff's prima facie case is based establish that the publication of the statement at issue was privileged; however, when the existence of a privilege depends on facts that are not part of plaintiff's prima facie case, the defendant has the burden of proof on a claim of privilege [see *Smith v. Commonwealth Land Title Ins. Co.* (1986) 177 Cal.App.3d 625, 630-631, 223 Cal.Rptr. 339].

[c] Trade Libel Distinguished

The required elements of a slander of title cause of action correspond to the requisites for a trade libel claim. The main distinction between the basic elements of these torts concerns special damages, which are required for a trade libel claim [see MB 7000A.06], but not for a slander of title action [see MB 7000A.32].

[d] Malice

Early California slander of title cases spoke of a malice requirement [see *Fearon v. Fodera* (1915) 169 Cal. 370, 379-380, 148 P. 200], but later cases held that the only degree of malice required for a slander of title claim is malice implied in law, or, in other words, malice implied from the absence of privilege or justification [*Gudger v. Manton* (1943) 21 Cal.2d 537, 543-544, 134 P.2d 217 , *disapproved on other grounds*, *Albertson v. Raboff* (1956) 46 Cal.2d 375, 381, 295 P.2d 405 ; *Hill v. Allan* (1968) 259 Cal.App.2d 470, 490, 66 Cal.Rptr. 676 ; *Contra Costa County Title Co. v. Waloff* (1960) 184 Cal.App.2d 59, 66, 7 Cal.Rptr. 358]. Actual malice would be necessary only to justify punitive damages [*Gudger v. Manton* (1943) 21 Cal.2d 537, 543-544, 134 P.2d 217 , *disapproved on other grounds*, *Albertson v. Raboff* (1956) 46 Cal.2d 375, 381, 295 P.2d 405] or to overcome a conditional privilege [*Gudger v. Manton* (1943) 21 Cal.2d 537, 543-544, 134 P.2d 217 , *disapproved on other grounds*, *Albertson v. Raboff* (1956) 46 Cal.2d 375, 381, 295 P.2d 405 ; *Hill v. Allan* (1968) 259 Cal.App.2d 470, 490-491, 66 Cal.Rptr. 676].

A still later case adopted the standard of a publication with knowledge of falsity or with reckless disregard for truth or falsity from Restatement (Second) of Torts § 623A [*Howard v. Schaniel* (1980) 113 Cal.App.3d 256, 264, 169 Cal.Rptr. 678]. This standard is based on the constitutionally required level of malice applied by the United States Supreme Court in defamation cases [*McCoy v. Hearst Corp.* (1986) 42 Cal.3d 835, 860, 231 Cal.Rptr. 518, 727 P.2d 711 ; see MB 7000A.05[3], MB 7000A.21[3][e]]. The court that gave this as an element of an action for slander of title also stated that malice, express or implied, was an element of the tort [*Howard v. Schaniel* (1980) 113 Cal.App.3d 256, 264, 169 Cal.Rptr. 678]. Therefore, the instruction in [1], above, requires a false, unprivileged statement (sufficient for implied malice) made with knowledge of falsity or reckless disregard.

LexisNexis Matthew Bender Expert Practice Tip--Burden of Proof: The intent requirement in this instruction is similar to the malice requirement in public figure defamation cases (i.e. knowledge of falsity or reckless disregard for the truth). Note, however, that the burden of proof is the normal standard and not the higher "clear and convincing" standard found in public figure defamation cases. *By Ronald Oster*

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsBusiness TortsSlander of TitleGeneral OverviewTortsBusiness TortsSlander of TitleDefensesTortsBusiness TortsSlander of TitleElementsTortsBusiness TortsTrade LibelGeneral OverviewTortsIntentional TortsDefamationDefensesPrivilegesGeneral Overview

Gordon P. Erspamer and Richard G. Seeborg contributed to the original chapter for California Forms of Jury Instruction (Matthew Bender). Eliot S. Jubelirer contributed to the original chapter as a consultant.



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CHAPTER 70A Matthew Bender Trade Libel or Disparagement Instructions
PART C. SLANDER OF TITLE

6-70A California Forms of Jury Instruction MB 7000A.32

MB 7000A.32 Damages Requirement

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

If you find that Defendant has slandered Plaintiff's ownership of _____ [describe land, chattels, or intangibles], Plaintiff may recover for the actual financial loss that [he/she/it] proves resulted directly and immediately from Defendant's slanderous publication. These losses include both of the following:

- 1. Any decrease in the marketability or value of Plaintiff's property; and**
- 2. The expense of measures reasonably necessary to counteract or remedy the slanderous publication, including costs and attorneys' fees incurred in a legal action to remove the doubt cast on the marketability or value of Plaintiff's property.**

Authorities: *Seeley v. Seymour* (1987) 190 Cal.App.3d 844, 864, 237 Cal.Rptr. 282 ; *Appel v. Burman* (1984) 159 Cal.App.3d 1209, 1214-1216, 206 Cal.Rptr. 259 ; *Earp v. Nobmann* (1981) 122 Cal.App.3d 270, 287, 175 Cal.Rptr. 767 ; *Glass v. Gulf Oil Corp.* (1970) 12 Cal.App.3d 412, 424, 89 Cal.Rptr. 514 ; *Alpine Mut. Water Co. v. Superior Court* (1968) 259 Cal.App.2d 45, 53, 66 Cal.Rptr. 250 ; *Spencer v. Harmon Enterprises, Inc.* (1965) 234 Cal.App.2d 614, 626, 44 Cal.Rptr. 683 ; *Contra Costa County Title Co. v. Waloff* (1960) 184 Cal.App.2d 59, 67, 7 Cal.Rptr. 358 .

[2] Use of Instruction

This instruction should be used to enunciate the general measure of damages recoverable in slander of title actions, but it should be modified to reflect the particular items of damage at issue.

Because trade libel requires proof of special damages and slander of title does not, counsel should consider basing trade

libel actions on slander of title as well as trade libel, whenever a disparagement claim can be construed as a communication concerning the title to real or personal property.

[3] Comment

[a] Measure of Damages in General

The compensatory damage recoverable in an action for slander of title is the pecuniary loss resulting from the impairment of marketability caused by the slander, together with any other detriment proximately caused by the same wrong [*Seeley v. Seymour* (1987) 190 Cal.App.3d 844, 864, 237 Cal.Rptr. 282 ; *Alpine Mut. Water Co. v. Superior Court* (1968) 259 Cal.App.2d 45, 53, 66 Cal.Rptr. 250]. However, loss of the property's value need not be related to its vendability. Damages for slander of title may also include losses resulting from impairment of use. For example, if the plaintiff is unable to build improvements on his or her property because of the defendant's slander, the plaintiff may be entitled to any increased costs that are incurred as a result of delaying the planned improvements [*Appel v. Burman* (1984) 159 Cal.App.3d 1209, 1214-1216, 206 Cal.Rptr. 259].

LexisNexis Matthew Bender Expert Practice Tip--Proof of Special Damages Not Required: Unlike trade libel, slander of title does not require proof of special damages. Attorneys' fees are recoverable to the extent required to clear title (though not to pursue the slander of title claim) [see [c], below]. Punitive damages can be recovered if malice is demonstrated [see [d], below]. By Ronald Oster

[b] Lost Sales or Leases

Damages recoverable in a slander of title action include the loss of a sale or lease of the property slandered, as well as the cost of litigation to remove the doubts occasioned by the title disparagement [see *Spencer v. Harmon Enterprises, Inc.* (1965) 234 Cal.App.2d 614, 622, 44 Cal.Rptr. 683 ; *Contra Costa County Title Co. v. Waloff* (1960) 184 Cal.App.2d 59, 67, 7 Cal.Rptr. 358]. However, the plaintiff may not recover damages for a loss of the use of proceeds of the property's sale or for emotional distress [*Seeley v. Seymour* (1987) 190 Cal.App.3d 844, 863-865, 237 Cal.Rptr. 282].

The property owner need not demonstrate the loss of a particular sale or lease opportunity [*Glass v. Gulf Oil Corp.* (1970) 12 Cal.App.3d 412, 424, 89 Cal.Rptr. 514]. Instead, it is sufficient to show that as a direct result of the slander of title, the property's market value suffered [*Glass v. Gulf Oil Corp.* (1970) 12 Cal.App.3d 412, 424, 89 Cal.Rptr. 514]. However, the damages that may be awarded in an action for disparagement of title do not include the loss of use of the money that would have been received if a prospective sale had been consummated [*Earp v. Nobmann* (1981) 122 Cal.App.3d 270, 287, 175 Cal.Rptr. 767].

[c] Attorneys' Fees and Costs

Attorneys' fees are recoverable in slander of title actions provided the action is joined with one to quiet title or there has been a separate action to clear the title. It is only those fees expended in clearing the title that are part of the plaintiff's special damages, which must be pleaded and proved at trial [*Glass v. Gulf Oil Corp.* (1970) 12 Cal.App.3d 412, 437-439, 89 Cal.Rptr. 514 ; *Spencer v. Harmon Enterprises, Inc.* (1965) 234 Cal.App.2d 614, 621, 44 Cal.Rptr. 683 ; *Contra Costa County Title Co. v. Waloff* (1960) 184 Cal.App.2d 59, 67-68, 7 Cal.Rptr. 358]. Fees need not be expended in bringing or defending an action to quiet title to qualify as expenses of clearing title. For example, costs incurred in defending an unlawful detainer action have been allowed as special damages in a slander of title action [*Castaic Clay Manufacturing Co. v. Dedes* (1987) 195 Cal.App.3d 444, 448, 240 Cal.Rptr. 652]. For instructions to be used in unlawful detainer actions, see Ch. 43, *California Judicial Council Unlawful Detainer Instructions*.

[d] Punitive Damages

Punitive damages may be appropriate in a disparagement or slander of title action [*Castaic Clay Manufacturing Co. v.*

Dedes (1987) 195 Cal.App.3d 444, 448, 450-451, 240 Cal.Rptr. 652 ; *Spencer v. Harmon Enterprises, Inc.* (1965) 234 Cal.App.2d 614, 626, 44 Cal.Rptr. 683]. For a punitive damages instruction appropriate in these actions, see MB 7000A.07 and MB 7000A.08.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Remedies Costs & Attorney Fees Attorney Expenses & Fees General Overview Civil
 Procedure Remedies Costs & Attorney Fees Costs General Overview Civil Procedure Remedies Damages Compensatory
 Damages Torts Business Torts Slander of Title General Overview Torts Business Torts Slander of Title Remedies

Gordon P. Erspamer and Richard G. Seeborg contributed to the original chapter for California Forms of Jury Instruction (Matthew Bender). Eliot S. Jubelirer contributed to the original chapter as a consultant.



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CHAPTER 70A Matthew Bender Trade Libel or Disparagement Instructions
PART C. SLANDER OF TITLE

6-70A California Forms of Jury Instruction MB 7000A.33

MB 7000A.33 Conditional Privilege--Rival Claimant

[1] Instruction Conditional Privilege--Rival Claimant

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Defendant had a right to make an honest, good faith claim to _____ [describe property] and to bring an action in good faith to try to prove [his/her/its] title to this property. If you find that Defendant has proved that [his/her/its] claim was an honest, good faith claim, then Plaintiff may not recover for Defendant's making that claim.

Authorities: *Gudger v. Manton* (1943) 21 Cal.2d 537, 545-546, 134 P.2d 217 ; *Glass v. Gulf Oil Corp.* (1970) 12 Cal.App.3d 412, 422 n. 3, 89 Cal.Rptr. 514 ; *Spencer v. Harmon Enterprises, Inc.* (1965) 234 Cal.App.2d 614, 622, 44 Cal.Rptr. 683 ; *Davis v. Wood* (1943) 61 Cal.App.2d 788, 794-795, 143 P.2d 740 .

[2] Use of Instruction

This instruction should be used by a defendant when it has at least a colorable claim to possession of the property allegedly slandered. Typical examples would be a bona fide claimant to real property with a cloudy title, and a title record owner engaged in a dispute with a party claiming a legally protected easement over that property.

[3] Comment

[a] Requirements for Exercise of Privilege

The "rival claimant" privilege is well established in the law of slander of title. A rival claimant of property is conditionally privileged to disparage another's property in land by an honest good faith assertion of an inconsistent legally protected interest [*Gudger v. Manton* (1943) 21 Cal.2d 537, 545, 134 P.2d 217 , *disapproved on other grounds*,

Albertson v. Raboff (1956) 46 Cal.2d 375, 381, 295 P.2d 405 ; *Glass v. Gulf Oil Corp.* (1970) 12 Cal.App.3d 412, 422 n. 3, 89 Cal.Rptr. 514]. For example, one who tells a would-be purchaser of land that he or she has an easement over the land in question is a rival claimant to its owner who is selling the land as free from easements [Restatement (Second) of Torts § 647, Comment e]. The person seeking protection under the rival claimant privilege need not believe in the claim's certain or even probable validity, so long as the person has a good faith belief in the substantial chance of the claim being sustained [Restatement (Second) of Torts § 647, Comment d].

[b] Conditional Nature of Privilege

The "rival claimant" privilege is conditional, and it can be lost if the defendant acted with malice [*Davis v. Wood* (1943) 61 Cal.App.2d 788, 794, 143 P.2d 740]. Lack of good faith or proof of actual malice will destroy the privilege [*Gudger v. Manton* (1943) 21 Cal.2d 537, 546, 134 P.2d 217 , *disapproved on other grounds*, *Albertson v. Raboff* (1956) 46 Cal.2d 375, 381, 295 P.2d 405 ; *Spencer v. Harmon Enterprises, Inc.* (1965) 234 Cal.App.2d 614, 622, 44 Cal.Rptr. 683].

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsBusiness TortsSlander of TitleGeneral OverviewTortsBusiness TortsSlander of TitleDefensesTortsIntentional TortsDefamationDefensesPrivilegesQualified Privileges

Gordon P. Erspamer and Richard G. Seeborg contributed to the original chapter for California Forms of Jury Instruction (Matthew Bender). Eliot S. Jubelirer contributed to the original chapter as a consultant.



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CHAPTER 71A Matthew Bender Common Counts for Indebtedness Instructions

6-71A California Forms of Jury Instruction 71A.syn

§ 71A.syn Synopsis to Chapter 71A: Matthew Bender Common Counts for Indebtedness Instructions

MB 7100A.01 Definition of Common Counts

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Nature and Validity of Common Counts

[b] Statute of Limitations

[c] When Common Counts May Be Used

[d] Disadvantages of Pleading Common Counts Together With Contract or Quasi-Contract Actions

[e] Related Judicial Council Jury Instructions

MB 7100A.02 Definition of Creditor

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 7100A.03 Definition of Debt

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 7100A.04 Definition of Debtor

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 7100A.05 Reasonable Value of Services

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Reasonable Value of Services

[b] Related Judicial Council Jury Instructions



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CHAPTER 71A Matthew Bender Common Counts for Indebtedness Instructions

6-71A California Forms of Jury Instruction Scope

Scope

SCOPE

This chapter includes jury instructions for cases in which an indebtedness is pleaded on the common counts. For the Judicial Council instructions on common counts, see Ch. 3, *California Judicial Council Contracts Instructions*, CACI Nos. 370- 374. The CACI contracts series sets forth common count instructions on the following topics:

- Money had and received [*CACI No. 370*].
- Goods and services rendered [*CACI No. 371*].
- Open book accounts and accounts stated [*CACI Nos. 372, 373*].
- Mistaken receipts [*CACI No. 374*].

This chapter covers the following topics:

- Definitions of "common counts" [*see MB 7100A.01*], "creditor" [*see MB 7100A.02*], and "debt" and "debtor" [*see MB 7100A.03, MB 7100A.04*].
- An action in quantum meruit to obtain the reasonable value of services rendered [*see MB 7100A.05*].

For instructions on debtor-related tort remedies, including collection torts, see Ch. 72A, *Matthew Bender Debt Collection Torts Instructions*.

For instructions on breach of contract, see Ch. 3, *California Judicial Council Contracts Instructions*, and Chs. 3A through 3G.

For instructions on the recovery of secured debts, see Ch. 3H, *Matthew Bender Commercial Code Sales Contract*

Instructions.

For relevant forms and a discussion of common counts, see California Forms of Pleading and Practice, Ch. 121, *Common Counts* (Matthew Bender).

For memoranda of points and authorities in common count cases, including memoranda for use in supporting and opposing demurrers to complaints pleaded on common counts, see California Points and Authorities, Ch. 43, *Common Counts and Bills of Particulars* .



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CHAPTER 71A Matthew Bender Common Counts for Indebtedness Instructions

6-71A California Forms of Jury Instruction MB 7100A.01

MB 7100A.01 Definition of Common Counts**[1] Instruction**

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Common counts are a form of legal relief by which the person who is owed money, the creditor, sets forth in account form the basis of [his/her/its] claim. For example, _____ [insert kind(s) of common counts applicable, e.g., the creditor may make a claim for _____ (money had and received and/or goods sold and delivered and/or account stated)].

A common count alleges that the [Debtor/Defendant] became indebted to [Creditor/Plaintiff] for a specified amount of money. The essential elements for any common count include all of the following:

- 1. Defendant owes Plaintiff a specified amount of money;**
- 2. The debt due is owed on some consideration, which means that that the money is owed for a service that was performed or for some goods that were sold; and**
- 3. The defendant has not paid the sum due.**

Authorities: *Weitzenkorn v. Lesser* (1953) 40 Cal.2d 778, 792-793, 256 P.2d 947 ; *Pike v. Zadig* (1915) 171 Cal. 273, 276, 152 P. 923 ; *Kawasho Internat., U.S.A., Inc. v. Lakewood Pipe Service, Inc.* (1983) 152 Cal.App.3d 785, 793, 201 Cal.Rptr. 640 ; *Lehner v. McLennan* (1921) 54 Cal.App. 491, 493, 202 P. 41 .

[2] Use of Instruction

This instruction should be used as an introduction to the common count causes of action. An instruction defining the standard of proof must be used with the common counts instructions [see Ch. 2, *California Judicial Council Evidence*

Instructions, CACI No. 200 ("Obligation to Prove--More Likely True Than Not True"). This instruction should also be used with the definitions of "creditor" and "debtor" in the instructions in MB 7100A.02 and MB 7100A.04.

For related Judicial Council instructions, see [3][e], *below*.

[3] Comment

[a] Nature and Validity of Common Counts

A common count is a form of action on a debt in which the plaintiff seeks money owed. A common count must allege all of the following [*Pike v. Zadig* (1915) 171 Cal. 273, 275-276, 152 P. 923 ; *Allen v. Powell* (1967) 248 Cal.App.2d 502, 510, 56 Cal.Rptr. 715]:

- The defendant became indebted to the plaintiff for a specified sum of money;
- The debt is owed for some consideration, such as services performed or goods sold; and
- The defendant has not paid.

Although common counts contradict the principles of code pleading by alleging legal conclusions, common counts are not subject to demurrer, and they are accepted in California as well as in federal courts and other code jurisdictions [*Weitzenkorn v. Lesser* (1953) 40 Cal.2d 778, 792-793, 256 P.2d 947 ; *Moya v. Northrup* (1970) 10 Cal.App.3d 276, 280, 88 Cal.Rptr. 783 ; see *Pike v. Zadig* (1915) 171 Cal. 273, 276, 152 P. 923 (practice of pleading by common counts "has been too long established in this state to be now open to question")]. California Judicial Council forms include allegations for common counts [see California Judicial Council Forms PLD-C-001(2)].

For relevant forms and a more detailed discussion of common counts, see California Forms of Pleading and Practice, Ch. 121, *Common Counts* (Matthew Bender).

LexisNexis Matthew Bender Expert Practice Tip--Explain Common Counts to Jury: Common counts were developed in an earlier pleading era but they are still used today. Such an allegation can usually survive a demurrer. However, most jurors have never heard of common counts, so they will require some additional explanation in the opening statement and closing argument. *By Ronald Oster*

[b] Statute of Limitations

The statute of limitations period on common counts is either two or four years, depending on whether the indebtedness is based on a writing. Common counts for book accounts and account stated must be based on a writing, and always have a four-year limitation period [*Code Civ. Proc.* § 337(2)]. Causes of action for breach of an obligation or liability not founded on an instrument in writing must be brought within two years [*Code Civ. Proc.* § 339(1)]. However, in the case of a claim for the value of services that a cohabiting domestic partner provided for the other partner's business during their 21-year period of cohabitation without marriage, the cause of action in quantum meruit accrued at the relationship's termination, not at the time when some hypothetical paycheck might ordinarily have come due [*Maglica v. Maglica* (1998) 66 Cal.App.4th 442, 454, 78 Cal.Rptr.2d 101].

[c] When Common Counts May Be Used

Common counts are not proper in any of the following situations [see Witkin, California Procedure, *Pleading*, § 516 (4th ed. 1997)]:

- When plaintiff has not yet fully performed his or her duties under the contract [see *Barrere v. Soms* (1896) 113 Cal. 97, 102, 45 P. 177 (no basis for common count found when evidence showed plaintiff

had not performed certain conditions)];

- When plaintiff seeks damages on a breach of contract theory [*Weitzenkorn v. Lesser* (1953) 40 Cal.2d 778, 793, 256 P.2d 947 ; see *Willett & Burr v. Alpert* (1919) 181 Cal. 652, 659, 185 P. 976 ; *King v. San Jose Pacific Bldg. & Loan Asso.* (1940) 41 Cal.App.2d 705, 708, 107 P.2d 442]; and

- When the defendant's obligation is something other than the payment of money [see *O'Connor v. Dingley* (1864) 26 Cal. 11, 22 (when defendant obligated to pay plaintiff for plaintiff's services with promissory note, remedy of plaintiff based on failure to execute note, not common count for work and labor in amount of work)].

[d] Disadvantages of Pleading Common Counts Together With Contract or Quasi-Contract Actions

Although advantages exist for alleging common counts in addition to contract and quasi-contract causes of action, this practice can also be dangerous. First, a judgment based on a common count would probably not support an attorney's fee award under *Civ. Code* § 1717, because the action is not one to enforce a contract. When both contract and common counts are pleaded, and the judgment is ambiguous as to the theory applied by the judge in awarding payment, it is possible that attorney's fees will not be awarded [see *McKenzie v. Kaiser-Aetna* (1976) 55 Cal.App.3d 84, 87-89, 127 Cal.Rptr. 275]. Second, when a common count is based on the same cause of action as a specific count pleaded with the common count, and the specific count is defective, the entire complaint is subject to demurrer [*Zumbrun v. University of Southern California* (1972) 25 Cal.App.3d 1, 14, 101 Cal.Rptr. 499].

[e] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 3, *California Judicial Council Contracts Instructions*]:

CACI No. 370, Common Count: Money Had and Received

CACI No. 371, Common Count: Goods and Services Rendered

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsStandard InstructionsCivil ProcedureRemediesEquitable AccountingsGeneral OverviewContracts LawBreachCauses of ActionGeneral OverviewContracts LawBreachCauses of ActionMoney Had & ReceivedGovernmentsLegislationStatutes of LimitationsTime Limitations

Robert L. Hughes, Eric J. Firstman, and Cindy Lee contributed to the original chapter for California Forms of Jury Instruction (Matthew Bender).



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CHAPTER 71A Matthew Bender Common Counts for Indebtedness Instructions

6-71A California Forms of Jury Instruction MB 7100A.02

MB 7100A.02 Definition of Creditor

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

A creditor is a person in whose favor an obligation exists by reason of which that person is entitled or may become entitled to the payment of money.

Authority: *Civ. Code § 3430.*

[2] Use of Instruction

This instruction should be used to define "creditor" in actions pleaded on common counts. It is not intended for use in actions involving secured creditors.

[3] Comment

Civ. Code § 3430 defines "creditor" as it is defined in [1], *above*. Black's Law Dictionary variously defines creditor as (1) a person to whom a debt is owing by another who is the debtor; (2) one who has the right to require the fulfillment of an obligation or contract; and (3) the opposite of "debtor." The term "is susceptible of latitudinous construction" and may have various special meanings when used in statutes, depending on the context in which it is used and the purpose of the statute [Black's Law Dictionary (5th ed. 1979) at p. 332].

A creditor's ability to recover a debt and the creditor's priority in seeking to do so depend on his or her creditor status [see, e.g., *Com. Code § 1201(13)* (creditor may be general creditor, secured creditor, or lien creditor, and so on)]. However, the scope of this chapter is limited to actions pleaded on the common counts for the recovery of unsecured debts.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsStandard InstructionsCivil ProcedureRemediesEquitable
AccountingsGeneral OverviewContracts LawBreachCauses of ActionGeneral OverviewContracts LawBreachCauses of
ActionMoney Had & Received

Robert L. Hughes, Eric J. Firstman, and Cindy Lee contributed to the original chapter for California Forms of Jury
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CHAPTER 71A Matthew Bender Common Counts for Indebtedness Instructions

6-71A California Forms of Jury Instruction MB 7100A.03

MB 7100A.03 Definition of Debt

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

A debt is money that is due or owing from one person to another person.

Authorities: *Civ. Code § 1788.2(d)*.

[2] Use of Instruction

This instruction should be used with the common count instructions to define "debt."

For purposes of this chapter, the definition of debt is limited to money due or owing. For this reason, the reference to "money, property, or their equivalent" in *Civ. Code § 1788.2(d)* has been simplified to "money." Similarly, the reference in *Civ. Code § 1788.2* to money due or owing from a "natural person" has been revised. Although the Rosenthal Fair Debt Collection Practices Act [*Civ. Code § 1788 et seq.*; see Ch. 72A, *Matthew Bender Debt Collection Torts Instructions*, for instructions on unfair debt collection practices], from which the above definition is taken, limits debtors to natural persons [*Civ. Code § 1788.2(h)*], there is no such restriction on actions for debt based on the pleading of the common counts.

[3] Comment

The term "debt" has been variously defined. Indeed, it has been suggested that the word has no fixed legal meaning, but takes its precise meaning from the occasion of its use and the accompanying words [*UMF Systems, Inc. v. Eltra Corp.* (1976) 17 Cal.3d 753, 756, 132 Cal.Rptr. 129, 553 P.2d 225]. The definition given in [1], above, is based on the definition of debt in *Civ. Code § 1788.2(d)*, which is part of the Rosenthal Fair Debt Collection Practices Act [*Civ. Code § 1788 et seq.*; see *Gouskos v. Aptos Village Garage, Inc.* (2001) 94 Cal.App.4th 754, 759-760, 114 Cal.Rptr.2d 558

(construing definition of "debt collector" in *Civ. Code* § 1788.2(c)); see also Ch. 72A, *Matthew Bender Debt Collection Torts Instructions*]. Debt has also been defined as a sum of money due by contract, express or implied, or any obligation to pay money [*Certified Grocers of California, Ltd. v. San Gabriel Valley Bank* (1983) 150 Cal.App.3d 281, 288, 197 Cal.Rptr. 710]. Black's Law Dictionary defines debt as a specified sum of money owing to one person from another, including not only the debtor's obligation to pay but the creditor's right to receive and enforce payment. A debt is a fixed and certain obligation to pay money or some other valuable thing or things, now or in the future [Black's Law Dictionary (5th ed. 1979) at p. 363].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsStandard InstructionsCivil ProcedureRemediesEquitable
AccountingsGeneral OverviewContracts LawBreachCauses of ActionGeneral OverviewContracts LawBreachCauses of
ActionMoney Had & Received

Robert L. Hughes, Eric J. Firstman, and Cindy Lee contributed to the original chapter for California Forms of Jury Instruction (Matthew Bender).



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California Forms of Jury Instruction

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CHAPTER 71A Matthew Bender Common Counts for Indebtedness Instructions

6-71A California Forms of Jury Instruction MB 7100A.04

MB 7100A.04 Definition of Debtor

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

A debtor is a person who by reason of an existing obligation is or may become liable to pay money to another person, whether the liability is certain or contingent. A debt is certain, if it is clear that the debtor owes money to the other person right now, regardless of whatever else happens. A debt is contingent on the occurrence of some specified event, if something has to happen before the debtor actually owes the money.

Authority: *Civ. Code § 3429.*

[2] Use of Instruction

This instruction should be used to define "debtor" in actions pleaded on common counts.

[3] Comment

The definition of "debtor" in this instruction is taken from *Civ. Code § 3429*. Black's Law Dictionary also defines a debtor as one who owes a debt or one who is liable on a claim, whether due or to become due [Black's Law Dictionary (5th ed. 1979), p. 364]. The Commercial Code defines a debtor in a secured transaction as any of the following [*Com. Code § 9102(a)(28)*]:

- A person having an interest, other than a security interest or other lien, in the collateral, whether or not the person is an obligor;
- A seller of accounts, chattel paper, payment intangibles, or promissory notes; or

- A consignee.

The theory used to secure a debtor's obligation to a creditor on an unsecured debt depends on the kind of transaction engaged in. Thus, an alleged creditor may make a claim on a book account or account stated [*see CACI Nos. 372, 373*], a claim for money had and received [*see CACI No. 370*], or a claim for money lent. For further discussion, see California Forms of Pleading and Practice, Ch. 121, *Common Counts* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsStandard InstructionsCivil ProcedureRemediesEquitable
AccountingsGeneral OverviewContracts LawBreachCauses of ActionGeneral OverviewContracts LawBreachCauses of
ActionMoney Had & Received

Robert L. Hughes, Eric J. Firstman, and Cindy Lee contributed to the original chapter for California Forms of Jury Instruction (Matthew Bender).



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CHAPTER 71A Matthew Bender Common Counts for Indebtedness Instructions

6-71A California Forms of Jury Instruction MB 7100A.05

MB 7100A.05 Reasonable Value of Services

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Plaintiff may be compensated for the reasonable value of services rendered to Defendant by awarding Plaintiff the reasonable value of what it would have cost Defendant to obtain from another person the services that Plaintiff provided.

Authority: Maglica v. Maglica (1998) 66 Cal.App.4th 442, 450, 452 .

[2] Use of Instruction

This instruction should be used when plaintiff is asserting a cause of action in quantum meruit to obtain the reasonable value of services rendered to defendant.

For related Judicial Council instructions, see [3][b], *below*.

[3] Comment

[a] Reasonable Value of Services

The legal test for recovery in quantum meruit for the value of services provided is the reasonable value of those services, not the value of the benefit conferred on the defendant by the services. It is reversible error to instruct that the reasonable value of services for recovery in quantum meruit is measured by the benefit to the defendant [*Maglica v. Maglica (1998) 66 Cal.App.4th 442, 450, 78 Cal.Rptr.2d 101*].

The threshold requirement that a benefit be derived from services rendered can lead to confusion. That the defendant

benefited from the services is a ground for recovery; however, to measure the reasonable value of the services by the value of the benefit to the defendant is error. A contract price and the reasonable value of services rendered are to be distinguished.

For example, in a case involving a quantum meruit claim for the value of the plaintiff's services provided for the defendant's business during the parties' 21-year period of cohabitation without marriage, an \$84 million jury verdict was reversed because the jury was mistakenly instructed that the reasonable value of the plaintiff's services was either the cost to obtain those services from someone else or the value of the defendant's benefit as a result of those services. To allow recovery based on the value of the resulting benefit, as contrasted with the reasonable cost of obtaining the services, would afford the best of all possible recoveries, whether contractual or quasi-contractual. In other words, measuring recovery in quantum meruit by the benefit resulting from a service would impose an open-ended standard that could result in a de facto change of ownership of a business, which would be grossly disproportionate to the cost of hiring the services [*Maglica v. Maglica* (1998) 66 Cal.App.4th 442, 450, 78 Cal.Rptr.2d 101].

LexisNexis Matthew Bender Expert Practice Tip--Measure of Damages: As indicated in the comment above, the measure of damages is the reasonable value of the services rendered by plaintiff, not the benefit received by defendant. However, it is sometimes difficult to prove what is "reasonable." By *Ronald Oster and Rex Heeseman*

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 3, *California Judicial Council Contracts Instructions*]:

CACI No. 371 Common Count: Goods and Services Rendered

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Contracts Law Remedies Equitable Relief Quantum Meruit

Robert L. Hughes, Eric J. Firstman, and Cindy Lee contributed to the original chapter for California Forms of Jury Instruction (Matthew Bender).



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CHAPTER 72A Matthew Bender Debt Collection Torts Instructions

6-72A California Forms of Jury Instruction 72A.syn

§ 72A.syn Synopsis to Chapter 72A: Matthew Bender Debt Collection Torts Instructions

MB 7200A.01 Definition of Collection Tort

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Definitions

[b] Liability of Creditor for Torts of Collector

MB 7200A.02 Definition of Privilege

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Privilege to Assert Economic Interests

[b] Related Judicial Council Jury Instructions

MB 7200A.03 Types of Invasion of Privacy Applicable in Creditor-Debtor Situations

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Origins of Right to Privacy

[b] Five Distinct Privacy Torts

[c] Objectionable or Offensive Invasions of Privacy

[d] Related Statutes and Regulations

[e] Related Judicial Council Jury Instructions

MB 7200A.04 Violation of Statutory Duty

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Violation of Statutory Duty

[b] Related Judicial Council Instructions

MB 7200A.05 Definition of Repossession

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Definition of "Repossession"; Validity

[b] Origins and Basis of Right to Repossess

[c] Repossession Torts



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CHAPTER 72A Matthew Bender Debt Collection Torts Instructions

6-72A California Forms of Jury Instruction Scope

Scope

SCOPE

This chapter includes jury instructions for torts that arise during attempts to collect unsecured debts. Because debtor and creditor remedies are a cross-section of general tort remedies, attorneys seeking related tort instructions should review the following Judicial Council and Matthew Bender chapters:

- Ch. 4, *California Judicial Council Negligence Instructions*.
- Ch. 13, *California Judicial Council Assault and Battery Instructions*.
- Ch. 14, *California Judicial Council False Imprisonment Instructions*.
- Ch. 15, *California Judicial Council Malicious Prosecution Instructions*.
- Ch. 16, *California Judicial Council Emotional Distress Instructions*.
- Ch. 17, *California Judicial Council Defamation Instructions*.
- Ch. 18, *California Judicial Council Right of Privacy Instructions*.
- Ch. 20, *California Judicial Council Trespass and Nuisance Instructions*.
- Ch. 21, *California Judicial Council Conversion Instructions*.
- Ch. 21A, *Matthew Bender Conversion Instructions*.
- Ch. 22, *California Judicial Council Economic Interference Instructions*.
- Ch. 22A, *Matthew Bender Interference With Economic Relations Instructions*.

This chapter covers the following topics:

- The definition of a "collection tort" [*see MB 7200A.01*].
- The definition of "privilege" [*see MB 7200A.02*].
- The types of invasion of privacy applicable specifically to creditor-debtor situations [*see MB 7200A.03*].
- Violation of a statutory duty [*see MB 7200A.04*].
- The definition of "repossession" [*see MB 7200A.05*].

For instructions when trade libel or disparagement is an issue, see Ch. 70A, *Matthew Bender Trade Libel or Disparagement Instructions*.

For instructions when an indebtedness is pleaded on the common counts, see Ch. 71A, *Matthew Bender Common Counts for Indebtedness Instructions*.

For instructions on the recovery of secured debts, see Ch. 3H, *Matthew Bender Commercial Code Sales Contract Instructions*.

For instructions regarding the interference with employment relations, see Ch. 24, *California Judicial Council Wrongful Termination Instructions*, and Ch. 24A, *Matthew Bender Employment Contract Instructions*.

For instructions regarding unfair competition, see Ch. 33, *California Judicial Council Unfair Practices Act Instructions*, and Ch. 33A, *Matthew Bender Unfair Competition Instructions*.

For extensive discussion of debt collection, see *Matthew Bender Practice Guide: California Debt Collection and Enforcement of Judgments*.



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CHAPTER 72A Matthew Bender Debt Collection Torts Instructions

6-72A California Forms of Jury Instruction MB 7200A.01

MB 7200A.01 Definition of Collection Tort

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

A tort is a private or civil wrong, other than a breach of contract, for which the injured party is entitled to recover damages.

A collection tort is a tort inflicted by a debt collector on a debtor while collecting or trying to collect a debt.

Authorities: *Hallidie v. Enginger* (1917) 175 Cal. 505, 507, 166 P. 1 ; *Denning v. State* (1899) 123 Cal. 316, 323, 55 P. 1000 ; *Markwell v. Swift & Co.* (1954) 126 Cal.App.2d 245, 250, 272 P.2d 47 .

[2] Use of Instruction

The instruction should be used to define the term "collection tort." It should be used as an introductory instruction in actions brought by a debtor who claims to have been injured by the unreasonable acts of the debt collector/defendant during the debt collection process. The defendant may be a collection agency, an attorney, or a private person.

[3] Comment

[a] Definitions

A tort is a civil wrong, other than a breach of contract, for which a court will provide a remedy, usually in the form of an action for damages [*L. B. Laboratories, Inc. v. Mitchell* (1952) 39 Cal. 2d 56, 62, 244 P.2d 385 ; see *Hallidie v. Enginger* (1917) 175 Cal. 505, 507, 166 P. 1 (tort is personal action for wrongs not arising from contract); *Markwell v. Swift & Co.* (1954) 126 Cal.App.2d 245, 250, 272 P.2d 47 (accord)].

Collection torts are torts committed by a debt collector during the collection process. Examples include the following:

- Intentional or negligent infliction of emotional distress [see Ch. 16, *California Judicial Council Emotional Distress Instructions*];
- Defamation [see Ch. 17, *California Judicial Council Defamation Instructions*];
- Invasion of privacy [see Ch. 18, *California Judicial Council Right of Privacy Instructions*];
- Interference with employment relations [see Ch. 24, *California Judicial Council Wrongful Termination Instructions*, and Ch. 24A, *Matthew Bender Employment Contract Instructions*]; and
- The tortious violation of a statutory duty [see MB 7200A.04 and Ch. 4, *California Judicial Council Negligence Instructions*, CACI No. 418, Presumption of Negligence Per Se].

LexisNexis Matthew Bender Expert Practice Tip--Be Wary of Using Term "Tort" With Jury: The term "tort" is likely to be unfamiliar to most jurors. In closing argument, counsel may want to use another term, such as "wrongful conduct" or "improper act." *By Ronald Oster and Rex Heeseman*

[b] Liability of Creditor for Torts of Collector

It has been suggested by analogy to *Noble v. Sears, Roebuck & Co.* [*Noble v. Sears, Roebuck & Co.* (1973) 33 Cal.App.3d 654, 109 Cal.Rptr. 269] that in California a creditor may be liable for the collector's tortious acts [see California CEB, *Debt Collection Tort Practice* (Supp. Aug. 1987), § 3.1A]. In *Noble*, the court of appeal held that Sears was liable for the alleged torts of its private investigator. The court stated that holding the hirer of a detective agency liable for a tort committed by employees of the agency was analogous to the rule that an attorney who, as a principal, employed other attorneys to collect a judgment and who authorized them to levy on the debtor's property, may be vicariously liable for the acts of the agent attorneys within the scope of their authority [*Noble v. Sears, Roebuck & Co.* (1973) 33 Cal.App.3d 654, 663, 109 Cal.Rptr. 269]. It appears that the court's reasoning in *Noble* could be applied against a creditor for the acts of its collector as well as against one who hires a private investigator [see California CEB, *Debt Collection Tort Practice* (Supp. Aug. 1987), § 3.1A].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Torts Business Torts Commercial Interference Employment Relationships General Overview Torts Intentional Torts Intentional Infliction of Emotional Distress General Overview Torts Intentional Torts Invasion of Privacy General Overview Torts Negligence Actions Negligent Infliction of Emotional Distress General Overview



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CHAPTER 72A Matthew Bender Debt Collection Torts Instructions

6-72A California Forms of Jury Instruction MB 7200A.02

MB 7200A.02 Definition of Privilege

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] PROPOSED INSTR. NO. _____

Defendant claims that [he/she/it] is not liable to Plaintiff because [his/her/its] conduct was privileged. As a [creditor/collector], Defendant is entitled to assert [his/her/its] legal rights of collection to the extent provided by law, even though asserting these rights may cause emotional distress to Plaintiff. If Defendant acted in an unreasonable and outrageous manner in exercising these rights, however, then the privilege does not apply. You must decide whether Defendant acted in good faith in believing that [he/she/it] was properly asserting [his/her/its] rights as a [creditor/collector] by _____ [describe the allegedly outrageous collection conduct of defendant] or whether Defendant's conduct went beyond permissible lawful conduct.

Authorities: *Symonds v. Mercury Savings & Loan Assn.* (1990) 225 Cal.App.3d 1458, 1469 ; *Bundren v. Superior Court* (1983) 145 Cal.App.3d 784, 789, 193 Cal.Rptr. 671 ; *Fletcher v. Western Nat'l Life Ins. Co.* (1970) 10 Cal.App.3d 376, 394-396, 89 Cal.Rptr. 78 ; *Timperley v. Chase Collection Service* (1969) 272 Cal.App.2d 697, 699, 77 Cal.Rptr. 782 .

[2] Use of Instruction

This instruction should be used to define privilege. It should be used in conjunction with instructions on intentional or negligent infliction of emotional distress whenever it is claimed that the defendant's conduct was privileged [see Ch. 16, *California Judicial Council Emotional Distress Instructions*].

To determine whether the defendant's conduct was lawful and permissible, another instruction will be required. This instruction must be based on the particular facts of the case and on any relevant statute or rule. For discussion of the effect of statutes and rules on a collector's qualified privilege to pursue his or her economic interest, see [3][a], *below*.

For related Judicial Council instructions, see [3][b], *below*.

LexisNexis Matthew Bender Expert Practice Tip--Using This Instructions: This is an introductory instruction that must be supplemented by more detailed instructions that directly address applicable statutory prohibitions. *By Ronald Oster*

[3] Comment

[a] Privilege to Assert Economic Interests

A common-law privilege exists to assert one's own economic interests [*Symonds v. Mercury Savings & Loan Assn.* (1990) 225 Cal.App.3d 1458, 1469, 275 Cal.Rptr. 871 ; *Bundren v. Superior Court* (1983) 145 Cal.App.3d 784, 789, 193 Cal.Rptr. 671 ; *Fletcher v. Western Nat'l Life Ins. Co.* (1970) 10 Cal.App.3d 376, 394-396, 89 Cal.Rptr. 78 ; see Levy, Golden & Sacks, California Torts, Ch. 44, *Intentional Infliction of Emotional Distress* (Matthew Bender)]. This privilege applies to a creditor who is attempting to collect a debt. A creditor is entitled take reasonable steps to collect a debt [*Bundren v. Superior Court* (1983) 145 Cal.App.3d 784, 789, 193 Cal.Rptr. 671 ; *Timperley v. Chase Collection Service* (1969) 272 Cal.App.2d 697, 699, 77 Cal.Rptr. 782].

This privilege is a qualified privilege, and is lost when a creditor's collection practices are "outrageous and unreasonable" [*Symonds v. Mercury Savings & Loan Assn.* (1990) 225 Cal.App.3d 1458, 1469, 275 Cal.Rptr. 871 ; *Bundren v. Superior Court* (1983) 145 Cal.App.3d 784, 789, 193 Cal.Rptr. 671 ; *Fletcher v. Western Nat'l Life Ins. Co.* (1970) 10 Cal.App.3d 376, 395, 89 Cal.Rptr. 78]. Because outrageous conduct is an element of the cause of action for intentional infliction of emotional distress and must therefore be proved in every case [see Ch. 16, *California Judicial Council Emotional Distress Instructions*, CACI Nos. 1600, 1602], it is not entirely clear what the effect of this privilege is. It has been suggested that because the privilege appears to apply only to conduct that was not actionable in the first place (i.e., conduct that was not outrageous), it is not a true privilege [see Levy, Golden & Sacks, California Torts, Ch. 44, *Intentional Infliction of Emotional Distress* (Matthew Bender)]. The test is whether the creditor's attempts to collect exceed "all reasonable bounds of decency" [*Bundren v. Superior Court* (1983) 145 Cal.App.3d 784, 789, 193 Cal.Rptr. 671].

Because the area of creditor's remedies and debtor's rights is highly regulated, the determination of whether a creditor has stepped beyond the scope of the privilege often depends on whether the conduct at issue is prohibited by statute or regulation. For example, *Civ. Code* § 1788.11 of the Robbins-Rosenthal Fair Debt Collection Practices Act [*Civ. Code* § 1788 *et seq.*] specifically prohibits the collector from harassing the debtor in collecting or attempting to collect a consumer debt. Prohibited types of harassment include all of the following:

- The use of obscene or profane language [*Civ. Code* § 1788.11(a)];
- Making telephone calls without disclosing the caller's identity [*Civ. Code* § 1788.11(b)]; and
- Communicating with the debtor with unreasonable frequency [*Civ. Code* § 1788.11(e)].

Civ. Code § 1788.12 also prohibits certain communications with others about the debt, such as the following [see *Sanchez v. Client Svcs., Inc.* (N.D. Cal. 2007) 520 F.Supp.2d 1149, 1158] :

- Telling the consumer's employer about the debt [*Civ. Code* § 1788.12(a)]; or
- Advertising the debt for sale by naming the debtor [*Civ. Code* § 1788.12(c)].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 16, *California Judicial Council Emotional Distress Instructions*]:

CACI No. 1600, Intentional Infliction of Emotional Distress--Essential Factual Elements

CACI No. 1605, Intentional Infliction of Emotional Distress--Affirmative Defense--Privileged Conduct

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsStandard InstructionsTortsIntentional TortsIntentional Infliction of Emotional DistressGeneral OverviewTortsIntentional TortsIntentional Infliction of Emotional DistressDefensesTortsNegligenceActionsNegligent Infliction of Emotional DistressGeneral Overview



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CHAPTER 72A Matthew Bender Debt Collection Torts Instructions

6-72A California Forms of Jury Instruction MB 7200A.03

MB 7200A.03 Types of Invasion of Privacy Applicable in Creditor-Debtor Situations**[1] Instruction**[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

In actions between a debtor and a creditor, an invasion of privacy can be broken down into four distinct wrongs:

- 1. Intruding on one's solitude or seclusion;**
- 2. Placing one in a false light in the public eye;**
- 3. Publicly disclosing private facts; and**
- 4. Violating the State constitutional right of privacy.**

In this case, Plaintiff claims that Defendant invaded [his/her] privacy by _____ [describe alleged invasion of privacy]. Thus, Plaintiff claims that Defendant has invaded Plaintiff's privacy by _____ [intruding on Plaintiff's solitude *and/or* publicly disclosing private facts about Plaintiff *and/or* placing Plaintiff in a false light in the public eye *and/or* violating the State constitutional right of privacy].

I will now explain what Plaintiff must prove to recover on this claim.

Authorities: *Cal. Const., art. I, § 1; Hill v. Nat'l Collegiate Athletic Ass'n (1994) 7 Cal.4th 1, 39-40, 26 Cal.Rptr.2d 834, 865 P.2d 633 ; Lugosi v. Universal Pictures (1979) 25 Cal.3d 813, 819, 160 Cal.Rptr. 323, 603 P.2d 425 .*

[2] Use of Instruction

This instruction should be used in a debtor's action for invasion of privacy to introduce the debtor's case. Instructions on the types of invasion of privacy that apply generally in debtor-creditor litigation do not differ from general invasion of privacy instructions, such as instructions regarding unreasonable intrusion, false light, and public disclosure of private facts. These instructions can be found in Ch. 18, *California Judicial Council Right of Privacy Instructions*.

The first paragraph of this instruction is intended to make it clear to the jury that invasion of privacy (as applied to debtor-creditor litigation) is not just one tort but is in fact four separate and distinct torts [see [3][b], *below*, regarding interference with right of publicity, which is not addressed in this instruction]. The distinctions among them are important when the plaintiff claims a right to relief under more than one right of privacy, because the elements that the plaintiff must prove will be different for each type. If the plaintiff claims relief under only one type, the first paragraph of this instruction may be omitted if the parties believe that it might confuse the jury by telling it more than it needs to know.

When filling in the blanks in the second paragraph of this instruction, it is important to be clear and specific about the plaintiff's factual allegations to help the jury focus on the plaintiff's claim.

For related Judicial Council instructions, see [3][e], *below*.

LexisNexis Matthew Bender Expert Practice Tip--Instruction Should Include Only Wrongs

Alleged in Your Case: This instruction should be cut down to include only the wrongs allegedly involved in the case at hand. Otherwise, this instruction could be confusing to the jury. Terms such as "false light" will have to be further explained in other instructions, as very few persons (including attorneys) know the meaning of "false light." *By Ronald Oster and Rex Heeseman*

[3] Comment

[a] Origins of Right to Privacy

The California Constitution guarantees the inalienable right to privacy [Cal. Const., art. I, § 1; *Sheehan v. San Francisco 49ers, Ltd.* (2009) 45 Cal.4th 992, 997, 89 Cal.Rptr.3d 594, 201 P.3d 472 ; see, e.g., *Jeffrey H. v. Imai, Tadlock & Keeney* (2000) 85 Cal.App.4th 345, 353, 101 Cal.Rptr.2d 916 , *overruled on other grounds*, *Jacob B. v. County of Shasta* (2007) 40 Cal.4th 948, 962, 56 Cal.Rptr.3d 477, 154 P.3d 1003] . Any infringement of this right must be justified by a compelling state interest [*Hill v. Nat'l Collegiate Athletic Ass'n* (1994) 7 Cal.4th 1, 39-40, 26 Cal.Rptr.2d 834, 865 P.2d 633]. In addition to this constitutional right of privacy, tort law recognizes four separate types of the common-law tort of invasion of privacy:

- (1) Intruding on someone's solitude or seclusion.
- (2) Placing someone in a false light.
- (3) Publicly disclosing private facts.
- (4) Right of publicity.

In tort law, the idea of the "right to be let alone" [Restatement (Second) of Torts § 652A, comment a; see *Melvin v. Reid* (1931) 112 Cal.App. 285, 289, 297 P. 91 ("right to be left alone")] is over 100 years old [Cooley, *Torts* (2d ed. 1888); Warren & Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193 (1890)], and the right has been recognized in virtually every state [*Diaz v. Oakland Tribune, Inc.* (1983) 139 Cal.App.3d 118, 125, 188 Cal.Rptr. 762].

[b] Five Distinct Privacy Torts

Five distinct torts compose invasion of privacy: the constitutional cause of action and the four types of the common-law tort [see [3][a], *above*]. Each recognizes a different interest that may be invaded [*Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 23-32, 26 Cal.Rptr.2d 834, 865 P.2d 633 ; Restatement (Second) of Torts § 652A]. The right of privacy embraces the torts named in [1], *above*, as well as the right of action for misappropriation of name or likeness, known as the right of publicity [see Ch. 33A, *Matthew Bender Unfair Competition Instructions*].

This instruction does not include the right of publicity because an action for misappropriation of name or likeness is not likely to arise when a creditor invades a debtor's privacy while attempting to collect a debt.

For a more complete review of the torts composing invasion of privacy, including an instruction on consent as a defense to a privacy claim, see Ch. 18, *California Judicial Council Right of Privacy Instructions*. For further discussion of the right to privacy, see Levy, Golden & Sacks, California Torts, Ch. 46, *Invasion of Privacy* (Matthew Bender). For forms that may be used in an action for invasion of privacy, see California Forms of Pleading and Practice, Ch. 429, *Privacy* (Matthew Bender).

[c] Objectionable or Offensive Invasions of Privacy

A creditor possesses a qualified privilege to protect its economic interest, but the privilege may be lost should the creditor use outrageous and unreasonable means in seeking payment. The applicable test is whether or not the creditor goes beyond "all reasonable bounds of decency" in attempting to collect the debt. Under the view set forth in the Restatement [Restatement (Second) of Torts, § 46, comment e], a collector who happens to demand payment in a rude and insolent manner is not liable unless other factors are present.

Such "other factors" may be supplied when the creditor has knowledge that the debtor is susceptible to emotional distress by reason of some physical or mental condition [*Bundren v. Superior Court* (1983) 145 Cal. App. 3d 784, 789, 193 Cal. Rptr. 671]. Such intentional infliction of emotional distress is present when the defendant's extreme or outrageous acts are made in reckless disregard of the fact that his or her conduct would cause plaintiff severe or extreme emotional distress [*Bundren v. Superior Court* (1983) 145 Cal. App. 3d 784, 790, 193 Cal. Rptr. 671].

[d] Related Statutes and Regulations

An action for invasion of privacy should be evaluated in conjunction with a review of the statutes and regulations that govern debt collection. Debt collection is a heavily regulated area, and the applicable statutes or rules may affect the relief available to the debtor [see, e.g., *Nickoloff v. Wolpoff & Abramson, L.L.P.* (C.D. Cal. 2007) 511 F.Supp.2d 1043, 1045 (Rosenthal Fair Debt Collection Practices Act); *Guevarra v. Progressive Fin. Svcs.* (N.D. Cal. 2007) 497 F.Supp.2d 1090, 1090-1091 (same); *Alkan v. Citimortgage, Inc.* (N.D. Cal. 2004) 336 F.Supp.2d 1061, 1064 (same)]. For example, Civ. Code § 1788.12 of the Robbins-Rosenthal Fair Debt Collection Practices Act [Civ. Code § 1788 *et seq.*] forbids a collector to make certain disclosures in collecting or attempting to collect a consumer debt. A creditor's violation of these provisions might affect the creditor's liability for the public disclosure of private facts [see Ch. 18, *California Judicial Council Right of Privacy Instructions*, CACI No. 1801].

An invasion of privacy action is not barred by a parallel action brought under the Investigative Consumer Reporting Agencies Act [Civ. Code § 1786.52; see Civ. Code § 1786.1 *et seq.*] or under the Rosenthal Fair Debt Collection Practices Act [Civ. Code § 1788.32; see Civ. Code § 1788 *et seq.*]. However, the Consumer Credit Reporting Agencies Act [Civ. Code § 1785.1 *et seq.*] generally prohibits actions for invasion of privacy based on the reporting of information by or the furnishing of information to a consumer reporting agency [Civ. Code § 1785.32]. There is an exception for false information furnished with malice or willful intent to injure. Civ. Code § 1785.32. In addition, those injured by violations of the Consumer Credit Reporting Agencies Act may sue for actual damages resulting from the violation [Civ. Code § 1785.31].

[e] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 18, *California Judicial Council Right of Privacy Instructions*]:

CACI No. 1800, Intrusion Into Private Affairs

CACI No. 1801, Public Disclosure of Private Facts

CACI No. 1802, False Light

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsStandard InstructionsTortsIntentional TortsInvasion of PrivacyGeneral OverviewTortsIntentional TortsInvasion of PrivacyFalse Light PrivacyGeneral OverviewTortsIntentional TortsInvasion of PrivacyIntrusionGeneral OverviewTortsIntentional TortsInvasion of PrivacyPublic Disclosure of Private FactsGeneral Overview



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CHAPTER 72A Matthew Bender Debt Collection Torts Instructions

6-72A California Forms of Jury Instruction MB 7200A.04

MB 7200A.04 Violation of Statutory Duty**[1] Instruction**

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

I have determined that under _____ [specify statute at issue] Defendant owed a duty to Plaintiff to _____ [specify duty, e.g., refrain from unfair or misleading collection practices]. Plaintiff claims that Defendant violated this duty. To recover damages on [his/her/its] claim for the violation of this duty, Plaintiff must prove both of the following:

1. Defendant violated [his/her/its] duty to _____ [specify duty, e.g., refrain from unfair or misleading collection practices]; and

2. Defendant's violation of this duty caused Plaintiff to suffer damages.

Authorities: *Biakanja v. Irving* (1958) 49 Cal.2d 647, 651, 320 P.2d 16 ; *Hudson v. Craft* (1949) 33 Cal.2d 654, 655-657, 204 P.2d 1 ; *Czap v. Credit Bureau of Santa Clara Valley* (1970) 7 Cal.App.3d 1, 6, 86 Cal.Rptr. 417 ; *Laczko v. Jules Meyers, Inc.* (1969) 276 Cal.App.2d 293, 295, 80 Cal.Rptr. 798 ; *Wetherton v. Growers Farm Labor Assoc.* (1969) 275 Cal.App.2d 168, 174, 79 Cal.Rptr. 543 .

[2] Use of Instruction

This instruction should be used when the debtor claims that he or she has been harmed by the collector's violation of a statutory duty owed to the debtor.

This instruction should be used with an instruction defining the standard of proof [see Ch. 2, *California Judicial Council Evidence Instructions*, CACI No. 200, Obligation to Prove--More Likely True Than Not True]. The instruction should also be used with an instruction explaining proximate cause [see Ch. 4, *California Judicial Council Evidence*

Instructions, CACI No. 430, Causation: Substantial Factor].

For related Judicial Council instructions, see [3][b], *below*.

[3] Comment

[a] Violation of Statutory Duty

The violation of a statutory duty owed to another may be a tort, and the violation of a statute that embodies a public policy is generally actionable even though the statute itself does not provide for a remedy. Any injured person for whose benefit the statute was enacted may bring an action [*Czap v. Credit Bureau of Santa Clara Valley* (1970) 7 Cal.App.3d 1, 6, 86 Cal.Rptr. 417 ; *Laczko v. Jules Meyers, Inc.* (1969) 276 Cal.App.2d 293, 295, 80 Cal.Rptr. 798 ; *Wetherton v. Growers Farm Labor Assoc.* (1969) 275 Cal.App.2d 168, 174, 79 Cal.Rptr. 543 ; see *Biakanja v. Irving* (1958) 49 Cal.2d 647, 651, 320 P.2d 16 (action against notary public for losses resulting from notary's drafting of will in violation of prohibition against unauthorized practice of law); *Hudson v. Craft* (1949) 33 Cal.2d 654, 655-657, 204 P.2d 1 (action for damages against a promoter for injuries suffered in illegal prize fight)]. This rule is similar to the doctrine of negligence per se, which is codified at *Evid. Code* § 669. *Evid. Code* § 669 provides a presumption of negligence when a statutory violation proximately causes plaintiff's injury, the statute was designed to prevent the type of injury resulting, and the plaintiff is a member of the class that the statute was intended to protect [see *Levy, Golden & Sacks, California Torts*, Ch. 3, *Proof of Negligence* (Matthew Bender)].

The elements of a tort action for breach of a statutory duty are [see *Laczko v. Jules Meyers, Inc.* (1969) 276 Cal.App.2d 293, 295, 80 Cal.Rptr. 798]:

- (1) A statutory duty owed by the defendant to the plaintiff.
- (2) A breach of that duty.
- (3) Damages suffered by the plaintiff as a result of the defendant's breach of the duty.

This cause of action is available for the violation of a duty imposed by a statute governing debt collection just as it would be for the violation of any other statutory duty. For example, in *Czap v. Credit Bureau*, the plaintiff alleged a tort based on harm to the plaintiff resulting from an unfair collection practice by the credit bureau. The trial judge sustained the credit bureau's demurrer and dismissed the action, but the appellate court reversed, noting that the standard of conduct set by the statute for unfair collection practices did appear to be designed to protect the public. The court stated that whether any particular act by a licensed collector is an unfair collection practice under former *Bus. & Prof. Code* § 6947(k) will normally be a question of fact [*Czap v. Credit Bureau* (1970) 7 Cal.App.3d 1, 6, 86 Cal.Rptr. 417].

Under this theory, federal, state, and local statutes and regulations governing the collection process may provide the basis for a tort action against a debt collector who violates such a statute or rule [see, e.g., 15 U.S.C. § 45(a)(1) (unfair methods of competition in commerce and unfair or deceptive practices in commerce); 16 Cal. Code Reg. § 628.5 (collection agencies' unlawful acts); see also *Clark v. Capital Credit & Collection Services, Inc.* (9th Cir. 2006) 460 F.3d 1162, 1167 (action under federal and Oregon state laws); *Dupuy v. Weltman, Weinberg & Reis Co.* (N.D. Cal. 2006) 442 F.Supp.2d 822, 824 (action under federal and California state laws)].

[b] Related Judicial Council Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 4, *California Judicial Council Negligence Instructions*]:

CACI No. 418, Presumption of Negligence Per Se

Legal Topics:

For related research and practice materials, see the following legal topics:

Banking LawConsumer ProtectionFair Debt CollectionLiabilityCivil ProcedureTrialsJury TrialsJury
InstructionsStandard InstructionsContracts LawDebtor & Creditor RelationsTortsNegligenceProofViolations of
LawStatutes



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CHAPTER 72A Matthew Bender Debt Collection Torts Instructions

6-72A California Forms of Jury Instruction MB 7200A.05

MB 7200A.05 Definition of Repossession

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Repossession is the creditor's self-help method of retaking property. The authority to repossess may be based on common law, contract, or statute.

A repossession tort is the retaking of property in such an unreasonable way that the debtor suffers damages.

I will now instruct you on the elements of the repossession tort of _____ [insert one or more conversion and/or trespass to land or chattel and/or assault and battery and/or false imprisonment and/or emotional distress].

Authorities: *Com. Code* § 9609; *Kipp v. Cozens* (1974) 40 Cal.App.3d 709, 713-715, 115 Cal.Rptr. 423 ; *Shirley v. State Nat'l Bank of Connecticut* (2d Cir. 1974) 493 F.2d 739, 742 ; *Adams v. Southern California First Nat'l Bank* (9th Cir. 1973) 492 F.2d 324, 330 ; *Black's Law Dictionary* (7th ed. 1999) at 1303.

[2] Use of Instruction

Repossession torts may be asserted when a chattel has been unreasonably repossessed. This instruction should be used as an introduction in conjunction with the specific repossession tort at issue, for example:

- Assault and battery [see Ch. 13, *California Judicial Council Assault and Battery Instructions*];
- False imprisonment [see Ch. 14, *California Judicial Council False Imprisonment Instructions*];
- Trespass [see Ch. 20, *California Judicial Council Trespass and Nuisance Instructions*]; or

- Conversion [see Ch. 21, *California Judicial Council Conversion Instructions*, and Ch. 21A, *Matthew Bender Conversion Instructions*].

[3] Comment

[a] Definition of "Repossession"; Validity

Black's Law Dictionary defines "repossession" as the act or an instance of retaking property, especially a seller's retaking of goods sold on credit when the buyer has failed to pay for them [Black's Law Dictionary (7th ed. 1999) at 1303]. Black's further defines "self-help" as an attempt to redress a perceived wrong by one's own action rather than through normal legal processes [Black's Law Dictionary (7th ed. 1999) at 1364].

Self-help repossession is one of the most commonly used means of collecting an overdue debt, because it does not require resort to the slow and expensive assistance of the courts [McCall, *The Past as Prologue: A History of the Right to Repossess*, 47 S. Cal. L. Rev. 58, 95 (1973)]. Self-help repossession under former Com. Code § 9503 [see now Com. Code § 9609] was challenged and upheld in the case of *Kipp v. Cozens* [*Kipp v. Cozens* (1974) 40 Cal.App.3d 709, 115 Cal.Rptr. 423 ; see also *Adams v. Southern California First Nat'l Bank* (9th Cir. 1973) 492 F.2d 324, 335-336 ; *Shirley v. State Nat'l Bank of Connecticut* (2d Cir. 1974) 493 F.2d 739, 741 ; Black's Law Dictionary (7th ed. 1999) at 1364 (UCC and other statutes provide for particular self-help remedies including repossession if remedy can be executed without breaching the peace)].

[b] Origins and Basis of Right to Repossess

The right to repossess is a common-law right that may also arise under a statute or a contract [Com. Code § 9609; *Kipp v. Cozens* (1974) 40 Cal.App.3d 709, 715, 115 Cal.Rptr. 423 , citing 2 Pollock & Maitland, *The History of English Law* (1909), p. 574; 2 Blackstone, *Commentaries on the Laws of England*, pp. 856-858]. Most security agreements covering the sale of personal property include a provision giving the creditor the right to possession of the goods if the debtor defaults [see *Debt Collection Practice in California* (2d ed. CEB 1999), § 4.6]. Even when the contract did not expressly provide this right, the right was often implied at common law [*Adams v. Southern California First Nat'l Bank* (9th Cir. 1973) 492 F.2d 324, 330 n.11].

In addition to these contractual and common-law repossession rights, the Commercial Code provides that after default, a secured party may take possession of the collateral without judicial process, if the secured party proceeds without breach of the peace [Com. Code § 9609]. Civ. Code § 1812.2, part of the Unruh Act [Civ. Code § 1801 et seq.] governing retail installment sales [Civ. Code § 1802.5], provides that when a buyer defaults on a retail installment contract, the holder [see Civ. Code § 1802.13 ("holder" is seller who acquires contract or financing agency or other assignee who buys it)] of that contract, pursuant to the rights granted in the contract, may retake the goods and proceed as provided for in the Unruh Act.

[c] Repossession Torts

There are two types of repossession torts:

- Repossession torts based on the fact that the creditor lacked the right to repossess the goods. Conversion is the principal example [see Ch. 21, *California Judicial Council Conversion Instructions*, Ch. 21A, *Matthew Bender Conversion Instructions*].
- Repossession torts based not on the lack of a right to repossess, but on the way that the repossession was carried out—for example, assault and battery [see Ch. 13, *California Judicial Council Assault and Battery Instructions*] or trespass [see Ch. 20, *California Judicial Council Trespass and Nuisance*].

Instructions].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsStandard InstructionsContracts LawDebtor & Creditor
RelationsTortsIntentional TortsAssault & BatteryGeneral OverviewTortsIntentional TortsFalse ImprisonmentGeneral
OverviewTortsPremises Liability & PropertyTrespassGeneral Overview



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CHAPTER 73A Reserved

6-73A California Forms of Jury Instruction 73A.syn

§ 73A.syn Synopsis to Chapter 73A: Reserved

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CHAPTER 73A Reserved

6-73A California Forms of Jury Instruction

Chapter 73A, *Matthew Bender Unlawful Detainer Instructions*, has been replaced by Chapter 43A, *Matthew Bender Unlawful Detainer Instructions*.

For official CACI unlawful detainer instructions, see Chapter 43, *California Judicial Council Unlawful Detainer Instructions*.



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CHAPTER 74A Matthew Bender Professional Liability in Real Property Transactions Instructions

6-74A California Forms of Jury Instruction 74A.syn

§ 74A.syn Synopsis to Chapter 74A: Matthew Bender Professional Liability in Real Property Transactions Instructions

MB 7400A.01 Definition of "Broker"

[1] Instruction

[2] Use of Instruction

[a] In General

[b] For Legal Person or Natural Person

[c] For Person Engaged in Business as Principal

[3] Comment

[a] General Definition of Real Estate Brokers

[b] Exceptions

[c] Real Property Sales Contracts and Promissory Notes

[d] Advance Fees

[e] Real Estate Syndication Securities

[f] Mobilehome Sales

MB 7400A.02 Definition of "Sales Agent"

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 7400A.03 Sales Agent Is Agent of Broker

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 7400A.04 Fiduciary Duty of Broker or Sales Agent

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Brokers Are Fiduciaries

[b] Related Judicial Council Jury Instructions

MB 7400A.05-MB 7400A.09 Reserved for Future Use

MB 7400A.10 Definition of "Constructive Fraud"

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Constructive Fraud

[b] Related Judicial Council Jury Instructions

MB 7400A.11 Definition of "Advantage"

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] "Advantage" Defined

[b] Related Judicial Council Jury Instructions

MB 7400A.12 Broker's Fiduciary Duty Includes Investigating Material Facts of Transaction

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Investigation of Material Facts

[b] Related Judicial Council Jury Instructions

MB 7400A.13 Broker's Fiduciary Duty Includes Making Full Disclosure of Material Facts

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Duty of Full Disclosure

[b] Related Judicial Council Jury Instructions

MB 7400A.14 Disclosure Must Be "Full and Fair"

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Disclosure Must Be "Full and Fair"

[b] Related Judicial Council Jury Instructions

MB 7400A.15 Definition of "Material Fact"

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Approval of Instruction

[b] Related Judicial Council Jury Instructions

MB 7400A.16 Failure of Broker to Disclose Material Fact Is Constructive Fraud

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Failure to Disclose Material Fact

[b] Related Judicial Council Jury Instructions

MB 7400A.17 When Fiduciary Duties Terminate

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Relationship Exists Until Close of Escrow

[b] Related Judicial Council Jury Instructions

MB 7400A.18 Broker's Burden of Proof

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 7400A.19-MB 7400A.29 Reserved for Future Use

MB 7400A.30 Broker's and Agent's Duty of Care to Client

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Duty of Care

[b] Related Judicial Council Jury Instructions

MB 7400A.31 Knowledge, Training, and Expertise

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Standard of Care

[b] Related Judicial Council Jury Instructions

MB 7400A.32 Broker's Duty to Supervise Sales Agents

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Duty to Supervise

[b] Related Judicial Council Jury Instructions

MB 7400A.33 Sales Agent Is Agent of Broker

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Salesperson Is Agent of Broker

[b] Related Judicial Council Jury Instructions

MB 7400A.34-MB 7400A.39 Reserved for Future Use

MB 7400A.40 What Constitutes Actual Fraud by Broker

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Elements of Fraud or Deceit

[b] Related Judicial Council Jury Instructions

MB 7400A.41 Falsity of Statement

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] False Statement

[b] Related Judicial Council Jury Instructions

MB 7400A.42 Material Fact

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Material Fact

[b] Related Judicial Council Jury Instructions

MB 7400A.43 Intent

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Intent

[b] Related Judicial Council Jury Instructions

MB 7400A.44 Justifiable Reliance in Fiduciary

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Justifiable Reliance

[b] Related Judicial Council Jury Instructions

MB 7400A.45 -MB 7400A.49 Reserved for Future Use

MB 7400A.50 Broker Liability

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Damages

[b] Related Judicial Council Jury Instructions

MB 7400A.51 Broker's Loss of Right to Commission for Bad Faith

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 7400A.52-MB 7400A.59 Reserved for Future Use

MB 7400A.60 Definition of "Escrow"

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 7400A.61 Definition of "Escrow Agent" and "Internet Escrow Agent"

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Definitions

[b] Related Judicial Council Jury Instructions

MB 7400A.62 Definition of "Escrow Instructions"

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 7400A.63-MB 7400A.69 Reserved for Future Use

MB 7400A.70 Escrow Instructions--No Requirement of Writing

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Escrow Instructions May Be Oral

[b] Disadvantages of Oral Instructions

MB 7400A.71 Escrow Instructions--Interpretation

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Contract Rules Apply to Interpretation of Escrow Instructions

[b] Question for Court or for Jury

[c] Related Judicial Council Jury Instructions

MB 7400A.72 Escrow Instructions--Uncertainty

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 7400A.73 No Substantial Performance Doctrine With Escrow

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 7400A.74 Escrow Agent's Duty--Conflict in Instructions

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Duty to Correct Conflict or Ambiguity

[b] Related Judicial Council Jury Instructions

MB 7400A.75 Escrow Instructions as a Contract--No General Duty to Disclose

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Requirement to Make Disclosures

[b] Related Judicial Council Jury Instructions

MB 7400A.76 No Duty to Go Beyond Terms of Escrow

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] No Duty to Go Beyond Strict Performance of Instructions

[b] Related Judicial Council Jury Instructions

MB 7400A.77 Escrow Agent's Liability for Damages

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Liability for Damages

[b] Related Judicial Council Jury Instructions

MB 7400A.78-MB 7400A.89 Reserved for Future Use

MB 7400A.90 Escrow Agents--Primary Duty

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Purpose of Escrow

[b] Related Judicial Council Jury Instructions

MB 7400A.91 Duty of Care

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Exercise of Ordinary Skill and Care

[b] Related Judicial Council Jury Instructions

MB 7400A.92 Duty of Strict Compliance

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Strict Compliance Required

[b] Related Judicial Council Jury Instructions

MB 7400A.93 Duty to Accept Only Complete Instructions

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Escrow Agent's Duty

[b] Caveat: Exemptions

[c] Related Judicial Council Jury Instructions

MB 7400A.94 Duty to Deliver Copy of Instructions

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Duty to Deliver Executed Instructions

[b] Related Judicial Council Jury Instructions

MB 7400A.95 Duty to Disclose

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Duty to Disclose

[b] Related Judicial Council Jury Instructions

MB 7400A.96 Escrow Holder Is Agent

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 7400A.97 Escrow Agent's Liability for Negligence

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Liability of Escrow Holder

[b] Related Judicial Council Jury Instructions

MB 7400A.98 Party to Escrow Not Vicariously Liable

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 7400A.99-MB 7400A.109 Reserved for Future Use

MB 7400A.110 Escrow Agent Is Fiduciary

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Fiduciary Duty of Escrow Holder

[b] Related Judicial Council Jury Instructions

MB 7400A.111 Fiduciary Duty of Escrow Holder Is Personal

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Fiduciary Duty Is Personal

[b] Related Judicial Council Jury Instructions

MB 7400A.112 Escrow Holder's Limited Duty of Disclosure

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Limited Duty of Disclosure

[b] Related Judicial Council Jury Instructions

MB 7400A.113 Constructive Fraud of Escrow Agent

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Constructive Fraud

[b] Related Judicial Council Jury Instructions

MB 7400A.114-MB 7400A.119 Reserved for Future Use

MB 7400A.120 Duty of Notary Public

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 7400A.121 Duty to Identify Acknowledging Party

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 7400A.122 False Certification by Notary

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 7400A.123 Duty to Maintain Sequential Journal

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 7400A.124 Notary Prohibited From Volunteering Legal Information

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 7400A.125 Acknowledgment by Interested Notary as Official Misconduct

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 7400A.126 Liability of Notary Public or Surety

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Liability of Notary for Official Misconduct or Neglect

[b] Related Judicial Council Jury Instructions

MB 7400A.127 Burden of Proof--Action Against Notary

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 7400A.128 Reliance Necessary

[1] Instruction

[2] Use of Instruction

[3] Comment



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CHAPTER 74A Matthew Bender Professional Liability in Real Property Transactions Instructions

6-74A California Forms of Jury Instruction Scope

Scope

SCOPE

This chapter includes jury instructions on the most frequently litigated areas involving providers of professional services in real estate transactions. The chapter covers tort and contract actions against (1) real estate licensees (brokers and agents), (2) escrow agents, and (3) notaries public, whose services are customarily used by the buyers and sellers of real property in California. Each of the three professions has special, unique duties that are set out in statutes and longstanding case law. Specifically, the chapter covers the following topics:

- Part A includes instructions surrounding actions against real estate brokers and sales agents [see *MB 7400A.01 -MB 7400A.51*]. The Part includes instructions defining "brokers" and "sales agents" [see *MB 7400A.01, MB 7400A.02*] and instructions on fraud and negligence [see *MB 7400A.10-7400A.44*] and damages [see *MB 7400A.50, MB 7400A.51*].
- Part B includes instructions surrounding actions against escrows and escrow agents [see *MB 7400A.60 -MB 7400A.113*]. The Part includes instructions defining applicable terms [see *MB 7400A.60 -MB 7400A.62*] and instructions relating to actions for breach of contract [see *MB 7400A.70 -MB 7400A.77*], negligence [see *MB 7400A.90 -MB 7400A.98*], and fraud [see *MB 7400A.110 -MB 7400A.113*].
- Part C includes instructions surrounding the duties and liabilities of notary publics and sureties [see *MB 7400A.120-7400A.128*].

Additional instructions for actions by and against buyers and sellers of real property are in Ch. 75A, *Matthew Bender Real Property Sales Instructions*.

Jury instructions in actions for fraud and deceit can be found in Ch. 19, *California Judicial Council Fraud or Deceit Instructions*, and Ch. 19A, *Matthew Bender Fraud and Deceit Instructions*.

6-74A California Forms of Jury Instruction Scope

Many contract instructions applicable to the actions covered in this chapter are in Ch. 3, *California Judicial Council Contracts Instructions*, and Ch. 3E, *Matthew Bender Contract Damages Instructions*.

Jury instructions in actions for the breach of fiduciary duties can be found in Ch. 41, *California Judicial Council Breach of Fiduciary Duty Instructions*.



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California Forms of Jury Instruction

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CHAPTER 74A Matthew Bender Professional Liability in Real Property Transactions Instructions
PART A. ACTIONS AGAINST BROKERS AND SALES AGENTS
1. General Instructions

6-74A California Forms of Jury Instruction MB 7400A.01

MB 7400A.01 Definition of "Broker"

[1] Instruction Definition of "Broker"

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

[CHOOSE ONE OR MORE OF FOLLOWING (See Use of Instruction)]

A real estate broker is a person who, for compensation or in expectation of compensation, _____
[state statutory acts of broker at issue, e.g., **buys or sells real property**] **or negotiates to _____** [repeat statutory acts of broker at issue, e.g., **buy or sell real property**] **on behalf of another person.**

If you find that Defendant _____ [state statutory acts of broker at issue, e.g., **bought or sold real property**] **or negotiated to _____** [repeat statutory acts of broker at issue, e.g., **buy or sell real property**] **on behalf of Plaintiff for compensation or in expectation of compensation, then Defendant was Plaintiff's real estate broker.**

[OR]

A real estate broker is [also] a person who, for compensation or in expectation of compensation, _____
[state statutory acts of broker at issue, e.g., **buys or sells (mineral OR oil OR gas) property**] **or negotiates to _____** [repeat statutory acts of broker at issue, e.g., **buys or sells (mineral or oil or gas) property**] **on behalf of another person.**

If you find that Defendant, _____ [*state statutory acts of broker at issue, e.g., bought or sold (mineral OR oil OR gas) property*] or negotiated to _____ [*repeat statutory acts of broker at issue, e.g., buy or sell (mineral OR oil OR gas) property*] on behalf of Plaintiff for compensation or in expectation of compensation, then Defendant was Plaintiff's real estate broker.

[OR]

A real estate broker is [also] a person who engages in either of the following businesses as a principal:

1. Buying or leasing, or taking an option on mineral, oil, or gas property for the purpose of sale, exchange, lease, sublease, or assignment of a lease of the property or any part of the property; or
2. Offering mining claims or any interest in mining claims for sale or assignment.

[OR]

A real estate broker is [also] a person who engages as a principal in the business of making loans secured directly or collaterally by liens on real property or buying from, selling to, or exchanging with the public real property sales contracts or promissory notes secured by liens on real property, or who makes agreements with the public for the collection of payments or the performance of services in connection with real property sales contracts or promissory notes secured by liens on real property.

A person is "in the business" if he or she does any of the following:

1. Acquires during a single calendar year eight or more real property sales contracts or promissory notes secured by liens on real property for resale to the public, and not as an investment; or
2. Sells or exchanges with the public during a single calendar year eight or more real property sales contracts or promissory notes secured by liens on real property--disregarding, for this purpose, any transaction negotiated through a real estate licensee; or
3. Makes eight or more loans in a calendar year from his or her own funds to the public when those loans are held or resold and are secured directly or collaterally by a lien on residential real property consisting of a single dwelling unit in a condominium or cooperative or on any parcel containing only residential buildings if the total number of units on the parcel is four or less--disregarding, for this purpose, any transaction negotiated through a large-scale real estate broker.

[OR]

A real estate broker is [also] a person who, for an advance fee, is employed to do either of the following:

1. Promote the sale or lease of real property or the sale or lease of a business opportunity by an advance fee listing, an advertisement, or any other offering to sell, lease, exchange, or rent property or a business opportunity; or

2. Get a loan on real property or on a business opportunity.

[OR]

A real estate broker is [also] a person who, for compensation or in expectation of compensation, does any of the following things for another person:

- 1. Issues or sells real estate syndication securities;**
- 2. Solicits prospective buyers or sellers of real estate syndication securities;**
- 3. Gets or solicits listings of real estate syndication securities; or**
- 4. Negotiates the purchase, sale, or exchange of real estate syndication securities.**

Authorities: *Bus. & Prof. Code §§ 10131, 10131.1, 10131.2, 10131.3, 10131.4, 10131.45.*

[2] Use of Instruction

[a] In General

This instruction should be used when the defendant claims that he or she is not a real estate broker within the meaning of *Bus. & Prof. Code §§ 10131, 10131.1, 10131.2, 10131.3, 10131.4, or 10131.45*. *Bus. & Prof. Code § 10131* is authority for the first alternate instruction, *Bus. & Prof. Code § 10131.4* for the second, *Bus. & Prof. Code § 10131.45* for the third, *Bus. & Prof. Code § 10131.1* for the fourth, *Bus. & Prof. Code § 10131.2* for the fifth, and *Bus. & Prof. Code § 10131.3* for the sixth. Which alternate or alternates to use depends on the activities alleged as the basis for the claim that the defendant was the plaintiff's broker. The bracketed "also" in the alternate instructions should be used when the jury is being instructed on more than one definition. This instruction should be used with the general agency instructions in Ch. 3C, *Matthew Bender Contract Party Instructions*, MB 300C.50-MB 300C.59.

[b] For Legal Person or Natural Person

This instruction and the instruction in MB 7400A.02 make no attempt to distinguish between the legal person that a broker must be [see, e.g., *Bus. & Prof. Code § 10131*; see also *Bus. & Prof. Code § 10006* ("person" defined)] and the natural person that a salesperson must be [see *Bus. & Prof. Code § 10132*]. If the broker is an entity rather than a natural person, the word "person" in this instruction may be replaced with a phrase such as "person or corporation" or "person or business."

[c] For Person Engaged in Business as Principal

The fourth alternative in this instruction is for use only when there is evidence supporting the contention that the defendant was engaged as a principal in any of the described business activities. In that case, it could be necessary to use an additional instruction defining certain terms in the second criterion [*Bus. & Prof. Code § 10131.1(b)(2)* ("sale"; "resale"; "exchange")] or third criterion [see *Bus. & Prof. Code § 10131.1(b)(3),(4)* ("own funds")]. Also, the reference in the third criterion to any transaction negotiated through a large-scale broker will require an additional instruction, based on *Bus. & Prof. Code § 10232(a)* or *(b)* and the evidence, explaining what are the relevant tests for identifying a broker as a large-scale broker [see *Bus. & Prof. Code § 10131.1(b)(1)(C)*].

[3] Comment

[a] General Definition of Real Estate Brokers

Bus. & Prof. Code § 10131 defines a real estate broker as a person who, for or in expectation of compensation, does or negotiates to do one or more of the following acts for another person:

- Sells or offers to sell, buys or offers to buy, solicits buyers or sellers of, solicits or obtains listings of, or negotiates the purchase, sale, or exchange of real property or a business opportunity [*Bus. & Prof. Code § 10131(a)*];
- Leases or rents, offers to lease or rent, places for rent, solicits listings of places for rent, solicits for prospective tenants, or negotiates the sale, purchase, or exchange of leases on real property, or on a business opportunity, or collects rents from real property, or improvements on realty, or from business opportunities [*Bus. & Prof. Code § 10131(b)*];
- Assists or offers to assist in filing an application to buy or lease, or in locating or entering on, lands owned by the state or federal government [*Bus. & Prof. Code § 10131(c)*];
- Solicits borrowers or lenders for, or negotiates for, loans secured by liens on real property or on a business opportunity [*Bus. & Prof. Code § 10131(d)*];
- Collects payments or performs services for borrowers, lenders, or note owners in connection with loans secured by liens on real property or on a business opportunity [*Bus. & Prof. Code § 10131(d)*]; and/or
- Sells or offers to sell, buys or offers to buy, or exchanges or offers to exchange a real property sales contract or a promissory note secured by a lien on real property or on a business opportunity, and performs services for the holders [*Bus. & Prof. Code § 10131(e)*].

A real estate broker may also be a financial consultant; the statutory schemes applicable to these professions are not mutually exclusive [*Onofrio v. Rice (1997) 55 Cal.App.4th 413, 418-419, 64 Cal.Rptr.2d 74* ; see *Bus. & Prof. Code § 10131 et seq.* (brokers); *Bus. & Prof. Code § 2945 et seq.* (financial consultants)].

A real estate broker may also be a person who, for or in expectation of compensation, does or negotiates to do one or more of the following things for another person with regard to mineral, oil, or gas property [*Bus. & Prof. Code §§ 10131.4, 10131.45*]:

- Sells or offers to sell, buys or offers to buy, solicits prospective sellers or purchasers, or solicits or obtains listings with regard to the property;
- Solicits borrowers or lenders for the property, or collects payments for lenders in connection with these loans;
- Rents or places for rent the property, or collects rent or royalties from the property, or from improvements on it; and/or
- Assists or offers to assist others in filing applications for the purchase of, or to locate on the property owned by the state or federal government. However, a person who is acting as an officer or employee of the state or federal government while performing these acts is not a real estate broker.

A real estate broker may also be a person who, as a principal, engages in the business of buying, leasing, or taking an

option on mineral, oil, or gas property for the purpose of sale, exchange, lease, sublease, or assignment of a lease of the property or any part of the property [*Bus. & Prof. Code § 10131.45(a)*]. However, a real estate broker's license is not required to negotiate a lease or agreement between an owner of mineral, oil, or gas lands, leases, or mineral rights and a person organized for or engaging in oil or gas or mineral or metal production. In addition, a real estate broker's license is not required to enter into leases or agreements with an owner of mineral, oil, or gas lands, leases, or mineral rights on behalf of a disclosed or undisclosed person organized for or engaging in oil or gas or mineral or metal production [*Bus. & Prof. Code § 10133.35(d)*].

A real estate broker may also be a person who engages in the business of offering mining claims or any interest in mining claims for sale or assignment [*Bus. & Prof. Code § 10131.45(b)*].

A real estate broker who acts pursuant to *Bus. & Prof. Code § 10131(d)* and who meets specified requirements must notify the Department annually in writing on a form that is acceptable to the Commissioner [see *Bus. & Prof. Code § 10166.02(a)*].

[b] Exceptions

The provisions of *Bus. & Prof. Code § 10131(b)* defining real estate brokers to include those who lease or rent real property [see *MB 7400A.01[3][a]*] do not apply to any of the following [*Bus. & Prof. Code § 10131.01(a)*]:

- The manager of a hotel, motel, or auto and trailer park;
- The resident manager of an apartment building, apartment complex, or court;
- The employees of the managers described in the first two items of this list;
- Any person or entity who (on behalf of another or others) solicits or arranges, or accepts reservations or money, or both, for transient occupancies [see *Civ. Code § 1940(b)*] in a dwelling unit in a common interest development [see *Civ. Code § 1351(c)* ("common interest development" defined)], an apartment building or complex, or in a single-family home; and
- Employees (other than the resident manager or employees of that manager) of the property management firm retained to manage a residential apartment building or complex or court. To qualify for the exception, an employee must perform certain specified functions under the supervision and control of a broker of record who is an employee of the property management firm or a salesperson licensed to the broker who meets certain minimum requirements.

For further discussion of license requirements and the exemptions from those requirements, see California Real Estate Law and Practice, Ch. 64, *Licensing and Discipline of Brokers* (Matthew Bender).

[c] Real Property Sales Contracts and Promissory Notes

A real estate broker is also a person who engages as a principal in the business of making loans secured directly or collaterally by liens on real property or buying from, selling to, or exchanging with the public real property sales contracts or promissory notes secured by liens on real property, or who makes agreements with the public for the collection of payments or the performance of services in connection with real property sales contracts or promissory notes secured by liens on real property [*Bus. & Prof. Code § 10131.1(a)*]. A person is "in the business" if he or she does any of the following:

- Acquires during a single calendar year eight or more real property sales contracts or promissory

notes secured by liens on real property for resale to the public, and not as an investment [*Bus. & Prof. Code § 10131.1(b)(1)(A)*];

- Sells or exchanges with the public during a single calendar year eight or more real property sales contracts or promissory notes secured by liens on real property [*Bus. & Prof. Code § 10131.1(b)(1)(B)*] (however, no transaction negotiated through real estate licensee will be considered in determining whether person is real estate broker based on these facts); *see Bus. & Prof. Code § 10131.1(b)(2)* (meaning of "sells or exchanges"); or

- Makes eight or more loans in a calendar year from the person's own funds to the public when those loans are held or resold and are secured directly or collaterally by a lien on residential real property consisting of a single dwelling unit in a condominium or cooperative or on any parcel containing only residential buildings if the total number of units on the parcel is four or less [*Bus. & Prof. Code § 10131.1(b)(1)(C)*] (however, no transaction negotiated through real estate broker who meets criteria of *Bus. & Prof. Code § 10232(a)* or *(b)*--that is, large-scale broker--will be considered in determining whether person is real estate broker based on these facts); *see Bus. & Prof. Code § 10131.1(b)(3),(4)* (meaning of "own funds").

[d] Advance Fees

A real estate broker is also a person who, for an advance fee, is employed to do either of the following [*Bus. & Prof. Code § 10131.3*]:

- Promote the sale or lease of real property or the sale or lease of a business opportunity by an advance fee listing, an advertisement, or any other offering to sell, lease, exchange, or rent property or a business opportunity; or
- Get a loan on real property or on a business opportunity.

[e] Real Estate Syndication Securities

A real estate broker is also a person who, for compensation or in expectation of compensation, does any of the following things for another person [*Bus. & Prof. Code § 10131.3*]:

- Issues or sells real estate syndication securities [*see Corp. Code § 25206*];
- Solicits prospective buyers or sellers of real estate syndication securities;
- Gets or solicits listings of real estate syndication securities; or
- Negotiates the purchase, sale, or exchange of real estate syndication securities.

A broker-dealer or agent of a broker-dealer licensed by the Commissioner of Corporations under the California Corporate Securities Law [*Corp. Code § 25000 et seq.*; *see Marsh & Volk, Practice Under the California Securities Laws*, Ch. 31, (Matthew Bender)] is not a real estate broker [*Bus. & Prof. Code § 10131.3*]. Note that the Department of Housing and Community Development licenses and regulates salespersons of mobilehomes, manufactured homes, and commercial coaches, who are not brokers [*Health & Safety Code § 18053.5*]. "Commercial coach" is deemed to include "commercial modular" [*Health & Safety Code § 18015.1*].

[f] Mobilehome Sales

A licensed real estate broker may buy, sell, or otherwise deal in mobilehomes only if the mobilehome has been registered under *Health & Safety Code § 18000 et seq.* [*Bus. & Prof. Code § 10131.6(a)*]. Although this requirement is included here because it helps to define who is a real estate broker, this point is not mentioned at all in the instruction in [1], *above*. In the unlikely event that this requirement becomes a jury issue in the case at hand, the instruction will have to be revised accordingly.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsStandard InstructionsReal Property LawBrokersGeneral OverviewReal Property LawFinancingGeneral OverviewReal Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawMiningGeneral Overview

Barry S. Willdorf contributed to the original chapter for California Forms of Jury Instruction (Matthew Bender).



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California Forms of Jury Instruction

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CHAPTER 74A Matthew Bender Professional Liability in Real Property Transactions Instructions

PART A. ACTIONS AGAINST BROKERS AND SALES AGENTS

1. General Instructions

6-74A California Forms of Jury Instruction MB 7400A.02

MB 7400A.02 Definition of "Sales Agent"

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

A real estate salesperson is a person who, for compensation or in expectation of compensation, is employed by a licensed real estate broker to perform one or more of the functions of a broker that I have already explained to you.

Authority: *Bus. & Prof. Code § 10132.*

[2] Use of Instruction

This instruction should be used when the defendant claims that he or she is not a real estate salesperson within the meaning of *Bus. & Prof. Code § 10132*. The instruction must be used with the alternative or alternatives from the instruction in MB 7400A.01 that explain the functions of a broker allegedly performed by the real estate salesperson in the case at hand.

The words of this instruction do not point out that a real estate salesperson must be "a natural person" [*Bus. & Prof. Code § 10132*]. This distinction is not likely to be an issue for the jury, and it is therefore better not to confuse the jury by mentioning this requirement.

[3] Comment

A real estate salesperson is a natural person who, for compensation or in expectation of compensation, is employed by a licensed real estate broker to perform one or more of the functions of a broker set out in *Bus. & Prof. Code §§ 10131,*

10131.1, 10131.2, 10131.3, 10131.4, 10131.45, and 10131.6 [see MB 7400A.01].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsStandard InstructionsReal Property LawBrokersGeneral OverviewReal
Property LawBrokersRight to Commissions

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CHAPTER 74A Matthew Bender Professional Liability in Real Property Transactions Instructions

PART A. ACTIONS AGAINST BROKERS AND SALES AGENTS

1. General Instructions

6-74A California Forms of Jury Instruction MB 7400A.03

MB 7400A.03 Sales Agent Is Agent of Broker**[1] Instruction Sales Agent Is Agent of Broker**[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

A real estate salesperson is an agent of his or her broker. A real estate salesperson can act only for, on behalf of, and in place of a broker under whom he or she is licensed, and his or her acts are limited to acts that he or she does as agent for the broker. If you find that _____ [name of salesperson] was licensed under _____ [name of broker], then _____ [name of broker] is liable for the acts of _____ [name of salesperson] in the transaction of _____ [name of broker]'s business.

Authorities: Civ. Code §§ 2079.13(b), 2338; Bus. & Prof. Code §§ 10132, 10137, 10160, 10177; *People v. Asuncion* (1984) 152 Cal.App.3d 422, 425, 199 Cal.Rptr. 514 ; *Grubb & Ellis Co. v. Spengler* (1983) 143 Cal.App.3d 890, 895, 192 Cal.Rptr. 637 ; *Gipson v. Davis Realty Co.* (1963) 215 Cal.App.2d 190, 203, 206-207, 30 Cal.Rptr. 253 .

[2] Use of Instruction

This instruction should be used when the broker's alleged liability rests on the acts of the salesperson.

[3] Comment

By law, a real estate salesperson is an agent of the broker [Civ. Code §§ 2079.13(b), 2338; Bus. & Prof. Code § 10132; see Bus. & Prof. Code § 10177(h)]. All of a real estate salesperson's professional compensation must come through the broker [Bus. & Prof. Code § 10137] and the salesperson's license must be in the broker's custody [Bus. & Prof. Code § 10160].

In one case it was held that any contract that purports to change the relationship from that of agent to independent contractor is invalid as being contrary to the real estate law. Whether or not the principal or employer is responsible for the act of the agent depends on whether the agent was engaged at that time in the transaction or the business of his or her principal or whether the agent was engaged in an act performed for his or her own personal convenience or accommodation and related to an end or purpose exclusively and individually on his or her own [*Gipson v. Davis Realty Co.* (1963) 215 Cal.App.2d 190, 207, 30 Cal.Rptr. 253]. However, *Bus. & Prof. Code* § 10032(b) now provides that a real estate broker and a real estate salesperson may contract between themselves as independent contractors or as employer and employee, and this contract determines their legal relationship with and obligations to each other. The Legislature expressly provided that this statute's adoption does not affect the holding in *Gipson* that (1) a real estate broker may be vicariously liable for the tortious acts of a salesperson licensed under the broker, (2) real estate salespersons cannot be classified as independent contractors for purposes of liability to third parties, and (3) any contract that purports to change the salesperson from agent to independent contractor is invalid as being contrary to law for purposes of tort liability to third parties [1991 Stats., ch. 679, § 2].

The salesperson may not contract in his or her own name and is not exempt from usury laws [*People v. Asuncion* (1984) 152 Cal.App.3d 422, 426, 199 Cal.Rptr. 514].

For purposes of tort liability, the broker is liable for the acts of his or her salesperson under the doctrine of respondeat superior [*Grubb & Ellis Co. v. Spengler* (1983) 143 Cal.App.3d 890, 895, 192 Cal.Rptr. 637].

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate Law Agency Relationships Duties & Liabilities Authorized Acts of Agents Liability of Principal Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Real Property Law Brokers General Overview Real Property Law Brokers Right to Commissions Torts Vicarious Liability Independent Contractors General Overview

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CHAPTER 74A Matthew Bender Professional Liability in Real Property Transactions Instructions
PART A. ACTIONS AGAINST BROKERS AND SALES AGENTS
1. General Instructions

6-74A California Forms of Jury Instruction MB 7400A.04

MB 7400A.04 Fiduciary Duty of Broker or Sales Agent

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] PROPOSED INSTR. NO. _____

The relationship of a [real estate broker/sales agent] to [his/her/its] principal is a fiduciary relationship, similar to that of a trustee to [his/her/its] beneficiary. In acting for a principal, a [real estate broker/sales agent] is bound to the same standards of conduct as a trustee. These standards include undivided service, loyalty, integrity, and good faith. As a matter of law, the relationship binds the [real estate broker/sales agent] to the utmost good faith, not only in form, but in substance. This standard requires a high degree of honesty, loyalty, and integrity, and the most faithful service.

Authorities: *Batson v. Strehlow* (1968) 68 Cal.2d 662, 674, 68 Cal.Rptr. 589, 441 P.2d 101 ; *Roberts v. Lomanto* (2003) 112 Cal.App.4th 1553, 1563, 5 Cal.Rptr.3d 866 ; *Gann v. Williams Brothers Realty, Inc.* (1991) 231 Cal.App.3d 1698, 1705, 283 Cal.Rptr. 128 ; *Montoya v. McLeod* (1985) 176 Cal.App.3d 57, 64-65, 221 Cal.Rptr. 353 ; *Jorgensen v. Beach 'N' Bay Realty, Inc.* (1981) 125 Cal.App.3d 155, 161, 177 Cal.Rptr. 882 ; *Burch v. Argus Properties, Inc.* (1979) 92 Cal.App.3d 128, 131, 154 Cal.Rptr. 485 ; *Ford v. Courdale* (1973) 36 Cal.App.3d 172, 180-181 n.6, 111 Cal.Rptr. 334 .

[2] Use of Instruction

This instruction should be used in a constructive fraud action by a client against a real estate broker or salesperson when the broker or salesperson claims that a fiduciary relationship did not exist. The burden of proof instruction for constructive fraud in MB 7400A.18 should be used with this instruction. In addition, the Judicial Council of California Civil Jury Instructions (CACI) include an instruction that explains "fiduciary duty." *CACI No. 4100* provides that a real estate agent or broker, among others, owes a fiduciary duty to his or her principal or client, and that this duty requires

the agent or broker "to act with the utmost good faith in the best interests of" the principal or client.

For additional Judicial Council instructions, see [3][b], *below*.

[3] Comment

[a] Brokers Are Fiduciaries

Real estate brokers are fiduciaries [*Batson v. Strehlow* (1968) 68 Cal.2d 662, 675, 68 Cal.Rptr. 589, 441 P.2d 101 ; *Jorgensen v. Beach 'N' Bay Realty, Inc.* (1981) 125 Cal.App.3d 155, 161, 177 Cal.Rptr. 882] who owe to their principals the same obligation of undivided service and loyalty that a trustee owes to his or her beneficiary [*Gann v. Williams Brothers Realty, Inc.* (1991) 231 Cal.App.3d 1698, 1705, 283 Cal.Rptr. 128 ; *Jorgensen v. Beach 'N' Bay Realty, Inc.* (1981) 125 Cal.App.3d 155, 161, 177 Cal.Rptr. 882 ; *Ford v. Cournale* (1973) 36 Cal.App.3d 172, 180, 111 Cal.Rptr. 334]. The principal of a real estate broker is entitled to the highest degree of loyalty and good faith [*Roberts v. Lomanto* (2003) 112 Cal.App.4th 1553, 1563, 5 Cal.Rptr.3d 866 ; *Burch v. Argus Properties, Inc.* (1979) 92 Cal.App.3d 128, 131, 154 Cal.Rptr. 485].

A real estate sales agent who acts for a client has the same fiduciary duties to that client as a broker [*Montoya v. McLeod* (1985) 176 Cal.App.3d 57, 64-65, 221 Cal.Rptr. 353].

An instruction similar to this one was approved in *Ford v. Cournale* [*Ford v. Cournale* (1973) 36 Cal.App.3d 172, 181 n.6, 111 Cal.Rptr. 334].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Chs. 6, *California Judicial Council Professional Negligence Instructions*, 41, *California Judicial Council Breach of Fiduciary Duty Instructions*]:

CACI No. 4100, "Fiduciary Duty" Explained

CACI No. 4101, Failure to Use Reasonable Care--Essential Factual Elements

CACI No. 4102, Duty of Undivided Loyalty--Essential Factual Elements

CACI No. 4103, Duty of Confidentiality--Essential Factual Elements

CACI No. 4106, Breach of Fiduciary Duty--Essential Factual Elements

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate Law Agency Relationships Causes of Action & Remedies Breach of Fiduciary Duty General Overview Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Real Property Law Brokers General Overview Real Property Law Brokers Fiduciary Responsibilities

Barry S. Willdorf contributed to the original chapter for California Forms of Jury Instruction (Matthew Bender).



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CHAPTER 74A Matthew Bender Professional Liability in Real Property Transactions Instructions

PART A. ACTIONS AGAINST BROKERS AND SALES AGENTS

1. General Instructions

6-74A California Forms of Jury Instruction MB 7400A.05-MB 7400A.09

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CHAPTER 74A Matthew Bender Professional Liability in Real Property Transactions Instructions

PART A. ACTIONS AGAINST BROKERS AND SALES AGENTS

2. Constructive Fraud

6-74A California Forms of Jury Instruction MB 7400A.10

MB 7400A.10 Definition of "Constructive Fraud"

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Constructive fraud is

[CHOOSE ONE OR MORE OF THE FOLLOWING (See Use of Instruction)]

any breach of duty without an actual fraudulent intent that gains an advantage to the person [optional (see Use of Instruction), or any one claiming under him or her,] who breached by misleading another to his or her prejudice [optional (see Use of Instruction) or to the prejudice of any one claiming under him or her].

[OR]

any act or omission that the law specifically declares to be fraudulent, without the occurrence of actual fraud.

[OPTIONAL (See Use of Instruction)]

This means that every breach by the [real estate broker/sales agent] of [his/her/its] fiduciary duties to [his/her/its] principal that (1) gains an advantage to the broker, and (2) causes prejudice to the principal is a constructive fraud against the principal.

Authorities: *Civ. Code § 1573*; *Byrum v. Brand* (1990) 219 Cal.App.3d 926, 936-939, 268 Cal.Rptr. 609 .

[2] Use of Instruction

This instruction should be used in an action for constructive fraud against a broker, a sales agent, or both. It defines constructive fraud as it is defined in *Civ. Code § 1573*. The optional bracketed phrases in the first of the two alternative paragraphs in the instruction should be added when the advantage from the breach of duty is gained by one claiming under the wrongdoer or when the advantage is gained to the prejudice of one claiming under the person misled by the wrong [see *Civ. Code § 1573*]. The optional final paragraph should be considered for use whenever the first definition of constructive fraud is at issue. This optional paragraph clarifies the relationship of the definition to the broker's or agent's fiduciary duties.

This instruction should be used with the instruction in MB 7400A.01 defining "broker." *CACI No. 4100*, explaining the broker's "fiduciary duty," should also be used [see also *MB 7400A.04*]. If the acts or liability of a sales agent are at issue, this instruction should also be used with the instruction in MB 7400A.02 defining "sales agent," and the instruction in MB 7400A.03 explaining the duties of a sales agent and the agent's relation to the broker.

For related Judicial Council instructions, see [3][b], *below*.

[3] Comment

[a] Constructive Fraud

Under *Civ. Code § 1573*, constructive fraud consists of the following:

- Any breach of duty without an actual fraudulent intent that gains an advantage to the person who breached, or anyone claiming under that person, by misleading another to his or her prejudice, or to the prejudice of anyone claiming under him or her; or
- Any such act or omission that the law specifically declares to be fraudulent, without respect to the occurrence of actual fraud.

Civ. Code § 1573 clearly provides that fraudulent intent is not required, and a special verdict form requiring an intentional failure to disclose material facts was reversible error [*Byrum v. Brand* (1990) 219 Cal.App.3d 926, 936-939, 268 Cal.Rptr. 609].

A real estate franchise company may be liable on a theory of ostensible agency for the fraud of its franchisee, the real estate broker [*Kaplan v. Coldwell Banker* (1997) 59 Cal.App.4th 741, 747-748, 69 Cal.Rptr.2d 640 (triable issue of fact existed with regard to ostensible agency of real estate broker who independently owned and operated Coldwell Banker franchise)]. However, in determining whether a true agency relationship exists between a franchisor and franchisee, the courts focus on the right to control. A true principal-agency relationship exists only when the franchisor retains complete or substantial control over the daily activities of the franchisee's business [*Kaplan v. Coldwell Banker* (1997) 59 Cal.App.4th 741, 745-746, 69 Cal.Rptr.2d 640 ; *Cislav v. Southland Corp.* (1992) 4 Cal.App.4th 1284, 1296, 6 Cal.Rptr.2d 386 ; see Ch. 3C, *Matthew Bender Contract Party Instructions*].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 41, *California Judicial Council Breach of Fiduciary Duty Instructions*]:

CACI No. 4100, "Fiduciary Duty" Explained

CACI No. 4101, Failure to Use Reasonable Care--Essential Factual Elements

CACI No. 4102, Duty of Undivided Loyalty--Essential Factual Elements

CACI No. 4103, Duty of Confidentiality--Essential Factual Elements

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate Law Agency Relationships Authority to Act Apparent Authority General Overview Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Real Property Law Brokers General Overview Real Property Law Brokers Fiduciary Responsibilities Torts Business Torts Fraud & Misrepresentation Constructive Fraud Elements

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CHAPTER 74A Matthew Bender Professional Liability in Real Property Transactions Instructions
PART A. ACTIONS AGAINST BROKERS AND SALES AGENTS
2. Constructive Fraud

6-74A California Forms of Jury Instruction MB 7400A.11

MB 7400A.11 Definition of "Advantage"

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] PROPOSED INSTR. NO. _____

A [real estate broker/sales agent] gains an advantage from [his/her/its] transactions with a client whenever the [real estate broker/sales agent]'s position is improved or the [real estate broker/sales agent] obtains a favorable opportunity or otherwise gains, benefits, or profits.

Authorities: *Rader v. Thrasher* (1962) 57 Cal.2d 244, 250, 18 Cal.Rptr. 736, 368 P.2d 360 ; *Bradner v. Vasquez* (1954) 43 Cal.2d 147, 152, 272 P.2d 11 ; *Montoya v. McLeod* (1985) 176 Cal.App.3d 57, 65, 221 Cal.Rptr. 353 .

[2] Use of Instruction

This instruction, which defines the meaning of the term "advantage," should be used with the applicable general instructions from MB 7400A.01-MB 7400A.04 and the instruction in MB 7400A.10 defining constructive fraud. This instruction should also be used with the CACI "Breach of Fiduciary Duty" series of instructions [see Ch. 41, *California Judicial Council Breach of Fiduciary Duty Instructions*, CACI Nos. 4100- 4105; see also [3][b], below].

[3] Comment

[a] "Advantage" Defined

A fiduciary, such as a real estate broker or sales agent [see CACI No. 4100, MB 7400A.04], obtains an advantage when he or she enters into a transaction with a beneficiary that results in an improvement of the fiduciary's position, or the obtaining of a favorable opportunity or other gains, benefits, or profits [*Rader v. Thrasher* (1962) 57 Cal.2d 244, 250,

18 Cal.Rptr. 736, 368 P.2d 360 ; Bradner v. Vasquez (1954) 43 Cal.2d 147, 152, 272 P.2d 11]. An advantage includes the benefit to a lending bank when the financial position of its debtor is improved by a merger [*see Barrett v. Bank of America (1986) 183 Cal.App.3d 1362, 1369, 229 Cal.Rptr. 16*] and the profit to a sales agent on a commission [*see Montoya v. McLeod (1985) 176 Cal.App.3d 57, 65, 221 Cal.Rptr. 353*]. Because brokers and sales agents usually receive a commission, it is seldom difficult to show advantage.

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [*see Ch. 41, California Judicial Council Breach of Fiduciary Duty Instructions*]:

CACI No. 4100, "Fiduciary Duty" Explained

CACI No. 4101, Failure to Use Reasonable Care--Essential Factual Elements

CACI No. 4102, Duty of Undivided Loyalty--Essential Factual Elements

CACI No. 4103, Duty of Confidentiality--Essential Factual Elements

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Real Property Law Brokers General Overview Real Property Law Brokers Fiduciary Responsibilities Torts Business Torts Fraud & Misrepresentation Constructive Fraud General Overview Torts Business Torts Fraud & Misrepresentation Constructive Fraud Elements

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CHAPTER 74A Matthew Bender Professional Liability in Real Property Transactions Instructions
PART A. ACTIONS AGAINST BROKERS AND SALES AGENTS
2. Constructive Fraud

6-74A California Forms of Jury Instruction MB 7400A.12

MB 7400A.12 Broker's Fiduciary Duty Includes Investigating Material Facts of Transaction

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

A real estate broker has a fiduciary duty to investigate the material facts of the transaction. The broker may not accept information received from others as being true, and transmit it to [his/her/its] principal, without verifying the information or disclosing that the information has not been verified.

Authorities: *Pagano v. Krohn* (1997) 60 Cal.App.4th 1, 11, 70 Cal.Rptr.2d 1 ; *Salahutdin v. Valley of California, Inc.* (1994) 24 Cal.App.4th 555, 562-563, 29 Cal.Rptr.2d 463 .

[2] Use of Instruction

This instruction should be used to explain that the fiduciary duty of a broker explained in *CACI No. 4100* and MB 7400A.04 requires the broker to investigate material facts of the transaction or to notify the client of the broker's reliance on another's (usually the seller's) representations. It is applicable in a constructive fraud action when the plaintiff claims either of the following:

- The broker has not told the plaintiff that the broker has failed to independently verify information on a multiple listing sheet; or
- The broker has failed to notify the plaintiff of the reliance on the seller's representations.

The instruction should be used, when applicable, in conjunction with the further instructions of a broker's fiduciary duty to make full disclosure of material facts [see MB 7400A.13 -MB 7400A.16].

For related Judicial Council instructions, see [3][b], *below*.

[3] Comment

[a] Investigation of Material Facts

A real estate broker has a fiduciary duty to a client to refrain from making representations of fact material to the client's decision to buy the property without advising the client that the broker is merely passing on information received from the seller without verifying its accuracy [*Salahutdin v. Valley of California, Inc.* (1994) 24 Cal.App.4th 555, 562 n.3, 29 Cal.Rptr.2d 463]. Although the broker is not required to investigate a seller's representations or the truth of a description contained in a multiple listing service sheet before showing the property to clients, the broker is at least required to tell the clients that the broker had not verified the information the broker passed on to the clients and that the broker was simply relying on the description provided by the sellers [*Pagano v. Krohn* (1997) 60 Cal.App.4th 1, 11, 70 Cal.Rptr.2d 1 ; *Salahutdin v. Valley of California, Inc.* (1994) 24 Cal.App.4th 555, 563, 29 Cal.Rptr.2d 463].

A breach of a fiduciary duty usually constitutes constructive fraud [*Salahutdin v. Valley of California, Inc.* (1994) 24 Cal.App.4th 555, 563, 29 Cal.Rptr.2d 463]. Civ. Code § 1573 defines constructive fraud [see MB 7400A.10]. For an instruction that a broker's failure to disclose material facts is constructive fraud, see MB 7400A.16. For instructions relating to constructive fraud in general, see Ch. 19A, *Fraud and Deceit*. For forms of pleading for use in actions for constructive fraud, see California Forms of Pleading and Practice, Ch. 269, *Fraud and Deceit* (Matthew Bender).

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Chs. 6, *California Judicial Council Professional Negligence Instructions*, 41, *California Judicial Council Breach of Fiduciary Duty Instructions*]:

CACI No. 4100, "Fiduciary Duty" Explained

CACI No. 4101, Failure to Use Reasonable Care--Essential Factual Elements

CACI No. 4102, Duty of Undivided Loyalty--Essential Factual Elements

CACI No. 4103, Duty of Confidentiality--Essential Factual Elements

CACI No. 4106, Breach of Fiduciary Duty--Essential Factual Elements

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Real Property Law Brokers General Overview Real Property Law Brokers Fiduciary Responsibilities Torts Business Torts Fraud & Misrepresentation Constructive Fraud General Overview Torts Business Torts Fraud & Misrepresentation Constructive Fraud Elements

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CHAPTER 74A Matthew Bender Professional Liability in Real Property Transactions Instructions
PART A. ACTIONS AGAINST BROKERS AND SALES AGENTS
2. Constructive Fraud

6-74A California Forms of Jury Instruction MB 7400A.13

MB 7400A.13 Broker's Fiduciary Duty Includes Making Full Disclosure of Material Facts

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

When a fiduciary relationship exists, it is the fiduciary's duty to make a full disclosure of all material facts about the property or transaction in question. This means that the [real estate broker/sales agent] has the duty to fully and completely disclose all of the material facts about _____ [identify property or transaction] to [his/her/its] principal.

Authorities: *Batson v. Strehlow* (1968) 68 Cal.2d 662, 675, 68 Cal.Rptr. 589, 441 P.2d 101 ; *Roberts v. Lomanto* (2003) 112 Cal.App.4th 1553, 1563, 5 Cal.Rptr.3d 866 ; *Montoya v. McLeod* (1985) 176 Cal.App.3d 57, 64, 221 Cal.Rptr. 353 ; *Ford v. Courneale* (1973) 36 Cal.App.3d 172, 181 n.6, 111 Cal.Rptr. 334 .

[2] Use of Instruction

This instruction should be used to explain that the fiduciary duty of a broker explained in *CACI* No. 4100 and MB 7400A.04 requires the full disclosure of all material facts. It should be used with the further instructions on disclosure in MB 7400A.14-MB 7400A.16.

For related Judicial Council instructions, see [3][b], *below*.

[3] Comment

[a] Duty of Full Disclosure

A real estate broker is a fiduciary and thus owes a duty to its principal to fully disclose all material facts about the transaction that might affect the principal's decision [*Batson v. Strehlow* (1968) 68 Cal.2d 662, 675, 68 Cal.Rptr. 589, 441 P.2d 101]. The duty continues even if the broker becomes a principal in the transaction [*Roberts v. Lomanto* (2003) 112 Cal.App.4th 1553, 1563, 5 Cal.Rptr.3d 866]. A real estate sales agent has the same duty to his or her clients [*Montoya v. McLeod* (1985) 176 Cal.App.3d 57, 64, 221 Cal.Rptr. 353]. A broker's or agent's principal is entitled to the highest degree of loyalty and good faith [*Roberts v. Lomanto* (2003) 112 Cal.App.4th 1553, 1563, 5 Cal.Rptr.3d 866 ; *Burch v. Argus Properties, Inc.* (1979) 92 Cal.App.3d 128, 131, 154 Cal.Rptr. 485].

An instruction containing language very similar to this one was approved in *Ford v. Cournale* [*Ford v. Cournale* (1973) 36 Cal.App.3d 172, 181 n.6, 111 Cal.Rptr. 334].

It is not necessary for the broker to directly profit from the transaction for liability to be imposed for breach of this duty of nondisclosure [*Jorgensen v. Beach 'N' Bay Realty, Inc.* (1981) 125 Cal.App.3d 155, 162, 177 Cal.Rptr. 882].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 6, *California Judicial Council Professional Negligence Instructions*, Ch. 19, *California Judicial Council Fraud or Deceit Instructions*, Ch. 41, *California Judicial Council Breach of Fiduciary Duty Instructions*]:

CACI No. 1901, Concealment

CACI No. 4100, "Fiduciary Duty" Explained

CACI No. 4101, Failure to Use Reasonable Care--Essential Factual Elements

CACI No. 4102, Duty of Undivided Loyalty--Essential Factual Elements

CACI No. 4103, Duty of Confidentiality--Essential Factual Elements

CACI No. 4106, Breach of Fiduciary Duty--Essential Factual Elements

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Real Property Law Brokers General Overview Real Property Law Brokers Fiduciary Responsibilities Torts Business Torts Fraud & Misrepresentation Constructive Fraud General Overview Torts Business Torts Fraud & Misrepresentation Constructive Fraud Elements

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CHAPTER 74A Matthew Bender Professional Liability in Real Property Transactions Instructions
PART A. ACTIONS AGAINST BROKERS AND SALES AGENTS
2. Constructive Fraud

6-74A California Forms of Jury Instruction MB 7400A.14

MB 7400A.14 Disclosure Must Be "Full and Fair"

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] PROPOSED INSTR. NO. _____

The [real estate broker/sales agent]'s duty to disclose requires a full and fair disclosure. To be full and fair, the disclosure must meet both of the following tests:

(1) The [real estate broker/sales agent] must disclose all the information that the principal needs to make an informed decision; and

(2) The [real estate broker/sales agent] must not suppress or conceal any facts within [his/her/its] knowledge that materially qualify the facts stated.

Authorities: *Truman v. Thomas* (1980) 27 Cal.3d 285, 291, 165 Cal.Rptr. 308, 611 P.2d 902 ; *Brady v. Carman* (1960) 179 Cal.App.2d 63, 68, 3 Cal.Rptr. 612 .

[2] Use of Instruction

This instruction should be given when it is claimed that the broker or sales agent has not made a "full and fair" disclosure.

For related Judicial Council instructions, see [3][b], *below*.

[3] Comment

[a] Disclosure Must Be "Full and Fair"

A fiduciary has a duty not only to state truly what he or she knows, but also not to suppress or conceal any facts within his or her knowledge that materially qualify the facts stated. The disclosure must be "full and fair" [*Brady v. Carman* (1960) 179 Cal.App.2d 63, 67-68, 3 Cal.Rptr. 612]. The California Supreme Court has said that the scope of a doctor's duty to disclose "is measured by the amount of knowledge a patient needs in order to make an informed choice. All information material to the ... decision should be given" [*Truman v. Thomas* (1980) 27 Cal.3d 285, 291, 165 Cal.Rptr. 308, 611 P.2d 902].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 41, *California Judicial Council Breach of Fiduciary Duty Instructions*]:

CACI No. 4100, "Fiduciary Duty" Explained

CACI No. 4101, Failure to Use Reasonable Care--Essential Factual Elements

CACI No. 4102, Duty of Undivided Loyalty--Essential Factual Elements

CACI No. 4103, Duty of Confidentiality--Essential Factual Elements

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Real Property Law Brokers General Overview Real Property Law Brokers Fiduciary Responsibilities Torts Business Torts Fraud & Misrepresentation Constructive Fraud General Overview Torts Business Torts Fraud & Misrepresentation Constructive Fraud Elements

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CHAPTER 74A Matthew Bender Professional Liability in Real Property Transactions Instructions
PART A. ACTIONS AGAINST BROKERS AND SALES AGENTS
2. Constructive Fraud

6-74A California Forms of Jury Instruction MB 7400A.15

MB 7400A.15 Definition of "Material Fact"

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

A fact is material if it is one that would be likely to affect the principal's judgment.

Authority: *Ford v. Cournale* (1973) 36 Cal.App.3d 172, 182 n. 8, 111 Cal.Rptr. 334 .

[2] Use of Instruction

This instruction should be used when the case involves fiduciary fraud.

For related Judicial Council instructions, see [3][b], *below*.

[3] Comment

[a] Approval of Instruction

An instruction that includes the words of this instruction was approved by the appellate court in *Ford v. Cournale* [*Ford v. Cournale* (1973) 36 Cal.App.3d 172, 182 n.8, 111 Cal.Rptr. 334 ; *see also Roberts v. Lomanto* (2003) 112 Cal.App.4th 1553, 1567, 5 Cal.Rptr.3d 866 (material facts are all facts that "might affect the principal's willingness to enter into or complete a transaction")].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Chs. 19, *California Judicial Council Fraud or Deceit Instructions*, 41, *California Judicial Council Breach of Fiduciary Duty Instructions*]:

CACI No. 1905, Definition of Important Fact/Promise

CACI No. 4100, "Fiduciary Duty" Explained

CACI No. 4101, Failure to Use Reasonable Care--Essential Factual Elements

CACI No. 4102, Duty of Undivided Loyalty--Essential Factual Elements

CACI No. 4103, Duty of Confidentiality--Essential Factual Elements

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Real Property Law Brokers General Overview Real Property Law Brokers Fiduciary Responsibilities Torts Business Torts Fraud & Misrepresentation Constructive Fraud General Overview Torts Business Torts Fraud & Misrepresentation Constructive Fraud Elements

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CHAPTER 74A Matthew Bender Professional Liability in Real Property Transactions Instructions
PART A. ACTIONS AGAINST BROKERS AND SALES AGENTS
2. Constructive Fraud

6-74A California Forms of Jury Instruction MB 7400A.16

MB 7400A.16 Failure of Broker to Disclose Material Fact Is Constructive Fraud

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Failure to make a full and complete disclosure [optional: or any concealment of a material fact] amounts to and is the equivalent of an affirmative misrepresentation or fraud on the principal.

Authorities: *Civ. Code § 1573; Bay Shore Homes, Inc. v. San Diego Trust & Sav. Bk. (1969) 276 Cal.App.2d 108, 115, 80 Cal.Rptr. 849 ; see also Sierra Pacific Industries v. Carter (1980) 104 Cal.App.3d 579, 581-583, 163 Cal.Rptr. 764 .*

[2] Use of Instruction

This instruction should be used in a constructive fraud action when the plaintiff claims that the real estate broker breached his or her fiduciary duty by failing to disclose a material fact. It should be used in conjunction with the instructions in *CACI No. 4100* and MB 7400A.04, as appropriate.

For related Judicial Council instructions, see [3][b], *below*.

[3] Comment

[a] Failure to Disclose Material Fact

Any breach of a duty without actual fraudulent intent that gains an advantage to the fiduciary is constructive fraud [*Civ. Code § 1573(1)*]. Failure to disclose is a breach of a broker's (or agent's) fiduciary duty [*see Batson v. Strehlow (1968) 68 Cal.2d 662, 675, 68 Cal.Rptr. 589, 441 P.2d 101 ; see also Montoya v. McLeod (1985) 176 Cal.App.3d 57, 63-65,*

221 *Cal.Rptr.* 353 (agent subject to same fiduciary duties as broker)]. Any act that the law specially declares to be fraudulent is also constructive fraud [*Civ. Code* § 1573(2)].

A broker who withholds information from his or her principal that the commission is being used to help the purchaser buy the property is defrauding the principal [*Bay Shore Homes, Inc. v. San Diego Trust & Sav. Bk.* (1969) 276 *Cal.App.2d* 108, 115, 80 *Cal.Rptr.* 849]. A broker must disclose to the broker's principal his or her relationship with the other party to the transaction if it suggests in any way that the broker may be acquiring an interest in the property [*Sierra Pacific Industries v. Carter* (1980) 104 *Cal.App.3d* 579, 582, 163 *Cal.Rptr.* 764].

A broker or agent must also disclose all compensation, commissions, or profits that it receives as a benefit of a transaction [*Bus. & Prof. Code* § 10176(g); *Roberts v. Lomanto* (2003) 112 *Cal.App.4th* 1553, 1563, 5 *Cal.Rptr.3d* 866]. Thus, an agent who entered into a purchase agreement for a property with her principal, and then entered into an assignment agreement with a third party that included an assignment fee from the third party, was required to disclose the existence and amount of the assignment fee [*Roberts v. Lomanto* (2003) 112 *Cal.App.4th* 1553, 1566-1567, 5 *Cal.Rptr.3d* 866].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Chs. 6, *California Judicial Council Professional Negligence Instructions*, 19, *California Judicial Council Fraud or Deceit Instructions*, 41, *California Judicial Council Breach of Fiduciary Duty Instructions*]:

CACI No. 1901, Concealment

CACI No. 1905, Definition of Important Fact/Promise

CACI No. 4100, "Fiduciary Duty" Explained

CACI No. 4101, Failure to Use Reasonable Care--Essential Factual Elements

CACI No. 4102, Duty of Undivided Loyalty--Essential Factual Elements

CACI No. 4103, Duty of Confidentiality--Essential Factual Elements

CACI No. 4106, Breach of Fiduciary Duty--Essential Factual Elements

Legal Topics:

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Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Real Property Law Brokers General Overview Real Property Law Brokers Fiduciary Responsibilities Torts Business Torts Fraud & Misrepresentation Constructive Fraud General Overview Torts Business Torts Fraud & Misrepresentation Constructive Fraud Elements

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CHAPTER 74A Matthew Bender Professional Liability in Real Property Transactions Instructions
PART A. ACTIONS AGAINST BROKERS AND SALES AGENTS
2. Constructive Fraud

6-74A California Forms of Jury Instruction MB 7400A.17

MB 7400A.17 When Fiduciary Duties Terminate

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

A broker's fiduciary duties to [his/her/its] principal extend until the transaction closes.

Authorities: *Bate v. Marsteller* (1959) 175 Cal.App.2d 573, 577-581, 346 P.2d 903 ; *Menzel v. Salka* (1960) 179 Cal.App.2d 612, 623-624, 4 Cal.Rptr. 78 .

[2] Use of Instruction

This instruction should be used when an issue exists concerning when the fiduciary relationship and its attached duties terminate.

For related Judicial Council instructions, see [3][b], *below*.

[3] Comment

[a] Relationship Exists Until Close of Escrow

Since the broker is involved in the entire escrow process, the fiduciary relationship exists until the close of escrow [*Bate v. Marsteller* (1959) 175 Cal.App.2d 573, 577-581, 346 P.2d 903]. In fact, the relationship continues to exist as long as the principal continues to rely on the broker within the context of the specific transaction [*Menzel v. Salka* (1960) 179 Cal.App.2d 612, 623-624, 4 Cal.Rptr. 78]. Thus, the relationship may continue even after a transaction closes, depending on the facts.

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 41, *California Judicial Council Breach of Fiduciary Duty Instructions*]:

CACI No. 4100, "Fiduciary Duty" Explained

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsStandard InstructionsReal Property LawBrokersGeneral OverviewReal Property LawBrokersFiduciary Responsibilities

Barry S. Willdorf contributed to the original chapter for California Forms of Jury Instruction (Matthew Bender).



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California Forms of Jury Instruction

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CHAPTER 74A Matthew Bender Professional Liability in Real Property Transactions Instructions
PART A. ACTIONS AGAINST BROKERS AND SALES AGENTS
2. Constructive Fraud

6-74A California Forms of Jury Instruction MB 7400A.18

MB 7400A.18 Broker's Burden of Proof

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

The real estate [broker/agent] who has obtained any advantage in a transaction with [his/her/its] principal has the burden of proving that [he/she/it] acted with the utmost good faith toward the principal and that before the transaction [he/she/it] made a full disclosure of all the facts at issue and that the transaction was without undue influence.

Authorities: See *Prob. Code § 16004(c)*; *Smith v. Zak* (1971) 20 Cal.App.3d 785, 793, 98 Cal.Rptr. 242 ; *Pepper v. Underwood* (1975) 48 Cal.App.3d 698, 712, 122 Cal.Rptr. 343 .

[2] Use of Instruction

This instruction should be used with the instructions in MB 7400A.04 and MB 7400A.10 because it allocates the correct burden of proof when a broker is being sued by a client for constructive fraud. As appropriate, this instruction should also be used with the CACI "Breach of Fiduciary Duty" series of instructions [see Ch. 41, *California Judicial Council Breach of Fiduciary Duty Instructions*, CACI Nos. 4100- 4105], in particular, CACI No. 4100, " 'Fiduciary Duty' Explained."

[3] Comment

Prob. Code § 16004(c) (effective July 1, 1987) repeats for actual trusts the historic allocation of burden of proof in a fiduciary relationship [*Prob. Code § 16004(c)*]. A breach of fiduciary duties is presumed. When the principal questions the acts of the agent done in the course of the agency, the burden is put on the agent to prove that he or she acted in the

utmost good faith toward the principal and made full disclosure [*Smith v. Zak* (1971) 20 Cal.App.3d 785, 793, 98 Cal.Rptr. 242]. However, the plaintiff still has the burden of proving the fact of the agency [*Pepper v. Underwood* (1975) 48 Cal.App.3d 698, 712, 122 Cal.Rptr. 343].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Evidence Procedural Considerations Burdens of Proof General Overview Real Property Law Brokers General Overview Real Property Law Brokers Fiduciary Responsibilities

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CHAPTER 74A Matthew Bender Professional Liability in Real Property Transactions Instructions

PART A. ACTIONS AGAINST BROKERS AND SALES AGENTS

2. Constructive Fraud

6-74A California Forms of Jury Instruction MB 7400A.19-MB 7400A.29

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MB 7400A.19Reserved for Future Use



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CHAPTER 74A Matthew Bender Professional Liability in Real Property Transactions Instructions
PART A. ACTIONS AGAINST BROKERS AND SALES AGENTS
3. Negligence

6-74A California Forms of Jury Instruction MB 7400A.30

MB 7400A.30 Broker's and Agent's Duty of Care to Client

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Defendant, as Plaintiff's real estate [broker/salesperson], had the duty to exercise reasonable skill and ordinary diligence in representing Plaintiff's interests. The skill required is that which you would reasonably expect of a real estate [broker/salesperson], who has special knowledge about real estate transactions. The knowledge required of Defendant includes ordinary professional knowledge about the title and natural characteristics of the property that [he/she/it] is [buying/selling/offering to buy or sell].

Authorities: *Montoya v. McLeod* (1985) 176 Cal.App.3d 57, 65, 221 Cal.Rptr. 353 ; *Stiefel v. McKee* (1969) 1 Cal.App.3d 263, 266, 81 Cal.Rptr. 565 ; *Brady v. Carman* (1960) 179 Cal.App.2d 63, 68, 3 Cal.Rptr. 612 ; *Wilson v. Hisey* (1957) 147 Cal.App.2d 433, 438, 305 P.2d 686 .

[2] Use of Instruction

This instruction should be used in a negligence action by a broker's or agent's client against the real estate broker or agent.

For related Judicial Council instructions, including an instruction setting forth essential factual elements for the failure to use reasonable care, see [3][b], *below*.

[3] Comment

[a] Duty of Care

As an agent, a real estate broker or agent has the duty to exercise reasonable skill and ordinary diligence on the client's behalf. As professionals, brokers and agents are required to exercise the particular skill to be expected of them and to have special knowledge with regard to their duties as brokers or agents [*Montoya v. McLeod* (1985) 176 Cal.App.3d 57, 65, 221 Cal.Rptr. 353 ; *Stiefel v. McKee* (1969) 1 Cal.App.3d 263, 266, 81 Cal.Rptr. 565], including ordinary professional knowledge about the title and natural characteristics of the property sold [*Wilson v. Hisey* (1957) 147 Cal.App.2d 433, 305 P.2d 686].

For related forms, see California Forms of Pleading and Practice, Ch. 103, *Brokers* (Matthew Bender).

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Chs. 4, *California Judicial Council Negligence Instructions*, 6, *California Judicial Council Professional Negligence Instructions*, 41, *California Judicial Council Breach of Fiduciary Duty Instructions*]:

CACI No. 401, Basic Standard of Care

CACI No. 600, Standard of Care

CACI No. 4100, "Fiduciary Duty" Explained

CACI No. 4101, Failure to Use Reasonable Care--Essential Factual Elements

CACI No. 4102, Duty of Undivided Loyalty--Essential Factual Elements

CACI No. 4103, Duty of Confidentiality--Essential Factual Elements

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsStandard InstructionsReal Property LawBrokersGeneral
OverviewTortsNegligenceGeneral OverviewTortsNegligenceStandards of CareReasonable CareReasonable Person

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California Forms of Jury Instruction

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CHAPTER 74A Matthew Bender Professional Liability in Real Property Transactions Instructions
PART A. ACTIONS AGAINST BROKERS AND SALES AGENTS
3. Negligence

6-74A California Forms of Jury Instruction MB 7400A.31

MB 7400A.31 Knowledge, Training, and Expertise

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

A real estate [broker/salesperson] must have an understanding of the principles of real estate [and business opportunity] conveyancing, the general purposes and legal effect of _____ [*insert, as appropriate:* agency contracts, deposit receipts, deeds, mortgages, deeds of trust, chattel mortgages, bills of sale, land contracts of sale and leases, and of the principles of business and land economics and appraisals]. [He/She] must also have a general and fair understanding of all of the following:

1. The obligations between principal and agent;
2. The principles of real estate [and business opportunity] practice;
3. The rules of business ethics that apply to real estate [and business opportunity] practice; and
4. The real estate laws.

Authority: Bus. & Prof. Code § 10153(b), (c).

[2] Use of Instruction

This instruction should be used to set out the basic standards of knowledge, training, and expertise that a real estate broker or salesperson must meet as a matter of law. It should be given following the instruction on the broker's or salesperson's duty of care to the client in MB 7400A.30.

For related Judicial Council instructions, see [3][b], *below*.

[3] Comment

[a] Standard of Care

The examination for a real estate license requires the applicant to possess the knowledge and expertise set out in this instruction. Accordingly, the broker or salesperson in any action may not raise as a defense his or her failure to be familiar with the items enumerated [*Bus. & Prof. Code § 10153*].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Chs. 6, *California Judicial Council Professional Negligence Instructions*, 41, *California Judicial Council Breach of Fiduciary Duty Instructions*]:

CACI No. 600 Standard of Care

CACI No. 4100 "Fiduciary Duty" Explained

CACI No. 4101 Failure to Use Reasonable Care--Essential Factual Elements

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Real Property Law Brokers General Overview Real Property Law Brokers Fiduciary Responsibilities Torts Negligence General Overview Torts Negligence Standards of Care Special Care Highly Skilled Professionals

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CHAPTER 74A Matthew Bender Professional Liability in Real Property Transactions Instructions
PART A. ACTIONS AGAINST BROKERS AND SALES AGENTS
3. Negligence

6-74A California Forms of Jury Instruction MB 7400A.32

MB 7400A.32 Broker's Duty to Supervise Sales Agents

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

[CHOOSE ONE OR BOTH OF FOLLOWING (See Use of Instruction)]

A real estate broker has a duty to exercise reasonable supervision and control over the activities of [his/her/its] salespersons.

[AND/OR]

[In addition, a/A] real estate broker who is the designated officer of a corporate broker licensee has a duty to exercise reasonable supervision and control of all corporate activities for which a real estate license is required.

Authorities: Bus. & Prof. Code § 10177(h); *Montoya v. McLeod* (1985) 176 Cal.App.3d 57, 65, 221 Cal.Rptr. 353 ; *Walters v. Marler* (1978) 83 Cal.App.3d 1, 35, 147 Cal.Rptr. 655 .

[2] Use of Instruction

This instruction should be used whenever an issue of negligent supervision exists. The first alternative should be used if the alleged negligent supervision of an individual broker is at issue. The second alternative should be used if alleged negligent supervision by a corporate broker licensee is at issue. If both are at issue, both alternatives should be used.

For related Judicial Council instructions, see [3][b], *below*.

[3] Comment

[a] Duty to Supervise

The law imposes a duty on a broker to exercise "reasonable" supervision over the activities of his or her salespersons [*Bus. & Prof. Code* § 10177(h); see *Montoya v. McLeod* (1985) 176 Cal.App.3d 57, 65, 221 Cal.Rptr. 353], and the officer designated by a corporate broker licensee must exercise reasonable supervision and control of all corporate activities for which a real estate license is required [*Bus. & Prof. Code* § 10177(h)]. What is reasonable is a question of fact. However, a supervising broker for a corporate licensee is not personally liable for his or her negligent supervision, although the corporate licensee is liable [*Walters v. Marler* (1978) 83 Cal.App.3d 1, 35, 147 Cal.Rptr. 655].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Chs. 37, *California Judicial Council Vicarious Responsibility Instructions*, 41, *California Judicial Council Breach of Fiduciary Duty Instructions*]:

CACI No. 3700 Introduction

CACI No. 3701 Tort Liability Asserted Against Principal--Essential Factual Elements

CACI No. 3703 Legal Relationship Not Disputed

CACI No. 3704 Existence of "Employee" Status Disputed

CACI No. 3705 Existence of "Agency" Relationship Disputed

CACI No. 4100 "Fiduciary Duty" Explained

CACI No. 4101 Failure to Use Reasonable Care--Essential Factual Elements

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate Law Agency Relationships Authority to Act Contracts & Conveyances Liability of Principal Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Real Property Law Brokers General Overview Real Property Law Brokers Fiduciary Responsibilities Torts Negligence Standards of Care Reasonable Care Reasonable Person

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CHAPTER 74A Matthew Bender Professional Liability in Real Property Transactions Instructions
PART A. ACTIONS AGAINST BROKERS AND SALES AGENTS
3. Negligence

6-74A California Forms of Jury Instruction MB 7400A.33

MB 7400A.33 Sales Agent Is Agent of Broker**[1] Instruction**[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

_____ [Name of real estate salesperson] is an agent of _____ [name of real estate broker] and can act only for, on behalf of, and in place of _____ [name of real estate broker], the broker under whom [he/she] is licensed. The acts of _____ [name of real estate salesperson] are limited to those that [he/she] does and performs as agent for _____ [name of real estate broker]. Because _____ [name of real estate salesperson] is an agent of _____ [name of real estate broker], _____ [name of real estate broker] is liable for those acts of _____ [name of real estate salesperson] that are done in the transaction of _____ [name of real estate broker]'s business.

Authorities: *Bus. & Prof. Code* §§ 10137, 10160, 10177; *Civ. Code* § 2338; *People v. Asuncion* (1984) 152 Cal.App.3d 422, 425, 199 Cal.Rptr. 514 ; *Grubb & Ellis Co. v. Spengler* (1983) 143 Cal.App.3d 890, 895, 192 Cal.Rptr. 637 ; *Gipson v. Davis Realty Co.* (1963) 215 Cal.App.2d 190, 203, 206-207, 30 Cal.Rptr. 253 .

[2] Use of Instruction

This instruction should be used when the broker's liability is based on the acts of his or her salesperson. The instruction assumes that the salesperson's employment by the broker is not a fact in dispute. The employer-employee relationship should not generally be in dispute, because the laws regulating real estate licensing tie the salesperson so tightly to his or her broker. For example, the name of the employing broker must be stated on the salesperson's license, and the name on the license must be changed if the salesperson enters the employ of a different broker [*Bus. & Prof. Code* § 10161.8(d)]. Further, every broker must have a signed and dated written agreement with each salesperson, whether

licensed as a salesperson or broker, that covers the material aspects of their relationship, including supervision of licensed activities, duties, and compensation [10 *Cal. Code Reg. § 2726*].

For related Judicial Council instructions, see [3][b], *below*.

[3] Comment

[a] Salesperson Is Agent of Broker

A real estate salesperson is, as a matter of law, an agent of the broker under whose license he or she operates [*Bus. & Prof. Code § 10177(h)*; *Grubb & Ellis Co. v. Spengler* (1983) 143 *Cal.App.3d* 890, 895, 192 *Cal.Rptr.* 637 ; *Gipson v. Davis Realty Co.* (1963) 215 *Cal.App.2d* 190, 203, 206, 207, 30 *Cal.Rptr.* 253]. All of a real estate salesperson's professional compensation must come through the broker [*Bus. & Prof. Code § 10137*], and the salesperson's license must be in the broker's custody [*Bus. & Prof. Code § 10160*].

Any contract that purports to change the salesperson from the broker's agent to an independent contractor is invalid as contrary to the real estate law. Whether the broker is responsible for the act of the agent depends on whether the agent was engaged at that time in the transaction of the broker's business or in an act done for the agent's own personal convenience or accommodation and related to an end or purpose exclusively and individually his or her own [*Gipson v. Davis Realty Co.* (1963) 215 *Cal.App.2d* 190, 207-209, 30 *Cal.Rptr.* 253].

The salesperson may not contract in his or her own name and is not exempt from usury laws [*People v. Asuncion* (1984) 152 *Cal.App.3d* 422, 426, 199 *Cal.Rptr.* 514].

For purposes of tort liability, the broker is liable for the acts of the broker's salesperson under the doctrine of respondeat superior, because a salesperson is the agent of the broker [*Grubb & Ellis Co. v. Spengler* (1983) 143 *Cal.App.3d* 890, 895, 192 *Cal.Rptr.* 637 ; see *Civ. Code § 2338* (principal responsible to third persons for negligence of agent in transaction of agency business)].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 37, *California Judicial Council Vicarious Responsibility Instructions*]:

CACI No. 3700 Introduction

CACI No. 3701 Tort Liability Asserted Against Principal--Essential Factual Elements

CACI No. 3703 Legal Relationship Not Disputed

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate Law Agency Relationships Duties & Liabilities Authorized Acts of Agents Liability of Principal Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Real Property Law Brokers General Overview Torts Vicarious Liability Employers General Overview

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CHAPTER 74A Matthew Bender Professional Liability in Real Property Transactions Instructions

PART A. ACTIONS AGAINST BROKERS AND SALES AGENTS

3. Negligence

6-74A California Forms of Jury Instruction MB 7400A.34-MB 7400A.39

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MB 7400A.34Reserved for Future Use



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CHAPTER 74A Matthew Bender Professional Liability in Real Property Transactions Instructions
PART A. ACTIONS AGAINST BROKERS AND SALES AGENTS
4. Actual Fraud

6-74A California Forms of Jury Instruction MB 7400A.40

MB 7400A.40 What Constitutes Actual Fraud by Broker

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

_____ [*Name of broker*] is liable to Plaintiff for damages for [fraud/concealment/negligent misrepresentation] if Plaintiff proves all of the following:

1. That _____ [*name of broker*] _____ [told Plaintiff or concealed from Plaintiff] that _____ [*specify fact misstated or concealed*] [*add if fraud by misrepresentation is at issue:, and this statement was false*];

2. That the [statement/fact concealed] was material to Plaintiff's decision to deal with _____ [*name of broker*];

[*Either (See Use of Instruction)*]

3. That _____ [*name of broker*] _____ [knew that the statement was false or made the statement without believing it to be true and without knowing whether it was true or false or knew that (he/she/it) had concealed the fact];

[OR]

3. That _____ [name of broker] made the statement without any reasonable ground for believing that it was true, and Plaintiff did not know that it was false;

[CONTINUE INSTRUCTION]

4. That _____ [name of broker] [made the statement/concealed the fact] intending that Plaintiff rely on this [statement/concealment];

5. That Plaintiff did rely on it; and

6. That as a result of this reliance, Plaintiff suffered damages.

Authorities: *Civ. Code* §§ 1572, 1710; *Hobart v. Hobart Estate Co.* (1945) 26 Cal.2d 412, 422, 159 P.2d 958 ; *Montoya v. McLeod* (1985) 176 Cal.App.3d 57, 64-65, 221 Cal.Rptr. 353 ; *Walters v. Marler* (1978) 83 Cal.App.3d 1, 17, 147 Cal.Rptr. 655 ; *Brady v. Carman* (1960) 179 Cal.App.2d 63, 67-68, 3 Cal.Rptr. 612 .

[2] Use of Instruction

This instruction should be used when a fiduciary is accused of actual fraud in lieu of the general fraud instructions [see Ch. 19, *California Judicial Council Fraud or Deceit Instructions*, Ch. 19A, *Matthew Bender Fraud and Deceit Instructions*, and Ch. 41, *California Judicial Council Breach of Fiduciary Duty Instructions*, CACI No. 4100, " 'Fiduciary Duty' Explained"]. It encompasses fraud by knowing or reckless misrepresentation, concealment, and negligent misrepresentation [see Ch. 19, *California Judicial Council Fraud or Deceit Instructions*, CACI Nos. 1900, 1901, 1903, and Ch. 19A, *Matthew Bender Fraud and Deceit Instructions*, MB 1900A.03, MB 1900A.04]. The first alternative paragraph 3 should be used if fraud by knowing or reckless misrepresentation or concealment is in issue. The second alternative paragraph 3 should be used when negligent misrepresentation is the issue. This instruction omits the requirement that the false statement must be a false statement of a material *fact*. It also omits the requirement that the plaintiff's reliance must be a justified reliance. For the reasons explained in [3][a], *below*, these elements of fraud will ordinarily not be at issue in a case involving the professional liability of a broker.

For related Judicial Council instructions, see [3][b], *below*.

[3] Comment

[a] Elements of Fraud or Deceit

"Fraud" is defined by *Civ. Code* § 1572, and "deceit" is defined by *Civ. Code* § 1710. The elements of fraud or deceit are stated in *Hobart v. Hobart Estate Co.* [*Hobart v. Hobart Estate Co.* (1945) 26 Cal.2d 412, 422, 159 P.2d 958]. The elements of negligent misrepresentation are stated in *Walters v. Marler* [*Walters v. Marler* (1978) 83 Cal.App.3d 1, 17, 147 Cal.Rptr. 655].

Because of the professional knowledge expected of and the fiduciary duties imposed on a broker, this instruction may be more appropriate than general fraud instructions. For example, the issue of independent investigation need not be a matter for instruction [see Ch. 19A, *Matthew Bender Fraud and Deceit Instructions*, MB 1900A.23[3]; see also Ch. 41, *California Judicial Council Breach of Fiduciary Duty Instructions*, CACI No. 4100, " 'Fiduciary Duty' Explained"].

This instruction omits the requirement that the false statement must be a false statement of a material *fact* [see *Walters v. Marler* (1978) 83 Cal.App.3d 1, 17, 147 Cal.Rptr. 655]. This requirement is unnecessary because a false statement of opinion will support an action for fraud if the party making the statement has superior knowledge or special information

about that subject [*Brady v. Carman* (1960) 179 Cal.App.2d 63, 68, 3 Cal.Rptr. 612]. A real estate professional is presumed to have the skill and knowledge of a professional with regard to real estate transactions [*Bus. & Prof. Code* § 10153; *Brady v. Carman* (1960) 179 Cal.App.2d 63, 68, 3 Cal.Rptr. 612].

This instruction also omits the requirement that the plaintiff's reliance must be a justified reliance, because a principal is justified in relying on the advice of a fiduciary giving advice in the context of the agency assumed [*Schoenberg v. Romike Properties* (1967) 251 Cal.App.2d 154, 162, 59 Cal.Rptr. 359 ; see MB 7400A.44]. Reliance on a professional is reasonable. A professional agent must provide direct and fair answers to inquiries and not discourage investigation by telling a purchaser "[you have] nothing ... to worry about" [*Brady v. Carman* (1960) 179 Cal.App.2d 63, 68, 3 Cal.Rptr. 612 ; *Civ. Code* § 1572].

A real estate franchise company may be liable on a theory of ostensible agency for the fraud of its franchisee, the real estate broker [*Kaplan v. Coldwell Banker* (1997) 59 Cal.App.4th 741, 747-748, 69 Cal.Rptr.2d 640 (triable issue of fact existed with regard to ostensible agency of real estate broker who independently owned and operated Coldwell Banker franchise)]. However, in determining whether a true agency relationship exists between a franchisor and franchisee, the courts focus on the right to control. A true principal-agency relationship exists only when the franchisor retains complete or substantial control over the daily activities of the franchisee's business [*Kaplan v. Coldwell Banker* (1997) 59 Cal.App.4th 741, 745-746, 69 Cal.Rptr.2d 640 ; *Cislaw v. Southland Corp.* (1992) 4 Cal.App.4th 1284, 1296, 6 Cal.Rptr.2d 386 ; see Ch. 3C, *Matthew Bender Contract Party Instructions*].

For related forms, see California Forms of Pleading and Practice, Ch. 103, *Brokers* (Matthew Bender).

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Chs. 19, *California Judicial Council Fraud or Deceit Instructions*, 41, *California Judicial Council Breach of Fiduciary Duty Instructions*]:

CACI No. 1900 Intentional Misrepresentation

CACI No. 1901 Concealment

CACI No. 1902 False Promise

CACI No. 1903 Negligent Misrepresentation

CACI No. 1904 Opinions as Statements of Fact

CACI No. 1905 Definition of Important Fact/Promise

CACI No. 1906 Misrepresentations Made to Persons Other Than the Plaintiff

CACI No. 1907 Reliance

CACI No. 1908 Reasonable Reliance

CACI No. 4100 "Fiduciary Duty" Explained

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate Law Agency Relationships Authority to Act Apparent Authority General Overview Civil

ProcedureTrialsJury TrialsJury InstructionsStandard InstructionsReal Property LawBrokersGeneral
OverviewTortsBusiness TortsFraud & MisrepresentationActual FraudElements

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California Forms of Jury Instruction

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CHAPTER 74A Matthew Bender Professional Liability in Real Property Transactions Instructions
PART A. ACTIONS AGAINST BROKERS AND SALES AGENTS
4. Actual Fraud

6-74A California Forms of Jury Instruction MB 7400A.41

MB 7400A.41 Falsity of Statement

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

A statement need not be a direct falsehood to constitute fraud. It may be a deceptive answer or other indirect, but misleading, language.

Authority: *Brady v. Carman* (1960) 179 Cal.App.2d 63, 68, 3 Cal.Rptr. 612 .

[2] Use of Instruction

This instruction should be used to elaborate on the requirement, in a case of fraud by knowing, reckless, or negligent misrepresentation, that the statement must be false.

For related Judicial Council instructions, see [3][b], *below*.

[3] Comment

[a] False Statement

Although fraud generally requires a false statement of a material fact [see *Walters v. Marler* (1978) 83 Cal.App.3d 1, 17, 147 Cal.Rptr. 655], a statement need not be a direct falsehood to constitute fraud. It may be a deceptive answer or other indirect but misleading language [*Brady v. Carman* (1960) 179 Cal.App.2d 63, 68, 3 Cal.Rptr. 612].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 19, *California Judicial Council Fraud or Deceit Instructions*]:

CACI No. 1900 Intentional Misrepresentation

CACI No. 1901 Concealment

CACI No. 1902 False Promise

CACI No. 1903 Negligent Misrepresentation

CACI No. 1904 Opinions as Statements of Fact

CACI No. 1905 Definition of Important Fact/Promise

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsStandard InstructionsReal Property LawBrokersGeneral
OverviewTortsBusiness TortsFraud & MisrepresentationActual FraudElements

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CHAPTER 74A Matthew Bender Professional Liability in Real Property Transactions Instructions
PART A. ACTIONS AGAINST BROKERS AND SALES AGENTS
4. Actual Fraud

6-74A California Forms of Jury Instruction MB 7400A.42

MB 7400A.42 Material Fact

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

You have been instructed that one of the things that Plaintiff must prove is that _____ [name of broker] [concealed/falsely stated] a material fact.

A material fact is one that is significant and is directly related to Plaintiff's decision to deal with _____ [name of broker]. The fact must be a fact of such nature, weight, and force that without the [false statement/concealment] of this fact the contract would not have been made. It is not necessary for Plaintiff to prove that the [false statement/concealment] of this fact was the only reason that Plaintiff made the contract.

Authorities: *Ford v. Cournale* (1973) 36 Cal.App.3d 172, 183 n. 10, 111 Cal.Rptr. 334 ; *Schaub v. Schaub* (1945) 71 Cal.App.2d 467, 475, 162 P.2d 966 .

[2] Use of Instruction

This instruction should be used when fraud is alleged against a broker. In these cases, the jury should be instructed on what constitutes a material fact.

For related Judicial Council instructions, see [3][b], *below*.

[3] Comment

[a] Material Fact

A fact is material if it relates to a matter of substance and directly affects the purpose of the party deceived in entering the contract [*Schaub v. Schaub* (1945) 71 Cal.App.2d 467, 475, 162 P.2d 966]. Proof of one such fact is enough to justify recovery [*Ford v. Cournale* (1973) 36 Cal.App.3d 172, 183 n. 10, 111 Cal.Rptr. 334 ; *Gormly v. Dickinson* (1960) 178 Cal.App.2d 92, 104, 2 Cal.Rptr. 650]. It is not necessary for plaintiff to prove that the misrepresentation was the sole inducement to the contract [*Ford v. Cournale* (1973) 36 Cal.App.3d 172, 183 n. 10, 111 Cal.Rptr. 334].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 19, *California Judicial Council Fraud or Deceit Instructions*]:

CACI No. 1905 Definition of Important Fact/Promise

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Real Property Law Brokers General
Overview Torts Business Torts Fraud & Misrepresentation Actual Fraud Elements

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CHAPTER 74A Matthew Bender Professional Liability in Real Property Transactions Instructions

PART A. ACTIONS AGAINST BROKERS AND SALES AGENTS

4. Actual Fraud

6-74A California Forms of Jury Instruction MB 7400A.43

MB 7400A.43 Intent**[1] Instruction**

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

You have been instructed that one of the things that Plaintiff must prove is that _____ *[name of broker]* **[concealed/falsely stated] a material fact with the intent that Plaintiff rely on this [false statement/concealment]. This means that Plaintiff must prove that the** _____ **[false statement was made by/fact was concealed by]** _____ *[name of broker]* **to cause Plaintiff to** _____ *[describe transaction]*. **It is not necessary for Plaintiff to show that** _____ *[name of broker]* **intended to deceive Plaintiff.**

Authorities: *Gagne v. Bertran* (1954) 43 Cal.2d 481, 488, 275 P.2d 15 ; *Ford v. Cournale* (1973) 36 Cal.App.3d 172, 183, 111 Cal.Rptr. 334 .

[2] Use of Instruction

This instruction should be used when fraud is alleged against a broker. In these cases, the jury should be instructed on the necessary intent.

For related Judicial Council instructions, see [3][b], *below*.

[3] Comment**[a] Intent**

The intent required in an action for fraud is that the defendant intended to induce the plaintiff to act in some manner. No specific intent to deceive need be shown [*Gagne v. Bertran* (1954) 43 Cal.2d 481, 488, 275 P.2d 15 ; *Ford v. Cournale* (1973) 36 Cal.App.3d 172, 183, 111 Cal.Rptr. 334].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 19, *California Judicial Council Fraud or Deceit Instructions*]:

CACI No. 1900 Intentional Misrepresentation

CACI No. 1901 Concealment

CACI No. 1902 False Promise

CACI No. 1903 Negligent Misrepresentation

CACI No. 1904 Opinions as Statements of Fact

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Real Property Law Brokers General
Overview Torts Business Torts Fraud & Misrepresentation Actual Fraud Elements

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CHAPTER 74A Matthew Bender Professional Liability in Real Property Transactions Instructions
PART A. ACTIONS AGAINST BROKERS AND SALES AGENTS
4. Actual Fraud

6-74A California Forms of Jury Instruction MB 7400A.44

MB 7400A.44 Justifiable Reliance in Fiduciary

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Because _____ [*name of broker or agent*] was Plaintiff's [real estate broker/real estate salesperson], Plaintiff had a right to rely on the truth of a representation made to [him/her/it] by _____ [*name of broker or agent*] about the terms of the transaction for which _____ [*name of broker or agent*] was employed.

It does not matter if Plaintiff could have found out the truth by making [his/her/its] own investigation of those facts. Plaintiff was under no duty to investigate those facts for [himself/herself/itself].

Authorities: *Manderville v. PCG&S Group, Inc.* (2007) 146 Cal. App. 4th 1486, 1502, 55 Cal. Rptr. 3d 59 ; *Ford v. Cournale* (1973) 36 Cal.App.3d 172, 180, 111 Cal.Rptr. 334 ; *Schoenberg v. Romike Properties* (1967) 251 Cal.App.2d 154, 162, 59 Cal.Rptr. 359 .

[2] Use of Instruction

This instruction on reliance should be given with CACI No. 4100, " 'Fiduciary Duty' Explained," and MB 7400A.40 whenever the actual fraud alleged is against a fiduciary, such as a broker.

For related Judicial Council instructions, see [3][b], *below*.

[3] Comment

[a] Justifiable Reliance

It is well established in California that in an action for fraud or deceit, negligence on the part of the plaintiff in failing to discover the falsity of the defendant's statement is no defense when the misrepresentation was intentional [*Manderville v. PCG&S Group, Inc.* (2007) 146 Cal. App. 4th 1486, 1502, 55 Cal. Rptr. 3d 59] . A principal is justified in relying on the advice of a fiduciary giving advice in the context of the agency assumed [*Schoenberg v. Romike Properties* (1967) 251 Cal.App.2d 154, 162, 59 Cal.Rptr. 359]. The principal is under no duty to make an independent investigation of the facts provided by a fiduciary [*Ford v. Cournale* (1973) 36 Cal.App.3d 172, 180, 111 Cal.Rptr. 334].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 19, *California Judicial Council Fraud or Deceit Instructions*, Ch. 41, *California Judicial Council Breach of Fiduciary Duty Instructions*]:

CACI No. 1907 Reliance

CACI No. 1908 Reasonable Reliance

CACI No. 4100 "Fiduciary Duty" Explained

CACI No. 4101 Failure to Use Reasonable Care--Essential Factual Elements

CACI No. 4102 Duty of Undivided Loyalty--Essential Factual Elements

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Real Property Law Brokers General Overview Real Property Law Brokers Fiduciary Responsibilities Torts Business Torts Fraud & Misrepresentation Actual Fraud Elements

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CHAPTER 74A Matthew Bender Professional Liability in Real Property Transactions Instructions

PART A. ACTIONS AGAINST BROKERS AND SALES AGENTS

4. Actual Fraud

6-74A California Forms of Jury Instruction MB 7400A.45 -MB 7400A.49

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MB 7400A.45Reserved for Future Use



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CHAPTER 74A Matthew Bender Professional Liability in Real Property Transactions Instructions
PART A. ACTIONS AGAINST BROKERS AND SALES AGENTS
5. Damages

6-74A California Forms of Jury Instruction MB 7400A.50

MB 7400A.50 Broker Liability

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

If you find that Plaintiff is entitled to recover damages from _____ [name of real estate broker or agent], then the damages awarded must be in an amount that will compensate Plaintiff for all the harm or loss caused by _____ [name of real estate broker or agent]'s wrongful conduct, whether the harm or loss could have been anticipated or not.

Authorities: *Civ. Code § 3333; Alliance Mortgage Co. v. Rothwell (1995) 10 Cal.4th 1226, 1240-1241, 44 Cal.Rptr.2d 352, 900 P.2d 601 ; Lewis v. Upton (1984) 151 Cal.App.3d 232, 237, 198 Cal.Rptr. 494 ; Brown v. Critchfield (1980) 100 Cal.App.3d 858, 871, 161 Cal.Rptr. 342 .*

[2] Use of Instruction

This instruction should be used in negligence cases. It should also be used when damages are sought from a fiduciary for fraud in the purchase or sale of real property. Ordinarily, the damages available for fraud in the purchase or sale of real property are fixed by *Civ. Code § 3343* rather than *Civ. Code § 3333*, but this is not the case when the defendant stands in a fiduciary relationship to the plaintiff, as explained in [3][a], *below*.

For related Judicial Council instructions, see [3][b], *below*.

[3] Comment

[a] Damages

Civ. Code § 3343 provides the usual measure of damages relating to fraud in the purchase or sale of real property. If the defrauding party stands in a fiduciary relationship to the victim, damages will be measured by *Civ. Code* § 3333, which governs compensation for obligations not arising from contract-torts, for example [*Alliance Mortgage Co. v. Rothwell* (1995) 10 Cal.4th 1226, 1240-1241, 44 Cal.Rptr.2d 352, 900 P.2d 601 ; *Brown v. Critchfield* (1980) 100 Cal.App.3d 858, 871, 161 Cal.Rptr. 342 ; cf. *Hensley v. McSweeney* (2001) 90 Cal.App.4th 1081, 1085-1086, 109 Cal.Rptr.2d 489 (in cases involving negligent misrepresentation by fiduciary, out-of-pocket measure of damages applies as set forth in *Civ. Code* § 3343)]. *Civ. Code* § 3333 provides for damages in the amount that will compensate for all the detriment proximately caused by the wrongful act, whether this detriment could have been anticipated or not. This means that, for example, emotional distress damages, which are not available under *Civ. Code* § 3343, may be recovered from a broker under *Civ. Code* § 3333 [*Lewis v. Upton* (1984) 151 Cal.App.3d 232, 237, 198 Cal.Rptr. 494].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Chs. 39, *California Judicial Council Damages Instructions*, 41, *California Judicial Council Breach of Fiduciary Duty Instructions*]:

CACI No. 3900 Introduction to Tort Damages--Liability Contested

CACI No. 3901 Introduction to Tort Damages--Liability Established

CACI No. 4100 "Fiduciary Duty" Explained

CACI No. 4101 Failure to Use Reasonable Care--Essential Factual Elements

CACI No. 4102 Duty of Undivided Loyalty--Essential Factual Elements

CACI No. 4103 Duty of Confidentiality--Essential Factual Elements

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Real Property Law Brokers General Overview Real Property Law Brokers Fiduciary Responsibilities Torts Business Torts Fraud & Misrepresentation Actual Fraud Remedies Torts Negligence General Overview

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CHAPTER 74A Matthew Bender Professional Liability in Real Property Transactions Instructions
PART A. ACTIONS AGAINST BROKERS AND SALES AGENTS
5. Damages

6-74A California Forms of Jury Instruction MB 7400A.51

MB 7400A.51 Broker's Loss of Right to Commission for Bad Faith

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] PROPOSED INSTR. NO. _____

If you find that the conduct of _____ [name of broker or agent] amounted to bad faith, disloyalty, or actual fraud, then _____ [(name of broker) has no right to receive a commission or (name of principal) is entitled to recover the commission that (he/she/it) paid to _____ (name of broker)]. However, negligence in the performance of [his/her/its] duties when there is no disloyalty, actual fraud, or bad faith will not deprive _____ [name of broker] of [his/her/its] right to be paid a commission.

Authorities: *Ziswasser v. Cole & Cowan, Inc.* (1985) 164 Cal.App.3d 417, 423-425, 210 Cal.Rptr. 428 ; *Bay Shore Homes, Inc. v. San Diego Trust & Sav. Bk.* (1969) 276 Cal.App.2d 108, 115-116, 80 Cal.Rptr. 849 ; *Tackett v. Croonquist* (1966) 244 Cal.App.2d 572, 578, 53 Cal.Rptr. 388 ; Restatement (Second) of Agency § 469.

[2] Use of Instruction

This instruction should be used when the broker's actual fraud, bad faith, or disloyalty is raised in a claim to recover a commission paid to the broker or in defense of the broker's claim or counterclaim for a commission. It should be used with the instructions in MB 7400A.40 and MB 7400A.41 or those in Ch. 19, *California Judicial Council Fraud or Deceit Instructions*, and Ch. 19A, *Matthew Bender Fraud and Deceit Instructions*, to explain what actual fraud is. Because a broker is in a fiduciary relationship with his or her principal, this instruction will likely also be appropriate with the CACI "Breach of Fiduciary Duty" series [see Ch. 41, *California Judicial Council Breach of Fiduciary Duty Instructions*, CACI Nos. 4100- 4105], in particular, CACI No. 4100, " 'Fiduciary Duty' Explained," and CACI No. 4102, "Duty of Undivided Loyalty--Essential Factual Elements."

[3] Comment

A broker will be denied a commission when that broker willfully fails to obtain the best terms for his or her principal, and has received a greater commission than he or she would otherwise have received [*Bay Shore Homes, Inc. v. San Diego Trust & Sav. Bk.* (1969) 276 Cal.App.2d 108, 115-116, 80 Cal.Rptr. 849]. Mere negligence or constructive fraud by the broker or agent does not deprive the broker of a commission when there is no disloyalty, bad faith, or actual fraud [*Ziswasser v. Cole & Cowan, Inc.* (1985) 164 Cal.App.3d 417, 423-425, 210 Cal.Rptr. 428 ; *Tackett v. Croonquist* (1966) 244 Cal.App.2d 572, 576-578, 53 Cal.Rptr. 388 ; Restatement (Second) of Agency § 469; but see *Hale v. Wolfson* (1969) 276 Cal.App.2d 285, 289-291, 81 Cal.Rptr. 23].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Real Property Law Brokers General Overview Real Property Law Brokers Fiduciary Responsibilities Real Property Law Brokers Right to Commissions

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CHAPTER 74A Matthew Bender Professional Liability in Real Property Transactions Instructions

PART A. ACTIONS AGAINST BROKERS AND SALES AGENTS

5. Damages

6-74A California Forms of Jury Instruction MB 7400A.52-MB 7400A.59

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MB 7400A.52Reserved for Future Use



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CHAPTER 74A Matthew Bender Professional Liability in Real Property Transactions Instructions
PART B. ACTIONS INVOLVING ESCROWS AND ESCROW AGENTS
1. General Instructions

6-74A California Forms of Jury Instruction MB 7400A.60

MB 7400A.60 Definition of "Escrow"

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

An "escrow" is a transaction in which one person, to sell, transfer, encumber, or lease property, delivers documents or money to a third person to be held by the third person until a specified event happens or a prescribed condition has been performed. When the specified event happens or the prescribed condition is performed, the documents or money is then to be delivered by that third person to a person specified in the escrow instructions.

The sale, transfer, or encumbrance of the property does not take effect until the documents or money held by the third party is delivered to the person specified in the escrow instructions.

Authorities: *Civ. Code § 1057; Fin. Code § 17003(a); Summit Financial Holdings, Ltd. v. Continental Lawyers Title Co. (2002) 27 Cal.4th 705, 711, 117 Cal.Rptr.2d 541, 41 P.3d 548 ; Peterson Development Co. v. Torrey Pines Bank (1991) 233 Cal.App.3d 103, 118, 284 Cal.Rptr. 367 .*

[2] Use of Instruction

This instruction should be used to define the term "escrow." Although the instruction will most often be used in real property litigation, an escrow need not concern real property. Personal property may also be subject to escrow [*Fin. Code § 17003; see Fin. Code § 17003(b)* (special provisions applicable to Internet escrow companies with regard to transfer of personal property or services)].

[3] Comment

A grant deposited by the grantor with a third person to be delivered to the grantee on performance of a condition is called an escrow while it is in the possession of the third person and subject to the condition [*Civ. Code* § 1057]. "Escrow" means any transaction in which one person, to sell, transfer, encumber, or lease property, delivers a written instrument, money, evidence of title, or some other thing of value to a third person to be held by that third person until the happening of a specified event or the performance of a prescribed condition, when it is then to be delivered by that third person to a grantee, grantor, promisee, promisor, obligee, obligor, bailee, bailor, or any agent or employee of the latter [*Fin. Code* § 17003(a); *Peterson Development Co. v. Torrey Pines Bank* (1991) 233 Cal.App.3d 103, 118, 284 Cal.Rptr. 367 ; see *Summit Financial Holdings, Ltd. v. Continental Lawyers Title Co.* (2002) 27 Cal.4th 705, 711, 117 Cal.Rptr.2d 541, 41 P.3d 548]. An escrow can involve personal as well as real property [*Fin. Code* § 17003].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Real Property Law Brokers General Overview Real Property Law Purchase & Sale Escrow

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CHAPTER 74A Matthew Bender Professional Liability in Real Property Transactions Instructions
PART B. ACTIONS INVOLVING ESCROWS AND ESCROW AGENTS
1. General Instructions

6-74A California Forms of Jury Instruction MB 7400A.61

MB 7400A.61 Definition of "Escrow Agent" and "Internet Escrow Agent"

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO. _____**

[EITHER (See Use of Instruction)]

An escrow agent is any person engaged in the business of receiving escrows for deposit or delivery.

[OR]

An Internet escrow agent is any person engaged in the business of receiving escrows for deposit or delivery over the Internet.

Authorities: *Fin. Code §§ 17004, 17004.5; Kirby v. Palos Verdes Escrow Co. (1986) 183 Cal.App.3d 57, 64, 227 Cal.Rptr. 785 , disapproved on other grounds in Summit Financial Holdings, Ltd. v. Continental Lawyers Title Co. (2002) 27 Cal.4th 705, 714, 117 Cal.Rptr.2d 541, 41 P.3d 548 .*

[2] Use of Instruction

This instruction should be used when an issue in the litigation is whether a person was acting as an escrow agent. Which alternative to use depends on whether the escrow agent is an Internet escrow agent. It should be preceded by the instruction in MB 7400A.60.

For related Judicial Council instructions, see [3][b], *below*.

[3] Comment

[a] Definitions

An escrow agent is any person engaged in the business of receiving escrows for deposit or delivery. An Internet escrow agent is any person engaged in the business of receiving escrows for deposit or delivery over the Internet [*Fin. Code* §§ 17004, 17004.5; *Kirby v. Palos Verdes Escrow Co.* (1986) 183 Cal.App.3d 57, 64, 227 Cal.Rptr. 785, disapproved on other grounds in *Summit Financial Holdings, Ltd. v. Continental Lawyers Title Co.* (2002) 27 Cal.4th 705, 714, 117 Cal.Rptr.2d 541, 41 P.3d 548].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 41, *California Judicial Council Breach of Fiduciary Duty Instructions*]:

CACI No. 4104 Duties of Escrow Holder

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate Law Agency Relationships Agents Distinguished Special Agents Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Real Property Law Brokers General Overview Real Property Law Purchase & Sale Escrow

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CHAPTER 74A Matthew Bender Professional Liability in Real Property Transactions Instructions
PART B. ACTIONS INVOLVING ESCROWS AND ESCROW AGENTS
1. General Instructions

6-74A California Forms of Jury Instruction MB 7400A.62

MB 7400A.62 Definition of "Escrow Instructions"

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Escrow instructions are a customary and necessary means of consummating a real estate transaction. The instructions do not take the place of the agreement for sale, but merely carry it into effect.

Authorities: *Crescenta Valley Moose Lodge v. Bunt* (1970) 8 Cal.App.3d 682, 685, 87 Cal.Rptr. 428 ; *Tancredi v. Garrett* (1962) 210 Cal.App.2d 818, 822, 27 Cal.Rptr. 52 ; *Karras v. Title Ins. & Guar. Co.* (1953) 118 Cal.App.2d 659, 664, 258 P.2d 866 .

[2] Use of Instruction

This instruction should be given when an alleged difference between the escrow instructions and the contract of the parties is in issue.

[3] Comment

Often, an escrow agent will not see the deposit receipt or any other documents evidencing the contract between the buyer and seller of real property. The agent will not know whether the instructions are consistent with the underlying contract of sale. As long as the instructions do not contradict one another and appear to contain all of the basic transaction's elements, an escrow can close even though the result may violate the terms of the contract between the principals. An escrow agent has no responsibility to even look at the contract. The agent's duty is to comply with the escrow instructions [*Amen v. Merced County Title Co.* (1962) 58 Cal.2d 528, 531, 25 Cal.Rptr. 65, 375 P.2d 33]. The agreement of sale and the escrow instructions are separate documents with separate functions so that an instruction to

the escrow agent canceling all previous instructions and stating that the escrow is not to be consummated is no bar to an action for specific performance on the underlying contract of sale [*Cohen v. Shearer* (1980) 108 Cal.App.3d 939, 941-942, 167 Cal.Rptr. 10].

Escrow is a process of consummating a real estate transaction [*Karras v. Title Ins. & Guar. Co.* (1953) 118 Cal.App.2d 659, 664, 258 P.2d 866]. The instructions do not supplant the basic agreement between buyer and seller although the two may be read together to ascertain intent [*Crescenta Valley Moose Lodge v. Bunt* (1970) 8 Cal.App.3d 682, 685, 87 Cal.Rptr. 428 ; *Tancredi v. Garrett* (1962) 210 Cal.App.2d 818, 822, 27 Cal.Rptr. 52]. Escrows are a method of carrying out the agreement employed by custom for convenience [*Tancredi v. Garrett* (1962) 210 Cal.App.2d 818, 822, 27 Cal.Rptr. 52].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Real Property Law Brokers General Overview Real Property Law Purchase & Sale Escrow

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California Forms of Jury Instruction

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CHAPTER 74A Matthew Bender Professional Liability in Real Property Transactions Instructions

PART B. ACTIONS INVOLVING ESCROWS AND ESCROW AGENTS

1. General Instructions

6-74A California Forms of Jury Instruction MB 7400A.63-MB 7400A.69

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MB 7400A.63Reserved for Future Use



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California Forms of Jury Instruction

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CHAPTER 74A Matthew Bender Professional Liability in Real Property Transactions Instructions
PART B. ACTIONS INVOLVING ESCROWS AND ESCROW AGENTS
2. Breach of Contract

6-74A California Forms of Jury Instruction MB 7400A.70

MB 7400A.70 Escrow Instructions--No Requirement of Writing

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Escrow instructions may be either written or oral.

Authorities: *Cannon v. Handley* (1887) 72 Cal. 133, 144, 13 P. 315 ; *Zang v. Northwestern Title Co.* (1982) 135 Cal.App.3d 159, 167-168, 185 Cal.Rptr. 176 ; *Womble v. Wilbur* (1906) 3 Cal.App. 535, 547, 86 P. 916 .

[2] Use of Instruction

This instruction should be given when an issue exists regarding oral escrow instructions. Because the underlying contract in an escrow transaction is usually one for the sale of real property, statute of frauds [see [3][a], *below*] or parole evidence rule [see *Code Civ. Proc.* § 1856 (parole evidence rule); see also Ch. 3B, *Matthew Bender Interpretation of Contract Instructions*, MB 300B.02] issues may arise concerning that underlying contract. If these issues do arise, and if all or part of the escrow instructions in the case are oral, it will be important to instruct the jury that escrow instructions are different from contracts for the sale of real estate in that they need not be in writing. Although escrow instructions need not be in writing [see [3][a], *below*] a conflict between alleged oral escrow instructions and a contemporaneous written agreement may raise parole evidence issues concerning the escrow instructions [see [3][b], *below*] that will require instructions to the jury [see Ch. 3B, *Matthew Bender Interpretation of Contract Instructions*, MB 300B.02].

[3] Comment

[a] Escrow Instructions May Be Oral

It is a well accepted principle that escrow instructions may be oral [*Zang v. Northwestern Title Co.* (1982) 135 Cal.App.3d 159, 167-168, 185 Cal.Rptr. 176 ; *Womble v. Wilbur* (1906) 3 Cal.App. 535, 547, 86 P. 916 ; *Cannon v. Handley* (1887) 72 Cal. 133, 144, 13 P. 315]. Even when the underlying contract is for the sale of real property and subject to the statute of frauds [see Civ. Code § 1624(a)(3), (4)], there is no requirement that the escrow instructions be in writing [*Cannon v. Handley* (1887) 72 Cal. 133, 144, 13 P. 315].

[b] Disadvantages of Oral Instructions

Although oral escrow instructions are permissible, they may pose certain disadvantages. When the existence of an oral instruction is in dispute, the escrow holder may have the burden of proof [Prob. Code § 16004(c)]. If the alleged oral instruction is inconsistent with a contemporaneous written agreement, the escrow holder may also face a parol evidence question [Code Civ. Proc. § 1856; see Ch. 3B, *Matthew Bender Interpretation of Contract Instructions*, MB 300B.02].

The Insurance Code declares that disbursing or offering to disburse escrow funds before the conditions of the escrow applicable to that disbursement have been met is deemed to be an unlawful inducement [Ins. Code § 12404(c)(5)]. Without written escrow instructions, an escrow agent disbursing funds would probably be unable to meet the code requirement for documenting the transaction [Ins. Code §§ 12407, 12414.22].

Moreover, it is the universal custom of escrow and underwriting title companies in California to require written instructions. A failure to obtain at least some written instructions executed by the parties to the escrow might raise tort as well as contract questions. For example, the failure to comply with custom by requiring written escrow instructions could be interpreted in an action alleging negligence as a failure by the escrow holder to exercise ordinary skill and diligence in his or her employment [see MB 7400A.91 (escrow holder's duty of care)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Real Property Law Brokers General Overview Real Property Law Purchase & Sale Escrow

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CHAPTER 74A Matthew Bender Professional Liability in Real Property Transactions Instructions
PART B. ACTIONS INVOLVING ESCROWS AND ESCROW AGENTS
2. Breach of Contract

6-74A California Forms of Jury Instruction MB 7400A.71

MB 7400A.71 Escrow Instructions--Interpretation

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] PROPOSED INSTR. NO. _____

The escrow instructions admitted into evidence as [exhibit/exhibits] _____ govern the rights and duties of the parties.

There is a dispute between the parties as to the meaning of those escrow instructions. Plaintiff contends that _____ [state plaintiff's contention]. Defendant contends that _____ [state defendant's contention]. This dispute raises a question of interpretation of the escrow instructions that you must decide according to the following rules of interpretation.

Authorities: *Warner Constr. Corp. v. City of Los Angeles* (1970) 2 Cal.3d 285, 291, 85 Cal.Rptr. 444, 466 P.2d 996 ; *Claussen v. First American Title Guaranty Co.* (1986) 186 Cal.App.3d 429, 437, 230 Cal.Rptr. 749 ; *Francis v. Eisenmayer* (1959) 171 Cal.App.2d 221, 227, 340 P.2d 54 .

[2] Use of Instruction

This instruction should be used when a conflict exists in the extrinsic evidence offered to interpret written escrow instructions, as explained in [3][b], *below*. The instruction should be used when there is a claim that the escrow agents incorrectly followed an escrow instruction or that it was ambiguous or contradicted other escrow instructions. It should be followed with those interpretational instructions based on *Civ. Code* §§ 1636-1663 that are appropriate to the particular case.

For possible instructions to be used other than the instruction on uncertainty in MB 7400A.72, see Ch. 3, *California*

Judicial Council Contracts Instructions, CACI Nos. 314-320 (general interpretation of contract instructions) [see [3][c], below], and Ch. 3B, *Matthew Bender Interpretation of Contract Instructions*.

[3] Comment

[a] Contract Rules Apply to Interpretation of Escrow Instructions

An escrow agent's task involves strict compliance with the escrow instructions [*Claussen v. First American Title Guaranty Co.* (1986) 186 Cal.App.3d 429, 435, 230 Cal.Rptr. 749 ; see MB 7400A.92 (instruction on escrow holder's duty to comply strictly with principal's instructions)]. These instructions are interpreted under the rules applicable to contracts [*Claussen v. First American Title Guaranty Co.* (1986) 186 Cal.App.3d 429, 437, 230 Cal.Rptr. 749 ; *Francis v. Eisenmayer* (1959) 171 Cal.App.2d 221, 226-227, 340 P.2d 54]. For instructions on the rules of contract interpretation, see Ch. 3, *California Judicial Council Contracts Instructions, CACI Nos. 314-320*, and Ch. 3B, *Matthew Bender Interpretation of Contract Instructions*.

[b] Question for Court or for Jury

The interpretation of a written instrument is solely a judicial function unless the interpretation turns on the credibility of extrinsic evidence [*Parsons v. Bristol Development Co.* (1965) 62 Cal.2d 861, 865, 44 Cal.Rptr. 767, 402 P.2d 839 ; *Greater Middleton Assn. v. Holmes Lumber Co.* (1990) 222 Cal.App.3d 980, 989-990, 271 Cal.Rptr. 917]. When the interpretation does turn on the credibility of extrinsic evidence, it is proper to submit the question of interpretation to the jury [*Warner Constr. Corp. v. City of Los Angeles* (1970) 2 Cal.3d 285, 291, 85 Cal.Rptr. 444, 466 P.2d 996]. For further discussion, see Ch. 3B, *Matthew Bender Interpretation of Contract Instructions*, MB 300B.01 and MB 300B.02.

[c] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 3, *California Judicial Council Contracts Instructions*]:

CACI No. 314 Interpretation--Disputed Term

CACI No. 315 Interpretation--Meaning of Ordinary Words

CACI No. 316 Interpretation--Meaning of Technical Words

CACI No. 317 Interpretation--Construction of Contract as a Whole

CACI No. 318 Interpretation--Construction by Conduct

CACI No. 319 Interpretation--Reasonable Time

CACI No. 320 Interpretation--Construction Against Drafter

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Real Property Law Brokers General Overview Real Property Law Purchase & Sale Escrow

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California Forms of Jury Instruction

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CHAPTER 74A Matthew Bender Professional Liability in Real Property Transactions Instructions
PART B. ACTIONS INVOLVING ESCROWS AND ESCROW AGENTS
2. Breach of Contract

6-74A California Forms of Jury Instruction MB 7400A.72

MB 7400A.72 Escrow Instructions--Uncertainty

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Any uncertainty in escrow instructions must be interpreted most strongly against the party who
_____ **[caused the uncertainty to exist or prepared the instructions, because (he/she/it) caused the uncertainty to exist].**

Authorities: *Civ. Code § 1654; Claussen v. First American Title Guaranty Co. (1986) 186 Cal.App.3d 429, 437, 230 Cal.Rptr. 749 ; Diaz v. United California Bank (1977) 71 Cal.App.3d 161, 171, 139 Cal.Rptr. 314 ; Francis v. Eisenmayer (1959) 171 Cal.App.2d 221, 227, 340 P.2d 54 .*

[2] Use of Instruction

This instruction should be used with the instruction in MB 7400A.71 when the jury is asked to ascertain the meaning of the escrow instructions based on extrinsic evidence. It should be used when there is an ambiguity or a contradiction contained within a single instruction or among several instructions. The second bracketed alternative directing the jury to construe the instructions against the party who prepared them should be used when the preparation of the instructions is causing the uncertainty that is at issue.

[3] Comment

When an uncertainty in an agreement is not removed by the general rules of interpretation in *Civ. Code §§ 1635-1663*, the language of the agreement should be interpreted most strongly against the party who caused the uncertainty to exist [*Civ. Code § 1654*]. This rule of contract interpretation applies as well to the interpretation of escrow instructions [

Diaz v. United California Bank (1977) 71 Cal.App.3d 161, 171, 139 Cal.Rptr. 314 ; *Francis v. Eisenmayer* (1959) 171 Cal.App.2d 221, 227, 340 P.2d 54].

The escrow agent's basic contractual duty is to comply strictly with instructions of the parties [*Claussen v. First American Title Guaranty Co.* (1986) 186 Cal.App.3d 429, 435, 230 Cal.Rptr. 749]. Any ambiguity is resolved against the party preparing the instruction [*Francis v. Eisenmayer* (1959) 171 Cal.App.2d 221, 227, 340 P.2d 54]. Any seeming contradiction in or among instructions requires that the escrow agent, in the exercise of due care, resolve the ambiguity or contradiction before proceeding to close [*Diaz v. United California Bank* (1977) 71 Cal.App.3d 161, 171, 139 Cal.Rptr. 314].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Real Property Law Brokers General Overview Real Property Law Purchase & Sale Escrow

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CHAPTER 74A Matthew Bender Professional Liability in Real Property Transactions Instructions PART B. ACTIONS INVOLVING ESCROWS AND ESCROW AGENTS 2. Breach of Contract

6-74A California Forms of Jury Instruction MB 7400A.73

MB 7400A.73 No Substantial Performance Doctrine With Escrow

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Full performance of escrow instructions is required for an escrow to close; substantial performance of the instructions is not enough. No title passes until the terms of the escrow have been fully performed.

Authorities: *Love v. White* (1961) 56 Cal.2d 192, 194-195, 14 Cal.Rptr. 442, 363 P.2d 482 ; *Weisberg v. Ashcraft* (1961) 194 Cal.App.2d 225, 231, 14 Cal.Rptr. 817 ; *Borgonovo v. Henderson* (1960) 182 Cal.App.2d 220, 226, 6 Cal.Rptr. 236 .

[2] Use of Instruction

This instruction should be given in the event of an alleged improper delivery of documents or funds by the escrow agent.

[3] Comment

The doctrine of substantial performance does not apply to escrows [*Love v. White* (1961) 56 Cal.2d 192, 194-195, 14 Cal.Rptr. 442, 363 P.2d 482 ; *Weisberg v. Ashcraft* (1961) 194 Cal.App.2d 225, 231, 14 Cal.Rptr. 817 ; *see generally* Ch. 3, *California Judicial Council Contracts Instructions*, CACI No. 312, for an instruction on substantial performance]. If an escrow holder delivers or records a deed before full performance of the escrow terms, the delivery or recordation is a nullity and no title passes [*Borgonovo v. Henderson* (1960) 182 Cal.App.2d 220, 226, 6 Cal.Rptr. 236].

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate Law Agency Relationships Agents Distinguished Special Agents Civil Procedure Trials Jury
Trials Jury Instructions Standard Instructions Contracts Law Performance General Overview Real Property
Law Brokers General Overview Real Property Law Purchase & Sale Escrow

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CHAPTER 74A Matthew Bender Professional Liability in Real Property Transactions Instructions
PART B. ACTIONS INVOLVING ESCROWS AND ESCROW AGENTS
2. Breach of Contract

6-74A California Forms of Jury Instruction MB 7400A.74

MB 7400A.74 Escrow Agent's Duty--Conflict in Instructions

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

If there is a conflict or an apparent error in an escrow instruction, the escrow holder has a duty to take corrective steps to clear up the conflict or apparent error.

Authorities: *Claussen v. First American Title Guaranty Co.* (1986) 186 Cal.App.3d 429, 436, 230 Cal.Rptr. 749 ; *St. Paul Title Co. v. Meier* (1986) 181 Cal.App.3d 948, 952, 226 Cal.Rptr. 538 ; *Diaz v. United California Bank* (1977) 71 Cal.App.3d 161, 166-167, 170-171, 139 Cal.Rptr. 314 .

[2] Use of Instruction

This instruction should be used when a conflict or ambiguity in an escrow instruction is at issue.

For related Judicial Council instructions, see [3][b], *below*.

[3] Comment

[a] Duty to Correct Conflict or Ambiguity

When a conflict or ambiguity exists in an instruction, the escrow holder has a duty to take corrective steps before obeying questionable instructions [*Kirk Corp. v. First American Title Co.* (1990) 220 Cal.App.3d 785, 807, 270 Cal.Rptr. 24]. The escrow holder should first make an effort to clarify the problem [*Claussen v. First American Title Guaranty Co.* (1986) 186 Cal.App.3d 429, 436, 230 Cal.Rptr. 749]. The escrow agent's duty is to delay the transfer

until the conflict is resolved [*Kirby v. Palos Verdes Escrow Co.* (1986) 183 Cal.App.3d 57, 66, 227 Cal.Rptr. 785 , disapproved on other grounds, *Summit Financial Holdings, Ltd. v. Continental Lawyers Title Co.* (2002) 27 Cal.4th 705, 714, 117 Cal.Rptr.2d 541, 41 P.3d 548]. If the conflict cannot be resolved, the escrow agent cannot proceed to close without incurring some liability to one party or the other. In such a case, the escrow holder's option is to interplead the dispute [*Diaz v. United California Bank* (1977) 71 Cal.App.3d 161, 170-171, 139 Cal.Rptr. 314 ; *St. Paul Title Co. v. Meier* (1986) 181 Cal.App.3d 948, 952, 226 Cal.Rptr. 538]. Closing an escrow when the instructions are indefinite and uncertain is a disposition of the principal's property without instructions, because the instructions given are meaningless. An escrow agent who does this is negligent and has failed to exercise due diligence in complying with the escrow instructions [*Spaziani v. Millar* (1963) 215 Cal.App.2d 667, 682-683, 30 Cal.Rptr. 658].

For related forms, see California Forms of Pleading and Practice, Ch. 253, *Escrows* (Matthew Bender).

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 41, *California Judicial Council Breach of Fiduciary Duty Instructions*]:

CACI No. 4104 Duties of Escrow Holder

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate Law Agency Relationships Agents Distinguished Special Agents Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Real Property Law Brokers General Overview Real Property Law Purchase & Sale Escrow

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CHAPTER 74A Matthew Bender Professional Liability in Real Property Transactions Instructions
PART B. ACTIONS INVOLVING ESCROWS AND ESCROW AGENTS
2. Breach of Contract

6-74A California Forms of Jury Instruction MB 7400A.75

MB 7400A.75 Escrow Instructions as a Contract--No General Duty to Disclose

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

The escrow instructions constitute the full measure of the obligations assumed by _____ [name of escrow holder] as escrow holder and owing to Plaintiff. _____ [Name of escrow holder] is not required to give Plaintiff information that [he/she/it] has if that information is not [related to/subject to disclosure under] [his/her/its] specific escrow instructions.

Authorities: *Blackburn v. McCoy* (1934) 1 Cal.App.2d 648, 655, 37 P.2d 153 ; *Cunningham v. Security Title Ins. Co.* (1966) 241 Cal.App.2d 626, 630-631, 50 Cal.Rptr. 724 ; *Mefford v. Security Title Ins. Co.* (1962) 199 Cal.App.2d 578, 585, 18 Cal.Rptr. 877 .

[2] Use of Instruction

This instruction should be used to describe the basic duty of an escrow agent, who is not required to make disclosures to the parties unless required to do so in the context of the instructions.

For related Judicial Council instructions, see [3][b], *below*.

[3] Comment

[a] Requirement to Make Disclosures

The scope of an escrow agent's duty to disclose to his or her principal facts that might affect the principal's decisions has

been the topic of a great deal of litigation. Due to the nature of the escrow business, escrow agents repeatedly come into contact with the same real estate agents, brokers, lenders, and investors. Indeed, escrow agents are often encouraged by their employers to maintain these individuals as clients because they bring substantial repeat business to the employer. In the course of this relationship, the escrow agent will obviously learn facts about these people that a principal would like to know. Requiring the escrow agent to disclose these facts to a principal any time that they might be material, even when the facts are outside the fair interpretation of a given principal's instructions, could subject the agent to liability for interference with the contract. Moreover, the business of escrow would be impaired [*see Lee v. Title Ins. & Trust Co.* (1968) 264 Cal.App.2d 160, 163, 70 Cal.Rptr. 378].

Accordingly, it has been firmly established in the law that an escrow holder is a limited agent whose agency is limited to the escrow instructions given [*Blackburn v. McCoy* (1934) 1 Cal.App.2d 648, 654-655, 37 P.2d 153] . Thus, a general agent's duty of disclosure does not extend to an escrow holder [*Cunningham v. Security Title Ins. Co.* (1966) 241 Cal.App.2d 626, 630-631, 50 Cal.Rptr. 724], unless the escrow holder is obligated under the escrow instructions to provide the information [*Mefford v. Security Title Ins. Co.* (1962) 199 Cal.App.2d 578, 585, 18 Cal.Rptr. 877]. Some facts that an escrow holder should disclose include clouds on title [*Contini v. Western Title Ins. Co.* (1974) 40 Cal.App.3d 536, 547, 115 Cal.Rptr. 257], specific conditions applicable to loans secured on title (construction loans) [*Spaziani v. Millar* (1963) 215 Cal.App.2d 667, 681-684, 30 Cal.Rptr. 658], and assignments that affect a party's interest in escrow funds [*Kirby v. Palos Verdes Escrow Co.* (1986) 183 Cal.App.3d 57, 65, 227 Cal.Rptr. 785 , *disapproved on other grounds, Summit Financial Holdings, Ltd. v. Continental Lawyers Title Co.* (2002) 27 Cal.4th 705, 714, 117 Cal.Rptr.2d 541, 41 P.3d 548]. When the escrow instructions require all changes to be given in writing by all the affected parties, the escrow holder may be liable for failing to verify the signatures on the amendments to the escrow instructions [*Lee v. Escrow Consultants, Inc.* (1989) 210 Cal.App.3d 915, 923-924, 259 Cal.Rptr. 117].

Even when no duty to disclose exists, if the escrow holder does make a disclosure, the holder is required to speak honestly, and may not mislead or suppress other facts that materially qualify those stated [*Brady v. Carman* (1960) 179 Cal.App.2d 63, 68, 3 Cal.Rptr. 612].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [*see Ch. 41, California Judicial Council Breach of Fiduciary Duty Instructions*]:

CACI No. 4104 Duties of Escrow Holder

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate Law
 Agency Relationships
 Agents Distinguished
 Special Agents
 Business & Corporate Law
 Agency Relationships
 Duties & Liabilities
 Authorized Acts of Agents
 Scope of Authority
 Civil Procedure
 Trials
 Jury Instructions
 Standard Instructions
 Real Property Law
 Brokers
 General Overview
 Real Property Law
 Purchase & Sale
 Escrow

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PART B. ACTIONS INVOLVING ESCROWS AND ESCROW AGENTS
2. Breach of Contract

6-74A California Forms of Jury Instruction MB 7400A.76

MB 7400A.76 No Duty to Go Beyond Terms of Escrow

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

An escrow holder is not liable for [his/her/its] failure to do something not required by the terms of the escrow or for a loss incurred while obediently following the escrow instructions.

Authorities: *Money Store Investment Corp. v. Southern Cal. Bank* (2002) 98 Cal.App.4th 722, 731, 120 Cal.Rptr.2d 58 ; *Hannon v. Western Title Ins. Co.* (1989) 211 Cal.App.3d 1122, 1127-1128, 260 Cal.Rptr. 21 ; *Axley v. Transamerica Title Ins. Co.* (1978) 88 Cal.App.3d 1, 9, 151 Cal.Rptr. 570 ; *Gordon v. D & G Escrow Corp.* (1975) 48 Cal.App.3d 616, 622, 122 Cal.Rptr. 150 ; *Lee v. Title Ins. & Trust Co.* (1968) 264 Cal.App.2d 160, 162-163, 70 Cal.Rptr. 378 ; *Blackburn v. McCoy* (1934) 1 Cal.App.2d 648, 655, 37 P.2d 153 .

[2] Use of Instruction

This instruction should be used when the scope of an escrow agent's duty is at issue.

For related Judicial Council instructions, see [3][b], *below*.

[3] Comment

[a] No Duty to Go Beyond Strict Performance of Instructions

The agency relationship between the escrow agent and the principal is a limited one, and there is no duty to go beyond strict performance of the escrow instructions [*Summit Financial Holdings, Ltd. v. Continental Lawyers Title Co.* (2002)

27 Cal.4th 705, 711, 117 Cal.Rptr.2d 541, 41 P.3d 548 ; *Axley v. Transamerica Title Ins. Co.* (1978) 88 Cal.App.3d 1, 8, 151 Cal.Rptr. 570 ; *Lee v. Title Ins. & Trust Co.* (1968) 264 Cal.App.2d 160, 162-163, 70 Cal.Rptr. 378]. For example, there is no duty to disclose to a buyer of real property that the other parties to the escrow are defrauding him or her by means of a second transaction of which he or she is not aware [*Gordon v. D & G Escrow Corp.* (1975) 48 Cal.App.3d 616, 622, 122 Cal.Rptr. 150]. Further, an escrow agent is not required to disclose to the buyer that the seller was actually in the process of buying the property himself or herself so he or she could resell it to the buyer at a higher price [*Blackburn v. McCoy* (1934) 1 Cal.App.2d 648, 655, 37 P.2d 153 ; see *Schaefer v. Manufacturers Bank* (1980) 104 Cal.App.3d 70, 77, 163 Cal.Rptr. 402]. An escrow agent has no duty to deposit escrow funds in an interest-bearing account. The escrow holder's duty is satisfied by faithful compliance with the escrow instructions; no general duty exists for policing the affairs of its depositors [*Summit Financial Holdings, Ltd. v. Continental Lawyers Title Co.* (2002) 27 Cal. 4th 705, 711, 117 Cal.Rptr.2d 541, 41 P.3d 548 ; *Hannon v. Western Title Ins. Co.* (1989) 211 Cal.App.3d 1122, 1127-1128, 260 Cal.Rptr. 21] .

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 41, *California Judicial Council Breach of Fiduciary Duty Instructions*]:

CACI No. 4104 Duties of Escrow Holder

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate LawAgency RelationshipsAgents DistinguishedSpecial AgentsBusiness & Corporate LawAgency RelationshipsDuties & LiabilitiesAuthorized Acts of AgentsScope of AuthorityCivil ProcedureTrialsJury TrialsJury InstructionsStandard InstructionsReal Property LawBrokersGeneral OverviewReal Property LawPurchase & SaleEscrow

Barry S. Willdorf contributed to the original chapter for California Forms of Jury Instruction (Matthew Bender).



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California Forms of Jury Instruction

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CHAPTER 74A Matthew Bender Professional Liability in Real Property Transactions Instructions
PART B. ACTIONS INVOLVING ESCROWS AND ESCROW AGENTS
2. Breach of Contract

6-74A California Forms of Jury Instruction MB 7400A.77

MB 7400A.77 Escrow Agent's Liability for Damages

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

If you find that _____ [name of escrow holder] has disposed of the property of _____ [name of principal] in violation of the escrow instructions, or has otherwise breached [his/her/its] duty to comply strictly with those instructions, then _____ [name of principal] is entitled to recover damages for any loss caused by that breach.

Authorities: 10 Cal. Code Reg. § 1738.2; *Common Wealth Ins. Systems, Inc. v. Kersten* (1974) 40 Cal.App.3d 1014, 1030, 115 Cal.Rptr. 653 ; *Ruth v. Lytton Sav. & Loan Assn.* (1968) 266 Cal.App.2d 831, 842-843, 72 Cal.Rptr. 521 , modified on other grounds, 272 Cal.App.2d 24, 76 Cal.Rptr. 926 ; *Colonial Savings & L. Assn. v. Redwood Empire Title Co.* (1965) 236 Cal.App.2d 186, 191, 46 Cal.Rptr. 16 ; *Spaziani v. Millar* (1963) 215 Cal.App.2d 667, 682-683, 30 Cal.Rptr. 658 .

[2] Use of Instruction

This instruction should be used to state the damages due for an escrow holder's failure to comply with the escrow instructions. The measure of damages is the same whether the action is one in contract for failure to comply with the instructions or in tort for failure to exercise ordinary skill and diligence in the performance of the instructions [see [3][a], *below*].

For related Judicial Council instructions, see [3][b], *below*.

[3] Comment

[a] Liability for Damages

An escrow agent [*Fin. Code* §§ 17004, 17004.5 ("escrow agent" and "Internet escrow agent" defined); *see MB 7400A.61*; *see also MB 7400A.93[3][b]* for discussion of exceptions to escrow agent requirements] must use documents or other items deposited in escrow only in accordance with the written instructions of or the instructions transmitted over the Internet from the escrow principals [*10 Cal. Code Reg. § 1738.2*]. An escrow holder who closes an escrow contrary to the instructions of his or her principal breaches the escrow contract and may also be liable for negligence for failure to exercise ordinary care in carrying out the instructions [*Common Wealth Ins. Systems, Inc. v. Kersten* (1974) 40 *Cal.App.3d* 1014, 1030, 115 *Cal.Rptr.* 653 ; *Ruth v. Lytton Sav. & Loan Assn.* (1968) 266 *Cal.App.2d* 831, 842-843, 72 *Cal.Rptr.* 521 , *modified on other grounds*, 272 *Cal.App.2d* 24, 76 *Cal.Rptr.* 926 ; *Colonial Savings & L. Assn. v. Redwood Empire Title Co.* (1965) 236 *Cal.App.2d* 186, 190-191, 46 *Cal.Rptr.* 16 ; *Spaziani v. Millar* (1963) 215 *Cal.App.2d* 667, 682-683, 30 *Cal.Rptr.* 658]. For a breach or an act of negligence, the escrow agent is liable for any loss proximately caused by the breach or negligence [*Zang v. Northwestern Title Co.* (1982) 135 *Cal.App.3d* 159, 166, 168, 185 *Cal.Rptr.* 176 ; *Ruth v. Lytton Sav. & Loan Assn.* (1968) 266 *Cal.App.2d* 831, 842-843, 72 *Cal.Rptr.* 521 , *modified on other grounds*, 272 *Cal.App.2d* 24, 76 *Cal.Rptr.* 926].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 41, *California Judicial Council Breach of Fiduciary Duty Instructions*]:

CACI No. 4104, Duties of Escrow Holder

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate Law Agency Relationships Agents Distinguished Special Agents Business & Corporate Law Agency Relationships Duties & Liabilities Care, Good Faith & Reasonable Skill Duty of Care & Reasonable Skill Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Real Property Law Brokers General Overview Real Property Law Purchase & Sale Escrow

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CHAPTER 74A Matthew Bender Professional Liability in Real Property Transactions Instructions

PART B. ACTIONS INVOLVING ESCROWS AND ESCROW AGENTS

2. Breach of Contract

6-74A California Forms of Jury Instruction MB 7400A.78-MB 7400A.89

Reserved for Future Use

MB 7400A.78Reserved for Future Use



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CHAPTER 74A Matthew Bender Professional Liability in Real Property Transactions Instructions
PART B. ACTIONS INVOLVING ESCROWS AND ESCROW AGENTS
3. Negligence

6-74A California Forms of Jury Instruction MB 7400A.90

MB 7400A.90 Escrow Agents--Primary Duty

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

An escrow agent is bound above all things not to take sides between the parties to the escrow.

Authorities: *In re Marriage of Cloney* (2001) 91 Cal.App.4th 429, 440, 110 Cal.Rptr.2d 615 ; *Karras v. Title Ins. & Guar. Co.* (1953) 118 Cal.App.2d 659, 666, 258 P.2d 866 .

[2] Use of Instruction

This instruction should be used to describe the basic duty of an escrow agent.

For related Judicial Council instructions, see [3][b], *below*.

[3] Comment

[a] Purpose of Escrow

The basic purpose of an escrow is to place performance of concurrent conditions in the hands of a neutral party. Escrow agents are stakeholders acting for the benefit of both parties [*In re Marriage of Cloney* (2001) 91 Cal.App.4th 429, 440, 110 Cal.Rptr.2d 615 ; *Karras v. Title Ins. & Guar. Co.* (1953) 118 Cal.App.2d 659, 666, 258 P.2d 866]. The abrogation of this responsibility by the escrow agent defeats the purpose of the escrow and breaches the contract between the principal and the escrow agent and does not meet the appropriate standard of care for an escrow agent. An unfaithful agent also breaches his or her fiduciary duty [see *Civ. Code* § 1573].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 41, *California Judicial Council Breach of Fiduciary Duty Instructions*]:

CACI No. 4104 Duties of Escrow Holder

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate Law Agency Relationships Agents Distinguished Special Agents Business & Corporate Law Agency Relationships Duties & Liabilities General Overview Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Real Property Law Brokers General Overview Real Property Law Purchase & Sale Escrow

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CHAPTER 74A Matthew Bender Professional Liability in Real Property Transactions Instructions
PART B. ACTIONS INVOLVING ESCROWS AND ESCROW AGENTS
3. Negligence

6-74A California Forms of Jury Instruction MB 7400A.91

MB 7400A.91 Duty of Care

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

An escrow holder has a duty to exercise ordinary skill and diligence in [his/her/its] employment.

Authorities: *Garton v. Title Ins. & Trust Co.* (1980) 106 Cal.App.3d 365, 381, 165 Cal.Rptr. 449 ; *Common Wealth Ins. Systems, Inc. v. Kersten* (1974) 40 Cal.App.3d 1014, 1030, 115 Cal.Rptr. 653 ; *Spaziani v. Millar* (1963) 215 Cal.App.2d 667, 682-684, 30 Cal.Rptr. 658 .

[2] Use of Instruction

This instruction states the applicable standard of care to determine the negligence of an escrow holder.

For related Judicial Council instructions, see [3][b], *below*.

[3] Comment

[a] Exercise of Ordinary Skill and Care

An escrow agent who fails to exercise ordinary skill and care in the discharge of his or her agency is negligent [*Garton v. Title Ins. & Trust Co.* (1980) 106 Cal.App.3d 365, 381, 165 Cal.Rptr. 449 ; *Common Wealth Ins. Systems, Inc. v. Kersten* (1974) 40 Cal.App.3d 1014, 1030, 115 Cal.Rptr. 653 ; *Spaziani v. Millar* (1963) 215 Cal.App.2d 667, 682-684, 30 Cal.Rptr. 658].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Chs. 4, *California Judicial Council Negligence Instructions*, 41, *California Judicial Council Breach of Fiduciary Duty Instructions*]:

CACI No. 401 Basic Standard of Care

CACI No. 4104 Duties of Escrow Holder

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate Law Agency Relationships Agents Distinguished Special Agents Business & Corporate Law Agency Relationships Duties & Liabilities Care, Good Faith & Reasonable Skill Duty of Care & Reasonable Skill Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Real Property Law Brokers General Overview Real Property Law Purchase & Sale Escrow

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CHAPTER 74A Matthew Bender Professional Liability in Real Property Transactions Instructions
PART B. ACTIONS INVOLVING ESCROWS AND ESCROW AGENTS
3. Negligence

6-74A California Forms of Jury Instruction MB 7400A.92

MB 7400A.92 Duty of Strict Compliance

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

It is the duty of an escrow holder to comply strictly with the instructions of [his/her/its] principal.

Authorities: *Summit Financial Holdings, Ltd. v. Continental Lawyers Title Co.* (2002) 27 Cal.4th 705, 711, 117 Cal.Rptr.2d 541, 41 P.3d 548 ; *Amen v. Merced County Title Co.* (1962) 58 Cal.2d 528, 531, 25 Cal.Rptr. 65, 375 P.2d 33 ; *Common Wealth Ins. Systems, Inc. v. Kersten* (1974) 40 Cal.App.3d 1014, 1030, 115 Cal.Rptr. 653 ; *Colonial Savings & L. Assn. v. Redwood Empire Title Co.* (1965) 236 Cal.App.2d 186, 190, 46 Cal.Rptr. 16 .

[2] Use of Instruction

This instruction should be used in both contract and tort actions and should be given when the issue is whether the escrow agent properly complied with the principals' instructions in closing an escrow.

For related Judicial Council instructions, see [3][b], *below*.

[3] Comment

[a] Strict Compliance Required

An escrow agent's basic contract with his or her principals is to receive money or documents and to hold them until the specific conditions of the escrow have been met, at which time the documents or money are exchanged between the principals. Failure to strictly follow instructions is a breach of contract [*Amen v. Merced County Title Co.* (1962) 58

Cal.2d 528, 532, 25 Cal.Rptr. 65, 375 P.2d 33], and may also constitute negligence [*Colonial Savings & L. Assn. v. Redwood Empire Title Co. (1965) 236 Cal.App.2d 186, 191, 46 Cal.Rptr. 16*].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 41, *California Judicial Council Breach of Fiduciary Duty Instructions*]:

CACI No. 4104 Duties of Escrow Holder

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate Law Agency Relationships Agents Distinguished Special Agents Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Real Property Law Brokers General Overview Real Property Law Purchase & Sale Escrow

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CHAPTER 74A Matthew Bender Professional Liability in Real Property Transactions Instructions
PART B. ACTIONS INVOLVING ESCROWS AND ESCROW AGENTS
3. Negligence

6-74A California Forms of Jury Instruction MB 7400A.93

MB 7400A.93 Duty to Accept Only Complete Instructions

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

[EITHER (See Use of Instruction)]

An escrow holder must not accept [a/an] [escrow instruction/amended escrow instruction/supplemental escrow instruction] that contains a blank space to be filled in after the [escrow instruction/amended escrow instruction/supplemental escrow instruction] is signed or initialed. An escrow holder must not permit anyone to add to, delete from, or otherwise change [a/an] [escrow instruction/amended escrow instruction/supplemental escrow instruction], unless the change is signed or initialed by every person who signed or initialed the [escrow instruction/amended escrow instruction/supplemental escrow instruction] before it was changed.

[OR]

An Internet escrow agent should not accept over the Internet [a/an] [escrow instruction/amended escrow instruction/supplemental escrow instruction] that contains a blank space to be filled in after the [escrow instruction/amended escrow instruction/supplemental escrow instruction] is signed or initialed. An Internet escrow agent should not permit anyone, over the Internet, to add to, delete from, or otherwise change [a/an] [escrow instruction/amended escrow instruction/supplemental escrow instruction], unless the change is signed or initialed by every person who signed or initialed the [escrow instruction/amended escrow instruction/supplemental escrow instruction] before it was changed.

Authority: *Fin. Code § 17403.2.*

[2] Use of Instruction

This instruction should be used when the escrow holder has accepted incomplete written escrow instructions or has allowed changes to written escrow instructions without the required signatures or initials. Which alternative instruction to use depends on whether the escrow holder is an Internet escrow agent. The instruction sets forth an obvious duty of ordinary care.

For related Judicial Council instructions, see [3][c], *below*.

[3] Comment

[a] Escrow Agent's Duty

Under *Fin. Code § 17403.2(a)*, an escrow agent should not accept written instructions with blanks, nor should the agent allow changes in written instructions without obtaining the signatures (or initials) of all who originally signed (or initialed) those instructions. *Fin. Code § 17403.2(b)* prohibits an Internet escrow agent from accepting over the Internet escrow instructions with blanks to be filled in after executing the instructions. An Internet escrow agent also should not permit any person, over the Internet, to make any changes in the instructions, unless the change is executed by all persons who originally executed the instruction. The conduct prohibited by § 17403.2 would be beneath the escrow holder's standard of care.

An escrow agent who violates the provisions of *Fin. Code § 17403.2* may have committed negligence per se under *Evid. Code § 669(a)*, which provides that failure to exercise due care is presumed when a person causes injury by violating a statute designed to prevent the occurrence that caused the injury, if the injured party was one of those whom the statute was intended to protect.

[b] Caveat: Exemptions

Under the Financial Code, attorneys at law and licensed real estate brokers are exempt from the provisions of *Fin. Code § 17000 et seq.*, including *Fin. Code § 17403.2* [*Fin. Code § 17006(a)(2), (4)*]. The exemptions for attorneys and real estate brokers are personal, and the attorney or broker may not delegate any duties other than duties performed under the direct supervision of the attorney or broker [*Fin. Code § 17006(b)*]. These exemptions are not available for any arrangement entered into for the purpose of performing escrows for more than one business [*Fin. Code § 17006(b)*]. Furthermore, an attorney is exempt only if he or she has a bona fide client relationship with a principal in a real estate or personal property transaction, and is not actively engaged in the business of an escrow agent [*Fin. Code § 17006(a)(2)*].

In addition, a person is exempt if his or her principal business is preparing abstracts or making title searches that are used for issuing title insurance policies by a company doing business under any California law relating to insurance companies [*Fin. Code § 17006(a)(3)*]. The question of what constitutes a principal business is one of fact [*54 Ops. Cal. Atty. Gen. 13, 15 (1971)*]. Finally, there is an exemption for any person doing business under any California or federal law relating to banks, trust companies, building and loan associations, savings and loan associations, or insurance companies [*Fin. Code § 17006(a)(1)*].

The burden of proving an exemption or an exception from the Financial Code is on the person claiming it [*Fin. Code § 17006.5*].

[c] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 41, *California Judicial Council Breach of Fiduciary Duty Instructions*]:

CACI No. 4104 Duties of Escrow Holder

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate Law Agency Relationships Agents Distinguished Special Agents Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Real Property Law Brokers General Overview Real Property Law Purchase & Sale Escrow

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CHAPTER 74A Matthew Bender Professional Liability in Real Property Transactions Instructions
PART B. ACTIONS INVOLVING ESCROWS AND ESCROW AGENTS
3. Negligence

6-74A California Forms of Jury Instruction MB 7400A.94

MB 7400A.94 Duty to Deliver Copy of Instructions

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

[*Either (See Use of Instruction)*]

When [a/an] [escrow instruction/amended escrow instruction/supplemental escrow instruction] is executed, the escrow holder must deliver a copy of the [escrow instruction/amended escrow instruction/supplemental escrow instruction] to every person who executed it.

[*OR*]

When [a/an] [escrow instruction/amended escrow instruction/supplemental escrow instruction] is executed, the Internet escrow agent must deliver electronically over the Internet a copy of the [escrow instruction/amended escrow instruction/supplemental escrow instruction] to every person who executed it. [*Optional: If a person is not able to receive the instruction electronically, the Internet escrow agent must mail a copy of the instruction to that person within 24 hours of the time that the instruction was executed.*]

Authority: *Fin. Code § 17403.3.*

[2] Use of Instruction

This instruction should be used to set out an escrow holder's duty to deliver a copy of the instructions to the proper

parties. Which of the alternative instructions to use depends on whether the escrow holder is an Internet escrow agent.

For related Judicial Council instructions, see [3][b], *below*.

[3] Comment

[a] Duty to Deliver Executed Instructions

Nonexempt escrow agents [see MB 7400A.93[3][b]] must comply with this requirement to provide a copy of each executed escrow instruction to each executing party [Fin. Code. § 17403.3], although the courts have not addressed this issue. An Internet escrow agent should deliver the instruction electronically. If a person who executed the instructions is unable to receive the instruction electronically, the Internet escrow agent must mail a copy of the instruction to that person within 24 hours of the instruction's execution [Fin. Code § 17403.3(b)]. Failure to carry out this duty may amount to negligence per se [Evid. Code § 669(a); see MB 7400A.93[3][a]].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 41, *California Judicial Council Breach of Fiduciary Duty Instructions*]:

CACI No. 4104 Duties of Escrow Holder

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate Law Agency Relationships Agents Distinguished Special Agents Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Real Property Law Brokers General Overview Real Property Law Purchase & Sale Escrow

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CHAPTER 74A Matthew Bender Professional Liability in Real Property Transactions Instructions
PART B. ACTIONS INVOLVING ESCROWS AND ESCROW AGENTS
3. Negligence

6-74A California Forms of Jury Instruction MB 7400A.95

MB 7400A.95 Duty to Disclose

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] PROPOSED INSTR. NO. _____

An escrow agent has the duty to exercise ordinary care to communicate to [his/her/its] principal, knowledge acquired in the course of carrying out [his/her/its] escrow instructions, if the knowledge acquired concerns those instructions.

Authorities: *In re Marriage of Cloney* (2001) 91 Cal.App.4th 429, 441, 110 Cal.Rptr.2d 615 ; *Wade v. Lake County Title Co.* (1970) 6 Cal.App.3d 824, 828-829, 86 Cal.Rptr. 182 ; *Spaziani v. Millar* (1963) 215 Cal.App.2d 667, 684, 30 Cal.Rptr. 658 .

[2] Use of Instruction

This instruction should be used when the agent's negligent failure to disclose information is an issue. To properly balance the escrow holder's duty to disclose against the limited nature of that duty, this instruction should be used with the instruction in MB 7400A.76.

For related Judicial Council instructions, see [3][b], *below*.

[3] Comment

[a] Duty to Disclose

The negligent failure to communicate knowledge is a negligent misrepresentation and is actionable not only as a breach

of fiduciary duty but also as ordinary negligence [*Wade v. Lake County Title Co.* (1970) 6 Cal.App.3d 824, 828-829, 86 Cal.Rptr. 182 ; *Spaziani v. Millar* (1963) 215 Cal.App.2d 667, 682-684, 30 Cal.Rptr. 658].

The critical factual questions involve the course and scope of the agency [see MB 7400A.76[3]]. Accordingly, a "balanced" disclosure instruction in tort litigation should include both this instruction and the instruction in MB 7400A.76.

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 41, *California Judicial Council Breach of Fiduciary Duty Instructions*]:

CACI No. 4100 "Fiduciary Duty" Explained

CACI No. 4101 Failure to Use Reasonable Care--Essential Factual Elements

CACI No. 4104 Duties of Escrow Holder

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate LawAgency RelationshipsAgents DistinguishedSpecial AgentsBusiness & Corporate LawAgency RelationshipsDuties & LiabilitiesCare, Good Faith & Reasonable SkillDuty of Care & Reasonable SkillCivil ProcedureTrialsJury TrialsJury InstructionsStandard InstructionsReal Property LawBrokersGeneral OverviewReal Property LawPurchase & SaleEscrow

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CHAPTER 74A Matthew Bender Professional Liability in Real Property Transactions Instructions
PART B. ACTIONS INVOLVING ESCROWS AND ESCROW AGENTS
3. Negligence

6-74A California Forms of Jury Instruction MB 7400A.96

MB 7400A.96 Escrow Holder Is Agent**[1] Instruction**

[PLAINTIFF'S/DEFENDANT'S] PROPOSED INSTR. NO. _____

Before _____ [the conditions of the escrow have been fully performed or _____
(name of seller or grantor) **has** _____ (describe escrow conditions to be performed by seller or
grantor) **and** _____ (name of buyer or grantee) **has** _____ (describe escrow
conditions to be performed by buyer or grantee)], _____ [name of escrow holder] **is the agent of
both parties to the escrow. This means that** _____ [name of escrow holder] **is the dual agent of
the parties, and that [he/she] owes the same duty to both of them, which is the duty to strictly comply with the
escrow instructions.**

After _____ [the conditions of the escrow have been fully performed or _____
(name of seller or grantor) **has** _____ (describe escrow conditions to be performed by seller or
grantor) **and** _____ (name of buyer or grantee) **has** _____ (describe escrow
conditions to be performed by buyer or grantee)], _____ [name of escrow holder] **is the agent not of
both parties, but of each party separately, with regard to those things placed in escrow to which each is now
entitled. This means that** _____ [name of escrow holder] **is the agent of** _____ [
name of seller or grantor] **with regard to the money and of** _____ [name of buyer or grantee] **with
regard to the deed to the property.**

Authorities: *Greenzweight v. Title Guar. & Tr. Co.* (1934) 1 Cal.2d 577, 582, 36 P.2d 186 ; *Shreeves v. Pearson* (1924) 194 Cal. 699, 707, 230 P. 448 ; *In re Marriage of Cloney* (2001) 91 Cal.App.4th 429, 440, 110 Cal.Rptr.2d 615 ; *Ruth v. Lytton Sav. & Loan Assn.* (1968) 266 Cal.App.2d 831, 839, 72 Cal.Rptr. 521 , modified on other grounds, 272

Cal.App.2d 24, 76 Cal.Rptr. 926 ; Spaziani v. Millar (1963) 215 Cal.App.2d 667, 682, 30 Cal.Rptr. 658 .

[2] Use of Instruction

This instruction should be used in an action between a principal and an escrow holder, and should not be used in a suit against a principal based on vicarious liability principles. This instruction explains the nature of the escrow holder's agency before and after the escrow conditions are complied with. This explanation helps show to whom the holder owes the various duties of an escrow holder explained in MB 7400A.90-MB 7400A.94 and it should accordingly be used with the appropriate instructions from those sections.

[3] Comment

An escrow holder is the agent of all parties to the escrow at all times before the escrow conditions are performed [*Shreeves v. Pearson (1924) 194 Cal. 699, 707, 230 P. 448 ; In re Marriage of Cloney (2001) 91 Cal.App.4th 429, 440, 110 Cal.Rptr.2d 615 ; Ruth v. Lytton Sav. & Loan Assn. (1968) 266 Cal.App.2d 831, 839, 72 Cal.Rptr. 521 , modified on other grounds, 272 Cal.App.2d 24, 76 Cal.Rptr. 926 ; Spaziani v. Millar (1963) 215 Cal.App.2d 667, 682, 30 Cal.Rptr. 658*]. After the escrow conditions have been performed, the holder becomes the agent of each party, rather than the dual agent of both [*Shreeves v. Pearson (1924) 194 Cal. 699, 707, 230 P. 448*]. For additional discussion of this point, see MB 7400A.110[3][a].

The escrow agent's duty of disclosure is viewed in light of the agency (fiduciary) relationship with the principal [*Spaziani v. Millar (1963) 215 Cal.App.2d 667, 684, 30 Cal.Rptr. 658*]. An escrow holder is a limited agent; his or her knowledge will be imputed to the escrow parties if it is acquired within the course and scope of his or her limited agency [*In re Marriage of Cloney (2001) 91 Cal.App.4th 429, 440, 110 Cal.Rptr.2d 615 ; Ruth v. Lytton Sav. & Loan Assn. (1968) 266 Cal.App.2d 831, 843, 72 Cal.Rptr. 521 , modified on other grounds, 272 Cal.App.2d 24, 76 Cal.Rptr. 926*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate Law Agency Relationships Agents Distinguished Special Agents Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Real Property Law Brokers General Overview Real Property Law Purchase & Sale Escrow

Barry S. Willdorf contributed to the original chapter for California Forms of Jury Instruction (Matthew Bender).



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California Forms of Jury Instruction

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CHAPTER 74A Matthew Bender Professional Liability in Real Property Transactions Instructions
PART B. ACTIONS INVOLVING ESCROWS AND ESCROW AGENTS
3. Negligence

6-74A California Forms of Jury Instruction MB 7400A.97

MB 7400A.97 Escrow Agent's Liability for Negligence

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

If you find that _____ [name of escrow holder] was negligent in carrying out the escrow instructions, then _____ [name of escrow holder] is responsible for any losses of _____ [name of principal] that were caused by _____ [name of escrow holder]'s negligence.

Authorities: *Colonial Savings & L. Assn. v. Redwood Empire Title Co.* (1965) 236 Cal.App.2d 186, 190-191, 46 Cal.Rptr. 16 ; *Spaziani v. Millar* (1963) 215 Cal.App.2d 667, 682-683, 30 Cal.Rptr. 658 .

[2] Use of Instruction

This instruction should be used in an action for negligence against an escrow agent.

For related Judicial Council instructions, see [3][b], *below*.

[3] Comment

[a] Liability of Escrow Holder

An escrow holder who acts negligently is liable for any loss proximately caused by the negligence [*Colonial Savings & L. Assn. v. Redwood Empire Title Co.* (1965) 236 Cal.App.2d 186, 191, 46 Cal.Rptr. 16]. The defense of comparative negligence is available to the escrow agent in a negligence action [*Spaziani v. Millar* (1963) 215 Cal.App.2d 667, 684,

30 Cal.Rptr. 658].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 41, *California Judicial Council Breach of Fiduciary Duty Instructions*]:

CACI No. 4104 Duties of Escrow Holder

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate LawAgency RelationshipsAgents DistinguishedSpecial AgentsBusiness & Corporate LawAgency RelationshipsDuties & LiabilitiesNegligent Acts of AgentsLiability of AgentsCivil ProcedureTrialsJury TrialsJury InstructionsStandard InstructionsReal Property LawBrokersGeneral OverviewReal Property LawPurchase & SaleEscrow

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CHAPTER 74A Matthew Bender Professional Liability in Real Property Transactions Instructions
PART B. ACTIONS INVOLVING ESCROWS AND ESCROW AGENTS
3. Negligence

6-74A California Forms of Jury Instruction MB 7400A.98

MB 7400A.98 Party to Escrow Not Vicariously Liable

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

A party to an escrow who is not [himself/herself/itself] negligent is not liable for the acts or omissions of an escrow holder.

Authority: *Common Wealth Ins. Systems, Inc. v. Kersten* (1974) 40 Cal.App.3d 1014, 1033, 115 Cal.Rptr. 653 .

[2] Use of Instruction

This instruction should be used when an issue exists concerning the vicarious liability of a party to an escrow based on respondeat superior.

For the CACI series on vicarious responsibility, see Ch. 37, *Judicial Council Vicarious Responsibility Instructions*. In particular, the CACI series includes an instruction on the essential factual elements when seeking tort liability against a principal [see CACI No. 3701].

[3] Comment

Although for certain purposes an escrow holder is an agent of the escrow parties, the relationship is not one that justifies the imputation of negligence. The relationship between a party to an escrow and the escrow holder is not that of master and servant, and neither the rationale of control nor that of allocation of risk justifies holding an innocent escrow party vicariously liable for the torts of its escrow holder [*Common Wealth Ins. Systems, Inc. v. Kersten* (1974) 40 Cal.App.3d 1014, 1033, 115 Cal.Rptr. 653]. Accordingly, in a negligence action, particularly when a vicarious liability instruction

is given on an agency issue, this instruction should be given to ensure that a principal is not held liable based solely on the negligent conduct of the escrow holder.

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate Law Agency Relationships Agents Distinguished Special Agents Civil Procedure Trials Jury
Trials Jury Instructions Standard Instructions Real Property Law Brokers General Overview Real Property Law Purchase &
Sale Escrow Torts Vicarious Liability General Overview

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CHAPTER 74A Matthew Bender Professional Liability in Real Property Transactions Instructions

PART B. ACTIONS INVOLVING ESCROWS AND ESCROW AGENTS

3. Negligence

6-74A California Forms of Jury Instruction MB 7400A.99-MB 7400A.109

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MB 7400A.99Reserved for Future Use



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CHAPTER 74A Matthew Bender Professional Liability in Real Property Transactions Instructions
PART B. ACTIONS INVOLVING ESCROWS AND ESCROW AGENTS
4. Constructive Fraud

6-74A California Forms of Jury Instruction MB 7400A.110

MB 7400A.110 Escrow Agent Is Fiduciary

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

As an agent, _____ [name of escrow holder] owes a fiduciary duty to the parties to the escrow. As soon as the escrow is opened, this duty begins, and it is a dual duty, because _____ [name of escrow holder] is the agent of both _____ [name of seller or grantor] and _____ [name of buyer or grantee]. After _____ [the escrow's conditions have been fully performed or _____ (name of seller or grantor) has _____ (describe escrow conditions to be performed by seller or grantor) and _____ (name of buyer or grantee) has _____ (describe escrow conditions to be performed by buyer or grantee)], _____ [name of escrow holder] is the agent not of both parties, but of each party separately, with regard to those things placed in escrow to which each is now entitled. This means that _____ [name of escrow holder] is the fiduciary of _____ [name of seller or grantor] with regard to the money and of _____ [name of buyer or grantee] with regard to the deed to the property.

Authorities: *Summit Financial Holdings, Ltd. v. Continental Lawyers Title Co.* (2002) 27 Cal.4th 705, 711, 117 Cal.Rptr.2d 541, 41 P.3d 548 ; *Greenzweight v. Title Guar. & Tr. Co.* (1934) 1 Cal.2d 577, 582, 36 P.2d 186 ; *Shreeves v. Pearson* (1924) 194 Cal. 699, 707, 230 P. 448 ; *Vournas v. Fidelity Nat. Tit. Ins. Co.* (1999) 73 Cal.App.4th 668, 674, 86 Cal.Rptr.2d 490 ; *Gordon v. D & G Escrow Corp.* (1975) 48 Cal.App.3d 616, 622, 122 Cal.Rptr. 150 ; *Common Wealth Ins. Systems, Inc. v. Kersten* (1974) 40 Cal.App.3d 1014, 1030, 115 Cal.Rptr. 653 .

[2] Use of Instruction

This instruction should be used in an action involving an escrow agent when there exists an issue of nondisclosure,

misrepresentation, or undue influence.

For related Judicial Council instructions, see [3][b], *below*.

[3] Comment

[a] Fiduciary Duty of Escrow Holder

Once an escrow is opened, the escrow holder is the agent (and fiduciary) of both parties. The holder is a dual agent. When the escrow conditions have been performed, the holder becomes the agent of each party, rather than the dual agent of both. That is, after the escrow conditions have been complied with, the escrow holder is the agent of each party with regard to that party's aspect of the escrow [*Greenzweight v. Title Guar. & Tr. Co.* (1934) 1 Cal.2d 577, 582, 36 P.2d 186 ; *Shreeves v. Pearson* (1924) 194 Cal. 699, 707, 230 P. 448]. Thus, after the escrow instructions have been fully complied with, the holder is the seller's agent with regard to the money [*Gordon v. D & G Escrow Corp.* (1975) 48 Cal.App.3d 616, 622, 122 Cal.Rptr. 150] and the buyer's agent as to the deed [*Shreeves v. Pearson* (1924) 194 Cal. 699, 707, 230 P. 448 ; Witkin, Summary of California Law, vol. 4, *Real Property*, § 183 (9th ed. 1987)].

Escrow agents bear a fiduciary relationship to each escrow party, but the escrow agent's duties are limited by the parties' instructions [*Summit Financial Holdings, Ltd. v. Continental Lawyers Title Co.* (2002) 27 Cal.4th 705, 711, 117 Cal.Rptr.2d 541, 41 P.3d 548 ; *Common Wealth Ins. Systems, Inc. v. Kersten* (1974) 40 Cal.App.3d 1014, 1030-1033, 115 Cal.Rptr. 653 ; *Ruth v. Lytton Sav. & Loan Assn.* (1968) 266 Cal.App.2d 831, 843-844, 72 Cal.Rptr. 521 , modified on other grounds, 272 Cal.App.2d 24, 76 Cal.Rptr. 926 ; *Colonial Savings & L. Assn. v. Redwood Empire Title Co.*, (1965) 236 Cal.App.2d 186, 193-194, 46 Cal.Rptr. 16 ; *Spaziani v. Millar* (1963) 215 Cal.App.2d 667, 681-685, 30 Cal.Rptr. 658].

An escrow agent has a fiduciary duty to disclose to his or her principal all facts acquired in the course of the agency that materially affect a principal's interest in the property or escrow funds [*Contini v. Western Title Ins. Co.* (1974) 40 Cal.App.3d 536, 547, 115 Cal.Rptr. 257 ; see MB 7400A.112].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Chs. 6, *California Judicial Council Professional Negligence Instructions*, 41, *California Judicial Council Breach of Fiduciary Duty Instructions*]:

CACI No. 4100, "Fiduciary Duty" Explained

CACI No. 4104, Duties of Escrow Holder

CACI No. 4106, Breach of Fiduciary Duty--Essential Factual Elements

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate LawAgency RelationshipsAgents DistinguishedFiduciary RelationshipsFiduciary ResponsibilitiesBusiness & Corporate LawAgency RelationshipsAgents DistinguishedSpecial AgentsCivil ProcedureTrialsJury TrialsJury InstructionsStandard InstructionsReal Property LawBrokersGeneral OverviewReal Property LawPurchase & SaleEscrow

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CHAPTER 74A Matthew Bender Professional Liability in Real Property Transactions Instructions
PART B. ACTIONS INVOLVING ESCROWS AND ESCROW AGENTS
4. Constructive Fraud

6-74A California Forms of Jury Instruction MB 7400A.111

MB 7400A.111 Fiduciary Duty of Escrow Holder Is Personal

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] PROPOSED INSTR. NO. ____

The fiduciary duty owed by _____ [name of escrow holder] to _____ [name of principal] as a party to the escrow is a personal duty owed directly to _____ [name of principal]. This duty continues even though _____ [name of principal] is also represented by _____ [name of real estate broker or attorney-at-law], [a real estate broker/an attorney-at-law], in this same transaction.

Authorities: Former Civ. Code § 2216; Prob. Code § 15003(b); *UMET Trust v. Santa Monica Medical Investment Co.* (1983) 140 Cal.App.3d 864, 873, 189 Cal.Rptr. 922 .

[2] Use of Instruction

This instruction should be given if other fiduciaries, such as attorneys and real estate brokers, are also involved in the litigation, or if third parties are making a claim against the agent.

For related Judicial Council instructions, see [3][b], *below*.

[3] Comment

[a] Fiduciary Duty Is Personal

A fiduciary duty is a personal obligation [see former Civ. Code § 2216 (repealed as of July 1, 1987); Prob. Code §

15003(b)]. The fact that a principal may employ more than one fiduciary does not relieve any fiduciary of his or her personal obligation to the principal [*UMET Trust v. Santa Monica Medical Investment Co.* (1983) 140 Cal.App.3d 864, 873, 189 Cal.Rptr. 922]. The escrow agent owes this duty only to the parties to the escrow and not to strangers to the escrow [*Summit Financial Holdings, Ltd. v. Continental Lawyers Title Co.* (2002) 27 Cal.4th 705, 713-715, 117 Cal.Rptr.2d 541, 41 P.3d 548].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Chs. 6, *California Judicial Council Professional Negligence Instructions*, 41, *California Judicial Council Breach of Fiduciary Duty Instructions*]:

CACI No. 4100, "Fiduciary Duty" Explained

CACI No. 4104, Duties of Escrow Holder

CACI No. 4106, Breach of Fiduciary Duty--Essential Factual Elements

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate Law Agency Relationships Agents Distinguished Fiduciary Relationships Fiduciary Responsibilities Business & Corporate Law Agency Relationships Agents Distinguished Special Agents Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Real Property Law Brokers General Overview Real Property Law Purchase & Sale Escrow

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CHAPTER 74A Matthew Bender Professional Liability in Real Property Transactions Instructions
PART B. ACTIONS INVOLVING ESCROWS AND ESCROW AGENTS
4. Constructive Fraud

6-74A California Forms of Jury Instruction MB 7400A.112

MB 7400A.112 Escrow Holder's Limited Duty of Disclosure

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

As an escrow holder, _____ [name of escrow holder] is an agent and a fiduciary. Like any other fiduciary, _____ [name of escrow holder] is under a duty to communicate to [his/her/its] principal, _____ [name of principal], any material facts learned in the course of [his/her/its] agency that might affect _____ [name of principal]'s decision on the pending transaction.

Authorities: *Summit Financial Holdings, Ltd. v. Continental Lawyers Title Co.* (2002) 27 Cal.4th 705, 713-715, 117 Cal.Rptr.2d 541, 41 P.3d 548 ; *In re Marriage of Cloney* (2001) 91 Cal.App.4th 429, 441, 110 Cal.Rptr.2d 615 ; *Vournas v. Fidelity Nat. Tit. Ins. Co.* (1999) 73 Cal.App.4th 668, 674-675, 86 Cal.Rptr.2d 490 ; *Contini v. Western Title Ins. Co.* (1974) 40 Cal.App.3d 536, 547, 115 Cal.Rptr. 257 ; *Spaziani v. Millar* (1963) 215 Cal.App.2d 667, 684, 30 Cal.Rptr. 658 .

[2] Use of Instruction

This instruction should be used when the duty of an escrow agent to disclose a specific fact is in issue.

For related Judicial Council instructions, see [3][b], *below*.

[3] Comment

[a] Limited Duty of Disclosure

An escrow agent may not make a decision as to what is material. If the fact "might" affect a decision, it should be disclosed. This principle is particularly true when the escrow holder knows the principal is looking to the agent for protection on the very facts of which the agent has knowledge [*Vournas v. Fidelity Nat. Tit. Ins. Co.* (1999) 73 Cal.App.4th 668, 674-675, 86 Cal.Rptr.2d 490 ; *Contini v. Western Title Ins. Co.* (1974) 40 Cal.App.3d 536, 547, 115 Cal.Rptr. 257]. The matters the agent must disclose are determined by the course and scope of the agency [*Spaziani v. Millar* (1963) 215 Cal.App.2d 667, 684, 30 Cal.Rptr. 658]. All information obtained during the course and within the scope of the agency that materially affect a principal's interest in the property or in the escrow funds must be disclosed [*In re Marriage of Cloney* (2001) 91 Cal.App.4th 429, 441, 110 Cal.Rptr.2d 615].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Chs. 6, *California Judicial Council Professional Negligence Instructions*, 41, *California Judicial Council Breach of Fiduciary Duty Instructions*]:

CACI No. 4100, "Fiduciary Duty" Explained

CACI No. 4104, Duties of Escrow Holder

CACI No. 4106, Breach of Fiduciary Duty--Essential Factual Elements

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate Law Agency Relationships Agents Distinguished Special Agents Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Real Property Law Brokers General Overview Real Property Law Purchase & Sale Escrow

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CHAPTER 74A Matthew Bender Professional Liability in Real Property Transactions Instructions
PART B. ACTIONS INVOLVING ESCROWS AND ESCROW AGENTS
4. Constructive Fraud

6-74A California Forms of Jury Instruction MB 7400A.113

MB 7400A.113 Constructive Fraud of Escrow Agent

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Any violation by an escrow holder of [his/her] fiduciary duties that is without actual fraudulent intent, but that gains an advantage to the escrow holder and that causes prejudice to the principal, is a constructive fraud against the principal.

Authorities: *Civ. Code § 1573(1); Byrum v. Brand (1990) 219 Cal.App.3d 926, 936-939, 268 Cal.Rptr. 609 .*

[2] Use of Instruction

This instruction should be used to state that part of the statutory [see *Civ. Code § 1573*] definition of constructive fraud most expressly applicable to a breach of fiduciary duties. See the instruction in MB 7400A.18 for a burden of proof instruction involving constructive fraud of a fiduciary and the instructions in MB 7400A.01 and MB 7400A.02 for definitions of "broker" and "sales agent."

For related Judicial Council instructions, see [3][b], *below*.

[3] Comment

[a] Constructive Fraud

The Civil Code sets out the basic rule that breach of a fiduciary duty even without fraudulent intent is fraud against the principal when (1) the fiduciary gains advantage, and (2) the principal is damaged [*Civ. Code § 1573(1)*]. Under

applicable law, an escrow agent who gains knowledge of a material fact affecting a party's interest in property or escrow funds during the course and within the scope of the agency and who does not disclose it breaches a fiduciary duty [*Kirby v. Palos Verdes Escrow Co.* (1986) 183 Cal.App.3d 57, 64, 227 Cal.Rptr. 785 , *disapproved on other grounds*, *Summit Financial Holdings, Ltd. v. Continental Lawyers Title Co.* (2002) 27 Cal.4th 705, 714, 117 Cal.Rptr.2d 541, 41 P.3d 548].

An instruction requiring a fraudulent intent would be grounds for reversal [see *Byrum v. Brand* (1990) 219 Cal.App.3d 926, 936-939, 268 Cal.Rptr. 609 (special verdict form requiring finding of intent in action against investment adviser for breach of fiduciary duty held reversible error)].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 41, *California Judicial Council Breach of Fiduciary Duty Instructions*]:

CACI No. 4100, "Fiduciary Duty" Explained

CACI No. 4104, Duties of Escrow Holder

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate Law Agency Relationships Agents Distinguished Special Agents Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Real Property Law Brokers General Overview Real Property Law Purchase & Sale Escrow Torts Business Torts Fraud & Misrepresentation Constructive Fraud Elements

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CHAPTER 74A Matthew Bender Professional Liability in Real Property Transactions Instructions

PART B. ACTIONS INVOLVING ESCROWS AND ESCROW AGENTS

4. Constructive Fraud

6-74A California Forms of Jury Instruction MB 7400A.114-MB 7400A.119

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MB 7400A.114Reserved for Future Use



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CHAPTER 74A Matthew Bender Professional Liability in Real Property Transactions Instructions
PART C. ACTIONS INVOLVING NOTARIES PUBLIC AND SURETIES

6-74A California Forms of Jury Instruction MB 7400A.120

MB 7400A.120 Duty of Notary Public

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

As a notary public, the primary duty of _____ [*name of notary public*] was to take acknowledgment or proof that _____ [*name of document*] had been executed by _____ [*name of person*] and to give a certificate of this proof or acknowledgment endorsed on or attached to the _____ [*name of document*]. _____ [*Name of notary public*] was required to sign the certificate in [his/her] own handwriting. _____ [*Name of notary public*] was required not to accept any acknowledgment or proof of [*name of document*] if it was incomplete.

Authorities: Gov. Code § 8205(a)(2); *Vanderhoof v. Prudential Sav. & Loan Assn.* (1975) 46 Cal.App.3d 507, 511, 120 Cal.Rptr. 207.

[2] Use of Instruction

This instruction should be given in an action against a notary public or against the notary's surety to establish the notary's basic duty.

[3] Comment

The duty of a notary public, when requested, is to take acknowledgment or proof of advance health care directives, powers of attorney, mortgages, deeds, grants, transfers, and other instruments in writing executed by any person and to give a certificate of this proof or acknowledgment. This certificate must be endorsed on or attached to the instrument, and must be signed by the notary in the notary's own handwriting. A notary public must not accept any acknowledgment or proof of any instrument that is incomplete [Gov. Code § 8205(a)(2)].

An acknowledgment is a ministerial act devoid of discretion [*Vanderhoof v. Prudential Sav. & Loan Assn.* (1975) 46 Cal.App.3d 507, 511, 120 Cal.Rptr. 207]. For a document to be recorded, it must be acknowledged or proved [Civ. Code § 1170].

Only after a document is recorded does it impart constructive notice of its contents to subsequent purchasers or mortgagees [Civ. Code § 1213]. However, the operative event is actually the indexing of the document as required by statute [*Lewis v. Superior Court* (1994) 30 Cal.App.4th 1850, 1866-1867, 37 Cal.Rptr.2d 63 ; see Gov. Code §§ 27230-27265].

Legal Topics:

For related research and practice materials, see the following legal topics:

GovernmentsLocal GovernmentsEmployees & OfficialsGovernmentsState & Territorial GovernmentsEmployees & Officials

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CHAPTER 74A Matthew Bender Professional Liability in Real Property Transactions Instructions
PART C. ACTIONS INVOLVING NOTARIES PUBLIC AND SURETIES

6-74A California Forms of Jury Instruction MB 7400A.121

MB 7400A.121 Duty to Identify Acknowledging Party

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

A notary public must not take an acknowledgment of a document unless the notary public has satisfactory evidence that the person making the acknowledgment is the person whose signature is being notarized.

Authority: Civ. Code § 1185.

[2] Use of Instruction

This instruction should be used with the instruction in MB 7400A.120 in an action concerning the liability of a notary public or the notary's surety for neglect in obtaining an acknowledgment.

[3] Comment

A notary must not take the acknowledgment of a document unless he or she has satisfactory evidence that the person making the acknowledgment is the person who is described in and who executed the instrument [Civ. Code § 1185(a)]. For this purpose, "satisfactory evidence" means the absence of any information, evidence, or other circumstances which would lead a reasonable person to believe that the person making the acknowledgment is not the individual he or she claims to be, together with any one of the following [Civ. Code § 1185(b)]:

- The oath or affirmation of a credible witness personally known to the officer, whose identity is proved to the officer on presentation of any document satisfying the requirements of Civ. Code § 1185(b)(3) or (4), that the person making the acknowledgment is personally known to the witness and that each of the following are true [Civ. Code § 1185(b)(1)(A); see Civ. Code § 1185(b)(1)(B) (civil

penalty for notary public who fails to obtain this evidence)]:

- The person making the acknowledgment is the person named in the document.
- The person making the acknowledgment is personally known to the witness.
- It is the reasonable belief of the witness that the circumstances of the person making the acknowledgment are such that it would be very difficult or impossible for that person to obtain another form of identification.
- The person making the acknowledgment does not possess any of the identification documents named in *Civ. Code* § 1185(b)(3) and (4).
- The witness does not have a financial interest in the document being acknowledged and is not named in the document.
- The oath or affirmation under penalty of perjury of two credible witnesses, whose identities are proved to the officer on the presentation of any document satisfying the requirements of *Civ. Code* § 1185(b)(3) or (4), that each statement in *Civ. Code* § 1185(b)(1) is true [*Civ. Code* § 1185(b)(2)].
- Reasonable reliance on the presentation to the officer of any one of the following, if the document is current or has been issued within five years [*Civ. Code* § 1185(b)(3)]:
 - An identification card or driver's license issued by the California Department of Motor Vehicles; or
 - A passport issued by the U.S. Department of State.
- Reasonable reliance on the presentation of any one of the following, provided that the document is current or was issued within five years, contains a photograph and a description of the person named on it, is signed by the person, and bears a serial or other identifying number [*Civ. Code* § 1185(b)(4)(A)-(E)]:
 - A passport issued by a foreign government, which has been stamped by the U.S. Immigration and Naturalization Service (superseded by the Citizenship and Immigration Services);
 - A driver's license issued by a state other than California or by a Canadian or Mexican public agency authorized to issue drivers' licenses;
 - An identification card issued by a state other than California;
 - An identification card issued by any branch of the U.S. Armed Forces; or
 - An inmate identification card issued after 1987 by the Department of Corrections and Rehabilitation, if the inmate is in custody.
- Reasonable reliance on the presentation of an inmate identification card issued before 1988 by the Department of Corrections and Rehabilitation, if the inmate is in custody [*Civ. Code* § 1185(b)(4)(F)].

Legal Topics:

For related research and practice materials, see the following legal topics:

GovernmentsLocal GovernmentsEmployees & OfficialsGovernmentsState & Territorial GovernmentsEmployees & Officials

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CHAPTER 74A Matthew Bender Professional Liability in Real Property Transactions Instructions
PART C. ACTIONS INVOLVING NOTARIES PUBLIC AND SURETIES

6-74A California Forms of Jury Instruction MB 7400A.122

MB 7400A.122 False Certification by Notary

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

The making of a false certification of acknowledgment or any other misuse of the notary public seal of office is official misconduct.

Authorities: *Gov. Code § 8207; Bank of America v. Dowdy (1960) 186 Cal.App.2d 690, 694, 9 Cal.Rptr. 779 .*

[2] Use of Instruction

This instruction should be used in an action against a notary or surety when the issue is the notary's negligence or misconduct.

[3] Comment

The false certification of an acknowledgment includes the affixing of the notary's seal to the document. Any use by the notary of the official seal is an official act, and the wrongful use of the seal is official misconduct [*Bank of America v. Dowdy (1960) 186 Cal.App.2d 690, 694, 9 Cal.Rptr. 779 ; Gov. Code § 8207*]. A notary public must not use the official notarial seal except for carrying out his or her duties and responsibilities under the notary laws [*Gov. Code § 8207*].

Legal Topics:

For related research and practice materials, see the following legal topics:

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CHAPTER 74A Matthew Bender Professional Liability in Real Property Transactions Instructions
PART C. ACTIONS INVOLVING NOTARIES PUBLIC AND SURETIES

6-74A California Forms of Jury Instruction MB 7400A.123

MB 7400A.123 Duty to Maintain Sequential Journal

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

It is the duty of the notary public to keep one active sequential journal at a time of all official acts performed as a notary public. This journal must be kept in a locked and secured area under the direct and exclusive control of the notary. It must include all of the following:

- 1. The date, time, and type of each official act.**
- 2. The character of every instrument sworn to, affirmed, acknowledged, or proved.**
- 3. The signature of each person whose signature is being notarized.**
- 4. A statement of the type of information used to identify the party whose signature is being notarized.**
- 5. The fee charged for the notarial service.**

[*ADD, if witnesses were used to identify person making acknowledgment or taking an oath or affirmation:*]

- 6. The type, number, and date of documents presented by witnesses to establish their identity.**

[*ADD, if document being notarized is deed, quitclaim deed, or deed of trust affecting real property:*]

7. The right thumbprint of the party signing the [deed/quitclaim deed/deed of trust/power of attorney].

Authority: *Gov. Code § 8206(a).*

[2] Use of Instruction

This instruction should be used in cases of alleged notary misconduct or when negligence by inadequate identification of the acknowledging party is alleged.

The first optional provision should be used when witnesses, rather than other evidence of identity, are used to establish the identity of the person making the acknowledgment or taking an oath or affirmation [*see Gov. Code § 8206(a)(2)(D), (E)*]. The second optional provision does not apply to a trustee's deed resulting from a decree of foreclosure or a nonjudicial foreclosure pursuant to *Civ. Code § 2924*, or to a deed of reconveyance [*Gov. Code § 8206(a)(2)(G)*].

[3] Comment

The notary law requires a notary public to keep one active sequential journal at a time to establish that the duty to properly identify the acknowledging party has been performed [*Gov. Code § 8206(a)(1)*]. The sequential journal is important admissible evidence on issues such as the delivery of deeds [*Williams v. Kidd (1915) 170 Cal. 631, 641, 151 P. 1*]. Therefore, if the journal is stolen, lost, misplaced, destroyed, damaged, or otherwise rendered unusable, the notary public must immediately notify the Secretary of State by certified or registered mail [*Gov. Code § 8206(b)*].

The failure to keep this journal is actionable misconduct if the plaintiff suffered damage proximately caused by this failure [*Kirk Corp. v. First American Title Co. (1990) 220 Cal.App.3d 785, 812, 270 Cal.Rptr. 24*].

Legal Topics:

For related research and practice materials, see the following legal topics:

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CHAPTER 74A Matthew Bender Professional Liability in Real Property Transactions Instructions PART C. ACTIONS INVOLVING NOTARIES PUBLIC AND SURETIES

6-74A California Forms of Jury Instruction MB 7400A.124

MB 7400A.124 Notary Prohibited From Volunteering Legal Information

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

A notary may not volunteer legal information about the document being notarized.

Authorities: *Gov. Code § 8214.1(g); Vanderhoof v. Prudential Sav. & Loan Assn. (1975) 46 Cal.App.3d 507, 511, 120 Cal.Rptr. 207 .*

[2] Use of Instruction

This instruction should be used defensively by a notary who is defending a failure to "explain" the effect of the document being notarized or the legal significance of notarization. It may also be used affirmatively by a plaintiff who is suing a notary for providing legal information concerning the effect of the document or the significance of notarization.

[3] Comment

A notary has no duty to explain to a person whose will he or she is notarizing that the will's notarization does not invest the document with legal validity [*Vanderhoof v. Prudential Sav. & Loan Assn. (1975) 46 Cal.App.3d 507, 511, 120 Cal.Rptr. 207*]. Notaries public are specifically forbidden to provide legal advice [*Gov. Code § 8214.1(g)*]. It follows that a notary has no duty to explain to a person whose will he or she is notarizing that the notarization of that will does not invest the document with legal validity [*Vanderhoof v. Prudential Sav. & Loan Assn. (1975) 46 Cal.App.3d 507, 511, 120 Cal.Rptr. 207*].

Legal Topics:

For related research and practice materials, see the following legal topics:

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CHAPTER 74A Matthew Bender Professional Liability in Real Property Transactions Instructions
PART C. ACTIONS INVOLVING NOTARIES PUBLIC AND SURETIES

6-74A California Forms of Jury Instruction MB 7400A.125

MB 7400A.125 Acknowledgment by Interested Notary as Official Misconduct

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

A notary public may not act in any matter in which [he/she] has a financial or beneficial interest.

Authorities: *Bank of Woodland v. Oberhaus* (1899) 125 Cal. 320, 324, 57 P. 1070 ; *Bank of America v. Dowdy* (1960) 186 Cal.App.2d 690, 694, 9 Cal.Rptr. 779 .

[2] Use of Instruction

This instruction should be used in an action against a notary public for damages based on the notarization of an official recorded document in which the notary has an interest.

[3] Comment

A notary may not certify an acknowledgment in any matter in which he or she has a beneficial or financial interest [*Bank of Woodland v. Oberhaus* (1899) 125 Cal. 320, 324, 57 P. 1070]. A notary who acknowledges his or her own signature or a fictitious name in which he or she has an interest has committed official misconduct [*Bank of America v. Dowdy* (1960) 186 Cal.App.2d 690, 694, 9 Cal.Rptr. 779].

Legal Topics:

For related research and practice materials, see the following legal topics:

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CHAPTER 74A Matthew Bender Professional Liability in Real Property Transactions Instructions
PART C. ACTIONS INVOLVING NOTARIES PUBLIC AND SURETIES

6-74A California Forms of Jury Instruction MB 7400A.126

MB 7400A.126 Liability of Notary Public or Surety

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

The [notary public/surety] is liable to any person who was injured by the official misconduct or neglect of the notary public for all the damages caused by this official misconduct or neglect.

Authorities: Gov. Code § 8214; *Bank of America v. Dowdy* (1960) 186 Cal.App.2d 690, 693, 9 Cal.Rptr. 779 .

[2] Use of Instruction

This instruction should be used in an action that claims notary negligence, the making of false certificates of acknowledgment, or the misuse of the notary public's seal.

For related Judicial Council instructions, see [3][b], *below*.

[3] Comment

[a] Liability of Notary for Official Misconduct or Neglect

If there is any official misconduct or neglect by a notary public, then the notary and the sureties on his or her official bond are liable to those injured by this misconduct or neglect for all the damages sustained [Gov. Code § 8214]. Civil liability for neglect or misconduct depends on the existence of damages proximately caused by the notary's conduct. It has been held, for example, that the failure to keep the required journal [see MB 7400A.123] is not grounds for civil liability when the plaintiff suffered no damage proximately caused by this lack of compliance [*Kirk Corp. v. First American Title Co.* (1990) 220 Cal.App.3d 785, 812, 270 Cal.Rptr. 24].

False certification is official misconduct [*Bank of America v. Dowdy* (1960) 186 Cal.App.2d 690, 694, 9 Cal.Rptr. 779]. The notary's bond per incident is set by statute [*Gov. Code* § 8212].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 4, *California Judicial Council Negligence Instructions*]:

CACI 401 Basic Standard of Care

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Remedies Bonds Sureties Liability Governments Local Governments Employees & Officials Governments State & Territorial Governments Employees & Officials

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CHAPTER 74A Matthew Bender Professional Liability in Real Property Transactions Instructions
PART C. ACTIONS INVOLVING NOTARIES PUBLIC AND SURETIES

6-74A California Forms of Jury Instruction MB 7400A.127

MB 7400A.127 Burden of Proof--Action Against Notary

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

In an action against [a notary public/a notary's surety] for negligence or official misconduct based on the notary public's failure to establish proper identification of a person making the acknowledgment, the burden of proof is on the party seeking the damages.

Authority: *Civ. Code § 1185(e).*

[2] Use of Instruction

This instruction should be used with the instruction in MB 7400A.121 in an action against a notary public or the notary's surety.

[3] Comment

Ordinarily, when a statute sets out a duty such as the notary public's duty to take acknowledgments [*Gov. Code § 8205(a)(2)*] or to keep a sequential journal with regard to obtaining satisfactory evidence of a person's identity [*Gov. Code § 8206(a)*; *Civ. Code § 1185*], *Evid. Code § 669* (negligence per se) would apply, creating a presumption in favor of the person injured and against the notary. However, in actions for negligence or official misconduct based on the notary public's failure to establish proper identification of a person making an acknowledgment, *Civ. Code § 1185(d)* puts the burden of proof on the party bringing the action. The sequential journal required under *Gov. Code § 8206* would ordinarily constitute the basic evidence in the required proof. Thus, the omission or misstatement of information required in a sequential journal under *Gov. Code § 8206* may assist the plaintiff in meeting his or her burden.

Legal Topics:

For related research and practice materials, see the following legal topics:

EvidenceProcedural ConsiderationsBurdens of ProofGeneral OverviewGovernmentsLocal GovernmentsEmployees & OfficialsGovernmentsState & Territorial GovernmentsEmployees & OfficialsTortsNegligenceGeneral Overview

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CHAPTER 74A Matthew Bender Professional Liability in Real Property Transactions Instructions
PART C. ACTIONS INVOLVING NOTARIES PUBLIC AND SURETIES

6-74A California Forms of Jury Instruction MB 7400A.128

MB 7400A.128 Reliance Necessary

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

To succeed in [his/her/its] action to recover for the negligence or official misconduct of _____ [name of notary public], Plaintiff must show that [his/her/its] loss was caused by reliance on the notary's certificate.

Authority: *Bank of America v. Dowdy (1960) 186 Cal.App.2d 690, 694-695, 9 Cal.Rptr. 779 .*

[2] Use of Instruction

This instruction should be used to state the requirement of causation in an action against a notary or the notary's surety.

[3] Comment

The misconduct or neglect of the notary need not be the sole proximate cause of loss. An action against a notary or surety is not dependent on a lack of contributory negligence or misconduct by others. A person injured by the improper notarial certification need only show that reliance on the notary's certificate was a proximate cause of damages. Reliance on the authenticity of a notary's certificate (barring other information concerning the notary or the signature notarized) has been held to be justifiable [*Bank of America v. Dowdy (1960) 186 Cal.App.2d 690, 694-695, 9 Cal.Rptr. 779*].

Legal Topics:

For related research and practice materials, see the following legal topics:

EvidenceProcedural ConsiderationsBurdens of ProofGeneral OverviewGovernmentsLocal GovernmentsEmployees & OfficialsGovernmentsState & Territorial GovernmentsEmployees & OfficialsTortsNegligenceGeneral Overview

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CHAPTER 75A Matthew Bender Real Property Sales Instructions

6-75A California Forms of Jury Instruction 75A.syn

§ 75A.syn Synopsis to Chapter 75A: Matthew Bender Real Property Sales Instructions

MB 7500A.01 Definition of Broker

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 7500A.02 Definition of Sales Agent

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 7500A.03 Sales Agent Is Agent of Broker

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 7500A.04-MB 7500A.09 Reserved for Future Use

MB 7500A.10 Definition of Listing

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Requirements for Listing Agreement

[b] Parties to Listing Agreement

[c] Prohibition on Listing Seller's Agent Acting as Buyer's Agent; Required Disclosures

MB 7500A.11 Definition of Open or General Listing

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 7500A.12 Definition of Exclusive Right to Sell Listing

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 7500A.13 Definition of Exclusive Agency Listing

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 7500A.14 Definition of Multiple Listing Service

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 7500A.15 Broker's Burden of Proof in Action for Commission on Open Listing

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 7500A.16 Broker's Burden of Proof in Action for Commission on Exclusive Right to Sell Listing

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 7500A.17 Broker's Burden of Proof in Action for Commission on Exclusive Agency Listing

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 7500A.18 Definition of Ready, Willing, and Able

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 7500A.19 Definition of Procure

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 7500A.20 Defense of Revocation of Open Listing

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 7500A.21 Defense of Rescission of Exclusive Listing

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 7500A.22-MB 7500A.29 Reserved for Future Use

MB 7500A.30 Broker Status as Fiduciary and Burden of Proof on Broker

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Broker's Fiduciary Duty

[b] Related Judicial Council Jury Instructions

MB 7500A.31 Broker's Duty to Disclose Material Facts to Client

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Duty to Disclose

[b] Related Judicial Council Jury Instructions

MB 7500A.32 Broker's Duty of Care to Client

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Duty of Care

[b] Related Judicial Council Jury Instructions

MB 7500A.33 Broker's Duty to Inspect Property and Make Related Disclosures to Buyer

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Establishment of Broker's Duty to Inspect

[b] Codification of Rule in Civil Code

[c] Limitations on Duty to Inspect

[d] Limitations on Duty to Disclose

[e] Broker's Standard of Care

[f] Statute of Limitations

[g] Related Judicial Council Jury Instructions

MB 7500A.34 Broker's Duty to Disclose Condition of Property on Statutory Transfer Disclosure Statement

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Establishment of Broker's Duty to Disclose

[b] Transfers to Which Disclosure Requirements Apply; Exceptions; Waiver

[c] Separate and Distinct Obligations of Seller and Broker

[d] Delivery of Transfer Disclosure Statement

[e] Limitation on Broker's Liability

[f] Consequences of Non-Compliance

[g] Subsequent Inaccuracy

MB 7500A.35 Broker's Duty to Disclose Natural Hazards to Buyer

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Establishment of Broker's Duty to Disclose

[b] Transfers to Which Disclosure Requirements Apply; Exceptions

[c] Primary Disclosure Obligation

[d] Consequences of Non-Compliance

[e] Limitations on Liability

[f] Actions of Agents; Delivery of Disclosures

[g] Effect on Other Laws

MB 7500A.36 Buyer's Duty to Exercise Reasonable Care--Affirmative Defense

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 7500A.37-MB 7500A.49 Reserved for Future Use

MB 7500A.50 Buyer's Burden of Proof in Action for Damages for Seller's Breach of Contract of Sale

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 7500A.51 Seller's Burden of Proof in Action for Damages for Buyer's Breach of Contract of Sale

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 7500A.52 Counter Offer

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Acceptance Must Be Unqualified

[b] Related Judicial Council Jury Instructions

MB 7500A.53 Waiver of Condition

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Waiver of Condition

[b] Related Judicial Council Jury Instructions

MB 7500A.54 Defense of Failure of Buyer's Condition

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Failure of Condition

[b] Related Judicial Council Jury Instructions

MB 7500A.55 Impossibility of Fulfilling Condition

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Impossibility

[b] Related Judicial Council Jury Instructions

MB 7500A.56 Breach of Duty of Good Faith and Fair Dealing Excuses Nonoccurrence of Condition

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 7500A.57 Burden of Proof in Action Against Escrow Holder

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Liability for Violation of Escrow Instructions

[b] Related Judicial Council Jury Instructions

MB 7500A.58-MB 7500A.69 Reserved for Future Use

MB 7500A.70 Measure of Buyer's Damages--Seller's Title Encumbered

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Measure of Damages

[b] Related Judicial Council Jury Instructions

MB 7500A.71 Measure of Buyer's Damages--Seller's Title Encumbered by Restriction

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Measure of Damages

[b] Related Judicial Council Jury Instructions

MB 7500A.72 Definition of Encumbrance

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 7500A.73 Definition of Fair Market Value

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Fair Market Value Defined

[b] Related Judicial Council Jury Instructions

MB 7500A.74 Measure of Seller's Damages--Liquidated Damages

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Liquidated Damages

[b] Related Judicial Council Jury Instructions

MB 7500A.75 Measure of Seller's Damages--Liquidated Damages in Residential Sale

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Liquidated Damages

[b] Related Judicial Council Jury Instructions

MB 7500A.76 Measure of Broker's Damages for Failure to Be Paid Commission

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 7500A.77 Measure of Client's Damages--Fraud by Broker

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Measure of Damages

[b] Related Judicial Council Jury Instructions



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CHAPTER 75A Matthew Bender Real Property Sales Instructions

6-75A California Forms of Jury Instruction Scope

Scope

SCOPE

This chapter includes jury instructions for actions involving real estate sales transactions. The chapter covers the following topics:

- Part A includes general definitions of "broker" and "sales agent" [see *MB 7500A.01 -MB 7500A.03*], instructions for actions by brokers to recover commissions [see *MB 7500A.10 -MB 7500A.21*], and instructions for actions against brokers by persons damaged by the broker's breach of a duty [see *MB 7500A.30 -MB 7500A.36*].
- Part B includes instructions for actions by both buyers and sellers against each other for breach of contracts of sale [see *MB 7500A.50 -MB 7500A.57*].
- Part C includes damages instructions for actions by and against brokers and between buyers and sellers for breach of contract [see *MB 7500A.70 -MB 7500A.77*].

In actions for breach of a real estate sales contract or a brokerage contract, many of the general contract instructions in Ch. 3, *California Judicial Council Contracts Instructions*, and Chs. 3A through 3G, will apply.

If the action is for fraud, the general fraud instructions in Ch. 19, *California Judicial Council Fraud or Deceit Instructions*, and Ch. 19A, *Matthew Bender Fraud and Deceit Instructions*, will apply.

If the action involves the breach of a fiduciary duty of a real estate broker or sales agent, see Ch. 41, *California Judicial Council Breach of Fiduciary Duty Instructions*.

Detailed instructions for tort and contract actions against real estate professionals in particular are set forth in Ch. 74A, *Matthew Bender Professional Liability in Real Property Transactions Instructions*.



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California Forms of Jury Instruction

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CHAPTER 75A Matthew Bender Real Property Sales Instructions

PART A. ACTIONS INVOLVING BROKERS

1. General Definitions

6-75A California Forms of Jury Instruction MB 7500A.01

MB 7500A.01 Definition of Broker**[1] Instruction**

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

For someone to be called a real estate broker in California, he or she must have a valid real estate broker's license issued by the State of California. A real estate broker is someone who _____ [specify statutory acts of broker in issue, e.g., buys or sells real property] or negotiates to _____ [repeat statutory acts of broker in issue] on behalf of someone else. A broker does this for pay, or with an expectation that he or she will be paid at some time for doing it.

If you find that [Plaintiff/Defendant] possessed a valid California real estate broker's license, and _____ [specify statutory acts of broker in issue, e.g., bought or sold real property] on behalf of [Plaintiff/Defendant] for pay, or with the expectation that he or she would be paid for doing it, then you must find that [Plaintiff/Defendant] was [Plaintiff/Defendant]'s real estate broker.

Authorities: *Bus. & Prof. Code §§ 10131(a), 10136; Garcia v. Wetzel (1984) 159 Cal.App.3d 1093, 1096, 206 Cal.Rptr. 251 .*

[2] Use of Instruction

This instruction should be used in two different ways. In an action to collect a commission, a broker should use it to claim that he or she is a real estate broker as specified by *Bus. & Prof. Code §§ 10131(a) and 10136*. In an action by a client against a broker, the instruction should be used by the client to assert that the defendant is, indeed, a broker, or by the broker to claim that he or she is not a real estate broker within the meaning of those sections. A more detailed instruction for actions against a broker by a client based on professional liability claims is in Ch. 74A, *Matthew Bender*

Professional Liability in Real Property Transactions Instructions, MB 7400A.01.

Depending on the circumstances, this instruction should be used with the general agency instructions in Ch. 37, *Judicial Council Vicarious Responsibility Instructions*, and in Ch. 3C, *Matthew Bender Contract Party Instructions*, MB 300C.50 through MB 300C.59, or with the instruction on the definition of an agent in MB 7500A.02, and the more specific instruction in MB 7500A.03 on broker's liability for acts of sales agents. In addition, because a "real estate broker" is in a fiduciary relationship with his or her principal, this instruction may also be appropriate for use with the California Judicial Council's "Breach of Fiduciary Duty" series of instructions [see Ch. 41, *California Judicial Council Breach of Fiduciary Duty Instructions*], in particular, *CACI No. 4100*, " 'Fiduciary Duty' Explained," and *CACI No. 4102*, "Duty of Undivided Loyalty--Essential Factual Elements."

[3] Comment

Bus. & Prof. Code § 10131(a) defines a real estate broker as a person who for compensation, or in expectation of compensation, does or negotiates the following:

- Sells or offers to sell real property or a business opportunity;
- Buys or offers to buy real property or a business opportunity;
- Solicits prospective sellers or purchasers of real property or a business opportunity;
- Solicits or obtains listings of real property or a business opportunity; or
- Negotiates the purchase, sale, or exchange of real property or a business opportunity.

Regarding this last item, a person is not negotiating as a broker when he or she merely arranges an introduction between an owner and a prospective purchaser; conversely, the person is deemed to be acting as a broker if he or she takes any part in negotiations, no matter how slight [*Spielberg v. Granz* (1960) 185 Cal.App.2d 283, 290-291, 8 Cal.Rptr. 190].

For a person [see *Estate of Baldwin* (1973) 34 Cal.App.3d 596, 604, 110 Cal.Rptr. 189 (for these purposes, corporation is deemed a "person")]] to be deemed a real estate broker, the person must meet all of the following requirements when performing these acts [*Garcia v. Wetzel* (1984) 159 Cal.App.3d 1093, 1096, 206 Cal.Rptr. 251]:

- Have a current, valid California real estate broker's license [*Bus. & Prof. Code § 10136*];
- Be acting on behalf of someone else [*Bus. & Prof. Code § 10131(a)*]; and
- Be working for compensation (or with the expectation of compensation) [*Bus. & Prof. Code § 10131*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property LawBrokersFiduciary ResponsibilitiesReal Property LawBrokersRight to Commissions

Robert L. Risley, James B. Little, Peter H. Ferris, Eric J. Firstman, and Eugene C. Hu contributed to the original chapter for California Forms of Jury Instruction (Matthew Bender). P. Gerhardt Zacher, Kenneth M. Miller, and Alan Carlton contributed to the original chapter as consultants.



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California Forms of Jury Instruction

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CHAPTER 75A Matthew Bender Real Property Sales Instructions

PART A. ACTIONS INVOLVING BROKERS

1. General Definitions

6-75A California Forms of Jury Instruction MB 7500A.02

MB 7500A.02 Definition of Sales Agent

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

A real estate salesperson is someone who is employed by a licensed real estate broker to perform one or more of the functions of a broker that I have already explained to you. For someone to be a real estate salesperson, he or she must perform these functions for pay or with the expectation that he or she will be paid at some point.

Authority: *Bus. & Prof. Code § 10132.*

[2] Use of Instruction

This instruction should be used in two different ways. In an action to collect a commission, the instruction should be used with the instruction in MB 7500A.01, which explains the functions of a broker allegedly performed by the real estate sales agent. In an action by a client against a broker and his or her agents, the instruction should be used by the client claiming that the person is, indeed, a sales agent or by the defendant to claim that the person is not a real estate salesperson within the meaning of *Bus. & Prof. Code § 10132*. The client in such a case could also use the instruction to assert that the person falls within the requirements of this section to show that the broker is thus liable in contract or tort for actions taken in this capacity.

This instruction should be used with the instruction in MB 7500A.03 on the status of the sales agent as the broker's agent. In addition, because a "sales agent" is in a fiduciary relationship with his or her principal, this instruction may also be appropriate for use with the Judicial Council's "Breach of Fiduciary Duty" series of instructions [see Ch. 41, *California Judicial Council Breach of Fiduciary Duty Instructions*], in particular, *CACI No. 4100*, "Fiduciary Duty' Explained," and *CACI No. 4102*, "Duty of Undivided Loyalty--Essential Factual Elements."

The wording of this instruction does not point out that a real estate salesperson must be a "natural person" [*Bus. & Prof. Code § 10132*]. This distinction is not likely to be an issue for the jury, and it is therefore better not to confuse the jury by mentioning this requirement.

[3] Comment

A real estate salesperson is a natural person who, for compensation or in expectation of compensation, is employed by a licensed real estate broker to perform one or more of the functions of broker as set out in the Real Estate Licensing Act [*Bus. & Prof. Code § 10132*]. The functions are set out specifically in *Bus. & Prof. Code §§ 10131, 10131.1, 10131.2, 10131.3, 10131.4, 10131.45, 10131.6*.

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property LawBrokersDiscipline, Licensing & RegulationReal Property LawBrokersFiduciary ResponsibilitiesReal Property LawBrokersRight to Commissions

Robert L. Risley, James B. Little, Peter H. Ferris, Eric J. Firstman, and Eugene C. Hu contributed to the original chapter for California Forms of Jury Instruction (Matthew Bender). P. Gerhardt Zacher, Kenneth M. Miller, and Alan Carlton contributed to the original chapter as consultants.



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CHAPTER 75A Matthew Bender Real Property Sales Instructions

PART A. ACTIONS INVOLVING BROKERS

1. General Definitions

6-75A California Forms of Jury Instruction MB 7500A.03

MB 7500A.03 Sales Agent Is Agent of Broker**[1] Instruction**

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

A real estate salesperson is an agent of his or her broker. A real estate salesperson can act only for, on behalf of, and in place of a broker under whom he or she is licensed. The salesperson's acts are limited to acts that he or she does as agent for the broker. If you find that _____ [name of salesperson] was licensed under _____ [name of broker], then _____ [name of broker] [is liable for/may claim responsibility for] the acts of _____ [name of salesperson] in the transaction of _____ [name of broker]'s business.

Authorities: Civ. Code §§ 2079.13(a), 2338; Bus. & Prof. Code §§ 10132, 10137, 10160, 10177(h); *People v. Asuncion* (1984) 152 Cal.App.3d 422, 425, 199 Cal.Rptr. 514 ; *Grubb & Ellis Co. v. Spengler* (1983) 143 Cal.App.3d 890, 895, 192 Cal.Rptr. 637 ; *Gipson v. Davis Realty Co.* (1963) 215 Cal.App.2d 190, 203-207, 30 Cal.Rptr. 253 .

[2] Use of Instruction

This instruction should be used when the broker's alleged liability or claim rests on the acts of a salesperson, and should be used in conjunction with the instruction in MB 7500A.02.

[3] Comment

A real estate salesperson is an agent of the broker [Civ. Code § 2338; Bus. & Prof. Code § 10132; see Bus. & Prof. Code § 10177(h)]. All of a real estate salesperson's professional compensation must come through the broker [Bus. & Prof. Code § 10137]. The salesperson's license must be in the broker's custody [Bus. & Prof. Code § 10160]. Any

contract that purports to change the relationship from that of agent to independent contractor is invalid as contrary to the real estate law. The responsibility of the principal (or broker employer) for the agent's act depends on whether the agent was engaged at that time in the transaction or the business of his or her principal or whether the agent was engaged in an act performed for his or her own personal convenience or accommodation and related to an end or purpose exclusively and individually on his or her own [*Gipson v. Davis Realty Co. (1963) 215 Cal.App.2d 190, 207, 30 Cal.Rptr. 253*]. In this capacity, the salesperson may not contract in his or her own name, and is not exempt from usury laws [*People v. Asuncion (1984) 152 Cal.App.3d 422, 426, 199 Cal.Rptr. 514*].

For tort liability, the broker is liable for the acts of the salesperson under the doctrine of respondeat superior [*Grubb & Ellis Co. v. Spengler (1983) 143 Cal.App.3d 890, 895, 192 Cal.Rptr. 637*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate Law Agency Relationships Agents Distinguished Special Agents Business & Corporate Law Agency Relationships Authority to Act Contracts & Conveyances Liability of Principal Real Property Law Brokers Discipline, Licensing & Regulation Real Property Law Brokers Fiduciary Responsibilities

Robert L. Risley, James B. Little, Peter H. Ferris, Eric J. Firstman, and Eugene C. Hu contributed to the original chapter for California Forms of Jury Instruction (Matthew Bender). P. Gerhardt Zacher, Kenneth M. Miller, and Alan Carlton contributed to the original chapter as consultants.



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CHAPTER 75A Matthew Bender Real Property Sales Instructions

PART A. ACTIONS INVOLVING BROKERS

1. General Definitions

6-75A California Forms of Jury Instruction MB 7500A.04-MB 7500A.09

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MB 7500A.04Reserved for Future Use



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California Forms of Jury Instruction

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CHAPTER 75A Matthew Bender Real Property Sales Instructions

PART A. ACTIONS INVOLVING BROKERS

2. Broker's Action to Recover Commission Based on Listing Agreement

6-75A California Forms of Jury Instruction MB 7500A.10

MB 7500A.10 Definition of Listing

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

A listing is a written contract between an owner of property and a broker. This contract authorizes the broker to do one of the following two things:

- (1) Sell the property; or**
- (2) Find or obtain a buyer for compensation or commission.**

A listing agreement may contain any provision the parties freely agree on. However, there are certain things that must be included in a listing agreement. These things are:

- (1) An adequately detailed property description;**
- (2) The performance required of the broker; and**
- (3) The terms and conditions that entitle the broker to compensation.**

If you find that the written contract between _____ [name of broker] and _____ [name of property owner] meets all of these requirements, the agreement is a listing.

Authorities: Civ. Code §§ 1086(f), 2079.13(e), (f); *Buckaloo v. Johnson* (1975) 14 Cal.3d 815, 821, 122 Cal.Rptr. 745,

537 P.2d 865 , disapproved on other grounds, *Della Penna v. Toyota Motor Sales, U.S.A., Inc.* (1995) 11 Cal.4th 376, 393 n.5, 45 Cal.Rptr.2d 436, 902 P.2d 740 ; *Blank v. Borden* (1974) 11 Cal.3d 963, 969-972, 115 Cal.Rptr. 31, 524 P.2d 127 ; *Metzenbaum v. R.O.S. Associates* (1986) 188 Cal.App.3d 202, 210, 232 Cal.Rptr. 741 ; *Holway v. Malloy* (1945) 70 Cal.App.2d 317, 319, 160 P.2d 893 .

[2] Use of Instruction

This instruction should be used to define "listing" or "listing agreement" as that term is used in this chapter. The instruction may be used in conjunction with instructions on specific kinds of listing agreements contained in MB 7500A.11 through MB 7500A.14, and with the instructions on the broker's burden of proof in action for commission in MB 7500A.15 and MB 7500A.17. The instruction may also be used with instructions on the fiduciary duties of a broker or sales agent in MB 7500A.30 through MB 7500A.33 [see also Ch. 41, *California Judicial Council Breach of Fiduciary Duty Instructions*].

[3] Comment

[a] Requirements for Listing Agreement

To satisfy the Statute of Frauds, and thus be enforceable, a listing agreement must be in writing and executed by the seller, except when the listing is for the lease of property for one year or less [Civ. Code § 1624(a)(4); *Buckaloo v. Johnson* (1975) 14 Cal.3d 815, 821, 122 Cal.Rptr. 745, 537 P.2d 865 , disapproved on other grounds in *Della Penna v. Toyota Motor Sales, U.S.A., Inc.* (1995) 11 Cal.4th 376, 393 n.5, 45 Cal.Rptr.2d 436, 902 P.2d 740]. Although the parties to the listing agreement are free to negotiate any lawful terms, all of the following items must be set forth in the agreement [*Blank v. Borden* (1974) 11 Cal.3d 963, 969, 115 Cal.Rptr. 31, 524 P.2d 127 ; *Metzenbaum v. R.O.S. Associates* (1986) 188 Cal.App.3d 202, 210, 232 Cal.Rptr. 741]:

- An adequate property description;
- The performance required of the broker; and
- The terms and conditions under which the broker is entitled to compensation.

Absent an express authorization from the seller, a listing agreement does not authorize the broker to sell the property or execute a sale contract or deed on behalf of the seller, but merely to find or obtain a buyer for the property [*Holway v. Malloy* (1945) 70 Cal.App.2d 317, 319, 160 P.2d 893 ; see *Bus. & Prof. Code* § 10131 (definition of broker's duties that does not include selling property or executing sale contract or deed on behalf of seller); see *Civ. Code* § 1086(b) (terms "sell" and "sale" include lease and exchange)]. A seller incurs no obligation to a broker until he or she has been given an opportunity to accept or reject the offer [*Duin v. Security-First Nat. Bank* (1955) 132 Cal.App.2d Supp. 904, 905-906, 283 P.2d 790 (broker not entitled to commission under listing agreement because buyer's offer was never communicated to seller)].

Under *Bus. & Prof. Code* § 10147.5, any listing agreement for residential property of four units or less must contain a statement advising seller that broker's commissions are not fixed by law, but are subject to negotiation and agreement between the parties. This requirement also applies to mobile home listings.

[b] Parties to Listing Agreement

A listing agreement imposes certain fiduciary duties on the broker [*Jorgensen v. Beach 'N' Bay Realty, Inc.* (1981) 125 Cal.App.3d 155, 161, 177 Cal.Rptr. 882 ; see MB 7500A.30 -MB 7500A.33; see also Ch. 41, *California Judicial Council Breach of Fiduciary Duty Instructions*]. Although *Civ. Code* § 1086(f) defines a "listing" as a contract between an owner and an agent, no prohibition exists against a listing agreement entered into between a broker and potential

purchaser of property [Miller & Starr, California Real Estate (West 3d ed. 2000), Ch. 2, *Specific Contracts*]. Usually, no distinction is made between a seller's listing and a buyer's listing for determining whether enforceability requirements have been met [Miller & Starr, California Real Estate (West 3d ed. 2000), Ch. 2, *Specific Contracts*]. However, the requirement of an adequate property description may be relaxed in the latter situation because the broker must first locate the property before any negotiation begins [see California Real Estate Law and Practice, Ch. 61, *Employment and Authority of Brokers* (Matthew Bender)]. Nonetheless, the property description and the terms of sale should be as specific as possible to avoid disagreement over the broker's entitlement to his or her commission. A buyer's broker must disclose to the seller and his or her principal that the broker is solely representing the buyer, even though he or she may receive a portion of the commission [Bus. & Prof. Code § 10176(d)].

[c] Prohibition on Listing Seller's Agent Acting as Buyer's Agent; Required Disclosures

A selling agent who is also the listing agent for residential real property may not act as an agent for the buyer alone in the same transaction [Civ. Code § 2079.18]. In addition, the Civil Code requires real estate agents in residential property transactions to provide two agency disclosure forms to buyers and sellers. First, listing agents and selling agents must provide the seller and buyer with a copy of the disclosure form set out in Civ. Code § 2079.16 (Disclosure Regarding Real Estate Agency Relationship) [Civ. Code § 2079.14; see *Brown v. FSR Brokerage Inc.* (1998) 62 Cal.App.4th 766, 774-776, 72 Cal.Rptr.2d 828 ; see also California Legal Forms, Ch. 21, *Agreements With Real Estate Brokers and Agents* (Matthew Bender)]. The agents must obtain a signed acknowledgment of receipt from that seller or buyer [Civ. Code § 2079.14], except when (1) the selling agent does not deal on a face-to-face basis with the seller; or (2) the buyer or seller refuses to acknowledge receipt [Civ. Code §§ 2079.14(c), 2079.15]. The listing agent must provide this disclosure form to the seller before entering into the listing agreement [Civ. Code § 2079.14(a)]. Failure to provide the required disclosure before entering into the listing agreement relieves the seller of the obligation to pay the agent's commission [*Huijers v. DeMarrais* (1992) 11 Cal.App.4th 676, 686, 14 Cal.Rptr.2d 232 ; see *Brown v. FSR Brokerage Inc.* (1998) 62 Cal.App.4th 766, 777, 72 Cal.Rptr.2d 828]. The selling agent must provide the disclosure form to the seller as soon as practicable before presenting the seller with an offer to buy, unless the selling agent is also the listing agent and has already provided the seller with a copy of the form before entering into the listing agreement [Civ. Code § 2079.14(b); see *Brown v. FSR Brokerage Inc.* (1998) 62 Cal.App.4th 766, 773-774, 777, 72 Cal.Rptr.2d 828]. The selling agent must provide the disclosure form to the buyer as soon as practicable before the execution of the buyer's offer to purchase. If the offer to purchase is not prepared by the selling agent, the selling agent must present the disclosure form to the buyer not later than the next business day after the selling agent receives the offer to purchase from the buyer [Civ. Code § 2079.14(d)].

In addition to the disclosure form required by Civ. Code § 2079.14 [Civ. Code § 2079.17(d)], a real estate agent must disclose his or her actual relationship to the buyer or seller in a particular transaction. This disclosure must be made as soon as practicable [Civ. Code § 2079.17(a), (b)]. A selling agent must disclose to the buyer and seller whether he or she is acting exclusively as the buyer's agent, exclusively as the seller's agent, or as dual agent representing both buyer and seller [Civ. Code § 2079.17(a)]. The disclosure must be confirmed in the sale contract or in a separate writing acknowledged by the seller, buyer, and selling agent before or coincident with the sale contract's execution by the buyer and seller [Civ. Code § 2079.17(a); see California Legal Forms, Ch. 21, *Agreements With Real Estate Brokers and Agents* (Matthew Bender)].

The listing agent must disclose to the seller whether the agent is acting exclusively as the seller's agent, or as a dual agent representing both buyer and seller [Civ. Code § 2079.17(b)]. This relationship must also be confirmed in the sale contract or some other writing executed or acknowledged by the seller before or contemporaneously with the sale contract's execution by the seller [Civ. Code § 2079.17(b); see California Legal Forms, Ch. 21, *Agreements With Real Estate Brokers and Agents* (Matthew Bender)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property LawBrokersBrokerage AgreementsReal Property LawBrokersRight to Commissions

Robert L. Risley, James B. Little, Peter H. Ferris, Eric J. Firstman, and Eugene C. Hu contributed to the original chapter for California Forms of Jury Instruction (Matthew Bender). P. Gerhardt Zacher, Kenneth M. Miller, and Alan Carlton contributed to the original chapter as consultants.



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CHAPTER 75A Matthew Bender Real Property Sales Instructions

PART A. ACTIONS INVOLVING BROKERS

2. Broker's Action to Recover Commission Based on Listing Agreement

6-75A California Forms of Jury Instruction MB 7500A.11

MB 7500A.11 Definition of Open or General Listing

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

An open or general listing is a listing in which the seller is obligated to pay a commission to a broker only if the broker [optional: or the broker's agent] procures an enforceable offer and presents it to the seller. The offer must meet all of the following requirements:

- 1. The offer must be from a buyer who is ready, willing, and able to carry out the offer's terms;**
- 2. The offer must be on the terms set forth in the listing or contain terms that are otherwise acceptable to the seller;**
- 3. The offer must be presented to the seller by the broker before the [he/she] sells the property by [himself/herself], or before another broker sells it; and**
- 4. The offer must be presented to the seller by the broker before the listing expires by its terms or is revoked by the seller.**

If you find that the evidence presented shows that the broker [optional: or the broker's agent] procured an enforceable offer, that the broker [optional: or the broker's agent] presented the offer to the seller, and that the offer meets the requirements that I just specified, you must find that an open listing agreement existed between _____ [name of broker] and _____ [name of property owner].

Authorities: *Civ. Code § 1086(f)(3)*; *Kopf v. Milam* (1963) 60 Cal.2d 600, 605, 35 Cal.Rptr. 614, 387 P.2d 390 ; *Estate of Ross* (1980) 101 Cal.App.3d 895, 900-901, 162 Cal.Rptr. 111 ; *Seck v. Foulks* (1972) 25 Cal.App.3d 556, 570-573, 102 Cal.Rptr. 170 ; *Tetrick v. Sloan* (1959) 170 Cal.App.2d 540, 544-547, 339 P.2d 613 ; *Nelson v. Mayer* (1954) 122 Cal.App.2d 438, 445-446, 265 P.2d 52 .

[2] Use of Instruction

This instruction should be used to distinguish an open or general listing from other kinds of listing agreements, and should be used in conjunction with the instruction in MB 7500A.15 on the broker's burden of proof in an action for commission on an open listing. A dispute arising under an open listing may require a determination of the sale's "procuring cause" if more than one broker claims a commission. Exclusive agency and exclusive right to sell listings normally do not require such a determination, because the exclusive broker is entitled to a commission regardless of which other broker procured the buyer. Thus, this definition should be used with the instructions defining "procure" in MB 7500A.19 and "ready, willing, and able" in MB 7500A.18. For a general instruction and comments for "listing agreements," see MB 7500A.10.

[3] Comment

An open or general listing is a listing by which a seller is obligated to pay a commission to a broker only if the broker procures an enforceable offer and presents it to the seller [*Civ. Code § 1086(f)(3)*; see also MB 7500A.02[3], MB 7500A.03[3] (real estate salesperson, acting as a broker's agent, may also procure offer)]. For a broker to be able to collect a commission on a sale under an open listing, the broker must show either that he or she actually sold the property to a person procured by the broker [*Towle v. Lewis* (1969) 274 Cal.App.3d 377, 377, 79 Cal.Rptr. 58] or that the offer meets all of the following requirements [*Civ. Code § 1086(f)(3)*]:

- The offer must be from a buyer who is ready, willing, and able to carry out the offer's terms [*Seck v. Foulks* (1972) 25 Cal.App.3d 556, 570, 102 Cal.Rptr. 170 ; *Tetrick v. Sloan* (1959) 170 Cal.App.2d 540, 544-545, 339 P.2d 613].
- The offer must be on the terms set forth in the listing or contain terms that are otherwise accepted by the seller [*Kopf v. Milam* (1963) 60 Cal.2d 600, 605, 35 Cal.Rptr. 614, 387 P.2d 390 ; *Seck v. Foulks* (1972) 25 Cal.App.3d 556, 570, 102 Cal.Rptr. 170 ; *Tetrick v. Sloan* (1959) 170 Cal.App.2d 540, 544-545, 339 P.2d 613].
- The offer must be presented to the seller by the broker before the listing agreement is terminated by the sale of the property either (1) directly by the seller [*Tetrick v. Sloan* (1959) 170 Cal.App.2d 540, 546, 339 P.2d 613 ; see *Nelson v. Mayer* (1954) 122 Cal.App.2d 438, 445, 265 P.2d 52 (property's sale directly by seller terminates listings of all brokers)]; or (2) by another broker [see *Estate of Ross* (1980) 101 Cal.App.3d 895, 900, 162 Cal.Rptr. 111 ; *Seck v. Foulks* (1972) 25 Cal.App.3d 556, 570-573, 102 Cal.Rptr. 170 (open listing allows seller to employ number of brokers to sell same property and first broker to procure ready, willing, and able buyer earns commission; thus, when sale of property is procured by one broker, open listing is terminated for other brokers)]. Property is "sold" when legally binding commitment to sell, lease, or exchange property comes into existence [*Civ. Code § 1086(b), (i)*]. The seller is not obligated to notify the other brokers of the agreement's sale or termination [*Tetrick v. Sloan* (1959) 170 Cal.App.2d 540, 546, 339 P.2d 613].
- The offer must be presented to the seller by the broker before the listing expires by its terms [see *Tetrick v. Sloan* (1959) 170 Cal.App.2d 540, 545, 339 P.2d 613 (introducing principal to party who comes to agreement with principal after termination of agency, but who was not ready, willing, and able to consummate transaction during agency term insufficient to entitle broker to commission)] or is

revoked by the seller. Because it may be revoked without liability for a commission at any time before it is performed, an open listing contract need not have the definite termination date that is required for an exclusive agency and exclusive right to sell listing [see *Bus. & Prof. Code* § 10176(f) (license of real estate licensee may be suspended or revoked for failure to specify definite date of final and complete termination in exclusive listing agreement)]. However, a seller's revocation of an open listing that lacks a specified duration must be made in good faith [*Tetrick v. Sloan* (1959) 170 *Cal.App.2d* 540, 545-547, 339 *P.2d* 613].

The broker must also show that he or she set in motion a continuous chain of events that resulted in the offer by the ready, willing, and able buyer [*Rose v. Hunter* (1957) 155 *Cal.App.2d* 319, 323, 317 *P.2d* 1027 ; *Nelson v. Mayer* (1954) 122 *Cal.App.2d* 438, 445, 265 *P.2d* 52 ; see *Estate of Ross* (1980) 101 *Cal.App.3d* 895, 900-901, 162 *Cal.Rptr.* 111 (broker must prove that sale was direct and proximate result of efforts to obtain commission); see MB 7500A.19[1] ("procure" defined), MB 7500A.18[1] ("ready, willing, and able")].

It should be noted that an open listing may contain an agreement by the seller to pay the listing broker in any amount, at any time, and for any service, other than for selling the property or procuring or finding a buyer, as the agreement may specify [*Civ. Code* § 1089].

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property LawBrokersBrokerage AgreementsReal Property LawBrokersRight to Commissions

Robert L. Risley, James B. Little, Peter H. Ferris, Eric J. Firstman, and Eugene C. Hu contributed to the original chapter for California Forms of Jury Instruction (Matthew Bender). P. Gerhardt Zacher, Kenneth M. Miller, and Alan Carlton contributed to the original chapter as consultants.



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CHAPTER 75A Matthew Bender Real Property Sales Instructions

PART A. ACTIONS INVOLVING BROKERS

2. Broker's Action to Recover Commission Based on Listing Agreement

6-75A California Forms of Jury Instruction MB 7500A.12

MB 7500A.12 Definition of Exclusive Right to Sell Listing

[1] Instruction Definition of Exclusive Right to Sell Listing

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

An exclusive right to sell listing gives to a broker for a specified period of time the sole right to sell or obtain a buyer for the property that is described in the listing. This means that no one else can sell the property during a period of time that is specified in the listing.

[*USE ONE OF FOLLOWING (See Use of Instruction)*]

A broker is entitled to the commission as stated in the listing when the broker presents to the seller an enforceable offer from a ready, willing, and able buyer on the terms that are set forth in the listing or that are otherwise acceptable to the seller.

[*OR*]

A broker is entitled to the commission as stated in the listing if, during the specified time period, the property is sold, no matter who procured the buyer or effected the sale.

[*OR*]

A broker is entitled to the commission as stated in the listing when the listing contains a provision for broker compensation under the following conditions, which are fulfilled: the property is sold within a specified period of time after the listing terminates to anyone with whom the agent has had negotiations before the termination.

[OR]

A broker is entitled to the commission even if the property is withdrawn from sale during the term of the listing, if the listing contains a provision that a commission is earned under these circumstances.

[CONTINUE INSTRUCTION]

If you find that the listing gives _____ [name of broker] an exclusive right to sell the property or to obtain a buyer for the property and that this exclusive right was for a specified period of time during which _____ [the property was sold or the broker presented to the seller an enforceable offer from a ready, willing, and able buyer on the terms set forth in the listing or that were otherwise acceptable to the seller or the property was sold within a specified period of time after the listing terminated to someone with whom the agent had negotiated before the termination or the property was withdrawn from sale, and the listing agreement contained a provision for payment of commission under these circumstances], then you must find that the listing was an exclusive right to sell listing.

Authorities: *Bus. & Prof. Code § 10176(f); Civ. Code § 1086(f)(1); Leonard v. Fallas (1959) 51 Cal.2d 649, 652-653, 335 P.2d 665 ; Nystrom v. First Nat. Bank of Fresno (1978) 81 Cal.App.3d 759, 767, 146 Cal.Rptr. 711 ; Babcock v. Houston (1973) 33 Cal.App.3d 858, 863, 109 Cal.Rptr. 454 ; Charles B. Webster Real Estate v. Rickard (1971) 21 Cal.App.3d 612, 615, 98 Cal.Rptr. 559 ; Berzon v. U.L.C. Corp. (1969) 274 Cal.App.2d 690, 696, 79 Cal.Rptr. 277 ; Baumgartner v. Meek (1954) 126 Cal.App.2d 505, 511-512, 272 P.2d 552 .*

[2] Use of Instruction

This instruction should be used to define an exclusive right to sell listing whenever that term is used in this chapter. One of the four alternatives should be selected to set forth the broker's performance under the listing agreement. The instruction should be used in conjunction with the instructions in MB 7500A.10 ("listing" defined), MB 7500A.16 (broker's burden of proof in action for commission on exclusive right to sell listing), MB 7500A.18 ("ready, willing, and able" defined) and MB 7500A.19 ("procure" defined). It may also be desirable to use the instruction in conjunction with the instructions in MB 7500A.01 through MB 7500A.03 ("broker" and "salesperson" defined and salesperson as broker's agent). It may be necessary to use the instruction in MB 7500A.11 ("open" listing defined) to distinguish the exclusive right to sell listing from an open listing.

[3] Comment

An "exclusive right to sell" listing is a listing in which the seller grants to a broker, for a specified period of time, the exclusive right to sell or to find or obtain a buyer for the property [*Civ. Code § 1086(f)(1)*]. The broker is entitled to the agreed compensation, during that period of time, if (1) the property is sold, no matter who effected the sale, or (2) the listing agent received and presents to the owner any enforceable offer from a ready, able, and willing buyer on terms authorized by the listing or accepted by the owner [*Civ. Code § 1086(f)(1); Leonard v. Fallas (1959) 51 Cal.2d 649, 652-653, 335 P.2d 665*].

The exclusive right to sell listing may provide that the broker is entitled to a commission when the property is sold within a specified period after termination of the listing to anyone with whom the broker had negotiated before the

termination [Civ. Code § 1086(f)(1)]. In addition, the listing agreement may provide that a broker may recover all or part of the commission when, during the listing period, the property is either (1) withdrawn from the market [*Blank v. Borden* (1974) 11 Cal.3d 963, 115 Cal.Rptr. 31, 524 P.2d 127 ; *Baumgartner v. Meek* (1954) 126 Cal.App.2d 505, 511-512, 272 P.2d 552], or (2) otherwise rendered unmarketable by the seller [*Berzon v. U.L.C. Corp.* (1969) 274 Cal.App.2d 690, 696, 79 Cal.Rptr. 277 (broker entitled to commission under provision when sale of property by seller made performance by broker impossible)].

In exchange for the exclusivity of the listing, the broker is required to exercise due diligence in performing his or her contract duties [*Charles B. Webster Real Estate v. Rickard* (1971) 21 Cal.App.3d 612, 615, 98 Cal.Rptr. 559 ; see *Nystrom v. First Nat. Bank of Fresno* (1978) 81 Cal.App.3d 759, 767, 146 Cal.Rptr. 711 ("[t]here is implied in every contract a covenant by each party not to do anything which will deprive the other parties thereto of the benefits of the contract... [T]his covenant not only imposes upon each contracting party the duty to refrain from doing anything which would render performance of the contract impossible by any act of his own, but also the duty to do everything that the contract presupposes that he will do to accomplish its purpose"); *Baumgartner v. Meek* (1954) 126 Cal.App.2d 505, 511, 272 P.2d 552 (consideration for seller's promise to pay money if sale was made by her, was performance of services by brokers in seeking purchaser)]. Thus, under an exclusive right to sell listing, the broker need not prove that he or she was the sale's procuring cause if he or she made diligent efforts to find a buyer [*Leonard v. Fallas* (1959) 51 Cal.2d 649, 652-653, 335 P.2d 665 ; but see MB 7500A.11 (broker must make such a showing for an open listing)].

An exclusive right to sell listing must contain a definite and final termination date [Bus. & Prof. Code § 10176(f); *Nystrom v. First Nat. Bank of Fresno* (1978) 81 Cal.App.3d 759, 764-765, 146 Cal.Rptr. 711]. However, a lack of a definite termination date renders the listing voidable, not void. The broker may still recover a commission when he or she has rendered full performance and the seller has benefited from the broker's services [*Babcock v. Houston* (1973) 33 Cal.App.3d 858, 863, 109 Cal.Rptr. 454]. If the broker has not fully performed or if the owner has not unjustly benefited from the services, however, the agreement is voidable at the seller's option [*Babcock v. Houston* (1973) 33 Cal.App.3d 858, 862-864, 109 Cal.Rptr. 454 ; *Nichols v. Boswell-Alliance Constr. Corp.* (1960) 181 Cal.App.2d 584, 588-589, 5 Cal.Rptr. 546].

An exclusive right to sell listing must clearly indicate that the broker is entitled to a commission when the property is sold or when a legally binding commitment to sell, lease, or exchange the property comes into existence during the listing period [see Civ. Code § 1086(b) ("sell" and "sale" include lease and exchange), (i) ("sold" includes leased and exchanged; property is sold when legally binding commitment to sell it comes into existence)]. An "exclusive" listing agreement that does not mention an exclusive right to sell or right to a commission when the property is sold by the owner is presumed to be an exclusive agency listing without any right to a commission on sale by owner [*E.A. Strout Western Realty v. Gregoire* (1950) 101 Cal.App.2d 512, 518, 225 P.2d 585]. For discussion of an exclusive agency listing, see MB 7500A.13.

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property LawBrokersBrokerage AgreementsReal Property LawBrokersRight to Commissions

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CHAPTER 75A Matthew Bender Real Property Sales Instructions

PART A. ACTIONS INVOLVING BROKERS

2. Broker's Action to Recover Commission Based on Listing Agreement

6-75A California Forms of Jury Instruction MB 7500A.13

MB 7500A.13 Definition of Exclusive Agency Listing

[1] Instruction Definition of Exclusive Agency Listing

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

An exclusive agency listing gives to a broker the sole right, for a specific period of time, to sell or obtain a buyer for the property that is described in the listing. This means that no other broker can sell the property during that time period. [Optional: Unlike an exclusive right to sell listing,] [The/the] seller under an exclusive agency listing reserves the right to directly sell the property by himself or herself without incurring an obligation to pay a commission to the broker.

[*USE ONE OF FOLLOWING (See Use of Instruction)*]

A broker is entitled to the commission as stated in the listing when the broker presents to the seller an enforceable offer from a *ready, willing, and able* buyer on the terms that are set forth in the listing or that are otherwise acceptable to the seller.

[*OR*]

A broker is entitled to the commission as stated in the listing if, during the specified time period, the property is sold by someone other than the seller.

[*OR*]

A broker is entitled to the commission as stated in the listing when the listing contains a provision for broker compensation under the following conditions, which are fulfilled: the property is sold within a specified period of time after the listing terminates to anyone with whom the agent has had negotiations before the termination.

[OR]

A broker is entitled to the commission even if the property is withdrawn from sale during the term of the listing, if the listing contains a provision that a commission is earned under these circumstances.

[CONTINUE INSTRUCTION]

If you find that the listing gives _____ [name of broker] an exclusive right to sell the property or to obtain a buyer for the property, but reserves to the seller the right to sell the property directly, that the exclusive right was for a specified period of time, during which _____ [the property was sold by someone other than the seller or the broker presented to the seller an enforceable offer from a ready, willing, and able buyer on the terms set forth in the listing or that were otherwise acceptable to the seller or the property was sold within a specified period of time after the listing terminated to someone with whom the agent had negotiated before the termination or the property was withdrawn from sale, and the listing agreement contained a provision for payment of commission under these circumstances], you must find that the listing was an exclusive agency listing.

Authorities: Civ. Code § 1086(f)(1), (2); *Coldwell Banker & Co. v. Pepper Tree Office Center* (1980) 106 Cal.App.3d 272, 278, 165 Cal.Rptr. 51, disapproved on other grounds, *Barrett v. Bank of America* (1986) 183 Cal.App.3d 1362, 1370-1371, 229 Cal.Rptr. 16; *Seck v. Foulks* (1972) 25 Cal.App.3d 556, 570 n.12, 102 Cal.Rptr. 170; *Carlsen v. Zane* (1968) 261 Cal.App.2d 399, 401-402, 67 Cal.Rptr. 747; *E.A. Strout Western Realty v. Gregoire* (1950) 101 Cal.App.2d 512, 518, 225 P.2d 585.

[2] Use of Instruction

This instruction should be used to define an exclusive agency listing whenever that term is used in this chapter. One of the four alternative paragraphs should be selected to set forth the broker's performance under the listing agreement. The optional language in the bracketed portion may be used to distinguish an exclusive agency listing from an exclusive right to sell listing [see MB 7500A.12].

The instruction should be used in conjunction with the instruction in MB 7500A.17 regarding the broker's burden of proof in an action for commission on an exclusive agency listing. In a dispute arising from a sale by the seller and the denial of commission to the exclusive broker, this instruction should be used in conjunction with the instructions for "procure" in MB 7500A.19 and "ready, willing, and able" in MB 7500A.18. However, these issues do not arise when the property is sold by another broker.

An instruction on the exclusive right to sell listing is set forth in MB 7500A.12. For an instruction and comments on listing agreements in general, see MB 7500A.10.

[3] Comment

The feature that distinguishes an exclusive agency listing from an exclusive right to sell listing is that it reserves to the

seller the right to directly sell the property by himself or herself. Thus, the comments on the exclusive right to sell listing in MB 7500A.12 apply to the exclusive agency listing.

As with an exclusive right to sell listing, an exclusive agency listing may provide that the broker receive a commission if the property is sold within a specified period after termination of the listing period to a buyer with whom the broker had negotiated before the listing period terminates [see *Civ. Code* § 1086(f)(1); *Leonard v. Fallas* (1959) 51 Cal.2d 649, 652-653, 335 P.2d 665]. In addition, the listing must contain clear and specific language of the "exclusive" agency [*Summers v. Freeman* (1954) 128 Cal.App.2d 828, 831, 276 P.2d 131].

An exclusive agency listing also must contain a "definite, specified date of final and complete termination" [see *Bus. & Prof. Code* § 10176(f)]. Absent a specific contrary contractual provision, an exclusive agency automatically terminates without notice when the seller sells to a buyer procured independently of the broker [*E.A. Strout Western Realty v. Gregoire* (1950) 101 Cal.App.2d 512, 518-519, 225 P.2d 585].

In an exclusive agency listing the seller can sell the property himself or herself without incurring an obligation to pay a commission to the listing broker [*Carlsen v. Zane* (1968) 261 Cal.App.2d 399, 401-402, 67 Cal.Rptr. 747]. However, if the broker presents a ready, willing, and able buyer before actual execution of a purchase contract between the seller and another buyer who was independently procured by the seller, the broker is entitled to a commission [*Houston v. Williams* (1921) 53 Cal.App. 267, 278, 200 P. 55 ; see *Civ. Code* § 1086(b) (terms "sell" and "sale" include lease and exchange)].

If another broker makes the sale, the listing broker need not show that he or she was the procuring cause of the sale [*Carlsen v. Zane* (1968) 261 Cal.App.2d 399, 401, 67 Cal.Rptr. 747 ; see *Leonard v. Fallas* (1959) 51 Cal.2d 649, 652, 335 P.2d 665 (under exclusive right to sell agreement, it is immaterial that agent was not procuring cause of sale)]. However, if the seller sells to a buyer who has already been contacted by the listing broker, the broker must show that he or she was the procuring cause [*Coldwell Banker & Co. v. Pepper Tree Office Center Associates* (1980) 106 Cal.App.3d 272, 278, 165 Cal.Rptr. 51 , *disapproved on other grounds*, *Barrett v. Bank of America* (1986) 183 Cal.App.3d 1362, 1370-1371, 229 Cal.Rptr. 16].

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property LawBrokersBrokerage AgreementsReal Property LawBrokersRight to Commissions

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CHAPTER 75A Matthew Bender Real Property Sales Instructions

PART A. ACTIONS INVOLVING BROKERS

2. Broker's Action to Recover Commission Based on Listing Agreement

6-75A California Forms of Jury Instruction MB 7500A.14

MB 7500A.14 Definition of Multiple Listing Service

[1] Instruction Definition of Multiple Listing Service

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

A multiple listing service is an exchange of existing listings between two or more brokers. In a multiple listing service, brokers pool their listings by furnishing the listings to the service, which compiles and disseminates them to all the member brokers who all become authorized agents of the seller.

[*EITHER (See Use of Instruction)*]

When an exclusive-listing property is sold through a multiple listing service, the commission is divided in agreed proportions between the listing broker and the selling broker. A listing broker who is also the selling broker is entitled to the entire commission, less the multiple listing fee.

[*OR*]

When an open-listing property is sold through a multiple listing service, the commission is paid to the selling agent who procures an enforceable offer from a ready, willing, and able buyer on terms accepted by the seller. An open listing need not specify any commission but may state that the compensation is to be negotiated between the selling agent and the seller.

[*CONTINUE INSTRUCTION*]

A multiple listing is valid only if the seller has authorized the listing broker to place the listing in the multiple listing service.

[*OPTIONAL (See Use of Instruction)*]

A listing agent is one who has obtained a listing of property of the kind for which he or she is licensed to act as agent for compensation.

A selling agent is an agent participating in a multiple listing service who acts in cooperation with a listing agent and who sells, or finds and obtains a buyer for, the property.

Authorities: *Civ. Code* §§ 1086(g), (h), 1087, 1088; *Korstad v. Hoffman* (1963) 221 Cal.App.2d Supp. 805, 808-809, 35 Cal.Rptr. 61 .

[2] Use of Instruction

This instruction should be used when the rights of listing brokers and cooperating or selling brokers are in issue, and it may be used in conjunction with the instructions in MB 7500A.11 through MB 7500A.13 and MB 7500A.15 through MB 7500A.17, as appropriate. For a definition of listing agreements in general, see *MB 7500A.10*. Alternatives are provided for specifying the compensation arrangement under either an open or exclusive listing. In appropriate cases, the optional definitions of listing agent and selling agent may be used.

[3] Comment

A multiple listing service is an exchange of existing listings between two or more brokers. That is, it is an entity rather than a technical legal term for a kind of listing. In a multiple listing service, brokers pool their listings by furnishing the listings to the service, which compiles and disseminates them to members who all become authorized agents of the seller [*Korstad v. Hoffman* (1963) 221 Cal.App.2d Supp. 805, 808-809, 35 Cal.Rptr. 61].

The Civil Code contains the following, somewhat obtuse, definition. A multiple listing service is a facility of cooperation of agents (and appraisers), operating through an intermediary that does not itself act as an agent (or appraiser), through which agents establish express or implied legal relationships with regard to listed properties (or that may be used by agents and appraisers, pursuant to the rules of the service, to prepare market evaluations and appraisals of real property) [*Civ. Code* § 1087]. (The references to appraisers are in the statute but are enclosed in parentheses here because they are superfluous in the present context.) The statutory definition may be substituted for the one in this instruction.

As a practice, when a broker sells an exclusive-listing property, the commission is divided in agreed proportions between the listing broker and the selling broker. A listing broker is defined as the broker who obtains the listing [*Civ. Code* § 1086(g)]. A selling broker is "an agent participant in a multiple listing service who acts in cooperation with a listing agent and who sells, or finds and obtains a buyer for, the property" [*Civ. Code* § 1086(h)]. A property is "sold" when a legally binding commitment to sell, lease, or exchange the property comes into existence [*Civ. Code* § 1086(b), (i)]. A listing agent who is also the selling agent is entitled to the entire commission, less the multiple listing fee [see *Civ. Code* § 1090 (listing agent as selling agent)].

When an open-listing property is sold through the multiple listing service, the commission is paid to the selling agent who procures an enforceable offer from a ready, willing, and able buyer on terms accepted by the seller [*Civ. Code* §

1087]. An open listing need not specify any commission to the selling agent but may state that the compensation is to be negotiated between selling agent and seller [*Civ. Code* § 1087].

A multiple listing service that restricts membership to members of a local or state realtors association or refuses to list agreements other than "exclusive right to sell" [see *MB 7500A.12*, *MB 7500A.16*] agreements may be violating antitrust laws [*Marin County Bd. of Realtors, Inc. v. Palsson* (1976) 16 *Cal.3d* 920, 939-940, 130 *Cal.Rptr. 1*, 549 *P.2d* 833 ; *People v. National Association of Realtors* (1981) 120 *Cal.App.3d* 459, 478-479, 174 *Cal.Rptr. 728*].

A listing may not be placed in a multiple listing service without the seller's authorization [*Civ. Code* § 1088]. The listing broker who places the listing in a multiple listing service is responsible for the truth and accuracy of all representations made by the agent [*Civ. Code* § 1088].

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property LawBrokersBrokerage AgreementsReal Property LawBrokersRight to Commissions

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CHAPTER 75A Matthew Bender Real Property Sales Instructions

PART A. ACTIONS INVOLVING BROKERS

2. Broker's Action to Recover Commission Based on Listing Agreement

6-75A California Forms of Jury Instruction MB 7500A.15

MB 7500A.15 Broker's Burden of Proof in Action for Commission on Open Listing**[1] Instruction**[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Plaintiff has the burden of proving all of the following:

1. That Plaintiff and Defendant executed an open listing agreement in writing employing Plaintiff to find a buyer for Defendant's property, known as _____ [describe property], and agreeing to a commission of _____ [describe commission].

2. That Plaintiff was a licensed California real estate broker when the agreement was executed and when the buyer was found _____ [optional (see Use of Instruction): and that some of the Plaintiff's broker functions were carried out by a real estate salesperson, _____ (name of salesperson), who was acting as Plaintiff's agent].

[OPTIONAL (See Use of Instruction)]

3. That before _____ [date of expiration of listing agreement] Plaintiff _____ [optional: or Plaintiff's agent] procured a purchaser, _____ [name], to buy the property, and Defendant subsequently sold the property to _____ [name].

[OR]

3. That Plaintiff _____ [optional: or Plaintiff's agent] procured and presented to Defendant an offer from _____ [name] who was ready, willing, and able to buy the property on the terms set forth in the listing agreement, and Defendant refused to sell the property to _____ [name]. Plaintiff presented the offer to Defendant before _____ [date of expiration of listing agreement] and before Defendant had agreed to sell the property to anyone else.

[OR]

3. That Plaintiff _____ [optional: or Plaintiff's agent] procured and presented to Defendant before _____ [date of expiration of listing agreement] an offer from _____ [name] who was ready, willing, and able to buy the property on terms agreed to by Defendant and Defendant refused to sell the property to _____ [name].

[CONTINUE]

4. That Defendant has not paid Plaintiff the agreed commission of \$_____.

Authorities: *Bus. & Prof. Code § 10136; Civ. Code §§ 1086(f)(3), 1624(a)(4); Kopf v. Milam (1963) 60 Cal.2d 600, 605, 35 Cal.Rptr. 614, 387 P.2d 390 ; Board of Trustees v. Superior Court of El Dorado County (1969) 79 Cal.Rptr. 58 ; Seck v. Foulks (1972) 25 Cal.App.3d 556, 102 Cal.Rptr. 170 .*

[2] Use of Instruction

This instruction should be used when the plaintiff broker is seeking to recover on an open listing. Its alternative paragraphs are for use in the following three different situations in which the broker is entitled to recover on an open listing:

- The person procured buys the property;
- The person procured is ready, willing, and able to buy the property on the terms in the listing; and
- The person procured agrees to buy the property on terms set by defendant.

If certain facts are not at issue, such as the broker's license, that element of the instruction should not be given. The optional provision in paragraph 2 should be given when the broker's agent performed some of the contractual duties.

When appropriate, the instructions in MB 7500A.01 through MB 7500A.03, on the definitions of broker and real estate salesperson and the salesperson as the broker's agent, may be used. In addition, the instructions on the general definition of a listing in MB 7500A.10 and the definition of an open listing in MB 7500A.11 should be used with this instruction.

"Ready, willing, and able" is defined in MB 7500A.18, and "procure" is defined in MB 7500A.19. The instruction defining the term "cause" set forth in Ch. 3E, *Matthew Bender Contract Damages Instructions*, must be used with this instruction.

A preponderance of evidence instruction [see Ch. 2, *California Judicial Council Evidence Instructions, CACI No. 200* ("More Likely True Than Not True")] and an instruction defining the term "cause" [see Ch. 4, *California Judicial*

Council Negligence Instructions, CACI No. 430 ("Causation: Substantial Factor")] must be used with this instruction.

[3] Comment

A broker earns a commission under an open listing only if he or she procures and presents to the owner an enforceable offer from a ready, able, and willing buyer on the terms authorized by the listing or accepted by the owner, before the property is otherwise sold and before the listing expires or is revoked [*Civ. Code* § 1086(f)(3)]. Thus, a broker earns the commission by first procuring a ready, willing, and able buyer [*Seck v. Foulks* (1972) 25 *Cal.App.3d* 556, 102 *Cal.Rptr.* 170], by procuring an offer accepted by the seller [*Kopf v. Milam* (1963) 60 *Cal.2d* 600, 605, 35 *Cal.Rptr.* 614, 387 *P.2d* 390], or when the property is sold to the person procured by the broker [*Board of Trustees v. Superior Court of El Dorado County* (1969) 79 *Cal.Rptr.* 58].

If the broker produces a satisfactory buyer during the listing period and the contract of sale is entered into either before or after the expiration of the listing, the broker is entitled to the commission regardless of when the ultimate sale is formally consummated [*Walter v. Libby* (1945) 72 *Cal.App.2d* 138, 164 *P.2d* 21]. When a purchaser is found and negotiations are begun within the time limit, it is immaterial that the negotiations are not completed until after expiration of the listing term [*De La Questa v. Armstrong Holdings Co.* (1920) 48 *Cal.App.* 487, 192 *P.* 135].

The broker must also show that he or she set in motion a continuous chain of events that resulted in the offer by a ready, willing, and able buyer [*Rose v. Hunter* (1957) 155 *Cal.App.2d* 319, 323, 317 *P.2d* 1027 ; *Nelson v. Mayer* (1954) 122 *Cal.App.2d* 438, 445, 265 *P.2d* 52 ; see *Estate of Ross* (1980) 101 *Cal.App.3d* 895, 900-901, 162 *Cal.Rptr.* 111 (broker must prove that sale was direct and proximate result of efforts to obtain commission); see also MB 7500A.19 ("procure" defined), MB 7500A.18 ("ready, willing, and able" defined)].

A real estate broker must plead and prove that he or she was duly licensed at the time the cause of action arose [*Bus. & Prof. Code* § 10136]. Under the statute of frauds, the listing agreement must be in writing and executed by the defendant to be enforceable [*Civ. Code* § 1624(a)(4); *Buckaloo v. Johnson* (1975) 14 *Cal.3d* 815, 821, 122 *Cal.Rptr.* 745, 537 *P.2d* 865 , disapproved on other grounds, *Della Penna v. Toyota Motor Sales, U.S.A., Inc.* (1995) 11 *Cal.4th* 376, 393 *n.5*, 45 *Cal.Rptr.2d* 436, 902 *P.2d* 740 ; see *Friddle v. Epstein* (1993) 16 *Cal.App.4th* 1649, 1655-1656 (defendant's ratification of purchase agreement was sufficient to satisfy former *Civ. Code* § 1624(d) [see now *Civ. Code* § 1624(a)(4)]). A licensed real estate broker or salesperson may not enforce an oral commission agreement by asserting equitable estoppel [see Ch. 3F, *Matthew Bender Contract Defenses Instructions*] against a statute of frauds defense, unless there is a showing of actual fraud by the party to be charged under that agreement [*Phillippe v. Shapell Industries* (1987) 43 *Cal.3d* 1247, 1264, 241 *Cal.Rptr.* 22, 743 *P.2d* 1279 ; see Ch. 19, *Judicial Council Fraud or Deceit Instructions*, and Ch. 19A, *Matthew Bender Fraud and Deceit Instructions*].

Additional discussion of the issues surrounding the definition of broker and real estate salesperson, the real estate salesperson as the broker's agent, and the definitions of "listing" and "open listing" are found in MB 7500A.01 through MB 7500A.11.

Legal Topics:

For related research and practice materials, see the following legal topics:

EvidenceProcedural ConsiderationsBurdens of ProofAllocationReal Property LawBrokersBrokerage AgreementsReal Property LawBrokersDiscipline, Licensing & RegulationReal Property LawBrokersRight to Commissions

Robert L. Risley, James B. Little, Peter H. Ferris, Eric J. Firstman, and Eugene C. Hu contributed to the original chapter for California Forms of Jury Instruction (Matthew Bender). P. Gerhardt Zacher, Kenneth M. Miller, and Alan Carlton contributed to the original chapter as consultants.



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CHAPTER 75A Matthew Bender Real Property Sales Instructions

PART A. ACTIONS INVOLVING BROKERS

2. Broker's Action to Recover Commission Based on Listing Agreement

6-75A California Forms of Jury Instruction MB 7500A.16

MB 7500A.16 Broker's Burden of Proof in Action for Commission on Exclusive Right to Sell Listing**[1] Instruction**

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Plaintiff has the burden of proving all of the following:

1. That Plaintiff and Defendant executed an exclusive right to sell listing agreement in writing employing Plaintiff to find a buyer for Defendant's property _____ [describe property] and agreeing to a commission of _____ [describe commission].

2. That Plaintiff was a licensed California real estate broker when the agreement was executed and when the buyer was found. [Optional (see Use of Instruction): Some of the Plaintiff's broker functions were carried out by a real estate salesperson, _____ [name of salesperson], who was acting as Plaintiff's agent.]

[EITHER (See Use of Instruction)]

3. That Plaintiff [optional: or Plaintiff's agent] exercised due diligence in carrying out [his/her] duties under the contract by actually selling the property before _____ [date of expiration of listing agreement].

[OR]

3. That Plaintiff [optional: or Plaintiff's agent] exercised due diligence in carrying out [his/her] duties under the

contract by procuring and presenting to Defendant an offer from _____ [name] who was ready, willing, and able to buy the property _____ [on the terms set forth in the listing agreement or on terms agreed to by Defendant] and Defendant refused to sell the property to _____ [name]. Plaintiff presented the offer to Defendant before _____ [date of expiration of listing agreement].

[OR]

3. That Plaintiff [optional: or Plaintiff's agent] exercised due diligence in carrying out [his/her] duties under the contract by negotiating before _____ [date of expiration of listing agreement] with _____ [name]. The property was sold to _____ [name] before _____ [date of expiration of listing agreement].

[OR]

3. That the listing agreement contained a provision for the commission's payment if the Defendant withdrew the property from sale, and that before _____ [date of expiration of listing agreement] Defendant withdrew the property from sale.

[CONTINUE]

4. That Defendant has not paid Plaintiff the agreed commission of \$_____.

Authorities: *Bus. & Prof. Code* § 10136; *Civ. Code* §§ 1086(f)(1), 1624(a)(4); *Blank v. Borden* (1974) 11 Cal.3d 963, 115 Cal.Rptr. 31, 524 P.2d 127; *Leonard v. Fallas* (1959) 51 Cal.2d 649, 652-653, 335 P.2d 665; *Babcock v. Houston* (1973) 33 Cal.App.3d 858, 863, 109 Cal.Rptr. 454; *Charles B. Webster Real Estate v. Rickard* (1971) 21 Cal.App.3d 612, 615, 98 Cal.Rptr. 559; *Berzon v. U.L.C. Corp.* (1969) 274 Cal.App.2d 690, 696-697, 79 Cal.Rptr. 277; *Carlsen v. Zane* (1968) 261 Cal.App.2d 399, 401-402, 67 Cal.Rptr. 747; *Baumgartner v. Meek* (1954) 126 Cal.App.2d 505, 511-512, 272 P.2d 552.

[2] Use of Instruction

This instruction should be used when the plaintiff broker is seeking to recover on an exclusive right to sell listing. The four alternative paragraphs in the instruction are to be used when (1) the property is sold by anyone during the period of the listing, (2) the broker procures a buyer and the defendant refuses to sell, (3) the property is withdrawn from sale, and (4) the property is sold after the listing has expired but during a further period specified in the listing to a person with whom the broker had negotiated during the term of the listing. The optional provision in paragraph 2 should be given when the broker's agent performed some of the contractual duties. For an instruction on an exclusive agency listing when the property is sold during the period of the listing by some person other than the owner [see *Civ. Code* § 1086(f)(2)], see MB 7500A.17.

When appropriate, the instructions in MB 7500A.01 through MB 7500A.03, on the definitions of broker and real estate salesperson and the salesperson as the broker's agent, may be used. In addition, the instructions on the general definition of a listing in MB 7500A.10 and the definition of an exclusive right to sell listing in MB 7500A.11 should be used with this instruction.

"Ready, willing, and able" is defined in MB 7500A.18, and "procure" is defined in MB 7500A.19.

A preponderance of evidence instruction [see Ch. 2, *California Judicial Council Evidence Instructions*, CACI No. 200 ("More Likely True Than Not True")] and an instruction defining the term "cause" [see Ch. 4, *California Judicial Council Negligence Instructions*, CACI No. 430 ("Causation: Substantial Factor")] must be used with this instruction.

[3] Comment

A broker earns a commission under an exclusive right to sell listing if during the term of the listing the property is sold, no matter who effected the sale, or the listing agent receives and presents to the owner any enforceable offer from a ready, able, and willing buyer on terms authorized by the listing or accepted by the owner. The listing may also provide for the broker's compensation if the property is sold within a specified period after termination of the listing to anyone with whom the agent has had negotiations before that termination [Civ. Code § 1086(f)(1)].

If there is a valid exclusive right to sell listing [see MB 7500A.12], the broker is entitled to the commission even if the owner sells the property himself or herself during the period of the listing [*Berzon v. U.L.C. Corp.* (1969) 274 Cal.App.2d 690, 696-697, 79 Cal.Rptr. 277 ; *Carlsen v. Zane* (1968) 261 Cal.App.2d 399, 401-402, 67 Cal.Rptr. 747]. If the listing provides that the commission is earned if the property is withdrawn from sale during its term, the clause is enforceable [*Blank v. Borden* (1974) 11 Cal.3d 963, 115 Cal.Rptr. 31, 524 P.2d 127 ; *Baumgartner v. Meek* (1954) 126 Cal.App.2d 505, 511-512, 272 P.2d 552]. If the agreement provides that the commission will be earned if the property is sold during a specified period after the listing expires to a person with whom the broker has negotiated, the agreement is enforceable and the broker does not even have to establish that he or she was the procuring cause of the sale [*Leonard v. Fallas* (1959) 51 Cal.2d 649, 652-653, 335 P.2d 665].

In exchange for the exclusivity of the listing, the broker is required to exercise due diligence in performing his or her contract duties [*Charles B. Webster Real Estate v. Rickard* (1971) 21 Cal.App.3d 612, 615, 98 Cal.Rptr. 559 ; see *Nystrom v. First Nat. Bank of Fresno* (1978) 81 Cal.App.3d 759, 767, 146 Cal.Rptr. 711 ("[t]here is implied in every contract a covenant by each party not to do anything which will deprive the other parties thereto of the benefits of the contract... [T]his covenant not only imposes upon each contracting party the duty to refrain from doing anything which would render performance of the contract impossible by any act of his own, but also the duty to do everything that the contract presupposes that he will do to accomplish its purpose"); *Baumgartner v. Meek* (1954) 126 Cal.App.2d 505, 511, 272 P.2d 552 (consideration for seller's promise to pay money if sale was made by her was performance of services by brokers in seeking purchaser)]. Thus, under an exclusive right to sell listing, the broker need not prove that he or she was the procuring cause of the sale if he or she made diligent efforts to find a buyer [*Leonard v. Fallas* (1959) 51 Cal.2d 649, 652-653, 335 P.2d 665 ; but see MB 7500A.11 (broker must make such a showing for an open listing)].

For a discussion of the writing and licensing requirements, see MB 7500A.15[3].

Legal Topics:

For related research and practice materials, see the following legal topics:

Evidence
Procedural Considerations
Burdens of Proof
Preponderance of Evidence
Real Property Law
Brokers
Brokerage Agreements
Real Property Law
Brokers
Right to Commissions

Robert L. Risley, James B. Little, Peter H. Ferris, Eric J. Firstman, and Eugene C. Hu contributed to the original chapter for California Forms of Jury Instruction (Matthew Bender). P. Gerhardt Zacher, Kenneth M. Miller, and Alan Carlton contributed to the original chapter as consultants.



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CHAPTER 75A Matthew Bender Real Property Sales Instructions

PART A. ACTIONS INVOLVING BROKERS

2. Broker's Action to Recover Commission Based on Listing Agreement

6-75A California Forms of Jury Instruction MB 7500A.17

MB 7500A.17 Broker's Burden of Proof in Action for Commission on Exclusive Agency Listing**[1] Instruction** Broker's Burden of Proof in Action for Commission on Exclusive Agency Listing[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____**Plaintiff has the burden of proving all of the following:**

1. That Plaintiff and Defendant executed an exclusive agency listing agreement in writing employing Plaintiff to find a buyer for Defendant's property _____ *[describe property]* **and agreeing to a commission of** _____ *[describe commission]*.

2. That Plaintiff was a licensed California real estate broker when the agreement was executed and when the buyer was found. *[Optional (see Use of Instruction): Some of the Plaintiff's broker functions were carried out by a real estate salesperson,* _____ *(name of salesperson), who was acting as Plaintiff's agent.]*

[EITHER (See Use of Instruction)]

3. That Plaintiff *[optional: or Plaintiff's agent]* **exercised due diligence in carrying out [his/her] duties under the contract by actually selling the property before** _____ *[date of expiration of listing agreement]* *[optional: and before the property was sold by Defendant on* _____ *(date of sale)].*

[OR]

3. That Plaintiff [optional: or Plaintiff's agent] exercised due diligence in carrying out [his/her] duties under the contract by procuring and presenting to Defendant an offer from _____ [name] who was ready, willing, and able to buy the property _____ [on the terms set forth in the listing agreement or on terms agreed to by Defendant] and Defendant refused to sell the property to _____ [name]. Plaintiff presented the offer to Defendant before _____ [date of expiration of listing agreement] [optional: and before the property was sold by Defendant on _____ (date of sale)].

[OR]

3. That Plaintiff [optional: or Plaintiff's agent] exercised due diligence in carrying out [his/her] duties under the contract by negotiating before _____ [date of expiration of listing agreement] with _____ [name]. The property was sold to _____ [name] before _____ [date of expiration of listing agreement] [optional: and before the property was sold by Defendant on _____ (date of sale)].

[OR]

3. That the listing agreement contained a provision for the commission's payment if the Defendant withdrew the property from sale and that before _____ [date of expiration of listing agreement], Defendant withdrew the property from sale without selling the property directly to someone else.

Authorities: *Bus. & Prof. Code* § 10136; *Civ. Code* §§ 1086(f)(1), (2), 1624(a)(4); *Coldwell Banker & Co. v. Pepper Tree Office Center* (1980) 106 Cal.App.3d 272, 278, 165 Cal.Rptr. 51, disapproved on other grounds, *Barrett v. Bank of America* (1986) 183 Cal.App.3d 1362, 1370-1371, 229 Cal.Rptr. 16; *Seck v. Foulks* (1972) 25 Cal.App.3d 556, 570 n.12, 102 Cal.Rptr. 170; *Carlsen v. Zane* (1968) 261 Cal.App.2d 399, 401-402, 67 Cal.Rptr. 747; *E.A. Strout Western Realty v. Gregoire* (1950) 101 Cal.App.2d 512, 518, 225 P.2d 585.

[2] Use of Instruction

This instruction should be used when the plaintiff broker is seeking recovery on an exclusive agency listing. One of the four alternative paragraphs should be selected to set forth the broker's performance under the listing agreement. The optional language in the bracketed portion may be used to distinguish an exclusive agency listing from an exclusive right to sell listing [see MB 7500A.12 and MB 7500A.16].

The instruction should be used in conjunction with the instruction in MB 7500A.13 on the definition of an exclusive agency listing. In a dispute arising from a sale by the seller and the denial of commission to the exclusive broker, this instruction should be used in conjunction with the instructions for "procure" in MB 7500A.19 and "ready, willing, and able" in MB 7500A.18. However, these issues do not arise when the property is sold by another broker.

An instruction on the broker's burden of proof for recovery on an exclusive right to sell listing is set forth in MB 7500A.16. For an instruction and comments on listing agreements in general, see MB 7500A.10.

[3] Comment

An exclusive agency listing differs from an exclusive right to sell listing by its reservation to the seller of the right to directly sell the property by himself or herself. Thus, the comments on the exclusive right to sell listing set forth in MB 7500A.12 and MB 7500A.16 apply to the exclusive agency listing.

In an exclusive agency listing the seller can sell the property himself or herself without incurring an obligation to pay a commission to the listing broker [*Carlsen v. Zane* (1968) 261 Cal.App.2d 399, 401-402, 67 Cal.Rptr. 747]. However, if the broker presents a ready, willing, and able buyer before actual execution of a purchase contract between the seller and another buyer who was independently procured by the seller, the broker is entitled to a commission [*Houston v. Williams* (1921) 53 Cal.App. 267, 278, 200 P. 55 ; see Civ. Code § 1086(b) (terms "sell" and "sale" include lease and exchange)].

If another broker makes the sale, the listing broker need not show that he or she was the procuring cause of the sale [*Carlsen v. Zane* (1968) 261 Cal.App.2d 399, 401, 67 Cal.Rptr. 747 ; see *Leonard v. Fallas* (1959) 51 Cal.2d 649, 652, 335 P.2d 665 (under exclusive right to sell agreement, it is immaterial that agent was not procuring cause of sale)]. However, if the seller sells to a buyer who has already been contacted by the listing broker, the broker must show that he or she was the procuring cause [*Coldwell Banker & Co. v. Pepper Tree Office Center Associates* (1980) 106 Cal.App.3d 272, 278, 165 Cal.Rptr. 51 , disapproved on other grounds, *Barrett v. Bank of America* (1986) 183 Cal.App.3d 1362, 1370-1371, 229 Cal.Rptr. 16]. As with an exclusive right to sell listing, an exclusive agency listing may provide for the broker to receive a commission if the property is sold within a specified period after termination of the listing period to a buyer with whom the broker had negotiated before the listing period terminates [see Civ. Code § 1086(f)(1); *Leonard v. Fallas* (1959) 51 Cal.2d 649, 652-653, 335 P.2d 665].

As with an exclusive right to sell listing, the listing must contain clear and specific language of the "exclusive" agency [*Summers v. Freeman* (1954) 128 Cal.App.2d 828, 831, 276 P.2d 131]. An exclusive agency listing also must contain a "definite, specified date of final and complete termination" [see Bus. & Prof. Code § 10176(f)]. Absent a specific contrary contractual provision, an exclusive agency automatically terminates without notice when the seller sells to a buyer procured independently of the broker [*E.A. Strout Western Realty v. Gregoire* (1950) 101 Cal.App.2d 512, 518-519, 225 P.2d 585].

Legal Topics:

For related research and practice materials, see the following legal topics:

Evidence
Procedural Considerations
Burdens of Proof
Allocation
Real Property Law
Brokers
Brokerage Agreements
Real Property Law
Brokers
Right to Commissions

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CHAPTER 75A Matthew Bender Real Property Sales Instructions

PART A. ACTIONS INVOLVING BROKERS

2. Broker's Action to Recover Commission Based on Listing Agreement

6-75A California Forms of Jury Instruction MB 7500A.18

MB 7500A.18 Definition of Ready, Willing, and Able

[1] Instruction Definition of Ready, Willing, and Able

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

For a broker to have earned the commission, [he/she/it] must demonstrate that the buyer was "ready, willing, and able" and that the offer was substantially in accordance with the terms contained in the listing agreement. A "ready and willing" buyer is one who makes an offer to purchase the property on the terms contained in the listing agreement or on such other terms as are acceptable to the owner. The buyer is "able" when [he/she/it] has the legal capacity and the financial ability to purchase the property. "Financial ability" means that [he/she/it] has sufficient resources available to consummate the transaction when the time comes to do so.

Authorities: *Martin v. Culver Enterprises, Inc.* (1966) 239 Cal.App.2d 925, 929, 49 Cal.Rptr. 149 ; *Herring v. Fisher* (1952) 110 Cal.App.2d 322, 327, 242 P.2d 963 ; *Baber v. Pappas* (1929) 97 Cal.App. 534, 536, 275 P. 978 .

[2] Use of Instruction

This instruction should be used when the issue is whether the prospective buyer was ready, willing, and able to make the purchase so as to entitle the broker to the commission. This issue only arises when the seller refuses to contract with the prospective buyer.

[3] Comment

A buyer is ready and willing to purchase the property when he or she makes an offer to purchase the property on the seller's terms [*Martin v. Culver Enterprises, Inc.* (1966) 239 Cal.App.2d 925, 929, 49 Cal.Rptr. 149]. A buyer is able to purchase the property when he or she is financially able to purchase the property. The burden is on the broker to show

that the buyer is able [*Herring v. Fisher* (1952) 110 Cal.App.2d 322, 327, 242 P.2d 963]. The buyer does not have to have sufficient funds when the offer is made; it is sufficient that it can be shown that he or she would have had the necessary credit or assets at the time the transaction was to be consummated [*Baber v. Pappas* (1929) 97 Cal.App. 534, 536, 275 P. 978].

A prospective seller owes a duty to the broker not to act arbitrarily or in bad faith to prevent the transaction's consummation when the broker has found a prospective buyer who is ready, able, and willing to purchase the property, and the prospective buyer and the prospective seller have agreed on the sale's terms and conditions. Even if the listing agreement provided for a broker's commission only on completion of the sale and the sale is not consummated because the seller acted arbitrarily or in bad faith, preventing consummation, the broker is entitled to a commission [*Stromer v. Browning* (1966) 65 Cal.2d 421, 55 Cal.Rptr. 18, 420 P.2d 730].

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property LawBrokersRight to Commissions

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CHAPTER 75A Matthew Bender Real Property Sales Instructions

PART A. ACTIONS INVOLVING BROKERS

2. Broker's Action to Recover Commission Based on Listing Agreement

6-75A California Forms of Jury Instruction MB 7500A.19

MB 7500A.19 Definition of Procure

[1] Instruction Definition of Procure

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Plaintiff procured the buyer if [he/she/it] set in motion a chain of events which, without a break in their continuity, caused the buyer to make an offer on the seller's terms or on terms agreed to by the seller.

Authorities: *Rose v. Hunter* (1957) 155 Cal.App.2d 319, 323, 317 P.2d 1027 ; *Nelson v. Mayer* (1954) 122 Cal.App.2d 438, 445, 265 P.2d 52 .

[2] Use of Instruction

This instruction should be used to define procure when that term is used in this chapter.

[3] Comment

If the broker establishes that there was a ready, willing, and able buyer, the broker must also establish that he or she procured the buyer. "Procure" means to set in motion a chain of events that, without a break in continuity, results in the offer by the ready, willing, and able buyer [*Rose v. Hunter* (1957) 155 Cal.App.2d 319, 323, 317 P.2d 1027 ; *Nelson v. Mayer* (1954) 122 Cal.App.2d 438, 445, 265 P.2d 52 ; see *Estate of Ross* (1980) 101 Cal.App.3d 895, 900-901, 162 Cal.Rptr. 111].

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property LawBrokersRight to Commissions

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CHAPTER 75A Matthew Bender Real Property Sales Instructions

PART A. ACTIONS INVOLVING BROKERS

2. Broker's Action to Recover Commission Based on Listing Agreement

6-75A California Forms of Jury Instruction MB 7500A.20

MB 7500A.20 Defense of Revocation of Open Listing**[1] Instruction** Defense of Revocation of Open Listing

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

If you find that Defendant notified Plaintiff that [he/she/it] revoked the listing agreement before Plaintiff procured an enforceable offer and presented it to the Defendant, Plaintiff may not recover the commission.

Authority: Tetrick v. Sloan (1959) 170 Cal.App.2d 540, 545-546, 339 P.2d 613 .

[2] Use of Instruction

This instruction should be used when the defendant claims that he or she revoked the open listing agreement before the plaintiff performed the duties set forth in the listing.

[3] Comment

When the listing is an open listing in which no termination date is specified [*see MB 7500A.11*], the seller may revoke the agreement without liability at any time before it is performed [*Tetrick v. Sloan (1959) 170 Cal.App.2d 540, 545-546, 339 P.2d 613*]. Only performance of the contract duties by the real estate agent would prevent the seller's revocation or withdrawal [*Tetrick v. Sloan (1959) 170 Cal.App.2d 540, 545-546, 339 P.2d 613*]. For a discussion of what would constitute performance by the broker, see *MB 7500A.11* and *MB 7500A.15*.

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property LawBrokersBrokerage AgreementsReal Property LawBrokersRight to Commissions

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CHAPTER 75A Matthew Bender Real Property Sales Instructions

PART A. ACTIONS INVOLVING BROKERS

2. Broker's Action to Recover Commission Based on Listing Agreement

6-75A California Forms of Jury Instruction MB 7500A.21

MB 7500A.21 Defense of Rescission of Exclusive Listing

[1] Instruction Defense of Rescission of Exclusive Listing

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

If you find that Plaintiff failed to use due diligence in looking for a buyer for Defendant's property and the Defendant notified Plaintiff that [he/she/it] rescinded the listing agreement before Plaintiff found a buyer, Plaintiff may not recover the commission.

Authorities: *Coleman v. Mora* (1968) 263 Cal.App.2d 137, 149-152, 69 Cal.Rptr. 166 ; *Carlsen v. Zane* (1968) 261 Cal.App.2d 399, 402, 67 Cal.Rptr. 747 .

[2] Use of Instruction

This instruction should be used when the defendant contends that he or she rescinded the listing agreement because of the plaintiff's failure to use due diligence in finding a buyer.

[3] Comment

A seller may rescind an exclusive listing for failure of consideration if the broker fails to use due diligence in looking for a buyer. The rescission is a defense to the broker's action for a commission [*Coleman v. Mora* (1968) 263 Cal.App.2d 137, 149-152, 69 Cal.Rptr. 166]. The seller must notify the broker of the rescission before the broker has performed. If the seller does not notify the broker and sells himself or herself, the failure to use due diligence is not a defense [*Carlsen v. Zane* (1968) 261 Cal.App.2d 399, 402, 67 Cal.Rptr. 747].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts Law Remedies Rescission & Redhibition General Overview Real Property Law Brokers Brokerage
Agreements Real Property Law Brokers Right to Commissions

Robert L. Risley, James B. Little, Peter H. Ferris, Eric J. Firstman, and Eugene C. Hu contributed to the original chapter for California Forms of Jury Instruction (Matthew Bender). P. Gerhardt Zacher, Kenneth M. Miller, and Alan Carlton contributed to the original chapter as consultants.



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CHAPTER 75A Matthew Bender Real Property Sales Instructions

PART A. ACTIONS INVOLVING BROKERS

2. Broker's Action to Recover Commission Based on Listing Agreement

6-75A California Forms of Jury Instruction MB 7500A.22-MB 7500A.29

Reserved for Future Use

MB 7500A.22Reserved for Future Use



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CHAPTER 75A Matthew Bender Real Property Sales Instructions
PART A. ACTIONS INVOLVING BROKERS
3. Actions Against Real Estate Broker *

6-75A California Forms of Jury Instruction MB 7500A.30

MB 7500A.30 Broker Status as Fiduciary and Burden of Proof on Broker

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] PROPOSED INSTR. NO. _____

Because Defendant was Plaintiff's real estate [broker/salesperson], Defendant was in a confidential relationship with Plaintiff. This relationship imposed on Defendant the duty of acting in the highest good faith toward Plaintiff and precluded Defendant from obtaining any advantage over Plaintiff. Thus, the burden of proof is on Defendant to establish that Defendant acted in good faith toward Plaintiff and that _____ [describe transaction at issue] was fair to Plaintiff.

Authorities: *Batson v. Strehlow* (1968) 68 Cal.2d 662, 674-675, 68 Cal.Rptr. 589, 441 P.2d 101 ; *Solon v. Lichtenstein* (1952) 39 Cal.2d 75, 82, 244 P.2d 907 ; *Leko v. Cornerstone Bldg. Inspection Serv.* (2001) 86 Cal.App.4th 1109, 1115-1116, 103 Cal.Rptr.2d 858 ; *Montoya v. McLeod* (1985) 176 Cal.App.3d 57, 62-64, 221 Cal.Rptr. 353 ; *Ford v. Cournale* (1973) 36 Cal.App.3d 172, 180-181, 111 Cal.Rptr. 334 .

[2] Use of Instruction

This instruction should be used in an action against a real estate broker by a client based on fraud. It may apply to a defendant who was a real estate salesperson acting of the plaintiff's behalf. It should be used with the more general fraud instructions in Ch. 19, *California Judicial Council Fraud or Deceit Instructions*, and Ch. 19A, *Matthew Bender Fraud and Deceit Instructions*. It should also be used with the Judicial Council instructions on breach of fiduciary duty [see Ch. 41, *California Judicial Council Breach of Fiduciary Duty Instructions*], in particular, *CACI No. 4100*, " 'Fiduciary Duty' Explained." A preponderance of evidence instruction must be used with this instruction [see Ch. 2, *California Judicial Council Evidence Instructions, CACI No. 200* ("More Likely True than Not True")]. This instruction should also be used with the instructions in MB 7500A.02 and MB 7500A.03 when the action involves a salesperson

employed by the broker.

For detailed instructions on professional liability in real estate transactions, see Ch. 74A, *Matthew Bender Professional Liability in Real Property Transactions Instructions*.

For related Judicial Council instructions, see [3][b], *below*.

[3] Comment

[a] Broker's Fiduciary Duty

A real estate broker is charged with the same duty of undivided service and loyalty toward a client that is imposed on a trustee dealing with a beneficiary [*Batson v. Strehlow* (1968) 68 Cal.2d 662, 674-675, 68 Cal.Rptr. 589, 441 P.2d 101 ; *Leko v. Cornerstone Bldg. Inspection Serv.* (2001) 86 Cal.App.4th 1109, 1115-1116, 103 Cal.Rptr.2d 858 ; *Ford v. Cournale* (1973) 36 Cal.App.3d 172, 180-181, 111 Cal.Rptr. 334 ; see Ch. 41, *California Judicial Council Breach of Fiduciary Duty Instructions*]. A real estate salesperson who acts on behalf of the broker's client in a real estate transaction may have the same duty of undivided service and loyalty that the law imposes on the broker [*Montoya v. McLeod* (1985) 176 Cal.App.3d 57, 62-64, 221 Cal.Rptr. 353]. When the client questions the acts done by the broker, the burden is on the broker to establish that he or she acted in the utmost good faith and that the transaction was fair to the client [*Batson v. Strehlow* (1968) 68 Cal.2d 662, 674-675, 68 Cal.Rptr. 589, 441 P.2d 101 ; *Solon v. Lichtenstein* (1952) 39 Cal.2d 75, 82, 244 P.2d 907].

A real estate franchise company may be liable on a theory of ostensible agency for the fraud of its franchisee, the real estate broker [*Kaplan v. Coldwell Banker* (1997) 59 Cal.App.4th 741, 747-748, 69 Cal.Rptr.2d 640 (triable issue of fact existed with regard to ostensible agency of real estate broker who independently owned and operated Coldwell Banker franchise)]. However, in determining whether a true agency relationship exists between a franchisor and franchisee, the courts focus on the right to control. A true principal-agency relationship exists only when the franchisor retains complete or substantial control over the daily activities of the franchisee's business [*Kaplan v. Coldwell Banker* (1997) 59 Cal.App.4th 741, 745-746, 69 Cal.Rptr.2d 640 ; *Cislav v. Southland Corp.* (1992) 4 Cal.App.4th 1284, 1296, 6 Cal.Rptr.2d 386 ; see Ch. 3C, *Matthew Bender Contract Party Instructions*].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Chs. 6, *California Judicial Council Professional Negligence Instructions*, 41, *California Judicial Council Breach of Fiduciary Duty Instructions*]:

CACI No. 4100, "Fiduciary Duty" Explained

CACI No. 4101, Failure to Use Reasonable Care--Essential Factual Elements

CACI No. 4102, Duty of Undivided Loyalty--Essential Factual Elements

CACI No. 4103, Duty of Confidentiality--Essential Factual Elements

CACI No. 4106, Breach of Fiduciary Duty--Essential Factual Elements

Legal Topics:

For related research and practice materials, see the following legal topics:

EvidenceProcedural ConsiderationsBurdens of ProofAllocationReal Property LawBrokersFiduciary Responsibilities

Robert L. Risley, James B. Little, Peter H. Ferris, Eric J. Firstman, and Eugene C. Hu contributed to the original chapter for California Forms of Jury Instruction (Matthew Bender). P. Gerhardt Zacher, Kenneth M. Miller, and Alan Carlton contributed to the original chapter as consultants.

* NOTE: More detailed instructions on professional liability in real estate transactions are set forth in Ch. 74A, *Matthew Bender Professional Liability in Real Property Transactions Instructions*.



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CHAPTER 75A Matthew Bender Real Property Sales Instructions
PART A. ACTIONS INVOLVING BROKERS
3. Actions Against Real Estate Broker *

6-75A California Forms of Jury Instruction MB 7500A.31

MB 7500A.31 Broker's Duty to Disclose Material Facts to Client

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Because Defendant was in a confidential relationship with Plaintiff, Defendant had the duty to disclose all material facts concerning the _____ [describe transaction at issue] to Plaintiff.

Authorities: *Batson v. Strehlow* (1968) 68 Cal.2d 662, 674-675, 68 Cal.Rptr. 589, 441 P.2d 101 ; *Montoya v. McLeod* (1985) 176 Cal.App.3d 57, 62-64, 221 Cal.Rptr. 353 .

[2] Use of Instruction

This instruction should be used when there is an issue as to whether a broker disclosed all the material facts to a client. It may also be applicable to a defendant who was a real estate salesperson acting on the plaintiff's behalf. An instruction defining material fact is in Ch. 3G, *Matthew Bender Rescission of Contract Instructions*. This instruction should be used with the general fraud instructions in Ch. 19, *California Judicial Council Fraud or Deceit Instructions*, and Ch. 19A, *Matthew Bender Fraud and Deceit Instructions*. It should also be used, as appropriate, with the breach of fiduciary duty instructions in Ch. 41, *California Judicial Council Breach of Fiduciary Duty Instructions* [see, e.g., CACI No. 4103, "Duty of Confidentiality--Essential Factual Elements"].

For related Judicial Council instructions, see [3][b], *below*.

[3] Comment

[a] Duty to Disclose

A real estate broker as a fiduciary has the duty to disclose to the principal all of the material facts concerning the transaction [*Batson v. Strehlow* (1968) 68 Cal.2d 662, 674-675, 68 Cal.Rptr. 589, 441 P.2d 101]. A real estate salesperson who acts on behalf of the broker's principal in a real estate transaction may have the same duty of full disclosure the law imposes on the broker [*Montoya v. McLeod* (1985) 176 Cal.App.3d 57, 62-64, 221 Cal.Rptr. 353].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 6, *California Judicial Council Professional Negligence Instructions*, Ch. 41, *California Judicial Council Breach of Fiduciary Duty Instructions*]:

CACI No. 4100, "Fiduciary Duty" Explained

CACI No. 4101, Failure to Use Reasonable Care--Essential Factual Elements

CACI No. 4102, Duty of Undivided Loyalty--Essential Factual Elements

CACI No. 4103, Duty of Confidentiality--Essential Factual Elements

CACI No. 4106, Breach of Fiduciary Duty--Essential Factual Elements

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property LawBrokersFiduciary Responsibilities

Robert L. Risley, James B. Little, Peter H. Ferris, Eric J. Firstman, and Eugene C. Hu contributed to the original chapter for California Forms of Jury Instruction (Matthew Bender). P. Gerhardt Zacher, Kenneth M. Miller, and Alan Carlton contributed to the original chapter as consultants.

* NOTE: More detailed instructions on professional liability in real estate transactions are set forth in Ch. 74A, *Matthew Bender Professional Liability in Real Property Transactions Instructions*.



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CHAPTER 75A Matthew Bender Real Property Sales Instructions
PART A. ACTIONS INVOLVING BROKERS
3. Actions Against Real Estate Broker *

6-75A California Forms of Jury Instruction MB 7500A.32

MB 7500A.32 Broker's Duty of Care to Client

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] PROPOSED INSTR. NO. _____

Defendant, as Plaintiff's real estate [broker/salesperson], had the duty to exercise reasonable skill and ordinary diligence in representing Plaintiff's interests. The skill required is that skill reasonably to be expected from real estate brokers, who have special knowledge about real estate transactions.

Carleton v. Tortosa (1993) 14 Cal.App.4th 745, 754 ; *Montoya v. McLeod* (1985) 176 Cal.App.3d 57, 65, 221 Cal.Rptr. 353 ; *Stiefel v. McKee* (1969) 1 Cal.App.3d 263, 266, 81 Cal.Rptr. 565 ; *Wilson v. Hisey* (1957) 147 Cal.App.2d 433, 438, 305 P.2d 686 .

[2] Use of Instruction

This instruction should be used in an action against a real estate broker for negligence in representing a client in a real estate sales transaction. It may also be applicable to a defendant who was a real estate salesperson acting on the plaintiff's behalf.

For related Judicial Council instructions, see [3][b], *below*.

[3] Comment

[a] Duty of Care

As an agent, a real estate broker has the duty to exercise reasonable skill and diligence on the client's behalf. As

professionals, brokers are required to exercise the particular skill reasonably to be expected of them and to have special knowledge with regard to their duties as brokers [*Padgett v. Phariss* (1997) 54 Cal.App.4th 1270, 1279-1280, 63 Cal.Rptr.2d 373 ; *Carleton v. Tortosa* (1993) 14 Cal.App.4th 745, 754 ; *Stiefel v. McKee* (1969) 1 Cal.App.3d 263, 266, 81 Cal.Rptr. 565 ; *Wilson v. Hisey* (1957) 147 Cal.App.2d 433, 438, 305 P.2d 686]. A real estate salesperson who acts on behalf of the broker's client in a real estate transaction may have the same duty to use the skill and care expected of a professional real estate agent [*Montoya v. McLeod* (1985) 176 Cal.App.3d 57, 65, 221 Cal.Rptr. 353].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 6, *California Judicial Council Professional Negligence Instructions*, Ch. 41, *California Judicial Council Breach of Fiduciary Duty Instructions*]:

CACI No. 4100, "Fiduciary Duty" Explained

CACI No. 4101, Failure to Use Reasonable Care--Essential Factual Elements

CACI No. 4106, Breach of Fiduciary Duty--Essential Factual Elements

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate Law Agency Relationships Duties & Liabilities Care, Good Faith & Reasonable Skill Duty of Care & Reasonable Skill Real Property Law Brokers Fiduciary Responsibilities Torts Negligence Standards of Care Reasonable Care General Overview

Robert L. Risley, James B. Little, Peter H. Ferris, Eric J. Firstman, and Eugene C. Hu contributed to the original chapter for California Forms of Jury Instruction (Matthew Bender). P. Gerhardt Zacher, Kenneth M. Miller, and Alan Carlton contributed to the original chapter as consultants.

* NOTE: More detailed instructions on professional liability in real estate transactions are set forth in Ch. 74A, *Matthew Bender Professional Liability in Real Property Transactions Instructions*.



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CHAPTER 75A Matthew Bender Real Property Sales Instructions
PART A. ACTIONS INVOLVING BROKERS
3. Actions Against Real Estate Broker *

6-75A California Forms of Jury Instruction MB 7500A.33

MB 7500A.33 Broker's Duty to Inspect Property and Make Related Disclosures to Buyer

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] PROPOSED INSTR. NO. _____

Defendant as a real estate [broker/salesperson] was under a duty to Plaintiff to conduct a reasonably competent and diligent visual inspection of the property _____ [which comprised one to four dwelling units or a manufactured home as defined in *Health & Safety Code § 18007*] and to disclose to Plaintiff all facts that _____ [materially affected *or* were important in determining] the property's value or desirability that an investigation would have revealed. In exercising [his/her/its] duty, Defendant was required to exercise the degree of care that a reasonably prudent real estate _____ [broker *or* salesperson] would exercise.

[OPTIONAL (*See Use of Instruction*)]

Defendant's duty to inspect does not include an inspection of any areas that are not reasonably and normally accessible in a reasonably competent and diligent visual inspection of the property. Defendant's duty to inspect also does not include an affirmative inspection of areas off the site of the subject property or of public records or permits concerning the property's title or use.

[OPTIONAL (*See Use of Instruction*)]

The duty to inspect does not include an inspection of more than the specific unit offered for sale.

[*OPTIONAL* (See Use of Instruction)]

Defendant's duty to inspect does not include inquiring of the homeowners' association whether there are construction defects in the common areas of the property or whether there is pending or proposed litigation concerning those defects.

Authorities: *Civ. Code* §§ 2079(a), 2079.2, 2079.3; *Pagano v. Krohn* (1997) 60 Cal.App.4th 1, 8-9, 70 Cal.Rptr.2d 1 ; *Robinson v. Grossman* (1997) 57 Cal.App.4th 634, 640-641, 67 Cal.Rptr.2d 380 ; *Padgett v. Phariss* (1997) 54 Cal.App.4th 1270, 1280-1282, 63 Cal.Rptr.2d 373 ; *Wilson v. Century 21 Great Western Realty* (1993) 15 Cal.App.4th 298, 308 ; *Smith v. Rickard* (1988) 205 Cal.App.3d 1354, 1359-1363, 254 Cal.Rptr. 633 ; *Easton v. Strassburger* (1984) 152 Cal.App.3d 90, 98-102, 199 Cal.Rptr. 383 .

[2] Use of Instruction

This instruction should be used in a negligence action against a real estate broker by a buyer for failure to reasonably inspect the property and to disclose material facts about the property sold that were known or should have been known to the broker. It may also be applicable to a defendant who was a real estate salesperson acting on the plaintiff's behalf. The instruction should be used in an action against the seller's broker or a cooperating broker [*Civ. Code* § 2079; see [3][b], *below*]. The buyer's broker has no similar duty to inspect [*Murray v. Hayden* (1989) 211 Cal.App.3d 311, 314-316, 259 Cal.Rptr. 257 ; see [3][c], *below*].

The first optional paragraph should be used when there is a factual issue as to whether the broker had a duty to inspect certain areas. The second optional paragraph should be used when the property sold was a unit in a planned development, a condominium, or a stock cooperative and there is a factual issue about whether the broker's duty extended beyond the particular unit that was for sale. The third optional paragraph should be used when the property sold was a unit in a planned development and there is a factual issue about whether the broker had a duty to ascertain whether there was any pending or proposed litigation concerning the property.

If there is evidence that the buyer or prospective buyer breached the duty to exercise reasonable care to protect himself or herself, counsel for the broker should consider the instruction in MB 7500A.36.

For related Judicial Council instructions, see [3][g], *below*.

[3] Comment

[a] Establishment of Broker's Duty to Inspect

This instruction is based on the rule promulgated in *Easton v. Strassburger* [*Easton v. Strassburger* (1984) 152 Cal.App.3d 90, 98-102, 199 Cal.Rptr. 383], which established that a broker has a duty to reasonably inspect property the broker is offering for sale and to disclose to the buyer all material defects. Breach of this duty renders the broker open to potential liability in negligence. The *Easton* case extended the rule in earlier cases that a broker was liable to a buyer for failure to disclose facts known to the broker that materially affected the property's value [see *Cooper v. Jevne* (1976) 56 Cal.App.3d 860, 866, 128 Cal.Rptr. 724 ; *Lingsch v. Savage* (1963) 213 Cal.App.2d 729, 733, 29 Cal.Rptr. 201].

The court in *Easton* pointed out that limiting the duty to disclose would protect incompetent and unscrupulous brokers and provide a disincentive to make an inspection. The court also found that buyers justifiably rely on real estate brokers in residential sales transactions to provide information and that brokers are in a position to make a competent

inspection. The court further noted that the Code of Ethics of the National Association of Realtors contained an affirmative duty to make an inspection. However, the court did not express an opinion as to whether the duty to inspect applied to sales of commercial real estate [*Easton v. Strassburger* (1984) 152 Cal.App.3d 90, 98-102, 199 Cal.Rptr. 383].

Although California courts have not confronted this precise issue, real estate salespersons who act on behalf of brokers' clients in real estate transactions may have the same duty to inspect and disclose that the law imposes on brokers [cf. *Montoya v. McLeod* (1985) 176 Cal.App.3d 57, 65, 221 Cal.Rptr. 353 (real estate salesperson had duty to exercise skill and care expected of professional real estate agent)].

For further discussion, see California Real Estate Law and Practice, Ch. 63, *Duties and Liabilities of Brokers* (Matthew Bender).

[b] Codification of Rule in Civil Code

The holding in *Easton v. Strassburger* [*Easton v. Strassburger* (1984) 152 Cal.App.3d 90, 98-102, 199 Cal.Rptr. 383 ; see [a], above] was codified and further defined in Civ. Code § 2079 *et seq.* Civ. Code §§ 2079.6-2079.11 were subsequently added to Article 2 on "Duty to Prospective Purchaser of Residential Property." The Legislature declared that Civ. Code §§ 2079-2079.6 should be construed as a definition of the duty of care found to exist by the holding of *Easton*, and the manner of its discharge, and is declarative of the common law regarding this duty [Civ. Code § 2079.12(a)(4)]. However, the Legislature stated further that nothing in Civ. Code § 2079.12 is intended to affect a court's ability to interpret Civ. Code §§ 2079-2079.6 [Civ. Code § 2079.12(a)(4)].

Civ. Code § 2079(a) provides that a licensed real estate broker or salesperson [see *Bus. & Prof. Code* § 10000 *et seq.*] has a duty to a prospective buyer of residential real property comprising one to four dwelling units or a manufactured home as defined in *Health & Safety Code* § 18007 to conduct a reasonably competent and diligent visual inspection of the property offered for sale and to disclose to that prospective purchaser all facts that materially affect the property's value or desirability that an investigation would reveal. Whether information has sufficient materiality to affect the value or desirability of residential property is ordinarily a question of fact [*Alexander v. McKnight* (1992) 7 Cal.App.4th 973, 977, 9 Cal.Rptr.2d 453 ; *Lingsch v. Savage* (1963) 213 Cal.App.2d 729, 737, 29 Cal.Rptr. 201]. Once the seller and the seller's agent make the required disclosures, the potential purchasers must investigate and make an informed decision based on those disclosures. In making the required disclosures, the seller's agent is required only to act in good faith and not convey the seller's representations without a reasonable basis for believing them to be true. The agent has no duty to verify independently or disclaim the accuracy of the seller's representations [*Robinson v. Grossman* (1997) 57 Cal.App.4th 634, 642-644, 67 Cal.Rptr.2d 380 (trial court correctly refused jury instructions expanding duty of seller's agent to buyer beyond Civ. Code § 2079)].

Civ. Code § 2079 applies to a broker who has a listing agreement with the seller to find or obtain a buyer and to a broker who acts in cooperation with a listing broker to find and obtain a buyer [Civ. Code § 2079(a)]. The duty also encompasses leases of the property that include an option to purchase, ground leases of land on which one to four dwelling units have been constructed, and real property sales contracts as defined in Civ. Code § 2985 [Civ. Code § 2079.1].

A broker's statutory inspection and disclosure duties apply exclusively to prospective buyers, and not to other persons who are not parties to a real estate transaction. Thus, a child could not state a cause of action against a broker for failure to disclose microbial contamination in a home purchased by the child's mother [*Coldwell Banker Residential Brokerage Co. v. Superior Court* (2004) 117 Cal.App.4th 158, 165, 11 Cal.Rptr.3d 564].

[c] Limitations on Duty to Inspect

The broker's duty does not extend to areas that are not reasonably and normally accessible to an inspection or to an affirmative inspection of areas off the subject property's site or of public records or permits concerning the property's title or use [Civ. Code § 2079.3; *Wilson v. Century 21 Great Western Realty* (1993) 15 Cal.App.4th 298, 308]. Furthermore, if the property comprises a unit in a planned development [Bus. & Prof. Code § 11003], a condominium [see Civ. Code § 783], or a stock cooperative [see Bus. & Prof. Code § 11003.2], the duty does not include an inspection of more than the unit offered for sale provided the seller or broker has complied with the provisions of Civ. Code § 1368 regarding documents to be provided to the prospective purchaser [Civ. Code § 2079.3]. If the property is a unit in a planned development, the duty does not include a duty to inquire of the homeowners' association regarding pending or proposed litigation, or to search public records for such litigation [*Padgett v. Phariss* (1997) 54 Cal.App.4th 1270, 1280-1282, 63 Cal.Rptr.2d 373].

The broker's duty to inspect does not apply to subdivision transfers that must be accompanied by a copy of the Real Estate Commissioner's public report [see Bus. & Prof. Code § 11018.1 (requirement of subdivision public report)], or to subdivision transfers that can be made without a public report pursuant to Bus. & Prof. Code § 11010.4, unless the property has been previously occupied [Civ. Code § 2079.6].

The broker's duty to inspect under *Easton v. Strassburger* [*Easton v. Strassburger* (1984) 152 Cal.App.3d 90, 98-102, 199 Cal.Rptr. 383] and Civ. Code § 2079 is limited to residential property, and the presence of a residence on commercial property does not transform the property into residential property [*Smith v. Rickard* (1988) 205 Cal.App.3d 1354, 1363, 254 Cal.Rptr. 633 (duty of inspection and disclosure does not apply to 50-acre property with 25 acres of income-producing lemon and avocado trees despite presence of residence on property)].

[d] Limitations on Duty to Disclose

The broker's duty does not extend to elaborating on essential facts disclosed to a buyer. For example, when the essential facts about a water intrusion problem were disclosed to a buyer before he made an offer to buy the subject property, the broker was not duty bound to elaborate on those facts by providing further details regarding the various manifestations of water intrusion throughout the development or the precise allegations in the condominium association's complaint against the developer [*Pagano v. Krohn* (1997) 60 Cal.App.4th 1, 8-10, 70 Cal.Rptr.2d 1].

[e] Broker's Standard of Care

The standard of care owed by a broker is the degree of care that a reasonably prudent real estate licensee would exercise. The standard is measured by the degree of knowledge through education, experience, and examination, required to obtain a broker's license [Civ. Code § 2079.2; see Bus. & Prof. Code §§ 10000-10481].

[f] Statute of Limitations

An action for a broker's breach of the duty to inspect and disclose material facts affecting the value or desirability of residential property must be commenced within two years of the date the buyer takes possession of the property. The date of possession is the date of recordation, the date of close of escrow, or the date of occupancy, whichever occurs first [Civ. Code § 2079.4]. However, the two-year statute of limitations does not apply to causes of action for intentional fraud [*Williams v. Wells & Bennett Realtors* (1997) 52 Cal.App.4th 857, 61 Cal.Rptr.2d 34]. The two-year statute of limitations established by Civ. Code § 2079.4 does not apply to claims for breach of fiduciary duty brought against real estate brokers by purchasers whom they exclusively represent [*Field v. Century 21 Klowden-Forness Realty* (1998) 63 Cal.App.4th 18, 26-27, 73 Cal.Rptr.2d 784 (rejecting contention that cooperation of buyer's broker with seller's broker in completing sales transaction rendered buyer's broker "cooperating broker" under Civ. Code § 2079)].

[g] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [

see Ch. 41, *California Judicial Council Breach of Fiduciary Duty Instructions*]:

CACI No. 4100 "Fiduciary Duty" Explained

CACI No. 4101 Failure to Use Reasonable Care--Essential Factual Elements

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property LawBrokersFiduciary ResponsibilitiesTortsBusiness TortsFraud &
MisrepresentationNondisclosureElements

Robert L. Risley, James B. Little, Peter H. Ferris, Eric J. Firstman, and Eugene C. Hu contributed to the original chapter for California Forms of Jury Instruction (Matthew Bender). P. Gerhardt Zacher, Kenneth M. Miller, and Alan Carlton contributed to the original chapter as consultants.

* NOTE: More detailed instructions on professional liability in real estate transactions are set forth in Ch. 74A, *Matthew Bender Professional Liability in Real Property Transactions Instructions*.



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CHAPTER 75A Matthew Bender Real Property Sales Instructions

PART A. ACTIONS INVOLVING BROKERS

3. Actions Against Real Estate Broker *

6-75A California Forms of Jury Instruction MB 7500A.34

MB 7500A.34 Broker's Duty to Disclose Condition of Property on Statutory Transfer Disclosure Statement

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

[*EITHER (See Use of Instruction)*]

As a real estate [broker/salesperson], Defendant was under a duty to Plaintiff to conduct a reasonably competent and diligent visual inspection of the [property/manufactured home/mobilehome]. Based on that inspection and on the information provided by the seller[s] in the _____ [Real Estate Transfer Disclosure Statement *or* Manufactured Home and Mobilehome Transfer Disclosure Statement], Defendant was under a duty to Plaintiff to disclose any material facts on the "Agent's Inspection Disclosure" portion of the _____ [Real Estate Transfer Disclosure Statement *or* Manufactured Home and Mobilehome Transfer Disclosure Statement].

[*OR*]

As a real estate [broker/salesperson], Defendant was under a duty to Plaintiff to conduct a competent and diligent visual inspection of the accessible areas of the [property/manufactured home/mobilehome]. Based on that inspection, Defendant was under a duty to Plaintiff to disclose any material facts on the "Agent's Inspection Disclosure" portion of the _____ [Real Estate Transfer Disclosure Statement *or* Manufactured Home and Mobilehome Transfer Disclosure Statement].

Authorities: *Civ. Code* §§ 1102.6, 1102.6d.

[2] Use of Instruction

This instruction should be used in a buyer's negligence action against a real estate broker for failure to make disclosures required on the Real Estate Transfer Disclosure Statement (TDS) set forth in *Civ. Code* § 1102.6 or the Manufactured Home and Mobilehome TDS set forth in *Civ. Code* § 1102.6d. The first alternative instruction should be used when the broker represented the seller in the transaction. The second should be used when the broker who obtained the offer did not represent the seller in the transaction.

[3] Comment

[a] Establishment of Broker's Duty to Disclose

This instruction is based on *Civ. Code* §§ 1102.6 and 1102.6d, which establish sellers' and their brokers' duty to disclose to prospective buyers information concerning the condition of the real property [*Civ. Code* § 1102.6] and manufactured homes and mobilehomes [*Civ. Code* § 1102.6d] to be sold. The disclosures must be made on a copy of the appropriate statutory transfer disclosure statement ("TDS") form set forth in *Civ. Code* §§ 1102.6 (real estate TDS) and 1102.6d (manufactured home and mobilehome TDS).

This statutory duty to disclose is independent of, and does not change or diminish, a broker's duty to disclose any known fact materially affecting the property's value and desirability [*Civ. Code* § 1102.1; see *MB 7500A.31* (common law duty to disclose material facts), *MB 7500A.33* (codified duty to inspect and disclose)]. Further, the specification of items for disclosure on the TDS does not limit or abridge any obligation for disclosure created by any other provision of law or that may exist to avoid fraud, misrepresentation, or deceit in the sale of the property [*Civ. Code* § 1102.8].

The following subsections summarize the statutory disclosure requirements. For more detailed coverage, see *California Forms of Pleading and Practice*, Ch. 569, *Vendor and Purchaser* (Matthew Bender), and *California Legal Forms*, Ch. 23, *Real Property Sales Agreements* (Matthew Bender).

[b] Transfers to Which Disclosure Requirements Apply; Exceptions; Waiver

Civ. Code § 1101 et seq. requires transfers of real property, or residential stock cooperatives, containing one to four dwelling units to complete and provide prospective transferees with a statutory TDS [see *Civ. Code* §§ 1102.3, 1102.6]. On and after January 1, 2000, these requirements also apply to a resale of a manufactured home or mobilehome that is classified as personal property intended for use as a residence [*Civ. Code* § 1102(b)]. The types of transfers subject to these requirements include sales, exchanges, installment land sale contracts, leases with options to purchase, any other options to purchase, and ground leases coupled with improvements [*Civ. Code* § 1102(a)].

Exceptions to the disclosure requirements are set forth in *Civ. Code* § 1102.2. They include, for example, transfers that are subject to the public reporting requirements of the Subdivided Lands Act [see *Bus. & Prof. Code* §§ 11000 et seq. (Act), 11018.1] and transfers from one co-owner to one or more other co-owners.

Any waiver of the disclosure requirements is void as against public policy [*Civ. Code* § 1102(c); *Realmuto v. Gagnard* (2003) 110 Cal.App.4th 193, 201, 1 Cal.Rptr.3d 569].

[c] Separate and Distinct Obligations of Seller and Broker

The TDS is prepared in part by the seller and in part by the broker or agent, and the seller/broker or agent have separate and distinct obligations in preparing their respective sections of the TDS. The majority of the TDS seeks to elicit information solely from the seller regarding the condition of specific aspects of the subject property. The broker or

agent must identify those material facts discovered during a reasonably competent and diligent visual inspection of the property by completing Paragraph III (if the broker/agent represents the seller) or IV (to be completed by any other broker/agent who obtains an offer) of the TDS.

[d] Delivery of Transfer Disclosure Statement

The transfer disclosure statement's delivery must be made in person or by mail. Delivery to the buyer's spouse is deemed delivery to the buyer, unless otherwise provided by contract [*Civ. Code* § 1102.10].

If more than one broker is acting as an agent in a transaction, the broker who obtained the offer made by the buyer must deliver the disclosure to the buyer unless the seller has given other written instructions for delivery and except as provided in the next paragraph [*Civ. Code* § 1102.12(a)].

If a broker responsible for delivering the disclosures cannot obtain the disclosure statement and does not have written assurance from the buyer that the disclosure has been received, the broker must advise the buyer in writing of his or her right to the disclosure [*Civ. Code* § 1102.12(b)].

[e] Limitation on Broker's Liability

A listing or selling agent will not be liable for any error, inaccuracy, or omission of any information delivered under the statutory disclosure requirements if all of the following factors are present [*Civ. Code* § 1102.4(a)]:

- The error, inaccuracy, or omission was not within that agent's personal knowledge;
- The error, inaccuracy, or omission was based on information timely provided by public agencies or by certain other persons (i.e., a licensed engineer, land surveyor, geologist, structural pest control operator, contractor, or other expert, dealing with matters within the scope of the professional's license or expertise) in accordance with a request by a prospective transferee; and
- Ordinary care was exercised in obtaining and transmitting it.

[f] Consequences of Non-Compliance

A seller's failure to provide the transfer disclosure statement gives the buyer the right of rescission [*Realmuto v. Gagnard* (2003) 110 Cal.App.4th 193, 201, 1 Cal.Rptr.3d 569]. Once the property has been transferred, failure to make a required disclosure will not invalidate a transaction. However, a broker who willfully or negligently violates or fails to make the required disclosures is liable in the amount of actual damages suffered by a buyer [*Civ. Code* § 1102.13].

[g] Subsequent Inaccuracy

If information disclosed on a transfer disclosure statement is rendered inaccurate as a result of any act, occurrence, or agreement after the delivery of the required disclosures, the resulting inaccuracy does not constitute a violation of the disclosure provisions. If at the time the disclosures are required to be made, an item of information required to be disclosed is unknown or not available to the seller, and the seller or his or her broker has made a reasonable effort to ascertain it, the seller may use an approximation of the information, provided the approximation is (1) clearly identified as such, (2) reasonable, (3) based on the best information available to the seller or his or her broker, and (4) not used for the purpose of circumventing or evading the disclosure requirements [*Civ. Code* § 1102.5].

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property LawBrokersFiduciary ResponsibilitiesTortsBusiness TortsFraud &
MisrepresentationNondisclosureElements

Robert L. Risley, James B. Little, Peter H. Ferris, Eric J. Firstman, and Eugene C. Hu contributed to the original chapter for California Forms of Jury Instruction (Matthew Bender). P. Gerhardt Zacher, Kenneth M. Miller, and Alan Carlton contributed to the original chapter as consultants.

* NOTE: More detailed instructions on professional liability in real estate transactions are set forth in Ch. 74A, *Matthew Bender Professional Liability in Real Property Transactions Instructions*.



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California Forms of Jury Instruction

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CHAPTER 75A Matthew Bender Real Property Sales Instructions

PART A. ACTIONS INVOLVING BROKERS

3. Actions Against Real Estate Broker *

6-75A California Forms of Jury Instruction MB 7500A.35

MB 7500A.35 Broker's Duty to Disclose Natural Hazards to Buyer**[1] Instruction** Broker's Duty to Disclose Natural Hazards to Buyer[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

[EITHER (See Use of Instruction)]

As a real estate [broker/salesperson], Defendant was under a duty to Plaintiff to disclose that the property is located within [a/an] _____ [special flood zone hazard area or area of potential flooding] if Defendant _____ [actually knew that the property is within (a/an) _____ (special flood hazard area or area of potential flooding) or _____ (state name of local jurisdiction) compiled a list, by parcel, of properties within the _____ (special flood hazard area or area of potential flooding) and a notice was posted at the offices of the county recorder, county assessor, and county planning agency stating the location of the parcel list].

[OR]

As a real estate [broker/salesperson], Defendant was under a duty to Plaintiff to disclose that the property is located within [a/an] _____ [very high fire hazard severity zone or earthquake fault zone or seismic hazard zone or wildland fire zone] if Defendant _____ [actually knew that the property is within (a/an) _____ (very high fire hazard severity zone or earthquake fault zone or seismic hazard zone or wildland fire zone) or a map that includes the property has been provided to the _____ (state name of local agency) and a notice was posted at the offices of the county recorder,

county assessor, and county planning agency stating the location of the map and any information regarding changes to the map received by _____ (state name of local agency)].

Authorities: *Civ. Code* §§ 1103-1103.14; *Gov. Code* §§ 8589.4, 51178; *Pub. Res. Code* §§ 2622, 4125.

[2] Use of Instruction

This instruction should be used in a buyer's negligence action against a real estate broker for failure to disclose that the property is located in a statutorily specified natural hazard area. The first optional paragraph should be used when the property in question is located in a special flood hazard area designated as zone type "A" or "V" by the Federal Emergency Management Agency or when the property is located in an area of potential flooding. The second paragraph should be used when the property is located in (1) an area designated in *Pub. Res. Code* § 51178 as a very high fire hazard severity zone; (2) an earthquake fault zone, designated pursuant to *Pub. Res. Code* § 2622; (3) a seismic hazard zone, designated pursuant to *Pub. Res. Code* § 2696; or (4) a state responsibility area (i.e., an area subject to substantial forest fire risks and hazards) subject to *Pub. Res. Code* § 4125.

[3] Comment

[a] Establishment of Broker's Duty to Disclose

This instruction is based on *Civ. Code* § 1103, which requires sellers and their agents to notify prospective transferees when the real property lies within any of the following hazardous areas [*Civ. Code* § 1103(c); see *Civ. Code* § 1103.2]:

- A special flood hazard area [see *Gov. Code* § 8589.3];
- An area of potential flooding [see *Gov. Code* § 8589.4];
- A very high fire hazard severity zone [see *Gov. Code* § 51183.5];
- A wildland area that may contain substantial forest fire risks and hazards [see *Pub. Res. Code* § 4125];
- An earthquake fault zone [see *Pub. Res. Code* § 2621.9]; and
- A seismic hazard zone [see *Pub. Res. Code* § 2694].

The following subsections summarize these disclosure requirements. For more detailed coverage, see California Forms of Pleading and Practice, Ch. 569, *Vendor and Purchaser* (Matthew Bender).

[b] Transfers to Which Disclosure Requirements Apply; Exceptions

These disclosures are required with regard to the transfer of real property or of a residential stock cooperative improved with or consisting of one to four dwelling units. This applies to transfers by sale, exchange, installment land sale contract, lease with an option to purchase, any other option to purchase, or ground lease coupled with improvements [*Civ. Code* § 1103(a); see *Civ. Code* § 1103.2]. These requirements also apply to a resale of a manufactured home or mobilehome that is classified as personal property intended for use as a residence if the transaction was entered into after 1999 [*Civ. Code* § 1103(b); see *Health & Safety Code* §§ 18007, 18008].

If the transaction is subject to the statutory real estate transfer disclosure requirements [see *Civ. Code* §§ 1102, 1102.6; see also MB 7500A.34], the disclosures must be made in a (1) statutory natural hazard disclosure statement [*Civ. Code* § 1103.2], or (2) local option real estate transfer disclosure statement [see *Civ. Code* § 1102.6a].

Exceptions to the disclosure requirements are set forth in *Civ. Code § 1103.1(a)*. They include, for example, transfers from one co-owner to one or more co-owners and transfers to a spouse.

[c] Primary Disclosure Obligation

Civ. Code § 1103 requires the transferor (i.e., the seller) or the seller's agent to deliver the natural hazard disclosure statement. The statement provides that the disclosures are made by the seller and his or her agent(s), and includes signature blanks for the seller and agent(s) [see *Civ. Code § 1103.2(a)*]. Further, *Civ. Code § 1103.2(e)* provides that the required disclosures may be provided by the seller and seller's agent in the local option real estate disclosure statement. Thus, if the transaction is subject to *Civ. Code § 1102 et seq.*, both the seller and the seller's agent share responsibility for making the required disclosures.

If the transaction is not subject to *Civ. Code § 1102 et seq.*, the statutory provision governing the specific type of disclosure required to be made will determine the party responsible for making the disclosure. Thus, the disclosure must be made by the following person or entity:

- The seller, if the property is located within a very high fire hazard severity zone [see *Gov. Code § 51179*] or wildland area that may contain substantial forest fire risks and hazards (i.e., state responsibility area) [*Gov. Code § 51183.5(a)*; *Pub. Res. Code § 4136(a)*; see *Pub. Res. Code § 4136*]; or
- The seller's agent, or the seller if he or she is acting without any agent, if the property is located within a designated special flood hazard area, area of potential flooding shown on an inundation map, delineated earthquake fault zone, or designated seismic hazard zone [*Gov. Code §§ 8589.3, 8589.4(a)*; *Pub. Res. Code §§ 2621.9(a), 2694(a)*].

[d] Consequences of Non-Compliance

Failure to make a required natural hazard disclosure will not invalidate a transaction. However, a broker who willfully or negligently violates or fails to make the required disclosures is liable in the amount of actual damages suffered by a buyer [*Civ. Code § 1103.13*].

[e] Limitations on Liability

A broker who uses ordinary care in obtaining and transmitting the information is not liable for any error, inaccuracy, or omission of any information that is disclosed if it was not within the broker's personal knowledge and was based on information timely provided by public agencies [*Civ. Code § 1103.4(a)*]. A broker also is not liable for the delivery of a report or opinion prepared by a licensed engineer, land surveyor, geologist, or expert in natural hazard discovery dealing with matters within the scope of the professional's license or expertise, if the information was provided to the prospective buyer pursuant to a written or oral request for that information. In responding to the request, the expert is required to make the following determinations and include the following statements, as appropriate, in the report [*Civ. Code § 1103.4(c)*]:

- If the property is determined to be within an "airport influence area" [see *Bus. & Prof. Code § 11010(b)(13)(B)* (definition)], the report must include this statement [*Civ. Code § 1103.4(c)(1)*]:
"NOTICE OF AIRPORT IN VICINITY. This property is presently located in the vicinity of an airport, within what is known as an airport influence area. For that reason, the property may be subject to some of the annoyances or inconveniences associated with proximity to airport operations (for example: noise, vibration, or odors). Individual sensitivities to those annoyances can vary from person to person. You may wish to consider what airport annoyances, if any, are associated with the property before you

complete your purchase and determine whether they are acceptable to you."

- If the property is determined to be within the jurisdiction of the San Francisco Bay Conservation and Development Commission [see *Gov. Code § 66620 et seq.*], the report must include this statement [*Civ. Code § 1103.4(c)(2)*]: "NOTICE OF SAN FRANCISCO BAY CONSERVATION AND DEVELOPMENT COMMISSION JURISDICTION. This property is located within the jurisdiction of the San Francisco Bay Conservation and Development Commission. Use and development of property within the commission's jurisdiction may be subject to special regulations, restrictions, and permit requirements. You may wish to investigate and determine whether they are acceptable to you and your intended use of the property before you complete your transaction."

- If the property is determined to be within one mile of a parcel of real property designated as "Prime Farmland," "Farmland of Statewide Importance," "Unique Farmland," "Farmland of Local Importance," or "Grazing Land" on the most current "Important Farmland Map" issued by the California Department of Conservation, Division of Land Resource Protection, using solely the county-level GIS map data, if any, available on the Farmland Mapping and Monitoring Program web site, the report must include this statement [*Civ. Code § 1103.4(c)(3)*]: "NOTICE OF RIGHT TO FARM. This property is located within one mile of a farm or ranch land designated on the current county-level GIS 'Important Farmland Map,' issued by the California Department of Conservation, Division of Land Resource Protection. Accordingly, the property may be subject to inconveniences or discomforts resulting from agricultural operations that are a normal and necessary aspect of living in a community with a strong rural character and a healthy agricultural sector. Customary agricultural practices in farm operations may include, but are not limited to, noise, odors, dust, light, insects, the operation of pumps and machinery, the storage and disposal of manure, bee pollination, and the ground or aerial application of fertilizers, pesticides, and herbicides. These agricultural practices may occur at any time during the 24-hour day. Individual sensitivities to those practices can vary from person to person. You may wish to consider the impacts of such agricultural practices before you complete your purchase. Please be advised that you may be barred from obtaining legal remedies against agricultural practices conducted in a manner consistent with proper and accepted customs and standards pursuant to *Section 3482.5 of the Civil Code* or any pertinent local ordinance."

After complying with these natural hazard disclosure requirements, a broker is relieved of further duty of disclosure with regard to those items of information. A broker is not required to provide notice to the buyer if the information provided subsequently becomes inaccurate as a result of any governmental action, map revision, changed information, or other act or occurrence unless the broker has actual knowledge that the information has become inaccurate [*Civ. Code § 1103.5(a)*]. If information that is disclosed becomes inaccurate after the delivery of the required disclosures, the resulting inaccuracy does not constitute a violation of the disclosure requirements [*Civ. Code § 1103.5(a)*].

[f] Actions of Agents; Delivery of Disclosures

Any person or entity, other than a real estate licensee licensed pursuant to *Bus. & Prof. Code § 10000 et seq.*, acting in the capacity of an escrow agent for the transfer of real property subject to these disclosure requirements will not be deemed the agent of the transferor or transferee for purposes of the disclosure requirements unless the person or entity is empowered to act by any express written agreement, which will govern the extent of that agency [*Civ. Code § 1103.11*].

If more than one licensed real estate broker is acting as an agent in a transaction subject to *Civ. Code § 1103 et seq.*, the broker who obtained the offer must, except as otherwise provided in *Civ. Code § 1103 et seq.*, deliver the written disclosure to the transferee, unless the seller has given other written instructions for delivery [*Civ. Code § 1103.12(a)*]. If a broker responsible for delivering the disclosures cannot obtain the required disclosure statement and does not have written assurance from the buyer that the disclosure has been received, the broker must advise the buyer in writing of

his or her rights to the disclosure. A broker responsible for delivering disclosures must maintain a record of the action taken to effect compliance in accordance with *Bus. & Prof. Code § 10148* [*Civ. Code § 1103.12(b)*].

[g] Effect on Other Laws

The specification of items for disclosure in *Civ. Code § 1103 et seq.* does not limit or abridge any disclosure obligation created by any other provision of law or that may exist to avoid fraud, misrepresentation, or deceit in the transfer transactions. These provision were not intended to affect the existing obligations of the parties to a real estate contract, or their agents, to disclose any fact materially affecting the value and desirability of the property, including, but not limited to, the property's physical condition and previously received reports of physical inspection noted on the disclosure form provided pursuant to *Civ. Code §§ 1102.6 and 1102.6a* [*Civ. Code § 1103.8(a)*]. Similarly, these provisions do not change the duty of a real estate broker or salesperson to inspect property pursuant to *Civ. Code § 2079* [*Civ. Code § 1103.8(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property LawBrokersFiduciary ResponsibilitiesTortsBusiness TortsFraud & MisrepresentationNondisclosureElements

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CHAPTER 75A Matthew Bender Real Property Sales Instructions
PART A. ACTIONS INVOLVING BROKERS
3. Actions Against Real Estate Broker *

6-75A California Forms of Jury Instruction MB 7500A.36

MB 7500A.36 Buyer's Duty to Exercise Reasonable Care--Affirmative Defense

[1] Instruction Buyer's Duty to Exercise Reasonable Care--Affirmative Defense

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Plaintiff as a _____ [buyer or prospective buyer] of real property had a duty to exercise reasonable care to protect [himself/herself/itself]. This duty included those facts that are known to or within Plaintiff's diligent attention and observation. In exercising this duty, Plaintiff was required to exercise the degree of care that a reasonably prudent _____ [buyer or prospective buyer] would exercise.

Authorities: *Civ. Code § 2079.5; Pagano v. Krohn (1997) 60 Cal.App.4th 1, 10, 70 Cal.Rptr.2d 1 .*

[2] Use of Instruction

This instruction should be used in cases involving the broker's duty to inspect and disclose material facts affecting the property's value or desirability [*see MB 7500A.33*], when there is evidence that the material facts that were not inspected for or disclosed could have been known to the buyer as well on diligent observation of the property.

[3] Comment

Notwithstanding a broker's duty to prospective purchasers of residential property to inspect and disclose material facts affecting the property's value or desirability, a buyer or prospective buyer has a duty to exercise reasonable care to protect himself or herself. This duty includes those facts that are known to or within the diligent attention and observation of the buyer or prospective buyer [*Civ. Code § 2079.5*]. For example, when the buyers of a condominium knew there was water intrusion at the condominium development, which had resulted in litigation against the developer, the additional details they claimed the broker should have disclosed, including the content of the condominium

association's complaint, were within their own diligent attention [*Pagano v. Krohn* (1997) 60 Cal.App.4th 1, 10, 70 Cal.Rptr.2d 1 ; see *Assilzadeh v. California Federal Bank* (2000) 82 Cal.App.4th 399, 416, 98 Cal.Rptr.2d 176 (after broker informed purchaser of condominium unit that homeowners' association had filed and settled construction defect lawsuit against developer, "buyer should have investigated the facts further and, if necessary, should have hired an attorney for advice on the legal aspects of the lawsuit and settlement")]. For discussion of the broker's duty to inspect and disclose, see MB 7500A.33.

For further discussion, see California Real Estate Law and Practice, Ch. 73, *Defenses in Actions Involving Agreements of Sale* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property LawBrokersFiduciary ResponsibilitiesReal Property LawCommon Interest

CommunitiesCondominiumsPurchase & SaleTortsNegligenceStandards of CareReasonable CareGeneral Overview

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CHAPTER 75A Matthew Bender Real Property Sales Instructions

PART A. ACTIONS INVOLVING BROKERS

3. Actions Against Real Estate Broker *

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CHAPTER 75A Matthew Bender Real Property Sales Instructions
PART B. ACTIONS FOR BREACH OF CONTRACTS TO SELL

6-75A California Forms of Jury Instruction MB 7500A.50

MB 7500A.50 Buyer's Burden of Proof in Action for Damages for Seller's Breach of Contract of Sale

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Plaintiff has the burden of proving all of the following:

- 1. That Plaintiff and Defendant entered into a written contract for Plaintiff to purchase Defendant's property**
_____ [*describe property*];
- 2. That Plaintiff either performed what [he/she/it] was required to do under the contract, or was excused from doing any more under that contract;**
- 3. That Defendant breached the contract of sale by** _____ [*describe breach of contract, e.g., failure to execute escrow instructions and failure to deposit demands and deed in escrow*];
- 4. That Defendant's failure to perform caused the damages that Plaintiff complains of; and**
- 5. The nature and extent of Plaintiff's damages.**

Authorities: *Reichert v. General Ins. Co.* (1968) 68 Cal.2d 822, 830, 69 Cal.Rptr. 321, 442 P.2d 377 ; *Careau & Co. v. Security Pacific Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1388, 272 Cal.Rptr. 387 .

[2] Use of Instruction

This instruction should be used in a buyer's action for breach of a contract to sell real property. General breach of contract instructions are set forth in Ch. 3, *California Judicial Council Contracts Instructions*, and Chs. 3A through 3G.

Specific damages instructions are set forth in CACI Nos. 350-361 and MB 7500A.70-MB 7500A.77.

A preponderance of evidence instruction [see Ch. 2, *California Judicial Council Evidence Instructions*, CACI No. 200 ("More Likely True than Not True")] and an instruction defining the term "cause" [see Ch. 4, *California Judicial Council Negligence Instructions*, CACI No. 430 ("Causation: Substantial Factor")] must be used with this instruction. If foreseeability of damage is an issue, the instructions on that issue in Chs. 3 and 3E, as appropriate, must also be given.

[3] Comment

The essential elements of a cause of action for breach of contract are:

- The contract;
- Plaintiff's performance or excuse for non-performance;
- Defendant's breach;
- The resulting damages to plaintiff [*Reichert v. General Ins. Co.* (1968) 68 Cal.2d 822, 830, 69 Cal.Rptr. 321, 442 P.2d 377 ; *Careau & Co. v. Security Pacific Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1388, 272 Cal.Rptr. 387]; and
- Proximate causation of those damages [Civ. Code § 3300].

Under the statute of frauds, the sales contract must be in writing and must have been executed by the defendant to be enforceable [Civ. Code § 1624(a)(3); see *Kaljian v. Menezes* (1995) 36 Cal.App.4th 573, 588-589, 42 Cal.Rptr.2d 510 (failure to give requested statute of frauds jury instruction based on former Civ. Code § 1624(c) [see now Civ. Code § 1624(a)(3)] was prejudicial error). For general instructions on the statute of frauds, see Ch. 3F, *Defenses*]. To satisfy the statute of frauds, the writing must describe the real property so that it can be identified with reasonable certainty [*Alameda Belt Line v. City of Alameda* (2003) 113 Cal.App.4th 15, 20-21, 5 Cal.Rptr.3d 879]. Although a real estate contract must contain the "essential" elements of the agreement to satisfy the statute of frauds, what is "essential" depends on the circumstances of the agreement. For example, a real estate sales contract is not unenforceable for failure to specify a time of performance because the law implies a reasonable time [*Patel v. Liebermensch* (2009) 45 Cal. 4th 344, 350, 86 Cal. Rptr. 3d 366, 197 P.3d 177 ; *House of Prayer v. Evangelical Assn. for India* (2003) 113 Cal. App. 4th 48, 53, 7 Cal. Rptr. 3d 24]. In addition, the manner of payment is a term that may be supplied by implication [*Patel v. Liebermensch* (2009) 45 Cal. 4th 344, 351, 86 Cal. Rptr. 3d 366, 197 P.3d 177 (disapproving *King v. Stanley* (1948) 32 Cal.2d 584, 588, 591, 197 P.2d 321 to the extent it suggests that time and manner of payment are material elements that must appear in writing in every real estate sale agreement)].

A licensed real estate broker or salesperson cannot enforce an oral commission agreement by asserting equitable estoppel [see Ch. 3F, *Matthew Bender Contract Defenses Instructions*] against a statute of frauds defense, unless there is a showing of actual fraud [see Ch. 19, *California Judicial Council Fraud or Deceit Instructions*, Ch. 19A, *Matthew Bender Fraud and Deceit Instructions*] by the party to be charged under that agreement [*Phillippe v. Shapell Industries* (1987) 43 Cal.3d 1247, 1264, 241 Cal.Rptr. 22, 743 P.2d 1279].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts Law Breach Causes of Action Elements of Claims Evidence Procedural Considerations Burdens of Proof Allocation Evidence Procedural Considerations Burdens of Proof Preponderance of Evidence Real Property Law Brokers Fiduciary Responsibilities Real Property Law Purchase & Sale Remedies Damages General Overview

Robert L. Risley, James B. Little, Peter H. Ferris, Eric J. Firstman, and Eugene C. Hu contributed to the original chapter for California Forms of Jury Instruction (Matthew Bender). P. Gerhardt Zacher, Kenneth M. Miller, and Alan Carlton contributed to the original chapter as consultants.



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CHAPTER 75A Matthew Bender Real Property Sales Instructions
PART B. ACTIONS FOR BREACH OF CONTRACTS TO SELL

6-75A California Forms of Jury Instruction MB 7500A.51

MB 7500A.51 Seller's Burden of Proof in Action for Damages for Buyer's Breach of Contract of Sale

[1] Instruction Seller's Burden of Proof in Action for Damages for Buyer's Breach of Contract of Sale

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Plaintiff has the burden of proving all of the following:

- 1. That Plaintiff and Defendant entered into a written contract for Defendant to purchase Plaintiff's property** _____ [*describe property*];
- 2. That Plaintiff either performed what [he/she/it] was required to do under the contract, or was excused from doing any more under that contract;**
- 3. That Defendant breached the contract of sale by** _____ [*describe breach of contract, e.g., failure to deposit the purchase price in escrow*];
- 4. That Defendant's failure to perform caused the damages that Plaintiff complains of; and**
- 5. The nature and extent of Plaintiff's damages.**

Authorities: *Reichert v. General Ins. Co.* (1968) 68 Cal.2d 822, 830, 69 Cal.Rptr. 321, 442 P.2d 377 ; *Careau & Co. v. Security Pacific Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1388, 272 Cal.Rptr. 387 .

[2] Use of Instruction

This instruction should be used in a seller's action for breach of a contract to buy real property. General breach of contract instructions are set forth in Ch. 3, *California Judicial Council Contracts Instructions*, and Chs. 3A through 3G.

Specific damage instructions are set forth in *CACI* Nos. 350- 361 and MB 7500A.70-MB 7500A.77.

A preponderance of evidence instruction [see Ch. 2, *California Judicial Council Evidence Instructions*, *CACI* No. 200 ("More Likely True than Not True")] and an instruction defining the term "cause" [see Ch. 4, *California Judicial Council Negligence Instructions*, *CACI* No. 430 ("Causation: Substantial Factor")] must be used with this instruction. If foreseeability of damage is an issue, the instructions on that issue in Chs. 3 and 3E, as appropriate, must also be given.

[3] Comment

The elements of a cause of action for breach of contract are discussed in *MB 7500A.50*[3].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawBreachCauses of ActionElements of ClaimsEvidenceProcedural ConsiderationsBurdens of ProofAllocationEvidenceProcedural ConsiderationsBurdens of ProofPreponderance of EvidenceReal Property LawPurchase & SaleContracts of SaleGeneral Overview

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CHAPTER 75A Matthew Bender Real Property Sales Instructions
PART B. ACTIONS FOR BREACH OF CONTRACTS TO SELL

6-75A California Forms of Jury Instruction MB 7500A.52

MB 7500A.52 Counter Offer

[1] Instruction Counter Offer

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

If the seller modifies any term or condition of the original offer from the buyer, such an alteration or modification becomes a counter offer. The buyer must accept the counter offer before a binding contract is created.

Authorities: Civ. Code § 1585; *Smith v. Holmwood* (1965) 231 Cal.App.2d 549, 552-553, 41 Cal.Rptr. 907 .

[2] Use of Instruction

This instruction should be used when there is a dispute between a buyer and seller as to whether the offer was accepted or a counter offer was made.

For related Judicial Council instructions, see [3][b], *below*.

[3] Comment

[a] Acceptance Must Be Unqualified

An acceptance must be absolute and unqualified. A qualified acceptance is a new proposal [Civ. Code § 1585]. Thus, if the acceptance changes a term of the offer, there is no contract unless the counter offer is accepted [*Smith v. Holmwood* (1965) 231 Cal.App.2d 549, 552-553, 41 Cal.Rptr. 907].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 3, *California Judicial Council Contracts Instructions*]:

CACI No. 307 Contract Formation--Offer

CACI No. 308 Contract Formation--Revocation of Offer

CACI No. 309 Contract Formation--Acceptance

CACI No. 310 Contract Formation--Acceptance by Silence

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts Law Formation Counteroffers Real Property Law Purchase & Sale Contracts of Sale Formalities

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CHAPTER 75A Matthew Bender Real Property Sales Instructions
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6-75A California Forms of Jury Instruction MB 7500A.53

MB 7500A.53 Waiver of Condition**[1] Instruction** Waiver of Condition

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

If a condition to the contract is solely for one party's benefit, that party may decide not to require the performance of that condition.

[EITHER (See Use of Instruction)]

Therefore, if you find that _____ [describe condition at issue] was inserted in the contract solely to benefit Defendant and that Defendant's actions indicated to Plaintiff that the condition did not have to occur, Defendant may not rely on the failure of _____ [describe condition at issue] to occur as the basis for [his/her/its] failure to perform.

[OR]

Therefore, if you find that _____ [describe condition at issue] was inserted in the contract solely to benefit Plaintiff and that Plaintiff's actions indicated to Defendant that the condition did not have to occur, Plaintiff may enforce the contract even though _____ [describe condition at issue] did not occur.

Authorities: *Galdjie v. Darwish* (2003) 113 Cal.App.4th 1331, 1339, 7 Cal.Rptr.3d 178 ; *Crescenta Valley Moose Lodge v. Bunt* (1970) 8 Cal.App.3d 682, 687, 87 Cal.Rptr. 428 ; *Wesley N. Taylor Co. v. Russell* (1961) 194 Cal.App.2d 816, 828-829, 15 Cal.Rptr. 357 .

[2] Use of Instruction

This instruction should be used when there is an issue as to whether a party has waived a condition in a contract that was inserted solely for his or her benefit. The first alternative should be used when the defendant is relying on a failure of the condition as a basis for not performing; the second alternative should be used when the plaintiff is seeking to enforce the contract after having waived the performance of a condition for his or her benefit.

For related Judicial Council instructions, see [3][b], *below*.

[3] Comment**[a] Waiver of Condition**

A party to a contract can waive the performance of a condition to a contract that is in the contract solely for his or her benefit, such as a condition that financing be obtained or that a liquor license be obtained [*Crescenta Valley Moose Lodge v. Bunt* (1970) 8 Cal.App.3d 682, 687, 87 Cal.Rptr. 428 ; *Wesley N. Taylor Co. v. Russell* (1961) 194 Cal.App.2d 816, 828-829, 15 Cal.Rptr. 357 ; see *Galdjie v. Darwish* (2003) 113 Cal.App.4th 1331, 1340-1343, 7 Cal.Rptr.3d 178 (mutual waiver of condition that time is of the essence)]. If the condition is waived, it is as if it has been performed for the purpose of enforcing the contract [*Wesley N. Taylor Co. v. Russell* (1961) 194 Cal.App.2d 816, 828-829, 15 Cal.Rptr. 357].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 3, *California Judicial Council Contracts Instructions*]:

CACI No. 321 Existence of Condition Precedent Disputed

CACI No. 322 Occurrence of Agreed Condition Precedent

CACI No. 323 Waiver of Condition Precedent

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts Law Contract Conditions & Provisions Waivers General Overview Real Property Law Purchase & Sale Contracts of Sale Period Between Execution & Closing General Overview

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CHAPTER 75A Matthew Bender Real Property Sales Instructions
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6-75A California Forms of Jury Instruction MB 7500A.54

MB 7500A.54 Defense of Failure of Buyer's Condition**[1] Instruction** Defense of Failure of Buyer's Condition[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Under the terms of the contract of sale, Defendant was obligated to purchase the property only if
_____ [*describe condition precedent, e.g., Plaintiff paved the road leading from the residence to the adjoining highway or Defendant's Board of Directors approved the terms of the purchase*].

[*EITHER (See Use of Instruction)*]

If this condition was not satisfied--that is, if _____ [*describe facts constituting failure of condition, e.g., Plaintiff failed to pave the road*]--**then Defendant had no obligation to purchase the property and did not breach the contract of sale.**

[*OR*]

However, if the contract also required Defendant to make reasonable efforts to _____ [*describe defendant's implied duty, e.g., obtain the Board of Director's approval*], **and if [he/she/it] failed to do so, the law will not permit [him/her/it] to take advantage of that failure to avoid an obligation to** _____ [*describe obligation at issue, e.g., purchase the property*]. **Consequently, if** _____ [*describe events constituting nonoccurrence, e.g., the lack of Board approval*] **was caused by Defendant's failure to make reasonable efforts to** _____ [*describe defendant's implied duty, e.g., obtain the Board's approval*], **then Defendant is obligated to Plaintiff in the same manner as if** _____ [*describe events*]

constituting fulfillment of condition, e.g., **the Board had approved the terms of the purchase**]. Plaintiff has the burden of proving, by a preponderance of the evidence, that Defendant did not make reasonable efforts to _____ [describe defendant's implied duty, e.g., **obtain the Board's approval**].

If you find that Defendant made reasonable efforts to _____ [describe defendant's implied duty, e.g., **obtain the Board's approval**], you must find that Defendant had no obligation under the contract to purchase the property and did not breach the contract of sale. On the other hand, if you find that Defendant failed to make reasonable efforts to _____ [describe defendant's implied duty, e.g., **obtain the Board's approval**], you must find that Defendant is obligated to Plaintiff in the same manner as if the _____ [describe events constituting fulfillment of condition, e.g., **the Board had approved the terms of the purchase**] [optional (see Use of Instruction): , **unless Defendant proves, by a preponderance of the evidence, that _____ (describe events constituting nonoccurrence, e.g., **the Board would not have given its approval**) even if Defendant had made reasonable efforts to (describe defendant's implied duty, e.g., **obtain the Board's approval**)**].

Authorities: *Mattei v. Hopper* (1958) 51 Cal.2d 119, 330 P.2d 625 ; *Jacobs v. Tenneco West, Inc.* (1986) 186 Cal.App.3d 1413, 1417, 231 Cal.Rptr. 351 ; *Abrams v. Motter* (1970) 3 Cal.App.3d 828, 837-838, 83 Cal.Rptr. 855 .

[2] Use of Instruction

This instruction assumes that the existence of the condition precedent and the nonoccurrence of the condition precedent are not disputed. If there is conflicting evidence as to the existence or failure of a condition precedent, this instruction should be modified to inform the jury that the above rules will only become applicable if it determines that there was a condition precedent to defendant's obligation and if it determines that that condition did not occur.

The first alternative provision should be used when the buyer has no obligation to use reasonable diligence to bring about the fulfillment of the condition or when there is no contention that the buyer has failed to use reasonable diligence. The second alternative provision should be used when the seller claims that the failure of the condition was the result of the buyer's failure to use reasonable diligence. The optional portion of the final sentence of this second alternative should be used when a defendant contends that the condition precedent would have failed even if he or she had made reasonable efforts to secure its fulfillment.

For related Judicial Council instructions, see [3][b], *below*.

[3] Comment

[a] Failure of Condition

When a party to a contract of sale conditions his or her performance on certain conditions being satisfied, the contract is enforceable and not illusory. However, the person benefited by the condition can terminate the contract if the condition is not met [*Mattei v. Hopper* (1958) 51 Cal.2d 119, 330 P.2d 625]. A party whose obligation to perform is subject to a condition precedent has an implied obligation to use reasonable diligence to secure the fulfillment of the condition [*Campbell v. Kennedy* (1918) 177 Cal. 430, 432, 170 P. 1107 ; *Lynch v. Keystone Con. Min. Co.* (1912) 163 Cal. 690, 699, 126 P. 968 ; *Jacobs v. Freeman* (1980) 104 Cal.App.3d 177, 188-191, 163 Cal.Rptr. 680]. When a party's failure to use reasonable diligence contributes materially to the nonoccurrence of a condition precedent, the condition is excused and the party will be obligated in the same manner as if the condition had occurred [*Jacobs v. Tenneco West, Inc.* (1986) 186 Cal.App.3d 1413, 1417, 231 Cal.Rptr. 351 ; *Rains v. Arnett* (1961) 189 Cal.App.2d 337, 347-348, 11 Cal.Rptr. 299]. The plaintiff has the burden of proving that the defendant failed to use reasonable diligence to secure the fulfillment of a condition precedent [*Abrams v. Motter* (1970) 3 Cal.App.3d 828, 838, 83 Cal.Rptr. 855]. If the plaintiff proved or if it is conceded that the defendant has failed to use reasonable diligence, the burden of proof shifts to

the defendant; the defendant then has the burden of proving that his or her failure did not contribute materially to the nonoccurrence of the condition (i.e., that the condition would not have occurred even if defendant had used reasonable diligence) and the occurrence of the condition will be excused if defendant does not sustain this burden [*Jacobs v. Tenneco West, Inc.* (1986) 186 Cal.App.3d 1413, 1418-1419, 231 Cal.Rptr. 351 ; *Abrams v. Motter* (1970) 3 Cal.App.3d 828, 838, 83 Cal.Rptr. 855].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 3, *California Judicial Council Contracts Instructions*]:

CACI No. 321 Existence of Condition Precedent Disputed

CACI No. 322 Occurrence of Agreed Condition Precedent

CACI No. 323 Waiver of Condition Precedent

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts Law Contract Conditions & Provisions Conditions Precedent Real Property Law Purchase & Sale Contracts of Sale Period Between Execution & Closing General Overview

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CHAPTER 75A Matthew Bender Real Property Sales Instructions
PART B. ACTIONS FOR BREACH OF CONTRACTS TO SELL

6-75A California Forms of Jury Instruction MB 7500A.55

MB 7500A.55 Impossibility of Fulfilling Condition

[1] Instruction Impossibility of Fulfilling Condition

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

If Defendant establishes by a preponderance of the evidence that _____ [describe unfulfilled condition] was impossible to fulfill, the fact that it was not fulfilled is a defense to Plaintiff's action regardless of whether Defendant used due diligence in trying to fulfill the condition.

Authority: *Abrams v. Motter* (1970) 3 Cal.App.3d 828, 837-838, 83 Cal.Rptr. 855 .

[2] Use of Instruction

This instruction should be used when the defendant raises the issue that the performance of a condition was impossible and therefore that his or her due diligence in attempting to perform the condition was irrelevant. A preponderance of evidence instruction must be used with this instruction [see Ch. 2, *California Judicial Council Evidence Instructions*, CACI No. 200 ("More Likely True than Not True")].

For related Judicial Council instructions, see [3][b], *below*.

[3] Comment

[a] Impossibility

When the buyer concedes, or lets it be assumed for the sake of presenting all possible defenses, that he or she did not use due diligence to perform a condition and contends that, even if he or she had used due diligence, the condition could not have been fulfilled, the burden is on the buyer to establish the impossibility [*Abrams v. Motter* (1970) 3 Cal.App.3d

828, 837-838, 83 *Cal.Rptr.* 855].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 3, *California Judicial Council Contracts Instructions*]:

CACI No. 321 Existence of Condition Precedent Disputed

CACI No. 322 Occurrence of Agreed Condition Precedent

CACI No. 323 Waiver of Condition Precedent

Legal Topics:

For related research and practice materials, see the following legal topics:

EvidenceProcedural ConsiderationsBurdens of ProofPreponderance of EvidenceReal Property LawPurchase & SaleContracts of SalePeriod Between Execution & ClosingImpossibility of Performance

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CHAPTER 75A Matthew Bender Real Property Sales Instructions
PART B. ACTIONS FOR BREACH OF CONTRACTS TO SELL

6-75A California Forms of Jury Instruction MB 7500A.56

MB 7500A.56 Breach of Duty of Good Faith and Fair Dealing Excuses Nonoccurrence of Condition

[1] Instruction Breach of Duty of Good Faith and Fair Dealing Excuses Nonoccurrence of Condition

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

The failure to satisfy a condition may be excused if the satisfaction of the condition was prevented or hindered through a breach of the implied promise of good faith and fair dealing.

If Plaintiff proves that Defendant prevented or hindered the satisfaction of the condition through a breach of the implied promise of good faith and fair dealing, then you must determine Defendant's obligations to Plaintiff as if the condition had been satisfied.

Authorities: *Ninety Nine Investments, Ltd. v. Overseas Courier Service (Singapore) Private, Ltd.* (2003) 113 Cal.App.4th 1118, 1131-1132, 6 Cal.Rptr.3d 891 ; *R.J. Kuhl Corp. v. Sullivan* (1993) 13 Cal.App.4th 1589, 1601-1604, 17 Cal.Rptr.2d 425 ; Restatement (Second) of Contracts § 225, Comment b.

[2] Use of Instruction

This instruction should be used when the plaintiff alleges that the defendant prevented or hindered the satisfaction of a condition through a breach of the implied covenant of good faith and fair dealing. The instruction should be used with an instruction on preponderance of the evidence [see Ch. 2, *California Judicial Council Evidence Instructions, CACI No. 200* ("More Likely True than Not True")], and the instruction on the implied covenant of good faith and fair dealing in Ch. 3B, *Matthew Bender Interpretation of Contract Instructions*, MB 300B.08.

[3] Comment

The nonoccurrence of a condition may be excused by the prevention or hindrance of its occurrence through a breach of

the implied promise of good faith and fair dealing [*Ninety Nine Investments, Ltd. v. Overseas Courier Service (Singapore) Private, Ltd.* (2003) 113 Cal.App.4th 1118, 1131-1132, 6 Cal.Rptr.3d 891 ; *R.J. Kuhl Corp. v. Sullivan* (1993) 13 Cal.App.4th 1589, 1601-1604, 17 Cal.Rptr.2d 425 ; Restatement (Second) of Contracts § 225, Comment b]. In *R.J. Kuhl Corp. v. Sullivan*, the defendant hired the plaintiff, a real estate broker, to find a site for an auto dealership. The commission's payment was conditioned on the completion of the purchase by the defendant. The plaintiff found a site, but the defendant did not buy it. A third party bought the property, but the defendant acquired an option on half of the property and the third party agreed to pay half of any commission that the defendant might owe to the plaintiff. The court stated that the defendant in effect traded his position under the unconsummated contract with the seller for a valuable consideration, an option to buy half the property, and indemnification for half of any commission owed to the plaintiff. This conversion of the defendant's right to buy the entire property into an indemnity and an option let the defendant profit unfairly from the plaintiff's services and breached the defendant's duty of good faith and fair dealing. The court therefore held that the defendant breached the brokerage contract by failing to pay the plaintiff's commission [*R.J. Kuhl Corp. v. Sullivan* (1993) 13 Cal.App.4th 1589, 1601-1604, 17 Cal.Rptr.2d 425].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts Law Contract Interpretation Good Faith & Fair Dealing Real Property Law Purchase & Sale Contracts of Sale Period Between Execution & Closing General Overview

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CHAPTER 75A Matthew Bender Real Property Sales Instructions
PART B. ACTIONS FOR BREACH OF CONTRACTS TO SELL

6-75A California Forms of Jury Instruction MB 7500A.57

MB 7500A.57 Burden of Proof in Action Against Escrow Holder

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Plaintiff has the burden of proving all of the following:

1. That Plaintiff employed Defendant as an escrow holder and gave Defendant escrow instructions to
_____ [*describe escrow instructions at issue*];

[*EITHER (See Use of Instruction)*]

2. That Defendant failed to comply with Plaintiff's escrow instructions;

[*OR*]

2. That Defendant was negligent in performing Plaintiff's escrow instructions;

[*CONTINUE INSTRUCTION*]

3. That Defendant's _____ [failure to comply or negligence] caused Plaintiff's damage; and

4. The nature and extent of Plaintiff's damages.

Authorities: *Garton v. Title Ins. & Trust Co.* (1980) 106 Cal.App.3d 365, 381-382, 165 Cal.Rptr. 449 ; *Wade v. Lake County Title Co.* (1970) 6 Cal.App.3d 824, 828-829, 86 Cal.Rptr. 182 ; *Ruth v. Lytton Sav. & Loan Assn.* (1968) 266 Cal.App.2d 831, 839-844, 72 Cal.Rptr. 521 .

[2] Use of Instruction

This instruction should be used in an action against an escrow holder. It can be based on either breach of contract in failing to follow the instructions or negligence in conducting the escrow.

For related Judicial Council instructions, see [3][b], *below*.

[3] Comment

[a] Liability for Violation of Escrow Instructions

An escrow holder bears a fiduciary relationship to each party to the escrow and must comply strictly with the instructions of the principals. If the escrow holder violates the instructions, liability attaches for breach of contract. An escrow holder also has the duty to exercise ordinary skill and diligence; any negligence gives rise to liability for any loss proximately caused by the negligence [*Garton v. Title Ins. & Trust Co.* (1980) 106 Cal.App.3d 365, 381-382, 165 Cal.Rptr. 449 ; *Wade v. Lake County Title Co.* (1970) 6 Cal.App.3d 824, 828-829, 86 Cal.Rptr. 182 ; *Ruth v. Lytton Sav. & Loan Assn.* (1968) 266 Cal.App.2d 831, 839-844, 72 Cal.Rptr. 521].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 41, *California Judicial Council Breach of Fiduciary Duty Instructions*]:

CACI No. 4104 Duties of Escrow Holder

Legal Topics:

For related research and practice materials, see the following legal topics:

EvidenceProcedural ConsiderationsBurdens of ProofAllocationReal Property LawPurchase & SaleEscrow

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CHAPTER 75A Matthew Bender Real Property Sales Instructions
PART B. ACTIONS FOR BREACH OF CONTRACTS TO SELL

6-75A California Forms of Jury Instruction MB 7500A.58-MB 7500A.69

Reserved for Future Use

MB 7500A.58Reserved for Future Use



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California Forms of Jury Instruction

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CHAPTER 75A Matthew Bender Real Property Sales Instructions
PART C. DAMAGES

6-75A California Forms of Jury Instruction MB 7500A.70

MB 7500A.70 Measure of Buyer's Damages--Seller's Title Encumbered

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

If under the court's instructions you find that the Defendant has breached an agreement to sell real property by conveying the property with encumbrances contrary to the terms and provisions of the agreement, then you must award Plaintiff damages, if any, in an amount equal to the money actually expended by Plaintiff in removing the encumbrance.

[*OPTIONAL (See Use of Instruction)*]

However, you may not award more than you find to be the fair market value of the property conveyed.

Authority: *Civ. Code § 3305.*

[2] Use of Instruction

This instruction should be used when the seller has breached the contract by conveying the property encumbered in a manner not allowed by the agreement of sale and the encumbrance can be removed by the payment of money. If the encumbrance is one, such as an easement, that cannot be removed at the owner's will, the measure of damages is the one set forth in MB 7500A.71. This instruction must be used with the general damages instructions for breach of contract in Ch. 3, *California Judicial Council Contracts Instructions*, and Ch. 3E, *Matthew Bender Contract Damages Instructions*, and with the instruction in MB 7500A.72 defining encumbrance.

If there is evidence that the amount expended might exceed the property's value at the time of the breach, the optional

paragraph must be used, and the definition of fair market value instruction in MB 7500A.73 must be given.

For related Judicial Council instructions, see [3][b], *below*.

[3] Comment

[a] Measure of Damages

The measure of damages for the breach of a covenant against encumbrances is, ordinarily, the amount that the plaintiff has actually expended in removing the encumbrance. However, damages may not exceed the property's value at the time of the breach [*Civ. Code* § 3305]. This rule refers only to encumbrances that may be removed by the payment of money such as mortgages and liens, and it is not applicable to encumbrances that cannot be extinguished at the owner's will by the payment of money, such as easements or restrictions on the use of the land [*Evans v. Faught* (1965) 231 Cal.App.2d 698, 712-713, 42 Cal.Rptr. 133].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 3, *California Judicial Council Contracts Instructions*]:

CACI No. 356 Buyer's Damages for Breach of Contract for Sale of Real Property

CACI No. 358 Mitigation of Damages

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property Law Deeds Covenants of Title Real Property Law Purchase & Sale Remedies Damages Compensatory Damages Real Property Law Purchase & Sale Remedies Damages Measures of Damages

Robert L. Risley, James B. Little, Peter H. Ferris, Eric J. Firstman, and Eugene C. Hu contributed to the original chapter for California Forms of Jury Instruction (Matthew Bender). P. Gerhardt Zacher, Kenneth M. Miller, and Alan Carlton contributed to the original chapter as consultants.



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CHAPTER 75A Matthew Bender Real Property Sales Instructions
PART C. DAMAGES

6-75A California Forms of Jury Instruction MB 7500A.71

MB 7500A.71 Measure of Buyer's Damages--Seller's Title Encumbered by Restriction

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

If under the court's instructions you find that the Defendant has breached an agreement to sell real property by conveying the property encumbered contrary to the terms and provisions of the agreement, then you must award the Plaintiff damages, if any, caused by the existence and continuance of the encumbrance. This damage is measured by the amount, if any, that the existence of the encumbrance reduces the real property's fair market value.

Authorities: *Civ. Code § 3300; Evans v. Faught (1965) 231 Cal.App.2d 698, 712-713, 42 Cal.Rptr. 133 .*

[2] Use of Instruction

This instruction should be used when the seller has breached the contract by conveying the property encumbered in a manner not allowed by the agreement of sale and the encumbrance cannot be removed by the payment of money, such as an easement or restriction. If the encumbrance can be removed at the owner's will, such as by a lien, the measure of damages is the one set forth in MB 7500A.70. This instruction must be used with the general damage for breach of contract instructions in Ch. 3, *California Judicial Council Contracts Instructions*, and Ch. 3E, *Matthew Bender Contract Damages Instructions*, with the definition of encumbrance instruction in MB 7500A.72, and with the definition of fair market value instructions in Ch. 35, *California Judicial Council Eminent Domain Instructions*, CACI No. 3501, and MB 7500A.73.

For related Judicial Council instructions, see [3][b], *below*.

[3] Comment

[a] Measure of Damages

The measure of damages for the breach of a covenant against encumbrances in the case of restrictions such as easements is the general breach of contract measure of damages in *Civ. Code* § 3300. Damages are based on the natural and proximate consequences to the plaintiff of the existence and continuance of the encumbrance, which are the decrease in fair market value caused by the encumbrance [*Evans v. Faught* (1965) 231 Cal.App.2d 698, 712-713, 42 Cal.Rptr. 133].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 3, *California Judicial Council Contracts Instructions*]:

CACI No. 356 Buyer's Damages for Breach of Contract for Sale of Real Property

CACI No. 358 Mitigation of Damages

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property LawDeedsCovenants of TitleReal Property LawPurchase & SaleRemediesDamagesCompensatory DamagesReal Property LawPurchase & SaleRemediesDamagesConsequential DamagesReal Property LawPurchase & SaleRemediesDamagesMeasures of Damages

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CHAPTER 75A Matthew Bender Real Property Sales Instructions
PART C. DAMAGES

6-75A California Forms of Jury Instruction MB 7500A.72

MB 7500A.72 Definition of Encumbrance

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

An "encumbrance" is any right to, or interest in, land held by someone other than the Plaintiff which right or interest diminishes the land's value. An encumbrance may affect the physical condition of the land or may affect the title to the land.

[*OPTIONAL (See Use of Instruction)*]

The court has determined that _____ [*describe encumbrance*] encumbers the property.

Authorities: *Civ. Code § 1114; Evans v. Faught (1965) 231 Cal.App.2d 698, 706, 42 Cal.Rptr. 133 .*

[2] Use of Instruction

This instruction should be used in defining encumbrance when that term is used in an instruction. The optional sentence should be used when the court has determined as a matter of law that there is an encumbrance on the property.

[3] Comment

Civ. Code § 1114 defines encumbrance as including taxes, assessments, and all liens on real property. The inclusive nature of the definition allows for other burdens on real property to constitute encumbrances, in addition to the burdens recognized by the statute [*Evans v. Faught (1965) 231 Cal.App.2d 698, 706, 42 Cal.Rptr. 133 ; Fraser v. Bentel (1911) 161 Cal. 390, 394, 119 P. 509*]. Therefore, encumbrance has been judicially defined as any right to, or interest in, real

property which belongs to someone other than the fee owner and reduces the property's value but which is consistent with the transfer of the fee [*Evans v. Faught* (1965) 231 Cal.App.2d 698, 706, 42 Cal.Rptr. 133].

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property LawDeedsCovenants of TitleReal Property LawTitle QualityMarketable TitleTests

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CHAPTER 75A Matthew Bender Real Property Sales Instructions
PART C. DAMAGES

6-75A California Forms of Jury Instruction MB 7500A.73

MB 7500A.73 Definition of Fair Market Value

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

The fair market value of real property is the highest price in cash that the property would bring if it were exposed for sale in the open market for a reasonable period of time and if the buyers had knowledge of all the uses and purposes to which the property is adaptable.

Authorities: *Klopping v. City of Whittier* (1972) 8 Cal.3d 39, 43, 104 Cal.Rptr. 1, 500 P.2d 1345 ; *Sacramento S. R. Co. v. Heilbron* (1909) 156 Cal. 408, 409, 104 P. 979 ; *CMSH Co. v. Antelope Development, Inc.* (1990) 223 Cal.App.3d 174, 182, 272 Cal.Rptr. 605 .

[2] Use of Instruction

This instruction should be used with instructions using the term "fair market value" to define that term.

For related Judicial Council instructions, see [3][b], *below*.

[3] Comment

[a] Fair Market Value Defined

When the measure of damages turns on the value of a piece of property, whether liability sounds in breach of contract or in tort, the standard is fair market value [*Bagdasarian v. Gragnon* (1948) 31 Cal.2d 744, 752-753, 192 P.2d 935 ; *CMSH Co. v. Antelope Development, Inc.* (1990) 223 Cal.App.3d 174, 182, 272 Cal.Rptr. 605 ; *Glendale Fed. Sav. & Loan Assn. v. Marina View Heights Dev. Co.* (1977) 66 Cal.App.3d 101, 141, 135 Cal.Rptr. 802].

The fair market value of real property is the highest price in cash that the property would bring if it were exposed for sale in the open market for a reasonable period of time and if the buyers had knowledge of all the uses and purposes to which the property is adaptable [*Klopping v. City of Whittier* (1972) 8 Cal.3d 39, 43, 104 Cal.Rptr. 1, 500 P.2d 1345 ; *Sacramento S. R. Co. v. Heilbron* (1909) 156 Cal. 408, 409, 104 P. 979 ; *CMSH Co. v. Antelope Development, Inc.* (1990) 223 Cal.App.3d 174, 182, 272 Cal.Rptr. 605]. This definition is based on a cash sale, not a credit sale [*CMSH Co. v. Antelope Development, Inc.* (1990) 223 Cal.App.3d 174, 182, 272 Cal.Rptr. 605 ; *Glendale Fed. Sav. & Loan Assn. v. Marina View Heights Dev. Co.* (1977) 66 Cal.App.3d 101, 141, 135 Cal.Rptr. 802].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 35 *California Judicial Council Eminent Domain Instructions*]:

CACI No. 3501 "Fair Market Value" Explained

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property LawProperty ValuationReal Property LawPurchase & SaleRemediesDamagesMeasures of Damages

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CHAPTER 75A Matthew Bender Real Property Sales Instructions
PART C. DAMAGES

6-75A California Forms of Jury Instruction MB 7500A.74

MB 7500A.74 Measure of Seller's Damages--Liquidated Damages

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

The contract between Plaintiff and Defendant contains a liquidated damages provision. You must award Plaintiff _____ [amount of damages in liquidated damage clause] unless Defendant proves that the liquidated damages clause was unreasonable under the circumstances existing at the time the contract was made. In deciding whether the clause was unreasonable, you may consider all of the circumstances that existed when the contract was made. These include all of the following:

- (1) The relationship that the damages provided in the contract bore to the range of harm that could have reasonably been anticipated;**
- (2) The relative equality of the bargaining power of the parties;**
- (3) Whether the parties were represented by lawyers when the contract was made;**
- (4) The anticipation of the parties that proof of actual damages would be costly or inconvenient;**
- (5) The difficulty of proving the cause and foreseeability of damages; and**
- (6) Whether the liquidated damages provision is in a form contract.**

Because you must consider the circumstances at the time the contract was made, you may not consider the amount of damages actually suffered by Plaintiff in determining whether the clause was unreasonable.

Authorities: *Civ. Code § 1671*; Cal. Law. Revision Comment to *Civ. Code § 1671*.

[2] Use of Instruction

This instruction should be used in an action involving the validity of a liquidated damages clause in a transaction that does not involve residential property. If property containing four or fewer residential units is involved, the instruction in MB 7500A.75 must be used. This instruction assumes that the plaintiff is attempting to recover the liquidated damages. If the plaintiff has retained the liquidated damages and the defendant is seeking to recover them, the instruction must be modified accordingly.

This instruction should be used with the general damages instructions in Ch. 3, *California Judicial Council Contracts Instructions*, and Ch. 3E, *Matthew Bender Contract Damages Instructions*.

For related Judicial Council instructions, see [3][b], *below*.

[3] Comment

[a] Liquidated Damages

A contractual liquidated damages clause is valid unless the party seeking to invalidate the provision establishes that it was unreasonable under the circumstances existing at the time the contract was made [*Civ. Code § 1671(b)*; *Ridgley v. Topa Thrift & Loan Assn.* (1998) 17 Cal.4th 970, 977, 73 Cal.Rptr.2d 378, 953 P.2d 484 ; *Allen v. Smith* (2002) 94 Cal.App.4th 1270, 1278, 114 Cal.Rptr.2d 898]. There is a different standard for liquidated damages clauses in residential sales [*Civ. Code §§ 1675-1681*] and for clauses in contracts for retail purchase of personal, family, or household goods or for leases for dwelling purposes [*Civ. Code § 1671(c), (d)*].

The California Law Revision Commission Comment to *Civ. Code § 1671* gives examples of the circumstances at the time the contract was made that can be considered in determining whether the liquidated damages clause was unreasonable. They are:

- The relationship that the damages provided in the contract bore to the range of harm that could have reasonably been anticipated;
- The relative equality of the bargaining power of the parties;
- Whether the parties were represented by lawyers when the contract was made;
- The anticipation of the parties that proof of actual damages would be costly or inconvenient;
- The difficulty of proving causation and foreseeability of damages; and
- Whether the liquidated damages provision is in a form contract.

The Law Revision Commission also stated that the actual damages suffered could not be considered because only the circumstances at the time the contract was made are relevant [*Cal. Law. Revision Comment to Civ. Code § 1671*].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [*see Ch. 3, California Judicial Council Contracts Instructions*]:

CACI No. 357 Seller's Damages for Breach of Contract to Purchase Real Property

CACI No. 358 Mitigation of Damages

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts Law Remedies Liquidated Damages Real Property Law Purchase & Sale Remedies Damages Liquidated Damages Real Property Law Purchase & Sale Remedies Damages Measures of Damages

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CHAPTER 75A Matthew Bender Real Property Sales Instructions
PART C. DAMAGES

6-75A California Forms of Jury Instruction MB 7500A.75

MB 7500A.75 Measure of Seller's Damages--Liquidated Damages in Residential Sale

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

To find that the Defendant is entitled to liquidated damages specified in the contract for the sale of real property, you must find all of the following:

- 1. That at the time the contract to sell the property was made, the Plaintiff intended to occupy _____ [the dwelling or one of the units in the dwelling] as Plaintiff's residence;**
- 2. That the provision in the contract liquidating the damages to the Defendant as seller was separately signed or initialed by each party to the contract; and**

[*EITHER (See Use of Instruction)*]

3. That Plaintiff has failed to establish by a preponderance of the evidence that _____ [amount of liquidated damages actually paid to defendant] is unreasonable as liquidated damages.

[*OR*]

3. That Defendant has proved by a preponderance of the evidence that _____ [amount of liquidated damages actually paid to defendant] is not unreasonable as liquidated damages.

[CONTINUE INSTRUCTION]

For the purpose of determining whether the amount actually paid as liquidated damages was unreasonable, you must take into account both of the following:

- 1. The circumstances existing at the time the contract was made; and**
- 2. The price and other terms and circumstances of any subsequent sale or contract of sale for the same property if such sale or contract was made within six months of the Plaintiff's default.**

Authorities: *Civ. Code §§ 1675, 1676, 1677, 1678.*

[2] Use of Instruction

This instruction should be used when the validity of a liquidated damages clause in a contract to sell residential property is at issue. It assumes that the buyer is seeking the return of liquidated damages held by the seller. The first alternative paragraph 3 should be used when the amount of liquidated damages paid to the seller was less than three percent of the purchase price. The second alternative paragraph 3 should be used when the amount of liquidated damages paid to the seller was more than three percent of the purchase price [*Civ. Code § 1675(c), (d)*]. The jury should only be instructed on the requirements that are at issue in the particular case.

This instruction should be used with the general damages instructions in Ch. 3, *California Judicial Council Contracts Instructions*, and Ch. 3E, *Matthew Bender Contract Damages Instructions*.

For related Judicial Council instructions, see [3][b], *below*.

[3] Comment**[a] Liquidated Damages**

The enforceability of liquidated damages clauses in sales of residential property is governed by *Civ. Code § 1675*. Residential property is defined as dwellings of not more than four residential units, at least one of which the buyer intends, at the time the contract is made, to occupy as his or her residence [*Civ. Code § 1675(a)*].

To be enforceable, the liquidated damages must have been actually paid in the form of cash or a currently dated or postdated check [*Civ. Code § 1675(b)*; *Allen v. Smith* (2002) 94 Cal.App.4th 1270, 1278, 114 Cal.Rptr.2d 898]. The liquidated damages provision must be separately signed or initialed by each party to the contract and, if the provision is included in a printed form, must be set out either in at least 10 point bold type or in contrasting red print in at least eight point bold type [*Civ. Code § 1677*].

If the amount paid is not in excess of three percent of the purchase price, the buyer has the burden of establishing that the amount is unreasonable to invalidate the liquidated damages provision. If the amount paid is greater than three percent, the seller has the burden of establishing that the amount was reasonable [*Civ. Code § 1675(c), (d)*; *Allen v. Smith* (2002) 94 Cal.App.4th 1270, 1278-1279, 114 Cal.Rptr.2d 898].

The reasonableness of the amount actually paid as liquidated damages must be determined by (1) the circumstances at the time the agreement was executed and (2) the price and other terms and circumstances of any subsequent sale or sale agreement made within six months of the buyer's default [*Civ. Code § 1675(e)*].

For the initial sale of newly constructed attached condominium units, as defined in *Civ. Code* § 783, that involves the sale of an attached residential condominium unit located within a structure of 10 or more residential condominium units and the amount actually paid to the seller pursuant to the liquidated damages provision exceeds 3 percent of the purchase price, both of the following must occur in the event of a buyer's default [*Civ. Code* § 1675(f)(1)]:

- The seller must perform an accounting of its costs and revenues related to and fairly allocable to the construction and sale of the residential unit within 60 calendar days after the final close of escrow of the sale of the unit within the structure; and
- The accounting must include any and all costs and revenues related to the construction and sale of the residential property and any delay caused by buyer's default. The seller must make reasonable efforts to mitigate any damages arising from the default. In addition, the seller must refund to the buyer any amounts previously retained as liquidated damages in excess of the greater of either (1) 3 percent of the originally agreed-upon purchase price of the residential property or (2) the amount of the seller's losses resulting from the buyer's default, as calculated by the accounting.

The refund referred to above must be sent to the buyer's last known address within 90 days after the final close of escrow of the sale or lease of all the residential condominium units within the structure [*Civ. Code* § 1675(f)(2)]. If the amount retained by the seller after the accounting does not exceed 3 percent of the purchase price, the amount is valid unless the buyer establishes that the amount is unreasonable as liquidated damages [*Civ. Code* § 1675(f)(3); see *Civ. Code* § 1675(e)].

With regard to newly constructed attached condominium units to which these provision apply, the seller does not have the burden of establishing that an amount paid as liquidated damages that exceeded 3 percent was reasonable [*Civ. Code* § 1675(f)(4); see *Civ. Code* § 1675(d)].

If a "new qualified buyer" has entered into the contract to purchase the condominium unit, the seller must perform the accounting referred to above within 60 calendar days after a new qualified buyer has entered into a contract to purchase [*Civ. Code* § 1675(f)(5)]. A "new qualified buyer" is a buyer that (1) has been issued a loan commitment that satisfies the purchase agreement loan contingency requirement by an institutional lender to obtain a loan for an amount equal to the purchase price less any down payment possessed by the buyer, and (2) has contracted to pay a purchase price that is greater than or equal to the purchase price to be paid by the original buyer [*Civ. Code* § 1675(f)(7)].

If more than one payment made by the buyer is to be valid as liquidated damages, the amount of all payments after the first payment must satisfy the burden of proof and reasonableness standards set forth above, and a separate liquidated damages provision satisfying the above described requirements for initialing and bold or red type must exist [*Civ. Code* § 1678].

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Ch. 3, *California Judicial Council Contracts Instructions*]:

CACI No. 357 Seller's Damages for Breach of Contract to Purchase Real Property

CACI No. 358 Mitigation of Damages

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property LawPurchase & SaleRemediesDamagesLiquidated DamagesReal Property LawPurchase &

SaleRemediesDamagesMeasures of Damages

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CHAPTER 75A Matthew Bender Real Property Sales Instructions
PART C. DAMAGES

6-75A California Forms of Jury Instruction MB 7500A.76

MB 7500A.76 Measure of Broker's Damages for Failure to Be Paid Commission

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

If, under the court's instructions, you find that Plaintiff broker is entitled to a verdict against Defendant for breach of the agreement to pay a commission, then you must award damages to Plaintiff arising from the breach.

The amount of the award must include both of the following:

- 1. The agreed amount of commission, less any commission actually paid to Plaintiff; and**
- 2. The amount of any other foreseeable damages, if any.**

Authorities: *Civ. Code § 3300; Dixon v. Malloy (1945) 70 Cal.App.2d 322, 329, 160 P.2d 896 .*

[2] Use of Instruction

This instruction should be used in an action against a principal to recover a broker's commission. The instruction should be used with the general damages instructions in Ch. 3, *California Judicial Council Contracts Instructions*, and Ch. 3E, *Matthew Bender Contract Damages Instructions*.

[3] Comment

An action for a broker's commission is an action for breach of contract [*Blank v. Borden (1974) 11 Cal.3d 963, 969, 115 Cal.Rptr. 31*], and therefore the damages are measured by the general breach of contract measure of damages set forth in *Civ. Code § 3300*, which include the amount of the unpaid commission [*Dixon v. Malloy (1945) 70 Cal.App.2d*

322, 329, 160 P.2d 896].

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property LawBrokersBrokerage AgreementsReal Property LawBrokersRight to CommissionsReal Property
LawPurchase & SaleRemediesDamagesMeasures of Damages

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CHAPTER 75A Matthew Bender Real Property Sales Instructions
PART C. DAMAGES

6-75A California Forms of Jury Instruction MB 7500A.77

MB 7500A.77 Measure of Client's Damages--Fraud by Broker

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

If, under the court's instructions, you find that Plaintiff is entitled to a verdict against Defendant for fraud, then you must award Plaintiff damages for all loss or harm caused by the fraud.

The amount of any such award is the actual damages suffered by Plaintiff as a result of Defendant's fraud, as proven. Actual damages may include all of the following:

- 1. Any money paid to Defendant as a commission by Plaintiff;**
- 2. Any monetary benefits or secret profits received by Defendant in the course of representing Plaintiff that were in excess of the compensation that Plaintiff agreed to pay Defendant for services as a broker;**
- 3. The amount of any lost earnings and lost profits suffered by Plaintiff; and**
- 4. The difference between the benefit the Plaintiff would have received if the broker had performed fully and faithfully and the value of the benefit the Plaintiff actually received.**

Authorities: *Civ. Code §§ 2237, 3333; Liodas v. Sahadi (1977) 19 Cal.3d 278, 283-284, 137 Cal.Rptr. 635, 562 P.2d 316; Fragale v. Faulkner (2003) 110 Cal.App.4th 229, 239, 1 Cal.Rptr.3d 616; Sierra Pacific Industries v. Carter (1980) 104 Cal.App.3d 579, 582-583, 163 Cal.Rptr. 764; Pepitone v. Russo (1976) 64 Cal.App.3d 685, 688-690, 134 Cal.Rptr. 709; St. James Armenian Church of Los Angeles v. Kurkjian (1975) 47 Cal.App.3d 547, 553, 121 Cal.Rptr. 214; Jolton v. Minster Graf & Co. (1942) 53 Cal.App.2d 516, 521-522, 128 P.2d 101.*

[2] Use of Instruction

This instruction should be used in an action by a client against a broker for breach of fiduciary duty. Instructions should only be given for those elements of damage present in the case at issue. Additional fraud damages instructions are set forth in Ch. 19, *California Judicial Council Fraud or Deceit Instructions*, and Ch. 19A, *Matthew Bender Fraud and Deceit Instructions*. Instructions appropriate specifically to a cause of action for the breach of a fiduciary duty are set forth in Ch. 41, *California Judicial Council Breach of Fiduciary Duty Instructions*.

This instruction should be used with the general damages instructions in Ch. 3, *California Judicial Council Contracts Instructions*, and Ch. 3E, *Matthew Bender Contract Damages Instructions*.

For related Judicial Council instructions, see [3][b], *below*.

[3] Comment**[a] Measure of Damages**

As a fiduciary, a broker is liable to his or her client for all losses caused by the breach of fiduciary duty [Civ. Code § 3333; *Liodas v. Sahadi* (1977) 19 Cal.3d 278, 283-284, 137 Cal.Rptr. 635, 562 P.2d 316 ; *Pepitone v. Russo* (1976) 64 Cal.App.3d 685, 688-690, 134 Cal.Rptr. 709]. These damages include all of the following:

- Any commission paid by the client to the broker [*Sierra Pacific Industries v. Carter* (1980) 104 Cal.App.3d 579, 582-583, 163 Cal.Rptr. 764];
- Secret profits earned by the broker in excess of the agreement with the client [*St. James Armenian Church of Los Angeles v. Kurkjian* (1975) 47 Cal.App.3d 547, 553, 121 Cal.Rptr. 214];
- Lost profits caused by the fraud [*Jolton v. Minster Graf & Co.* (1942) 53 Cal.App.2d 516, 521-522, 128 P.2d 101]; and
- The difference between the benefit to the client had the broker performed faithfully and what the client actually received [*Fragale v. Faulkner* (2003) 110 Cal.App.4th 229, 239, 1 Cal.Rptr.3d 616 ; *Pepitone v. Russo* (1976) 64 Cal.App.3d 685, 688-690, 134 Cal.Rptr. 709].

Punitive damages may also be available. An instruction on punitive damages that may be adapted to this situation can be found in Ch. 39, *California Judicial Council Damages Instructions*.

[b] Related Judicial Council Jury Instructions

The Judicial Council Jury Instructions contain the following instructions that pertain to topics covered in this section [see Chs. 19, *California Judicial Council Fraud or Deceit Instructions*, 41, *California Judicial Council Breach of Fiduciary Duty Instructions*]:

CACI No. 1920 Buyer's Damages for Purchase or Acquisition of Property

CACI No. 1921 Buyer's Damages for Purchase or Acquisition of Property--Lost Profits

CACI No. 1922 Seller's Damages for Sale or Exchange of Property

CACI No. 1923 Damages--"Out of Pocket" Rule

CACI No. 1924 Damages--"Benefit of the Bargain" Rule

CACI No. 4100 "Fiduciary Duty" Explained

CACI No. 4101 Failure to Use Reasonable Care--Essential Factual Elements

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property LawBrokersFiduciary ResponsibilitiesReal Property LawPurchase & SaleRemediesDamagesMeasures of DamagesReal Property LawPurchase & SaleRemediesDamagesPunitive DamagesTortsIntentional TortsBreach of Fiduciary DutyElementsTortsIntentional TortsBreach of Fiduciary DutyRemedies

Robert L. Risley, James B. Little, Peter H. Ferris, Eric J. Firstman, and Eugene C. Hu contributed to the original chapter for California Forms of Jury Instruction (Matthew Bender). P. Gerhardt Zacher, Kenneth M. Miller, and Alan Carlton contributed to the original chapter as consultants.



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CHAPTER 76A Matthew Bender Acquiring Title to Real Property Instructions

6-76A California Forms of Jury Instruction 76A.syn

§ 76A.syn Synopsis to Chapter 76A: Matthew Bender Acquiring Title to Real Property Instructions

MB 7600A.01 Introductory Instruction: Definition of Title to Property

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Title Defined

[b] Methods of Acquiring Title

[c] Quiet Title Actions

MB 7600A.02through MB 7600A.09 [Reserved]

MB 7600A.10 Deeds: Introductory Instruction

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 7600A.11 Deeds: Capacity to Convey

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 7600A.12 Delivery of Deeds: Introductory Instruction

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Grantor's Intent to Deliver; Question of Fact

[b] Actual or Constructive Delivery

[c] Incapacity

[d] Mistake

MB 7600A.13 Delivery of Deeds: Presumptions and Inferences

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 7600A.14 Delivery of Deeds: Date of Delivery

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 7600A.15 Delivery of Deeds: Physical Possession of Instrument by Grantee; Inference of Delivery

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 7600A.16 Delivery of Deeds: Possession by Grantor; Inference of Nondelivery

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 7600A.17 Delivery of Deeds: Inference of Delivery by Execution and Recording of Deed

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 7600A.18 Delivery of Deeds: Conditional Delivery When Grantor's Death a Condition

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 7600A.19 Acceptance of Deeds

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 7600A.20-MB 7600A.29 [Reserved]

MB 7600A.30 Adverse Possession: Burden of Proof

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Definition and Elements of Adverse Possession; Exceptions

[b] Prescription Distinguished

[c] Burden of Proof

MB 7600A.31 Payment of Taxes Levied and Assessed for Possession Period

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Payment Requirement

[b] Exceptions

[c] Period for Which Taxes Must Be Paid

[d] Redemption

MB 7600A.32 Claim of Title by Virtue of Claim of Right

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 7600A.33 Claim of Title by Virtue of Color of Title

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 7600A.34 Actual, Open, and Notorious Possession

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Actual Possession

[b] Acts That Constitute Actual Possession

[c] Open and Notorious

MB 7600A.35 Actual Possession Under Claim of Right

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 7600A.36 Actual Possession Under Color of Title

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 7600A.37 Acts Hostile to the True Owner's Title

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Hostile Possession

[b] Permissive Possession

[c] Mistake

[d] Exclusive Use

MB 7600A.38 Continuous and Uninterrupted Possession for Five Years

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Five-Year Period

[b] Tacking

[c] Continuity of Use

[d] Re-entry by Owner; Interruption of Possession

[e] Tolling

MB 7600A.39-MB 7600A.49 [Reserved]

MB 7600A.50 Common Law Dedication Defined

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Common Law Dedication Defined

[b] Question of Fact; Acceptance

[c] Use of Land

[d] Capacity to Dedicate

[e] Adverse Possession Distinguished

[f] Statutory Dedication Distinguished

[g] Actions to Determine Title

MB 7600A.51 Offer

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Offer Defined

[b] Written Offer of Dedication

[c] Offer to Dedicate Through Description in Conveyances or Contracts

[d] Offer to Dedicate by Map or Plat

[e] Offer to Dedicate by Declaration

MB 7600A.52 Acceptance

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Acceptance, Actual and Implied

[b] Formal Acceptance

[c] Informal Acceptance

[d] After Acceptance

MB 7600A.53 Time Limit for Acceptance: Reasonable Time

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 7600A.54 Revocation of Offer

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 7600A.55 Implied Dedication by Public Use

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Introduction

[b] Dedication by Acquiescence in Public Use

[c] Dedication by Adverse Use

[d] Dedication by Public Use After March 4, 1972

MB 7600A.56 Abandonment of Dedicated Property

[1] Instruction

[2] Use of Instruction

[3] Comment



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CHAPTER 76A Matthew Bender Acquiring Title to Real Property Instructions

6-76A California Forms of Jury Instruction Scope

Scope

SCOPE

This chapter includes jury instructions for actions involving the acquisition of title to real property or the acquisition of specified interests in real property. The chapter covers the following topics:

- Part A includes an instruction on the definition of title to property [*see MB 7600A.01*].
- Part B includes instructions on acquiring title by deeds [*see MB 7600A.10 -MB 7600A.19*].
- Part C includes instructions on adverse possession [*see MB 7600A.30 -MB 7600A.38*].
- Part D includes instructions on common law dedication [*see MB 7600A.50 -MB 7600A.56*].

The instructions in this chapter will most commonly be used in a quiet title action or in cases in which a deed to real property has been executed but the effectiveness of its delivery or acceptance has been questioned, requiring instructions on delivery and acceptance of deeds and instructions on adverse possession under color of title.

For related instructions on acquiring title to real property by purchase and sale, see Ch. 75A, *Matthew Bender Real Property Sales Instructions*. For instructions on acquiring the right to use land without acquiring title and ownership, see Ch. 77A, *Matthew Bender Easement Instructions*.



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CHAPTER 76A Matthew Bender Acquiring Title to Real Property Instructions
PART A. INTRODUCTION

6-76A California Forms of Jury Instruction MB 7600A.01

MB 7600A.01 Introductory Instruction: Definition of Title to Property**[1] Instruction** Introductory Instruction: Definition of Title to Property[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

The word "title" has a variety of meanings. It sometimes means property or ownership in the sense that the owner of title has a right to possession or use of land. A common meaning of title is complete ownership, meaning that the owner of title to land possesses all of the rights, privileges, powers, and immunities that an owner may have with regard to land. However, the title to real property may also be limited. For example:

1. Title may be shared with one or more persons;
2. The right to the real property's enjoyment may be deferred or limited in time;
3. The right to the real property's use may be restricted; or
4. The duration of the right to the real property's use may be limited in time.

In this case, [Plaintiff/Defendant] claims to have acquired title to _____ [describe property and claimed interest, e.g., fee estate or life estate or easement] by virtue of _____ [describe method, e.g., adverse possession or dedication or transfer by deed].

Authorities: Civ. Code §§ 669, 671, 678-682, 1000 ; *Smith v. Bank of America etc. Assn.* (1936) 14 Cal.App.2d 78, 85-86, 57 P.2d 1363 ; *Adams v. Hopkins* (1904) 144 Cal. 19, 33, 77 P. 712 ; Black's Law Dictionary (7th ed. 1999) at 1493-1494.

[2] Use of Instruction

This instruction should be used as an introduction to actions that involve disputes over the title to real property, or the title to an interest in real property, and the means by which title to real property may be acquired. The instruction should be used as an introduction to instructions on deeds, adverse possession, and dedication.

[3] Comment

[a] Title Defined

Title has been defined as "the means whereby the owner of lands hath the just possession of his property" [*Adams v. Hopkins* (1904) 144 Cal. 19, 33, 77 P. 712 ; *Arrington v. Liscom* (1868) 34 Cal. 365, 385] and as "the means by which property in land is established, as in the expression chain of title" [*Smith v. Bank of America etc. Assn.* (1936) 14 Cal.App.2d 78, 85, 57 P.2d 1363]. A common meaning of the word "title" is complete ownership, in the sense of all the rights, privileges, powers, and immunities an owner may have with regard to real property [*Smith v. Bank of America etc. Assn.* (1936) 14 Cal.App.2d 78, 85, 57 P.2d 1363].

All property has an owner [Civ. Code § 669], and any person may own property in California [Civ. Code § 671]. Ownership or title to property is either absolute or qualified [Civ. Code § 678]. The ownership of property is absolute when a single person has the absolute dominion over it and may use it or dispose of it according to his or her pleasure, subject only to general laws [Civ. Code § 679]. The ownership of property is qualified when it is shared with one or more persons, when the time of enjoyment is deferred or limited, or when the use of the property is restricted [Civ. Code § 680]. The ownership of property by a single person is designated as a sole or several ownership [Civ. Code § 681], whereas the ownership of property by several persons may be ownership by joint interests, partnership interests, interests in common, or community interest of husband and wife [Civ. Code § 682].

[b] Methods of Acquiring Title

Civ. Code § 1000 provides that property is acquired by (1) occupancy, (2) accession, (3) transfer, (4) will, or (5) succession. The specific methods by which title to real property may be acquired are public grant, private grant, involuntary alienation (which includes execution sales and other transfers by operation of law under judicial decree or statute), descent or succession, devise (i.e., will), adverse possession, escheat, dedication, eminent domain, estoppel, accretion, and abandonment or forfeiture [see generally California Real Estate Law and Practice, Ch. 80, *Deeds and Transfer of Title* (Matthew Bender)].

[c] Quiet Title Actions

Actions to quiet title are governed by *Code Civ. Proc. § 760.010 et seq.* Under these provisions, the plaintiff must allege the basis of the title to be quieted in a verified complaint and file a lis pendens [Code Civ. Proc. §§ 761.020, 761.010(b)].

In a quiet title action the plaintiff must prevail on the strength of his or her own title and not on the weakness of the defendant's title [*Millyard v. Faus* (1968) 268 Cal.App.2d 76, 82, 73 Cal.Rptr. 697]. A plaintiff can prove his or her claim to title to property by relying on paper title alone [*Ernie v. Trinity Lutheran Church* (1959) 51 Cal.2d 702, 706, 336 P.2d 525] or on possession of the property [*Davis v. Crump* (1912) 162 Cal. 513, 519, 123 P. 294]. A plaintiff who relies on paper title alone (i.e., who is not in possession) must, when the defendant also asserts paper title, trace title back to one of the following four sources [*Ernie v. Trinity Lutheran Church* (1959) 51 Cal.2d 702, 706, 336 P.2d 525]:

- The government;
- A grantor in possession;

- A grantor in common to the plaintiff or defendant; or
- A grantor who had obtained a judgment quieting title.

Title to property can also be proven by possession of the property [*Davis v. Crump* (1912) 162 Cal. 513, 519, 123 P. 294]. The presumption of ownership by possession [*Evid. Code* §§ 637-638 ; *Civ. Code* §§ 1006-1007] may be rebutted [*Evid. Code* § 630 ; see *Bond v. Aickley* (1919) 168 Cal. 161, 163-164, 141 P. 1188 ; see also California Real Estate Law and Practice, Ch. 370, *Quieting Title and Determining Adverse Claims* (Matthew Bender)].

Once the plaintiff has established a prima facie case, the defendant must prove that he or she is a bona fide purchaser of the property or otherwise has an adverse claim [*Crook v. Forsyth* (1866) 30 Cal. 662, 663 ; *Oaks v. Renshaw* (1946) 74 Cal.App.2d 144, 149, 168 P.2d 199 ; *President & Presiding Elder v. Goodwin* (1931) 119 Cal.App. 37, 39, 5 P.2d 973]. If the defendant establishes a claim of right by introducing evidence to show that his or her title predates that of the plaintiff, the burden of proof shifts back to the plaintiff [*Douglass v. Willard* (1900) 129 Cal. 38, 39-40, 61 P. 572 (deed); *Cuddy v. O'Brien* (1921) 55 Cal.App. 469, 472, 204 P. 37]. Although the plaintiff's burden of proof in quiet title actions is the "clear and convincing" standard pursuant to *Evid. Code* § 662 [see Ch. 2, *California Judicial Council Evidence Instructions*, CACI No. 201], when the dispute involves the beneficial, rather than legal, title, the "preponderance of evidence" standard is applicable when the legal title itself is in dispute [*Murray v. Murray* (1994) 26 Cal.App.4th 1062, 1067-1068, 31 Cal Rptr. 2d 855 (jury was properly instructed on burden of proof in case involving challenge to legal title); see Ch. 2, *California Judicial Council Evidence Instructions*, CACI No. 200 ("More Likely True than Not True")].

Legal Topics:

For related research and practice materials, see the following legal topics:
 Real Property Law Title Quality Marketable Title General Overview

Peter H. Ferris, Eric J. Firstman, and Cindy Lee contributed to the original chapter for California Forms of Jury Instruction (Matthew Bender).



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CHAPTER 76A Matthew Bender Acquiring Title to Real Property Instructions
PART A. INTRODUCTION

6-76A California Forms of Jury Instruction MB 7600A.02through MB 7600A.09

[Reserved]

MB 7600A.02[Reserved]



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CHAPTER 76A Matthew Bender Acquiring Title to Real Property Instructions
PART B. DEEDS

6-76A California Forms of Jury Instruction MB 7600A.10

MB 7600A.10 Deeds: Introductory Instruction

[1] Instruction Deeds: Introductory Instruction

[PLAINTIFF'S/DEFENDANT'S] PROPOSED INSTR. NO. _____

A written transfer of title to real property is called a "grant" or a "conveyance." The party who transfers the title is called the "grantor," and the party who receives the title is the "grantee." The written instrument that conveys or transfers the title to real property is called a "deed." A deed is an executed conveyance that acts as a present transfer of title to real property. A deed can also be called an instrument of conveyance.

To be effective, a deed must satisfy all of the following requirements:

1. The deed must be in writing;
2. The deed must be signed by the grantor;
3. The grantor must have the mental capacity to convey;
4. The grantee must be another person or entity in existence and capable of taking and holding title to real property;
5. The deed must be delivered to the grantee; and
6. The deed must be accepted by the grantee.

These are the minimum requirements for a valid conveyance of title to real property by deed. If they are all

present, the deed is effective to transfer the title to the real property to the grantee.

I will now instruct you in more detail on the law that governs the issues that you must decide in this case.

Authorities: *Civ. Code* §§ 1039, 1053, 1054, 1091 ; *Miller v. Jansen* (1943) 21 Cal.2d 473, 477, 132 P.2d 801 ; *Estate of Stephens* (2002) 28 Cal.4th 665, 671-672, 122 Cal.Rptr.2d 358, 49 P.3d 1093 ; *Peterson v. Ellebrecht* (1962) 205 Cal.App.2d 718, 721, 23 Cal.Rptr. 349 ; *Burns v. Grable* (1956) 138 Cal.App.2d 280, 286, 291 P.2d 969

[2] Use of Instruction

This instruction should be used to explain the requirements for a valid transfer of title by deed when the validity of the transfer is at issue. The jury should be instructed on only those requirements that are at issue. The most common issue in litigation over deeds is whether there has been a valid and effective delivery of the deed, but acceptance or capacity to convey may also be at issue. Because the sufficiency of a writing to constitute an instrument of conveyance and the capacity of a grantee to accept a conveyance are not commonly questions of fact for a jury, they are excluded from this instruction and are excluded from the scope of this part on deeds.

If capacity to convey is at issue, this instruction should be used with the instruction in MB 7600A.11. If delivery is at issue, this instruction should be used with one or more of the instructions in MB 7600A.12-MB 7600A.18. If acceptance is at issue, this instruction should be used with the instruction in MB 7600A.19.

[3] Comment

"Transfer" is an act of the parties, or of the law, that conveys title to real property from one living person to another [*Civ. Code* § 1039]. Except for estates at will and estates that do not exceed one year, estates in real property may be transferred only by operation of law or by an instrument in writing that is signed by the transferring party or that party's agent [*Civ. Code* § 1091]. The required writing ordinarily takes the form of a deed [*see Civ. Code* § 1092 (statutory sample form for grant deed); *see also* California Real Estate Law and Practice, Ch. 80, *Deeds and Transfer of Title* (Matthew Bender)]. A "deed" is a written instrument conveying title to real property [*Estate of Stephens* (2002) 28 Cal.4th 665, 671-672, 122 Cal.Rptr.2d 358, 49 P.3d 1093 ; *Brusseau v. Hill* (1927) 201 Cal. 225, 228, 256 P. 419]. A deed can also be referred to as a grant or a conveyance [*Civ. Code* § 1053]. A transfer of title by deed takes effect, and the interest to be transferred is vested, only on the delivery of the deed by the grantor to the grantee [*Civ. Code* § 1054]. For a delivery of a deed to be effective, the deed must be accepted by the grantee [*Reina v. Erassarret* (1949) 90 Cal.App.2d 418, 426, 203 P.2d 72 ; *see* California Real Estate Law and Practice, Ch. 80, *Deeds and Transfer of Title*, §§ 80.40, 80.138 (Matthew Bender); *see also* MB 7600A.19]. Whether the deed was delivered is generally a question of fact to be determined from all the surrounding circumstances [*Miller v. Jansen* (1943) 21 Cal.2d 473, 477, 132 P.2d 801]. The rules on delivery are discussed in more detail in MB 7600A.12 -MB 7600A.18.

If a person is of unsound mind, but not entirely without understanding, a conveyance made by that person before a judicial determination of incapacity is subject to rescission [*Civ. Code* § 39 ; *see* Ch. 3G, *Matthew Bender Rescission of Contract Instructions*, MB 300G.69, for discussion of rescission of contracts under *Civ. Code* § 39]. The existence of the capacity to convey is a question of fact for the trier of fact [*Peterson v. Ellebrecht* (1962) 205 Cal.App.2d 718, 721, 23 Cal.Rptr. 349]. For further discussion on capacity to convey, *see* MB 7600A.11.

A deed will not effect a conveyance unless the grantee is a person, either natural or artificial, capable of taking and holding the property [*Burns v. Grable* (1956) 138 Cal.App.2d 280, 286, 291 P.2d 969].

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property LawDeedsDeliveryReal Property LawDeedsEnforceabilityReal Property LawDeedsExecution Formalities

Peter H. Ferris, Eric J. Firstman, and Cindy Lee contributed to the original chapter for California Forms of Jury Instruction(Matthew Bender).



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CHAPTER 76A Matthew Bender Acquiring Title to Real Property Instructions
PART B. DEEDS

6-76A California Forms of Jury Instruction MB 7600A.11

MB 7600A.11 Deeds: Capacity to Convey

[1] Instruction Deeds: Capacity to Convey

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

_____ [*Name of party alleging incapacity*] **claims that the deed conveying** _____
[*specify property*] **from** _____ [*grantor*] **to** _____ [*grantee*] **is invalid because**
_____ [*grantor*] **was not of sound mind when [he/she] made and delivered the deed.**
_____ [*Name of party alleging incapacity*] **has the burden of proving this claim.**

A deed made and delivered by a person who is not of sound mind is not valid.

The test for determining if _____ [*grantor*] **was of sound mind and able to convey real property by deed is whether the** _____ [*grantor*]'s **mind and memory was sufficiently sound to enable [him/her] to know and understand the business in which [he/she] was engaged at the time that [he/she] executed the deed.**

[*OPTIONAL (See Use of Instruction)*]

A person is not incompetent to execute a deed merely because [he/she] is old, sick, or impaired of body. It is the state of the mind, not the body, that determines whether a person is capable of conveying property.

[*OPTIONAL (See Use of Instruction)*]

The test for determining if a person is of a sound mind is whether, at the time [he/she] executed and delivered the deed, [he/she] had sufficient mental capacity to be able to understand the nature of [his/her] act and to fairly and rationally consider all of the following:

- 1. The character and extent of [his/her] property;**
- 2. The people to whom [he/she] is bound by blood or by friendship; and**
- 3. The manner and the proportions in which [he/she] wants the property to go.**

[CONTINUE WITH INSTRUCTION]

Although _____ [name of party alleging incapacity] must prove that _____ [grantor] was of unsound mind at the very time the deed was executed and delivered, evidence of mental unsoundness before or after this time must be considered in determining the grantor's mental condition at the time of execution and delivery.

Authorities: *Marback v. Marback* (1965) 235 Cal.App.2d 354, 356-357, 45 Cal.Rptr. 341 ; *Allen v. Samuels* (1962) 204 Cal.App.2d 710, 715, 22 Cal.Rptr. 528 ; *Jones v. Jones* (1960) 183 Cal.App.2d 468, 472, 6 Cal.Rptr. 819 ; *Brunoni v. Brunoni* (1949) 93 Cal.App.2d 215, 218, 208 P.2d 1028 ; *Hughes v. Grandy* (1947) 78 Cal.App.2d 555, 564-566, 177 P.2d 939 ; *Clark v. Abrams* (1942) 49 Cal.App.2d 497, 499, 121 P.2d 750 .

[2] Use of Instruction

This instruction should be used when the mental capacity of the grantor to convey real property is at issue. This instruction should be accompanied by the introductory instruction in MB 7600A.01.

The first option should be used if the grantor is old, ill, handicapped, or otherwise infirm. The second option should be used when the circumstances of the conveyance raise issues of testamentary intent--as when the deed was executed shortly before the grantor's death.

This instruction must be used with an instruction on preponderance of the evidence [see, e.g., Ch. 2, *California Judicial Council Evidence Instructions*, CACI No. 200 ("More Likely True than Not True")].

[3] Comment

The grantor must have the capacity to convey title at the time the deed is executed [*Hughes v. Grandy* (1947) 78 Cal.App.2d 555, 564, 177 P.2d 939] and at the time it is delivered [*Jones v. Jones* (1960) 183 Cal.App.2d 468, 472, 6 Cal.Rptr. 819 ; see *Code Civ. Proc.* § 1933 (execution of instrument includes its delivery)]. The existence of capacity is a question of fact [*Marback v. Marback* (1965) 235 Cal.App.2d 354, 356-357, 45 Cal.Rptr. 341] to be determined from the particular circumstances of each case [*Allen v. Samuels* (1962) 204 Cal.App.2d 710, 715, 22 Cal.Rptr. 528 ; *Hughes v. Grandy* (1947) 78 Cal.App.2d 555, 564, 177 P.2d 939]. The party alleging incapacity has the burden of proving by a preponderance of the evidence that the incapacity existed when the deed was executed and delivered [*Clark v. Abrams* (1942) 49 Cal.App.2d 497, 499, 121 P.2d 750].

The rules governing capacity to execute and deliver a deed are in general the same as those governing testamentary capacity [*Blevin v. Mayfield* (1961) 189 Cal.App.2d 649, 652, 11 Cal.Rptr. 882 ; *Brunoni v. Brunoni* (1949) 93 Cal.App.2d 215, 218, 208 P.2d 1028 ; *Hughes v. Grandy* (1947) 78 Cal.App.2d 555, 564, 177 P.2d 939]. Thus, a grantor has sufficient capacity to convey if the grantor is able to understand the nature of his or her act and is capable of

considering fairly and rationally (1) the character and extent of his or her property, (2) the persons to whom he or she is bound by blood or friendship, and (3) the persons to whom and the manner and proportions in which he or she wants the property to go [*Marback v. Marback* (1965) 235 Cal.App.2d 354, 356, 45 Cal.Rptr. 341 ; *Hughes v. Grandy* (1947) 78 Cal.App.2d 555, 565-566, 177 P.2d 939]. Neither old age nor physical incapacity renders a person incompetent to execute a deed, so long as sufficient intelligence remains [*Blevin v. Mayfield* (1961) 189 Cal.App.2d 649, 652, 11 Cal.Rptr. 882 ; *Brunoni v. Brunoni* (1949) 93 Cal.App.2d 215, 218, 208 P.2d 1028 ; *Hughes v. Grandy* (1947) 78 Cal.App.2d 555, 564, 177 P.2d 939]. The mind and memory of the grantor must be sound enough to enable the grantor to know and understand the business in which he or she was engaged when he or she executed the deed [*Hughes v. Grandy* (1947) 78 Cal.App.2d 555, 564, 177 P.2d 939].

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property LawDeedsDeliveryReal Property LawDeedsEnforceabilityReal Property LawDeedsExecution Formalities

Peter H. Ferris, Eric J. Firstman, and Cindy Lee contributed to the original chapter for California Forms of Jury Instruction(Matthew Bender).



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CHAPTER 76A Matthew Bender Acquiring Title to Real Property Instructions
PART B. DEEDS

6-76A California Forms of Jury Instruction MB 7600A.12

MB 7600A.12 Delivery of Deeds: Introductory Instruction

[1] Instruction Delivery of Deeds: Introductory Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

A valid delivery requires a mutual intention on the part of the parties, particularly on the part of the grantor, to pass title to the property immediately. In other words, there is a valid delivery only if the grantor intends for the instrument to be presently operative as a deed, that is, there must be the intent on the part of the grantor to divest [himself/herself] presently of the title to the real property.

A valid delivery requires a physical delivery of the deed with the intent to transfer title to the property at that time. This means that _____ [grantor] must have intended for the delivery of the deed to operate as a present transfer of the title to _____ [specify real property at issue], or there was no delivery.

Authorities: *Civ. Code* §§ 1054, 1056 ; *Hotaling v. Hotaling* (1924) 193 Cal. 368, 382, 224 P. 455 ; *Gonzales v. Gonzales* (1968) 267 Cal.App.2d 428, 435, 73 Cal.Rptr. 83 ; *Danenberg v. O'Connor* (1961) 195 Cal.App.2d 194, 200, 15 Cal.Rptr. 667 ; *Coffey v. Cooper* (1960) 185 Cal.App.2d 464, 467, 8 Cal.Rptr. 358 ; *Henneberry v. Henneberry* (1958) 164 Cal.App.2d 125, 129, 330 P.2d 250 .

[2] Use of Instruction

This instruction should be used as an introductory instruction with the instructions following in MB 7600A.13-MB 7600A.18 in actions that involve questions about the grantor's intentions regarding delivery of a deed. The grantor's intent usually becomes an issue when this intent is obscured by the way that the grantor dealt with the deed or with the real property subject to the deed. For example, the issue may arise when the grantor fails to manually transfer the executed deed to the grantee or places the deed in an extended escrow for later delivery. The issue might also arise if the deed is not recorded as a public document or the grantor retains physical possession of the real property. This

instruction should be supplemented with the instructions in MB 7600A.13-MB 7600A.18, as applicable.

If there was no physical delivery of the deed to the grantee, but a constructive delivery is alleged, this instruction must be modified accordingly [see [3][b], *below*, for discussion of constructive delivery].

[3] Comment

[a] Grantor's Intent to Deliver; Question of Fact

A deed takes effect only when it is delivered by the grantor [*Civ. Code* § 1054 ; *Huth v. Katz* (1947) 30 Cal.2d 605, 606-608, 185 P.2d 521 ; *Camperi v. Chiechi* (1955) 134 Cal.App.2d 485, 506, 286 P.2d 399 ; see *Code Civ. Proc.* § 1933 (execution of instrument includes its delivery)]. Delivery of a deed depends on the intention of the parties that title to the real property must pass irrevocably [*Hotaling v. Hotaling* (1924) 193 Cal. 368, 381-383, 224 P. 455 ; *Danenberg v. O'Connor* (1961) 195 Cal.App.2d 194, 200, 15 Cal.Rptr. 667]. In addition to physical delivery [see [b], *below*], there must be a mutual intention on the part of the parties, particularly the grantor, to pass title to the property immediately [*Gonzales v. Gonzales* (1968) 267 Cal.App.2d 428, 435, 73 Cal.Rptr. 83 ; *Henneberry v. Henneberry* (1958) 164 Cal.App.2d 125, 129, 330 P.2d 250] and unconditionally [*Civ. Code* § 1059]. The instrument must be intended to be presently operative as a deed. That is, the grantor must intend to divest himself or herself presently of the title [*Gonzales v. Gonzales* (1968) 267 Cal.App.2d 428, 435, 73 Cal.Rptr. 83 ; *Henneberry v. Henneberry* (1958) 164 Cal.App.2d 125, 129, 330 P.2d 250].

Whether the grantor has the necessary intent is generally a question of fact to be determined by the trial court or the jury from all the circumstances surrounding the transaction [*Williams v. Kidd* (1915) 170 Cal. 631, 639, 151 P. 1 ; *Meyer v. Wall* (1969) 270 Cal.App.2d 24, 27, 75 Cal.Rptr. 236 ; *Mecchi v. Picchi* (1966) 245 Cal.App.2d 470, 482, 54 Cal.Rptr. 1 ; *Jones v. Jones* (1960) 183 Cal.App.2d 468, 472, 6 Cal.Rptr. 819].

[b] Actual or Constructive Delivery

Even when the deed is not actually delivered into the grantee's possession, the deed is deemed to be constructively delivered in either of the following circumstances [*Civ. Code* § 1059]:

- There is an agreement between the parties that the deed is understood to be delivered and that the grantee is entitled to its possession; or
- The deed is delivered to a stranger for the grantee's benefit, and the grantee's assent is shown or may be presumed.

Under these circumstances there may be a legal "delivery," even though the deed has not actually been given to the grantee, if the grantor has the intent required for a delivery [see, e.g., *Osborn v. Osborn* (1954) 42 Cal.2d 358, 363, 365-367, 267 P.2d 333 (deposit of deed with trustee); see [a], *above*, for discussion of intent required for delivery].

Not only is an actual, physical delivery of the deed sometimes unnecessary, it is not conclusive evidence of the intent required for delivery [*Huth v. Katz* (1947) 30 Cal.2d 605, 606-609, 184 P.2d 521 ; *Meyer v. Wall* (1969) 270 Cal.App.2d 24, 28, 75 Cal.Rptr. 236], although the grantee's possession of the deed is some evidence of its delivery [see MB 7600A.15 for discussion of possession of deed by grantee as evidence of delivery].

[c] Incapacity

A person who is incapable of entertaining the necessary intent cannot deliver a deed [*Jones v. Jones* (1960) 183 Cal.App.2d 468, 472, 6 Cal.Rptr. 819 ; *Piercy v. Piercy* (1912) 18 Cal.App. 751, 759, 124 P. 561]. The rules governing capacity to execute a deed are in general the same as those governing capacity to execute a will [*Hughes v. Grandy*

(1947) 78 Cal.App.2d 555, 564, 177 P.2d 939 ; see MB 7600A.11].

[d] Mistake

If a deed is executed and delivered but the grantor mistakenly believes that an additional act is required to transfer title to the real property, no delivery will be found until the subsequent act is performed [*Kimbrow v. Kimbro* (1926) 199 Cal. 344, 350-351, 249 P. 180 (grantor believed acknowledgment required); *Hotaling v. Hotaling* (1924) 193 Cal. 368, 383-384, 224 P. 455 (both parties believed that deed not effective until recorded)]. In these cases, since the parties understood that the deed could have no effect until the future act was performed, there was no intent that the conveyance be immediately operative and therefore there was no delivery [*Kimbrow v. Kimbro* (1926) 199 Cal. 344, 350-351, 249 P. 180 ; *Hotaling v. Hotaling* (1924) 193 Cal. 368, 383-384, 224 P. 455].

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property LawDeedsDelivery

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CHAPTER 76A Matthew Bender Acquiring Title to Real Property Instructions
PART B. DEEDS

6-76A California Forms of Jury Instruction MB 7600A.13

MB 7600A.13 Delivery of Deeds: Presumptions and Inferences

[1] Instruction Delivery of Deeds: Presumptions and Inferences

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

In determining whether or not _____ [*grantor*] had the intent that is required for a valid delivery of a deed, certain presumptions and inferences may arise either in favor of or against the delivery of the deed's validity.

A presumption is an assumption of fact that the law requires to be made from another fact or group of facts found or otherwise established in the action. An inference, on the other hand, is a deduction of fact that may logically or reasonably be drawn from another fact or group of facts found or otherwise established in the action.

However, all of the presumptions and inferences that I will explain to you may be rebutted by evidence of the grantor's actual intent. The grantor's declarations and acts before and after the alleged delivery, and the grantee's declarations and acts afterwards, may be considered in determining the grantor's intent.

Authorities: Evid. Code § 600 ; *Blackburn v. Drake* (1963) 211 Cal.App.2d 806, 812-813, 27 Cal.Rptr. 651 ; *Henneberry v. Henneberry* (1958) 164 Cal.App.2d 125, 129-130, 330 P.2d 250 ; *Estate of Galvin* (1952) 114 Cal.App.2d 354, 360-361, 250 P.2d 333 .

[2] Use of Instruction

This instruction should be used to introduce the instructions in MB 7600A.14-MB 7600A.17 on the various presumptions and inferences that may arise with regard to the issue of delivery. These include the presumptions and inferences raised by the recording of the deed [see MB 7600A.17] and the possession of the deed by the grantor [see MB 7600A.16], the grantee [see MB 7600A.15], or a third party.

[3] Comment

Various presumptions and inferences may arise with regard to the issue of delivery [see MB 7600A.14 -MB 7600A.17]. For example, possession of a deed by the grantee raises an inference that the deed was duly delivered [*Blackburn v. Drake* (1963) 211 Cal.App.2d 806, 812-813, 27 Cal.Rptr. 651 ; *Estate of Galvin* (1952) 114 Cal.App.2d 354, 360-361, 250 P.2d 333]. A prima facie case of valid delivery may be established by evidence that the grantor signed the deed and manually handed it to the grantee, that the deed was acknowledged and recorded, and that the deed was in the grantee's possession [*Henneberry v. Henneberry* (1958) 164 Cal.App.2d 125, 129-130, 330 P.2d 250]. However, this prima facie case of delivery can be rebutted through the introduction of other evidence, such as testimony that at the date of the alleged delivery the grantor did not intend the deed to be operative as a deed and to divest the grantor presently of his or her title [*Henneberry v. Henneberry* (1958) 164 Cal.App.2d 125, 129-130, 330 P.2d 250].

Inferences and presumptions regarding the delivery of a deed or instrument of conveyance are rebuttable and may be overcome by contrary evidence [see, e.g., *Henneberry v. Henneberry* (1958) 164 Cal.App.2d 125, 129-131, 330 P.2d 250 (presumptions and inferences raised by signing of deed, manual delivery to grantee, acknowledgment and recording of deed, and possession by grantee, overcome by testimony as to grantor's intent); see also *Evid. Code* § 601 (presumption is either conclusive or rebuttable)]. The burden of proof is on the party against whom the inference or presumption operates to present persuasive evidence to the contrary [*Evid. Code* § 606].

Legal Topics:

For related research and practice materials, see the following legal topics:

EvidenceInferences & PresumptionsInferencesEvidenceInferences & PresumptionsPresumptionsReal Property
LawDeedsCovenants of Title

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CHAPTER 76A Matthew Bender Acquiring Title to Real Property Instructions PART B. DEEDS

6-76A California Forms of Jury Instruction MB 7600A.14

MB 7600A.14 Delivery of Deeds: Date of Delivery

[1] Instruction Delivery of Deeds: Date of Delivery

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

A duly signed and delivered deed is presumed to have been delivered on the date that is on the deed.

Authorities: *Civ. Code* § 1055 ; *Code Civ. Proc.* § 1933 ; *Miller v. Jansen* (1943) 21 Cal.2d 473, 475-476, 132 P.2d 801 ; *Blackburn v. Drake* (1963) 211 Cal.App.2d 806, 812, 27 Cal.Rptr. 651 ; *Estate of Galvin* (1952) 114 Cal.App.2d 354, 360-362, 250 P. 333 .

[2] Use of Instruction

This instruction should be used when the date of delivery is at issue.

[3] Comment

The presumption stated in this instruction applies only to the time of delivery, and not to the issue of whether there was a delivery [*Blackburn v. Drake* (1963) 211 Cal.App.2d 806, 812, 27 Cal.Rptr. 651]. Once delivery in fact is established, a presumption attaches that the deed was delivered on the date it bears [*Miller v. Jansen* (1943) 21 Cal.2d 473, 475-476, 132 P.2d 801 ; *Blackburn v. Drake* (1963) 211 Cal.App.2d 806, 812, 27 Cal.Rptr. 651].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawDeedsDelivery

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CHAPTER 76A Matthew Bender Acquiring Title to Real Property Instructions
PART B. DEEDS

6-76A California Forms of Jury Instruction MB 7600A.15

MB 7600A.15 Delivery of Deeds: Physical Possession of Instrument by Grantee; Inference of Delivery

[1] Instruction Delivery of Deeds: Physical Possession of Instrument by Grantee; Inference of Delivery

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Possession of the deed by the grantee is some evidence of its delivery and, in the absence of any contradictory evidence, is sufficient evidence to establish delivery.

Authorities: *Estate of Galvin* (1952) 114 Cal.App.2d 354, 360-361, 250 P.2d 333 ; *Ephraim v. Oakland Title etc. Co.* (1921) 54 Cal.App. 379, 383, 201 P. 946 .

[2] Use of Instruction

This instruction should be used with the introductory instruction on delivery in MB 7600A.12 and the introductory instruction on inferences and presumptions in MB 7600A.13. The instruction will generally be offered by a grantee in possession of a deed in support of an inference of delivery by virtue of possession.

[3] Comment

The grantee's possession of a duly executed deed gives rise to an inference that the instrument was duly delivered, but this inference can be rebutted by evidence that the grantee came into possession of the deed without the grantor's intent to deliver it [*Miller v. Jansen* (1943) 21 Cal.2d 473, 477, 132 P.2d 801 ; *Blackburn v. Drake* (1963) 211 Cal.App.2d 806, 812-813, 27 Cal.Rptr. 651 ; *Estate of Galvin* (1952) 114 Cal.App.2d 354, 360-361, 250 P.2d 333]. Possession of the deed by the grantee is sufficient to establish delivery if there is no evidence to the contrary [*Ephraim v. Oakland Title etc. Co.* (1921) 54 Cal.App. 379, 383, 201 P. 946]. It is therefore incumbent on the party disputing delivery to produce evidence that there has been no delivery [*Rich v. Ervin* (1948) 86 Cal.App.2d 386, 394, 194 P.2d 809].

Although there is a statutory presumption as to the date of delivery of an instrument [see Civ. Code § 1055 ; see also

MB 7600A.14], there is only a nonstatutory inference as to the fact of the instrument's delivery when it is in the grantee's possession [*Miller v. Jansen* (1943) 21 Cal.2d 473, 475-477, 132 P.2d 801 ; *Blackburn v. Drake* (1963) 211 Cal.App.2d 806, 812-813, 27 Cal.Rptr. 651]. The inference of delivery is rebuttable, and, when contrary evidence is offered, delivery is a question of fact for the trial court or jury to determine [*Jones v. Jones* (1960) 183 Cal.App.2d 468, 472, 6 Cal.Rptr. 819 ; *Hennelly v. Bank of America* (1951) 102 Cal.App.2d 754, 758, 228 P.2d 79].

Legal Topics:

For related research and practice materials, see the following legal topics:

Evidence Inferences & Presumptions Inferences Real Property Law Deeds Construction & Interpretation Real Property Law Deeds Delivery

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CHAPTER 76A Matthew Bender Acquiring Title to Real Property Instructions
PART B. DEEDS

6-76A California Forms of Jury Instruction MB 7600A.16

MB 7600A.16 Delivery of Deeds: Possession by Grantor; Inference of Nondelivery

[1] Instruction Delivery of Deeds: Possession by Grantor; Inference of Nondelivery

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Possession of the deed by the grantor raises an inference that the deed has not been delivered to the grantee. If there is no contradictory evidence, this inference is sufficient to establish lack of delivery.

[*OPTIONAL (See Use of Instruction)*]

This inference can be rebutted by evidence that the deed was actually delivered to the grantee and that the grantor's possession of the deed was merely for safekeeping or a similar purpose.

Authorities: *Miller v. Jansen* (1943) 21 Cal.2d 473, 477-478, 132 P.2d 801 ; *Condencia v. Nelson* (1960) 187 Cal.App.2d 300, 303, 9 Cal.Rptr. 759 ; *Jones v. Jones* (1960) 183 Cal.App.2d 468, 472, 6 Cal.Rptr. 819 .

[2] Use of Instruction

This instruction should be used with the introductory instruction on delivery in MB 7600A.12 and the introductory instruction on inferences and presumptions in MB 7600A.13. The instruction will generally be offered by the grantor seeking to prove nondelivery based on the grantor's possession of the deed. The grantee may wish to modify the instruction by adding the optional clause to inform the jury that the inference may be rebutted by evidence of actual delivery with intent to pass title.

[3] Comment

When a deed or conveyance is in the grantor's possession, an inference arises that the deed or conveyance has not been delivered. This evidence is sufficient to make out a case of nondelivery, unless the grantee proves that there was an actual delivery and that the grantor's possession was merely for safekeeping or some similar purpose [*Miller v. Jansen* (1943) 21 Cal.2d 473, 477-478, 132 P.2d 801 ; *Condencia v. Nelson* (1960) 187 Cal.App.2d 300, 303, 9 Cal.Rptr. 759 ; *Jones v. Jones* (1960) 183 Cal.App.2d 468, 472, 6 Cal.Rptr. 819]. When evidence is offered to rebut this inference, the issue of delivery is a question of fact for the trial court or the jury to determine [*Jones v. Jones* (1960) 183 Cal.App.2d 468, 472, 6 Cal.Rptr. 819].

Legal Topics:

For related research and practice materials, see the following legal topics:

Evidence
Inferences & Presumptions
Inferences
Real Property Law
Deeds
Construction & Interpretation
Real Property
Law
Deeds
Delivery

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CHAPTER 76A Matthew Bender Acquiring Title to Real Property Instructions
PART B. DEEDS

6-76A California Forms of Jury Instruction MB 7600A.17

MB 7600A.17 Delivery of Deeds: Inference of Delivery by Execution and Recording of Deed

[1] Instruction Delivery of Deeds: Inference of Delivery by Execution and Recording of Deed

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

The deed to _____ [*describe subject property*] was acknowledged and recorded. When a deed is acknowledged and recorded, the deed is presumed to be genuine, and it is presumed that the deed was properly executed and delivered.

Authority: Thomas v. Peterson (1931) 213 Cal. 672, 674, 3 P.2d 306 .

[2] Use of Instruction

This instruction should be used by the grantee to establish delivery when the deed was acknowledged by the grantor and recorded with the County Recorder. The instruction should be used with the introductory instruction on delivery in MB 7600A.12 and the introductory instruction on inferences and presumptions in MB 7600A.13.

In offering this instruction, counsel should be aware that the court decision on which it is based was itself based on former *Code Civ. Proc.* § 1951, repealed in 1965 [see *Thomas v. Peterson (1931) 213 Cal. 672, 674, 3 P.2d 306 ; see also Stats. 1965, ch. 299*].

[3] Comment

When a deed is acknowledged and recorded, its genuineness and due execution and delivery are presumed [*Thomas v. Peterson (1931) 213 Cal. 672, 674, 3 P.2d 306*]. If the deed is recorded but not acknowledged, the recording raises a presumption of delivery that will support a judgment in the absence of evidence to the contrary [*Blevin v. Mayfield (1961) 189 Cal.App.2d 649, 651, 11 Cal.Rptr. 882*]. However, even though a deed is recorded, evidence may be adduced to rebut the presumption and show that in fact the deed was not "delivered" to the grantee by the grantor [

Priest v. Bell (1954) 123 Cal.App.2d 528, 532, 267 P.2d 49 ; *Rousseau v. Hurtado* (1954) 122 Cal.App.2d 705, 716-717, 265 P.2d 580].

Legal Topics:

For related research and practice materials, see the following legal topics:

EvidenceInferences & PresumptionsInferencesReal Property LawDeedsConstruction & InterpretationReal Property LawDeedsDeliveryReal Property LawDeedsExecution Formalities

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CHAPTER 76A Matthew Bender Acquiring Title to Real Property Instructions
PART B. DEEDS

6-76A California Forms of Jury Instruction MB 7600A.18

MB 7600A.18 Delivery of Deeds: Conditional Delivery When Grantor's Death a Condition**[1] Instruction** Delivery of Deeds: Conditional Delivery When Grantor's Death a Condition[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Even if the deed was manually delivered to _____ [*grantee*], if you find that _____ [*grantor*] intended that the deed was to become operative only on [his/her/its] death, then the deed is testamentary in character and it is void as a deed and it must be considered under the law of wills.

Authorities: *Coffey v. Cooper* (1960) 185 Cal.App.2d 464, 467, 8 Cal.Rptr. 358 ; *Henneberry v. Henneberry* (1958) 164 Cal.App.2d 125, 129, 330 P.2d 250 ; *Kelly v. Bank of America* (1952) 112 Cal.App.2d 388, 396, 246 P.2d 92 .

[2] Use of Instruction

This instruction should be used when the party challenging the deed claims that the conveyance was conditioned on the grantor's death. The instruction may be supplemented with instructions on the requirements for execution of a will. If the grantee claims that the grantor intended to convey a present fee estate to the grantee while retaining a life estate in the property, then this instruction may also be supplemented with an instruction calling for the jury to determine whether or not this was indeed the grantor's intention. This instruction should be used with the introductory instruction in MB 7600A.12.

[3] Comment

A testamentary transfer of real property can be made only by a document that satisfies all of the requirements of a will [*Coffey v. Cooper* (1960) 185 Cal.App.2d 464, 467, 8 Cal.Rptr. 358 ; *Kelly v. Bank of America* (1952) 112 Cal.App.2d 388, 396, 246 P.2d 92]. A deed is valid and effective only if the grantor intends for the deed to operate as a present and immediate transfer to the grantee [*Hotaling v. Hotaling* (1924) 193 Cal. 368, 381-383, 224 P. 455]. A deed that only

becomes operative on the grantor's death, and that is meanwhile subject to the grantor's power to control or recall the conveyance, is not a conveyance of a present and immediate interest in property, and therefore there is no delivery [*Stone v. Daily* (1919) 181 Cal. 571, 575, 185 P. 665 ; *Fisher v. Oliver* (1917) 174 Cal. 781, 784-787, 164 P. 800 ; *Kelly v. Bank of America* (1952) 112 Cal.App.2d 388, 396, 246 P.2d 92]. A conveyance that is testamentary in character is void as a deed [*Coffey v. Cooper* (1960) 185 Cal.App.2d 464, 467, 8 Cal.Rptr. 358 ; *Henneberry v. Henneberry* (1958) 164 Cal.App.2d 125, 129, 330 P.2d 250].

An ineffective conditional delivery should be distinguished from a present delivery with a life estate retained by the grantor [see *Osborn v. Osborn* (1954) 42 Cal.2d 358, 362-363, 267 P.2d 333 (collecting cases)]. The deposit in escrow or with a third party of a deed granting an estate in fee simple, with instructions that the deed be transmitted to the grantee on the grantor's death, conveys a remainder interest in fee simple to the grantee with the life estate reserved in the grantor, so long as the grantor intended the deposit to be irrevocable [*Osborn v. Osborn* (1954) 42 Cal.2d 358, 362-363, 267 P.2d 333]. The result is the same as if the grantor delivered to the grantee a deed reserving a life estate and granting a remainder in fee [*Osborn v. Osborn* (1954) 42 Cal.2d 358, 362-363, 267 P.2d 333].

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property Law
Deeds
Delivery
Real Property Law
Ownership & Transfer
Death & Incapacity
Testamentary Dispositions

Peter H. Ferris, Eric J. Firstman, and Cindy Lee contributed to the original chapter for California Forms of Jury Instruction (Matthew Bender).



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CHAPTER 76A Matthew Bender Acquiring Title to Real Property Instructions
PART B. DEEDS

6-76A California Forms of Jury Instruction MB 7600A.19

MB 7600A.19 Acceptance of Deeds**[1] Instruction** Acceptance of Deeds[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

For delivery of a deed to be complete, and the deed to be valid and effective, the delivery must be accepted by the grantee. Acceptance is necessary to complete delivery, because the law does not force a person to take title to real property against his or her will.

[*OPTIONAL (See Use of Instruction)*]

In certain circumstances, acceptance will be presumed. Acceptance is presumed if _____ [insert relevant presumption (See [3], below), e.g., the deed is in the grantee's possession or the deed was beneficial to the grantee and the grantee lacks the mental capacity for acceptance]. _____ [If presumption is rebuttable, add: This presumption is rebuttable. That is, the presumption may be rebutted by evidence that the grantee did not accept the deed. Or, if presumption is conclusive, add: This presumption is conclusive. If you find that the deed was beneficial to the grantee and that the grantee lacked the mental capacity to accept the deed, then you must find that the deed was accepted].

Authorities: *Green v. Skinner* (1921) 185 Cal. 435, 439-440, 197 P. 60 ; *Reina v. Erassarret* (1949) 90 Cal.App.2d 418, 426, 203 P.2d 72 .

[2] Use of Instruction

This instruction should be used with the instructions on delivery of deeds [see MB 7600A.12 -MB 7600A.18] to explain the need for acceptance to complete delivery. The optional paragraph should be used to supplement this instruction with

an instruction on any applicable presumptions or inferences concerning acceptance [see [3], below].

[3] Comment

A deed cannot take effect until the deed, or the gift made by the deed, is accepted by the grantee [*Green v. Skinner* (1921) 185 Cal. 435, 438-439, 197 P. 60]. An effective delivery requires not only that the deed must be meant by its maker to take immediate effect [see MB 7600A.12], it also requires the deed to be presumably or in fact accepted by the grantee [*Reina v. Erassarret* (1949) 90 Cal.App.2d 418, 426, 203 P.2d 72]. Delivery and acceptance are of necessity simultaneous and correlative acts. The law will not force a person to take title to real property against his or her will. The assent of the grantee is therefore necessary to make a delivery effective and a deed operative [*Danenbergh v. O'Connor* (1961) 195 Cal.App.2d 194, 202-203, 15 Cal.Rptr. 667 ; *Reina v. Erassarret* (1949) 90 Cal.App.2d 418, 426, 203 P.2d 72].

Acceptance is presumed in various situations. Acceptance is presumed when the deed has been recorded [*Reina v. Erassarret* (1949) 90 Cal.App.2d 418, 426, 203 P.2d 72] and when the deed is in the grantee's possession [*California Trust Co. v. Hughes* (1952) 111 Cal.App.2d 717, 721, 245 P.2d 374 ; *Hodoian v. Garabedian* (1926) 79 Cal.App. 762, 769-770, 251 P. 227]. These presumptions are rebuttable [*California Trust Co. v. Hughes* (1952) 111 Cal.App.2d 717, 721, 245 P.2d 374 (possession of deed by grantee is prima facie evidence of acceptance); *Reina v. Erassarret* (1949) 90 Cal.App.2d 418, 426, 203 P.2d 72 ("this presumption [from recording] is a disputable one")]. A conveyance for the benefit of a person who is incapable of accepting, such as a minor [*Adams v. Adams* (1952) 113 Cal.App.2d 654, 656, 248 P.2d 784] or an incompetent [*Estate of Kalt* (1940) 16 Cal.2d 807, 813-814, 108 P.2d 401], is conclusively presumed to be accepted [*Estate of Kalt* (1940) 16 Cal.2d 807, 813-814, 108 P.2d 401 ; *Turner v. Turner* (1916) 173 Cal. 782, 787, 161 P. 980 ; *Adams v. Adams* (1952) 113 Cal.App.2d 654, 656, 248 P.2d 784]. The law accepts the conveyance for the minor or incompetent if it is to his or her benefit [*De Levillain v. Evans* (1870) 39 Cal. 120, 123]. Acceptance has also been presumed when a grantee knew of a deed beneficial to him and did not reject it [*Marshall v. Marshall* (1956) 140 Cal.App.2d 475, 479, 295 P.2d 131]. Similarly, when a deed is accepted by one or more of several grantees, and the deed is beneficial to all, acceptance by the others may be presumed [*Marshall v. Marshall* (1956) 140 Cal.App.2d 475, 479, 295 P.2d 131].

As between the grantor and the grantee, the grantee's assent, once given, will relate back to the time that the grantor first handed the deed over to a third person to be delivered to the grantee [*Green v. Skinner* (1921) 185 Cal. 435, 438, 197 P. 60]. An assent after the grantor's death may therefore be effective by relation back, so that the deed will be deemed delivered in the grantor's lifetime [*Green v. Skinner* (1921) 185 Cal. 435, 438, 197 P. 60]. However, the grantee's assent will operate retroactively by relation back only when the rights of third persons have not intervened [*Green v. Skinner* (1921) 185 Cal. 435, 438, 197 P. 60].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property Law Deeds Delivery

Peter H. Ferris, Eric J. Firstman, and Cindy Lee contributed to the original chapter for California Forms of Jury Instruction (Matthew Bender).



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CHAPTER 76A Matthew Bender Acquiring Title to Real Property Instructions
PART B. DEEDS

6-76A California Forms of Jury Instruction MB 7600A.20-MB 7600A.29

[Reserved]

MB 7600A.20[Reserved]



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CHAPTER 76A Matthew Bender Acquiring Title to Real Property Instructions
PART C. ADVERSE POSSESSION

6-76A California Forms of Jury Instruction MB 7600A.30

MB 7600A.30 Adverse Possession: Burden of Proof**[1] Instruction** Adverse Possession: Burden of Proof[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

In this case, [Plaintiff/Defendant] claims to have title to _____ [*describe real property*] because [he/she/it] has acquired title by means of a legal doctrine known as adverse possession.

To prove that [he/she/it] has acquired title to _____ [*describe real property*] by adverse possession, [Plaintiff/Defendant] must prove each of the following things by clear and satisfactory evidence:

1. [Plaintiff/Defendant] has paid all taxes levied and assessed on

_____ [*describe real property*] during the period that [he/she/it] has occupied the property; and

2. [Plaintiff/Defendant] has occupied

_____ [*describe real property*] for at least five years and this occupation was:

- a. Open and notorious;
- b. Continuous;
- c. Hostile to the true owner; and

d. Under a claim of title.

If [Plaintiff/Defendant] proves all of these things, then [he/she/it] has proven title by adverse possession. The burden of proof will then shift to _____ [name], the owner of record title to _____ [describe real property], to disprove [Plaintiff/Defendant]'s title. I will now provide you with further instructions on each of the things that [Plaintiff/Defendant] must prove.

Authorities: Code Civ. Proc. § 321 ; Civ. Code § 1007 ; *Dimmick v. Dimmick* (1962) 58 Cal.2d 417, 421, 24 Cal.Rptr. 856, 374 P.2d 824 ; *West v. Evans* (1946) 29 Cal.2d 414, 417, 175 P.2d 219 ; *California Maryland Funding, Inc. v. Lowe* (1995) 37 Cal.App.4th 1798, 1803, 44 Cal.Rptr.2d 784 ; *Buic v. Buic* (1992) 5 Cal.App.4th 1600, 1604, 7 Cal.Rptr.2d 738 ; *Machado v. Southern Pacific Transportation Co.* (1991) 233 Cal.App.3d 347, 361-362, 284 Cal.Rptr. 560 ; *Sevier v. Locher* (1990) 222 Cal.App.3d 1082, 1085, 1087, 272 Cal.Rptr. 287 ; *Mesnick v. Caton* (1986) 183 Cal.App.3d 1248, 1258, 228 Cal.Rptr. 779 .

[2] Use of Instruction

This instruction should be used as an introductory instruction when a party in a quiet title action, or other proceeding when title and the right to possession of property are at issue, seeks to prove that title has been acquired by adverse possession. This instruction will need to be accompanied with the instructions that follow on the individual elements of adverse possession [see MB 7600A.31 -MB 7600A.38]. The instruction should be supplemented with instructions on the applicable burdens of proof [see [3][c], below], standards of proof, and presumptions and inferences.

[3] Comment**[a] Definition and Elements of Adverse Possession; Exceptions**

Adverse possession is a method of acquiring title to real property by possession under specified conditions for the period of a statute of limitations [*Thomson v. Dypvik* (1985) 174 Cal.App.3d 329, 338, 220 Cal.Rptr. 46 ; see California Real Estate Law and Practice, Ch. 360, *Adverse Possession* (Matthew Bender)], which in California is five years [Code Civ. Proc. § 321]. A holder of title by adverse possession is not a successor in interest of the former owner. Title by adverse possession is new, absolute fee title [*Williams v. Sutton* (1872) 43 Cal. 65, 73]. To acquire title by adverse possession, the claimant has the burden of proving [see [c], below] all of the following five elements [Civ. Code § 1007 ; Code Civ. Proc. § 321 ; *Dimmick v. Dimmick* (1962) 58 Cal.2d 417, 421, 24 Cal.Rptr. 856, 374 P.2d 824 ; *West v. Evans* (1946) 29 Cal.2d 414, 417, 175 P.2d 219 ; *California Maryland Funding, Inc. v. Lowe* (1995) 37 Cal.App.4th 1798, 1803, 44 Cal.Rptr.2d 784 ; *Buic v. Buic* (1992) 5 Cal.App.4th 1600, 1604, 7 Cal.Rptr.2d 738 ; *Machado v. Southern Pacific Transportation Co.* (1991) 233 Cal.App.3d 347, 361-362, 284 Cal.Rptr. 560 ; *Sevier v. Locher* (1990) 222 Cal.App.3d 1082, 1085, 1087, 272 Cal.Rptr. 287 ; *Mesnick v. Caton* (1986) 183 Cal.App.3d 1248, 1258, 228 Cal.Rptr. 779]:

- Acts hostile to the true owner's title;
- Actual, open, and notorious occupancy of the land;
- Possession under claim of right or color of title;
- Continuous and uninterrupted possession for five years; and
- Payment of all taxes levied and assessed for the possession period.

All five of these elements must be proven to establish title [*Tobin v. Stevens* (1988) 204 Cal.App.3d 945, 947, 251

Cal.Rptr. 587 (even though claimant was in possession for 15 years, adverse possession not established because claimant did not pay taxes)]. Whether the elements of adverse possession have been established is a question of fact [*Sevier v. Locher* (1990) 222 *Cal.App.3d* 1082, 1087, 272 *Cal.Rptr.* 287].

Certain properties and people are exempt from adverse possession. Property dedicated to or owned by the state or any public entity is not subject to adverse possession [*Civ. Code* § 1007]. Minors and insane people are protected from adverse possession for 20 years or until their disability ends [*Code Civ. Proc.* § 328]. In addition, people imprisoned for less than a life term are protected from adverse possession for two years or until their imprisonment ends [*Code Civ. Proc.* § 328.5].

For further discussion, see California Real Estate Law and Practice, Ch. 360, *Adverse Possession* (Matthew Bender).

[b] Prescription Distinguished

Adverse possession is similar to prescription, and sometimes confused with it, but there are important differences between the two. Prescription is a way of acquiring incorporeal hereditaments, rights in the land of another that do not include the right or title to the land itself, such as easements. Adverse possession refers to title acquired by continuous possession of another's land for the required period, while prescription refers to the right to use another's land acquired by the use of that land for the same period [*Thomson v. Dypvik* (1985) 174 *Cal.App.3d* 329, 338, 220 *Cal.Rptr.* 46]. There are also differences in the conduct required for each process. The most important of these differences is that the right of use gained by prescription is measured by the actual use made of the property by the claimant, whereas the title obtained by adverse possession is focused on the exclusive possession of the premises [*Thomson v. Dypvik* (1985) 174 *Cal.App.3d* 329, 338-339, 220 *Cal.Rptr.* 46]. When a claimant cannot satisfy the requirements for adverse possession, the claimant may not receive a prescriptive easement that extends so far that it becomes the equivalent of a fee interest and dispossesses the record title owners of part of their property [*Mehdizadeh v. Mincer* (1996) 46 *Cal.App.4th* 1296, 1304-1305, 54 *Cal.Rptr.2d* 284].

For further discussion, see California Real Estate Law and Practice, Ch. 343, *Easements and Licenses* (Matthew Bender).

[c] Burden of Proof

The burden is on the person claiming adverse possession to prove each of the five elements in [a], *above*, necessary to establish title [*Dimmick v. Dimmick* (1962) 58 *Cal.2d* 417, 421, 24 *Cal.Rptr.* 856, 374 *P.2d* 824 ; *West v. Evans* (1946) 29 *Cal.2d* 414, 417, 175 *P.2d* 219]. Once the claimant meets his or her burden of proof, the burden shifts to the record owner to disprove the adverse claimant's title [*West v. Evans* (1946) 29 *Cal.2d* 414, 417, 175 *P.2d* 219 ; *California Maryland Funding, Inc. v. Lowe* (1995) 37 *Cal.App.4th* 1798, 1810, 44 *Cal.Rptr.2d* 784].

However, a plaintiff is not required to bring an action to perfect his or her claim of adverse possession. Rather, it is the record owner--not the intruder--who must bring an action within the prescribed five-year period after adverse possession commences to recover the property [*Marriage v. Keener* (1994) 26 *Cal.App.4th* 186, 191, 31 *Cal.Rptr.2d* 511 ; see *Code Civ. Proc.* § 318].

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property Law Adverse Possession Elements of Adverse Claims Real Property Law Adverse Possession Procedure

Peter H. Ferris, Eric J. Firstman, and Cindy Lee contributed to the original chapter for California Forms of Jury Instruction (Matthew Bender).



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CHAPTER 76A Matthew Bender Acquiring Title to Real Property Instructions
PART C. ADVERSE POSSESSION

6-76A California Forms of Jury Instruction MB 7600A.31

MB 7600A.31 Payment of Taxes Levied and Assessed for Possession Period**[1] Instruction** Payment of Taxes Levied and Assessed for Possession Period[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

To establish adverse possession, _____ [*claimant*] must prove that [he/she/it] has paid all the state, county, or municipal taxes that have been levied and assessed on _____ [*specify property at issue*] during _____ [*claimant*]'s five-year period of possession.

If taxes have been levied and assessed on _____ [*specify property at issue*], then _____ [*claimant*] must prove this fact and must also prove that [he/she/it] has paid the taxes. If no taxes have been levied and assessed against the land, then _____ [*claimant*] must prove this fact as a reason for not making payment.

The word "assessed" refers to an act of the assessor, and the word "levied" refers to an act of the board of supervisors or city council.

Authorities: *Code Civ. Proc.* § 325 ; *Allen v. McKay & Co.* (1898) 120 Cal. 332, 334-336, 52 P. 828 ; *Reynolds v. Willard* (1889) 80 Cal. 605, 607, 22 P. 262 ; *Smith v. Byer* (1960) 179 Cal.App.2d 118, 119-121, 3 Cal.Rptr. 645 .

[2] Use of Instruction

This instruction should be used to explain the requirement that a party claiming adverse possession must establish payment of all taxes levied and assessed against the subject property during the period of possession. The instruction must be given with the introductory instruction in MB 7600A.30 explaining the elements of adverse possession.

[3] Comment

[a] Payment Requirement

A party claiming title to land by adverse possession must prove that it has paid all taxes--state, county, or municipal--that have been levied and assessed on the land [*Code Civ. Proc.* § 325 ; *Gibbons v. Yosemite Lumber Co.* (1916) 172 Cal. 714, 716, 158 P. 196]. The adverse possessor has the burden of proving that he or she paid the taxes on the property or, alternatively, that no taxes were levied and assessed and therefore none were paid [*Gilardi v. Hallam* (1981) 30 Cal.3d 317, 326, 178 Cal.Rptr. 624, 636 P.2d 588 ; *Glatts v. Henson* (1948) 31 Cal.2d 368, 372, 188 P.2d 745 ; *Reynolds v. Willard* (1889) 80 Cal. 605, 607, 22 P. 262 ; *Raab v. Casper* (1975) 51 Cal.App.3d 866, 878, 124 Cal.Rptr. 590]. Whether the claimant paid the taxes is a question of fact [*Finley v. Yuba County Water Dist.* (1979) 99 Cal.App.3d 691, 698, 160 Cal.Rptr. 423].

The claimant must actually pay the taxes to comply with this requirement. The tax collector's refusal to accept the claimant's offer to pay will not excuse the failure to pay, and this refusal will therefore prevent the establishment of adverse title [*Glowner v. De Alvarez* (1909) 10 Cal.App. 194, 195-196, 101 P. 432]. Payment of the taxes by a third party may be sufficient in some circumstances [see, e.g., *Kraemer v. Kraemer* (1959) 167 Cal.App.2d 291, 309-310, 334 P.2d 675 (oil company's payment of taxes under lease agreement with claimant held to be payment on claimant's behalf because it was made to discharge company's obligation under lease); *Williams v. Stillwell* (1933) 217 Cal. 487, 491-492, 19 P.2d 773 (payment by claimant's mother and sister sufficient if claimant reimburses them in money or labor)]. For discussion of these circumstances, see California Real Estate Law and Practice, Ch. 360, *Adverse Possession* (Matthew Bender).

[b] Exceptions

The rule requiring payment of taxes does not apply if no taxes are assessed [*Costa v. Fawcett* (1962) 202 Cal.App.2d 695, 701, 21 Cal.Rptr. 143] or if the assessment was void [*Los Angeles Mountain Park Co. v. Burrows* (1932) 121 Cal.App. 165, 166-167, 8 P.2d 489]. The rule also does not apply if the issue is raised in an action that is not between the holder of legal title and the adverse claimant [*Shanahan v. Tomlinson* (1894) 103 Cal. 89, 90, 36 P. 1009]. There is also an exception for claimants that are semi-public in nature, such as a school district [*Mings v. Compton City School Dist.* (1933) 129 Cal.App. 413, 417, 18 P.2d 967], or an irrigation district, which is not subject to taxation of property used by it in its governmental capacity [*Anderson-Cottonwood Irrigation Dist. v. Zinzer* (1942) 51 Cal.App.2d 587, 591, 125 P.2d 82].

The payment requirement also does not apply to easements acquired by prescription. However, a party that has enclosed and possessed land may not escape the statutory requirement for paying taxes by claiming a prescriptive easement [*Kapner v. Meadowlark Ranch Assn.* (2004) 116 Cal.App.4th 1182, 1187, 11 Cal.Rptr.3d 138]. For discussion of easements and prescription, see Ch. 77A, *Matthew Bender Easement Instructions*, MB 7700A.06.

[c] Period for Which Taxes Must Be Paid

The period for which taxes must be paid to establish an adverse possession claim is five years [*Code Civ. Proc.* § 325]. This is the same five years during which the claimant's possession must be continuous and uninterrupted [*Walner v. City of Turlock* (1964) 230 Cal.App.2d 399, 409, 41 Cal.Rptr. 29] and it dates from the time that the claimant went into possession [*Smith v. Byer* (1960) 179 Cal.App.2d 118, 119, 3 Cal.Rptr. 645]. Taxes levied and assessed before the beginning of possession by the claimant need not be paid [*Allen v. McKay & Co.* (1898) 120 Cal. 332, 336, 52 P. 828], but the failure to pay taxes on any part of the five-year period can defeat a claim for adverse possession [*Smith v. Byer* (1960) 179 Cal.App.2d 118, 119-120, 3 Cal.Rptr. 645].

The five-year period for which taxes are due refers to the time the taxes are levied and assessed, not to the time they must be paid [*Smith v. Byer* (1960) 179 Cal.App.2d 118, 120, 3 Cal.Rptr. 645]. Thus, even if taxes cannot be paid until after the five-year period expires, they must be paid if they were levied and assessed during that period [*Smith v. Byer*

(1960) 179 Cal.App.2d 118, 120, 3 Cal.Rptr. 645]. The levy and assessment of taxes after the five-year period is completed does not affect the acquisition of title by adverse possession, and the failure to pay these taxes will not defeat title previously acquired [*Nord v. McIlroy* (9th Cir. 1961) 296 F.2d 12, 16].

Taxes must be paid only if they were both levied and assessed during the applicable period. Thus, a claimant is not obliged to pay taxes that were assessed before the applicable period of possession even if those taxes were levied during the claimant's period of possession [*Allen v. McKay & Co.* (1898) 120 Cal. 332, 335, 52 P. 828]. "Levied" refers to the act of the board of supervisors in making the levy, and "assessed" refers to the act of the assessor in making the assessment [*Allen v. McKay & Co.* (1898) 120 Cal. 332, 334, 52 P. 828].

[d] Redemption

Redemption of property, which is the buying back of property sold because of nonpayment of taxes [see *Rev. & Tax. Code* §§ 4101-4116], can qualify as the payment of taxes if done in good faith and while the claimant was in undisturbed possession of the property [*Owsley v. Matson* (1909) 156 Cal. 401, 404-405, 104 P. 983]. There is no payment when the redeemers were never in possession of the property and later conveyed the property to the adverse claimant [*Warden v. Bailey* (1933) 133 Cal.App. 383, 388, 24 P.2d 192]. In addition, a redemption after the claimant's adverse possession has ended does not relate back, and it is therefore not a payment during the period of possession [*Owsley v. Matson* (1909) 156 Cal. 401, 404-405, 104 P. 983 ; *McDonald v. McCoy* (1898) 121 Cal. 55, 73, 53 P. 421].

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property LawAdverse PossessionElements of Adverse ClaimsReal Property LawAdverse PossessionProcedureReal Property LawDeedsTypesTax Deeds

Peter H. Ferris, Eric J. Firstman, and Cindy Lee contributed to the original chapter for California Forms of Jury Instruction(Matthew Bender).



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CHAPTER 76A Matthew Bender Acquiring Title to Real Property Instructions
PART C. ADVERSE POSSESSION

6-76A California Forms of Jury Instruction MB 7600A.32

MB 7600A.32 Claim of Title by Virtue of Claim of Right**[1] Instruction** Claim of Title by Virtue of Claim of Right[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

_____ [*Claimant*] bases [his/her/its] claim of title on a claim of right. _____ [*Claimant*] must therefore prove that [he/she/it] possessed _____ [*describe real property at issue*] under a claim of right.

A claim of right means that _____ [*claimant*] entered the land as an intruder or trespasser and then claimed the property as [his/her/its] own. A claim of right is a claim of title that is not based on a written instrument, judgment, or decree. The claim of right must be exclusive of any other right, and _____ [*claimant*] must actually and continually occupy the land.

Authorities: Code Civ. Proc. §§ 324, 325 ; *Sorensen v. Costa* (1948) 32 Cal.2d 453, 458, 196 P.2d 900 ; *Kimball v. Lohmas* (1866) 31 Cal. 154, 159 ; *Brown v. Berman* (1962) 203 Cal.App.2d 327, 329, 330, 21 Cal.Rptr. 401 .

[2] Use of Instruction

This instruction should be used in adverse possession cases when the claimant alleges possession under a claim of right and not under color of title. Adverse possession under a claim of right does not involve a written instrument, judgment, or decree. It is based solely on possession. When a written instrument is involved, the instruction in MB 7600A.33 on color of title should be used. Both this instruction and the color of title instruction should be used when a person receives a deed that applies to only a part of the land actually occupied and claimed, as this person can claim title under color of title only to that part of the property described in the instrument that evidences color of title. For the remaining part of the occupied property, the claimant must prove adverse possession under a claim of right.

This instruction should be given with the instruction in MB 7600A.30 on the elements of adverse possession, and the instruction in MB 7600A.35 on actual possession under a claim of right.

[3] Comment

Adverse possession by a claim of right is based on actual and continued possession of land under a claim of title that is not based on a written instrument, judgment, or decree. The claim of title must be exclusive of any other right [*Code Civ. Proc.* §§ 324, 325 ; *Sorensen v. Costa* (1948) 32 Cal.2d 453, 458, 196 P.2d 900 ; *Buic v. Buic* (1992) 5 Cal.App.4th 1600, 1604, 7 Cal.Rptr.2d 738]. A party who claims title under a claim of right generally has no bona fide belief in his or her title and therefore enters into possession as a trespasser and intruder, but with an intent to claim exclusive title and to hold it against all comers [*Kimball v. Lohmas* (1866) 31 Cal. 154, 159 ; *Brown v. Berman* (1962) 203 Cal.App.2d 327, 329, 330, 21 Cal.Rptr. 401].

A claim of right may be hostile or based on mistake [*Gilardi v. Hallam* (1981) 30 Cal.3d 317, 323-324, 178 Cal.Rptr. 624, 636 P.2d 588 ; *Sorensen v. Costa* (1948) 32 Cal.2d 453, 459-460, 196 P.2d 900 ; *Woodward v. Faris* (1895) 109 Cal. 12, 16-17, 41 P. 781]. When the occupation of land is by a mere mistake, with no intention by the occupant to claim the land as his or her own, but with the intention to claim only to the true boundary line, the holding is not adverse [*Sorensen v. Costa* (1948) 32 Cal.2d 453, 459-460, 196 P.2d 900]. On the other hand, when the possessor intends to claim the area occupied as his or her own, the holding is adverse despite the fact that the claim is based on mistake, unless the claimant showed an intent not to claim the occupied land if record title was in another [*Gilardi v. Hallam* (1981) 30 Cal.3d 317, 323-324, 178 Cal.Rptr. 624, 636 P.2d 588]. This intent not to claim the occupied land must be established by substantial evidence [*Gilardi v. Hallam* (1981) 30 Cal.3d 317, 323-324, 178 Cal.Rptr. 624 ; *Mesnick v. Caton* (1986) 183 Cal.App.3d 1248, 1259-1260, 228 Cal.Rptr. 779].

It is possible that a claimant may assert title to property under both claim of right and color of title if the written instrument on which a claim of title under color of title is based does not include all the areas that the claimant actually possessed and seeks title to [see *Johns v. Scobie* (1939) 12 Cal.2d 618, 628, 86 P.2d 820 ; see also MB 7600A.33 for an instruction on claim of title under color of title].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property Law Adverse Possession Elements of Adverse Claims

Peter H. Ferris, Eric J. Firstman, and Cindy Lee contributed to the original chapter for California Forms of Jury Instruction (Matthew Bender).



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CHAPTER 76A Matthew Bender Acquiring Title to Real Property Instructions
PART C. ADVERSE POSSESSION

6-76A California Forms of Jury Instruction MB 7600A.33

MB 7600A.33 Claim of Title by Virtue of Color of Title**[1] Instruction** Claim of Title by Virtue of Color of Title[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

_____ [*Claimant*] bases [his/her/its] claim of title on color of title. _____ [*Claimant*] must therefore prove that [he/she/it] possessed _____ [*describe real property at issue*] under color of title.

To find that _____ [*claimant*] **has a claim of title under color of title, you must find that** _____ [*claimant*] **entered into the possession of** _____ [*describe real property at issue*] **under a good faith claim of title that was founded on a written instrument that purported to be a conveyance of title to the real property or on a decree or judgment from a court that appeared to grant title to the real property.**

Authorities: Code Civ. Proc. §§ 322, 323 ; *Johns v. Scobie* (1939) 12 Cal.2d 618, 626, 86 P.2d 820 ; *Thomson v. Dypvik* (1985) 174 Cal.App.3d 329, 339, 220 Cal.Rptr. 46 .

[2] Use of Instruction

This instruction should be used when the claimant has entered into possession of the land on a claim of title based on a written instrument or court decree that is defective in some manner. This instruction should be given with the introductory instruction on the elements of adverse possession in MB 7600A.30 and with the applicable instructions explaining those elements in MB 7600A.31-MB 7600A.38.

[3] Comment

Color of title is apparent title based on a written instrument (such as a deed), judgment, or decree that purports to

convey or grant title, but is somehow defective [*Code Civ. Proc.* §§ 322, 323 ; *Packard v. Moss* (1885) 68 Cal. 123, 127, 8 P. 818 ; *Thomson v. Dypvik* (1985) 174 Cal.App.3d 329, 339, 220 Cal.Rptr. 46]. In effect, color of title is merely a means of showing hostility of possession; it is never good title, but merely an appearance of it [*Johns v. Scobie* (1939) 12 Cal.2d 618, 626, 86 P.2d 820 ; *Packard v. Moss* (1885) 68 Cal. 123, 127-128, 8 P. 818]. Adverse possession perfected by color of title dispenses with other proof of hostile or adverse claim [*Wilson v. Atkinson* (1888) 77 Cal. 485, 491, 20 P. 66]. Moreover, the claimant is not bound to show a forcible ouster of the true owner [*Wilson v. Atkinson* (1888) 77 Cal. 485, 491, 20 P. 66].

Under claim of title by color of title, the land described in the defective instrument, judgment, or decree is the land that may be claimed by adverse possession [*Code Civ. Proc.* § 322]. If, for example, a tract of land described in a deed is claimed adversely under color of title, continuous possession of only part of the tract is sufficient to support an adverse possession claim for the entire tract [*Wheatley v. San Pedro, etc. R.R. Co.* (1915) 169 Cal. 505, 515, 147 P. 135]. By contrast, with claim of right, the land claimed by adverse possession is only the land that is actually occupied [*Wheatley v. San Pedro, etc. R.R. Co.* (1915) 169 Cal. 505, 515, 147 P. 135 ; see MB 7600A.32].

The claim to ownership of one claiming under color of title must be in good faith [*Madden v. Alpha Hardware & Supply Co.* (1954) 128 Cal.App.2d 72, 76, 274 P.2d 705], and the claimant must have a bona fide belief that he or she owns the property [*Buic v. Buic* (1992) 5 Cal.App.4th 1600, 1604, 7 Cal.Rptr.2d 738 ; *Devlin v. Powell* (1924) 67 Cal.App. 165, 172, 227 P. 231]. To eliminate the required good faith, there must be actual knowledge that the writing on which the claim is based is invalid: "[T]he knowledge of the true character of the instrument by the occupant must be actual, and not such as would arise from the legal construction of the instrument" [*Wilson v. Atkinson* (1888) 77 Cal. 485, 493, 20 P. 66]. "[A]ctual knowledge ... of invalidity eliminates the essential element of good faith" [*Nutting v. Herman Timber Co.* (1963) 214 Cal.App.2d 650, 658, 29 Cal.Rptr. 754 ; see *Madden v. Alpha Hardware & Supply Co.* (1954) 128 Cal.App.2d 72, 76, 274 P.2d 705 ; *Yuba River Sand Co. v. City of Marysville* (1947) 78 Cal.App.2d 421, 430, 177 P.2d 642].

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property Law Adverse Possession Elements of Adverse Claims Real Property Law Adverse Possession Procedure

Peter H. Ferris, Eric J. Firstman, and Cindy Lee contributed to the original chapter for California Forms of Jury Instruction (Matthew Bender).



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CHAPTER 76A Matthew Bender Acquiring Title to Real Property Instructions
PART C. ADVERSE POSSESSION

6-76A California Forms of Jury Instruction MB 7600A.34

MB 7600A.34 Actual, Open, and Notorious Possession**[1] Instruction** Actual, Open, and Notorious Possession[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Actual possession of land means a subjection of the land to the will and dominion of _____ [claimant]. This is usually evidenced by occupation together with a substantial enclosure, cultivation, or otherwise making an appropriate use of the land, according to the customs of the particular locality and the quality of the property. Actual possession is not established just by asserting title; there must be acts of ownership that proclaim to the world, and bring notice to the owner, that a right is claimed in the land. Thus _____ [claimant] does not necessarily have to prove that [he/she/it] lived on the land or cultivated the land. Rather, _____ [claimant] must prove that the land was occupied and used during the five-year period in the same manner that owners of land of like character in that vicinity usually occupy and exercise dominion over their property.

Authorities: Code Civ. Proc. § 325 ; West v. Evans (1946) 29 Cal.2d 414, 417, 175 P.2d 219 ; Hart v. Cox (1915) 171 Cal. 364, 367, 153 P. 391 ; Coryell v. Cain (1860) 16 Cal. 567, 573 .

[2] Use of Instruction

This instruction should be used with one of the two instructions that follow on actual possession under claim of right [see MB 7600A.35] or color of title [see MB 7600A.36]. The instruction is to be read in conjunction with the introductory instruction in MB 7600A.30 and the remaining applicable instructions on the elements of adverse possession in MB 7600A.31-MB 7600A.38.

[3] Comment**[a] Actual Possession**

To establish adverse possession, a claimant must have been in actual possession of the real property for a continuous period of five years [*Stanley v. Westover* (1928) 93 Cal.App. 97, 109, 269 P. 468]. Actual possession of the land requires an act beyond the mere assertion of title. There must be overt acts of ownership that proclaim to the world, and bring notice to the owner, that a right is claimed in the land over which the claimant seeks to exercise dominion [*West v. Evans* (1946) 29 Cal.2d 414, 417, 175 P.2d 219 ; *Wareham v. Randolph* (1960) 184 Cal.App.2d 218, 225, 7 Cal.Rptr. 483 ; *Bell v. Towne* (1957) 155 Cal.App.2d 225, 229, 318 P.2d 110]. Actual possession means "a subjection [of the real property] to the will and dominion of the claimant, and is usually evidenced by occupation--by a substantial enclosure--by cultivation, or by appropriate use, according to the particular locality and quality of the property" [*Coryell v. Cain* (1860) 16 Cal. 567, 573 ; see *Hart v. Cox* (1915) 171 Cal. 364, 367, 153 P. 391 (there must be subjection of land to adverse possessor's will and control, as opposed to mere assertion of title and exercise of casual acts of ownership)].

In determining what types of acts are sufficient to constitute possession of a specific piece of real property, the courts consider numerous factors. "[T]he character of the land, its locality, and the customs of the community" are factors in determining whether there is actual possession [*Landini v. Day* (1968) 264 Cal.App.2d 278, 282-283, 70 Cal.Rptr. 260]. For examples of specific acts that have been found to satisfy this requirement, see [b], *below*.

[b] Acts That Constitute Actual Possession

Actions that satisfy the actual possession requirement include, but are not limited to, all of the following:

- A substantial enclosure of land [*Code Civ. Proc.* §§ 323, 325 ; *Brumagim v. Bradshaw* (1870) 39 Cal. 24, 44 ; *Polack v. McGrath* (1867) 32 Cal. 15, 21-22];
- The construction of improvements [*Code Civ. Proc.* §§ 323, 325 ; *Blume v. MacGregor* (1944) 64 Cal.App.2d 244, 258, 148 P.2d 656];
- Cultivation [*Code Civ. Proc.* §§ 323, 325 ; *Blume v. MacGregor* (1944) 64 Cal.App.2d 244, 258, 148 P.2d 656 ; *County of Los Angeles v. Pacific E. R. Co.* (1928) 93 Cal.App. 512, 514, 269 P. 767];
- Pasturage [*Mattes v. Hall* (1913) 21 Cal.App. 552, 562-563, 132 P. 295]; and
- Possession by a tenant of the adverse claimant [*Palin v. Sweitzer* (1937) 8 Cal.2d 329, 331, 65 P.2d 351].

Occasional use of the property, though generally insufficient, may amount to actual possession when, because of climate, inaccessibility, or some similar factor, occasional use is the ordinary and usual use of the property [*Newman v. Cornelius* (1970) 3 Cal.App.3d 279, 290, 83 Cal.Rptr. 435]. For a comprehensive discussion of acts sufficient to constitute actual possession, see CALIFORNIA REAL ESTATE LAW AND PRACTICE, Ch. 360, *Adverse Possession* (Matthew Bender).

[c] Open and Notorious

An adverse possession claim requires an occupancy that is open and notorious [*Klein v. Caswell* (1948) 88 Cal.App.2d 774, 779, 199 P.2d 689] so as to give the owner reasonable notice of the adverse nature of the claimant's possession [*Sorensen v. Costa* (1948) 32 Cal.2d 453, 461, 196 P.2d 900]. The purpose for giving notice is to provide the owner an opportunity to bring a lawsuit to regain possession of the land [*Mauldin v. Costa* (1885) 67 Cal. 387, 394, 7 P. 804]. In most cases, the actions that constitute actual occupancy (e.g., enclosure, cultivation, or construction of improvements) also satisfy the open and notorious requirement [see *Mattes v. Hall* (1915) 28 Cal.App. 361, 365, 152 P. 436 (enclosure,

occupation, and cultivation generally sufficient to give owner notice, but there are exceptions to rule, as when enclosure is consistent with permission to use land); *see also* California Real Estate Law and Practice, Ch. 360, *Adverse Possession* (Matthew Bender)]. The claimant's occupancy must be of a type that constitutes reasonable notice to the true owner that the claimant is claiming the land as his or her own [*Kraemer v. Kraemer* (1959) 167 Cal.App.2d 291, 309, 334 P.2d 675]. The record owner's unawareness of his or her rights in the land is immaterial [*Lobro v. Watson* (1974) 42 Cal.App.3d 180, 187, 116 Cal.Rptr. 533 ; *Kraemer v. Kraemer* (1959) 167 Cal.App.2d 291, 309, 334 P.2d 675]. Notice to the owner must be actual or the use must be so open, visible, and notorious that it constitutes reasonable notice [*Kerr Land & Timber Co. v. Emmerson* (1969) 268 Cal.App.2d 628, 634, 74 Cal.Rptr. 307]. Constructive notice of the use is sufficient to constitute reasonable notice. Constructive notice can be defined as any visible act that demonstrates the intention to claim ownership and possession and that would put the legal owner on inquiry [*Weyse v. Biedebach* (1927) 86 Cal.App. 712, 721, 261 P. 1086 ; *but see Madden v. Alpha Hardware & Supply Co.* (1954) 128 Cal.App.2d 72, 75, 274 P.2d 705 (open and notorious possession is not sufficient notice when it is with owner's permission)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property LawAdverse PossessionElements of Adverse ClaimsReal Property LawAdverse PossessionProcedure

Peter H. Ferris, Eric J. Firstman, and Cindy Lee contributed to the original chapter for California Forms of Jury Instruction(Matthew Bender).



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CHAPTER 76A Matthew Bender Acquiring Title to Real Property Instructions
PART C. ADVERSE POSSESSION

6-76A California Forms of Jury Instruction MB 7600A.35

MB 7600A.35 Actual Possession Under Claim of Right**[1] Instruction** Actual Possession Under Claim of Right[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

_____ [*Claimant*] may establish actual possession of _____ [*describe real property at issue*] under a claim of right only if _____ [*describe real property at issue*] has been (1) protected by a substantial enclosure, or (2) cultivated or improved in the usual manner. Only the land that is actually possessed by means of enclosure, cultivation, or improvement may be claimed by adverse possession.

To constitute a substantial enclosure, there must be a barrier surrounding the property sufficient to protect it from intrusion by livestock or people during the five-year period.

To establish usual cultivation, it is sufficient to show that _____ [*claimant*] was present at all times and seasons appropriate to the regular and usual cultivation of the land.

To establish a usual improvement, it is sufficient to show that _____ [*claimant*] has been in actual possession of the property and improved the property in the manner or to the extent usual in the case of similar property. Land will be considered usually improved by the making of improvements that are permanent in their nature, are usual in the case of similar property, and are of a nature that indicates exclusive management and control, rather than mere temporary trespass.

Authorities: Code Civ. Proc. §§ 324, 325 ; Gray v. Walker (1910) 157 Cal. 381, 384-385, 108 P. 278 ; Brown v. Berman (1962) 203 Cal.App.2d 327, 329, 21 Cal.Rptr. 401 ; Hayes v. Mitchell (1960) 184 Cal.App.2d 301, 304-305, 7 Cal.Rptr. 364 ; Blume v. MacGregor (1944) 64 Cal.App.2d 244, 258, 148 P.2d 656 ; Mings v. Compton City School Dist. (1933) 129 Cal.App. 413, 418-419, 18 P.2d 967 ; Los Angeles Co. v. Pacific Elec. Ry. Co. (1928) 93 Cal.App. 512, 514, 269 P. 767 ; Ross v. Burkhard

Investment Co. (1928) 90 Cal.App. 201, 210-211, 265 P. 982 .

[2] Use of Instruction

This instruction should be used with the instruction on actual occupancy of property in MB 7600A.34 when the claimant is seeking to prove adverse possession under a claim of right.

[3] Comment

The statutory requirements for possession differ depending on whether the claimant holds his possession under color of title or merely under a claim of right [*Code Civ. Proc.* §§ 323-325 ; *Brown v. Berman (1962) 203 Cal.App.2d 327, 329, 21 Cal.Rptr. 401*]. The requirements of possession are more stringent when the possessor acts under a mere claim of right than when he or she occupies the land under color of title [*Brown v. Berman (1962) 203 Cal.App.2d 327, 329, 21 Cal.Rptr. 401*]. For occupation under a claim of right, the claimant must protect the property with a substantial enclosure or must "usually" cultivate or improve the property [*Code Civ. Proc.* § 325].

A claimant possessing land under a claim of right sufficiently possesses the claimed property when the claimant builds a substantial enclosure around the property that is sufficient to prevent the intrusion of cattle or people onto the property [*Code Civ. Proc.* § 325 ; *Ross v. Burkhard Investment Co. (1928) 90 Cal.App. 201, 210-211, 265 P. 982*]. When property is fenced on three sides, leaving the fourth side open to a vacant lot, however, this is not a substantial enclosure, and the claimant must rely on cultivation to prove possession under a claim of right [*Williams v. Stillwell (1933) 217 Cal. 487, 492-493, 19 P.2d 773*].

The requirement of usual cultivation does not require that the claimant be constantly present on the land [*County of Los Angeles v. Pacific E. R. Co. (1928) 93 Cal.App. 512, 514, 269 P. 767*]. It is enough if the adverse claimant is present at all times and seasons appropriate to the land's regular and usual cultivation [*County of Los Angeles v. Pacific E. R. Co. (1928) 93 Cal.App. 512, 514, 269 P. 767*].

Actual possession may be shown by "the making of improvements which are permanent in their nature, are usual in the case of similar property, and are such as to indicate exclusive management and control, rather than a mere temporary trespass" [*Blume v. MacGregor (1944) 64 Cal.App.2d 244, 258, 148 P.2d 656*]. The requirement of a usual improvement of the property means that the property should be improved in a manner or to the extent usual in the case of similar property [*Gray v. Walker (1910) 157 Cal. 381, 384, 108 P. 278*]. This requirement was found to be satisfied when a claimant had been in actual possession of the property, used and improved it, and constructed a building on it [*Mings v. Compton City School Dist. (1933) 129 Cal.App. 413, 418, 18 P.2d 967*].

The adverse claimant need not personally occupy or reside on the property. An adverse claimant in possession of a structure, who thereafter rents and manages the structure for five years, has been held to adequately possess the property to perfect title by adverse possession [*People v. Lapcheske (1999) 73 Cal.App.4th 571, 573, 86 Cal.Rptr.2d 565* ; *Treager v. Friedman (1947) 79 Cal.App.2d 151, 168, 179 P.2d 387 (under color of title)*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property Law Adverse Possession Elements of Adverse Claims Real Property Law Adverse Possession Procedure

Peter H. Ferris, Eric J. Firstman, and Cindy Lee contributed to the original chapter for California Forms of Jury Instruction (Matthew Bender).



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CHAPTER 76A Matthew Bender Acquiring Title to Real Property Instructions
PART C. ADVERSE POSSESSION

6-76A California Forms of Jury Instruction MB 7600A.36

MB 7600A.36 Actual Possession Under Color of Title

[1] Instruction Actual Possession Under Color of Title

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

To establish actual possession under color of title, _____ [*claimant*] must prove that [he/she/it] has done one of the following with the land:

1. Cultivated or improved it in the usual manner;
2. Protected it by a substantial enclosure;
3. Used it for the supply of fuel or of fencing timber;
4. Used it for husbandry;
5. Used it for pasturage; or
6. Used it for the occupant's ordinary use.

[*OPTIONAL (See Use of Instruction)*]

If a known farm or single lot has been partly improved, the portion of the farm or lot that has not been cleared or enclosed is considered to have been occupied for the same length of time as the part that was improved and cultivated.

[CONTINUE INSTRUCTION]

To establish actual possession under color of title it is only necessary that the claimed land be used in a way that is appropriate to that piece of land. If, for example, the land is only suitable for seasonal use, then the land's use during the seasons when it is fit for use is sufficient to establish actual possession. If the land is only suitable for slight use, then slight use is sufficient to establish actual possession.

Authorities: *Code Civ. Proc. § 323 ; Posey v. Bay Point Realty Co. (1932) 214 Cal. 708, 712, 7 P.2d 1020 ; Newman v. Cornelius (1970) 3 Cal.App.3d 279, 290, 83 Cal.Rptr. 435 ; Kellogg v. Huffman (1934) 137 Cal.App. 278, 284, 30 P.2d 593 .*

[2] Use of Instruction

This instruction should be used with the instruction on actual occupancy of property in MB 7600A.34 when the claimant is seeking to prove adverse possession under color of title. Because an adverse possessor claiming under color of title may also prove possession of the property by all the means available to an adverse claimant under claim of right, this instruction may be supplemented with elements of the instruction in MB 7600A.35 on possession under claim of right if the facts warrant. If the claimant alleges adverse possession of all of a farm or single lot that has only been partly improved, the optional part of the instruction should be used.

[3] Comment

A party claiming adverse possession under color of title, like a claimant under a claim of right, can establish actual possession if he or she protects the property by a substantial enclosure or "usually" cultivates or improves the property [*Code Civ. Proc. § 323*]. If the adverse possessor seeks to prove actual possession by an occupation of the property in satisfaction of one of these requirements, the rules discussed with reference to actual possession under a claim of right will apply [*see MB 7600A.35*]. However, in certain circumstances an adverse possessor claiming under color of title need not satisfy the strict requirements of possession under claim of right.

An adverse possessor who has color of title can establish possession of the real property when the adverse possessor uses timber from the property to supply fuel or fencing materials, or when the property is used for purposes of husbandry or for pasturage [*Code Civ. Proc. § 323*]. If the adverse possessor claims to have used the unenclosed property for grazing or pasturage, and the land is reasonably fit only for pasturage, it is sufficient use and occupation of land under color of title to use the land as pasture throughout the grazing season of each year while feed is available, if this use is to the exclusion of others [*Kellogg v. Huffman (1934) 137 Cal.App. 278, 284, 30 P.2d 593*]. To establish adverse possession under color of title, it is only necessary that land be put to such use as can reasonably be made of it, and this use is sufficiently continuous if, during the required time, it is used at all times when it can be used for the purpose to which it is adapted [*Posey v. Bay Point Realty Co. (1932) 214 Cal. 708, 712, 7 P.2d 1020 ; Kellogg v. Huffman (1934) 137 Cal.App. 278, 284, 30 P.2d 593*].

An adverse possessor claiming title to property under color of title can also prove possession by use that qualifies as "the ordinary use of the occupant" [*Code Civ. Proc. § 323*]. Thus, the adverse possessor can prove possession by showing use of the property in the manner normal and usual for other, similar property in the area [*Posey v. Bay Point Realty Co. (1932) 214 Cal. 708, 712, 7 P.2d 1020 ; Newman v. Cornelius (1970) 3 Cal.App.3d 279, 290, 83 Cal.Rptr. 435*]. For example, when a party held color of title to a mountain cabin, the court held that "using land in a mountainous area for summer and weekend recreation purposes, coupled with the modest effort to extract gold, albeit not in commercial quantities, constitutes 'an ordinary use' of such land" [*Newman v. Cornelius (1970) 3 Cal.App.3d 279, 290, 83 Cal.Rptr. 435*]. The court, quoting from prior authorities, reasoned: "If but slight use can be made of land claimed adversely, then the requirements of continuous and uninterrupted occupancy are satisfied, if such slight use as

can be made, is made thereof" [*Newman v. Cornelius* (1970) 3 Cal.App.3d 279, 290, 83 Cal.Rptr. 435].

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property LawAdverse PossessionElements of Adverse ClaimsReal Property LawAdverse PossessionProcedure

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CHAPTER 76A Matthew Bender Acquiring Title to Real Property Instructions
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6-76A California Forms of Jury Instruction MB 7600A.37

MB 7600A.37 Acts Hostile to the True Owner's Title**[1] Instruction** Acts Hostile to the True Owner's Title[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

The requirement of "hostility" means, not that the parties must have a dispute as to the title during the period of possession, or that there is open aggression or combat, but that _____ [*claimant*]'s possession must be adverse to the record owner, unaccompanied by any recognition of _____ [*owner*]'s rights in the property. _____ [*Claimant*]'s possession of the property must be under a claim of title against _____ [*owner*] during the entire five-year period.

[*OPTIONAL (See Use of Instruction)*]

If _____ [*claimant*] is in actual possession of _____ [*describe real property at issue*] under color of title, then [his/her/its] possession is hostile to the rights of any other person.

[*USE IF PERMISSIVE POSSESSION IS IN ISSUE (See Use of Instruction)*]

A claimant who uses land with the owner's consent may change the possession into a possession that is hostile to the owner's title, by an unqualified and definite renunciation of the subordination to the owner. The use is then hostile even though the character of use to which the claimant puts the property after the renunciation may be identical to that contemplated by the parties when the claimant first entered on the land.

The renunciation must be clear enough to put the owner on notice that subsequent possession is adverse to

[his/her/its] title. The owner may be charged with constructive notice of the plaintiff's claimed renunciation if the owner has actual notice of circumstances sufficient to put a prudent person on inquiry.

[USE IF CLAIMANT ENTERS LAND BY MISTAKE (See Use of Instruction)]

When an adverse possessor enters on land mistakenly believing that [he/she/it] is the land's owner, the possession is adverse unless _____ [party disputing adverse title] proves by substantial evidence that the adverse claimant (1) recognized the record owner's claim to the land, and (2) expressly or impliedly showed an intent to claim the disputed land only if record title was determined in [his/her/its] favor.

Authorities: *Code Civ. Proc.* § 322 ; *Gilardi v. Hallam* (1981) 30 Cal.3d 317, 322-326, 178 Cal.Rptr. 624, 636 P.2d 588 ; *Southern Pacific Co. v. San Francisco* (1964) 62 Cal.2d 50, 56, 41 Cal.Rptr. 79, 396 P.2d 383 ; *Buic v. Buic* (1992) 5 Cal.App.4th 1600, 1605, 7 Cal.Rptr.2d 738 ; *Mesnick v. Caton* (1986) 183 Cal.App.3d 1248, 1259, 228 Cal.Rptr. 779 ; *Newman v. Cornelius* (1970) 3 Cal.App.3d 279, 288-289, 83 Cal.Rptr. 435 ; *Nutting v. Herman Timber Co.* (1963) 214 Cal.App.2d 650, 658, 29 Cal.Rptr. 754 .

[2] Use of Instruction

This instruction on hostile possession should be given with the introductory instruction on adverse possession in MB 7600A.30 and it should follow the instructions on claim of right or color of title [see MB 7600A.32, MB 7600A.35 (claim of right), MB 7600A.33, MB 7600A.36 (color of title)]. If actual possession under color of title is proven, no other proof of hostility is needed. If actual possession under color of title is alleged, the first optional paragraph should be used. If permissive possession or entry by mistake is at issue, then the options on permissive possession or entry of land by mistake should be used.

[3] Comment

[a] Hostile Possession

To establish adverse possession, the claimant must show that his or her possession is hostile to the owner's title [*Sorensen v. Costa* (1948) 32 Cal.2d 453, 459, 196 P.2d 900 ; *Newman v. Cornelius* (1970) 3 Cal.App.3d 279, 288-289, 83 Cal.Rptr. 435 ; *Faus v. Pacific Electric Ry. Co.* (1956) 146 Cal.App.2d 370, 378, 303 P.2d 814]. Hostility need not be in the form of open aggression but requires that the claimant's possession be adverse to the record owner and without any recognition, express or inferable from the circumstances, of the right in the record owner, during the entire statutory period [*Sorensen v. Costa* (1948) 32 Cal.2d 453, 459, 196 P.2d 900 ; *Buic v. Buic* (1992) 5 Cal.App.4th 1600, 1605, 7 Cal.Rptr.2d 738 ; *Kunza v. Gaskell* (1979) 91 Cal.App.3d 201, 210, 154 Cal.Rptr. 101 ; *Newman v. Cornelius* (1970) 3 Cal.App.3d 279, 289, 83 Cal.Rptr. 435]. Acts considered hostile are those that operate as an invasion of the right of the party against whom they are asserted [*Laubisch v. Roberdo* (1954) 43 Cal.2d 702, 706, 277 P.2d 9]. The invasion must be of the type that is sufficient to give the record owner grounds for legal action against the adverse claimant [*Anaheim Water Co. v. Semi--Tropic Water Co.* (1883) 64 Cal. 185, 192, 30 P. 623]. Actual possession under color of title is a hostile occupancy, and no other proof of hostility is required [*Code Civ. Proc.* § 322 ; *Wilson v. Atkinson* (1888) 77 Cal. 485, 487, 491, 20 P. 66 ; *Nutting v. Herman Timber Co.* (1963) 214 Cal.App.2d 650, 657-658, 29 Cal.Rptr. 754].

[b] Permissive Possession

Permissive possession is occupancy of the land with the permission of or under a license from the owner [*Alper v. Tormey* (1907) 7 Cal.App. 8, 11, 93 P. 402]. While possession is permissive, the statute of limitations does not commence [*Davis v. Martin* (1910) 157 Cal. 657, 661, 108 P. 866]. However, if the claimant repudiates his or her relation with the true owner and asserts his or her own title to the land and gives clear notice to the owner, the claimant can trigger the statute of limitations [*Southern Pacific Co. v. San Francisco* (1964) 62 Cal.2d 50, 56, 41 Cal.Rptr. 79,

396 P.2d 383] and change a permissive possession to a hostile one. Constructive notice is sufficient if the acts evidencing it are such that notice to the true owner will be presumed [*Packard v. Johnson* (1881) 57 Cal. 180, 183 ; see *Southern Pac. Co. v. San Francisco* (1964) 62 Cal.2d 50, 57, 41 Cal.Rptr. 79, 396 P.2d 383 (court held that listing of railroad as owner of property on city tax rolls was not sufficient notice to city to change permissive nature of railroad's occupancy of disputed land to a hostile one)].

[c] Mistake

Mistake can be the basis for adverse possession [*Gilardi v. Hallam* (1981) 30 Cal.3d 317, 322, 178 Cal.Rptr. 624, 636 P.2d 588]. When a person enters on land and mistakenly believes that he or she is the owner, possession is adverse unless it is established by substantial evidence that the person recognized the record owner's potential claim and expressly or impliedly showed an intent to claim the disputed land only if record title was determined in his or her favor [*Gilardi v. Hallam* (1981) 30 Cal.3d 317, 326, 178 Cal.Rptr. 624, 636 P.2d 588 ; *Mesnick v. Caton* (1986) 183 Cal.App.3d 1248, 1259, 228 Cal.Rptr. 779].

The statute of limitations for an adverse possession claim based on mistake begins to run when the claimant takes possession, not on the date that the mistake is discovered [*Sorensen v. Costa* (1948) 32 Cal.2d 453, 460, 196 P.2d 900]. Further, a mistaken belief that the United States (government) owned land is not a bar to holding adversely as against all others [*Newman v. Cornelius* (1970) 3 Cal.App.3d 279, 289, 83 Cal.Rptr. 435].

[d] Exclusive Use

The claimant's possession of the property must be exclusive [*Strauss v. Canty* (1915) 169 Cal. 101, 105, 145 P. 1012 ; *Berry v. Cohn* (1920) 47 Cal.App. 19, 22, 189 P. 1044 ; *Cory v. Hotchkiss* (1916) 31 Cal.App. 443, 446, 160 P. 841]. Title may not be perfected if the owner and others also use the property [*Myran v. Smith* (1931) 117 Cal.App. 355, 360, 4 P.2d 219 ; *Cory v. Hotchkiss* (1916) 31 Cal.App. 443, 446-447, 160 P. 841]. Occasional use by the public in general will not disprove exclusiveness of use [*Webber v. Clarke* (1887) 74 Cal. 11, 19, 15 P. 431 (public right of way for livestock not inconsistent with claim of possession)], so long as the claimant's claim is based on his or her individual use of the property rather than on use as a member of the public [see *O'Banion v. Borba* (1948) 32 Cal.2d 145, 151, 195 P.2d 10 (easement by prescription)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property LawAdverse PossessionElements of Adverse ClaimsReal Property LawAdverse PossessionProcedure

Peter H. Ferris, Eric J. Firstman, and Cindy Lee contributed to the original chapter for California Forms of Jury Instruction(Matthew Bender).



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California Forms of Jury Instruction

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CHAPTER 76A Matthew Bender Acquiring Title to Real Property Instructions
PART C. ADVERSE POSSESSION

6-76A California Forms of Jury Instruction MB 7600A.38

MB 7600A.38 Continuous and Uninterrupted Possession for Five Years

[1] Instruction Continuous and Uninterrupted Possession for Five Years

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

To prove title by adverse possession, _____ [*claimant*] must prove that [he/she/it] possessed _____ [*describe real property at issue*] continuously and uninterruptedly for a five-year period.

[*USE ONE OR MORE OF FOLLOWING AS APPLICABLE (See Use of Instruction)*]

The continuity of adverse possession necessary to establish a claim of title by adverse possession does not require _____ [*claimant*] to be constantly present on the land. To establish adverse possession, it is only necessary that the land be put to such use as can reasonably be made of it, and such a use is sufficiently continuous if, during the required five years, the land is used at all times when it can be used for the purpose to which it is suited.

[*OR*]

The continuity of adverse possession necessary to establish adverse possession under color of title does not require _____ [*claimant*] to be constantly present on the land. _____ [*Claimant*]'s possession is sufficiently continuous if the land is devoted to its ordinary use. Constant occupancy and use is not always required. If only a slight use can be made of the land, then the requirement of continuous and uninterrupted possession is satisfied if a slight use is made of the land.

[OR]

_____ [*Claimant*] may add to [his/her/its] period of possession the time that a prior adverse possessor spent on the land. This is called "tacking." However, to "tack" on another person's time to meet the five-year statutory requirement, there must be privity of possession among the successive possessors of land. The privity required for tacking successive possessions of property may be based on any connecting relationship or agreement that will prevent a breach in the adverse possession.

[OR]

If you find that _____ [*owner*] re-entered the land in question or that _____ [*claimant*]'s use of the land was interrupted by some other person, and that the interruption was open, notorious, and under a claim of right, or if you find that _____ [*claimant*] abandoned the land, or _____ [*claimant*] recognized title to the land in another, at any time during the five-year period, then _____ [*claimant*] has not met [his/her/its] burden of proving a continuous use.

[OR]

The running of the five-year period of possession that an adverse claimant must prove is temporarily suspended if the landowner was _____ [a minor/insane/in prison] at any time during that period. If you find that _____ [*owner*] was _____ [a minor/insane/in prison] during any part of _____ [*claimant*]'s five-year period of possession, then the five-year period must be extended by the length of the time that its running [is/was] suspended due to _____ [*owner*]'s _____ [minority/insanity/imprisonment].

Authorities: Civ. Code § 1007 ; Code Civ. Proc. §§ 318, 319, 321, 322, 325, 328, 328.5 ; *Sorensen v. Costa* (1948) 32 Cal.2d 453, 461-464, 196 P.2d 900 (tacking); *Dillon v. Board of Pension Commrs.* (1941) 18 Cal.2d 427, 431, 116 P.2d 37 (tolling); *Posey v. Bay Point Realty Co.* (1932) 214 Cal. 708, 712, 7 P.2d 1020 (ordinary use under color of title); *Akley v. Bassett* (1922) 189 Cal. 625, 643-644, 209 P. 576 ; *Hodgkins v. People's Water Co.* (1918) 177 Cal. 730, 732, 171 P. 945 ; *Newman v. Cornelius* (1970) 3 Cal.App.3d 279, 290, 83 Cal.Rptr. 435 (use under color of title); *Landini v. Day* (1968) 264 Cal.App.2d 278, 282-283, 70 Cal.Rptr. 260 (use under claim of right); *Kendrick v. Klein* (1944) 65 Cal.App.2d 491, 496-497, 150 P.2d 955 (interruption of possession); *Comstock v. Finn* (1936) 13 Cal.App.2d 151, 155, 56 P.2d 957 (privity); *Kellogg v. Huffman* (1934) 137 Cal.App. 278, 284, 30 P.2d 593 (definition of reasonable use); *County of Los Angeles v. Pacific Elec. Ry. Co.* (1928) 93 Cal.App. 512, 514, 269 P. 767 (reasonable use under claim of right); *Weyse v. Biedebach* (1927) 86 Cal.App. 712, 721, 261 P. 1086 ; *Westphal v. Arnoux* (1921) 51 Cal.App. 532, 197 P. 395 ; *Goodrich v. Mortimer* (1919) 44 Cal.App. 576, 582, 186 P. 844 .

[2] Use of Instruction

This instruction should be used to explain the requirement of continuous and uninterrupted possession and its exceptions, including tacking [see [3][b], *below*] and tolling [see [3][e], *below*]. Use the first optional instruction for making a claim of right, the second for claiming under color of title, the third for making a tacking claim, the fourth for claiming interruption, and the fifth for claiming that the time limit is tolled. This instruction should be read with the introductory instruction in MB 7600A.30 and with the applicable instructions on the other elements required for adverse possession from MB 7600A.31-MB 7600A.37.

[3] Comment**[a] Five-Year Period**

Under the doctrine of adverse possession, a claimant must possess the land continuously for five years [*Hayes v. Martin* (1873) 45 Cal. 559, 562]. The five-year duration is required under the statutes [*Code Civ. Proc.* §§ 318, 319, 321, 322, 325]. After the five-year period has passed, the adverse claimant is the property's owner [*Civ. Code* § 1007] and may defend an action concerning ownership of the property [*see, e.g., City and County of San Francisco v. Fulde* (1869) 37 Cal. 349, 351] or bring an action to quiet title to the property [*Code Civ. Proc.* § 760.020 ; *see Mings v. Compton City School Dist.* (1933) 129 Cal.App. 413, 418, 18 P.2d 967]. The claimant need not bring the action immediately after the five-year period of continuous possession is completed [*Comstock v. Finn* (1936) 13 Cal.App.2d 151, 155, 56 P.2d 957]. The issue of whether possession has been exclusive and continuous for the full five-year period is a question of fact [*Kendrick v. Klein* (1944) 65 Cal.App.2d 491, 496, 150 P.2d 955].

Code Civ. Proc. § 318 provides that "[n]o action for the recovery of real property, or for the recovery of the possession thereof, can be maintained, unless it appear that the plaintiff, his ancestors, predecessor, or grantor, was seized or possessed of the property in question, within five years before the commencement of the action." The statute of limitations begins to run when the cause of action accrues [*Dillon v. Board of Pension Commrs.* (1941) 18 Cal.2d 427, 430, 116 P.2d 37]. A cause of action for the recovery of real property accrues when the owner is deprived of possession of the property [*Sorensen v. Costa* (1948) 32 Cal.2d 453, 460, 196 P.2d 900]. The owner of record title therefore has five years from the day he or she was deprived of possession to bring suit to recover it [*Code Civ. Proc.* § 318]. The adverse claimant may commence or defend a suit to protect his or her possession after five years has passed from the date on which he or she entered into continuous and adverse possession [*Code Civ. Proc.* §§ 322, 325].

[b] Tacking

Tacking is the process that permits an adverse possessor to add his or her period of possession to that of a prior adverse possessor or successive occupant to establish a continuous possession for the statutory period [*see California Real Estate Law and Practice*, Ch. 360, *Adverse Possession* (Matthew Bender)]. Privity between the successive possessors of land is necessary and their occupancies must be connected so that each occupant can go back or "tack" his or her time to the original entry or holding as a source of title [*Sorensen v. Costa* (1948) 32 Cal.2d 453, 461-464, 196 P.2d 900]. The required privity may be based on any connecting relationship that will prevent a breach in the adverse possession and that will enable each occupant to find the source of his or her claim to the original entry or holding [*Sorensen v. Costa* (1948) 32 Cal.2d 453, 463-464, 196 P.2d 900]. For example, the courts have recognized privity based on a deed [*Meier v. Meier* (1945) 71 Cal.App.2d 502, 506, 162 P.2d 950] and privity of blood between family members [*Park v. Powers* (1935) 2 Cal.2d 590, 594-595, 42 P.2d 75].

[c] Continuity of Use

The requirement that to acquire title by adverse possession the possession must be continuous for the statutory period does not mean that the claimant must be continuously present on the land for five years. The continuity of use required for adverse possession depends on whether the occupation of the property was under claim of right or color of title. When the occupation is under color of title, it is enough that the occupation be devoted to "the ordinary use of the occupant" [*Code Civ. Proc.* § 323(3), (4)]. If only slight use can be made of land held adversely under color of title, then the requirement of continuous occupancy is satisfied by this slight use [*Posey v. Bay Point Realty Co.* (1932) 214 Cal. 708, 712, 7 P.2d 1020 ; *Newman v. Cornelius* (1970) 3 Cal.App.3d 279, 290, 83 Cal.Rptr. 435 ; *Kellogg v. Huffman* (1934) 137 Cal.App. 278, 284, 30 P.2d 593].

When the adverse possessor acts under mere claim of right, and not color of title, the requirements of possession are much more stringent [*Landini v. Day* (1968) 264 Cal.App.2d 278, 282, 70 Cal.Rptr. 260]. Additionally, when

possession is under a claim of right, "the land so actually occupied, and no other, is deemed to have been held adversely" [Code Civ. Proc. § 324]. For a more complete discussion of the requirements for actual possession under a claim of right, see MB 7600A.35.

[d] Re-entry by Owner; Interruption of Possession

If the claimant's possession is interrupted, the continuity required for adverse possession is broken and the statutory period ceases to run [*Laubisch v. Roberdo* (1954) 43 Cal.2d 702, 707, 277 P.2d 9 ; *Big Three Min. & Mill Co. v. Hamilton* (1909) 157 Cal. 130, 140, 107 P. 301]. An interruption is a disturbance in the claimant's possession [*Montgomery & Mullen L. Co. v. Quimby* (1912) 164 Cal. 250, 253, 128 P. 402 ; *Blume v. MacGregor* (1944) 64 Cal.App.2d 244, 258, 148 P.2d 656].

Re-entry by the owner, even if by force or fraud [*San Jose v. Trimble* (1871) 41 Cal. 536, 543] interrupts the adverse claimant's possession if the re-entry is open, notorious, and under claim of right, and it equals in dignity and character the possession required to initiate an adverse possession [*Smith v. Southern P. R. Co.* (1934) 1 Cal.2d 272, 275, 34 P.2d 713 ; *Kendrick v. Klein* (1944) 65 Cal.App.2d 491, 496, 150 P.2d 955]. The owner can also interrupt the claimant's possession by means of a quiet title action [*Myran v. Smith* (1931) 117 Cal.App. 355, 361, 4 P.2d 219] or an action in ejectment [*Newman v. Bank of California* (1889) 80 Cal. 368, 373, 22 P. 261]. If the owner loses the lawsuit, the running of the statute of limitations is not interrupted by the filing of the action [*Dong Chun Len v. Luke Kow Lee* (1935) 7 Cal.App.2d 194, 196, 45 P.2d 827]. Once a judgment is obtained in the owner's favor, the owner must enter the land, otherwise the statutory period begins to run again from the date of entry of the judgment [*Hodgkins v. People's Water Co.* (1918) 177 Cal. 730, 732, 171 P. 945]. Another way for a true owner to interrupt possession is by paying taxes on the land [*Commercial Nat. Bank v. Schlitz* (1907) 6 Cal.App. 174, 184, 91 P. 750].

An adverse claimant may interrupt his or her own possession by abandoning the land [see *Goodrich v. Mortimer* (1919) 44 Cal.App. 576, 582, 186 P. 844] or recognizing title to the claimed property in another [*Lovell v. Frost* (1872) 44 Cal. 471, 474-475 ; *Cannon v. Stockmon* (1869) 36 Cal. 535, 538]. Acceptance of a lease is a recognition of the owner's title that interrupts the running of the statute of limitations [*Abbey Homestead v. Willard* (1874) 48 Cal. 614, 618-619].

The statute of limitations for adverse possession does not run when the parties occupy a fiduciary relationship toward each other. Thus, when one of the decedent's heirs claimed that he had established adverse possession of a parcel formerly owned by the decedent, the period in which that heir was acting as executor of the estate could not be considered in determining whether the five-year period had run [*Estate of Siefert* (2005) 128 Cal.App.4th 64, 68, 26 Cal.Rptr.3d 560].

[e] Tolling

If a person is entitled to bring a lawsuit for the recovery of real property, to recover possession of real property, or to make an entry or a defense founded on the title to real property, and this person is (1) a minor, (2) insane, or (3) in prison, the time during which the disability continues is not to be made a part of the time set forth in Code Civ. Proc. §§ 315-330. The action may be commenced, or the entry or defense made, within five years after the disability or imprisonment ceases. If the person entitled to bring the action or to make the entry or defense dies under the disability or while imprisoned, then the action must be begun within five years after his or her death [Code Civ. Proc. §§ 328, 328.5]. The running of the five-year period is tolled by imprisonment only if the imprisonment is on a criminal charge or a criminal conviction for a term less than life [Code Civ. Proc. § 328.5]. In addition, the tolling provision for prisoners is limited to two years as opposed to 20 years for minors or insane persons [compare Code Civ. Proc. § 328 with Code Civ. Proc. § 328.5]. A minor owner has until five years after he or she attains majority to recover possession of the property [*Akley v. Bassett* (1922) 189 Cal. 625, 643-644, 209 P. 576 ; *Westphal v. Arnoux* (1921) 51 Cal.App. 532, 535, 197 P. 395].

Furthermore, the running of the five-year period is tolled by the filing of an action contesting the right to the property. However, an unsuccessful action leading to no change of possession does not interrupt the running of the statute [*California Maryland Funding, Inc. v. Lowe* (1995) 37 Cal.App.4th 1798, 1803-1806, 44 Cal.Rptr.2d 784 (adverse claimant's earlier lawsuit over right to property, dismissed for failure to prosecute, held not to toll statute)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property Law Adverse Possession Elements of Adverse Claims

Peter H. Ferris, Eric J. Firstman, and Cindy Lee contributed to the original chapter for California Forms of Jury Instruction (Matthew Bender).



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CHAPTER 76A Matthew Bender Acquiring Title to Real Property Instructions
PART C. ADVERSE POSSESSION

6-76A California Forms of Jury Instruction MB 7600A.39-MB 7600A.49

[Reserved]

MB 7600A.39[Reserved]



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CHAPTER 76A Matthew Bender Acquiring Title to Real Property Instructions
PART D. COMMON LAW DEDICATION

6-76A California Forms of Jury Instruction MB 7600A.50

MB 7600A.50 Common Law Dedication Defined

[1] Instruction Common Law Dedication Defined

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

A dedication is a voluntary transfer of an interest in land to the public for public use. Because dedication involves the loss of private property without compensation, there is no dedication unless the property owner shows a clear and unequivocal intent to dedicate the property to public use.

Proof of dedication requires proof of other facts, because dedication results from the acts of the land's owner coupled with the intent with which [he/she/it] carries out those acts. It may be express and completed by a single act, as when the land is dedicated by deed, or it may be implied from a series of acts.

A common law dedication does not require a writing, nor must the formalities of any statute, such as the statute of frauds, be satisfied. All that is necessary is sufficient evidence that the property owner either expressly or impliedly manifested an unequivocal intention to offer the property for a public purpose and that there was an acceptance of the offer by the public. Acceptance by the public may be express or implied.

I will now provide you with more detailed instructions on what constitutes an offer to dedicate and on what constitutes an acceptance of an offer to dedicate.

Authorities: *Cal. Water & Tel. Co. v. Public Util. Com.* (1959) 51 Cal.2d 478, 494, 334 P.2d 887 ; *Union Transp. Co. v. Sacramento County* (1954) 42 Cal.2d 235, 240, 267 P.2d 10 ; *Western Aggregates, Inc. v. County of Yuba* (2002) 101 Cal.App.4th 278, 297, 130 Cal.Rptr.2d 436; *Carstens v. California Coastal Com.* (1986) 182 Cal.App.3d 277, 285, 227 Cal.Rptr. 135 ; *Cherokee Valley Farms, Inc. v. Summerville Elementary Sch. Dist.* (1973) 30 Cal.App.3d 579, 584, 585, 106 Cal.Rptr. 467 ; *Morse v. E.A. Robey & Co.* (1963) 214 Cal.App.2d 464, 469, 29 Cal.Rptr. 734 .

[2] Use of Instruction

This instruction should be used when common law dedication is at issue. Common law dedication is to be distinguished from statutory dedication [see [3][f], *below*] and dedication by public use [see MB 7600A.55]. This instruction can also be used when a dedication of an easement is at issue. For a definition of easement, see Ch. 77A, *Matthew Bender Easement Instructions*, MB 7700A.01. This instruction serves as an introduction to instructions on offer [see MB 7600A.51, MB 7600A.54], acceptance [see MB 7600A.52, MB 7600A.53], and abandonment of dedicated property [see MB 7600A.56].

[3] Comment

[a] Common Law Dedication Defined

Common law dedication is a voluntary transfer of interest in land that is in the nature of both a grant and a gift [*Union Transp. Co. v. Sacramento County* (1954) 42 Cal.2d 235, 240, 267 P.2d 10 ; *Carstens v. California Coastal Com.* (1986) 182 Cal.App.3d 277, 285, 227 Cal.Rptr. 135 ; *Sacramento v. Jensen* (1956) 146 Cal.App.2d 114, 118, 1303 P.2d 549]. The owner must show a clear and unequivocal intent to dedicate the property because dedication results in the loss of private property without compensation [*Carstens v. California Coastal Com.* (1986) 182 Cal.App.3d 277, 285, 227 Cal.Rptr. 135].

The offer of dedication and the acceptance by the public can be express or implied in fact [*Union Transp. Co. v. Sacramento County* (1954) 42 Cal.2d 235, 240, 267 P.2d 10 ; *Carstens v. California Coastal Com.* (1986) 182 Cal.App.3d 277, 285, 227 Cal.Rptr. 135 ; *Cherokee Valley Farms, Inc. v. Summerville Elementary Sch. Dist.* (1973) 30 Cal.App.3d 579, 585, 106 Cal.Rptr. 467 ; *Faus v. Los Angeles County* (1967) 256 Cal.App.2d 604, 610, 64 Cal.Rptr. 181]. The difference between an implied and an express dedication is the way the offer of dedication by a landowner and acceptance of the offer by the public is proven [see *Yucaipa Water Co. No. 1 v. Public Utilities Comm'n.* (1960) 54 Cal.2d 823, 827-828, 9 Cal.Rptr. 239, 357 P.2d 295]. Dedication is implied when the acts and conduct of the owner clearly indicate an intention to devote the land to public use [*People v. Myring* (1904) 144 Cal. 351, 354, 77 P. 975 ; *Laguna Beach v. Consolidated Mfg. Co.* (1945) 68 Cal.App.2d 38, 155 P. 2d 844 ; see instruction on implied dedication by public use in MB 7600A.55]. Common law dedication often has elements of an estoppel against the property owner in the public's favor, arising out of the owner's failure to object to acts or events that indicate his or her implied intent to dedicate the property [*Sussman v. County of San Luis Obispo* (1899) 126 Cal. 536, 539, 59 P. 24 ; *Western Aggregates, Inc. v. County of Yuba* (2002) 101 Cal.App.4th 278, 297, 130 Cal.Rptr.2d 436 ; *Cherokee Valley Farms, Inc. v. Summerville Elementary School Dist.* (1973) 30 Cal.App.3d 579, 585, 106 Cal.Rptr. 467].

In its operation and effect, dedication is legally equivalent to the granting of an easement [*Jones v. Deeter* (1984) 152 Cal.App.3d 798, 802, 199 Cal.Rptr. 825].

[b] Question of Fact; Acceptance

Whether a dedication of private property has occurred is a question of fact [*Henry Cowell Lime & Cement Co. v. State* (1941) 18 Cal.2d 169, 173, 114 P.2d 331 ; *Richmond Ramblers Motorcycle Club v. Western Title Guaranty Co.* (1975) 47 Cal.App.3d 747, 754, 755, 121 Cal.Rptr. 308 ; *Cherokee Valley Farms, Inc. v. Summerville Elementary Sch. Dist.* (1973) 30 Cal.App.3d 579, 585, 106 Cal.Rptr. 467 ; *Glass v. Gulf Oil Corp.* (1970) 12 Cal.App.3d 412, 428, 429, 96 Cal.Rptr. 902].

Acceptance of the offer to dedicate may be express or implied. Express acceptance occurs when a formal acceptance is made by the proper authorities. Acceptance is implied when the public has made use of the property for a period of time that demonstrates an intention to accept dedication or where actions by the responsible public officials indicate an assumption of control over the property [*Carstens v. California Coastal Com.* (1986) 182 Cal.App.3d 277, 285, 227

Cal.Rptr. 135]. Maintenance and repair work on the property may constitute implied acceptance [*Western Aggregates, Inc. v. County of Yuba* (2002) 101 *Cal.App.4th* 278, 297, 130 *Cal.Rptr.2d* 436 ; *Ackley v. City & County of San Francisco* (1970) 11 *Cal.App.3d* 108, 113, 89 *Cal.Rptr. 480*]. For further discussion of acceptance, see MB 7600A.52.

[c] Use of Land

The doctrine of dedication applies to land that is used for any of the following public purposes:

- Roads, streets, alleys, squares, or parks [*Kittle v. Pfeiffer* (1863) 22 *Cal. 485, 489* ; *Western Aggregates, Inc. v. County of Yuba* (2002) 101 *Cal.App.4th* 278, 297, 130 *Cal.Rptr.2d* 436];
- Canals for drainage or navigation [*People v. Williams* (1884) 64 *Cal. 498, 502, 2 P. 393*];
- Cemeteries [*Hollywood Cemetery Ass'n. v. Powell* (1930) 210 *Cal. 121, 130, 291 P. 397*];
- Levees [*Napa v. Howland* (1890) 87 *Cal. 84, 88, 25 P. 247*];
- Ferry crossings [*Humboldt County v. Van Duzer* (1920) 48 *Cal.App. 640, 645, 192 P. 192*];
- Schools [*Board of Education v. Martin* (1891) 92 *Cal. 209, 214-215, 28 P. 799*]; and
- Athletic fields [*Morse v. Miller* (1954) 128 *Cal.App.2d* 237, 242, 275 *P.2d* 545].

Dedicated property may only be used for the purposes for which it was dedicated. For a more complete discussion on the variety of uses of dedicated land, see California Real Estate Law and Practice, Ch. 361, *Dedication* (Matthew Bender).

[d] Capacity to Dedicate

A person may dedicate only land that he or she owns [*Eureka v. McKay & Co.* (1899) 123 *Cal. 666, 671, 56 P. 439*]. A person who dedicates land without title and later acquires title to that same property is estopped from denying dedication [*Napa v. Howland* (1890) 87 *Cal. 84, 86, 25 P. 247*].

[e] Adverse Possession Distinguished

The difference between adverse possession and dedication by adverse use or acquiescence in a user is that a person seeking to establish title by adverse possession is acting to gain a private right and intends to claim a personal legal right in property [*O'Banion v. Borba* (1948) 32 *Cal.2d* 145, 148, 151, 195 *P.2d* 10]. In dedication, no personal claim of right needs to be demonstrated, and the public's use of the property need not be "adverse" as required and defined in adverse possession cases [*Gion v. City of Santa Cruz* (1970) 2 *Cal.3d* 29, 39, 84 *Cal.Rptr. 162, 465 P.2d* 50 ; see MB 7600A.55[3]]. Simply stated, adverse possession applies if a private property right is the claimant's objective, and dedication applies if public use is the ultimate objective [*People v. Ocean Shore Railroad* (1948) 32 *Cal.2d* 406, 420, 196 *P.2d* 570].

[f] Statutory Dedication Distinguished

Statutory dedication, which is discussed here only to distinguish statutory and common law dedication, can be accomplished only by recording a map in substantial compliance with the Subdivision Map Act [see *Gov. Code* § 66410 *et seq.*]. Common law dedication embraces all forms of dedication other than statutory dedication [see California Real Estate Law and Practice, Ch. 361, *Dedication* (Matthew Bender)]. An attempted statutory dedication that fails to substantially comply with the requirements of the Subdivision Map Act may nonetheless qualify as a common law

dedication [*People v. Marin County* (1894) 103 Cal. 223, 229, 37 P. 203 ; *Hanshaw v. Long Valley Road Assn.* (2004) 116 Cal.App.4th 471, 477, 11 Cal.Rptr.3d 357].

[g] Actions to Determine Title

Whether title to land has been transferred to the public is generally litigated in quiet title actions, though an action for declaratory relief might also be instituted [see, e.g., *Safwenberg v. Marquez* (1975) 50 Cal.App.3d 301, 304, 123 Cal.Rptr. 405 ; *Cherokee Valley Farms, Inc. v. Summerville Elementary Sch. Dist.* (1973) 30 Cal.App.3d 579, 582, 584-586, 106 Cal.Rptr. 467]. Title to property may also be raised as an issue when an action is instituted against a public entity for personal injuries sustained on the land allegedly dedicated [see, e.g., *Union Transp. Co. v. Sacramento County* (1954) 42 Cal.2d 235, 238-245, 267 P.2d 10 ; *Ackley v. City and County of San Francisco* (1970) 11 Cal.App.3d 108, 112-114, 89 Cal.Rptr. 480].

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property LawOwnership & TransferTransfer Not By DeedDedicationElementsReal Property LawOwnership & TransferTransfer Not By DeedDedicationProcedure

Peter H. Ferris, Eric J. Firstman, and Cindy Lee contributed to the original chapter for California Forms of Jury Instruction(Matthew Bender).



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CHAPTER 76A Matthew Bender Acquiring Title to Real Property Instructions
PART D. COMMON LAW DEDICATION

6-76A California Forms of Jury Instruction MB 7600A.51

MB 7600A.51 Offer

[1] Instruction Offer

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Dedication is like a contract and consists of an offer and an acceptance. Under common law dedication, there must be a clear and unequivocal intent by the owner to dedicate the property to public use. The intention to dedicate land can be express or can be inferred from the owner's actions in [his/her/its] dealings with and relations to the property. Inferred dedication is normally shown by an act that is reasonably interpreted and relied on by the public as an indication of willingness to provide service from the property to all who might apply. You must find that there has been a valid offer before there can be an acceptance.

Authorities: *Cal. Water & Tel. Co. v. Public Util. Com.* (1959) 51 Cal.2d 478, 494, 495, 334 P.2d 887 ; *Western Aggregates, Inc. v. County of Yuba* (2002) 101 Cal.App.4th 278, 297, 130 Cal.Rptr.2d 436 ; *Carstens v. California Coastal Com.* (1986) 182 Cal.App.3d 277, 285, 227 Cal.Rptr. 135 ; *Cherokee Valley Farms, Inc. v. Summerville Elementary Sch. Dist.* (1973) 30 Cal.App.3d 579, 584, 106 Cal.Rptr. 467 ; *City of Santa Clara v. Ivancovich* (1941) 47 Cal.App.2d 502, 508, 118 P.2d 303 .

[2] Use of Instruction

This instruction should be used to define the offer required for a common law dedication, and it should follow the general instruction on common law dedication in MB 7600A.50. If a valid offer to dedicate has already been established, use the instruction on acceptance in MB 7600A.52. If the jury is being instructed on implied dedication by public use, this instruction should also be used with the instruction on that topic in MB 7600A.55.

[3] Comment

[a] Offer Defined

A common law dedication is a voluntary transfer of an interest in land by a private owner to the public [*Union Transp. Co. v. Sacramento County* (1954) 42 Cal.2d 235, 240, 267 P.2d 10]. Dedication, like a contract, consists of an offer and an acceptance [*City of Santa Clara v. Ivancovich* (1941) 47 Cal.App.2d 502, 508, 118 P.2d 303]. An offer of dedication can be made in a variety of ways. The offer must be indicated clearly and unequivocally by the owner's words and actions [*Cal. Water & Tel. Co. v. Public Util. Com.* (1959) 51 Cal.2d 478, 494, 495, 334 P.2d 887 ; *Cordano v. Wright* (1911) 159 Cal. 610, 619, 115 P. 227 ; *Carstens v. California Coastal Com.* (1986) 182 Cal.App.3d 277, 285, 227 Cal.Rptr. 135 ; *Cherokee Valley Farms, Inc. v. Summerville Elementary Sch. Dist.* (1973) 30 Cal.App.3d 579, 584, 106 Cal.Rptr. 467]. If there is any doubt, an examination of the pertinent circumstances must be made to determine whether an offer has been made [*Hays v. Vanek* (1989) 217 Cal.App.3d 271, 282, 266 Cal.Rptr. 856 ; *Flavio v. McKenzie* (1963) 218 Cal.App.2d 549, 552, 32 Cal.Rptr. 535]. Whether sufficient facts exist to evidence an owner's intent to dedicate the land for public use is a question of fact [*Gion v. City of Santa Cruz* (1970) 2 Cal.3d 29, 41, 84 Cal.Rptr. 162, 465 P.2d 50 ; *Hays v. Vanek* (1989) 217 Cal.App.3d 271, 282, 266 Cal.Rptr. 856 ; *Richmond Ramblers Motorcycle Club v. Western Title Guaranty Co.* (1975) 47 Cal.App.3d 747, 755-759, 121 Cal.Rptr. 308 ; *Flavio v. McKenzie* (1963) 218 Cal.App.2d 549, 552, 32 Cal.Rptr. 535].

[b] Written Offer of Dedication

The clearest form of express dedication occurs when an owner provides a written offer of dedication [*Gov. Code § 7050*]. An express conveyance to a public agency can be made in the form of an absolute conveyance in fee title [*City & County of San Francisco v. Linares* (1940) 16 Cal.2d 441, 442-443, 106 P.2d 369] or by transfer for a specific purpose [*Slavich v. Hamilton* (1927) 201 Cal. 299, 304, 257 P. 60]. The granting of an easement is another way of dedicating property by express conveyance [*United States v. 5. United States v. 5.324 Acres of Land* (S.D. Cal. 1948) 79 F.Supp. 748, 753].

[c] Offer to Dedicate Through Description in Conveyances or Contracts

An owner's intent to dedicate land can also be evidenced by a description in conveyances or contracts [*Eureka v. Gates* (1902) 137 Cal. 89, 92-93, 69 P. 850], such as the reservation by the grantor of a right of way over land that has been used by the public [*see, e.g., Smith v. Krintz* (1962) 201 Cal.App.2d 696, 698, 700, 20 Cal.Rptr. 471], or a reference in a deed to certain land as being reserved for road purposes [*Santa Ana v. Santa Ana Valley Irrigation Co.* (1912) 163 Cal. 211, 217, 124 P. 847]. Note, however, that mere reference in a deed may not be enough to constitute dedication [*Flavio v. McKenzie* (1963) 218 Cal.App.2d 549, 553, 32 Cal.Rptr. 535 ; *see Santa Ana v. Santa Ana Valley Irrigation Co.* (1912) 163 Cal. 211, 217, 124 P. 847]. The owner's intent to dedicate property to public use is a primary requirement for dedication, and this intent must be unequivocally manifested [*Flavio v. McKenzie* (1963) 218 Cal.App.2d 549, 552, 32 Cal.Rptr. 535].

[d] Offer to Dedicate by Map or Plat

An offer of dedication can be evidenced by a map or plat if the map or plat specifically identifies certain property as for public or common use [*see Morse v. Miller* (1954) 128 Cal.App.2d 237, 239, 247, 275 P.2d 545], and the map is subsequently filed and recorded [*Archer v. Salinas* (1892) 93 Cal. 43, 49, 50, 28 P. 839 (park); *Hanshaw v. Long Valley Road Assn.* (2004) 116 Cal.App.4th 471, 482, 11 Cal.Rptr.3d 357 (road); *Tischauer v. Newport Beach* (1964) 225 Cal.App.2d 138, 144, 37 Cal.Rptr. 141 (streets)]. This kind of dedication is not the same as dedication under the Subdivision Map Act [*Gov. Code § 66410 et seq.*]. The common law rule that the owner's actions must evidence the owner's intent is fully applicable [*Union Transp. Co. v. Sacramento County* (1954) 42 Cal.2d 235, 240, 267 P.2d 10].

[e] Offer to Dedicate by Declaration

An offer of dedication can also be evidenced by the declaration of an owner of land. The owner's statement is not itself an offer, but it is a probative fact of value in determining whether or not the land has been dedicated [*Cerf v. Pfleging*

(1892) 94 Cal. 131, 136, 29 P. 417].

Legal Topics:

For related research and practice materials, see the following legal topics:

EvidenceInferences & PresumptionsInferencesReal Property LawOwnership & TransferTransfer Not By
DeedDedicationElementsReal Property LawOwnership & TransferTransfer Not By DeedDedicationProcedure

Peter H. Ferris, Eric J. Firstman, and Cindy Lee contributed to the original chapter for California Forms of Jury
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CHAPTER 76A Matthew Bender Acquiring Title to Real Property Instructions
PART D. COMMON LAW DEDICATION

6-76A California Forms of Jury Instruction MB 7600A.52

MB 7600A.52 Acceptance

[1] Instruction Acceptance

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Acceptance of an offer of dedication is not binding until there has been unequivocal proof of acceptance. The acceptance may be actual or implied. A dedication without acceptance is merely an offer to dedicate and an offer does not impose any burdens or confer any rights unless there is an acceptance.

[*USE ONE OR BOTH OF FOLLOWING (See Use of Instruction)*]

Actual acceptance of dedication occurs when formal acceptance is made by the proper authorities. In this instance the acceptance was made by _____ [specify applicable authority, e.g., city council/board of supervisors].

[*AND/OR*]

Acceptance is implied when the public has made use of the property for a period of time that demonstrates an intention to accept dedication or when actions by the responsible public officials indicate an assumption of control over the property. For example, maintenance or repair work on property would indicate an assumption of control over that property.

Use of the land by the public for the purpose[s] for which it was dedicated over a reasonable period of time constitutes an acceptance of the offer without any formal action by the governmental authority, and if this

acceptance by use occurs before the offer is revoked, the dedication is immediately effective and irrevocable.

[CONTINUE INSTRUCTION]

The public's intent to accept must be clear. I will now provide you with instructions on what constitutes a "reasonable" time for acceptance and when an offer is revoked.

Authorities: *Union Transp. Co. v. Sacramento County* (1954) 42 Cal.2d 235, 240-241, 267 P.2d 10 ; *County of Inyo v. Given* (1920) 183 Cal. 415, 418, 191 P. 688 ; *Western Aggregates, Inc. v. County of Yuba* (2002) 101 Cal.App.4th 278, 297-298, 130 Cal.Rptr.2d 436 ; *Mikels v. Rager* (1991) 232 Cal.App.3d 334, 353-354, 284 Cal.Rptr. 87 ; *Carstens v. California Coastal Com.* (1986) 182 Cal.App.3d 277, 285, 227 Cal.Rptr. 135 ; *Tischauser v. City of Newport Beach* (1964) 225 Cal.App.2d 138, 145, 37 Cal.Rptr. 141 ; *McKinney v. Ruderman* (1962) 203 Cal.App.2d 109, 115-116, 21 Cal.Rptr. 263 ; *City of Santa Clara v. Ivancovich* (1941) 47 Cal.App.2d 502, 508, 118 P.2d 303 ; *McGinn v. State Board of Harbor Commrs.* (1931) 113 Cal.App. 695, 703-704, 299 P. 100 .

[2] Use of Instruction

This instruction should follow the instruction on common law dedication in MB 7600A.50 and the instruction on offers in MB 7600A.51. The first optional paragraph should be used if actual acceptance is at issue. The second optional paragraph should be used if implied acceptance is at issue. If both methods of acceptance are at issue, then both options should be used. The implied acceptance instruction must be read with the instruction on implied dedication by public use in MB 7600A.55.

[3] Comment

[a] Acceptance, Actual and Implied

Dedication is like a contract in that it consists of an offer and an acceptance and is not binding until acceptance [*Mikels v. Rager* (1991) 232 Cal.App.3d 334, 353-354, 284 Cal.Rptr. 87 ; *Carstens v. California Coastal Com.* (1986) 182 Cal.App.3d 277, 285, 227 Cal.Rptr. 135]. Proof of acceptance must be unequivocal. The acceptance may be actual or implied [*McGinn v. State Board of Harbor Commrs.* (1931) 113 Cal.App. 695, 703, 299 P. 100]. Acceptance is actual when formal acceptance [see [b], below] is made by the proper authorities [*Carstens v. California Coastal Com.* (1986) 182 Cal.App.3d 277, 285, 227 Cal.Rptr. 135 ; *City of Santa Clara v. Ivancovich* (1941) 47 Cal.App.2d 502, 508, 118 P.2d 303 ; *Elliott v. McIntosh* (1919) 41 Cal.App. 763, 766-767, 183 P. 692], and implied when a use has been made of the property by the public for a length of time that shows an intention to accept the dedication, or when actions by responsible public officials assume control over the property [*Western Aggregates, Inc. v. County of Yuba* (2002) 101 Cal.App.4th 278, 297-298, 130 Cal.Rptr.2d 436 ; *Carstens v. California Coastal Com.* (1986) 182 Cal.App.3d 277, 285, 227 Cal.Rptr. 135 ; *Tischauser v. City of Newport Beach* (1964) 225 Cal.App.2d 138, 145, 37 Cal.Rptr. 141]. A dedication without acceptance is merely an offer to dedicate and an offer does not impose any burdens or confer any rights, unless it is accepted [*City of Santa Clara v. Ivancovich* (1941) 47 Cal.App.2d 502, 508, 118 P.2d 303].

Whether a particular use is sufficient to constitute acceptance is a question of fact [*Fitzgerald v. Smith* (1928) 94 Cal.App. 480, 484, 271 P. 507]. The circumstances of the case are taken into account to determine whether there has been acceptance [*City of Santa Clara v. Ivancovich* (1941) 47 Cal.App.2d 502, 509, 118 P.2d 303].

[b] Formal Acceptance

Formal acceptance of dedication is an acceptance by the proper public authorities, usually in the form of an ordinance or resolution accepting the offered property [*Eureka v. Armstrong* (1890) 83 Cal. 623, 625, 22 P. 928]. A formal acceptance by official action requires some evidence of intent for the action to operate as acceptance of the dedication [

see *County of Inyo v. Given* (1920) 183 Cal. 415, 418, 191 P. 688 ; *City of Santa Clara v. Ivancovich* (1941) 47 Cal.App.2d 502, 510, 118 P.2d 303]. Incidental reference to property as a street or park in some official action does not necessarily constitute acceptance [see *City of Santa Clara v. Ivancovich* (1941) 47 Cal.App.2d 502, 510, 118 P.2d 303].

[c] Informal Acceptance

There are two kinds of informal acceptance. The first is official government actions [*Union Transp. Co. v. Sacramento County* (1954) 42 Cal.2d 235, 244, 267 P.2d 10] such as maintenance or repair work that indicates that the public has taken dominion over the property or depiction of a public road on official maps [*Western Aggregates, Inc. v. County of Yuba* (2002) 101 Cal.App.4th 278, 298, 130 Cal.Rptr.2d 436 ; *Ackley v. City & County of San Francisco* (1970) 11 Cal.App.3d 108, 113, 89 Cal.Rptr. 480 ; *Tischauser v. Newport Beach* (1964) 225 Cal.App.2d 138, 145, 37 Cal.Rptr. 141 ; see *Union Transp. Co. v. Sacramento County* (1954) 42 Cal.2d 235, 244, 267 P.2d 10 ; *Smith v. Krantz* (1962) 201 Cal.App.2d 696, 701, 20 Cal.Rptr. 471].

The second kind of informal acceptance is by public use. Use of dedicated land by the public for the purpose for which it was dedicated over a reasonable period of time constitutes acceptance of the offer [*City of Yuba City v. Consolidated Mausoleum Syndicate* (1929) 207 Cal. 587, 590, 279 P. 427 ; *Hanshaw v. Long Valley Road Assn.* (2004) 116 Cal.App.4th 471, 482, 11 Cal.Rptr.3d 357 ; *City of Santa Clara v. Ivancovich* (1941) 47 Cal.App.2d 502, 508, 118 P.2d 303 ; see MB 7600A.55 on implied dedication by public use] without any formal action [*City of Monterey v. Malarin* (1893) 99 Cal. 290, 293, 33 P. 840 ; *Smith v. City of San Luis Obispo* (1892) 95 Cal. 463, 466, 30 P. 591 ; *McKinney v. Ruderman* (1962) 203 Cal.App.2d 109, 115, 21 Cal.Rptr. 263]. If this informal acceptance precedes the offer's revocation, the dedication immediately becomes effective and irrevocable [*McKinney v. Ruderman* (1962) 203 Cal.App.2d 109, 115-116, 21 Cal.Rptr. 263]. If a proposal is made to dedicate real property for public improvement, there is a conclusive presumption that the proposed dedication was not accepted if certain conditions are satisfied [*Code Civ. Proc.* § 771.010].

[d] After Acceptance

After the public has accepted an offer, a dedicator may not revoke that offer [*Archer v. Salinas* (1892) 93 Cal. 43, 51, 28 P. 839 ; see MB 7600A.54 for discussion of revocation].

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property Law Ownership & Transfer Transfer Not By Deed Dedication Elements Real Property Law Ownership & Transfer Transfer Not By Deed Dedication Procedure

Peter H. Ferris, Eric J. Firstman, and Cindy Lee contributed to the original chapter for California Forms of Jury Instruction (Matthew Bender).



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CHAPTER 76A Matthew Bender Acquiring Title to Real Property Instructions PART D. COMMON LAW DEDICATION

6-76A California Forms of Jury Instruction MB 7600A.53

MB 7600A.53 Time Limit for Acceptance: Reasonable Time

[1] Instruction Time Limit for Acceptance: Reasonable Time

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

If the property owner made an offer of dedication, acceptance must occur within a reasonable time after the offer is made. What constitutes a reasonable time depends on the circumstances in each case.

Authorities: *McKinney v. Ruderman* (1962) 203 Cal.App.2d 109, 116, 21 Cal.Rptr. 263 ; *City of Santa Clara v. Ivancovich* (1941) 47 Cal.App.2d 502, 511, 118 P.2d 303 .

[2] Use of Instruction

This instruction should be used if it is alleged that the dedication offer was not accepted within a reasonable time. In this case, the instruction should accompany the instruction on implied acceptance in MB 7600A.52 and the instruction on revocation of offer in MB 7600A.54.

[3] Comment

The public must accept the offer of dedication within a reasonable time after the offer is made [*McKinney v. Ruderman* (1962) 203 Cal.App.2d 109, 116, 21 Cal.Rptr. 263 ; *City of Santa Clara v. Ivancovich* (1941) 47 Ca1. App. 2d 502, 511, 118 P.2d 303]. What constitutes a "reasonable time" to accept an implied offer of dedication is a question of fact in each case [*McKinney v. Ruderman* (1962) 203 Cal.App.2d 109, 116, 21 Cal.Rptr. 263 ; *City of Santa Clara v. Ivancovich* (1941) 47 Cal.App.2d 502, 511, 512, 118 P.2d 303]. What constitutes a reasonable time depends on the type of dedicated property and the nature of the dedication. The range of times found to be reasonable has varied from two to 31 years [*Yuba City v. Mausoleum Syndicate* (1929) 207 Cal. 587, 589, 590, 279 P. 427 (31 years a reasonable time); *Eureka v. Gates* (1902) 137 Cal. 89, 93, 69 P. 850 (seven years a reasonable time); *City of Eureka v. Armstrong* (1889) 83 Cal. 623, 625, 22 P. 928 (two years a reasonable time); *City of Anaheim v. Metropolitan Water Dist. of Southern*

Cal. (1978) 82 *Cal.App.3d* 763, 770, 147 *Cal.Rptr.* 336 (13 years a reasonable time); *McKinney v. Ruderman* (1962) 203 *Cal.App.3d* 109, 117, 21 *Cal.Rptr.* 263 (over 20 years a reasonable time); *L.A. City High School Dist. v. Kennard* (1928) 94 *Cal.App.* 450, 452, 453, 271 *P.* 342 (seven years a reasonable time)], while periods from nine years to over 40 years have been held unreasonable [*Anaheim v. Langenberger* (1901) 134 *Cal.* 608, 610-611, 66 *P.* 855 (20 years not a reasonable time); *Forsyth v. Dunnagan* (1892) 94 *Cal.* 438, 440-441, 29 *P.* 770 (nine years not a reasonable time); *People v. Reed* (1889) 81 *Cal.* 70, 78-80, 22 *P.* 474 (20 years not a reasonable time); *City of Santa Clara v. Ivancovich* (1941) 47 *Cal.App.2d* 502, 511, 512, 118 *P.2d* 303 (over 40 years an unreasonable time); *Elliott v. McIntosh* (1919) 41 *Cal.App.* 763, 766, 183 *P.* 692 (29 years not a reasonable time)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property LawOwnership & TransferTransfer Not By DeedDedicationElements

Peter H. Ferris, Eric J. Firstman, and Cindy Lee contributed to the original chapter for California Forms of Jury Instruction(Matthew Bender).



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CHAPTER 76A Matthew Bender Acquiring Title to Real Property Instructions
PART D. COMMON LAW DEDICATION

6-76A California Forms of Jury Instruction MB 7600A.54

MB 7600A.54 Revocation of Offer

[1] Instruction Revocation of Offer

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

At any time before an offer of dedication is accepted, the offer may be revoked. After a dedication is completed by the public's acceptance, whether express or implied, the property becomes public property and the owner loses all control over it. The owner may revoke the offer by resuming the possession of the property or by any other act that is inconsistent with the use for which it is claimed the land was dedicated. For example, an offer of dedication may be revoked by conveying title to a third party without recognizing the dedication.

[*OPTIONAL (See Use of Instruction)*]

The owner may revoke the dedication until the offer has been acted on in such a way that the acting party would be injured by the revocation.

Authorities: *City of Los Angeles v. McCollum* (1909) 156 Cal. 148, 151-153, 103 P. 914 ; *Schmitt v. San Francisco* (1893) 100 Cal. 302, 307, 34 P. 961 ; *People v. Reed* (1889) 81 Cal. 70, 80, 22 P. 474 ; *Morse v. E.A. Robey & Co.* (1963) 214 Cal.App.2d 464, 469, 29 Cal.Rptr. 734 ; *Myers v. City of Oceanside* (1907) 7 Cal.App. 87, 92, 93 P. 686

[2] Use of Instruction

This instruction should be used with the instructions on acceptance and the time limitations for acceptance [see *MB 7600A.52*, *MB 7600A.53*]. The second paragraph should only be used if estoppel is at issue.

[3] Comment

Dedication, whether by deed or otherwise, may be revoked by the owner of land before acceptance [*County of Inyo v. Given* (1920) 183 Cal. 415, 420, 191 P. 688 ; *Eltinge v. Santos* (1915) 171 Cal. 278, 282, 152 P. 915 ; *Prescott v. Edwards* (1897) 117 Cal. 298, 301, 49 P. 178 ; *Schmitt v. San Francisco* (1893) 100 Cal. 302, 306-308, 34 P. 961 ; *People v. Reed* (1889) 81 Cal. 70, 80, 22 P. 474]. Once dedicated property is accepted by the public, the dedication is complete and the landowner, whether an individual or the state [*Slavich v. Hamilton* (1927) 201 Cal. 299, 306, 257 P. 60 ; *Morse v. E.A. Robey & Co.* (1963) 214 Cal.App.2d 464, 469, 29 Cal.Rptr. 734 ; see *McGuinn v. State Board of Harbor Commrs.* (1931) 113 Cal.App. 695, 704, 299 P. 100], no longer has the power to revoke [*Morse v. E.A. Robey & Co.* (1963) 214 Cal.App.2d 464, 469, 29 Cal.Rptr. 734 ; *Fitzgerald v. Smith* (1928) 94 Cal.App. 480, 483, 271 P. 507]. The dedication immediately becomes effective and irrevocable [*McKinney v. Ruderman* (1962) 203 Cal.App.2d 109, 115, 116, 21 Cal.Rptr. 263]. An exception to the general rule permits a landowner to be estopped from revoking an offer, even where there has been no acceptance, if a person has acted on the offer in such a way as to be injured by revocation [*City of Los Angeles v. McCollum* (1909) 156 Cal. 148, 151, 103 P. 914 ; *Schmitt v. San Francisco* (1893) 100 Cal. 302, 307-308, 34 P. 961].

Acts of revocation are acts whereby the property owner uses his or her property in a way that is inconsistent with the public use, including any of the following:

- Filing a map or plat that designates the property as private property [*Myers v. City of Oceanside* (1907) 7 Cal.App. 87, 92, 93 P. 686];
- Conveying title to the subject property to a third party without recognizing the offer of dedication [*Myers v. City of Oceanside* (1907) 7 Cal.App. 87, 92, 93 P. 686]; or
- Subjecting the property to an inconsistent use [*Orange County v. Cole* (1950) 96 Cal.App.2d 163, 170, 215 P.2d 41].

The offer may also be revoked by the dedicator's death [*Orange County v. Cole* (1950) 96 Cal.App.2d 163, 170, 215 P.2d 41]. Whether or not the acts of the property owner constitute a revocation of the offer to dedicate land is a question of fact [*Henry Cowell Lime & Cement Co. v. State* (1941) 18 Cal.2d 169, 173, 114 P.2d 331 ; *Yuba City v. Consolidated Mausoleum Syndicate* (1929) 207 Cal. 587, 590, 279 P. 427 ; *City of Los Angeles v. McCollum* (1909) 156 Cal. 148, 151-153, 103 P. 914].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts Law Formation Offers Revocable Offers Real Property Law Ownership & Transfer Transfer Not By Deed Dedication Elements

Peter H. Ferris, Eric J. Firstman, and Cindy Lee contributed to the original chapter for California Forms of Jury Instruction (Matthew Bender).



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CHAPTER 76A Matthew Bender Acquiring Title to Real Property Instructions
PART D. COMMON LAW DEDICATION

6-76A California Forms of Jury Instruction MB 7600A.55

MB 7600A.55 Implied Dedication by Public Use**[1] Instruction Implied Dedication by Public Use**[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

To prove that _____ [*specify property at issue*] was dedicated to the public,
_____ [*party claiming dedication*] must prove either one of the following:

1. That _____ [*owner*], the property's owner, acquiesced in the use of the land under circumstances that negate the idea that the use was under license; or
2. That there was open and continuous use by the public for five years.

When dedication by acquiescence for a period of less than five years is claimed, _____ [*party claiming dedication*] must prove that _____ [*owner*] actually consented to the dedication.
_____ [*Owner*]'s intent is the crucial factor.

If _____ [*party claiming dedication*] seeks to establish dedication by adverse use, the inquiry shifts from the owner's intent and activities to those of the public. _____ [*Party claiming dedication*] must prove by substantial evidence that the public has used the land for a period of more than five years with the owner's full knowledge without asking for permission to do so, and without objection being made by anyone.

Authorities: *Gion v. City of Santa Cruz* (1970) 2 Cal.3d 29, 38, 84 Cal.Rptr. 162, 465 P.2d 50 ; *Union Transp. Co. v. Sacramento County* (1954) 42 Cal.2d 235, 241, 267 P.2d 10 ; *Burch v. Gombos* (2000) 82 Cal.App.4th 352, 98 Cal.Rptr.2d 119 ; *Bess v. County of Humboldt* (1992) 3 Cal.App.4th 1544, 1550-1551, 5 Cal.Rptr.2d 399 ; *Hays v. Vanek* (1989) 217 Cal.App.3d 271, 281, 266 Cal.Rptr. 856 ;

County of Orange v. Chandler-Sherman Corp. (1976) 54 Cal.App.3d 561, 566, 126 Cal.Rptr. 765

[2] Use of Instruction

This instruction should be used only if the rights to the land vested before March 4, 1972. After March 4, 1972, Civ. Code § 1009 protects property owners from the threat of losing their land through dedication implied from public use [see [3][d], below]. This instruction should also be read with the instruction defining license in Ch. 77A, *Matthew Bender Easement Instructions*, MB 7700A.13.

[3] Comment

[a] Introduction

Public use of private property can result in common law dedication by (1) acquiescence of the owner in the use of land under circumstances negating the idea that the use is under license, or (2) open and continuous use of land by the public for five years [*Gion v. City of Santa Cruz (1970) 2 Cal.3d 29, 38, 84 Cal.Rptr. 162, 465 P.2d 50* ; *Hays v. Vanek (1989) 217 Cal.App.3d 271, 281, 266 Cal.Rptr. 856*].

In establishing an implied dedication to the public, it is necessary to show that persons have used the property as they would have used the public land, or as if they believed the public had a right to such use [*Bess v. County of Humboldt (1992) 3 Cal.App.4th 1544, 1550-1551, 5 Cal.Rptr.2d 399* ; *Aptos Seascap Corp. v. County of Santa Cruz (1982) 138 Cal.App.3d 484, 501, 188 Cal.Rptr. 191*]. Various groups of persons rather than a limited and definable number must use the land in a substantial way [*Hanshaw v. Long Valley Road Assn. (2004) 116 Cal.App.4th 471, 482, 11 Cal.Rptr.3d 357* ; *Aptos Seascap Corp. v. County of Santa Cruz (1982) 138 Cal.App.3d 484, 500-501, 188 Cal.Rptr. 191*], and there must be substantial evidence of this use [*County of Orange v. Chandler-Sherman Corp. (1976) 54 Cal.App.3d 561, 566, 126 Cal.Rptr. 765*]. If implied public dedication is found because of open and continuous public use of private property for a five-year period, the dedication's scope (that is, the purposes for which the dedicated property may be used) is limited to the purposes for which the property was used during the prescriptive period [*Burch v. Gombos (2000) 82 Cal.App.4th 352, 362, 98 Cal.Rptr.2d 119*].

Acceptance is implied when the public has made use of the property for a period of time that demonstrates an intention to accept dedication, or when actions by the responsible public officials indicate an assumption of control over the property [*Carstens v. California Coastal Com. (1986) 182 Cal.App.3d 277, 285, 227 Cal.Rptr. 135*].

[b] Dedication by Acquiescence in Public Use

Dedication by acquiescence in public use is a dedication implied in fact [*Union Transp. Co. v. Sacramento County (1954) 42 Cal.2d 235, 241, 267 P.2d 10* ; see *Laguna Beach v. Consolidated Mfg. Co. (1945) 68 Cal.App.2d 38, 43, 155 P.2d 844*]. When dedication by acquiescence is for a period of less than five years, the owner's actual consent to the dedication must be proven [*Union Transp. Co. v. Sacramento County (1954) 42 Cal.2d 235, 241, 267 P.2d 10*].

Persons seeking to show that land has been dedicated to the public need only produce evidence that persons have used the land as they would have used public land. Thus, if the land involved is a beach or shoreline area, they should show that the land was used as if it were a public recreation area. For roads, it must be shown that it was used as if it were a public road [*Gion v. City of Santa Cruz (1970) 2 Cal.3d 29, 39, 84 Cal.Rptr. 162, 465 P.2d 50* ; *Bess v. County of Humboldt (1992) 3 Cal.App.4th 1544, 1550-1551, 5 Cal.Rptr.2d 399* ; *Hays v. Vanek (1989) 217 Cal.App.3d 271, 281, 266 Cal.Rptr. 856*]. However, when an implied public dedication of a road arises by prescription (that is, by open and continuous use of the road by the public for five years), the road's use under the implied dedication will be limited to the use during the prescriptive period. Thus, if a dedication arose from recreational use of a road, the road could not be used for logging operations [*Burch v. Gombos (2000) 82 Cal.App.4th 352, 362, 98 Cal.Rptr.2d 119*].

[c] Dedication by Adverse Use

Dedication by adverse use is a dedication implied in law [*County of Los Angeles v. Berk* (1980) 26 Cal.3d 201, 218, 161 Cal.Rptr. 742, 605 P.2d 381 ; *Union Transp. Co. v. Sacramento County* (1954) 42 Cal.2d 235, 241, 267 P.2d 10]. The litigant's burden of proof shifts from the owner of the land's intent and activities to those of the public [*Gion v. City of Santa Cruz* (1970) 2 Cal.3d 29, 38, 84 Cal.Rptr. 162, 465 P.2d 50 ; *Hays v. Vanek* (1989) 217 Cal.App.3d 271, 281, 266 Cal.Rptr. 856]. Adverse use is established if the public has used the land for a period of more than five years with the full knowledge of the owner, without asking for or receiving permission to do so and without any objection being made by anyone [*Gion v. City of Santa Cruz* (1970) 2 Cal.3d 29, 38, 84 Cal.Rptr. 162, 465 P.2d 50 ; *Bess v. County of Humboldt* (1992) 3 Cal.App.4th 1544, 1550, 5 Cal.Rptr.2d 399].

[d] Dedication by Public Use After March 4, 1972

Dedication by public use as described in this instruction only applies to rights that vested before March 4, 1972. Civ. Code § 1009, effective March 4, 1972, protects property owners from the threat of losing their land through implied dedication by public use [*Bustillos v. Murphy* (2002) 96 Cal.App.4th 1277, 1280-1281, 117 Cal.Rptr.2d 895]. For a discussion on the effect of Civ. Code § 1009, see California Real Estate Law and Practice, Ch. 361, *Dedication* (Matthew Bender).

There are two exceptions to the rule that public use of property after March 4, 1972, cannot result in a dedication. Certain coastal properties are exempted from the statute [see Civ. Code § 1009(e)], and a governmental entity may acquire a vested right to use the land if it has expended public funds on visible improvements on the land such as cleaning and maintenance [see Civ. Code § 1009(d)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property Law Adverse Possession Elements of Adverse Claims Real Property Law Ownership & Transfer Transfer Not By Deed Dedication Elements Real Property Law Ownership & Transfer Transfer Not By Deed Dedication Procedure

Peter H. Ferris, Eric J. Firstman, and Cindy Lee contributed to the original chapter for California Forms of Jury Instruction (Matthew Bender).



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CHAPTER 76A Matthew Bender Acquiring Title to Real Property Instructions
PART D. COMMON LAW DEDICATION

6-76A California Forms of Jury Instruction MB 7600A.56

MB 7600A.56 Abandonment of Dedicated Property**[1] Instruction** Abandonment of Dedicated Property[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

To prove that _____ [*public entity owning dedicated land or easement*] **abandoned the [easement/dedicated land] acquired by grant to the public authorities,** _____ [*party claiming abandonment*] **must prove that** _____ [*public entity owning dedicated land or easement*] **clearly demonstrated its intention to abandon the property. Mere nonuse does not amount to an abandonment.**

Authorities: *Western Aggregates, Inc. v. County of Yuba* (2002) 101 Cal.App.4th 278, 308, 130 Cal.Rptr.2d 436; *Humboldt County v. Van Duzer* (1920) 48 Cal.App. 640, 644, 192 P. 192

[2] Use of Instruction

This instruction should be used following the instruction on common law dedication [see MB 7600A.50] or the instruction on implied dedication by public use [see MB 7600A.55] when the title to dedicated property is at issue and abandonment is the cause of the dispute. This instruction can also be used when abandonment of an easement is at issue [see Ch. 77A, *Matthew Bender Easement Instructions*].

[3] Comment

The abandonment of dedicated property (or an easement) must be evidenced by the user's clear intent to abandon the property [*Humboldt County v. Van Duzer* (1920) 48 Cal.App. 640, 644, 192 P. 192]. Mere nonuse of property does not amount to abandonment [*Humboldt County v. Van Duzer* (1920) 48 Cal.App. 640, 644, 192 P. 192]. The burden is on the party claiming abandonment of a road to show that deviations from the originally dedicated road "are so profound as to constitute abandonment" [*Western Aggregates, Inc. v. County of Yuba* (2002) 101 Cal.App.4th 278, 308, 130 Cal.Rptr.2d 436]. Abandonment of dedicated property can occur when a governmental body acting in its legislative

capacity so designates [*County of Inyo v. Given* (1920) 183 Cal. 415, 421, 191 P. 688].

Dedicated property reverts to the dedicator's ownership if the property is abandoned [*County of Inyo v. Given* (1920) 183 Cal. 415, 421, 191 P. 688].

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property LawOwnership & TransferTransfer Not By DeedDedicationElementsReal Property LawOwnership & TransferTransfer Not By DeedDedicationProcedure

Peter H. Ferris, Eric J. Firstman, and Cindy Lee contributed to the original chapter for California Forms of Jury Instruction(Matthew Bender).



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CHAPTER 77A Matthew Bender Easement Instructions

6-77A California Forms of Jury Instruction 77A.syn

§ 77A.syn Synopsis to Chapter 77A: Matthew Bender Easement Instructions

MB 7700A.01 Easement: Introductory Instruction

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Nature of Easement

[b] Right to Jury Trial in Easement Case

MB 7700A.02 Easements by Implied Grant or Reservation: Elements of Proof

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Implied Easements: General Rule

[b] Intent to Create Easement

[c] Easements by Implied Reservation

MB 7700A.03 Easement by Implied Grant or Reservation: Long-Continued and Obvious Use

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 7700A.04 Easements by Implied Grant or Reservation: Reasonable Necessity of Use

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 7700A.05 Easement by Necessity: Defense of Lack of Intent

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 7700A.06 Easement by Prescription: Elements of Proof

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Nature of Prescriptive Easement

[b] Adverse Possession Distinguished From Prescriptive Easement

[c] Burden of Proof on Party Claiming Easement

[d] Payment of Taxes Not Required

MB 7700A.07 Easement by Prescription: "Open and Notorious" Use

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 7700A.08 Easement by Prescription: Defense of Permissive Use

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 7700A.09 Extent of Use

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Easement by Implication

[b] Easement by Prescription

MB 7700A.10 Unreasonable Interference With Easement by Servient Landowner

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 7700A.11 Damages for Unreasonable Interference With Easement

[1] Instruction

[2] Use of Instruction

[3] Comment

MB 7700A.12 Termination of Easement by Abandonment

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Abandonment of Easement Acquired by Grant

[b] Abandonment of Prescriptive Easement

[c] Statutory Abandonment Procedure

MB 7700A.13 License in Real Property

[1] Instruction

[2] Use of Instruction

[3] Comment

[a] Nature of License

[b] Licenses and Easements Compared

[c] Licenses and Leases Compared

[d] License Coupled With Interest

[e] Estoppel

[f] Effect of Irrevocable License



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CHAPTER 77A Matthew Bender Easement Instructions

6-77A California Forms of Jury Instruction Scope

Scope

SCOPE

This chapter includes jury instructions concerning the types of easements that may arise in the absence of an express written grant. These easements include easements implied by grant or reservation, easements by necessity, and prescriptive easements. Parol licenses, insofar as they are distinguished from easements, are covered. Instructions on the recovery of damages for an unreasonable interference with an easement are also included. Specifically, the chapter covers the following topics:

- An introductory instruction defining an "easement," "dominant estate," and "servient estate" [*see MB 7700A.01*].
- Easements by implied grant or reservation, including reasonable necessity of use [*see MB 7700A.02 -MB 7700A.04*].
- Easements by necessity [*see MB 7700A.05*].
- Easements by prescription [*see MB 7700A.06 -MB 7700A.08*].
- The extent of an easement's use [*see MB 7700A.09*].
- The unreasonable interference with an easement [*see MB 7700A.10*] and damages for such an interference [*see MB 7700A.11*].
- The termination of an easement by abandonment [*see MB 7700A.12*].
- License in real property [*see MB 7700A.13*].

The creation and interpretation of express written easements and other servitudes in land, such as covenants, conditions,

and equitable servitudes, generally involve issues of law and equity within the sole province of the court, and they are not included in this chapter. Although they may be written, oral, or implied, revocable licenses in real property are governed by general contract principles. For instructions on the creation, validity, and breach of contracts, see Ch. 3, *California Judicial Council Contracts Instructions*, and Chs. 3A through 3G.



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CHAPTER 77A Matthew Bender Easement Instructions

6-77A California Forms of Jury Instruction MB 7700A.01

MB 7700A.01 Easement: Introductory Instruction

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

An easement is an interest in the land of another that entitles the easement owner to a limited use or enjoyment of the other's land. An easement may be affirmative, allowing the owner to do certain acts, or it may be negative, preventing certain acts from being performed on the property.

The land that is benefited by having the use of an easement on another's land is called the "dominant" estate or tenement. The land on which the easement is imposed is called the "servient" estate or tenement.

In this case, [Plaintiff/Defendant], as owner of the dominant estate, claims that [a/an] [implied easement/prescriptive easement/easement by necessity] has been created in the form of _____ [describe alleged easement, e.g., a right-of-way or a right of pasture or a right of taking water, wood, minerals, or other things] attached to or imposed on property owned by [Defendant/Plaintiff].

Authorities: Civ. Code §§ 801, 803; *Camp Meeker Water System, Inc. v. Public Utilities Com.* (1990) 51 Cal.3d 845, 865, 274 Cal.Rptr. 678, 799 P.2d 758 ; *Gerhard v. Stephens* (1968) 68 Cal.2d 864, 890, 69 Cal.Rptr. 612, 442 P.2d 692 ; *Mosier v. Mead* (1955) 45 Cal.2d 629, 632, 290 P.2d 495 ; *Committee to Save the Beverly Highlands Homes Assn. v. Beverly Highlands Home Assn.* (2001) 92 Cal.App.4th 1247, 1269, 112 Cal.Rptr.2d 732 ; *Wolford v. Thomas* (1987) 190 Cal.App.3d 347, 354, 235 Cal.Rptr. 422 ; *Moylan v. Dykes* (1986) 181 Cal.App.3d 561, 568, 226 Cal.Rptr. 673 ; Restatement (Third) of Property (Servitudes) § 1.2 (2000).

[2] Use of Instruction

This instruction should be used to precede and introduce the instructions on easement by implied grant or reservation [see MB 7700A.02 -MB 7700A.04], prescriptive easement [see MB 7700A.06 -MB 7700A.08], or easement by necessity

[see MB 7700A.05]. It includes definitions of "dominant" estate and "servient" estate, technical terms commonly used in the law of easements.

The last paragraph may be used to instruct the jury in nontechnical terms on the specific type of easement at issue.

[3] Comment

[a] Nature of Easement

An easement is an interest of a landowner in the land of another, which entitles the easement owner to the limited use or enjoyment of the other's land [*Camp Meeker Water System, Inc. v. Public Utilities Com.* (1990) 51 Cal.3d 845, 865, 274 Cal.Rptr. 678, 799 P.2d 758 ; *Mosier v. Mead* (1955) 45 Cal.2d 629, 632, 290 P.2d 495 ; *Committee to Save the Beverly Highlands Homes Assn. v. Beverly Highlands Home Assn.* (2001) 92 Cal.App.4th 1247, 1269, 112 Cal.Rptr.2d 732 ; *City of Long Beach v. Daugherty* (1977) 75 Cal.App.3d 972, 977, 142 Cal.Rptr. 593 ; Restatement (Third) of Property (Servitudes) § 1.2 (2000)]. An easement interest conveys no property rights to the land subject to the easement. It exists only to benefit the easement holder's property [*Kazi v. State Farm Fire & Casualty Co.* (2001) 24 Cal.4th 871, 885, 103 Cal.Rptr.2d 1, 15 P.3d 223]. An easement may be affirmative, allowing the doing of acts, or it may be negative, preventing acts from being performed on the property [*Wolford v. Thomas* (1987) 190 Cal.App.3d 347, 354, 235 Cal.Rptr. 422]. It may be created by prescription or by express or implied grant [*Wolford v. Thomas* (1987) 190 Cal.App.3d 347, 354, 235 Cal.Rptr. 422]. Although an easement is an interest in real property, it is a nonpossessory interest and cannot become a fee estate in real property [*Darr v. Lone Star Industries, Inc.* (1979) 94 Cal.App.3d 895, 901, 157 Cal.Rptr. 90 ; see *Concord & Bay Point Land Co. v. City of Concord* (1991) 229 Cal.App.3d 289, 295, 280 Cal.Rptr. 623 (easement is interest in land of another rather than estate in land)].

In California, easements include any "land burdens, or servitudes on land" [Civ. Code § 801]. The Civil Code and case law make no distinctions between easements and profits and in fact include typical profits as easements [Civ. Code § 801]. Easements and profits a prendre are indistinguishable in terms of the legal consequences stemming from ownership [*Gerhard v. Stephens* (1968) 68 Cal.2d 864, 890, 69 Cal.Rptr. 612, 442 P.2d 692].

Because an easement is an interest in land, an express grant of an easement must be in writing [*Elliott v. McCombs* (1941) 17 Cal.2d 23, 32, 109 P.2d 329]. Thus, an instrument creating an easement is subject to the same rules of construction that apply to deeds and contracts in general [Civ. Code § 1066; *Willard v. First Church of Christ, Scientist* (1972) 7 Cal.3d 473, 476, 102 Cal.Rptr. 739, 498 P.2d 987 ; *Continental Baking Co. v. Katz* (1968) 68 Cal.2d 512, 521, 67 Cal.Rptr. 761, 439 P.2d 889].

However, when there is a claim of easement by implied grant or reservation, the trier of fact must examine the surrounding circumstances, the parties' relationships, the prior uses of the properties, and the nature and purpose of the easement to ascertain the intentions of both grantor and grantee [*Mosier v. Mead* (1955) 45 Cal.2d 629, 632-633, 290 P.2d 495 ; *Fristoe v. Drapeau* (1950) 35 Cal.2d 5, 8, 215 P.2d 729 ; *Leonard v. Haydon* (1980) 110 Cal.App.3d 263, 266, 167 Cal.Rptr. 789].

An easement may be appurtenant to land or in gross. An appurtenant easement is attached to the land itself and benefits the landowner in his or her use of the land [Civ. Code § 801; *Committee to Save the Beverly Highlands Homes Assn. v. Beverly Highlands Home Assn.* (2001) 92 Cal.App.4th 1247, 1269, 112 Cal.Rptr.2d 732 ; *Franceschi v. Kuntz* (1967) 253 Cal.App.2d 1041, 1046, 61 Cal.Rptr. 810 ; Restatement (Third) of Property (Servitudes) § 1.5(1) (2000)]. The property benefited is called the dominant tenement [Civ. Code § 803; *Camp Meeker Water System, Inc. v. Public Utilities Com.* (1990) 51 Cal.3d 845, 865, 274 Cal.Rptr. 678, 799 P.2d 758 ; *Wright v. Best* (1942) 19 Cal.2d 368, 381, 121 P.2d 702 ; *Moylan v. Dykes* (1986) 181 Cal.App.3d 561, 568, 226 Cal.Rptr. 673]. The property burdened by the appurtenant easement is the servient tenement [Civ. Code § 803; *Camp Meeker Water System, Inc. v. Public Utilities Com.* (1990) 51 Cal.3d 845, 865, 274 Cal.Rptr. 678, 799 P.2d 758].

By contrast, an easement in gross is not attached to any particular land but belongs to a person individually. An easement in gross is a personal interest in real property that can be transferred [*Civ. Code* § 802; *Collier v. Oelke* (1962) 202 Cal.App.2d 843, 847, 21 Cal.Rptr. 140 ; *Bates v. Terry* (1961) 194 Cal.App.2d 137, 144, 14 Cal.Rptr. 829].

[b] Right to Jury Trial in Easement Case

Easement issues typically arise in actions that seek equitable relief, such as an injunction or a judgment quieting title. However, the form of action does not determine a litigant's right to a jury trial of the factual issues [*Frahm v. Briggs* (1970) 12 Cal.App.3d 441, 444, 90 Cal.Rptr. 725]. When legal and equitable issues are joined in the same action, the parties are entitled to a jury trial on the legal issues [*Robinson v. Puls* (1946) 28 Cal.2d 664, 665-666, 171 P.2d 430].

When the establishment of an easement is a condition precedent to the granting of equitable relief, the denial of a jury trial on issues concerning a claimant's entitlement to an easement is reversible error [*Frahm v. Briggs* (1970) 12 Cal.App.3d 441, 445, 90 Cal.Rptr. 725]. When a claimant's right to an easement is clear, it is the court's function to grant injunctive or declaratory relief. If, however, the claimant's entitlement to an easement is in substantial dispute, no equitable relief will be granted until the claim is established at law [*Frahm v. Briggs* (1970) 12 Cal.App.3d 441, 445, 90 Cal.Rptr. 725].

The establishment of title by the resolution of factual, as opposed to legal, questions does not create undesirable uncertainty regarding the real property's ownership, because trial courts and juries frequently make these determinations [*Gerhard v. Stephens* (1968) 68 Cal.2d 864, 889, 69 Cal.Rptr. 612, 442 P.2d 692]. The stability of title is protected by adherence to the rules of law governing real property ownership [*Gerhard v. Stephens* (1968) 68 Cal.2d 864, 889, 69 Cal.Rptr. 612, 442 P.2d 692].

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property Law Limited Use Rights Easements Affirmative & Negative Easements Real Property Law Limited Use Rights Easements Characteristics Real Property Law Limited Use Rights Easements Creation Easement by Implication Real Property Law Limited Use Rights Easements Creation Easement by Necessity Real Property Law Limited Use Rights Easements Creation Easement by Prescription



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CHAPTER 77A Matthew Bender Easement Instructions

6-77A California Forms of Jury Instruction MB 7700A.02

MB 7700A.02 Easements by Implied Grant or Reservation: Elements of Proof

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Plaintiff contends that [he/she/it] acquired an easement by implied [grant/reservation] over _____ [describe burdened land] on a prior separation or transfer of title when Plaintiff's land and Defendant's land were owned by a single person. To prove that an easement by implied [grant/reservation] was created on a separation or transfer of title, Plaintiff must prove all of the following:

- 1. That _____ [describe dominant estate] and _____ [describe servient estate] were once a single parcel under common ownership and that title to this parcel was separated when the common owner conveyed part of the property to another;**
- 2. That, before the separation took place, the _____ [describe use or activity that gives rise to easement] was so long continued and so obvious as to show that it was intended to be permanent; and**
- 3. That the _____ [describe use or activity that gives rise to easement] was reasonably necessary to the beneficial enjoyment of the land [granted/retained].**

[OPTIONAL (See Use of Instruction)]

Plaintiff [was the common owner of both pieces of property/owns the property that was retained by the common owner when title to the property was separated]. Plaintiff claims an easement by implied reservation on the transferred property resulting from the separation of title. Because the grantor is the party in a conveyance who is best able to protect [himself/herself/itself], the law requires a conveyance to be interpreted against the grantor.

This means that you must interpret any ambiguity in the circumstances of the conveyance by [Plaintiff/the common owner] against Plaintiff and in favor of Defendant.

[CONTINUE WITH INSTRUCTION]

If you find that the evidence presented shows that Plaintiff has proved all three of the required facts, you must find that an easement exists in Plaintiff's favor as the owner of the dominant estate and against Defendant as the owner of the servient estate. However, if you find that the granting of an implied easement is contrary to the intent of the parties to the original transfer, then you must find that no implied easement was created.

Authorities: *Civ. Code* §§ 806, 1069, 1104; *Fristoe v. Drapeau* (1950) 35 Cal.2d 5, 8, 215 P.2d 729 ; *Tusher v. Gabrielsen* (1998) 68 Cal.App.4th 131, 141, 80 Cal.Rptr.2d 126 ; *Mikels v. Rager* (1991) 232 Cal. App. 3d 334, 357, 284 Cal. Rptr. 87 ; *George v. Goshgarian* (1983) 139 Cal.App.3d 856, 860, 189 Cal.Rptr. 94 ; *Leonard v. Haydon* (1980) 110 Cal.App.3d 263, 266, 167 Cal.Rptr. 789 ; *Kytasty v. Godwin* (1980) 102 Cal.App.3d 762, 769, 162 Cal.Rptr. 556 ; *Piazza v. Schaefer* (1967) 255 Cal.App.2d 328, 332-333, 63 Cal.Rptr. 246 ; *County of Los Angeles v. Bartlett* (1962) 203 Cal. App. 2d 523, 530, 21 Cal. Rptr. 776 ; *Mammoth Gold Dredging Co. v. Forbes* (1940) 39 Cal.App.2d 739, 750-751, 104 P.2d 131 .

[2] Use of Instruction

This instruction should be used when it is alleged that an easement arose out of an implied grant or reservation, as opposed to an express grant by written instrument or an easement by prescription [see MB 7700A.06 -MB 7700A.08]. It should be used with the introductory instruction in MB 7700A.01 and with the instructions that follow on continuous and obvious use [see MB 7700A.03] and reasonable necessity of use [see MB 7700A.04].

The optional paragraph should be added if the claimant is the original grantor, or a successor in interest of the original grantor, and the claimant alleges an easement by implied reservation.

This instruction concerns implied easements acquired in connection with the transfer of title to land. A tenant may also possess an implied easement appurtenant with regard to the property it leases [see, e.g., *Dubin v. Robert Newhall Chesebrough Trust* (2002) 96 Cal.App.4th 465, 472-475, 116 Cal.Rptr.2d 872]. In *Dubin*, a tenant had an implied easement over a driveway that permitted access to his vehicle repair shop because use of the driveway was reasonably necessary to the beneficial use of the leased property [*Dubin v. Robert Newhall Chesebrough Trust* (2002) 96 Cal.App.4th 465, 472-475, 116 Cal.Rptr.2d 872].

If an easement providing access to leased property is in issue, this instruction should be modified.

[3] Comment

[a] Implied Easements: General Rule

An easement may be created by conveyance even when there is no express grant of an easement. *Civ. Code* § 1104 provides that when land under common ownership is divided by conveyance into separately owned parts, the grantee will acquire an easement to use the granted land in the same way and to the same extent as that land was "obviously and permanently" used by the grantor before the transfer. An easement in the grantee's favor arises by implication out of the separation of ownership [Restatement (Third) of Property (Servitudes) § 2.11 (2000)]. An implied easement may be created only in connection with a conveyance [*Kytasty v. Godwin* (1980) 102 Cal.App.3d 762, 768, 162 Cal.Rptr. 556]. For example, an easement by implication may be created when an owner of real property dies intestate and the property is then divided and distributed to the intestate's heirs by court decree [*Larsson v. Grabach* (2004) 121

Cal.App.4th 1147, 1153-1154, 18 Cal.Rptr.3d 136].

Based on the provisions of *Civ. Code § 1104*, California courts have developed the following three principal elements required for the creation of an easement by implication [*Mikels v. Rager* (1991) 232 *Cal. App. 3d* 334, 357, 284 *Cal. Rptr. 87*]:

- (1) There must be a separation of title;
- (2) Before this separation, the use that gives rise to the easement must be so long continued and so obvious as to show that it was intended to be permanent [*see MB 7700A.03*]; and
- (3) The easement must be reasonably necessary to the beneficial enjoyment of the land granted [*see MB 7700A.04*; Restatement (Third) of Property (Servitudes) § 2.11, Comment (e) (2000) (if easement is implied by reservation, it must be reasonably necessary to land retained, not land granted); *see also* [c], *below*].

[b] Intent to Create Easement

The factors enumerated in *Civ. Code § 1104* are not exclusive of other factors that may be relevant in ascertaining the existence or extent of an easement by implied grant or reservation. *Civ. Code § 1104* must be read with *Civ. Code § 806*, which has the effect of establishing intent as the criterion [*Camp Meeker Water System, Inc. v. Public Utilities Com.* (1990) 51 *Cal.3d* 845, 867, 274 *Cal.Rptr. 678*, 799 *P.2d* 758 ; *Fristoe v. Drapeau* (1950) 35 *Cal.2d* 5, 9, 215 *P.2d* 729]. This is in accord with the rationale for implied easements, because the primary purpose of the doctrine of implied easements is to give effect to the actual intent of the parties as shown by all the facts and circumstances [*Fristoe v. Drapeau* (1950) 35 *Cal.2d* 5, 8, 215 *P.2d* 729 ; *George v. Goshgarian* (1983) 139 *Cal.App.3d* 856, 861-862, 189 *Cal.Rptr. 94*]. An implied easement will not be enforced contrary to the actual intent of the parties [*Kellogg v. Garcia* (2002) 102 *Cal.App.4th* 796, 804, 125 *Cal.Rptr.2d* 817 ; *County of Los Angeles v. Bartlett* (1962) 203 *Cal.App.2d* 523, 529, 21 *Cal.Rptr. 776*].

Whether an implied easement exists is a question of fact to be determined by the trier of fact [*Leonard v. Haydon* (1980) 110 *Cal.App.3d* 263, 274, 167 *Cal.Rptr. 789*]. To determine the intent of the parties, the trier of fact must consider (1) all relevant facts and circumstances attending the original conveyance, (2) the particular relationship of the parties, and (3) the nature and extent of the prior use [*George v. Goshgarian* (1983) 139 *Cal.App.3d* 856, 862-863, 189 *Cal.Rptr. 94* ; *Leonard v. Haydon* (1980) 110 *Cal.App.3d* 263, 274, 167 *Cal.Rptr. 789* ; *Kaynor v. Fisch* (1951) 103 *Cal.App.2d* 832, 839, 230 *P.2d* 418].

What facts and circumstances are relevant to this determination will depend on the terms of the deed and facts of the case [*County of Los Angeles v. Bartlett* (1962) 203 *Cal. App. 2d* 523, 530, 21 *Cal. Rptr. 776*]. Factors to consider in the determining whether an easement should be implied include: (1) the policies behind requiring written expressions of intent to create interests in land and those behind permitting exceptions to the requirement; (2) meeting the reasonable expectations of land owners and purchasers; (3) arriving at results that are fair to all parties; (4) avoiding unnecessary waste of resources when that can be done without violating the reasonable expectations of land owners; (4) the relative abilities of the parties to have acted to avoid the loss; (5) the consideration paid; (6) the overall economic impact of the decision; and (7) the value of developing caselaw that provides a sound basis for prediction [Restatement (Third) of Property (Servitudes) § 2.11, Comment f (2000)].

If simultaneous conveyances are made to two or more grantees, the likelihood that an easement was intended is stronger, since it is reasonable to infer that a grantor who divided land among several grantees intends the privileges of use to be shared by them all [*McCarty v. Walton* (1963) 212 *Cal. App. 2d* 39, 43-44, 27 *Cal. Rptr. 792*].

Implied easements are generally disfavored and will not be imposed absent a showing of the intent of the parties to create the easement [*County of Los Angeles v. Bartlett* (1962) 203 Cal. App. 2d 523, 529-531, 21 Cal. Rptr. 776]. An easement by implication will not be found absent clear evidence that it was intended by the parties [*Walters v. Marler* (1978) 83 Cal.App.3d 1, 21, 147 Cal.Rptr. 655]. However, the need for "clear" evidence of intent does not create a "clear and convincing" standard of proof [*Tusher v. Gabrielsen* (1998) 68 Cal.App.4th 131, 145-146, 80 Cal.Rptr.2d 126 (proper standard of proof to establish implied easement is by preponderance of evidence)].

[c] Easements by Implied Reservation

Easements may result from implied reservations as well as implied grants [Restatement (Third) of Property (Servitudes) § 2.12, Comment a (2000); see California Real Estate Law and Practice, Ch. 343, *Easements and Licenses* (Matthew Bender)]. Even though Civ. Code § 1104 refers only to implying an easement in the grantee's favor, California courts also recognize easements by implied reservation [*Kytasty v. Godwin* (1980) 102 Cal.App.3d 762, 770, 162 Cal.Rptr. 556 ; *Horowitz v. Noble* (1978) 79 Cal.App.3d 120, 133, 144 Cal.Rptr. 710]. The elements of an easement by implied reservation are the same as the elements required for an easement by implied conveyance [see [a], above], except that the easement must be reasonably necessary for the beneficial enjoyment of the land retained rather than the land granted [Restatement (Third) of Property (Servitudes) § 2.15 (2000)]. In addition, the existing use must be actually known to the grantee or must be so obvious and apparently permanent that the grantee's knowledge may be implied [*Horowitz v. Noble* (1978) 79 Cal.App.3d 120, 131-132, 144 Cal.Rptr. 710].

In view of the rule that a conveyance is to be construed against the grantor [Civ. Code § 1069], an easement will be implied in the grantee's favor more readily than in the grantor's favor [*Kytasty v. Godwin* (1980) 102 Cal.App.3d 762, 769, 162 Cal.Rptr. 556 ; *Pacific Gas & Elec. Co. v. Hacienda Mobile Home Park* (1975) 45 Cal.App.3d 519, 525, 119 Cal.Rptr. 559]. Accordingly, circumstances that may be sufficient to imply the creation of an easement by grant may not suffice to imply the existence of an easement by reservation [*Orr v. Kirk* (1950) 100 Cal.App.2d 678, 682, 224 P.2d 71].

A conveyance is construed against the grantor because the grantor has more control than the grantee over the language of the conveyance and the circumstances under which it is made [*Glass v. Gulf Oil Corp.* (1970) 12 Cal. App. 3d 412, 432, 89 Cal. Rptr. 514]. This means that if there are any ambiguities in the language or the circumstances of the conveyance, they should be resolved against the grantor [*Mammoth Gold Dredging Co. v. Forbes* (1940) 39 Cal.App.2d 739, 750-751, 104 P.2d 131].

In contrast to private party conveyances, conveyances involving a sovereign as the common owner typically do not give rise to implied reservations of easements or other property interests in conveyed land [*Murphy v. Burch* (2009) 46 Cal.4th 157, 165, 92 Cal.Rptr.3d 381, 205 P.3d 289]. When a claimant traces common ownership back to the federal government and seeks to establish an implied reservation of an access right-of-way, the intent of Congress is paramount and the government's power of eminent domain also bears significance. Given the unique historical and legal nature of land patents, extreme caution must be exercised in determining whether the circumstances surrounding a government land grant are sufficient to overcome the inference prompted by the omission of an express reference to a reserved right of access. The easement claimant bears the burden of producing evidence on the issues regarding the government's intent to reserve an easement and the government's lack of power to condemn. An easement is not a matter of necessity when the federal government had the power of eminent domain to gain access to its property and strict necessity may be extinguished when a sovereign owner failed to exercise that power [*Murphy v. Burch* (2009) 46 Cal.4th 157, 167, 92 Cal.Rptr.3d 381, 205 P.3d 289 ; *Moore v. Walsh* (1995) 38 Cal.App.4th 1046, 1051, 45 Cal.Rptr.2d 389].

Legal Topics:

For related research and practice materials, see the following legal topics:

EvidenceProcedural ConsiderationsBurdens of ProofAllocationReal Property LawLimited Use

RightsEasementsCreationEasement by Implication



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CHAPTER 77A Matthew Bender Easement Instructions

6-77A California Forms of Jury Instruction MB 7700A.03

MB 7700A.03 Easement by Implied Grant or Reservation: Long-Continued and Obvious Use

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

To find that an easement has been continued long enough to show that it was intended to be permanent, you must find that the use involved was not occasional, accidental, or temporary, but was of such a character that _____ [claimant] was reasonably entitled to rely on the continuance of the use.

To find that an easement is obvious, you must find something on the servient estate that is either visible or in the nature of a permanent artificial structure so as to confirm the original owner's intent to use part of [his/her/its] land for the benefit of the other and to give notice to future grantees of the easement's existence.

Authorities: *Civ. Code § 1104; Fristoe v. Drapeau (1950) 35 Cal.2d 5, 8, 215 P.2d 729 ; George v. Goshgarian (1983) 139 Cal.App.3d 856, 860, 189 Cal.Rptr. 94 ; Leonard v. Haydon (1980) 110 Cal.App.3d 263, 266, 167 Cal.Rptr. 789 ; Kytasty v. Godwin (1980) 102 Cal.App.3d 762, 769, 162 Cal.Rptr. 556 ; Piazza v. Schaefer (1967) 255 Cal.App.2d 328, 332-333, 63 Cal.Rptr. 246 .*

[2] Use of Instruction

This instruction should be used to explain the requirement of long-continued and obvious use for an easement by implied grant or implied reservation. It should be given after the elements of proof instruction for easements by an implied grant or reservation in MB 7700A.02.

[3] Comment

One element required for an implied easement is that the use that gives rise to the easement must be so continuous and so obvious as to show that it was intended to be permanent [*Civ. Code § 1104; Fristoe v. Drapeau (1950) 35 Cal.2d 5,*

8, 215 P.2d 729 ; *Leonard v. Haydon* (1980) 110 Cal.App.3d 263, 266, 167 Cal.Rptr. 789 ; *Kytasty v. Godwin* (1980) 102 Cal.App.3d 762, 769, 162 Cal.Rptr. 556 ; *Piazza v. Schaefer* (1967) 255 Cal.App.2d 328, 332-333, 63 Cal.Rptr. 246]. The reason for this requirement is that the easement's obvious and permanent quality confirms the original owner's intent to use part of his or her land for the benefit of the other part and that it gives notice to the owner's successors in interest that the future servient estate is burdened with the easement in favor of the future dominant estate [*George v. Goshgarian* (1983) 139 Cal.App.3d 856, 860, 189 Cal.Rptr. 94]. Generally, there must be something on the servient estate that is either visible or in the nature of a permanent artificial structure [*George v. Goshgarian* (1983) 139 Cal.App.3d 856, 860, 189 Cal.Rptr. 94].

An easement has been continued long enough to show that it was intended to be permanent if the use involved was not occasional, accidental, or temporary, but was of such a character that the claimant was reasonably entitled to rely on the continuance of the use [*George v. Goshgarian* (1983) 139 Cal.App.3d 856, 860, 189 Cal.Rptr. 94].

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property Law Limited Use Rights Easements Continuous & Discontinuous Easements Real Property Law Limited Use Rights Easements Creation Easement by Implication



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CHAPTER 77A Matthew Bender Easement Instructions

6-77A California Forms of Jury Instruction MB 7700A.04

MB 7700A.04 Easements by Implied Grant or Reservation: Reasonable Necessity of Use

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

To find that the easement is reasonably necessary for the beneficial use of _____ [*claimant*]'s property, you must find that the easement is necessary for the convenient and comfortable enjoyment of the property as it existed when the severance was made. Mere convenience is insufficient, but absolute necessity is not required.

[*OPTIONAL (See Use of Instruction)*]

Among the factors that you may consider in determining whether the easement is reasonably necessary for the beneficial use of _____ [*claimant*]'s property is whether _____ [*claimant*] can create a substitute on [his/her/its] property at a reasonable cost.

Authorities: *Owsley v. Hamner* (1951) 36 Cal.2d 710, 718-720, 227 P.2d 263 ; *Leonard v. Haydon* (1980) 110 Cal.App.3d 263, 268-273, 167 Cal.Rptr. 789 ; *Navarro v. Paulley* (1944) 66 Cal.App.2d 827, 829-830, 153 P.2d 397 .

[2] Use of Instruction

This instruction should be used to explain the requirement that an easement may be implied only if the easement is reasonably necessary to the beneficial enjoyment of the land granted or retained. The optional part of the instruction should be used when evidence of the reasonable cost of creating a substitute on the easement claimant's property has been admitted. The instruction should be given after the elements of proof instruction for easements by an implied grant or reservation in MB 7700A.02.

[3] Comment

An easement by implied grant or implied reservation will be recognized only if the easement is reasonably necessary to the beneficial enjoyment of the land conveyed [*Owsley v. Hamner* (1951) 36 Cal.2d 710, 718-720, 227 P.2d 263 ; *Leonard v. Haydon* (1980) 110 Cal.App.3d 263, 269, 167 Cal.Rptr. 789 ; *Navarro v. Paulley* (1944) 66 Cal.App.2d 827, 829, 153 P.2d 397] or retained [Restatement (Third) of Property (Servitudes) § 2.15 (2000)]. Mere convenience is insufficient, but absolute necessity is not required [*Leonard v. Haydon* (1980) 110 Cal.App.3d 263, 269, 271-273, 167 Cal.Rptr. 789 (no precise definition of "reasonable necessity" can be given, but it is less than "strict necessity" and more than "mere convenience"); *Navarro v. Paulley* (1944) 66 Cal.App.2d 827, 830, 153 P.2d 397 ; but see *Dubin v. Robert Newhall Chesebrough Trust* (2002) 96 Cal.App.4th 465, 477, 116 Cal.Rptr.2d 872 (in connection with easement by necessity with regard to leased property, court found that to state claim plaintiff must plead he had "no other means of access to his property")]. An easement is reasonably necessary if the easement is necessary for the convenient and comfortable enjoyment of the property as it existed when the severance was made [*Leonard v. Haydon* (1980) 110 Cal.App.3d 263, 269, 167 Cal.Rptr. 789 ; *Navarro v. Paulley* (1944) 66 Cal.App.2d 827, 830, 153 P.2d 397].

In determining whether an easement is reasonably necessary to the use and benefit of a claimant, the jury may consider whether the claimant can create a substitute on its own property at a reasonable cost [*Leonard v. Haydon* (1980) 110 Cal.App.3d 263, 268-269, 167 Cal.Rptr. 789 ; *Navarro v. Paulley* (1944) 66 Cal.App.2d 827, 829-830, 153 P.2d 397]. The jury may be instructed to consider the cost of an alternative, as long as the jury is informed that the cost of a substitute is not determinative but merely a factor that it may consider in determining the easement's reasonable necessity [*Leonard v. Haydon* (1980) 110 Cal.App.3d 263, 268, 272-273, 167 Cal.Rptr. 789].

Evidence that the conveyed property is worth substantially less without the easement is also a factor bearing on the easement's reasonable necessity [*Owsley v. Hamner* (1951) 36 Cal.2d 710, 720, 227 P.2d 263].

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property Law Limited Use Rights Easements Creation Easement by Implication Real Property Law Limited Use Rights Easements Creation Easement by Necessity



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CHAPTER 77A Matthew Bender Easement Instructions

6-77A California Forms of Jury Instruction MB 7700A.05

MB 7700A.05 Easement by Necessity: Defense of Lack of Intent

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

When a division of property owned by a single grantor creates a parcel of land that is completely shut off from access to an outside road, the law presumes that the grantor intended to [grant/reserve] an access easement to use the parcel [sold to another/retained by the grantor].

To rebut the presumption of an easement by necessity, _____ [servient landowner] must prove by a preponderance of the evidence that the original grantor did not intend to [grant/reserve] an easement through _____ [specify parcel subject to presumed easement]. As jurors, you must determine the intent and expectations of the original grantor and grantee in dividing the parcel of land. To make this determination, you must examine all of the circumstances surrounding the original transaction.

Authorities: *Kellogg v. Garcia* (2002) 102 Cal.App.4th 796, 804, 125 Cal.Rptr.2d 817 ; *Hewitt v. Meaney* (1986) 181 Cal.App.3d 361, 367, 226 Cal.Rptr. 349 ; *Lichty v. Sickels* (1983) 149 Cal.App.3d 696, 699, 197 Cal.Rptr. 137 ; *Pipkin v. Der Torosian* (1973) 35 Cal.App.3d 722, 729-730, 111 Cal.Rptr. 46 ; *Daywalt v. Walker* (1963) 217 Cal.App.2d 669, 672, 31 Cal.Rptr. 899 ; *Reese v. Borghi* (1963) 216 Cal.App.2d 324, 331-333, 30 Cal.Rptr. 868 .

[2] Use of Instruction

This instruction should be used when an easement by necessity is alleged and the owner of a potentially servient estate attempts to rebut the presumption of necessity by showing that the common grantor did not intend to grant or reserve an easement. It should be used with the introductory instruction in MB 7700A.01 that explains what an easement is. The instruction should be supplemented with an explanation of the terms "grantor" and "grantee." The explanation of these terms in the introductory instruction on deeds in Ch. 76A, *Matthew Bender Acquiring Title to Real Property Instructions*, MB 7600A.10, can be used for this purpose.

[3] Comment

An easement by necessity arises when ownership of land is divided in a way that creates a landlocked parcel [*Kellogg v. Garcia*(2002) 102 Cal.App.4th 796, 804, 125 Cal.Rptr.2d 817 ; *Daywalt v. Walker* (1963) 217 Cal.App.2d 669, 672, 31 Cal.Rptr. 899] . An easement by necessity may be enforced only if the claimed dominant and servient estates were under common ownership when the property was divided [*Reese v. Borghi* (1963) 216 Cal.App.2d 324, 332-333, 30 Cal.Rptr. 868]. Thus, an easement by necessity arises by operation of law when a grantor conveys land that is entirely shut off from access to any road, if it is shut off by land retained by the grantor or by the grantor's land and by a stranger's land [*Lichty v. Sickels* (1983) 149 Cal.App.3d 696, 699, 197 Cal.Rptr. 137 ; *Reese v. Borghi* (1963) Cal.App.2d 324, 331-332, 30 Cal.Rptr. 868]. The doctrine is of common-law origin and is supported by the rule of sound public policy that lands should not be rendered unfit for occupancy or successful cultivation [*Kellogg v. Garcia* (2002) 102 Cal.App.4th 796, 803, 125 Cal.Rptr.2d 817 ; *Reese v. Borghi* (1963) Cal.App.2d 324, 331, 30 Cal.Rptr. 868].

An easement by necessity exists only in a case of strict necessity [*Hewitt v. Meaney* (1986) 181 Cal.App.3d 361, 370, 226 Cal.Rptr. 349]. It will not exist if a property owner has a means of access across his or her own property, albeit with difficulty [*Horowitz v. Noble* (1978) 79 Cal.App.3d 120, 133, 144 Cal.Rptr. 710], nor will strict necessity exist if the claimant has already acquired an easement by prescription [*Pipkin v. Der Torosian* (1973) 35 Cal.App.3d 722, 730, 111 Cal.Rptr. 46]. The easement by necessity continues only while the necessity exists [*Lichty v. Sickels* (1983) 149 Cal.App.3d 696, 699, 197 Cal.Rptr. 137].

Although an easement by necessity is based on public policy, the implication of such an easement is a factual inquiry based on the inferred intent of the parties, which is to be determined either as a matter of law from the terms of the instrument involved, or from all the circumstances surrounding the transaction as a matter of fact [*Hewitt v. Meaney* (1986) 181 Cal.App.3d 361, 366, 226 Cal.Rptr. 349]. Although the fact of necessity may be evidence of the grantor's intention to convey an easement, an easement by necessity will not be imposed contrary to the actual intent of the parties [*Kellogg v. Garcia* (2002) 102 Cal.App.4th 796, 804, 125 Cal.Rptr.2d 817 ; *Hewitt v. Meaney* (1986) 181 Cal.App.3d 361, 366-367, 226 Cal.Rptr. 349].

Conveyances involving a sovereign as the common owner typically do not give rise to implied reservations of easements or other property interests in conveyed land [*Murphy v. Burch* (2009) 46 Cal.4th 157, 165, 92 Cal.Rptr.3d 381, 205 P.3d 289]. When the claimant of an easement by necessity traces common ownership back to the federal government and seeks to establish an implied reservation of an access right-of-way, the intent of Congress is paramount and the government's power of eminent domain also bears significance. Given the unique historical and legal nature of land patents, extreme caution must be exercised in determining whether the circumstances surrounding a government land grant are sufficient to overcome the inference prompted by the omission of an express reference to a reserved right of access. The easement claimant bears the burden of producing evidence on the issues regarding the government's intent to reserve an easement and the government's lack of power to condemn. An easement is not a matter of necessity when the federal government had the power of eminent domain to gain access to its property and strict necessity may be extinguished when a sovereign owner failed to exercise that power [*Murphy v. Burch* (2009) 46 Cal.4th 157, 167, 92 Cal.Rptr.3d 381, 205 P.3d 289 ; *Moore v. Walsh* (1995) 38 Cal.App.4th 1046, 1051, 45 Cal.Rptr.2d 389].

Legal Topics:

For related research and practice materials, see the following legal topics:

EvidenceInferences & PresumptionsPresumptionsEvidenceInferences & PresumptionsRebuttal of PresumptionsReal Property LawLimited Use RightsEasementsCreationEasement by Necessity



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CHAPTER 77A Matthew Bender Easement Instructions

6-77A California Forms of Jury Instruction MB 7700A.06

MB 7700A.06 Easement by Prescription: Elements of Proof

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] PROPOSED INSTR. NO. _____

In this case, the plaintiff claims that [he/she/it] has acquired an easement by prescription on the defendant's land. An easement by prescription is a means of acquiring a limited right to make a specific use of another's property by continuously using that property in the manner required by law for five years. The right acquired to use the easement must be less than the right of ownership.

As jurors, you must decide whether the plaintiff has proven by clear and convincing evidence that each of the three elements required for an easement by prescription has been met. I will first instruct you what these elements are and then explain the meaning of each element. In so doing, I may at times refer to an easement by prescription simply as a prescriptive easement.

To prove that [he/she/it] has acquired a prescriptive easement, Plaintiff must show that for a period of five years [his/her/its] use of Defendant's property has been (1) open and notorious, (2) continuous and uninterrupted, and (3) under a claim of right hostile to the defendant's right of exclusive use as owner.

Authorities: Civ. Code § 1007; Code Civ. Proc. § 321; *Warsaw v. Chicago Metallic Ceilings, Inc.* (1984) 35 Cal.3d 564, 570, 199 Cal.Rptr. 773, 676 P.2d 584 ; *Kapner v. Meadowlark Ranch Assn.* (2004) 116 Cal.App.4th 1182, 1186, 11 Cal.Rptr.3d 138 ; *Harrison v. Welch* (2004) 116 Cal.App.4th 1084, 1090, 11 Cal.Rptr.3d 92 ; *Mehdizadeh v. Mincer* (1996) 46 Cal.App.4th 1296, 1305, 54 Cal.Rptr.2d 284 ; *Otay Water Dist. v. Beckwith* (1991) 1 Cal.App.4th 1041, 1045, 3 Cal.Rptr.2d 223 ; *Field-Escandon v. DeMann* (1988) 204 Cal.App.3d 228, 235, 251 Cal.Rptr. 49 ; *Mesnick v. Caton* (1986) 183 Cal.App.3d 1248, 1260-1261, 228 Cal.Rptr. 779 ; *Thomson v. Dypvik* (1985) 174 Cal.App.3d 329, 338-339, 220 Cal.Rptr. 46 ; *Applegate v. Ota* (1983) 146 Cal.App.3d 702, 708, 194 Cal.Rptr. 331 .

[2] Use of Instruction

This instruction should be used by a party who claims to have acquired a right to make a specific use of another's property by open, notorious, and continuous use that is adverse to the interest of the true owner. The party may be either a plaintiff or a defendant in a quiet title, trespass, or nuisance action. The instruction should follow the general introductory instruction in MB 7700A.01 and be used in conjunction with an instruction on the "clear and convincing evidence" standard of proof [see Ch. 2, *California Judicial Council Evidence Instructions*, CACI No. 201]. It may also be used by a servient landowner who seeks to prove the extinguishment of an easement by a use of the easement that is adverse to the easement owner's rights.

This instruction should be used with the instruction in MB 7700A.07 that explains the meaning of "open and notorious" use.

[3] Comment

[a] Nature of Prescriptive Easement

An easement is a restricted right to a specific or limited use or activity on another's property, which must be less than the right of ownership [*Mesnick v. Caton* (1986) 183 Cal.App.3d 1248, 1261, 228 Cal.Rptr. 779]. A prescriptive easement for traveling across the property of another is limited to a "single, defined right-of-way" [*Bustillos v. Murphy* (2002) 96 Cal.App.4th 1277, 1281, 117 Cal.Rptr.2d 895]. A prescriptive easement in another's property may be acquired by open, notorious, continuous, adverse use, under a claim of right, for a period of five years [Code Civ. Proc. § 321; Civ. Code § 1007; *Warsaw v. Chicago Metallic Ceilings, Inc.* (1984) 35 Cal.3d 564, 570, 199 Cal.Rptr. 773, 676 P.2d 584 ; *Felgenhauer v. Soni* (2004) 121 Cal.App.4th 445, 449, 17 Cal.Rptr.3d 135 ; *Kapner v. Meadowlark Ranch Assn.* (2004) 116 Cal.App.4th 1182, 1186, 11 Cal.Rptr.3d 138 ; *Harrison v. Welch* (2004) 116 Cal.App.4th 1084, 1090, 11 Cal.Rptr.3d 92 ; *Otay Water Dist. v. Beckwith* (1991) 1 Cal.App.4th 1041, 1045, 3 Cal.Rptr.2d 223 ; *Applegate v. Ota* (1983) 146 Cal.App.3d 702, 708, 194 Cal.Rptr. 331].

These elements are designed to ensure that the true real property's owner being encroached on has actual or constructive notice of the adverse use and to provide the true owner sufficient time to take necessary action to prevent that adverse use from ripening into a prescriptive easement [*Field-Escandon v. DeMann* (1988) 204 Cal.App.3d 228, 235, 251 Cal.Rptr. 49 ; *Twin Peaks Land Co. v. Briggs* (1982) 130 Cal.App.3d 587, 593, 181 Cal.Rptr. 25]. Whether each of the elements of prescription is established is a question of fact for the court or jury [*Warsaw v. Chicago Metallic Ceilings, Inc.* (1984) 35 Cal.3d 564, 570, 199 Cal.Rptr. 773, 676 P.2d 584 ; *Twin Peaks Land Co. v. Briggs* (1982) 130 Cal.App.3d 587, 593, 181 Cal.Rptr. 25].

For further discussion, see California Real Estate Law and Practice, Ch. 343, *Easements and Licenses* (Matthew Bender).

[b] Adverse Possession Distinguished From Prescriptive Easement

The elements necessary for prescriptive easement resemble those necessary for adverse possession, but the doctrines are not identical nor are their prerequisites interchangeable [*Felgenhauer v. Soni* (2004) 121 Cal.App.4th 445, 449, 17 Cal.Rptr.3d 135 ; *Mesnick v. Caton* (1986) 183 Cal.App.3d 1248, 1261, 228 Cal.Rptr. 779 ; see Ch. 76A, *Matthew Bender Acquiring Title to Real Property Instructions*, Part C, for instructions on adverse possession]. Unlike adverse possession, proof of a prescriptive easement does not require proof of payment of taxes [see [d], below]. Under Civ. Code § 806, which provides that the extent of a servitude is determined by the nature of the enjoyment by which it was acquired, a claimant's right to a prescriptive easement is limited to the actual use of the easement during the statutory period [*Thomson v. Dypvik* (1985) 174 Cal.App.3d 329, 340, 220 Cal.Rptr. 46]. Unlike adverse possession, which refers to title acquired by continuous possession of another's land, a prescriptive easement is the right to use another's land acquired by continuous use [*Thomson v. Dypvik* (1985) 174 Cal.App.3d 329, 338, 220 Cal.Rptr. 46]. A court may

not grant a prescriptive easement if it would deprive the owner of essentially all rights in the property. In that case, the claimant must proceed under the adverse possession doctrine, and show payment of taxes on the disputed property [*Bustillos v. Murphy* (2002) 96 Cal.App.4th 1277, 1281, 117 Cal.Rptr.2d 895].

When a claimant cannot satisfy the requirements for adverse possession, the claimant may not receive a prescriptive easement that extends so far that it becomes the equivalent of a fee interest and dispossesses the record title owners of part of their property [*Mehdizadeh v. Mincer* (1996) 46 Cal.App.4th 1296, 1304-1305, 54 Cal.Rptr.2d 284]. Moreover, a party claiming a prescriptive easement may not use the doctrine of color of title to expand the area of the claim--the extent of a prescriptive easement is determined solely by the area actually used [*Thomson v. Dypvik* (1985) 174 Cal.App.3d 329, 340, 220 Cal.Rptr. 46].

For further discussion, see California Real Estate Law and Practice, Ch. 360, *Adverse Possession* (Matthew Bender).

[c] Burden of Proof on Party Claiming Easement

The party claiming the prescriptive easement bears the burden of proving each of its elements [*Warsaw v. Chicago Metallic Ceilings, Inc.* (1984) 35 Cal.3d 564, 570, 199 Cal.Rptr. 773, 676 P.2d 584 ; *Mesnick v. Caton* (1986) 183 Cal.App.3d 1248, 1260, 228 Cal.Rptr. 779 ; *Twin Peaks Land Co. v. Briggs* (1982) 130 Cal.App.3d 587, 593, 181 Cal.Rptr. 25]. When the claimant offers satisfactory evidence that all of the required elements exist, the burden of showing that the use was merely permissive shifts to the owner of the servient land [*Twin Peaks Land Co. v. Briggs* (1982) 130 Cal.App.3d 587, 594, 181 Cal.Rptr. 25 ; see MB 7700A.08 for instruction on defense of permissive use]. Continuous use of an easement over a long period of time without the landowner's interference is presumptive evidence of its existence, and, in the absence of evidence of mere permissive use, this presumption will be sufficient to sustain a judgment [*Warsaw v. Chicago Metallic Ceilings, Inc.* (1984) 35 Cal.3d 564, 571-572, 199 Cal.Rptr. 773, 676 P.2d 584 ; *MacDonald Properties, Inc. v. Bel-Air Country Club* (1977) 72 Cal.App.3d 693, 702, 140 Cal.Rptr. 367].

A finding of the existence of a prescriptive easement must be based on clear and convincing evidence [*Field-Escandon v. DeMann* (1988) 204 Cal.App.3d 228, 235, 251 Cal.Rptr. 49 ; *Applegate v. Ota* (1983) 146 Cal.App.3d 702, 708, 194 Cal.Rptr. 331]. The character and extent of the use (e.g., the type and intensity of traffic) determines the nature and extent of the easement [*Otay Water Dist. v. Beckwith* (1991) 1 Cal.App.4th 1041, 1047, 3 Cal.Rptr.2d 223 ; *Twin Peaks Land Co. v. Briggs* (1982) 130 Cal.App.3d 587, 594, 181 Cal.Rptr. 25]. Thus, an easement allowing a right of way over another's land is limited only by the extent of the use made during the statutory period; subsequent use cannot exceed the burden imposed by the use during that time [*Twin Peaks Land Co. v. Briggs* (1982) 130 Cal.App.3d 587, 594-595, 181 Cal.Rptr. 25 , quoting *Confederated Salish and Kootenai Tribes v. Vuller* (9th Cir. 1971) 437 F.2d 177, 181].

[d] Payment of Taxes Not Required

Unlike adverse possession, proof of a prescriptive easement does not require proof of payment of taxes [*Gilardi v. Hallam* (1981) 30 Cal.3d 317, 327, 178 Cal.Rptr. 624, 636 P.2d 588 ; *Otay Water Dist. v. Beckwith* (1991) 1 Cal.App.4th 1041, 1045, 1048, 3 Cal.Rptr.2d 223]. Because easements are seldom taxed separately from land itself, the burden of showing that taxes were assessed on the easement is on the party contesting the prescriptive easement [*Welsher v. Glickman* (1969) 272 Cal.App.2d 134, 137, 77 Cal.Rptr. 141 ; *Cleary v. Trimble* (1964) 229 Cal.App.2d 1, 11, 39 Cal.Rptr. 776]. Until there is evidence that the easement was separately assessed, the prescriptive claimant need not prove payment of taxes [*Balestrieri v. Sullivan* (1956) 142 Cal.App.2d 332, 341-342, 298 P.2d 688].

Legal Topics:

For related research and practice materials, see the following legal topics:

EvidenceProcedural ConsiderationsBurdens of ProofAllocationEvidenceProcedural ConsiderationsBurdens of ProofClear & Convincing ProofReal Property LawAdverse PossessionElements of Adverse ClaimsReal Property

Law Limited Use Rights Easements Creation Easement by Prescription



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CHAPTER 77A Matthew Bender Easement Instructions

6-77A California Forms of Jury Instruction MB 7700A.07

MB 7700A.07 Easement by Prescription: "Open and Notorious" Use

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

To establish the existence of a prescriptive easement on another's property, Plaintiff must prove that [his/her/its] use was "open and notorious." To prove this element, Plaintiff must prove by clear and convincing evidence that Defendant was actually aware of or had constructive notice of the existence of the adverse use on Defendant's property so that Defendant had an opportunity to take action to prevent that adverse use from ripening into a prescriptive easement.

[*OPTIONAL (Use if constructive notice is at issue)*]

Defendant had constructive notice of the adverse use if both of the following are true:

- 1. Defendant had actual notice of circumstances sufficient to cause a prudent person to inquire further; and**
- 2. Defendant might have learned about the adverse use if [he/she/it] had inquired further.**

For example, if there were visible signs of the adverse use, then a prudent person would probably inquire further.

Authorities: Civ. Code § 19; *Field-Escandon v. Demann* (1988) 204 Cal.App.3d 228, 236-237, 251 Cal.Rptr. 49 ; *Jones v. Harmon* (1959) 175 Cal.App.2d 869, 879, 1 Cal.Rptr. 192 .

[2] Use of Instruction

This instruction should be used with the instruction in MB 7700A.06 on the elements of proving an easement by prescription to explain in more detail the term "open and notorious." The optional part of the instruction should be used when constructive notice is at issue.

[3] Comment

To establish the existence of a prescriptive easement on another's property, the claimant must prove that the use was open and notorious. This requires proof that the property owner was aware of the adverse use, with the resulting opportunity to take action to prevent the adverse use from ripening into a prescriptive easement [*Field-Escandon v. Demann* (1988) 204 Cal.App.3d 228, 235-236, 251 Cal.Rptr. 49]. An open and notorious use is a use that notifies the owner that the property is being used in a way that is inconsistent with the owner's rights [*Kerr Land & Timber Co. v. Emmerson* (1969) 268 Cal.App.2d 628, 634, 74 Cal.Rptr. 307]. Notice to the owner may be either actual or constructive [*Applegate v. Ota* (1983) 146 Cal.App.3d 702, 709-710, 194 Cal.Rptr. 331]. The burden of proving open and notorious use is on the person asserting the claim of easement by prescription [*Field-Escandon v. Demann* (1988) 204 Cal.App.3d 228, 235, 251 Cal.Rptr. 49 ; *Zimmer v. Dykstra* (1974) 39 Cal.App.3d 422, 431, 114 Cal.Rptr. 380].

A person who has actual notice of circumstances that would be deemed sufficient to notify a prudent person of a particular fact has constructive notice of the fact itself if he or she might have learned the fact by further inquiry [Civ. Code § 19]. In most cases, the courts require some visibility of the easement throughout its prescriptive period, or at least the existence of apparent accessories or other physical signs [*Field-Escandon v. Demann* (1988) 204 Cal.App.3d 228, 236-237, 251 Cal.Rptr. 49]. There cannot be concealment or furtive conduct on the claimant's part [*Twin Peaks Land Co. v. Briggs* (1982) 130 Cal.App.3d 587, 593, 181 Cal.Rptr. 25].

Although mere passage over the property is insufficient to establish a prescriptive easement, the fact that the easement is used by family members, guests, friends, and business invitees is evidence that supports an inference of open and notorious use [*Applegate v. Ota* (1983) 146 Cal.App.3d 702, 709, 194 Cal.Rptr. 331]. Unlike an adverse possessor, a user claiming easement by prescription is not required to show that he or she used the easement to the exclusion of all others, including the true owner [*Applegate v. Ota* (1983) 146 Cal.App.3d 702, 710, 194 Cal.Rptr. 331]. However, the claimant's right to use the easement must be based on individual use rather than use as a member of the public [*Applegate v. Ota* (1983) 146 Cal.App.3d 702, 709-710, 194 Cal.Rptr. 331].

Legal Topics:

For related research and practice materials, see the following legal topics:

Evidence
Procedural Considerations
Burdens of Proof
Allocation
Real Property Law
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Rights
Easements
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Easement by Prescription



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CHAPTER 77A Matthew Bender Easement Instructions

6-77A California Forms of Jury Instruction MB 7700A.08

MB 7700A.08 Easement by Prescription: Defense of Permissive Use

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

If Plaintiff proves by clear and convincing evidence that [he/she/it] openly, notoriously, and continuously used the claimed easement for more than five years without protest, opposition, or interference from Defendant, the land's owner, then the burden shifts to Defendant to prove that Plaintiff's use was merely permissive.

As jurors, if you find that Plaintiff has proven all of the elements required to establish a prescriptive easement, you must then determine whether Plaintiff's use was adverse to Defendant or was merely a matter of neighborly accommodation. To make this determination, you must examine the relation of the parties, their conduct, the situation of the property, and all of the surrounding circumstances.

Permission may be shown by evidence of a written or spoken license to use the property. Permission may be inferred from other circumstances, such as the neighborly relations of the parties.

When property is used by permission of the owner, the permission is presumed to continue until it is repudiated. Prescriptive use begins only after the owner has notice that the permission has been repudiated and the property is now being used without [his/her/its] permission.

Authorities: *Warsaw v. Chicago Metallic Ceilings, Inc.* (1984) 35 Cal.3d 564, 570-572, 199 Cal.Rptr. 773, 676 P.2d 584 ; *MacDonald Properties, Inc. v. Bel-Air Country Club* (1977) 72 Cal.App.3d 693, 701-702, 140 Cal.Rptr. 367 ; *Everett v. Bosch* (1966) 241 Cal.App.2d 648, 656, 50 Cal.Rptr. 813 ; *Finley v. Botto* (1958) 161 Cal.App.2d 614, 619-620, 327 P.2d 353 .

[2] Use of Instruction

This instruction should be used when a landowner defends against a claim of prescriptive easement by arguing that the claimant's use was permissive rather than adverse. It should be used with the instruction in MB 7700A.06 on the elements of proving an easement by prescription. The instruction may also be used with the instruction on license in MB 7700A.13.

[3] Comment

When the claimant offers satisfactory evidence that all of the required elements exist for a prescriptive easement, the burden of showing that the use was merely permissive shifts to the owner of the servient land [*Twin Peaks Land Co. v. Briggs* (1982) 130 Cal.App.3d 587, 594, 181 Cal.Rptr. 25]. The continuous use of an easement over a long period of time without the landowner's interference is presumptive evidence of its existence and that, in the absence of evidence of mere permissive use, this presumption will be sufficient to sustain a judgment [*Warsaw v. Chicago Metallic Ceilings, Inc.* (1984) 35 Cal.3d 564, 571-572, 199 Cal.Rptr. 773, 676 P.2d 584 ; *MacDonald Properties, Inc. v. Bel-Air Country Club* (1977) 72 Cal.App.3d 693, 702, 140 Cal.Rptr. 367].

The presumption of adverse use based on open and notorious use without protest has been criticized [*O'Banion v. Borba* (1948) 32 Cal.2d 145, 148-151, 195 P.2d 10 ; *Conaway v. Toogood* (1916) 172 Cal. 706, 708-709, 158 P. 200]. In one case, an instruction on this presumption was criticized on the ground that it "did not follow the better rule" [*LeDeit v. Ehlert* (1962) 205 Cal.App.2d 154, 162, 22 Cal.Rptr. 747 (better rule is that open and notorious use is evidence of adverse use, but it does not raise presumption of adverse use)]. However, the court found that the instruction did not constitute prejudice, and it upheld the verdict. In upholding the jury's verdict, the court relied in part on the other instructions given, including an instruction in language similar to that used in the second paragraph of the instruction in [1], above [*LeDeit v. Ehlert* (1962) 205 Cal.App.2d 154, 159-164, 170-171, 22 Cal.Rptr. 747].

Despite this criticism, the presumption continues to be applied [*Warsaw v. Chicago Metallic Ceilings, Inc.* (1984) 35 Cal.3d 564, 571-572, 199 Cal.Rptr. 773, 676 P.2d 584 ; *Applegate v. Ota* (1983) 146 Cal.App.3d 702, 708-711, 194 Cal.Rptr. 331 ; *MacDonald Properties, Inc. v. Bel-Air Country Club* (1977) 72 Cal.App.3d 693, 702-703, 140 Cal.Rptr. 367]. A case decided in 2008 noted that there is still a split of authority as to the existence of the presumption [*Grant v. Ratliff* (2008) 164 Cal.App.4th 1304, 1308, 79 Cal.Rptr.3d 902]. That court concluded that *Warsaw v. Chicago Metallic Ceilings, Inc.* did not overrule *O'Banion v. Borba*, but stands for nothing more than that the open, notorious, and continuous use of another person's land is sufficient evidence to support a finding that the use was adverse [*Grant v. Ratliff* (2008) 164 Cal.App.4th 1304, 1309, 79 Cal.Rptr.3d 902]. *Grant* also noted that *Warsaw* did not specify the type of presumption, and concluded that if a presumption did apply, it would be one affecting the burden of producing evidence, not the burden of proof [*Grant v. Ratliff* (2008) 164 Cal.App.4th 1304, 1309-1310, 79 Cal.Rptr.3d 902].

Whether the use is hostile or is merely a matter of neighborly accommodation is a question of fact to be determined in light of the surrounding circumstances and the relationship between the parties [*Warsaw v. Chicago Metallic Ceilings, Inc.* (1984) 35 Cal.3d 564, 572, 199 Cal.Rptr. 773, 676 P.2d 584]. The posting of appropriate permissive use signs provided for by Civ. Code § 1008 or the recording of a notice of revocable consent under Civ. Code § 813 is conclusive evidence of the permissive nature of the use.

Permission may be shown by evidence of a written or oral license to use the property [see MB 7700A.13]. It may also be inferred from other circumstances, such as the neighborly relations of the parties [*Finley v. Botto* (1958) 161 Cal.App.2d 614, 619-620, 327 P.2d 55]. When property is used by permission of the owner, the permission is presumed to continue until it is repudiated, and prescriptive use only begins when the owner has notice of the repudiation [*Everett v. Bosch* (1966) 241 Cal.App.2d 648, 656, 50 Cal.Rptr. 813].

Legal Topics:

For related research and practice materials, see the following legal topics:

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CHAPTER 77A Matthew Bender Easement Instructions

6-77A California Forms of Jury Instruction MB 7700A.09

MB 7700A.09 Extent of Use

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

In this case, Plaintiff contends that [he/she/it] has acquired [an implied easement/a prescriptive easement] over Defendant's land. If you find that such an easement exists in Plaintiff's favor, you must further determine whether the easement's extent and scope allows Plaintiff to _____ [describe use, activity, or conduct in question].

[*USE THE FOLLOWING AS APPROPRIATE (Use when implied easement or easement by necessity is at issue.)*]

In determining the extent and scope of an easement by [implied grant/implied reservation/necessity], you should consider (1) all the circumstances that existed at the time of the original transfer to ascertain the intent of the parties involved, (2) the prior use that gave rise to the easement, and (3) the character and extent of the prior use. [Optional (Use if access easement is at issue): In the case of an access easement, for example, you should consider the type and intensity of traffic.]

In addition, you should consider what was within the reasonable contemplation of the parties at the time of conveyance. In so doing, you should assume that the parties anticipated those uses that might reasonably be required by normal development of the dominant estate, but it is not to be assumed that they anticipated an abnormal development that would impose an undue burden on the servient estate.

[*USE THE FOLLOWING AS APPROPRIATE (Use when prescriptive easement is at issue.)*]

In determining the extent and scope of a prescriptive easement, you should consider the nature, character, extent, location, and type of use that the dominant tenement experienced during the prescriptive period. To determine whether the present use is permissible, you must compare the present use and the use by which the easement was created on the following points:

- 1. Their physical character;**
- 2. Their purpose; and**
- 3. The relative burden caused by them on the servient tenement.**

The ultimate criterion in determining a prescriptive easement's scope is that of avoiding increased burdens on the servient tenement while allowing some flexibility in the use of the dominant tenement. However, the nature, scope, and extent of the use in question must not substantially increase the burden placed on the servient tenement as it existed during the prescriptive period.

Authorities: *Civ. Code* § 806; *Camp Meeker Water System, Inc. v. Public Utilities Com.* (1990) 51 Cal.3d 845, 866-867, 274 Cal.Rptr. 678, 799 P.2d 758 ; *Neff v. Ernst* (1957) 48 Cal.2d 628, 636, 311 P.2d 849 ; *Fristoe v. Drapeau* (1950) 35 Cal.2d 5, 9-10, 215 P.2d 729 ; *George v. Goshgarian* (1983) 139 Cal.App.3d 856, 862, 189 Cal.Rptr. 94 ; *Horowitz v. Noble* (1978) 79 Cal.App.3d 120, 133-134, 144 Cal.Rptr. 710 ; *Jordan v. Worthen* (1977) 68 Cal.App.3d 310, 324-325, 137 Cal.Rptr. 282 ; *Pipkin v. Der Torosian* (1973) 35 Cal.App.3d 722, 729, 111 Cal.Rptr. 46 ; Restatement (Third) of Property (Servitudes) § 4.10 (2000).

[2] Use of Instruction

This instruction should be used when a dispute exists over the permissibility or propriety of the use of a particular easement by the dominant landowner. The first option should be used when the easement in question was originally established by implied grant (or reservation) or necessity. The second option should be used when the easement was acquired by prescription.

[3] Comment

[a] Easement by Implication

The extent to which an owner may use an implied easement depends on "the nature of the enjoyment by which it was acquired" [*Civ. Code* § 806]. The scope of an easement created by implication is to be inferred from the circumstances that give rise to the implication [*Camp Meeker Water System, Inc. v. Public Utilities Com.* (1990) 51 Cal.3d 845, 866-867, 274 Cal.Rptr. 678, 799 P.2d 758 ; *Southern Pacific Co. v. San Francisco* (1964) 62 Cal.2d 50, 54, 41 Cal.Rptr. 79, 396 P.2d 383 ; *Fristoe v. Drapeau* (1950) 35 Cal.2d 5, 9, 215 P.2d 729 ; Restatement (Third) of Property (Servitudes) § 4.10 (2000)]. One of these circumstances is the use being made of the dominant estate at that time, but the authorized use of the easement is not limited to the use required by the dominant estate at the time the easement arose [*Camp Meeker Water System, Inc. v. Public Utilities Com.* (1990) 51 Cal.3d 845, 866-867, 274 Cal.Rptr. 678, 799 P.2d 758 ; *Fristoe v. Drapeau* (1950) 35 Cal.2d 5, 9, 215 P.2d 729 ; Restatement (Third) of Property (Servitudes) § 4.10 (2000)].

The extent of the authorized use is to be measured by the uses that the parties might reasonably have expected from the future use of the dominant estate, based on the circumstances at the time the property was divided [*Camp Meeker Water System, Inc. v. Public Utilities Com.* (1990) 51 Cal.3d 845, 866-867, 274 Cal.Rptr. 678, 799 P.2d 758 ; *Fristoe v. Drapeau* (1950) 35 Cal.2d 5, 9, 215 P.2d 729 ; *George v. Goshgarian* (1983) 139 Cal.App.3d 856, 862, 189 Cal.Rptr. 94 ; Restatement (Third) of Property (Servitudes) § 4.10 (2000)]. It is assumed that the parties anticipated the uses that

might reasonably be required by a normal development of the dominant estate [*Camp Meeker Water System, Inc. v. Public Utilities Com.* (1990) 51 Cal.3d 845, 866-867, 274 Cal.Rptr. 678, 799 P.2d 758 ; *Neff v. Ernst* (1957) 48 Cal.2d 628, 636, 311 P.2d 849 ; *George v. Goshgarian* (1983) 139 Cal.App.3d 856, 862, 189 Cal.Rptr. 94]. However, it is not assumed that the parties anticipated an abnormal development [*Fristoe v. Drapeau* (1950) 35 Cal.2d 5, 9, 215 P.2d 729 ; Restatement (Third) of Property (Servitudes) § 4.10 (2000)].

The authorized use may be greater or lesser than the preexisting use. Because an easement is implied only when it is reasonably necessary for the property's beneficial use [*Fristoe v. Drapeau* (1950) 35 Cal.2d 5, 8, 215 P.2d 729 ; see MB 7700A.04], a court may determine as a question of fact that the extent of permissible use of the servient estate should be less than the preexisting use because that is all that is required for the dominant landowner's benefit [*Horowitz v. Noble* (1978) 79 Cal.App.3d 120, 133-134, 144 Cal.Rptr. 710]. In addition, an easement's use can be enlarged when it can be shown that (1) an increased use was within the natural contemplation of the parties as a foreseeable and ordinary development of the dominant estate, and (2) the use is for reasonable purposes consistent with the basic purpose of the easement's scope [see *Laux v. Freed* (1960) 53 Cal.2d 512, 525, 2 Cal.Rptr. 265, 348 P.2d 873 ; *Pasadena v. California-Michigan etc. Co.* (1941) 17 Cal.2d 576, 579, 110 P.2d 983].

Whether the increased or different use is excessive or abnormal is a question of fact that depends on the circumstances that existed at the time of the easement's creation [*Neff v. Ernst* (1957) 48 Cal.2d 628, 635-636, 311 P.2d 849].

[b] Easement by Prescription

The location and extent of a prescriptive easement is generally determined by the use made during the prescriptive period [*Otay Water Dist. v. Beckwith* (1991) 1 Cal.App.4th 1041, 1047-1048, 3 Cal.Rptr.2d 223 ; *Connolly v. McDermott* (1984) 162 Cal.App.3d 973, 977, 208 Cal.Rptr. 796]. The extent of an easement not acquired by grant depends on "the nature of the enjoyment by which it was acquired" [Civ. Code § 806]. This means that the owner of a prescriptive easement may not make any substantially different or greater use of the easement than was made during the prescriptive period [*Jordan v. Worthen* (1977) 68 Cal.App.3d 310, 322, 137 Cal.Rptr. 282 ; *Bartholomew v. Staheli* (1948) 86 Cal.App.2d 844, 850, 195 P.2d 824].

To determine whether a particular use is permissible, the use at issue must be compared to the use by which the easement was created in all of the following regards [*Jordan v. Worthen* (1977) 68 Cal.App.3d 310, 324-325 n.2, 137 Cal.Rptr. 282]:

- The physical character of the two uses;
- Their purposes;
- The relative burden caused by the uses on the servient estate; and
- The needs that result from a normal evolution by the dominant landowner's use.

Because land is subject to continuous change caused by natural forces and human activity, the extent of a prescriptive easement cannot be exactly measured by the conditions of the dominant estate during the prescriptive period [*Jordan v. Worthen* (1977) 68 Cal.App.3d 310, 324-325 n.2, 137 Cal.Rptr. 282].

The ultimate criterion in determining a prescriptive easement's scope is that of avoiding increased burdens on the servient estate while allowing some flexibility in the use of the dominant estate [*Pipkin v. Der Torosian* (1973) 35 Cal.App.3d 722, 729, 111 Cal.Rptr. 46].

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property Law Limited Use Rights Easements Creation Easement by Implication Real Property Law Limited Use
Rights Easements Creation Easement by Prescription



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CHAPTER 77A Matthew Bender Easement Instructions

6-77A California Forms of Jury Instruction MB 7700A.10

MB 7700A.10 Unreasonable Interference With Easement by Servient Landowner

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Plaintiff contends that [his/her/its] ability to use a validly acquired easement is being unreasonably interfered with by Defendant. Even though an easement exists in Plaintiff's favor, Defendant, as [the owner/the owner's assignee] of the servient estate, retains every incident or benefit of ownership that is not inconsistent with the easement and that does not interfere unreasonably with the easement.

As the owner of the dominant estate, Plaintiff must prove all of the facts necessary to establish that Defendant's use of [his/her/its] land is an unreasonable interference with Plaintiff's easement. In determining whether Defendant's use of [his/her/its] land is an unreasonable interference with Plaintiff's easement, you must consider (1) the intent of the original grantor and grantee at the time of the original conveyance, (2) the nature of the enjoyment by which the easement was acquired, and (3) all the circumstances surrounding the easement's creation.

Authorities: Civ. Code § 806; *Herzog v. Grosso* (1953) 41 Cal.2d 219, 224, 259 P.2d 429 ; *Pasadena v. California-Michigan etc. Co.* (1941) 17 Cal.2d 576, 579, 110 P.2d 983 ; *McCann v. City of Los Angeles* (1978) 79 Cal.App.3d 112, 116, 144 Cal.Rptr. 696 ; *City of Los Angeles v. Ingersoll-Rand Co.* (1976) 57 Cal.App.3d 889, 893, 129 Cal.Rptr. 485 ; *Pacific Gas & Elec. Co. v. Hacienda Mobile Home Park* (1975) 45 Cal.App.3d 519, 528, 119 Cal.Rptr. 559 ; *Guerra v. Packard* (1965) 236 Cal.App.2d 272, 295, 46 Cal.Rptr. 25 .

[2] Use of Instruction

This instruction should be used when an easement owner claims that the servient estate's owner, or an authorized representative of the servient owner, is unreasonably interfering with the easement. The instruction presumes the existence of a valid easement and may be used regardless of whether the easement arose by express or implied grant or

reservation, by necessity, or by prescription.

This instruction must be used with an instruction on preponderance of the evidence [see, e.g., Ch. 2, *California Judicial Council Evidence Instructions*, CACI No. 200, Obligation to Prove--More Likely True Than Not True].

[3] Comment

In general, every incident of ownership not inconsistent with the easement and its enjoyment is retained by the servient estate's owner [*City of Los Angeles v. Ingersoll-Rand Co.* (1976) 57 Cal.App.3d 889, 893-894, 129 Cal.Rptr. 485 ; *Guerra v. Packard* (1965) 236 Cal.App.2d 272, 295, 46 Cal.Rptr. 25]. The servient estate's owner may make any use of the property that does not interfere unreasonably with the easement owner's superior right [*Herzog v. Grosso* (1953) 41 Cal.2d 219, 224, 259 P.2d 429 ; *Pasadena v. California-Michigan etc. Co.* (1941) 17 Cal.2d 576, 579, 110 P.2d 983 ; *McCann v. City of Los Angeles* (1978) 79 Cal.App.3d 112, 116, 144 Cal.Rptr. 696].

Whether a particular use of land by the owner of the servient estate constitutes an unreasonable interference with the easement is a question of fact for the jury or trier of fact, and its findings based on conflicting evidence are binding on appeal [*Pacific Gas & Elec. Co. v. Hacienda Mobile Home Park* (1975) 45 Cal.App.3d 519, 528, 119 Cal.Rptr. 559 ; *City of Los Angeles v. Howard* (1966) 244 Cal.App.2d 538, 543-544, 53 Cal.Rptr. 274]. Because the extent of an easement is determined by the terms of the grant (express easements) or the nature of the enjoyment by which the easement was created (implied and prescriptive easements) [Civ. Code § 806], the reasonableness of the servient landowner's use must be considered in light of the parties' intent and all the circumstances surrounding the easement's creation [*McCann v. City of Los Angeles* (1978) 79 Cal.App.3d 112, 117, 144 Cal.Rptr. 696 ; *City of Los Angeles v. Jameson* (1958) 165 Cal.App.2d 351, 357, 331 P.2d 1014].

Legal Topics:

For related research and practice materials, see the following legal topics:

EvidenceProcedural ConsiderationsBurdens of ProofAllocationReal Property LawLimited Use
RightsEasementsInterference



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CHAPTER 77A Matthew Bender Easement Instructions

6-77A California Forms of Jury Instruction MB 7700A.11

MB 7700A.11 Damages for Unreasonable Interference With Easement

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] PROPOSED INSTR. NO. _____

If you find that Plaintiff has suffered damages that were caused by Defendant's unreasonable interference with Plaintiff's easement, then Plaintiff is entitled to recover the following damages:

1. The amount that will reasonably compensate Plaintiff for the damage to [his/her/its] property interest. This amount equals the difference in the fair market value of the property immediately before the injury and immediately after the injury. However, if the defendant proves that the injury has been repaired or is capable of being repaired, and that this repair has restored or will restore the property to the value it had before the injury, then the cost of this repair is the proper measure of damage, if the cost of the repair is less than the amount of the difference in fair market value.

2. The amount that will reasonably compensate Plaintiff for [his/her] annoyance, discomfort, or mental distress naturally flowing from Defendant's act[s] and from Plaintiff's loss of use. The amount of these damages, if any, is left to your sound judgment and discretion based on the evidence, without the necessity of receiving any opinion testimony concerning the amount of the damages.

"Market value" means the highest price in money that the property would bring if offered for sale in the open market, with a reasonable time allowed to find a buyer who buys with knowledge of all the uses and purposes to which the property is suited and of which it is capable.

Authorities: *Harman v. City and County of San Francisco* (1972) 7 Cal.3d 150, 165, 101 Cal.Rptr. 880, 496 P.2d 1248 ; *Merced Irrigation Dist. v. Woolstenhulme* (1971) 4 Cal.3d 478, 488, 93 Cal.Rptr. 833, 483 P.2d 1 ; *Kornoff v. Kingsburg Cotton Oil Co.* (1955) 45 Cal.2d 265, 267, 288 P.2d 507 ; *Herzog v. Grosso* (1953) 41 Cal.2d 219, 225, 259

P.2d 429 ; Moylan v. Dykes (1986) 181 Cal.App.3d 561, 574, 226 Cal.Rptr. 673 .

[2] Use of Instruction

This instruction should be used by an easement owner who claims to have suffered damages resulting from unreasonable interference with the easement. The action for interference may be against an interfering servient landowner or a third party.

[3] Comment

A person who interferes with or obstructs an easement's use deprives the easement owner of a protectable property interest [*Herzog v. Grosso (1953) 41 Cal.2d 219, 225, 259 P.2d 429*]. This interference is a private nuisance or trespass for which the easement owner may recover damages [*Herzog v. Grosso (1953) 41 Cal.2d 219, 225, 259 P.2d 429 ; Moylan v. Dykes (1986) 181 Cal.App.3d 561, 574, 226 Cal.Rptr. 673*]. The easement owner may recover compensatory damages measured by the depreciation in market value caused by the defendant's interference [*Moylan v. Dykes (1986) 181 Cal.App.3d 561, 574, 226 Cal.Rptr. 673*], as well as damages for personal discomfort, annoyance, and mental distress, even if the nuisance or trespass does not injure the property or decrease its value [*Kornoff v. Kingsburg Cotton Oil Co. (1955) 45 Cal.2d 265, 274, 288 P.2d 507 ; Herzog v. Grosso (1953) 41 Cal.2d 219, 225, 259 P.2d 429*].

If the interference results in a reduction in the property's market value, the plaintiff's damages are measured by the difference in the property's value immediately before and after the interference [*Kornoff v. Kingsburg Cotton Oil Co. (1955) 45 Cal.2d 265, 267, 288 P.2d 507 ; Lawlor v. Southern Pacific Co. (1918) 39 Cal.App. 97, 100, 178 P. 165*]. Once the plaintiff establishes his or her damages by showing the reduction in the property's value, the burden is on the defendant to come forward with proof that the cost of restoring the property would be less than the amount of the reduction in market value [*Herzog v. Grosso (1953) 41 Cal.2d 219, 226, 259 P.2d 429 ; for the definition of "market value" used in this instruction, see Harman v. City and County of San Francisco (1972) 7 Cal.3d 150, 165, 101 Cal.Rptr. 880, 496 P.2d 1248 ; Merced Irrigation Dist. v. Woolstenhulme (1971) 4 Cal.3d 478, 488, 93 Cal.Rptr. 833, 483 P.2d 1 ; see also Ch. 35, California Judicial Council Eminent Domain Instructions, CACI No. 3501, "Fair Market Value" Explained*].

If the nuisance can be abated, the remedy is either abatement or damages for loss of market value, but not both [*Spaulding v. Cameron (1952) 38 Cal.2d 265, 269, 239 P.2d 625*]. If the nuisance will continue indefinitely, the plaintiff can recover in a single action damages for past and future injuries, that is, for the reduction in the property's value up to the time of the suit and for damages foreseeably resulting from the future continuance of the unreasonable interference. Alternatively, the plaintiff can elect to sue for past injuries and bring later actions for any future injuries [*Kornoff v. Kingsburg Cotton Oil Co. (1955) 45 Cal.2d 265, 269-271, 288 P.2d 507 ; Spaulding v. Cameron (1952) 38 Cal.2d 265, 268-270, 239 P.2d 625*].

In any action for personal injury, property damage, or wrongful death that is based on comparative fault, each defendant is liable only for the amount of non-economic damages that is allocated to that defendant in direct proportion to that defendant's percentage of fault, and there must be a separate judgment against that defendant for that amount [*Civ. Code § 1431.2(a)*]. "Non-economic damages" are subjective, non-monetary losses including, but not limited to, pain, suffering, inconvenience, mental suffering, emotional distress, loss of society and companionship, loss of consortium, injury to reputation, and humiliation [*Civ. Code § 1431.2(b)(2)*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property Law Limited Use Rights Easements Interference Real Property Law Property

ValuationTortsDamagesCompensatory DamagesProperty DamageAward Calculations



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CHAPTER 77A Matthew Bender Easement Instructions

6-77A California Forms of Jury Instruction MB 7700A.12

MB 7700A.12 Termination of Easement by Abandonment**[1] Instruction**

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

_____ [*Servient landowner*] contends that the easement was abandoned by _____ [*easement owner*]. To prove this abandonment, _____ [*servient landowner*] must prove that _____ [*easement owner*] has shown by [his/her/its] conduct a clear intention to forgo all future conforming uses of the easement. The fact that _____ [*easement owner*] has not used the easement for _____ [*specify period of nonuse, e.g., three years*] is not by itself proof of abandonment, but it is evidence that you may consider in deciding whether [he/she/it] intended to abandon the easement. You must find that _____ [*easement owner*]'s conduct is so decisive and conclusive that it shows a clear intent to abandon the easement.

Authorities: *Gerhard v. Stephens* (1968) 68 Cal.2d 864, 890-892, 69 Cal.Rptr. 612, 442 P.2d 692 ; *Faus v. City of Los Angeles* (1967) 67 Cal.2d 350, 363, 62 Cal.Rptr. 193, 431 P.2d 849 ; *Tract Development Service, Inc. v. Kepler* (1988) 199 Cal.App.3d 1374, 1384-1385, 246 Cal.Rptr. 469 ; *Buechner v. Jonas* (1964) 228 Cal.App.2d 127, 132, 39 Cal.Rptr. 298 ; *Lake Merced Golf & Country Club v. Ocean S. R. Co.* (1962) 206 Cal.App.2d 421, 436-439, 23 Cal.Rptr. 881 ; *Flanagan v. San Marcos Silk Co.* (1951) 106 Cal.App.2d 458, 462-463, 235 P.2d 107 .

[2] Use of Instruction

This instruction should be used when a servient landowner sues or defends by claiming that the dominant owner's easement has been abandoned. The instruction applies only to an easement acquired by express or implied grant (or reservation), and it may not be applied to an easement by prescription or an easement by necessity [see [3][b], below, for discussion of special rules applicable to prescriptive easements]. This instruction should be used with the introductory instruction in MB 7700A.01, which explains what an easement is.

[3] Comment**[a] Abandonment of Easement Acquired by Grant**

The owner of an easement acquired by grant may terminate the easement by abandoning it. Extinguishment of an easement by abandonment requires (1) nonuse, and (2) the intent to abandon the easement [*Gerhard v. Stephens* (1968) 68 Cal.2d 864, 890-892, 69 Cal.Rptr. 612, 442 P.2d 692 ; *Faus v. City of Los Angeles* (1967) 67 Cal.2d 350, 363, 62 Cal.Rptr. 193, 431 P.2d 849 ; *Buechner v. Jonas* (1964) 228 Cal.App.2d 127, 132, 39 Cal.Rptr. 298 ; *Lake Merced Golf & Country Club v. Ocean S. R. Co.* (1962) 206 Cal.App.2d 421, 436-439, 23 Cal.Rptr. 881 ; *Flanagan v. San Marcos Silk Co.* (1951) 106 Cal.App.2d 458, 462-463, 235 P.2d 107] . Proof of intent to abandon requires evidence of acts by the owner so decisive and conclusive that they show a clear intent to abandon the easement [*Gerhard v. Stephens* (1968) 68 Cal.2d 864, 890-892, 69 Cal.Rptr. 612, 442 P.2d 692 ; *Tract Development Service, Inc. v. Kepler* (1988) 199 Cal.App.3d 1374, 1384-1385, 246 Cal.Rptr. 469 ; *Flanagan v. San Marcos Silk Co.* (1951) 106 Cal.App.2d 458, 462, 235 P.2d 107]. Nonuse alone does not prove intent or constitute an abandonment, but nonuse is some evidence of an intent to abandon [*Gerhard v. Stephens* (1968) 68 Cal.2d 864, 890-892, 69 Cal.Rptr. 612, 442 P.2d 692 ; *Flanagan v. San Marcos Silk Co.* (1951) 106 Cal.App.2d 458, 462, 235 P.2d 107].

Because abandonment depends primarily on the owner's intent, abandonment is a question of fact to be determined by the trial court or the jury from a consideration of the easement owner's conduct and all the surrounding circumstances [*Gerhard v. Stephens* (1968) 68 Cal.2d 864, 892, 69 Cal.Rptr. 612, 442 P.2d 692 ; *Buechner v. Jonas* (1964) 228 Cal.App.2d 127, 131, 39 Cal.Rptr. 298].

[b] Abandonment of Prescriptive Easement

A special rule applies to the abandonment of prescriptive easements. Under *Civ. Code* § 811(4), an easement acquired by prescription may be extinguished by "disuse" by the easement owner for the period prescribed for acquiring a prescriptive easement [see *Code Civ. Proc.* § 321; *Civ. Code* § 1007 (period for acquiring prescriptive easement is five years); see also MB 7700A.06]. The disuse required is failure to use the easement in the way it was formerly used [*Strong v. Baldwin* (1908) 154 Cal. 150, 161, 97 P. 178]. It is not necessary to show an intent to abandon to prove the abandonment of a prescriptive easement [*People v. Ocean Shore Railroad* (1948) 32 Cal.2d 406, 419, 196 P.2d 570].

[c] Statutory Abandonment Procedure

A special statutory procedure is available to establish the abandonment of certain easements that have not been used for at least 20 years [*Civ. Code* §§ 887.010-887.090]. This statutory procedure is supplementary to the common law of abandonment and does not limit or affect the common law governing abandonment of an easement or any other procedure provided by statute or otherwise for clearing an abandoned easement from the title to real property [*Civ. Code* § 887.030; see California Real Estate Law and Practice, Ch. 343, *Easements and Licenses* (Matthew Bender) for discussion of this statutory procedure].

Legal Topics:

For related research and practice materials, see the following legal topics:
 Real Property Law Limited Use Rights Easements Termination of Easements



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CHAPTER 77A Matthew Bender Easement Instructions

6-77A California Forms of Jury Instruction MB 7700A.13

MB 7700A.13 License in Real Property

[1] Instruction

[PLAINTIFF'S/DEFENDANT'S] **PROPOSED INSTR. NO.** _____

Plaintiff claims that [he/she/it] has been granted a license to _____ [describe use or activity] on Defendant's land.

A license in real property is a grant of a personal privilege authorizing a person or entity (called the licensee) to perform some specified act or acts on the land of another person or entity (called the licensor) without conferring any possessory interest in the other's land. In the absence of something written, a license may be created by spoken words or by the exercise of the privilege with the licensor's acquiescence.

You must examine the acts of the parties and their relations with each other to determine whether Plaintiff has proved that Defendant assented to _____ [describe use or activity] by Plaintiff. Defendant's assent may be manifested by written or spoken words, or it may be inferred from the acts of the parties, their relations with each other, or custom. For example, when a property owner knows that people are entering his or her property for a certain purpose and does not object to that entry, a license to enter may be inferred.

[OPTIONAL (See Use of Instruction)]

An easement, which cannot be revoked by the grantor, is not a license. A license is generally revocable at any time at the will of the licensor. Moreover, the privilege conferred by a license is personal to the licensee and cannot be inherited, transferred, or assigned.

[CONTINUE WITH INSTRUCTION]

If you find that Defendant has agreed to or acquiesced in Plaintiff's use of Defendant's land and that this agreement or acquiescence has not been revoked, then you must find that the _____ [describe use or activity] is permitted by license.

Authorities: *Bomberger v. McKelvey* (1950) 35 Cal.2d 607, 618, 220 P.2d 729 ; *Belmont County Water Dist. v. State of California* (1976) 65 Cal.App.3d 13, 17, 135 Cal.Rptr. 163 ; *Lusk v. Krejci* (1960) 187 Cal.App.2d 553, 555, 9 Cal.Rptr. 703 ; *Fisher v. General Petroleum Corp.* (1954) 123 Cal.App.2d 770, 776, 267 P.2d 841 ; *Eastman v. Piper* (1924) 68 Cal.App. 554, 560, 229 P. 1002 ; Restatement of Property § 512.

[2] Use of Instruction

This instruction should be used to explain what constitutes a license in real property. The optional paragraph should be used when it is necessary to distinguish a license from an easement.

[3] Comment

[a] Nature of License

A license granted by a private landowner is generally defined as personal, revocable, and nonassignable permission or authority to perform specified acts on the landowner's property [*Belmont County Water Dist. v. State of California* (1976) 65 Cal.App.3d 13, 17, 135 Cal.Rptr. 163 ; *Eastman v. Piper* (1924) 68 Cal.App. 554, 560, 229 P. 1002 ; Restatement of Property § 512]. A license may be created in writing, orally, or by the exercise of the privilege with the licensor's acquiescence [*Zellers v. State of California* (1955) 134 Cal.App.2d 270, 273, 285 P.2d 962 ; *Fisher v. General Petroleum Corp.* (1954) 123 Cal.App.2d 770, 776, 267 P.2d 841].

No formalities are necessary to create a license [Restatement of Property § 515]. The only thing essential to the creation of a license is some expression of assent to the licensee's use by the licensor [*Eastman v. Piper* (1924) 68 Cal.App. 554, 560, 229 P. 1002 ; Restatement of Property § 512(b)]. In the absence of any spoken or written words evidencing the licensor's assent, the assent may be inferred from the acts of the parties or their relations with each other [*Eastman v. Piper* (1924) 68 Cal.App. 554, 560, 229 P. 1002 ; Restatement of Property § 516, Comment c]. For example, a license to enter will be inferred whenever a landowner knows that people are entering on his or her property and the owner does not object to that entry [*Lusk v. Krejci* (1960) 187 Cal.App.2d 553, 555, 9 Cal.Rptr. 703].

Similarly, the revocation of a license requires no formalities. A licensor's attempt to interfere with or frustrate the licensee's use may be sufficient to show the license's revocation [see California Real Estate Law and Practice, Ch. 343, *Easements and Licenses* (Matthew Bender)]. With certain exceptions [see [d], below], a mere license may be revoked at any time at the licensor's pleasure [*Bomberger v. McKelvey* (1950) 35 Cal.2d 607, 618, 220 P.2d 729 ; *County of Alameda v. Ross* (1939) 32 Cal.App.2d 135, 143, 89 P.2d 460 ; Restatement of Property § 519(1)].

[b] Licenses and Easements Compared

Licenses and easements are very similar. In fact, when parties try to create an easement, a license may result if they fail to satisfy one or more of the requirements for an easement [*Noronha v. Stewart* (1988) 199 Cal.App.3d 485, 490, 245 Cal.Rptr. 94 ; Restatement of Property § 514]. However, there are important differences between licenses and easements. The principal difference is that a license, unlike an easement, is revocable at the will of the licensor. A license is therefore generally not a compensable interest in real property [*County of Alameda v. Ross* (1939) 32 Cal.App.2d 135, 143, 89 P.2d 460]. In addition, a license is an entirely personal interest, and is terminated if the licensee attempts to transfer or assign it [see Powell On Real Property, Ch. 34, *Easements and Licenses*, § 34.25 (Matthew Bender); California Real Estate Law and Practice, Ch. 343, *Easements and Licenses*, § 343.35[2] (Matthew

Bender)] or the licensor transfers the property to a third party [*Shaw v. Caldwell* (1911) 16 Cal.App. 1, 7-8, 115 P. 941]. Because a license requires the licensor's assent, a license may not form the basis of a prescriptive title [*Everett v. Bosch* (1966) 241 Cal.App.2d 648, 656, 50 Cal.Rptr. 813 ; *Kaler v. Brown* (1951) 101 Cal.App.2d 716, 719, 226 P.2d 66].

[c] Licenses and Leases Compared

To determine whether an agreement for the property's use is a license or a lease, one must examine the "nature of the possession granted ... [i]f the contract gives exclusive possession of the premises against all the world, including the owner, it is a lease; if it merely confers a privilege to occupy the premises under the owner, it is a license" [*Qualls v. Lake Berryessa Enterprises, Inc.* (1999) 76 Cal.App.4th 1277, 1283, 91 Cal.Rptr.2d 143]. Thus, a concession agreement that granted mobilehome owners the right to a mobilehome space and specified services, such as parking passes and garbage collection, but did not purport to convey any sort of title or possessory interest, created a license rather than a lease [*Qualls v. Lake Berryessa Enterprises, Inc.* (1999) 76 Cal.App.4th 1277, 1284, 91 Cal.Rptr.2d 143].

[d] License Coupled With Interest

Although usually revocable at the will of the licensor, a license may become irrevocable when coupled with an interest [*Bomberger v. McKelvey* (1950) 35 Cal.2d 607, 618, 220 P.2d 729 ; Restatement of Property § 519(1), (3)]. A license coupled with an interest is a license that is incidental to the ownership of an interest in personal property located on the subject land [Restatement of Property § 513]. Thus, the owner of a chattel may have the right to cross another's land to use, secure, or remove the chattel [*Bomberger v. McKelvey* (1950) 35 Cal.2d 607, 618, 220 P.2d 729 ; Restatement of Property § 513, Comment a]. The license serves as a defense to an action for trespass [*Bomberger v. McKelvey* (1950) 35 Cal.2d 607, 619, 220 P.2d 729]. A license coupled with an interest continues to exist for the period contemplated by the license [*Bomberger v. McKelvey* (1950) 35 Cal.2d 607, 618, 220 P.2d 729].

[e] Estoppel

A license may become irrevocable when a licensee makes expenditures, builds structures, expends labor, or otherwise changes position in reasonable reliance on the license [*Hammond v. Mustard* (1967) 257 Cal.App.2d 384, 389, 64 Cal.Rptr. 829 ; Restatement of Property § 519(4)]. The transformation of a license from a mere revocable personal privilege into an enforceable right is based on equitable estoppel [*Cooke v. Ramponi* (1952) 38 Cal.2d 282, 286, 239 P.2d 638].

[f] Effect of Irrevocable License

When the licensor is estopped to revoke the license, the licensee has the right to enter on the licensor's land to exercise the license and, if necessary, to maintain, secure, or remove any equipment or structures erected in accordance with the license [*Higgins v. Kadjevich* (1960) 186 Cal.App.2d 520, 523-524, 9 Cal.Rptr. 115]. When a license is irrevocable, the license has the same effect as an easement [*Noronha v. Stewart* (1988) 199 Cal.App.3d 485, 490, 245 Cal.Rptr. 94 ; *Higgins v. Kadjevich* (1960) 186 Cal.App.2d 520, 523-524, 9 Cal.Rptr. 115]. The irrevocable license will continue for as long as the nature of the license requires [*Cooke v. Ramponi* (1952) 38 Cal.2d 282, 286, 239 P.2d 638].



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DT Disposition Table

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DT Disposition Table

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Table 1 BAJI to CACI

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Table 2 CACI to BAJI

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■ CACI No. 3801-- *Garlock Sealing Techs., LLC v. NAK Sealing Techs. Corp.* (2007) 148 *Cal.App.4th* 937, 56 *Cal.Rptr.3d* 177

Damages

■ CACI No. 3901-- *Metz v. Soares* (2006) 142 *Cal.App.4th* 1250 , 48 *Cal.Rptr.3d* 743

■ CACI No. 3903A-- *Yanez v. SOMA Environmental Engineering, Inc.* (2010) 185 *Cal.App.4th* 1313, 2010 *Cal. App. LEXIS* 966 ; *Howell v. Hamilton Meats & Provisions, Inc.* (2009) 179 *Cal.App.4th* 686, 101 *Cal.Rptr.3d* 805

■ CACI No. 3903M-- *Metz v. Soares* (2006) 142 *Cal.App.4th* 1250, 48 *Cal.Rptr.3d* 743

■ CACI No. 3903N-- *Joseph Maatuk v. Bruce J. Guttman* (2009) 173 *Cal.App.4th* 1191, 93 *Cal.Rptr.3d* 381

■ CACI No. 3905A-- *Buell-Wilson v. Ford Motor Co.* (2006) 141 *Cal.App.4th* 525, 46 *Cal.Rptr.3d* 147

■ CACI No. 3921-- *People v. Giordano* (2007) 42 *Cal.4th* 644, 68 *Cal.Rptr.3d* 51, 170 *P.3d* 623 ; *Quiroz v. Seventh Ave. Center* (2006) 140 *Cal.App.4th* 1256, 45 *Cal.Rptr.3d* 222

■ CACI No. 3926-- *Brawley v. J.C. Interiors, Inc.* (2008) 161 *Cal.App.4th* 1126, 74 *Cal.Rptr.3d* 832

■ CACI No. 3928-- *A.M. v. Albertsons* (2009) 178 *Cal.App.4th* 455, 100 *Cal.Rptr.3d* 449

■ CACI No. 3929-- *Henry v. Superior Court* (2008) 160 *Cal.App.4th* 440, 72 *Cal.Rptr.3d* 808

■ CACI No. 3930-- *Jackson v. Yarbray* (2009) 179 *Cal.App.4th* 75, 101 *Cal.Rptr.3d* 303

■ CACI No. 3940-- *Bullock v. Philip Morris USA, Inc.* (2008) 159 *Cal.App.4th* 655, 71 *Cal.Rptr.3d* 775

■ CACI No. 3942-- *Bullock v. Philip Morris USA, Inc.* (2008) 159 *Cal.App.4th* 655, 71 *Cal.Rptr.3d* 775

■ CACI No. 3943-- *Bullock v. Philip Morris USA, Inc.* (2008) 159 *Cal.App.4th* 655, 71 *Cal.Rptr.3d* 775

■ CACI No. 3945-- *Bullock v. Philip Morris USA, Inc.* (2008) 159 *Cal.App.4th* 655, 71 *Cal.Rptr.3d* 775

■ CACI No. 3947-- *Bullock v. Philip Morris USA, Inc.* (2008) 159 *Cal.App.4th* 655, 71 *Cal.Rptr.3d* 775

■ CACI No. 3949-- *Bullock v. Philip Morris USA, Inc.* (2008) 159 *Cal.App.4th* 655, 71 *Cal.Rptr.3d* 775

Breach of Fiduciary Duty

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■ CACI No. 4101-- *Oravecz v. New York Life Ins. Co.* (2009) 174 Cal.App.4th 1114, 95 Cal.Rptr.3d 1

■ CACI No. 4105-- *Oravecz v. New York Life Ins. Co.* (2009) 174 Cal.App.4th 1114, 95 Cal.Rptr.3d 1

Trade Secrets

■ CACI No. 4400-- *Jasmine Networks v. Superior Court* (2009) 180 Cal.App.4th 980, 103 Cal.Rptr.3d 426

■ CACI No. 4401-- *Jasmine Networks v. Superior Court* (2009) 180 Cal.App.4th 980, 103 Cal.Rptr.3d 426

Concluding Instructions

■ CACI No. 5002-- *Whitlock v. Foster Wheeler, LLC* (2008) 160 Cal.App.4th 149, 72 Cal.Rptr.3d 369

■ CACI No. 5003-- *People v. Ibarra* (2007) 156 Cal.App.4th 1174, 67 Cal.Rptr.3d 871

■ CACI No. 5005-- *Employers Mutual Cas. Co. v. Phila. Indem. Ins. Co.* (2008) 169 Cal.App.4th 340, 86 Cal.Rptr.3d 383

■ CACI No. 5009-- *Whitlock v. Foster Wheeler, LLC* (2008) 160 Cal.App.4th 149, 72 Cal.Rptr.3d 369



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Cumulative Table of Derived, Renumbered, Replaced, and Revoked Instructions

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§ Synopsis to Appendix TDRI: Cumulative Table of Derived, Renumbered, Replaced, and Revoked Instructions

Scope



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Cumulative Table of Derived, Renumbered, Replaced, and Revoked Instructions

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503	Replaced by 503A, 503B April 2007
503A	Derived from 503 April 2007
503B	Derived from 503 April 2007
530	Replaced by 530A, 530B April 2007
530A	Derived from 530 April 2007
530B	Derived from 530 April 2007
605	Renumbered to 4106 December 2007
802	Revoked February 2007
1009	Replaced by 1009A, 1009B February 2007
1009A	Derived from 1009 February 2007
1009B	Derived from 1009 February 2007
1009D	Derived from 1009B April 2009
1207	Replaced by 1207A, 1207B April 2009
1207A	Derived from 1207 April 2009
1207B	Derived from 1207 April 2009
1503	Revoked October 2008
1504	Revoked October 2008
1804	Replaced by 1804A, 1804B April 2008
1804A	Derived from 1804 April 2008
1804B	Derived from 1804 April 2008
1806	Revoked December 2007

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VF-1805	Revoked December 2007
VF-1806	Revoked December 2007
VF-2302	Revoked April 2008
2521	Replaced by 2521A, 2521B, 2521C December 2007
2521A	Derived from 2521 December 2007
2521B	Derived from 2521 December 2007
2521C	Derived from 2521 December 2007
2522	Replaced by 2522A, 2522B, 2522C December 2007
2522A	Derived from 2522 December 2007
2522B	Derived from 2522 December 2007
2522C	Derived from 2522 December 2007
VF-2506	Replaced by VF-2506A, VF-2506B, VF-2506C December 2007
VF-2506A	Derived from VF-2506 December 2007
VF-2506B	Derived from VF-2506 December 2007
VF-2506C	Derived from VF-2506 December 2007
VF-2507	Replaced by VF-2507A, VF-2507B, VF-2507C December 2007
VF-2507A	Derived from VF-2507 December 2007
VF-2507B	Derived from VF-2507 December 2007
VF-2507C	Derived from VF-2507 December 2007
3023	Replaced by 3023A, 3023B December 2009
3023A	Derived from 3023 December 2009
3023B	Derived from 3023 December 2009
3102	Replaced by 3102A, 3102B October 2008
3102A	Derived from 3102 October 2008
3102B	Derived from 3102 October 2008
3105	Revoked October 2008
3108	Revoked October 2008
3111	Revoked October 2008
4106	Renumbered to 4120 December 2007 n*

FOOTNOTES:

(n29)Footnote *. Current CACI No. 4106 is former CACI No. 605, which was renumbered to that slot in December 2007.